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DISCLOSURE OF MANAGEMENT PROJECTIONS UNDER DELAWARE LAW

The Delaware courts have issued a variety of opinions, seemingly pointing in different directions, on the required disclosure of management projections in M & A transactions. Analyzing the cases, the authors find that whether the courts will require disclosure of projections will be influenced by such factors as their reliability, their contribution to the total mix of available information, and the extent of disclosures already made. This discussion of the cases concludes with a short list of disclosure principles for practitioners.

By Blake Rohrbacher and Christopher H. Lyons *

Of all the issues implicated by Delaware law regarding the duty of disclosure in M&A transactions, the issue of the target company's projections is likely the simplest yet most difficult. Simple because the relevant disclosure typically consists of a defined tabular set of data that has been compiled and provided to, among others, potential buyers and the target's financial advisors. Difficult because Delaware law is not – and never has been – perfectly clear on exactly what data in (or even whether) this set of data must be disclosed.

Directors of Delaware corporations seeking stockholder action, such as approval of a merger or acquisition, owe their stockholders a fiduciary duty to disclose information "material" to that decision.[1] Delaware's disclosure regime rests on a context-specific fiduciary duty, not on a *per se* set of rules.[2] Similarly, each disclosure opinion rests on its own facts, and the decision in any given case may depend significantly on the procedural context in which it is made.[3] As such,

[1] *E.g., Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992).

[2] *See, e.g., Malpiede v. Townson*, 780 A.2d 1075, 1086 (Del. 2001) ("[T]he board's fiduciary duty of disclosure . . . is not an independent dut[y] but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty."); *see also In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) ("[T]here is no 'checklist' of the sorts of things that must be disclosed relating to an investment bank fairness opinion . . . .").

[3] The Delaware courts most often address the merits of disclosure claims in three specific procedural contexts, each with its own

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even generally accepted propositions may not control the result in certain circumstances.

This is particularly true for the disclosure of projections. The Delaware courts have issued a variety of decisions regarding the disclosure of projections, providing practitioners on all sides of the issue with enough ammunition to support almost any argument. Depending on one's purpose, these decisions can be read to argue that Delaware law in this area has been a consistent framework, an evolution over time, or a hopeless muddle of precedents.

In this article, we attempt to describe the current state of Delaware law regarding the disclosure of projections.[4] We will first discuss briefly the principal Delaware cases on the topic. Then, we will examine in more detail rulings from 2012 and attempt to place them in their historical context. Finally, we will review some of the general principles that appear to animate the courts' decisions, and how those principles should influence the thinking of those who deal with disclosure issues.

SKEEN AND "SOFT INFORMATION"

Delaware law has never imposed a *per se* rule on the disclosure of projections. In the 1980s and 1990s, the Delaware courts occasionally "cited to the soft-information doctrine when holding that information, like projections, did not have to be disclosed."[5] Reliability was often the key to these decisions. For example, the Court of Chancery did on occasion require soft information to be disclosed when it was reliable.[6] In *McMillan v. Intercargo Corp.*, the court stated that there is "no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker," but instead "the projections must be material in the context of the specific case."[7] The court observed that, in "cases where the inherent unreliability of the projections is disclosed to stockholders in the proxy statement or is otherwise established, the projections have been found to be not material."[8] Because the proxy in that case stated that the projections were inherently unreliable, and plaintiffs had not proved the contrary, the court dismissed the claim.

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standard of review. First, on a motion to expedite a challenge to a transaction, the plaintiff must show only "a sufficiently colorable claim." *E.g.*, *Giammargo v. Snapple Beverage Corp.*, 1994 WL 672698, at *2 (Del. Ch. Nov. 15, 1994). Next, on a motion to preliminarily enjoin a transaction, the plaintiff must show a "reasonable probability of success on the merits" of its claim. *E.g.*, *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987). Finally, when approving a settlement based on supplemental disclosures, the court determines whether the supplemental disclosures conferred a "benefit" on stockholders reflecting a "fair, adequate, and reasonable exchange" for a release of the class's claims (and need not resolve any merits issues). *See, e.g.*, *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at *20 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. 2012).

Due to the varying standards of review, decisions issued in the context of a motion for preliminary injunction are generally the most authoritative statements of Delaware law on disclosure, and statements made at settlement hearings are generally the least. Decisions on motions to expedite, while often given orally and after only a cursory review of the facts, are still useful for those practitioners seeking to avoid expedition in future litigation.

