

# MERGERS & ACQUISITIONS

A DELAWARE CHECKLIST

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## I. FIDUCIARY STANDARDS

### A. The Business Judgment Rule Is The Touchstone For Fiduciary Analysis Of Board Action.

In general terms, the business judgment rule provides that a decision by a board of directors in which the directors possess no direct or indirect personal interest, which is made with reasonable awareness of all reasonably available material information, and after prudent consideration of the alternatives, and which is in good faith furtherance of a rational corporate purpose, will not be interfered with by the courts, either prospectively by injunction, or retrospectively by imposition of liability for damages upon the directors, even if the decision appears to have been unwise or to have caused loss to the corporation or its stockholders.

- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (“The business judgment rule embodies the deference that is accorded to managerial decisions of a board of directors. ‘Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decision of the directors.’”).
- *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (holding that the business judgment rule “combines a judicial acknowledgement of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders”).
- *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1373 (Del. 1995) (holding that “a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be ‘attributed to any rational business purpose’”).
- *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that the business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”).
- *In re Goldman Sachs Grp., Inc. S’holder Litig.*, 2011 WL 4826104, at \*23 (Del. Ch. Oct. 12, 2011) (“Through the business judgment rule, Delaware law encourages corporate fiduciaries to attempt to increase stockholder wealth by engaging in those risks that, in their business judgment, are in the best interest of the corporation ‘without the debilitating fear that they will be held personally liable if the company experiences loss.’”).
- *Gagliardi v. Trifoods Int’l, Inc.*, 683 A.2d 1049, 1053 (Del. Ch. 1996) (holding that the business judgment rule “provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty”).

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**B. Duty Of Care.** The board of directors must exercise due care in connection with a merger or other business combination. Although the standard of conduct for claims that a director breached her duty of care typically is gross negligence, a breach of the duty of care may be established in certain circumstances for purposes of determining secondary liability (i.e., for situations where the directors themselves do not face liability) by showing simple negligence.

- *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) (holding that in the specific context of a proposed merger, directors have a duty to act in an informed and deliberative manner in determining whether to approve a merger agreement before submitting proposal to the stockholders).
- *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984) (holding that directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them; having become so informed, they must then act with requisite care in the discharge of their duties).
- *McMullin v. Beran*, 765 A.2d 910 (Del. 2000) (holding that complaint adequately stated claim that directors failed to exercise due care when they approved a merger negotiated by the majority stockholder without adequately informing themselves about the transaction and without determining whether the merger consideration equaled or exceeded the value of the company as a going concern).
- *McPadden v. Sidhu*, 964 A.2d 1262 (Del. Ch. 2008) (finding plaintiff adequately pled a duty of care violation in connection with a corporation's sale of a subsidiary corporation to management where: (1) the board delegated the task of selling the subsidiary to its vice-president, the leader of the management group that sought to acquire the subsidiary; (2) the board did very little to oversee the process of selling the subsidiary and therefore provided no check on the vice-president's "half-hearted" efforts to solicit bids for the subsidiary; (3) the vice-president did not contact any of the subsidiary's competitors, who were its most likely buyers; and (4) the sale price was at the lowest end of the valuation range generated by the corporation's financial advisor).
- *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015) (stating that when "disinterested directors themselves face liability, the law, for policy reasons, requires that they be deemed to have acted with gross negligence in order to sustain monetary judgment against them," but holding that a breach of the duty of care in a context where *Revlon* is applicable and the plaintiff is attempting to establish a predicate breach of fiduciary duty in connection with a claim for secondary liability (i.e., aiding and abetting), may be established by showing simple negligence).
- *Palmer v. Reali*, 2016 WL 5662008 (D. Del. Sept. 29, 2016) (stating that "[i]n Delaware, corporate officers, 'like directors, owe fiduciary duties of care and loyalty, and [ ] the fiduciary duties of officers are the same as those of directors,'" and holding that the plaintiffs pleaded facts sufficient to survive a motion to dismiss for alleged breaches of the duties of care and loyalty, and possibly implicating waste, when the officers were allegedly

grossly negligent in presenting financial forecasts to the board, purposefully presenting misleading financials to the board for personal gain, and relocating the company closer to their personal residences for no business purpose).

- *Morrison v. Berry*, 2019 WL 7369431 (Del. Ch. Dec. 31, 2019) (declining to dismiss duty of care claims; finding it was reasonably conceivable that the CEO and general counsel were grossly negligent in preparing a 14D-9 where material facts were omitted and the pled facts supported an inference that the CEO and general counsel knew of such omissions).

**C. Change In Control: *Revlon*.** A number of cases have imposed a heightened standard on directors approving a change in control transaction. In such a situation, directors must act reasonably to maximize the short-term value of the consideration to be received by the stockholders, and courts will scrutinize the methods utilized to do so. *But see Malpiede v. Townson*, 780 A.2d 1075, 1084 (Del. 2001) (explaining that even where “the *Revlon* doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control, it does not eliminate the requirement that plaintiffs plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale”). The Supreme Court has held that this standard will be applied: (1) ‘when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company’; (2) ‘where, in response to a bidder’s offer, a target abandons its long term strategy and seeks an alternative transaction involving the breakup of the company’; or (3) ‘when approval of a transaction results in a ‘sale or change of control’”). *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994). The *Revlon* standard does not apply simply because a corporation is “in play.” *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009).

- *Mills Acq. Co. v. MacMillan, Inc.*, 559 A.2d 1261 (Del. 1989) (stating that pursuant to *Revlon*, in the context of sale of corporate control, the responsibility of directors is to get the highest value reasonably attainable for the shareholders).
- *Krim v. ProNet, Inc.*, 744 A.2d 523 (Del. 1999) (stating that Delaware law requires that once a change of control of a company is inevitable the board must assume the role of an auctioneer in order to maximize shareholder value).

## 1. Does *Revlon* apply?

a. Cash-out Merger with a Third Party.

- *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986) (holding that when directors decide to sell the company in a cash-out merger, their role changes from protectors of the corporate entity to “auctioneers” whose duty is to get the best price for stockholders).

b. Cash-out Merger with a Controlling Stockholder.

- *Bershad v. Curtiss-Wright Corp.*, 535 A.2d 840 (Del. 1987) (holding *Revlon* standard is not applicable when a controlling stockholder cashes out minority stockholders).

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- *Mendel v. Carroll*, 651 A.2d 297, 306 (Del. Ch. 1994) (“This obligation the board faces is rather similar to the obligation that the board assumes when it bears what have been called ‘Revlon duties,’ but the obligations are not identical.”).
  - *In re Best Lock Corp. S’holders Litig.*, 845 A.2d 1057, 1091 n.139 (Del. Ch. 2001) (finding that directors did not have duty under *Revlon* to auction corporation where majority stockholder could block transaction and the director’s duty to ‘obtain the greatest value reasonably attainable’ meant the “greatest value reasonably attainable from the controlling shareholder, in accordance with the entire fairness standard”).
- c. Stock-for-Stock Merger.
- i. Non-controlled Acquiror.
    - *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1990) (holding duty to maximize the value of consideration to be received by stockholders under *Revlon* was not triggered by a stock-for-stock merger that left control of the surviving entity in “a fluid aggregation of unaffiliated shareholders representing a voting majority,” or in other words, in the market).
    - *Arnold v. Soc’y for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (*Revlon* not implicated in a stock for stock transaction in which control of the combined company remains in a “large, fluid, changeable and changing market” (citations omitted)).
    - *Compare Steinhardt v. Howard-Anderson*, C.A. No. 5878-VCL (Del. Ch. Jan. 24, 2011) (TRANSCRIPT) (suggesting that enhanced scrutiny should apply in any end-stage transaction and observing “[w]e often talk about, oh, well, but the stockholders can get a future control premium. That’s all well and good for the future entity, but what you’re bargaining over now is how much of that future premium you’re going to get”), with *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022 (Del. Ch. 2012) (rejecting an “end-stage transaction” theory and deciding *Revlon* did not apply where merger consideration consistent of mix of 65% stock and 35% cash and stock portion was not in a controlled company).
  - ii. Controlled Acquiror.
    - *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (holding that duty to maximize stockholder value was triggered in a stock-for-stock merger that resulted in a shift in control to the acquirer’s single controlling stockholder).
    - *But cf. C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049 (Del. 2014) (declining to decide if a transaction where target stockholders would own a minority interest in an entity with a controlling stockholder is subject to *Revlon* in

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light of contractual protections negotiated for the go-forward minority stockholders).

## d. Sale of a Controlled Corporation.

- *In re Paxson Commc'n Corp. S'holders Litig.*, 2001 WL 812028 (Del. Ch. July 12, 2001) (holding that duty to maximize stockholder value was not triggered where majority stockholder that owned 75% of the company's voting power gave a call right to a third party, because either the majority stockholder or holder of the call right retained control of the company and the minority stockholders would never be in the position to collectively control the company and receive a control premium for their shares).
- *McMullin v. Beran*, 765 A.2d 910 (Del. 2000) (reversing the Court of Chancery's ruling that *Revlon* duties did not apply to transaction initiated and negotiated by controlling stockholder, and holding that in the specific context presented, the directors' *Revlon* duties required an informed good faith decision by the directors whether to recommend to minority stockholders to accept the merger consideration or seek appraisal rights).
- *Orman v. Cullman*, 794 A.2d 5, 42 n.141 (Del. Ch. 2002) (where controlling stockholder retained control and shares owned by public were sold to third party that had right to purchase controlling stake in three years, *Revlon* was not implicated because company was not "being broken up nor was control being transferred or sold via the challenged merger").
- *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (when the board, at the suggestion of the corporation's majority stockholder, undertook to find a buyer for the whole company, it had an obligation to obtain the maximum value reasonably attainable for all the stockholders).
- *Frank v. Elgamal*, 2014 WL 957550, at \*21 (Del. Ch. Mar. 10, 2014) ("However, that a board decides to sell the entire corporation to a third party, such as at the controlling shareholder's suggestion or director, does implicate *Revlon*. In that situation, the concomitant goal of the directors is then to determine if the sale to the third party 'will result in a maximization of value for the minority shareholders.'").

## e. Mixed Consideration.

- *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59 (Del. 1995) (holding a transaction with a voluntary 33% cash component did not necessarily implicate *Revlon*).
- *In re Lukens Inc. S'holders Litig.*, 757 A.2d 720 (Del. Ch. 1999) (stating that a stock and cash transaction "in which over 60% of the consideration is cash" triggered duties under *Revlon*).

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- *Flake v. Hoskins*, 55 F. Supp. 2d 1196 (D. Kan. 1999) (applying *Revlon* standard under Missouri law and finding that transaction with up to 40% cash component did not trigger *Revlon* where stockholders could choose all cash).
  - *In re NYMEX S'holder Litig.*, 2009 WL 3206051 (Del. Ch. Sept. 30, 2009) (acknowledging, but not deciding, dispute between parties as to whether *Revlon* applied to transaction involving 56% stock and 44% cash).
  - *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076 (Del. Ch. May 20, 2011) (concluding, “based on economic implications and relevant judicial precedent,” in deciding a motion to preliminarily enjoin a merger, that *Revlon* duties applied to a stock and cash transaction in which 50% of the consideration is cash and 50% of the consideration is stock but noting that the matter is “not free from doubt” because the Supreme Court “has not yet addressed this issue directly”).
  - *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1048 (Del. Ch. 2012) (stating that a mixed consideration deal of 65% stock—in a widely traded, public company—and 35% cash did “not qualify as a change of control under our Supreme Court’s precedent” and, therefore, did not implicate *Revlon*).
  - *But see Steinhardt v. Howard Anderson*, C.A. No. 5878-VCL, at 4 (Del. Ch. Jan. 24, 2011) (TRANSCRIPT) (suggesting, but not holding, in context of transaction involving 50% stock and 50% cash that *Revlon* should apply regardless of the composition of consideration because there is a “final stage transaction,” meaning “[t]his is the only chance that [target] stockholders have to extract a premium, both in the sense of maximizing cash now, and in the sense of maximizing their relative share of the future entity’s control premium”).
- f. Post-Signing.
- *McGowan v. Ferro*, 859 A.2d 1012 (Del. Ch. 2004) (expressing doubt that *Revlon* applied to post-bid negotiations when there was “no evidence of any alternative value maximizing transaction” but finding that, even if *Revlon* standard of enhanced scrutiny applied, directors satisfied their fiduciary duties).
  - *In re Family Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436 (Del. Ch. Dec. 19, 2014) (evaluating board’s decisions with respect to a fiduciary out to a no-talk clause in a merger agreement under the *Revlon* standard).
- g. Change in Control Considered but not Effected.
- *Arnold v. Soc. for Sav. Bancorp, Inc.*, 650 A.2d 1270 (Del. 1994) (finding that, although the market was initially canvassed for potential acquirors of the whole company, *Revlon* was not implicated because the board did not initiate an active bidding process and the resulting transaction did not involve a change in control).

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- *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169 (Del. Ch. Jan. 18, 1996) (holding that *Revlon* did not apply because no change in control occurred in the transaction, and stating “the fact that, as alleged, the First Interstate board talked to a number of other transaction-partners does not itself constrain the usual scope of board authority and does not invoke . . . special duties”).
  - *In re NCS Healthcare, Inc. S’holders Litig.*, 825 A.2d 240 (Del. Ch. 2002) (stating “a *Revlon* analysis is not implicated solely by seeking to conduct an auction that, if successful, might end with a change in control,” and holding that because the transaction ultimately approved did not involve a sale or change in control, *Revlon* was not implicated even though the board originally initiated a “stalking horse” strategy), *rev’d on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).
- h. Review of a Board Decision Not to Engage in a Sale Process.
- *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290, at \*11 (Del. Ch. Mar. 2, 1989) (stating, in the context of an unsolicited offer to purchase a company at a 50% premium rejected by the board (after consulting with its financial advisor) in order to pursue the company’s long-term strategy, that “[i]nsofar as [the buyer’s offer] constitutes a proposal to negotiate a merger, I understand the law to permit the board to decline it, with no threat of judicial sanction providing it functions on the question in good faith pursuit of legitimate corporate interests and advisedly”).
  - *Paramount Commc’ns v. Time, Inc.*, 571 A.2d 1140 (Del. 1990) (finding that a board, that had signed up a merger agreement with another party, was under “no obligation” to negotiate with an unsolicited bidder and stating that “[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy”).
  - *Kahn v. MSB Bancorp, Inc.*, 1998 WL 409355, at \*3 (Del. Ch. July 16, 1998) (applying the business judgment rule to a board’s decision to reject an unsolicited expression of interest in acquiring the company made after the company had signed an agreement to purchase certain assets and stating “there was no defensive action. The board merely voted not to negotiate the merger offer. . . . Because the board’s actions were not defensive and were authorized by statute, . . . it is particularly appropriate to apply the business judgment presumption in this case”).
  - *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255, at \*1 (Del. Ch. Sep. 27, 1999) (holding that a target board, that had already approved a merger agreement with another buyer, had no duty to negotiate with an unsolicited third-party bidder, so long as it did so on an informed basis; stating “[a] target can refuse to negotiate . . . but it should be informed when making such refusal”).

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- *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235 (Del. 2009) (stating that a board’s decision to adopt a “wait and see” approach—i.e., not putting the company up for sale or instituting defensive measures—after it learned of a potential buyer’s interest in purchasing the company “was an entirely appropriate exercise of the directors’ business judgment”).
- *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (concluding that a board’s decision to reject bids from potential buyers and instead implement a management-sponsored reclassification to take the company private would be reviewed for entire fairness because a majority of the directors were interested in the going-private transaction, but also stating that “a board’s decision not to pursue a merger opportunity is normally reviewed within the traditional business judgment framework. In that context the board is entitled to a strong presumption in its favor, because implicit in the board’s statutory authority to propose a merger, is also the power to decline to do so”).
- Hostile Tender Offer Rejected by Board. The Court of Chancery has also held that *Revlon* will not apply when a board resists a hostile offer by adopting or maintaining a rights plan, unless the board initiates an alternative transaction that constitutes a change in control. See *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (holding that only *Unocal* (discussed below), and not *Revlon*, applies when a board determines to reject an unsolicited tender offer, declines to redeem the company’s rights plan in response to the offer, declines to put the company up “for sale,” and instead pursues its long-term business plan for the company). The Court approvingly cited *TW Services* and distinguished the facts before it from a circumstance where, in response to a hostile offer, a board initiates a transaction that constitutes a change in control (citing *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1995); *Grand Metro Pub. Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988); *Capital City Assocs. Ltd. P’ship v. Interco Inc.*, 551 A.2d 787 (Del. Ch. 1988)).

## 2. How is value maximized?

- Generally, there is “no single blueprint” to maximizing value. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Thus it has been noted that directors may exercise their business judgment whether value should be maximized through an auction or other shopping process. *C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049, 1053 (Del. 2014) (“But *Revlon* and its progeny do not set out a specific route that a board must follow when fulfilling its fiduciary duties.”); *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (“Whether it is wiser for a disinterested board to take a public approach to selling a company versus a more discreet approach relying upon targeted marketing by an investment bank is the sort of

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business strategy question Delaware courts ordinarily do not answer.”); see also *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 197 (Del. Ch. 2007) (“The ‘no single blueprint’ mantra is not a one way principle. The mere fact that a technique was used in different market circumstances by another board and approved by the court does not mean that it is reasonable in other circumstances that involve very different market dynamics”); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (“No court can tell directors exactly how to ... [satisfy their *Revlon* duties], because they will be facing a unique combination of circumstances many of which will be outside their control.”); *Wayne Cty. Emps. Ret. Sys. v. Corti*, 2009 WL 2219260, at \*15 (Del. Ch. July 24, 2009) (“*Revlon* does not proscribe any specific steps that must be taken by a board before selling a company.”).

- A post-signing market check may be an acceptable method for maximizing value. See *In re Fort Howard Corp. S’holders Litig.*, 1988 WL 83147 (Del. Ch. Aug. 8, 1988) (although special committee of independent directors did not conduct an auction prior to signing agreement, it fulfilled its fiduciary duties by negotiating provisions intending to permit an effective check of the market prior to closing of the transaction); *In re Pennaco Energy, Inc. S’holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (board met its fiduciary duties by aggressively negotiating with a single bidder and insuring that transaction was subject to a post-signing market check unobstructed by onerous deal protection measures that would impede a topping bid); *In re MONY Grp. Inc. S’holders Litig.*, 852 A.2d 9 (Del. Ch. 2004) (holding that board’s decision to limit merger negotiations to one bidder and to rely on a five month, post-signing market check complied with *Revlon* and was reasonable in light of the company’s circumstances); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009) (a board’s decision to rely on a post-signing market check to satisfy its *Revlon* duties was not made in bad faith where the board: (1) met several times to consider a premium offer, (2) was generally aware of the value of the company and the market in which the company operated, (3) solicited and followed the advice of its financial and legal advisors, (4) attempted to negotiate a higher offer even though all of the evidence indicated that the offer was a “blowout” price, and (5) approved the merger agreement “because it was simply too good not to pass along [to the stockholders] for their consideration”); *In re 3Com S’holders Litig.*, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009) (denying a motion for expedited discovery related to Hewlett-Packard’s strategic acquisition, with a 4% break fee and matching rights, negotiated without a pre-signing market check, because the disclosure claims were unpersuasive, the protective provisions “have been repeatedly upheld by this court” as standard and “not *per se* unreasonable,” the plaintiff failed to demonstrate how such provisions would stifle another bid, and the Court pointed to the “notable absence of any other interested bidders”); *In re Plains Exploration & Prod. Co. S’holder Litig.*, 2013 WL 1909124

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(Del. Ch. May 9, 2013) (denying motion for a preliminary injunction of a merger between two natural resource companies where the board pursued a single-bidder strategy, with a post-signing window shop, where the directors met multiple times to consider the proposed merger, the merger agreement's other deal protections were not "onerous" and the target had received no topping bids in the five months since execution of the merger agreement); *C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049, 1053 (Del. 2014) ("When a board exercises its judgment in good faith, tests the transaction through a viable passive market check, and gives its stockholders a fully informed, uncoerced opportunity to vote to accept the deal, we cannot conclude that the board likely violated its *Revlon* duties."). *But see Koehler v. Netspend Hldgs. Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013) (holding that, although the board was permitted under *Revlon* to use a "one-bidder" strategy, the plaintiffs had shown a reasonable probability of success on the merits—but denying an injunction on other grounds—on their claim that a board of directors breached its *Revlon* duties where the board (i) did not conduct a pre-signing market check, (ii) agreed to a post-signing window shop with a short (approximately two month) period between execution of the merger agreement and the closing of the transaction, (iii) did not waive "don't-ask-don't-waive" standstill provisions with potential private equity buyers prior to entering into the merger agreement, which prohibited waiver of the standstills and (iv) relied upon a "weak" fairness opinion).

- However, the Court of Chancery, in the context of determining fair value in an appraisal proceeding, has noted that unlimited matching rights may serve as a deterrent to prevent topping bidders from perceiving a realistic path to success because the topping bidder would need to (i) value the company at a higher value than the original bidder and (ii) believe it can outbid the original bidder. *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170, at \*25 (Del. Ch. Dec. 16, 2016) (noting that "[a] matching right is the functional equivalent of a right of first refusal and can foreclose a topping bidder from having a realistic path to success" and that in order for a topping bidder to submit a topping bid it must "both (i) value the [c]ompany more highly [than the current offer] and (ii) believe that it could outbid [the original bidder]"); *see also In re Appraisal of Dell Inc.*, 2016 WL 3186538, at \*41 (Del. Ch. May 31, 2016) (noting that the "one-time match [right] is more favorable to a topping bidder than an unlimited match right, which is a powerful disincentive").
- The court may be suspicious of a merger with a private equity buyer if the post-signing market check is in the form of a passive "no shop" with a fiduciary out, at least when management has an interest in continuing on with the business and a board has not sufficiently analyzed the existence of other potential bidders. *Compare Forgo v.*

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*Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (denying motion for preliminary injunction but explaining that plaintiffs demonstrated a probability of success on the merits where record did not establish adequate support for failing to contact other potential bidders and where buyer and management had “very comfortable” relationship), and *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 197 (Del. Ch. 2007) (finding that in the context of a sale of a micro-cap public company, where the record did not support any basis for financial advisor’s concurrence with management that post-signing market check would turn up any would-be bidders, “an inert, implicit post-signing market check does not . . . suffice as a reliable way to survey interest by strategic players”), with *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (denying a motion for a preliminary injunction where a board pursued a single-bidder strategy with a strategic buyer and did not reach out to another strategic that had made overtures in the past, where the latter had “walked” from past discussions and faced financial and antitrust constraints, and where board agreed to a “relatively lenient” no-shop with match rights, a lengthy period between signing and the stockholder vote, and a 3.9% termination fee), *In re Atheros Commc’ns, Inc.*, 2011 WL 864928 (Del. Ch. Mar. 4, 2011) (denying a motion for a preliminary injunction with respect to *Revlon* claims where a target board—after being approached by a strategic buyer, considering other strategic and financial buyers with its financial advisor, contacting three potential buyers, and signing an exclusivity agreement with the initial suitor after two of the parties declined a transaction and one responded slowly in a manner that the board believed jeopardized the bird in hand—signed a merger agreement containing no-shop and match right provisions and providing for a termination fee of 3.3% of deal value), and *C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049, 1067-68 (Del. 2014) (reversing grant of injunction and stating that a “market check does not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal”).

- A post-signing market check may take the form of a “go-shop” allowing the target affirmatively to contact potential acquirors for a specified period of time. *E.g.*, *In re Lear Corp. S’holders Litig.*, 926 A.2d 94 (Del. Ch. 2007) (finding overall approach to *Revlon* duties, including foregoing broad pre-signing auction process and instead entering into merger agreement providing for 45-day go-shop period, reasonable in light of (a) limited pre-signing market check directed solely to financial buyers, (b) prior elimination of the target’s rights plan, (c) previous equity investments made by investor that indicated that target could have been in play, and (d) market premium represented by “bird in hand”); *In re Topps Co. S’holders Litig.*, 926 A.2d 58 (Del. Ch. 2007) (board’s decision to

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take “bird-in-hand” proposal that permitted 40-day go-shop period was reasonable in light of (a) board’s skepticism that auction process would result in more attractive proposal, (b) fact that bird-in-hand suitor indicated it would withdraw its offer if auction commenced, and (c) board’s concern about effect of failed auction); *see also Miramar Firefighters Pension Fund v. AboveNet*, 2013 WL 4033905, at \*7-\*8 (Del. Ch. July 31, 2013) (holding that, unlike *Netsmart*, the board was allowed to conduct a post-signing, 30-day go-shop to actively solicit strategic bidders; plaintiff’s allegations that the board intended to conduct a “sham go-shop” by hiring a financial advisor who had never conducted one before, and that the “delay in soliciting strategic acquirers prejudiced the sales process,” were insufficient to show that the board had failed to canvass the market for strategic buyers).

- Initial bid may be pre-emptive. *See Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279 (Del. 1989) (holding that when “directors possess a body of reliable information with which to evaluate the fairness of a transaction, they may approve [a] transaction without conducting an active survey of the market”); *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at \*9 (Del. Ch. Jan. 31, 2013) (rejecting complaint that “it took only ten days” for a target to decide not to entertain an expression of interest by noting that “Delaware law does not require that a board consider a proposal for a certain length of time” and by stating that, “at best” such a complaint states a duty of care claim that would be exculpated under target’s 102(b)(7) provision).

### 3. What is reasonable varies with the circumstances.

- *Golden Cycle, LLC v. Allan*, 1998 WL 892631, at \*16 (Del. Ch. Dec. 10, 1998) (“I am not prepared to say that the board had a duty to call [a previously interested bidder] to inquire whether it was ready to raise its bid. The board had some justifiable concern that calling [the previously interested bidder] would risk losing the transaction with [the current high bidder], with whom they had an exclusive dealing agreement.”).
- *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (holding that directors did not fail to maximize value by proceeding with a year-long publicly announced search for strategic alternative, pursuing in particular a sale of a single division, and then offering to sell the whole company to the final bidders for the single division).
- *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 196 (Del. Ch. 2007) (finding that “decade-spanning, sporadic chats” with potential strategic acquirors “are hardly the stuff of a reliable market check”).
- *Guttman v. McGinnis*, C.A. No. 3450-VCL, at 26 (Del. Ch. Jan. 14, 2008) (TRANSCRIPT) (“Dealing exclusively with strategic buyers assuages, rather than heightens, concerns about managers’ conflicts of interest.”).

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- *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260 (Del. Ch. July 24, 2009) (finding that plaintiffs' failed to state a *Revlon* claim premised on a breach of the duty of good faith where: (1) a corporation's board of directors formed a committee of outside directors to oversee the sale process, (2) the board of directors and the committee met several times in the months leading up to the transaction, (3) the board of directors regularly evaluated financial reports and analysis, (4) no alternative bidder emerged in the roughly seven-month period between signing and closing of the transaction, and (5) the board of directors received a fairness opinion from its financial advisor, which had been advising the board throughout the sale process).
- *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS, at 14 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) ("I'm not asking anybody to go on eBay. That's not what *Revlon* says. But . . . the board[] . . . didn't position itself. It didn't . . . sift through possible strategic and private equity buyers and make a judgment about whether there might be someone who would be interested [before signing a merger with a private equity buyer, subject to a no-shop with fiduciary out].").
- *In re Smurfit-Stone Container Corp. S'holder Litig.*, 2011 WL 2028076 (Del. Ch. May 20, 2011) (board had reasonable basis to conclude that pre-signing market check was unnecessary because (1) company had gone through functional equivalent of market check when it was available for sale during recently concluded bankruptcy proceedings, (2) no bidders responded to company's post-bankruptcy attempt to sell certain operating assets, (3) industry was aware company was a takeover target, (4) only other unsolicited bidder had made much lower offer and refused to increase it, and (5) company's financial advisor opined that merger price was fair).
- *In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011) (holding that, although sale process of board of a small-cap company traded OTC on the pink sheets "was not a model to be followed," plaintiffs failed to show a reasonable likelihood of success on their *Revlon* claim where board: (1) "performed a targeted market check over the course of about a year, and seriously pursued transactions with two legitimate strategic buyers"; (2) had not received a fairness opinion, but had used advice, albeit partly stale advice, from a financial advisor to make its decision to enter into merger agreement; (3) had not sought out any financial buyers based in part on the view of two directors active in the PE community that the company would not be an attractive target to a financial acquiror; and (4) possessed "impeccable knowledge" of the company).
- *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1045 (Del. Ch. 2012) (rejecting plaintiffs' argument "that the duty of loyalty required the [target] board to be more brazen" and reach out to one bidder again to seek a higher price even after the other bidder had not matched its earlier bid; "[e]ven when *Revlon*

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applies, it requires only that a board take reasonable measures to ensure that it gets the highest price reasonably attainable. It does not require the board to engage in deceptive or even edgy negotiating tactics. Such tactics are not only unseemly, but also have real economic costs”).

- *In re Micromet, Inc. S’holder Litig.*, 2012 WL 681785 (Del. Ch. Feb. 29, 2012) (denying motion to enjoin tender offer and finding sale process at a development stage drug company was likely reasonable where board (i) conducted a targeted market check of seven strategic buyers that had expressed prior interest in partnering to develop the company’s most promising drug and who had the financial capacity to undertake the acquisition and bring the drug to market, (ii) eschewed contacting private equity buyers where target needed both capital and technical expertise to bring its drugs to market, (iii) limited the due diligence period to one week given that six of the seven potential bidders had conducted prior diligence related to the target’s leading drug candidate and (iv) entered into a merger agreement with a no-shop period).
- *In re Celera Corp. S’holder Litig.*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (in the context of approving class action settlement, (i) stating that plaintiffs’ *Revlon* claims challenging a sale process that did not involve a full canvass of all potential bidders immediately before signing up the deal had “some merit” and that a “sale process” running from 2009 to 2011 could be reasonably characterized as “a series of attempted and aborted negotiations” and (ii) suggesting that by 2011, the market might have thought that the target’s willingness to sell itself in 2009 was stale, but noting that the failure to do a full market check was not necessarily unreasonable and recognizing that over the course of 2009-2011, the board had “accumulated a wealth of information about the Company’s inherent value and the state of the market”), *aff’d in part, rev’d in part*, 59 A.3d 418 (Del. 2012).
- *In re Comverge Inc. S’holder Litig.*, C.A. No. 7368-VCP (Del. Ch. Apr. 27, 2012) (TRANSCRIPT) (granting a motion to expedite process claims where the company had been shopped pre-signing and the merger agreement contained a go-shop provision, but the tender offer price was below the pre-announcement market price and below prior indications of interest; stating that plaintiffs made a colorable argument that accepting the lower price would have been unreasonable if, as plaintiffs alleged, the target had the ability to prevent a liquidity crisis—allegedly justifying accepting the below market price bid—at the company brought about by a threatened acceleration of certain notes held by an affiliate of the acquiror); *see also In re Comverge Inc. S’holder Litig.*, C.A. No. 7368-VCP (Del. Ch. May 8, 2012) (TRANSCRIPT) (denying preliminary injunction and concluding that although the “objective reasonableness” of the target board’s decisions was “not clear,” plaintiffs had not shown a reasonable probability of success in light of the lengthy market check,

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aggressive negotiations with the acquiror and refusal to grant exclusivity); *In re Comverge, Inc.*, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014) (granting motion to dismiss on *Revlon* claims discussed above).

- *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 (Del. Ch. Jan. 3, 2013) (denying motion to dismiss plaintiffs' claims that outside directors breached their fiduciary duties by "treat[ing] a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably attainable" in connection with a sale of the company transaction where target corporation's financial advisor contacted over fifty potential buyers in a pre-signing market check, but plaintiffs alleged that (1) the board treated two bidders who had submitted roughly comparable bids—the eventual winning bidder and "Party C"—differently by permitting the winning bidder, but not Party C, to partner with other investors and by providing the winning bidder, but not Party C, with certain information that, if known to Party C, might have led to an increased bid and (2) one director who was previously affiliated with one of the winning bidder's partners provided information regarding confidential board deliberations to his former affiliate; noting that the board "could have dealt with bidders differently if the shareholders' interests justified such a course," but that the court could not determine if such reasons existed on a motion to dismiss).
- *C&J Energy Servs., Inc. v. City of Miami Gen. Emps. & Sanitation Emps. Ret. Tr.*, 107 A.3d 1049 (Del. 2014) (reversing grant of injunction where board approached transaction as an acquiror even though corporation's stockholders would have a minority interest in surviving entity because the board negotiated for a post-signing passive market check).
- *But cf. In re BJ's Wholesale Club, Inc. S'holders Litig.*, 2013 WL 396202, at \*8 n.75 (Del. Ch. Jan. 31, 2013) (distinguishing *Novell* and granting a motion to dismiss complaint alleging that the target board treated strategic competitor "Party A" differently from the financial acquiror by explaining that the BJ's board "was making an initial assessment, in its business judgment," whether Party A's expression of interest was serious and "raised serious regulatory issues," while the board in *Novell* provided an "asymmetrical distribution of information . . . after the board had determined that the bidder was a serious participant").
- *Miramar Firefighters Pension Fund v. AboveNet*, 2013 WL 4033905, at \*7 (Del. Ch. July 31, 2013) (finding, on a motion to dismiss, that the board's decision to offer financing to private equity buyers and not to the strategic buyer who eventually acquired the corporation was "reasonably justified" because the strategic buyer either did not need the financing or had found it elsewhere, and further noting that no facts existed that the financing would have caused the buyer to raise its offer price; "[t]hus, it is not reasonably conceivable that the shareholders were deprived of the best price reasonably attainable").

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- *Chen v. Howard-Anderson*, 87 A.3d 648, 674-75 (Del. Ch. 2014) (finding, on summary judgment record, disputed evidence of unreasonable favoritism to one bidder “at the expense of generating greater value through a competitive bidding process or by remaining a stand-alone company” based on differential treatment showed to “a serious suitor that was contemplating an all-cash deal at prices exceeding [the favored bidder’s] level of interest,” “a 24-hour ultimatum to make a bid when there was no need for such a short deadline,” and board’s reliance on financial advisor’s 24-hour market check over holiday July 4th weekend).
- *Houseman v. Sagerman*, 2014 WL 1478511, at \*7 (Del. Ch. Apr. 14, 2014) (holding board’s decision, after considering the question, not to obtain a fairness opinion due to cost relative to overall transaction value did not constitute bad faith under *Revlon*).
- *Chester Cty. Emps.’ Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at \*2 (Del. Ch. June 21, 2019) (finding it reasonably conceivable that the board acted in bad faith under *Revlon* because it “knowingly placed [the company’s CEO] in a position to extract compensation for management at the expense of the . . . stockholders” and then “approved last-minute revisions to the company’s projections that made the deal price more reasonable relative to the company’s discounted cash flow valuation”).
- *In re Essendant, Inc. S’holder Litig.*, 2019 WL 7290944, at \*14 n.152 (Del. Ch. Dec. 30, 2019) (dismissing claims against directors after the company terminated its all-stock merger agreement in favor of a cash offer from a third-party; finding the pled facts did not support an inference that the board acted in bad faith under *Revlon*; stating “[t]he decision to accept this cash transaction, while perhaps a breach of the . . . merger agreement, is, nevertheless, imminently explicable as a measured determination that a cash payment *today* is superior to uncertain returns derived from remaining in the highly-competitive office supply business *tomorrow*”).

## 4. *Revlon* not a guarantee that stockholders receive “highest” price.

- *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at \*9 (Del. Ch. Jan. 31, 2013) (upholding target board’s decision to approve a merger with a financial acquiror rather than pursue a higher indication of interest from strategic competitor “Party A,” in part because “the Board had legitimate concerns about the potential antitrust risks”; recognizing that “[i]f regulatory approval is denied or drawn out in a costly delay, then a higher price does not necessarily mean a greater return for stockholders”).
- *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at \*7 (Del. Ch. Jan. 31, 2013) (though a target was considering a sale of the company, [i]t had no obligation under its *Revlon* duties to pursue this fundamentally different proposal [i.e.,

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that the target should instead effect a recapitalization, pay a dividend and itself acquire a subsidiary of “Party B”] based upon Party B’s speculative estimation of what the value of such a transaction would be worth,” apparently exceeding the merger price).

- *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (refusing to grant a preliminary injunction against a transaction, even though a competing bidder had submitted an indication of interest with a higher price, where the competing bidder faced antitrust and financing constraints and refused to agree to a reverse termination fee).
- *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975, 1000 (Del. Ch. 2005) (“Critically, in the wake of *Revlon*, Delaware courts have made clear that the enhanced judicial review *Revlon* requires is not license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith.”).
- *Optima Int’l of Miami, Inc., v. WCI Steel, Inc.*, C.A. No. 3833-VCL, at 24 (Del. Ch. June 27, 2008) (TRANSCRIPT) (denying plaintiffs’ application for a preliminary injunction even though the corporation’s board of directors did not choose the highest bidder for the sale of the corporation where contractual constraints made it highly unlikely that a transaction with the highest bidder could be consummated).
- *Golden Cycle, LLC v. Allan*, 1998 WL 892631 (Del. Ch. Dec. 10, 1998) (denying highest bidder’s preliminary injunction where directors accepted lower bid for sale of control, where directors rejected higher bid because it contained numerous conditions and bidder refused to execute confidentiality agreement).
- *Malpiede v. Townson*, C.A. No. 15943 (Del. Ch. Sept. 29, 1997) (TRANSCRIPT) (“[R]ules of the game are not that the highest offer always wins no matter what the circumstances. This Court will intervene, but only if there is some showing measured by some appropriate evidentiary standard that the lower price was the product of a breach of fiduciary duty. It will not intervene if the price is merely the product of a complex business judgment which itself was the product of highly unusual circumstances.”).
- *Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 45 (Del. 1994) (“A court applying enhanced judicial scrutiny should be deciding whether directors make a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second guess that choice even though it might have decided otherwise or subsequent events have cast doubt on the board’s determination.”).
- *In re Family Dollar Stores, Inc. S’holder Litig.*, 2014 WL 7246436, at \*16 (Del. Ch. Dec. 19, 2014) (declining to grant a preliminary injunction where board determined that a topping bid was not superior based on antitrust risks and stating, “[i]n

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short, the Board's decision reflects the reality that, for the Company's stockholders, a financially superior offer on paper does not equate to a financially superior transaction in the real world if there is a meaningful risk that the transaction will not close for antitrust reasons").

## 5. Directors may be found to act unreasonably under *Revlon* if they permit their financial advisors to proceed with conflicts in a manner that may taint the sale process.

- *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012) (concluding that plaintiffs had shown a reasonable probability of success on their *Revlon* claims challenging a merger where, among other issues, (1) target board retained target's longtime investment bank to represent the target in connection with a spin-off that was being considered as the main alternative to the merger where the financial advisor held a *disclosed* \$4 billion stake in the acquiror and the lead banker on the financial advisor's team representing the target held an *undisclosed* \$340,000 stake in the acquiror and (2) the valuation advice and tactics of a second financial advisor retained to advise target in connection with the merger—to "cleanse" any conflict of the longtime advisor—were "questionable" because, at the insistence of the target's longtime banker, the second financial advisor was not entitled to any fee in connection with the spin-off; declining to enjoin the merger because the balancing of the harms weighed against issuing an injunction).
- *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011) (enjoining a stockholder vote on a merger for 20 days, and the application of no-solicitation, match-right, and termination fee provisions relating to topping bids during that period, and holding that plaintiffs had a reasonable probability of success in showing that directors breached their fiduciary duties under *Revlon*, where: (1) the target board's financial advisor, "secretly and selfishly manipulated the sale process" by seeking permission from the board to provide buy-side financing before a price was agreed upon with the buyers, failing to disclose that it had sought to provide such financing from the beginning of the process, and, in further concealment from the board, pairing bidders in a manner that violated "no-teaming" provisions in the bidders' confidentiality agreements and limited price competition between bidders (one of whom, KKR, was a significant client of the advisor), and (2) the board, although unaware of the extent of the advisor's activities, approved its request to provide buy-side financing, in the absence of any need to do so, permitted the advisor to continue to run the process, including the go-shop period, and approved the pairing orchestrated by the advisor; also holding that there was a reasonable probability that KKR, as buyer, aided and abetted the directors' breaches).

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- *In re Ness Techs., Inc. S'holders Litig.*, 2011 WL 3444573 (Del. Ch. Aug. 3, 2011) (holding that plaintiffs “possibly” stated colorable price/process and disclosure claims that the target corporation’s financial advisors suffered from conflicts of interest that impaired their ability to render impartial fairness opinions given statements in the proxy that the advisors had in the past provided, and would continue to provide, financial advisory and financing services to the acquiror).
- *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015) (finding the Rural Metro board’s financial advisor liable for aiding and abetting board’s breach of its duty of care by providing sell-side funding while pursuing a role in a related M&A transaction and favoring bidders from the parallel transaction if they used the financial advisor for buy-side financing in a bid for Rural Metro; the Court of Chancery observed that plaintiffs had the burden of proof on all elements of the aiding and abetting claim, including the existence of a breach of fiduciary duty, because they already settled with the director defendants, but the “highly compensated [financial] advisors on whom the directors are entitled (and encouraged) to rely” could not claim the affirmative defense of a 102(b)(7) exculpatory provision; “the prospect of aiding and abetting liability for investment banks who induce boards of directors to breach their duty of care creates a powerful financial reason for the banks to provide meaningful fairness opinions and to advise boards in a manner that helps ensure that the directors carry out their fiduciary duties when exploring strategic alternatives and conducting a sale process . . . . Another part of providing active and direct oversight is acting reasonably to learn about actual and potential conflicts faced by directors, management, and their advisors. . . . Because of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, directors must act reasonably to identify and consider the implications of the investment banker’s compensation structure, relationships, and potential conflicts. . . . It was during the final stages of the negotiations between Rural and [its eventual acquiror] that direct and active oversight by independent directors was needed most. [the financial advisor] led this phase of the negotiations, which forced [the financial advisor] to confront powerfully conflicting incentives. Although a contingent compensation arrangement that pays an agent a percentage of deal value generally will align the interests of the agent in getting more compensation with the principal’s desire to obtain the best value, the interests of the agent and principal diverge over whether to take the deal in the first place. The agent only gets paid if the deal happens, but for the principal, the best value may be not doing the deal at all. The same divergent interests play out on a smaller scale during final negotiations over price. The contingently compensated agent has a greater incentive to get the deal done rather than push for the last quarter, particularly if pushing too hard might jeopardize

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the deal and if the terms on offer are already defensible. If the agent is a repeat player, the agent can generate greater aggregate compensation by completing more total transactions with slightly less compensation on each deal. When the opposite side in the negotiation is a repeat player that has used and could continue to use the agent's services, then the incentives to maintain goodwill and not push too hard become all the greater." The court criticized the special committee for failing to provide guidance, make inquiries, or impose practical checks on the financial advisor's financing activities. "Because the Board's financial advisors did not provide the directors with valuation materials until the final board meeting, just hours before the merger was approved, the directors did not have an opportunity to examine those materials critically and understand how the value of the merger compared to Rural's value as a going concern [and] . . . there was no time to seek follow-up information or probe inconsistencies."); see also *Mesirov v. Enbridge Energy Co., Inc.*, 2018 WL 4182204 (Del. Ch. Aug. 29, 2018) (declining to dismiss claims of aiding and abetting breaches of fiduciary duties brought against the company's financial advisor in connection with an asset sale where the financial advisor allegedly performed a "perfunctory valuation" in order to preserve its longstanding relationship with the general partner of the master limited partnership buying the asset from the general partner, where the plaintiff alleged that the valuation was based on "last-minute manipulations" of projected EBITDA, and that the financial advisor ignored a sale of the same asset that took place a few years prior between the same parties and knew that the asset had recently been valued at a much lower price than the purchase price); *Morrison v. Berry*, 2020 WL 2843514 (Del. Ch. June 1, 2020) (declining to dismiss an aiding-and-abetting claim against a financial advisor; finding that the board "conceivably breached duties imposed in the *Revlon* context" by failing to fully probe conflicts and uncover backchannel communications between the financial advisor and the lead bidder).

- *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) (holding investment banker RBC Capital Markets liable to a class of stockholders of Rural Metro Corp. for aiding and abetting Rural Metro's directors in breaching their fiduciary duties owed to Rural Metro's stockholders and ordering RBC to pay Rural Metro's stockholders \$76 million in damages, representing 83% of the total damages suffered by the class).
- *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021) (applying *Rural Metro* and declining to dismiss complaint alleging that a financial advisor aided and abetted breaches of fiduciary duty by tipping a bidder in the auction process).
- *In re Zale Corp. S'holders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) (questioning whether the directors breached their fiduciary duties by relying on an investment banker that had previously pitched an acquisition of their client to

the ultimate acquiror, and had indicated a price point for the target company in that pitch, but did not initially disclose that pitch when the target engaged the banker).

- *But see Houseman v. Sagerman*, 2014 WL 1478511 (Del. Ch. Apr. 16, 2014) (dismissing allegations that board breached its fiduciary duties by using the company's largest creditor as its financial advisor because "the Plaintiffs do not contend that the Universata Board was unaware of that fact [that the financial advisor was the target's largest creditor]... Without allegations that KeyBanc actively concealed information to which it knew the Board lacked access . . . the Plaintiffs fail to adequately plead knowing participation in a breach of duty: the Plaintiffs have simply not pled that KeyBanc misled the Universata Board or created an "informational vacuum" sufficient for a finding of knowing participation in a breach").

## 6. *Revlon* review after a transaction closes: *Corwin* and its Progeny.

- The business judgment rule is the appropriate standard of review for a transaction that is not otherwise subject to entire fairness review and which has been approved by a fully-informed, uncoerced vote of a majority of disinterested stockholders. *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).
- *Corwin* and two-step transactions under Section 251(h). For purposes of a Section 251(h) transaction (under which the DGCL permits a majority tender to substitute for the majority vote otherwise required in a merger), the act of a majority of the shares held by fully informed, disinterested stockholders tendering into a noncoercive first step tender offer has "the same cleansing effect that *Corwin* affords to a statutorily required vote in favor of a merger." *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 746 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017); *see also English v. Narang*, 2019 WL 1300855 (Del. Ch. Mar. 20, 2019) (dismissing complaint under *Corwin*; finding that the pled facts did not support an inference that retiring founder had a unique need for liquidity such that the Section 251(h) transaction should be subject to entire fairness), *aff'd*, 2019 WL 5681416 (Del. Nov. 1, 2019).
- Claim extinguishment under *Corwin*. In *Singh v. Attenborough*, 137 A.3d 151 (Del. 2016), the Delaware Supreme Court rejected the Court of Chancery's suggestion in *In re Zale Corp. Stockholders Litig.*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015), that, where a transaction has been approved by a majority of disinterested stockholders in a fully informed vote, the damages liability standard for a breach of the duty of care is gross negligence. The Delaware Supreme Court instead found that a fully informed, uncoerced vote of the disinterested stockholders extinguishes all claims other than waste because if gross negligence were the standard of liability after stockholder ratification, then "an informed, uncoerced vote of the disinterested stockholders would give no standard-of-review-shifting effect to the vote."

