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Update | Delaware Corporate Law

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2022 Delaware Corporate Law Year in Review

In 2022, Delaware courts offered preeminent guidance regarding a wide range of corporate and M&A matters, including stockholder franchise and takeover activities; contractual provisions in M&A documents; transfer restrictions and waivers; dissolution, winding up and receiverships; procedures for management of potential conflicts; inspection and discovery of corporate records and communications; oversight obligations; D&O compensation, indemnification, exculpation, insurance and employment restriction; and corporate ratification and judicial validation. A wave of SPAC-related litigation also swept through the Court of Chancery leaving issues for resolution in 2023.[1] Due to the significant nature and volume of corporate and M&A issues addressed in published, transcript, and order decisions, this GT Update attempts to summarily bring those cases to readers' attention.[2] We will continue tracking these trends in 2023.

Stockholder Franchise and Takeover Activities

Delaware courts in 2022 carefully balanced several objectives related to the stockholder franchise: a corporation's flexibility to order voting arrangements; stockholders' ability to exercise voting power; and a board's responsibility to prevent abusive takeover activities.

Stockholder Voting Arrangements. Stockholders and corporations may enter into enforceable agreements and grant proxies related to the voting of their shares, but the underlying mechanics must conform to the hierarchy of a corporation's governing documents as contemplated by the Delaware General Corporation Law (the "DGCL"),[3] making precise drafting of such arrangements critical. In one case, a voting provision in an underlying stockholders agreement, which did not reference a proxy, established an enforceable contractual voting obligation and not a revocable proxy, the board could not fix the board size to be less than the minimum number of seats required under the certificate of incorporation, and the full board could not exercise certain vacancy-filling power when such power was limited to those directors elected by the same class or series of stock as the vacancy.[4] Another case explained that Delaware courts have concerns about decoupling voting power and economic interests, and that those concerns animate a tendency to interpret proxies narrowly, to disfavor restrictions on stockholders' right to vote, to construe ambiguity against the proxyholder, and to not consider extrinsic evidence if a proxy is ambiguous. The disputed proxy lacked the particularly clear language required to bind all subsequent owners, and therefore did not "run with the shares" or bind subsequent third-party transferees.[5] Another stockholder's decision to withhold consent, under a voting agreement provision requiring its consent not to be unreasonably withheld, was viewed as baseless, pretextual, related solely to a dispute over fundraising alternatives, and intended to create deadlock.[6]

One case in 2022 found that a five-month failure to give prompt notice of action by consent, when the parties were in litigation for at least two of those months over related matters and it appeared to be gamesmanship, resulted in those actions (change of board composition) being set aside for purposes of a demand futility analysis.[7]

Protection of the stockholder franchise. Equitable and statutory rules related to the stockholder franchise were closely examined by Delaware courts in 2022, including assessment of advance notice bylaws and repeated application of the *Blasius*[8] standard of review for a compelling justification of actions taken primarily to thwart the stockholder franchise. In one such case, a board's approval of an entirely fair stock issuance, which tilted the result of a stockholder vote, was not entirely in bad faith or inequitable under *Schnell*,[9] but instead done at least partially in good faith for the purpose of breaking a deadlock to avoid a custodian action, requiring compelling justification review under *Blasius*.[10] Because the custodian action represented an existential threat to the company, and the directors were not acting to remain on the board, there was a compelling justification for the entirely fair issuance.

Disputes over stockholder voting provided guidance regarding relevant charter and bylaw provisions. First, a board acted inequitably by instructing the inspector of election at a stockholder meeting to apply a previously unused charter provision that imposed a 10% cap on voting power exercised by stockholders acting in concert, to stockholders supporting an insurgent slate.[11] In another case, an annual stockholder meeting of a post-SPAC company was enjoined when the classified board, after the advance notice deadline and receipt of indications that holders of a majority of the stock would seek to elect an insurgent slate, shifted two directors from classes not up for election into the class up for election, rejected bylaw amendments that would have allowed for nomination of an insurgent slate, and adopted a bylaw amendment reducing the stockholder meeting quorum from majority to 1/3.[12] That board likely mooted a disclosure claim with belated disclosures of its actions and stockholders' ability to revoke proxies, but the board's reduction of the quorum to ensure that the majority stockholders could not prevent a plurality vote for the incumbent slate was likely for the primary purpose of interfering with stockholders' rights and lacked a compelling justification under *Blasius*. In a dispute over whether separate class votes were required, a charter authorizing "common stock . . ., including . . . Class A common stock . . . and Class B common stock," and preferred stock created three classes of stock, and the Class A and Class B were each entitled to votes under Section 242(b)(2) on a charter amendment that adversely affected them in the same manner, because they were classes and not series of stock.[13]

Advance notice bylaws and proxy contests. Public company advance notice bylaws and proxy contests factored into the Delaware docket, while the SEC's universal proxy rules became effective. In two disputes over advance notice bylaws, the boards' decisions to reject a stockholder nomination, which failed to comply with the advance notice bylaw, were reviewed for compliance with fiduciary duties. In one, a stockholder submitted a nomination without a required questionnaire and before its shares had been transferred to its name; although formalistic adherence to the letter of bylaw requirements could be improper, that board acted reasonably and in good faith on its genuine interest in enforcing the bylaw which was adopted on a "clear day."[14] In the second, the nominating stockholder failed to obtain a preliminary mandatory injunction requiring the board to accept his nomination after the board rejected the nomination for failure to comply with a bylaw requiring disclosure of an arrangement or understanding with more active dissident stockholders, despite the nominating stockholder potentially having knowledge when submitting the nomination notice of only an intermediary and not of the activists' plans for

pursuing board control and unresolved factual disputes regarding whether the board's rejection was inequitable.[15] Another proxy contest saw an evenly divided board running separate slates—each side was entitled to privileged board materials and outside counsel communications (despite counsel initially providing legal advice to the management-led faction), though neither was entitled to use company assets to promote its slate.[16] As a preliminary step in another case, a stockholder was permitted to obtain books and records under Section 220, because running a proxy contest was a proper purpose.[17]

Limits on stockholder communications and takeover activities. Delaware courts continued in 2022 to express skepticism about claims alleging violations of the anti-takeover statute in Section 203 when the deal did not involve a hostile takeover. For instance, evidence of board awareness of potential agreements, arrangements, or understandings between the buyer and stockholders largely undermined one claim that Section 203 would prohibit a proposed merger,[18] while the court addressing the buyer in another deal, who allegedly negotiated agreements for a stockholder (or its affiliates) to provide the buyer with financial advice, deal financing, and voting of its shares in the deal, found colorable support for a violation of Section 203 but expressed skepticism in light of the buyer's negotiation of the merger with the board.

In one case involving stockholder rights plans, the board may have breached its fiduciary duties by adopting and enforcing a rights plan that was allegedly triggered by ownership of 5% of the company's outstanding shares, where that allegedly represented only 1% of the outstanding voting power and could potentially be triggered by exercise of the plaintiff's redemption right.[19]

M&A Matters: Structure, Terms, Remedies, and Appraisal

Delaware case law in 2022 has provided important guidance regarding negotiation, structuring, drafting, performance, and termination of M&A transactions and deal documents, including in the context of de-SPAC transactions.

