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2024 Delaware Year-End Review: M&A and Stockholder Litigation

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The past year continued a steady evolution in Delaware law relating to M&A and stockholder litigation. Key developments in 2024 included the Delaware Supreme Court's decision in the *Match* case clarifying the scope of the *MFW* safe harbor, as well as much discussed legislative amendments to the Delaware General Corporation Law ("DGCL") relating to the validity of stockholder agreements, board approval of mergers and lost-premium damages, taken in response to the Delaware Court of Chancery's decisions in *Moelis*, *Activision* and *Crispo*. Although practitioners received answers to many of their questions, new questions have arisen, including some likely to be resolved in a number of high-profile appeals scheduled for 2025. These appeals will include matters arising from the Court of Chancery's opinion rescinding Elon Musk's multibillion-dollar compensation package from Tesla and rejection of an attempt to ratify that package after rescission, as well as the Court's *TripAdvisor* opinion concerning potential controlling stockholder and director liability for re-domesticating a Delaware corporation to another state. Practitioners should also be on the lookout for decisions from the Court of Chancery that interpret and define the scope of the recent DGCL amendments.

In addition, this past year saw some changes at the Court of Chancery with retirements, promotions and new arrivals. Vice Chancellor Sam Glasscock III announced his retirement in February 2024, and Magistrate Judge Bonnie David was sworn in as a new Vice Chancellor. The Court of Chancery has also expanded its ranks to meet its significant and still growing caseload, with its bench now including a Senior Magistrate and three Magistrates.

Legislative Responses to Court of Chancery Decisions

In response to three high-profile Court of Chancery decisions in 2024, the Delaware legislature passed amendments to the DGCL, effective August 1, 2024.

The first decision, ***West Palm Beach Firefighters' Pension Fund v. Moelis & Co.***, concerned a stockholder agreement that was found to violate the DGCL's mandate that directors manage the corporation.[1] The Court invalidated the agreement on the grounds that the governance rights granted to the stockholder could not be squared with Section 141(a) of the DGCL, which provides that the business and affairs of a corporation must be managed by or under the direction of the board of directors, except as otherwise provided in its certificate of incorporation.

The second case, ***Sjunde AP-Fonden v. Activision Blizzard, Inc.***, held that a merger agreement had not been validly approved by the target's board of directors because it had not been approved in substantially final form.[2] In denying the defendants' motion to dismiss, the Court held that stockholder plaintiffs had stated a claim that the company failed to comply with the technical requirements of the DGCL, including because the merger agreement was not "essentially complete" when approved by the board.

The third opinion, ***Crispo v. Musk***, involved a common provision in merger agreements—typically known as a "*Con Ed* provision"—that defined the target company's damages resulting from a wrongful breach by the buyer to include the lost merger premium.[3] The Court ruled that because the target company had no entitlement to the merger premium (which would be paid its stockholders at closing), a *Con Ed* provision including the premium as part of the target's damages was an unenforceable penalty under Delaware law.

These decisions generated widespread debate among practitioners, academics and others, and ultimately led to the enactment of amendments to address the concerns and issues raised. These amendments are set forth at 8 *Del. C.* §§ 122(18), 147, 232(g), 261, and 268 of the DGCL. In summary, they provide:

- **Section 122(18)** permits a corporation to contract with its current or prospective stockholders in exchange for minimum consideration as determined by the board of directors.
- **Section 147** permits a board of directors to approve an agreement "in final form or substantially final form," and to "adopt a resolution ratifying the agreement" "at any time after providing such approval . . . and prior to the effectiveness of such filing with the [Delaware] Secretary of State."

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1 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, 311 A.3d 809 (Del. Ch. 2024).

2 *Sjunde AP-Fonden v. Activision Blizzard, Inc*., No. 2022-1001-KSJM, 2024 WL 863325 (Del. Ch. Feb. 29, 2024). The *Moelis* and *Activision* decisions are described in greater detail in our prior client alert. *See* Recent Delaware Major Corporate Law Decisions (Mar. 7, 2024), https://www.willkie.com/-/media/files/publications/2024/03/recent_delaware_major_corporate_law_decisions.pdf.

