IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AIRGAS, INC., JAMES HOVEY, PAULA SNEED, DAVID STOUT, LEE THOMAS, JOHN VAN RODEN and ELLEN WOLF,	)	
Plaintiffs,	)	Civil Action No. 5817-CC
v.	)	
AIR PRODUCTS AND CHEMICALS, INC.,	)	
Defendant.	)	

OPINION

Date Submitted: October 8, 2010
Date Decided: October 8, 2010

Donald J. Wolfe, Jr., Kevin R. Shannon, Berton W. Ashman, Jr. and Ryan W. Browning, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; OF COUNSEL: Theodore N. Mirvis, Marc Wolinsky, George T. Conway III and Meredith L. Turner, of WACHTELL, LIPTON, ROSEN & KATZ, New York, New York, Attorneys for Plaintiffs/Counterclaim Defendants.

Kenneth J. Nachbar, Jon E. Abramczyk, William Lafferty, John P. DiTomo, John A. Eakins and Ryan D. Stottmann, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Rory O. Millson, Thomas G. Rafferty, David R. Marriott and Gary A. Bornstein, of CRAVATH, SWAINE & MOORE LLP, New York, New York, Attorneys for Defendant/Counterclaim Plaintiff.

CHANDLER, Chancellor

In this case of apparent first impression, I confront this question: whether a bylaw amendment proposed by Air Products and Chemicals, Inc. that would cause Airgas, Inc.'s annual meetings to be held each year in the month of January, as opposed to approximately seven months later (August) when Airgas's annual meetings have historically been held, is valid under Delaware law. Of particular concern is whether Airgas, Inc.'s 2011 annual meeting may be held on January 18, 2011, barely four months after its 2010 annual meeting was held.

This issue arises in the midst of a heated takeover battle by Air Products and Chemicals, Inc. for control of Airgas, Inc. On September 15, 2010, Airgas held its 2010 annual meeting. At that annual meeting, Air Products successfully obtained all three board seats that were up for election on Airgas's nine-member board.[1] The Air Products bylaw proposal to move Airgas's annual meetings to January received approximately 45.8% of the shares entitled to vote in the election (which equates to a little over 51% of the shares actually voted).

The first question I am presented with is whether the bylaw received enough votes to be adopted under Airgas's charter, or whether it actually

[1] On September 23, 2010, Airgas expanded the size of its board to ten members and reappointed Chief Executive Officer Peter McCausland, who lost his seat at the September 15, 2010 meeting, to fill the new seat on the board.

required a supermajority vote of 67% of the outstanding shares to pass. This question turns on whether the bylaw is viewed as a bylaw amendment to Article II of Airgas's bylaws, the article that addresses annual meetings of stockholders (which requires a simple majority vote to amend), or as a bylaw amendment that is "inconsistent" with Article III of Airgas's bylaws, the article that addresses director elections and their terms (which requires a supermajority vote of stockholders to amend).

The next question, of far greater import (assuming I find that the bylaw was properly passed), is whether the bylaw itself is valid. Airgas challenges the validity of the annual meeting bylaw under Delaware law, and the parties take opposing stances on whether the bylaw violates Sections 141(d), 141(k), and 211 of the Delaware General Corporation Law ("DGCL"). Also in dispute is whether the bylaw violates Airgas's charter. The key issue here is whether the bylaw would cut short the Airgas directors' "full term" on Airgas's classified board by moving up the annual meeting to take place earlier in the year. Much of this debate over the validity of the bylaw boils down to a semantics war over the meaning of one word: "annual." Specifically, in the context of an "annual meeting" that, depending on when it is held, could have the effect of altering the length of a director's tenure on a staggered board, does the term "annual" mean

"separated by approximately twelve months" or does it simply mean "occurring once a year"?

On an expedited briefing schedule, the parties have submitted cross-motions for judgment on the pleadings. Plaintiff/Counterclaim Defendant Airgas, Inc., together with individual plaintiffs/counterclaim defendants James Hovey, Paula Sneed, David Stout, Lee Thomas, John van Roden, and Ellen Wolf (collectively, "plaintiffs") have moved for judgment declaring that the Air Products bylaw is invalid. Defendant/Counterclaim Plaintiff Air Products and Chemicals, Inc. ("defendant") has moved for judgment declaring the bylaw valid and adopted as of September 15, 2010. The parties concluded briefing on this motion on September 28, 2010, and it was argued on October 8, 2010. As there is no direct precedent on point, in arriving at my decision I rely heavily on the plain text of—and the policy underlying—the statutory authority relied upon by the parties and the text of Airgas's charter and bylaw provisions. For the reasons explained below, I have determined that the bylaw was properly adopted at the September 15, 2010 annual meeting, that it does not conflict with Airgas's charter, and that it is valid under Delaware law.

I. FACTUAL BACKGROUND

At the time of its September 15, 2010 annual meeting, Airgas had a nine-member staggered board of three equal classes, with one class (three members) up for reelection each year.[2] Air Products, a stockholder of Airgas, has been attempting to acquire Airgas for almost a year now, although its overtures have been coolly received. It first expressed interest in October 2009, and over the following couple of months made three proposals to acquire Airgas. Each offer was rejected by the Airgas board as grossly undervaluing the company. After raising its bid several more times,[3] Air Products' most recent proposal is an all-cash tender offer to acquire 100% of Airgas's shares for $65.50 per share.[4] In connection with its proposal, Air Products launched a proxy contest to gain control of Airgas's board.[5] Air Products nominated three candidates for election at the 2010 annual meeting and proposed three amendments to Airgas's bylaws, only

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[2] Airgas now has a ten-member staggered board. *See supra* note 1.

[3] On October 15, 2009, Air Products made its initial offer. That offer was rejected. On November 20, 2009, it offered a $60/share all-stock deal. That offer was rejected. Air Products made another offer worth $62/share in December which was also rejected. On February 4, 2010, Air Products made a public proposal to acquire Airgas for $60/share, and on February 11, it announced an all-cash tender offer at that price for 100% of the Airgas shares. On July 8, Air Products increased its offer to $63.50/share. Airgas rejected that offer. On September 6, 2010, Air Products again raised its bid to $65.50/share. The Airgas board rejected that offer as well.

[4] The market price of Airgas's stock on October 7, 2010 closed at $68.57, suggesting that the market expects Air Products to increase its offer.

[5] Airgas has a poison pill, a staggered board, and other standard defenses in place (*e.g.*, Airgas has not opted out of DGCL Section 203, which is Delaware's anti-takeover statute).

one of which is at issue in this Opinion. All three of Air Products' bylaw proposals were adopted by a majority vote at the September 15, 2010 annual meeting.

The first bylaw amendment would establish new director eligibility criteria and disqualification requirements. Airgas contests the validity of this bylaw and Air Products has moved for judgment on the pleadings seeking a declaration on its adoption and validity, but the parties have stipulated to defer briefing on that motion until a later date. The second Air Products proposal would repeal any new bylaw or bylaw amendment adopted by the Airgas board without stockholder approval after April 7, 2010. Airgas has not contested the validity of this resolution. The third bylaw amendment proposed by Air Products, as noted earlier, would move Airgas's annual meeting to January. The key operative sentence of the annual meeting bylaw reads: "The annual meeting of stockholders to be held in 2011 (the '2011 Annual Meeting') shall be held on January 18, 2011 at 10:00 a.m., and each subsequent annual meeting of stockholders shall be held in January."[6] This is the only bylaw at issue here.

