

SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

AMENDMENT NO. 4 TO  
SCHEDULE 13D  
UNDER THE SECURITIES EXCHANGE ACT OF 1934

AMP INCORPORATED  
(NAME OF SUBJECT COMPANY)

PMA ACQUISITION CORPORATION  
A WHOLLY OWNED SUBSIDIARY OF  
ALLIEDSIGNAL INC.  
(BIDDER)

COMMON STOCK, WITHOUT PAR VALUE  
(INCLUDING THE ASSOCIATED COMMON STOCK PURCHASE RIGHTS)  
(TITLE OF CLASS OF SECURITIES)

031897101  
(CUSIP NUMBER OF CLASS OF SECURITIES)

PETER M. KREINDLER, ESQ.  
ALLIEDSIGNAL INC.  
101 COLUMBIA ROAD  
MORRISTOWN, NEW JERSEY 07692  
(973) 455-5513

(NAME, ADDRESS AND TELEPHONE NUMBER OF PERSON AUTHORIZED TO  
RECEIVE NOTICES AND COMMUNICATIONS ON BEHALF OF BIDDERS)

Copies to:  
ARTHUR FLEISCHER, ESQ.  
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON  
ONE NEW YORK PLAZA  
NEW YORK, NEW YORK 10004 - 1980  
(212) 859-8120

SCHEDULE 13D

CUSIP No. 031897101

1. NAME OF REPORTING PERSONS  
S.S. OR I.R.S IDENTIFICATION NO. OF ABOVE PERSON

ALLIEDSIGNAL INC. (E.I.N.: 22-2640650)

2. CHECK THE APPROPRIATE BOX IF A MEMBER OF A GROUP (a) [ ]  
(b) [X]

3. SEC USE ONLY

4. SOURCE OF FUNDS

BK, WC, 00

5. CHECK BOX IF DISCLOSURE OF LEGAL PROCEEDINGS IS REQUIRED PURSUANT

TO ITEMS

2(d) or 2(c)

[ ]

6. CITIZENSHIP OR PLACE OF ORGANIZATION

Delaware

7. AGGREGATE AMOUNT BENEFICIALLY OWNED BY EACH REPORTING PERSON

20,000,100 Common Shares

8. CHECK BOX IF THE AGGREGATE AMOUNT IN ROW (7) EXCLUDES CERTAIN SHARES

[ ]

9. PERCENT OF CLASS REPRESENTED BY AMOUNT IN ROW (7)

9.1% of outstanding Common Shares

10. TYPE OF REPORTING PERSON

HC and CO

SCHEDULE 13D

CUSIP No. 031897101

1. NAME OF REPORTING PERSONS  
S.S. OR I.R.S IDENTIFICATION NO. OF ABOVE PERSON  
  
PMA ACQUISITION CORPORATION (E.I.N.: 22-3610482)  
-----
2. CHECK THE APPROPRIATE BOX IF A MEMBER OF A GROUP (a) [ ]  
(b) [X]  
-----
3. SEC USE ONLY  
-----
4. SOURCE OF FUNDS  
  
BK, WC, 00  
-----
5. CHECK BOX IF DISCLOSURE OF LEGAL PROCEEDINGS IS REQUIRED PURSUANT  
TO ITEMS  
  
2(d) or 2(c) [ ]  
-----
6. CITIZENSHIP OR PLACE OF ORGANIZATION  
  
Delaware  
-----
7. AGGREGATE AMOUNT BENEFICIALLY OWNED BY EACH REPORTING PERSON  
  
20,000,100 Common Shares  
-----
8. CHECK BOX IF THE AGGREGATE AMOUNT IN ROW (7) EXCLUDES CERTAIN  
SHARES [ ]  
-----
9. PERCENT OF CLASS REPRESENTED BY AMOUNT IN ROW (7)  
  
9.1% of outstanding Common Shares  
-----
10. TYPE OF REPORTING PERSON  
  
CO  
-----

The Schedule 13D filed by PMA Acquisition Corporation ("PMA"), a Delaware corporation, a wholly owned subsidiary of AlliedSignal Inc. (AlliedSignal), a Delaware corporation, on October 9, 1998 is hereby amended as follows:

ITEM 7. MATERIAL TO BE FILED AS EXHIBITS.

PREVIOUSLY FILED AS EXHIBITS TO AMENDMENT NO. 35 TO SCHEDULE 14D-1 AND SCHEDULE 13D, DATED OCTOBER 9, 1998.

- (a)(1) Form of Credit Agreement among AlliedSignal as Borrower, Citibank, N.A. as Agent and various Lenders.
- (a)(2) Form of Commitment Letter and Term Sheets relating certain AlliedSignal financing Commitments.
- (a)(3) Press Release issued by AlliedSignal on October 9, 1998.
- (a)(4) Press Release issued by AlliedSignal on October 9, 1998.

PREVIOUSLY FILED AS EXHIBIT TO AMENDMENT NO. 36 TO SCHEDULE 14D-1 AND AMENDMENT NO. 1 TO SCHEDULE 13D, DATED OCTOBER 13, 1998.

- (a)(5) Preliminary Consent Statement, dated October 13, 1998.

PREVIOUSLY FILED AS EXHIBIT TO AMENDMENT NO. 37 TO SCHEDULE 14D-1 AND AMENDMENT NO. 2 TO SCHEDULE 13D, DATED OCTOBER 13, 1998.

- (a)(6) Slide Show Presentation prepared by AlliedSignal.

PREVIOUSLY FILED AS EXHIBIT TO AMENDMENT NO. 38 TO SCHEDULE 14D-1 AND AMENDMENT NO. 3 TO SCHEDULE 13D, DATED OCTOBER 13, 1998.

- (a)(7) Press release dated October 13, 1998 announcing final proration factor.

AMENDMENT NO. 4 TO SCHEDULE 13D.

- (a)(8) Press Release issued by AlliedSignal on October 15, 1998.
- (a)(9) AlliedSignal and PMA Motion for an Expedited Appeal filed in the United States Court of Appeals for the Third Circuit, dated October 9, 1998.
- (a)(10) AlliedSignal and PMA Submission in Opposition to the Letter Request of AMP Incorporated for a Temporary Restraining Order filed in the United States District Court for the Eastern District of Pennsylvania, dated October 15, 1998 (C.A. No. 98-CV-4450).
- (a)(11) AlliedSignal and PMA Opening Brief filed in the United States Court of Appeals for the Third Circuit, dated October 8, 1998.

SIGNATURE

After reasonable inquiry and to the best of their knowledge and belief, the undersigned certifies that the information set forth in this statement is true, complete and correct.

Dated: October 15, 1998

PMA ACQUISITION CORPORATION

By: /s/ Peter M. Kreindler

-----  
Name: Peter M. Kreindler  
Title: Vice President, Secretary  
and Director

ALLIEDSIGNAL INC.

By: /s/ Peter M. Kreindler

-----  
Name: Peter M. Kreindler  
Title: Senior Vice President,  
General Counsel and  
Secretary

[LOGO OF ALLIED SIGNAL]

AlliedSignal Inc.  
101 Columbia Road  
Morristown, NJ 07962

## NEWS RELEASE

Contact: Mark Greenberg  
(973) 455-5445

ALLIEDSIGNAL 3RD-QUARTER EARNINGS PER SHARE ARE UP 16%;  
OPERATING MARGIN EXPANDS TO 13.6% FROM 11.6%

MORRIS TOWNSHIP, New Jersey, October 15, 1998 -- AlliedSignal Inc. (NYSE: ALD) today reported record third-quarter earnings per share of \$0.58, an increase of 16% over 1997 third-quarter earnings per share of \$0.50. This was the company's 27th consecutive quarter of 14% or more growth in earnings per share.

Sales in the third quarter grew 2% to a record \$3.74 billion from \$3.66 billion in the third quarter 1997. Excluding the effects of divestitures, sales were up 13%.

Operating margin in the third quarter expanded to a record 13.6% from 11.6% in the third quarter of 1997. Productivity was 7.4%, also a quarterly record. Net income increased 13% to \$329 million from \$292 million. Free cash flow for the third quarter of 1998 was \$101 million. Free cash flow for the first nine months of 1998 was \$365 million, a 183% improvement over the first nine months of 1997, putting the company in an excellent position to achieve its target of \$500 million in free cash flow for the year.

"AlliedSignal continues to deliver strong results despite uncertain conditions in the global economy," said Lawrence A. Bossidy, Chairman and Chief Executive Officer. "Our strategy of investing in high-growth, high-margin businesses is paying off, and we're seeing the advantages of having a diverse portfolio of businesses. While some of our businesses are facing uncertain economic conditions, others are thriving, enabling us to deliver our promised 13-to-17% earnings growth. Our earnings growth is further solidified by record productivity gains stemming primarily from the continued application of Six Sigma across all functions of our businesses."

## NINE-MONTH RESULTS

For the nine months ended September 30, 1998, sales of \$11.3 billion were up 7% from \$10.6 billion in the corresponding year-earlier period. Excluding the results of the divested automotive safety restraints business, 1998 nine-month sales increased by 13%. Net income was a record \$979 million, up 14% from \$856 million. Earnings per share were up 16% to \$1.70 from \$1.47.

Third-quarter segment results were as follows:

AEROSPACE SYSTEMS sales grew 15% to \$1.24 billion from \$1.08 billion in the third quarter of 1997. Net income was up 60% to \$162 million from \$101 million.

Revenue growth was led by strong sales of safety avionics products and continued aftermarket growth, as well as the acquisition of a controlling interest in the Normalair-Garrett Ltd. joint venture. Growth in safety avionics reflects strong demand for the company's exclusive Enhanced Ground Proximity Warning System (EGPWS) and mandated installations of Traffic Alert and Collision Avoidance Systems (TCAS) products.

Strong demand for products in the equipment systems area is evidenced by: several key contracts announced this quarter, including environmental control systems for Fairchild Aerospace's 728JET family; wheel and brake wins for the Boeing 737-Next Generation aircraft; and growth in engine fuel controls and electrical power and lighting systems.

Net income expansion reflected sales growth in higher-margin safety and aftermarket products, as well as the contribution of productivity, cost control actions and improved factory performance in both the avionics and equipment systems businesses.

SPECIALTY CHEMICALS & ELECTRONIC SOLUTIONS sales increased 1% to \$541 million from \$536 million. Net income declined 22% to \$56 million from \$72 million.

The growth in sales is attributable to higher sales of pharmaceutical intermediates, driven by new products and the pharmaceutical industry's growing trend toward outsourcing the production of intermediates. Specialty waxes and additives sales were higher, which more than offset the impact of lower sales of Electronic Materials resulting from weakness in the semiconductor industry.

Net income declined largely due to a lower contribution from the 50%-owned UOP joint venture in process technology and lower sales of advanced microelectronic products and laminates.

In July, AlliedSignal and Air Products and Chemicals, Inc. announced plans to form an alliance that will enable both companies to expand their ability to supply electronic chemicals to semiconductor customers around the world. AlliedSignal Specialty Chemicals will exclusively manufacture and supply electronic process chemicals to Air Products. Air Products will market an entire line of electronic chemicals and gases to semiconductor customers.

TURBINE TECHNOLOGIES sales rose 17% to \$900 million from \$771 million. Net income grew 31% to \$68 million from \$52 million.

Revenue growth reflected record deliveries of propulsion engines for regional and executive aircraft and strong sales of automotive turbochargers and commercial aircraft auxiliary power units. During the quarter AlliedSignal announced the introduction of an all-new AS900 engine for which the company has a committed launch customer. The AS900 will position AlliedSignal to take advantage of the continuing demand for business aircraft, including fractional executive jet ownership, and the increasing use of jet aircraft by regional airlines. Turbocharger sales growth reflects increased penetration of the turbocharged diesel engine car market in Europe and the light truck market in North America.

Net income growth was fueled by volume growth and productivity gains despite development costs for the TurboGenerator (TM) product line and for the new AS900 propulsion engine.

PERFORMANCE POLYMERS sales were flat excluding the impact of divested businesses. Reported sales declined 14% to \$436 million from \$509 million. Net income declined to \$45 million from \$46 million.

Strength in pharmaceutical and food packaging drove higher sales of specialty films, which were offset by lower volumes in industrial polyester due to a strike at one of the company's automotive customers.

Net income declined slightly due to lower unit volumes, which were partially offset by continued productivity-driven Six Sigma initiatives and a more favorable price/cost relationship.

In July, construction began in Augusta, Georgia for the world's first large-scale nylon recycling facility, which will increase caprolactam production by 100 million pounds per year and reduce annual costs by \$15 million. The exclusive patented technology will also benefit the environment by keeping 200 million pounds of discarded carpet out of landfills each year.

TRANSPORTATION PRODUCTS sales declined 18% to \$619 million from \$757 million, and net income was down to \$10 million from \$18 million. Excluding the divested safety restraints business, sales of Transportation Products grew 12%.

Sales growth was fueled by: higher sales of Prestone(R) products and FRAM(R) filters, which benefited from increased advertising and brand awareness; the acquisition of Holt Lloyd; and continued strength in truck braking systems.

Net income declined primarily due to the divestiture of safety restraints, as well as planned investments in brand advertising, implementation of a new distribution system and improvements in the segment's cost structure.

#### ALLIEDSIGNAL'S OFFER FOR AMP

On Tuesday, October 13, AlliedSignal acquired 9% of the outstanding shares of AMP Incorporated, making AlliedSignal the largest shareowner of AMP. Today marks the record date for AlliedSignal's consent

solicitation, in which AMP shareowners are being asked to expand AMP's board from its current 11 directors to 28 and to elect AlliedSignal's 17 nominees to the board. These actions represent further progress in AlliedSignal's effort to acquire AMP.

AlliedSignal is an advanced technology and manufacturing company serving customers worldwide with aerospace and automotive products, chemicals, fibers, plastics and advanced materials. The company employs 70,500 people worldwide. AlliedSignal is a component of the Dow Jones Industrial Average and Standard and Poor's 500 Index, and it is included in Fortune magazine's lists of the "Global Most Admired Companies" and the "100 Best Companies To Work For in America." Additional information on the company is available on the World Wide Web at <http://www.alliedsignal.com/>.

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This release contains forward-looking statements as defined in Section 21E of the Securities Exchange Act of 1934, including statements about future business operations, financial performance and market conditions. Such forward-looking statements involve risks and uncertainties inherent in business forecasts.  
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#### CERTAIN INFORMATION CONCERNING PARTICIPANTS

AlliedSignal Inc. ("AlliedSignal"), PMA Acquisition Corporation ("Acquisition Subsidiary") and certain other persons named below may solicit the consent of shareholders (a) to elect seventeen nominees (the "Nominees") as directors of AMP Incorporated ("AMP") pursuant to a shareholder action by written consent (the "Consent Solicitation") and (b) in favor of the adoption of five proposals to amend the By-laws of AMP. The participants in this solicitation may include the directors of AlliedSignal (Hans W. Becherer, Lawrence A. Bossidy (Chairman of the Board and Chief Executive Officer), Ann M. Fudge, Paul X. Kelley, Robert P. Luciano, Robert B. Palmer, Russell E. Palmer, Frederic M. Poses (President and Chief Operating Officer), Ivan G. Seidenberg, Andrew C. Sigler, John R. Stafford, Thomas P. Stafford, Robert C. Winters and Henry T. Yang), each of whom is a Nominee; and the following executive officers and employees of AlliedSignal: Peter M. Kreindler (Senior Vice President, General Counsel and Secretary), Donald J. Redlinger (Senior Vice President- Human Resources and Communications), and Richard F. Wallman (Senior Vice President and Chief Financial Officer), each of whom is a Nominee, and Terrance L. Carlson (Deputy General Counsel), Robert F. Friel (Vice President and Treasurer), John W. Gamble, Jr., (Assistant Treasurer), Mark E. Greenberg (Vice President, Communications), John L. Stauch (Director, Investor Relations), Robert J. Buckley (Manager, Investor Relations), G. Peter D'Aloia (Vice President, Planning & Development) Mary Elizabeth Pratt (Assistant General Counsel) and James V. Gelly (Vice President, Finance, Aerospace Marketing, Sales & Service).

