DELAWARE STATE BAR ASSOCIATION

BENCH AND BAR CONFERENCE 2023

THURSDAY, JUNE 15, 2023

JOHN M. CLAYTON HALL
NEWARK, DELAWARE

CONFERENCE SCHEDULE

8:00 a.m. - 9:00 a.m.	Registration Breakfast/Vendor Visit
9:00 a.m. - 9:15 a.m.	**Opening Session** *Welcome, State of the Judiciary, and Remarks from Dean Todd J. Clark of Widener University Delaware Law School*
9:15 a.m. - 10:45 a.m.	**CLE Plenary Session with Keynote Speaker Aaron N. Taylor** *Reform and Rigor: How Delaware's Bar Admission Reform Efforts Can Be a Model for the Nation*
10:45 a.m. - 11:00 a.m.	Refreshment Break/Vendor Visit
11:00 a.m. - 12:00 p.m.	**Annual Meeting**
12:00 p.m. - 1:00 p.m.	**Lunch Reception**
1:00 p.m. - 2:30 p.m.	**CLE Breakout Sessions**
2:30 p.m. - 3:00 p.m.	**Dessert Reception and Toast**

KEYNOTE SPEAKER

Aaron N. Taylor

Senior Vice President, Executive Director at AccessLex Institute Center for Legal Education Excellence

Aaron N. Taylor provides leadership and oversight for the AccessLex Center for Legal Education Excellence®. He joined AccessLex Institute in June 2017 from Saint Louis University School of Law, where he served as a Professor of Law. Dr. Taylor also served as director of the Law School Survey of Student Engagement, a national study that seeks to measure the effects of legal education on students.

CLE BREAKOUT SESSIONS

CIVIL LITIGATION

LEAVE IT TO THE MEDIATOR

According to the most recent statistics from The American Bar Association, approximately 90 percent of civil cases resolve short of trial. This panel of experienced mediators will provide their perspectives on how best to prepare for mediation, present your case during mediation, and avoid some common pitfalls throughout the process. The panel will also address some of the ethical obligations that can arise while engaged in the alternative dispute resolution process.

Panelists

The Honorable Joseph R. Slights III (Vice-Chancellor, Ret.)
Wilson Sonsini Goodrich & Rosati

David A. White, Esquire
Office of Disciplinary Counsel

Yvonne Takvorian Saville, Esquire
Weiss, Saville & Houser, P.A.

Bernard G. Conaway, Esquire
Conaway-Legal LLC

Kathi A. Karsnitz, Esquire
Kathi A. Karsnitz, Attorney at Law

CRIMINAL LAW

WHO'S CRIME IS IT ANYWAY?

This panel will discuss an update to Brady obligations and the new proposed change to Criminal Rule 16. It will also touch upon a criminal best practices and update on any recent new Supreme Court decisions in the field.

Panelists

The Honorable Danielle J. Brennan
Superior Court of the State of Delaware

Abigail E. Rodgers, Esquire
Delaware Department of Justice

Sonia Augusthy, Esquire
Office of Defense Services

CHANCERY LAW

REAL WORLD CHANCERY

This session will look at the Court of Chancery's Greatest Hits 2022-2023. Members of the Court of Chancery will discuss hot topics on the court's docket in the past year, including SPACs, advance notice bylaws, and Caremark liability.

Panelists

The Honorable Kathaleen St. Jude McCormick
Chancellor, Court of Chancery of the State of Delaware

The Honorable Nathan A. Cook
Court of Chancery of the State of Delaware

The Honorable Lori W. Will
Court of Chancery of the State of Delaware

Benjamin M. Potts, Esquire
Wilson Sonsini Goodrich & Rosati

Mae Oberste, Esquire
Bernstein Litowitz Berger & Grossmann LLP

FAMILY LAW

The LINK: Domestic Violence, Animal Abuse, and Child Welfare

Panel will present on the links between various forms of abuse and how we can use that knowledge to better protect and support victims. In addition, the panel will discuss the importance of family relationships (especially those of children) with their pets with a focus on how uncertainty in divorce proceedings relates to the future of their pets.

Panelists

The Honorable Michael K. Newell
Chief Judge, Family Court of the State of Delaware

The Honorable Jennifer B. Ranji
Family Court of the State of Delaware

Kara M. Swasey, Esquire
Bayard, P.A.

Tania Marie Culley, Esquire
Office of the Child Advocate

Jenna R. Milecki, Esquire
Delaware Department of Justice

Janine N. Howard-O'Rangers, Esquire
Delaware Volunteer Legal Services, Inc.

WELCOME

Charles J. Durante, Esquire
Connolly Gallagher LLP
President, Delaware State Bar Association

The Honorable Collins J. Seitz Jr.
Chief Justice, Supreme Court
of the State of Delaware

Dean Todd J. Clark
Widener University Delaware Law School

DELAWARE COURTS

JUDICIAL BRANCH

State of the Judiciary 2023

Bench and Bar Conference June 15, 2023

Chief Justice Collins J. Seitz, Jr.

Changes to our Bench: Superior Court

Judge Sean P. Lugg
(April 3, 2023)

Judge Patricia A. Winston
(June 1, 2022)

Changes to our Bench: Court of Chancery

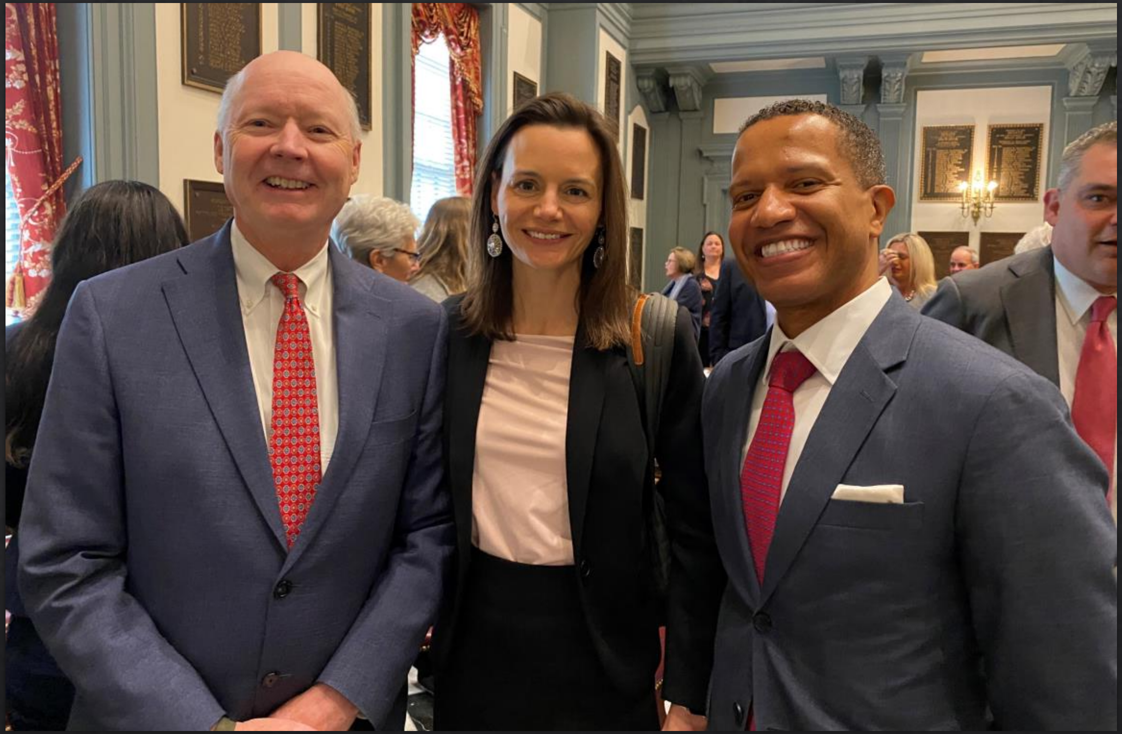
Vice Chancellor Nathan A. Cook (July 21, 2022)

Master Loren Mitchell (Dec. 2022)

Master Bonnie W. David (Jan. 2023)

Changes to our Bench: Supreme Court

Justice Abigail M. LeGrow
(May 11, 2023)



Justice N. Christopher Griffiths
(May 22, 2023)

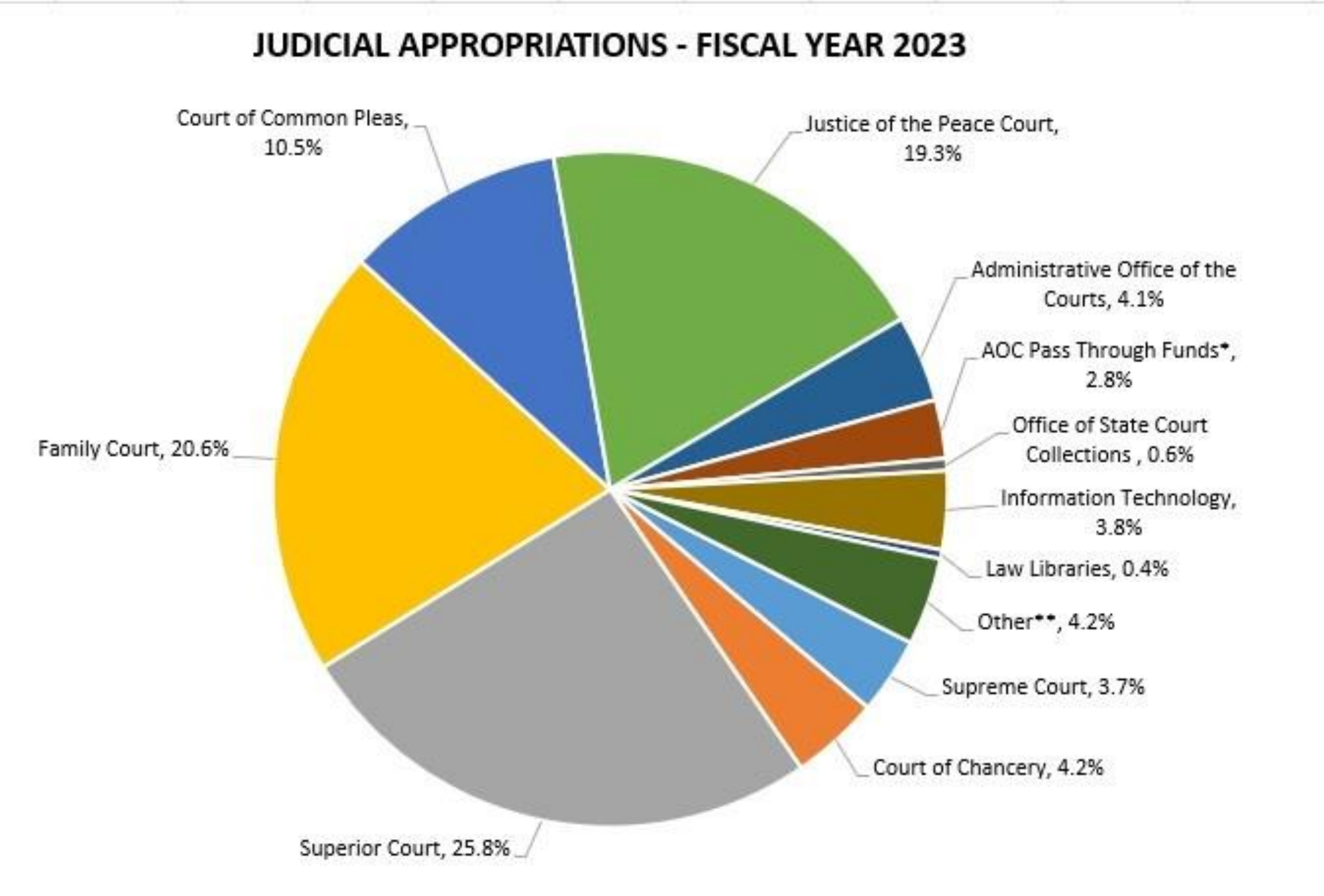
Farewell to Justices Vaughn and Montgomery-Reeves

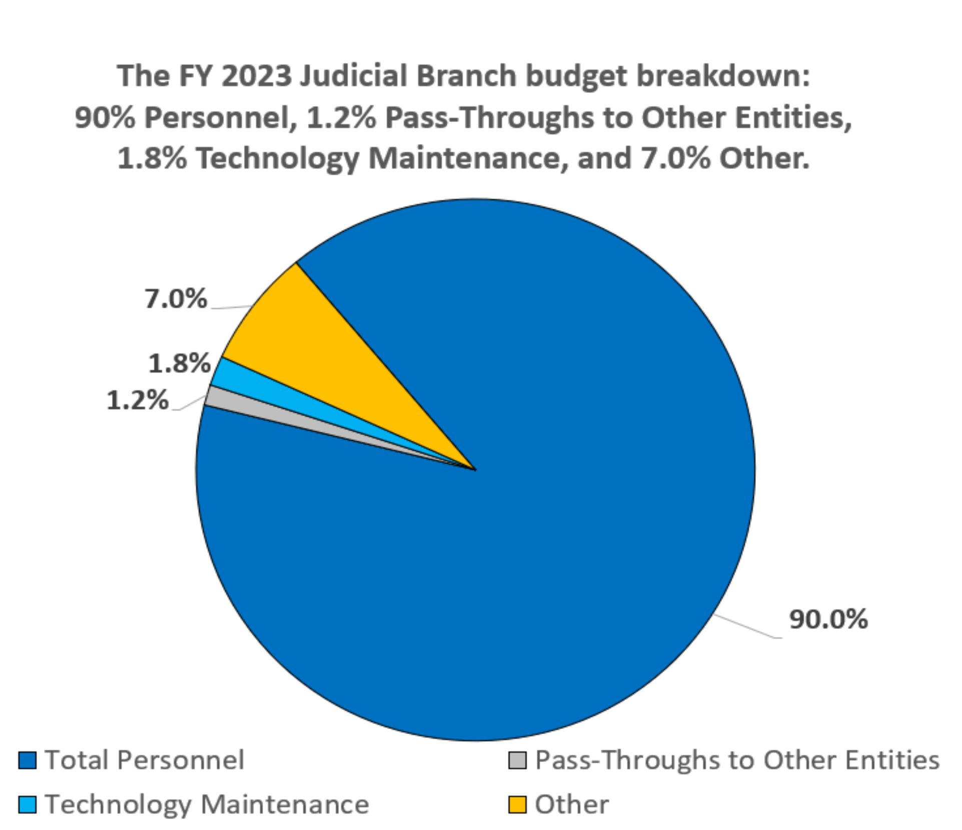
Farewell to Judge Carpenter

47 years of public service, nearly 30 years of service with the Delaware Judiciary

Judicial Branch Operating Budget for FY 2023

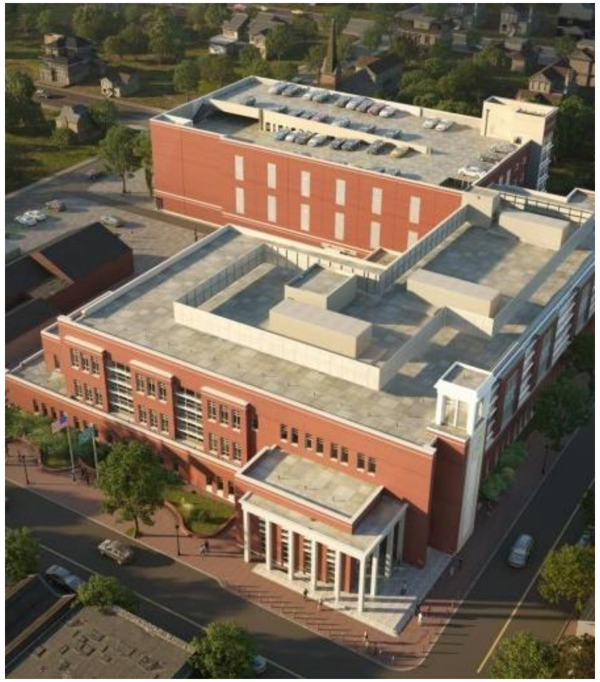
$108,198,300

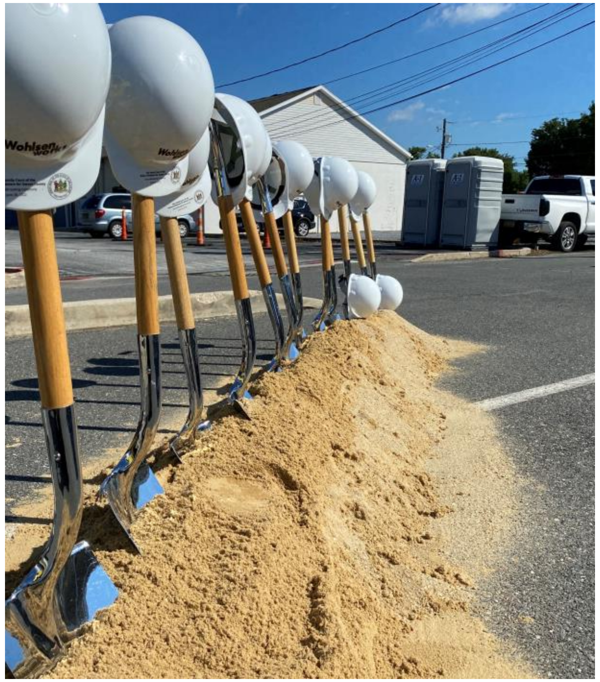




New Sussex County Family Court building

- Groundbreaking June 28, 2022
- Located at Race and Market Streets in Georgetown
- Across the street from Sussex County Courthouse
- 107,800 square feet
- Parking garage
- Estimated completion Summer 2025





New Kent County Family Court building

- Groundbreaking Sept. 22, 2022
- Located at S. Governors Ave. and Water St. in Dover
- Close to Kent County Courthouse
- 106,711 square feet
- Parking garage
- Estimated completion Winter 2025/2026

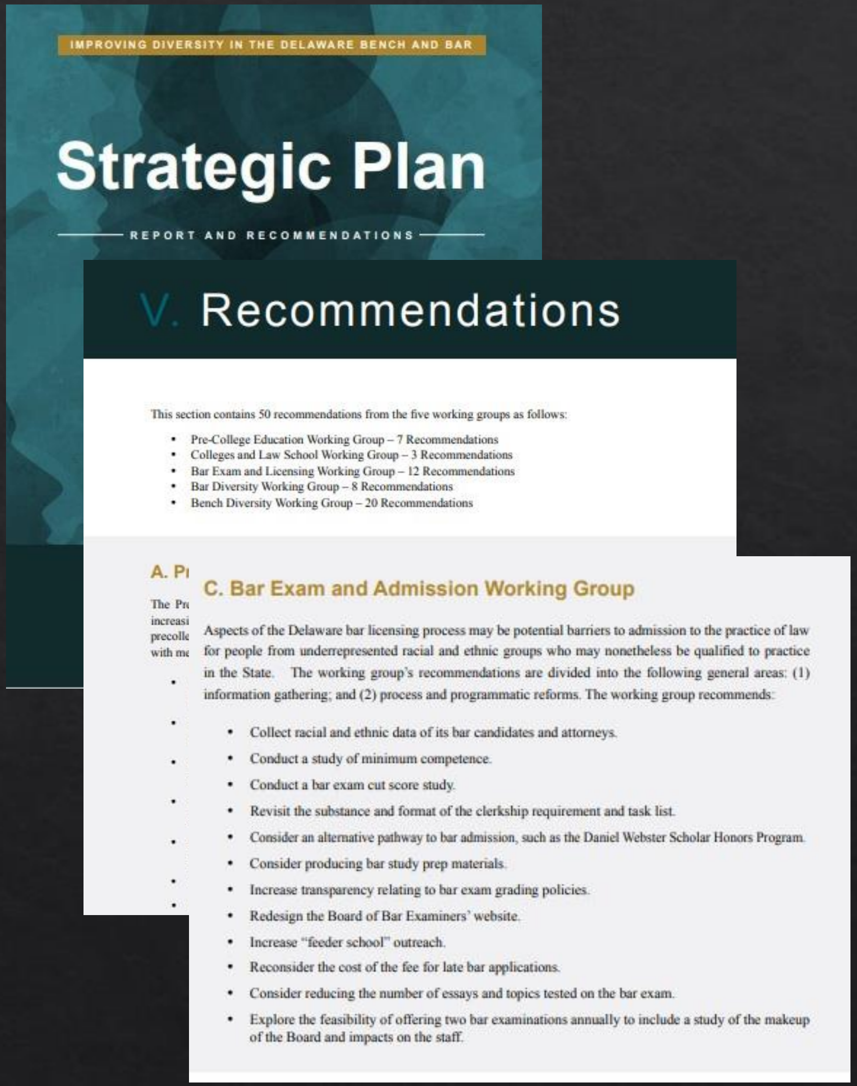



Custom House

- Renovation and expansion to begin in the fall of 2023
- Will restore and preserve a piece of Delaware legal history (1855 Federal Courthouse)
- Estimated completion Winter 2025/2026
- Will provide new home for
  - Chambers for the Delaware Supreme Court
  - Administrative Office of the Courts
  - Arms of the Court
  - Community Resource Center
  - The Delaware State Bar Association and affiliated organizations

Progress on Strategic Plan to Improve Diversity

- Hired the Delaware Judiciary's First DEI Director Kaelea Shaner
- Made significant changes to the Delaware Bar and Attorney Admission process
  - Exam will now be offered twice a year
  - Essay questions reduced in number and scope
  - “Cut” score changed from 145 to 143
  - Clerkship and “checklist” requirements eased
- Participating in the Blueprint for Racial Justice CORA (Court Opportunity Recruitment for All)



IMPROVING DIVERSITY IN THE DELAWARE BENCH AND BAR

Strategic Plan

REPORT AND RECOMMENDATIONS

V. Recommendations

This section contains 50 recommendations from the five working groups as follows:

- Pre-College Education Working Group – 7 Recommendations
- Colleges and Law School Working Group – 3 Recommendations
- Bar Exam and Licensing Working Group – 12 Recommendations
- Bar Diversity Working Group – 8 Recommendations
- Bench Diversity Working Group – 20 Recommendations

C. Bar Exam and Admission Working Group

Aspects of the Delaware bar licensing process may be potential barriers to admission to the practice of law for people from underrepresented racial and ethnic groups who may nonetheless be qualified to practice in the State. The working group's recommendations are divided into the following general areas: (1) information gathering; and (2) process and programmatic reforms. The working group recommends:

- Collect racial and ethnic data of its bar candidates and attorneys.
- Conduct a study of minimum competence.
- Conduct a bar exam cut score study.
- Revisit the substance and format of the clerkship requirement and task list.
- Consider an alternative pathway to bar admission, such as the Daniel Webster Scholar Honors Program.
- Consider producing bar study prep materials.
- Increase transparency relating to bar exam grading policies.
- Redesign the Board of Bar Examiners' website.
- Increase “feeder school” outreach.
- Reconsider the cost of the fee for late bar applications.
- Consider reducing the number of essays and topics tested on the bar exam.
- Explore the feasibility of offering two bar examinations annually to include a study of the makeup of the Board and impacts on the staff.

Progress on Strategic Plan to Improve Diversity

- Participating in the Delaware Department of State's Future Leaders Initiative (Flii) to host 20 paid high school interns from Leading Youth Through Empowerment (LYTE) throughout the Judicial Branch for six weeks in the summer
- Collaborating with LYTE leadership and the Delaware Law School to establish a Legal Pathways Program for high school students in Delaware
- Updated, modernized and increased the budget for the Delaware Law Related Education Center Inc
- Began collecting data on race/ethnicity/gender identity to give a baseline for future process
- Supreme Court "On the Road" program to start this fall

DELREC
Delaware Law Related Education Center

Other Branch Enhancements in 2022-23

- **Installation of high-tech courtrooms using American Rescue Plan Act funding**

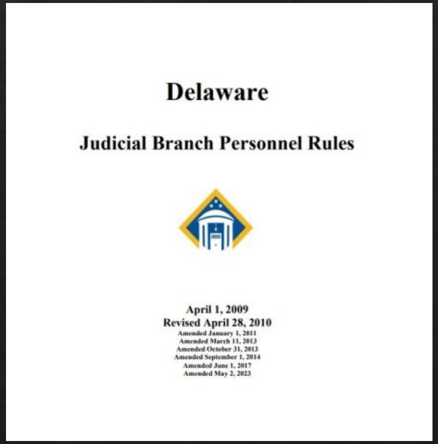
  - 18 courtrooms upgraded and 12 more planned

- **Judicial Privacy Program**

  - Removes sensitive personal information, like home addresses and phone numbers from public databases and other places online to enhance safety and security for our judicial officers and their families

- **Implementation of Fees and Fines reform**
- **Unification of all branch employees under one system of personnel administration**

  - Increases efficiency, reenforces independence of Judicial Branch



Delaware

Judicial Branch Personnel Rules

April 1, 2009
Revised April 28, 2010
Amended January 1, 2011
Amended March 11, 2013
Amended October 31, 2013
Amended September 1, 2014
Amended June 1, 2017
Amended May 2, 2023

New cell phone policy

BAY TO BAY NEWS

DELAWARE STATE NEWS · MILFORD CHRONICLE · SMYRNA EXTRA · SUSSEX POST · CRISFIELD-SOMERSET COUNTY TIMES · SALISBURY INDEPENDENT · DORCHESTER BANNER

Local News · Nation · World · Business · Things To Do · Calendar · Neighbors · Opinion · Schools · Sports · Bay To The Beach Byways

Cellphones to be permitted in state courts June 1

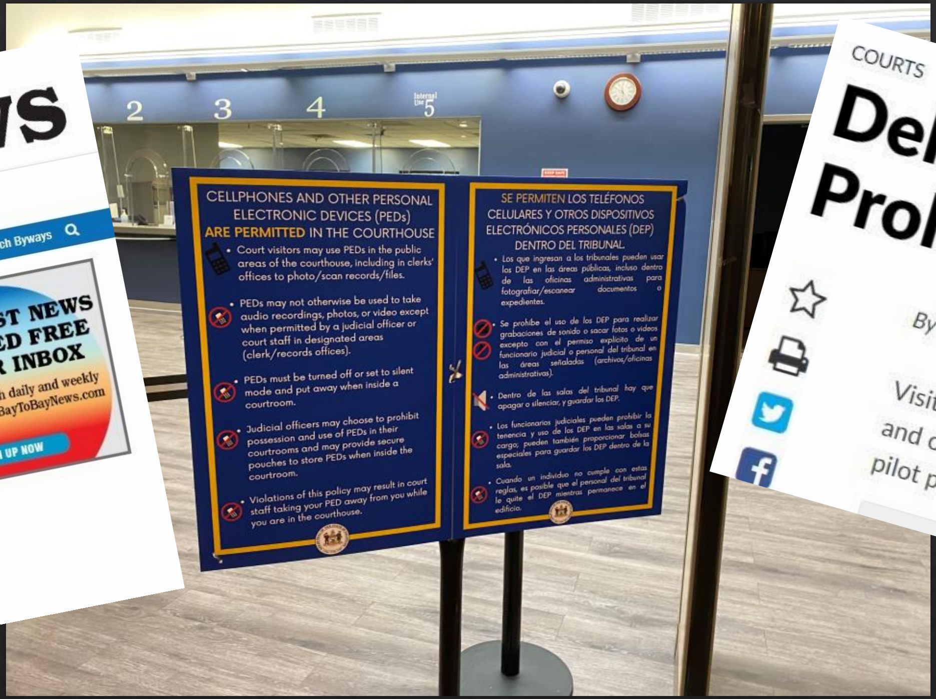
Posted Thursday, May 25, 2023 9:29 am

By Craig Anderson

Starting June 1, visitors to state courthouses will be allowed to bring cellphones and other personal electronic devices.

