

RECENT DEVELOPMENTS IN DELAWARE LAW



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 as Delaware counsel, we have handled the most M&A transactions valued at or above \$100 million for 32 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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Controlling Stockholders

***In re Oracle Corp. Derivative Litigation*: Delaware Supreme Court Holds Larry Ellison Was Not a Controlling Stockholder of Oracle**

In *In re Oracle Corp. Derivative Litigation*, 339 A.3d 1 (Del. 2025), the Delaware Supreme Court addressed, among other things, whether documents prepared by a special litigation committee before it handed derivative litigation over to stockholder-plaintiffs were subject to discovery and whether Larry Ellison, a co-founder of and large minority equity holder in both Oracle Corporation and NetSuite Inc., controlled Oracle and/or exercised transaction-specific control in connection with Oracle's acquisition of NetSuite.

The case centered around Oracle's acquisition of NetSuite in 2016. In May 2017, Oracle stockholders filed derivative claims against Ellison, Safra Catz (one of Oracle's co-CEOs), members of the Oracle special committee that negotiated the transaction, and Oracle itself, challenging the acquisition on grounds that Oracle overpaid for NetSuite in a manner that conferred a unique benefit on Ellison as a result of his ownership stake in NetSuite. The defendants filed a motion to dismiss under Court of Chancery Rule 23.1 for failure to satisfy the demand requirement, which was denied. Thereafter, in May 2018, the Oracle board formed a special litigation committee to assess whether to move to dismiss the lawsuit, press the claim, or return control of the litigation to the stockholder-plaintiffs. It ultimately settled on the latter, and the stockholder-plaintiffs continued to press the claims.

The derivative suit proceeded to discovery, during which the stockholder-plaintiffs sought all (i) documents the special litigation committee reviewed and relied upon and (ii) materials prepared by the special litigation committee's counsel, including interview memos, a presentation summarizing the evidence, tables summarizing NetSuite's financial performance, and draft reports. Following the plaintiffs' motion to compel, the Court of Chancery ordered production of the category (i) documents, but denied discovery of the category (ii) documents, reasoning that they were protected by the work product doctrine and that the special litigation committee's decision to withhold them was subject to the business judgment rule.

Ellison was not a controlling stockholder of Oracle. The court noted, among other things, that Oracle's board and management "were not afraid to disagree with Ellison," Ellison did not control Oracle's operations, Ellison avoided transaction-related discussions with the special committee, and that even though Ellison could have exercised transaction-specific control, he did not attempt to, and did not, control negotiations.

After a 10-day trial, the Court of Chancery held that Ellison was not Oracle's controlling stockholder, finding that Ellison did not exert general control over Oracle or so-called "transaction-specific" control over the 2016 acquisition of NetSuite. The Court of Chancery also rejected the plaintiffs' argument that entire fairness applied because Ellison and Catz committed "fraud on the board," finding that the plaintiffs had failed to prove

the elements of a five-factor test. In particular, the Court of Chancery found that neither individual had defrauded the Oracle board or special committee in any manner. Accordingly, the Court of Chancery held that the business judgment rule applied and entered judgment for the defendants. The plaintiffs appealed.

The Delaware Supreme Court affirmed the Court of Chancery's judgment in whole. Its opinion proceeded in three parts. First, the Supreme Court held that the Court of Chancery correctly denied discovery of the special litigation committee materials that had been prepared by counsel. In so doing, it rejected the plaintiffs' arguments that, under *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981), plaintiffs are typically permitted broad discovery and that a reviewing court should apply *Zapata's* heightened scrutiny to a special litigation committee's decision to withhold documents. The court reasoned that *Zapata*, a standard created to address the potential conflict of interest created when directors act to terminate litigation, does not apply to a special litigation committee's decision to do the opposite by allowing derivative plaintiffs to proceed. It thus concluded that "instead of fiduciary review ... the discovery rules" govern motions to compel special litigation committee documents. Applying those rules, the Supreme Court held that the materials that plaintiffs sought were protected by the work product doctrine, including because such protections had not been waived and because the plaintiffs had failed to demonstrate a substantial need for them.

Second, the Supreme Court affirmed the Court of Chancery's finding that Ellison was not a controlling stockholder of Oracle. The court noted, among other things, that Oracle's board and management "were not afraid to disagree with Ellison," Ellison did not

control Oracle's operations, Ellison avoided transaction-related discussions with the special committee, and that even though Ellison could have exercised transaction-specific control, he did not attempt to, and did not, control negotiations. Accordingly, Ellison, who owned roughly a 28.8% stake, neither exerted general control over Oracle's business and affairs nor exerted transaction-specific control over the NetSuite transaction. Accordingly, Ellison, who owned roughly a 28.8% stake, neither exerted general control over Oracle's business and affairs nor exerted transaction-specific control over the NetSuite transaction.

Third and finally, the Supreme Court rejected the plaintiffs' argument that entire fairness applied because Ellison and Catz committed a "fraud on the board" "by failing to disclose material facts relating to NetSuite's valuation and their interactions with NetSuite." The court began its discussion by clarifying that a fraud on the board inquiry "does not require a multi-factor test"—instead, the inquiry focuses on the "familiar ground" of "whether a conflicted fiduciary violated his fiduciary duty of loyalty" by withholding information from the board, engaging in deceptive conduct, or otherwise misleading the board. Applying this test, the court found that the plaintiffs failed to prove that Ellison or Catz had withheld material information from, or otherwise misled, the special committee.

Accordingly, the Supreme Court held that the business judgment rule applied and affirmed the Court of Chancery's judgment.

***Maffei v. Palkon*: The Delaware Supreme Court Finds Business Judgment Review Is the Standard for a Controller-Led Reincorporation from Delaware to Nevada**

In *Maffei v. Palkon*, 339 A.3d 705 (Del. 2025), the Delaware Supreme Court reversed the

Court of Chancery's denial of a motion to dismiss, holding that the business judgment rule applied to a controlled company's decision to reincorporate from Delaware to Nevada. The justices reasoned that fiduciaries are not conflicted unless they stand to receive a *material*, non-ratable benefit and that any liability protections associated with reincorporating in Nevada were too speculative and hypothetical to satisfy that materiality standard.

TripAdvisor is a large, publicly traded company that offers a travel guidance platform. Liberty TripAdvisor Holdings ("Holdings") owned high-vote shares in TripAdvisor, giving it a majority of TripAdvisor's outstanding voting power. Gregory Maffei was the CEO and chair of the board of Holdings and owned high-vote shares in Holdings, giving him 43% of the outstanding voting power in Holdings. For purposes of the motion to dismiss, the defendants conceded that he controlled both Holdings and TripAdvisor.

In November 2022, TripAdvisor's board considered reincorporating from Delaware to Nevada via statutory conversion, and in March 2023, the Holdings board considered the same thing. In each case, the proposed benefits of reincorporation were described to each board as including increased protections against liability for fiduciaries as well as lower franchise taxes and fees. By April 2023, each board unanimously approved the reincorporation, and each company sought stockholder approval for the move. The proxy statements for the conversions disclosed that litigation protections available to directors and officers would be greater under Nevada law. Stockholder approval was obtained, but only 5.4% of TripAdvisor's minority stockholders and 30.4% of Holdings' minority stockholders voted in favor of the conversion; neither proposal would have passed absent Maffei and Holdings' vote.

Minority stockholders sued each company's directors and alleged controlling stockholder for breach of fiduciary duties and to enjoin the closing of the conversions. The Court of Chancery denied the defendant's motion to dismiss, which the defendants appealed.

The decision by TripAdvisor and Holdings to reincorporate to Nevada was made on a "clear day," there were no claims that the conversion was an attempt to extinguish either existing or threatened litigation, and the conversion was not a prelude to consummating a post-conversion transaction under Nevada law.

On appeal, the Delaware Supreme Court reversed. The court began its analysis by confirming that entire fairness is the proper standard of review where a material, non-ratable benefit is received by a majority of directors who approved a challenged transaction or by the controlling stockholder from the challenged transaction. The court defined what constitutes a non-ratable benefit for both directors and controlling stockholders. For directors, the benefit must be a personal financial benefit from the transaction that is not equally shared by the stockholders. Further, it must be improbable, in the context of the director's economic circumstances, that the director would be able to make a decision about whether to approve the transaction "without being influenced by her overriding personal interest." For a controlling stockholder, the court stated that the benefit must be "to the exclusion of, and detriment to, the minority stockholders." When a controller extracts something uniquely valuable to them from a transaction, the requirement may be met even if they nominally receive the same consideration as other stockholders.



The Supreme Court agreed with the lower court's imposition of a materiality requirement for non-ratable benefits but held that litigation temporality was a key factor in determining the materiality of the purported litigation benefits to the defendants from moving to Nevada. The court found that providing protection to directors and controllers for future, hypothetical liability rather than an existing or currently threatened litigation was critical in determining whether the defendants were sufficiently self-interested to have their judgment impaired. The court noted that temporality had long been used as an important distinction by Delaware courts and that without it, boards could not adopt exculpation provisions under DGCL Section 102(b)(7), indemnification benefits, and director and officer insurance policies without being subjected to entire fairness review under the lower court's view of the materiality standard.

Applying that standard, the Supreme Court found that the decision by TripAdvisor and Holdings to reincorporate to Nevada was made on a "clear day," there were no claims that the conversion was an attempt to extinguish either existing or threatened litigation, and the conversion was not a prelude to consummating a post-conversion transaction under Nevada law. The court stated that these factors weighed heavily against finding that the directors or controlling stockholders of TripAdvisor or Holdings received a material, non-ratable benefit from the reincorporation. The court also found that any alleged protection gained from future liability exposure under Nevada's laws was too speculative and hypothetical to cast doubt on the decision-making process of the controller and directors. Accordingly, the Supreme Court held that the business judgment rule applied and reversed the lower court's holding to the contrary.

Manti Holdings, LLC v. Carlyle Group Inc.:
Court of Chancery Rejects Fiduciary Challenge to Merger Based on Alleged Fire Sale of Company by its Private Equity Controller

In *Manti Holdings, LLC v. Carlyle Group Inc.*, 2025 WL 39810 (Del. Ch. Jan. 7, 2025), *aff'd*, 2025 WL 3095219 (Del. Nov. 5, 2025), the Delaware Court of Chancery found that The Carlyle Group Inc. and its affiliates ("Carlyle") did not extract a non-ratable benefit from the sale of Authentix Acquisition Company, Inc. ("Authentix").

Carlyle invested in Authentix via an equity investment vehicle (the "Fund") which had a 10-year fund lifecycle. According to its terms, the Fund was not required to exit from its investments before the Fund's expiration date on September 30, 2017. While exiting the Authentix investment by the 10-year mark was not mandatory, doing so would have been consistent with the typical life cycle of a private equity fund and would have avoided the need to seek approval to extend the Fund beyond its original expiration date.

Through the Fund, Carlyle engaged in multiple rounds of investment in Authentix to support its business and had acquired a majority interest in Authentix by 2013. During the course of the Fund's investment, Authentix's financial performance declined, and it explored a sale on multiple occasions. In 2015, the Authentix board authorized a sale process which was formally launched in September 2016. Over the course of the year-long process, Authentix negotiated with numerous potential buyers and closed the sale of Authentix on September 12, 2017, weeks before the scheduled expiration of the Fund. However, shortly before the expiration date, the Fund's existence was extended by two years so it could continue to hold its other investments. The plaintiffs brought suit, asserting breach

of fiduciary duty by Carlyle in connection with the sale. Specifically, the plaintiffs alleged that Carlyle, as a controlling stockholder, pushed through a fire sale of Authentix at an unfairly low price because Carlyle needed to exit its investment in Authentix before the expiration of the Fund to satisfy Carlyle's investors. The plaintiffs argued that timing the sale to close prior to the expiration of the Fund provided Carlyle with a non-ratable benefit, and therefore, the court should review the transaction under the entire fairness standard as a conflicted controller transaction.

Instead of rushing to get a sale done by the expiration date, Authentix had engaged in a comprehensive sales process involving outreach to over 100 parties, which provided more evidence that Carlyle was aligned with minority stockholders in obtaining the best price and not driven by liquidity pressure.

In a post-trial opinion, the court entered judgment for the defendants, holding that the business judgment rule applied because although Carlyle was a controlling stockholder, it did not stand to receive a material, non-ratable benefit sufficient to trigger an entire fairness review.

Two primary factors drove the court's conclusion. First, the court rejected the plaintiffs' liquidity need theory. The court stressed that a liquidity theory is difficult to plead and prove, as past cases held that they would essentially have to involve a "crisis, fire sale" in order to create an exigent need persuading a controlling stockholder to take less than the fair value of their shares in a transaction. The court found that Carlyle was incentivized to negotiate the highest price

possible as Authentix's largest stockholder. Relatedly, the court was not persuaded that general allegations regarding Carlyle's desire to liquidate before the expiration of the Fund were sufficient to show an exigent need for liquidity. While there was some evidence suggesting a general concern that Carlyle's investors could "claw back" funds if the expiration occurred, the plaintiffs were unable to directly link those concerns to the Authentix sale. Further, the court concluded that the Fund's expiration date was flexible and in fact was extended for two years beyond the original expiration date. Finally, the court found that instead of rushing to get a sale done by the expiration date, Authentix had engaged in a comprehensive sales process involving outreach to over 100 parties, which provided more evidence that Carlyle was aligned with minority stockholders in obtaining the best price and not driven by liquidity pressure. In sum, the plaintiffs failed to prove that Carlyle either had or acted on an urgent need for cash that drove it to accept less than fair value for Authentix.

Second, the court rejected the plaintiffs' theory that Carlyle's receipt of consideration for its preferred stock was a non-ratable benefit sufficient to trigger entire fairness review. In the event of an Authentix sale, the applicable stock designations provided that cash proceeds would be paid to Authentix stockholders pursuant to a waterfall in which Carlyle would be paid first and then paid any residual cash, eclipsing remaining preferences. The court held that this structure aligned Carlyle's incentives with other stockholders in maximizing value in the sale.

For all of these reasons, the Court of Chancery held that the business judgment rule applied and entered judgment for the defendants.



***In re Tesla, Inc. Derivative Litigation*: Delaware Supreme Court Reverses Court of Chancery's Rescission of CEO Pay Package**

In re Tesla, Inc. Derivative Litigation, 2025 WL 3689114 (Del. Dec. 19, 2025), the Delaware Supreme Court reversed the Court of Chancery's order of rescission and reinstated the 2018 equity compensation package for Elon Musk, the chief executive officer of Tesla, Inc.

In 2018, Tesla's board of directors and a majority of its disinterested stockholders approved an equity incentive compensation package for CEO Elon Musk. The compensation package consisted solely of significant equity awards divided into 12 tranches of options that would vest upon Tesla's completion of certain market capitalization and operational milestones. By early 2023, all 12 milestones had been achieved, and Musk had fully performed under the compensation package such that all equity awards had vested.

Shortly after the compensation package was approved, a Tesla stockholder brought a derivative action on behalf of Tesla alleging that Musk, in his capacity as controlling stockholder and director of Tesla, as well as members of the Tesla board, breached their fiduciary duties in approving Musk's compensation package. The Court of Chancery agreed. In *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024), the Court of Chancery held post-trial that the compensation package was not entirely fair to Tesla and entered an order rescinding the entire compensation package. Following the Court of Chancery's decision, Tesla convened a special stockholder meeting at which Tesla's minority stockholders voted on a proposal to approve and ratify the compensation package. The proxy statement distributed to stockholders before the special meeting summarized the problems that the Court of Chancery had identified with the package and attached the Court of Chancery's

opinion in full. Tesla's minority stockholders ultimately voted to ratify the package. Thereafter, defense counsel moved to modify the Court of Chancery's trial holding. In *Tornetta v. Musk*, 326 A.3d 1203 (Del Ch. 2024), the Court of Chancery denied the motion and awarded \$345 million in attorneys' fees to plaintiff's counsel. The defendants appealed.

On appeal, the defendants offered three paths the Delaware Supreme Court could adopt to resolve their appeal: overturning the Court of Chancery's application of entire fairness on the grounds that Musk was not a controlling stockholder, holding that rescission was an improper remedy, or finding that the prior ratification vote effectively cleansed any alleged breaches of fiduciary duty. In its opinion, the Delaware Supreme Court acknowledged that, although the justices held differing views on the liability determination, they unanimously agreed that rescission was an improper remedy. As a result, the court confined its analysis to the rescission issue and did not expressly address the liability and ratification issues in its opinion.

The court reasoned that the Court of Chancery had erred by leaving Musk uncompensated for six years of work, an inequitable result that left him worse off rather than merely restoring the status quo.

The Supreme Court began by explaining the legal standards governing equitable rescission under Delaware law. The court observed that rescission is an extreme remedy designed to return parties to a void or voidable transaction to the *status quo ante*. It further noted that plaintiffs seeking rescission bear the burden of proving two elements: (i) that

rescission is viable, and (ii) that the court can in fact restore both of the transaction's parties to the status quo ante. The court stressed that the latter "mutuality" requirement means that impossibility of returning both sides to the status quo can defeat the remedy.

Applying that standard, the Supreme Court held that rescission was not warranted because it did not restore Musk, who had fully formed the terms of the 2018 plan, to the status quo ante. The court reasoned that the Court of Chancery had erred by leaving Musk uncompensated for six years of work, an inequitable result that left him worse off rather than merely restoring the status quo. The justices further rejected the plaintiff's argument that Musk's pre-existing equity, which substantially accreted in value during the contract's six-year period, sufficed as consideration because black-letter contract law provides that past consideration cannot support an unrelated, separate promise.

The Supreme Court similarly rejected the plaintiff's argument that rescission was the only possible remedy to award because the defendants failed to prove that any alternative remedy was warranted. The court reasoned that this argument misapprehended Delaware law because the plaintiff bears the burden of proof on this issue, not the defendants. As such, because the plaintiff sought rescission, failed to prove it, and sought no other remedy, nominal damages of \$1 was the appropriate award for the breaches of fiduciary duty that the Court of Chancery had found.

Lastly, the Supreme Court reversed the \$345 million fee award the Court of Chancery had granted to plaintiff's counsel. The court recognized, as the company had acknowledged, that plaintiff's counsel was entitled to a fee based on *quantum meruit* in light of the award of nominal damages, but significantly reduced the fee in light of the fact that the plaintiff had

only achieved an award of nominal damages. Instead, the court awarded fees amounting to a 4x lodestar multiplier, which is the award that the defendants had sought. The Supreme Court noted that while ordinarily it would remand the fee award to the trial court for consideration, it made an exception in light of the considerable time and effort already expended by the Court of Chancery in this matter.

