

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

GEORGE RICH, JR., )  
 )  
 Plaintiff, )  
 )  
 v. ) *Civil Action No. 5653-VCG*  
 )  
 FUQI INTERNATIONAL, INC., )  
 )  
 Defendant. )

**MEMORANDUM OPINION**

Date Submitted: October 26, 2012

Date Decided: November 5, 2012

Paul A. Fioravanti, Jr. and Tanya E. Pino, of PRICKETT, JONES & ELLIOT, P.A., Radnor, Pennsylvania; OF COUNSEL: Eric L. Zagar and Justin O. Reliford, of KESSLER TOPAZ MELTZER & CHECK, LLP, Attorneys for Plaintiff.

John L. Reed and K. Tyler O’Connell, of DLA PIPER LLP, Wilmington, Delaware; OF COUNSEL: Robert W. Brownlie, of DLA PIPER LLP, San Diego, California, and Jennifer A. Lloyd, of DLA PIPER LLP, Austin, Texas, Attorneys for Defendant.

GLASSCOCK, Vice Chancellor

## I. BACKGROUND

This action was brought by Plaintiff George Rich, Jr. to compel a meeting of the stockholders of Defendant Fuqi International, Inc. (“Fuqi”) pursuant to Section 211 of the Delaware General Corporation Law.<sup>1</sup> Fuqi is a Delaware Corporation, but its headquarters and operations are located in Shenzhen, China. Fuqi is a jewelry company that designs, produces, and sells “high-quality precious metal jewelry in China, consisting of unique styles and designs made from gold and platinum.”<sup>2</sup> Fuqi was also publicly traded on the NASDAQ stock exchange until it was recently delisted.<sup>3</sup> At all relevant times, Rich has been a stockholder of Fuqi.<sup>4</sup> On June 1, 2012 I issued an Order requiring Fuqi to hold its annual meeting by August 20, 2012,<sup>5</sup> and on October 10, 2012 I extended the deadline to December 17, 2012.<sup>6</sup> This Order was by its terms subject to modification, and thus not final. Fuqi now moves for entry of a partial final judgment under Rule 54(b) and, in the alternative, applies for certification for interlocutory appeal of my October 10, 2012 Order. For the reasons that follow, I deny Fuqi’s motion and application.

Fuqi’s troubles with investors and regulators began on March 16, 2010, when it announced that “it had identified certain historical accounting errors”

---

<sup>1</sup> 8 *Del. C.* § 211(c).

<sup>2</sup> Def.’s Mot. Entry Partial Final J./Appl. Certif. Interloc. Appeal and Mot. Stay Pending Appeal 1 (hereinafter “Def.’s Mot. Partial Final J.”).

<sup>3</sup> *Id.* at 6.

<sup>4</sup> Pl.’s Br. Opp’n Def.’s Mot. Partial Final J. 3.

<sup>5</sup> Order 1, June 1, 2012.

<sup>6</sup> Order 1, Oct. 10, 2012.

affecting its 2009 quarterly reports and that, as a result, it would have to restate those reports and delay filing its audited financial statements for the 2009 fiscal year.<sup>7</sup> Subsequently, the Board of Directors of Fuqi conducted an internal investigation of potential breaches of fiduciary duties by the company's directors and officers.<sup>8</sup> On March 28, 2011, Fuqi announced the results of that investigation and revealed that the company had engaged in "certain cash transfer transactions" that caused the restatement.<sup>9</sup> Fuqi further announced that it was working with its auditor to correct its mistakes and provide accurate financials for the 2009 fiscal year, and that it was taking remedial steps to prevent similar errors from recurring.<sup>10</sup> Immediately after the restatement, shareholders brought several actions against the company and its directors, and the SEC began a formal investigation.<sup>11</sup>

Rich brought this action on July 21, 2010, alleging that Fuqi had not held a meeting in over 13 months.<sup>12</sup> Fuqi conceded that it had not held its annual meeting but responded that it was unable to provide audited financial statements for the 2009 fiscal year or later and that it would therefore violate SEC rules to hold the

---

<sup>7</sup> Def.'s Mot. Partial Final J. 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 5.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 5-6.

