EFiled: Jan 06 2017 05:33PM EST
Transaction ID 60037090
Case No. 12299-CB

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

JOHN SOLAK, On Behalf of Himself and All Other Similarly Situated Stockholders of **PAYLOCITY HOLDING CORPORATION**,	:	
Plaintiff,	:	
v.	:	C.A. No. 12299-CB
STEVEN I. SAROWITZ, **MARK H. MISHLER**, **STEVEN R. BEAUCHAMP**, **RONALD V. WATERS III**, **ANDRES D. REINER**, **JEFFREY T. DIEHL** and **PAYLOCITY HOLDING CORPORATION**,	:	
Defendants.	:	

PAYLOCITY HOLDING CORPORATION'S APPLICATION FOR CERTIFICATION OF INTERLOCUTORY APPEAL

John L. Reed (I.D. No. 3023)
Ethan H. Townsend (I.D. No. 5813)
Harrison S. Carpenter (I.D. No. 6018)
DLA PIPER LLP (US)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700

DATED: January 6, 2017

Attorneys for Defendants

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE**

RULES and STATUTES

OTHER AUTHORITIES

INTRODUCTION[1]

The Court's Opinion dated December 27, 2016 (cited as "Op.") is appropriate for interlocutory review by the Delaware Supreme Court because (i) it involves a substantial issue of material importance, not just to Paylocity, but to all corporations formed in Delaware in accordance with the Delaware General Corporation Law ("DGCL"), (ii) only a single, pure legal issue remains and it is dispositive of the entire case, (iii) it involves a matter of first impression, (iv) it involves the application of a new statute, (v) it involves the application of a statute in derogation of the common law, and (vi) interlocutory review will avoid several onerous procedural steps and otherwise serve considerations of justice. *See generally* Supr. Ct. R. 42.

[1] Unless otherwise defined in this Application, all capitalized terms have the same meaning ascribed to them in Defendants' Opening Brief in Support of Their Motion to Dismiss the Verified Class Action Complaint. (D.I. 11.)

THE COURT'S OPINION AND GROUNDS FOR APPEAL

In its Opinion, this Court concluded that Section 8.2 of Paylocity's Bylaws, which provides for the recovery of damages (*i.e.*, recoupment of attorneys' fees and costs) incurred in connection with a violation of Paylocity's exclusive forum-selection bylaw, was invalid on its face based on the language utilized by the General Assembly in Section 109(b) of the DGCL to ban bylaws that override the "American Rule" and shift fees onto stockholders in connection with internal corporate claims. In so deciding, the Court was the first to interpret the breadth of Section 109(b) and the General Assembly's intent in amending Section 109(b) in 2015 in the wake of the Delaware Supreme Court's decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554 (Del. 2014).

The analysis immediately below is not intended to be a form of reargument (the time for a motion pursuant to Court of Chancery Rule 59(f) has passed), though it may read like one. The analysis of the Opinion is presented simply to demonstrate the significance of the legal question presented.

The Court's Opinion expressed legitimate concerns over the practical outcome of its legal conclusion: "I do not intend to suggest that a stockholder who files an internal corporate claim outside Delaware in blatant violation of a plainly-valid forum-selection bylaw would suffer a detriment from being compelled to litigate in the mandated forum, nor should such behavior be condoned." (Op. at

14.) The Court further noted that, "[t]o the contrary, stockholders are expected to play by the rules of the company in which they chose to invest." (*Id.*) Nonetheless, it appears the Court felt completely constrained by "the plain text" of Section 109(b) in concluding that the language used by the General Assembly placed a "blanket prohibition" on any provision shifting fees, even ones designed merely to recover attorneys' fees and costs needlessly incurred when a stockholder violates a corporation's indisputably valid and enforceable exclusive forum-selection bylaw. (*Id.* at 20; *see also id.* ("The Supreme Court similarly has explained that '[a] court should not resort to legislative history in interpreting a statute where statutory language provides unambiguously an answer to the question at hand.'" (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1287 (Del. 1994))).)