A Delaware Courts news release said the move is an extension of a branchwide pilot program that started in February 2022 and allowed devices in a handful of locations, including the Sussex County Courthouse.

Kent County Courthouse
414 Federal St.
Dover, DE 19901



COURTS

Delaware State Courts To Lift Prohibition Statewide

By Emily Sawicki · May 26, 2023, 4:15 PM EDT

Visitors to Delaware state courtrooms will soon be permitted to carry cellphones and other electronic devices with them into court as part of an expansion of a pilot program that began...

FOR IMMEDIATE RELEASE
May 25, 2023

Delaware Judiciary to allow visitors to bring cellphones and other personal electronics into all court facilities June 1 as part of pilot program

On June 1, 2023, the public will be allowed to bring cell phones and other personal electronic devices into all state courthouses in an extension of a branch-wide pilot program that started in February 2022.

There will still be restrictions on use of the devices in court facilities, and in particular in courtrooms, but

PILOT PROGRAM POLICY FOR THE PUBLIC'S USE OF PORTABLE ELECTRONIC DEVICES IN COURTHOUSES AND COURTROOMS
Effective June 1, 2023

1. Applicability of this Policy

In furtherance of the Delaware Judicial Branch's expanded Pilot Program for the Use of Portable Electronic Devices in Courthouses and Courtrooms, effective June 1, 2023, this policy

Facility Dog Program

February 2023
Officer Vinn

- Partnership with the Capitol Police
- Provides comfort for vulnerable individuals in legal settings, particularly children
- Trained to be calm and unobtrusive

Judicial Branch Strategic Planning

The Following Message is being sent on behalf of Chief Justice Collins J. Seitz, Jr.

Good morning,

Today is the last day to complete the Judicial Branch Strategic Planning Survey. We need your help to move forward with our long-range planning. Your input will help us shape the future of the Delaware courts. Please take some time out of your busy day to complete the survey – today. The deadline to complete the survey is end of day today, April 17.

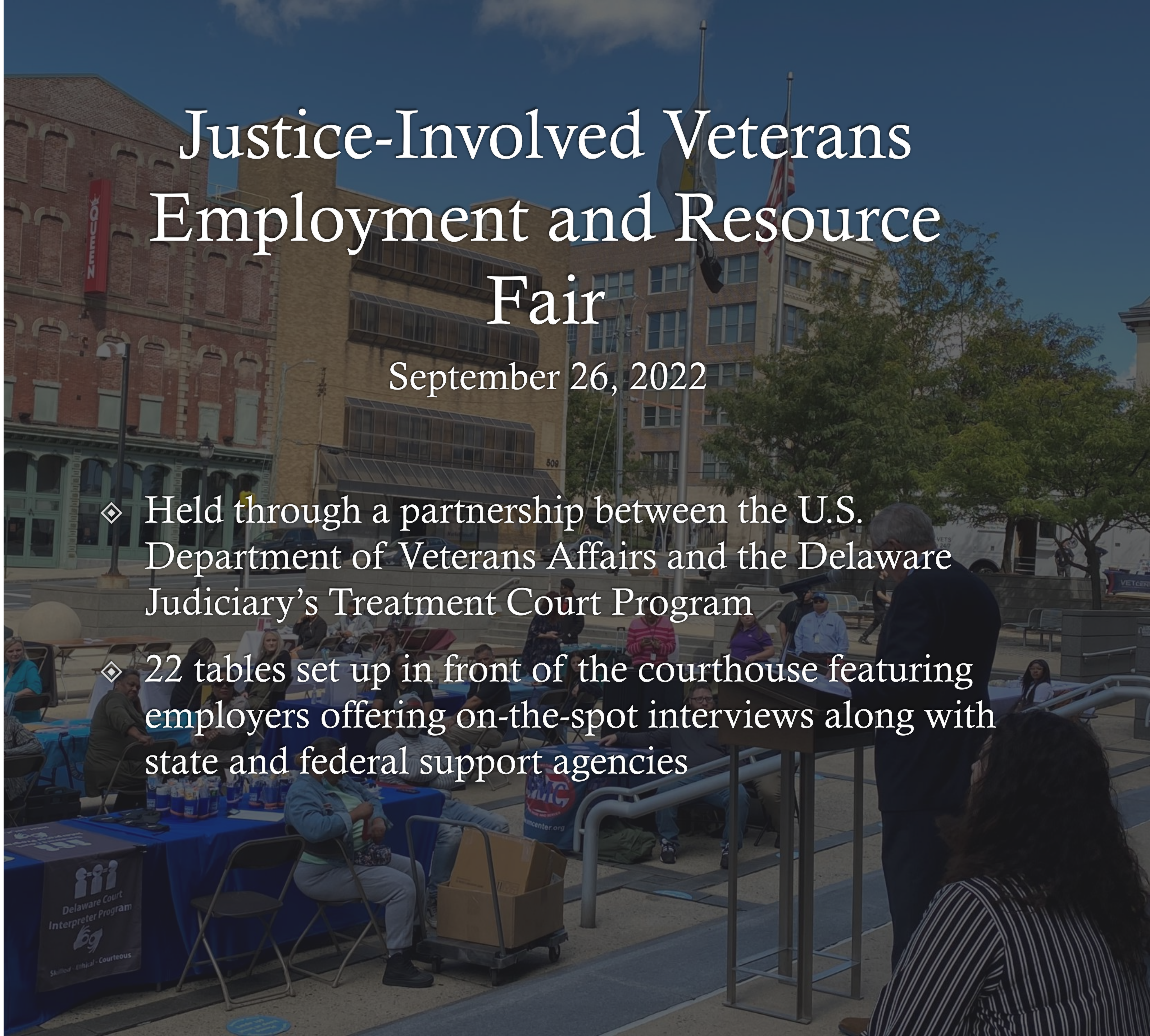
The survey is available at: https://ncsc2.iad1.qualtrics.com/jfe/form/SV_3gaxRsqPzXP6w3I. It should take no more than 15-20 minutes. You may not have an answer to some of the questions, and some questions may not apply to you or your court. It is okay to select the response Don't Know/Not Applicable. The open-ended questions do not have to be answered in order to advance further in the survey.

If you encounter any problems with the survey, please contact Alisa Kim at akim@ncsc.org or Grace Spulak at gspulak@ncsc.org.

Thank you.
Chief Justice Seitz

Court of Chancery 230th Anniversary

Hotel DuPont Nov. 30, 2022



Justice-Involved Veterans Employment and Resource Fair

September 26, 2022

- Held through a partnership between the U.S. Department of Veterans Affairs and the Delaware Judiciary's Treatment Court Program
- 22 tables set up in front of the courthouse featuring employers offering on-the-spot interviews along with state and federal support agencies

Delaware High School Mock Trial Competition

- February 24 and 25, 2023
- 32nd anniversary
- 18 teams, 217 students
- 118 Delaware Bench and Bar members served as presiding judges or scoring judges
- First all-female judging panel for final round
- Wilmington Charter represented Delaware at Nationals
- Delaware will host the National High School Mock Trial Competition in 2024

Safe Surrender May 12, 2023

Leonard L. Williams Justice Center

- 450 individuals turned out to clear their records
- More than 1,000 capiases and warrants cleared
- Over a dozen judicial officers involved
- One individual travelled all the way from Florida to participate

Behavioral Health and Criminal Justice Integration Summit May 22-23, 2023

DELAWARE BEHAVIORAL HEALTH & CRIMINAL JUSTICE INTEGRATION SUMMIT

Over 500 legal, law enforcement and social service professionals attended

Chase Center on the Riverfront

Miracle on 34th Street (19th year)

- Dec. 13 – 16, 2022
- Held at courthouses in Georgetown, Dover and Wilmington
- Over 1,300 students from public and private schools attended

Looking Ahead

- **Online Enhancements**
  - ARPA funds will be used to improve the accessibility of the Judicial Branch’s online content, including forms for those with disabilities and limited English proficiency
- **Project CASCADE**
  - Branch-wide e-Filing, case management and document management system
  - 5-year project will bring all Delaware state courts onto one unified e-file system
  - Will permit enhanced data gathering and analysis
- **Court Security Audit**
  - Branch-wide review of all facilities to identify and close security gaps
  - Define future security needs

Thank You

PLENARY SESSION

Reform and Rigor: How Delaware's Bar Admission Reform Efforts Can Be a Model for the Nation

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Keynote Speaker

Aaron N. Taylor

Senior Vice President, Executive Director at AccessLex Institute Center for Legal Education Excellence

BREAKOUT SESSIONS

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LEAVE IT TO THE MEDIATOR

Panelists

The Honorable Joseph R. Slights III
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Bernard G. Conaway, Esquire
Conaway-Legal LLC

Kathi A. Karsnitz, Esquire
Kathi A. Karsnitz, Attorney at Law

David A. White
Chief Disciplinary Counsel, Office of Disciplinary Counsel,
Delaware Supreme Court

Mr. White is a frequent speaker/moderator in the areas of legal ethics and Alternative Dispute Resolution. In March 2021, the Delaware Supreme Court appointed Mr. White Chief Disciplinary Counsel of the Office of Disciplinary Counsel ("ODC"), and Arm of the Court.

The ODC, which functions as an educational and professional resource for members of the Delaware bar, receives, evaluates, investigates, and when necessary, prosecutes complaints of lawyer misconduct and the unauthorized practice of law. The Office also recommends sanctions for attorney misconduct to the Board on Professional Responsibility and the Court.

Previously, Mr. White was in private practice and was the office managing partner in the Wilmington, Delaware office of McCarter & English, LLP. There, he was a member of the firm's business litigation, products liability, and bankruptcy practice groups. A substantial portion of his practice was devoted to ADR and representing lenders in the areas of commercial loan workouts, commercial litigation, commercial real estate, and related bankruptcy issues.

Mr. White was a Superior Court Commissioner from 2001-2008 and for several years he taught a civil litigation course for the University of Delaware, Division of Professional and Continuing Studies, where he was awarded Excellence in Teaching awards in 2007 and 2008.

Mr. White has served on the Executive Committee of the Delaware State Bar Association for many years and he is also an Honorary/Volunteer member of the Professional Guidance Committee.

Education:
Widener University School of Law, J.D 1986
University of Delaware, B.A. 1982

Yvonne Takvorian Saville

Ms. Saville is a director with the law firm of Weiss, Saville & Houser, P.A. where her practice is focused on civil litigation and alternative dispute resolution. She has mediated and arbitrated over 14,000 cases to date. Ms. Saville has also served as a Special Master for complex civil cases in Delaware's District Court for eight years and has been an adjunct professor at the Delaware Law School since 2014. In recognition of her ADR practice, Ms. Saville was named a "Friend of the Court" by President Judge Jurden and was accepted as a Fellow with the American College of Civil Trial Mediators and as a member of the National Academy of Distinguished Neutrals. She has presented over 85 lectures on the topics of Alternative Dispute Resolution, Personal Injury and Workers' Compensation.

Ms. Saville is a Past President of the Delaware State Bar Association (DSBA) and is a member and previous Chair of DSBA's Workers' Compensation Section. She is also a member of the Randy J. Holland Inn of Court and serves on the CLE planning commissions for the DSBA Workers' Compensation section and Delaware Trial Lawyers Association. She co-chaired the Women and Law Section annual conference for 10 years and is a past co-Chair of the DSBA Nominating Committee.

Ms. Saville has been appointed to the Judicial Nominating Commission by Governor Carney and also currently serves on the Delaware Law School Alumni Board. She is a previous co-chair of the Delaware Supreme Court's Access to Justice Commission and served as a member of the Judicial Strategies Committee. She was a board member for 14 years with the Combined Campaign for Justice and served as an officer with the Delaware Financial Literacy Institute.

For the last 26 years, Ms. Saville has been on the Board of Governors for the Delaware Trial Lawyers Association (DTLA) and has served as its' President twice. She is a member of the American Bar Association and the American Association for Justice.

Awards and Honors

- **"AV"** Martindale-Hubbell Peer Review Pre-Eminent Rating 5.0 out of 5 in the areas of Personal Injury, Alternative Dispute Resolution and Workers' Compensation , 2012-2023
- **Kimmel-Thynge Award**, presented by the Alternative Dispute Resolution Section of the Delaware Bar in recognition for outstanding contributions to ADR in Delaware, 2021
- **Amicus Curiae Award** or "Friend of the Court", presented by President Judge Jurden on behalf of the Delaware Superior Court in recognition of ADR practice, 2019
- **Honorable Aida Waserstein Award**, presented by the Women and Law Section of the Delaware Bar in recognition of professional excellence and significant contributions to the legal community, 2019
- **Women's Leadership Award**, presented by the Delaware State Bar Association in recognition of achievement and activities in matters affecting woman and who has served as an inspiration to and a model for women lawyers in our profession, 2018

- **Alumna of the Year Award**, presented by Delaware Law School in recognition of contribution to community and profession, 2016
- **Eagle of Justice Award**, presented by the Delaware Trial Lawyers Association for dedication to preserving the rights of Delawareans, 2016
- Named *The Best Lawyers in America*© Mediation **"Lawyer of the Year"** in Wilmington in 2015, 2018, 2020 and 2022
- Recognized in *The Best Lawyers in America*© 2015 - 2023 in the field of Mediation
- Recognized by *Delaware Today Magazine* as the **Top Alternative Dispute Resolution Lawyer**, 2013 - 2022; one of the **Top Worker's Compensation Lawyers**, 2010
- Recognized as a *Delaware Super Lawyer*® for Alternative Dispute Resolution, 2013-2023
- Named as **Delaware Top 10** *Super Lawyer*® , 2016 - 2018, 2023
- **DSBA President's Gavel and Ring** for service as the 67th President of the Delaware State Bar Association, 2014-2015
- **DTLA President's Award for Outstanding Leadership** on behalf of the Delaware Trial Lawyers Association, 2006-2007
- **Outstanding Service Award**, presented by Delaware Law School in recognition of "dedication and service to the legal community," 2006
- **Five-Year Volunteer Service Award**, presented by the Office of the Child Advocate in recognition of "pro bono work on behalf of children", 2006
- **Key Contact of the Year Award**, presented by the Delaware Trial Lawyers' Association in recognition of "outstanding service in support of Delaware's civil justice system," 2003

Law Firm recognition:

- Weiss, Saville & Houser, P.A. named by U.S. News and World Reports as Top Tier 1 **Best Law Firms in Workers Compensation Law and Mediation**, 2011-2023

BERNARD G. CONAWAY *is the founding member of Conaway-Legal LLC. Over the course of his 30 year career he's served as a law clerk to former Clarence Taylor, of the Superior Court of Delaware, was appointed and served for 10 years on the Superior Court of Delaware as a Special Mater in Complex Litigation, and was a partner in very large and small law firms.*

His practice focuses on ADR, bankruptcy, practice before the Delaware Court of Chancery, corporate and alternate entity governance under Delaware law and complex civil litigation. In thirty years of practice, Mr. Conaway has been involved in every facet of complex civil litigation serving a lead and local counsel, as Special Master, as a mediator and party selected arbitrator.

Mr. Conaway frequently appears in Delaware's Court of Chancery on matters involving director/officer indemnification and advancement pursuant to Section 145 of the Delaware General Corporate Law, for books and records demands under Section 220, served as corporate custodian under authority of Section 226, Section 275/276 regarding dissolutions, director and officer demands for indemnification and advancement, injunctive relief, specific performance, quiet title actions, guardianship, trust and estate litigation and other equitable claims. In his bankruptcy practice.

Mr. Conaway has served as lead and local counsel on every side of the bankruptcy process including representing creditors, debtors, directors against preference and insider claims, landlords, and other parties seeking to lift the automatic stay.

Since 1994, Mr. Conaway served as an arbitrator and mediator. Since then he has successfully mediated thousands of cases, including hundreds of large complex, multi-party, multi-level insurance, *construction, bankruptcy, environmental, and commercial cases. He has mediated law firm break-ups, intra-company disputes, governance and financial disputes between alternate entity members and personal injury claims. Mr. Conaway has served for over sixteen years as a mentor in the Delaware Superior Court's mediation training program. He formerly served as adjunct instructor at the National Judicial College in Reno, Nevada teaching civil mediation.*

Mr. Conaway volunteers his time to a number of boards and committees. Over the past eighteen years he has served on numerous board and committees including the Widener University School of Law Alumni Association (board member), the York College of Pennsylvania Collegiate Counsel (board member), St. Thomas More Society of the Archdiocese of Wilmington (past president), Caesar Rodney Rotary Club (member), Colin J. Seitz Bankruptcy Inn of Court (barrister) Wilmington, Richard S. Rodney Inn of Court (Executive Committee) Wilmington, and Superior Court Committee on Complex Litigation (member). He serves as a volunteer attorney Guardian Ad Litem for Delaware children and has continuously done so since 2003.

EVENTS

- *Ethical Considerations in Alternative Dispute Resolution*
- *"Expert" Advise From Successful Arbitrators*
- *ADR in Practice: A Lawyer Round Table*

EXPERIENCE

- *Represented a corporate client opposing a director's 220 action involving an onerous demand for books and records. The Chancery Court dismissed the matter without production of any records and without answering the complaint.*
- *Appointed and/or selected to serve as a Special Discovery Master in complex civil cases involving insurance coverage, products liability, construction, mass tort, and environmental cases.*
- *Settled a multi-million dollar bankruptcy preference claim asserted against one of the world's largest aluminum suppliers. The case was complicated by the interplay between US and INCO maritime conventions as well as US, UK and Bahrain law.*

• Successfully secured liquidation of a client's LLC interest in the face of vigorous opposition involving protracted discovery, trial, and appeal to the Supreme Court of Delaware.
• Following a year long effort, successfully mediated all of the pending state court abuse claims brought against multiple religious order entities affiliated/working with the Diocese of Wilmington. The mediation was complicated by the number of claims, multiple insurers' reservations of rights, unresolved and novel legal questions, funding issues, and the Diocese's then pending bankruptcy.
• Served as local counsel for an ad hoc consortium of preferred security holders in the Chapter 11 of Washington Mutual, Inc.
• Served as local counsel to an indentured trustee and an Ad Hoc Committee of bondholders in an expedited Delaware Chancery Court trial and successfully appealed the matter to the Supreme Court of Delaware resolving a dispute over Calpine's use of $700 million subject to lien indenture restrictions.
• Served as local counsel to bondholders holding $2 billion in Countrywide Series B May 2007 bonds in an action seeking a determination whether the acquisition of Countrywide constituted a "change of control" and therefore triggered bondholder put rights. The matter was settled and the bondholders were paid nearly $2 billion (i.e., close to par) for their bonds.
• Successfully defended the former CEO of a major imaging company against preference, fraudulent transfer, and insider trading claims.
• Frequently draft LLC and Series LLC organizational documents for Delaware real estate investors including completion of client tailored limited liability agreements.
• Often represent pro bono, minor children in actions where the state is seeking to terminate parental rights.

CHANCERY LAW

REAL WORLD CHANCERY

Panelists

The Honorable Kathaleen St. Jude McCormick
Chancellor, Court of Chancery of the State of Delaware

The Honorable Nathan A. Cook
Court of Chancery of the State of Delaware

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Mae Oberste, Esquire
Bernstein Litowitz Berger & Grossmann LLP

CHANCELLOR KATHALEEN ST. JUDE MCCORMICK

The Honorable Chancellor Kathaleen St. J. McCormick was sworn in as Chancellor of the Court of Chancery on May 6, 2021. Chancellor McCormick first joined the court as Vice Chancellor on November 1, 2018. Prior to joining the Court, Chancellor McCormick was a partner in the Delaware law firm Young Conaway Stargatt & Taylor, LLP, where she focused her practice on litigating internal governance and corporate disputes, primarily in the Court of Chancery. Before entering private practice, Chancellor McCormick was a staff attorney with the Community Legal Aid Society, Inc.

Chancellor McCormick received her undergraduate degree from Harvard and her law degree from Notre Dame Law School. She is a Delaware native and a graduate of Smyrna High.

VICE CHANCELLOR LORI W. WILL

The Honorable Lori W. Will was sworn in as a Vice Chancellor of the Court of Chancery on May 26, 2021. Prior to joining the Court, Vice Chancellor Will was a partner at Wilson Sonsini Goodrich & Rosati, P.C., where she focused on the representation of business entities and their directors and officers in corporate, complex commercial, and federal securities litigation.

Before joining Wilson Sonsini, Vice Chancellor Will was a senior associate in the litigation department of Skadden, Arps, Slate, Meagher & Flom LLP. She served as a law clerk to then-Vice Chancellor Leo E. Strine, Jr. after graduating from law school.

Vice Chancellor Will received her B.A. summa cum laude in both History and Government & Law from Lafayette College. She received her J.D. from the University of Pennsylvania Law School and a graduate Certificate in Business and Public Policy from the Wharton School of the University of Pennsylvania.

VICE CHANCELLOR NATHAN A. COOK

The Honorable Nathan A. Cook was sworn in as Vice Chancellor of the Court of Chancery on July 21, 2022. Prior to joining the Court, Vice Chancellor Cook was the managing partner of Block & Leviton LLP's Delaware office, where he focused his practice on litigation before the Court of Chancery.

The Vice Chancellor received both his undergraduate degree and law degree from the University of Virginia. After law school, he clerked for Vice Chancellor John W. Noble of this Court.

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Mae Oberste practices out of BLB&G's Wilmington office, prosecuting corporate governance and shareholder rights litigation on behalf of the firm's institutional investor clients.

Prior to joining the firm, Mae was an associate at a plaintiffs' firm where she litigated cases involving corporate law, including breach of fiduciary duty claims and expedited litigation in the Delaware Court of Chancery. Her earlier experience includes securities litigation, and she also served as primary editor for Practising Law Institute's *Directors' and Officers' Liability: Current Law, Recent Developments, Emerging Issues* (Third Edition).

Mae graduated *summa cum laude* from Seattle University School of Law, where she served as an editor of both the *Seattle University Law Review* and the *American Indian Law Journal*. After law school, Mae served as a judicial clerk to then-Vice Chancellor Tamika R. Montgomery-Reeves of the Delaware Court of Chancery.

Mae is currently an executive committee member of the Delaware State Bar Association.

Ben Potts is an associate in the Wilmington, Delaware, office of Wilson Sonsini Goodrich & Rosati. Ben specializes in litigation in the Delaware Court of Chancery, with expertise representing directors and officers of public and private entities. Prior to joining Wilson Sonsini, Ben was an associate at Young, Conaway, Stargatt & Taylor LLP in Wilmington.

Ben graduated from The University of Pennsylvania Carey Law School, where he was a Senior Editor on the Journal of Constitutional Law. After law school, Ben served as law clerk to Justice Carolyn Berger of the Supreme Court of Delaware.