As of the date of this communication, AlliedSignal is the beneficial owner of 20,000,100 shares of common stock of AMP. Mr. Greenberg is the beneficial owner of 87 shares of common stock of AMP. Other than set forth herein, as of the date of this communication, neither AlliedSignal, Acquisition Subsidiary nor any of their respective directors, executive officers or other representatives or employees of AlliedSignal, any Nominees or other persons known to AlliedSignal who may solicit proxies has any security holdings in AMP. AlliedSignal disclaims beneficial ownership of any securities of AMP held by any pension plan or other employee benefits plan of AlliedSignal or by any affiliate of AlliedSignal.

Although neither Lazard Freres & Co. LLC ("Lazard Freres") nor Goldman, Sachs & Co. ("Goldman Sachs"), the financial advisors to AlliedSignal, admits that it or any of its members, partners, directors, officers, employees or affiliates is a "participant" as defined in Schedule 14A promulgated under the Securities Exchange Act of 1934 by the Securities and Exchange Commission, or that Schedule 14A requires the disclosure of certain information concerning Lazard Freres or Goldman Sachs, Steven J. Golub and Mark T. McMaster (each a Managing Director) and Yasushi Hatakeyama (a Director) of Lazard Freres, and Robert S. Harrison and Wayne L. Moore (each a Managing Director) and Peter Gross and Peter Labbat (each a Vice President) of Goldman Sachs, may assist AlliedSignal in the solicitation of consents of shareholders. Both Lazard Freres and Goldman Sachs engage in a full range of investment banking, securities trading, market-making and brokerage services for institutional and individual clients. In the normal course of its business Lazard Freres and Goldman Sachs may trade securities of AMP for its own account and the accounts of its customers, and accordingly, may at any time hold a long or short position in such securities. Lazard Freres has informed AlliedSignal that as of August 6, 1998, Lazard Freres held a net long position of



approximately 20,861 shares of common stock of AMP, and Goldman Sachs has informed AlliedSignal that as of August 7, 1998, Goldman Sachs held a net long position of approximately 800,000 shares of common stock of AMP.

Except as disclosed above, to the knowledge of AlliedSignal, none of AlliedSignal, the directors or executive officers of AlliedSignal, the employees or other representatives of AlliedSignal or the Nominees named above has any interest, direct or indirect, by security holdings or otherwise, in AMP.

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10/15/98

ALLIEDSIGNAL INC.  
 CONSOLIDATED STATEMENT OF INCOME (UNAUDITED)  
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 (IN MILLIONS EXCEPT PER SHARE AMOUNTS)

	THREE MONTHS ENDED SEPTEMBER 30		NINE MONTHS ENDED SEPTEMBER 30	
	1998	1997	1998	1997
Net sales	\$3,741	\$3,657	\$11,256	\$10,562
Cost of goods sold	2,838	2,840	8,596	8,209
Selling, general and administrative expenses	396	394	1,200	1,145
 Total costs and expenses	3,234	3,234	9,796	9,354
Income from operations	507	423	1,460	1,208
Equity in income of affiliated companies	19	44	82	140
Other income (expense)	(8)	14	(9)	62
Interest and other financial charges	(38)	(50)	(104)	(131)
Income before taxes on income	480	431	1,429	1,279
Taxes on income	151	139	450	423
Net income	\$329	\$292	\$979	\$856
Earnings per share of common stock - basic	\$0.59	\$0.52	\$1.74	\$1.51
Earnings per share of common stock - assuming dilution	\$0.58	\$0.50	\$1.70	\$1.47
Weighted average number of shares outstanding - basic	560	564	562	566
Weighted average number of shares outstanding - assuming dilution	572	581	576	581

ALLIEDSIGNAL INC.  
 SEGMENT DATA  
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 (DOLLARS IN MILLIONS)

THREE MONTHS ENDED SEPTEMBER 30  
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	NET SALES		NET INCOME	
	1998	1997	1998	1997
Aerospace Systems	\$1,242	\$1,080	\$162	\$101
Specialty Chemicals & Electronic Solutions	541	536	56	72
Turbine Technologies	900	771	68	52
Performance Polymers	436	509	45	46
Transportation Products	619	757	10	18
	-----	-----	-----	-----
Total Businesses	3,738	3,653	341	289
Corporate & Unallocated	3	4	(12)	3
	-----	-----	-----	-----
Total	\$3,741	\$3,657	\$329	\$292
	=====	=====	=====	=====

NINE MONTHS ENDED SEPTEMBER 30  
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	NET SALES		NET INCOME	
	1998	1997	1998	1997
Aerospace Systems	\$3,576	\$2,919	\$401	\$245
Specialty Chemicals & Electronic Solutions	1,728	1,626	220	259
Turbine Technologies	2,641	2,242	184	160
Performance Polymers	1,494	1,507	147	104
Transportation Products	1,809	2,259	28	80
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Total Businesses	11,248	10,553	980	848
Corporate & Unallocated	8	9	(1)	8
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Total	\$11,256	\$10,562	\$979	\$856
	=====	=====	=====	=====

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. \_\_\_\_\_

ALLIEDSIGNAL INC., a Delaware corporation, and  
PMA ACQUISITION CORPORATION, a Delaware corporation  
Appellants

v.

AMP INCORPORATED, a Pennsylvania corporation,  
Appellee

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
Civil Action No. 98-CIV-4405

APPELLANTS' MOTION FOR AN EXPEDITED APPEAL

DECHERT PRICE & RHOADS  
Mary A. McLaughlin  
George G. Gordon  
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APPELLANTS' MOTION FOR AN EXPEDITED APPEAL

Pursuant to Rule 2 of the Federal Rules of Appellate Procedure, appellants AlliedSignal Inc. and PMA Acquisition Corporation (collectively "AlliedSignal") hereby move for an expedited appeal from the October 8, 1998 Order of the United States District Court for the Eastern District of Pennsylvania, Civil Action Nos. 98-CV-4058 and 98-CV-4405, declaring illegal the consent solicitation of AMP Incorporated ("AMP") shareholders on AlliedSignal's "Shareholder Rights Plan" scheduled to commence November 16, 1998, enjoining AlliedSignal's consent solicitation with respect to the election of directors, scheduled to commence October 15, 1998 and denying AlliedSignal's request for injunctive relief enjoining certain amendments to AMP's Shareholder Rights Plan (the "poison pill").

AlliedSignal respectfully requests that the Court enter the proposed expedited briefing schedule set forth below.

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GROUNDS FOR EXPEDITED APPEAL  
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At issue in this appeal is the fundamental right of shareholders to elect directors of their choosing and to structure the system of governance for the corporation that they own. In connection with AlliedSignal's announced intention to make a tender offer for all of the outstanding shares of AMP at \$44.50 cash per share, AlliedSignal has also commenced a consent solicitation which proposes that AMP's shareholders act by written consent to elect 17 new members to AMP's board (the "nominees")(the consent solicitation proposals related to the nominees are referred to as the "Nominees Election Proposals"). The 17 nominees, all current directors or officers of AlliedSignal, have announced their

intention to support a merger between AMP and AlliedSignal, subject to their fiduciary duties to AMP. AMP's current board of directors has set a record date for this consent solicitation of October 15, 1997.

In an effort to give shareholders an additional vehicle to express disagreement with the actions of AMP's current directors, AlliedSignal added to its consent solicitation a proposal that shareholders amend AMP's By-laws pursuant to ss.1721 of the Pennsylvania Business Corporation Law ("PBCL"), to place all powers with respect to AMP's poison pill in the hands of three Shareholders Rights Agents (the "Shareholder Rights Proposal"). Those Shareholders Rights Agents would amend the poison pill so that it would not apply to merger proposals approved by a majority of the shareholders. AMP's current board has set a record date for this consent solicitation of November 16, 1998.

In an attempt to entrench themselves in office and to frustrate the shareholders' ability to vote on the Nominee Election Proposal and the Shareholder Rights Proposal, AMP's current board of directors made certain amendments to its poison pill. First, AMP amended its poison pill so that, if shareholders vote to change the majority of the board of directors (i.e., vote for the AlliedSignal Nominees), it will become non-amendable and non-redeemable until it expires in November 1999 (the "nonredemption provision"). Subsequently, after AlliedSignal added the Shareholder Rights Proposal to its consent solicitation, AMP amended its poison pill so that, if shareholders vote to implement the Shareholder Rights Proposal, the poison pill will become non-amendable and non-redeemable until it expires (the "nullification provision"). In other words, if shareholders exercise their franchise in a manner that the existing directors disagree with, they will be punished and AMP will not be able to be sold until the poison pill expires.

On September 11, 1998, AMP moved in the U.S. District Court of the Eastern District of Pennsylvania for summary judgment in the form of a declaratory injunction that the Nominee Election Proposals were unlawful ("AMP's Motion"). AMP's Motion was limited to the "Second Claim for Relief" in its Complaint and was limited to a request for a declaratory judgment. AMP's Motion did not seek injunctive relief and AMP expressly excluded from its Motion the federal disclosure claims in the First Claim for Relief in its Complaint. Similarly, AMP's Motion did NOT include a request for a declaratory judgment that the Shareholder Rights Proposal was unlawful. On September 23, 1998, AlliedSignal cross-moved for summary judgment on AMP's Second Claim for Relief.

On September 14, 1998, AlliedSignal moved for summary judgment seeking, among other things, a declaratory judgment that the nonredemption provision and the nullification provision were unlawful and, in the alternative, a preliminary injunction enjoining AMP from giving effect to those provisions.

On October 8, 1998, the District Court entered the Order being appealed from which (1) entered a declaratory judgment that the Shareholder Rights Proposal was unlawful (despite the fact that no such judgment had been requested, briefed or argued); (2) enjoined AlliedSignal's Nominee Election Proposals until AlliedSignal's Consent Solicitation Statement states that its director nominees have a fiduciary duty solely to AMP under Pennsylvania law and includes a statement from each nominee affirmatively committing personally to that duty (despite the fact that no such relief was sought and no relief of any kind was sought on its disclosure claim); and (3) denied AlliedSignal's request for injunctive relief on the nonredemption and nullification provisions.

The Order of the District Court is extraordinary and simply inappropriate. Indeed, the relief granted on the Nominee Election Proposals was never requested, briefed or argued. AlliedSignal was deprived of any opportunity to bring to the Court's attention relevant facts, including an updated consent solicitation statement, that shows the required disclosure is unnecessary. Moreover, the District Court's ruling is based on basic misunderstandings of Pennsylvania law. Thus, if left standing, the District Court's ruling, and the opinion on which it is based, will infect the entire corporate election process (the record date for which is October 15, 1998). Indeed, shareholders will be left to rely on the District Court's fundamental misperceptions in deciding whether or not to vote for the nominees.

Moreover, the District Court also erred in denying AlliedSignal's requested injunctive relief on the nonredemption and nullification provisions. Those provisions would unlawfully eliminate AMP's ability to consider tender offers and takeover proposals in direct violation of the PBCL. Section 1502(18) of the PBCL is clear on this point -- subject only to limitations imposed by statute or in the articles of incorporation, every business corporation SHALL have power to accept, reject, respond to

or take no action with respect to tender offers and takeover proposals. See also PBCL ss.1721 (the powers set forth in ss.1502 are to be exercised by the board or other persons designated by the shareholders). If the nonredemption and nullification provisions are given effect no one -- not the current directors, not new directors, not the shareholders -- could exercise this power.

In addition, without expedited relief from the District Court's erroneous Order, shareholders will vote on the Nominee Election Proposals with a gun to their head. If they vote in favor of the nominees and the nominees take their seats on the AMP board, the nonredemption provision will go into effect and AMP cannot be sold until the poison pill expires.

Thus, expedited relief from the District Court's October 8, 1998 Order is crucial. The record date for the consent solicitation is October 15, 1998. Owners of shares on that date have 90 days to decide whether or not to consent to the Nominee Election Proposals. Without expedited relief, the entire consent solicitation process will be infected by the uncertainty created by the District Court's rulings and the fundamental misunderstandings of Pennsylvania law expressed in the opinion. Expedited relief from this Court is the only way to avoid this and to insure that the corporate election process is based on the shareholders' analysis of facts and not on misperceptions of, or uncertainty about, the legal status of the nominees created by the District Court's erroneous decision.

In addition, as the Supreme Court has noted, simple delay itself is "the most potent weapon in a tender-offer fight" and can "seriously impede" or prevent an offer from succeeding. *Edgar v. MITE Corp.*, 457 U.S. 624, 637 n.12 (1982) (plurality opinion) (internal quotation marks and citation omitted). If delay caused by the District Court's decision frustrates AlliedSignal's tender offer for the company, then AMP's shareholders will lose the opportunity to sell their shares to AlliedSignal at a substantial premium to market, and AlliedSignal will lose the unique opportunity to acquire AMP. See, e.g. *San Francisco Real Estate Investors v. Real Estate Investment Trust of America*, 701 F.2d 1000, 1003 (1st Cir. 1983) (loss of opportunity to obtain control of a corporation is irreparable harm); *Kennecott Corp. v. Smith*, 637 F.2d 181, 183-84, 188 (3d Cir. 1980) (granting expedited argument and finding irreparable harm because of threat of delay to a tender offer).

#### PROPOSED BRIEFING SCHEDULE

For the above reasons, AlliedSignal respectfully requests that this Court set the following briefing schedule if this Motion is granted.

(1) Brief for appellants and the appendix thereto to be served and filed by 5:00 p.m. on October 13, 1998.

(2) Brief for appellee, and a supplemental appendix with any record materials relied on by appellee not contained in the appendix filed by appellants, if any, to be served and filed by 5:00 p.m. on October 15, 1998.

(3) Reply Brief for appellant to be served and filed by 5:00 p.m. on October 16, 1998.

(4) Oral argument, if necessary, to be held as soon as practicable thereafter.

CONCLUSION

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For the reasons set forth above - the clear error of the Order of the district court, the threat of irreparable harm to AlliedSignal and to AMP's shareholders from delay, and the risk of an incurably tainted corporate election - appellants respectfully request this Court adopt and order the proposed expedited briefing schedule above.

Respectfully submitted,

/s/ Mary A. McLaughlin

-----  
Mary A. McLaughlin  
George G. Gordon  
Dechert, Price & Rhoads  
4000 Bell Atlantic Tower  
1717 Arch Street  
Philadelphia, PA 19103  
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and

/s/ Alexander R. Sussman

-----  
Alexander R. Sussman  
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(212) 859-8000  
Attorneys for AlliedSignal Inc.

DATED: October 9, 1998



motion by 5:00 p.m. on that date, AlliedSignal never received any such motion.

The only immediate, and potentially irreparable, harm in this case will be to the AMP shareholders resulting from a delay in the election process. The shareholders cannot be deprived of their right to elect directors of their choice at a time set by the existing AMP Board of Directors, not AlliedSignal. Under Pennsylvania statutory provisions and AMP's own articles of incorporation, the shareholders of record as of today, October 15, have the right to vote and put AMP in the hands of the board of directors that they want. That may be the current board, but it also may be the board of directors that AlliedSignal has proposed -- the eleven existing directors, plus 17 new directors.

Although there are no events that can happen during the pendency of the consent solicitation that would deprive this Court of its jurisdiction to enjoin or invalidate action to be taken by a new AMP board, there is one event that could deprive this Court of jurisdiction to ensure that the shareholders' right to vote is not irreparably compromised. This Court cannot restore a \$44.50 all cash offer for all outstanding shares of AMP if AlliedSignal, in light of the decline in the financial markets, were to reduce its price or decide not to go forward.

Two months ago, AMP set October 15 as the record date on the consent solicitation now at issue. They chose a two-month hiatus before the formal consent process could begin because they allegedly believed that the shareholders needed that much time to receive appropriate information from both the AMP board and AlliedSignal to make an informed vote. The AMP board has utilized that two-month period and has been constantly in contact with its shareowners through proxy materials mailed to them, direct personal contacts, and a number of full-page advertisements in the Wall Street Journal and other newspapers.

AMP has had more than ample opportunity to make its arguments to the Court over the last two months. After full briefing and argument, the Court ruled in its written opinion and then reaffirmed at the hearing on Tuesday that the AMP shareholders could elect the AlliedSignal slate and that the consent solicitation could go forward if the Consent Statement made two very specific disclosures. AMP, although it could have cross-appealed that ruling, has not done so.

AMP has also had more than ample opportunity to make its arguments to the SHAREHOLDERS over the last two months.

Enough is enough. Now is the time to let the voters decide and to let the parties make whatever arguments they want to the Court of Appeals.

