

# Update | Delaware Corporate Law

January 2024

## Year-End 2023 Delaware Corporate and M&A Law Update

The Delaware courts have closed out a hectic year during which a wide range of important corporate and M&A issues were addressed. These reflect practice-changing updates and refinements to the law, and the developments arising in the final portion of 2023 are summarized briefly in this GT Update.

*\*\*Our previous 2023 Delaware Corporate and M&A Law Updates can be found at the following links: [Early 2023](#) and [Mid 2023](#).\*\**

### CORPORATE

**Challenges to Enforceability of Restrictive Covenants.** Restrictive covenants purporting to prevent employees, independent contractors, and/or equityholders from working for competitors, soliciting employees and customers, and/or using business and confidential information, have become a frequent issue in Delaware litigation involving companies with headquarters and operations outside of Delaware. The Delaware Court of Chancery has repeatedly noted that it will not “blue-pencil” overbroad covenants and instead will refuse to enforce them. The Delaware Court of Chancery has also increasingly engaged in conflict of laws analyses between Delaware law and the law of other relevant jurisdictions notwithstanding express governing law provisions in favor of Delaware law and/or the application of Delaware’s internal affairs doctrine where the covenants are embedded in the governing documents of the Delaware entity. In one case, a Delaware court strongly urged that

such disputes be channeled to other venues (e.g., principal place of business or jurisdiction of employment activities/residence) as a policy matter and recommended that the Delaware Supreme Court accept an interlocutory appeal to rule on the foregoing legal and policy issues.<sup>1</sup>

**Officer Oversight Claims Held to Same Standard as Directors.** The Delaware Court of Chancery expressly held for the first time in January 2023 that corporate officers have oversight obligations as part of their fiduciary duties that are equivalent to those of corporate directors. The court recently rejected an oversight claim against an officer on the grounds that the allegations failed to demonstrate a breach of the duty of loyalty because sufficient facts were not alleged to support a reasonable inference that the fiduciary acted in bad faith. The court specified that it was analyzing the oversight claim under the same high standard applicable to oversight claims against directors, which arise from the duty of good faith, which is a subsidiary element of the duty of loyalty.<sup>2</sup>

**Board’s Rejection of Dissident Nomination Upheld While Striking Down Preclusive and Ambiguous Advance Notice Bylaws.** Advance notice bylaws for stockholder nominations of director candidates are common for public companies but remain subject to Delaware legal standards, including that they provide stockholders with a fair opportunity to nominate director candidates. In a recent case, the Delaware Court of Chancery, while determining that a stockholder had failed

to comply with advance notice bylaws and that the board had rightly rejected the stockholder's notice, found that four provisions were designed to thwart a proxy contest, entrench incumbents, and remove any possibility of a contested election and were therefore unenforceable (though the court rejected a request to void the bylaws in total). The unenforceable provisions pertained to disclosure of (1) agreements, arrangements, or understandings (AAU) between the stockholder and a universe of loosely associated persons that the court viewed as overbroad and unworkable (the court noted that a reasonably tailored AAU provision generally promotes a proper corporate objective and could be enforceable); (2) similar AAUs involving a nominee that were viewed as similarly flawed and also ambiguous and potentially draconian as to the applicable term; (3) support of any type (not only financial support, which may have been permissible) for the stockholder and nominees that the court viewed as ambiguous and unreasonably impeding the stockholder franchise; and (4) ownership of company stock including synthetic, derivative, short, and hedging positions that the court found indecipherable as drafted (though potentially legitimate in concept) and overly broad as applicable to persons associated with the stockholder.<sup>3</sup>

**Forum Selection of Delaware Court of Chancery and Superior Court.** Forum selection provisions allow parties to ensure appropriate resolution of governance and contractual disputes, and it has become common for parties with a nexus to Delaware to select the Court of Chancery. An exclusive selection of the Court of Chancery, however, may exclude the Delaware Superior Court and its Complex Commercial Litigation Division (CCLD), which may be the preferable or necessary court for legal and contract claims. In a recent dispute over noncompete provisions in equity compensation agreements, the Superior Court determined that a Chancery exclusive-forum provision did not reflect consent to the Superior Court's jurisdiction and dismissed the complaint because it did not otherwise have jurisdiction.<sup>4</sup>