<sup>12</sup> Compl. 1.

annual meeting or solicit proxies from shareholders.<sup>13</sup> Initially, both parties apparently believed that this conflict could be mooted by simply obtaining audited financial statements for Fuqi's 2009 fiscal year. On August 19, 2010, the parties submitted a joint stipulation delaying the deadline for obtaining a response from Fuqi to the complaint.<sup>14</sup> However, Fuqi failed to produce its audited financial statements, leading to another extension, and then another, until the ninth such amended stipulation came on January 3, 2012.<sup>15</sup>

Fuqi represents that during this time it asked the SEC for an exemption from the relevant proxy rules in order for Fuqi to be able to hold its annual meeting, as required by Delaware law.<sup>16</sup> That request was later withdrawn on account of informal communications from the SEC that, according to Fuqi, indicated that the application would likely be denied and that such a denial could negatively affect the outcome of the SEC's pending investigation.<sup>17</sup>

On March 16, 2012, the Plaintiff decided to move forward with his claims, filing for summary judgment and asking me to order Fuqi to hold its annual meeting.<sup>18</sup> Fuqi responded by filing its Motion to Dismiss on April 2, 2012.<sup>19</sup> I

---

<sup>13</sup> Def.'s Mot. Partial Final J. 7.

<sup>14</sup> See Stip. & Proposed Order Extend Time Answer Compl. 1.

<sup>15</sup> See Ninth Am. Stip. & Proposed Order Re. Def.'s Time to Answer Pl.'s Verif. Compl 1.

<sup>16</sup> Def.'s Mot. Partial Final J. 7.

<sup>17</sup> *Id.* at 8.

<sup>18</sup> Pl.'s Br. Supp. Mot. Summ. J. & Opp. Def.'s Mot. Dismiss 1.

<sup>19</sup> Def.'s Br. Supp. Mot. Dismiss & Br. Opp'n Pl.'s Mot. Summ. J. 1 (hereinafter "Def.'s Br. Supp. Mot. Dismiss").

heard oral argument on May 22, 2012, and on June 1, 2012, I granted the Plaintiff's Motion and ordered Fuqi to hold its annual meeting on September 19, 2012 and distribute its proxy materials by August 20, 2012.<sup>20</sup>

At my direction, Fuqi again filed an application with the SEC seeking an exemption from the federal securities laws requiring the provision of audited financial statements to shareholders in advance of an annual meeting.<sup>21</sup> The SEC again informally indicated that it would likely deny Fuqi's request.<sup>22</sup> On August 14, 2012, six days before Fuqi was ordered to solicit shareholder proxies, Fuqi asked me to reconsider my earlier ruling, arguing that it was "physically impossible" for Fuqi to comply with both my Order and the SEC's proxy rules.<sup>23</sup> On October 1, 2012 I heard oral argument, during which Fuqi said that it could give me no indication when its audited financial statements could be produced.<sup>24</sup> On October 10, 2012 I issued an Order for the annual meeting to be held no later than December 17, 2012, and for proxy materials to be distributed to shareholders at least 30 days prior to the meeting.<sup>25</sup> At that time, I declined to rule on the merits of Fuqi's argument concerning "physical impossibility," in light of the fact that the

---

<sup>20</sup> Tr. of Oral Arg. & Ct.'s Ruling 39, June 1, 2012.

<sup>21</sup> Def.'s Mot. Partial Final J. 9.

<sup>22</sup> *Id.*

<sup>23</sup> Letter Re. Ct.'s June 1, 2012 Order, at 2, Aug. 14, 2012.

<sup>24</sup> Teleconf. Tr. 8, Oct. 1, 2012.

<sup>25</sup> *Id.* at 16.