Air Products made clear in its proxy materials that its proposed bylaws were directly related to its pending tender offer, telling stockholders

[6] Air Products, Definitive Proxy Statement (Schedule 14A), at 18-19 (July 29, 2010).

that by voting in favor of its nominees and bylaw proposals, they would be "send[ing] a message to the Airgas Board and management that . . . Airgas stockholders want the Airgas Board to take action to eliminate the obstacles to the consummation of the [Air Products] Offer."[7] At the same time, Airgas heavily lobbied its stockholders to vote against the proposed bylaws, urging them not to fall for Air Products' "tactics," and telling them that the Air Products offer was well below the fair value of their shares and that, by shortening the time it would take for Air Products to gain control of the board, voting in favor of the bylaw would help facilitate Air Products' grossly inadequate offer.[8] As part of its efforts to dissuade stockholders from voting for Air Products' nominees and the proposed bylaw requiring annual meetings to be held in January, Airgas promised its stockholders that it would hold a special meeting on June 21, 2011 where the stockholders would have the opportunity to elect a majority of the Airgas board by a plurality vote—but only if Air Products' bylaw proposal did not receive a majority of votes at the 2010 annual meeting.[9] Airgas openly communicated to its stockholders that it thought Air Products' bylaw proposal was invalid under Delaware law.

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[7] *Id.* at 6.
[8] *See, e.g.*, Airgas Press Release (Aug. 4, 2010); Airgas Press Release (Aug. 23, 2010); Airgas, Definitive Proxy Statement (Schedule 14A), at 66 (July 23, 2010).
[9] Airgas Press Release (Aug. 30, 2010).

Of course, there was absolutely nothing wrong with either Air Products or Airgas attempting to convince Airgas's stockholders to vote in favor of their respective proposal(s) at the September 15, 2010 annual meeting—this is the type of communication with stockholders that is to be expected during a proxy fight taking place in the midst of a public takeover battle. Air Products' hostile acquisition attempt is far from over, and the war is being fought very hard by both sides.

In addition, Institutional Shareholder Services ("ISS"), a leading proxy advisory firm, recommended that Airgas's stockholders vote against the January annual meeting bylaw because it viewed the bylaw as reducing Airgas's negotiating leverage in the bidding process.[10] While ISS also recommended that Airgas's stockholders vote in favor of Air Products' three director nominees, it advised stockholders to vote against the bylaw proposal because, in its view, "[p]ulling 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."[11]

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[10] Airgas Press Release (Sept. 9, 2010) (quoting ISS report (Sept. 8, 2010)) ("[Air Products'] January [meeting] proposal . . . is a bold, unprecedented move by a bidder to obviate the defensive value of a classified board by collapsing the time required to win control . . . . Because this proposal cedes significant control of the negotiation process to the bidder, we believe it carries a higher price tag than simply earning a seat at the table. As the current bid remains below a fair and full price, we do not recommend shareholders support the proposal.").

[11] Airgas Press Release (Sept. 9, 2010) (quoting ISS report (Sept. 8, 2010)).

Notwithstanding the ISS recommendation, a majority of Airgas's voting stockholders voted in favor of the bylaw.

As noted above, Airgas held its 2010 annual meeting on September 15. Airgas's stockholders voted for the three Air Products nominees, and 45.8% of the shares entitled to vote in the election (51.9% of all shares actually voted) voted in favor of Air Products' bylaw proposal to move Airgas's annual meetings to January of each year.[12]

II. STANDARD OF REVIEW

The parties have moved for judgment on the pleadings pursuant to Court of Chancery Rule 12(c). This Court may grant judgment on the pleadings when there is no dispute as to any material issue of fact and the moving parties are entitled to judgment as a matter of law.[13] Here, because the issue—whether a bylaw that would move Airgas's annual meeting to January violates the DGCL and Airgas's governing documents—is "purely a

[12] As of the record date for determination of stockholders entitled to vote at that meeting, there were 83,629,731 outstanding shares. Of the 73,886,665 shares represented at the meeting, approximately 46.7 million voted in favor of each of Air Products' three director nominees, as opposed to approximately 22.7 million, 23.3 million, and 26.5 million voting for the incumbent directors (Richard C. Ill, W. Thacher Brown, and Peter McCausland respectively). The Air Products January annual meeting bylaw proposal received the affirmative vote of 38,321,496 shares—representing 51.9% of the shares voted and 45.8% of the outstanding shares.

[13] *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund, II, L.P.*, 624 A.2d 1199, 1205 (Del. 1993).

question of law, judgment on the pleadings is an appropriate mechanism for resolving the present dispute."[14]

"Corporate charters and by-laws are contracts among the shareholders of a corporation and the general rules of contract interpretation are held to apply."[15] When the issue before the Court involves the interpretation of a contract, as it does here, the question is a purely legal one if the contract is unambiguous as to its terms.[16] In interpreting charter provisions, "[c]ourts must give effect to the intent of the parties as revealed by the language of the certificate and the circumstances surrounding its

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[14] *JANA Master Fund, Ltd. v. CNET Networks, Inc.*, 954 A.2d 335, 338 (Del. Ch. 2008). The parties have attached exhibits to their briefing submissions and made references to matters outside the pleadings, including press releases, the full text of Airgas's bylaws, Air Products' Schedule 14A and Airgas's Schedule 14A. This Court has not excluded those matters, thus converting this to a Rule 56 summary judgment motion. *See* Ch. Ct. Rule 12(c) ("If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment.") Under Rule 56(h), "[w]here the parties have filed cross motions for summary judgment and have not presented argument to the Court that there is an issue of fact material to the disposition of either motion, the Court shall deem the motions to be the equivalent of a stipulation for decision on the merits based on the record submitted with the motions." Ch. Ct. Rule 56(h). Neither party contends that there is a disputed issue of fact, and the parties have argued the matter as though it were a stipulated factual record on cross motions for summary judgment, thus entitling the Court to dispose of it as summary judgment with a stipulated set of facts, as envisioned by Rule 56(h).

[15] *Centaur Partners, IV v. Nat'l Intergroup, Inc.*, 582 A.2d 923 (Del. 1990) (citing *Berlin v. Emerald Partners*, 552 A.2d 482, 488 (Del. 1988); *Hibbert v. Hollywood Park, Inc.*, 457 A.2d 339, 342-43 (Del. 1983); *Ellingwood v. Wolf's Head Oil Refining Co.*, 38 A.2d 743, 747 (Del. 1944)).

