THE DUPONT PROXY BATTLE: SUCCESSFUL DEFENSE MEASURES AGAINST SHAREHOLDER ACTIVISM

BRANDON R. HARPER*

ABSTRACT

In the ever-increasing climate of shareholder activism, corporations with at-risk boards are keen to new defensive tactics. In May of 2015, DuPont CEO Ellen Kullman fought off a hedge fund activist attack led by Nelson Peltz of Trian Partners. Peltz purported to supplant four of the 12 seats on DuPont's Board of Directors with himself and three other individuals whom he nominated. His strategy for the four seats was to win a proxy battle.

Peltz engaged DuPont by sending the Board a letter that both highlighted the deficiencies in the company's corporate governance and proposed solutions for those deficiencies. These "white papers" were Peltz's tactic to fracture shareholder support for the incumbent DuPont Board and sway that support his way come proxy season. In response to Peltz's white papers, Kullman directly combated each of his criticisms with specifically targeted maneuvers. The shareholders reciprocated her efforts and leadership by voting to keep the DuPont Board intact. DuPont successfully defended against Peltz's short-termism campaign.

This Note reviews contemporary shareholder activism generally through the lens of the DuPont proxy battle with hedge fund manager Nelson Peltz. It explores the defense measure implemented by DuPont and CEO Ellen Kullman. Finally, it evaluates the effect of a contested proxy vote on a company and proposes a cost-benefit consideration for companies facing an activist campaign.

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*Brandon R. Harper is a 2017 J.D. Candidate from Widener University Delaware Law School and is the Volume 42 External Managing Editor of the *Delaware Journal of Corporate Law*. Brandon is also a graduate of the University of Delaware. I am grateful to my DJCL mentors for their guidance. Thank you to Sabrina Hendershot for her continued support in my pursuit of academic and professional success. Thank you to Brittany Giusini for her mentorship as an alumnus, as well as for her comments on this Article. Thank you to Matt Goeller for his tireless efforts in the editing process. I am grateful for the hard work of everyone on the *Delaware Journal of Corporate Law* Staff. Special thanks to my family and friends for their support.

I. INTRODUCTION

E.I. du Pont de Nemours and Company's ("DuPont") proxy contest victory against activist hedge fund manager Nelson Peltz of Trian Partners provides a blueprint for defending against a common shareholder activism tactic, the proxy battle.[1] However, despite DuPont's victory of all 12 individuals nominated by DuPont being voted to the board of directors ("the Board"), there were still causalities, and the effects of the proxy battle are still being felt.[2] Amid the increasing rate of activist investors targeting public companies,[3] corporations like DuPont have demonstrated effective strategies in defending against activist attack devices, such as the proxy battle. DuPont's ability to fight off Nelson Peltz illustrates a successful defensive campaign among many more recent activism victories. In September of 2014, eBay conceded to activist investor Carl Icahn's push to spin off the company's online payment service, PayPal.[4] Icahn also nominated two new board members, but withdrew his nominations.[5] In another successful shareholder activism campaign, Darden Restaurants Inc. (owner of Olive Garden and Red Lobster) lost every seat on its board to a nine-month proxy battle with Starboard Value LP in October of 2014.[6]

In the first half of 2015, investor activism had increased by 23%.[7] Increased capital to activists, adoption of different tactics, and fewer companies fighting off those activist investors' proposals are all factors suggesting that the rate of shareholder activism will continue to increase.[8] Activism activity has grown steadily since 2000, which saw 27 activist campaigns, to 2014, which saw 344.[9] A slower economy

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[1]*See* Jeff Mordock, *DuPont Vote: Nelson Peltz Fell Short, But Was Close*, DELAWAREONLINE: THE NEWS JOURNAL (May 20, 2015), http://tinyurl.com/mordock-tnj-20v15.

[2]*See id*. Peltz received 43% of the total 681 million votes cast.

[3]*See Activist Investing: An Annual Review of Trends in Shareholder Activism* (Josh Black ed., 2015) at 5, http://tinyurl.com/black-artsa-15 (illustrating how shareholder activism has increased since 2013).

[4]*See* Deepa Seetharaman & Supantha Mukherjee, *EBay follows Icahn's advice, plans PayPal spinoff in 2015*, REUTERS (Sept. 30, 2014), http://tinyurl.com/reuters-ebay-30ix2014.

[5]*See id.*

[6]Leslie Patton, *Starboard Wins All Seats on Darden's Board*, BLOOMBERG BUSINESS, Oct. 10, 2014, *available at* http://tinyurl.com/bloom-starboard-10x14.

[7]David Benoit, *Investor Activism on Pace For Record Around the Globe*, WALL ST. J. (July 14, 2015), http://tinyurl.com/wsj-mb-act-14vii15.

[8]*See* Black*, supra* note 3, at 8–9.

[9]*See* Stephen F. Arcano & Richard J. Grossman, *Activist Shareholders in the US: A Changing Landscape*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE & FIN. REG. (June 28, 2013), http://tinyurl.com/hls-fcgfr-arcano-28vi13; Stephen Gandel, *Activist Investors Were A Lot More Active in 2014*, FORTUNE (Feb. 3, 2015), http://tinyurl.com/fortune-03-ii15

makes even the largest companies vulnerable to activist investors because when numbers are down, shareholders are more likely to accept a short-term change if it means seeing the share price rise.[10]

DuPont's recent proxy battle victory against Nelson Peltz and Trian marks the latest—and most notable—in a group of activist victories, and will be explored in this Note.[11] This Note proceeds in four parts. First, this Note will examine shareholder activism and its current climate, while exploring two examples of successful defenses against activism campaigns.[12] Second, this Note will analyze DuPont's proxy battle and implemented defensive strategies against Trian Partners.[13] Third, this Note evaluates the effects of a contested proxy vote, suggesting that companies face a challenging decision of whether to engage in a proxy battle or settle beforehand in order to mitigate greater loss and do best by the company in the long-term.[14] Finally, this Note will propose a cost-benefit consideration for all companies facing activism approaches similar to that of DuPont.[15]

II. BACKGROUND: SHAREHOLDER ACTIVISM—AN OVERVIEW AND TWO EXAMPLES

A. *Activism Generally*

"Shareholder activism" is the act of buying shares of a company an investor views as undervalued, and then imposing his will for change on the board of directors through his voice as a shareholder.[16] The activist investor's goal is to influence the board to make certain changes in performance or corporate governance that they believe will add value to the company, such as stimulating cash-flow or throwing out divisions of

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(reporting that in 2014, 344 companies were targeted by activist investors representing a 16% increase in volume from 2013).

[10] *See generally* Gandel, *supra* note 9.

