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Re: The 2006 Amendments to the General Corporation Law of the State of Delaware and Recent Delaware Corporate Law Decisions

A summary of the amendments to the General Corporation Law of the State of Delaware (the "General Corporation Law") and to certain provisions of the Delaware Code relating to corporate franchise taxes is enclosed. These amendments were signed into law by the Governor of the State of Delaware and will become effective on August 1, 2006, January 1, 2007 or January 1, 2008, depending on the specific amendment. The amendments address a number of important topics, including issues relating to bylaws adopted by stockholders specifying the vote required for the election of directors, information that will be required on annual franchise tax forms and the ramifications of failure to provide such information.

In addition, in the past few months, the Delaware courts have issued several opinions that raise important issues for Delaware corporations and their advisors. The highly anticipated decision of the Delaware Supreme Court in *In re Walt Disney Co. Deriv. Litig.*, C.A. No. 411, Jacobs, J. (Del. June 8, 2006), affirmed the Court of Chancery's post-trial opinion finding that members of the board of directors of The Walt Disney Company did not breach their fiduciary duties or act in bad faith in connection with the hiring and subsequent termination of Michael Ovitz. In *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, C.A. No. 2205-N, Lamb, V.C. (Del. Ch. June 29, 2006), the Court found that redeemable preferred stock should be treated as equity, rather than debt, for purposes of determining whether the holder thereof has standing to sue the company in the capacity of a creditor, notwithstanding the accounting treatment of such stock. In *Oliver v. Boston Univ.*, C.A. No. 16570-NC, Noble, V.C. (Del. Ch. Apr. 14, 2006), the Court, applying the entire fairness standard to transactions approved by a board with a majority of interested directors, reached the rare finding that the fair price, but not the fair dealing, element of the entire fairness standard had been met with respect to certain claims. In *Levy v. Hayes Lemmerz Int'l, Inc.*, C.A. No. 1395-N, Lamb, V.C. (Del. Ch. Apr. 5, 2006), the Delaware Court of Chancery held that, absent a contractual duty, a newly formed holding company was not obligated to indemnify the former directors of its operating subsidiary. In *Lions Gate Entm't Corp. v. Image Entm't Inc.*, C.A. No. 2011-N, Chandler, C. (Del. Ch. June 5, 2006), the Court interpreted a staggered board provision and ruled on the validity of other provisions of the defendant's governing documents adopted in connection with its reincorporation into Delaware. In *Gesoff v. IIC Industries Inc.*, C.A. 19600, Lamb, V.C. (Del. Ch. May 18, 2006), the Court revisited issues of fairness in the going-private context and addressed the application of exculpatory provisions adopted pursuant to Section 102(b)(7) of the General Corporation Law. Summaries of each of the foregoing cases are set forth below.

In re Walt Disney Company Derivative Litigation

In the greatly anticipated decision on appeal, the Delaware Supreme Court, in *In re Walt Disney Co. Deriv. Litig.,* C.A. No. 411, Jacobs, J. (Del. June 8, 2006), affirmed Chancellor William B. Chandler III's post-trial opinion in which he found that the members of the board of directors of The Walt Disney Company ("Disney" or the "Company") did not breach any of their fiduciary duties and did not act in bad faith in connection with the hiring and subsequent firing of Michael Ovitz as Disney's president or the structuring of his employment contract.

This case began in January 1997 when several Disney stockholders brought derivative actions in the Court of Chancery on behalf of Disney against Ovitz and the directors of Disney, claiming that after only 14 months of employment, the $130 million termination payout on Ovitz's employment contract was the product of fiduciary duty and contractual breaches by Ovitz and breaches of fiduciary duty by the Disney directors and constituted a waste of the Company's assets. After trial, Chancellor Chandler entered judgment in favor of all defendants as to all claims in plaintiffs' second amended complaint, holding that none of the defendants had breached any fiduciary duty or committed waste. Richards, Layton & Finger, P.A. represented 13 of the 18 defendants. After thorough briefing and oral argument *en banc*, the Supreme Court upheld the Chancellor's 174-page opinion with an 89-page opinion of its own.

In the wake of the untimely death of Disney's prior president and the need for a potential successor to Chairman and CEO Michael Eisner, attention focused by the summer of 1995 on Ovitz, then-head of a powerful Hollywood talent agency. Negotiations with Eisner and Irwin Russell, Chairman of Disney's Compensation Committee, resulted in a proposed 5-year compensation arrangement as set forth in the Ovitz Employment Agreement (the "OEA"). This arrangement included stock options as well as non-fault termination ("NFT") payments in the event that Ovitz's termination was not for "good cause" under the OEA.

Russell and fellow committee member Ray Watson conferred multiple times with compensation expert Graef Crystal to solicit his views on Ovitz's proposed compensation and analyze his calculations as well as historical comparables and Watson's spreadsheets reflecting various scenarios. Russell and Watson also had telephone conversations with the two other members of the committee, Sidney Poitier and Ignacio Lozano. Meanwhile, Eisner called each board member to inform them of his desire to hire Ovitz. On September 26, 1995, the Compensation Committee met for what the Court found was one hour and (among other topics) discussed Ovitz's proposed compensation package; the full board met thereafter and elected Ovitz President. On October 16, the Compensation Committee met to award Ovitz his stock options under his contract, which contract, although becoming effective as of October 1, was not actually executed until December 16.

Ovitz's tenure at the Company did not work out as planned or hoped. Disney's directors had discussions at various times about these difficulties, discussions which eventually turned to Ovitz's anticipated termination. While Ovitz's tenure at the Company had been disappointing, Sanford Litvack, Disney's General Counsel, advised Eisner and other directors that the Company did not have cause to avoid the NFT payment. Eisner therefore reluctantly decided to terminate Ovitz on a not-for-cause basis, a decision which board members were informed of and supported. After 37 days of trial testimony and post-trial briefing, the Chancellor found no liability on behalf of any defendant with regard to the above-described events. Plaintiffs then appealed their case to the Delaware Supreme Court.

The Supreme Court analyzed plaintiffs-appellants' claims of error in two separate groupings: (i) the claims against Disney's directors; and (ii) the claims against Ovitz.

Claims against Disney's directors were that they breached fiduciary duties of care and good faith by approving the OEA and approving the NFT payment to Ovitz upon his termination. This payment was also alleged to have amounted to corporate waste. Plaintiffs did not contend that the Disney directors were directly liable for these actions; rather, plaintiffs argued that these breaches of duty required the defendants to prove the entire fairness of their actions because they were no longer entitled to the protections of the business judgment rule; thus, it was the defendants' burden of proof to carry. The Court rejected this theory, stating that it was plaintiff's initial burden to prove such a breach had occurred in order to rebut the presumptions of the business judgment rule.