**Waiver under Investors' Rights Agreement Ineffective as to Differently Situated Investor.** Amendment and waiver provisions in a private company's governance agreements often contain detailed terms related to their binding effect on non-consenting investors and situations where the consent of specific investors is required. In a post-trial decision regarding the effect of a waiver of information rights, given on behalf of all investors, under an investors' rights agreement, the Delaware Court of Chancery determined that the waiver did not bind a non-consenting stockholder because the waiver did not apply "in the same fashion" to the consenting and non-consenting stockholders. That investor had previously filed a demand for information and engaged in litigation, such that the court viewed the waiver as "clearly targeted" at that investor. As several prevalent form stockholder agreements, including certain National Venture Capital Association (NVCA) form documents, include amendment language similar to the waiver language at issue in this case, particular care should be given when evaluating what approvals are necessary to amend stockholder agreements going forward.<sup>5</sup>

**Vice President Does Not Necessarily Qualify as Officer for Advancement and Indemnification.** The definition of a corporate officer is not fixed for all purposes under Delaware law, and there may be disputes over whether a vice president or other title qualifies as an officer. The Delaware Court of Chancery recently deferred a decision regarding whether a public company's vice president was an officer entitled to mandatory advancement under that company's bylaws. The court focused on the company's governance documents and practices, including whether vice presidents were defined by the bylaws as officers and whether vice presidents were elected by the board. The existence of material factual disputes related to those issues precluded an order on the pleadings that the vice president was entitled to advancement of fees.<sup>6</sup>

**Chancery Magistrates Addressing Litigation over Books and Records Inspection Demands.** Over the past few years, there has been a marked increase in demands to inspect corporate books and records. The Delaware Court of Chancery sought to lighten this workload by assigning inspection cases to magistrates in Chancery.<sup>7</sup> The magistrates have heard many such cases and issued reports for review by the chancellor and vice chancellors, including recommendations to further curb potentially inappropriate uses of such inspection rights. In one recent case, a magistrate recommended rejection of an LLC member’s demand (including a request to tailor the request to the extent the court viewed it as overbroad), because the stated purpose of valuing the LLC interest was found to be a pretext for seeking control and leverage against the company.<sup>8</sup> Another magistrate, in granting some inspection requests in a post-trial final report, limited a director’s demanded inspection on the basis that the director had purposes beyond exercise of his fiduciary duties as a director—specifically to provide information to a state agency investigating the company and potentially to take control of the company.<sup>9</sup> In a case where the magistrate found that the company had engaged in “glaringly egregious conduct,” the magistrate recommended partially shifting fees, while noting that the company’s conduct in the aggregate reflected “an unfortunate pattern of unreasonable positions designed to unnecessarily complicate the proceedings.”<sup>10</sup>

**Corporate Benefit and Mootness Fees.** Under the corporate benefit doctrine, a stockholder and its counsel may be entitled to an award by making the company aware of a potential issue that is remediated to the company’s benefit. In a recent Delaware Court of Chancery case, counsel to a hedge fund-stockholder received an unusually large fee of \$18 million for their work on a complaint challenging a stockholder rights plan (a.k.a., poison pill) and bylaws that restricted dissident stockholder nominations, which were adopted after the stockholder sought to nominate two

directors. Following the stockholder’s complaint challenging the rights plan and bylaws, the company retracted the bylaws and eliminated certain change-of-control contract provisions with the company’s CEO, which the court viewed as beneficial to the stockholder base.<sup>11</sup>

**Broad Applicability of Doctrine of Corporate Opportunity.** Delaware courts have explained that the doctrine of corporate opportunity, which prevents corporate fiduciaries from usurping certain opportunities rightly belonging to the corporation, will be applied in broad manner that tends to view opportunities as those of the company (at least on a motion to dismiss). The Delaware Court of Chancery has applied that approach in determining whether an opportunity falls within the corporation’s line of business and whether the corporation is financially able to exploit the opportunity. As to the company’s financial wherewithal, the court found it sufficient that the corporation asserted it could have raised funds to exploit the opportunity.<sup>12</sup>

**Principles of Judicial Interpretation of Ambiguous Provisions of a Voting Agreement.** Delaware is generally viewed as a strong contractarian state, allowing contractual parties to reach agreements that courts will respect, including certain terms prescribing how courts will interpret the contract. The Delaware Court of Chancery recently enforced a provision that a court could not consider drafting history in resolving disputes, while the court proceeded to consider other extrinsic evidence to interpret an ambiguous voting commitment provision. In this decision, the court also methodically analyzed provisions of a voting commitment—e.g., the court noted that in isolation, the term “recapitalization” is ambiguous and, in the context of that voting agreement, it reasonably may have included an increase in the number of the corporation’s authorized shares.<sup>13</sup>