Statutory Interpretation

***Salama v. Simon*: Court of Chancery Determines Whether Class Vote Opt-Out Provision Overrides Section 242(d)'s "Votes Cast" Standard**

In 2023, Section 242(d) of the DGCL was amended to allow public companies to obtain stockholder approval for authorized share increase amendments using a lower "majority of the votes cast" voting standard rather than the default "majority of the outstanding" voting standard. In *Salama v. Simon*, 328 A.3d 356 (Del. Ch. 2024), *aff'd*, 342 A.3d 373 (Del. 2025), the Court of Chancery addressed the interplay between the new provisions of Section 242(d) and Section 242(b)(2) of the DGCL, which permits corporate drafters to include a provision in a company's certificate of incorporation to "opt out" of the default requirement that a separate class vote must be obtained to approve an authorized share amendment. In *Salama*, the court held that such an opt-out provision did *not* override the company's ability to use "majority of the votes cast" standard under Section 242(d) in the circumstances presented. The court clarified that even where the opt-out provision arguably specifies a different voting standard—in *Salama*, the provision included language suggesting a "majority-of-the-outstanding" standard would apply to authorized share amendments—the more lenient "votes

cast" standard applicable under Section 242(d) will govern if the opt-out provision strongly resembles the language used in Section 242(b)(2) and was adopted before Section 242(d) became effective.

In September 2024, Tilray Brands Inc. filed a proxy statement seeking stockholder approval of a charter amendment that would increase the number of authorized shares of its common stock. The proxy statement advised stockholders that the charter amendment would be approved if more shares voted for it than against it—reflecting the "majority of the votes cast" standard applicable under Section 242(d). In October 2024, a Tilray stockholder sued Tilray and its directors for breach of fiduciary duty, alleging that the proxy statement disclosed the wrong voting standard for the amendment's approval. The plaintiff contended that under Section 242(d), the lower "votes cast" standard only applies to authorized share amendments if the operative certificate of incorporation does not "expressly require" otherwise—which the plaintiff argued was the case for Tilray, whose charter contained a class vote opt-out provision providing (in short) that the authorized share count could be changed by a vote of a majority of all outstanding shares without a vote of the holders of the preferred stock or common stock (which the Court of Chancery called the "Single Vote Provision"). The plaintiff sought a preliminary injunction to bar the corporation from holding its annual stockholder meeting pending corrective disclosures. In response, the defendants filed a cross-motion for summary judgment, maintaining that the "majority-of-the-votes-cast" standard applied because the Single Vote Provision was intended to opt out of class voting requirements otherwise applicable to authorized share amendments under Section 242(b)(2), not to alter or increase the default voting standards for such an amendment which, prior to the amendments to Section 242(d), was the same "majority of the outstanding" voting

standard stated in the Single Vote Provision. The Court of Chancery entered judgment for the defendants. After noting that general principles of contract construction govern the interpretation of both DGCL provisions and charter provisions, the court concluded that the provisions at issue were ambiguous and resolved the ambiguity in the defendants' favor based on extraneous facts.

The extrinsic evidence weighed in favor of the defendants' interpretation or was inconclusive. As such, the proper voting standard for the charter amendment was the majority-of-the-votes-cast standard as disclosed in the proxy statement.

The court held that, as applied to the Single Vote Provision, Section 242(d) was ambiguous because it was susceptible to at least two reasonable interpretations. First, the court held that the defendants' reading was reasonable. The court agreed with the defendants that because the language of the Single Vote Provision was "functionally identical" to the class vote opt-out language of the last sentence of Section 242(b)(2), the Single Vote Provision could reasonably be read to have been intended to opt out of the class vote requirement without changing the voting standard.

But the court also credited the plaintiff's "strong arguments" against the foregoing interpretation and concluded that their reading was also reasonable. The court observed that the Single Vote Provision went beyond what is necessary to opt out of a class vote by identifying a voting standard, that there were drafting alternatives that would make a contrary intent (i.e., solely to opt out of the class vote) clearer, and that other market

participants had used those alternatives. The court further rejected the defendants' argument that the words "expressly require" in Section 242(d) require charter provisions to cite Section 242(d) to override its application, and agreed with the plaintiff that, in theory, a provision need only identify an issue and specify a voting standard to do so.

To resolve the ambiguity, the court first evaluated Section 242(d)'s legislative history, finding that the legislative synopsis supported the defendants' argument that charter provisions must explicitly cite to Section 242(d) to override its application. The court observed that the synopsis's statement that "a general recitation in the certificate of incorporation of the vote generally required under [Section 242(b)] without specific reference to the amendments specified in [Section 242(d)] is not sufficient" was particularly probative. The court then found that the public policy goal of Section 242(d)(2)—to make it easier for corporations to increase their authorized shares—bolstered the defendants' interpretation. The court further noted that Tilray's adoption of the Single Voting Provision five years before Section 242(d)(2) was enacted also supported the defendants' interpretation because the legislature likely intended for Section 242(d)(2) to override pre-existing provisions like the Single Vote Provision. Finally, the court described, but refrained from applying, the interpretive canon requiring courts to interpret ambiguous provisions in favor of voting rights because the canon supported both sides' positions.

In sum, the court determined that the extrinsic evidence weighed in favor of the defendants' interpretation or was inconclusive. As such, the proper voting standard for the charter amendment was the majority-of-the-votes-cast standard as disclosed in the proxy statement.

Accordingly, the court granted the defendants' motion for summary judgment and denied the plaintiff's motion for preliminary injunction. On June 18, 2025, the Delaware Supreme Court summarily affirmed the Court of Chancery's decision and judgment.

Advance Notice Bylaws

***Siegel v. Morse* and *Assad v. Chambers*: Equitable Challenges to Advance Notice Bylaws Must Be Dismissed as Unripe Absent a Live Controversy**

In *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024), the Delaware Supreme Court clarified the legal standards applicable to stockholder challenges to advance notice bylaws. The Supreme Court first noted that these sorts of challenges take one of two distinct forms: (1) "legal" or "facial validity" challenges alleging that the bylaws cannot operate under any circumstance without violating the certificate of incorporation, bylaws, or DGCL, or (2) "equitable" or "as applied" challenges alleging that the bylaws' adoption, amendment, or enforcement was the product of a breach of fiduciary duty. Importantly, the *Kellner* court further stated in a footnote that the Court of Chancery should only entertain equitable challenges that are ripe for review where they address "real-world concerns" arising in "real-world and extant disputes, rather than hypothetical and imagined future ones." In *Siegel v. Morse*, 2025 WL 1101624 (Del. Ch. Apr. 14, 2025) and *Assad v. Chambers*, 2025 WL 1554609 (Del. Ch. June 2, 2025), the Court of Chancery heeded that guidance by dismissing—in each case on ripeness grounds—equitable challenges to the adoption of advance notice bylaws.

Equitable challenges to advance notice bylaws cannot proceed unless the court is "presented with a ripe dispute," which turns on "a common sense assessment of whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form."

Stockholder complaints filed in *Siegel* and *Assad* arose from similar facts. In both cases, a corporation (AES Corporation and Owens Corning, respectively) amended its bylaws to accommodate the SEC's new universal proxy rules and, as part of the same effort, made additional changes to update and modernize the advance notice bylaws. In both cases, a stockholder-plaintiff challenged the "acting in concert" and "ownership" concepts in the amended bylaws on facial validity and equitable grounds pre-*Kellner*. After *Kellner* was issued, the plaintiffs in both cases amended their complaints to drop the facial validity theory and proceed solely with the equitable challenge. The defendants then moved to dismiss under Court of Chancery Rule 12(b)(1) for lack of subject matter jurisdiction, in each case on ripeness grounds.

In both *Siegel* and *Assad*, the Court of Chancery granted the defendants' motion and dismissed the suit *in toto*. *Siegel*, which pre-dates *Assad*, established the basic logic driving dismissal. The *Siegel* court began by holding that equitable challenges to advance notice bylaws cannot proceed unless the court is "presented with a ripe dispute," which turns on "a common sense assessment of

whether the interests of the party seeking immediate relief outweigh the concerns of the court in postponing review until the question arises in some more concrete and final form.” If no live controversy existed, then the case should be dismissed as not ripe.

The court held that no live controversy existed in either *Siegel* or *Assad* because the plaintiff was not running a live proxy contest, the plaintiff did not allege that the challenged bylaw would apply to him if he were to submit a director nomination, and the plaintiff could not point to any other stockholder who was deterred or “chilled” from submitting a director nominee by the challenged bylaws or otherwise planned to propose business or a director nominee. The *Siegel* court further rejected the plaintiff’s argument that slides in a board presentation containing “generic references to stockholder activism” were sufficient to create a live controversy, reasoning that more evidence of a present threat was required. Similarly, the *Siegel* court rejected the plaintiff’s invocation of prior Court of Chancery opinions invalidating rights plans and dead-hand proxy puts adopted on a clear day because those actions, if triggered, “are characterized by immediate and devastating financial consequences, which are not present in the context of an advance notice bylaw.”

The same result was obtained in *Assad* for the same basic reason: the plaintiff’s equitable challenge was not ripe because there was no live controversy or manifest defensive action. The *Assad* court recognized that because “equity is eminently flexible,” there may be “circumstances ... where an equitable challenge to the adoption of advance notice bylaws can be ripe in the absence of a pending or imminent proxy context,” but the plaintiff failed to plead them. As such, the complaint was dismissed in its entirety in both cases.

***Carroll v. Burstein*: Court of Chancery Dismisses Facial Challenge to Advance Notice Bylaw**

In *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024), the Delaware Supreme Court clarified the legal standards for both facial and equitable stockholder challenges to advance notice bylaws. In *Carroll v. Burstein*, 2025 WL 2446891 (Del. Ch. Aug. 25, 2025), the Court of Chancery, in one of the first opinions to apply *Kellner*’s teachings, dismissed a facial challenge to the bylaws of Stoke Therapeutics, Inc. (“Stoke”) and, in so doing, confirmed the high bar necessary to pleading a facial invalidity claim.

In recent years, stockholder challenges to advance notice bylaws—brought on both facial and equitable grounds—have proliferated in Delaware courts. Many of these cases involve a fact pattern similar to *Kellner* and the *Burnstein* court noted that, as of the time of its opinion, there were about 20 “nearly identical” complaints filed in the Delaware courts.

Stoke adopted its advance notice bylaws in 2019, then amended them in 2023 to address the SEC’s new universal proxy rules as well as to make additional updates and changes. The amendments were made on a “clear day” absent the threat of a proxy contest or another form of stockholder activism. A stockholder-plaintiff brought facial and equitable challenges to the bylaws’ “acting in concert” provision and “associated persons” definition, which the plaintiff argued were impermissibly broad. After *Kellner*, the plaintiff voluntarily dismissed its equitable challenge and proceeded solely on the grounds that the challenged provisions were facially invalid, which the Court of Chancery surmised was because there were no facts suggesting they were invalid as applied. The defendants moved to dismiss the remaining claims.

Before turning to the merits of the motion, the Court of Chancery held that the plaintiff's facial validity challenge was ripe for adjudication. The court reasoned that an invalid advance notice bylaw would frustrate the stockholder franchise due to an ongoing deterrent effect and allegations of invalidity would suffice for purposes of ripeness.

The Court of Chancery rejected the plaintiff's facial validity challenges because each of the challenged bylaws could operate lawfully. In each instance, stockholders could easily comply with the bylaw depending on the facts and circumstances.

The Court of Chancery dismissed the plaintiff's facial validity claim. In so doing, the court stressed that, as clarified in *Kellner*, the standard for facial validity is "formidable" and requires a showing that the challenged bylaw cannot operate lawfully under any circumstance. As such, if the defendants can show that the challenged bylaws can operate consistent with the DGCL, certificate of incorporation, and bylaws in any identifiable scenario, the claim must fail.

Applying that standard, the Court of Chancery rejected the plaintiff's facial validity challenges because each of the challenged bylaws could operate lawfully. In each instance, stockholders could easily comply with the bylaw depending on the facts and circumstances. For example, the court observed that a lone stockholder who "told no one about her plan to nominate a director" could easily comply with the bylaw because she would have nothing to disclose. While counterfactuals could be identified in which a nominating stockholder may be unable to

confirm that it identified all relevant persons, the court reasoned that was not enough to satisfy *Kellner's* high bar.

The court also rejected the plaintiff's argument that *Kellner* created a new standard for facial validity based on legibility, clarifying that the "unintelligible" bylaw in *Kellner* was invalid because it was impossible to determine whether compliance could be achieved. While the court agreed that the challenged bylaws may have been broad, dense, and even muddled, it refused to find them facially invalid because they were not so complex or confusing that they could not be complied with.

Merger Agreements

***Desktop Metal, Inc. v. Nano Dimension Ltd.:* Delaware Court of Chancery Orders Specific Performance Against Strategic Buyer in Merger**

In *Desktop Metal, Inc. v. Nano Dimension Ltd.*, 2025 WL 904521 (Del. Ch. Mar. 24, 2025), the Delaware Court of Chancery assessed allegations that a strategic buyer in a merger transaction attempted to scuttle the deal by deliberately thwarting necessary regulatory approvals and thereby breached its regulatory covenants under the merger agreement. The court agreed with the plaintiff, the target company in the transaction, that the buyer had breached the merger agreement's regulatory covenants and accordingly ordered the buyer to specifically perform its contractual obligations to take appropriate actions to obtain regulatory approvals and consummate the merger.

The transaction at the center of the dispute was Nano Dimension Ltd.'s agreement to acquire Desktop Metal, Inc., a supplier of products that assist in missile defense and nuclear capabilities. Both parties understood that, given the nature of Desktop's business,

the merger's regulatory approvals process would be lengthy and complex. The parties executed a merger agreement on July 2, 2024 containing a "hell or high water" regulatory covenant requiring Nano to take "all action necessary to receive CFIUS Approval," provided that Nano would not have to relinquish businesses comprising more than 10% of Desktop's revenue. The merger agreement further provided for an outside date of January 31, 2025, which could be extended to allow for regulatory approval.

Rather than taking "all action necessary" to obtain CFIUS approval as was required, Nano took steps designed to prevent CFIUS approval, including by waiting for weeks to sign necessary documents, taking unreasonable positions in negotiations with CFIUS, and declining to take reasonable CFIUS mitigation measures.

After the merger agreement was executed and announced, Nano's largest stockholder, Murchinson Ltd., which had opposed the transaction from the outset as "overpriced [and] misguided," ran and won a proxy contest that increased its representation on the Nano board from two to four directors, a slight minority of Nano's ten total directorships. Shortly thereafter, on December 16, 2024, all six legacy directors resigned, leaving Murchinson's designees as Nano's sole board members. The plaintiff alleged that Murchinson's designees took action to obstruct CFIUS approval. The plaintiff brought suit in the Court of Chancery, alleging breach of the merger agreement and seeking specific performance. The case proceeded to trial.

In its post-trial opinion, the Court of Chancery entered judgment for Desktop and ordered specific performance of Nano's obligations under the merger agreement. The court held that Nano had breached its regulatory covenants under the merger agreement. It reasoned that, rather than taking "all action necessary" to obtain CFIUS approval as was required, Nano took steps designed to prevent CFIUS approval, including by waiting for weeks to sign necessary documents, taking unreasonable positions in negotiations with CFIUS, and declining to take reasonable CFIUS mitigation measures. The court also observed that "[t]he timeline [was] damning" because these acts coincided with Murchinson's takeover of the Nano board. Relatedly, the court held that the carve-out permitting Nano to decline mitigation measures resulting in the loss of 10% of Desktop's business did not apply because the measures in question would merely impose limits on Desktop's business without empowering any person to exercise control. The court rejected all of Nano's remaining arguments against breach, including its argument that certain proposed CFIUS mitigation measures would conflict with law.

The Court of Chancery also rejected Nano's counterclaims that its obligations under the merger agreement were excused because Desktop breached its covenants or that other closing conditions had failed. The court observed that Nano's "strongest" claim was its argument that Nano breached a closing condition entitling Nano not to close if Desktop experienced a "Bankruptcy," a term defined to include admission in writing of an inability to pay debts as they mature. The court first noted that this definition was "quite specific" and excluded insolvency—instead, an admission of current insolvency in writing was required. It then held that while Desktop's public filings stated that it was "probable" that

Desktop would be unable to satisfy its debts “within one year,” that expression of potential future insolvency was not enough to trip the provision, which required admission of an inability to pay *current* liabilities.

The Court of Chancery also rejected Nano’s argument that Desktop violated its covenant to operate its business in the ordinary course “in all material respects,” reasoning that Desktop’s workforce reduction was both modest and in line with Desktop’s projections, that Desktop’s relationships with vendors and customers had not materially deteriorated (and instead had, at most, become strained), and that Desktop’s failure to conduct a 2024 audit was warranted in light of the parties’ reasonable expectation that the transaction would close before the end of 2024. In addition, the court rejected Nano’s argument that Desktop violated a covenant prohibiting Desktop from incurring transaction expenses exceeding \$15 million. The court reasoned that it would be “non-sensical” to interpret the provision as including litigation expenses because that reading would thwart the parties’ contractual scheme that allowed Desktop to sue for specific performance. The court further reasoned that, to the extent that the expense provision’s plain terms included litigation expenses, the “prevention doctrine” would prevent Nano from terminating the merger agreement by virtue of the after-effects of its own breach.

Finally, the Court of Chancery held that specific performance was an appropriate remedy for Nano’s breaches of the merger agreement. The court began by observing that the key obstacle to closing had been Nano’s refusal to enter into a “national security agreement” (or “NSA”) that had been negotiated and offered by CFIUS, and that Nano had failed to prove at trial that it had good reason to reject the NSA.





The court also noted that the parties had contractually stipulated (via the merger agreement's specific performance provision) that specific performance would be appropriate in the event of breach and that the equities favored specific performance because failure to close would risk harm to customers, suppliers, and employees, as well as carry national security repercussions. Accordingly, the court held that specific performance was an appropriate remedy and entered an order requiring Nano to consent to the latest NSA proposed by CFIUS and consummate the merger.

