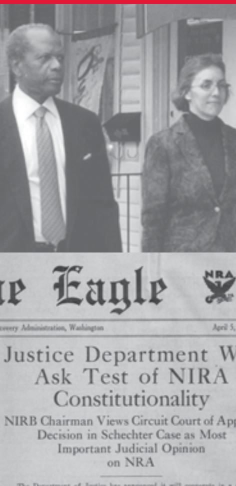
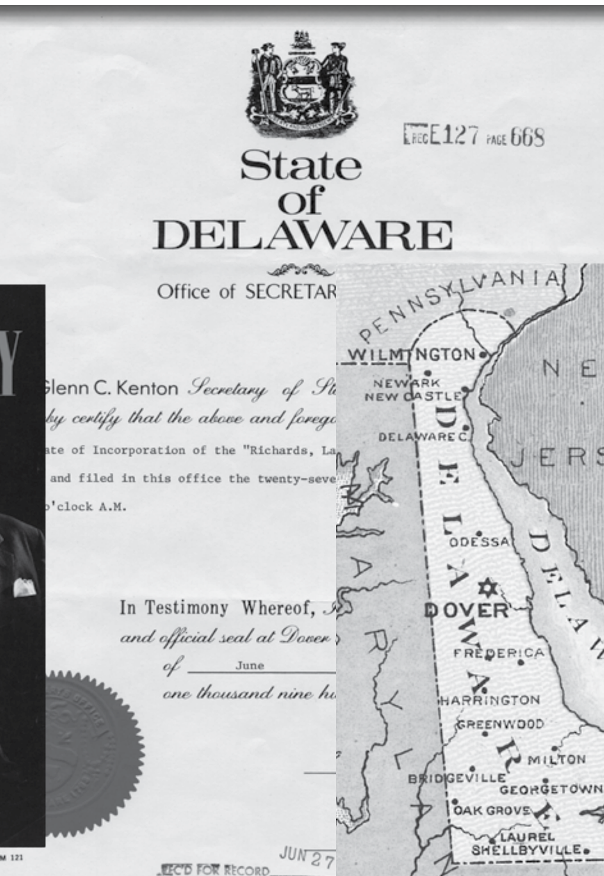
Spring 2024

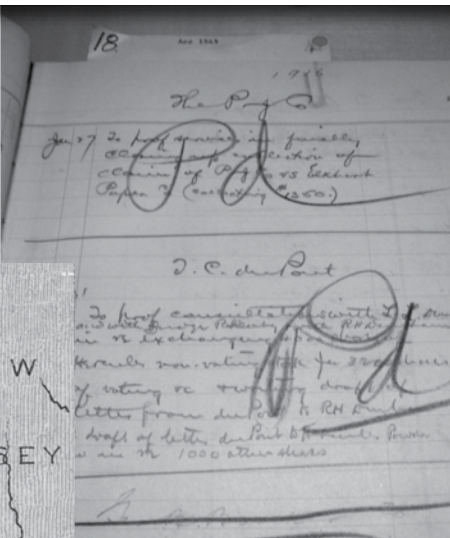
Recent Developments in Delaware Law

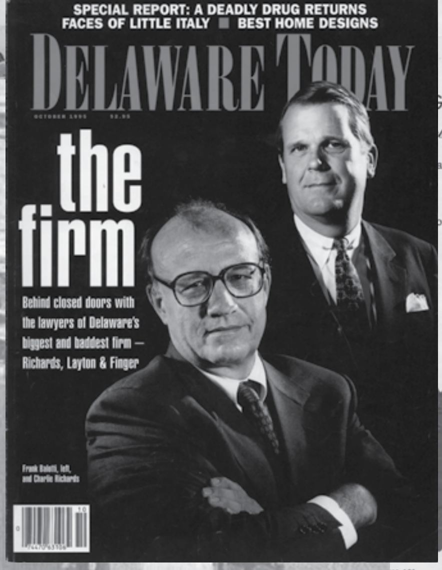


RICHARDS LAYTON & FINGER 125 YEARS

Defining Delaware Law since 1899







In celebration of our 125th anniversary, we've gathered photos of the people and places that helped make us one of Delaware's most esteemed law firms. Please scan the QR code above to view the firm's history book.

125 YEARS OF HELPING CLIENTS NAVIGATE THE INTRICACIES OF DELAWARE CORPORATE LAW

Richards, Layton & Finger has been defining Delaware law since 1899. Continuing our long tradition of providing insight into the evolution of our state's influential laws, this publication highlights recent Delaware corporate and alternative entity cases as well as statutory developments in our state.

Our corporate and alternative entities teams, the largest and most recognized in the state, play crucial roles in Delaware. For decades we have contributed to the development of key statutes, litigated influential decisions, and provided counsel on complex transactions—making us uniquely skilled at delivering the outstanding results our clients count on.

Richards Layton has been involved with many of the cases highlighted in this publication, and we have handled, as Delaware counsel, the most M&A transactions valued at or above $100 million for over 30 years running, as reported in *Corporate Control Alert.* We welcome the opportunity to discuss with you the practical implications of the recent developments in Delaware law.

—Richards, Layton & Finger

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Recent Decisions of Delaware Courts

Fiduciary Duties

Coster v. UIP Companies, Inc.: Supreme Court Establishes Unified Standard for Actions Impacting Stockholder Franchise

In *Coster v. UIP Companies, Inc.*, 300 A.3d 656 (Del. June 28, 2023), the Delaware Supreme Court established a unified standard of review governing board action that interferes with corporate elections or stockholders' voting rights in contests for control, then applied the new standard to a stockholder challenge to a stock sale that director-defendants had approved to break a 50/50 stockholder deadlock. The Supreme Court ultimately affirmed the Court of Chancery's post-trial holding that the sale was a valid exercise of the directors' fiduciary duties.

In 2007, UIP Companies, Inc. was founded by Steven Schwat, Cornelius Bruggen, and Wout Coster to provide a range of real estate investment services in the Washington, D.C. area. Each founder initially controlled a third of UIP's shares, but after Bruggen left the company, Schwat and Wout became half owners of UIP. Several years later, Wout passed away and his stake in UIP was inherited by his wife, Marion Coster.

UIP executives explored options to buy out Coster's shares through the end of 2017. After negotiations stalled, Coster called for a special meeting of UIP stockholders to elect new directors. At this time, the UIP board consisted of Schwat; Peter Bonnell, a senior UIP executive; and Stephen Cox, UIP's chief financial officer. Stockholder meetings were held in May and June of 2018, but both meetings ended in a deadlock as Schwat and Coster each opposed the other's respective motions. With the deadlock, Schwat, Bonnell, and Cox remained UIP's directors.

Coster subsequently filed a complaint in the Court of Chancery seeking appointment of a custodian "with broad oversight and managerial powers" under Delaware General Corporation Law Section 226(a)(1).

Coster's complaint "mainly sought to impose a neutral tie-breaker to facilitate director elections," but Coster's request for a broadly empowered custodian rather than one specifically tailored to resolve the stockholder deadlock presented unique risks to UIP's business model. In particular, Coster's proposed custodian would possess broad termination rights that could threaten UIP's revenue stream. Facing this threat, UIP offered, and Bonnell accepted, a one-third interest in the company (the "Stock Sale"). The Stock Sale diluted Coster's ownership interest from one-half to one-third and negated her ability to block stockholder action as a half owner of the company. Coster responded by filing suit, seeking to cancel the Stock Sale.

In a post-trial ruling, the Delaware Court of Chancery upheld the Stock Sale under the entire fairness standard of review and held that once the Stock Sale "satisfied Delaware's most onerous standard of review," no further review was required. When Coster appealed, the Delaware Supreme Court left untouched the Court of Chancery's entire fairness decision, but remanded with instructions to review the Stock Sale under the *Schnell* and *Blasius* standards of review after finding that entire fairness is not a "substitute for further equitable review" under either standard. On remand, the Court of Chancery found that the UIP board had not acted for inequitable purposes under *Schnell* and had compelling justifications for the Stock Sale under *Blasius*. In Coster's second appeal, she challenged both holdings.

The Supreme Court conducted a thorough review of *Schnell*, *Blasius,* and their progeny before ultimately holding that "as a matter of precedent and practice," *Schnell* and *Blasius* review "have been and can be folded into *Unocal* review to accomplish the same ends: enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control." The court reasoned that *Unocal* is appropriate in this context because it "address[es] issues of good faith such as were at stake in *Schnell*," and "can be applied with the sensitivity *Blasius* review brings to protect the fundamental interests at stake—the free exercise of the stockholder vote as an essential element of corporate democracy."

The court further explained that when *Unocal* is applied in this context, the board bears the burden of proving that the board's action satisfied two factors. The first factor is whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit." The court clarified that under the first factor, there must be a real, non-pretextual threat, and the board's motivations must be proper, as opposed to selfish or disloyal. The second factor is whether the board's response to the threat was "reasonable in relation to the threat posed and was not coercive to the stockholder franchise." The court explained that under the second factor, a reviewing court should pay special consideration to whether the board's response to a threat is narrowly tailored to counter only what is necessary. If a board's response deprives stockholders of a vote or coerces stockholders to vote a certain way, it will not survive the court's review.

Schnell and _Blasius_ review "have been and can be folded into _Unocal_ review to accomplish the same ends: enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control."

With this framework established, the court turned to the Court of Chancery's findings on remand. The Court of Chancery found that the UIP board faced a threat to UIP's existence because the deadlocked stockholder vote facilitated the risk of a custodian appointment with termination powers. The Court of Chancery also found that the UIP board's response to the threat—approving the Stock Sale to moot the custodian action—was reasonable and proportionate, especially since there were more aggressive options available. The Court of Chancery concluded that the board's response was neither preclusive nor coercive and, to the contrary, presented Coster with a potentially "more effective way for her to exercise actual control," in addition to a "realistic path to control of UIP" in the future. The court affirmed each

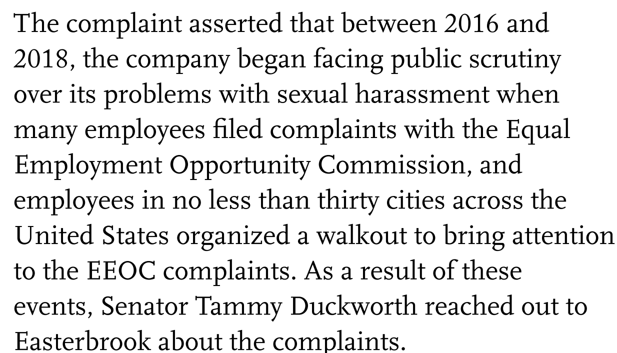
of these holdings and concluded that the Stock Sale satisfied both *Schnell* and *Blasius* as well as the new modified *Unocal* standard.

The court rejected Coster's arguments to the contrary. The court disagreed with Coster's contention that the board should have simply contested the custodian action, explaining that the mere pendency of the custodian action caused the existential crisis for UIP such that the board was not required to risk litigating it. The court further rejected Coster's challenge to the relevance of the "broad termination rights" to UIP's contracts as unsupported by the record.

***In re McDonald's Corp. Stockholder Derivative Litig.*: Corporate Officers Found to Have Fiduciary Duty of Oversight**

In *In re McDonald's Corp. Stockholder Derivative Litig.*, 291 A.3d 652 (Del. Ch. 2023), the Court of Chancery held, as a matter of first impression, that corporate officers owe a fiduciary duty of oversight. In particular, the court held that the stockholder-plaintiffs stated a claim that David Fairhurst, the Global Chief People Officer at McDonald's Corporation, owed a fiduciary duty of oversight and breached it by failing to respond to red flags indicating a culture of sexual harassment had developed at the company and breached the duty of loyalty by engaging in sexual harassment and misconduct himself.

McDonald's is a large corporation with over 200,000 employees, and while over half of the employees were women, at more senior levels, women made up one-fourth of officers. In 2015, Stephen J. Easterbrook became the company's CEO and began working in the company's executive offices in Chicago. Easterbrook had previously worked with Fairhurst in the McDonald's London office and hired Fairhurst as the Global Chief People Officer. The plaintiffs alleged that Easterbrook and Fairhurst promoted a party culture in the Chicago office, hosting regular happy hours in the office with an open bar and engaging in inappropriate behavior, including flirting with female employees. It was further alleged that employees began to fear reporting issues to the company's human resources department.



The complaint asserted that between 2016 and 2018, the company began facing public scrutiny over its problems with sexual harassment when many employees filed complaints with the Equal Employment Opportunity Commission, and employees in no less than thirty cities across the United States organized a walkout to bring attention to the EEOC complaints. As a result of these events, Senator Tammy Duckworth reached out to Easterbrook about the complaints.

The plaintiffs further alleged that in 2018, the same month that Senator Duckworth sent an inquiry to Easterbrook, the company's board allegedly received reports that Fairhurst committed acts of sexual harassment. The plaintiffs claimed that the board's audit committee met to discuss the misconduct and that Easterbrook recommended that Fairhurst's punishment be a 50% reduction of his bonus payment for 2018 despite the company's alleged "zero tolerance" policy on sexual harassment. Fairhurst executed a letter (which the opinion referred to as the "Last Chance Letter") explaining that Fairhurst's misconduct was not an isolated incident and that his misconduct violated the company's Standards of Business Conduct and put the company at significant risk.

The plaintiffs claimed that after these events, the company and the board began taking steps to address sexual harassment issues. The plaintiffs alleged that the board and several board committees received reports on the EEOC complaints and on how the company was revising its policies, providing training to employees, and engaging outside experts. Later, in 2019, a memorandum was allegedly provided to the board's Public Policy & Strategy Committee that summarized the issues the company was facing with sexual harassment and management's responses, and Fairhurst allegedly led a presentation on the memorandum given to the committee. It was further alleged that the board received a presentation on the company's Enterprise Risk Management, which identified a "Respectful Workplace" as a risk having a potential to cause long-term damage to the company.

In October 2019, the board was allegedly informed that Easterbrook was involved in a prohibited relationship with an employee. After outside counsel

investigated the report, the board negotiated a separation agreement with Easterbrook, and he was removed without cause from his position as CEO. While considering Easterbrook's misconduct, the company's general counsel also informed the board of "recent conversations" with Fairhurst. The board then terminated Fairhurst for cause, which the court inferred at the pleading stage was because Fairhurst violated the Last Chance Letter by engaging in another instance of sexual harassment or misconduct. Shortly after Easterbrook and Fairhurst's departure, multiple class action lawsuits were filed against the company across the U.S., generally alleging that the company had a toxic culture, sexual harassment was prevalent at the company, and the company provided inadequate training and reporting systems to address sexual harassment.

Fiduciary duties of officers are context-based such that officers other than the CEO and chief compliance officer only have a duty to oversee matters within their specific domain.

After these complaints were filed, a group of stockholders filed a Section 220 books and records action in the Delaware Court of Chancery and asserted follow-on plenary claims using the information they received. The stockholders' complaint alleged that Fairhurst violated his duty of oversight in response to risks of sexual harassment and misconduct at the company in violation of *In re Caremark Int'l Inc. Derivative Litig.* Fairhurst moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim and Rule 23.1 for lack of demand futility but—importantly—the court decided to rule on the Rule 12(b)(6) and Rule 23.1 motions in separate written opinions. This opinion addressed only Rule 12(b)(6).

Fairhurst argued that officers do not owe a duty of oversight. The court rejected this argument and held that officers owe such a duty for four principal reasons. First, the rationale for applying the duty of oversight to directors applies equally to officers. The court reviewed the duty of oversight's genesis and policy rationale, including the notion that Delaware takes a director's role seriously, that timely and credible information is a predicate to a director's monitoring role under Section 141(a) of the DGCL, and that monitoring systems are necessary to comply with federal laws requiring the existence of an ethics program overseen by high-ranking employees. The court reasoned that each of these policy priorities extends to officers, who are more involved in the day-to-day decisions of the corporation, including decisions regarding oversight issues, and who must ensure information systems are in place so that they can then fulfill their duty to report issues to the board.

Second, the court relied on *Gantler v. Stephens*, in which the Delaware Supreme Court stated that "the fiduciary duties of officers are the same as those of directors." The court reasoned that this statement could be interpreted to mean that directors' and officers' duties are identical. The court further cited several articles and a federal bankruptcy court decision relying on *Gantler* to reach the same conclusion.

Third, the court observed that, pursuant to principles of agency law, officers are agents who owe fiduciary duties that generally obligate them to report pertinent information to their principal (the board). The court reasoned that these legal principles "laid the foundation" for extending *Caremark* duties to officers.

Fourth and finally, the court posited that officers should owe a duty of oversight because the board should be able to pursue an action against an officer who purposely ignored red flags regarding corporate misconduct that ultimately led to significant corporate trauma. Further, if officers did not owe a duty of oversight, this might restrict the ability of others to bring claims, including bankruptcy trustees. The court also observed that this new rule would not necessarily subject officers to massive additional liability because *Caremark* claims are derivative and therefore subject to Rule 23.1's demand requirement, which would restrict the number of claims that could be brought.

Having concluded that officers owe a duty of oversight, the court turned to the scope of that duty. The court explained that fiduciary duties of officers are context-based such that, whereas directors have plenary authority over the corporation and thus have broad-ranging oversight duties, officers other than the CEO and chief compliance officer only have a duty to oversee matters within their specific domain. The court explained that, for example, the CFO is only responsible for financial oversight and establishing information systems that cover that specific area. The court clarified, however, that officers may have duties to report especially egregious red flags arising outside of their area (like violations of law). Finally, the court explained that officers, like directors, will only be liable "if a plaintiff can prove that they acted in bad faith and hence disloyally."

The court then turned to whether the plaintiffs had adequately pled that Fairhurst breached his duty of oversight, concluding that Fairhurst had violated "prong 2" of *Caremark* by failing to respond to "red flags" within his specific domain of human resources. The court listed a number of red flags, including complaints about sexual harassment, the EEOC complaints filed in 2016 and 2018 against the company, the employee walkouts protesting sexual harassment issues at the company, Senator Duckworth and other senators inquiring about the company's issues with sexual harassment among its employees, and Fairhurst's own engagement in sexual harassment and misconduct. The court held that these events indicated there was a serious problem with sexual harassment and misconduct at the company, and, based on the facts pled in the complaint, it was reasonable to infer that Fairhurst was aware of these red flags.

The court next addressed whether Fairhurst ignored these red flags in bad faith such that he violated his duty of oversight. The court posited that Fairhurst's alleged involvement in sexual misconduct supported an inference that Fairhurst would consciously ignore the issues of sexual harassment and misconduct by others. The court further held that the complaint adequately alleged that the human resources department ignored complaints of sexual harassment and misconduct under Fairhurst's watch. Additionally, Fairhurst never took action before June 2019 to report the issues of sexual harassment and misconduct at the company. The court acknowledged that Fairhurst was involved in efforts at the company in 2019 to resolve the company's issues with sexual harassment and misconduct, but engaged in another act of sexual harassment in 2019 (leading to his termination), which supported the notion that red flags were ignored during that time. Therefore, the court concluded, the complaint had adequately pled that Fairhurst had breached the duty of oversight.

The court likewise declined to dismiss the plaintiffs' claim that Fairhurst breached his duty of loyalty by engaging in multiple instances of sexual harassment himself. The court explained that these allegations supported an inference of bad faith because these acts could not possibly have been undertaken in good faith and in the best interests of the company. The court further rejected the policy concern that the possibility of fiduciary liability for sexual harassment claims could lead to a flood of employment-related cases in the Court of Chancery, which could result in inefficiencies arising out of the fact that such misconduct is already addressed by state and federal employment legislation. The court explained that duty of loyalty claims are derivative and thus employees would not have standing to bring such claims while the corporation is solvent.

Importantly, shortly after issuing the foregoing opinion, the court issued a separate order dismissing all oversight and loyalty claims against Fairhurst under Rule 23.1. The court ruled that demand was not futile because a majority of directors who would receive the demand were independent of Fairhurst and did not face a substantial likelihood of liability premised on related conduct.

In re Mindbody, Inc. Stockholder Litigation: Court of Chancery Finds *Revlon* Duties Not Satisfied During Sale Process

In *In re Mindbody, Inc. Stockholder Litig.,* 2023 WL 2518149 (Del. Ch. Mar. 15, 2023), the Delaware Court of Chancery, in a post-trial opinion, held that the founder and then-CEO of Mindbody, Inc. violated his

fiduciary duties under *Revlon* by (i) tilting Mindbody's sale process for his personal benefit and the benefit of Vista Equity Partners Management, LLC, the acquiror of Mindbody, and (ii) failing to disclose his pre-acquisition involvement with Vista and the sale process generally.

Richard Stollmeyer was the founder and former CEO of Mindbody, a public company, and by virtue of his super-voting Class B stock was the company's second-largest stockholder. Mindbody's largest stockholder was Institutional Venture Partners XIII, L.P., or IVP, a venture capital investor that held super-voting Class B stock since the company's IPO in 2015.

The court found that Stollmeyer wanted to monetize his holdings of Mindbody stock (which accounted for roughly 98% of his net worth) and had determined to sell the company. The court also found that IVP desired a near-term exit. For his part, Stollmeyer met with an investment banker, Jeff Chang, who introduced him to Vista.

The court found that, following Chang's introduction, Stollmeyer met with Vista representatives periodically—including at a summit for CEOs hosted by Vista—who highlighted, among other things, Vista's successes in creating incredible wealth for former public company CEOs through its buying and selling of companies. Stollmeyer informed Vista that he was looking for a "good home" for Mindbody. Importantly, the court noted that Mindbody's board of directors was unaware of these discussions and interactions. Following further discussions with Vista, Stollmeyer believed that selling Mindbody to Vista gave him the unique opportunity to both gain liquidity and remain employed post-acquisition. The court found that Stollmeyer was thus "laser focused" on consummating a deal with Vista.

In mid-October 2018, Vista delivered to Stollmeyer an oral expression of interest to acquire Mindbody. A few days later, Stollmeyer informed his management team of Vista's expression of interest, noting that he would "socialize" the topic with Mindbody's board. Stollmeyer also informed Eric Liaw, the director representative of IVP. Meanwhile, Vista revved up its internal processes, contracted for a detailed market study, and generally put itself in a position to make a firm offer before other bidders could react. Eight days after Vista's initial expression of interest, Stollmeyer informed the other Mindbody board members of Vista's communication. However, the court found that the other board members remained unaware of Stollmeyer's interactions with Vista and the fact that Stollmeyer and IVP desired to sell the company and/or exit in the near term.

In late October 2018, the formal sale process began. The board formed a transaction committee at the request of Stollmeyer, with Liaw assuming the role of chair of the committee. The other directors did not discuss or vote on who would serve as chair.

In early November 2018, Stollmeyer led an earnings call during which Mindbody announced its Q3 revenue miss and issued Q4 guidance. After the earnings call, Mindbody stock fell 20%. Following the drop in Mindbody's stock price, Stollmeyer informed Vista that a formal sale process was beginning. The court found that Stollmeyer's discussions with Vista were contrary to the committee's guidelines requiring management to obtain authorization for outbound communications to potential strategic parties. Chang then disclosed to Vista that Stollmeyer's target price for the sale was $40 per share. In response to Chang's outreach, Vista made a firm offer for $35 per share. In response, the board directed its financial advisor to communicate to all other potential bidders to submit prompt indications of interest. However, the court noted that the remaining potential bidders were unable to submit a bid by the requested timeline.

In response to Vista's initial offer, the committee countered with an offer of $40 per share. Vista then raised its offer to a "best and final offer" of $36.50 per share. In late December 2018, the board approved the deal at a price of $36.50 per share. Shortly thereafter, the board approved the merger agreement. The merger agreement authorized a 30-day go-shop. The go-shop did not produce a competing bid.

In addition, the court found that the proxy statement filed in connection with the merger either omitted or failed to adequately disclose certain material information, including Stollmeyer's meeting with

Vista in August, Stollmeyer's attendance at the CEO summit hosted by Vista, and Vista's initial expression of interest in October. Moreover, despite Mindbody beating the analyst consensus revenue target, the company determined to not disclose its fourth-quarter results before the stockholder vote on the merger.

Before the deal closed, Luxor Capital Partners, L.P., a Mindbody stockholder, filed suit in the Court of Chancery under Section 220 of the DGCL for books and records. After closing, Luxor filed additional suits against Stollmeyer and others, including a class action complaint, that were eventually consolidated. In the consolidated action, Luxor claimed that Stollmeyer and the other board members breached their fiduciary duties in connection with the merger and that Vista aided and abetted those breaches. The plaintiffs claimed that Stollmeyer breached his fiduciary duties by tilting the sale process in Vista's favor and by failing to disclose material information in connection therewith.

The court first considered the appropriate standard of review, determining that enhanced scrutiny under *Revlon* applied to the plaintiffs' claims against Stollmeyer. *Revlon* requires that directors act reasonably to obtain the highest price reasonably available to the stockholders under the circumstances. However, where enhanced scrutiny under *Revlon* presumptively applies, defendant fiduciaries can invoke *Corwin* to lower the standard to an irrebuttable version of the business judgment rule. To lower the standard, the transaction must have been "approved by a fully informed, uncoerced majority of the disinterested stockholders."

The court held that the merger fell outside the range of reasonableness mandated by *Revlon* and that the disclosure deficiencies made *Corwin* unavailable. Under the enhanced scrutiny standard of review, the court held that because Stollmeyer tilted the sale process in Vista's favor for personal reasons, the process did not achieve a result that fell within the range of reasonableness. As the court reasoned, Stollmeyer suffered a disabling conflict because he had an interest in near-term liquidity, a desire to sell fast (given the Class B sunset date), and an expectation that he would receive post-merger

employment. The court found that Stollmeyer then proceeded to tilt the sale process by strategically driving down Mindbody's stock price and providing Vista with informational and timing advantages during the due diligence and go-shop periods. Vista used this informational and timing advantage to prepare a firm offer while the other bidders were still in their early stages of diligence. Moreover, the court found that the board was unaware of these conflicts and could not reasonably manage them.

The court held that the merger fell outside the range of reasonableness mandated by *Revlon* and that the disclosure deficiencies made *Corwin* unavailable.

The court found that Mindbody's disclosures to the stockholders regarding the transaction omitted material information regarding Stollmeyer's alleged conflicts and the sale process. As a result, the court concluded that the stockholder vote in favor of the merger was not fully informed and that *Corwin* cleansing was inapplicable.

As a remedy, the plaintiffs sought the lost transaction price that Vista would have paid if the process had not been tilted in its favor, which the plaintiffs pegged at $40 per share. While the court accepted the plaintiffs' theory of liability, it rejected the evidentiary basis for a $40 per share figure, reasoning that the record demonstrated that Vista would have paid $37.50 per share. Stollmeyer was therefore liable for damages in the amount of $1 per share.

The court then addressed the claims against Vista, holding first that the plaintiffs could not advance their claim against Vista for aiding and abetting in the sale-process breaches because the plaintiffs failed to assert the claim in a timely manner. On the disclosure claims, however, the court held that they prevailed against both Stollmeyer and Vista. Regarding Stollmeyer, the court found that he failed to disclose the full extent of his involvement with Vista, which was a "material omission." With respect to Vista, the plaintiffs proved that Vista aided and abetted Stollmeyer's breach by failing to correct the proxy materials, which Vista was contractually entitled to review, to include a full and fair description of its own interactions with Stollmeyer.