[4] Other issues regarding management projections (including disclosure obligations when multiple sets of projections exist and the obligation to disclose divisional details in projections) are discussed in Blake Rohrbacher & John Mark Zeberkiewicz,

footnote continued from previous column…

Fair Summary II: An Update on Delaware's Disclosure Regime Regarding Fairness Opinions, 66 Bus. Law. 943, 949-53 (2011) [hereinafter *Fair Summary II*].

[5] Blake Rohrbacher & John Mark Zeberkiewicz, *Fair Summary: Delaware's Framework for Disclosing Fairness Opinions*, 63 Bus. Law. 881, 903-04 (2008) [hereinafter *Fair Summary*] (citing cases).

[6] *See, e.g.*, *Glassman v. Wometco Cable TV, Inc.*, 1989 WL 1160, at *6 (Del. Ch. Jan. 6, 1989).

[7] 1999 WL 288128, at *6-7 (Del. Ch. May 3, 1999).

[8] *Id.* at *6.

In 2000, the Delaware Supreme Court decided *Skeen v. Jo-Ann Stores, Inc.*, seemingly rejecting the argument that directors were obligated to disclose management projections.[9] In *Skeen*, the stockholders of House of Fabrics, Inc. were being asked to decide whether to accept the merger consideration in the second step of a two-step acquisition, or to pursue their appraisal rights. Plaintiffs argued that, where appraisal of shares is an option, stockholders should be given all information necessary for an independent determination of the fair value of those shares, including management's projections. The Supreme Court rejected plaintiffs' argument, holding that even though such extensive disclosure might be "helpful" to stockholders' decision, "[o]mitted facts are not material simply because they might be helpful."[10] The Court of Chancery had dismissed the complaint, and because plaintiffs did not allege "facts suggesting that the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information," the Supreme Court affirmed.[11]

PURE RESOURCES AND THE PUSH FOR PROJECTIONS

Nevertheless, *Skeen* was not necessarily seen as ruling that management projections were *per se* immaterial. Largely due to opinions by then-Vice Chancellor Strine, projections soon took on more importance in disclosure statements. For example, then-Vice Chancellor Strine in *In re Staples, Inc. Shareholders Litigation* characterized the "typical disclosures of information regarding investment banker fairness opinions" as "quirky" because it was "common that such disclosures omit the specific management projections on which the banker's analyses are based."[12] Because in that case "management projections were the foundation for all the valuation information provided in the proxy statement," the court observed, "[o]ne suspects that the projections are the information that most stockholders would find the most useful to them."[13] The court urged the company to disclose its projections when it amended the misleading disclosures identified elsewhere in the opinion, but it did not mandate that disclosure because plaintiffs had waived the argument.

The court in *In re Pure Resources, Inc. Shareholders Litigation*[14] a year later issued an important (if controversial)[15] decision regarding disclosure of financial information. The plaintiff minority stockholders of Pure Resources, Inc. sought to enjoin a going-private exchange offer by the controlling stockholder, Unocal Corporation. Unocal's registration statement included Pure's projected results, but the special committee of Pure directors omitted those projections and, indeed, any summary of the committee's financial advisor's valuation analysis from their recommendation statement. Then-Vice Chancellor Strine ordered the disclosure of "a fair summary of the substantive work performed by the investment bankers," including "the basic valuation exercises that [the bankers] undertook, the key assumptions that they used in performing them, and the range of values that were thereby generated."[16] While the court did not mandate

[9] 750 A.2d 1170, 1173-74 (Del. 2000).

[10] *Id.* at 1174.

[11] *Id.*; *see also In re Best Lock Corp. S'holder Litig.*, 845 A.2d 1057, 1073 (Del. Ch. 2001) (dismissing claims that information statement misrepresented projections supplied to financial advisor and failed to disclose those projections, where it was "uncontested" and "clearly disclosed" that the advisor "used data prepared by management to create its own financial projections," and reasoning that "Delaware courts have held repeatedly that a board need not disclose specific details of the analysis underlying a financial advisor's opinion. Moreover, even if such facts were required to be disclosed, this information would not have altered significantly the total mix of information available to shareholders"; that the information statement accurately described the general nature of the projections; and that "the shareholders were certainly notified that the projections were based on data supplied to Piper by the management of the Best Companies and the shareholders could draw their own conclusions about how this might affect the final analysis").

