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CLIENT ALERT

2023 Delaware Year-End Review: M&A and Shareholder Litigation

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Over the last year, the Delaware Supreme Court and the Court of Chancery issued a wealth of opinions addressing many issues of interest to M&A practitioners. Some of those decisions clarified longstanding principles of Delaware corporate law while others broke new ground. For example, this past year the Court of Chancery, for the first time, confirmed that corporate officers owe a duty of oversight and provided some guidance on the contours of that duty. The Court recently also held, for the first time, that controlling stockholders owe certain limited fiduciary duties when exercising their voting power to influence corporate decision-making. In a closely watched case involving officer exculpation bylaws, the Delaware Supreme Court affirmed the Delaware courts' historical approach to its definition of the rights, powers, and preferences of classes of stock under the Delaware General Corporation Law ("DGCL"). The Supreme Court also affirmed opinions finding that transactions with controllers were entirely fair despite certain flaws in the process. The Court of Chancery demonstrated that it remains willing to dismiss weak claims at the pleading stage, but it also issued a number of major post-trial opinions that resulted in significant damages awards. Recent opinions also offer guidance on several other important and recurring issues regarding advance notice bylaws, special litigation committees, and attorneys' fees. These opinions underscore the continuing need for practitioners to stay abreast of the latest developments in Delaware law.

***Caremark* Claims and the Fiduciary Duty of Oversight**

Over the past year, there were a number of high-profile decisions involving derivative claims against corporate directors or officers for alleged failure of oversight—commonly known as *Caremark* claims.[1] There are two ways for a stockholder to allege a violation of the fiduciary duty of oversight: (1) an "Information-Systems Claim," based on an utter failure to implement any reporting or information system or controls and (2) a "Red-Flags Claim," based on a failure to respond when the systems or controls in place generate red flags indicating wrongdoing.

In *In re McDonald's Corporation Stockholder Derivative Litigation*, the Court of Chancery held—for the first time—that officers, like directors, owe a fiduciary duty of oversight under Delaware law ("***McDonalds I***").[2] The case arose from allegations of sexual harassment at the company, including by the Chief Executive Officer ("CEO") and the Chief People Officer ("CPO"). The Court denied a motion to dismiss claims against the CPO, finding that plaintiffs had sufficiently pleaded that the CPO had breached his fiduciary duty of oversight, including by consciously and in bad faith ignoring red flags regarding sexual harassment, as well as by breaching his fiduciary duty of loyalty by "committing acts of sexual harassment, violating company policy, violating positive law, and subjecting the Company to liability."

The Court made clear that the scope of the duty of oversight for officers is subject to "context-driven application" because some officers, like a CEO, have a "company-wide remit," but other officers have "particular areas of responsibility and [their] duty to make a good faith effort to establish an information system only applies within that area." The Court indicated that although an officer's duty to report red flags would generally be limited to their purview, "a particularly egregious red flag" outside their domain "might require an officer to say something."

However, other opinions from the Delaware courts have reaffirmed that *Caremark* claims remain among the most difficult types of claims to plead successfully. For example, in the McDonald's case, although the complaint had pleaded what the Court of Chancery described as "brutal" facts regarding sexual harassment and misconduct at the company, the Court nevertheless held the plaintiffs had not alleged facts that would be sufficient to plead a *Caremark* claim on the basis that the directors failed to respond or otherwise had acted in bad faith ("***McDonalds II***").[3] Among other things, the plaintiffs claimed that the McDonald's board should not have provided the CPO with a "last chance" before terminating him, and that it committed waste by permitting the CEO to enter into a without-cause separation agreement rather than terminating him for cause. The Court determined that the board's decisions were either protected by the business judgment rule or that the board had taken steps to address any identified misconduct—including by implementing new training programs and revising company policies—thereby negating the assertion that they had "failed to respond" to red flags.

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[1] *In re Caremark Int'l. Deriv. Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[2] *In re McDonald's Corp. S'holder Deriv. Litig.*, 289 A.3d 343 (Del. Ch. 2023).

[3] *In re McDonald's Corp. S'holder Deriv. Litig.*, 291 A.3d 652 (Del. Ch. 2023).