As a remedy for the disclosure claims, the plaintiffs were only entitled to nominal damages since they provided no evidence of causation or reliance. The court then used its equitable discretion to award nominal damages of $1 per share for the disclosure violations, reasoning "that a $1 increase in the per share price would not have rendered the deal undesirable for Vista, nor would it represent a windfall to the class."

After determining that Stollmeyer and Vista were jointly and severally liable for the damages award, and after determining that the plaintiffs were not entitled to a double recovery, the court awarded the class $1 per share plus interest and related costs.

Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton: Separate Accrual Method Established as Appropriate Approach to Determine Timeliness of *Caremark* Claims

In *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walton*, 294 A.3d 65 (Del. Ch. 2023), the Court of Chancery denied the defendants' motion to dismiss the plaintiffs' claims for breach of the duty of oversight, commonly known as *Caremark* claims, in connection with Walmart's operation as a dispenser and distributor of opioids, to the extent such motions were based on grounds of untimeliness. The court established the separate accrual method as the appropriate approach to determine the timeliness of *Caremark* claims and found that the plaintiffs had standing to challenge Walmart's wrongful conduct because it took place during the actionable stage of the relevant limitations period. With respect to a third claim, the court found that equitable tolling applied even though the relevant conduct occurred outside the relevant limitations period.

Walmart is a dispenser of opioid throughs its pharmacies. Until April 2018, Walmart was also a

wholesale distributor of opioids. As a distributor and dispenser of opioids, Walmart was subject to federal laws and regulations requiring Walmart to maintain "effective controls and procedures to guard against theft and diversion of controlled substances," maintain sufficient records of prescriptions filled by its pharmacists, refuse to fill suspicious prescriptions, and report suspicious orders to the U.S. Drug Enforcement Administration. In 2009, the DEA asserted that Walmart was not in substantial compliance with its obligations under federal law with respect to one of its pharmacies. The allegations resulted in Walmart entering into a settlement with the DEA in 2011, which required Walmart to "implement and maintain a compliance program for all of its pharmacies."

Then, beginning in 2016, Walmart began to face a barrage of lawsuits all over the U.S. for its actions as a dispenser and distributor of prescription opioids, including civil and criminal actions by various governing authorities. As a result, Walmart incurred significant liabilities related to its distribution and dispensing of prescription opioids.

Three separate plaintiffs made Section 220 demands of Walmart in May and June of 2020, and in September 2021, those plaintiffs filed one collective action against Walmart's directors and officers. The allegations made by the plaintiffs and assumed by the court paint a picture of Walmart's board of directors and officers, at best, taking an ongoing and repeated nonchalant attitude toward compliance with federal laws with respect to its opioid distribution, its dispensing practices, and the DEA settlement as shown by minimal and slow efforts to comply with such laws; and at worst, making ongoing and repeated conscious decisions to prioritize profits over compliance, consciously ignore red flags of non-compliance, and consciously fail to make a good faith effort to comply with the DEA settlement. For example, the plaintiffs alleged that Walmart underfunded efforts to create an adequate compliance structure, board materials repeatedly showed that Walmart was not on track to comply with the DEA settlement, Walmart did not have adequate training or tools in place for its pharmacies to monitor or report suspicious opioid orders, and the board did very little to remedy the situation. Specifically, the plaintiffs alleged that the directors breached their fiduciary duties by "(i) knowingly causing Walmart to fail to comply with its obligations under the federal Controlled Substances Act and its implementing regulations when acting as a dispenser of opioids through its pharmacies (the "Pharmacy Issues"), (ii) knowingly causing Walmart to fail to comply with its obligations under the Controlled Substances Act when acting as a distributor of opioids (the "Distributor Issues"), and (iii) knowingly causing Walmart to fail to comply with its obligations under a settlement with the United States Drug Enforcement Administration (the "DEA Settlement Issues")."

For each class of issues, the plaintiffs put forward three types of claims: (i) a *Massey* Claim brought under *In re Massey Energy Co.* alleging that the directors and officers knew that Walmart was not complying with the Controlled Substances Act and DEA settlement and "made a conscious decision to prioritize profits over legal compliance," thereby violating the law; (ii) a Red Flags Claim asserting that the directors and officers were put on notice by "a steady stream of red flags" indicating that Walmart was not complying with its obligations under the Controlled Substances Act and the DEA settlement, but the directors and officers "consciously ignored them"; and (iii) an Information Systems Claim arguing that the directors and officers knew they "had an obligation to establish information systems sufficient to enable them to monitor Walmart's compliance with the Controlled Substances Act and the DEA settlement, yet consciously failed to make a good faith effort to fulfill that obligation."

The defendants moved to dismiss the claims as being untimely. On the motion to dismiss, the court noted that the Red Flags Claim and Information Systems Claim "rest on the premise that a conscious decision not to act is itself a decision that can be the product of bad faith," whereas a *Massey* Claim concerns directors' and officers' "conscious decision[s] to prioritize profits over legal compliance." The court explained, however, that the three types of claims are "all variants of the same foundational concept: a breach of the duty of loyalty grounded on bad faith action."

Applying the principles set forth in *Lebanon County Employees Retirement Fund v. Collis,* the court rejected the defendants' argument that the plaintiffs' claims were untimely. To address the timeliness defense, the court assumed the validity of the claims and instead addressed whether the claims were brought within the statute of limitations for legal claims or the analogous limitations period for equitable claims. In doing so, the court first analyzed when the plaintiffs' claims accrued.

The court explained that there are three different claim accrual approaches: (i) the discrete act approach, (ii) the continuing wrong approach, and (iii) the separate accrual approach. In this case, the court held that the separate accrual approach applied to all three claims. The court reasoned that the separate accrual approach "make[s] more sense when it is difficult to identify a clear starting point for a claim and the conduct persists over time," as was alleged by the plaintiffs against Walmart. Additionally, the court concluded that the separate accrual approach strikes "an appropriate balance by respecting defendants' interests in finality and repose, while preserving a litigation vehicle that can provide accountability and compensation."

The court explained that when applying the separate accrual approach, a court "picks a lookback date by identifying when the plaintiff began pursuing its claims." Then the court measures backwards from the lookback date using the statute of limitations, resulting in the "actionable period." The final step a court takes is the determination of whether "any of the ongoing conduct that gives rise to the claim occurred during the actionable period." If the ongoing conduct occurred during the actionable period, the claim is timely.

Applying the separate accrual approach to the claims, the court explained that an appropriate lookback date is generally when a plaintiff files suit but can also be—and in this instance it was—when, in a derivative case, a plaintiff seeks books and records in advance of filing suit. Using that approach, the court held that May 4, 2020, the date on which the plaintiffs sent their initial books and records demand, was the appropriate lookback date.

Next, the court applied the most closely analogous statute of limitations for a breach of the fiduciary duty of loyalty (three years) and held that the actionable period commenced on May 4, 2017. Afterwards, the court examined whether any of the ongoing conduct that gave rise to the various claims occurred during the actionable period. The court examined each claim's timeliness individually, ultimately concluding that the Pharmacy Issues and Distributor Issues were timely and that the DEA Settlement Issues may be timely because of equitable tolling principles.

The separate accrual approach strikes "an appropriate balance by respecting defendants' interests in finality and repose while preserving a litigation vehicle that can provide accountability and compensation."

The court first examined the timeliness of the Pharmacy Issues beginning at the onset of the actionable period on May 4, 2017. The court noted that in August 2022, a federal judge entered an injunction order that required Walmart "to remediate deficient controls and reporting systems." Additionally, in November 2022, Walmart agreed to a settlement implementing extensive procedures and controls over its opioid dispensing practices. The court held that those events supported a reasonable inference that the Pharmacy Issues continued through the actionable period. With respect to the Distributor Issues, the court held that the actionable period began on May 4, 2017. Walmart did not complete its exit from the opioid distribution business until April 2018. Thus, the court held that there was sufficient overlap to make the Distributor Issues timely.

With respect to the DEA settlement, the court noted that the settlement expired on March 11, 2015, and therefore any violations of the DEA settlement ceased on that date. The court explained that the actionable period only extended backward to May 4, 2017, so there was no overlap between the wrongdoing and the actionable period. Consequently, the court held that "[a]bsent tolling, the plaintiffs' claims based on the DEA Settlement Issues were untimely." However, the court held that because of the doctrine of equitable tolling, the DEA settlement claim was not at this stage of the litigation untimely. The court explained that the purpose of equitable tolling is to "ensure that fiduciaries cannot use their own success at concealing their misconduct as a method of immunizing themselves from accountability for their wrongdoing." In this instance, the court held that because Walmart allegedly never disclosed the existence of the DEA settlement or its failure to comply with the settlement but instead repeatedly made misleading and reassuring public disclosures that Walmart was taking actions to curb the misuse and abuse of opioids, equitable tolling was applicable.

The court left open the possibility that at a later stage, additional facts could be uncovered that would lead the court to conclude that the plaintiffs were on inquiry notice of the DEA settlement claims, and that the plaintiffs were therefore required to act sooner on the DEA settlement claims in order for the claim to be timely, but that there was insufficient information before the court at this juncture to make that determination. As a result, the court rejected the defendants' motion to dismiss claims for lack of timeliness.

In re Columbia Pipeline Group: Court of Chancery Holds Third-Party Acquirer Liable for Aiding and Abetting in Sell-Side Breaches of Fiduciary Duties

In *In re Columbia Pipeline Group*, 299 A.3d 393 (Del. Ch. 2023), the Court of Chancery held a third-party acquiror, TC Energy Corp. ("TransCanada"), liable for aiding and abetting breaches of the fiduciary duties of loyalty and disclosure by the officers and directors of the target company, Columbia Pipeline Group, because it knowingly participated in such breaches.

In July 2015, Columbia, a midstream natural gas company, was spun off from NiSource, a publicly traded utility company. In the spinoff, several

NiSource executives joined Columbia, including Robert Skaggs and Stephen Smith. In connection with the spinoff, Skaggs successfully lobbied for change-in-control agreements that would entitle him and Smith to large payouts in the event of a sale of Columbia post-spinoff. Skaggs served as Columbia's chief executive officer and chair of its board of directors, and Stephen Smith served as Columbia's executive vice president and chief financial officer. As anticipated by Columbia's management, shortly after being spun off from NiSource, Columbia began receiving inbound expressions of interest from third parties interested in acquiring Columbia.

Skaggs and Smith and the Columbia board began running a sales process. Each of the potential acquirers entered into a standstill agreement with Columbia, which included "don't ask, don't waive" provisions. However, because initial indications of interest were too low in price for Columbia's board's liking, the board told Skaggs and Smith to end the sales process. Columbia informed the potential acquirers to go "pencils down." Despite this message, one of the potential buyers, TransCanada, began backchannel communications with Smith about a potential acquisition of Columbia. TransCanada's negotiations were led by Francois Poirier, the Senior Vice President for Strategy and Corporate Development for TransCanada.

Those backchannel communications included Smith telling Poirier in early 2016 that Columbia management wanted to sell and that other bidders would not compete. Shortly thereafter and without board authorization, Skaggs and Smith opened a data room so that TransCanada could begin diligence. At one meeting, Smith even handed his own negotiation talking points to Pourier. At the end of January 2016, TransCanada's CEO called Skaggs and expressed interest in a deal at $25 to $28 per share. During this time, Skaggs and Smith made no effort to enforce the standstill agreement, and Columbia's in-house counsel told TransCanada's in-house counsel that nothing implicated the standstill agreement and willingly went along with the communications.

After TransCanada's CEO expressed his interest, Skaggs went to Columbia's board for approval and received permission to engage in exclusive

negotiations with TransCanada. Poirier was so confident that Columbia wanted to sell, TransCanada made an initial offer of $24.00 per share, below the range previously indicated by TransCanada, which offended Skaggs and Smith. After some back and forth, TransCanada upped its price to $25.25 per share. Skaggs and Smith recommended rejecting the offer, and Columbia's board did just that. Eventually, TransCanada agreed in principle to $26.00 per share, composed of 90% cash and 10% stock. Despite multiple opportunities to engage in discussions with other third parties and create competition in the sales process, Skaggs and Smith did not, and instead pushed for a transaction with TransCanada. For example, after exclusivity with TransCanada expired, a second bidder contacted Skaggs with whom Columbia could have engaged; instead of engaging, Skaggs and Smith recommended, and the Columbia board authorized, renewed exclusivity with TransCanada.

Upon receiving extended exclusivity and confident that Skaggs and Smith wanted a sale, Poirier backtracked on the agreement in principle at $26.00 per share and reduced it to $25.50 per share in cash, required an answer within three days, and threatened to publicly announce that negotiations were dead unless Columbia accepted the new offer. Skaggs and Smith considered providing a $25.75 per share counter, but because they did not want to lose the deal, they recommended the Columbia board accept $25.50 per share. The Columbia board accepted.

The plaintiffs sued Skaggs, Smith, and TransCanada, alleging that (i) Skaggs and Smith breached their duty of loyalty during the sales process and their duty of disclosure, and (ii) TransCanada aided and abetted in Skaggs's and Smith's breaches of fiduciary duty. Skaggs and Smith settled out, but TransCanada fought the aiding and abetting claims through trial.

To show that TransCanada aided and abetted in the breach of the fiduciary duty of loyalty, the plaintiffs needed to prove four elements: (i) the existence of a fiduciary relationship, (ii) a breach of that duty by the fiduciary, (iii) knowing participation in the breach by the defendant, and (iv) damages proximately caused by the breach. Skaggs and Smith, as executive officers of Columbia, were clearly fiduciaries. As such, the

court concluded that they owed a duty of loyalty to Columbia's stockholders during the sales process and applied enhanced scrutiny to their conduct because the conduct in question took place in connection with an end-stage transaction for all stockholders. The plaintiffs successfully proved bad faith by showing Skaggs and Smith were motivated by their desires to retire early and receive significant amounts of cash associated with their change-in-control benefits that would be triggered by a sale of Columbia. Notably, the plaintiffs did not try to prove that Skaggs and Smith would sell at any price, but rather that they behaved in ways that undercut Columbia's negotiating power and resulted in a lower offer. On this point, the court noted:

> Maybe there could be a time when obtaining the best transaction reasonably available requires telling the buyer you are eager to sell, reassuring the buyer that there is unlikely to be any competition, never mentioning a standstill, eagerly providing due diligence, appearing receptive to a price below the range you had asked for, revealing to the buyer that your side is 'freaking out' and wants to get a deal done, extending exclusivity after a public leak about the deal talks and an inbound inquiry from a second bidder, and then not countering a last-minute price drop. This is not that case. Due to Skaggs and Smith's conflicted actions, the sale process in this case fell outside the range of reasonableness.

Having proved the fiduciary breach, the court then examined whether TransCanada knowingly participated in the breach. The court reasoned that to demonstrate knowing participation requires both knowledge that the fiduciary is breaching a duty and culpable participation by the aider and abettor. The court explained that proving an "arm's length buyer knowingly participated is difficult" but that a potential acquirer's right "'to seek the lowest possible price through arms' length negotiations with the target board' is not unlimited." The court also stated that knowledge could be actual or constructive. Applying these principles, the court held that Skaggs and Smith sent a sufficient number of bizarre signals, including their message that there would be no social issues in the deal, their lack of

Proving an "arm's length buyer knowingly participated is difficult," but a potential acquirer's right "'to seek the lowest possible price through arms' length negotiations with the target board' is not unlimited."

interest in enforcing the standstill agreement when TransCanada made repeated approaches, and Smith's statement to Poirier that TransCanada would not face competition, to give TransCanada constructive knowledge that they were seeking to cash out on change-in-control benefits rather than seeking the best transaction reasonably available.

Further, the court held that TransCanada had knowledge in real time that Skaggs and Smith were "behaving eccentrically, even bizarrely, for sell-side negotiators." Skaggs and Smith did not negotiate, they shared information freely, and they sought to renew exclusivity even after negotiations were leaked to the public and a second bidder tried to enter negotiations.

Lastly, to show participation, the court held that TransCanada "knowingly exploited" Skaggs's and Smith's conflict of interest. The court noted, "[T]he decisive moment came when Poirier reneged on the agreement in principle at $26 per share, lowered TransCanada's bid to $25.50 per share in cash, demanded an answer publicly within three days, and threatened to announce publicly that negotiations were dead unless Columbia accepted the reduced offer." The court held that Poirier acted in violation of the standstill agreement, and he did so because he was confident (and correct) that Skaggs and Smith wanted a deal. Moreover, the court noted that TransCanada behaved persistently and opportunistically when violating the standstill agreement, which the court refused to brush away as "legitimate instances of aggressive bargaining," noting that standstills need "to be taken seriously to enable sell-side fiduciaries to fulfill their duties. If accountability for persistent and opportunistic violations of a process boundary only falls on the

sell-side fiduciary and not the bidder, then bidders will keep crossing boundaries." Here, the totality of circumstances, including TransCanada's taking advantage of its counterparty's mistakes, convinced the court that TransCanada participated in Smith's and Skaggs's breaches, resulting in liability for aiding and abetting in those breaches.

The court noted that "[b]y knowingly participating in the breaches of loyalty committed by Skaggs and Smith, TransCanada caused Columbia's stockholders to lose the benefit of an agreement in principle at $26.00 per share, comprised 90% in cash and 10% in stock." The damages proximately caused by the breach of the duty of loyalty were $1.00 per share because the handshake deal (which also included a stock component) price was $26.00 per share, and TransCanada's stock price went up post-signing but before closing; therefore the effective price would have been $26.50.

The court also found TransCanada liable for aiding and abetting breaches of the duty of disclosure. The court held that Skaggs, Smith, and the Columbia directors failed "to disclose all material information to Columbia's stockholders in connection with the vote on the merger." Importantly, the proxy did not disclose Skaggs's and Smith's desire to retire and a number of Skaggs's and Smith's interactions with TransCanada, and it did not mention that those interactions violated the standstill agreement. The court noted that the Court of Chancery previously held that "an acquirer knowingly participates in a disclosure violation when the acquirer has the opportunity to review a proxy statement, has an obligation to identify material misstatements or omissions ... and fails to identify those misstatements or omissions." In this instance, the court concluded that TransCanada had a duty under the merger agreement to ensure full and truthful disclosures in the proxy statement, TransCanada knew about the undisclosed interactions, and individuals at TransCanada reviewed the proxy statement in detail. The court held that TransCanada failed to meet its obligations with respect to such material misstatements and omissions and therefore aided and abetted a breach of the duty of disclosure.

After reviewing case law and other scholarly sources, the court awarded $0.50 nominal damages per share with respect to the disclosure claim, but held that the awards of $1.00 and $0.50 were concurrent, not cumulative, and therefore held that damages were $1.00 per share in total.

Controlling Stockholders and Entire Fairness Standard of Review

In re Tesla Motors, Inc. Stockholder Litig.: *MFW*'s Procedural Safeguards Not Required to Demonstrate Entire Fairness

In *In re Tesla Motors, Inc. Stockholder Litig.*, 298 A.3d 667 (Del. 2023), the Delaware Supreme Court held that *MFW* devices are not required to demonstrate entire fairness in a conflicted controller transaction. In so doing, the Supreme Court clarified that while employing *MFW*'s devices remains the best practice for navigating conflicted controller transactions and avoiding a heavy burden in litigation, they are not required to pass muster under the entire fairness standard of review.

SolarCity was a publicly traded solar panel development and production company. Tesla and its CEO, Elon Musk, were interested in a deal with SolarCity to advance Tesla's long-term goal of combining solar energy (which SolarCity provided) with Tesla's already existing battery storage capabilities. However, Musk was conflicted with respect to the transaction because, at the time of the deal, he was both the CEO of Tesla and chairman of the SolarCity board, holding a little over 20% of the equity in both companies. Further, SolarCity was founded by Musk's cousins.

The Tesla board determined to explore a potential acquisition of SolarCity—notably, months after Musk had originally encouraged the Tesla board to do so. The Tesla board retained financial advisors, vested negotiating authority in an independent member of the board (but did not form a special committee), and

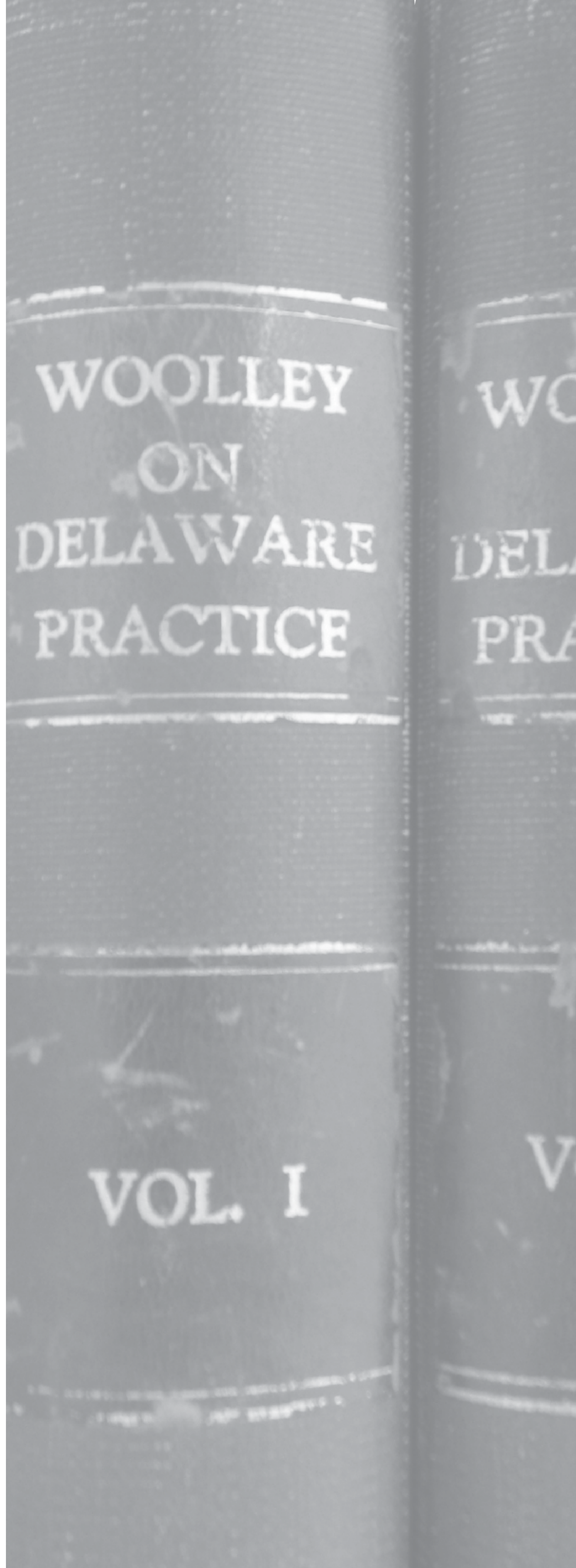
eventually made an offer to acquire SolarCity. SolarCity was facing serious liquidity issues prior to the deal, and Musk even needed to provide additional cash by purchasing bonds from SolarCity prior to the deal closing. The financial advisor to Tesla's board informed the board during diligence of the full extent of SolarCity's financial issues, but the board determined that the deal still made strategic sense for Tesla.

The two companies entered into a merger agreement, which was conditioned upon approval of Tesla's stockholders, including a majority of the disinterested stockholders. The Tesla stockholders approved the deal, and it closed shortly thereafter. Various Tesla stockholders brought breach of fiduciary duty claims against Musk, arguing he caused Tesla to overpay for SolarCity.

In its post-trial opinion, the Court of Chancery recognized that Musk's conflicts of interest may have warranted entire fairness review, but as a matter of judicial economy and the parties' agreement to assume that entire fairness applied, the court assumed, but did not actually determine, that entire fairness was the appropriate standard of review, placing the burden on Musk to prove that the deal was entirely fair.

As to process, the court found that the deal was not perfect, finding both procedural flaws and strengths. Specifically, the court identified eleven process flaws in the acquisition flowing principally from Musk's inability to separate himself from the negotiations. These flaws included findings that (i) Musk had communications with SolarCity's management about the deal that he had not disclosed to the Tesla board; (ii) Musk pressed the Tesla board to consider the deal on several occasions; (iii) Musk participated in the selection of Tesla's outside deal counsel; (iv) Musk was frequently involved in board discussions about the deal; (v) Musk maintained frequent communications with Tesla's financial advisor about the deal; and (vi) Musk made public demonstrations to garner stockholder support for the deal.

However, the court also found several aspects of the deal process demonstrated the fairness of the transaction. First, the court found that the timing



indicated fair process because Tesla's board did not begin negotiations with SolarCity upon Musk's request, but rather focused on addressing Tesla's own car production issues before pivoting to consider a deal with SolarCity. Second, the court found that the structure of the deal was indicative of fair process because the deal included a majority-of-the minority stockholder vote, recusals of certain interested directors from voting on the deal, and the retention of top-tier industry-informed independent advisors; and a skillful lead independent director led Tesla's negotiations. Third, the court found that the process benefited Tesla because the Tesla board leveraged its due diligence discoveries concerning SolarCity's liquidity issues to negotiate a lower price. Fourth, the court found that on several occasions, the Tesla board rebuffed Musk's wishes concerning the timing and structure of the acquisition, indicating that Musk did not dominate the board as alleged. Fifth, the court found that the rationale and material aspects of the transaction were well known to the public and Tesla's stockholders. And finally, the court found that although a majority of the board was potentially interested in the deal, the negotiating process was led by a director who the court found to be independent and a strong force on the Tesla board for ensuring the best deal for Tesla. Therefore, according to the court, the deal process was fair.

The court also held that the price was entirely fair. The court first considered the plaintiffs' lone fair price theory: that SolarCity was insolvent and worthless, and Tesla overpaid. The court rejected this theory, finding that while SolarCity needed cash, it was never insolvent or in danger of pursuing bankruptcy.

The court also considered the opinions of experts on valuation. After concluding that the plaintiffs' valuation theories were unconvincing, the court turned to Musk's theories, which it found more persuasive. First, the court found that the market evidence supported a finding of fair price, as the market was efficient and informed. Especially notable to the court was the market's pre-acquisition view of SolarCity, which valued SolarCity stocks at $21.19 per share. This pre-acquisition price suggested that instead of paying a premium, Tesla acquired SolarCity at $20.35 per share—an 84 cents per share discount compared to SolarCity's unaffected stock price. Similarly, Tesla's 85% stockholder approval was another indicator that the market evidence favored fair price.

Second, the court considered SolarCity's cashflows, finding that Tesla's realization of $1 billion dollars in nominal cash flows from the deal, with at least $2 billion outstanding, suggested fair price.

Third, even though a fairness opinion offered by its financial advisor relied, in part, on a DCF analysis, the court found that the financial advisor's opinion supported fair price. The court reached this conclusion because the financial advisor performed substantial market research, conducted weeks of due diligence, helped Tesla negotiate a lower offer price, and had very credible witnesses.

Finally, the court concluded that the substantial synergies between the two companies, and the value they would provide to Tesla, supported a finding of fair price. Accordingly, the court held that the price was entirely fair.

On appeal, the plaintiffs did not challenge any of the Court of Chancery's fact or credibility findings—instead, the plaintiffs raised a host of arguments seeking to have the Delaware Supreme Court reweigh the evidence considered at trial and conclude the deal was unfair. Two of the plaintiffs' arguments are noteworthy.