Stockholder consent rights. Charter-based voting rights may be interpreted in the same way as analogous statutory provisions. In an appeal to the Delaware Supreme Court, a distressed company was required to obtain preferred stockholder approval of a negotiated foreclosure on its assets, under a charter-based protective provision applicable to a sale, lease, exchange, or other disposition of assets, because "dispositions" are broader than Section 271, which covers only sales, leases, and exchanges, and there is no exception under Delaware law for a failing company.[20]

Sandbagging and preliminary agreements. Practitioners have long viewed Delaware as a "pro-sandbagging" jurisdiction, where a contractual party may sue for breach of representation even when its falsity was known before closing. In 2022, following the acquisition of a business with haphazard recordkeeping by a sophisticated buyer with extensive access to the business, Delaware's position permitting sandbagging was confirmed by the Court of Chancery and clarified as referring only to situations where the sandbagging party had actual pre-closing knowledge of the falsity of the representation and sues on that misrepresentation post-closing.[21]

The Delaware Supreme Court and Complex Commercial Litigation Division of the Superior Court ("CCLD") addressed disputes over the formation of preliminary agreements, which arise when parties bind themselves to all material terms subject to negotiation and execution of a definitive agreement (type I) or when parties are bound to some material terms and an obligation to negotiate in good faith the balance of the terms (type II), and the possibility of additional collateral binding covenants. In one case, a litigation settlement agreement created a type II preliminary agreement—and not an enforceable negative covenant—by stating that before one party began providing a certain

service in the market, it would enter into a definitive agreement to provide that service with the settlement counterparty.[22] In that case and another, the parties formed a type II preliminary agreement with an implied obligation to negotiate in good faith, despite omitting an express agreement to negotiate in good faith.[23]

Fair value of shares. Judicial assessment of fair value of shares factored into several cases. In an appeal regarding appraisal, the Delaware Supreme Court explained that a dividend conditioned on the merger closing would be treated as merger consideration, which would also be expected to be reflected in disclosures regarding appraisal rights.[24] In a reverse stock split, a holder of fractional shares that were to be cashed out may not have received "fair value" as required by Section 155, when the company based the price on thin OTC trading, though the stockholder was also not entitled to an equivalent proceeding as under Section 262.[25]

MAE, ordinary course, and requisite efforts. Litigation over material adverse effect and efforts provisions and the result of their alleged breaches has continued in the wake of the COVID-19 pandemic. In a dispute over an asset purchase agreement without closing conditions, between a franchisee and a franchisor that had directed the franchisee to close locations in response to the COVID-19 pandemic, the franchisor was ordered to close the transaction.[26] As reflected by the franchisor's statements to lenders and its board that the pandemic was not expected to be durationally significant or a material adverse effect, the pandemic did not cause an MAE. Nor did the franchisee's compliance with the franchisor's directions to close locations, which was consistent with past practice, breach the ordinary course covenant. Likewise, in CCLD, the pandemic did not release a commercial tenant from lease payment obligations, because the risk of a pandemic was not unprecedented or unforeseeable but was allocated to the tenant by a *force majeure* provision that covered matters outside of the landlord's control or fault (though not specifically pandemics).[27] In a deal with earn-out payments based on development and sales of a particular product, the buyer's aggressive redesign, use of resources, discontinuance of production, and failure to meet a milestone related to that product did not violate buyer's obligation to use "commercially best efforts" (which was essentially equivalent to "best efforts") to maximize earn-out payouts or trigger acceleration of payments upon discontinuation, because the buyer's determinations were in good faith and met a contractual exception to acceleration for commercially reasonable determinations.[28]

Termination, fraud claims, and remedies. M&A termination and remedy provisions and disputes over alleged fraud remained on the 2022 Delaware docket. In a cash merger, target stockholders did not have standing as third-party beneficiaries to seek specific performance relief, because the no third-party beneficiaries provision was not boilerplate but instead contained three carve-outs that did not apply to the plaintiff-stockholders, which created a negative inference supporting the general exclusion of third-party beneficiaries. In litigation over a services agreement, one party's notice of termination, given by email under a termination provision, may have been ineffective because a separate notice provision required notice by both facsimile and email.[29]

The Court of Chancery and CCLD also addressed claims for fraud in several cases. In one case, a founder and chairman, who was not a signatory or knowledge party but may have known of the falsity of a no-material-litigation representation in a merger agreement and may have deliberately concealed the inaccuracy by actively monitoring the litigation in which the company received several significant adverse decisions and negotiating the litigation representation with the buyer, may have committed fraud though it was unclear whether that company's representations were accurate in light of the representation's references to the disclosure schedule which listed litigation.[30] Two other

cases saw unsuccessful fraud claims where a seller's statements about plans that ultimately didn't pan out did not constitute fraud (1) in the absence of evidence that they were misleading when made[31] and (2) when the conditions to a party's obligation were unsatisfied.[32] While another buyer's misleading statement, downplaying potential conflicts in sales to competitors, which caused the seller to accept higher earn-out standards, followed by reduction of sales to competitors, may have constituted fraud, because pre-closing presentations suggested that the buyer never intended to resolve the competitor sale issues.[33]

In a relatively unusual scenario, two companies formed a cooperative commercial relationship to use one company's AI software to jointly develop the other company's medical technology, thereby forming the special relationship necessary for imposition of strict liability for false representations based on a theory of equitable fraud.[34] Such equitable fraud may have occurred when the parties entered into agreements aligning their interests, representing themselves as partners, and allowing one company to control the other company's IP and proprietary information, which the controlling company did to the detriment of the owning party while making false statements (though possibly not made with scienter). In another case, however, there was no such special relationship between the underwriter of an insurance policy and a consultant who assisted the insured in negotiating that policy, because each party acted in their own interests and did not rely on the other.[35]

Recent litigants also successfully shifted attorneys' fees related to disputes over the indemnification provision of a merger agreement,[36] and prevailing party provisions of an investment agreement[37] and partnership and employment agreements.[38] The merger agreement decision is notable because indemnification provisions will only permit fee shifting when the language is sufficiently specific to modify the American rule that parties pay their own fees, while the investment agreement was interpreted to require only predominant success which was satisfied by settlement of a proper demand under the information rights of that agreement. With respect to the partnership and employment agreements, the Delaware Supreme Court affirmed the Superior Court determination, which determination was required by the provision in the partnership agreement, that neither party was the prevailing party, but also found that the party for which the Superior Court ruled on all claims was the prevailing party entitled to fee shifting (and the employment agreement did not require judicial determination of status as the party).