Although plaintiffs argued that the Chancellor had conflated the fiduciary duty of care and the duty to act in good faith in determining whether the defendants should be held liable, the Supreme Court parsed the Chancellor's opinion and found that he had, in fact, applied the legal tests separately. Rather than reviewing the good faith conduct of the directors in the Section 102(b)(7) context, as plaintiffs argued occurred, the Chancellor had correctly reviewed the good faith conduct of the directors in determining whether plaintiffs had rebutted the presumptions of the business judgment rule. The Court held that, although a bad faith determination can eliminate charter-authorized exculpation from monetary damage liability *after* liability has been established, a determination of bad faith can also be used to rebut the presumptions of the business judgment rule *before* liability is established.

Duty of Care

In determining whether any of the defendants had acted with gross negligence in the hiring and firing of Ovitz or the approval of the OEA, the Court held that the board was not required to approve the OEA as it had appropriately delegated decisions relating to employment and compensation of Company officers to its Compensation Committee, and nothing in the General Corporation Law mandates that such decisions cannot be delegated. Plaintiffs also asserted that the Chancellor erred in determining liability on a director-by-director basis rather than in a collective manner, despite the fact that they themselves had analyzed the issue that way in their arguments below. The Court dismissed this assertion, noting that plaintiffs could not show that they were prejudiced in any way by this method. Because the Chancellor had found each director not liable, plaintiffs bore the burden to show how a collective analysis would have yielded a different result—a burden they failed to carry.

In determining whether the compensation committee members breached their duty of care in the negotiation and approval of the OEA, the Court found no reason to overturn the Chancellor's conclusion that all of the members were adequately informed. This included Poitier and Lozano, who plaintiffs alleged had been uninvolved in the OEA negotiation process and were thus materially uninformed. The Court concluded that the evidence supported a finding that discussions regarding payout scenarios and total compensation had occurred and been analyzed among all of the Compensation Committee members. Most significantly, the Court held that under Section 141(e) of the General Corporation Law, Poitier and Lozano were entitled to rely on their fellow committee members to inform them of the status of the contract, just as the committee as a whole was entitled to rely on their executive compensation expert Graeff Crystal. The Court concluded that it was not legally relevant that Crystal had not attended the committee meetings nor had ever even met Poitier or Lozano, as long as Crystal's analysis and information were relayed by Russell, which they were. Thus, the committee members were entitled to rely on the expert's analysis.

Duty of Good Faith

In this appeal, plaintiffs claimed that the Chancellor used a different definition of good faith in his post-trial opinion than he did in an earlier motion to dismiss decision. In its analysis of the issues of good faith, the Supreme Court made clear that it was not holding, nor would it analyze in any way, "whether the fiduciary duty to act in good faith is a duty that, like the duties of care and loyalty, can serve as an independent basis for imposing liability upon corporate officers and directors." Rather, the Court discussed the categories of good faith or lack thereof that Delaware common law has developed.

The Court noted that there is the obvious type of lack of good faith – namely, conduct that is motivated by an actual intent to harm. On the opposite end of the spectrum is conduct that is grossly negligent without accompanying malevolent intent. This latter category, the Court held, cannot be a basis for a breach of the duty to act in good faith. If that were not so, the Court noted, the Delaware General Assembly would never have drawn the distinctions that exist in Section 102(b)(7) and Section 145 of the General Corporation Law between due care and good faith. A third category of conduct that falls between these two categories is that which the Chancellor attempted to capture in his opinions (both pre-trial and post-trial). Here, behavior motivated by an "intentional dereliction of duty, a conscious disregard for one's responsibilities" is the type of bad faith that would both rebut the business judgment rule presumptions as well as fall outside conduct that is otherwise exculpable and indemnifiable.

Using these guidelines, the Court found that the Chancellor's holding that the directors did not breach their duty to act in good faith in connection with Ovitz's termination was entirely correct. First, the board was not required to act in this regard. There was sufficient ambiguity in the Company's governing documents for the Court to conclude, based upon extrinsic evidence, that the board and Eisner as CEO had concurrent authority to terminate the president of the Company. Because Eisner had already undertaken the responsibility to effect such termination, the board did not have to do so. Finally, the determination that there was no cause to terminate Ovitz (and thus no grounds to avoid making the payout under the OEA) was made by Eisner and Litvack who, based upon facts supported by the Chancellor's credibility determinations that must be accepted on appeal, found that no such cause existed. The board was also allowed, for the same reasons discussed above relating to Section 141(e), to rely on this determination.

No Waste if Rational Business Purposes Exists

Lastly, the Court dismissed the plaintiffs' claims of waste noting that such claims arise only in the rarest of circumstances and are extremely difficult to prove. Because the payment to Ovitz was based upon a contractual obligation, such payment could not be considered waste unless the underlying contractual obligation irrationally squandered or gave away corporate assets. Thus, instead of analyzing the NFT payment, the Court analyzed the rationale underlying the creation of the OEA 14 months earlier. In that examination, the Court found that the NFT provisions had a rational business purpose—to induce Ovitz to leave his former employment in order to join Disney.

No Breach Before or After Fiduciary Relationship Created

The plaintiffs' claims against Ovitz were that he had breached his fiduciary duties of care and loyalty to Disney by negotiating for and accepting the NFT provisions of the OEA and negotiating a full NFT payout in connection with this termination. In a summary judgment opinion prior to trial, the Chancellor dismissed claims against Ovitz that had been based on a theory that he owed fiduciary duties prior to commencement of his employment. The Chancellor held, and the Supreme Court upheld, that until Ovitz became president and a director of Disney, he did not owe any fiduciary duties and thus could not breach them. The Court was not convinced by plaintiffs' argument that Ovitz had been a *de facto* officer before the start of his contract due to receipt of financial information, his use of Company letterhead and other acts. Rather, the Court found that Ovitz did not assume the duties of an officer before October 1—he merely prepared for taking office. After his employment ended, plaintiffs argued that he was not terminated but was acting to "settle out his contract" such that he had a duty to convene a board meeting to consider terminating him for cause. The Court viewed the overwhelming evidence that Ovitz was, in fact, terminated as dispositive as to the question of whether Ovitz breached any duties with regard to settling up his contract. Having presented no authority either legal or factual to support their argument that Ovitz was obliged to call a meeting to discuss his termination, plaintiffs failed to carry their burden of proof that Ovitz breached any duty in that regard. In fact, after December 27, 1996, Ovitz was no longer an officer or director of Disney, so could no longer be considered a fiduciary subject to liability for breaches of duties to stockholders.

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The *Disney* decision demonstrates the continuing application of the bedrock business judgment rule to boards of directors of Delaware corporations with respect to subjects such as executive compensation, hiring and termination payments, and it clarifies the relationship between the fiduciary duty of care and the duty to act in good faith. Although both Chancellor

Chandler's post-trial decision as well as the Supreme Court's decision on appeal describe what would have amounted to "best practices" in the hiring and firing of Michael Ovitz (and for which both decisions should be studied), such descriptions amounted to aspirational guidelines the failure of which to attain did not, under these circumstances, result in a finding of liability.