Thompson Street Capital Partners IV, L.P. v. Sonova United States Hearing Instruments, LLC: Delaware Supreme Court Finds Immaterial Noncompliance with Contractual Notice Provisions May Be Excused to Avoid Disproportionate Forfeiture

In Thompson Street Capital Partners IV, L.P. v. Sonova U.S. Hearing Instruments, LLC, 340 A.3d 1151 (Del. 2025), the Delaware Supreme Court reversed the Court of Chancery's dismissal of a lawsuit, holding that a party's noncompliance with a condition precedent of a contract's clear and unambiguous forfeiture provision may be excused if it is determined that the condition precedent was not a material part of the agreement and noncompliance would result in a disproportionate forfeiture.

In 2022, Sonova United States Hearing Instruments, LLC acquired several audiology practices from Alpaca Group Holdings, LLC through a series of transactions governed by two integrated agreements: a merger agreement and an escrow agreement. Together, these agreements established the procedures through which Sonova could submit indemnification claims to recover damages from an indemnity escrow fund in

the event of a breach by the former members of Alpaca. Both agreements included provisions addressing the required timing and specificity for indemnification claim notices, but the merger agreement also imposed a more onerous written evidence requirement and expressly conditioned Sonova's right to recover on submitting a claim notice to Thompson Street Capital Partners IV, L.P., the members' representative, that complied with the merger agreement's requirements.

One business day before the indemnity escrow fund was scheduled to expire, Sonova submitted an indemnification claim notice to Thompson and the escrow agent asserting claims related to improper billing practices. The notice directed the escrow agent to establish a claim reserve in the full amount of the indemnity escrow fund but did not quantify Sonova's alleged damages and did not include any supporting materials or evidence. Soon after receiving the notice, Thompson filed suit in the Court of Chancery seeking (i) a declaration that Sonova's claim notice did not comply with applicable notice requirements and (ii) a mandatory injunction requiring Sonova to instruct the escrow agent to release the escrowed funds to Thompson.

The Court of Chancery concluded that Sonova's notice was timely. But rather than analyzing the specificity of Sonova's notice under the requirements of both agreements, the Court of Chancery focused exclusively on the escrow agreement, which required Sonova to "specify in reasonable detail the nature and dollar amount of the claim." Finding that the notice provided adequate specificity under the escrow agreement, the court granted Sonova's motion to dismiss. Thompson appealed, arguing in principle that the Court of Chancery erred by applying only the escrow agreement's notice requirements and by failing to evaluate whether Sonova's notice complied with additional requirements set forth in the merger agreement.

The Delaware Supreme Court reversed and remanded. In its opinion, the court reaffirmed several principles of Delaware contract law, including that specific contractual terms control over more general ones, integrated agreements should be read together as a unitary contractual scheme, and contracts should not be interpreted in a way that renders any provision meaningless or illusory. The court also observed that forfeiture provisions must be drafted clearly and unambiguously, and even when they are, a court "may excuse the nonoccurrence of a condition that would cause a disproportionate forfeiture unless its occurrence was a material part of the agreed [e]xchange."

Applying these principles, the court held that the merger agreement and the escrow agreement were integrated and therefore should be read together. The court then concluded that because the Court of Chancery had analyzed Sonova's notice exclusively under the specificity requirements of the escrow agreement, it effectively rendered the merger agreement's more restrictive specificity requirements meaningless. The court determined that the Court of Chancery erred in this respect because the merger agreement's requirements could not be ignored and Sonova was required to comply with them. The court further held that the final sentence of the merger agreement's notice provision clearly and unambiguously expressed a condition precedent capable of triggering a forfeiture of Sonova's indemnification rights upon Sonova's noncompliance with the merger agreement's notice requirements.

With these points established, the court next addressed whether it was reasonably conceivable that Sonova failed to comply with the merger agreement's notice requirements. The court answered in the affirmative, observing that despite Sonova's months-long investigation into the alleged improper billing

practices, the merger agreement’s notice requirements were not satisfied because Sonova failed to include any written materials or evidence supporting its claim. The court also found it reasonably conceivable that Sonova violated the timing component of the merger agreement’s notice provision because Thompson had pleaded that Sonova knew of the alleged improper billing “months” before submitting the notice.

The court also observed that forfeiture provisions must be drafted clearly and unambiguously, and even when they are, a court “may excuse the nonoccurrence of a condition that would cause a disproportionate forfeiture unless its occurrence was a material part of the agreed [e]xchange.”

The court next turned to whether Sonova’s noncompliance with the notice requirement could be excused. Citing the Restatement (Second) of Contracts and common law from Delaware and other jurisdictions, the Supreme Court observed that in instances where a party demonstrates that the condition precedent was not a material part of the exchange and satisfies the requirements for disproportionate forfeiture, courts may excuse such party’s noncompliance with the condition precedent. The court found that under the Restatement, a two-prong test was appropriate to determine whether noncompliance with the notice requirements should be excused. Under the first “materiality” prong, the court considers whether “the occurrence of the condition was a material part of the agreed exchange.” If a court determines that the provision was not material, then under the second “proportionality” prong, the court

must “balance[] the risk to be protected with the amount to be forfeited.” Because the existing record was inadequate to resolve the materiality and disproportionality questions, the court remanded the proceeding to the Court of Chancery to address these issues.

Fiduciary Challenges to Mergers

***In Re Dura Medic Holdings, Inc. Consolidated Litigation:* Court of Chancery Holds Enhanced Scrutiny under *Revlon* Applies to Sale of All or Substantially All Assets**

In *In re Dura Medic Holdings, Inc. Consolidated Litigation*, 331 A.3d 796 (Del. Ch. 2025), the Court of Chancery issued a post-trial opinion addressing various breach of fiduciary duty claims arising from a private equity firm’s acquisition, management, and subsequent sale of the assets of a medical supplies company. The court ruled in favor of the defendants on multiple claims where it found that the business judgment rule and enhanced scrutiny were the proper standards of review but ruled for the plaintiffs on other claims invoking entire fairness review. As for the entire fairness claims, the court fashioned a bespoke remedy—equitable subordination of certain debt—to address the facts at hand.

Dura Medic, Inc. was a company that supplied durable medical equipment to hospitals. In June 2018, private equity firm Comvest Partners acquired the company via a reverse triangular merger for \$18 million in cash and a \$12 million note from the seller (the “Seller Note”). The company faced challenges arising from administrative difficulties in collecting payments and increased regulatory scrutiny of its practices, which allegedly prompted the company’s new board and management to make personnel and billing changes to improve performance. After consummating

several debt and equity financings with Comvest (the “Midstream Financings”) did little to improve the situation, the board and management allegedly sought an exit strategy to salvage any remaining value of the company. Ultimately, the company conducted a sale of all of its assets in October 2020.

A co-founder of Dura Medic brought derivative claims on behalf of the company and its parent entities against Comvest and the company’s CEO and directors (the “Comvest Parties”) for breach of fiduciary duty. The plaintiff’s claims centered on three categories of alleged misconduct: the post-merger management of the company, the Midstream Financings, and the asset sale. Each was addressed separately by the court in this post-trial opinion.

***Revlon* applies where fiduciaries are considering a change of control transaction or a similar type of end-stage transaction implicating the “final period problem” in which corporate fiduciaries perceive that there will be no ongoing relationship with stockholders. The court reasoned that a sale of all or substantially all assets was such a transaction because it “effectively ended the stockholders’ ongoing investment in the Company.”**

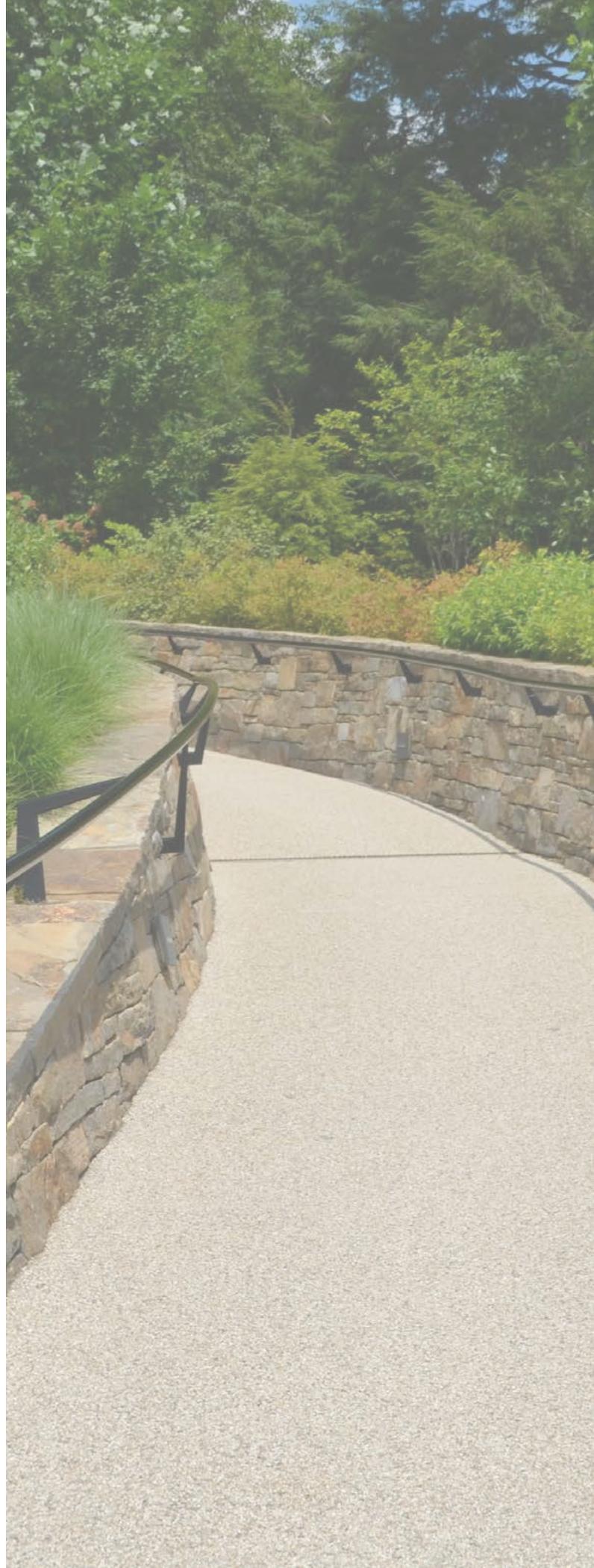
As to the first category of claims, the Court of Chancery held that the business judgment rule applied to all challenged midstream operation decisions because the plaintiff had failed to prove that any such decision entailed a conflict of interest. The plaintiff attempted to show that the defendants, motivated to depress the company’s short-term revenues in order to maximize certain contractual indemnification

claims and avoid paying the Seller Note, intentionally stifled the business in violation of their duty of loyalty. The court disagreed, reasoning that the defendants’ indemnification rights only entitled them to recover for pre-merger conduct such that depressing value post-merger would not further that interest. Further, the court determined that interest on the Seller Note would accrue regardless of performance, so there was again no reason for the Comvest Parties to intentionally depress the company’s value. Finding that no conflict of interest existed, the court determined that the defendants were entitled to the presumption that they acted in the company’s best interests under the business judgment rule and ruled in their favor on the post-merger management claims.

As to the second category of claims, the court held that the Midstream Financings were subject to entire fairness review as conflicted transactions and that they were not entirely fair. The court first explained that the entire fairness standard applies to a transaction between an entity and its controller. Since the Midstream Financings involved Comvest-controlled entities on both sides, they were subject to entire fairness. The court found that the financings lacked the typical hallmarks of fair process, including no appointment of a special committee, no “negotiation over price,” no stockholder approval, no “guidance from qualified advisors,” and no “testing the market.” The court also found that traditional hallmarks of fair value were absent, including that no “contemporaneous market evidence, expert analysis, and contemporaneous financial analyses” were present in the determination of a 15% interest rate for each of the financings at issue. Accordingly, the court found that the financings were not entirely fair and that the defendants breached their fiduciary duties. To remedy the breach, the court ordered equitable subordination, a remedy warranted where a creditor’s

inequitable conduct causes harm. Because the Midstream Financings had structural priority over the Seller Note despite the defendants' breach of fiduciary duty, the court determined to treat the Seller Note as senior to the Midstream Financings.

Finally, as to the third category of claims in which the plaintiff challenged the asset sale as a breach of fiduciary duty, the court held that enhanced scrutiny applied under *Revlon* but that the defendants' conduct fell within a range of reasonableness. The court first explained that enhanced scrutiny under *Revlon* applies where fiduciaries are considering a change of control transaction or a similar type of end-stage transaction implicating the "final period problem" in which corporate fiduciaries perceive that there will be no ongoing relationship with stockholders. The court reasoned that a sale of all or substantially all assets was such a transaction because it "effectively ended the stockholders' ongoing investment in the Company." This holding was obtained despite the fact that the sale created a pool of consideration that could be reinvested to finance new operations because it reflected the stockholders' last chance to obtain a return on capital on their investment "in the business the company conducted." Applying enhanced scrutiny, the court found that the process the Comvest Parties undertook was reasonable, including the pre-signing market check. The court held that while the outreach process was not ideal because the record (including the minutes of relevant board meetings) was sparse, other aspects of the process carried the hallmarks of arm's-length negotiation. Finally, the court credited the defendant's expert witness with presenting a more credible report that showed the company received a fair price in the transaction. Finding the process and price reasonable, the court entered judgment for the defendants on breach of fiduciary duty claims pertaining to the sale.



***In re Columbia Pipeline Group, Inc. Merger Litigation* and *In re Mindbody, Inc. Stockholder Litigation*: Delaware Supreme Court Raises Legal Standards Required to Establish Aiding and Abetting Claims**

In *In re Columbia Pipeline Group, Inc. Merger Litigation*, 342 A.3d 324 (Del. 2025), and *In re Mindbody, Inc. Stockholder Litigation*, 332 A.3d 349 (Del. 2024), the Delaware Supreme Court clarified the legal standards governing aiding and abetting liability under Delaware law. In particular, the high court established that the “knowing participation” prong requires the plaintiff to plead and prove each element of a multi-part test that is guided by factors set forth in the Restatement (Second) of Torts. In each case, the Delaware Supreme Court, applying the new standard, reversed the Court of Chancery’s post-trial finding that the buyer in a public company merger aided and abetted breaches of fiduciary duty by sell-side fiduciaries.

The lawsuits in *Mindbody* and *Columbia Pipeline* both centered around public company mergers. In *Mindbody*, Vista Equity Partners Management, LLC acquired Mindbody, Inc. in a going-private merger. The plaintiffs alleged that Mindbody’s CEO, who allegedly had urgent liquidity needs, improperly gave Vista advantages in the bid process, including by engaging in early discussions with Vista that allegedly gave Vista a head start in negotiations. The Court of Chancery held, post-trial, that the CEO had breached his fiduciary duties both by tilting the process in favor of Vista and by approving the dissemination of a materially false and misleading proxy statement that failed to disclose the full extent of Vista’s advantages and the CEO’s alleged conflicts. The Court of Chancery also held that Vista had aided and abetted the CEO’s breaches by failing to correct the proxy statement, including

because the merger agreement obligated Vista to review the proxy and correct any material misstatements or omissions.

Similarly, in *Columbia Pipeline*, TC Energy Corp. (“TransCanada”), a strategic buyer, acquired Columbia Pipeline Group in an all-cash merger. Columbia’s stockholders challenged the merger on grounds that Columbia’s CEO and CFO, who were allegedly eager to retire, improperly advantaged TransCanada in the sale process by, among other things, giving TransCanada informational advantages over other bidders, failing to push back when TransCanada violated a standstill agreement, and accepting an offer that allegedly undervalued the company. After trial, the Court of Chancery found that the CEO and CFO had breached their fiduciary duties by tilting the sale process in TransCanada’s favor. It also held that TransCanada aided and abetted those breaches by taking advantage of the CEO and CFO’s known desire to retire to give itself an advantage in the process.

The defendants in both cases appealed, and in both cases, the Delaware Supreme Court reversed the Court of Chancery’s finding that the buyer had aided and abetted breaches of fiduciary duty by the seller’s officers. In the course of so holding, the Delaware Supreme Court both clarified and heightened the legal standard applicable to a claim of aiding and abetting breach of fiduciary duty.

The *Mindbody* and *Columbia Pipeline* decisions together held that an aiding and abetting claim’s “knowing participation” prong effectively has several sub-elements: the plaintiff must plead and prove (1) knowledge (or “scierter”), which itself requires a two-part showing that the aider and abetter acted with “actual knowledge” that (a) “the primary party’s conduct constitutes a breach of fiduciary duty”

and (b) “its own conduct is legally improper,” and (2) active participation by the aider and abettor in the underlying breach. Failure to plead any of the foregoing elements results in a failure of the “knowing participation” prong.

The Supreme Court explained that, when applying the new test, the Court of Chancery should conduct a “holistic” assessment guided by four “illustrative factors” derived from the Restatement (Second) of Torts.

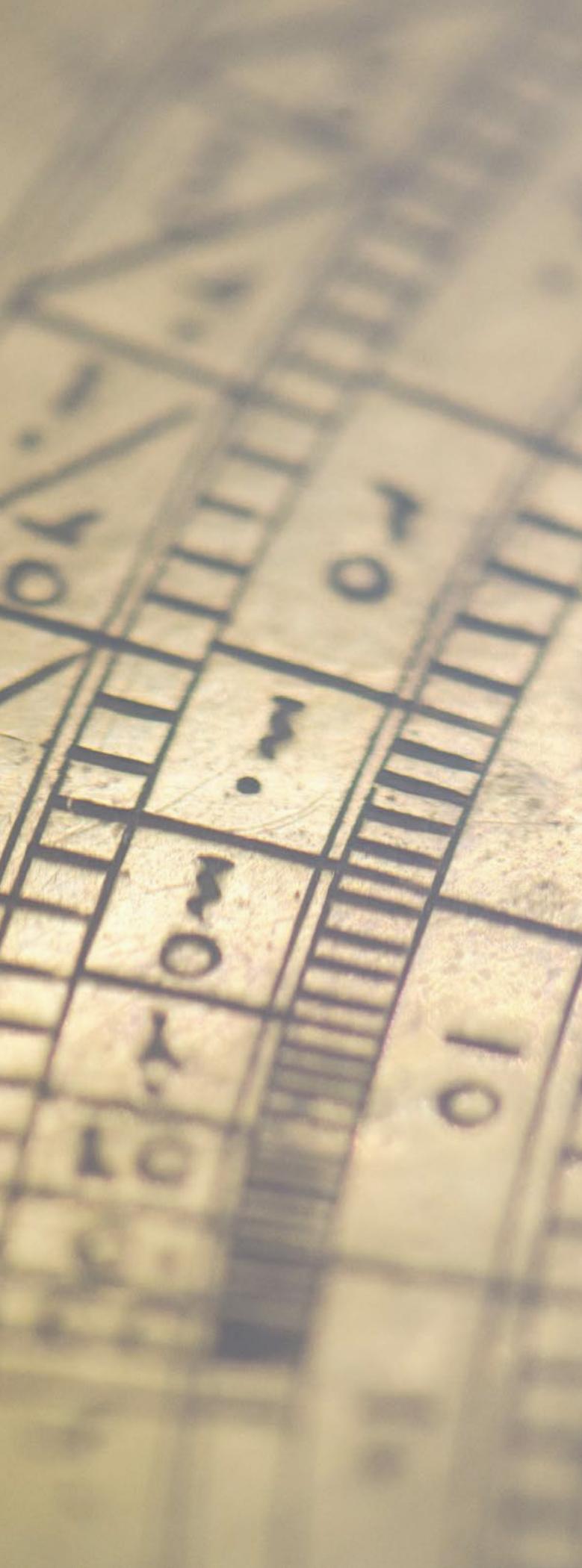
As to the “scienter” requirement, the Supreme Court explained that “actual knowledge” requires “clear and direct knowledge” such that neither constructive knowledge nor any form of recklessness will suffice. The justices also observed that the two scienter elements are interlinked: if the defendant lacks knowledge of the underlying breach of fiduciary duty, it cannot know that its conduct is unlawful. As to the “participation” requirement, the court held that there must be an overt act—that is, the aider and abettor’s participation “must be of an active nature,” and passivity, omission, or inaction will not suffice.