State of the Court of Chancery

BENCH & BAR

JUNE 15, 2023



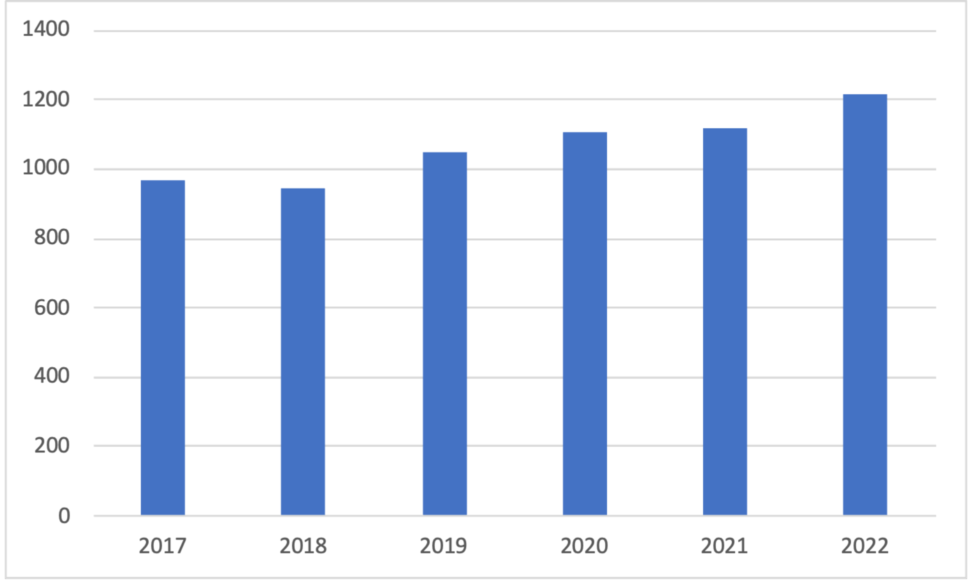
RETIREMENT LANE



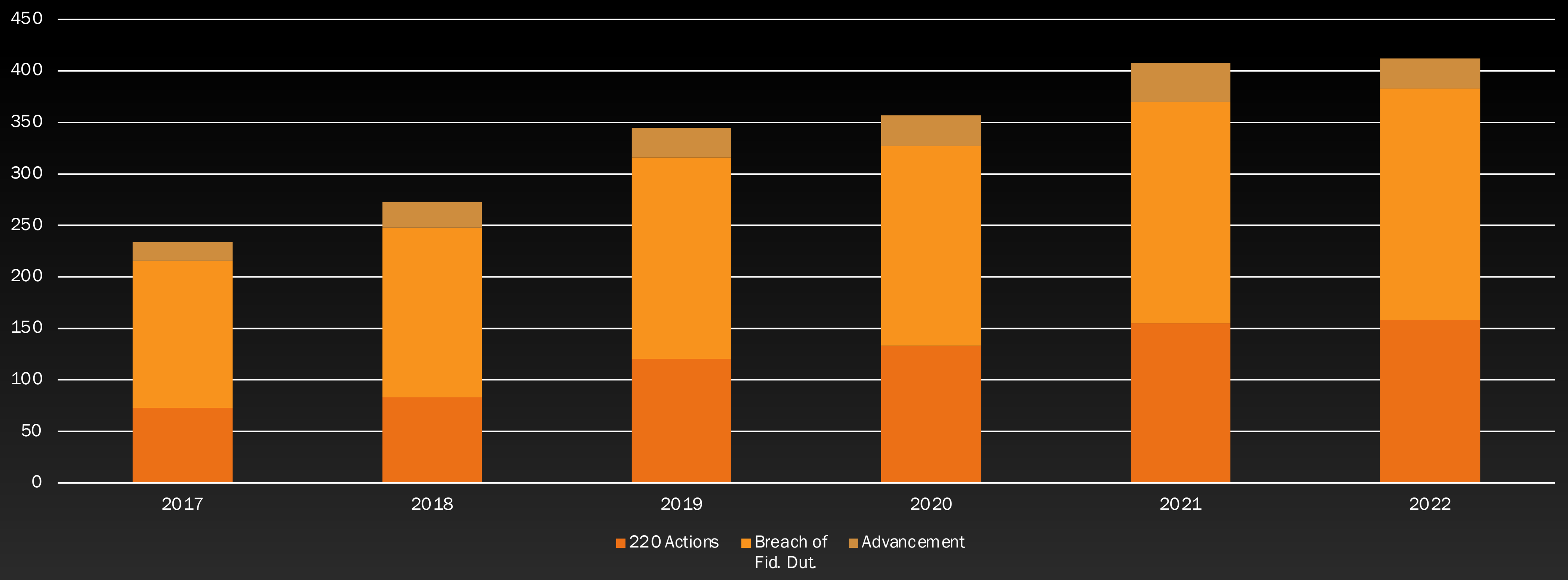

New Members of the Court

The Ever-Increasing Caseload

YEAR	Total Actions	(Y-O-Y)
2017	965	-
2018	943	-2.28%
2019	1049	11.24%
2020	1108	5.62%
2021	1120	1.08%
2022	1214	8.39%



Select Growth Categories



The Court's Caseload

37% of new actions were accompanied by a motion to expedite

Rise in Section 220 actions provides partial explanation for increase in expedited cases

12% of new filings were categorized as breach of contract cases (with non-compete actions, 17%)

2023

- 618 filings as of 6/14 in 2023
  - Compared to 523 filings as of 6/14 in 2022
- SPAC Ratification Cases accounts for 63 of those cases
  - Much but not all of the increase

Some Solutions

Third Master in Chancery

Staff Attorney →

Special Designation of Section 111 Cases

IN THE SUPREME COURT OF THE STATE OF DELAWARE

In re:	)
	)
DESIGNATION OF ACTIONS FILED	)
PURSUANT TO 8 *Del. C.* § 111	)

CROSS-DESIGNATION ORDER

WHEREAS, the Delaware Court of Chancery is the preeminent business court in the United States whose highly skilled Chancellors and Vice Chancellors resolve business disputes – large and small – in a timely and careful manner;

Supplemental Information Sheet

- Identify Section 111 disputes at the outset of a case to facilitate special designation process
- Distinguish summary proceedings from other forms of expedited proceedings
- Make clear that attorneys are obligated to identify related matters at the outset of the case

KeyCite Yellow Flag - Negative Treatment
Distinguished by New Enterprise Associates 14, L.P. v. Rich, Del.Ch., May 2, 2023

288 A.3d 692
Court of Chancery of Delaware.

Richard DELMAN, Plaintiff,
v.
GIGACQUISITIONS3, LLC, Avi Katz, Raluca Dinu, Neil Miotto, John Mikulsky, Andrea Betti-Berutto, and Peter Wang, Defendants.

C.A. No. 2021-0679-LWW
|
Date Submitted: September 23, 2022
|
Date Decided: January 4, 2023

Synopsis
Background: Public stockholder filed putative class action against directors of special purpose acquisition company (SPAC), SPAC's sponsor, and sponsor's managing member, asserting direct claims for breach of fiduciary duty and unjust enrichment. Defendants moved to dismiss for failure to plead demand futility and failure to state a claim.

Holdings: The Court of Chancery, Will, Vice Chancellor, held that:

claims were direct, not derivative;

claims were not "holder" claims that would be improper as class action;

stockholder adequately alleged sponsor was conflicted controller, warranting application of "entire fairness" review;

stockholder adequately alleged that majority of board of directors was not disinterested, warranting application of "entire fairness" review;

vote of stockholders approving of merger did not cleanse transactions of conflicts;

stockholder adequately alleged merger was not entirely fair due to withholding of information material to redemption decision; and

stockholder adequately alleged sponsor and directors enriched themselves in a way that impoverished public stockholders.

Motion denied.

Attorneys and Law Firms

***699** Michael J. Barry, GRANT & EISENHOFFER, P.A., Wilmington, Delaware; Michael Klausner, Stanford, California; Attorneys for Plaintiff Richard Delman

John L. Reed, Ronald N. Brown & Kelly L. Freund, DLA PIPER LLP (US), Wilmington, Delaware; Melanie E. Walker & Gaspard Rappoport, DLA PIPER LLP (US), Los Angeles, California; Attorneys for Defendants GigAcquisitions3, LLC, Avi Katz, Raluca Dinu, Neil Miotto, John Mikulsky, Andrea Betti-Berutto & Peter Wang

OPINION

WILL, Vice Chancellor

****1** Over the latter half of the 2010s, special purpose acquisition companies (or SPACs) ***700** became wildly popular investment vehicles. Successful SPACs are structured to create value for multiple participants. For private companies, SPACs provide an efficient path to access the public equity markets without a traditional initial public offering. The SPAC's management team (or sponsor) can obtain substantial profits on nominal invested capital. And the public stockholders who purchase the SPAC's units have a chance to invest early in an emerging company's lifecycle.

Because the ultimate investment opportunity is initially unknown, a SPAC's public stockholders rely on the entity's sponsor, officers, and directors to identify a favorable merger target. Public stockholders are given redemption rights, allowing them to reclaim their funds—held in trust—before a merger if they choose to forego investing in the combined company. For a SPAC organized as a Delaware corporation, stockholders are also assured that the entity's fiduciaries will abide by standards of conduct.

The plaintiff in this action asserts that the sponsor and directors of a SPAC failed to live up to those fiduciary obligations. The defendants allegedly undertook a value destructive deal that generated returns for the sponsor at the expense of public stockholders. The plaintiff claims that the defendants impaired stockholders' ability to decide whether to redeem or to invest in the post-merger company. Public stockholders were left with shares worth far less than the guaranteed redemption price; the sponsor received a windfall.

Barring legislation providing otherwise, the fiduciaries of a Delaware corporation cannot be exempted from their loyalty obligation and the attendant equitable standards of review that this court will apply to enforce it. That the corporation is a SPAC is irrelevant. Long-established principles of Delaware law require fiduciaries to deal candidly with stockholders and avoid conflicted, unfair transactions. Here, it is reasonably conceivable that the defendants breached those duties by disloyally depriving public stockholders of information material to the redemption decision. The defendants' motion to dismiss is therefore denied.

I. FACTUAL BACKGROUND

Unless otherwise noted, the following facts are drawn from the plaintiff's Verified Class Action Complaint (the "Complaint") and the documents it incorporates by reference.[1]

1 Verified Class Action Compl. (Dkt. 1) ("Compl."); *see* *In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *1 (Del. Ch. Oct. 10, 2016) (explaining that the court may take judicial notice of "facts that are not subject to reasonable dispute" (citing *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006))); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002) ("The court may take judicial notice of facts publicly available in filings with the SEC.").
Citations in the form of "Defs.' Opening Br. Ex. __" refer to exhibits to the Unsworn Declaration of Kelly L. Freund to Defendants' Opening Brief in Support of Their Motion to Dismiss Verified Class Action Complaint. Dkt. 18.

A. Gig3's Formation and Sponsor

****2** GigCapital3, Inc. ("Gig3" or the "Company")—now Lightning eMotors, Inc. ("New Lightning")—is a Delaware corporation formed as a special purpose acquisition company (SPAC) in February 2020.[2]

2 Compl. ¶¶ 1, 35, 39.

A SPAC is a financial innovation that traces its origins to the "blank check" companies of the 1980s.[3] It is a shell corporation, ***701** most commonly incorporated in Delaware, that lacks operations and takes a private company public through a form of reverse merger. The number of SPAC mergers skyrocketed in 2020 and 2021.[4] That trend has recently slowed.[5]

3 *Id.* ¶ 2; *see* *Hamilton P'rs, L.P. v. Englard*, 11 A.3d 1180, 1189 n. 3 (Del. Ch. 2010) (discussing blank check companies as "common instruments of fraud in the 1980s") (citations omitted).

4 Compl. ¶ 2; *see* Michael Klausner, Michael Ohlrogge & Emily Ruan, *A Sober Look at SPACs*, 39 Yale J. Reg. 228, 230-31 & 231 fig.1 (2022) (noting that in January 2020 through November 2021, SPAC IPOs accounted for more than half of total IPOs and, among all firms that went public, SPAC mergers accounted for 22% in 2020 and 34% in 2021).

5 *See* Aziz Sunderji & Amrith Ramkumar, *SPAC Activity in July Reached the Lowest Levels in Five Years*, Wall St. J. (Aug. 17, 2022), https://www.wsj.com/articles/spac-activity-in-july-reached-the-lowest-levels-in-five-years-11660691758.

SPAC structures have become largely standardized.[6] The SPAC is formed by a sponsor that raises capital in an initial public offering (IPO). Its IPO units are customarily sold for $10 each and consist of a share and a fraction of a warrant (or alternatively a warrant to purchase a fraction of a share). The IPO proceeds are held in trust for the benefit of the SPAC's public stockholders, who have a right to redeem their shares after a merger target is identified. These redemption rights essentially guarantee public IPO investors a fixed return.

6 Compl. ¶¶ 2-8; *see* *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 793-96 (Del. Ch. 2022) (discussing typical SPAC structure).

The sponsor, most often a limited liability company, is responsible for administering the SPAC. Sponsors are compensated by a "promote." Though that can take many forms, it is usually 20% of the SPAC's post-IPO equity—issued as "founder shares"—for a nominal price. The sponsor will also make an investment concurrently with the IPO to cover the SPAC's underwriting fees and other expenses, since those expenses cannot be paid using cash in the trust. At the time of its merger, a SPAC may also issue new shares as private investment in public equity (PIPE).

The SPAC's charter sets a fixed period—generally between 18 and 24 months—to complete a de-SPAC transaction with a yet-to-be-identified private company. The SPAC must liquidate if it fails to merge within that window. In the event of liquidation, the trust distributes its cash (IPO proceeds plus accrued interest) to the SPAC's public stockholders. The founder shares, meanwhile, become worthless.

Gig3 fell within these structural norms.

Its sponsor was defendant GigAcquisitions3, LLC (the "Sponsor"), a Delaware limited liability company.[7] The Sponsor was responsible for incorporating the entity, appointing its directors, and managing its IPO.[8]

7 Compl. ¶¶ 4, 26.

8 *Id.* ¶ 4.

****3** In February 2020, shortly after it was incorporated, Gig3 issued founder shares to the Sponsor amounting to approximately 20% of Gig3's post-IPO equity for the nominal sum of $25,000.[9] This came to about five million founder shares, referred to as the "Initial Stockholder Shares," at a price of $0.005 per share.[10]

9 *Id.* ¶ 39; *see also* Defs.' Opening Br. Ex. 3 ("Prospectus") at 13-14.

10 Compl. ¶¶ 7, 39. Specifically, there were 4,985,000 Initial Stockholder Shares. *See* GigCapital3, Inc., Definitive Proxy Statement (Amendment No. 3 to Form S-4) ("Proxy") at 5 (Mar. 22, 2021), *available at* https://www.sec.gov/Archives/edgar/data/1802749/000119312521088347/d70436ds4a.htm.

***702** The Initial Stockholder Shares differed from those that would later be offered to the public. The Initial Stockholder Shares could not be redeemed and lacked liquidation rights.[11] They were also subject to a lock-up that prohibited the Sponsor from transferring, assigning, or selling the shares until a set time.[12]

11 Compl. ¶ 8; *see also* Prospectus at 15, 26.

12 Prospectus at 14-15.

B. Gig3's IPO

Gig3 completed its IPO on May 18, 2020, selling 20 million units to public investors at $10 per unit and raising proceeds of $200 million.[13] The units were offered pursuant to a Form S-1 Registration Statement, filed with the Securities and Exchange Commission (SEC) on February 25, 2020, and a May 13, 2020 prospectus.[14] The prospectus disclosed certain conflicting interests between the Sponsor and Gig3's public stockholders:

> Since our Sponsor will lose its entire investment in us if our initial business combination is not consummated, and our executive officers and directors have significant financial interests in our Sponsor, a conflict of interest may arise in determining whether a particular acquisition target is appropriate for our initial business combination.[15]

13 Compl. ¶ 40; *see also* Prospectus at 9.

14 *See generally* Defs.' Opening Br. Ex. 5; Prospectus.

15 Prospectus at 46.

Each unit consisted of a share of common stock and three-quarters of a warrant to purchase a share of common stock at an exercise price of $11.50 per share.[16] The shares of common stock had redemption and liquidation rights. If Gig3 failed to complete a de-SPAC merger within 18 months, it would liquidate and public stockholders would receive their $10 per share investment back plus interest.[17] If Gig3 identified a target, public stockholders could redeem their shares for $10 per share plus interest but keep the warrants included in the IPO units.[18] The warrants were essentially free for public IPO investors.[19]

16 Compl. ¶ 40; *see also* Prospectus at 9. For example, the warrants contained in four units would allow the holder to purchase three common shares at $11.50 per share.

17 Compl. ¶ 4; *see also* Defs.' Opening Br. Ex. 9 ("Charter") § 9.1(b); Prospectus at 26.
It bears noting that the transaction discussed in this decision is technically a series of business combinations involving Gig3's merger subsidiary and the target, leading to the target becoming a subsidiary of Gig3. *See* Proxy at A-13.

18 Compl. ¶¶ 8, 40; *see also* Prospectus at 20. Whole warrants became exercisable after the merger closed.

19 Compl. ¶ 40. In the event of a liquidation, the warrants would expire worthless. In the event of a merger, public stockholders could redeem their shares—recouping the cost of purchasing IPO units—and retain the warrants.

****4** The IPO proceeds were deposited in a trust. The cash in the trust was earmarked for the exclusive purposes of redeeming shares in the first instance, contributing the remainder to a merger, or returning funds to stockholders in the event of a liquidation.[20]

20 *Id.*

Nomura Securities International, Inc. ("Nomura") and Oppenheimer & Co. Inc. ("Oppenheimer") acted as the joint lead ***703** book-running managers for the offering, and Odeon Capital Group LLC acted as co-manager.[21] The underwriters agreed to defer two-thirds (or $8 million) of their underwriting fees until a merger was accomplished.[22]

21 Prospectus at Cover Page.

22 Compl. ¶ 52.

Simultaneously with the IPO, the Sponsor purchased 650,000 Gig3 units for $10 per unit in a private placement.[23] The $6.5 million in proceeds were used to pay Gig3's underwriting fees and operating expenses.[24] The IPO underwriters also collectively purchased 243,479 private placement units for $10 per unit.[25] Like an IPO unit, each private placement unit consisted of a share of common stock and three-quarters of a warrant to purchase a share of common stock.[26] But unlike the IPO shares, the shares included in the private placement units lacked liquidation or redemption rights and were subject to a lock-up.[27]

23 *Id.* ¶ 41.

24 *Id.*

25 *Id.* ¶ 52; *see also* Prospectus at 110.

26 Prospectus at 110.

27 *Id.*; *see supra* notes 11-12 and accompanying text.

C. Gig3's Directors and Officers

Defendant Avi Katz is a "serial founder of SPACs" affiliated with GigCapital Global, where Katz is a founding managing partner, Chief Executive Officer, and Executive Chairman.[28] Katz served as a member of Gig3's Board of Directors (the "Board") and as Gig3's Executive Chairman, Secretary, President, and Chief Executive Officer.[29] He held a controlling interest in the Sponsor and was its managing member.[30]

28 *Id.* ¶¶ 6, 37; *see id.* ¶¶ 27-32 & ¶ 27 n.1; GigCapital, https://www.gigcapitalglobal.com (last visited Jan. 1, 2023).

29 Compl. ¶ 27; *see* Prospectus at 109.

30 Compl. ¶ 26; *see* Prospectus at 109 ("The shares held by our Sponsor are beneficially owned by Dr. Katz ... who has sole voting and dispositive power over the shares held by our Sponsor.").

Katz, through the Sponsor, had the power to select Gig3's initial directors and officers.[31] Katz appointed defendants Raluca Dinu (his spouse), Neil Miotto, John Mikulsky, Andrea Betti-Berutto, and Peter Wang to the Board.[32] These individuals have prior ties to Katz, are associated with GigCapital Global, and have held multiple roles at GigCapital Global affiliated business.[33]

31 Compl. ¶¶ 4, 6, 9.

32 *Id.* ¶¶ 28-32.

33 *Id.* ¶¶ 42-45; *see infra* notes 185-96 and accompanying text.

The directors also held membership interests of an undisclosed quantity or value in the Sponsor, which in turn held Gig3 Initial Stockholder Shares.[34] In addition, Wang and Betti-Berutto were each given 5,000 Gig3 common shares as consideration for future services (the "Insider Shares").[35] Like the Initial Stockholder Shares, the Insider Shares lacked redemption and liquidation rights and were subject to a lock-up ***704** restriction.[36]

34 Compl. ¶ 43. Miotto held a 10% ownership interest in GigFounders, LLC, which held membership interests of an undisclosed quantity or value in the Sponsor. *Id.*

35 *Id.*; *see also* Prospectus at 14. Non-party Brad Weightman, Gig3's Chief Financial Officer and Vice President, was likewise given 5,000 Insider Shares. Prospectus at 14.

36 *See* Prospectus at F-8; *supra* notes 11-12 and accompanying text.

D. Lightning eMotors

****5** After the IPO, Gig3's officers and directors began to search for a merger target. They identified Lightning eMotors Inc. ("Lightning"), an electric vehicle manufacturer focused on zero-emission medium duty vocational vehicles and shuttle buses.[37] Katz and Dinu "dominated" the Company's negotiations with Lightning.[38]

37 Compl. ¶ 65; *see also* Proxy at 244.

38 Compl. ¶ 51.

Oppenheimer and Nomura—two of the three IPO underwriters—were hired to serve as Gig3's financial advisors.[39] The Board did not ask Oppenheimer or Nomura to provide a fairness opinion on the merger.[40]

39 *Id.* ¶ 52.

40 *Id.* ¶ 53.

On December 9, 2020, the Board approved a proposed transaction with Lightning.[41] The next day, Gig3 and Lightning announced that they had entered into a merger agreement.[42] The merger agreement provided that Lightning stockholders would receive consideration in the form of Gig3 common shares plus a right to receive additional shares in an earnout.[43] Upon the completion of the transactions contemplated by the merger agreement, Gig3 would change its name to New Lightning and its common stock would trade on the New York Stock Exchange under the symbol "ZEV."[44]

41 *Id.* ¶ 17.

42 *Id.* ¶ 46.

43 *Id.*

44 Proxy at Cover Page.

E. PIPE and Convertible Note Financing

At the same time that it announced the proposed merger, Gig3 entered into a PIPE subscription agreement and a convertible note subscription agreement. Both agreements were contingent on the merger closing.[45]

45 Compl. ¶ 47.

Gig3 met with 46 potential PIPE investors, hoping to raise between $100 million and $150 million in PIPE financing at $10 per share based on a $899 million valuation of Lightning's equity.[46] Initial feedback indicated that Gig3 would have to improve the share exchange (that is, reduce the valuation of Lightning) to justify a $10 investment in common stock.[47] Lightning's valuation was then lowered to $539 million to support a PIPE financing of at least $75 million.[48] Gig3 ultimately raised $25 million in PIPE financing from a single investor, who "was the largest owner of Lightning's pre-merger equity."[49]

46 *Id.* ¶ 61; Proxy at 151.

47 Compl. ¶ 61.

48 Proxy at 152.

49 Compl. ¶ 61.

With the failure of the PIPE, Gig3 pursued a dilutive convertible debt financing.[50] It entered into an agreement with 30 undisclosed investors—20 of whom had declined to participate in the PIPE—for the purchase of convertible notes (the "Notes") at an aggregate price of $100 million.[51] The Notes have a three-year term and accrue ***705** 7.5% interest annually.[52] They are convertible into 8,695,652 shares of Company common stock at a conversion price of $11.50 per share.[53] Under the terms of the convertible note subscription agreement, if the conversion right is exercised before the Notes mature, the Company is responsible for future interest payable on the Notes.[54] The Note holders also received—at no additional cost—8,695,652 warrants to purchase common stock at an exercise price of $11.50 per share.[55]

50 *Id.* ¶ 62; *see also* Proxy at 154.

51 Compl. ¶¶ 47-48, 62; *see also* Proxy at 2, 156-57.

52 Compl. ¶ 47.

53 *Id.* New Lightning has the option to force conversion after one year if Gig3's stock price exceeds $13.80 per share for 20 out of 30 trading days. *Id.*

54 *Id.* ¶ 47 & n.2. For example, assume New Lightning's stock price was $14 per share at the end of year one. If the conversion right was exercised, the Note holders would receive nearly $15 million in cash (from the

future interest payable for the two remaining years), plus 8,695,652 shares worth $14—for a price of $11.50. In total, the Note holders would gain $36,114,130. That is a $2.50 per share profit times 8,695,652 shares, plus 23/24 of $15 million in remaining interest. *Id.*

55 *Id.* ¶ 48. Continuing the example in footnote 54, if the Note holders exercised their warrants along with their conversion rights, they would receive a profit of $2.50 on another 8,695,652 shares—for an additional profit of $21,739,130 and a total profit of $57,853,260. *Id.* That would equate to approximately a 58% return over one year on the $100 million investment. *Id.*

F. The Proxy

****6** Gig3's definitive proxy statement (the "Proxy") was filed with the SEC on March 22, 2021.[56] The Proxy informed stockholders that a special meeting would be held on April 21.[57] Stockholders were invited to vote on the Lightning merger and related transactions, including the PIPE and convertible note financings.

56 *Id.* ¶ 49.

57 Proxy at Cover Page.

Stockholders were also informed that the deadline to exercise their redemption rights was April 19—two business days before the special meeting.[58] They were reminded that redeeming would entitle them to "approximately $10.10 per share" from the trust.[59] The Proxy emphasized that "[p]ublic stockholders may elect to redeem their shares even if they vote for the [merger]."[60]

58 Compl. ¶ 49; *see also* Proxy at 25.

59 Proxy at Cover Page, 3, 23-24. The Proxy also warned that there could be insufficient funds to pay redemptions if a third party brought a claim that the Sponsor was unable to indemnify. Compl. ¶¶ 88-91; *see also* Proxy at 81, 84. The Proxy explained "[t]he Sponsor may not have sufficient funds to satisfy its indemnity obligations" because Gig3 "ha[d] not asked the Sponsor to reserve for such indemnification obligations." Compl. ¶ 90 (quoting Proxy at 84). The plaintiff alleges that the likelihood of the SPAC being unable to satisfy redemptions was extremely low; public sources indicate it has never occurred. *Id.* ¶¶ 90-91.