Forum selection. Forum selection provisions were also the subject of litigation in 2022. Removal of a contract dispute to the Delaware federal district court was permitted where the contract provided for "exclusive jurisdiction" over actions arising from the contract and each party "submits" to such jurisdiction and "irrevocably" waives any objection to venue and any claim that the action has been brought in an inconvenient forum.[39] In a merger where hackers stole the deal consideration from a trust, the transfer agent was a necessary party in the litigation but not subject to Delaware jurisdiction or a signatory to the merger agreement selecting Delaware courts exclusively, such that all necessary litigation parties were not subject to the same court's jurisdiction.[40] In a decision applying federal constitutional principles of full faith and credit, the Court of Chancery retained jurisdiction over claims for breach of fiduciary duty and contract between members of a New Hampshire LLC, on the basis that the claims were not local (in rem or focused on real property) but were transient (non-local or focused on contract, tort, or personal property) and therefore not subject to a New Hampshire exclusive venue statute.[41]

Common words and phrases. Common words and phrases were disputed and interpreted under context-driven cannons of construction in 2022. The word "and" was twice construed, once

in its several, permissive meaning because it was used to allow an equity call right following termination of the equityholders' employment or a breach of restrictive covenants by that employee,[42] and in another case in its joint, mandatory meaning because a statutory right to attorneys' fees in the interests of justice in connection with particular proceedings was limited to situations where that type of proceeding was pending.[43]

Transfer Restrictions

Delaware courts in 2022 closely examined transfer restrictions. In the context of transfer restrictions, drafting must reflect a clear intention to apply in specific scenarios. For instance, following a de-SPAC merger, the shares that were to be issued to target stockholders "immediately following the closing" of the transaction were subject to transfer restrictions, such that the restrictions did not apply to a former target stockholder who did not receive shares for at least 3.5 months after executing letters of transmittal.[44] In another case, a drag along provision in a voting agreement may not have been enforceable against a preferred stockholder, because the company potentially breached obligations under the voting agreement to provide financial information to the stockholder and to ensure payment of the stockholder's liquidation preference in such a transaction.[45] Another company's restriction against transfers unless made without consideration was violated because, under the end result and interdependence tests of the step transaction doctrine, lending arrangements effected in connection with a technically separate transfer provided consideration for the transfer.[46]

Dissolution, Winding Up, and Receiverships

Delaware law provides for judicial winding-up under Section 280 and ABCs. In 2022, those procedures received attention from the court which noted that the ABC statute is "a bit archaic"[47] and provided several discrete pieces of practical guidance in that area. For instance, an ABC petition under Section 280 must be more than a barebones petition and something akin to a first-day declaration in a bankruptcy proceeding.[48] The court also expressed concerns with the sufficiency of security posted by special purpose vehicle assignees and assignor business information[49] and unsecured bonds,[50] while finding comfort to approve an unusual ABC petition where there was no affiliation between the buyer and petitioner.[51] Similarly, a petition for appointment of a receiver of a dissolved entity must provide sufficient information to establish that the application is bona fide—i.e., to ensure that the courts are not used by questionable individuals to obtain control over Delaware entities or use them for improper schemes.[52]

In two judicial winding-up proceedings, the court explained that it will tend to adopt a conservative position on the required amount reserved for claims[53] and that there typically will not be any interim distributions in the absence of good cause.[54] That first case also explained that all three categories of claims—contractual, litigation, and unknown—involved in a corporate winding up under Section 281(b) are subject to the same reasonableness standard.

Procedures for Management of Potential Conflicts

In litigation over alleged breaches of fiduciary duty, Delaware courts grant deference to independent and disinterested board decisions. As a result, the analyses related to control and conflicts, and procedures for ameliorating potential conflicts, merit close attention.

Existence of control and potential conflicts. Two cases involved potential conflicts between holders of different types of stock. In a case challenging the board's approval of a sale where the preferred stockholders received their liquidation preferences and the same de minimis consideration for their common shares as the other common stockholders, a preferred stockholder was a conflicted controller, because

it owned a majority of the stock, its affiliates constituted two of the company's five directors (while the CEO-director claimed to work for the controller and was entitled to a cash bonus in the deal), it received a non-ratable benefit for the preferred shares, it was being pressured by its own investors to close the fund holding those shares, and excluded the lone dissenting stockholder from negotiations.[55] Because the sale may not have been fair, the controller and dual fiduciaries who acted as management directors of the controller and the company may have breached their fiduciary duty of loyalty. In a case involving a de-SPAC transaction, the controlling stockholder would receive a unique benefit and compete with the public stockholders, because the controller's purchase price—which was lower than the public stockholders' mandatory redemption price—created incentives to find *any* transaction, even with consideration below the redemption price, and to discourage redemptions, and that was not adequately disclosed.[56] These conflicting interests and lack of independence from the controller also applied to a majority of the directors, such that fiduciary duty claims would continue under the entire fairness standard of review. In two other cases, (1) *pro rata* dividends to all stockholders along with alleged collateral benefits did not provide a controlling stockholder with a non-ratable benefit, but payments under tax agreement and a sale of preferred stock to the controller were treated on a motion to dismiss as conflicted transactions because the board exercised discretion to uniquely benefit the controller[57] and (2) upsizing of a stock repurchase program that would bring the majority stockholder closer to thresholds for tax benefits and a short-form merger and the board's approval without negotiation of a tax sharing agreement with the controller, may have been unique benefits to the detriment of the other stockholders.[58] In that second case, the court was particularly sensitive to the potential for retribution by the majority stockholder where it had expressed an intention to reach 90% ownership and effect a short-form squeeze out. In another case, a management director's $72.3 million change-of-control right may have been sufficiently material to create a disabling conflict, despite arising in a pre-existing contract.[59]

In other cases, the courts considered whether relationships with a controlling stockholder affected the disinterestedness and independence of directors. For instance, potential conflicts existed where a controller removed directors from a special committee that refused to accept the controller's buyout offer, filled two board vacancies, and amended the bylaws to require 90% board approval of certain material transactions; a director had longstanding personal, professional, and investment ties to the controller (including acting as chair of another company affiliated to the controller), and meeting minutes did not describe details of her communications with the controller before she approved the buyout offer; and two new directors, who were elected to vacancies by the controller at the recommendation of the controller's secured creditor, may have approved the buyout offer to please the creditor which worked to the controller's benefit.[60] In addition, the independence of "house directors" (directors placed on multiple boards by the same investor) may be compromised by their potential anticipation of further board service.[61]

Corporate opportunities and D&O trading. The doctrine of corporate opportunity, a subspecies of the duty of loyalty, requires a corporate fiduciary to present the company with an opportunity that should belong to the company. The scope of that doctrine turns on (1) the company's financial ability to exploit the opportunity; (2) the opportunity falling in the company's line of business; (3) the company's interest in the opportunity; and (4) the fiduciary's ability to exercise fiduciary duties if she takes the opportunity.[62] In a 2022 case, the company had funds to invest in a new venture started by its managing member because the practice of making distributions did not mean that the company's cash was "promised" for other purposes; the company had an interest in

the investment—when taking a broad view of this factor, as directed by Delaware courts—because its business was to invest in affiliated entities even after redeeming its prior investors; and taking the investment opportunity placed the managing member in an inimical position by borrowing the investment funds from the company and failing to fairly disclose the opportunity to other investors.[63] Elsewhere, dual fiduciaries who acted as management directors of the company and its controlling stockholder may have inappropriately usurped a corporate opportunity by causing the controller to acquire assets at the same price that the company had already negotiated for itself (and one defendant executed the purchase agreement for the controller).[64] In another context, directors, after learning of a premium offer for the company, may have improperly traded on material nonpublic company information by rejecting the offer, concealing it from the board, acquiring substantial stock through an affiliate, and conceivably delaying a deal until expiration of the federal securities short-swing period.[65]

Claim waivers and bespoke standards. Waivers of important corporate rights remained on the docket in 2022. In litigation previously addressing appraisal rights waivers, a stockholders agreement provision that a stockholder would "raise no objection" against a sale transaction, was not a knowing, clear, and unequivocal waiver regarding fiduciary duties.[66] Although the court suggested that the parties could have given an explicit waiver of fiduciary duties, the decision also reserved on the enforceability of such a waiver, which would "blur the line between LLCs and the corporate form and represent a departure from norms of corporate governance."

