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April 18, 2008

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2008 APR 21 PM 12:43
OFFICE OF CHIEF COUNSEL
CORPORATION FINANCE

Securities and Exchange Commission,
Office of Chief Counsel,
Division of Corporation Finance,
100 F Street, N.E.,
Washington, DC 20549.

Re: CA, Inc. – Request Under Rule 14a-8 to
Exclude Stockholder Proposal

Ladies and Gentlemen:

CA, Inc., a Delaware corporation (“CA” or the “Company”), proposes to exclude a stockholder proposal (the “Proposal”) from the proxy statement for its upcoming annual meeting of stockholders, to be held on September 9, 2008. The Proposal was submitted by AFSCME Employees Pension Plan (“AFSCME”). For the reasons set forth below, CA believes the Proposal may be excluded under Sections (i)(8), (i)(1), (i)(2) and (i)(3) of Rule 14a-8 because it relates to an election of directors, conflicts with Delaware law and is inconsistent with the Commission’s proxy rules. On behalf of CA, I ask the Staff to please confirm that it will not recommend any enforcement action to the Commission if CA excludes the Proposal from its proxy statement and proxy card for the 2008 annual meeting.

CA currently plans to file its definitive proxy statement for the 2008 annual meeting on or about July 17, 2008, which is more than 80 days after the date I am submitting this letter to the Staff. I have filed six paper copies of this letter, including the Proposal and the supporting opinion of counsel described in part two below, with the Staff and have sent copies of these materials to AFSCME.

The Proposal

If adopted, the Proposal would require CA to amend its by-laws to include a provision that would require the Company to reimburse any stockholder who wages a “short-slate” proxy contest for related expenses if the contest is at least partially successful. Specifically, the proposed by-law would require that any stockholder or group of stockholders be reimbursed by the Company for reasonable expenses incurred in nominating one or more candidates in a contested election of directors at any time in the future, as long as fewer than 50% of the directors to be elected are contested and at least one of the stockholder nominees is elected.¹ Reimbursable expenses would include all those reasonably incurred in connection with the contest, including those relating to printing, mailing, legal services, solicitation, travel, advertising and public relations, up to the amount expended by the Company in connection with the contest.

In its supporting statement, AFSCME notes that the Proposal focuses on successful “short-slate” contests – those involving a competing slate of candidates that, if elected, would not comprise a majority of the board – with success defined as the election of at least one candidate. A successful “long-slate” contest would result in a change of control and the new board would have the authority to approve reimbursement for contest expenses if it decided to do so. Thus, as a practical matter, there is no need for a mandatory reimbursement by-law in those situations, according to AFSCME. Rather, the Proposal seeks to mandate reimbursement when contest proponents do not gain control of the board, so that they can by-pass the board and obtain reimbursement without board approval.

A copy of the Proposal and AFSCME’s supporting statement is attached as Annex A.

It is important to note that the Proposal is not precatory. It does not merely recommend that the CA board provide for reimbursement in short-slate contests. Rather, the Proposal would amend the CA by-laws to require that the reimbursement be provided in all future contests meeting the proposed criteria. The board of directors would have no discretion to review any reimbursement request covered by the Proposal, regardless of the circumstances, nor would the board have the ability to consider the merits of adopting a mandatory reimbursement rule as a matter of corporate policy. If the Proposal is adopted, such a rule will become binding on CA.

¹ The Proposal also requires that the election may not be subject to cumulative voting. CA’s certificate of incorporation does not provide for cumulative voting.

Recent Changes to Section (i)(8) of Rule 14a-8

In 2006 and 2007, the Staff denied several requests by other companies to exclude similar proposals from their proxy statements.² Since that time, however, the Commission has amended Rule 14a-8 to confirm that proposals relating to the election of directors may be excluded from proxy statements. Following a 2006 federal appeals court decision that significantly narrowed the scope of the election exclusion in Section (i)(8),³ the Commission acted to re-confirm its longstanding, much broader interpretation of the exclusion. In a release issued in December 2007,⁴ the Commission stated definitively that the purpose of Section (i)(8) is to permit exclusion of any stockholder proposal that results in a contested election of directors, or that establishes a procedure that would make a contested election more likely in the future. In addition to confirming this broad interpretation of Section (i)(8), the Commission also amended the text of the election exclusion to make its broader scope explicit. As amended, the exclusion in Section (i)(8) now expressly covers not only proposals relating to the election of directors, but also those relating to the nomination of directors and those relating to procedures for the nomination or election of directors.

The Staff's prior decisions on similar proposals, which I cited above, were rendered before the Commission acted in December 2007 to re-affirm its broad interpretation of Section (i)(8) and to expand the scope of the text of that Section. Given the Commission's recent action, as well as the importance of that action as a statement of Commission policy on the treatment of stockholder proposals in this area, CA respectfully asks the Staff to consider its request to exclude the Proposal notwithstanding the prior decisions and, for the reasons set forth below, confirm that the Proposal may be excluded from the proxy statement for the 2008 annual meeting.

The Proposal Relates to a Procedure for the Election of Directors and May Be Excluded Under Section (i)(8)

Section (i)(8) of Rule 14a-8, as recently amended, permits a company to exclude a stockholder proposal from its proxy statement if the proposal "relates to a nomination or an election for membership on the company's board of directors ... or a procedure for such nomination or election." In 1976, when Rule 14a-8 was adopted, the

² Letters to Apache Corporation (February 8, 2007), Citigroup Inc. (March 2, 2006), The Bank of New York Company, Inc. (February 28, 2006) and American Express Company (February 28, 2006).

³ *AFSCME v. AIG*, 462 F3d 121 (2d Cir. 2006).

⁴ Release No. 34-56914 (December 6, 2007).