[12] 792 A.2d 934, 958 n.44 (Del. Ch. 2001).

[13] *Id. But see Best Lock*, 845 A.2d at 1073 (decided fewer than five months after *Staples*; granting motion to dismiss even though projections were not disclosed).

[14] 808 A.2d 421, 448-50 (Del. Ch. 2002).

[15] In *Pure Resources*, then-Vice Chancellor Strine cited *Skeen* and *McMullin v. Beran*, 765 A.2d 910 (Del. 2000), as indicating some "ambivalence" as to disclosure of investment banker analyses where those analyses have been cited as support for a board's recommendation. The court concluded that "it is time that this ambivalence be resolved in favor of a firm statement that stockholders are entitled to a fair summary of the substantive work performed by the investment bankers upon whose advice the recommendations of their board as to how to vote on a merger or tender rely." *Pure Res.*, 808 A.2d at 449. The reasoning in *Pure Resources* has been criticized for failing to follow *Skeen* and requiring overly detailed disclosures. *See, e.g.*, Kevin Miller, *A Critique of* Pure *Reasoning*, Insights: The Corporate & Securities Law Advisor, Mar. 2008, at 25.

[16] *Pure Res.*, 808 A.2d at 449.

disclosure of projections in that case (because they had already been disclosed),[17] its request for the "key assumptions" of the bankers' analysis was generally seen as a call for disclosing projections.

In a 2006 case, addressing after trial whether directors were required to disclose a set of projections that had been prepared about two years before the merger, then-Vice Chancellor Strine explained that, in "the context of a cash-out merger, reliable management projections of the company's future prospects are of obvious materiality to the electorate. After all, the key issue for the stockholders is whether accepting the merger price is a good deal in comparison with remaining a shareholder and receiving the future expected returns of the company."[18] Nevertheless, the court also observed that

> it is not our law that every extant estimate of a company's future results, however stale or however prepared, is material. Rather, because of their essentially predictive nature, our law has refused to deem projections material unless the circumstances of their preparation support the conclusion that they are reliable enough to aid the stockholders in making an informed judgment.[19]

Ultimately, the projections at issue were found to be immaterial because, by the time of the merger, they were "stale" and thus "no longer provided reliable information."[20]

NETSMART AND PARTIAL DISCLOSURE

In the 2007 *Netsmart* case,[21] the court appeared to make its strongest statement yet regarding disclosure of management projections. Then-Vice Chancellor Strine (without citing *Skeen*) described "the best estimate of the company's future returns, as generated by management and the Special Committee's investment bank," as "probably among the most highly prized disclosures by investors" who are forced to decide whether to accept immediate payment in exchange for their share of those future earnings.[22] In light of its view on the importance of projections, the court refused to "blind stockholders to their management's best estimates of the company's future profits" even though the board's financial advisor said it had placed little emphasis on its discounted cash flow analysis.[23]

The issue in *Netsmart*, however, was not as much *whether* projections should be disclosed, but *which* projections.[24] The defendants in *Netsmart* had argued

[17] *Id.* at 448 n.57.

[18] *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at *15 (Del. Ch. Aug. 18, 2006).

[19] *Id.* at *16.

[20] *Id.*; *cf. id.* at *15 ("Had the Merger been proposed in 2001, months after Criswell prepared the projections, the failure to disclose these projections would have created a material deficiency.").

[21] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171 (Del. Ch. 2007).

[22] *Id.* at 203. In a 2008 case, Vice Chancellor Noble echoed *Netsmart*'s view that a "proxy statement should 'give the stockholders the best estimate of the company's future cash flows as of the time the board approved the [transaction],'" and stated that "Delaware law places a premium on management's predictions of future performance." *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *10 (Del. Ch. June 27, 2008) (quoting *Netsmart*). Because the proxy statement in *Simonetti* did disclose the projections relied on by the board's financial advisor, and the record showed that those projections were management's "best estimate," the court rejected plaintiffs' argument that management's alternative-case projections, which management considered less probable, should also have been disclosed.