In several 2022 cases, parties sought to prescribe standards of discretion or review that would apply to contractual interpretation. In one, a charter provision that board determinations were "conclusive and binding" did not ensure business judgment deference to the board's interpretation of a voting power limit on stockholders.[67] The court explained that such authority was in contravention of fundamental Delaware corporate law principles and would alter directors' fiduciary duties. Another corporate charter provided that a stockholder's determination of its voting power pursuant to a formula would be binding on the inspector of election.[68] At a settlement hearing, the court suggested that other stockholders had raised legitimate concerns with that sort of authority under the inspector of election provisions of Section 231.

Contractual provisions in a non-competition, non-solicitation agreement "that each and every one of the restraints is reasonable" and that each party "waives (and irrevocably agrees not to raise) as a defense any issue of reasonableness" did not preclude judicial review of reasonableness, because that limitation is unenforceable under public policy related to non-competes and non-solicits.[69] Discretionary determinations regarding standards of conduct for entitlement to indemnification may not alter the application of a good faith standard because, the Delaware Supreme Court explained, the exercise of discretion may import the implied covenant of good faith and fair dealing, and otherwise the requirement that indemnitees act in good faith would be rendered meaningless.[70]

Meeting minutes. Meeting minutes are often prima facie evidence of a board's process related to important corporate actions. In connection with an investigation into a deal, a stockholder was permitted to obtain books and records under Section 220 to investigate possible wrongdoing where merger disclosures did not match related board meeting minutes.[71] In other cases, when assessing the presence of potential conflicts, board resolutions (1) acknowledging directors' recusals supported (but were not dispositive of) a finding that those directors lacked independence, while the court suggested that resolutions reflecting a board determination as to any conflict or lack of independence would have been stronger evidence[72] and (2) identifying individuals as interested parties

supported a finding that a controlling stockholder and its board representatives had differential interests in a merger.[73]

Director abstention. Another method of showing fairness in a potentially conflicted board process is for interested directors to abstain from deliberations. In a high-profile deal litigation, the alleged controller of both public companies to a merger (22% stockholder of the buyer company subject to this judicial decision; largest stockholder and chairman of the target company) recused himself from the merger vote and some related board deliberations but had private conversations with the target and the buyer's financial advisor without the board's knowledge, and his brother was not recused from the board discussions or vote.[74] Although that recusal protocol was unclear and the alleged controller remained involved to a degree that the court criticized, the alleged controller did not impede the board from running a process that led to a fair price. Another director, who held debt, preferred stock, and common stock and may have personally negotiated a term sheet for a merger that squeezed out common stockholders, did not avoid liability or cleanse alleged conflicts among the board-majority of creditors and preferred stockholders by abstaining from the vote on the merger.[75]

Approvals by disinterested stockholders, independent directors, and board committees. Procedures for cleansing conflicts so that fiduciary duty claims may then be dismissed at early stages of litigation, including under the *MFW* and *Corwin* cases[76] have continued to evolve. Delaware courts confirmed that *Corwin* applies to a controlled-company merger where the controller is unconflicted and receives no unique benefit to the detriment of the unaffiliated stockholders, such that entire fairness is not initially the standard of review.[77] The company in one case adequately disclosed relationships between the buyer and seller management and advisors including joint ownership interests in the seller, and disclosure in a second case was not inadequate due to omission of information about a two-year-old proposal for certain assets to which the company didn't respond. In addition, the first case illustrated that a controller's potentially unique interest in repayment of a loan would only create a conflict requiring entire fairness review if the stockholders may have otherwise received additional consideration. *Corwin* was not satisfied, however, where (1) a merger that squeezed out the common stockholders was approved in a single vote of all stockholders, because the holders of debt and preferred stock were not disinterested, and the other approving stockholders may not have represented a majority of the disinterested stock,[78] and (2) a company may have incompletely or inaccurately disclosed initial discussions with the potential buyer, certain insider stock purchases, and management's changes to company projections, and the effects of the transaction on a tax matters agreement.[79]

In the *MFW* context, the courts have closely examined the effectiveness of the independent committee. One *MFW* process leading to a 2017 merger failed to obtain early dismissal but was shown after post-trial briefing in 2022 to be fair, because of the strong independence, diligence, resistance, and meaningful negotiation shown by the committee and its advisors, the company's provision of all requested information, and extraction of the controller from the process.[80] This result was reached despite the controller initiating the deal and selection of advisors and committee co-chairs, the committee succumbing on deal structure, compressed timing on negotiations and information, and the record leaving unclear how the final deal was reached. Another *MFW* committee may have been undermined when, after it was authorized to exercise all board power regarding waivers of Section 203 antitakeover restrictions, the full board granted the controller a Section 203 waiver to facilitate the transaction without evidence that the committee had considered the waiver.[81] Because that committee may not have been fully functioning, fiduciary duty claims related to the merger survived dismissal. Two

other *MFW* cases, which settled before resolution, suggested that (1) the committee may not have satisfied its duty of care in valuing derivative claims when negotiating deal price[82] and (2) negotiation by a 43% stockholder of a services agreement alongside a merger agreement may have shifted consideration to favor the alleged controller.[83]

The courts in 2022 also evaluated the individuals providing the *MFW* approvals. The court went as far as stating that the parties to a high profile, public company merger that did not attempt to implement the *MFW* procedures should have used *MFW*, though that merger was found after trial to be fair, in significant part due to disinterested stockholder approval and the efforts of a strong independent chairman who spearheaded the board's resistance to the alleged controlling stockholder.[84] In two other cases, *MFW* was satisfied when (1) a spinoff was approved, where the independence of one out of three committee directors was called into question based on a 20-year professional affiliation with controller, but only a majority of the committee was required to be independent for *MFW* purposes and the non-independent director did not dominate or undermine the process[85] and (2) likewise, where the extension of a dual-class stock sunset on the controller's high-vote stock was approved, the possibility that a committee director was not independent of the controller was not dispositive of the effectiveness of the majority independent committee.[86] Another *MFW* case that settled left open the question whether shares owned by joint venturer are to be excluded from the unaffiliated stockholder vote.[87]

Inspection and Discovery of Corporate Records and Director Communications

Stockholders and directors actively pursued corporate records under the DGCL and litigation discovery rules in 2022. In cases under Section 220, stockholders seeking to investigate potential wrongdoing were not permitted to use hearsay to establish a proper purpose because the evidence was unreliable as a result of misleading tactics by the stockholder that prevented the company from knowing potential witnesses who would assist in testing the propriety of the demand's purpose.[88] Stockholders who made a proper demand under Section 220 (1) in two cases were overreaching and not permitted to access informal documents such as directors' and officers' emails, because there was no evidence of atypical circumstances and formal, appropriately redacted board records related to potential mismanagement during a more limited period were sufficient[89] and (2) in another case, were not subject to the company's requested terms of confidentiality which were not supported by standard concerns that competitors might use its information, particularly given that the company went dark in 2014.[90] The court also explained that it was not a "good playbook for defending a books and records action" when the company largely rejected the fairly focused demand of 14 requests, told the stockholder to exercise his rights in person, and produced quite a small proportion of requested materials despite five purposes that were deemed proper, and in the subsequent Section 220 proceeding raised new arguments and filed a poorly supported motion to compel.[91]

