

Delaware Supreme Court Clarifies Meaning of “Annual Meeting,” Reverses Chancery Court in *Airgas, Inc. v. Air Products and Chemicals, Inc.*

On November 23, 2010, in *Airgas, Inc. v. Air Products and Chemicals, Inc.*, the Delaware Supreme Court unanimously reversed a Chancery Court decision and held that the bylaw amendment proposed by Air Products to accelerate Airgas’ annual meeting to January 2011 (when the prior annual meeting had been held in September 2010) was invalid. The bylaw amendment at issue was adopted in the context of Air Products’ takeover battle with Airgas, and had the effect of reducing the term of a class of directors of Airgas’ classified board from three years to two years and four months. The bylaw amendment would have permitted Air Products to appoint a new class of directors at any time in the new calendar year rather than waiting for a one-year period to elapse, and presumably would have permitted Air Products to take control of the Airgas board eight months earlier than had been expected.

This decision reversed an earlier ruling of the Delaware Chancery Court that had surprised many commentators. Airgas brought action in the Chancery Court claiming the bylaw amendment was invalid because, among other things, it was inconsistent with Section 141(d) of the Delaware General Corporation Law (“DGCL”) and with the provision of Airgas’ charter regarding the election of directors. The Chancery Court found that the bylaw amendment was not inconsistent with either Section 141(d) of the DGCL or with Airgas’ charter, which provides that the terms of directors would expire at “the annual meeting of stockholders held in the third year following the year of their election.” In holding that the bylaw amendment was valid, the Chancery Court noted that the provision at issue in Airgas’ charter was ambiguous as to the required length of the term the directors of Airgas’ classified board were required to serve. The Chancery Court focused on and interpreted the words “annual” and “year” within Airgas’ charter provision and concluded that the charter provision did not define a precise term of office for its classified board of directors. The Chancery Court determined that the charter provided that the terms of each class of directors of Airgas’ classified board will “expire at the annual meeting in the third year following their year of election” and, therefore, the 2011 annual meeting could occur anytime in the 2011 calendar year.

In reversing the decision below, the Supreme Court also found the language of Airgas’ charter to be ambiguous but looked to extrinsic evidence to interpret the intent of the charter language. The Supreme Court concluded that the intent of the charter language was for the Airgas directors to serve three-year terms and that the effect of the bylaw at issue is to prematurely remove Airgas directors who, under Airgas’ historical practices, would serve on the board for eight additional months. The Supreme Court acknowledged that while neither Section 141(d) of the DGCL nor Airgas’ charter “requires that the three year terms be measured with mathematical precision,” it is fairly apparent that the period of four months from the annual meeting in September 2010 until the annual meeting in January 2011 that would have resulted from implementing the bylaw would not qualify “under any construction of ‘annual’” within the intended meaning of Section 141(d) or Airgas’ charter. The Supreme Court therefore held the bylaw to be invalid, as it “so extremely truncates the directors’

term” that it frustrates the purpose behind the provisions for a classified board by “impermissibly shorten[ing] the directors’ three year staggered terms ... [and] [it] amounts to a *de facto* removal without cause” of the affected directors, without the requirement of a supermajority vote contained in the Airgas charter.

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Derek M. Stoldt

e-mail: dstoldt@kayescholer.com

Konstantinos Yiannopoulos

e-mail: kyiannopoulos@kayescholer.com

Chicago Office
+1.312.583.2300

Frankfurt Office
+49.69.25494.0

London Office
+44.20.7105.0500

Los Angeles Office
+1.310.788.1000

Menlo Park Office
+1.650.319.4500

New York Office
+1.212.836.8000

Shanghai Office
+86.21.2208.3600

Washington, DC Office
+1.202.682.3500

West Palm Beach Office
+1.561.802.3230

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