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IN THE SUPREME COURT OF THE STATE OF DELAWARE

BIOLASE, INC., a Delaware corporation, *Defendant, Counterclaim-Plaintiff Below, Appellant/Cross-Appellee,* v. ORACLE PARTNERS, L.P., a Delaware limited partnership, *Plaintiff, Counterclaim-Defendant Below, Appellee/Cross-Appellant.*	**No. 270, 2014** On appeal from the Court of Chancery of the State of Delaware, C.A. No. 9438-VCN

APPELLEE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NATURE OF PROCEEDINGS

This is an appeal from the May 21, 2014 Final Judgment (Ex. A to Appellant's Opening Brief ("OB")) of the Court of Chancery in an action by Oracle Partners, L.P. ("Oracle") under 8 *Del. C.* § 225 to determine the composition of the Board of Directors of Biolase, Inc. ("Biolase"). The sole issue on Biolase's appeal is whether two Biolase directors, Alexander Arrow and Samuel Low, resigned during a Board meeting held on February 28, 2014 (the "Meeting"), creating vacancies that were then filled by the election of Paul Clark and Jeffrey Nugent, two independent directors whose election to the Biolase Board had been discussed between and agreed to by the parties. After extensive expedited discovery and an expedited trial on the merits, the Court of Chancery issued a 46-page Memorandum Opinion ("Opinion") on May 21, 2014 (Ex. B to OB) determining that Dr. Arrow orally resigned at the Meeting, and that Mr. Clark was elected to fill that vacancy. The Court ruled in favor of Oracle, and against Biolase, on Biolase's "unclean hands" defense and each of its counterclaims.

Biolase challenges only the portions of the judgment finding that Arrow resigned at the Meeting and that Clark was elected in his place. OB at 1. Notwithstanding that, Biolase spends large portions of its Statement of Facts recounting the alleged conduct by Oracle that formed the basis of its defenses and counterclaims that are not subject to this appeal. *See* OB at 4-10.

Oracle Partners' cross appeal seeks the right to file an application in the trial court to obtain reimbursement of attorneys' fees incurred in prosecuting this action on the ground that its lawsuit has determined the proper composition of the Biolase Board, and has thereby benefited Biolase and its stockholders.

SUMMARY OF ARGUMENT

1. Denied. The Court of Chancery correctly determined that Section 3.3 of the Company's Bylaws is "unambiguous" and that the language providing that directors "*may* resign at any time upon written notice" in Section 3.3 "can only be interpreted as permissive, not mandatory" and, therefore, that the Bylaws permit oral resignations. Opinion ("Op.") at 38-39. Indeed, Section 3.3 of the Bylaws tracks the language of Section 141(b) in all material respects, and Delaware courts have long interpreted the language of Section 141(b) to permit oral resignations. Thus, Biolase cannot show that a "plain reading" of the Bylaws require a different result.

2. Denied. The Court of Chancery determined that the "overwhelming weight of the evidence" shows that Arrow made a "sufficiently clear statement" that he resigned at the February 28 Meeting. Op. at 40. Biolase's only argument is that the Court did not use the word "unequivocal" in its Opinion in finding that Arrow made a clear statement that he had resigned. But Biolase cannot show that Delaware law requires something more than a "clear statement" for a resignation to be effective.

3. Denied. The Court of Chancery correctly found that Arrow resigned during the February 28 Meeting based on the "overwhelming weight of

the trial and deposition testimony," Op. at 40, including both the testimony of Arrow himself and of Biolase's Rule 30(b)(6) designee that Arrow had resigned, and that factual determination is entitled to deference on appeal. This Court's practice on appeal is not to "weigh" the evidence to determine if it would have reached the same conclusion as the trial court. But here, the overwhelming weight of evidence shows that the parties' intent was that Arrow had resigned during the meeting, which the trial court properly credited in its discretion as the trier of fact.

4. Denied. The Court of Chancery correctly found that Clark was appointed to fill the vacancy created by Arrow's resignation based on an "orderly and logical deductive process" based on the available evidence, including the parties' shared intent to appoint directors at the February 28 Meeting and the draft minutes prepared by Biolase's own counsel that showed that Clark was intended to fill the vacancy created by Arrow. Biolase does not identify, and Oracle is not aware of, any legal principle contrary to the trial court's determination.

SUMMARY OF ARGUMENT REGARDING CROSS APPEAL

5. The Court of Chancery erred by entering a Final Order simultaneously with the Opinion, thereby denying Oracle the opportunity to apply for an award of attorneys' fees and expenses, or to argue that such fees are appropriate. Through the prosecution of this Section 225 action, Oracle benefited Biolase and its stockholders and, thus, is entitled, as a matter of law, to apply for

an award of attorneys' fees and expenses. Oracle seeks to vacate the portion of the Final Order denying it attorneys' fees and for the matter to be remanded to the Court of Chancery to determine whether such an award is appropriate and, if so, the amount of attorneys' fees to be awarded.

STATEMENT OF FACTS

A. Factual Background.

At the parties' mutual request, the Court held an expedited trial in this action on April 24, 2014. The Court received extensive pre-trial briefs, heard the live testimony of six witnesses, and heard post-trial argument the following day. The Court issued its 46-page Opinion on May 21, 2014.

As found by the Opinion, Biolase, a publically traded Delaware corporation with its headquarters in Irvine, California, is a medical device manufacturer focused on the dental industry. Op. at 3-4. Oracle, a Delaware limited partnership based in in Greenwich, Connecticut, is a strategic investment firm solely within the healthcare industry. *Id.* at 3. Oracle has never been involved in a proxy contest, or going private transaction, or prior to this lawsuit, any litigation. *Id.*

This lawsuit was filed because, after extensive discussions between Federico Pignatelli, a founder, long-time director and CEO of Biolase, and Larry Feinberg, the principal of Oracle, Mr. Pignatelli ("Pignatelli") agreed that two directors of Biolase (Drs. Arrow and Low) would resign from the Board, and that two highly qualified independent directors, Paul Clark ("Clark") and Jeffrey Nugent ("Nugent") (Op. at 5-6), would be appointed to fill the vacancies created by their resignations. A16-24. On February 28, 2014, the Board held a telephonic

meeting to effect this agreement. It is undisputed that all parties (including Pignatelli) intended that Drs. Arrow and Low would resign, and that Clark and Nugent would be elected to replace them. OB at 11; Op. at 21-22. There is substantial evidence that is in fact what occurred, including a press release issued by Biolase on March 3, the Monday following the Meeting, announcing that Drs. Arrow and Low had resigned from the Board and that Clark and Nugent had been appointed to fill the vacancies created by their resignations. Op. at 2; B1.

Following the Meeting, Nugent and Clark – who had never previously spoken to one another, Op. at 27 – shared their observations about Biolase, and were in agreement that the Company was in a "very dangerous situation" with Pignatelli as Chairman and CEO. Op. at 28; A423 (Nugent). Clark and Nugent called Pignatelli and "tried to convince him, as nicely as [they could] that he should step down as CEO of Biolase." Op. at 29; A423 (Nugent). Pignatelli was, in his own words, "furious." Op. at 29. He also recognized that the other two independent members of the Board would likely support his removal as CEO, resulting in a 4-2 vote for removal. A486 (Furry). Pignatelli immediately solicited the two non-independent directors who had just resigned, Arrow (President of Biolase) and Low (a paid consultant to Biolase) to rejoin the Board (*id*. at 30). Pignatelli extended this invitation even though he had no Board authorization to do so and even though the size of the Board remained at six. A480 (Furry). On

March 6, the Company (again, with no Board approval) filed a Form 8-K with the Securities and Exchange Commission disclosing that the size of the Board was now eight members. *Id*. at 2; B4. When it became apparent that Dr. Arrow would not support Pignatelli (meaning that the Board would likely vote 5-3 to remove him as CEO), Pignatelli caused Biolase – again, with no Board authorization – to take the position, its current position, that the Board comprises only four directors (Pignatelli and Norman Nemoy, who has been loyal to Pignatelli), leaving the Board in deadlock.