Harbinger: **Is Preferred Stock Debt or Equity?**

In *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, C.A. No. 2205-N, Lamb, V.C. (Del. Ch. June 29, 2006), the Delaware Court of Chancery addressed whether redeemable preferred stock of Granite Broadcasting Corporation ("Granite") constituted a debt or equity instrument for purposes of determining whether a holder of such stock had standing to sue Granite in the capacity as a creditor of Granite. For the reasons that follow, the Delaware Court of Chancery found that the redeemable preferred stock represented an equity interest in Granite and, as a result, any holder of such stock had no standing to sue Granite as a creditor.

Plaintiff Harbinger Capital Partners Master Fund I, LTD. ("Harbinger") owns approximately 39% of Granite's 12¾% Cumulative Exchangeable Preferred Stock (the "Preferred Stock"). The terms of the Preferred Stock require Granite to redeem the stock at a fixed price plus accumulated dividends on April 1, 2009. Granite also has the exclusive right to redeem such stock at any time prior to the redemption date, subject to certain conditions. If Granite fails to redeem the stock or pay accumulated dividends on the redemption date, then Harbinger's "exclusive remedy" is the right to elect the lesser of two Granite directors or that number of Granite directors constituting 25% of the members of the Granite board of directors. Further, the certificate of designations provides for certain additional contractual protections for the holders of the Preferred Stock, *inter alia*, in connection with mergers, consolidations and sales of Granite's assets.

Defendant Granite is an owner and operator of television stations. Granite, which has been in financial distress, entered into agreements to sell two of its television stations in May 2006. Harbinger argued that the transactions violated the terms of an indenture governing senior notes issued by Granite and fraudulent conveyance laws. Granite moved to dismiss the case on the basis that Harbinger was not a creditor of Granite and, thus, had no standing to bring the claims asserted. The Court began its analysis with the proposition that the rights of holders of preferred stock are primarily contractual in nature and are strictly construed. According to the Court, this contractual level of analysis will exhaust the judicial review of challenges as a wrong to a holder of preferred stock except in the limited circumstances where the holder also has a right to pursue its claims on fiduciary duty grounds. The Court then found that the body of case law (primarily in the bankruptcy context) almost unanimously favored a finding that the Preferred Stock was an equity interest in Granite. These cases focused on the fact that even where a certificate of designation confers on the holders of preferred stock redemption and dividend rights, such rights are not guaranteed in the way that a creditor's claim is guaranteed since such rights are dependent on the solvency of the corporation. Similarly, the Court noted that while holders of preferred stock often enjoy a preference on liquidation vis-à-vis holders of common stock, the right of such preferred holders to a preference on liquidation is subordinated to the rights of secured creditors.

Harbinger argued that the 2003 change in Generally Accepted Accounting Principles, promulgated by the Financial Accounting Standards Board under the name FAS150, required Granite to treat the Preferred Stock as debt on its balance sheets and that such accounting rule should control the outcome of the case. The Court rejected this argument on the basis that "the foundational issue of standing pursuant to a statute limiting suits to a certain kind of plaintiff is too weighty to rest on the slender reed of a corporation's decision to marginally revise its financial reporting in order to comply with FAS150."

* * *

Harbinger is the first decision by the Delaware Court of Chancery directly addressing whether preferred stock is a debt or equity instrument, although it is in the context of considering the issue of standing for purpose of a New York fraudulent conveyance claim.

Oliver v. Boston Univ.: More on Controlling Stockholder Transactions

In *Oliver v. Boston Univ*., C.A. No. 16570-NC, Noble, V.C. (Del. Ch. Apr. 14, 2006), the Delaware Court of Chancery found that a controlling stockholder and the directors of the corporation it controlled breached their fiduciary duties for not valuing potential derivative claims in connection with the allocation of merger consideration where they had "inquiry notice" of such claims. Moreover, after finding that the defendants' actions were to be evaluated under the entire fairness standard, the Court found that the fair price aspect of the standard had been met, but not the fair dealing element—a rare result.

In June 1995, Seragen Inc. ("Seragen") was in severe financial distress. At that time, Boston University ("BU") was Seragen's controlling stockholder, and the board of directors of Seragen was comprised of three persons who were affiliated with BU (Messrs. Cassidy, Condon and Silber), two persons who were members of management of Seragen (Messrs. Prior and Nichols) and one independent director (Mr. Jacobs). BU and persons affiliated with BU entered into a series of transactions with Seragen that were designed to infuse Seragen with the additional working capital it desperately needed. These transactions involved: (1) the assumption by BU, Cassidy and Condon of certain of Seragen's loan obligations in exchange for the issuance of warrants and newly issued "Series B" preferred stock; (2) the issuance by Seragan to BU of newly created "Series C" preferred stock; (3) the sale by Seragen of its operating division to Marathon Biopharmaceuticals, LLC ("Marathon"), an entity created by BU expressly for that purpose; and (4) the grant of certain intellectual property rights by Seragan to United States Surgical Corporation ("USSC"), a corporation founded by Hirsch. No fairness opinions were obtained and no independent committee was formed in connection with any of the transactions set forth above. In addition, the same law firm represented both BU and Seragen in connection with the Series B and Series C transactions.

Despite the foregoing transactions, Seragen was still suffering financially. As a result, Seragen entered into merger talks with Ligand Pharmaceuticals, Inc. ("Ligand") in early 1998. Under the proposed merger, Ligand would acquire Seragen and its operating assets, including Marathon, for $75 million. Although the initial agreement allocated $70 million of the merger proceeds for Seragen and the remaining $5 million for Marathon, the final agreement allocated $67 million to Seragen and $8 million to Marathon (the "Accord Agreement").

The plaintiffs argued, *inter alia*, that BU and the Seragen directors breached their fiduciary duties by not considering the value of potential derivative claims deriving from the pre-merger transactions when allocating the portion of the $67 million allocated to Seragen's minority stockholders in connection with the merger. The plantiffs further claimed that the allocation of the merger consideration under the Accord Agreement was not entirely fair. For the reasons that follow, the Court found that the defendants were on "inquiry notice" of four potential derivative claims and breached their fiduciary duties by failing to consider such claims when allocating merger consideration to the minority stockholders of BU. Moreover, the Court found that the allocation of merger consideration pursuant to the Accord Agreement was not entirely fair. Entire fairness applied to the claims since a majority of Seragen's directors were interested in the transactions, either personally or because of their relationship with BU.

