

# A&O SHEARMAN

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January 16, 2025

VIA STAFF ONLINE FORM

SEC Division of Corporation Finance  
Office of Chief Counsel  
U.S. Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Re: AEye, Inc. - Exclusion of Stockholder Proposal Submitted by Pamela Bauer

Ladies and Gentlemen:

On behalf of AEye, Inc., a Delaware corporation (the “Company”), we are filing this letter pursuant to Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), to notify the Securities and Exchange Commission (the “Commission”) of the Company’s intention to exclude the shareholder proposal described below (the “Proposal”) from the Company’s proxy statement and form of proxy (together, the “2025 Proxy Materials”) to be distributed to the Company’s stockholders in connection with its 2025 annual meeting of stockholders (the “2025 Annual Meeting”). The Company respectfully requests confirmation that the staff of the Division of Corporation Finance of the Commission (the “Staff”) will not recommend to the Commission that enforcement action be taken if the Company excludes the Proposal from the 2025 Proxy Materials.

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff’s online Shareholder Proposal Form. In accordance with Rule 14a-8(j), a copy of this letter and its attachments are being concurrently sent to the Proponent (as defined below), informing the Proponent of the Company’s intention to exclude the Proposal from the 2025 Proxy Materials.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponent elects to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to the undersigned.

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## **THE PROPOSAL**

On December 2, 2024, the Company received the Proposal dated November 27, 2024 from Pamela Bauer (the “Proponent”) for inclusion in the 2025 Proxy Materials. The Proposal states as follows:

“Should the shareholders vote to declassify the board of directors at the annual meeting, the shareholders seek to remove the following board members without cause.

Matt Fisch CEO and Chairperson of the board

Jon Husby

Prof Dr. Bernd Gottschalk”

Copies of the Proposal and the supporting statement relating thereto are attached to this letter as Exhibit A.

## **BASES FOR EXCLUSION OF THE PROPOSAL**

As discussed more fully below, the Company believes that it may properly exclude the Proposal from its 2025 Proxy Materials pursuant to Rule 14a-8(i)(8)(ii), Rule 14a-8(i)(2), Rule 14a-8(i)(6) and Rule 14a-8(i)(8)(iii) because (1) implementing the Proposal would remove a director from office before his or her term has expired, (2), implementing the Proposal would cause the Company to violate Delaware law, (3) the Company lacks the power to implement the Proposal and (4) the Proposal questions the competence, business judgment, or character of one or more directors.

## **ANALYSIS**

### ***I. The Proposal May Be Excluded Under Rule 14a-8(i)(8)(ii) Because the Implementation of the Proposal Would Remove a Director from Office Before His or Her Term Expired.***

Rule 14a(i)(8)(ii) states that a shareholder proposal may be excluded from a company’s proxy materials if it “[would] remove a director from office before his or her term expired.” The Commission has stated the purpose of Rule 14a-8(i)(8) is “to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature.” *Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders*, Release NO. 34-12598 (Jul. 7, 1976) [41 FR 29982]. To further clarify this purpose, the text of Rule 14a-8(i)(8) was amended in 2010 to “codify prior [S]taff interpretations with respect to the types of proposals that would continue to be excludable pursuant to Rule 14a-8(i)(8).” *Facilitating Shareholder Director Nominations*, *Exchange Act Release No. 62764* (Aug. 25, 2010). These types of excludable proposals included those that would have removed a director from office before his or her term expired.

