

INSIGHTS

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PROXY SEASON

Making Sure Newly Cautious Shareholders Get the Information They Want

3

Brian Breheny, Raquel Fox, Joshua Shainess, and Kyle Wiley

When Do Large Investors Vote Against Directors for Compensation Concerns at US Companies?

5

Karla Bos, AJ Patterson, and Laura Wanlass

ADVANCE NOTICE BYLAWS

Delaware Court of Chancery Gives Activists Advance Notice Bylaw Do-Over

9

Andrew Kaplan, Mark Mixon, and Justine Drohan

DIRECTOR ELECTIONS

Not Just Say-on-Pay: ISS Recommendations “Against” Directors Also Spike in June

12

Ben Burney

STATE LAW

Texas Makes Bullish Changes to Its Corporate Law: Amendments to the TBOC

13

Hillary H. Holmes, Gerald Spedale, and Jason Ferrari

Nevada Adopts Significant Amendments to Further Entice Corporations to Incorporate or Reincorporate

19

David A. Bell, Ran Ben-Tzur, Dean Kristy, and Wendy Grasso

ARTIFICIAL INTELLIGENCE

From Code to Compensation: The High-Stakes Race for AI Talent

24

Ryan Colucci

FOREIGN PRIVATE ISSUERS

SEC Concept Release on Foreign Private Issuer Eligibility: A Portent for the FPI Regulatory Framework?

27

Colin J. Diamond, Gil Savir, Spencer Francis Young, and Meg Dennard

ADVANCE NOTICE BYLAWS

Delaware Court of Chancery Gives Activists Advance Notice Bylaw Do-Over

By Andrew Kaplan, Mark Mixon, and Justine Drohan

The Delaware Court of Chancery recently concluded that a board properly rejected activists' non-compliant director nomination notice, but nevertheless permitted the activists a rare second attempt at complying with the company's advance notice bylaw. Applying *Unocal* and *Blasius* in a post-trial memorandum opinion, the do-over followed the Court's separate conclusion that the board's decision to reduce its size while in the shadow of a proxy fight was a breach of fiduciary duty.

Background

On May 21, 2025, Vice Chancellor Bonnie W. David issued a decision in *Vejseli v. Duff*,¹ invalidating a board resolution that reduced the size of the board and permitting activists a second attempt at complying with an advance notice bylaw in nominating two new directors. The Court in this decision reaffirmed the enforcement of advance notice bylaws but, using its discretion as a court of equity, nevertheless provided a second chance at complying with the advance notice bylaw here due to the board's own actions, which were not taken on a "clear day" and thus were a breach of the board's fiduciary duties.

The opinion describes the facts as follows. In January 2024, digital currency mining assets of a company in Chapter 11 proceedings were spun off to a newly formed entity, Ionic Digital, Inc. (the Company), and many creditors became stockholders

of the Company. The Company experienced significant management and director turnover, and a subset of stockholders became frustrated with the Company's failure to publicly list its shares and what they considered other management failures.

These activists aligned themselves with non-stockholder third parties whom the Company previously had passed over for arguably lucrative business opportunities. Those activists and third-party entities attempted to initiate a proxy contest at the Company's first annual meeting of stockholders and install two new directors.

The Company's board consisted of six seats (four directors and two vacancies), divided into three even classes, each standing for election every three years. Class I, consisting of one director and one vacancy, was up for re-election at the upcoming annual meeting of stockholders. In advance of the annual meeting, however, the Company's board reduced its size from six directors to five, and, as a result, eliminated one of the two seats (which was vacant up until this point) that otherwise was going to be up for election.

Without disclosing the board size reduction, the board announced the annual meeting date, triggering a 10-day window for submissions of nominations or other proposals of business under the company's advance notice bylaw. The activists submitted nominations for the two board seats they believed were still up for election. In their nomination notice, however, the activists failed to disclose all existing agreements between them and the third-party entities with which they had partnered. After the nomination deadline passed, the board disclosed the board reduction and rejected the nomination notice based on the activists' failure to include these agreements. The activists filed suit, alleging, among other things,

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that the directors had breached their fiduciary duties by reducing the board size and rejecting the nomination notice. In the meantime, the company postponed its annual meeting of stockholders until thirty days after the Court ruled in this action.

The Board Reduction

The Court first concluded that the board's decision to reduce the board size was a breach of the board's fiduciary duties. In reaching its decision, the Court considered the board's actions under the enhanced scrutiny standard of review under *Unocal*, with a focus on election interference under *Blasius*, which considers whether (1) the board faced a "real and not pretextual" threat "to an important corporate interest or to the achievement of a significant corporate benefit," and (2) the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise. The Court applied enhanced scrutiny because the resolution "interfere[d] with the election of directors," and because the resolution was not adopted "on a 'clear day,'" but rather as a defensive measure against the impending proxy contest.

