



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DAVID PORTNOY, )  
)  
Plaintiff, )  
)  
v. )  
)  
CRYO-CELL INTERNATIONAL, INC., )  
a Delaware corporation, MERCEDES )  
WALTON, GABY W. GOUBRAN, )  
JAGDISH SHETH, Ph.D, ANTHONY P. )  
FINCH and SCOTT CHRISTIAN, )  
)  
Defendants. )

C.A. No. 3142-VCS

**REDACTED - PUBLIC VERSION  
NOVEMBER 28, 2007**

DEFENDANTS' OPENING POST-TRIAL BRIEF

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
INTRODUCTION .....	1
FACTS .....	2
Cryo-Cell's Business .....	2
David Portnoy .....	3
Andrew J. Filipowski .....	4
Filipowski Joins The Management Slate .....	8
The Portnoy Group Prepares For A Proxy Contest .....	11
Filing The Proxy Statements .....	12
Both Sides Mount Campaigns .....	14
Saneron .....	15
The Management Slate's Efforts In The Final Days Of The Campaign .....	19
Roszak Seeks Additional Representation; The Board Promises Nothing .....	21
Portnoy Group Declines To Solicit Votes; Its Supporters Decline To Purchase Shares To Increase Their Voice In The Election .....	25
The Shareholders Meeting .....	26
Choi's Votes .....	26
The Krueger (Apollo Capital) Shares .....	27
The Recess .....	28
The Proxies To Vote On Procedural Issues At The Time Of Plaintiff's Motion To Close The Polls And At The Time Of The Recess .....	30
The Results .....	31
Plaintiff's Misconduct In Connection With The Proxy Contest Comes To Light .....	31

ARGUMENT .....	34
A. Plaintiff's Vote-Buying Claims Are Meritless .....	34
1. The Agreement To Put Filipowski On The Management Slate Did Not Constitute Impermissible Vote-Buying .....	35
2. The Expansion Of The Board To Allow Filipowski To Be Added To The Management Slate Did Not Constitute Illegal Vote-Buying.....	36
3. There Was No Agreement With Filipowski Or Choi Regarding Board Seats (Other Than The Filipowski Agreement Filed With The SEC); In Any Event, There Is Nothing Wrong With Giving A Large Shareholder A Board Seat In Exchange For His Support.....	38
B. Plaintiff's Claims Regarding The Conduct Of The Annual Meeting Are Also Meritless .....	41
1. The Chair Had Legal Authority To Take A Break .....	42
2. There Is Nothing Inequitable About Taking A Break Of Less Than Three Hours To Ensure That A Major Shareholder Had An Opportunity To Correct A Mistake Regarding His Vote.....	44
C. Plaintiff's Unclean Hands Precludes His Claim For Equitable Relief .....	47
D. Remedies.....	48
CONCLUSION .....	50

## TABLE OF AUTHORITIES

### CASES

<i>Am. Int'l Rent a Car, Inc. v. Cross</i> , 1984 WL 8204 (Del. Ch. May 9, 1984).....	42
<i>Aprahamian v. HBO &amp; Co.</i> , 531 A.2d 1204 (Del. Ch. 1987).....	45
<i>Blasius Indus., Inc. v. Atlas Corp.</i> , 564 A.2d 651 (Del. Ch. 1988).....	39
<i>Brown v. Hartlage</i> , 456 U.S. 45 (1982).....	1
<i>Chesapeake Corp. v. Shore</i> , 771 A.2d 293 (Del. Ch. 2000).....	44
<i>Chris-Craft Industries, Inc. v. Independent Stockholders Committee</i> , 354 F. Supp. 895 (D. Del. 1973).....	47
<i>Commonwealth Assoc. v. Providence Healthcare</i> , 641 A.2d 155 (Del. Ch. 1993).....	38, 39
<i>H.F. Ahmanson v. Great W. Fin. Corp.</i> , 1997 WL 305824 (Del. Ch. 1997) .....	45
<i>Hewlett v. Hewlett-Packard Co.</i> , 2002 WL 549137 (Del. Ch. Apr. 8, 2002).....	34, 41
<i>MM Cos. v. Liquid Audio, Inc.</i> , 813 A.2d 1118 (Del. 2003) .....	37, 44
<i>Mercier v. Inter-Tel (Del.), Inc.</i> , 929 A.2d 786 (Del. Ch. 2007).....	44, 45
<i>Mitchell v. Highland-Western Glass Co.</i> , 167 A. 831 (Del. Ch. 1933).....	39, 40
<i>Nevins v. Bryan</i> , 885 A.2d 233 (Del. Ch.), <i>aff'd</i> , 884 A.2d 512 (Del. 2005) (TABLE).....	36
<i>North Fork Bancorporation, Inc. v. Toal</i> , 825 A.2d 860 (Del. Ch. 2000), <i>aff'd</i> , 781 A.2d 693 (Del. 2001) (TABLE).....	49

<i>Savin Bus. Machs. Corp. v. Rapifax Corp.</i> , 375 A.2d 469 (Del. Ch. 1977).....	49
<i>Schreiber v. Carney</i> , 447 A.2d 17 (Del. Ch. 1982).....	34
<i>SmithKline Beecham Pharms. Co. v. Merck &amp; Co.</i> , 766 A.2d 442 (Del. 2000).....	47
<i>State of Wisc. Inv. Bd. v. Peerless Sys. Corp.</i> , 2000 WL 1805376 (Del. Ch. Dec. 4, 2000).....	42
<i>Sutter Opportunity Fund 2, LLC v. Cede &amp; Co.</i> , 838 A.2d 1123 (Del. Ch. 2003).....	47

#### MISCELLANEOUS

Brian Garner, <i>Dictionary of Modern Legal Usage</i> 26 (2d ed. 1995).....	42
Jayne W. Barnard, <i>Institutional Investors and the New Corporate Governance</i> , 69 N.C. L. Rev. 1135, 1145-46 (1991).....	41
Ronald Gilson & Reinier Kraakman, <i>Reinventing the Outside Director: An Agenda for Institutional Investors</i> , 43 Stan. L. Rev. 863, 872 (1991).....	41

## INTRODUCTION

Justice Brennan wrote that “[n]o body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter.” *Brown v. Hartlage*, 456 U.S. 45, 54 (1982). He was not referring to corporations. In corporate elections, there is nothing wrong with an auction. It makes perfect economic sense for a shareholder who values the corporation more highly than others to buy shares for purposes of voting them for his chosen leadership. Allowing those who value the corporation the most to have the greatest influence on the choice of directors reflects the sort of value-maximization the corporate form was designed to promote.

Cryo-Cell’s 2007 director elections essentially came down to an auction. The management slate’s supporters were willing to pay for their choice of leadership by purchasing shares in the final days of the election — in particular, by purchasing the shares of Apollo Capital (Krueger’s firm). Portnoy’s supporters were unwilling to do so, despite ample opportunity, including on the day of the meeting.

Portnoy assumes that, because he was not willing to pay a premium over market to buy, for example, the Apollo shares, no one would have been willing to do so absent some sort of illicit behind-the-scenes deal. Tr. 424-25 (Walton cross-examination) (“Q. So they got none of what they were asking for in exchange for acting as the buyers in this matchmaking plan. Is that right? A. Correct. Q. Yet they go ahead and spend millions of dollars to implement the plan, anyway, don’t they? A. Correct.”). He believes, for example, that Filipowski (who sold a business for \$4 billion a few years ago) was willing to risk millions of dollars on a management slate he did not truly support and to make untruthful statements in his SEC filings all so that he could obtain a “second” board seat, roughly \$30,000 a year in director fees, and a slightly greater

voice in the governance of a \$17 million per year company. That is implausible.

The truth is that Filipowski and others purchased additional shares to influence the vote because they believe the company is undervalued, they believe the management slate has the best vision for achieving its true value, and (most of all) they believe the Portnoy slate was unqualified and dangerous.

Plaintiff's other assertions similarly fall short of satisfying the extraordinary remedy he seeks. He has not made a sufficient case for disenfranchising Filipowski and the other shareholders who put millions on the line to vote for management. The agreement between Cryo-Cell and Andrew Filipowski, and the decision to expand the board, were consistent with board's fiduciary duties, involved no corporate asset, and left to the shareholders to determine whether to make Filipowski a director (*see* 4 to 11). Saneron's witnesses (whom plaintiff ignores) testified that there was no link between Saneron's votes and the removal of the legend on its shares or any other alleged coercion (15 to 19). Finally, a break of less than three hours during the company's annual meeting — taken to allow a major shareholder to correct a mistake regarding his vote — was legal and well justified, and there is no evidence that Portnoy would have won the election but for the break (28 to 31). Portnoy's quest to have his slate installed as Cryo-Cell's board finds insufficient support in the proof or equities of this case.

## FACTS

### Cryo-Cell's Business

Cryo-Cell is a Delaware corporation whose primary business focuses on preserving umbilical-cord-blood stem cells for family use. Stip. Fact 1, 2. Several years ago, management realized that Cryo-Cell's future success would depend on diversifying its services to obtain stem cells from sources other than umbilical-cord blood. Trial Transcript ("Tr.") 316. On November 1, 2007, Cryo-Cell took an important step toward that goal, announcing its discovery

of breakthrough technology to store menstrual stem cells. The company discovered that menstrual blood contains millions of stem cells having properties similar to bone-marrow and embryonic stem cells. Joint Exhibit (“JX”) 292.<sup>1</sup> The market for menstrual stem cell storage encompasses the roughly 100 million women in this country who menstruate, or about 100 times the market for cord-blood storage. Tr. 317-18.