In litigation discovery, (1) a director successfully asserted privilege over documents residing on servers belonging to third parties whose policies provided users with no expectation of privacy, because those hosts had other policies limiting their monitoring of emails and requiring that the director's consent to access his emails, such that the director had an expectation of privacy in those emails, as did (2) directors who were also directors and officers of other companies whose email addresses, which were subject to policies providing no expectation of privacy, were used in communications with company counsel,[92] while (3) former stockholders in an appraisal proceeding, whose purpose for seeking appraisal was to investigate potential wrongdoing, were only permitted discovery related to potential wrongdoing to the extent that they could have

previously obtained records under Section 220.[93]

Several cases illustrated the high bar companies will face when seeking to withhold privileged communications from a director (or former director[94]) on the basis of adversity. In a Section 220(d) proceeding, a director, who had been terminated as CEO for alleged fiduciary and contractual breaches related to establishing a competitor business and deceptively communicating with the company's suppliers, was permitted to obtain documents related to the proper purposes of understanding the company's financial position, liabilities, and potential mismanagement and protecting the company and its customers.[95] Those documents included directors' electronic communications and informal records because the record showed that the directors were conducting board business in such communications, while the court emphasized that the director has essentially unfettered rights to corporate information and that any misuse of that information by the director would be addressed by an applicable confidentiality order and the director's fiduciary duties. And in three other cases, adversity was not established by (1) a proxy contest between evenly divided factions of current directors, including one side associated with an alleged activist stockholder,[96] (2) an LLC board member's hiring litigation counsel (though adversity was created after the manager was subsequently informed of his possible removal),[97] and (3) the commencement of a proceeding under Section 18-110 of the DLLCA over the status of an ostensible LLC member.[98]

Oversight Obligations and Corporate Purpose

Delaware fiduciary duties include an oversight obligation to establish monitoring and reporting systems and to react to red flags of corporate misconduct. In a 2022 decision, the board of an IT infrastructure management software company, whose customer information was leaked by cyber hackers, had not acted in bad faith by establishing a subpar cybersecurity risk monitoring system.[99] Notably, the court viewed cybersecurity as mission critical for online service providers but concluded that the existence of board committees (though not ideal in performance) and lack of violations of positive law demonstrated minimal compliance with oversight obligations. Under a novel theory, which the court adopted with trepidation and discomfort in another case, a board that awarded equity to the CEO in excess of the applicable equity plan limits may have breached its oversight obligations by failing to address the over-issuance after it was raised in a stockholder's demand letter.[100] The court noted that this theory of potential liability may not be broadly applicable but was appropriate in the specific situation where both the over-issuance violated a plain and unambiguous restriction and the equity recipient also owed fiduciary duties to fix the violation. The Court of Chancery also held that oversight claims, based on a sequence of events whereby the defendants allegedly ignore red flags or cause the corporation to violate positive law, are subject to statute of limitations that separately accrue upon each event.[101]

The purpose of the corporation also remained an important topic, with a stockholder raising the novel argument that the board of a high-profile public company had breached its fiduciary duties by failing to take into account the impact of its operations on its diversified stockholders' interests in investments in other companies.[102] That complaint raises foundational corporate law issues for resolution in 2023, focusing on corporate actions that allegedly threaten the global economy, stock repurchases, and rejection of stockholder proposals to better understand the company's global impact.

Officers and Buyers in Fiduciary Litigation

Officers, who are said to owe the same corporate fiduciary duties as directors, also featured in fiduciary litigation in 2022. At a de-SPAC company that revised its slate of nominees after the advance notice deadline, the bylaws

permitting the "chairperson" to call a board meeting likely did not allow one co-chair to call a board meeting to permit nomination of a dissident slate, when (for the first time in the company's history) the other co-chair contested that meeting and slate.[103]

In another litigation, an officer settled direct claims for allegedly inadequate disclosures of projections and a merger go-shop, after dismissal of those claims against directors because the directors were exculpated from personal liability under a charter provision adopted pursuant to Section 102(b)(7).[104] This final case illustrates the rationale for the amendment, effective August 1, 2022, to Section 102(b)(7) permitting charter provisions to eliminate certain officers' personal liability arising from direct claims for breach of fiduciary duty.[105]

D&O Compensation, Indemnification, Exculpation, Insurance, and Employment Restriction

Equity compensation. Compensation committee members may have breached their fiduciary duties and would be subject to entire fairness review when approving equity compensation awards to themselves and the controlling stockholder under an incentive plan providing the compensation committee with significant discretion in making awards.[106] In a similar case, management may have breached its fiduciary duties by accepting awards known to be improper, but in this case, there were only allegations that the management equity grants were priced low and no allegations that management knew about impropriety.[107] Nor did public company directors face substantial likelihood of fiduciary liability by granting stock options while in possession of positive material nonpublic information, because the single instance of alleged "spring loading" did not establish bad faith.[108] In another case, the invitation of a biotech company to participate in a study related to the government's efforts to develop a COVID-19 vaccine did not require supplemental disclosure for a proposed increase in shares reserved for an equity incentive plan, because it did not impart a new and significant slant on the earlier proxy information.[109] In particular, there was no support for the allegation that such preliminary invitation would cause a dramatic increase in the stock price or a watershed moment for the company.

Indemnification, insurance, and exculpation. The courts confirmed that D&O insurance of director wrongdoing does not cover an appraisal action.[110] In a notable amendment to Section 102(b)(7), effective August 1, 2022, corporate charters may now authorize elimination of certain officers' personal liability for monetary damages for breach of fiduciary duty arising from direct stockholder claims.[111]

Restrictive covenants. Restrictive covenants in employment agreements remained at the center of litigation. One former employee was not prevented from working for a competitor during litigation but was restrained by the non-solicitation and confidentiality provisions, in light of potential harm to the company from the employee's alleged removal of confidential documents before resignation.[112] In another case, despite the seller's acknowledgements of reasonableness of the restrictive covenants and the seller's agreement not to contest their reasonableness, restrictive covenants imposed on a stockholder in an acquisition were overbroad and enforceable only to the extent that they protected the buyer's interest in the assets or company that was purchased.[113] The court declined to "blue pencil" that restrictive covenant on a public policy basis that doing so would create an inequitable "no-lose" incentive for employers to draft broad restrictive covenants. In a third case, a noncompete was enforced against a former employee who retained confidential information, failed to satisfy the contractual notice requirements, and may have suggested in a LinkedIn posting that he could use the prior company's information for new clients.[114] The court emphasized that a contractual stipulation of irreparable harm may not have bound the court's determination of that

element of a TRO, and independently determined that such irreparable harm existed.