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- Corwin in the private company context. In *Huff Energy Fund, L.P. v. Gershen*, 2016 WL 5462958 (Del. Ch. Sept. 29, 2016), the plaintiff alleged, in part, that the decision of a private company's board to approve the dissolution of the company was subject to enhanced scrutiny under *Revlon* or *Unocal*. The Court found that the dissolution did not trigger *Revlon* or *Unocal* enhanced scrutiny, but even if it had, under the principles articulated in *Corwin*, the approval of the company's stockholders "cleansed the transaction thereby irrebuttably reinstating the business judgment rule."
- Application of *Corwin*:
  - *Corwin* applied to conflicted board transactions.
  - Compare *City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016) (applying *Corwin* and dismissing post-closing fiduciary duty claims under the business judgment rule where the Court assumed the stockholder vote of the majority of the disinterested stockholders approving the merger was fully informed and found the plaintiff failed to establish a basis for applying entire fairness to the merger and suggesting that fully informed stockholder approval will not change the standard of review to the business judgment rule if the entire fairness standard of review applies to the transaction for any reason (including board-level conflicts), with *Larkin v. Shah*, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016) (applying the business judgment rule and dismissing post-closing fiduciary duty claims after finding there was no controlling stockholder and that the merger was approved by fully informed, disinterested, and uncoerced stockholders, and suggesting that "the only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval are those involving a controlling stockholder").
  - In *re OM Grp., Inc. S'holders Litig.*, 2016 WL 5929951 (Del. Ch. Oct. 12, 2016) (applying *Corwin* and dismissing post-closing fiduciary duty claims under the business judgment rule "because a majority of the fully informed, uncoerced, disinterested stockholders voted to approve the merger and Plaintiffs have not alleged that the transaction amounted to waste" and observing that plaintiffs did not allege the presence of a controlling stockholder or that the majority of the target's board was interested in the merger, nor did plaintiffs plead any material misstatements or omissions in the company's disclosures).
  - In *In re Merge Healthcare Inc.*, 2017 WL 395981 (Del. Ch. Jan. 30, 2017), the Court of Chancery applied *Corwin* and dismissed post-closing fiduciary duty claims under the business judgment rule as a result of the fully informed, uncoerced vote of the disinterested stockholders (and plaintiffs did not allege waste). Notably, the target

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arguably had a controlling stockholder. The Court quoted *Larkin* for the proposition that “the only transactions that are subject to entire fairness that cannot be cleansed by proper stockholder approval are those involving a controlling stockholder,” but clarified that “the mere presence of a controller does not trigger entire fairness *per se*,” and coercion is only assumed “when a controller sits on both sides of the transaction, or is on only one side but ‘competes with the common stockholders for consideration.’” The Court dismissed the claims after finding that the alleged controlling stockholder did not stand on both sides of the transaction and that “he did not extract any personal benefits because his interests were fully aligned with the other common stockholders.”

- Cases applying *Corwin* to dismiss at the pleading stage.
  - *Harcum v. Lovoi*, 2022 WL 29695 (Del. Ch. Jan. 3, 2022) (applying *Corwin* and dismissing claims; finding that the plaintiff failed to adequately plead that the controlling stockholder stood on both sides of the transaction or extracted a unique benefit).
  - *Kihm v. Mott*, 2021 WL 3883875 (Del. Ch. Aug. 31, 2021) (applying *Corwin* and dismissing claims; finding that stockholders were fully informed by the 14D-9, which disclosed the financial advisors’ potential conflicts and the dual fiduciary status of the chairman of the board who also served as the chairman of the target’s board).
  - *In re Rouse Props., Inc. Fiduciary Litig.*, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018) (applying *Corwin* and dismissing claims for breach of fiduciary duty because the plaintiffs failed to prove that the stockholder vote approving the merger was not fully informed; noting that although some omitted information may have been “interesting,” all “material” information had been disclosed).
  - *In re Cyan, Inc. S’holders Litig.*, 2017 WL 1956955 (Del. Ch. May 11, 2017) (applying *Corwin* and dismissing post-closing breach of fiduciary duty claims where stockholders were adequately informed of all material information, including (i) the financial advisor’s conflict due to their ownership of certain debt of the target, (ii) the financial advisors’ precedent transactions analysis, and (iii) of the company’s dependence on a large customer).
  - *In re Paramount Gold & Silver Corp. S’holders Litig.*, 2017 WL 1372659 (Del. Ch. Apr. 13, 2017) (holding that (i) deal protections were reasonable (but declining to decide whether *Unocal* would apply to the review of deal protection devices notwithstanding stockholder approval under *Corwin*), and (ii) the plaintiff did not plead a viable disclosure claim, thereby dismissing the claims under *Corwin* and noting that, even if *Corwin* did not apply, plaintiff had not plead any unexculpated claims).

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- In *In re Solera Holdings, Inc. S'holder Litig.*, 2017 WL 57839 (Del. Ch. Jan. 5, 2017), the Court of Chancery applied *Corwin* and dismissed post-closing fiduciary duty claims under the business judgment rule where (i) the merger was approved by a majority of the disinterested stockholders in an uncoerced vote, (ii) plaintiff failed to plead any material misstatements or omissions in the company's disclosures, (iii) the merger did not involve a controlling stockholder and (iv) plaintiff did not allege waste or that a majority of the board was interested or not independent. In evaluating whether plaintiff had adequately pled any material misstatements or omissions in the company's disclosures, the Court noted that "when a board seeks 'to obtain "ratification effect" from a stockholder vote,' the 'burden to prove that the vote was fair, uncoerced, and fully informed falls squarely on the board.'" However, "a plaintiff challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document, at which point the burden would fall to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote."
- *Chester Cty. Ret. Sys. v. Collins*, C.A. No. 12072-VCL (Del. Ch. Dec. 6, 2016) (applying *Corwin* and dismissing post-closing fiduciary duty claims under the business judgment rule where the merger was approved by the fully informed, uncoerced vote of a majority of disinterested stockholders, plaintiff did not allege waste and plaintiff did not plead a viable disclosure claim).
- Cases where conditions to *Corwin* not satisfied.
  - No fully informed vote.
    - *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at \*13 (Del. Ch. Oct. 27, 2020) (declining to dismiss post-closing breach of fiduciary duty claims under *Corwin* where the proxy statement did not include unaudited financial statements that the Court found to be material; reasoning that, although the financial statements could be pieced together from various post-signing SEC filings, the stockholder vote was not fully informed because "stockholders are entitled to receive material information bearing on the fairness of a transaction they are being asked to approve in a 'clear and transparent manner'").
    - *In re Mindbody, Inc.*, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020) (declining to dismiss post-closing breach of fiduciary duty claims under *Corwin* because the proxy statement failed to disclose that the CEO may have "tilted" the sale process in favor of a certain private equity bidder due to his interest in obtaining liquidity and continued employment).

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- *In re USG Corp. S'holder Litig.*, 2020 WL 5126671 (Del. Ch. Aug. 31, 2020) (declining to dismiss post-closing breach of fiduciary duty claims under *Corwin* because the proxy statement failed to disclose the board's subjective belief that the corporation had an intrinsic value nearly 15% higher than the deal price).
- *Chester Cty. Emps.' Ret. Fund v. KCG Hldgs., Inc.*, 2019 WL 2564093, at \*2 (Del. Ch. June 21, 2019) (declining to dismiss post-closing breach of fiduciary duty claims under *Corwin* where (i) the company's disclosures created the misleading impression that a divestiture strategy connected to the merger was undeveloped, (ii) the company failed to disclose its CEO's initial opposition to the merger and potential conflicts surrounding the CEO's involvement in negotiations and (iii) the company failed to disclose the "more optimistic, earlier" financial projections and the circumstances surrounding the preparation of the revised financial projections).
- *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677 (Del. Ch. Dec. 10, 2018) (declining to dismiss breach of fiduciary duty claims against target company CEO under *Corwin* because stockholders were not informed of the fact that, among other things, the CEO, whose interests were not aligned with the stockholders, privately negotiated with the buyer, including on price, without the board's knowledge or approval).
- *In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at \*11, \*15 (Del. Ch. Nov. 20, 2018) (declining to dismiss post-closing breach of fiduciary duty claims under *Corwin* where the directors of the recently delisted company did not provide stockholders with reliable financial statements or information on when, if ever, the company would complete a restatement of its financials; explaining that, in the context of a "regulatory storm," such as a mandated financial restatement, "to earn pleading-stage business judgment deference by invoking stockholder approval of a challenged transaction, the directors must demonstrate that they carefully and thoroughly explained all material aspects of the storm to stockholders—how the company sailed into the storm, how the company has been affected by the storm, what alternative courses the company can take to sail out of the storm and the bases for the board's recommendation that a sale of the company is the best course").
- *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018) (declining to apply *Corwin* in connection with a merger where the company failed

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to disclose director communications with another potential acquiror and financial advisor conflicts, and the board falsely portrayed projections as being prepared in the ordinary course of business), *aff'd*, 211 A.3d 137 (Del. 2019).

- *Morrison v. Berry*, 191 A.3d 268 (Del. 2018) (reversing the Court of Chancery and declining to dismiss stockholder claims for breach of fiduciary duty under *Corwin* where the company failed to disclose several facts in its Schedule 14D-9 including (i) that the company's founder had agreed with the acquiror, prior to the board's consideration of the acquiror's proposal, to roll over his equity interest, but had denied the existence of that agreement to the other board members, (ii) that the company's founder made statements expressing a clear preference for a rollover transaction involving the acquiror and a reluctance to engage in such a transaction with a different buyer, (iii) that the founder threatened to sell his shares if the board did not undertake a sale process, and (iv) that the company stated that it had formed a strategic transaction committee because it "could become" subject to stockholder pressure, but did not disclose that it already had become subject to stockholder pressure).
- *Appel v. Berkman*, 180 A.3d 1055 (Del. 2018) (finding that the Court of Chancery improperly dismissed claims challenging a tender offer under *Corwin* where the company did not disclose that the company's founder, chairman and former CEO abstained from voting on the merger because he did not feel it was the right time to sell the company and had expressed concerns about mismanagement of the company).
- *van der Fluit v. Yates*, 2017 WL 5953514, at \*8 (Del. Ch. Nov. 30, 2017) (finding that the stockholders who tendered shares were not fully informed, and therefore declining to dismiss plaintiff's claims under *Corwin*, where the company failed to provide stockholders information sufficient to determine whether certain of the company's directors, who were potentially conflicted due to receiving additional consideration in the form of post-sale employment and conversion of stock options, were involved in "key stages of negotiations," but ultimately granting motion to dismiss because plaintiff failed to plead non-exculpated claims against the board or aiding and abetting claims against the buyer).
- *In re Comverge, Inc. S'holder Litig.*, C.A. No. 7368-VCMR (Del. Ch. Oct. 31, 2016) (declining to grant summary judgment in favor of defendants under *Corwin* where plaintiff argued that the stockholder

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vote was not fully informed by pointing to various omissions in the target company's disclosures).

- Coercion.
  - *Sciabucucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017) (finding that *Corwin* did not apply to support dismissal of post-closing breach of fiduciary duty claims because the plaintiff pled facts making it reasonably conceivable that the stockholder vote was “structurally coerced” where stockholders were forced to approve an equity issuance and a voting agreement in favor of the company’s largest stockholder in order to receive the benefits of a value enhancing acquisition and merger).
  - *In re Saba Software Inc. S’holder Litig.*, 2017 WL 1201108, at \*16 (Del. Ch. Mar. 31, 2017; revised Apr. 11, 2017) (declining to grant a motion to dismiss under *Corwin* where the Court found the stockholder vote was coerced because the stockholders were forced to choose between approving a sale of the company to a third party and holding stock in a company that was delisted from NASDAQ and deregistered by the SEC for failing to restate its financials to reflect that the company engaged in financial fraud).
  - See also *In re Dell Techs. Inc. Class V S’holders Litig.*, 2020 WL 3096748 (Del. Ch. June 11, 2020) (applying the reasoning of *Saba Software* and *Liberty Broadband* to stockholder votes under *MFW*).
- Disinterest.
  - *In re Pattern Energy Grp. Inc. S’holders Litig.*, 2021 WL 1812674 (Del. Ch. May 6, 2021) (declining to dismiss claims under *Corwin*; finding that the vote of a significant stockholder was not disinterested because while the transaction was being negotiated, the stockholder agreed to vote in favor of any merger recommended by the board and such agreement “carried with it financial consequences for breach and financial incentives for performance”).
- *Corwin* not available as defense to a Section 220 books and records demand.
  - *Lavin v. West Corp.*, 2017 WL 6728702, at \*7 (Del. Ch. Dec. 29, 2017) (holding that a corporation may not invoke the *Corwin* doctrine as a basis to deny a plaintiff’s demand to access the corporation’s books and records pursuant to Section 220).

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## 7. *Revlon* review after a transaction closes: exculpation.

- Whatever the standard of review, an exculpatory charter provision adopted pursuant to Section 102(b)(7) of the DGCL

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may exculpate directors from monetary liability for a breach of the duty of care, but not for a breach of the duty of loyalty or action taken in bad faith, in connection with a challenged merger. If claims for monetary liability are all that remain post-closing, an exculpatory provision will permit dismissal or summary judgment in the directors' favors before trial. *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173 (Del. 2015); *see also van der Fluit v. Yates*, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017) (granting motion to dismiss because plaintiff failed to plead non-exculpated claims); *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999); *accord, e.g., Malpiede v. Townson*, 780 A.2d 1075 (Del. 2001); *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180 (Del. Ch. June 30, 2014) (dismissing *Revlon* claims post-closing where no allegations that directors acted disloyally or in bad faith in approving merger); *In re Alloy, Inc.*, 2011 WL 4863716 (Del. Ch. Oct. 13, 2011) (same).

- An exculpatory provision, however, cannot exculpate, or in turn provide a basis to dismiss claims against, corporate officers for a breach of fiduciary duty or if they are alleged to have aided and abetted an exculpated director's breach of duty. *See, e.g., Gantler v. Stephens*, 965 A.2d 695, 709 n.37 (Del. 2009) ("Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers"); *Chen v. Howard-Anderson*, 87 A.3d 648, 686 (Del. Ch. 2014) ("Section 102(b)(7) does not authorize exculpation for officers."); *In re Rural Metro Corp.*, 88 A.3d 54, 97 (Del. Ch. 2014) ("This court has recognized that a third party can be liable for aiding and abetting, 'even if the Board breached only its duty of care.'" (quoting *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471, at \*28 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012)).
- Finally, in *Chen v. Howard-Anderson*, the Court held that a litigable inference of bad faith sufficient to preclude reliance on an exculpatory provision to dismiss a claim before trial would exist if the record "supports an inference that the directors made decisions that fell outside the range of reasonableness for reasons other than pursuit of the best value reasonably available, which could be no transaction at all." 87 A.3d 648, 685 (Del. Ch. 2014). There, the Court found that, although certain board decisions could support an inference of having been unreasonable for purposes of summary judgment, "the factual record will not support a reasonable inference that any of the outside directors were motivated by a non-stockholder-related influence." *Id.* (emphasis added). As to one director who was also an officer, by contrast, the Court found that amendments to his severance package agreed to by the board on the same day that it approved the merger agreement and that were triggered by the merger made him "interested in the Merger in the traditional sense because he personally received financial benefits from the Merger that were not shared

with the stockholders,” which in turn provided a sufficient inference for purposes of summary judgment of a disloyal or bad faith motive for his unreasonable conduct in the sale process so as to preclude summary judgment against him. That unreasonable conduct by the board and its financial advisor during the sale process was unexplained favoritism to one bidder “at the expense of generating greater value through a competitive bidding process,” such as by imposing on another “serious suitor” a “24-hour ultimatum to make a bid when there was no need for such a short deadline” and the board’s reliance on a rushed market check conducted over the July 4th holiday weekend. *Id.* at 674-75.

- *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205, 249 (Del. Ch. 2014) (holding that investment banker RBC Capital Markets, which was found liable for aiding and abetting Rural Metro directors in breaching their fiduciary duties, could not obtain contribution from a director-defendant who had been exculpated under Section 102(b)(7) of the DGCL).
- *In re Pattern Energy Grp. Inc. S’holders Litig.*, 2021 WL 1812674 (Del. Ch. May 6, 2021) (finding it reasonably conceivable that directors acted in bad faith by delegating to conflicted management full authority to prepare and file a proxy statement, failing to review the proxy statement before its filing and failing to correct misstatements in the proxy statement).

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**D. *Unocal*.** *In Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), the Court held that when a board unilaterally—i.e., without stockholder approval—adopts defensive measures, it must establish that the board had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and that its response to that threat was reasonable. This rule is generally applied to mergers that are designed to fend off hostile bids to acquire the corporation.

**1. Some cases have indicated that deal protections have the effect of fending off competing offers and are therefore “defensive.” Thus, even where the heightened standard of *Revlon* does not apply, courts may apply the heightened *Unocal* standard to deal protections.**

- *In re Santa Fe Pac. Corp. S’holders Litig.*, 669 A.2d 59 (Del. 1995) (applying enhanced judicial scrutiny under *Unocal* to board’s entering into a joint tender offer with acquiror, adopting a poison pill rights plan exempting one bidder, amending the pill to allow one bidder to increase its ownership, and authorizing a stock repurchase program).
- *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255, at \*2 (Del. Ch. Sept. 27, 1999) (indicating that *Unocal* would apply to board’s decision to enter into a merger agreement containing a 6.3% termination fee, stating that such fee “certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point”).

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- *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 108 (Del. Ch. 1999) (“When corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out by the board, some of the policy concerns that animate the *Unocal* standard of review might be implicated. In this case, for example, if [the no-talk provision of the merger agreement] is read as precluding board consideration of alternative offers—no matter how much more favorable—in this non-change of control context, the [target] board’s approval of the Merger Agreement is as formidable a barrier to another offer as a non-redeemable poison pill.”).
- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (applying *Unocal* standard of enhanced scrutiny to board’s adoption of deal protections when such “defensive measures” were challenged in context of competing higher bid; declining to determine whether *Revlon* applied).
- *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (finding that *Unocal* did not apply to a board’s rejection of a friendly merger offer because the rejection of a merger offer is not a defensive action in the absence of any hostile takeover attempt or similar threatened conduct).
- *Gaines v. Narachi*, 2011 WL 4862978 (Del. Ch. Sept. 30, 2011) (denying motion to expedite brought by stockholder of acquiror and holding that *Unocal* was not implicated when acquiror rejected a third-party’s unsolicited offer to buy acquiror as an alternative to an already-signed merger agreement in which acquiror agreed to acquire target and issue to target’s stockholders 39% of the combined entity and which included “relatively routine” deal protections because the third-party had not emerged at the time the deal protection provisions were instituted; *Revlon* was not implicated because there was no change of control).
- *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) (stating that “Delaware has three tiers of review for evaluating director decision-making” and discussing *Unocal* review and *Revlon* review each as an example of the same “intermediate standard of review,” i.e., “enhanced scrutiny”).
- *High River Ltd. P’ship v. Dell Inc.*, C.A. No. 8762-CS, at 16, 25-26 (Del. Ch. Aug. 16, 2013) (TRANSCRIPT) (denying plaintiff’s motion to expedite fiduciary duty claims arising from the special committee’s decision to set a new meeting date to consider plaintiff’s slate of directors and proposed recapitalization plan separate from the meeting to consider defendants’ proposed management-led buy-out merger; no argument existed under “*Unocal*, *Blasius* or some hybrid claim,” that the special committee’s decision was coercive, preclusive or disenfranchised the stockholders; rather, the special committee’s purpose was to enfranchise a new stockholder base that had been excluded due to a “stale” record date: “What the moving plaintiff is essentially trying to get the Court to do is usurp the authority of the special

committee's conduct of a value maximization process by setting a court-mandated meeting at which two separate votes have to be taken on the same day. . . . Having provided the Court with no colorable basis to conclude that the special committee has acted in anything other than good faith, and having provided the Court with no rational basis to believe that the board's chosen approach will coerce stockholders into voting for a suboptimal merger or preclude a genuine topping bid or the election of the [plaintiff] group's slate at an annual meeting, if the stockholders choose to reject the merger, it would be inconsistent with equity to intrude at this sensitive time").

## 2. Other cases have suggested that, outside of *Revlon*, the business judgment rule is the appropriate standard to apply.

- *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at \*7 (Del. Ch. Oct. 27, 1999) (refusing to accept contention that a board consisting of three of the largest individual shareholders would actively shirk their fiduciary duties and in the process ignore their own economic self interest by not shopping the company, Court held that “[a]bsent convincing evidence that the board skewed the process in order to prevent a shareholder from voting knowledgeably and intelligently on the merger agreement, no court should apply an artificial barrier to market consideration of that business judgment”).
- *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (in appearing to apply the business judgment rule, stating “[i]n contrast to the usual *Revlon/Unocal* case involving defendants who have resisted a sale, this complaint attempts to state a claim against a board with a disinterested majority that engaged an investment banker to search for strategic buyers, that consummated a merger agreement with a third-party purchaser, and that put up no insuperable barriers to a better deal”).
- *In re MONY Grp. Inc. S'holders Litig.*, 853 A.2d 661 (Del. Ch. 2004) (holding that *Unocal* did not apply when none of the directors were to retain positions with the surviving company; explaining that *Unocal* (and potentially *Blasius*) review are implicated when a board acts to impede the stockholder franchise and the board's control of the corporation is at risk).

**E. *Blasius*.** *In Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988), the Delaware Court of Chancery held that a board's action in adding two new members to the board in order to thwart a consent solicitation seeking to take control of the board was invalid even though the board may have acted in good faith and with appropriate care. The *Blasius* standard applies to board actions taken with the “primary purpose of preventing or impeding” a stockholder vote. Such action will be found invalid unless the board has a compelling justification for thwarting the stockholder vote.

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- In *Mercier v. Inter-Tel, Inc.*, 929 A.2d 786 (Del. Ch. 2007), the Delaware Court of Chancery applied the *Blasius* standard of review to a board's decision to postpone a stockholder vote on a merger. However, in this case the Court noted that where it was clear that the merger was about to be voted down the *Unocal* standard of review might be more appropriate, and analyzed the board's action under that standard as well. If *Unocal* applied, the Court stated that the directors postponing the vote would bear the burden of showing a legitimate corporate objective for postponing the meeting. As part of that burden, the board would have to prove that its motivation was proper and not selfish, and "[t]o ultimately succeed, the directors must show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way." *Id.* at \*69. The Court also applied the more traditional *Blasius* compelling justification test to the directors' actions and held: "In the corporate context, compelling circumstances are presented when independent directors believe that: (1) stockholders are about to reject a third-party merger proposal that the independent directors believe is in their best interests; (2) information useful to the stockholders' decision-making process has not been considered adequately or not yet been publicly disclosed; and (3) if the stockholders vote no, the acquiror will walk away without making a higher bid and that the opportunity to receive the bid will be irretrievably lost." *Id.* at \*95. The Court ultimately found that, under either standard of review, the board satisfied its fiduciary duties when it acted to postpone the vote on the merger.
- By comparison, in *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at \*22 n.39 (Del. Ch. May 2, 2014), the Court of Chancery found the question of whether *Blasius* applied to the board's decision in refusing to waive a poison pill "uncomfortably close." There, the board of Sotheby's adopted a poison pill in response to rapid accumulation of stock by activist investors, which the Court found reasonable applying *Unocal* alone. That specific pill, however, contained a two-tiered trigger: a generally applicable 10% trigger for all stockholders, but a 20% trigger for any stockholder who disclosed its position on Schedule 13G, which requires disclaiming any intent to influence the control or management of the issuer. Five months later, the only remaining activist still on the scene publicly announced a short slate proxy contest against the incumbent board. By running a proxy contest and advocating for changes in business strategy, it was ineligible to file a Schedule 13G. However, the activist disclaimed any intent to take over the company. Arguing that the 20% trigger for Schedule 13G filers conceded that a 20% bloc does not, on its own, pose a threat to the company, and asserting that its intention simply was to exercise its right to run a proxy contest, the activist requested that the board amend the pill so that the activist could increase its stake up to the same 20% threshold. At the meeting where the board considered and rejected this request, the board received presentations from its financial, proxy, and other advisors, each of whom opined "that allowing [the activist] to acquire an additional 10% stake likely would ensure a [activist] victory in the ongoing proxy contest." *Id.*

Nevertheless, the Court found that the board’s “primary purpose” for refusing the activist’s request was not to interfere with the proxy contest, and therefore *Blasius* did not apply, because facts surrounding the particular activist’s behavior suggested that it posed a legitimate risk of wielding “effective negative control” that the board legitimately could defend against with a poison pill. Elsewhere in the opinion, however, the Court wrote, “I do not mean to endorse the Rights Plan’s two-tiered feature, and I am inclined to agree that the discrimination between ‘active’ and ‘passive’ shareholders raises some valid concerns.” *Id.* at \*20 n.37, suggesting that the *Third Point* facts may be the dividing line after which *Blasius* would apply.

- The *Blasius* standard may apply even if a board’s action is found to be entirely fair. In *Coster v. UIP Companies, Inc.*, 255 A.3d 952 (Del. 2021), the Delaware Supreme Court reversed and remanded a case involving a dilutive stock sale that the Court of Chancery found to be entirely fair. The three-member board of a corporation whose two stockholders were deadlocked on director elections approved a sale of stock to one of the directors in order to break the deadlock and avert the appointment of a custodian. After a trial, the Court of Chancery found that the sale was entirely fair and declined to consider *Blasius*. On appeal, the Supreme Court reframed the analysis, reiterating the principle from *Schnell v. Chris-Craft Industries* that legal actions can nonetheless be impermissible if they are inequitable, and further noting that even if the directors were not acting in bad faith, actions taken with the primary purpose of interfering with the statutory or voting rights of stockholders must be shown to have had a “compelling justification” under *Blasius*.

NEW!

## F. Duties To Creditors.

- In *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 101-03 (Del. 2007), the Delaware Supreme Court held that directors of an insolvent corporation or a corporation in the “zone of insolvency” do not owe direct fiduciary duties to creditors. However, the Court held that “creditors of an insolvent corporation” take the place of stockholders as residual beneficiaries of any increased value and may maintain derivative suits against directors on behalf of the corporation. *Id.* at 101-02. See also *Angelo, Gordon & Co., L.P. v. Allied Riser Commc’ns Corp.*, 805 A.2d 221 (Del. Ch. 2002) (refusing to enjoin merger where creditors of insolvent surviving corporation claimed that directors breached fiduciary duties to noteholders and preliminarily concluding that business judgment rule applied and protected the directors’ decisions from such claims of creditors).
- Although *Gheewalla* did not address explicitly whether creditors of a corporation in the zone of insolvency may maintain derivative suits against directors on behalf of the corporation, in *Production Resources Group, L.L.C. v. NCT Group, Inc.*, 863 A.2d 772 (Del. Ch. 2004), the Court of Chancery held that directors in the zone of insolvency have the protection of the business judgment rule and that Section 102(b)(7) limits the liability of directors when creditors’ claims are derivative. See also *Trenwick Am. Litig. Tr. v.*

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*Ernst & Young, L.L.P.*, 906 A.2d 168, 195 n.75 (Del. Ch. 2006) (“The judicial decisions indicating that directors owe fiduciary duties to the firm when it is insolvent . . . seem to [be] . . . a judicial method of attempting to reinforce the idea that the business judgment rule protects the directors of solvent, barely solvent, and insolvent corporations, and that the creditors of an insolvent firm have no greater right to challenge a disinterested, good faith business decision than the stockholders of a solvent firm.”). *But see CML V, LLC v. Bax*, 28 A.3d 1037 (Del. 2011) (holding that creditors of an insolvent limited liability company do not have standing to bring derivative claims).

- In one of Vice Chancellor Laster’s first bench rulings, he stated that *Trenwick* held that it was a question within the “business judgment” of directors of an equitably insolvent corporation whether or not to consider creditor interests. *Global Asset Capital, LLC v. Rubicon US REIT, Inc.*, C.A. No. 5071-VCL, at 59 (Del. Ch. Nov. 16, 2009) (TRANSCRIPT) (“You will not be held to have breached your duty of loyalty to stockholders if you do consider creditors’ interests. In fact, you are expected to consider all corporate constituencies, because the duties run to the corporation. But that is very different from some free-standing duty to creditors.”).
- In *Quadrant Structured Products Co. Ltd., v. Vertin*, 102 A.3d 155 (Del. Ch. 2014), Vice Chancellor Laster held, in light of *Gheewalla*, the shift from solvency to insolvency of a corporation, does not refer to a shift in directors’ duties to creditors, but instead refers to a shift in creditors standing to bring derivative actions against directors for breach of fiduciary duties. “The fiduciary duties that creditors gain derivative standing to enforce are not special duties to creditors, but rather the fiduciary duties that directors owe to the corporation to maximize its value for the benefit of all residual claimants.” *Id.* at 176. In addressing the defendant-directors’ argument that creditors must comply with Section 327’s contemporaneous ownership requirement, the Court held “[e]xtending Section 327 to creditors also would stand in tension with the ability of creditors to assert claims that pre-date the point when they acquire standing to sue” because of how they gain standing to sue. Thus, “creditors can and should be able to assert claims that arose before they gained standing.” *Id.* at 180.

**G. Entire Fairness.** Where the board of a target corporation does not consist of a majority of disinterested directors, or a transaction is with a controlling stockholder, entire fairness scrutiny may apply.

**1. When the entire fairness test applies, a transaction must be fair as to both price and process.**

- *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (holding “fair dealing” embraces questions of process, particularly how the transaction was timed, initiated, structured, negotiated, and disclosed, and how the approvals of the directors and the stockholders were obtained, and that “fair price” relates to the economic and financial terms of the transaction).
- *In re Dole Food Inc. S’holder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) (finding two directors of Dole Food Company,

Inc. liable under the entire fairness standard and awarding damages of \$148 million. Chairman, Chief Executive Officer, and controlling stockholder David H. Murdock and director, President, Chief Operating Officer, and General Counsel C. Michael Carter were found to have driven down Dole's stock price prior to a merger proposal by which Murdock took Dole private and to have undermined the work of a special committee formed to consider Murdock's proposal).

- *In re Nine Sys. Corp. S'holder Litig.*, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014) (finding that a control group of stockholders and their director designees breached their fiduciary duties to the minority stockholders when a majority of the conflicted directors approved a recapitalization that diluted the minority stockholders from a 26% to a 2% holding in the company's equity, because the recapitalization was the result of an unfair process, even though it was accomplished at a fair price).
- *But see In re Trados S'holder Litig.*, 73 A.3d 17 (Del. Ch. 2013) (finding that a merger was the product of unfair dealing but that the unfair dealing did not sufficiently impact the price received by minority common stockholders such that the approval of the merger did not fail the "unitary determination" of fairness); *Frederick Hsu Living Tr. v. Oak Hill Capital P'rs III, L.P.*, 2020 WL 2111476 (Del. Ch. May 4, 2020) (holding after trial that the decision to pursue a strategy of accumulating cash to maximize the near-term value of a controller's redemption right rather than investing in the company's business to promote long-term growth was entirely fair, even though the defendants failed to prove fair process, because the defendants proved that the corporation's common stock would have ended up being worthless with or without the cash accumulation strategy).

## 2. To minimize conflict issues, inside deals should be negotiated after all deal terms that affect stockholders have been finalized.

- *City of Fort Myers Gen. Emps.' Pension Fund v. Haley*, 235 A.3d 702 (Del. 2020) (reversing the Court of Chancery's dismissal of claims against the CEO and Chairman, who failed to disclose to the board that he received a lucrative executive compensation proposal from the counterparty's largest stockholder during negotiations, which allegedly incentivized him to seek the smallest price bump necessary to secure stockholder approval of the transaction).
- *In re Plains Exploration & Prod. Co. S'holder Litig.*, 2013 WL 1909124 (Del. Ch. May 9, 2013) (noting that the board had "properly managed" potential conflicts of interest of the CEO who led negotiations but was interested in continuing to work for the post-merger company where post-merger employment was not discussed until the parties had agreed upon the merger consideration).
- *Wayne Cty. Emps.' Ret. Sys. v. Corti*, 2009 WL 2219260 (Del. Ch. July 24, 2009) (recognizing that management conflicts were

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mitigated by keeping disinterested directors informed and deferring compensation discussions until after an agreement was reached on merger consideration; recognizing that management incentives might have been different if the board was weighing a “management sponsored offer” against a “less-management-friendly bid”). *But cf. Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS, at 20-22 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (acknowledging that the board instructed management not to negotiate management discussions until after the transaction was consummated, but finding that the relationship between management and the private equity buyer suggested that all parties knew a management retention agreement would eventually be reached and holding that implied that management had “a totally different incentive system than everybody else”).

- *In re Toys “R” Us, Inc., S’holder Litig.*, 877 A.2d 975, 1003-04 (Del. Ch. 2005) (finding that plaintiffs’ claim that a CEO had a conflict of interest and thus tainted a bidding process was without merit, in part because the CEO refused to consider any employment offers from any bidder until the board had concluded a deal).
- *Parnes v. Bally Entm’t Corp.*, 2001 WL 224774 (Del. Ch. Feb. 23, 2001) (concluding that business judgment rule applied and directors acted in good faith where interested director’s severance agreement, consulting agreement, and purchase of certain warrants were negotiated after the parties reached an understanding regarding price, price protections and basic structure of the merger agreement, and interested director recused himself from any board discussions regarding his inside agreements), *aff’d*, 788 A.2d 131 (Del. 2001).

### **3. A Court may apply the entire fairness standard to a board’s decision to reject a merger.**

- In *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), the Delaware Supreme Court confirmed that a board’s decision to reject a merger offer is generally subject to the business judgment standard of review, but held that the entire fairness standard would apply if the plaintiffs could show that the board’s decision to reject the merger offer was not made in the good faith pursuit of a legitimate corporate purpose. In this case, the Court found that plaintiffs had met this burden by showing that a majority of the members of the board acted disloyally.

### **4. There are many types of potential conflicts:**

- a. “Interest” v. “Independence.”
  - *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002), discussed the difference between director disinterest and director independence. A director is interested when he or she stands on both sides of a transaction, or will benefit or experience some detriment that does not flow to the corporation or the stockholders generally. Absent self-dealing, the benefit must be material to the individual director. In contrast, a director is not independent

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where the director's decision is based on "extraneous considerations or influences" and not on the "corporate merits of the subject." The stockholder must plead particularized facts that show that the director is under the control of or beholden to another such that he or she is unable to exercise discretion in decision-making.

## b. Employment or Consulting Relationships.

- *Chester Cty. Emps. Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at \*9 (Del. Ch. Oct. 6, 2017) (in the context of a demand futility analysis, rejecting the plaintiff's argument that a retired director lacked independence because he received director fees that were a material part of his income, noting that "a ruling in Plaintiff's favor with respect to [the retired director] essentially would be a blanket determination that all retired board members lack independence" and that "allegations of payment of director's fees, without more, do not establish any financial interest").
- *Frank v. Elgamal*, 2012 WL 1096090, at \*11 (Del. Ch. Mar. 30, 2012) (denying motion to dismiss fiduciary duty claims against a director based on his receipt of a \$250,000 fee for his work in connection with negotiating a merger; stating that allegations that directors worked at hospitals that had contractual relationships with one of target's subsidiaries were "insufficient as a matter of law to suggest that [such directors] were not independent" with respect to a merger).
- *Freedman v. Adams*, 2012 WL 1345638, at \*9 (Del. Ch. Mar. 30, 2012) (holding that plaintiff had not pled facts indicating that outside directors were not independent from inside directors, but suggesting that a court could infer that outside directors were not independent if such directors "routinely behaved in the manner of employees—that is to say that their actions demonstrated that an interested director, like an employer, controlled the performance of their duties"), *aff'd*, 58 A.3d 414 (Del. 2013).
- *In re Barnes & Noble S'holder Deriv. Litig.*, C.A. No. 4813-CS (Del. Ch. Mar. 27, 2012) (TRANSCRIPT)
  - i. The court denied a motion to dismiss where a director did not recuse himself from voting on Barnes & Noble's acquisition of B&N College, which was privately owned by the chairman and 30% stockholder of Barnes & Noble where the B&N chairman had invested \$20-25 million in that director's investment fund and made substantial political contributions through him. The court noted that "the reality is if you're a conduit for contributions, if you're seen as someone who can raise money in a political process where people who run for office have to seek contributions in order to fund their campaigns if they're not independently wealthy, that is a source of stature" and that "to be seen as someone who is a gateway to raising money from a very wealthy

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and incredible head of a long-standing public company in a community, that can be a useful thing.”

- ii. On length of board membership as an alleged conflict: “There’s a certain freshness that’s lost after 16 years. But learned judgments have been made by both exchanges in our nation about independence requirements. And, frankly, length of service is not one of them. There’s no indication from our Supreme Court that mere length of service deprives someone of independence.” Compare *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at \*6 n.63 (Del. Ch. Jan. 31, 2013) (allegation that director had “nearly twenty years of Board service . . . and a long-term relationship” with management “does not raise a reasonable doubt as to the independence of a director under Delaware law”).
- *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. 2010) (finding a director independent and rejecting the claim that she was beholden to the company’s founder and former CEO because she previously served as CFO under him, where it had been 10 years since she served as a company executive and where she satisfied the New York Stock Exchange’s “cooling-off period”).
  - *Selectica, Inc. v. Versata Enters., Inc.*, 2010 WL 703062, at \*14-\*15 (Feb. 26, 2010) (finding that payments to two “co-chair” directors of \$164,125 and \$274,273 were “material,” but noting that, in reference to the directors’ other income and desire to retire from such positions, it was not “personally material”).
  - *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (finding director to be interested in a decision not to accept a merger proposal where the acceptance of the proposal would likely result in the termination of a substantial business relationship between the target and a business operated by the director).
  - *In re infoUSA, Inc. S’holders Litig.*, 953 A.2d 963, 991-92 (Del. Ch. 2007, revised Aug. 20, 2007) (holding that plaintiffs raised reasonable doubt as to a director’s independence for purposes of considering a demand where the director was a named partner in a law firm that provided legal services to the company in return for payments (averaging \$500,000 per year and equaling \$1.1 million in the most recent year) that came close to or exceeded a reasonable estimate of the annual yearly income per partner at the law firm and concluding that the “threat of withdrawal of one partner’s worth of revenue from a law firm is arguably sufficient to exert considerable influence over a named partner such that . . . his independence may be called into question”).
  - *Krasner v. Moffett*, 826 A.2d 277 (Del. 2003) (holding that, despite use of independent committee to negotiate merger with third party, entire fairness standard would apply if majority of the board was not disinterested and

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independent; determination whether two directors who received income from companies related to the other merger party were disinterested and independent would control the determination of the appropriate standard of review).

- *Biondi v. Scrushy*, 820 A.2d 1148 (Del. Ch. 2003) (questioning the independence of two members of a special committee formed to investigate charges against the CEO because committee members served with the CEO as directors of two organizations and the CEO and one committee member had “long-standing personal ties” that included making large contributions to certain sports programs).
- *In re NCS Healthcare, Inc., S’holders Litig.*, 825 A.2d 240 (Del. Ch. 2002) (rejecting argument that two directors were conflicted based on their agreements with the acquiror because, with the exception of one consulting agreement, the payments by acquiror were based on prior obligations; noting that, despite consulting agreements, the level of the directors’ stock ownership aligned the directors’ interests with the stockholders’ interests in receiving the highest value for their shares) *rev’d on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).
- *In re Ltd., Inc. S’holders Litig.*, 2002 WL 537692 (Del. Ch. Mar. 27, 2002) (finding, in context of demand futility analysis, that the plaintiffs had cast reasonable doubt on the independence of certain directors in a transaction that benefited the founder, Chairman, CEO and 25% stockholder of the company, where one director received a large salary for his management positions in the company’s wholly-owned subsidiary, one director received consulting fees, and another director had procured, from the controlling stockholder, a \$25 million grant to the university where he formerly served as president).
- *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002) (questioning the independence of one director who had a consulting contract with the surviving corporation and also questioning the disinterestedness of another director whose company would earn a \$3.3 million fee if the deal closed).
- *In re Ply Gem Indus., Inc. S’holders Litig.*, 2001 WL 755133 (Del. Ch. June 26, 2001) (holding that plaintiffs raised reasonable doubt as to directors’ independence where interested director as Chairman of the Board and CEO was in a position to exercise considerable influence over directors serving as President and COO; director serving as Executive Vice President; a director whose small law firm received substantial fees over a period of years; and directors receiving substantial consulting fees).
- *Goodwin v. Live Entm’t, Inc.*, 1999 WL 64265 (Del. Ch. Jan. 25, 1999) (stating on motion for summary judgment that evidence produced by plaintiff generated a triable issue of fact regarding whether directors’ continuing employment

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relationship with surviving entity created a material interest in merger not shared by the stockholders), *aff'd*, 741 A.2d 16 (Del. 1999).

## c. Family Relationships.

- *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879 (Del. Ch. 1999) (holding that director who was brother-in-law of CEO and involved in various businesses with CEO could not impartially consider a demand adverse to CEO's interests).
- *Chaffin v. GNI Grp., Inc.*, 1999 WL 721569 (Del. Ch. Sept. 3, 1999) (finding that director lacked independence where a transaction benefited son financially).
- *Mizel v. Connelly*, 1999 WL 550369 (Del. Ch. July 22, 1999) (holding that director could not objectively consider demand adverse to interest of grandfather).
- *In re Barnes & Noble S'holders Deriv. Litig.*, C.A. No. 4813-VCS, at 160-61 (Del. Ch. Oct. 21, 2010) (TRANSCRIPT) (suggesting that a CEO/director was unable to evaluate a transaction fairly because it was proposed by his brother; suggesting that abstention may be insufficient to remedy such conflict).

## d. Liquidity. Delaware courts have been split as to whether a director/stockholder is interested in a transaction because of unique liquidity needs.

- Cases suggesting a liquidity need may raise a conflict include:
  - *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2011 WL 4825888, at \*11 (Del. Ch. Sept. 30, 2011, revised Oct. 6, 2011) (finding that the plaintiff sufficiently alleged that a director and 37% stockholder was materially interested in a merger because the transaction provided him with desperately needed liquidity to defeat a motion to dismiss. He had no salary, owed over \$25 million, and had plans to launch a new business entirely with his own money. He received \$100 million in the merger, which he initiated and pursued through a "pattern of threats" and the "domination" of the rest of the board);
  - *In re Answers Corp. S'holders Litig.*, 2012 WL 1253072 (Del. Ch. Apr. 11, 2012) (finding that plaintiffs' complaint adequately alleged facts sufficient to infer that (1) two directors appointed by a 30% stockholder were interested in a merger where the 30% stockholder desired to exit its otherwise illiquid investment and (2) otherwise disinterested and independent directors acted in bad faith by consciously failing to seek the highest value reasonably available for all stockholders based on allegations that, against their own financial advisor's advice, those directors acquiesced in an expedited sale process in order to accommodate the 30% stockholder; noting that the court "wonder[ed]

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if an explanation will emerge [for the independent directors' decision to conduct an expedited market check] because disinterested and independent directors do not usually act in bad faith"); *In re Answers Corp. S'holders Litig.*, 2014 WL 463163 (Del. Ch. Feb. 3, 2014) (granting summary judgment that directors had not acted in bad faith while obtaining increased acquisition offers from \$8.00 to \$10.50 per share over 11-month process, by using exclusive bidding rights, expense reimbursement, and improved quarterly results as enticements to bidder, determining from management's previous discussions with potential financial buyers and financial advisor's two-week market check involving ten potential strategic acquirors that no dark horse topping bidder existed, and receiving financial advisor's fairness opinion and advice that bidder would not further raise its offer price, in the context of increasing market competition, the board's plausible concerns about the company's stability and future success, and the company's poor quarterly results at the early stages of the sale and bargaining process).

- *McMullin v. Beran*, 765 A.2d 910 (Del. 2000) (denying motion to dismiss plaintiffs' claims based on theory that controlling stockholder conducted a "fire sale" of its 80%-owned subsidiary in order to obtain cash to fund a \$3.3 billion acquisition where 8 of the 12 subsidiary directors were affiliated with the controller).
- *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011) (finding that, although board designee of 14% stockholder in a controlled company did not act in "less than good faith" in negotiating a transaction involving registration rights for the stockholder's illiquid 14% equity stake, the liquidity interest of the stockholder meant that its board designee was "less than ideally situated to press hard" in negotiations with the controller), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).
- *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) (holding that Chairman of Rural's board, who was also a managing director of an "activist hedge fund," would have been monetarily liable for a breach of the duty of loyalty because he had "unique reasons to favor a nearterm transaction" including: (i) that the fund generally sought exits within three-to-five years; (ii) the fund's position in Rural had become 22% of the fund's portfolio; and (iii) the fund was seeking to raise new capital and a sale of Rural could be used in marketing the fund to new investors).
- *Virtus Capital L.P. v. Eastman Chem. Co.*, 2015 WL 580553 (Del. Ch. Feb. 11, 2014) (finding that a complaint

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contains detailed allegations sufficient to state a claim that Sass breached his duty of loyalty by causing Sterling to be sold at a fire-sale price to alleviate a liquidity crisis that Sass was facing at his investment funds).

- *In re Columbia Pipeline Grp. Inc. S'holder Litig.*, CA. No. 12152-VCL (Del. Ch. Feb. 28, 2017) (TRANSCRIPT) (questioning whether the potential accelerated vesting of an aggregate of approximately \$1.6 million in stock options could create a conflict for directors to pursue an immediate transaction).
- *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018) (finding that defendants had a “divergent interest” from other company stockholders where the record indicated that the defendants orchestrated a sale to achieve quick profits by (i) failing to prepare a valuation or other analysis as to the fundamental value of the company, (ii) failing to provide alternative ideas to generate value for the company (other than selling it) and (iii) maintaining a thesis for investing in the company that “depended entirely on a short-term sale to the other bidder who emerged during the go-shop period” of a merger transaction), *aff'd*, 211 A.3d 137 (Del. 2019).
- Cases suggesting a liquidity need may not raise a conflict include:
  - *Firefighters' Pension Sys. v. Presidio, Inc.*, 251 A.3d 212 (Del. Ch. 2021) (dismissing claims against private equity controlling stockholder, reasoning that the cyclical process of investment funds “is not so formulaic and structured that the cycle itself would support an inference of a liquidity-based conflict”).
  - *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1036 (Del. Ch. 2012) (suggesting that, at least in the context of a transaction in which all stockholders receive the same pro rata consideration, there are “very narrow circumstances in which a controlling stockholder’s immediate need for liquidity could constitute a disabling conflict of interest” and that “[t]hose circumstances would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation”).
  - *Chen v. Howard-Anderson*, 87 A.3d 648, 671-72 (Del. Ch. 2014) (finding outside director affiliated with institutional investor did not “face[] a liquidity-driven conflict due to the winding down of the [institution’s] fund” holding a large bloc of the company’s shares because the institution “routinely extended its funds”

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and the liquidating fund “could have distributed the [company] shares to its investors”).