SEC had not ruled definitively on Fuqi's request for an exemption.<sup>26</sup> I further indicated that "if [Fuqi] get[s] a negative decision from the SEC, I am not precluding [Fuqi] from seeking some type of relief."<sup>27</sup>

On October 22, 2012, Fuqi brought this issue before me once again, via this motion.<sup>28</sup> Fuqi asserts that the SEC will likely not issue a formal rejection of Fuqi's application before the November 17, 2012 deadline for Fuqi to file its proxy materials.<sup>29</sup> Fuqi requests that I order either a partial final judgment or certification of this issue for an interlocutory appeal to the Delaware Supreme Court. For the reasons below, I deny Fuqi's application.

## II. ANALYSIS

Fuqi contends that it is caught in a conflict between Delaware's annual meeting requirement<sup>30</sup> and SEC Regulations 14A and 14C requiring publicly traded companies to distribute certain materials, including an annual report and audited financial statements, to stockholders in advance of an annual meeting.<sup>31</sup> Fuqi concedes that this Court addressed a similar issue in *Newcastle Partners v. Vesta Insurance Group, Ltd.* but argues that that opinion does not govern the facts

---

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Def.'s Mot. Partial Final J. 1.

<sup>29</sup> *Id.* at 11.

<sup>30</sup> 8 *Del. C.* § 211.

<sup>31</sup> 17 C.F.R. §§ 240.14a-3(b), 240.14c-3(a)(1).

of this case.<sup>32</sup> Specifically, Fuqi contends that *Newcastle Partners* does not apply because the SEC has subsequently promulgated a new rule providing for exemption requests from Rules 14A and 14C when companies are unable to comply with both state corporate law and federal proxy rules.<sup>33</sup>

As mentioned above, I have rejected that argument and have ordered Fuqi to hold its annual meeting. Fuqi now asks me to enter partial final judgment or to certify this issue for interlocutory review.<sup>34</sup> Fuqi's application is denied. First, I will explain in more detail the reasoning underlying my earlier Orders concerning application of the rationale of *Newcastle Partners* to the issues of this case. Then, I will explain that entry of partial final judgment is not appropriate, because my prior Order was not final. Finally, I will explain why this issue does not qualify for interlocutory review.

*A. Fuqi May Not Further Delay Holding its Annual Meeting.*

Delaware law requires companies to hold annual meetings of stockholders.<sup>35</sup> Stockholders have the statutory right to petition the Court of Chancery to order a meeting if a company fails to do so on its own.<sup>36</sup> Upon application of a stockholder, the Court of Chancery "may issue such orders as may be appropriate, including, without limitation, orders designating the time and place of such

---

<sup>32</sup> *Newcastle P'rs v. Vesta Ins. Grp., Inc.*, 887 A.2d 975, 975 (Del Ch. 2005).

<sup>33</sup> Def.'s Br. Supp. Mot. Dismiss 12.

<sup>34</sup> Def.'s Mot. Partial Final J. 2.

<sup>35</sup> 8 *Del. C.* § 211(b).

<sup>36</sup> 8 *Del. C.* § 211(c).

meeting, the record date or dates for determination of stockholders entitled to notice of the meeting and to vote thereat, and the form of notice of such meeting.”<sup>37</sup> Though Fuqi argues that the conditional language of Section 211(c) gives me plenary discretion to indefinitely postpone an annual meeting pending the completion of its audited financial statements or a final decision from the SEC,<sup>38</sup> this Court’s precedent indicates that such an order would exceed the bounds of my discretion under Section 211.<sup>39</sup>

The annual meeting requirement of Section 211 is no procedural triviality. On the contrary, this Court recognizes that “[t]he shareholder meeting to elect directors is a cornerstone of Delaware corporate law. . . . [And] the policy justifications behind 8 *Del. C.* § 211 are so strong that if the statutory elements required to compel a shareholder’s meeting are shown, the right to relief is virtually absolute.”<sup>40</sup>

In *Newcastle Partners*, this Court considered and rejected precisely Fuqi’s argument that a corporation that is unable to produce audited financial statements should be exempt from Section 211 until it can produce them. *Newcastle Partners* concerned a publicly traded Delaware corporation, Vesta Insurance Group, that

---

<sup>37</sup> *Id.*

<sup>38</sup> Def.’s Br. Supp. Mot. Dismiss 10.

