RICHARDS, LAYTON & FINGER
A PROFESSIONAL ASSOCIATION
ONE RODNEY SQUARE
920 NORTH KING STREET
WILMINGTON, DELAWARE 19801
(302) 651-7700
FAX: (302) 651-7701
WWW.RLF.COM

October 4, 2007

Re: Recent Delaware Corporate Law Decisions

In the past few months, the Delaware courts have issued several opinions that raise important issues for Delaware corporations and their advisors. For example, in the *Highfields Capital, Ltd. v. AXA Financial, Inc.* appraisal action, the Court's valuation gave persuasive weight to the price agreed to in the arm's-length merger in connection with which the appraisal was sought. In *Mercier v. Inter-Tel (Delaware), Inc.*, the Court of Chancery articulated a reformulation of the "compelling justification" standard of review announced in *Blasius.* In *In re: INFOUSA, Inc. Shareholders Litigation*, the Court found that otherwise independent directors were interested (for demand futility purposes) based upon potential personal liability for misleading SEC filings. In *Lillis v. AT&T Corp.*, the Court enforced an anti-destruction clause in a stock option plan in connection with a merger. In *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, the Court held that discovery of accounting discrepancies in pre-acquisition due diligence did not preclude an action for breach of representations and warranties in the acquisition agreement. Finally, in *Law Debenture Trust Company of New York v. Petrohawk Energy Corp.*, the Court held that the issuer of corporate debt did not breach contractual obligations by structuring a transaction to avoid triggering a mandatory redemption provision. These cases are summarized more fully below.

Negotiated Price In Arm's-Length Merger Given Persuasive Weight In Appraisal Action

Although Delaware courts tend to favor discounted cash flow ("DCF") models in appraisal proceedings pursuant to 8 *Del. C.* § 262, in *Highfields Capital, Ltd. v. AXA Financial*, 2007 WL 2410295 (Del. Ch.), the Court of Chancery calculated the fair value of an insurance conglomerate's stock by weighting the per share cash merger price (less synergies) at 75% and a sum-of-the-parts analysis at 25%. The resulting valuation was approximately 20% lower than the merger consideration.

The transaction at issue was a 2004 merger by which AXA Financial, Inc. ("AXA") acquired all of the outstanding shares of The MONY Group, Inc. ("MONY") for $31 per share in cash. When the merger was announced, it represented a 7.3% premium over MONY's then-current trading price; however, it was 76% of the GAAP book value.

Like most appraisals, the action amounted to a battle of valuation experts. Petitioners asserted that the fair value was between $37 and $47 per share, based upon three traditional valuation methodologies – DCF, comparable transactions, and a market price analysis.

AXA asserted that the fair value was $20.80 per share, based upon five valuation methodologies – shared synergies (*i.e.*, per share cash merger price (less synergies)), sum-of-the-parts, comparable companies, comparable transactions and DCF. AXA argued that the shared synergies analysis was the best indicator of going-concern value due to an arm's-length negotiation process and lack of material impediments to a topping bid. AXA argued that the sum-of-the-parts analysis would have been the best valuation method had an arm's length transaction not occurred.

The Court concluded that a DCF had little utility in the action, because: (i) the merger was arm's-length; (ii) the inputs used by the experts were unreliable; and (iii) the industry standard was to use a sum-of-the-parts analysis to value an insurance conglomerate as a going concern. As such, the Court ascribed no value to the DCF models presented by the experts.

The Court rejected the experts' comparable company and comparable transactions analyses for failing to use truly comparable companies or transactions. For example, most of the transactions analyzed were not directly comparable because they took place more than five years prior to the merger in a strong "bull market" that had long since disappeared.

Petitioner's market price analysis – a metric not commonly relied upon in the financial community – was also found to be flawed and given no weight.

The Court found the remaining two analyses (shared synergies and sum-of-the-parts) credible and utilized them as the foundation for the determination of fair value. Perhaps the most interesting aspect of the *AXA Financial* appraisal action is the Court's use of the AXA-MONY merger itself as a metric for the going concern value. The Court noted that it is not unusual for Delaware courts to derive fair value from the transaction value, less embedded synergies, in an appraisal action if the sale of the company in question resulted from an arm's-length bargaining process where no structural impediments existed that might prevent a topping bid. In AXA there was an eight-month period between the merger announcement and the stockholder vote. With a market check of that length, the Court found that the only "logical explanation for why no bidder ever emerged" was that MONY was not worth more than $31 per share. Citing to AXA's expert report (with adjustments), the Court determined that $4.12 per share of the merger consideration represented shared synergies, leaving a fair value figure of $26.88 per share. The Court weighted this figure at 75% in determining MONY's going concern value.

