



DIVISION OF  
CORPORATION FINANCE

UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

March 29, 2024

Lori Zyskowski  
Gibson, Dunn & Crutcher LLP

Re: Gartner, Inc. (the "Company")  
Incoming letter dated January 24, 2024

Dear Lori Zyskowski:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by the New York City Carpenters Pension Fund for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal asks that the board of directors take the necessary action to adopt specific revisions to the director election resignation provisions in the Company's bylaws.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(2). Refer to our response in *Verizon Communications Inc.* (Mar. 15, 2024). Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(2).

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Edward J. Durkin  
United Brotherhood of Carpenters and Joiners of  
America

January 24, 2024

**VIA INTERNET SUBMISSION**

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

Re: *Gartner, Inc.*  
*Stockholder Proposal of the New York City Carpenters Pension Fund*  
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Gartner, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2024 Annual Meeting of Stockholders (collectively, the “2024 Proxy Materials”) a stockholder proposal (the “Proposal”) and statement in support thereof received from the New York City Carpenters Pension Fund (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2024 Proxy Materials with the Commission; and
- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that stockholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to the Proposal, a copy of such correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

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## THE PROPOSAL

The Proposal, entitled “Director Election Resignation Bylaw,” states:

**Resolved:** That the shareholders of Gartner, Inc. (“Company”) hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director’s failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a “holdover” director, the resignation bylaw shall stipulate that should a “holdover” director not be re-elected at the next annual election of directors, that director's new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

A copy of the Proposal, the supporting statement, and related correspondence from the Proponent are attached to this letter as Exhibit A.

## BASIS FOR EXCLUSION

We hereby respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2024 Proxy Materials pursuant to Rule 14a-8(i)(2) because implementing the Proposal would cause the Company to violate state law.

## ANALYSIS

### **The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Implementing The Proposal Would Cause The Company To Violate State Law**

#### *A. Background*

Rule 14a-8(i)(2) permits a company to exclude 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.” See *The Goldman Sachs Group, Inc.* (avail. Feb. 1, 2016); *Kimberly-Clark Corp.* (avail. Dec. 18, 2009); *Bank of America Corp.* (avail. Feb. 11, 2009). As discussed below and for the reasons set forth in the legal opinion provided by Richards, Layton & Finger, P.A., the Company’s Delaware counsel, attached hereto as Exhibit B (the “Delaware Law Opinion”), we

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believe that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law.

On numerous occasions, the Staff has concurred with the exclusion of stockholder proposals where the proposal, if implemented, would cause a company to violate state law. For example, the proposal in *Johnson & Johnson* (avail. Feb. 16, 2012) sought to limit the ability of the board of directors to appoint directors to the compensation committee if such directors received a certain number of “no” or “withhold” votes in a director election. The Staff concurred with the exclusion of the proposal because its implementation would violate New Jersey law—which provides that decisions regarding committee composition are exclusively left to the board of directors—by limiting the decision-making authority of the board to select such committee members in the exercise of its fiduciary duties. The proposal in *Oshkosh Corp.* (avail. Nov. 21, 2019) requested that the company amend its bylaws to require that a director who received less than a majority vote be removed from the board “immediately.” The Staff concurred with the proposal’s exclusion under Rule 14a-8(i)(2) because implementing it would cause the company to violate Wisconsin law, which provided two methods for the removal of directors—by a stockholder vote or by a judicial proceeding—and neither was immediate or an action the company or its board could unilaterally take. *See also IDACORP, Inc.* (avail. Mar. 13, 2012) (concurring with the exclusion under Rule 14a-8(i)(2) of a stockholder proposal requesting that the company amend its bylaws to implement majority voting for director elections where Idaho law provided for plurality voting unless a company’s certificate of incorporation provided otherwise); *Ball Corp.* (avail. Jan. 25, 2010, *recon. denied* Mar. 12, 2010) (concurring with the exclusion under Rule 14a-8(i)(2) of a stockholder proposal that would cause the company to violate Indiana law relating to board classification); *Bank of America Corp.* (avail. Feb. 11, 2009) (concurring with the exclusion under Rule 14a-8(i)(2) of a stockholder proposal to amend the company’s bylaws to establish a board committee and authorize the board chairman to appoint members of the committee that would cause the company to violate Delaware law).

Here, implementation of the Proposal would cause the Company to violate Delaware law in two respects: (i) it requires the board of directors of the Company (the “Board”) to accept a resignation in circumstances where doing so would violate its fiduciary duties and (ii) it effects the removal of a director without the statutorily required vote.

*B. Implementation Of The Proposal Would Cause The Company To Violate Delaware Law*

The Bylaws of the Company (the “Bylaws”) require each director who fails to receive a majority of the votes cast in an uncontested election to submit an offer to resign from the Board. The Proposal requests that the Board amend the Bylaws to instead require the Board to accept such a tendered resignation unless the Board finds a “compelling reason or reasons” not to accept the resignation. The amendments to the Bylaws contemplated by the Proposal would thus impose a

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“compelling reasons” standard on decisions made by the current and future Boards with respect to resignations tendered by directors in accordance with the Bylaws provision. In addition, the Proposal would require that, if the Board finds one or more compelling reasons not to accept a director’s tendered resignation, the director thus continues as a “holdover” director and if such director fails to receive a majority of the votes cast at the next annual meeting of stockholders, such director’s resignation “will be automatically effective 30 days after the certification of the election vote.” The amendment contemplated by the Proposal would thus establish, for the removal of any such holdover director, a voting standard based on less than a majority of the votes cast at the meeting.

*i. The Proposal Would Cause The Company To Violate Delaware Law Because It Would Limit The Board’s Decision-Making Authority In Contravention Of Its Fiduciary Duties*

The Company is incorporated in Delaware and is governed by Delaware law. As discussed in detail in the Delaware Law Opinion, in accordance with Section 141(a) of the Delaware General Corporation Law (the “DGCL”), the Board possesses the full power and authority to manage the business and affairs of the Company. In making business decisions consistent with this authority, directors owe duties of care and loyalty to the corporation and all of its stockholders, which requires them to base their decisions on what they reasonably believe to be in the best interests of the corporation and its stockholders. The decision whether to accept a director’s resignation is one such business decision for the Board in which it is required to exercise its fiduciary duties.

