

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

BLASIOUS INDUSTRIES, INC.,
a Delaware corporation,

Plaintiff,

-against-

ATLAS CORPORATION,
a Delaware corporation;
JOHN J. DWYER; EDWARD R.
FARLEY, JR.; MICHAEL
BONGIOVANNI; RICHARD R.
WEAVER; WALTER G. CLINCHY;
ANDREW DAVLIN, JR.; EDGAR
M. MASINTER; JOHN M.
DEVANEY; and HARRY J.
WINTERS, JR.,

Defendants.

C.A. No. 9522

AMENDED AND SUPPLEMENTAL COMPLAINT

Plaintiff Blasius Industries, Inc. ("Blasius"), by its attorneys, Morris, Nichols, Arsht & Tunnell and Kramer, Levin, Nessen, Kamin & Frankel, and pursuant to Court of Chancery Rule 15(a) for its amended and supplemental complaint alleges:

1. Blasius is a Delaware corporation with its principal place of business at 1600 Peninsula Drive, Erie, Pennsylvania. Blasius is the beneficial owner of 248,600 shares of the common stock of defendant Atlas Corporation ("Atlas"), constituting approximately 8.4% of Atlas' outstanding shares.

2. Atlas is a Delaware corporation with its principal place of business at 353 Nassau Street, Princeton, New Jersey. Atlas' registered agent for service of process in Delaware is The Corporation Trust Company, 1209 Orange Street, Wilmington, Delaware.

3. According to its Statement on Form 10-K filed on September 28, 1987, Atlas has outstanding 2,969,045 shares of common stock. Atlas' common stock is registered pursuant to Section 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(a), and is traded on the New York Stock Exchange.

4. Atlas' Board of Directors consists of seven members. Each of defendants John J. Dwyer, Edward R. Farley, Jr., Michael Bongiovanni, Richard R. Weaver, Walter G. Clinchy, Andrew Davlin, Jr., and Edgar M. Masinter (the "Director Defendants") is and was at the time of the wrongs alleged herein a director of Atlas.

5. Defendants John M. Devaney, the treasurer and chief financial officer of Atlas, and Harry J. Winters, Jr. (the "Putative Director Defendants"), by action of Atlas' Board of Directors on Sunday, January 3, 1988, are also purported to be directors of Atlas.

6. On December 30, 1987, Blasius filed with the Securities and Exchange Commission and on that date mailed to

Atlas Amendment No. 2 to its Schedule 13D, which disclosed its intention to solicit consents to amend the By-laws of Atlas to expand the Board of Directors to 15 members (the greatest number permitted under Atlas' Certificate of Incorporation), to elect eight new directors to the newly created directorships, and to obtain shareholder approval of a precatory resolution urging Atlas' Board to restructure Atlas in a manner similar to that earlier set forth in Amendment No. 1 to the Schedule 13D (the "Restructuring Plan").

7. Blasius' announced plan, if the consent solicitation is successful, is to implement the Restructuring Plan as promptly as possible. Blasius believes that the value of Atlas exceeds the current stock market price, and that the Restructuring Plan will help Atlas shareholders to obtain the real value of their shares.

8. On December 30, 1987, Blasius caused to be delivered to Atlas, in accordance with 8 Del. C. § 228, a signed written consent with respect to 10,000 of its shares (the "December 30 consent") setting forth the actions proposed to be taken, as set forth above. A copy of this signed written consent is attached hereto as Exhibit A.

9. On or about January 3, 1988, concerned that a majority of its shareholders would consent to expand the Board to fifteen, elect the 8 Blasius nominees and effect a change in

control of the Board, Atlas' Board of Directors purported to amend the By-Laws to increase the number of directors by two to nine, and elected the Putative Director Defendants to those two new directorships. This action was taken to hinder and thwart the already initiated consent process and to quash the threat to the incumbent Board's control of the Company.

10. Immediately prior to the filing of this Amended and Supplemental Complaint, and in direct response to the actions of Atlas and the Director Defendants, Blasius is causing to be delivered to Atlas, in accordance with 8 Del. C. § 228, a second signed written consent with respect to 1,000 of its additional shares (the "January 7 consent"). This consent gives approval to, inter alia, (a) an amended by-law expanding the Board of Directors to fifteen members; and (b) removal of the Putative Director Defendants without cause; and in the alternative (c) the election of new directors to the newly created directorships; or (d) the sequential election of one to seven directors to any vacant newly created directorships. A copy of the January 7, consent is attached hereto as Exhibit B.