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

- **Section 232(g)** provides that, for stockholder notices, "each document enclosed with the notice or annexed or appended to the notice shall be deemed part of the notice solely for purposes of determining whether notice was duly given under this title, the certificate of incorporation or bylaws."

- **Section 261(a)(1)** provides that a merger agreement may provide that a "party to the agreement that fails to perform its obligations under such agreement in accordance with the terms and conditions of such agreement . . . shall be subject, in addition to any other remedies . . . to such penalties or consequences as set forth in the agreement of merger or consolidation," which "may include an obligation to pay . . . an amount representing, or based on the loss of, any premium or other economic entitlement the stockholders of such other party would be entitled to receive" if the "merger or consolidation were consummated" pursuant to the merger agreement.

- **Section 268** provides that, unless otherwise stated in a merger agreement, "any disclosure letter, disclosure schedules or similar documents or instruments . . . shall not be deemed part of the agreement for purposes" of the statute, "but shall have the effects provided in the agreement."

The amendments have already influenced the way stockholder agreements and merger agreements are being drafted. The language of Section 261(a)(1), for example, has provided the foundation for merger agreement provisions specifying that a party may be liable for lost premium damages arising from a breach of a merger agreement. Conversely, on the litigation side, practitioners can expect that the coming year will likely see disputes over interpretations of the newly-enacted provisions, including with respect to enforcement of Section 261(a)(1) for lost-premium damages arising from breaches of merger agreements.

Re-domestication

The Court of Chancery cases discussed in the prior section, among others, also spurred debate among corporate boards and managers about potentially reincorporating outside of Delaware to avoid what some perceived as the unfavorable impact of these rulings for defendants in stockholder litigation. The issue of how a Delaware corporation could re-domesticate also directly arose in ***Palkon v. Maffei***, where a stockholder sued to enjoin an effort by TripAdvisor to change its state of incorporation from Delaware to Nevada.[4] Plaintiffs alleged that the company's controlling stockholder sought to move TripAdvisor to a jurisdiction with more defendant-friendly fiduciary duty standards and, as a result, obtained a unique benefit that subjected the move to entire fairness review. Although the Court of Chancery refused to block the reincorporation, the Court agreed that entire fairness applied because the reincorporation impaired the rights of TripAdvisor's public stockholders given the pleaded differences between Nevada and Delaware law. The Court's decision is currently on appeal.

[4] *Palkon v. Maffei*, 311 A.3d 255 (Del. Ch. 2024).

However, stockholders were less successful in another case seeking to challenge a reincorporation from Delaware to Nevada. In ***Gunderson v. The Trade Desk, Inc.***, plaintiffs sought to enjoin a corporate conversion approved by a majority of stockholders, arguing that it constituted an amendment or repeal of The Trade Desk's certificate of incorporation and, therefore, required a supermajority vote to approve it.[5] The Court of Chancery rejected this argument, citing the "doctrine of independent legal significance," which provides that legal action authorized under one section of the DGCL is not invalid merely because it causes a result that would not be achievable if pursued through action under other provisions of the statute. Here, the conversion was governed by Section 266 of the DGCL, which only requires a majority vote. The Court noted that the language of The Trade Desk's certificate of incorporation could have extended the supermajority vote requirement to amendments or repeal that were effected through a corporate conversion, but it did not. Thus, the supermajority vote requirement did not apply to corporate transactions that were authorized under other provisions of the DGCL. This case reaffirms the caution to drafters that precision and explicit language is needed when seeking to achieve (or avoid) a specific outcome.