Claims against officers will be held to this same high pleading standard. In ***Segway Inc. v. Cai***, the company sued its former president, alleging that she breached her duty of oversight by ignoring issues with certain customers that resulted in an increase in uncollected accounts receivable and negatively impacted the company's profitability.[4] The Court of Chancery dismissed the claims, finding that the company had not pleaded facts sufficient to show she had acted in bad faith. The Court noted that "[o]fficers' management of day-to-day matters does not make them guarantors of negative outcomes from imperfect business decisions."

The Delaware Supreme Court also summarily affirmed the Court of Chancery's 2022 dismissal of a *Caremark* claim arising from a cybersecurity breach at SolarWinds Corp.[5] Plaintiffs alleged that the directors breached their fiduciary duties of loyalty and care by failing to implement or oversee management of the Company's "mission critical" cybersecurity risks in the years leading up to the cyberattack. The Court of Chancery had previously found that the Board's inability to prevent a crime perpetrated against SolarWinds did not constitute bad faith under *Caremark.*[6] The Supreme Court's affirmance provides some comfort to corporate boards and management that not every corporate trauma will support a *Caremark* claim.

Transactions Involving Controlling Stockholders

Challenges to transactions involving controlling stockholders remained a focus of litigation over the past year. ***In re Oracle Corporation*** arose out of Oracle's 2017 acquisition of NetSuite.[7] At the time of the transaction, Oracle founder Larry Ellison held about a quarter of the voting equity in Oracle and approximately 40% of the outstanding equity in NetSuite. Oracle stockholders brought a derivative action alleging that Oracle overpaid to acquire NetSuite. The plaintiffs asserted two theories that they argued warranted entire fairness review rather than business judgment deference. First, the plaintiffs alleged that Ellison, as Oracle's founder and significant stockholder, used his position to influence the special committee tasked with negotiating the transaction. Second, the plaintiffs alleged that Ellison (along with Oracle's CEO) concealed facts and misled the special committee, thereby perpetrating a "fraud on the board."

Based on a full trial record, the Court determined that Ellison did not exercise control of Oracle with respect to this particular transaction. Though he was Oracle's founder and remained a board member, Ellison had relinquished his role as CEO and became "CTO" three years prior to the transaction, had completely recused himself from nearly all discussions related to the matter (specifically with respect to the Special Committee), and in fact had initially *opposed* the idea of engaging in the acquisition of NetSuite. The Court also highlighted various instances where the board was not afraid to stand opposed to

4 *Segway Inc. v. Cai*, No. 2022-1110-LWW, 2023 WL 8643017, at *1 (Del. Ch. Dec. 14, 2023).

5 *Constr. Indus. Laborers Pension Fund v. Bingle*, 297 A.3d 1083 (Del. 2023) (TABLE).

6 *Constr. Indus. Laborers Pension Fund v. Bingle*, C.A. No. 2021-0940-SG, 2022 WL 4102492 (Del. Ch. Sept. 6, 2022); ***see also*** our 2022 Review, which discussed the case in more detail.

7 *In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG, 2023 WL 3408772 (Del. Ch. May 12, 2023).

Ellison. Although the Court determined that it was more likely than not that Ellison could have exerted control in respect of a particular transaction, it found that Ellison did not do so here given (i) the fully empowered Special Committee that explored alternatives and negotiated forcefully with NetSuite and (ii) the fact that "Ellison scrupulously avoided any discussion of the transaction with the Special Committee." The Court of Chancery also rejected plaintiffs' "fraud on the board" theory, again because the Special Committee was fully empowered to negotiate and was materially informed of all information necessary to make decisions in connection with the negotiations.[8]

There was a similar result in ***City of Hialeah Employees' Retirement System v. Insight***, in which the Court of Chancery dismissed claims arising from nCino, Inc.'s $1.2 billion acquisition of SimpleNexus LLC.[9] The plaintiff claimed that a venture capital fund, Insight Venture Partners, stood on both sides of the transaction and had caused nCino to overpay. The Court found that a majority of nCino's board of directors was disinterested and independent of Insight, and so the plaintiff had not shown that a stockholder litigation demand would be futile, as required to assert a derivative claim on behalf of nCino under Delaware law. The Court noted that only a single director on nCino's seven-member board was directly employed by Insight, that Insight's lone director had been walled off from the transaction process, and that Insight held only a minority stake in nCino at the time the complaint was filed. The Court also held that Insight's influence over the election of nCino's directors as 32% stockholder—as well as the plaintiff's attempts to draw ties between Insight and the nCino directors—did not impair the nCino directors' ability to independently consider litigation against Insight.

