

Comments

STAGGERED BOARDS AND ANNUAL MEETINGS: CLOSING A LOOPHOLE IN THE STAGGERED BOARD DEFENSE

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INTRODUCTION

In the context of a hostile takeover, the Board of Directors (“Board”) of the target corporation has significant power to protect its charge. Among the available defenses against hostile takeover is the statutory power to establish a classified or staggered board. This particular defense, however, has come under assault recently in the attempted takeover of Airgas, Inc. (“Airgas”). In the takeover battle between Air Products and Chemicals, Inc. (“Air Products”) and Airgas, both sides fought zealously, Air Products seeking to acquire Airgas, and Airgas seeking to remain independent.¹ Air Products, in an unprecedented move, attempted to circumvent Airgas’s staggered board² by advancing the date of the Airgas shareholder annual meeting by approximately eight months via bylaw amendment. To rebuff Air Products’ advances, Airgas brought suit to declare the shareholder approved amendment to Airgas’s bylaws invalid under Airgas’s charter and under Delaware law.

The Air Products takeover attempt raises interesting and important questions about the future of Delaware corporate takeover battles. Particularly in light of the recent decision in the Court of Chancery

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1. Or at the very least, obtain a higher price.

2. Corporations can employ staggered or classified (these terms are used interchangeably) boards pursuant to DEL. CODE ANN. tit. 8, § 141(d) (2010). The staggered board provision of the Delaware code provides that “[t]he directors of any corporation . . . may . . . be divided into 1, 2 or 3 classes. . . .” *Id.* Each class of directors’ terms expire at the annual meeting in the first, second or third year following their election.

rejecting Air Products' demand that Airgas redeem its poison pill, the ability for bidders to wage proxy contests becomes increasingly critical.³ As such, the decisions of the Court of Chancery and the Delaware Supreme Court regarding Air Products' proposed bylaw amendments have broad implications.

This comment reviews the Court of Chancery⁴ and Delaware Supreme Court⁵ opinions, and considers the potential impact of each. First, this comment contends that the Delaware Supreme Court, although giving lip service to the principles of favoring the shareholder franchise, impinges on the shareholders' right to amend corporate bylaws, while protecting the Board's right to do the same. Both the Court of Chancery and the Delaware Supreme Court held that the Airgas charter was ambiguous, and thus required contract interpretation to resolve. This comment argues that Airgas's charter was not ambiguous, and could be interpreted by its plain language. Even assuming an ambiguity existed, however, this comment argues that the Delaware Supreme Court's interpretation, in contrast to the Court of Chancery's interpretation, did not properly apply the principle of favoring the shareholder franchise in interpreting Airgas's charter and bylaws.

Second, this comment argues that the actions taken by Airgas's Board should have triggered heightened review by the courts, because the conduct of the Board blatantly interfered with the shareholder franchise. Absent an alternative requirement in a corporate charter or bylaws, the Delaware General Corporate Law provides that "[i]n all matters other than the election of directors, the affirmative vote of the majority of shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the stockholders"⁶

Here, the Airgas Board amended the corporate bylaws to move the 2010 annual meeting back from August 2010 until September 2010. However, when the Airgas shareholders voted to move the 2011 annual meeting, the Airgas Board brought suit to invalidate the shareholder action. The Airgas Board's conduct suggests that their underlying motive for

3. Airgas employed a poison pill triggered at 15% share ownership, and has steadfastly refused to redeem the pill. Absent a redemption of the pill by Airgas's Board, no shareholder can acquire more than 14.99% of the company. Therefore, Air Products' only avenue for pursuing its takeover attempts, and Airgas's shareholders' only avenue for supporting such a takeover, is through a proxy context.

4. *Airgas, Inc. v. Air Prods. & Chems., Inc. (Airgas I)*, No. 5817-CC, 2010 WL 3960599, at *1 (Del. Ch. Oct. 8, 2010) (holding that Air Products' proposed bylaw is valid under Airgas's Charter and Delaware law).

5. *Airgas, Inc. v. Air Prods. & Chems., Inc. (Airgas II)*, 8 A.3d 1182, 1185 (Del. 2010) (reversing the Court of Chancery and holding that Air Products' proposed bylaw is invalid under Airgas's charter).

6. DEL. CODE ANN. tit. 8, § 216(2) (2010).

invalidating the proposed bylaw is entrenchment, or keeping themselves in office. This is precisely the concern that instigated the Delaware courts to establish the heightened review in *Blasius*.⁷

Finally, this comment considers the impact of the Court of Chancery and more importantly the Delaware Supreme Court decisions on the future of the takeover battle in Delaware. Particularly in light of the strength of the staggered board mechanism in resisting takeovers, this comment considers whether the Delaware Supreme Court's opinion created too much protection for target companies. This comment also considers whether the holding of the Delaware Supreme Court may prevent future changes to Airgas's annual shareholder meeting date, as well as any company that takes advantage of a staggered board, imposing a significant limitation to the ability of shareholders to exercise their voting power.

Section I of this comment introduces the key players, and sets the stage of the hostile takeover battle between Air Products and Airgas. Section II discusses the Delaware Court of Chancery opinion of October 8, 2010. Section III discusses the Delaware Supreme Court decision of November 23, 2010, which reversed the Court of Chancery's holding. Section IV discusses the principles of contract interpretation in corporate law, specifically considering the principle of interpretation of ambiguous provisions of corporate charters and bylaws in favor of the shareholder franchise. Section V discusses the *Blasius* standard of review, and argues that the conduct of Airgas's Board should have triggered this heightened standard of review. Finally, Section VI discusses the potential impacts of the Delaware Supreme Court's decision on staggered Boards and annual meetings, with specific focus on the efficacy of staggered Boards and the ability of a company to change the date of the shareholder meeting.

I. THE KEY PLAYERS AND THE TAKEOVER DANCE

Airgas, Inc. and Air Products and Chemicals, Inc. are large corporations within the chemical industry.⁸ Airgas claims to be the "largest distributor of industrial, medical, and specialty gases and related equipment . . . to industrial and commercial markets" in the United States.⁹ Air Products serves a worldwide market in atmospheric, process and specialty gases, and related equipment.¹⁰

Both companies are major players in the diversified chemical industry. Bloomberg.com data indicates that Airgas was the "biggest acquirer of

7. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988).

8. AIR PRODUCTS, <http://www.airproducts.com> (last visited Jan. 28, 2011); AIRGAS, <http://www.airgas.com> (last visited Jan. 28, 2011).