Exclusive forum-selection bylaws are now statutorily authorized by newly-adopted Section 115 of the DGCL. Section 115 created an independent statutory and legal right for Delaware corporations, it was adopted by the General Assembly at the same time it amended Section 109(b), and the General Assembly did not even contemplate, or expressly impose, any restrictions on the rights surrounding Section 115. Respectfully, given the nature of the statute at issue here -- *i.e.*, Section 109(b) is a statute in derogation of the common law -- Paylocity believes the Court had the power to further test "the plain text" of Section 109(b) to ensure

its application in this case was consistent with the General Assembly's intent and did not produce a mischievous result, frustrate the public policies in question, or weaken a deterrent to behavior that the Court correctly recognized cannot be "condoned." (Op. at 14.)[2]

The Court correctly identified the heavy burden placed on Plaintiff in challenging Section 8.2: "[O]ne who has voluntarily chosen to mount a facial attack on the validity of a bylaw must demonstrate that it cannot operate lawfully under any circumstance to state a claim for relief . . . ." (Op. at 17-18.) That burden is even greater when applied to Section 109(b) because Section 109(b) is a statute in derogation of the common law, and "[i]t is axiomatic that statutes in derogation of the common law are to be strictly construed." *See Colonial Sch. Bd. v. Colonial Affiliate, NCCEA/DSEA/NEA*, 449 A.2d 243, 247 (Del. 1982). "Where there is any doubt about [a statute's] meaning or intent [it is to be] given the effect

[2] "[C]harters and bylaws are contracts," *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015), and besides constituting a breach of contract subject to remedies at law, a violation of a forum selection clause is also an inequitable act subject to equitable maxims. *See, e.g., Carlyle Investment Mgmt. L.L.C. v. Nat'l Indus. Gp. (Hldg.)*, 2012 WL 4847089, at *11 (Del. Ch. Oct. 11, 2012) (finding claim time-barred, refusing to credit time period spent litigating in improper forum, and noting that "[t]here is nothing unreasonable about enforcing the forum selection clause against National, because any harm it has suffered is entirely self-inflicted"), *aff'd* 61 A.3d 373 (Del. 2013); *CMS Investment Hldgs., LLC v. Castle*, 2016 WL 4411328, at *3 (Del. Ch. Aug. 19, 2016) ("Having chosen to disregard that clause and having made the decision to file initially in Colorado rather than in the parties' bargained-for jurisdiction, the Castle Parties cannot now present the Colorado State Action as a basis for avoiding application of laches.").

which makes the least, rather than the most, change in the common law." 3 Sutherland, *Statutory Construction* § 61:1 (7th ed.). Therefore, Plaintiff had the obligation to overcome any such doubt.[3]

Starting with legislative intent, there is absolutely no doubt about the public policies the General Assembly was promoting when it amended Section 109(b) and adopted Section 115. Section 109(b) was amended to eliminate the deterrent effect of fee-shifting provisions on stockholders who believe they have a good faith basis to pursue internal corporate claims. The concern was that the fear of possible fee-

---

[3] Even with regard to an ordinary statutory construction analysis, the "plain text" of is not necessarily always the stopping point:

> Statutory construction requires us to ascertain and give effect to the intent of the legislature. Because a statute passed by the General Assembly is to be considered as a whole, rather than in parts, each section should be read in light of all others in the enactment. In addition, words and phrases shall be read with their context and shall be construed according to the common and approved usage of the English language. *If uncertainty does exist, the statute must be construed to avoid "mischievous or absurd results. Thus, the golden rule of statutory interpretation . . . is that unreasonableness of the result produced by one among possible interpretations . . . is reason for rejecting that interpretation in favor of another which would produce a reasonable result. We will therefore reject any reading of the Act inconsistent with the intent of the General Assembly*.