As a Delaware corporation, the Company is subject to the General Corporation Law of the State of Delaware (the “DGCL”). Additionally, according to Article V, Section 5.2(b) of the Company’s Second Amended and Restated Certificate of Incorporation (as further amended from time to time, the “Certificate”), the Company’s directors are divided by class such that in any given year, approximately one-third of the Company’s directors are up for election for a three-year term. As disclosed in the Company’s Form 8-K filed with the Commission on May 15, 2024, the Company’s stockholders elected each of Prof. Dr. Bernd Gottschalk and Jonathon B. Husby as a Class III director at the 2024 annual stockholders meeting, to hold office until the Company’s 2027 annual stockholders meeting and until his successor is duly elected and qualified, or until his earlier death, resignation or removal. Additionally, as disclosed in the Company’s Form 8-K filed with the Commission on May 3, 2023, the Company’s stockholders elected Matthew Fisch as a Class II director at the 2023 annual stockholders meeting, to hold office until the Company’s 2026 annual stockholders meeting and until his successor is duly elected and qualified, or until his earlier death, resignation or removal. As such, the Proposal, if implemented would result in the removal of such directors before their terms expire.

The Staff has repeatedly concurred that shareholder proposals that act to cut short the terms of current directors, like the Proposal, are excludable under Rule 14a-8(i)(8)(ii). *See ES Bancshares, Inc.* (Feb. 2, 2011) (permitting the exclusion of a proposal requesting that two directors be removed); *Commonwealth Biotechnologies, Inc.* (Dec. 28, 2010) (permitting the exclusion of a proposal that requested the removal of specific directors).

The Proposal explicitly seeks to end the term of three directors, which such terms have not expired and will not expire as of the 2025 Annual Meeting, and therefore falls squarely within the exclusionary basis of Rule 14a-8(i)(8)(ii). For the stated reasons, the Company believes the Proposal is excludable pursuant to Rule 14a-8(i)(8)(ii) because implementation of the Proposal would remove director from office before their terms have expired.

## ***II. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because the Implementation of the Proposal Would Cause the Company to Violate Delaware Law***

Rule 14a-8(i)(2) provides for the exclusion of a stockholder proposal if implementation of the proposal would “cause the company to violate any state, federal, or foreign law to which it is subject.” As discussed below, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because the Certificate does not allow for the removal of directors without cause. Even if the Proposal is interpreted as proposing an amendment to the Certificate by shareholders to allow for the removal of directors without cause, for the reasons described below and set forth in our opinion attached hereto as Exhibit B (the “Opinion”), implementation of the Proposal without prior approval from the Company’s board of directors would be in contravention of Delaware law.

Under Section 121 of the DGCL, the Company “possess[es] and may exercise all the powers and privileges granted by [the DGCL] or by any other law or by its certificate of

incorporation, together with any powers incidental thereto, so far as such powers and privileges are necessary or convenient to the conduct, promotion or attainment of the business or purposes set forth in its certificate of incorporation.” Additionally, Article V, Section 5.4 of the Certificate governs the removal of directors. It states, in relevant part, that directors “may be removed from office, but only for cause.” As such, the removal of any director of the Company without cause, as the Proposal seeks to have implemented, would be in contravention of the Certificate and thus would be in contravention of the DGCL. Under the Certificate, there is no action the Company can lawfully take to implement the Proposal, and any such action would be void and *ultra vires*.

The Staff has repeatedly permitted the exclusion of proposals on the basis that implementation of such proposals would conflict with a company’s certificate of incorporation and thus be in contravention of the DGCL. In *PayPal Holdings, Inc.* (March 9, 2018), the Staff permitted the exclusion of a proposal that called for the board to amend the company’s proxy access bylaw provisions in a manner that would conflict with the company’s certificate of incorporation. In *Baker Hughes Inc.* (March 4, 2008), the Staff permitted the exclusion of a proposal to amend the company’s bylaws to give certain holders the power to call special shareholder meetings because the company’s certificate of incorporation provided that only the board or a committee thereof had such power.

