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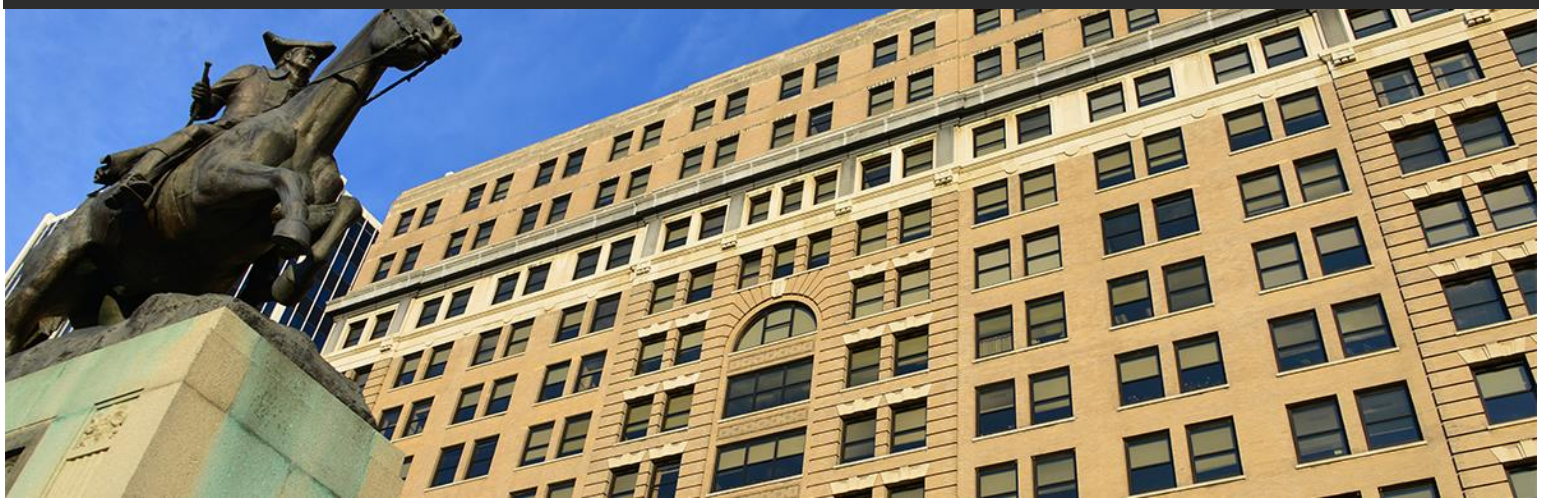
Update | Delaware Corporate Law



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2021 Delaware Corporate Law Year in Review

The Delaware Supreme Court, Court of Chancery, and Complex Commercial Litigation Division of the Superior Court continued to serve as the preeminent courts for corporate and M&A litigation in 2021. The courts issued a historic volume of opinions, orders, and transcript decisions that provide valuable guidance regarding issues highlighted in this GT Update, including potential liability of board advisors, officers, and buyers in M&A; limits on stockholder voting, communications, and takeover activities; interpretation of M&A provisions related to material adverse effects, ordinary course operation, and fraud claims; the scope of protections for directors acting in reliance on experts; and access to director emails, texts, and records via statutory demands and litigation discovery. We expect this level of activity and development of corporate law principles to continue in 2022.

Oversight Obligations

Directors have an obligation to oversee corporate operations by making good faith efforts to establish monitoring and reporting systems and to react to red flags of corporate misconduct. This oversight obligation continued to draw attention in 2021, particularly where a corporation had mission-critical operations in heavily regulated industries. In one case, a claim alleging failure by the board of an airplane manufacturer to adequately oversee airplane safety following two crashes within a few months survived dismissal.[1] The board may have failed to establish controls related to flight safety, given the lack of a board committee for safety issues, the absence of board discussion related to safety issues in meeting minutes, and the lack of protocols for management reporting to the board. The board also may have disregarded a red flag related to airplane safety—i.e., the first deadly crash—where it did not inquire or

investigate but belatedly treated the crash as an anomalous public relations and litigation problem. Other boards may have failed in their fiduciary duties, one when it flatly rejected a stockholder demand to rectify serious noncompliance with applicable law in a public company's capital structure,[2] and another where it may have failed to comply with its charter provisions for approval of conflicted transactions.[3] In contrast, claims challenging the exercise of oversight obligations by three other boards were dismissed at early stages of litigation.[4] Key aspects of those cases, which reflected adequate board oversight, included the creation of board committees to monitor key regulatory issues, meeting minutes documenting board discussion of litigation and enforcement actions, punishments meted out by the company for regulatory noncompliance, a ban on a potentially problematic line of business, and implementation of fraud-prevention software.

D&O Compensation, Indemnification, and Insurance

Director compensation has been a significant topic of Delaware litigation in recent years, continuing in 2021 with a focus on the related approval process. In one case, stockholder approval of an equity incentive plan was challenged on the grounds that the company's proxy statement failed to state that directors would receive awards under that plan for their previous efforts in connection with the company's IPO.[5] Disclosures that the plan would be used for recognition of significant contributions, however, sufficiently informed stockholders even though the specific awards were not stated in the proxy statement. In other cases, compensation packages were subjected to extensive litigation, including a special litigation committee review culminating in a settlement where directors agreed to forfeit some or all of their stock options.[6]

The Delaware Supreme Court also affirmed lower court decisions that D&O insurance coverage of losses arising from fraudulent conduct does not violate Delaware public policy.[7]

The Delaware General Assembly is also considering an amendment to Section 145 of the Delaware General Corporation Law (the DGCL), which would permit corporations to use captive insurers that may provide coverage beyond the scope of indemnifiable conduct.[8]

Officers, Advisors, and Buyers in Fiduciary Litigation

Protections for good faith reliance. Officers and advisors can play an important role in the board's exercise of its oversight and other responsibilities, and the DGCL provides the board with protection when relying on them in good faith.[9] For example, the board of an insurance company was protected against oversight claims relating to inaccurate company disclosures regarding capital reserves and GAAP compliance, because the board had relied on its outside auditor.[10] The board was protected because of its reliance on advice regarding complex issues and documentation in meeting minutes reflecting that reliance. The court in another case at the pleading stage confirmed that, in the context of stock repurchases and dividend payments, where directors have heightened exposure to personal liability under the DGCL, directors were fully protected when it was later determined that the company lacked requisite surplus, because the directors had relied on management and advisors for determining the existence of surplus.[11]