First, the plaintiffs argued that the absence of a special committee plus the process flaws required imposition of liability as a matter of law. In addition, the plaintiffs and *amicus curiae* brought forward a doomsday argument that, if affirmed, the Court of Chancery's finding of no liability would disincentivize any board from utilizing the procedural protections endorsed in *MFW*. Second, the plaintiffs argued that the Court of Chancery applied a bifurcated entire fairness test, and that the court's rote reliance on market price led to an erroneous conclusion of fair price in that bifurcated test, which merited reversal.

In addressing the first argument, the Supreme Court held that a board is not required to form a

special committee prior to engaging in a conflicted transaction. Accordingly, should a board choose not to follow the best practices outlined in *MFW*, there would not be a *per se* imposition of liability, but the directors would face an uphill battle in litigation under the entire fairness standard of review. The Supreme Court held that by not following *MFW*, Musk chose the litigation arena (entire fairness), the plaintiffs' theory of liability had been tested below in that arena, and the Court of Chancery rejected the plaintiffs' arguments. The Supreme Court concluded that the factual record supported the Court of Chancery's conclusion because the procedural strengths neutralized the procedural flaws, leading to a fair process. In particular, the Supreme Court agreed with the Court of Chancery's conclusion that the Tesla board was focused on the bona fides of the deal and that Tesla's deal negotiations were led by an "indisputably independent" director, which together neutralized "any control Musk may have attempted to exercise in connection with the deal."

In making their second primary argument, the plaintiffs argued that the Court of Chancery applied a bifurcated entire fairness test, erroneously relied on market price, and erroneously credited cashflows and synergies when determining fair price, and that the stockholder vote did not suggest fair price.

The Supreme Court disagreed with the plaintiffs' reading of the opinion below, holding that the Court of Chancery did not employ a bifurcated entire fairness test. The Supreme Court acknowledged that price played a key role in the Court of Chancery's fairness analysis, but reasoned that price plays a paramount role in every entire fairness analysis, and, regardless, nothing in the record demonstrated that the process flaws infected the price sufficiently to make the transaction not entirely fair.

In addressing the plaintiffs' cashflow argument, the Supreme Court held that the record demonstrated that cash flows were an integral part of SolarCity's value and were part of the "get" for Tesla. The plaintiffs' argument that those cash flows were speculative and unsupported did not sway the court. Instead, the court held that the Court of Chancery's reliance on cash flows as evidence of fair value was undergirded by the credible testimony of several witnesses at trial.

With respect to synergies, the court noted that synergies are often a key motivator in pursuing acquisitions and that when that is the case, it is appropriate for the court to consider such synergies in evaluating fair price. The court noted, however, that in order for synergies to factor into the court's fair price analysis, the synergies must be cognizable and not merely speculative. The court held that the Court of Chancery committed no reversible error when it concluded that potential synergies weighed in favor of determining that the deal was fairly priced because credible evidence of approximately $150 million in synergies per year was presented at trial.

Should a board choose not to follow the best practices outlined in *MFW*, there would not be a *per se* imposition of liability, but the directors would face an uphill battle in litigation under the entire fairness standard of review.

The court also concluded that the Court of Chancery committed no error in reasoning that approval of the deal by 85% of Tesla's stockholders weighed in favor of concluding the deal was fairly priced.

Lastly, the Supreme Court found that some, but not all, of the market evidence supported fair price. Specifically, the Supreme Court affirmed the Court of Chancery's conclusion that market efficiency and the disinterested stockholder approval suggested fair price. However, the Supreme Court held that the Court of Chancery erred in its consideration of SolarCity's pre-acquisition market price. On this point, the Supreme Court noted that when material nonpublic information has not been factored into a stock price, the courts must be cautious in relying on such a stock price in its fair price analysis. In this instance, the court noted that the full extent of SolarCity's liquidity issues were not known by the public or fully reflected in the relevant pre-

acquisition market price that was relied upon by the Court of Chancery. Therefore, the court held that consideration of the pre-acquisition price without explaining why it was reasonable to do so, or without disclosing the weight given to the pre-acquisition price, was an error. The Supreme Court further explained that, while the weighing of factors impacting value is more significant in the appraisal context, it is still helpful and relevant in an entire fairness analysis. Nevertheless, the Supreme Court held that even though it was an error to consider the pre-acquisition price without further explanation, the other credible evidence was persuasive and sufficient to support the Court of Chancery's finding that Tesla paid a fair price.

Having considered the plaintiffs' arguments on fair process and fair price, the Supreme Court then concluded that together, the process and the price suggested that the deal was entirely fair. The Supreme Court emphasized that while it did not think the deal process was perfect, it survived scrutiny under entire fairness and affirmed the Court of Chancery's decision.

In re Oracle Corp. Derivative Litigation: Conflicted Transaction Involving a Holder of Potential Control Does Not Automatically Mandate Entire Fairness

In *In re Oracle Corp. Derivative Litigation*, 2023 WL 3408772 (Del. Ch. May 12, 2023), the Delaware Court of Chancery, in a post-trial opinion, reversed its pleading stage finding that Lawrence J. Ellison was a controlling stockholder of Oracle Corporation, holding that while Ellison had significant influence and was a respected figure of Oracle, he was not a controlling stockholder, nor did he exercise control with respect to Oracle's acquisition of Netsuite Corporation.

In 1977, Ellison founded Oracle and served as Oracle's CEO until 2014, when he assumed the role of chief technology officer and executive chairman of the board. After sustaining substantial growth through the acquisition of other companies, Oracle institutionalized its mergers and acquisitions strategy by implementing a standard framework to assess potential targets. As part of this framework, Oracle's corporate development team kept dossiers on potential takeover targets, including NetSuite.

More than twenty years after Oracle's formation, Ellison co-founded NetSuite with former Oracle employee Evan Goldberg, and at the time of this transaction, Ellison owned nearly 40% of NetSuite. Like Oracle, NetSuite sold enterprise resource planning software, but for the most part each serviced separate markets. Ellison long believed that an Oracle acquisition of NetSuite was mutually beneficial, and when Ellison stepped down as Oracle's CEO in 2014, discussions of whether to purchase NetSuite ramped up. In February 2015, Ellison and Oracle's co-CEOs met to discuss a potential acquisition of NetSuite, but determined the timing was not right.

In January 2016, the Oracle board held an annual offsite meeting at Porcupine Creek, Ellison's property in California. During the meeting, Oracle's head of corporate development presented on the potential takeover of NetSuite for the first time. Ellison left the room and recused himself from the NetSuite discussion. Following the discussion, and in the absence of Ellison, the Oracle board decided it was in the company's best interest to explore a transaction involving NetSuite and directed Oracle's co-CEOs to assess NetSuite's interest in an acquisition without discussing price.

Co-defendant Oracle CEO, Safra Catz, did as instructed and initiated discussions with NetSuite's CEO, Zachary Nelson, regarding Oracle's potential acquisition of NetSuite. Catz did not engage with Nelson in price discussions, but Nelson expressed that NetSuite's co-founder, Evan Goldberg, was unwilling to sell. When Goldberg shared the same concerns with Ellison, Ellison explained that he was recusing himself from NetSuite's decision-making process.

Despite Goldberg's concerns, Oracle pushed forward, forming an independent, three-member special committee designated to evaluate, determine whether to pursue, and, if pursued, negotiate the potential transaction with NetSuite on behalf of Oracle. Over the course of the next seven months,

the special committee met fifteen times and engaged independent legal and financial advisors.

In May 2016, Oracle management recommended that the special committee move forward with the acquisition. After the special committee's financial advisor similarly touted the complementary nature of the two companies, the special committee believed it was time to make an offer. Prior to the communication of the initial offer, the special committee's legal advisor shared rules of recusal, which had been approved by the special committee and prohibited Ellison from "discussing the potential acquisition with anyone but the special committee, required Oracle employees brought in to assess the [t]ransaction to be made aware of Ellison's recusal, and forbade Oracle officers and other employees from participating in the negotiation process absent Special Committee direction."

The special committee, aided by its advisors, negotiated in a "hard-nosed" fashion that reduced the price paid by Oracle in a way that was against Ellison's interest since he held a larger stake in Netsuite.

On June 1, 2016, the special committee's financial advisor communicated an initial offer of $100 per share. NetSuite responded with a counterproposal of $125 per share. The special committee—which intended to maintain room to negotiate below a $110 ceiling—raised its offer to $106. But when NetSuite countered at $120 per share and indicated that it had little room left to negotiate a lower price, the special committee indicated that it would not provide a counterproposal.

The special committee was prepared to let the deal die. And the deal appeared to be dead, until NetSuite informed Oracle of its interest in moving the deal forward. Oracle's special committee re-engaged in negotiations, this time intending to impress upon NetSuite's transaction committee why Oracle's offer of $106 was reasonable. NetSuite countered the special committee's non-bid by offering to accept $111 per share. In response, the special committee made a "best and final" offer of $109 per share. NetSuite accepted. Shortly thereafter, Oracle and NetSuite announced the merger agreement, and the special committee's financial advisor delivered its formal fairness opinion. The NetSuite acquisition closed on November 7, 2016.

The plaintiffs, stockholders of Oracle, alleged that Oracle overpaid to acquire NetSuite. In particular, the complaint alleged that Ellison used his significant influence at Oracle to cause it to acquire NetSuite at a premium. Because Ellison owned a larger percentage of NetSuite than he did Oracle, it was in his financial interest that Oracle overpay. The plaintiffs argued that because Ellison was a conflicted controller, the acquisition of NetSuite must be reviewed under the entire fairness standard. To bring the acquisition within the exacting standard of entire fairness, the plaintiffs proffered two theories: (i) Ellison was a controller who sat on both sides of the transaction, and (ii) Ellison, on his own and through Catz, misled the Oracle board and the special committee, thereby rendering the transaction a product of fraud.

On an earlier motion, the court held that the plaintiffs' allegations were sufficient to suggest entire fairness and merit further court review. But, in this post-trial opinion, the court held that Ellison was not a controller and did not act as a controller generally or in connection with Oracle's acquisition of NetSuite.

The court began its analysis by addressing whether Ellison was a controller and explained that a stockholder with more than 50% of the voting power of a corporation is a controlling stockholder because of their ability to remove, and thus influence, the directors. The court also explained, however, that control could be demonstrated in the absence of majority stock ownership if a plaintiff shows domination by a minority stockholder through actual control of a corporation's conduct. Since Ellison held less than 30% of the voting power of Oracle, the plaintiffs argued that entire

fairness was the appropriate standard of review because Ellison actually dominated, either generally or with respect to the NetSuite acquisition, Oracle's corporate conduct.

The court disagreed. The court first held that Ellison did not exercise "general control" over the corporate machinery. The court explained that in order to make a finding of general control, the power of the putative controller must be such that independent directors "cannot freely exercise their judgment" for fear of retribution. And according to the court, the evidence suggested the opposite: the Oracle board vigorously debated assumptions and was not afraid to disagree with Ellison. The court made a similar finding for Ellison's relationship with Oracle's co-CEOs, citing in support Catz's practice of rejecting Ellison's proposals.

Next, the court acknowledged that while Ellison could have exerted control as to particular transactions, the evidence demonstrated that he did not with regard to the NetSuite acquisition. Instead, the court believed that the special committee, aided by its advisors, negotiated in a "hard-nosed" fashion that reduced the price paid by Oracle in a way that was against Ellison's interest since he held a comparatively larger stake in Netsuite.

Despite these findings, the court still took the occasion to review and reject each component of the plaintiffs' argument to the contrary. The plaintiffs maintained that Ellison wielded actual control of the NetSuite transaction and rested their theory on Ellison's publicly held view that a NetSuite transaction would make sense, as well as Ellison's discussions with NetSuite co-founder Goldberg and Catz's loyalty to Ellison, which, according to the plaintiffs, allowed Ellison to control the transaction through her. The court again disagreed.

The plaintiffs' first contention—that Ellison raised the concept of buying NetSuite—was rejected by the court in short order. The court noted that when Oracle was contemplating the acquisition of NetSuite in early 2015, Ellison was the driving force *against* a transaction, and it was not until Ellison stepped down as CEO that the idea of purchasing NetSuite

was revisited. The court also noted that Ellison's implicit agreement with the concept of the NetSuite acquisition and any presentations given thereafter at the Porcupine Creek meeting were within the ordinary course of business. Accordingly, the court held that the foregoing evidence did not show any control over the special committee.

The plaintiffs also alleged that Ellison indirectly controlled merger negotiations through his control over principals of NetSuite, positing that Ellison's NetSuite holdings were coercive such that Goldberg felt an obligation to sell. But, according to the court, this argument would only make sense if the plaintiffs were NetSuite stockholders who believed the acquisition garnered too low a price. Since the plaintiffs were not, and since Ellison's discussions with Goldberg were immaterial to the special committee's decision-making process, the court held that the plaintiffs' argument failed to show that Ellison controlled Oracle with respect to the acquisition.

The plaintiffs' final contention was that Ellison controlled the transaction through Oracle's co-CEO, Safra Catz, who allegedly provided false information to Oracle's special committee in order to cause Oracle to overpay for NetSuite. According to the plaintiffs, Catz was not independent of Ellison because of their long friendship and because he controlled her employment. But since the plaintiffs failed to prove that Catz ran the negotiation process or took actions to advance Ellison's interests, the court rejected the plaintiffs' theory and found instead that Catz's tough negotiating demonstrated loyalty to Oracle, and not to Ellison's conflicted interests. Accordingly, the court held that business judgment applied because Ellison did not control Oracle generally or specifically for purposes of the NetSuite transaction.

In a second attempt to shift the standard of review governing the NetSuite acquisition from the business judgment rule to entire fairness, the plaintiffs posited that Ellison and Catz perpetrated a fraud on the board by not disclosing material facts relating to the value of NetSuite and their interactions with NetSuite. In support, the plaintiffs contended that Ellison misled the special committee by failing to disclose his critiques of NetSuite's business strategy, the business strategies that he planned to implement at NetSuite post-acquisition, and his discussions with Goldberg.

The plaintiffs' theory that Ellison and Catz omitted material facts relied on Ellison's supposed knowledge that competition between Oracle and NetSuite would be such that only one could thrive. In response, the court explained that while Oracle and NetSuite compete at the margins, the two companies were not significant competitors. The court also explained that Ellison's critiques of NetSuite's business strategy would not have been material to the special committee because NetSuite was already in the process of implementing them throughout the negotiations. As such, the court held that there was no evidence that Ellison or Catz breached fiduciary duties by failing to disclose the extent of competition between Oracle and NetSuite.

The plaintiffs' next contention was that Ellison's failure to disclose his post-closing business strategies for NetSuite was fraud because, if followed, Ellison's strategies would entail costs and risks that were not accounted for in the analyses given to Oracle's special committee. The court disagreed again, this time reasoning that Ellison's failure to reveal management's post-closing plans was not material to Oracle or the special committee's deliberation process, which followed Oracle's well-trodden and extensive M&A process to arrive at its decision to acquire NetSuite.

The court also rejected the plaintiffs' contention that Catz and Ellison's failure to inform the Oracle board of certain discussions with Goldberg amounted to a fraud on the board. The court agreed that Catz and Ellison should have informed the special committee of their separate comments to Goldberg that Oracle would keep NetSuite independent and keep on NetSuite's management post-transaction, but that the failure to report such information to the committee did not taint the committee's process.

As a result of these findings, and since the plaintiffs were unable to rebut the business judgment rule, the court found for the defendants.

IBEW Local Union 481 Defined Contribution Plan & Trust ex rel. GoDaddy v. Winborne: Holistic Review of Director and Officer Conduct Leading to TRA Buyout Supports Inferences of Bad Faith and Waste Such that Demand Is Excused

In *IBEW Local Union* 481 *Defined Contribution Plan & Trust ex rel. GoDaddy v. Winborne*, 301 A.3d 596 (Del. Ch. 2023), the Delaware Court of Chancery held that the plaintiff-stockholder's allegations that the board of directors of GoDaddy acted in bad faith when it approved a tax receivables buyout were sufficient to support an inference of bad faith and a claim for waste. Because the directors could not be exculpated for such claims and a majority of the directors who otherwise would have reviewed a demand were therefore at risk of personally liability, the court held that demand was excused.

In 2015, GoDaddy Inc. completed an Up-C IPO. Prior to the IPO, GoDaddy entered into tax revenue agreements ("TRAs") with several founding investors. Pursuant to the TRAs, if GoDaddy reduced its taxable income by using a tax asset generated by a founding investor, then GoDaddy was required to pay the founding investor 85% of the savings. By February 2019, several founding investors exited from their equity positions, generating tax assets with a total value of $2.2 billion and a resulting nominal liability of GoDaddy to the founding investors of $1.8 billion. At that time GoDaddy was not generating taxable income. Therefore, the TRAs were not being utilized to offset any taxable income. As a result, GoDaddy had not paid—nor did it have an obligation to pay—the founding investors for the TRAs.

In early 2020, GoDaddy's general counsel asked GoDaddy's nine directors to form a special committee to consider and negotiate the terms of a potential TRA buyout providing for GoDaddy's use of company capital to acquire the founding investors' rights to payments under the TRAs. Only two of GoDaddy's nine directors lacked any ties to the founding investors, but when the special committee was formed, neither was named as a member.

At the special committee's first meeting, it retained legal and financial advisors and instructed them to start analyzing a potential TRA buyout. In the subsequent meeting, GoDaddy's chief financial officer, Raymond Winborne, walked the special committee through a base case financial model that assumed GoDaddy would start to utilize the tax assets in 2022 and valued the anticipated TRA payments at approximately $900 million. The special committee was aware, however, that Winborne's presentation did not account for GoDaddy's growth initiatives or future acquisitions, both of which reduced the likelihood of using the tax assets.

In February 2020, GoDaddy filed its annual report and recorded a TRA liability of only $175.3 million, citing favorable tax attributes due to limited taxable income as support. GoDaddy's audited financial statements also failed to project any TRA payments to the founding investors until 2023. Notably, both representations were quite different from what Winborne told the special committee in his presentation.

A few weeks after the annual report was filed, the special committee authorized Winborne to begin price negotiations for a buyout of the TRAs. In June 2020, Winborne returned to the special committee with a TRA buyout offer of $850 million and informed the members that they needed "to move quickly." The special committee did as Winborne asked and reviewed the offer. But instead of providing the full board of directors with a recommendation as to how to proceed, the special committee balked and lateraled the decision back to the full board of directors. After a thirty-minute meeting—and without any presentation from the special committee's financial advisor—seven of the nine members of GoDaddy's board approved the TRA buyout offer of $850 million. Two directors affiliated with the founding investors did not attend the approval meeting.

The plaintiff, a GoDaddy stockholder, sued derivatively to challenge the TRA buyout, alleging that Winborne breached his fiduciary duties as CFO by providing false information to the board, the special committee, and the special committee's

financial advisor. The plaintiff also alleged that the members of GoDaddy's board breached their fiduciary duties by approving the TRA buyout and that the TRA buyout constituted waste. The defendants moved to dismiss the complaint for failure to plead demand futility.

The court began its analysis by addressing whether demand was excused, and explained that to establish demand futility, the plaintiff must plead facts supporting a reasonable inference that a majority of the members of the board that would consider the demand could not act disinterestedly or independently on a demand. Two directors were immediately disqualified due to their personal interest in the TRA buyout.

For the remaining directors, the court was left to analyze whether they faced a substantial likelihood of liability for breaching their fiduciary duties when voting to approve the TRA buyout. The plaintiff argued that the directors acted in bad faith, making exculpation unavailable, rebutting the business judgment rule, and requiring review under the entire fairness standard.

The court evaluated the standard for pleading bad faith and ultimately held that at the pleading stage, "the test is whether the complaint alleges a constellation of particularized facts which, when viewed holistically, support a reasonably conceivable inference that an improper purpose sufficiently infected a director's decision to such a degree that the director could be found to have acted in bad faith." The court explained that contrary to the defendants' contentions, the demand futility test is not a checklist. Instead, the good faith inquiry operates as a backstop that protects against inappropriate pleading stage dismissals and provides courts of equity with a tool to allow cases to proceed past the pleading stage when the allegations as a whole support an inference of bad faith. Furthermore, the court explained that even though bad faith is a state of mind and an individual's mental state is not directly observable, a trial judge can look to external indications to the extent they permit an inference that a defendant lacked the necessary subjective belief.

Applying this framework to the facts of the case, the court held that "viewed holistically," the

plaintiff's complaint provided reason to doubt that the directors who voted in favor of the TRA buyout acted in good faith. The court listed five factors that indicated bad faith.

The first indicative factor was the extreme disparity between the TRA liability valuation of $175.3 million in GoDaddy's audited financial statements and the $850 million payment in the TRA buyout, which, according to the court, was enough alone to "support a claim of waste and hence an inference of bad faith." The court took particular issue with the fact that the TRA liability valuation was prepared by management, audited by a global accounting firm, and signed off on by GoDaddy's audit committee, but ignored by the directors who approved the TRA buyout. Without any explanation from the defendants bridging the publicly reported TRA liability of $175.3 million to the $850 million payment agreed to in the TRA buyout, the court held that the plaintiff was entitled to an inference that the directors approved the TRA buyout in bad faith.

The second indicator of bad faith was the conflicting representations made by Winborne. When addressing the audit committee and GoDaddy's accounting advisor for purposes of the TRA liability, Winborne represented that GoDaddy *would likely not* generate enough taxable income to use all of the tax assets. When addressing the special committee (which included two members of the audit committee) and the board of directors for purposes of the TRA buyout, Winborne represented that GoDaddy *would likely* generate enough taxable income to use all of the tax assets. The court found the conflicting representations, and the fact that several directors (if not all of the directors who approved the TRA buyout) knew about the disparity between the $175.3 million publicly reported TRA liability and the $850 million TRA buyout and did nothing about it, supported an inference of bad faith.

The third indicative factor of bad faith was that Winborne's projections and analysis excluded any consideration of GoDaddy's M&A-based business model and its effect on GoDaddy's ability to use tax assets. The court explained that as directors, the board knew about GoDaddy's M&A-based business model, and thus inferably knew that Winborne's projections rested on the unrealistic assumption that GoDaddy would not make any more acquisitions. At the pleading stage, this was enough to entitle the plaintiff to an inference of bad faith.

The extreme disparity between the TRA liability valuation of $175.3 million in GoDaddy's audited financial statements and the $850 million payment in the TRA buyout was enough alone to "support a claim of waste and hence an inference of bad faith."

The fourth indicative factor of bad faith was the approval of the TRA buyout after a thirty-minute meeting, without a fairness opinion, without the presence of the financial advisor who performed the analysis of the TRA buyout, and despite knowing that the pricing of the TRA buyout conflicted with TRA liability valuation. As noted by the court, these factors "provide another ingredient for the mulligan stew and contribute to the inference of bad faith."

The fifth and final indicative factor of bad faith was the entanglements between the founding investors on the one hand and the board and management on the other. GoDaddy's general counsel, Nima Kelly, was a founding investor, and her circulation of the written consent that formed the special committee kicked off the TRA buyout process. Winborne served for several years at KKR, one of the founding investors. When the TRA buyout was approved, Kelly and Winborne left GoDaddy and Kelly was hired by another KKR affiliate. One special committee member was a founding investor who renounced his interests in the TRAs so he could serve on the committee. Another committee member was a co-investor with one of the founding investors in another company. Additionally, the two directors without any apparent ties to the founding investors were excluded from the special committee. The court held that collectively, these entanglements, together with the special committee's

lateral of the TRA buyout decision back to the full board of directors, was indicative of bad faith.

As a result, the court held that when viewed holistically, the complaint's allegations supported an inference of bad faith, waste, and unexculpated claims against a majority of the board's members. As a result, demand was excused, and the court refused to dismiss the case.

In re Straight Path Communications Inc. Consolidated Stockholder Litigation: Delaware Court of Chancery Awards Nominal Damages After Finding Unfair Process Ultimately Resulted in a Fair Price

In *In re Straight Path Communications Inc. Consolidated Stockholder Litigation,* 2023 WL 6399095 (Del. Ch. Oct. 3, 2023), the Delaware Court of Chancery, in a post-trial opinion, found that the controller, Howard Jonas, drove an unfair process in breach of his fiduciary duty of loyalty by using his controller position to "bully" a committee into the release of certain indemnification claims at a price he unilaterally determined to be proper. However, while the court determined that Jonas's coerced settlement of the indemnification claim involved a "manifestly unfair" process, it concluded that the price paid to release the claim was not unfair because the underlying claim was essentially worthless.

Jonas founded and owned a controlling interest in IDT Corporation, a public company. Despite its public status, IDT was in essence a Jonas family business. IDT owned, among other things, certain litigation assets relating to patent infringement. IDT, however, was reluctant to monetize these litigation assets given the potential risks of counterclaims. As such, IDT spun off Straight Path Communications Inc., a public company, as a vehicle to pursue the litigation assets. As a result of the spin-off, Jonas remained the controller of IDT and became a controller of Straight Path. In addition to the transfer of the litigation assets, for tax reasons, IDT also received a portfolio of broadcast spectrum licenses from IDT, with IDT agreeing to indemnify Straight Path pursuant to a separation and distribution agreement for certain pre-spin losses relating to the licenses. Importantly, for an indemnification claim to be viable under the separation and distribution agreement, Straight Path had to comply with certain notice and consent requirements.

At the time of the spin-off, the parties did not consider the spectrum licenses to be particularly valuable. However, following changes in regulations and demand, the spectrum licenses skyrocketed in value, with Verizon ultimately agreeing to buy Straight Path (sans the litigation assets) for approximately $3.1 billion.

However, prior to the sale to Verizon, Straight Path and its licenses became the subject of a Federal Communications Commission investigation. Notably, the FCC required that license holders demonstrate "substantial service" (i.e., that they can broadcast over the spectrum). As such, when IDT renewed the licenses with the FCC prior to the spin-off, it was required to demonstrate the viability of each license. In an attempt to comply with the FCC's requirements, evidence demonstrated that IDT established temporary installations at each location and then submitted the resulting tests to the FCC as alleged "substantial service" demonstrations.

> **While the court determined that Jonas's coerced settlement of the indemnification claim involved a "manifestly unfair" process, it concluded the price paid to release the claim was not unfair because the underlying claim was essentially worthless.**

Years later, a whistleblower report surfaced about the scheme; the FCC investigated and concluded that IDT's procedures were not in compliance with its regulations. Following negotiations, Straight Path ultimately agreed to settle the FCC investigation. As part of the settlement, Straight Path agreed to pay

the FCC $15 million in penalties, forfeited some of its licenses, and was required to either (i) give up the remaining licenses, (ii) sell the rest of the spectrum assets and pay a portion of the sale proceeds to the FCC, or (iii) pay an additional fine of $85 million. After careful consideration, Straight Path's board of directors determined to sell the company and pay a portion of the proceeds to the FCC.

Prior to the sale, Straight Path formed a committee to consider seeking indemnification from IDT for the costs and settlement of the FCC investigation. The committee believed that, in a sale process for the spectrum licenses, the indemnification claim was unlikely to be valued highly by a buyer. Therefore, it attempted to preserve the claim as a post-sale stockholder asset. However, when Jonas caught wind of the plan to preserve the claim, he used his position as the controller of Straight Path to strong-arm the committee to release the indemnification claims against IDT for $10 million, plus contingent rights to certain profits. The licenses were then sold to Verizon for $3.1 billion, which resulted (as per the terms of the FCC settlement) in hundreds of millions of dollars of the proceeds being paid to the FCC instead of the Straight Path stockholders.