Mercedes Walton has served as a director of Cryo-Cell since 2000 and chairman since 2002. *See* Stip. Fact 4. She became interim CEO in April 2003, when the company was in dire straits: it had lost roughly \$7.5 million on \$7.5 million in revenues; cash reserves were evaporating rapidly; it had been delisted from NASDAQ; it went through three different audit firms; it was embroiled in litigation; and the former CEO had just resigned. The board asked Walton to step in as interim CEO and steer the company to safe harbor. In September 2005, with the company stabilized under Walton’s leadership, the board asked her to serve on a non-interim basis. Tr. 313-14. Cryo-Cell’s other directors are defendants Gaby W. Goubran (Stip. Fact 5), Jagdish Sheth, Ph.D. (Stip. Fact 6), Anthony P. Finch (Stip. Fact 7), Scott Christian (Stip. Fact 8), and Andrew J. Filipowski, who is not a defendant.

#### David Portnoy

Portnoy’s first contacts with Cryo-Cell came in 2004, a few months after he became a Cryo-Cell investor. Tr. 33. Portnoy met Walton and the company’s CFO at the company’s facility. Walton characterized Portnoy’s tone as “antagonistic and generally hostile,” which she found puzzling “because the company was actually in the midst of a major turnaround.” Tr. 319-20. Portnoy and Walton had later phone calls where Portnoy’s tone was similar. Tr. 320.

In December 2006, the Cryo-Cell board amended the bylaws. The amendments were

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<sup>1</sup> All exhibits (with the exceptions of Exhibits A-D) are in the Appendix, filed contemporaneously herewith.

intended to provide a more orderly process for stockholder actions. In response to these amendments, Portnoy sent the board a letter expressing “dissatisf[action] with the performance of the Company over the last several years,” and claiming that the amendments had been made “for the sole purpose of placing substantive and procedural barriers to shareholders’ actions.” He threatened litigation, “which may or may not be covered by the Company’s indemnification provisions and insurance,” and told the directors to “govern your actions accordingly.” JX27A.

**Andrew J. Filipowski**

Andrew J. Filipowski and his associate Matthew Roszak are the owners of SilkRoad Equity LLC, a private investment company. Filipowski has extensive business experience. In the 1970’s, Filipowski was executive vice president and COO of Cullinet Software, Inc., the largest software company of that era. In 1979, he founded DBMS, Inc., which grew from a startup to a major international software enterprise. In 1987, he founded Platinum Technology, Inc., growing it from a startup to the eighth-largest software company in the world, with \$1 billion in revenue before its sale to Computer Associates International, Inc. in 1999 (for \$4 billion). Filipowski’s next venture, Divine Interventures, went bankrupt in 2003. Currently, Filipowski serves at the helm of SilkRoad Equity, which owns about 18 different companies. He also owns a House of Blues franchise, hotels and golf courses, a Margaritaville restaurant and a minor-league baseball team. He has served on the boards of (among others) the Chicago Board of Trade, the Illinois Institute of Technology, University of Chicago Hospitals, and the Wake Forest University Institute for Regenerative Medicine. Tr. 146-47; JX76.

Filipowski first invested in Cryo-Cell several years ago after developing an interest in the stem-cell industry. Tr. 149. Cryo-Cell “stood out as a very undervalued company.” Tr. 149. Filipowski believed that, while cord-blood stem cells had “some meaningful but limited use,” the industry “would potentially discover other stem cells” to be of greater use. Tr. 149.

In January 2007, Filipowski and Roszak wrote a letter to Cryo-Cell's board complaining about the bylaw amendments, the same amendments Portnoy had written about. Filipowski and Roszak, who then controlled more than 6% of Cryo-Cell's stock, wrote that they were "dismayed" by the amendments, which they saw as "discouraging stockholder oversight" by imposing more procedural requirements for stockholder action. They stated they were "considering proposing a slate of directors" at the next annual meeting and requested to meet with the board or management to discuss their concerns. JX19; *see also* Filipowski Timeline, Ex. A. The "input" for this letter, it turns out, came "mostly from the Portnoy group" (Tr. 168), which had indicated to Filipowski that Cryo-Cell "was not very well run and were pretty disparaging in their remarks about the state of the business." Tr. 151. The letter was intended to be a "wake up call to request a meeting and to make sure that it got the right attention from management." Tr. 168.

Walton knew Filipowski from an earlier, "very positive" telephone conversation. She found him to be "quite knowledgeable . . . of the stem cell industry," and "thought that if [they] would have an opportunity for a two-way dialogue, that it could possibly lead to a new understanding." Tr. 321-22. Filipowski, in turn, felt that "as a major shareholder and one that was very interested in accumulating more share[s], [he] ought to do some more homework," and accordingly "asked for a meeting with management." Tr. 151. Walton invited Filipowski and Roszak to Cryo-Cell's offices for an all-day meeting. Tr. 321-22. In light of her past dealings with Portnoy and his belligerent tone, Walton did not extend him an invitation. Tr. 319-21.

Filipowski and Roszak's mid-February 2007 visit was a great success. Tr. 322-23. Walton, Jill Taymans (Cryo-Cell's CFO), and other members of the executive team attended for the company. Tr. 323. Walton deemed the meeting "very constructive":

[Filipowski], at the conclusion of the meeting, indicated that he had not been aware of all that the company had experienced, and he was quite complimentary of the facility and of the management team, but most specifically, he was very encouraged by the strategy that we articulated to him.

Tr. 323-24. Following the meeting, Walton thanked Filipowski for his “thoughtful candor, insights and encouragement.” JX34. Filipowski’s reaction to the meeting was equally positive:

My fears that they did not have a handle on the business went away. I felt that they were very much on top of their business, knew where the future of the business lay, and were very much anxious to pursue what I thought was a very logical appropriate strategy.

Tr. 153. According to Roszak, the meeting “went a long way in helping us better understand and appreciate what the company went through over the last few years and what work still needed to get done over the next few years. And we came away with a very positive impression of Mercedes. That she had a handle on the issues in the company; that she thought strategically; that she had a terrific energy and desire to build shareholder value.” Roszak Dep. 30.

In particular, Filipowski, Roszak, and management realized that they shared a vision for the company’s future. Filipowski “thought the future of Cryo-Cell was going to be predicated upon our ability to move into another area of stem cells.” Tr. 324-25. Filipowski felt that the “cord blood business is, for the most part, a deadend business,” and that, “as new sources of stem cells were isolated and found, they should upgrade their services to collect more and different stem cells for the benefit of the customer.” Tr. 156. This differed from Portnoy’s vision, which continued to focus on cord-blood stem cells. Tr. 155.

At the conclusion of their meeting, Filipowski told Walton that Portnoy was interested in taking control of the company for “all of the wrong reasons.” Tr. 325-26. Filipowski also expressed an interest in possibly serving on Cryo-Cell’s board, though he did not request that a board-nomination process be undertaken at that point.

Around the same time, Filipowski and Roszak were separately communicating with Portnoy about Cryo-Cell's prospects and the possibility of assembling a slate for the upcoming meeting. Portnoy went so far as to offer Filipowski "one board seat," writing that "Flip's wisdom and experience would be of value to us in making CCEL a better company." JX43A; Tr. 30. Filipowski's participation was contingent on "execution of an agreement with us in which he agrees" among other things to "vote for our proxy slate." JX43A; Tr. 30-31.

By then, however, Filipowski and Roszak had lost interest in those discussions and did not respond to Portnoy's e-mail. *Id.* Filipowski testified that Portnoy "made it sound like he was going to retrench into the cord blood collection process and put a gentleman that had HVAC experience in charge of the businesses." Tr. 155. Filipowski felt that if the Portnoy slate were elected, "the future value creation potential of the company would be destroyed." Tr. 156. Roszak had a similar reaction. In his view, Portnoy's slate

was a group of family members and friends that had no experience serving on public boards. And I think the most fundamental point was [Portnoy's] proposal to bring on the board and have serve as the CEO of this company a gentleman that had experience in the HVAC industry, which to us was a red flag. And we viewed that as a huge risk to the company.

Rozzak Dep. 41.

After hearing of Portnoy's plans for the board, Filipowski and Roszak did not want even to consider pursuing spots on a Portnoy slate. They had:

No interest in that slate because of the risk that could give to the company. So, for example, if Mr. Portnoy wanted to give us more board seats, it still wouldn't have mattered either way because of the way we interpreted that risk of unqualified board members and a highly unqualified CEO with HVAC experience.

In our minds, the thinking and negotiations, discussions in our minds pretty much shut down intellectually on that discussion with Mr. Portnoy.

Rozzak Dep. 44. "In my humble opinion," Filipowski testified, "it was critical that the current

management team be in charge rather than Mr. Portnoy's team." Tr. 165-66.

### Filipowski Joins The Management Slate

Meanwhile, discussions between Filipowski/Roszak and the company continued. Filipowski and Roszak began talking with the company about a slate for the upcoming shareholders meeting. JX54. Names were exchanged, and at one point Roszak suggested that an entirely new slate of outside directors (but including Walton as management representative) be nominated to replace the current board. Tr. 171. By late May, however, discussions had coalesced around a plan to nominate a slate of six proposed directors, including Filipowski, thus increasing the size of the board by one seat after the annual meeting.