Delaware Bay Surgical Servs., P.C. v. Swier, 900 A.2d 646, 652 (Del. 2006) (omission in original) (emphasis added) (citations, footnotes, and internal quotation marks omitted).

shifting for merely losing a case -- via provisions overriding the "American Rule" -- would prevent otherwise valid internal corporate claims from ever being pursued. *See* Explanation of Council Legislative Proposal at 1, 3-4 (explaining rationale for amending Section 109(b) in wake of *ATP Tour* was that "few stockholders will rationally be able to accept the risk of exposure to millions of dollars in attorneys' fees in an attempt to rectify a perceived corporate wrong, no matter how egregious"); *see also Strougo v. Hollander*, 111 A.3d 590, 595 (Del. Ch. 2015) (explaining that fee-shifting bylaws implicate and deter the stockholders' "right to sue to vindicate their interests as stockholders"). Paylocity's Bylaw does not in any way deter the litigation of internal corporate claims. Indeed, Section 8.1 of Paylocity's Bylaws provides the forum for them (Delaware), as permitted by Section 115, and Section 8.2 enforces the forum where internal corporate claims can be litigated without ***any*** fear of fee-shifting.

Section 115 was adopted to further the important public policy of ensuring that Delaware courts decide Delaware law issues governing the internal affairs of Delaware corporations, as squarely articulated in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934, 953 (Del. Ch. 2013) (stating when ruling in a case involving a forum provision providing for exclusive jurisdiction in Delaware that "choosing the most obviously reasonable forum -- the state of incorporation, Delaware -- so that internal affairs cases will be decided in

the courts whose Supreme Court has the authoritative final say as to what the governing law means"). *See* Del. S.B. 75 syn., § 5, 140th Gen. Assem. (2015) ("New Section 115 confirms, as held in *Boilermakers Local 154 Retirement Fund v. Chevron Corporation*, 73 A.3d 934 (Del. Ch. 2013), that the certificate of incorporation and bylaws of the corporation may effectively specify, consistent with applicable jurisdictional requirements, that claims arising under the DGCL, including claims of breach of fiduciary duty by current or former directors or officers or controlling stockholders of the corporation, or persons who aid and abet such a breach, must be brought only in the courts (including the federal court) in this State."). Sections 8.1 and 8.2 of Paylocity's Bylaws further that policy as well. Thus, Section 8.2 does not interfere with, nor is it inconsistent with, the two goals of the Legislature.

Turning to the common law, there are two types of common law implicated by this case: (1) the common law right to have a fee-shifting provision as recognized in *ATP Tour*, and (2) the common law right to damages for breach of a forum-selection clause, as recognized by the Delaware Supreme Court in *El Paso Natural Gas Co. v. TransAmerican Natural Gas Corp.*, 669 A.2d 36 (Del. 1995). Section 109(b) and Section 115 were heavily debated and scrutinized by both the legal and business communities. Senate Bill No. 75 contained an extensive synopsis and the final product was presented with an accompanying memorandum

explaining the legal and policy rationales for the legislation. The entirety of the discussions revolved around the common law discussed in *ATP Tour*. Not a single word involved the common law discussed in *El Paso*, and that has dispositive implications for a statute in derogation of the common law, like Section 109(b).

Section 8.2 embodies Paylocity's common law right recognized in *El Paso.* As "bylaws of a corporation are presumed to be valid," *Frantz Mfg. Co. v. EAC Indus.*, 501 A.2d 401, 407 (Del. 1985), "may contain any provision, not inconsistent with law," 8 *Del. C.* § 109(b), and statutes in derogation of the common law are to be narrowly construed, the burden on Plaintiff here was, to repeat, heavy:

> A statute may take away a common-law right, but courts presume the legislature has no such purpose. If a common-law right is to be taken away, it must be noted clearly by the legislature. As the Supreme Court has stated, to abrogate a common law principle, the statute must "speak directly" to the question addressed by the common law."

3 Sutherland, *Statutory Construction* § 61:1 (7th ed.) "The common law is not repealed by statute unless the legislative intent to do so is plainly and clearly manifested[,]" and "any such repeal is affected to a greater extent than the unmistakable import of the [statutory] language used." *A.W. Fin. Servs., S.A. v. Empire Res. Inc.*, 981 A.2d 1114, 1122 (Del. 2009).