Limits on reliance and delegation. Directors are, however, limited in their ability to delegate to advisors and officers and, after delegating authority, are expected to remain active in managing officers' potential conflicts. Such protection is unavailable when the expert is known or pressured not to act in good faith when giving a contrived opinion, by taking unrealistic and counterfactual assumptions, knowingly relying on artificial predicates, and engaging in goal-directed reasoning.[12] In another case, fiduciary duty claims survived against a special committee that delegated significant responsibility for running a strategic review process to the CEO, who was known to

have conflicts arising from his relationship with the company's controlling stockholder.[13] That committee also failed to reassert control over the process after learning of the CEO's violation of the committee's process guidelines, engaged a financial advisor known to have a relationship with the CEO, and delegated the preparation of the company's proxy statement to the CEO, which exacerbated the potential conflicts and may have abdicated disclosure obligations. Another company's failure to disclose current relationships between the board's financial advisor and a merger counterparty, including the proportion of the advisor's income received from the counterparty, undermined stockholder approval of the transaction for lack of full information.[14]

Claims against officers, advisors, and buyers. Delaware fiduciary litigation in 2021 also targeted officers who allegedly breached their fiduciary duties or misled the board, and advisors and buyers who allegedly aided and abetted fiduciary breaches by affirmatively misleading corporate fiduciaries or knowingly participating in their fiduciary breaches. Unlike directors, officers cannot be exculpated from a breach of the duty of care by charter provision, which makes it easier for such claims to survive a motion to dismiss. For example, in one case, fiduciary duty claims against the CEO and CFO survived, based on a fraud on the board theory that those officers had sought to retire and receive significant transaction payouts; disfavored bidders who proposed a stock deal; favored cash bidders by not informing other bidders of the board's bid deadline, provided only the cash bidders with information to shape their bids, and allowed breaches of standstill agreements; and failed to fully report this information to the board.[15] A fiduciary duty claim against another company's CEO and fraud on the board claim against the board's financial advisor were allowed to proceed where the officer and advisor appeared to have misled the board about a bidder that was not favored by management and to have tipped the management-favored bidder with information about the disfavored bidder's offer.[16] And allegations against a third CEO-director pertained to his officer capacity, in which he lacked exculpation and was exposed to liability under a gross negligence standard, were permitted to proceed on the basis that his conduct may have been taken as an officer at the board's instruction or involved discussion of management's plans.[17]

The Delaware decisions in 2021 also counsel that claims in merger cases may survive against the buyer, as a result of its knowing participation in potential fiduciary misconduct such as preparation of inadequate proxy materials or due to its knowledge that conflicted officers were inappropriately favoring that buyer and the buyer seized on that knowledge including by violating a standstill and lowering its bid at the last minute.[18]

Procedures for Management of Potential Conflicts

In 2021, the Delaware courts emphasized the board's role in identifying and managing potential conflicts, including through procedures intended to mitigate the impact of conflicts on a transaction. Board decisions made by independent and disinterested directors or resulting from a conflict-cleansing process can receive greater judicial deference. Thus, fiduciary duty claims subject to heightened scrutiny, such as change of control or controlling stockholder transactions, can potentially be dismissed or subjected to a reduced standard of judicial review.

Existence of control and potential conflicts. A threshold matter for management of potential conflicts is identification of a material interest or relationship that could create a conflict, including whether one or more stockholders are exercising corporate control that imposes fiduciary duties. In one case, a control group may have existed where three longtime friends founded a company, held themselves out as founders and partners who jointly managed other portfolio companies, indirectly controlled 90% of the company's voting power, and

collectively negotiated a tax-free reorganization to meet their desire for liquidity.[19] In another case, the court found no controller where a stockholder owned 35.3% of the company's stock and had no ability to direct board or management action.[20]

When there is a controlling stockholder, there is a question whether the stockholder is free to exercise its rights without considering other stockholders or must consider other stockholders' interests. For example, on the one hand, a controlling stockholder did not influence the corporate machinery by informing an independent committee that he would not support a transaction that would require his consent and eliminate his control, when another transaction was available that involved acquisition of that company and another company he controlled.[21] On the other hand, directors on a controlled company board lacked independence from the controller, for purposes of considering a demand to bring litigation claims against the controller, because of compensation for board service that constituted just over half of a director's household income and another director's reverence for the controller.[22]

Director abstention. Although a potentially conflicted director may abstain from deliberations, Delaware courts may examine closely the effectiveness of an abstention solely from a final vote. For example, directors' abstentions from board meetings related to a merger were ineffective to alleviate the impact of potentially conflicted directors who may have been actively involved in earlier negotiations.[23] Abstention also may not provide the desired protection at the pleading stages of litigation because it can be difficult to determine on a preliminary record that directors completely recused themselves. In a case illustrating the challenges of a dual fiduciary, a controlling stockholder sat on the boards of two companies that he controlled, and his recusal from board votes regarding a transaction between the two companies was ineffective to summarily defeat a fiduciary duty claim.[24] That controller was alleged to have known about one company's investigation into potential accounting misconduct and, when the other company's board considered purchasing a subsidiary not implicated in the investigation, the controller did not disclose any knowledge of the investigation to the rest of the purchaser's board.

Board committees. An empowered and effective committee of disinterested and independent directors can also help to manage potential conflicts. But in two cases, fiduciary duty claims survived against directors on special committees constituted to negotiate potential mergers at allegedly controlled companies. In one, the committee chairperson lacked independence based on her close friendship with the other company's CEO and ambition to run her own Silicon Valley business with substantial financing from that company (which was run by an important Silicon Valley entrepreneur).[25] In the other, the committee may not have effectively neutralized the controller's influence, in light of its delegation to a conflicted CEO after his violation of the committee's process guidelines and engagement of a financial advisor with a close relationship to the controller.[26] In another case, however, a special litigation committee demonstrated its independence and the reasonableness of its investigation into insider trading claims, where the committee directors had no financial interests and few relationships with company insiders, and the committee engaged outside counsel and issued a 377-page report stating that the alleged insider information was not material and didn't motivate insiders' trades.[27] The court agreed, after applying its own business judgment, with the committee's determination to dismiss the fiduciary duty claims.