[11] *See* Andrew R. Brownstein, Steven A. Rosenblum, David A. Katz & Sebastian V. Niles, *Winning a Proxy Fight – Lessons from the DuPont Trian Vote*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE & FIN. REG. (May 18, 2015), http://tinyurl.com/gvjtqzg.

[12] *See infra* Part II.

[13] *See infra* Part III.

[14] *See infra* Part IV.

[15] *See infra* Part V.

[16] *See generally* Bill George & Jay W. Lorsch, *How to Outsmart Activist Investors*, HARVARD BUSINESS REVIEW (May 2014), http://tinyurl.com/hbr-george-v14; Arcano & Grossman, *supra* note 9; Gandel, *supra* note 9; David Benoit & Vipal Monga, *Are Activist Investors Helping or Undermining American Companies?*, WALL ST. J. (Oct. 5, 2015), http://tinyurl.com/wsj-benoit-5x15.

the company they think are bringing the company's value down.[17] The activist investor will try to supplant a current board seat and fill it with themselves or a constituent they trust to represent the plan of the activism campaign.[18]

Most activist investors are hedge fund managers with significant assets.[19] There have been more than 100 hedge funds that have exercised activism.[20] These are individuals with plenty of resources, who have professional financial analysts and advisors at their disposal that rival top investment-banking institutions.[21] Some notable activists today are Carl Icahn of Ichan Enteprises, Jeff Smith of Starboard Value, and Nelson Peltz of Trian Partners.[22]

The activist will produce analyses and proposed remedies to what they believe are the target company's shortcomings in the form of "white papers."[23] The biggest criticism of this approach is that activists will move for abrupt changes in the company they target, which may boost the stock price and shareholder value in the short-term, but their strategy will not account for any long-term financial stability.[24] Hedge fund activists have been referred to as "short-term investors who make a quick profit at the expense of long-term shareholders."[25]

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[17]*See* George & Lorsch, *supra* note 16.

[18]*See* Benoit & Monga, *supra* note 16.

[19]*See* Martin Lipton & Sebastian V. Niles, *Dealing With Activist Hedge Funds*, Wachtell, Lipton, Rosen & Katz, at 1, http://tinyurl.com/work-lipton-niles; Gandel, *supra* note 9.

[20]Lipton & Niles, *supra* note 19.

[21]*See id.*

> Activists have become more sophisticated in selecting their platforms and more nuanced in approach, sometimes seeking incremental change and longer-term involvement with target companies rather than solely focusing on short-term gains. They also are running more professional campaigns than in prior years, hiring financial and legal advisors to perform in-depth analyses of target companies, providing written presentations to targets and investors, and seeking more qualified candidates to serve as nominees for the boards of directors of target companies.

See Arcano & Grossman, *supra* note 9.

[22]Gandel, *supra* note 9; George & Lorsch, *supra* note 16. Notable activists of late have been hedge fund managers with 344 companies being targeted in 2014 as identified by the research firm Activist Insight and law firm Schulte, Roth & Zabel. Gandel, *supra* note 9 (citing Black*, supra* note 3).

[23]*See* Lipton & Niles, *supra* note 19.

[24]*See* Arcano & Grossman, *supra* note 9; David Benoit, *Clinton Puts Activist Investors in Campaign Spotlight*, WALL ST. J. (July 20, 2015), http://tinyurl.com/wsj-20vii15; Leo E. Strine, Jr., *Can We Do Better By Ordinary Investors? A Pragmatic Reaction To The Dueling Ideological Mythologists Of Corporate Law*, 114 COLUM. L. REV. 449, 477 (2014) (explaining "the danger that activist hedge funds may induce corporations to take actions that generate short-term stock price increases at the expense of greater risk of firm failure and lower long-term investment").

[25]Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential*

Activist investors use a number of common methods to target and attack susceptible companies.[26] Relevant strategies pertaining to this discussion are:

> (a) proposing a precatory proxy resolution for specific actions prescribed by the activist or the creation of a special committee of independent directors to undertake a strategic review for the purpose of 'maximizing shareholder value';"
>
> (b) "conducting a proxy fight to get board representation . . . (note that solicitation for a short slate is very often supported by ISS [and when it is, is usually successful]) at an annual or special meeting or through action by written consent;
>
> (c) aggressively criticizing [and opposing] a company's announced initiatives and strategic actions.[27]

In mounting an attack to call for change in a company's corporate governance, activist investors will wage a proxy fight to obtain votes for the individual they want to sit on the board.[28] From their new influential seat on the board of directors, the individual representing the activist campaign can influence change on behalf of the activist's proposed initiatives. This approach utilizes a minority shareholder position rather than previous takeovers, which required a purchase of a bare majority to influence change.[29]

Of course, there are defenses that may be employed to combat activist attacks at the outset and in advance.[30] The common defensive techniques vary now, compared to tactics in the 80's and 90's, due to the popularity of today's proxy battle approach as opposed to the previous

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Decision Model, 107 J. FIN. ECON. 610 (2013), *quoted* in Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 898 n. 118 (2013).

[26] *See* Lipton & Niles, *supra* note 19, at 1, 2.

[27] *Id.* (illustrating that in today's climate of activism, a corporation's ability to effectively communicate with investors and shareholder is the key defense against unwanted activist investor campaigns).

[28] *See id.* at 1.

[29] Frank Reynolds, *Directors Should Embrace Changing Roles and, Activist Investors, Law Professor Advises*, THOMPSON REUTERS BLOG (Oct. 19, 2015), http://tinyurl.com/reuters-reynolds (commenting on Professor N. Jeffrey Gordon's topic at the 31st Annual Francis G. Pileggi Distinguished Lecture in Law where he suggested that Delaware should "celebrate" this newer activist approach "in comparison to the corporate raiders and takeover specialists" of the past).

[30] *See* Arcano & Grossman, *supra* note 9; Lipton & Niles, *supra* note 19 at 2-4.

majority buyout takeovers.[31] In the past, when corporate raiders would buy a majority stake in the company, a target company's best obstruction to the attempted takeover was the "poison pill."[32]

In today's activist culture, it is key that the target company's management unifies the current board in the wake of an activist attack, because if members of the board have doubts about the company's current strategy, then the activist's goal to create a rift between the board and management is achieved.[33] Additionally, the board must maintain shareholder relations by candidly reminding shareholders of the company's strategy, while also proactively addressing underperformance, in anticipation of activist white papers criticizing such shortfalls.[34] Moreover—as was the key to DuPont's successful defense as explored below—it is crucial to be proactive and address any key downfalls that the company anticipates will be attacked as a weakness by the activist.[35]

B. *Forest Laboratories Against Carl Icahn*

On August 18, 2011, Forest Laboratories defeated famed activist investor, Carl Icahn's attempted proxy battle initiative to replace four of the ten seats on Forest Laboratories' board of directors.[36] Two prominent proxy advisory firms showed their support for Forest Labs' board nominees.[37] Institutional Shareholder Services ("ISS") and Egan-Jones Ratings Co. both backed Forest Labs, while another proxy firm, Glass Lewis, supported one of Icahn's four nominees.[38] Icahn held a 9.2% stake in Forest Laboratories and argued that the company's value had plummeted 30.1% in the past five years, and its corporate governance was inadequate.[39]

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[31] *See* Reynolds, *supra* note 29 (quoting Professor Jeffrey N. Gordon who compared today's activism tactic of "minority position to leverage change" to previous takeover specialists who would target boards with a "direct-to-shareholders offer for a bare majority of the stock").