Suit was subsequently brought in the Delaware Court of Chancery on behalf of the class of minority stockholders of Straight Path challenging the committee's decision to settle the indemnification claims against IDT. The stockholder-plaintiffs claimed that the FCC investigation of Straight Path was attributable to pre-spin-off violations of FCC regulations by IDT, making the penalties paid indemnifiable under the terms of the separation and distribution agreement.

However, as alleged by the plaintiffs, Jonas recognized this as a threat to his family's substantial interest in IDT and used his control of Straight Path to settle the indemnification claim at an unfair price, in turn denying the Straight Path stockholders the right to receive, through indemnification, the value turned over to the FCC as penalties. Because Jonas allegedly received a non-ratable benefit from the settlement, the plaintiffs' suit challenged the committee's decision to settle the indemnification claims against IDT under the entire fairness standard, which required the defendants to demonstrate fair process and fair price.

With respect to fair process, the court found that Jonas breached his fiduciary duty of loyalty and damaged the process by "bullying" the committee members and its counsel and threatening to torpedo sale negotiations with Verizon if the indemnification claim was not settled. As the court reasoned, "[t]his campaign of abuse and coercion led the Special Committee to reasonably conclude that it had to settle the Indemnification Claim on Howard's terms or risk an even less favorable outcome for the Company." Accordingly, the court held that the defendants had failed to demonstrate fair process.

With respect to fair price, the court found that Straight Path, by failing to fulfill the notice and consent requirements contained in the separation and distribution agreement with IDT, failed to create a viable indemnification obligation on the part of IDT. Because the indemnification claim was "economically worthless," had the committee successfully preserved the claim for Straight Path's stockholders, that asset would have had no value. Therefore, the court determined that the $10 million defendants paid was not unfair. In so holding, the court was unpersuaded by the plaintiffs' equitable arguments.

Finally, the court examined what a reasonable sale process for a release of the indemnification claim would have achieved, absent the controller imposing an unfair process. After calculating a risk-adjusted value for a viable indemnification claim at around $8.5 million as of the applicable date, the court held that the plaintiffs suffered no damages as a result of the "coerced" $10 million settlement.

Therefore, after years of litigation, the court concluded that although Jonas had breached his duty of loyalty to the Straight Path's minority stockholders by interfering with the committee process, the resulting $10 million payment was entirely fair. Because, however, Jonas breached his duty of loyalty to Straight Path's minority stockholder, the court held that Straight Path's minority stockholders were entitled to nominal damages.

Drafting Merger Agreements and Stockholder Agreements

New Enterprise Associates 14, L.P. v. Rich: **Covenant Not to Sue Cannot Limit Ability to Bring Claims Based on Intentional Misconduct**

In *New Enterprise Associates* 14*, L.P. v. Rich,* 295 A.3d 520 (Del. Ch. 2023), the Delaware Court of Chancery held that contractual covenants not to sue for breach of fiduciary duty can be valid under Delaware law if certain factors are met, but cannot relieve any party of tort liability for intentional harm.

In 2014, the plaintiffs, investment funds (the "Funds") managed by sophisticated venture capital firms, invested in the startup company Fugue, Inc. in exchange for preferred stock. After several years, the Funds encouraged management, and management agreed, to seek a liquidity event involving a sale of the company. After the sale effort proved unsuccessful, the company needed capital, the Funds were not interested in increasing their financial commitment, and management believed that the only viable option was to engage in a recapitalization led by George Rich.

Rich agreed to the recapitalization subject to three conditions: (i) all existing preferred stock became common stock, (ii) Rich and his investor group would receive a new class of Series A-1 Preferred Stock, and (iii) the Funds and other significant investors would execute a voting agreement (the "Voting Agreement"). The Voting Agreement contained a drag-along right providing that if the company's board of directors and the holders of a majority of the preferred stock approved a transaction that met a list of eight criteria, then the signatories to the Voting Agreement must support the transaction (the "Drag-Along Sale"). The Voting Agreement also contained a covenant not to sue Rich or his affiliates or associates over a Drag-Along Sale, including for breaches of fiduciary duty (the "Covenant"). The Funds declined the opportunity to participate in the recapitalization, but accepted Rich's terms and executed the Voting

Agreement. As a result, the company raised roughly $8 million by issuing Series A-1 Preferred Stock to Rich and his investor group.

Shortly thereafter, the company's two independent directors resigned, leaving Rich, Fugue's CEO, and one director designated by the holders of a majority of Series A-1 Preferred Stock, David Rutchik, as the only members of the board. One week later, the three-member board authorized the company to issue another 3,938,941 shares of Series A-1 Preferred Stock to nine entities and individuals, including Rich and Rutchik. Instead of treating the second issuance as a new transaction, the board amended the terms of the recapitalization and allegedly treated the second issuance as part of the original deal. The board also granted large stock options to the three directors.

Amidst the second issuance of Series A-1 Preferred Stock and grant of stock options, a potential acquirer contacted Stella. The company ultimately negotiated the acquisition as a Drag-Along Sale, but the Funds refused to approve the transaction as required by the drag-along provision. Despite this, the company executed the merger agreement and closed the transaction.

Less than three months after closing, the Funds filed suit challenging the Drag-Along Sale and asserting claims for breach of fiduciary duty against the company's board of directors and Rich's related entities as controlling stockholders, arguing in principal that that the Drag-Along Sale was an interested transaction subject to entire fairness review. In response, the defendants moved to dismiss, contending that the Covenant barred the Funds from asserting their claims.

The court began its analysis by explaining that the key issue raised by the defendants' motion was whether contractual covenants not to sue for breach of fiduciary duty are enforceable under Delaware law. The court determined that the Drag-Along Sale met all contractual requirements and triggered the signatories' obligations under the Voting Agreement, which included the Covenant's obligation not to assert claims raised in the complaint. Accordingly, the court determined that it was squarely presented with the question of the Covenant's validity.

The court concluded that contractual covenants not to sue for breach of fiduciary duty can be valid under Delaware law, subject to several important conditions and limitations. The court's reasoning followed three high-level analytical markers. First, the court observed that numerous precepts of contract law, corporate law, and common law suggest that the scope of directors' fiduciary duties can be modified, in each case supporting the notion that limitations on the right to sue for breach of fiduciary duty are permissible. The court began with contract law, noting that fiduciary duties of trustees and agents, which owe fiduciary duties analogous to those owed by corporate directors, can be modified by contract. Turning to corporate law, the court observed that the scope and orientation of fiduciary duties can be tailored to the extent permitted by the Delaware General Corporation Law, including under Sections 102(b)(7) (permitting charter provisions that foreclose liability for breach of the fiduciary duty of care), Section 122(17) (permitting charter provisions that foreclose liability for loyalty claims premised on theft of corporate opportunity), Section 102(a)(3) (permitting charter provisions that reorient fiduciary focus by narrowing the corporation's purpose), Section 141(a) (permitting charter provisions that reorient fiduciary focus by altering directors' authority to manage the corporation's business and affairs), Section 145 (permitting charter and bylaw provisions that shield fiduciaries from the monetary consequences of breach), Section 327 (foreclosing breach of fiduciary duty claims to the extent brought by stockholders who fail to satisfy the contemporaneous ownership requirement), and Section 367 (foreclosing breach of fiduciary duty claims brought by stockholders of public benefit companies who fail to meet certain qualifications).

The court listed several common law rules that likewise limit stockholders' ability to challenge fiduciary misconduct, including that fiduciary duties are not owed with respect to stockholders' special contractual rights and that stockholder ratification of certain corporate acts restores the business judgment rule as the standard of review applicable to a transaction that would otherwise be subject to a higher standard. The court explained that the fact that Delaware law permits both fiduciary tailoring and limitations on stockholders' ability to challenge fiduciary misconduct in many contexts suggests that covenants not to sue should not be facially invalid.

As a matter of Delaware public policy, a forward-looking covenant not to sue for breach of fiduciary duty cannot bar a stockholder from bringing claims for intentional or reckless misconduct.

Second, the court stated that public policy supports the same conclusion. In particular, the court noted that Delaware law favors private ordering, is generally contractarian in nature, and recognizes that stockholder agreements should generally give stockholders greater leeway to forego rights (than, say, the corporation's governing documents). Third and finally, the court addressed miscellaneous arguments buttressing its conclusion—including that individuals can waive important rights like the right to a trial by jury that are arguably more fundamental than the right to sue for breach of fiduciary duty. After undertaking this thorough analysis, the court determined that the Covenant was not facially invalid.

However, and importantly, the court clarified that not all covenants not to sue for breach of fiduciary duty will be facially valid. Relying on *Manti Holdings, LLC v. Authentix Acquisition Co*. and other Delaware authorities, the court held that such covenants will only be valid if they meet a two-part inquiry. First, the covenant must be narrowly tailored to address a specific transaction. Second, the covenant must survive scrutiny for reasonableness pursuant to factors that include "(i) the presence of a written contract, (ii) the clarity of the waiver, (iii) the stockholder's understanding of the waiver's implications, (iv) the stockholder's ability to reject the provision, (v) the existence of bargained-for consideration, and (vi) the stockholder's sophistication."

The *NEA* court held that this case presented "an optimal scenario for enforcement" under this inquiry based on considerations including the Covenant's

clear and specific terms, the Funds' sophistication and "repeat player" status, the Covenant's inclusion in the Voting Agreement, which tracks the form Voting Agreement of the NVCA (of which the Funds were a member), and the fact that the Covenant was part of the exchange that induced Rich to lead the recapitalization and other investors to participate in the recapitalization at a time when the Funds were "dominant incumbents in the cap table" and could have blocked the recapitalization if they did not like it. Further, the court explained that the Covenant was appropriately narrow because it only applied to transactions subject to the drag-along right. The court cautioned that its decision does not mean that similar provisions will always be enforced by the Delaware courts and analogized the Covenant to a covenant not to compete, explaining that parties should expect both types of covenants to be examined with similar scrutiny.

The court's analysis concluded with an important clarification and caveat: as a matter of Delaware public policy, a forward-looking covenant not to sue for breach of fiduciary duty cannot bar a stockholder from bringing claims for intentional or reckless misconduct. And because the court found that the facts pled in the complaint supported a reasonable inference "that the defendants could have acted intentionally and in bad faith to benefit themselves and harm the common stockholders during the lead up to the Drag-Along Sale," the court ultimately denied the defendants' motion to dismiss the claims based on the Covenant.

In re Edgio, Inc. Stockholders Litigation: Court of Chancery Holds *Corwin* Is Inapplicable to Claims Subject to Judicial Review Under *Unocal*

In *In re Edgio, Inc. Stockholders Litigation*, 2023 WL 3167648 (Del. Ch. May 1, 2023), the Court of Chancery dealt with the interplay between two longstanding corporate law doctrines—*Unocal* enhanced scrutiny for review of alleged entrenchment devices and the cleansing effect of stockholder approval under *Corwin*. The court held that *Corwin* does not apply to claims that seek to enjoin defensive measures taken by a board to entrench themselves in office, and that *Unocal* enhanced scrutiny is the correct standard for reviewing such claims.

Limelight Network, Inc., a provider of network services for delivering digital media content and software, experienced a significant decline in its stock price from 2020 to 2021. The company had hired advisors specializing in turnaround work to assist it with its performance, but the company's stock price continued to struggle. Market analysts speculated that the company may be targeted by activist investors, but instead, Limelight was approached by Apollo Global Management, Inc. about a potential combination with one of Apollo's portfolio companies, Edgecast, Inc. After Limelight conducted due diligence and negotiated terms with Edgecast's parent company, College Parent, L.P., Limelight entered into an agreement with College Parent to acquire Edgecast in exchange for Limelight stock. As part of the deal, Limelight changed its name to Edgio, Inc., and College Parent became the owner of 35% of Edgio's outstanding stock.

College Parent also agreed to enter into a stockholders' agreement with Edgio upon completion of the acquisition. Under the stockholders' agreement, among other things, College Parent was (i) required to vote in favor of the Edgio board's recommendations with respect to director nominations and against any nominees not recommended by the board, (ii) required to either vote in favor of the board's recommendation or pro rata with all other Edgio stockholders on other non-routine matters presented to the stockholders, and (iii) restricted from transferring its shares for two years unless it obtained the consent of the Edgio board, or the transfer was in connection with a third-party tender offer, business combination, or other similar transaction recommended by the Edgio board, provided that, after that two-year period expired, College Parent was still prohibited from transferring its shares to a competitor of Edgio or any investor listed in the most recently published "SharkWatch 50" list for an additional one-year period.

The acquisition of Edgecast required approval of the Limelight stockholders. Limelight disclosed the terms of the stockholders' agreement in an 8-K, as well its

proxy statement soliciting stockholder approval of the acquisition. The Limelight stockholders approved the acquisition, and the deal closed shortly thereafter.

A month after closing, certain stockholders filed a complaint alleging that the directors of Limelight (now Edgio) breached their fiduciary duties by "prioritizing their own personal, financial, and/or reputational interests and approving the Acquisition and the Stockholders' Agreement, which they used to entrench themselves." The plaintiffs argued that implementation of the provisions in the stockholders' agreement discussed above effectively established a 35% voting block that protected the Edgio board from stockholder activism. As a remedy, the stockholders requested that the court enjoin the enforcement of certain provisions in the stockholders' agreement. The defendants moved to dismiss the complaint, arguing that under *Corwin v. KKR Financial Holdings LLC,* the business judgment rule applied because a fully informed and uncoerced majority of the Limelight stockholders approved the acquisition and the stockholders' agreement. The court then requested supplemental briefing on the issue of whether *Corwin* could cleanse a post-close claim to enjoin enduring entrenchment devices.

In its opinion on the motion to dismiss, the court held that *Corwin* is not applicable to a claim for injunctive relief governed by *Unocal*. Examining *Unocal*'s historical development, the court reasoned that *Unocal*'s principle purpose is to provide a framework for evaluating whether an injunction should issue against defensive measures taken by a board and that its application in a damages action is at best unclear. The court then acknowledged that under *Corwin* a fully informed and uncoerced stockholder vote can cleanse certain board actions.

In examining the two doctrines side-by-side, the court explained that the *Corwin* ruling referred to post-closing damages claims only, not claims for injunctive relief. Additionally, the court noted that the Delaware Supreme Court recently reiterated in *Morrison v. Berry* that *Corwin* only addressed a post-closing damages action, and that careful application of *Corwin* is important because of its often case-dispositive impact on the standard of review. The

The court reasoned that *Unocal*'s principle purpose is to provide a framework for evaluating whether an injunction should issue against defensive measures taken by a board and that its application in a damages action is at best unclear.

court also noted that the *Corwin* decision did not reference prior Delaware Supreme Court precedent that suggested stockholder votes could not cleanse claims for injunctive relief. The court referenced the Supreme Court's decision in *In re Sante Fe Corporation Shareholder Litigation*, where the Supreme Court held that a stockholder vote approving a merger could not ratify a board's adoption of unreasonable and disproportionate defensive measures to prevent another potential bidder from acquiring the company. The Supreme Court's decision focused on the broad purposes of the *Unocal* and *Revlon* doctrines in protecting the stockholder franchise from unilateral board action. The court determined that the Supreme Court's failure to engage with the holding in *Santa Fe* in *Corwin* signaled an implicit preservation of the view that a stockholder vote cannot cleanse a *Unocal* or *Revlon* claim seeking injunctive relief.

The court also rejected the defendants' reliance on two pre-*Corwin* Supreme Court decisions that the defendants claimed supported the application of *Corwin* to claims for injunctive relief. The first of those cases dealt with defensive measures implemented in a company's charter and bylaws and approved by stockholders at an annual meeting, and the second addressed defensive measures implemented in a charter amendment that was again approved by the company's stockholders. In both cases, the Supreme Court held that *Unocal* did not apply because there was an informed and uncoerced stockholder vote approving the board action, and thus the board was not acting unilaterally to adopt the defensive measures at issue. In this case, the court recognized that such decisions seemed to conflict with its reading of *Corwin*, but determined not to apply those decisions and to instead follow *Corwin* and *Morrison*, both of which were more recent decisions of the Supreme Court and did not rely on these pre-*Corwin* cases. Therefore, the court held that *Corwin* is not applicable to a claim for injunctive relief governed by *Unocal*.

The court then held that the claim brought by the plaintiffs against the Edgio directors, a claim for injunctive relief under *Unocal*, was not subject to *Corwin* cleansing. The court determined that the plaintiffs had sufficiently pled facts that supported their claim that enhanced scrutiny under *Unocal* applied. The complaint alleged that the provisions of the stockholders' agreement, particularly the requirement that College Parent, a 35% holder, vote with the board's recommendations for director nominees, were defensive measures that protected the board from stockholder activist threats. And while none of the alleged facts indicated that the Edgio board adopted the defensive measures in response to an active threat, the plaintiffs had alleged that the company was dealing with significant financial difficulty and was a target for activists. Therefore, the court held that a pleading stage inference could be made that the board adopted the defensive measures with the subjective intent of defending against activist investors, and thus *Unocal* enhanced scrutiny applied. Because enhanced scrutiny applied, and the defendants had conceded that the complaint should only be dismissed if the business judgment rule applied, the court denied the motion to dismiss.

Crispo v. Musk: Court of Chancery Addresses Enforceability of "*ConEd* Provisions" Under Delaware Law

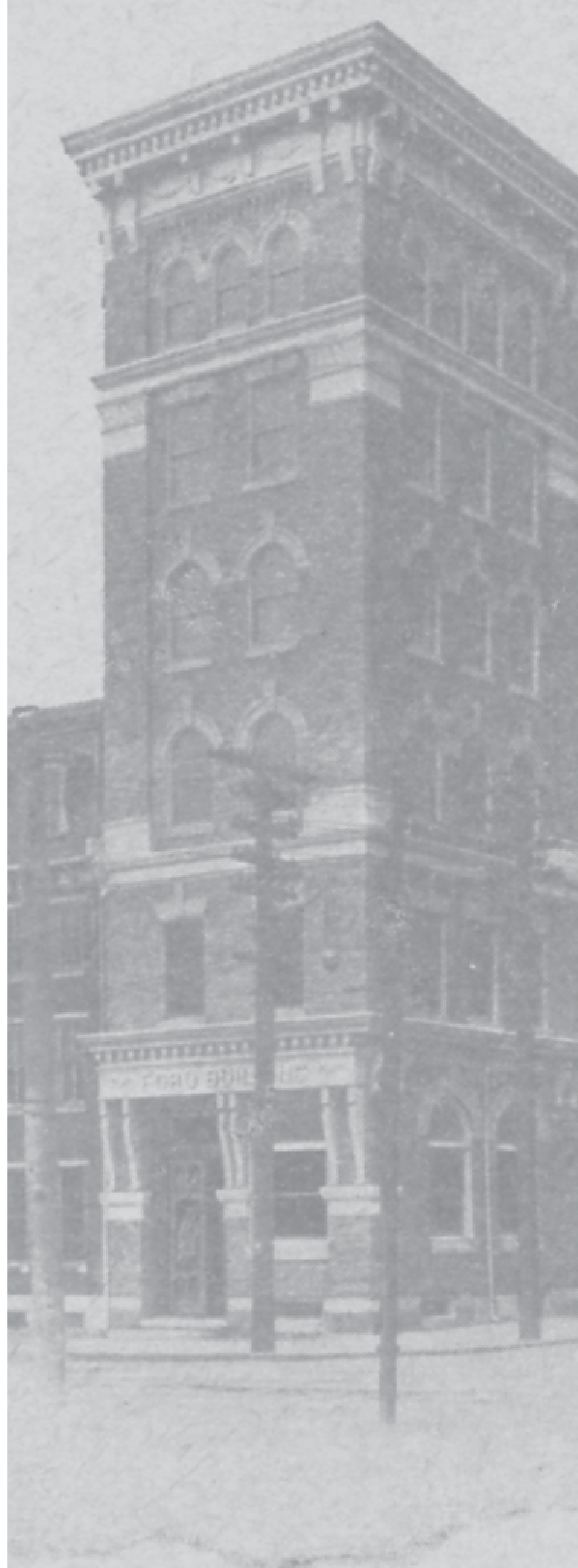
In *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023), an opinion relating to Elon Musk's acquisition of the company then known as Twitter, Inc., the Delaware Court of Chancery rejected a mootness fee petition brought by a former Twitter stockholder. The former stockholder, who brought suit against Musk and his affiliates (the "Buyer Group") seeking specific performance and damages after the Buyer Group attempted to terminate a merger agreement, sought the fee award on grounds that the stockholder's

claims contributed to Musk's decision to change course and consummate the merger. After reviewing the terms of the merger agreement, the court rejected the mootness fee petition on grounds that the stockholder's claims were not meritorious when filed, reasoning that either the stockholder lacked third-party beneficiary status or the stockholder's ability to exercise his rights as a third-party beneficiary, if any, never vested.

In early 2022, the Buyer Group signed a merger agreement to acquire Twitter, but attempted to terminate the merger agreement shortly thereafter. In response, Luigi Crispo, a Twitter stockholder, sued the Buyer Group in the Court of Chancery and asserted two causes of action—(i) Musk breached his fiduciary duties as a controller of Twitter, and (ii) the Buyer Group had breached the merger agreement—and sought specific performance and damages. Thereafter, the Buyer Group determined to consummate the deal. The plaintiff alleged that his lawsuit induced Musk to close and sought a mootness fee to compensate him for the benefit his efforts conferred on Twitter's stockholders.

A precondition to receiving a mootness fee under Delaware law is proving that the plaintiff's underlying claim was meritorious when filed. Since the stockholder was not a party to the merger agreement, the merits of his claim rested on whether he had standing to sue the Buyer Group by virtue of third-party beneficiary status.

The court began its analysis by observing that the merger agreement contained two seemingly inconsistent provisions: a "No Third-Party Beneficiaries Provision" and a "Lost-Premium Provision." The No Third-Party Beneficiaries Provision provided, subject to certain express carve-outs, that the merger agreement "shall not confer upon any Person other than the parties hereto any rights or remedies hereunder[.]" On the other hand, the Lost-Premium Provision provided that, in the event of a breach, the buyers will be liable for "the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders ... taking into consideration all relevant matters, including lost stockholder premium[.]"



In analyzing the effect of the No Third-Party Beneficiaries Provision on the Lost-Premium Provision, the court first reviewed applicable legal standards providing that third-party beneficiary status can be expressly or impliedly limited. The court also considered that Delaware courts are generally reluctant to confer third-party beneficiary status on stockholders, given, among other things, Delaware's board-centric model and the potential proliferation of stockholder suits.

Next, the court reviewed the Lost-Premium Provision in the context of so-called "*ConEd* provisions." *ConEd* provisions, which were developed by M&A practitioners after (and owe their name to) the Second Circuit Court of Appeals' decision in *Consolidated Edison, Inc. v. Northeast Utilities*, are intended to provide that a buyer can be liable for damages—including for the premium lost by the target's stockholders—if a transaction is not consummated due to the buyer's breach of the agreement. The court explained that *ConEd* provisions generally take one of three forms: (i) providing stockholders with third-party beneficiary status, (ii) appointing the target as the stockholders' agent to recover damages, or (iii) like the Lost-Premium Provision at issue in *Crispo*, "defin[ing] damages resulting from breach in terms of lost premia." Citing relevant commentary, the court noted that the first approach raises practical problems for both parties for the same reasons that Delaware courts are reluctant to confer third-party beneficiary status to stockholders, and that the second approach rests on "shaky ground" under agency law "because there is no legal basis for allowing one contracting party to unilaterally and irrevocably appoint itself as an agent for a non-party."

The court then evaluated the effect of *ConEd* provisions using the third approach like the Lost-Premium Provision. Applying principles of contract law, the court determined that a provision purporting to define a target company's damages to include lost-premium damages cannot be enforced by the target company because the merger consideration is paid to the stockholders (not the target) and, as a result, the target has no expectation of lost-premium damages. For that reason, the court reasoned that any recovery by the target would be tantamount to an unenforceable contractual penalty and concluded that a provision defining a buyer's damages to include a lost premium is only enforceable if it grants stockholders third-party beneficiary status.

Next, the court found that there were two reasonable interpretations of the merger agreement. One interpretation is that the Lost-Premium Provision is unenforceable because the merger agreement does not confer third-party beneficiary status on stockholders. The court observed that the carefully drafted No Third-Party Beneficiaries Provision could be interpretated as a blanket prohibition disclaiming third-party beneficiary status to all stockholders, and added that Delaware law is generally reluctant to confer third-party beneficiary on stockholders in the M&A context.

A provision purporting to define a target company's damages to include lost-premium damages cannot be enforced by the target company because the merger consideration is paid to the stockholders and the target has no expectation of lost-premium damages.

The other interpretation is that the merger agreement grants stockholders third-party beneficiary status that only vests where specific performance is no longer available and for the limited purpose of seeking lost-premium damages. This second interpretation, the court reasoned, complied with the "cardinal rule" of contract construction that a court should attempt to give effect to all contract provisions. However, since third-party beneficiary status can be expressly or impliedly limited by contractual language, the court determined that the parties did not intend to vest stockholders with the right to enforce lost-premium damages while the remedy of specific performance was still available. Therefore, any third-party beneficiary status conferred on stockholders would not vest while the remedy of specific performance was still available (which was the case when the former stockholder originally filed his claim).

Under either interpretation, the court found that the former stockholder would have lacked standing to enforce the merger agreement at the time he filed his complaint. Therefore, the stockholder's mootness fee was denied.

Challenges to Provisions of the Certificate of Incorporation and Bylaws

Colon v. Bumble, Inc.: Court of Chancery Upholds Identity-Based Voting Provision

In *Colon v. Bumble, Inc.*, 2023 WL 5920100 (Del. Ch. Sept. 12, 2023), the Court of Chancery dismissed a challenge to a charter provision providing that each share of stock would carry one vote unless the share was owned by a "Principal Stockholder," in which case it would carry ten votes. The defined term "Principal Stockholders" included the parties to a specific stockholders' agreement, and those parties included the company's founder and financial sponsor. A Bumble stockholder challenged this provision, claiming that this "identity-based voting" violates Sections 212(a) and 151(a) of the DGCL.

Bumble adopted the challenged provision in connection with reorganizing the company into a so-called "Up-C structure" in connection with its February 2021 initial public offering. A standard Up-C structure typically involves insiders holding non-economic voting shares in a public holding corporation and economic units in an operating limited liability company controlled by the corporation. Bumble's charter sought to combine the benefits of an Up-C structure with a dual-class, high vote/low vote structure by giving the insiders who held Class A common stock more voting power than non-insider holders of the same class of Class A common stock. The net effect of the challenged provision was to entitle Bumble's founder and financial sponsor to control 92.2% of Bumble's outstanding voting power. The plaintiff challenged the provision more than eighteen months after the IPO, and the parties cross-moved for summary judgment on a pure question of law: whether the provision violates the DGCL by providing a different number of votes to shares of the same class of capital stock solely by virtue of who holds the shares.