In the face of this Board manipulation, Oracle initiated this action on March 11, 2014 seeking a determination that Arrow and Low had properly resigned and Clark and Nugent had properly been elected to fill the vacancies created by their resignations. A16-24. In opposition, Biolase argued that Arrow and Low had not properly resigned at the Meeting, and therefore there were no board vacancies to fill when Clark and Nugent were elected. A75. Biolase also asserted defenses and counterclaims claiming that Oracle had defrauded it by not telling it that it wished to replace Pignatelli as CEO of the Company and that Oracle had secret agreements with Clark and Nugent to replace Pignatelli.

B. Background of Oracle's Investment in Biolase.

Oracle identified Biolase as a potential investment in the Summer of 2013. A236 (Feinberg). Oracle felt that Biolase had great technology, but poor

management. Op. at 6; A237 (Feinberg). In fact, Pignatelli was not a full time CEO of Biolase. Op. at 4-5. As Pignatelli's website makes clear, his "passion" is Pier 59 Studios, which he founded and bills as "the paramount location for photographic productions and a center of international creativity, art and fashion" (B12), and Art & Fashion Group, a holding company that Pignatelli founded to house "an array of business services to the advertising and fashion industry, commonly defined as the Hollywood of photography." *Id.* In fact, Pignatelli spends so little time at Biolase that Fred Furry, its CFO and 30(b)(6) witness in this lawsuit, keeps an "over/under" tally of the number of times that Pignatelli will be at Biolase each year. A854 (Furry) at 21; A338 (Arrow). In all of 2013, Pignatelli was present at Biolase for a total of just 14 days. A855 (Furry) at 24; A649 (Arrow) at 18. Even without knowing these details, it was apparent to Feinberg that Biolase needed a full time CEO.

On August 29, 2013, Fienberg met with Pignatelli at Pignatelli's Pier 59 office in New York. A238 (Feinberg). Though Pignatelli spent much of the meeting talking about photo shoots and models, Feinberg did eventually shift the conversation to Biolase. *Id.* At this very first meeting, Feinberg told Pignatelli that in his view, Biolase "had very poor corporate governance and quite frankly, you need a real CEO to run the company." A239 (Feinberg); Op. at 6. As reflected in Feinberg's contemporaneous notes, Pignatelli was receptive to the idea of

stepping down as CEO. B14 ("Federico would be thrilled to be just chairman, doesn't want to be CEO"); Op. at 6.

Following the meeting, Feinberg sent an email to Pignatelli and Arrow (Biolase's President) proposing an investment in the company, and reiterating his view that "Biolase needs to both supplement its current Board of Directors with more experienced operational personnel, as well as bring in a full-time CEO with medical device experience to help fix the operational issues and implement the strategic vision of Federico." Op. at 7 *quoting* e-mail from Feinberg to Pignatelli and Arrow, B17. As the Opinion notes, Feinberg never wavered from this view. *See* Op. at 8, 18, 43.

Biolase spends pages of its brief asserting that this was a "hostile" "backdoor takeover" seeking to gain "control" of Biolase, but the record does not support these assertions. Op. at 44-46. To the contrary, the trial court expressly found that "Oracle was not seeking to 'control' Biolase – Feinberg wanted strong independent directors to manage the company." Op. at 8; *accord*, *id.* at 17, n. 87; 18; 43. The trial court similarly found that there is "no evidence from which the Court could conclude that Oracle had any agreement, especially an agreement to terminate Pignatelli, with Clark and Nugent." *Id.* at 45. Based on these findings of fact, the trial court held that "Oracle did not make any false statements or omissions" to Biolase. *Id.* at 45. Biolase has not appealed the denial of its

"unclean hands" defense or the judgment against it on it counterclaims, and therefore may not contest these findings. Moreover, the trial court's factual findings are fully supported by the record and could not be overturned on appeal in any event.

C. Oracle Invests in Biolase.

Following Feinberg's initial meeting with Pignatelli, Oracle proposed to invest up to $20 million in Biolase, but Pignatelli rejected it as being "too dilutive." A1209; A242-43 (Feinberg). Pignatelli has consistently rejected all capital infusion proposals for this same reason, and as a result, Biolase has been (and remains) perpetually short of capital. A346-47 (Arrow). Pignatelli's refusal to entertain potential capital investments, and the Company's resulting precarious financial condition, has led to conflict among members of the Board and, ultimately, to the resignations of at least two independent directors. Op. at 10-11; A252-54 (Feinberg); A347 (Arrow).

In the Fall of 2013, Oracle purchased shares of Biolase in the open market. In December, 2013 and February, 2014, as Biolase was increasingly desperate for cash, Oracle purchased shares directly from Biolase in two private placements, bringing its then ownership to 16.4% of the Company's stock, and making Oracle Biolase's largest shareholder. Op. at 12-13.

D. Feinberg and Pignatelli Agree To Add Clark and Nugent as Independent Directors.

Thereafter, Feinberg and Pignatelli discussed corporate governance, including the specific topic – raised by Feinberg at his prior meeting with Pignatelli – of adding directors to strengthen Biolase's Board. *Id*. at 14. In February, 2014, Pignatelli told Feinberg that two current directors – Arrow and Low – would not be up for election at that 2014 annual meeting and that he was considering inviting Nugent, who had been the CEO of several companies, to be on the Board. Op. at 14; A260 (Feinberg). Feinberg suggested two other candidates, Paul Clark and another individual, both of whom had relevant experience, and neither of whom had any economic relationship with Oracle. *Id*. at 14-15.

E. All Parties Agree That Arrow and Low Will Resign at the Meeting, and that Clark and Nugent Will Be Elected To Fill their Vacancies.

Ultimately, Feinberg and Pignatelli came to an agreement that Clark and Nugent would be appointed to the Biolase Board. *Id*. at 20. Shortly before the scheduled February 28 Meeting, Pignatelli decided (without input from Biolase's Nominating Committee) that Arrow and Low would resign during the Meeting and be replaced immediately by Clark and Nugent. Op. at 21, *citing* B19; B20. Arrow initially resisted, but by the end of the night of February 27, he agreed to resign, and he and Pignatelli shook hands to memorialize their agreement. Op. at 22. Low, who was a consultant to the Company and preferred that role to the role of a

director, also agreed to resign if doing so was in the best interest of the Company. A558 (Low); Op. at 23. Low testified that he understood that he and Arrow would be resigning from the Board and that Clark and Nugent would be elected as their replacements. *Id*. at 23, *citing* A558-59 (Low).