Later in 2008, however, Vice Chancellor Noble seemingly took a different approach, holding that a claim that Merrill Lynch's board of directors breached their fiduciary duties by not disclosing all financial projections considered by their financial advisors was "not colorable," because "Merrill was not required to disclose all financial projections considered by [its financial advisor]," citing only *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *6-7 (Del. Ch. May 3, 1999) (holding projections immaterial where proxy disclosed their unreliability). *Cnty. of York Emps.' Ret. Plan v. Merrill Lynch & Co.*, 2008 WL 4824053, at *12 (Del. Ch. Oct. 28, 2008). *But see id.* at *11 n.67 (noting in a separate discussion that, because the company was in distress, "[t]he proxy informs the reader that Merrill's board did not pursue the Merger based on its assessment of long-term financial projections," and that "[i]f the firm will not survive for, again say, five years, five-year projections are of lesser importance to the shareholders").

[23] *Netsmart*, 924 A.2d at 203.

[24] *Fair Summary, supra* note 5, at 902-03; *see also In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) ("Although the *Netsmart* Court did indeed require additional disclosure of certain management projections used to generate the discounted cash flow analysis conducted by the investment bank, the proxy in that case affirmatively disclosed an early version of *some* of management's projections.").

that disclosure of three of the five years of earnings projected by management was adequate, because the fourth and fifth years had not been provided to bidders and, because they were more distant, they were speculative. The court disagreed, noting that the projections had been provided to the special committee's financial advisors and that the fifth year, as the basis for calculation of the terminal value for the discounted cash flow analysis, had a major impact on the valuation analysis. Ultimately, because the disclosed projections were not the final ones relied on by the financial advisor, the court enjoined the merger pending disclosure of all five years of the final projections. The court did not require disclosure of another set of projections, however, because those projections did not appear to be management's "best estimate" of earnings: they were older and *less* optimistic than those that had been disclosed, and the aspect of the projections in which plaintiffs were principally interested (predicted share prices) was unreliable.[25]

A similar decision – also widely seen as an opinion requiring projections to be disclosed – was *Maric Capital Master Fund, Ltd. v. PLATO Learning, Inc.*, also by then-Vice Chancellor Strine.[26] The court enjoined a merger pending, among other things, disclosure of the free cash flows contained in management projections that were provided to the board's financial advisor. The proxy statement had disclosed projections, including projected revenues, net income, and EBITDA.[27] But the disclosed projections omitted free cash flow projections that had been provided to the financial advisor, for reasons that the court found were "not adequately explained."[28]

Citing *Netsmart* and *Simonetti* (discussed *supra* note 22), but not *Skeen*, the court left no doubt about its view that "management's best estimate of the future cash flow of a corporation that is proposed to be sold in a cash merger is clearly material information."[29] But the actual question decided in *Maric Capital* was not whether any projections must be disclosed; it was whether the partial disclosure (excising the free cash flow numbers from projections provided to the financial advisor) was problematic.[30] This specific aspect of the opinion was emphasized by three decisions from other members of the court indicating that the lack of free cash flow data was *immaterial* if that information had not previously been provided to the financial advisors.[31] That is, partial disclosure was the key to *Maric Capital*, although the opinion also provided further support for the materiality of projections.

THE RETURN OF *SKEEN?*

A few recent cases – discussed below – have apparently resurrected *Skeen*, refocusing analysis on whether the claimed disclosure omissions are material in the particular case, rather than holding projections material *per se*. But *Skeen* was never really gone. For example, it appeared in a number of opinions decided by then-Chancellor Chandler. In the 2005 case of *In re*

[25] *Netsmart*, 924 A.2d at 200-01.

[26] 11 A.3d 1175 (Del. Ch. 2010).

[27] PLATO Learning, Inc., Proxy Statement (Schedule 14A), at 27 (Apr. 20, 2010).

[28] *Maric Capital*, 11 A.3d at 1178.

[29] *Id.*

[30] The *Maric Capital* court noted that "reasonable minds might differ on this issue," citing an opinion by then-Chancellor Chandler. *Id.* at 1178 & n.14 (citing *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *13 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006)). Another decision by then-Chancellor Chandler the year before had addressed similar facts – a proxy statement included some projected metrics, but not free cash flows, EBIT, or EBITDA – and had ruled the omission immaterial. *In re 3Com S'holders Litig.*, 2009 WL 5173804, at *2-3 (Del. Ch. Dec. 18, 2009).