Commission stated that the principal purpose of Section (i)(8) is to make clear, with respect to corporate elections, that Rule 14a-8 is not the proper means for conducting campaigns or effecting reforms in elections of that nature.⁵ More recently, when it amended Section (i)(8), the Commission re-affirmed this fundamental position:

The express purpose of the election exclusion is to make clear that Rule 14a-8 is not a proper “means” to achieve election contests because “other proxy rules” are applicable to such contests. We are acting today to state clearly that the phrase “relates to an election” in the election exclusion cannot be read so narrowly as to refer only to a proposal that relates to the current election, or a particular election, but rather must be read to refer to a proposal that “relates to an election” in subsequent years as well.⁶

The Commission made clear that its position is based on a concern about stockholders using a company’s proxy statement to contest director elections, not only by seeking to include alternative candidates in the proxy statement but also by seeking to establish a procedure that is likely to result in a contested election in the future. Consequently, as explained in the December 2007 release, the election exclusion, as now amended, specifically applies to stockholder proposals that seek to establish any procedure “that would result in a contested election either in the year in which the proposal is submitted or in any subsequent year.”⁷

The Proposal relates to such a procedure. It would establish a mechanism requiring the Company to fund any future stockholder effort to elect an alternative candidate if the proposed criteria were met. The Proposal is intended to facilitate contested elections by requiring the Company to pay the contestants’ expenses to the extent provided. AFSCME makes clear in its supporting statement that the purpose of the Proposal is to create “a meaningful threat of director replacement.” AFSCME states that the “unavailability of reimbursement for director election campaign expenses for so-called ‘short-slates’ ... contributes to the scarcity of such contests.” It is quite clear, then, that the Proposal is intended to facilitate stockholder efforts to contest director elections. It would do so by creating a procedure for funding those contests when the proposed criteria are met. As such, the Proposal falls squarely within the scope of the

⁵ Release No. 34-12598 (July 7, 1976).

⁶ Release No. 34-56914, at text following note 42.

⁷ Id., at text following note 47.

election exclusion as recently amended because its primary purpose is – and if adopted its principal effect would be – to make election contests more likely.

The Commission's position reflects its fundamental concern that contested elections be subject to and comply with the proxy rules governing contested elections. Those rules require stockholders who wage election contests to provide extensive disclosure about their background, including whether they have been convicted in a prior criminal proceeding, the amount they are spending and by whom the cost will be borne, their interests in the contest and any relationships or understandings they have with other parties concerning the company's securities or transactions with the company. Those rules also require extensive information about the director nominees, including their experience, their involvement in certain legal proceedings, their arrangements with others concerning the election and their dealings with the company.⁸ As the Commission noted, allowing a stockholder to contest an election by including candidates in a company's proxy statement, rather than by soliciting proxies on his or her own, would enable the stockholder to avoid providing the critical disclosures required of those who solicit proxies in opposition to a company. As emphasized in the December 2007 release, the Commission is particularly concerned about stockholder proposals that make contested elections more likely because it wants to ensure that those who contest elections comply with the disclosure requirements applicable to such contests. Consequently, any stockholder proposal that makes inclusion of an alternative candidate in a company's proxy statement more likely would raise serious disclosure concerns.

One might observe that the Proposal is cleverly designed not to require inclusion of stockholder nominations in the Company's proxy statement. Rather, the Proposal purports to focus on funding the cost of short-slate proxy contests waged by stockholders – that is, on facilitating the inclusion of a stockholder nomination in proxy materials prepared by the stockholder rather than in the Company's proxy statement. In reality, however, the Proposal would force CA to choose between including any future candidate proposed by a stockholder in the Company's proxy statement, or potentially having to fund the cost of the stockholder including the candidate in its own proxy materials and conducting its own solicitation – a cost that is likely to be substantially greater than the cost of simply including the candidate in the Company's proxy statement. In reality, therefore, the Proposal would create a substantial financial incentive for CA to include – or rather, would impose a substantial financial cost on the Company if it did not include – future stockholder nominations in its proxy statement. Section (i)(8) is intended to prevent results of this kind. The election exclusion is intended to ensure that a stockholder cannot force a company to include a director nomination in its proxy statement, and neither should a stockholder be permitted to coerce, or establish a

⁸ See Rules 14a-3(a) and 14a-12(c) and Items 4(b), 5(b) and 7 of Schedule 14A.

financial incentive for, a company to do so by establishing a procedure that makes exclusion of stockholder candidates more costly.

The Proposal would create a procedure for funding the efforts of stockholders to nominate and elect directors. It is intended to make contested elections more likely, and it would make it costly for the Company *not* to include stockholder nominations for those elections in the Company's proxy statements. Thus, the Proposal could make it more likely that any future election contests will be waged through the Company's proxy statements, which is precisely what Section (i)(8) is intended to prevent.

The Proposal Is Improper Under and, If Implemented, Could Violate State Law

Section (i)(1) of Rule 14a-8 permits a company to exclude a stockholder proposal from the proxy statement if the proposal "is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization." In addition, Section (i)(2) permits exclusion of a proposal that, if implemented, would cause a company to violate any state law to which it is subject. Based on the supporting opinion of Richards, Layton & Finger, P.A. special Delaware counsel to the company ("RLF"), which opinion is attached as Annex B, the Proposal, if adopted, would cause the Company to violate the Delaware General Corporation Law ("DGCL") as well as the certificate of incorporation by depriving the CA board of its statutory authority to manage the use of the Company's funds with regard to contested elections. Consequently, CA should be permitted to exclude the Proposal from the proxy statement for the 2008 annual meeting under Sections (i)(1) and (i)(2).