Although controlling stockholders can avoid the application of the rigorous "entire fairness" standard of review by empaneling a special committee and subjecting a transaction to a majority-of-the-minority vote,[10] two opinions this year showed that even if controllers decide not to do so, it nevertheless is possible to prove that a transaction was entirely fair to a company's stockholders. In both ***In re Tesla Motors*** and ***In re BGC Partners***, the Delaware Supreme Court affirmed decisions by the Court of Chancery holding that even though there were certain flaws in the sales process, the result in each case was entirely fair.[11] Further, the Supreme Court recognized that there may be reasons why a board decides not to apply *MFW*'s dual protections, reflecting the Delaware courts' recognition that commercial realities do not require a one-size-fits-all approach.

The law regarding controllers continues to evolve. In early 2024, the Court of Chancery issued a ruling deciding—as a matter of first impression—the fiduciary duties owed and the standard of review that will apply when a controlling stockholder exercises its voting power to influence corporate decision-making.[12] In ***In re Sears Hometown & Outlet Stores, Inc.***

[8] A final form of order has not yet been entered, and no appeal has yet been taken.

[9] *City of Hialeah Employees' Ret. Sys. on behalf of nCino, Inc. v. Insight Venture Partners, LLC*, C.A. No. 2022-0846-MTZ, 2023 WL 8948218, at *1 (Del. Ch. Dec. 28, 2023).

[10] *Kahn v. M & F Worldwide Corp.* ("*MFW*"), 88 A.3d 635, 645 (Del. 2014).

[11] *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667 (Del. 2023); *In re BGC Partners, Inc. Deriv. Litig.*, 303 A.3d 337 (Del. 2023) (TABLE); *see also* our 2022 Review, which discussed the Court of Chancery's ruling in these cases.

[12] *In re Sears Hometown & Outlet Stores, Inc. S'holder Litig.*, No. 2019-0798-JTL, 2024 WL 262322 (Del. Ch. Jan. 24, 2024).

S'holder Litig., billionaire Eddie Lampert used his voting power as controlling stockholder to create certain procedural hurdles for (but not expressly prohibit) a liquidation plan that he did not support. Lampert also removed and replaced two of the three directors serving on the special committee that had endorsed the liquidation plan. The Court found that such action is not per se unlawful. But the Court held that when a controlling stockholder takes action to change the status quo, it owes limited fiduciary duties to the corporation and the minority stockholders. However, the Court said that, in exercising its voting powers as a stockholder, a controller need not meet the higher standard applied to directors, who must act affirmatively to promote the best interests of the corporation. The Court also held that the controlling stockholder's actions to change the status quo are subject to the "enhanced scrutiny" standard of review, given the subtle conflicts at play. The ruling has important implications for controllers, including private equity sponsors, which are discussed in more detail in our client alert, available here.

Conflicted Management

This past year saw several major post-trial decisions issued by the Court of Chancery. Two—*Mindbody* and *Columbia Pipeline*—were *Revlon*-style[13] claims involving allegations of conflicted management that resulted in significant damages awards. In both cases, plaintiffs succeeded in proving liability not only for breach of duty of loyalty and disclosure by conflicted management, but also for aiding and abetting the breach by the buyer—a difficult claim to prove because it requires proving "knowing participation" in the breach by the buyer.

In re Mindbody, Inc. Stockholder Litigation concerned the 2019 take private of Mindbody by private equity firm Vista Equity Partners Management, LLC.[14] Stockholder plaintiffs claimed that the CEO of Mindbody breached his fiduciary duties of loyalty and disclosure in connection with the merger by tilting the process in favor of Vista and failing to disclose material facts about the sale process in the proxy. They also claimed that Vista aided and abetted those breaches. Following a trial, and applying enhanced scrutiny under *Revlon*, the Court of Chancery concluded that plaintiffs had proven a breach of fiduciary duty by the CEO, based on the CEO's well-documented desire to monetize his holdings of Mindbody stock, coupled with an extensive record of meetings and communications between the CEO and Vista without the involvement or knowledge of the board. The Court held that this was sufficient to prove that the CEO "did not strive in good faith to pursue the best transaction reasonably available." The Court also found that the CEO breached his duty of disclosure by failing to disclose in the proxy the full extent of his interactions with Vista. The Court then found that Vista aided and abetted the CEO's breach of duty of disclosure by failing to correct the proxy materials to include a full and fair description of Vista's interactions with the CEO—where the record showed that Vista had reviewed the proxy materials and was contractually obligated to correct any material omissions. In other words, the Court held that Vista "knowingly participated in the breach by not speaking up." The Court awarded $1 per share in damages for the breach of loyalty, because the record

[13] *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173 (Del. 1986).