Even if the Proposal were interpreted to propose an amendment to the Certificate to allow for the removal of directors without cause, the implementation of the Proposal under such an interpretation would still be in contravention of the DGCL. Under the DGCL, as explained more thoroughly in the Opinion, bilateral action by the board and shareholders, in a specific order, is required to amend a company’s certificate of incorporation. First, according to Section 242 of the DGCL, the board of directors must adopt resolutions setting forth the proposed amendment, recommending the adoption of the amendment by the shareholders, and calling a meeting at which the shareholders may vote to approve it. Second, a majority of the outstanding shareholders entitled to vote on the amendment must affirmatively vote in favor of amending the company’s certificate of incorporation. *See 8 Del. C. § 242(b)(1)*. Only if these two steps are taken in precise order does the Company have the power to file a Certificate of Amendment with the office of the Secretary of State of the State of Delaware to effectuate the amendment. The Delaware Supreme Court has required strict compliance with this two-step procedure:

*[I]t is significant that two discrete corporate events must occur in precise sequence to amend the certificate of incorporation under 8 Del. C. § 242: First, the board of directors must adopt a resolution declaring the advisability of the amendment and calling for a stockholder vote. Second, a majority of the outstanding stock entitled to vote must vote in favor.<sup>1</sup>*

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<sup>1</sup> *Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996); see also *Gantler v. Stephens* 2008 Del. Ch. LEXIS 20, at \*45 n. 81 (Del. Ch. Feb. 14, 2008) (“A board must submit a proposed amendment of the certificate of incorporation to the

The Company has advised us that its board of directors has not currently approved or recommended to shareholders an amendment to the Certificate to provide for removal of directors without cause. As discussed above, the shareholders do not have the power to unilaterally amend the Certificate under Delaware law. Therefore, even if the Proposal were interpreted to require the Company to file an amendment to the Certificate, which is necessary to implement the Proposal, doing so with only shareholder approval would be in contravention of the DGCL. This conclusion is supported by the Opinion.

The Staff has repeatedly permitted the exclusion of proposals on the basis that they do not follow proper amendment procedure by requiring either unilateral action of shareholders or the board of directors in violation of state law. In *The Stanley Works* (Feb. 2, 2009), the Staff permitted the exclusion of a proposal that called for “the articles of incorporation to be amended to provide that directors shall be elected by the shares represented in person or by proxy at any meeting for the election of directors at which a quorum is present,” in reliance on Rules 14a-8(i)(2) and 14a-8(i)(6). *Stanley Works* argued that under the laws of Connecticut, its state of incorporation, *Stanley Works*’ charter may not be amended by action only of the stockholders and without the necessary prior approval of the board. This position was supported by an opinion submitted by *Stanley Works*’ Connecticut counsel. In a similar way, the Staff has permitted the exclusion of proposals that request the board to unilaterally amend the company’s charter, contrary to state law that requires stockholder action. In *Pfizer Inc.* (Mar. 7, 2008), the Staff permitted the exclusion of a proposal that requested the board of directors “adopt cumulative voting.” Based on the opinion of Pfizer’s Delaware counsel, Pfizer could not implement such proposal without violating certain provisions of the DGCL, because “adopt[ing] cumulative voting” requires an amendment to the company’s certificate of incorporation, and the board of directors cannot unilaterally amend a certificate of incorporation. In *Fortune Brands, Inc.* (Jan. 6, 2010), the Staff permitted the exclusion of a proposal that required the board of directors to unilaterally amend the charter to remove a prohibition on stockholder action by written consent, noting the opinion of the company’s Delaware counsel that implementing the proposal would cause the company to violate Delaware law. In *eBay Inc.* (Apr. 1, 2020), the Staff permitted the exclusion of a proposal to “reform the structure of the board of directors letting the employees to elect at least 20% of the board members.” Based on the opinion of eBay’s Delaware counsel, eBay could not implement such proposal without violating certain provisions of the DGCL.