Notably, as outlined in the Delaware Law Opinion, the Delaware courts have held that a bylaw that purports to mandate a substantive decision on the part of the board of directors without regard to the application of the directors’ fiduciary duties violates Section 141(a) of the DGCL. The Proposal does just that by requesting amendments to the Bylaws that would mandate that current and future directors of the Company make substantive decisions about whether to accept a director’s tendered resignation based on a “compelling reasons” standard that has meaning only if it would require the directors to accept such a resignation in circumstances where proper application of their fiduciary duties would cause them to decide otherwise. As such, the Delaware Law Opinion concludes that, “[b]ecause the bylaw provision contemplated by the Proposal mandates the Company’s current and future directors accept director resignations based on a compelling reasons standard that does not take into account the director’s fiduciary duties, it violates Delaware law.”

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- ii. *The Proposal Would Cause The Company To Violate Delaware Law Because It Would Permit Stockholders To Effect The Removal Of A Director Without The Statutorily Required Vote*

In addition, Section 141(k) of the DGCL provides that, other than with respect to certain exceptions that are not applicable to the Company, “any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors” (emphasis added). As discussed in detail in the Delaware Law Opinion, “[t]he Delaware courts have held that a bylaw provision that purports to permit the stockholders to remove directors by a lesser voting standard than required by Section 141(k) is invalid under Delaware law.” The amendments contemplated by the Proposal purport to fix the stockholder vote required to end the term of a holdover director and remove the holdover director from office as less than a majority of the shares cast in an election of directors. Put differently, if adopted as proposed, the Proposal would provide for automatic termination of the director’s service based solely on whether the director fails to receive a majority of votes cast at the meeting, which is a lower standard than the majority of the shares entitled to vote at the meeting standard required under Section 141(k) of the DGCL. In this respect, implementing the Proposal would therefore violate Delaware law.

We are aware that in *Genzyme Corp.* (avail. Feb. 8, 2007), the Staff did not concur with the exclusion of a proposal under Rule 14a-8(i)(2) where the company argued that implementing a proposal requesting a majority voting standard in uncontested elections would violate state law because the proposed requirement for directors to submit an irrevocable resignation would operate to remove directors in a manner inconsistent with the Massachusetts “holdover rule.” On its face, the Staff’s conclusion in *Genzyme* deals with Massachusetts rather than Delaware law. In addition, the Proposal is distinguishable, because the resignation requirement in *Genzyme* was still conditioned on the board’s acceptance of the resignation. Here, by contrast, the amendments contemplated by the Proposal are significantly more restrictive, as they provide that the director’s resignation “will be automatically effective 30 days after” a holdover director fails to receive a majority of the votes cast at the next annual meeting of stockholders. As discussed in detail above and in the Delaware Law Opinion, the Proposal impermissibly seeks both to limit the Board’s ability to exercise its fiduciary duties and to permit stockholders to effect a director’s removal without the statutorily required vote, neither of which was at issue in the proposal in *Genzyme*.

Accordingly, just as in *Johnson & Johnson, Oshkosh*, and the other precedents cited above, the Proposal may properly be excluded under Rule 14a-8(i)(2) because, as supported by the Delaware Law Opinion, implementing the Proposal would cause the Company to violate state law.

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**CONCLUSION**

Based upon the foregoing analysis, the Company intends to exclude the Proposal from its 2024 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8(i)(2). We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to [shareholderproposals@gibsondunn.com](mailto:shareholderproposals@gibsondunn.com). If we can be of any further assistance in this matter, please do not hesitate to call me at (212) 351-2309.

Sincerely,



Lori Zyskowski

Enclosures

cc: Kevin Tang, Gartner, Inc.  
Richards, Layton & Finger, P.A.  
Michael Piccirillo, New York City Carpenters Pension Fund

**EXHIBIT A**



UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA  
NEW YORK CITY & VICINITY DISTRICT COUNCIL OF CARPENTERS

JOSEPH A. GEIGER  
Executive Secretary - Treasurer

PAUL CAPURSO  
President /Asst EST

DAVID CARABALOSO  
Vice President /Asst EST



www.nycdistrictcouncil.com

**SENT VIA OVERNIGHT UPS**

December 8, 2023

Thomas S. Kim  
Senior Vice President  
General Counsel and Secretary  
Gartner, Inc.

Dear Mr. Kim:

I hereby submit the enclosed shareholder proposal ("Proposal") on behalf of the New York City Carpenters Pension Fund ("Fund"), for inclusion in the Gartner, Inc. ("Company") proxy statement to be circulated in conjunction with the next annual meeting of shareholders. The Proposal relates to the issue of director resignations and is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission proxy regulations.

The Fund is the beneficial owner of shares of the Company's common stock, with a market value of at least \$25,000, which shares have been held continuously for more than a year prior to and including the date of the submission of the Proposal. Verification of this ownership by the record holder of the shares, BNY Mellon, will be sent under separate cover. The Fund intends to hold the shares through the date of the Company's next annual meeting of shareholders. Either the undersigned or a designated representative will present the Fund's Proposal for consideration at the annual meeting of shareholders.

If you would like to discuss the Proposal, please contact Michael Piccirillo at [REDACTED]. Mr. Piccirillo will be available to discuss the proposal on Tuesday, December 19, or Tuesday, December 26, from 1:00PM to 5:00PM (ET) either day or other mutually agreeable date and time. Please forward any correspondence related to the proposal to Mr. Piccirillo, New York City District Council of Carpenters, 395 [REDACTED] or at the email address above.