The remaining 25% of the Court's valuation was based on AXA's "sum-of-the-parts analysis," which consisted of four distinct calculations: (i) an actuarial appraisal to value MONY's life insurance and annuity business; (ii) a blended comparable company and comparable transactions approach to value MONY's broker-dealer subsidiary; (iii) a weighted DCF and comparable company metric to value MONY's asset management business; and (iv) a standard accounting approach to value MONY's corporate assets and liabilities. With minor modifications, the Court found this to be a reliable means of deriving MONY's fair value, since the use of the metric is standard procedure in the financial community when valuing insurance conglomerates. The sum-of-the-parts valuation, as adjusted by the Court, yielded a fair value of $19.22 per share.

Ultimately, the Court found petitioners were entitled to $24.97 per share of MONY for which appraisal was perfected – about 80% of the $31 per share merger consideration.

The "Legitimate Objective" Standard – A Reformulation Of The "Compelling Justification" Test Announced In Blasius

In *Mercier v. Inter-Tel (Delaware), Inc.*, 929 A.2d 786 (Del. Ch. 2007), the Court of Chancery articulated a reformulation of the "compelling justification" standard of review announced in *Blasius Industries, Inc., v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), to be utilized in cases where director conduct affects either an election of directors or a vote touching on matters of corporate control. The Court also held, in the alternative, that the defendant directors satisfied the "compelling justification" standard.

For several years, Inter-Tel (Delaware), Inc. ("Inter-Tel") had been the subject of a tumultuous struggle for control between the independent board majority and the founder (who was the largest stockholder). In 2005, a special committee of independent directors was formed to consider various expressions of interest received by Inter-Tel. Ultimately, in the summer of 2006, the board agreed to a merger.

On the morning of the scheduled stockholder vote, a special committee of the Inter-Tel board postponed the meeting and set a new record date. At the time, the special committee knew with virtual certainty that the merger would be defeated if the meeting proceeded as scheduled – Institutional Shareholder Services ("ISS") was recommending against the merger and Innisfree M & A Incorporated (the proxy solicitor) was reporting that 49.6% of the shares had already submitted proxies voting against the merger. For reasons detailed in the opinion, the special committee members feared that the stockholders (by voting against the merger) would lose a unique opportunity to receive a premium for their shares. As described by the Court, "the Special Committee believed the stockholders were about to make a huge mistake." Thus, the special committee postponed the vote to allow more time to convince stockholders to support the merger.

Subsequently, ISS changed its position (to recommend in favor of the merger) and at the postponed stockholders meeting the merger was overwhelmingly approved by stockholders. Nevertheless, the plaintiff sought to preliminarily enjoin the merger from closing – invoking *Blasius* and claiming that the Inter-Tel directors had inequitably interfered with the stockholders' right to vote on the merger.

After an extended discussion, the Chancery Court reformulated the compelling justification test under *Blasius*, and articulated a new standard:

> I believe that the standard of review that ought to be employed in this case is a reasonableness standard consistent with the *Unocal* standard….
>
> To be specific … the burden should be on the Inter-Tel board as an initial matter to identify a legitimate corporate objective served by its decision to reschedule the … special meeting on the … Merger and to set a new record date. As part of meeting that burden, the

> directors should bear the burden of persuasion to show that their motivations were proper and not selfish. That showing, however, is not sufficient to ultimately prevail. To ultimately succeed, the directors must show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way. If for some reason, the fit between means and end is not reasonable, the directors would also come up short.

The Court expressly limited the test to cases where director conduct affected either an election of directors or a vote touching on matters of corporate control.

Applying the above "legitimate objective" standard, the Court found that the special committee had acted in good faith. Specifically, the Court concluded that the special committee reasonably believed that the merger was in the best interests of the Inter-Tel stockholders, and that the advantages of the merger would have been irretrievably lost if the vote had been held when initially scheduled. Postponing the vote allowed the stockholders to make a more informed decision on the merits of the Merger.

