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OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

EMPLOYEES PENSION PLAN

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May 21, 2008

VIA HAND DELIVERY
Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, NE
Washington, DC 20549

Re: Shareholder proposal of AFSCME Employees Pension Plan; request by CA Inc. for no-action determination

Dear Sir/Madam:

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, the American Federation of State, County and Municipal Employees, Employees Pension Plan (the "Plan") submitted to CA Inc. ("CA") a shareholder proposal (the "Proposal") seeking to amend CA's bylaws to add a bylaw (the "Bylaw") providing for reimbursement of "short slate" proxy contest expenses upon the election of at least one member of the slate to CA's board.

In a letter dated April 18, 2008, CA stated that it intends to omit the Proposal from its proxy materials being prepared for the 2008 annual meeting of shareholders. CA argues that it can exclude the Proposal pursuant to (a) Rule 14a-8(i)(8), as relating to the election of directors; (b) Rules 14a-8(i)(1) and (i)(2), on the ground that the Bylaw violates the law of Delaware, the state of CA's incorporation; and (c) Rule 14a-8(i)(3), as violating one of the Commission's other proxy rules. As discussed more fully below, CA has not met its burden of establishing its entitlement to rely on any of these exclusions, and its request for relief should accordingly be denied.

The Director Election Exclusion Does Not Permit Exclusion of the Proposal

Rule 14a-8(i)(8) (the "Director Election Exclusion") allows a company to exclude a proposal that "relates to a nomination or an election for membership on the company's board of directors or analogous governing body or a procedure for such nomination or election." The language of the Director Election Exclusion was revised late last year to add language regarding nominations and procedures for nominations and elections to the board.

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CA contends that the newly-revised Director Election Exclusion permits exclusion of the Proposal because it would create "a substantial financial incentive for CA to include" shareholder-nominated candidates in CA's own proxy statement. In other words, CA argues that the Proposal has the same effect as a shareholder proxy access proposal, just indirectly.

As an initial matter, it is important to note that last year's change to the Director Election Exclusion did not, as CA asserts, meaningfully change the interpretation of the Director Election Exclusion as applied to proposals like the Proposal. The Commission's release adopting the revision to the Director Election Exclusion made clear that the amendment did "not affect or address any other aspect of the agency's prior interpretation of the exclusion," providing as an example of that prior interpretation the Staff's previous determinations not permitting exclusion of proposals relating to "reimbursement of shareholder expenses in contested elections."[1] These determinations, which are cited in footnote 2 of CA's request for determination, involved proposals that were nearly identical to the Proposal.

Further, CA's argument that the Director Election Exclusion permits exclusion of the Proposal relies on an implausible interpretation of the Director Election Exclusion, one that is not supported by the language of the Exclusion or the policy reasons behind its revision. First, the language of the Director Election Exclusion makes clear that it applies to proposals "that would result" in a contested election to the board. Put another way, the proposal needs to be the causal link to the contested election. That is the case with a proxy access proposal: the mechanism established by the proposal would enable a substantial long-term shareholder to place a nominee on the company's proxy statement, thereby creating an election in which there are more candidates than available seats on the board.

By contrast, the Proposal would not "result in" a contested director election. The Proposal would establish a mechanism by which expenses incurred in connection with a short slate director contest would be reimbursed, provided certain requirements are satisfied. Most important, at least one of the candidates on the short slate must be elected by shareholders. Thus, the Proposal would not affect the director election at all but would reallocate costs after the fact for certain contests. The fact of the election contest would exist regardless of the Proposal.

Moreover, the Proposal does not implicate the policy concerns that prompted the Commission's revisions to the Director Election Exclusion. When the Commission adopted last year's amendment, it said it was acting out of concern that shareholder proxy access proposals could result in circumvention of the Commission's proxy rules relating to contested director elections. Specifically, the Commission asserted that the "numerous protections of the federal proxy rules are triggered only by the presence of a solicitation made in opposition to

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1 Exchange Act Release No. 56914 at pp. 18-19 & n. 56 (Dec. 6, 2007).

another solicitation. Accordingly, were the election exclusion not available for proposals that would establish a process for the election of directors that circumvents the proxy disclosure rules, it would be possible for a person to wage an election contest without providing the disclosures required by the Commission's present rules governing such contests."[2]

The Proposal would create no such risk. The Proposal contemplates that a proxy contest would be waged in the traditional way, with the dissident shareholder(s) using a separate proxy statement and card. Accordingly, the full panoply of the Commission's proxy rules would apply, including Rule 14a-12, which triggers disclosure of a wide variety of information about dissident director candidates and shareholder(s) sponsoring their candidacies.