The Court of Chancery found that the challenged provision was permitted under the DGCL. First, the court explained why identity-based voting is consistent with Sections 151 and 212 of the DGCL. The court observed that Section 151 permits stock's "special attributes, including voting rights" to "depend on facts ascertainable outside the certificate of incorporation" and that Section 212(a) provides for a statutory default vote of one vote per share that can be modified in the certificate of incorporation. These provisions together, the court reasoned, allow for charter provisions to provide rights (including voting right) based on a formula that depends on facts ascertainable outside of the charter—including, for example, the identity of the holder. Importantly, the court expressly held that "having the level of voting power turn on the identity of the owner is permissible."

The court further explained that prior Delaware cases—including *Providence & Worcester Co. v. Baker* (which involved scaled voting provision that depended on the number of shares held), *Williams v. Geier* (which involved a tenure-based voting mechanism), and *Sagusa v. Magellan Petroleum Corp.* (which involved a per capita voting provision)—buttress this conclusion because in each case, the court validated a voting provision that depended on a fact ascertainable outside of the charter. While these cases did not involve provisions that operated exactly like the challenged provision in Bumble's charter, the court reasoned that "the starting point" of each challenged provision "was the identity of the owner."

The court next turned to the plaintiff's Section 212(a) argument, which relied on *Providence*, a 1977 opinion in which the Delaware Supreme Court upheld a "scaled voting" provision providing that a share's voting power could be limited depending on how many shares the holder owned such that no single shareholder controlled more than a specified percentage of the corporation's outstanding voting power. The *Providence* court had reasoned that differential voting within the same class of stock

was permissible because Section 212(a) permits the charter to alter the "voting rights of the stockholder" but not "the voting rights of the stock per se." The Court of Chancery disagreed with that interpretation of Section 212(a), including because (i) it is not supported by Section 212(a)'s plain language as a default rule, and (ii) "Delaware law correctly views [voting] rights as appurtenant to the shares" rather than the stockholder. However, the court concluded that even if *Providence*'s focus on shareholder rights were true ("the distinction is a false one, but to the extent it exists"), Bumble's provision satisfied *Providence*'s rule because the provision was framed as an adjustment to the stockholders' voting rights.

Section 151 permits stock's "special attributes, including voting rights" to "depend on facts ascertainable outside the certificate of incorporation," and Section 212(a) provides for a statutory default vote of one vote per share that can be modified in the certificate of incorporation.

Next, the court addressed the plaintiff's argument that per the lower court's opinion in *Providence*, "[a] class of stock can use a formula, but the formula must generate the same result for all shares," or, alternatively, a formula must give "any holder an opportunity to gain the benefits of the superior voting rights" and "cannot create a closed set of owners entitled to superior voting rights." Further, the plaintiff argued that if a "formula does not create the same outcome for each share in the class, then the provision creates *de facto* sub classes in violation of Section 151(a)." The *Bumble* court rejected this argument, observing that each of *Providence*, *Williams*, and *Sagusa* "upheld formulas that applied identically across all shares but generated different outcomes for particular shares," a concept that can apply to "any special attribute" of the shares. The court further stated that "[n]othing in Section 151(a) prohibits a provision that creates a closed set of holders who can exercise certain rights." Therefore, the court concluded that Bumble's identity-based voting provision did not violate Section 151(a) and was permitted under Delaware law.

Kellner v. AIM ImmunoTech Inc.: Court of Chancery Invalidates Advance Notice Bylaw Provisions

In *Kellner v. AIM ImmunoTech Inc.*, 2023 WL 9002424 (Del. Ch. Dec. 28, 2023), the Delaware Court of Chancery upheld an incumbent board's rejection of a group of dissidents' director nominees for a corporation's 2023 annual meeting, finding that the dissidents failed to comply with the requirements of the corporation's advance notice bylaws. In addition, the court found that certain portions of the corporation's advance notice bylaws were invalid.

The defendant, AIM Immunotech Inc., was a Delaware corporation with a stockholder base primarily composed of retail investors. In summer 2020, two stockholders, Franz Tudor and Todd Deutsch, initiated a campaign of activism through a series of communications to AIM directors. In spring 2021, Tudor informed AIM stockholder Walter Lautz that he planned to oust the board with two potential director nominees: Daniel Ring and Robert Chioni. Months later, at Tudor's direction, Lautz submitted a notice to the company nominating Ring and Chioni to the board. After AIM rejected Lautz's notice for alleged non-compliance with federal securities laws, Tudor, Deutsch, and fellow AIM stockholder Ted Kellner hatched a more organized plan. The three recruited a new stockholder nominator and nominee and submitted a new nomination notice. The notice was again rejected—this time, for failure to satisfy AIM's advance notice bylaws. AIM's incumbents were re-elected.

In March 2023, the AIM board began discussing amending AIM's advance notice bylaws. Shortly thereafter, legal counsel provided the board with proposed amendments to the advance notice bylaws, and after determining that the provisions were not "preclusive or unreasonably restrictive," the board unanimously adopted the amendments. At this point, Chioni had replaced Tudor in the dissident group and

Deutsch, Kellner, and Chioni reinitiated their plan to launch a proxy contest.

On August 3, 2023, Kellner's legal counsel submitted a notice of Keller's intent to nominate himself, Chioni, and Deutsch as director candidates for election at AIM's 2023 annual meeting. After three meetings and input from legal counsel, the board

> **The court undertook a thorough review of six particular bylaw provisions, determining that four provisions unreasonably restricted stockholders' nomination rights or were an otherwise disproportionate response.**

rejected Kellner's notice on grounds that they violated the advance notice bylaws. Kellner subsequently filed suit seeking a mandatory injunction requiring the company to put forth his nominees and an order invalidating the amended advance notice bylaws in their entirety. A trial was held, and the Court of Chancery issued a written ruling on the merits.

The court first took up Kellner's argument that the amended advance notice bylaws were invalid. The court applied the new equitable standard of review set forth in the Supreme Court's recent *Coster v. UIP* decision, which established that a modified *Unocal* standard governs challenges to board interference with director elections or stockholder votes in contests for corporate control. The *Coster* standard requires defendants to prove that (i) the board faced a threat to an important corporate interest, and (ii) the board's response was reasonable and proportionate in relation to the threat posed.

The court held that the defendants satisfied the first *Coster* element because the board proved it faced a legitimate threat: the risk that stockholders could face potentially abusive and deceptive tactics in the upcoming director election. Per the court, the board appropriately concluded that this threat existed

following consideration of advice from counsel, the 2022 proxy contest campaign that itself featured deceptive nomination tactics, and the apparent likelihood that the 2023 contest was spurred by the same dissidents.

However, the court found that the defendants failed to satisfy *Coster*'s second element because the board's response to that legitimate corporate objective—adopting the amended advance notice bylaws—was not reasonable and proportionate. The court undertook a thorough review of six particular bylaw provisions, determining that four provisions unreasonably restricted stockholders' nomination rights or were an otherwise disproportionate response. The four bylaw provisions that the court invalidated were:

- An "AAU" provision requiring disclosure of all agreements, arrangements, or understandings that a nominating stockholder or any "Stockholder Associated Person"— defined to include (at a high level) (i) persons acting in concert with the nominating holder, (ii) affiliates and associates of the nominating holder, and (iii) immediate family members of the nominating holder or its affiliates and associates—had with any holder, nominee (or immediate family member, affiliate, or associate thereof), person acting in concert with any Stockholder Associated Person, holder, nominee (or immediate family member, affiliate, or associate thereof), or "other person or entity." The court held that while this bylaw served the legitimate end of helping the board and stockholders learn the identity and motivations of nominees' proponents, it went "off the rails" by being vague and overbroad.
  The court observed that the "interplay of the various terms" "acting in concert," "Associate," "Affiliate," and "immediate family" within the Stockholder Associated Person definition "cause[d] them to multiply, forming an ill-defined web of disclosure requirements" that led to absurd results. However, the court declined to invalidate a term within the AAU provision requiring disclosure of all AAUs within the prior twenty-four months on grounds that it appropriately sought to thwart the same sort of

gamesmanship that the dissidents had attempted during their 2022 campaign.

- A provision requiring disclosure of all AAUs between the proponent or a Stockholder Associated Person, on the one hand, and any stockholder nominee, on the other hand, "regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years." The court held that this bylaw was unreasonable because it suffered from the same vagueness and overbreadth flaws as the AAU provision and "impose[d] ambiguous requirements across a lengthy term."

- A provision requiring disclosure of all known supporters of the nomination. The court determined that this provision was unreasonable because its limitations were so ambiguous that the board could reject a good faith response on grounds that would be difficult to predict. The court noted, however, that limiting such a provision to known *financial* supporters would correct this shortcoming as per *Rosenbaum v. CytoDyn Inc.*

- A provision requiring disclosure of the nominating stockholder's ownership of all stock and "beneficial, synthetic, derivative, and short positions" of the corporation, as well as those of all Stockholder Associated Persons, immediate family members, and persons acting in concert with a nominee. The court reasoned that although provisions requiring disclosure of synthetic equity positions are generally "perfectly legitimate" because they close loopholes created by federal securities laws, AIM's provision—which contained over 1,099 words and 13 subparts—was "indecipherable" and "sprawl[ed] wildly beyond this purpose" by requiring, among other things, "disclosure of 'legal, economic, or financial' interests 'in any principal competitor'" of the corporation.

Two challenged provisions were deemed reasonable and proportionate to the threat. The first required disclosure of the dates of first contact among those involved in the nomination effort, which proved reasonable because it was easy to satisfy and furthered the legitimate end of enabling the board to make an informed recommendation to stockholders. The second required nominees to submit a completed questionnaire within five business days of the proponent's request for the questionnaire's form from the corporation. The court held that this was a "common" provision and rejected the dissidents' argument that the five-business-day period would enable the board to make unreasonable revisions, noting that those types of challenges would be better asserted as challenges to the board's enforcement of the bylaw.

Next, the court turned to Kellner's claim that the board had wrongfully applied the advance notice bylaws to reject his three nominees. The court rejected this claim on grounds that Kellner's notice violated AIM's advance notice bylaws, and the board's decision to enforce them was equitable under the *Coster* standard. The court determined that Kellner's notice violated, among other provisions, AIM's AAU bylaw because it falsely stated that before July 2023, no decision had been made for Kellner's three nominees to work together to advance nominations when in fact the effort had begun long before then. And the court found the board's enforcement of the bylaw equitable given, among other factors, the board's diligent evaluation of the issue with assistance from counsel in order to promote the legitimate ends of evaluating nominees and enabling stockholders to cast informed votes. The court also cited the dissidents' history of deploying deceptive tactics to shield nominees' true proponents as supporting this result.

Validation of Defective Corporate Acts

In re Lordstown Motors Corp.: Court of Chancery Ratifies "Defective Corporate Acts" Under Section 205 of the DGCL

In *In re Lordstown Motors Corp.*, 290 A.3d 1 (Del. Ch. 2023), the Court of Chancery addressed a petition for relief by Lordstown Motors Corp., a former special

purpose acquisition company ("SPAC"), under Section 205 of the DGCL to validate an amendment to its certificate of incorporation to increase the number of authorized shares in connection with its de-SPAC merger and shares of its capital stock issued in reliance on the validity of the amendment. The court granted the relief and indicated that such relief would be available to similarly situated companies.

In a preceding opinion, *Garfield v. Boxed, Inc.*, a similarly situated former SPAC, Boxed, Inc., had sought stockholder approval to amend its certificate of incorporation to, among other things, increase the number of authorized shares of stock of Boxed in connection with a de-SPAC transaction. Before the stockholder vote, a stockholder plaintiff asserted that the disclosed voting standard—which provided that the amendment required approval by a majority of all outstanding shares—was wrong because Section 242(b)(2) of the DGCL provided the holders of Class A common stock with the right to vote on the amendment as a separate class. Boxed responded by amending its merger agreement and supplementing its disclosure documents to seek a separate class vote of the Class A stockholders on the amendment.

Thereafter, the plaintiff sought a fee award in the Court of Chancery for the plaintiff's role in providing a corporate benefit to Boxed by ensuring that the proper vote on the amendment was obtained. In determining whether the plaintiff had conferred a corporate benefit worthy of fees and expenses, the court considered whether the plaintiff's demand was meritorious when filed, which in turn hinged on whether the Class A and Class B shares were "classes" or "series" of common stock, as only the former are entitled to vote separately as a class on share increase amendments under Section 242(b)(2). Noting, among other things, that the certificate of incorporation only used the word "class" and not "series" to describe the authorized common shares, the court concluded that the two stock types were classes and that a class vote was required. Accordingly, the court held that the plaintiff's claim was meritorious when filed and awarded the plaintiff $850,000 in fees and expenses.

The *Boxed* opinion had widespread implications because many de-SPAC transactions conducted before *Boxed* involved charter amendments whose voting standard hinged on the same language used in Boxed's charter and similarly did not seek a separate Class A stockholder vote. Many such companies filed petitions in the Delaware Court of Chancery shortly after the opinion in *Boxed* was issued, requesting validation of both the charter amendments that were adopted as part of these de-SPAC mergers and the stock issued in reliance on those amendments. These companies generally claimed that the uncertainty regarding their capital structure because of the *Boxed* opinion caused various forms of harm, from difficulty engaging in equity financings, to obtaining auditor approval of financial statements for 10-K filings, and even the possibility of stock exchange delisting. Lordstown was the first of these petitioners, and the court explained that its reasoning in *Lordstown* would apply to similarly situated companies' petitions as well.

The court, after reviewing the scope of its authority under Section 205 to determine the validity of a defective corporate act or the validity of a corporation's stock, stated that Lordstown's adoption of the charter amendment and subsequent stock issuances in reliance on the amendment are the precise type of corporate acts that the statute was intended to address. The court stated that if the charter amendment was not validly adopted, then the subsequently issued shares would not have been authorized because Lordstown would have issued more shares than its charter allowed.

The court reviewed the five factors set forth in Section 205 that guide the court's determination of whether to exercise its discretion to validate a defective corporate act. The court observed that (i) Lordstown had completed the share increase amendment in the good faith belief that doing so complied with its existing certificate of incorporation and the DGCL; (ii) Lordstown and other third parties had consistently treated the potentially defective acts as valid by, for example, disclosing that the additional shares were outstanding or by purchasing the additional shares, all of which would be unauthorized if the charter amendment was invalid; (iii) no legitimate harm would result from validating the acts, including because no stockholders had objected and the Court of Chancery has held in past cases that

Following the *Lordstown* opinion, the court issued a number of orders granting the same relief to over sixty other similarly situated former SPACs, in each case relying on the reasoning in *Lordstown*.

plaintiffs who challenge Section 205 relief were entitled to no fee awards; (iv) absent validation, a number of parties would face harm because stockholder votes would be called into question, Lordstown may be unable to make public filings, Lordstown could face stock exchange delisting, and, more immediately, Lordstown had pending equity financing transactions that could be sidetracked due to Lordstown's inability to certify the number of shares outstanding; and (v) validation is consistent with Section 205's purpose to provide a means to remedy a defective corporate act that is otherwise incurable. The court further considered that validation under Section 204—which requires the current stockholders of the company to vote in favor of such validation—was not practical because it was unclear which stockholders could participate in the vote due to share tracing issues inherent in public markets.

Accordingly, the court granted the relief requested by Lordstown and entered an order validating both the share increase amendment and all additional stock issued in reliance on the effectiveness of the amendment. Following the *Lordstown* opinion, the court issued a number of orders granting the same relief to over sixty other similarly situated former SPACs, in each case relying on the reasoning in *Lordstown*.

Mootness Fees

Anderson v. Magellan Health, Inc.: Raising the Standard for Awarding Mootness Fees in Certain M&A Disclosure Cases

In *Anderson v. Magellan Health, Inc.*, 298 A.3d 734 (Del. Ch. 2023), the Delaware Court of Chancery raised the standard for awarding mootness fees in settled M&A disclosure cases that resulted in supplemental disclosures, holding that supplemental disclosures must be "plainly material" to justify mootness fee awards. In so holding, the court departed from a prior ruling in *In re Xoom Corp. S'holder Litig.*, which held that mootness fee awards were appropriate for supplemental disclosures that were merely "helpful."

In late 2018, Centene, a publicly traded healthcare company, expressed interest in acquiring Magellan, a managed healthcare provider, with the companies entering into a confidentiality agreement in early January 2019. After this, Magellan's stock price spiked and Centene determined not to pursue a transaction with Magellan at that time.

With Centene no longer interested, Magellan contacted multiple potential buyers. Of those contacted, twenty-four entered into confidentially agreements with Magellan containing so-called "don't-ask-don't waive provisions" that prohibited the bidder from making any public or private requests to waive standstill restrictions. Each confidentially agreement was in effect for two years from the date of signing. By the end of March 2019, Magellan had received nine indications of interest, none of which resulted in an offer to acquire the whole company.

In May 2020, Centene expressed renewed interest in acquiring Magellan and, in August 2020, submitted an offer. Magellan determined not to conduct an additional market check, reasoning that the 2019 process supplied sufficient information regarding the interest of potential buyers. In November 2020, following discussions and multiple rounds of revised offers, Centene submitted its best and final offer of $95 per share in cash. Following the receipt of Centene's November offer, Magellan determined to negotiate exclusively with Centene. In January 2021, Magellan and Centene executed a merger agreement. At that time, six of the confidentiality agreements remained in effect (five of which contained don't-ask-don't-waive provisions). Magellan scheduled a stockholder vote to approve the merger and distributed the accompanying proxy to its stockholders.

A Magellan stockholder filed suit in the Delaware Court of Chancery seeking to enjoin the stockholder vote and merger. The stockholder alleged that the don't-ask-don't-waive provisions impeded the deal process and that the related stockholder disclosures were materially misleading as they did not adequately disclose the don't-ask-don't-waive provisions. Shortly thereafter, the stockholder agreed to dismiss the lawsuit as moot in exchange for Magellan waiving some of the remaining don't-ask-don't-waive provisions and issuing supplemental disclosures. In March 2021, after no other bidder emerged, Magellan's stockholders voted to approve the merger.

Following dismissal of the action, the parties were unable to agree on a fee amount. The plaintiffs petitioned the court for an award of $1,100,000, whereas Magellan requested fees in the range of $75,000 to $125,000. The court sided with Magellan, ultimately awarding $75,000 in fees and expenses.

Under the corporate benefit doctrine, mootness fees are appropriate where (i) the suit was meritorious when filed, (ii) the defendant took action that produced a corporate benefit before judicial resolution, and (iii) the suit and the benefit are causally related. In addition, the court must make an independent determination of the reasonableness of the amount requested. The court's analysis focused on the latter reasonableness inquiry.

In determining the reasonableness of the requested fee award, the court looked to the seven factors set forth in *Sugarland Indus. v. Thomas*, noting that the primary consideration is the benefit achieved. The court further explained that under *In re Compellent Techs., Inc. S'holder Litig.*, a court should consider the "increased likelihood of a topping bid due to the loosened deal protections, the expected value of a topping bid, and the percentage of the benefit to which counsel was entitled." As the court explained, loosening deal protection devices like don't-ask-don't-waive provisions make topping bids more likely and "benefits conferred by attorney actions that provide the opportunity for a topping bid do not vary depending on whether or not a topping bid actually emerges."

However, in applying the above rule framework to Magellan's waivers, the court reasoned that the increased likelihood of a topping bid due to the movants' efforts was close to zero because three potential buyers emerged after the waivers, none of whom expressed serious interest. Thus, the court concluded, the stockholder's actions did not increase the likelihood of a topping bid. The court also rejected the stockholder's appeal to opinions predating *In re Trulia, Inc. S'holder Litig.*, awarding sizeable fees in similar scenarios, noting that "pre-*Trulia* precedent pricing corporate benefits reflect inflated valuations and warrant careful review." The court further distinguished the stockholder's post-*Trulia* precedent as reflecting greater benefits than those the Magellan stockholder achieved.

Awarding mootness fees for disclosures that are merely "helpful" had resulted in an unintended "deal-litigation diaspora" and attendant "merger tax" litigation akin to pre-*Trulia* disclosure-only settlements.

The court next turned to the reasonableness of a fee for Magellan's supplemental disclosures. The court began its analysis by determining the applicable legal standard, ultimately deciding to apply the *Trulia* "plainly material" standard to disclosure-based mootness fees. In *Trulia*, the Court of Chancery had sought to tamp down on disclosure-based merger litigation by declining to approve disclosure-only settlements unless the disclosures at issue were plainly material. The *Magellan* court reasoned that the same policy problems had creeped into the mootness fee context after the Court of Chancery's *Xoom* decision, and that awarding mootness fees for disclosures that are merely "helpful" had resulted in an unintended "deal-litigation diaspora" and attendant "merger tax" litigation akin to pre-*Trulia* disclosure-only settlements.

Accordingly, the court held that it would only award mootness fees based on supplemental disclosures

that are "plainly material." However, since no Delaware court had applied this standard since *Xoom* and the parties did not brief it, the court ultimately decided to apply the *Xoom* "helpful" standard—which it characterized as a "last call" for that standard—to assess the value of the supplemental disclosures at hand. The court ultimately awarded $75,000, reasoning in part that while the new information only "provided a more easy-to-read summary of the existence, terms, and operation of the standstills," a modest fee award based on the supplement disclosures was appropriate. This holding, admittedly "more art than science," drew in part on post-*Trulia* academic surveys and the court-ordered mootness fees awards in post-*Trulia* decisions. The court also reasoned that the secondary *Sugarland* factors supported the $75,000 fee award.

Finally, the court addressed several public policy reforms proposed by two corporate law professors acting as *amici curiae*. The court ultimately rejected the professors' first two reforms, which proposed (i) offering further guidance on how to value don't-ask-don't-waive standstills for non-Delaware courts (and overturn *Compellent*), and (ii) reducing fee awards in instances where certain prerequisites to mootness fee applications are not met (like establishing a leadership structure, seeking class certification, etc.). The court cautioned that both reforms would likely cause more harm than good because *Compellent* has value when applied responsibly and plaintiffs would likely respond to the second reform by simply taking the steps necessary to support a fee award. The court was, however, persuaded by the *amici*'s third reform proposal that the court deny, or dramatically decrease, the movants' initial fee request of $1,100,000 in hopes of sending a signal to the plaintiffs' bar. The court agreed, and in reducing the movants' fee to $75,000 noted that it should "send a signal that these sorts of cases are not worth the attorneys' time." Moreover, the court also reasoned that had the movants "been required to meet the materiality standard, it seems unlikely that there would have been any award at all." ■

Restrictive Covenants in LP and LLC Agreements

Sunder Energy, LLC v. Jackson: Court of Chancery Notes Problematic Nature of Incorporating Restrictive Covenants into Entity's Governing Agreement

In *Sunder Energy, LLC v. Jackson,* 2023 WL 8166517 (Del. Ch. Nov. 22, 2023), the Delaware Court of Chancery, in part, considered and subsequently denied an application for a preliminary injunction brought by Sunder Energy, LLC against Tyler Jackson to enjoin Jackson from taking actions in breach of restrictive covenants (the "Sunder Covenants").

Sunder sells residential solar polar systems and had an exclusive dealer agreement with Freedom Forever LLC, which installed the solar panel systems. Jackson was a co-founder of Sunder Energy and Sunder's head of sales. At its formation in 2019, Sunder Energy operated under an oral agreement that provided for all co-founders, including Jackson, owning a single class of units as members with two of the members, Max Britton and Eric Nielson, owning a majority of the units. Thereafter, Britton and Nielson engaged a law firm to prepare an LLC agreement (the "2019 LLC Agreement") that materially changed the ownership structure of Sunder, altered its internal governance, and added the Sunder Covenants. The Sunder Covenants included restrictions on, among other things, engaging in competitive activities and soliciting Sunder's employees and independent contractors. Britton and Nielson sent a copy of the 2019 LLC Agreement to the other co-founders on New Year's Eve, encouraging them to sign it by the end of the night, without an explanation of the terms of the incentive units that they were to receive, which drastically differed from the members' rights as co-owners of a single class of units. In 2021, Britton and Nielson informed the other members that the

2019 LLC Agreement was being amended (the "2021 LLC Agreement") to add a member and that no substantive changes were being made. However, the 2021 LLC Agreement also expanded the geographic scope of the Sunder Covenants. The other members did not receive a copy of the 2021 LLC Agreement at the time it was adopted. The relationship between Sunder and Jackson deteriorated over time, which prompted Jackson to seek employment with a rising Freedom Forever dealer. Several of Sunder's high-level managers and sales personnel joined Jackson.

In seeking a preliminary injunction against Jackson, Sunder argued that Jackson breached certain of the Sunder Covenants. The court first had to consider choice of law issues. The court noted that jurisdictions outside of Delaware have a significant interest in how businesses compensate employees and the extent to which restrictive covenants can be attached to such arrangements. The court described the problematic nature of including restrictive covenants in internal governance documents for Delaware entities because they call on the court to adjudicate post-employment disputes for Delaware entities operating around the world. The court expressed concern for jeopardizing the deference provided by other states deferring to Delaware law to govern the internal affairs of Delaware entities and suggested that a potential solution could involve policy-makers beyond the courts.

Here, the court analyzed whether to apply laws of Delaware (the choice of law specified in the Sunder LLC agreements), Utah (where Sunder is headquartered), or Texas (where Jackson lives and works). The court noted that Sunder asked the court to apply Delaware law, not Texas law, even though Sunder would fare better under Texas law. The court next observed that although Jackson would have a stronger case for invalidity of the covenants under Utah law, this is a false conflict given that the Sunder Covenants are invalid under Delaware law. For these reasons, the court analyzed the substantive issues under Delaware law.

The court determined that Sunder could not obtain a preliminary injunction against Jackson to enforce the Sunder Covenants because the 2019 LLC Agreement and the 2021 LLC Agreement, which contained the Sunder Covenants, were not validly approved. The court found that Britton and Nielson breached their fiduciary duty of disclosure when they sought member approval for the 2019 LLC Agreement and the 2021 LLC Agreement, and that it would be inequitable to permit Britton and Nielson to enforce the Sunder Covenants in light of the circumstances surrounding their approval. The court noted that the one-sided nature of the 2019 LLC Agreement should have been disclosed by Britton and Nielson to the other members, and that providing a copy of the 2019 LLC Agreement was not enough to fulfill their fiduciary duty of disclosure. The court also focused on the language in the email in which Britton and Nielson sought the approval of the other members for the 2019 LLC Agreement. Further, the court noted that the adoption of the 2021 LLC Agreement also did not fulfill Britton and Nielson's fiduciary duty of disclosure because a copy of the 2021 LLC Agreement was not circulated to the other members, and Britton and Nielson inaccurately stated that no material changes were being made.

The court expressed concern for jeopardizing the deference provided by other states deferring to Delaware law to govern the internal affairs of Delaware entities.

The court then analyzed the reasonableness of the Sunder Covenants under the assumption that the Sunder Covenants could be enforced under general principles of contract law. The court generally found the Sunder Covenants to be overly broad and particularly egregious in their terms.

HighTower Holding, LLC v. Gibson: Court of Chancery Does Not Apply Delaware Law in Analyzing Validity of Restrictive Covenant Contained in Governing Agreement of Delaware LLC

In *HighTower Holding, LLC v. Gibson*, 2023 WL 1856651 (Del. Ch. Feb. 9, 2023), the Delaware Court of Chancery denied a motion for a preliminary

injunction filed by HighTower Holding, LLC against John Gibson seeking to enjoin Gibson from breaching covenants not to compete.