The Supreme Court explained that, when applying the new test, the Court of Chancery should conduct a “holistic” assessment guided by four “illustrative factors” derived from the Restatement (Second) of Torts. These factors direct the trial court to consider: (i) the nature and severity of the tortious act that the aider and abettor participated in, (ii) the amount, kind, and duration of assistance given, (iii) the nature of the relationship between the fiduciary and the aider and abettor, and (iv) the aider and abettor’s state of mind. In both *Mindbody* and *Columbia*, the first factor related to the first element of scienter, the second and

third factors related to participation, and the fourth factor related to the second element of scienter.

Applying this new, more stringent test, the Supreme Court in both cases held that the plaintiff had failed to prove the element of knowing participation. In *Mindbody*, the Supreme Court observed that while certain omissions at issue were “undoubtedly material” such that the underlying breach was severe, the fact that Vista provided no affirmative assistance whatsoever as well as its relationship to the CEO—an arm’s-length, third-party buyer—each weighed against a finding of knowing participation. The court further rejected the plaintiff’s argument that the merger agreement provision requiring Vista to correct material omissions did not convert Vista’s inaction to an overt act sufficient to satisfy the “active participation” requirement, explaining that “no case law or other legal authority” supported that result and that “compelling public policy reasons” militated against holding that the provision effectively meant that Vista owed disclosure duties to Mindbody’s stockholders.

Likewise, in *Columbia Pipeline*, the Supreme Court held that the Restatement factors, considered holistically, warranted reversal. The court explained that TransCanada lacked “actual knowledge” of the officers’ underlying *Revlon* breaches because TransCanada, by seeing “results” of the officers’ actions rather than the actions themselves, had merely “constructive” knowledge of breach. In addition, the justices held that TransCanada did not actively participate in any sale process breaches, reasoning in pertinent part that the exercise of “superior negotiating skills and experience to secure the best reasonably available price” cannot justify aiding and abetting liability. The court further noted that the CEO and CFO’s alleged non-reactions to



violations of a standstill agreement were not severe because both sides contemporaneously believed that the standstill was not being violated. The court similarly reasoned that TransCanada's decision to renege on a higher offer and proceed with a lower offer that sell-side officers indicated they would agree to was insufficient to support knowing participation because there was insufficient evidence that TransCanada's higher offer was anything more than "tentative."

For all of these reasons, the Supreme Court reversed the Court of Chancery's finding of aiding and abetting in both cases. Although the Supreme Court in *Mindbody* affirmed the Court of Chancery's finding that the CEO breached his fiduciary duties, judgment was entered for Vista on the aiding and abetting claim.

***DrugCrafters, L.P. v. Loh*: Court of Chancery Dismisses Breach of Fiduciary Duty Claims under *Corwin* Due to Fully Informed Stockholder Vote**

In *DrugCrafters, L.P. v. Loh*, 2025 WL 3438408 (Del. Ch. Nov. 26, 2025), the Delaware Court of Chancery dismissed a challenge to a merger under *Corwin v. KKR Financial Holdings, LLC*, despite allegations that *Corwin* "cleansing" was not available due to allegations of fraud on the board and that the stockholder vote was not fully informed. *DrugCrafters* reiterates the availability of *Corwin* as a path for early dismissal of challenges to change of control transactions otherwise subject to enhanced scrutiny.

Paratek Pharmaceuticals, Inc. is a pharmaceutical company, and its primary product is NUZYRA. Paratek had a revenue performance incentive plan that provided payouts to management (including each defendant) based on cumulative revenue milestones for NUZYRA.

The incentive plan payouts would automatically vest upon a change of control. Paratek began to explore strategic opportunities and Gurnet Point Capital and MannKind Corporation (among others) showed interest. After a prolonged sales process, including periods of time where the process was put on pause, Gurnet Point made a best and final offer of \$2.15 per share with a CVR worth \$0.85 per share. The transaction committee of the Paratek board agreed to pursue the offer and started negotiations with Gurnet Point on definitive transaction documents. MannKind, upon learning this, increased its offer to \$2.75 per share, but conditioned the offer on a 50% reduction in incentive plan payouts. After meeting with the transaction committee and learning management was willing to accept the offer if the applicable incentive plan payouts were made in full, MannKind made a revised offer of \$2.50 per share with full incentive plan payouts. The transaction committee said it would agree to the MannKind offer if the consideration was increased to \$2.75 per share and requested that MannKind submit a binding proposal on an expedited timeframe. MannKind refused to do so. Following this, one of the defendants informed Gurnet Point that negotiations with another strategic buyer had meaningfully progressed and encouraged Gurnet Point to finalize its deal. Paratek shortly thereafter entered into a merger agreement with Gurnet Point on the terms of their best and final offer. In the deal, management would receive full incentive plan payouts and would also reinvest a portion of the payouts into the post-merger entity. The merger was approved by Paratek stockholders and closed shortly thereafter.

Former stockholders of Paratek sued five of Paratek's officers, two of whom were directors, for breaches of fiduciary duty in connection with the merger but did not bring claims against either the remaining directors or the

three members of the transaction committee that handled the negotiations. The plaintiffs argued in part that entire fairness review should apply because conflicted officers committed a "fraud on the board" which led to the board and transaction committee approving the Gurnet Point deal. According to the plaintiffs, the defendants manipulated the sale process and deceived the board and transaction committee by withholding material information and controlling negotiations to steer the board and transaction committee to approve the Gurnet Point deal that allegedly benefitted them. The defendants moved to dismiss for failure to state a claim.

The Court of Chancery granted the motion and dismissed the complaint in its entirety. The court's opinion proceeded in two parts. First, the court held that entire fairness did not apply because the plaintiffs failed to adequately plead either that the defendants committed a fraud on the board or that the board failed to adequately monitor allegedly conflicted officers. The court began by observing that, in order to plead such a theory, plaintiffs must allege both that officers were conflicted and that they engaged in deceptive or disloyal conduct to achieve their desired outcome. The court assumed for purposes of analysis that the defendants were conflicted, but the court rejected the plaintiffs' arguments that the defendants withheld information or otherwise controlled the process.

To support their fraud on the board theory, the plaintiffs alleged that the defendants withheld key information from the board, including early discussions with Gurnet Point, and that the defendants back-channeled information to Gurnet Point to give it an advantage. The court disagreed, holding that the plaintiffs' allegations that the defendants' initial discussions with Gurnet Point showed the discussions were

preliminary and immaterial. Further, because the plaintiffs had not adequately alleged that material information was shared with Gurnet Point, and MannKind received the same information anyway, they failed to plead that Gurnet Point was advantaged. The plaintiffs also argued that the board and transaction committee did not adequately oversee the conflicted defendants' negotiation of the deal, which enabled management to control the process. The court again disagreed, noting that the transaction committee was actively engaged, discussed and responded to offers, sought higher prices from bidders, and was advised by its independent counsel and financial advisors, as well as that the board met periodically to receive updates. The court also declined to credit allegations that the defendants convinced the board or transaction committee to take certain actions during the negotiations. Accordingly, fraud on the board was not well-pled, and entire fairness did not apply.

Plaintiffs alleged that the defendants withheld key information from the board, including early discussions with Gurnet Point, and that the defendants back-channeled information to Gurnet Point to give it an advantage.

Second, the court held that *Corwin* applied to cleanse the merger because the plaintiffs failed to allege a material misstatement or omission, rendering the stockholder vote uninformed. The plaintiffs challenged disclosure regarding (i) certain discussions the defendants had with bidders regarding the incentive plan; (ii) the reasons why the transaction committee made certain offers, rejected others, and did not wait for a further response from MannKind before

pursuing the deal with Gurnet Point; (iii) each defendants' individual attendance record at transaction committee meetings; and (iv) the defendants' alleged conflicts concerning incentive plan payouts. The court held that this information was either already disclosed, immaterial, or not required to be disclosed. Per the court, the defendants' discussions with MannKind and Gurnet Point regarding the incentive plan were adequately addressed in the proxy statement, and the plaintiffs' speculation that other information regarding such discussions must have existed and should have been disclosed could not support a disclosure violation. The court also held that the reasons behind the transaction committee's actions were not required to be disclosed, and that Delaware courts are not receptive to these types of "why" or "tell me more" disclosure claims. The court then held that the proxy statement was not required to disclose which defendants attended which transaction meetings, and the disclosure that "management" attended the meetings was sufficient. Finally, the court held that the defendants' conflicts regarding incentive plan payouts in the Gurnet Point deal as opposed to the MannKind deal were all disclosed in the proxy statement. The court concluded that because the plaintiffs had failed to plead facts that showed the stockholder vote was uninformed or coerced, *Corwin* applied, and the court dismissed the complaint.

Preferred Stock

***Alcon Research, LLC v. Aurion Biotech, Inc.*: Court of Chancery Holds Preferred Stock Consent Rights Did Not Apply to Pre-IPO Reverse Stock Split or IPO Charter Amendments**

In *Alcon Research, LLC v. Aurion Biotech, Inc.*, 2025 WL 312371 (Del. Ch. Jan. 27, 2025) the

Court of Chancery addressed whether charter-based consent rights entitled a preferred stockholder to block a private company's initial public offering, ultimately concluding they did not. In addition, the court held that the preferred stockholder had successfully revoked a voting proxy set forth in a stockholders agreement.

In 2022, the defendant corporation, Aurion Biotech, Inc., pursued a preferred stock financing in which the plaintiff stockholder, Alcon Research, LLC, came to hold more than one-third of Aurion's Series C Preferred Stock. Section 3.4 of Aurion's charter required that Aurion obtain Alcon's consent to: (i) "directly or indirectly" alter Aurion's number of authorized shares; (ii) purchase, redeem, or acquire specified shares of Aurion's stock; or (iii) amend Aurion's charter in a manner that would adversely affect the powers, preferences, or rights of the Series C Preferred Stock. Section 5.1 of the charter mandated that the Series C Preferred Stock be converted to common stock upon the consummation of a "Qualified IPO" (as defined by that section). When Alcon expressed concerns that it would experience accounting issues if its ownership of Aurion's voting power equaled more than 20%, Aurion negotiated a voting agreement with Alcon that included a voting proxy entitling Aurion's officers to vote all Alcon shares exceeding 19% in the same proportion as the outstanding series of preferred stock (excluding the shares held by Alcon) were voted on a given proposal.

In the years following the 2022 financing, a special committee of Aurion's board of directors explored several additional financing options, ultimately resolving to pursue an IPO in 2024, despite Alcon's objections. Promptly before Aurion announced the IPO, Alcon informed Aurion that it was revoking the voting proxy under Section 7.20 of the voting

agreement. Aurion refused to recognize the revocation. In response to this refusal and the Aurion board's approval of the proposed IPO, Alcon sought a declaration from the Court of Chancery that: (i) under the charter, Aurion must obtain Alcon's consent to increase its number of authorized shares in order to be able to issue a number of shares of common stock sufficient to consummate the IPO; and (ii) Alcon had validly revoked the voting proxy created by the voting agreement and was therefore entitled to vote its full stake in Aurion. Aurion counter-claimed, seeking a declaration that: (i) it did not require Alcon's consent to consummate the proposed IPO; and (ii) Alcon did not validly revoke the voting proxy, and even if the voting proxy was revoked, certain other voting limitations imposed by Section 7.20 requiring mirrored voting (i.e., voting the shares in proportion to votes cast by other Series C Preferred stockholders) remained in effect. After Alcon filed its initial complaint, Aurion effected a reverse stock split, freeing up existing authorized shares of common stock to facilitate the IPO, rather than increasing Aurion's total number of authorized shares. Accordingly, Alcon amended its complaint seeking a declaration that the reverse stock split violated its charter-based consent rights.

After trial, the Court of Chancery entered a declaratory judgment that Aurion was not required to obtain Alcon's consent to effectuate the reverse stock split and consummate the IPO. The court entered declaratory judgment for Alcon, however, as to the revocation of the voting proxy. It held that Alcon had validly revoked the voting proxy and that the voting provisions in Section 7.20 no longer limited Alcon's ability to vote on future matters submitted to a vote of all holders of Aurion's capital stock.

First, the court held that Alcon's consent was not required for Aurion to conduct the reverse stock split or consummate the IPO. The court concluded that Aurion had not triggered Section 3.4 by "indirectly" increasing its number of authorized shares through the reverse stock split, reasoning that the number of outstanding shares was reduced as a result of the split, but there had been no increase in the number of shares authorized by the charter. The court further rejected Alcon's argument that the reverse stock split was "functionally equivalent" to an increase in authorized shares under the doctrine of independent legal significance, which generally provides that different methods of achieving the same transactional ends have equal dignity.

Next, the court held that Aurion had not "purchased, redeemed, or acquired" shares such that Section 3.4 would be triggered. It reasoned that Aurion did not purchase or redeem any fractional shares resulting from the reverse stock split; instead, those fractional shares were cancelled and converted to a holder's right to receive equivalent cash value. That reclassification of fractional shares, the court continued, was distinguishable from an acquisition or repurchase.

Finally, the court held that the charter did not require Alcon's consent to amend the charter in the ways necessary to convert it to a public company charter. It noted that construing Section 3.4 in such a way would be "illogical" because the charter's contractual scheme ensured that the preferred stock would mandatorily convert in an IPO, but such mandatory conversion could not occur if the preferred stockholders' consent was required. As such, the court held that the share conversion of preferred to common occurred before the filing of the IPO charter.

For that reason, the preferred stock was not outstanding at the time that the charter amendments at issue became effective, and thus, Alcon had no consent rights over them.

The court concluded that Aurion had not triggered Section 3.4 by "indirectly" increasing its number of authorized shares through the reverse stock split, reasoning that the number of outstanding shares was reduced as a result of the split, but there had been no increase in the number of shares authorized by the charter.

The court then considered whether Alcon had validly revoked the voting proxy created in Section 7.20 of the voting agreement. In determining that it had, the court noted the provision's lack of express language of irrevocability, which made the proxy revocable. The court further rejected Aurion's arguments that even if the voting proxy was validly revoked, Section 7.20 still prohibited Alcon from voting shares in excess of 19% of Aurion's outstanding stock and still required that Alcon vote such shares in the same proportion as Series C Preferred Stock not held by Alcon. First, the court found that because the mirrored voting requirement was a voting instruction to the proxyholder, it had no relevance after the proxy was revoked. The court next reasoned that the language and placement of the voting threshold within Section 7.20 suggested that the voting threshold was intended to operate in tandem with the voting proxy. Further, the court found that Section 7.20's plain terms indicated that it existed solely to address Alcon's accounting concerns. Thus, the requirement was revoked when the voting proxy was revoked.

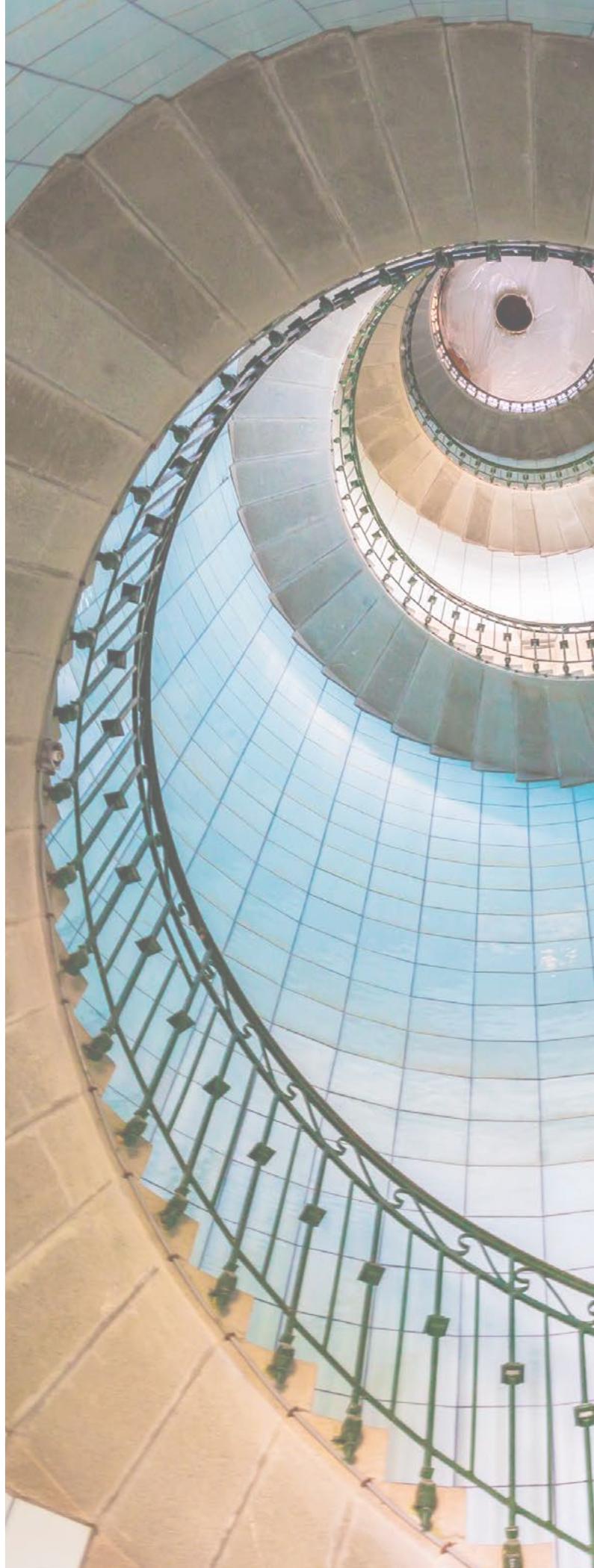
In sum, the court entered judgment in favor of Aurion, declaring that the reverse stock split was valid and the IPO charter amendment did not require Alcon's consent. The court entered judgment in favor of Alcon, however, with respect to its revocation of the voting proxy.

