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Advance Notice Bylaws: Caution Required

The recent Delaware Chancery Court decision of *Paul A. Rosenbaum, et al. v. CytoDyn Inc., et al.* reinforces a board’s ability to enforce reasonably-drafted advance notice bylaws.

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The *CytoDyn* case involved a group of dissident stockholders who sought to wage a proxy contest to elect their slate of directors to the CytoDyn board of directors. CytoDyn’s bylaws required 90 days’ notice of any intended nominations. However, the dissident stockholders submitted the deficient nomination notice on the eve of the nomination notice deadline and neglected to include certain information in their nomination notice that was required under the CytoDyn bylaws, including who was supporting the dissident stockholders’ proxy contest and a potential conflict of interest between a particular dissident stockholder and CytoDyn. The board let the deficient nomination notice languish for several weeks after the deadline, and then notified the dissidents that their notice was invalid under the advance notice bylaws. The dissidents then sought to amend and supplement their nomination notice with the missing information after the deadline, but CytoDyn rejected the notice. Litigation then ensued.

The dissident stockholders argued that the board’s rejection of the nomination notice was an action designed to interfere with the effectiveness of the Company stockholder vote, and as a result, under *Atlas v. Blasius*, the board needed to demonstrate a “compelling justification” for rejecting the notice. The Court of Chancery denied plaintiffs’ motion, reasoning that *Blasius* applies only when faithless fiduciaries act for the sole or primary purpose of thwarting a stockholder vote, which the board had not done. The Court found that the advance notice bylaw had been adopted on a “clear day” years prior to the current conflict with the dissident stockholders, and was commonplace in its formulation. The Court considered whether inequitable conduct, including an inequitable application of the advance notice bylaws, had deprived stockholders of “a fair opportunity” to nominate its director slate. The Court noted that, because the dissident stockholders had filed on the eve of the deadline and as a result, had not left any time for the notice to be corrected, the fact that the Board did not promptly send the deficiency notice did not amount to “manipulative conduct” and change the analysis. The Court also noted that the dissident stockholders understood the terms of, and the effects of non-compliance with, the CytoDyn bylaws. As a result, the Court denied the dissident stockholders’ claim to compel CytoDyn to include the dissident’s slate.

The *CytoDyn* case, together with the *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.* case (holding that missing deadlines of advance notice bylaws will not excuse the dissident or permit the dissident to wage its proxy contest), serve as book-ends of Delaware law standing for the proposition that reasonably drafted advance notice bylaws will be upheld. On the other end of the spectrum, there is *Jana Master Fund, Ltd. v. CNET Networks, Inc.* and *Levitt Corp. v. Office Depot, Inc.*, which both impress the need to draft advance notice bylaws clearly lest they be ineffective in preventing director nominations.

CytoDyn also reinforces the need to strictly comply with advance notice bylaws, and not to play “fast and loose,” in the words of the Court, with disclosures in the nomination notice. It also is a reminder that it generally is unwise to wait until the last possible moment to make required submissions, whether those be nomination notices, SEC filings or otherwise. If there is a later need to amend or supplement the submission after the deadline, the Court in *CytoDyn* made clear that there will be no special accommodation to make corrections at a later date.