[31] *See Scully v. Nighthawk Radiology Holdings, Inc.*, C.A. 5890-VCL, at 23 (Del. Ch. Oct. 21, 2010) (Transcript) (on a motion to expedite, where plaintiffs relied principally on *Maric*, noting that there "would have been a disclosure issue" if management had "prepared a set of free cash flow projections and provided them to [the board's financial advisor]"); *Steamfitters Local Union 447 v. Walter*, C.A. 5492-CC, at 9 (Del. Ch. June 21, 2010) (Transcript) ("[T]his isn't a case where free cash flow estimates were deliberately removed or excised from a proxy disclosure. Unlike in *Maric*, in this case no free cash flow estimates were actually provided to [the financial advisor]."); *In re SeraCare Life Scis., Inc. S'holder Litig.*, C.A. 7250-VCG, at 6 (Del. Ch. Mar. 20, 2012) (Transcript) (similar, and noting that "the board need not disclose every piece of information used by its financial advisor, such that an investor could conduct its own fair value analysis using that same data"). *But see Gaines v. Narachi*, 2011 WL 4822551, at *2 (Del. Ch. Oct. 6, 2011) (granting motion to expedite although the record was unclear as to whether the free cash flow projections had specifically been provided to the financial advisor, and noting that "any rule stating that cash flow projections not provided by management never need to be disclosed could be abused in circumstances where such disclosure would be necessary in order to provide adequate information to shareholders").

General Motors (Hughes) Shareholder Litigation,[32] for example, stockholder plaintiffs challenged a consent solicitation disclosure that omitted management projections. The court dismissed the claim, noting that the solicitation statement included "over 35 pages of text and figures that describe the financial analyses employed, and the opinions that accompany those analyses."[33] In support of this conclusion, later affirmed by the Supreme Court, the court cited *Skeen* for the proposition that a "disclosure that does not include all financial data needed to make an independent determination of fair value is not . . . *per se* misleading or omitting a material fact."[34]

Then-Chancellor Chandler also cited *Skeen*, while distinguishing *Netsmart*, in *In re CheckFree Corporation Shareholders Litigation*.[35] Even though management's projections had not been disclosed, the court refused to enjoin the proposed merger in *CheckFree*, ruling that the seven-page summary of the financial advisor's analysis – which also "describe[d] or otherwise disclose[d] management's estimated earnings and estimated EBITDA" for the next two years by identifying the multiple to earnings and EBITDA implied by the merger price – was sufficient.[36] Similarly, then-Chancellor Chandler refused to expedite litigation where a proxy statement omitted some elements of management projections.[37] The proxy statement included management's projections on the "key metrics" of revenue, gross profit margin, operating profit, and earnings per share, but did not disclose projected free cash flow, EBIT, or EBITDA. The court declined to require defendants to "provide full versions of the projections underlying the already disclosed summaries," observing that it was "reluctant to require full disclosure of the projections underlying such summaries as [it did] not believe it would alter the total mix of available information and may even undermine the clarity of the summaries."[38]

RECENT DEVELOPMENTS: RETHINKING *MARIC CAPITAL* AND REMEMBERING *SKEEN*

In three 2012 decisions, the Court of Chancery (including Chancellor Strine, the author of *Maric Capital*) issued transcript rulings that softened the apparent requirement in *Maric Capital* that free cash flow must always be disclosed – thereby suggesting that the holding of that case was indeed based on partial-disclosure principles.

In April 2012, Vice Chancellor Parsons rejected a motion to expedite; plaintiffs had pointed to the omission of free cash flow projections from the board's recommendation statement.[39] While recognizing that projections had been held material in previous cases, the court emphasized that "there is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker."[40] The court distanced itself from such a rigid approach:

> The mere fact that some issue may have proven material in a past case cannot endow that issue with talismanic properties or reduce it to a magic word forever after. That is, the materiality of any fact, projection, or figure cannot be divorced from the particular circumstances facing the defendant company and the challenged transaction. In other words, context matters.[41]

In that case, the context was that the board had conducted an active, public auction process; had agreed to sell to the highest bidder after outreach to over 100 potential buyers; and had disclosed projected sales, adjusted EBIT, and adjusted EBITDA.[42] Defendants

[32] 2005 WL 1089021 (Del. Ch. May 4, 2005), *aff'd*, 897 A.2d 162 (Del. 2006).