9. AIRGAS, *supra* note 8.

10. AIR PRODUCTS, *supra* note 8.

industrial-gas companies in North America in the five years through [Feb. 4, 2010], accounting for . . . transactions valued at \$805 million . . . ”¹¹ In 2002, Airgas acquired Air Products’ U.S. packaged-gas business for \$236 million.¹² Air Products’ CEO John McGlade said in an interview that Air Products sought to re-enter the U.S. packaged-gas business, a motivating factor in its bid for Airgas.¹³ Further, according to Air Products, the combined company “would generate annual savings of \$250 million two years after the deal is completed . . . ”¹⁴

According to Yahoo! Finance, as of early 2011, Airgas had a market capitalization of approximately \$5.62 billion, and Air Products had a market capitalization of approximately \$18.62 billion.¹⁵ A combination of the two corporations would create “the largest industrial gas supplier in North America” with annual sales of approximately \$12.5 billion.¹⁶ Air Products is a shareholder of Airgas, holding approximately two percent of Airgas’s outstanding common stock.¹⁷

In October of 2009, Air Products expressed interest in acquiring Airgas.¹⁸ Air Products’ CEO John McGlade met with Airgas’s CEO Peter McCausland to discuss a potential transaction between the companies.¹⁹ Air Products offered \$60.00 in Air Products stock per share of Airgas stock for the purchase of Airgas.²⁰ McCausland informed McGlade that it was not a good time for Airgas to consider a sale of the company, but presented the proposal to Airgas’s Board.²¹ Airgas’s Board rejected the bid as “grossly undervalu[ing]” the company.²² In their arguments before the Court of Chancery, Airgas claimed that, if left alone, the Airgas stock price would “be worth north of \$70 by [2012].”²³

Air Products presented several offers to the Airgas Board, which were

11. Jack Kaskey and Zachary Mider, *Air Products May Take \$5.1 Billion Airgas Bid Hostile (Update 4)*, BLOOMBERG (Feb. 5, 2010, 4:10PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aPoHDw2OZD.o>.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Summary for Air Products Common Stock*, YAHOO! FINANCE (last visited Jan. 28, 2011), <http://finance.yahoo.com/q?s=APD>; *Summary for Airgas Common Stock*, YAHOO! FINANCE (last visited Jan 30, 2011), <http://finance.yahoo.com/q?s=ARG>.

16. Matt Wilkinson, *Air Products To Swallow Airgas*, ROYAL SOC’Y OF CHEMISTRY (Feb. 9, 2010), <http://www.rsc.org/chemistryworld/News/2010/February/09021001.asp>.

17. *Air Prods. & Chems, Inc. v. Airgas, Inc. (Air Prods.)*, 16 A.3d 48, 61 (Del. Ch. 2011).

18. *Airgas I*, 2010 WL 3960599, at *2.

19. *Air Prods.*, 16 A.3d at 55.

20. Wilkinson, *supra* note 16.

21. *Air Prods.*, 16 A.3d at 64.

22. Wilkinson, *supra* note 16.

23. *Air Prods.*, 16 A.3d at 61.

refused as inadequate.²⁴ Air Products attempted several times to privately negotiate with Airgas's Board to come to an agreement, but Airgas rebuffed the attempts, stating that "[t]he [Airgas] Board is not interested in pursuing [Air Products'] proposal and continues to believe there is no reason to meet."²⁵

On February 4, 2010, Air Products took its offer public, sending a public letter to the Airgas board detailing Air Products' intention to offer Airgas shareholders an all-cash offer of sixty dollars per share for all outstanding shares of Airgas stock.²⁶ Although the Airgas Board rejected this latest offer, Air Products launched its tender offer on February 11, 2010.²⁷ Because Airgas employed a poison pill, among other defenses, Air Products' tender offer included several conditions that required the Airgas Board to allow the transaction to proceed.²⁸ Air Products also announced its intention to nominate directors to Airgas's board at the next Airgas annual meeting.²⁹ Airgas's stock price increased by forty percent after Air Products announced its intentions.³⁰

Airgas sought and received several "inadequacy opinions" from investment bankers, and recommended that its shareholders not tender into Air Products' offer because the price was grossly inadequate based on these opinions.³¹ On March 13, 2010, Airgas announced its nominees for Airgas's Board: John P. Clancey, Robert L. Lumpkins, and Ted B. Miller, Jr.³² The platform upon which the nominees ran for election touted their independence, qualifications, and willingness to "consider without any bias [the Air Products] offer . . ."³³

In addition to the nominees, Air Products announced that it would seek three amendments to the Airgas bylaws:

- (1) Amend Airgas's bylaws to require Airgas to hold its 2011 annual meeting and all subsequent annual shareholder meetings in the month of January;
- (2) Amend Airgas' [sic] bylaws to limit the Airgas Board's ability to reseat directors not elected by Airgas shareholders at

24. *Airgas I*, 2010 WL 3960599, at *2.

25. *Air Prods.*, 16 A.3d at 67.

26. *Id.* at 68.

27. *Id.*

28. For example, the tender offer was conditioned on the Airgas board redeeming its poison pill, approving the deal under the Delaware anti-takeover statutes, and not otherwise impeding the transaction by, for example, entering into an agreement or transaction with a third-party buyer. *Id.* at 69–70.

29. *Id.* at 70.

30. Wilkinson, *supra* note 16.

31. *Air Prods.*, 16 A.3d at 70.

32. *Id.*

33. *Id.* at 72.

the annual meeting (excluding the CEO); and

(3) Repeal all bylaw amendments adopted by the Airgas Board after April 7, 2010.³⁴

Airgas and Air Products engaged in a very public debate regarding the upcoming proxy contest.³⁵ Airgas's Board, as well as "all four leading proxy advisory firms," recommended that Airgas's shareholders vote against Air Products proposed amendments.³⁶ According to the Institutional Shareholder Services report, Air Products' proposed bylaw amendment would "cede[] significant control of the negotiation process to the bidder," as well as "significantly impair the defensive value of the classified board, limiting the board's ability to negotiate the highest offer for shareholders."³⁷

In April 2010, the Airgas Board amended Airgas's bylaws to provide the board with the ability to push back the date of the annual meeting.³⁸ Prior to this amendment, Article II of Airgas's bylaws required the annual meeting to be held within five months of the end of Airgas's fiscal year, which is in March.³⁹ The board amended the bylaws to set the annual meeting "on such date as the Board of Directors shall fix."⁴⁰ Pursuant to this newly adopted power, the Airgas Board moved the annual meeting to September 15, 2010 (the deadline would have been August 2010 absent the bylaw amendment), ostensibly to "provide information to stockholders' before the annual meeting, as well as more time to 'demonstrate performance of the company.'"⁴¹

Airgas's charter provides that its Board will be staggered, pursuant to

34. *Id.* at 72 (citing Air Products' Definitive Proxy Statement for 2010 Annual Meeting of Airgas Stockholders (July 29, 2010)). Each of these proposed bylaws would put Air Products closer to its goal of acquiring a majority of the board. For example, changing the date of the annual meeting would theoretically shorten the time between directorial elections by several months, potentially allowing Air Products to obtain a majority of the board by January 2011.

35. Both companies issued several press releases regarding Airgas's 2010 Annual Meeting and Air Products' tender offer. Air Products Press Releases, AIR PRODUCTS, <http://www.airproducts.com/company/news-center.aspx> (select "2010" and "Corporate" from the drop-down boxes). Airgas Press Releases, AIRGAS, <http://www.airgas.com/content/pressReleases.aspx?year=2010>.

36. Press Release, Airgas, Inc., All Four Leading Proxy Advisory Firms Recommend Voting Against APD's January Meeting Proposal (Sept. 10, 2010), http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1586&year=2010 (quoting Institutional Shareholder Services (ISS) report from Sept. 8, 2010). ISS did, however, recommend that Airgas shareholders elect Air Products' board nominees. *Id.*

37. *Id.*

38. *Air Prods.*, 16 A.3d at 73.

39. *Id.*

40. *Id.* (citing Airgas Amended and Restated Bylaws, amended through April 7, 2010, at Art. II).

