IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP,

Plaintiffs,

v.

JAMES L. HOLBROOK, JR., *et al.*,

Defendants.

JAMES L. HOLBROOK, JR., *et al.*,

Counterclaim-Plaintiffs,

v.

DONALD A. KURZ and SEMS DIVERSIFIED VALUE, LP,

Counterclaim-Defendants,

and

JAMES L. HOLBROOK, JR., *et al.*,

Third Party Plaintiffs,

v.

TAKE BACK EMAK, LLC,

Third Party Defendants,

CROWN EMAK PARTNERS, LLC,

Counterclaim and Third-Party Plaintiff,

v.

DONALD A. KURZ, *et al.*,

Counterclaim and Third-Party Defendants.

C.A. No. 5019-VCL

PUBLIC VERSION
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PLAINTIFFS' POST-TRIAL BRIEF

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PRELIMINARY STATEMENT

This post-trial brief of the plaintiffs and counterclaim and third-party defendants ("Plaintiffs") supplements our pre-trial brief (cited herein as "Pls.' Br. __) in light of the evidence adduced at trial and the arguments made in the pre-trial briefs filed by EMAK Worldwide, Inc. ("EMAK" or the "Company") and certain director defendants (cited herein as "EMAK Br. __") and by Crown EMAK Partners, LLC ("Crown") and certain other director defendants (cited herein as "Crown Br. __"). Our brief focuses on the following five issues:

(i) the legal deficiencies of the Crown Consents;

(ii) the breach of fiduciary duty that allowed Crown to deliver the Crown Consents on December 18, 2009;

(iii) the validity of the consent executed by Peter Boutros;

(iv) the meritless disclosure claims against Donald Kurz, Sems Diversified Value LP, and Take Back EMAK, LLC ("TBE");

(v) the irrelevance of the lack of a DTC omnibus proxy on December 21, 2009, since (a) EMAK already possessed a Cede breakdown, which is identical in substance to a DTC omnibus proxy of the same record date, for purposes of verifying the number of shares (*i.e.*, positions) that can be voted by each DTC participant; (b) Teresa Tormey, EMAK's Chief Administrative Officer, General Counsel and Secretary, failed to order a DTC omnibus proxy (or to timely notify TBE that one was missing) after she received TBE's consents and Certificate and a notice from the inspector of elections that he needed a DTC omnibus proxy to tabulate the TBE consents; and (c) TBE's subsequent delivery of Broadridge Client Proxies

confirmed that an absolute majority of the common stock had consented as of the record date.

A common thread of inequitable conduct runs through the key issues and events in this case. In the late summer of 2009, when the critical Burger King account (and 50% of the Company's revenue) was slipping away, and Crown was threatening to seize control of the Company if its Series AA Stock was not restructured on a no-discount basis, CEO James Holbrook determined that the appropriate course of action was to grant full voting rights to Crown in order to block a consent solicitation that could otherwise elect a new Board majority supportive of replacing him as CEO. When TBE initiated its consent solicitation, Holbrook, EMAK and Crown tailored an Exchange Transaction that would have made it impossible for the consent solicitation to succeed. After abandoning the Exchange Transaction on the eve of the injunction hearing, Holbrook, EMAK and Crown cooperated in a new gambit to block TBE's consent solicitation. EMAK stood aside as Holbrook and his management team, who are slated to receive large severance and bonus payments, consented to bylaw amendments that purported to give control of a shrunken Board to Crown. On December 21, 2009, the final day of the TBE consent solicitation, Tormey decided not to order an omnibus proxy from DTC and not to promptly inform TBE and the Board that no omnibus proxy had been delivered.

The acts of EMAK's fiduciaries to disenfranchise common stockholders are contrary to Delaware law and cannot prevent the seating of newly elected directors. As discussed below and in the pre-trial brief, Crown's novel board-shrinking bylaw amendments are violative of Section 141(b) of the DGCL and the Board's fiduciary obligation to defend against the conceded threat posed by Crown and to protect the franchise rights of common stockholders. The result of TBE's consent solicitation is clear. Amidst an active consent contest in which both sides

published abundant information and leading independent proxy advisors (RiskMetrics Group and Glass Lewis) recommended change, fully informed holders of an absolute majority of common stock executed consents that were delivered to EMAK by the deadline of December 21, 2009. The record holder consents and the Broadridge consents are all legally valid.

Under Delaware law, it was perfectly legitimate for Peter Boutros to execute a consent in conjunction with his contract to sell his economic interest in 150,000 shares of unvested restricted stock. The Company's lack of an omnibus proxy on December 21 -- the sole basis on which the inspector of elections invalidated the Broadridge consents -- is of no moment. Delaware law allows this Court to require a corporation "to treat the equitable holder as a registered holder for purposes of counting votes in an election contest, in order that equitable rights are respected." *Len v. Fuller*, 1997 WL 305833, *3 (Del. Ch. May 30, 1997). Here, the Broadridge consents clearly express the voting rights of the equitable holders, the DTC omnibus proxy was readily available to EMAK, and its only substantive information is duplicative of the Cede breakdown that was already in EMAK's possession that contains all the position information necessary to tabulate the votes of the banks and brokers.

ARGUMENT

I. THE CROWN BYLAW AMENDMENTS ARE LEGALLY INVALID

Plaintiffs' pre-trial brief demonstrates how Sections 109(b) and 141(b) of the DGCL forbid bylaw amendments that purport to (i) set the number of directorships below the number of sitting directors and (ii) permit the election of a single successor to multiple sitting directors. (Pls.' Br. 22-26) Neither the EMAK brief nor the Crown brief addresses plaintiffs' arguments or cites any legal authority supporting Crown's bylaw amendments.

EMAK cites *Roven v. Cotter*, 547 A.2d 603 (Del. Ch. 1988), for the unremarkable proposition that directors have no vested right to serve a full term. (EMAK Br. 27) *Roven* observes that Sections 141(b) and 141(k) of the DGCL expressly allow for the ***removal*** of a director in the middle of a term. 627 A.2d at 607-08. That is no help to Crown, as Crown did not seek or obtain the consent of an absolute majority of the common stock in order to effectuate a valid removal. EMAK quotes *Roven*'s reference to the "expressed will of the majority," even though that phrase was written in the context of the votes needed to remove a director pursuant to Section 141(k). *Id.* at 608. Here, it is the "expressed will of the majority," as reflected in the TBE consents, whose "resolve should not be thwarted ... even by a determined minority[,]" *id.*, as represented by the Crown Consents, which are signed by holders of a minority of EMAK's common stock.