As RLF notes in the supporting opinion, the Delaware courts have permitted Delaware corporations to use corporate funds to pay proxy solicitation expenses of stockholders when the contest involves clear disagreements between competing slates of directors over concrete policy issues, but not when the contest involves personal disagreements or disputes that are not shared by the stockholders generally. By mandating reimbursement in all successful short-slate contests, regardless of the reasons why the contests are waged, the Proposal would disregard the distinction at law between permissible and impermissible reimbursement. While stockholders are free to nominate and vote for directors for any reason, including self-serving reasons, they are not entitled under Delaware law to use corporate funds to pay their proxy solicitation expenses if their motivation is personal or self-serving. By mandating reimbursement in all successful short-slate contests, the Proposal would compel the Company to disregard

the legal distinction between contests that promote personal interests and those that promote broader corporate purposes.⁹

In addition, the Proposal would remove the board of directors from the decision whether to provide reimbursement in successful short-slate contests, making it automatic in all such cases regardless of the board's view. As a result, according to the supporting opinion, the Proposal effectively vests in the stockholders, rather than the board, the ability to manage the corporate assets in this context. This in turn conflicts with Section 141(a) of the DGCL, which mandates that the business and affairs of a Delaware corporation be managed by or under the direction of the board of directors, not by the stockholders. The opinion notes that this principle is particularly important when it comes to the expenditure of corporate funds.

RLF also notes that CA's certificate of incorporation expressly provides that "[t]he management of the business and the conduct of the affairs of the Corporation shall be vested in its Board of Directors," which is consistent with Section 141(a) of the DGCL. This provision evidences an intent to require that placing restrictions on the board's substantive power to manage the Company be effected through an amendment to the certificate of incorporation, which in turn requires the prior approval of the both the board and the stockholders. Thus, the apparent intent of the certificate of incorporation is to require that the board relinquish its statutorily granted power to manage the Company only with its prior consent. Because the by-law contemplated in the Proposal would be adopted solely by the stockholders, however, it would remove the board's statutory power with regard to reimbursement of election expenses without board consent. The proposing opinion concludes that, while Delaware courts will generally seek to interpret a by-law in a manner that is consistent with the certificate of incorporation, where a conflict is unavoidable – as it would appear to be here – the by-law must yield and would likely be declared void by a Delaware court.

RLF notes that the Staff has previously accepted the view that under Delaware law the stockholders cannot, by a requested amendment of the by-laws, lawfully require the board of directors to expend corporate funds. In a 1993 no-action letter, the Staff permitted a company to omit a stockholder proposal providing for expense reimbursement under Section (i)(1), based on an opinion of RLF that effecting

⁹ The supporting opinion notes that management have fiduciary duties to the stockholders and, when they nominate candidates, owe stockholders a duty to apprise them of all information necessary to cast an intelligent vote. Stockholders, in contrast, are not fiduciaries and generally do not owe such a duty to each other. Consequently, stockholders are not entitled by right to use corporate funds to pay the cost of the proxy contests they choose to wage. Rather, before reimbursement may be provided for any particular contest, the board of directors must, in the exercise of their fiduciary duties, determine that reimbursement is appropriate under the relevant facts and circumstances.

such a by-law without any concurring action by the board was inconsistent with DGCL Section 141(a) unless otherwise provided in the certificate of incorporation.¹⁰ In the present case, CA's certificate of incorporation expressly follows Section 141(a) and does not permit the stockholders unilaterally to restrict the statutory power of the board in this area.

The supporting opinion notes that, while there is no Delaware court case directly on point, there is a significant body of law supporting the conclusions summarized above. Both the case law and the foregoing conclusions are discussed in detail in the supporting opinion. In light of the opinion, there is a serious question under Delaware law as to whether the Company could lawfully implement the Proposal, at least in all cases as mandated by the Proposal, and whether the Proposal improperly divests the CA board of its lawful power to manage the Company's business and affairs in this area. Accordingly, the Company should be permitted to exclude the Proposal from the proxy statement for the 2008 annual meeting under Sections (i)(1) and (i)(2) of Rule 14a-8.

The Proposal Would Conflict with the Proxy Rules

Section (i)(3) of Rule 14a-8 permits a company to exclude a stockholder proposal from its proxy statement if the proposal is "contrary to any of the Commission's proxy rules." The Proposal, if adopted, would conflict with Rule 14a-7, which requires stockholders to bear the cost of mailing their own proxy solicitation materials. In essence, if any stockholders notify a company of their intention to solicit proxies for an election contest, the company either must provide them with a list of names and addresses to enable them to mail their solicitation materials to other stockholders on their own, or must itself mail the materials on their behalf. If the company conducts the mailing itself, the stockholder must reimburse the company for its reasonable expenses incurred in doing so.

Rule 14a-7, in other words, provides that stockholders who wish to solicit proxies must do so at their own expense, either by doing so directly or by reimbursing the company for doing so on their behalf. The Proposal, in contrast, would shift the cost of the proxy solicitation effort in a successful short-slate contest to the Company, which is the opposite of what Rule 14a-7 contemplates. If adopted, the Proposal would override the cost-allocation procedure established by Rule 14a-7 and replace it with a fundamentally contrary mechanism. Rule 14a-7 ensures that a single stockholder that wishes to wage a proxy contest must do so at his or her own expense, and not at the

¹⁰ Letter to Pennzoil Co. (February 24, 1993). The proposed by-law at issue in that letter would have created an advisory committee of stockholders to review the board's activities and would have provided for the payment of fees and expenses to the committee members without board approval.

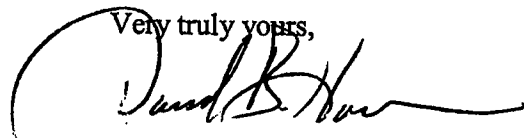
expense of the Company and its other stockholders. The Rule protects the interests of all stockholders, ensuring that no stockholder must bear, indirectly, the expense of any contest that is waged by any other stockholder – especially when the soliciting stockholder may be acting for reasons of his or her own that are of little interest to others. Although the Proposal will not be adopted without a majority vote of CA's stockholders entitled to vote at the upcoming annual meeting, this fact does not justify shifting the cost of future proxy contests back to the Company, contrary to the allocation provided by Rule 14a-7. The Rule serves to protect the interests of all stockholders, not just some of them or even most of them, and should not be set aside even by majority vote.