11. On information and belief, Atlas intends to enforce new By-Laws, amended September 1, 1987, to frustrate and defeat Blasius' right to utilize the statutory consent procedure. These amended By-Laws, a copy of which is attached hereto as Exhibit C, contain at least three provisions that are invalid under Delaware law:

a. Section 11(b) of the By-Laws purports to require a stockholder seeking to have action authorized or taken by written consent to give written prior notice to the Secretary of Atlas of its intent to utilize the consent procedure. Section 11(b) then provides, "The Board of Directors shall, upon receipt of such notice, fix as the Consent Record Date a date no later than 30 days after the receipt of such notice or such later date as shall be requested by the stockholder."

b. Section 11(c) of the By-Laws provides that the Secretary of Atlas shall determine whether the proposed action has been validly consented to, but not until the 59th day after the fixing of the Consent Record Date, and only then if no "legal proceeding incident to the validity of such consent exists."

c. Section 12 of the By-Laws provides, in pertinent part, that in the event a stockholder wishes to utilize the consent procedure to nominate any persons for election as directors, the stockholder must give prior notice to the Secretary of Atlas, such notice to be 60 days prior to the mailing of soliciting materials to stockholders or, if no soliciting materials are required to be mailed, 60 days prior to the execution of the first consent.

12. Each of these provisions is an invalid attempt by the Director Defendants to enact By-Laws that undermine the right of shareholders to utilize the statutory consent procedure. The Delaware General Corporation Law specifically provides that the holders of the majority of shares of the common stock of a Delaware corporation may take corporate actions by means of written consents, without prior notice and without a vote, "[u]nless otherwise provided in the certificate of incorporation." 8 Del. C. § 228(a). The Delaware Supreme Court has

therefore struck down similar by-laws that obstruct and delay the consent procedure. See, e.g., Datapoint Corp. v. Plaza Securities Co., 496 A.2d 1031 (Del. 1985). Further, the Delaware General Corporation Law provides that the record date for consents shall be the first date on which a signed written consent has been delivered to the corporation, unless a "record date has been fixed by the board of directors." 8 Del. C. § 213(b). As no such record date has been set, the record date for the December 30 consent is December 30, and that for the January 7 consent is January 7. These record dates cannot be subsequently changed by the Board.

13. Atlas' Certificate of Incorporation contains no provisions limiting the statutory consent procedure. Notably, the Director Defendants attempted, at Atlas' November, 1987 annual meeting, to obtain approval to an amendment to the Atlas Certificate of Incorporation that would have done away with the consent procedure. Atlas' proxy statement, dated October 1, 1987, stated that

The Board of Directors has concluded that stockholders should act only after there has been a reasonable opportunity for positions to be presented and considered. Stockholders meetings assure an opportunity for this process. By contrast, action by written consent can become effective as soon as holders of the requisite number of shares eligible to be voted have signed the consent, without any prescribed period of time or forum for the presentation of positions. In the judgment of the Board of Directors, action by

consent in those circumstances is inappropriate for a corporation whose shares are held widely.

Although the amendment was defeated, defendants still intend, on information and belief, to delay the effectiveness of the consent procedure by purporting to enforce the By-Laws referred to above and deeming the consent delivered on January 7 and/or that delivered on December 30, 1987 to be ineffective for failure to comply with such By-Laws.

FIRST CLAIM

14. Blasius repeats and realleges the allegations of paragraphs 1 through 13 of the Amended and Supplemental Complaint.

15. The amendment of Atlas' By-Laws, expansion of Atlas' Board of Directors and election of the Putative Director Defendants in response to plaintiff's delivery of its consent was taken for the sole or primary purpose of thwarting the will of Atlas' shareholders as expressed through the consent procedure initiated by Blasius, thereby entrenching the Director Defendants' control of Atlas. Such actions serve no proper corporate purpose. Defendants' actions are intended to and do impinge upon the rights of Atlas shareholders, pursuant to 8 Del. C. § 228, to act by written consent to expand the Board and elect the proposed slate of eight new directors. Under Delaware law,

Atlas shareholders retain the inherent right to create and fill the eight positions authorized by Atlas' Certificate of Incorporation.

16. Accordingly, the attempted amendment of the By-Laws, expansion of the Board of Directors and election of the Putative Director Defendants is an inequitable manipulation of Atlas' corporate machinery and is therefore invalid even if otherwise legal.

17. Blasius has no adequate remedy at law.

SECOND CLAIM

18. Blasius repeats and realleges the allegations of paragraphs 1 through 17 of the Amended and Supplemental Complaint.

19. Taken together, the three challenged provisions of the By-Laws permit the defendants to delay the election of new directors by consent for at least 119 days and to unilaterally invalidate the consents delivered on December 30 and January 7 by causing them to expire pursuant to 8 Del. C. § 228(c) before any action pursuant to them is possible, and to otherwise manipulate the Consent Record Date for their maximum advantage. Taken singly, the provisions are invalid for the following reasons:

a. Section 11(b) purports to permit defendants to fix a record date by resolution subsequent to the delivery of a valid written consent to them, in violation of 8 Del. C. § 213(b).

b. Section 11(b) purports to require a stockholder to give the Secretary of Atlas prior notice of its intent to utilize the statutory consent procedure, and thereafter purports to allow the defendants to fix a record date as many as 30 days subsequent to that notice, in violation of 8 Del. C. §§ 213(b) and 228.

c. Section 11(c) purports to delay the effectiveness of action taken by consent until at least 59 days subsequent to the setting of a Consent Record Date by the Defendant Directors, in violation of 8 Del. C. § 228.

d. Section 12 purports to require a stockholder to give the Secretary of Atlas notice, 60 days before the mailing of any solicitation materials to shareholders, of its intent to nominate persons for election as directors by means of the consent procedure in violation of 8 Del. C. § 228.