[14] *In re Mindbody, Inc., S'holder Litig.*, C.A. No. 2019-0442-KSJM, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023).

demonstrated that Vista would have increased its bid by $1 per share but for the breach. In the alternative, the Court awarded $1 per share in nominal damages for the disclosure breach, because plaintiffs did not prove reliance or causation (though plaintiffs were not entitled to a double recovery).[15]

A few months after the *Mindbody* post-trial opinion, the Court of Chancery issued a nearly 200-page post-trial opinion in ***In re Columbia Pipeline Group Merger Litigation***, finding that the buyer of Columbia Pipeline, TC Energy Corp. ("TransCanada") aided and abetted breaches of duty by the CEO and CFO of Columbia.[16] The CEO and CFO had previously settled; only TransCanada went to trial. Again applying enhanced scrutiny under *Revlon*, the Court first concluded that the CEO and CFO breached their duties of loyalty by tilting the sales process in favor of TransCanada to further their own goals of retiring and collecting material change-of-control benefits. The Court found that, rather than engaging in arm's-length bargaining with TransCanada, the CEO and CFO repeatedly undercut Columbia's bargaining leverage through "solicitous responses and a lack of pushback." The Court also found that they violated their duty of disclosure by failing to adequately inform the stockholders about their communications with TransCanada. The Court then found that TransCanada knowingly participated in the breaches and "exploited" the conflict, and was therefore liable for aiding and abetting breaches of fiduciary duty. TransCanada repeatedly and knowingly violated a standstill agreement between Columbia and TransCanada, and then reneged on a $26 per share agreement in principle, lowered its bid to $25.50, and made a coercive threat that the standstill prohibited. TransCanada also failed to correct false statements in the proxy statement. For damages on the sales process breaches, the Court awarded $1.00 per share, based on evidence of what TransCanada was willing to offer. For damages on the breach of disclosure violation, the Court awarded $0.50 per share in nominal damages, because plaintiffs did not prove reliance or causation. But the Court determined that, moving forward, it would apply a rebuttable presumption of reliance by stockholders on materially false statements in a proxy statement.[17]

In contrast, the Delaware courts are willing to dismiss weak claims at the pleading stage, especially where the documents incorporated by reference into a complaint directly contradict the allegations of the complaint. As one example, the disclosure claims in ***Teamsters Local 677 v. Martell*** were dismissed because the plaintiff failed to overcome *Corwin* business judgment deference,[18] reinforcing that *Corwin* cleansing remains a potent tool to use in seeking dismissal of weak claims.[19] *Martell* concerned the sale of CoreLogic, Inc. to a financial buyer for $6 billion in cash. The CoreLogic board rejected a competing bid from a strategic bidder, CoStar Group, Inc., citing, among other reasons, antitrust concerns that could have delayed closing. A stockholder of CoreLogic brought a post-closing breach of fiduciary duty claim against the CEO of CoreLogic, alleging that the "real reason" CoreLogic chose the financial buyer over the strategic buyer was because

[15] The *Mindbody* decision has been appealed to the Delaware Supreme Court, with briefing to be completed in April 2024.

[16] *In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393 (Del. Ch. 2023).

[17] A final form of order has not yet been entered, and no appeal has yet been taken.

[18] *Teamsters Local 677 Health Servs. & Ins. Plan v. Martell*, C.A. No. 2021-1075-NAC, 2023 WL 1370852 (Del. Ch. Jan. 31, 2023).

[19] *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304 (Del. 2015).

the CEO stood to retain his job post-closing with the financial buyer. The Court of Chancery concluded that the complaint failed to allege a disclosure violation, i.e., that the stockholders were not fully informed, and because there were no allegations that the stockholder vote was coerced or that the stockholders were not disinterested. The complaint relied "exclusively" on a post-closing statement by CoStar's CEO that, in strategic mergers, "'inevitably some of [senior management's] jobs go away' and 'that's a powerful motive to not do a deal.'" The Court concluded that this "generic" statement by itself was not sufficient to allege that CoreLogic's CEO was motivated to save his job or that the proxy disclosures omitted information about the CEO's post-merger employment. In deciding to dismiss the claim, the Court noted that the "factual narrative as told by the Complaint" either "obscure[d] or elide[d] integral Section 220 documents and public filings" that had "supplied the facts for the Complaint."