The Court found that Seragen's board of directors was required to value potential derivative claims when allocating merger consideration in this context. According to the Court, any fair allocation of those proceeds could not ignore Seragen's derivative claims because the purpose of the process was to determine the relative entitlements of the Seragen stockholders to the $75 million in aggregate merger proceeds. Therefore, the Seragen directors should have evaluated the possible derivative claims of which they had "inquiry notice" during the negotiation and merger processes, and their failure to do so resulted in a breach of the fiduciary duty of loyalty. "Inquiry Notice" was defined by the Court as existing "when the directors become aware of facts sufficient to put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to the discovery of the injury." According to the Court, the board had inquiry notice of four potential derivative claims that could have affected the merger consideration allocation process because of the interested nature of the pre-merger transactions and the fact that a small group of Seragen's stockholders, including one of the plaintiffs in this action, had made their concerns about the pre-merger transactions known to the Seragen board. These four claims were: (1) equity dilution and other harm to Seragen from the Series B transaction that resulted from a breach of the fiduciary duty of loyalty; (2) equity dilution and other harm to Seragen from the Series C transaction that resulted from a breach of the fiduciary duty of loyalty; (3) waste of corporate assets in connection with the Marathon transaction that resulted from a breach of the fiduciary duty of loyalty; and (4) a breach of the fiduciary duty of loyalty in connection with the USSC transaction.

As to the first two of the four derivative claims, the Court found that the directors should have assessed the Series B and Series C transactions as derivative claims because the BU defendants were on both sides of the transaction and there were no procedural safeguards to assure the fairness of the transactions. The Court then considered whether the Series B and Series C transactions were entirely fair. The Court found that, in light of the defendants' expert testimony and the poorly supported testimony of the plaintiffs' expert (who was merely an appraiser who took "a leap of faith (not logic)" in valuing Seragen's stock), the price for the Series B and Series C transactions was fair. In particular, the defendants' expert demonstrated that: (1) the Series B transaction did nothing to change the value of Seragen's common stock, since it created no new liabilities or obligations for Seragen; (2) the Series C transaction was functionally an interest-free loan from BU to Seragen which benefited Seragen's minority stockholders, since no other lender would provide such loan without charging interest; and (3) the market did not react negatively to the Series B and Series C transactions, and, in fact, the price of Seragen's common stock increased on the day of the announcement of the Series B transaction. However, the Court found that the defendants were unable to prove that the treatment, during the negotiation of the Accord Agreement, of the Series B and Series C transactions was fair because there was no process to protect the interests of the minority common stockholders. Therefore, although the BU defendants breached their duty of loyalty and were unable to demonstrate the entire fairness of the Series B and Series C transactions, the price was fair and the weight the defendants gave the derivative claims—zero—was fair. The Court assigned only nominal damages based on this claim.

In evaluating the possible derivative claim relating to the Marathon transaction, the Court found that the sale of the facility to a BU-controlled entity did not amount to corporate waste. Marathon was sold to BU for $5 million plus a significant agreement to meet Seragen's ongoing operating expenses. The plaintiffs could offer no basis, beyond the fact that Ligand later paid $8 million for Marathon, to bolster their claim that the consideration BU paid was so little as to amount to corporate waste. The Court next assessed whether the Marathon transaction was entirely fair. As with the Series B and Series C derivative claims, the Court found that the price paid was fair but the process was deficient, and thus only nominal damages were warranted.

The Court then evaluated the potential derivative claim arising from the USSC transaction. The plaintiffs argued that the defendant directors breached their duty of loyalty in this transaction because of their relationship with Hirsch, a major benefactor and the founder of USSC, and therefore the claim had value that the defendants failed to assess. The Court rejected this claim, finding that the plaintiffs had failed to show that any special benefit devolved upon any of the defendants as a result of the transaction. Moreover, the defendants produced evidence that showed that the USSC transaction was at a fair price, and thus the potential derivative claim had no value as a bargaining chip in the allocation negotiations. Any harm that resulted from failing to consider the claim was merely procedural. Thus, damages for the failure to consider the potential derivative claim from the USSC transaction were only nominal.

The Court next considered whether the allocation of the merger proceeds in the Accord Agreement was entirely fair. As in the pre-merger transactions, the Court found that the process was not fair to the minority stockholders because there was no representative who negotiated on behalf of the minority common stockholders. According to the Court, this defect in process resulted in mis-allocations of $4,809,244, which the Court awarded to the plaintiffs as actual damages. The Court also awarded the plaintiffs nominal damages for the other process failures associated with the negotiation and implementation of the Accord Agreement.

* * *

Oliver v. Boston Univ. again makes clear that in controlling stockholder transactions, there must be a process in place to protect the controlled corporation's minority stockholders.

Otherwise, the fair-dealing prong of the entire fairness standard will be found not to have been satisfied.

Levy v. Hayes Lemmerz Int'l, Inc.: Director Indemnification

In *Levy v. Hayes Lemmerz Int'l, Inc.*, C.A. No. 1395-N, Lamb, V.C. (Del. Ch. Apr. 5, 2006), the Delaware Court of Chancery held that, absent a contractual duty, a newly formed holding company was not obligated to indemnify its operating subsidiary's former directors, and declined to read a prior written demand requirement into an otherwise silent indemnification agreement.

The dispute in *Levy* initially arose in September 2001, when the former outside directors of Hayes Lemmerz International, Inc. ("Old Hayes"), the plaintiffs in this case, were sued by Old Hayes' stockholders and bondholders for various statutory violations and breaches of fiduciary duty in connection with materially misleading financial statements issued by Old Hayes (the "2001 Suit"). In December 2001, Old Hayes entered Chapter 11 bankruptcy. While Old Hayes was in bankruptcy, the Securities and Exchange Commission (the "SEC") began an investigation into the misstated financials, which was pending at the time this decision was issued. Old Hayes emerged from bankruptcy in June 2003 as an operating subsidiary of a successor company also called Hayes Lemmerz International, Inc. ("New Hayes"). The reorganization plan excluded the former directors of Old Hayes from any release of Old Hayes' indemnification obligations in the bankruptcy, but capped those obligations at $10 million beyond any amount paid pursuant to Old Hayes' directors and officers insurance policies.

In June 2005, Old Hayes and former officers of Old Hayes (but none of the former directors) received "Wells Notices" from the SEC indicating that the SEC intended to recommend enforcement against them. Also during that month, the former directors settled the 2001 Suit for $27.5 million, of which they personally paid $7.2 million (the "Settlement Payment"). Following the settlement, the former directors sought indemnification in connection with the Settlement Payment from both Old Hayes and New Hayes pursuant to their indemnification rights under the Old Hayes' bylaws, their indemnification agreements with Old Hayes and their rights under the reorganization plan. Both Old Hayes and New Hayes informed the former directors that they would not indemnify them for the Settlement Payment. As a result, the former directors filed their complaint in this case without delivering a written demand to the board of directors of either Old Hayes or New Hayes. Several months later, though, the former directors sent a letter to both defendant companies "reiterating" their demand for indemnification. Old Hayes refused to indemnify them until they agreed "to follow the procedures set forth in the Indemnification Agreements." Old Hayes' letter also requested that the former directors provide a wide range of information that would enable Old Hayes to make what the letter called an "informed decision" regarding the demand.

