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MEMORANDUM

TO: Lawrence C. Ashby
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Henry E. Gallagher, Jr.
Michael D. Goldman
Stephen P. Lamb
David C. McBride
Edward M. McNally
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Bruce M. Stargatt
Rodman Ward, Jr.

FROM: David B. Brown *DBB*

DATE: October 13, 1987

RE: Corporation Law Section Council Meeting
Tuesday, October 20, 1987 -- 9:00 A.M.

A meeting of the Council of the Corporation Law Section will be held in the 16th Floor Conference Room at Morris, Nichols, Arsht & Tunnell on Tuesday, October 20, 1987 at 9:00 a.m. for the purpose of considering the legislation proposed by the Takeover Committee chaired by Mike Goldman. A copy of the proposed legislation is enclosed. Until such time as the Council authorizes the distribution of the proposed legislation to the Section, access to the draft legislation should be restricted to Council members. As has been our practice, all members of the Goldman committee are also invited and encouraged to attend the Council meeting ex officio.

DBB/jf

cc (w/encl.): Mrs. Marie Shultie
Mr. Richard L. Templeton
Henry N. Herndon, Jr., Esq.
Michael Hanrahan, Esq.
Bruce Silverstein, Esq.
Charles S. Crompton, Jr., Esq.

Amend present Section 151(b) by striking the first sentence thereof, and adding the following sentence:

Any shares of ~~Stock~~ of any class or series ~~thereof~~
may be made subject to redemption by
the corporation at its option or at
the option of the holders of such shares
or upon the happening of a specified
event, provided that there are outstand-
ing at all times one or more shares
that together have unlimited voting
rights and one or more shares that
together are entitled to receive the
net assets of the corporation upon
dissolution.

*Intent is that can only
be done by charter provision
Is this clear
from statute?*

Add a new Section 203 to read as follows:

§ 203 Business Combinations With Interested Stockholders

(a) Notwithstanding any other provision of this Title, a corporation shall not engage in any business combination with any interested stockholder of such corporation for a period of three (3) years following the date such stockholder becomes an interested stockholder, unless, prior to such date, the corporation's board of directors approved either (i) the business combination in question, or (ii) the transaction which resulted in such stockholder becoming an interested stockholder.

(b) The restrictions contained in this section against business combinations between a corporation and an interested stockholder of such corporation shall not apply if:

(1) such interested stockholder was the legal or beneficial owner of five percent (5%) or more of such corporation's outstanding voting stock on the effective date of this section and remained so through the date that such stockholder became an interested stockholder and proposed a business combination; or

(2) such corporation's original certificate of incorporation contains a provision expressly electing not to be governed by this subchapter; or

(3) such corporation, by action of its board of directors, adopts an amendment to its bylaws within 45 days of

the effective date of this section expressly electing not to be governed by this section, which amendment shall not be subject to further amendment or repeal; or

(4) such corporation, by action of its stockholders, adopts an amendment to its bylaws expressly electing not to be governed by this section, provided that (i) such an amendment to the bylaws is approved by the affirmative vote of a majority of the shares entitled to vote at a meeting called for the purpose of adopting such an amendment to the bylaws, and (ii) the shares legally or beneficially owned by any interested stockholder or stockholders are not necessary to obtain such a majority vote. Any amendment to the bylaws adopted pursuant to this paragraph shall not be effective until eighteen (18) months after the amendment is approved; shall not apply to any business combination between such corporation and any interested stockholder who became an interested stockholder of such corporation on or prior to the effective date of the amendment; and shall not be subject to further amendment or repeal; or

(5) such corporation does not have a class of voting stock registered with the Securities and Exchange Commission pursuant to section twelve of the Securities Act of 1934, unless the certificate of incorporation provides otherwise; provided that an amendment to the certificate of incorporation of such a company that elects to be governed by this section shall not apply to restrict a business combination

between the corporation and an interested stockholder of such corporation if the interested stockholder became an interested stockholder of the corporation prior to the effect date of the amendment; or

(6) such interested stockholder (i) becomes an interested stockholder inadvertently, and (ii) as soon as practicable, divests sufficient shares so that the stockholder ceases to be an interested stockholder, and (iii) would not, at any time within the five-year period immediately prior to a business combination between such corporation and such interested stockholder, have been an interested stockholder but for any inadvertent acquisition.

(c) As used in this section only, the term:

(1) "Affiliate" means a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, another person.

(2) "Associate," when used to indicate a relationship with any person, means (A) any corporation or organization of which such person is an officer or partner or is, directly or indirectly, the beneficial owner of ten percent (10%) or more of any class of stock entitled to vote generally in the election of directors, (B) any trust or other estate in which such person has a substantial beneficial interest or as to which such person serves as trustee or in a similar fiduciary capacity, and (C) any relative or spouse of such person,

or any relative of such spouse, who has the same home as such person.