41. *Id.*

Title 8, Section 141(d) of the Delaware Code.⁴² At the time of the 2010 annual meeting, Airgas's board consisted of nine directors divided into three equal classes, with one class of Airgas's directors up for election each year.⁴³ Air Products' nominees were elected in the September 2010 annual meeting of Airgas's shareholders.⁴⁴ In addition, despite the vigorous opposition and lobbying from Airgas, Air Products' proposed bylaws received fifty-one percent of the shares voted at the September 15, 2010 meeting.⁴⁵

Following the September 2010 annual meeting, Airgas issued a press release indicating its disappointment with the results, but also noting its belief that the bylaw amendment changing the annual meeting date to January was invalid under Delaware law and Airgas's articles of incorporation.⁴⁶ Airgas's Board brought suit in the Court of Chancery claiming, among other things, that the amendment to Airgas's bylaws changing the date of the annual meeting was invalid.⁴⁷

II. THE COURT OF CHANCERY OPINION

The Court of Chancery engaged in a two-part analysis to determine whether the bylaw proposed by Air Products was invalid.⁴⁸ First, the Court of Chancery considered whether the bylaw amendment was proper under Airgas's bylaws and charter.⁴⁹ Second, the Court of Chancery, having found that the bylaw was appropriately passed under Airgas's charter, considered whether the bylaw violated Delaware law.⁵⁰

Airgas contended that a bylaw moving the date of the annual meeting requires approval of a supermajority, or sixty-seven percent, and that such a bylaw is inconsistent with Airgas's bylaws and charter.⁵¹ The argument follows that, because Air Products' bylaw amendment proposal only

42. DEL. CODE ANN. tit. 8 § 141(d) (2010); *Airgas I*, 2010 WL 3960599, at *2.

43. *Airgas I*, 2010 WL 3960599, at *2.

44. *Id.*

45. Air Products' proposed bylaws received 45.8% of shares entitled to vote, which amounted to a majority (51%) of shares that actually voted. *Id.* at *3.

46. Press Release, Airgas, Inc., Airgas Announces Preliminary Results of Annual Meeting of Stockholders (Sept. 15, 2010), http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1589&year=2010.

47. *Airgas I*, 2010 WL 3960599, at *1; see Press Release, Airgas, Inc., Airgas Announces Preliminary Results of Annual Meeting of Stockholders (Sept. 15, 2010), http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1589&year=2010 (stating "Airgas intends to seek an expedited judicial determination on the validity of this by-law.").

48. *Airgas I*, 2010 WL 3960599, at *1.

49. *Id.*

50. *Id.*

51. *Id.* at *4.

received a bare majority, such amendment was not passed by the shareholders. Airgas's charter provides that the bylaws may be amended by the board of directors or the shareholders.⁵² Any shareholder amendment to the bylaws must be passed by a "majority vote of the shares represented and entitled to vote at [the annual] meeting."⁵³

Airgas's charter also provides that:

Notwithstanding the foregoing [provisions regarding shareholder amendment] and anything contained in the certificate of incorporation to the contrary, Article III of the By-Laws shall not be altered, amended or repealed and no provision inconsistent therewith shall be adopted without the affirmative vote of the holders of at least 67% of the voting power of all the shares of the Corporation entitled to vote generally in the election of Directors⁵⁴

Article III of Airgas's bylaws provides the mechanism for the election and terms of Airgas's Board.⁵⁵ Article III, Section 1 provides, in pertinent part:

The Directors . . . shall be classified, with respect to the time for which they severally hold office, into three classes, as nearly equal in number as possible, one class to hold office initially for a term expiring at the annual meeting of stockholders to be held in 1987, another class to hold office initially for a term expiring at the annual meeting of stockholders to be held in 1988, and a third class to hold office initially for a term expiring at the annual meeting of stockholders to be held in 1989, with the members of each class to hold office until their successors are elected and qualified. At each annual meeting of stockholders, the successors or the class of Directors whose term expires at the meeting shall be elected to hold office for a term expiring at the annual meeting of stockholders held in the third year following the year of their election.⁵⁶

The Court of Chancery determined that the proposed bylaw moving the annual meeting from September 2011 to January 2011 was not inconsistent with Article III of Airgas's bylaws.⁵⁷ The Court of Chancery noted that corporate charters and bylaws are subject to contract law, because they are contracts among the shareholders of a corporation.⁵⁸ If a

52. *Id.*

53. *Id.* (emphasis omitted).

54. Airgas Cert. of Inc., Art. V, § 6.

55. *Airgas I*, 2010 WL 3960599, at *4.

56. Airgas Bylaws, Art. III, § 1.

57. *Airgas I*, 2010 WL 3960599, *5.

58. *Id.* at *4 (citing *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923 (Del. 1990)).

provision in a corporate charter or bylaws is ambiguous, or susceptible to multiple interpretations, the court must resolve such ambiguity “in favor of the stockholders’ electoral rights.”⁵⁹

According to the Court of Chancery, Article III is susceptible to multiple interpretations.⁶⁰ The Court of Chancery resolved the ambiguity in favor of the shareholder franchise, and held that the proposed bylaw was not inconsistent with Article III of Airgas’s bylaws.⁶¹

The Court of Chancery next addressed whether the proposed bylaw amendment was inconsistent with Airgas’s charter.⁶² Specifically, Airgas contended that Article 5, Section 1 of its charter, which established the staggered board, provided that the term of its directors is “approximately three years.”⁶³ Airgas relied heavily on extrinsic evidence indicating that Airgas has always held its annual meetings eleven to thirteen months apart.⁶⁴ The Court of Chancery, noting that the terms “annual” and “year” are not defined in Airgas’s charter, determined that the provision is ambiguous.⁶⁵ Again resolving the conflict in favor of the shareholder franchise, the Court of Chancery held that the charter, which provides that directorial terms end at the annual meeting in the third year following their election, does not require approximately 1095 day terms.⁶⁶

After determining that the proposed bylaw amendment was not inconsistent with Airgas’s bylaws or charter, the Court of Chancery addressed whether the amendment was nevertheless invalid under Delaware law.⁶⁷ Airgas pointed to two provisions of the Delaware General Corporate Law to support their argument that the bylaw violated Delaware law.⁶⁸ Specifically, Airgas contended that (1) the bylaw effected a

59. *Id.*; see also *Harrah’s Entm’t, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002):

When a corporate charter is alleged to contain a restriction on the fundamental electoral rights of stockholders . . . it has been said that the restriction must be ‘clear and unambiguous’ to be enforceable. The policy basis for this rule of construction rests in the ‘belief that the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.

60. *Airgas I*, 2010 WL 3960599, at *5.

61. *Id.*

62. *Id.*

63. *Id.* at *6.

64. *Id.*

65. *Id.*

66. *Id.* at *7. The Court of Chancery relies on the contract interpretation doctrine of giving meaning to each provision. Because the bylaws provide the date of the annual meeting, interpreting the charter to require that annual meeting to occur approximately a year after the previous meeting would make the bylaw provision establishing the date of the annual meeting superfluous. *Id.*

67. *Id.* at *8.

68. *Id.*

“removal” under 8 Del. C. 141(k), and (2) the bylaw was invalid under 8 Del. C. 141(d).⁶⁹

The Court of Chancery first addressed Airgas’s argument regarding “removal.”⁷⁰ Delaware Code title 8, section 141(k) provides that “[a]ny director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except . . . in the case of a corporation whose board is classified [under 8 Del. C. 141(d)].”⁷¹ In the case of classified boards, shareholders may only remove directors “for cause.”⁷²

The Court of Chancery noted that, in order to constitute a “removal” under the statute, the directors must be removed from office prior to the expiration of their “full term” on the board.⁷³ Pursuant to Airgas’s charter and bylaws, however, the Court of Chancery held that the “full term” expires at the “annual meeting” of the shareholders, and therefore the bylaw does not constitute a removal.⁷⁴ Essentially, the directors’ terms end at the annual meeting, whenever that happens to be. In order to be a “removal,” the directors must be removed between annual meetings.