As the trial court found, "what was intended, is not really in debate. It was intended that the two [Arrow and Low] would resign and the other two [Clark and Nugent] would take their positions on the Board." B67. This finding is well supported by the record, including

- Pignatelli's oral instruction to Nemoy (Chair of the Nominating Committee) on the evening of February 27 that Low and Arrow were to resign, and that Clark and Nugent would be elected to take their places. A414 (Nugent);

- A text message sent by Pignatelli to Biolase's CFO and its General Counsel (Fred Furry and Mike Carroll, respectively) on the evening of February 27 stating that "both Clark and Jeff Nugent are ok in joining the Board. Alex [Arrow] has agreed in resigning tomorrow as Dr. Low." B19;

- An email to the Board from Nemoy on the evening of February 27 saying that Arrow and Low were resigning and proposing that Clark and Nugent be elected in their stead. B20;

- An email from James Talevich, an independent director, to Pignatelli in the early morning of February 28 laying out three possible options as to the timing of the resignations and election of new directors because he "wanted to be really sure exactly what Federico's intentions were," B74; A1158-59 (Talevich) at 97-98, which prompted Pignatelli to tell Talevich that they were pursuing "Option 1" – *i.e.*, that "Sam [Low] and Alex [Arrow] resign as directors now [and] Paul Clark and Jeff Nugent are appointed tomorrow by board action to fill the vacancies." B74; A1160 (Talevich) at 103-14.

Furry, Biolase's 30(b)(6) designee, confirmed that going into the February 28 Meeting, the plan was for Arrow and Low to resign, and for Clark and Nugent to be appointed as their replacements on the Board. A478-79 (Furry).

F. Arrow and Low Resign, and Clark and Nugent Are Elected.

Consistent with the intent of all of the participants, Michael Carroll, Biolase's Secretary and General Counsel, began the February 28 Meeting by raising the resignations of Arrow and Low. Op. at 23. Arrow interrupted, and raised an issue about his stock options. There was a 15-30 minute discussion, during which Pignatelli reminded Arrow that he had agreed, the prior evening, that he would resign. Op. at 24; A671 (Arrow) at 108-09; A873 (Furry) at 95-96; A353 (Arrow). Arrow asked fellow director Frederick Moll about what he should do, and Moll encouraged him to follow Pignatelli's lead and resign. Op. at 24; A354-55 (Arrow); A672 (Arrow) at 110; A872 (Furry) at 89-90; A947 (Moll) at 58-59; A1145 (Talevich) at 44. At the end of the debate, Arrow said "okay, I agree, I go along with that." Op. at 24, *citing* A354 (Arrow); *accord*, A672 (Arrow) at 110; A467 (Furry); A872 (Furry) at 90; A909 (Low) at 33; A947 (Moll) at 59; A1145 (Talevich) at 44-45. With those words, Arrow, and the rest of the Board (other than Pignatelli) understood that Arrow had verbally resigned from the Board. Op. at 24, citing deposition and trial testimony of Arrow, Furry (the Company's CFO), and directors Low, Moll and Talevich.

Low never spoke at the meeting. Op. at 24, *citing* testimony of Low, Arrow, Furry, Pignatelli, Moll and Talevich. Low testified that he did not speak because he agreed to his resignation. A560 (Low). However, based on his experience as a college administrator, he expected his resignation to be effective "with the completion of a written resignation." *Id*. at 24; A555.

Following discussion of the resignations, the Board unanimously voted to elect Clark and Nugent as directors. Op. at 25. There was no discussion of expanding the Board, A480 (Furry), as all the directors believed that Arrow and Low had resigned and that Clark and Nugent were elected to fill their vacancies. A354-55 (Arrow); A963 (Moll) at 123-24; A1145 (Talevich) at 44-45; A907 (Low) at 25; A560 (Low). Arrow participated in the vote to elect the two new directors but did so only because he didn't want to seem "spiteful" following the prior exchange over his options and because he "was not trying to make a statement that I was still a director," testimony that trial court fully credited. A384 (Arrow); Op. at 25.

Shortly after the Meeting, Carroll (the general counsel) provided Arrow and Low with a template resignation email for them to send to Pignatelli. Op. at 26; A1329. Arrow did not think that he needed to tender a written resignation to resign, but sent the email because he was instructed to do so by

Biolase's general counsel. *Id*. Low sent his resignation email to Pignatelli and Carroll within an hour of the meeting. Op. at 27; A561-62 (Low).

G. Biolase Announces The New Board.

On March 3, Biolase issued a press release announcing that the Board of Directors had appointed Clark and Nugent to the Board, and that Arrow and Low had tendered their resignations. Op. at 28-29; B1. The press release stated that as a result, Biolase's board currently consists of six directors, five of whom are independent directors. *Id*. The press release quoted Pignatelli as being "thrilled" by these new appointments. *Id*.

H. Pignatelli Attempts To Manipulate The Board To Entrench Himself As CEO.

Pignatelli's "thrill" was short-lived. Late in the day on March 3, Clark and Nugent called Pignatelli and suggested that he resign as CEO of the Company. Op. at 29. As noted previously, Pignatelli was "furious" and tried to manipulate the Board by unilaterally (*i.e.*, without Board approval) asking Arrow and Low to rejoin, and then unilaterally filed a Form 8-K that they had done so and that the size of the Board was eight members. *See* pp. 7-8, *supra*; Op. at 30-31; B4. Evidence at trial demonstrated that Pignatelli sought to both bribe and threaten Arrow. Op. at 34, n. 168. In the end, however, Arrow would not support Pignatelli, meaning that an eight person board would likely vote 5-3 against retaining Pignatelli as CEO. Upon learning of this, Pignatelli caused Biolase to

take the position asserted in this lawsuit, that Arrow and Low did not resign at the meeting, that there were no vacancies for Clark and Nugent to fill, but that Arrow and Low's written resignations were effective, leaving the size of the Board at four. A75. Pignatelli contends that this leaves Biolase with a four-person Board, comprising Moll and Talevich (who do not support Pignatelli as CEO), and Pignatelli and Norman Nemoy, a director who has been loyal to Pignatelli.

I. The Status Quo Order and Ensuing Board Deadlock.

On March 20, 2014, this Court issued a Status Quo Order, ruling that, until trial, Biolase's Board would consist of the four "undisputed" directors – Moll, Talevich, Pignatelli and Nemoy – and that a majority of that Board was required to take any action outside the ordinary course of business. A88-90. That Board has been deadlocked, and the Company has, among other things, been unable to agree on a meeting date or a plan to raise capital. Op. at 34; A472-75 (Furry). The Company is currently in default on its credit agreement, and rapidly running out of cash. B76. As the trial court found, if the deadlock persists, "given the financial problems the Company has had and the uncertainty that the Company is suffering – the record is fairly clear about all of that it – then not only will Oracle be harmed, but the other public stockholders run a risk of a severe diminution of the value of their investment. There are lots of stockholders, and the value of

their residual ownership of Biolase is at risk if a stay is granted" such that the deadlock persists. B69.

Moreover, Biolase concedes that the uncertainty about the composition of Oracle Biolase's Board is harming its ongoing business. In a press release Pignatelli authorized on May 16, 2014, Biolase advised stockholders,

> I believe that Oracle's lawsuit has had a dramatic and meaningful impact upon our end of quarter sales for the three months ended March 31, 2014. Like most companies that sell capital equipment, a significant portion of our sales closes in the last month of a quarter, and the uncertainty that the lawsuit created regarding the composition of our Board most definitely impacted the decision making process of most buyers.

B87. If Biolase were to prevail on this appeal, the result would be continuation of the current four-person board, and of the deadlock that continues to harm Biolase's business.