- *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656 (Del. Ch. 2013) (“When a large stockholder supports an arm’s-length transaction resulting from a thorough market check that spreads the transactional consideration ratably across all stockholders, Delaware law does not regard that as a conflict transaction.”)
  - *Koehler v. Netspend Hldgs. Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013) (rejecting claim that company conducted a “fire sale” at the behest of its largest stockholder where the facts demonstrated that the stockholder was focused on obtaining the highest price attainable for its shares).
  - *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (dismissing claims that company conducted a “fire sale” at the behest of its majority stockholder where the company conducted a 2-year long sale process); *Van de Walle v. Unimation, Inc.*, 1991 WL 29303 (Del. Ch. Mar. 7, 1991) (rejecting plaintiff’s claim that majority stockholder had pursued a sale of the company in response to a “liquidity crisis” where, *inter alia*, the company conducted a seven-month long sale process).
  - *In re Crimson Exploration Inc., S'holder Litig.*, 2014 WL 5449419, at \*19 (Del. Ch. Oct. 24, 2014) (finding “unconvincing” and “conclusory” plaintiff-stockholders’ argument that (i) the investor-defendant’s demand for a registration rights agreement and (ii) the fact that the investor-defendant had a longer-than-normal investment in the company, reflected the investor-defendant’s need for liquidity).
  - *Gamco Asset Management Inc. v. iHeartMedia Inc.*, 2016 WL 6892802 (Del. Ch. Nov. 29, 2016) (finding “conclusory” and “lacking factual support” plaintiff-stockholder’s allegations that the transactions at issue were (i) entered into to benefit the controlling stockholder, (ii) “needless” (iii) at suboptimal prices and (iv) on a timetable to fund the controlling stockholder’s need to service its debt, and thus the challenged “arms-length” transactions entered into with third parties did not yield the controlling stockholder a “unique benefit . . . that would justify entire fairness review”).
- e. Affiliation with Acquiror, Controlling Stockholder or Interested Party.
- *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at \*19-25 (Del. Ch. Dec. 29, 2020, revised Dec. 30, 2020) (declining to dismiss claims against the members of a special committee, where the plaintiffs adequately pled that (i) one committee member lacked independence from the controller due to “a close personal relationship”

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with the controller, (ii) all committee members lacked independence from the controller because they feared retribution for failure to meet the controller's demands, and (iii) all committee members lacked independence from the controller because they operated under a "controlled mindset").

- *In re BGC P's, Inc. Deriv. Litig.*, 2019 WL 4745121 (Del. Ch. Sept. 30, 2019) (finding that, in the context of a demand futility analysis, directors were not independent from the company's controlling stockholder where the directors had served on multiple controller-affiliated boards for ten to twenty years, received a significant portion of their income from these positions and had familial and social relationships with the controlling stockholder).
- *In re Tesla Motors, Inc.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018) (finding that a director was not independent from the company's controlling stockholder where the director had served on the board of directors for ten years, the controller had gifted the director two Tesla vehicles, and the director's venture capital firm had invested in Tesla on three occasions).
- *In re Oracle Co. Deriv. Litig.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018) (finding that the company's directors were not independent of the founder where the directors had various ties to the founder, such as business relationships and decades-long personal relationships, and where the directors faced a significant threat of losing their lucrative directors' fees; noting that each allegation individually may not be enough to prove a lack of independence, but the facts alleged, plus the founder's willingness to remove directors or officers that crossed him, cast reasonable doubt on a majority of the board's ability to objectively evaluate a demand to sue the founder).
- *Chester Cty. Emps. Ret. Fund v. New Residential Inv. Corp.*, 2017 WL 4461131, at \*6 (Del. Ch. Oct. 6, 2017) (in the context of a demand futility analysis, rejecting the plaintiff's argument that one director lacked independence because of a prior business relationship pursuant to which the director oversaw the securitization of a mortgage loan for the interested party 12 years earlier because the plaintiff failed to plead with particularity how the director would not be able to use his independent business judgment to consider a demand and failed to explain how this prior business relationship was "significant").
- *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at \*20 (Del. Ch. Aug. 18, 2017) (finding that the members of a special committee were independent of the controlling stockholder where the plaintiff alleged (i) one member served as CEO of a company that carried a line of products bearing the controlling stockholder's name; (ii) one member was previously employed by a company that aired the

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controlling stockholder's syndicated television program; (iii) one member and the controlling stockholder shared an affinity for tennis; and (iv) the corporation was a client of one member when she worked at Arthur Andersen; and noting that bare allegations of prior business relationships or shared interests are insufficient to rebut the presumption of independence).

- In *Sandys v. Pincus*, 2016 WL 7094027 (Del. Dec. 5, 2016), the Delaware Supreme Court reversed the Court of Chancery's decision in *Sandys v. Pincus*, 2016 WL 769999 (Del. Ch. Feb. 29, 2016), and held that certain directors of Zynga, Inc. were not independent for purposes of demand futility due to personal and business connections to the company's CEO/chairman/controlling stockholder (Mark Pincus). In finding that the plaintiff pled sufficiently particularized facts to create reasonable doubt about the independence of three directors, (i) the Court focused on one director's co-ownership of a private plane with Pincus which, to the Court, "signaled an extremely close, personal bond," and (ii) with regard to two other directors, the Court focused on their significant business relationships with Pincus and the fact that the Board had previously concluded these two directors were not independent under NASDAQ rules, which though different from the Delaware independence standards, "focus on whether directors can act independently of the company or its managers," which also has relevance in the independence analysis for purposes of Delaware law.
- *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1022 (Del. 2015) (in the context of a demand futility analysis, finding that plaintiffs pled particularized facts that create a reasonable doubt about a director's independence where the director had a friendship of over 50 years with an interested party and the director's primary employment was as an executive of a company that also employed the director's brother and over which the interested party had substantial influence).
- *Compare N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, 2011 WL 4825888, at \*11 (Del. Ch. Sept. 30, 2011, revised Oct. 6, 2011) (holding that plaintiff sufficiently alleged that defendant directors were not disinterested or independent for purposes of voting on merger where they were "dominated" by one interested director through a "pattern of threats" where that director was also a 37% stockholder and was facing an extreme liquidity crisis), *with In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716 (Del. Ch. Oct. 13, 2011) (holding that (i) conclusory allegations that two management directors, holding a combined 15% of the company's stock, "dominated" the seven outside directors did not support an inference that the outside directors were not independent and (ii) while a "threat" by management to "abandon" the company could undermine the independence of outside directors, the mere allegation that management directors "were

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in a position” to make such a threat did not undermine the outside directors’ independence), *In re Novell, Inc. S’holder Litig.*, 2013 WL 322560 (Del. Ch. Jan. 3, 2013) (dismissing claims that a 7.1% stockholder dominated a sale of the company process and noting that the “possible initiation of a proxy contest is not sufficient to establish domination” and that proposing a course of action that the board later pursues is not “sufficient evidence of domination”), and *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, 2013 WL 396202, at \*6 (Del. Ch. Jan. 31, 2013) (finding that “conclusory allegations that management . . . influenced the Company’s disinterested directors” in order to approve a merger agreement with a financial acquiror, rather than further investigate an indication of interest from a competitor “lacked any facts buttressing that conclusion,” and accordingly granting a motion to dismiss the complaint).

- *S. Muoio & Co. LLC v. Hallmark Entm’t Invs. Co.*, 2011 WL 863007, at \*10 (Del. Ch. Mar. 9, 2011) (holding that a “mere nomination of a director by a majority stockholder . . . is insufficient to demonstrate lack of independence” and rejecting the claim that a director was beholden to a controlling stockholder because the controlling stockholder made significant contributions to a university on whose boards the director served and for whom the director raised funds and with whom the director held a three-month employment position, the salary for which he ultimately returned to the university).
- *Beam v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) (holding that allegations that the controlling stockholder and other directors “moved in the same social circles, attended the same weddings, developed business relationships before joining the board, and described each other as ‘friends’” were not sufficient to rebut the presumption of independence).
- *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917 (Del. Ch. 2003) (finding that members of a special litigation committee were not independent from directors who were accused of insider trading because each committee member worked as a Stanford professor, and multiple defendant directors had significant financial (e.g., charitable donations) and other (e.g., serving on a university committee with a member of the special litigation committee) ties to Stanford).
- *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997) (holding members of special committee had significant prior business relationship with majority stockholder/acquiror such that the committee lacked independence triggering entire fairness).
- *Heineman v. Datapoint Corp.*, 611 A.2d 950 (Del. 1992) (holding that allegations of “extensive interlocking business relationships” did not sufficiently demonstrate the necessary “nexus” between the conflict of interest and

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resulting personal benefit necessary to establish directors' lack of independence).

- *Citron v. Fairchild Camera & Instr. Corp.*, 569 A.2d 53 (Del. 1989) (holding mere fact that a controlling stockholder elects a director does not render that director non-independent).
  - *See also United Food & Commercial Workers Union v. Zuckerberg*, 2020 WL 6266162, at \*23 (Del. Ch. Oct. 26, 2020) (explaining that a director's belief that it is "generally optimal for companies to be controlled by their founders" is not by itself a disqualifying interest and that "[a]s long as an otherwise independent and disinterested director has a rational basis for her belief, that director is entitled (indeed obligated) to make decisions in good faith based on what she subjectively believes will maximize the long-term value of the corporation for the ultimate benefit of its residual claimants").
- f. Allocation Issues. Where there is more than one class/series of stock, directors may have conflicts with stockholders because of their affiliation with one or more classes or series of stock. *See also* Part VII(D)(1) regarding fiduciary issues concerning preferred stock.
- *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232 (Del. Ch. Mar. 6, 2012) (finding a reasonable probability of success on the merits that founder and controlling stockholder with high-vote stock and target board breached their fiduciary duties by negotiating and approving a merger in which the founder received a premium for his high-vote stock at the expense of the low-vote stock largely held by the public when a charter provision required that the two classes receive the same consideration, but denying a preliminary injunction based on the balancing of the equities).
  - *In re Hanover Direct, Inc. S'holders Litig.*, 2010 WL 3959399, at \*1-3 (Del. Ch. Sept. 24, 2010) (finding, in a post-trial decision, that a going-private merger by a controlling stockholder was entirely fair where the public common stockholders were cashed out at \$.25 per share (even though the company's equity had no value), where the company was "heading toward insolvency," and where the company's "debt commitments combined with its contractual obligations to its preferred stockholders together exceeded the value of its common stock"; noting that company "had long been struggling financially" and that the board, although it did not use a special committee, had conducted a fair process).
  - *Morgan v. Cash*, 2010 WL 2803746 (Del. Ch. July 16, 2010) (dismissing aiding and abetting claim against buyer who negotiated with preferred stockholder-affiliated board to acquire target company for a 10% "hair-cut" to the preferred's liquidation preference and nothing for the common stockholders; stating "[i]t is not a status crime

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under Delaware law to buy an entity for a price that does not result in a payment to the selling entity's common stockholders").

- *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 446 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a \$25 per share liquidation preference), denying motion that directors, who owned common stock, breached their fiduciary duties to the preferred stockholders and finding “no basis to find that the directors sought to advantage the common stockholders at the unfair expense of the preferred stockholders,” and recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).
- *In re Trados Inc. S’holder Litig.*, 2009 WL 2225958 (Del. Ch. July 24, 2009) (finding, on a motion to dismiss, that the plaintiff had adequately rebutted the presumption of the business judgment rule by alleging that a majority of the members of a corporation’s board, who had ties to holders of a large percentage of the company’s preferred stock, were interested in a merger where the preferred stockholders received cash and the common stockholders received nothing in the merger); see also *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 42 n.16 (Del. Ch. 2013) (noting in the post-trial opinion that, “[s]ome scholars . . . have argued that in lieu of a common stock valuation maximand, directors should have a duty to maximize enterprise value, defined in the common-preferred context as the aggregate value of the returns to the common stock plus the preferred stock, taking into account the preferred stock’s contractual rights. . . . Delaware case law as I read it does not support the enterprise value theory. As long as a board complies with its legal obligations, the standard of fiduciary conduct calls for the board to maximize the value of the corporation for the benefit of the common stock”).
- *Carsanaro v. Bloodhound Techs., Inc.*, 65 A.3d 618, 660 n.16 (Del. Ch. 2013) (finding that, where directors employed by various venture capital firms owning different classes of preferred stock had approved several dilutive issuances of preferred stock, followed by a merger that delivered most of the consideration to preferred stockholders and to directors and officers in the form of payments under a management incentive plan, “the complaint has pled facts calling for entire fairness review because of director interest, not because of *Lynch*,” i.e., not because of the existence of a controlling stockholder or control group—see Part G.5, below).

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- *Encite LLC v. Soni*, 2011 WL 5920896 (Del. Ch. Nov. 28, 2011) (denying motion for summary judgment on plaintiff's claims that preferred stockholder affiliated directors had breached their duty of loyalty in running an unfair bidding process to sell the assets of a financially-troubled company and preferring a bid from a consortium including the preferred stockholder; summary judgment was also denied on aiding and abetting claims against the preferred stockholder).
- *Oliver v. Boston Univ.*, 2006 WL 1064169 (Del. Ch. Apr. 14, 2006). In *Oliver*, Boston University ("BU"), the company's controlling stockholder, held common stock as well as several series of preferred stock. After approving a merger, the company's board (the majority of whom were interested due to affiliations with BU), company insiders, and other stakeholders negotiated primarily against each other as to how the merger proceeds should be allocated, with no one representing the minority common stockholders. The Court held that the allocation of merger proceeds between various stakeholders was unfair. The Court found that no steps were taken to ensure fairness to the minority common stockholders, stating "although representatives of all of the priority stakeholders were involved to some degree in the negotiations, no representative negotiated on behalf of the minority common stockholders." *Id* at \*27.
- *In re Tele-Communications, Inc. S'holders Litig.*, 2005 WL 3642727, at \*7 (Del. Ch. Dec. 21, 2005) (stating that "because a clear and significant benefit of nearly \$300 million accrued" to board members because of their holdings of Series B common stock "at the expense of another class of shareholders to whom was owed a fiduciary duty," the entire fairness test applies).
- *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (plaintiffs did not challenge and the Court did not address the preferred stockholder's receipt of its liquidation preference in light of the common stockholders' payment of \$4.60 per share).
- *Orman v. Cullman*, 794 A.2d 5, 25 (Del. Ch. 2002) (four related directors, who were treated together as a controlling stockholder group, were interested because they "received benefits from the transaction that were not shared" with the other stockholders, including the initial ability to enter into a private sale with the acquiror and the right to put their remaining interest to the company three years after the merger). *But see Angelo, Gordon & Co., L.P. v. Allied Riser Commc'ns Corp.*, 805 A.2d 221 (Del. Ch. 2002) (applying business judgment rule even though board owed a duty to creditors and the board owned common stock, not debt).
- *In re FLS Hldgs., Inc. S'holders Litig.*, 1993 WL 104562 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or

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directors who were affiliates of the company's controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock).

- *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986) (applying entire fairness test to allocation of merger consideration where one element of consideration was apportioned wholly to the shares of the controlling stockholder).
- *Lewis v. Great W. United Corp.*, 1978 WL 2490 (Del. Ch. Mar. 28, 1978) (applying entire fairness test where a corporation that was controlled by a 65% common stockholder structured a merger treating preferred less favorably than common).

g. Equity-Based Compensation/Acceleration.

- *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at \*8 (Del. Ch. Nov. 30, 2007) (holding that the accelerated vesting of director-owned options, which resulted from a merger, does not create a conflict of interest "because the interests of the shareholders and directors are aligned in obtaining the highest price" and noting that the acceleration of unvested options could be viewed as an inducement to effectuate a merger but was not an inducement in this case because the directors' shares and vested options were significant enough that any benefit resulting from the acceleration of unvested options was minor in comparison); see also *In re BioClinica, Inc.*, 2013 WL 673736, at \*1 n.12 (Del. Ch. Feb. 25, 2013) (finding that the acceleration of the vesting of directors' stock options is "insufficient grounds for expedition" of litigation).
- *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS, at 74 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT) ("It's actually seen as an aligning interest, and the vesting of options is routine in merger agreements. [I]t's designed to . . . grease the skids for change-of-control transactions.").
- *In re K-Sea Transp. P'rs L.P. Unitholders Litig.*, 2011 WL 2520209 (Del. Ch. June 10, 2011) (distinguishing *Globis Partners* and holding that accelerated vesting of directors' restricted phantom units in limited partnership, resulting from a merger, rendered otherwise independent directors interested where restricted phantom units approximately equaled directors' unrestricted holdings and restricted units were granted immediately prior to beginning of discussions with acquiror).
- *Chen v. Howard-Anderson*, 87 A.3d 648, 670 (Del. Ch. 2014) (finding director and CEO "interested in the Merger" because "[h]e personally received more than \$840,500 in benefits from the Merger that were not shared with the stockholders generally, including \$272,803 in cash severance and other benefits from a Change of Control Severance Agreement" the terms of which were amended

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by the board “the same day the Merger Agreement was executed” so as “to increase the amounts due” to the CEO).

- *In re Crimson Exploration Inc., S’holder Litig.*, 2014 WL 5449419, \*18-19 (Del. Ch. Oct. 24, 2014) (finding an agreement from Contango (the acquiring company) to pay off debt owed to Oaktree Capital Management (an investor and alleged controlling (33.7%) stockholder of Crimson, the selling company) and Oaktree’s ability to negotiate a registration rights agreement among Crimson, Contango and itself, did not trigger entire fairness under the category of “unique benefit” of controller-conflict cases because (i) the prepayment was not negotiated until after the signing of the merger agreement, (ii) the 1% prepayment fee was not sufficient enough to cause Oaktree to take a lower price for its shares, and (iii) the registration rights agreement, standing alone, was not of such significance as to require the application of the entire fairness standard).
- *JJS, Ltd. v. Steelpoint CP Hldgs., LLC*, 2019 WL 5092896, at \*13 (Del. Ch. Oct. 11, 2019) (finding it was reasonably conceivable that a CEO who received a severance payment equivalent to two years of his salary and outside the company’s historical norm was interested in the transaction).

## h. Indemnification Rights.

- *La. Mun. Police Emps.’ Ret. Sys. v. Crawford*, 918 A.2d 1172, 1180 n.8 (Del. Ch. 2007) (suggesting, in the context of potential claims against directors for backdating executive stock options, contractual indemnification rights contained in a merger agreement indemnifying directors to the fullest extent permitted by law may be broader than statutory-based indemnification rights (including those in a corporation’s charter or bylaws) and thus constitute conflicted interests).
- *Globis P’rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at \*8 (Del. Ch. Nov. 30, 2007) (holding that receiving indemnification benefits pursuant to a merger agreement does not create a conflict of interest for directors because there “is no basis for inferring the receipt of indemnification benefits is material or likely to taint the [directors’] judgment”).
- *In re Massey Energy Co.*, 2011 WL 2176479 (Del. Ch. May 31, 2011) (taking comfort in fact that any indemnification obligations provided by acquiror were limited to the extent the target corporation could have provided indemnification under Delaware law).
- *In re Cyan, Inc. S’holders Litig.*, 2017 WL 1956955 (Del. Ch. May 11, 2017) (rejecting allegations that a board was motivated by self-interest in approving a merger due to a desire to better their indemnification rights in light of pending litigation by partnering the company with a

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buyer who had “deeper pockets,” where the Court found (i) that the company was obligated to indemnify the board members; (ii) the board members were also protected by D&O insurance; (iii) the company had cash and cash equivalents of \$53.87 million (and the total damages the directors faced was approximately \$25 million) as of March 31, 2015, and its operational results were improving before the merger; (iv) there were other deep pockets from which plaintiffs in the pending litigation could obtain recovery apart from the company; (v) plaintiffs had not identified any documentary evidence or pled any specific facts from the discovery they obtained suggesting that the exposure from the pending litigation motivated the board’s approval of the merger; and (vi) plaintiffs had not pled any nonconclusory facts to support the assertion that buyer was a deeper pocket than the company”).

- *See also In re AmTrust Fin. Servs., Inc. S’holder Litig.*, 2020 WL 914563 (Del. Ch. Feb. 26, 2020) (finding that the members of a special committee formed to negotiate a management buyout had a material self-interest in the transaction because the buyout would effectively terminate viable claims from pending shareholder litigation for which the directors faced significant personal liability and therefore declining to dismiss claims under *MFW*).

## i. Management Continuity.

- *In re SSE&C Techs., Inc. S’holders Litig.*, 911 A.2d 816, 820 (Del. Ch. 2006) (a CEO who used corporate resources “to identify a transaction in which he could both realize a substantial cash payout for some of his shares and use his remaining shares and options to fund a sizeable investment in the resulting entity” was described as having “an array of conflicting interests that made him an unreliable negotiator”).
- *In re Lear Corp. S’holders Litig.*, 926 A.2d 94, 118 (Del. Ch. 2007) (stating that a merger negotiation conducted by a CEO who would continue to manage the company after consummation of the merger was “far from ideal and unnecessarily raise[d] concerns about the integrity and skill of those trying to represent Lear’s public investors”).
- *Wayne Cty. Emps.’ Ret. Sys. v. Corti*, 2009 WL 2219260 (Del. Ch. July 24, 2009) (complaint failed to state claim that management directors breached their fiduciary duty of loyalty to target’s stockholders in negotiating a business combination even though the directors would continue as managers of the combined entity following a business combination where: (1) there were no allegations that the management directors would lose their jobs if they did not pursue that particular transaction, (2) the buyer assumed from the start of negotiations that the management directors would retain positions in the combined entity, and (3) the complaint did not allege that there was a competing bidder that would be hostile to existing management).

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- *In re Alloy, Inc. S'holder Litig.*, 2011 WL 4863716 (Del. Ch. Oct. 13, 2011) (holding, on a motion to dismiss, that plaintiffs failed to state a claim that special committee acted in bad faith in negotiating a merger in which management directors would (i) retain management roles following the transaction, (ii) receive an equity stake in the new parent company in the merger and (iii) receive an initial profits interest in the parent, where the acquiror insisted on these terms as a condition to the merger).
- *Kahn v. Stern*, 2017 WL 3701611 (Del. Ch. Aug. 28, 2017) (holding, on a motion to dismiss, that the plaintiff failed to state a claim that a majority of the directors acted in bad faith in approving a merger in which management directors received “side deals” (which included a roll-over interest, continued employment, and amendments to an existing employment agreement)), *aff'd*, 183 A.3d 715 (Del. 2018).
- *In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012) (finding that plaintiffs alleged facts sufficient to suggest that target’s CEO was interested in merger negotiations when he was secretly considering making a management bid to acquire a portion of target’s business after the merger agreement was signed).
- *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (finding, in approving a settlement, that claims challenging the CEO-led sale process were weak where the board also held 16 meetings to discuss the sale and claims that CEO had “sabotaged” an earlier negotiation process when the negotiations turned to her employment agreement—which was a condition of buyer’s offer—were also unsupported, but noting that an allegation that a CEO whose job was in jeopardy supported a deal with a buyer that would retain the CEO might support a claim for breach of the duty of loyalty), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012).
- *In re Answers Corp. S'holders Litig.*, 2012 WL 1253072, at \*7 (Del. Ch. Apr. 11, 2012) (“Although this Court has questioned the theory that the managers of a target company should be considered ‘interested’ in a change of control transaction simply because those managers will, post-transaction, manage the acquiring company, here, the Complaint alleges that [the CEO] would lose his job unless he completed a change of control transaction. Moreover, the Complaint alleges that [the CEO’s] desire to keep his job is what caused him to seek a sale of [the company]. Those allegations are sufficient to suggest that [the CEO] was interested in the Merger.”).
- *Compare Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS, at 6 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (under a *Revlon* analysis, criticizing the founder and CEO for his conflicts in leading the sale process for the company in negotiations with a financial single bidder, noting that “founders . . . care about who their business goes

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to” and that the founder and CEO had “an interest in continuing” with the new company), with *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 600 (Del. Ch. 2010) (also under a *Revlon* analysis, finding that the CEO was not conflicted in negotiating a deal with a strategic buyer where he “displayed a willingness to talk to anyone who made a serious overture” and “ha[d] no desire to work for an industry competitor,” and where he and the directors “owned material amounts of stock” and thus were concerned with the value of the company); see also *Miramar Firefighters Pension Fund v. AboveNet*, 2013 WL 4033905 (Del. Ch. July 31, 2013) (holding that a claim that the CEO allegedly excluded strategic buyers from the bidding process to roll over his equity into the post-merger corporation and retain his position as CEO was unfounded where: (1) a strategic acquiror eventually purchased the corporation and the CEO did not retain his position; (2) the board’s differential treatment of strategic buyers and private equity buyers relating to financing was reasonable under the circumstances and not in bad faith; and (3) plaintiff’s allegations that the board colluded with its financial advisors to lower its financial projections were factually unsupported).

- *In re Xura, Inc., S’holder Litig.*, 2018 WL 6498677, at \*13 (Del. Ch. Dec. 10, 2018) (declining to dismiss claim alleging that a CEO breached his fiduciary duties by steering his company into an unfair acquisition by a private equity firm that promised to retain him post-closing; finding that the CEO had divergent interests from the company’s stockholders and noting that “[c]ontinued employment in itself is a material interest”).
- *City of Warren Gen. Emps.’ Ret. Sys. v. Roche*, 2020 WL 7023896 (Del. Ch. Nov. 30, 2020) (distinguishing *Xura* and dismissing a breach of fiduciary duty claim against officers alleging that the promise of post-closing employment combined with the threat posed by an activist investor had motivated the officers to manipulate directors into a buyout, where the acquirors had made no employment offers to the officers nor held any discussions with them on the topic, and where the activist investor had taken no threatening action and sold all its stock before the acquirors expressed interest).

## 5. Transactions Involving Controlling Stockholders.

a. Existence of a Controlling Stockholder. Generally, a “controlling stockholders” may exist if a stockholder is a majority holder or if the less-than-majority holder (or group of stockholders) “exercises control over the business affairs of the corporation.”

- Cases Finding Existence of Controller:
  - *Reith v. Lichtenstein*, 2019 WL 2714065 (Del. Ch. Jun. 28, 2019) ( finding it reasonably conceivable that a 35%

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stockholder was a controller given its influence over the board and control over management through an affiliate's management services agreement).

- *Voigt v. Metcalf*, 2020 WL 614999 (Del. Ch. Feb. 10, 2020) (finding it reasonably conceivable that a 34.8% stockholder was a controller because of its relationship with a majority of directors, the size of its equity stake, its contractual rights and relationship with key managers and advisors, despite contractual obligations mitigating the controller's influence).
- *FrontFour Capital Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019) (finding that two brothers, who together owned less than 15% of the company, acted as a controlling stockholder with respect to the challenged transaction where half of the members of the special committee were beholden to the brothers and the committee "sat supine in negotiations," allowing the brothers to "dominate the process").
- *In re Tesla Motors, Inc.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018) (finding that it was reasonably conceivable that the company's co-founder, CEO and chairman of the board, who held 22.1% of the stock of the company, was a controlling stockholder where (i) he demonstrated a willingness to facilitate the ouster of senior management when displeased, (ii) he was indisputably the "face of the company," (iii) the company acknowledged in SEC filings that he exercised control over the company, (iv) he had strong personal and business connections with the other directors, making a majority of them either interested in the transaction or not independent from him and (v) the company's bylaws contained several supermajority voting provisions); *see also Tesla*, 2020 WL 553902, at \*5 (Del. Ch. Feb. 4, 2020) (denying defendants' motion for summary judgment, reasoning that, because it is "the 'ability' to control, rather than the actual exercise of control" that threatens the validity of shareholder ratification of conflicted controller transactions, the concept of the "inherent coercion" of controlling stockholders extends past the pleading stage, and plaintiffs need not prove *actual* coercion after discovery to merit entire fairness review of a conflicted minority blockholder transaction at trial).
- *In re Zhongpin Inc. S'holders Litig.*, 2014 WL 6735457 (Del. Ch. Nov. 26, 2014) (finding sufficient allegations of control by CEO and chairman of the board who held a 17.3% stake in company in part based on company's 10-K that called CEO "our controlling shareholder"), *rev'd on other grounds sub nom. In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173 (Del. 2015).
- *In re Primedia Inc. Deriv. Litig.*, 910 A.2d 248 (Del. Ch. 2006) (finding sufficient allegations of control by

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40+% stockholder based on statements in SEC filings, number of associates of stockholder's on the allegedly controlled company's board and alleged course of dealing).

- *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531 (Del. Ch. 2003) (holding that 35% stockholder and founder of company was controlling stockholder).
- *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902 (Del. Ch. 1999) (finding sufficient allegations that controller existed where Complaint alleged that: (i) Transworld owned 49% of HMI's voting stock; (ii) Transworld held an option to purchase another 2% of HMI's outstanding voting stock; (iii) Transworld owned substantially all of HMI's debt; and (iv) in response to Transworld's "threat" that it would not consummate the Merger unless the Merger price was reduced, HMI's board agreed to reduce the Merger price from \$1.50 to \$0.30, and that in response to Transworld's representation to HMI that HMI's negotiations with Counsel Corp. would place the Merger at risk, HMI's board refrained from negotiating with Counsel Corp).
- *Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110 (Del. 1994) (43% holder deemed a controller because of its influence over the board of directors).
- Cases Not Finding Existence of Controller:
  - *In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326 (Del. Ch. May 25, 2021) (finding plaintiffs failed to adequately plead that a 35% stockholder dominated a special committee process and dismissing claims under *Corwin*).
  - *In re Rouse Props., Inc. Fiduciary Litig.*, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018) (granting motion to dismiss and finding that a 33.5% stockholder who stood on both sides of a transaction, but did not have any contractual rights to replace the board and did not overpower negotiations, which were handled by the special committee, was not a controlling stockholder).
  - *In re Morgans Hotel Grp. Co. S'holder Litig.*, 2017 WL 4810996 (Del. Ch. Oct. 24, 2017) (ORDER) (granting motion to dismiss and finding that preferred stockholders possessing validly negotiated contractual blocking rights over certain transactional alternatives did not exercise effective control for purposes of the decision to enter into a merger, and thus did not owe plaintiffs fiduciary duties).
  - *Thermopylae Capital P'rs, L.P. v. Simbol, Inc.*, 2016 WL 368170, at \*13 (Del. Ch. Jan. 29, 2016) ("The Plaintiffs here have alleged the existence of a contractual right, which permitted MDV to restrict corporate action, thus giving it leverage over the Board. Holding, even exercising, this right does not make MDV a controller owing fiduciary duties to the Plaintiffs.")

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- *Sciabacucchi v. Liberty Broadband Corp.*, 2017 WL 2352152 (Del. Ch. May 31, 2017) (notwithstanding public filings regarding control status for purposes of the Investment Company Act, stockholder not a controller when, among other things, it was contractually bound not to acquire more than 35% of relevant company stock, and could not designate more than 4 out of 10 directors).
- *In re Sanchez Deriv. Litig.*, 2014 WL 6673895 (Del. Ch. Nov. 25, 2014) (finding that directors who collectively owned 21.5% of the stock of a company that was a shell company established by those directors solely to obtain access to public equity markets and that had no employees were not controlling stockholders because such allegations did not support a reasonable inference that the two directors exercised “actual control” over the company’s board), *rev’d on other grounds sub nom. Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015).
- *In re Crimson Exploration S’holder Litig.*, 2014 WL 5449419 (Del. Ch. Oct. 24, 2014) (finding a 33.7% stockholder and large creditor of a corporation, which allegedly designated a majority of the board as well as senior management of that corporation, and which had three employees sitting on that corporation’s seven-member board, was not a controlling stockholder and noting that “the focus in a control analysis is on domination of the board with regard to the transaction at issue”).
- *In re KKR Fin. Hldgs. LLC S’holder Litig.*, 101 A.3d 980 (Del. Ch. 2014) (although all of KFN’s officers were employees of KKR, KFN was “completely reliant” on KKR’s affiliate for its everyday management under a management agreement that required a significant fee to terminate and KFN’s primary assets were debt securities used to finance KKR’s leveraged buyouts, KKR, which owned less than 1% of KFN’s equity, was found not to be a controller), *aff’d sub nom. Corwin v. KKR Fin. Hldgs., LLC*, 125 A.3d 304 (Del. 2015).
- *In re Morton’s Rest. Grp., Inc. S’holder Litig.*, 74 A.3d 656 (Del. Ch. 2013) (less than 30% stockholder, who had two employees on eight member board of directors, not a controller).
- *In re Dell Inc. S’holder Litig.*, C.A. No. 8329-CS, at 36-37 (Del. Ch. June 19, 2013) (TRANSCRIPT) (refusing to find that the CEO and 16% stockholder of the target in a proposed management-led buy-out was a controlling stockholder even under *Cysive*—the “edgiest” of the cases in terms of who can be a controlling shareholder, where 16% is far below the 35% block at issue in *Cysive*, and the stockholder’s voting power had been “neutralized”: (1) his vote did not count in support of

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his own deal and (2) he was required to vote in favor of a superior proposal).

- *Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co.*, 2006 WL 2521426 (Del. Ch. Aug. 25 2006) (44% stockholder who had contractual veto rights over dividends not a controlling stockholder).
- *In re W. Nat. Corp. S'holder Litig.*, 2000 WL 710192 (Del. Ch. May 22, 2000) (finding 46% stockholder who had ability to purchase additional 20% not to be a controller in part because a standstill agreement limited to 2 the number of directors the stockholder could nominate).
- *In re Sea-Land Corp. S'holders Litig.*, 1987 WL 11283 (Del. Ch. May 22, 1987) (dismissing claim that 39.5% stockholder was a controlling stockholder).
- **Cases Dealing With A Control Group:**
  - *Patel v. Duncan*, 2021 WL 4482157 (Del. Ch. Oct. 4, 2021) (finding plaintiffs failed to adequately plead that a 27% stockholder and a 35% stockholder acted as a control group where there was no indication that the stockholders worked together to structure and negotiate the transaction).
  - *Garfield v. BlackRock Mortgage Ventures, LLC*, 2019 WL 7168004 (Del. Ch. Dec. 20, 2019) (finding it reasonably conceivable that two stockholders constituted a control group because, in addition to controlling 46% of the vote and having aligned interests in the transaction, the plaintiff pled historical and transaction-specific ties (similar to those pled in *In re Hansen Med., Inc. S'holders Litig.*)).
  - *Sheldon v. Pinto Tech. Ventures, L.P.*, 2019 WL 4892348 (Del. Oct. 4, 2019), *aff'g* 2019 WL 336985 (Del. Ch. Jan. 25, 2019) (affirming dismissal of claims against former directors and stockholder venture capital firms related to a dilutive financing; finding that, although the venture capital firms collectively controlled 60% of the vote, the plaintiff failed to adequately allege that the firms were connected in a legally significant way).
  - *In re Hansen Med., Inc. S'holders Litig.*, 2018 WL 3025525 (Del. Ch. June 18, 2018) (holding that the plaintiff adequately pled the existence of a “control group” where two minority stockholders who collectively held a controlling interest in the company (i) had a twenty-one year history of coordinating their investment strategy in at least seven different companies, (ii) declared themselves to the SEC as a “group” in connection with their investment in one such company, (iii) both entered into proxies and voting agreements in connection with the merger, and (iv) were given a unique opportunity to roll over their investments into the acquiring company).

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- *van der Fluit v. Yates*, 2017 WL 5953514, at \*6 (Del. Ch. Nov. 30, 2017) (holding that the plaintiff failed to plead the existence of a “control group,” because the plaintiff alleged no facts about the personal or working relationship between two members of the alleged group who held almost 30% of the outstanding stock; and noting that an investor rights agreement among all members of the alleged control group contained no voting, decision-making, or other agreements with respect to the challenged transactions).
- *Buttonwood Tree Value P’rs, L.P. v. R.L. Polk & Co., Inc.*, 2017 WL 3172722 (Del. Ch. July 24, 2017) (holding that plaintiff had adequately pled the existence of a control group for purposes of a motion to dismiss where (i) members of a family owned over 90% of the corporation’s stock, (ii) 3 of the 7 directors were members of the family and (iii) the CEO and chairman himself referred to the family as a controlling block).
- *In re Nine Sys. Corp. S’holders Litig.*, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014) (although control group did not initially exist, the investment firms subsequently formed a control group when “their interests shifted to become more than parallel” through cooperation to control the company, based on the following evidence: (i) a memo among the investors suggesting a program of controlled corporate spending and further investment would give the three investors effective control over the company, (ii) the group’s knowing exclusion of the director who represented a group of minority holders from discussions regarding the recapitalization, and (iii) a right to invest that was offered to an investor in the control group and not presented to other stockholders or disclosed to all members of the board).
- *Frank v. Elgamal*, 2014 WL 957550 (Del. Ch. Mar. 10, 2014) (finding that stockholders holding 68% of common stock were not a control group during initial stages of sale process because those stockholders didn’t put company up for sale, dictate terms of market canvass, or negotiate different merger consideration in two of three offers, and the court stated it was immaterial whether the group first proposed rolling into the surviving company, but the court found a reasonable (if not the best) inference that a control group was formed by letter agreements and selected the transaction most favorable to itself although a member of rollover group attended only one of 14 special committee meetings and the special committee negotiated a fair total offer value for the company; because the stockholders formed a control group later in the sale process, and there was no condition to obtain majority-of-the-minority approval, entire fairness review applied only to that period for which the court examined whether the merger consideration was fairly allocated between the control group and minority stockholders).

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- *In re PNB Hldg. Co. S'holders Litig.*, 2006 WL 2403999, at \*10 (Del. Ch. Aug. 18, 2006) (directors and officers as a group together owned 33.5% of PNB's outstanding shares, but found not to be a control group as the record did "not support the proposition that these various director-stockholders and their family members were involved in a blood pact to act together").
- b. Default – Entire Fairness Applies To Transactions With Controlling Stockholder On Both Sides.
- *Kahn v. Lynch Comm'n Sys., Inc.*, 638 A.2d 1110 (Del. 1994) ("It is a now well-established principle of Delaware corporate law that in an interested merger, the controlling or dominating shareholder proponent of the transaction bears the burden of proving its entire fairness.").
  - If a board of directors allows a controlling stockholder to dictate the terms of a transaction to the detriment of minority stockholders, plaintiff may state a claim for the breach of the duty of loyalty. *La. Mun. Police Emps.' Ret. Sys. v. Fertitta*, 2009 WL 2263406 (Del. Ch. July 28, 2009). In *Fertitta*, a company entered into a going-private merger with an entity controlled by its Chairman, CEO and 39% stockholder. The Court found that minority stockholders had stated a claim for breach of the duty of loyalty where the directors: (1) allowed the controlling stockholder to negotiate on behalf of the company the refinancing of its debt, (2) allowed the controlling stockholder to engage in a creeping takeover instead of adopting a poison pill, and (3) terminated the merger agreement instead of forcing the controlling stockholder to close or pay a termination fee.
  - *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761 (Del. Ch. 2011) (applying entire fairness standard to review merger in which NYSE-listed company (Southern Peru) acquired its majority stockholder's (Grupo Mexico) 99% stake in a mining corporation (Minera); holding, post trial, that Grupo Mexico and the Grupo Mexico affiliated directors on Southern Peru's board breached their duty of loyalty and awarding \$1.26 billion (plus interest) in damage), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).
  - *In re Cornerstone Therapeutics Inc. S'holder Litig.*, 115 A.3d 1173 (Del. 2015) (independent directors (including members of a special committee negotiating a transaction with a controlling stockholder) who are protected by a Section 102(b)(7) exculpatory charter provision will be entitled to dismissal from a case challenging a controlling stockholder transaction unless the stockholder-plaintiff asserts well-pled, non-exculpated claims for breach of fiduciary duty against the independent directors).
  - *In re Ezcorp Consulting Agreement Deriv. Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016) (observing that Delaware

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courts apply the entire fairness standard not just to controlling stockholder cash-out mergers, but also to any transaction with a controlling stockholder “in which a controller extracts a non-ratable benefit”).

- *Buttonwood Tree Value P’rs, L.P. v. R.L. Polk & Co., Inc.*, 2017 WL 3172722 (Del. Ch. Jul. 24, 2017) (holding that entire fairness applies to claims against members of a controlling family, where the plaintiff alleged that the family caused the corporation to engage in a self-tender offer, and then engage in a merger two years later for three-times the consideration paid in the self-tender).
- *In re Hansen Med., Inc. S’holders Litig.*, 2018 WL 3025525 (Del. Ch. June 18, 2018) (holding that entire fairness applies to claims against two minority stockholders, who the court found to be a “control group,” where they were given the opportunity to roll over their shares, a benefit unavailable to other stockholders).
- *Garfield v. BlackRock Mortgage Ventures, LLC*, 2019 WL 7168004 (Del. Ch. Dec. 20, 2019) (holding that entire fairness applied to a reorganization resulting in unique tax benefits for a control group; finding that the plaintiff adequately pled the reorganization was the result of an unfair process where the control group “exercised control over the formulation” of the reorganization and the special committee’s authority was limited to making a recommendation).
- *In re Viacom Inc. S’holders Litig.*, 2020 WL 7711128, at \*11-18 (Del. Ch. Dec. 29, 2020, revised Dec. 30, 2020) (holding that entire fairness applied to a merger between two corporations controlled by the same stockholder because it was reasonably conceivable that the controller obtained a non-ratable benefit to the detriment of the minority stockholders, as the plaintiffs pled that (i) the controller historically faced obstacles when seeking to exert control over the boards of both corporations, (ii) the controller was concerned about her ability to control both corporations if they remained separate entities and (iii) the consolidation of both corporations and the installation of loyal management and directors at the combined post-merger entity ensured that the controller’s control position would expand and continue; discussing whether the “mere presence” of a controlling stockholder on both sides of a transaction is sufficient to trigger entire fairness review or whether the controlling stockholder must also receive a benefit “to the exclusion and at the expense” of the minority stockholders).
- *In re Tilray, Inc. Reorganization Litig.*, 2021 WL 2199123 (Del. Ch. June 1, 2021) (holding that entire fairness applied to a reorganization resulting in unique tax benefits for a control group; finding it reasonably conceivable that the directors failed to exert leverage over the control group to the detriment of minority stockholders).

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- *Berteau v. Glazek*, 2021 WL 2711678 (Del. Ch. June 30, 2021) (holding that entire fairness applied to an acquisition; finding it reasonably inferable that the controlling stockholder interfered with the special committee's process, orchestrating board and committee meetings on a single day, after which the committee abandoned a majority-of-the-minority vote condition and ceased negotiations).
- c. Short-form Merger: Appraisal Is The Only Remedy.
  - *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001) (holding that (a) absent fraud or illegality appraisal is the exclusive remedy available to stockholders in a § 253 short form merger, entire fairness doctrine does not apply and (b) no need for subsidiary to use a special committee since there is no opportunity to "deal" with majority holder).
  - d. Cash-outs by controlling stockholders effected in the form of a reverse stock split, or recapitalizations negotiated with a controlling stockholder, without sufficient procedural protections, will be subject to the entire fairness standard.
    - *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) (holding that "[w]hen a controlling stockholder uses a reverse split to freeze out minority stockholders without any procedural protections, the transaction will be reviewed for entire fairness with the burden of proof on the defendant fiduciaries," stating that a "reverse split under those circumstances is the 'functional equivalent' of a cash-out merger," and indicating that the "unified standard" approach of *Cox Communications*, as discussed above and below, should apply to such a transaction).
    - *Zutrau v. Jansing*, 2014 WL 3772859, at \*35 (Del. Ch. July 31, 2014) ("As recently clarified by this Court in *Reis v. Hazelett Strip-Casting Corp.*, the fair price standard of entire fairness and the fair value standard applicable to compensation for fractional interests under Section 155(2) of the DGCL call for equivalent economic inquiries. For both, the appropriate test, as in the appraisal context, is whether the "minority stockholder shall receive the substantial equivalent in value of what he had before." (footnotes omitted) (quoting *Reis*, 28 A.3d at 462)).
    - *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007 (Del. Ch. Mar. 9, 2011) (applying entire fairness with a burden shift to a recapitalization negotiated with a controlling stockholder, where a special committee, but not a majority of the minority condition, was used).
- e. Issues raised by sale of controlled company to a third party.
  - *Sinclair Oil Corp. v. Levien*, 280 A.2d 717 (Del. 1971) (holding that since dividends had been distributed to the minority stockholders and parent alike, adoption of the dividend policy was not self-dealing).

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- *McMullin v. Beran*, 765 A.2d 910 (Del. 2000) (holding that the minority stockholder stated a claim for breach of the duty of loyalty by alleging that the board was not independent from the controlling stockholder, and in particular, that the conflicted directors on the board did not abstain from approving the transaction that the controlling stockholder had negotiated).
- *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (no finding of breach of fiduciary duty in a sale of a controlled corporation because the plaintiff did not allege sufficient facts to support a claim that (a) subsidiary's board or special committee was dominated and controlled by parent, (b) board or special committee lacked independence necessary to objectively consider the transaction, (c) special committee and board's interests were not aligned with the stockholders, (d) parent forced a quick sale because of its need for cash, (e) parent received different consideration, (f) parent received special benefits, or (g) "the merger was anything other than an arms-length transaction with an unaffiliated third party pursuant to the goal of maximizing shareholder value by attaining the best possible price").
- *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613 (Del. Ch. Oct. 2, 2009) (third party acquisition in which former controlling stockholder received different consideration from the minority stockholder would have been subject to business judgment review if the transaction had been contingent upon a non-waivable, fully informed vote of a majority of the outstanding minority stockholders and was negotiated by an effective special committee of independent directors); *see also* 984 A.2d 124 (Del. 2009) (denying petition for interlocutory appeal); 2011 WL 227634, at \*2 n.5 (Del. Ch. Jan. 14, 2011) (finding, in a post-trial decision, that the Court was not required to apply the entire fairness standard of review because the controlling stockholder did not actually use "his controlling position to divert merger consideration disproportionately to himself" but applying it nonetheless "because defendants easily satisfy it").
- *Frank v. Elgamal*, 2012 WL 1096090 (Del. Ch. Mar. 30, 2012) (holding that third party merger in which the controlling stockholders retained a stake in the surviving entity while minority stockholders were cashed out was subject to entire fairness review—even though plaintiffs did not allege that the controlling stockholders negotiated the consideration received by the minority—but would have been subject to the business judgment rule if it had been "recommended by a disinterested and independent special committee" and conditioned on approval of the outstanding minority stockholders; rejecting defendants' argument that entire fairness should not apply where the controlling stockholders are "net sellers" because,

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on a motion to dismiss, it was reasonable to infer that a controlling stockholder might agree to “a lower sale price in order to secure a greater profit from his investment in . . . [the surviving entity]”).