[33] *Id.* at *16.

[34] *Id.* at *16 & n.157.

[35] 2007 WL 3262188 (Del. Ch. Nov. 1, 2007).

[36] *Id.* at *3; *see also* CheckFree Corp., Proxy Statement (Schedule 14A), at 18-19 (Sept. 20, 2007). The court distinguished *Netsmart* as a partial-disclosure case, noting that defendants in that case had "affirmatively disclosed an earlier version of *some* of management's projections." *CheckFree*, 2007 WL 3262188, at *3.

[37] *In re 3Com S'holders Litig.*, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009).

[38] *Id.* at *3.

[39] *In re Midas, Inc. S'holders Litig.*, C.A. 7346-VCP (Del. Ch. Apr. 12, 2012) (Transcript).

[40] *Id.* at 17.

[41] *Id.* at 18; *see also id.* at 21 (noting that plaintiffs "made no allegations that the company's disclosure of its five-year projections of sales, adjusted EBIT, and adjusted EBITDA, especially following a robust market-based auction, are insufficient to allow shareholders to decide whether the price being offered for their shares is adequate compensation for forfeiting their right to the future cash flows of the corporation").

[42] *Id.* at 6, 18.

argued that the allegedly incomplete disclosure was not a material omission, in part because the market had provided the best evidence of a fair price. The court agreed.

In June 2012, Chancellor Strine denied a motion to expedite where plaintiffs had alleged that the board's recommendation statement improperly omitted the free cash flow line from management's projections, despite including numerous other line items from those projections.[43] The Chancellor rejected arguments based on *Maric Capital*, observing that "EBITDA is essentially a very close proxy to free cash flow and that the metrics are almost indistinguishably different, usually."[44] Thus, because the stockholders could "calculate rough estimates" of the value of the company's future cash flows, the court found no "colorable argument . . . that adding the free cash flow into the mix would materially change the mix of information available to stockholders."[45]

In November 2012, Vice Chancellor Parsons pointed to *Skeen* to deny a motion for a preliminary injunction, rejecting arguments based on *Netsmart* and *Maric Capital* that projections are "clearly material."[46] The court reasoned that, as in *Skeen*, there were "no facts suggesting that the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information."[47] That is, the value range indicated by the disclosed discounted cash flow analysis, based on the projections, was higher than the deal price. The court reasoned that stockholders could infer that the projections were relatively bullish and likely supported a higher price than was on offer, that the board had considered them, and that the board nonetheless thought the offered price was fair; because the actual projections were not inconsistent with that inference, they were not material under *Skeen*.[48]

This string of decisions confirmed that *Skeen* remains good law, that there truly is no *per se* rule that management projections used by a financial advisor must be disclosed, and that the Court of Chancery will instead consider the materiality of projections in the context of the specific case.

PRINCIPLES FOR PRACTITIONERS

Viewed in one way, the cases discussed above could tell a story of changes in Delaware law, marked by a rise and subsequent fall of a rule providing that projections are, in effect, *per se* material. The cases could also be read to state that Delaware has consistently held that projections, while likely material, are only material in certain circumstances. Delaware disclosure law is not designed "to make it possible for stockholders to re-run the analyses in the fairness opinion; it is only required that stockholders be able to evaluate the fairness opinion for themselves."[49] That is, disclosure in this context should be sufficient to allow stockholders to "kick the tires" of the financial analysis and hold their fiduciaries to account.

In that light, and in consideration of the cases discussed above, we offer the following principles as guidelines for this area of Delaware law:

- *Context matters.*

Regardless of how the cases above are read, Delaware law mandates disclosure of information only if it is material in the particular context. Consistent with the nature of the case-by-case adjudication of claims, and with the fact that the "duty of disclosure" is actually a context-specific application of directors' fiduciary duties,[50] Delaware eschews a *per se* or "check-the-box" disclosure regime, and it will likely do so for the foreseeable future.[51]

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[43] *Cox v. Guzy*, C.A. 7529-CS (Del. Ch. June 8, 2012) (Transcript).

[44] *Id.* at 6-7.

[45] *Id.* at 8-9.

[46] *Dent v. Ramtron Int'l Corp.*, C.A. 7950-VCP (Del. Ch. Nov. 19, 2012) (Transcript).