[32] *See generally* Lucian A. Bebchuk & Robert J. Jackson, Jr., *Toward a Constitutional Review of the Poison Pill*, 114 COLUM. L. REV. 1549 (2014).

[33] *See* Arcano & Grossman, *supra* note 9; Lipton & Niles, *supra* note 19 at 4 (explaining that "in large measure an attack by an activist hedge fund is an attempt to drive a wedge between the board and management by raising doubts about strategy and management performance"). Lipton & Niles, *supra* note 19 at 4.

[34] *See id.* at 3.

[35] *See id.*; *see also infra* pp. 130-32 (addressing the key defensive measures taken by DuPont against Peltz).

[36] Evan Weinberger, *Forest Labs Defeats Ichan in Proxy Fight*, LAW360 (Aug. 18, 2011), http://tinyurl.com/360-proxy.

[37] *See id.*

[38] Michael J. De La Merced, *Forest Labs Defeats Icahn in Proxy Fight*, N.Y. TIMES (Aug. 18, 2011), http://tinyurl.com/nyt-merced-fl-i.

[39] *See id.*

In defending against activist Carl Icahn's proxy battle, Forest Labs presented a plan to deal with previously identified issues and to refresh its board.[40] By addressing shortcomings identified by the activist investor, Forest Labs was able to suppress the proxy battle eventually winning by "a significant margin."[41]

C. *AOL Against Starboard Value*

On June 13, 2012, AOL Inc. ("AOL") won a proxy battle against activist investor Starboard Value for three seats on AOL's eight-seat board, including Starboard CEO Jeffrey Smith.[42] Unlike the above mentioned proxy battle between Forest Laboratories and Carl Icahn, Starboard obtained the influential support of two of the most significant proxy advisory firms, ISS and Glass Lewis, both of whom had shown support for Jeffrey Smith's potential seat on the AOL board of directors.[43] AOL's board and management worked together to effectively present shareholders[44] with a clear, long-term, value-creating plan that ultimately won them the votes necessary to maintain their current board.[45]

This 2012 victory represented much more in the context of activist use of proxy battles than AOL could have known. This victory proved that activist investors—even when supported by influential proxy providers, like ISS—cannot play "Pied Piper" to uninformed shareholders.[46] In other words, shareholders may overlook the temptation of short-termism when presented with concise strategy for long-term success by the target company.[47]

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[40] *See id.* (explaining that Forest Labs' patent expirations on its two most important drugs, Lexapro and Namenda, could cost shareholders even more money than was previously lost).

[41] *See id.* "[Forest Laboratories] said in a press release that all 10 director nominees were elected by "a significant margin," at least according to preliminary results. Its slate included three new director candidates." *Id.*

[42] William Launder & Jon Kamp, *AOL Wins Proxy Fight, Easing Pressure on CEO*, WALL ST. J. (June 14, 2012), http://tinyurl.com/wsj-14vii12-kamp.

[43] *See id.*

[44] *See id.*

[45] *See* Lipton & Niles, *supra* note 19. In preparation of activist criticisms, it is important to "[p]roactively address reasons for any shortfall versus peer company benchmarks; anticipate key questions and challenges from analysts and activists, and be prepared with answers; [b]uild credibility with shareholders and analysts before activist's surface and attempt to 'educate' the sell-side [analysts]." *Id.*

[46] *See* Martin Lipton, Steven A. Rosenblum & Sebastian V. Niles, *Current Thoughts About Activism, Revisited*, Wachtell, Lipton, Rosen & Katz (Apr. 7, 2014), at 4, http://tinyurl.com/wlrk-activism.

[47] *See* Arcano & Grossman, *supra* note 9; Lipton & Niles, *supra* note 19 at 6, 7.

III. ANALYSIS: PELTZ'S PUSH FOR BOARD REPRESENTATION AND DUPONT DEFENSES

A. *An Overview of DuPont*

The DuPont Company first established itself in Delaware in 1802.[48] For over 200 years, DuPont has been a leader and innovator in the chemical industry.[49] It's long tenured history is a testament to DuPont's ability to maintain long-term stability and adapt to changing industry and economic climates.

During the most recent financial downturn, DuPont appointed Ellen Kullman as CEO.[50] In order to guide DuPont through the recession, she employed a plan to restructure the company, which saved DuPont about $225 million by 2010.[51] Since her start as CEO in 2009, not only was Kullman able to weather the storm of the recession, but she was able to increase shareholder value by about $30 per share.[52] Kullman's philosophy for DuPont's success was consistent with what historically benefitted the company: innovation.[53] In 2010, Kullman's focus on innovation caused the company to release a historically significant 1,786 new products.[54] The next year, Kullman led DuPont's purchase of the Danish manufacturer, Danisco.[55] This acquisition was the second largest in DuPont's history at $6 billion.[56] Under Kullman's leadership, the stock price rose 20% in 2011, which marked the largest increase in value the company had ever seen in a one-year period.[57]

Ellen Kullman's focus for DuPont, as evidenced by her attention to innovation as a vehicle for increased growth and improved shareholder

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[48] *See DuPont Co. Timeline*, DELAWAREONLINE: THE NEWS JOURNAL, Oct. 6, 2015, http://tinyurl.com/dnj-dupont-tl.

[49] DUPONT COMPANY HISTORY, http://tinyurl.com/dupont-tl (depicting a history of innovation, among DuPont's most notable innovations are Kevlar and Tyvec).

[50] *See* Jeff Mordock & Maureen Milford, *Kullman Legacy Tied to DuPont Stock*, DELAWAREONLINE: THE NEWS JOURNAL (Oct. 15, 2015), http://tinyurl.com/dnj-kullman. On January 1, 2009 Ellen Kullman became DuPont's CEO. *Id.*

[51] *See id.* (highlighting Kullman's cost-cutting plan which allowed DuPont to retain its research and development budget to continue to innovate during the recession).