## MERGERS & ACQUISITIONS

**Third-Party Beneficiary Standing, Lost-Premium Damages, and *Con Ed* Provisions.** Stockholders' standing as third-party beneficiaries under a merger agreement is a question that arises occasionally in M&A litigation. In the 2005 *Con Ed* federal court decision, the 2nd Circuit held that stockholders did not have third-party beneficiary standing to sue for the premium lost when a busted deal failed to close. In a recent Delaware Court of Chancery case, the underlying merger agreement permitted the target company to sue for lost-premium damages, while disclaiming stockholders as third-party beneficiaries. The court, however, explained that a provision exclusively entitling the company to lost-premium damages was unenforceable, because it would allow for damages in excess of expectation damages. The court inferred that the no-third-party-beneficiaries provision may have been intended not to apply in narrow circumstances where stockholders sought lost-premium damages, though the court also noted that stockholders could not pursue lost-premium damages while the company was seeking specific performance (as the company had in the context of this deal, which ultimately closed). The court also suggested that the stockholders may not have been able to pursue lost-premium damages because the company had not been appointed as their agent for that purpose. The result of this decision was that the stockholder, who had brought lost-premium damages claims that were mooted when the merger closed, was not entitled to a mootness fee because the lost-premium claim was not meritorious when filed while the company was seeking specific performance.<sup>14</sup>

## RELATED TOPICS AND OUTLOOK

**Year-End Trends Related to Delaware Corporate and M&A Law.** Delaware corporate law saw many important developments during 2023 that will continue to be litigated and explored in 2024. In addition to those mentioned elsewhere in this GT Update, we will be watching the Delaware Supreme

Court for important appeals regarding the application of entire fairness review to non-squeeze-out controlling stockholder litigation and the scope of stockholder class voting rights on charter amendments.<sup>15</sup> In the Delaware Court of Chancery, we'll be watching for guidance regarding fiduciary duties to stockholders with diversified portfolios.<sup>16</sup> We will also be watching for further developments in disputed aspects of forum selection provisions that have been litigated in federal and California state courts.<sup>17</sup>

**Corporate Transparency Act Takes Effect with Deadlines for New and Pre-Existing Reporting Companies.** The Corporate Transparency Act became effective January 1, 2024. Non-exempt reporting companies created or registered to do business before 2024 will have until January 1, 2025, to file the required beneficial ownership information with FinCEN, while non-exempt companies created or registered to do business in 2024 must make their filings within 90 days after being created or registering for business.<sup>18</sup>

**Drafting Considerations: Revisions to National Venture Capital Association Model Investment Agreements and Commentary on "Material" in Corporate and M&A Documents.** The NVCA's widely used model investment agreements have been updated. After an update to the model certificate of incorporation in September, the model voting, investors' rights, stock purchase, and right of first refusal and co-sale agreements were revised in October. Some changes account for developments in Delaware law, including with respect to the drag-along and claim waivers in the voting agreement. As with all open-source form documents, the updated NVCA documents do not address every potential investment term or every negotiating point in a venture transaction, and parties should carefully consider which form provisions may need to be modified to appropriately address potential drafting gaps and/or terms applicable to specific companies and investors.<sup>19</sup> Separately, a noted commentator on corporate drafting has published an article (viewed favorably by at least one member of the Delaware Court of Chancery

who previously co-authored with that commentator) explaining that “material” can be used on a spectrum spanning from “nontrivial” to “dealbreaker.” The article proposes clarification that would be particularly relevant

to common provisions in agreements used in mergers, stock, and asset deals.<sup>20</sup>

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<sup>1</sup> *Sunder Energy, LLC v. Jackson*, C.A. No. 2023-0988-JTL (Del. Ch. Nov. 22, 2023, and Del. Ch. Dec. 22, 2023). See also J. Travis Laster, *A Coyle-Inspired Idea For Restrictive Covenants*, discussing *Sunder Energy*; John F. Coyle, *Parsing Invalidating Statutes (Part I)*, Transnational Litigation Blog (Nov. 27, 2023), and the possibility of legislative solutions; *Centurion Service Group, LLC v. Eric Wilensky*, C.A. No. 2023-0422-MTZ (Del. Ch. Aug. 31, 2023); *Intertek Testing Services NA, Inc. v. Eastman*, C.A. No. 2023-0853-LWW (Del. Ch. Mar. 16, 2023); *Hightower Holding, LLC v. John Gibson*, C.A. No. 2022-0086-LWW (Del. Ch. Feb. 9, 2023); *Ainslie v. Cantor Fitzgerald, L.P.*, C.A. No. 2022-9436-MTZ (Del. Ch. Jan. 4, 2023); *FP UC Holdings, LLC v. James W. Hamilton, Jr.*, C.A. No. 2019-1029-JRS (Del. Ch. Mar. 27, 2020); *Kodiak Building Partners, LLC v. Adams*, 2022 WL 5240507 (Del. Ch. Oct. 6, 2022).