Crown relies on *Stroud v. Milliken Enter., Inc.*, 585 A.2d 1306 (Del. Ch. 1988), which upheld a provision in a Certificate of Incorporation that set qualifications for directors and required the "automatic termination of directors because of a lack of qualification." *Id.* at 1309. The Court analogized the "failure to remain qualified" to "a resignation." *Id.* The Court also observed that Section 141(b) expressly provides that the "Certificate of Incorporation or bylaws

may prescribe other qualifications for directors [apart from stock ownership]." *Id.* at 1308 (quoting 8 *Del. C.* § 141(b)). Here, directors of EMAK are not facing termination of their service because of a lack of any "qualification." Crown did not seek to adopt a qualification bylaw. Instead, Crown solicited consents purporting to reduce the number of directorships below the number of sitting directors, in violation of Section 141(b), and purporting to end the terms of sitting directors in a manner not authorized by Section 141(b).

Crown's other authorities are no more helpful. *Chesapeake Corp. v. Shore*, 771 A.2d 293 (Del. Ch. 2000), involved a bylaw amendment that de-staggered a board of directors pursuant to Section 109(b) (where the classified board had been established in the bylaws), and the subsequent removal of the directors without cause pursuant to Section 141(k). *Id.* at 345-47. The restrictions of Section 141(b) were not implicated in *Chesapeake*. Nor were the restrictions of 141(b) at issue in *Kidsco Inc. v. Dinsmore*, 674 A.2d 483 (Del. Ch. 1995), a case cited by Crown recognizing that bylaws are subject to amendment.

EMAK and Crown have failed to explain how Crown's novel approach to eliminating directorships and removing directors is consistent with the words of Section 141(b) and the "necess[ity] that a specific number of directorships be in place at all times[.]" 1 David A. Drexler et al., *Delaware Corporate Law and Practice* § 13.01[2], at 13-5 (2009).

II. ALTERNATIVELY, DELIVERY OF THE CROWN CONSENTS WAS THE PRODUCT OF A BREACH OF FIDUCIARY DUTY, AIDED AND ABETTED BY CROWN

At trial, Crown manager and EMAK director Jeffrey Deutschman admitted the truth of the following statements contained in the brief filed by EMAK and the incumbent directors on November 29, 2009:

> Crown was threatening to take draconian measures to ensure it received its liquidation preference, irrespective of the effect such measures would have on the value of the common stock or the future of EMAK.

(JX 141 at 41; Tr. 249-50)

> Crown was threatening to pursue a variety of options through which it would recoup most or all of its $25 million liquidation preference, which would clearly harm the common stockholders.

(JX 141 at 16; Tr. 250-51)

> the Board of Directors perceived a danger from Crown based upon Crown's repeated statements that it would force EMAK to honor its liquidation preference despite the effect it would have on the value of the common shares.

(JX 141 at 34; Tr. 253)

> **if the Exchange Transaction were not consummated, the Preferred Stockholder could, and was threatening to, take unilateral actions – including** purchase of additional shares, **partnering with existing holders to assume control of the company**, seeking to buy the company, or initiation of litigation – **that could have far more severe consequences for the common stockholders**. ...The Exchange Transaction reduced this pressure, avoided hostile actions by Crown, and ultimately put the common stockholders in a position to command a better price for their shares than they could under the old capital structure.

(JX 141 at 43-44; Tr. 255) (emphasis added)

> it would be within Mr. Ackerman's character to commence litigation against EMAK if he believed there was no other way to recoup his investment.

(JX 141 at 12; Tr. 252)

Notwithstanding the admitted danger posed by Crown, when Crown proceeded to take unilateral action to seize control, the incumbent directors took no defensive action and facilitated the transfer of control to Crown at the earliest possible date. They refused to support Kurz's motions to set a record date for the Crown consent solicitation more than ten days after Crown's delivery of its initial consent. (Tr. 74-75; TX 134) The incumbents' refusal to set a post-December 21 record date is not surprising. It had the same purpose and effect as the original Exchange Transaction – to transfer control to Crown as a means of blocking TBE from delivering consents of an absolute majority of the common stock to change the composition of the Board. Deutschman admitted at trial that blocking Kurz was Crown's objective. (Tr. 221, 223, 246-47; *see* JX 151 ¶ 18)

Deutschman admitted that Crown wanted to seize board control in order to facilitate the negotiated restructuring of its Series AA Stock, a negotiation that has been in abeyance since mid-September 2009, when Peter Ackerman rejected Holbrook's last proposal by hanging up on him and threatening to seize control. (Tr. 238-40; TX 52) Deutschman testified that it "certainly is helpful" for the restructuring negotiation if Crown has two out of three board seats (Tr. 241), especially since Crown has been careful not to commit to any restrictions on its conduct or on its discretion in appointing two directors. (Tr. 256)

Crown has good reason to favor a scenario in which Crown appoints a Board majority and Holbrook is the negotiator for EMAK, rather than face a Board majority that backs Kurz as CEO. Kurz, unlike Holbrook, openly contended that it is not necessary to restructure Crown's security, especially if a proposed restructuring is at the expense of the rights of the common stockholders. (*Compare* TX 45 at EMK02119 *and* TX 49 at EMK02684-87 (Kurz) *with* TX 45 at EMK02122 (Holbrook)) Crown desperately favors Board control as a means of restructuring

its Series AA Stock, because, as Deutschman testified, "it's a security that is only valuable by being paid off immediately," and if EMAK keeps operating without a change of control or dissolution, the liquidation preference does not become due. (Tr. 225, 253) Moreover, the Series AA Stock does not reap the benefits from a profitable business strategy, since the conversion price of $9 per share is far above current market price of less than $1 per share.

The Board's decision not to set a post-December 21 record date (or otherwise defend against Crown) must be analyzed under the rubric of entire fairness, because a majority of the directors who so voted had a disqualifying self-interest. The Delaware Supreme Court held in *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), that entire fairness review, not the business judgment rule, applied to a board decision to decline a merger because "a director-specific analysis establishes ... that a majority of the Board was conflicted." *Id.* at 707. The *Gantler* Court reasoned that entire fairness review is appropriate "where shareholders are able to establish a cognizable claim of self-interested director behavior," even "in a non-transaction context" involving a subject over which Delaware law allocates broad powers to directors. *Id.* at 708 n.33. Entire fairness review applies here for the same reason.

Six directors attended the critical Board meeting of December 16, 2009. (Tr. 73-74; TX 134) The affirmative vote of four directors was needed to set a post-December 21 record date for the Crown consent solicitation. 8 *Del. C.* § 141(b) (requiring "vote of the majority of the directors present at a meeting"); TX 84 § 3.8 (same). Only Kurz voted to do so. (Tr. 74-75; TX 134) Three of the other five directors (Deutschman, Ackerman and Holbrook) had a disqualifying self-interest in the decision not to set a post-December 21 record date.