[52] *See id.*

[53] *See id.*

[54] *See* Mordock & Milford, *supra* note 50. These new products were represented by 2,034 patent applications highlighting Kullman's ability to capitalize on the focus on the R&D budget even during the recession. *Id.*

[55] *See id.*

[56] *Id.*

[57] *Id.* In 2011, sales improved by 20% and developing markets increased by 27%, both contributing to the share price increase. *Id.*

value, has always been on the long-term.[58] While she was brought in to handle the short-term dangers of the economic recession in 2009, Kullman was able to concentrate on long-term, revenue-driving mechanisms, like research and development.[59] A company with a history of longevity and adaptation, such as DuPont, could do no better than a leader with those same principles.

B. *Peltz's Activism and White Paper Initiatives*

Beginning in early 2013, Nelson Peltz of Trian Partners owned roughly 3% of DuPont after purchasing $1.6 billion worth of shares in the company.[60] With a top-10 stake in the company, Peltz began to propose "white paper" restructuring plans, recommending that DuPont be broken into smaller business segments.[61] On September 16, 2014, Trian sent a letter to DuPont's board of directors ("the Board") stating, "DuPont's conglomerate structure is destroying value" and proposed "Trian Initiatives" to maximize shareholder value.[62] Peltz believed that by splitting up DuPont's seven major business lines into three separate companies, the company's overall value would increase.[63] The division of companies would mean one company comprised of agriculture and nutrition businesses ("GrowthCo"), a separate company for its specialty-chemical products, such as Tyvek and Kevlar ("CylcicalCo/CashCo"), and a third company for Performance Chemicals.[64] Trian's goal was to see DuPont create one public company focused on its faster-growing businesses and another that generated cash flow.[65]

In addition to the division of the two business lines, Trian's letter included three additional white paper proposals:

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[58]*See* Mordock & Milford, *supra* note 50.

[59]*See id.* Reinvestment into research and development can help achieve a company's long-term goals. *See* Lipton et al., *supra* note 46, at 2.

[60]Brendan Byrne, *Activist Fund Trian Calling for DuPont Breakup*, VALUEWALK, Sept. 17, 2014, http://tinyurl.com/je5vnm9.

[61]*Id.*; Aaron Nathans, *Investor Campaigns for DuPont to Break Up*, DELAWAREONLINE: THE NEWS JOURNAL (Sept. 18, 2014), http://tinyurl.com/dnj-nathans.

[62]Letter from Trian Partners to The Board of Directors, DuPont, WALL ST. J. (Sept. 17, 2014), http://tinyurl.com/wsj-trian [hereinafter Letter].

[63]*Id.* at 3.

[64]*Id.*; Letter, *supra* note 62, at 1-3. The third division for Performance Chemicals was already in process by DuPont's own discretion at the time Trian mailed the Letter to the Board. *See* Letter, *supra* note 62, at 1.

[65]Byrne, *supra* note 60.

> 2) Commit to the elimination of unnecessary holding company costs, the implementation of zero-based budgeting, and a timeframe for best-in-class revenue growth and margins in each business, by segment
>
> 3) Commit to a shareholder-friendly capital allocation policy at the low-growth and highly cash generative CyclicalCo/CashCo and a prioritization of high return on invested capital (ROIC) organic growth initiatives at GrowthCo
>
> 4) Implement the following corporate governance initiatives: a. Put an end to extraordinary charges (or "significant items") b. Commit to best-in-class transparency and consistency of reporting.[66]

Peltz believed these "[i]nitiatives" could possibly "double the value of DuPont's stock over the next three years."[67]

In the letter, Peltz commended DuPont for its step in the right direction toward simplifying its business's "overwhelming complexity" by spinning off its Performance Chemicals business, known as Chemours.[68] However, Peltz maintained that this move, along with two others, were insufficient to "optimize shareholder value."[69] "These actions are not moving the needle," Peltz commented in an interview.[70] "It's not dealing with the problem."[71] Peltz's letter explained his opinion that DuPont's Board was "[un]willing to hold the company's management accountable" for its "continu[ed] underperformance" and therefore must intervene with these proposed solutions.[72] Peltz included in the letter that he and the DuPont Board "discussed adding a Trian representative and an industry-insider to the Board" but the "idea has been summarily rejected."[73] The letter concluded by calling for a private meeting between the Board and shareholders—excluding management—to discuss these initiatives.[74]

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[66]Letter, *supra* note 62, at 3.
[67]*Id.*
[68]*Id.* at 1–2.
[69]*Id.* at 1.
[70]Byrne, *supra* note 60.
[71]*Id.*
[72]Letter, *supra* note 62, at 1.
[73]*Id.* at 3, 4. Peltz discusses in his white papers that he wants to submit Trian representation onto DuPont's Board of Directors. *See id.*
[74]*See id.* at 4.

Peltz nominated himself and three other individuals for seats on DuPont's 12-person Board of directors.[75] The results of the proxy vote to elect the company's Board was to be announced at the shareholder meeting in May.[76] This letter foreshadowed the proxy battle that ensued, and voting results that determined the company's new Board.[77]

C. *The Use of the Proxy Battle in Activism*

In the inevitably increasing climate of shareholder activism in today's marketplace, it is key to evaluate the changing approaches of hedge funds, like Trian and their mechanisms for control, as opposed to the classic takeover bids to which legal analysts are accustomed.[78] The use of classic defense mechanisms, such as the "poison pill," have made way for tactful and interpersonal defenses simply due to the popularity of today's activist approach: the proxy battle.[79] Proxy battles hit their peak in 2009, and have since decreased in total number of proxy battles fought, but this statistic belies their effectiveness.[80]

While the number of proxy fights decreased by about 30% from 2009 to 2014,[81] the percentage of activist victories has nearly doubled.[82]

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[75]Mordock, *supra* note 1; Scott Goss, *DuPont Formally Rejects Three of Peltz's Board Nominees*, DELAWAREONLINE: THE NEWS JOURNAL (Mar. 16, 2015), http://tinyurl.com/z7y2za3. Peltz proposed to nominate himself as well as three other individuals to the DuPont Board of Directors. Those individuals were John H. Myers, the chairman of ForstmannLeff; Arthur B. Winkleblack, former Executive Vice President and CFO of H.J. Heinz Co.; and Robert J. Zatta, CEO of Rockwood Holdings. *Id.*

[76]Mordock, *supra* note 1.

[77]*See id.*

[78]*See* Ciara Linnane, *Activist Shareholders Were Busier and More Aggressive than Ever in 2015*, MARKET WATCH, Nov. 11, 2015, http://tinyurl.com/mw-10xi15 (projecting 225 to 235 activism campaigns by year end); Black, *supra* note 3, at 8.

[79]*See* Strine, *supra* note 24, at 470 n. 66 (noting that data indicated the number of poison pills in force at year-end for the S&P 1500 companies dropped from 854 in 1998 to 182 in 2012 (*citing* Poison Pills in Force Year over Year, SHARKREPELLENT.NET (2013) (on file with the COLUM. L. REV.)); Reynolds, *supra* note 29 (quoting Professor Jeffrey N. Gordon who highlighted today's activism tactic of proxy battles as a way to "use a minority position to leverage change").