#### AMP'S ABUSE OF THE LITIGATION PROCESS

Since the Court issued its Order last Thursday, AMP has engaged in a series of tactics amounting to litigation by ambush and has abused the litigation process. Prior to the issuance of the Court's Order, the Court offered to be available to answer questions about the Order. Shortly after receiving the Order, counsel for the parties spoke with the Court and AlliedSignal's counsel asked the Court if it was correct that the consent solicitation could go forward if AlliedSignal made the disclosures required by the Court's Order. The Court confirmed that AlliedSignal could conduct the consent solicitation process as long as it made the required disclosures. Based on the Court's statement and the clear wording of the Order, AlliedSignal agreed the following morning to buy approximately 9% of the stock of AMP at a cost of \$890,000,000. AlliedSignal would not have made that purchase if AlliedSignal did not believe that the consent solicitation process could continue as long as it made the required disclosures.

Ever since that moment, AMP has engaged in a series of maneuvers to get the Court to broaden the injunction without ever actually filing a motion to do so. First, AMP's counsel set up a conference call with the Court on Friday afternoon without telling counsel for AlliedSignal the purpose of the call.

In the course of that telephone conversation, AMP's counsel urged the Court to broaden its injunction. The Court agreed to have a hearing at 4:30 p.m. on Tuesday, October 13, 1998, and told AMP's counsel explicitly to give AlliedSignal's counsel, PRIOR TO THE HEARING, sufficient notice of any proposals AMP intended to make at the 4:30 p.m. hearing.

At the hearing on Tuesday afternoon, AMP's counsel made three motions: two written and one oral. Counsel for AlliedSignal received NONE of those motions before the hearing -- in clear violation of the Court's directive. After AlliedSignal's counsel had left for Court shortly before



4:00 p.m., two of the motions were apparently faxed to her office: a motion for expedited discovery and a motion to amend the judgment. There was no written motion with respect to AMP's third motion, a request to enjoin the consent solicitation process.

Yesterday afternoon, counsel for AlliedSignal received a voice mail from counsel for AMP, saying that counsel for AMP had called the Judge's chambers, without notifying AlliedSignal's counsel ahead of time, and arranged for a meeting in the morning. AMP's counsel stated in his voice mail message that, at the meeting, he would seek a temporary restraining order to stop AlliedSignal's consent solicitation. When AlliedSignal's counsel called AMP's counsel and asked to know the basis of the request for a temporary restraining order, AMP's counsel refused to tell her even though counsel already had a five-page letter prepared. When AlliedSignal's counsel complained to AMP's counsel about his calling the Court without telling her ahead of time and refusing to give a basis for the TRO request, AMP's counsel quipped: "You're breaking my heart."

The reason for AMP's conduct is quite clear. AMP knows that its shareholders have had enough of its poor management and are overwhelmingly going to give their consents to AlliedSignal. AMP is so desperate that after the hearing on Tuesday in which the Court clearly said that AlliedSignal's disclosures complied with its Order and refused to issue an injunction, AMP issued a press release designed to mislead shareholders and the public. The press release clearly implied that the Court had enjoined AlliedSignal from continuing with its consent solicitation. Having implied to the public that AlliedSignal was enjoined from conducting its consent solicitation, AMP hours later asked the Court for a hearing to again seek an injunction.

AMP is desperately trying to delay the consent solicitation process to manipulate the corporate election machinery. It is trying to mislead AMP's shareholders and the public at large. This must stop.

#### ARGUMENT

AMP's latest attempt to interfere with the corporate election process suffers from at least three fatal flaws: (1) The purported premise of the request for a temporary restraining order -- that AlliedSignal has failed to comply with the Court's Order -- is demonstrably false; (2) AMP is not entitled to relitigate issues that have already been decided by this Court; and (3) AMP cannot show imminent and irreparable harm.

#### I. ALLIEDSIGNAL HAS COMPLIED WITH THE ORDER AND AMP'S ATTEMPTS TO RELITIGATE THE INJUNCTION ARE IMPROPER

The ostensible basis for AMP's current request is that AlliedSignal has not complied with the disclosure conditions in the Court's Order. (Baughman Ltr. at 2-4.) AMP knows, however, that AlliedSignal has in fact complied with the Order and that this Court has acknowledged AlliedSignal's compliance. (10/13/98 Tr. at 30-31, Tab 1.) Consequently, AMP's request for a temporary restraining order is nothing more than yet another (its fourth) bite at the apple in AMP's effort to interfere with the corporate election process.

#### A. ALLIEDSIGNAL HAS COMPLIED WITH THE COURT'S ORDER

It is well settled that injunction orders must be "specific in terms" and "must describe in reasonable detail ... the act or acts sought to be restrained." Fed. R. Civ. Pro. 65(d). Parties subject to an injunction order, such as AlliedSignal, are "entitled to fair and precisely drawn notice of what the injunction actually prohibits because serious consequences may befall those who do not comply with court orders." *Louis W. Epstein Family Partnership v. KMart Corp.*, 13 F.3d 762, 771 (3d Cir. 1994) (citation and internal quotation marks omitted). In violation of this well-settled principle of law, AMP asks this Court to read into the Order a myriad of requirements that are simply not there.

Consistent with Fed. R. Civ. Pro. 65(d), the Order described in detail what AlliedSignal was enjoined from doing and under what circumstances. In the Order, the Court enjoined AlliedSignal's consent solicitation until it satisfied two specific conditions: (1) the AlliedSignal Consent Statement had to state that its director nominees have a fiduciary duty solely to AMP under Pennsylvania law; and (2) the AlliedSignal Consent Statement had to include a statement from each nominee affirmatively committing personally to that duty. The Order contained no other conditions or requirements of any kind. The plain meaning of the Order could not be more clear -- if AlliedSignal satisfied the two conditions, the consent solicitation could go forward. That interpretation was confirmed by the Court in the October 8 telephone conference immediately following the issuance of the Order.

AlliedSignal satisfied the two conditions. On October 13, 1998, AlliedSignal filed an amended Consent Statement with the Securities and Exchange Commission which stated that "[t]he Nominees, if elected as directors of [AMP], WILL OWE A FIDUCIARY DUTY SOLELY TO [AMP] UNDER PENNSYLVANIA LAW." (Tab 2 at 9.) The Consent Statement, as amended October 13, 1998, also explains that

Each Nominee has undertaken personally (in writing) to be bound by and discharge his or her duty of undivided loyalty to [AMP] and has agreed to perform his or her duties in good faith, in a manner that he or she reasonably believes to be in the best interests of [AMP].

(Id. at 9, A-V-1.) The nominees' signed statements are collected at Tab 3. To make absolutely certain that AlliedSignal satisfied the Court's Order, AlliedSignal quoted in its entirety in the Consent Statements the portion of the Court's opinion dealing with the injunction.

After counsel for AlliedSignal read these provisions into the record at the October 13, 1998, conference, the Court stated that these statements complied with the Order, remarking that "I think that's helpful. That complies." (10/13/98 Tr. at 30-31, Tab 1.) Later in the hearing, the Court confirmed that "[AlliedSignal] can solicit consents so long as they have a solicitation that does not include the poison pill." (10/13/98 Tr. at 42, Tab 1.)

Unable to challenge seriously AlliedSignal's compliance with the Order, AMP resorts to (1) questioning the speed with which AlliedSignal complied; and (2) complaining about AlliedSignal's failure to comply with requirements that are not in the Order. Neither of these points carries any weight. The speed with which AlliedSignal complied reflects nothing more than the fact that the nominees, before consenting to serve as AMP directors had been committed to their fiduciary duties and that neither AlliedSignal nor the nominees ever took issue with the propositions that they were asked to state by the Court. AlliedSignal and the nominees have always recognized that the directors of a Pennsylvania corporation have a duty solely to the corporation and that the nominees, if elected, would be bound by that duty.

In fact, on October 1, 1998, one week before the Order, AlliedSignal amended its Consent Statement to state:

[T]he nominees understand that, in their actions as directors of the Company, they should not be guided by or take into account any duties or responsibilities they may have in other capacities to AlliedSignal or its stockholders, but rather are OBLIGATED TO ACT SOLELY WITH REGARD TO THEIR DUTIES AS DIRECTORS OF THE COMPANY UNDER APPLICABLE PENNSYLVANIA LAW.

(Tab 4 at 8.) Similarly, the Consent Statement, as amended October 1, 1998, also states:

Moreover, AlliedSignal has authorized and requested the nominees to participate in the consent solicitation and understands that their actions as directors of the Company must take into account ONLY THE INTERESTS OF THE COMPANY AND NOT THE INTERESTS OF ALLIEDSIGNAL except to the extent of AlliedSignal's interest as a shareholder of the Company in common with other shareholders of the Company.

Id. Thus, AlliedSignal's compliance with the Court's Order was quick because AlliedSignal and the nominees agreed with the statements that the Court asked them to make.

AMP also argues that AlliedSignal failed to comply with a number of other purported "requirements" that were not in the Court's Order.(FN2) Although AMP attempts to read these requirements into the Order, they are simply not there. In fact, at the October 13, 1998, conference, the Court confirmed that it had "not required that [the nominees] do more than pledge themselves to [their duty]." (10/13/98 Tr. at 42, Tab 1.) It is to avoid exactly what AMP is trying to do here -- saddle a party with a vague and ambiguous injunction subject to ever-changing interpretations -- that the law requires Orders to be specific and precise.

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2 For example, AMP complains (1) that AlliedSignal failed "to recognize" that the nominees' duties as AlliedSignal directors are to

AlliedSignal shareholders, but as AMP directors their duties would be to AMP; (2) that AlliedSignal failed "to reflect any awareness" of what the nominees' duty of undivided loyalty to AMP would mean in the context of a takeover of AMP; and (3) that the nominees did not "acknowledge" that AMP shareholder have allegedly not released them to act as AMP directors. (Baughman Ltr. at 2.)

B. AMP IS NOT ENTITLED TO A MODIFICATION OR RECONSIDERATION OF THE COURT'S ORDER

Because there is no question that AlliedSignal complied with the Court's Order, it is clear that what AMP really wants to do is relitigate the issues decided by the Court on October 8, 1998 and, thereby, DELAY the election process. The law, however, limits the situations in which a litigant can take repeated bites at the apple, particularly where, as here, a party has filed a notice of appeal on the issue in question and fundamental issues like the right to vote are involved.

It is well settled that "[a]s a general rule, the timely filing of a notice of appeal is an event of jurisdictional significance, immediately conferring jurisdiction on a Court of Appeals and divesting a district court of its control over those aspects of the case involved in the appeal." *Hudson United Bank v. LiTenda Mortgage Corp.*, 142 F.3d 151, 158 (1998) (quoting *Venen v. Sweet*, 758 F.2d 117, 120 (3d Cir. 1985)). In *Venen*, the Third Circuit explained that "[t]his judge-made rule has the salutary purpose of preventing the confusion and inefficiency which would of necessity result were two courts to be considering the same issue or issues simultaneously." 758 F.2d at 121. Similarly, once a party has filed a notice of appeal from the entry of an injunction, the district court may modify an injunction only in "very limited circumstances" to preserve the integrity of the proceedings in the court of appeals. See *Death Row Prisoners of Pa. v. Ridge*, 948 F. Supp. 1282, 1289 (E.D. Pa. 1996) (declining under Rule 62(c) to exercise jurisdiction over a motion for injunctive relief after an interlocutory notice of appeal was filed).

Even ignoring the fact that AlliedSignal has filed a notice of appeal, courts generally reject motions that seek merely to relitigate issues previously decided by the court. For example, courts routinely throw out motions for reconsideration that seek nothing more than "a second bite at the apple." See *Bhatnagar v. Surrendra Overseas Ltd.*, 52 F.3d 1220, 1231 (3d Cir. 1995) (rejecting defendant's motion for reconsideration as "a classic attempt at a 'second bite at the apple'"); *Allianz Ins. Co. v. Pennsylvania Orthopedic Assocs., Inc.*, No. C.A. 96-7470, 1998 WL 512940, at \*2 (E.D. Pa. Aug. 18, 1998) (Defendants' "attempt at a second bite of the apple is an abuse of the mechanism of reconsideration, and the Court is disappointed by the consequent waste of valuable judicial resources."); *Tischio v. Bontex, Inc.*, No. C.A. 9801608, 1998 WL 462095, at \*22 (D.N.J. June 29, 1998) ("When a motion for reconsideration raises only a disagreement by a party with a decision of the court, that dispute should be dealt with in the normal appellate process, not on a motion for reargument.") (internal quotation marks and citation omitted).

These same limitations apply regardless of the procedural vehicle used to relitigate the case. Rule 62(c), for example, permits a district court to modify an injunction "only when there has been a change of circumstances between entry of the injunction and the filing of the motion" and does not permit a party to "relitigate the original issue." *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 337 (3d Cir. 1993) (internal quotation and citation omitted). In addition, Rule 59(e), an "extraordinary remedy," allows a court to alter or amend a judgment only when the court has made a manifest error of law or fact, there has been an intervening change in the law, or new evidence has arisen. See *NL Indus., Inc. v. Commercial Union Ins. Co.*, 935 F. Supp. 513, 516 (D.N.J. 1996); *Knepp v. Lane*, 859 F. Supp. 173, 175 (E.D. Pa. 1994); see also *Ben-Shalom v. Marsh*, 881 F.2d 454, 456 (7th Cir. 1989) (a Rule 60 motion for relief from an order "cannot be used merely to relitigate the merits of the case."); accord *Cashner v. Freedom Stores, Inc.*, 98 F.3d 572, 577 (10th Cir. 1996).

Here, none of the conditions that would allow for reconsideration, modification of an injunction or alteration of a judgment are present. In fact, AMP does not even attempt to argue that such conditions exist. Nothing has changed since October 8, 1998, except that AlliedSignal has complied with the Order. Even AMP's arguments remain the same: the nominees have "inherent and pervasive" conflicts which will prevent them from fulfilling their duty to AMP in the context of AlliedSignal's merger proposal.

The Court heard these arguments and, after doing so, issued a carefully fashioned Order requiring AlliedSignal to comply with two -- and only two -- very specific conditions. AMP's request that this Court now add to those conditions, after AlliedSignal complied with them and, in reliance

on the Court's Order, purchased \$900,000,000 worth of AMP shares, would be fundamentally unfair and contrary to well settled law.

### C. THERE IS NO NEED FOR THE NEW DISCLOSURES

Not only would it be fundamentally unfair to change the Court's Order at this stage, but it is unnecessary as a matter of federal disclosure law. AMP's shareholders know who the AlliedSignal nominees are and their affiliations with AlliedSignal. (Tab 3 at 12-14.) AlliedSignal's Consent Statement also spells out for shareholders that, in certain circumstances including the proposed merger and proposals made by third parties, the nominees may have a potential "conflict of interest." (Id. at 9.) In addition, AMP has made sure that its views on the nominees' alleged conflicts of interest are part of the "total mix" of information available to shareholders.

The only standard by which to assess the adequacy of AlliedSignal's disclosures is that provided by the federal securities laws. Without a finding that AlliedSignal's disclosures have violated the federal securities laws, there is no basis to require additional disclosures or order any other type of relief. Yet AMP's letter asking for a temporary restraining order does not even mention federal securities law, let alone attempt to establish a violation of that law.

In fact, AlliedSignal's disclosures are sufficient, as a matter of law, to satisfy its federal disclosure obligations. In *Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 511 (D.C. Cir. 1986), for example, the plaintiff alleged that defendants' proxy material failed to disclose that the dual roles of two individuals who served as directors of a target corporation and as attorneys to, and directors of, the acquiror constituted a "conflict of interest." The proxy materials, however, disclosed the fact that these two directors served as directors of the acquiror. See *id.* at 515. The court held that the proxy material could not "be faulted because it never uses the actual phrase 'potential conflict of interest,'" explaining that "[T]HE FEDERAL SECURITIES LAWS REQUIRE ONLY THAT THE VARIOUS ROLES OF [THE DIRECTORS] BE CLEARLY DISCLOSED -- as they were." *Id.* at 517. Here, AlliedSignal went beyond *Kas*: it not only disclosed the nominees' roles, but also acknowledged the potential conflict of interest. See *Valley Nat'l Bank of Arizona v. Westgate-California Corp.*, 609 F.2d 1274, 1281-82 (9th Cir. 1979) (holding that proxy material adequately disclosed the dual position of directors on both acquiror's and acquired's board and refusing to undo merger transaction).