Sincerely,

Joseph A. Geiger  
Fund Co-Chair - Trustee

cc. Michael Piccirillo  
Edward J. Durkin  
Enclosure

## **Director Election Resignation Bylaw Proposal**

**Resolved:** That the shareholders of Gartner, Inc. (“Company”) hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director’s failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a “holdover” director, the resignation bylaw shall stipulate that should a “holdover” director not be re-elected at the next annual election of directors, that director’s new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

**Supporting Statement:** The Proposal requests that the Board amend its director resignation bylaw to enhance director accountability. The Company has established in its bylaws a majority vote standard for use in an uncontested director election, an election in which the number of nominees equal the number of open board seats. Under applicable state corporate law, a director’s term extends until his or her successor is elected and qualified, or until he or she resigns or is removed from office. Therefore, an incumbent director who fails to receive the required vote for election under a majority vote standard continues to serve as a “holdover” director until the next meeting of shareholders. A Company resignation bylaw addresses the continued status of an incumbent director who fails to be re-elected by requiring such director to tender his or her resignation for Board consideration.

The proposed new director resignation bylaw will set a more demanding standard of review for addressing director resignations than that contained in the Company’s current resignation bylaw. The resignation bylaw will require the reviewing directors to articulate a compelling reason or reasons for not accepting a tendered resignation and allowing an un-elected director to continue to serve as a “holdover” director. Importantly, if a director’s resignation is not accepted and he or she continues as a “holdover” director but again fails to be elected at the next annual meeting of shareholders, that director’s new tendered resignation will be automatically effective 30 days following the election vote certification. While providing the Board latitude to accept or not accept the initial resignation of an incumbent director that fails to receive majority vote support, the amended bylaw will establish the shareholder vote as the final word when a continuing “holdover” director is not re-elected. The Proposal’s enhancement of the director resignation process will establish shareholder director election voting as a more consequential governance right.

**EXHIBIT B**

January 23, 2024

Gartner, Inc.  
56 Top Gallant Road  
Stamford, Connecticut 06902

Re: Stockholder Proposal on behalf of New York City Carpenters Pension Fund

Ladies and Gentlemen:

We have acted as special Delaware counsel to Gartner, Inc., a Delaware corporation (the “Company”), in connection with a stockholder proposal (the “Proposal”) on behalf of New York City Carpenters Pension Fund (the “Proponent”), dated December 8, 2023, for the 2024 annual meeting of stockholders of the Company (the “Annual Meeting”). In this connection, you have requested our opinion as to certain matters under the laws of the State of Delaware.

For the purpose of rendering our opinion as expressed herein, we have been furnished with and have reviewed the following documents: (i) the Restated Certificate of Incorporation of the Company as filed with the Secretary of State of the State of Delaware (the “Secretary of State”) on July 6, 2005, as amended by the Certificate of Change of Registered Agent and/or Registered Office as filed with the Secretary of State on September 28, 2006, as amended by the Certificate of Designation as filed with the Secretary of State on November 27, 2006, as amended by the Certificate of Elimination as filed with the Secretary of State on May 5, 2010, as amended by the Certificate of Change of Registered Agent and/or Registered Office as filed with the Secretary of State on June 7, 2019 (collectively, the “Certificate of Incorporation”); (ii) the By-laws of the Company, effective as of April 29, 2021 (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 the legal capacity of natural persons; and (iv) that the foregoing documents, in the forms thereof submitted to us for our review, have not been and will not be altered or amended in any respect material to our opinion 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 opinion 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.



## **THE PROPOSAL**

The Proposal states the following:

**Resolved:** That the shareholders of Gartner, Inc. (“Company”) hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director’s failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a “holdover” director, the resignation bylaw shall stipulate that should a “holdover” director not be re-elected at the next annual election of directors, that director’s new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

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, Rule 14a-8(i)(2) 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.” In this connection, you have requested our opinion as to whether, under Delaware law, the implementation of the Proposal, if adopted by the Company’s stockholders, would violate Delaware law.

For the reasons set forth below, the Proposal, if implemented, would, in our opinion, violate Delaware law in two respects: (i) it requires the board of directors of the Company (the “Board”) to accept a resignation in circumstances where doing so would violate its fiduciary duties and (ii) it effects the removal of a director without the statutorily required vote.

## **DISCUSSION**

### **The Proposal would violate Delaware law if implemented.**

The Proposal requests that the Board amend the provision of the Bylaws that requires each director who fails to receive a majority of the votes casts in an uncontested election to submit a conditional resignation. The amendments to the bylaw provision contemplated by the Proposal would require the Board to accept such a tendered resignation unless the Board finds a “compelling

reason or reasons” not to accept the resignation. The amendments to the bylaw provision contemplated by the Proposal thus would impose a “compelling reasons” standard on decisions made by the current and future Boards with respect to accepting resignations tendered by directors in accordance with the bylaw provision.

For the reasons set forth below, in our opinion, because the Proposal, if adopted, would require the Company’s current and future boards to accept a director’s resignation unless there were “compelling reasons” not to, the Proposal appears designed to require the Board to accept a resignation even in circumstances where the board believes, in the good faith exercise of its fiduciary duties under Delaware law, that accepting the resignation is not in the best interests of the Company and its stockholders. Because the Proposal is designed to require that the Board accept resignations in circumstances where proper application of the Board’s fiduciary duties would preclude it from doing so, the Proposal violates Delaware law.

Section 141(a) of the General Corporation Law provides that the “business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.” 8 *Del. C.* § 141(a). Significantly, if there is to be any variation from the mandate of Section 141(a), it can only be as “otherwise provided in this chapter or in its certificate of incorporation.” *See, e.g., Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966). The Certificate of Incorporation does not provide for management of the Company by persons other than directors, and the phrase “except as otherwise provided in this chapter” does not include bylaws adopted pursuant to Section 109(b) of the General Corporation Law. Thus, the Board possesses the full power and authority to manage the business and affairs of the Company. *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also In re CNX Gas Corp. S’holders Litig.*, 2010 WL 2705147, at \*10 (Del. Ch. July 5, 2010) (“the premise of board-centrism animates the General Corporation Law”); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (“One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.”) (citing 8 *Del. C.* § 141(a)); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291 (Del. 1998) (“One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation.”) (footnote omitted). In making business decisions, directors owe duties of care and loyalty to the corporation and all of its stockholders which requires them to base their decisions on what they reasonably believe to be in the best interests of the corporation and its stockholders. *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989).

