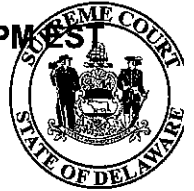


December 5, 2013

**BRIEF: Klaassen v. Allegro Development Corporation: Appellees' Corrected Answering Brief -- Filed Dec. 5, 2013 -- in the Delaware Supreme Court, citing Bigler & Tillman's Void or Voidable? -- Curing Defects in Stock Issuances Under Delaware Law**

Seth Barrett Tillman



IN THE SUPREME COURT OF THE STATE OF DELAWARE

|  |   |                          |
|--|---|--------------------------|
| ELDON KLAASSEN,                                    | ) |                          |
|  | ) |                          |
| <i>Plaintiff and Counterclaim-Defendant Below,</i> | ) |                          |
| <i>Appellant,</i>                                  | ) |                          |
|  | ) |                          |
| v.   | ) | No. 583, 2013            |
|  | ) |                          |
| ALLEGRO DEVELOPMENT                                | ) | Court Below              |
| CORPORATION,                                       | ) | The Court of Chancery of |
| RAYMOND HOOD, GEORGE PATRICH                       | ) | The State of Delaware    |
| SIMPKINS, JR., MICHAEL PEHL, and                   | ) | C.A. No. 8626-VCL        |
| ROBERT FORLENZA,                                   | ) |                          |
|  | ) |                          |
| <i>Defendants and Counterclaimants Below,</i>      | ) |                          |
| <i>Appellees.</i>                                  | ) |                          |

**APPELLEES' CORRECTED ANSWERING BRIEF**

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## STATUTES

|                       |               |
|-----------------------|---------------|
| 8 Del. C. § 141 ..... | 23            |
| 8 Del. C. § 225 ..... | 1, 16, 21, 32 |

## OTHER AUTHORITIES

|  |    |
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| ✓ C. Stephen Bigler & Seth B. Tillman, <i>Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law</i> , 63 Bus. Law. 1109, 1110 (2008) .....            | 22 |
| James A. Brickley, Jeffrey L. Coles & Gregg Jarrell, <i>Leadership Structure: Separating the CEO and Chairman of the Board</i> .....                                   | 26 |
| Sydney Finkelstein & Richard A. D'Aveni, <i>CEO Duality as a Double-Edged Sword: How Boards of Directors Balance Entrenchment Avoidance and Unity of Command</i> ..... | 26 |
| Thuy-Nga T. Vo, <i>To Be or Not to Be Both CEO and Board Chair</i> , 76 Brook. L. Rev. 65, 89–91 (2010) .....  | 26 |

*Nevins*, 885 A.2d at 246–50. In another case, the court applied the equitable defense of waiver to a plaintiff’s claim that a board meeting was improperly noticed. *Prizm Grp. v. Anderson*, 2010 WL 1850792, at \*6 (Del. Ch.). And in still another, laches and acquiescence barred an election challenge alleging procedural violations of the bylaws. *Stengel v. Rotman*, 2001 WL 221512, at \*7 (Del. Ch.), *aff’d sub nom.*, *Stengel v. Sales Online Direct, Inc.*, 783 A.2d 124 (Del. 2001).<sup>14</sup>

The Court’s affirmance of such cases is consistent with its other precedent. For example, defective issuance of stock may be void “where the corporation lacks the inherent power” to issue it, *Waggoner*, 581 A.2d at 1137, but not all defective stock issuances are void—even when statutes or bylaws are violated. See *Kalageorgi v. Victor Kamkin, Inc.*, 748 A.2d 913 (TABLE), 2000 WL 313439 (Del.) (affirming decision that board could cure, by ratification, defectively issued stock in violation of statute and corporate charter). This has important implications not only for affirmative defenses, but also for the ability of boards to ratify legitimate corporate actions taken with procedural defects unrelated to stock issuing power. See C. Stephen Bigler & Seth B. Tillman, *Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law*, 63 Bus. Law. 1109, 1110 (2008).

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<sup>14</sup> See also *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 462–63 (Del. Ch. 2012) (applying affirmative defense despite bylaw violation); *President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at \*16–17 (Del. Ch.) (same); *Comac Partners, L.P. v. Ghaznavi*, 793 A.2d 372, 377–82, 382 n.18 (Del. Ch. 2001) (rejecting on facts (not in principle) an acquiescence defense to illegal election); *Lofland v. DiSabatino*, 1991 WL 138505, at \*1 (Del. Ch.) (defective notice rendered election at annual meeting voidable, not void).