The *MFW* Doctrine and Claims Against Controlling Stockholders

There were several important decisions from the Delaware courts relating to breach of fiduciary duty claims against controlling stockholders in 2024, and each offers critical lessons to practitioners who seek to minimize litigation risk in controlling stockholder transactions. This is particularly true with respect to attempts to lower the standard of review for conflicted controlling stockholder transactions through the use of the safe harbor established in *Kahn v. M&F Worldwide Corp.* ("*MFW*"), which requires a transaction with a controlling stockholder to be conditioned *ab initio* on both approval by a special committee of disinterested and independent directors, as well as informed and uncoerced approval by a majority of the company's disinterested minority stockholders.[6] Successfully invoking *MFW* avoids the application of the rigorous "entire fairness" standard of review at the pleading stage, and shifts it to the more deferential business judgment review.

However, this past year, the Delaware courts determined that multiple attempts to invoke *MFW* were unsuccessful. For example, ***In re Match Group, Inc. Derivative Litigation*** concerned IAC/InterActive Corp.'s reverse spinoff of its internet and media businesses from its subsidiary, Match Group, Inc.[7] Even though the transaction had been designed to fit within the *MFW* safe harbor, stockholder plaintiffs of Match contended that the transaction provided IAC with certain unique benefits at their expense, and argued that one member of the special committee was not independent. The Court of Chancery granted the defendants' motion to dismiss based on *MFW*, but the Delaware Supreme Court reversed and, in arriving at its ruling, resolved two hotly-debated questions of Delaware law.

First, the Delaware Supreme Court clarified that the dual-prong *MFW* framework applied to any conflicted controller transaction where the controller receives a non-ratable benefit, and not just controller freeze-out merger transactions as the defendants had argued. Second, the Delaware Supreme Court clarified that every director—

[5] *Gunderson v. The Trade Desk, Inc.*, 326 A.3d 1264 (Del. Ch. 2024), *as corrected* (Nov. 8, 2024).

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

[7] *In re Match Group, Inc. Derivative Litigation*, 315 A.3d 446 (Del. 2024).

not only a majority—on a special committee must be independent for the committee to serve as an effective "cleansing" mechanism under *MFW*. Here, because one member of the special committee acting on behalf of Match was deemed not independent, the special committee was not "wholly independent," and therefore could not satisfy the requirements of *MFW*.

The Delaware Supreme Court also issued two major decisions involving controlling stockholder transactions where the court declined to apply the *MFW* safe harbor at the pleadings stage because the plaintiffs had sufficiently alleged that the proxy statements in those cases did not fully inform stockholders of potential conflicts of interest relating to the special committees' advisors.

In ***City of Dearborn Police & Fire Revised Retirement System v. Brookfield Asset Management Inc.***, minority stockholders sued the company's directors and controlling stockholder in connection with a freeze-out transaction alleging that *MFW* did not apply because, among other things, the proxy statement failed to disclose prior engagements and other ties between the controller and the special committee's financial and legal advisors.[8] In particular, the plaintiffs alleged that one of the special committee's bankers had worked on a transaction for the controller and that its affiliates collectively held substantial investments in entities affiliated with the controller. The Court of Chancery disagreed that these alleged omissions were dispositive and dismissed the case.

On appeal, the Supreme Court reversed and reaffirmed that "Delaware law places great importance on the need for transparency in the special committee's reliance on its advisors" and that "[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, [the Court of Chancery] has required full disclosure of investment banker compensation and potential conflicts." In particular, the Delaware Supreme Court focused on the proxy statement's use of the word "may" when describing potential investments by the banker in private equity funds managed by the controller or its affiliates. The Court noted that use of the word "may" was misleading given that the banker and its affiliates had already invested hundreds of millions of dollars. Similarly, the Court found that the failure to disclose concurrent and prior representation of the controller on unrelated matters by the special committee's legal advisor was a material omission because it could affect the legal advisor's objectivity.