The law of the default state would apply over the Delaware choice of law provision if enforcement would conflict with Alabama law and Alabama has a materially greater interest in the issues than Delaware.

Gibson is a registered investment advisor who lives and works in Alabama. In 2019, Gibson and his business partners sold a majority interest in Twickenham, their investment management services company, to HighTower. In connection with that sale, Gibson executed a standard protection agreement that contained a non-compete covenant restricting Gibson from owning or working for another investment advisor company anywhere in the United States until 2024. To facilitate HighTower's management of Twickenham, Gibson and two HighTower entities became members of a new limited liability company, HTT Newco, LLC. Later in 2019, the members of HTT Newco, including Gibson, executed an LLC agreement that contained another non-compete covenant that restricted Gibson from competing against HighTower and HTT Newco in the investment advising business anywhere in the United States until 2025. Both the standard protection agreement and the LLC agreement contained Delaware choice of law provisions. Gibson eventually left HTT Newco to start his own hedge fund. HighTower then filed a complaint against Gibson that included this motion for a preliminary injunction.

The court analyzed if HighTower had a reasonable probability of succeeding on its claims against Gibson. To determine if HighTower had a reasonable probability of success, the court first needed to decide whether Alabama or Delaware law applied. The court determined that Alabama was the default state because it had the most significant relationship to the transaction and the parties, as the contracts were negotiated and signed in Alabama and Gibson had lived and worked in Alabama during his career with Twickenham and HTT Newco. The court explained that the law of the default state would apply over the Delaware choice of law provision if (i) enforcement of the covenant would conflict with a fundamental policy of Alabama law, and (ii) Alabama has a materially greater interest in the issues than Delaware.

The court explained that Alabama has a well-known fundamental policy against non-compete covenants. While Alabama has some exceptions that allow non-compete covenants, the court found that Gibson's covenant was likely invalid in Alabama because it was overbroad in time and place restrictions, and because Alabama has an interest in its citizens being able to receive professional services from trained professionals such as accountants and registered investment advisors. The court also held that Alabama had a materially greater interest in the issues because preventing non-competes against an Alabama resident working in Alabama is more significant than Delaware's general contractarian policies. The court ultimately held that, despite the Delaware choice of law provisions, Alabama law applied and HighTower did not demonstrate a reasonable likelihood of success on the merits of its claims under Alabama law. Therefore, the court denied the motion for a preliminary injunction to enforce the non-competes.

It is worth noting that neither the parties nor the court appeared to reference Section 18-1101(i) of the LLC Act, which provides: "A limited liability company agreement that provides for the application of Delaware law shall be governed by and construed under the laws of the State of Delaware in accordance with its terms."

Ainslie v. Cantor Fitzgerald, L.P.: Court of Chancery Finds Restrictive Covenants in Limited Partnership Agreement Unenforceable

In *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924 (Del. Ch. Jan. 4, 2023), the Delaware Court of Chancery

considered cross-motions for summary judgment in an action brought by six former limited partners and employees of Cantor Fitzgerald, L.P. or its affiliates ("Cantor Fitzgerald") to resolve disputes relating to certain restrictive covenants and related provisions in the partnership agreement of Cantor Fitzgerald (the "CF LP Agreement"). The court determined, among other things, that certain restrictive covenants and related forfeiture provisions in the CF LP Agreement were unenforceable and that Cantor Fitzgerald breached the CF LP Agreement when it failed to make certain payments owed to the former employees.

The CF LP Agreement contains two provisions to discourage and ban competition after a partner withdraws from Cantor Fitzgerald. First, the CF LP Agreement contains restrictive covenants prohibiting, among other things, a partner of Cantor Fitzgerald from engaging in competitive activities for a one- to two-year period after its withdrawal from Cantor Fitzgerald, including a non-compete covenant with no geographic limitation during the first year after withdrawal and a non-solicit covenant during the second year after withdrawal. These covenants are breached when Cantor Fitzgerald's managing general partner makes a good faith determination that a partner has engaged in a competitive activity during the restricted period. Second, the CF LP Agreement contains provisions permitting Cantor Fitzgerald to withhold payments owed to a partner of Cantor Fitzgerald from its capital account and other earned compensation ("CF Capital Account") that is repaid to a partner in annual installments over a four-year period after such partner's withdrawal from Cantor Fitzgerald unless such partner engages in competitive activities with Cantor Fitzgerald at any time during the four-year period.

The plaintiffs voluntarily withdrew from Cantor Fitzgerald between 2010 and 2011. Within a year of each of their withdrawals, Cantor Fitzgerald determined to withhold CF Capital Account payments from each of the plaintiffs based on determinations by the managing general partner that each plaintiff had accepted employment or otherwise performed services on behalf of a competing business within a year of each of their respective withdrawals from Cantor Fitzgerald. The plaintiffs sought claims

for, among other things, breach of contract against Cantor Fitzgerald seeking enforcement of their respective CF Capital Account payments and seeking a declaration that the non-compete provisions were unenforceable. Cantor Fitzgerald argued that (i) each of the plaintiffs engaged in competitive activities, and (ii) restrictive covenants should be enforceable as a matter of public policy. Cantor Fitzgerald also argued that the provisions permitting it to withhold CF Capital Account payments if a former partner engages in a competitive activity during a four-year period following withdrawal are not non-compete agreements because Cantor Fitzgerald is not seeking to prohibit the competition, but rather only to withhold the obligation to make payments. The plaintiffs countered that the restrictive covenants and the withholding of payments are both restraints of trade and should be evaluated accordingly.

The court determined that forfeiture-for-competition provisions should be analyzed for reasonableness as restraints on trade, but under an employer-friendly review in light of the former partners' ability to compete.

The court first considered whether the restricted covenant provisions are penalties or conditions precedent to Cantor Fitzgerald's duty to make the CF Capital Account payments. The court determined that the covenants are conditions precedent to Cantor Fitzgerald's duty to pay based on the plain language of the CF LP Agreement and a determination that an agreement can create a condition that is triggered by a failure to perform a duty under a contract. The court then analyzed the restrictive covenants for reasonableness and determined that they were unreasonable because (i) the worldwide geographic scope was not narrowly tailored to serve Cantor Fitzgerald's interests; (ii) the scope of protection extended to any affiliated entity of Cantor Fitzgerald and included any activity that is or could be considered a competitive activity; (iii) Cantor Fitzgerald's managing general partner was afforded the discretion to determine if a competitive activity has taken place; and (iv) the restricted period was too long in light of each of the CF Partners having withdrawn from Cantor Fitzgerald. Despite the foregoing, the court considered that Cantor Fitzgerald was not prohibiting the former partners from obtaining employment and that the former partners had in fact entered into the CF LP Agreement that contained the restrictive covenants. The court then considered that the plaintiffs would lose an extraordinary amount of compensation by Cantor Fitzgerald withholding the CF Capital Account payments. In its balancing of the equities, the court determined that the restrictive covenants were unreasonable and unenforceable.

The court then analyzed the four-year competitive activity condition as a basis to discharge Cantor Fitzgerald's duty to make the CF Capital Account payments. The court noted that it is not clear under Delaware law whether a forfeiture-for-competition provision is a restraint of trade requiring the court to evaluate it for reasonableness. The court considered precedent regarding treatment of liquidated damages provisions enforcing non-compete and non-solicit agreements and determined that, similar to liquidated damages provisions, forfeitures are not favored because of the potential to result in unjust outcomes. Additionally, the court noted that the plaintiffs could engage in a competitive activity accidentally or unknowingly, were not able to negotiate the CF LP Agreement, and could experience an extraordinary loss as a result of the forfeiture. The court then determined that forfeiture-for-competition provisions should be analyzed for reasonableness as restraints on trade, but under an employer-friendly review in light of the former partners' ability to compete. The court noted that the same reasoning for concluding that the restrictive covenants are unreasonable also applies to the four-year competitive activity condition, but that this condition is more reasonable because the scope of prohibited activities is narrower and the determination of whether a competitive activity has been engaged in is not left up to the Cantor Fitzgerald managing general partner. The court then determined that because Cantor Fitzgerald could not advance a compelling reason for the four-year period of the

competitive activity condition, this condition was also unenforceable, and Cantor Fitzgerald could not rely on it to withhold the CF Capital Account Payments.

Void vs. Voidable Under LLC Agreement

XRI Inv. Holdings LLC v. Holifield: Court of Chancery and Delaware Supreme Court Address Void vs. Voidable Acts Under LLC Agreement

In *XRI Inv. Holdings LLC v. Holifield*, 283 A.3d 581 (Del. Ch. 2022), *aff'd in part, rev'd in part and remanded*, 304 A.3d 896 (Del. 2023), the Delaware Court of Chancery provided clarification as to void and voidable acts in LLC agreements, and when the defense of acquiescence can be utilized in this regard. The court ultimately held that, when an LLC agreement expressly prohibits a particular transaction or act, any violation is void and not subject to ratification or acquiescence. Thus, the prohibited act or transaction is considered void, not voidable. However, the court also noted *in dicta* that such results are inequitable and recommended that the controlling precedent be reconsidered.

XRI Investment Holdings LLC was formed in 2013 by Matthew Gabriel and Gregory Holifield. Through various transactions, Morgan Stanley came to hold all Class A units, while Gabriel and Holifield held all the Class B units. Additionally, Morgan Stanley designated three of the five members of the board of representatives. Gabriel, who also served as CEO, and Holifield held the other two seats on the board. XRI's LLC agreement included a provision that prohibits members from transferring their member interests, making any such transfer void (the "XRI Transfer Provision"). The LLC agreement also included a related provision that enables members to transfer their interest to an entity that is owned solely by the transferring member, so long as that transfer is made for no consideration (the "XRI Transfer Exception").

In addition to XRI, Holifield also had large stakes in several other entities, including Entia, LLC. In 2018, Holifield sought to raise capital for Entia and created Blue Holdings, LLC as a special purpose vehicle to do so. Holifield's ultimate plan was to transfer ownership of his XRI units (the "XRI Disputed Units") to Blue Holdings, and then use those units as collateral to obtain a loan that would help finance Entia (the "Blue Transfer"). Holifield notified Gabriel of this financing arrangement, and Gabriel subsequently discussed the arrangement with the board, as well as attorneys for XRI. After receiving no objections, Gabriel informed Holifield that board approval was not required. Entia's loan agreement was executed in June 2018. In December 2020, XRI informed Holifield that: (i) the 2018 transaction was in violation of the XRI Transfer Provision, (ii) Holifield still had sole possession of the disputed units, and (iii) XRI was initiating a strict foreclosure on those units. Holifield countered that the foreclosure action was invalid because the board had acquiesced to the transfers, and therefore Blue Holdings was the rightful owner of the disputed units.

Citing recent Delaware Supreme Court precedent interpreting Section 18-106(e) of the LLC Act, XRI argued that because the LLC agreement used the word "void" to specify the consequences of breaching the XRI Transfer Provision, the noncompliant act by Holifield was void and thus could not be subsequently acquiesced to. The court reluctantly agreed with this argument, finding that if a particular transaction is a "restricted activity" under the LLC agreement, then it is void and, in contrast to being voidable, could never be ratified. In essence, any transaction that is void is incurably void, and equitable defenses cannot be invoked that would validate the prohibited transaction.

Applying precedent to the facts at hand, the court determined that the XRI Transfer Provision explicitly prohibited any transfers of units by members for consideration, even with acquiescence by the necessary parties (in this case, the board). The court found that, although Holifield had transferred the disputed units to a solely owned entity (Blue) and therefore appeared to satisfy the XRI Permitted Transfer Exception, he had actually received consideration for the transfer because the Blue transaction was used to secure a $3.5 million loan for Entia. Thus, the XRI Permitted Transfer Exception

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STORY OF LAW

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While the court noted that contracting parties' use of the word "void" does not necessarily render the act incurably void in every case, it held that the language of the agreement was a clear expression of the parties' intent that any noncompliant transfers would be incurably void.

could not apply. The court also dismissed Holifield's argument based on the equitable defense of acquiescence. Although Holifield followed the proper procedures in asking Gabriel for board approval, the transaction was not voidable, but rather void on its face. As a result, the disputed units still belonged to Holifield, and the foreclosure was proper.

Although the court concluded that the Blue Transfer was indeed void, the opinion also noted, *in dicta*, that the result was inequitable and suggested that the controlling precedent be reconsidered. The opinion went so far as to find that if the court were able to consider equitable remedies, Holifield would likely be successful in asserting an acquiescence defense. According to the court, equity enables courts to "ameliorate the sometimes harsh consequences that can result from the blanket application of a generally sound rule of law." The current structure, therefore, enabled XRI to basically contract out of equity—an undesirable result that should be addressed. In sum, the decision was correct under the legal precedent, but contrary to equitable principles.

On appeal, the Delaware Supreme Court affirmed in relevant part the Court of Chancery's holding that (i) the transfer was rendered incurably void by the plain language of the XRI LLC agreement, and (ii) the Court of Chancery lacked the power to consider equitable defenses to breach of the XRI LLC agreement, such as acquiescence. Noting that Delaware limited liability companies are creatures of contract, the court stated that it would use longstanding principles of contractual interpretation to examine the provisions of the

XRI LLC agreement at issue; absent a finding of ambiguity, the court would not need to look beyond that agreement to the default rules in the LLC Act or to apply equitable principles. While the court noted that contracting parties' use of the word "void" does not necessarily render the relevant act incurably void in every case, it held that the particular language of the XRI LLC agreement ("the use of the word 'void,' the language prohibiting XRI from recording a noncompliant transfer on its books and the language prohibiting XRI from recognizing a transferee of a noncompliant transfer as the owner of units, in addition to the contractual context [a transfer restriction in a private, closely held LLC, with sophisticated members]") was a clear expression of the parties' intent that any noncompliant transfers would be incurably void.

The court went on to discuss the import of Section 18-106(e) of the LLC Act in this case, which provides, in relevant part:

> (e) Any act or transaction that may be taken by or in respect of a limited liability company under this chapter or a limited liability company agreement, but that is void or voidable when taken, may be ratified (or the failure to comply with any requirements of the limited liability company agreement making such act or transaction void or voidable may be waived) by the members, managers or other persons whose approval would be required under the limited liability company agreement:
>
> (1) For such act or transaction to be validly taken; or
>
> (2) To amend the limited liability company agreement in a manner that would permit such act or transaction to be validly taken, in each case at the time of such ratification or waiver....

The court held that this provision extended only to ratification of breaching acts taken by the limited liability company itself, and not to acts taken by its members, as was the case in *Holifield*. In its discussion of Section 18-106(e), the court expressed its view that the legislature had intentionally chosen to limit the circumstances in which Section 18-106(e) could be used in certain respects and declined to effectively expand Section 18-106(e) by judicial decision. The court further determined that considerations of *stare decisis* weighed against overturning precedent in the present case.

The court therefore held that, because the transfer at issue was incurably void, XRI was entitled to recover damages for breach of contract, and remanded the case for additional proceedings regarding the amount of these damages and the extent to which XRI was entitled to recover amounts advanced to Holifield under the XRI LLC agreement, noting that the Court of Chancery's potential finding *in dicta* of acquiescence did not preclude recovery.

Appointment of Receiver for Cancelled LLC

In re Reinz Wisconsin Gasket, LLC: Appointment of Receiver for Cancelled LLC Claimed to Have Wound Up Affairs in Violation of LLC Act

In *In re Reinz Wisconsin Gasket, LLC*, 2023 WL 2568326 (Del. Ch. Mar. 20, 2023); *In re Reinz Wisconsin Gasket, LLC*, 2023 WL 3300042 (Del. Ch. May 8, 2023), *cert. denied*, 2023 WL 5046777 (Del. Ch. July 10, 2023), the Court of Chancery ruled on a petition pursuant to Section 18-805 of the LLC Act to appoint a receiver to distribute the assets of an LLC that had dissolved, wound up, and terminated in violation of the LLC Act. The court ultimately appointed the receiver because the plaintiff showed that it was reasonably likely that the defendant LLC had assets when it dissolved that it failed to set aside for pending claims against it, and thus terminated in violation of Section 18-804(b) of the LLC Act.

Reinz arose out of tort litigation between workers exposed to asbestos and the defendant, Reinz Wisconsin Gasket, LLC ("RWG"), a gasket manufacturer. While multiple tort cases were pending, RWG dissolved, wound up, and terminated.

RWG claimed to have no assets and so made no provisions for creditors or claimants. The plaintiff, Linda Cook, was a tort plaintiff whose husband died from mesothelioma. Cook alleged that by winding up without setting aside any assets for creditors or pending claims, RWC violated Section 18-804(b), which dictates that upon winding up, an LLC must make such provision as will be reasonably likely to be sufficient to provide compensation for any claims that the company knows of or knows are likely to arise against the company. The assets in question were various prepaid insurance policies that had been purchased by RWG's corporate ancestors and that would have covered liability from the pending tort claims. RWG argued that the insurance policies in question had been lost over decades of reorganizations, splits, bankruptcies, and mergers. Cook petitioned the Court of Chancery to nullify RWG's certificate of cancellation and to appoint a receiver to properly distribute RWG's assets, in accordance with Section 18-805.

The court held that cancellation precludes a defunct entity, including a cancelled limited liability company, from retaining counsel before a receiver is appointed, even in a proceeding in which such entity must be named as a respondent.

First, the court established that Cook had standing to seek the appointment of a receiver. Section 18-805 states that the court may appoint a receiver on the petition of an LLC's creditor, member, manager, or "any other person who shows good cause." The court rejected Cook's claim that she was a creditor because the underlying tort action had not reached a verdict yet. The court held that to be "creditor" for purposes of Section 18-805 requires a present and outstanding obligation to pay, and not a mere claim for money allegedly owed. However, the court held that Cook had shown good cause and thus had standing to seek the appointment of a receiver.

In finding that Cook had shown good cause, the court held that the plaintiff bears the burden of establishing good cause for the appointment of a receiver. Good cause, in turn, requires showing a reasonable likelihood that the defendant company violated the LLC Act. The court held that while a mere allegation or "specter" of a violation would not have been enough to show good cause, Cook satisfied her burden by showing through trial evidence that it was reasonably likely that RWG had assets—namely, insurance policies—at the time of its termination. The trial evidence, which included documents from RWG's bankruptcy proceeding in 2006, letters between RWG and insurers, and internal RWG documents, showed that it was reasonably likely that RWG had assets when it terminated and that it knew of several pending claims against it. As such, it was reasonably likely that RWG had violated Section 18-804. This was sufficient to show good cause to seek that a receiver be appointed under Section 18-805.

Cook also petitioned the court to nullify RWG's certificate of cancellation. The court deferred ruling on this question until the appointed receiver made a determination on whether or not RWG actually had any assets.

In a subsequent decision, the Court of Chancery held that cancellation precludes a defunct entity, including a cancelled limited liability company, from retaining counsel before a receiver is appointed, even in a proceeding in which such entity must be named as a respondent. The court held that cancellation precludes a "defunct" entity (i.e., a cancelled alternative entity or a cancelled corporation after its three-year winding-up period) from retaining or speaking through counsel unless and until a receiver is appointed. The court reasoned that upon filing of a certificate of cancellation, the existence of a legal entity ceases; such defunct entity may speak only through a receiver to manage litigation or other outstanding business, and such defunct entity cannot otherwise make any decisions or take any actions. The court also found that there could not be an implied attorney-client relationship between counsel and RWG, the defunct entity, because RWG "cannot have 'believe[d] that the attorney was acting on its behalf as its counsel.'" The court also held that

because RWG is cancelled and lacks a decision-maker, it cannot participate in the process of appointing its own receiver or retain counsel to do so.

Inspection Rights to Books and Records

Bruckel v. TAUC Holdings, LLC: Delaware Court of Chancery Confirms Essentially Ongoing Unfettered Right of Access of Managers to Limited Liability Company's Documents

In *Bruckel v. TAUC Holdings, LLC*, 2023 WL 116483 (Del. Ch. Jan. 6, 2023), the Delaware Court of Chancery clarified a previous decision regarding a manager's right to inspect the books and records of an LLC under Section 18-305 of the LLC Act and under the relevant LLC agreement. The court held that the plaintiff manager had continuous contractual and statutory rights to inspect the meeting minutes, emails, and other documents related to informal meetings between other managers.

Bruckel arose out of a dispute between the managers of TAUC Holdings, LLC, a Delaware limited liability company. Matthew Bruckel, a founding member and manager of TAUC, fell out of favor with the other four managers on TAUC's board of managers (the "Favored TAUC Managers"). At a previous trial, the court held that Bruckel had both a contractual right to TAUC's books and records, because TAUC's LLC agreement granted Bruckel unrestricted access to books and records, and a statutory right to books and records under Section 18-305, which states that a manager of an LLC has a right to inspect the books and records of a company that are reasonably related to their role as a manager. After trial, in an effort to avoid the court's ruling, the Favored TAUC Managers largely ceased having formal meetings and instead held dozens of informal "weekly group updates," each involving only a few of the Favored TAUC Managers at a time. The Favored TAUC Managers argued that they were not obligated to produce all emails and meeting minutes surrounding these and other meetings because those documents were outside the substantive and temporal scope of the court's previous holding. The court ultimately sided with Bruckel and required that he be allowed to inspect all documents and communications in question.

First, the court clarified the substantive extent of Bruckel's right to review books and records. The court held that "what the other managers are being given and documents that reflect how the other managers meet and act collectively" are the best proxies for what is reasonably related to a manager's status as manager. The court also noted that the way in which managers conduct their business is important to determining which records and communications must be disclosed. If business is sometimes conducted informally, then even supposedly informal communications are books and records that managers are entitled to inspect. Even though the weekly group updates were supposedly informal, the court held that the "managers acted as managers in settings other than Board meetings," and, as a result, Bruckel was entitled to minutes of those meetings and to related communications under Section 18-305.

> **The plaintiff manager had continuous contractual and statutory rights to inspect the meeting minutes, emails, and other documents related to informal meetings between other managers.**

Second, the court clarified the temporal scope of Bruckel's inspection rights. The Favored TAUC Managers argued that they were only obligated to produce books and records up to the date of the trial. The court rejected this assertion and held that Bruckel had a continuing right to inspect books and records both under Section 18-305 and TAUC's LLC agreement. Regarding Section 18-305, the court stated that managers need to inspect books and records to fulfil their fiduciary duties, and that "[a]s long as a sitting manager owes fiduciary duties, she is entitled to receive whatever the other managers are

given." Regarding TAUC's LLC agreement, the court noted that Bruckel had an unrestricted and ongoing contractual right to books and records, which was not limited to the scope or timing of Bruckel's lawsuit.

Implied Covenant Relating to Indemnification Determination

Baldwin v. New Wood Resources LLC: Delaware Supreme Court Reverses Trial Court and Holds Implied Covenant of Good Faith and Fair Dealing Applies to Whether Former Manager Was Entitled to Indemnification

In *Baldwin v. New Wood Resources LLC*, 283 A.3d 1099 (Del. 2022), the Delaware Supreme Court reversed a trial court decision and held that the covenant of good faith and fair dealing was implied where an individual's right to indemnification under an operating agreement was to be determined by the majority interest holder of the limited liability company. Richard Baldwin, the initial plaintiff, served as a manager of New Wood Resources LLC, a Delaware limited liability company. ACR Winston Preferred Holdings LLC held approximately 85.52% of New Wood's then-outstanding units, making it the majority holder of New Wood.

There was a dispute as to whether Baldwin was entitled to indemnification for certain costs pursuant to the New Wood operating agreement. Section 8.2 of the New Wood operating agreement entitled Baldwin to indemnification only if he had acted in good faith. The operating agreement also provided that ACR Winston, as the majority interest holder, was entitled to determine whether Baldwin adhered to the good faith standard for purposes of being entitled to indemnification.

ACR Winston executed a written consent stating that Baldwin had not acted in good faith for purposes of indemnification. The written consent did not explain the rationale for the determination, nor did it provide evidence of bad faith by Baldwin. Baldwin challenged the determination by ACR Winston on behalf of New Wood denying him indemnification. The trial court denied Baldwin's challenge and held that the implied covenant of good faith and fair dealing was not applicable with respect to the good faith determination contemplated by Section 8.2 of the New Wood operating agreement. The trial court reasoned that imposing an additional "free-floating" good faith covenant would result in subjecting every provision to "fact-intensive and unyielding judicial review" inconsistent with Delaware law.

On appeal to the Delaware Supreme Court, Baldwin asserted, among other things, that the implied covenant of good faith and fair dealing was applicable to the good faith determination required under Section 8.2. The Supreme Court agreed with Baldwin and held that the implied covenant was applicable and acted as a "gap-filler," because a determination of entitlement to indemnification may not be made in bad faith. The court noted that although Delaware gives maximum effect to the principle of freedom of contract, the Delaware Limited Liability Company Act specifically prohibits the elimination of the implied covenant in Section 18-1101(c). The court noted that drafters of LLC agreements are not expected to include "obvious and provocative" conditions in agreements, such as one stating that a manager would not mislead members. The court held that it would be "too obvious" to demand the express inclusion of the implied covenant that a determination under the LLC agreement be reached in good faith. The court also noted precedents reinforcing the underlying principle that if one party is given discretion in determining whether a condition has occurred, that party must use good faith in making that determination.

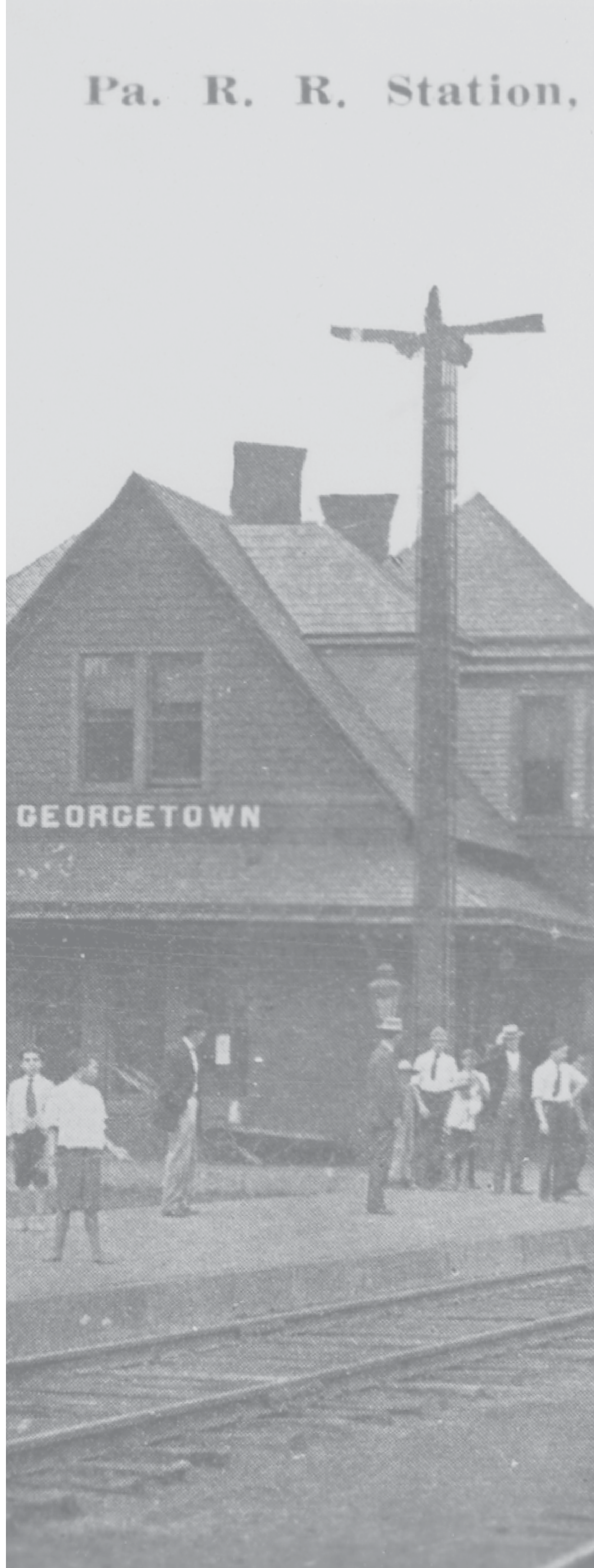
Drafters of LLC agreements are not expected to include "obvious and provocative" conditions in agreements, such as one stating that a manager would not mislead members.