As previously explained, there is certainly no "repugnance" between Section 8.2 and the articulated public policies behind Section 109(b) and Section 115, nor does Section 109(b) "speak directly" to the common law articulated in *El Paso*. That then leaves the following questions: Does "the statutory scheme actually conflict with the common law," *id.* at 1123, and is "there is a fair repugnance between the common law and the statute[?]" *Id.* at 1122. Here too, there is no repugnance between the common law recognized in *El Paso* (as embodied in Section 8.2 of Paylocity's Bylaws) and Section 109(b).

Section 109(b) was intended to bar provisions that override the "American Rule" when a stockholder loses a case involving an internal corporate claim. In contrast, if a court determines that a party violated a forum-selection clause, damages flow from that breach. Provisions imposing damages for violation of a form selection clause have nothing to do with overriding the American Rule. *See Cornerstone Brands, Inc. v. O'Steen*, 2006 WL 2788414, at *4 (Del. Ch. Sept. 20, 2006) (holding that party can seek damages by way of attorneys' fees for breach of forum selection clause and explaining that in *El Paso* "the Supreme Court of Delaware implied that damages may be obtained for a breach of a forum selection

clause, and an award of such damages *does not contravene the American Rule*" (emphasis added)).[4]

The prohibition imposed by Section 109(b) has nothing to do with the common law recognized in *El Paso* or the rights vindicated by Section 8.2. Thus, it was legal error to conclude that the statutory scheme created by Section 109(b) is repugnant to the common law right to impose damages for violation of a forum selection clause. A stockholder (or any other type of party) is entitled under the American Rule to litigate and lose a lawsuit, which "loser pays" provisions alter, but no party is entitled to violate a valid forum selection clause. Comparing Section 109(b) to the common law recognized in *El Paso* is like comparing apples to oranges.

The Opinion endeavored to draw a distinction between Section 109(b) and the common law right to seek damages for violation of a forum-selection clause recognized by the Delaware Supreme Court in *El Paso* on the basis that the right recognized in *El Paso* involved a private contract. (Op. at 22.) However, that common law contract right is still the common law even though it can arise in

[4] As previously noted, the Opinion correctly pointed out the problem when a stockholder violates a corporation's independent legal right to have an exclusive forum provision: "I do not intend to suggest that a stockholder who files an internal corporate claim outside Delaware in blatant violation of a plainly-valid forum-selection bylaw would suffer a detriment from being compelled to litigate in the mandated forum, nor should such behavior be condoned. To the contrary, stockholders are expected to play by the rules of the company in which they chose to invest." (Op. at 14.)

different contexts (*e.g.*, it arose in a merger agreement in *Cornerstone Brands*), and bylaws and charter provisions are interpreted and enforced as contracts. *Hill Int'l*, 119 A.3d at 38. Nonetheless, the Court deemed the distinction important because the Opinion seems to conclude that the Legislature actually contemplated the common law discussed in *El Paso* and then carved it out for private contracts but not for bylaws:

> *El Paso* is distinguishable because the fee-shifting provision in that case was the subject of a private contract, to which the prohibition on fee-shifting *bylaws* in Section 109(b) does not apply. Indeed, the legislative synopsis expressly states that the amendment to Section 109(b) was not intended "to prevent the application of any provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced."

(Op. at 22.)

The problem with tying the carveout in Section 109(b) to *El Paso* is that what the Legislature carved out was the right to have an *ATP Tour*-type fee-shifting provision in a private contract -- *i.e.*, a "loser pays" provision that upends the American Rule for litigating and losing corporate claims, which is the very common law abrogated by Section 109(b). Neither the carveout, nor anything else in the legislation was addressing the common law right to obtain damages for breach of a forum selection clause. The Opinion seems to conclude that the words the Legislature chose to eliminate one common law right -- the one recognized in

ATP Tour -- unknowingly wiped out two common law rights, but the rule for statutes in derogation of the common law is that all doubt is to be resolved by giving "the effect which makes the least, rather than the most, change in the common law." 3 Sutherland, *Statutory Construction* § 61:1 (7th ed.). "If a change is to be made in the common law, the legislative purpose to do so must be clearly and plainly expressed." *Id.*

The right to have an exclusive forum selection clause is an independent right that was already recognized by our courts and is now codified in Section 115. When the General Assembly created the independent statutory right for Delaware corporations to have exclusive forum provisions, it could have restricted the rights at common law attendant to such provisions. For example, Section 109(b) could have been drafted to state the following:

> (b) 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. The bylaws may not contain any provision that would impose liability on a stockholder for the attorneys' fees or expenses of the corporation or any other party in connection with an internal corporate claim, as defined in § 115 of this title, *or in connection with a violation of an exclusive forum provision authorized by § 115 of this title*.