While the Court based its decision on the new standard articulated above, it held, in the alternative, that the special committee members satisfied the compelling justification standard under *Blasius*. As a threshold matter, the Court concluded that *Blasius* would not apply because the plaintiff had not shown that the Inter-Tel board's actions had precluded or coerced stockholder choice. By rescheduling the vote and record date, the board had simply delayed the stockholder action without infringing on their right to act, thus the board had not acted for the primary purpose of disenfranchising stockholders. However, even if *Blasius* were applicable, the Inter-Tel board could nonetheless show a compelling justification because the special committee members believe that: (1) stockholders were about to reject a third-party merger proposal that the special committee believe was in the stockholders' best interests; (2) information useful to the stockholders' decisionmaking process had not been considered adequately or not yet been disclosed publicly; and (3) if the stockholders voted no, the potential acquirer would walk away without making a higher bid and that the opportunity to receive the bid could be irretrievably lost. Stated differently, when directors act for the purpose of preserving what they believe in good faith to be a value-maximizing offer, they act for a compelling reason in the corporate context.

The Court also rejected plaintiff's disclosure claims. After commenting that it would have been better practice for the special committee to disclose that it had rescheduled the meeting because of its concerns that the stockholders would reject the merger, the Court held that the failure had a negligible effect.

Otherwise Independent Directors Found Interested (For Demand Futility Analysis) Based Upon Likelihood Of Personal Liability For Misleading SEC Filings

In *In re: INFOUSA, Inc. Shareholders Litigation*, Consol. 2007 WL 2419611 (Del. Ch. Aug. 13, 2007), the Court denied a motion to dismiss under Court of Chancery Rule 23.1 because a demand on the nine member InfoUSA board would have been futile in an action alleging that Vinod Gupta – the CEO and largest stockholder of InfoUSA – and other insiders had long used InfoUSA to enrich themselves at the expense of stockholders. The Court concluded that five of the directors were interested because they signed allegedly materially misleading SEC filings related to Gupta's compensation.

Based largely upon documents obtained through a prior petition for access to books and records under 8 *Del. C.* § 220, the consolidated complaint detailed numerous related-party transactions and payments made directly for the benefit of Gupta and his family. As described by the Court, "the extravagances included the lease of aircraft and office space for personal use, the provision of a yacht, and a collection of luxury and collectible cars that would leave James Bond green with envy." Nevertheless, the Court reiterated the fact that mere recitations of large compensation packages "will rarely be enough" to establish demand futility, and focused its analysis upon whether the motivations or good faith of the individual directors were called into doubt.

While numerous arguments were rejected as "either irrelevant to the issue of demand or supported by piecemeal references to barely-relevant legal authority," the opinion is most notable for finding that five directors were interested because they signed annual reports for 2004 and 2005 that, allegedly, materially misrepresented the nature of benefits provided to Gupta. The InfoUSA annual reports, filed no earlier than March 2005, disclosed that approximately $1.5 million in payments to a Gupta-owned company were supposedly made for "usage of aircraft and related services." The SEC filings were signed by the directors despite the fact that each had access to a February 2005 internal report which concluded that $631,899 of the payments had no relationship whatever to aircraft, and were instead payments for Gupta's "personal perquisites" (*e.g.,* a yacht, use of personal residences, and other undefined travel services). The February 2005 internal report also commented that the InfoUSA practice of paying fixed monthly amounts to the Gupta-owned company for use of personal residences was "difficult to support under any circumstances." Based on the allegations, the Court inferred that the directors signed the SEC filings with knowledge that the disclosures "fell far below the standards of candor expected." The Court held that Gupta and the five directors who signed the annual reports each faced a significant likelihood of personal liability and were, therefore, interested for purposes of a demand.

Although the foregoing holding was sufficient to establish that a demand would have been futile, the Court also found it reasonable to infer that four of the directors who signed the annual reports lacked independence from Gupta for other reasons. The first director lacked independence because his law firm received annual payments from InfoUSA that approached the annual income per partner for the firm – the threatened withdrawal of which the Court held was sufficiently material, in the case of a legal professional, to raise a reasonable doubt as to the director's independence. The second director, a professor at Creighton University, was found to lack independence because his board remuneration exceeded the average salary reported for a Creighton professor, because he previously received a $50,000 grant from a Gupta-affiliated entity, and because Gupta (and another defendant) had social and professional ties to Creighton which were sufficient to affect the director's professional advancement. The remaining two directors were found to lack independence because they utilized several hundred square feet of InfoUSA office space to run their personal businesses, but were not required to pay rent to InfoUSA and had no formal leases. The Court also noted that the February 2005 internal report (discussed above) expressed concern that the office space might undermine the directors' independence.