<sup>2</sup> *Segway Inc. v. Cai*, C.A. No. 2022-1110-LWW (Del. Ch. Dec. 14, 2023); see also Frank Placenti, Emily Ladd-Kravitz, Marina Olman-Pal, Kyle Freeny, Dmitriy Tartakovskiy, Nathan Emeritz, Justin Mann, et al., *GT Alert: Delaware Court of Chancery Determines that Corporate Officers Owe Duty of Oversight: Practical Considerations* (Feb. 6, 2023).

<sup>3</sup> *Kellner v. AIM Immunotech, Inc.*, C.A. No. 2023-0879-LWW (Del. Ch. Dec. 28, 2023).

<sup>4</sup> *Cargill Incorporated v. Rossi.*, C.A. No. N23C-03-047 SKR CCLD (Del. Super. Oct. 16, 2023). See also Anthony Clark, Nathan Emeritz, Justin Mann, et al., *Mid 2023 Delaware Corporate and M&A Law Update*, discussing *EpicentRx, Inc. v. EpiRx, L.P.*, Super. Ct. No. 37-2022- 00015228 (Cal. App. 4th Sept. 21, 2023).

<sup>5</sup> *Schreiber v. Hanzo Corp.*, C.A. No. 2022-0451-KSJM (Del. Ch. Sept. 21, 2023) (TRANSCRIPT). This language is similar to the phrase “applies to all Investors . . . in the same fashion” that currently appears in NVCA model agreements including Section 7.8(a) of the Model Voting Agreement. Compare Section 7.8(e)(B) of the NVCA Model Voting Agreement providing that Key Holder consent is not required for an amendment or waiver if it doesn’t “adversely affect the rights of the Key Holders in a manner that is different than the effect on the rights of the other parties.” The latter formulation, focusing on the effect on rights, instead of the application to investors, arguably tracks more closely the framing of Section 242(b)(2) of the Delaware General Corporation Law, which requires approval by a class of stockholders if a charter amendment would “alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely.” This portion of Section 242(b)(2) has generally been interpreted by Delaware courts, as recently as this year, as focused on the changes in the terms of the stock and not on the impact of the amendment on particular stockholders. See Nathan Emeritz, Justin Mann, Emily Ladd-Kravitz, et al., *Early 2023 Delaware Corporate and M&A Law Review*, discussing *Electrical Workers Pension Fund, Local 103, IBEW v. Fox Corp.*, C.A. No. 2022-1007-JTL (Del. Ch. Mar. 29, 2023) (TRANSCRIPT), citing *Hartford Accident & Indem. Co. v. W. S. Dickey Clay Mfg. Co.*, 21 A.2d 178, 184 (Del. Ch. 1941), aff’d, 24 A.2d 315 (Del. 1942); *Orban v. Field*, C.A. No. 12820 (Del. Ch. Apr. 1, 1997).

<sup>6</sup> *Gilbert v. Unisys Corporation*, C.A. No. 2023-0513-PAF (Del. Ch. Oct. 27, 2023) (TRANSCRIPT); see also *Centrella v. Avantor, Inc.*, C.A. No. 2022-0876-NAC (Del. Ch. Nov. 13, 2023) (TRANSCRIPT) (addressing whether a vice president, who also may have served as an employee of a subsidiary, was an officer entitled to advancement).

<sup>7</sup> Magistrates have offered expedited proceedings that remain subject to review by the chancellor or a vice chancellor and less expedited proceedings that are not subject to further judicial review. See *Next Generation TC FBO Patrick Daly IRA 2098 v. GenHydro, Inc.*, C.A. No. 2023-1148-BWD (Del. Ch. Dec. 8, 2023) (ORDER) (citing Delaware Court of Chancery Rule 144(h)).

<sup>8</sup> *Leistner v. Red Mud Enterprises, LLC*, C.A. No. 2023-0503-SEM-SG (Del. Ch. Dec. 8, 2023) (adopting magistrate’s report after *de novo* review); see C.A. No. 2023-0503-SEM-SG (Sept. 26, 2023) (TRANSCRIPT) (Magistrate’s Final Report).

