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OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

EMPLOYEES PENSION PLAN

May 21, 2008

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

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

Dear Sir/Madam:

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

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

The Director Election Exclusion Does Not Permit Exclusion of the Proposal

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

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

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

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

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

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

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

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

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

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

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

The Proposal Does Not Violate Delaware Law

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

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

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

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

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

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

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

The Proposal Would Not Conflict With Rule 14a-7

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

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

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

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

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

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

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

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

* * * *

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

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

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

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

Very truly yours,

Charles Jurgonis
Plan Secretary

CJ:jm

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

Exhibit A

KF

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Gerald W. McEntee,
Chairman, Pension Committee,
American Federation of State, County and Municipal Employees
Employees Pension Plan
1625 L Street, N.W.
Washington, DC 20036

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

Dear Gerald W. McEntee:

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

You have furnished us with, and we have reviewed, copies of the Proposal and the supporting statement submitted to the Company, as well as a letter dated March 13, 2008, which accompanied your submission of the Proposal to the Company. We have also reviewed a letter from the Company dated April 18, 2008 to the Division of Corporation Finance (the "Division") of the U.S. Securities and Exchange Commission (the "Commission") stating that the Company intends to omit the Proposal from its proxy materials to be distributed in connection with the Company's 2008 annual meeting (the "Proxy Statement"). We have reviewed an opinion attached to the Company's letter from Richards, Layton, & Finger, PA ("RLF"), dated April 17, 2008 (the "RLF Opinion"), expressing the opinion that the Proposal is not a proper subject for stockholder action and, if implemented, would violate Delaware General Corporation Law ("DGCL"). We have also reviewed the Company's Restated Certificate of Incorporation, as amended (the "Certificate of Incorporation") and the Company's Bylaws, as amended (the "Bylaws"), and such other documents as we deemed necessary and appropriate. We have assumed the conformity to the original documents of all documents submitted to us as copies and the authenticity of the originals of such documents.

Summary Of The Proposal

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

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

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

Summary Of Our Opinion

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

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

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

- The Proposed Bylaw would "vest[] in the stockholders of the Company the ability to manage the Company...." RLF Opinion at 6.
- The Proposed Bylaw would "require that the Board relinquish its power to determine what expenses should and should not be reimbursed to stockholders." RLF Opinion at 4.

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

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

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

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

Grant & Eisenhofer P.A.

Additionally, RLF argues that the Proposed Bylaw is inconsistent with the Certificate of Incorporation, which states: "The management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors." Article SEVENTH, Section (1) of the Certificate of Incorporation. This language closely tracks the language of DGCL § 141(a), which does not prohibit shareholders from enacting the Proposed Bylaw. Because of the similar language, it would make little sense to construe the Certificate's grant of authority to directors more broadly than the grant of authority in DGCL § 141(a). Thus, because the Proposed Bylaw is consistent with DGCL § 141(a), it is consistent with the Certificate of Incorporation.

Analysis of the Proposal and Proposed Bylaw

I. The Proposed Bylaw, If Enacted, Would Be Valid Under Delaware General Corporation Law

A. A Bylaw Requiring A Corporation To Expend Corporate Funds to Reimburse Successful Nominators Is Valid Under Delaware Law

Delaware law is clear that bylaws may require corporations to expend funds in specific circumstances. For example, DGCL § 145(e) states:

> Expenses (including attorneys' fees) incurred by an officer or director in defending any civil, criminal, administrative or investigative action, suit or proceeding may be paid by the corporation in advance of the final disposition of such action, suit or proceeding upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled to be indemnified by the corporation as authorized in this section. Such expenses (including attorneys' fees) incurred by former directors and officers or other employees and agents may be so paid upon such terms and conditions, if any, as the corporation deems appropriate.

Although the statute leaves the discretion of whether or not to advance legal fees to the company, Delaware courts have held that "a corporation can make the right to advancement of expenses mandatory, through a provision in its certificate of incorporation ***or bylaws***." *See Gentile*, 787 A.2d at 106 (emphasis added). Further, where "such a mandatory provision exists, the rights of potential recipients of such advancements will be enforced as a contract." *Id.*

Grant & Eisenhofer P.A.