In dismissing the claims, the Court of Chancery evaluated board materials that had been produced to the plaintiffs through Section 220 books and records demands, and which contradicted certain of plaintiff's allegations. The decision reinforces the importance of having clear and detailed board-level records explaining the board's rationale for making certain decisions. It also reinforces the need—and fairness—of ensuring that any corporate records produced pursuant to a Section 220 demand are incorporated-by-reference into any subsequent complaint.

Exculpatory Amendments—the *Fox* and *Snap* Cases

Section 242(b)(2) of the DGCL requires a corporation to hold a stockholder class vote for amendments to a corporation's certificate of incorporation if that amendment would "alter or change the powers, preferences, or special rights of the shares" of the class. In 2022, Section 102(b)(7) of the DGCL was amended to allow Delaware corporations to include provisions in their certificates of incorporation to exculpate officers for breaches of the fiduciary duty of care under certain circumstances. The question therefore arose whether a corporation with a dual-class structure would require separate class votes of stockholders in order to amend its certificate of incorporation to add such exculpatory provisions. In ***In re Fox Corporation/Snap Inc. Section 242 Litigation***, the Court of Chancery decided that Section 242(b)(2) of the DGCL did not require a separate class stockholder vote to amend a corporate charter. The Delaware Supreme Court affirmed the ruling in early 2024, holding that the "right to sue corporate officers for damages for breach of the duty of care is not a class-based power."[20] In so holding, the Supreme Court declined to modify long-standing precedent that "powers, preferences, or special rights" referenced in Section 242 of the DGCL refer to powers, preferences, and rights expressed in a corporation's certificate of incorporation or Section 151(a) the DGCL, and does not include the ability to sue officers for breaches of the duty of care.

[20] *In re Fox Corp./Snap Inc. Section 242 Litig.*, Nos. 120 & 121, 2023, 2024 WL 176575 (Consolidated) (Del. Jan. 17, 2024), as revised (Jan. 25, 2024).

Special Litigation Committees

Should a derivative action survive the pleading stage, many companies opt to empanel a special litigation committee to make a determination as to whether continuing the litigation is in the best interests of the company. The Delaware courts' opinions analyzing the committee's work and conclusions thus provide valuable blueprints for future committees. The ***Baker Hughes*** case concerned the separation of Baker Hughes, a GE Company ("BHGE") from General Electric Company ("GE").[21] In March 2019, BHGE shareholders filed derivative actions challenging the fairness of certain transactions associated with the separation. After the Court of Chancery denied motions to dismiss, BHGE formed a special litigation committee to investigate and evaluate the allegations. After that investigation was complete, the committee moved to terminate the litigation. Stockholder plaintiffs opposed the motion, arguing that the committee was not independent, had conducted an unreasonable process, and had reached unreasonable conclusions.

Although the Court noted that the committee's work had been "imperfect"—including because the committee was comprised of only a single director, that single committee member had "exchanged a handful of messages with an investigation subject," and that the committee's report did not contain any discussion of "potential transaction advisor conflicts"—the Court nevertheless granted the motion to terminate. The Court held that the investigation was performed in good faith, the committee and its advisors were independent, and the investigation had been pursued in an unbiased manner without a predetermined conclusion. To reach this conclusion, the Court heard testimony from the committee member, and noted that the committee spent more than 6,300 hours on the investigation, including meeting with plaintiffs to understand their theories of the claims, reviewing over 110,000 documents, and interviewing 22 witnesses, which culminated in a 320-page report. The Court's own analysis was "exhaustive," reflecting that special litigation committees must undertake their work with the full understanding that the Court will carefully analyze their independence, process, and conclusions.

