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Case Number 343,2014

IN THE SUPREME COURT OF THE STATE OF DELAWARE

GARY SALAMONE, MIKE DURA, and ROBERT W. HALDER,	)	
Defendants Below-Appellants.	)	
v.	)	No. 343,2014
JOHN J. GORMAN, IV,	)	On Appeal from the Court of Chancery, Consol. C.A. No. 8845-VCN
Plaintiff Below-Appellee,	)	

CROSS-APPELLANT'S REPLY BRIEF ON CROSS-APPEAL

BAYARD, P.A.

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INTRODUCTION

The issue on Gorman's cross-appeal is whether the Court of Chancery erred by finding that the process for electing Westech directors set forth in the Voting Agreement[1] (the "Westech Election Process") does not violate Section 212(a) of the Delaware General Corporation Law ("DGCL"), which mandates that any deviation from the default one vote per share rule be set forth in Westech's Certificate of Incorporation. (D.I. 25 at Section IV); s*ee also* 8 *Del. C.* § 212(a). Pursuant to Section 1.2 of the Voting Agreement, the Westech Election Process has two steps: (1) a vote of a certain identified groups of stockholders to designate or elect certain directors (the "Nomination Step") and (2) a constrained vote of stockholders[2] at the annual meeting who must vote for the directors "designate[d]" or "elect[ed]" in the Nomination Step (the "Election Step"). (A540.) The parties agree that Section 212(a) applies to the Election Step, and that the Election Step complies with Section 212(a). (D.I. 26 at 30; D.I. 25 at 46.) Thus, the only issue for the Court to decide is whether Section 212(a) applies to the Nomination Step of the Westech Election Process.

The Court of Chancery did not discuss the application of Section 212(a) to the Nomination Step in detail in its Opinion, though the trial court appears to have

[1] Capitalized terms not defined here shall have the meanings attributed to them in Appellee's Second Corrected Answering Brief on Appeal and Cross-Appellant's Second Corrected Opening Brief on Cross-Appeal ("Gorman Answering Brief"). (D.I. 25.)

[2] Only those stockholders who are parties to the Voting Agreement are so constrained. Westech has a minority of common stockholders who are not parties to the Voting Agreement.

declined to apply Section 212(a) to Section 1.2(c) of the Voting Agreement due to "the broad provisions found in 8 *Del. C.* § 218." (A67.) Given the Court of Chancery's holding that Section 1.2(b) of the Voting Agreement does not involve per capita voting, Section 1.2(b) does not implicate Section 212(a). The below argument nonetheless applies with equal force to Section 1.2(b) and provides yet another reason why the Court should reject Appellants' argument that both Sections 1.2(b) and 1.2(c) of the Voting Agreement require per capita voting. The Court should reverse and find that Section 212(a) renders the Court of Chancery's interpretation of 1.2(c) of the Voting Agreement invalid.

The Court of Chancery's failure to apply Section 212(a) to the Nomination Step under Section 1.2(c) is erroneous for several reasons. First, Section 212(a) applies *whenever* stockholders vote and the Nomination Step requires a stockholder vote. (A540; 8 *Del. C.* § 212(a).) Second, Section 212(a) of the DGCL does not conflict, and is consistent with, Section 218 of the DGCL. Therefore, the Court of Chancery should have applied Section 212(a) when interpreting Section 1.2(c) of the Voting Agreement.

The Court of Chancery interpreted Section 1.2(c) to provide for per capita voting by the Key Holders to elect the Key Holder Designees and Appellants urge this Court to interpret Section 1.2(b) to provide for per capita voting by the Series A Stockholders to elect the Series A Director. (A67; D.I. 26 at 30-31.) It is

undisputed that Westech's Certificate of Incorporation does not authorize per capita voting, or permit any other deviation from the default rule. (B1347.) Therefore, the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement, and Appellants' interpretation of Sections 1.2(b) and (c) of the Voting Agreement, violate Section 212(a) of the DGCL and fail as a matter of law. The Court should reverse the trial court's interpretation of Section 1.2(c) of the Voting Agreement and reject Appellants' interpretation of Sections 1.2(b) and (c) of the Voting Agreement.