### II. AMP CANNOT SHOW IMMINENT AND IRREPARABLE HARM

The only justification for a temporary restraining order is a "clear showing of immediate irreparable (not merely serious or substantial) injury." *Manganaro v. InteropTec Corp.*, 874 F. Supp. 660, 662 (E.D.Pa. 1995), (quoting *Campbell Soup Co. v. Conagra, Inc.*, 977 F.2d 86, 91-92 (3d Cir. 1992)). Showing "a risk of mere irreparable harm is not enough to warrant injunctive relief." *Id.* Here, AMP simply cannot show that it will suffer the type of imminent and irreparable harm that would justify enjoining the consent solicitation.

Contrary to the misleading picture AMP paints in its request for relief, AlliedSignal cannot take "quick" control of AMP. (Baughman Ltr. at 4-5.) A basic timetable of the consent solicitation shows that AMP's shareholders cannot even begin to vote on AlliedSignal's proposal until several days from today's record date:

- \* Today, October 15, 1996, is the record date for the consent solicitation. Shareholders who are record owners as of today will be entitled to vote their shares in the solicitation BUT THEY CANNOT YET CAST AN EFFECTIVE VOTE
- \* Before these shareholders can actually vote, AMP must prepare a list of the record shareholders (essentially a voting roll). See PBCL ss. 1764 . At the same time, AlliedSignal must distribute blue consent cards (essentially the "ballots") to the AMP shareholders on the record list. BOTH OF THESE ACTIONS WILL TAKE SEVERAL DAYS AND AMP SHAREHOLDERS CANNOT CAST AN EFFECTIVE VOTE UNTIL THEY ARE COMPLETED.
- \* Only after the record list is compiled and the consent cards are sent out, can AMP shareholders submit consents.
- \* ONCE THE VOTING BEGINS, AMP SHAREHOLDERS MAY REVOKE THEIR CONSENTS AT ANY TIME before the certification process concludes.

- \* Even once a majority of shareholders give their consent to the proposals, before those votes can become effective, they must be submitted to an independent inspector of elections who may "conduct such reasonable investigation as he deems necessary or appropriate for the purpose of ascertaining the validity of such Consents." AMP Bylaw 1.7.3. (emphasis added)
- \* Only after all of this will the shareholders' vote be effective and AlliedSignal's nominees be allowed to take their seats on the board.
- \* Moreover, once AlliedSignal's nominees take their seats, they cannot, as AMP claims, "sell the company" or consummate a merger without FURTHER shareholder approval. See PBCL ss. 2538; Article X of AMP's Articles of Incorporation.

Given the stages that remain in the consent solicitation process before the alleged harms that AMP asserts are even a possibility, AMP is not threatened with IMMINENT harm of any kind. All that AlliedSignal is doing now is communicating with shareholders (which AMP is doing in a very aggressive and continuous manner). The only activity that will be restrained by AMP's requested TRO is AlliedSignal's ability to solicit shareholders -- hardly the stuff of imminent and irreparable harm.

Indeed, the last minute nature of AMP's claim gives the lie to AMP's claim of irreparable harm. AMP has known for over two months that October 15 was the record date for the consent solicitation. It has yet to file a single written MOTION for an injunction barring AlliedSignal's solicitations of consents. The only motion that it has filed relating to the solicitation is a motion for summary judgment that the consent proposal itself is unlawful. The Court DENIED that motion, upholding the unconditional right of shareholders to elect directors of their choosing. Yet AMP waited until 5:00 p.m. on the day before the record date -- five days after the Court issued its Order and four days after AlliedSignal complied with it -- to send a letter to the Court seeking an expansion of the existing injunction with which AlliedSignal has already complied. AMP cannot explain why, having waited over two months to request this relief, the harm it faces is now suddenly imminent and irreparable.

On the other hand, enjoining AlliedSignal will cause significant harm to AMP's shareholders. Indeed, AMP's purpose in seeking a temporary restraining order is clear: to block AlliedSignal's effort to solicit and to delay the process so that AMP can continue to manipulate the election. Yesterday, for example, AMP issued a press release implying that the Court had found that AlliedSignal failed to comply with the Order and that the consent solicitation was enjoined. In fact, just the opposite was true.

At a conference with the Court on October 13, AMP's counsel made an oral motion to enjoin the consent solicitation until after the Third Circuit ruled on AlliedSignal's appeal. After argument, the Court DENIED AMP's motion, stating that AlliedSignal's disclosures complied with the Court's Order. Immediately after that conference, however, AMP issued a press release obviously designed to mislead shareholders into believing that the Court ruled that AlliedSignal had NOT complied with the Order and that the consent solicitation could not go forward -- EXACTLY THE OPPOSITE OF WHAT THE COURT HAD ACTUALLY RULED:

Following a conference held today with the United States District Court for the Eastern District of Pennsylvania, AMP Incorporated (NYSE:AMP) stated that AlliedSignal, Inc. (NYSE:ALD) has not properly complied with the Court's order issued on October 8, 1998, and that AlliedSignal's consent solicitation remains subject to the Court's injunction.

(The press release is attached at Tab 5.)

Finally, enjoining the consent solicitation would cause AlliedSignal extraordinary financial harm. AMP's requested relief would require this Court to expand its Order. In reliance on the clear language of that Order -- that AlliedSignal could conduct its consent solicitation process as long as it made the required disclosures -- and on the Court's confirmation of that understanding, AlliedSignal agreed to buy approximately 9% of the stock of AMP at a cost of \$890,000,000. AlliedSignal would not have made the purchase had AlliedSignal not believed that the consent solicitation process could continue as long as it made the required disclosures. Moreover, the effect of an injunction could be to upset the whole consent process and bring all the unpredictable consequences that delay always produces in the acquisition context in terms

of financial risks and equity valuation.

AMP cannot wait until the last minute to request a change in the Court's Order when AlliedSignal has taken action in reliance on that Order in the amount of \$890,000,000. AMP is guilty of inexcusable delay.

CONCLUSION

For the foregoing reasons, AlliedSignal respectfully requests that AMP's request for a temporary restraining order be denied.

Respectfully submitted,

/s/ Mary A. McLaughlin

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Dated: October 15, 1998

IN THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

NO. 98-\_\_\_\_\_

ALLIEDSIGNAL INC., a Delaware corporation,  
Appellant

v.

AMP INCORPORATED, a Pennsylvania corporation,  
Appellee

ALLIEDSIGNAL INC., a Delaware corporation, and  
PMA ACQUISITION CORPORATION, a Delaware corporation,  
Appellant

v.

AMP INCORPORATED, a Pennsylvania corporation,  
Appellee

On Appeal from the United States District Court  
for the Eastern District of Pennsylvania  
Civil Action No. 98-CIV-4058  
Civil Action No. 98-CIV-4405

APPELLANTS' OPENING BRIEF

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from an Order of the United States District Court for the Eastern District of Pennsylvania (the "district court") dated October 8, 1998, granting partial summary judgment for AMP Incorporated ("AMP"), entering an injunction against AlliedSignal Inc. ("AlliedSignal") (in Civil Action No. 98-CV-4405), and denying AlliedSignal's request for injunctive relief (in Civil Action No. 98-CV-4058). AlliedSignal filed a Notice of Appeal and a Motion for Expedited Appeal on October 9, 1998.

The district court had jurisdiction over these matters pursuant to 28 U.S.C. ss.ss. 1331, 1332 and 1367. AMP is incorporated and has its principal place of business in Pennsylvania. AlliedSignal and PMA Acquisition Corp. are Delaware corporations with their principal places of business in New Jersey. The amount in controversy is in excess of \$75,000, exclusive of interest and costs. AMP's Amended Complaint (C.A. No. 98-CV-4405) includes federal claims (not at issue in this appeal) under the Securities Exchange Act of 1934. AlliedSignal's Complaint (C.A. No. 98-CV-4058) includes claims under the commerce and supremacy clauses of the U.S. Constitution. This Court has appellate jurisdiction over the district court's denial of AlliedSignal's requested injunctive relief and the district court's entry of an injunction against AlliedSignal pursuant to 28 U.S.C. ss. 1291 and ss. 1292(a). Similarly, this Court has appellate jurisdiction, pursuant to 28 U.S.C. ss.1292(a), over the district court's grant of partial summary judgment in favor of AMP because that issue is inextricably bound to a meaningful appellate review of the district court's denial of AlliedSignal's requested injunction. See *Casey v. Planned Parenthood of Southeastern Pa.*, 14 F.3d 848, 855-56 (3d Cir. 1994).

## STATEMENT OF RELATED CASES AND PROCEEDINGS

AlliedSignal is not aware of any related appeals.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court commit an error of law in enjoining AlliedSignal's consent solicitation until AlliedSignal's Consent Statement states that its director nominees have a fiduciary duty solely to AMP under Pennsylvania law and includes a statement from each nominee affirmatively committing to that duty when:

(a) AMP never requested injunctive relief, and the court did not make the necessary findings for such relief;

(b) AMP expressly did not move for relief on its federal disclosure claims and, thus, AlliedSignal did not have an opportunity to brief, argue or develop a record on those claims;

(c) The record shows that AlliedSignal's disclosures were adequate as a matter of law; and

(d) The district court's ruling is premised on an erroneous interpretation of Pennsylvania law?

2. Did the district court err in granting summary judgment in the form of a declaratory judgment that AlliedSignal's Shareholder Rights Proposal was unlawful (in which case review is plenary) when:

(a) AMP had not moved for summary judgment on AlliedSignal's Shareholder Rights Proposal or requested a declaratory judgment; and

(b) The Shareholder Rights Proposal is expressly authorized by ss. 1721 of the Pennsylvania Business Corporation Law ("PBCL")(FN1) and AMP's own Articles of Incorporation?

- - - - -

1 Pursuant to FRAP 28(f) and Local Rule 28.1(a)(iii), the relevant statutory sections of the PBCL are collected at Tab 4 in the accompanying Addendum to Appellant's Opening Brief.

3. Did the district court commit an error of law by denying AlliedSignal's request for injunctive relief enjoining the nonredemption and nullification provisions of AMP's Shareholder Rights Plan ("poison pill") when:

(a) In direct violation of ss.ss. 1721 and 1502(18) of the PBCL, the nonredemption and nullification provisions make it impossible for the directors to exercise their power to consider fully, reject, accept or otherwise respond to a tender offer or proposed acquisition;

(b) The nonredemption provision is a direct interference with the right of shareholders under ss. 1725 of the PBCL to elect directors of their choosing; and

(c) The nullification provision is a direct interference with the explicit right of shareholders under ss. 1721 of the PBCL to decide who can exercise corporate powers and to place such powers in the hands of individuals other than the board of directors?

#### STATEMENT OF THE CASE

This appeal concerns AlliedSignal's consent solicitation of AMP shareholders (1) to elect new directors to AMP's board and (2) to adopt a bylaw transferring the power of AMP's directors over AMP's "poison pill"(FN2) to an independent group of "Shareholder Rights Agents." It also concerns the legality of two amendments to AMP's poison pill adopted by AMP's board of directors, both designed to render those consent solicitation proposals ineffective.

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2 A poison pill, commonly adopted by publicly traded corporations in the form of a "shareholder rights agreement," is designed to repel, or at least delay, takeover attempts that are not approved by the board of directors. In general terms, a poison pill works as follows: if an acquiring entity (the "acquiror") acquires more than a specified percentage of a target company's stock (a "triggering event"), each share of the stock other than stock held by the acquiror carries with it a "right" to acquire newly-issued shares of the company's stock at half price and/or, once a merger is consummated, newly-issued shares of the acquiror's stock at half-price. Once triggered, these rights place huge amounts of half-price stock in the hands of the target's shareholders, thereby diluting the interest of the acquiror and making it economically prohibitive for the acquiror to complete its acquisition. All poison pills include a "redemption" provision that allows a target company's board of directors to extinguish the poison pill rights in order to permit a sale or merger of the company that is approved by the board.

In early August 1998, AlliedSignal announced an unsolicited, all-cash tender offer for all outstanding shares of AMP. In addition to the tender offer, AlliedSignal announced a consent solicitation to obtain AMP shareholders' consent to the election of new directors to AMP's board (the "Nominee Election Proposals"). The consent procedure, which is specifically authorized by Pennsylvania law and AMP's own Articles of Incorporation, allows AMP's shareholders to act by written consent without calling a meeting. The purpose of the consent solicitation, a strategy that is common in takeover contests when the target company has a poison pill, is to permit the shareholders to place new directors on AMP's board who would redeem the pill and allow the shareholders to vote on a merger proposal between AMP and AlliedSignal or permit AlliedSignal to complete its tender offer.

On August 4, 1998, AlliedSignal filed a complaint (C.A. No. 98-CV-4058) against AMP, alleging that AMP's poison pill was illegal because it contained a "dead hand" provision preventing newly elected directors from amending or redeeming the pill.(FN3) In response to AlliedSignal's tender offer and consent solicitation, the AMP board of directors amended AMP's poison pill to provide that, if AMP's shareholders voted to elect the AlliedSignal nominees, then ALL directors would be prevented from amending or redeeming the pill until it expires in November 1999 (the "nonredemption provision").

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3 The dead hand provision provided that the poison pill could be amended or redeemed only by a majority of the directors in office before a hostile takeover began or by their chosen and approved successors.

AlliedSignal then amended its consent solicitation to add a proposal, termed the "Shareholder Rights Proposal," asking that shareholders amend AMP's Bylaws, pursuant to ss. 1721 of the PBCL and Article VII of AMP's Articles, to place all powers with respect to AMP's poison pill in the hands of three "Shareholder Rights Agents." These agents would then amend the poison pill so that it would not apply to tender offers or merger proposals effectively approved by a majority of the outstanding shares. In response, AMP's board again amended the poison pill

to provide that, if AMP's shareholders voted to adopt this bylaw, then all power to amend or redeem the poison pill, whether exercised by directors or by Shareholder Rights Agents, would be lost until the poison pill expires (the "nullification provision"). AlliedSignal amended its complaint to challenge both amendments to AMP's poison pill.

On August 21, 1998, AMP filed a complaint against AlliedSignal and PMA Acquisition Corporation, alleging that AlliedSignal's tender offer and consent solicitation materials were false and misleading under federal law (AMP's "First Claim for Relief") and that AlliedSignal's Nominee Election Proposals were unlawful because AlliedSignal's nominees have an inherent conflict of interest with AMP (AMP's "Second Claim for Relief"). AMP amended its complaint on September 22 to add two additional claims, one regarding the legality of the Shareholder Rights Plan and the other regarding the ability of AlliedSignal to vote any AMP shares it purchases.

On September 11, 1998, AMP moved for partial summary judgment in the form of a declaratory judgment. AMP's motion was limited to its Second Claim for Relief regarding the nominees' alleged "inherent conflict of interest" and was limited to a request for a declaratory judgment. AMP's motion did not seek injunctive relief, and AMP expressly excluded from its motion the federal disclosure claims in its First Claim for Relief. Similarly, AMP did NOT include a motion for a declaratory judgment that the Shareholder Rights Proposal was unlawful. On September 23, 1998, AlliedSignal cross-moved for summary judgment on AMP's Second Claim for Relief.

On September 14, 1998, AlliedSignal moved for a preliminary injunction and summary judgment on the claims in its complaint, seeking to enjoin and declare illegal both amendments to AMP's poison pill. AMP cross-moved for summary judgment on these claims.

On October 8, 1998, after hearing argument, the district court issued an Order disposing of all pending motions and certain "motions" that had not been filed. First, although AMP had never moved for a judgment that AlliedSignal's Shareholder Rights Proposal was unlawful, the district court stated that it was "grant[ing]" AMP's non-existent "motion" and declared the Shareholder Rights Proposal illegal. Despite the fact that the Shareholder Rights Proposal was specifically predicated on authority granted to shareholders under PBCL ss. 1721, the district court's opinion did not even mention that section. Instead, the basis for the court's holding was that, although the Shareholder Rights Proposal was specifically denominated as a bylaw amendment, it actually "constitut[ed] an attempt to propose an amendment to AMP's Articles of Incorporation," which the court noted "cannot be done by shareholders." (Op. at P. 46.) AMP never made this argument.