60 Proxy at Cover Page, 23, 123. As a practical matter, because the record date was March 15, 2021, public stockholders could elect to redeem their shares and then vote at the April 21 special meeting. *See id.* at 19.

The Proxy indicated that the merger consideration to be paid to Lightning stockholders consisted of Gig3 stock valued at $10 per share.[61] It defined "Aggregate Closing Merger Consideration" to mean "a number of shares of [Gig3] Common Stock equal to the quotient of (a) the Aggregate Closing Merger Consideration Value divided by (b) $10.00."[62] The Proxy ***706** also disclosed a general risk of dilution caused by the merger and related transactions, including the PIPE financing and the Notes.[63]

61 *Id.* at Cover Page, A-14.

62 *Id.* at Cover Page, A-2. "Aggregate Closing Merger Consideration Value" was equivalent to the valuation of Lightning equity ($539 million) adjusted for Lightning's outstanding options, debt, and cash. *Id.*; *see id.* at 152.

63 *E.g.*, *id.* at 14, 87 ("Warrants will become exercisable for our Common Stock, which would increase the number of shares eligible for future resale in the public market and result in dilution to our stockholders."), 94 ("Our public stockholders will experience dilution as a consequence of [the merger and related transactions].").

Gig3's Proxy contained projections prepared by Lightning management that forecast dramatic growth over the next five years. From 2020 to 2025, Lightning's revenues were predicted to rise from $9 million to more than $2 billion and its annual gross profits would grow from zero to more than $500 million.[64] The Lighting management projections reported to stockholders in the Proxy were as follows:[65]

64 Compl. ¶¶ 65-66; Proxy at 164.

65 Compl. ¶ 65; Proxy at 164.

	2020	2021	2022	2023	2024	2025
Revenue	$9	$63	$354	$640	$1,165	$2,012
Gross Growth	*NM*	*NM*	*462%*	*81%*	*82%*	*73%*
Gross Profit	$0	$9	$68	$140	$296	$528

Gross Margin	*3%*	*14%*	*19%*	*22%*	*25%*	*26%*
EBITDA	($11)	($17)	$15	$50	$155	$315
EBITDA Margin	*(122%)*	*(27%)*	*4%*	*8%*	*13%*	*16%*

$ values are in millions.

In 2019 and 2020 combined, Lightning delivered 97 vehicles and built an additional 12 demonstration and test vehicles.[66] The Proxy stated that Lightning would "expand[ ] its production facility by roughly 107,000 square feet to prepare for capacity expansion to 3,000 vehicles per shift per year" from its current capacity of 500 vehicles per shift per year.[67] It explained that Lightning had built "a complete modular software and hardware solution" that "broaden[ed] and strengthen[ed]" its access to a $67 billion total addressable market.[68]

66 Compl. ¶ 67.

67 Proxy at 161; *see also* Compl. ¶¶ 68, 69 (quoting Proxy at 253).

68 Proxy at 246; *see also* Compl. ¶ 68.

****7** Finally, the Proxy disclosed potential conflicts of interest between Gig3's Sponsor and Board, on one hand, and its public stockholders, on the other. One such conflict was caused by "the fact that [the] Sponsor, officers and directors w[ould] lose their entire investment in [Gig3] and w[ould] not be reimbursed for any out-of-pocket expenses if an initial business combination [wa]s not consummated by the applicable deadline."[69]

69 Proxy at 5; *see also supra* note 15 and accompanying text.

Approval of the merger required the affirmative stockholder vote of a majority of the votes cast at the special meeting.[70] Stockholders overwhelmingly approved the transaction, with more than 98% of the votes cast being in favor.[71] Approximately 29% of public stockholders elected to redeem 5.8 million shares.[72]

70 Proxy at Cover Page.

71 Compl. ¶ 50; *see also* Defs.' Opening Br. Ex. 6 ("April 21, 2021 Form 8-K") at Item 5.07.

72 Compl. ¶ 50.

***707 G. Post-Merger Performance**

On May 6, 2021, a merger subsidiary of Gig3 merged with and into Lightning, with Lightning surviving the merger.[73] Upon closing, Gig3 changed its name to Lightning eMotors, Inc.[74] New Lightning subsequently elected a nine-member board of directors, which included Miotto, Dinu, and Katz.[75]

73 *Id.* ¶ 36; *see also* Defs.' Opening Br. Ex. 1 ("May 6, 2021 Form 8-K") at Item 2.01.

74 Compl. ¶ 1; *see also* May 6, 2021 Form 8-K at Item 2.01.

75 Compl. ¶ 11; *see also* May 6, 2021 Form 8-K at Item 5.02.

Before the vote, Gig3's stock price had traded around the redemption price, closing at $10.07 on April 15.[76] By the May 6 closing date, Gig3's stock price had fallen to $7.82 per share.[77] Still, the Initial Stockholder Shares were worth more than $39 million when the merger closed.[78]

76 Compl. ¶ 92.

77 *Id.* ¶ 93.

78 *Id.* ¶ 96.

On May 17, New Lightning issued a press release announcing its first quarter 2021 financial results and 2021 projections.[79] It announced quarterly revenues of $4.6 million and reduced its 2021 revenue guidance, stating that projected 2021 revenues would "be in the range of $50 million to $60 million."[80] Taking the midpoint ($55 million), this was a 12.7% downward revision from the projection in the Proxy.[81]

79 *Id.* ¶ 72.

80 *Id.*

81 *Id.* ¶ 73; *see supra* note 65 and accompanying text (noting that the 2021 projection was $63 million).

By August 2, Gig3's stock price had fallen to $6.57 per share.[82] As of the day before this opinion was filed, trading closed at $0.41 per share.[83]

82 Compl. ¶ 94.

83 NYSE, Lightning eMotors Incorporated (ZEV), https://www.nyse.com/quote/ZEV (last visited Jan. 3, 2021).

H. This Litigation

Plaintiff Richard Delman has held stock in Gig3 since August 26, 2020.[84] On August 4, 2021, he filed a putative class action Complaint on behalf of himself and current and former Gig3 stockholders.[85]

84 Compl. ¶ 25.

85 *Id.* ¶¶ 99-107.

His Complaint advances three claims. Count One is a direct claim for breach of fiduciary duty against the six members of the Gig3 Board.[86] Count Two is a direct claim for breach of fiduciary duty against Katz and the Sponsor as the controlling stockholders of Gig3.[87] Count Three is a direct claim for unjust enrichment against the Sponsor and the director defendants.[88]

86 *Id.* ¶¶ 108-15.

87 *Id.* ¶¶ 116-24.

88 *Id.* ¶¶ 125-28.

The defendants moved to dismiss the Complaint on August 31, 2021.[89] Briefing was completed on March 1, 2022.[90] I heard oral argument on the motion to dismiss on September 23.[91]

89 Dkt. 8.

90 *See* Dkt. 31. This matter was reassigned to me on August 1, 2022. Dkt. 36.

91 Dkts. 38, 39.

***708 II. LEGAL ANALYSIS**

****8** The defendants moved to dismiss the Complaint under Court of Chancery Rule 23.1 for failure to plead demand futility and under Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

The standard that governs a motion to dismiss under Rule 12(b)(6) is well settled:

> (i) all well-pleaded factual allegations are accepted as true; (ii) even vague allegations are "well-pleaded" if they give the opposing party notice of the claim; (iii) the Court must draw all reasonable inferences in favor of the non-moving party; and [(iv)] dismissal is inappropriate unless the "plaintiff would not be entitled to recover under any reasonably conceivable set of circumstances susceptible of proof."[92]

The "pleading standards for purposes of a Rule 12(b)(6) motion 'are minimal.' "[93] The "reasonable conceivability" standard a plaintiff must meet to survive a Rule 12(b)(6) motion asks only "whether there is a 'possibility' of recovery."[94] I "must draw all reasonable inferences in favor" of the plaintiff but am "not required to accept every strained interpretation of the [plaintiff's] allegations."[95]

92 *Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896-97 (Del. 2002) (citations omitted).

93 *In re China Agritech, Inc. S'holder Deriv. Litig.*, 2013 WL 2181514, at *23 (Del. Ch. May 21, 2013) (quoting *Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Hldgs. LLC*, 27 A.3d 531, 536 (Del. 2011)).

94 *China Agritech*, 2013 WL 2181514, at *24 (quoting *Cent. Mortg.*, 27 A.3d at 537 n.13).

95 *Gen. Motors (Hughes)*, 897 A.2d at 168.

The plaintiff's breach of fiduciary duty claims are akin to those considered by this court in *In re MultiPlan Corp. Stockholders Litigation*.[96] There, the defendants undertook a value-decreasing de-SPAC merger that allegedly benefitted them to the detriment of public stockholders for whom liquidation would have been preferable. The defendants were purportedly incentivized to minimize redemptions to secure significant returns for themselves. The claim recognized in *MultiPlan* was that "the defendants' actions—principally in the form of misstatements and omissions—impaired public stockholders' redemption rights to the defendants' benefit."[97]

96 268 A.3d 784 (Del. Ch. 2022).

97 *Id.* at 800. For the sake of brevity, I at times refer to a claim concerning the impairment of stockholders' redemption rights as a "*MultiPlan* claim."

The plaintiff here likewise alleges that the defendants breached their fiduciary duties by "prioritizing their own financial, personal, and/or reputational interests [in] approving the [m]erger, which was unfair to Gig3's public stockholders."[98] The plaintiff also avers that the defendants acted on these conflicts by depriving stockholders of information necessary to decide whether to redeem or to invest in the combined company.[99] The essential difference between the present case and *MultiPlan* lies in the manner in which stockholders' redemption rights were allegedly compromised.

98 Compl. ¶ 111.

99 *See id.* ¶¶ 109, 112-13, 118, 122.

The defendants moved to dismiss the Complaint for a panoply of reasons. They assert, among other things, that the plaintiff's claims are derivative and must be dismissed under Rule 23.1 or are impermissible "holder" claims. Similar positions were considered and rejected in *MultiPlan*. Still, I address them given the defendants' insistence that a different outcome ***709** is appropriate here. The defendants' arguments fail.

****9** I then consider the merits of the plaintiff's claims and assess the applicable standard of review. Applying the entire fairness standard, I determine that the plaintiff has pleaded reasonably conceivable breach of fiduciary duty claims against the Board and the Sponsor. The unjust enrichment claim also survives.

A. The Plaintiff's Claims Concern Individually Compensable Harm.

As an initial matter, the plaintiff's claims are direct rather than derivative. The crux of the plaintiff's fiduciary duty claims is that the defendants' disloyal conduct deprived Gig3 public stockholders of information needed to decide whether to exercise their redemption rights.[100] The unjust enrichment claim is based on the Sponsor and Board being enriched because of that informational imbalance.[101] These harms are individually compensable, separate and distinct from any potential injury to Gig3 caused by the merger.

100 *Id.* ¶¶ 113, 122.

101 *Id.* ¶¶ 126-27.

The defendants nonetheless characterize this case as an "overpayment" action challenging a "bad deal."[102] Their assessment is misplaced. In an overpayment claim, "the corporation's funds have been wrongfully depleted, which, though harming the corporation directly, harms the stockholders only derivatively so far as their stock loses value."[103] In a *MultiPlan* claim, by contrast, the funds being depleted are held in trust for the SPAC's public stockholders.[104] If a stockholder's redemption right had not been manipulated and she chose to redeem her shares, she would retrieve her *pro rata* portion of the trust. Any subsequent overpayment by the SPAC—regardless of the amount—would be irrelevant.[105]

102 Defs.' Opening Br. in Supp. of Their Mot. to Dismiss Verified Class Action Compl. (Dkt. 18) ("Defs.' Opening Br.") 25-30.

103 *El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248, 1261 (Del. 2016).

104 *See MultiPlan*, 268 A.3d at 802.

105 *See id.* at 804 n.118. Whether the SPAC overpaid for the target by $1 or $100 billion, the damages available to the plaintiff for impairment of his redemption right would remain the same.

Application of the two-pronged *Tooley* test, which considers "(1) who suffered the alleged harm" and "(2) who would receive the benefit of any recovery or other remedy," confirms the direct nature of these claims.[106]

106 *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004).

First, Gig3 public stockholders suffered the harm pleaded in the Complaint. The plaintiff asserts that the defendants disloyally failed to provide stockholders with the information necessary to decide whether to redeem and how to vote. Because of a SPAC's distinctive structure and the absence of a meaningful vote on the merger,[107] the redemption right is the central form of stockholder protection and the focus of the harm alleged. Interference with that right produces an injury that would not run to the corporation.

107 *See infra* notes 202-07 and accompanying text.

Second, the recovery would accrue only to stockholders who suffered a harm to their redemption rights.[108] Any restoration of value to the Company that indirectly benefitted stockholders *pro rata* would ***710** be inapt for two reasons. The loss of value involves the public stockholders' funds held in trust, which do not belong to the Company until after redemption requests are satisfied.[109] And many stockholders who would indirectly benefit from a derivative recovery lack a redemption right. Although the redemption right was only carried by shares issued to the public in Gig3's IPO, a recovery to the corporation would be shared with various pre-merger and PIPE investors as well as other stockholders of New Lightning.[110]

108 *MultiPlan*, 268 A.3d at 803-05.

109 *See supra* note 20 and accompanying text.

110 *Cf. El Paso*, 152 A.3d at 1264 ("Were the [plaintiff] to recover directly for the alleged decrease in the value of the Partnership's assets, the damages would be proportionate to his ownership interest. The necessity of a *pro rata* recovery to remedy the alleged harm indicates that his claim is derivative.").

****10** Furthermore, the remedy for a direct claim brought by public stockholders would not lead to a double recovery if a derivative overpayment claim were brought by the SPAC.[111] The defendants acknowledge that this court previously recognized as much.[112] They nevertheless argue that the calculation of overpayment damages and redemption damages in this case would be the same. By the defendants' logic, damages under either theory would address whether stockholders were harmed because rather than receiving something worth $10 (either cash if redeeming or a share in New Lighting if investing), they received something worth less.[113] Not so.

111 *Cf. In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006) ("[I]f the plaintiffs' damages theory is valid, the directors of an acquiring corporation would be liable to pay both the corporation and its shareholders the same compensatory damages for the same injury. That simply cannot be."); *Lenois v. Lawal*, 2017 WL 5289611, at *20 (Del. Ch. Nov. 7, 2017) (holding that plaintiff's direct claims were disallowed to prevent the defendants from paying identical damages to the company and to stockholders for the same underlying behavior). The Delaware Supreme Court's decision in *J.P. Morgan* concerned an alleged disclosure violation for which no "quantifiable amount" of damages could be inferred from stockholders "individually ... being deprived of their right to cast an informed vote." 906 A.2d at 773 (emphasis omitted). The claim here presents a different scenario: the disclosure violation is related to the stockholders' right to redeem their $10 per share investment plus interest.

112 Defs.' Reply Br. in Supp. of Their Mot. to Dismiss Verified Class Action Compl. (Dkt. 24) ("Defs.' Reply Br.") 23; *see MultiPlan*, 268 A.3d at 804 n.118 (demonstrating the separate calculations for overpayment and redemption damages with a numerical example).

113 Notably, the plaintiff avers that the corporation had less than $10 per share to contribute to the merger. *See* discussion *infra* Section II.C.2.a.

In an overpayment case, damages would be based on the difference between the amount the SPAC paid for the target and the target's true value at the time of the merger (i.e., if it had been valued correctly).[114] But the plaintiff's recovery for impairment of his redemption right would be based on the $10.10 redemption price.[115] In the hypothetical (and unlikely) scenario where a derivative overpayment claim were brought in parallel with a *MultiPlan* claim, the corporation's damages would presumably be net of the amount owed to public stockholders in relation to their redemption rights.

114 *See MultiPlan*, 268 A.3d at 804 n.118.

115 *See id.*

B. The Plaintiff Does Not Advance "Holder" Claims. The defendants next insist that the plaintiff's claims should be dismissed ***711** as "holder" claims. A holder claim is "a cause of action by persons wrongfully induced to *hold* stock instead of selling it."[116] It is predicated on circumstances where a stockholder is not "forced" or "even asked" to make a decision.[117]

116 *Citigroup Inc. v. AHW Inv. P'ship*, 140 A.3d 1125, 1132 (Del. 2016) (quoting *Small v. Fritz Cos., Inc.*, 30 Cal.4th 167, 132 Cal.Rptr.2d 490, 65 P.3d 1255, 1256 (2003) (emphasis in original)).

117 *In re CBS Class Action & Deriv. Litig.*, 2021 WL 268779, at *23-24 (Del. Ch. Jan. 17, 2021).

The plaintiff's claims are not of that ilk. The Proxy expressly stated that stockholders were being "provid[ed] ... with the opportunity to redeem" and instructed stockholders how to complete the redemption process.[118] That the default action was to invest—that is, no physical action need be taken—does not mean a stockholder was "holding." Instead, a stockholder who opted not to redeem chose to invest her portion of the trust in the post-merger entity. This affirmative choice is one that each SPAC public stockholder must make. There is no continuation of the status quo.

118 Proxy at 23.

****11** The defendants argue that the Proxy did not seek stockholder action on the redemption decision because public stockholders could redeem even if they did not vote on the merger.[119] But whether stockholders were also asked to make a voting decision is of no moment. Irrespective of how they voted, Gig3's public stockholders were required "to decide whether to request that their cash be returned to them from the trust or to invest that cash in the proposed business combination."[120] This "investment decision" is comparable to those that the Delaware Supreme Court has recognized as calls for "stockholder action," including "purchasing and tendering stock or making an appraisal election."[121]

119 *Cf. MultiPlan*, 268 A.3d at 803 (noting that stockholders were "obligated" to vote on the merger in order to redeem).

120 *Id.* at 807.

121 *Dohmen v. Goodman*, 234 A.3d 1161, 1168 (Del. 2020) (citing *In re Wayport, Inc. Litig.*, 76 A.3d 296, 314 (Del. Ch. 2013)). By way of imperfect analogy, a stockholder seeking appraisal may opt not to vote on a merger and nonetheless perfect her appraisal rights. *See Roam-Tel P'rs v. AT&T Mobility Wireless Operations Hldgs. Inc.*, 2010 WL 5276991, at *13 (Del. Ch. Dec. 17, 2010) ("In order for a dissenting stockholder to perfect his appraisal rights in the case of a long-form merger, he must either vote against the merger or not vote at all ...."). In the tender offer context, of course, there is no vote. *See Latesco v. Wayport*, 2009 WL 2246793, at *6 (Del. Ch. July 24, 2009) (discussing that a "call for stockholder action" included the "collective action problem" of asking stockholders to "tender their shares").

Further, the practical reasons that prevent holder claims from being pursued on behalf of a class are not present here. Holder claims are grounded in common law fraud or negligent misrepresentation, which require proof of reliance.[122] Individual questions of justifiable reliance predominate over common questions of law or fact, making class wide treatment inappropriate.

122 *See CBS*, 2021 WL 268779, at *20 (discussing that holder claims cannot be brought as class claims because "individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of law or fact"); *Gaffin v. Teledyne, Inc.*, 611 A.2d 467, 474 (Del. 1992) ("A class action may not be maintained in a purely common law or equitable fraud case since individual questions of law or fact, particularly as to the element of justifiable reliance, will inevitably predominate over common questions of law or fact.").

The redemption right, though individual in nature, created a "collective action problem" ***712** for stockholders such that it would be "impractical, if not impossible, for each stockholder to ask and have answered by the corporation its own set of questions regarding the decision presented for consideration."[123] Stockholders must choose to redeem or invest based upon the disclosures provided by the SPAC. "[A] reasonable inference can be drawn that the stockholder relied upon the disclosure and that, assuming it is 'material,' any harm flowing from the stockholder's action proximately resulted from such reliance."[124] Individual proof of reliance is unnecessary.

123 *Latesco*, 2009 WL 2246793, at *6.

124 *CBS*, 2021 WL 268779, at *23; *see Malone v. Brincat*, 722 A.2d 5, 12 (Del. 1998) (explaining that an action for a disclosure violation does not concern reliance, causation, or quantifiable damages but rather includes "a connection to the request for shareholder action").

C. The Fiduciary Duty Claims Are Reasonably Conceivable.

Directors of Delaware corporations owe duties of care and loyalty to the entity and its stockholders.[125] Those duties give rise to a duty of disclosure, the obligations of which "are defined by the context in which the director communicates."[126] A controlling stockholder also "owes fiduciary duties to the corporation and its minority stockholders, and it is 'prohibited from exercising corporate power ... so as to advantage [itself] while disadvantaging the corporation.' "[127] The duties owed by the fiduciaries of a SPAC organized as a Delaware corporation are no different.[128]

125 *See Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

126 *Dohmen*, 234 A.3d at 1168; *see Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009) (observing that the fiduciary duty of disclosure "is not an independent duty, but derives from the duties of care and loyalty").

127 *Carr v. New Enter. Assocs., Inc.*, 2018 WL 1472336, at *22 (Del. Ch. Mar. 26, 2018) (quoting *Thorpe v. CERBCO, Inc.*, 1995 WL 478954, at *8 (Del. Ch. Aug. 9, 1995)) (emphasis omitted).

128 *See infra* notes 149-53 and accompanying text.

****12** The plaintiff contends that the defendants breached their fiduciary duties by disloyally interfering with Gig3 public stockholders' redemption rights.[129] But the defendants refute that their duties of care and loyalty extend to the redemption right in the first place. They insist that the plaintiff is limited to bringing a breach of contract (or quasi-contract) claim because the redemption right is provided by Gig3's charter. In that case, the plaintiff's claim would solely implicate the SPAC as the contracting party, rather than the Sponsor or Board.[130]

129 Compl. ¶¶ 111-13.

130 In the defendants' view, the implied covenant of good faith and fair dealing would provide the only recourse to the plaintiff. *See* Defs.' Reply Br. 26-28.

The plaintiff is not asserting that Gig3 breached its obligation to provide him with a redemption right. Rather, he is claiming that the defendants disloyally hindered his ability to exercise it. Gig3's charter does not speak to the actions that its fiduciaries must undertake in connection with the right. Requiring the defendants to abide by their fiduciary duties would neither "rewrite the contract"[131] nor "undermine the ***713** primacy of contract law."[132]

131 *Nemec v. Shrader*, 991 A.2d 1120, 1126, 1129 (Del. 2010) (addressing a claim where the "nature and scope of the [d]irectors' duties," when causing the company to exercise a right to redeem shares acquired under a stock plan agreement, were "defined solely by reference to that contract").

132 *Gale v. Bershad*, 1998 WL 118022, at *5 (Del. Ch. Mar. 4, 1998) (addressing a claim regarding breach of a preferred stockholder's explicit rights provided for in a charter).

The right to redeem is the primary means protecting stockholders from a forced investment in a transaction they believe is ill-conceived. It is a bespoke check on the sponsor's self-interest, which is intrinsic to the governance structure of a SPAC. It follows that a SPAC's fiduciaries must ensure that right is effective, including by disclosing "fully and fairly all material information" that is reasonably available about the merger and target to inform the redemption decision.[133] To hold otherwise would lead to the illogical outcome that SPAC directors owe fiduciary duties in connection with the "empty" vote on the merger, but not the redemption choice that is of far greater consequence to stockholders.[134]

133 *Loudon v. Archer-Daniels-Midland Co.*, 700 A.2d 135, 143, 137 (Del. 1997); *see Alidina v. Internet.com Corp.*, 2002 WL 31584292, at *8 (Del. Ch. Nov. 6, 2002) (holding that direct claims for breach of fiduciary duty arose in the context of a tender offer when it was alleged that "defendants failed to disclose all material information to the shareholders in the 14D-9 and Amended 14D-9"). Moreover, as discussed above, stockholders were collectively called upon to make a redemption decision. *See* discussion *supra* Section II.B.

134 *See generally infra* notes 202-07 and accompanying text.

1. Standard of Review

The standard of review supplies the appropriate lens through which the court evaluates whether the defendants complied with their fiduciary obligations.[135] The business judgment rule, Delaware's default standard of review, presumes "that in making a business decision, the board of directors 'acted on an informed basis, in good faith and in the honest belief that the action was taken in the best interests of the company.' "[136] "[T]he judgment of a properly functioning board will not be second-guessed and '[a]bsent an abuse of discretion, that judgment will be respected by the courts.' "[137]

135 *See In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 35-36 (Del. Ch. 2013) ("The standard of review is the test that a court applies when evaluating whether directors have met the standard of conduct."); *Metro Storage Int'l LLC v. Harron*, 275 A.3d 810, 841 (Del. Ch. 2002)

("For the equitable tort, the court evaluates the question of breach through the lens of one of several possible standards of review."); *Williams Cos., Inc. v. Energy Transfer Equity, L.P.*, 159 A.3d 264, 275-76 (Del. 2017) (Strine, C.J., dissenting) ("[T]he lens that a judge uses"—i.e., the "burden of proof" and "standard of review"—are "supposed to influence how [s]he assesses the evidence before h[er].").

136 *Solomon v. Armstrong*, 747 A.2d 1098, 1111 (Del. Ch. 1999) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)), *aff'd*, 746 A.2d 277 (Del. 2000) (TABLE).

137 *Orman v. Cullman*, 794 A.2d 5, 20 (Del. Ch. 2002) (quoting *Aronson*, 473 A.2d at 811).