Stockholders Agreements

Moelis & Co. v. West Palm Beach Firefighters' Pension Fund: Delaware Supreme Court Holds Challenge to Stockholders Agreement Time-Barred by Laches

Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund, 2026 WL 184868 (Del. Jan. 20, 2026), the Delaware Supreme Court held that facial validity challenges brought against Moelis & Co.'s stockholders agreement were barred by laches. In so holding, it reversed the Court of Chancery's finding to the contrary and vacated the Court of Chancery's order declaring that certain provisions of the agreement violated the DGCL by impinging on directors' statutory charge to manage the corporation's business and affairs.

Moelis & Company is an investment bank that, in 2014, entered into a stockholders agreement with founder Ken Moelis and his affiliates in connection with its IPO. The stockholders agreement provided that the corporation would not take 18 categories of corporate acts (including, for example, hiring and firing key officers and amending the governing documents or any material contract) without Mr. Moelis's consent. Other provisions governed the board's size, Mr. Moelis's right to designate and nominate directors, the company's obligation to use reasonable efforts to see that Mr. Moelis's designees were elected, and Mr. Moelis's rights concerning vacancies and the composition of board committees.



Roughly nine years later, in 2023, a Moelis stockholder sued to invalidate the foregoing provisions on grounds that they violated Section 141(a) of the DGCL, which charges the board of directors with managing the corporation’s business and affairs unless the certificate of incorporation provides otherwise. The plaintiff argued that the Moelis stockholders agreement violated Section 141(a) by impermissibly limiting the Moelis board’s managerial freedom “in a substantial way.” The parties cross-moved for summary judgment. The Court of Chancery entered judgment for the plaintiff, holding that the acts were void because they could not “operate lawfully in the face of Section 141(a) under any circumstances.” In addition, the court rejected the defendants’ laches defense, reasoning that (i) statutory violations (like violations of Section 141(a)) are void and not susceptible to equitable defenses like laches, and (ii) even if laches were available, it would not apply because the plaintiff’s claim entailed a “continuing wrong” rather than a “discrete act” accruing upon execution in 2014. The defendants appealed.

The Delaware Supreme Court reversed the Court of Chancery’s holding. It began its analysis by clarifying the legal standard Delaware courts should apply to determine whether provisions of a contract are void (and thus not susceptible to equitable defenses) or voidable—an issue that it observed had “long vexed courts and legal scholars alike.” The court clarified that a challenged contractual provision is void if “there are no lawful means” to achieve the desired contractual arrangement, a framework that “appropriately considers whether the *arrangements* agreed to in a challenged contract are contrary to public policy” rather than the “*means*” of achieving such arrangements.

The court clarified that a challenged contractual provision is void if “there are no lawful means” to achieve the desired contractual arrangement, a framework that “appropriately considers whether the *arrangements* agreed to in a challenged contract are contrary to public policy” rather than the “*means*” of achieving such arrangements.

Applying this standard, the Supreme Court held that the challenged provisions in Moelis’s stockholders agreement were voidable rather than void. In the opinion below, the Court of Chancery had observed that most of the challenged provisions could have been lawfully implemented via inclusion in the certificate of incorporation or by issuing preferred stock to Mr. Moelis out of the board’s “blank check” authority. Without directly assessing that finding, the court held that it was the plaintiff’s burden to prove that the challenged provisions were void and that the plaintiff failed to meet that burden. Per the court, rather than identify any mandatory DGCL provision or feature of Delaware law that would render the challenged provisions categorically improper, the plaintiff identified token scenarios in which it might operate inequitably, which was insufficient. Accordingly, the court held that the provisions were voidable and thus subject to a laches defense.

Next, the court held that the plaintiff’s claim was barred by laches. It began by explaining the operative legal standards governing when claims accrue for purposes of a laches defense, noting that there are three alternative approaches: the “discrete act” method, the “continuing wrong” method, and the “separate

accrual” method. The court ultimately held that the discrete act method, which “applies when a claim arises at a distinct point in time and is effectively complete as of that date, even if it has ongoing effects or implications,” governed plaintiff’s statutory challenge to the stockholders agreement. In so holding, the justices reasoned that contrary to the Court of Chancery’s conclusion that violating the statute posed a “continuing wrong,” the challenged act was in fact the execution of the stockholders agreement in 2014, and the alleged statutory defects were mere “ongoing effects” of that key initial event. The court further stressed that all elements of the statutory claim were present, and complete relief was available in 2014, as well as that applying the “discrete act” method squared with numerous Delaware cases addressing analogous claims.

Having determined that the “discrete act” method of accrual was appropriate, and that the plaintiff’s delay had long exceeded the analogous three-year statute of limitations, the court assessed whether the defendants would be prejudiced in being forced to defend the claim. The court found that there was a presumption of prejudice in an action filed after the analogous statute of limitations had

elapsed and that absent “unusual conditions or extraordinary circumstances,” the claim would be barred by laches. Applying that standard, the court found that no such circumstances existed in the case at bar because the plaintiff had no sufficient explanation for its delay of nine years to file its claim. Accordingly, all of the elements of laches were satisfied, and the claim was deemed time-barred.

Finally, the court noted that this result did not mean that contracts violating the DGCL are immune from review, so long as no challenges arise within three years of their execution. The justices noted that as-applied challenges can be brought at any time post-execution, as well as that facial challenges can be brought if tolling occurs or other equitable grounds justify setting aside the presumption of prejudice generally applicable where the statutory period has elapsed.

Accordingly, the Supreme Court reversed the Court of Chancery’s judgment and vacated the Court of Chancery’s prior order granting the plaintiff’s motion for an award of attorneys’ fees, noting that its decision “eliminates the purported governance benefits upon which the Court of Chancery’s attorney fee award rests.”

Mergers to Circumvent Amendment Approval Requirements under LLC Act

***Campus Eye Management Holdings, LLC v. DiDonato*: Court of Chancery Validates Merger Done for Purposes of Circumventing Amendment Approval Requirements Pursuant to Delaware Limited Liability Company Act**

In *Campus Eye Management Holdings, LLC v. DiDonato*, 2024, WL 4024230 (Del. Ch. Aug. 30, 2024), the court approved a motion for judgment on the pleadings filed by Campus Eye Management Holdings, LLC (“CE Holdings”), confirming the amendment by merger of the limited liability company agreement (the “Original CE Management Agreement”) of CE Holding’s wholly owned subsidiary, Campus Eye Management, LLC (“CE Management”), where such amendment by merger was effected in such a manner to circumvent the Original CE Management Agreement’s amendment approval requirements.

The court held that by operation of Sections 18-209(f) and 18-302(e) of the LLC Act, a valid amendment by merger does not require an “actual transaction of some kind” rather than one with the “sole purpose” of effecting “an otherwise impossible amendment.”

The defendant, E. Bruce DiDonato, OD, is an optometrist who in 2021 sold a majority interest in his New Jersey practice to a private equity firm, The Beekman Group. Following

the sale, CE Management was the operating company of the optometry practice and CE Holdings was the sole member of CE Management. DiDonato maintained a 35% equity interest in CE Holdings, and Beekman received a 65% equity interest therein. CE Management was managed by DiDonato, and CE Holdings was managed by a board of three managers, with DiDonato appointing one manager and Beekman appointing two. The CE Holdings board was authorized to act by majority action.

The divergence of equity interests and management power in CE Management soon caused friction between DiDonato and Beekman. Seeking to curb DiDonato’s power to manage CE Management, the Beekman-appointed managers of CE Holdings attempted to amend the Original CE Management Agreement to make CE Management managed by its sole member, CE Holdings, rather than its manager, prior to such amendment, DiDonato. This attempted amendment prompted litigation resulting in the rejection of the attempted amendment because, under the Original CE Management Agreement, the approval of CE Management’s manager, DiDonato, was required to amend the Original CE Management Agreement.

The very day that the court rejected this attempted amendment, the Beekman-appointed managers of CE Holdings approved via written consent (i) the formation of a new subsidiary of CE Holdings, (ii) the merger of such subsidiary into CE Management, and (iii) by virtue of such merger, the amendment and restatement by merger of the Original CE Management Agreement in the form of an amended and restated limited liability company agreement of CE Management (the “A&R CE Management Agreement”). The newly adopted A&R CE Management Agreement provided that CE Management

would be managed by its sole member, CE Holdings, rather than a manager, effectively eliminating DiDonato's direct management rights over CE Management. After approving these matters, CE Holdings sought from the court a declaratory judgment that the merger and the A&R CE Management Agreement were valid. After some parliamentary jostling, CE Holdings moved for a judgment on the pleadings related to such declaratory judgment.

Analyzing the merger approval requirements for a Delaware limited liability company under Section 18-209(d) of the LLC Act, the court determined that CE Holdings, as the sole member of CE Management, could unilaterally approve CE Management's merger, notwithstanding CE Management's contemporaneous management by a manager, DiDonato. While the court expressly noted that Section 18-209(d) of the LLC Act provides that a majority of an entity's members can approve a merger unless "otherwise provided" in its limited liability company agreement, the court did not find that the Original CE Management Agreement's vesting primary management authority of CE Management in DiDonato, as manager, gave him an approval right regarding CE Management's merger. It is not clear from the court's opinion whether DiDonato proffered this argument or whether the court considered it. Similarly, the court did not analyze the impact of CE Management's merger approval coming from the board of managers of CE Holdings, its sole member, rather than from CE Holdings directly in its capacity as sole member of CE Management.

Having concluded that CE Holdings could unilaterally approve CE Management's merger, the court synthesized Section 18-209(f) of the LLC Act and the Original CE Management Agreement, noting that the Original CE Management Agreement's

amendment provisions did not expressly apply to amendments by merger and that, as a result, such amendment provisions do not apply to amendments by merger. As a result, only CE Holdings' approval of the merger was required to amend by merger the Original CE Management Agreement. In so finding, and rejecting DiDonato's arguments, the court held that by operation of Sections 18-209(f) and 18-302(e) of the LLC Act, a valid amendment by merger does not require an "actual transaction of some kind" rather than one with the "sole purpose" of effecting "an otherwise impossible amendment."

The court further dispensed with DiDonato's argument that the gap-filling effects of the implied contractual covenant of good faith and fair dealing entitled him to an approval right over an amendment by merger of CE Management, holding that no gap exists because of the very presence of Section 18-209(f) of the LLC Act. Because an existing provision of the LLC Act expressly sanctions the amendment of a, or adoption of a new, limited liability company agreement notwithstanding any provision of the limited liability company agreement relating to amendment (unless such provision expressly restricts amendments by merger), the court reasoned that there was no gap to be filled via the implied covenant.

While the court quickly dispatched with DiDonato's allegations of breaches of fiduciary duty on the basis that the CE Holdings managers had no fiduciary duties under the limited liability company agreement of CE Holdings and that CE Holdings owes no fiduciary duties to its wholly owned subsidiary, CE Management, it is notable that the court undertook such analysis after determining that the amendment by merger was legally permitted under the LLC Act.

Restrictive Covenants in LP and LLC Agreements

***Cantor Fitzgerald, L.P. v. Ainslie*: Delaware Supreme Court Enforces Forfeiture-for-Competition Provisions in Limited Partnership Agreement Given Strong Public Policy for Freedom of Contract in Limited Partnership Context**

An interesting scenario arises when a limited partnership agreement contains forfeiture-for-competition provisions in the context of employee limited partners. Typically, noncompetition provisions or restrictive noncompetition covenants are subject to reasonableness review under Delaware law, but the question arises whether forfeiture-for-competition provisions in a limited partnership agreement are subject to this same standard.

In *Ainslie v. Cantor Fitzgerald, L.P.*, 2023 WL 106924 (Del. Ch. Jan. 4, 2023), rev'd and remanded, 312 A.3d 674 (Del. 2024), 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 noncompete covenant with no geographic limitation during the first year after withdrawal and a nonsolicit 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 noncompete 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 noncompete 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 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 Supreme Court found that the public policy interest that is present when a court reviews the reasonableness of a restriction on working in a specific field is much stronger than the public policy interest in preventing employees from forfeiting benefits for choosing to compete.

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 noncompete and nonsolicit agreements and determined that, similar to liquidated damages provisions, forfeitures are not favored because of their 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.

On appeal, in *Cantor Fitzgerald, L.P. v. Ainslie*, 312 A.3d 674 (Del. 2024), the Delaware Supreme Court reversed the decision below by the Delaware Court of Chancery and found that the forfeiture-for-competition provisions are enforceable. The Supreme Court distinguished forfeiture-for-competition provisions in a partnership agreement from restrictive noncompetition covenants and liquidated damages provisions used to enforce such covenants. While restrictive noncompetition covenants and related liquidated damages provisions are generally subject to scrutiny for reasonableness under Delaware law, the court held that absent unconscionability, bad faith, or other extraordinary circumstances, forfeiture-for-competition provisions in a partnership agreement are not subject to reasonableness review. Instead, the court found that the express and stated public policy of the LP Act of giving effect to the principle of freedom of contract and the enforceability of partnership agreements supported enforcing a forfeiture-for-competition provision without regard to reasonableness.

It in its analysis, the Delaware Supreme Court reviewed the public policy considerations associated with noncompetition provisions and related liquidated damages provisions and compared them to the public policy considerations associated with forfeiture-for-competition provisions. In analyzing whether to enforce the forfeiture-for-competition provisions, the court distinguished between a restrictive noncompetition covenant that prevents an individual from working in a specific field (which may be subject to injunctive relief) and a forfeiture-for-competition provision that allows an individual to work but imposes a cost for doing so (which is not subject to injunctive relief). The court also noted that Section 17-306 permits partnership agreements to contain consequences that are not available in other commercial contracts, such as penalties and forfeitures, and that the LP Act has a stated policy “to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements.” While recognizing that freedom of contract is not unbounded, the Supreme Court found that the public policy interest that is present when a court reviews the reasonableness of a restriction on working in a specific field is much stronger than the public policy interest in preventing employees from forfeiting benefits for choosing to compete. As a result, the court found that the forfeiture-for-competition provisions in this case are not subject to review for reasonableness.

The Delaware Supreme Court’s opinion in *Cantor Fitzgerald* highlights that in the context of Delaware limited partnerships, Delaware courts (i) recognize a strong public policy of freedom of contract, and (ii) absent some form of bad faith or unconscionability, will generally preserve contractual flexibility and hold parties to their bargained-for 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*, 305 A.3d 723 (Del. Ch. 2023), *aff’d in part, rev’d in part*, 332 A.3d 472 (Del. 2024), 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 power systems and had an exclusive dealer agreement with Freedom Forever LLC, which installed the solar power 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.

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.

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 the laws of Delaware (the choice of law specified in the 2021 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 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.

Void vs. Voidable Under LLC Agreements

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

In *XRI Investment 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").

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.

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 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 Delaware Supreme 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.

Inspection Rights to Books and Records

***Cornett v. Collectable Sports Assets, LLC:* Delaware Court of Chancery Analyzes Modifications to Default Inspection Rights**

In *Cornett v. Collectable Sports Assets, LLC*, 2025 WL 1531160 (Del. Ch. May 29, 2025), the Delaware Court of Chancery examined the extent to which an LLC agreement may modify or restrict a member's statutory right to inspect

books and records under Section 18-305 of the LLC Act, as well as the proper scope of such inspection rights.

Justin Cornett was a member of Collectable Sports Assets, LLC, a Delaware series limited liability company (“CSA”) that operates a sports memorabilia platform and at all relevant times was managed by CS Assets Manager, LLC (“CSAM”), which is owned by Collectable Technologies, Inc. (“CTI”). In 2023, CTI was acquired by an entity controlled by Philip Neuman. Following the acquisition, Cornett grew concerned about CSA’s financial stability and governance after observing a series of alarming developments, namely the resignation and termination of key executives, CSA’s failure to timely file its annual SEC report, the suspension of trading on its platform, and the transfer of assets to an affiliate’s investment gallery. Further, Cornett expressed concerns about CSA’s refusal to engage with its members over asset sale proposals and Neuman’s extensive history of litigation.

Cornett served a written demand to inspect books and records for the purposes of valuing his membership interests and investigating potential mismanagement, seeking ten categories of documents, including, *inter alia*, information on his series interests, the names and addresses of each member of CSA, CSA’s overall financial condition, the location and insurance status of key assets, the circumstances surrounding the removal of CSA’s former president, and communications concerning halted trading and asset sales. The LLC agreement contained inspection rights coextensive with Section 18-305 of the LLC Act but included two potentially limiting provisions: (i) it allowed the managing member to “reasonably determine” whether a demand was proper, and (ii) it limited access to series-level information to only those series

in which the member held an interest. CSA responded by offering limited production conditioned on a confidentiality agreement that would bar Cornett from contacting other members or asset custodians. The parties failed to reach an agreement regarding the confidentiality agreement, prompting Cornett to file suit seeking a court-ordered inspection and fee shifting.

The court held that Cornett was entitled to inspect most of the requested books and records, finding that Cornett (i) asserted proper purposes of valuation and investigation, (ii) established a credible basis to suspect mismanagement sufficient to support the investigative purpose, and (iii) demonstrated the production request was related, in part, to such purposes. The court also determined that while the LLC agreement imposed some contractual limits on inspection rights, it did not override or fundamentally displace the statutory standard. Specifically, the court rejected CSA’s argument that the managing member had unfettered discretion to determine whether a demand was reasonably related to a member’s interest. Although the LLC agreement stated that the managing member could “reasonably determine” whether a purpose was proper, the court held that this language merely offers protection to managerial decisions made in good faith—it does not and cannot displace the court’s exclusive statutory authority under Section 18-305(f) of the LLC Act to determine whether a member’s inspection is warranted. In this context, the court reaffirmed that while Delaware law vigorously protects freedom of contract in the LLC setting, such freedom does not extend to eliminating the court’s oversight function under the LLC Act. The court did, however, enforce the provision restricting access to series-level records unrelated to Cornett’s investment.