ARGUMENT

I. SECTION 212(a) OF THE DGCL APPLIES TO BOTH STEPS OF THE WESTECH ELECTION PROCESS SET FORTH IN THE WESTECH VOTING AGREEMENT.

The Court of Chancery's interpretation of Section 1.2(c) (and Appellants' interpretation of Section 1.2(b)) to permit per capita voting without the requisite authorizing provision in Westech's Certificate of Incorporation violates Section 212(a) because both steps of the Westech Election Process require a stockholder vote. *See* 8 *Del. C.* § 212(a). Further, Section 212(a) of the DGCL does not conflict with Section 218 and therefore, does not preclude its application to the Nomination Step of Section 1.2(c). This Court should reverse the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement and reject Appellants' interpretation of Section 1.2(b) of the Voting Agreement because neither complies with the requirements of Section 212(a).

A. The Plain Language of the Voting Agreement and Delaware Law Demonstrate that Section 212(a) Applies to the Nomination Step of Westech's Election Process.

Section 212(a) applies to the Nomination Step of the Westech Election Process because the Nomination Step requires a stockholder vote. (A540.) Section 212(a) of the DGCL provides, in pertinent part, "[u]nless otherwise provided in the certificate of incorporation and subject to § 213 of this title**,** each stockholder shall be entitled to 1 vote for each share of capital stock held by such

stockholder." 8 *Del. C.* § 212(a). This provision applies to all situations that require a stockholder vote. *Id.*; 8 *Del. C.* § 216. The parties agree that Section 212(a) applies to the Election Step – the election of the directors at the annual meeting. (D.I. 26 at 30; D.I. 25 at 46.) The parties disagree, however, about whether the provision applies to the first step – the Nomination Step – whereby certain stockholders "designate" (under Section 1.2(b)) or "elect" (under Section 1.2(c)) directors to the Board. (A540.) The plain language of the Voting Agreement and Delaware law and policy prove that the Nomination Step involves a vote of the stockholders and as such, Section 1.2(c) of the Westech Voting Agreement implicates Section 212(a). Therefore, the Court of Chancery erred in failing to consider the impact of Section 212(a) in its interpretation and enforcement of Section 1.2(c) of the Voting Agreement.

1. *The Plain Language of Section 1.2 Requires a Stockholder Vote at the Nomination Step.*

The plain language of Sections 1.2(b) and (c) of the Voting Agreement requires three or more Westech stockholders to act together to "designate" or "elect" directors to the Westech Board in the Nomination Step. (A540.) Section 1.2(b) of the Voting Agreement provides for the nomination (and subsequent election) of "[o]ne person who is an Independent Director and is *designated* by the majority of the holders of the Series A Preferred Stock." (A540 at § 1.2(b) (emphasis added).) Section 1.2(c) provides for the nomination (and subsequent

election) of "two persons *elected* by the [three] Key Holders." (*Id.* at § 1.2(c) (emphasis added).)

Under Delaware law, stockholders may act (*i.e.* to "elect" or "designate" a director) only by written consent or by voting at a duly noticed meeting where a quorum is present. 8 *Del. C.* §§ 212(b) ("Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting . . ."), 216 (setting forth the votes required and default procedures for stockholders to take corporate action); 228 ("any action required by this chapter to be taken at any annual or special meeting of stockholders of a corporation, or any action which may be taken at any annual or special meeting of such stockholders, may be taken without a meeting, without prior notice and without a vote, if a consent or consents in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted"). Both Sections 1.2(b) and 1.2(c) of the Voting Agreement involve three or more Westech stockholders acting to "elect" or "designate" the director nominee for whom the other Westech stockholders must vote. (A540.) By definition, this process of "electing" or "designating" in the Nomination Step requires stockholders to act – either by direct vote or written consent. Either method of

action involves a stockholder vote and is subject to the requirements of Section 212(a). 8 *Del. C.* §§ 211(b), 212, 228; *see also* BLACK'S LAW DICTIONARY (9th ed. 2009) (defining "vote" as "[t]he expression of one's preference or opinion in a meeting or election by ballot, show of hands, or other type of communication."). The Court should therefore find that Section 212(a) applies to the Nomination Step of the Westech Election Process.