Cryo-Cell had planned for the last couple of years to expand the board to include additional outside directors and had regularly discussed the topic. Tr. 376. The agenda for the March 2007 governance committee meeting, for instance, notes that by then the "Governance Committee [wa]s overdue in adding new directors to the board." JX81. Having only four outside directors, with three committees to fill (audit, governance, and compensation), there was significant overlap in committee assignments. JX18.

A number of candidates had been considered by early 2007. The board, however, had difficulty finding suitable and interested candidates, primarily because of Cryo-Cell's small size and the prevailing regulatory environment. Filipowski was a compelling candidate for a number of reasons. He had an outstanding entrepreneurial background with significant public-company experience. Tr. 329-30. He was knowledgeable and passionate about the stem-cell industry, having chaired the board of the Wake Forest Institute for Regenerative Medicine. Tr. 329-30. He was a fiercely independent thinker. Tr. 329-30. And, as a large shareholder, he would well represent shareholder interests. Tr. 329-30.

Strategically, of course, adding a large shareholder who supported the board's vision for

the company made it more likely that the management slate would win. Tr. 157, 330-31. That said, no one seriously thought Filipowski would support the Portnoy slate if left off the management slate. Tr. 331-32. And Filipowski had no intention of supporting Portnoy:

Q. Mr. Filipowski, if you had not been . . . added as a nominee to the management slate, would you have supported the Portnoy slate in the election?

A. Absolutely not.

Q. Why not?

A. I just thought it was the wrong direction for the company.

Tr. 159.<sup>2</sup>

The board's deliberative process followed the normal protocol.

REDACTED Filipowski completed a D&O questionnaire and an independence and committee compliance questionnaire. Tr. 326-27; JX76. Those documents were shared with the board for discussion. JX79. The governance committee met on May 21 to consider procedures for evaluating Filipowski, including discussing the information they had received about Filipowski and additional information they would need to gather. JX84. In particular, the committee "raised specific concerns and questions about bankruptcy and litigation involving some companies with which Mr. Filipowski was previously associated," and asked for additional information. JX84. Following the meeting, the committee scheduled a

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<sup>2</sup> It is true that the May 21 governance committee minutes indicate that Filipowski "had subsequently confirmed that his agreement to support management's slate was conditioned on his nomination to the Board." JX84. But that notation is inconsistent with Filipowski's testimony. It is inconsistent with what the board minutes from the next day report Filipowski as saying (Filipowski "expressed his opinions regarding the detrimental effect that a takeover by Mr. Portnoy would have on the company," JX93). And it makes little sense: withholding support for management would lead directly to the election of the Portnoy slate, which Filipowski and Roszak emphatically and repeatedly testified they opposed. Tr. 155-56, 159, 165-66; Roszak Dep. 41, 44. By May 21, Filipowski had long since lost interest in the Portnoy slate, had long since let lapse Portnoy's offer to join his slate, and had long since missed the deadline (the end of March) for pursuing his own slate. The only remaining option, given his harshly negative view of the Portnoy slate, was to support management.

telephone interview of Filipowski and asked that he be prepared to discuss a number of issues, including his “[s]pecific skills and expertise,” his “[c]ontacts and resources,” his “[r]ecommendations for business strategies for the Company,” his “[c]ommitment to serving on the board of a public company,” his “[e]xpectations on length of time serving as a member of the Board,” and, critically, “[f]urther detail on Blue Rhino proceedings by [the] SEC involving Mr. Roszak [, and] [Mr. Filipowski’s] involvement in the related events.” JX93.

During the next day’s telephone interview, Filipowski gave an extensive history of his business background and board experience. JX93. He answered questions about the bankruptcies with which he was involved (notably, Divine Interventures) and the SEC investigation of insider trading by his associate Roszak. *Id.*; Tr. 476. The board satisfied itself that the SEC investigation of Roszak did not implicate Filipowski. Tr. 476-80. The board learned that Filipowski himself contacted the SEC to notify them that Roszak had sold shares while in possession of non-public information about Blue Rhino. Tr. 476-80; JX94. This resulted in Roszak agreeing with the SEC to return the proceeds of the sale with interest (without admitting liability). Tr. 478-79. Filipowski then discussed his views of the company’s business prospects and his goals for its strategy. JX93. And Filipowski “expressed his opinions regarding the detrimental effect that a takeover by Mr. Portnoy would have on the company.” *Id.*

Following the conference call, the governance committee decided to hold a face-to-face interview of Filipowski. *Id.* The then-chairman of the governance committee, Gaby Goubran, flew in from Europe to meet with Filipowski. Tr. 157-58, 326-27. The governance committee subsequently met (without Walton present) to discuss the nomination. Goubran later reported to Walton that the committee voted unanimously to recommend adding Filipowski to the management slate. JX97; Tr. 157-58, 326-27. The committee’s recommendation was reported

to the board, and the board unanimously approved Filipowski on May 25. JX100.

Ultimately, on June 4, Filipowski, Roszak and the company entered into an agreement (filed with the SEC) under which Filipowski would be included on the management proxy card and would serve as a director if elected, Filipowski and Roszak would vote their shares for the management slate, and Filipowski and Roszak would agree to a “standstill” on various matters through the 2008 annual meeting. JX119; *see also* Stip. Fact 14. The reason for the agreement (similar to the agreement plaintiff wanted Filipowski to execute to join plaintiff’s slate) was that the company lacked a significant history with Filipowski and wanted to confirm his stated intentions. Tr. 159, 333-34. For his part, Filipowski was “ambivalent” about the agreement. Tr. 159. He still felt he had a chance to be included on the management slate even if he refused to sign the agreement. Tr. 172-73.

#### **The Portnoy Group Prepares For A Proxy Contest**

Having fruitlessly pursued Filipowski, the Portnoy group assembled a slate consisting of plaintiff, his brother Mark, Mark Portnoy’s accountant Harold Berger, John Yin (an employee of a private computer company controlled by David Portnoy), Scott Martin (a self-employed investor with experience as CEO of an HVAC company), and Craig Fleishman, a physician (and the brother of Mark Portnoy’s life-long friend). Tr. 25-26. None of the slate members had experience in the biotech field or the stem-cell industry. Tr. 26; JX126. None of the slate members had ever served as a director of a public company. Tr. 10-13. And none had any experience in proxy contests. Tr. 28 (Portnoy), 109-110 (Schulman). Recognizing their inexperience, the Portnoy group hired a seasoned proxy solicitor, Paul Schulman of The Altman Group, “to guide them through” the process. Tr. 35; Tr. 110.

The shareholder-members of the Portnoy slate entered into a voting agreement under which they agreed to vote their shares for the Portnoy slate, just as Filipowski and Roszak had

agreed to vote for the management slate. Tr. 28-29; JX119. As the Portnoy group's proxy solicitor testified at trial, there was nothing odd about the Portnoy group members agreeing to vote for their slate; he expected members of a slate to agree to vote for each other because "that's the way it always works" in proxy contests. Tr. 110-11.

In the weeks leading up to the proxy contest, members of the Portnoy group bought shares of Cryo-Cell stock for the purpose of voting them in support of the Portnoy slate. Tr. 36 (Portnoy), 111 (Schulman). Portnoy's proxy solicitor was not troubled by that, recognizing that share purchases during a proxy contest are "something that happens in proxy contests." Tr. 112. Schulman knew that, after the record date for a shareholder meeting, a person can buy shares "along with the voting rights for the shares." Tr. 112.

#### **Filing The Proxy Statements**

Both groups mailed definitive proxy statements to shareholders in mid-June, immediately after the SEC approved them. JX181; Schulman Dep. 59-60; *see* Stip. Fact 17, 18. Final SEC approval had been delayed because, among other things, both sides filed their preliminary proxy materials with the wrong EDGAR code, resulting in the materials initially being routed to the wrong SEC official for review. JX102; JX121; Hayden Dep. 51. By the time the SEC approved the definitive proxy materials, too little time remained to distribute the materials to beneficial holders, and for those holders to have a reasonable opportunity to consider the materials and vote, before the originally-planned meeting date of June 28. Indeed, Portnoy slate member Scott Martin did not receive the Portnoy group's proxy for the shares he held in street name until a week after the original June 28 meeting date. JX160. The board, therefore, moved the meeting date to July 16. As explained by the Portnoys' proxy solicitor, "four to five weeks is standard" between mailing proxy materials and the meeting date, "because it takes a while for street holders to get copies of the proxy materials" through their brokers or through Broadridge (a

service provider that distributes proxy materials and tabulates votes). Schulman Dep. 69. Although plaintiff has asserted that the meeting date was moved to allow more time to “turn around the vote,” Pl.’s Pre-Trial Opening Br. 16, it is undisputed that at the time the meeting date was moved, no proxy materials had been mailed, no votes had been cast, and there was no vote to “turn around.” JX110; JX117; JX126.

Before mailing the proxy, Schulman had advised David Portnoy that “you need to still put in some sort of business plan. It can be very vague — cut unnecessary costs, look for strategic alternatives, etc.” JX171; *see also* Tr. 37. Plaintiff took this literally. The Portnoy proxy materials outlined only the vaguest plans for Cryo-Cell: “eliminate any and all unnecessary costs”; “seek to ensure to maximize the return from the deployment of CCII’s marketing resources”; “consider strategic alternatives”; “be responsive to input from other Stockholders”; “reduce the annual cash compensation of directors.” JX126 at CRYO 00318.