The Court of Chancery next addressed whether 8 Del. C. 211, which provides the statutory framework for annual shareholder meetings, bars a bylaw amendment to the date of the annual meeting.⁷⁵ Section 211 provides that “an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided by the bylaws.”⁷⁶ Section 211 also provides that annual meetings shall not be held more than thirteen months apart.⁷⁷

The Court of Chancery held that nothing in Section 211 prevented moving the 2011 annual meeting earlier in the year.⁷⁸ The requirement of no more than thirteen months elapsed time between meetings was enacted to protect corporate democracy, and did not provide an alternate “minimum

69. *Id.*

70. *Id.* at *9.

71. DEL. CODE ANN. tit. 8, § 141(k)(2001).

72. DEL. CODE ANN. tit. 8, § 141(k)(1)(2010).

73. *Airgas I*, 2010 WL 3960599, at *9.

74. *Id.* (citing *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 401 (Del. 2010)). The Court of Chancery considered and discarded the argument that the proposed bylaw amendment “evad[es] the 67% removal requirement” in Airgas’s charter, applying the doctrine of independent legal significance. The doctrine provides that an action taken validly under one part of the statute is legally independent from other sections, even if the same result could be effected under another provision of the statute. *Id.* at *5 (citing *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963)).

75. *Id.* at *10.

76. DEL. CODE ANN. tit. 8, § 211 (2010).

77. *Id.*

78. *Airgas I*, 2010 WL 3960599, at *10.

elapsed time” between meetings.⁷⁹ Although the Court of Chancery noted certain logistical reasons that two meetings must be separated by a minimum time, none of these reasons prevented a four-month gap between meetings.⁸⁰

The Court of Chancery concluded that the proposed bylaw amendment was valid under both the Airgas charter and Delaware law.⁸¹

III. THE DELAWARE SUPREME COURT OPINION

After the Court of Chancery issued its final order declaring the proposed bylaw amendment to be valid under the Airgas charter and Delaware law, Airgas appealed to the Delaware Supreme Court.⁸² The Delaware Supreme Court reversed the Court of Chancery decision, finding that the proposed bylaw amendment was inconsistent with Airgas’s charter and constituted a *de facto* removal of Airgas’s directors.⁸³

To arrive at its decision, the Delaware Supreme Court distinguished between Defined Term Alternative and Annual Meeting Term Alternative forms for staggered boards.⁸⁴ The court noted that, in the Defined Term Alternative (with language tracking 8 Del. C. 141(d)), corporate charters explicitly provided for three-year terms for directors.⁸⁵ Consequently, in the Annual Meeting Term Alternative (using language substantially similar to the Airgas charter), corporate charters provided that the directorial terms ended at the annual meeting in the third year following their election.⁸⁶

The Delaware Supreme Court engaged in a lengthy analysis of case law, statutory commentary, and extrinsic evidence of corporate practice to find that the Annual Meeting Term Alternative and the Defined Term Alternative are indistinguishable in that both provide for three-year

79. *Id.*

80. *See id.* (noting that notice and filing requirements may prevent two meetings from being back to back, but these logistical issues would not prevent a meeting four months later).

81. *Id.* at *14.

82. Press Release, Airgas, Inc., Airgas to Appeal Delaware Chancery Court Ruling (Oct. 11, 2010), http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1598&year=2010.

83. *Airgas II*, 8 A.3d at 1194–95.

84. *Id.* at 1188. The “Defined Term Alternative” and “Annual Meeting Term Alternative” are defined in the Delaware Supreme Court opinion, and indicate that there are distinct forms of classified board provisions, which provide for distinct term lengths.

85. *Id.*

86. *Id.* The distinction between the Defined Term Alternative and the Annual Meeting Term Alternative is the possible length of the directorial terms. The plain language of the Defined Term Alternative indicates that directors serve for three years. The plain language of the Annual Meeting Term Alternative indicates that directors serve until the third annual meeting (which could be as little as two years and one month, or as much as three years and three months).

directorial terms.⁸⁷ The court found that the Airgas charter is ambiguous, and held that uncontroverted extrinsic evidence indicates that the intended meaning of the Annual Meeting Term Alternative is three-year directorial terms.⁸⁸

The Delaware Supreme Court began its analysis with case law.⁸⁹ Although the court conceded that it had not yet been called upon to interpret the Annual Meeting Term Alternative, the court cited language from several cases that suggest that directors on staggered boards serve three-year terms.⁹⁰ However, because this is a question of first impression, the language cited by the Delaware Supreme Court merely reflects that Delaware courts have not had cause to note a distinction between the Defined Term Alternative and the Annual Meeting Term Alternative language.⁹¹

The Delaware Supreme Court next considered industry practice with respect to staggered boards.⁹² According to the court, fifty-eight of the eighty-nine Fortune 500 Delaware corporations employ the Annual Meeting Term Alternative.⁹³ Of those corporations, forty-six expressly state in their proxy statements that their directors serve three-year terms.⁹⁴ This suggests that these corporations *intended* that their staggered board provisions, which used the Annual Meeting Term Alternative language,

87. *See id.* at 1194 (holding that Defined Term Alternative language and Annual Meeting Term Alternative language are equivalent).

88. *Id.* at 1189–90. The Delaware Supreme Court considered the ABA’s Public Company Organizational Documents: Model Forms and Commentary, as well as proxy statements of corporations that employ the Annual Meeting Term Alternative, to arrive at its decision that there is no functional difference between the Annual Meeting Term Alternative and the Defined Term Alternative. *Id.* At 1191–92 (citing A.B.A. PUBLIC COMPANY ORGANIZATIONAL DOCUMENTS: MODEL FORMS AND COMMENTARY (2009)).

89. *Id.* at 1190.

90. *Id.* The Delaware Supreme Court cited dicta from several cases, which, according to the Court, “reflects the understanding of the [Delaware courts] that directors of staggered boards serve a three year term.” *Id.* For example, the Delaware Supreme Court cites *Versata Enters. v. Selectica, Inc.*, 5 A.3d 586, 604 (Del. 2010), for the proposition that “[a] classified board would *delay-but not prevent-a hostile acquirer from obtaining control of the board*, since a determined acquirer could wage a proxy contest and obtain control of two thirds of the target board over a two year period, as opposed to seizing control in a single election.” *Id.* at n. 18 (quoting *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180, 1186 n. 17 (Del. Ch. 1998)). However, *Versata* held that a 4.99% poison pill was not preclusive, so the statement about the length of time to acquire control of the board is unnecessary to the holding, and reflects a “worst case scenario” for a bidder to acquire control of the board. *Versata Enters.*, 5 A.3d at 604.

91. *See, e.g.*, *Dolgovff v. Projectavision, Inc.*, No. Civ.A. 14805, 1996 WL 91945, at *9 (Del. Ch. Feb. 29, 1996) (“It *ordinarily* requires two years for an opponent to possibly secure a majority of the seats on a staggered board.”) (emphasis added).

92. *Airgas II*, 8 A.3d at 1191.