[16] *JANA Master Fund*, 954 A.2d at 338; *United Rentals, Inc. v. RAM Holdings, Inc.*, 937 A.2d 810, 829-30 (Del. Ch. 2007).

creation and adoption,"[17] and the "common or ordinary meaning" of that language is what controls.[18] As this Court has previously held, when presented with any ambiguity in interpreting bylaws, "doubt is resolved in favor of the stockholders' electoral rights."[19]

Similarly, when the issue before the Court involves the interpretation of a statute, under the well-settled rules of statutory construction, "[a]t the outset, the court must determine whether the provision in question is ambiguous."[20] A statute is ambiguous if it is reasonably susceptible of more than one interpretation.[21] In the case of any ambiguity, "[u]ndefined words in a statute must be given their ordinary, common meaning,"[22] and "[t]he

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[17] *Centaur Partners*, 582 A.2d at 928 (citing *Waggoner v. Laster*, 581 A.2d 1127, 1134 (Del. 1990)); *see also Citadel Holding Corp. v. Roven*, 603 A.2d 818, 822 (Del. 1992) ("It is an elementary canon of contract construction that the intent of the parties must be ascertained from the language of the contract.").

[18] *In re IAC/InterActive Corp.*, 948 A.2d 471, 494 (Del. Ch. 2008).

[19] *JANA Master Fund*, 954 A.2d at 339 & n.16; *Openwave Sys. Inc. v. Harbinger Capital Partners Master Fund I, Ltd.*, 924 A.2d 228, 239 (Del. Ch. 2007); *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.'") (quoting *Centaur Partners*, 582 A.2d at 927).

[20] *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 2010 WL 2977928, at *2 (Del. July 30, 2010).

[21] *Id.*

[22] *Id.* (quoting *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 900 (1994)).

established preference of our law is of course to give to [] statutory language a literal reading, if that is possible."[23]

III. REQUISITE APPROVAL OF THE VOTING STOCKHOLDERS

A. Contentions of the Parties

Plaintiffs contend that the bylaw that would move the annual meeting to January required the approval of 67% of the shares entitled to vote at the annual meeting to pass, and that because it only received a majority vote at the annual meeting as opposed to a supermajority vote, the bylaw was not lawfully enacted. Defendant argues that the 67% requirement does not apply here, and therefore the support of a majority of the voting shares at the annual meeting was sufficient to adopt the bylaw.

The parties do not disagree about where to look to resolve this issue: Airgas's charter and bylaws. Under Article 5, Section 6 of Airgas's charter, "[a]ny Bylaws made by the Directors . . . may be altered, amended or repealed by the Directors or by the stockholders."[24] According to Airgas's bylaws, any such alteration, amendment, or repeal may be effected "at any regular meeting of the stockholders (or at any special meeting thereof duly

[23] *Hoschett v. TSI Int'l Software, Ltd.*, 683 A.2d 43, 46 (Del. Ch. 1996).
[24] Certificate of Incorporation ("Certificate"), art. 5, § 6.

called for that purpose) by a *majority vote* of the shares represented and entitled to vote at such meeting."[25]

Article 5, Section 6 of the Airgas charter continues, however:

> Notwithstanding the foregoing and anything contained in this 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 Directors.[26]

Thus, if the bylaw at issue "alter[s], amend[s], or repeal[s]" Article III of the bylaws, or is "inconsistent therewith," it would have required a supermajority of the outstanding shares to pass. If not, a simple majority vote was sufficient. Article III of Airgas's bylaws is entitled "Directors." Article III, Section 1 (entitled "Number, Election, and Terms") addresses the number of directors and their election and terms of office. It establishes a staggered board and provides that:

> 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

[25] Bylaws, art. IX, § 1 (emphasis added).
[26] Certificate, art. 5, § 6.

> 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.*[27]

Plaintiff argues that the supermajority requirement "plainly applies" here because the bylaw is "plainly inconsistent with Article III" of Airgas's bylaws.[28] They say this because, by allowing a director election to take place at an "annual meeting" that is not a true "annual" meeting, this "impermissibly shorten[s] the terms" of those directors, thereby conflicting with Article III on this point.[29] Defendant counters that the bylaw is simply an amendment replacing Article II, Section 1 of Airgas's bylaws. Article II, Section 1 governs the holding of the annual meeting of stockholders. If the bylaw is merely an amendment to Article II, the majority vote it received at the annual meeting is sufficient for the bylaw's adoption.

As defendant correctly points out, there is no dispute that the bylaw does not alter, amend, or repeal anything in Article III of Airgas's bylaws. The dispute is whether the bylaw is "inconsistent" with Article III.

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[27] Bylaws, art. III, § 1 (emphasis added).
[28] Pls.' Opening Br. 33.
[29] *Id.*

B. Analysis

On its face, Air Products' bylaw proposal to move Airgas's annual meeting date to January is an amendment to Article II of Airgas's bylaws—it explicitly amends and restates Article II, Section 1. In so doing, the bylaw moves the "annual meeting" date to January of each year, which in turn relates to the timing of when the current class of directors on Airgas's board will be up for reelection. It does not, however, *conflict* with that class of directors' "full term" as defined by Article III of the bylaws. As noted above, under Article III, Airgas directors are elected "for a term *expiring at the annual meeting* of stockholders *held in the third year following the year of their election*."[30]

Although the bylaw does specify when during the "year" the annual meeting will be held, it does not contradict the plain meaning of Article III. As explained more fully in the next section, the operative provisions of Airgas's bylaws and charter in dispute here contain language that may fairly be read to have more than one meaning.[31] Construing the ambiguous terms in favor of the shareholder franchise, the class of Airgas directors who were elected in 2008 will have their terms expire in 2011—the "third year"

[30] Bylaws, art. III, § 1 (emphasis added).

[31] *See United Rentals*, 937 A.2d at 830 ("[C]ontracts are ambiguous 'when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.'") (quoting *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

following the "year" of their election (2008). Thus, I conclude that Air Products' proposed bylaw amends Article II of Airgas's bylaws, and that it is not inconsistent with or in conflict with the language used in Article III.

Because the proposed bylaw amends Article II of Airgas's bylaws, which requires only a majority vote to amend, Air Products' proposed bylaw moving Airgas's 2011 annual meeting and each subsequent annual meeting to January was validly adopted by the majority vote of Airgas's stockholders at the 2010 annual meeting.

IV. VALIDITY OF THE BYLAW UNDER AIRGAS'S CHARTER

A. Contentions of the Parties

Using a similar line of reasoning as it did to challenge the shareholder vote adopting the bylaw (that is, an argument grounded in contract interpretation to say that the bylaw conflicted with the staggered board provision in Article III of Airgas's bylaws), Airgas next argues that the annual meeting date bylaw conflicts with the terms of Airgas's charter—namely, Article 5, Section 1, which is the charter provision establishing Airgas's staggered board.

Airgas's charter contains nearly identical language to Article III of Airgas's bylaws establishing the terms of Airgas's staggered board. The charter defines the length of each director's term, providing, in relevant part:

> At each annual meeting of the stockholders of the Corporation, the successors to the class of Directors whose term expires at that 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*.[32]

Since going public in 1986, Airgas's annual meetings have taken place between July 28 and September 15 of each year, almost always occurring in the first week of August. In fact, "Airgas has held its annual meeting . . . at the earliest, 11 months and 26 days, and, at the latest, 12 months and 28 days, after the prior year's meeting" for the last 23 years.[33] Accordingly, through 2007, every class of directors elected by the Airgas stockholders at a given annual meeting has served a term of approximately three years.

