

WILLIAM B. CHANDLER III
CHANCELLOR

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Submitted: April 12, 2006

Decided: April 19, 2006

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Re: *Lions Gate Entm't Corp. v. Image Entm't, Inc.*
Civil Action No. 2011-N

Dear Counsel:

Lions Gate Entertainment Corp. ("Lions Gate") brought this action against Image Entertainment, Inc. ("Image") to confirm that Image did not effectively implement a classified board of directors in 2005 and that all of Image's directors must stand for election in connection with its 2006 annual meeting of stockholders. Among other defenses and counterclaims, Image has sought to reform Image's bylaws and certificate of incorporation to conform them to disclosures issued in connection with its 2005 annual meeting of stockholders. In alleged connection with such a claim for reformation, Image filed twenty-six motions for commission. For the reasons set forth below, the motions for commission are granted only in part, because portions are unduly burdensome in the context of this focused expedited proceeding, and seek material irrelevant to any well-pled claim or issue in this litigation.

With twenty-six motions for commission, Image seeks discovery from twenty-six different third parties. Each motion for commission includes nearly identical requests for documents. Requests one through seven seek those

documents relating to communications or agreements with the person that is the subject of the commission. Request eight seeks documents related to the trading of Image stock. Requests nine and ten seek documents regarding stockholders' knowledge of alleged discrepancies between the Image charter and bylaws and the disclosures in the 2005 proxy statement. Request eleven seeks documents regarding which directors of Image must stand for re-election, and request twelve seeks documents relating to potential nominees to Image's board of directors.

A party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action, whether it relates to a claim or defense, and even though the information elicited may ultimately not be admissible at trial.¹ Lions Gate argues that Image's requests are not relevant to the subject matter of this action—the reformation of Image's Certificate of Incorporation and Bylaws.

Courts of equity, such as the Court of Chancery, may reform an agreement in order to express the “real agreement” of the parties involved, under one of two doctrines.² In the case of mutual mistake, the plaintiff must show that both parties were mistaken as to a material portion of the written agreement.³ In the case of unilateral mistake, the party asserting this doctrine must show that it was mistaken and that the other party knew of the mistake but remained silent.⁴ Regardless of which doctrine is used, the plaintiff must show by clear and convincing evidence that the parties came to a specific prior understanding that differed materially from the written agreement. Finally, in reforming an agreement, in particular a certificate of incorporation or bylaws of a corporation, a court must consider the interests of any third parties affected by the reformation.⁵

Image's affirmative defenses and counterclaims are grounded primarily in these two doctrines of reformation: that Lions Gate (and possibly other shareholders) knew of the mistakes and that Lions Gate tarried in taking action with respect to those mistakes. Only requests nine and ten are relevant to these allegations, investigating when Lions Gate and other shareholders became aware of discrepancies. Requests one through eight, eleven and twelve are not relevant to the subject matter of the present litigation. Additionally, in the context of these

¹ See CH. CT. R. 26(b)(1); *Council of Unit Owners of Sea Colony East v. Carl M. Freeman Assoc.*, 1990 WL 128185, at *1 (Del. Super. 1990).

² See *Cerberus Intern., Ltd. v. Apollo Mgmt., L.P.*, 794 A.2d 1141, 1151 (Del. 2002).

³ See *Id.*; *Collins v. Burke*, 418 A.2d 999, 1002 (Del. 1980) (“The Courts of this State have always insisted in reformation cases on a showing of mutual mistake or, in appropriate cases, unilateral mistake on plaintiff's part coupled with knowing silence on defendant's part.”).

⁴ See *Cerberus*, 794 A.2d at 1151.

⁵ See *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990).

expedited proceedings and in light of the relevance of only a small portion of each commission, twenty-six commissions are unduly burdensome. Therefore, only five of the motions for commission are granted, and only in respect to requests nine and ten described above. Image may re-file five commissions of its own choosing, modified in accordance with this ruling; if upon expedited discovery, Image finds a basis for additional commissions, this Court will be amenable to permitting such additional discovery upon application by Image. Additionally, the modified commissions should allow Lions Gate to (1) receive contemporaneous copies of all written communications between Image and the third parties, (2) receive copies of documents produced in response to the subpoenas, and (3) be consulted regarding the manner and timing of production.

IT IS SO ORDERED.

Very truly yours,

A handwritten signature in black ink that reads "William B. Chandler III". The signature is written in a cursive style with a horizontal line at the end.

William B. Chandler III

WBCIII:bsr