[80]Jacob Bunge & David Benoit, *DuPont Defeats Peltz, Trian in Board Fight*, WALL ST. J. (May 13, 2015), http://tinyurl.com/wsj-peltz-g (displaying a graph portraying proxy data from 2008-2014).

[81]*See id.* Proxy fights dropped from 133 in 2009 to 92 in 2014, representing roughly a 30% drop. *Id.*

[82]*Id.* Graph illustrating a jump in activist win rate in proxy fights that go to a vote, which has forced management of companies facing activism to settle beforehand to avoid the increased likelihood of proxy defeat. Companies are avoiding proxy battles which leads to the total number of proxy fights declining because proxy vote campaigns have been proving to be more successful for activists. *See id.*

However, DuPont's recent proxy victory over Trian may mark the beginning of an upward trend in companies' success rates against activist investors.[83] Data as of June 2015 showed an increased company win rate of 57% against activists vying for board seats that went to a shareholder vote.[84] This rise in target company success is especially significant when observed in light of the circumstances of DuPont's adversarial support.[85]

Two prominent proxy service providers came forward to show their support for Peltz in the DuPont proxy battle.[86] ISS and Glass Lewis believed in Nelson Peltz's "Initiatives," and agreed that Trian should have a presence on the DuPont Board.[87] Typically, proxy advisory firms carry substantial influence over shareholder votes, as they are largely unregulated and favor the ideals of activist investors.[88] The largest proxy firm, ISS, echoed Peltz's sentiment of the Board's lack of accountability on management by saying, "[o]perating efficiency is not what it should be, yet instead of addressing the core issues, the board and management, at least in their communications with shareholders, are more inclined to obfuscation than accountability."[89] ISS makes its determination of support by asking whether Peltz has proven that change in DuPont is warranted; if so, they then determine whether Peltz and the three other Trian individuals are better suited to pilot that change than the current

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[83]*See* John Laide, *Activist Influence at U.S. Corporations Continues to Rise in 2015*, FACTSET, 2015, http://tinyurl.com/factset-aisu.

> An early look at proxy fight statistics for the 2015 proxy season, along with the high profile management victory at E.I. du Pont de Nemours and Company, would on the surface provide the impression that companies may have turned the corner against ever increasing activist success. However, a deeper dive into the data shows that activist influence at U.S. corporations continues to rise.

Id.

[84]*Id.* (showing the 2015 win rate: 62% v. 2014 win rate: 39%).

[85]*See* Bunge & Benoit, *supra* note 80 (explaining how ISS and Glass Lewis provided support for Peltz and how support from these proxy service providers gave Peltz an advantage).

> DuPont had to overcome in the past few weeks the recommendations from proxy advisers Institutional Shareholder Services Inc. and Glass Lewis & Co., which had said shareholders should put Mr. Peltz on the board. While DuPont hadn't counted on ISS, it was hopeful it would get Glass Lewis's support, people familiar with the matter said. *Those recommendations gave Trian a head start* of sorts as some funds vote automatically with those, and DuPont had to convince others that usually vote with those recommendations to take steps to override internal systems.

Id. (emphasis added).

[86]*See id.*

[87]*See id.*

[88]*See* Lipton et al., *supra* note 46, at 4.

[89]David Benoit, *Proxy Adviser Backs Two Trian Board Seats at DuPont*, WALL ST. J. (Apr. 27, 2015), http://tinyurl.com/wsj-iss-trian; *see* Letter, *supra* note 62, at 1, 2.

Board.[90] Although not entirely fatal to a company, the support of a proxy provider can undoubtedly garner a substantial amount of shareholders following suit.[91]

D. *Defenses Employed*

DuPont's management, led by CEO Ellen Kullman, successfully blocked Peltz and Trian from gaining Board control by winning the May proxy battle.[92] Peltz pushed to gain four seats on DuPont's Board of directors, but lost, and shareholders elected all 12 of the company's nominees.[93] As activist white papers purport to accomplish, Trian called for reformed corporate governance in DuPont, and demanded that management be held accountable for its "continu[ed] underperformance."[94] DuPont successfully defeated Peltz by being proactive and addressing its own deficiencies amid Trian's public scrutiny of them. The three ways in which DuPont defended against Peltz and won the proxy battle were (1) the preemptive spinoff of the Performance Chemicals business; (2) the appointment of two new Board members; and (3) total transparency with shareholders on all ongoing DuPont activities and business.[95]

Primary in Peltz's criticism of DuPont's diminished value was the company's overly complex business model.[96] One of his "initiatives" was to break up the multi-faceted structure into three separate businesses, including Performance Chemicals,[97] but DuPont had already announced to spinoff its Performance Chemicals segment (Chemours) in October 2013.[98] Trian incredulously applauded the spinoff of Chemours in their Letter, while declaring that it was "not enough to optimize shareholder value" in DuPont.[99] But it was enough to at least obtain shareholder

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[90] *See* Bunge & Benoit, *supra* note 80.

[91] *See id.*

[92] Mordock, *supra* note 1.

[93] *See id.*; Goss*, supra* note 75. Peltz proposed to nominate himself as well as three other individuals to the DuPont Board of Directors. Those individuals were John H. Myers, the chairman of ForstmannLeff; Arthur B. Winkleblack, former Executive Vice President and CFO of H.J. Heinz Co.; and Robert J. Zatta, CEO of Rockwood Holdings. *Id.*

[94] Letter, *supra* note 62, at 1.

[95] *See* Brownstein et al., *supra* note 11.

[96] *See* Letter, *supra* note 62, at 2.

[97] *See id.* at 3.

[98] *See* Jeff Mordock, *DuPont Announces Chemours Job Cuts Ahead of Spin-off*, DELAWAREONLINE: THE NEWS JOURNAL (June 2, 2015), http://tinyurl.com/del-nj-1vi15 (explaining the early announcement of the to-be-named spinoff performance chemicals company, Chemours).