Second, even though AlliedSignal had never argued that AMP's directors had breached their fiduciary duties, the court held that the two amendments to AMP's poison pill were not a breach of the directors' fiduciary duties and were not (as AlliedSignal had argued) ultra vires. The holding as to each poison pill amendment was based in part on the court's conclusion that each of AlliedSignal's consent proposals was unlawful. (Op. at P. 49-50.)

Third, although AMP had specifically declined to move on the disclosure claims in its complaint, the district court, without notice or hearing and without a record of AlliedSignal's current disclosures, held that AlliedSignal had not disclosed "unequivocally" that its nominees to AMP's board would owe exclusive fiduciary duties to AMP under Pennsylvania law. Without making any findings as to the materiality of this "omission," the court ordered AlliedSignal's consent solicitation enjoined until such a disclosure was made. In addition, without citing any precedent or authority, the court also conditioned its injunction on AlliedSignal's producing statements by "each individual nominee affirmatively committing personally to that duty." (Order at 2.)

Fourth, the district court denied AlliedSignal's motion for a declaratory judgment and preliminary injunction, finding that AMP's nullification and nonredemption amendments to its poison pill were permissible under Pennsylvania law. Incorrectly characterizing the pill amendments as imposing only "voting disqualifications for interested directors" (Op. at P. 56), the district court's opinion ignored the fact that the pill amendments prevent all directors -- interested or disinterested -- from redeeming or amending the pill, in direct derogation of the powers of current and future boards.

Finally, in a provision of its Order from which no appeal is taken, the district court, although recognizing that it had declared AlliedSignal's Shareholder Rights Proposal illegal in the first provision of its order, upheld AMP's choice of a record date for that provision and

denied AlliedSignal's request for a preliminary injunction.

#### STATEMENT OF FACTS

ALLIEDSIGNAL ANNOUNCES A TENDER OFFER FOR AMP. On August 4, 1998, AlliedSignal announced a tender offer for all outstanding shares of AMP at a price of \$44.50 cash per share (the "Initial Offer"), totaling approximately \$10 billion. (A 1140.) The \$44.50 price represented a premium of more than 55% over the price of AMP's stock before the announcement of the offer. (A 1140-41.)

AlliedSignal's Initial Offer was subject to several conditions. These conditions included redemption of the poison pill. (A 81-84.) On August 21, 1998, AMP's board of directors rejected the Initial Offer, preventing the conditions of the Initial Offer from being fulfilled. (A 237.) Despite the opposition of the AMP board, by the expiration date of the Initial Offer, AMP's shareholders had tendered 72% of AMP's outstanding shares to AlliedSignal, an overwhelming indication of support for the proposed business combination with AlliedSignal. (A 1141-42.)

Because the opposition of AMP's board prevented AlliedSignal from purchasing any shares, AlliedSignal revised its tender offer on September 14, 1998 (the "Amended Offer"). In the Amended Offer, AlliedSignal offered to purchase up to 40 million shares of AMP stock (approximately 18% of AMP's outstanding common shares) at \$44.50 per share. (A 763.) The planned purchase of 18% of AMP's stock was just below the number of shares AlliedSignal could acquire without triggering AMP's poison pill. (A 1142.)

On September 18, 1998, in response to AlliedSignal's Amended Offer, AMP amended its poison pill to lower the percentage of shares necessary to trigger the poison pill from 20% to 10%. As a result, AlliedSignal announced a revision of its Amended Offer reducing the number of shares it would purchase to 20 million at \$44.50 per share, approximately 9% of AMP shares. (A 1138-39.) The Amended Offer has closed, and AlliedSignal is in the process of purchasing the 20 million shares on a pro rata basis. After AlliedSignal completes its purchase of the 20 million shares under the Amended Offer, it intends to commence a new tender offer for all remaining AMP shares at \$44.50 per share. (A 1142.)

ALLIEDSIGNAL ANNOUNCES A CONSENT SOLICITATION OF AMP SHAREHOLDERS TO ELECT ADDITIONAL DIRECTORS TO AMP'S BOARD. At the time of its Initial Offer, AlliedSignal also announced its intention to conduct a consent solicitation to gain control of AMP's board.(FN4) (A 1148.) A consent solicitation is a procedure specifically authorized by Pennsylvania law and AMP's Articles of Incorporation that allows shareholders, without the necessity for a meeting, to authorize corporate actions by submitting written consents (effectively, ballots). See PBCL ss. 2524; Article IX of AMP's Articles of Incorporation. (A 554.) Because consent solicitations are subject to federal proxy rules, AlliedSignal filed a preliminary Consent Statement with the Securities and Exchange Commission ("SEC"). (A at 554.) When effective, that Consent Statement will be provided to all AMP shareholders. The AMP board of directors has filed a Consent Revocation Statement with the SEC, which also will be provided to AMP shareholders. (A 1153.)

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4 Consent solicitations or proxy contests to elect new members to a target company's board are a common part of a takeover bid. See, e.g., Shawn C. Lese, Preventing Control from the Grave: A Proposal for Judicial Treatment of Dead Hand Provisions in Poison Pills, 96 Colum. L. Rev. 2175, 2175 (1996) ("[T]oday, [hostile bidders'] method for gaining control usually involves commencing a tender offer in combination with a proxy or consent solicitation."); Steven Lipin, More Potent Weapons Dwell in Takeover Arsenal, Wall St. J., Sept. 7, 1995, at C1 ("The joining of proxy or consent solicitations with takeover bids is almost standard operating procedure now.") (quoting Peter Atkins of Skadden, Arps, Slate, Meagher & Flom, currently AMP's principal corporate legal advisors in connection with AlliedSignal's offer). (A 722.)

AlliedSignal's consent solicitation includes the Nominee Election Proposals, which essentially propose that AMP's shareholders elect an additional 17 persons to AMP's board of directors. (A 768-73, 784.) These 17 nominees are all current officers or directors of AlliedSignal. (A 770-73.) Twelve of the 17 nominees, however, are outside directors of AlliedSignal and do not hold management positions within the company.(FN5) (A 770-73.) Once elected, the 17 nominees will constitute a majority of AMP's board. The purpose of the consent solicitation is no secret: all 17 nominees have announced their intention, subject to their fiduciary duties to AMP, to support a merger of AMP and AlliedSignal. (A 761, 763, 769.)

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5 The qualifications of the 17 nominees are not in question. All 17 have held corporate positions of responsibility. Most have held executive and board positions with large U.S. companies including: Bell Atlantic Corporation, General Electric Corporation, The Prudential Insurance Company of America, American Home Products Corporation, CVS Corporation, Kraft Foods, Inc., Bankers Trust Company, GTE Corporation, Merrill Lynch & Co., Viacom, Inc., Schering-Plough Corporation, The Chase Manhattan Corporation, Deere & Company, Champion International Company, Digital Equipment Corporation and The Federal Home Loan Mortgage Corporation. (A 770-73.) Ten are current or former chief executive officers; one is a former member of the Joint Chiefs of Staff; one is a former astronaut; and another is the Chancellor of the University of California, Santa Barbara. (A 770-73.)

Even if the nominees are elected by AMP shareholders, however, they cannot effect a merger with AlliedSignal without a shareholder vote. Indeed, they first must undertake a process by which the entire board, including the "current" directors, reviews the desirability of submitting a merger proposal to AMP's shareholders under the facts and circumstances then existing. Under AMP's Articles of Incorporation, unless an acquiror owns 80% or more of AMP's shares, any merger agreement requires the affirmative vote of 66 2/3% of the votes cast by AMP's shareholders entitled to vote. (A 554.) Also, if the merger were at a price below the highest price that AlliedSignal has paid for AMP shares, it would require a majority vote of disinterested directors (i.e. not including the nominees) or of disinterested shareholders (i.e. not including AlliedSignal). See PBCL ss. 2538. In addition, if a merger is consummated involving all or part cash consideration (and AlliedSignal contemplates an all cash merger), the PBCL provides a specific procedure for a shareholder to object to the merger and obtain the rights and remedies of a dissenting shareholder, including the right to demand payment of the "fair value" of his or her shares. See PBCL ss. 1571-80, 1930(a).

ALLIEDSIGNAL HAS DISCLOSED THE MATERIAL FACTS ABOUT THE NOMINEES IN ITS CONSENT SOLICITATION. AlliedSignal's Consent Statement, as originally filed, fully describes the material facts regarding the nominees, including their ties to AlliedSignal and their intentions regarding a merger between AlliedSignal and AMP. The Consent Statement includes (1) the identity of each nominee and (2) for each nominee, a description of his or her professional background, including his or her affiliation with AlliedSignal. (A 770-73.) In addition, the Consent Statement discloses that, subject to their fiduciary duties:

[t]he nominees intend, if elected as directors of [AMP], to cause [AMP] to enter into and consummate a merger or similar business combination (a "Proposed Merger") with AlliedSignal as soon as reasonably practicable and under circumstances in which [AMP's poison pill] would not be triggered.

(A 763.)

AlliedSignal's Consent Statement also explains to shareholders that "AlliedSignal's primary purpose in seeking to elect the Nominees to the [AMP] Board is to facilitate the consummation of the Second Offer and Proposed Merger" and spells out for shareholders that the nominees, in certain circumstances, may have a potential "conflict of interest." (A 769.) The Consent Statement further discloses that the nominees do not have any plans with respect to the actions they may take if such circumstances occur, but that they "intend to discharge their obligations owing to [AMP] under Pennsylvania law and in light of then prevailing circumstances, taking into account the effects of any actions taken on [AMP's] shareholders and other stakeholders." (A 769.)

On October 1, 1998, AlliedSignal amended its Consent Statement to expand its disclosures. The Consent Statement, as amended October 1, 1998, explains that:

[T]he nominees understand that, in their actions as directors of the Company, they should not be guided by or take into account any duties or responsibilities they may have in other capacities to AlliedSignal or its stockholders, but rather are OBLIGATED TO ACT SOLELY WITH REGARD TO THEIR DUTIES AS DIRECTORS OF THE COMPANY UNDER APPLICABLE PENNSYLVANIA LAW.

(Tab 1 at 8.)(FN6) Similarly, in disclosing the circumstances in which the

nominees may face a conflict, the Consent Statement, as amended October 1, 1998, also states that:

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6 AlliedSignal has attached three documents to the accompanying Addendum to Appellant's Opening Brief (these documents are cited to throughout as "Tab \_\_\_.") that were not before the district court: (1) the Consent Statement, as amended October 1, 1998 (Tab 1); (2) the Consent Statement, as amended on October 13, 1998 to comply with the district court's Order (Tab 2); and (3) a full-page advertisement placed by AMP in the Wall Street Journal on Monday, October 12, 1998 (Tab 3). AlliedSignal submits these documents to establish, first, that it has complied with the district court's order pending appeal, see *Acierno v. Mitchell*, 6 F.3d 970, 973 n.8 (3d Cir. 1993) (taking notice of compliance with injunction); second, that, notwithstanding AlliedSignal's compliance, the district court's erroneous Order and opinion continues to affect the consent solicitation process; and third, that, had AlliedSignal had notice that the district court intended to consider AMP's disclosure claims, there was relevant evidence that AlliedSignal would have brought to the court's attention on the disclosure issues (namely, the Consent Statement, as amended October 1, 1998). Given the expedited nature of the present appeal and the significance of these intervening events, AlliedSignal requests, in connection with the filing of its Opening Brief, that the Court supplement the record by taking judicial notice of these materials. See *Federal Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270, 1284 (3d Cir. 1993).

Moreover, AlliedSignal has authorized and requested the nominees to participate in the consent solicitation and understands that their actions as directors of the Company must take into account ONLY THE INTERESTS OF THE COMPANY AND NOT THE INTERESTS OF ALLIEDSIGNAL except to the extent of AlliedSignal's interest as a shareholder of the Company in common with other shareholders of the Company.

Id.  
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On October 13, 1998, AlliedSignal amended its Consent Statement to comply with the district court's Order. (Tab 2.) In its Consent Statement, as amended October 13, 1998 AlliedSignal reinforces its prior disclosures by stating that "[t]he Nominees, if elected as directors of [AMP], WILL OWE A FIDUCIARY DUTY SOLELY TO [AMP] UNDER PENNSYLVANIA LAW." (Id. at 9.) The Consent Statement, as amended October 13, 1998, also explains that

Each Nominee has undertaken personally (in writing) to be bound by and discharge his or her duty of undivided loyalty to [AMP] and has agreed to perform his or her duties in good faith, in a manner that he or she reasonably believes to be in the best interests of [AMP].

(Id. at 9, A-V-1.) In addition, the Consent Statement, as amended October 13, 1998, sets forth in their entirety paragraphs 67-81 of the district court's Order relating to the Nominee Election Proposals. (Id. at 10-11.)

THE PROPOSALS IN ALLIEDSIGNAL'S CONSENT SOLICITATION ARE COMMON CORPORATE PRACTICE AND RECOGNIZED UNDER PENNSYLVANIA AND FEDERAL LAW. The district court suggests that there is something unusual about the nomination of acquiror-affiliated directors for the board of a target company. (Op. P. P. 75-76.) To the contrary, proposals such as those in AlliedSignal's consent solicitation that ask shareholders to elect directors affiliated with a potential acquiror to a target's board are common corporate practice. In fact, there have been at least 18 proxy contests and consent solicitations in the last five years in which an acquiror has nominated affiliated persons for election to the target's board, and in 12 of those situations, the acquiror-affiliated directors would have made up a majority of the target's board. (A 798-800.) In none of those situations did the target challenge the proxy or consent solicitation on the ground that the acquiror-affiliated nominees had a conflict of interest.

AMP ATTEMPTS TO PREVENT SHAREHOLDERS FROM VOTING ON THE CONSENT SOLICITATION PROPOSALS BY AMENDING ITS POISON PILL AND FILING THE CLAIMS AT ISSUE IN THIS APPEAL. After the announcement of AlliedSignal's Nominee Election Proposals, AMP's board took several steps to hinder AMP's shareholders from voting for the nominees. First, AMP's board delayed the

solicitation by setting a record date of October 15, 1998, two months after the consent solicitation was announced.(FN7) (A 1152.)

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7 The record date determines which AMP shareholders are entitled to give consent to the proposals in the consent solicitation and the number of outstanding shares for computing whether a majority of such shares have consented. Under the terms of AMP's Bylaws, shareholder consents are effective for 90 days from the record date. AMP Bylaw 1.7.1 (A 557.)

Second, on August 20, 1998, AMP's board announced an amendment to AMP's poison pill, adding the nonredemption provision that would make the poison pill non-redeemable and non-amendable, if AMP's shareholders elected a new majority to the AMP board. (A 688-92.) In that event, AMP's poison pill could no longer be redeemed by anyone, including the current directors, until the pill expires in November of 1999, regardless of whether a majority of the board or a majority of the shareholders supported a transaction and regardless of the identity of the bidder or the terms of its offer. Id.

ALLIEDSIGNAL AMENDS ITS CONSENT SOLICITATION TO PROPOSE A NEW BYLAW AND AMP'S BOARD AGAIN AMENDS AMP'S POISON PILL TO FRUSTRATE A SHAREHOLDER VOTE. In response to the AMP board's use of the poison pill to frustrate the election of new directors, AlliedSignal amended its consent solicitation to propose that AMP's shareholders adopt the Shareholder Rights Proposal pursuant to Article VII of the AMP Bylaws and PBCL ss. 1721, transferring the power over AMP's poison pill to three Shareholder Rights Agents. (A 761-68.) To prevent AMP's shareholders from approving the Shareholder Rights Proposal, AMP's board again amended AMP's poison pill, this time adding the nullification provision making the poison pill non-redeemable and non-amendable if the Shareholder Rights Proposal were adopted. (A 838s-838v.) AMP's board also set a separate record date of November 16, 1998 for the Shareholder Rights Proposal. (A 1155.)

#### SUMMARY OF ARGUMENT

THE DISTRICT COURT'S INJUNCTION. The order of the district court enjoining the pending consent solicitation exceeded the court's authority and was an abuse of discretion. There was no motion for such an injunction before the district court.

The ostensible basis for issuing the injunction was the court's conclusion that the disclosures in AlliedSignal's Consent Statement were not adequate, even though the motion before the Court EXPRESSLY EXCLUDED alleged disclosure violations. The parties had neither raised nor briefed that issue. As a result, the court's decision did not take into account the amended Consent Statement on file with the SEC and, thus, it was based on a clearly erroneous factual premise. Moreover, the court did not cite a single authority for its conclusion. Under clearly established federal securities law decisions, the disclosures were in fact adequate as a matter of law.

