

DELCATH SYSTEMS INC  
Form DEFA14A  
September 06, 2006  
**UNITED STATES**

**SECURITIES AND EXCHANGE COMMISSION**

**WASHINGTON, D.C. 20549**

**SCHEDULE 14A**

(Rule 14a-101)

INFORMATION REQUIRED IN PROXY STATEMENT

SCHEDULE 14A INFORMATION

Proxy Statement Pursuant To Section 14(a) of the

Securities Exchange Act of 1934 (Amendment No. )

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**DELCATH SYSTEMS, INC.**

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(Name of Registrant as Specified In Its Charter)

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1 to get 51 percent of the vote or else we lose. We aren't  
2 fairly restrained in that respect.

3 THE COURT: I didn't understand what you just said to  
4 me.

5 MR. HECHT: Here's the point: They don't need to  
6 gather 51 percent revocations. We need to gather 51 percent  
7 consents.

8 THE COURT: Right.

9 MR. HECHT: So you can't just say both sides are  
10 barred from taking action on the consents. They don't have to  
11 take action on the revocations. We're the ones who have to  
12 take action. We bear a greater burden in the consent  
13 solicitation process. So the very nature of the restraint,  
14 even if it purports to be bilateral, covering both sides,  
15 impacts us more profoundly.

16 THE COURT: So what? What's the harm? That's the  
17 point.

18 MR. HECHT: Here's the greater harm: They are the  
19 incumbent board of directors; they can make changes; they can  
20 do extraordinary things right now that we cannot. They've done  
21 one already, Judge. They've changed the change-in-control  
22 provision which runs the risk of giving a greater package to  
23 management if there's a change in control. That didn't used to  
24 exist.

25 THE COURT: When was that?

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1 MR. HECHT: I m sorry?

2 THE COURT: When?

3 MR. HECHT: We first learned of that in their first  
4 preliminary consent revocation materials on August 7th.

5 THE COURT: What about that?

6 MR. OFFENHARTZ: Your Honor, I don t know the exact  
7 timing of that, but --

8 THE COURT: Recently is the answer.

9 MR. OFFENHARTZ: Recently. Your Honor, if I may, two  
10 responses to that:

11 One, that really highlights the difference between  
12 what my adversary is talking about and what we are talking  
13 about. If they win, if at the PI hearing your Honor decides  
14 that our claims are not correct or we re wrong, and there was a  
15 change, something happened that was inappropriate, the new  
16 board can take steps to correct that. That s a normal  
17 run-of-the-mill process. That s something that can be  
18 addressed, addressed quickly, corrected.

19 Moreover, your Honor, we are not here trying to gain  
20 anything. We are here because we believe we have very serious  
21 issues to be dealt with. While I find it odd that they, in  
22 effect, are moving for a TRO without actually putting in any  
23 papers, without making any showing, without --

24 THE COURT: You mean as to you?

25 MR. OFFENHARTZ: As to us. I think that procedurally

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1 that doesn't make sense, and it's faulty and it's flawed.

2 By the same token, we are not trying to game the  
3 system. And if the concern is that with a TRO in place we  
4 would change the rights plan, I will stipulate right now that  
5 during the pendency of the TRO leading up to the PI hearing  
6 Delcath will not alter the rights plan. I think that's a red  
7 herring, your Honor. It's not going to happen.

8 Moreover, your Honor, the adversary's position is that  
9 because they initiated a consent solicitation, and because  
10 Delcath is asserting its rights under the securities laws, and,  
11 frankly, to this date I'm not even sure why we're talking about  
12 balance of hardships, because with undisputed factual record  
13 before the Court, I think we went on likelihood of success of  
14 merits. So balance of the hardships is irrelevant for today's  
15 purposes.

16 But even with that in place, their whole view is that  
17 because they have initiated a consent, anything we do under the  
18 securities laws, by asserting the private right of actions  
19 under 13d and 14a that are Horn Book securities law, and by  
20 asserting our rights under the list of cases that we've  
21 provided your Honor, they're saying that's irreparable harm.

22 As your Honor noted, all they are going to be hit  
23 with, if anything, is some additional expense. And as to  
24 resetting the clock in the Pabst case that we cite, it was  
25 clear that resetting the clock and having a new record date is

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1 fine. That's the cost of doing business.

2 THE COURT: Okay.

3 MR. HECHT: If I may, Judge. The point is this:

4 We're not necessarily here to seek a countervailing TRO that

5 binds the management even more than they currently are. My

6 point is it's a reductio ad absurdum.

7 If you just continue the restraints in their existing

8 form, while ostensibly it may appear to be keeping the playing

9 field neutral, it does not.

10 Two things happen: It leaves management pre -- to

11 possible mischief. I just gave the poison pill as one example.

12 The change of control is a real example, but they are still

13 free to do that. That's why a mere continuation of the

14 existing restraints is not as innocuous as it seems. It was

15 when Judge Walton did it ten days ago, but we are farther along

16 in the process now.

17 THE COURT: I don't get the difference.

18 MR. HECHT: Because then we didn't start the process

19 yet. Now we have the process in place. Shareholders don't

20 think their votes count. The footnote that Judge Keenan

21 addressed, the Management Assistance, makes the point very

22 well, too.

23 THE COURT: But there's no real record support for

24 that at this point.

25 MR. HECHT: We proffer the affidavit of Mr. Ladd is

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1 obviously --

2 THE COURT: Which is --

3 MR. HECHT: He s spoken to shareholders, and he  
4 understands people are withholding their vote.

5 But if I may move to two other quick points, Judge.

6 That s our point is, if I wore the black robe, I  
7 respect the idea that the first thing I want to do is keep the  
8 playing field level, preserve the status quo until we get to a  
9 hearing.

10 What I am urging your Honor to consider is it is not  
11 so innocent to purportedly preserve the status quo by  
12 continuing the restraints, because we submit the current status  
13 quo presents a cloud on our ability to get votes.

14 What I propose we do --

15 THE COURT: Wait a minute. Why shouldn t there be a  
16 cloud on your ability to get votes if I find that they are  
17 likely to prevail in demonstrating that the disclosures are  
18 inadequate?

19 MR. HECHT: Two reasons. I ll speak to the 13d point.  
20 I don t think they are likely to succeed on the merits. Let s  
21 assume, as your Honor just supposed, that you do find that,  
22 then it s still not too late. As Judge Weinfeld said, as Plant  
23 Industries said, as Management Assistance said, as Poughkeepsie  
24 said, to unscramble the transaction later, if, in fact, your  
25 Honor finds that the disclosures were inadequate. It is simply

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**Important Additional Information**

On August 17, 2006, Laddcap filed a definitive consent solicitation statement with the SEC relating to Laddcap's proposal to, among other things, remove the current Board of Directors and replace them with Laddcap's nominees. In response, on August 21, 2006, Delcath filed a definitive consent revocation statement on Form DEFC14A (the Definitive Consent Revocation Statement ) with the SEC in opposition to Laddcap's consent solicitation. Delcath shareholders should read the Definitive Consent Revocation Statement (including any amendments or supplements thereto) because it contains additional information important to the shareholders' interests in Laddcap's consent solicitation.

The Definitive Consent Revocation Statement and other public filings made by Delcath with the SEC are available free of charge at the SEC's website at [www.sec.gov](http://www.sec.gov). Delcath also will provide a copy of these materials free of charge upon request to Delcath Systems, Inc., Attention: M.S. Koly, President and Chief Executive Officer, (203) 323-8668.

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