Appellants argue Section 212(a) does not apply to Sections 1.2(b) and 1.2(c) of the Voting Agreement because those provisions do not require a vote of stockholders.[3] (D.I. 26 at 23.) They do not, however, explain how the Series A Stockholders (under Section 1.2(b)) or the Key Holders (under Section 1.2(c)) can act either to "elect" or "designate" directors without voting. Appellants' also ignore applicable case law that is fatal to their argument. Delaware courts have

[3] Though Appellants spend nearly two full pages discussing the "confused and confusing" response of Gorman's counsel to a hypothetical posed by the Court of Chancery involving an "investment club" that maintained a two-step voting structure similar to the Westech Election Process, they do not explain what is "confused or confusing" about the response. (D.I. 26 at 32.) The hypothetical included a vote at the investment club level (similar to the Nomination Step) and a vote at the entity level (similar to the Election Step). The hypothetical addressed the issue of whether Section 212(a) should apply to both steps of the election process. Gorman's counsel responded that Section 212 should apply to both and explained that "if, at the investment club level, you give two of those stockholders who own 80 percent of the shares the same amount of voting power as the other 14 [members] . . . who own collectively 20 percent, and you give them each one vote, then you do have a 212 problem." (AR71-74.) In other words, if the investment club's voting structure called for per capita voting at the investment club level, and the members of the club own different amounts of stock, then Section 212 *applies*. This voting structure *violates* Section 212 if the investment club's certificate of incorporation does not authorize the per capita voting scheme. It is unclear what is confusing about this response – it is consistent with Gorman's position throughout the Westech litigation and appears to have been understood, albeit ignored, by the Court of Chancery. As with the "investment club level" in the hypothetical, the Nomination Step involves a stockholder vote. Therefore, Section 212(a) applies and per capita voting is not permitted absent the requisite charter provision.

recognized the nomination process as "inherent" in stockholders' critical right to vote. *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 311 (Del. Ch. 2002); *see also Levitt Corp. v. Office Depot, Inc.*, 2008 WL 1724244, at *6 (Del. Ch.) ("Notwithstanding this difference, nomination is a critical part of the election process – in the absence of other nominations, the stockholder constituency has no electoral choice as between candidates; instead, the shareholders are left with only an 'up or down' vote on the company sponsored candidates. Despite the role of nominations in giving substance to elections, *i.e.*, providing shareholders with a selection of candidates, neither Subchapter VII of the Delaware General Corporation Law nor any provision of Office Depot's Bylaws discusses or imposes limitations on the nomination process. Perhaps the best explanation for this silence is that the concept of nominations is included within the broader category of elections. Typically, the election process is understood as spanning from nomination to voting to vote tabulation to announcement and certification of the results."). Excusing compliance with Section 212(a) at the Nomination Step ignores that nomination is inherent in the voting process *and* that Westech's Nomination Step requires Westech stockholders to vote. Appellants offer no response or counterargument in their papers. (*See generally* D.I. 26 at Section III.) *Harrah's* and *Levitt Co.* demonstrate the importance of nominating directors in stockholders' critical right to vote. The only way to effect this policy is to find that

Section 212(a) applies to both the Nomination Step and the Election Step of the Westech Election Process.

Second, the Nomination Step can only be completed by Westech stockholders. Section 1.2(b) explicitly provides for a vote of "the majority of holders of the Series A Preferred Stock." (A540.) Thus, under Section 1.2(b), the Series A Preferred *stockholders* actual vote to determine the designee for the Series A Directorship. As such, Section 212(a) applies and renders Appellants' interpretation of the provision invalid as a matter of law.

Section 1.2(c) also requires a *stockholder* vote because under the Voting Agreement, the Key Holders, who vote to elect the Key Holder Designees, must be stockholders. (*Id.*) Although Appellants argue that the Key Holders need not be Westech stockholders, the plain language of the Voting Agreement refutes their argument. The Voting Agreement defines a "Key Holder" in the first paragraph of the Voting Agreement, and again in Sections 7.1(b) and 7.2. (*See* A539; A546-47.) The first paragraph of the Voting Agreement provides:

> THIS VOTING AGREEMENT is made and entered into this 23rd day of September, 2011, by and among Westech Capital Corp. . . . each holder of the Company's Series A Preferred Stock . . . and those certain **stockholders** of the Company listed in Schedule B (together with any subsequent **stockholders**, or any transferees, who become parties hereto as "Key Holders" pursuant to Sections 7.1(b) or 7.2 below, the "Key Holders", and together collectively with the Investors, **the "Stockholders"**).

