

Court Denies Proxy Contest After Board Determines Dissident Candidates Failed to Complete Questionnaire

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A recent case interprets and demonstrates the importance of the requirements in advance notice bylaws.

The U.S. District Court in the Northern District of Texas granted a preliminary injunction to Ashford Hospitality Prime that invalidated Sessa Capital's slate of candidates for Ashford's annual meeting. Sessa owns more than 8% of Ashford's stock and notified the company that it intended to nominate five candidates to Ashford's seven-member board.

Ashford's bylaws require nominees to fill out a questionnaire, and include all information relating to the nominee that must be disclosed in connection with the solicitation of proxies in a contested election under SEC rules. Those rules direct nominees to "[d]escribe any plans or proposals" that would result in a sale or transfer of material assets, any extraordinary corporate transaction, any other material change to the corporate structure or any similar action.

The Sessa candidates claimed to have no plans for Ashford and refused to provide answers to this question. There was correspondence, however, that revealed discussions at Sessa about amending Ashford's bylaws, conversations about stopping acquisitions and details of a "gameplan" for selling the company after election. In phone calls, Sessa discussed with its candidates that the goal of maximizing value in today's environment would mean having a "real and fair sale process." Internal emails also indicated that Sessa employees believed a "gameplan" is necessary to convince ISS to support its nominees.

The Ashford board determined that the responses to the questionnaires from the Sessa candidates were deficient and offered them a chance to amend their answers, which they refused. Applying Maryland law, given the company's state of incorporation, the Court reviewed the board's actions under the business judgment rule.

The Court decided that the board could rationally believe that it is not possible that "a sophisticated hedge fund would engage in expensive litigation and a difficult proxy contest without any plans for the company after it seized control." The Court found that the board reasonably exercised its business judgment in concluding that the Sessa candidates actually had a plan that they refused to disclose in their questionnaire, which rendered them ineligible under the bylaws.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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