<sup>39</sup> See *Newcastle P’rs*, 887 A.2d at 979 (explaining that “the court exercised the full measure of its discretion” in granting Vesta a 90-day period to hold its annual meeting).

<sup>40</sup> *Id.* (quoting *Speiser v. Baker*, 525 A.2d 1001, 1005 (Del. Ch. 1987)).



was the subject of a stockholder action, brought by Newcastle Partners, L.P., to compel Vesta to hold an annual meeting.<sup>41</sup> Vesta's excuse for not holding an annual meeting was that its auditors had not completed a review of the company's prior period financial statements and that holding a stockholder meeting without audited financials would violate federal securities laws.<sup>42</sup> Vesta maintained that the SEC specifically warned them that holding a meeting would violate the SEC's proxy rules.<sup>43</sup>

Notwithstanding Vesta's purported inability to produce audited financial statements, the Court in *Newcastle Partners* ordered Vesta to hold its meeting as scheduled.<sup>44</sup> The Court supported its decision by pointing out that Vesta had received no explicit order from the SEC to abstain from holding its meeting, and that depriving stockholders of their right to an annual meeting "would cut directly against the policy of a strong stockholder franchise that underlies the SEC's rules on the distribution of proxy and information statements."<sup>45</sup> Then-Vice Chancellor Lamb also explained that the SEC originally adopted the rules at issue for the very purpose of preventing companies from evading federal disclosure requirements by

---

<sup>41</sup> *Newcastle P'rs*, 887 A.2d at 977.

<sup>42</sup> *Id.* at 978.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 982.

<sup>45</sup> *Id.* at 980.

refusing to solicit proxies at an annual meeting.<sup>46</sup> The Court concluded, soundly in my view, that a rule meant to reinforce management accountability to stockholders could not be used as a tool to indefinitely deprive stockholders of the franchise.

Fuqi's arguments to distinguish this case from *Newcastle Partners* are unpersuasive. Fuqi argues that "[w]hile [*Newcastle Partners*] holds there is no 'outright' conflict between federal and state corporate law, under the specific factual circumstances here, Fuqi simply cannot comply with both."<sup>47</sup> This merely repeats Vesta's argument.<sup>48</sup> Fuqi's other argument is that the case at hand is distinguished from *Newcastle Partners* because since the time *Newcastle Partners* was decided the SEC has issued a release to address the "dilemma of being required to hold a meeting of security holders when [management is] unable to

---

<sup>46</sup> *Id.* at 980-81 ("The effects that the circumvention of the proxy regulations had on shareholders and on corporate governance were significant. Presented with the possibility of governing the corporation without soliciting proxies, directors saw a method to govern without accountability. A study of the Glidden corporation in 1950 demonstrates the danger: by simply refusing to solicit proxies, the Glidden directors made sure that no quorum was present at their annual meeting. Unable to elect new directors, then, the company determined that 'the directors and officers must hold over until their successors are elected and qualified,' leaving the shareholders with almost no way to exercise their franchise. As evident as the problem was to observers, however, the academic consensus in 1950 was that the Commission lacked the power to solve the problem with the tools at hand. In 1964, Congress responded to the SEC's lack of authority by enacting Section 14(c), requiring substantially the same filings for meetings at which no proxies are to be solicited as the SEC then required for solicitations.").

<sup>47</sup> Def.'s Br. Supp. Mot. Dismiss 14.