In addition to Rule 23.1, the defendants moved to dismiss the complaint under Court of Chancery Rule 12(b)(6) by arguing that the consolidated complaint failed to state a claim. The motion was largely denied. One aspect bears noting. The Court refused to dismiss a claim that InfoUSA should be reimbursed for expenses incurred by the company in connection with an offer by Gupta to acquire all outstanding shares. After concluding that the offer to take the company private would potentially serve the best interest of the stockholders, the board formed a special committee to consider the proposal and alternatives. Roughly two months later, the special committee informed Gupta that his offer was inadequate, and offered a choice: (i) enter into exclusive negotiations with an understanding that any agreement would be subject to a post-signing market check and a requirement that Gupta support a sale of the company if a superior offer was obtained; or (ii) if Gupta declined to support an alternative superior transaction, the special committee would not agree to exclusive negotiations with Gupta and would begin exploring strategic alternatives with third parties. Gupta withdrew his offer, and indicated that he would not sell his shares or vote in favor of any other transaction. Thereafter, all five board members who were not on the special committee voted to abolish the special committee – citing concerns related to the potential disruption to operations and other adverse consequences that might arise from going private.

Plaintiffs' claim was that the board – consisting of dominated directors – formed the special committee with the expectation that it would allow Gupta to acquire InfoUSA at a lowball price. When the special committee took their mandate seriously and began searching for alternative acquirers, Gupta and the conflicted members of the board voted to disband the special committee to prevent it from considering any non-Gupta offers. After examining the allegations, the Court concluded that equity might require the directors to reimburse InfoUSA for sums spent pursuing such faithless ends.

Stock Option Anti-Destruction Clause Enforced In Connection With A Merger

In *Lillis v. AT&T Corp.*, 2007 WL 2110587 (Del. Ch. Jul. 20, 2007), the Court of Chancery held that a successor of the original issuer of stock options was liable to stock option holders pursuant to an anti-destruction clause for failing to fully protect the holders' economic positions in connection with a merger.

The disputed options were issued under a 1994 MediaOne grant plan ("1994 Plan"), which contained an "anti-destruction" clause providing, in the event of certain transactions, that:

> the number and kind of shares or interests … and the per share price or value thereof shall be appropriately adjusted ... at the time of such event, provided that each Participant's economic position with respect to the Award shall not, as a result of such adjustment, be worse than it had been immediately prior to such event.

In 2000, MediaOne merged with AT&T Corp. ("AT&T"). In connection with the merger, AT&T agreed that the MediaOne options would be converted into AT&T options, would be governed by the 1994 Plan, and would remain fully vested and exercisable for their full grant terms. AT&T also agreed to "take such actions as are necessary for the assumption of" the MediaOne stock options, to cause its subsidiaries to honor the terms thereof, and that the 1994 Plan would not be modified without the written consent of option holders (unless otherwise expressly permitted by its terms). While not based on the well known Black-Scholes methodology, the option adjustments made in connection with the AT&T merger preserved both the intrinsic value and the option value of the MediaOne options.[1]

In 2001, AT&T Wireless ("Wireless") split-off from AT&T, and the AT&T options were adjusted into options to acquire both AT&T stock ("T options") and Wireless stock ("AWE options"). The 1994 Plan participants were informed that the 1994 Plan would continue to govern the T options, and that a new Wireless stock option plan would govern the AWE options but the terms and conditions would remain unchanged (with immaterial exceptions).

In connection with the split-off, AT&T and Wireless entered into agreements dividing all employee benefit obligations between AT&T and Wireless. Unlike the 1994 Plan, however, the relevant agreements did not include language protecting the option holders' "economic position" in the event of an adjustment. Rather, the adjustments clause provided for "such adjustment and other substitutions … as the Committee, in its sole discretion, deems equitable or appropriate." AT&T did not obtain consent from the 1994 Plan participants for any option adjustments in connection with the split-off.