Ultimately, the New Wood operating agreement required ACR Winston to make a "subjective discretionary determination as to whether an indemnitee has met a specific standard of conduct." The court reasoned that, as the operating agreement did not expressly state whether the determination must be made in good faith, if indemnification could be denied for any reason, including in bad faith, the good faith determination would be rendered meaningless. The court reversed and remanded the trial court's judgment, intending to give Baldwin an opportunity to prove whether New Wood did in fact breach the implied covenant that the court held to be implied in Section 8.2 of the operating agreement.

Reliance on Counsel for Exercise of Call Right

Boardwalk Pipeline Partners, LP v. Bandera Master Fund LP: **Delaware Supreme Court Reverses Trial Court Decision and Finds Correct Entity Made Determination as to Exercise of Call Right and Was Presumed to Have Acted in Good Faith**

In *Boardwalk Pipeline Partners, LP. v. Bandera Master Fund LP*, 288 A.3d 1083 (Del. 2022), the Delaware Supreme Court heard an appeal relating to the exercise of a call right to cause a master limited partnership to repurchase publicly held units upon the occurrence of certain events, as contemplated by its partnership agreement. The *Boardwalk* court reversed the Delaware Court of Chancery's decision that the call right at issue had been improperly exercised, holding that (i) the sole member in the corporate structure was the proper entity to determine whether the opinion of counsel required to be obtained under the partnership agreement in connection with the exercise was acceptable; (ii) the sole member reasonably relied on the opinion of counsel in directing the general partner of the limited partnership to exercise the call right; (iii) the sole member and the general partner were therefore entitled to the benefit of a conclusive presumption that they had acted in good faith as provided in the



partnership agreement; and (iv) the sole member and the general partner were therefore exculpated from damages thereunder.

Boardwalk Pipeline Partners, LP (the "Boardwalk MLP") was a master limited partnership that benefited from favorable tax policy available to entities of its type. It was managed by a general partner (the "Boardwalk GP"), which in turn was managed by its general partner (the "Boardwalk UGP"). The Boardwalk UGP was managed by a board of directors (the "Boardwalk UGP Board") comprised of both independent and sponsor-appointed members, in addition to having a sole member (the "Boardwalk Sole Member") to which certain decisions were reserved under its governing documents. The Boardwalk Sole Member was wholly owned by the Boardwalk sponsor and managed by a sponsor-appointed board of directors (the "Boardwalk Sole Member Board").

The partnership agreement governing the Boardwalk MLP (the "Boardwalk LPA") contained a call right that could be exercised by the Boardwalk GP in certain circumstances pursuant to a contractually prescribed formula. Specifically, the Boardwalk GP was permitted to exercise the call right if it received an opinion of counsel providing that the Boardwalk MLP's tax status "ha[d] or [would] reasonably likely in the future have a material adverse effect on the maximum applicable rate that c[ould] be charged to customers." Other relevant provisions in the Boardwalk LPA specified that the opinion of counsel must be "acceptable" to the Boardwalk GP and that, in making the acceptability determination, the Boardwalk GP would be acting in its individual capacity rather than its managerial capacity and would be free of any fiduciary duties in so acting. The Boardwalk LPA also exculpated the Boardwalk GP from liability for monetary damages in the absence of bad faith, fraud, willful misconduct, or criminality on the part of the Boardwalk GP, and provided that the Boardwalk GP would be conclusively presumed to have acted in good faith if it acted in reliance on expert advice.

In 2016, a D.C. circuit court ruling that challenged the existing tax framework, the passage of legislation lowering the federal corporate income tax rate, and action taken by the Federal Energy Regulatory Commission in response to the foregoing developments created uncertainty in the market and caused a significant drop in the price of Boardwalk MLP units. Thereafter, the Boardwalk sponsor began consulting with legal counsel regarding the feasibility of exercising the call right. A few months later, counsel to the Boardwalk GP issued a legal opinion (the "Boardwalk GP Opinion") providing that the contractual condition to exercise the call right had been met.

While the Boardwalk Sole Member Board had obtained the opinion, the presumption of good faith inured to the benefit of Boardwalk GP because the Boardwalk Sole Member Board had caused Boardwalk GP to exercise the call right.

In order to address the opinion acceptability requirement contained in the Boardwalk LPA, a second outside law firm was engaged. The firm issued a legal opinion to the Boardwalk Sole Member Board (the "Boardwalk Sole Member Opinion") providing that it would be reasonable (i) to conclude that the Boardwalk Sole Member, rather than the Boardwalk UGP Board, was the correct body to determine the acceptability of the Boardwalk GP Opinion, and (ii) for the Boardwalk Sole Member to determine that the analysis and conclusions contained in the Boardwalk GP Opinion were acceptable. Following this advice, the Boardwalk Sole Member Board determined that the opinion was acceptable and caused the Boardwalk GP to exercise the call right. A lawsuit followed, alleging (i) that the Boardwalk GP had breached the Boardwalk LPA by exercising the call right without the opinion of counsel requirement having been met; (ii) that the Boardwalk GP had breached the Boardwalk LPA through the payment of a deflated purchase price per unit or, alternatively, had breached the implied contractual covenant of good faith and fair dealing by causing a decline in the Boardwalk MLP unit price and then paying a lower purchase price; and (iii) tortious interference and unjust enrichment

claims against the Boardwalk UGP, the Boardwalk Sole Member, and the Boardwalk sponsor. The Court of Chancery found in favor of the plaintiffs and, having determined that the Boardwalk GP had acted in bad faith and that the exculpation provision in the Boardwalk LPA was therefore unavailable to it, awarded damages.

On appeal, the Delaware Supreme Court first addressed the issue of who had the authority to determine the acceptability of the Boardwalk GP Opinion. The court held that the Court of Chancery had erred in determining that the Boardwalk LPA was ambiguous on this point simply because it did not identify the ultimate decision-maker, reasoning that it was necessary for the governing documents of the entities in the corporate structure to be read together in order to resolve this question. In finding that the Boardwalk Sole Member, rather than the Boardwalk UGP Board, was the proper actor, the court noted that (i) the Boardwalk LPA provided that this determination was an "individual capacity" decision as opposed to a "general managerial authority" decision and that it therefore directly implicated the upper-tier governing documents; (ii) the Boardwalk LPA was clear about designating certain items as being within the authority of the Boardwalk UGP Board, which it did not do in respect of the call right; and (iii) the limited liability company agreement of the Boardwalk UGP (the "Boardwalk UGP LLCA") granted the Boardwalk Sole Member "exclusive authority to cause the [Boardwalk UGP] to exercise the rights of the [Boardwalk UGP] and [the Boardwalk GP], as general partner of the [Boardwalk] MLPc" and listed the call right as one of these rights. The court went on to note that this conclusion was supported by the public disclosures made in connection with the offering of units in the Boardwalk MLP, which provided context for both Boardwalk's intent and the terms on which public unitholders had agreed to purchase their units, and that the Boardwalk UGP LLCA defined "Opinion of Counsel" as an opinion that was acceptable to the Boardwalk Sole Member.

Having determined that the Boardwalk Sole Member was the appropriate decision-maker, the Supreme Court then addressed the applicability of the exculpation and expert reliance provisions contained in the Boardwalk LPA. The court disagreed with the Court of Chancery that the Boardwalk GP could not rely on the Boardwalk Sole Member Opinion to meet the exculpation standard due to the opinion having been rendered at the Boardwalk Sole Member Board level, holding that exculpation generally applies to the board-level actors managing an entity rather than the non-decision-maker agents of such entity. As a result, the court reasoned that while the Boardwalk Sole Member Board had obtained the opinion, the conclusive presumption of good faith for relying on expert advice inured to the benefit of the Boardwalk GP because the Boardwalk Sole Member Board had caused the Boardwalk GP to exercise the call right. The court therefore determined that the Boardwalk GP, through the Boardwalk Sole Member, was entitled to rely on the conclusive presumption of good faith and was exculpated from damages.

Two justices wrote in concurrence that they would reverse the Court of Chancery's holding that the Boardwalk GP Opinion was rendered in bad faith on the basis that the Court of Chancery had erred in reviewing the Boardwalk GP Opinion *de novo* and engaging in a substantive evaluation of the legal correctness thereof, instead of applying a deferential standard focused on whether counsel had acted in good faith in rendering the opinion.

Scope of Who Is a "Manager" of LLC for Purposes of Personal Jurisdiction

In re P3 Health Group Holdings, LLC: Court of Chancery Finds Chief Legal Officer of LLC and Person Who Had No Official Role with LLC but Made Decisions Regarding Management of LLC Were Both "Managers" Under the LLC Act for Purposes of Personal Jurisdiction

In *In re P3 Health Group Holdings, LLC*, 282 A.3d 1054 (Del. Ch. 2022), the Delaware Court of Chancery dismissed a motion for lack of personal

jurisdiction. The court held that an LLC's chief legal officer was a manager within the meaning of 6 *Del. C.* § 18-109(a) and implicitly consented to service of process. Ultimately, the court reasoned that the chief legal officer materially participated in the LLC's management, qualifying her as a manager under Section 18-109(a).

P3 Health Group Holdings, LLC, a Delaware LLC, was managed by a board of managers. Hudson Vegas Investment SPV, LLC, a minority unit holder, brought a breach of fiduciary duty claim against P3's general counsel and chief legal officer, Jessica

An individual who has a significant role in managing an LLC or plays a significant part in an activity that constitutes part of the management of such LLC "participates materially" in the management of the LLC and is a "manager" under Section 18-109(a).

Puathasnanon. Puathasnanon moved for dismissal for lack of personal jurisdiction, arguing that there was improper service of process under Section 18-109(a) of the LLC Act. Specifically, Puathasnanon argued that she was not a company manager and did not consent to service of process.

Section 18-109(a) states that an LLC manager consents to the service of process through the LLC's registered agent by agreeing to serve as a manager for the LLC. Section 18-109(a) defines a "manager" as either (i) a person officially named as a manager in the company's governing documents ("formal manager"), or (ii) a person, not formally named, who materially participates in the management of the LLC ("acting manager").

The court found that Puathasnanon was an acting manager and consented to service of process for three reasons. First, the court interpreted the plain meaning of "material participation" to include personnel in senior roles who perform functions

consistent with those roles. Here, Puathasnanon was named the chief legal officer and general counsel. Further, Puathasnanon performed functions consistent with those roles, including working with outside counsel to shape P3's merger strategy and guide the board in effectuating the merger. Second, the court applied the technical meaning of "material participation" as interpreted under the tax code. The court noted that one such test to determine if a taxpayer materially participated in a business is whether the taxpayer worked more than 500 hours a year in the role. Using this test to inform its analysis, the court found that, as chief legal counsel and general counsel, Puathasnanon materially participated in P3's management by working more than 500 hours a year in a senior management position. Third, the court analogized Section 18-109(a) to 10 *Del. C.* § 3114(b), which states that a corporate officer implicitly consents to service of process by voluntarily accepting the appointment. Section 3114(b) specifically names, among other officers, the chief legal officer as a role consenting to service. The court found that Section 3114(b) was analogous to Section 18-109(a), despite Section 18-109(a) not listing specific officers. Ultimately, the court found that Puathasnanon consented to service of process by accepting a role as a chief legal counsel.

In the same decision, the court also denied a motion to dismiss for lack of personal jurisdiction filed by Sameer Mathur, a principal of Chicago Pacific Founders Fund, L.P., a Delaware limited partnership private equity fund that controls P3 through control of a majority of the P3 board of managers.

Mathur argued that his purported service of process under Section 18-109 (a) of the LLC Act was ineffective because he was not a "manager" of P3 within the meaning of Section 18-109(a). Mathur never held any official role with P3, as a manager, officer, employee, or otherwise, and was never designated as a manager by P3. Nevertheless, the court noted that an individual who has a significant role in managing a limited liability company or who plays a significant part in an activity or an event that constitutes part of the management of such limited liability company "participates materially" in the management of the limited liability company and is a "manager" under Section 18-109(a). While Mathur had no official role with P3, facts and documents presented to the court demonstrated that in connection with the year-long negotiation and ultimate consummation of the de-SPAC merger that led to this litigation, Mathur made decisions on behalf of P3, directed P3's management to take actions, instructed P3's advisors to perform work without authorization from P3's management, berated P3's legal counsel for not sending documents to him before circulating them to the wider group, and received materials for and attended P3's board meetings (despite his not being on P3's board). The court held that taking these actions on behalf of P3 and in connection with the de-SPAC merger constituted a significant role in the management of P3. As a result, the court found that Mathur was a "manager" within the meaning of Section 18-109(a) and could be validly served with process pursuant to that section.

In making this finding, the court rejected Mathur's arguments based on the "control overlay test"—that an individual cannot effectively control an entity if a different party is designated as the "sole manager" of such entity, and such individual therefore cannot be subject to personal jurisdiction in Delaware. The court concluded that the control overlay test conflicts with the plain language of Section 18-109(a). ■

Recent Developments in Delaware Law

2023 Amendments to the Delaware General Corporation Law

Legislation amending the General Corporation Law of the State of Delaware (the "DGCL") was signed into law on July 17, 2023 (effective August 1, 2023, unless otherwise noted). The 2023 amendments to the DGCL, among other things: (i) make clarifying changes with respect to the creation and issuance of stock and rights and options to purchase stock, including confirming that a corporation is not required to receive the statutory minimum consideration (typically the par value) for a disposition of treasury shares; (ii) simplify the requirements for the filing of certificates of validation in connection with the ratification of certain defective corporate acts; (iii) provide greater certainty as to the stockholders to whom notice of a non-unanimous action by consent of stockholders must be given; (iv) eliminate the need to obtain the default vote of stockholders for charter amendments effecting specified types of forward stock splits and associated increases in the authorized number of shares; (v) reduce the minimum stockholder vote required to authorize a charter amendment increasing or decreasing the authorized shares of a class, or effecting a reverse split of the shares of a class, in circumstances where the shares of such class are listed on a national securities exchange immediately before the amendment becomes effective and meet the listing requirements of such exchange after the amendment becomes effective; (vi) confirm that a corporation continuing or resulting from a conversion or domestication will have the same power to issue bonds, other obligations, and securities as a corporation surviving or resulting from a merger or consolidation; (vii) authorize the adoption of a plan by which another entity may convert to a Delaware corporation and to provide that certain acts and transactions effected pursuant to such plan may be accomplished without a further vote of the board of directors or stockholders of the Delaware corporation continuing after the conversion; (vii) clarify that a corporation may adopt

a plan of conversion specifying, among other things, the terms of the conversion, the provisions of the organizational documents of the entity continuing after the conversion, the treatment of stock converted or exchanged in the conversion, and other matters; (viii) reduce the vote required to consummate a domestication, transfer, or continuance of a Delaware corporation to a non-U.S. entity from a unanimous vote of all stockholders (voting and non-voting) to a majority in voting power of the outstanding stock entitled to vote and to clarify that the corporation may adopt a plan of domestication; (ix) revise the provisions governing statutory appraisal rights, including to provide that such rights are available in connection with a transfer, continuance, or domestication of a Delaware corporation to a non-U.S. entity; and (x) provide that no vote of stockholders is required to authorize a sale, lease, or exchange of collateral securing a mortgage or pledge under specified circumstances.

The 2023 amendments became effective on August 1, 2023, except that (i) the amendments to Section 262 are effective with respect to (A) a merger or consolidation consummated pursuant to an agreement of merger or consolidation entered into on or after August 1, 2023, (B) a "short-form" merger authorized on or after August 1, 2023, or (C) a conversion, transfer, continuance, or domestication effected on or after August 1, 2023; (ii) the amendments to Section 265 apply only to conversions effected pursuant to a plan of conversion entered into on or after August 1, 2023 (or, if no plan of conversion is entered into, a corporation with respect to which the authorization of the conversion under the DGCL is obtained on or after August 1, 2023); and (iii) the amendments to Section 390 apply only to domestications, transfers, or continuances authorized by the board on or after August 1, 2023.

Creation and Issuance of Stock and Rights and Options to Purchase Stock; Disposition of Treasury Shares

In 2022, Sections 152 and 153 of the DGCL, which deal with the creation and issuance of stock, and Section 157 of the DGCL, which deals with the creation and issuance of rights and options to purchase stock, were amended to harmonize the procedures by which stock, and rights and options to purchase stock, could be authorized for issuance, including with respect to the power of the board of directors (or a duly empowered committee of the board) to delegate its powers under those statutes to officers and others. The 2023 amendments make certain clarifying changes to Sections 152, 153, 157, and 160 to build on the changes enacted in 2022.

In connection with the 2022 amendments to the DGCL, Section 153 was amended to make clear that the procedures governing the power of the board (or a committee) to delegate the authority to issue stock applied equally to a disposition of treasury shares. (Treasury shares are those that have been issued but are no longer outstanding because they have been redeemed, purchased, or otherwise reacquired by the corporation and have not been retired or cancelled.) Because the 2022 amendments to Section 153 provided that treasury shares could be disposed in the same manner as shares could be issued under Section 152, there was a question as to whether a corporation needed to receive, for a disposition of treasury shares, the minimum consideration that would be required for an issuance of stock (which, for shares having a par value, is consideration having a value at least equal to the par value of the shares). Historically, the principal distinction between an original issuance of stock, on the one hand, and the disposition of treasury shares, on the other, was that the corporation was not required to receive the statutory minimum consideration for the disposition of treasury shares. The longstanding view was that, when disposing of treasury shares, the corporation was not required to receive the par value in respect of the shares, since the shares had already been fully paid upon the corporation's receipt of consideration at least equal to the par value thereof in connection with their original issuance. As no change to this basic construct was intended by the 2022 amendments, Sections 152 and 153 was amended to clarify that treasury shares may be disposed without the need for the corporation to receive consideration at least equal to the par value. Section 152 was amended to clarify that the minimum consideration for which shares may be issued may not be less than the consideration, if any, required under Section 153. Section 153 was amended to state that the consideration received for

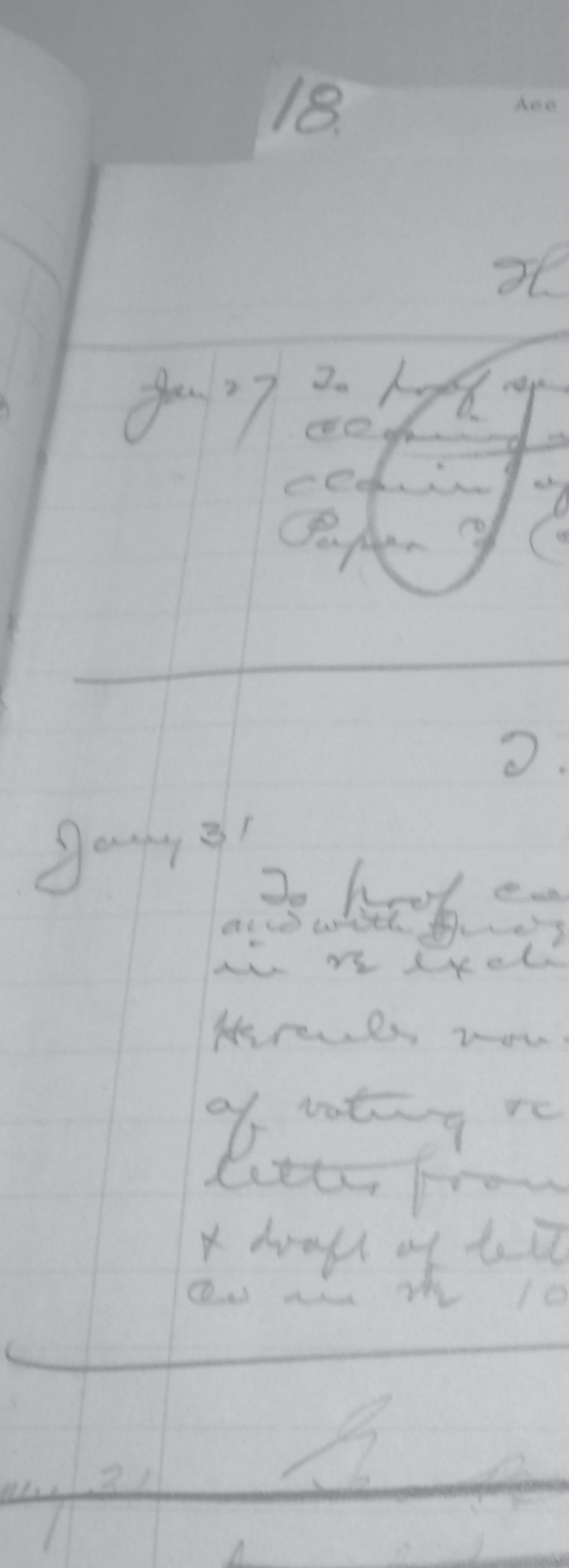
treasury shares may be greater than, less than, or equal to the par value of the shares. Section 153 was further amended to confirm that, as with an issuance of stock, the corporation may receive for a disposition of treasury shares consideration consisting of cash, tangible or intangible property, or any benefit to the corporation (or any combination of the foregoing).

In connection with this change, Section 160(b) was amended in a few technical respects. Before the amendments, Section 160(b) provided that nothing in Section 160, which governs a corporation's power to deal in its own stock, limits or affects the corporation's right to resell shares that have been purchased or redeemed but have not been retired for such consideration as is fixed by the board. The amendments to Section 160(b) make clear that nothing in Section 160 limits or affects the corporation's right to resell, under Section 153, shares that have been purchased or redeemed by the corporation and have not been retired, or are not required by the certificate of incorporation to be retired.

The 2023 amendments make clarifying changes to Section 157. As noted above, in 2022, Section 157 was amended to harmonize the procedures for issuing rights and options to purchase or acquire stock with the procedures applicable to the issuance of stock. Those amendments authorized the board of directors (or a duly empowered committee of the board) to delegate to one or more other persons or bodies (e.g., officers and others) the power to issue rights and options, subject to the adoption of a resolution fixing (i) the maximum number of rights or options, and the maximum number of shares issuable upon exercise thereof; (ii) a time period during which the rights or options, and during which the shares issuable upon exercise thereof, may be issued; and (iii) a minimum amount of consideration (if any) for which the rights or options may be issued and the minimum amount of consideration for the shares issuable upon exercise thereof. The 2023 amendments preserve this basic construct, albeit with some technical enhancements. The language in Section 157(c), which permits the board to adopt resolutions delegating to other persons and bodies the power to enter into transactions to issue rights or options, was expanded to make clear that the board (or committee) may in such resolutions delegate the power to fix the terms upon which shares may be acquired from the corporation upon the exercise of rights or options. Accordingly, under revised Section 157, a resolution of the board (or duly empowered committee) delegating the power to issue rights or options to officers or others could include, for example, the power to fix the vesting terms of the grant, including whether any grant may be accelerated. Amended Section 157(c) also provides that the board's (or committee's) delegating resolutions must continue to fix the maximum number of shares issuable upon exercise of the rights or options issued pursuant to the delegation, but do not otherwise need to fix the maximum number of rights or options issuable under the delegation. Additionally, amended Section 157(c) clarifies that such delegating resolutions must establish two separate time periods: one time period during which the delegate can issue rights or options, and another time period during which shares may be issued upon the exercise of the rights or options. Those time periods may be expressed in terms of specific dates or time horizons, or they may be made dependent upon extrinsic facts. Thus, it would be sufficient for the resolutions to state, for example, that a person or body may issue options under an incentive plan for the duration of the plan and that shares may be issued upon the exercise of such options for a period of ten years following the grant date. Section 157(e), which deals with the consideration payable upon the exercise of rights or options, was amended to reference the minimum consideration (if any) required by Section 153 of the DGCL.

Ratification of Defective Corporate Acts

Section 204, which relates to the ratification of defective corporate acts (i.e., corporate acts that, due to a failure in authorization, are void or voidable), was amended in several respects, principally to streamline the filings associated with the ratification of defective corporate acts that require the filing of an instrument with the Delaware Secretary of State. Under the pre-amendment version of Section 204, if the defective corporate act being ratified would have required under any section of the DGCL the filing of a certificate with the Delaware Secretary of State, the corporation must file a certificate of validation with



the Delaware Secretary of State (even if a certificate was previously filed and no changes need to be made to such certificate to give effect to the ratification). The pre-amendment version of the statute required that the certificate of validation include specified information, including (i) the identification of each defective corporate act that is the subject of the certificate of validation (including, in the case of an act involving the issuance of putative stock, the number and type of shares of putative stock issued and the date or dates upon which the putative shares were purported to be issued), the date of the defective act, and the nature of the failure of authorization in respect of each such act; (ii) a statement that the defective corporate act was ratified in accordance with Section 204, including the date on which the board ratified the act and the date, if any, on which the stockholders ratified the act; and (iii) (A) if a certificate was previously filed with the Delaware Secretary of State and no change is required to give effect to the defective corporate act, the name, title, and filing date of the prior certificate as well as a copy of such certificate (and any certificates of correction that were filed to correct that prior certificate), (B) if a certificate was previously filed and that certificate requires some change to give effect to the defective corporate act, the name, title, and filing date of the prior certificate, a statement that a certificate containing the information required to be included under the applicable provision of the DGCL to give effect to the defective corporate act is attached as an exhibit to the certificate of validation (with the exhibit so attached), and the date and time that such certificate is deemed to become effective, and (C) if no certificate was previously filed, a statement that a certificate containing all information required by the applicable provision of the DGCL is attached as an exhibit to the certificate of validation (with the exhibit so attached), and the date and time that such certificate is deemed to become effective.

The relative complexity of the certificate of validation, along with the lack of uniformity in the practice of preparing such certificates, resulted in delays in the processing of certificates of validation. In an effort to alleviate some of the administrative burdens associated with such filings, the 2023 amendments seek to streamline the procedures relating to the

preparation and filing of certificates of validation. First, the amendments to Section 204(e) dispense with the need for filing a certificate of validation in circumstances where the underlying defective corporate act required the filing of a certificate under another section of the DGCL and such a certificate has already been filed and requires no change to give effect to the defective corporate act. As an example, under the pre-amendment version of Section 204, if the board, acting by less than unanimous written consent, approved an amendment to the certificate of incorporation to effect a stock split, and such amendment was adopted by stockholders and duly filed with the Delaware Secretary of State at the appropriate time, the corporation, after ratifying the stock split, would be required to file a certificate of validation attaching that previously filed instrument, even though no change was required to give effect to the underlying act. Under the 2023 amendments, no such certificate of validation would be required. Dispensing with the need to file a certificate of validation in these circumstances does not prejudice the rights of any parties in interest, as Section 204 still requires notice of the ratification to be given to holders of valid stock and putative stock as of all relevant times.

