



Activists are Hereby on Notice: Board Authority to Reject Deficient Director Nominations

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In a closely watched decision, the Superior Court of Washington for King County in *Blue Lion Opportunity Master Fund, L.P. vs. HomeStreet, Inc.*, No. 18-2-06791-0 SEA, affirmed the authority of a corporation's board of directors to reject a notice of director nominations and shareholder proposals for failure to comply with an advance notice bylaw.

In the case, HomeStreet, Inc., a Washington corporation and parent of HomeStreet Bank, received a purported notice from an activist, Blue Lion Opportunity Master Fund, L.P., stating Blue Lion's intention to nominate two director candidates and submit three shareholder proposals at HomeStreet's 2018 annual meeting. Blue Lion delivered its notice in the late afternoon on Friday, February 23, the eve of the deadline for such notices under HomeStreet's advance notice bylaw.

On March 1, HomeStreet rejected the notice because it failed to comply with the company's advance notice bylaw in myriad instances. Among other things, the notice failed to provide information required under the bylaws by reference to the federal proxy rules (e.g., the activist's estimated proxy fight cost and whether the activist planned to seek reimbursement from the company for its cost). The notice also failed to include a variety of information regarding share ownership of Blue Lion affiliates and certain required shareholder representations. In response, on March 13, Blue Lion filed suit against the company, seeking a declaratory judgment that Blue Lion's notice complied with the company's advance notice bylaw, along with a motion for a preliminary injunction enjoining the company from rejecting the notice as invalid. In their briefs, both parties agreed that there was no Washington case law on point and thus advised the court to look to Delaware case law.

On March 30, the court ruled in favor of HomeStreet. The court affirmed that advance notice bylaws like the one at issue are common, that HomeStreet's advance notice bylaw was valid and that Blue Lion failed to comply with the requirements of that bylaw. The court ruled that the company's board of directors' decision to reject the activist's notice was an exercise of its business judgment that the court will not second-guess or disturb. The court further found that Blue Lion failed to establish irreparable harm in the absence of injunctive relief because, for example, the activist could seek a special meeting of the shareholders as an alternative to reach the same ends.

The decision confirms that a board of directors has the power to reject a deficient advance notice and that the board's decision is generally protected by the business judgment rule. The court rejected the contention that "enhanced scrutiny" under the Blasius line of Delaware precedent should apply because HomeStreet's board did not take any defensive measures—it only rejected a deficient notice. The advance notice bylaw had been in place since the company's initial public offering, and the advance notice deadline had been publicly disclosed for 10 months.

The ruling is a reminder that every public company should have a carefully drafted advance notice bylaw. Generally, a public company's bylaws should be reviewed by a proxy fight expert with experience in how these bylaws are interpreted by activists and courts alike. The outcome of a proxy contest might depend on it.