Corporate Ratification and Judicial Validation

As Delaware approaches its 10-year anniversary of adoption of Sections 204 and 205, the practices of corporate ratification and judicial validation continued to develop. Although litigants have often resorted to a validation petition under Section 205 only after confirming that corporate self-help was unavailable under Section 204, the court confirmed that petitioners are not required to seek alternative remedies before petitioning the court.[115] The court also confirmed, however, that it will review the petition under the expansive authority prescribed in Section 205(d), and indeed dismissed that validation petition because the corporation could have sought stockholder approval and the corporation may not have originally viewed the defective corporate act as valid. A sole stockholder did, however, obtain validation of a defective conversion from Virginia LLC to Delaware corporation.[116] And a lengthy opinion discussing the history of equitable jurisdiction proposed that the Delaware Supreme Court should rethink case law holding that corporate actions taken in breach of contractual restrictions are void—and not merely voidable—if the contract states that such breaches will result in null and void actions.[117]

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Endnotes

[1] *See, e.g., Brown v. Matterport, Inc.*, C.A. No. 2021-0595-LWW (Del. Ch.) [Matterport]; *In re MultiPlan Corp. Stockholders Litig.*, Consol. C.A. No. 2021-0300-LWW (Del. Ch.) [MultiPlan]; *Bray v. Katz*, C.A. No. 2022-0489-LWW (Del. Ch.) [UpHealth]; *Buzzfeed v. Anderson*, C.A. No. 2022-0357-MTZ (Del. Ch.) [Buzzfeed]; *BioTE Corp., v. Donovitz*, C.A. No. 2022-0611-JTL (Del. Ch.) [BioTE]; *Shirley v. Kabot*, C.A. No. 2022-1023-PAF (Del. Ch.) [Momentus]; *Ghazaleh v. Decarbonization Plus Acquisition Sponsor LLC*, C.A. No. 2022-1050-LWW (Del. Ch.) [Hyzon Motors]; *Quantum Fintech Acquisition Corp. v. TradeStation Group Inc.*, C.A. No. 2022-1106 (Del. Ch.) [TradeStation]; *Newbold v. McCaw*, C.A. No. 2022-0439-LWW (Del. Ch.) [Astra Space]; *Garfield v. Boxed, Inc.*, C.A. No. 2022-0132-MTZ (Del. Ch.) [Seven Oaks Acquisition]; *In re P3 Health Group Holdings, LLC*, Consol. C.A. No. 2021-0518-JTL (Del. Ch.) [P3 Health]; *see also Li v. Xu-Nuo Pharma, Inc.*, C.A. No. N22C-08-417 PRW CCLD (Del. Super.) [Xynomic Pharmaceuticals].

[2] Although case law guidance in this GT Update pertains largely to litigation involving Delaware corporations, there is also select guidance from litigation involving LLCs and other entity types with generally applicable corporate and M&A practice points.

[3] *See, e.g.,* 8 *Del. C.* §§ 141(b) (providing that the board size may be fixed by or in the manner set forth in the bylaws, unless the certificate of the incorporation fixes the number of directors), 141(d) (providing that the charter may confer upon holders of a class or series the right to elect directors), 218 (permitting voting agreements among stockholders), 223(a) (providing for filing of vacancies and newly created directorships, subject to the charter and bylaws). References to "Sections" are to sections of the DGCL.

[4] *Esfandyarpour v. Zollars*, C.A. No. 2022-0324-MTZ (Del. Ch. July 8, 2022) (TRANSCRIPT) [GenapSys].

[5] *Hawkins v. Daniel*, C.A. No. 2021-0453-JTL (Del. Ch. Apr. 4, 2022) [N.D. Management].

[6] *Bighorn Ventures Nevada, LLC v. Solis*, C.A. No. 2022-1116-LWW (Del. Ch. Dec. 23, 2022) [MovoCash].

[7] *Schoenmann v. Irvin*, C.A. No. 2021-0326-SG (Del. Ch. June 2, 2022) [Clear Align].

[8] *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. Ch. 1988) [Atlas].

[9] *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971) [Chris-Craft Industries].

[10] *Coster v. UIP Companies, Inc.,* C.A. No. 2018-0440-KSJM (Del. Ch. May 2, 2022) [UIP Companies].

[11] *Totta v. CCSB Fin. Corp.*, C.A. No. 2021-0173-KSJM (Del. Ch. May 31, 2022) [CCSB Financial].

[12] *UpHealth* (June 8 & 24, 2022) (TRANSCRIPTS).

[13] *Seven Oaks Acquisition* (Dec. 27, 2022).

[14] *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, C.A. No. 2021-1089-LWW (Del. Ch. Feb. 14, 2022) [Lee Enterprises].

[15] *Jorgl v. AIM ImmunoTech, Inc.*, C.A. No. 2022-0669-LWW (Del. Ch. Oct. 28, 2022) [AIM ImmunoTech].

[16] *In re Aerojet Rocketdyne Holdings, Inc.*, C.A. No. 2022-0127-LWW (Del. Ch. Feb. 15, May 5 & 9, June 16, 2022) [Aeroject Rocketdyne].

[17] *Gliksberg v. Texas Pacific Land Corp.*, C.A. No. 2021-1063-JTL (Del. Ch. Nov. 9, 2022) (TRANSCRIPT) [Texas Pacific Land].

[18] *Kei v. Lane*, C.A. No. 2022-1028-MTZ (Del. Ch. Nov. 23, 2022) (TRANSCRIPT) [BTRS Holdings].

[19] *Whitestone REIT Operating Partnership, L.P.*, C.A. No. 2022-0607-LWW (Del. Ch. Sept. 8, 2022) (TRANSCRIPT) [Pillarstone Capital REIT].

[20] *Stream TV Networks, Inc. v. SeeCubic, Inc.*, No. 360, 2021 (Del. June 15, 2022) [Stream TV Networks].

[21] *Arwood v. AW Site Servs.*, C.A. No. 2019-0904-JRS (Del. Ch. Mar. 24, 2022) [*Arwood Waste*].

[22] *Cox Communications, Inc. v. T-Mobile US, Inc.*, No. 340, 2021 (Del. Mar. 3, 2022) [Cox Communications; T-Mobile].

[23] *Greentech Consultancy Co., WLL v. Hilco IP Services, LLC*, C.A. No. N20C-07-052 AML CCLD (Del. Super. May 11, 2022) [Greentech Consultancy; Hilco IP Services]; *see also Venator Materials PLC v. Tronox Limited*, C.A. No.: N19C-05-117 EMD CCLD (Del. Super. Jan. 7, 2022) [Tronox; Venator Materials] (disputing an obligation to include a FTC-related "hell or high water" provision in a definitive stock purchase agreement after allegedly agreeing to include that term).

[24] *In re GGP, Inc. Stockholder Litig.*, No. 202, 2021 (Del. July 19, 2022) [GGP].

[25] *Samuels v. CCUR Holdings, Inc.*, C.A. No. 2021-0358-PAF (Del. Ch. May 31, 2022) [CCUR Holdings].

[26] *Level 4 Yoga, LLC v. CorePower Yoga, LLC*, C.A. No. 2020-0249-JRS (Del. Ch. Mar. 1, 2022) [Level 4 Yoga; CorePower Yoga].

[27] *Simon Property Group, LP v. Regal Entertainment Group*, C. A. No. N21C-01-204-MMJ CCLD (Del. Super. Jul. 6, 2022) [Simon Property; Regal Entertainment].

[28] *Menn v. ConMed Corp.*, C.A. No. 2017-0137-KSJM (Del. Ch. June 30, 2022) [Conmed; EndoDynamix].

[29] *IP Network Solutions, Inc. v. Nutanix, Inc.*, C.A. No. N21C-04-014 PRW CCLD (Del. Super. Feb. 8, 2022) [IP Network Solutions; Nutanix].

[30] *Atos S.E. v. Desai*, C.A. No. 2021-0630-NAC (Del. Ch. Oct. 19, 2022) (TRANSCRIPT) [Syntel]; *see also AmeriMark Interactive, LLC v. AmeriMark Holdings, LLC*, C.A. No. N21C-12-175 MMJ CCLD (Del. Super. Nov. 3, 2022) [AmeriMark Interactive; AmeriMark Holdings] (denying motion to dismiss on public policy grounds and rejecting enforcement of a non-recourse provision with respect to a fraud claim against seller officers and affiliates based on statements in an equity purchase agreement).