The Delaware courts have held that a bylaw that purports to mandate a substantive decision on the part of the board of directors without regard to the application of the directors’ fiduciary duties violates Section 141(a). *CA, Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 235-338 (Del. 2008). For example, in *CA, Inc.*, the Delaware Supreme Court held that a proposed stockholder adopted bylaw that mandated that the board of directors reimburse a stockholder for its expenses in running a proxy contest to elect a minority of the members of the board of directors would violate Delaware law because it mandated reimbursement of proxy

expenses even in circumstances where a proper application of fiduciary principles would preclude doing so. *Id.* Thus, a corporation's board or its stockholders may not bind future directors on matters involving the management of the company. *Id.*; see also *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1191 (Del. Ch. 1998) (refusing to dismiss claims that the "deadhand" provision in the company's rights plan which would limit a future board's ability to redeem the rights plan was invalid under Delaware law); *Quickturn Design Sys., Inc.*, 721 A.2d at 1281 (invalidating a provision that, under certain circumstances, would have prevented newly-elected directors from redeeming a rights plan for a six-month period); *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51 (Del. 1994) (invalidating a provision in a merger agreement that prevented the directors from communicating with competing bidders); *Abercrombie v. Davies*, 123 A.2d 893, 899 (Del. Ch. 1956) (invalidating a provision in an agreement that required the directors to act as directed by an arbitrator in certain circumstances where the board was deadlocked), *rev'd on other grounds*, 130 A.2d 338 (Del. 1957).

The decision whether to accept a resignation is a business decision for the Board in which it is required to exercise its fiduciary duties. *Louisiana Mun. Police Emps. Ret. Sys. v. Morgan Stanley & Co. Inc.*, 2011 WL 773316, at \*6 (Del. Ch. Mar. 4, 2011). There are a number of factors which need to be considered in deciding whether to accept a resignation which a Board must consider and balance, including, without limitation, the underlying reasons for the director failing to receive a majority vote for such director's election, the tenure and qualifications of the director, the director's past and expected future contributions to the Board and the overall composition of the Board including whether accepting the resignation would cause the Company to fail to meet the requirements of any law, rule or regulation applicable to the Company. The Proposal requests amendments to the Bylaws that would mandate current and future directors of the Company to make determinations based on a "compelling reasons" standard that has meaning only if it would require the directors to accept a resignation in circumstances where proper application of its fiduciary duties would cause it to decide otherwise. Because the bylaw provision contemplated by the Proposal mandates the Company's current and future directors accept director resignations based on a compelling reasons standard that does not take into account the director's fiduciary duties, it violates Delaware law.

In addition, the bylaw contemplated by the Proposal would require that, if the board finds there are compelling reasons not to accept the resignation of a director who did not receive a majority of the votes cast for such director's election (and thus continues as a holdover director) *and* such director fails to receive a majority of the votes cast for such director's election at the next annual meeting of stockholders, such director's resignation "will be automatically effective 30 days after the certification of the election vote." The supporting statement to the Proposal provides that the foregoing provision is intended to ensure that the stockholder vote is the "final word when a continuing 'holdover' director is not re-elected." Thus, the clear purpose and intent of such provision is to end the holdover term of the director and remove the holdover director from office if such director does not receive a majority of the votes cast at the second annual meeting. The bylaw contemplated by the Proposal would thus establish, for the removal of any such holdover director, a voting standard based on the votes cast for such director's election at the second annual meeting. Because such bylaw purports to fix the stockholder vote required to end the term of a holdover

director and remove the holdover director from office as less than a majority of the shares entitled to vote at an election of directors – which the Proposal, if adopted as proposed, would do because it would provide for automatic termination of the director’s service based solely on whether the director fails to receive a majority of votes cast, a lower standard than the majority of the shares entitled to vote – it violates Delaware law.

Section 141(k) of the General Corporation Law provides that, other than with respect to two exceptions that are not applicable to the Company,<sup>1</sup> “any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors.” 8 *Del. C.* § 141(k). A bylaw may not override a statutory mandate. *See* 8 *Del. C.* § 109(b); *Kerbs v. California Eastern Airways*, 90 A.2d 652, 658-59 (Del. 1952) (finding that a bylaw purporting to allow establishment of a quorum with fewer directors than the minimum required by statute to be void and stating that “a by-law which is repugnant to the statute must always give way to the statute’s superior authority”). A bylaw that is contrary to statute is void. *Sinchareonkul v. Fahnmann*, 2015 WL 292314, at \*8 (Del. Ch. Jan. 22, 2015) (observing, in finding that a bylaw that purported to provide a specified director additional votes qua director was invalid in light of statute, Section 141(d) of the General Corporation Law, requiring any such provision to appear in the certificate of incorporation, that “[u]nder Section 109(b), a bylaw that conflicts with the DGCL is void.”). The Delaware courts have held that a bylaw provision that purports to permit the stockholders to remove directors by a lesser voting standard than required by Section 141(k) is invalid under Delaware law. *Cf. Frechter v. Zier*, 2017 WL 345142, at \*4 (Del. Ch. Jan. 24, 2017) (invalidating a provision of the bylaws purporting to change the statutory default for the removal of directors). The Delaware courts have also held that a bylaw may not impose a requirement that disqualifies a director and terminates the director’s service. *See, e.g. Kurz v. Holbrook*, 989 A.2d 140, 157 (Del. Ch. 2010) (“In light of the three procedural means for ending a director’s term in Section 141(b), I do not believe a bylaw could impose a requirement that would disqualify a director and terminate his service.”); *see also Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190, at \*12 (Del.Ch. July 21, 2000). Thus, because such bylaw purports to fix the stockholder vote required to end the term of a holdover director and remove the holdover director from office as less than a majority of the shares entitled to vote at an election of directors – which the Proposal, if adopted as proposed, would do because it would provide for automatic termination of the director’s service based solely on whether the director fails to receive a majority of votes cast, a lower standard than the majority of the shares entitled to vote – it violates Section 141(k) of the General Corporation Law and is therefore invalid.