93. *Id.*

94. *Id.*

provided for precisely three-year terms. Further, of the corporations that have “de-staggered” their Annual Meeting Term Alternative staggered boards, 97% represented in their proxy statements that their directors served three-year terms.⁹⁵

The Delaware Supreme Court also found commentary on the Delaware General Corporate Law and the Model Forms persuasive.⁹⁶ The commentary to 8 Del. C. 141(d) states that “directors elected to succeed those whose terms expire shall be elected for a three-year term.”⁹⁷

The Delaware Supreme Court, disagreeing with the Court of Chancery, found that although the wording of the staggered board provision in Airgas’s charter differs from provisions that mandated three-year terms, Airgas’s charter nonetheless provides that Airgas’s directors were entitled to a full term of three years.⁹⁸ The court hedged its decision by saying that there need not be mathematical exactitude in measuring the duration of the director’s terms, but only that two years and four months was too short.⁹⁹

Ultimately, the Delaware Supreme Court held that the proposed bylaw amendment seeking to move the annual meeting date was invalid under the Airgas charter.¹⁰⁰ The proposed bylaw amendment was invalid, according to the court, because it “impermissibly shorten[ed] the directors’ three year staggered terms as provided by Article 5, Section 1 of the Airgas Charter,”¹⁰¹ and constituted a *de facto* removal of directors without the required sixty-seven percent shareholder approval under Article 5, Section 3.¹⁰²

IV. FINDING AMBIGUITY AND CONTRACT INTERPRETATION

A corporation’s Articles of Incorporation and Bylaws are interpreted by courts applying the standards of contract interpretation.¹⁰³ The first question a court must answer is whether the plain meaning of a provision lends itself to multiple interpretations.¹⁰⁴ If there is no ambiguity, then the

95. *Id.*

96. *Id.*

97. A.B.A., PUBLIC COMPANY ORGANIZATIONAL DOCUMENTS: MODEL FORMS AND COMMENTARY 67 (2009).

98. *Airgas II*, 8 A.3d at 1194.

99. *Id.*

100. *Id.* at 1195.

101. *Id.* at 1194–95.

102. *Id.* Interestingly, the *de facto removal* argument fails to consider the possibility that the board members could be reelected by the shareholders at the January 2011 meeting.

103. *KFC Nat’l Council and Adver. Coop., Inc. v. KFC Corp.*, C.A. No. 5191-VCS, 2011 WL 350415, at *10 (Del. Ch. Jan. 31 2011).

104. *Id.*

court must interpret the contract in accordance with the plain meaning of the language.¹⁰⁵

To determine if there is ambiguity in or among corporate articles of incorporation and bylaws, courts should look only to the contractual language.¹⁰⁶ Courts must not look at extrinsic evidence to create an ambiguity.¹⁰⁷ Further, where possible, contracts should be interpreted to “give effect to every term and not render any terms meaningless or superfluous.”¹⁰⁸

Both the Court of Chancery and the Delaware Supreme Court, in arriving at their decisions, make it clear that the analysis hinges on contract interpretation.¹⁰⁹ Both courts also note that, in interpreting an unclear or ambiguous charter or bylaw, any doubt is resolved “in favor of the stockholders’ electoral rights.”¹¹⁰ As the Court of Chancery noted, the term *annual meeting* should mean the same thing for companies with staggered boards and those without.¹¹¹ Shareholders have the right under Delaware law to amend the bylaws by a majority shareholder vote, and in corporations without staggered boards, shareholders have the flexibility to move the annual meeting to any time during the year, so long as it does not conflict with the statutory requirements.¹¹² It follows that, where the Board and the Shareholders disagree on the meaning of an ambiguous provision regarding the date of the annual meeting, the court should interpret the provision in a manner that favors shareholder democracy, rather than Board power. However, only the Court of Chancery applied these principles in its opinion.¹¹³

As the opinion of the Delaware Supreme Court demonstrates, although perhaps unintentionally,¹¹⁴ the language of Airgas’s charter does

105. *Id.*

106. *O’Brien v. Progressive Nat’l Ins. Co.*, 785 A.2d 281, 289 (Del. 2001) (“Delaware courts are obligated to confine themselves to the language of the document and not to look to extrinsic evidence to find ambiguity.”).

107. *Id.*

108. *KFC Nat’l Council and Adver. Coop.*, 2011 WL 350415, at *11.

109. *Airgas I*, 2010 WL 3960599, at *3 (“Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply.”); *Airgas II*, 8 A.3d at 1188 (“Corporate charters and bylaws are contracts among a corporation’s shareholders; therefore, our rules of contract interpretation apply.”).

110. *Airgas II*, 8 A.3d at 1188.

111. *Airgas I*, 2010 WL 3960599, at *12.

112. Specifically, the separation between annual meetings cannot be less than thirty days, or greater than thirteen months. DEL. CODE ANN. tit. 8, § 211 (2010); *see Airgas I*, 2010 WL 3960599, at *12 (citing *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227 (Del. 2005)).

113. *Airgas I*, 2010 WL 3960599, at *7 (stating that “. . . [in] construing the ambiguous terms of the charter in favor of the shareholder franchise, ‘annual’ in this context must mean occurring once a year”).

114. The Delaware Supreme Court expended much verbiage in describing the distinction

not mandate a finding of ambiguity.¹¹⁵ The Delaware Supreme Court notes that there are two incarnations of the staggered board mechanism, the Defined Term Alternative and the Annual Meeting Term Alternative.¹¹⁶ Each alternative has explicit language indicating the length of directorial terms; the Defined Term Alternative expressly indicates a three-year term and the Annual Meeting Term Alternative expressly indicates a term ending at the annual meeting occurring in the third year following election.¹¹⁷ Therefore, no finding of ambiguity is necessary.

The Delaware Supreme Court gives great weight to the “uncontroverted extrinsic evidence bearing on the intended meaning of the Airgas Charter”¹¹⁸ in arriving at its decision that, notwithstanding Airgas’s use of the Annual Meeting Term Alternative language, Airgas *intended* to have three-year directorial terms.¹¹⁹ However, the Delaware Supreme Court does not consider the effect of its decision on the shareholders’ electoral rights. The court’s ultimate holding is that both the Annual Meeting Term Alternative and the Defined Term Alternative mean precisely the same thing—each provides three-year directorial terms.¹²⁰

At the time Airgas established its charter and began holding annual meetings in 1986, both the Annual Meeting Term Alternative and the Defined Term Alternative Language existed.¹²¹ The Court of Chancery and the Delaware Supreme Court appear to consider the presence of the two alternatives as creating an ambiguity, which requires analysis into extrinsic evidence and the intent of the parties. However, the fact that two sets of alternative language exist suggests that, at the time Airgas established its charter, it considered (or at least could have considered) both options, and the plain meaning that each option inheres, and selected the Annual Meeting Term Alternative.

As the Court of Chancery stated, if Airgas had desired that its

between the Defined Term Alternative and the Annual Meeting Term Alternative, and what the plain language of each provides, only to then find ambiguity in the Annual Meeting Term Alternative. *Airgas II*, 8 A.3d at 1188–90.

115. See *Airgas II*, 8 A.3d at 1188 (defining the staggered board mechanisms as the Defined Term Alternative and the Annual Meeting Term Alternative).

116. *Id.*

117. *Id.*

118. *Id.* at 1189.

119. *Id.* at 1194.