The court's ruling with respect to the consent solicitation also was based on an erroneous interpretation of ss. 2538 of the PBCL. The court held that ss. 2538, which establishes the procedures for approval of a corporate transaction with an interested shareholder, prevents a director affiliated with or nominated by the interested shareholder from voting on the transaction. The court had it exactly wrong. On the contrary, ss. 2538 plainly provides that directors affiliated with or nominated by the interested shareholder can vote on a transaction with the interested shareholder and, indeed, can constitute a majority of the favorable votes of the board even if a majority of disinterested directors do not support the transaction. In that event, however, one of the following conditions must occur: a majority of the disinterested shareholders must approve the transaction; or the price paid to the shareholders must not be less than the highest price paid by the interested shareholder. Pennsylvania's "interested director" statute, PBCL ss. 1728, which the district court never cited, also clearly provides that an interested director can vote on a merger transaction with a company with which the director is affiliated.

DENIAL OF ALLIEDSIGNAL'S MOTIONS. The district court denied AlliedSignal's motion to enjoin the two amendments to AMP's poison pill that make the pill non-redeemable and non-amendable if the shareholders, as they have a right to do, vote to change control of the board or take away powers of the board. The denial of the injunction was based, in each instance, on the erroneous holding that the board of director's action was a justified response to an "unlawful" proposal. Both proposals are lawful. The Nominee Election Proposals would amend AMP's Bylaws to enlarge the size of the board of directors and would elect AlliedSignal's nominees. The shareholders have a right to take those actions by the express terms of



PBCL ss. 2524, which permits shareholders to act by written consent without the need for a meeting, provided that the shareholders have that right pursuant to the company's articles of incorporation. Article IX of AMP's Articles of Incorporation provides:

ANY ACTION THAT MAY BE TAKEN AT A MEETING OF THE SHAREHOLDERS or of a class of shareholders may be taken without a meeting if proper consent is made to the action. ANY SUCH ACTION MAY BE TAKEN WITHOUT A MEETING UPON THE WRITTEN CONSENT OF SHAREHOLDERS who would have been entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote were present and voting. (Emphasis added.)

(A 554.) Neither AMP nor the district court challenges the right of shareholders to amend the bylaws, nominate directors, or elect directors.

The district court, however, characterized the proposals as an attempt by shareholders to propose a plan of merger because the nominees have stated an intention, subject to their fiduciary duties to AMP, to pursue a merger with AlledSignal. Once elected, however, the nominees, in their capacity as AMP directors, will consider whether a merger is in the best interests of AMP and then decide what action to take, taking into account all of the facts and circumstances at the time. Nothing in the proposals themselves commits the nominees to take specific action with respect to a merger or to take any action inconsistent with their fiduciary duties. Moreover, it would be astounding if a plan of merger proposed by the directors after their election, was deemed to be a plan of merger proposed by the shareholders simply because the directors had "run" for office on a specific platform and the shareholders had elected them on that basis.

With respect to the Shareholder Rights Proposal, which would give all powers with respect to the poison pill to a committee of Shareholder Rights Agents, the district court wrongly concluded that PBCL ss. 2513 requires that all powers with respect to a poison pill reside with the directors. The district court completely ignored the controlling provision, PBCL ss. 1721, which provides that the shareholders may take away from the board of director powers otherwise given to the board by statute and vest those powers in persons of the shareholders choosing.

Once one concludes that the proposals are lawful and can be presented to the shareholders, it follows that the two poison pill amendments, both adopted to prevent the shareholders from acting on the proposals, exceeded the authority of the directors and encroach upon the fundamental voting rights of the shareholders. This is not a case about whether the directors breached their fiduciary duties (as the district court analyzed it), but rather a case about whether the directors acted outside their statutory authority by penalizing the shareholders for taking action clearly within the shareholders' power and in restricting the future exercise of the board's discretion.

Under PBCL ss. 1502, the directors have no power to limit their authority to accept, reject or respond to a proposed acquisition. That is precisely what the two amendments do: if the shareholders vote as proposed, then the board has no ability to go forward with any merger until the poison pill expires, no matter who the other party to the merger is and no matter what price is offered.

This Court has held in the past that "actions taken for the purpose of interfering with the shareholder franchise must be supported by compelling justification." *IBS Fin. Corp. v Seidman & Assocs., L.L.C.*, 136 F.3d 940, 951 (3d Cir. 1998). There is no such justification here.

#### ARGUMENT

##### I. STANDARD OF REVIEW

The standard of review of a district court's grant of summary judgment is plenary. See *Iberia Foods Corp. v. Romeo*, 150 F.3d 298, 302 (3d Cir. 1998). The standard of review of both the grant of a permanent injunction and the denial of a preliminary injunction is abuse of discretion. See *Smith v. Magras*, 124 F.3d 457, 460 (3d Cir. 1997) (permanent injunction); *Troster v. Pa. State Dep't of Corrections*, 65 F.3d 1086, 1089 (3d Cir. 1995) (preliminary injunction). Abuse of discretion will be found where "the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *Smith*, 124 F.3d at 461; see also *Troster*, 65 F.3d at 1089; *AT&T Co. v. Winback and Conserve Program, Inc.*, 42 F.3d 1421, 1427 (3d Cir. 1994) (vacating district court's denial of preliminary injunction and noting that "a court of appeals must reverse if the district

court has proceeded on the basis of an erroneous view of the applicable law") (citation and internal quotation marks omitted).

II. THE DISTRICT COURT ERRED IN ENJOINING THE PENDING ELECTION OF DIRECTORS UNTIL ALLIEDSIGNAL AND THE DIRECTOR NOMINEES MADE ADDITIONAL DISCLOSURES

The district court enjoined the pending consent solicitation on the ground that AlliedSignal had inadequately disclosed the fiduciary duties owed by directors under Pennsylvania law. The district court's order must be reversed for three independent reasons: (1) AMP never made a motion based on its disclosure claim, and the court did not have the benefit of briefing, argument, or a full record on this important issue; (2) AlliedSignal's Consent Statement already included the disclosures required by federal law and, indeed, the essence of the specific disclosures ordered by the district court; and (3) the court based its order on a fundamental misinterpretation of Pennsylvania law.(FN8)

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8 The unfounded injunction order causes AlliedSignal continuing prejudice in connection with the consent solicitation. Although AlliedSignal has amended its consent solicitation to reinforce the required disclosures, AMP has already threatened to challenge AlliedSignal's compliance with the Order. The Order and opinion also send an unwarranted but clear message to AMP's shareholders that they have substantial reason in the eyes of the court to be wary of AlliedSignal's nominees and not to consent to the nominees. The AMP directors have already included the court's decision in its solicitation materials opposing AlliedSignal's proposals and yesterday published a full-page advertisement in the Wall Street Journal seeking to take advantage of the district court's decision. (Tab 3.)

A. THE DISTRICT COURT ERRED IN GRANTING RELIEF THAT HAD NOT BEEN REQUESTED ON A CLAIM THAT WAS NOT INCLUDED IN AMP'S MOTION

This Court has cautioned that, "[u]nder our cases, a district court may not grant summary judgment sua sponte unless the court gives notice and an opportunity to oppose summary judgment." *Otis Elevator Co. v. George Washington Hotel Corp.*, 27 F.3d 903, 910 (3d Cir. 1994); see also *Chambers Dev. Co., v. Passaic County Utilities Auth.*, 62 F.3d 582, 584 n.5 (3d Cir. 1995) (holding that sua sponte summary "judgment cannot be entered without first placing the adversarial party on notice . . . [and providing] the party with an opportunity to present relevant evidence in opposition to that motion"). Failure to afford notice and opportunity to be heard by granting judgment sua sponte "endanger[s] important rights and . . . [is] likely to result in judicial inefficiency and deprivation to the rights of one of the parties." *American Flint Glass Workers Union, AFL-CIO v. Beaumont Glass Co.*, 62 F.3d 574, 578 n.5 (3d Cir. 1995).

Here, AMP expressly declined to move on its federal disclosure claim and stated so in its brief below (alleged "disclosure problems . . . are not the subject of AMP's present motion") (A 1122) and at oral argument.(FN9) Thus, the court's sua sponte order deprived AlliedSignal of the opportunity to present a complete factual record for the court. See *Otis Elevator*, 27 F.3d at 910 (unless notice of summary judgment is given, a party is under no compulsion to "marshall all of the evidence in support of his claims") (citation and internal quotation marks omitted). In fact, the court issued its order based on disclosure statements that had already been supplemented by a later, more detailed public filing that included the critical core of the disclosures ordered by the district court. (Tab 1 at 8.) That supplemental public filing was not submitted to the district court because the adequacy of AlliedSignal's disclosures was not at issue in any pending motion.

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9 Counsel for AMP compounded the court's confusion. Although counsel for AMP did inform the court at oral argument that there was no motion before it concerning AlliedSignal's disclosures, AMP's counsel incorrectly suggested that it had filed such a motion:

THE COURT: Well, there is a motion before me as to whether or not there has been full disclosure by Allied.

MR. HARKINS [AMP'S COUNSEL]: We haven't brought that on to the Court today, BUT YOU'RE ABSOLUTELY RIGHT, YOUR HONOR.

(A 1242) (emphasis added). In fact, AMP has never brought any motion regarding AlliedSignal's disclosures.

B. THERE IS NO EVIDENCE THAT ALLIEDSIGNAL VIOLATED THE FEDERAL SECURITIES LAWS

In ordering the additional disclosures, the district court did not make the required finding that the omitted statements would be material to any shareholder. See SEC Rule 14a-9, 17 C.F.R. ss. 240.14a-9 (promulgated under 15 U.S.C. ss. 78n(a)) (prohibiting false or misleading statements or omissions "of material fact"); see also *General Elec. Co. v. Cathcart*, 980 F.2d 927, 932 (3d Cir. 1992). (FN10) Indeed, no such finding of materiality was possible in this case.

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10 The district court misapplied this test by finding that the omitted statements were "material to AMP's motion" instead of material to a reasonable shareholder. (Op. at P. 66.)

An omission is material only "if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote" when considered as part of the "total mix" of information available to shareholders. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (U.S. 1976). Here, even the version of AlliedSignal's Consent Statement before the district court disclosed that the nominees "understand that, as directors of [AMP], each of them has an obligation under Pennsylvania law to discharge his or her duties as a director in good faith IN A MANNER HE OR SHE REASONABLY BELIEVES TO BE IN THE BEST INTERESTS OF [AMP] and with such care, including reasonable inquiry, skill and diligence, as a person of ordinary prudence would use under similar circumstances." (A 769.) (emphasis added.) The Consent Statement further stated that the nominees "intend to discharge THEIR OBLIGATIONS OWING TO THE COMPANY UNDER PENNSYLVANIA LAW." (A 769.) (emphasis added.) There is no material difference between AlliedSignal's disclosures and the additional disclosure ordered by the district court.

In addition, in its amended Consent Statement that had been filed with the SEC on October 1 -- before the court's decision -- AlliedSignal made the following disclosures:

[T]he nominees understand that, in their actions as directors of the Company, they should not be guided by or take into account any duties or responsibilities they may have in other capacities to AlliedSignal or its stockholders, but rather ARE OBLIGATED TO ACT SOLELY WITH REGARD TO THEIR DUTIES AS DIRECTORS OF THE COMPANY UNDER APPLICABLE PENNSYLVANIA LAW.

(Tab 1 at 8.) Not only does this statement unequivocally state that the nominees' duty is only to AMP, but it also makes clear that the nominees understand that they are obligated to act solely with regard to their duties as directors of AMP. *Id.*

Thus, AlliedSignal's disclosures in its original or amended Consent Statements are sufficient, as a matter of law, to satisfy federal disclosure obligations. In *Kas v. Financial Gen. Bankshares, Inc.*, 796 F.2d 508, 511 (D.C. Cir. 1986), for example, the plaintiff alleged that defendants' proxy material failed to disclose that the dual roles of two individuals who served as directors of a target corporation and as attorneys to, and directors of, the acquiror constituted a "conflict of interest." The proxy materials, however, disclosed the fact that these two directors served as directors of the acquiror. See *id.* at 515. The court held that the proxy material could not "be faulted because it never uses the actual phrase 'potential conflict of interest,'" explaining that "[t]he federal securities laws require only that the various roles of the [directors] be clearly disclosed -- as they were." *Id.* at 517. Here, AlliedSignal went beyond *Kas*: it not only disclosed the nominees' roles, but also acknowledged the potential conflict of interest. See *Valley Nat'l Bank of Arizona v. Westgate-California Corp.*, 609 F.2d 1274, 1281-82 (9th Cir. 1979) (holding that proxy material adequately disclosed the dual position of directors on both acquiror's and acquired's board and refusing to undo merger transaction).

Moreover, the district court's injunction goes beyond merely requiring disclosure of omitted facts; it orders AlliedSignal to provide a "statement from each nominee affirmatively committing personally" to their exclusive loyalty to AMP. (Order at 2.) Whatever the benefits of having director candidates pledge exclusive loyalty to the corporation they wish to serve -- and all AlliedSignal's nominees have willingly made that pledge -- a court has no authority (and neither AMP nor the Order identifies any) to require such a pledge under the federal disclosure laws, or any other

law. In any event, the nominees had already, in effect, made such attestations. The October 1, 1998 Consent Statement states that "the nominees understand that . . . [they] are obligated to act solely with regard to their duties as directors of [AMP]." (Tab 1 at 8.) Such a statement -- made under the penalties of the securities laws -- is tantamount to the attestations ordered by the district court.

C. THE DISTRICT COURT'S INJUNCTIVE RELIEF IS PREMISED ON A FUNDAMENTAL MISUNDERSTANDING OF PENNSYLVANIA LAW

The district court's ruling on the Nominee Election Proposals is also premised on an erroneous interpretation of PBCL ss. 2538 and on the court's mistaken conclusion that the nominees, if elected, will be unable to support the merger proposal without breaching their fiduciary duties. The court's opinion is particularly significant because AMP shareholders may rely on the court's holding in deciding whether or not to vote for the nominees. Thus, if left to stand, the district court's Order, and the opinion on which it is based, will likely infect the entire corporate election process. Shareholders will be left to vote on the central issue of corporate governance -- who will sit on AMP's board of directors -- based on the district court's fundamental misperception of Pennsylvania law.

Indeed, the district court's opinion paints the following scenario for the shareholders who will be asked to consent to the election of the nominees: if shareholders elect the nominees, the nominees "may be disqualified as AMP directors by self-restraint or by judicial restraint, from voting on or implementing acquisition related transactions." (Op. at P. 75.) The district court also predicts that, if elected, the nominees will become "embroiled" in "protracted litigation on each and every action that relates to acquisition or AMP corporate independence" and "will have an inherent conflict that will NECESSARILY put them at risk of violating Pennsylvania's fiduciary duty standard." (Op. at P. P. 68, 73, 76.) The import of the district court's opinion is clear: if elected, the nominees cannot do what they were elected to do -- support the AlliedSignal tender offer or merger proposal -- without violating Pennsylvania law and breaching their fiduciary duties.

1. SECTION 2538 PERMITS INTERESTED DIRECTORS TO VOTE ON TRANSACTIONS WITH AN INTERESTED SHAREHOLDER

Paragraph 56 of the district court's opinion contains the following blatant misstatement of Pennsylvania law:

Such disqualifications [of interested directors] have been expressed by the Pennsylvania Legislature with respect to interested directors in the context of voting on a merger transaction. 15 Pa. Cons. Stat. Ann. ss. 2538(b). Only disinterested directors may vote to approve a plan of merger if the board were asked to adopt or reject the same.

Similarly, paragraph 79 states: "Under Section 2538, interested directors are prohibited from voting on merger transactions." The district court is wrong. Section 2538 expressly allows directors who are affiliates or nominees of an interested shareholder ("interested directors") to vote on a proposed corporate transaction with an interested shareholder.