Crown designees Jeffrey Deutschman and Jason Ackerman both lack independence from Crown, the beneficiary of an early record date. Deutschman is the Crown manager who

spearheaded Crown's consent solicitation by signing Crown's agreement with Georgeson, Inc. and soliciting EMAK employees on Crown's behalf. (TX 152; TX 158; Tr. 230) Deutschman also signed the Exchange Transaction on behalf of Crown on the instruction of Peter Ackerman, the key decisionmaker for Crown. (Tr. 246; TX 69 at EMK02364; TX 151 ¶ 1). Jason Ackerman is the nephew of Peter Ackerman and a longtime key employee of Crown Capital (JX 146 ¶ 13; JX 147 ¶ 13; JX 148 ¶ 13; JX 149 ¶ 13), which was established to provide services to companies in which Peter Ackerman invested or intended to invest. *Ackerman v. Comm'r of Internal Revenue*, 2009 Tax. Ct. Memo LEXIS 81, *12-14 (T.C. Apr. 15, 2009). The votes cast by Deutschman and Jason Ackerman in opposition to deferring the setting of a record date until December 21 and in opposition to setting a record date of December 24 served the interest of Crown, which favored an early record date so that TBE could not remove Holbrook as a director and CEO and elect a board majority supportive of Kurz. (Deutschman 1/13/10 at 9, 52-53, 60; Tr. 221, 223) Given their affiliation with Crown or its affiliates, Deutschman and Jason Ackerman were "incapable of making a decision with only the best interests of [EMAK] in mind." *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 939 (Del. Ch. 2003) (internal quotation omitted).

Holbrook's vote was similarly tainted by self-interest, given that Kurz and TBE openly advocated terminating Holbrook for cause in light of his dissembling to the Board respecting the Burger King account. (Tr. 53-57, 60; TX 49 at EMK02690; TX 109 at 2; TX 110 at 3) Holbrook executed a Crown consent on December 15 (TX 274 at EMK019604), and his vote against Kurz's motions on December 16 allowed Crown to deliver consents immediately and argue that there were no vacancies for the TBE nominees to fill. Given that Holbrook was "financially motivated to maintain the status quo," and given that he decided to join Crown

rather than defend against Crown soon after filing a brief admitting the threat posed by Crown, "a duty of loyalty violation can reasonably be inferred." *Gantler*, 965 A.2d at 707.[1]

The votes against setting a post-December 21 record date, and the Board's failure to take any defensive action respecting Crown, do not meet the standards of entire fairness or fair dealing. EMAK's Board did not establish a committee of independent directors or obtain legal advice from independent counsel, despite Kurz's written suggestion that they do so. (TX 140 at 2, 3-4) Instead, the Board was advised by the same law firms that represented them, including clearly conflicted Jeffrey Deutschman and James Holbrook, in litigation brought against them in this Court and in California Superior Court seeking monetary damages. (*See* TX 56; TX 141; TX 146)

Those conflicted counsel – who had just authored and filed a brief articulating the threats posed by Crown and the "compelling justification" for defensive action (TX 141 at 40-42) – provided the Board with no written legal analysis and no detailed oral analysis addressing any of the pertinent legal questions, including those raised in Kurz's email of December 13 (TX 140):

(i) the validity of Crown's unprecedented effort to shrink the size of the Board below the number of sitting directors;

(ii) the threat posed by Crown if it obtained control of the Board;

(iii) the case law applicable to setting a record date;

(iv) the case law applicable to adopting a supermajority provision for stockholder amendments to bylaws;

(v) whether any defensive action to the Crown consent solicitation is justified.

[1] In a deposition taken less than a month after the December 16 board meeting, Holbrook professed not to recall what record-date motions he supported or opposed or why, even when shown notes indicating how he had voted. (Holbrook 1/14/10 at 37-40, 53-62; TX 134)

(Tr. 187-90) Instead, conflicted counsel treated with complete deference a consent solicitation initiated by a preferred stockholder with antagonistic economic interests that needed the support of only 22% of the common stock in order to effect an unprecedented method of board shrinkage and to block a consent solicitation seeking an absolute majority of the common stock to elect new directors. Deutschman testified that counsel orally advised on December 16 that "it would be a mistake to take any action to favor one consent over another." (Tr. 229) There is no record evidence of any legal advice that setting a record date of December 24 or December 31, in order to afford the Board time to evaluate its defensive options and allow for the completion of the TBE consent solicitation, would constitute a breach of fiduciary duty.[2] Counsel did advise the non-Crown directors on December 17 that Crown might assert a *Blasius* claim if the Board took defensive action. (Tr. 160) There is no record of counsel advising of the litigation risks if the Board failed to take defensive action.

The Board should have obtained from independent counsel and an independent proxy solicitor a thorough analysis of the potential defensive tactics suggested in writing by Kurz, such as a supermajority requirement for stockholder amendments to the bylaws. (TX 140) The Delaware Supreme Court has declared: "depending upon the circumstances, **the board may respond to a reasonably perceived threat by adopting** individually or sometimes in combination: advance notice by-laws, **supermajority voting provisions**, shareholder rights plans, repurchase programs, etc." *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 n.38 (Del. 1995) (emphasis added). *See also Gaylord Container S'holders Litig.*, 753 A.2d 462 (Del.

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[2] There are no minutes of the December 16 Board meeting. The handwritten notes from the meeting and Kurz's recollection are not clear about the precise advice on the question when delay in setting a record date can be appropriate. (TX 134 at EMK021063; Tr. at 149-50) Holbrook did not recall any specifics about the discussion informing the motions about setting a record date. *See supra* note 1.

Ch. 2000) (granting summary judgment in favor of defendants for challenge to supermajority vote requirement for stockholder bylaw amendments, among other defensive measures). In *Chesapeake*, this Court invalidated under *Blasius* a supermajority bylaw at "preclusive levels" in the face of the "mild threat [of an] all-shares, all-cash tender Tender Offer and supporting Consent Solicitation." 771 A.2d 345. Here, EMAK was facing an admitted threat to force a "no-discount" restructuring or redemption of the Series AA Stock by seizing control of the Board with the support of only 22% of the common stock, including unvested stock held by a conflicted CEO and subordinate employees who may lose their restricted stock, severance and bonus if they cross him. (TX 141; Tr. 181-85)

The defendants invoke 8 *Del. C.* § 141(e). (Crown Br. 38; EMAK Br. 30) This is not a situation in which the directors can assert reliance on counsel as a defense. In *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988), the Delaware Supreme Court cautioned that Section 141(e) applies only to good-faith reliance on experts "'selected with reasonable care,'" and that a Board "may not avoid its active and direct oversight in a matter as significant as the sale of corporate control." *Id.* at 1281 (quoting Section 141(e)). The Delaware Supreme Court more recently cautioned that reliance on expert advice is no defense if the subject matter "was so obvious that the board's failure to consider it was grossly negligent regardless of the expert's advice or lack of advice." *Brehm v. Eisner*, 746 A.2d 244, 262 (Del. 2000).