J. The Facts Concerning Oracle's Cross-Appeal.

In its Complaint, Oracle sought, among other relief, "an award of its costs, including attorney fees, in bringing this action." A24. Well established law provides that, where a plaintiff prevails in a dispute involving issues of corporate governance, it may be entitled to have to company pay its attorneys' fees, if it has conferred a "corporate benefit." *E.g.*, *Keyser v. Curtis*, 2012 WL 3115453, at *19 (Del. Ch. July 31, 2012), *aff'd sub nom.*, *Poliak v. Keyser*, 65 A.3d 617 (Del. 2013); *Baron v. Allied Artists Pictures Corp.*, 395 A.2d 375, 383 (Del. Ch. 1978),

aff'd, 413 A.2d 876 (Del. 1980). Such an application can only be made, however, *after* the plaintiff achieves success on the merits.

Here Oracle Partners was never given an opportunity to make an application for attorney fees. It was successful in this action on May 21, 2014, when the Court issued the Opinion. The Opinion, however, was accompanied by an Order (which was the Final Order and Judgment in the action) that stated in pertinent part: "Court costs, but not attorneys' fees because there is no basis for shifting such fees, are assessed against Defendant/Counterclaim Plaintiff Biolase, Inc." Final Order at ¶ 4. Because the Opinion and the Order denying fees (and terminating the case) were entered simultaneously, Oracle never had any opportunity to present evidence or argument to the trial court that its success on the merits entitles it to an award of attorneys' fees.

ARGUMENT

II. THE COURT OF CHANCERY CORRECTLY HELD THAT ORAL RESIGNATIONS ARE EFFECTIVE UNDER 8 *DEL. C.* § 141(b) AND BIOLASE'S BYLAWS.

A. Question Presented.

Whether oral resignations are effective under 8 *Del. C.* § 141(b) and Section 3.3 of the Company's Bylaws.

B. Standard of Review.

Questions of law, including the interpretation and construction of statutory provisions and the provisions of governing documents, are reviewed *de novo*. *See, e.g.*, *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923, 926 (Del. 1990) (interpreting a certificate of incorporation); *Bay City, Inc. v. Williams*, 2 A.3d 1060, 1061 (Del. 2010) (interpreting a statutory provision).

C. Merits of the Argument.

An unbroken line of at least five Court of Chancery cases spanning nearly thirty years has addressed the issue of whether oral resignations from the board of a Delaware corporation are effective, and each one of those cases has interpreted the use of the permissive "may" in 8 *Del. C.* § 141(b) to permit oral resignations. The Court of Chancery correctly relied on those precedents to determine that Section 3.3 of the Company's Bylaws—which tracks the pre-2000 language of Section 141(b) in all material respects—is "unambiguous" and that the

use of "may" in the Bylaws "can only be interpreted as permissive, not mandatory" and, thus, consistent with the statute, permits oral resignations. Op. at 38-39.

1. Delaware Law Recognizes Oral Resignations

In 1984, then-Chancellor Brown addressed the issue of oral board resignations in *Bachmann v. Ontell*, 1984 WL 8245 (Del. Ch. Nov. 27, 1984). *Bachmann* was a Section 225 action to determine whether a director, Sussman, had orally resigned during a Board meeting. Following a contentious vote during which Sussman was removed as an officer, Sussman "became angered, packed his papers in his briefcase, and left the meeting." *Id*. at *1. The directors aligned with the defendant testified that Sussman stated at the time that he was resigning, while the directors aligned with the plaintiff, including Sussman himself, denied that he had made such a statement. *Id.* Given the conflicting testimony, including that of the subject director, and the fact that the draft minutes did not reference a resignation, the Court concluded that the "preponderance of the evidence" weighed against finding that Sussman had resigned. However, in response to plaintiff's argument that Section 141(b) required that resignations be in writing, the Court observed that, although not required to decide the question of whether oral resignations are effective under the statute, the Court's "inclination would be to hold against plaintiffs" on this legal issue, explaining:

> This is because the statutory language can be construed as permissive rather than mandatory (it is said that the

> purpose of this language is to provide a means for a director's resignation to become effective at his election as opposed to requiring acceptance by the corporation, which was the former status of our law) and because I can conceive of circumstances where a completely illogical result would follow from the refusal of the law to recognize an oral resignation clearly given.

1984 WL 8245, at *2.

In *Dionisi v. DeCampli*, 1995 WL 398536 (Del. Ch. June 28, 1995, amended Jan. 23, 1996), then-Vice Chancellor Steele expressly held that oral resignations are effective under Section 141(b). There, the withdrawing officer and director, Dionisi, announced to the only other director and stockholder, DeCampli, on January 5, 1987 that he was "leaving the company." *Id*. at *3. Dionisi asked to "remain active" for another 30 days so that he could finish up some projects; DeCampli initially demanded that Dionisi leave immediately but ultimately acquiesced. Following that conversation, Dionisi left for vacation and DeCampli began telling the company's employees that Dionisi had resigned. After Dionisi returned from vacation, he worked for an hour a day over the next two weeks to finish up existing projects. The Court concluded that "[b]oth Dionisi and DeCampli understood that Dionisi's announcement on January 5 meant he was effectively resigning all of his positions in the company including CEO, Secretary and Director, effective immediately." *Id*. at *9. In particular, the Court focused on the fact that DeCampli had told employees that Dionisi had resigned, concluding

that the "only logical and rational interpretation of the evidence" was that both Dionisi and DeCampli understood that Dionisi was resigning and had "abdicated all authority of office" upon his January 5 announcement. *Id*. In so holding, the Court acknowledged that the *Bachman* Court did not decide whether oral resignations are permissible, but nonetheless agreed with its analysis as supporting the Court's holding that Dionisi's oral resignation was effective under Section 141(b). *Id.* *8-*9.

In *Rypac Packaging Machinery Inc. v. Coakley*, 2000 WL 567895 (Del. Ch. May 1, 2000), then-Vice Chancellor Jacobs was faced with a similar question of whether a director and officer had resigned. As in *Dionisi*, the director in question, Coakley, told the only other officer and director of the plaintiff, Poges, that he was resigning during a meeting on October 10, 1997. After going through the "somewhat erratic sequence of events" that followed, and without reference to the preceding case law, the Court concluded that Coakley had resigned on October 10 when he told Poges that he was resigning because "Poges and Coakley both understood that to mean that Coakley was resigning all his positions in the company, including President, director, and employee, effective immediately." *Id*. at *5. The Court also concluded that Coakley later holding himself out to be an officer in a December 11, 1997 letter "did not legally alter the fact that Coakley had resigned on October 10, 1997" when told Poges that he had resigned. *Id*.

In *General Video Corp. v. Kertesz*, 2008 WL 5247120 (Del. Ch. Dec. 17, 2008), the Court (per Vice Chancellor Lamb) again addressed the question of whether an oral resignation was effective when given. Like *Dionisi* and *Rypac*, the Court focused on the parties' mutual intent and concluded that a director and officer resigned on the date that he orally informed his business partner (the only other officer and director) that he "wanted out" and "was all done" and was terminating their business relationship. Based on this communication, the Court found that "both parties knew and understood that their venture . . . was at an end." *Id*. at *18. On the legal question of whether oral resignations could be effective, the Court recognized that the commentary from *Bachman* was *dicta*, but that *Dionisi*, when "presented squarely with the question," quoted *Bachman* approvingly as the "rule in the case." *Id*. at *17. The Court then expressly held that the statute does not "require written notice to the corporation before a resignation can take effect." *Id*.