Director Elections and Advance Notice Requirements

The Delaware courts also issued significant rulings impacting director elections, bylaw provisions, and stockholder activism this past year. These cases reinforced the long-standing maxim that a board's actions are "twice-tested, first for legal authorization and second for equity."[22]

In ***CCSB Financial Corp. v. Totta***, CCSB had a charter provision that prohibited a stockholder from exercising more than 10% of the company's voting power in an election. The board interpreted that provision to aggregate multiple stockholders' holdings if the board perceived the stockholders to be "acting in concert" with one another, and instructed the inspector of elections not to count any votes above 10% submitted by an insurgent together with his slate of nominees and an entity affiliated with a nominee's father, which resulted in the insurgent's nominees losing the election. In the ensuing lawsuit, CCSB argued that the decision was entitled to business judgment review because the charter purported to provide the

[21] *In re Baker Hughes, a GE Co., Deriv. Litig.*, C.A. No. 2019-0201-LWW, 2023 WL 2967780 (Del. Ch. Apr. 17, 2023).

[22] *See In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1222 (Del. 2017); *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971).

board with "conclusive and binding" authority to construe the 10% voting provision as long as the board acted in good faith. Following trial on a paper record, the Court of Chancery rejected this argument, reasoning that constitutive agreements for a corporation—as opposed to agreements for other entities, such as partnerships or LLCs—cannot modify the standard of review for director conduct. Accordingly, applying enhanced scrutiny under *Blasius*,[23] the Court determined that the aggregation violated the letter of the 10% voting provision, because there was not enough evidence to show that the stockholders were in fact acting in concert. The Court also found that the board lacked a "compelling justification" for interfering with the election. CCSB appealed, but the Delaware Supreme Court affirmed in all respects.[24]

In ***Coster v. UIP Companies, Inc.***, the Delaware Supreme Court affirmed the Court of Chancery's determination that a dilutive stock issuance to break a director election deadlock was permissible because the company faced an "existential crisis" as a result of the deadlock.[25] The Supreme Court analyzed *Unocal*, *Schnell*, and *Blasius* to determine whether director actions that would disenfranchise stockholders were appropriate, recognizing both that proportionality of the response and equitable considerations will factor into the Court's decision. Applying this standard, the Supreme Court determined that the company's board had responded reasonably and proportionately to the threat posed by potential deadlock.

There also have been several decisions addressing the validity and enforceability of advance notice bylaws.

In ***Kellner v. AIM ImmunoTech Inc.***, the Court of Chancery upheld a board's rejection of dissident nominees after finding that the dissidents had failed to comply with the corporation's advance notice bylaws.[26] However, in the course of doing so, the Court invalidated certain of the bylaws, finding that they were "overbroad, unworkable, and ripe for subjective interpretation by the Board." The invalidated bylaws included: (i) a broad definition of "Stockholder Associated Person" that, when read together with other definitions, created "an ill-defined web of disclosure requirements"; (ii) an ambiguous requirement to disclose "known supporters" of the nomination, not limited to financial support or meaningful assistance; (iii) an ambiguous requirement to disclose consulting or investment advice over the previous ten years; and (iv) a vague requirement to disclose ownership of the company's securities, which the Court described as "indecipherable." Companies may want to consider updating their advance notice bylaws based on the Court's guidance.

Also, in ***Sternlicht v. Hernandez***, certain stockholders and former directors of Cano Health, Inc. sought to elect two directors to the company's board and sought to enjoin the company's application of an advance notice bylaw to block their nominees. The plaintiffs were three of the nine Cano Health directors, who resigned from the board after the nomination deadline had passed, and who wanted to nominate a competing slate of directors. The plaintiffs argued, among other things, that a

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

[24] *CCSB Financial Corp. v. Totta*, 302 A.3d 387 (Del. 2023).

[25] *Coster v. UIP Companies, Inc.*, 300 A.3d 656 (Del. 2023).

[26] *Kellner v. AIM ImmunoTech Inc*., C.A. No. 2023-0879-LWW, 2023 WL 9002424 (Del. Ch. Dec. 28, 2023).

radical shift in position or a material change in circumstances had occurred such that the board had a duty to waive the advance notice bylaw provision. After expedited discovery and a hearing, the Court denied the motion, finding that the resignations by the minority faction were not material, because they did not substantially alter the direction of the company.[27] The Court also accepted the company's laches argument and determined that plaintiffs had delayed too long in pursuing a proxy contest and seeking to enjoin the advance notice bylaw.

