

GETTING BOARD APPROVAL: A LESSON BY POWERPOINT

by

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Many companies, when seeking a board of director's (or compensation committee's) approval for an agreement or document, summarize the proposal for the board in bullet-point form. That makes sense. What does not make sense is failing to also provide the board with a full copy of the particular agreement (or document), unless there is some other corporate body or individual that has been delegated (or inherently has) the power to approve the particular language of the agreement. If the board, or other party with power to enter into an agreement, approves only a PowerPoint version, there may linger questions about whether the parties in fact reached an agreement and, if so, the terms of that agreement.

We see a good illustration of this danger in a recent case, *Cole v. Champion Enterprises, Inc.*, 2008 U.S. App. LEXIS 26646, 45 EBC 2371 (4th Cir. 2008). In *Cole*, which was decided by the federal appeals court for the Fourth Circuit, a company was successful in arguing that it had reached no agreement with an executive, where its board had approved only a PowerPoint summary. This worked to the company's favor. But it does not take much imagination to envision a scenario where a company may instead wish to argue that it has entered into an agreement, or has approved an executive compensation arrangement or in fact an entire plan, but is challenged in this conclusion by having adopted not the fully expressed agreement or plan, but instead only an outline summary.

In *Cole*, the executive had a previous employment agreement, but it had expired. The court held that the executive was not entitled to compensation under discussion when his employment was terminated, because his termination of employment occurred prior to the parties reaching final agreement on any new employment contract.

The company was publicly traded and, following enactment of the Sarbanes-Oxley Act of 2002, had implemented provisions clarifying that its board of directors was in charge of all aspects of executive compensation. The executive had entered into negotiations with the company's CEO for a new agreement prior to his termination. Both the executive and the CEO with whom he was negotiating understood that only the board could approve an agreement. The CEO presented a proposal to the board in the form of PowerPoint slides. Those slides read as follows:

Approval Request to Board

- Increase Mark Cole salary by \$20,000.

"If [a] board, or other party with power to enter into an agreement, approves only a PowerPoint version, there may linger questions about whether the parties in fact reached an agreement and, if so, the terms of that agreement."

"The court concluded that no contract was formed."

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- Salary will increase to \$300,000 after two profitable quarters (versus \$285,000 now)
- Give Mark an option to:
 - Retain current restricted stock (40,000 shares) and target bonus of 80%, or
 - Take restricted stock of 50,000 shares and reduce target bonus to 60%.
- Give Mark a change of control agreement
- Ed Graskamp concurs with these changes.

If Mark Cole is removed as President of Retail without cause, then:

- He may continue as a CHC retailer with an approx. 80% stocking requirement,
- He will remain an employee with a different assignment requiring about 10 days per year.
- His salary will be reduced to approx. \$20,000 to \$30,000 per year.

This will preserve Mark's existing restricted stock and option grants. Vesting would occur on targeted dates if he is still employed.

The PowerPoint slides did not address several issues, such as the executive's post-termination position and salary, any potential severance package, and how or when the executive would exercise his "option" to choose a reduction in his cash bonus in return for an increase in his number of performance shares. The board and the compensation committee did, however, approve the proposal and authorized the CEO to proceed with the executive. The CEO informed the executive that the board had approved the terms and that the company's general counsel would subsequently draft a contract for the executive's review.

The executive continued to work for the company, which he contended was in reliance on the CEO's representations. The company's legal department sent a draft agreement to the executive's attorney, who modified the draft in a number of ways, including a revision to at least one of the terms that had been included in the PowerPoint proposal approved by the board. Prior to the parties agreeing to a written contract, the executive's employment was terminated without cause. The company offered the executive a one year severance, conditioned on his releasing all claims against the company. The executive did not sign the release. Instead, he sent the company a letter attempting to accept a de minimis employment role, pursuant to discussions he had with the CEO prior to the board meeting, and which seemed to be contemplated in the PowerPoint presentation made to the board. The company denied that any agreement had been reached.

The executive brought suit on a variety of theories, including breach of contract for the failure to pay compensation contemplated under the alleged agreement. The court concluded that no contract was formed. There could not have been a contract formed prior to board action, and there was no contract formed when the board approved the PowerPoint proposal. The latter was because the PowerPoint slides approved by the board did not contain all material terms of the potential agreement. For example, the slides were silent regarding

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"crucial issues" such as the specific position that the executive would fill upon termination, the severance package to be received by the executive, and whether the executive's de minimis employment would be guaranteed until his equity compensation vested. The court also concluded that some of the terms that did appear in the PowerPoint slides were indefinite. In particular, the court said there was merely a vague reference to the executive's post-termination salary, specifying only that it will be "approx[imately] \$20,000 to \$30,000 per year." Because the PowerPoint slides were indefinite and uncertain, the board's approval of the proposal represented thereby could not have created a contract. The court said the actions of the parties following the board meeting confirmed that there had never been a meeting of the minds between the executive and the company, since the parties continued to negotiate the final terms of the contract over succeeding months. These negotiations prevented the executive and company from reasonably believing they were already obligated under an enforceable agreement.

Lesson. Although the result in *Cole* seems the right one, and although the employer got the result it wanted, companies should be mindful of the possibility that they will find themselves on the other side of the argument. The temptation is great to present to a busy board or compensation committee only an outline of an agreement (or plan). Even so, one should not assume that approval of an outline necessarily results in a valid agreement or that the terms of any such agreement will be precisely what the company may have intended. An outline description of an agreement or plan document should serve as a supplement to, and not a substitute for, the full agreement or document a party is being asked to approve. Where a board or compensation committee is presented only with an outline, it should be careful to formally delegate to an appropriate individual (or committee) approval of the particular terms of the arrangement.