****13** Where the presumption of the business judgment rule is rebutted, deference is no longer afforded and a more exacting review is required. The corporate fiduciaries' actions are examined under the entire fairness standard.[138]

138 *See Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995) (stating that where "the presumption of the business judgment rule has been rebutted, the board of directors' action is examined under the entire fairness standard" (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1371 n.7 (Del. 1995))).

Here, the "entire fairness standard of review applies due to inherent conflicts between the SPAC's fiduciaries and public stockholders in the context of a value-decreasing ***714** transaction."[139] The plaintiff pleads facts supporting two independent grounds for that conclusion. First, the de-SPAC merger with Lightning was a conflicted controller transaction. Second, a majority of the Board was not disinterested or independent.[140]

139 *MultiPlan*, 268 A.3d at 792.

140 *See, e.g.*, *Larkin v. Shah*, 2016 WL 4485447, at *8 (Del. Ch. Aug. 25, 2016) ("Delaware courts will apply the most stringent level of review, entire fairness, in circumstances where: (1) properly reviewable facts reveal that the propriety of a board decision is in doubt because the majority of the directors who approved it were grossly negligent, acting in bad faith, or tainted by conflicts of interest; or (2) the plaintiff presents facts supporting a reasonable inference that a transaction involved a controlling stockholder.").

The defendants ask me to put the question of fairness to the side and focus first on whether the plaintiff has shown that the Proxy informing the redemption decision was materially false or misleading.[141] That approach would be suitable if the plaintiff had advanced a straightforward disclosure claim. But the plaintiff's allegations give rise to a single claim where the deficient disclosures are "inextricably intertwined" with the disloyal behavior that caused them.[142]

141 *E.g.*, Defs.' Reply Br. 5-11.

142 *MultiPlan*, 268 A.3d at 800 & n.92 (citing Jack B. Jacobs, *The Fiduciary Duty of Disclosure after* Dabit, 2 J. Bus. & Tech. L. 391, 397 (2007)).

The core thesis of the Complaint is that the defendants were incentivized to undertake a value-decreasing transaction because it led to colossal returns on the Sponsor's investment, without regard to whether public stockholders were better served by liquidation. By providing inadequate disclosures about the merger, the defendants could discourage redemptions and ensure greater deal certainty. These "quintessential Delaware concerns" would go unresolved if the court's analysis began and ended with materiality.[143]

143 *In re Lordstown Motors Corp. S'holders Litig.*, 2022 WL 678597, at *4 (Del. Ch. Mar. 7, 2022) (describing similar allegations as "quintessential Delaware concerns" and not "a rebranding of securities claims about material misstatements as fiduciary duty claims").

To view the disclosures in a vacuum would evade any meaningful assessment of whether the redemption choice was manipulated to maximize the sponsor's profits at public stockholders' expense. The SPAC's fiduciaries, motivated to close a de-SPAC transaction, would not be held to account for failing to undertake the thorough and careful process their duties to stockholders require. This court cannot wear blinders where conflicts are alleged to infect the decision-making of a board majority or a transaction benefitting a controller to other stockholders' detriment. Instead, Delaware law mandates the application of entire fairness review.[144]

144 *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983).

****14** The defendants further argue that these misaligned economic incentives should play no role in the court's analysis because they were disclosed in the prospectus when the plaintiff invested in Gig3 and again in the Proxy when he opted not to redeem.[145] In other words, they believe that the plaintiff is estopped from invoking the duty of loyalty and a heightened standard of review because he implicitly assented to the conflicts.

145 Defs.' Opening Br. 41-42 n.6.

The sole decision cited in support of this estoppel theory held that a stockholder plaintiff lacked standing to pursue derivative ***715** claims challenging an insider transaction that was disclosed in the IPO prospectus.[146] The court addressed whether the plaintiff could demonstrate contemporaneous ownership because the terms of the challenged transaction were set before the IPO in which the plaintiff purchased stock.[147] Nothing in that decision indicates that the plaintiff waived loyalty claims by tacitly consenting to a conflicted arrangement when investing.[148] Nor does it suggest that this court is barred from applying entire fairness if the conflicts triggering that standard of review were disclosed.

146 *In re SmileDirectClub, Inc. Deriv. Litig.*, 2021 WL 2182827, at *12 (Del. Ch. May 28, 2021) ("In view of the Prospectus's thorough disclosures about the Company's plans to complete the Insider Transactions at the IPO price, 'it would seem to follow that plaintiff would be barred from suing by reason of its knowledge of the alleged wrong when it purchased the stock.' " (quoting *7547 P'rs v. Beck*, 1995 WL 106490, at *3 (Del. Ch. Feb. 24, 1995))).

147 *Id.*

148 *See MultiPlan*, 268 A.2d at 812.

Such an approach would be inconsistent with the fundamental principles of our law. Delaware corporate law "does not allow for a waiver of the directors' duty of loyalty."[149] And it does not exempt SPAC mergers from the application of entire fairness review to enforce that obligation.[150] Neither the nature of the SPAC nor the presence of the redemption right permits otherwise.

149 *Schock v. Nash*, 732 A.2d 217, 225 n.21 (Del. 1999).

150 *Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *2, *14-16 (Del. Ch. May 31, 2022) (rejecting the defendants' argument that enhanced scrutiny did not apply because the company's charter contained a provision stating that the board's decisions made "in good faith and on the basis of such information and assistance as was then reasonably available for such purpose shall be conclusive and binding upon the Corporation and its stockholders"; noting that such provisions could not "alter the directors' fiduciary obligations and the attendant equitable standards a court will apply when enforcing those obligations"); *cf. Glassman v. Unocal Expl. Corp.*, 777 A.2d 242, 243 (Del. 2001) ("By enacting a statute [8 *Del. C.* § 253] that authorizes the elimination of the minority without notice, vote, or other traditional indicia of procedural fairness, the General Assembly effectively circumscribed the parent corporation's obligations to the minority in a short-form merger. The parent corporation does not have to establish entire fairness, and, absent fraud or illegality, the only recourse for a minority stockholder who is dissatisfied with the merger consideration is appraisal.").

The Delaware General Assembly alone "has the authority to eliminate or modify fiduciary duties and the standards that are applied by this court, or to authorize their elimination or modification."[151] Whether it is wise to "create a business entity in which the managers owe the investors no duties at all except as set forth" by statute or the entity's governing documents is a "policy judgment" left to that legislative body.[152] Unless and until that occurs, a SPAC taking the Delaware corporate form "promises investors that equity will provide the important default protections it always has."[153] It is not for this court to grant an exemption.

151 *Totta*, 2022 WL 1751741, at *15.

152 *Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 856 (Del. Ch. 2012).

153 *Id.*; Minor Myers, *The Corporate Law Reckoning for SPACs* 1 (Aug. 2, 2022), https://ssrn.com/abstract=4095220 ("For a SPAC that has elected to organize as a corporation, in Delaware, and sold shares of common stock to the public, the core attributes of the privately-ordered bargain are deceptively simple: (1) the mandatory loyalty obligation for fiduciaries and (2) the limited ways to satisfy that obligation short of a judicial inquiry.").

***716** a. The Conflicted Controller Allegations

****15** The plaintiff alleges that a "chain of control" allowed Katz to dominate Gig3, its Board, and the merger with Lightning.[154] Katz owned and controlled the Sponsor which, in turn, controlled Gig3. The defendants reject the characterization of the Sponsor as a controlling stockholder because it owned less than a majority of Gig3's pre-merger shares.[155]

154 Compl. ¶ 6.

155 Defs.' Opening Br. 37-38 n.5; Oral Arg. Tr. (Dkt. 39) 13-14. By my calculation, the Sponsor held 21.76% of the pre-merger shares (5,635,000 out of a total of 25,893,479 shares). *See* Proxy at 1, 5. The Sponsor held 4,985,000 Initial Stockholder Shares and 650,000 common shares from the private placement units.

A stockholder is deemed a "controlling stockholder" if "it owns a majority interest in" the corporation or owns less than a majority but "*exercises control* over the business affairs of the corporation."[156] Delaware courts have long been chary of determining that minority stockholders—particularly those who are not significant blockholders—have effective control.[157] In cases where "soft" control has been found, the controller generally possesses a potent "combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes."[158]

156 *Kahn v. Lynch Commc'ns Sys, Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (emphasis in original); *see also In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293, at *12 (Del. Ch. Mar. 28, 2018).

157 *See In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 661 (Del. Ch. 2013) (holding that the purported controller's 27% stake and right to appoint two of ten directors was insufficient to support an inference that it exercised control); *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000) (concluding that a defendant owning 46% of the outstanding stock—and the ability to purchase an additional 20%—and with the right, albeit unexercised, to appoint two of eight directors was not a controlling stockholder).

158 *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 553 (Del. Ch. 2003); *see Tesla*, 2018 WL 1560293, at *19 (holding it was reasonably conceivable at the pleading stage that a 22% stockholder and CEO was a controlling stockholder where the purported controller exercised substantial influence over the corporation and board).

Although the Sponsor held less than a quarter of Gig3's voting power at the time of the merger, the governance structure of the SPAC makes it reasonably conceivable that the Sponsor was its controlling stockholder.[159] The sponsor of a SPAC controls all aspects of the entity from its creation until the de-SPAC transaction. In Gig3's case, the Sponsor created the Company and incorporated it in Delaware. It selected the initial Board, which would remain in place until the merger with Lightning closed.[160] The Sponsor controlled the Board through Katz who, as discussed below, had close ties to and influence over each of the directors.[161]

159 It must be emphasized that the SPAC structure is central to this pleading-stage conclusion.

160 Compl. ¶¶ 4, 6, 42; Prospectus at 42 (explaining that Gig3 did not "intend to hold an annual meeting of stockholders [to elect directors] until after ... consummat[ion] of a business combination" even though this "may not be in compliance with Section 211(b) of the DGCL"); *see Voigt v. Metcalf*, 2020 WL 614999, at *14 (Del. Ch. Feb. 10, 2020) (explaining that "the ability of an alleged controller to designate directors ... is an indication of control").

161 *See* discussion *infra* Section II.C.1.b.

****16** The Sponsor also held unrivaled authority ***717** over Gig3's business affairs.[162] Like all SPACs, Gig3 had no substantive operations before the de-SPAC merger. Its sole objective was to seek out a merger target—a process "dominated" by Katz (Gig3's Executive Chairman and CEO) and Dinu (his spouse).[163] The Sponsor, through its control of the Board, exercised power over the most crucial decision facing the Company: merge or liquidate.[164] Gig3's SEC filings acknowledge that the Sponsor "may exert a substantial influence on actions requiring a stockholder vote."[165]

162 *Kahn*, 638 A.2d at 1114 (describing the "threshold question" in assessing whether a minority stockholder is a controlling stockholder to be whether it "exercised control over [the company's] business affairs").

163 Compl. ¶ 51; *see also* Proxy at 147-57.

164 Compl. ¶ 45; *see* Prospectus at 31 ("[E]xcept as required by applicable law or stock exchange rules, the decision as to whether we will seek stockholder approval of a proposed business combination ... will be made by us, solely in our discretion .... Accordingly, we may consummate our initial business combination even if holders of a majority of the issued and outstanding shares of Common Stock do not approve of the business combination we consummate.").

165 Prospectus at 31; *see id.* at 54 ("Our initial stockholders will control a substantial interest in us and thus may influence certain actions requiring a stockholder vote."); *id.* at 110 ("Because of [its] ownership block, [the Sponsor], acting alone, may be able to effectively influence the outcome of all matters requiring approval by our stockholders."); *see also Tesla*, 2018 WL 1560293, at *19 (explaining that "public acknowledgements" of the alleged controller's "substantially outsized influence" was relevant to "the controlling stockholder inquiry when coupled with the other well-pled allegations" of control).

"Entire fairness is not triggered solely because a company has a controlling stockholder. The controller also must engage in a conflicted transaction."[166] Such transactions include those where the controlling stockholder receives a "unique benefit" by "extracting something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders."[167] Here, it is reasonably conceivable that the Sponsor—and Katz through his ownership of the Sponsor—received a "unique benefit" from its ownership of the Initial Stockholder Shares and private placement units.[168]

166 *In re Crimson Expl. Inc. S'holder Litig.*, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014).

167 *Id.* at *13.

168 *See MultiPlan*, 268 A.3d at 811.

As the defendants point out, the Sponsor was generally aligned with public stockholders in seeking out a favorable merger target. The Sponsor and public stockholders who did not redeem would receive the same stock in the post-de-SPAC entity. But the economic structure of the SPAC allowed the Sponsor to extract something uniquely valuable, at the expense of public stockholders, in two ways.

First, the Sponsor's interests diverged from public stockholders in the choice between a bad deal and a liquidation. The Sponsor would realize enormous returns on its $25,000 investment in a value-decreasing merger.[169] For example, despite ***718** the plunge in New Lightning's stock price since the merger, the Initial Stockholder Shares were worth nearly $32.7 million when this litigation was filed.[170] But if Gig3 liquidated, the Initial Stockholder Shares would be worthless. Public stockholders, by contrast, would receive their investment plus interest from the trust in a liquidation. For those stockholders, no deal was preferable to one worth less than the liquidation price.[171]

169 The defendants assert that a lock-up agreement, requiring the Sponsor to refrain from selling its shares for twelve months or until the stock reached a particular target price, incentivized the Sponsor to seek out a value-increasing merger. Defs.' Opening Br. 40. Even if the lock-up agreement could be considered at this stage, I would not reach a different outcome on the motion to dismiss. It can be fairly inferred that unless Gig3 went bankrupt within a year, the value the Sponsor would receive one year after the merger would well exceed its $25,000 investment.

170 Compl. ¶¶ 94, 96. New Lightning's stock price was $6.57 per share as of August 2, 2021. *Id.* ¶ 94.

171 The cases relied upon by the defendants do not involve this dynamic. *See In re BioClinica, Inc. S'holder Litig.*, 2013 WL 5631233, at *5 (Del. Ch. Oct. 16, 2013) (noting that the vesting of stock options in a change of control transaction aligned directors' interests with those of stockholders and both parties would remain in their status quo positions if a transaction were not achieved); *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *13 n.64 (Del. Ch. Feb. 29, 2012) (same); *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (same).

****17** Additionally, the Sponsor had an interest in minimizing redemptions after the merger agreement was signed. The merger with Lightning was conditioned on Gig3 contributing at least $150 million in cash, $50 million of which was required to come from the trust account.[172] By minimizing redemptions, the Sponsor reduced the risk that the merger would fail and increased the value of the Sponsor's interest if it closed. Thus, the Sponsor "effectively competed with the public stockholders for the funds held in trust and would be incentivized to discourage redemptions if the deal was expected to be value decreasing."[173]

172 Proxy at 16; *see also* Compl. ¶ 87.

173 *MultiPlan*, 268 A.3d at 811; *see Crimson Expl.*, 2014 WL 5449419, at *12.

These disparate incentives were not ameliorated by Gig3's single-class structure. The nature of the Sponsor's promote incentivized it to complete a merger with Lightning, even if the deal proved disastrous for non-redeeming public stockholders. That Gig3 had 11 months left to consummate a transaction does not support a conclusion otherwise.[174]

Drawing all inferences in the plaintiff's favor, the Sponsor might have desired to take the money in hand and focus on the next "Gig" SPAC rather than continuing to seek a target for Gig3.

174 *See MultiPlan*, 268 A.3d at 811 ("Time left in the completion window does not change the potential for misaligned incentives.").

b. The Board-Level Conflicts

The standard of review also elevates to entire fairness when a complaint "allege[s] facts supporting a reasonable inference that there were not enough sufficiently informed, disinterested individuals who acted in good faith when taking the challenged actions to comprise a board majority."[175] Here, the Board had six members. The plaintiff must demonstrate that at least three of those directors were interested or lacked independence to support the application of entire fairness on that basis.[176]

175 *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *26 (Del. Ch. Apr. 14, 2017), *as corrected* (Apr. 25, 2017).

176 *Id.* ("If a board is evenly divided between compromised and non-compromised directors, then the plaintiff has succeeded in rebutting the business judgment rule.").

The plaintiff adequately pleaded that Katz, through his ownership and control of the Sponsor, had a material conflict regarding the transaction with Lightning. ***719** [177] As of the merger date, the Initial Stockholder Shares had an implied market value of $39 million.[178] That represents a 155,900% return on the Sponsor's initial $25,000 investment. Irrespective of Katz's personal wealth, a windfall of that magnitude cannot easily be dismissed as inconsequential.[179]

177 Compl. ¶ 6.

178 *Id.* ¶ 96.

179 *See Orman*, 794 A.2d at 31 (observing, in different circumstances, that "it would be naïve to say, as a matter of law, that $3.3 million is immaterial").

The remaining five members of the Board are Dinu, Miotto, Mikulsky, Betti-Berutto, and Wang.

It can be fairly inferred that Dinu shared Katz's interest in the merger.[180] But the Complaint lacks allegations of material self-interest for the other four directors. The plaintiff asserts that the directors are conflicted because they held "direct or indirect" interests in the Sponsor.[181] But he did not plead the size of those interests or any context for their materiality to the directors.[182] According to the defendants, the directors were compensated for their services in cash.[183]

180 Compl. ¶¶ 27-28.

181 *Id.* ¶ 43.

182 *See DiRienzo v. Lichtenstein*, 2013 WL 5503034, at *12 (Del. Ch. Sept. 30, 2013) (holding that a plaintiff failed to allege a fiduciary was "financially interested" in a merger based on an investment by the fiduciary's company where the plaintiff did not make "any allegations pertaining to the materiality of the ... investment" to the fiduciary"); *In re Limited, Inc. S'holders Litig.*, 2002 WL 537692, at *5 (Del. Ch. Mar. 27, 2002) (concluding that a plaintiff failed to plead a director was interested where the complaint referred to aggregate revenue received by an entity in which the director had an interest but did not allege how the director "may have benefited from any portion of those revenues"); *cf. MultiPlan*, 268 A.3d at 813-14 (determining, at the pleading stage, that directors were interested based on specific allegations showing the implied value of each independent director's interests in the sponsor).

183 *See* Defs.' Opening Br. Ex. 11 ("May 27, 2020 Form 8-K") at Item 5.02.

****18** Despite appearing to compensate the Board members in a way that could reduce conflicts, the Sponsor appointed directors with close ties to Katz. Directors may be found to lack independence where they are beholden to an interested party or "so under [the interested party's] influence that their discretion would be sterilized."[184] Here, the Board members are alleged to have held multiple positions within Katz's GigCapital Global enterprise of entities:

- Dinu is Katz's spouse.[185] She is a founding managing partner of GigCapital Global.[186] She was a director of GigCapital2, Inc. (a SPAC) since March 2019 and continued in that position with UpHealth, Inc. (the post-SPAC company), acting as its CEO from August 2019 until June ***720** 2021. Dinu is also the CEO and a director of GigCapital4, Inc., GigCapital5, Inc., and GigInternational1, Inc.—all SPACs that had not undergone a de-SPAC transaction as of the filing of the Complaint. She was an executive at GigPeak, Inc.—a company Katz developed and managed—from 2008 until it was sold in 2017.[187]

- Miotto is a GigCapital Global partner.[188] He was a director of GigCapital1, Inc. (a SPAC) and remains in that position with Kaleyra, Inc. (the post-SPAC company).[189] He was also a director of GigCapital2, continuing in that position with UpHealth, and is a director of GigCapital4 and GigCapital5. He served as a director of GigPeak from its founding until its sale.[190]
- Mikulsky, a GigCapital Global strategic advisor, was a director of GigCapital1 and continues as a director of Kaleyra.[191] Mikulsky was the CEO and President of Endwave Corporation, a company purchased by GigPeak in 2011, after which he served as a director of GigPeak until it was sold. He was also a director of GigCapital2 until its de-SPAC transaction with UpHealth in 2021.[192]
- Betti-Berutto is GigCapital Global's Chief Technology Officer of Hardware.[193] He was a co-founder and CTO of GigPeak until its sale in 2017. He is also a director of GigCapital4 and GigInternational1.[194]
- Wang is GigCapital Global's Chief Technology Officer of Software and is a director of GigCapital6, Inc. and GigInternational1.[195] He was also a director of GigCapital1 from November 2017 until its de-SPAC merger with Kaleyra in 2021.[196]

184 *Orman*, 794 A.2d at 24 (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993)); *see also In re BGC P'rs, Inc.*, 2021 WL 4271788, at *6 (Del. Ch. Sept. 20, 2021) ("A director 'subject to the interested party's dominion or beholden to that interested party' lacks independence." (quoting *Del. Cty. Emps. Ret. Fund v. Sanchez*, 124 A.3d 1017, 1023 n.25 (Del. 2015))).

185 Compl. ¶ 27. That "[c]lose familial relationship[ ]" would alone "create a reasonable doubt as to [her] impartiality." *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999); *Sandys v. Pincus*, 152 A.3d 124, 130 (Del. 2016) (noting that "family ties ... would [be] expect[ed] to heavily influence a human's ability to exercise impartial judgment").

186 Compl. ¶ 28.

187 *Id.*; *see* Proxy at 214-15.

188 Compl. ¶ 28.

189 *Id.* ¶ 29.

190 *Id.*

191 *Id.* ¶ 30.

192 *Id.*

193 *Id.* ¶ 31.

194 *Id.*

195 *Id.* ¶ 32.

196 *Id.*

It is reasonably inferable that these directors would "expect to be considered for directorships" in companies—such as other SPACs—that Katz launches in the future.[197] It is also rational to presume that the directors received compensation for these various roles, which would be accretive to their compensation in connection with Gig3. The totality of these relationships provides ample reason to doubt at the pleading stage that any of the Board members qualify as independent of Katz.[198]

197 *See Caspian Select Credit Master Fund Ltd. v. Gohl*, 2015 WL 5718592, at *7 (Del. Ch. Sept. 28, 2015) (considering allegations that the interested party had nominated directors to current board and other boards and inferring that the directors could "expect to be considered for directorships in companies the [interested party] acquire[s] in the future"); *see also BGC*, 2019 WL 4745121, at *12 (remarking that "past benefits conferred ... may establish an obligation or debt (a sense of 'owingness') upon which a reasonable doubt as to a director's loyalty to a corporation may be premised" (quoting *In re Ply Gem Indus., Inc. S'holders Litig.*, 2001 WL 1192206, at *1 (Del. Ch. Oct. 3, 2001))).

198 *See In re New Valley Corp.*, 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001) ("The facts alleged in the complaint show that all the members of the current Board have current or past business, personal, and employment relationships with each other and the entities involved.").

***721** c. The Unavailability of *Corwin* Cleansing

****19** The defendants contend that if entire fairness applies because of Board-level conflicts, the stockholder vote approving the merger subjects the transaction to business judgment review under *Corwin v. KKR Financial Holdings LLC*.[199] My assessment below that the Proxy was materially false and misleading renders that argument meritless.[200] It also fails, in my view, because the structure of the Gig3 stockholder vote is inconsistent with the principles animating *Corwin*.[201]

199 125 A.3d 304, 306 (Del. 2015) (holding that a fully informed, uncoerced majority stockholder vote cleanses transactions other than self-dealing transactions involving controlling stockholders); *see Larkin*, 2016 WL 4485447, at *8; Defs.' Opening Br. 41 (arguing that "even if a majority of the members of the Board were interested or not independent, the Acquisition would still be subject to business judgment rule review because ... more than 98% of Gig3 stockholders approved the Merger in a fully informed vote based on the disclosures and the price proposed to the market").

200 *E.g.*, *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018) (describing the inquiry regarding whether a stockholder vote is fully informed for purposes of triggering the application of the business judgment rule under *Corwin* to be "whether the Company's disclosures apprised stockholders of all material information and did not materially mislead them"); *see* discussion *infra* Section II.C.2.

201 The dual protections outlined in *Kahn v. M&F Worldwide Corp.* would also be an ill fit for a de-SPAC transaction. 67 A.3d 496, 528 (Del. Ch. 2013), *aff'd*, 88 A.3d 635 (Del. 2014). The *MFW* process was designed to protect minority stockholders from the retribution of a controlling stockholder engaged in a self-dealing transaction—specifically, a squeeze-out. Those fears are not realized in a SPAC merger; public stockholders can simply redeem their shares. This fact highlights, once again, the importance of the redemption right to a SPAC's public stockholders.

"[W]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization."[202] A stockholder vote is afforded deference under our law because stockholders are presumed to be "impartial decision-makers" with an "actual economic stake in the outcome" of the merger.[203]

202 *Crown EMAK P'rs, LLC v. Kurz*, 992 A.2d 377, 388 (Del. 2010)); *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 416 (Del. Ch. 2010) ("Economic incentives matter, particularly for the effectiveness of a legitimizing mechanism like a majority-of-the-minority tender condition or a stockholder vote.").

203 *Corwin*, 125 A.3d at 313-14.

Unlike the vote on a typical merger or acquisition, however, the Gig3 stockholder vote on the de-SPAC merger could not reflect its investors' collective economic preferences. Stockholders' voting interests were decoupled from their economic interests.[204] Gig3's public stockholders could simultaneously divest themselves of an interest in New Lightning by redeeming and vote in favor of the deal. Many did. Although 98% of all Gig3 stockholders (according to the defendants) voted in favor of the merger, 29% of the public stockholders ***722** redeemed their shares.[205]

204 *See* Usha Rodrigues & Mike Stegemoller, *Redeeming SPACs* 28 (U. Ga. Sch. L. Rsch. Paper No. 2021-09, 2021), https://ssrn.com/abstract=3906196 ("[T]he vote is nearly irrelevant, because SPACs have decoupled voting and economic interest in the de-SPAC. This decoupling renders the SPAC shareholder vote—when it even occurs—a mere fig leaf. A de-SPAC is a *fait accompli*."); John C. Coates, *SPAC Law and Myths* 9 (Feb. 11, 2022), https://ssrn.com/abstract=4022809 (discussing the "possibility—often a reality—that many voting shareholders will redeem and exit the SPAC shortly after they vote on a deal, creating a close analogue of 'empty voting' ").