Next, the court found that Cornett’s stated purpose to value his interest was facially proper and conceded by CSA. With respect to the investigative purpose, the court found that Cornett had established a credible basis to suspect wrongdoing. The court emphasized that under Delaware law, the credible basis standard is the “lowest possible burden of proof” and does not require proof of actual wrongdoing—only sufficient circumstantial evidence to warrant further inquiry.

The court also determined that while the LLC agreement imposed some contractual limits on inspection rights, it did not override or fundamentally displace the statutory standard. Specifically, the court rejected CSA’s argument that the managing member had unfettered discretion to determine whether a demand was reasonably related to a member’s interest.

The court then analyzed the scope of documents to which Cornett was entitled and applied the necessary and essential standard to each request. The court ordered CSA to produce various categories of documents responsive to Cornett’s requests concerning CSA’s overall financial condition, the location and insurance status of his series assets, and formal materials regarding CSA’s decision to halt trading, delay regulatory filings, and relocate assets. However, the court denied Cornett’s demand for a narrative explanation of the former executive’s termination, finding that such a request fell outside the scope of a books and records action. The court also partially denied Cornett’s request for informal documents, namely emails and

notes, limiting the court-ordered production to formal board and officer-level materials unless further evidence emerged showing the need for a broader inspection.

The court further held that production must be subject to a confidentiality agreement consistent with the LLC agreement, which required confidential treatment of all books and records produced and limited use to monitoring one’s investment. However, the court rejected CSA’s attempt to prohibit member-to-member communication, holding that Cornett may use his inspection rights to inform discussions with other members, provided he does not share confidential information that such members are not already privy to. The court upheld CSA’s restriction on contacting asset custodians, reasoning that such use fell outside the scope of monitoring one’s investment.

Implied Covenant Relating to Amendments to LLC Agreements

***Khan, et al. v. Warburg Pincus, LLC*: Delaware Chancery Court Holds Implied Covenant of Good Faith and Fair Dealing Did Not Restrict Controlling Parties from Amending LLC Agreement**

In *Khan v. Warburg Pincus, LLC*, 2025 WL 1251237 (Del. Ch. Apr. 30, 2025), the Delaware Court of Chancery held, on a motion to dismiss, that an amendment provision in a limited liability company agreement left no gap to fill with the implied covenant of good faith and fair dealing. In addition, because the LLC agreement eliminated fiduciary duties, the court found that there was not an implied term in the LLC agreement restricting the controlling parties from amending the LLC agreement in a manner that furthers their own

interests, noting that the implied covenant of good faith and fair dealing is not a substitute for traditional fiduciary duties. The court's ruling highlights that the implied covenant of good faith and fair dealing has limited application, particularly when the parties to an LLC agreement have eliminated fiduciary duties.

Underscoring the implied covenant's character as a gap-filling mechanism, the Court of Chancery held that the WP TopCo Agreement had no gap to fill with respect to the WP Investors' negotiation of disparate merger consideration and implementation of an amendment of the WP TopCo Agreement to permit the disparate merger consideration.

WP CityMD TopCo LLC ("WP TopCo"), an urgent medical care provider, was capitalized into classes of units, with certain affiliated private equity funds holding 60% of the ownership of WP TopCo through Class A Units (the "WP Investors") and other minority investors of WP TopCo owning Class B Units. In late 2021 and 2022, the WP Investors negotiated a merger of WP TopCo with Village Practice Management Company LLC ("Village"), pursuant to which the WP Investors would receive consideration in cash and the minority investors would receive consideration in a combination of cash and equity in Village. As negotiated, the terms of the merger violated certain existing minority investor protections in the LLC agreement of WP TopCo (the "WP TopCo Agreement"), which required that each class of unitholders receive the same type of consideration in this type of transaction in accordance with the WP TopCo Agreement's distribution waterfall, and which empowered minority investors to

elect to participate in such a transaction on the same terms as the WP Investors.

Consequently, the WP Investors sought to amend the WP TopCo Agreement to permit the merger, including the negotiated merger consideration, notwithstanding these restrictions. The amendment provision in the WP TopCo Agreement required that such amendment be approved by a majority of the minority investors, as a class of unitholders whose rights would be adversely affected by the amendment. The amendment was approved by such vote, and the merger was consummated in January 2023. In March 2024, the primary controller of Village after the merger filed a \$12.4 billion goodwill impairment charge with respect to Village, effectively devaluing the equity in Village received as merger consideration solely by the minority investors. The minority investors subsequently brought an action against the WP Investors for, among other things, breach of the implied covenant of good faith and fair dealing in negotiating away the minority investors' rights under the WP TopCo Agreement and coercing the minority investors into approving the amendment to permit disparate consideration for different classes of interests.

Underscoring the implied covenant's character as a gap-filling mechanism, the Court of Chancery held that the WP TopCo Agreement had no gap to fill with respect to the WP Investors' negotiation of disparate merger consideration and implementation of an amendment of the WP TopCo Agreement to permit the disparate merger consideration. The court held that no gap existed because the WP TopCo Agreement expressly contemplated amendments to the agreement that adversely affect specific classes of unitholders. In addition, the WP TopCo Agreement both expressly eliminated the

WP Investors' fiduciary duties and provided that the WP Investors were permitted to act in their own interests. Because the WP TopCo Agreement contained an explicit provision for amendments that adversely affect the minority investors, and because the WP Investors were authorized to act in their own interests, the WP TopCo Agreement contained no gap or implied term that would prevent the WP Investors from taking those steps.

Scope of Who Is a “Manager” of LLC for Purposes of Personal Jurisdiction

Next Level Ventures, LLC v. AVID USA Technologies LLC: Court of Chancery Finds de facto Managers of Delaware Limited Liability Company Subject to Personal Jurisdiction in Delaware

In *Next Level Ventures, LLC v. AVID USA Technologies LLC*, 2023 WL 3141054 (Del. Ch. Mar. 16, 2023), the Delaware Court of Chancery considered, *inter alia*, whether it could exercise personal jurisdiction over two defendants alleged to be de facto managers of a Delaware limited liability company under Section 18-109 of the LLC Act. The plaintiff in *Next Level* sought to enforce a preliminary injunction against AVID USA Technologies LLC (f/k/a AVD Technologies USA LLC), a Delaware limited liability company, and its alleged managers, Jonathan and Hanna Carfield, for violations of the Delaware Deceptive Trade Practices Act. Ultimately, the court found, *inter alia*, that the Carfields were de facto managers of AVID USA Technologies and subject to personal jurisdiction in Delaware under Section 18-109 of the LLC Act.

The court explained that to exercise personal jurisdiction over a defendant, a “plaintiff must first show there is a statutory basis for

service, and then that the exercise of personal jurisdiction comports with due process.” After determining that the Carfields materially participated in the management of AVID USA Technologies and were de facto managers under Section 18-109 of the LLC Act, the court analyzed whether the defendant’s claim fell within the scope of Section 18-109 of the LLC Act. Consistent with analogous corporate

The court found, *inter alia*, that the Carfields were de facto managers of AVID USA Technologies and subject to personal jurisdiction in Delaware under Section 18-109 of the LLC Act.

precedent, the court, relying on the plain language of the statute, noted that for claims to fall within Section 18-109, such claims must relate to (i) the business of the limited liability company, or (ii) a violation by the manager of a duty to the limited liability company. Further, the court highlighted that while earlier Delaware decisions had collapsed the Section 18-109 analysis with the due process analysis, the court would, looking to corporate precedent, conduct a separate due process analysis. Ultimately, the court found that the defendant’s claims fell within the scope of Section 18-109 and noted that the Carfields had conceded that due process would be satisfied if they were found to be managers of AVID USA Technologies. As such, the court found, *inter alia*, that it could exercise personal jurisdiction over the Carfields.

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).

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).

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 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 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 consistently 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

2025 AMENDMENTS TO THE DELAWARE GENERAL CORPORATION LAW

In 2025, Governor Matt Meyer signed into law two separate packages of amendments to the Delaware General Corporation Law (DGCL) previously adopted by the Delaware General Assembly. The first set of amendments enacted significant changes designed to alter the statutory regimes for transactional safe harbors and books and records inspections. The second set of amendments enacted changes to provisions governing forum selection, fee shifting, the issuance of fractional shares, the revocation of voluntary dissolution, and the filing of annual reports and payment of corporate franchise taxes, among other changes.

Spring 2025 Amendments to the DGCL

The first set of DGCL amendments was signed into law on March 25, 2025. The amendments made the following important changes to Section 144 and Section 220 of the DGCL:

- Section 144 was amended to provide a safe harbor for transactions in which a director or an officer, or a controlling stockholder or control group, may have a conflict of interest. The changes to Section 144 set forth clear procedures for corporations and transaction planners to follow to obtain the protection of the safe harbor for transactions that might otherwise be subject to judicial review under the entire fairness standard. As the procedural protections are

obtained through disinterested director or disinterested stockholder approval, revised Section 144 provides statutory definitions of those and other terms necessary to implement and uniformly apply the statute. Revised Section 144 also defines when a party may be found to be a controlling stockholder or a member of a control group, relying principally upon notions of ownership and control of voting stock.

- Section 220, which governs stockholders’ and directors’ statutory rights to inspect books and records, was amended to specify the core corporate documents that are required to be produced in a books and records action. The amendments also permit a corporation to impose reasonable restrictions on the confidentiality, use or distribution of books and records, to require that the stockholder agree that any information included in the corporation’s books and records is deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand, and to redact portions of any books and records produced not specifically related to the stockholder’s purpose. Stockholders seeking records beyond those listed in the statute—including emails and text messages—must, among other things, show a compelling need and demonstrate by clear and convincing evidence that the additional records are necessary and essential to further the stockholder’s proper purpose.

Section 144: Interested Directors and Officers; Controlling Stockholder Transactions; Quorum

Before the amendments became effective, Section 144 of the DGCL provided that contracts or transactions between a corporation and one or more of its directors or officers (or an entity in which one or more of its directors or officers are directors or officers or have a financial interest) would not be “void or voidable” solely for that reason if approved by disinterested directors or stockholders, in each case upon disclosure of material facts, or if the contract or transaction was fair as to the corporation. Although the prior version of Section 144 appeared on its face to provide safe harbor protection to insulate transactions from equitable review, its application was far more limited, as it operated principally to ensure the technical validity of specified interested transactions by statutorily overturning the common law principle, not universally followed, that disregarded the presence of “common or interested” directors for quorum purposes.

Revised Section 144 provides meaningful safe harbor protection for acts or transactions in which directors or officers, as well as controlling stockholders and members of a control group, may have an interest, so long as the parties follow the procedures set forth in the statute or the acts or transactions are fair to the corporation and its stockholders.

Transactions Involving Directors and Officers

Revised Section 144(a), which applies to acts or transactions that do not involve interests on the part of a controlling stockholder or control group, provides that an act or transaction involving the corporation in which one or more directors or officers either have a financial interest or are the corporation’s counterparty may not be the subject of

equitable relief or give rise to an award of damages against a director or officer as a result of the fact that (i) the foregoing circumstances exist, (ii) the director or officer received any benefit from the transaction, or (iii) the director or officer is present at or participates in the meeting of the board or committee that authorizes the transaction or was involved in the initiation, negotiation, or approval of the transaction, as long as any of the following conditions are met:

- I. The material facts as to the director's or officer's relationship or interest in the act or transaction, including any involvement in the initiation, negotiation, or approval of the transaction, are disclosed or known to the board of directors or a board committee, and the board or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative vote of a majority of the disinterested directors. Notably, if a majority of the directors are not disinterested directors, to obtain safe harbor protection, it must be approved by a committee of the board consisting of at least two directors whom the board has determined to be disinterested. Thus, where parties are seeking safe harbor under Section 144(a) and it is necessary to form a committee due to the presence of material interests on the part of a majority of the directors, it will be critical for the board to form a committee consisting of not less than two directors and to make a specific, good faith finding that each of the directors serving

on the committee is, in fact, disinterested. The fact that any individual director is later found not to have been disinterested, however, should not, of itself, defeat the application of the safe harbor, so long as the original determination that all directors serving on the committee were disinterested was in fact made in good faith and the act or transaction is approved by the committee with a vote of a majority of the disinterested directors serving on the committee. As Section 144(a) (and the corresponding provisions of Section 144(b) and Section 144(c)) require the decision to be made "without gross negligence," the directors should be mindful of the scrutiny placed upon their discharge of the duty of care. Thus, directors should continue to observe best practices in governance, including ensuring that they have received and reviewed all information material to any decision they are being asked to make and, where appropriate, sought guidance and advice from competent outside experts and advisors selected in good faith and with reasonable care.

2. The act or transaction is approved or ratified by the informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders. Notably, under Section 144(a), the act or transaction need not be expressly conditioned upon the requisite

stockholder vote; the safe harbor will apply if the vote is validly obtained. The statute does not expressly define what constitutes an “informed” or “uncoerced” vote, relying instead on Delaware’s well-developed body of common law on those matters.

3. The transaction is fair as to the corporation and its stockholders.

Transactions Involving Controlling Stockholders

New Section 144(b) provides that, except in the case of a “going private transaction,” an act or transaction between the corporation and a controlling stockholder or a control group, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation’s stockholders generally (a “controlling stockholder transaction”), may not be the subject of equitable relief or give rise to an award of damages against a director, officer, controlling stockholder, or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group if any of the following conditions are met:

1. The material facts as to the controlling stockholder transaction are disclosed or known to a committee of the board of directors expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject the controlling stockholder transaction, and such controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross

negligence by a majority of disinterested directors on the committee. As with Section 144(a), the committee must consist of at least two directors determined in good faith by the board to be disinterested. The determination regarding the disinterestedness of the committee members must be made in good faith at the outset, and a subsequent determination that one or more of the members was not disinterested will not, of itself, prevent reliance on the safe harbor procedures. Unlike Section 144(a), however, it must be clear that the committee has the power to reject the transaction. The statute does not, however, incorporate from the common law any requirement that the committee be formed, or delegated the authority to negotiate and reject, any controlling stockholder transaction before the commencement of substantive economic negotiations. While that requirement was crafted with a salutary purpose in mind, it proved in practice to introduce an unacceptable level of “foot-fault” risk and perversely provided a disincentive to the deployment of sound procedural protective devices.

2. The controlling stockholder transaction is conditioned, by its terms as in effect at the time it is submitted for a stockholder approval or ratification, on the approval of or ratification by disinterested stockholders

and is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders. Although the controlling stockholder transaction must be expressly conditioned upon the minority stockholder vote where a party is relying on such vote for safe harbor protection, the condition need only be in place before the act or transaction is submitted to a vote of stockholders; it need not be in place prior to the time at which substantive negotiations commence.

3. The controlling stockholder transaction is fair as to the corporation and its stockholders.

New Section 144(c) provides that a controlling stockholder transaction that constitutes a “going private transaction”—which is defined as a Rule 13e-3 transaction (for a publicly listed corporation) and as specified transactions (including mergers, consolidations, conversions, recapitalizations, share purchases, charter amendments, tender or exchange offers, etc.) in which all shares of capital stock held by disinterested stockholders are cancelled, converted, purchased, acquired, or otherwise cease to be outstanding (for all other corporations)—may not be the subject of equitable relief or give rise to an award of damages against a director, officer, controlling stockholder, or member of a control group by reason of a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if both disinterested committee approval and disinterested stockholder approval are validly obtained as set forth in Section 144(b), or if

the going private transaction is fair as to the corporation and its stockholders.

Notably, for approval of a controlling stockholder transaction or a going private transaction under Section 144(b) or (c), a separate vote (or recommendation) of a committee comprised of at least a majority of disinterested directors is required. As with Section 144(a), the standard for approval of such a transaction by the stockholders is a majority of the votes cast by the disinterested stockholders, but in order to validly obtain disinterested stockholder approval under Section 144(b) or (c), the controlling stockholder transaction or going private transaction must be conditioned on a vote of disinterested stockholders at the time that it is submitted to stockholders for approval.

Exculpation of Controlling Stockholders

New Section 144(d)(5) sets forth an exculpatory provision for controlling stockholders that eliminates liability of a controlling stockholder or member of a control group for monetary damages for breach of fiduciary duty other than for breach of the duty of loyalty, acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, or transactions from which they derive an improper personal benefit. By reciting the core concepts imported from Section 102(b)(7) of the DGCL, which allows for the exculpation of directors and officers, Section 144(d)(5) confirms that controlling stockholders cannot be liable for monetary damages to the corporation or its stockholders for a breach of the duty of care. The recitation of the corresponding provisions of Section 102(b)(7), however, should not be viewed as creating or imposing on controlling stockholders or members of a control group any additional duties that were not already imposed upon them at common law.

Definitions

One of the principal goals of the new legislation was to provide clarity and predictability in the law, including by codifying concepts that are core to any review of fiduciary conduct.

Disinterested Director

New Section 144(e)(4) defines “disinterested director” as a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction. In addition to supplying a definition of “disinterested director,” new Section 144(d)(2) provides that any director of a publicly listed corporation shall be presumed to be a disinterested director with respect to an act or transaction that such director is not a party to if the board of directors shall have determined that such director satisfies the relevant criteria for determining director independence under any rules promulgated by an applicable exchange or, with respect to controlling stockholder transactions, satisfies such exchange independence rules when substituting the company for the controlling stockholder for purposes of that inquiry. The statute provides that the presumption arising out of satisfaction of independence standards under the listing rules is heightened and may only be rebutted by substantial and particularized facts that a director who meets the criteria for independence under the applicable listing rules has a material interest in the transaction or has a material relationship with a person with a material interest in the transaction. New Section 144(d)(3) also codifies the common law rule that the mere designation, nomination, or vote in the election of the director to the board of directors by any person that has a material interest in an act or transaction shall not,

of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party.

Disinterested Stockholder

New Section 144(e)(5) defines “disinterested stockholder” as any stockholder that does not have a material interest in the act or transaction at issue or a material relationship with any person that has a material interest in the act or transaction.

Material Interest

New Section 144(e)(8) defines “material interest” as an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director’s judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue, and (ii) in the case of a stockholder or any other person (other than a director), would be material to such stockholder or such other person.

Material Relationship

New Section 144(e)(9) defines “material relationship” as a familial, financial, professional, employment, or other relationship that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director’s judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue, and (ii) in the case of a stockholder, would be material to such stockholder.