[99] Letter, *supra* note 62, at 1.

support, because we know that this story ends with DuPont winning the proxy battle against Peltz and Trian Partners. The decision to spin off Chemours proved to be the first, and biggest, step in the right direction because it worked to convince shareholders to keep their faith in DuPont's management. That faith was necessary to win shareholder votes. The Chemours Performance Chemicals spinoff move represented something far more significant than Peltz alluded to in the Letter. It was the foundation of DuPont's defense against Trian's activist campaign that instilled trust in the shareholders, showing them that management was active, and taking the necessary steps to improve the company's value.[100]

DuPont also strengthened its resolve to defend against Trian's activism from the inside by transitioning two directors to Board positions.[101] By bringing in two experienced and capable directors to sit as new Board members, DuPont effectively proved to shareholders that it was again making the necessary changes to better position the company for increased value, but also garnered support from within the Board against Trian.[102] DuPont was able to bring in individuals who shared management's current vision for the future success of the company, and in doing so, brought the members of the Board "on the same page," presenting a unified front against Trian.[103]

Further, DuPont maintained shareholder transparency by using media tools like a campaign website, advertisements, tailored proxy materials, and correspondence from the CEO to shareholders directly.[104] DuPont management also tactfully refuted any illegitimate claims made by Peltz regarding the company's performance.[105]

DuPont exhibited anticipatory defense tactics to Peltz's white papers by spinning off Chemours, which cut costs and showed commitment to R&D.[106] This type of preemptive move is what separates

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[100] *See* Brownstein et al., *supra* note 11.

[101] Press Release, The DuPont Media Center, Dupont Appoints Edward D. Breen and James L. Gallogly to Board of Directors (Feb. 5, 2015) (on file at http://tinyurl.com/bod-appt).

[102] *See* Brownstein et al., *supra* note 11 (explaining how Breen and Gallogly were "super star" directors and personal advocates of their vision for DuPont and how support for Peltz would ultimately decrease DuPont's Board expertise).

[103] Press Release, *supra* note 101 (quoting Breen: "I am excited about joining this Board, which has demonstrated active oversight of a strategy that is delivering results and positioning the company for future success. I look forward to bringing my experience to DuPont and am confident in the company's prospects for continued success and value creation.").

[104] Brownstein et al., *supra* note 11; Letter from Ellen Kullman, CEO DuPont, to shareholders (May 5, 2015) (on file at http://tinyurl.com/kullman-letter) [hereinafter Letter from Ellen Kullman].

[105] Brownstein et al., *supra* note 11.

[106] *Id.*; Mordock, *supra* note 98 / (explaining how Chemours will "reduce and simplify its cost structure" and "eliminate selected roles across its global workforce").

those companies that defend against activism attacks and those that do not. Further, DuPont's addition of new Board members showed shareholders an intent to facilitate change from within and stand united against outside influence.[107] And finally, by maintaining a transparent dialogue with shareholders, DuPont management could show that it was taking the steps necessary to again achieve added long-term value, despite recent underachieving.[108] DuPont was able to display to its shareholders that its corporate governance was dynamic, and that it had already taken the steps necessary to increase value, prior to Peltz's proposals.[109]

IV. EVALUATION

A. *Despite Proxy Victory Peltz's Presence is Still Felt*

DuPont's defensive measures were proven effective when proxy votes were tallied at the May 13, 2015 shareholders' meeting.[110] Ellen Kullman successfully defended DuPont by defeating Nelson Peltz and Trian Partners' attempt to win control of four seats on the Board of directors by proxy vote.[111] The 12 directors nominated by DuPont all won seats on the Board.[112] Kullman managed to defend against the activist attack of Peltz, but that victory came with its own loss. Although successful in keeping Peltz off of DuPont's Board as a direct influencer of corporate governance, Trian's white papers still had their intended effect. Trian exposed DuPont's deficiencies and criticized its management's ineptitude, and while not winning the proxy battle, Trian could be well on its way to winning the proverbial war. The immediate concentrated goal of winning the proxy contest was met, but that victory arguably came at the expense of the CEO's standing at DuPont. On October 5, 2015, Kullman announced that she would step down as CEO, effective on October 16, 2015.[113] Kullman is out the door, and recent

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[107] Brownstein et al., *supra* note 11 (explaining the importance of Kullman and management's ability to instil trust in the shareholders, and supporting Trian would mean "losing valuable expertise" on DuPont's Board).

[108] *See* Lipton & Niles, *supra* note 19 at 6, 7.

[109] *See* Brownstein et al., *supra* note 11; Letter, *supra* note 62.

[110] Tom Hals, *DuPont Wins Board Proxy Fight Against Activist Investor Peltz*, REUTERS (May 13, 2015), http://tinyurl.com/hlhw3kd.

[111] *See id.*

[112] *Id.*

[113] Jack Kaskey, *Kullman to Retire as DuPont Chair, CEO*, BLOOMBERG BUSINESS (Oct. 5, 2015), http://tinyurl.com/zyv26fz.

"super star" director turned Board member, Edward Breen, has stepped in to fill the CEO role.[114]

Peltz achieved the management shake-up he intended when he first sought out to engage DuPont.[115] Although unsuccessful in gaining Board representation, Peltz's desire for upheaval in the company's corporate governance was attained, as well as business line consolidation,[116] and a refreshed Board.[117] The use of the proxy battle in shareholder activism is ostensibly now one of the most effective vehicles for change in the corporate world.[118] If today's new activism landscape is one where, regardless of a proxy attack's success, the activist ideals are still implemented, then corporations are faced with the decision of whether to settle with the activist before a proxy battle reaches a vote, or do as DuPont and fight the proxy war to the end.

B. *Choosing Between Settlement and a Proxy Vote*

As long as proxy battles ending up in a vote remain the activist investor's preferred mechanism of leveraging control of a company in order to provoke change, companies facing proxy vote pressures should look no further than to DuPont's recent success in staving off Peltz's attack. DuPont's proxy victory defies the recent statistical odds.[119] DuPont's ability to still acquire the necessary votes to block out Peltz's attempted claim of four Board seats, despite the two large proxy advisory firms' open support for Trian, illustrates the effectiveness of the anticipatory defenses employed by DuPont, and should be an example to other companies facing a similar proxy battle situation.[120]

Amid an increased activism climate, generally, proxy battles that reach a vote typically result in an activist victory.[121] This explains why

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[114] *Id.*

[115] *See generally* Letter, *supra* note 62.

[116] *See* Jeff Mordock, *DuPont has Combined Four of its Business Units into Two*, DELAWAREONLINE: THE NEWS JOURNAL (Nov. 3, 2015), http://tinyurl.com/zxtj85c. DuPont announces the combination of its Packaging & Industrial Polymers business with Performance Polymers and its Protection Technologies unit with its Building Innovations unit. *See id.*

[117] *See* Press Release, *supra* note 101.

[118] *See* Bunge & Benoit, *supra* note 80. (depicting a graph portraying proxy data from 2008-2014 and activist win percentage).

[119] *See id.* The win percentage of shareholder activism in proxy battles has increased in the past five years, thus reflecting a lower number of proxy battles even getting to a vote. *Id.*

[120] *See* Lipton et al., *supra* note 46.