In the weeks before the election, the company and plaintiff had an opportunity to speak with Institutional Shareholder Services (“ISS”), an entity that provides independent vote recommendations to shareholders. Tr. 37-38. David Portnoy spoke with ISS on behalf of the Portnoy slate. Portnoy, however, “do[es]n’t recall preparing a lot” for that conversation. Tr. 37-38. Plaintiff’s lack of any real business plan or relevant experience for the Portnoy slate contributed to ISS’s recommendation in favor of management. ISS noted that Cryo-Cell’s stock price had “outperformed both its peers [in the cord-blood storage industry] over a two-year period.” JX166; Tr. 38-39. “The dissident . . . did not present any specific, detailed plan for the company. More importantly, the dissidents did not have any specific strategic recommendations for the company.” JX166. “ISS believes that management’s plans regarding the direction of the company are much more substantive than those presented by the dissident. As such, ISS

recommends that shareholders vote FOR the management nominees.” *Id.*<sup>3</sup>

### Both Sides Mount Campaigns

After mailing the proxy statements, both sides campaigned vigorously to win the vote, and nothing prevented either side from mounting an effective campaign. Both sides hired proxy solicitors. Tr. 35-36. Both sides were represented by counsel. Tr. 34-35. Both sides had a list of stockholders and devised a strategy for contacting them to elicit support. Tr. 35-36. Shareholders supporting both sides purchased shares after the record date and directed those shares to be voted for the shareholder’s preferred slate. Tr. 36. Both sides’ proxy solicitors called shareholders to solicit votes. In some cases, representatives of the two sides made personal visits to seek shareholders’ votes. Tr. 113-14. Over the course of the contest, both sides sent several “fight letters” to the shareholders, outlining their strongest arguments. *See, e.g.*, JX131; JX138; JX154.

With some larger shareholders, the contestants had repeated communications, because both sides recognized that shareholders could switch their votes at any time, and that no vote could be considered locked up. Tr. 117 (Schulman); Schulman Dep. 161. For example, both sides communicated with Ki Yong Choi, a holder of some 400,000 shares (about 3% of the outstanding) who lived in San Francisco. Mark Portnoy traveled to meet with Choi. Tr. 113-14. Mark Portnoy reported to his brother that he had an “okay” meeting with Choi (JX163 at Portnoy 199), but was “disappointed that [Choi] didn’t give me a big hug and say he was going to . . . vote his shares for us.” M. Portnoy Dep. 82.

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<sup>3</sup> Glass Lewis also endorsed the management slate, opining that “the Company has performed well under its current leadership.” “In light of Cryo-Cell’s financial performance over the past several years, we believe the Dissidents’ stated recommendations . . . do not constitute a substantive plan for improvement. Moreover, we believe that the Portnoy Group’s demand for control of the Company’s board appears out of line to the Dissidents’ ownership of only 13% of the Company’s outstanding common stock. In our view, any dissident shareholder seeking to take over a board should pay a premium for the privilege through a buyout offer to shareholders.” JX152.

Walton and Taymans had more productive discussions with Choi. In a “delightfully uplifting” June call, Choi was “most supportive,” and indicated an interest “in buying more shares.” JX143; Tr. 416; Walton Dep. 86. Choi also indicated an interest in possibly increasing his involvement in the company, perhaps through the board of directors, and Walton explained the established nomination process through the governance committee. Walton Dep. 161-62.

Both sides wooed other large shareholders, as well, including Lewis Asset Management, a holder of about 7% of the shares, and Kyle Krueger, whose Apollo Capital owned about 2.5% of the shares. At one point, Portnoy wrote his proxy solicitor that “I would say Lewis is rock solid although everyone has their price, right?” — reflecting his and Schulman’s understanding “that Mr. Lewis could switch his vote if he wanted to,” and that “Mr. Lewis could sell his shares with the proxy attached if he wanted to.” JX242 at AltmanGroup 1204; Schulman Dep. 140-41; Tr. 118-19. The Portnoys personally communicated with Krueger on several occasions. Tr. 116. Krueger, for his part, made verbal commitments to both sides at various times. Two days before the annual meeting, Krueger informed plaintiff that he had decided to vote for the management slate. Tr. 116-17 (Schulman); JX193. Even after Krueger told Portnoy this, the Portnoy group continued to lobby him because his votes were still in play. Tr. 117. And on Sunday night, Portnoy informed his proxy solicitor that he believed that Krueger would vote the Apollo shares for the Portnoy slate. Tr. 117-18; JX242 (Portnoy 456). Even after seeing this e-mail, Portnoy’s proxy solicitor had not concluded Krueger’s vote was locked up. Tr. 116, 118.

### Saneron

Saneron CCEL Therapeutics Inc. is a research firm owned 38% by Cryo-Cell. Stip. Fact 20. At the time of the annual meeting, Saneron held 253,800 shares of Cryo-Cell stock. Stip. Fact 19. Saneron voted its shares (which turned out not to be outcome-determinative) in favor of the management slate.

**REDACTED**

REDACTED

Unfortunately, at trial the Court did not have the benefit of live testimony from the three Saneron witnesses (all Florida residents) deposed in this case — the witnesses in the best position to testify about what happened. They confirmed that Saneron's vote reflected its assessment of the merits of the contest and not any improper influence by Cryo-Cell.

One of those witnesses was Saneron's founder and CEO Paul Sanberg, a professor of neuroscience at the University of South Florida. Sanberg Dep. 5-6. He testified that several weeks before the annual meeting, Portnoy tried unsuccessfully to solicit Saneron's support. Dr. Sanberg was unimpressed with the Portnoy slate on the merits:

I asked him [Portnoy] if he knew anything about Saneron, and he didn't know anything about Saneron, which surprised me. He didn't — he really didn't have an interest in that aspect of Cryo-Cell's business. He was more interested in them as kind of like an annuity bank. So I talked to him about what Saneron did a bit. I also think I asked him why he didn't have a scientist on his slate, because he didn't have a scientist on his slate. And he said, well, he didn't really think about it. And so that was it. We didn't talk maybe 20 minutes or so.

Sanberg Dep. 8-9.

Sanberg also testified that Saneron intended to vote for management, but also to attend the annual meeting in case the Portnoy slate could present something "miraculous" to change Saneron's assessment of which side had the better plan for Cryo-Cell. Sanberg Dep. 14-15.

Bernard Skerkowski, the president of Saneron, echoed Sanberg's assessment. He testified that Saneron had decided to vote for management before the annual meeting:

Q. Now, as of the Friday before [the annual meeting, *i.e.*, July 13], do you know if Saneron was leaning one way or another as to who they were going to vote for at the annual meeting?

\* \* \* \*

REDACTED

**REDACTED**

**REDACTED**

**The Management Slate's Efforts In The Final Days Of The Campaign**

During the campaign's final week, the company received a Broadridge report showing for the first time that the management slate was behind. Tr. 347. In response, the board held a teleconference to discuss the campaign's final days. The board discussed two issues. First, the

board would intensify efforts to communicate the history, performance, and strategic direction of the company. Tr. 348. Recognizing that large numbers of votes remained in play, the management group redoubled its efforts to contact shareholders. Tr. 187. Both Georgeson and management made numerous calls. Management and its supporters continually prodded Georgeson to provide additional analysis. As part of a "full-court press" plan, Georgeson kept its call center open on Saturday and Sunday, July 14-15, and on through the day on Monday, July 16, to lobby shareholders to the end.

**REDACTED**

REDACTED

Roszak Seeks Additional Representation; The Board Promises Nothing

REDACTED

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<sup>4</sup> Roszak also asked management and the directors to use their personal resources (and for the company to use its resources) to buy additional shares. The response from Walton and the company was an unequivocal no: "The company said that it cannot participate in providing any of those things that we requested, and so that was it." Roszak Dep. 116; Tr. 355 ("An emphatic 'no way.'").

**REDACTED**

**REDACTED**

**REDACTED**

REDACTED

**Portnoy Group Declines To Solicit Votes; Its Supporters Decline To Purchase Shares To Increase Their Voice In The Election**

Like Georgeson and management, the Portnoy's proxy solicitor, Schulman, knew that the contest was fluid until the end. Tr. 121. Schulman told his clients this, but mysteriously, the Portnoy group seems to have eased up in the homestretch, rather than leaning through the finish line. Tr. 123-24. Plaintiff believed he held a large lead, so he did not ask the Altman Group to make any extraordinary efforts. Tr. 39. Their call center was not in operation over the weekend or even on the day of the meeting. Tr. 125. Schulman traveled to Houston the weekend before the election for a family function. Tr. 39; Tr. 125. While there, he did nothing on the Cryo-Cell contest. The Portnoys themselves did very little over the weekend,

REDACTED And they did little soliciting on the day of the meeting. Tr. 40.

Although the Portnoy side recognized that shares could be bought with proxies attached, they decided not to try to buy shares in the final days. According to their proxy solicitor (and as described below), they had the opportunity to bid for the Krueger shares, but "none of them were willing to spend the money." Schulman Dep. 128-29; Tr. 119-20.

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<sup>5</sup> Nor is it odd that Filipowski has not purchased additional shares since the election. He is a director now, and, as such, has restrictions on when he can purchase shares. In any event, he testified that he is interested in buying more shares. Tr. 180.