In light of this previous history, plaintiffs insist that the class of directors elected at the August 2008 annual meeting was elected to serve a "full term on the Airgas Board of Directors" which, under Airgas's charter and bylaws, means that their term will expire at Airgas's 2011 "annual meeting"—a meeting plaintiffs suggest should take place approximately three years after the August 2008 annual meeting, or one year after the 2010 annual meeting. In other words, according to plaintiffs, each annual meeting must be separated by "approximately one year" (or 365 days) and the next

[32] Certificate, art. 5, § 1 (emphasis added).
[33] Pls.' Opening Br. 9.

annual meeting must take place "around" August or September 2011. A "full term" of a class of directors is, according to plaintiffs, approximately three years.

The word "annual," however, is not defined in Airgas's charter. Neither is "year." Nor does the locution "full term" specify a 36-month term, an approximately three-year term, or any other more or less precise length of time for which a director must hold office. A "full term" on the Airgas board is only defined in the charter as expiring "at the annual meeting of stockholders held *in the third year* following the year of their election."[34] Defendant's position is that, had Airgas "wished to prescribe a more specific time period for its directors' terms, it could have done so."[35] Because Airgas did not specify a particular term length, defendant argues that moving the annual meeting to January does not conflict with any provision of Airgas's charter.

B. Analysis

Airgas's charter provision is not crystal clear on its face. A "full term" expires at the "annual meeting" in the "third year" following a director's year of election. The absence of a definition of annual, year, or full term leads to this puzzle. Does a "full term" contemplate a durationally

[34] Certificate, art. 5, § 1 (emphasis added).
[35] Def.'s Opening Br. 10.

defined three year period as Airgas suggests? The charter does not explicitly say so. Then, if a "full term" expires at the "annual meeting," what does "annual" mean—yearly? In turn, if "annual" means "separated by about a year," does that mean fiscal year? Calendar year?

Both parties make plausible arguments as to why their contentions are the obvious, commonsense reading of the plain language of the charter. These competing readings, though, do not clearly illuminate the intent of the board in adopting the charter provision. The lack of a clear definition of these terms in the charter mandates my treatment of them as ambiguous terms to be viewed in the light most favorable to the stockholder franchise.

Construing the ambiguous terms in that way, if the "full term" of directors does expire at the "annual meeting" in the "third year" following their year of election, I now turn to what is meant by the "annual" meeting. Plaintiffs contend that "annual" must mean separated by approximately twelve months, while defendant argues that "annual" means once a year. Because this term is not otherwise defined in Airgas's charter or bylaws, I turn to the common dictionary definition, which defines "annual" as "covering the period of a year" or "occurring or happening every year or once a year."[36] And again, construing the ambiguous terms of the charter in

[36] MERRIAM-WEBSTER DICTIONARY (online edition).

favor of the shareholder franchise, "annual" in this context must mean occurring once a year.[37]

Finally, the remaining question is how to define a "year." Airgas's charter and bylaws do not define a "year," so I take the dictionary definition, which is a period of about 365 days.[38] Nothing in Airgas's charter or bylaws defines years as being either calendar years or fiscal years. Thus, it is unclear under Airgas's charter when each 365 day period begins—is it at the

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[37] Contract language must be read "within the context of the agreement in which it is located." *USA Cable v. World Wrestling Federation Entmt., Inc.*, 2000 WL 875682, at *8 (Del. Ch.), *aff'd*, 766 A.2d 462 (Del. 2000). A "[c]ertificate should be read as a whole and, if possible, interpreted to reconcile all of the provisions of the document." *Kaiser Aluminum Corp. v. Matheson*, 681 A.2d 392, 395 (Del. 1996). Reading the language of Airgas's staggered board provision in the context of its charter as a whole leads to this result. Directors' full terms expire at the "annual meeting" held in the "third year" after the year of their election. The annual meeting date is set in the bylaws. So long as there is an "annual meeting" held each year, a director's "full term" expires at the third annual meeting after election. Nothing about this interpretation of the word "annual" renders Article 5, Section 1 of Airgas's charter in conflict with any other charter or bylaw provision. Plaintiffs argue that Airgas's charter, in addition to providing for a classified board, provides methods by which the stockholders can remove directors from office before the end of their term (for example, under Article 5, Section 3 of Airgas's charter (entitled "Removal of Directors"), 67% of the outstanding shares could vote to remove a director from office without cause.) That is true, but as discussed below, the issue here is not a "removal," even if what the January meeting bylaw accomplishes leads to a similar result. *See infra* at 25-27. The fact that Airgas's charter provides that 67% of the outstanding shares can remove a director, or that 67% of the outstanding shares is required to amend Article 5 of Airgas's charter or Article III of the bylaws (i.e. the sections establishing Airgas's classified board and directors' terms) does not show a clear intention on the part of the drafters to set three-year terms for its directors. While it may reflect the intention of the drafters to insulate Airgas's board from hostile takeover threats by causing bidders to have to wait through two "annual meeting" cycles, it has succeeded, in that Air Products will have to wait until the next "annual meeting" (albeit less time than it would have had to wait if Airgas's next annual meeting were later), wage another proxy fight, and get its three nominees elected for a second time.

[38] *See* MERRIAM-WEBSTER DICTIONARY (online edition); *see also* BLACK'S LAW DICTIONARY 1754 (9th ed. 2009) (defining "year" as a "consecutive 365 day period beginning at any point").

start of each fiscal "year" or the start of each calendar "year"? As defendant pointed out, the language of the bylaw could have easily included the word "fiscal" or "calendar" if the parties had intended for "year" to have that specific meaning. For example, Airgas could have defined a director's term to be "for a term expiring at the annual meeting of stockholders held in the third *fiscal* year following the year of their election."

In light of that, the charter and bylaws are ambiguous as to whether directors' terms run in accordance with a calendar year or a fiscal year. Therefore, under the "rule of construction in favor of franchise rights,"[39] I cannot read the word "fiscal" into the charter, and must instead construe the ambiguous terms against the board, which leads to my conclusion that Airgas's annual meeting cycle can validly run on a calendar year basis and still be consistent with the charter.[40]

Airgas similarly could have defined "annual meeting" elsewhere in its charter or bylaws to require a minimum durational interval between meetings (i.e. "annual meetings must be held no less than nine months

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[39] *Harrah's Entm't, Inc. v. JCC Holding Co.*, 802 A.2d 294, 310 (Del. Ch. 2002); *see also JANA Master Fund*, 954 A.2d at 345-46.

[40] To be sure, this ruling that under the language of Airgas's charter, its annual meeting cycle could be read to run on a calendar year is limited to the specific language used in the Airgas charter. That is not to suggest that "annual meetings" under Section 211 or any provision of the DGCL must be read to run on a calendar year. Other charters for other companies are not implicated, and they can adjust their charters and/or bylaws accordingly if they have a similar ambiguity.

apart"). It could have said that directors shall serve "three-year terms." Had it done any of those things, then a bylaw shortening such an explicitly defined "full term" would have conflicted with its explicit provisions and thereby would have been invalid under Airgas's charter. Airgas, however, did not clearly define these terms. Airgas's charter and bylaws simply say that the successor shall take the place of any director whose term has expired "in the third year" following the year of election.

As such, a January 18, 2011 annual meeting would be the "2011 annual meeting." 2011 is the third "year" after 2008. Successors to the 2008 class can be elected in the "third year following the year of their election"[41] which is 2011. Thus, the bylaw does not violate Airgas's charter as written.