In doing so, the Court noted that the most credible explanation offered at trial for the board reduction was that the board sought to ensure that "the Board, rather than the stockholders, could later identify better candidates," which was "not a legitimate corporate purpose."

The Court also found that (1) the resolution was not necessary to accomplish the objectives of "cost savings and avoiding deadlock" that the board asserted post hoc as the reasons for the resolution, and (2) the board reduction was preclusive, because by eliminating a seat, the board made it impossible for stockholders to elect directors to that position, and therefore imposed its own favored outcome on the stockholders.

The Advance Notice Bylaw

The Court also held that the board properly rejected the nomination notice. First, the Court found that the activists failed to comply with the

advance notice bylaw provision requiring "copies of all written agreements, contracts, arrangements, understanding, plans or proposals relating to" "[a]ny change in the present board of directors or management . . . , including any plans or proposals to change the number or term of directors or to fill any existing vacancies on the board" by not attaching the agreements between the activists and third-party entities and, more importantly, not even disclosing the existence of some of those agreements.

The agreements included, among others, a solicitation agreement—described by, but not attached to the nomination notice—for "the purpose of (i) supporting the [n]ominating [s]tockholders in their efforts to achieve the election of the persons they have nominated (at the [n]ominating [s]tockholders' sole discretion) to the Board . . . at the 2025 [A]nnual [M]eeting . . . of [the Company]."

The Court concluded there are legitimate reasons why a board would want to know whether a nomination was part of a broader scheme relating to the governance, management, or control of the Company and such information was important to stockholders in deciding which director candidates to support. While the Court cited precedent suggesting that information regarding terminated agreements could be important, the Court did not definitively resolve whether such agreements needed to be disclosed because some provisions in the activists' arrangements survived termination.

Second, the Court concluded the directors did not breach their fiduciary duties by rejecting the nomination notice. The Court analyzed the fairness of their decision under the enhanced scrutiny standard of review. The Court determined that the board rejected the notice to advance the "important corporate interest[]" of "preserving an informed stockholder vote," and that the board's enforcement of the advance notice bylaw was both reasonable and not preclusive because "[e]nforcing the Advance Notice Bylaw is a reasonable means of ensuring that stockholders receive material information about director nominees" and "did not preclude [the activists] from submitting a compliant Nomination Notice."

The Court also rejected the activists' argument that the board's failure to provide an opportunity to supplement the nomination notice before the nomination window closed was inequitable and found that such action did not amount to "manipulative conduct," given that the window closed only two days after the activists submitted the nomination notice, noting that "Plaintiffs could have complied with the Advance Notice Bylaw's disclosure requirements, but they did not."

Despite concluding the board properly and fairly rejected the activists' nomination notice, as a consequence of the board's breach of fiduciary duty in reducing the board size, the Court issued an injunction "directing the Board to reopen the nomination window under the Advance Notice Bylaw to allow the Board, Plaintiffs, and any other the Company stockholder to submit director nominations."

In doing so, the Court stated that "[a] remedy that would permit the directors who breached their fiduciary duties to choose who will serve on the Board is no remedy at all." The Court also noted that the "unusual facts of this case" necessitated this remedy because it was the board's own wrongful conduct that required re-opening the nomination window, and the record did not support the board's position that the activists intentionally concealed material information.

Takeaways

- This decision reaffirms that the Delaware Court of Chancery applies enhanced scrutiny under *Unocal* with a focus on stockholder franchise concerns articulated in *Blasius* when evaluating claims that a board breached its fiduciary duties by taking defensive action that impacts the election of directors.
- The Court reinforced that Delaware law permits a company to reject a non-complying

nomination notice after the close of the nomination window where the activists' submission did not provide the company sufficient time to do so before the deadline. If such rejection is challenged, however, a court may still examine a board's motives in rejecting even a non-complying notice.

- To avoid triggering enhanced scrutiny review, directors and advisors should ensure that any adjustment to board size is done on a clear day and for legitimate corporate interests, as documented by the record. This supports the notion that any board size decrease should (ideally) be done in connection with any director departure and that leaving a vacancy open for a period of time could lead to scrutiny if circumstances change in the future.
- This case is a reminder that the Delaware Court of Chancery, as a court of equity, has broad discretion to fashion a remedy for breach of fiduciary duty. That principle is difficult to predict and plan around. It manifested here when, despite achieving practically complete victory with respect to the advance notice bylaw, the Company was compelled to give the activists another chance.
- While the Court seemed to suggest that disclosure of recently terminated agreements would be appropriate, it also expressly acknowledged that it remains an open question whether an activists' failure to disclose such agreements is sufficient to establish a violation of the advance notice bylaw at issue in this case. At minimum, disclosure is required where a material provision of such an agreement expressly survives termination.

Note

1. *Vejseli v. Duffy*, 2025 WL 1452842 (Del. Ch. May 21, 2025).