CA argues that the Proposal is nonetheless excludable because it would create financial pressures that could lead CA to put dissident candidates on CA's own proxy statement. In other words, CA argues that the impact of the Proposal is the same as the impact of a proxy access proposal, which last year's revision to the Director Election Exclusion was intended to allow companies to exclude. Such an indirect and purely speculative impact—and one that is solely within the control of CA—does not bring the Proposal within the ambit of the Director Election Exclusion. As the language in the adopting release quoted above indicates, the changes to the Director Election Exclusion were intended to address a narrow category of proposals, not to permit exclusion of a wide range of proposals based on companies' assertions regarding their possible impact.

In sum, the Proposal would not result in a contested election of directors, nor would it implicate the disclosure concerns that led the Commission to amend the Director Election Exclusion. For those reasons, CA's request to exclude the Proposal in reliance on Rule 14a-8(i)(8) should be denied.

<u>The Proposal Does Not Violate Delaware Law</u>

Next, CA claims that the Proposal violates the law of Delaware, where CA is incorporated. CA submits an opinion of Richards, Layton & Finger, P.A. ("RLF"), special Delaware counsel to CA, stating that the Proposal would impermissibly infringe on the CA board's management of CA' s business and affairs, including the power to expend corporate funds.

As discussed more fully in the opinion of Grant & Eisenhofer, P.A., special Delaware counsel to the Plan, which is attached as Exhibit A, the Proposal does not violate Delaware law. Delaware law confers broad authority on shareholders to adopt bylaws, provided they do not violate the certificate of incorporation or Delaware law. Delaware courts have upheld

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2 Exchange Act Release No. 56914, at pp. 5-6 (Dec. 6, 2007).

bylaws constraining the board's ability to act, including with respect to the expenditure of corporate funds. For example, Delaware courts have held that a bylaw may compel the board to advance litigation costs to directors.

Further, the cases relied upon by RLF to the effect that reimbursements for contest expenses must be screened by the board to ensure that the contest involved matters of policy and not personal interests are inapposite here. Those cases were decided in the context of incumbent board members spending corporate funds to defend against a proxy contest, which is unrelated to the subject of the Proposal. Moreover, the screening for non-policy-oriented contests is unnecessary in light of the Proposal's requirement that one or more of the dissident candidates be elected in order to trigger reimbursement. Given the intensity of scrutiny and debate in director election contests, it is beyond dispute that a candidacy motivated solely by personal or petty concerns would not succeed in garnering sufficient votes for election.

Finally, RLF's arguments regarding the power of the board under section 141(a) of the Delaware General Corporation Law, including the power to expend corporate funds, fail to take into account the broad power of shareholders to limit director conduct under Delaware law. In particular, RLF's discussion of Delaware law misrepresents the effect of Unisuper Ltd. v. News Corp., a 2005 case in which the court disagreed with News Corp.'s argument that an agreement by the board not to enact a poison pill without shareholder approval was invalid because it impermissibly limited the board's power under section 141(a).[3] The Unisuper court stated: "Fiduciary duties exist in order to fill the gaps in the contractual relationship between shareholders and directors of the corporation. Fiduciary duties cannot be used to silence shareholders and prevent them from specifying what the corporate contract is to say."[4] The court also emphasized that shareholders could adopt bylaws limiting directors' managerial power under section 141(a).[5]

Because the Proposal does not violate Delaware law, exclusion in reliance on Rules 14a-8(i)(1) and (i)(2) would be inappropriate. Accordingly, we ask that the Staff decline to grant relief to CA on this basis.

The Proposal Would Not Conflict With Rule 14a-7

Finally, CA urges that the Proposal is excludable pursuant to Rule 14a-8(i)(3) because it violates one of the Commission's other proxy rules. Specifically, CA claims that the Proposal violates Rule 14a-7 by establishing a cost-shifting regime different from the one supplied by that Rule. Rule 14a-7 requires a registrant, upon the request of any security holder, to (1) provide the security holder with a list of holders of the registrant's securities or (2) mail the

3 2005 WL 3529317 (Del. Ch. 2005).
4 Id. at *8.
5 Id. at *6.

security holder's soliciting material to other security holder's at the soliciting security holder's expense. The registrant has the power to decide between these two options.