* * * * *

In summary, the Proposal would establish a procedure that facilitates contested elections by guaranteeing reimbursement of certain solicitation expenses; it would mandate reimbursement in all successful short-slate contests, including those for which reimbursement would be impermissible under Delaware law, and would deprive the board of directors of their statutory authority to manage corporate assets in this area; and it would conflict with Rule 14a-7 by shifting the cost of a successful short-slate proxy contest from the stockholder who wages it to the Company and, indirectly, all other stockholders, whether or not they support the effort. For these reasons, the Company asks the Staff to confirm that the Company may exclude the Proposal from the proxy statement for the 2008 annual meeting, in reliance on Sections (i)(8), (i)(1), (i)(2) and (i)(3) of Rule 14a-8.

If you would like to discuss this request, please contact me by telephone, at 212-558-3882, or email, at harmsd@sullcrom.com. Thank you for your consideration.

Very truly yours,



David B. Harms

(Enclosures)

cc: Kenneth V. Handal
Executive Vice President and Corporate Secretary
CA, Inc.

Gerald W. McEntee
Chairman
AFSCME Employees Pension Plan

RECEIVED

MAR 17 2008

Kenneth V. Handal



EMPLOYEES PENSION PLAN

March 13, 2008

Committee
Gerald W. McEntee
William Lucy
Edward J. Keller
Kathy J. Sackman
Henry C. Scheff

VIA Overnight Mail and Telecopier (631) 342-6800

CA, Inc.

One CA Plaza

Islandia, NY 11749

Attention: Kenneth Handal, Executive Vice President, Global Risk & Compliance, and Corporate Secretary

Dear Mr. Handal:

On behalf of the AFSCME Employees Pension Plan (the "Plan"), I write to give notice that pursuant to the 2007 proxy statement of CA, Inc. (the "Company") and Rule 14a-8 under the Securities Exchange Act of 1934, the Plan intends to present the attached proposal (the "Proposal") at the 2008 annual meeting of stockholders (the "Annual Meeting"). The Plan is the beneficial owner of 39,753 shares of voting common stock (the "Shares") of the Company, and has held the Shares for over one year. In addition, the Plan intends to hold the Shares through the date on which the Annual Meeting is held.

The Proposal is attached. I represent that the Plan or its agent intends to appear in person or by proxy at the Annual Meeting to present the Proposal. I declare that the Plan has no "material interest" other than that believed to be shared by stockholders of the Company generally. Please direct all questions or correspondence regarding the Proposal to Charles Jurgonis at (202) 429-1007.

Sincerely,

GERALD W. McENTEE
Chairman

GWMcE:jkr
Enclosure

American Federation of State, County and Municipal Employees, AFL-CIO

TEL (202) 775-8142 FAX (202) 785-4606 1625 L Street, N.W., Washington, D.C. 20036-5687

RESOLVED, that pursuant to section 109 of the Delaware General Corporation Law and Article IX of the bylaws of CA, Inc., stockholders of CA hereby amend the bylaws to add the following Section 14 to Article II:

"The board of directors shall cause the corporation to reimburse a stockholder or group of stockholders (together, the "Nominator") for reasonable expenses ("Expenses") incurred in connection with nominating one or more candidates in a contested election of directors to the corporation's board of directors, including, without limitation, printing, mailing, legal, solicitation, travel, advertising and public relations expenses, so long as (a) the election of fewer than 50% of the directors to be elected is contested in the election, (b) one or more candidates nominated by the Nominator are elected to the corporation's board of directors, (c) stockholders are not permitted to cumulate their votes for directors, and (d) the election occurred, and the Expenses were incurred, after this bylaw's adoption. The amount paid to a Nominator under this bylaw in respect of a contested election shall not exceed the amount expended by the corporation in connection with such election.

SUPPORTING STATEMENT

In our opinion, the power of stockholders to elect directors is the most important mechanism for ensuring that corporations are managed in stockholders' interests. Some corporate law scholars posit that this power is supposed to act as a safety valve that justifies giving the board substantial discretion to manage the corporation's business and affairs.

The safety valve is ineffective, however, unless there is a meaningful threat of director replacement. We do not believe such a threat currently exists at most U.S. public companies, including Dell. Harvard Law School professor Lucian Bebchuk has estimated that there were only about 80 contested elections at U.S. public companies from 1996 through 2002 that did not seek to change control of the corporation.

The unavailability of reimbursement for director election campaign expenses for so-called "short slates"—slates of director candidates that would not comprise a majority of the board, if elected—contributes to the scarcity of such contests. (Because the board approves payment of such expenses, as a practical matter they are reimbursed only when a majority of directors have been elected in a contest.) The proposed bylaw would provide reimbursement for reasonable expenses incurred in successful short slate efforts—but not contests aimed at changing control by ousting a majority or more of the board—with success defined as the election of at least one member of the short slate.

The bylaw would also cap reimbursable expenses at the amount expended by the company on the contested election. We believe that the amount spent by a dissident stockholder or group will rarely exceed the amount spent by the company, but the cap ensures that the availability of reimbursement does not create an incentive for wasteful spending.

We urge stockholders to vote for this proposal.

RICHARDS, LAYTON & FINGER

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WILMINGTON, DELAWARE 19801
(302) 651-7700
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WWW.RLF.COM

April 17, 2008

CA, Inc.
One CA Plaza
Islandia, NY 11749

Re: Bylaw Amendment Proposal Submitted By AFSCME

Ladies and Gentlemen:

We have acted as special Delaware counsel to CA, Inc., a Delaware corporation (the "Company"), in connection with a proposal (the "Proposal") submitted by Gerald W. McEntee on behalf of the AFSCME Employees Pension Plan (the "Proponent") that the Proponent intends to present at the Company's 2008 annual meeting of stockholders (the "2008 Annual Meeting"). In this connection, you have requested our opinion as to a certain matter under the General Corporation Law of the State of Delaware (the "General Corporation Law").

