

IN THE
SUPREME COURT OF THE STATE OF DELAWARE

No. 27, 2009

CLARE C. MARSHALL,)	
)	
Plaintiff Below-Appellant,)	Court Below:
)	Court of Chancery
v.)	of the State of Delaware
)	Civil Action No. 3892-CS
)	
CHARLES H. SALIGMAN, PATRICK)	
C. RICHMOND, YVONNE M. CRAIG,)	
MARTIN R. ROTHSCHILD, ELAINE A.)	
LASATER, WILLIAM M. LEWIS,)	
GILBERT W. COULSON, RACHEL N.)	
LIBERMAN, TIMOTHY M. STOCKDALE,)	
AND CARLOS B. HUELVA,)	
)	
Defendant Below-Appellee,)	
)	
and)	
)	
SECURANCE INCORPORATED,)	
)	
Nominal Defendant Below-)	
Appellee.)	

Appendix for Appellees

Team W
Counsel for
Defendant Below-Appellees
Securance, Inc.

Dated: February 16, 2009

APPENDIX: RELEVANT STATUTES AND RULES

TABLE OF CONTENTS

STATUTES

Del. Code Ann. tit. 8, § 102(b)(7) (2009)..... B-2
Del. Code Ann. tit. 8, § 141(a) (2009)..... B-3
Del. Code Ann. tit. 8, § 141(e) (2009)..... B-3
Del. Code Ann. tit. 8, § 220 (2009)..... B-4

RULES

Ct. of Chancery R. 12(b)(6)..... B-5
Ct. of Chancery R. 23.1..... B-6
Fed. R. Civ. P. 12(b)(6)..... B-5
NYSE, Inc. Listed Company Manual § 303A.02(a) (2004)..... B-8
NYSE, Inc. Listed Company Manual § 303A.05(a) (2004)..... B-10
NYSE, Inc. Listed Company Manual § 303A.05(b) (2004)..... B-10
NYSE, Inc. Listed Company Manual § 303A.06 (2004)..... B-11
NYSE, Inc. Listed Company Manual § 303A.07(b) (2004)..... B-12
NYSE, Inc. Listed Company Manual § 303A.07(c) (2004)..... B-12
SEC Listing Standards Relating to Audit Committees,
17 C.F.R. § 240.10A-3(b)(3)(ii) (2008)..... B-14

Del. Code Ann. tit. 8, § 102(b)(7) (2009)

DELAWARE CODE
TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER I. FORMATION

§ 102(b)(7) Contents of Certificate of Incorporation

(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: . . .

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided that such provision shall not eliminate or limit the liability of a director: (i) For any breach of the director's duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit. No such provision shall eliminate or limit the liability of a director for any act or omission occurring prior to the date when such provision becomes effective. All references in this paragraph to a director shall also be deemed to refer (x) to a member of the governing body of a corporation which is not authorized to issue capital stock, and (y) to such other person or persons, if any, who, pursuant to a provision of the certificate of incorporation in accordance with § 141(a) of this title, exercise or perform any of the powers or duties otherwise conferred or imposed upon the board of directors by this title.

Del. Code Ann. tit. 8, § 141(a) & (e) (2009)

DELAWARE CODE
TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER IV. DIRECTORS AND OFFICERS

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonprofit corporations; reliance upon books; action without meeting; removal

(a) 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. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

Del. Code Ann. tit. 8, § 220 (2009)

DELAWARE CODE
TITLE 8. CORPORATIONS
CHAPTER 1. GENERAL CORPORATION LAW
SUBCHAPTER VII. MEETINGS, ELECTION, VOTING, AND NOTICE

§ 220. Inspection of books and records

(b) Any stockholder, in person or by attorney or other agent, shall, upon written demand under oath stating the purpose thereof, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

(1) The corporation's stock ledger, a list of its stockholders, and its other books and records; and

(2) A subsidiary's books and records, to the extent that:

a. The corporation has actual possession and control of such records of such subsidiary; or

b. The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:

1. The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

2. The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

In every instance where the stockholder is other than a record holder of stock in a stock corporation or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be. A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder. In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder. The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

Delaware Court of Chancery Rule 12(b)(6)

DELAWARE CODE
DELAWARE RULES OF COURT
CHANCERY COURT RULES
CHAPTER III. PLEADINGS AND MOTIONS

RULE 12. Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.

