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April 18, 1986

BY HAND

A. Gilchrist Sparks, III, Esquire
Morris, Nichols, Arsht & Tunnell
12th & Market Streets
P. O. Box 1347
Wilmington, DE 19899

Re: **Council of Corporation Law Section**

Dear Gil:

Enclosed are my draft minutes of the April 17 Council meeting for your review and comment. Please advise me of any changes at your earliest convenience. If possible, I would like to circulate these minutes on Monday along with a notice of the meeting to be held April 23 at 9:00 a.m. In this connection, could you let me know what items, in addition to approval of minutes, you would like me to include on the agenda.

With best regards.

Sincerely yours,

David B. Brown

DBB/jf

Enclosure

DBB:4/18/86

MINUTES OF MEETING OF COUNCIL OF CORPORATION LAW SECTION OF DELAWARE STATE BAR ASSOCIATION

APRIL 17, 1986

A meeting of the Council of the Corporation Law Section was held on April 17, 1986 at 4:30 P.M. in the offices of Morris, Nichols, Arsht & Tunnell. Council members present were: A. Gilchrist Sparks, III (Chairman), Edward M. McNally (Vice Chairman), R. Franklin Balotti, Lewis S. Black, David B. Brown, Michael D. Goldman, Stephen P. Lamb, Joseph A. Rosenthal, and John H. Small. Also in attendance were E. Norman Veasey and Edward P. Welch.

The minutes of the meetings of November 26, 1985, February 24, 1986, March 10, 1986 and April 11, 1986 were approved subject to the right of any Council member, prior to April 25, 1986, to submit proposed changes to the Secretary, with a copy to Mr. Sparks.

Mr. Sparks circulated a copy of House Bill 480 which would make officers of corporations that fail to pay gasoline taxes or file related reports personally liable for such failure. Mr. Sparks expressed concern that imposition of personal liability on officers for such failures might set bad precedent and result unwittingly in enormous exposure to the officers of large oil companies. Mr. Black said he had received a copy of the bill from Marie Shultie in his capacity as Council liaison to the

Secretary of State's office and agreed to look into the bill and report back to the Council.

The Council then considered the proposed amendments to §145 set forth in Mr. Small's memorandum to Council members dated April 16, 1986, with attachment, that had previously been circulated. The amendments to §145 and the description thereof were approved subject to (1) a small change in the description at page 1-2 of the attachment describing the amendment to §145(e) and (2) elimination from the text of proposed §145(b) of the phrase "for gross negligence or misconduct in the performance of his duty" so that no suggestion is made in that subsection as to the standard of liability applicable to directors. Mr. Small agreed to make these changes. There was discussion of the advisability of eliminating from §145(c) any reference to indemnification of employees and agents (and possibly officers). Mr. Black suggested that such a change was probably advisable at some point but that the timing was not good at this time when our principal focus is on limiting director liability.

The discussion then turned to proposed §146. Mr. Sparks circulated a copy of a memorandum from Bar President Crompton to him dated April 17, 1986 expressing Mr. Crompton's opposition to the concept embodied in proposed §146 which would limit director liability by statute [in certain cases] to $1 million. Mr. Sparks expressed regret

that the Council had not had the opportunity to complete its deliberations and discuss fully with Mr. Crompton the rationale for whatever proposal it decided to recommend but suggested that the Council move forward and finalize a proposal that could then be discussed with Mr. Crompton. There was discussion regarding the importance, as a practical matter, of securing the Bar President's support for proposed legislative changes in the DGCL and it was agreed that the Council should move forward to reach a consensus on a legislative solution to the D&O problem.

Mr. Sparks then circulated the proposal Mr. Veasey had made at the prior meeting titled "Possible Amendments to 8 Del. C. §102(b)," which would in effect authorize in §102 a provision limiting or precluding director liability for gross negligence. A lengthy discussion ensued as to whether this proposal, which would require a shareholder vote but would permit a "zero cap" on damages, was preferable to proposed §146 which would limit liability automatically by statute but impose a cap of $1 million (unless the charter permitted a higher cap). The arguments in favor of the proposed amendment to §102 which were considered were as follows:

1. It is fairer to shareholders and probably more politically acceptable in that it requires a shareholder vote.

2. It avoids the difficulty of selecting a cap that is substantively appropriate in amount and also avoids the potential of an unseemly "race to the bottom" with other states who might seek to adopt a lower cap.

3. It avoids both the appearance of compromise, which a cap suggests, and the stigma of a cap, which groups like the trial lawyers association have a predisposition to oppose.

4. It enjoys historical legitimacy in its approach since similar limitations on liability have long been permitted in the law of agency and the law of trusts.

5. It would be more acceptable to the Bar President and, as a practical matter, have a greater chance of being endorsed by the Bar Executive Committee and adopted by the General Assembly.

The advantages of proposed §146 discussed were as follows:

1. It provides a promise of relief to directors and insurers without statutorily mandating or permitting an overruling of Smith v. Van Gorkom, i.e., by imposing a cap it preserves at least some liability for gross negligence.

2. It may appear more attractive to directors and insurers, at least superficially, because it imposes a maximum dollar liability which courts might be more certain to respect than an attempt to eliminate liability for gross negligence altogether in the charter.

3. It offers a quick solution to the D&O problem because it avoids the delays inherent in requiring a shareholder vote.

In the course of the foregoing discussion, the question again arose as to whether corporations would prefer broadened indemnification. Several Council members responded affirmatively but stated that we were correct in abandoning that alternative, citing the "circularity" problem inherent in permitting indemnity in derivative actions.

There was also discussion as to how urgent the need was to adopt legislation in the June session as opposed to next year. Some members expressed the view that it was very important to act quickly. Others questioned the urgency of the need.

Each Section member in attendance was given an opportunity to express his views and preferences on proposed §102 versus proposed §146. All expressed a

preference for proposed §102 over proposed §146, except for Mr. McNally. He expressed a preference for proposed §146, but stated that he could appreciate the arguments on either side of the debate and would not stand in the way of what the majority favored.

It was agreed that Mr. Sparks should try to meet with Mr. Crompton the next day if possible to discuss the proposed amendment to §102 but that the D&O subcommittee should proceed apace to fine tune the drafting of the language and the synopsis.

Mr. Sparks announced that the next meeting of the Council would be on Wednesday, April 23 at 9:00 A.M. in the 16th Floor Conference Room of Morris, Nichols, Arsht & Tunnell.

The meeting was adjourned at 6:15 P.M.

David B. Brown
Secretary