Approvals by disinterested stockholders and independent directors. Since the Delaware Supreme Court's *MFW* and *Corwin* decisions,[28] procedures have been further developed for cleansing claims and obtaining early dismissal of fiduciary claims that would have been subject to entire fairness review or enhanced scrutiny. The Delaware courts have observed that a rhythm

has emerged in such litigation: plaintiffs argue first that a significant minority stockholder is a conflicted controller subject to entire fairness review (e.g., that it has formidable power or potent influence over management and independent directors' decision-making) unless the transaction complied with the *MFW* procedures, and second that any approval by disinterested stockholders was not fully informed and uncoerced under *Corwin*.[29]

In two cases, the significant stockholders were not found to be controllers, and fiduciary claims were cleansed under *Corwin* (without regard to *MFW*) where a 35% stockholder had three board designees and a right to accumulate another 10%,[30] and where a longtime private equity sponsor's position had been reduced over several years from just over 50% to 19% before the cash sale of the company.[31] In those cases, the plaintiffs unsuccessfully challenged the adequacy of stockholder disclosures regarding the background of the transaction, the significant stockholder's unique interests, and interests and relationships of directors and advisors. However, *Corwin* cleansing was denied where approval by a stockholder, whose shares were necessary to reach a majority of the disinterested shares, was not counted as part of the fully informed, disinterested, or voluntary approval of a merger, because of an earlier stock purchase agreement that obligated the stockholder to approve such a merger and provided for unique benefits and penalties.[32] *Corwin* cleansing was also denied with respect to claims regarding a merger, where the proxy statement omitted disclosure that the board's financial advisor was simultaneously representing an affiliate of a significant stockholder of the company and the company's merger counterparty on a transaction of approximately twice the value of the merger.[33] Although the length of the relationship and amount of that financial advisor's prior fees from the significant stockholder were disclosed, the omission regarding the simultaneous engagement was considered extraordinary. In a third decision, where a controlling stockholder received the same consideration as other stockholders in a merger, *Corwin* cleansing was denied for failure to disclose a financial advisor's information tip to a favored bidder.[34] Although payment of the same consideration provided a safe harbor from entire fairness review, enhanced scrutiny remained the standard of review applicable to whether stockholder value had been maximized in the end stage transaction.

In a case challenging a controlling-stockholder transaction, the standard of review was returned from entire fairness to business judgment under *MFW* where the independent director committee was effective and the unaffiliated stockholders were fully informed.[35] In other cases, however, entire fairness remained the standard of review where: (1) the *MFW* procedures were not put in place until after outside advisors were hired, executives met and discussed post-merger operations, and preliminary diligence was substantially completed;[36] (2) the *MFW* conditions were imposed by an agreement that was set to expire, the stockholder vote only reached a majority by including the shares held by the company's joint venture partner, the controller threatened to cut off the company's financing, information was shared without committee approval, and the company's valuations may have been deficient;[37] and (3) the unaffiliated stockholders were not informed that the individual who controlled the company and its acquirer was permitted to represent the company in an arbitration over a key asset of the company.[38]

Other cases involving disputes over corporate control provide guidance regarding improper manipulation of directors. While affirming the Court of Chancery, the Delaware Supreme Court stated that board actions were invalid when a preferred director, whose presence was required for a quorum, was tricked into attending the meeting by other directors who intended to take different actions than suggested in the notice and to consolidate control over the company.[39] Another controlling stockholder may have acted inequitably—for the purpose of obtaining board approval of an allegedly unfair merger—by

securing generous post-merger compensation for the CEO as a quid pro quo for the CEO's support, while other directors may have acted disloyally by facilitating those efforts.[40]

Important litigation tests. Within a few days, the Delaware Supreme Court issued two opinions addressing key tests used in corporate litigation. The court consolidated and clarified the demand futility standard for determining whether a stockholder is permitted to bring litigation on behalf of the company without first demanding that the board bring the litigation, explaining that the relevant question is whether a majority of the directors considering whether to bring a claim are disinterested—that is, they neither received a material benefit nor faced substantial likelihood of liability from the alleged misconduct—and independent of any such interested parties.[41] The court also overruled its previous decision that dilution or overpayment claims against a controlling stockholder are both derivative and direct in nature.[42] The court noted that there is no reason to allow such claims to be brought directly against controllers when they are considered classically derivative when not brought against a controller.

Inspection and Discovery of Corporate Records and Director Communications

Access to corporate records, via books and records demands and litigation discovery, continues to represent an important element of Delaware corporate litigation, with parties seeking greater support for their litigation positions via formal and informal records, including directors' notes and emails. Stockholders demanding inspection of corporate books and records under Section 220 of the DGCL have been granted access to directors' documents, emails, and text messages when those records reflect information relevant to the stockholder's inspection demand that was not covered by meeting minutes, resolutions, and other formal documentation. Although Delaware courts denied access to material unrelated to the inspection demand or covered by attorney-client privilege, stockholders were able to inspect emails, text messages, and phone records where traditional board records were bereft of information regarding a regulatory settlement being investigated by the stockholder, including the company's condition that a settlement provide the CEO with a liability release, and traditional records suggested that directors were discussing those matters by email and text message.[43] The court does not blithely allow access to informal records but has stated that a company should not resort to bad faith rejection of meritorious inspection demands or take overly aggressive positions to dispute such a demand.[44] Nor may a company fail to update its stock ledger to prevent a new stockholder's ability to demand inspection.[45]

In other circumstances, stockholders were denied inspection of informal records such as directors' notes, emails, and text messages. Inspection demands under Section 220 of the DGCL, one regarding potentially inaccurate financial statements and the other regarding a government investigation into potential violations of federal laws, were denied when the stockholders failed to demonstrate either that formal board materials were insufficient or that informal board materials were necessary.[46] Similarly, in a discovery dispute related to fiduciary duty claims arising from a controlling stockholder transaction, a director successfully asserted attorney-client privilege over email communications in an account managed by a former employer.[47] The court explained that there is a reasonable expectation of privacy when using the company's email for company-related business (even if the company monitors that account), but use of a non-company email account may allow an outsider to access otherwise privileged or confidential communications. In this case, the director's expectation of privacy was reasonable under the former employer's policy that expressly acknowledged the email account could be used for personal use but also provided that emails may be monitored for certain reasons. Section 220 of the DGCL was misused, however, by a director seeking books and records for use in an

individual breach of contract claim[48] and by a stockholder using the corporate records for interests as creditor.[49] Despite directors' generally unfettered right to corporate information, directors were unable to compel discovery of privileged documents related to the board's discussion of the separation of those directors from the company.[50]

M&A Matters: Structure, Terms, and Appraisal

Parallel transactions. The independent legal significance of each step of a complex transaction is important for deal planning, reflecting an outgrowth of the enabling provisions of the DGCL and Delaware's contractarian view of parties' rights. Delaware courts have, however, found it appropriate at times to look beyond the form of a transaction. In a merger case, stockholders holding one class of stock with the right to no less favorable treatment in a merger than holders of the company's other class of stock were cashed out while the company's controlling stockholder entered into an agreement to exchange shares of one or both classes of stock for equity in a post-merger company.[51] Although the exchange was effected under an exchange agreement separate from the merger agreement, interlocking references and conditions in the two agreements supported a claim that the exchange violated the charter. In another merger case, where all stockholders received a pre-closing dividend representing approximately 98% of the aggregate deal consideration, the court explained that the dividend value would be a relevant factor in an appraisal proceeding for determining whether stockholders had received fair value for their shares in the merger.[52]

Rights offering disclosure. A rights offering can provide a means of financing a company but can also raise concerns when it results in significant swings in ownership or is effected under inequitable circumstances. Delaware courts have addressed previously the dynamics around rights offerings and in 2021 again provided insights regarding related disclosure obligations.[53] One company, in parallel with its efforts to sell its interest in a professional soccer club, solicited existing investors to participate pro rata in loans to the company that came with a right to a premium payment upon a sale of the club, which closed only months after the loan transaction. The court rejected a claim that the likelihood of the sale was inadequately disclosed, stating the company had disclosed certain details about the club sale process and was not required to provide a blow-by-blow description of fluid sale negotiations.