### CONCLUSION

Based upon and subject to the foregoing and subject to the limitations stated herein, it is our opinion that the Proposal, if implemented, would violate Delaware law.

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<sup>1</sup> The two exceptions relate to the removal of directors from a classified board or where cumulative voting in the election of directors is permitted. 8 *Del. C.* § 141(k). The Company does not have a classified board and does not permit cumulative voting the election of directors.



The foregoing opinion is limited to the laws of the State of Delaware. 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 of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that the Company and Gibson, Dunn & Crutcher LLP 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 opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

*Richard S. Zingales & John, P.A.*

CSB/JJV



UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

**VIA ELECTRONIC SUBMISSION**

February 26, 2024

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

**Re:** *Gartner, Inc.*  
*Response of the New York City Carpenters Pension Fund to Gartner Inc. No-Action Request*

Ladies and Gentlemen:

On December 8, 2023, the New York City Carpenters Pension Fund (“Fund”) submitted to Gartner Inc. (“Company”) a Director Election Resignation Bylaw shareholder proposal (“Proposal”) pursuant to Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission (“Commission”) proxy regulations. On January 24, 2024, the Company filed with the Commission a request for the Staff’s concurrence in their view that the Proposal may be excluded from the Company’s 2024 Proxy Materials. A copy of this response to the Company’s request is being sent to the Company and to its outside legal counsel. For the reasons outlined below, we believe that the Company has failed to state any proper bases for omitting the Proposal from its Proxy Materials to be circulated in conjunction with its 2024 annual meeting of shareholders. Rather than limiting the Company’s board of directors’ rights to manage the operations of the Company, the Proposal simply fortifies the fundamental right of shareholders, as the owners of the Company, to exercise their most important right of ownership, the right to vote in the election of Company directors.

**THE PROPOSAL**

The text of the Fund’s Proposal submitted for inclusion in the Company’s 2024 Proxy Materials is set forth below.

**Resolved:** That the shareholders of Gartner, Inc. (“Company”) hereby request that the board of directors take the necessary action to amend its director election resignation bylaw that requires each director nominee to submit an irrevocable conditional resignation to the Company to be effective upon the director’s failure to receive the required shareholder majority vote support in an uncontested election. The proposed amended resignation bylaw shall require the Board to accept a tendered resignation absent the finding of a compelling reason or reasons to not accept the resignation. Further, if the Board does not accept a tendered resignation and the director remains as a “holdover” director, the resignation bylaw shall stipulate that should a “holdover” director not be re-elected at the next annual election of directors, that director’s new tendered resignation will be automatically effective 30 days after the certification of the election vote. The Board shall report the reasons for its actions to accept or reject a tendered resignation in a Form 8-K filing with the U.S. Securities and Exchange Commission.

### **OPPOSITION TO THE COMPANY’S REQUEST FOR NO-ACTION RELIEF**

The Fund believes that the arguments against the Proposal by the Company and its Delaware counsel are unpersuasive and do not establish grounds for the omission of the Proposal from the Company’s Proxy Materials to be distributed in conjunction with its 2024 annual meeting of shareholders. Specifically, Company arguments on the following basis for relief are not persuasive:

#### **The Proposal May be Excluded Under Rule 14a-8(i)(2) Because implementing the Proposal Would Cause the Company to Violate State Law**

### **PROPOSAL BACKGROUND AND CONTEXT**

It is instructive to review the voting rights that corporate shareholders in Delaware incorporated corporations possess in evaluating the Company’s no-action letter arguments. Section 211(b) of the Delaware General Corporation Law (“DGCL”) establishes that an annual meeting of stockholders shall be held for the election of directors on a date and time designated by or in the manner provided in a corporation’s bylaws. In addition to the shareholders’ right to elect directors at the annual meeting, “any other proper business” may be transacted. The election of directors by shareholders is a foundational right in the corporate governance system established in the DGCL. “The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.” *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del.Ch. 1988).

A plurality vote standard<sup>1</sup> in the election of directors was set as the default vote standard in 1987 when the DGCL was amended to replace the majority vote standard that was in place for all matters voted upon at an annual meeting of shareholders. The DGCL election vote standard change was prompted by the growing number of contested elections in an era of hostile takeover activity and

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<sup>1</sup> A plurality vote standard in a director election holds that the director nominees that receive the highest number of “For” votes corresponding to the number of open board seats are elected. Further, “Against” votes are not permitted; the option is to “Withhold.” Thus, a single “For” vote assures election.

the incompatibility of a majority vote standard with contested elections.<sup>2</sup> The new plurality default standard applied to both contested and uncontested director elections. While a plurality vote standard is the appropriate vote standard in a contested director election,<sup>3</sup> the use of the plurality standard in an uncontested director election virtually ensures that board-sponsored nominees are elected. To address this issue, a shareholder private-ordering campaign<sup>4</sup> using precatory shareholder proposals began in 2003 to advance the adoption of a majority vote standard in uncontested director elections. This decades-long governance activism resulted in the broad market adoption of a majority vote standard by most large and mid-cap publicly traded companies.<sup>5</sup> The majority vote standard in an uncontested election provides shareholders the opportunity to vote “for” or “against” board nominees, raising the possibility that director nominees, both new nominees and incumbent directors running for reelection, might fail to be elected, or in the case of incumbent directors reelected.