In February 2004, Wireless merged with Cingular Wireless LLC ("Cingular"). In connection therewith, Cingular paid $15 per share for Wireless's outstanding shares and the AWE options were adjusted into the right to received $15 cash upon exercise. Thus, "out-of-the-money" AWE options became worthless and the value of "in-the-money" AWE options was fixed at the spread between the exercise price and $15.

Plaintiffs brought an action against AT&T and Wireless, alleging that the options adjustment in the Cingular merger violated the anti-destruction clause in the 1994 Plan, which plaintiffs interpreted as protecting the full economic value of the options (not just the intrinsic value). Plaintiffs contended that the proper measure of damages was the Black-Scholes value of their options.

The Court held that AT&T remained primarily liable for the AWE options under the 1994 Plan, and that AT&T was obligated to adjust the plaintiffs' options when Wireless failed to do so in connection with the Cingular merger. Conversely, the Court held that Wireless could not be liable under the 1994 Plan – commenting that "[t]he fact that AT&T should have bound Wireless to the 1994 Plan does not mean that AT&T did so as to render Wireless liable."

After discussing the history of anti-destruction clauses, the Court determined that the phrase "economic position" was ambiguous. Considering the extrinsic evidence (*e.g.*, trial

[1] As the Court explained, "[o]ptions have two components of value: time value and intrinsic value. The time value is the chance that the underlying security will appreciate before the option expires such that the market price is more than the strike price. The intrinsic value is the difference between the strike price and the market price now."

testimony, other option adjustments under the 1994 Plan, and the important role options played in compensation), the Court concluded that plaintiffs' interpretation of the 1994 Plan was the proper one. Therefore, the full economic value (not just the intrinsic value) of the options should have been preserved when making the options adjustment in the Cingular merger.

The parties agreed that the Black-Scholes method of valuing options was proper for calculating damages, but disagreed on the variance in the price of the underlying equity, or volatility, that should be used in making such a calculation. Plaintiff's expert based damages on a historic volatility of 63%, the same volatility used by Wireless to value its employee stock options in 2003. Defendants presented damages calculations based upon implied, rather than historic volatility. The Court adopted Plaintiffs' position and awarded $11,306,986 in damages.

Discovery Of Accounting Discrepancies In Pre-Acquisition Due Diligence Did Not Preclude Action For Breach Of Representations And Warranties In Acquisition Agreement

In *Cobalt Operating, LLC v. James Crystal Enterprises, LLC*, 2007 WL 2142926 (Del. Ch. July 20, 2007), the Court of Chancery addressed whether the purchaser of a business could prevail on its breach of contract and fraud claims despite the fact that the purchaser performed pre-purchase[2] due diligence that revealed discrepancies that later formed the basis of its claims. The Court entered judgment in favor of the purchaser – finding that it reasonably relied upon the seller's representations in an asset purchase agreement.

In 2002, Cobalt Operating, LLC ("Cobalt") agreed to buy a radio station from James Crystal Enterprises, LLC and James Crystal Licenses, LLC (collectively, "Crystal") for $70 million. The purchase price was based on Cobalt's offer to purchase the radio station for fourteen times the radio station's annual broadcast cash flow, which Crystal represented was $5 million. After Cobalt's due diligence confirmed that the actual cash flow for the previous twelve months was approximately $5 million, the transaction closed.

Approximately three months after closing, Cobalt discovered that the radio station was unable to air all of the commercials sold – even though the volume of commercials had not been increased from the volume sold by Crystal. After investigation, Cobalt filed an action for fraud and breach of contract, claiming that Crystal over stated the annual broadcast cash flow by billing the station's customers for advertising that did not air.

Cobalt argued that Crystal breached numerous contractual representations in the asset purchase agreement and that Cobalt reasonably relied upon Crystal's fraudulent representations. Crystal denied the allegations and claimed that Cobalt could not have reasonably relied upon Crystal's representations because Cobalt's pre-acquisition due diligence revealed the accounting discrepancies underlying Cobalt's claims.