For purposes of rendering our opinion as expressed herein, we have been furnished and have reviewed the following documents:

- (i) the Restated Certificate of Incorporation of the Company, as filed with the Secretary of State of the State of Delaware on March 8, 2006 (the "Certificate of Incorporation");
- (ii) the By-Laws of the Company, as amended, effective as of February 23, 2007 (the "Bylaws"); and
- (iii) the Proposal and its supporting statement.

With respect to the foregoing documents, we have assumed: (a) the genuineness of all signatures, and the incumbency, authority, legal right and power and legal capacity under all applicable laws and regulations, of each of the officers and other persons and entities signing or whose signatures appear upon each of said documents as or on behalf of the parties thereto; (b) the conformity to authentic originals of all documents submitted to us as certified, conformed, photostatic, electronic or other copies; and (c) that the foregoing documents, in the forms submitted to us for our review, have not been and will not be altered or amended in any

respect material to our opinion as expressed herein. For the purpose of rendering our opinion as expressed herein, we have not reviewed any document other than the documents set forth above, and, except as set forth in this opinion, we assume there exists no provision of any such other document that bears upon or is inconsistent with our opinion as expressed herein. We have conducted no independent factual investigation of our own, but rather have relied solely upon the foregoing documents, the statements and information set forth therein, and the additional matters recited or assumed herein, all of which we assume to be true, complete and accurate in all material respects.

THE PROPOSAL

The Proposal proposes to amend the bylaws to read as follows (the "Proposed Bylaw"):

RESOLVED, that pursuant to Section 109 of the Delaware General Corporation Law and Article IX of the bylaws of CA, Inc., stockholders of CA hereby amend the bylaws to add the following Section 14 to Article II:

"The board of directors shall cause the corporation to reimburse a stockholder or group of stockholders (together, the "Nominator") for reasonable expenses ("Expenses") incurred in connection with nominating one or more candidates in a contested election of directors to the corporation's board of directors, including, without limitation, printing, mailing, legal, solicitation, travel, advertising and public relations expenses, so long as (a) the election of fewer than 50% of the directors to be elected is contested in the election, (b) one or more candidates nominated by the Nominator are elected to the corporation's board of directors, (c) stockholders are not permitted to cumulate their votes for directors, and (d) the election occurred, and the Expenses were incurred, after this bylaw's adoption. The amount paid to a Nominator under this bylaw in respect of a contested election shall not exceed the amount expended by the corporation in connection with such election."

DISCUSSION

You have asked our opinion as to whether the Proposal is a proper subject for stockholder action and, if implemented by the Company, would violate the General Corporation Law. For the reasons set forth below, in our opinion the Proposal is not a proper subject for stockholder action and, if implemented by the Company, would violate the General Corporation Law.

There is no Delaware case that specifically addresses the validity of the Proposed Bylaw or a similar bylaw. Accordingly, we start from the proposition that, as a general matter, the stockholders of a Delaware corporation have the power to amend the bylaws. This power, however, is not unlimited and is subject to the express limitations set forth in Section 109(b) of the General Corporation Law, which provides:

The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.

8 Del. C. § 109(b) (emphasis added). We turn, therefore, to consideration of whether the Proposed Bylaw is "inconsistent with law or with the certificate of incorporation."

I. THE PROPOSED BYLAW VIOLATES THE GENERAL CORPORATION LAW.

The Proposed Bylaw, if adopted, would cause the Company to violate Section 141(a) of the General Corporation Law (sometimes referred to hereinafter as "Section 141(a)"). Section 141(a) provides, in pertinent part:

The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.

8 Del. C. § 141(a). Significantly, if there is to be any variation from the mandate of Section 141(a), it can only be as provided in the General Corporation Law or the corporation's certificate of incorporation. See, e.g., Lehrman v. Cohen, 222 A.2d 800, 808 (Del. 1966). Article SEVENTH, Section 1 of the Certificate of Incorporation provides that "the management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors." Thus, the Certificate of Incorporation does not contemplate management by the stockholders or anyone other than the Board of Directors of the Company (the "Board"). Moreover, the phrase "except as may be otherwise provided in this chapter" found in Section 141(a) does not include bylaws adopted pursuant to Section 109(b) of the General Corporation Law.¹ Thus, the Board possesses the full power and authority to manage the business and affairs

¹ While we are aware of no case directly on point, we believe that the "except as may be otherwise provided in this chapter" language of Section 141(a) refers only to specific provisions of the General Corporation Law which expressly authorize a departure from the general rule of management by directors, and not to open-ended provisions such as Section 109(b). Moreover, we believe that Section 109's purportedly broad grant of authority for stockholders to adopt bylaws relating to the rights and powers of stockholders and directors relates to bylaws that govern procedural or organizational matters, and not substantive decisions governing the corporation's business and affairs. See Charles F. Richards, Jr. & Robert J. Stearn, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law, 54 Bus. Law. 607, 621 (Feb. 1999) (Messrs. Richards and Stearn are members of this firm); Lawrence A. Hamermesh, The Shareholder Rights By-Law: Doubts from Delaware, 5 Corporate Governance Advisor 9, 14 n. 20 (1997) ("A by-law removing an entire category of business decisions from board authority ... is quite distinct from a by-law that merely governs how board decisions are to be made, and poses a distinct challenge to the

of the Company.