[47] *Id.* at 69. Vice Chancellor Parsons had earlier invoked *McMillan* when discussing projections in a December 2011 denial of a motion to expedite. *In re Vertro, Inc. S'holders Litig.*, C.A. 7010-VCP, at 31 (Del. Ch. Dec. 21, 2011) (Transcript) ("There is no *per se* duty to disclose financial projections furnished to and relied upon by an investment banker. To be a subject of mandated disclosure, the projections must be material in the context of the specific case.").

[48] Defendants had also argued that the projections were immaterial because they were unreliable, but the court specifically declined to rely on that basis for rejecting the claim. *Dent*, C.A. 7950-VCP, at 72-74.

[49] *Fair Summary*, *supra* note 5, at 901.

[50] *See supra* note 2.

[51] *See Fair Summary*, *supra* note 5, at 899.

- *Projections are generally material.*

The language in the opinions above is unmistakable – regardless of the specific ruling in the opinion, the Delaware courts do expect projections to be disclosed.[52] Failure to disclose projections will leave directors with some explaining to do, likely through expedited discovery.

- *Exceptions to materiality do exist.*

In any specific case, projections might not be material. For example, if multiple sets of projections exist, generally only those projections representing the board's views must be disclosed.[53] Projections may be immaterial because they are not reliable[54] or do not add information because they are consistent with the existing disclosures.[55]

- *Partial disclosure is dangerous.*

The cases above make clear that partial disclosure, or intentional omission of certain information, can cause trouble. Generally, boards should not withhold information that creates an inconsistency in how or what information is disclosed.[56]

- *Disclose the projections*.

As a general matter, management's projections should be disclosed. Even if the projections are particularly unreliable, that unreliability can also be disclosed to alert the stockholders as to the weight that should be due the projections. If nothing else, and regardless of whether the directors ultimately triumph on a motion for preliminary injunction, disclosing projections can help avoid needless expedited litigation. As Chancellor Strine stated in *Cox v. Guzy*, "the investment banking community and the management community [should] stop creating these arguments" by omitting certain projections, because it would be "more felicitous," even if not "materially better," to include the projections relied on by the financial advisor.[57]■

[52] *See, e.g.*, *Fair Summary II*, *supra* note 4, at 950 & n.41 (2011) (citing a case "suggesting that the Court of Chancery might scrutinize an intentional failure to disclose projections under concepts of bad faith").

[53] *See, e.g.*, *In re Orchid Cellmark Inc. S'holder Litig.*, 2011 WL 1938253, at *10-11 (Del. Ch. May 12, 2011), *appeal refused*, *Silverberg v. Bologna*, 19 A.3d 302 (Del. 2011) (Table). This may change if multiple sets were used by the bidder and/or the financial advisors. *See Fair Summary II*, *supra* note 4, at 950-51.

[54] *See, e.g.*, *In re CheckFree Corp. S'holders Litig.*, 2007 WL 3262188, at *3 (Del. Ch. Nov. 1, 2007) (noting that disclosure of projections that did not take into account certain risks to their reliability, about which the financial advisor had to interview members of senior management, "may, in fact, be misleading"); *McMillan v. Intercargo Corp.*, 1999 WL 288128, at *6-7 (Del. Ch. May 3, 1999) (holding projections immaterial where proxy disclosed their unreliability).

[55] *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1173-74 (Del. 2000); *Dent v. Ramtron*, C.A. 7950-VCP, at 69 (Del. Ch. Nov. 19, 2012) (Transcript).

[56] *Cf. Dias v. Purches*, C.A. 7199-VCG, at 18-20 (Del. Ch. Apr. 5, 2012) (Transcript) (ordering correction to proxy statement that stated that the discounted cash flow analysis was based on free cash flow projections provided by management, when the

footnote continued from previous column…

record indicated that management had not provided those projections).

[57] *Cox v. Guzy*, C.A. 7529-CS, at 9-10 (Del. Ch. June 8, 2012) (Transcript); *accord Steamfitters Local Union 447 v. Walter*, C.A. 5492-CC, at 26-27 (Del. Ch. June 18, 2010) (Transcript) (noting "some evidence of a difference of opinion about the requirement that [projections] be disclosed as material," and suggesting that "you might be well advised just to take the more prudent and safer course of including this information, so that if you are sued, you won't have this argument to confront" and "that the path of least resistance would be to include these kinds of numbers").