120. *Id.* at 1194. The alternative to this holding is that each provides a different benchmark to measure directorial terms: Defined Term Alternative uses an approximately 36 month benchmark, whereas Annual Meeting Alternative uses three annual meetings to define the length of directorial terms.

121. See, e.g., *Roven v. Cotter*, 547 A.2d 603, 604 (Del. Ch. 1988) (discussing the Annual Meeting Term Alternative language); *Essential Enters Corp. v. Automatic Steel Prods., Inc.*, 159 A.2d 288, 290 (Del. Ch. 1960) (discussing the Defined Term Alternative language).

directors would serve three-year terms, the language was readily available to mandate this result.¹²² Airgas opted to select language that tied the expiration of directorial terms to the date of the annual meeting. It is unlikely that, by establishing the staggered board, Airgas intended to permanently set the date of its annual meeting. Nevertheless, this is the precise result of the opinion of the Delaware Supreme Court. Although the court qualified its holding by stating that “[n]o party to this case has argued that DGCL Section 141(d) or the Airgas Charter requires that the three year terms be measured with mathematical precision[,]” the holding of the court essentially ties Airgas’s Board and shareholders to holding their annual meetings at approximately the same time every year, until such time as the charter is amended to remove the staggered board mechanism.¹²³

Airgas also chose to include a provision in its charter that provided for the manner of setting the date of the annual meeting. Article II, Section 1 of the Airgas charter governs annual meetings of the shareholders, including setting the date for such meeting.¹²⁴ Under normal operation of the Airgas charter, Article II is not subject to the special sixty-seven percent requirements for amendment.¹²⁵ However, under the Delaware Supreme Court’s holding, the date of the annual shareholder meeting was permanently fixed by the establishment of the staggered board, because any attempt to change the date (absent amending the charter to either “de-stagger” the board or to create a charter provision setting the date of the shareholder meeting) would conflict with Airgas’s charter. Any bylaw provision that conflicts with the charter is void under Delaware law.¹²⁶

More importantly, just prior to the approval of Air Products’ proposed bylaw, which moved the date of the annual meeting, the Airgas Board amended Airgas’s bylaws to allow the board to change the date of the annual meeting to such time “as the Board of Directors shall fix.”¹²⁷ Following this bylaw amendment by the Airgas Board, the board moved Airgas’s 2010 Annual Meeting back to September 15, 2010.¹²⁸ Under the Delaware Supreme Court’s holding, this would have been an invalid action because it extended the staggered board term beyond the three year mark to more than thirty-seven months.¹²⁹

122. *Airgas*, 2010 WL 3960599, at *7.

123. *Airgas II*, 8 A.3d at 1194.

124. *Airgas I*, 2010 WL 3960599, at *5.

125. *See id.* (noting that amendments that are inconsistent with article III are subject to the required sixty-seven percent shareholder approval).

126. DEL. CODE ANN. tit. 8, § 109(b) (2010).

127. Airgas Amended and Restated Bylaws (amended through April 7, 2010) at Art. II.

128. Such action would have been inconsistent with the pre-amendment Airgas Bylaws, because prior to the amendment, Airgas’s Bylaws required the Annual Meeting to be held within five months after the end of Airgas’s fiscal year in March. *Air Prods.*, 16 A.3d at 73.

129. *See Airgas II*, 8 A.3d at 1186 n.2 (listing the dates of the historical annual meetings,

Notwithstanding the fact that the Annual Meeting Term Alternative language is not necessarily ambiguous on its face, in resolving the supposed ambiguity, the Delaware Supreme Court did not adhere to the principle of resolving ambiguity in corporate charters in favor of the shareholder franchise.¹³⁰ Although it stated that it was applying this principle, the Delaware Supreme Court did not favor the shareholder franchise in its analysis.¹³¹

The Delaware Supreme Court identified two interpretations for the supposedly ambiguous provision, one that provided the shareholders with flexibility to set the date of their annual meetings in the Bylaws by a majority vote,¹³² and the other that requires a sixty-seven percent vote of the shareholders to set the date of the annual meeting.¹³³ The first option clearly gives greater effect to the shareholder franchise, and would provide parity between the power of the board and the shareholders to amend the bylaws and set the date of the annual meeting.

The Airgas shareholders voted in favor of moving the annual meeting date. The annual meeting is the primary mechanism through which the shareholders can employ their electoral rights. However, the Delaware Supreme Court interpreted the charter to require that, even though a majority vote of the shareholders approved the change to the date of the annual meeting, the shareholders were unable to effectuate such a decision.¹³⁴

When presented with two interpretations of the charter, the Delaware Supreme Court selected the interpretation that effectively eviscerated the shareholder franchise, rather than the (more than equally) plausible interpretation that would give maximum effect to the shareholder franchise. For example, had the court determined that the Annual Meeting Term Alternative comported with its plain language, the shareholders would be free to decide what time of year provided them the best opportunity to employ their electoral rights. However, given the Delaware Supreme Court's holding, Airgas's shareholders are bound by the date set in the bylaws until they effectively "de-stagger" the Airgas Board, because any change to the annual meeting date necessarily would be inconsistent with

which show that the Airgas 2007 Annual Meeting was held on August 7, 2007, and the directors elected at that meeting served more than three years, because they were up for election on September 15, 2010).

130. *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338 (Del. Ch. 2008); *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002).

131. *See Airgas II*, 8 A.3d at 1194–95 (resolving the ambiguity in favor of the Airgas board of directors).

132. *Airgas I*, 2010 WL 3960599 at *5.

133. *Id.*

134. *Airgas II*, 8 A.3d at 1194.

the Charter provision establishing the staggered board and thus invalid.¹³⁵

V. HEIGHTENED REVIEW AND CONCERNS OF ENTRENCHMENT

Beyond the question of interpretation of the Airgas charter, the Court of Chancery and the Delaware Supreme Court should have considered the concerns of board entrenchment and heightened review for board action. The conduct of Airgas's Board in responding to the efforts of Air Products to acquire Airgas should have implicated the heightened review mandated in *Blasius Industries, Inc. v. Atlas Corp.*¹³⁶ Since the Court of Chancery's decision in *Blasius*, Delaware courts have considered the shareholder franchise as the key to the hostile takeover. Delaware law does not prevent hostile takeovers but essentially forces the bidder to employ its rights as a shareholder to vote out the existing management.

By relying on the shareholder franchise as the only recourse for interested bidders, Delaware law puts a great deal of pressure on the shareholder franchise being uninhibited by the actions of the board of directors. To protect the efficacy of the shareholder franchise, the Delaware courts have established heightened standards of review for corporate board actions taken in the context of a hostile takeover. Specifically, where a corporate board of directors takes action that interferes with the shareholder franchise, such action must have a compelling justification.¹³⁷

The Airgas Board brought a suit to invalidate a shareholder-approved amendment to its bylaws.¹³⁸ Applying the *Blasius* standard, in order for this defensive action to be valid, the Airgas Board cannot be motivated by a primary purpose of entrenchment.¹³⁹ Here, the argument of the Airgas Board explicitly demonstrates that their primary concern with the proposed bylaw amendment is that it would effect a *de facto* removal of certain directors.¹⁴⁰

Where Airgas's Board acts with a primary purpose of entrenchment, it must have a compelling justification for such action.¹⁴¹ Here, the justification implicitly presented by the Airgas Board is that Air Products' proposed bylaw amendment would allow Airgas's shareholders to elect

135. DEL. CODE ANN. tit. 8, § 109(b) (2010).

136. 564 A.2d 651, 660 (Del. Ch. 1988).