[121] *See* Bunge & Benoit, *supra* note 80 (explaining "Those activism situations that have gone to a proxy fight often reach an accord before the final vote. More than half of [2014's] proxy fights settled before a vote, compared with just 31% in 2009, the data provider said."); *see also* Laide, *supra* note 83.

the number of proxy battles has decreased in recent years.[122] It is because companies submit to activists before ever having to battle them toe-to-toe for proxy votes. Companies are reaching settlement agreements with activists far before shareholder meetings and nomination deadlines; and can we blame them?[123] A proxy battle can be a long, drawn-out process that proves costly to not only the company's coffers, but to its public image as well.[124] From a cost benefit perspective, it is easy to understand why a company would at least partially meet the demands of an activist if it meant avoiding the costs of a proxy battle and staying out of the headlines.[125]

DuPont, however, chose to face, head-on, the activist approach of Peltz. The defenses implemented by Ellen Kullman and DuPont's management proved to be successful within the context of the Peltz v. DuPont proxy battle.[126] But, outside of that vacuum, the unfortunate

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> Settlements continue to rise. *The 33 proxy fights that have been formally settled* (or were withdrawn after the company made material concessions) *as of June 5, 2015 is the most at this point in any year since FactSet began tracking proxy fights in 2001.* More importantly, many companies are choosing to grant activists board seats, often as part of a standstill agreement, *before letting an activist situation escalate into a proxy fight*. Forty-six non-proxy fight activist campaigns have resulted in a board seat as of June 1, 2015, the most in any comparable period according to FactSet data. In comparison, 34 and 11 such campaigns resulted in board seats in the same period in 2014 and 2013 respectively. The data, which is based on the announcement date that the seat was granted, includes all campaigns where activist investors attained board seats directly or had a material say in the appointment of new independent director(s), that were granted as part of an activist campaign or to prominent activists that were schedule 13D filers but had not publicly agitated at the company.

Id. (emphasis added).

[122] *See id*. In 2014, activists won 56% of the share of proxy votes that went to a vote. *See id*.

[123] Karlee Weinmann, *Proxy Preview: Targets Eager to Settle To Avoid Proxy* Wars, LAW360 (Mar. 19, 2014), http://tinyurl.com/z7n5gk2. (Detailing how more companies are cooperating with shareholder activists to reach a settlement in order to avoid a drawn-out proxy fight. The settlements typically are one-year agreements with activists achieving minor board representation).

[124] *See id.* A proxy battle can divert focus from the issues that drew the activist attention in the first place to an all-out defensive struggle to keep shareholders confident in the company's standing and keep its board free from outsiders. *See id.*

[125] *See id.* Proxy battles can be very public and paint the company as one struggling to meet benchmarks in its corporate governance and fiscal goals. *See id.*

[126] *See, e.g.* Brownstein et al., *supra* note 11 (explaining the various defenses that successfully won DuPont its proxy battle against Peltz); Letter from Ellen Kullman, *supra* note 104 (portraying a letter from CEO Ellen Kullman to shareholders informing them of DuPont's strategies and initiatives); Mordock, *supra* note 98 (explaining the early announcement of the to-be-named spinoff performance chemicals company, Chemours); Press Release, *supra* note 101 (announcing the appointment of Breen and Gallogly to the Board).

reality is that Trian's white papers and subsequent attempted proxy battle exposed company shortcomings, highlighted underperformance, and bluntly addressed the Board's lack of accountability placed on DuPont's management, namely CEO Ellen Kullman.[127] Peltz's influence cannot be ignored. What, on its face, looks like a victory for DuPont, may be disguised by the thin veil of Peltz's ideals. Despite losing the proxy battle, changes were still made. A spin-off occurred.[128] Board seats were refreshed.[129] Business lines were consolidated.[130] And most recently and significantly, the CEO, against whom Peltz was opposed, stepped down.[131] While Kullman may have represented DuPont's long-term success and sustainability, Peltz represents the enticing, short-termist specter that can still affect change without winning the proxy battle.

C. *Short-term Pressure for Long-term Risk*

As is the theme with classic shareholder activism, pressure on the shareholders to see promised short-term return is often too tempting to pass up. However, to ensure that the short-term increase in value is achieved, changes could be made that result in lackluster long-term performance.[132] When activist investors come into the picture, they cite corporate governance as the problem why the company is failing to perform, and propose changes for the company to perform better (albeit, marginally and in the short-term).[133] In the midst of the activist's

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[127] Letter, *supra* note 62, at 1.

[128] *See Mordock*, *supra* note 98. DuPont's Performance Chemicals division spun off to create "Chemours." *See id.*

[129] *See* Press Release, *supra* note 101 (announcing the appointment of Breen and Gallogly to the Board).

[130] *See* Mordock, *supra* note 116 (announcing DuPont's combination of its Packaging & Industrial Polymers business with Performance Polymers and its Protection Technologies unit with its Building Innovations unit).

[131] *See* Kaskey, *supra* note 113; Jeff Mordock, *New DuPont Directors Latest Salvo in Peltz Fight*, DELAWAREONLINE: THE NEWS JOURNAL (Feb. 10, 2015), http://tinyurl.com/salvo-del-nj. While Peltz criticized Kullman's management, he lauded the appointment of Edward Breen as bringing a perspective that was "fresh, independent, [and] highly relevant"; Jacob Bunge & David Benoit, *DuPont Names Breen CEO, Removing Interim Tag*, WALL ST. J. (Nov. 9, 2015), http://tinyurl.com/wsj-bunge. DuPont officially names Breen CEO, presumably at the pleasure of Peltz who made clear his disagreement with Kullman, but expressed positive remarks regarding Breen. *See id.*

[132] *See* Lipton et al., *supra* note 46 (discussing pressures faced by successful U.S. companies such as the "pressure to deliver short-term results at the expense of long-term value").

[133] *See* PwC, *Shareholder Activism Who, What, When, and How?*, (2015) (noting that activists plan to propose ideas to earn short term value).

nebulous projections in the alternative, shareholders oftentimes are swayed in a "grass is always greener" sense.

In this case, since taking on her position as CEO in 2009, Ellen Kullman's plan for DuPont has always been one of sustained profitability and growth.[134] Upon announcing her retirement from her position at DuPont, Kullman, in her short-lived six years as CEO, chartered a value increase of the stock price of 266%.[135] All that it takes to waver a shareholder's confidence in Kullman is for someone like Peltz to come along and shine a spotlight on the fact that earnings have been down in the past three years under her.[136] It is rash and overactive to suggest that underperformance since 2011 warrants such a drastic action like succumbing to the pressures of Peltz's activism. Such an event, while bringing about short-term performance, could potentially jeopardize performance in the long-term for DuPont, a company that is built for the long-term, being that it has been in business for over 200 years.[137]

The success of the current changes to DuPont, brought upon by Peltz's white papers, will be an important lesson to other corporations facing the short-term promises of shareholder activism. If DuPont sees short-term success but its sustainability wanes over the long-term, then other companies must decide if their activist's proposed changes are the best approach for greater long-term value of their companies.