**The Shareholders Meeting**

**REDACTED**

**The Krueger (Apollo Capital) Shares:** When Walton went to bed Sunday night, she thought the Krueger shares had been voted for management. Tr. 369. Walton and Taymans had had an hour-long conversation on Friday with Krueger in which Krueger said he was inclined to support management. Tr. 369-70. Krueger had asked to speak with Filipowski. Tr. 370-71; JX202. After that call, Filipowski called Walton to say they had Krueger's votes. Tr. 371.

On Monday morning, Walton heard that management had lost Krueger's vote. Nevertheless, she did not act with respect to Krueger

REDACTED

Only after the meeting, in retrospect,

did the Krueger shares appear "pivotal" (to borrow plaintiff's description).

It turns out that the Krueger shares — shares the Portnoy group would later describe as "pivotal" and "outcome determinative" — became the subject of what was effectively an auction. Unbeknownst to Walton, Roszak contacted Krueger Monday morning and offered to buy the 323,617 shares held by Apollo Capital, along with the voting rights for those shares. The Portnoy group also discussed buying those shares, but never made an offer. Tr. 119 (Schulman). They simply were not willing to spend the money. Tr. 119-20. Indeed, during the meeting, Mark Portnoy asked Walton whether she knew that Filipowski was trying to buy Krueger's shares. Walton honestly said she had no idea. The only way Mark Portnoy would have known that Filipowski (actually SilkRoad through Roszak) was trying to purchase Krueger's shares would be if Krueger had called the Portnoy group to solicit a bid. The clear implication is that Portnoy had an opportunity to beat Roszak's offer, but declined. Tr. 373-74.

SilkRoad Equity purchased the Krueger shares using SilkRoad's own funds,

REDACTED

Krueger arranged for the votes to be switched from the Portnoy slate to the management slate.

The votes in favor of management were submitted by Banc of America Securities to Broadridge at some point between 11:16 a.m. and 3:41 p.m. JX230; JX231; JX237.<sup>6</sup> Walton learned near the end of the recess that Krueger's votes had switched back to management, but did not know why. Later that evening she spoke with Roszak, who told her that he had purchased them. Tr. 374-75; *see also* Apollo Timeline, Ex. C.

**The Recess:** The shareholder meeting began on schedule, at 11:00 a.m. Stip. Fact 21. It followed the rules of conduct expressly agreed to by both sides in advance. JX191; JX197A; Tr. 60. Walton called the meeting to order, and introduced the directors and officers who were present, as well as the auditors and the independent inspector of the election. JX229. She reviewed the agreed-upon rules of conduct, and allowed Portnoy to introduce the members of his slate. JX229. Portnoy was given the opportunity to make a statement on behalf of his slate, and in support of his shareholder proposal. JX229; Tr. 7-8, 40-41. The meeting was more contentious than usual; for example, the former CEO and large shareholder insisted on answers to a large number of questions. Schulman Dep. 239 ("Q: Mr. Richard said that he didn't want to vote until all of the shareholders' questions were answered? A: That's right."); *see also* Schulman Dep. 237, 243.

At about 1:00, David Portnoy attempted to make a motion from the floor for the polls to be closed.

**REDACTED**

Because the meeting had run "through what you would normally consider to be the lunch hour," Kuzmin-Nichols Dep. 52, **REDACTED**

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<sup>6</sup> The Broadridge reports do not show the actual time that a broker or a bank submitted a vote to Broadridge. The reports are not issued every time a vote is recorded, and there is a lag of "a number of hours" (Tr. 133 (Schulman); Hayden Dep. 184) between when a vote is submitted to Broadridge and when Broadridge issues a report. The most that can be discerned from a Broadridge report is that the votes it reflects were submitted at some point after the previous report was issued, but before the time of the report on which they appear. Tr. 132-33; Hayden Dep. 215-16.

REDACTED

she called a recess at about 2:00. Walton stated that the polls would remain open during the recess, and that any shareholder who wanted to vote during the recess could do so. She also announced that the meeting would resume at 4:45. No one else from the board was involved in the decision to call a recess. Tr. 368.<sup>7</sup>

Walton called the recess for two reasons.

REDACTED

The break had nothing to do with the Krueger shares; Walton was unaware that anything was happening with respect to them. Tr. 376. The break also allowed attendees in the meantime to have lunch, because provision had not been made for lunch to be brought into the meeting room and the meeting had run well past the normal lunch hour.

During the recess, both sides were free to solicit votes and to submit proxies. Portnoy's proxy solicitors obtained several proxies during the break, which they faxed to the meeting site and which were voted. Tr. 129-30; JX247; JX235. At 4:45, the meeting reconvened in accordance with the announcement at the time of the break. Walton asked if any shareholders had not yet voted who wanted to vote; she told them to proceed to the inspector's table and submit their ballots. No one indicated that they had not yet voted, and so Walton declared the polls closed and concluded the meeting. Tr. 368-69.

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<sup>7</sup> David Portnoy variously describes the recess as having been taken at 1:00, 1:30, 1:35, and 1:45. Tr. 69-73; D. Portnoy Dep. (I) 200; D. Portnoy Dep. (II) 24-25. The best piece of extrinsic evidence comes from the Portnoys' proxy solicitor, Schulman, who testified that the first thing he did after the meeting was recessed was to call a colleague at The Altman Group's offices to inform him that the polls would be open until 4:45 and that incoming votes could be accepted until that time. Tr. 126. Shortly after Schulman called his colleague, Peter Casey, Casey circulated an email to an internal Altman email group called "proxy group" (which included Schulman), informing the group that the polls would remain open until 4:45. That Altman Group email was circulated at 2:15. JX248; Tr. 126-27.

The Proxies To Vote On Procedural Issues At The Time Of Plaintiff's Motion To Close The Polls And At The Time Of The Recess

No vote was taken for the recess because Walton believed that the recess was a procedural matter (Tr. 360-61), which was covered by the rules the parties' counsel had negotiated in the week before the election. Tr. 57-60; JX176; JX197A. The agreed Rules of Conduct gave the chairman "the authority to decide all procedural matters." JX191; Tr. 59. Plaintiff now contends that an email sent the morning of the meeting limited Walton's ability to declare a recess, but the e-mail says no such thing. Tr. 61; JX240.

Both at the time Portnoy moved to close the polls and at the time Walton recessed the meeting, the management slate had enough proxies to keep the polls open and to take a recess or adjournment, had the matters been put to a vote. The language of both the white and gold proxies included authority to vote on procedural matters. JX227 at Georgeson00061 (white proxy, granting authority to vote "[u]pon such other matters as may properly come before the meeting"); JX227 at Georgeson00067 (gold proxy, granting authority to vote "in their discretion upon such other matters as may come before the meeting"). Whether to recess or adjourn an annual meeting and whether to close the polls are procedural matters. Tr. 199. Thus, each proxy included the authority to vote on an adjournment or a motion to close the polls.

Management received 4,422,283 proxies in total, including both withhold and in favor votes, at the election.<sup>8</sup> Stip. Fact 23; *see also* Vote Summary, attached as Ex. D. The Portnoy slate received 3,647,514, including both withhold and in favor. *Id.* Even assuming that the Apollo shares were not switched to vote on the management proxy card by the 2 p.m. recess, management still had enough proxies to recess or adjourn the meeting, or to defeat a motion to

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REDACTED

close the polls.

**The Results**

The independent inspector certified the results of the director election on July 31, 2007. Stip. Fact 23; *see also* Ex. E, at 1. All six management nominees won. The management slate nominee with the fewest votes (Goubran) exceeded the Portnoy slate nominee with the most votes (Fleishman and Berger) by 605,087 votes. The management slate nominee with the fourth most votes (and thus providing the majority of the board) (Finch) exceeded the Portnoy slate nominee with the fourth most votes (D. Portnoy) by 622,827.

**Plaintiff's Misconduct in Connection with the Proxy Contest Comes to Light**

**REDACTED**

**REDACTED**

**REDACTED**

REDACTED

ARGUMENT

A. Plaintiff's Vote-Buying Claims Are Meritless.

Plaintiff alleges that Cryo-Cell and others illegally “bought” the votes of several shareholders. Vote-buying is “a voting agreement supported by consideration personal to the stockholder, whereby the stockholder divorces his discretionary voting power and votes as directed by the offeror.” *Schreiber v. Carney*, 447 A.2d 17, 23 (Del. Ch. 1982). *Schreiber* held that management’s use of corporate assets to buy votes in favor of a corporate reorganization would be illegal if “[the] object or purpose is to defraud or in some manner disenfranchise the other stockholders.” *Id.* at 25-26. Later cases firmly established that the linchpin of a vote-buying claim is the use of *corporate assets* to buy votes. *Hewlett v. Hewlett-Packard Co.*, 2002 WL 549137, at \*4 (Del. Ch. Apr. 8, 2002). “Shareholders are free to do whatever they want with their votes, including sell them to the highest bidder,” so long as corporate assets are not exchanged for votes. *Id.*

Measured by these standards, plaintiff’s vote-buying claims fail. Much of his evidence relates not to vote-buying at all, but to *stock*-buying, which does not implicate the concerns in the Court’s vote-buying cases because it does not divorce property rights from voting rights. *See Schreiber*, 447 A.2d at 24. There is nothing wrong with a shareholder purchasing shares for the purpose of voting them as he sees fit. And plaintiff has not established that Cryo-Cell assets were used to buy *any* shares. All that happened here was that those shareholders who valued Cryo-Cell most highly used their own money to buy shares to vote them for their chosen slate of directors. That is the ordinary and salutary (in the sense that it leads to increases in stock price and the value of the firm) consequence of a voting contest, not the telltale sign of any illicit

activity. It advances the sort of value-maximization the corporate form was designed to promote.