If Section 109(b) was intended to take away the right to obtain damages for breach of a forum clause it must say so and it does not. Respectfully, the Court gave a

broad, rather than the required narrow reading to the phrase "in connection with." Section 109(b) was intended to ban bylaws that shift fees on to stockholders "in connection with" actually litigating and losing an internal corporate claim, not provisions that impose damages that are "*in any way* connected with" an internal corporate claim.

Given that Section 8.2 is not inconsistent with the articulated public policies and intent behind Section 109(b) and Section 115, and that Section 109(b) does not speak directly to the abrogation of the common law rights attendant to enforcing exclusive forum provisions, Paylocity submits that a narrower reading of the phrase "in connection with" was required. For example, in *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058 (2014), the U.S. Supreme Court interpreted "in connection with" in the Securities Litigation Uniform Standards Act of 1998 consistent with Paylocity's arguments here. In *Chadbourne*, the Court explained that to satisfy "in connection with" the purchase or sale of securities, a fraudulent misrepresentation or omission must be "material to a decision by one or more individuals (other than the fraudster) to buy or to seller a covered security." *Id.* at 1066. Here, there is no "material connection" between, on the one hand, being forced to pay the other side's attorneys' fees and costs merely for losing a case and, on the other hand, having to pay damages for violating a forum selection clause. A narrower reading of "in connection with" would have preserved this

distinction and the common law recognized in *El Paso* without interfering in any way with the common law the General Assembly actually abrogated in Section 109(b).

In sum, Section 109(b) bars any bylaw that imposes liability "in connection with" litigating and losing an internal corporate claim. The liability under Paylocity's bylaw is imposed "in connection with" a violation of the exclusive forum bylaw, not in connection with litigating the substance of the internal claim itself. The internal claim never gets off the starting line in the non-Delaware court if the forum clause is enforceable because the non-Delaware court does not have jurisdiction over the claims. *See Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 287 (Del. 1999) (concluding that exclusive forum provision providing for jurisdiction outside of Delaware "strip[s] the Court of Chancery of subject matter jurisdiction"). If the exact claims are then re-filed in Delaware (the proper forum per Paylocity's exclusive forum bylaw, as authorized by Section 115), there is no liability whatsoever under Paylocity's fee-shifting bylaw, no matter how badly the stockholder loses in Delaware. Thus, the liability under Section 8.2 is not, in any "material" way, "in connection with" the liability addressed by Section 109(b).

Respectfully, given that Section 109(b) is a statute in derogation of the common law, the Court had the power to peek around "the plain text" before making its legal conclusion. Such a peek warrants a different outcome. The Court

gave too broad a meaning to the phrase "in connection with," which is not how statutes in derogation of the common law are to be interpreted. That reading produced a mischievous result that is inconsistent with the policies and intent behind Section 109(b) and Section 115. The Delaware General Assembly undoubtedly sought to protect stockholders and their counsel from "loser pays" provisions that end-run the American Rule, but there is no indication whatsoever that the General Assembly intended to create a special class of litigants (stockholders) who can violate a forum selection clause without facing the same consequences any other type of litigant would face for such a violation.

The interpretation of Section 109(b) is of critical importance to this case, and to all Delaware corporations. Accordingly, Defendants hereby request that the Court certify its Opinion for interlocutory review to the Delaware Supreme Court pursuant to Delaware Supreme Court Rule 42. As detailed below, this case meets each one of Rule 42's requirements. Further, in accordance with Rule 42(b)(iii), Paylocity and its counsel state that they have determined in good faith that this application for certification of an interlocutory appeal meets the criteria of Rule 42(b), that there are important and urgent reasons for an immediate appeal, and that interlocutory review of the Opinion will otherwise "serve considerations of justice." Supr. Ct. R. 42(b)(iii)(H).