137. *Id.* at 661.

138. *Airgas I*, 2010 WL 3960599, at *1.

139. *Blasius*, 564 A.2d at 658.

140. *Airgas I*, 2010 WL 3960599, at *1; *see also* Steel Partners II, L.P. v. Point Blank Solutions, Inc., C.A. No. 3695-CC, 2008 WL 3522431, at *1 (Del. Ch. Aug. 12, 2008) (considering a motion to postpone annual meeting and finding that postponing the annual meeting impinges on the shareholder franchise).

141. *Blasius*, 564 A.2d 651.

new board members sooner than anticipated. There is no suggestion that this bylaw automatically inserts Air Products' nominees onto the Airgas board. To the contrary, all the amendment provides is the opportunity for Airgas's shareholders to exercise their electoral rights in January 2011, as opposed to September 2011.

By bringing a suit to invalidate the proposed bylaw amendment, Airgas's Board acted for the primary purpose of interfering with the shareholder franchise and entrenching themselves. Particularly after amending the bylaws to provide the Airgas Board greater flexibility in setting Airgas's annual meetings, the Board's efforts to eliminate similar flexibility for the shareholders is telling.

Although the Delaware Supreme Court held that the delay of an annual meeting for the purpose of providing shareholders with more information does not mandate *Blasius* review in *Mercier v. Inter-Tel, Inc.*,¹⁴² the circumstances here do not suggest a motive other than board entrenchment. The assumption made by the Airgas Board is that the Airgas shareholders will elect the wrong people to the board in January. The implicit statement made by this conduct is that the Airgas shareholders are ill-equipped to determine who should manage Airgas.

The Delaware Supreme Court provided a clear explanation of the logic behind *Blasius* in *MM Companies, Inc. v. Liquid Audio, Inc.*:¹⁴³

Maintaining a proper balance in the allocation of power between the stockholders' right to elect directors and the board of directors' right to manage the corporation is dependent upon the stockholders' unimpeded right to vote effectively in an election of directors. This Court has repeatedly stated that, if the stockholders are not satisfied with the management or actions of their elected representatives on the board of directors, the power of corporate democracy is available to the stockholders to replace the incumbent directors when they stand for re-election. Consequently, two decades ago, this Court held: The Courts of this State will not allow the wrongful subversion of corporate democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law. Accordingly, careful judicial scrutiny will be given a situation in which the right to vote for the election of successor directors has been *effectively frustrated* and denied.¹⁴⁴

The Delaware Supreme Court in *Mercier*, interpreting the *MM Companies* decision, noted that the *Blasius* approach "should be reserved largely for director election contests or election contests having

142. 929 A.2d 786 (Del. Ch. 2007).

143. 813 A.2d 1118 (Del. 2003).

144. *Id.* at 1127 (internal citations and quotation marks omitted).

consequences for corporate control.”¹⁴⁵

In the battle between Air Products and Airgas, the date of the annual meeting has significant “consequences for corporate control[,]” and therefore brings to the fore the question of whether the conduct of the Airgas Board indicates entrenchment motives.¹⁴⁶ Although the *Blasius* standard has not, apparently, been applied to the conduct of bringing suit to invalidate shareholder bylaw amendments, this situation provides a compelling set of facts under which to extend the *Blasius* protections for the shareholder franchise. The Delaware Supreme Court, and the Court of Chancery, should have considered whether the Airgas Board’s conduct met the heightened review required by *Blasius*.

The “compelling justification” requirement for board action that risks entrenchment is a difficult standard to meet.¹⁴⁷ It is unlikely that the Airgas Board could present any justification, let alone a compelling justification, for attempting to invalidate its shareholders’ exercise of their voting rights in approving Air Products’ proposed bylaw. Therefore, the Court of Chancery and the Delaware Supreme Court, had they considered Airgas’s Board’s conduct under *Blasius*, would likely have found that Airgas’s Board fell far short of appropriate conduct.

Even if the courts chose not to consider the Airgas Board’s conduct under the stringent *Blasius* standard, the courts should have considered the Airgas Board’s actions under the less stringent *Unocal* standard.¹⁴⁸ Airgas’s Board likely could not meet even this burden. Under *Unocal*, defensive measures must be proportionate to the threat perceived, and cannot be coercive or preclusive.¹⁴⁹ Here, the Airgas Board likely would not have been able to establish a legitimate threat to corporate policy warranting defensive action. Air Products’ nominees were elected to the Airgas Board on September 15, 2010 and voted against the merger because they believed the price was inadequate. Even if Air Products had acquired three additional seats on the Airgas Board, giving them a majority, there is no indication that the Air Products’ nominees would change their positions on the merger. Therefore, the only apparent justification behind the conduct of Airgas’s Board of Directors is that they objected to being replaced.

The “omnipresent specter that a board may be acting primarily in its own interests” creating an “enhanced duty” is not only present in this case but also explicit.¹⁵⁰ As such, the Delaware Supreme Court, and the Court

145. *Mercier*, 929 A.2d at 809 (internal citation omitted).

146. *Id.*

147. *Id.* at 805 (noting the “extremely heavy burden” under *Blasius*).

148. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

149. *Id.* at 949.

150. *Id.* at 954; see also *Air Prods.*, 16 A.3d at 93.

of Chancery, should at the very least have scrutinized Airgas's Board's conduct under the *Unocal* standard of review. Had they engaged in such scrutiny, the courts likely would not have found the actions of the Airgas Board to be proportionate to the threat, because the only threat the corporation faced was the threat of different Board membership, rather than takeover.

VI. THE FUTURE OF THE STAGGERED BOARD

Staggered boards are a particularly effective defensive measure against hostile takeover attempts.¹⁵¹ In light of the Delaware Supreme Court's decision in this case, a staggered board will at the very least prevent a hostile bidder from acquiring a majority of the board of its target for two years.¹⁵² The power inherent in this type of defense is felt two-fold: the bidder must wage two successful proxy contests separated by a year, and the bidder's shareholders must endure a prolonged period of depressed stock price while the bidder "negotiates" the merger.¹⁵³

According to Lucian A. Bebchuk, an effective staggered board provision provides corporations with a more powerful anti-takeover defense than is typically recognized by the courts.¹⁵⁴ Bebchuk opines that, in light of empirical data, companies with staggered boards did not benefit, in the form of higher premiums, from the presence of the staggered board.¹⁵⁵ Bebchuk suggests that, in the context of staggered boards, incumbent directors that lose the first election of the staggered board after a hostile takeover bid should no longer be allowed to continue to block the bid with takeover defenses such as poison pills.¹⁵⁶ At this point, the argument goes, the board of directors is no longer managing the corporation for the benefit of the shareholders.

Of primary importance to the present case is Bebchuk's empirical evidence and analysis of the ex post benefits to shareholders of a corporation's staggered board defense. According to Bebchuk, the ability

151. See Lucian Arye Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Further Findings and a Reply to Symposium Participants*, 55 STAN. L. REV. 885, 916-17 (2002) (finding that a staggered board increases the likelihood that a corporation remains independent after a hostile takeover bid).

152. *Air Prods.*, 16 A.3d at 115 (noting that the Delaware Supreme Court decision in *Airgas, Inc. v. Air Products and Chemicals, Inc.* requires two years to overcome the staggered board).

