

# Who are the officers and what can they do?

*This case is an important reminder for why directors should periodically review and update the corporate records.*

BY DOUG RAYMOND

A RECENT DECISION out of the Delaware courts, *Flaa v. Montano*, reminds directors to consider what authority they have given (or intend to give) the officers of the corporation.

Daniel Montano was the founder and CEO of CardioVascular BioTherapeutics. He held a significant portion of the stock of the company jointly with his (then) wife Vicki. While married, they had created a new corporation, Vizier Investment, which was the holding company for their Cardio stock. Vicki was a vice president and one of four directors of Vizier. Vicki and Daniel later divorced, but Vicki continued in her roles as an owner, officer, and director of Vizier.

Cardio got into financial difficulties and ultimately defaulted on loans that Daniel had personally guaranteed.

Upon this default, the lender sought, among other things, to remove Daniel as CEO and remove Daniel and his relatives from Cardio's board of directors. As Daniel's family constituted half of Cardio's board, the proposal failed. The lender then initiated a written stockholder consent to replace the board.

Upon learning of the consent solicitation, Vicki directed Vizier's registered agent to change the mailing address for Vizier from Daniel's former home address. She requested that all mail go to another member of the Vizier board who was sympathetic to her. As a result, she and not Daniel received the consent solicitation. Vicki then voted the

Cardio shares with the lender in favor of changing the board and divesting her ex-husband of his positions as CEO and director of Cardio. The Vizier votes were sufficient to carry the day. Daniel objected to this vote on the basis that she had not been authorized to vote the Cardio shares held by Vizier. In the ensuing litigation before Vice Chancellor Glasscock, the effectiveness of the lender's consent solicitation depended on the validity of Vicki's authority to vote the Vizier shares.



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Daniel argued that Vicki was not an officer of Vizier and as a result did not have authority to vote the shares of Cardio owned by Vizier. Here the record was murky. An old register of officers identified Vicki as a vice president, but a more recent yet disputed version of the register listed Vicki only as a director and not as an officer at the time

she signed the contested consents. Both registers, however, also identified another individual as a vice president. With Vicki's status as vice president in question, the court looked to Vizier's articles of association for guidance.

The articles provided that "in the absence of any specific allocation of duties, it shall be the responsibility of ... the President to manage the day to day affairs of the Company, [and] the Vice Presidents to act in order of seniority in the absence of the President." Without additional information, the court did not decide as a matter of fact whether Vicki was still an elected vice president.

Instead, the court assumed for the

purposes of its analysis that Vicki still was a vice president. The court observed that the office of vice president does not by itself carry any actual or apparent authority to bind the corporation. A corporation determines the powers and authority granted to its officers only through the action of its directors or in its constituent documents. However, the only authority granted to the Vizier vice presidents, as provided in its articles of association, was the ability to act, in order of seniority, in the absence of the president. And there was no way to establish which of the (possible) two vice presidents was the senior one.

The lack of guidance in the articles, the inability to determine which vice president was the senior one, and Vizier's failure to properly update its corporate records created a mess. Without an express delegation of authority to either vice president, the court instead looked to whether the president, i.e. Daniel, was absent. Because Vicki had deliberately changed the mailing address for the consent solicitation without his or the Vizier board's knowledge or consent, the court found that he was not absent, and thereby invalidated Vicki's votes, even assuming that she was a vice president.

This case illustrates why directors should periodically review and update the corporate records and other organizational documents. *Montano* reminds directors that it is important to annually update the corporation's list of authorized officers (more frequently, if there are changes) and regularly review the powers and authorities delegated to the officers.

This delegation could establish the identities, respective authorities, and chain of authority for each of the corporation's officers. It would provide a clear picture of the board's grant of authority to each officer. Doing so now can avoid confusion and even worse, if unexpected events occur. ■

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