- *In re Ancestry.com Inc. S’holder Litig.*, C.A. No. 7988-CS, at 82, 85 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT) (dismissing fiduciary claims against directors who approved a sale to a third party despite allegations that a 31% stockholder exercised effective control over the target’s board, causing the board to discriminate against a higher bidder and ultimately select a lower offer where: (1) 31% did not amount to a controlling stake and the stockholder did not exercise actual control over the corporation; (2) the alleged controller did not dominate the board; (3) neither the stockholder nor management had any prior relationship with the winning bidder that would create a conflict of interest; (4) plaintiffs gave no reason why the stockholder or management would discriminate against other bidders for impermissible reasons; and (5) although the stockholder had agreed to roll over its equity and retain a stake in the post-merger corporation, this did not constitute a conflict of interest, particularly where the acquiror, not the stockholder, sought the rollover— “[I]f you read the complaint fairly . . . the only inference is that the rollover was despite, rather than because of. . . [w]hich is, we’ll do this deal despite the fact we’re being asked to roll over, rather than we’re doing this deal because we’ve got an opportunity to roll over”).
- *Se. Pa. Transp. Auth. v. Volgenau*, 2013 WL 4009193, at \*28 (Del. Ch. Aug. 5, 2013) (finding, on a motion for summary judgment, that a merger between a controlled company and a third party should be reviewed under the business judgment rule where the controlling stockholder did not stand on both sides of the transaction despite receipt of an equity interest in the merged entity; further finding, under *Hammons*, that the merger would have been reviewed under the business judgment rule because the merger was approved by a disinterested and independent special committee and a non-waivable majority of the minority vote— “[a]s does *MFW*, this case serves as an example of how the proper utilization of certain procedural devices can avoid judicial review under the entire fairness standard and, perhaps in most instances, the burdens of trial”), *aff’d*, 91 A.3d 562 (Del. 2014).
- *In re Morton’s Rest. Grp. Inc. S’holders Litig.*, 2013 WL 4106655 (Del. Ch. July 23, 2013) (finding, on a motion to dismiss, that the board met its burden under *Revlon* to get the best price for the sale of the corporation; the mere presence of a 27.7% stockholder was insufficient to subject the sale to entire fairness review or to show that the board had breached its duty of loyalty by acquiescing to a fire sale, as plaintiff-minority stockholders alleged no facts showing that the “controlling stockholder” had

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a conflict of interest necessitating a quick sale or the power to dominate the board, particularly where: (1) the “controlling stockholder” had only two executives on the otherwise disinterested and independent ten-member board; (2) received the same pro rata consideration as the other stockholders; (3) had no affiliation with the acquiror; (4) supported the corporation’s desire to engage in an extended market check, which consisted of contacting over 100 potential bidders and signing up over 50 confidentiality agreements over the course of nine months; (5) the acquiror made the highest offer; and (6) over 90% of the corporation’s stockholders tendered their shares).

- *In re Martha Stewart Living Omnimedia, Inc. S’holder Litig.*, 2017 WL 3568089, at \*2 (Del. Ch. Aug. 18, 2017) (holding that the sale of a company to a third party did not constitute a conflict transaction for the controlling stockholder because, although the controlling stockholder entered into certain “side deals” with the acquiror (e.g., an employment agreement, license agreements and payment of up to \$4 million of the controller’s legal fees), plaintiff failed to allege that such arrangements were “materially different from or more lucrative” for the controlling stockholder than those already in place with the company).
  - *Cf. IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964 (Del. Ch. Dec. 11 2017) (holding that entire fairness presumptively applies to a reclassification pursuant to which the controlling stockholder nominally receives pro rata treatment, but where the reclassification was consummated to permit the controlling stockholder to retain control, a benefit unique to the controlling stockholder); *see also In re Coty Inc. S’holder Litig.*, 2020 WL 4743515 (Del. Ch. Aug. 17, 2020) (denying defendants’ motion to dismiss; finding it reasonably conceivable that unaffiliated stockholders were harmed by a partial tender offer that increased a 40% stockholder’s stake to 60%).
  - *In re Straight Path Commc’ns Inc.*, 2018 WL 3120804 (Del. Ch. June 25, 2018) (declining to dismiss claims against controlling stockholder after finding that he (i) conditioned his support for the merger on his receipt of unique benefits, (ii) threatened the members of the special committee to obtain such benefits and (iii) threatened to undercut the sale process if he did not get his way), *aff’d sub nom. IDT Corp. v. JDSI, LLC*, 206 A.3d 260 (Del. 2019).
- f. Business judgment review may be applicable for one- and two-step “going private” transactions under a “unified standard” of judicial review.
- *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (holding that the business judgment rule is the appropriate standard of review for a merger between a controlling stockholder and its subsidiary, where the

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merger is conditioned *ab initio* upon the approval of both an independent, adequately-empowered Special Committee that fulfills its duty of care, and the uncoerced, informed vote of the minority stockholders, because (1) entire fairness applies by default “as a substitute for the dual statutory protections of disinterested board and stockholder approval,” but “simultaneous deployment” of both safeguards “create a countervailing, offsetting influence of equal force,” (2) this structure “optimally protects the minority stockholders” by creating a “potent tool” from which the special committee can extract value from the controller, viz., the committee’s ability to say no and the controller’s inability to “dangle a majority-of-the-minority vote . . . late in the process as a deal-closer rather than having to make a price move,” (3) this approach “is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion,” and (4) like the “underlying purpose” of entire fairness review, it requires judicial scrutiny of price; to invoke the business judgment rule, a court must make “two price-related pretrial determinations” that a fair price was achieved by a fully functioning independent committee and that the minority approved that price by a fully-informed, uncoerced vote; six prerequisites are necessary to invoke the business judgment rule: (i) the controller conditions “procession of the transaction” on both safeguards; (ii) the committee is independent; (iii) the committee is empowered to select its own advisors and to say no definitively; (iv) the committee meets its duty of care in negotiating a fair price; (v) the minority vote is informed; and (vi) there minority vote is uncoerced); *see also In re Pilgrim’s Pride Corp. Deriv. Litig.*, 2019 WL 1224556 (Del. Ch. Mar. 15, 2019) (discussing the possibility of a deferential standard of review applicable to interested transactions approved by a duly empowered committee of “enhanced-independence” directors that can only be nominated, elected and removed by minority stockholders).

- *Swomley v. Schlecht*, C.A. No. 9355-VCL (Del. Ch. Aug. 27, 2014) (TRANSCRIPT) (granting motion to dismiss a challenge to management buyout (where management previously held 46%) of a privately held corporation due to satisfaction of six prerequisites identified in *MFW* and stating, “the whole point of encouraging this structure was to create a situation where defendants could effectively structure a transaction so that they could obtain a pleading-stage dismissal against breach of fiduciary duty claims”). This opinion was summarily affirmed by the Delaware Supreme Court. 2015 WL 7302260 (Del. Nov. 19, 2015).
- *In re Orchard Enters., Inc. S’holder Litig.*, 88 A.3d 1 (Del. Ch. 2014) (holding that the court will review a transaction

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with a controlling stockholder under business judgment “[i]f a controller agrees up front, before any negotiations begin, that the controller will not proceed with the proposed transaction without both (i) the affirmative recommendation of a sufficiently authorized board committee composed of independent and disinterested directors and (ii) the affirmative vote of a majority of the shares owned by stockholders who are not affiliated with the controller”).

- *In re Sauer-Danfoss, Inc. S’holder Litig.*, C.A. No. 8396-VCL (Del. Ch. Jan. 22, 2016) (order partially granting motions for summary judgment) (holding that entire fairness was the applicable standard of review and that *MFW* did not apply to a controller’s freeze-out of minority stockholders because the controller did not unambiguously disable himself from the transaction at the board and stockholder level by (i) failing to expressly condition the merger on approval by a special committee before proceeding and (ii) failing to include a majority-of-the-minority provision in the initial draft of the merger agreement (even though the controller in fact negotiated with the special committee and the final merger agreement included a non-waivable majority of the minority vote requirement)).
- In *In re Books-A-Million S’holders Litig.*, 2016 WL 5874974 (Del. Ch. Oct. 10, 2016), the Court of Chancery granted a motion to dismiss to a challenge to squeeze-out merger of a publicly held company, where the controlling stockholder definitively stated that it would not consider selling its shares, due to satisfaction of six prerequisites identified in *MFW*. The Court focused its analysis on the independence of the special committee and found that the special committee did not act in bad faith by accepting the controlling stockholder’s offer even though a third party submitted an indication of interest to purchase all of the outstanding shares of the company, because the special committee used the third party offer to extract more value from the controlling stockholder. The Court considered the existence of an appraisal condition as “a further check on expropriation” by the controlling stockholder because 10% of the stockholders seeking appraisal could trigger the appraisal condition, and the controlling stockholder could determine to terminate the transaction due to the risk of an appraisal action. In discussing that the special committee satisfied its duty of care in negotiating for a fair price, the Court stated that a committee can satisfy this duty by “negotiating diligently with the assistance of advisors” and that a committee that gathers additional information through a market check “goes one better.”
- In *ACP Master, Ltd. v. Sprint Corp.*, C.A. No. 8508-VCL and *ACP Master, Ltd. v. Clearwire Corp.*, C.A. No. 9042-VCL, the plaintiff brought fiduciary duty claims in connection with Sprint’s acquisition of all the remaining outstanding shares of Clearwire (Sprint was the 50.4% holder of Clearwire at the time), which was conditioned on special

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committee approval and on approval by a majority of the minority stockholders (some of whom signed voting agreements under which they agreed to support the merger and to vote against any alternative). Defendants sought to dismiss the claims under *MFW*, but the Court of Chancery denied the motion, finding that plaintiffs pled sufficient facts to make it reasonably conceivable that the majority-of-the-minority stockholder vote was “not uncoerced,” noting that certain members of the “minority” were parties to commercial agreements with one another, Sprint and Clearwire, which raised factual questions as to how their interests may have diverged from those of the other minority stockholders. The Court of Chancery later refused to grant cross motions for summary judgment, finding there was evidence that would establish that the special committee did not act effectively for multiple reasons, including that the special committee was not formed until after substantive price negotiations took place. As a result, the burden to establish fairness remained on Sprint throughout the trial. In its post-trial opinion, the Court of Chancery concluded that, although there were certain flaws in the sale process, the transaction was entirely fair. *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142 (Del. Ch. July 21, 2017; corrected Aug. 8, 2017).

- *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754, 763 (Del. 2018) (affirming dismissal of claims in connection with a squeeze-out merger by a controlling stockholder under *MFW*, despite the controller's failure to condition his proposal on *MFW* in his first expression of interest to the board; explaining that the “ab initio” requirement of *MFW* is generally satisfied “so long as the controller conditions its offer on the key [*MFW*] protections at the germination stage of the Special Committee process, when it is selecting its advisors, establishing its method of proceeding, beginning its due diligence, and has not commenced substantive economic negotiations with the controller”); see also *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019) (applying *Synutra* to find that the “ab initio” requirement was not met where the controlling stockholder “substantially negotiated the financial state of play . . . before special committee involvement and the *MFW* conditions”); *In re HomeFed Corp. S'holder Litig.*, 2020 WL 3960335 (Del. Ch. July 13, 2020) (holding that *MFW* did not cleanse a going-private transaction; finding that the “ab initio” requirement was not met where the controlling stockholder discussed exchange ratios with the corporation's largest minority stockholder before conditioning the transaction on the dual *MFW* protections).
- *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at \*27 (Del. Ch. June 11, 2020) (holding that *MFW* did not cleanse a negotiated redemption; finding

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it reasonably conceivable that there was coercion of the minority stockholders because the company signaled its intent to force an allegedly less favorable conversion if the redemption was not approved, explaining that “the court must have confidence that the vote reflects an endorsement of the merits of the transaction, not just a preference for a marginally better alternative over an already bad situation”; finding that it was reasonably conceivable that the company “failed to respect the twin-*MFW* conditions” when it bypassed the committee and negotiated directly with a group of significant stockholders).

- *Franchi v. Firestone*, 2021 WL 5991886 (Del. Ch. May 10, 2021) (holding that *MFW* cleansed a going-private transaction; finding plaintiffs’ allegations insufficient to cast doubt on the special committee’s independence).
  - *The MH Haberkorn 2006 Trust v. Empire Resorts, Inc.*, C.A. No. 2020-0619-KSJM (Del. Ch. July 23, 2021) (TRANSCRIPT) (holding that *MFW* did not cleanse a cash-out merger where the majority of the minority vote would not have been obtained without the votes of a stockholder possessing “significantly divergent interests from the other minority stockholders”).
  - *Ligos v. Iramco, Inc.*, 2021 WL 3870679 (Del. Ch. Aug. 31, 2021) (finding plaintiffs adequately alleged that the stockholder vote was not fully informed because of inadequate disclosures around the controlling stockholder’s involvement in a pending arbitration proceeding that was material to the company’s valuation).
- g. *MFW* has been extended to contexts other than transactions in which a controlling stockholder squeezes out minority stockholders.
- *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964 (Del. Ch. Dec. 11, 2017) (applying *MFW* to a reclassification of shares that would perpetuate control by the controlling stockholder and dismissing stockholders’ breach of fiduciary duty claim because the transaction was conditioned on the six prerequisites identified in *MFW*; the Court specifically determined that the vote of the minority stockholders was properly informed of material information, including the fact that the defendant was close to losing majority control).
  - *In re Martha Stewart Living Omnimedia, Inc. S’holder Litig.*, 2017 WL 3568089, at \*18 (Del. Ch. Aug. 18, 2017) (stating as an alternative holding that the business judgment rule is the appropriate standard of review for transactions in which a conflicted controlling stockholder in a sale to a third party extracts benefits not shared with the minority stockholders, where such transaction is conditioned on the six prerequisites identified in *MFW*, as long as the *MFW* conditions are in place before the controlling stockholder begins negotiations to extract different consideration).

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- *Historical Caselaw*: Prior to *MFW*, Courts had declined to apply the entire fairness test to mergers with controlling stockholders structured as two-step transactions (i.e., tender offers followed by short-form mergers), but there was uncertainty as to what procedures had to be followed in order to obtain business judgment, rather than entire fairness, review of such a transaction.
- *Siliconix*: Non-coercion test
  - *In re Siliconix Inc., S'holders Litig.*, 2001 WL 716787 (Del. Ch. June 19, 2001) (absent coercion or disclosure violation, directors had no duty to demonstrate the entire fairness of tender offer by 80% stockholders). In *Siliconix*, the Court distinguished *McMullin v. Beran* on the basis that it involved a merger pursuant to Section 251, which imposes statutory duties with “attendant fiduciary duties.” In addition, the minority shareholders in *Siliconix* had the power to thwart the tender offer because it required a majority of the minority shares to be tendered.
  - *In re Aquila, Inc. S'holders Litig.*, 805 A.2d 184 (Del. Ch. 2002) (controlling stockholder’s tender offer followed by short form merger was not subject to entire fairness review; stockholders could freely choose whether to accept or reject the offer because transaction was structured to allow a majority of the minority to make the decision).
  - *In re Life Techs., Inc., S'holders Litig.*, 1998 WL 1812280 (Del. Ch. Nov. 24, 1998) (declining to enjoin a tender offer by a majority stockholder and holding that noncoercive tender offer by parent was not subject to entire fairness review).
- *Pure Resources*: Four-part standard
  - *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002) (controlling stockholder’s tender offer followed by a short form merger analyzed under business judgment review applicable if the tender offer is (1) subject to a non-waivable majority of the minority tender condition; (2) the controller promises to consummate a prompt short-form merger at the same price if it obtains more than 90% of the shares; (3) the controller has made no retributive threats; and (4) the controller permits the independent directors “both free rein and adequate time to react” to the tender offer).
  - *Next Level Commc'ns, Inc. v. Motorola*, 834 A.2d 828 (Del. Ch. 2003) (where majority stockholder made full and fair disclosure, its post-*Pure Resources* tender offer, conditioned on a majority of the minority shares tendering and committing majority stockholder to complete short form merger at same price was not coercive even though made when

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stock price depressed and majority holder had inside information).

- *In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, at \*21 (Del. Ch. May 6, 2010) (following *Pure Resources* to determine business judgment review would likely apply to a controlling stockholder tender offer conditioned on non-waivable majority-of-the-minority tender and a commitment to effect a short form merger if it got to 90% ownership; stating that “[c]ontrolling shareholder tender offer cases are relatively straightforward”).
- *CNX: “Unified Standard” of Cox Communications*
  - *In re Cox Commc'ns Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005) (discussing the possibility of unifying one-step and two-step freeze-out standards of review through increasing procedural requirements for a tender offer freeze-out to gain the benefit of business judgment review).
  - *In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 960 (Del. Ch. 2010) (citing *Cox Communications* and indicating the possibility of “invoking the protections of the business judgment rule” in the context of a controlling stockholder freeze-out if the additional procedural steps described in *Cox Communications* are followed).
  - *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 414 (Del. Ch. 2010) (applying the “unified standard” described in *Cox Communications* to a controlling stockholder’s tender offer; suggesting that business judgment review could be obtained if the transaction were conditioned on both majority-of-the-minority stockholder approval and approval of the transaction by a special committee of independent directors exercising “authority comparable to what a board would possess in a third-party transaction,” including authority to seek alternatives, file a lawsuit against the controller, and deploy a poison pill).
  - *In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147 (Del. Ch. July 5, 2010) (granting application to certify interlocutory appeal of preliminary injunction ruling to the Supreme Court in light of the conflict in the Court of Chancery created by the disparate *Siliconix*, *Pure Resources* and *Cox Communications* standards).
- *Liang v. Cohen*, C.A. No. 5721-VCL (Del. Ch. Aug. 19, 2010) (TRANSCRIPT) (suggesting that entire fairness, not business judgment, would likely apply to a controlling stockholder tender offer structured as a *Pure Resources* offer, because consummation of the tender was “not conditioned on the receipt of an affirmative recommendation from the special committee”).

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- *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at \*9 n.73 (Del. Ch. Mar. 9, 2011) (noting that “[i]f the controlling stockholder permits the use of both protective devices [an independent special committee and informed majority of the minority], then the transaction could avoid entire fairness review”).

## h. de-SPAC Transactions.

- The application of the entire fairness standard to de-SPAC transactions is a developing area of Delaware law. In the Court of Chancery’s first decision in the area, *In re MultiPlan Corp. Stockholders Litigation*, 2022 WL 24060 (Del. Ch. Jan. 3, 2022), the Court declined to dismiss breach of fiduciary claims against a SPAC’s directors, officers and controlling stockholder. The Court held that entire fairness applied because of the incentives created by the SPAC structure. Absent a transaction, the controlling stockholder’s founder shares and warrants would be worthless. Thus, the Court reasoned that the controlling stockholder was incentivized to pursue a transaction, even one that was value decreasing to the public stockholders. The Court held that the directors had a duty to disclose all material information about the merger when stockholders had to decide whether to redeem their shares. The Court rejected the defendants’ argument that the contractual nature of the redemption right foreclosed a fiduciary claim, noting that the certificate of incorporation did not speak to the board’s disclosure obligations.

## 6. Effective use of committees of independent directors, without a concomitant majority of the minority stockholder vote, can shift burden of proof back to plaintiff.

- *Kahn v. Lynch Commc’n Sys., Inc.*, 638 A.2d 1110 (Del. 1994) (approval of cash-out merger transaction initiated by controlling stockholder by independent committee or informed majority of minority stockholders shifts burden on issue of fairness from controlling stockholder to plaintiff).
- *In re W. Nat’l Corp. S’holders Litig.*, 2000 WL 710192 (Del. Ch. May 22, 2000) (holding that use of independent committee triggered deferential business judgment standard of review in absence of controlling stockholder or group).
- *Clements v. Rogers*, 790 A.2d 1222 (Del. Ch. 2001) (holding that special committee did not act properly where (a) its chairman did not understand that he had no duty to the 84% parent proposing the merger and to reject the proposed transaction and (b) committee was uninformed as to its financial advisors’ conformation of its valuation opinion to the parent’s offer).

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- In *Levco Alt. Fund Ltd. v. Reader's Digest Ass'n, Inc.*, 803 A.2d 428 (Del. 2002), the Class A stockholders of Reader's Digest sought to enjoin a recapitalization of Reader's Digest that included a plan to purchase all of the Class B voting stock at premium ratio for newly issued common stock and to recapitalize all Class A nonvoting stock into shares of voting common. Reader's Digest formed a special committee to evaluate the recapitalization because certain Funds controlled half of the Class B voting stock and two Reader's Digest directors served as directors of the Funds. The special committee focused on the effects of the recapitalization on the corporation as a whole and on the stockholders other than the Funds but did not specifically consider the transaction from the perspective of the Class A stockholders and did not procure a fairness opinion specifically regarding the effects on the Class A holders. Because the special committee did not properly consider the interests of the Class A stockholders in the recapitalization, the Supreme Court reversed the Court of Chancery's denial of the preliminary injunction motion.
- *In re Tele-Communications, Inc. S'holders Litig.*, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005) (finding a special committee ineffective to shift the burden to plaintiff stockholders where holders of high vote common stock, including a majority of the board, would receive a premium for their stock in a merger and: (1) members of the special committee were confused about the committee's mandate to protect the interests of the low vote common stock; (2) one of the two members of the committee owned more high vote than low vote common stock; (3) special committee used the company's financial advisor, which was compensated on a contingent basis, and used that financial advisor's attorneys, as its only advisors; (4) committee was not fully informed in making its determination because it did not investigate historical premiums, and did not investigate whether premiums for high-vote stock were as common as equal treatment; and (5) evidence pointed to a lack of arm's length bargaining).
- *Gesoff v. IIC Indus. Inc.*, 902 A.2d 1130 (Del. Ch. 2006) (use of a special committee was flawed because: (1) committee was only composed of one member; (2) committee's mandate was vague and it was unclear whether the committee had the power to veto the transaction; (3) committee member was confused as to the structure of the transaction, which was changed mid-process from a tender offer followed by a short-form merger to a long-form merger; and (4) advisors chosen by committee were essentially "handpicked," and controlled by, the company).
- *In re Loral Space & Commc'ns Inc. Litig.*, 2008 WL 4293781, at \*26 (Del. Ch. Sept. 19, 2008) (where the special committee's lead negotiator had substantial ties to the party proposing the transaction, the special committee's mandate was too narrow, and the special committee allowed the party proposing the transaction to dictate the terms of the

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transaction, stating that “it is the sheer accumulation of examples of timorousness and inactivity that contributes to [the] conclusion that this Special Committee did not fulfill its intended function”).

- *S. Muoio & Co. LLC v. Hallmark Entm't Invs. Co.*, 2011 WL 863007, at \*12 (Del. Ch. Mar. 9, 2011) (finding, in a post-trial decision, special committee effective, shifting entire fairness burden to plaintiff, and upholding fairness of the challenged recapitalization with a controlling stockholder where, among other things, the special committee was independent, negotiated at arm's length, had independent advisors, and had a broad mandate; noting generally that “[a]s respected practitioners have noted, in the context of a conflict transaction, the importance of the committee’s charter cannot be overstated. In addition to being independent, a well-constituted special committee must have a clear mandate setting out its powers and responsibilities in negotiating the interested transaction. This Court has stated that this mandate should include the power to fully evaluate the transaction at issue, and, ideally, include what this court has called the critical power to say ‘no’ to the transaction.” (internal citations omitted)).
- *Cf. In re S. Peru Copper Corp. S’holder Deriv. Litig.*, 52 A.3d 761, 791-95 (Del. Ch. 2011) (finding, post-trial, that because the special committee “was not ‘well functioning,’” defendants bore the burden to prove fairness; suggesting, in *dicta*, that the determination of whether defendants were entitled to a burden shift should not focus on whether a committee is “well functioning,” but rather on factors that can be determined early in litigation “like the independence of the committee and the adequacy of its mandates”), *aff’d sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).
- *Frank v. Elgamal*, 2014 WL 957550 (Del. Ch. Mar. 10, 2014) (finding that this special committee did not see M&A as its expertise so it relied on others to negotiate on its behalf). The Court stated, “Foremost among the indicia relevant to the Court’s assessment of whether a special committee is well functioning is whether the committee is well informed. . . . Material information—especially material information about the fair value of the corporation and the minority stock—should not be withheld from the special committee or its advisors. . . . If the controlling stockholder recommends or has a pre-existing, material relationship with a financial advisor, the special committee’s reliance on that advisor may cast doubt on the committee’s independence and access to adequate information. Although it may not be *per se* inappropriate for the special committee to not negotiate directly with a potential acquirer, the advisor charged with the direct negotiations must be faithful to the special committee and its utmost duty to protect the interests of minority stockholders, and the special committee should be informed about material actions by its advisors and material

developments in the negotiations—particularly related to price.” Because the record lacked evidence that the special committee was adequately informed about the allocation of merger consideration (which was found to be an otherwise fair enterprise value) between the control group and minority stockholders in three different offer options, the Court could not conclude that the special committee was well functioning as required to shift the burden of proof to the plaintiff.

- *Cf. In re Dole Food Inc. S’holder Litig.*, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015) (finding two directors of Dole Food Company, Inc. liable under the entire fairness standard for, among other things, undermining the work of an otherwise independent special committee).
- *Cumming v. Edens*, 2018 WL 992877 (Del. Ch. Feb. 20, 2018) (declining to dismiss breach of fiduciary duty claims against a company’s board in circumstances where it was alleged that a majority of the board was conflicted and the transaction committee was “flawed in its composition”; clarifying that satisfaction of the safe harbor provisions of Section 144 does not necessarily result in the business judgment review of an interested transaction).
- *Salladay v. Lev*, 2020 WL 954032, at \*12 (Del. Ch. Feb. 27, 2020) (holding that if a majority of the board is conflicted, the business judgment rule can be restored if the transaction is approved by an independent, fully-functioning committee that is empowered before substantive economic negotiations take place; finding that this requirement was not satisfied where, prior to the committee’s formation, the chairman of the board told the counterparty what price the board would be receptive to, which “plausibly created a price collar . . . and thus constituted substantive economic discussions”).

## H. Intersection Between Fiduciary Duties And Contractual Obligations.

- *See generally Glidepath Ltd. v. Beumer Corp.*, 2019 WL 855660, at \*19 (Del. Ch. Feb. 21, 2019) (“[F]iduciaries do not owe duties to contractual claimants. To the contrary, a fiduciary violates the standard of conduct if the fiduciary seeks to maximize the value of a contractual claim at the expense of the fiduciary’s beneficiaries.” (citation omitted)).
- A board of directors does not breach its fiduciary duties when complying with its contractual obligations. In *Hokanson v. Petty*, 2008 WL 5169633 (Del. Ch. Dec. 10, 2008), a corporation in financial distress entered into a contract with a third party in 2003 to provide a capital infusion in exchange for a “buyout option” that allowed the third party to purchase outstanding securities of the corporation at any time during a three-year period at a specified price and to dictate the form of the transaction. The third party subsequently exercised the option in 2007 and, under the merger agreement with the corporation, the preferred stockholders received a percentage of their liquidation preference and the common stockholders received nothing. Plaintiffs brought suit

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claiming that the corporation's board breached its fiduciary duties by failing to obtain more consideration in the merger. The Court dismissed the plaintiffs' claim because the merger price was dictated by the terms of the buyout option and the distribution of the consideration was in accordance with the requirements of the corporation's charter. According to the Court: "Parties cannot repudiate their contracts simply because they wish they had gotten better terms . . . . The plaintiffs have cited no authority suggesting that the . . . directors were mandated to cause the company to breach a contract and avoid the Merger." However, it should be noted that the issue of whether the corporation's board breached its fiduciary duties by entering into the buyout option in 2003 was not before the Court because any such claim was time-barred under the doctrine of laches. In other words, the only issue before the Court was whether the board breached its fiduciary duties at the time the buyout option was exercised. *See also In re Sirius XM S'holder Litig.*, 2013 WL 5411268 (Del. Ch. Sept. 27, 2013) (citing to *Hokanson* in case where Liberty Media provided investment in Sirius XM conditioned on Sirius agreeing not to interfere with Liberty's ability to acquire additional Sirius shares after a standstill period). *But see In re Essendant, Inc. S'holder Litig.*, 2019 WL 7290944, at \*13 (Del. Ch. Dec. 30, 2019) ("Even with an iron-clad contractual obligation, there remains room for fiduciary discretion because of the doctrine of efficient breach.' A board may even have a duty to breach a contract if it determines that the 'benefits of breach (broadly conceived) exceed the costs (broadly conceived).'" (quoting *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at \*24 (Del. Ch. Apr. 14, 2017))).

## I. Fiduciary Duty Of Disclosure.

### 1. Duty of disclosure.

- Directors "have a fiduciary duty to disclose to the shareholders the available material facts that would enable them to make an informed decision, pre-merger, whether to accept the merger consideration or demand appraisal." *Turner v. Bernstein*, 1991 WL 66532, at \*5 (Del. Ch. Feb. 9, 1999) (citations omitted).
- A board may be required to disclose certain financial projections used in valuing the company. *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 203 (Del. Ch. 2007) (in finding that the proxy's failure to disclose all projections used by the company's financial advisor in preparing its DCF valuation rendered it materially incomplete, the Court stated that when "[f]aced with the question of whether to accept cash now in exchange for forsaking an interest in [the company's] future cash flows, [the company's] stockholders would obviously find it important to know what management and the company's financial advisor's best estimate of those future cash flows would be"). However, "where the advisor derived the [free cash flow] projections on its own, those projections do not have to be disclosed." *In re SeraCare Life Scis., Inc. S'holders Litig.*, C.A. No. 7250-VCG, at 6 (Del. Ch. Mar. 20, 2012) (TRANSCRIPT).

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- The Court of Chancery found a breach of the duty of disclosure where the proxy statement informed stockholders that the special committee's financial advisor had received the right to provide staple financing because it could provide a source of financing that might not otherwise be available to potential buyers, when the board had not actually made that determination. *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54 (Del. Ch. 2014).
- The duty of disclosure is not diluted for private companies. See *Erickson v. Centennial Beauregard Cellular, LLC*, 2003 WL 1878583, at \*8-\*9 (Del. Ch. Apr. 11, 2003).
- The same standard of materiality exists as in other disclosure contexts. *Skeen v. Jo-Ann Stores*, 750 A.2d 1170, 1173 (Del. 2000). Statutorily required notices, such as the description of a proposed charter amendment in a notice of meeting, are "material *per se*." *E.g., Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at \*11 (Del. Ch. May 8, 2019) (declining to dismiss claim that directors breached their duty of disclosure; finding the plaintiff adequately pled that directors did not satisfy the statutory requirements for notice of appraisal rights).
- The Delaware Supreme Court has held that, where there is a breach of the duty of disclosure in connection with a short-form merger, the appropriate remedy is a quasi-appraisal remedy i.e., a class action to recover the difference between "fair value" and the merger consideration wherein the minority stockholders are automatically treated as members of the class with no obligation to opt-in or to escrow any portion of the merger consideration. *Berger v. Pubco Corp.*, 976 A.2d 132 (Del. 2009); see also *In re United Capital Corp. S'holders Litig.*, 2017 WL 389520 (Del. Ch. Jan. 4, 2017) (dismissing a quasi-appraisal claim alleging breaches of the duty of disclosure where the notice of merger adequately disclosed (i) the necessary information regarding the special committee's determination of a fair price; (ii) the controlling stockholder's reasoning behind his offer price; (iii) sufficient financial information, including current, historical and forward-looking information; (iv) the company's cash, cash equivalents, and their future use; (v) a discussion of the independence of two of the three special committee members; and (vi) certain directors' potential conflicts).
- In connection with a squeeze-out merger, "quasi-appraisal damages are one possible remedy for breaches of the duty of disclosure . . . [b]ut more importantly, as noted at the outset, the quasi-appraisal damages measure is simply a remedy, and it can be awarded for other breaches of fiduciary duty as well." If a transaction is found to be not entirely fair to the stockholders, then the court would calculate quasi-appraisal damages as the difference between the appraised value and the merger consideration. *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1 (Del. Ch. 2014).
- Expedited proceedings may be allowed if plaintiffs bring colorable disclosure claims. *Ortsman v. Green*, 2007 WL 702475, at \*2 (Del. Ch. Feb. 28, 2007) ("The court recognizes

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that there is no automatic right to expedition. Nonetheless where, as here, there are colorable disclosure claims, the better course is to address them in advance of a stockholder vote when appropriate disclosure-based relief is available. Only by remedying proxy deficiencies in advance of a vote can irreparable harm be avoided.” (citations omitted); see also *FrontFour Capital Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019) (ordering supplemental disclosures after expedited trial; finding that the proxy statement failed to disclose expressions of interest from third parties and created a misleading impression that the special committee process was effective).

- The Delaware Court of Chancery cannot grant monetary or injunctive relief for disclosure violations in connection with a proxy solicitation in favor of a merger three years after that merger has been consummated where there is no evidence of breach of the duty of loyalty or good faith by the directors who authorized the disclosures. See *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346 (Del. Ch. 2008).
- “When seeking injunctive relief for a breach of the duty of disclosure in connection with a request for stockholder action, a plaintiff need only show a material misstatement or omission. The plaintiff need not address the ‘elements of reliance, causation and actual quantifiable monetary damages.’ When seeking post-closing damages for breach of the duty of disclosure, however, the plaintiffs must prove quantifiable damages that are ‘logically and reasonably related to the harm or injury for which compensation is being awarded.’ In other words, although the request for stockholders to take action based on the disclosures may satisfy the requirement of reliance, the plaintiff still must prove causation and damages.” *In re Orchard Enters., Inc. S’holders Litig.*, 88 A.3d 1, 53 (Del. Ch. 2014) (quoting *In re J.P. Morgan Chase & Co. S’holder Litig.*, 906 A.2d 766, 773, 775 (Del. 2006)).
- Settlement of class action litigation involving solely additional disclosures will “be met with continued disfavor in the future unless the supplemental disclosures address a plainly material misrepresentation or omission, and the subject matter of the proposed release is narrowly circumscribed to encompass nothing more than disclosure claims and fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.” *In re Trulia Inc. S’holder Litig.*, 2016 WL 325008 (Del. Ch. Jan. 22, 2016). See also *In re Riverbed Tech. S’holders Litig.*, 2015 WL 5458041 (Del. Ch. Sept. 17, 2015).

**2. Duty of disclosure in a short-form merger.** The Court of Chancery has held that even if disclosure was made in connection with a tender offer in a two-step transaction and remains publicly available, the notice of appraisal following the second step short-form merger should include summary financial information, instructions as to how to obtain more detailed information and an explanation of the method by which the board set the merger consideration. *Berger v. Pubco Corp.*, 2008 WL 2224107 (Del. Ch. May 30, 2008), *rev'd on other grounds*, 976 A.2d 132 (Del. 2009); *see also Gilliland v. Motorola, Inc.*, 859 A.2d 80 (Del. Ch. 2004) (suggesting that two years of stock data and five years of summary financial information was an example of adequate disclosure of the target's financials).

**3. Duty of disclosure in connection with a Section 228(e) notice.**

- When corporate action is taken by written consent, Section 228(e) of the DGCL requires the corporation to give “prompt” notice of such action to non-consenting stockholders. *See, e.g., Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at \*10 (Del. Ch. May 8, 2019) (noting that “prompt” is not defined by the statute and reasoning that “[w]hen a transaction approved by written consent triggers notice obligations under Section 262 [appraisal], the deadline in Section 262 should supply the outer bound of what constitutes ‘prompt’ notice under Section 228”); *Riskin v. Burns*, 2020 WL 7861209 (Del. Ch. Dec. 31, 2020) (finding it reasonably conceivable that a five month delay in providing notice violated Section 228(e)).
- In *Dubroff v. Wren Hldgs., LLC*, 2009 WL 1478697 (Del. Ch. May 22, 2009), the Delaware Court of Chancery declined to dismiss a claim that a corporation's directors had breached their fiduciary duty of disclosure by failing to make certain disclosures about a recapitalization in a notice of action by written consent sent pursuant to Section 228(e) of the DGCL. Specifically, the Court declined to dismiss plaintiff's claims that the disclosures in the notice were insufficient because the notice did not disclose the nature of the benefits received by the defendant directors pursuant to the recapitalization or that the defendant directors were the primary beneficiaries of the recapitalization. The Court declined to delineate the parameters of the duty of disclosure in the Section 228(e) context, and found that regardless of the scope of disclosure, the plaintiffs had sufficiently pled a disclosure violation.

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## II. THE POISON PILL UNDER DELAWARE LAW

**A. Rights Plans Upheld As A Technical Matter.** Delaware courts have rejected technical challenges to the concept of a rights plan under Delaware law.

- *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (rejecting the argument that the adoption of a rights plan violated Section 157 of the DGCL and upholding the validity of a “flip-over” provision).
- *Leonard Loventhal Account v. Hilton Hotels Corp.*, 780 A.2d 245 (Del. 2001) (rejecting, among other things, the claim that, contractually, a rights plan is not binding unless all stockholders agree to the rights plan and the claim that a rights plan, absent such an agreement, impermissibly places transfer restrictions on the common shares to which rights attach).

**B. Unocal Standard Of Review: Adoption And Maintenance.** A board’s decision to adopt or maintain a rights plan is subject to the *Unocal* standard of review, regardless of whether a specific takeover threat exists at the time of the plan’s adoption. In addition, rights plans and other defensive measures that are related or adopted contemporaneously may be examined collectively under a *Unocal* analysis.

- *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (requiring directors to show that in adopting a defensive device, they had “reasonable grounds for believing that a danger to corporate policy and effectiveness” existed and that the defensive measure must be “reasonable in relation to the threat posed”); *see also Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1367 (Del. 1995) (holding further that the initial test is that the defensive measure may not be “draconian,” which means that the measure may not be preclusive or coercive).
- *Moran v. Household Int'l, Inc.*, 500 A.2d 1346 (Del. 1985) (applying the *Unocal* standard of review to the adoption of a rights plan as a preventive measure, in the absence of a specific takeover threat, and also stating that the decision whether to redeem rights is subject to the same standard).
- *Nomad Acq. Corp. v. Damon Corp.*, 1988 WL 383667, at \*5 (Del. Ch. Sept. 20, 1988) (“A board is held to the same fiduciary standards in deciding whether to accept or reject a tender offer as it had when it adopted a rights plan . . . . A board, therefore, does not have unfettered discretion in refusing to redeem Rights.”).
- *In re DeSoto Inc. S’holder Litig.*, 1990 WL 13476, at \*6 (Feb. 5, 1990) (examining a rights plan and stating that “[b]ecause corporate directors face an inherent conflict when confronted with possible loss of corporate control, the responsive action in adopting or maintaining an anti-takeover defense must be reasonable in relation to the threat posed”).
- *In re Gaylord Container Corp. S’holders Litig.*, 1996 WL 752356 (Del. Ch. Dec. 19, 1996) (confirming that the adoption of a rights plan,

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whether occurring on a “clear day” or in response to a specific takeover threat, is subject to the *Unocal* standard of review and also noting that when a rights plan and other measures are adopted in concert, they may be collectively examined under the *Unocal* standard).

- *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010) (reviewing and rescinding a rights plan under *Unocal* where the defendant directors, controlling stockholders, and officers of craigslist adopted the rights plan to protect the craigslist “corporate culture” against the company’s other stockholder, eBay, and to prevent eBay from obtaining control upon the defendants’ deaths).

**C. Rights Plans And Proxy Contests.** With regard to the specific issue of proxy contests, rights plans have been upheld by Delaware courts so long as they do not “fundamentally restrict” the right of stockholders to conduct a proxy contest.

- *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1355 (Del. 1985) (noting, in examining the validity of the challenged rights plan, that “[t]he issue . . . is whether the restriction upon individuals or groups from first acquiring 20% of shares before waging a proxy contest fundamentally restricts stockholders’ right to conduct a proxy contest” and noting the Court of Chancery’s “finding that the effect upon proxy contests will be minimal”).
- *Henley Grp., Inc. v. Santa Fe S. Pac. Corp.*, 1988 WL 23945 (Del. Ch. Apr. 18, 1988) (holding that the adoption of a rights plan with a 20% trigger, in the face of a possible joint proxy solicitation and hostile offer by stockholders jointly holding 21% of the company’s stock, did not impermissibly restrict a proxy contest and violate the *Unocal* test, where the rights plan was amended to add a carve-out for joint proxy solicitations, and stating that the Court would have viewed the rights plan “more darkly” prior to defendant revising the rights plan “to eliminate proxy solicitation activity from its coverage”).
- *Stahl v. Apple Bancorp, Inc.*, 1990 WL 114222 (Del. Ch. Aug. 9, 1990) (denying motion for summary judgment by a 30.6% stockholder conducting a tender offer for the company and a proxy contest to elect directors who would redeem the rights and who challenged the company’s rights plan as invalid on the basis that although it contained a carve-out for revocable proxies or consents given in response to a public proxy or consent, it otherwise precluded him from reaching agreements or understandings with other stockholders concerning the voting of stock or the formation of a joint slate; finding that given the size of the stockholder’s block and his above-market price tender offer, the prohibitions would have only a minimal impact on his prospects in the proxy contest).
- *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310, 313 (Del. Ch. 2010) (upholding, in a post-trial opinion, the rights plan adopted by Barnes & Noble’s board of directors with a 20% trigger and a provision grandfathering a founding stockholder who held 30% of the company’s stock, after Yucaipa acquired 17% of the company’s stock, sought to mount a proxy contest, and appeared potentially aligned with another stockholder of equal size to it; the

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Court reasoned, among other things, that the rights plan did not preclude a successful proxy contest because it permitted public solicitation of revocable proxies, that it was possible for Yucaipa to mount a successful proxy contest, and that the rights plan would be “subject to a stockholder vote this year, a feature that further limits its inhibiting potency”).

- *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586, 601 (Del. 2010) (upholding a rights plan with a 4.99% trigger, in part because evidence showed that the rights plan did not render a proxy contest “mathematically impossible” or “realistically unattainable” and therefore was not preclusive).
- *Third Point LLC v. Ruprecht*, 2014 WL 1922029, at \*20-21 & n.37 (Del. Ch. May 2, 2014) (finding two tiered rights plan allowing passive investors to acquire larger stakes than activists did not impinge on ongoing proxy contest being waged by activist because no passive investor’s stake exceeded the generally applicable lower threshold and the poison pill’s definition of passive, although excluding any stockholder actually running a proxy contest, did not restrict how passive investors could vote their shares).
- *Compare In re Chrysler Corp. S’holders Litig.*, 1992 WL 181024, at \*5 (Del. Ch. July 27, 1992) (rejecting a motion to dismiss a challenge to a board’s amendment of a rights plan lowering the trigger from 20% to 10%, after a 5% stockholder refused to sign a standstill agreement and increased his ownership to 9.8%, based on an allegation that the pill “significantly impair[s] and hinder[s] a third party’s ability to effectuate a successful tender offer for the Company by substantially reducing the number of shares which can be acquired prior to triggering the Rights...[and] impair[s] the ability of [the target’s] shareholders to oppose management or otherwise influence corporate policy by preventing shareholders from owning individually or collectively more than 10% of [the target’s] common stock *thereby limiting concerted action through proxy contests or contests for control*”).

**D. Pill As Auction Or Negotiating Device.** Several decisions have upheld a board’s decision to adopt or maintain a pill in order to promote an orderly auction process or to cause bidders to negotiate with the board.

- *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (upholding board decision to keep pill in place in face of hostile, fully-financed, all-cash, all-shares tender offer where target board had spent over a year communicating its conclusion that the offer was inadequate, which conclusion was supported by bidder’s nominees who had won election to the board, even though the board conceded that stockholders had enough information to decide whether to accept offer; reasoning that the pill/staggered board combination present was not preclusive where it was “realistically attainable” for bidder to win a majority of the target board seats through a second proxy contest).
- *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986) (upholding the adoption of a note purchase rights plan in response to an offer the board of directors, with the input of

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advisors, believed was inadequate, where the rights plan led to a significant increase in the offeror's price).

- *Facet Enters., Inc. v. The Prospect Grp., Inc.*, 1988 WL 36140 (Del. Ch. Apr. 15, 1988) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, adopted in response to a hostile tender offer, where the board believed the offer price was inadequate, desired to conduct an orderly auction process, and sought to encourage negotiation with the board, despite the offeror's argument that its offer was not coercive).
- *Tate & Lyle PLC v. Staley Cont'l, Inc.*, 1988 WL 46064, at \*10 (Del. Ch. May 9, 1988) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, which was adopted on a "clear day" and maintained in the face of a tender offer, where the board sought to pursue an auction process and achieve an increase in price, and noting that "while the market price is greater than the tender price, the rights plan is obviously serving a useful purpose in allowing the Board to seek a more realistic offer"; also refusing to enjoin board's decision to lower rights plan trigger from 40% to 20%).
- *Nomad Acq. Corp. v. Damon Corp.*, 1988 WL 383667, at \*5 (Del. Ch. Sept. 20, 1988) (denying a motion for a preliminary injunction against the adoption of a rights plan in response to a stockholder's 13-D filing disclosing the acquisition of 9.97% of the company's stock and a possible intention to acquire the company, after which filing the stockholder launched a tender offer for the company; finding that the board adopted the rights plan to encourage negotiations with the board, and stating that "a board need not be faced with a specific threat before adopting a rights plan" and that "a rights plan can be validly adopted where a board reasonably believes that the corporation may be vulnerable to coercive acquisition techniques").
- *Doskocil Cos. Inc. v. Griggy*, 1988 WL 105751 (Del. Ch. Oct. 7, 1988) (denying a motion for a preliminary injunction redeeming a rights plan, where, in the face of two pending tender offers, a target board concluded that keeping the rights plan in place could lead to an increase in price or give stockholders time to consider both offers, even though the company had been in an auction process for ten weeks and a majority of shares had been tendered to one of the bidders).
- *In re Holly Farms Corp. S'holders Litig.*, 1988 WL 143010, at \*6 (Del. Ch. Dec. 30, 1988) (finding, on a motion for a preliminary injunction, that a board failed to satisfy its *Revlon* duties in choosing to sell the company to one of two bidders, but refusing to require the board to redeem the company's rights plan, on the rationale that "[t]here is no evidence that the Board is presently using the poison pill for any improper purpose and it may still have a role in maximizing values. At some future time, the poison pill may no longer serve a valid purpose but that time has not yet arrived"); see also 564 A.2d 342 (Del. Ch. 1989) (continuing to refuse to grant a preliminary injunction ordering the redemption of the rights plan, where the maintenance of the rights plan allowed the stockholders to vote on a transaction the board believed was

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economically superior, without interference from the competing bidder, and where the rights plan could help achieve an increased price for the company).

- *Compare Mills Acq. Co. v. MacMillan, Inc.*, 1988 WL 108332 (Del. Ch. Oct. 18, 1988) (granting a preliminary injunction against a rights plan and holding that once an auction was concluded, and there were two fair bids “on the table,” there was no longer any corporate purpose served by maintaining the rights plan against one of the bidders), *rev'd on other grounds*, 559 A.2d 1261 (Del. 1989).

## E. Adopting Or Maintaining A Rights Plan In Response To “Inadequate” Offers.

### 1. Delaware courts have upheld decisions by boards, under a variety of circumstances, to refuse to redeem rights plans in the face of a hostile tender offer that the board believes offers inadequate value to stockholders.