<sup>48</sup> *Newcastle P'rs*, 887 A.2d at 978 ("Vesta argues that these . . . communications from members of the SEC staff leave Vesta in the uncomfortable position of having to disobey either this court or the SEC.").

deliver current audited financial statements.”<sup>49</sup> Fuqi contends that because the procedure by which a company requests an exemption from the proxy rules is now expressly regulated by Exchange Act Release No. 57,262, and because the SEC has informed Fuqi that “[Fuqi] would be unable to meet the criteria for exemption,”<sup>50</sup> that Fuqi’s situation is different than Vesta’s situation in *Newcastle Partners*.

I disagree. The SEC release does not change a company’s substantive obligations under federal securities law.<sup>51</sup> Neither does it affect the principles and goals of SEC proxy rules, which are still to protect the stockholder franchise and provide accurate information to stockholders. If anything, the most recent release has actually harmonized Delaware and federal law by outlining the criteria under which a company may seek an exemption from federal reporting requirements, thereby reducing the likelihood of any outright conflict between the annual meeting requirement and the proxy rules.<sup>52</sup>

---

<sup>49</sup> Delegation of Authority, Exchange Act Release No. 57,262, 92 SEC Docket 1585 (Feb. 4, 2008).

<sup>50</sup> Def.’s Br. Supp. Mot. Dismiss 12.

<sup>51</sup> Delegation of Authority, Exchange Act Release No. 57,262, 92 SEC Docket 1585 (Feb. 4, 2008) (“The Commission finds . . . that this amendment relates solely to agency organization, procedure, or practice, and does not relate to a substantive rule. Accordingly, notice, opportunity for public comment, and publication of the amendment prior to its effective date are unnecessary.”).

<sup>52</sup> The release gives an administrative officer authority to grant a company an exemption from the proxy rules when the company can demonstrate that it:

- (i) Is required to hold a meeting of security holders as a result of an action taken by one or more of the applicant’s security holders pursuant to state law;

In fact, Fuqi's situation is almost identical to Vesta's position in *Newcastle Partners*. Like Vesta, Fuqi has had informal, verbal communications with SEC staff regarding its compliance with federal securities laws. Just as Vesta received no "definitive interpretation of the SEC rules" in *Newcastle Partners*, neither has Fuqi received any such interpretation here. Furthermore, like Vesta, Fuqi does *not* seek a brief continuance of the time for the annual meeting, pending production of audited financial statements.<sup>53</sup> Nor is it asking for a delay, long or short, of the meeting until a date certain, by which point the financial statements will have been produced. As in *Newcastle Partners*, what Fuqi seeks is an indefinite suspension of the requirement that the stockholders be allowed to exercise their franchise, with no end in sight.<sup>54</sup>

- 
- (ii) Is unable to comply with the requirements of Rules 14a-3(b) or 14c-3(a) under the Act for audited financial statements to be included in the annual report to security holders to be furnished to security holders in connection with the security holder meeting required to be held as a result of the security holder demand under state law;
  - (iii) Has made a good faith effort to furnish the audited financial statements before holding the security holder meeting;
  - (iv) Has made a determination that it has disclosed to security holders all available material information necessary for the security holders to make an informed voting decision in accordance with Regulation 14A or Regulation 14C; and
  - (v) Absent a grant of exemptive relief, it would be forced to violate with state law or the rules and regulations administered by the commission.

*Id.*

<sup>53</sup> Indeed, such requests have been granted informally (the plaintiff agreed to forbear in advancing this action nine separate times between October 2010 and January 2012) and formally (my June 1, 2102 Order, setting the meeting date four months out, was designed to allow the company to either produce the financial statements or receive a ruling from the SEC).