Most recently, in *Boris v. Schaheen*, 2013 WL 6331287 (Del. Ch. Dec. 2, 2013), the Court of Chancery again concluded that oral resignations were effective in the context of determining the proper composition of a board pursuant to Section 225. Citing *General Video*, *Dionisi* and *Bachmann*, the Court observed that "[f]irst in *dicta*, and then twice as a legal conclusion, this Court has interpreted the use of 'may' in this statute to mean that it is permissive, rather than

mandatory, for a director to resign with written notice." The Court ruled that it "concur[red]" with those decisions, and accordingly held that "a director may resign orally." *Id*. at *17.

The case law on oral resignations could not be clearer. Since *Bachmann*, four separate Court of Chancery decisions have recognized oral resignations are effective, and recognized oral resignations to give effect to the parties' mutual intent.[1] The Courts in *Dionisi*, *Kertesz* and *Boris* each cited to the permissive language in Section 141(b) and held that Section 141(b) did not preclude oral resignations. In particular, each of those decisions recognized that

[1] Biolase's weak policy related arguments do not support overturning this clear authority. Biolase equates the need for written resignations to the requirements in 8 *Del. C.* § 151 *et seq.* that require formal writings to evidence the issuance of stock. OB at 24-25. Of course, there is a body of established Delaware law recognizing the need for strict adherence to statutory formalities in matters relating to the issuance of capital stock. *See, e.g.*, *Grimes v. Alteon, Inc.*, 804 A.2d 256, 261 (Del. 2002) (recognizing that "[t]o ensure certainty, [8 *Del. C.* § 151 *et seq.*] contemplate board approval and a written instrument evidencing the relevant transactions affecting issuance of stock and the corporation's capital structure."). There is no such authority in the context of oral resignations and, instead, the cases discussed above all correctly conclude that refusing to recognize a clear oral resignation would only frustrate the parties' mutual intent. Indeed, the *Bachmann* Court was prescient that refusing to recognize an oral resignation could lead to an "illogical result" and thwart the clear intent of the parties. *Bachmann*, 1984 WL 8245, at *2. This case presents the "illogical result" contemplated by *Bachmann* in that, as the trial court found, "what was intended, is not really in debate." B67. Moreover, it would be particularly unfair to visit this result on the parties when Delaware law has consistently recognized that oral resignations are effective and the parties had no reason to believe that such resignations could later be determined to be invalid.

the commentary in *Bachmann* was *dicta* and separately concluded, based on the prior holdings and the unambiguous language in Section 141(b), that oral resignations are permitted. *Dionisi*, 1995 WL 398536, at *9; *Kertesz*, 2008 WL 5247120, at *18; *Boris*, 2013 WL 6331287, at *17-*18.

Indeed, this interpretation is consistent with other case law interpreting sections of the DGCL containing the language "may" to be permissive. *See, e.g., Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377, 399 (Del. 2010) (reaffirming longstanding rule that, although DGCL § 223(a)(1) provides only that board vacancies "*may* be filled by a majority of the directors then in office" and otherwise is silent as to stockholders' power to fill vacancies, "[u]nder Delaware law, newly created directorships also may be filled by the stockholders" (citing *Moon v. Moon Motor Car Co.*, 151 A. 298, 302 (Del. Ch. 1930))); *Merrill Lynch Pierce Fenner & Smith, Inc. v. N. European Oil Royalty Trust*, 490 A.2d 558, 561 (Del. 1985) (interpreting DGCL § 167, providing "[a] corporation *may* issue a new certificate of stock" to replace lost, stolen, or destroyed certificates, as only "deal[ing] with the powers of the corporation" because "[c]learly, 8 *Del .C.* § 167 is permissive; the corporation may choose to issue replacement certificates to a record owner, but it need not do so"); *Providence & Worcester Co. v. Baker*, 378 A.2d 121, 124 (Del. 1977) (rejecting challenge to quorum provision in corporate charter as failing to "gear the quorum definition to the voting power of the stock

required to be present" because DGCL § 216 "provides that the certificate of incorporation . . . 'may' specify the number of shares with voting power to be counted for quorum purposes. The permissive 'may,' and not the mandatory 'shall,' is utilized in this connection. Accordingly, it cannot be said that the [company's] quorum provision is violative of any requirement of the Statute.").

Biolase's primary argument in the face of this clear authority is that the amendment to Section 141(b) adopted by the General Assembly in 2000 to change "upon written notice" to "upon notice in writing or by electronic transmission" evidences a legislative intent to overrule the established case law recognizing oral resignations. That argument fails for several reasons. As an initial matter, Biolase's argument ignores that two of the Court of Chancery decisions interpreting Section 141(b) to permit oral resignations came *after* the 2000 amendments – *General Video* and *Boris*. Both of those cases held that the language of Section 141(b), *as amended*, was permissive and permitted oral resignations. *See Boris*, 2013 WL 6331287, at *17; *Kertesz*, 2008 WL 5247120, at *17-18.

Moreover, the Delaware legislature is presumed to be aware of *Dionisi* and related cases. *See, e.g.*, *One-Pie Investments, LLC v. Jackson*, 43 A.3d 911, 915 (Del. 2012) ("Courts have found that '[w]here a particular interpretation has been placed on a statute by the court . . . and the legislature at its subsequent

meetings has left the statute materially unchanged, it is presumed that the legislature has acquiesced in that interpretation.'" (alterations in original) (*quoting* 82 *C.J.S. Statutes* § 384)); *Jones Apparel Grp., Inc. v. Maxwell Shoe Co.*, 883 A.2d 837, 846 n.21 (Del. Ch. 2004)("By reenacting that statute with similar language . . . the General Assembly can be presumed to have adopted judicial interpretations of that language."). Had the legislature intended to overrule that authority it could have, and no doubt would have, done so explicitly. Clear common law precedent permitted oral resignations. It strains credulity to contend (as Biolase does) that the legislature, through "mere implication," sought to *prohibit* oral resignations by amending the statute to *permit* a new means of resignation – by electronic transmission.

In any event, we do not need to guess the legislative intent behind the 2000 amendments because the legislative history makes clear that the amendments were not intended to overrule existing case law on oral resignations.[2] Rather, the

[2] For this reason, Biolase's reliance on the principle *expressio unius est exclusio alterius* to divine the legislative intent is misplaced. Biolase cites *Leatherbury v. Greenspun*, 939 A.2d 1284, 1291 (Del. 2007) for the proposition that the *expressio unius* canon of construction creates "an inference that all omissions [from a statute] were intended by the legislature." This is a correct statement of law, but Biolase fails to appreciate that this canon creates only an "inference," *id.*, "to help determine a legislature's intent *that is otherwise not clear*," 2A Norman Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 47:23 (7th ed., rev. vol. 2014) (emphasis added). Indeed, the facts and reasoning of the *Leatherbury* case illustrate *expressio unius*'s limited weight. Specifically,

additional language was part of a larger set of amendments to the numerous provisions of the DGCL enacted in 2000 to permit various notices to be made by electronic transmission, including the addition of 8 *Del. C.* § 232 containing a definition of "electronic transmission." *See* Holzman, James L. and Thomas A. Mullen, *A New Technology Frontier for Delaware Corporations*, DELAWARE LAW REVIEW, Vol. 4, No. 1, at 55 (2001)(discussing the purpose of the 2000 technology amendments to "implement sweeping changes in the permitted scope of communication methods in corporate governance"). The synopsis accompanying the 2000 amendment to Section 141—which Biolase ignores—explains that the purpose of the amendments to subsections (b), (f) and (i) of Section 141 was to "permit a corporation's directors to make use of available communication