- *MAI Basic Four, Inc. v. Prime Computer, Inc.*, 1988 WL 140221, at \*4 (Del. Ch. Dec. 20, 1988) (denying a motion for a preliminary injunction against a rights plan adopted in response to a tender offer where the directors were disinterested, the board “immediately after being advised of the tender offer . . . retained two outside independent financial advisors who expressed their opinion that the \$20 per share offer was inadequate,” the offer represented “a relatively small premium over the recent selling price” of the company’s shares, the company had “recently obtained new management and [was] on the verge of reaping the economic benefits of its recent acquisition” of another company, the “tender offer ha[d] been pending for less than a month, and less than 1% of the stockholders ha[d] tendered their shares,” the “tender offer contain[ed] numerous contingencies which ha[d] not yet been fulfilled, and plaintiff [offeror] ha[d] been less than candid in revealing the value its experts have established” for the company, and it “appear[ed] that plaintiff [was] prepared, and [was] in a position, to offer more than \$20 per share but only the existence of the anti-takeover devices [would] compel it to do so”).
- *BNS, Inc. v. Koppers Co.*, 683 F. Supp. 458 (D. Del. 1988) (denying a motion for a preliminary injunction either declaring a rights plan invalid or ordering directors to redeem the rights, where the rights plan was maintained in the face of a hostile tender offer for the company that the directors believed was inadequate).
- *Moore Corp. Ltd. v. Wallace Computer Servs., Inc.*, 907 F. Supp. 1545 (D. Del. 1995) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, even though holders of nearly 75% of the target’s stock had tendered into a hostile tender offer, and finding that the maintenance of the rights plan appeared reasonable in response to the threat that, if the hostile tender offer closed and the offeror proceeded with a follow-up merger, the stockholders would

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be deprived of what the target board viewed as an imminent increase in the company's value resulting from years of technological advances within the company).

- *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (upholding, in a post-trial opinion, albeit with explicit reluctance, a board's ongoing decision, over the course of more than one year, not to redeem a rights plan and allow a non-discriminatory, all-cash, all-shares, fully financed tender offer to proceed, despite periodic increases in the offeror's price, where the board believed that continuing the company as a standalone business and executing the company's business plan would result in greater value for stockholders, even though the stockholders were fully informed and the offer was not structurally coercive).
- *Compare In re DeSoto Inc. S'holder Litig.*, 1990 WL 13476, at \*8 (Del. Ch. Feb. 5, 1990) (finding, on a motion for preliminary injunction, that a board of directors did not act reasonably in rejecting a tender offer (such as by refusing to elicit a fairness range from its banker with respect to the offer or by failing to attempt to elicit the highest bid from the offeror), and stating that in "the absence of other factors, this would likely result in the ordering of the immediate redemption of the [company's] poison pill," but refusing to order the redemption of the pill, on the rationale that business circumstances were in flux at the company and the "court [was] . . . ill-equipped to make th[e] determination" whether the offer was fair).

## 2. Case law suggests that a board cannot use a rights plan to favor a particular change in control transaction over a hostile bid offering comparable value, but its reach may be unclear or limited after *Airgas*.

- *Grand Metro. PLC v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988) (granting a preliminary injunction against a rights plan and holding that directors did not act reasonably under *Unocal* in refusing to redeem rights in the face of a hostile tender offer in order to favor an alternative plan that involved spinning off or selling parts of the company's business, where 87% of the stockholders tendered into the offer and stockholders could conclude that the alternatives were of similar value).
- *City Capital Assocs. Ltd. v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988) (granting a preliminary injunction against a rights plan and holding that directors did not act reasonably under *Unocal* in refusing to redeem rights in order to favor a restructuring of the company over a hostile bid of similar value, where the maintenance of the rights plan no longer appeared to serve "to increase the options available to shareholders or to improve the terms of those options" and appeared simply to "foreclose" stockholder choice).
- *TW Servs., Inc. v. SWT Acq. Corp.*, 1989 WL 20290 (Del. Ch. Mar. 2, 1989) (suggesting that the precedential value of *Interco* and *Grand Metropolitan* was limited to certain circumstances by

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stating that “[i]n few instances has this court issued an order requiring a board of directors to redeem a defensive stock rights plan. In those instances, the board itself had elected to pursue either an outright sale of the company and had completed an auction process, or had elected to pursue a defensive restructuring that in form and effect was (so far as the corporation itself was concerned) a close approximation of and an alternative to a pending all cash tender offer for all shares. In those instances, it was thought that the central purpose of a pill -- to give a board time to negotiate on shareholders’ behalf or to consider alternatives to a tender offer or street sweep that threatened to coerce or otherwise injure shareholders -- had been fully served”).

- *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1153 (Del. 1990) (questioning the reach of *Interco* and stating that “Plaintiffs’ position [that a board could not reject an offer for the company in order to pursue the board’s long-term plan, which it believed offered greater long-term value for stockholders] represents a fundamental misconception of our standard of review under *Unocal* principally because it would involve the court in substituting its judgment as to what is a ‘better’ deal for that of a corporation’s board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper *Unocal* analysis. See, e.g., *Interco*, 551 A.2d 787, and its progeny . . .”).
- *Airgas* also provides extensive commentary on *Interco* and *Pillsbury*. The *Airgas* Court compared the case before it to *Interco* by noting that “here, the takeover battle between Air Products and Airgas seems to have reached an ‘end stage.’ Air Products has made its ‘best and final’ offer. Airgas deems that offer to be inadequate. And we’re not ‘talking nickels and quarters here’ — an \$8 gulf separates the two. The Airgas stockholders know all of this. At this stage, the pill is serving the principal purpose of precluding the shareholders from tendering into Air Products’ offer. As noted above, however, the Supreme Court rejected the reasoning of *Interco* in *Paramount*. Thus, while I agree theoretically with former-Chancellor Allen’s . . . conception [in *Interco*] of substantive coercion and its appropriate application, the Supreme Court’s dictum in *Paramount* (which explicitly disapproves of *Interco*) suggests that, unless and until the Supreme Court rules otherwise, that is not the current state of our law.” 16 A.3d 48 at 101. The Court also described *TW Services* as follows: “Chancellor Allen shed light on two then-recent cases where the Court of Chancery had attempted to order redemption of a poison pill. He noted that the boards in those cases (i.e., *Pillsbury* and *Interco*) had ‘elected to pursue a defensive restructuring that in form and effect was (so far as the corporation itself was concerned) a close approximation of and an alternative to a pending all cash tender offer for all shares.’ In other words, in *Pillsbury* and *Interco*, the boards were responding to a hostile offer by proposing ‘a management endorsed breakup transaction that, realistically

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viewed, constituted a functional alternative to the resisted sale.’ Importantly, ‘[t]hose cases *did not involve circumstances in which a board had in good faith . . . elected to continue managing the enterprise in a long term mode and not to actively consider an extraordinary transaction of any type.*’ The issue presented by a board that responds to a tender offer with a major restructuring or recapitalization is fundamentally different than that posed by a board which ‘just says no’ and maintains the status quo.”). *Id.* at 103.

- *Cf. In re Orchid Cellmark Inc. S’holder Litig.*, 2011 WL 1938253, at \*7-8 (Del. Ch. May 12, 2011) (rejecting a motion for a preliminary injunction against a tender offer on *Revlon* grounds and upholding a merger agreement provision in which the target agreed, absent terminating the merger agreement for a superior proposal and paying a termination fee, not to “amend or waive [its] Rights Agreement, redeem the Rights or take any action which would allow” anyone other than the acquiror to obtain 20% of the target without triggering the pill).
- *In re BioClinica, Inc. S’holder Litig.*, 2013 WL 673736, at \*2 n.23, \*4 (Del. Ch. Feb. 25, 2013) (upholding continued use of a poison pill following target board’s approval of a two-step merger agreement, notwithstanding standstill agreements signed by losing bidders prohibiting them from making tender offers *other than* offers for all of the outstanding stock made at a price higher than a third party tender offer recommended by the target; finding that the target board could redeem the pill after the higher tender offer is announced but before “the teeth of the Rights Plan are . . . exposed,” and that “a sophisticated buyer could navigate [these] shoals if it wanted to make a serious bid”).

**F. Other Delaware Cases In Which Rights Plans Have Been Upheld.** In addition to many of the above cases, there are several other Delaware cases in which rights plans have withstood challenges to their validity.

- *Chrysogelos v. London*, 1992 WL 58516 (Del. Ch. Mar. 25, 1992) (dismissing claims attacking adoption of rights plan and lowering of trigger from 20% to 15%, following the expiration of a dual class structure and a shift in control to the public stockholders, where complaint alleged no present injury to the corporation, but finding that such actions were relevant to other claims, which the court did not dismiss, alleging that the board had an entrenchment motive in rejecting an acquisition proposal and repurchasing shares).
- *In re Unitrin, Inc. S’holders Litig.*, 1994 WL 698483 (Del. Ch. Oct. 13, 1994) (applying *Unocal* and upholding adoption of a flip-in rights plan as a reasonable response to the threat of an unsolicited merger proposal at an inadequate price, but enjoining a defensive stock repurchase plan), *rev’d in part, Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) (reversing injunction against repurchase plan and suggesting that it, like the rights plan, met the *Unocal* reasonableness test).

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- *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004) (upholding adoption of a rights plan by independent directors in order to prevent a controlling stockholder who had breached his fiduciary duties to the company from violating a restructuring agreement between the company and the stockholder and from subverting the company's agreed-upon strategic process).
- *In re Atmel Corp. S'holders Litig.*, C.A. No. 4161-CC (Del. Ch. May 19, 2009) (TRANSCRIPT) (denying a motion for a preliminary injunction, and instead requiring claims to proceed to trial, where plaintiffs argued that language in a rights plan including derivative instruments within the definition of beneficial ownership was so vague and unclear that it was facially invalid and constituted a *per se* breach of the directors' fiduciary duties).
- *Versata Enters., Inc. v. Selectica, Inc.*, 5 A.3d 586 (Del. 2010) (upholding a rights plan with a 4.99% trigger adopted to protect the tax benefits of a company's net operating loss carryforwards).
- *Third Point LLC v. Ruprecht*, 2014 WL 1922029 (Del. Ch. May 2, 2014) (applying *Unocal* and upholding adoption of and later refusal to waive a two-tiered trigger, one set at 20% for stockholders who file Schedule 13G (which necessarily disclaim any intent to influence the control or management of the issuer) and another set at 10% for all other stockholders, in response to activist investor affirmatively disclaiming any intent to acquire the company and only running a short-slate proxy contest based on factual finding that the activist investor's "aggressive and domineering manner . . . provides an adequate basis for legitimate concern that [the activist] would be able to exercise influence sufficient to control certain important corporate actions, such as executive recruitment, despite a lack of actual control or an explicit veto power").

## G. Limits On The Board's Power To Adopt A Rights Plan.

### 1. Delaware courts have struck down pills that place unlawful constraints on the board's power to manage the corporation.

- *Carmody v. Toll Bros., Inc.*, 723 A.2d 1180 (Del. Ch. 1998) (refusing to dismiss a complaint challenging a rights plan with a "dead hand" feature (i.e., providing that the rights plan could only be redeemed by the current board or by directors approved by the current board for the full ten-year life of the rights plan) on the basis that such feature violated Sections 141(a) and 141(d) of the DGCL and constituted a breach of the directors' fiduciary duties under *Blasius* and *Unocal*).
- *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. Ch. 1998) (invalidating a "no hand" provision in a rights plan (i.e., providing that a newly elected board of directors could not redeem rights issued under the plan for six months after taking office) as a violation of Section 141(a) of the DGCL).
- *Cf. Cal. Pub. Emps. Ret. Sys. v. Coulter*, 2005 WL 1074354 (Del. Ch. Apr. 21, 2005) (refusing to extend *Carmody* to a contractual provision in golden parachute agreements, and holding that such provision did not violate Section 141(d)

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of the DGCL, where the provision provided that change-in-control payments would be due, if among other things, the board ceased to consist of “existing directors”—those serving at the time the agreements were executed and their approved successors).

- *Pontiac Gen. Emps. Ret. Sys. v. Healthways, Inc.*, C.A. No. 9789-VCL (Del. Ch. Oct. 14, 2014) (TRANSCRIPT)
  - i. (finding plaintiffs’ claim that defendant-directors breached their fiduciary duties when they approved a proxy put provision in a revolving credit and term loan agreement was ripe because “Delaware courts have consistently recognized that disputes are ripe when challenging defensive measures that have a substantial deterrent effect”);
  - ii. (denying defendant-directors’ motion to dismiss plaintiffs’ claim that the defendant-directors breached their fiduciary duties when they approved a proxy put provision in a revolving credit and term loan agreement because: (i) it was adopted in response to a rise in stockholder opposition, which had led to the overwhelmingly approval of a non-binding stockholder proposal to declassify the board; (ii) there was an identified insurgency from an 11% stockholder who had notified the board of its intent to wage a proxy fight; (iii) it was a departure from the company’s historical debt instrument practices; (iv) there was no evidence that the provision was adopted with informed consideration by the board; and (v) there was no evidence that the company negotiated over the provision with the lender);
  - iii. (holding plaintiffs’ aiding and abetting claims against the lender survived the lender’s motion to dismiss because, although it is true “that evidence of arm’s-length negotiation negates claims of aiding and abetting,” one is not allowed to “propose terms, insist on terms, demand terms, contemplate terms, incorporate terms that take advantage of a conflict of interest that the fiduciary counterparts on the other side of the negotiating table face” and “[t]here was ample precedent from this Court putting lenders on notice that [dead hand proxy put] provisions were highly suspect and could potentially lead to a breach of duty”).

## **2. Other claims against rights plans succeeded or were permitted to go forward where the rights plan violated earlier agreements binding the board.**

- *In re Nat’l Intergroup, Inc. Rights Plan Litig.*, 1990 WL 92661 (Del. Ch. July 3, 1990) (granting summary judgment to plaintiff stockholders and holding that the board’s amendments to a rights plan lowering the trigger from 20% to 10%, introducing an automatic trigger feature that was no longer contingent upon a self-dealing transaction, eliminating the flip-over

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feature, and implementing an exchange right, three years after the plan's adoption, were sufficiently significant to constitute a new plan, in violation of a resolution adopted by the board and stockholders at the time the plan was adopted providing that after three years, the board could not adopt a new rights plan without stockholder approval).

- *KLM Royal Dutch Airlines v. Checchi*, 698 A.2d 380 (Del. Ch. 1997) (denying a motion to dismiss, on ripeness grounds, a claim challenging a newly adopted rights plan brought by a stockholder who, under a preexisting agreement with the corporation and in exchange for an investment in the corporation, held an option to purchase additional shares of the corporation, but could not exercise the option without triggering the newly adopted rights plan); *cf. Creo Inc. v. Printcafe Software, Inc.*, C.A. No. 20164-CC (Del. Ch. Feb. 21, 2003) (TRANSCRIPT) (rejecting motion for temporary restraining order against rights plan adopted after a would-be acquiror signed agreements to purchase shares amounting to a majority stake in the target, but before purchases were consummated).
- *Unisuper Ltd. v. News Corp.*, 2005 WL 3529317 (Del. Ch. Dec. 20, 2005) & 2006 WL 207505 (Del. Ch. Jan. 19, 2006) (holding that a board of directors was bound to stockholders by its previously announced policy that it would not extend the corporation's rights plan without a stockholder vote), *cert. for interlocutory appeal denied*, 906 A.2d 138 (Del. 2006).

## H. Other Cases In Which Claims Against Rights Plans Were Permitted To Proceed Or Succeeded.

Notwithstanding the Delaware courts' general respect for rights plans, there are other circumstances in which Delaware courts have either permitted claims to go forward against or rescinded rights plans.

- *In re Chrysler Corp. S'holders Litig.*, 1992 WL 181024, at \*5 (Del. Ch. July 27, 1992) (rejecting a motion to dismiss a challenge to a board's amendment of a rights plan lowering the trigger from 20% to 10%, after a 5% stockholder refused to sign a standstill agreement and increased his ownership to 9.8%, based on an allegation that the pill "significantly impair[s] and hinder[s] a third party's ability to effectuate a successful tender offer for the Company by substantially reducing the number of shares which can be acquired prior to triggering the Rights...[and] impair[s] the ability of [the target's] shareholders to oppose management or otherwise influence corporate policy by preventing shareholders from owning individually or collectively more than 10% of [the target's] common stock thereby limiting concerted action through proxy contests or contests for control").
- *Wells Fargo & Co. v. First Interstate Bancorp*, 1996 WL 32169 (Del. Ch. Jan. 18, 1996) (denying motion to dismiss *Unocal* claim challenging refusal to redeem rights to allow stockholders to consider a hostile exchange offer following target board's approval of a friendly merger).

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- *In re Gaylord Container Corp. S'holders Litig.*, 1996 WL 752356 (Del. Ch. Dec. 19, 1996) (denying a motion to dismiss a breach of fiduciary duty claim against directors who, prior to control shifting to public stockholders following the expiration of a dual class structure, adopted a rights plan and charter and bylaw amendments implementing a number of defensive measures, where the rights plan and charter and bylaw amendments were, collectively, “arguably disproportionate to their purported purpose” and “where the circumstances permit an inference that entrenchment was their true purpose”). *But see* 753 A.2d 462 (Del. Ch. 2000) (ultimately granting summary judgment to defendants and noting, among other things, that the expiration of the dual class structure constituted a legitimate threat, that the rights plan was “a garden-variety poison pill,” and that a would-be acquiror could still mount an effective proxy contest).
- *eBay Domestic Hldgs., Inc. v. Newmark*, 16 A.3d 1, 32 (Del. Ch. 2010) (rescinding, in a post-trial decision, a rights plan where the defendant directors, controlling stockholders, and officers of craigslist failed to prove, under *Unocal*, that they analyzed the threats they argued justified the rights plan (alleged threats to “corporate culture” posed by the other stockholder, eBay, and threats eBay allegedly would pose when stock held by the defendants passed to their heirs in the future) and where the rights plan was not reasonable, in that the defendants could, without the rights plan, protect their vision of the company as long as they controlled it, and would not be permitted to adopt “the Rights Plan *now* so that their vision of craigslist’s culture can bind *future* fiduciaries and stockholders from beyond the grave”).
- *In re Versum Materials, Inc. S'holder Litig.*, C.A. No. 2019-0206-JTL, at 58-60, 83 (Del. Ch. July 16, 2020) (TRANSCRIPT) (awarding a \$12 million mootness fee; finding that plaintiffs’ challenge to an acting-in-concert provision “was relatively strong” reasoning (i) with respect to the first prong of *Unocal*, the record’s existence of wolf-pack activity was “quite skimpy” and (ii) with respect to the second prong of *Unocal*, (a) the acting-in-concert provision was “an expansive provision that [went] beyond traditional concepts of beneficial ownership to include . . . any type of parallel action in the context of a control contest, regardless of the existence of any type of arrangement, agreement, or understanding, and with the indicative events being, really, customary activities, such as exchanging information, attending meetings, or conducting discussions,” (b) the acting-in-concert provision “put at risk” the interloper’s roadshows, solicitation calls, and meetings with target stockholders and (c) the acting-in-concert provision was asymmetric because it excluded the first merger partner and the merger agreement the target executed prior to the interloper’s topping bid).
- *The Williams Cos. S'holder Litig.*, 2021 WL 754593 (Del. Ch. Feb. 26, 2021) (invalidating a rights plan adopted amidst the volatile early days of the COVID-19 pandemic; assuming for the sake of analysis that “lightning strike attacks”—i.e., rapid, undetected accumulation of stock by activists in a short period of time when

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the stock is undervalued—is a legitimate corporate objective under the first prong of *Unocal*, but holding that the rights plan adopted was not a proportional response to this threat because of, among other things, an expansive “acting in concert” provision, which the court found was “likely to chill a wide range of anodyne stockholder communications.”).

## I. Could A Board Be Obligated To Adopt A Pill?

- *La. Mun. Police Emps.’ Ret. Sys. v. Fertitta*, 2009 WL 2263406, at \*8 n.34 (Del. Ch. July 28, 2009) (“To say that there is no *per se* duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board’s failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover.”). In *Fertitta*, a company entered into a going-private merger with an entity controlled by its Chairman, CEO, and 39% stockholder. After the merger agreement was signed, the CEO purchased shares on the open market, and, “although the board and its advisors must have been aware of [the CEO’s] continuing open market purchases, which threatened to (and ultimately did) deliver majority control of the company to [the CEO] without his consummation of the merger agreement at a premium price, the board did nothing to stop [the CEO] from continuing to accumulate shares.” *Id.* at \*17. The Court found that, given other facts, which also suggested that the corporation’s board was more interested in accommodating the controlling stockholder than protecting the corporation’s minority stockholders’ interests, the plaintiff had stated a claim for the breach of the duty of loyalty.
- *Ford v. VMWare, Inc.*, 2017 WL 1684089 (Del. Ch. May 2, 2017) (finding that, even if the parent were selling itself to a known looter, the directors serving on the boards of both the controlling stockholder and subsidiary did not breach their fiduciary duties by failing to protect the subsidiary’s minority stockholders from the actions of the controlling stockholder, either by adopting a pill or issuing a dilutive stock option or block of equity, because the controlling stockholder had consent rights over these actions; because of the controlling stockholder’s consent rights, the directors could not be held responsible for failing to take action they could not take).
- *NACCO Indus., Inc. v. Applicia, Inc.*, 997 A.2d 1 (Del. Ch. 2009) (adopting a pill to cap the company’s largest stockholder “is an action that [the target] logically would have taken in response to the threat of a creeping takeover”).
- *In re CNX Gas Corp. S’holders Litig.*, 4 A.3d 397 (Del. Ch. 2010) (applying the “unified standard” described in *Cox Communications* (discussed above) to a controlling stockholder’s tender offer; suggesting that business judgment review could be obtained if the transaction were conditioned on both majority-of-the-minority

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stockholder approval and approval of the transaction by a special committee of independent directors exercising “authority comparable to what a board would possess in a third-party transaction,” including authority to seek alternatives, file a lawsuit against the controller, and deploy a poison pill).

- *Cf. In re infoUSA, Inc. S’holders Litig.*, 953 A.2d 963 (Del. Ch. 2007) (dismissing claim that directors breached their fiduciary duties by permitting CEO to remain exempt from rights plan, where directors instead entered into standstill agreement with CEO following acquisitions of stock by him).

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

## III. MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

**A. No Talk/No Solicitation.** Many merger agreements prohibit solicitation of bids once a deal is signed up, although the provisions generally permit targets to negotiate with unsolicited topping bidders.

### 1. More aggressive agreements may prevent targets from even talking to such unsolicited bidders. Is this “willful blindness?”

- *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255, at \*2 (Del. Ch. Sept. 27, 1999) (considering prospective competitor’s challenge to “no-talk” provision under which target could not talk to prospective acquirors, Court stated that clause appeared to impose upon the target board “willful blindness” in violation of the board’s fiduciary duty to be informed of all material information reasonably available).
- *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999) (suggesting that agreement to a “no-talk” provision—i.e., a provision without an effective carve-out permitting it to talk with unsolicited bidders—in a merger for which the stockholder vote was locked up would violate a board’s duty of care).
- *In re IXC Commc’ns, Inc. S’holders Litig.*, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) (dismissing stockholder claim that their directors breached their fiduciary duties by agreeing to a “no-talk” clause, where the provision was agreed to late in the negotiation process after a thorough examination of possible alternatives).
- *Cirrus Hldg. Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1207 (Del. Ch. 2001) (holding that under directors’ heightened duty to obtain best price reasonably available, “directors cannot be precluded by the terms of an overly restrictive ‘no-shop’ provision from all consideration of possible better transactions” and that directors are “required to consider all available alternatives in an informed manner until such time as [the transaction is] submitted to the stockholders for approval”).
- See Part A.4, below, discussing the potential “informational vacuum” of including a no solicitation provision when a company has executed standstill agreements with losing bidders that contain “Don’t Ask, Don’t Waive” provisions.

### 2. The courts may be questioning of overly “buyer-friendly” no-shop provisions.

- *In re Compellent Techs., Inc. S’holder Litig.*, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011) (characterizing the following fiduciary out provisions to a no-shop as a “procedural gauntlet”: (1) requirement of strict compliance with no-shop with no

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

materiality, intent or causation limitations; (2) required conclusion that failure to act “would constitute a breach,” rather than “could,” “would be reasonably likely to” or “would be inconsistent with” formulations; (3) obligated topping bidder to sign 275-day standstill, with target only having ability to waive if, after giving acquiror 4 days’ notice, target determined failure to do so “would constitute a breach” of fiduciary duties; (4) non-public information had to be provided to acquiror 24 hours before it was given to any topper; and (5) target had to provide acquiror with topping bidder’s identity 2 days before talking to the topper; other deal protections included: (1) ongoing information rights for acquiror if target met the standard to talk to topper; (2) change of recommendation provision that (x) included notice and 4-business day delay before target board could change recommendation, (y) provided that change from unanimous recommendation to majority recommendation by special committee constituted a change of recommendation and (z) was potentially not workable because target board could not adjourn/postpone the stockholder meeting without acquiror’s consent (particularly with a force-the-vote provision and 29% of stockholders locked-up in a support agreement with a nine-month tail); (3) target adopted poison pill, carving out current deal, which could only be pulled through similar procedures to the fiduciary out; and (4) termination fee of 3.85% of equity value (5% in the case of an intervening event) and the superior proposal break fee could be triggered by acquiror if it simply terminated after target responded to a topping bidder).

- *FrontFour Capital Grp. LLC v. Taube*, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019) (holding that combination of deal protection measures, including a window shop provision, was outside the range of reasonableness given the absence of a pre-signing market check in a transaction involving affiliated entities).

### **3. Interpretation of a provision prohibiting actions that may impair or delay the consummation of a merger.**

- *Energy P’rs, Ltd. v. Stone Energy Corp.*, 2006 WL 2947483 (Del. Ch. Oct. 11, 2006) (when read in context of entire merger agreement, a provision that prevented an acquiror from taking action that could “reasonably be expected to materially impair the ability of [the parties] to consummate the Merger . . . or materially delay such consummation . . .” did not prevent the acquiror from investigating, negotiating, or pursuing a certain tender offer or any other Third Party Acquisition Proposal).

### **4. Some agreements may prohibit targets from talking to bidders who previously agreed to standstill agreements by prohibiting the waiver of such provisions.**

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

- In *In re Topps Co. S'holders Litig.*, 926 A.2d 58 (Del. Ch. 2007), a third-party bidder was prohibited by a standstill agreement from making public any information about its discussion with the target or proceeding with a tender offer for the target's shares without permission from the target board. The target board refused to waive the standstill agreement. The Court found that where: (a) the target refused to negotiate with a third-party bidder, who then made an unsolicited bid for the target's shares at a materially higher price than was being offered in the target's current deal; (b) the target board did not use the standstill agreement as a negotiating tool to extract concessions from the bidder; (c) the board's refusal to waive the standstill agreement meant that the stockholders were foreclosed from considering the bidder's offer; and (d) the target board disparaged the seriousness of the bidder's offer while using the standstill agreement to prevent the bidder from telling its side of the story, then the standstill agreement was not being used for a legitimate purpose and the refusal to waive it was inconsistent with the board's fiduciary duties under *Revlon*. The Court enjoined a merger vote of the target until after the target board waived the standstill agreement to: (1) allow the third-party bidder to make a tender offer; and (2) allow the bidder to communicate with the target's shareholders about its version of relevant events.
- See also *In re RehabCare Grp., Inc. S'holders Litig.*, C.A. No. 6197-VCL, at 46 (Del. Ch. Sept. 8, 2011) (TRANSCRIPT) (approving settlement of litigation involving, among other things, target waiving standstill provisions prohibiting bidders from requesting a waiver of the standstill to make a topping bid).
- Compare *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (TRANSCRIPT) (noting that “per se rulings where judges invalidate contractual provisions across the bar are exceedingly rare in Delaware”; suggesting that, in an auction process, there are circumstances in which standstill provisions prohibiting a bidder from requesting a waiver of the standstill to make a topping bid can have “value-maximizing purposes” to “allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you're creating an auction, there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process”), with *Koehler v. NetSpend Hldgs. Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013) (concluding that plaintiffs had shown a reasonable probability of success on the merits, but denying a preliminary injunction based upon a balancing of the equities, with respect to their claim that a board acted unreasonably when, after pursuing a single-bidder sale of the company strategy, it entered into a merger agreement prohibiting the waiver of standstills and (i) in connection with a prior unrelated effort to facilitate a sale of a 31% stockholder's stake, certain

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

potential private equity buyers were party to standstill provisions prohibiting them from requesting a waiver of the standstills to make a bid for the whole company and (ii) the board had failed to consider whether the standstills should remain in effect before approving the merger agreement), *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (characterizing as possibly “problematic” the combination of a standstill provision prohibiting bidders who had signed the standstill from asking the board to waive the standstill with a no-shop provision because it created a potential informational vacuum and suggesting that the likely remedy for a successful claim challenging such a standstill would be an injunction against its enforcement), *aff'd in part, rev'd in part*, 59 A.3d 418 (Del. 2012), and *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012) (TRANSCRIPT) (recognizing that “Delaware entities are free to enter into binding contracts without a fiduciary out so long as there is no breach of fiduciary duty involved when entering into the contract in the first place” but finding that plaintiffs had shown a reasonable probability of success on their claims challenging standstills prohibiting a bidder from privately requesting a waiver to make a topping bid and a merger agreement provision that prohibited the company from waiving or modifying standstills because the board “impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders”).

## 5. The court may evaluate the “body language” of a no-talk provision when considering its reasonableness and its signaling effect to potential topping bidders.

- *In re Fort Howard Corp. S'holders Litig.*, 1988 WL 83147 (Del. Ch. Aug. 8, 1988) (noting that the joint press release announcing the no-shop merger explained that “the Special Committee” directed the Company’s management and [its financial advisor] to be available to receive inquiries from any other parties interested in a possible acquisition . . . and, [for the financial advisor] as appropriate, to provide information and . . . enter into discussions and negotiations . . . .”); *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (evaluating the merits of ordering a *Fort Howard*-style announcement and the signaling effect of failing to make such a press release).

## B. Right To Terminate For Superior Proposal.

### 1. The DGCL authorizes “exclusive” merger agreements.

- Section 146 allows a corporation to agree to submit any matter to its stockholders whether or not the board of directors determines subsequent to its approval that such matter is no longer advisable.

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (holding that, by approving voting agreements that assured stockholder approval of merger coupled with a force the vote provision, the directors irrevocably locked up the merger and took measures that were unreasonable and preclusive).

## 2. To preserve a termination right, it should be clear that the right is a right to terminate for a defined superior proposal, rather than relying upon some inherent requirement that “fiduciary duties” require termination.

- *Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985) (explaining that merger agreement, which provided that the directors “may have a competing fiduciary obligation to the shareholders under certain circumstances,” did not permit the board to terminate the merger agreement to accept a better offer, stating that the board’s only options were to (i) proceed with merger and stockholders’ meeting, with the board’s recommendation of approval or (ii) rescind the merger agreement, withdraw its approval of the merger and notify its stockholders that the proposed stockholders’ meeting was cancelled).
- *See Corwin v. deTrey*, 1989 WL 146231, at \*4 (Del. Ch. Dec. 1, 1989) (“In such a third-party transaction, the directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed.”).
- *Global Asset Capital, LLC v. Rubicon US REIT, Inc.*, C.A. No. 5071-VCL, at 90 (Del. Ch. Nov. 16, 2009) (TRANSCRIPT) (“[C]ontracts, in my view, do not have inherent fiduciary outs.”).

## C. May A Board Limit Its Right To Change Its Recommendation?

### 1. Directors may present a merger agreement to stockholders that they no longer recommend.

- Prior to 1998, the board recommendation was a technical but necessary requirement for holding a stockholders meeting. *See Smith v. Van Gorkom*, 488 A.2d 858, 887-88 (Del. 1985) (stating that board could neither (i) recommend that the stockholders vote against the merger nor (ii) take a noncommittal position on the merger).
- Since 1998, there has not been a technical requirement that a board continue to recommend to present a merger agreement to stockholders. From 1998 to 2003, Section 251(c) permitted a merger agreement to require that the agreement be submitted to the stockholders (i.e., a force the vote provision) whether or not the board of directors determined subsequent to declaring its advisability that the agreement was no longer advisable and recommended that the stockholders reject it. In 2003, Section 146 was added to replace Section 251(c). Section 146 provides that a corporation may agree to submit

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

any matter (including a merger agreement) to its stockholders for approval whether or not the board of directors determines after approving any such matter that it is no longer advisable and recommends that stockholders vote against the matter.

- See *In re Berkshire Realty Co., Inc. S'holders Litig.*, 2002 WL 31888345, at \*4 (Del. Ch. Dec. 18, 2002) (although charter provision required board of directors to submit liquidation plan to stockholders, the board had no duty to recommend stockholder approval of the plan; stating “if the board, in the exercise of its business judgment, determined that liquidation was not in the best interests of the corporation and its stockholders, it could not have recommended a liquidation without violating its fiduciary duty to the stockholders”).
- In *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005), the Court stated that a merger agreement “was not an ordinary contract. Before the [m]erger could occur, the shareholders of [the target corporation] had to approve it. The directors of [the target] were under continuing fiduciary duties to the shareholders to evaluate the proposed transaction.” The Court noted that the merger agreement accommodated those duties by providing that the board could, in certain circumstances, change or withdraw its recommendation that stockholders approve the merger. In holding that the target had not repudiated the merger agreement, Vice Chancellor Noble stated that “[r]evisiting the commitment to recommend the [m]erger was not merely something that the [m]erger [a]greement allowed the [target] Board to do; it was the duty of the [target] Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties.” *Id.* at \*28.
- *Mercier v. Inter-Tel, Inc.*, 929 A.2d 786, 809 (Del. Ch. 2007) (discussing the intricacies of the *Blasius* standard of review and noting that “[a]s a matter of fiduciary duty, directors should not be advising stockholders to vote for transactions or charter changes unless the directors believe those measures are in the stockholders’ best interests”).

## 2. Strong case law language regarding the board’s fiduciary duty of disclosure.

- *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005) (noting that duty of disclosure could require a board to change its recommendation).
- See *Malone v. Brincat*, 722 A.2d 5 (Del. 1998) (board of directors owes a fiduciary duty of disclosure in connection with disclosures to its stockholders even when the board is not seeking stockholder action, and that directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder thereby violate their fiduciary duty to the corporation and its stockholders).

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

- *ODS Techs., L.P. v. Marshall*, 832 A.2d 1254, 1261 (Del. Ch. 2003) (emphasizing the duty of disclosure in the context of a stockholder vote on various charter amendments and stating that “Delaware law requires full and fair explanation of the rationale for a proposal that directors are recommending stockholders to approve”).
- Many agreements purport to limit the circumstances under which directors can change their recommendation to certain defined, “superior proposals.” But there may be other developments that would require a board to change its recommendation. There may be an unforeseen positive development with respect to the target or an unexpected decline in an acquiror’s stock price. A requirement that the board continue to “recommend” a transaction in the face of such a development may place directors in an untenable position.
- *Marmon v. Arbinet-Thexchange, Inc.*, 2004 WL 936512, at \*5 (Del. Ch. Apr. 28, 2004) (stating, in the context of Section 220 (books and records demand), that the “directors of a Delaware corporation have a duty to disclose material facts to all of the corporation’s shareholders. The directors are not free arbitrarily to pick and choose the shareholders to whom they will or will not make disclosure. Nor can the corporation be heard to defend such a practice on the basis that it has bound itself contractually not to make such disclosures. [The Company’s] directors were not free to contract away disclosure obligations that they had a fiduciary duty to observe. Nor could they rely upon a certificate provision prohibiting disclosure to avoid a shareholder’s inspection right conferred by statute.” (footnotes omitted)).
- *Cavalcade Oil Corp. v. Texas Am. Energy Corp.*, 1984 WL 8215 (Del. Ch. May 22, 1984) (holding that charter amendments would not become effective until corporation made additional disclosures because, inter alia, board of directors had unanimously recommended in favor of the amendments but, after proxy statements were mailed, two directors changed their position and one director resigned in opposition to the amendments).

### **3. Directors may recommend a merger that is unlikely to be approved by stockholders.**

- *In re Lear Corp. S’holder Litig.*, 967 A.2d 640, 655 (Del. Ch. 2008) (rejecting claim that directors breached their duty of loyalty by recommending a merger agreement to stockholders while knowing that approval of the agreement was unlikely and stating “in the merger context, directors are free to adopt a merger agreement and seek stockholder approval if they believe that the stockholders will benefit upon adoption, even if they recognize that securing approval will be a formidable challenge”).

# MERGER AGREEMENT PROVISIONS: DEAL PROTECTION

## D. Break-Up Fees.

### 1. What standard applies?

- *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) (holding that where a termination fee is not a defensive mechanism instituted to respond to a perceived threat from a potential acquiror, or the result of disloyalty or lack of care, the courts will review break-up fees under deferential business judgment standard).
- *Mills Acq. Co. v. MacMillan, Inc.*, 559 A.2d 1261 (Del. 1989) (where break-up fee is adopted as a defensive measure in the context of a sale of control favoring one bidder over others, heightened judicial scrutiny will be applied).
- *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986) (break-up fee as part of no-shop provision improperly ended “rather than intensified” the bidding contest).
- *Brazen v. Bell Atl. Corp.*, 695 A.2d 24 (Del. 1997) (analyzing termination fee under a liquidated damages analysis).
- For an analysis of whether the obligation to pay a break-up fee was triggered, see *The Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 2017 WL 5953513 (Del. Ch. Dec. 1, 2017) (finding that, among other things, the seller’s public negative statements regarding the buyer’s CEO and failure to “reconsider the recommendation” . . . in light of changes ‘described in the [seller’s] Form S-4’ were not a *de facto* change of recommendation that would trigger the break-up fee where the merger agreement contemplated that a change of recommendation required formal board action); see also *The Williams Cos., Inc. v. Energy Transfer LP*, 2021 WL 6136723 (Del. Ch. Dec. 29, 2021) (holding that limited partnership was contractually obligated to pay \$410 million break-up fee).

### 2. Magic number?

- *Vintage Rodeo Parent, LLC v. Rent-a-Ctr., Inc.*, 2019 WL 1223026, at \*24 (Del. Ch. Mar. 14, 2019) (describing a 15.75% reverse break-up fee as “enormous”; questioning whether the parties intended the fee to apply if the buyer “simply forgot to exercise its contractual right” to extend the end date and ordering supplemental briefing on the application of the implied covenant of good faith and fair dealing).
- *In re Comverge, Inc.*, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014) (observing that a termination fee of 5.55% of equity value and 5.2% of enterprise value “tests the limits of what this Court has found to be within a reasonable range for termination fees”).
- *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at \*4 n.47 (Del. Ch. Apr. 11, 2011) (refusing to preliminarily enjoin transaction with a termination fee equal to 4.4% of the target’s equity value and 5% of its enterprise value and noting: “The break-up fee, at 4.4% of equity value, is near

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the upper end of a 'conventionally accepted' range. This is a relatively 'small' transaction [at approximately \$127 million]; a somewhat higher than midpoint on the 'range' is not atypical. The Plaintiffs argue that the meaningful percentage is one calculated in reference to [the target's] enterprise value and not to its equity value. The argument is plausible. This, however, is not a matter of first impression. Our law has evolved by relating the break-up fee to equity value. The Plaintiffs have offered no compelling reason for deviating from that approach." (internal citations omitted)).

- *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (refusing to preliminarily enjoin transaction with 3.5% termination fee based on deal value and 3.9% taking into account the additional payment of expenses).
- *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487 (Del. Ch. 2010) (finding termination fee reasonable where it represented 3% of the equity value or 6.6% of the enterprise value of the target and holding that equity value was the appropriate measure given the facts before the Court).
- *In re 3Com S'holders Litig.*, 2009 WL 5173804, at \*7 (Del. Ch. Dec. 18, 2009) (4% break fee has "been repeatedly upheld by this Court" and is "not *per se* unreasonable").
- *In re Lear Corp. S'holders Litig.*, 926 A.2d 94 (Del. Ch. 2007) (3.5% of equity value and 2.4% of enterprise value termination fee following go-shop period reasonable notwithstanding that banker presentation indicated 2.9% was median fee in such cases).
- *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 86 (Del. Ch. 2007) (two-tiered termination fee of approximately 3% of deal value (inclusive of expenses) for termination during first 40-day period following execution of merger agreement and approximately 4.3% of deal value (inclusive of expenses) for termination after 40-day period not unreasonable; although 4.3% "a bit high" in percentage terms, court noted inclusion of expenses and stated percentage "can be explained by relatively small size of the deal" (total purchase price \$385 million)).
- *Berg v. Ellison*, C.A. No. 2949-VCS, at 7, 16-17 (Del. Ch. June 12, 2007) (TRANSCRIPT) (indicating a willingness to expedite injunction proceedings focused on the issue of the size of the break fee "if the plaintiffs can in good faith come back after discussions with the defendants and say the defendants are wrong, this termination fee is four and a half percent or more of the real equity or enterprise value of the deal," but opting not to expedite where termination fee was "something more like three, three and a half percent" on a fully diluted basis).
- *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007) ("Though a '3% rule' for termination fees might be convenient for transaction planners, it is simply too blunt an instrument, too subject to abuse, for this Court to bless as a blanket rule.").

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- *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 177 (Del. Ch. 2007) (“modest [3%] termination fee . . . is not triggered simply on a naked no vote, and, in any event, has not been shown to be in any way coercive or preclusive”).
- *In re Toys “R” Us, Inc. S'holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (3.75% breakup fee, which had been negotiated down from the 4.0% fee initially requested, was not impermissible, particularly when the winning bidder was paying \$350 million, or 5.6% more, than the next highest bidder).
- *In re CompuCom Sys., Inc. S'holders Litig.*, 2005 WL 2481325 (Del. Ch. Sept. 29, 2005) (3.46% breakup fee was permissible).
- *In re Pennaco Energy, Inc. S'holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (holding break-up fee of 3% was “modest and reasonable”).
- *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (holding 3.5% break-up fee “was at the high end” of fees approved by Delaware courts, but within a reasonable range).
- *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at \*10 (Del. Ch. Oct. 27, 1999) (stating “[i]t is very difficult to say that any termination fee is so excessive on its face that it is unenforceable. Termination fees are most properly evaluated in the context of the merger agreements under which they arise”).
- *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, 1999 WL 1054255, at \*2 (Del. Ch. Sep. 27, 1999) (stating that 6.3% termination fee “certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point”).
- *Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.*, 729 A.2d 280, 291-92 n.15 (Del. Ch. 1998) (citing authority referring to break-up fees as “liquidated damages provisions,” acknowledging that fees in the range of 1-5% of the proposed acquisition price are reasonable and upholding 4.98% break-up fee (including expense reimbursement) based on the number of shares outstanding as of date of merger agreement).
- *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (1.2% termination fee coupled with uncapped stock option entitling bidder to 19.9% of target's stock upon triggering of termination fee was an “improper” and “counter-productive” measure in violation of the board's fiduciary duties).

### **3. What is included in the percentage? Expenses? Profit on stock option? Is the percentage based on the equity value of the transaction or the enterprise value?**

- *In re Comverge, Inc.*, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014) (taking into account baseline termination fees and expenses and, in addition, suggesting Court would take into account payment that could result as a result of conversion privilege in notes issued to acquiror).

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- *In re Novell, Inc. S'holder Litig.*, 2013 WL 322560 (Del. Ch. Jan. 3, 2013) (stating that “the Plaintiffs’ argument that the termination fee constituted 8% of the actual purchase price, and thus was actionable, fails because the proper measure of a termination fee is based on its percentage [2.7%] of equity value”).
- *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1030 (Del. Ch. 2012) (stating that “the Board agreed to a termination fee of \$650 million, which represented approximately 3.05% of the equity value of the Merger at the time of signing, and an even lower percentage of enterprise value (approximately 2.9%), which is typically the more relevant measure for assessing the preclusive effect of a termination fee on a materially better topping bid”).
- *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at \*4 n.47 (Del. Ch. Apr. 11, 2011) (refusing to preliminarily enjoin transaction with a termination fee equal to 4.4% of the target’s equity value and 5% of its enterprise value and noting as follows: “The break-up fee, at 4.4% of equity value, is near the upper end of a ‘conventionally accepted’ range. This is a relatively ‘small’ transaction [at approximately \$127 million]; a somewhat higher than midpoint on the ‘range’ is not atypical. The Plaintiffs argue that the meaningful percentage is one calculated in reference to [the target’s]’ enterprise value and not to its equity value. The argument is plausible. This, however, is not a matter of first impression. Our law has evolved by relating the break-up fee to equity value. The Plaintiffs have offered no compelling reason for deviating from that approach.” (internal citations omitted)).
- *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 613 (Del. Ch. 2010) (calculating fee based on deal value and including within the denominator options, restricted stock units, and performance units that would have to be paid by the acquiror and a special dividend that would be paid by the target company to its stockholders only upon consummation of the merger, and also taking into account the target’s agreement to pay expenses).
- *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 504 (Del. Ch. 2010) (finding that equity value was the appropriate measure for determining reasonableness of a termination fee, where termination fee was 3% of equity value or 6.6% of enterprise value (due to fact that company had essentially no debt and sizable cash assets); citing language from *Dollar Thrifty* for proposition that the “relevant transaction value is logically quantified as the amount of consideration flowing into stockholders’ pockets—not the amount of money coming exclusively from bidder and bidder alone” (internal citations omitted)).
- *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 86 (Del. Ch. 2007) (finding a fee that was 4.3% of the deal value reasonable in part because that percentage included expenses and the deal itself was relatively small).

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- *Berg v. Ellison*, C.A. No. 2949-VCS, at 10 (Del. Ch. June 12, 2007) (TRANSCRIPT) (suggesting that the “actual cost of acquisition”—which Court defined as the merger consideration multiplied by the number of shares on a fully diluted basis—not the number of shares outstanding—is the appropriate denominator for calculating the percentage value of termination fees).
  - *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171 (Del. Ch. 2007) (termination fee was 3% of equity value and was inclusive of the acquiror’s expenses).
  - *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (noting that termination fee of \$247.5 million was 3.75% of equity value and a “more modest” 3.25% of enterprise value).
  - *In re MONY Grp. Inc. S’holders Litig.*, 852 A.2d 9 (Del. Ch. 2004) (holding that termination fee that represented 3.3% of the equity value and 2.4% of the transaction value was “well within the range of reasonableness”).
  - *In re NCS Healthcare, Inc. S’holders Litig.*, 825 A.2d 240 (Del. Ch. 2002) (holding that termination fee that was 2% of total transaction value was not “coercive or preclusive”; instructing that because board owed duties to stockholders and creditors, debt should be included in calculation of transaction value), *rev’d on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).
  - *Lewis v. Leaseway Transp. Corp.*, 1990 WL 67383 (Del. Ch. May 16, 1990) (dismissing challenge to break-up fee and related expense reimbursement provision totaling approximately 3% of deal’s value).
  - *Mills Acq. Co. v. MacMillan, Inc.*, 1988 WL 108332 (Del. Ch. Oct. 18, 1988) (holding combination of expenses and break-up fee totaling 2.5% of the transaction price not to be excessive), *rev’d on other grounds*, 559 A.2d 1261 (Del. 1989).
  - *In re Lear Corp. S’holders Litig.*, 926 A.2d 94, 120 (Del. Ch. 2007) (“For purposes of considering the preclusive effect of a termination fee on a rival bidder, it is arguably more important to look at the enterprise value metric because, as is the case with Lear, most acquisitions require the buyer to pay for the company’s equity and refinance all of its debt.”).
- 4. Vote coercion.** Analysis of fee may be different if triggered solely by stockholder vote against deal. Does triggering fee based on board recommendation change raise similar issue? What if company has no cash?
- *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 615 (Del. Ch. 2010) ( finding that deal protections were not coercive where termination fee would only be payable upon a no-vote by stockholders and the acceptance of another more valuable transaction within a year).
  - *In re Lear Corp. S’holders Litig.*, 926 A.2d 640, 656-57 (Del. Ch. 2008) ( finding that target board of directors did not breach

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its fiduciary duties in agreeing to a 0.9% termination fee payable on a naked no-vote in exchange for a 3.4% increase in the merger consideration and noting that “this court has approved termination fees contingent solely on a ‘naked no vote’ of up to 1.4% of transaction value”).