<sup>9</sup> *Mellado v. ACPDO Parent Inc.*, C.A. No. 2023-0791-BWD (Del. Ch. Nov. 21, 2023); see also C.A. No. 2023-0791-BWD (Dec. 4, 2023) (addressing Plaintiff’s requests for clarification of the Magistrate’s Final Report).

<sup>10</sup> *Myers v. Academy Securities, Inc.*, C.A. No. 2023-0241-BWD (Del. Ch. Oct. 2, 2023) (ORDER) (finding that the company had sought reasons to deny inspection potentially not in good faith, attempted to cancel

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the stockholder's shares, stated and then dropped arguments that the stockholder had breached fiduciary duties and a separation agreement, alleged irrelevant violation of regulatory requirements, and "raised other baseless factual assertions and legal red herrings"); see No. 2023-0241-BWD (July 27, 2023) (Magistrate's Final Report); No. 2023-0241-BWD (Aug. 3, 2023) (approving and adopting Magistrate's final report).

<sup>11</sup> *Politan Capital Management, LP v. Kiani*, C.A. No. 2022-0948-NAC (Del. Ch. Nov. 17, 2023) (ORDER). The Delaware Court of Chancery has also recently awarded corporate benefit and mootness fees for supplemental disclosures made in response to stockholders' allegations that previous disclosures were inadequate with respect to potential conflicts of directors and board advisors in connection with proposed mergers. See, e.g., *Assad v. Botha*, C.A. No. 2022-0691-LWW (Del. Ch. Oct. 30, 2023) (awarding \$100,000 on a fee request of \$850,000); *Allen v. Harvey*, C.A. No. 2022-0248-MTZ (Del. Ch. Oct. 30, 2023) (awarding \$450,000 on a fee request of \$600,000).

<sup>12</sup> *Global Discovery Biosciences Corp. v. Harrington*, C.A. No. 2022-1132-SG (Del. Ch. Dec. 1, 2023); see also *Wolfe v. Quantum Automotive Intelligence, Inc.*, C.A. No. 2022-0884-NAC (Del. Ch. Nov. 9, 2023) (TRANSCRIPT) (declining to dismiss a claim based on alleged usurpation of corporate opportunity where a putative release of such claims may have been given on an interested and unenforceable basis).

<sup>13</sup> *Texas Pacific Land Corp. v. Horizon Kinetics LLC*, C.A. No. 2022-1066-JTL (Del. Ch. Dec. 1, 2023).

<sup>14</sup> C.A. No. 2022-0666-KSJM (Del. Ch. Oct. 31, 2023) discussing *Consolidated Edison, Inc. v. Northeast Utilities*, 426 F.3d 524 (2d Cir. 2005).

<sup>15</sup> *In re Match Group, Inc. Deriv. Litig.*, No. 368, 2022 (Del.) (appellate argument held Dec. 13, 2023) appealing Consol. C.A. No. 2020-0505-MTZ (Del. Ch. Sept. 1, 2022); *In re Fox Corporation/Snap Inc. Section 242 Litig.*, Consol. No. 120, 2023 (Del.) (appellate argument held Oct. 18, 2023) appealing Consol. C.A. Nos. 2022-1007-JTL & 2022-1032-JTL (Del. Ch. Mar. 29, 2023) (TRANSCRIPT).

<sup>16</sup> *McRitchie v. Zuckerberg*, C.A. 2022-0890-JTL (Del. Ch.) (oral argument on a motion to dismiss held Dec. 20, 2023).

<sup>17</sup> *Lee v. Fisher*, No. 21-15923 (9th Cir. June 1, 2023); *Seafarers Pension Plan v. Bradway*, 23 F.4th 714 (7th Cir. 2022); *EpicentRx, Inc. v. Superior Court (EpiRx, L.P.)*, Docket No. S282521 (Cal. Dec. 13, 2023), granting review of Super. Ct. No. 37-2022- 00015228 (Cal. App. 4th Sept. 21, 2023).

<sup>18</sup> See Marina Olman-Pal, Kyle R. Freeny, Robert Mangas, and Claudio J. Arruda, *Corporate Transparency Act: Compliance Deadline Approaching for FinCEN's Beneficial Ownership Information Reporting Requirements* (Oct. 2023).

<sup>19</sup> National Venture Capital Association, *Model Documents (Oct. 2023)*.

<sup>20</sup> Kenneth A. Adams, *The Word Material Is Ambiguous in Contracts, Why That's a Problem, and How to Fix It* (Nov. 2023).