Mootness Fees and Awards of Attorneys' Fees

The Court of Chancery decisions addressing fees this past year reaffirmed that the availability of attorneys' fees to stockholder plaintiffs' counsel remains heavily contingent upon the merits of the underlying action. The Court had occasion to apply that principle in the context of mootness fee requests based on supplemental disclosures. Where a company voluntarily moots a disclosure claim by making supplemental disclosures, the plaintiff's attorneys often apply for a "mootness fee" to compensate them for their efforts on behalf of the stockholders, and defendants can challenge the fee applications. Until this year, the Court of Chancery awarded mootness fees if the supplemental disclosures were merely "helpful" (rather than the more demanding "plainly material" standard articulated in *Trulia*[28] for fees based on "disclosure-only" settlements). Observing that the "helpful" standard for mootness fees "could be construed as encouraging plaintiffs' counsel to pursue meritless [disclosure] claims," Chancellor McCormick declared in ***Anderson v. Magellan Health, Inc.*** that, moving forward, the Court "will award mootness fees based on supplemental disclosures only when the information is material."[29] As a matter of fairness, the Court did not apply the new "material" standard to the fee request at issue in *Magellan Health*, but held that, even under the previous "helpful" standard, plaintiff was entitled to only $75,000 in fees, rather than the $1.1 million requested.

On the other end of the spectrum, Vice Chancellor Laster recently approved a record-setting $266.7 million fee request in ***In re Dell Techs. Inc. Class V. Shareholders Litigation***, which demonstrates that the Court of Chancery remains willing to award substantial attorneys' fees in complex litigations.[30] In *Dell*, the parties settled for an unprecedented $1 billion, resolving investor claims directed at Michael Dell and other controllers of Dell concerning a $23.9 billion transaction in 2018 that consolidated Dell's control of VMWare, Inc. Plaintiff's counsel asked for a 28.5% of the recovery as a fee, but a group of eight investment funds (who stood to receive a greater recovery if plaintiff's fees were reduced) challenged the fee request. They argued that the Court should adopt a rule followed by some federal courts that reduces the percentage of the benefit awarded as the size of the settlement increases so as to avoid a windfall. The Court rejected this "declining percentage method" as counter to Delaware precedent, and awarded a 26.67% fee. The Court observed that plaintiff's

[27] *Sternlicht v. Hernandez*, C.A. No. 2023-0477-PAF, 2023 WL 3991642, at *1 (Del. Ch. June 14, 2023).

[28] *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

[29] *Anderson v. Magellan Health, Inc.*, 298 A.3d 734 (Del. Ch. 2023).

[30] *In re Dell Techs. Inc. Class V S'holder Litig.*, 300 A.3d 679 (Del. Ch. 2023).

counsel "brought a real case, invested over $4 million of real money, and obtained a real and unprecedented result." The decision is currently on appeal before the Delaware Supreme Court.

Another noteworthy fee decision in 2023 was ***Crispo v. Musk***, though the attention it attracted from practitioners had little to do with the fee request itself and more to do with the Court's analysis of a fundamental question that affects virtually every public company transaction—whether stockholders in a busted deal scenario have standing to sue the buyer for damages based on the lost merger premium.[31] The case involved a mootness fee sought by a Twitter stockholder who had previously sued Elon Musk seeking to compel him to consummate his proposed acquisition of Twitter. To evaluate the fee claim, the Court first evaluated whether the mooted claim was "meritorious when filed." Here, that required the Court to address whether the stockholder had standing to sue for lost-premium damages. In support of his standing argument, the stockholder cited a provision in the Twitter merger agreement holding the buyer liable for "lost stockholder premium[s]" (with such provisions commonly being referred to as *Con Ed* provisions). The Court held, however, that such provisions were not enforceable by the target company because merger consideration is paid directly to the stockholders. The Court further determined that Twitter's stockholders could not be third-party beneficiaries because the merger agreement specifically disclaimed such status. Nevertheless, the Court acknowledged that it should avoid an interpretation of the ConEd provision that rendered it meaningless and, therefore, posited that the provision could be read to provide for an "exceptionally narrow" circumstance in which a stockholder may implicitly have standing to seek lost premium damages—where the buyer terminates and the company's specific performance remedy is no longer available. Because that narrow circumstance did not exist in Twitter's case, the Court denied the fee application. The Court's analysis of the enforceability and limits of ConEd provisions will likely focus many deal participants and their advisers on ways to modify contract terms and address this issue, which may include expressly providing for stockholder standing, authorizing the company to serve as "agent" for purposes of recovering lost premium damages or replacing ConEd provisions with other mechanisms such as reverse termination fees.

[31] *Crispo v. Musk*, 304 A.3d 567 (Del. Ch. 2023).

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