Appraisal rights. Delaware law regarding the appraisal remedy in a merger has developed significantly in recent years. In 2021, the Delaware Supreme Court concluded that sophisticated and informed stockholders, who were represented by counsel and had bargaining power, may voluntarily agree to waive their appraisal rights in exchange for valuable consideration.[54] The court noted that appraisal is not a nonwaivable feature of a corporation, and affirmed that the company could enforce a stockholder's appraisal waiver under an agreement with the company and that such an appraisal waiver is not a stock restriction that must be contained in the charter. In a novel case, a stockholder was permitted to bring an action to enforce an appraisal judgment against both the buyer in a merger and subsidiaries of the acquired holding company, on the basis of traditional and reverse veil piercing theories, because the buyer may have inequitably used a securitization facility to upstream funds from the subsidiaries to the buyer, leaving the company unable to satisfy the appraisal judgment.[55]

In several other cases, Delaware courts held that: (1) payment of a pre-closing dividend that represented approximately 98% of the aggregate deal consideration was a relevant factor that the court could take into account when determining fair value in an appraisal action;[56] (2) a stockholder may obtain damages in a fiduciary duty action even when the merger price was equal to the fair value determined in a companion appraisal proceeding;[57] (3) DCF was a reliable indicator of fair value in an appraisal

proceeding where deal price was not a reliable indicator of fair value because there was no efficient market for the private company stock, the board held no meetings after receiving the indication of interest, and there was no solicitation of other offers;[58] and (4) deal price less synergies was a reliable indicator of fair value where there was a lone third-party bidder, there were no board conflicts, the company actively engaged in diligence and negotiations, and there was an unencumbered post-signing market check.[59]

MAE, ordinary course, and requisite efforts. Three provisions from M&A agreements that have received significant attention from the Delaware courts during the upheaval of the COVID-19 pandemic relate to material adverse effects, ordinary course conduct, and required efforts. Each of these provisions may be tailored to the specifics of a transaction, with the Delaware courts closely reading and adhering to the precise wording. But Delaware 2021 case law also established a framework for interpreting these provisions. In two post-trial decisions, the buyer unsuccessfully argued that an MAE had occurred by failing to demonstrate the durational significance of the adverse effect that has become a hallmark of the courts' MAE analysis. In the first case, the buyer alleged that sales downturns and cost-cutting by the target (a cake-decorating technology company) had constituted an MAE and breached the ordinary course covenant in the M&A agreement.[60] But the changes were not durationally significant and were consistent with the company's past practice in downturns; in fact, the buyer had breached its reasonable best efforts obligation under the M&A agreement by developing draconian forecasts that ignored management's optimistic projections in connection with demands for better financing terms. In the second case, a change to the Medicare reimbursement rate for the target medical device company didn't have a disproportionate effect relative to the industry, and that change was also covered by an exclusion from the definition of MAE for changes in law.[61] The court also noted that an MAE was not limited to only unknown changes. But in a third case, the selling company may have breached the ordinary course covenant in the relevant M&A agreement by going beyond legally mandated closure of yoga studios and furloughing or terminating employees.[62]

The Delaware Supreme Court also weighed in by affirming two Court of Chancery decisions from 2020 regarding these provisions. First, the Court found breaches of obligations to use reasonable efforts to close and all necessary efforts to avoid legal impediments, but declined to order either damages (because no breach affected the ultimate legal impediment result) or a reverse termination fee (because the M&A agreement was not terminated properly and was then terminated by the other party).[63] Second, the Court closely examined relevant Delaware precedent and held that an adaptation common across an industry constituted a breach of the ordinary course covenant when there was overwhelming evidence that the adaptation was outside of past practices and the M&A agreement's ordinary course covenant was based on the seller's past practices, not industry practices or commercially reasonable efforts.[64] The Court also affirmed that the ordinary course covenant was not subject to the MAE provision where the two provisions contained different materiality standards, the ordinary course covenant didn't refer to the MAE provision, and the two provisions served different purposes.

Termination, earnouts, fraud claims, and remedies. M&A provisions related to termination and remedies also received the Delaware courts' attention in 2021. In one case, the buyer had discretion in the M&A agreement to operate the business but could not act with the intent of decreasing a selling stockholder earnout based on revenue milestones.[65] That buyer's post-closing shift of the company's operations from revenue-generating e-commerce business to revenue-light brick and mortar business may have been intended to avoid the earnout in breach of the agreement. In another case, a right to terminate upon a direct or indirect transfer of rights under a distribution agreement was not triggered by alleged

upstream changes in control, nor did changes in upstream board composition constitute a change of control.[66] In a busted-deal case, the non-terminating party was obligated under the merger agreement to reimburse the terminating party for a previously paid termination fee, because the terminating party's breach of ordinary course and interim operating covenants was not excused by an "in all material respects" qualifier, which was construed by the court as less onerous than a material breach standard.[67]

Additionally, Delaware courts continued to provide guidance regarding M&A agreement provisions limiting fraud claims: (1) an integration clause was sufficient, even without a non-reliance provision, to prevent a fraud claim based on the buyer's misrepresentations of future intent (rather than statements of fact) for business operations, which was specifically negated by the provisions of the M&A agreement;[68] (2) the absence of a non-reliance provision allowed fraud claims based on extracontractual factual misrepresentations to proceed in two cases despite the presence of an integration clause (in one agreement)[69] and an exclusive remedies provision (in the other agreement);[70] (3) contracts could not set limits on liability for fraud with respect to a party who knew the representations were false or with respect to the time when such a claim may be brought,[71] or with respect to the amount of a party's liability for knowing fraud;[72] (4) intentional or deliberate fraud does not include reckless fraud;[73] and (5) equitable fraud provides for different remedies than common law fraud.[74]

Other notable takeaways concerning M&A agreements included: (1) a party terminating the merger agreement had no remedy for an alleged willful breach by the counterparty when only fraud (and not willful breaches) was carved out of the effect of termination provision;[75] (2) in the absence of the parties' provision otherwise in the agreement, the status of a person as an affiliate of a party to an agreement was measured at the time of the party's alleged breach of the agreement;[76] (3) a choice of law provision, stating that an agreement shall be governed by and construed in accordance with the laws of the selected state, only applied to contract claims and not tort or statutory claims;[77] and (4) a seller waived attorney-client privilege to the extent of communications on a server transferred under an asset purchase agreement.[78]

Stockholder Voting and Takeover Activities

Stockholder voting rights and takeover activities emerged as an important topic in 2021. Delaware courts are vigilant in protecting the stockholder franchise, while also enforcing limits on stockholders' ability to engage in potentially abusive takeover activities that seek to circumvent the board. The courts saw numerous cases in 2021 addressing both sides of that equation.