Fed. R. Civ. P. 12(b)(6)

UNITED STATES CODE ANNOTATED
FEDERAL RULES OF CIVIL PROCEDURE FOR THE U.S. DISTRICT COURTS
TITLE III. PLEADINGS AND MOTIONS

RULE 12. Defenses and Objection: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: . . . (6) failure to state a claim upon which relief can be granted.

Delaware Court of Chancery Rule 23.1

DELAWARE CODE
DELAWARE RULES OF COURT
CHANCERY COURT RULES
CHAPTER IV. PARTIES

RULE 23.1. Derivative Actions by Shareholders

(a) In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

(b) Each person seeking to serve as a representative plaintiff on behalf of a corporation or unincorporated association pursuant to this Rule shall file with the Register in Chancery an affidavit stating that the person has not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in the derivative action in which the person or entity is a named party except (i) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of such person, or (ii) reimbursement, paid by such person's attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of the action. The affidavit required by this subpart shall be filed within 10 days after the earliest of the affiant filing the complaint, filing a motion to intervene in the action or filing a motion seeking appointment as a representative party in the action. An affidavit provided pursuant to this subpart shall not be construed to be a waiver of the attorney-client privilege.

(c) The action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the Court directs; except that if the dismissal is to be without prejudice or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made. At the time that any party moves or otherwise applies to the Court for approval of a compromise of all or

any part of a derivative action, each representative plaintiff in such action shall file with the Register in Chancery a further affidavit in the form required by subpart (b) of this rule.

(d) For purposes of this Rule, an 'unincorporated association' includes a statutory trust, business trust, limited liability company and a partnership (whether general or limited), and a 'member' includes a person permitted by applicable law to bring a derivative action to enforce a right of such an unincorporated association.

NYSE, Inc. Listed Company Manual § 303A.02(a) (2004)

NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL
SECTION 3: CORPORATE RESPONSIBILITY
303.00 CORPORATE GOVERNANCE STANDARDS

§ 303A.02 Independence Tests (without commentary)

In order to tighten the definition of "independent director" for purposes of these standards:

(a) No director qualifies as "independent" unless the board of directors affirmatively determines that the director has no material relationship with the listed company (either directly or as a partner, shareholder or officer of an organization that has a relationship with the company). Companies must identify which directors are independent and disclose the basis for that determination.

(b) In addition, a director is not independent if:

(i) The director is, or has been within the last three years, an employee of the listed company, or an immediate family member is, or has been within the last three years, an executive officer, of the listed company.

(ii) The director has received, or has an immediate family member who has received, during any twelve-month period within the last three years, more than \$120,000 in direct compensation from the listed company, other than director and committee fees and pension or other forms of deferred compensation for prior service (provided such compensation is not contingent in any way on continued service).

(iii) (A) The director is a current partner or employee of a firm that is the company's internal or external auditor; (B) the director has an immediate family member who is a current partner of such a firm; (C) the director has an immediate family member who is a current employee of such a firm and personally works on the listed company's audit; or (D) the director or an immediate family member was within the last three years a partner or employee of such a firm and personally worked on the listed company's audit within that time.

(iv) The director or an immediate family member is, or has been with the last three years, employed as an executive officer of another company where any of the listed company's present executive officers at the same time serves or served on that company's compensation committee.

(v) The director is a current employee, or an immediate family member is a current executive officer, of a company that has made payments to, or received payments from, the listed company for property or services in an amount which, in any of the last three fiscal years, exceeds the greater of \$1 million, or 2% of such other company's consolidated gross revenues.

NYSE, Inc. Listed Company Manual § 303A.05 (2004)

NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL
SECTION 3: CORPORATE RESPONSIBILITY
303.00 CORPORATE GOVERNANCE STANDARDS

§ 303A.05 Compensation Committee (without commentary)

(a) Listed companies must have a compensation committee composed entirely of independent directors.