PROCEDURAL BACKGROUND

Plaintiff filed his Complaint on May 5, 2016, asserting three claims: (1) Section 8.2 of Paylocity's Bylaws is facially invalid as inconsistent with 8 *Del. C.* § 109(b) (*see* Compl. at 13 & ¶¶ 39–41); (2) Section 8.2 is facially invalid because it is also inconsistent with 8 *Del. C.* § 102(b)(6) (*see id.* at 14 & ¶¶ 45–47); and (3) the Director Defendants breached their fiduciary duties by "invoking the unlawful Fee-Shifting Bylaw six months after the adoption of Section 109(b) and [] failing to correct and rescind the Fee-Shifting Bylaw" (*see id*. at 15 & ¶ 52). (D.I. 1.)

On May 31, 2016, Defendants moved to dismiss the Complaint (the "Motion"). (D.I. 6.) This Court heard oral argument on the Motion on September 27, 2016 (D.I. 18), and issued its Opinion on December 27, 2016, granting the Motion as to Counts II and III, but denying it as to Count I (D.I. 20).[5]

In denying Defendants' Motion as to Count I, the Court concluded that "the plain text of [Section 8.2] violates Section 109(b) because the statute unambiguously prohibits the inclusion of '*any provision*' in a corporation's bylaws that would shift to a stockholder the attorneys' fees or expenses incurred by the corporation '*in connection with an internal corporate claim*,' irrespective of where such a claim is filed." (Op. at 20 (emphasis in original).)

[5] Defendants neither seek interlocutory review of those aspects of the Opinion dismissing Counts II and III, nor review them specifically in this Application.

In so deciding, the Court rejected two core arguments that will be the basis of Paylocity's appeal if this application is granted. First, the Court disagreed that Section 109(b) must be read in tandem with the simultaneously adopted Section 115, such that the DGCL permits fee-shifting bylaws when a corporation also adopts an exclusive-forum bylaw, because "Section 109(b) plainly prohibits '*any* provision' that would shift fees 'in connection with an internal corporate claim' without regard to where such a claim is filed." (Op. at 21.) Second, the Court discounted Defendants' argument that "fee-shifting is permissible at common law and that Section 109(b) of the DGCL was not intended to displace the common law" because the amendments to Section 109(b) stand in "fair repugnance" to the common law -- including in particular the *ATP Tour* decision -- permitting fee-shifting in bylaws, at least as to stock corporations. (*Id.* at 22–23.)

Respectfully, the Court's Opinion is in error and should be reviewed on an interlocutory basis.

ARGUMENT

Supreme Court Rule 42 governs interlocutory appeals. Rule 42 permits an interlocutory appeal from a trial court order that "decides a substantial issue of material importance that merits appellate review before a final judgment," Supr. Ct. R. 42(b)(i), and "there are substantial benefits that will outweigh the certain costs that accompany an interlocutory appeal," Supr. Ct. R. 42(b)(ii). *See also Nistazos Hldgs., LLC v. Milford Plaza Enters., LLC*, 2016 WL 5408123, at *1 (Del. Ch. Sept. 26, 2016) (setting forth same factors).

In deciding whether to certify an interlocutory appeal, the trial court considers several factors, including whether "[t]he interlocutory order involves a question of law resolved for the first time in this State," Supr. Ct. R. 42(b)(iii)(A), "[t]he question of law relates to the . . . construction[] or application of a statute of this State, which has not been, but should be, settled by [the Supreme Court] in advance of an appeal from a final order," Supr. Ct. R. 42(b)(iii)(C), "[r]eview of the interlocutory order may terminate the litigation," Supr. Ct. R. 42(b)(iii)(G), and "[r]eview of the interlocutory order may serve considerations of justice," Supr. Ct. R. 42(b)(iii)(H).