RLF, therefore, is simply mistaken in arguing that a provision requiring a corporation to pay the costs of proxy solicitation must be in the certificate of incorporation. *See* RLF Opinion at 3-4.[1] Indeed, RLF concedes that it would be "absurd" to read DGCL § 141(a) to preclude directors from entering into binding contracts such as loan agreements and golden parachutes. *See* RLF Opinion at 7 n.3. It is, however, no less absurd to read DGCL § 141(a) to prevent a company from maintaining a bylaw that similarly binds a company to make payment to certain Nominators.

Contrary to RLF's argument (RLF Opinion at 3-4), cases where Delaware courts have held that a company cannot reimburse directors for expenses incurred in promoting only personal issues are entirely irrelevant to the present dispute. For example, the court in *Hall v. Trans-Lux Daylight Pictures Screen Corp.*, 171 A. 226, 227 (Del. Ch. 1934) held that incumbent directors could expend corporate funds to inform stockholders of important policy matters, but not to entrench themselves. The court held:

> I quite agree with the proposition that if all that is at stake is the ambition of the "ins" to stay in, the corporation should not be called upon to pay for the expense of their campaign to persuade the voting stockholders to rally to their support.
>
> But if the so called "ins" are engaged in answering attacks against their re-election because of a position they have taken upon some matter of important concern to the corporation, I am unable to see why they should not be permitted to make the same sort of expenditure from the corporate funds in defense of their offices as they would if their policy were under attack in a manner entirely disassociated from individuals.

Id. at 229; *see also Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 345 (Del. 1983) (holding that incumbent directors could be reimbursed for their proxy expenses in seeking their re-election because they had "substantive differences about corporate policy" with competing directors). These cases are inapposite because the Proposed Bylaw does not enable incumbent directors to use corporate funds to entrench themselves, rather it calls for reimbursement of funds spent by Nominators in a contested election only if their candidates are successful.

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[1] *Lehrman v. Cohen*, 222 A.2d 800, 808 (Del. 1966), cited in the RLF Opinion at 3, is inapposite because it merely holds that shareholders may amend the certificate of incorporation to define directors' duties. It does not speak to shareholders ability to regulate corporate behavior through amending the bylaws.

Grant & Eisenhofer P.A.

RLF's argument that the Proposed Bylaw, if enacted, unlawfully would prevent directors from exercising their business judgment to stop reimbursement of shareholders who nominate candidates because of "personal disagreements or disputes that are not shared by stockholders generally" (*see* RLF Opinion at 5) is completely misplaced. As discussed below, bylaws – including bylaws enacted by shareholders – "may pervasively and strictly regulate the process by which boards act." *Hollinger Intern., Inc. v. Black*, 844 A.2d 1022, 1080 n. 136 (Del. Ch. 2004), *aff'd* 872 A.2d 559 (Del. 2005) (Bylaws can "impose severe requirements on the conduct of a board" and may "pervasively and strictly regulate the process by which boards act" without running afoul of the DGCL.). That a bylaw may create guidelines within which directors may exercise their discretionary authority, therefore, does not render the bylaw invalid as a matter of law.

But furthermore, RLF's expressed concern is entirely misplaced. Under the Proposed Bylaw, Nominators would only be reimbursed if one of their candidates were elected by their fellow shareholders. Thus, there is no danger that corporate funds would be given to a Nominator who sponsors a candidate because of a personal grievance not relevant to the interests of other stockholders. As the court in *Steinberg v. Adams*, 90 F. Supp. 604, 607-08 (S.D.N.Y. 1950) (citied by RLF Opinion at 4, 6) held: "I see no reason why the stockholders should not be free to reimburse those whose expenditures succeeded in ridding a corporation of a policy frowned upon by a majority of the stockholders." Thus, the reimbursement contemplated in the Proposed Bylaw is entirely permissible under Delaware law.

B. Shareholders May Regulate Board Action Through Enacting A Bylaw

Shareholders may enact a bylaw requiring reimbursement of election expenses for certain successful shareholder-nominated directors under the DGCL. "The power to make and amend the bylaws of a corporation has long been recognized as an inherent feature of the corporate structure." *Frantz Mfg. Co. v. EAC Industries,* 501 A.2d 401, 407 (Del. 1985).[2] Under the DGCL, the shareholders are vested with the power to adopt bylaws, which power may be shared with the board of directors if the corporation's certificate of incorporation so provides. DGCL § 109(a) provides that:

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[2] The bylaws of a corporation are "the self-imposed rules and regulations deemed expedient for . . . [the] convenient functioning" of the corporation. *Gow v. Consolidated Coppermines Corp.*, 165 A. 136, 140 (Del. Ch. 1933). Under Delaware law, bylaws are subordinate to the certificate of incorporation and statutory law, *see Oberle v. Kirby*, 592 A.2d 445, 457-58 (Del. 1991); *Prickett v. American Steel and Pump Corp.*, 253 A.2d 86, 88 (Del. Ch. 1969); *State ex rel. Brumley v. Jessup & Moore Paper Co.*, 24 Del. 379 (1910); *Gaskill v. Glady's Gelle Oil Co.*, 146 A. 337 (Del. Ch. 1929), and must be reasonable in their application. *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971).

> (a) The original or other bylaws of a corporation may be adopted, amended or repealed by the incorporators, by the initial directors if they were named in the certificate of incorporation, or, before a corporation has received any payment for any of its stock, by its board of directors. After a corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote, or, in the case of a nonstock corporation, in its members entitled to vote; provided, however, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body by whatever name designated. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws.

8 Del.C. § 109(a). The only limitation on the subject matter of such bylaws is set forth in DGCL § 109(b), which states that:

> (b) The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating the business of the corporation, the conduct of its affairs, and its ***rights or powers or the rights or powers of its stockholders, directors***, officers or employees.

8 Del.C. § 109(b) (emphasis added).[3] "The bylaws of a corporation are presumed to be valid, and the courts will construe the bylaws in a manner consistent with the law rather than strike down the bylaws." *Frantz Mfg. Co.*, 501 A.2d at 407.

Shareholders broad power to enact bylaws was confirmed by *Hollinger*, 844 A.2d at 1080. In that case, the Court rejected an argument that shareholders could not adopt a

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[3] Despite the plain language of DGCL § 109(b), RLF argues that shareholders' power to "adopt bylaws relating to the rights and powers of stockholders and directors" is limited only to procedural matters or in the alternative shareholders may only enact bylaws where *other sections besides* DGCL § 109 give shareholders the right to enact bylaws. *See* RLF Opinion at 3-4 n.1. This analysis is fatally flawed. The first interpretation adds, without citation to case law, a limitation on substantive shareholder-enacted bylaws not on the face of DGCL § 109. The alternative interpretation would render DGCL § 109's broad language to enact bylaws entirely superfluous as it would require shareholders to look to other provisions of the DGCL to specify permissible bylaws. *See Keeler v. Harford Mut. Ins. Co.*, 672 A.2d 1012, 1016 (Del. 1996) ("In determining legislative intent in this case, we find it important to give effect to the whole statute, and leave no part superfluous.").

Grant & Eisenhofer P.A.

bylaw abolishing a committee created by the board of directors because that power was reserved to the board by DGCL §141. *Id.* at 1078-81. Specifically, the Court noted that

> [s]tockholders are invested by § 109 with a statutory right to adopt bylaws. By its plain terms, § 109 provides stockholders with a broad right to adopt bylaws "relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." This grant of authority is subject to the limitation that the bylaws may not conflict with law or the certificate of incorporation.
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> * * *
>
> In *Frantz Manufacturing Co. v. EAC Industries*, [501 A.2d 401 (Del.1985)], the Delaware Supreme Court made clear that bylaws could impose severe requirements on the conduct of a board without running afoul of the DGCL. In *Frantz*, a majority stockholder implemented bylaw-amendments when it feared that the incumbent board would divest it of its voting power. The amendments required, among other things, that there be unanimous attendance and board approval for any board action, and unanimous ratification of any committee action. The Supreme Court found that the bylaws were consistent with the terms of the DGCL.

844 A.2d at 1078-80.

The court also expressly rejected the exact argument put forth by RLF in this case (that the Proposal impermissibly vests to shareholders power conferred upon the board pursuant to DGCL § 141(a)), stating:

> For similar reasons, I reject International's argument that that provision in the Bylaw Amendments impermissibly interferes with the board's authority under § 141(a) to manage the business and affairs of the corporation. ***Sections 109 and 141, taken in totality, and read in light of*** **Frantz, *make clear that bylaws may pervasively and strictly regulate the process by which boards act, subject to the constraints of equity*.**

Id. at 1080 n. 136 (emphasis supplied).[4] Thus, bylaws may regulate director conduct and not run afoul of DGCL § 141(a).