The Delaware Supreme Court revisited this issue in ***City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.***, which also held that a merger transaction led by a buyer consortium that included the company's founder and controlling stockholder failed to satisfy the requirements of *MFW* because the proxy statement failed to disclose material information regarding potential conflicts of both of the special committee's financial advisors.[9] As in *Brookfield*, the Delaware Supreme Court found that the proxy's use of "may" was misleading when the financial advisor was concurrently providing advisory services to one of the consortium members. Likewise, the Court found that the amount of fees that were received by the special committee's other financial advisor from the buyer in prior transactions should have been disclosed. Though the Court noted that there was "no hard and fast rule" regarding

[8] *City of Dearborn Police & Fire Revised Ret. Sys. v. Brookfield Asset Mgmt. Inc.*, 314 A.3d 1108 (Del. 2024).

[9] *City of Sarasota Firefighters' Pension Fund v. Inovalon Holdings, Inc.*, 319 A.3d 271 (Del. 2024).

disclosure of fees, it found that merely stating that the banker had received "customary compensation" did not permit stockholders to compare the amount of fees received in the current transaction against those other prior transactions. Practitioners should accordingly avoid disclosures that may be viewed as misleadingly unspecific in the context of merger parties' historical relationships with advisors.

The Delaware Court of Chancery's decision in ***Firefighters' Pension System of City of Kansas City v. Foundation Building Materials, Inc.*** provides an instructive overview of the benefits and risks of forming a special committee to approve a potential conflicted controller transaction.[10] This action concerned the sale of Foundation Building Materials by a private equity sponsor, which triggered an early termination payment to the sponsor under a tax receivable agreement between it and the company. A special committee of directors unaffiliated with the sponsor was formed given the potential conflict created by the early termination payment, and the committee had, among other things, the power to reject the sale. In their lawsuit, stockholders alleged that the sponsor was conflicted and that it had elected to pursue a sale of the company, rather than remain a standalone entity, because it wanted the early termination payment. Plaintiffs also alleged that the special committee was formed too late and was too deferential to the sponsor.

In a lengthy opinion that traced the development of Delaware's differing standards of review, Vice Chancellor Laster sustained the claims against the sponsor on the basis that the early termination payment was a benefit not shared ratably with Foundation Building Materials' minority stockholders, which triggered entire fairness review. The Court, however, rejected plaintiffs' argument that the sponsor was obligated to share the early termination payment—which the Court held was a previously-disclosed contractual right belonging solely to the sponsor—with the minority stockholders. With respect to the special committee, though a "close call," the Court found that the plaintiffs had pleaded facts showing that the special committee had acted "only when prompted" by the sponsor and otherwise "repeatedly went into hiding for months while the sale process was unfolding." That alleged failure to discharge their duties was sufficient at the pleadings stage to support a claim that the committee members "acted for a purpose other than the best interest of the corporation." The opinion is therefore a timely reminder to practitioners that the formation and conduct of committees must be considered with a view towards how they will be viewed well into the future, rather than solely as a means to achieve a particular end.

Litigation surrounding the executive compensation package paid by ***Tesla*** to its founder and controlling stockholder Elon Musk continued to grab headlines and resulted in two significant decisions from the Court of Chancery. The first opinion, issued in January 2024, found that Musk acted as a controlling stockholder with respect to the decision to award him the compensation package, including because of testimony from the company's directors that they had not negotiated with Musk at arm's length.[11] The Court further held that Musk's performance-based pay package was unfair to the company's stockholders, including because it was not benchmarked against any other pay

[10] *Firefighters' Pension Sys. of City of Kansas City v. Found. Bldg. Materials, Inc.*, 318 A.3d 1105 (Del. Ch. 2024).

[11] *Tornetta v. Musk*, 310 A.3d 430 (Del. Ch. 2024).

package. The Court accordingly determined that both the board of directors and Musk breached their fiduciary duties by awarding Musk the unprecedented compensation package, and ordered the compensation rescinded.

Tesla and Musk then sought to nullify or limit the Court's decision through a process similar to that prescribed by *MFW*: the company created a new committee of "independent directors," and solicited a vote from the stockholders to "ratify" the same grant that was to be rescinded pursuant to the Court of Chancery's first opinion. The company's stockholders overwhelmingly approved the previously-rescinded grant to Musk, and the company then moved to revise the Court's opinion, arguing that the approvals constituted ratification of Musk's compensation package.