This case satisfies Rule 42's requirements for certification of an interlocutory appeal.

I. THE COURT'S RULING DECIDED A SUBSTANTIAL ISSUE

There can be no serious dispute that the Court's Opinion determined a substantial legal issue. "An order satisfies the substantial issue requirement when it decides a main question of law relating to the merits of the case, as opposed to some collateral matter, such as a discovery dispute." *Pontone v. Milso Indus. Corp.*, 2014 WL 4967228, at *2 (Del. Ch. Oct. 6, 2014). The Court's Opinion determined that Section 8.2 was facially invalid -- which was the gravamen of Plaintiff's Verified Complaint, and the central issue in the case. The requirements of Rule 42(b)(i) are therefore satisfied.

II. THE COURT'S RULING MEETS THE FURTHER CRITERIA OF SUPREME COURT RULE 42(b)(iii)

In addition to determining a substantial issue of material importance to this case, the Court's Opinion satisfies at least three additional criteria under Rule 42(b)(iii) -- only one of which is necessary to qualify for potential interlocutory review.

A. The Opinion Addresses A Question Of First Impression And Relates To The Construction Of A Statute That Has Not Been, But Should Be, Settled By The Supreme Court In Advance Of An Appeal From A Final Order

The Court's Opinion satisfies Rule 42(b)(iii), which incorporates the certification concept of Supreme Court Rule 41(b), first because "the question of law is of first instance in this State," Supr. Ct. R. 41(b)(i), and second because "the

question of law relates to the constitutionality, construction or application of this State which has not been, but should be, settled by this Court," Supr. Ct. R. 41(b)(iii).

To date, this Court's Opinion is the only decision interpreting the breadth of the new amendment to Section 109(b) of the DGCL, which altered Delaware's common law. It is also the first decision by this Court that determined that Section 109(b) partially abrogated the common law recognized in both *El Paso* and *Cornerstone Brands* that a company has a right to damages, by way of attorneys' fees and costs, for breach of a forum-selection clause, and such recovery does not run afoul of the American Rule. *See El Paso*, 669 A.2d at 40 ("The Court of Chancery correctly determined, *inter alia*, that El Paso could raise the forum selection clause in the Settlement Agreement as a defense in the first filed Texas action and, if successful, recover the costs of that litigation."); *Cornerstone Brands*, 2006 WL 2788414, at *4 (collecting cases from various jurisdictions holding that party can seek damages by way of attorneys' fees for breach of forum selection clause and explaining that in *El Paso* "the Supreme Court of Delaware implied that damages may be obtained for a breach of a forum selection clause, and an award of such damages *does not contravene the American Rule*" (emphasis added)).

The Court's Opinion warrants prompt review because the ability of all Delaware corporations to have a mechanism to enforce, deter violations of, and recover damages for breach of the independent legal right to maintain an exclusive forum-selection provision, as expressly authorized by the General Assembly in Section 115 to statutorily implement an important public policy, is now in flux. The breadth of the Delaware General Assembly's abrogation of the common law is an issue of critical importance that the Delaware Supreme Court should settle immediately.

B. Review Of The Opinion May Terminate The Litigation

There is also no question that the Delaware Supreme Court's review of the Court's Opinion may terminate the litigation. Plaintiff primarily challenges the facial validity of Section 8.2, and all his remaining claims are derivative of that claim. If the Delaware Supreme Court determines that Plaintiff has failed to state a claim that Section 8.2 of Paylocity's Bylaws is invalid, this entire case must be dismissed.

C. Review Of The Opinion Will Serve Considerations Of Justice

There are substantial considerations of justice here as well that warrant interlocutory review. The only claim that is set to proceed in this case is Plaintiff's challenge to the facial validity of Section 8.2 of Paylocity's Bylaws. Although the Court determined that particular issue, there are still substantial related issues the

parties must litigate -- namely, class certification, a fee applicable from Plaintiff, notice and opportunity to object, and a final hearing.