(3) "Beneficial owner," when used with respect to any stock of any class or series of stock, means a person that:

a. individually or with or through any of its affiliates or associates, beneficially owns such stock, directly or indirectly; or

b. individually or with or through any of its affiliates or associates, has (i) the right to acquire such stock (whether such right is exercisable immediately or only after the passage of time), pursuant to any agreement, arrangement or understanding (whether or not in writing), or upon the exercise of conversion rights, exchange rights, warrants or options, or otherwise; provided, however, that a person shall not be deemed the beneficial owner of stock tendered pursuant to a tender or exchange offer made by such person or any of such person's affiliates or associates until such tendered stock is accepted for purchase or exchange; or (ii) the right to vote such stock pursuant to any agreement, arrangement or understanding (whether or not in writing); provided, however, that a person shall not be deemed the beneficial owner of any stock under this item if the agreement, arrangement or understanding to vote such stock arises solely from a revocable proxy or consent given in response to a proxy or consent solicitation made in accordance with the applicable

rules and regulations under the Securities Exchange Act of 1934 and is not then reportable on a Schedule 13D (or any comparable or successor report) under the Securities Exchange Act of 1934; or

c. has any agreement, arrangement or understanding (whether or not in writing), for the purpose of acquiring, holding, voting (except voting pursuant to a revocable proxy or consent as described in item (ii) of clause b. of this subparagraph), or disposing of such stock with any other person that beneficially owns, or whose affiliates or associates beneficially own, directly or indirectly, such stock.

(4) "Business combination," when used in reference to any corporation and any interested stockholder of such corporation, means:

a. any merger or consolidation of such corporation or any majority-owned subsidiary of such corporation with (i) such interested stockholder or (ii) any other corporation (whether or not itself an interested stockholder of such corporation) which is, or after such merger or consolidation would be, an affiliate or associate of such interested stockholder;

b. any sale, lease, exchange, mortgage, pledge, transfer or other disposition (in one transaction or a series of transactions) to or with such interested shareholder or any affiliate or associate of such interested shareholder

of assets of such corporation or any majority-owned subsidiary of such corporation (i) having an aggregate market value equal to ten percent or more of the aggregate market value of all the assets, determined on a consolidated basis, of such corporation, (ii) having an aggregate market value equal to ten percent or more of the aggregate market value of all the outstanding stock of such corporation, or (iii) representing ten percent or more of the earning power or net income, determined on a consolidated basis, of such corporation;

c. any issuance or transfer by such corporation or any majority-owned subsidiary of such corporation (in one transaction or a series of transactions) of any stock of such corporation or any majority-owned subsidiary of such corporation which has an aggregate market value equal to five percent (5%) or more of the aggregate market value of all the outstanding stock of such corporation to such interested stockholder except pursuant to the exercise of warrants or rights to purchase stock offered, or a dividend or distribution paid or made, pro rata to all stockholders of such corporation;

d. any adoption of any plan or proposal for or the taking of any action which would result in the liquidation or dissolution of such corporation proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, such interested stockholder or any affiliate or associate of such interested stockholder;

e. any reclassification of securities (including, without limitation, any stock split, stock dividend, or other distribution of stock in respect of stock, or any reverse stock split), or recapitalization of such corporation, or any merger or consolidation of such corporation with any majority-owned subsidiary of such corporation, or any other transaction (whether or not with or into or otherwise involving such interested stockholder), proposed by, or pursuant to any agreement, arrangement or understanding (whether or not in writing) with, such interested stockholder or any affiliate or associate of such interested stockholder, which has the effect, directly or indirectly, of increasing the proportionate share of the stock of any class or series of stock or securities convertible into stock of such corporation or any majority-owned subsidiary of such corporation and owned directly or indirectly by such interested stockholder or any affiliate or associate of such interested stockholder, except as a result of immaterial changes due to fractional share adjustments; or

f. any receipt by such interested stockholder or any affiliate or associate of such interested stockholder of the benefit, directly or indirectly (except proportionately as a shareholder of such corporation) of any loans, advances, guarantees, pledges, tax credits or other tax advantages, or other financial benefits provided by or through such corporation.

(5) "Control," including the term "controlling," "controlled by" and "under common control with," means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract, or otherwise. A person who is the legal or beneficial owner of ten percent (10%) or more of a corporation's outstanding voting stock shall be presumed to have control of such corporation, in the absence of proof by a preponderance of the evidence to the contrary. Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for one or more beneficial owners who do not individually or as a group have control of such corporation.

(6) "Interested stockholder," when used in reference to any corporation, means:

a. any person (other than such corporation and any majority-owned subsidiary of such corporation) that (i) is the beneficial owner, directly or indirectly, of ten percent (10%) or more of the outstanding voting stock of such corporation, or (ii) is an affiliate or associate of such corporation, and was the beneficial owner, directly or indirectly, of ten percent (10%) of the outstanding voting stock of such corporation at any time within the three-year

period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder; provided that

b. for the purpose of determining whether a person is an interested stockholder, the voting stock of such corporation deemed to be outstanding shall include stock deemed to be beneficially owned by the person through application of subparagraph (3) of this paragraph but shall not include any other unissued stock of such corporation which may be issuable pursuant to any agreement, arrangement or understanding, or upon exercise of conversion rights, warrants or options, or otherwise.

(7) "Voting stock" means stock of any class or series of stock entitled to vote generally in the election of directors of a corporation.

(d) The Court of Chancery is hereby vested with exclusive jurisdiction summarily to hear and determine all matters with respect to this section.