In December 2024, the Court of Chancery denied Tesla's motion, while at the same time resolving the plaintiff's request for $5.6 billion in attorneys' fees.[12] In the Court's second opinion, the Court held that the attempted ratification had no legal effect for four reasons: (i) there was no procedural grounds to change the outcome of an adverse post-trial decision; (ii) the defendants had not raised ratification as an affirmative defense; (iii) a post-hoc stockholder vote cannot ratify a conflicted controller transaction because the *MFW* safe harbor must have been met *before* the process began; and (iv) the company's proxy statement seeking ratification of Musk's compensation was itself materially misleading, including because it suggested that ratification would be given legal effect by the Court of Chancery. In awarding attorney's fees, the Court of Chancery rejected plaintiff's request for a fee award valued at approximately $5.6 billion and instead calculated the award based on the grant date fair value of Musk's compensation package, which resulted in a record-setting $345 million in attorney's fees. The Court's decision is now being appealed.

Caremark Claims and the Duty of Oversight

In the past few years, Delaware courts have issued a number of high-profile decisions that sustained *Caremark* duty of oversight claims at the pleadings stage, leading some commentators to question whether the traditionally onerous standards in Delaware for such claims were being loosened. Two decisions in 2024 show that *Caremark* claims remain subject to careful scrutiny by the Delaware courts, and that such claims still generally require allegations that give rise to a reasonable inference that directors or officers have acted in bad faith.

In ***Clem v Skinner***, stockholders of a medical services company brought a derivative action asserting that the board violated its *Caremark* duties in connection with a $209.2 million settlement between the company and the U.S. Department of Justice relating to certain billing practices.[13] The Court noted that, though "*Caremark* suits have proliferated in Delaware," many of them "fall outside the narrow confines of the *Caremark* doctrine," because they simply "seek to hold directors personally liable for imperfect efforts, operational struggles, business decisions, and even when the corporation is the victim of a crime." As was the case here, the Court held that plaintiffs' own allegations detailed regular discussions by the audit committee of the billing issue and that the board addressed legal and regulatory compliance risks. The Court also rejected plaintiffs' assertion that the board deliberately

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12 *Tornetta v. Musk*, 326 A.3d 1203 (Del. Ch. 2024).

13 *Clem v. Skinner*, No. 2021-0240-LWW, 2024 WL 668523 (Del. Ch. Feb. 19, 2024)

ignored "red flags" because "[k]nowledge of illegality in one corner of a vast business does not mean that directors were on notice of a distinct problem in another." The Court, accordingly, held that demand futility had not been satisfied, and the complaint was dismissed in its entirety.

In ***Bricklayers Pension Fund of Western Pennsylvania v. Brinkley***, the Court of Chancery also granted a motion to dismiss a *Caremark* claim for failure to plead demand futility. The stockholder plaintiff alleged that the directors and officers of a company failed to exercise oversight in connection with the company's compliance with Medicaid pricing practices, which the plaintiff claimed led to various settlements by the company with regulators totaling several hundreds of millions of dollars. In dismissing the *Caremark* claim, the Court found that the board had reporting systems in place to receive updates from management and that the directors had not ignored any red flags. In particular, the Court noted that the board's reliance on management was not unreasonable in this case because the record showed that the board was aware of the steps management was taking to address the compliance issues and, thus, the board was entitled to accept management's assurances that compliance risks were being handled.

Aiding and Abetting Liability

Several decisions from the Delaware courts also informed the scope of potential aiding and abetting liability, especially for acquirors of a company. As discussed in our annual update last year, ***In re Mindbody, Inc. Stockholder Litigation*** concerned the 2019 take-private of Mindbody by a private equity firm.[14] In March 2023, the Court of Chancery issued a post-trial opinion ruling that the plaintiffs had proven a breach of fiduciary duty by the CEO, including by failing to disclose the extent of his interactions with the private equity buyer, and that the buyer had aided and abetted the CEO's breach by failing to correct the misleading proxy materials. In other words, the Court held that the buyer "knowingly participated in the breach by not speaking up."