V. VALIDITY OF THE BYLAW UNDER DELAWARE LAW

A. Contentions of the Parties

Finally, Airgas challenges the bylaw's validity under Delaware law as well, based on a similar line of reasoning using statutory interpretation. DGCL Section 141(d) authorizes corporations to adopt a staggered board of up to three classes with the following terms:

[41] Certificate, art. 5, § 1.

> [T]he term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire.[42]

As with Airgas's governing documents, this section of the DGCL does not explicitly define when a "full term" expires, and the answer is not clear from the plain language of the statute.

Section 141(k) is the provision on removal of directors. It provides that, in general, "[a]ny director or the entire board of directors may be removed, with or without cause," by a majority of the shares entitled to vote at an election of directors.[43] For companies with staggered boards, however, "[u]nless the certificate of incorporation otherwise provides . . . stockholders may effect such removal only for cause."[44]

Plaintiffs contend that the Air Products bylaw violates Sections 141(d) and 141(k)(1) of the DGCL because it would require Airgas to hold an annual meeting that is not really "annual" (i.e. it would take place only four months after the previous "annual" meeting as opposed to a year later), and therefore it would defeat the purpose of classified boards by shortening the

[42] 8 *Del. C.* § 141(d).
[43] 8 *Del. C.* § 141(k).
[44] 8 *Del. C.* § 141(k)(1).

Airgas directors' terms of office by seven months without properly removing them for cause. Thus, plaintiffs argue, the class of directors up for re-election at the 2011 annual meeting will not have served their "full term" on the board.

In support of this argument, plaintiffs point to DGCL Section 211(b), which 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"[45] and Section 211(c), which provides that annual meetings cannot be separated by greater than thirteen months[46]—the "policy thrust" of Section 211 being "that corporations should hold *annual* meetings of stockholders."[47]

Defendant agrees that the "full term" of the class of Airgas directors up for reelection in 2011 will expire at Airgas's 2011 annual meeting of stockholders. The question is the same one asked in the previous sections of this Opinion when evaluating whether the bylaw conflicted with Airgas's charter and bylaw provisions: when can that "annual" meeting validly take place? Defendant points to the identical language of DGCL Sections 211(b)

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[45] 8 *Del. C.* § 211(b).
[46] *See* 8 *Del. C.* § 211(c). Plaintiffs cite *MFC Bancorp* for the proposition that what this section provides is a "one month 'leeway,'" but "this modest grace period is not a license to undermine the clear import of the term 'annual meeting.'" Pls.' Opening Br. 5 (quoting *MFC Bancorp Ltd. v. Equidyne Corp.*, 844 A.2d 1015, 1021 (Del. Ch. 2003)).
[47] Pls.' Opening Br. 5, 22.

and 211(c) relied on by plaintiffs to support its own opposing position that there is "[n]othing in the statutes or in Airgas's charter establish[ing] a minimum interval between a company's annual meetings."[48] Instead, defendant argues that this is simply a case about entrenchment; about the Airgas board wanting this Court to "plug the hole" in a vulnerability in its takeover defenses (namely, its staggered board) and to undo the result of a shareholder vote that the Airgas board lost fair and square.[49]

Defendant counters plaintiffs' argument regarding the policy of DGCL Section 211 by suggesting instead that the purpose of that Section is "to ensure that directors remain accountable to their shareholders" by prohibiting them from going more than thirteen months without an annual meeting; not less.[50] Accordingly, defendant contends that Airgas's interval of approximately one year is merely "implied"—it is a fiction.

As far as Sections 141(d) and 141(k), defendant argues that Section 211 is the statute governing the timing of annual meetings, and so that is where any "overriding rule for the timing of annual meetings" would be found in the DGCL.[51] Defendant maintains that "[n]othing in [DGCL] §

[48] Def.'s Letter to the Court (Aug. 30, 2010), at 2.
[49] Def.'s Opening Br. 1.
[50] Def.'s Opening Br. 17.
[51] Def.'s Reply Br. 12.

211(c), or anywhere else in the DGCL, specifies that any particular interval between meetings is too short."[52]

B. Analysis

First, plaintiffs have seemingly abandoned their "removal" argument, given that they did not once mention 141(k) in their answering brief, but I will address the applicability of Section 141(k) here nonetheless. Plaintiffs argue that by cutting short the "full term" of the directors' up for election at the 2011 annual meeting, the bylaw constitutes an improper removal under Section 141(k)(1), as it is both without cause and without 67% of the vote of Airgas's stockholders as required for removal under Airgas's charter.[53] Defendant responds that there is no removal problem "because the Airgas directors are not being 'removed'."[54] In order for plaintiffs' argument to hold water, the bylaw would have to be found to "cut short" the "full term" of the directors; otherwise defendant is correct that the Airgas directors are not being "removed" (i.e. unseated before the end of their term) and thus the "removal" statute is not implicated. As discussed more fully below, there is no removal problem here—the "full term" of these directors expires at the

[52] Def.'s Opening Br. 15.
[53] *See* Pls.' Opening Br. 4, 15, 16, 31-32 & 38-41.
[54] Def.'s Opening Br. 25.

"annual meeting" to be held in 2011.[55] Under the statutory framework of the DGCL, "absent a specific charter or bylaw provision classifying a board, the term of office of each director is coextensive with the period between annual meetings."[56] Airgas has a charter and bylaw provision classifying the board, but it does not unambiguously define what is meant by a "full term" or when the "annual meeting" must take place. Thus, on Airgas's classified board, the directors whose terms expire at the next election will have served a "full term" at the 2011 "annual meeting," regardless of whether that meeting takes place earlier in the year or later in the year. The fact is that the directors' term "expires" at the "annual meeting," whatever date it is held. Section 141(k) is inapposite here. Plaintiffs' only "removal" argument remaining suggests, therefore, that the Air Products bylaw "accomplishes" a removal by "evad[ing] the 67% removal requirement" in Airgas's charter by "permit[ting] shareholders to remove directors before their terms have expired" by a simple majority vote.[57] While it is true that under Airgas's charter, 33% of the stockholders could call a special meeting to remove the directors by a 67% supermajority vote, that provision governs "removal" of

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[55] *See, e.g.*, *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 401 (Del. 2010) ("The election of successors takes place at an annual meeting," whereas removal of directors takes place "between annual meetings").
[56] *Id.* at 401 (quoting 1 David A. Drexler et al., Delaware Corporation Law and Practice § 13.01[3], at 13-6 (2009)).
[57] Pls.' Reply Br. 25.

directors and is a separate and distinct issue from the question of what constitutes a "full term" under Airgas's charter.[58] Because under Airgas's charter, the directors' "full term" expires at the 2011 "annual meeting," there is no removal problem.

DGCL Section 211 is entitled "Meetings of stockholders."[59] As noted above, Section 211(b), 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."[60] "Annual meeting" is not defined. Corporations are free to draft their governing documents to specify when their annual meetings shall take place. They can do this explicitly in the bylaws. They can also explicitly define the terms of their staggered board in their charter or bylaws, should they decide to have a classified board. To the extent that they do not unambiguously make these terms clear in their governing documents, though, the default rules in Delaware do not

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[58] Moreover, under the doctrine of independent legal significance, an action that is validly taken under one section of the DGCL has legal independence from an action that might have been taken under another section of the statute, even if the actions lead to the same result. *Orzeck v. Englehart*, 195 A.2d 375, 377 (Del. 1963) ("[T]he uniform interpretation given the Delaware Corporation Law over the years [is] that action taken in accordance with different sections of that law are acts of independent legal significance even though the end result may be the same under different sections. The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section."); *see also Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 970 (Del. Ch. 1989).