If adopted, the Proposed Bylaw would require that the Board relinquish its power to determine what expenses should and should not be reimbursed to stockholders, instead requiring that the Board reimburse all proxy solicitation expenses that meet the criteria set forth in the Proposed Bylaw. An insurgents' reimbursement is subject to approval by the board of directors. See, Aranow & Einhorn, Proxy Contest for Corporate Control, §21.04[A] at 21-24 (3d Ed. 1998) ("The board of directors of the corporation must approve the reimbursement and their decision must be ratified by a majority of the stockholders."). A board of directors may only expend corporate funds "[w]here the controversy is concerned with a question of policy as distinguished from personnel of management." Hall v. Trans-Lux Daylight Picture Screen Corp., 171 A. 226, 227 (Del. Ch. 1934). Where there is a disagreement as to policy issues, a board may spend money to inform the stockholders of each side of the issue. Id.; See also Hibbert v. Hollywood Park, Inc., 457 A.2d 339, 345 (Del. 1983) (providing for reimbursement where the court found that the proxy contest, "though couched in terms of an election to the board, was actually one involving substantive differences about corporation policy.") With respect to elections for directors, the court in Trans-Lux stated that "[i]t is impossible in many cases of intracorporate contests over directors, to sever questions of policy from those of persons." Id. at 229. Thus, there may be instances in which corporate funds may be expended in the election context in order to inform stockholders of the policy matters in which director nominees differ. However, the decision as to when it is necessary to so inform the stockholders is a matter that is vested in the Board, which is responsible for managing the business and affairs of the Company. See Steinberg v. Adams, 90 F. Supp. 604 (S.D.N.Y. 1950) (applying Delaware law) (stockholder suit challenging payment of insurgent proxy expenses as a waste of assets.). The Proposed Bylaw, if adopted, would mandate that the Board reimburse all stockholder expenses meeting the criteria outlined in the Proposed Bylaw without consideration of the surrounding circumstances as required by applicable law.

The mandatory reimbursement scheme envisioned by the Proposal would undermine the very purpose of the legal requirement applied by the courts, i.e., that the corporation's money should be spent on proxy contests only where the expenditure of funds confers a benefit on all stockholders because corporate policy issues are involved. See Trans-

allocation of management authority specified by Section 141(a)."). See also id. at 10 ("by-laws of Delaware corporations do not customarily prescribe or limit the substantive content of business decisions"). Such an interpretation of Section 109(b) would harmonize Sections 109(b) and 141(a) without running afoul of Section 141(a)'s mandate that the corporation's business and affairs be managed by or under the direction of the board of directors. See Hamermesh, Corporate Democracy and Stockholder -- Adopted By-Laws: Taking Back The Street?, 73 Tul. L. Rev., 409, at 444 (suggesting that procedural/substantive distinction does not necessarily "provide a coherent analytical structure" and that "it is preferable to read section 141(a) as an absolute preclusion against by-law limits on director management authority, in the absence of explicit statutory authority for such limits outside of section 109(b)") (footnote omitted).

Lux, 171 A. at 228. Expenditure of company funds is permitted in proxy contests only because some question of corporate policy is presented through the choice among competing candidates:

A question of policy which concerns very intimately the future of the corporate business may turn upon the particular personnel of the directors and officers. Indeed it often happens in practice as it necessarily must that questions of policy come up not as abstract propositions which are referred to the stockholders for a yes and no vote, but in the form of whether the directors who stand for the given policy shall be re-elected to office.²

Id. at 228.

Where courts have either upheld or declined to enjoin the use of corporate funds for proxy solicitation expenses, the record pointed to clear disagreements between competing slates of director candidates over concrete policy issues, such as whether the corporation should approve a merger with another company (see Id. at 229; Empire S. Gas. Co. v. Gray, 46 A.2d 741,745 (Del. Ch. 1946)), pursue a plan of liquidation based on the terms offered by management (see Hand v. Missouri-Kansas Pipe Line Co., 54 F. Supp. 649, 650 (D. Del. 1944)), change its existing policy on paying dividends to stockholders (see Levin v. Metro-Goldwyn-Mayer, Inc., 264 F. Supp. 793, 802 n.7) (S.D.N.Y. 1967), continue maintaining a suite of offices in a specific location (see Gray, 46 A.2d at 745) and hire full-time management and change the role of the director audit committee (see Hibbert, 457 A.2d at 340); compare Essential Enters Corp. v. Doresey Corp., 1960 WL 56156, at *2 (Del. Ch. Dec. 15, 1960) (ordering former directors to repay the corporation for proxy solicitation expenses incurred to advance the "purely personal purpose" of those directors). Under the Proposed Bylaw the Board would not be able to exercise its judgment in distinguishing which proxy contests involve substantive differences of corporate policy, and are thus deserving of reimbursement, and those which involve personal disagreements or disputes that are not shared by stockholders generally, and thus are not proper for reimbursement. Because the Proposed Bylaw would require the Board to reimburse stockholders without examining whether there are corporate policy issues in dispute, the Proposed Bylaw would violate Delaware law if adopted.

The Proposed Bylaw ignores the requirement that proxy expenses benefit the corporation by permitting stockholders to access the corporate treasury to pay their proxy solicitation expenses regardless of whether the motivation behind their solicitation is personal

² The quoted language recognizes that, in practice, whenever incumbent directors are nominated for re-election or new director candidates are selected by a board of directors, policy issues concerning the board's stewardship of company assets are presented. But this is not necessarily the case with, stockholder nominees who may seek election not to unseat any director but for purely personal reasons.

and self-serving. Stockholders are indeed free to nominate and vote for directors for any reason, including self-serving reasons, and in doing so are not constrained by the fiduciary duties that attach to directors. Stockholders are not entitled, however, to the reimbursement of expenses from the corporate treasury simply because they are stockholders. Indeed, the Delaware cases permitting the payment of proxy solicitation expenses can be read as permitting reimbursement only for management candidates because only management owed a duty to apprise stockholders of all information necessary to cast an intelligent vote on company policies at issue in an election. Trans-Lux, 171 A. at 228. In the only decision applying Delaware law that endorsed the repayment of an insurgent's expenses, the repayment was premised on a similar corporate benefit rationale, i.e., that stockholders other than the proxy contestants could benefit from the information on company policy disseminated by the insurgents in the proxy contest. Steinberg, 90 F. Supp. at 607-608 ("[I] see no reason why the stockholders should not be free to reimburse, those whose expenditures succeeded in ridding a corporation of a policy frowned upon by a majority of the stockholders" and analogizing such reimbursement to a stockholder reimbursed for expenses incurred in bringing a derivative action "for the benefit of the corporation"). The same court also noted: "It seems permissible to me that [insurgent stockholders] ... who advocate a contrary policy and succeed in securing approval from the stockholders should be able to receive reimbursement, at least where there is approval by both the board of directors and a majority of the stockholders." Id. See also Rosenfeld v. Fairchild Engine & Airplane Corp., 128 N.E.2d 291, 293 (N.Y. 1955). (upholding reimbursement of stockholder proxy solicitation expenses under New York law, where both the directors and the stockholders approved the reimbursement).