Controlling Stockholder

New Section 144(e)(2) defines “controlling stockholder” as any person that, together with such person’s affiliates and associates,

either (i) owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors who have a majority in voting power of all director votes, (ii) has contractual or other rights to elect nominees to the board having a majority in voting power of all director votes, or (iii) has the power functionally equivalent to that of a majority stockholder by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors with a majority in voting power of all director votes and the power to exercise managerial authority over the business and affairs of the corporation. Notably, by limiting the third category to instances in which a large stockholder has the power to “exercise managerial authority over the business and affairs of the corporation,” this definition functionally excludes large stockholders who may be able to control the outcome of a specific transaction (so-called “transaction-specific” control) but do not possess control over the entity generally.

Control Group

New Section 144(e)(1) defines a “control group” as two or more persons that are not individually controlling stockholders but that, by virtue of an agreement, arrangement, or understanding between them, collectively constitute a controlling stockholder. In general, the provisions described above applicable to a “controlling stockholder” are also applicable to a “control group.” New Section 144(d)(4) provides that no person will be a controlling stockholder or part of a control group unless the criteria set forth in the foregoing definitions are met.

Miscellaneous

New Section 144(d)(6) clarifies that revised Section 144 is not intended to limit the right of any person to seek equitable relief on the grounds that an act or a transaction, including a controlling stockholder transaction, was not validly authorized or approved in compliance with Delaware law. Thus, the safe harbor procedures do not displace any existing authorization requirements under the corporation’s certificate of incorporation or bylaws or the default provisions of the DGCL. Section 144(d)(6) also clarifies that revised Section 144 is not intended to limit judicial review for purposes of injunctive relief of provisions or devices designed to deter, delay, or preclude a change of control or other transaction (such as stockholder rights plans) or a change in the composition of the board of directors. It further provides that Section 144 does not limit persons’ rights to seek relief on grounds that a person aided or abetted a breach of fiduciary duty by a director.

New Section 144 is designed solely to provide safe harbor for acts or transactions that follow its procedures. It is not intended to displace any protections available at common law. Thus, the failure to comply expressly with one or more of the procedures will not result in the application of heightened review if the act or transaction that is the subject of a challenge, at common law, would have otherwise been entitled to the presumption of the business judgment rule.

Section 220: Inspection of Books and Records

Before the amendments were signed into law, Section 220 provided that stockholders and beneficial owners could inspect a corporation’s stock ledger, a list of its stockholders, and its other “books and records” upon written demand under oath stating the purpose of the

demand. That version of Section 220 did not specifically define the term “books and records,” and as a result, the scope of the books and records that may be obtained by a stockholder under Section 220 has largely been developed by common law. In recent years, books and records demanded under Section 220 have often included informal documents and other materials, such as emails, text messages, and other forms of electronic communication and documentation, that would traditionally have been produced only in the context of discovery during adversarial litigation. As a result, books and records demands under Section 220 have become increasingly costly, time-consuming, and burdensome for Delaware corporations.

The amendments to Section 220 seek to relieve some of this burden by statutorily defining the scope of “books and records” available for inspection to documents and materials that are most relevant to the business and governance of Delaware corporations. The list of books and records is largely consistent with the list set forth in the corresponding provisions of the Model Business Corporation Act. Specifically, new Section 220(a)(1) defines “books and records” to mean all of the following:

1. the corporation’s certificate of incorporation (including a copy of any agreement or other instrument incorporated by reference therein);
2. the corporation’s bylaws (including a copy of any agreement or other instrument incorporated by reference therein);
3. the minutes of all meetings of stockholders and any actions taken by consent of stockholders without a meeting, in each case in the past three years;

4. all communications by the corporation in writing or by electronic transmission to stockholders generally within the past three years;
5. the minutes of any meeting of the board of directors or any committee thereof and any actions taken by consent of the board or a committee thereof without a meeting;
6. the annual financial statements of the corporation for the past three years;
7. any agreement entered into under Section 122(18) of the DGCL; and
8. any director and officer independence questionnaires.

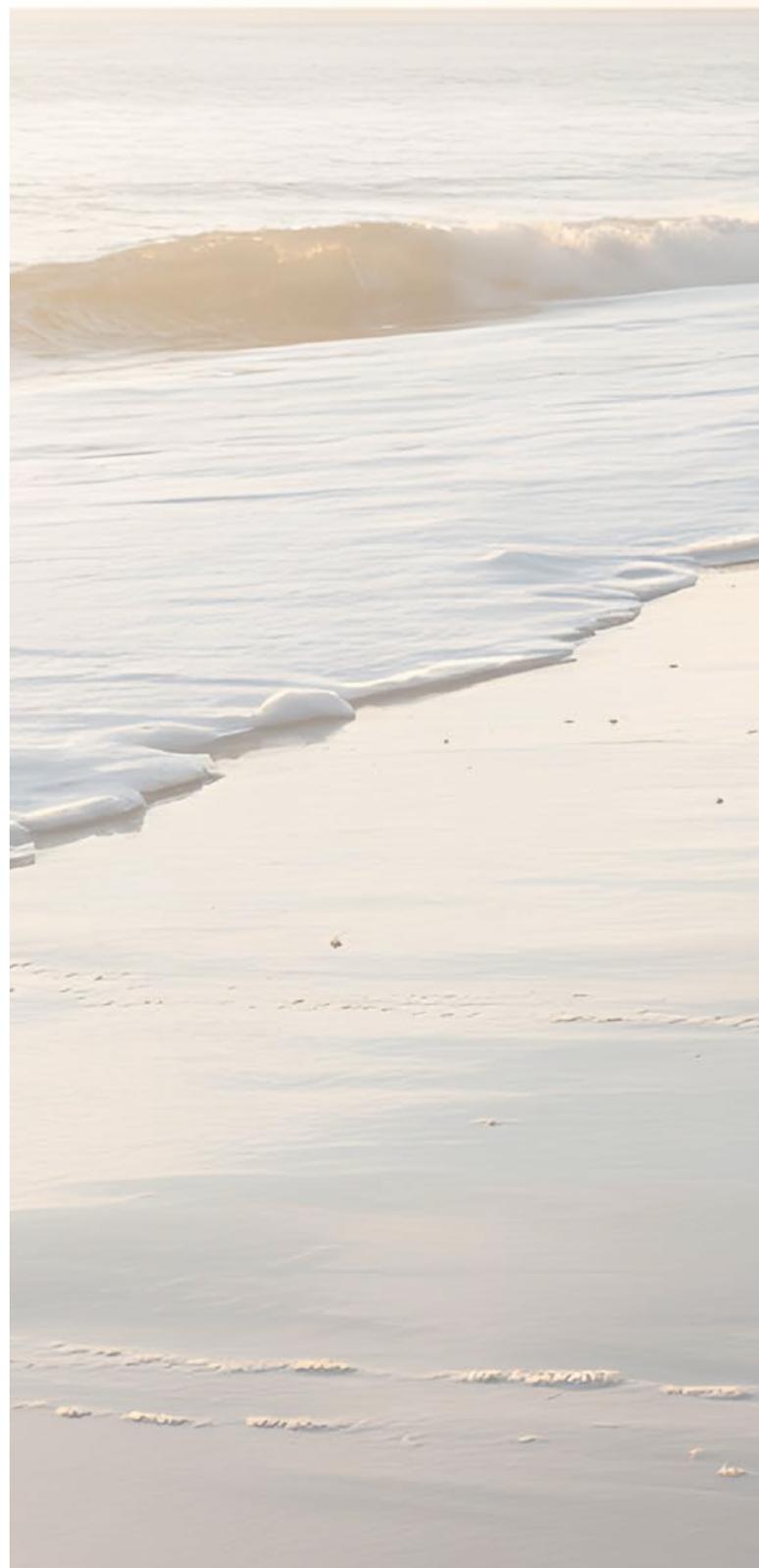
New Section 220(b)(2) sets forth procedural requirements relating to a stockholder’s demand to inspect books and records. In order for a stockholder or beneficial owner to inspect a corporation’s books and records, (i) the stockholder’s demand must be made in good faith and for a proper purpose, (ii) the stockholder’s demand must describe with reasonable particularity the stockholder’s purpose and the books and records the stockholder seeks to inspect, and (iii) the books and records that are sought must be specifically related to the stockholder’s purpose. New Section 220(b)(3) expressly permits a corporation to impose reasonable restrictions on the confidentiality, use, or distribution of books and records produced in response to a demand under Section 220 and to require, as a condition to producing any such books and records, that the stockholder agree that any such books and records be

deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter of the demand.

New Section 220(b)(4) clarifies that nothing in Section 220 affects the right of a stockholder to seek discovery of books and records of the corporation if the stockholder is in litigation with the corporation or the power of a court to compel the production of corporate records for inspection by a stockholder who has otherwise met the requirements of Section 220 and to impose reasonable restrictions on the production of such books and records. Consistent with the corresponding provision of the Model Business Corporation Act, this provision merely preserves whatever independent rights of inspection exist under the sources referenced in the statute and does not create any additional rights, either expressly or by implication.

Revised Section 220(d) clarifies that a director's inspection rights are not limited to the "books and records" of the corporation as defined in Section 220(a)(1) but also include inspection of other records of the corporation for a purpose reasonably related to the director's position as a director.

New Section 220(e) makes clear that the Delaware Court of Chancery cannot order inspection of records beyond those listed above unless either of two statutory exceptions applies. The first exception, set forth in new Section 220(f), permits the Court of Chancery to order a corporation that does not have records of stockholder or board meetings or actions by consent or financial statements (or, in the case of a publicly listed corporation, that does not have director independence questionnaires) to produce additional records of the corporation constituting the functional equivalent of any such books and records in response to an otherwise proper demand for inspection to the extent doing





so would be necessary and essential to fulfill the stockholder’s proper purpose.

The second exception, set forth in new Section 220(g), permits the Court of Chancery to compel inspection of additional materials only if: (i) the petitioning stockholder has satisfied all requirements of Section 220(b) (which includes the proper purpose requirement, “reasonable particularity” requirement, and “form and manner” requirements for inspection demands), (ii) such stockholder shows a compelling need for inspection to further the stockholder’s proper purpose, and (iii) such stockholder has demonstrated by clear and convincing evidence that the records the stockholder seeks are necessary and essential to further such proper purpose.

New Section 220(h) permits the Court of Chancery to impose restrictions and conditions on court-ordered productions of the same type permitted by Section 220(b)(3)—that is, restrictions on confidentiality, use, and distribution, as well as a requirement that the recipient agree that all records disclosed are deemed part of any complaint filed in a follow-on plenary action related to the demand

Effective Date of Amendments

The first set of DGCL amendments took effect on March 25, 2025. They apply both prospectively (to acts and transactions occurring on and after their effective date) and retroactively (to acts and transactions occurring before their effective date), subject to an exception: the new regime does not apply to any court proceedings that were pending, nor to any books and records demand made, on or before February 17, 2025.

Summer 2025 Amendments to the DGCL

The second set of DGCL amendments was signed into law on June 30, 2025. The following provisions were updated:

Sections 102(f), 109(b), and 115: Contents of the Certificate of Incorporation; Bylaws; Forum Selection Provisions

Amendments to Sections 102(f), 109(b), and 115 of the DGCL harmonize the breadth of the DGCL’s “fee-shifting” and forum selection provisions with the permissible scope of such provisions as clarified by the Delaware Supreme Court in *Salzberg v. Sciabacucchi*, 227 A.3d 102 (Del. 2020).

Section 115 of the DGCL effectively establishes the scope of not only Section 115 but also Sections 102(f) and 109(b). Old Section 115 provided that the certificate of incorporation or bylaws could require “internal corporate claims” to be brought exclusively in Delaware courts and that no provision of the certificate of incorporation or bylaws could prohibit bringing such claims in Delaware courts. Section 115 then defined “internal corporate claims” as claims either (i) based upon a violation of a duty by a current or former director or officer or stockholder in such capacity, or (ii) as to which the DGCL confers jurisdiction on the Court of Chancery. These categories subsumed (as the *Salzberg* court recognized) judicially defined “internal affairs” claims traditionally governed by Delaware state law, including for breach of fiduciary duty and violations of the DGCL. Old Sections 102(f) and 109(b), which prohibited “fee-shifting” provisions (i.e., provisions imposing liability on a stockholder for attorneys’ fees or expenses of the corporation or any other party) in the certificate of incorporation or bylaws, only provided as much for “internal corporate claims” as defined in the previous Section 115.

In *Salzberg*, the Delaware Supreme Court upheld charter-based provisions requiring claims arising under the Securities Act of 1933—which were deemed beyond the scope of the “internal corporate claims” defined in Section 115—to be brought in federal district courts (which it called “federal forum provisions” or “FFPs”). In so holding, the Supreme Court reasoned in part that Section 102(b)(1)—which broadly allows the certificate of incorporation to include “any provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders” not contrary to Delaware law—unambiguously permitted corporations to adopt charter-based forum selection provisions governing “intra-corporate” claims, a broader class of claims than “internal corporate claims.” While the *Salzberg* court did not define the scope of “intra-corporate” claims with precision, it did hold that this class of claims includes claims within the ambit of Section 102(b)(1), which comprises a broader class of claims than the “internal corporate claims” referenced in Section 115. Notably, Section 109(b), which governs the scope of permissible bylaw provisions, contains limiting language similar to the above-quoted Section 102(b)(1) clause that the Supreme Court parsed in *Salzberg*.

Accordingly, after *Salzberg*, the scope of forum selection provisions permitted under Delaware law outstripped the literal terms of Section 115. And because the scope of Section 115 governed the scope of fee-shifting provisions in Sections 102(f) and 109(b), that disjunction arguably applied to fee-shifting provisions as well.

The 2025 amendments effectively harmonized these provisions of the DGCL with prevailing common law. Amended Section 115 is broadened by using, as the *Salzberg* court did,

the language of Sections 102(b)(1) and 109(b) to define the breadth of permissible forum selection provisions. The amendments to Section 115 provide that, with respect to claims that are not “internal corporate claims” defined in Section 115, the certificate of incorporation or bylaws may require stockholders acting in their capacity as such to bring such claims in one or more prescribed forums or venues if such claims—consistent with Sections 102(b)(1) and 109(b)—“relate to the business of the corporation, the conduct of its affairs, or the rights or powers of the corporation or its stockholders, directors or officers.”

The provision must, however, comply with applicable jurisdictional requirements and permit claims to be brought in a Delaware court that has jurisdiction. As the legislation’s synopsis observes, amended Section 115 reaches a result different from certain federal court decisions that applied a Delaware exclusive forum provision to bar certain claims arising under federal securities laws. In *Lee v. Fisher*, 70 F.4th 1129 (9th Cir. 2023) and *Sobel v. Thompson*, 2023 WL 4356066 (W.D. Tex. July 5, 2023), each court held that a Delaware exclusive forum provision validly required derivative claims brought under the Securities Exchange Act of 1934 (the “Exchange Act”) to be brought only in the Court of Chancery, a result that rendered plaintiffs categorically unable to bring such claims because the Exchange Act provides for exclusive jurisdiction in federal court. Under amended Section 115, forum selection provisions must permit such claims to be brought in the United States District Court for the District of Delaware.

The amendments to Sections 102(f) and 109(b) similarly provide that the certificate of incorporation and bylaws, respectively, may not purport to impose fee-shifting on stockholders in connection with stockholder

derivative claims or claims brought by a stockholder in its capacity as such.

The synopsis to the amendments clarifies that the amendments are not intended to affect contractual fee-shifting or forum selection provisions that bind stockholder-signatories. It further clarifies that amended Section 115 is not intended to foreclose equitable review of the adoption or operation of a Section 115-compliant provision, nor limit or expand the jurisdiction of the Court of Chancery or Superior Court.

Section 103(f): Filing Instruments with the Delaware Secretary of State

New Section 103(f) of the DGCL clarifies and confirms that filings made with the Delaware Secretary of State can be nullified under certain circumstances. Section 103 of the DGCL governs the execution, acknowledgment, filing, recording, and effective date of various instruments with the Delaware Secretary of State. Subsection 103(f) previously permitted corporate filers to correct previously filed instruments if the instrument was defectively or erroneously executed, sealed, or acknowledged or was an inaccurate record of the corporate action described in the filing. Filers could do so by either filing a “certificate of correction” specifying the nature of the defect and providing corrected language or by filing the corrected instrument itself. However, Section 103(f) previously did not expressly state whether corporations could use the foregoing correction process to nullify a document rather than correct it. A nullification could be appropriate, for example, where the corporation discovers that necessary board or stockholder approval was not obtained prior to the filing of a document with the Delaware Secretary of State. The amendments to Section 103(f) clarify that if any of the conditions supporting a correction

are present, the corporation can file a certificate of correction specifying that the instrument will be nullified. The amendments also make clear that, as with corrections, nullifications will apply retroactively to the effective date of the original filing except for persons substantially and adversely affected by the nullification.

Sections 131, 132, and 502: Registered Office and Registered Agent in Delaware

Section 131 of the DGCL requires every corporation to have a registered office in Delaware. New Section 131 eliminates provisions automatically treating a corporation's registered office as its principal place of business in Delaware for purposes of the DGCL and certificate of incorporation. Instead, the amended Section 131 provides that the term "registered office" means, as used in the DGCL, the address of the corporation's registered agent in Delaware.

Section 132(b) of the DGCL sets forth the responsibilities of the corporation's registered agent. New Section 132(b) clarifies that a registered agent may not perform its duties solely through a mail forwarding service, the internet, or other means of remote communication, or a combination of the foregoing.

Section 502(a) of the DGCL sets forth information that must be included on the corporation's annual franchise tax report and provides that the report must state, among other things, the corporation's principal place of business. The amended Section 502(a) provides that the principal place of business listed on the annual report cannot be the address of any registered agent unless the corporation's principal place of business is in Delaware and the corporation serves as its own registered agent. New Section 502 further requires the annual report to set forth the nature of the corporation's business

Section 155: Fractions of Shares

Section 155 of the DGCL governs fractional shares of capital stock and previously provided, in pertinent part, that where the corporation does not issue fractions of a share, it shall, among other options, issue scrip or warrants in registered form or in bearer form. Amended Section 155 harmonizes the DGCL with the Corporate Transparency Act by eliminating the corporation's ability to issue scrip or warrants in bearer form (while preserving the ability to issue them in registered form). As the legislation's synopsis observes, the Corporate Transparency Act, 31 U.S.C. § 5336(f), prohibits corporations from issuing certificates for fractional interests in bearer form.

