

Delaware Corporate Law Update

Tuesday, January 2, 2024

Court of Chancery Enforces Certain Advance Notice Bylaws, While Invalidating Others, in Upholding Board’s Rejection of Dissidents’ Nominees

In *Kellner v. AIM ImmunoTech Inc.*, C.A. 2023-0879-LWW (Del. Ch. Dec. 28, 2023), the Delaware Court of Chancery upheld an incumbent board’s rejection of a group of dissidents’ nominees for a corporation’s 2023 annual meeting, finding that the dissidents failed to comply with the requirements of the corporation’s advance notice bylaws. Despite upholding the rejection of the dissidents’ nominees, the Court found that certain portions of the corporation’s advance notice bylaws—which the board, before the opening of the advance notice window for the 2023 annual meeting, amended to impose additional requirements in light of the same dissident group’s unsuccessful attempt to submit nominations at the prior annual meeting—were invalid because aspects of them were inequitable.

Applying *Unocal*, the Court determined that the board identified a legitimate threat—namely, the risk that stockholders could be subject to potentially abusive and deceptive tactics—in adopting the amended advance notice bylaws, but found that certain of the amendments were unreasonable or disproportionate to that threat and were unduly restrictive of the stockholder franchise.

- The Court found that a provision requiring disclosure of all agreements, arrangements, or understandings that a nominating stockholder or any “Stockholder Associated Person”—which was defined as (i) any person acting in concert with the nominating holder with respect to the proposal or the corporation, (ii) any person controlling, controlled by, or under common control with, such holder or any of their respective Affiliates and Associates, or a person acting in concert therewith with respect to the proposal or the corporation, and (iii) any member of the immediate family of such holder or an Affiliate or Associate of such holder—had with any holder, nominee (or immediate family member, affiliate, or associate thereof), person acting in concert with any Stockholder Associated Person, holder, nominee (or immediate family member, affiliate, or associate thereof), or “other person or entity,” went “off the rails” and undermined “an otherwise reasonable and appropriate bylaw.” The Court observed that the “interplay of the various terms” “acting in concert,” “Associate,” “Affiliate,” and “immediate family” within the Stockholder Associated Person definition “cause[d] them to multiply, forming an ill-defined web of disclosure requirements.”
- The Court also found that the provision requiring disclosure of all agreements, arrangements, or understandings between the nominating stockholder or a Stockholder Associated Person, on the one hand, and any stockholder nominee, on the other hand, “regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years” suffered from the same issues in relation to the definition



of Stockholder Associated Person and “impose[d] ambiguous requirements across a lengthy term.”

- The Court found that the bylaw requiring disclosure of all known supporters of the nomination was ambiguous and overbroad in seeking “disclosure of any sort of support whatsoever,” contrasting it with the more limited advance notice bylaw requiring disclosure of known *financial* supporters that was upheld in *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140 (Del. Ch. Oct. 13, 2021).
- In addition, the Court found that the disclosure requirements with respect to ownership interests in respect of the corporation’s stock, “including beneficial, synthetic, derivative, and short positions,” of all Stockholder Associated Persons, immediate family members, and persons acting in concert with a nominee, were overbroad. While noting that advance notice bylaws requiring disclosure of synthetic equity positions are generally “perfectly legitimate,” the Court found that the provision in question—which continued for over 1,000 words and was divided into 13 subparts—“sprawl[ed] wildly beyond this purpose” by requiring, among other things, “disclosure of ‘legal, economic, or financial’ interests ‘in any principal competitor’” of the corporation.

By contrast, the Court recognized that several portions of the amended advance notice bylaws were reasonable and proportionate to the threat.

- The Court upheld the provision requiring disclosure of the dates of first contact among those involved in the nomination effort, noting that it called “for a more defined set of information that could be known or knowable with reasonable diligence.”
- Consistent with recent precedent, the Court upheld the provision requiring nominees to submit a completed D&O questionnaire in the form provided by the corporation within five business days of a request therefor. The Court rejected the dissidents’ argument that the five-business-day period would allow the board additional time to make unreasonable revisions, noting that those types of matters would be better addressed in a challenge to the board’s enforcement of the provisions relating to the questionnaire.
- The Court also upheld a “bespoke” provision imposing a 24-month lookback period for disclosure of agreements, arrangements, and understandings relating to board nominations. The Court noted that the board had adopted the provision to prevent the type of “gamesmanship” that could occur through an overly narrow interpretation that would apply the requirements only with respect to current nominees. The Court observed that the board, in setting the 24-month lookback period, took into account the fact that the 2022 proxy contest followed roughly 18 months of activity.

Although it invalidated certain aspects of the amended advance notice bylaws on equitable grounds, the Court declined the dissidents’ request to invalidate the amended advance notice bylaws in their entirety. In addition, the Court enforced the provision requiring disclosure of “all arrangements or understandings between [the nominating] stockholder and each proposed nominee and any other person or persons (including their names) pursuant to which the nomination(s) are to be made” that was included in the corporation’s pre-amendment advance notice bylaws, noting that

the previous iteration was “fully within and narrower” than the amended version invalidated by the Court and that it would be inequitable to eliminate those disclosure requirements, given the “vital corporate considerations at risk if nominating stockholders” were able to conceal agreements, arrangements, and understandings. Accordingly, after holding that the disclosure requirement in the prior iteration of the bylaws did “not suffer from the same flaws as the amended version,” and finding that the dissidents’ nomination notice was deficient in, among other things, omitting required disclosure of certain arrangements or understandings regarding the nominations, the Court upheld the board’s rejection of the nominations.