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that case concerned a 90-day tolling period to the two-year statute of limitations for medical malpractice claims when a prospective plaintiff sends a Notice of Intent to investigate "by certified mail, return receipt requested." In concluding that the statutory text did not permit giving notice by Federal Express, the Court considered, among other things, that "strict construction is particularly important when construing statutes of limitations," and that other contemporaneously enacted statutes employed language such as delivery by "a nationally recognized carrier" and "certified mail or its equivalent" demonstrating that the legislature knew how to expand the permissible means of delivery when intended. *Leatherbury*, 939 A.2d at 1291-92. The Court also noted that the legislative history, and prior case law interpreting "the Delaware Medical Malpractice Act . . . clearly reflect the General Assembly's intent to limit the number of medical malpractice actions." *Id*. at 1289-90. In short, the inference that the legislature intentionally omitted other methods of giving notice was corroborated by numerous other indications of the General Assembly's intent. *Id*.

technologies" and, thus, "as amended, subsections 141(b) and (f) permit director resignations and actions by consent to be submitted or taken by electronic transmission, as defined in new Section 232(c)." Chapter 343, Laws 2000.

Interpreting Section 141(b) consistent with existing authority to permit oral resignations does not render the 2000 amendments "meaningless" as Biolase claims. OB at 22. Prior to the 2000 amendments, the law was clear that directors could resign in one of two ways—either through written or oral notice to the corporation. The 2000 amendments made clear that there was a third way, which was neither oral nor clearly written, in the form of carefully defined "electronic transmissions." Thus, Biolase's reliance on the 2000 legislative amendments to assert that the legislature wished to prohibit oral based resignations is not persuasive.

2. Biolase's Bylaws Do Not Provide for a Different Result.

Biolase tries to side-step the clear statutory language in Section 141(b) permitting oral resignations by claiming that the Company's Bylaws "plainly require written resignations." OB at 20. That is, although Section 3.3 of the Bylaws precisely tracks the pre-2000 language of Section 141(b) in all material respects by providing that any director "may resign at any time upon written notice," Biolase claims that a "plain reading" of the Bylaws dictates a different result.

Biolase does not, however, offer any basis for applying a different interpretation to identical language contained in a bylaw or charter provision as that contained in the analogous statutory provision. Indeed, numerous Delaware decisions have interpreted charter or bylaw provisions that track the language in the DGCL by looking to interpretations of the statutory language. *See, e.g.*, *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 969-70 (Del. Ch. 1989) (recognizing that "[t]he language of Section 3.3(i) is closely similar to the language of Section 242(b)(2) of the corporation law statute governing amendments to a certificate of incorporation. . . . The parallel is plain. It is therefore significant, when called upon to determine whether Section 3.3(i) creates a right to a class vote on a merger, to note that the language of Section 242(b)(2) does not itself create a right to a class vote on a merger."); *Cf. Jones Apparel Grp., Inc. v. Maxwell Shoe Co., Inc.*, 883 A.2d 837, 842 (Del. Ch. 2004) (in interpreting bylaw that did not give board authority to set a record date, noting by counterexample that "what is important for purposes of interpreting Article VII is the fact that the drafters could have simply tracked the language of the statute [§213(b)], but did not").

Biolase concedes (as it must) that the verb "may" in Section 3.3 is intended to be permissive, but argues that the permissive "may" only modifies the phrase "resign at any time" and, therefore, "reflects only that directors cannot be

forced to resign." OB at 20. That is, Biolase takes the position that the sole purpose of Section 3.3 is to make clear that resignations are voluntary. That argument defies logic. Resignation is by definition a voluntary act, as it is something an individual does to him or herself; it cannot be imposed by a third party.[3] Plaintiff's reading of Section 3.3 is also contrary to all of the cases that have considered the parallel language of Section 141(b). *See* pp. 21-25, *supra.* Moreover, had the authors of Section 3.3 intended the result claimed by Biolase, they would no doubt have written the bylaw to say "directors may resign *only* upon written notice. . . ." Thus, the better reading, consistent with Section 141(b), is that the permissive "may" modifies the entire phrase "resign upon written notice" in Section 3.3.

Biolase's only other argument is to point out that, rather than specify that notice must be provided to "the corporation" generally as in Section 141(b), the drafters of Section 3.3 identified the officers to whom the permissive written notice contemplated by that bylaw may be given. OB at 20-21. That distinction does not change the result. Under the bylaw, if written notice is given to one of the specified individuals, Biolase will be unable to claim that the company did not

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[3] Termination of a director's position by a third party is called "removal" and is separately addressed by the DGCL. *See* 8 *Del. C.* § 141(k). A director can obligate him or herself contractually to resign upon some event, but that is another form of voluntary act.

receive notice of the resignation. If the resignation is given to someone else, there could be a factual dispute about whether the notice was properly communicated to the company. But none of those mechanics has anything to do with the separate issue of whether an oral resignation is effective. Nor can there be any issue here about whether the oral resignations, if permitted, were effectively communicated to Biolase, as they were made to Biolase's CEO, its President, its CFO and each of its directors at the February 28 Meeting.

Lastly, Biolase ignores the obvious problem with its interpretation: had the drafters of Section 3.3 wanted to make clear that written resignations are required, they could have drafted that provision to provide that a director "may *only* resign upon written notice." Instead, the drafters of Section 3.3 expressly adopted and maintained language that tracks Section 141(b) of the DGCL and are presumed to be aware of the clear Delaware precedent interpreting that language to permit oral resignations.[4] Accordingly, the trial court did not err by interpreting Section 3.3 to permit for oral resignations.

[4] The Company last amended its Bylaws on July 1, 2010, A58—well after the decisions in *Bachman*, *Dionisi* and *Kertesz*.

III. THE COURT OF CHANCERY CORRECTLY FOUND THAT ARROW RESIGNED DURING THE FEBRUARY 28 MEETING BASED ON THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THAT CLARK WAS APPOINTED TO FILL THAT VACANCY.

A. Question Presented.

Having determined that oral resignations are permitted under Delaware law and the Company's Bylaws, did the trial court err by finding, based on the preponderance of the evidence, that (i) Arrow orally resigned at the February 28 Meeting, and (ii) Paul Clark was appointed to fill the vacancy created by Arrow's resignation.

B. Standard of Review.

The trial court's findings of fact are accepted if not "clearly erroneous." *Pollak*, 65 A.3d 617, at *2. Under Delaware law, findings of fact cannot be reversed if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Schock v. Nash*, 732 A.2d 217, 225 (Del. 1999) (*quoting Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972)). Moreover, "findings of the trial court that are supported by the record must be accepted by the reviewing court even if, acting independently, it would have reached a contrary conclusion." *Wright v. Platinum Fin. Servs.*, 930 A.2d 929 (TABLE), 2007 WL 1850904, at *2 (Del. 2007).

C. Merits of the Argument.

1. There Is No Basis to Overturn the Court of Chancery's Determination that Arrow Resigned during the February 28 Meeting.