Here, the incumbents had filed a brief emphasizing the threat from Crown. (JX 141 at 16, 34, 41, 43-44) Nevertheless, the directors allowed Crown to assert control at the earliest possible date. We are aware of no case suggesting that directors can avoid the issuance of declaratory relief because they consulted with conflicted counsel when they decided to take no

action, formulate no defensive strategy, and form no independent committee in the face of an admitted imminent threat to common stockholders.

Crown cites *Empire of Carolina, Inc. v. Deltona Corp.*, 501 A.2d 1252 (Del. Ch. 1985), *aff'd*, 514 A.2d 1091 (Del. 1986), for the proposition that "the Board was under no obligation to interfere with the Crown Consent." (Crown Br. 38) Yet in *Empire of Carolina*, the Delaware Supreme Court noted the "traditional and primary authority upon a board of directors to fix a record date" and upheld the fixing of a particular record date as a "reasonable exercise of business judgment" and "reasonably related to the issuance by [the company] of new stock to [a third party]" in a transaction "entered into for an entirely bona fide business purpose." 514 A.2d at 1097. *Empire of Carolina* hardly supports the abdication of board authority to fix a record date in the face of an admitted threat to the corporation and its common stockholders. Moreover, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954-55 (Del. 1985), obliges the Board to protect the corporation and its common stockholders from threats posed by a hostile party seeking to seize control.[3]

Crown also cites *Golden Cycle, LLC v. Allan*, 1998 WL 276224 (Del. Ch. May 20, 1998), for the proposition that "had the Board decided to take action to favor the TBE Consent over the Crown Consent, it would have breached its fiduciary duty." (Crown Br. 39) *Golden Cycle* stands for the exact opposite. The *Golden Cycle* Court expressed "doubt" whether "the act of fixing a record date, essentially a ministerial act, should be examined under *Unocal*'s enhanced duty standard" and observed that the setting of the record date in that case was not "remotely

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[3] *See also Louisiana Municipal Police Employees' Retirement System v. Fertitta*, 2009 WL 2263406, *8 n.34 (Del. Ch. July 28, 2009) ("To say that there is *no per se* duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board's failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover.") (Ex. A hereto).

comparable to the action taken in *Blasius*," because there was no suggestion in the record that [suggested problems resulting from the record date] will preclude or even substantially interfere with the ability of the Global stockholders to remove and replace the entire board, should they choose to do so." 1998 WL 276224, at *7, 8. *See id.* at *8 ("the significantly concentrated ownership of Global's common stock strongly suggests that whatever effects the setting of the March 30 record date may have, it will not, as a practical matter, interfere with the ability of the stockholders as a whole to remove the directors").

The same is true here. A December 24 or December 31 record date would not prevent Crown from soliciting and delivering consents from a mere 22% of the common stock. When asked at deposition whether it mattered to Crown if its consents were delivered before or after December 21, Deutschman testified:

> Actually what I thought was, if Crown's were delivered earlier, it would just make things more clear but if they were delivered afterwards, it would still have the same effect. So I just thought one was preferable than the other but I think in terms of substance, it would have no difference.

(Deutschman 1/13/10 at 30-31) Deutschman did not ask any stockholder to return a Crown consent before December 21. (*Id.* at 32) On this record, there can be no plausible argument that setting a post-December 21 record date would have constituted a breach of fiduciary duty.

The breach of duty resides in the Board's failure to set a post-December 21 record date or otherwise defend against Crown. That inaction was motivated by the improper purpose of facilitating the transfer of control to Crown for no payment, despite the acknowledged threat posed by Crown, in order to block holders of an absolute majority of the common stock from removing incumbents Holbrook and Rednor and electing directors who would stand up to Crown. As discussed in plaintiffs' pre-trial brief, the appropriate remedy for that breach of duty,

aided and abetted by Crown, is not to recognize the effectiveness of the delivery of the Crown Consents on December 18, 2009. (Pls.' Br. at 30-32)

III. THE BOUTROS CONSENT IS VALID

At trial Crown previewed some creative arithmetic by which it will apparently argue that its consent solicitation was more successful than TBE's. (Tr. 176, 180, 232, 344) The only numbers that matter, however, are those showing that on December 21, 2009, TBE delivered to EMAK's registered office consents to remove and elect directors signed by persons who held an absolute majority of EMAK's common stock. (Tr. 330; Pls.' Br. 39-40 & Ex. A)

Defendants attack that absolute majority by attacking the validity of the consent signed by record stockholder Peter Boutros, who possessed the right to vote 150,000 shares of restricted common stock. According to defendants, Kurz engaged in illegal vote buying as to Boutros. (EMAK Br. 43-45; Crown Br. 46-48) For the reasons set forth below, that claim must fail, and the consent signed by Boutros is valid.

EMAK's pre-trial brief highlights one fatal flaw in defendants' argument: "Mr. Kurz did not expend corporate funds to purchase those shares." (EMAK Br. 45) *All* of the modern vote-buying cases cited by defendants discuss the significance of the use of corporate resources to purchase votes. As explained in *Hewlett v. Hewlett-Packard Co.*, 2002 WL 549137 (Del. Ch. Apr. 8, 2002):

> **Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder. Management, on the other hand, may not use corporate assets to buy votes** in a hotly contested proxy contest about an extraordinary transaction that would significantly transform the corporation, **unless** it can be demonstrated, as **it** was in Schreiber, that management's vote-buying activity **does not have a deleterious effect on the corporate franchise.**

Id. at *4 (citing *Schreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982)) (emphasis added). *See also Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 74 (Del. Ch. 2008) (quoting the above-quoted

passage from *Hewlett* and finding breach of duty for "intentionally using corporate assets to coerce Saneron in the exercise of its voting rights"); *Henley Group, Inc. v. Sante Fe S. Pac. Corp.*, 1988 WL 23945, *7 (Del. Ch. Mar. 11, 1988, revised, Apr. 12, 1988) (allegedly, "O & Y was given representation on the Sante Fe Board in exchange for agreeing to support the restructuring and the 'management' slate of director nominees at the forthcoming annual meeting"); *Wincorp Realty Investments, Inc. v. Goodtab, Inc.*, 1983 WL 8948, *5 (Del. Ch. Oct. 13, 1983) (declining to enjoin transaction in which shareholder allegedly purchased votes, noting: "in *Schreiber* the challenged transaction was not between two shareholders as such, but rather it was an agreement between the corporation , through its management, and a shareholder"); *Schreiber*, 447 A.2d at 23 (the corporation "purchased or 'removed' the obstacle of Jet Capital's opposition"). Mr. Kurz's transaction with Mr. Boutrous was a personal obligation funded with personal assets. (TX 317; Tr. 110)