[31] *Knight Broadband LLC v. Knight*, C.A. No. N21C-07-076 EMD CCLD (Del. Super. June 2, 2022) [Knight Broadband; Knight Enterprises].

[32] *Cipercen, LLC v. Morningside Texas Holdings, LLC*, C.A. No. N19C-12-074 EMD CCLD (Del. Super. Sept. 14, 2022) [Meineke].

[33] *Camaisa v. Pharmaceutical Research Assocs., Inc.*, C.A. No. 2019-0561-NAC (Del. Ch. Oct. 21, 2022) (TRANSCRIPT) [Parallel 6; Pharmaceutical Research].

[34] *Trust Robin, Inc. v. Tissue Analytics, Inc.*, C.A. No. 2021-0806-SG (Del. Ch. Sept. 29, 2022) [Trust Robin; Tissue Analytics].

[35] *Biegler v. Underwriting Service Management Company, LLC*, C.A. No. 2022-1003-MTZ (Del. Ch. Dec. 20, 2022) [Fleetlogix; GMI Insurance].

[36] *Schneider National Carriers, Inc. v. Kuntz*, C.A. No. N21C-10-157-PAF (Del. Super. Apr. 25, 2022) [Schneider National Carriers] (providing indemnification "including reasonable out-of-pocket expenses of investigation and reasonable and documented attorneys' fees and expenses in connection with any Action, whether involving a Third-Party Claim or a claim solely between the Parties hereto").

[37] *Curry v. Digitzs Solutions*, C.A. No. 2022-0205-JTL (Del. Ch. Nov. 2, 2022) [Digitzs Solutions].

[38] *Bako Pathology LP v. Bakotic*, No. 382, 2021 (Del. Nov. 28, 2022) [Bako Diagnostics].

[39] *Tkach v. RumbleOn, Inc.*, C.A. No. 22-00710-RGA (D.Del. Sept. 22, 2022) [RumbleOn].

[40] *Sorenson Impact Foundation v. Continental Stock Transfer & Trust Company*, C.A. No. 2021-0413-SG (Del. Ch. Apr. 1 & Nov. 17, 2022) [Graduation Alliance].

[41] *Jung v. El Tinieblo International, Inc.*, C.A. No. 2021-0798-MTZ (Del. Ch. Oct. 31, 2022) [TAMA Imports].

[42] *Weinberg v. Waystar, Inc.*, C.A. No. 2021-1023-SG (Del. Ch. July 6, 2022) [Waystar].

[43] *Twin Willows, LLC v. Pritzkur*, C.A. No. 2020-0199-PWG (Del. Ch. Oct. 18, 2022) [Twin Willows].

[44] *Matterport* (Jan. 10, 2022).

[45] *Cygilant, Inc. v. Basani*, C.A. No. 2022-0112-JTL (Del. Ch. Oct. 18, 2022) (TRANSCRIPT) [Cygilant].

[46] *XRI Investment Holdings LLC v. Holifield*, C.A. No. 2021-0619-JTL (Del. Ch. Sept. 19, 2022) [XRI Investment].

[47] *In re Illumitex, Inc.*, C.A. No. 2020-1102-KSJM (Del. Ch. Sept. 14, 2022) (TRANSCRIPT) [Illumitex].

[48] *In the Matter of Global Safety Labs, Inc.*, C.A. No. 2022-0309-JTL (Del. Ch. May 12, 2022) [Global Safety Labs].

[49] *In re TeraDact Solutions, Inc.*, C.A. No. 2020-1103-JTL (Del. Ch. Sept. 16, 2022) (TRANSCRIPT) [TeraDact Solutions].

[50] *In re Tarveda Therapeutics, Inc.*, C.A. No. 2022-0317-PAF (Del. Ch. Sept. 15, 2022) (ORDER) [Tarveda Therapeutics].

[51] *In re Ohana Biosciences, Inc. v. OBS (ABC), LLC*, C.A. No. 2021-0515-PAF (Del. Ch. Oct. 4, 2022) (TRANSCRIPT) [Ohana Biosciences].

[52] *In re VBR Agency, LLC*, C.A. No. 2022-0328-JTL (Del. Ch. Apr. 20, 2022) [VBR Agency] (applying 6 *Del. C.* § 18-805 to a dissolved LLC).

[53] *In re Altaba, Inc.*, C.A. No. 2020-0413-JTL (Del. Ch. Apr. 18, 2022) [Altaba].

[54] *In re Anavrin Inc.*, C.A. No. 2022-0197-JTL (Del. Ch. Aug. 16, 2022) (ORDERS) [Avavrin].

[55] *Manti Holdings LLC v. The Carlyle Group Inc.*, C.A. No. 2020-0657-SG (Del. Ch. June 3, 2022) [Authentix Acquisition].

[56] *MultiPlan* (Jan. 3, 2022).

[57] *Fair Value Investments Inc. v. Roach*, C.A. No. 2020-0847-JTL (Del. Ch. Jan. 21, 2022) (TRANSCRIPT) [DBM Global].

[58] *Fishel v. Liberty Media Corp.*, C.A. No. 2021-0820-KSJM (Del. Ch. Nov. 1, 2022) (TRANSCRIPT) [SiriusXM].

[59] *Goldstein v. Denner,* C.A. No. 2020-1061-JTL (Del. Ch. May 26, 2022) [Bioverativ].

[60] *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litig.*, Consol. C.A. No. 2019-0798-JTL (Del. Ch. Jan. 3 & 4, 2022) (ORDERS) [Sears Hometown].

[61] *In re MPM Holdings Inc. Appraisal and Stockholder Litig.*, C.A. No. 2019-0519-JTL (Del. Ch. Jan. 13, 2022) (TRANSCRIPT) [MPM Holdings]; *Bioverativ* (May 26, 2022); *see also Sirius XM*.

[62] *Broz v. Cellular Info. Sys., Inc.*, 673 A.2d 148 (Del. 1996) [Cellular Information Systems].

[63] *Deanne v. Maginn, Jr.*, C.A. No. 2017-0346-LWW (Del. Ch. Nov. 1, 2022) [New Media Investors II-B].

[64] *Bocock v. Innovate Corp.*, C.A. No. 2021-0224-PAF (Del. Ch. Oct. 28, 2022) [DTV America].

[65] *Bioverativ* (June 2, 2022).

[66] *Authentix Acquisition* (Feb. 14, 2022).

[67] *CCSB Financial*.

[68] *In re Palantir Techs. Inc. Class F Stock Litig.*, C.A. No. 2021-0275-SG (Del. Ch. Sept. 13, 2022) (TRANSCRIPT) [Palantir Technologies].

[69] *Kodiak Building Partners, LLC v. Adams*, C.A. No. 2022-0311-MTZ (Del. Ch. Oct. 6, 2022) [Kodiak Building Partners].

[70] *Baldwin v. New Wood Resources LLC*, No. 303, 2021 (Del. Aug. 16, 2022) [New Wood Resources].

[71] *Hightower v. SharpSpring, Inc.*, C.A. No. 2021-0720-KSJM (Del. Ch. Aug. 31, 2022) [SharpSpring].

[72] *Schiabacucchi v. Liberty Broadband Corp.*, C.A. No. 11418-VCG (Del. Ch. May 2, 2022) [Charter Communications].

[73] *Cygilant, Inc. v. Basani*, C.A. No. 2022-0112-JTL (Del. Ch. Oct. 18, 2022) (TRANSCRIPT) [Cygilant].