Implicit in CA's argument is the notion that the cost-allocation scheme provided in Rule 14a-7 is mandatory; otherwise, it would make no sense to speak of the Proposal "violating" that scheme. But that is simply not the case. Rule 14a-7 is not the exclusive mechanism for learning the identities of fellow shareholders and distributing soliciting material to them. Indeed, because Rule 14a-7 gives the company the option of mailing soliciting material without giving the soliciting shareholder the contact information needed to follow up by mail or phone, soliciting shareholders do not often use it.[6] Instead, shareholders turn to state inspection statutes, such as section 220 of the Delaware General Corporation Law, that give shareholders the right to demand a shareholder list.

The Commission has recognized that state inspection statutes supplement, and in many cases supplant, Rule 14a-7. In Exchange Act Release No. 29315, which proposed changes to Rule 14a-7, among other rules, the Commission stated, "Since the choice of whether to produce a list or mail under current Rule 14a-7 resides exclusively with the registrant, those security holders who wish to employ the list to conduct a personal solicitation normally must pursue in the courts any state statutory or common-law rights thereto."

It is thus clear that the Commission does not intend for Rule 14a-7 to serve as the sole means by which shareholders can distribute soliciting material. As a result, the fact that Rule 14a-7 imposes the cost of such distribution on the soliciting shareholder does not preclude companies from adopting a different cost allocation—such as the one urged in the Proposal—if they believe it would be beneficial.

The Staff has rejected arguments similar to CA's in recent determinations. In Apache Corp.,[7] for example, the company argued that a proposal substantially similar to the Proposal could be excluded on Rule 14a-8(i)(3) grounds because the proposal violated Rule 14a-7. The Staff did not concur with Apache. Similarly, in Bank of New York Co., Inc.,[8] the Staff rejected the argument that a proposal much like the Proposal could be excluded pursuant to Rule 14a-8(i)(3) because it conflicted with Rule 14a-7.

For these reasons, we respectfully request that CA's request for relief be denied.

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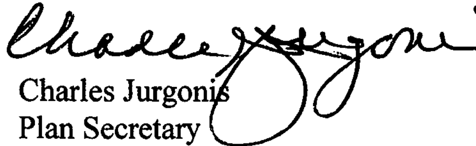
6 See Randall Thomas, "Improving Shareholder Monitoring and Corporate Management by Expanding Statutory Access to Information," 38 Arizona L. R. 331, 361 (1996).

7 Apache Corporation (publicly available Feb. 8, 2007).

8 Bank of New York Co., Inc. (publicly available Feb. 28, 2006).

If you have any questions or need additional information, please do not hesitate to call me at (202) 429-1007. The Plan appreciates the opportunity to be of assistance to the Staff in this matter.

Very truly yours,



Charles Jurgonis
Plan Secretary

CJ:jm

cc: David B. Harms
Sullivan & Cromwell LLP
Fax # 212-558-3588

Exhibit A

KF

RESEARCH DEPARTMENT

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May 16, 2008

VIA OVERNIGHT MAIL

Gerald W. McEntee,
Chairman, Pension Committee,
American Federation of State, County and Municipal Employees
Employees Pension Plan
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RECEIVED
PRESIDENT'S OFFICE
4: 35

Re: Shareholder Proposal Submitted by American Federation of State, County and Municipal Employees, Employees Pension Plan, for Inclusion in CA Inc.'s 2008 Proxy Statement

Dear Gerald W. McEntee:

You have requested our opinion as to whether the shareholder proposal (the "Proposal") submitted by the American Federation of State, County and Municipal Employees ("AFSCME"), Employees Pension Plan (the "Plan") to CA, Inc. ("CA" or the "Company"), a Delaware corporation, would be a proper action for shareholders under Delaware law and whether the proposed bylaw contained therein ("Proposed Bylaw") would, if adopted and implemented, violate Delaware law. As set forth below the Proposal is a proper action for shareholders and the Proposed Bylaw, if enacted, would be permissible under Delaware law.