Protection of the stockholder franchise. Board authorization of a stock issuance in a way that suggests it is tilting the results of a stockholder vote raises the specter of inequitable conduct. The Delaware Supreme Court ruled that a dilutive stock issuance, which was intended to eliminate a deadlock between a corporation's two stockholders and had been found by the Court of Chancery to have been entirely fair, was still subject to review as to whether it had been approved by the board for the primary purpose of interfering with the diluted stockholder's voting rights.[79] If so, the board would have the burden of showing a compelling justification for its action. In another case, where the board received a stockholder consent seeking to replace directors and a letter requesting that the board fix a record date for that consent, the court rejected the board's attempt to fix a later record date that would follow a newly authorized issuance of a significant amount of stock.[80] After noting the concerns with the board's ability to fix a later record date that would allow for potentially entrenching actions, the court held that under the DGCL the delivery of the first consent cut off the board's power to fix a record date, and therefore the newly issued shares would not be counted for approval of the consent. In another case, a stockholder with a

successful record of activism launched and ultimately settled a proxy contest in exchange for the company's repurchase of stock, three board seats, and a note convertible into 3% of the company's stock.[81] A fiduciary duty claim challenging the board's approval of that settlement was allowed to proceed on the basis that the directors, including the CEO and directors who were not up for re-election, may have been motivated by personal concerns about the tenacity of the activist and about losing their seats. The court took particular note of the impact of the convertible note on stockholder voting going forward. And in another case, a securities purchase was conditioned on the company (including its stockholders) authorizing an increase in its authorized shares, while requiring the company to pay a fee and the stockholders to periodically re-vote if the stockholders failed to approve the increase.[82] The structure related to the re-vote may have been coercive because a rational stockholder may have been unable to afford to vote down the proposal.

Statutory voting issues. In a year of few DGCL amendments, Section 160(c), which excludes shares of a corporation's stock held by itself or a corporate subsidiary for voting and quorum purposes, was extended to cover shares held by a non-corporate subsidiary.[83] In litigation regarding Section 271, which generally requires stockholder approval of a sale of substantially all assets, the court clarified that a common law exception to that requirement applies only to an insolvent—and not a merely unprofitable—company.[84] And the Delaware Supreme Court affirmed that Section 218 does not prohibit a corporation from entering into or enforcing a stockholder agreement that is drafted and negotiated by sophisticated stockholders represented by counsel.[85]

Limits on stockholder communications and takeover activities. Section 203 of the DGCL generally prohibits business combinations between a 15% interested stockholder (including related parties) and the company for three years unless the stockholder first obtained board approval or subsequently obtained supermajority stockholder approval. Historically, there has not been extensive case law regarding Section 203, so the handful of such decisions in 2021 are valuable. Guidance includes that the three-year prohibition on business combinations with a new affiliate of a longtime interested stockholder would be treated as if it had lapsed, because it had lapsed for the interested stockholder;[86] that stockholders didn't have standing to enforce a securities purchase agreement containing a Section 203 waiver, standstill provision, and no third-party beneficiary disclaimer and to which they were not parties;[87] and that Section 203 concerns were not implicated when an interested stockholder approached the board to negotiate a potential business combination with the company's noteholders.[88] Two other cases addressed whether an agreement, arrangement, or understanding had been formed between an interested stockholder and a potential buyer before a merger without prior board approval (which can cause attribution of ownership of the stockholder's shares to the potential buyer and prohibition of the merger under Section 203). Such an understanding may have arisen where a potential buyer began negotiating a commercial contract with an interested stockholder in advance of a merger,[89] but in another case there was not such an unapproved understanding where the interested stockholder rejected a voting agreement before agreeing to a revised version after the board approved the merger and where the potential buyer had sent the board a draft merger agreement that referenced the anticipated voting agreement before reaching an agreement with the interested stockholder.[90] The litigation where there may have been an agreement, arrangement, or understanding was resolved by settlement and supermajority approval by disinterested stockholders as contemplated by Section 203, while another case involving alleged fiduciary duty breaches and Section 203 violations resulted in a settlement obligating the significant stockholder to reduce the gap between his disproportionately small economic ownership and his outsized voting power.[91]

Stockholder rights plans, or "poison pills," can also discourage unfair, creeping, or coercive takeover activities, while driving potential acquirers to negotiate directly with the board. But terms of a stockholder rights plan can go too far in prohibiting stockholders from reasonable communication or engagement in legitimate activities that don't animate concerns with unfair takeovers. Such a rights plan was enjoined where it was triggered by 5% beneficial ownership, which included derivatives without voting power and shares held by other stockholders directly and indirectly acting in concert, only exempted a narrow group of passive investors, was adopted in the absence of takeover indications when the company's stock was deeply depressed.[92] That plan did not satisfy enhanced scrutiny for defensive measures, because it was not a reasonable or proportional response in relation to a threat, and the board's concern with activism did not constitute a reasonable perception of a threat to corporate policy and effectiveness. Another company's rights plan with similar terms, except that there was a 10% ownership threshold, was also challenged and resulted in a settlement where the provisions mentioned above were removed or amended (e.g., the ownership threshold increased to 15%).[93] Advance-notice bylaws, which can present a hurdle to a stockholder agitating for control of board seats, were also the subject of litigation, where the court confirmed that stockholders must closely follow the relevant timing and content requirements.[94]

Redemptions, Repurchases, and Dividends

As in recent years, the Court of Chancery continued to address important issues related to redemptions, repurchases, and dividends. The issues can be particularly important to companies given the potentially significant impositions that may be placed on the company's finances, and to directors who face heightened exposure to personal liability in this area.[95] In a protracted litigation, a preferred stockholder sought default interest on shares that had not been redeemed when a mandatory redemption was triggered.[96] The court largely rejected the claim for interest, finding the board had latitude to determine how much capital was available for the redemption. The company was not obligated to operate on the brink of insolvency but rather the board had discretion to determine requirements for remaining as a going concern. In other cases related to redemptions and repurchases, the court noted limits on protections available to stockholders to ensure their access to available funds,[97] and denied standing of stockholders who purchased shares in an IPO to challenge repurchases of insiders' stock that were financed by IPO proceeds.[98] In an important decision applying DGCL protections against director liability when relying on advisors, the board was given significant deference when determining the amount of surplus for repurchases and dividends, despite a later finding that the company had lacked surplus.[99]