BlackRock CEO, Larry Fink's letter to U.S. companies carries a message that rings clear in the current climate of shareholder activism:

> It is critical, however, to understand that corporate leaders' duty of care and loyalty is not to every investor or trader who owns their companies' shares at any moment in time, but to the company and its long-term owners. Successfully fulfilling that duty requires that corporate leaders engage with a company's long-term providers of capital; that they *resist the pressure of short-term shareholders to extract value from the company if it would compromise value creation for long-term owners*; and, most importantly, that they clearly and effectively articulate their

[134] *See* Bill George, *The DuPont Proxy Contest Is a Battle for the Soul of American Capitalism*, BILLGEORGE.ORG (May 11, 2015), http://tinyurl.com/bgeo-11v15.

[135] *Id.*

[136] Letter, *supra* note 62, at 3 (stating that "[m]anagement is unable to forecast the results of the business. In June 2014, DuPont lowered and/or missed earnings guidance for the third consecutive year"); *see* DuPont Second Quarter 2015 Earnings, July 28, 2015, http://tinyurl.com/bg-dupont.

[137] *See* DUPONT COMPANY HISTORY, *supra* note 49.

> strategy for sustainable long-term growth. Corporate leaders and their companies who follow this model can expect our support.[138]

Fink's message reinforces the necessary focus on the long-term within management's duty of care and loyalty; the interests of the short-termist shareholder do not deserve any more attention than those of the long-term holders of stock.[139] To "resist the pressure of short-term shareholders to extract value from the company" is to defend against activist campaigns like Trian, and to have faith in the long-term profitability of the company as run by its current management's corporate governance.[140]

D. *Why Fight?—DuPont's Example as a Future Model*

In the midst of the ever-increasing environment of shareholder activism, how is a company facing a proxy battle to react? It certainly seems that, whether an institutional investor seeking change in a company is successful or not, their influence is felt. As the DuPont situation has shown, an activist does not need to win a seat on the company's board to impose his influence of short-term value-adding. By sending white papers and engaging in a proxy battle, the activist forces the company's hand. Therefore, change in the company's governance is likely. In the context of DuPont, it is yet to be seen if the changes that have been made, which were first initiated by Peltz's white papers,[141] will help the company achieve greater long-term value; but irrespective of the initiatives' success or failure, the fact is they were received by DuPont and are still being implemented.[142]

If the activist shareholder's proposals are going to force change whether or not a proxy contest is successful, then corporations are faced with the burden of weighing the costs and benefits of even engaging in

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[138] Letter from Larry Fink, CEO, BlackRock, to S&P 500 CEOs, *BlackRock CEO Larry Fink Tells the World's Biggest Business Leaders to Stop Worrying about Short-term Results*, BUSINESS INSIDER (Apr. 14, 2015), http://tinyurl.com/bi-blackrock (emphasis added).

[139] *See id.*

[140] *See id.*

[141] *See* Letter, *supra* note 62, at 3 (listing Peltz's "initiatives").

[142] Mordock, *supra* note 98 (explaining the early announcement of the to-be-named spinoff performance chemicals company, Chemours); Press Release, *supra* note 101 (announcing the appointment of Breen and Gallogly to the Board); Mordock, *supra* note 116 (announcing DuPont's combination of its Packaging & Industrial Polymers business with Performance Polymers and its Protection Technologies unit with its Building Innovations unit); Kaskey, *supra* note 113. The white paper initiatives that Peltz proposed ultimately came to fruition, despite Peltz's proxy battle defeat.

the proxy battle. Rather than fight the proxy battle like DuPont, is it better to give in to the activist investor early on at the loss of something relatively minimal like one board seat, to avoid the greater losses that could follow? This posited thought is increasingly interesting when weighing in the possibility that the activist's plan could achieve greater long-term value for the company, and not just short-term value. If a company can avoid a contentious proxy war that could publically expose its weaknesses and cost millions of dollars, by simply conceding a seat on the board of directors, then why not do it?[143] The net loss from going toe-to-toe in a proxy battle could be far greater than that of allowing an activist's nominee onto the company's board, especially if the activist's plan is actually better for the company, and can bring greater value in the long-term.

The decision of a company, like DuPont, who engaged in a proxy battle to fight and allow it to go to a vote, or reach a settlement beforehand, is one that requires an awareness of the market and the foresight to identify how best to prepare for the sustainable future of the company.[144] However, if the company decides to fight and go to a vote, it is worth considering what occurred this year with DuPont. Although CEO Ellen Kullman employed successful defensive tactics against Trian's proxy battle for Board representation, the original white paper changes that Peltz proposed were made nonetheless. Thus, DuPont's proxy battle with Nelson Peltz is as much of a lesson to companies facing imposing shareholder activism as it is to the activists themselves. A formal victory is not needed to influence desired change. Simply the threat of a proxy battle can force a change in corporate governance, whether the battle is fought or not.

V. CONCLUSION: IMPORTANT CONSIDERATIONS FOR COMPANIES FACING PROXY BATTLE

While winning the proxy contest meant DuPont's Board remained its own, it came at a great cost. Deciding to move forward and see a proxy battle through until the end vote means financial expenses, public transparency, and widespread exposure of a company's inadequacies and shortcomings. Even a formal proxy victory can feel like a loss when changes made within the company necessary to reaching that victory are the changes the activist wanted in the first place. A company fighting to

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[143] Bunge & Benoit, *supra* note 80.

[144] *See* Weinmann, *supra* note 123. More companies are cooperating with shareholder activists to reach a settlement in order to avoid a drawn-out proxy fight. *See id.*

maintain control of its identity and corporate governance structure cannot help but feel that the activist has already won, when engaging in the proxy battle forces his desired change. Thus, when faced with the decision to forge onward in the proxy fight or negotiate a settlement compromise to avoid the proxy battle drudgeries, companies must weigh their interests. Companies should also use DuPont as an example because DuPont decided to take on Peltz, but at the expense of their CEO and their autonomy in the future of the company; in order to garner the votes, DuPont made the changes that Peltz proposed and those changes continue today under Breen. If the proxy battle can altogether be avoided by accepting at least some of the activist investor's ideas for change, then a company must identify if that balance is what is best for its own long-term stability.[145]

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[145] Although not seen in the case of DuPont, a noteworthy consideration is if a company was to comply with an activist demand for a board seat in order to avoid a drawn-out proxy contest and maintain majority control of the company, what is to stop the activist from continuing to effectuate change? With a representative on the board, an activist shareholder has a hand placed directly on the company's reins that may result in even greater change to the company's governance than if the proxy battle went to vote that was won by the incumbent board.