A second fatal flaw with defendants' vote-buying claim is that the Kurz-Boutros transaction does not involve the public policy problem "whereby the stockholder divorces his discretionary voting power" from his economic interest. *Schreiber*, 447 A.2d at 23. As Chancellor Allen explained in *Commonwealth Assocs. v. Providence Health Care, Inc.*, 641 A.2d 155 (Del. 1993), the law "has long discouraged the sale of votes **unconnected** to the sale of stock." *Id.* at 157 (emphasis added). Here, Boutros contracted to transfer to Kurz *his entire economic interest* in the 150,000 shares of restricted stock that he agreed to vote in favor of the TBE nominees. The parties' Purchase Agreement provides that Kurz bought from Boutros "all shares of common stock ... that Seller owns and is entitled or permitted to sell" as well as "all rights to receive all other shares of the Company that Seller is or may hereafter be entitled or permitted to sell ...." (TX 317 at KURZ05499) Boutros retains no economic interest in the

150,000 shares. Kurz would obtain all rights to those 150,000 shares on March 3, 2011, the "Vesting Date," so long as Boutros did not resign or was not terminated for cause prior to that date (in which case some or all of those shares may be forfeited to EMAK). (*See id.* at KURZ05503-04)[4]

There is no public policy against Kurz contracting with Boutros about the voting of shares that Boutros contracted to transfer to Kurz. Public policy favors vesting Kurz with the power to direct the vote as to shares for which he is the purchaser of the residual economic interest. *Haft v. Haft*, 671 A.2d 413, 421 (Del. Ch. 1995) ("A powerful argument can be advanced that generally the congruence of the right to vote and the residual rights of ownership will tend towards efficient wealth production."); *Commonwealth Assocs.*, 641 A.2d at 157 (sale of votes unconnected to the sale of stock "misalign the interests of voters and the interests of the residual corporate risk bearers"). Boutros's express grant of a proxy to Kurz is consistent with how the law treats post-record date transactions, by placing voting power where it belongs – in the purchaser. *See Commonwealth Assocs.*, 641 A.2d at 158 ("the legally presumed implication, in a 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

[4] The enforceability of the transfer restrictions and forfeiture provision in the Restricted Stock Grant Agreement as to the 150,000 shares should not be presumed. Defendants have not put into the record a complete, signed copy of a Restricted Stock Grant Agreement between EMAK and Boutros. Defendants cannot establish the existence of a transfer restriction, or a violation of the Restricted Stock Grant Agreement, without record evidence of a binding contract. Moreover, there is reason to question whether Boutros faced any restriction on his ability to transfer 50,000 of those shares as of December 20, 2009. EMAK delivered to Boutros a signed letter, dated March 3, 2008, stating that Boutros has been awarded 150,000 shares of restricted stock effective March 3, 2008, and that "[t]he stock will vest equally (one-third per year) over a three-year period." (TX 317 at KURZ05502) EMAK's "Options and Awards Summary" for Boutros also states that 50,000 shares had fully vested on March 3, 2009. (*Id.* at KURZ05501) Neither document mentions any transfer restriction on fully vested shares.

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").

The defendants' attack on the Kurz-Boutros transaction is fundamentally misconceived. Assuming *arguendo* that the Restricted Stock Grant Agreement is binding,[5] it is irrelevant that "Mr. Boutros had ***no shares*** that could be transferred as of December 20, 2009." (EMAK Br. 14) (emphasis in original). Mr. Boutros could transfer his economic interest in all 150,000 shares plus the right to vote such shares. The Restricted Stock Grant Agreement contains no prohibition on contracting in the present to transfer stock in the future once it becomes fully vested and free of transfer restrictions. (*See* TX 317 at KURZ05503) When EMAK was intent on requiring employees to retain the economic interest in shares, they knew how to do so. In the Resale Restriction Agreement between Boutros and EMAK respecting 25,000 restricted stock units that had not vested as of the October 22, 2009 record date, Boutros agreed not to "sell, **contract to sell**, grant any option to purchase, **transfer the economic risk of ownership in**, make any short sale, pledge **or otherwise transfer or dispose of** any Shares (or **any interest in any Shares**) until the Shares have been released from the foregoing resale restrictions." (TX 240) (emphasis added). The Restricted Stock Grant Agreement does not contain restrictions on contracting to sell an economic interest in the 150,000 shares of restricted stock. Therefore, no such restriction exists. *See* 8 *Del. C.* § 202(a) (requiring transfer restriction to be in writing). In the absence of an enforceable restriction on the sale of an economic interest in the Boutros restricted stock, there is no issue of buying votes not connected to shares.

Functionally, there is no difference between the Kurz-Boutros transaction and any post-record date contract to buy stock. By virtue of their contract, Boutros transferred to Kurz

[5] *But see supra* note 4.

beneficial ownership of the 150,000 shares of restricted stock, and Kurz bought the voting rights along with the economic interest. Kurz never stopped soliciting Boutros's vote. (Tr. 21-24; TX 272) The fact that Boutros's lawyer called Kurz and negotiated the sale of Boutros's economic interest in the shares does not render Boutros's vote legally problematic.

Kurz would be deemed the beneficial owner of the 150,000 shares under federal and state law. When EMAK issued the 925,000 total shares of restricted stock, it filed a Form 4 for each recipient, and the Form 4 for Peter Boutros states that he is the beneficial owner of 150,000 shares.[6] For purposes of SEC Rule 13d-3(a)(1), "a beneficial owner of a security includes any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares [v]oting power which includes the power to vote, or to direct the voting of, such security[.]" 17 CFR 240.13d-3(a)(1). *See also Rosenberg v. XM Ventures*, 274 F.3d 137, 144 (3d Cir. 2001) ("13d-3 focuses on the person who can actually vote the shares, rather than the record owner of the stock"). Since EMAK's Board granted immediate voting rights to the recipients for all of the unvested restricted stock,[7] Kurz obtained the voting rights in his contract with Boutros, and thus became the beneficial owner as defined in SEC Rule 13d-3.

Section 203(c)(9) of the DGCL contains various alternative statutory definitions of the term "owner," at least four of which apply to Kurz and the 150,000 shares. First, Kurz "[b]eneficially owns such stock." 8 *Del. C.* § 203(c)(9)(i). Section 203 does not define

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[6] The Form 4s filed by EMAK on March 5, 2008 are attached hereto as Exhibit B.

[7] Deutschman admitted at trial that the grant of immediate, full voting rights to the employees was not disclosed to the Board of Directors when they approved the issuance of the 925,000 shares of unvested restricted stock. (Tr. 214 ("As to the terms of the RSUs voting or not voting, I expressed to Mr. Kurz that was not something that was highlighted at the board level, but it's also possible I missed something at the meeting."))