[59] 8 *Del. C.* § 211.

[60] 8 *Del. C.* § 211(b).

require waiting a "year," or "twelve months" or any set amount of time from one annual meeting to the next.

Plaintiffs contend that, although not defined in the DGCL, the common sense reading of "annual meeting" means at least (or approximately) one year apart. That gloss is nowhere to be found in the statute, though. Undefined words in statutes are given their "ordinary, common" meaning.[61] A literal reading of "annual meeting" means a meeting that will take place once a year.[62] "Annual meeting" is a statutory term with an obvious legal import—it refers to the obligatory stockholder meeting that must occur, by law, once every year. There is no requirement that it be spaced by eleven or twelve months, but just that it happen once a year, every year.

Section 211(c), in turn, sets limits on the timing of annual meetings in two ways: (1) if an annual meeting date is designated, the meeting must be

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[61] *Dewey Beach Enters., Inc. v. Bd. of Adjustment*, 2010 WL 2977928, at *2 (Del. July 30, 2010).

[62] The numerous dictionary definitions cited by both plaintiffs and defendant (dubbed a form of "dictionary abuse" at oral argument) support this reading. *See* MERRIAM-WEBSTER DICTIONARY (online edition) (defining "annual" as "covering the period of a year" or "occurring or happening every year or once a year"); *see also* WEBSTER'S THIRD NEW INT'L DICTIONARY 88 (Philip Babcock Gove ed. 2002) (defining "annual" as "reckoned by the year," "covering the period of a year: based on a year" or "occurring, appearing, made, done, or acted upon every year or once a year"); AMERICAN HERITAGE COLLEGE DICTIONARY 1587 (4th ed. 2010) (defining "annual" as "[h]appening every year; yearly" or "a period of approximately the duration of a calendar year"); 1 OXFORD ENGLISH DICTIONARY (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (defining "annual" as "[p]erformed or recurring once every year; yearly").

held within 30 days of that date, and (2) annual meetings cannot be separated by greater than thirteen months—that is, Section 211(c) explicitly prohibits holding the annual meeting later than thirteen months after the last annual meeting. But the statute does not explicitly prohibit the annual meeting interval from being *shortened* by any amount of time. Put differently, it does not prohibit holding the annual meeting *earlier* than a year after the previous annual meeting. So, while Section 211 may provide one month wiggle room after a year has passed to hold the annual meeting, the DGCL is silent as to the amount of "leeway" in the opposite direction. A logical reading of the statute thus leads to the conclusion that, under the default rule, the annual meeting date cannot be held *later* than thirteen months from the last annual meeting, but it can be moved *up* by any amount of time (so long as notice requirements are met, it does not conflict with the charter and bylaws, etc.).[63] If the General Assembly had meant to prohibit the latter, it would have explicitly said so as it did with the former.[64]

[63] There are practical constraints that would prevent one annual meeting from being held too close to the next. For example, if Air Products' bylaw is adopted, two meetings could not be held, as plaintiffs suggest they might, "in four weeks, four days, or even four minutes" or "on December 31, 2010, and [then] on January 1, 2011—one *day* later." Pls.' Opening Br. 5-6; Pls.' Reply Br. 2. Notice requirements would not allow for that (the latter three suggestions, at least, would explicitly violate Airgas's charter which has an advance notice requirement of no less than ten days before an annual meeting may be held). Similarly, filing obligations (*e.g.*, proxy statements must be filed with the SEC before an annual meeting may be held) would be difficult, if not impossible, to comply

Moreover, the policy behind Section 211 reflects Delaware's "concern for corporate democracy."[65] By prohibiting corporations from waiting longer than thirteen months between meetings, the statute is aimed at preventing board entrenchment by ensuring that stockholders have an

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with in that timeframe. And the Air Products bylaw does not contemplate such absurd results—the annual meeting would simply be held in January of each year.

[64] The legislative history of the DGCL supports this reading. The requirement to hold a stockholder meeting "annually" was added to Section 211 because "[a]lthough the legal requirement of annual meetings to elect directors is ingrained in Delaware cases, the statute should specifically say so." Folk Report 110, *available at* http://law.widener.edu/LawLibrary/Research/OnlineResources/DelawareResources/~/media/Files/lawlibrary/corporations/folkreportpt2.ashx (citing *Standard Power & Light Corp. v. Inv. Assocs.*, 51 A.2d 572 (Del. 1947). In *Standard Power & Light Corp.*, the Delaware Supreme Court held that "'[t]he statute of this state under which the corporation was created provides that directors shall be elected at an annual meeting of stockholders. The duty to hold such a meeting and to elect directors thereat is one that is laid by the statute . . . Reasonable rules ought to prevail in aid of the accomplishment of the statute's purposes, and a certain degree of liberality in favor of a meeting ought to prevail.'" 51 A.2d at 577 (quoting *Duffy v. Loft, Inc.*, 151 A. 223, 227, *aff'd*, 152 A. 849). DGCL Section 224, whose content was transferred to Section 211(c), addressed the failure to timely hold a meeting. The Folk Report refers to that Section as Delaware's "exclusive method for dealing with refusals to summon annual meetings." Folk Report 113. The intent of the drafters of Section 211 was thus to require a meeting to take place once a year—if a corporation failed to hold a meeting for an extended period of time, a deadline of either thirty days after a meeting date was designated or thirteen months after the last annual meeting would ensure that a corporation would not go *too long* without holding an annual meeting. The leading treatises on Delaware law are in accord with this view of Section 211. In the section entitled "Time of annual meeting," Folk on the Delaware General Corporation Law explains that "[t]he date for the annual meeting is determined 'by or in the manner provided in the by-laws' . . . *A corporation may amend its bylaws to advance the annual meeting date* unless such change is for an inequitable purpose." 1 Welch, Turezyn & Saunders, Folk on the Delaware General Corporation Law § 211.5, at 15 (citing 8 *Del. C.* § 211(b); *Lenahan v. Nat'l Computer Analysts Corp.*, 310 A.2d 661, 663 (Del. Ch. 1973)) (emphasis added). In *Lenahan*, a case where the fixing of the date of the annual meeting of stockholders was done in compliance with the company's bylaws, then-Vice Chancellor Marvel held that "advancing such [a] meeting date [] is permitted under the terms of the Delaware Corporation Law, 8 *Del. C.* § 211, unless such change is for an inequitable purpose." 310 A.2d at 663 (citing *Schnell*).