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[4] RLF does not, nor can it, argue that the Proposed Bylaw is inequitable.

Grant & Eisenhofer P.A.

The cases cited by RLF are completely inapposite and stand simply for the proposition that directors may not abdicate their fiduciary duties owed to shareholders. In *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281, 1289-90 (Del. 1998) (cited by RLF Opinion at 6), for example, the court held that directors could not amend a poison pill in a manner that disabled future directors' ability to redeem it for six months. The Court held that the poison pill amendment would impermissibly "prevent[] a newly elected board of directors from completely discharging its fiduciary duties." Thus, the board would cause future directors to abdicate their fiduciary duty. Similarly, in *Abercrombie v. Davies*, 123 A.2d 893, 897 (Del. Ch. 1956) (cited by RLF Opinion at 6), the court invalidated an agreement between a number of directors and a number of stockholders of a corporation in which the directors who were party to the contract agreed to always vote similarly on issues. In that case, the court held that directors had contracted to vote in a specified manner even though such vote may be "contrary to their own best judgment." *Id.* at 899. Cases addressing situations where *directors* improperly abdicate their fiduciary duties have nothing to do with whether *shareholders* may enact bylaws that regulate the conduct of the corporations they own. .

This distinction is illustrated by *News Corp.*, 2005 WL 3529317 at *6-8. In that case, the defendants argued that a contract with shareholders was invalid because the board agreed not to enact a poison pill for successive one year terms without shareholder approval. The defendants argued that the contract was "inconsistent with the general grant of managerial authority to the board in Section 141(a)." *Id.* at *6. The court disagreed, holding that allowing shareholders to vote on corporate matters was not a delegation of managerial authority inconsistent with DGCL § 141(a):

> Delaware's corporation law vests managerial power in the board of directors because it is not feasible for shareholders, the owners of the corporation, to exercise day-to-day power over the company's business and affairs. Nonetheless, when shareholders exercise their right to vote in order to assert control over the business and affairs of the corporation the board must give way. ***This is because the board's power-which is that of an agent's with regard to its principal - derives from the shareholders, who are the ultimate holders of power under Delaware law.***

Id. at *6 (emphasis added). Because of this relationship, akin to that between an agent and principal, directors cannot use the grant of managerial power in DGCL § 141(a) to silence shareholders. The court in *News Corp.* held:

> Fiduciary duties exist in order to fill the gaps in the contractual relationship between shareholders and directors of the corporation. ***Fiduciary duties cannot be used to silence shareholders and prevent them from specifying what the corporate contract is to say.***

> ***Shareholders should be permitted to fill a particular gap in the corporate contract if they wish to fill it.*** This point can be made by reference to principles of agency law: Agents frequently have to act in situations where they do not know exactly how their principal would like them to act. In such situations, the law says the agent must act in the best interest of the principal. Where the principal wishes to make known to the agent exactly which actions the principal wishes to be taken, the agent cannot refuse to listen on the grounds that this is not in the best interest of the principal.

Id. at *8 (emphasis added).[5]

Additionally, the court in *News Corp.* held that a shareholder-enacted bylaw was an appropriate means for shareholders to exert control over the company. The court held: ***"Of course, the board of directors' managerial power is not unlimited .... [T]he Delaware General Corporations Law vests shareholders with the power to adopt, amend or repeal bylaws relating to the business of the corporation and the conduct of its affairs."*** *Id.* at *6 (emphasis added).[6]

The RLF Opinion wholly ignores case law that construes the language of DGCL § 109 broadly to enable shareholders to regulate director conduct through enacting bylaws. Instead, RLF cites cases for the unremarkable proposition that generally DGCL § 141(a) vests power in directors to manage the affairs of the corporation. The cases cited by

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[5] In *Citigroup Inc.*, SEC No-Action Letter, 2006 WL 568681 (March 02, 2006) the Division refused to grant the company's request for no action relief on a similar proposal requesting that the board adopt a bylaw that required, in certain circumstances, that the company reimburse shareholders who nominate a director in a contested election. The Division did not agree with Citigroup's argument that enacting the recommended bylaw would violate Delaware law. RLF, however, cites Pennzoil *Co.*, SEC No-Action Letter, 1993 WL 52187 (Feb. 24, 1993), for the proposition that the Division has concurred with a company that argued that "stockholders cannot, by a requested amendment, lawfully require the board of directors to expend corporate funds." RLF Opinion at 9 n.4. In *Pennzoil* Co. the disputed proposed bylaw gave authority to a shareholder-elected committee to expend corporate funds to monitor the board of directors. However, the Division's decision in that instance was made prior *News Corp.* and *Hollinger*, Delaware decisions that further illuminated the relationship between directors and stockholders.