20. On information and belief, defendants intend to utilize the challenged By-Laws to require Blasius to wait more than sixty days to solicit shareholders to sign consents on behalf of the director nominees, to set a Consent Record Date some 30 days in the future, and to defer the effectiveness of the consent procedure until at least 59 days subsequent to the passage of a resolution fixing a Consent Record Date, thereby delaying the effectuation of the consent procedure for 89 days or more.

21. Defendants' utilization of these By-Laws is unauthorized by Delaware law, and therefore the Court should declare that they are void and of no force and effect.

22. If defendants are not enjoined from utilizing these By-Laws, Blasius will suffer irreparable injury in its attempt to promptly obtain the consents of the holders of the majority of the common stock of Atlas to its proposed actions. Moreover, in the absence of injunctive relief, there will be confusion as to which stockholders of record are entitled to express consents -- those stockholders of record on December 30 (should consents be solicited to the December 30 consent), on January 7 (should consents be solicited to the January 7 consent), or on some other Consent Record Date set by the Defendant Directors and Putative Director Defendants.

23. Blasius has no adequate remedy at law.

THIRD CLAIM

24. Blasius repeats and realleges the allegations of paragraphs 1 through 17 and 19 through 23 of the Amended and Supplemental Complaint.

25. Even if otherwise legal, defendants' enforcement of the consent provisions of the By-Laws would constitute an inequitable manipulation of the corporate machinery to preserve the Director Defendants' control of Atlas and a breach of the

Director Defendants' and Putative Director Defendants' fiduciary duties.

26. If Section 12 is allowed to stand, defendants will, on information and belief, refuse to recognize the consents that Blasius intends to solicit on the grounds that Blasius was required to give 60 days prior notice of its intent to use the consent procedure to nominate persons for election as directors, a procedure which in and of itself is alien to the concept of action by an absolute majority of stockholders acting by written consent without a meeting.

27. If Section 11(b) is allowed to stand, the Director and Putative Director Defendants will, on information and belief, seek unreasonably to delay the effectiveness of the consents Blasius intends to solicit by setting a record date which is later than that which Atlas itself could have set under 8 Del. C. § 213 if the Director and Putative Director Defendants themselves had resolved to fix a record date for action by written consent.

28. If Section 11(c) is allowed to stand, any action taken by consent will not be effective until at least 59 days subsequent to the fixing of the Consent Record Date by the Director and Putative Director Defendants. This delay is completely arbitrary and can serve no purpose other than to prevent directors elected by a majority of stockholders from taking office. Further, if a legal proceeding is brought

contesting the validity of consents required for action, the Secretary of Atlas, in his sole discretion, may delay the effectiveness of the consented to action until after the disposition of the legal proceeding.

29. Apart from these manipulative and delaying effects, defendants' implementation of the consent By-Laws is a manipulation of Atlas' corporate machinery because in November, 1987, the shareholders of Atlas rejected amendments to Atlas' Certificate of Incorporation proposed by the Director Defendants that would have done away with the signed written consent procedure.

30. Blasius has no adequate remedy at law.

WHEREFORE, Blasius demands judgment:

A. Declaring the putative amendment of the By-Laws, expansion of Atlas' Board of Directors and election of the Putative Director Defendants to be void and of no force and effect and preliminary and permanently enjoining the Director Defendants from purporting to amend the By-Laws to expand the Board of Directors and elect new directors to newly created directorships.

B. Preliminarily and permanently enjoining the Putative Director Defendants from taking any action as a Director of Atlas pursuant to their supposed election on or about January 3, 1988.

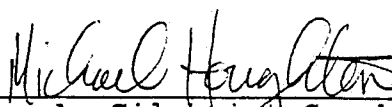
C. Declaring Sections 11(b), 11(c) and 12 of the amended By-Laws to be void and of no force and effect.

D. Preliminarily and permanently enjoining defendants, and all persons acting in concert with them, from taking any action pursuant to Sections 11(b), 11(c) and 12 of the amended By-Laws.

E. Awarding such other relief as the Court deems just and proper.

Dated: Wilmington, Delaware
January 7, 1988

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