"beneficial ownership," but Kurz fits the definition under SEC Rule 13d-3, discussed above. Second, Kurz has "the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time) pursuant to any agreement, arrangement or understanding[.]" 8 *Del. C.* § 203(c)(9)(ii)(A). Kurz contracted for the right to acquire the shares once they vest in March 2011, and Boutros can then transfer them. Third, Kurz possesses "the right to vote such stock pursuant to any agreement, arrangement or understanding[.]" 8 *Del. C.* § 203(c)(9)(ii)(B). Boutros granted Kurz an irrevocable proxy for the shares in their Purchase Agreement. (TX 317) The caveat to subsection 203(c)(9)(ii)(B) does not apply, since the proxy granted by Boutros is not revocable. Fourth, the Kurz-Boutros Purchase Agreement is an "agreement, arrangement or understanding for the purpose of acquiring [and] voting ... stock[.]" 8 *Del. C.* § 203(c)(9)(iii). This statutory definition has been construed broadly to encompass contingent agreements as well as non-contingent contracts. *Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 631-32 (Del. Ch. 1989).

Additionally, defendants did not establish at trial that Kurz acted with any intention to induce a violation of any agreement between Boutros and EMAK. Kurz was cognizant of the absence of any "contract to sell" prohibition in the Restricted Stock Grant Agreement. (Tr. 31) As for the 25,000 restricted stock units supposedly covered by the Resale Restriction Agreement, they have no relevance to this Section 225 proceeding,[8] and counsel for Boutros advised Kurz that he did not believe that the contract had been executed by EMAK, that Boutros had not

[8] There is no claim in this Section 225 proceeding that depends on the purported binding effect of the transfer restrictions in the Resale Restriction Agreement as to the 25,000 restricted stock units, as those RSUs did not vest and could not vote until after the record date for the TBE consent solicitation. Consequently, the transfer restrictions are not a proper subject of litigation in this proceeding. *See, e.g., Agranoff v. Miller*, 1999 WL 219650, *18 (Del. Ch. Apr. 12, 1999) ("the relationship of the claim to a person's entitlement to corporate office is what is determinative"), *aff'd*, 737 A.2d 530 (Del. 1999) (Order).

received a counter-signed copy of the contract, and that the cash consideration had not been paid to Boutros by EMAK. (Tr. 33; *see* TX 317 at KURZ05506) Kurz therefore believed that Boutros could immediately transfer 50,000 shares of restricted stock (based on the documentation discussed in footnote 4), that Boutros could immediately transfer the 25,000 restricted stock units (on the assumption that no binding contract existed restricting their transfer), and that he would eventually obtain full rights to the remaining 100,000 shares of restricted stock (assuming that Boutros was not terminated for cause). (Tr. 36, 107-08, 113, 115-16)

Finally, defendants failed to demonstrate any violation of an EMAK insider trading policy or insider trading law, and failed to articulate how a violation could be a basis for invalidating the consent executed by Boutros. Kurz provided unrefuted testimony that he had not been advised that the policy in question (TX 315) was still in existence when he rejoined the Board in June 2009 (following a four-year absence from the Board, during which time EMAK's shares were de-listed and de-registered) and that the Company failed to inform him that it had entered a "quiet period," unlike the manner of policy implementation when he had been CEO. (Tr. 41-43, 45-49) Kurz also provided unrefuted testimony that the financial projections for the fourth quarter in his possession contained negative information about the Company's outlook, and that the negative information was not a basis on which he decided to pay a premium to market for an interest in the Boutros shares. (Tr. 27-28, 43, 115-17, 120) In short, defendants failed to establish any basis for invalidating the Boutros consent.

IV. THE STOCKHOLDERS WERE FULLY INFORMED

Crown's pre-trial brief contains no argument that Kurz breached his duty of disclosure or that the stockholders were deprived of material information. The last four pages of argument in

EMAK's pre-trial brief are cut-and-paste disclosure allegations from EMAK's Counterclaim, without any citations to the record or any effort to analyze "the total mix of information made available" to EMAK's stockholders. *Unanue v. Unanue*, 2004 Del. Ch. LEXIS 153, *36 (Nov. 3, 2004) (citing *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985). In fact, the bulk of the disclosure argument is taken virtually verbatim from EMAK's letter to stockholders of December 7, 2009! (*Compare* EMAK Br. 46-48 *with* TX 104 at 5-6) Defendants had their chance to persuade stockholders not to execute the TBE consent or to sign a revocation of consent. Defendants cannot eliminate the votes of stockholders they failed to persuade.

At trial, the only disclosure allegation defendants questioned Kurz about was his retention of Bouchard Margules & Friedlander, P.A. on a contingent basis to challenge the Exchange Transaction. (Tr. 165) That issue is discussed in plaintiffs' pre-trial brief. (Pls.' Br. 5, 47) In short, it is of no importance to stockholders that Kurz could not afford to retain counsel on an hourly basis to challenge the Exchange Transaction (Tr. 69), and the fee application relating to that challenge will not depend on whether TBE prevails in the consent solicitation.

The other disclosure issue mentioned in the EMAK brief concerns relationships between Kurz and TBE. (EMAK Br. 49) EMAK fails to identify any proven, undisclosed, material fact. Contrary to EMAK's contention about alleged undisclosed agreements or understandings, TBE disclosed how Kurz had affiliated himself with TBE and with the current members of the shareholder group. (Tr. 67-68; TX 108 at TBE08; TX 109 at 2)

V. THE BROADRIDGE CLIENT PROXIES ARE VALID CONSENTS

Plaintiffs' pre-trial brief explains the statutory basis for recognizing a consent signed by Broadridge on behalf of the listed banks and brokers, notwithstanding the absence of an omnibus proxy from the record holder. Section 228(a) of the DGCL authorizes stockholder action

without a meeting if written consents "*signed by the holders of outstanding stock*" having the requisite number of votes are delivered to the corporation. 8 *Del. C.* § 228(a) (emphasis added). The use of the undefined "holders" in Section 228 stands in sharp contrast to Section 219(c), which provides that the "stock ledger shall be the only evidence" as to who are the stockholders entitled to vote "at a meeting of stockholders." 8 *Del. C.* § 219(c). It also stands in sharp contrast to other Sections of the DGCL that define "stockholder" either to include beneficial owners (8 *Del. C.* § 220(a)(2)) or to mean only holders of record (8 *Del. C.* § 262(a)). Section 228(a) resembles Section 327, which leaves the word "stockholder" undefined, and thus subject to uniform judicial interpretation that it includes beneficial owners. (Pls.' Br. 41-42)

Plaintiffs' pre-trial brief discusses then-Vice Chancellor Berger's opinion in *Olson v. Buffington*, 11 Del. J. Corp. L. 687, 692 (1985), the only judicial decision to address the validity of a written consent executed by a bank or broker in the absence of an omnibus proxy from a depository. The rule in *Olson* is that the depository must be "identified on the consent in order to provide the company a ready means of verifying the brokerage houses' holdings." *Id.* at 692. *See also* 2 David A. Drexler et al., *Delaware Corporate Law and Practice* § 31.03[2], at 31-9 (2009) ("A more recent authority applying the election review procedures of Section 225 to a consent action suggests that a beneficial owner may execute a valid consent without the formality of a proxy from the record holder, so long as the consent identifies the record holder and the authority of the beneficial holder to control voting of the shares is clear."). (Pls.' Br. 44)

Plaintiffs' pre-trial brief also explains why *Grynberg v. Burke*, 1981 Del. Ch. LEXIS 487 (Aug. 13, 1981), and *Freeman v. Fabiniak*, 1985 Del. Ch. LEXIS 486 (Aug 15, 1985), are not persuasive authority. They rely on a flawed "strict construction" of Section 228 that is inconsistent with the subsequent guidance in *Allen v. Prime Computer, Inc.*, 540 A.2d 417, 420

(Del. 1988). Neither case speaks to the mere formality of an omnibus proxy from a depository. (Pls.' Br. 44-45) Defendants make no serious effort to distinguish *Olson* or to analyze the significantly different language of Section 228(a) as compared to Section 219(c). Crown's pre-trial brief does not even mention *Olson*.