(A539 (emphasis added).) Sections 7.1(b) (addressing the issuance of shares to new investors) and 7.2 (addressing the transfer or assignment of shares to new or other investors) further demonstrate that a person may become a Key Holder only by purchasing new shares (pursuant to Section 7.1(b)) or obtaining shares through a transfer (Section 7.2). (A546.) Logic also suggests that "Key *Holders*" would actually hold stock. Therefore, Section 1.2(c) requires the vote of the three Key Holders, who must be stockholders. Sections 1.2(b) and 1.2(c) of the Voting Agreement require a stockholder vote in the Nomination Step and Section 212(a) of the DGCL applies to both steps of the Westech Election Process. Westech's Certificate of Incorporation does not authorize per capita voting, which renders the Court of Chancery's interpretation of Section 1.2(c) in conflict with the mandates of Section 212(a) and this Court should reverse.

2. Gorman's Application of Section 212(a) to the Voting Agreement is Consistent With, Not Adverse To, Delaware Law and Policy.

The underlying policy of Section 212(a) supports Gorman's interpretation of Sections 1.2(b) and 1.2(c) of the Voting Agreement. Appellants correctly point out that "Section 212(a) reflects the concern of Delaware law regarding transactions that create a misalignment between voting interest and economic interest." (D.I. 26 at 27.) Appellants' interpretation of Section 1.2(b) and the Court's interpretation of Section 1.2(c) create exactly the misalignment of interest Section

212(a) is designed to address by giving a minority of employee stockholders (measured by the size of their respective investments) disproportionate control over the election of Westech directors. To protect against this potential problem, the Delaware legislature set forth a clear mechanism in Section 212(a) to ensure that unsuspecting third parties do not invest in Delaware corporations that divorce voting power from economic interest without fair and adequate notice. *See* 8 *Del. C.* § 212(a). Pursuant to Section 212(a), corporations that diverge from the default one vote per share must disclose as much in the certificate of incorporation. 8 *Del. C.* § 212. This procedure, set by the Delaware legislature, has been in effect for over a century. *See Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977) (noting that Section 212(a) "has remained substantially unchanged since 1901, despite numerous other revisions of the Corporation Law.").

Only Gorman's interpretation of the Voting Agreement respects this policy. Gorman has consistently argued that his interpretation is the only one that affords Westech's major investors – Pallotta, Fellus, and Gorman – voting power consistent with their respective investments in the Company. (*See e.g.* B1193:4-1194:1; AR15:9-16:6.) Conversely, Appellants' reading of the Voting Agreement gives each individual "employee" – none of whom invested more than $250,000 (and none of whom is employed by the Company) – the same voting power as Gorman, who invested $1.8 million, Pallotta, who invested $2 million, and Fellus,

who invested $1.6 million. (*See* D.I. 25 at 6-7.) This scenario – whereby significant investors (*e.g.* Gorman, Pallotta, and Fellus) purport to disconnect their economic interests from their voting interests — is exactly what Section 212(a) seeks to address. *See Rohe*, 2000 WL 1038190, at *16. Even if the parties intended per capita voting by the Key Holders in Section 1.2(c), the parties failed properly to implement that intent in compliance with Section 212(a). Therefore, the Court should find Gorman's interpretation as the only reasonable interpretation of the Voting Agreement or invalidate the Voting Agreement. *See Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985) ("Consequently, each part or section [of a statute] should be read in light of every other part or section to produce an harmonious whole."); *see also Newtowne Village Service Corp. v. Newtowne Road Dev. Co.*, 772 A.2d 172, 175 (Del. 2001).