Accordingly, for the reasons set forth above and as supported by the Opinion, the Company believes the Proposal is excludable pursuant to Rule 14a-8(i)(2) because the

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shareholders for a vote, and it will not be effective unless ‘a majority of the outstanding stock entitled to vote thereon votes in favor of the amendment.’”); *Lions Gate Entm’t Corp. v. Image Entm’t Inc.*, 2006 Del. Ch. LEXIS 108, at \*23-\*24 (Del. Ch. June 5, 2006) (“Because the Charter Amendment Provision purports to give the...board the power to amend the charter unilaterally without shareholder vote, it contravenes Delaware law and is invalid.”); *Klang v. Smith’s Food Drug Centers, Inc.*, 1997 Del. Ch. LEXIS 73, at \*53-\*54 (Del. Ch. May 13, 1997) (“Pursuant to 8 Del. Co. § 242, amendment of corporate certificate requires board of directors to adopt resolution which declares the advisability of the amendment and calls for shareholder vote. Thereafter in order for the amendment to take effect majority of outstanding stock must vote in its favor.”).

Proposal, if sought to be implemented, would be in contravention of the Certificate and thus contravene the DGCL. Even if the Proposal were interpreted to require the Company to file an amendment to the Certificate, such amendment to the Certificate, if sought to be implemented, would be in contravention of the DGCL as well.

***III. The Proposal May Be Excluded Under Rule 14a-8(i)(6) Because the Company Lacks the Power to Implement the Proposal***

Rule 14a-8(i)(6) allows a company to exclude a proposal if the company would lack the power to implement the proposal. As explained above, implementing the Proposal would be in contravention of the Certificate. Even if the Proposal were interpreted to require the Company to file an amendment to the Certificate, such amendment to the Certificate, if sought to be implemented, would be in contravention of the DGCL as well. The Staff has repeatedly concurred with the exclusion of proposals under both Rule 14a-8(i)(2) and Rule 14a-8(i)(6) when implementation of the proposal would violate state corporate law and, accordingly, the company would lack the authority to implement the proposal. See *Highlands REIT, Inc.* (Feb. 7, 2020) (permitting exclusion under both Rule 14a-8(i)(2) and 14a-8(i)(6) as implementation of the proposal would, in the opinion of company’s counsel, cause the company to violate Maryland law); *IDACORP, Inc.* (Mar. 13, 2012) (permitting exclusion under both Rule 14a-8(i)(2) and 14a-8(i)(6) as implementation of the proposal would, in the opinion of company’s counsel, cause the company to violate Idaho law); *The Boeing Co.* (Feb. 20, 2008) (permitting exclusion under both Rule 14a-8(i)(2) and 14a-8(i)(6) as implementation of the proposal would, in the opinion of company’s counsel, cause the company to violate Delaware law).

Here, removing directors without cause would be in contravention of the Certificate and thus the DGCL. As such, the Company does not have the power and authority under the DGCL to implement the Proposal. Additionally, even if the Proposal were interpreted to require the Company to file an amendment to the Certificate to allow for removal of directors without cause, the Company does not have the power and authority under the DGCL to file a certificate of amendment that is unilaterally adopted by the shareholders. Therefore, the Company believes the Proposal is excludable pursuant to Rule 14a-8(i)(6) because the Company lacks the power to implement the proposal since such implementation would be in contravention of state law.

***IV. The Proposal May Be Excluded Under Rule 14a-8(i)(8)(iii) Because the Proposal Questions the Competence, Business Judgment, or Character of One or More Nominees or Directors.***

Rule 14a-8(i)(8)(iii) states that a shareholder proposal may be excluded from a company’s proxy materials if it “questions the competence, business judgement, or character of one or more nominees or directors.” The Commission’s purpose behind this rule is explained in the preceding section, with emphasis on the point that “Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature.” *Proposed*

*Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders*, Release NO. 34-12598 (Jul. 7, 1976) [41 FR 29982].

The Proposal explicitly names the three directors, Matt Fisch (serving as the Company's CEO and Chairperson of the board), Jon Husby, and Prof. Dr. Bernd Gottschalk, and questions their competence, business judgment, and character as a basis for their removal. The Supporting Statement claims that these three directors have approved "large and excessive compensation" for themselves and top management while the Company has lost market value, that the board has "participated in a plan to dilute shareholder interest without shareholder oversight" and "circumvented the NASDAQ 20% rule," and, overall, that these board members have "shown little interest in the shareholders, their concerns or their well-being and have acted against the shareholders best interest in the past several years."