[6] RLF attempts to distinguish *News Corp.* from the present dispute by arguing that *News Corp.* was a "case of the board agreeing with stockholders [on] what is advisable and in the best interest of the corporation...." The RLF Opinion at 7 n.3. The argument is absurd. In *News Corp.*, there was a disagreement between stockholders who wished to submit a poison pill for a shareholder vote and the board which did not. *See News Corp.*, 2005 WL 3529317, at *6. The court held that enabling shareholders to vote collectively to decide whether to extend a poison pill did not conflict with DGCL § 141(a). *Id.* Thus, the corporation had to abide with the shareholder collective decision, even if directors, in their business judgment, disagreed with it.

Grant & Eisenhofer P.A.

RLF, however, simply do not address the issue presented here: whether shareholders, acting collectively, may enact a bylaw regulating how directors fulfill their fiduciary duty. *See* RLF Opinion at 6-7 (quoting *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) (holding that shareholder bringing derivative suit did not allege that demand was excused); *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (holding plaintiff adequately pled that the directors breached their fiduciary duties to minority shareholders in selling the company to a third party); *Maldonado v. Flynn*, 413 A.2d 1251, 1255 (Del. Ch. 1980), *rev'd sub nom.*, *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981) (holding that board could not compel dismissal of a derivative lawsuit brought by a shareholder after it refused demand); *Norte & Co. v. Manor Healthcare Corp.*, 1985 WL 44684, at *3 (Del. Ch. 1985) (holding "convertible debenture holders may not state a claim for breach of fiduciary duty"). These cases are simply not contrary to *News Corp.*, *Hollinger* and *Frantz*, which hold that shareholders have broad power to enact bylaws that dictate how directors execute their fiduciary duties.[7]

Further, RLF's reliance on *Paramount Commc'ns, Inc. v. Time Inc.*, 1989 WL 79880, at *30 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1980), is also misplaced. In that case, the Court held that a board may maintain a poison pill, even if a majority of shareholders wished to tender their shares. This has nothing to do with whether bylaws can regulate the process by which a corporation's directors expend corporate funds.[8]

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[7] Similarly, RLF's citations to cases holding that directors have authority to expend corporate funds are inapposite because these cases, also, simply do not discuss the issue of how shareholder-enacted bylaws may regulate director conduct. *See* RLF Opinion at 8 (quoting *Wilderman v. Wilderman*, 315 A.2d 610 (Del. Ch. 1974) (holding that unless board authorized compensation to an officer, the officer had to argue that such payment was allowable under "the theory of quantum meruit" to retain such payment); *Lewis v. Hirch*, 1994 WL 263551, at *3 (Del. Ch. June 1, 1994) (approving settlement concerning excessive compensation over objection) ("Excessive compensation claims are difficult to prove at trial, largely because executive compensation is a matter ordinarily left to the business judgment of a company's board of directors."); *Alessi v. Beracha*, 849 A.2d 939, 943 (Del. Ch. 2004) (holding that it was a reasonable inference that directors knew about a company stock buy back program because DGCL § 141(a) created a duty for directors to manage the affairs of the corporation); *UIS, Inc. v. Walbro Corp.*, 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 2987) (holding that the court would not freeze proceeds from issuance of preferred stock pending litigation because *the court* would not interfere with the directors' ability to control company funds). It is undisputed that DGCL § 141(a) gives directors authority to decide how to expend corporate assets consistent with their fiduciary duties, however, the above cases do not shed light on the issue of whether shareholder-adopted bylaws may regulate director conduct.

[8] At best for the Company, a recent Delaware decision has held the exact extent to which shareholders may regulate director conduct was "unsettled." *See Bebchuk v. CA, Inc.*, 902 A.2d 737, 745 (Del. Ch. 2006). The Division has repeatedly refused to issue no action relief based on unsettled issues of state law. *See, e.g.*, *PLM Intern'l, Inc.*, SEC No-Action Letter, 1997 WL 219918 (Apr. 28, 1997) ("The staff notes in particular that whether the proposal is an appropriate matter for shareholder action appears to be an