On appeal this year, the Delaware Supreme Court reversed the Court of Chancery's ruling with respect to the claim against the buyer for aiding and abetting the breach of fiduciary duty.[15] The Court acknowledged that the buyer knew of the undisclosed interactions it had with the CEO, and that it was contractually required to promptly notify Mindbody of any misleading portions of the proxy statement. However, the Court explained that "failure to act" or "passive awareness" of a breach of fiduciary duty cannot alone sustain an aiding and abetting claim. Further, the Court noted that the culpable participation element of an aiding and abetting claim should be "the most difficult to prove" in a case where the claim is brought against an acquiror negotiating at arm's length. The Court similarly rejected the contention that the buyer owed independent contractual or fiduciary duties to stockholders.

The Delaware courts' reluctance to hold arm's-length acquirors liable for aiding and abetting fiduciary duty was also evident in ***In re Nikola Corp. Derivative Litigation***, where the Court of Chancery dismissed aiding and abetting

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

[15] *In re Mindbody, Inc.*, No. 484, 2023, 2024 WL 4926910 (Del. Dec. 2, 2024).

breach of fiduciary duty claims related to a de-SPAC merger.[16] Although the Court permitted the underlying breach of fiduciary duty claims to proceed against the board and controller of the SPAC for allegedly causing the omission of material information from the proxy statement, the Court dismissed related aiding and abetting claims brought against the pre-merger board of the target company. The Court reasoned that the plaintiffs failed to plead sufficient particularized facts concerning the target company board's participation in the transaction or the breach, distinguishing this case from others where the directors were "closely involved in a sales process." The Court also dismissed an aiding and abetting claim against an investment bank that advised on the transaction, for similar reasons.

Earnout Disputes

In somewhat of a departure from the general trend of prior Delaware cases concerning post-closing earnout payments resulting in judgments for the buyer-defendants, the Court of Chancery issued two decisions in 2024 ruling in favor of the seller-plaintiffs. However, because these cases tend to be highly fact-intensive and contract-specific, with the Court carefully scrutinizing the particular contract language and the buyer's post-closing actions after a full trial record is developed, it may be premature to draw broader conclusions from these decisions.

In ***Fortis Advisors LLC v. Johnson & Johnson***, the relevant earnout provision obliged the buyer to use "commercially reasonable efforts" to cause the surgical robots it had acquired from the seller to achieve certain regulatory milestones.[17] The merger agreement used an "inward facing" definition of "commercially reasonable efforts" requiring the buyer to use efforts consistent with its "usual practices" for a comparable "priority medical device." The Court determined that the buyer had failed to employ commercially reasonable efforts when, soon after closing, it forced the acquired robots to "compete against" its own robots then in-development, effectively turning the acquired robots into a "parts shop" for other robots. The Court found that the buyer knew these actions would likely result in significant delays and missed milestones, and found that the buyer's actions had contributed to six of ten missed earnout milestones. Additionally, the Court determined that the buyer had violated the implied covenant of good faith and fair dealing by failing to reasonably pursue certain milestones when the regulatory environment changed, and had committed fraud by informing sellers that a regulatory milestone was certain to be met when the buyer knew that meeting the milestone deadline was doubtful. The Court awarded damages of over $1 billion based largely on the contractual payout for each missed milestone, reduced by the probability of achieving the milestones had the buyer not breached the contract. This case thus shows that a buyer-friendly "inward facing" efforts provision will not protect a buyer where the record shows that the buyer acted in a manner to affirmatively breach the covenant.

In ***Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.***, the parties' agreement contained an "outward facing" earnout provision that required the buyer to use "commercially reasonable efforts" to achieve certain regulatory milestones, which was defined as "such efforts and resources typically used by

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[16] *In re Nikola Corp. Derivative Litigation*, No. 2022-0023-KSJM (Del. Ch. Apr. 9, 2024) (TRANSCRIPT).