You have furnished us with, and we have reviewed, copies of the Proposal and the supporting statement submitted to the Company, as well as a letter dated March 13, 2008, which accompanied your submission of the Proposal to the Company. We have also reviewed a letter from the Company dated April 18, 2008 to the Division of Corporation Finance (the "Division") of the U.S. Securities and Exchange Commission (the "Commission") stating that the Company intends to omit the Proposal from its proxy materials to be distributed in connection with the Company's 2008 annual meeting (the "Proxy Statement"). We have reviewed an opinion attached to the Company's letter from Richards, Layton, & Finger, PA ("RLF"), dated April 17, 2008 (the "RLF Opinion"), expressing the opinion that the Proposal is not a proper subject for stockholder action

and, if implemented, would violate Delaware General Corporation Law ("DGCL"). We have also reviewed the Company's Restated Certificate of Incorporation, as amended (the "Certificate of Incorporation") and the Company's Bylaws, as amended (the "Bylaws"), and such other documents as we deemed necessary and appropriate. We have assumed the conformity to the original documents of all documents submitted to us as copies and the authenticity of the originals of such documents.

Summary Of The Proposal

The Proposal (a copy of which is attached hereto as "Exhibit A") sets forth a bylaw to be voted on by shareholders pursuant to DGCL § 109. The Proposed Bylaw would require the Company, in certain limited circumstances, to reimburse the "reasonable expenses" incurred by a shareholder or group of shareholders (the "Nominator") "in connection with nominating one or more candidates in a contested election of directors." If the Proposed Bylaw were enacted, the board of directors (the "Board") would be required to cause the Company to reimburse reasonable Nominator expenses if the following conditions are met:

- "[T]he election of fewer than 50% of the directors to be elected is contested in the election;"
- "[O]ne or more candidates nominated by the Nominator are elected to the corporation's board of directors;" and
- [S]tockholders are not permitted to cumulate their votes for directors.

Further, the Proposed Bylaw applies only prospectively and would not apply to elections held prior to the date the Proposed Bylaw was enacted.

Summary Of Our Opinion

CA's Delaware counsel misapplied Delaware law when arguing that the Proposal is not a proper subject for stockholder action. RLF argues that the Proposed Bylaw, if enacted, would violate Delaware law because it is inconsistent with the grant of authority to manage the affairs of the Corporation in DGCL § 141(a) and also is inconsistent with the Company's Certificate of Incorporation. As set forth below, the Proposed Bylaw is valid under Delaware law.

DGCL § 141(a) states: "The business and affairs of every corporation organized under this chapter shall be managed by or under the director of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation."

RLF argues that the Proposed Bylaw would, if enacted, violate DGCL § 141(a) for the following two reasons:

- The Proposed Bylaw would "vest[] in the stockholders of the Company the ability to manage the Company...." RLF Opinion at 6.

- The Proposed Bylaw would "require that the Board relinquish its power to determine what expenses should and should not be reimbursed to stockholders." RLF Opinion at 4.

First, RLF's argument that the Proposed Bylaw would impermissibly vest power in stockholders is not correct. It is undisputed that under Delaware law shareholders have the power to enact bylaws. *See* DGCL § 109(a). The scope of this power is defined broadly in DGCL § 109(b), which states:

> Bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

Delaware courts have held that it is entirely consistent with the grant of authority to directors in DGCL § 141(a) for bylaws to regulate the conduct of directors. *See, e.g., Hollinger Int'l.., Inc. v. Black*, 844 A.2d 1022, 1079 (Del. Ch. 2004), *aff'd* 872 A.2d 559 (Del. 2005) (Bylaws can "impose severe requirements on the conduct of a board" and may "pervasively and strictly regulate the process by which boards act" without running afoul of the DGCL.); *see also Unisuper Ltd. v. News Corp.*, 2005 WL 3529317, at *6 (Del. Ch. 2005), *appeal refused by*, 906 A.2d 138 (Del. 2006) ("[W]hen shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. This is because the board's power -- which is that of an agent's with regard to its principal -- derives from the shareholders, who are the ultimate holders of power under Delaware law."). Accordingly, Delaware law recognizes stockholders' ability to enact bylaws such as the one contained in the Proposal.

Second, bylaws may regulate how directors execute their fiduciary duties by constraining their ability to act. *See Hollinger Int'l, Inc.*, 844 A.2d at 1080 ("[B]ylaws are generally thought of as having a hierarchical status greater than board resolutions, and that a board cannot override a bylaw requirement by merely adopting a resolution."); *see generally Gentile v. Singlepoint Fin., Inc.*, 787 A.2d 102, 106 (Del. Ch. 2001), *aff'd*, 788 A.2d 111 (Del. 2001) (holding that a bylaw may require a company to advance litigation costs to directors). As such, a bylaw requiring the company to reimburse reasonable proxy expenses to Nominators in certain circumstances is proper under Delaware law.