Section 252(c): Merger or Consolidation of Domestic and Foreign Corporations

Section 252 of the DGCL permits Delaware corporations to merge or consolidate with or into corporations formed under the laws of another jurisdiction (or "foreign corporations"). Subsection 252(c), which lists the required contents of a certificate of merger filed to effectuate such a merger, requires the certificate to set forth the authorized capital stock of each foreign corporation that is a constituent in the merger if the surviving or resulting corporation is a Delaware corporation. The amendments to Section 252(c) eliminate that requirement.

Section 311: Revocation of Voluntary Dissolution; Restoration of Expired Certificate of Incorporation

Section 278 generally provides that after a corporation voluntarily dissolves or dissolves by operation of a limited life provision in its certificate of incorporation, the corporation will survive for a minimum of three years to wind up its business and affairs and distribute its liquidated assets to creditors and stockholders. Section 311 of the DGCL

enables corporations to revoke any such dissolution during its wind-down period by making an appropriate filing with the Delaware Secretary of State. The amendments to Section 311 require that filing—a certificate of revocation of dissolution or certificate of restoration—to state the date of filing of the corporation’s certificate of dissolution with the Secretary of State.

Sections 312 and 377: Annual Reports Due and Franchise Taxes Payable upon Revival of Certificate of Incorporation or Reinstatement of Foreign Corporation’s Qualification to Do Business

The DGCL provides that a corporation’s certificate of incorporation can become “forfeited” in several ways, including for failure to replace a registered agent within 30 days following the agent’s resignation or removal (per Sections 132(f) and 136(b)); upon motion by Delaware’s attorney general on grounds of abuse, misuse, or nonuse of corporate powers, privileges, or franchises (per Sections 284 and 285); and upon failure to comply with certain court orders (per Section 323). A corporation’s certificate of incorporation can also become “void” for failure to timely pay franchise taxes or file annual reports (per Section 510). Section 312 of the DGCL provides a means for corporations to revive their certificate of incorporation after it has become forfeited or void. Amendments to Section 312 provide that if a corporation seeks to validate a defective corporate act that occurred when its charter was forfeited or void through Section 204, the corporation must file all annual reports and pay all corporate franchise taxes, plus interest, that would have been filed and paid during the period of forfeiture or voidness.

Sections 371 through 385 of the DGCL address the ability of corporations incorporated in foreign jurisdictions to qualify to do business in Delaware, including provisions governing

how to qualify, annual report requirements, registered agent requirements, and other related matters. Section 377 provides, among other terms, that foreign corporations can lose their qualification to do business in Delaware if they fail to replace their registered agent within 30 days after the agent has died, left Delaware, or resigned. The amendments to Section 377 provide that if a corporation files a certificate of reinstatement to re-establish its qualification to do business after having lost it for failure to timely replace its registered agent, it must file all annual reports and pay all corporate franchise taxes, plus interest, that would have been due and payable while its qualification to do business was forfeited.

Sections 503 and 505: Corporate Franchise Taxes

Section 503 of the DGCL sets forth corporate franchise tax rates and calculation methods. Amendments to Section 503(e) clarify that a certificate of validation filed under Section 204 will not reduce the interest owed on franchise taxes accrued nor entitle the corporation to a refund for franchise taxes paid during periods before the defective corporate act being validated. The amendments to Section 505 of the DGCL, which governs corporate franchise tax refunds, make corresponding changes clarifying that corporations are not entitled to refunds for taxes, penalties, or interest in connection with filing a certificate of validation under Section 204 or a certificate of correction under Section 103(f).

Effective Date of Amendments

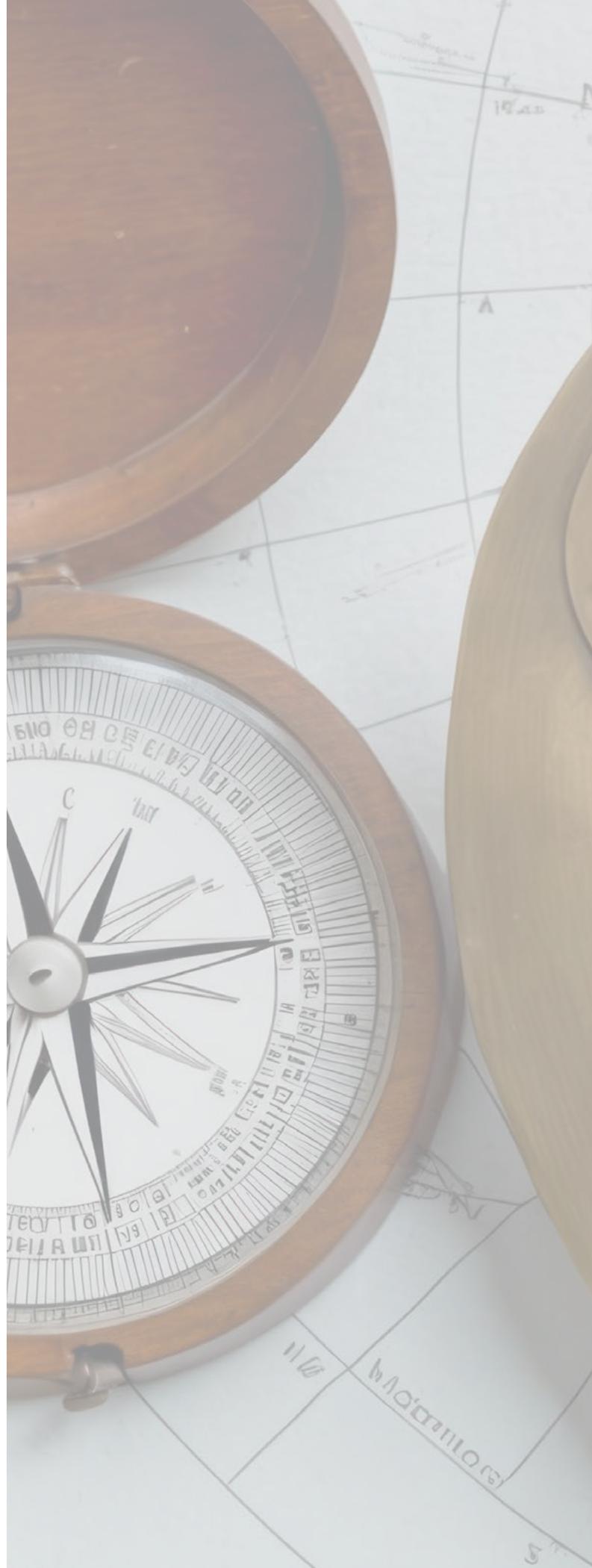
The second set of DGCL amendments became effective on August 1, 2025, except that the amendments to Section 503 are effective for tax years beginning on or after January 1, 2026.

2025 AMENDMENTS TO THE DELAWARE LLC AND PARTNERSHIP ACTS

Legislation proposing to amend 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) has been introduced to the Delaware General Assembly. The following is a brief summary of some of the more significant amendments that affect Delaware limited liability companies (Delaware LLCs), Delaware limited partnerships (Delaware LPs), and Delaware general partnerships (Delaware GPs), including amendments relating to (i) broadening the safe harbor procedures for the ratification of void and voidable acts and transactions, (ii) nullifying certificates or statements filed with the Delaware Secretary of State, (iii) liquidating trustees of Delaware LPs and registered series of Delaware LPs, (iv) the deemed consent to service of process by general partners and liquidating trustees of Delaware LPs, (v) required filings in connection with consolidations, (vi) virtual offices of Delaware registered agents, and (vii) foreign limited partnerships and limited liability partnerships. The amendments became effective on August 1, 2025.

Ratification of Void or Voidable Acts and Transactions

Effective August 1, 2021, the LLC and Partnership Acts were amended to provide a safe harbor procedure for (i) the ratification of acts or transactions taken by a Delaware LLC, Delaware LP, or Delaware GP that are void or voidable when taken, and (ii) waiving failures







to comply with any requirements under the limited liability company agreement or the partnership agreement, as applicable, of a Delaware LLC, Delaware LP, or Delaware GP that make such acts or transactions void or voidable. These amendments were enacted to provide a rule different from that applied in each of *CompoSecure, L.L.C. v. Cardux, LLC*, 206 A.3d 807 (Del. 2018), and *Absalom Trust v. Saint Gervais LLC*, 2019 WL 2655787 (Del. Ch. June 27, 2019), in which the relevant Delaware court applied a rule that void acts or transactions generally may not be ratified.

As currently in effect, such safe harbor procedure allows the ratification of acts or transactions that are void or voidable when taken (or the waiver of the failure to comply with any requirements of the limited liability company agreement or the partnership agreement, as applicable, making such act or transaction void or voidable) by the persons whose approval would otherwise be required under such agreement at the time of such ratification or waiver (i) for such act or transaction to be validly taken, or (ii) to amend such agreement in a manner to permit such act or transaction to be validly taken.

The proposed amendments are intended to expand such safe harbor procedure to (i) permit the ratification and waiver of acts and transactions taken by members, managers, partners, or other persons, in addition to acts or transactions taken by a Delaware LLC, Delaware LP, or Delaware GP itself, and (ii) permit such ratification or waiver to be express or implied. The proposed amendments are intended to provide a rule different from that set forth in *Holifield v. XRI Inv. Holdings, LLC*, 304 A.3d 896 (Del. 2023), in which the Delaware Supreme Court determined that the existing formulation of such safe harbor procedure did not apply to the acts of members of a Delaware LLC in the context of a member transfer.

The proposed amendments are also intended to address the court's assertion in *XRI's* Court of Chancery case later remanded by the Delaware Supreme Court case cited above, *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), that the existing formulation of such safe harbor procedure did not permit ratification or waiver by equitable means, such as waiver by conduct. The proposed amendments permit any ratification to be express or implied, including by the statements, action, inaction, or acquiescence of or by members, managers, partners, or other persons.

Nullification of Filed Certificates and Statements

The LLC and Partnership Acts currently provide that a certificate or statement of correction may be filed correcting a previously filed certificate or statement that is an inaccurate record of the action referred to therein or was defectively or erroneously executed. The proposed amendments are intended to confirm and clarify that, in addition to correcting a previously filed certificate or statement, a certificate or statement of correction may be filed with the Delaware Secretary of State to also nullify any previously filed certificate or statement by specifying the inaccuracy or defect contained in such filed certificate or statement and providing that such filed certificate or statement is nullified.

Liquidating Trustees of Delaware LPs and Registered Series of Delaware LPs

The proposed amendments to the LP Act address certain additional requirements where, following the dissolution of a Delaware LP or a registered series of a Delaware LP, such Delaware LP's or registered series' winding-up process is conducted by someone other than a general partner. In this scenario, the

person or persons conducting the winding up of the Delaware LP or registered series would not be shown on a Delaware LP's certificate of limited partnership or a registered series' certificate of registered series, as applicable, that is on file with the Delaware Secretary of State. As a result, the proposed amendments to the LP Act require that any time a person who is not shown as a general partner of a Delaware LP or registered series in its certificate of limited partnership or certificate of registered series, as applicable, is conducting the winding up of such Delaware LP or registered series, the certificate of limited partnership or certificate of registered series, as applicable, must be amended to (i) add the name and the business, residence, or mailing address of each liquidating trustee if the winding up is being conducted by one or more liquidating trustees; or (ii) if the limited partners of the Delaware LP or the limited partners associated with the registered series are the liquidating trustees, state the fact that the winding up is being conducted by the limited partners of such Delaware LP or the limited partners associated with such registered series, as applicable. The proposed amendments do not require that the names or addresses of the limited partners that are the liquidating trustees be listed in the certificate of limited partnership or certificate of registered series. The proposed amendments also expressly provide that the liquidating trustees will not be subject to liability as a general partner by reason of the amendment to the certificate of limited partnership or registered series.

In addition, the proposed amendments provide that (i) if one or more liquidating trustees are conducting the winding up of a Delaware LP or a registered series of a Delaware LP, all such liquidating trustees must sign any certificates of such Delaware

LP or such registered series, as applicable, to be filed with the Delaware Secretary of State under the LP Act; and (ii) if the limited partners of a Delaware LP or the limited partners associated with a registered series of a Delaware LP are the liquidating trustees winding up the Delaware LP's or registered series' affairs, the limited partners who own more than 50% of the then current percentage or other interests in the profits of such Delaware LP or registered series, as applicable, must sign any certificates of such Delaware LP or registered series to be filed with the Delaware Secretary of State under the LP Act.

Consent by General Partners and Liquidating Trustees of Delaware LPs to Service of Process

The proposed amendments to the LP Act streamline how general partners and liquidating trustees of Delaware LPs are deemed to consent to service of process in all civil actions or proceedings brought in the State of Delaware involving or relating to the business of a Delaware LP or a violation by a general partner or a liquidating trustee of a duty to a Delaware LP, or any partner of a Delaware LP, whether or not the general partner or liquidating trustee is a general partner or a liquidating trustee at the time a suit is commenced. The proposed amendments provide that a general partner or liquidating trustee serving in such role (i) constitutes consent to the appointment of the Delaware LP's registered agent (or, if there is none, the Delaware Secretary of State) as such person's agent for service of process, and (ii) signifies the consent of such general partner or liquidating trustee that any process when so served shall be of the same legal force and validity as if served upon such general partner or liquidating trustee within the State of Delaware.

Consolidation Filings

The proposed amendments to the LLC and Partnership Acts require that, in a transaction where one or more entities are consolidated to form a new resulting entity, the certificate of consolidation that is filed with the Delaware Secretary of State for such resulting entity must attach a certificate of formation, certificate of limited partnership, or statement of partnership existence, as applicable, for such resulting entity.

Delaware Registered Agent Virtual Office

The proposed amendments to the LLC and Partnership Acts clarify that registered agents of Delaware LLCs, Delaware LPs, and Delaware GPs (i) may not perform their duties as a registered agent solely through the use of a virtual office, the retention by the registered agent of a mail forwarding service, or both; and (ii) are required to have a physical office in the State of Delaware. The proposed amendments define “virtual office” as the performance of duties or functions solely through the internet or solely through other means of remote communication.

Foreign LPs and LLPs

Under the LP Act and the GP Act, foreign limited partnerships and foreign limited liability partnerships are required to register with the Delaware Secretary of State before doing business in the State of Delaware.

The proposed amendments to the LP Act provide that (i) an application for registration as a foreign limited partnership, (ii) a certificate correcting an application for registration as a foreign limited partnership, and (iii) a certificate of cancellation of registration as a foreign limited partnership filed with the Delaware Secretary of State, may each be executed by any person or entity

authorized to sign such documents on behalf of such foreign limited partnership and not only a general partner of such foreign limited partnership, as is required under the current provisions of the LP Act.

The proposed amendments to the GP Act provide that in connection with registering to do business in the State of Delaware, a statement of foreign qualification filed with the Delaware Secretary of State by a foreign limited liability partnership must contain the following additional information: (i) the state, territory, possession, or other jurisdiction or country where such entity was formed, (ii) the date of its formation, and (iii) a statement from a partner that, as of the date of filing, such foreign limited liability partnership validly exists as a limited liability partnership under the laws of the jurisdiction of its formation.

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. 98, 97, and 96, respectively.

**Corporate
Directors**



Michael D. Allen
allen@rlf.com
302-651-7760



Thomas A. Beck
beck@rlf.com
302-651-7742



C. Stephen Bigler
bigler@rlf.com
302-651-7724



Robert L. Burns
burns@rlf.com
302-651-7618



Daniel A. Dreisbach
dreisbach@rlf.com
302-651-7762



Anne C. Foster
foster@rlf.com
302-651-7744



Kevin M. Gallagher
gallagher@rlf.com
302-651-7692



Mark J. Gentile
gentile@rlf.com
302-651-7722



Rudolf Koch
koch@rlf.com
302-651-7721



Kyle H. Lachmund
lachmund@rlf.com
302-651-7782



Matthew Murphy
murphy@rlf.com
302-651-7817



Stephanie Norman
norman@rlf.com
302-651-7756



Lisa A. Schmidt
schmidt@rlf.com
302-651-7763



Nathaniel J. Stuhlmiller
stuhlmiller@rlf.com
302-651-7881



Gregory P. Williams
williams@rlf.com
302-651-7734



John Mark Zeberkiewicz
zeber@rlf.com
302-651-7698

**LLC &
Partnership
Directors**



Paul M. Altman
altman@rlf.com
302-651-7664



Monica M. Ayres
ayres@rlf.com
302-651-7581



Matthew S. Criscimagna
criscimagna@rlf.com
302-651-7593



Kenneth E. Jackman
jackman@rlf.com
302-651-7735



Elisa Erlenbach Maas
maas@rlf.com
302-651-7776



Joshua J. Novak
novak@rlf.com
302-651-7587



Mark V. Purpura
purpura@rlf.com
302-651-7588



John D. Seraydarian
seraydarian@rlf.com
302-651-7798



Susan Hannigan Cohen
scohen@rlf.com
302-651-7578



Brock E. Czeschin
czeschin@rlf.com
302-651-7571



Catherine G. Dearlove
dearlove@rlf.com
302-651-7788



Raymond J. DiCamillo
dicamillo@rlf.com
302-651-7786



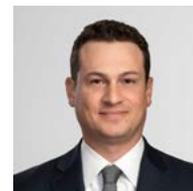
Robert B. Greco
greco@rlf.com
302-651-7728



William J. Haubert
haubert@rlf.com
302-651-7559



John D. Hendershot
hendershot@rlf.com
302-651-7679



Daniel E. Kaprow
kaprow@rlf.com
302-651-7636



Matthew D. Perri
perri@rlf.com
302-651-7684



Srinivas M. Raju
raju@rlf.com
302-651-7748



Blake Rohrbacher
rohrbacher@rlf.com
302-651-7847



Richard P. Rollo
rollo@rlf.com
302-651-7846



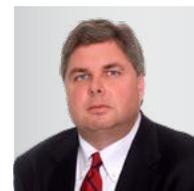
Bernard J. Kelley
kelley@rlf.com
302-651-7674



Zachary Kmetz
kmetz@rlf.com
302.651.7539



Gregory W. Ladner
ladner@rlf.com
302-651-7547



James G. Leyden Jr.
leyden@rlf.com
302-651-7620



Drew G. Sloan
dsloan@rlf.com
302-651-7612



Melissa K. Stubenberg
stubenberg@rlf.com
302-651-7515

Richards, Layton & Finger
920 North King Street
Wilmington, DE 19801
302.651.7700
corporate@rlf.com
rlf.com

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