The defendant companies moved to dismiss all claims against them. They first argued that all claims against New Hayes should be dismissed because the former directors were never directors of New Hayes and because the reorganization plan did not extend Old Hayes' indemnification obligations to New Hayes. In response, the former directors argued that because the reorganization plan limited both Old Hayes' and New Hayes' liabilities, it necessarily implied that New Hayes was also bound by Old Hayes' indemnification obligations. The Court found that if the reorganization plan was meant to impose such indemnification obligations on New Hayes, it could have been drafted to reach that result. Because the reorganization plan did not explicitly impose such obligations on New Hayes, the Court found that there was no reason to believe that the indemnification provisions of the reorganization plan had any effect other than to limit New Hayes' indemnification liability. Accordingly, the Court dismissed the claims against New Hayes.

The only remaining claims for indemnification were against Old Hayes. In connection with those claims, the defendant companies argued that, whatever the former directors' eventual rights to indemnification, their case to compel payment was premature because they failed to satisfy certain contractual provisions of the indemnification agreements. The indemnification agreements stated that "the Company shall indemnify Indemnitee to the fullest extent permitted by law as soon as practicable, but in any event no later than thirty days after written demand is presented to the Company." The defendant companies argued that such provision would only make sense if read to extend "the thought … beyond the word 'practicable' to include the phrase 'after written demand is presented to the Company.' " Read that way, the defendant companies argued that such provision established a strict demand requirement and a contractually mandated thirty-day consideration period for any indemnification claim. The Court, however, found that it was designed to protect the potential indemnitee by requiring Old Hayes to respond to a request for indemnification "as soon as practicable" and by allowing the former directors to start the clock against Old Hayes by delivering a written demand.

The defendant companies also argued that the former directors violated their implied duties to perform the indemnification agreements with good faith and fair dealing when they refused to respond to Old Hayes' information requests. The Court recognized that a contracting party can violate the covenant of good faith and fair dealing in an indemnification agreement by withholding information. However, it also noted that an implied covenant would be an "extremely curious" way for sophisticated parties to structure the exchange of key documents. Given that so few facts about Old Hayes' requests were known at the time, the Court declined to conclude at that time that the former directors violated their implied duties of good faith and fair dealing as a matter of law.

Finally, the defendant companies claimed that the Court should stay the former directors' indemnification action because, arguably, the Court could not determine whether the former directors acted in "good faith" and in the "best interests" of Old Hayes, as required by Section 145 of the General Corporation Law, until the SEC concluded its investigation of the misstated financial statements. Although no Wells Notices were issued against the former directors, and no litigation was pending against them individually, Old Hayes claimed that it could not indemnify the former directors without violating its statutory and fiduciary duties until the statute of limitations for action by the SEC against the former directors ran in 2007.

The Court noted that the defendant companies were correct in stating that Section 145 requires the board of directors of an indemnifying company to make a full determination of whether the indemnitees are entitled to indemnification, including an investigation as to whether the indemnitees acted in good faith and in a manner reasonably believed to be in or not opposed to the best interests of the corporation, and that such duty would be made easier if an SEC investigation produced additional information. While acknowledging that such concerns were legitimate, the Court held that the board of directors of Old Hayes could not use that rationale to abrogate its responsibility to determine the former directors' indemnification rights with respect to the Settlement Payment. For the foregoing reasons, the Court denied dismissal of the claims against Old Hayes.

Lions Gate Entm't Corp. v. Image Entm't Inc.

In *Lions Gate Entm't Corp. v. Image Entm't Inc.*, C.A. No. 2011-N, Chandler, C. (Del. Ch. June 5, 2006), the plaintiff, Lions Gate Entertainment Corp. ("Lions Gate"), sought declaratory relief in conjunction with various provisions of the certificate of incorporation (the "Charter") and bylaws (the "Bylaws") of the defendant, Image Entertainment, Inc. ("Image"). Specifically, Lions Gate sought a declaration as to (i) the effect of the staggered board provision set forth in the Bylaws (namely, the time at which it implemented the staggered director terms), (ii) the validity of the Bylaw purporting to authorize Image's board of directors to amend the Bylaws and (iii) the validity of the provision of the Charter purporting to authorize Image's board to amend the Charter unilaterally. Image answered the complaint, raised affirmative defenses and sought reformation of the Charter and Bylaws. The Court granted summary judgment in favor of Lions Gate as to all claims, affirmative defenses and counterclaims asserted in connection with the complaint.

The issues in *Lions Gate* arose in connection with the reincorporation of Image as a Delaware corporation (the "Reincorporation"). As part of the Reincorporation, which was approved at Image's 2005 annual meeting of stockholders, Image adopted the Charter and Bylaws. In September 2005, Lions Gate filed a Schedule 13D with the Securities and Exchange Commission disclosing its purchases of Image stock and offering to acquire Image at a substantial premium. The Board ultimately rejected Lions Gate's offer, and after determining that it had lost confidence in the desire and/or ability of the Board to maximize stockholder value, Lions Gate disclosed that it was considering nominating a slate of six directors for Image's 2006 annual meeting.

As part of the Reincorporation, the Board included a classified board provision in the Bylaws (the "Classified Board Provision"), which constituted the initial bylaws of Image as a Delaware corporation. Pursuant to Section 141(d) of the General Corporation Law, a Delaware corporation may adopt a classified board structure by including a classified board provision in the corporation's certificate of incorporation, by an initial bylaw or through a bylaw adopted by a vote of the corporation's stockholders. The Classified Board Provision stated that, "[a]t the 2006 annual meeting of stockholders, Class I directors shall be elected for a one-year term, Class II directors for a two-year term and Class III directors for a three-year term." A plain reading of this provision suggests that the entire Image board would stand for election at Image's annual stockholders meeting to be held during calendar year 2006, thereby permitting Lions Gate to nominate a full slate of directors.

In an effort to thwart Lions Gate's attempt to gain control of the Board, Image argued that the phrase "2006 annual meeting" in the Classified Board provision was intended to refer to the annual meeting to be held in fiscal year 2006, rather than calendar year 2006. Because Image's fiscal year 2006 ran from April 1, 2005 until March 31, 2006, interpreting the Classified Board Provision as being effective as of the annual meeting held during fiscal year 2006 would mean that the Board was classified as of the annual meeting held during September 2005, and that Lions Gate would only be able to nominate candidates for the two directorships whose one-year terms would expire one year after that meeting.

In determining whether the Classified Board Provision established a classified board that would become staggered at the annual meeting to be held during the calendar year 2006 or if the Board became staggered at the annual meeting held during the calendar year 2005, the Court applied the "plain meaning rule." This rule is applicable to construction of corporate charters and bylaws as well as statutes, contracts and other written instruments. The Court held that use of the phrase "2006 annual meeting" in the Classified Board Provision did not create any ambiguity, and that the plain meaning of that phrase leads to the conclusion that the board would become staggered at the annual meeting to be held during the calendar year 2006. This holding was buttressed by the fact that the Bylaws also state that "[e]lected directors shall hold office until the next annual meeting and until their successors shall be duly elected and qualified." The Court noted that this language is inconsistent with an immediately effective classified board and that allowing for an immediately effective classified board would violate one of the Delaware canons of interpretation, which states that "[w]hen a corporate charter [or in this case, the Bylaws] is alleged to contain a restriction on fundamental electoral rights of stockholders under default provisions of law … the restriction must be 'clear and unambiguous' to be enforceable."[1] The Court also refused Image's request to consider Image's proxy statements as parol evidence, but held that even if it were to consider such evidence, it would not change the outcome.