1. **The Agreement To Put Filipowski On The Management Slate Did Not Constitute Impermissible Vote-Buying.**

Under Filipowski's June 4, 2007 agreement with the board, which was disclosed to shareholders in the management proxy, Cryo-Cell put Filipowski on the management proxy card and left the decision of whether to add him to the board to the shareholders. Plaintiff's assertion that this was impermissible vote-buying falters on several grounds.

First, the Filipowski agreement did not involve a corporate asset. Even assuming that a board seat could be a corporate asset in the relevant sense (as we explain below, it cannot be), Cryo-Cell did not give Filipowski a directorship, only a spot on the ballot with no guarantee whatsoever that shareholders would elect him or that he would be nominated in future years. The decision whether to add Filipowski to the board ultimately rested with the shareholders, and agreeing to put that decision to a vote of the shareholders cannot conceivably be deemed the grant of a corporate asset in exchange for votes.

Second, even if a spot on a ballot could be viewed as a corporate asset (which it cannot), the claim fails because the agreement's purpose was not to defraud or disenfranchise shareholders. There can be no claim of fraud here because the company disclosed the agreement to shareholders in its proxy. Nor can plaintiff establish that the purpose of the agreement was to disenfranchise shareholders. Neither the company, nor management, nor the board of directors gave Filipowski a seat. If plaintiff's slate had been elected as directors, would anyone say that the board (as opposed to the shareholders) "gave" the slate's sixth member a seat on the board? Of course not. It would have been the shareholders who gave him the seat, just as it was the shareholders who gave Filipowski a seat.

2. The Expansion Of The Board To Allow Filipowski To Be Added To The Management Slate Did Not Constitute Illegal Vote-Buying.

The plan to expand the board to include more than four outside directors predated this proxy contest, and therefore cannot be the basis of a vote-buying claim. And the particular decision to implement that plan by adding Filipowski to the management slate was in the shareholders' best interests: It gave the shareholders a chance to add depth and experience to the board, if they so chose. The notion that nominating Filipowski somehow disserved shareholders is undermined by the fact that plaintiff offered Filipowski a spot on the Portnoy slate, writing that Filipowski's "wisdom and experience would be of value to us in making CCEL a better company." Tr. 30:16-19.

Not only was expansion of the board in the shareholders' interests, but *plaintiff acquiesced in it*. See *Nevins v. Bryan*, 885 A.2d 233, 246-50 (Del. Ch.) (doctrines of acquiescence, laches, and equitable estoppel apply to proceedings under 8 *Del. C.* § 225), *aff'd*, 884 A.2d 512 (Del. 2005) (TABLE). He knew about the expansion long before the vote. Yet he neither complained about it nor made any effort to reverse it. See D. Portnoy Dep. (I) at 73. It is not as if plaintiff is shy about voicing his concerns. And, yet, when the board was expanded by one seat he sat silently. The reason for this is obvious: *plaintiff planned to fill the additional seat himself*. Only after shareholders rejected his slate (including his nominee for the sixth seat) did plaintiff raise the hue and cry. This is not a valid ground for equitable relief.

In any event, plaintiff cannot establish the elements of an illegal-vote-buying claim in connection with the expansion of the board. He has not shown that the expansion amounted to the exchange of a corporate asset, nor could he. The decision whether to add Filipowski or the sixth member of plaintiff's slate ultimately rested with the shareholders, and agreeing to put that decision to a vote of the shareholders cannot conceivably be seen as giving a corporate asset to

Filipowski. It was no more the grant of a corporate asset to Filipowski than it was the grant of a corporate asset to the Portnoy group.

Nor can plaintiff show that expanding the board had a fraudulent or disenfranchising purpose. There was no fraud because the agreement was fully disclosed to shareholders and filed with the SEC. And who exactly was disenfranchised? Both sides tried to fill the additional seat. The shareholders chose the management slate's nominee. Plaintiff claimed in his answering pretrial brief (at 44) that the disenfranchising effect of the agreement was "to induce the Filipowski Group to vote its shares for the Management Slate." But the answer to the question of "who was disenfranchised?" cannot be the party to the alleged vote-buying agreement, because if the mere agreement to vote shares amounted to disenfranchisement then all voting agreements (including the ones entered into by the Portnoy Group (JX126)) would *per se* invalidate the votes attributed to them. That is not the law.

Rehashing these allegations as an alleged violation of *Blasius*, as plaintiff seeks to do, is redundant. Adding a seat to Cryo-Cell's board did not defraud or disenfranchise anyone. It did not prevent plaintiff from running for a majority of the seats and did not threaten to diminish his influence if his slate had been elected. Plaintiff was able to run candidates for all six seats, and his slate would have had complete and total control of the board had shareholders elected them, notwithstanding the addition of a sixth seat to the board. It was up to shareholders to decide whom to elect to all six seats. *Cf., e.g., MM Cos. v. Liquid Audio, Inc.*, 813 A.2d 1118 (Del. 2003) (the board admitted that it expanded a classified board and filled the seats with its own appointees to diminish the opposition's influence should its two nominees be elected).

In any event, plaintiff's claim rests on a weak factual premise: that Filipowski would have voted for plaintiff's slate but for the alleged vote-buying. That is not true. Both Filipowski

and Roszak made it abundantly clear that at the time of their agreement with the board, they had no intention of voting for plaintiff's slate whether or not the board was expanded to allow him to run on the management slate. Their views are set forth in detail above. *See supra* at 6 – 9.

3. **There Was No Agreement With Filipowski Or Choi Regarding Board Seats (Other Than The Filipowski Agreement Filed With The SEC); In Any Event, There Is Nothing Wrong With Giving A Large Shareholder A Board Seat In Exchange For His Support.**

We have already addressed (*supra* at 34) plaintiff's assertion that the directors, SilkRoad Equity, and/or Choi entered into an agreement to exchange seats on the Cryo-Cell board for votes. For the reasons stated, that claim is factually implausible. Even if there had been such an arrangement, however, it would not amount to vote-buying. To begin with, Filipowski and Roszak were already bound to vote for management under their June 4 voting agreement, and that agreement covered subsequently purchased shares. So any promise of an additional seat did not divorce discretion from ownership, which is the concern identified in this Court's vote-buying cases. And Choi had long been firmly in the management camp.

Moreover, an agreement to buy stock along with the voting rights linked to those shares is not "vote-buying"; it is just about the opposite of vote-buying. There is nothing illicit in a shareholder influencing an election by purchasing stock after the record date and demanding a proxy to vote the stock according to his wishes. Not only is an agreement to vote stock as directed by the post-record-date purchaser permissible, it arguably goes without saying. This Court has explained that "the legally presumed implication, in a [post-record-date] sale of the underlying stock, would be that the seller is contracting to sell and assign all of its rights, title and interest in the stock, including its right to grant a consent or a revocation with respect to a past record date, and that upon request the seller will, in good faith, take such ministerial steps as are necessary (*e.g.*, granting proxies) to effectuate that transfer." *Commonwealth Assoc. v.*

*Providence Healthcare*, 641 A.2d 155, 158 (Del. Ch. 1993) (citing *In re Giant Portland Cement Co.*, 21 A.2d 697, 701-02 (Del. Ch. 1941); *In re Canal Constr. Co.*, 182 A. 545, 548 (Del. Ch. 1936)).<sup>9</sup>

The result remains the same even if management induces the shareholder to purchase additional shares and the votes attached to those shares with a promise of a board seat. For a board seat is not a corporate asset. *Blasius* itself makes that clear:

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 corporations

*Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988) (emphasis altered). In other words, exchanging a board seat for support in an election does not give rise to a vote-buying claim (though it may violate the board's fiduciary duties if it disenfranchises other shareholders by precluding them from voting or coercing them to vote in a certain way).

Other cases reflect the same understanding. In *Mitchell v. Highland-Western Glass Co.*, 167 A. 831 (Del. Ch. 1933), for example, directors who owned and controlled a majority of the stock in Highland-Western Glass Company sold all the assets in the company for stock in Mississippi Glass Company. The sale was challenged on the ground that "the directors of Highland-Western have "used their power to commit the [company] to the sale in order to give themselves a personal advantage and profit," namely by "pre-arrang[ing]" to become directors of Mississippi Glass. The Court, however, rejected the claims on the eminently logical ground that

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<sup>9</sup> Even when a purchaser does not expressly reserve the right to instruct the record-date owner how to vote the shares, such a term is inferred. "It is almost incredible" to suggest that "in the heat of a . . . solicitation battle, [a buyer] would . . . purchase[] the stock without his vendor agreeing to cooperate in the exercise of the voting rights that supplied the entire reason for the purchase." *Commonwealth Assoc.*, 641 A.2d at 158.

someone who acquires a large stake in a company is entitled to seek a say in its governance through board representation:

But certainly that is a circumstance of no objectional import. Why should not the selling interests have insisted that, in view of the large stock ownership which the selling corporation was to acquire in the purchaser, the former should have representation on the latter's directorate? Business prudence would suggest that it should be so and practice in such matters uniformly follows the suggestions of prudence. There is no profit in the office of director . . . . No contention is made, as none could be made in view of the evidence, that anything by way of so-called advantage flowed to these three individuals as a result of the sale, other than what has just been stated, which marks them apart as particularly favored over any other stockholder. Such a so-called advantage is hardly worth the name.

