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SUBMISSION OF VENABLE LLP, BALTIMORE, MARYLAND TO INSTITUTIONAL SHAREHOLDER SERVICES INC. ("ISS") RE "RESTRICTIONS ON BINDING SHAREHOLDER PROPOSALS"

November 10, 2016

We appreciate the opportunity to respond to ISS's proposal on "Restrictions on Binding Shareholder Proposals." We continue to applaud ISS's willingness to receive and consider the views of market participants.

In its policy consultation document released on October 27, ISS takes the basic position that shareholders should have the power to amend the bylaws. In addition, ISS asks for comment on (a) whether an "on-going" withhold recommendation on members of the governance committee is "sufficient" (presumably to penalize the committee members for not taking action to allow the shareholders the right to amend the bylaws) and (b) whether a bylaw provision requiring a super-majority shareholder vote to amend the bylaws, in lieu of a "previous prohibition," would be "sufficiently responsive" to escape any penalty.

1. Before responding, as we do in 2 below, to questions (a) and (b), we would like to express some concerns about ISS's underlying position that shareholders should have the power to amend the bylaws.

First, we question the wisdom of ISS providing a negative vote recommendation on directors regardless of the economic performance of the company, based solely on "undue restrictions on shareholders' ability to amend the bylaws" and without regard to whether such provisions have always been a part of the company's governing documents or the subject of a prior shareholder proposal seeking their inclusion. While it may be a factor that ISS may want to consider in its new QuickScore Profile governance scoring, we fail to see its significance compared to the overall stewardship of directors in reviewing and monitoring strategy, hiring and compensating senior management and otherwise guiding the company's economic performance.

Second, Securities Exchange Act Rule 14a-8 provides a well established process, in place for many years, for shareholders to seek concurrent power to amend bylaws, to seek to remove perceived impediments to the shareholders amending the bylaws or simply to implement the substantive changes that would otherwise be implemented by bylaw amendment. If the shareholders approve these proposals and the board does not implement them, ISS already has policies that would result in negative voting recommendations for directors. In fact, there have been very few such proposals made, suggesting that any ISS policy change in this regard would be a solution in search of a problem. Furthermore, as noted below, most of the proposals of which we are aware have generally come from the same labor union.

Third, most of the provisions of bylaws deal with internal administrative matters, such as quorums for board, committee and shareholders meetings; stock certificates; inspectors of election; corporate seals; checks, drafts and deposits; consents of directors and committees; and the like. While other matters, such as shareholder-requested meeting procedures and advance notice provisions, might be regarded as having more impact on shareholder rights, the board seems ideally suited to establish all of these rules because *each director* has (i) enforceable legal duties to the corporation under Section 2-405.1(c) of the Maryland General Corporation Law ("MGCL"), (ii) access to more information than any single shareholder or group of shareholders and (iii) the legitimacy of having been elected by the shareholders.

Fourth, Section 2-401 of the MGCL requires that the corporation's business and affairs be managed under the direction of the board. This is the historic role of the board – to act as the elected representatives of the shareholders and to oversee the management of the business in their place, subject to enforceable legal duties and the possibility of replacement by the shareholders. Giving the shareholders the concurrent power to amend the bylaws will enable mischievous or harmful binding proposals, such as, to name just a few examples, dictating business strategy or decisions or limiting the board's power with respect to budgets, borrowings and major supplier or customer contracts. Permitting the shareholders to use the bylaws to make binding such business decisions would, at best, create cumbersome delays and, at worst, confer these decisions on the

shareholders, a constantly changing group with no duty to act in the company's best interests.

Fifth, much of the recent impetus for repealing provisions giving the board the exclusive right to amend the bylaws has come from a labor union with members in the hospitality and gaming sectors. This union typically owns only a nominal number of shares, often not many more than the minimum required to file a shareholder proposal under Rule 14a-8, and has economic interests that are clearly different from (indeed, may be adverse to) the interests of shareholders generally. Shareholders with typical economic interests simply have not been submitting these proposals.

Sixth, the shareholders have the ultimate power to elect directors. Especially with the widespread adoption of annually-elected boards, we think that the shareholders' power to elect directors, for any reason or no reason (including failure to implement a proposal seeking the power to amend the bylaws), is the ultimate check on directors' actions, including amendments to the bylaws.

Finally, the MGCL has for decades permitted the board to have exclusive control of the bylaws, a provision that has been widely adopted by Maryland corporations. We are aware of no empirical data suggesting that the shareholders' power to amend the bylaws is positively related to the economic performance of the company.

2. With respect to the particular questions you raise about (a) the sufficiency of withhold recommendations in achieving compliance with your basic policy of permitting shareholders to amend the bylaws and (b) the sufficiency of a company's response in order to escape any withhold recommendations or other penalties in lieu of a "previous prohibition" on shareholder amendment of the bylaws, we urge you to consider (i) the overall corporate governance of the company; (ii) whether the bylaw provision giving the board exclusive control over the bylaws is in the charter or has been in the bylaws since the company went public; (iii) whether there are certain provisions of the bylaws, *e.g.*, shareholder-requested special meeting procedures, D&O indemnification and expense advance and advance notice provisions, that could be made amendable only by the board; and (iv) whether a company may extend to the shareholders the power to amend the bylaws subject to approval by a vote greater than a

mere majority of the votes cast on the matter. With respect to (iv), if ISS were to adopt a policy that shareholders should have the power to amend the bylaws, we believe that the adoption by a board of a shareholder vote requirement of up to two-thirds of the votes entitled to be cast on the matter would be a sufficient response by the company to the policy. We also urge ISS to consider the potentially dilutive effect of imposing an ongoing withhold recommendation against a substantial portion of the independent directors due to a company's failure to adopt a single governance feature (for which shareholders can request implementation of by means of a Rule 14a-8 proposal) on the shareholders' ability to express dissatisfaction with other matters, such as poor economic return.

Again, we appreciate ISS's solicitation of views and would be glad to discuss any or all of the above further.

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