

Court Rules Director Of California Corporation Has A Duty To Disclose When Soliciting Consents

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The California General Corporation Law permits shareholders to take action by written consent, unless otherwise provided in the articles of incorporation. Cal. Corp. Code § 603(a). **When shareholder action is taken by written consent, the GCL imposes two specific notice requirements unless the consents of all shareholders entitled to vote have been solicited in writing:**

- Notice of any shareholder approval pursuant to Section 310, 317, 1152, 1201 (except for a reorganization as to which shareholders have the right, pursuant to Chapter 13 (commencing with Section 1300) to demand payment of cash for their shares), or 2007 without a meeting by less than unanimous written consent shall be given at least 10 days before the consummation of the action authorized by that approval.
- Prompt notice shall be given of the taking of any other corporate action approved by shareholders without a meeting by less than unanimous written consent, to those shareholders

entitled to vote who have not consented in writing.

Cal. Corp. Code § 603(b). The GCL does not impose any other specific notice or disclosure requirements in connection with a solicitation of shareholder written consents. This contrasts sharply with the Schedule 14C of the Securities and Exchange Commission, which requires extensive and very detailed disclosure requirements on companies with class of securities registered pursuant to Section 12 of the Exchange Act or of a class of securities issued by an investment company registered under the Investment Company Act of 1940 that has made a public offering of securities .

In a ruling issued this week, U.S. District Court Judge [Jeffrey S. White](#) found that notwithstanding the legislative silence, directors of a California corporation have a duty to disclose when soliciting shareholder consents. *Chan v. Arcsoft, Inc.*, 2023 WL 8260886 (N.D. Cal. Nov. 29, 2023). In support, Judge White quotes *Hill v. State Farm Mut. Auto. Ins. Co.*, 166 Cal. App. 4th 1438, 1490 (2008). That case, however, involved an Illinois corporation that quoted a Delaware Court of Chancery decision, *Kelly v. Bell*, 254 A.2d 62, 71 (Del. Ch. 1969).

Declaring that directors have a duty to disclose is easy. Defining the metes and bounds of that duty is hard, as demonstrated by the extensive detail of the SEC's disclosure requirements. The problem for thousands of directors of California corporations is knowing what is required. Does the duty to disclose fully and fairly all material information mean that directors must provide disclosures similar to those mandated by the SEC? If so, many

corporations simply do not have the resources do do so.

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