Section 2538(a) provides that certain transactions with interested shareholders "shall require the affirmative vote of the shareholders entitled to cast at least a majority of the votes that all shareholders other than the interested shareholder are entitled to cast with respect to the transaction, without counting the vote of the interested shareholder." Section 2538(b) then provides three separate exceptions to the general rule: (1) transactions approved by a majority vote of the board of directors without counting the vote of interested directors; (2) transactions in which the consideration to be received by the shareholders is not less than the highest amount previously paid by the interested shareholder in acquiring shares; and (3) mergers in which the interested shareholder owns 80% or more of the outstanding shares.

Contrary to the district court's conclusion, there is NO language in ss. 2538 stating that interested directors cannot vote in favor of a merger. Indeed, if interested directors could not vote in favor of a merger, there would be no need for the exception in ss. 2538(b)(1) for transactions approved by a majority of the directors not counting the vote of interested directors. Without interested directors voting, such transactions could only be approved by a majority of the disinterested directors. In fact, under ss. 2538, not only can interested directors vote on merger proposals, they can cast a majority of the votes in favor of those proposals even without the support of a majority of "disinterested" directors so long as (1) the merger proposal is subject to a vote of

disinterested shareholders under ss. 2538(a), or (2) the price offered in the merger is the highest price paid by the interested shareholder.

The conclusion that interested directors can vote on a merger with an interested shareholder is also supported by PBCL ss. 1728. Section 1728, Pennsylvania's "interested director statute," expressly provides that a "transaction" between a corporation and another company in which one or more of the first corporation's directors have an "interest"

shall not be void or voidable solely for that reason, or solely because the [interested] director or officer is present at or participates in the meeting of the board of directors that authorizes the contract or transaction, OR SOLELY BECAUSE HIS OR THEIR VOTES ARE COUNTED FOR THAT PURPOSE

if one of the specified conditions of the statute is met (emphasis added). Thus, the interested director statute specifically contemplates that an acquiror-affiliated director can vote on a merger transaction between a corporation and an interested shareholder.(FN11) See also Landy v. Amsterdam, 815 F.2d 925, 930 (3d Cir. 1987) (plaintiff could not maintain a cause of action merely by showing that two corporations involved in a merger were controlled by the same trustees).(FN12)

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11 The text of the interested director statute is incorporated almost verbatim into AMP's own Bylaws at ss. 2.12. (A 564.)

12 AMP argued below that Landy was inapposite, primarily because that case involved neither the director's "obligations to their corporation" nor a "board packing scheme." This misses the point. AMP's arguments are based on the allegation that the nominees' affiliation with AlliedSignal create an inherent conflict of interest. Landy simply recognizes that Pennsylvania has rejected such a simplistic analysis of merger transactions in which directors sit on the boards of both companies.

## 2. THE DISTRICT COURT'S PREMISE THAT THE NOMINEES CANNOT ACT WITHOUT BREACHING A FIDUCIARY DUTY IS INCONSISTENT WITH PENNSYLVANIA LAW AND STANDARD CORPORATE PRACTICE

A fundamental premise of the district court's opinion appears to be that the nominees, if elected, would be unable to act without breaching their fiduciary duties to AMP. For example, according to the court, since AMP's current directors determined that AlliedSignal's offer was not in AMP's best interests, the "fiduciary duty" of the current directors "may well compel legal challenge" to the nominees' actions, if they are elected. (Op. at P. 77.) That conclusion cannot be correct in the abstract, but can properly be reached only based upon the deliberations and decisions of the reconstituted board. There is no presumption of unfair dealing in these circumstances. The district court's theory ignores entirely the fact that the directors' interaction after the election may cause the old or new directors to have a new understanding. Pennsylvania, like other states, does not outlaw potential conflicts of interest. Rather, it requires full disclosure and an analysis of fair dealing on a case by case basis. That is the mandate of PBCL ss. 1728.

At bottom, the district court reads a "disinterestedness" element into the requirements for an individual to serve on a corporate board and vote on transactions, but there is no legal or factual support for such a requirement. See PBCL ss. 1722(a); AMP Bylaw ss. 2.1 ("[d]irectors shall be at least 18 years of age and need not be United States citizens or residents of Pennsylvania or shareholders of the Corporation.") (A 561.) Nothing in Pennsylvania law or AMP's Articles or Bylaws remotely suggests that shareholders' fundamental right to elect directors of their choosing may be limited or taken away simply because a nominee is affiliated with a potential acquiror. Such a disinterestedness requirement would be contrary to those PBCL sections that expressly contemplate the vote of interested directors on merger proposals. See PBCL ss. 1728, 2538.

## III. THE DISTRICT COURT ERRED IN NOT ISSUING A PRELIMINARY INJUNCTION AGAINST THE NONREDEMPTION AND NULLIFICATION PROVISIONS

### A. ALLIEDSIGNAL'S CONSENT SOLICITATION PROPOSALS ARE AUTHORIZED BY THE PBCL, AMP'S ARTICLES OF INCORPORATION, AND AMP'S BYLAWS

The district court denied AlliedSignal's preliminary injunction motion on the ground that AlliedSignal's consent solicitations are unlawful. The district court expressly held "unlawful" AlliedSignal's Shareholder Rights Proposal, that would amend AMP's Bylaws to take power

with respect to the poison pill away from the board. (Op. at P. P. 43-47.) The district court also characterized AlliedSignal's Nominee Election Proposal as an "attempt [by] a shareholder to propose a plan of merger," and then held that "[s]uch action is beyond the powers of the shareholders and, therefore, is unlawful." (Op. at P. 50.) In making these findings, the district court ignored clear statutory authority for AlliedSignal's consent solicitations and manifested a basic misunderstanding of the PBCL.

#### 1. THE NOMINEE ELECTION PROPOSALS ARE LAWFUL

Neither AMP nor the district court questions AlliedSignal's right to conduct a consent solicitation to enlarge the size of the board and elect new directors. That right is clearly articulated in the PBCL and AMP's Articles of Incorporation. Section 2524 of the PBCL provides that "[a]n action may be authorized by the shareholders of a registered corporation without a meeting by less than unanimous written consent only if permitted by its articles." Article IX of AMP's Articles of Incorporation provides:

ANY ACTION THAT MAY BE TAKEN AT A MEETING OF THE SHAREHOLDERS or of a class of shareholders may be taken without a meeting if proper consent is made to the action. ANY SUCH ACTION MAY BE TAKEN WITHOUT A MEETING UPON THE WRITTEN CONSENT OF SHAREHOLDERS who would have been entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all shareholders entitled to vote were present and voting. (Emphasis added.)

(A 554.) Shareholders are entitled to amend the bylaws (PBCL ss. 1504) and, of course, nominate and elect directors (PBCL ss. 1725).

The district court held that the Nominee Election Proposals are nonetheless "unlawful" because, in the court's view, they are an attempt by a shareholder to "propose a plan of merger." (Op. at P. 50.) There is no disagreement that only a board of directors may propose a plan of merger, but that is beside the point. The Nominee Election Proposals by their terms relate only to (1) amending the bylaws to expand the size of the board and clarify the nomination process and (2) electing new directors. Nothing in the proposals refers to shareholders proposing a plan of merger; most importantly, the shareholders will not be taking any action that approves a plan of merger if they consent to the proposals.

It is true that the nominees have stated their intention, if elected, and subject to their fiduciary duties to AMP, to propose to the entire board a plan of merger between AMP and AlliedSignal. That plan will not be sent to the shareholders for a vote unless it is first approved by the board of directors as being in AMP's best interests in light of the facts and circumstances at that time. If the district court were correct that this stated intention, by itself, constituted an illegal attempt by a shareholder to propose a plan of merger, no nominee could ever state his intention to take any action as a director that can be taken only by the directors. The federal securities laws REQUIRE that nominees for election as directors disclose any plans they have regarding transactions with the company involved, such as a proposed merger. This required disclosure cannot create a plan by a shareholder to propose a "plan of merger."

#### 2. ALLIEDSIGNAL'S SHAREHOLDER RIGHTS PROPOSAL IS EXPLICITLY AUTHORIZED BY PENNSYLVANIA LAW

The district court's refusal to enjoin the nullification provision was based on its conclusion that the provision was an attempt to counter "an anticipated unlawful act by AlliedSignal and other shareholders." (Op. at P. 45.) That "unlawful" act was AlliedSignal's Shareholder Rights Proposal which, according to the district court, "violates BCL Section 2513" and constitutes an improper attempt to amend AMP's Articles of Incorporation. (Op. at P. P. 43, 46.) The district court's conclusion, however, is contrary to Pennsylvania law. Section 1721 of the PBCL (which the district court does not mention even once in its entire 26-page opinion) expressly gives AMP shareholders the right to transfer to other persons powers that the PBCL grants to the board of directors:

Unless otherwise provided by statute OR IN A BYLAW ADOPTED BY THE SHAREHOLDERS, all powers enumerated in section 1502 (relating to general powers) AND ELSEWHERE IN THIS SUBPART or otherwise vested by law in a business corporation shall be exercised by or under the authority of, and the business and affairs of every business corporation shall be managed under the direction of a board of directors. IF ANY SUCH PROVISION IS MADE IN THE BYLAWS, THE POWERS AND DUTIES

CONFERRED OR IMPOSED UPON THE BOARD OF DIRECTORS BY  
THIS SUBPART SHALL BE EXERCISED OR PERFORMED TO SUCH  
EXTENT AND BY SUCH PERSON OR PERSONS AS SHALL BE  
PROVIDED IN THE BYLAWS.

PBCL ss. 1721 (emphasis added). The powers set forth in PBCL ss. 2513 are nowhere excluded from the broad authority granted to shareholders by ss. 1721.(FN13)

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13 AMP argued below that PBCL ss. 2501(b) should be read to mean that ss. 2513 trumps ss. 1721 on the grounds that ss. 2513 is a "specific provision" that should control over a "general provision" such as ss. 1721. AMP is wrong for at least two reasons. First, the concept of the specific controlling over the general only applies if statutory provisions conflict. Nothing in ss. 2513 purports to give the directors sole or exclusive authority over the poison pill or otherwise conflicts with ss. 1721. Second, ss. 2501 was designed to clarify situations in which there is true conflict between provisions elsewhere in the PBCL generally applicable to corporations and those in Chapter 25 applicable to registered corporations. Compare e.g. PBCL ss. 1755(b) (shareholders entitled to cast at least 20% of outstanding voting shares may call special meeting) with PBCL ss. 2521 (shareholders of registered corporation may not call special meeting); PBCL ss. 1766(b) (shareholders may act by consent if authorized in bylaws) with PBCL ss. 2524 (shareholders of registered corporation may act by written consent if authorized in articles of incorporation); PBCL ss. 1912(a) (shareholders entitled to cast 10% of outstanding voting may propose an amendment to articles) with PBCL ss. 2535 (shareholders of registered corporation may not propose an amendment to articles); PBCL ss. 1924(b)(1)(ii) (plan of merger does not require shareholder approval if corporation that is party to merger owns 80% of each class of corporation's shares) with PBCL ss. 2539 (merger of registered corporation without shareholder approval pursuant to ss. 1924(b)(1)(ii) requires board approval).

The authority of AMP shareholders to implement the Shareholder Rights Proposal flows directly from the fundamental underlying philosophy of the PBCL -- to allow shareholders maximum flexibility in structuring and controlling the affairs of their corporation. In fact, the PBCL is structured in large part as a collection of default provisions that shareholders can reject or otherwise modify and that control only if shareholders do not decide otherwise.(FN14) As one of the draftsmen of the 1988 amendments to the PBCL recently commented, the PBCL is unique in the degree of flexibility it grants to the shareholders of a Pennsylvania corporation:

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14 See, e.g., ss. 1521(c) (providing that shareholders may adopt bylaws setting forth "additional provisions regulating or restricting the exercise of corporate powers"); ss. 1729(a) (allowing shareholders to modify directors' voting rights through a bylaw amendment); ss. 1731 (providing that corporate bylaws may restrict the powers of board committees); ss. 1306(a)(8), (b) (allowing corporate articles to relax, be inconsistent with or supersede statutory provisions).

One of the most important differences between the 1988 PA BCL and the corporation laws of other states is the extent to which the Pennsylvania law validates the ability of the owners of a Pennsylvania business corporation to control the internal affairs of their corporation by contract.

William H. Clark, Jr., What the Business World is Looking for in an Organizational Form: The Pennsylvania Experience, 32 Wake Forest L. Rev. 149, 169 (1997).

Despite the fact that ss. 1721 is the one PBCL section directly on point (and AlliedSignal relied heavily on that section in its briefing and at oral argument), the district court fails even to mention PBCL ss. 1721 in its opinion. Rather, it relies exclusively on the power granted to the directors pursuant to PBCL ss. 2513 to "adopt poison pills" and fix their terms. (Op. at P. 49.) That reliance is misplaced and again turns statutory interpretation on its head. Section 2513 cannot be read without reference to ss. 1721. Indeed, as with any other powers granted to the directors by the PBCL, the directors' ability to exercise the powers described in ss. 2513 are subject to the shareholders' overarching authority to transfer those powers to other persons under ss. 1721.

The district court also suggests that the Shareholder Rights Proposal is an attempt to alter AMP's Articles of Incorporation through a bylaw amendment. (Op. at P. 43, 46.) The district court's only basis for this conclusion is the fact that AMP did not opt out of ss. 2513 and, according to the district court, the failure to opt out operates to incorporate the powers set forth in ss. 2513 into AMP's Articles of Incorporation (which cannot be amended through a bylaw). (Op. at P. 29.) This assertion is a non-sequitur. AMP's failure to opt-out of ss. 2513 does not operate to make ss. 2513 part of AMP's Articles. At most, AMP's decision not to opt-out simply means that AMP is subject to ss. 2513 as a provision of Pennsylvania law, nothing more and nothing less. Moreover, nothing in AMP's Articles speaks to the directors' authority with respect to a poison pill, let alone purports to give the board of directors sole authority on issues relating to a poison pill. Thus, the Shareholder Rights Proposal does not operate to amend anything in AMP's Articles of Incorporation.

Most importantly, the Shareholder Rights Proposal is expressly authorized by AMP's Articles of Incorporation, which allow shareholders to modify or limit the directors' powers through an amendment to AMP's Bylaws. Article VII of AMP's Articles incorporates PBCL ss. 1721 and provides that "[E]XCEPT AS OTHERWISE PROVIDED by statute or by these Articles of Incorporation as the same may be amended from time to time OR BY BYLAWS AS THE SAME MAY BE AMENDED FROM TIME TO TIME, all corporate powers may be exercised by the Board of Directors."(FN15) (A 553.) In short, far from giving the existing directors exclusive power over AMP's poison pill, Article VII allows shareholders to decide through bylaws who should exercise the powers initially given to the directors by statute.(FN16)

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15 See also Bylaws ss. 9.1 (A 575.) Moreover, the PBCL expressly provides that shareholders entitled to vote shall have the power to adopt, amend and repeal the bylaws of a business corporation. PBCL ss. 1504(a).

16 One of the few courts to examine the issue of a shareholder bylaw regarding a poison pill has found such a bylaw to be valid. International Bhd. of Teamsters Gen. Fund v. Fleming Cos., Inc., No. Civ-96-1650-A, 1997 U.S. Dist. LEXIS 2980 (W.D. Okla. Jan. 24, 1997). In the Fleming case, a shareholder proposed a bylaw that required the Fleming board to redeem its poison pill and obtain shareholder approval before adopting any new pill. Upholding the validity of the proposed bylaw under Oklahoma law (which parallels Delaware, not Pennsylvania, law), the court recognized that, although boards may adopt poison pills, they cannot deprive shareholders of ultimate control. Id. at \*2.

Finally, the district court compounded its error by purporting to grant a motion that was never made. The first numbered paragraph of the October 8 Order refers to, and grants, "AMP's motion for partial summary judgment, in the nature of a declaratory judgment that AlliedSignal's consent solicitation plan is unlawful in that it attempts to have AMP shareholders amend AMP's Bylaws to place the board of directors' authority over the shareholder rights plan in the hands of persons not on the board." AMP made no such motion. Indeed, AMP never requested relief of any kind on AlliedSignal's Shareholder Rights Proposal.