Turning to the second provision of the Bylaws at issue, the Court held that Section 109 of the General Corporation Law states that after a corporation has received any payment for any of its stock, a board of directors has the power to amend the corporation's bylaws only if the certificate of incorporation "confer[s] the power to adopt, amend or repeal bylaws upon the directors." Because the General Corporation Law explicitly requires that a board of directors can only be given the power to adopt, amend or repeal the bylaws by virtue of a provision in the corporation's certificate of incorporation, the provision was deemed to be invalid.

Regarding the Charter amendment purporting to grant the Board unilateral authority to amend the Charter, the Court held that the provision was invalid because it was in direct violation of Section 242 of the General Corporation Law, which requires the approval of both a corporation's board of directors and stockholders in order to amend the corporation's certificate of incorporation after it has received payment for its capital stock.

Finally, the Court rejected Image's argument that the contested provisions should be reformed in order to cure the aforementioned deficiencies, which were allegedly mutual or unilateral mistakes. The Court noted that although it has jurisdiction to reform a corporation's governing documents to conform to the original intent of the parties, it may exercise such

[1] *Harrah's Entm't v. JCC Holding Co., 802 A.2d 294, 309 (Del. Ch. 2002).*

jurisdiction only when it is clear that all present and past stockholders intended the provisions to be included within the certificate of incorporation and/or bylaws and there is no intervening third-party interest. The Court noted that, aside from the fact that Image has thousands of stockholders and confirming their intentions regarding the governing documents would be virtually impossible, it was clear that Lions Gate, by virtue of its status as the plaintiff in this action, clearly did not share Image's intentions regarding the proposed reformation of the contested provisions. Therefore, Image was unable to meet the burden of proof required for reformation.

Gesoff v. IIC Industries Inc.

In *Gesoff v. IIC Industries Inc.*, C.A. 19600, Lamb, V.C. (Del. Ch. May 18, 2006), the Delaware Court of Chancery found that the process leading up to the going-private merger at issue was unfair and resulted in an unfair price to the minority stockholders. Accordingly, the Court awarded damages to the individual plaintiffs and to the stockholders seeking appraisal in an amount in excess of the consideration offered in the merger. The Court's conclusion was based primarily on its finding that the single-person special committee charged with negotiating the merger on behalf of the minority stockholders did not function properly. Nonetheless, the Court found that the special committee director was entitled to rely on the exculpatory provision adopted pursuant to Section 102(b)(7) of the General Corporation Law, which generally authorizes corporations to eliminate or limit the liability of directors for personal monetary damages arising out a breach of the duty of care, and was therefore not subject to liability for monetary damages.

The plaintiff in *Gesoff*, a stockholder of IIC Industries Inc. ("IIC"), brought suit to challenge the fairness of, and to seek an appraisal in connection with, the cash-out merger of IIC effected at the direction of CP Holdings ("CP"), which owned approximately 80% of the shares of IIC. The challenged merger arose out of the transactions beginning in December of 2000, when CP's finance director was asked to review and consider CP's corporate structure. After concluding the review, CP determined that it could obtain significant benefits, including a reduction of regulatory costs and potential tax liability, by removing IIC as an intermediate holding company of CP's other interests. Following this report, CP began investigating potential transactions designed to eliminate the minority stockholders of IIC. In May of 2001, CP's board of directors authorized a tender offer for IIC's shares at a price per share of $13, which would be followed by a short-form merger under Section 253 of the General Corporation Law. In connection with the proposed tender offer, IIC's board appointed a special committee consisting of Alfred L. Simon, the only director who was both independent of CP and capable of fulfilling the committee's responsibilities. Simon was vested with the power to present a recommendation to IIC's full board and the public stockholders as to IIC's position with respect to CP's tender offer. Simon was also given the authority to appoint outside auditors and counsel to assist him in making the recommendation. Despite this relatively broad grant, Simon's authority was in fact "closely circumscribed" in that he had no real authority to retain his own legal counsel or financial advisor but was instead essentially forced to use advisors selected by or at the direction of CP.

CP made an initial bid of $10 per share, a price that, though lower than the initial bid of $13 per share considered by CP's board, was deemed to be a starting bid from which further negotiations would proceed. The special committee's financial advisor conducted a valuation of IIC purportedly for the benefit of the special committee in considering this bid. Unbeknownst to Simon, however, CP was privy to the financial advisor's valuation numbers and analysis. After negotiating over the terms of the offer, Simon and CP agreed on September 10, 2001 to a price of $10.50 per share, which would be supported by a fairness opinion from the special committee's financial advisor. The IIC board met later that day and discussed the process leading up to the $10.50 per share offer. At this meeting, Simon announced his decision to recommend the tender offer to the stockholders as fair from a financial point of view. The full board, however, declined to make a recommendation.

Due to the events of September 11, 2001, the commencement of the tender offer was delayed until October 15, 2001. Despite three extensions of the offer period, the tender offer resulted in only 20% of the unaffiliated shares being tendered, which increased CP's total ownership to approximately 84%. Unable to effect a short-form merger, CP decided to proceed with a conventional merger. In late January of 2002, CP's finance director discussed the proposed merger with Simon and provided him with information regarding the performance of IIC. The finance director advised Simon of the need to include the independent director's view of the fairness of the merger consideration in the proxy materials. Believing that he had already satisfied his duty to represent the minority stockholders, Simon conducted no new research as to the fairness of the merger, engaged in no new negotiations with CP and did not seek or obtain a new fairness opinion from the financial advisor. Nonetheless, he concluded that he was prepared to recommend the merger to the IIC stockholders. On February 1, 2002, IIC's board convened to vote on the merger. Simon was not in attendance but purported to appoint the finance director as his proxy to vote in favor of the merger.

In examining the plaintiff's claims, the Court found that the merger was a self-interested transaction subject to entire fairness review. Although the Court noted that the establishment of an independent special committee could serve as evidence of fair dealing, it could only do so if certain procedural safeguards were observed. In this regard, the Court reiterated the importance of the composition of the special committee, stating that "independence is the *sina qua non* of the entire negotiation process." The Court observed that multiple-member special committees are entitled to more trust than single-member committees, noting that where a special committee by necessity must be comprised of one member, such member must be beyond reproach. In addition, the Court noted that a special committee should have a clear mandate, including "the power to fully evaluate the transaction at issue and, ideally, to include what this court has called the 'critical power' to say 'no' to the transaction." Finally, the Court noted that the discussions between the parent and the special committee "should be conducted in a way that is consistent with arm's-length negotiations" that are sufficiently vigorous to ensure that the parent and the special committee are not "colluding to injure the minority stockholders."