The trial evidence shows why the analysis in *Olson*, in light of current industry practices, creates a compelling case for recognizing the validity of the Broadridge Client Proxies, and counting the listed votes to the extent that they do not exceed the positions of the DTC participants as reflected on the Cede breakdowns in EMAK's possession. EMAK's proxy solicitor, Lawrence Dennedy, who doubled as expert witness for the EMAK defendants, admitted the following basic facts:

- DTC is the only depository in the country (Tr. 307) and the only depository on EMAK's list of stockholders of record (Tr. 308-09);
- The position listing in a DTC omnibus proxy is identical to the position listing in a Cede breakdown of the same record date (Tr. 320-21);
- DTC has no voting discretion not to issue an omnibus proxy reassigning the votes as set forth in the position listing; the issuance of an omnibus proxy is a purely ministerial act that can be accomplished in less than a day (Tr. 322, 328);[9]
- Broadridge is the back-office service provider for the banks and brokers (Tr. 266); every consent on the Broadridge Client Proxy can be traced to a bank or broker listed on either the Cede breakdown or the record list (Tr. 316-317);

[9] According to materials printed from the DTC website, a Cede breakdown can be delivered within two hours of being ordered. (TX 164 at 20)

- An inspector of elections will count all of the votes on the face of a Broadridge Client Proxy for a given bank or broker if the position listed on the DTC omnibus proxy (or Cede breakdown) is the same or higher than the number of votes (Tr. 317-18);
- The inspector of elections would have certified a victory for TBE, but for the inspector's legal ruling that a DTC omnibus proxy needed to be in the Company's possession by December 21 (Tr. 330; TX 323);
- Since Broadridge can tabulate the votes as of any record date by counting the votes it received and gathering information from the banks and brokers about the size of their clients' positions on that date (Tr. 268, 331-34), one way to adjust for an incorrect record date on a Broadridge Client Proxy is by asking Broadridge to pull information as of the true record date (Tr. 318, 329-30, 331-32).[10]

Plaintiffs respectfully submit that delivery of a DTC omnibus proxy is wholly unnecessary given the plain language of Section 228(a), the authority of *Olson* and the Drexler treatise, and the admitted facts about the content of the Broadridge Client Proxies and the Cede breakdowns that were in the Company's possession as of December 21, 2009.

An additional reason why plaintiffs should prevail is because it was the Company's responsibility to obtain the DTC omnibus proxy no later than December 21, when EMAK's

[10] This mode of adjustment is unnecessary. Defendants cite no law for the proposition that a consent with an incorrect record date is facially invalid. (EMAK Br. 39; Crown Br. 43) The statute requires only that the consent "bear the date of signature." 8 *Del. C.* § 228(c). The Broadridge Client Proxies have that information. (TX 127 (November 23, 2009); TX 128 (December 21, 2009)) Nor is there any risk that the underlying beneficial owner consent cards are more than 60 days old since the initial mailing of consent cards to banks and brokers did not take place until after October 22, 2009. (Tr. 64-65) The votes on the Broadridge Client Proxies delivered on December 21 can be tabulated with reference to the positions reflected on the Cede breakdowns of October 12 and October 22. Given the minimal changes in position between the two dates (and minimal trading volume (TX 142)), and the margin of victory, it is clear that TBE prevailed. (Pls.' Br. 40 & Ex. A) The subsequent Broadridge Client Proxies confirm the same result. (*Id.*)

Chief Administrative Officer, General Counsel and Secretary (Teresa Tormey) was reminded by the inspector of elections of his need for the document. At trial, Dennedy, whose experience was limited to about six consent solicitations (Tr. 264), opined that obtaining a DTC omnibus proxy is the responsibility of the soliciting stockholder in a consent solicitation, even though it is the responsibility of the issuer to obtain a DTC omnibus proxy in a proxy contest. (Tr. 276) This distinction makes little sense in light of Dennedy's following admissions and basic facts:

- Dennedy is not aware of any writing from any source imposing on the soliciting stockholder the responsibility for obtaining a DTC omnibus proxy (Tr. 299-300);
- An issuer can request and obtain an omnibus proxy from DTC (Tr. 300);
- An issuer has a contractual relationship with DTC; a soliciting stockholder does not (Tr. 301, 304);
- DTC will deliver an omnibus proxy only to the issuer, even if the request for an omnibus proxy is made by the soliciting stockholder (Tr. 301-02);
- On December 18, 2009, Tormey signed a contract on behalf of EMAK with the inspector of elections, IVS, containing the following provisions:
    - "The company agrees to provide IVS with all documents required in order for IVS to provide the services contemplated hereby, including but not limited to a list of the shareholders of the company as of the record date certified to be correct and all omnibus proxies (if any)." (TX 157 at EMK019950)
    - "IVS will look to the company to provide original copies of the various omnibus proxies and the accompanying list of participants and share entitlements." (*Id.* at EMK019952);

- At 12:23 p.m. (EST) on December 21, 2009, after EMAK and IVS had each received a set of written consents and a Certificate from the soliciting stockholder, IVS sent an email to Tormey, reminding her that IVS needs an omnibus proxy from DTC and a certified stockholder list (TX 135 at EMK019809; Tr. 323);
- Tormey responded at 12:47 p.m. (EST) to IVS's email by inquiring whether it is possible to obtain an omnibus proxy from DTC and whether it is EMAK's responsibility to do so (TX 135 at EMK19808);
- When IVS responded to Tormey's email by saying that "only the company can request an omnibus from DTC" (*id.*), Tormey responded to that email at 1:36 p.m. (EST) (TX 161), but she failed to request an omnibus proxy from DTC, and outside counsel failed to notify Kurz, the Board or TBE until ***after the close of business*** that no omnibus proxy had been received from DTC (TX 130; TX 137);
- Dennedy testified that if he were confronted with a situation as proxy solicitor to an issuer in which no omnibus proxy had been received from DTC in connection with an active consent solicitation, he would expect that the soliciting party wanted the omnibus proxy to be delivered by DTC to the issuer, and he would consider it appropriate to ask IVS to tell the soliciting party that no omnibus proxy had been received (Tr. 327).