**B. THE NONREDEMPTION AND NULLIFICATION PROVISIONS ARE ILLEGAL AS THEY ARE BEYOND THE POWER OF A BOARD OF DIRECTORS TO ENACT AND ARE IMPERMISSIBLE ATTEMPTS TO PUNISH SHAREHOLDERS FOR EXERCISING THEIR VOTING RIGHTS**

Both the nonredemption and nullification provisions have essentially the same two-part structure: if AMP's shareholders choose to oust AMP's current directors from exercising power over the company's poison pill -- either by voting for the Nominee Election Proposals to replace them with a new board majority or by voting for the Shareholder Rights Proposal to transfer their power over the pill to shareholder rights agents -- then, as a direct and immediate consequence of that vote, all power over the poison pill is extinguished and the pill becomes non-amendable and non-redeemable, by anyone, until it expires. Thus, for a period of over one year, AMP's board could not consider a merger proposal, no matter how attractive the terms, how high the price, or how qualified the bidder.

Each part of this structure violates Pennsylvania law. First, a Pennsylvania board of directors has no power to prevent a future board (or those exercising the powers of the board) from amending or redeeming a company's poison pill. Second, AMP's board cannot exercise its authority with respect to the poison pill to interfere directly with a shareholder



vote.

The district court failed to confront the clear statutory limits on the board in this area and, instead, analyzed the case as if it were a breach of fiduciary duty case. In part, the district court may have made this mistake that AMP's briefs below were replete with arguments that the AMP board had not breached their fiduciary duty. AlliedSignal, however, never argued that they had; its position was clear:

This is a case about the fundamental division of power between the shareholders -- the owners of a corporation -- and their elected representatives, the board of directors. It is not a case about the latitude given to directors in exercising the powers properly vested in them; nor is it about a breach of fiduciary duties. It is a case about shareholder rights.(FN17)

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17 Memorandum in Support of AlliedSignal's Motion for Summary Judgment and for an Immediate Declaratory Judgment and Preliminary Injunction filed September 14, 1998. (A 478q-478r.)

1. THE NONREDEMPTION AND NULLIFICATION PROVISIONS ARE ILLEGAL RESTRICTIONS ON A FUTURE BOARD'S POWER AND RESPONSIBILITIES UNDER THE PBCL

PBCL ss. 1721 mandates that that "[u]nless otherwise provided by statute or in a bylaw adopted by the shareholders, all powers enumerated in section 1502 . . . or otherwise vested by law in a business corporation shall be exercised by, or under the authority of . . . a [corporation's] board of directors." One of the powers specifically enumerated in PBCL ss. 1502 is the power "[t]o accept, reject, respond to or take no action in respect of an actual or proposed acquisition, divestiture, tender offer, takeover or other fundamental change under Chapter 19 . . . or otherwise." PBCL ss. 1502(18). The Committee Comment to ss. 1502(18) makes clear that the power to accept, reject, or respond to a proposed acquisition includes the power to amend or redeem the poison pill:

The type of decision committed to the board of directors by subsection (a)(18) is intended to include, among other things, whether to adopt a shareholder rights plan (sometimes referred to as a "poison pill") and, if a shareholder rights plan is or has been adopted, whether to redeem the rights.

Committee Comment to PBCL ss. 1502. The powers enumerated in PBCL ss. 1502 cannot be limited by unilateral director action: section 1502 provides that Pennsylvania corporations "shall" have all the enumerated corporate powers, "[s]ubject to the limitations and restrictions imposed by statute or contained in [their] articles." The limitations at issue here were created through unilateral board action adopting the poison pill amendments, not by statute or through the Articles.

A similar action by a corporate board was held unlawful in *Bank of New York Co. v. Irving Bank Corp.*, 528 N.Y.S.2d 482 (Sup. Ct. N.Y. County 1988). In *Bank of New York*, the court invalidated a dead hand amendment to a company's poison pill (purporting to make the pill non-redeemable by any director except those on the board when the amendment was enacted and their designees). *Id.* at 485-86. The court recognized that the dead hand amendment was a restriction on the power of future boards of directors to amend or redeem the pill and held that under governing New York law such restrictions were valid only if adopted in a company's articles of incorporation. *Id.* at 485. As the dead hand amendment was enacted by unilateral board action, it was contrary to the statute and illegal. *Id.*

The nullification provision is also beyond the power of the AMP board for another reason: it contravenes the express authority of Article VII of the AMP Articles and PBCL ss. 1721. The Shareholder Rights Proposal seeks to have shareholders exercise their authority under Article VII and ss. 1721 to adopt a bylaw transferring the AMP board's power over the company's poison pill to Shareholder Rights Agents. The nullification provision, however, is designed to render the Shareholder Rights Proposal void ab initio, by providing that as soon as shareholders pass a bylaw to transfer the power over the poison pill from the board, that power is extinguished. As an attempt to abrogate AMP shareholders' statutory right to transfer the powers of their board, the nullification provision is in direct conflict with AMP's own Articles and with Pennsylvania law.

The opinion of the district court ignores these statutory

limitations on the power of the board. Instead, the district court erroneously analyzes the legality of the nonredemption and nullification provisions as a question of fiduciary duty. (Op. at P. P. 49, 61, 62.) This analysis, however, misses the point. At issue is not the propriety of the board's decision to amend the pill, but rather the board's legal authority to do so in a manner that removes the power of future boards over the pill (and robs shareholders of authority expressly given to them by the AMP Articles and PBCL ss. 1721). See Bank of New York, 528 N.Y.S.2d at 485 (distinguishing the issue of "the propriety of the adoption of the plan" from the "legality of . . . [a] provision restricting the power of duly elected directors"). AMP's pill amendments go far beyond the dead hand pills, which have been declared unlawful in a number of cases even though they permit disinterested directors to redeem the pill. See *id.*; *Carmody v. Toll Brothers, Inc.*, C.A. No. 15983, 1998 Del. Ch. LEXIS 131, \*36-37, \*40 n.30 (Del. Ch. July 24, 1998).

Moreover, even a fiduciary duty analysis reveals the illegality of the nonredemption and nullification provisions. Under Pennsylvania law, the fiduciary duty of a director requires that he "shall perform his duties . . . with such care, including reasonable inquiry, skill, and diligence, as a person of ordinary prudence would use in similar circumstances." PBCL ss. 1712 (emphasis added). These fiduciary duties are applicable to board decisions with respect to poison pills. See Committee Comment to PBCL ss. 2513 (directors' decisions "in connection with a shareholder rights plan, including . . . redemption of the rights" will be subject to directors' fiduciary duty standard). Thus, the board's attempted abdication of its authority and responsibility to respond to merger proposals by enacting the nonredemption and nullification provisions cannot be effected in good faith, certainly not when the period involved is more than one year.

The opinion of the district court also attempts to find authorization for the nonredemption and nullification provisions in PBCL ss. 2513, which permits Pennsylvania companies to implement poison pills with terms "as are fixed by the board of directors." This section does not "trump" the other provisions of the PBCL or give a Pennsylvania board carte blanche to exercise clearly ultra vires powers as long as they are cloaked in the form of a rights plan amendment. Indeed, reading ss. 2513 to authorize the nonredemption and nullification provisions would turn the statute on its head -- it would read the board's power to "fix the terms" of a poison pill under ss. 2513 as being so broad as to prevent future boards from exercising that very same power, or indeed any power, over the poison pill.

Finally, the district court's opinion mischaracterizes the nonredemption and nullification provisions as imposing only "voting disqualifications for interested directors," when by their express terms they prevent all directors -- interested or disinterested -- from redeeming or amending the pill. This basic misconception infects the court's entire opinion upholding these provisions. The court upheld the nonredemption and nullification provisions on the grounds that they simply reflected what it termed the "the disinterested majority concept," the concept that "only disinterested directors may vote to redeem or amend shareholder rights plans." In truth, these provisions leave no one with power over AMP's pill.(FN18)

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18 The fact that the nonredemption and nullification provisions take the power to amend or redeem the pill from all directors renders the court's reliance on *Invacare Corp. v. Healthdyne Techs., Inc.*, 968 F. Supp. 1578 (N.D. Ga. 1997) inapposite. *Invacare* upheld a dead hand poison pill that allowed incumbent directors and their designees to redeem the pill at issue. *Id.* at 1581. Moreover, *Invacare* upheld the dead hand provision on the basis of a statutory scheme which is fundamentally different from Pennsylvania's. *Id.* at 1580. The Georgia statute in *Invacare*, unlike Pennsylvania's, gave Georgia boards "sole discretion" over shareholder rights plans. *Id.*; compare PBCL ss. 1504, 1721, 2513 (Pennsylvania) with Ga. Code Ann. ss. 14-2-624(c) (Georgia); see also *Carmody v. Toll Brothers, Inc.*, C.A. No. 15983, 1998 Del. Ch. LEXIS 131, \*36-37, \*40 n.30 (Del. Ch. July 24, 1998) (holding that a valid claim against a dead hand provision in a poison pill had been stated under Delaware law and distinguishing *Invacare* on the basis of the unique Georgia statutory language.) NO COURT HAS RULED ON A TOTALLY NON-REDEEMABLE, NON-AMENDABLE PILL LIKE THE ONE AT ISSUE HERE.

2. THE NONREDEMPTION AND NULLIFICATION PROVISIONS PUNISH SHAREHOLDERS FOR VOTING AND ARE THEREFORE ILLEGAL

AMP's nonredemption and nullification provisions also are illegal under Pennsylvania law because they effectively penalize shareholders for

exercising their right to vote. Under the nonredemption provision, if AMP's shareholders elect a new majority to AMP's board to facilitate a merger with AlliedSignal, then all of AMP's directors lose the power to amend or redeem AMP's poison pill and consequently lose, as well, the ability to approve AlliedSignal's (or any other company's) tender offer until the poison pill rights expire on November 6, 1999. This punishes the shareholders for voting to oppose the directors' position on a merger with AlliedSignal, in effect saying to shareholders that, if the current board cannot have power over the pill, no one can. The nullification provision metes out the same punishment to shareholders if they vote for the Shareholder Rights Proposal -- if they vote for the Rights Proposal, then no one, not AMP's directors or the Shareholder Rights Agents, can amend or redeem the pill, effectively preventing any merger, with anyone, until the expiration of the pill.

Such a direct attempt to frustrate the ability of shareholders to vote violates Pennsylvania law and warrants injunctive relief. Pennsylvania law accords shareholder voting rights the highest degree of protection. The Pennsylvania Supreme Court has described the right to vote as "a shareholder's most fundamental right." *Reifsnyder v. Pittsburgh Outdoor Adver. Co.*, 173 A.2d 319, 322 n.8 (Pa. 1961) (citing 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, ss. 5717 (rev. Col. 1961)). Under Pennsylvania law, actions like those by AMP's board that "effectively disenfranchise" shareholders violate "general fundamental principles that when a vote is to be taken it should be a fair and open vote, and that the shareholders should be treated fairly and properly," and such actions should be enjoined as "fundamentally unfair" under PBCL ss. 1105. (FN19) *Norfolk Southern Corp. v. Conrail*, Civ. Act. No. 96-7167, \*68-69 (E.D. Pa. Dec. 17, 1996) (VanArtsdalen, J.) (A 546-47).

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19 PBCL ss. 1105, as interpreted by the Pennsylvania Supreme Court, authorizes courts to issue "an injunction to prevent any proposed corporate plan fraught with fraud or fundamental unfairness." In re *Jones & Laughlin Steel Corp.*, 412 A.2d 1099, 1103 (Pa. 1980).

In *Norfolk Southern*, the Conrail board, like AMP's board, attempted to manipulate a shareholder vote by coercing the outcome. The Conrail board attempted indefinitely to postpone an announced shareholder meeting called to consider certain aspects of Conrail's proposed merger with CSX, unless and until Conrail could be assured it had enough proxies to win the vote. Conrail's action, Judge VanArtsdalen found, "effectively disenfranchises those shareholders who may be opposed to [Conrail's] proposal because it says to them that . . . we will not allow the vote to go ahead if there is any [chance] . . . the proposal will not be approved." (A 546.) By depriving shareholders of a meaningful choice, the directors created a "sham election" that was "fundamentally unfair to those who may be opposed to the transaction." (A 546-47.) Such interference with shareholder voting rights, Judge VanArtsdalen held, justified an injunction against the directors' actions.

This Court has similarly recognized that a board may not take actions that prevent shareholders from exercising their right to vote. In *IBS Fin. Corp.*, 136 F.3d at 951, this Court, applying New Jersey law (which does not differ from Pennsylvania law in its respect for the voting process), invalidated a board's attempt to reduce its size because the only purpose to the board's action was to prevent dissident shareholders from gaining seats on the board. The Court applied heightened scrutiny to "matters involving the integrity of the shareholder voting process," explaining that the shareholder franchise is "critical to the theory that legitimates the exercise of power by some (directors and officers) over vast aggregations of property that they do not own." *Id.* at 949 (quoting *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988)). (FN20)

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20 The *IBS Fin. Corp.* court predicted that New Jersey would follow Delaware and apply heightened scrutiny to director actions which interfered with voting rights, even though New Jersey law, like Pennsylvania's, rejects Delaware's heightened scrutiny standard for responding to tender offers. See *IBS Fin. Corp.*, 136 F.3d at 950; compare 14A N.J. Stat. Ann. 6-1(3) (boards of directors have "no obligation to facilitate" a takeover) with PBCL ss. 1715 (directors' fiduciary duties do not require them to redeem a poison pill). Although the election in *IBS Fin. Corp.* was not in the context of a takeover, the analysis of the Court's opinion would apply heightened scrutiny to all actions "intended to hamper the exercise by some shareholders of their franchise." *Id.* at 949.

A poison pill provision similar to, but less draconian than, the nonredemption and nullification provisions at issue in this case was held invalid as an illegal disenfranchisement of shareholders in *Carmody v. Toll Brothers, Inc.*, C.A. No. 15983, 1998 Del. Ch. LEXIS 131, \*44 (Del. Ch. July 24, 1998). In *Carmody*, the court invalidated a dead hand poison pill as purposefully disenfranchising shareholders. The court held that, if the pill were upheld, "shareholders will be powerless to elect a board that is both willing and able to accept [a takeover] bid and they may be forced to vote for incumbent directors whose policies they reject because only those directors have the power to change them." *Id.* at 42-43 (internal quotations and citations omitted).

C. ALLIEDSIGNAL HAS DEMONSTRATED THE REMAINING PREREQUISITES TO INJUNCTIVE RELIEF

Irreparable harm will result from the cloud cast over the shareholders' vote by the nonredemption and nullification provisions. Shareholders may be deterred from voting for the consent solicitation if they believe that doing so will trigger these provisions and cause all power to redeem the pill, by anyone, to be lost. See *Bank of New York*, 528 N.Y.S.2d at 482 (irreparable harm where an invalid poison pill amendment was "likely to taint the electoral process"); see also *International Banknote Co. v. Miller*, 713 F. Supp. 612, 623 (S.D.N.Y. 1989) (management causes irreparable harm to shareholders by "frustrating them in the attempt to obtain representation on the board"). In addition, by making AMP's poison pill non-redeemable and non-amendable, the provisions threaten to deprive AMP's shareholders of the opportunity to tender their shares to AlliedSignal at \$44.50 cash per share and to deprive AlliedSignal of the unique opportunity to effect a merger with AMP. See *San Francisco Real Estate Investors v. Real Estate Inv. Trust of Am.*, 701 F.2d 1000, 1003 (1st Cir. 1983) (loss of opportunity to acquire corporation is irreparable harm).

Given this irreparable harm, the balance of the equities favors an injunction, which can cause no harm to AMP. AMP remains free to convince its shareholders to vote against the solicitation proposals and will have ample time to challenge any AMP-AlliedSignal combination before it could be consummated. Finally, the public interest in safeguarding corporate democracy supports an injunction to prevent the taint of illegality from affecting a shareholder vote in a closely-watched, multi-billion dollar tender offer and consent solicitation.

CONCLUSION

For the foregoing reasons, AlliedSignal respectfully requests that this Court reverse and vacate the district court's October 8, 1998, Order as it relates to Civil Action Nos. 98-CV-4405 and 98-CV-4058, except with respect to the setting of the record date for the Shareholder Rights Proposal, and remand to the district court with instructions to enjoin AMP from giving effect to, or enforcing, the nonredemption and nullification provisions.

Respectfully Submitted

/s/ Mary A. McLaughlin

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Dated: October 13, 1998

CERTIFICATION OF BAR MEMBERSHIP

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I hereby certify that Mary A. McLaughlin and George G. Gordon are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Mary A. McLaughlin

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