For the first time, uncontested director elections could result in director nominees, both new nominees and incumbents, failing to be elected. DGCL Section 141(b) states in part that an elected director shall hold office until “such director’s successor is elected and qualified or until such director’s earlier resignation or removal.” Thus, under DGCL an incumbent director nominee that is not re-elected in an uncontested director election with a majority vote standard continues to serve as a director, a “holdover” director, absent his or her resignation. With increasing corporate adoption of a majority vote standard for uncontested elections and the possibility of an incumbent director losing a reelection vote, it was necessary to construct a post-election process to address the continued status of an unelected “holdover” director. Director election resignation policies and bylaws developed as a necessary and important complementary component to the majority vote standard in uncontested director elections.

Pfizer Inc. advanced the first director election resignation policy, proposing it as an alternative to the adoption of a majority vote bylaw. The Pfizer model became known as the “plurality plus” model as it combined the plurality vote standard with a conditional director resignation. Under the “plurality plus” model, an incumbent board nominee who received more so-called “withhold” votes than “for” votes was required to submit a resignation letter even though the director had been reelected.<sup>6</sup> The market ultimately rejected the “plurality plus” model as an alternative to majority voting, but the conditional resignation was embraced as a complementary component of the majority vote regime.

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<sup>2</sup> The use of a majority vote standard in a contested election can result in a “failed election”. A “failed election” occurs when a non-management board nominee receives more votes than an incumbent director but short of a majority resulting in the incumbent directors continuing in office as a “holdover” director.

<sup>3</sup> In a contested election with more board nominees than available board seats, the nominees receiving the highest number of votes corresponding to the number of available board seats are elected.

<sup>4</sup> A private-ordering campaign by the United Brotherhood of Carpenter Pension Funds and other Trades Fund that used precatory shareholder proposals to urge the adoption of a majority vote standard bylaw spanned multiple years beginning in 2003 and transformed the vote standard in the common uncontested director election (an election in which the number of board-sponsored nominees equals the number of open board seats).

<sup>5</sup> The plurality vote standard remains the default standard under the DGCL.

<sup>6</sup> A Commission rulemaking in 1979 instituted the use of so-called “withhold” votes in director elections under the plurality vote standard. The “withhold” vote is an abstention and has no legal effect on an election outcome. Securities Exchange Act Release 34-16356 (November 21, 1979) 44FR68764 (November 29, 1979).

In 2006, DGCL Section 141(b) was amended to add a new provision that a director resignation may be made effective upon the happening of a future event or events, coupled with authority granted in the same section to make certain resignations irrevocable. By permitting a corporation to enforce a director resignation conditioned upon the director's failure to achieve a specified vote for reelection, e.g., more votes "For" than "Against", coupled with board acceptance of the resignation, these provisions permit corporations and individual directors to agree voluntarily, and give effect in a manner subsequently enforceable by the corporation, to voting standards for the election of directors which differ from the plurality default standard in Section 216. A director resignation could now be conditioned upon the happening of a future event (failure to be reelected) and could be made irrevocable. The legislature took the additional step in 2006 to amend DGCL Section 216 to support the majority vote standard by providing that a bylaw adopted by a vote of stockholders that prescribes the required vote for the election of directors may not be unilaterally altered or repealed by the board of directors.

Following the 2006 DGCL amendments, majority vote corporations adopted "director resignation" governance policies or bylaw provisions to address the status of an unelected "holdover" director. The typical resignation policy or bylaw sets a process for board review of the tendered resignation, with the board deciding whether the resignation is accepted or rejected. The resignation provisions outline a timeline and process for review of a tendered resignation by the board, or some subset thereof, such as a board's governance committee. Typically included is a statement that the board's decision will be made in the best interests of the company. Most companies commit to inform shareholders of the board's decision by means of a Commission Form 8-K filing. In the event a tendered resignation is not accepted, the disclosure will usually include the rationale for the board's decision and possible alternative action to be taken.

### **THE COMPANY'S RESIGNATION BYLAW AND THE PROPOSAL**

The Company has in place a director resignation bylaw. The bylaw reads as follows:

Section 3. Election of Directors and Term of Office. Except as provided in Section 5 of this Article III, each nominee for election as a director shall be elected by the vote of a majority of the votes cast with respect to the director nominee at any meeting for the election of directors at which a quorum is present, *provided, however*, that at a contested election meeting, director nominees shall be elected by a plurality of the votes cast by the holders of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors. For purposes of this section, a majority of the votes cast means that the number of shares voted "for" a director nominee must exceed the number of votes cast "against" that director nominee. For purposes of this section, a "contested election meeting" is any meeting of stockholders for which (a) the secretary of the corporation receives a notice that a stockholder has nominated a person for election to the Board of Directors in compliance with the advance notice requirements for stockholder nominees for director set forth in Section 13 of Article II herein, and (b) such

nomination has not been withdrawn by such stockholder on or prior to the tenth day preceding the date the corporation first gives notice of such meeting to the stockholders, as required by Section 4 of Article II herein. The Board of Directors has established procedures under which any director who is not elected shall offer to tender his or her resignation to the Board. The Corporate Governance/Nominating Committee will make a recommendation to the Board of Directors on whether to accept or reject the resignation. The Board of Directors will consider and act on the Corporate Governance/Nominating Committee's recommendation and publicly disclose its decision and the rationale behind it within 90 days from the date of the certification of the election results. At each annual meeting of the stockholders, the stockholders shall elect the successors of the directors whose terms expire at such meeting, to hold office until their successors are duly elected and qualified at the next annual meeting of stockholders or until their earlier death, resignation, retirement, disqualification or removal as herein or in the certificate of incorporation provided (including any certificate of designations relating to any series of preferred stock). The directors shall be elected in this manner, except as provided in Section 5 of this Article III and the certificate of incorporation (including any certificate of designations relating to any series of preferred stock).