[17] *Fortis Advisors LLC v. Johnson & Johnson*, No. 2020-0881-LWW, 2024 WL 4048060 (Del. Ch. Sept. 4, 2024).

biopharmaceutical companies similar in size and scope to [buyer]."[18] Applying that outward facing efforts standard, the Court compared the buyer's actions against that of a hypothetical biopharmaceutical company and concluded that the buyer breached its contractual obligations by cancelling the acquired monoclonal antibody program due to supposed issues with safety, efficacy, and the low likelihood of regulatory approval. The Court found that a hypothetical company would have continued with the program despite the alleged issues and, particularly with respect to safety, would have conducted more research instead of immediately terminating the program. The Court's ruling also noted that the buyer was recently acquired by another company and that the trial record showed that its premature termination of the program was driven by a desire to improve post-merger synergies.

In contrast, in ***Himawan v. Cephalon, Inc.***, the Court of Chancery held that the buyer did not breach the earnout provision when it decided to pursue commercialization of the acquired antibody for only one of two potential medical conditions.[19] The merger agreement provided that the buyer was required to use "commercially reasonable efforts" to reach certain regulatory milestones, but also that the buyer retained "complete discretion" with respect to the development of the antibody. In ruling for the buyer, the Court reasoned that "commercially reasonable efforts" was an objective standard, and it was reasonable for the buyer not to develop the antibody for all potential treatments when it realized that such development was not likely to be profitable. Although the sellers could have negotiated a more restrictive efforts clause in the merger agreement, they agreed to language that gave the buyer "complete discretion" and, thus, the Court found the sellers received what they bargained for.

Advance Notice Bylaws

In the wake of numerous challenges brought in recent years against the legality of various aspects of advance notice bylaws, 2024 saw an opportunity for the Delaware Supreme Court to weigh in and provide some much needed clarity. In ***Kellner v. AIM ImmunoTech Inc.***, the Supreme Court struck down sweeping advance notice bylaws adopted by AIM ImmunoTech's board of directors to thwart an activist proxy contest.[20] The newly-adopted bylaws required broad disclosure of, among other things, known supporters of the nomination, the exact date of first contact between the activists, and agreements, arrangements, or understandings between the activists.

The Court first considered whether the bylaws survived a "facial" challenge, reaffirming as a general rule that Delaware law presumes bylaws are valid if they relate to the business of the corporation and are not inconsistent with law or the company's certificate of incorporation. The Supreme Court determined that almost all of the bylaws at issue were facially valid under this test, except one "indecipherable" bylaw containing a 1,099-word single sentence. However, because the bylaws were adopted in the midst of a proxy contest, they were also subject to an as-applied challenge, which required application of *Unocal*'s enhanced scrutiny test.[21] Under this test, Delaware courts consider whether (1) "the board faced a threat to an important corporate interest" that was "real and not

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[18] *S'holder Representative Servs. LLC v. Alexion Pharms., Inc.*, 2020-1069-MTZ2024, WL 4052343 (Del. Ch. Sept. 5, 2024).

[19] *Himawan v. Cephalon, Inc.*, No. 2018-0075-SG, 2024 WL 1885560 (Del. Ch. Apr. 30, 2024), *aff'd*, No. 226, 2024, 2025 WL 287772 (Del. Jan. 24, 2025).

[20] *Kellner v. AIM ImmunoTech Inc.*, 320 A.3d 239 (Del. 2024).

[21] *See Unocal v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

pretextual," and whether the board acted with unselfish motivations; and (2) "whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise." The Supreme Court analyzed the remaining bylaws, and found that each functioned more as a "tripwire" to rejecting the nomination, rather than a legitimate information-gathering tool. Though the bylaws were unenforceable, the Supreme Court determined that no remedy was warranted as a matter of equity in light of the plaintiff's own conduct of submitting false and misleading responses to certain information requests.

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