In addition, by removing from the Board the decision whether reimbursement of the proxy expenses of a stockholder by the Company is permissible in a given case, regardless of the Board's view of the merit of such reimbursement, the Proposed Bylaw effectively vests in the stockholders of the Company the ability to manage the Company in this area in violation of Section 141(a). The distinction implicit in Section 141(a) between the role of stockholders and the role of the board of directors is well established. As the Delaware Supreme Court consistently has stated, "a cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984). See also McMullin v. Beran, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors.") (citing 8 Del. C. § 141(a)); Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281, 1291 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation."). This principle has long been recognized in Delaware. Thus, in Abercrombie v. Davies, 123 A.2d 893, 898 (Del. Ch. 1956), the Court of Chancery stated that "there can be no doubt that in certain areas the directors rather than the stockholders or others are granted the power by the state to deal with questions of management policy." Similarly, in Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980), rev'd on other grounds sub nom., Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981), the Court of Chancery stated:

[T]he board of directors of a corporation, as the repository of the power of corporate governance, is empowered to make the business decisions of the corporation. The directors, not the stockholders, are the managers of the business affairs of the corporation.

See also 8 Del. C. § 141(a); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985); Adams v. Clearance Corp., 121 A.2d 302 (Del. 1956); Mayer v. Adams, 141 A.2d 458 (Del. 1958). The rationale for these statements is as follows:

Stockholders are the equitable owners of the corporation's assets. However, the corporation is the legal owner of its property and the stockholders do not have any specific interest in the assets of the corporation. Instead, they have the right to share in the profits of the company and in the distribution of its assets on liquidation. Consistent with this division of interests, the directors rather than the stockholders manage the business and affairs of the corporation and the directors, in carrying out their duties, act as fiduciaries for the company and its stockholders.

Norte & Co. v. Manor Healthcare Corp., 1985 WL 44684, at *3 (Del. Ch. Nov. 21, 1985) (citations omitted); Paramount Commc'ns Inc. v. Time Inc., 1989WL 79880, at *30 (Del. Ch. July 14, 1989), aff'd, 571 A.2d 1140 (Del. 1989) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares.")³

³ The mandatory reimbursement scheme contemplated by the Proposed Bylaw may be distinguished from other arrangements pursuant to which a board of directors contractually limits its discretion (e.g., a loan agreement limiting the ability of the board to take certain actions without lender approval). See, e.g., John C. Coates & Bradley C. Faris, Second-Generation Shareholder Bylaws: Post-Quickturn Alternatives, 56 Bus. Law. 1323, 1331 (Aug. 2001) (noting that the Delaware Supreme Court's decision in Quickturn should not be construed as prohibiting such arrangements because to read the case otherwise "would be absurd, as it would render unenforceable normal loan agreements (which frequently limit a board's authority to authorize certain corporate actions, such as dividends), golden parachutes (which limit a board's ability to terminate an executive's employment without severance compensation) . . ."). A board of directors, exercising its own business judgment, may restrict by contract its discretion as to limited matters falling within the scope of its authority. In Unisuper Ltd. v. News Corp., 2005 WL 3529317 (Del. Ch. Dec 20., 2005), the Court of Chancery held that a board of directors could agree, by adopting a board policy, to submit the final decision on whether or not to adopt a stockholder rights plan to a vote of the stockholders. The case of a board agreeing with stockholders what is advisable and in the best interests of the corporation and its stockholders is different from the case of stockholders unilaterally imposing restrictions on the Board's discretion. A limited contractual restriction on the Board's authority would not unduly interfere

In addition, implicit in the management of the business and affairs of a Delaware corporation is the concept that the board of directors, or persons duly authorized to act on its behalf, directs the decision-making process regarding (among other things) the expenditure of corporate funds. See 8 Del. C. § 122(5); Wilderman v. Wilderman, 315 A.2d 610 (Del. Ch. 1974) (authority to compensate corporate officers is normally vested in the board pursuant to Section 122(5)); Lewis v. Hirsch, 1994 WL 263551, at *3 (Del. Ch. June 1, 1994) (same); Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) (finding that the size and structure of agents' compensation are inherently matters of directors' judgment); Alessi v. Beracha, 849 A.2d 939, 943 (Del. Ch. 2004) (finding that it would be "unreasonable" to infer that directors of a Delaware corporation were unaware of the corporation's program to reacquire its shares because of the directors' responsibility under Section 141(a) to oversee the expenditure of corporate funds). In that regard, it is not appropriate under the General Corporation Law for the stockholders, or even a court in some instances, to restrict the discretion of a board of directors regarding the expenditure of funds. In considering whether to restrain a corporation from expending funds, the Delaware Court of Chancery has noted the following:

[T]o grant emergency relief of this kind, while possible, would represent a dramatic incursion into the area of responsibility created by Section 141 of our law. The directors of [the corporation], not this court, are charged with deciding what is and what is not a prudent or attractive investment opportunity for the Company's funds.

UIS, Inc. v. Walbro Corp., 1987 WL 18108, at *2 (Del. Ch. Oct. 6, 1987).