The Staff has consistently allowed exclusion of proposals that question the personal suitability of specific individuals to serve on the board, as the Proposal here does. *See The Kraft Heinz Company* (Mar. 13, 2024) (concurring with the exclusion of a shareholder proposal under Rule 14a-8(i)(8) where the proposal and its supporting statement made specific reference to a director's competence); *Commonwealth Biotechnologies, Inc.* (Dec. 28, 2010) (concurring with the exclusion of a shareholder proposal that requested the removal of specific directors); *Marriott International, Inc.* (Mar. 12, 2010) (concurring with the exclusion of a shareholder proposal that sought the removal of two directors standing for reelection).

As such, the Company believes the Proposal should be excluded pursuant to Rule 14a-8(i)(8)(ii) because the Proposal seeks to remove specific directors from the board and the Supporting Statement "questions the competence, business judgement, or character" of the directors.

## **CONCLUSION**

Based on the foregoing, the Company believes that the Proposal may be omitted from the 2025 Proxy Materials. Accordingly, we respectfully request that the Staff indicate that it will not recommend enforcement action to the Commission if the Company excludes the Proposal from the 2025 Proxy Materials.

If you have any questions regarding this request, please contact the undersigned at 650.838.3720 or [yian.huang@aoshearman.com](mailto:yian.huang@aoshearman.com). Thank you for your consideration.

Sincerely,



Yian Huang

cc: Andrew Hughes, AEye, Inc.

Pamela Bauer

Christopher Forrester, Allen Overy Shearman Sterling US LLP

**EXHIBIT A**

Proposal

Andrew Hughes  
Attn: Corporate Secretary  
Aeye, Inc.  
4670 Willow Rd, Suite 125  
Pleasanton, CA 94588

11/29/2024

Dear Andrew:

Pursuant to Article II, Section 2.7a(iii) of the Company Bylaws and Section 240.14a-8 of the Securities Act, I would like to submit the following proposal for an agenda item to be considered by the shareholders at the annual meeting of shareholders. The Description of the business desired to be brought before the annual meeting, the text of the proposal and/or business to be decided and the reasons for the proposal are attached. Briefly, this is a request to remove certain directors should the shareholders vote to approve declassification of the board of directors.

The following information is provided to meet procedural requirements of Article II, Section 2.7a(iii) of the Company Bylaws and Section 240.14a-8 of the Securities Act.

- A) Submission is made by: Pamela Bauer, age [REDACTED] Business address: [REDACTED] Email: [REDACTED] Phone #: [REDACTED]
- B) At the time of this submission, the submitter owns 26,166 shares of Aeye, Inc. Class A Common Stock individually. These shares have been held continuously since the SPAC merger in August 2021. The submitter intends to hold these shares through the upcoming annual shareholder meeting.
- C) The Submitter intends to appear in person at the meeting to introduce the agenda item.
- D) The Submitter is available to consult via teleconference at

9am PST on December 17, 2024.

E) Merrill Lynch is the record holder of shares indicated above and attached is a letter from Merrill Lynch confirming the above shares are held for the Submitter and have been held since by ML for over 2 years.

Signed by the Submitter

*Pamela Bauer*

Pamela Bauer dated 11/29/2024.

## **PROPOSAL: TO REMOVE CERTAIN MEMBERS OF THE BOARD OF DIRECTORS WITHOUT CAUSE**

Should the shareholders vote to declassify the board of directors at the annual meeting, the shareholders seek to remove the following board members without cause.

Matt Fisch CEO and Chairperson of the board

Jon Husby

Prof Dr. Bernd Gottschalk

### **SUPPORTING STATEMENT**

This resolution urges shareholders to remove certain board members without cause. The board has been overseeing the Company since the Spac merger in 2021 and the above-board members have served from between 1 and 3 years.

During that time, the Company has lost significant market value and needs new directions from the board.