<sup>54</sup> See *Newcastle P'rs*, 887 A.2d at 978, 982 (explaining Vesta's position that "it should be relieved of its obligation to hold its 2004 annual meeting . . . until those financial statements are

Neither Delaware law nor the SEC rules contemplate such a suspension of the stockholder vote. Delaware law requires a yearly meeting so that stockholders, the owners of the company, may effectively assert their interests by exercising their voting franchise. The SEC rules complement that purpose. Regulations 14A and 14C require companies to provide audited financial statements so that stockholders may cast an informed and intelligent vote. Fuqi’s position here is that the company has been managed in such a way that it cannot comply with the proxy rules, and therefore it should not be subject to *any* oversight by stockholders by way of an annual meeting. Such a position stands the purpose of corporate and securities law on its head. It cannot be the case that managers of a corporation can entirely avoid the annual meeting requirement by “dickering with the auditors and the SEC over financial statements.”<sup>55</sup> On the contrary; a stockholder’s right to a meeting is especially strong when financial management is so questionable as to delay the provision of audited financial statements for three full years.

*B. Partial Final Judgment*

Court of Chancery Rule 54(b) provides that

When more than 1 claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon 1 or more but fewer

---

ready” and concluding that “[t]he issue presented in this case, in its most simple form, is whether a shareholder meeting . . . will be indefinitely delayed.”).

<sup>55</sup> J. Travis Laster & Michelle D. Morris, *How to Avoid a Collision Between the Delaware Annual Meeting Requirement and the Federal Proxy Rules*, 10 Del. L. Rev. 213, 254 (2008).

than all of the claims or parties only upon an express determination that there is not just reason for delay and upon an express direction for the entry of judgment.<sup>56</sup>

Thus, in order for me to grant Fuqi's request for a partial final judgment I must first find that "(1) the action involves multiple claims or parties, (2) at least one claim or the rights and liabilities of at least one party has been *finally decided*, and (3) that there is no just reason for delaying an appeal."<sup>57</sup> In my Order dated October 10, 2012 I expressly provided Fuqi the opportunity to seek further relief in the event it received a formal decision from the SEC. Accordingly, it was not a final decision, and thus could not be entered as a partial final judgment under Rule 54(b).<sup>58</sup>

It also bears mentioning that Fuqi has caused the very uncertainty it now seeks to resolve. Fuqi chose to withdraw its 2011 exemption request because SEC staff purportedly suggested that a formal opinion denying the exemption would prejudice Fuqi in the SEC's investigation into Fuqi's original financial restatement. In withdrawing its application, Fuqi made a tactical decision to forego obtaining a formal decision from the SEC. Given that Fuqi was in the midst of negotiating this action, Fuqi was presumably aware that the lack of a final SEC decision was an

---

<sup>56</sup> Del. Ct. Ch. R. 54(b).

<sup>57</sup> *In re TriStar Pictures, Inc., Litig.*, 1989 WL 112740, at \*1 (Del. Ch. Sept. 26, 1989) (emphasis added).

<sup>58</sup> Del. Ct. Ch. R. 54(b).

important consideration of the Court's decision in *Newcastle Partners*, and Fuqi should be prepared to accept the consequences of its choice.

### *C. Interlocutory Review*

This Court has long recognized that interlocutory review creates a risk of fragmentation and delay in the administration of justice and, therefore, “[a]pplications for interlocutory review under Rule 42 should be granted only in exceptional circumstances.”<sup>59</sup> Accordingly, Delaware Supreme Court Rule 42 forbids the certification of an interlocutory appeal *unless* an order has “determine[d] a substantial issue, establishe[d] a legal right,”<sup>60</sup> *and* met one of several enumerated criteria.<sup>61</sup> The defendant asserts that my Order satisfies three of those criteria: namely, that it (1) raises a legal issue of first impression,<sup>62</sup> (2) determines “the constitutionality, construction or application of a statute of this State which has not been, but should be, settled by the [Supreme] Court,”<sup>63</sup> and (3) involves an issue where interlocutory review may entirely resolve the litigation or otherwise serve the interests of justice.<sup>64</sup>

---

<sup>59</sup> *In re Pure Res., Inc.*, 2002 WL 31357847, at \*1 (Del. Ch. Oct. 9, 2002) (citing Donald J. Wolfe, Jr. and Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery*, § 14-4 at 14-5 (2000)).

<sup>60</sup> Supr. Ct. R. 42(b).