[74] *In re Tesla Motors, Inc. Stockholder Litig.*, Consol. C.A. No. 12711-VCS (Del. Ch. Apr. 27, 2022) [Tesla Motors].

[75] *Lockton v. Rogers*, C.A. No. 2021-0058-SG (Del. Ch. Mar. 1, 2022) [WinView].

[76] *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).

[77] *Harcum v. Lovoi*, C.A. No. 2020-0398-PAF (Del. Ch. Jan. 3, 2022) [Roan Resources].

[78] *WinView*.

[79] *Bioverativ* (May 26, 2022).

[80] *In re BGC Partners, Inc. Deriv. Litig.*, Consol. C.A. No. 2018-0722-LWW (Del. Ch. Aug. 19, 2022) [BGC Partners].

[81] *Styslinger v. Pan*, C.A. No. 2020-0651-PAF (Del. Ch. Jan. 24, 2022) (TRANSCRIPT) [Highpower International].

[82] *Makris v. Ionis Pharmaceuticals, Inc.*, C.A. No. 2021-0681-LWW (Del. Ch. Oct. 11, 2022) (TRANSCRIPT) [Akcea Therapeutics] ($12.125mm settlement while pending a motion to dismiss claims regarding $500mm merger).

[83] *Hawkes v. Bettino*, C.A. No. 2020-0360-PAF (Del. Ch. Sept. 21, 2022) (TRANSCRIPT) [TD Ameritrade] ($31.5mm settlement while pending a motion to dismiss claims regarding $26B merger).

[84] *Tesla Motors*.

[85] *In re Match Group, Inc. Deriv. Litig.*, Consol. C.A. No. 2020-0505-MTZ (Del. Ch. Sept. 1, 2022) [Match Group].

[86] *City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, Inc.*, C.A. No. 2021-0560-PAF (Del. Ch. July 29, 2022) [Trade Desk].

[87] *The MK Haberkorn 2006 Trust v. Kien Huat Realty III Limited*, C.A. No. 2020-0619-KSJM (Del. Ch. Sept. 15, 2022) (TRANSCRIPT) [Empire Resorts] ($12mm settlement after denial of motion to dismiss claims regarding $129mm merger).

[88] *NVIDIA Corp. v. City of Westland Police and Fire Retirement System*, No. 259, 2021 (Del. July 19, 2022) [NVIDIA].

[89] *Oklahoma Firefighters Pension and Retirement System v. Amazon.com, Inc.*, C.A. No. 2021-0484-LWW (Del. Ch. June 1, 2022) [Amazon]; *Frank v. National Holdings Corp.*, C.A. No. 2021-0160-MTZ (Del. Ch. July 22, 2022) (TRANSCRIPT) [National Holdings].

[90] *Rivest v. Hauppage Digital, Inc.*, C.A. No. 2019-0848-PWG (Del. Ch. Sept. 1, 2022) [Hauppage Digital].

[91] *Digitzs Solutions*.

[92] *In re Madison Square Garden Entertainment Corp. Stockholders Litig.*, C.A. No. 2021-0468-KSJM (Del. Ch. Nov. 3, 2022) (TRANSCRIPT) [Madison Square Garden Entertainment].

[93] *Wei v. Zoox, Inc.*, C.A. No. 2020-1036-KSJM (Del. Ch. Jan. 31, 2022) [Zoox].

[94] *Digitzs Solutions*.

[95] *Deuer v. Tuf-Tug, Inc.*, C.A. No. 2022-0586-PAF (Del. Ch. Oct. 21, 2022) (TRANSCRIPT) [Tuf-Tug].

[96] *Aerojet Rocketdyne* (Del. Ch. May 5, 2022).

[97] *Packsize Europe Holdings, LLC v. Wittwer*, C.A. No. 2022-0711-PAF (Del. Ch. Nov. 10, 2022) (TRANSCRIPT) [Packsize International].

[98] *Northern Gold Holdings, LLC v. REM EQ Holdings, LLC*, C.A. No. 2022-0308-LWW (Del. Ch. Oct. 10, 2022) (TRANSCRIPT) & (Nov. 16, 2022) [REM EQ Holdings].

[99] *Construction Industry Laborers Pension Fund v. Bingle*, C.A. No. 2021-0940-SG (Del. Ch. Sept. 6, 2022) [SolarWinds].

[100] *Lebanon County Employees' Retirement Fund v. Collis*, C.A. No. 2021-1118-JTL (Del. Ch. Dec. 15, 2022) [AmerisourceBergen].

[101] *Garfield v. Allen*, C.A. No. 2021-0420-JTL (Del. Ch. May 24, 2022) [ODP].

[102] *McRitchie v. Zuckerberg*, C.A. No. 2022-0890-JTL (Del. Ch. Oct. 3, 2022) (COMPLAINT) [Meta Platforms].

[103] *UpHealth* (June 8 & 24, 2022) (TRANSCRIPTS).

[104] *City of Warren General Employees' Retirement Sys. v. Roche*, C.A. No. 2019-0740-PAF (Del. Ch. Oct. 5, 2022) (TRANSCRIPT & ORDER) [Blackhawk Network] (awarding $5.6mm in attorneys' fees).

[105] 83 Del. Laws 377, § 1 (July 27, 2022); *see also GT Update: Preparation of Corporate and M&A Documents for Proposed 2022 Delaware Corporate Law Amendments*.

[106] *Knight v. Miller*, C.A. No. 2021-0581-SG (Del. Ch. Apr. 27, 2022) [Universal Health Services].

[107] Compare *ODP*.

[108] *Ho v. Wood*, C.A. No. 2021-1006-KSJM (Del. Ch. Dec. 20, 2022) (TRANSCRIPT) [Roku].

[109] *In re Vaxart, Inc. Stockholder Litig.*, C.A. No. 2020-0767-PAF (Del. Ch. June 3, 2022) [Vaxart].

[110] *MPM Holdings Inc. v. Federal Insurance Co.*, C.A. No. N20C-07-014 MMJ CCLD (Del. Super. Mar. 17, 2022) [MPM Holdings].

[111] 83 Del. Laws 377, § 1 (July 27, 2022).

[112] *Avantus Federal, LLC v. Cherqaoui*, C.A. No. 2022-0215-LWW (Del. Ch. Mar. 24, 2022) [Avantus Federal].

[113] *Kodiak Building Partners, LLC v. Adams*, C.A. No. 2022-0311-MTZ (Del. Ch. Oct. 6, 2022) [Northwest Building Components].

[114] *Hub Group, Inc. v. Needham*, C.A. No. 2022-0840-SG (Del. Ch. Oct. 18, 2022) (TRANSCRIPT) [Hub Group].

[115] *In re 1847 Goedeker Inc.*, Consol. C.A. No. 2022-0219-SG (Del. Ch. May 27, 2022) [1847 Goedeker].

[116] *In re ExecVision, Inc.*, C.A. No. 2022-0588-NAC (Del. Ch. Oct. 27, 2022) (TRANSCRIPT) [ExecVision]. As noted in this case, the Delaware Secretary of State has a reputation for expeditious service. Likewise, the Court of Chancery has demonstrated great responsiveness to petitions for judicial validation under Section 205, including with respect to complex transactions involving certificates filed in Delaware. A sample survey of such petitions reflected that relief in uncontested proceedings was generally granted in well under two months and frequently on a timeframe closer to one to four weeks.

[117] *XRI Investment*.