205 Defs.' Opening Br. 21 (citing April 21, 2021 Form 8-K at Item 5.07).

****20** Public stockholders had no reason to vote against a bad deal because they could redeem. Moreover, redeeming stockholders remained incentivized to vote in favor of a deal—regardless of its merits—to preserve the value of the warrants included in SPAC IPO units.[206] Because this vote was of no real consequence, its effect on the standard of review is equivalently meaningless.[207]

206 *See* Klausner, Ohlrogge & Ruan, *Sober Look*, *supra* note 4, at 241-46 (discussing research reflecting that all stockholders who buy units in the IPO but sell or redeem their shares retain free warrants); *supra* note 19 and accompanying text.

207 The vote could have held greater importance if stockholders' voting and economic interests had been "recoupled" by requiring redeeming stockholders to vote against the deal. *See* Usha Rodrigues & Michael Stegemoller, *Disclosure's Limits*, 40 Yale J. Reg. 37, 42-43 (2022) (proposing that stockholders must vote against a merger in order to exercise their redemption right and arguing that "[r]ecoupling the vote with the redemption right can help ensure that good deals go forward—and bad deals don't"); Holger Spamann & Hao Guo, *The SPAC Trap: How SPACs Disable Indirect Investor Protection*, 40 Yale J. Reg. 75, 79 (2022) (recounting that the SPACs of the 1990s and early 2000s "required investors to vote against the de-SPAC if they wanted to redeem," which provided an "indirect investor protection defense" because "the acquisition would not go through if it was a bad deal for non-redeeming SPAC shareholders"). This, of course, assumes that the vote otherwise satisfied *Corwin*, including the requirement that it be fully informed. But in that case, it would seem that stockholders would also have been given a fair opportunity to redeem and there would not be a reasonably conceivable *MultiPlan* claim.

2. The Fairness Analysis

Under the entire fairness standard, the defendant fiduciaries will bear the burden "to demonstrate that the challenged act or transaction was entirely fair to the corporation and its [stockholders]."[208] "Although fairness has two component parts—price and process—the court must make a 'single judgment that considers each of these aspects.' "[209]

208 *In re Walt Disney Co. Deriv. Litig.*, 906 A.2d 27, 52 (Del. 2006).

209 *BGC*, 2022 WL 3581641, at *42 (Del. Ch. Aug. 19, 2022) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1139-40 (1994)).

The fact intensive nature of this inquiry "normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss."[210] But "[e]ven in a self-interested transaction," a plaintiff "must allege some facts that tend to show that the transaction was not fair."[211] Dismissal may be appropriate if the defendants demonstrate that the challenged act "was entirely fair based solely on the allegations of the complaint and the documents integral to it."[212]

210 *Orman*, 794 A.2d at 21 n.36.

211 *Solomon v. Pathe Commc'ns Corp.*, 1995 WL 250374, at *5 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996).

212 *Hamilton P'rs, L.P. v. Highland Cap. Mgmt., L.P.*, 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014).

In *Weinberger v. UOP, Inc.*, the Delaware Supreme Court explained that compliance with the duty of disclosure is included within the fair dealing facet of the test.[213] Because "[m]aterial information" was withheld from minority stockholders "under circumstances amounting to a ***723** breach of fiduciary duty," the court concluded that the merger did "not meet the test of fairness."[214] The directors' lack of candor was considered in the broader context of their unfair dealing, including "the absence of any attempt to structure th[e] transaction on an arm's length basis" and the "obvious conflicts" involved.[215] The court viewed complete disclosure as a means of ensuring fair play but assessed the adequacy of the disclosures against the backdrop of the overall transaction.

213 457 A.2d at 711 (describing "fair dealing" as including the question of "how the approvals of the directors and the stockholders were obtained").

214 *Id.* at 703; *see also In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 29 (Del. Ch. 2014) (concluding that a "disclosure issue on which the plaintiffs received summary judgment provide[d] some evidence of unfairness"); *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104-05 (Del. 1985) (overruling a "narrow interpretation" of *Weinberger* focused solely on "allegations of non-disclosures or misrepresentations" because the "mandate of fair dealing does not turn solely on issues of deception" but includes "broader concerns respecting the matter of procedural fairness").

215 *Weinberger*, 457 A.2d at 710-11.

****21** In keeping with that guidance, this court held in *MultiPlan* that the plaintiffs had stated viable claims under the entire fairness standard not only due to the conflicts in the de-SPAC merger but also because the defendants "failed, disloyally, to disclose information necessary for the plaintiffs to knowledgeably exercise their redemption rights."[216] That opinion explicitly did not address "the validity of a hypothetical claim" premised solely on the conflicts inherent in a SPAC structure if public stockholders "in possession of all material information" had chosen "to invest rather than redeem."[217] Rather, it evaluated the "core, direct harm" caused by the action or inaction of conflicted fiduciaries that constrained the informed exercise of the redemption right.[218]

216 268 A.3d at 816.

217 *Id.*

218 *Id.*

The defendants argue that this case presents the theoretical scenario contemplated in *MultiPlan* because the Proxy contained all material information. Not so.

The plaintiff has provided "some facts" that public stockholders' redemption decisions were compromised by the defendants' unfair dealing in two primary ways.[219] The first concerns the failure to disclose the cash per share that Gig3 would invest in the combined company. The second relates to the incomplete disclosure of the value that Gig3 and its non-redeeming stockholders could expect to receive in exchange.

219 *Solomon*, 1995 WL 250374, at *5.

Both pieces of information would be essential to a stockholder deciding whether it was preferable to redeem her funds from the trust or to invest them in New Lightning. Gig3's public stockholders knew that if they redeemed, they were promised $10 per share plus interest. They were given incomplete information about what they would receive if they instead opted to invest.

a. What Gig3 Was Investing

The Board was under an "affirmative duty" to provide "materially accurate and complete" information to stockholders in connection with the redemption choice and merger vote.[220] The Proxy indicated that the merger consideration to be paid to Lightning stockholders consisted solely of Gig3 stock valued at $10 per share.[221] If ***724** non-redeeming stockholders were exchanging Gig3 shares worth $10 each, they could reasonably expect to receive equivalent value in return.[222]

220 *Feldman v. Cutaia*, 2006 WL 920420, at *8 (Del. Ch. Apr. 5, 2006).

221 Proxy at Cover Page, A-2 (defining "Aggregate Closing Merger Consideration" to mean "a number of shares of GigCapital3 Common Stock equal to the quotient of (a) the Aggregate Closing Merger Consideration Value divided by (b) $10.00").

222 *See* Klausner, Ohlrogge & Ruan, *Sober Look*, *supra* note 4, at 287-88 (explaining that in a de-SPAC transaction, the target negotiates an exchange in which its stockholders will "give up a fraction of their company roughly equal to the value of the SPAC shares they will receive, and the primary value of a SPAC is its cash").

According to the Complaint, however, the amount of net cash per share to be invested in New Lightning was not $10.[223] It was instead less than $6 per share after accounting for considerable dilution.[224] Because the Proxy allegedly misstated and obfuscated the net cash—and thus the value—underlying Gig3's shares, public stockholders could not make an informed choice about whether to redeem or invest.[225]

223 Compl. ¶¶ 19, 56; *see In re P3 Health Grp. Hldgs., LLC*, 2022 WL 16548567, at *19 (Del. Ch. Oct. 31, 2022) (finding it reasonably conceivable that a contractual party's right to a priority distribution was breached by the company valuing distributed SPAC shares at $10, based on the observation that "the value of SPAC equity when a de-SPAC merger takes place is materially less than $10 per share" (citing Klausner, Ohlrogge & Ruan, *Sober Look*, *supra* note 4, at 232, 246, 253)).

224 *See* Compl. ¶ 56.

225 *See O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 920 (Del. Ch. 1999) ("To state a claim for breach of the fiduciary duty of disclosure on the basis of a false statement or representation, a plaintiff must identify (1) a material statement or representation in a communication contemplating stockholder action (2) that is false.").

****22** Gig3's sole asset at the time of the Proxy—i.e., before redemptions—was cash. That included funds in the trust account (about $202 million) and funds to be received at closing in exchange for shares pursuant to the PIPE agreement ($25 million).[226] To determine net cash per share, costs would be subtracted from that total cash (about $227 million) before dividing by the number of pre-merger shares.[227]

226 Oral Arg. Tr. 82; *see* Proxy at 107. Redemptions would further dilute equity and dissipate cash. The extent of that dilution was not, however, known at the time of the Proxy.

227 *See* Oral Arg. Tr. 75-93; *see also* Michael Klausner, Michael Ohlrogge & Harold Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 Yale J. Reg. 18, 24-30 (2022) (describing that costs include cash expenses, the value of warrants, and the value of other equity derivatives and that pre-merger shares include public shares, founder shares, and PIPE shares).

$$\text{Net Cash per Share} = \frac{\text{Cash} - \text{Costs}}{\text{Pre-Merger Shares}}$$

The plaintiff asserts that the costs to be subtracted from the cash component of the numerator would include: (1) transaction costs, including deferred underwriter fees ($8 million) and financial advisory and other fees ($32 million);[228] (2) the market value of public warrants at the time of the Proxy (about $38 million);[229] (3) the value ***725** of the warrants in the private placement units and given to Note holders; and (4) the value of the Notes' conversion feature.[230] The denominator—pre-merger shares—would consist of: (1) public shares issued in the IPO (20 million); (2) the Initial Stockholder Shares (about 5 million); (3) the Insider Shares (15,000); (4) shares to be issued at closing pursuant to the PIPE agreement (2.5 million); and (5) shares issued as part of the private placement units (about 240,000).[231] Using these inputs and the above formula, the plaintiff calculates Gig3's net cash per share at the time the Proxy was filed to be about $5.25 per share.[232]

228 Oral Arg. Tr. 82.

229 This figure values the 15 million public warrants at $2.53 per warrant, which was the average trading price the week before the Merger announcement. *Id.* at 78, 116. Per SEC guidance, the public warrants are treated as a current liability. *See Staff Statement on Accounting and Reporting Considerations for Warrants Issued by Special Purpose Acquisition Companies ("SPACs")*, SEC (Apr. 12, 2021), https://www.sec.gov/news/public-statement/accounting-reporting-warrants-issued-spacs.

230 Because the value of the third and fourth factors could not be determined based on the information in the Proxy, the plaintiff was unable to calculate their dilutive effects. *See* Oral Arg. Tr. 83-85. Accordingly, the plaintiff argues its calculated net cash per share value is an overestimate. *See id.*

231 *See id.* at 75-76.

232 *Id.* at 83; Compl. ¶ 11. At this stage, I do not assess the accuracy of the plaintiff's inputs in reaching a figure of $5.25. For example, I accept the plaintiff's assertion that the public warrants should be valued according to their market price and included in the numerator. *Cf.* Oral Arg. Tr. 91-92 (acknowledging that the "costs [of the warrants] could be reflected in the denominator of the fraction rather than the numerator"). I also am not endorsing a specific formula or methodology for calculating net cash per share. The plaintiff concedes that different companies could take different approaches. Using any reasonable method of calculating net cash per share, however, this information was not fully or accurately disclosed in the Proxy.

****23** Accepting the plaintiff's allegations as true, the sizeable difference between the $10 of value per share Gig3 stockholders expected and Gig3's net cash per share after accounting for dilution and dissipation of cash is information "that a reasonable shareholder would consider ... important in deciding" whether to redeem or invest in New Lightning.[233] If Gig3 had less than $6 per share to contribute to the merger, the Proxy's statement that Gig3 shares were worth $10 each was false—or at least materially misleading.[234] Moreover, Gig3 stockholders could not logically expect to receive $10 per share of value in exchange.[235]

233 *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985); *see Zirn v. VLI Corp.*, 681 A.2d 1050, 1057 (Del. 1996) (discussing that, in the context of stockholders deciding whether to tender or retain shares, "any misstatement ... which misled the stockholders concerning the value of the company would necessarily be material").

234 Whether a SPAC has disclosed all material information regarding the cash per share it would invest in the combined company is a fact dependent analysis. Each SPAC's potential dilution and dissipation of cash varies depending upon, among other factors, the number of warrants, the size of the PIPE, and the amount of advisor and other fees. Here, it is reasonably conceivable that the Proxy was materially misleading because the Complaint alleges significant dilution and dissipation of cash that starkly contrasts with the Proxy's attribution of $10 to each Gig3 share. *See* Compl. ¶ 63.

235 *See id.* ¶ 57.

b. What Gig3 Was Receiving

The second category of alleged disclosure violations concerns the value that stockholders would receive in a merger with Lightning. The plaintiff avers that because Gig3 was not worth $10 per share, Lightning's stated worth was commensurately overstated.[236] The value that Gig3 obtained in the merger would be highly relevant to stockholders' investment decisions. But according to the Complaint, the Board "accepted" an "inflated valuation" for Lightning built on unrealistic revenue and production projections and passed this ***726** misinformation along to stockholders.[237] The Proxy was silent as to Lightning's true prospects.

236 *E.g.*, *id.* ¶ 80.

237 *Id.* ¶ 63.

Gig3's Proxy reported that Lightning's annual revenues were projected to increase by over 22,100% in five years, from $9 million to over $2 billion.[238] It also stated that Lightning's annual gross profits were expected to rise from zero to more than $500 million over the same time period.[239] These projections assumed that Lightning would ramp up its production capacity dramatically from fewer than 100 vehicles delivered in 2019 and 2020 combined to 20,000 vehicles a year by 2025.[240]

238 *Id.* ¶ 66.

239 *Id.*

240 *Id.* ¶¶ 68, 79.

The disclosure of the projections does not, by itself, imply that the defendants failed to inform the exercise of stockholders' redemption rights. They are obviously forward-looking and qualified by cautionary language.[241] The Proxy explained that the projections were prepared by Lightning management "for internal use and not with a view toward public disclosure" and were disclosed "because they were made available to [Gig3] and [its] Board in connection with their review of the proposed [merger]."[242]

241 Proxy at 162-63. The plaintiff is not asserting a fraud claim.

242 *Id.* at 162-63; *see City of Miami Gen. Emps. v. Comstock*, 2016 WL 4464156, at *12 (Del. Ch. Aug. 24, 2016) (rejecting a disclosure claim against directors concerning financial estimates prepared by the merger counterparty because "[a]mending or supplementing those figures with other estimates that were not presented to [the company] would misstate the information that [the company] actually received from [the counterparty]").

****24** The problem is that Lightning's lofty projections were not counterbalanced by impartial information.[243] Stockholders were kept in the dark about what they could realistically expect from the combined company. Gig3 did not, for example, tell investors that Lightning's business would be difficult to scale because it built highly customized vehicles in small batches.[244] The Complaint alleges that the Board had good reason to question Lightning's future capabilities.[245] Yet the Proxy was silent.[246]

243 *See Lynch v. Vickers Energy Corp.*, 383 A.2d 278, 281 (Del. 1977) (holding that the defendants violated their duty of disclosure when they disclosed a "floor value, but not an equally reliable 'ceiling' value" because "full disclosure ... was a prerequisite"); *Maric Cap. Master Fund, Ltd. v. Plato Learning, Inc.*, 11 A.3d 1175, 1177-78 (Del. Ch. 2010) ("Because the proxy statement spoke on this subject, there was a duty to do so in a non-misleading fashion.").

244 Compl. ¶ 79.

245 *Id.* ¶ 64.

246 The Proxy cautioned, for example, that Lightning is "an early stage company with a history of losses" that "expects to incur significant expenses and continuing losses for the foreseeable future." Proxy at 53-54. But the defendants "are not excused from disclosing material facts" simply because general "risk factors" were listed. *Pfeffer*, 965 A.2d at 686-87; *see Lynch*, 383 A.2d at 281 (stating that the duty of disclosure is not fulfilled by technically correct, generalized statements).

"To state a claim for breach by omission of any duty to disclose, a plaintiff must plead facts identifying (1) material, (2) reasonably available (3) information that (4) was omitted from the proxy materials."[247] The phrase "reasonably available" is not meaningless. It sets out a baseline expectation that directors have undertaken a ***727** sufficient inquiry for material information. The Complaint alleges that this standard was not met because the Board was incentivized to turn a blind eye to Lightning's problems and close the deal.[248]

247 *Pfeffer*, 965 A.2d at 686 (quoting *O'Reilly*, 745 A.2d at 926).

248 Compl. ¶¶ 20, 23, 64, 66-72.

The nature of Lightning's business model was "knowable" through the sort of diligence and analysis expected of the board of a Delaware corporation undertaking a major transaction.[249] It can be inferred that the defendants knew (and should have disclosed) or should have known (but failed to investigate) that Lightning's production would be difficult to scale in the manner predicted.[250] In either event, it is reasonably conceivable that the Board deprived Gig3's public stockholders of an accurate portrayal of Lightning's financial health. As a result, public stockholders could not fairly decide whether it was preferable to redeem for $10 plus interest or to invest in a risky venture.

249 *Pfeffer*, 965 A.2d at 687 (quoting *IOTEX Commc'ns, Inc. v. Defries*, 1998 WL 914265, at *4 (Del. Ch. 1998)).

250 Compl. ¶¶ 79-80.

* * *

The plaintiff has sufficiently pleaded that the Proxy contained material misstatements and omitted material, reasonably available information. I therefore cannot conclude that the transaction was the product of fair dealing.[251]

251 *See Weinberger*, 457 A.2d at 710-11.

The Complaint provides additional grounds for that assessment. The merger negotiations were directed by Katz and Dinu—the two individuals who arguably stood to gain the most in a value-destructive deal.[252] The Board's advisors, Nomura and Oppenheimer, had large stakes in 243,479 private placement shares that would be worthless and $8 million of contingent compensation that would not be realized if Gig3 failed to merge.[253] The Board did not obtain a fairness opinion or even an informal presentation on the fairness of the transaction—not to mention one considering the effect of the Sponsor promote.[254]

252 *See Cinerama*, 663 A.2d at 1173 ("The independence of the bargaining parties is a well-recognized touchstone of fair dealing.").

253 Compl. ¶ 52; *see MultiPlan*, 268 A.3d at 818.

254 Delaware courts have stated that there is no duty to obtain a fairness opinion. In *Crescent/Mach I Partners, L.P. v. Turner*, for example, the court held that the director defendants' approval of a fairness opinion did not "rise[ ] to the level of grossly negligent conduct that would deprive them of the benefit of the business judgment rule." 846 A.2d 963, 985 (Del. Ch. 2000). The court remarked that "fairness opinions prepared by independent investment bankers are generally not essential, as a matter of law, to support an informed business judgment." *Id.* at 984. Nevertheless, it observed that the directors obtained an evaluation of the fairness of the merger consideration "from an investment banking firm" that was not conflicted, relied on that fairness opinion "to make an informed decision on whether or not to consummate the merger," and disclosed it in the proxy statement. *Id.* at 984-75.

In *Houseman v. Sagerman*, the plaintiffs relied on the failure to obtain a formal fairness opinion in claiming that the board "knowingly and completely failed to undertake a reasonable sales process" under *Revlon*. 2014 WL 1600724, at *7 (Del. Ch. Apr. 16, 2014). The board "considered the expense of obtaining a fairness opinion relative to the overall transaction value" but chose to engage an independent financial advisor to aid in diligence and provide "an informal opinion" that the merger price was within a range of reasonableness. *Id.* The court concluded that the directors did not act in bad faith since they undertook a reasonable process and determined "that, due to the relative expense, it was not in the Company's best interest to obtain a fairness opinion." *Id.*

In both *Turner* and *Sagerman*, the disinterestedness and independence of the directors were not in dispute. The boards undertook some efforts to assess the fairness of a transaction. They did so in reliance on independent advisors. The facts alleged here are markedly different.

****25 *728** Unfair price can be inferred from the allegation that public stockholders were left with shares of New Lightning worth far less than the $10 per share redemption price.[255]

255 *E.g.*, Compl. ¶¶ 21-22, 58, 95-96, 120.

These matters may ultimately not support a finding of unfairness. At present, however, they provide some evidence that the Board failed to live up to the standard of conduct demanded of it. The benefit of a developed factual record is needed to make a definitive assessment of fairness. The defendants will bear that burden at trial.

3. Exculpation

Gig3's charter contains an exculpatory provision that eliminated director liability for breaches of the duty of care.[256] A plaintiff seeking monetary damages from a director must state a claim for breach of the duty of loyalty, "regardless of the underlying standard of review for the board's conduct."[257] To do so, the plaintiff must plead "facts supporting a rational inference that the director harbored self-interest adverse to the stockholders' interests, acted to advance the self-interest of an interested party from whom they could not be presumed to act independently, or acted in bad faith."[258]

256 Charter § 8.1.

257 *In re Cornerstone Therapeutics Inc., S'holder Litig.*, 115 A.3d 1173, 1175-76 (Del. 2015).

258 *Id.* at 1179-80.

The Complaint sufficiently pleads that each of the Board members was either self-interested in the merger or acted in a manner that advanced the interests of the Sponsor and Katz to the public stockholders' detriment. The plaintiff's claims against the Board are also "inextricably intertwined with issues of loyalty."[259] As a result, those claims are not exculpated.

259 *Emerald P'rs v. Berlin*, 787 A.2d 85, 93 (Del. 2001).

D. The Unjust Enrichment Claim Is Reasonably Conceivable.

Count Three is a claim for unjust enrichment against the Sponsor and the Board. Unjust enrichment is "the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience."[260] The elements of unjust enrichment are "(1) an enrichment, (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification and (5) the absence of a remedy provided by law."[261]

260 *Schock*, 732 A.2d at 232 (quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* § 3 (1973)).

261 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 585 (Del. Ch. 1998).

The Complaint pleads adequate facts to satisfy these elements. It alleges that the defendants were "unjustly enriched" by the disloyal conduct described in Counts One and Two, which impoverished Gig3 public stockholders who were unable to exercise their redemption rights with the benefit of all material information.[262] The enrichment and impoverishment ***729** described by the plaintiff are also related. By providing inadequate disclosures about the amount of net cash available to Gig3 in the merger and Lightning's prospects, the defendants could discourage redemptions and ensure greater deal certainty. As a remedy, the plaintiff seeks disgorgement of the unjust profits realized by the defendants to be recouped by the affected stockholders.[263]

262 Compl. ¶¶ 126-27.

263 *Id.* ¶ 128.

****26** This claim turns, in large part, on the same allegations as the fiduciary duty claims. If the plaintiff prevails on his fiduciary duty claims, he will similarly succeed in proving unjust enrichment. Although he cannot obtain a double recovery, "[o]ne can imagine ... factual circumstances in which the proofs for a breach of fiduciary duty claim and an unjust enrichment claim are not identical, so there is no bar to bringing both claims" against the same defendants.[264] The unjust enrichment claim therefore survives along with the fiduciary duty claims.

264 *MCG Cap. Corp. v. Maginn*, 2010 WL 1782271, at *25 n.147 (Del. Ch. May 5, 2010); *see Calma on Behalf of Citrix Sys., Inc. v. Templeton*, 114 A.3d 563, 592 (Del. 2015) (concluding that it was reasonably conceivable the plaintiff could recover on an unjust enrichment claim where it stated a claim for breach of fiduciary duty on the same, "duplicative" allegations).

III. CONCLUSION

The defendants' motion to dismiss is denied. The Complaint states reasonably conceivable claims against the defendants in Counts One, Two, and Three. The standard of review is entire fairness with the defendants bearing the burden of persuasion at trial.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

IN RE BAKER HUGHES, A GE COMPANY, DERIVATIVE LITIGATION

C.A. No. 2019-0201-LWW
|
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|
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MEMORANDUM OPINION

WILL, Vice Chancellor

***1** Delaware corporate law centers around the principle that a board of directors manages the business and affairs of a corporation. This managerial authority includes the right to decide whether to pursue a claim on the corporation's behalf. Although directors may be disqualified from exercising judgment with respect to a suit, the board is not powerless. It may authorize a special litigation committee to investigate and determine whether pressing derivative claims is in the company's best interests.

A special litigation committee is a potent tool for a corporation to retain control of a derivative suit, so long as it meets several guidelines. The committee must consist of disinterested and independent directors. The committee, often with assistance from advisors, must undertake a diligent and good faith investigation. It must carefully apply the relevant legal standards to the evidence it uncovers and draw conclusions supported by reasonable bases. If the committee follows these standards, the court will generally support its judgment.

In October 2019, the board of directors of Baker Hughes delegated its authority over the derivative claims in this action to a special litigation committee. It did so after the court made a pleadings stage determination that demand was futile. The sole member of the committee lacked disabling ties to conflicted parties or interests in the underlying transactions and joined the board after motions to dismiss had been filed. The committee retained independent advisors and performed a nine-month investigation.

After completing its investigation, the committee concluded that the court would likely hold that the transactions at issue were entirely fair to Baker Hughes. Given that conclusion, and the costs and burdens incumbent in litigating an entire fairness suit, the committee determined that further prosecution would not be in the best interests of Baker Hughes or its stockholders. A motion to terminate the action followed in October 2020.