- *In re Netsmart Techs., Inc. S’holders Litig.*, 924 A.2d 171, 177 (Del. Ch. 2007) (refusing to enjoin merger, in part because “[t]he modest termination fee in the Merger Agreement is not triggered simply on a naked no vote, and, in any event, has not been shown to be in any way coercive or preclusive”).
- *Brazen v. Bell Atl. Corp.*, 695 A.2d 43, 50 (Del. 1997) (stating that “the mere fact that the stockholders knew that voting to disapprove the merger may result in activation of the termination fee does not constitute stockholder coercion”; rather, the “determination of whether a particular stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case” (citations omitted)).
- *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (stating that structure in which termination fee was payable only if stockholders rejected the merger and there was another acquisition proposal within one year was significant in Court’s determination that the breakup fee was not preclusive or coercive).
- *Orman v. Cullman*, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (upholding transaction in which majority stockholders with high vote stock agreed to vote shares pro rata in accordance with public stockholders where majority stockholders also agreed not to vote in favor of another transaction for 18 months following termination and stating that such a transaction was not coercive because there was no penalty to public stockholders for voting against the transaction).

**E. Top-Up Options.** Prior to the adoption of Section 251(h) of the DGCL, deal planners structuring a two-step transaction would include a “top-up option” in order to allow an acquirer who successfully consummated a tender offer for a majority of the shares to obtain record ownership of 90% of the shares and be able to consummate the back-end merger as a short-form merger without a stockholder vote at a meeting. Several decisions together indicate that (1) top-up options are, as a general matter, valid under Delaware law, (2) parties can likely contractually agree to exclude the effects of an exercise of a top-up option from appraisal valuations, and (3) a board’s approval of a merger agreement with a top-up option must sufficiently set forth certain terms.

- *In re Cogent, Inc. S’holder Litig.*, 7 A.2d 487, 504-05 (Del. Ch. 2010) (denying a motion for a preliminary injunction and rejecting claims (1) that the directors, in granting a top-up option, were not sufficiently informed under the DGCL provisions governing the issuance of stock; (2) that the option, because it “technically” could allow the acquirer to exercise the top-up option without receiving a majority of the shares in the tender offer, would allow

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the acquiror “to take control of the Company against the wishes of minority stockholders, even if a majority of shares are not tendered” as “far too speculative to warrant injunctive relief” and depending “on the occurrence of more than one highly unlikely event”; (3) that the option was a “sham” transaction because the acquiror could pay for the top-up shares with a promissory note and thus nothing but a “promise to pay itself,” where the note was an enforceable obligation providing for recourse against the parent; and (4) that the appraisal rights of stockholders would be diluted as a result of the issuance of the new shares, where the parties had agreed in the merger agreement that the fair value of the shares would be determined without regard to the top-up option or shares).

- *Olson v. ev3, Inc.*, 2011 WL 704409, at \*9-\*14 (Del. Ch. Feb. 21, 2011) (holding, for purposes of determining plaintiff’s counsel fees and the benefits conferred by plaintiffs’ claims in the context of a settlement that required the merger agreement to be amended to provide that the top-up shares and related consideration would not be considered in an appraisal proceeding and, along with the board resolutions approving the amendments, more precisely set forth the terms of the top-up option and promissory note with which the acquiror would pay for the top-up shares, (1) that plaintiffs’ “appraisal dilution” claim with respect to the top-up option was of “minimal benefit,” since the exclusion of top-up shares would likely be required under the appraisal statute, which provides for excluding “any element of value...arising from the ...expectation of the merger...,” and the nature of the appraisal process, and because parties can contractually provide for such exclusion, and (2) that plaintiffs’ statutory claims, i.e., that any top-up shares would be void, did confer a “meaningful benefit,” because, under the merger agreement and apparently the resolutions adopted by the target board, the material terms of the promissory note with which the acquiror would pay for the top-up shares were not set forth (“including the terms of repayment, provisions for interest, whether the note will be secured, negotiable or transferable, or other terms...”), in violation of Section 157(b) of the DGCL, which requires that option terms be set forth in a company’s certificate of incorporation or in a board resolution, and in violation of Sections 152, 153, and 157(d) of the DGCL, under which directors must determine the consideration received for shares).
- *Turberg v. ArcSight, Inc.*, C.A. No. 5021-VCL, at 41 (Del. Ch. Sept. 20, 2011) (TRANSCRIPT) (stating that “it was a different world in September 2010,” i.e., before *Cogent* was decided and resolved possible challenges to top-up options).

## F. Voting Agreements.

- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (reversing the Court of Chancery and holding that NCS board had impermissibly “locked up” a merger with a third party bidder where directors agreed to a “force the vote” provision and approved agreements between the bidder and two stockholders (who owned shares having a majority of the voting power) that obligated the stockholders to vote for the merger; finding that the directors’ approval of the voting agreements and force the vote

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provision in the merger caused the board to abdicate its fiduciary duties during the period between the signing and the vote, because the board was unable to react to the subsequent offer).

- *Optima Int'l of Miami, Inc., v. WCI Steel, Inc.*, C.A. No. 3833-VCL, at 24 (Del. Ch. June 27, 2008) (TRANSCRIPT) (rejecting plaintiffs' argument that defendants had impermissibly "locked up" a merger without an effective fiduciary-out where the merger agreement required the target's stockholders to approve the agreement by written consent within twenty-four hours of being approved by the target's board and stating: "if it is your state of knowledge that you know that at least 50% of your shares are going to be voted in favor of this transaction immediately thereafter, in what sense can it be a breach of fiduciary duty to authorize the transaction without ... a fiduciary-out period?"; stating that "*Omnicare* is of questionable continued vitality").
- *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022, 1048-49 (Del. Ch. 2012) (rejecting challenges to deal protections including an agreement by 49% stockholders to vote 37% of the outstanding stock in favor of the merger where the merger agreement contained a force-the-vote provision (in which case the stockholders were only obligated to vote 33% in favor of the deal), noting that the votes "locked-up" were "far less than a majority, and even less in a force-the-vote context," and characterizing the combined deal protections as not of a size that would prevent a serious topping bid from a motivated buyer).
- *In re OPENLANE, Inc. S'holders Litig.*, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011) (rejecting argument that board had improperly "locked-up" merger where the directors approved a merger agreement that the directors and officers, as holders of 68% of the company's stock, adopted the next day by written consent, in light of the absence of any voting agreements and the right of the board to terminate the merger agreement, without having to pay a termination fee, if a majority of the shares had not consented to the merger within 24 hours after execution of the merger agreement).
- *Forgo v. Health Grades, Inc.*, C.A. No. 5716-VCS (Del. Ch. Aug. 18, 2010) (TRANSCRIPT) (noting that the fact that support agreements from management to tender their 20% stake would fall away if the target board changed its recommendation "reduces some of the vibrancy of some of the color I see" for purposes of ruling on a motion for expedited proceedings, but nevertheless granting expedition, in part because the support agreements are "a very strong signal that management is happy with this particular deal").
- *Orman v. Cullman*, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (upholding transaction in which majority stockholders with high vote stock agreed to vote shares pro rata in accordance with public stockholders where majority stockholders also agreed not to vote in favor of another transaction for 18 months following termination and stating that such a transaction was not coercive because there was no penalty to public stockholders for voting against the transaction).

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- *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999) (noting that acquiror's ownership of 12.3% of target's stock and voting agreements with respect to another 33.5%, gave acquiror, as a "virtual certainty," the votes to consummate the merger even if a materially more valuable transaction became available).
- *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174, at \*8 (Del. Ch. Oct. 27, 1999) (stating, in reference to a transaction where an independent majority of the target's stockholders owning nearly 60% of the target's shares could freely vote for or against the merger, "[a]lmost locked up' does not mean 'locked up,' and 'scant power' may mean less power, but it decidedly does not mean 'no power,'" and finding that the voting agreement did not have the purpose or effect of disenfranchising the remaining majority of stockholders (citations omitted)).
- *Am. Bus. Info., Inc. v. Faber*, C.A. No. 16265 (Del. Ch. Mar. 27, 1998) (TRANSCRIPT) (refusing to enjoin grant of lock-up to high bidder because of "credible risk" that high bidder "may abandon the picture, leaving only [lower bidder] in the picture").

**G. Target Options.** Options granted by a target corporation to purchase shares of the target's stock serve several purposes including (i) providing the acquiror an upside in the event a merger is consummated with another party, and (ii) generally deterring third-party bidders. Historically, options granted by a target corporation also made pooling of interests accounting treatment difficult or unavailable for a third party; however, since pooling of interests accounting treatment for corporate acquisitions was eliminated in 2001, use of such options has become less common.

## 1. Size of option? Should the option be capped?

- *Rand v. W. Airlines, Inc.*, 1994 WL 89006 (Del. Ch. Feb. 25, 1994) (upholding 30% stock option, finding that it kept the "only party expressing any interest at the table"), *aff'd*, 659 A.2d 228 (Del. 1995).
- *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (invalidating a 19.9% stock option, the terms of which permitted the acquiror to exercise the option by payment of a note of questionable marketability instead of cash and had a put feature permitting the acquiror to put the stock to the target for the difference between a strike price and the market price of the target's stock, without a cap to limit its maximum dollar value, finding the option to be unreasonable and draconian).
- *In re IXC Commc'ns, Inc. S'holders Litig.*, 1999 WL 1009174 (Del. Ch. Oct. 27, 1999) (upholding 19.9% stock option with a profit cap of \$26.25 million).
- *See also In re Comverge, Inc.*, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014) (finding it reasonably conceivable at a motion to dismiss stage that the conversion right of convertible notes with a conversion price below the deal price will "work in tandem with the termination fees effectively to prevent a topping bid").

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## H. Other Covenants.

### 1. Can target board covenant to leave rights plan in place to fend off other acquirors?

- *Quickturn Design Sys. v. Shapiro*, 721 A.2d 1281 (Del. 1998) (invalidating delayed redemption provision of rights plan that prohibited a newly elected board from redeeming the rights for six months because such provision prevented a newly elected board from completely discharging its fundamental managerial duties to the corporation and its stockholders).
- *Chesapeake Corp. v. Shore*, 771 A.2d 293, 333 (Del. Ch. 2000) (suggesting that the decision to leave defensive measures in place, except for a limited time to insure that stockholders are sufficiently informed, is an unreasonable response to the threat of stockholder confusion).
- *In re Pure Res., Inc. v. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002) (finding that the subsidiary's board had no duty to adopt poison pill to fend off a non-coercive tender offer and suggesting that board might have obligation to remove rights plan in face of non-coercive third party tender offer).
- *In re Compellent Techs., Inc. S'holder Litig.*, 2011 WL 6382523 (Del. Ch. Dec. 9, 2011) (characterizing as "novel" and "bidder friendly" a merger agreement provision requiring target to adopt a rights plan, carving out the current deal and providing that target board could only redeem the pill if (1) there had been no breach—with no materiality or other qualifier—of the no-shop provision, (2) the failure to pull the pill "would constitute" a breach of fiduciary duties and (3) target provided acquiror with 4 business days' prior notice of its intent to redeem the pill).
- *Compare NACCO Indus. Inc. v. Applica Inc.*, 997 A.2d 1, 31 (Del. Ch. 2009) (suggesting that a target board might have attempted to "cap" a significant stockholder and 13D filer "with a rights plan" as a "logical[]" response to the threat of a creeping takeover," particularly because the stockholder had initially filed under Form 13G while the initial bidder executed a standstill agreement that hampered it in a subsequent bidding war for the target).

### 2. Can target board agree not to waive standstill agreement?

- *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 91 n.28 (Del. Ch. 2007) (stating that it is "important" for a target board to reserve the right to waive a standstill agreement "if its fiduciary duties required" where there was no shopping prior to signing merger agreement and finding that target board was required to waive standstill in context where it had released misleading disclosures regarding potential interloper's bid and potential interloper sought to make a tender offer with limited conditions at price approximately 10.25% greater than bird in hand, but noting that in a scenario where a broad market canvass occurred prior to signing, "[o]ne can easily

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imagine how a board striving in good faith to extract the last dollar they could for their stockholders might promise the three remaining bidders that the top bidder . . . will get very strong deal protections including a promise from the target not to waive the Standstill as to the losers”).

- *In re Transatlantic Hldgs. Inc. S'holders Litig.*, C.A. Nos. 6574-CS & 6776-CS, at 7, 88 (Del. Ch. Aug. 22, 2011) (TRANSCRIPT) (noting that “[t]he standstill, obviously, is freighted with fiduciary character, which is supposed to be used in an appropriate way” and explaining that after a potential topping bidder has signed a confidentiality agreement with a standstill, if the topping bidder believes it has made a superior proposal but the target board disagrees, the topping bidder might then file suit for “misuse of the standstill, because that is when [the board members] would have, as a fiduciary, discretion”).
- *In re RehabCare Grp., Inc. S'holders Litig.*, C.A. No. 6197-VCL, at 46 (Del. Ch. Sept. 8, 2011) (TRANSCRIPT) (approving settlement of litigation involving, among other things, target waiving standstill provisions prohibiting bidders from requesting a waiver of the standstill to make a topping bid; stating “I do think it is weird that people persist in the ‘agree not to ask’ in the standstill. When is that ever going to hold up if it’s actually litigated, particularly after *Topps*? It’s just one of those things that optically looks bad when you’re reviewing the deal facts. It doesn’t give you any ultimate benefit because you know that the person can get a *Topps* ruling making you let them ask, at a minimum, or can ask in a back channel way. Why would you hurt yourself in terms of the optics by asking for that? One of those strange things in life”).
- *In re Celera Corp. S'holder Litig.*, 2012 WL 1020471 (Del. Ch. Mar. 23, 2012) (characterizing as possibly “problematic” the combination of a standstill provision prohibiting bidders who had signed the standstill from asking the board to waive the standstill with a no-shop provision because it created a potential informational vacuum and suggesting that the likely remedy for a successful claim challenging such a standstill would be an injunction against its enforcement), *aff’d in part, rev’d in part*, 59 A.3d 418 (Del. 2012).
- *In re Complete Genomics, Inc. S'holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012) (TRANSCRIPT) (recognizing that “Delaware entities are free to enter into binding contracts without a fiduciary out so long as there is no breach of fiduciary duty involved when entering into the contract in the first place” but finding that plaintiffs had shown a reasonable probability of success on their claims challenging standstills prohibiting a bidder from privately requesting a waiver to make a topping bid and a merger agreement provision that prohibited the company from waiving or modifying standstills because the board “impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information,

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and make a meaningful merger recommendation to its stockholders”).

- *In re Ancestry.com Inc. S’holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (TRANSCRIPT) (noting that “per se rulings where judges invalidate contractual provisions across the bar are exceedingly rare in Delaware”; suggesting that, in an auction process, there are circumstances in which standstill provisions prohibiting a bidder from requesting a waiver of the standstill to make a topping bid can have “value-maximizing purposes” to “allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you’re creating an auction, there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process”).
- *In re Complete Genomics, Inc. S’holder Litig.*, C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012) (TRANSCRIPT) (recognizing that, post-*Ancestry*, an agreement not to waive a standstill may be upheld if, among other things, there is disclosure to stockholders informing stockholders of “the type of information that they’re never going to get” – i.e., that certain parties who might have otherwise submitted an offer are prohibited from doing so).
- *Koehler v. NetSpend Hldgs. Inc.*, 2013 WL 2181518 (Del. Ch. May 21, 2013) (concluding that plaintiffs had shown a reasonable probability of success on the merits, but denying a preliminary injunction based upon a balancing of the equities, with respect to their claim that a board acted unreasonably when, after pursuing a single-bidder sale of the company strategy, it entered into a merger agreement prohibiting the waiver of standstills and (i) in connection with a prior unrelated effort to facilitate a sale of a 31% stockholder’s stake, certain potential private equity buyers were party to standstill provisions prohibiting them from requesting a waiver of the standstills to make a bid for the whole company and (ii) the board had failed to consider whether the standstills should remain in effect before approving the merger agreement).

# OTHER MERGER AGREEMENT PROVISIONS

## IV. OTHER MERGER AGREEMENT PROVISIONS

### A. Material Adverse Change/Effect.

- *Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027 (Del. Ch. Apr. 29, 2005).
  - a. Showing of Liability in Litigation. The Court of Chancery stated: “in assessing whether the risk of litigation (as contrasted with the cost of litigation) may have a Material Adverse Effect, the mere existence of a lawsuit cannot be determinative. There must be some showing that there is a basis in law and fact for the serious adverse consequences prophesized by the party claiming the MAE.”
  - b. Dollar Value. The Court noted that \$15-\$20 million was not an MAE to a company with a net present value on a stand alone basis of approximately \$338 million.
  - c. MAE v. “Material.” In *Holly*, the Court stated that “[i]n the context of the Merger Agreement, the concept of ‘Material Adverse Effect’ and ‘material’ are analytically distinct, even though their application may be influenced by the same factors.” *Id.* at \*38.
- *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) ( finding that a broadly-written Material Adverse Effect clause was not breached, and stating “even where a Material Adverse Effect condition is . . . [broad], that provision is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner. A short-term hiccup should not suffice . . .”).
- *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715, 738 (Del. Ch. 2008) (A court’s focus in determining the occurrence of an MAE is “whether there had been an adverse change in the target’s business that is consequential to the company’s long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months.” Thus, evidence of a significant decline in earnings by a target prior to closing is irrelevant for purposes of determining the existence of an MAE unless the “poor earnings are expected to persist significantly into the future.” Moreover, because MAE provisions are essentially “backstops” to account for unknown events that threaten the target company’s long-term earnings potential, the buyer bears a heavy burden when it seeks to terminate based on an MAE. Indeed, the Court found, that absent clear language in the merger agreement to the contrary, the burden of proving the occurrence of an MAE rests on the party seeking to excuse performance regardless of whether the MAE is reflected as a closing condition or a representation.).
- *Raskin v. Birmingham Steel Corp.*, 1990 WL 193326, at \*5 (Del. Ch. Dec. 4, 1990) (“While it is possible that on a full record and placed in a larger context one might conclude that a reported 50% decline in earnings over two consecutive quarters might not be held to constitute a material adverse development, it is, I believe unlikely to think that might happen.”).

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- *Ameristar Casinos, Inc. v. Resorts Int'l Hldgs., LLC*, 2010 WL 1875631, at \*10 (Del. Ch. May 11, 2010) (accepting premise, although not deciding, that material adverse effect had occurred where target asset underwent a 248% increase in its property tax assessment, which would have amounted to a tax liability of \$18 million per year for an asset producing \$30 million per year in net income).
- *Osrham Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554 (Del. Ch. Nov. 19, 2013) (finding a likelihood of an MAE where sales were manipulated by shipping and billing excess product, misapplying credits and discounts during the pre-effective period in breach of seller's representations, and not disclosing material failures to meet forecasted sales in breach of seller's warranties during the post-effective pre-closing period; but rejecting the assertion that seller's loss of two salespeople might have led to a MAE).
- *Cooper Tire & Rubber Co. v. Apollo (Mauritius) Hldgs. Pvt. Ltd.*, 2014 WL 5654305, at \*11 (Del. Ch. Oct. 31, 2014) (“[T]he logical operation of the definition of Material Adverse Effect [in the Merger Agreement] shifts the risk of any carved-out event onto [the buyer], unless that event prevents [the target] from complying with its obligations under the Merger Agreement; the parties agreed not to excuse [the target] for any such breach”).
- *Mrs. Fields Brand, Inc. v. Interbake Foods LLC*, 2017 WL 2729860 (Del. Ch. June 26, 2017) (analyzing a representation that a party to a licensing agreement was not aware of any fact or condition that was, or could reasonably be expected to become, materially adverse to the business, prospects, condition or assets of the company as a “material adverse effect” standard and concluding that there was no MAE – because, among other things, the counter-party had knowledge (or the opportunity to obtain knowledge of) of the facts alleged to constitute an MAE and, therefore, the counter-party was not permitted to terminate the licensing agreement).
- *Akorn v. Fresenius Kabi AG*, 2018 WL 4719347 (Del. Ch. Oct. 1, 2018) (concluding that a buyer validly terminated a merger agreement due to a general MAE and a breach of regulatory representations that constituted an MAE; finding the general MAE because, after signing, the target suffered dramatic declines in financial performance, the target's EBITDA declined 51% over the prior year and the downturn was durationally-significant, with no signs of abating), *aff'd*, 198 A.3d 724 (Del. 2018).
- *Channel Medsystems, Inc. v. Boston Scientific Corp.*, 2019 WL 6896462 (Del. Ch. Dec. 18, 2019) (finding that an officer's fraud related to FDA approval of the company's sole device would not reasonably be expected to have an MAE given that, before the buyer terminated the agreement, the FDA accepted the seller's remediation plan in connection with the fraud, signaling a strong likelihood that the fraud would not be the cause of any failure to obtain FDA approval).
- *AB Stable VIII LLC v. Maps Hotels & Resorts One LLC*, 2020 WL 7024929, at \*68 (Del. Ch. Nov. 30, 2020) (finding that the COVID-19 pandemic did not result in an MAE under an asset purchase

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agreement because the MAE definition excluded “calamities,” but holding that the seller breached an ordinary course covenant by closing facilities during the pandemic, reasoning that the relevant inquiry was whether the seller substantially deviated from its “customary and normal routine of managing [its] business,” not whether the seller’s response to the COVID-19 pandemic was reasonable or similar to other companies’ responses); *aff’d*, 2021 WL 5832875 (Del. Dec. 8, 2021) (reasoning that, although the steps taken by the seller were reasonable and consistent with the actions of others in the same industry, the covenant did not provide for such a broad reasonableness assessment).

- *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.*, 2021 WL 1714202 (Del. Ch. Apr. 30, 2021) (holding that the target company’s precipitous but temporary decline in sales did not constitute an MAE under the stock purchase agreement because the target company was not expected to have a “sustained drop” in performance; further finding the target company did not stray from the ordinary course of business in its response to the COVID-19 pandemic because the target company’s cost-cutting measures were “*de minimis*” and consistent with historical practices).
- *Bardy Diagnostics, Inc. v. Hill-Rom, Inc.*, 2021 WL 2886188 (Del. Ch. July 9, 2021) (holding that the drastic reduction in the Medicare reimbursement rates for the target’s medical device did not amount to a MAE because the buyer failed to show that the rates would not increase within a “commercially reasonable period”, thus failing to establish the MAE’s “durational significance”).

## B. Best Efforts.

- *Carteret Bancorp, Inc. v. The Home Grp., Inc.*, 1988 WL 3010 (Del. Ch. Jan. 13, 1988) (dismissing a claim that target corporation breached its obligation to use “best efforts in good faith” to close a merger as quickly as possible because there could be no present breach of the best efforts clause while regulatory approvals were still pending, but suggesting that if regulators required divestiture of certain assets, target’s refusal to make such divestitures might constitute a breach; cautioning that even if the court had found a breach of the best efforts clause, it might be hesitant to order specific performance in the context of a complex transaction because doing so would “risk involving the court in the detailed administration of this contract”).
- *Corwin v. DeTrey*, 1989 WL 146231, at \*2 (Del. Ch. Dec. 1, 1989) (rejecting an argument that a company should have avoided the merger agreement by not obtaining necessary financing and stating such argument was based “on the faulty premise that the ‘best efforts’ clause is unenforceable,” and that “such clauses are not illusory . . . [t]hey are fairly routine and the failure of a party to exercise best efforts can form the basis for liability in a breach of contract action”).
- *Conley v. Dan-Webforming Int’l A.S. (Ltd.)*, 1992 WL 401628, at \*19 (D. Del. Dec. 29, 1992) (“the best efforts clause . . . should be read to provide some additional obligation upon the defendants” above the otherwise outstanding obligations set out in the agreement).

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- *Hexion Specialty Chem., Inc. v. Huntsman Corp.*, 965 A.2d 715 (Del. Ch. 2008) (finding that a buyer breached its obligations under a merger agreement to use its reasonable best efforts to take all actions necessary to secure financing for a merger and to not take any action to impair, delay or prevent consummation of the financing, by obtaining, publishing and circulating among its lenders an opinion that the target would be insolvent at closing).
- *Alliance Data Sys. Corp. v. Blackstone Capital P'rs VLP*, 963 A.2d 746 (Del. 2009) (finding that buyer did not breach an obligation under a merger agreement to use its reasonable best efforts to obtain regulatory approvals for a merger by failing to cause its parent to obtain the approvals where the parent was not a party to the merger agreement, and the merger agreement did not impose any affirmative obligation on the buyer to cause its parent to obtain the regulatory approvals).
- *WaveDivision Hldgs., LLC v. Millenium Dig. Media Sys., L.L.C.*, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010) (holding that a seller of assets breached “no solicit” and “reasonable best efforts” clauses contained in an asset purchase agreement where the seller was obligated by agreement to secure consent of certain noteholders and senior lenders to the asset sale, but, instead of seeking their consent, consciously facilitated an alternative and mutually exclusive transaction; awarding \$15 million in expectation damages to the jilted buyer).
- *Narrowstep, Inc. v. Onstream Media Corp.*, 2010 WL 5422405 (Del. Ch. Dec. 22, 2010) (concluding, on a motion to dismiss, that acquiror may have breached its obligation under a merger agreement to use its “reasonable best efforts” to make required securities filings and close the merger expeditiously when the acquiror (i) failed to timely file the required registration statement with the SEC, (ii) repeatedly manufactured reasons to postpone closing and (iii) refused to close until the target agreed to multiple price reductions).
- *The Williams Cos, Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264 (Del. 2017) (holding that clauses requiring reasonable best efforts to consummate the merger and commercially reasonable efforts to obtain a tax opinion (i) require that parties not take action to prevent the consummation or receipt of the tax opinion and (ii) place an affirmative obligation on the parties to take all reasonable steps to consummate the transaction and obtain the opinion (which tax counsel was ultimately unable to provide), but concluding that, although there was evidence from which the Court of Chancery could have concluded that the efforts provisions had been breached, there was no evidence that any breach materially contributed to tax counsel’s liability to issue the opinion).
- *Akorn, Inc. v. Fresenius Kabi AG*, 2018 WL 4719347, at \*91 (Del. Ch. Oct. 1, 2018) (“When evaluating whether a merger partner has used reasonable best efforts [to consummate the transaction], this court has looked to whether the party subject to the clause (i) had reasonable grounds to take the action it did and (ii) sought to address problems with its counterparty.”), *aff’d*, 198 A.3d 724 (Del. 2018).

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- *Vintage Rodeo Parent, LLC v. Rent-a-Ctr., Inc.*, 2019 WL 1223026, at \*21 (Del. Ch. Mar. 14, 2019) (holding that a commercially reasonable efforts clause did not require the seller “warn” the buyer of its intention to terminate the merger agreement if the buyer did not exercise its contractual right to extend the end date; stating “[c]ommerciably reasonable efforts do not require that sophisticated parties remind one another of their contractual rights”).
- *In re Anthem-Cigna Merger Litig.*, 2020 WL 5106556 (Del. Ch. Aug. 31, 2020) (analyzing claims that breaches of a merger agreement’s efforts clauses led to a failure to obtain regulatory approval and finding (i) that Cigna actively undermined the merger, including by engaging in a covert public relations campaign against the merger, amounting to an egregious breach of the efforts clauses and (ii) that Cigna’s breaches contributed materially to the failure to achieve regulatory approval, but ultimately holding that Anthem was not entitled to damages because it was more likely than not that regulatory approval would not have been obtained, irrespective of Cigna’s actions).

## C. Contractual Indemnification.

### 1. Limitations Period for Indemnification Claims.

- Statute of Limitations for Breach of Contract (10 *Del. C.* § 8106).
  - Default statute of limitations is 3 years (“[N]o action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . .”).
  - In 2014, Section 8106 was amended to provide that, notwithstanding the 3-year default, parties to a contract involving at least \$100,000 could lengthen the statute of limitations to 20 years. (“[A]n action based on a written contract, agreement or undertaking involving at least \$100,000 may be brought within a period specified in such written contract, agreement or undertaking provided it is brought prior to the expiration of 20 years from the accruing of the cause of such action.”).
  - In *Bear Stearns Mortgage Funding Trust 2006-SL1 v. EMC Mortgage LLC*, 2015 WL 139731 (Jan. 12, 2015), the Court of Chancery applied the amendment to Section 8106 retroactively to a contract entered into prior to the adoption of the amendment.
- Alteration of Statutory Limitations Period. Generally under Delaware law, subject to a “reasonableness” standard, parties to a contract can shorten a statutory limitations period, but an extension of a statute of limitations is contrary to public policy and unenforceable. See generally *Shaw v. Aetna Life Ins. Co.*, 395 A.2d 384 (Del. Super. Ct. 1978) (stating that “an

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express provision in a contract which abbreviates the time frame for filing a claim, so long as it remains a reasonable time, hastens the enforcement and complements the policy behind the statute of limitations” but also that a “contractual limitations period of limitations which attempts to lengthen or extend the period otherwise contained in a statute violates . . . public policy . . . . Two parties contracting between themselves cannot agree to circumvent the law as mandated by the legislature in its attempt to protect the public interests”); *GRT, Inc. v. Marathon GTF Tech.*, 2011 WL 2682898, at \*6 (Del. Ch. July 11, 2011) (“Under Delaware law, however, parties to a contract are entitled to shorten the period of time in which a claim for breach may be brought, i.e., the statute of limitations, so long as the agreed upon time period is a reasonable one. Shortening statutes of limitations, as opposed to lengthening them, does not conflict with the legislatively determined limitations period and, in fact, has been seen as being harmonious with the public policy purposes served by statutes of limitations in general.”).

- **Effect of a Survival Clause on the Statutory Limitations Period.** *GRT, Inc. v. Marathon GTF Tech.*, 2011 WL 2682898 (Del. Ch. July 11, 2011) (holding that an unambiguous clause in a securities purchase agreement providing that representations and warranties would, together with any right of indemnification, survive for one year after closing and then terminate created a contractual limitations period and effectively shortened the default three-year statutory limitations period; suggesting that the court would interpret a provision providing for the indefinite survival of representations and warranties as providing for a survival period ending at the statutory limitations period); *ENI Hldgs., LLC v. KBR Grp. Hldgs., LLC*, 2013 WL 6186326 (Del. Ch. Nov. 27, 2013) (holding that an unambiguous survival clause in a stock purchase agreement providing that representations and warranties would terminate on the termination date, despite remaining silent on the survival of related remedies, created a contractual limitations period thereby shortening the applicable statutory limitations period).
- **Interaction of Survival Clauses and Notice Provisions.** In indemnity provisions, parties may expressly provide for notice periods during which one party must notify the other of potential indemnification claims. The parties need to be clear about whether the notice provision is meant to extend the limitations period. A notice period will not necessarily be read as extending a *survival period*. In *ENI Holdings, LLC v. KBR Group Holdings, LLC*, 2013 WL 6186326 (Del. Ch. 2013), a buyer made an indemnity claim by providing seller notice of the claim within the contractual period for notice, but the buyer did not bring a lawsuit until after the survival period for the underlying representation. The court held that the notice of claims period did not extend the limitations period. Rather, a lawsuit had to be brought within the survival period of the underlying representation because the parties did not expressly provide otherwise. See also *Kilcullen v. Spectro Sci.*,

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*Inc.*, 2019 WL 3074569 (Del. Ch. July 15, 2019) (dismissing indemnification claims under an SPA as time-barred; finding that the SPA did not clearly provide that a claim notice would toll the statute of limitations).

- **Accrual of Claim.** *Certaineed Corp. v. Celotex Corp.*, 2005 WL 217032 (Del. Ch. Jan. 24, 2005) (finding that provisions in a merger agreement providing indemnification for breaches of representations and warranties accrued at the date of closing of the merger agreement and the statute of limitations expired on the third year anniversary of such date, while indemnification for liabilities to third parties accrued under the common law principles of indemnification, that is, the three-year statute of limitations began to run when indemnifiable liabilities to third parties were incurred and the dispute concluded, which in this case, occurred when Certaineed settled its third party product liability claims).
- **Tolling of Claim.** *ENI Hldgs., LLC v. KBR Grp. Hldgs., LLC*, 2013 WL 6186326 (Del. Ch. 2013) (holding that “application of the discovery rule to toll a contractual limitations period is inappropriate, at least, as here, where the inherent unknowability of a potential claim is itself knowable or predictable, and thus the proper source of negotiation and resolution between the parties to the contract” and assuming without deciding that doctrines of “equitable tolling” and “fraudulent concealment” would apply to toll a contractually shortened statute of limitations).

## 2. Applications of Contractual Indemnification Provisions.

- *Medicalgorithmics S.A. v. AMI Monitoring, Inc.*, 2016 WL 4401038 (Del. Ch. Aug. 18, 2016) (finding that a party to an exclusive licensing agreement materially breached the contract, thereby entitling the non-breaching party to declaratory judgment that its termination of the agreement was valid, and entitling the non-breaching party to damages and costs and attorneys’ fees under the indemnification provisions of the agreement, which provided, “[Breaching Party] shall indemnify, defend, and hold [Non-Breaching Party] harmless from all claims, damages, settlements, expenses, and attorneys’ fees incurred as a result of: . . . [Breaching Party’s] material breach of this Agreement”).
- *Data Ctrs., LLC v. 1743 Hldgs. LLC*, 2015 WL 9464503 (Del. Super. Oct. 27, 2015) (holding that, where a lease required a landlord to “indemnify, defend and hold harmless Tenant . . . against and from all claims” arising from certain conduct of the landlord, indemnity was not available for costs incurred by the tenant in suing the landlord, because “absent specific language showing intent to extend the protections of an indemnity provision to claims brought against parties to the contract, the Court will interpret the indemnity provision as applying to third party claims only”).

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- *Osram Sylvania Inc. v. Townsend Ventures, LLC*, 2013 WL 6199554 (Nov. 19, 2013) (holding that acquiror had stated a claim for contractual indemnification, under a stock purchase agreement that eliminated materiality qualifiers for breaches of representations or warranties and required a threshold of \$200,000 in indemnifiable damages, for seller's alleged manipulation and concealment of matters relevant to the purchase price).
- *Winshall v. Viacom Int'l Inc.*, 2012 WL 6200271 (Del. Ch. Dec. 12, 2012) (holding that acquiror was not entitled to contractual indemnification for alleged breaches of representations and warranties because the alleged breaches, relating to infringement of intellectual property, occurred after the closing of the transaction; holding, in the alternative, the acquiror was not entitled to indemnification on certain claims because it failed to comply with a provision requiring it to give notice of any claim for indemnification within a specified time period), *aff'd*, 76A.3d 808 (Del. 2013).
- *Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P.*, 2011 WL 549163 (Del. Ch. Feb. 16, 2011) (addressing claim for indemnification for damages resulting from breach of representation in a merger agreement related to the efficacy of drugs, where "special" damages were expressly excluded from the indemnification obligation; discussing the difference between "general" and "special" damages; arguably suggesting, without deciding, that the development costs of drugs (the main assets of the acquired corporation) were not special damages because any acquiring company would likely want and need to continue to fund drug development).
- *Sage Software, Inc. v. CA, Inc.*, 2010 WL 5121961 (Del. Ch. Dec. 14, 2010) (finding that although a merger agreement required seller to indemnify buyer for tax losses allocable to the period prior to closing, payment on that indemnification obligation was not required until the final tax payment was due and all appeal procedure were exhausted; reasoning that the buyer bearing the interim costs of non-finality of the tax losses did not "shock the conscience" as it was "the bargained for risk allocation" under the language of the merger agreement), *aff'd*, 27 A.3d 552 (Del. 2011).
- *Ameristar Casinos, Inc. v. Resorts Int'l Hldgs., LLC*, 2010 WL 1875631 (Del. Ch. May 11, 2010) (denying motion to dismiss buyer's suit seeking order requiring seller to indemnify buyer pursuant to a securities purchase agreement in which seller had represented that as of closing no extraordinary taxes had been incurred and (after signing but before closing) seller learned that property taxes would increase by 248%; finding that damages floor providing that neither party was required to indemnify the other for damages below a certain amount did not apply because buyer had pled a "willful breach" of the tax representation and in such case the agreement provided that this floor was inapplicable).

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- *Rexnord Indus., LLC v. RHI Hldgs., Inc.*, 2008 WL 4335871 (Del. Super. Ct. Sept. 17, 2008) (holding that buyer was entitled under a stock purchase agreement to indemnification for costs incurred in defending against environmental claims pursuant to a provision requiring the seller to indemnify the buyer for any losses that the buyer incurred as a result of environmental contamination caused by the seller).
- *Matria Healthcare, Inc. v. Coral SR LLC*, 2007 WL 763303, at \*7 n.31 (Del. Ch. Mar. 1, 2007) (using traditional principles of contract interpretation to determine the forum where a dispute over an escrow fund established to satisfy certain post-closing adjustments should be resolved, and finding that the fact that “a judge may believe that [a certain arbitrator] would be the preferable forum for resolution of the dispute does not (nor should it) trump the agreement of the parties”).

## D. Choice Of Law.

- Under the Delaware statute (6 *Del. C.* § 2708), the parties to any contract may agree in writing that the contract will be governed by Delaware law and the contract will be “conclusively presumed to be a significant, material and reasonable relationship” to Delaware if:
  - a. the parties are subject to the jurisdiction of a Delaware court;
  - b. the parties may be served with legal process; and
  - c. the contract involves at least \$100,000.
- The Synopsis to the bill enacting Section 2708 notes that the statute “is intended to supersede all Delaware common law limitations on the enforceability of Delaware choice of law provisions (including any restrictions contained in the *Restatement (Second) Conflict of Laws*), as well as limitations on contractual consent to jurisdiction or service of process.” 137th Gen. Assembly, House Bill no. 291 (1993).
- In *ABRY Partners V, L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006), the Court of Chancery appeared to interpret Section 2708 as not overruling one common law limitation on the enforceability of Delaware choice of law provisions—that Delaware choice of law provisions will not be enforced if application of Delaware law would offend a fundamental policy of a state with a material greater interest in the litigation. Nevertheless, the Court seemingly narrowed this limitation by emphasizing Delaware’s strong interest in having its law apply to its citizens (including Delaware entities).
- Even assuming the parties choose Delaware law to govern their contract, if another forum is chosen to hear disputes, the parties should consider whether that forum will apply its local rules on statutes of limitation or the contract-chosen law of Delaware. In *Pivotal Payments Direct Corp. v. Planet Payment, Inc.*, 2015 WL 9595285 (Del. Super. Dec. 29, 2015), the Delaware Superior Court applied the Delaware statute of limitations period to claims under a contract with a New York choice of law because the choice of law provision did not expressly reference the New York statute of

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limitations and the parties did not demonstrate that New York substantive law is “inseparably interwoven” with its statute of limitations.

## E. Non-Reliance Clauses.

- The baseline standard for whether provisions in a contract will prevent fraud claims based on representations outside the four corners of the contract is whether the contract contains “language that, when read together, can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract’s four corners in deciding to sign the contract.” *Kronenberg v. Katz*, 872 A.2d 568, 593 (Del. Ch. 2004).
- *ABRY P’rs V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032 (Del. Ch. 2006) (stating that “murky integration clauses, or standard integration clauses without explicit anti-reliance representations will not relieve a party of its oral and extra-contractual fraudulent representations” and advising that in order for an integration clause to act as a limit on liability, such a clause must contain “language that . . . can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract’s four corners in deciding to sign the contract.” (citation and internal quotations omitted)).
- *Overdrive, Inc. v. Baker & Taylor, Inc.*, 2011 WL 2448209 (Del. Ch. June 17, 2011) (suggesting that a non-reliance provision cannot prevent fraud claims based on extracontractual representations that “relate directly” to a contract provision and “go to the very core of the Agreement”).
- *RAA Mgmt., LLC v. Savage Sports Hldgs., Inc.*, 45 A.3d 107 (Del. 2012) (finding that an extra-contractual representation disclaimer coupled with a no liability provision was sufficient to bar a claim for fraud based on representations and warranties outside the four corners of a confidentiality agreement).
- *Anvil Hldg. Corp. v. Iron Acq. Co.*, 2013 WL 2249655 (Del. Ch. May 17, 2013) (holding that a standard integration clause and an extra-contractual representation disclaimer in a purchase agreement for all the outstanding equity interests in a limited liability company, but without clear anti-reliance language, did not bar a fraud claim at the motion to dismiss stage; suggesting, in *dicta*, that another provision, with language similar to the provision at issue in *RAA*, might not bar a fraud claim against individual defendants who were equity holders and managers of the LLC and who were the individuals who made the alleged misrepresentations at issue).
- *Transdigm Inc. v. Alcoa Global Fasteners, Inc.*, 2013 WL 2326881 (Del. Ch. May 29, 2013) (nonreliance clause that did not disclaim reliance on accuracy and completeness of information not sufficient to prevent claims of fraud based on active concealment).
- *TrueBlue, Inc. v. Leeds Equity P’rs IV, LP*, 2015 WL 5968726 (Del. Super. Sept. 25, 2015) (holding that the combination of an integration clause and an extra-contractual disclaimer, pursuant to which the buyer acknowledged that the representations and

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warranties in the agreement superseded any other material, written or oral, made available to the buyer, was not sufficient to disclaim reliance on representations outside the four corners of the contract because the contract did not contain a “non-reliance” provision and the parties specifically preserved the right to pursue a legal remedy for fraud).

- *Prairie Capital III, L.P. v. Double E Hldg. Corp.*, 2015 WL 7461807 (Del. Ch. Nov. 24, 2015) (holding that reliance on extra-contractual representations and completeness of information provided in due diligence was disclaimed by combination of an (i) extra-contractual representation disclaimer by the buyer where the buyer represented that it only relied on the representations and warranties in the stock purchase agreement (but did not include “nonreliance” or “accuracy and completeness of information” language) and (ii) an integration clause, notwithstanding a fraud exception to the sole remedy provision, and stating that Delaware law “does not require magic words” to disclaim reliance”).
- *FdG Logistics LLC v. A&R Hldgs., Inc.*, 131 A.3d 842 (Del. Ch. 2016) (distinguishing *Prairie Capital* and allowing a fraud claim to proceed where the extra-contractual representation disclaimer was located in the seller’s representation and stating that the “difference between a disclaimer from the point of view of a party accused of fraud and from the point of view of a counterparty who believes it has been defrauded may seem inconsequential . . . [but it] is critical . . . because of the strong public policy against fraud” and that a disclaimer of reliance on representations outside the four corners of a contract “must come from the point of view of the aggrieved party (or all parties to the contract) to ensure the preclusion of fraud claims for extra-contractual statements under *Abry* and its progeny”).
- *IAC Search, LLC v. Conversant LLC*, 2016 WL 6995363 (Del. Ch. Nov. 30, 2016) (holding that reliance on extra-contractual representations provided in due diligence was disclaimed by a combination of (i) an acknowledgement clause pursuant to which the buyer acknowledged that the seller was not making any representation or warranty regarding any information the buyer received during due diligence “unless such information [was] expressly included in a representation and warranty [in the purchase agreement]” and (ii) an integration clause that defined the “universe of writings reflecting the terms of [the purchase agreement]” and noting that the combination of such provisions “add up to a clear disclaimer of reliance on extra-contractual statements”).
- *Sparton Corp. v. O’Neil*, 2017 WL 3421076 (Del. Ch. Aug. 9, 2017) (holding that an anti-reliance provision contained in a merger agreement, providing that the representations in the agreement “constitute[d] the sole and exclusive representations,” that all other representations were disclaimed and that the buyer would not have any claim based on any reliance on an extra-contractual representation, barred buyer from relying on extra-contractual representations when attempting to state a fraud claim under the fraud exception to an escrow limitation).
- *Flowshare LLC v. GeoResults Inc.*, 2018 WL 3599810 (Del. Super.

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July 25, 2018) (declining to dismiss a seller's extra-contractual fraud claim where the asset purchase agreement included only a standard integration clause and not an express anti-reliance clause).

- *ChyronHego Corp. v. Wight*, 2018 WL 3642132 (Del. Ch. July 31, 2018) (dismissing extra-contractual fraud claims and holding that a fraud carve-out to a non-reliance provision did not undermine the effectiveness of the non-reliance provision).
- *S'holder Rep. Servs. LLC v. Albertsons Cos., Inc.*, 2021 WL 2311455 (Del. Ch. June 7, 2021) (dismissing fraudulent inducement claim grounded in extra-contractual promises regarding post-closing operations; reasoning that an integration clause lacking anti-reliance language would not bar fraud claims based on extra-contractual statements of fact, but would bar fraud claims based on extra-contractual statements of "future intent or future promises").

## F. Limits On Liability.

- *ABRY P'rs V, L.P. v. F&W Acq. LLC*, 891 A.2d 1032 (Del. Ch. 2006) (holding that parties to a contract may not eliminate or cap liability for knowing fraud within the four corners of a contract).
- *EMSI Acq., Inc. v. Contrarian Funds, LLC*, 2017 WL 1732369, at \*11 (Del. Ch. May 3, 2017) (declining to dismiss post-closing indemnification claims based on allegedly fraudulent contractual representations because the agreement was ambiguous regarding whether the indemnification cap applied to claims based on fraud by the subject company of which the defendant seller had no knowledge).
- *Great Hill Equity P'rs v. SIG Growth Equity Fund I*, 2018 WL 6311829 (Del. Ch. Dec. 3, 2018) (holding that a former CEO of the target was liable for fraud without regard to the limitations on liability under the agreement, but finding that the fraud carve-out in the provision stating that indemnification was the sole remedy against the sellers did not permit the buyers to recover from innocent sellers for the fraud of the CEO).
- *Genuine Parts Co. v. Essendant Inc.*, 2019 WL 4257160 (Del. Ch. Sept. 9, 2019) (declining to dismiss claims on the grounds that a termination fee was the exclusive remedy; finding that because the merger agreement provided that the termination fee would be the exclusive remedy for a termination "in accordance with" certain no-shop provisions, the plaintiff could argue that the exclusive remedy provision did not apply because the defendant breached the no-shop provisions).

## G. Specific Performance.

- Availability of Specific Performance in Mergers and Acquisitions. In a merger where stockholders had the election of accepting stock in the surviving entity, one Delaware Court (applying New York Law) has held that because a target corporation "is unique and will yield value of an unquantifiable nature, once combined with the acquiring company" specific performance was available and there was no "compelling reason why sellers in mergers and

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acquisitions transactions should have less of a right to demand specific performance than buyers. . . .” *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14, 83 (Del. Ch. 2001) (citing *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153 (3d Cir. 1999); *C&S/Sovran Corp. v. First Fed. Sav. Bank of Brunswick*, 463 S.E.2d 892, 894-96 (Ga. 1995)).

