Proper Notice and Conduct of Board Meeting Necessary To Ensure Valid Corporate Action



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The case of *Fogel v. US Energy Systems, Inc.* (2007 Del. Ch. LEXIS 178, Dec. 13, 2007) raises questions about the meeting notice requirements and reminds us of the importance of adhering to more formal board meeting protocol when taking votes.

US Energy Systems was a Delaware corporation with a 4 person board. Three of the directors were outside directors, and 1 director was the CEO. A meeting of the directors was properly called. The outside directors had determined prior to such meeting that they were going to terminate the CEO, but no prior notice of this purpose had been communicated to the CEO director. At the meeting, the CEO was given the news that he would be terminated if he did not resign. No deliberations took place at this meeting, and no formal vote was passed.

The CEO subsequently challenged the authority of the outside directors to terminate him. A few days after the meeting the CEO, who had the authority to call a meeting under the by-laws, called a special meeting of the stockholders for the purpose of removing the other directors and electing their replacements. The board ignored this request for a special meeting in the good faith belief that the CEO had been properly removed.

The CEO brought suit seeking in part to compel the company to hold the special meeting of stockholders he had called. The Delaware Court of Chancery found that the action of the board to remove the CEO was void *ab initio* either because (i) there was no proper meeting of the board, or (ii) the meeting was "procured by deceit", implying that the CEO had not been properly informed of the purpose of the meeting and stating that notice must be sufficient to allow directors "adequate opportunity to protect [their] interests".

The Fogel case reminds us of the importance of certain basic practices when conducting an official meeting of the Board of Directors. The meeting should be called to order. There should be an opportunity to discuss specific resolutions being brought forward for consideration. After discussion, the adoption of the resolution should be properly motioned and then put to an official vote, the results of which are recorded in the minutes. Most notably, after Fogel, boards need to more closely examine the sufficiency of any board meeting notice, and consider whether a director that is also the CEO must have advance notice that he is going to be removed at the meeting.

For more information on this topic, please contact **Jonathan D. Gworek**.