The plaintiffs took discovery before filing a brief opposing the motion to terminate. Their opposition raises various challenges to the committee's independence, process, and conclusions. On independence, the plaintiffs scrutinize matters from causal acquaintanceships with non-defendant directors to gifts of wine for virtual happy hours. On process, the plaintiffs critique the committee's decisions about report drafting, document collection, and witness interview tactics. And on conclusions, the plaintiffs mount a series of merits-based attacks. These arguments are strong in number but weak in substance.

To be sure, the committee was imperfect. Having a single member is not ideal. Nor is the fact that the member exchanged a handful of messages with an investigation subject. The committee's report also omits any discussion of the potential transaction advisor conflicts it investigated. But despite these flaws, the committee's independence, the thoroughness of its investigation, and the reasonableness of its conclusions are not in doubt.

***2** The record before me, including live testimony of the committee member, demonstrates that the special litigation committee has met its burden. The motion to terminate is therefore granted.

I. FACTUAL BACKGROUND

The following background is drawn from the record submitted by the special litigation committee (the "SLC") and the plaintiffs. This record includes the SLC's report, exhibits to the report, additional documents produced by the SLC to the plaintiffs, three deposition transcripts, and live testimony of the SLC member.[1]

1 *See* Opening Br. in Supp. of Special Litigation Committee's Mot. to Terminate (Dkt. 105) Ex. A ("SLC Rep."). Citations in the form of "Pls.' Answering Br. Ex. __" refer to exhibits to the Transmittal Affidavit of Michael J. Barry in Support of Plaintiffs' Answering Brief in Opposition to the Special Litigation Committee's Motion to Terminate. Dkts. 138-47. Citations in the form of "SLC's Reply Br. Ex. __" refer to exhibits to the Transmittal Affidavit of Matthew L. Miller in Support of Special Litigation Committee's Reply Brief in Further Support of its Motion to Terminate. Dkt. 150. Where an exhibit lacks internal pagination, pin citations reflect the last three digits of the exhibit's Bates stamp.

A. The 2017 Transactions

On October 30, 2016, Baker Hughes Incorporated ("BHI") and GE Oil & Gas UK Limited ("GE Oil & Gas") entered into a merger agreement.[2] BHI, a Delaware corporation, was an energy technology and services company.[3] GE Oil & Gas was a wholly-owned oil and gas subsidiary of General Electric Company ("GE").[4]

2 SLC Rep. 7, 13. BHI stockholders approved the merger agreement on June 30, 2017.

3 *Id.* at 3.

4 *Id.* at 6.

On July 3, 2017, a series of transactions contemplated by the merger agreement closed (the "2017 Transactions").[5] BHI was converted into a Delaware limited liability company called Baker Hughes, a GE company, LLC ("BHGE, LLC").[6] BHGE, LLC became an operating entity under a newly-formed Delaware corporation called Baker Hughes, a GE company ("Baker Hughes").[7] GE contributed GE Oil & Gas's assets to BHGE, LLC.[8] As consideration for the merger, BHI stockholders received a cash dividend and Baker Hughes Class A common shares, which would trade publicly on the New York Stock Exchange.[9] GE received Baker Hughes Class B common shares and BHGE, LLC common units.[10]

5 *Id.* at 13.

6 Baker Hughes, a GE company, Current Report (Form 8-K12B) (July 3, 2017) at Introduction.

7 SLC Rep. 13. On October 15, 2019, Baker Hughes, a GE company changed its name to Baker Hughes Company. *See* Baker Hughes Company, Current Report (Form 8-K) (Oct. 17, 2019) at Item 5.03. Baker Hughes Company is also referred to as "Baker Hughes" in this decision.

8 SLC Rep. 13-14.

9 *Id.* at 14-15. GE contributed $7.4 billion to fund substantially all of the special dividend.

10 *Id.*

As a result of the 2017 Transactions, GE held 62.5% of the voting rights in Baker Hughes and BHI stockholders held the remaining 37.5%.[11] BHGE, LLC common units were owned by GE (about 62.5%) and Baker Hughes (about 37.5%), and Baker Hughes managed BHGE, LLC.[12] Lorenzo Simonelli and Brian Worrell became the Chief Executive Officer and Chief Financial Officer, respectively, of Baker Hughes.[13]

11 *Id.* at 15. BHI stockholders held 100% of the economic rights in Baker Hughes; GE held none. Economic rights included the right to distributions in the event of a liquidation and the right to dividends. *See* Baker Hughes, a GE company, Current Report (Form 8-K12B) (July 3, 2017) at Ex. 3.1 § 4(C) (Baker Hughes certificate of incorporation describing the difference between Class A and Class B common stock).

12 SLC Rep. 14-15.

13 *Id.* at 20. Before assuming positions at Baker Hughes, Simonelli and Worrell were GE Oil & Gas's CEO and CFO, respectively.

***3** GE and Baker Hughes executed a Stockholders Agreement on the same day the 2017 Transactions closed. The

Stockholders Agreement gave GE the right to designate six of the eleven members of Baker Hughes's board of directors (the "Board"), including the Chairman.[14] GE would retain that right until a "Trigger Date" on which GE or its affiliates owned less than 50% of Baker Hughes's voting power and GE could no longer consolidate Baker Hughes on its financial statements.[15] The Board's other five members included BHI's Chief Executive Officer and four "Independent Directors."[16] The Independent Directors would be designated by BHI, "reasonably acceptable to GE," and independent under New York Stock Exchange rules.[17]

14 Pls.' Answering Br. Ex. 5 ("Stockholders Agreement") § 3.1(a); *see* SLC Rep. 17.

15 SLC Rep. 17; Stockholders Agreement §§ 1.1 (defining "Trigger Date"), 3.1(b).

16 Stockholders Agreement § 3.1(a); *see* SLC Rep. 17.

17 Stockholders Agreement §§ 1.1 (defining "Independent Director"), 3.1(a); *see* SLC Rep. 17.

GE nominated Jeffrey Immelt (who served as Chairman), W. Geoffrey Beattie, Jamie S. Miller, James J. Mulva, John G. Rice, and Lorenzo Simonelli to the Board.[18] BHI CEO Martin Craighead also joined the Board, along with Independent Directors Gregory D. Brenneman, Clarence P. Cazalot, Jr., Lynn L. Elsenhans, and J. Larry Nichols.[19]

18 SLC Rep. 18.

19 *Id.*

The Stockholders Agreement further provided for the formation of a Conflicts Committee—a subcommittee of the Board's Governance & Nominating Committee.[20] The Conflicts Committee consisted of all "Company Independent Directors," meaning the Independent Directors with no substantial ties to GE.[21] The Conflicts Committee's mandate included reviewing and approving related party transactions.[22]

20 *Id.*; Stockholders Agreement § 3.3(d).

21 Stockholders Agreement §§ 1.1 (defining "Company Independent Director"), 3.3(d); *see* SLC Rep. 18-19. The Governance & Nominating Committee designated each Company Independent Director after determining that the director: (1) was independent under New York Stock Exchange rules; (2) was not a GE board member; (3) was not an officer or employee of GE or its affiliates; and (4) had no other past or present substantial relationship with GE or its affiliates. Stockholders Agreement § 1.1; *see* SLC Rep. 18-19.

22 SLC Rep. 18-19 & n.61; Stockholders Agreement §§ 3.3(d), 4.2(a), 4.5(a).

The Stockholders Agreement imposed a multistage lockup on GE's ability to sell its Baker Hughes stock (the "Lockup").[23] From July 3, 2017 to July 3, 2019, GE could not sell its Baker Hughes stock without Conflicts Committee approval.[24] From July 3, 2019 to July 3, 2022, GE could not sell its Baker Hughes stock in a transaction that would result in any person or group beneficially owning more than 15% voting power.[25] After July 3, 2022, GE could sell freely.[26]

23 SLC Rep. 19; Stockholders Agreement § 4.2(a).

24 SLC Rep. 19; Stockholders Agreement § 4.2(a)(i).

25 SLC Rep. 19; Stockholders Agreement § 4.2(a)(ii).

26 There were two minor conditions on GE's sale of its Baker Hughes shares after that point: (1) any buyer must make an offer to other, non-GE stockholders of Baker Hughes on substantially the same terms as those between GE and the buyer; and (2) if the buyer did not offer to buy 100% of Baker Hughes's common stock, then the buyer must agree to assume GE's obligations under the Stockholders Agreement or enter into a stockholders agreement with Baker Hughes on substantially the same terms as the Stockholders Agreement. Stockholders Agreement § 4.2(a)(iii).

B. The Original Master Agreement Framework

In connection with the 2017 Transactions, Baker Hughes entered into an array of commercial and other agreements with GE and GE's subsidiaries, known as the Master Agreement Framework.[27] Key aspects of the Master Agreement Framework included: the Supply Agreement, through which GE supplied Baker Hughes with a range of products and services—such as gas turbines;[28] the GE Digital Master Products and Services Agreement, under which Baker Hughes obtained certain GE Digital products and services;[29] and the Intercompany Services Agreement, in which GE agreed to provide corporate services to Baker Hughes.[30] Many components of the Master Agreement Framework would terminate on or soon after the Trigger Date.[31]

27 SLC Rep. 20-26.

28 *Id.* at 21-22.

29 *Id.* at 24.

30 *Id.* at 24-25. Other parts of the Master Agreement Framework included the Non-Competition Agreement, the Channel Agreement, the Intellectual Property Cross-License Agreement, and the Tax Matters Agreement. *Id.* at 20-26.

31 *Id.*

C. GE's Strategy Shift

***4** GE was facing a financial crisis around the time the 2017 Transactions closed. The company had accumulated massive debt and saw its stock price plummet.[32] A managerial overhaul and strategic adjustment followed. On August 1, 2017, John Flannery replaced Immelt as GE's CEO.[33] A few months later, on October 2, Flannery replaced Immelt as GE's Chairman.[34] And on November 1, Miller became GE's CFO.[35]

32 *Id.* at 27-28 & tbl.2; Verified Deriv. Compl. (Dkt. 1) ("Compl.") ¶¶ 29-33.

33 SLC Rep. 28; Pls.' Answering Br. Ex. 14.

34 SLC Rep. 28.

35 Pls.' Answering Br. Ex. 15.

Around the same time, two directors resigned from the Baker Hughes Board: Immelt, a GE designee, and Nichols, Chairman of the Conflicts Committee.[36] GE and Baker Hughes consequently amended the Stockholders Agreement to reduce the Baker Hughes Board from eleven to nine members and the number of GE-designated directors from six to five.[37] Simonelli became Chairman of the Board and Cazalot became Chairman of the Conflicts Committee.[38]

36 SLC Rep. 29.

37 *Id.* at 30.

38 *Id.* at 29.

On November 13, 2017, Flannery announced a restructuring plan for GE to raise $20 billion through asset sales over the next few years.[39] He specified that GE was evaluating its "exit options" with respect to Baker Hughes.[40] This announcement put GE and Baker Hughes's relationship on unsettled ground, sowing worry among Baker Hughes investors, customers, and employees.[41] Market analysts described the uncertainty over GE's position as a "contagion" on Baker Hughes stock.[42] Baker Hughes believed that the GE overhang depressed the price of its shares relative to that of its peers.[43]

39 *Id.* at 32-33.

40 *Id.* at 32.

41 *Id.* at 33-38.

42 *Id.* at 34.

43 *Id.* at 34-36; *see id.* App. A.

D. Project SAW

From October 2, 2017 to May 10, 2019, the Baker Hughes Board consisted of Brenneman, Cazalot, Craighead, Elsenhans, Beattie, Miller, Mulva, Rice, and Simonelli.[44] The latter five were GE designees and current or former GE executives and directors.[45] The Conflicts Committee consisted of Brenneman, Cazalot, and Elsenhans.[46]

44 *Id.* at 30.

45 Beattie had been a GE director since 2009. Miller had been GE's CFO since October 2017 and held various high-level roles at GE since 2008. Mulva had been a GE director since 2008. Rice held various high-level roles at GE since 1978. Simonelli held various high-level roles at GE beginning in 1994 but left GE to become Baker Hughes's CEO on July 3, 2017. *See* Compl. ¶¶ 12, 17-20; SLC Rep. 295-98.

46 SLC Rep. 29, 211.

On December 21, 2017, the Conflicts Committee met with Baker Hughes management, including CEO Simonelli and CFO Worrell, to discuss GE's potential exit from Baker Hughes and the retention of outside advisors.[47] After recommendations from Baker Hughes management, the Conflicts Committee retained Lazard Frères & Co. as its financial advisor and Simpson Thacher & Bartlett LLP as its legal advisor.[48] Baker Hughes selected J.P. Morgan Securities LLC as its financial advisor and Davis Polk & Wardwell LLP as its legal advisor.[49]

47 *Id.* at 38-39.

48 *Id.* at 40.

49 *Id.*

In early 2018, Baker Hughes management and the Conflicts Committee launched "Project SAW" to evaluate a potential separation from GE.[50] The objectives of Project SAW were to minimize uncertainty and any resulting negative effects on Baker Hughes's equity story, limit the overhang caused by GE's ownership stake, reduce operational disruption, renegotiate key commercial agreements, and maintain a strong balance sheet and low leverage.[51]

50 "SAW" was an acronym for "spin and win"—a reference to the fact that GE might spin off its Baker Hughes stake. *Id.* at 41 & n.148.

51 *Id.*

E. The Separation Proposal

***5** During the first five months of 2018, Baker Hughes attempted to engage with GE about a potential separation.[52] GE was unresponsive, so Baker Hughes decided to prepare a separation proposal on its own.[53] This approach was driven by Baker Hughes and the Conflicts Committee's view that Baker Hughes had the upper hand due to the Lockup and GE's need to address its financial woes.[54] Baker Hughes's leverage would become less potent as the expiration of the Lockup approached, incentivizing it to act quickly to secure favorable terms.[55]

52 *Id.* at 54.

53 *Id.* at 55.

54 *Id.*; *see also id.* at 81-84, 227-31; *supra* Section I.C (describing GE's financial troubles).

55 SLC Rep. 84; *see also id.* at 228.

On June 5, 2018, Simonelli sent Flannery an initial separation proposal.[56] Baker Hughes suggested a three-part strategy involving: (1) amendments to the Master Agreement Framework; (2) capital markets transactions that would provide GE with up to $6 billion in liquidity and reduce GE's Baker Hughes stake to just over 50%; and (3) public communication of a "mutually agreed path to separation," potentially through a spin-off or split-off.[57]

56 *Id.* at 62.

57 *Id.* at 64.

F. The Separation Negotiations

Flannery and Simonelli met on June 8 to discuss Baker Hughes's proposal.[58] A few weeks later, GE announced that it would work towards "an orderly separation from [Baker Hughes] over the next two to three years."[59]

58 *Id.* at 67.

59 *Id.* at 68.

Negotiations proceeded over the ensuing months. Baker Hughes management—specifically, Simonelli and Worrell—led Project SAW's day-to-day efforts with assistance from J.P. Morgan and Davis Polk.[60] The Conflicts Committee oversaw Project SAW, advised by Lazard and Simpson Thacher.[61] The Conflicts Committee held fourteen formal meetings during this period.[62]

60 *Id.* at 78-79.

61 *Id.*

62 *Id.* at 79.

A key aspect of the negotiations involved the aeroderivative gas turbine (AGT) and heavy-duty gas turbine (HDGT) components of the Master Agreement Framework.[63] GE sold AGTs and HDGTs that Baker Hughes installed and serviced for customers.[64] Because the servicing business was highly profitable, Baker Hughes sought to secure long-term access to GE products and technology.[65] Baker Hughes also wanted to serve as the exclusive supplier of GE turbine-based solutions for the oil and gas industry and to obtain a return on its investments in researching and developing turbine technology.[66]

63 *Id.* at 85-93; *see also id.* at 259.

64 AGTs and HDGTs are modified jet engine turbines used in oil and gas compression systems and power generation, respectively. *See* Pls.' Answering Br. Ex. 82 ("Forgione Interview Mem.") at 3.

65 *See* SLC Rep. 88-91 & nn.333, 345 (noting that up to $1 billion of contribution margin was at risk with AGTs

and HDGTs, with most of that coming from the servicing business).

66 *Id.* at 86-87.

As the parties negotiated changes to the Master Agreement Framework, they also discussed capital markets transactions by which GE would liquidate a portion of its Baker Hughes stock. On September 20, 2018, the parties' financial advisors jointly recommended two "Capital Markets Transactions": (1) Baker Hughes's repurchase of its shares from GE (the "Repurchase"); and (2) GE's sale of Baker Hughes shares in a secondary offering to the public (the "Secondary Public Offering").[67] The Conflicts Committee consistently refused to waive the Lockup and permit the Capital Markets Transactions until GE agreed to acceptable amendments to the Master Agreement Framework.[68]

67 *Id.* at 131-32.

68 *Id.* at 133-36.

***6** In the midst of negotiations, on September 30, GE replaced its Chairman and CEO Flannery with Larry Culp.[69]

69 *Id.* at 74.

G. The 2018 Transactions

In early November 2018, the parties reached agreement on the Repurchase, the Secondary Public Offering, amendments to the Master Agreement Framework (together, the "2018 Transactions").[70]

70 *Id.* at 140-46. The Lockup was waived through an amendment to the Stockholders Agreement. Only the first stage (not the second or third stages) of the Lockup was waived. *See* Baker Hughes, a GE company, Current Report (Form 8-K) (Nov. 13, 2018) at Ex. 10.4 § 4.2(a).

On November 12, the Conflicts Committee met to review the 2018 Transactions.[71] Representatives from Lazard, Simpson Thacher, Baker Hughes management, J.P. Morgan, and Davis Polk also attended the meeting.[72] After presentations from management and the advisors, the Conflicts Committee approved the 2018 Transactions and a waiver of the Lockup.[73] Later that day, the Baker Hughes Board approved the 2018 Transactions.[74]

71 SLC Rep. 140. Approval by the Conflicts Committee was required for related party transactions between Baker Hughes and GE and for amendments to the Stockholders Agreement. *See* Stockholders Agreement §§ 4.5, 7.8. The Conflicts Committee's "non-approval [was] binding on the [Baker Hughes] Board." *Id.* § 3.3(d).

72 SLC Rep. 140.

73 *Id.* at 142-44.

74 *Id.* at 144-46.

H. The Announcement

On November 13, 2018, Baker Hughes announced the 2018 Transactions.[75] Baker Hughes estimated that the amendments to the Master Agreement Framework would cause it to incur "one-time charges related to separation from GE" of approximately $200 to $300 million over three years.[76] The amendments would also have a "slight negative impact" on the company's annual operating margin rates of "approximately 20 to 40 basis points."[77] Baker Hughes estimated that the amendments to the AGT components of the Master Agreement Framework would have the most negative long-term effect on its margins.[78]

75 *Id.* at 146-47.

76 *Id.*

77 *Id.* at 147; *see also id.* at 111-12.

78 *Id.* at 111-12.

Under the original Master Agreement Framework, GE Aviation sold AGTs to Baker Hughes at cost.[79] Under the amended Master Agreement Framework, GE Aviation sold AGTs at a 10% to 25% margin.[80] Baker Hughes expected the higher AGT prices to hurt its business outlook.[81] Still, Baker Hughes believed that it had obtained better-than-market terms and other substantial benefits through the AGT-related amendments.[82]

79 *Id.* at 21.

80 In the 2018 Transactions, Baker Hughes and GE Power contributed assets to form a joint venture for their AGT products and services. This joint venture entered into a new AGT supply agreement with GE Aviation. *Id.* at 96-101, 107.

81 *Id.* at 260-65.

82 For example, Baker Hughes obtained exclusivity provisions, shifted AGT warranties and liabilities to GE Aviation, and received significant intellectual property rights. *Id.* at 112-13, 260-70. With respect to pricing, the SLC determined that "it would have been impossible for [Baker Hughes] to negotiate better pricing on most AGT aspects of the 2017 Supply Agreement [because] GE Aviation received *no margin*" under the original Master Agreement Framework. *Id.* at 261 (emphasis in original). The original Master Agreement Framework "reflected legacy pricing from GE [Oil & Gas]'s, and then [Baker Hughes's], status as a subsidiary of GE.... [Baker Hughes] expected that a change in its GE subsidiary status would result in pricing changes reflecting [Baker Hughes's] status as a third party vis-a-vis GE." *Id.* at 262.

***7** Other Master Agreement Framework amendments included: a new supply agreement for HDGTs; a transfer of Baker Hughes's industrial steam turbine business to GE; an extension of the original Supply Agreement for certain controls products and services; amendments to the GE Digital Master Products and Services Agreement; a transfer of certain pension liabilities to Baker Hughes; and amendments to the Intercompany Services Agreement.[83]

83 *Id.* at 114-27.

The Secondary Public Offering (in which GE sold approximately $2.3 billion of its Baker Hughes shares) and the Repurchase (in which Baker Hughes repurchased about $1.5 billion of its shares from GE) closed on November 16, 2018.[84] GE's stake in Baker Hughes was reduced to 50.4%.

84 *Id.* at 148-49, 151 & tbl.11.

I. The Derivative Litigation

On March 13 and 14, 2019, two Baker Hughes Class A stockholders filed separate derivative actions in this court.[85] Both complaints challenged the fairness of the 2018 Transactions and named GE and the members of the Baker Hughes Board as defendants.[86] On March 21, the court entered a stipulated proposed order consolidating the actions (the "Action") and designating the operative Complaint.[87] The thesis of the Complaint is that GE, driven by its "desperate need for liquidity," exercised its control over Baker Hughes to force Baker Hughes to agree to the 2018 Transactions, which unfairly favored GE.[88]

85 *Id.* at 156-58. These actions were originally captioned *Schippnick v. Beattie et al.*, C.A. No. 2019-0201-AGB (Del. Ch.) and *City of Riviera Beach Police Pension Fund v. Beattie et al.*, C.A. No. 2019-0205-AGB (Del. Ch.).

86 SLC Rep. 156-58.

87 Dkt. 10.

88 Compl. ¶¶ 1-8.

The Complaint advances three derivative claims. In Count I, the plaintiffs allege that GE breached its duty of loyalty as the controlling stockholder of Baker Hughes.[89] In Count II, the plaintiffs allege that the nine members of the Board breached their fiduciary duties by agreeing to the 2018 Transactions.[90] Count III is a claim for unjust enrichment against GE.[91]

89 *Id.* ¶¶ 71-74.

90 *Id.* ¶¶ 75-78.

91 *Id.* ¶¶ 79-82.

On May 10, Conflicts Committee members Brenneman, Cazalot, and Elsenhans were voluntarily dismissed from the Action without prejudice.[92] Craighead was voluntarily dismissed without prejudice on May 16.[93] The remaining defendants are GE and GE-designated Board members Beattie, Miller, Mulva, Rice, and Simonelli.

92 Dkt. 29.

93 Dkt. 32.

On June 7, the defendants filed motions to dismiss the Complaint.[94] Nominal defendant Baker Hughes moved to dismiss the Complaint for failure to plead demand futility under Court of Chancery Rule 23.1.[95] GE and the individual defendants sought dismissal for failure to plead demand futility and for failure to state a claim under Rule 12(b)(6).[96]

94 Dkts. 34-37.

95 Dkt. 34.

96 GE, Beattie, Miller, Mulva, and Rice filed a single motion. Dkt. 35. Simonelli moved separately and joined the other motions. Dkts. 36-37.

On October 8, 2019, Chancellor Bouchard issued a bench ruling that granted the motions in part and denied them in part.[97] He determined that the Complaint adequately pleaded demand futility.[98] He denied the Rule 12(b)(6) motion as to Counts I and II but granted dismissal of Count III.[99] He also observed that the burden of proving entire fairness might shift to the plaintiffs due to the Conflicts Committee's role in negotiating the 2018 Transactions.[100]

97 *In re Baker Hughes, a GE Co. Deriv. Litig.*, Consol. C.A. No. 2019-0201-AGB (Del. Ch. Oct. 8, 2019) (TRANSCRIPT) (Dkt. 66) ("MTD Ruling").

98 *Id.* at 97.

99 *Id.* at 89.

100 *Id.* at 102 (citing *Kahn v. Lynch*, 638 A.2d 1110, 1117 (Del. 1994)).

J. The Special Litigation Committee

***8** On October 31, 2019, the Board unanimously adopted resolutions forming a special litigation committee.[101] The resolutions vested the SLC with "the full power and authority of the Board" to investigate and evaluate the allegations and issues raised in the Action.[102] They directed the SLC to "prepare such reports, arrive at such decisions and take such other actions in connection with the [Action] as the [SLC] deems appropriate and in the best interests of [Baker Hughes] and its stockholders, all to the fullest extent that such powers and authority may be delegated under Delaware law."[103] The resolutions stated that "the determinations made by the [SLC] shall be final and binding upon [Baker Hughes]."[104]

101 SLC Rep. 170; *id.* Ex. 1.

102 *Id.* at 170.

103 *Id.* The resolutions also authorized the SLC to "engage such accountants and advisors, including its own independent legal counsel and financial advisor, as the [SLC] shall deem necessary or desirable in order to assist it in the discharge of its responsibilities" and provided that Baker Hughes would bear the costs of any advisors retained by the SLC. *Id.* at 170-71. The resolutions required the company's officers and employees to "supply the [SLC] and its legal counsel and/or advisors with any and all information requested by the [SLC] or its legal counsel and/or advisors and to cooperate in all respects with the requests of the [SLC]." *Id.* at 171.

104 *Id.* at 170.

Gregory L. Ebel was appointed the SLC's sole member.[105] Ebel had joined the Board on May 10, 2019 to replace Craighead, who had retired.[106] Ebel is the Chairman of the Board's Audit Committee and a member of its Governance & Nominating Committee.[107] He has served in various officer and director roles with several energy companies.[108] Ebel was paid $15,000 annually for his service on the SLC.[109]

105 *Id.* at 171; *id.* Ex. 1.