Judicial Dissolution and Winding Up

The DGCL allows dissolved companies to use a judicial winding-up process under Section 280. Although there has not been extensive case law arising from such proceedings, a lengthy opinion has provided useful guidance regarding those actions and how the statute will be applied.[100] There, the dissolved company was ordered to reserve enough funds to cover potential liabilities in case a class action litigation settlement was overturned on appeal. The company failed to carry its burden of proving the sufficiency of a lesser amount of security, and uncertainties must be resolved in favor of creditors over stockholders. In another case, involving a Puerto Rico LLC, the court lacked jurisdiction to determine the dissolution of a non-Delaware LLC under the DLLCA or under equitable principles.[101]

Defective Actions, Corporate Ratification, and Judicial Validation

Legal principles continued to develop around the validity of actions taken by LLCs and validation of actions taken by corporations. In light of the contractual nature of Delaware LLCs, actions that are statutorily within the power of the LLC, permitted by authorizing provisions under the LLC's operating agreement, and not expressly made void for failure to obtain proper authorization, but are taken without authorizations required by the operating agreement will only be voidable—not void—and therefore susceptible of equitable defenses and ratification. Thus, when a conversion of a Delaware LLC to a Puerto Rico LLC was not validly approved under the operating agreement, the plaintiff-minority member was prevented by waiver, acquiescence, and estoppel from challenging the conversion.[102] In a second case, the LLC failed to give notice of a capital call to a member, who otherwise was aware of the capital call, and the capital call led to dilution of that member's interest and corresponding termination of the member's right to designate a member of the LLC's management committee.[103] The failure to follow the operating agreement requirements, however, did not allow for setting aside the capital call; rather it was subject to ratification, waiver, and estoppel when the diluted member later executed a note agreement that included an exhibit showing the diluted ownership level. To allow potentially void actions to be ratified or validated, however, Section 18-106(e) of the DLLCA, Section 15-202(g) of the DRUPA, and Section 17-106(e) of the DRULPA were added to those statutes in 2021. Like Sections 204 and 205 of the DGCL, the new subsections provide for ratification and judicial validation of void or voidable acts taken by LLCs, partnerships, and limited partnerships.

In a judicial validation proceeding under Section 205 of the DGCL, a public company conceded that mistakes, identified by a plaintiff-stockholder, had been made when tabulating stockholder votes regarding a charter amendment and an increase in authorized shares.[104] Despite potential difficulties in determining which shares were valid and which were invalid, the stockholders were sufficiently protected by the company's agreement both to supplement its proxy materials with an explanation of the issue, and to delay the issuance of stock or options and the filing of another charter amendment until the court had addressed the prior defective amendment. In two other cases, the court confirmed Section 205 is a remedial statute and not intended to invalidate corporate actions,[105] and examined the complexities of the corporate conversion statutes and the benefits of judicial validations.[106]

Authors and Contributors

This GT Update was prepared by the following Corporate attorneys from Greenberg Traurig's Delaware office:

- Nathan P. Emeritz | +1 302.661.7385 | emeritzn@gtlaw.com
- Justin E. Mann | +1 302.661.7664 | mannju@gtlaw.com
- Kelly A. Terribile | +1 302.661.7393 | terribilek@gtlaw.com

The following Corporate and Litigation attorneys from Greenberg Traurig's Delaware office also contributed to this GT Update: Corinne R. Moini, Samuel L. Moultrie, Olivia L. Snow, and Glenn J. Thompson.

Endnotes

[1] *In re The Boeing Co. Deriv. Litig.*, C.A. No. 2019-0907-MTZ (Del. Ch. Sept. 7, 2021).

[2] *Drachman v. Cukier*, C.A. No. 2019-0728-LWW (Del. Ch. Oct. 29, 2021) [BioDelivery Sciences].

[3] *Lacey v. Mota-Velasco*, C.A. No. 2019-0312-SG (Del. Ch. Feb. 11, 2021) [Southern Copper].

[4] *Pettry v. Smith*, C.A. No. 2019-0795-JRS (Del. Ch. June 28, 2021) [FedEx]; *Fisher v. Sanborn*, C.A. No. 2019-0631-AGB (Del. Ch. March 30, 2020) [LendingClub]; *Richardson v. Clark*, C.A. No. 2019-1015-SG (Del. Ch. Dec. 31, 2020) [MoneyGram].

[5] *Pascal v. Czerwinski*, C.A. No. 2020-0320-SG (Del. Ch. Dec. 16, 2020) [Columbia Financial] (reserving for subsequent decision whether the directors' actual awards were granted in breach of their fiduciary duties).

[6] *Alpha Venture Capital Partners LP v. Pourhassan*, C.A. No. 2020-0307-PAF (Del. Ch. Apr. 19, 2021) (TRANSCRIPT) [CytoDyn].

[7] *RSUI Indemnity Co. v. Murdock*, C.A. No. 154, 2020 (Del. Mar. 3, 2021) [Dole Food].

[8] Senate Bill No. 203 (Dec. 16, 2021).

[9] 8 Del. C. §§ 141(e), 172.

[10] *Genworth Financial, Inc. Consol. Deriv. Litig.*, C.A. No. 11901-VCS (Del. Ch. Sept. 29, 2021).

[11] *In re The Chemours Co. Deriv. Litig.*, C.A. No. 2020-0786-SG (Del. Ch. Nov. 1, 2021).

[12] *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A. No. 2018-0372-JTL (Del. Ch. Nov. 12, 2021) [Boardwalk Pipeline].

[13] *In re Pattern Energy Grp. Inc. S'holders Litig.*, C.A. No. 2020-0357-MTZ (Del. Ch. May 6, 2021).

[14] *Tornetta v. Maffei*, C.A. No. 2019-0649-KSJM (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) [Pandora].

[15] *In re Columbia Pipeline Grp, Inc. Merger Litig.*, C.A. No. 2018-0484-JTL (Del. Ch. Mar. 1, 2021).

[16] *Firefighters' Pension Sys. of the City of Kansas City, Missouri Tr. v. Presidio Inc.*, C.A. No. 2019-0839-JTL (Del. Ch. Jan 29, 2021) [Presidio].

[17] *In Re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG (Del. Ch. June 21, 2021).

[18] *Columbia Pipeline*.

[19] *In re Tilray, Inc. Reorganization Litig.*, C.A. No. 2020-0137-KSJM (Del. Ch. June 1, 2021).

[20] *In re GGP, Inc. S'holder Litig.*, C.A. No. 2018-0267-JRS (Del. Ch. May 25, 2021).

[21] *RCS Creditor Trust v. Schorsch*, C.A. No: 2017-0178-SG (Del. Ch. Mar. 18, 2021) [RCS Capital].

[22] *In re BGC Partners, Inc. Deriv. Litig.*, C. A. 2018-0722-LWW (Del. Ch. Sept. 20, 2021).

