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Re: *State of Wisconsin Investment Board v. Peerless Systems Corp., et al.*
Civil Action No. 17637

Dear Counsel:

Defendants Peerless Systems Corporation ("Peerless") and Edward A. Galvadon have moved for reargument on a portion of this Court's December 4, 2000 Memorandum Opinion[1] pursuant to Rule 59(f).[2] The defendants challenge the Court's denial of summary judgment to both the plaintiff, the State of Wisconsin Investment Board ("SWIB"), and the defendants on

[1] *State* of *Wisconsin Investment Board v. Peerless Systems Corp.*, Del. Ch., C.A. No. 17637, Chandler, C. (Dec. 4, 2000).
[2] Ct. Ch. R. 59(f).

SWIB's claim that the defendants breached their fiduciary duties to all shareholders by exercising corporate power to manipulate and interfere with a shareholder vote. More specifically, the defendants question the Court's conclusion that the defendants acted with the primary purpose of interfering with or impeding an otherwise valid shareholder vote and that the adjournment was invalid absent a compelling justification. For the reasons described below, I deny the defendants' motion.

I pass over a more thorough recitation of the facts involved in this matter as both parties are already intimately familiar with them.[3] Briefly, this lawsuit challenges an adjournment to the June 17, 1999 annual shareholders meeting of Peerless (the "Annual Meeting"). The adjournment, called by Peerless's Chairman, Chief Executive Officer and President, Edward Galvadon, postponed the closing of the polls on a certain proposal to add 1,000,000 shares to the Peerless stock option plan ("Proposal 2"). At the time of the Annual Meeting, Proposal 2 would have been defeated. Thirty days later, Peerless reconvened the Annual Meeting, Galvadon closed the polls on Proposal 2, and that proposal passed by a slim margin.

The standard on a motion for reargument is well settled. The motion generally will not be granted

[3] *See SWIB v. Peerless,* mem. op. at 2-14.

> unless the Court has overlooked a decision or principle of law that would have a controlling effect or the Court has misapprehended the law or the facts so that the outcome of the decision would be affected.[4]

Where the motion for reargument merely rehashes arguments previously made by the moving party, the motion must be denied.'

In support of their motion for reargument, the defendants assert that the Court incorrectly applied the following rule:

> [T]he application of the 'compelling justification' standard set forth in *Blasius* is appropriate only where the 'primary purpose of the board's action. [is] to interfere with or impede exercise of the shareholder franchise,' and the stockholders are not given a 'full and fair opportunity to vote.'"[6]

The defendants argue that they did not "interfere with" or "impede" the exercise of the shareholder franchise by adjourning the Annual Meeting on June 17 to gain more votes on Proposal 2. Further, the defendants argue that the Court's decision to deny summary judgment, in contradistinction to existing Delaware law, "assumes that there was an expectation of finality at the June 17 session of the annual meeting."[7] The defendants also argue that "[t]he rule announced by the Court will seriously erode procedural due

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[4] *Miles, Inc. v. Cookson America, Inc.,* Del. Ch., 677 A.2d 505, 506 (1995) (quoting *Stein* v. *Orloff,* Del. Ch., C.A. No. 7276, slip op. at 3, Hartnett, V.C. (Sept. 25, 1985)).
[5] *Miles v. Cookson, 677* A.2d at 506.
[6] *SWIB* v. Peerless, mem. op. at 22 (quoting *Williams v. Geier*, Del. Supr., 671 A.2d 1368, 1376 (1996)).
[7] Defs.' Mot. for Reargument, ¶ 3.

process at annual stockholders meetings" by eliminating altogether the "universally accepted requirement" that those who object to rulings from the chair must so inform management at the original session either in person, by an agent, or in writing.'

The defendants' first argument merely challenges my application of the rule spelled out in *Williams* to the facts of this case. The defendants do not present a new argument or principle of law that contradicts the Court's reading of the *Williams* standard. The defendants also present no reading of the facts of this case that would seem to contradict my own reading of the pertinent facts. For the reasons discussed at length in the *Peerless* decision, I believe that I have correctly apprehended and applied the law of Delaware concerning the adjournment claim.[9] This basis for the motion for reargument seeks to rehash fundamental arguments behind the Court's decision and is without merit.

The defendants next argue that the Court's conclusions directly conflict with the clear legal basis for adjournments of annual meetings within Delaware law. Here, the defendants seem to have misinterpreted my decision. *Peerless* in no way is meant to entirely foreclose the ability of a

[8] Defs.' Mot. for Reargument, ¶ 7.
[9] *SWIB v. Peerless*, mem. op. at 18-42.

Delaware corporation to reschedule or adjourn a shareholders meeting. The decision does stand for the principle, however, that in deciding to adjourn such a meeting, officers and directors must abide by their fiduciary duties to shareholders. Where a decision to adjourn is made due to an improper purpose, that decision may be challenged as a breach of fiduciary duty.

Moreover, there clearly are numerous instances where a company may be entirely justified in calling for an adjournment. At oral argument, SWIB described three such occasions: where there is evidence of vote fraud, a disruption in the proxy process, or the absence of a quorum. I agree with this understanding of the law and note that this list is in no way exhaustive of the situations where an adjournment may be legally justified. In fact, Peerless, itself, may ultimately be found to have lawfully and equitably decided to adjourn its Annual Meeting based on the facts adduced at trial in this matter. All I have concluded at this point is that the facts on this point are in dispute. As a result, the defendants' assertion that the Court's ruling creates a new rule of "finality" at shareholder meetings is simply not true. Defendants' argument on this point is likewise without merit.

Finally, I fail to see any merit in the defendants' contention that the *Peerless* decision will seriously erode procedural due process at annual shareholder meetings. I directly addressed this issue in my discussion of

whether SWIB had standing to bring the adjournment claim at all after not attending either the Annual Meeting or the reconvening of the Annual Meeting and not formally objecting to the adjournment during the period between those two meetings." As noted in the *Peerless* opinion, "this attendance and objection requirement simply cannot be the law of Delaware." The defendants have offered no reason beyond those already argued before the *Peerless* decision that calls the Court's judgment into question. Further, I note that in my view, *Peerless* actually fortifies the procedural due process guaranteed to shareholders of Delaware corporations by reinforcing the legitimacy of the shareholder voting process, the basic foundation of the corporate structure and of directorial power.

For these reasons, I deny the defendants' motion for reargument.

IT IS SO ORDERED.

Very truly yours,

William B. Chandler III

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[10] *SWIB v. Peerless,* mem. op. at 15-17.