Appellants claim, without explanation, that their interpretation of the Voting Agreement does not misalign voting and economic interest. (D.I. 26 at 31.) They do not, however, provide any support for this claim; nor can they because it is antithetical to the argument they advance to support their interpretation of the Voting Agreement – *i.e.* that the parties executed the Voting Agreement to take control of Westech away from its majority stockholder and give it to a myriad of Westech employees who made relatively small investments in the Corporation. Unable to avoid this reality or justify Westech's failure to comply with Section

212(a), Appellants simply state that the parties to the Voting Agreement "contractually agreed to a nomination process under Section 1.2(b) and Section 1.2(c) that permits per capita voting for the designation of nominees" and therefore, the Court should force Gorman to honor that contract. (*Id.*) This argument misses the point, as the Court cannot enforce the Voting Agreement in contravention of Section 212(a) even if Mr. Gorman agreed to it. *Hansen v. Boyd*, 161 U.S. 397, 406 (1896) ("Courts, however, must recognize from necessity the methods of carrying on business at the present day, and apply well-settled principles of the common law to enforce contracts, unless they are forbidden by statute, or violate some rule of public policy."); *Burns v. Ferro*, 1991 WL 53834, at *2 (Del. Super Ct.) ("It is well-settled law that a court will not aid a contractual claim founded on a violation of the law." (citing *Affiliated Enter., Inc. v. Waller*, 5 A.2d 257, 259 (Del. Super. 1939)). That Appellants' interpretation of the Voting Agreement violates Section 212(a), and Gorman's does not, further demonstrates that only Gorman's interpretation is correct.

Appellants further argue that Gorman is seeking to invalidate the Voting Agreement as a matter of "judicial legislation," and his interpretation violates the stockholders' rights to "exercise wide liberality of judgment in the matter of voting." (D.I. 26 at 32, 34.) Appellants' misunderstand Gorman's argument. As noted at trial and again in Gorman's Answering Brief, Gorman does not dispute

parties' broad contractual freedom to enter into voting agreements. (B12117-18; D.I. 25 at 47.) Gorman simply contends that parties freely entering into broad voting agreements also must comply with other requirements of Delaware law (*i.e.* Section 212(a)), as Section 218(d) of the DGCL explicitly recognizes. (D.I. 25 at 47.) The Westech Election Process, under Appellants' interpretation, violates Section 212(a) and is not permitted under Section 218. (*See generally* D.I. 17 at Parts I and II; D.I. 26 at Part III.) Gorman does not ask this Court to rewrite Section 218 or any other provision of the DGCL, rather he respectfully requests that the Court interpret the Voting Agreement in an a manner that complies with all applicable statutory mandates.

B. Section 218(c) of the DGCL Does Not Excuse Compliance with Section 212(a).

Section 218 of the DGCL does not excuse, and in fact requires, compliance with Section 212(a). Section 218(c) provides, "An agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or as the parties may agree, or as determined in accordance with a procedure agreed upon by them." 8 *Del. C.* § 218(c). The Court of Chancery found that the Voting Agreement permissibly acts as a "contractual overlay" on top of a one share, one vote scheme. (A67.) Appellants take the same position. (D.I. 26 at 29-30.) Both are wrong as the Voting Agreement, at least under Appellants'

interpretation, does not "overlay" but rather replaces the one share, one vote scheme with per capita voting at the Nomination Step. Nothing in Section 218(c), however, permits parties to abrogate the requirements of Section 212(a) of the DGCL (or any other statutory provision) by agreement, and Appellants fail to provide any authority to the contrary. (*See generally* D.I. 26 at Section III.) Further, Section 218(d) confirms Gorman's reading of Section 218(c) that agreements permitted by Section 218 must comply with Section 212(a). *See* 8 *Del. C.* § 218(d) (permitting any voting agreement not "otherwise" illegal). Therefore, the Court should reverse the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement.

1. Appellants Fail to Provide Any Support for their Position that Section 218(c) Trumps Section 212(a).

In Appellants' Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal ("Appellants' Reply Brief"), they do not cite any authority for their position that Section 218(c) precludes the application of Section 212(a) to the Voting Agreement.[4] Relying on Section 218(c) and irrelevant cases, Appellants argue their interpretations of Sections 1.2(b) and 1.2(c) do not violate

[4] Notably missing from Appellants' Reply Brief is any citation to or analysis of *Klassen v. Allegro Dev. Corp.*, 2013 WL 5739680 (Del. Ch.), the sole case relied upon by the Court of Chancery to apply Section 218(c) of the DGCL to justify its interpretation of Section 1.2(c), which Gorman distinguished in his Answering Brief. (D.I. 25 at 48.) As explained in Appellee's Answering Brief, the election scheme in *Klassen* did not implicate Section 212 (and thus is distinguishable from the present case) because each director was designated by a single individual, rather than a group of stockholders, and did not involve per capita voting. *Id.*

Section 212(a) because "holders of such capital stock may enter into an agreement that obligates the stockholders to vote their stock in a manner that guarantees the election of particular individuals to a board of directors." (D.I. 26 at 28.) While true, this right does not excuse compliance with Section 212(a) of the DGCL, and Appellants fail to cite any support to the contrary.