Plaintiffs have not located internal rules or procedures of DTC about the process of requesting an omnibus proxy. One trial exhibit sets forth procedures by which an issuer can obtain an omnibus proxy from DTC. (TX 321) Dennedy testified that he had never seen similar instructions about how a soliciting stockholder can request an omnibus proxy. (Dennedy 203; *see* Tr. 299-300)

DTC's contracts and procedures clearly contemplate that if provided with sufficient notice, DTC will issue an omnibus proxy to the issuer so that DTC's participants can exercise voting rights. DTC's website contains a form letter of representation between an issuer and DTC which specifies:

> Neither DTC nor Cede & Co. (nor any other DTC nominee) will consent or vote with respect to Securities unless authorized by a Direct Participant in accordance with DTC's MMI Procedures. Under its usual procedures, DTC mails an Omnibus Proxy to Issuer as soon as possible after the record date. The Omnibus Proxy assigns Cede & Co.'s consenting or voting rights to those Direct Participant to whose accounts Securities are credited on the record date (identified in a listing attached to the Omnibus Proxy).

(Exhibit C hereto Sched. A ¶ 7) DTC's website also contains the Rules of DTC. Rule 6, which discusses voting rights, states in part:

> On or immediately after the record date for the exercise of Voting Rights, the Corporation [*i.e.*, DTC] shall use its best efforts to permit Participants to exercise Voting Rights in accordance with this Rule and the Procedures. The Corporation shall have no responsibility or obligation to Participants or others with respect to the exercise of Voting Rights except to use its best efforts to act in accordance with this Rule and the Procedures. Without limiting the generality of the foregoing, the Corporation shall have no responsibility in the event that (x) the Corporation, without fault of its part, receives insufficient notice of a proposed meeting to permit action in accordance with this paragraph ....

(Exhibit D hereto at 46)

The Delaware Supreme Court recently held that officers owe the same fiduciary duties as directors do. *Gantler*, 965 A.2d at 709. Delaware law has "long exercised a most sensitive and protective regard for the free exercise of voting rights," *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988), and does not leave to a fiduciary's business judgment questions over a "decision to act to prevent the shareholders from creating a majority of new board positions and filling them." *Id.* Here, Tormey's duty of loyalty as an officer required her to request an omnibus proxy from DTC, or at least inform TBE of its absence, no later than

December 21, 2009, once she received a Certificate from the soliciting stockholders that they had obtained the consents of a stockholder majority to change the composition of the Board of Directors and she was reminded by the inspector of elections of his need for the omnibus proxy in order to tabulate the consents solicited by TBE. Her intentional inaction was an affirmative decision to disenfranchise all of the consenting stockholders who held their shares through DTC, and thereby disenfranchise the absolute majority of stockholders who consented to remove incumbent directors and appoint new directors.

Tormey's attempt to disenfranchise stockholders by refusing to undertake a ministerial act cannot succeed. The command of equity is to "regard[] as done that which ought to be done[.]" *Freeman v. Fabiniak*, 1985 Del. Ch. LEXIS 486, *21 (Aug. 15, 1985). Chancellor Allen explained how this principle of equity applies in contested elections:

> **a court of equity** may enforce equitable rights in the stock (including an equitable right to control the exercise of the vote attached to the stock) and **may under certain circumstances require the corporation itself to treat the equitable holder as a registered holder for purposes of counting votes in an election contest, in order that equitable rights are respected**.... This deployment by the Court of Chancery of equitable relief as part of the determination of an election contest has a long history under Delaware corporation law....
>
> **What is significant about this exercise of equitable jurisdiction is that it turns quite specifically on the situation of the legal owner and the equitable owner of the corporate stock *vis a vis* each other.** The first and most important thing to be noticed about this relationship is that, absent fraud or fiduciary relationship, *it is subject to the parties own contract.* It is the formation of a binding obligation to make a transfer and the specific enforceability of that obligation that authorizes the court in equity to recognize, in effect, the immediate transfer of voting rights, even though insofar as the corporation is concerned, absent equitable intervention, it may safely treat the registered owner as the holder of all stockholder rights.

Len v. Fuller, 1997 WL 305833, *3-4 (Del. Ch. May 30, 1997) (bold added; italics in original) (citations omitted).

Here, DTC commits in its contractual relationships with participants and issuers to assign voting rights to the participants. (*See* Exhibits C & D hereto) The equitable right to control the exercise of the vote belongs to the banks and brokers, who authorize Broadridge to consent on their behalf. Whatever miscommunication or mistake resulted in DTC not issuing an omnibus proxy to EMAK prior to December 21, 2009, Tormey was put on notice no later than mid-day on December 21 that she could rectify the situation and cause the voting rights to be formally assigned where they equitably and contractually belong. Tormey's failure to exercise her fiduciary responsibilities, for the apparent purpose of disenfranchising the absolute majority of stockholders who consented to the removal and replacement of directors, creates an additional reason why this Court of Equity should intervene and "require the corporation itself to treat the equitable holder as a registered holder for purposes of counting votes in an election contest, in order that equitable rights are respected." *Len*, 1997 WL 305833, at *3.

"Delaware courts have vigilantly guarded against stockholder disenfranchisement in contested corporate elections," *Concord Fin. Group, Inc., v. Tri-State Motor Transit Co.*, 567 A.2d 1, 5 (Del. Ch. 1989), and "the court should hesitate to deploy ambiguity in the record against the effective exercise of voting rights." *Commonwealth Assocs.*, 641 A.2d at 157. Intentional action by a fiduciary to disenfranchise consenting stockholders can be effectively remedied in this case by using the Cede breakdown already in the Company's possession as a means to validate the positions held by the banks and brokers and thereby tally the consents clearly expressed by Broadridge and delivered to the corporation prior to the conclusion of the consent solicitation.

CONCLUSION

For all the foregoing reasons, and those set forth in Plaintiffs' pre-trial brief, and on the basis of the evidence presented at trial, Plaintiffs respectfully request that the Court invalidate the Crown Consents and declare that (i) James Holbrook and Jordan Rednor were removed as directors, (ii) Philip Kleweno, Michael Konig, and Lloyd Sems were appointed as directors as of December 21, 2009, and (iii) the Board of Directors of EMAK is comprised of Donald Kurz, Jeffrey Deutschman, Jason Ackerman, and newly appointed directors Philip Kleweno, Michael Konig, and Lloyd Sems.

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DATED: February 3, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2010, I caused a copy of the foregoing **Public Version of Plaintiffs' Post-Trial Brief** to be served on the following counsel in the manner indicated below:

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