In light of the foregoing, the Court found that the process followed by CP to effect the merger did not establish fair dealing. The Court noted several flaws in the special committee process, beginning with the appointment of Simon as the sole member thereof. That the special committee was comprised of a single member caused the Court to examine the entire process with a higher level of scrutiny. The Court indicated that the "moderating influence" of a second director could have enhanced the process followed by the special committee by making it more difficult for CP to exert such a significant degree of influence. Moreover, the Court noted that Simon's mandate as a special director was "fatally incomplete" and that the resolution pursuant to which he was appointed authorized him to provide only a "vague recommendation" as to the transaction. Moreover, the authorization did not clearly empower Simon to veto the transaction. The Court noted that after CP abandoned its tender offer and proceeded with the merger, it undertook no significant formalities to ensure that the new transaction would be fair to the minority stockholders and that the legal and financial advisors assisting Simon were far from independent. The Court specifically remarked upon the fact that CP's finance director was receiving information from the special committee's financial advisor, noting that this flow of information was "inimical to the special committee's power to negotiate a fair transaction." Based on this record, the Court found that the merger was not the result of fair dealing, noting that "any transaction that relies on so transparently corrupt a process cannot possibly be found to satisfy the high standard of entire fairness."

In addressing the fairness of the price, the Court found the consideration offered in the merger to be similarly inadequate. As to the defendants' claim that the attacks of September 11 resulted in a decrease in the value of IIC's stock, the Court noted that the defendants had failed to show that the attacks had a significant effect on IIC. Further, the Court noted that the defendants had offered no reason for the Court to believe that the price was fair on either side of September 11. In fashioning the remedy, the Court noted that "the calculation of damages in a consolidated entire fairness and appraisal action decided on the basis of entire fairness is a flexible process" and that the Court was empowered to fashion "'any form of equitable and monetary relief as may be appropriate.' " Noting the inherent difficulty of assessing the value of IIC—which had wide ranging holdings in divergent markets—the Court decided to evaluate the reports of the experts furnished by both sides, to conduct its own discounted cash flow analysis based on those reports and to test the results against the facts presented in the case. The Court found that because such process would yield a value at least as high as a formal appraisal, it would not perform a separate appraisal but instead use the value ascertained as a basis on which to compensate all individual and class plaintiffs. Based on this approach, the Court arrived at a value of $14.30 per share of IIC common stock.

The Court next addressed the question of Simon's liability in light of the exculpatory clause of IIC's charter adopted pursuant to Section 102(b)(7) of the General Corporation Law. The Court noted that all of the individual director defendants, other than Simon, implicitly conceded that they were not entitled to protection under the exculpatory clause in IIC's certificate of incorporation. Simon argued that even if the merger was unfair, and even if he breached his duty of care in authorizing an unfair merger, he was entitled to raise the exculpatory clause as an affirmative defense and thus could not be liable for monetary damages. In making this determination, the Court stated that it was faced with the question of whether Simon violated his fiduciary duty of loyalty or acted with a lack of good faith. The Court found no evidence that Simon was personally conflicted in the merger or derived a personal benefit from it. Moreover, the Court found that there was no evidence showing that Simon colluded with the interested directors and IIC in their "scheme to squeeze out the IIC minority at an unfair price." The Court found evidence showing that Simon was not aware of the key facts that made the merger unfair from a process standpoint, noting in particular that Simon was unaware of the facts suggesting that the financial advisor and legal counsel supplied to him had divided loyalties. In addition, the Court noted that Simon's efforts to seek an increase in the price offered in the tender offer, though based on the flawed analysis of the financial advisor, evidenced a good faith effort on the part of Simon to negotiate with CP. Based on the foregoing, the Court found that Simon attempted to fulfill his obligations as the sole member of the special committee but failed to do so as a result of a breach of the duty of care—a breach that was brought about in part by the efforts of the controlling stockholder and its agents. Accordingly, the Court held that Simon had proved that he was entitled to exculpation under IIC's exculpatory provision and was thus not liable for the damages awarded by the Court.

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If you have any questions or would like a copy of any decisions discussed above or the amendments described in the attachment, please do not hesitate to contact me.

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2006 AMENDMENTS TO THE GENERAL CORPORATION LAW OF THE STATE OF DELAWARE AND TO CERTAIN PROVISIONS OF CHAPTER 5 OF TITLE 8 OF THE DELAWARE CODE

Legislation amending the General Corporation Law of the State of Delaware (the "DGCL") and provisions of the Delaware Code relating to Corporation Franchise Tax has been adopted by the Delaware General Assembly and signed by the Governor of the State of Delaware. The amendments, which will become effective August 1, 2006, January 1, 2007 or January 1, 2008, depending on the amendment, are designed to keep Delaware law current and address any issues raised by practitioners, the judiciary and legislators with respect to the current language or interpretation of the DGCL and other provisions of the Delaware Code relating to corporations. The 2006 amendments are discussed below.

AMENDMENTS EFFECTIVE AUGUST 1, 2006

Formation/Foreign Corporations/Miscellaneous Provisions

Contents of Certificate of Incorporation [§ 102]. Section 102 of the DGCL governs what information must be contained in a Delaware corporation's certificate of incorporation. Subsection (a)(1) of Section 102 sets forth the requirements with respect to the corporation's name and has been amended to provide that a Delaware corporation's name must be distinguishable from the names, whether reserved or of record, of each other domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust upon the records in the office of the Division of Corporations in the Department of State, except with the written consent of the person who reserved such name or such other corporation, partnership, limited partnership, limited liability company or statutory trust. Section 102 has also been amended to add a new subsection (e) to clarify who may reserve an available name for a corporation and sets forth the procedures that must be followed to reserve such name.

Qualification to Do Business [§ 371]. Section 371 of the DGCL governs the qualification of foreign corporations to do business in the State of Delaware. Subsection (c) of Section 371, which sets forth when the Secretary of State of the State of Delaware may provide a certificate evidencing a foreign corporation's right to do business in the State of Delaware, has been amended to provide that a foreign corporation's name must be distinguishable from the names, whether reserved or of record, of each other domestic or foreign corporation, partnership, limited partnership, limited liability company or statutory trust upon the records in the office of the Division of Corporations in the Department of State, except with the written consent of the person who reserved such name or such other corporation, partnership, limited partnership, limited liability company or statutory trust.

Taxes and Fees Payable to the State [§ 391]. Section 391 of the DGCL sets forth the applicable taxes and filing fees a Delaware corporation must pay the Secretary of State in connection with filings made in the office of the Secretary of State. In connection with the amendments to Section 102 of the DGCL regarding the reservation of a corporate name, Section 391 of the DGCL has been amended to provide that a fee of up to $75 shall be paid to the Secretary of State in connection with the Secretary of State accepting a corporate name reservation application, an application for renewal of a corporate name reservation or a notice of transfer or cancellation of a corporate name reservation.