The Fund's precatory Proposal requests that the Board revise the Company's unilaterally adopted resignation bylaw that empowers the Board to address the legal status of an unelected "holdover" director. Importantly, the Proposal advances a bylaw amendment that calls on the Board in the exercise of its fiduciary duties to articulate a "compelling reason or reasons" should it not accept the tendered resignation of a director opposed by a majority vote of shareholders. Further, the Proposal urges that the Company's new bylaw crafted by the Board hold that the conditional and irrevocable resignation of a "holdover" director not elected at a second consecutive meeting be effective 30 days after the certification of election results. As used in the Proposal, we define a "compelling reason or reasons" consistent with the ordinary meaning of the words, that is a reason that convinces someone that something should be done, in this case not to accept a resignation despite the director failing to receive majority shareholder support. The reason or reasons to reject a resignation must be "compelling," as determined by the Board in its business judgment, which requires the directors to make all decisions with due care and in good faith under Delaware corporation law. The requirement that a "holdover" director's second consecutive election defeat result in the acceptance of his or her tendered resignation comports with the importance of shareholder voting rights in director elections. Board action to amend the bylaw as requested would simply bind it to give effect to shareholders' director election voting rights. A board's failure to adequately address the individual director or company performance issue or issues that prompted a director's initial election loss justifies the proposed heightened accountability. Limiting Board discretion in this context is appropriate and a measured toughening of the consequences of a repeated election loss for a "holdover" director.

## RESPONSE TO RULE 14a-8(i)(2) ARGUMENT

The Company and its Delaware counsel argue that the Proposal may be excluded under Rule 14a-8(i)(2) because implementing it would cause the Company to violate Delaware law. The Company argues that the “compelling reason or reasons” language and the required acceptance of a “holdover” director’s resignation following a second consecutive election loss would cause the Board to violate its fiduciary duty to act in the best interest of the Company and its stockholders in contravention of Delaware law for the following reasons:

1. The Proposal Would Cause The Company To Violate Delaware Law Because It Would Limit The Board’s Decision-Making Authority In Contravention Of Its Fiduciary Duties, and
2. The Proposal Would Cause The Company To Violate Delaware Law Because It Would Permit Stockholders To Effect The Removal Of A Director Without The Statutorily Required Vote.

The Fund believes that the Company fails to present persuasive arguments for omission based on Rule 14a-8(i)(2).

### **The Proposal Would Not Limit the Board’s Decision-Making Authority**

Rule 14a-8(i)(2) permits a company to exclude a proposal if its implementation would cause the company to violate state, federal or foreign law applicable to the company. The Company is incorporated under the laws of the state of Delaware. Section 141(a) of the DGCL provides: “The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.” The Company argues that the Board’s authority to manage the business and affairs of the Company under the DGCL requires that the Board have complete authority to accept or reject a “holdover” director’s resignation. It cites several cases for the proposition that a board of directors has authority to manage the business and affairs of a Delaware corporation. The Fund does not dispute this proposition. However, the Company’s resignation bylaw sets the process for the adjudication of shareholder vote outcomes in director elections, not the management of the “business and affairs” of the Company. Thus, the Proposal’s resignation bylaw provisions do not interfere with the Board’s management of the Company nor does requesting acceptance of an incumbent nominees previously tendered resignation constitute compelling directors to breach their fiduciary duties.

The official State of Delaware website contains a discussion of Delaware Corporate Law entitled “The Delaware Way: Deference to the Business Judgment of Directors Who Act Loyal and Carefully.” [www.corplaw.delaware.gov](http://www.corplaw.delaware.gov). It begins by stating:

The [Delaware General Corporation Law’s](#) central mandate appears in [Section 141\(a\)](#); it provides that the business and affairs of every Delaware corporation are managed by or under the direction of the corporation’s board of directors. In discharging their duty to manage or oversee the management of the corporation, directors owe fiduciary duties of loyalty and care to the corporation and its stockholders.

Business judgment rule: Although some major transactions require the consent of stockholders as well as the approval of the board, the board generally has the power and duty to make business decisions for the corporation. These decisions include establishing and overseeing the corporation's long-term business plans and strategies, and the hiring and firing of executive officers. Delaware law affords directors making such decisions a set of presumptions—known as the “business judgment rule”—that, so long as a majority of the directors have no conflicting interest (see “duty of loyalty” below) in the decision, their decision will not later be second-guessed by a court if it is undertaken with due care and in good faith.

Managing the business and affairs of a Delaware corporation clearly includes authority to establish and oversee a company's long-term strategic plans, hire, monitor, compensate and, if necessary, fire executive officers. Just as clearly, overseeing the election of directors is not within the exclusive purview of the board of directors as the Company's request for no-action relief request suggests.

The Company fails to establish that Delaware law assigns to the board of directors unlimited power over the election of directors. Delaware law does no such thing. In MM Companies v. Liquid Audio, Inc., 813 A.2d 1118, 1128 (Del. 2003), the Delaware Supreme Court stated:

The most fundamental principles of corporate governance are a function of the allocation of power within a corporation between its stockholders and its board of directors. [] The stockholders' power is the right to vote on specific matters, in particular, in an election of directors. The power of managing the corporate enterprise is vested in the shareholders' duly elected board representatives. [] Accordingly, while these "fundamental tenets of Delaware corporate law provide for a separation of control and ownership,"[] the stockholder franchise has been characterized as the "ideological underpinning" upon which the legitimacy of the directors' managerial power rests. [*Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del.Ch. 1988).] (footnotes omitted)

Maintaining a proper balance in the allocation of power between the stockholders' right to elect directors and the board of directors' right to manage the corporation is dependent upon the stockholders' unimpeded right to vote effectively in an election of directors. This Court has repeatedly stated that, if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election. []

In *Blasius*, Chancellor Allen set forth a cogent explanation of why judicial review under the deferential traditional business judgment rule standard is inappropriate when a board of directors acts for the primary purpose of impeding or interfering with the effectiveness of a shareholder vote, especially in the specific context presented in *Blasius* of a contested election for directors:

[T]he ordinary considerations to which the business judgment rule originally responded are simply not present in the shareholder voting context. That is, a decision by the board to act for the primary purpose of preventing the effectiveness of a shareholder vote inevitably involves the question who, as between the principal and the agent, has authority with respect to a matter of internal corporate governance. That, of course, is true in a very specific way in this case which deals with the question who should constitute the board of directors of the corporation,



but it will be true in every instance in which an incumbent board seeks to thwart a shareholder majority. A board's decision to act to prevent the shareholders from creating a majority of new board positions and filling them does not involve the exercise of the corporation's power over its property, or with respect to its rights or obligations; rather, it involves allocation, between shareholders as a class and the board, of effective power with respect to governance of the corporation . . . . Action designed principally to interfere with the effectiveness of a vote inevitably involves a conflict between the board and shareholder majority.