In addition, during that same period the Board has approved large and excessive compensation for itself and top management.

Further, the board has participated in a plan to dilute shareholder interest without any shareholder oversight and has circumvented the NASDAQ 20% rule to dilute without shareholder oversight.

The above-board members have shown little interest in the shareholders, their concerns or their well-being and have acted against the shareholders best interest in the past several years.

Vote Required for Approval

Approval of the Proposal to remove certain members Board of Directors requires the affirmative vote of a majority of the shares entitled to vote.

VOTE:

For removal

Against removal

Abstain

**EXHIBIT B**

Opinion

# A&O SHEARMAN

1460 El Camino Real, Floor 2  
Menlo Park, CA 94025  
+1.650.838.3600

January 16, 2025

AEye, Inc.  
4670 Willow Rd, Suite 125  
Pleasanton, CA 94588

Re: Exclusion of Stockholder Proposal Submitted by Pamela Bauer

Ladies and Gentlemen,

We have acted as counsel to AEye, Inc., a Delaware corporation (the “Company”), in connection with a stockholder proposal (the “Proposal”) received from Pamela Bauer (the “Proponent”), dated November 29, 2024, for the 2025 annual meeting of stockholders of the Company (the “Annual Meeting”). In connection with the foregoing, you have requested our opinion as to certain matters under the General Corporation Law of the State of Delaware, 8 Del. C. §101, *et seq.* (the “DGCL”).

For the purpose of rendering our opinions as expressed herein, we have been furnished with, and have reviewed, the following documents: (i) the Second Amended and Restated Certificate of Incorporation of the Company, as amended (as filed with the Secretary of State of the State of Delaware and in effect as of the date hereof, the “Certificate”); (ii) the Amended and Restated Bylaws of the Company, as amended (the “Bylaws”); and (iii) the Proposal.

With respect to the foregoing documents, we have assumed: (i) the authenticity of all documents submitted to us as originals; (ii) the conformity to authentic originals of all documents submitted to us as copies; (iii) the genuineness of all signatures and legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review have not been altered or amended in any respect material to our opinions as expressed herein. We have not reviewed any document other than the documents listed above for purposes of rendering this opinion, and we assume that there exists no provision of any such other document that bears upon or is inconsistent with our opinions as expressed herein. In addition, we have conducted no independent factual investigation of our own but rather have relied solely on the foregoing documents, the statements and information set forth therein and the additional factual matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

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## **THE PROPOSAL**

The Proposal states as follows:

*“Should the shareholders vote to declassify the board of directors at the annual meeting, the shareholders seek to remove the following board members without cause.*

*Matt Fisch CEO and Chairperson of the board.*

*Jon Husby*

*Pro Dr. Bernd Gottschalk”*

A copy of the full Proposal and the associated supporting statements received by the Company are attached hereto as Annex A.

We have been advised that the Company is considering excluding the Proposal from the Company’s proxy statement for the Annual Meeting under, among other reasons, Rules 14a-8(i)(2) and 14a-8(i)(6) promulgated under the Securities Exchange Act of 1934, as amended. Rule 14a-8(i)(2) provides that a registrant may omit a proposal from its proxy statement when “the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject.” Rule 14a-8(i)(6) provides that a registrant may omit a proposal from its proxy statement “if the company would lack the power or authority to implement the proposal.” You have requested our opinions as to whether the implementation of the Proposal, if adopted by the Company’s stockholders, would violate the DGCL and consequently, whether the Company would lack the power or authority to implement the Proposal under the DGCL.

For the reasons set forth below, to the extent the Proposal, if approved by the stockholders of Company and sought to be implemented, would purport to amend the Company’s Certificate without action by the Company’s board of directors (the “Board”), such purported amendment would contravene the DGCL. As such, the Company would lack the power or authority to implement the Proposal under the DGCL.