The Board of Directors is under an obligation to use its own best judgment to determine how corporate funds should be spent. By mandating that corporate funds be spent to reimburse stockholders for their expenses relating to proxy solicitations, the Proposed Bylaw would thereby abrogate the duty of the Board of Directors to exercise its informed business judgment concerning expenditures by the Company.⁴

with or otherwise deprive the Board or any future Board of the fundamental powers granted to it under the General Corporation Law, since the Board (or future Board) could renegotiate the terms of the contract, take action to satisfy the contractual obligations or exercise its right to terminate the contract. Far from imposing a limited contractual restriction on the power of the Board or any future Board, the reimbursement requirements contemplated by the Proposed Bylaw, if implemented, would deprive the Board of its power under the General Corporation Law to consider freely whether to reimburse stockholders for their proxy solicitation expenses, and it would impede the Board's exercise of its fiduciary duties to manage the business and affairs of the Company.

II. THE PROPOSED BYLAW VIOLATES THE CERTIFICATE OF INCORPORATION.

In addition to contravening Section 141(a) of the General Corporation Law, the Proposed Bylaw violates the Certificate of Incorporation. Article SEVENTH, Section (1) of the Certificate of Incorporation provides that "[t]he management of the business and the conduct of the affairs of the corporation shall be vested in its Board of Directors." This provision is consistent with the language of Section 141(a) of the General Corporation Law. Together with Section 141(a) of the General Corporation Law, Article SEVENTH, Section (1) of the Certificate of Incorporation evidences the apparent intent of the drafters thereof to require restrictions on the Board's substantive power to manage the Company to be set forth in an amendment to the Certificate of Incorporation, which requires the prior approval of the Board and the stockholders. The apparent intent of the Certificate of Incorporation is to require the Board to consent to any relinquishment of its statutorily granted power to manage the Company.

Although the Delaware courts generally attempt to interpret bylaws in harmony with the certificate of incorporation and Delaware law so as to avoid any conflict, if a conflict is unavoidable the bylaw must yield and is said to be a "nullity." Burr v. Burr Corp., 291 A.2d 409 (Del. Ch. 1972). "[A] corporation's bylaws may never contradict its certificate of incorporation." Oberly v. Kirby, 592 A.2d 445, 458 n.6 (Del. 1991). In Oberly, the Court held that, although "cast in neutral-sounding language," a proposed bylaw requiring that only directors could qualify to serve as members of the corporation was invalid on the grounds that "it was clearly designed to remove certain [non-director] individuals from membership" and thus conflicted with the election mechanism set forth in the certificate of incorporation. Id. at 459. The Court noted that although the membership qualifications set forth in the bylaws were not prohibited by the certificate of incorporation, they were "inconsistent with the overall structure" of the corporation. Id. at 458. The Proposed Bylaw would similarly frustrate the "overall structure" of the Company as currently set forth in Article SEVENTH, Section (1) by restricting the Board's ability to freely

⁴ The SEC has previously accepted the view that under Delaware law the stockholders cannot, by a requested amendment, lawfully require the board of directors to expend corporate funds. In its ruling in Pennzoil Co., SEC No-Action Letter, 1993 WL 52187, at *31-32 (Feb. 24, 1993), the SEC stated that "[t]here appears to be some basis for your view that the proposal may be omitted from the Company's proxy material under Rule 14a-8(c)(1). This view is based on the opinion of Delaware counsel, Richards, Layton & Finger, that a by-law provision authorizing the expenditure of corporate funds, effected by shareholders without any concurring action by the Board of Directors, is inconsistent with Section 141(a) of the Delaware General Corporation Law unless otherwise provided in the company's certificate of incorporation or the Delaware General Corporation Law." See also, The Gillette Co., SEC No-Action Letter, 2003 SEC No-Act. LEXIS 387 (Mar. 10, 2003). Significantly, even though, following this ruling, the proponent revised its proposal so as to be cast in precatory terms (i.e., requesting that the board of directors "consider the advisability of establishing [the Committee] through an amendment to the Bylaws . . ."), the SEC staff declined to alter its ruling. Pennzoil Co., SEC No-Action Letter, 1993 WL 87871 (Mar. 22, 1993).

manage the business and affairs of the Company. This would conflict with the allocation of power set forth in the Certificate of Incorporation and could potentially result in every matter to be considered by the Board being made subject to a bylaw mandating what action the Board must take, regardless of whether the action is made in good faith and in the best interests of the Company and its stockholders.

The allocation of power set forth in the Certificate of Incorporation recognizes that decisions of the Board must be made on a case-by-case basis and that the Board, being most familiar with the business and affairs of the Company and most keenly attuned to which actions would serve the best interests of the Company and its stockholders, is in the best position to address the myriad subtleties and nuances that any particular matter of corporate policy presents. The Proposed Bylaw, by contrast, operates to impose a one-size-fits-all requirement that the Board reimburse stockholders for proxy solicitation expenses meeting the criteria set forth in the Proposed Bylaw. That policy conflicts with the power granted to the Board under Article SEVENTH, Section (1). Because a corporation's bylaws cannot contradict its certificate of incorporation, the Proposed Bylaw, if adopted, would likely be a "nullity" and would be declared void by a Delaware court.

CONCLUSION

Based upon and subject to the foregoing, and subject to the limitations stated herein, it is our opinion that the Proposed Bylaw, if adopted, would violate Delaware law and is therefore not a proper subject for action by the Company's stockholders.

The foregoing opinion is limited to the General Corporation Law. We have not considered and express no opinion on any other laws or the laws of any other state or jurisdiction, including federal laws regulating securities or any other federal laws, or the rules and regulations of stock exchanges or of any other regulatory body.

The foregoing opinion is rendered solely for your benefit in connection with the matters addressed herein. We understand that you may furnish a copy of this opinion letter to the SEC and the Proponent in connection with the matters addressed herein, and we consent to your doing so. Except as stated in this paragraph, this opinion letter may not be furnished or quoted to, nor may the foregoing opinion be relied upon by, any other person or entity for any purpose without our prior written consent.

Very truly yours,

Richard S. Zingales, Jr., P.A.

CSB/PHS