Class certification in this case will be a bit out of the ordinary. One of the critical issues with respect to class certification will be how to define the class of stockholders and then determine who is in that class. All Paylocity stockholders have a common interest in being invested in a company that does not have a facially invalid bylaw. However, the case was determined to be "ripe" for review because of the present deterrent effect of Section 8.2, and the benefit obtained if the Opinion is affirmed is the elimination of one deterrent to blatantly violating a valid exclusive forum bylaw. Plaintiff ***himself*** has not indicated any intent (current or future), and has not identified any stockholder that has an intent (current or future), to file an action that might invoke Section 8.2 of Paylocity's Bylaws. The only alleged "harm" is that stockholders would be "deterred" from filing claims outside of Delaware because of Section 8.2. (*See* Pl.'s Ans. Br. at 18.) The class of stockholders whose interests actually made the case ripe thus would be those stockholders that believe Paylocity's Bylaw had a sufficient deterrent effect to prevent ***them*** from filing internal corporate claims in contravention of the exclusive forum-selection bylaw. Whether Plaintiff can adequately represent that class (he is at odds with them, as explained below), locating members of that class, and conducting class certification discovery, will be time consuming and completely

unnecessary if, after the Court enters a final judgment, Paylocity then appeals and Section 8.2 is determined to be facially valid by the Delaware Supreme Court.

Beyond defining the class, quantifying the benefit is not so simple. This Plaintiff represents the interests of a class that has no present or future intention of violating Paylocity's exclusive forum selection bylaw. But, he is advocating for a result that allows other Paylocity stockholders to violate the Company's exclusive forum selection bylaw, without the consequences imposed by Section 8.2. One portion of the class he purports to represent seeks to violate Paylocity's exclusive forum provision without having to automatically pay Paylocity the attorneys' fees and expenses needlessly incurred in having to enforce its exclusive forum bylaw. The other portion of the class Plaintiff represents (the one which actually includes Plaintiff himself), includes those Paylocity stockholders who remain invested in a company that will now have a weakened ability, or a more expensive or cumbersome route, to recover damages caused by the other portion of the class. Specifically identifying the "violator class," and quantifying the benefit, if any (there is none), to them is an exercise that may become unnecessary in the event of a successful interlocutory appeal.

Even assuming that class certification is appropriate, an interlocutory appeal will obviate the need to provide notice to the putative class, as well as litigation over a fee application from Plaintiff's counsel.

In short, there will be a great conservation of resources for the Court, as well as the parties, if the validity of Section 8.2 of Paylocity's Bylaws is finally determined by the Delaware Supreme Court before the parties proceed with litigating the remaining issues in this case.[6] Clearly, the interests of justice will be served by immediate review of the interlocutory order.

* * *

An immediate interlocutory review of this Court's decision has "substantial benefits that . . . outweigh the costs that accompany an interlocutory appeal," Supr. Ct. R. 42(b)(ii), because the Delaware Supreme Court will have the opportunity to consider Section 8.2 of Paylocity's Bylaws, Section 109(b), Section 115, and the important public policies and common law rights for Delaware corporations, for which the Delaware Supreme Court has ultimate authority to determine.

[6] The Court need not be worried that, by certifying its decision for interlocutory appeal, it will have to entertain injunction motions by Plaintiff because Paylocity agrees not to enforce Section 8.2 of its Bylaws during the interim period of review by the Delaware Supreme Court.

CONCLUSION

For all the foregoing reasons, Defendants respectfully request that the Court grant their application for certification of an interlocutory appeal.

DATED: January 6, 2017

DLA PIPER LLP (US)

/s/ John L. Reed

John L. Reed (I.D. No. 3023)
Ethan H. Townsend (I.D. No. 5813)
Harrison S. Carpenter (I.D. No. 6018)
1201 North Market Street, Suite 2100
Wilmington, DE 19801
(302) 468-5700
(302) 394-2341 (Fax)
john.reed@dlapiper.com
ethan.townsend@dlapiper.com
harrison.carpenter@dlapiper.com

Attorneys for Defendants Steven I. Sarowitz, Mark H. Mishler, Steven R. Beauchamp, Ronald V. Waters III, Andres D. Reiner, Jeffrey T. Diehl and Paylocity Holding Corporation