Second, the 2023 amendments greatly simplify the contents of a certificate of validation in circumstances where one is required. (A certificate of validation is required under circumstances where the certificate on file with the Delaware Secretary of State requires some change to give effect to the defective corporate act and where no certificate was previously filed but the underlying act requires recordation with the Delaware Secretary of State.) Specifically, the amendments eliminate the need for the certificate of validation to identify the underlying defective corporate acts, the nature of the failure of authorization relating to those acts, and matters relating to any shares of putative stock arising from those acts. In addition, the amendments eliminate the need for the certificate of validation to specifically state that the board and, if applicable, stockholders have approved the ratification of the acts and the date(s) on which the ratification was so approved. Instead, the certificate of validation need only state that the corporation has ratified one or more defective acts that would have required the filing of a certificate under another provision of the DGCL, that each act has been ratified in accordance with Section 204, and, in the case where a certificate has previously been filed, the name, title, and filing date of the certificate, a statement that a certificate containing the information required to be included under such other provision of the DGCL to give effect to the defective corporate act is attached as an exhibit, and the date and time that the certificate is deemed to become effective or, in the case where no certificate has previously been filed, a statement that a certificate containing the information required under the other provision of the DGCL is attached as an exhibit and the date and time such certificate is deemed to become effective.

Section 204 was also amended to clarify technical procedural requirements in circumstances where no valid stock is outstanding and entitled to vote on the ratification. The pre-amendment version of Section 204(c)(2) dispensed with the need for a vote of stockholders in circumstances where no valid stock is outstanding and entitled to vote on the ratification. That provision, however, stated that no such vote is needed if there are no shares of valid stock outstanding and entitled to vote on the ratification "as of the record date for determining the stockholders entitled to vote on the ratification." Because the use of the construct of a record date is inapposite in circumstances where no vote of stockholders is being taken, the language of Section 204(c)(2) was clarified to provide that the determination as to whether any shares of valid stock are outstanding and entitled to vote on the ratification must be made at the time the board adopts the resolutions approving the defective corporate act. The pre-amendment version of Section 204(d), which specified that shares of "putative stock" outstanding as of the record date for determining stockholders entitled to vote on a ratification are neither entitled to vote on the ratification nor counted for quorum purposes in any ratification vote, was similarly amended to dispense with the concept of a record date and to fix the board's adoption of the resolutions ratifying the defective corporate act as the time for determining which shares constitute valid stock and which shares constitute putative stock entitled to vote on the adoption of the ratification of a

defective corporate act requiring a vote of the holders of valid stock.

Action by Consent of Stockholders in Lieu of a Meeting

Under Section 228 of the DGCL, unless the certificate of incorporation otherwise provides, stockholders may take action by consent in lieu of a meeting without prior notice and without a vote, provided that valid consents of the requisite number of votes of stockholders are delivered to the corporation in accordance with law. As no prior notice is required for such action to be taken, Section 228(e) requires prompt notice to be given to non-consenting stockholders after an action is taken. Specifically, Section 228(e) currently requires notice of the taking of corporate action by consent to be given to those stockholders who have not consented to the action and who, if the action had been taken at a meeting, would have been entitled to notice of the meeting if the record date for notice of the meeting had been the date that consents signed by a sufficient number of holders to take the action were delivered to the corporation as provided in Section 228.

Under the current law, the date for notice to non-consenting stockholders differs from the record date for determining stockholders entitled to act by consent. Under Section 213(b) of the DGCL, which governs the fixing of a record date for action by consent of stockholders in lieu of a meeting, there are three different record dates that could be used for determining stockholders entitled to act on a consent. (These include (i) a record date fixed by the board, which date may not precede the date upon which the board fixes the record date and which may not be more than ten days after the date of such resolution, (ii) if no record date is fixed by the board, and no prior action of the board is required by the DGCL, the first date on which a signed consent is delivered to the corporation, and (iii) if no record date is fixed by the board and prior action of the board is required under the DGCL, the date on which the board adopts the resolutions taking such prior action.) As revised by the 2023 amendments, Section 228(e) harmonizes the notice requirements to non-consenting stockholders with the provisions governing the record date for determining stockholders entitled to consent to an action. Specifically, amended Section 228(e) provides that notice of action by consent of stockholders in lieu of a meeting must be given to those non-consenting stockholders as of the record date for the action by consent who would have been entitled to notice of a meeting held to take such action if the record date for the notice of the meeting was the record date for the action by consent.

The amendments to Section 228(e) also provide that a notice that constitutes a notice of internet availability of proxy materials for purposes of the federal Securities Exchange Act will satisfy the notice requirements of Section 228(e) for corporations entitled to use such notices under the relevant regulation promulgated under the Securities Exchange Act.

Amendments to Certificates of Incorporation

Section 242, which governs the procedures by which a corporation may implement amendments to its certificate of incorporation, was amended in several important respects. In general, after a corporation has received payment for its stock, an amendment to the certificate of incorporation must be approved by the board and then adopted by the holders of a majority in voting power of the outstanding stock entitled to vote thereon and by the holders of a majority in voting power of each class entitled to vote thereon as a class, subject to limited exceptions.

The 2023 amendments added a new Section 242(d) governing the circumstances in which a vote of stockholders otherwise required by Section 242(b) may be eliminated or reduced. The pre-amendment version of Section 242(b)(1) contained provisions that eliminated the need for a vote of stockholders to adopt an amendment in limited circumstances, such as an amendment to effect a name change (unless the certificate of incorporation requires such a vote) or an amendment to delete provisions that named the incorporator, initial directors, or initial subscribers for stock or provisions contained in any amendment to effect a change, exchange, reclassification subdivision, combination, or cancellation of stock that has already become effective. As those provisions relate to circumstances where an amendment does not require a vote of stockholders, they have been

moved to new Section 242(d)(1). New Section 242(d)(1) then creates additional categories of amendments for which no vote of stockholders is required. Under new Section 242(d)(1), no vote of stockholders is required for an amendment that subdivides the issued shares of a class of stock into a greater number of issued shares (i.e., a forward stock split), so long as such class is the only class of such corporation's capital stock then outstanding and such class is not divided into series. New subsection 242(d)(1) further provides that no vote of stockholders is required in connection with any such forward stock split in order to increase the authorized number of shares of such class up to an amount proportionate to the subdivision. By way of example, if a corporation with only common stock outstanding has 100 shares of common stock authorized, 50 of which are issued, the corporation could effect a 3:1 forward stock split. In connection with that split, the corporation would be required to increase its authorized shares of common stock to at least 150 authorized shares, but it could increase its authorized shares of common stock to up to 300 authorized shares.

Next, new Section 242(d)(2) reduces the default stockholder vote required to approve an amendment to increase or decrease the authorized number of shares of a class of stock, or an amendment to reclassify the outstanding shares of a class into a lesser number of shares of the class (i.e., a reverse stock split), under specified circumstances. In recent years, due to a wider dispersion of shares among retail holders and policies in which brokerage firms decline to exercise their discretionary authority to vote shares held in "street name," many public corporations have encountered significant difficulty in securing various stockholder votes and, in particular, a vote necessary to effect a reverse stock split to help a corporation maintain the minimum share price amount necessary to be listed on a national securities exchange. The lack of interest and participation among stockholders and beneficial owners in these critical votes is often attributable not to the merits of the proposal—few stockholders, it would seem, would support a de-listing that would assuredly diminish the liquidity of the stock—but to "rational apathy" among retail and other dispersed investors, each of whom individually owns too few shares to have a vested

interest in the corporation but all of whom collectively represent a significant portion of the voting base. New Section 242(d)(2) provides that a corporation may amend its certificate of incorporation to increase or decrease the authorized shares of a class of stock, or to effect a reverse stock split in respect of a class of stock, without obtaining the vote or votes otherwise required by Section 242(b) (i.e., at least a majority in voting power of the outstanding stock entitled to vote thereon) if (i) the shares subject to the reverse stock split are listed on a national exchange immediately before the amendment becomes effective and such corporation meets the listing requirement of such exchange relating to the minimum number of holders immediately after the amendment becomes effective, (ii) at a meeting of stockholders at which a vote is taken for and against the proposed amendment, the votes cast for the amendment exceed the votes cast against the amendment, and (iii) if the amendment increases or decreases the number of shares of a class of stock that has not opted out of the class vote pursuant to the last sentence of Section 242(b)(2) (which sentence provides that an amendment to the certificate of incorporation to increase or decrease the authorized shares of a class, which would otherwise require a separate vote of the holders of the class, may be approved by the holders of the stock entitled to vote), the votes cast for the amendment by the holders of such class exceed the votes cast against the amendment by the holders of such class. As new Section 242(d)(2) refers only to votes cast for or against an amendment, it makes clear that abstentions have no effect on whether the required approval is obtained. The addition of subsection (d) does not eliminate the stockholder vote required to change the par value of a class of stock, whether or not in connection with any reclassification, subdivision or combination. Thus, if the par value of the shares of a class is changed, even proportionately with the split, a separate vote of the holders of a majority in voting power of the outstanding shares of such class would still be required under Section 242(b)(2) of the DGCL.

In connection with the foregoing amendments to Section 242(d) dealing with forward and reverse stock splits, Section 242(a)(3), which governs amendments that reclassify outstanding stock, is also being amended to require that reclassifications by way of subdividing and combining (i.e., forward stock splits and reverse stock splits) must reclassify both outstanding shares and shares held in treasury. That is, when a corporation effects a forward or reverse stock split, the split will apply to all issued shares, whether they are outstanding or held by the corporation in treasury.

New Section 242(d) contains lead-in language (i.e., "unless otherwise expressly required by the certificate of incorporation") that permits a corporation to "opt in" to the stockholder votes that otherwise would be required under subsection (b) in connection with any reclassification, subdivision, or combination of the issued shares or increase or decrease in the authorized number of shares contemplated by Section 242(d). To make use of such lead-in language, though, the provision of the certificate of incorporation must expressly state that the vote of stockholders otherwise required under Section 242(b) is required to adopt any amendment to the certificate of incorporation specified in Section 242(d), or it must expressly "opt out" of the provisions of Section 242(d).

Powers of Surviving, Resulting, Converted, or Domesticated Corporations

Section 260 of the DGCL gives surviving or resulting corporations of a merger or consolidation broad power to issue bonds and other obligations, to an amount sufficient with its capital stock to provide for the payments it will be required to make, or obligations it will be required to assume, to effect the merger. It also specifies that it is lawful for the surviving corporation to mortgage its franchise, rights, privileges, and property to secure such obligations. It then provides that a surviving or resulting corporation may issue certificates for shares of capital stock or uncertified shares and other securities to the stockholders of the constituent corporation in exchange or payment for the original shares as required by the agreement of merger or consolidation.

The 2023 amendments apply the empowering provisions of Section 260 to both conversions and domestications, given that virtually any changes in a capital structure that may be effected through a

merger or consolidation may also be effected through a conversion or domestication.

Conversion of Other Entities to Delaware Corporations

Similar to amendments made in 2022 to Section 388 of the DGCL (which relates to domestications of non-U.S. entities to Delaware), the 2023 amendments to Section 265 provide that a plan of conversion adopted under Section 265 in connection with the conversion of another entity to a Delaware corporation may set forth corporate action to be taken by the converted corporation in connection with the conversion. Those additional corporate actions must be approved prior to the conversion in accordance with the legal requirements applicable to the entity prior to the conversion. Once so approved, any such corporate action that is within the power of a Delaware corporation under the DGCL and that is set forth in the plan of conversion will be deemed authorized, adopted, and approved, as applicable, by the converted Delaware corporation and its board of directors and stockholders, without further action by the board or stockholders. In the event that any such follow-on action requires the filing of a certificate under any other section of the DGCL, such other certificate must state that, pursuant to Section 265, no action by the board of directors or stockholders is required.

Conversion of Other Entities to Other Entities

The 2023 amendments revise Section 266, which relates to a conversion of a Delaware corporation to another entity, to clarify that a corporation may adopt a plan of conversion specifying, among other things, the terms of the conversion, the provisions of the organizational documents of the other entity continuing after the conversion, the treatment of stock converted or exchanged in the conversion, and other matters. The pre-amendment version of Section 266 provided that the board must adopt resolutions approving a conversion of the corporation to another entity and submit the resolutions to the stockholders for their adoption. As amended, Section 266 provides that if a plan is to be adopted in connection with any conversion, the plan must be approved by the board and the stockholders in the manner prescribed in Section 266 together with the resolution approving the conversion.

Transfer, Continuance, and Domestication of Delaware Corporations to Non-U.S. Entities

Consistent with changes made in 2022 to Section 266, which allows Delaware corporations to convert to other entities, the 2023 amendments change the requirement in Section 390 for stockholder approval of the transfer, domestication, or continuance of a corporation in a non-U.S. jurisdiction from all of the outstanding shares of stock of the corporation (voting or non-voting) to a majority in voting power of the outstanding shares of stock entitled to vote on the transfer, domestication, or continuance. If the corporation is transferring, domesticating, or continuing as a partnership with one or more general partners, the transfer, domestication, or continuance requires the approval of each stockholder that is to become a general partner of the partnership.

Given that many stockholders, including preferred stockholders, will have invested in Delaware corporations on the basis that domestications, transfers, and continuances would be practically impossible to consummate (and will have negotiated protective provisions or other rights with that premise in mind), the amendments make clear that any provision of the certificate of incorporation of a corporation incorporated before August 1, 2023, or voting agreement or other written agreement between the corporation and any stockholder entered into before that date, that restricts or prohibits the consummation of a merger, consolidation, or conversion shall be deemed to apply to a domestication, transfer, or continuance unless the certificate of incorporation or agreement expressly otherwise provides. Thus, for example, protective provisions of existing corporations that require a separate vote of the holders of preferred stock (or one or more series thereof) to approve a merger will be construed to require the same vote to effect a domestication, transfer, or continuance. Nevertheless, going forward, if investors want to obtain veto rights over domestications, transfers, or continuances, they must specifically negotiate for blocking rights in the certificate of incorporation over those transactions. Without those express rights, investors run the risk of having their shares cancelled or converted into another form of consideration (either cash, securities, or other property) in a transfer, domestication, or continuance of the corporation. Investors should also review the terms of any “deemed liquidation” provisions to ensure that they will obtain the rights they seek to receive if the corporation consummates a transfer, domestication, or continuance that changes the nature of their investment. Although investors should consider negotiating for such rights, they will not be entirely unprotected. As described below, Section 262 of the DGCL was amended to give stockholders appraisal rights in connection with any transfer, domestication, or continuance. From a practical standpoint, the availability of appraisal rights will have the effect of deterring many private corporations from effecting a transfer, domestication, or continuance in a non-U.S. jurisdiction, as the prospect of a liquidity event will make it economically infeasible to complete the transaction.

As with Section 266, Section 390 was amended to clarify that a corporation may adopt a plan of transfer, domestication, or continuance specifying, among other things, the terms of the transfer, domestication, or continuance; the mode of carrying it into effect; the provisions of the organizational documents of the resulting entity; the treatment of stock converted or exchanged in the transfer, domestication, or continuance; and other matters, including any provisions required to be set forth therein under the laws applicable to the resulting entity.

Appraisal Rights

The 2023 amendments effect several changes to Section 262, which provides stockholders with a right to seek a judicial appraisal of the fair value of their stock in connection with specified mergers, consolidations, and conversions in which the corporation is a constituent entity or is the converting entity. Principally, the 2023 amendments give appraisal rights to stockholders in connection with a domestication, transfer, or continuance of a Delaware corporation to a non-U.S. jurisdiction under Section 390 of the DGCL. As noted above, Section 390 of the DGCL was amended to reduce the statutory voting requirement necessary to effect a domestication, transfer, or continuance from a unanimous vote of all stockholders, voting and non-voting, to the holders of a majority in voting power of the outstanding stock. As any change in stock that

may be effected through a merger, consolidation, or conversion can likewise be effected through a domestication, transfer, or continuance, it was deemed appropriate, in light of the reduction in the voting threshold, to provide objecting stockholders with appraisal rights. A domestication, transfer, or continuance, however, will not give rise to appraisal rights where the current "market out" exception in Section 262(b)(2) applies. (In general, Section 262(b)(2) provides that, where shares of stock are listed on a national securities exchange or held of record by more than 2,000 stockholders on the record date for determining stockholders entitled to notice of the meeting of stockholders to vote upon the merger or consolidation or conversion, those holders will not be entitled to appraisal rights in such merger or consolidation or conversion unless their shares are converted into anything other than shares of the surviving corporation, shares of stock of another corporation (or depository receipts in respect thereof) that are listed on a national securities exchange or held of record by more than 2,000 stockholders, cash in lieu of fractional shares, or any combination of the foregoing.)

Next, in connection with the changes to Section 265, Section 262 was amended to deny appraisal rights in connection with a merger, consolidation, conversion, transfer, domestication, or continuance that is approved in connection with a plan adopted by an entity that has converted or domesticated to a Delaware corporation.

Finally, Section 262(k) was amended to clarify that an appraisal demand may be withdrawn more than 60 days after the effective date of the transaction resulting in appraisal rights if the withdrawal is approved by the corporation. The amendment does not, however, change the pre-existing rule that appraisal rights cease if a petition for appraisal is not filed under Section 262(e).

Mortgages, Pledges, and Foreclosures

The 2023 amendments revise Section 272 of the DGCL to add a new "safe harbor" provision for the sale, lease, or exchange of collateral assets that secure a mortgage or pledge. Notably, this safe harbor under amended Section 272(b) was not intended to affect a secured party's obligation to comply with Article 9 of the Uniform Commercial Code (as applicable), real property law, or other applicable law.

Section 271 of the DGCL requires a vote of stockholders to authorize a sale, lease, or exchange of all or substantially all of the assets of the corporation. The pre-amendment version of Section 272 of the DGCL specified that the authorization or consent of stockholders to the mortgage or pledge of a corporation's property or assets shall not be necessary, except to the extent provided in the certificate of incorporation. But the pre-amendment version of Section 272 of the DGCL did not, at least by its express terms, state that no stockholder vote is required to authorize a sale, lease, or exchange of all or substantially all of a corporation's assets.

As amended, Section 272(b)(1) clarifies that stockholder approval of a sale, lease, or exchange of collateral securing a mortgage or pledge is not required if such transaction is being effected through the secured party's exercise of its rights under the law governing the mortgage or pledge (or other applicable law, including under Article 9 of the Uniform Commercial Code, real property law, or other law) without the corporation's consent. Alternatively, Section 272(b)(2) permits the secured party and the corporation, with the approval of its board of directors, to agree to an alternative transaction not prohibited by the law governing the mortgage or pledge (e.g., a strict foreclosure or sale to a third party), without obtaining a vote of stockholders under Section 271, so long as the value of the assets sold, leased, or exchanged is less than or equal to the amount of the liability or obligation being reduced or eliminated as a result of the transaction. The amended statute does not prescribe a specific method for valuing assets for this purpose. Section 272(b)(2) does, however, provide that there is not a presumption that a transaction fails this asset test because it involves consideration being paid to or received by the corporation or its stockholders. This could include, for example, transactions in which consideration is paid to those parties in the ordinary course of similar matters or paid as "nuisance value" to avoid claims in litigation.

New Section 272(c) expands on the effect of this asset test, providing that, after a transaction is completed, the transaction cannot be invalidated for failure to satisfy the asset value test if the transferee of the assets provided value therefor and acted in good faith (as defined in Section 1-201(b)(20) of Title 6 of the Delaware Code). Section 272(c) clarifies, however, that a transaction may be enjoined before consummation and that the statute does not preclude any claim for monetary damages (including a claim in the right of the corporation based on a breach of fiduciary duty by a director, officer, or stockholder). New Section 272(c) does not alter the fiduciary duties of directors or officers (or, as applicable, stockholders) in connection with a sale, lease, or exchange of assets, or the level of judicial scrutiny that will apply to the decision to enter into a sale, lease, or exchange of assets, each of which will be determined based on the common law of fiduciary duty, including the duty of loyalty. Additionally, new Section 272(c) does not eliminate defenses otherwise available, including based on Section 141(e) of DGCL (providing directors with "full protection" for good faith reliance on the books and records of the corporation, officers, board committees, and experts selected with reasonable care) or a provision in the corporation's certificate of incorporation adopted under Section 102(b)(7) that exculpates directors or officers against monetary damages for breach of fiduciary duty, subject to specified limitations and exceptions. The adoption of Section 272(c) was also not intended to preclude application of a similar remedies scheme for a violation of Section 271.

Under new Section 272(d), a certificate of incorporation provision that requires stockholder authorization of a sale, lease, or exchange of assets does not apply to a sale, lease, or exchange permitted by Section 272(b) unless the certificate of incorporation expressly so provides. Nevertheless, a provision of a certificate of incorporation that extends to transactions beyond Section 271 and requires the vote or consent of stockholders for "dispositions" of assets may result in such transaction being denied the full benefit of Section 272(b)'s safe harbor. New Section 272(d) applies only to certificate of incorporation provisions that first become effective after August 1, 2023.

Notably, amended Section 272 does not create a general insolvency exception to Section 271 akin to that the Delaware Supreme Court declined to adopt in *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 279 A.3d 323 (Del. 2022). The amendments to Section 272 instead establish specified safe harbors for when stockholder approval is not required under Section 271. In doing so, amended Section 272 does not preclude further case law developments on which transactions constitute a "sale, lease or exchange" of assets for purposes of Section 271, and was not intended to preclude further development of the quantitative and qualitative analyses used by the Delaware courts in interpreting and applying Section 271. ■

2023 Amendments to the Delaware LLC and Partnership Acts

Delaware has recently adopted legislation amending the Delaware Limited Liability Company Act (LLC Act), the Delaware Revised Uniform Limited Partnership Act (LP Act), and the Delaware Revised Uniform Partnership Act (GP Act) (collectively, the LLC and Partnership Acts). The following is a brief summary of some of the more significant amendments that affect Delaware limited liability companies, Delaware limited partnerships, and Delaware general partnerships, including amendments (i) providing for certificates of amendment to a certificate of division, (ii) allowing for the revocation of the termination of a protected series, (iii) allowing for the revocation of the dissolution of a registered series, and (iv) clarifying that subscriptions for interests may be irrevocable. The amendments became effective on August 1, 2023.

Certificate of Amendment to a Certificate of Division

Prior to and following the enactment of the amendments, the LP Act and the LLC Act provide that when a Delaware limited partnership or a Delaware limited liability company divides into two or more Delaware limited partnerships or Delaware

limited liability companies, respectively, the dividing entity must file a certificate of division containing certain information with the office of the Secretary of State. The amendments to the LP Act and the LLC Act permit or require the filing of a certificate of amendment to a certificate of division if the name or business address of the division contact or the business address where the plan of division is on file was false when the filing was made or such information changes. A certificate of amendment must be filed if, during the six years following the filing of the certificate of division, it is determined that such information was false at the time of the filing or the information changes. After such time, a certificate of amendment to a certificate of division may be filed.

Revocation of the Termination of a Protected Series

The amendments add a new subsection to each of the LP Act and the LLC Act that provides for the revocation of termination of a protected series, similar to the previously existing provisions of the LP Act and the LLC Act allowing for the revocation of dissolution of a limited partnership or limited liability company.

Unless the revocation of termination of a protected series is prohibited in the applicable limited liability company or partnership agreement, the termination of a protected series may be revoked prior to the completion of the winding up of such protected series: (i) in the manner provided by the applicable limited liability company or partnership agreement; (ii) in the case of a termination effected by vote or consent, pursuant to such vote or consent; (iii) in the case of a termination at the time specified in the limited liability company or partnership agreement or upon the happening of events specified in the limited liability company or partnership agreement (other than a vote of consent), pursuant to such vote or consent that is required under the limited liability company or partnership agreement for the amendment of the provision effecting such termination (and any other approvals required by the limited liability company or partnership agreement to revoke such termination); or (iv) for a Delaware limited partnership only, in the case of a

termination effected by an event of withdrawal of a general partner associated with the protected series, pursuant to the vote or consent of all remaining general partners associated with such protected series, and limited partners associated with such protected series who own more than two-thirds of the then-current percentage or other interest in the profits of such series.

Further, if a protected series is terminated by the dissolution of the limited partnership or limited liability company, the termination of a protected series will be automatically revoked upon any revocation of dissolution of the limited partnership or the limited liability company pursuant to Section 17-806 of the LP Act and Section 18-806 of the LLC Act.

The termination of a protected series may not be revoked if the partnership or limited liability company, as applicable, has dissolved and the dissolution of such entity has not been revoked.

Revocation of Dissolution of a Registered Series

The amendments add a new subsection to the LP Act and the LLC Act to create a mechanism for revoking the dissolution of a registered series, similar to the previously existing provisions of the LP Act and the LLC Act allowing for the revocation of dissolution of a limited partnership or limited liability company.

Unless the revocation of dissolution of a registered series is prohibited in the applicable limited liability company or partnership agreement, the dissolution of a registered series may be revoked prior to the filing of a certificate of cancellation of the certificate of registered series of such registered series: (i) in the manner provided by the applicable limited liability company or partnership agreement; (ii) in the case of a dissolution effected by vote or consent, pursuant to such vote or consent; (iii) in the case of a dissolution at the time specified in the limited liability company or partnership agreement or upon the happening of events specified in the limited liability company or partnership agreement (other than a vote of consent), pursuant to such vote or consent that is required under the limited liability company or partnership agreement for the amendment of the provision effecting such dissolution (and any other approvals required by the limited liability company or partnership agreement to revoke such dissolution); or (iv) for a Delaware limited partnership only, in the case of a dissolution effected by an event of withdrawal of a general partner associated with the registered series, pursuant to the vote or consent of all remaining general partners associated with such registered series, and limited partners associated with such protected series who own more than two-thirds of the then-current percentage or other interest in the profits of such series.

Additionally, if a registered series is dissolved by the dissolution of the limited partnership or limited liability company, respectively, unless a certificate of cancellation of the certificate of registered series has been filed, the dissolution of a registered series will be automatically revoked upon any revocation of dissolution of the limited partnership or the limited liability company pursuant to Section 17-806 of the LP Act and Section 18-806 of the LLC Act.

The dissolution of a registered series may not be revoked if the partnership or limited liability company has dissolved and the dissolution of such entity has not been revoked.

Irrevocable Subscription Agreements

The amendments add a new section to each of the LLC and Partnership Acts that allows a subscription for a limited liability company or partnership interest, whether submitted in writing, by an electronic transmission, or by other means permitted by applicable law, to be irrevocable if such subscription clearly states that it is irrevocable.

The amendments reflect Delaware's continuing commitment to maintaining statutes governing Delaware LLCs, LPs, and GPs that effectively serve the business needs of the national and international business communities. The amendments to the LLC Act, the LP Act, and the GP Act are contained in Senate Bill Nos. 113, 112, and 115, respectively. ■

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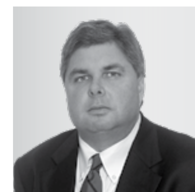

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