153. See *id.* (noting the legitimate reasons why Air Products may not wait eight months to wage a second proxy contest).

154. Bebchuk, *supra* note 151, at 886.

155. *Id.* at 887.

156. Bebchuk engaged in a five-year study which indicated that defeating hostile bids "not only does not profit shareholders in the 'overwhelming majority' of cases, but commonly hurts them." *Id.* at 890.

of incumbent directors to resist hostile bids in such a fashion actually hurts, on average, shareholders of the target corporations.¹⁵⁷ This is an important finding, because it suggests that when a corporation's board of directors pushes to maintain its staggered board after losing an election, it is doing so at the expense of the shareholders.¹⁵⁸

In the context of Airgas's defensive strategy to Air Products' hostile takeover bid, Airgas has found itself on the losing end of a proxy contest. Air Products ousted the first set of incumbent directors up for election in September 2010, and is theoretically poised to oust the second set of directors in 2011. At this point, applying the findings of Bebchuk's studies, the Airgas Board is no longer operating to provide Airgas's shareholders with the highest value, but instead is acting for entrenchment purposes.

Not only does this potentially implicate *Blasius* concerns, as discussed above, this also raises the question of whether the board is acting to acquire the best possible price for the shareholders.¹⁵⁹ Under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,¹⁶⁰ a corporation that acknowledges that their company is for sale has the primary duty of obtaining the highest value possible for the shareholders.¹⁶¹ The trigger for the *Revlon* duties has been debated over the years, and it is an open question as to whether Airgas's Board's conduct in negotiating with Air Products implicates such duties.¹⁶² Although there has not been an explicit statement that Airgas is "in play," the conduct of the board of directors indicates that the only reason for rejecting the Air Products hostile bid is that the price is inadequate.¹⁶³

The question of whether the holdings in the Airgas and Air Products battle ultimately will hurt the Airgas shareholders can only be answered in time. Although the Airgas stock price has fallen from the high of \$71/share during the October–November 2010 time period, it has hovered in the mid to low \$60s since mid–November 2010.¹⁶⁴ It is possible that the Air

157. *Id.* at 889.

158. *Id.*

159. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that once a company has put itself up for sale, its board of directors have a duty to obtain the highest possible price).

160. *Id.*

161. *Id.*

162. For example, according to testimony of McCausland, Airgas's CEO, Airgas would be willing to begin negotiations with Air Products upon receipt of a \$70/share offer. *Air Prods.*, 16 A.3d at 81 n.202. Air Products did provide a \$70/share offer in December 2010. *Id.* at 86.

163. Indeed, price inadequacy is the only threat to corporate policy identified by the Court of Chancery. *Air. Prods.*, 16 A.3d at 57–58.

164. Summary for Airgas, Inc. Common Stock, YAHOO! FINANCE (last visited March 27, 2011), <http://finance.yahoo.com/q?s=ARG>.

Products bid was precisely the necessary catalyst to bring Airgas out of its multi-year slump. However, as suggested by Bebchuk's research, it is likely that defeating Air Product's hostile bid will not provide Airgas shareholders with any additional value and may even hurt them.

In light of the research of Lucian A. Bebchuk, the conduct of the Airgas Board in attempting to extend their control of the corporation via the staggered board may actually disadvantage the Airgas shareholders. Further, Airgas's shareholders have already voted in favor of transferring control, both by electing Air Products' slate of directors in September 2010 and by approving the proposed bylaw amendment moving the annual meeting.¹⁶⁵ Although the Airgas Board apparently can continue to delay a transaction, whether such delay is in the best interests of the shareholders is questionable.

CONCLUSION

In the now well-known battle between Air Products and Airgas, Air Products succeeded in electing three of its nominees to Airgas's Board, as well as obtaining a majority vote on a bylaw that would move the next annual meeting of the shareholders up eight months, only to be rebuffed by the courts. In an important decision under Delaware law, the Delaware Supreme Court held that a staggered board requires three-year terms, even where the enabling language of the Charter does not appear to so require.

The Delaware Supreme Court has abandoned the principles of contract interpretation and has found that a bylaw that changes the date of the shareholders' annual meeting is invalid where a corporation has employed a staggered board. This decision is contrary to the plain language of the corporate charter enabling the staggered board, and fails to apply the longstanding principle of interpreting charter provisions in favor of the shareholder franchise.

Although it is arguable that moving the annual meeting is an end run around the staggered board, it is clear in this case that the shareholders were well aware of the import of their decisions and had made their desires known. For example, the shareholders approved by majority vote moving the annual meeting, notwithstanding the fact that Institutional Shareholder Services strongly advised against it and stated that such a vote would

165. The shareholders approved moving the meeting notwithstanding Institutional Shareholder Services' advice to Airgas's shareholders that "pulling the next annual meeting ahead by 9 months would significantly impair the defensive value of the classified board, limiting the board's ability to negotiate the highest offer for shareholders." *Airgas I*, 2010 WL 3960599, at *3 (quoting Press Release, Airgas, Inc., Two Leading Proxy Advisory Firms Recommend Voting Against APD's January Meeting Proposal (Sept. 9, 2010), http://www.airgas.com/content/pressReleases.aspx?PressRelease_ID=1584&year=2010).

significantly diminish the defensive value of the staggered board.¹⁶⁶

Further, the Delaware Supreme Court did not consider whether the actions by Airgas's Board were taken primarily for the purpose of entrenching themselves. The Delaware courts have consistently held that, in the context of hostile takeovers, it is the risk of board entrenchment motivations that implicates heightened review. Here, Air Products successfully elected its three nominees to Airgas's Board and obtained a bylaw amendment that would allow another vote early the following year. In response, the board of directors brought suit to invalidate the bylaw amendments, thereby delaying the election of the second class of directors.

The effect of this ruling is to put out of reach a change in the date of the annual meeting for corporations employing staggered boards. This result impinges on the shareholder franchise, rather than enabling it. Thus, the ruling fails to give effect to the important principle of protecting the shareholder franchise. Whether or not the decision of the shareholders weakens the staggered board defense, the vote to move the annual meeting was an informed vote, and from a policy perspective, it is more important to give effect to the shareholder vote with regards to the means of electing directors.

In light of the recent decision of the Court of Chancery with regard to Airgas's poison pill, the effectiveness of the shareholder franchise is a critical aspect to hostile takeovers. For, as the court stated in *Blasius*, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."¹⁶⁷ And yet, when the shareholders voted to move the meeting at which they exercise their voting rights, the corporate board of directors effectively vetoed those rights by moving the courts to enforce an understanding of their corporate charter that was neither obvious nor shared among the shareholders. In doing so, the board of directors effectively entrenched themselves, ultimately forcing Air Products to cease its efforts to acquire the company.¹⁶⁸

Although the long-term impact of the Delaware Supreme Court's decision cannot be known, it appears that corporations must take especial care in drafting, and shareholders in understanding, their bylaws. Even language that seems plain on its face may be considered ambiguous, and ambiguities may be interpreted based on the practice and custom of other corporations, rather than the understood principle of favoring the shareholder franchise.

166. *Id.*

167. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659 (Del. Ch. 1988).

168. Air Products ultimately withdrew its bid and has ceased its pursuit of acquiring Airgas. Steven M. Davidoff, *Air Products Bid Dies As Airgas Poison Pill Lives On*, DEALBOOK (Feb. 15, 2011), 2011 WLNR 3004142.