[65] *See Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 660 (Del. Ch. 1988).

opportunity to have their voices heard and to hold directors accountable.[66] This thirteen-month period also limits gamesmanship by insurgents. That is, insurgents who make a tactical decision to move an annual meeting forward in the year do not have unlimited authority to keep changing the dates as it suits them. As it stands, the bylaw as written moves Airgas's meeting for all years until amendment to January. Thus, if insurgents move up a meeting (as here), they will face stockholders, if elected, within thirteen months. The Air Products nominees who were elected to Airgas's board at the September 15, 2010 meeting will face stockholders at a meeting in January 2012, rather than July 2012. If, once in office, the insurgents engage in musical meeting games advancing or delaying meetings for entrenchment, disenfranchisement, or other improper purposes, this Court's broad equitable powers would have bite, as would the thirteen month limit under Section

[66] *See MM Cos., Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003) ("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 . . . . [The Delaware Supreme] Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors.") (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1378 (Del. 1995); *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 659-61 (Del. Ch. 1988); *In re Gaylord Container Corp. S'holders Litig.*, 753 A.2d 462 (Del. Ch. 2000)).

211(c). Equity stands ready to thwart misuse or abuse by directors or by insurgents.[67]

Having found that the bylaw does not conflict with the plain meaning of "annual meeting" under DGCL Section 211, I conclude that the bylaw consequently does not conflict with Section 141(d), as it does not change the meaning of a "full term" on a classified board. In order to interpret the legal meaning of Sections 211 and 141(d) of the DGCL this Court will, "to the maximum extent feasible, [interpret these two Sections in a way that] gives full effect to the literal terms of the language of each."[68]

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[67] *See Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971) (holding that attempts by a board to "utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office [and] for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management [] are inequitable purposes, contrary to established principles of corporate democracy."). Thus, in *Schnell*, the Court held that the advancement by directors of a bylaw date of a stockholders' meeting was not permitted to stand for inequitable purposes. A court of equity has jurisdiction over corporate cases to make sure that fiduciaries don't abuse their trust; not to protect fiduciaries. Absent a clear statutory or contractual right to a full year's (or three years') service, there exists no animating principle under which I would strike down the January annual meeting bylaw. Indeed, plaintiffs suggest that "there is no need [for this Court] to decide here how far short of twelve months is too short"—only that four months is not long enough. But under plaintiffs' definition of "annual," just how far short of twelve months *would* be too short? If annual meetings are to be held "approximately every twelve months," must amendments to annual meeting dates always go forward and never backwards? Pls.' Reply Br. 20. If not, would an amendment to move the annual meeting back by one or two months be okay, but three months would not (i.e., only a "material shortening" is prohibited)? There is no basis in the DGCL or in our common law for such a ruling. To hold in favor of the target (plaintiffs) would require twisting the *Schnell* doctrine against stockholders to protect directors who have no clear right—statutory *or* contractual—to serve 365 days.

[68] *Hoschett v. TSI Int'l Software, Ltd.*, 683 A.2d 43, 44 (Del. Ch. 1996).

Section 141(d), as noted above, contains the following language authorizing corporations to adopt a staggered board:

> The directors of any corporation organized under this chapter may . . . be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; *and at each annual election held after such classification becomes effective, directors shall be chosen for a full term*, as the case may be, to succeed those whose terms expire.[69]

Plaintiffs contend that "[t]he statute's reference to '1 year' and '2 years' reflects a simple proposition: that the 'annual elections' or 'annual meetings' are things that occur approximately one year apart."[70] But simply because the statute refers to "years" to separate the initial two "annual meetings" in which classification becomes effective, does not automatically mean that "annual meeting" equals "approximately one year apart"—had the General Assembly wanted to say that, it would have.

As support for their position, plaintiffs also cite to *Essential Enterprises Corp. v. Automatic Steel Prods., Inc.* for the proposition that "[c]learly the 'full term' visualized by the statute is a period of three years—not up to three years."[71] But what that case holds is that DGCL Section 141(d) "says that 'directors shall be chosen for a full term.' *The certificate*

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[69] 8 *Del. C.* § 141(d) (emphasis added).
[70] Pls.' Reply Br. 9.
[71] 159 A.2d 288, 291 (Del. Ch. 1960).

implements this."[72] The certificate at issue in *Essential Enterprises* called for a staggered board with the following terms:

> [After the initial classes had been established,] [a]t each annual election, commencing at the next annual meeting of the stockholders, the successors to the class of directors whose term expires in that year *shall be elected to hold office for the term of three years* to succeed those whose term expires so that the term of office of one class of directors shall expire in each year.[73]

The charter in *Essential Enterprises* explicitly called for three-year terms; Airgas's charter does not. Thus, the "full term" specified by the charter in *Essential Enterprises* was three years. The "full term" visualized by the statute based on Airgas's charter is until "the annual meeting of stockholders held in the third year following the year of their election.[74] Plaintiffs argue that "[t]he word 'annual' must mean one thing, and one thing only, for all purposes throughout the statute."[75] I agree, and my holding here gives the word annual a single, consistent meaning throughout the statute. My holding does not give "annual" more than one meaning—whether it is an "annual election" or an "annual meeting," it occurs once a year, every year. But there is no statutory requirement that there be a

[72] *Id.* at 290.
[73] *Id.* at 96-97 (emphasis added).
[74] Certificate, art. 5, § 1.
[75] Pls.' Reply Br. 3.

durational minimum amount of time between annual elections or annual meetings, unless it is so specified in a company's bylaws or charter.[76]

Other cases cited by the parties are easily distinguishable. *Roven v. Cotter*[77] involved a charter amendment that would declassify a staggered board so that a director could then be immediately removed with or without cause (because under the company in question's charter, classified directors could not be removed without cause). Thus, it was clearly a "removal" case and did not address the question of when in the year an "annual meeting" must be held, but it is instructive nonetheless. There, Citadel Holding's charter contained a staggered board provision with language similar to Airgas's charter (i.e. directors' terms expire at the "third annual meeting of

[76] Plaintiffs' counsel at oral argument forcefully contended that the language "shall be elected to hold office for three years" is functionally equivalent (X=Y) to the phrase that appears in Airgas's charter and bylaws (as well as in many other Delaware corporations' charters and bylaws). That is, counsel insisted that the locution "shall be elected to hold office for three years" is equivalent to (means the very same as) the locution that directors "shall hold office for a term expiring at the annual meeting . . . held in the third year following the year of their election." But this equation will not solve—X does not equal Y for the simple reason they are different letters in the alphabet and the words each serve as a proxy for are different linguistic formulations that have a different meaning in standard English usage. If these linguistic formulations appear in ten thousand company charters, the words will nonetheless have the meaning I believe they must be read to have here. To read them in the manner plaintiff urges is, in my opinion, contrary to a common sense interpretation of the words. In addition, to read them in this non-literal fashion would be to read them contrary to the reading more favorable to the stockholder franchise. And so, despite the skillful advocacy of plaintiff's counsel, I am unable to accept the proposition that X=Y in these circumstances.