[23] *Pandora*.

[24] *RCS Capital*.

[25] *Oracle*.

[26] *Pattern Energy*.

[27] *Diep v. Sather*, C.A. No. 12760-CM (Del. Ch. July 30, 2021) [El Pollo Loco].

[28] *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) [M & F Worldwide] (standard of review is returned from entire fairness to business judgment when the transaction is irrevocably conditioned from the outset on approvals by an uncoerced and fully informed vote of unaffiliated stockholders and an independent director committee that satisfies its duty of care); *Corwin v. KKR Fin. Holdings LLC*, No. 629, 2014 (Del. Oct. 2, 2015) [KKR Financial] (claims subject to enhanced scrutiny are cleansed by approval of fully informed, uncoerced vote of disinterested stockholders).

[29] *GGP*.

[30] *GGP*.

[31] *Kihm v. Mott*, C.A. No. 2020-0938-MTZ (Del. Ch. Aug. 31, 2021) [Tesaro].

[32] *Pattern Energy*.

[33] *Pandora*.

[34] *Presidio*.

[35] *Franchi v. Firestone*, C.A. No. 2020-0503-KSJM (Del. Ch. May 10, 2021) [Firestone].

[36] *In re: Pivotal Software, Inc. S'holders' Litig*., C.A. No. 2020-0440-KSJM (Del. Ch. June 29, 2021) (TRANSCRIPT).

[37] *The MH Haberkorn 2006 Trust v. Empire Resorts, Inc.*, C.A. No. 2020-0619 (Del. Ch. Jul. 23, 2021) (TRANSCRIPT) [Empire Resorts].

[38] *Ligos v. Isramco, Inc.*, C.A. No. 2020-0435-SG (Del. Ch. Aug. 31, 2021) [Isramco].

[39] *Bäcker v. Palisades Growth Capital II*, No. 156, 2020, (Del. Jan. 15, 2021) [QLess].

[40] *In re CBS Corp. S'holder Class & Deriv. Litig*., C.A. No. 2020-0111-JRS (Del. Ch. Jan. 27, 2021).

[41] See, e.g., *United Food & Commercial Workers Union v. Zuckerberg*, No. 404, 2020 (Del. Sept. 23, 2021) [Facebook].

[42] *Brookfield Asset Management, Inc. v. Rosson*, No. 406, 2020 (Del. Sept. 20, 2021) [TerraForm Power].

[43] See, e.g., *Employees' Retirement System of Rhode Island v. Facebook, Inc.*, C.A. No. 2020-0085-JRS (Del. Ch. Feb. 10, 2021) [Facebook]; see also *Durham v. Grapetree, LLC*, No. 343, 2019 (Del. Jan. 26, 2021) [Grapetree] (LLC member granted inspection of emails under an analogous provision of the DLLCA to Section 220).

[44] *Pettry v. Gilead Sciences, Inc.*, C.A. Nos. 2020-0132-KSJM; 2020-0138-KSJM; 2020-0155-KSJM; 2020-0173-KSJM (Del. Ch. July 22, 2021) [Gilead Science] (shifting stockholder's fees in a 220 proceeding for company's glaringly egregious conduct with respect to a good faith books and records demand). Contra *Facebook* (Del. Ch. Feb. 10, 2021) (commending parties for focusing on documents and not being overly aggressive in disputing purpose).

[45] *Knott Partners LP v. Telepathy Labs, Inc.*, C.A. No. 2021-0583-SG (Del. Ch. Nov. 23, 2021) [Telepathy Labs].

[46] *Jacob v. Bloom Energy Corporation*, C.A. No. 2020-0023-JRS (Del. Ch. Feb. 25, 2021) [Bloom Energy]; *Gross v. Biogen Inc.*, C.A. No. 2020-0096-PAF (Del. Ch. Apr. 14, 2021) [Biogen].

[47] *In Re Dell Technologies Inc. Class V S'holders Litig*., Consol. C.A. No. 2018-0816-JTL (Del. Ch. Sept. 17, 2021) (TRANSCRIPT).

[48] *SerVaas v. Ford Smart Mobility LLC*, C.A. No. 2020-0909-LWW (Del. Ch. Nov. 9, 2021) [Journey Holdings].

[49] *Georgia Notes 18, LLC v. Net Element, Inc.*, C.A. No. 2021-0246-JRS (Del. Ch. Nov. 18, 2021) [Net Element].

[50] *In re Howard Midstream Energy Partners, LLC*, C.A. No. 2021-0487-LWW (Del. Ch. Sept. 22, 2021).

[51] *Nantahala Capital Partners II Limited Partnership v. QAD Inc.*, C.A. No. 2021-0573-PAF (Del. Ch. July 15, 2021) (TRANSCRIPT) [QAD].

[52] *GGP*.

[53] *Feldman v. AS Roma SPV GP, LLC*, C.A. No. 2020-0314-PAF (Del. Ch. July 22, 2021) [AS Roma].

[54] *Manti Holdings, LLC v. Authentix Acquisition Co., Inc.*, No. 354, 2020 (Del. Sept. 13, 2021) [Authentix].

[55] *Manichaean Capital, LLC v. Exela Technologies Inc.*, C.A. No. 2020-0601-JRS (Del. Ch. May 25, 2021) [Exela Technologies].

[56] *GGP*.

[57] *Columbia Pipeline*.

[58] *SourceHOV Holdings Inc. v. Manichaean Capital LLC*, No. 215, 2020 (Del. Jan. 22, 2021) [SourceHOV].

[59] *In re Appraisal of Regal Entertainment Grp.*, C.A. No. 2018-0266-JTL (Del. Ch. May 13, 2021).

[60] *Snow Phipps Group, LLC v. KCAKE Acquisition, Inc.*, C.A. No. 2020-0282-KSJM (Del. Ch. April 30, 2021) [DecoPac Holdings].

[61] *Bardy Diagnostics, Inc., v. Hill-Rom, Inc.*, C.A. No. 2021-0175-JRS (Del. Ch. July 9, 2021) [Bardy Diagnostics].

[62] *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, C.A. No. 2020-0249 (Del. Ch. July 20, 2021) (TRANSCRIPT) [CorePower Yoga].

[63] *Cigna Corp. v. Anthem, Inc.*, No. 364, 2020 (Del. May 3, 2021) [Anthem; Cigna].

[64] *AB Stable VIII LLC v. Maps Hotels and Resorts One LLC*, No. 71, 2021 (Del. Dec. 8, 2021) [Strategic Hotels & Resorts].

[65] *Shareholder Representative Services LLC v. Albertsons Companies, Inc.*, C.A. No. 2020-0710-JRS (Del. Ch. June 7, 2021) [DineInFresh].

[66] *The American Bottling Company v. BA Sports Nutrition, LLC*, C.A. No. N19C-03-048 AML CCLD (Del. Super. Dec. 22, 2021) [BodyArmor].