The trial court made detailed findings that "a clear preponderance of the evidence demonstrates that Arrow verbally resigned from the Board during the Meeting," that "the overwhelming weight of the trial and deposition testimony – namely, that of everyone except Mr. Pignatelli – shows that [Arrow] made a sufficiently clear statement to that effect" and that Arrow's subsequent acts, in view of the evidence, do not contradict the conclusion that he resigned. Op. at 40. Indeed, the Court credited Arrow's testimony at trial that following the discussion of his resignation, he made the statement that "Okay, I agree, I go along with that." The Court held that, "[w]ith those words, Arrow believed that he had verbally resigned from the board." Op. at 24. The trial court further noted that "[t]he deposition and trial testimony of other witnesses supports Arrow's understanding that he had resigned," citing to the deposition or trial testimony of four other witnesses, including Fred Furry, Biolase's Rule 30(b)(6) witness. *Id*. at 24 n.117; *see* pp. 13-15, *supra.* Indeed, the Court noted that "[o]nly Pignatelli claimed that Arrow did not agree to resign" at the meeting. *Id*. These findings are fully supported by the detailed citations to the record set forth in the Opinion and, therefore, cannot be overturned on appeal, even if this Court might have arrived at

a different conclusion if presented with the evidence in the first instance. *Wright*, 930 A.2d 929 (TABLE), 2007 WL 1850904, at *2.

Despite these clear factual findings, Biolase claims that the trial court gave "insufficient weight" to contrary evidence concerning Arrow's resignation. OB at 28. It is not this Court's function, on appeal, to second guess the "weight" given to evidence, and the challenge to the trial court's findings must fail for that reason alone. But even if the Court were to "weigh" the evidence, it must still affirm the trial court's decision.

Biolase attempts to confuse the factual record by claiming that there were two topics being discussed during this portion of the February 28 Meeting—Arrow's resignation and the treatment of his options upon resignation—and, therefore, "it is unclear whether Arrow agreed to a specific proposal from Pignatelli concerning his stock options rather to resign more generally." OB at 29-31.[5] That argument ignores that *five witnesses*, including Biolase's Rule 30(b)(6) witness and Arrow himself, all testified that they understood the intent of Arrow's

[5] To the extent Biolase relies on the draft minutes for the February 28 Meeting for support, we note that the trial court placed little if any weight on the language in the minutes describing the discussions surrounding Arrow and Low's resignations for good reason. Op. at 25. The metadata showed that the draft minutes were edited on March 21, 2014 during the litigation. *See* B101 (the parties' joint trial exhibit list identifying JX-227, the draft minutes, as dated March 21, 2014 based on the metadata). Biolase offered no evidence to counter the strong inference based on the metadata that the draft minutes were altered (or even prepared) after the parties' dispute arose.

statement to be that he was resigning from the Board. A354-55 (Arrow); A467 (Furry); A909 (Low) at 33; A963 (Moll) at 123-24; A1145 (Talevich) at 44-45. The only individual present at the February 28 Meeting who testified to the contrary was Pignatelli, testimony that the Court discredited. A545-46 (Pignatelli); Op. at 24 n.117. Moreover, any suggestion that Arrow agreed to some treatment of his options, but not to his resignation, is a non-sequitur. Arrow's options were only an issue *if he were resigning*. A 353 (Arrow) ("And there was a financial impact to me if I resigned because that would trigger the expiration date of my options"). Thus, any assent by Arrow to the treatment of his options necessarily reflected his agreement to resign from the Board.

Biolase's repeated assertion that the trial court "ignored Arrow's contradictory trial testimony that he believed that a resignation does not take effect unless it is in writing" (OB at 15, 31) misrepresents the evidence and Arrow's testimony. Both at his deposition and at trial, Arrow testified that in November 2013 Pignatelli purported to *fire* Arrow and demanded that he send an email to the Board saying that was no longer President and COO. A393-94 (Arrow); A650-51 (Arrow) at 25-26. Arrow never resigned as President and CEO, orally or in writing. Arrow testified at both his deposition and at trial that he had consulted with his father and concluded, given the circumstances, that his "firing" would not be official unless it was in writing and, therefore, refused to send the email

requested by Pignatelli to the Board. *Id*. Indeed, Arrow testified at trial—testimony that the Court credited in its Opinion—that he believed that he did not need to tender a written resignation to resign as a director of Biolase and that he sent his resignation email only because he was instructed to do so by Biolase's counsel. *Id*. at 26; A355 (Arrow). Despite Arrow's clear testimony on that last point, Biolase argues that the fact that Arrow did not manually change the effective time of 12:00 p.m. pacific included in the form email resignation prepared by Company counsel evidences a different intent. OB at 31. But the trial court expressly acknowledged the sequence of events that led to the 12:00 p.m. pacific effective time being included in that email and credited Arrow's testimony that "[b]ecause it was 'obvious' that he had resigned during the Meeting, it 'did not occur' to Arrow to change the effective time or to note that he was 'confirming' his prior resignation." *Id*. at 26-27; *citing* A356, A396, A401 (Arrow).

Biolase also claims that the fact that Arrow recalled purporting to vote on the subsequent appointments undermines Arrow's testimony that he had resigned. OB at 31. But Arrow explained at trial that he only purported to vote because he didn't want to seem "spiteful" following the prior exchange over his options and that he "was not trying to make a statement that I was still a director," testimony that trial court fully credited. A384 (Arrow); Op. at 25. Likewise, Biolase relies on Pignatelli's claim that shortly after the February 28 Meeting,

Arrow approached him and asked if Nemoy could resign from the Board instead of him. OB at 31; A1091 (Pignatelli) at 120-21. Arrow directly contradicted that testimony, claiming that he made the suggestion that Nemoy resign the night before and that his follow-up conversation "was about not whether I should resign because I had already resigned at that point . . . [but] whether I could be part of the board of the new slate of directors." A392 (Arrow). The trial court credited Arrow's testimony over that of Pignatelli and concluded that "this conversation did not change anything for either of them." Op. at 26. Biolase does not offer any basis for this Court to overturn that factual determination.

Stuck with the trial court's findings of fact, Biolase resorts to claiming that the trial court's actual finding—that the evidence showed that Arrow made a "sufficiently clear statement" that he had resigned—is not equal to the "unequivocal expression" that Biolase claims is needed for an oral resignation to be effective. OB at 26-27. That argument fails for two reasons. First, Biolase cannot show that an "unequivocal expression" is the relevant standard merely because the decisions in *Dionisi* and *Kertesz* used a variation of that word. In *Dionisi*, the Court found as a matter of fact that Dionisi made a "clear and unequivocal announcement" of his intent to resign. *Dionisi*, 1995 WL 398536, at *9. In *Kertesz*, the Court found as a matter of fact that Kertesz had "unequivocally stated" that he "wanted out" and "was all done" and, therefore, "both parties knew

and understood that their venture . . . was at an end." *Kertesz*, 2008 WL 5247120, at *18. Neither of those cases, however, held that an oral resignation could be effective only upon an "unequivocal" statement, nor did either case discuss what was meant by the adjective "unequivocal."

Moreover, neither *Rypac* nor *Boris*, which held that oral resignations were effective, used the term "unequivocal" or any variation of that word. Rather, all of these cases recognized that the determination as to whether or not a director resigned is a "question of fact," *see*, *e.g.*, *Bachmann*, 1984 WL 8245, at *3; *Dionisi*, 1995 WL 398536, at *9; *Boris*, 2013 WL 6331287, at *9, and determined based on the weight of the evidence presented whether the parties' intended and understood the oral resignations to be effective, *see*, *e.g.*, *Dionisi*, 1995 WL 398536, at *9; *Rypac*, 2000 WL 567895, at *5; *Kertesz*, 2008 WL 5247120, at *18; *Boris*, 2013 WL 6331287, at *17-*18. That is precisely what the trial court did here. Op. at 40.