<sup>61</sup> Supr. Ct. R. 42(b)(i)-(v).

<sup>62</sup> Supr. Ct. R. 42(b)(i); Supr. Ct. R. 41(b)(i).

<sup>63</sup> Supr. Ct. R. 42(b)(i); Supr. Ct. R. 41(b)(iii).

<sup>64</sup> Supr. Ct. R. 42(b)(v).

I find, and the Plaintiff does not dispute, that my October 10, 2012 Order both determined a substantial issue and established a legal right.<sup>65</sup> Accordingly, the only issue before me is whether any of the additional criteria are present such that interlocutory review of my Order is merited. I conclude that certification of this issue for interlocutory review is not warranted here. This case does not raise a legal issue of first impression, does not involve unsettled Delaware law, and the interests of justice do not weigh in favor of interlocutory review.

Fuqi argues in its brief that this case presents original and unsettled questions of Delaware law. Specifically, Fuqi contends that SEC Release No. 57,262 changes the application of *Newcastle Partners* because the Release creates a situation where “[u]nless and until Fuqi receives an exemption . . . it must comply with federal law.”<sup>66</sup> Fuqi is mistaken. As noted above, the Release has caused no substantive change in a company’s obligations under the SEC’s proxy rules.<sup>67</sup> All the Release does is recognize that the agency may grant exemptions, in limited circumstances, to a company’s reporting obligations under federal

---

<sup>65</sup> An interlocutory order addresses a substantial issue where it decides an issue that is both substantial and related to the merits of the gravamen of the case; an interlocutory order establishes a legal right where it decides an issue essential to the merits. *MICH II Hldgs. LLC v. Schron*, 2012 WL 3224351, at \*6 nn.23-24 (Del. Ch. Aug. 7, 2012).

<sup>66</sup> Def.’s Mot. Partial Final J. 2.

<sup>67</sup> Delegation of Authority, Exchange Act Release No. 57,262, 92 SEC Docket 1585 (Feb. 4, 2008).



securities law. This was the precisely the case in *Newcastle Partners*.<sup>68</sup> Because *Newcastle Partners* was summarily affirmed by the Supreme Court,<sup>69</sup> I conclude that this case presents no “original question of law” or “unsettled question” meriting certification for interlocutory review.<sup>70</sup>

Nor would interlocutory review of this issue serve the interests of justice.<sup>71</sup> As I mentioned previously, in 2011 Fuqi purposefully abandoned its exemption application it had submitted to the SEC. Accordingly, any uncertainty over its position vis-à-vis the SEC is self-inflicted. Furthermore, Fuqi bears sole responsibility for not produced audited financial statements in accordance with its obligations under federal law.<sup>72</sup> Because Fuqi has created the very predicament it now finds itself in, and because Fuqi has now deprived stockholders of their right to an annual meeting for over three years,<sup>73</sup> the interests of justice weigh heavily in favor of holding the annual meeting as scheduled.

---

<sup>68</sup> *Newcastle P’rs*, 887 A.2d at 981 n.14 (“[T]he SEC sometimes uses its discretion to issue orders exempting companies from the requirements of the [proxy rules].”).

<sup>69</sup> *Vesta Ins. Group, Inc. v. Newcastle P’rs, L.P.*, 906 A.2d 807, 807 (Del. 2005) (concluding that the case “should be affirmed on the basis of and for the reasons assigned by the Court of Chancery in its well-reasoned decision”).

<sup>70</sup> Del. Supr. Ct. R. 41(b)(i), (iii).

<sup>71</sup> Del. Supr. Ct. R. 42(b)(v).

<sup>72</sup> Def.’s Mot. Partial Final J. 4-5 (identifying “certain historical accounting errors” and “certain cash transfer transactions” as the cause of Fuqi’s earnings restatement).

<sup>73</sup> Compl. 1.

### **III. CONCLUSION**

For the foregoing reasons, Fuqi's Application is denied.

**IT IS SO ORDERED.**