*Mitchell*, 167 A. at 832-33.

Plaintiff's theory is illogical. The whole basis for a vote-buying claim is concern that management may use corporate assets to influence voting. In this case, plaintiff claims that Filipowski and others acquired shares they would not otherwise be interested in acquiring in exchange for board representation. The influence of *board representation*, however, is not an improper one. While the shareholder might vote for the slate that gives him a voice on the board, *the end result is that he gets a voice on the board, which promotes shareholder interests.*

Imagine a scenario in which a board offers seats to large shareholder such as Portnoy to convince him not to run a dissident slate. The shareholder would not have voted for management without the offer, but is willing to do so in exchange for board representation. Under these circumstances, the decision to provide a voice to a substantial minority shareholder cannot possibly be seen as contrary to the interests of shareholders as a whole. Plaintiff's contrary view, that a board may do no such thing, would itself disserve shareholders seeking a voice in corporate government.

Indeed, the reason a board would want to "buy" a large shareholder's vote with a board seat is the large number of shares the shareholder will vote for the board. And yet, the large

number of shares the shareholder has to vote justifies giving him (assuming he is otherwise qualified) board representation and voice in governing the corporation. Exchanging a board seat for the votes of a large shareholder who is otherwise qualified to serve on the board will always be justified because it gives a voice to shareholder interests.<sup>10</sup>

History is replete with such arrangements. In the late 1980's, for example, Texaco faced a proxy fight from Carl Icahn. In response, Texaco's president agreed to give CALPERS (with which it previously did not see eye-to-eye) a board seat in exchange for CALPERS's support in the proxy fight. See Ronald Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 Stan. L. Rev. 863, 872 (1991); Jayne W. Barnard, *Institutional Investors and the New Corporate Governance*, 69 N.C. L. Rev. 1135, 1145-46 (1991); Es Flanigan, *Texaco Stresses the "Share" in "Shareholders,"* L.A. Times, Jan. 25, 1989, 1989 WLNR 2598255. We submitted other such recent agreements as a trial exhibit, to which plaintiff has objected. JX294. It simply cannot be the case that the accepted practice of giving board representation to a large shareholder who might not otherwise support management has all along amounted to illegal vote-buying, without any court saying so. In any event, there was no agreement (other than the one filed with the SEC) regarding board seats for Filipowski, Roszak or Choi.<sup>11</sup>

**B. Plaintiff's Claims Regarding the Conduct of the Annual Meeting Are Also Meritless.**

The Cryo-Cell board notified shareholders that the annual meeting would take place on

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<sup>10</sup> The same result obtains if the claim is analyzed under *Blasius*. Giving a large shareholder a voice in corporate governance disenfranchises no one, and affirmatively enfranchises a large shareholder who will presumably represent the interests of likeminded shareholders. In this case, it is plaintiff who wants to disenfranchise shareholders who do not agree with him.

<sup>11</sup> The claim that Cryo-Cell "bought" Saneron's vote fares no better. We addressed the shaky factual basis for that claim above. Suffice it to say here that the claim is not outcome-determinative because canceling Saneron's votes would not be "sufficient to change the result of the vote." *Hewlett*, 2002 WL 549137, at \*5. Saneron controlled only 253,800 shares.

July 16, 2007, beginning at 11:00 a.m. local time. *See* JX177. The notice did not say at what time the polls would close; but surely notice that voting will take place on a certain day at least suggests the possibility that the polls will remain open for as many business hours as are necessary to facilitate the vote. The meeting took place on the scheduled date at the scheduled time, and concluded by the end of the business day, lasting until about 4:45 p.m. There is no precedent for asking a court to override the majority vote at the meeting, and install a new board representing a minority group unwilling to pay a control premium, all because the polls were kept open for a few hours to facilitate a major shareholder's voting (and in the meantime to allow attendees to have some lunch). In any event, plaintiff has not established that the break had any effect on the election outcome.

**1. The Chair Had Legal Authority To Take A Break.**

Plaintiff contends that the break was an illegal "adjournment." But the break was not an adjournment at all. There is no authority for the proposition that a break of less than three hours in the middle of a meeting started and concluded within the same day constitutes an "adjournment" in a legally significant sense. The word "adjourn" "means literally 'to put off to another day or place.'" Brian Garner, *Dictionary of Modern Legal Usage* 26 (2d ed. 1995). The word derives from the French term "à jour," meaning "to a day." *Id.*; *see also* Shorter Oxford English Dictionary 23 ("3. To adjourn (a meeting): To put off or defer proceedings to another day"). The company did not put off its meeting to another day (or place); it took a short break.

This understanding also comports with this Court's use of the term "adjournment." The Court has referred to a lunch break as a "recess," not an adjournment, *Am. Int'l Rent a Car, Inc. v. Cross*, 1984 WL 8204, at \*2-3 (Del. Ch. May 9, 1984), while innumerable other decisions refer to "adjournment" as an act that results in a meeting being reconvened at a later date, *see, e.g., State of Wisc. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at \*1 (Del. Ch. Dec. 4,

2000). This understanding also respects the policy animating the legal rules applicable to adjournments — namely, that a company should not lightly impose on shareholders the burden and expense of reconvening at a later date. A short break implicates no such concern.

Plaintiff's contrary argument assumes that a break of *any* duration constitutes an adjournment requiring a shareholder vote. It is absurd and unworkable to suggest, for example, that if bylaws require a shareholder vote to adjourn, then a vote must be called to take a five-minute bathroom break. The more natural distinction between a legally significant adjournment and a short break is that the former extends beyond the meeting day, and the latter does not.

Even assuming *arguendo* that a break of less than three hours could amount to an adjournment, Cryo-Cell's bylaws do not require a shareholder vote to adjourn. By their plain terms, the bylaws allow the company to put the decision of whether to adjourn to a vote of shareholders comprising less than a quorum (without such a provision, any vote would have to have a quorum), but do not require that decision to be made by shareholders. Indeed, if the drafters of the company's bylaws intended to require a shareholder vote to adjourn, they would not have done so by means of a negative pregnant in a section entitled "Quorum." See JX16 at CRYO 00986-998, at art. II, para. 8(b) (Am. and Restated Bylaws of Cryo-Cell Int'l, Inc).

In any event, plaintiff agreed to negotiated rules giving the chair authority to adjourn and management clearly had enough proxies at the time of the break (and also at the time plaintiff moved to close the polls) to adjourn the meeting and to keep the polls open. See *supra* at 30 – 31. Of course, the fact that the chair had legal authority to take a break does not necessarily mean that such action was consistent with the board's fiduciary duties. Which brings us to plaintiff's real beef with the board.

2. **There Is Nothing Inequitable About Taking A Break Of Less Than Three Hours To Ensure That A Major Shareholder Had An Opportunity To Correct A Mistake Regarding His Vote.**

Plaintiff claims that the exercise of the chair's authority to call a break violated the board's fiduciary duties under *Blasius*. *Blasius*'s compelling-justification standard is triggered "only where 'the primary purpose of the board's action is to interfere with or impede exercise of the shareholder franchise,'" *MM Cos.*, 813 A.2d at 1130 — in other words, only where "director action . . . has the primary purpose of disenfranchisement." *Mercier v. Inter-Tel (Del.), Inc.*, 929 A.2d 786, 806 (Del. Ch. 2007). Action that "d[oes] not have the effect of precluding or coercing stockholder choice" does not have a primary purpose of disenfranchisement. *Id.* at 818. "That is, the lack of disenfranchising effect provide[s] that the trigger for the [*Blasius*] test [is] not pulled." *Id.*; see also *id.* at 808; *Chesapeake Corp. v. Shore*, 771 A.2d 293, 320 (Del. Ch. 2000).

In this case, the break was not taken to disenfranchise anyone —

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The break was not of indefinite duration (for example, of a duration sufficient to get some number of votes); the chair stated that the meeting would resume at 4:45, and it did. The polls remained open during the break, and anybody who wanted to vote or to change their vote was free to do so. Indeed, plaintiff himself used the break to communicate with shareholders to try to solicit votes. And plaintiff obtained additional proxies during the break, which were faxed to the hotel by The Altman Group. Facilitating voting by an out-of-town shareholder (while allowing attendees to have some lunch) is a "legitimate corporate objective," *Mercier*, 929 A.2d at 810, not an action aimed at disenfranchising voters.