Second, Biolase does not provide any basis to distinguish between an "unequivocal expression" and the trial court's findings of fact, other than to claim that a "clear manifestation" (as opposed to the trial court's *actual* factual finding of a "clear statement") is a "lower standard" providing that the resignation "could have been effective as along as an objective listener would have considered more likely than not he resigned, even if some confusion about his intentions remain."

OB at 27. Biolase does not cite *any* authority for that interpretation or point to any aspect of the trial court's factual findings that show the trial court was operating under a lesser standard. Instead, what the Opinion does say is that the trial court determined that the "overwhelming weight of the evidence," supported by five witnesses testifying consistently about what they heard, including Arrow himself, supported a finding that Arrow had a made a clear statement that he was agreeing to resign. Op. at 40. This was an "unequivocal" statement. Accordingly, there is no basis to overturn the Court of Chancery's determination Arrow sufficiently communicated his intent to resign from the Biolase Board.

2. There Is No Basis to Overturn the Court of Chancery's Determination that Clark Was Appointed to Fill Arrow's Vacancy.

Biolase also challenges the Court of Chancery's determination that Clark was appointed to fill the vacancy created by Arrow's resignation. Biolase's sole basis for challenging that determination is to claim that the trial court applied the incorrect "legal standard" in making that determination. OB at 32. Biolase does not, however, identify what "legal standard" applies or cite to any case or theory of law that contradicts the trial court's determination in this context. Rather, the trial court's determination was based on an "orderly and logical deductive process" based on the available evidence. *Schock*, 732 A.2d 217 at 225.

Starting from the fact that the Board "unanimously" voted to appoint two new directors as evidence of the parties' shared intent, the trial court reasonably concluded that "[a] board's appointing two directors where there is legally only one vacancy cannot mean that neither nominee was duly appointed." Op. at 41. The trial court then relied on the best evidence available of the parties' intent as to the sequence of the resignations and appointments intended by looking to Biolase's own draft minutes for the February 28 Meeting, which listed Clark's name in parallel with Arrow's name. The trial court then made a factual determination that the parties intended for Clark to fill Arrow's vacancy. *Id*. at 42. Biolase does not offer any evidence to contradict that determination. Rather, Biolase's solution—that despite there being a clear vacancy and a clear intent to appoint a mutually approved, independent director to fill that vacancy, no one was elected—would completely frustrate the intent of the parties and plunge the Board back into destructive deadlock.

IV. THE COURT OF CHANCERY ERRED BY ENTERING A FINAL ORDER DENYING ORACLE THE OPPORTUNITY TO SEEK AN AWARD OF ATTORNEYS' FEES AND EXPENSES.

A. Question Presented.

Whether Oracle is entitled to an opportunity to seek an award of attorneys' fees and expenses as a successful Section 225 plaintiff for conferring a benefit on the company and its stockholders? This issue was properly raised in Oracle's Verified Complaint. A24. However, any application for an award of attorneys' fees and expenses would be based on conferring a corporate benefit through successful litigation determining the proper composition of Biolase's Board, and thus could be made only after Oracle was successful in the litigation. Because the Final Order denying the award of attorneys' fees and expenses was issued simultaneously with the Opinion establishing Oracle's entitlement to such an award, Oracle did not have an opportunity to present its request for an award of attorneys' fees and expenses to the trial court. Under the circumstances, the interests of justice require that Oracle be permitted to raise this issue on appeal. *See* Sup. Ct. Rule 8.

B. Standard of Review.

Questions of law are reviewed *de novo*. *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2012 WL 6049157, at *3 (Del. 2012).

C. Merits of the Argument.

Under the American Rule, the "prevailing party is responsible for the payment of his own counsel fees in the absence of statutory authority or contractual undertaking." *Tandycrafts, Inc. v. Initio P'nerhsip*, 562 A.2d 1162, 1164 (Del. 1989). However, in corporate litigation matters, counsel fees and related expenses may be awarded to "a plaintiff whose efforts result in the creation of a common fund or *the conferring of a corporate benefit. . .*" *Tandycrafts*, 562 A.2d at 1164 (emphasis added) (*citing Weinberger v. UOP, Inc.*, 517 A.2d 653, 654-55 (Del. Ch. 1986) and *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1966), *aff'g* 215 A.2d 709 (Del. Ch. 1965)). The definition of a corporate benefit is "much more elastic" than that of a common fund. *Id.* at 1165. "The benefit need not be measurable in economic terms." *Id.* In determining whether attorneys' fees should be awarded under the corporate benefit exception, "the question . . . is whether a plaintiff, in bringing a suit either individually or representatively, has conferred a benefit on others." *Goodrich v. E.F. Hutton Gp., Inc.*, 681 A.2d 1039, 1044 n.5 (Del. 1996) (*quoting Tandycrafts*, 562 A.2d at 1166).

"[W]hen an action brought pursuant to § 225 achieves a benefit for the corporation, the Court may award attorneys' fees to the person(s) who brought that action." *Keyser v. Curtis*, 2012 WL 3115453, at *19 (Del. Ch. July 31, 2012),

aff'd sub nom., Poliak v. Keyser, 65 A.3d 617 (Del. 2013); *see also Baron v. Allied Artists Pictures Corp.*, 395 A.2d 375, 383 (Del. Ch. 1978), *aff'd*, 413 A.2d 876 (Del. 1980) (holding that a Section 225 plaintiff was entitled to attorneys' fees and expenses for conferring a benefit arising from action to moot his claims); *Niehenke v. Right O Way Transp., Inc.*, 1995 WL 767348, at *11-*12 (Del. Ch. Dec. 28, 1995) (awarding attorneys' fees to a success plaintiff in a Section 226 action seeking to appoint a custodian to break a board deadlock). Indeed, in *Niehenke*, the Court of Chancery recognized that the "stalemate-breaking" effect of a Section 226 action may provide a sufficient corporate benefit. *Id.* at *11.

Oracle has spent hundreds of thousands of dollars of its own money to—as the trial court found based on the trial record, Op. at 8, 45—improve Biolase's governance by ensuring that it has competent, independent directors. Indeed, the trial court concluded that Clark was an "experienced and independent" director. *Id*. at 45-46. Biolase sought (and is continuing to seek) to frustrate Oracle's effort to put competent, independent directors on Biolase's board by improperly claiming that Clark was not properly elected, and that Pignatelli therefore still has a blocking position on the Biolase board.

As a direct result of Oracle's efforts during the litigation, an experienced and independent director (Clark) was appointed to the Board, ensuring that a majority of the newly constituted five-member Board is independent and not

aligned with Pignatelli, thereby breaking the "stalemate" created by the four-person Board resulting from Pignatelli's manipulations of the Board process. *Keyser*, 2012 WL 3115453, at *19; *Niehenke*, 1995 WL 767348, at *11.

Oracle believes that, in the circumstances, it will be entitled to an award of its attorneys' fees in bringing this action. However, Oracle does not ask for that relief now. Rather, it asks only that portion of the Final Order denying attorneys' fees be vacated, and that the matter be remanded to the Court of Chancery so that Oracle may have an opportunity to presents its application for such fees.

CONCLUSION

For the foregoing reasons, the decision by the trial court should be affirmed, with the exception of the portion of the Final Order precluding Oracle from seeking an award of attorneys' fees and expenses, which should be vacated.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of June, 2014, the foregoing APPELLEE'S ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL was caused to be served upon the following counsel of record via File & Serve*Xpress*:

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