The Company's entire argument depends upon its contention that the Proposal improperly interferes with directors' fiduciary discretion, but as this discussion demonstrates the Proposal embraces the Delaware Supreme Court discussion of the appropriate role of shareholders vis-à-vis the board of directors. Consider the logic behind the Company's argument. The Board chose to adopt a majority vote standard for the election of directors. The Board's adoption of a majority vote standard gave Company shareholders the right to vote "For" or "Against" nominees to the Board, or to abstain from voting. The votes have legal consequence, as the Board surely intended. As facilitated by the 2006 amendment to DCGL Section 141(b), the Company adopted a director resignation bylaw providing that Board nominees submit an irrevocable resignation conditioned on their failure to be reelected under the majority vote standard. The resignation requirement conditioned on failure to gain majority shareholder support was necessitated by the Board's concern that absent such a resignation requirement, a director who is not reelected would simply continue to serve on the Board by operation of the law despite shareholders' legal vote. The Company's resignation bylaw, beyond simply requiring the conditional resignation, empowers the Board to decide whether to accept or reject the tendered resignation.

It is important to note that the DCGL Section 141(b) amendments permitting a director resignation conditioned on his or her failure to receive majority shareholder support did not speak to a post-election process by a board to determine the effectiveness of the resignation. In this context consider that the Proposal does not seek to preclude directors from strong control of the results of director elections, despite the clear statements from the Delaware Supreme Court emphasizing shareholders' rights. Rather, the Proposal requests that when shareholders cast a majority vote against an incumbent director to the Board that the other directors accept that nominees' tendered resignation unless the Board determines it has a compelling reason or reasons not to do so. It is a very measured proposition. Yet the Company argues that if the Board must articulate a compelling reason to keep that director on the board that this can only be done by the Board ignoring its fiduciary duties. The opinion of Delaware counsel discusses the Board process for considering a director's resignation. It states:

The decision whether to accept a resignation is a business decision for the Board in which it is required to exercise its fiduciary duties. *Louisiana Mun. Police Emps. Ref. Sys. v. Morgan Stanley & Co. Inc.*, 2011 WL 773316, at \*6 (Del. Ch. Mar. 4, 2011). There are a number of factors which need to be considered in deciding whether to accept a resignation which a Board must consider and balance, including, without limitation, the underlying reasons for the director failing to receive a majority vote for such director's election, the tenure and qualifications of the director, the director's past and expected future contributions to the Board and the overall composition of the Board including whether accepting the resignation would cause the Company to fail to meet the requirements of any law, rule or regulation applicable to the Company. The Proposal requests amendments to the Bylaws that would mandate current and future directors of the Company to make determinations based on a "compelling reasons" standard that has meaning only if it would require the directors to accept a resignation in

circumstances where proper application of its fiduciary duties would cause it to decide otherwise.

First, as we have demonstrated above, accepting a resignation is not a business decision. Second, the argument that considering whether there is a compelling reason not to accept the resignation “has meaning only if it would require the directors to accept a resignation in circumstances where proper application of its fiduciary duties would cause it to decide otherwise” is an unsupported and illogical assertion. The factors the Board must consider include why the nominee did not receive a majority vote, past and future contributions to the board, and the implications of accepting the resignation. The Board could simply add to this list “consideration of the director failing to be elected by virtue of not receiving the necessary level of shareholder support.”

### **The Proposal is Not a Removal Provision or Bylaw that Contravenes Delaware Law**

The Company also argues that the Proposal represents a director “removal” contravening DGCL Section 141(k) by requesting that a “holdover” director’s resignation be automatically effective following a second consecutive annual election defeat. The Company’s argument, if correct, would eviscerate the director election voting rights of shareholders in Delaware corporations. The Company has established a majority of the votes cast standard for the annual election of directors and Section 141(k) has a more demanding “majority of the shares then entitled to vote” standard. The Company conflates a removal action against one or more directors with the director election process that may result in an incumbent director or directors failing to be reelected and leaving the board through resignation. The logical conclusion of the Company’s removal argument is that a company with the common “majority of votes cast” director election standard, rather than Section 141(k)’s more demanding “majority of the shares then entitled to vote” standard, could not require an unelected incumbent director to resign or otherwise leave the board. A clear reading of the DGCL sections 141(k) and Section 216 addressing the vote requirement for director elections at an annual meeting of shareholders indicate the Section 141(k) vote standard does not pertain to director election votes that may result in directors leaving a corporate board. As quoted above, in MM Companies the Delaware Supreme Court stated:

Maintaining a proper balance in the allocation of power between the stockholders' right to elect directors and the board of directors' right to manage the corporation is dependent upon the stockholders' unimpeded right to vote effectively in an election of directors.

Contrast the Company’s argument with the Delaware Supreme Court’s ruling. The Company’s removal argument holds that it would be a violation of Delaware law for an incumbent director nominee who twice failed to receive the requisite level of shareholder support for election to be required to tender his or her resignation for board acceptance. On the other hand, the Delaware Supreme Court holds that shareholders must have the “unimpeded right to vote effectively.” The Company’s removal argument fails.

## CONCLUSION

For the reasons stated above, the Fund requests that the Staff not concur with the Company's position that the Fund's Proposal may be excluded under Rule 14a-8(i)(2), as to do so would severely undermine the director election voting rights of shareholders under DGCL. We would gladly provide any additional information regarding this matter.

Sincerely,

*Ed Durkin*

Edward J. Durkin

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