- **The Right to Specific Performance Must be Established by Clear and Convincing Evidence.** Under Delaware law, and when the parties’ agreement “is silent as to the availability of specific performance,” *Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at \*11 (Del. Ch. June 5, 2006), a party seeking specific performance must demonstrate by “clear and convincing” evidence the existence and terms of an enforceable contract. *Cirrus Hldg. Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1201 (Del. Ch. 2001).
- An order of specific performance is “a compulsory remedy [and] is not typical and should not be lightly issued, especially given the availability of the more usual legal remedy of money damages.” *In re IBP, Inc.*, 789 A.2d 14 (Del. Ch. 2001) (citing *In re Estate of Getchell*, 1994 WL 469153, at \*4 n.3, (Del. Ch. Aug. 4, 1994)).
- **Parties may Provide by Contract that no Adequate Remedy at Law Exists.** Because specific performance is an equitable remedy the party seeking to enforce a contract must demonstrate that there is no adequate legal remedy such as money damages. *Collins v. Am. Int’l Grp., Inc.*, 1998 WL 227889 (Del. Ch. Apr. 29, 1998), *aff’d*, 719 A.2d 947 (Del. 1998).
- Generally speaking, parties cannot by contract confer equitable jurisdiction upon the Court of Chancery. *El Paso Nat. Gas Co. v. Transamerican Nat. Gas Corp.*, 669 A.2d 36, 39 (Del. 1995); *see also Helix Generation LLC v. TransCanada Facility USA, Inc.*, 2019 WL 2068659, at \*1 (Del. Ch. May 10, 2019) (transferring dispute over an asset purchase agreement to the Superior Court because the plaintiff did not seek equitable relief or establish grounds for jurisdiction under Section 111 of the DGCL; explaining that a contractual exclusive forum provision “may bind the parties, but can never bind a court, and cannot satisfy the jurisdictional requirements of this Court of limited jurisdiction”). Nevertheless, “given Delaware’s public policy of favoring freedom of contract” a separate inquiry into whether an adequate remedy at law exists may not be necessary when the parties’ agreement expressly provides for specific performance and the provision is not a “sham” or meant simply “as a means to confer jurisdiction on th[e] court.” *Gildor v. Optical Sols., Inc.*, 2006 WL 4782348, at \*11 & n.35; *see also Amaysing Tech. Corp. v. Cyberair Comm., Inc.*, 2004 WL 1192602, at \*2 n.14 (Del. Ch. May 28, 2004) (“Although not controlling, the fact that the parties’ Agreement contains a provision agreeing to jurisdiction in the Court of Chancery supports the analysis which follows on the availability of specific performance as a remedy and the lack of an adequate remedy at law.”).
- If a contract is ambiguous and the extrinsic evidence is inconclusive, the Court may consider the parties’ subjective belief when considering whether specific performance is available. In *United Rentals, Inc. v. Ram Hldgs., Inc.*, 937 A.2d 810 (Del. Ch. 2007), the Court of Chancery found that the parties had contracted away

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the right to specific performance where a contract provided both that the parties' "sole and exclusive" remedy was the recovery of the termination fee and that the parties could "enforce specifically" the terms and provisions of the agreement and guarantees "to prevent breaches" or "enforce compliance." Based on these two provisions, the Court concluded that the contract supported two equally reasonable interpretations and the agreement was therefore ambiguous. Then, by reference to the extrinsic evidence and, in particular, the parties' negotiations, the Court applied the "forthright negotiator principle" to conclude that the "buyer understood the agreement to preclude the remedy of specific performance and that seller knew or should have known of this understanding."

## H. Transfer Of Assets.

- Control of the Attorney-Client Privilege. In the absence of a contractual carve-out, the attorney-client privilege (and communications covered thereby) pass in a merger with all corporate assets to the surviving corporation by operation of law under Section 259. In *Great Hill*, selling stockholders and representatives of the target company asserted the attorney-client privilege over communications allegedly reflecting their fraudulent inducement of the buyer-plaintiffs to enter into the merger. The Court declined to create an exception for the attorney-client privilege from Section 259 which states that all assets, rights, and privileges pass to the surviving corporation in a merger. *Great Hill Equity P'rs IV, LP v. SIG Growth Equity Fund I, LLP*, 80 A.3d 155 (Del. Ch. 2013); see also *S'holder Representative Servs. LLC v. RSI Holdco, LLC*, 2019 WL 2290916 (Del. Ch. May 29, 2019) (holding that the buyer could not use or rely on privileged communications in post-closing litigation where the merger agreement provided: (i) the privilege would survive closing and be assigned to the stockholder representative; (ii) all parties would take the necessary steps to ensure the privilege was preserved and assigned to the stockholder representative; and (iii) the buyer could not use or rely on any privileged communications in any post-closing action or claim against any of the parties).

## I. Sandbagging.

- The majority of cases in Delaware hold that Delaware is a pro-sandbagging state—i.e., as a default rule in Delaware, a party may successfully plead breach of contract even if it knew a representation was not true at the time it entered into a contract. *NASDI Hldgs., LLC v. N. Am. Leasing, Inc.* (Del. Ch. Oct. 23, 2015); *Universal Enter. Grp., L.P. v. Duncan Petroleum Corp.*, 2013 WL 3353743 (Del. Ch. July 1, 2013); *Cobalt Operating, LLC v. James Crystal Enters., LLC*, 2007 WL 2142926 (Del. Ch. July 20, 2007); *Gloucester Hldgs. Corp. v. U.S. Tape & Sticky Prods., LLC*, 832 A.2d 116 (Del. Ch. 2003). *But cf. MicroStrategy Inc. v. Acacia Research Corp.*, 2010 WL 5550455 (Del. Ch. Dec. 30, 2010); *Kelly v. McKesson HBOC, Inc.*, 2002 WL 88939, at \*8 (Del. Super. Jan. 17, 2002).
- However, the Delaware Supreme Court has recently cast doubt on Delaware's status as a pro-sandbagging state. *Eagle Force*

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*Hldgs., LLC v. Campbell*, 187 A.3d 1209, 1237 n.185 (Del. 2018) (“We acknowledge the debate over whether a party can recover on a breach of warranty claim where the parties know that, at signing, certain of them were not true. [Defendant] argues that reliance is required, but we have not yet resolved this interesting question.”).

## J. Binding Stockholders.

- Stockholders may be bound by the decisions of a “stockholders’ representative” as a matter of agency law if the stockholder has become a signatory to the relevant agreement. *Aveta Inc. v. Cavallieri*, 23 A.3d 157 (Del. Ch. 2010).
- If the stockholder is not a signatory to a merger agreement, the stockholder may still be bound by the decisions of a stockholders’ representative if the merger agreement is drafted such that the decisions of a stockholders’ representative is drafted as a “fact ascertainable” in the merger agreement. *Aveta Inc. v. Cavallieri*, 23 A.3d 157 (Del. Ch. 2010).
- The extent to which stockholders may be bound to an indemnification clawback as a matter of Delaware law is still developing. See *Cigna Health & Life Ins. Co. v. Audax Health Solutions, Inc.*, 107 A.3d 1082 (Del. Ch. 2014) (finding that a clawback “literally” complied with the “facts ascertainable” concept under Section 251 of the DGCL, but holding that a clawback of indefinite amount and indefinite duration violated the implicit requirement of that Section that merger consideration be “determinable” with a “reasonable degree of precision”); *Houseman v. Sagerman*, 2021 WL 3047165 (Del. Ch. July 20, 2021) (holding that *Audax* was inapplicable where the indemnification obligations were limited in duration and most were limited to the escrow amount).
- Generally, non-signatories do not have standing to enforce (or seek damages for breach of) an agreement unless they demonstrate standing under the third-party beneficiary doctrine. See *Dolan v. Altice, USA, Inc.*, 2019 WL 2711280 (Del. Ch. Jun. 27, 2019) (declining to dismiss claim that the acquiror breached its obligation under the merger agreement to operate a business division substantially in accordance with an existing plan for four years post-closing; holding that the plaintiffs (who were not parties to the merger agreement) adequately pled (i) standing to pursue the claim as third-party beneficiaries and (ii) that the obligation survived closing, despite not being carved out from a no-survival provision).

## K. Forum Selection And Jurisdiction Over Post-Closing Disputes.

- Court of Chancery. While generally a court of equity only, the Court of Chancery has statutory jurisdiction to hear certain disputes involving monetary damages. Section 111 of the DGCL grants statutory jurisdiction to the Court of Chancery over post-closing disputes in the context of a merger agreement and concurrent jurisdiction to hear disputes related to (i) any agreement to which the corporation and one or more stockholders is a party and pursuant to which one or more stockholders sell stock and (ii) any

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# OTHER MERGER AGREEMENT PROVISIONS

agreement pursuant to which a corporation agrees to sell, lease or exchange assets and the terms of the agreement provide that one or more stockholders must consent to or approve of the sale. Only bench trials are available in the Court of Chancery and punitive damages are not available.

- **Superior Court.** In 2010, the Delaware Superior Court established a complex commercial division (“CCLD”) to provide sophisticated parties a meaningful alternative for commercial disputes not otherwise litigable in the Court of Chancery. “Any case that includes a claim asserted by any party (direct or declaratory judgment) with an amount in controversy of \$1 million or more (designated in the pleadings for either jury or non-jury trials), or involves an exclusive choice of court agreement or a judgment resulting from an exclusive choice of court agreement, or is so designated by the President Judge, qualifies for assignment to the CCLD.”
- **Section 115 of the DGCL.**
  - Confirming the Court of Chancery’s holding in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.2d 934 (Del. Ch. 2013), the legislature added Section 115 to the DGCL in 2015. Section 115 permits a corporation to adopt charter or bylaw provisions that require “internal corporate claims” to be brought exclusively in “any or all of the courts” in Delaware. Section 115 also prohibits a corporation from selecting a non-Delaware jurisdiction as the exclusive forum for deciding “internal corporate claims.” Since the adoption of Section 115, courts have had occasion to interpret Delaware forum selection provisions. *See e.g., Anderson v. GTCR, LLC*, 2016 WL 5723657 (D. Del. Sept. 29, 2016) (denying a motion to dismiss pursuant to a corporation’s forum selection provision where such provision selected the Delaware Court of Chancery as the exclusive forum for actions relating to breaches of fiduciary duty by directors and officers, but the plaintiff alleged claims for breach of fiduciary duties of loyalty and good faith against the defendants in their collective capacity as controlling stockholder of the corporation); *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113-120, 129 (Del. 2020) (holding charter provisions that require actions arising under the Securities Act of 1933 to be filed in federal court are facially valid under Delaware law because they fall within the broad, enabling text of Section 102(b)(1) and do not violate the policies or laws of Delaware; finding that Section 115 does not circumscribe the scope of optional provisions that may be included in a charter under the broad, enabling language of Section 102(b)(1)); *In re Pilgrim’s Pride Corp. Deriv. Litig.*, 2019 WL 1224556 (Del. Ch. Mar. 15, 2019) (declining to dismiss claims for lack of personal jurisdiction; finding that a controller parent entity implicitly consented to personal jurisdiction in Delaware when its board designees voted to adopt a forum selection bylaw on the same day that the board approved the transaction at issue).
  - Section 115 does not directly address forum selection provisions in contracts, however, in the synopsis accompanying the bill enacting Section 115, the legislature provided, “Section 115

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does not address the validity of a provision of the certificate of incorporation or bylaws that selects a forum other than the Delaware courts as an additional forum in which internal corporate claims may be brought, but it invalidates such a provision selecting the courts in a different State, or an arbitral forum, if it would preclude litigating such claims in the Delaware courts. Section 115 is not intended, however, to prevent the application of any such provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced.” In *Bonanno v. VTB Holdings, Inc.*, 2016 WL 614412 (Del. Ch. Feb. 8, 2016), the Court dismissed plaintiff’s breach of contract claim, finding that plaintiff’s claim fell within the scope of the forum selection provisions of various contracts entered into by the plaintiff and the defendant corporation which required the parties to those agreements to litigate disputes in a New York court.

- When Section 115 was added to the DGCL in 2015, Section 109(b) was amended to clarify that neither the charter nor the bylaws can include a provision that would impose liability on a stockholder for attorneys’ fees or expenses of the corporation (or any other party) in connection with “internal corporate claims” (“fee-shifting” provisions). In *Solak v. Sarowitz*, 2016 WL 7468070 (Del. Ch. Dec. 27, 2016), the Court held that a fee-shifting bylaw that was triggered only if the stockholder filed an “internal corporate claim” outside of Delaware, in violation of the corporation’s forum selection bylaw provision, was facially invalid.
- Delaware Rapid Arbitration Act. In 2009, Delaware adopted a statute that would allow Court of Chancery judges to arbitrate disputes in a confidential proceeding. That statute was held unconstitutional in *Delaware Coalition for Open Government, Inc. v. Strine*, 733 F.3d 510 (2013). In response, in 2015 Delaware adopted the Delaware Rapid Arbitration Act (the “DRAA”). There are no monetary thresholds to opt in to the DRAA, but one of the parties to the arbitration agreement must be a Delaware entity. Unless parties agree to a different deadline prior to arbitration, the dispute generally must be resolved within 120 days of the arbitrator’s appointment. If the award is late, the arbitrator’s fee gets reduced. Appeals go directly to the Delaware Supreme Court, but parties may waive right to appeal the final determination.

## V. STRUCTURAL ISSUES

### A. Section 203: Delaware's Business Combination Statute.

Section 203 imposes severe restrictions on transactions between corporations and stockholders who own more than 15% of its voting stock, unless the stockholder obtains board approval before crossing the 15% threshold.

1. Public companies. Section 203 does not apply to companies that do not have a class of voting stock that is: (1) listed on a national securities exchange; or (2) held of record by more than 2,000 stockholders, unless such company opts into Section 203 in its certificate of incorporation.
2. Target shares. Make sure that acquiror does not get a 15% stake in company prior to board approval. Note that definition of ownership is very broad.

- *Flannery v. Genomic Health, Inc.*, 2021 WL 3615540 (Del. Ch. Aug. 16, 2021) (dismissing claims alleging a violation of Section 203 where a 25% stockholder of the target entered into a voting agreement immediately after board approval of the merger agreement; reasoning that, to the extent earlier negotiations gave rise to an agreement, arrangement or understanding, the board was aware of it and endorsed it).
- *Hollywood Firefighters' Pension Fund v. Dolan*, C.A. No. 2021-0468-KSJM (Del. Ch. July 6, 2021) (TRANSCRIPT) (declining to enjoin a merger; reasoning that Section 203's aggregation principles are designed to prevent an interested stockholder from doing indirectly what it could not do directly and that, absent facts suggesting that a stockholder is seeking to subvert the purpose of the statute, affiliates of a 15% or greater stockholder that is not subject to the restrictions of Section 203 are similarly exempt).
- *Hawkes v. Bettino*, C.A. No. 2020-0360-PAF, at 49 (Del. Ch. May 15, 2020) (TRANSCRIPT) (granting motion to expedite claim to enjoin a pending stockholder vote on a merger where plaintiffs alleged that the acquiror and the target's 43% stockholder agreed to the terms of a lucrative go-forward commercial agreement without target board approval; finding "at least a colorable inference" that, in agreeing to the terms of the commercial agreement, the 43% stockholder agreed to vote its shares in favor of the merger, such that the acquiror was deemed to own the shares for purposes of Section 203).
- *Chesapeake Corp. v. Shore*, 771 A.2d 293, 351 (Del. Ch. 2000) (given the broad language of Section 203, it is "plausible that an agreement could create such substantial economic incentives for the seller with respect to purchased shares that the agreement could also, as a practical matter, constitute an 'agreement, arrangement or understanding for the purpose of . . . voting' other shares still held by the seller").
- *Matador Capital Mgmt. Corp. v. BRC Hldgs., Inc.*, 729 A.2d 280 (Del. Ch. 1998) (holding that acquiror did not become "owner," within meaning of Section 203, of shares of target corporation

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stock pursuant to agreement where stockholder of target corporation agreed to tender 20% block to acquiror and abstain from taking any actions which would encourage another bidder to make a competing proposal, because evidence showed that board approved the merger with the acquiror prior to the stockholder's execution of the agreement).

- *Siegman v. Columbia Pictures Entm't, Inc.*, 576 A.2d 625, 634 (Del. Ch. 1989) (noting that intent of Section 203, as set forth in the legislative history thereof, is to force acquirors to approach the board before buying a significant interest in a corporation: "the essential element to avoid a stockholder vote is the approval by the board of the about-to-be-acquired corporation before the board becomes beholden to the acquiror").
  - *Siegman v. Columbia Pictures Entm't, Inc.*, 1993 WL 133068 (Del. Ch. Jan. 12, 1993) (stating that agreement by stockholder of target corporation giving acquiror option to purchase 49% of target's stock which stated that it was contingent upon approval by the boards of target and stockholder, would prevent an "agreement, arrangement or understanding" under the definition of owner in Section 203 from coming into being until the contingencies were removed but holding that despite stated contingency, there was a disputed question of fact as to whether the agreement was contingent upon such board approval).
3. Target interest in public companies. If target owns a stake in a Delaware corporation, then, following an acquisition, any "business combination" involving that Delaware company and the combined entity may be subject to the restrictions of Section 203. Business combination is broadly defined.
- *In re Digex, Inc. S'holders Litig.*, 789 A.2d 1176 (Del. Ch. 2000) (finding at preliminary injunction stage that defendants were not reasonably likely to meet their burden as to the entire fairness of the decision of the interested directors of a subsidiary corporation to waive proscriptions of Section 203 that would otherwise apply to acquiring corporation as result of merger with parent-target corporation, due to independent directors' lack of "meaningful participation" in negotiations leading to the Section 203 waiver).
4. Competing bid exception. Section 203(b)(6) provides that, subsequent to a public announcement or notice of certain management approved transactions (including mergers), and prior to the completion or abandonment of such transaction, a bidder may propose a business combination; and such business combination will not be subject to the restrictions of Section 203.

**B. Section 251(h).** Section 251(h) was enacted in 2013 and generally provides for "medium form mergers," meaning a public company can forgo holding a stockholders meeting or soliciting consents to approve a merger so long as the corporation is acquired through a qualifying first-step tender or exchange offer and a second step-merger. Upon consummation of the first-step offer, the buyer must have the amount and kind of shares that otherwise would be

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necessary to approve the merger at a stockholder meeting under the DGCL and the target's certificate of incorporation. Generally, the consideration paid in the offer and merger must be the same.

- Section 251(h) was first amended in 2014 and then again in 2016. The 2014 amendments (i) eliminated the prohibition on entering into a 251(h) merger with an “interested stockholder” as such term is defined in Section 203 of the DGCL, (ii) provided that the merger agreement may either permit or require the merger be effected pursuant to Section 251(h), (iii) provided that the first-step tender or exchange offer made for “any and all” shares of the target may exclude shares owned (at the time the offer is commenced) by the target (including any wholly-owned subsidiary) or by the party making the offer (including such party’s direct or indirect 100% parent or such party’s wholly owned subsidiaries) and clarified that shares owned by such parties do not need to be converted into merger consideration that is the same as what is being provided to public stockholders in the tender or exchange offer and (iv) clarified that, for purposes of determining whether, following the first-step tender offer, the acquiror owned the number of shares equal to the number of shares needed to approve the merger if the merger were approved at a stockholders meeting, as required by Section 251(h), the acquiror “owns” stock that has irrevocably been accepted for purchase or exchange and “received” (as defined in Section 251(h)) by the depository prior to the expiration of the offer.
- The 2016 amendments to Section 251(h) provided (i) that a target corporation is eligible for Section 251(h) if it has at least one class or series of stock publicly listed on a national securities exchange or held of record by more than 2,000 stockholders immediately prior to the execution of the merger agreement, (ii) that the first-step offer must be for “all” shares, but need not be for “any and all shares” (which was the predecessor language in the statute) and may be conditioned on the receipt of a minimum number or percentage of the shares of the stock of the target, or of any class or series thereof, (iii) that “hook shares” (shares of target’s stock that, as of the commencement of the offer, are owned by one of target’s wholly-owned subsidiaries) and “toe-hold shares” (shares of target that, as of the commencement of the offer, are owned by the acquiring corporation making the offer, its 100% parent or wholly-owned subsidiaries of the acquiror or its 100% parent) do not need to be converted into merger consideration that other stockholders receive in the transaction, (iv) that “toe-hold shares” may be counted toward the shares owned by the acquiring corporation making the offer, for purposes of satisfying the minimum tender requirement, even if the shares are not actually transferred to the acquiror, (v) that “rollover shares” (shares of target that are the subject of a written agreement requiring the shares to be transferred, contributed, and delivered to the acquiror or its affiliate in exchange for stock or equity interests in the acquiror or affiliate) are effectively treated as shares owned by the acquiror for purposes of satisfying the minimum tender requirement, but will cease to be classified as such if they have not been transferred, contributed or delivered to the acquiror before consummation

of the merger, (vi) that the merger agreement does not need to provide for the conversion of rollover stock into the consideration received by other stockholders and (vii) clarification on when shares are “received” in the tender or exchange offer.

**C. Class Votes.** Delaware law does not provide for class voting in mergers. *Compare* 8 Del. C. § 251 (no class vote in mergers), *with* 8 Del. C. § 242 (charter amendments require class vote of a class of stock if the rights, preferences and powers thereof are amended so as to adversely affect them). However, preferred stock provisions often do provide for class votes in connection with adverse changes to the stock. The case law provides some guidance as to whether these provisions are triggered by mergers. Generally, a close reading of the provision is required to determine whether such a vote is required.

- *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962 (Del. Ch. 1989) (provision of Warner charter requiring a class vote of preferred stock to amend, alter or repeal any provision of charter which adversely affects the preferred stock did not require class vote in triangular merger where Warner preferred stock was converted into Time preferred stock and Warner charter was amended to delete the terms of the preferred stock because the conversion of the preferred stock in the merger created the adverse effect, not the amendment), *aff'd*, 567 A.2d 419 (Del. 1989).
- *Sullivan Money Mgmt., Inc. v. FLS Hldgs., Inc.*, 1992 WL 345453 (Del. Ch. Nov. 20, 1992) (provision of charter requiring class vote of the preferred stock to change, by amendment to the charter “or otherwise” the terms and provisions of the preferred stock so as to affect adversely the rights and preferences thereof, did not trigger class vote in merger where the preferred stock was converted into cash, because “or otherwise” cannot be interpreted to mean merger where other provisions of charter specifically required class vote of another series of preferred stock to amend the terms of such preferred stock so as to affect adversely the rights thereof “either directly or indirectly or through merger or consolidation with any other corporation”).
- *Elliott Assocs., L.P. v. Avatex Corp.*, 715 A.2d 843 (Del. 1998) (charter provision requiring class vote of preferred stock for the amendment, alteration or repeal, “whether by merger, consolidation or otherwise,” of any provision of the Avatex charter that would adversely affect the rights of the preferred stock applied to merger where Avatex did not survive and preferred stock was converted into common stock of surviving corporation, because the adverse effect was caused by the repeal of the charter and the stock conversion, and because the Avatex charter contained the phrase “whether by merger, consolidation or otherwise”).
- *Starkman v. United Parcel Serv. of Am., Inc.*, C.A. No. 17747 (Del. Ch. Oct. 18, 1999) (TRANSCRIPT) (applying *Avatex* and stating that charter provision requiring supermajority vote to amend or delete right of first refusal in charter was not triggered in holding company merger where corporation survived and charter was not amended as there was no amendment or deletion to charter and reasoning, in dicta, that the supermajority voting requirement would not apply even if the charter of the surviving corporation

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in the merger amended or deleted the right of first refusal because the critical language, referring to “merger, consolidation or otherwise,” present in *Avatex* but absent in *Warner*, was not found in the charter provision at issue).

- In *Benchmark Capital P’rs IV, L.P. v. Vague*, 2002 WL 1732423 (Del. Ch. July 15, 2002), the company’s charter required a series vote for corporate action that would “materially adversely change the rights, preferences and privileges” of the junior stock. The charter required a series vote to issue or authorize securities senior to or on parity with junior preferred stock, but the vote could be waived where the contemplated corporate action would “diminish or alter the liquidation preference or other financial or economic rights” of the junior preferred. The Court held that the first series vote provision did not expressly extend to mergers and therefore, the preferred stockholders were not entitled to a series vote. With respect to the waiver of the second series vote, the Court rejected a broad reading of the limitation on the waiver and found that the issuance of senior stock did not “diminish or alter . . . financial or economic rights of the existing preferred” under the principle that preferences must be express and will not be presumed. The Supreme Court affirmed this holding in *Benchmark Capital P’rs IV, L.P. v. Juniper Fin. Corp.*, 822 A.2d 396 (Del. 2003).
- *Watchmark Corp. v. ARGO Global Capital, LLC*, 2004 WL 2694894 (Del. Ch. Nov. 4, 2004) (confirming that provision in certificate of incorporation requiring 80% vote of each series of preferred stock to amend certificate of incorporation to create a new series of preferred stock did not apply to a merger to eliminate the high vote provision).
- *In re Kinder Morgan, Inc. Corp. Reorganization Litig.*, 2014 WL 5667334 (Del. Ch. Nov. 5, 2014) (interpreting voting requirement in a limited partnership agreement not to require separate class votes).
- *SBTS, LLC v. NRC Grp. Hldgs. Corp.*, C.A. No. 2019-0566-VCL (Del. Ch. Sept. 11, 2019) (TRANSCRIPT) (holding that provision of target’s charter requiring a class vote of preferred stockholders for an adverse amendment, alteration or repeal of any charter provision, whether by merger, consolidation or otherwise, did not give preferred stockholders a class vote on a merger where the preferred stock was converted into the right to receive common stock of the acquiror’s newly formed parent corporation and the target survived the merger as a wholly-owned subsidiary of the newly formed parent corporation, with its charter remaining in place, unchanged).

## **D. Business Combination And Fair Price Provisions.**

This type of provision is often long and complex but, in general, requires a supermajority vote to approve a merger with an interested stockholder, i.e., a stockholder that owns more than a fixed percentage of the company’s stock. These provisions often require close and creative reading.

## E. Rights Plans.

- Before a merger agreement can be signed, it is often necessary to amend the company's rights plan in order to exempt the acquiror from the terms thereof, particularly where the acquiror is entering into voting agreements with stockholders or a stock option agreement with the company, which would otherwise make it an "acquiring person," and trigger the pill.
- It is important to give the rights agent some notice so that the amendment can be signed over the weekend, if necessary.
- Because Section 251 does not permit the conversion of securities other than stock in a merger, the rights plan must be amended so that it will not be triggered in the merger, unless the company plans to actually redeem the rights.
- Avoid issuing rights as merger consideration—doing so may trigger appraisal rights. 8 *Del. C.* § 262 (appraisal rights triggered if stockholders are required to accept anything other than stock or depository receipts in a merger).
- While there is no *per se* duty to enact a rights plan in response to a stockholder's creeping takeover, a board must consider whether, given a certain set of facts, not employing a pill will implicate the duty of loyalty. *See, e.g., La. Mun. Police Emps.' Ret. Sys. v. Fertitta*, 2009 WL 2263406, at \*8 n.34 (Del. Ch. July 28, 2009) ("To say that there is no *per se* duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board's failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover."). In *Fertitta*, a company entered into a going-private merger with an entity controlled by its Chairman, CEO, and 39% stockholder. After the merger agreement was signed, the CEO purchased shares on the open market, and, "although the board and its advisors must have been aware of [the CEO's] continuing open market purchases, which threatened to (and ultimately did) deliver majority control of the company to [the CEO] without his consummation of the merger agreement at a premium price, the board did nothing to stop [the CEO] from continuing to accumulate shares." *Id.* at \*17. The Court found that, given other facts, which also suggested that the corporation's board was more interested in accommodating the controlling stockholder than protecting the corporation's minority stockholders' interests, the plaintiff had stated a claim for the breach of the duty of loyalty.

## F. Control Premiums.

1. **Courts have approved receipt of a premium by controlling stockholders.**
  - *In re Delphi Fin. Grp. S'holder Litig.*, 2012 WL 729232 (Del. Ch. Mar. 6, 2012) (acknowledging that "a controlling stockholder is, with limited exceptions, entitled under Delaware law to negotiate a control premium for its shares" but finding that plaintiffs had shown a reasonable probability of success

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on the merits of their claim that controlling stockholder had breached his fiduciary duties by extracting a control premium for his high-vote stock because, the court reasoned, the controlling stockholder had already received a control premium in connection with the company's IPO in which the company added a provision to its certificate of incorporation providing that the high-vote and low-vote stock would receive the same consideration in any future merger).

- *In re Tele-Communications, Inc. S'holders Litig.*, 2005 WL 3642727, at \*14 (Del. Ch. Dec. 21, 2005) (questioning why a premium was paid to all holders of high-vote stock "if only [the controlling stockholder] was entitled to a control premium as a control shareholder").
- *Mendel v. Carroll*, 651 A.2d 297, 305 (Del. Ch. 1994) ("The law has acknowledged, albeit in a guarded and complex way, the legitimacy of the acceptance by controlling shareholders of a control premium.").
- *In re BHC Commc'ns, Inc. S'holders Litig.*, 789 A.2d 1 (Del. Ch. 2001) (holding directors of controlling stockholder corporation properly agreed to accept control premium of wholly owned subsidiary and indirectly owned subsidiary without implicating fiduciary duties to minority stockholders of subsidiaries and mere fact that controlling stockholder corporation received premium not shared by minority stockholders of subsidiaries did not support inference of breach of fiduciary duties).
- *In re Synthes Inc. S'holder Litig.*, 50 A.3d 1022, 1035-40 (Del. Ch. 2012) (explaining that "[i]t is, of course, true that controlling stockholders are putatively free under our law to sell their own bloc for a premium or even to take a different premium in a merger. As a practical matter, however, that right is limited in other ways that tend to promote equal treatment"; noting that "there is a good deal of utility to making sure that when controlling stockholders afford the minority pro rata treatment, they know that they have docked within the safe harbor created by the business judgment rule. If, however, controlling stockholders are subject to entire fairness review when they share the premium ratably with everyone else, they might as well seek to obtain a different premium for themselves").

**2. "Fair Price" includes control value.** Delaware case law indicates that "fair price" in a merger is equivalent to the value of the equity of a company, including any control premium, divided by the number of shares outstanding.

- *Wayne Cty. Emps. Ret. Sys. v. Corti*, 2009 WL 2219260, \*15 (Del. Ch. July 24, 2009) ("Any 'control premium' received by the selling company would be included in the consideration received by the shareholders in exchange for what is given to the acquirer, including voting control. There is certainly no requirement that the board obtain some separate consideration that could be separately identified as a 'control premium.'").

- *Andaloro v. PFPC Worldwide, Inc.*, 2005 WL 2045640, at \*16 (Del. Ch. Aug. 19, 2005). (“It is generally recognized that shares trading on the market reflect the price of minority shares: that is, shares without any accompanying benefit of control. The price of these shares therefore is generally thought to include a minority discount. To honor the Supreme Court’s teaching that plaintiffs should receive their pro rata share of the entity as a going concern, this court’s decisions adjust minority trading multiples to account for the implied discount, in order to accurately arrive at a fair value of the entire entity.”).
  - *Agranoff v. Miller*, 791 A.2d 880 (Del. Ch. 2001) (appraisal action in which the Court of Chancery stated that, in the comparable companies analysis, a control premium must be added to the equity value of the corporation to correct the minority discount implicit in the methodology).
  - *Borruso v. Commc’s Telesystems Int’l*, 753 A.2d 451 (Del. Ch. 1999) (in an appraisal action, the Court of Chancery noted that Delaware law recognizes that the comparable companies analysis results in a minority valuation of the shares that requires a control premium adjustment and found that the control premium must be applied to the equity value, not the enterprise value).
  - *Bomarko, Inc. v. Int’l Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999) (in determining that a merger was not entirely fair and calculating damages based on the fair value of the minority shares, the Court stated that the values produced by the comparable companies analysis must be adjusted to account for the inherent minority discount), *aff’d sub nom.* 766 A.2d 437 (Del. 2000).
  - *Citron v. E.I. DuPont de Nemours & Co.*, 584 A.2d 490, 508 (Del. Ch. 1990) (analyzing fair price under the entire fairness standard and concluding that a determination of fair price requires “fair or intrinsic valuation, which is to value the entire corporation and allocate that pro-rata to each of its shares”).
  - *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134 (Del. Ch. 1994), (applying control premium to an entire fairness valuation), *aff’d*, 663 A.2d 1156 (Del. 1995).
  - *Highfields Capital, LTD. v. AXA Fin., Inc.*, 939 A.2d 34, 57 n.72 (Del. Ch. 2007) (rejecting two comparable companies analyses that applied a control premium and stating in a footnote that adding a control premium in a comparable companies analysis by removing the implicit minority discount in the target’s stock is not always appropriate in a valuation).
- 3. “Fair price” requires “fair allocation” of control premium.** *In re Tele-Communications, Inc. S’holders Litig.*, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005) (suggesting that if a control premium is provided to controlling stockholders, a board of directors must consider not only whether the price to be paid

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to minority stockholders is fair from a general perspective, but also whether the price to be paid to those stockholders is fair as compared to that to be paid to the controlling stockholders).

## VI. APPRAISAL RIGHTS

### A. The Availability Of Appraisal Rights.

- 1. Mergers and consolidations.** With some exceptions, appraisal rights are available to stockholders of constituent corporations in mergers and consolidations effected pursuant to Sections 251, 252, 253, 254, 255, 256, 257, 258, 263 or 264 of the DGCL. 8 *Del. C.* § 262(b). The statute only allows stockholders of a constituent corporation in a merger to seek appraisal. *City of N. Miami Beach Gen. Emps.' Ret. Plan v. Dr. Pepper Snapple Grp., Inc.*, 2018 WL 2473150 (Del. Ch. June 1, 2018) (holding that stockholders of a parent company, whose subsidiary merges with another entity, are not entitled to appraisal of their shares where (i) they retain their shares following the completion of the merger and (ii) the parent company is not a “constituent corporation,” actually being merged or combined in the merger).
- 2. Other transactions.** A corporation’s certificate of incorporation may also provide for appraisal rights for shares of any class or series of stock following an amendment to the certificate of incorporation, a sale of all or substantially all of the assets of the corporation, or any merger or consolidation in which appraisal rights would not otherwise be available. 8 *Del. C.* § 262(c).
- 3. Section 262 applies without regard to voting rights.** Appraisal rights are generally available to all stockholders, whether or not their shares are entitled to vote on the merger. However, a certificate of designation may contract around appraisal rights by providing that a class or series receive consideration pursuant to a specified metric. See *In re Appraisal of Metromedia Int’l Grp., Inc.*, 971 A.2d 893 (Del. Ch. 2009); *In re Appraisal of Ford Hldgs., Inc. Preferred Stock*, 698 A.2d 973 (Del. Ch. 1997).
- 4. Section 251(f).** Section 262 denies appraisal rights for stockholders of the constituent corporation surviving the merger if their vote was not required to approve the merger under Section 251(f). 8 *Del. C.* § 262(b)(1). As a general matter, Section 251(f) eliminates the requirement of approval of a merger by the stockholders of a surviving corporation if the outstanding shares and charter of the surviving corporation are unaffected by the merger, and if the surviving corporation issues 20% or less of its shares in connection with the merger. 8 *Del. C.* § 251(f).
- 5. Section 253 short-form mergers.** Appraisal rights are not available to the stockholders of a parent corporation in a short-form merger. 8 *Del. C.* § 253.
- 6. Section 251(g) holding company mergers.** Appraisal rights are not available in holding company mergers accomplished pursuant to Section 251(g). Section 251(g) allows

# APPRAISAL RIGHTS

a corporation to effect a merger to create a holding company structure without a stockholder vote if a somewhat complex set of provisions, intended to protect stockholder rights, is satisfied. 8 *Del. C.* § 251(g).

- 7. Market Out.** Section 262 begins with the premise that appraisal rights exist for the shares of each class or series of stock of each constituent corporation. The statute then denies appraisal rights if the corporation's shares qualify for the "market out."
- a. Double Test:
- i. Part One. Section 262 denies appraisal rights to shares of a class or series that, as of the record date fixed for the vote on the merger, are:
    1. listed on a national securities exchange; or
    2. held of record by more than 2,000 stockholders (multiple owners holding through a single record owner should not be counted in applying the 2,000 stockholder limit).
  - ii. Part Two. Even if the market out would otherwise apply, the statute reinstates appraisal rights if the holders are required to accept cash or other consideration in the merger other than:
    1. shares of stock of the surviving corporation;
    2. shares of stock that at the effective date of the merger (not the record date) are:
      - a. listed on a national securities exchange; or
      - b. held by record of more than 2,000 stockholders; or
    3. cash in lieu of fractional shares. 8 *Del. C.* § 262(b)(2)(a)-(d).
- b. Exception to the Market Out: Short-Form Mergers under Section 253 and Section 267. The market out does not apply to short-form mergers accomplished pursuant to Section 253 or Section 267 of the DGCL. In a short-form merger, the shares of the parent corporation have no appraisal rights, and the shares of the subsidiary have appraisal rights if the parent owns less than all of the subsidiary's stock, regardless of the number of record holders or the nature of the merger consideration. 8 *Del. C.* § 262(b)(3).
- c. Appraisal Rights are not Available in a Merger Providing for a Cash or Stock Election, not Subject to Proration. *Krieger v. Wesco Fin. Corp.*, 30 A.3d 54 (Del. Ch. 2011) (holding that appraisal rights were not available in a merger providing for a cash or stock election, not subject to proration, with cash as the default form of consideration; declining plaintiff's invitation to take a "stockholder-by-stockholder" approach to determining the availability of appraisal rights); *Akile v. Rite Aid Corp.*, C.A. No. 2018-0305-AGB (Del. Ch. May 9, 2018) (TRANSCRIPT) (holding that appraisal rights were not available in a merger providing for a cash stock election, and

rejecting plaintiff's argument that stockholders were coerced into electing "an allegedly more valuable cash option" because the availability of appraisal rights does not depend on "the relative value of the options available to stockholders").

- d. A Special Cash Dividend may be Treated as Merger Consideration, thus Triggering Appraisal Rights. In *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, 918 A.2d 1172 (Del. Ch. 2007), Caremark entered into a merger agreement with CVS pursuant to which Caremark would merge with CVS and the Caremark stockholders would receive CVS stock in consideration for their shares. After receiving a competing offer, it was decided that the Caremark stockholders would receive a special cash dividend payable by Caremark if the merger was approved. The Court of Chancery found this special cash dividend was "fundamentally cash consideration paid to Caremark shareholders on behalf of CVS" and thus appraisal rights were available. Notably, the Court found that the special dividend *did not have legal significance independent of the merger* despite being approved and payable by Caremark because the dividend was conditioned on stockholder approval of the merger agreement, payment would not become due until on or after the effective date of the merger and Caremark's public disclosures stated that the dividend could be treated as merger consideration for tax purposes. In a subsequent ruling, however, the Court of Chancery stated "I suppose in the most hypertechnical of senses, Caremark shareholders might not be considered to receive cash in exchange for their shares as a result of this merger." *La. Mun. Police Emps.' Ret. Sys. v. Crawford*, C.A. Nos. 2635-N & 2663-N (Del. Ch. Mar. 7, 2007) (TRANSCRIPT). The Court noted that, instead, the Caremark stockholders could be regarded as receiving CVS shares and a waiver on the part of CVS of the restrictive interim covenant in the merger agreement prohibiting the payment of dividends by Caremark. The Court noted that such a waiver does not constitute the form of consideration mentioned in Section 262(b)(2) of the DGCL as an exception to the triggering of appraisal rights. *Cf. In re GGP, Inc. S'holder Litig.*, 2021 WL 2102326 (Del. Ch. May 25, 2021) (rejecting plaintiff's argument that a two-step structure under which stockholders received 98.5% of the deal consideration as a pre-closing dividend and the remaining consideration in cash at closing violated Section 262; reasoning that the plaintiff remained entitled to appraisal rights and the Court could determine that the pre-closing dividend plus the closing consideration undervalued the plaintiff's shares).

- 8. De Minimis Exception.** Section 262(g) denies stockholders appraisal rights for publicly listed stock where (i) the appraisal demands represent 1% or less of the corporation's outstanding stock and (ii) the total value of the demands (as implied by the merger price) is \$1 million or less. This ban on *de minimis* claims does not apply to short-form mergers effected pursuant to Section 253 or 267. The ban does apply to contractual appraisal rights conferred by a provision in a corporation's charter.

## 9. Failure to pay

- *Mehta v. Smurfit-Stone Container Corp.*, 2014 WL 5438534, at \*5 (Del. Ch. Oct. 20, 2014) (noting that a surviving corporation's failure to pay stockholders the merger consideration could be best treated as a breach of contract or unjust enrichment claim).
- *Chertok v. Onsolve, LLC*, 2021 WL 1714938 (Del. Ch. Apr. 29, 2021) (finding that plaintiffs stated claims for breach of contract and unjust enrichment where the corporation withheld merger consideration).
- *Manichaeen Capital, LLC v. Exela Techs., Inc.*, 2021 WL 2104857 (Del. Ch. May 25, 2021) (declining to dismiss veil-piercing and reverse veil-piercing claims where plaintiff alleged that the acquiror engaged in a wrongful scheme to divert assets from the surviving corporation, leaving it unable to pay an appraisal award).

## B. Who May Seek Appraisal.

1. **General rule.** The right to pursue appraisal extends to any stockholder of record who: (1) owns shares of stock on the date that the stockholder demands appraisal; (2) continues to hold the shares through the effective date of the merger or consolidation; and (3) neither votes in favor of the merger or consolidation nor executes a written consent in favor of the transaction. 8 *Del. C.* § 262(a).
2. **Stockholders of record.** Stockholders of record must take the first step in perfecting appraisal rights—demanding appraisal for shares prior to the vote on the adoption of the merger agreement. In 2007, Section 262(e) was amended expressly to permit beneficial owners of shares of stock held either in a voting trust or by a nominee on their behalf to commence an appraisal proceeding by filing a petition, in their own names, in the Court of Chancery.
3. **Shares acquired after the merger is announced or post-record date.** Stockholders who purchase stock after the announcement of a merger and stockholders who become stockholders of record after the record date for the merger or consolidation are not disqualified from pursuing appraisal if the other statutory requirements are met. *Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650 (Del. Ch. 1989). However, if shares are voted in favor of the merger and then sold, it is not clear whether the new holder would have appraisal rights.
4. **Shares held in street name.** In *In re Appraisal of Transkaryotic Therapies, Inc.*, 2007 WL 1378345 (Del. Ch. May 2, 2007), the Court found that a beneficial owner that acquired shares after the record date but before the date of the vote on the merger and who held the stock in street name through Cede & Co. was not required to prove that each of its specific shares

for which it sought appraisal had not been voted in favor of the merger by the previous beneficial owner. The Court noted that only a record holder may claim and perfect appraisal rights and that, therefore, the record holder's actions determine perfection of the right to seek appraisal. Since Cede & Co., the record owner of the shares at issue, owned more than 16,000,000 shares of stock that had not been voted in favor of the merger, and the petitioners only sought appraisal for approximately 11,000,000 shares, the Court permitted the appraisal action to proceed. Thus, in the case of shares held in street name, the Court determined not to impose a share tracing requirement where the depository holds at least as many shares not voted in favor of the merger as the number of shares which demanded appraisal. *See also In re Ancestry.com, Inc.*, 2015 WL 66825 (Del. Ch. Jan. 5, 2015); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 67586 (Del. Ch. Jan. 5, 2015). *But cf. In re Appraisal of Dell Inc.*, 2015 WL 4313206 (Del. Ch. July 13, 2015) (revised July 30, 2015) (holding that the continuous holder requirement set forth in Section 262 bars a beneficial owner from pursuing appraisal if there has been an administrative transfer of the shares at the depository level). However, in *In re Appraisal of Dell Inc.*, 143 A.3d 20 (Del. Ch. 2016), the Court of Chancery found that beneficial owners are not entitled to seek appraisal where there is evidence that the record holder voted the specific shares for which appraisal is sought in favor of the merger. Specifically, the Court held that while an appraisal petitioner can establish a prima facie case that it complied with the dissenter requirement of Section 262 by showing that the depository "held a sufficient number of shares that were not voted in favor of a merger to cover the appraisal class," a defendant company can rebut this presumption by showing that the depository actually voted the specific shares in favor of the merger.

5. **Stockholders who dispose of shares between the date of demand and the effective date of the merger or consolidation do not have appraisal rights.** Because the statute requires stockholders to hold their shares continuously through the period following the date of demand until the effective date, any stockholder that was a record holder as of the date of demand but sold his or her shares only to reacquire other shares so as to become a stockholder of record on the effective date will not be entitled to appraisal.
6. **"Hedging."** A stockholder of record holding shares for more than one beneficial owner may vote some shares in favor of a merger and seek appraisal for others. *Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752 (Del. 1963).
  - In a short-form merger, a stockholder may demand appraisal as to some shares while accepting the merger consideration for the rest. *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683 (Del. 1966); *Lichtman v. Recognition Equip., Inc.*, 295 A.2d 771 (Del. Ch. 1972).

# APPRAISAL RIGHTS

- In one case involving a long-form merger, the Court of Chancery permitted a stockholder who voted all of his shares against the merger and demanded appraisal to withdraw the demand and accept the merger price as to some (but not all) of his shares, as long as all the shares held by such owner (who was also the record owner) were voted against the merger. *Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd.*, 847 A.2d 340 (Del. Ch. 2003).

## 7. Stockholders who vote in favor of the merger or consolidation do not have appraisal rights.

- Stockholders need not vote against the proposed transaction as long as they did not vote for it. *Engel v. Magnavox Co.*, 1976 WL 1705 (Del. Ch. Apr. 2, 1976).
- Any proxy previously submitted in favor of the proposed transaction must be effectively revoked before a demand for appraisal may be made. *See Moffitt v. Wellington Mgmt. Co.*, 1981 WL 7611 (Del. Ch. Apr. 8, 1981).
- A stockholder who waives appraisal rights by submitting a letter of transmittal may be able to withdraw that waiver and demand appraisal if the stockholder is still able to comply with the requirements of Section 262. *Roam-Tel P'rs v. AT&T Mobility Wireless Operations Hldgs. Inc.*, 2010 WL 5276991 (Del. Ch. Dec. 17, 2010) (holding, in the context of a short-form merger cashing out the minority stockholders, that a stockholder who had submitted a letter of transmittal expressly accepting the merger consideration in lieu of demanding appraisal was able to proceed with its appraisal petition even though the company had cancelled the stock certificate and mailed the stockholder a check where the stockholder had not cashed the check, sent the check back to the company and was able to comply with all of the express requirements appraisal statute; suggesting that if the stockholder had cashed the check for the merger consideration, the company could have argued that the waiver of appraisal rights could not be rescinded because the company had relied on the waiver).
- It is unclear under Delaware law whether consents voted pursuant to Section 228 in favor of a merger or consolidation that are delivered after approval of the transaction constitute a vote in favor of the transaction. It could be argued that once sufficient consents are delivered, the vote has been concluded, and thus the later delivered consents do not amount to a waiver of appraisal rights. 8 *Del. C.* § 228.