In support of their argument, Appellants first rely on *Dweck v. Nassar*, 2005 WL 5756499, at *4 (Del. Ch.) and *Rohe v. Reliance Training Network, Inc.*, 2000 WL 1038190 (Del. Ch.) for the proposition that stockholders may agree to vote in favor of a particular director and that courts will respect that agreement "except in extremely limited circumstances." (*Id.* at 28-29.) This point is not disputed by the parties or relevant to the disposition of this appeal. The only authority cited by Appellants in support of their argument that Section 218(c) excuses compliance with Section 212 is *Carter v. Pearlman*, 1998 WL 326605 (Del. Ch.). *Carter* does not stand for this proposition or even implicate Section 212(a). The voting scheme at issue in that case provided: "[e]ach Stockholder, for so long as he shall own at least 5% of the outstanding Common Stock, shall have the right to nominate himself to be a director" and "[e]ach stockholder, for so long as he remains a stockholder of the Corporation, agrees to vote the shares of Common Stock owned by such Stockholder to elect the nominees of the other Stockholders." *Id.* at *1. As with *Klassen*, the voting structure at issue in *Carter*

does not implicate Section 212(a) because one individual designated each director and, therefore, the nomination step of that voting scheme did not involve per capita voting and did not implicate Section 212(a). *Id.* Therefore, *Klassen* and *Carter* do not inform the resolution of this appeal.

The Westech Election Process does not "overlay" a permissible one share, one vote system as in *Klassen* and *Carter*. Rather, the Westech Election Process, under the Court of Chancery's interpretation, replaces a one share one vote scheme with per capita voting without an authorizing provision in the Certificate of Incorporation and in violation of Section 212(a). Therefore, the Court should reject Appellants' argument and reverse the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement.

2. Section 218(d) Requires Compliance With Other Provisions of the DGCL

Section 212(a) does not conflict with Section 218 of the DGCL. In fact, Section 218(d) explicitly recognizes that voting agreements must comply with applicable law, including Section 212(a). *See* 8 *Del. C.* § 218(d) (permitting any voting agreement not "otherwise" illegal). The parties do not dispute that Sections 218(c) *and* Section 212(a) permit parties to deviate, through per capita voting or otherwise, from the default rule. *See* 8 *Del. C.* §§ 218(c) and 212(a). Section 218 authorizes such agreements, and Section 212(a) establishes the procedural prerequisites for effecting them. *See, e.g. Providence & Worcester Co. v. Baker,*

378 A.2d 121, 123 (Del. 1977) ("Under [§] 212(a), voting rights of stockholders may be varied from the 'one share-one vote' standard by the certificate of incorporation.") However, the contractual "overlay" here, as found by the Court of Chancery, displaces the one vote per share principle without the necessary charter provision. (A67.) Thus, the Court of Chancery's interpretation of Section 1.2(c) violates Section 212(a) of the DGCL, and is "otherwise" illegal under Section 218(d). Section 218(d) of the DGCL only supports Gorman's interpretation of the Voting Agreement and his Section 212(a) argument. *See* 8 *Del. C.* § 218(d). Therefore, the Court should reverse the Court of Chancery's interpretation of Section 1.2(c) of the Voting Agreement.

CONCLUSION

For the foregoing reasons, in addition to those stated in Gorman's Answering Brief, Gorman respectfully requests that the Court affirm the Court of Chancery's interpretation of Section 1.2(b), reverse the Court of Chancery's interpretation of Section 1.2(c), and determine that the Westech board consists of Salamone, Ford, Gorman, Olsen, Sanditen, Williamson, and Woodby.

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