

## Delaware Corporate Law Update

Tuesday, April 15, 2025

### Delaware Court of Chancery Dismisses Challenge to Advance Notice Bylaws as Unripe

In *Siegel v. Morse*, C.A. No. 2024-0628-NAC (Del. Ch. Apr. 14, 2025), the Delaware Court of Chancery dismissed as unripe a challenge to amendments to a corporation’s advance notice bylaws. The court’s ruling makes clear that the Delaware courts will not undertake an equitable review of a corporation’s bylaws without a ripe controversy.

In August 2023, the board of directors of The AES Corporation amended AES’s advance notice bylaws following the SEC’s adoption of the universal proxy rule. Martin Siegel (“Plaintiff”), an AES stockholder, sued AES and its board to challenge the amendments. Plaintiff originally claimed that the amended bylaws were facially invalid and that the board breached its fiduciary duties by amending the bylaws.

The court denied Plaintiff’s motion to expedite and, following the Delaware Supreme Court’s decision in *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024), stayed discovery. Plaintiff then amended his complaint in light of *Kellner*, removing his facial invalidity challenge and resting on his fiduciary claim. Plaintiff’s claim focused on two purported issues with the amended advance notice bylaws: the “acting in concert” definition and an ownership provision that required nominating stockholders to disclose any equity interest in AES (including synthetic and derivative ownership interests, short interests, and hedging arrangements), along with their history of ownership of stock or derivative interest in AES (the “Ownership Provision”). The Ownership Provision also required a nominating stockholder and any person “acting in concert” with such stockholder to disclose any performance-related fees they would receive if AES’s stock appreciated or depreciated. Importantly, Plaintiff did not seek to nominate a director to AES’s board and did not identify any other AES stockholder who did. The defendants moved to dismiss the amended complaint.

Because Plaintiff had disclaimed a facial validity challenge and had not demonstrated that a ripe controversy existed, the court granted the defendants’ motion to dismiss under Court of Chancery Rule 12(b)(1). Plaintiff did not allege that any of the challenged advance notice bylaws applied to him, and did not identify any AES stockholder who was deterred by the bylaws from nominating a director; the court accordingly described Plaintiff’s equitable challenge to the bylaws as a “hypothetical one.” The court also rejected Plaintiff’s claim that the presentation made to the AES board proved that they acted defensively: “Pointing to excerpts from a few slides from a slide deck is just not enough, in these circumstances, to demonstrate that a genuine, extant controversy exists.” Finally, the court rejected Plaintiff’s analogies to stockholder rights plans and dead-hand proxy puts, noting that advance notice bylaws do not lead to devastating consequences when triggered but rather allow the stockholder to engage with the company’s board or mount a litigation challenge.