[77] *Roven v. Cotter*, 547 A.2d 603 (Del. Ch. 1988).

the stockholders following said Director's election").[78] Plaintiff Roven argued that "sections 141(d) and 141(k), when taken together, entitle a director elected in accordance with § 141(d) to serve a 'full term' of three years."[79] The Court rejected that argument, however, holding that Section 141(d) "could not possibly entitle a director to serve a 'full term' contrary to basic principles of corporate democracy, and the expressed will of the majority."[80]

Dolgoff v. Projectavision, Inc.[81] is the only case cited by the parties in which the Court expressly considered the question of whether a corporation could hold its "annual meeting" earlier in the year than it was historically held. This case is distinguishable, first, because the directors in *Dolgoff* had a defined term of office, unlike Airgas.[82] Moreover, there was no claim that holding the annual meeting earlier in the year violated some statutory or charter provision.[83] Instead, Mr. Dolgoff argued that holding the meeting

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[78] *Id.* at 604.
[79] *Id.* at 607.
[80] *Id.* at 608.
[81] 1996 WL 91945 (Del. Ch. Feb. 29, 1996).
[82] *Id.* at *3 n.9 (Projectavision's charter provided: "At the expiration of the initial term, and of each succeeding term of each class, the directors of each class shall be elected to serve *for a three year term.*") (emphasis added).
[83] Indeed, Projectavision had not held an annual meeting in over a year. *Id.* at *2.

earlier in the year was an inequitable manipulation of the electoral process under *Schnell* and *Blasius*.[84] The case thus is inapplicable to this case.

Ultimately, the policy arguments comport with this conclusion as well. First, the "Delaware General Corporation Law is an enabling statute that provides great flexibility,"[85] and so the Court will read it that way. DGCL Section 211 broadly enables corporations to define for themselves when their annual meetings shall be held. The DGCL does not define the term "annual meeting," and I will not read a specific definition into what is clearly an enabling provision. Directors and stockholders are free to specify when the annual meeting shall occur, and they are free to change it as they see fit, so long as they do not violate the limitations that do appear in the statute (the 30 day and 13 month constraints).[86] Plaintiffs' argument relies most heavily on the impact that the word "annual" has on Section 141(d)—that is, on the "full term" of a director serving on a staggered board. Not all

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[84] *Id.* at *5. Although the bylaw proponent in this case (Air Products) certainly had strategic aims in mind when it proposed moving the annual meeting forward to January 18, 2011, there is no allegation that those aims were inequitable or otherwise inappropriate. That is, plaintiff has not asserted equitable arguments against the adoption of the bylaw; it has not accused defendant of seeking to advance the date of the 2011 annual meeting in order to entrench board members or to thwart the exercise of the stockholder franchise—arguments typically encountered when *directors* are seeking to advance (or postpone) an annual meeting. The holding of the 2011 annual Airgas stockholder meeting may result in certain Airgas board members being replaced by successors, but that will only occur if it is the will of a majority of stockholders who vote at the 2011 annual meeting.

[85] *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 227 (Del. 2005).

[86] *See* 8 *Del. C.* § 211(c).

companies have classified boards, and the term "annual meeting" must mean the same thing for companies both with and without classified boards. The meaning of "annual" should be gleaned from the section of the DGCL (211) discussing "annual meetings"; not the section (141) authorizing classified boards.

Second, plaintiffs suggest that the common practice and understanding of staggered boards is that a "full term" is three years, and a conclusion that two "annual meetings" can be held in a four-month period would "destabilize the staggered boards of Delaware companies."[87] This is not the case—it will not diminish the effectiveness of staggered boards. The common sense, ordinary language reading that an "annual meeting" must happen once every year comports with the clear terms of our statute, its policy rationale and our common law decisions. If corporate charters and

[87] Pls.' Reply Br. 4. Plaintiffs make much of this idea that two meetings in four months cannot be "annual." Ironically, until April 2010, Airgas's bylaws provided for annual meetings to be held anytime within a five-month window following Airgas's fiscal year—that is, the meeting could be held anytime from April to August. *See* Airgas Bylaws (amended through October 9, 2007), art. II, § 1 ("The annual meeting of the stockholders for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date within five (5) months after the end of the fiscal year of the Corporation as the Board of Directors shall each year fix."). In April 2010, Airgas amended its bylaws so that its directors could set the annual meeting date at *any* time and pushed back its annual meeting to September in response to Air Products' hostile threat. *See* Airgas Bylaws (amended through April 7, 2010), art. II, § 1 ("Each annual meeting of the stockholders for the election of Directors and for the transaction of such other business as may properly come before the meeting shall be held on such date as the Board of Directors shall fix."). Had Airgas held its annual meeting earlier in the year as its old bylaws allowed, the January meeting could have actually taken place nine months later than the 2010 annual meeting.

bylaws have been written in a non-specific, open-ended fashion, it is not for this Court to twist their plain words to achieve a purported intent of the drafters. The solution is for drafters to employ clear and simple language to provide clarity and avoid ambiguity.[88] This could easily be accomplished by corporate planners and draftsmen through such simple language as: "The annual shareholder meeting shall be held as closely as practicable in the same month of each year so as to ensure that the terms of office of directors shall approximate a complete year in length." In short, this is not the end of the world for staggered boards; it is an easy fix if it needs fixing.

VI. CONCLUSION

Delaware law prescribes no minimum amount of time that must elapse between annual stockholder meetings of a Delaware corporation. Section 211 of the DGCL prescribes only the maximum amount of time that may elapse between annual stockholder meetings (thirteen months). Delaware law thus affords companies flexibility to schedule annual meetings based on the particularized needs and circumstances of the corporation. A Delaware corporation may, of course, specify in its charter or bylaws a certain date or a certain time period of a year for its annual stockholder meeting. In the

[88] *See Frankino v. Gleason*, 1999 WL 1032773, at *4 (Del. Ch. Nov. 5, 1999) (a corporation "is accountable to the provisions in its very own bylaws"), *aff'd sub nom.*, *McNamera v. Frankino*, 744 A.2d 988 (Del. 1999).

absence of a specified date or time period for the meeting, directors or stockholders of the corporation (as authorized) may choose a particular date for a given annual meeting. In this case, the stockholders of Airgas at its September 15, 2010 annual meeting voted to amend the company's bylaws to establish a particular period of the year (January) for the 2011 meeting and for all future annual stockholder meetings. This particular exercise of authority does not conflict with any other express provision of Airgas's bylaws or charter; nor does it conflict with any Delaware statute or with any common law decision. Airgas has no provision in its charter or its bylaws that defines a precise term of office for the members of its classified board of directors; instead, its bylaws and charter provide that the terms of its classified board of directors shall expire at the annual meeting in the third year following their year of election. This means that the current class (the class elected in 2008) of Airgas directors' terms of office shall expire at the annual meeting set in the third year after their election, or 2011. Thus, the bylaw adopted at the September 15, 2010 annual meeting setting the next annual meeting for January 18, 2011, shall be the annual meeting at which the 2008 class of directors will stand for election. If Airgas (or any other Delaware corporation) desires a "North Star"—an invariable, determinate and fixed term of office—for its directors, it must craft its charter or bylaws

to specify that a director's term shall be for a defined period of time (e.g., a three year term, or a term not less than 35 months, or some other durationally defined minimum). The Court of Chancery is not charged with the duty to reform the actual words used in charters or bylaws so as to make them conform to expectations, purposes or intentions.

For the foregoing reasons, I have concluded that (1) Air Products' proposed bylaw amends Article II of Airgas's bylaws and is not "inconsistent" with Article III and, thus, a majority vote was sufficient to validly adopt the bylaw at the September 15, 2010 annual meeting, (2) the bylaw does not conflict with the terms of Airgas's charter, and (3) the bylaw is valid under Delaware law.

An Order implementing this Opinion has been entered.