[2] Recently, the Court of Chancery also addressed whether post-acquisition conduct violated a covenant in an acquisition agreement in *LaPoint v. AmeriSourceBergen Corp.*, No. 327-C (Del. Ch. Sept. 4, 2007). In *LaPoint*, AmerisourceBergen ("ABC") agreed to acquire Bridge Medical Inc. ("Bridge") for $27 million, and agreed to an earnout to be paid if Bridge met certain earnings targets. The Court found ABC "frequently" breached its obligations under the acquisition agreement by failing to exclusively and actively promote Bridge products. Despite finding a breach occurred, the Court awarded only nominal damages because the plaintiffs failed to show ABC's breach caused Bridge to miss its earnout targets.

The Court noted that the matter involved a factual dispute that was "stark and simple – did the disputed advertisements air or not?" Although Crystal argued that all of the advertising sold had been played on the air, the Court found Crystal's evidence and explanations unpersuasive, and thus concluded that the disputed commercials did not air. Accordingly, the Court held that Crystal breached numerous contractual representations, including the representation that the financial statements that reflected annual cash flow of $5 million were not materially misleading and that Crystal was in compliance with applicable law.

Likewise, the Court rejected Crystal's contention that Cobalt's discovery of accounting discrepancies prior to the acquisition precluded Cobalt from arguing it reasonably relied upon Crystal's representations because the Court found the asset purchase agreement contained (i) an "express and unqualified representation regarding the material accuracy" of the radio station's financial statements, and (ii) a representation that Crystal was in compliance with applicable law. Moreover, the Court found that Cobalt's failure to uncover the fraud during due diligence was not unreasonable because the fraud was intentionally hidden from Cobalt when its due diligence team investigated the accounting discrepancies.

Issuer Of Corporate Debt Did Not Breach Contractual Obligations By Structuring Transaction To Avoid Triggering A Mandatory Redemption Provision

In *Law Debenture Trust Company of New York v. Petrohawk Energy Corp.*, 2007 WL 2248150 (Del. Ch. Aug. 1, 2007), the Court of Chancery granted summary judgment against noteholders who claimed that a friendly merger of equals constituted a "Change of Control" under the indenture establishing their rights (governed by New York law) which triggered a contractual obligation to redeem their notes early at 101% of face value.

The notes were issued by KCS Energy, Inc., which subsequently merged with Petrohawk Energy Corp. (the surviving entity). As described by the Court, the arguments in support of the claim that a Change of Control occurred were "based on overly-technical contentions and raise[d] concerns that [we]re outside the scope of the rights granted … by the indenture."

First, in order to avoid a contractual change of control, the former KCS stockholders needed to hold a majority of the combined entity's voting shares immediately following the merger. Based on the respective number of shares when the merger was agreed to, the former KCS stockholder would have held only 49% of the post-merger shares. To avoid triggering the indenture provision, Petrohawk redeemed approximately 590,000 shares of its preferred stock before the merger closed. As a result, KCS stockholders held 50.06% of the post-merger shares.

While they admitted that the preferred shares had been redeemed, the noteholders claimed that the shares should have been counted in the post-merger share count because the redemption process violated a notice period in the certificate of designation, and a SEC rule requiring tender offers to remain open for at least twenty days. The Court found that the noteholders lacked standing to assert the purported defects, which were beyond the scope of the indenture (the sole source of the noteholders' rights). The Court also noted that "issuers of corporate debt do not breach their contractual obligations by structuring transactions to avoid triggering a mandatory redemption provision in favor of the Noteholders."

Second, in order to avoid triggering a change of control, at least five of the directors of the combined entity needed to be "Continuing Directors," which the indenture defined as "any member of the Board of Directors of the Company who (1) was a member of such Board of Directors on the [date the Notes were issued]; or (2) was nominated for election or elected to such Board of Directors with the approval of a majority of the Continuing Directors who were members of such Board at the time of such nomination or election." Because only four of the KCS directors were to continue as board members post-merger, the KCS board adopted a resolution (prior to the merger) confirming and approving the nomination and election of each of the post-merger directors – an act which "indisputably demonstrate[d] that the KCS board intended … to cause all of the post-[m]erger board members to be Continuing Directors."

The noteholders' most notable argument challenged the manner in which the post-merger directors were seated on the board. The certificate of merger filed with the Secretary of State correctly identified the post-merger board; however, no further action was taken to seat the board. The Noteholders claimed that this was improper as a matter of Delaware corporate law. After noting that it was colorable, the Court held that the argument was irrelevant to the noteholders' rights under the indenture and concluded that the language and clear purpose of the Continuing Director provision was satisfied. Thus, a change of control was not triggered.