## 8. Withdrawal. A stockholder who properly demands appraisal may withdraw the demand as follows:

- At any time within 60 days of the effective date of the merger, the stockholder may withdraw his or her demand unilaterally as long as the stockholder has not commenced an appraisal proceeding or joined that proceeding as a named party. 8 *Del. C.* § 262(e).

- After the period of 60 days following the effective date of the merger has passed but before the petition for appraisal is filed, the stockholder can only withdraw his or her demand for appraisal with the written consent of the surviving corporation. 8 *Del. C.* § 262(k).
- After the petition for appraisal has been filed, a stockholder can only withdraw his or her demand for appraisal with court approval. 8 *Del. C.* § 262(k).
- Dismissal will not be granted by the court if 60 days have passed after the effective date and the surviving corporation opposes dismissal. 8 *Del. C.* § 262(k). See *Salomon Bros., Inc. v. Interstate Brands Corp.*, 1991 WL 131866 (Del. Ch. July 12, 1991).

## 9. Waiver of Appraisal Rights.

- The Delaware Supreme Court has upheld a contractual waiver of appraisal rights by holders of common stock. *Manti Hldgs., LLC v. Authentix Acq. Co., Inc.*, 261 A.3d 1199 (Del. 2021), *aff'g* 2018 WL 4698255 (Del. Ch. Oct. 1, 2018), (holding that a waiver of appraisal rights in a stockholders agreement by a private company's sophisticated and sole common stockholder was enforceable; finding that the agreement's modification to the statutory right of appraisal was clear and unambiguous and not inconsistent with the DGCL). In a related opinion in the same case, the Court of Chancery enforced a fee-shifting provision in the stockholders agreement against the unsuccessful petitioners. 2020 WL 4596838 (Del. Ch. Aug. 11, 2020). Earlier, the case *Halpin v. Riverstone Nat'l, Inc.*, 2015 WL 854724 (Del. Ch. Feb. 26, 2015), raised without answering the question of whether common stockholders contractually may waive appraisal rights. The proper use of a drag-along provision to force common stockholders to vote in favor of a transaction, however, will cause that stockholder statutorily to lose appraisal rights. *Id.* Such drag-along provisions must be complied with precisely. In *Halpin*, minority common holders sought to exercise appraisal rights, despite being party to a stockholders agreement that required them to vote for (or tender into) a deal approved by the majority. Under its terms, the obligation was not triggered unless the company gave the minority notice before the vote, which it did not; nor did the agreement give the majority a proxy to vote the minority's shares. Thus, the minority stockholders were not bound to vote in favor of the transaction and appraisal rights were not lost.

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## C. Fair Value.

### 1. The Court of Chancery determines fair value.

- After the Court of Chancery determines the stockholders entitled to appraisal, an appraisal proceeding will be conducted in accordance with the rules of the Court of Chancery. In an appraisal proceeding, the Court will determine the fair value of the shares, excluding any value

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arising from the accomplishment or expectation of the merger or consolidation. 8 Del. C. § 262(h).

- The Delaware Supreme Court has declined to adopt a judicial presumption in favor of the deal price, reasoning that Section 262 vests in the Court of Chancery the discretion to determine the fair value of the shares in the first instance. The Delaware Supreme Court has also explained, however, that in appropriate circumstances the Court of Chancery may rely on deal price as an indication of fair value and that in certain circumstances deal price may be the most reliable indication of fair value—particularly in the context of (i) a robust market check, (ii) a sale to an unrelated third party involving arm’s length negotiations and (iii) no indication of any conflicts of interest. *DFC Global Corp. v. Muirfield Value P’rs, L.P.*, 172 A.3d 346, 348 (Del. 2017); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 2017 WL 6375829 (Del. 2017) (reversing a Court of Chancery decision in an appraisal proceeding relating to an MBO to rely exclusively on the court’s own DCF analysis and holding that the Court of Chancery abused its discretion when it placed no weight on the deal price or market price where the Supreme Court concluded that the evidence indicated that both were potentially useful indications of fair value); *Verition P’rs Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019) (reversing the Court of Chancery’s decision relying on unaffected market price and ordering a fair value award reflecting deal price minus synergies; explaining that *Dell* and *DFC* merely reaffirm the principle that “the price a stock trades at in an efficient market is an important indicator of its economic value that should be given weight,” and rejecting “the idea that an informationally efficient market price invariably reflects the company’s fair value in an appraisal or fundamental value in economic terms”); *In re Appraisal of Columbia Pipeline Grp., Inc.*, 2019 WL 3778370 (Del. Ch. Aug. 12, 2019) (relying on deal price where the company was “publicly traded, widely held, and sold in a process that began with a pre-signing outreach and finished with an open, albeit passive, post-signing check”; holding that the respondent did not carry its burden to prove any downward adjustment for synergies); *In re Stillwater Mining Co.*, 2019 WL 3943851 (Del. Ch. Aug. 21, 2019) (relying on deal price where the sale process contained “objective indicia” of reliability—(i) the merger was an arm’s length transaction with a third party, (ii) the board was not conflicted, (iii) the acquiror conducted due diligence and received confidential information about the target’s value, (iv) the target negotiated with the acquiror and extracted multiple price increases, and (v) no bidders emerged post-signing; holding that the respondent did not carry its burden to prove any downward adjustment for synergies), *aff’d sub nom. Brigade Leveraged Capital Structures Fund Ltd. v. Stillwater Mining Co.*, 240 A.3d 3 (Del. 2020); *In re Panera Bread Co.*, 2020 WL 506684 (Del. Ch. Jan. 31, 2020) (relying on deal price where the sale process contained “objective indicia” of reliability; holding that the respondent carried its burden

to prove downward adjustment for synergies); *In re Appraisal of Solera Hldgs., Inc.*, 2018 WL 3625644 (Del. Ch. July 30, 2018); *In re Appraisal of PetSmart, Inc.*, 2017 WL 2303599 (Del. Ch. May 26, 2017); *Merion Capital L.P. v. Lender Processing Servs., Inc.*, 2016 WL 7324170 (Del. Ch. Dec. 16, 2016); *Merion Capital LP v. BMC Software, Inc.*, 2015 WL 6164771 (Del. Ch. Oct 21, 2015); *LongPath Capital, LLC v. Ramtron Int'l Corp.*, 2015 WL 4540443 (Del. Ch. June 30, 2015); *In re Appraisal of Regal Ent. Grp.*, 2021 WL 1916364 (Del. Ch. May 13, 2021).

- The Court of Chancery has declined to look to the merger price where the court concluded that, under the specific circumstances of the case, the deal price was not a reliable indication of fair value. See, e.g., *In re ISN Software Corp. Appraisal Litig.*, 2016 WL 4275388 (Del. Ch. Aug. 11, 2016) (relying exclusively on a DCF analysis where controlling stockholder of closely held corporation cashed out some, but not all, of the stock held by minority stockholders because the method used by the controller to determine value was “unreliable,” the company did not trade publicly and historical sales of stock were not reliable indicators of value, and no comparable company evaluation existed on which the court could reasonably rely); *Dunmire v. Farmers & Merchants Bancorp of W. Pa.*, 2016 WL 6651411 (Del. Ch. Nov. 10, 2016) (declining to consider merger price as a component of fair value because (i) the two corporations were controlled by the same family, (ii) no third parties were solicited, (iii) there was no majority of minority condition and two of the three members of the seller’s special committee had business ties to the controlling family and (iv) during the first three months of negotiations, the special committee’s financial advisor was limited to reacting to the buyer’s financial advisor’s analysis rather than conducting its own independent valuation); *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at \*31 (Del. Ch. July 21, 2017; corrected Aug. 8, 2017) (holding, in the context of a merger with a controlling stockholder and involving an imperfect sale process, that the deal price was not a reliable indicator of fair value where the respondent company did not argue that the court should give weight to deal price in its valuation and significant synergies with the strategic buyer created an “exaggerated picture” of the corporation’s value and concluding that the fair value of the shares was less than 50% of the transaction price); *In re Appraisal of SWS Grp., Inc.*, 2017 WL 2334852, at \*10, 18 (Del. Ch. May 30, 2017) (finding that deal price was unreliable as evidence of fair value, and relying exclusively on a DCF, where the acquiror, as a creditor of the target held partial veto power over competing offers under a credit agreement and noting that “the fact that my DCF analysis resulted in a value below the merger price is not surprising; the record suggests that this was a synergies-driven transaction whereby the acquirer shared value arising from the merger with [the company]”), *aff’d, sub nom. Merlin P’s LP v. SWS Grp., Inc.*, 181 A.3d 153 (Del. 2018); *In re Appraisal of AOL Inc.*, 2018 WL 1037450 (Del. Ch. Feb. 23, 2018) (declining to find that the deal price was the fair value in circumstances where the company had not

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been auctioned, the transaction was protected by aggressive deal protection measures and the company's CEO, who negotiated the deal, made public statements stating that he was committed to doing the deal with the existing acquiror, but finding that the fair value based on a DCF analysis was below the deal price); *Blueblade Capital Opportunities LLC v. Norcraft Cos., Inc.*, 2018 WL 3602940 (Del. Ch. July 27, 2018) (holding that the deal price did not reflect the fair value of the target where there were various flaws in the sales process, including that: (i) there was no pre-signing market check, (ii) a conflicted board member lead most of the negotiations, (iii) the target's board did not understand the terms and function of the go-shop, (iv) the acquiror had unlimited match rights and (v) the acquiror's advisor attempted to contact potential bidders and dissuade them from making a topping bid); *In re Appraisal of Jarden Corp.*, 2019 WL 3244085, at \*27 (Del. Ch. July 19, 2019) (relying on unaffected market price; finding that the company traded on an efficient market and there was no evidence that the market lacked material information; finding that the deal price was not a reliable indicator of fair value where the company's lead negotiator acted with little to no board oversight, suggested a price range to sell the company before negotiations began in earnest and the company failed to conduct a pre-signing or post-signing market check), *aff'd sub nom. Fir Tree Value Master Fund, LP v. Jarden Corp.*, 236 A.3d 313 (Del. 2020); *Kruse v. Synapse Wireless, Inc.*, 2020 WL 3969386 (Del. Ch. July 14, 2020) (adopting the DCF analysis of the respondent's expert after finding that (i) both sides' proffered market evidence was unreliable because the previous transactions used as inputs had not taken place in a competitive market, (ii) the competing experts had discredited one another's comparable transaction analyses and (iii) the petitioner's expert's DCF analysis assumed a "fantastical" 10% perpetual growth rate, whereas no major criticisms had been made of the respondent's); *Manichaeon Capital, LLC v. SourceHOV Holdings, Inc.*, 2020 WL 496606 (Del. Ch. Jan. 30, 2020) ( finding that the DCF analysis was the most reliable indicator of fair value because the private company was not traded in an efficient market and it lacked a sales process by failing to hold a single board meeting throughout the combination or to conduct a pre-signing or post-signing market check, and the parties agreed that market evidence was not a useful indication of fair value).

- 2. Interest to be paid on the amount determined to be fair value.** Section 262(h) of the DGCL establishes a presumption that interest will be paid on the amount determined to be fair value. Unless the Court of Chancery, in its discretion, determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. 8 *Del. C.* § 262(h).

- 3. Prepayment of Interest.** Section 262(h) of the DGCL also provides corporations the option to defray interest accrual by making cash pre-payments to stockholders seeking appraisal, before entry of judgment in the appraisal proceeding, which will be deducted from the ultimate fair value award. However, a corporation can only make pre-payments to stockholders whose entitlement to appraisal is not contested. The synopsis to the 2016 amendments to Section 262(h) provides that there are no inferences that the pre-payment is equal to, greater than or less than the fair value of the shares. Section 262(h) does not provide for a return of pre-paid amounts if the appraisal award is less than such amount and the Court of Chancery has declined to award such refunds in the absence of a clear clawback provision in the prepayment agreement. *In re Panera Bread Co.*, 2020 WL 506684 (Del. Ch. Jan. 31, 2020).

## D. Required Filings, Notices, And Demands.

- 1. Notice of appraisal rights and the effective date.**
- a. For Mergers Approved at a Stockholder Meeting:
- **Notice of Appraisal Rights.** The corporation must notify all stockholders that were stockholders on the record date of the meeting for which appraisal rights are available of the availability of appraisal rights, and such notice must include a copy of Section 262. *See generally Berger v. Pubco Corp.*, 976 A.2d 132 (Del. 2009) (outlining procedure for a quasi-appraisal remedy after appraisal notice failed to disclose material information necessary to decide whether or not to seek appraisal and incorrectly included an outdated version of Section 262); *Nebel v. Sw. Bancorp., Inc.*, 1999 WL 135259 (Del. Ch. Mar. 9, 1999) (finding that the erroneous inclusion of a page from another state's appraisal statute in the notice of appraisal rights was a material misdisclosure and substantive statutory violation for which a quasi-appraisal was the appropriate remedy); *see also Mehta v. Mobile Posse, Inc.*, 2019 WL 2025231, at \*7 (Del. Ch. May 8, 2019) (finding it "reasonably conceivable that a corporation does not satisfy Section 262 by attaching a correct copy of the statute but then telling stockholders information and procedures that contradict the statute"). Such notice must be sent not less than 20 days prior to the meeting, 8 *Del. C.* § 262(d)(1); *Jackson v. Turnbull*, 1994 WL 174668 (Del. Ch. Feb. 8, 1994) (holding that a corporation may not vary the statutory time periods set forth in Section 262, where corporation stated in notice that a stockholder's demand and petition for appraisal must be made within 20 and 120 days, respectively, following the mailing of a valuation), *aff'd*, 653 A.2d 506 (Del. 1994).
  - **Stockholder Demand.** Each stockholder demanding appraisal must deliver a demand in writing (or, if the corporation so elects, by electronic transmission to an email address (or other information processing system)

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expressly designated in the notice of appraisal rights) for appraisal to the corporation before the vote on the merger or consolidation is taken. A proxy or vote against the transaction will not constitute a demand. 8 *Del. C.* § 262(d)(1).

- **Notice of Effective Date.** Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation must notify each stockholder that properly demanded appraisal under Section 262 of the effective date of the merger or consolidation. 8 *Del. C.* § 262(d)(1).
- b. For Mergers Approved by Written Consent or under the Short-Form Provisions of Section 253:
- **Notice of Appraisal Rights.** Notice of appraisal rights must be given to each of the holders of any class or series of such constituent corporation who are entitled to appraisal rights.
    1. Such notice may be given by the constituent corporation before the effective date of the merger to all stockholders entitled to appraisal rights on the record date fixed by the corporation. Such notice should state that the merger or consolidation was approved and that appraisal rights are available, and shall include a copy of Section 262. 8 *Del. C.* § 262(d)(2).
    2. Such notice may be given by the surviving corporation within 10 days after the effective date of the merger to all stockholders entitled to appraisal rights as of the effective date, and must state that the merger or consolidation was approved, provide the effective date of the transaction, state that appraisal rights are available, and include a copy of Section 262. 8 *Del. C.* § 262(d)(2).
  - **Stockholder Demand.** Any stockholder entitled to appraisal rights may, within 20 days after the mailing by the corporation of the notice of appraisal rights, demand appraisal of such holder's shares in writing or, if the corporation so elects, by electronic transmission to an email address (or other information processing system) expressly designated in the notice of appraisal rights. 8 *Del. C.* § 262(d)(2).
  - **Notice of Effective Date.** If the notice of appraisal rights did not notify stockholders of the effective date of the merger or consolidation, either (1) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation; or (2) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date. If such second notice is sent

# APPRAISAL RIGHTS

more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with Section 262(d)(2). 8 *Del. C.* § 262(d)(2).

- **Record Date.** For the purpose of determining the stockholders entitled to receive either the first or second notice, each constituent corporation may fix a record date that shall not be more than 10 days prior to the date notice is given, provided that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given. 8 *Del. C.* § 262(d)(2).
- c. For Mergers Approved under the Medium-Form Provisions of Section 251(h):
- **Notice of Appraisal Rights.** Generally the same as above for mergers approved by written consent or the short-form provisions of Section 253. Note, however, that only the shares of the corporation whose shares are the subject of the tender or exchange offer referred to in Section 251(h) (i.e., of the “target”) are eligible for appraisal and, in turn, notice of appraisal must be given by “such” corporation. Accordingly, only the target corporation can provide valid notice of appraisal before the effective date of the merger; neither the acquiring parent or its merger subsidiary can provide valid notice of appraisal rights in their offer documents (e.g., in a Schedule TO). 8 *Del. C.* § 262(d)(2).
  - **Stockholder Demand.** Any stockholder entitled to appraisal rights may, within the later of the consummation of the tender or exchange offer and 20 days after the mailing by the corporation of the notice of appraisal rights, demand appraisal of such holder's shares in writing or, if the corporation so elects, by electronic transmission to an email address (or other information processing system) expressly designated in the notice of appraisal rights. 8 *Del. C.* § 262(d)(2).
  - **Notice of Effective Date.** If the notice of appraisal rights did not notify stockholders of the effective date of the merger or consolidation, either (1) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation; or (2) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date. If such second notice is sent later than the later of the consummation of the tender or exchange offer and 20 days following the sending of the first notice, such second notice need only be sent to each stockholder

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who is entitled to appraisal rights and who has demanded appraisal of such holder's shares in accordance with Section 262(d)(2). 8 *Del. C.* § 262(d)(2).

- **Record Date.** Same as above for written consents and short forms.

**2. Section 262(e) notice.** Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with Section 262 (including a beneficial owner) shall, upon written request (or, if the corporation so elects, request by electronic transmission to an email address (or other information processing system) expressly designated in the notice of appraisal rights), be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such statement shall be given to the stockholder within 10 days after such stockholder's request is received by the corporation or within 10 days after expiration of the period for delivery of demands for appraisal under Section 262(d), whichever is later. 8 *Del. C.* § 262(e).

**3. Filing of petition for appraisal.** Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with Section 262 (including a beneficial owner) may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. 8 *Del. C.* § 262(e).

**4. Section 262(f) verified list filing.**

- a. Procedure if a Stockholder Files the Petition for Appraisal. Upon the filing of any petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which surviving or resulting corporation shall, within 20 days after such service, file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. 8 *Del. C.* § 262(f).
- b. Procedure if the Surviving or Resulting Corporation Files the Petition for Appraisal. The duly verified list containing the names and addresses of all stockholders who have demanded appraisal for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation shall accompany the petition. 8 *Del. C.* § 262(f).

- 5. Notice by the Registry in Chancery.** If so ordered by the Court, the Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders set forth in the duly verified list. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices must be approved by the Court and the costs of such notices must be borne by the surviving or resulting corporation. 8 *Del. C.* § 262(f).

## E. Content Of Notices.

- 1. Contents of notice of appraisal rights.** The notice of appraisal must contain: (1) a statement making known the availability of appraisal rights; (2) a copy of Section 262; (3) instructions regarding how to perfect appraisal rights (under Delaware case law, minimally, it is advisable to inform stockholders that a demand for appraisal must be made by or on behalf of the holder of record, as such holder is identified on the records of the corporation (*see Enstar Corp. v. Senouf*, 535 A.2d 1351 (Del. 1987)); and (4) information material to the stockholder's decision to accept the merger consideration or demand appraisal (see Part V(F) below for a discussion of the duty of disclosure). 8 *Del. C.* § 262(d).
- 2. Contents of notice of effective date.** The notice of effective date must notify the stockholders entitled to appraisal of the effective date of the merger or consolidation. 8 *Del. C.* § 262(d).
- 3. Contents of 262(e) notice.** This notice must contain a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares.

## F. Settlements.

- It is permissible for the surviving corporation to settle the appraisal demands of certain non-appearing former stockholders on terms that may not be available to others who sought appraisal. *Mannix v. PlasmaNet, Inc.*, 2015 WL 4455032 (Del. Ch. July 21, 2015) (granting a motion to dismiss and approving a settlement whereby certain former stockholders would dismiss their appraisal demands in exchange for shares of the surviving corporation so long as they attested to their status as "accredited investors" under the federal securities laws).

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

## VII. PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

### A. Voting Rights.

#### 1. Voting under statute.

- a. No Class Vote in Merger under Section 251 of the DGCL.
  - i. In a Merger with No Class Vote Required by the DGCL, Shares may be:
    - left outstanding
    - cancelled
    - cashed out
    - changed by amending terms (§ 251(b)(3) and (e))
    - subrogated to new series
    - converted into stock of acquiror
    - recapitalized into preferred or common stock of same corporation. *See Fed. United Corp. v. Havender*, 11 A.2d 331 (Del. 1940) (discussed in Part VI(B)(3)(6)).
  - ii. Holders of shares may have appraisal rights under Section 262 of the DGCL. *See* Part V.
- b. Limited Class Votes in Amendments under Section 242(b)(2) of the DGCL.
  - i. *Section 242(b)(2)*. This section provides that the “holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would . . . alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely.”
  - ii. *Adverse Effect*. No class vote for Section 242 charter amendments unless the peculiar legal characteristics of a class are altered adversely.
    - *Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co.*, 24 A.2d 315 (Del. 1942). In *Hartford Accident*, the Court construed the predecessor to Section 242(b)(2) of the DGCL, which granted a class vote on charter amendments that “alter or change the preferences, special rights or powers given to any one or more classes of stock, by the Certificate of Incorporation, so as to affect such class or classes of stock adversely.” *Id.* at 318. The Court held that a charter amendment that increased the authorized number of shares of preferred stock did not require a class vote of the common stock regardless of any dilutive effect on the common because a class vote is required only when an amendment changes the “rights incident to that class as compared with other classes of shares.” *Id.* at 318. “Where the corporate amendment does no more than

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

to increase the number of the shares of a preferred or superior class, the relative position of subordinated shares is changed in the sense that they are subjected to a greater burden. The peculiar, or special, quality with which they are endowed, and which serves to distinguish them from shares of another class, remains the same.” *Id.* at 318-19.

- *Orban v. Field*, 1993 WL 547187 (Del. Ch. Dec. 30, 1993). In *Orban*, the common stockholders argued that the creation of a new class of preferred stock that diluted the voting power of the common stock required a class vote. The *Orban* Court relied on *Hartford Accident* and explained that the right to vote is not a “peculiar or special characteristic of common stock in the capital structure of [the corporation].” *Id.* at \*8. Therefore, an amendment to the certificate of incorporation that creates a new class of preferred stock does not require a class vote of the common stockholders because the amendment does not adversely affect “the peculiar legal characteristics of that class of stock.” *Id.* In addition, the Court explained that the new issuance diluted the voting power of all of the classes of stock, not simply the common stock. Similarly, the Court rejected the plaintiffs’ argument that the amendments to the certificate of designation increasing the number of shares of certain series, and changing the conversion ratios and redemption provisions of other series required a class vote of the common stock, relying on *Hartford Accident* and finding that “no special rights of common shareholders were adversely affected by those changes.” *Id.* at \*9.
- *Mariner LDC v. Stone Container Corp.*, 729 A.2d 267, 272 n.4 (Del. Ch. 1998) (stating that amendment to terms of preferred stock granting voting rights to a class formerly having none “cannot in any way, be interpreted as having an adverse [e]ffect on the ‘preferences, rights or powers’ of those shares” and finding that since merger implicated terms of anti-destruction provision which required adjustment of conversion rights, amendment of charter to adjust conversion rights did not adversely affect preferred stockholders such that they were entitled to a class vote on amendment).
- Special Considerations:
  - Does a reverse stock split create an adverse effect?
  - Although creation of senior stock is not, *per se*, an adverse effect, the terms of the junior stock should be reviewed to insure that creation of senior stock does not otherwise result in adverse effect on powers, preferences or special rights of junior stock, e.g., provision that a series will be junior only to, or share in a liquidation pool exclusively with, specified other series.

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

## iii. Series Vote?

- Section 242(b)(2) of the DGCL provides that if a proposed amendment “would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for purposes of [the statute].”
- Consider reclassification of multiple series of preferred stock into common stock; amendment to add “pay to play” conversion term to multiple series.

## iv. Class Vote to Increase or Decrease Number of Authorized Shares?

- Class vote required under Section 242.
- This class vote (but not the others provided for by Section 242(b)) may be denied in corporation’s certificate of incorporation. *See 8 Del. C. § 242(b)(2).*

## 2. Voting under charter.

a. No Class Vote for Mergers Unless Charter Expressly Requires. Case law suggests that to require a class vote in a merger, even if the merger effects amendments to the charter, the terms of the stock must expressly require a class vote for mergers.

- Cases reasonably clear that if a provision requires class vote for adverse changes but does not by its terms specifically apply to “mergers,” it will not be construed to apply to charter amendments effected in a merger (including a recap merger with a subsidiary). *See Watchmark Corp. v. Argo Global Capital, LLC*, 2004 WL 2694894 (Del. Ch. Nov. 4, 2004); *Tera Sys., Inc. v. Mentor Graphics Corp.*, 2003 WL 23341841 (Del. Ch. Aug. 22, 2003).
- *Warner Commc’ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962 (Del. Ch. 1989). In *Warner*, the provision of the Warner charter at issue required a 2/3 class vote of the preferred stock to amend, alter or repeal any provision of the charter if such action adversely affected the preferences, rights, powers or privileges of the preferred stock. Warner merged with a Time subsidiary and was the surviving corporation. In the merger, the Warner preferred stock was converted into Time preferred stock and the Warner charter was amended to delete the terms of the preferred stock. The Court rejected the argument that holders of the preferred stock were entitled to a class vote on the merger, reasoning that any adverse effect on the preferred stock was caused not by an amendment of the terms of the stock but solely by the conversion of the stock into a new security pursuant to Section 251 of the DGCL. The Court also reasoned that the language of the class vote provision at issue was similar to Section 242 and did not expressly apply to mergers.

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

- *Sullivan Money Mgmt., Inc. v. FLS Hldgs., Inc.*, 1992 WL 345453 (Del. Ch. Nov. 20, 1992), *aff'd*, 628 A.2d 84 (Del. 1993). *Sullivan* involved the interpretation of a charter provision of FLS Holdings, Inc. which required a class vote of the preferred stockholders for the corporation to “change, by amendment to the Certificate of Incorporation . . . or otherwise,” the terms and provisions of the preferred stock so as to affect adversely the rights and preferences of the preferred stock. *Id.* at \*2. In that case, the preferred stock of FLS was converted into cash but FLS survived. The plaintiff argued that the conversion to cash was an elimination of the preferred stock and, therefore, was a change, by amendment “or otherwise” to the terms of the preferred stock. The Court disagreed, holding that “or otherwise” cannot be interpreted to include a merger. The Court pointed to other provisions of the charter where the drafters specifically required a class vote of another series of preferred stock to amend the terms of the preferred stock so as to affect adversely the rights of such stock, “either directly or indirectly or through merger or consolidation with any other corporation.” The Court reasoned: “The word ‘merger’ is nowhere found in the provision governing the Series A Preferred Stock. The drafters’ failure to express with clarity an intent to confer class voting rights in the event of a merger suggests that they had no intention of doing so, and weighs against adopting the plaintiffs’ broad construction of the words ‘or otherwise.’” *Id.* at \*5.
- *Elliott Assocs. v. Avatex Corp.*, 715 A.2d 843 (Del. 1998). In *Avatex*, the Court construed a provision that expressly gave preferred stockholders a class vote on the “amendment, alteration or repeal, whether by merger, consolidation or otherwise” of provisions of the charter of Avatex Corporation so as to adversely affect the rights of the preferred stock. The challenged transaction involved the merger of Avatex into its wholly owned subsidiary, Xetava Corporation, in which the Avatex preferred stock was converted into common stock of the surviving corporation. The Court, for purposes of its opinion, assumed that the preferred stock was adversely affected. The Court distinguished *Warner* because the Avatex charter contained the “whether by merger, consolidation or otherwise” language and held that the preferred stock had a right to a class vote on the merger because the adverse effect was caused by the repeal of the Avatex charter and the stock conversion. The Court concluded that the “path for future drafters to follow in articulating class vote provisions is clear”: “When a certificate (like the Warner certificate or the Series A provisions here) grants only the right to vote on an amendment, alteration or repeal, the preferred have no class vote in a merger. When a certificate (like the First Series Preferred certificate here) adds the terms ‘whether by merger, consolidation or otherwise’ and a merger results in an amendment,

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

alteration or repeal that causes an adverse effect on the preferred, there would be a class vote.” *Id.* at 855.

- *Starkman v. United Parcel Serv. of Am., Inc.*, C.A. No. 17747 (Del. Ch. Oct. 18, 1999) (TRANSCRIPT). *Starkman* involved a holding company merger where UPS formed two subsidiaries, one immediately below UPS and the second immediately below that first-tier subsidiary. UPS then merged with the second-tier subsidiary and its stockholders received stock of the first-tier subsidiary, New UPS, in exchange for their shares. UPS continued as a wholly owned subsidiary of New UPS and its charter was not amended in the merger. The plaintiffs in that case argued that the merger triggered a supermajority vote in the UPS charter that required an 80% vote for the amendment or deletion of a transfer restriction in the charter. The Court disagreed, noting that the charter of UPS, which became a wholly owned subsidiary of New UPS, was not amended in the merger. In addition, citing *Avatex* and *Warner*, the Court found that the supermajority vote provision would not have been triggered even if the charter provision of UPS had been amended in the merger, stating:

I reach this conclusion because the Supreme Court in *Avatex* rested its holding on the presence of language in the Avatex certificate of incorporation specifically referring to the possibility of an amendment, alteration or repeal by merger, consolidation or otherwise. The critical language, referring to merger, consolidation or otherwise, was not found in *Warner* and is not found here. Thus, *Warner*, which was reaffirmed by the Supreme Court, requires that I read [the supermajority vote provision] to pertain only to charter amendments proposed in accordance with Section 242 of the DGCL. Because the transaction at issue is a merger proposed under the authority of Section 251 of the DGCL, *Warner* requires a finding that [the supermajority provision] has no application.

*Id.* at 19-20.

- b. However, other protective provisions may be triggered in a merger or recap transaction, e.g., a provision requiring a class vote to authorize or issue senior equity. See *Benchmark Capital P’rs IV, LP v. Vague*, 2002 WL 1732423 (Del. Ch. July 15, 2002), *aff’d*, 822 A.2d 396 (Del. 2003).

## **B. Deemed Liquidation Provisions.**

### **1. Typical private company preferred.**

- Fixed liquidation amount for each series.
- A “deemed liquidation” provision generally contemplates a so-called “waterfall” payout of liquidation amounts in any transaction “deemed a liquidation,” including, for example:

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

- mergers
- a transaction (or series of transactions) resulting in a 50% change in voting power
- sale, lease or other disposition of substantially all of the assets of the corporation

## 2. Interpretation problem.

- Transaction such as asset sale or sale of 50% voting power may not involve any distribution to stockholders.
- Is deemed liquidation provision intended to force a distribution or to require a particular allocation of proceeds in a merger?
- If requiring a mandatory dividend prior to merger:
  - Must be clear and express
  - Corporation must have sufficient surplus
  - Potential for director liability for payment of unlawful dividend

## 3. Enforceability problem.

- a. Section 102(b)(1). Although there is freedom of contract in drafting preferred stock terms, Section 102(b)(1) of the DGCL provides that a corporation's charter cannot contain provisions "contrary to the laws of this State."
- b. Case Law: No Vested Rights.
  - *Fed. United Corp. v. Havender*, 11 A.2d 331 (Del. 1940). In *Havender*, the defendant corporation formed a wholly owned subsidiary and merged the subsidiary into itself in order to convert outstanding preferred stock into shares of a new series of preferred stock and common stock. Plaintiffs objected to the merger because it destroyed the accrued dividend right of the preferred stock, which, at that time, could not be accomplished by a charter amendment. The Court rejected this argument and held that the preferred stockholders' right to accrued dividends could validly be eliminated in a merger that converted the preferred stock into new stock. The Court reasoned that the Delaware statute permitting mergers put every stockholder on notice that contract rights in a charter were "defeasible" in a merger.
  - *Langfelder v. Universal Labs., Inc.*, 163 F.2d 804 (3d Cir. 1947). The charter provision at issue in *Langfelder* gave preferred stockholders the right to a specified cash payment plus accrued dividends in the "event of any reduction in the capital stock of the corporation resulting in a reduction of the preferred stock either as to number of shares or as to the par value thereof." *Id.* at 805 n.2. The corporation effected a merger with a wholly owned subsidiary which converted the preferred stock into new preferred stock with a reduced par value and eliminated the accumulated dividends on the former preferred stock.

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

The Court found that the quoted provision applied in such a merger. However, finding that it was bound by *Havender*, the Court concluded that the provision was no different from any other contractual right incidental to stock ownership—and thus was subject to defeasance in a statutory merger.

- See Richard M. Buxbaum, *Preferred Stock—Law and Draftsmanship*, 42 Cal. L. Rev. 243, 307 (1954) (reading *Langfelder* to mean that an “absolute provision that a merger shall have a given effect on the stock cannot control a validly consummated merger which does not provide for that effect”).
- *Cf. Dawson v. Pittco Capital P’rs, L.P.*, 2012 WL 1564805 (Del. Ch. Apr. 30, 2012) (holding that the *Havender* and *Langfelder* only permit elimination by merger of rights arising from an equity interest and, therefore, did not permit elimination of notes in a merger even where those notes were marketed as part of a single “unit” along with a preferred equity interest in a limited liability company).
- *But see In re: Appraisal of Metromedia Int’l Grp., Inc.*, 971 A.2d 893, 901 (Del. Ch. 2009) ( finding that the valuation of preferred stock in an appraisal proceeding “must be viewed through the defining lens of its certificate of designation, unless the certificate is ambiguous or conflicts with positive law”); *In re Appraisal of Ford Hldgs.*, 698 A.2d 973, 974 (Del. Ch. 1997) (stating that “properly expressed terms of a Certificate of Designation of preferred stock may establish the consideration to which holders of the stock will be entitled in the event of a merger and, when the documents creating the security do so, that the amount so fixed or determined constitutes the ‘fair value’ of the stock for the purposes of dissenters’ rights under Section 262 of the Delaware General Corporation Law”).

## 4. Avoiding deemed liquidation uncertainty.

- Draft provision as protective vote, e.g., merger requires separate vote of Series X unless that series receives its liquidation amount.
- Draft provision as mandatory redemption or put right, or automatic conversion or exchange, triggered immediately prior to any “deemed liquidation” event.
- Amend the provision to exempt the subject transaction. See Part VI(A) for discussion of required votes.

## 5. What effect does deemed liquidation value limit have on the valuation of stock in appraisal proceeding?

- *In re Appraisal of Orchard Enters., Inc.*, 2012 WL 2923305 (Del. Ch. July 18, 2012) (holding, in the context of a squeeze-out merger by a controlling stockholder that owned all of the company’s preferred stock which remained outstanding following the merger, that in valuing appraisal petitioners’

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

common stock the court would not subtract the preferred's \$25 million liquidation preference from the company's enterprise value because that liquidation preference was the type of "speculative event" excluded from an appraisal valuation and instead valuing the preferred on an as-converted basis where (1) the liquidation preference was not payable upon a merger and (2) the preferred participated in dividends on an as-converted basis).

- *Shifftan v. Morgan Joseph Hldgs., Inc.*, 57 A.3d 928 (Del. Ch. 2012) (holding, at the summary judgment stage, that a provision providing for mandatory redemption of preferred stock in exchange for the preferred's liquidation preference six months after the merger at issue would be relevant in the ultimate fair value determination because that mandatory redemption provision was a "specific, non-speculative contract right of the preferred," even though the merger itself did not trigger the liquidation preference).
- *Gearreald v. Just Care, Inc.*, 2012 WL 1569818 (Del. Ch. Apr. 30, 2012) (treating convertible preferred stock on an as-converted basis for the purposes of determining a corporation's cost of capital, where the company had never paid a dividend on the preferred stock and the company had the ability to convert the preferred into common in the event of a merger; based on the briefing and the final order, the court appears to have valued the preferred stock on an as-converted basis in its ultimate appraisal determination, but this approach was not strongly contested by the parties in their briefing).
- *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a \$25 per share liquidation preference), recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).
- *In re Appraisal of Metromedia Int'l Grp., Inc.*, 971 A.2d 893, 901 (Del. Ch. 2009) (finding that where a certificate of designation fixed the precise value to which preferred stockholders were entitled in the event of a merger, the preferred stockholders were entitled to that value and no more in a statutory appraisal proceeding).
- *In re Appraisal of Ford Hldgs., Inc. Preferred Stock*, 698 A.2d 973, 978 (Del. Ch. 1997) (holding that provision of certificate of designation setting forth the value to be paid to stockholders if they are forced to give up their shares in a cash-out merger was unambiguous and stating that "the shareholders can not now come to this court seeking additional consideration in the merger through the appraisal process").
- The courts have, however, distinguished between a deemed liquidation provision and protective vote provisions, noting that the latter, generally, protect the preferred stock against a merger that the preferred stockholders view as

# PREFERRED STOCK AND NEGOTIATED ACQUISITIONS

disadvantageous, but do not necessarily establish the value the preferred stock is entitled to receive in a merger (or in a subsequent appraisal proceeding). *In re Appraisal of Ford Hldgs., Inc. Preferred Stock*, 698 A.2d 973 (Del. Ch. 1997); *In re Appraisal of GoodCents Hldgs., Inc.*, 2017 WL 2463665, at \*5 (Del. Ch. June 7, 2017).

## C. No Impairment Provisions.

### 1. Typical provision.

- A typical “no impairment” provision prohibits a company from amending the charter, merging or taking any other action to avoid or impair preferred terms or rights, although it is often limited to conversion terms and rights.

### 2. Interpretation problem.

- Is the provision limited to mergers and other acts affecting the conversion rights only or does it apply to all rights of the stock?
- Can a corporation, in a certificate of designation, limit its power regarding certain matters such as engaging in mergers?
- Is provision intended to prohibit changes to the preferred’s rights, or only other actions that do not expressly change the preferred’s rights but effectively undermine them?

### 3. Enforceability issue.

- The enforceability of the “no impairment” provisions may be limited for the same reasons the enforceability of “deemed liquidation” provisions may be limited, i.e., Delaware case law provides that existing rights may be subject to defeasance in a valid statutory merger or by charter amendment. *See* Part VI(B)(3).
- *Kumar v. Racing Corp. of Am.*, 1991 WL 67083 (Del. Ch. Apr. 26, 1991) (finding, on a motion for preliminary injunction, that the plaintiff had not established the likelihood of success on the merits of its claim that a merger that converted preferred stock into cash violated a no impairment clause).

## D. Fiduciary Duty Issues Concerning Preferred Stock.

1. **Allocation issues.** Where there is more than one class or series of stock, directors may have conflict with stockholders because of their affiliation with one or more classes or series of stock, thereby requiring application of entire fairness standard. *See also* Part I(G)(4)(e).

- a. Case Law – Conflict.

- *In re Trados Inc. S’holder Litig.*, 2009 WL 2225958 (Del. Ch. July 24, 2009) (finding, on a motion to dismiss, that the plaintiff had adequately rebutted the presumption of the business judgment rule by alleging that a majority of the members of a corporation’s board, who had ties to

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holders of a large percentage of the company's preferred stock, were interested in a merger where the preferred stockholders received cash and the common stockholders received nothing in the merger); *see also In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 78 (Del. Ch. 2013) (holding in the post-trial decision, that even though the directors did not employ a fair process due to their failure to implement "a procedural device such as a special committee," the directors did not breach their duty to the common stock "by agreeing to a Merger in which the common stock received nothing" because the "common stock had no economic value before the Merger, and the common stockholders received in the Merger the substantial equivalent in value of what they had before").

- *Encite LLC v. Soni*, 2011 WL 5920896 (Del. Ch. Nov. 28, 2011) (denying motion for summary judgment on plaintiff's claims that preferred stockholder affiliated directors had breached their duty of loyalty in running an unfair bidding process to sell the assets of a financially-troubled company and preferring a bid from a consortium including the preferred stockholder; summary judgment was also denied on aiding and abetting claims against the preferred stockholder).
- *In re FLS Hldgs., Inc. S'holders Litig.*, 1993 WL 104562 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or directors who were affiliates of the company's controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock).
- *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986) (applying entire fairness test to allocation of merger consideration where one element of consideration was apportioned wholly to the shares of the controlling stockholder).
- *Lewis v. Great W. United Corp.*, 1978 WL 2490 (Del. Ch. Mar. 28, 1978) (applying entire fairness test where a corporation that was controlled by a 65% common stockholder structured a merger treating preferred less favorably than common).

## b. Case Law – No Conflict.

- *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435, 446 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a \$25 per share liquidation preference), denying motion that directors, who owned common stock, breached their fiduciary duties to the preferred stockholders and finding "no basis to find that the directors sought to advantage the common stockholders at the unfair expense of the preferred stockholders," and

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recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).

- *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611 (Del. Ch. 1999). In *General Motors*, the plaintiffs alleged that the directors breached their duty of loyalty to the holders of General Motors Class H Common Stock because a recapitalization transaction favored the General Motors \$1 2/3 Common Stock. The plaintiffs alleged that the directors owned more \$1 2/3 Common Stock, in terms of number of shares and dollar value, than Class H Common Stock and that, accordingly, the entire fairness standard should apply. The Court rejected the plaintiffs' argument, holding that the business judgment rule applied, noting that the amount of \$1 2/3 Common Stock held by the directors was not "so substantial as to have rendered it improbable that [the] directors could discharge their fiduciary obligations in an even-handed manner." *Id.* at 618.
  - *Giammalvo v. Sunshine Mining Co.*, 1994 WL 30547 (Del. Ch. Jan 31, 1994), *aff'd*, 651 A.2d 787 (Del. 1994). The challenged transaction in *Sunshine* involved the directors' decision to refrain from paying dividends on the preferred stock. The plaintiff had argued that due to the directors' ownership of common stock, the market price of which allegedly would have been adversely affected if the dividend had been paid on the preferred stock, the directors breached their duty of loyalty to the preferred stockholders. The Court rejected the plaintiff's argument and held that the plaintiff had not rebutted the presumption of loyalty that is accorded the directors under the business judgment rule, noting that the plaintiff offered no evidence to establish that the directors received any personal benefit from their decisions with respect to the preferred stock.
- c. Use of Committee of Independent Directors may Shift Burden to Plaintiffs
- *Kahn v. Lynch Comm'cn Sys., Inc.*, 638 A.2d 1110 (Del. 1994) (approval of cash-out merger transaction initiated by controlling stockholder by independent committee or informed majority of minority stockholders shifts burden on issue of fairness from controlling stockholder to plaintiff).
  - *In re CNX Gas Corp. S'holders Litig.*, 2010 WL 2705147 (Del. Ch. July 5, 2010) (implying that a *Kahn v. Lynch* burden shift is still available under the *Cox Communications* "unified standard" if either an effective special committee or majority-of-the-minority vote (but not both) is utilized).
  - *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192 (Del. Ch. May 22, 2000) (holding that use of independent committee triggered more deferential business judgment standard of review in absence of controlling stockholder or group).

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**2. “Waterfall” may not be “fair.”** Transaction involving payment of waterfall liquidation amounts may not leave any consideration to be paid to common stockholders although common stock may have value.

- Should the board refrain from doing a deal under these circumstances? See *Equity-Linked Inv’rs, L.P. v. Adams*, 705 A.2d 1040 (Del. Ch. 1997). The *Equity-Linked* Court found no breach of fiduciary where the board took steps to continue the corporate enterprise at a time when its liquidation would have made the preferred stockholders whole, recognizing that the action taken by the board imposed economic risks upon the preferred stock which the holders of the preferred stock did not want and was taken for the benefit largely of the common stock. See also *In re Trados Inc. S’holder Litig.*, 2009 WL 2225958 (Del. Ch. July 24, 2009) (stating that “the interests of the preferred stockholders and common stockholders were [not] aligned with respect to the decision of whether to pursue a sale of the company or continue to operate the company without pursuing a transaction” and declining to dismiss plaintiff’s claim that the board breached its fiduciary duties by entering into a merger in which the preferred stockholders received cash consideration due to their liquidation preference and the common stockholders received nothing; note, however, that in the post-trial opinion—*In re Trados Inc. Shareholder Litigation*, 73 A.3d 17, 78 (Del. Ch. 2013)—after subjecting the board’s process to entire fairness review, the Court ultimately held that the board had not breached its duty to the common stockholders because “[t]he common stock had no economic value before the Merger, and the common stockholders received . . . the substantial equivalent in value of what they had before”); *Oliver v. Boston Univ.*, 2006 WL 1064169, at \*28 (Del. Ch. Apr. 14, 2006) (finding that allocation of merger consideration was unfair because common stockholders not appropriately represented in allocation process and awarding damages to common stockholders even though claims of preferred stockholders exceeded consideration offered). But see *Orban v. Field*, 1997 WL 153831 (Del. Ch. Apr. 1, 1997) (rejecting attack on merger where common stock received no merger consideration and preferred stock received all merger consideration in accordance with liquidation preference of preferred stock).

**3. Fiduciary duties owed to the preferred stockholders.**

- Duties to preferred stockholders are primarily contractual and fiduciary duties generally are not implicated by matters relating to the specific preferences or limitations of the preferred stock.
- *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986). In *Jedwab* the plaintiff, a preferred stockholder, argued that the preferred were entitled to fair apportionment of the merger consideration and that the directors breached their

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fiduciaries duties to the preferred in the negotiation of the merger. The *Jedwab* Court explained that, generally, directors do not owe fiduciary duties to preferred stockholders in “matters relating to preferences or limitations that distinguish preferred stock from common.” *Id.* at 594. Instead, the relationship between the corporation and the preferred stock is contractual in nature and “the scope of the duty is properly defined by reference to the specific words evidencing that contract.” *Id.* However, where the right asserted is “a right shared equally with the common, the existence of such right and the scope of the correlative duty may be measured by equitable as well as legal standards.” *Id.* See also *Quadrangle Offshore (Cayman) LLC v. Kenetech Corp.*, 1999 WL 893575, at \*8, (Del. Ch. Oct. 13, 1999) (reciting rule that preferred stockholder’s rights are usually set forth in certificate of designation but where “their interests are harmonious, preferred shareholders share with common shareholders the right to demand loyalty and care from the fiduciaries entrusted with managing the corporation” and finding that preferred stockholders’ liquidation preference created “economically antagonistic relationship” with common such that terms of certificate controlled). Cf. *Frederick Hsu Living Tr. v. ODN Hldgs. Corp.*, 2017 WL 1437308 (Del. Ch. Apr. 14, 2017; corrected Apr. 24, 2017) (denying a motion to dismiss claims by a common stockholder for breach of fiduciary duty against directors who allegedly approved the sale of company assets to fund redemption of preferred stock in a manner that “compromised the [c]ompany’s ability to generate long-term value for the benefit of the undifferentiated equity”).

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