Directors and Officers

Board of Directors [§ 141]. Section 141 of the DGCL governs the operation of the board of directors of a Delaware corporation. Subsection (b) of Section 141 has been amended to add a new provision allowing resignations of members of the board of directors to be effective at a later date or effective upon the happening of an event or events. Subsection (b) of Section 141 has also been amended to allow a resignation conditioned upon the director failing to receive a specified vote for reelection to be irrevocable. These amendments to Section 141(b) allow a Delaware corporation to enforce a director resignation conditioned upon the director failing to receive a specified vote for reelection, coupled with board acceptance of the resignation and, therefore, allow Delaware corporations and individual directors to agree, and give effect in a manner subsequently enforceable by the corporation, to voting standards for the election of directors that are different than the plurality vote standard which is the statutory default under Section 216 of the DGCL. The amendments to Section 141(b) do not address whether resignations may be made irrevocable in different contexts.

Subsection (d) of Section 141, which governs the classification of a board of directors of a Delaware corporation into one, two or three classes, has been amended to clarify that the classified terms of the directors begin after the classification of the board of directors becomes effective. This amendment to Section 141(d) expressly allows the certificate of incorporation or bylaws of a Delaware corporation to provide for the classification of the board of directors to be effective at some point after the provisions classifying the board of directors are adopted. Section 141(d) has also been amended to allow the provisions in the certificate of incorporation or bylaw which classify the board of directors to include language authorizing the board of directors to allocate members of the board of directors already in office to the various classes of directors at such time when the classification becomes effective.

Meetings, Elections, Voting and Notice

Quorum and Required Vote [§ 216]. Section 216 of the DGCL provides that, subject to specific provisions of the DGCL setting forth the vote required for specified action, the certificate of incorporation or bylaws may specify the votes required for the transaction of business. Section 216 also sets forth the default voting requirements. The default voting standard for the election of directors under Section 216 is a plurality vote. Section 216 has been amended to provide that any bylaw adopted by the stockholders of a Delaware corporation which specifies the vote required for the election of directors may not be further amended or repealed by the board of directors. The amendment to Section 216 does not address any other situation in which the board of directors amends a stockholder adopted bylaw.

AMENDMENTS EFFECTIVE JANUARY 1, 2007

Registered Office and Registered Agent

Registered Agent in the State [§ 132]. Section 132 of the DGCL requires that all Delaware corporations must have and maintain in the State of Delaware a registered agent and sets forth who may act as a registered agent. Section 132 has been amended to (i) expand the types of entities that may serve as registered agent; (ii) add provisions setting forth the duties and qualifications of registered agents; (iii) require Delaware corporations to provide registered agents with a designated natural person to receive communications from the registered agent; (iv) authorize the Secretary of State to make rules and regulations necessary or appropriate to enforce the provisions of Section 132, including refusing to file documents submitted by a registered agent; (v) authorize the Secretary of State to bring an action in the Court of Chancery of the State of Delaware to enjoin any person who has failed to comply with the provisions of Section 132, who has been convicted of a felony or any crime involving dishonesty, fraud or moral turpitude, or who has used the office of the registered agent in a manner intended to defraud the public from serving as a registered agent or as an officer, director or managing agent of a registered agent; and (vi) authorize the Secretary of State to make a list of registered agents available to the public.

Renewal, Revival, Extension and Restoration of Certificate of Incorporation [§ 312]. Section 312 of the DGCL provides a mechanism for a Delaware corporation whose certificate of incorporation has become inoperative to restore its certificate of incorporation with all rights, franchises, privileges and liabilities which had been secured or imposed by its original certificate of incorporation and all amendments thereto. Section 312 of the DGCL has been amended with technical changes to make it consistent with the amendments to Section 132 of the DGCL and Sections 502, 503, 510, 511, 514 and 517 of Title 8 of the Delaware Code.

AMENDMENTS EFFECTIVE JANUARY 1, 2008

Corporation Franchise Tax

Annual Franchise Tax Report [§ 502]. Section 502 of Title 8 of the Delaware Code sets forth the requirement that a Delaware corporation file an annual franchise report on or before March 1 of each year. Section 502 has been amended to clarify the information required to be reported on the annual franchise tax report and to require that Delaware corporations file a complete annual franchise report each year. In addition, Section 502 has been amended to provide that certain tax information shall not be deemed to be public. Finally, Section 502 has been amended to provide that the Secretary of State is not permitted to issue certificates of good standing that pertain to a corporation that does not have on file a completed annual franchise tax report for the relevant time period.

Rates and Computation of Franchise Tax [§ 503]. Section 503 of Title 8 of the Delaware Code sets forth the method for computing franchise taxes for a Delaware corporation. A technical amendment has been made to subsection (b) of Section 503 to clarify what information a Delaware corporation must include on its annual franchise tax report in order to allow the corporation to calculate its franchise tax based on the assumed par value method of Section 503(a)(2) instead of the authorized capital stock method of Section 503(a)(1).

Failure to Pay Tax for 1 Year [§ 510]. Section 510 of Title 8 of the Delaware Code provides that if a corporation neglects or refuses for 1 year to pay the State of Delaware any franchise tax, the certificate of incorporation of the corporation shall be void and all powers conferred by law upon the corporation are declared inoperative, subject to limited exceptions. Section 510 has been amended to provide that the neglect or refusal to file a complete annual franchise tax report shall also cause the certificate of incorporation of the corporation to become void and cause all powers conferred by law upon the corporation to be declared inoperative.

Repeal of Charters of Delinquent Corporations [§ 511]. Section 511 of Title 8 of the Delaware Code provides that on or before June 30 of each year, the Secretary of State shall report to the Governor a list of all the corporations, which for 1 year next preceding such report, failed or neglected or refused to pay franchise taxes and the Governor shall issue a proclamation declaring that the certificates of incorporation of such corporations are repealed. Section 511 has been amended to provide that the Secretary of State must also report corporations that have failed, neglected or refused to file complete annual franchise tax reports and the certificates of incorporation of such corporations shall also be repealed by proclamation of the Governor.

Mistakes in Proclamation [§ 514]. Section 514 of Title 8 of the Delaware Code provides that whenever it is established that any corporation named in the proclamation as provided in Section 511 has in fact not neglected or refused to pay franchise taxes, the Governor may correct the mistake and the Secretary of State shall restore the corporation's certificate of incorporation. Section 514 has been amended to provide that the Governor may also correct a mistake where it is established that a corporation did not neglect or refuse to file a complete annual franchise tax report.

Duties of Attorney General [§ 517]. Section 517 of Title 8 of the Delaware Code provides that the Attorney General shall have the power, in conjunction with the Secretary of State, to collect franchise taxes and penalties due from proclaimed corporations and corporations whose certificates of incorporation become void by operation of law. Section 517 has been amended to clarify that this power exists whenever a corporation's certificate of incorporation has become void by operation of law, including for failing to file a completed annual franchise tax report.