[67] *The Williams Companies, Inc. v. Energy Transfer LP*, C.A. No. 12168-VCG (Del. Ch. Dec. 29, 2021) [Williams; Energy Transfer].

[68] *DineInFresh*.

[69] *McDonald's Corp. v. Easterbrook*, C.A. No. 2020-0658-JRS (Del. Ch. Feb. 2, 2021) [McDonald's].

[70] *Fortis Advisors LLC v. Johnson & Johnson*, C.A. No. 2020-0881-LWW (Del. Ch. Dec. 13, 2021) [Auris Health].

[71] *Online Healthnow, Inc. v. CIP OCL Investments, LLC*, C.A. No. 2020-0654-JRS (Del. Ch. Aug. 12, 2021).

[72] *Spay, Inc. Stack Media Inc.*, C.A. No. 2020-0540-JRS (Del. Ch. Dec. 21, 2021) [Stack Media].

[73] *Express Scripts, Inc. v. Bracket Holdings Corp.*, No. 62, 2020 (Del. Feb. 23, 2021).

[74] *Auris Health*.

[75] *Yatra Online, Inc. v. Ebix, Inc.*, C.A. No. 2020-0444-JRS (Del. Ch. Aug. 30, 2021).

[76] *Symbiont.IO, Inc. v. Ipreo Holdings, LLC*, C.A. No. 2019-0407-JTL (Del. Ch. Aug. 13, 2021).

[77] *ARKRAY America, Inc. v. Navigator Business Solutions, Inc.*, C.A. No. N20C-12-012 MMJ [CCLD] (Del Super. June 9, 2021).

[78] *Serviz, Inc. v. The ServiceMaster Company, LLC*, C.A. No. N20C-03-070 PRW [CCLD] (Del. Super. Dec. 6, 2021).

[79] *Coster v. UIP Companies, Inc.*, No. 49, 2020 (Del. June 28, 2021) [UIP].

[80] *Wetherald v. Mahoney*, C.A. No. 2021-0194-MTZ (Del. Ch. Mar. 12 & Apr. 1, 2021) (TRANSCRIPTS) [Taronis Fuels].

[81] *Orlando Police Pension Fund v. Dorsey*, C.A. No. 2021-0041-JTL (Del. Ch. Sept. 10, 2021) (TRANSCRIPT) [Twitter].

[82] *Hammann v. CytRx Corporation*, C.A. No. 2021-0676-PAF (Del. Ch. Aug. 11, 2021) (TRANSCRIPT) [CytRx].

[83] 83 Del. Laws 60, § 1 (June 30, 2021).

[84] *Stream TV Networks, Inc. v. SeeCubic, Inc.*, C.A. No. 2020-0766-JTL (Del. Ch. Dec. 8, 2021).

[85] *Authentix*.

[86] *Hollywood Firefighters' Pension Fund v. Dolan*, C.A. No. 2021-0468-KSJM (Del. Ch. July 2, 2021) & (July 6, 2021) (TRANSCRIPT) [Madison Square Garden Entertainment].

[87] *Pandora*.

[88] *Mamakas v. Iconix Brand Group, Inc.*, C.A. No. 2021-0632-KSJM (Del. Ch. July 26, 2021) (TRANSCRIPT) [Iconix Brands].

[89] *Hawkes v. Bettino*, C.A. No. 2020-0360-PAF (Del. Ch. Apr. 1, 2021) (TRANSCRIPT) [TD Ameritrade].

[90] *Flannery v. Genomic Health Inc.*, C.A. No. 2020-0492-JRS (Del. Ch. Aug. 16, 2021) (TRANSCRIPT) [Genomic Health].

[91] *Hollywood Firefighters' Pension Fund v. Malone*, C.A. No. 2020-0880-SG (Del. Ch. Nov. 8, 2021) [GCI Liberty].

[92] *In re The Williams Cos. Stockholder Litig.*, C.A. No. 2020-0707-KSJM (Del. Ch. Feb. 26, 2021) [Williams].

[93] *Vladimir Gusinsky Revocable Trust v. Tribune Publishing Company*, C.A. No. 2020-0716-KSJM (Del. Ch. Apr. 15, 2021) (TRANSCRIPT) [Tribune Publishing].

[94] *Hammann v. Adamis Pharmaceuticals Corporation*, C.A. No. 2021-0506-PAF (Del. Ch. June 17, 2021) (TRANSCRIPT) [Adamis Pharmaceuticals]; *Rosenbaum v. CytoDyn Inc.*, C.A. No. 2021-0728-JRS (Del. Ch. Oct. 13, 2021) [CytoDyn].

[95] 8 Del. C. §§ 102(b)(7), 174.

[96] *Cont'l Investors Fund LLC v. TradingScreen, Inc.*, C.A. No. 10164-VCL (Del. Ch. July 23, 2021) [TradingScreen]; see also *The Frederick Hsu Living Trust v. ODN Holding Corporation*, C.A. No. 12108-VCL (Del. Ch. Jan. 5, 2021) (TRANSCRIPT) [Oversee.net].

[97] *Tetragon Financial Group Limited v. Ripple Labs Inc.*, C.A. No. 2021-0007-MTZ (Del. Ch. Jan. 15 & Mar. 5, 2021) (TRANSCRIPTS) [Tetragon Financial].

[98] *In re SmileDirectClub, Inc. Deriv. Litig.*, C.A. No. 2019-0940-MTZ (Del. Ch. May 28, 2021) [SmileDirectClub].

[99] *Chemours*.

[100] *In re Altaba, Inc.*, C.A. No. 2020-0413-JTL (Del. Ch. Oct. 8, 2021); see also *In re Swisher Hygiene, Inc.*, C.A. No. 2018-0080-SG (Del. Ch. Mar. 5, 2021) (TRANSCRIPT).

[101] *In re Coinmint, LLC*, C.A. No. 2019-0983-MTZ (Del. Ch. Aug. 12, 2021).

[102] *Coinmint*.

[103] *Produced Water Transfer, LLC v. Pilot Water Solutions LLC*, C. A. No. 2021-0178-JTL (Del. Ch. Mar. 8, 2021) (TRANSCRIPT) [Pilot Water Solutions].

[104] *Stein v. Pickens*, C.A. No. 2021-0322-JRS, C.A. No. 2021-0380-JRS (Del. Ch. Apr. 27, 2021) (TRANSCRIPT) [Astrotech].

[105] *Amgine Technologies (US), Inc. v. Miller*, C.A. No. 2020-0537-JRS (Del. Ch. Nov. 29, 2021) [Amgine Technologies].

[106] *In re Covalent Group, Inc.*, C.A. No. 2021-0680-KSJM (Del. Ch. Sept. 1, 2021) (TRANSCRIPT).