## **DISCUSSION**

The Proposal seeks to enable stockholders of the Company to remove three directors from the Board. The Certificate currently includes a provision in Article V, Section 5.4, which states, in relevant part, that directors may be “removed from office, but only for cause.” As the Certificate sets forth the Board removal standard as “for cause”, any attempt to remove directors without cause would contravene the Certificate and thus the DGCL. As such, the Company would lack the power or authority to implement the Proposal.

Even if the Proposal were interpreted to propose an amendment to the Certificate, such purported amendment would still contravene the DGCL and the Company would still lack the power or authority to implement it. An amendment to the Certificate must be made in accordance with the Section 242 of the DGCL, which lays out a two-step process for amending a company’s certificate of incorporation. First, the board of directors “shall adopt a resolution setting forth the amendment

proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote [...] or directing that the amendment proposed be considered at the next annual meeting of stockholders.” Second, at the stockholder meeting, “a vote of the stockholders entitled to vote thereon shall be taken for and against any proposed amendment that requires adoption by stockholders.” The Delaware Supreme Court has emphasized that the corporation only has the power to file a certificate of amendment if the two steps are taken in the order as prescribed in the DGCL: “[I]t is significant that two discrete corporate events must occur, in precise sequence, to amend the certificate of incorporation under 8 *Del. C.* § 242.” (*Williams v. Geier*, 671 A.2d 1368, 1381 (Del. 1996)). As a result, “stockholders may not act without prior board action.” *Id.*

We have been advised by the Company that the Board has not currently approved or recommended to shareholders an amendment to the Certificate to allow for removal without cause of directors. As such, contrary to the prescribed statutory construct, the Proposal, if sought to be implemented, would result in a vote of stockholders to amend the Certificate before the Board adopts a resolution recommending the proposal and calling a stockholder meeting for a vote. As the implementation of the Proposal would fail to follow the appropriate procedure to amend the Certificate prescribed by the DGCL, the Proposal, if approved by the stockholders and sought to be implemented, would contravene the DGCL. *See Blades v. Wisheart*, C.A. No. 5317-VCS (Del. Ch. 2010) (finding that an amendment to the certificate of incorporation was invalid because the board failed to follow the “prescribed corporate formalities to amend its certificate of incorporation” with emphasis on the events being “temporally significant”); *Klang v. Smith’s Food & Drug Ctrs., Inc.*, 1997 Del. Ch. LEXIS 73, at \*53 (May 13, 1997) (“Pursuant to 8 *Del. C.* § 242, amendment of a corporate certificate requires a board of directors to adopt a resolution which declares the advisability of the amendment and calls for a stockholder vote. Thereafter, in order for the amendment to take effect, a majority of the outstanding stock must vote in its favor.”) *aff’d*, 702 A.2d 150 (Del. 1997) *STAAR Surgical Co. v. Waggoner*, 588 A.2d 1130 (Del. 1991) (reasoning that, despite intentions of the board or stockholders, proper procedure must be followed to effectively amend a company’s charter). As the Company may not take actions that contravene the DGCL, it lacks the power and authority to implement the Proposal.

## **CONCLUSION**

In summary, the Proposal seeks to enable stockholders of the Company to remove three directors from the Board without cause. As the Certificate only allows for removal of directors for cause, any attempted removal of directors from the Board without cause would contravene the Certificate and thus render the Company without the power and authority to implement the Proposal. Even if the Proposal were interpreted to propose an amendment to the Certificate, amending the Certificate without Board approval would be in contravention of the two-step process required under the DGCL. Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that the Proposal, if it were approved by the stockholders of Company and sought to

be implemented, would contravene the DGCL. Consequently, it is our opinion that the Company does not have the power and authority to implement the Proposal.

The foregoing opinions are limited to the DGCL. We have not considered and express no opinion on the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or any other regulatory body.

The foregoing opinions are rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the Securities and Exchange Commission and to the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinions be relied upon by, any person or entity for any purpose without our prior written consent.

Sincerely,

/s/Allen Overy Shearman Sterling US LLP

YH/hs/nr  
CMF