(b) The compensation committee must have a written charter that addresses:

(i) the committee's purpose and responsibilities - which, at minimum, must be to have direct responsibility to:

(A) review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation; and

(B) make recommendations to the board with respect to non-CEO executive officer compensation, and incentive-compensation and equity-based plans that are subject to board approval; and

(C) produce a compensation committee report on executive officer compensation as required by the SEC to be included in the listed company's annual proxy statement or annual report on Form 10-K filed with the SEC;

(ii) an annual performance evaluation of the compensation committee.

NYSE, Inc. Listed Company Manual § 303A.06 (2004)

NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL
SECTION 3: CORPORATE RESPONSIBILITY
303.00 CORPORATE GOVERNANCE STANDARDS

§ 303A.06 Audit Committee (without commentary)

Listed companies must have an audit committee that satisfies the requirements of Rule 10Z-3 under the Exchange Act.

NYSE, Inc. Listed Company Manual § 303A.07(b) & (c) (2004)

NEW YORK STOCK EXCHANGE LISTED COMPANY MANUAL
SECTION 3: CORPORATE RESPONSIBILITY
303.00 CORPORATE GOVERNANCE STANDARDS

303A.07 Audit Committee Additional Requirements (without commentary)

(b) In addition to any requirement of Rule 10A-3(b)(1), all audit committee members must satisfy the requirements for independence set out in Section 303A.02.

(c) The audit committee must have a written charter that addresses:

(i) the committee's purpose - which, at minimum, must be to:

(A) assist board oversight of (1) the integrity of the listed company's financial statements, (2) the listed company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the listed company's internal audit function and independent auditors; and

(B) prepare an audit committee report as required by the SEC to be included in the listed company's annual proxy statement;

(ii) an annual performance evaluation of the audit committee; and

(iii) the duties and responsibilities of the audit committee - which, at a minimum, must include those set out in Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act, as well as to:

(A) at least annually, obtain and review a report by the independent auditor describing: the firm's internal quality-control procedures; any material issues raised by the most recent internal quality-control review, or peer review, of the firm, or by any inquiry or investigation by governmental or professional authorities, within the preceding five years, respecting one or more independent audits carried out by the firm, and any steps taken to deal with any such issues; and (to assess the auditor's independence) all relationships between the independent auditor and the listed company;

(B) meet to review and discuss the listed company's annual audited financial statements and quarterly financial statements with management and the independent auditor, including reviewing the company's specific disclosures

under "Management's Discussion and Analysis of Financial Condition and Results of Operations";

(C) discuss the listed company's earnings press releases, as well as financial information and earnings guidance provided to analysts and rating agencies;

(D) discuss policies with respect to risk assessment and risk management;

(E) meet separately, periodically, with management, with internal auditors (or other personnel responsible for the internal audit function) and with independent auditors;

(F) review with the independent auditor any audit problems or difficulties and management's response;

(G) set clear hiring policies for employees or former employees of the independent auditors; and

(H) report regularly to the board of directors.

SEC Listing Standards Relating to Audit Committees,
17 C.F.R. § 240.10A-3(b)(3)(ii) (2008)

CODE OF FEDERAL REGULATIONS
TITLE 17. COMMODITY AND SECURITIES EXCHANGES
CHAPTER II. SECURITIES AND EXCHANGE COMMISSION
PART 240. GENERAL RULES AND REGULATIONS,
SECURITIES EXCHANGE ACT OF 1934
SUBPART A. RULES AND REGULATIONS UNDER
THE SECURITIES EXCHANGE ACT OF 1934.
REPORTS UNDER SECTION 10A

§ 240.10A-3 Listing standards relating to audit committee.

- (b) Required standards
- (3) Complaints. Each audit committee must establish procedures for:
 - (i) The receipt, retention, and treatment of complaints received by the listed issuer regarding accounting, internal accounting controls, or auditing matters; and
 - (ii) The confidential, anonymous submission by employees of the listed issuer of concerns regarding questionable accounting or auditing matters.