It is, of course, theoretically possible for an adjournment to be coercive. "In a contested election of directors under a plurality vote standard, the continuation of a campaign by the board forces the other side to keep actively soliciting." *Id.* at 818 n.84. Thus, a lengthy delay might

put an impermissible burden on dissidents to maintain their solicitation efforts. A five-month postponement, for instance, where dissidents had expended considerable sums of money on the proxy contest and where proxies solicited by them would have become void before the rescheduled meeting, was held to place an intolerable burden on dissidents. See *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1208 (Del. Ch. 1987). Here, there was no adjournment to a later date, no postponement of the meeting, and, in fact, no continuation — the vote took place exactly when scheduled, commencing on July 16 and concluding that same day. This “short delay . . . did not force . . . stockholders to change their vote”; investors “faced no sanction” in simply having some lunch and waiting out the break; and “there is no evidence that the [incumbent board] made threats of any kind.” *Mercier*, 929 A.2d at 817. “No such exhaustion inequity is extant here.” See *id.* at 818 n.84. A short break, even one in which plaintiff might be expected to maintain his efforts, “does not involve a board asking stockholders to survive a grueling gauntlet.” *Id.* at 818; see *H.F. Ahmanson v. Great W. Fin. Corp.*, 1997 WL 305824, at \*16 (Del. Ch. 1997) (50-day delay of annual meeting by board facing proxy contest did not trigger *Blasius* review). If “in the rough and ready United States of America, our corporate law can expect investors to be able to display fortitude by hewing to their convictions for ninety days or so,” surely the corporate law can expect investors to do so *for less than three hours*. *Mercier*, 929 A.2d at 818.

More importantly, far from precluding shareholders’ ability to vote, the break facilitated it, by ensuring that all shareholders had the opportunity to vote. By the end of the break, all shareholders who wanted to vote had a chance to vote their true intentions, as confirmed by the chair before closing the polls. Where a shareholder has manifested a desire to correct a mistake, the outcome of the election could turn on those votes, and the only remaining act is the mere

clerical task of resubmitting the proxy, surely Delaware law favors keeping the polls open for a matter of hours so the shareholder's voice can be heard. It is plaintiff who wants to disenfranchise one or more of the company's largest shareholders by disregarding (or, worse yet, reversing) their votes.

Just as importantly, plaintiff has no support for his assertion that "[if] the polls had been closed after the conclusion of the Board's presentations . . . the Portnoy Group would have been victorious." Pl.'s Pre-Trial Opening Br. 49. Plaintiff's proxy solicitor admitted that he has no idea when the Choi/Schwab and Apollo votes were changed. Tr. 99-100; Schulman Dep. 214. Moreover, all he could do as to registered shareholders and shareholders with legal proxies was give "guesstimates" of how they might vote. He did not know how many proxy cards the other side had and when they were dated. He did not know how many registered shareholders were at the meeting. He did not know how the holders of legal proxies who attended the meeting would vote. Tr. 136; Schulman Dep. 222-23. And, by his own account, all of his projections incorporated the assumption that Saneron would vote for them — which was a false assumption. Tr. 123. Correcting for that mistaken assumption means, apparently, that management was ahead at 1:00 p.m. even according to Schulman's "guesstimate." There is no evidence allowing a determination of who was "ahead" when the break was announced.

Which brings us to perhaps the most fundamental flaw in plaintiff's request for relief. He seeks to invalidate all votes procured by the incumbent slate during the break, but he cannot prove that there were any such votes. Neither plaintiff's proxy solicitor nor any other witness was able to say when the switch in the Apollo votes was actually transmitted to Broadridge. What is clear is that, *even before the meeting started, Apollo intended to switch its votes to support the incumbents.* The most that plaintiff could possibly establish, then, is that the mere

clerical act of recordation necessary to effectuate Apollo's decision to vote for management may not have been completed before the break was taken. That is no basis on which to overturn the result of an election.

C. Plaintiff's Unclean Hands Preclude His Claim For Equitable Relief.

Plaintiff seeks equitable relief, yet comes to this Court with unclean hands. He broke the rules to seek an advantage in the proxy contest, and used that furtive advantage to induce Krueger to change his 323,617 votes from the management proxy to the dissidents. Portnoy now asks the Court to use its equitable powers to change the results of the election — in particular, to invalidate Krueger's vote for management and reinstate his prior vote for the dissidents, which Portnoy obtained by underhanded measures.

“Well established law dictates that when a party who seeks relief in this Court has violated conscience or good faith or other equitable principles in his conduct, then the doors of the Court of Equity should be shut against him.” *Sutter Opportunity Fund 2, LLC v. Cede & Co.*, 838 A.2d 1123, 1131 (Del. Ch. 2003) (internal quotation marks omitted). Unclean hands has been applied to proxy contest dissidents who cried foul but themselves engaged in intentional misconduct. In *Chris-Craft Industries, Inc. v. Independent Stockholders Committee*, 354 F. Supp. 895 (D. Del. 1973), the Court was faced with cross-claims for injunctive relief in connection with alleged proxy misconduct. It found that “in the hard-fought proxy contest both Chris-Craft and the Committee committed proxy violations.” *Id.* at 921. In response to the dissident's request that the Court weigh the relative misconduct, the Court held, “[s]ince both parties were guilty of illegal conduct in violation of the federal securities laws during a proxy contest, the Court will not lend its aid or grant the relief requested to either opposing party.” *Id.* at 922; see also *SmithKline Beecham Pharms. Co. v. Merck & Co.*, 766 A.2d 442, 449 (Del. 2000) (court does not weigh relative conduct). So too here should Portnoy's misconduct

preclude relief in equity.

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Absent that inequitable conduct, there may never have been a purchase of the shares by SilkRoad, or the challenged vote switch on the day of the meeting. Even if there were something wrong with the SilkRoad purchase and vote change, to allow the Apollo shares to revert to their previous status as of Sunday night would only reward Portnoy's inequitable actions and make his subterfuge the deciding factor in the election.

**D. Remedies**

If the Court were to determine that the defendant-directors breached their fiduciary duties in any respect, the appropriate remedy would *not* be to install the Portnoy slate as Cryo-Cell's directors. Installing the Portnoy slate would negate the will of the majority of shareholders participating in the election. And it would most greatly affect several large investors who are not defendants in this case, who did not serve on the board at the time, who believe in management's strategic vision for the company, and who strongly oppose the Portnoy slate. In particular, Filipowski, Roszak, and Choi substantially increased their investment in the company to the tune of millions of dollars in order to have a greater voice in the choice of the company's leadership and in order to ensure that the Portnoy group did not prevail. The Court heard Filipowski's testimony, in which he reiterated his emphatic opposition to the Portnoy slate. Members of the Portnoy group and their supporters had ample opportunity to make such an economic commitment to the company by buying shares in the days leading up to the election, but declined to do so. And this was not a political election based on the principle of one-man, one-vote. It was a market exercise based on the principle that those with the greatest economic interest in the firm ought to have the greatest say in its leadership. Disenfranchising those shareholders willing

to make a large economic commitment to the company, based on alleged breach of fiduciary duty by the company's directors, finds no support in traditional notions of equity.

Instead, were the Court to find a sufficiently serious breach of fiduciary duty, the appropriate remedy would be to put the issue of the company's leadership to a shareholder vote. One possibility would be to order a special meeting to "re-do" the 2007 election. In our view, that would be inefficient. The fiscal year concludes November 30, and an annual meeting will have to take place within six months. Holding another 2007 election a few months from now, after the end of fiscal 2007 (the necessary lead time), only to be followed shortly afterwards by a 2008 annual meeting would be enormously wasteful and would disserve shareholder interests — in particular, one more election offers one more opportunity for litigation, disruption, and uncertainty concerning the future of the company. The better option would be to order an expedited 2008 annual meeting to take place within a certain number of weeks of the close of the fiscal year. *See North Fork Bancorporation, Inc. v. Toal*, 825 A.2d 860, 871 (Del. Ch. 2000) (“[E]ven if this court were to order a new election, a number of months would pass before it could be held. By then, only a short while would remain before the time for the 2001 Annual Meeting, making it a wasteful exercise to order a special meeting.”), *aff'd*, 781 A.2d 693 (Del. 2001) (TABLE); *Savin Bus. Machs. Corp. v. Rapifax Corp.*, 375 A.2d 469, 472 (Del. Ch. 1977) (“The timing of the mandated meeting clearly falls within th[e Court's] discretionary authority.”).

If the Court were to consider the possibility of requiring defendants to reimburse any costs, several factors would be relevant.<sup>12</sup> First, we note that plaintiff represented to

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<sup>12</sup> To the extent the Court were to require defendants to make any monetary payment, such payment should be made by the company and not the individual directors, who, among other things, are entitled to indemnification in the company's charter. *See* Paragraph Sixth of Amended and Restated Certificate of Incorporation of Cryo-Cell International, Inc., attached as Exhibit 84 of the Appendix. The

shareholders in his proxy statement that he would “seek reimbursement for all costs and expenses associated with the proxy solicitation in the event that [his] Slate is elected to the Board,” and that those costs were “estimated to be up to \$50,000 in total.” JX120. After telling shareholders that he intended to stick them with the bill, but only for up to \$50,000, plaintiff now has no equitable claim to reimbursement in excess of that number. Second, requiring defendants to pay plaintiff’s costs in connection with any future proxy contest would seem to make it a foregone conclusion that there *will be* a future proxy contest (and future litigation, disruption, and uncertainty). Better to let plaintiff rationally weigh his economic self-interest in pursuing another proxy contest without placing a thumb on the scale in favor of another run. And third, the corporation would have had to pay the costs of a 2008 annual meeting no matter the outcome of this litigation, so there is no reason to require defendants to pay for those future costs.

### CONCLUSION

For the foregoing reasons, and based on the evidence submitted at trial, judgment on the merits should be entered in favor of defendants on all claims.

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(continued...)

Court may take judicial notice of the charter. See D.R.E. 201.