106 *Id.* at 171; *see* Baker Hughes, a GE company, Proxy Statement (Schedule 14A) (Mar. 25, 2019) at Cover Page, 7-11; Baker Hughes, a GE company, Current Report (Form 8-K) (May 13, 2019) at Item 5.07.

107 SLC Rep. 171.

108 *Id.* at 171-73.

109 *Id.* at 173.

The SLC retained Quinn Emanuel Urquhart & Sullivan LLP and Abrams & Bayliss LLP to serve as its legal advisors.[110] The SLC selected Quinn Emmanuel based on the firm's representation of Ebel in an unrelated case.[111] The SLC retained The Brattle Group as its financial advisor.[112]

110 *Id.* at 174.

111 Pls.' Answering Br. Ex. 89 ("Ebel Dep.") at 30-31; Pls.' Answering Br. Ex. 77 at 36 (identifying the prior case as *Morris v. Spectra Energy P'rs (DE) GP, LP*, C.A. No. 12110-VCG (Del. Ch.)).

112 SLC Rep. 174.

On November 12, 2019, the SLC moved for a stay,[113] which the plaintiffs did not oppose.[114] On December 3, the court granted a stay of the Action until June 1, 2020.[115] The parties agreed to extend the stay twice—first to October 1, 2020, and then to October 15.[116]

113 Dkt. 73.

114 *See* Dkt. 78.

115 Dkt. 79.

116 Dkts. 82-83, 96-97.

K. The SLC Investigation and Report

The SLC's investigation lasted nine months.[117] The SLC held seventeen minuted meetings between December 6, 2019 and September 24, 2020.[118] Its investigation concluded on October 13, 2020 when the SLC prepared a written report, which was revised on January 15, 2021.[119] The report details the SLC's factual assessments, the applicable legal standards, the merits of the plaintiffs' claims, and other factors considered by the SLC.

117 SLC Rep. 2, 177.

118 *Id.* at 186-87.

119 The revised report dated January 15, 2021 is substantively identical to the October 13, 2020 original report. *See* Opening Br. in Supp. of the Special Litigation Committee's Mot. to Terminate ("SLC's Opening Br.") (Dkt. 105) at Ex. B (providing a blackline between the revised and the original report).

***9** The SLC concluded that the court would likely hold that the 2018 Transactions were entirely fair to Baker Hughes.[120] The SLC weighed the potential costs that the continued prosecution of the Action could have on Baker Hughes, including indemnification and advancement costs, diversion of company resources, and negative publicity.[121] After considering the factors it deemed relevant, the SLC concluded that "terminating the [ ] Action with prejudice would best serve the interests of the Company and its stockholders."[122]

120 SLC Rep. 320; *see also id.* at 289-90.

121 *Id.* at 306-19.

122 *Id.* at 319-20.

L. The Motion to Terminate and the Opposition

On October 13, 2020, the SLC moved for an order terminating the Action.[123] The SLC filed an opening brief in support on January 15, 2021.[124] The plaintiffs then pursued discovery to test the independence, good faith, and reasonableness of the SLC's investigation and its conclusions. The SLC produced 12,190 pages of documents to the plaintiffs.[125] The plaintiffs also deposed Ebel and two representatives of Brattle.[126]

123 Dkt. 98.

124 Dkt. 105.

125 These documents included: the SLC report and exhibits; all other documents the SLC reviewed or relied on in reaching its conclusions; interview memoranda and exhibits; the SLC's minutes and resolutions (redacting work product); Board minutes reflecting Ebel's appointment as a director and SLC member; and all communications between the SLC and others about the investigation. *See In re Baker Hughes, a GE co. Deriv. Litig.*, Consol. C.A. No. 2019-0201-LWW (Del. Ch. Feb. 25, 2022) (TRANSCRIPT) (Dkt. 129) ("MTC Ruling") at 53-54.

126 The two Brattle representatives were Yvette Austin Smith, Chairman and a Principal of Brattle, and David Hutchings, a Principal of Brattle. *See* Pls.' Answering Br. Ex. 86 ("Hutchings Dep."); Pls.' Answering Br. Ex. 87 ("Smith Dep.").

On January 12, 2022, the plaintiffs moved to compel additional discovery.[127] I denied this motion except as to documents from Ebel's custodial files focused on his recruitment to the Board.[128]

127 Dkt. 122.

128 MTC Ruling 60; *see* Dkt. 128. This Action was reassigned to me in May 2021 after Chancellor Bouchard retired from the bench.

On August 25, the plaintiffs filed an answering brief opposing the SLC's motion to terminate, attaching 109 exhibits.[129] On October 4, the SLC filed a reply brief in further support of its motion to terminate along with seventeen additional exhibits.[130]

129 Pls.' Answering Br. in Opp'n to the Special Litigation Committee's Mot. to Terminate (Dkt. 137) ("Pls.' Answering Br.").

130 Reply Br. in Further Supp. of the Special Litigation Committee's Mot. to Terminate (Dkt. 150) ("SLC's Reply Br.").

On December 19, 2022, I heard oral argument on the motion to terminate.[131] At the hearing, Ebel provided live testimony and was cross-examined by the plaintiffs' counsel.[132]

131 *See* Dkt. 154.

132 Trans. of Oral Arg. on Special Litigation Committee's Mot. to Terminate (Dkt. 157) ("Oral Arg. Tr.").

II. LEGAL ANALYSIS

Section 141(a) of the Delaware General Corporation Law empowers a board of directors "to make decisions regarding corporate litigation."[133] "Like a fleet of trucks or a factory, a lawsuit is a corporate asset that must be managed by the board consistent with its fiduciary duties."[134] Pleadings stage allegations of board-level conflicts can excuse a stockholder's failure to make a pre-suit demand but do not strip the board of its authority. "The problem is one of member disqualification, not the absence of power in the board."[135] The board still has "one final arrow in its quiver to gain control of the derivative litigation—the special litigation committee."[136]

133 *Zapata Corp. v. Maldonado*, 430 A.2d 779, 786 (Del. 1981); *see* 8 *Del. C.* § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors.").

134 *Diep v. Trimaran Pollo P'rs, L.L.C.*, 280 A.3d 133, 149 (Del. 2022).

135 *Zapata*, 430 A.2d at 786.

136 *Diep*, 280 A.3d at 151; *see Zapata*, 430 A.2d at 786; 8 *Del. C.* § 141(c).

***10** In *Zapata Corp. v. Maldonado*, the Delaware Supreme Court considered the tension between the board's responsibility under Section 141 to control a corporation's litigation assets and the risk that a conflicted board would seek to terminate a beneficial derivative action.[137] The court crafted a two-step analysis "to find a balancing point where bona fide stockholder power to bring corporate causes of action cannot be unfairly trampled on by the board of directors, but the corporation can rid itself of detrimental litigation."[138]

137 430 A.2d at 786-77.

138 *Id.* at 787; *see In re Oracle Corp. Deriv. Litig.*, 808 A.2d 1206, 1210-11 (Del. Ch. 2002) [hereinafter "*Oracle I*"] ("[T]he *Zapata* procedure takes the case away from the [derivative] plaintiff" and "turns his allegations over to special agents appointed on behalf of the corporation for the purpose of making an [ ] internal investigation of his charges." (quoting *Kaplan v. Wyatt*, 484 A.2d 501, 509 (Del. Ch. 1984), *aff'd*, 499 A.2d 1184 (Del. 1985))).

The first step of the analysis requires the court to "review[ ] the independence of SLC members and consider[ ] whether the SLC conducted a good faith investigation of reasonable scope that yielded reasonable bases supporting its conclusions."[139] This step is often dispositive.[140] If the special litigation committee meets its burden under step one, the court can grant dismissal or proceed to the discretionary second step.[141] In the second step, the court applies "its own business judgment" to determine whether dismissal would serve the company's best interests.[142]

139 *London v. Tyrrell*, 2010 WL 877528, at *11 (Del. Ch. Mar. 11, 2010) (citing *Zapata*, 430 A.2d at 789).

140 *See, e.g.*, *Katell v. Morgan Stanley Grp., Inc.*, 1995 WL 376952, at *13 (Del. Ch. June 15, 1995) (granting a special litigation committee's motion to terminate after a step one analysis); *Kindt v. Lund*, 2003 WL 21453879, at *5 (Del. Ch. May 30, 2003) [hereinafter "*Kindt II*"] (same).

141 *Kaplan*, 499 A.2d at 1192 ("Proceeding to the second step of the *Zapata* analysis is wholly within the discretion of the court.").

142 *London*, 2010 WL 877528, at *11 (citing *Zapata*, 430 A.2d at 789).

A. The First Step of *Zapata*

"The first prong of the *Zapata* standard analyzes the independence and good faith of committee members, the quality of its investigation, and the reasonableness of its conclusions."[143] The SLC bears "the burden of demonstrating that there are no genuine issues of material fact as to its independence, the reasonableness and good faith of its investigation and that there are reasonable bases for its conclusions."[144] A "procedural standard akin to a summary judgment inquiry" is applied.[145] The court considers whether there are disputed issues of material fact about the SLC's independence, the scope of its investigation, or the reasonableness of its conclusions—not about the merits of the claims.[146]

143 *In re WeWork Litig.*, 250 A.3d 976, 997 (Del. Ch. 2020) (quoting *Kahn v. Kohlberg Kravis Roberts & Co., L.P.*, 23 A.3d 831, 836 (Del. 2011)).

144 *London*, 2010 WL 877528, at *11 (citing *Kaplan*, 484 A.2d at 507).

145 *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 928 (Del. Ch. 2003) [hereinafter, "*Oracle II*"]; *see Zapata*, 430 A.2d at 788 (explaining that an SLC "should be prepared to meet the normal burden under Rule 56 that there is no genuine issue as to any material fact and that the moving party is entitled to dismiss as a matter of law"); *Lewis v. Fuqua*, 502 A.2d 962, 966 (Del. Ch. 1985) (same).

146 *See*, *e.g.*, *Diep*, 280 A.3d at 156; *Kaplan*, 484 A.2d at 519 ("[I]t is the conduct and activity of the [SLC] in making its evaluation of the factual allegations and contentions contained in the plaintiff's complaint which provide the measure for the [SLC's] independence, good faith and investigatory thoroughness. This is because it is the [SLC] which is under examination at this first-step stage of the proceedings, and not the merits of the plaintiff's cause of action.").

1. The SLC Is Independent.

***11** The court's independence inquiry under *Zapata* is both broad and nuanced. It looks "beyond determining whether SLC members are under the 'dominion and control' of an interested director" to consider whether any "lesser affiliations" create "a material question of fact as to whether the SLC member can make a totally unbiased decision."[147] "The question of independence 'turns on whether a director is, for any substantial reason, incapable of making a decision with only the best interests of the corporation in mind.' "[148] The court need not conclude that an actual conflict made the SLC "less inclined to find [the plaintiffs' claims] meritorious, only that the connections identified would be on the mind of the SLC members in a way that generates an unacceptable risk of bias."[149]

147 *London*, 2010 WL 877528, at *12 (quoting *Oracle II*, 824 A.2d at 937); *Katell*, 1995 WL 376952, at *7 (explaining that an SLC is "independent when it can base its decision on 'the merits of the issue rather than being governed by extraneous consideration or influences' " (quoting *Kaplan*, 499 A.2d at 1189)).

148 *Oracle II*, 824 A.2d at 920 (citation and emphasis omitted).

149 *Id.* at 947.

Although the "substantive contours of the independence doctrine" are similar in the pre-suit demand and special litigation committee contexts, "SLC members are not given the benefit of the doubt as to their impartiality and objectivity."[150] Rather, the SLC must prove its independence. That burden is particularly hefty if a single member SLC is used.[151] "[T]he sole member of a one-person special litigation committee" must "meet unyielding standards of diligence and independence."[152]

150 *London*, 2010 WL 877528, at *13.

151 *See Lewis*, 502 A.2d at 967 ("If a single member committee is to be used, the member should, like Caesar's wife, be above reproach."). In *Lewis*, the court concluded that a one-member special litigation committee had not met its burden of demonstrating its independence. *Id.* at 936. The committee member was on the board at the time of the challenged actions, was a named defendant in the lawsuit, and had "numerous political and financial dealings" with the principal defendant who served as CEO and "allegedly control[led] the board." *Id.* at 966. The special litigation committee member was also the president of a university that had received a substantial pledge from the company and its CEO. *Id.* at 967. Ebel lacks any comparable conflicts.

152 *Sutherland v. Sutherland*, 2007 WL 1954444, at *3 n.10 (Del. Ch. July 2, 2007) [hereinafter "*Sutherland I*"].

Here, the Board delegated to the SLC its full authority and power with respect to the Action.[153] The SLC was authorized to retain independent advisors at Baker Hughes's expense.[154] Ebel was appointed to the SLC after the Board determined he was uninvolved in the 2018 Transactions and had no personal or business ties to any defendant that compromised his independence.[155]

153 *See* SLC Rep. 170-71; *id.* Ex. 1; *supra* Section I.J. The plaintiffs argue that the "SLC was formed with the goal of seeking dismissal of Plaintiffs' claims." Pls.' Answering Br. 73. The only facts cited in support concern, one, the timing of the SLC's formation shortly after the court's motion to dismiss decision and, two, the role of Baker Hughes's outside counsel in advising the Board on forming the SLC. *Id.* at 73-74. But this is typically when and how special litigation committees are created in the first place. *See Zapata*, 430 A.2d at 786 (observing that "the board, tainted by the self-interest of a majority of its members, can legally delegate its authority to a committee of two disinterested directors"); *Diep*, 280

A.3d at 151 ("[T]he special litigation committee typically comes into existence after demand is excused.").

154 SLC Rep. 170-71; *id.* Ex. 1.

155 SLC Rep. 172.

***12** Ebel's lack of any disabling self-interest in the challenged events is not in dispute. He did not stand to receive "a personal financial benefit" or face "a materially detrimental impact" from the 2018 Transactions, and he has no ties to GE.[156] He was also unconflicted with respect to the Action, having joined the Board on May 10, 2019—after the defendants moved for dismissal.[157] Thus, the focus of my independence inquiry is on Ebel's relationships with interested parties.[158]

156 *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *see* Oral Arg. Tr. 9 (Ebel testifying that he has no ties to GE).

157 SLC Rep. 171-73; *see Sandys v. Pincus*, C.A. No. 9512-CB, at 52 (Del. Ch. Jan. 18, 2019) (TRANSCRIPT) (holding that special litigation members who joined the board after the challenged transactions were independent for *Zapata* purposes). Before joining the SLC, Ebel knew "[v]ery little" about the Action and had no "views about the merits." Oral Arg. Tr. 11-12; *see* Ebel Dep. 25-26.

158 *See London*, 2010 WL 877528, at *12 ("When an SLC member has no personal interest in the disputed transactions, the Court scrutinizes the members' relationship with the interested directors, as that would be the source of any independence impairment that might exist.").

"Independence can be impaired by ... affiliations [with interested parties] ... [if] those affiliations are substantial enough to present a material question of fact as to whether the SLC member can make a totally unbiased decision."[159] The plaintiffs point to three affiliations: (1) Ebel's relationship with Simonelli; (2) Ebel's relationship with Cazalot; and (3) the SLC advisors' relationships with GE. I take each in turn and conclude that none raises a genuine issue of material fact about the SLC's independence. The SLC has met its burden of establishing its impartiality and objectivity with respect to the Action.

159 *Id.*

a. Ebel's Relationship with Simonelli

The plaintiffs' primary challenge to Ebel's independence concerns his relationship with Simonelli. Before joining the Board, Ebel had met Simonelli—as well as Elsenhans and Craighead[160]—at industry events while they were oil and gas industry executives in the Houston, Texas area. Ebel's relationship with Simonelli is best described as an acquaintanceship.[161]

160 The plaintiffs voluntarily dismissed Elsenhans and Craighead without prejudice. To the extent that Ebel's relationships with these former defendants are relevant, they are merely acquaintanceships. *See infra* note 161 and accompanying text. Simonelli remains a defendant.

161 *See Kaplan*, 484 A.2d at 512-13 (determining that an SLC member was independent despite business associations, which exceeded millions of dollars, between entities affiliated with the SLC member and the company where a defendant served as chairman and CEO); *Beam v. Stewart*, 845 A.2d 1040, 1051 (Del. 2004) (concluding in the demand futility context that alleging an interested party and "other directors moved in the same social circles" or "developed business relationships before joining the board" did not provide a basis to infer that the directors lacked independence); *cf. Oracle II*, 824 A.2d at 942-93. This case is unlike *Oracle*, where the court determined that special litigation committee members could not be impartial when considering whether to press insider trading claims against a fellow professor at the university where they taught. *Oracle II*, 824 A.2d at 942-93.

The plaintiffs assert that several emails exchanged between Ebel and Simonelli during the SLC investigation create a material fact issue about Ebel's ability to impartially investigate Simonelli. To be sure, certain of these communications should not have occurred.[162] But each is non-substantive, and none impugns Ebel's objectivity or the SLC's integrity.[163]

162 *See In re Primedia Deriv. Litig.*, C.A. No. 1808-VCL, at 54 (Del. Ch. May 12, 2008) (TRANSCRIPT) ("[C]ommunications from the defendants ... to the committee with respect to the committee's work ... should be a null set.").

163 In *Diep*, the Delaware Supreme Court affirmed the Court of Chancery's determination that a special litigation committee was independent. The Court of Chancery held that communications between committee members and interested parties about aspects of the matters under

investigation did not give rise to material fact issues. 280 A.3d at 152. One committee member had discussed the derivative action with the manager of the defendant controller. *Id.* at 143. Two other committee members attended a board meeting where the board, including the defendant directors, discussed the derivative action. *Id.* at 153. The communications raised here are even further removed from the merits.

i. *The Board Expansion Exchanges*

***13** Between early March and late May 2020, Ebel had three exchanges with Simonelli about the logistics of potentially expanding the SLC. The Board was considering adding directors around this time, which created the possibility of those new directors joining the SLC.[164] Although an expansion of the SLC was a matter of discussion for Ebel and his counsel, the addition of new directors to the Board was a threshold topic.[165] As such, Ebel asked Simonelli—the Board's Chairman—for information.[166]

164 *See* SLC's Reply Br. Ex. A at 1-2; SLC's Reply Br. Ex. C at 2; Ebel Dep. 76-77.

165 Oral Arg. Tr. 57 (Ebel testifying that "[he] discussed [with Simonelli] the logistics of new directors coming on, not about expanding the SLC"); *see also id.* at 27, 29, 35; Ebel Dep. 105.

166 Oral Arg. Tr. 27 (Ebel testifying that he "need[ed] information from Mr. Simonelli in connection with [the] consideration of adding another board member ... just purely logistics from that perspective" and "what [he] could [ ] expect to see in terms of new directors coming on the Baker Hughes board"); *see also id.* at 35; Ebel Dep. 105.

The SLC first assessed the possibility of an expansion at a March 2, 2020 SLC meeting.[167] Ebel informed his counsel that Baker Hughes might add a director "in connection with the Baker Hughes annual stockholders meeting in May 2020" or as early as "the next Board meeting in March 2020."[168] Ebel and the SLC's counsel "discussed their preliminary views on the possibility of expanding the SLC to include a new director."[169] The SLC's next steps would depend upon whether and when a new director was added to the Board.[170]

167 SLC's Reply Br. Ex. A at 1-2.

168 *See id.* at 1. Ebel testified that he learned of the potential Board expansion through general Board-level discussions. Oral Arg. Tr. 24.

169 SLC's Reply Br. Ex. A at 1-2.

170 Oral Arg. Tr. 32-33.

Four days later, on March 6, Ebel emailed Simonelli: "I do need to speak to you about an SLC matter. Your thoughts would be helpful before I reach out to Geoff B[eattie]."[171] Ebel credibly testified that he sought to obtain details about the timing of the potential Board additions.[172] This would have been crucial to whether the SLC expanded, given the time it would take to bring a new member up to speed and the looming end of the litigation stay on June 1.[173]

171 Pls.' Answering Br. Ex. 90 at -077. As Chair of the Governance & Nominating Committee, Beattie was involved in new director recruitment. *See* Pls.' Answering Br. Ex. 77 at 19-20. Ebel could not recall whether he spoke with Beattie but believed that he never had to reach out to him. Ebel Dep. 106.

172 *See* Oral Arg. Tr. 27. According to the plaintiffs, Ebel's memory gap about this email puts his independence in doubt. In a February 9, 2022 declaration, Ebel said that the "SLC matter" in his March 6, 2020 email could refer to difficulties in scheduling interviews or to the SLC's potential expansion. Unsworn Decl. of Gregory L. Ebel ("Ebel Decl.") (Dkt. 124) ¶ 11(a). Later, during his April 27, 2022 deposition, Ebel testified that the "SLC matter" was the SLC's potential expansion. Ebel Dep. 104. His testimony during the December 19, 2022 hearing was consistent with that given at his deposition. Oral Arg. Tr. 24-25. Ebel also explained that "[h]aving reviewed various communications [since the declaration], [he] felt more comfortable being definitive" during his deposition and at the hearing. *Id.* at 29.

In this context, Ebel's inability to remember with absolute certainty the context of an email sent years earlier is hardly a material fact. Independence is not a memory test. *Cf. In re Freeport-McMoran Sulphur, Inc. S'holder Litig.*, 2005 WL 1653923, at *10 (Del. Ch. June 30, 2005) (concluding that a director's "inability to recall important facts" created an issue of material fact about his independence where the director did not recall working for a company affiliated with conflicted directors or attending board meetings for that affiliate). In any event, Ebel has consistently maintained that he did not discuss the substantive details of the SLC investigation with Simonelli—or anyone else aside from his advisors. *See* Ebel Decl. ¶ 12; Ebel Dep. 105, 109; Oral Arg. Tr. 35.

173 Oral Arg. Tr. 24-25; *see also id.* at 32-33.

***14** The SLC continued to mull a potential expansion. At a March 16 SLC meeting, Ebel told the SLC's counsel that any additions to the Board were unlikely to occur until May 2020.[174] He "also noted the potential difficulties in getting a new SLC member up to speed."[175] Ten days later, Baker Hughes sent stockholders the proxy for its upcoming annual meeting, soliciting votes on the election of two new directors.[176]

174 SLC's Reply Br. Ex. C at 2.

175 *Id.*

176 Baker Hughes Company, Proxy Statement (Schedule 14A) (Mar. 26, 2020).

Ebel reached out to Simonelli again on April 19, 2020, asking "to speak with [Simonelli] th[at] week about the special litigation committee."[177] Ebel wrote: "All good just some delays (for obvious reasons) and, as such, lawyers are wondering about whether we should revisit membership given b[oa]rd changes."[178] Simonelli replied, "let me know when convenient to connect on the SLC."[179] The two subsequently had a brief conversation.[180]

177 Pls.' Answering Br. Ex. 92 at -070.

178 *Id.*

179 *Id.* at -069.

180 *See* Ebel Dep. 104-05; *see also* Oral Arg. Tr. 26-27, 31-32.

This email was a follow-up to Ebel and Simonelli's prior exchange.[181] Ebel was concerned about "how long [new Board members] would take to get up to speed" given the time needed to complete the SLC's investigation.[182] Just a few days earlier, at an April 13 meeting, the SLC and its counsel had discussed the need for "an extension of at least three months" to complete their process.[183]

181 *See* Ebel Dep. 109.

182 Oral Arg. Tr. 32.

183 The Special Litigation Committee's Opp'n to Pls.' Jan. 12, 2022 Mot. to Compel (Dkt. 124) Ex. O at 2. At the next SLC meeting on April 27, 2020, the SLC decided to ask the plaintiffs' counsel to agree to a four-month extension to the stay.

Baker Hughes's stockholders subsequently elected two new directors at the May 14 annual meeting.[184] On May 20, the court granted a stipulated order to extend the stay of the Action until October 1.[185]

184 Baker Hughes Company, Current Report (Form 8-K) (May 14, 2020) at Item 5.07.

185 Dkt. 83.

The next day, on May 21, Simonelli texted Ebel "let me know when you have a few minutes to connect on [the] SLC."[186] Ebel responded that he could speak that evening or the next.[187] Ebel could not recall the details of this communication during the litigation, but he believed that it "may have been in connection with a potential expansion of the SLC."[188] Given the context, Ebel's explanation is both logical and credible. It was not "strange" that Simonelli reached out because Simonelli knew from prior exchanges that Ebel was interested in the logistics of the Board expansion.[189]

186 Pls.' Answering Br. Ex. 93 at -056.

187 Pls.' Answering Br. Ex. 94 at -057.

188 Ebel Dep. 111; *see* Oral Arg. Tr. 34-35, 60. When Ebel submitted a declaration on February 9, 2022, he could "not recall what Mr. Simonelli wanted to discuss," though he noted that the May 21, 2020 text was sent just after the company's annual meeting. Ebel Decl. ¶ 11(d). He remained uncertain at his April 27, 2022 deposition. Ebel's inability to recall with precision a communication occurring more than two years earlier does not impugn his independence. *See supra* note 172.

189 Oral Arg. Tr. 59; *see also id.* at 34-35.

The SLC ultimately did not add another member.[190] By this point, the SLC's investigation was well underway, and the time left to complete its work grew short.[191] The SLC felt that adding another member would cause delay, especially given the logistical difficulties created by the COVID-19 pandemic.[192]

190 *See id.* at 35; Ebel Decl. ¶ 10.

191 By May 20, 2020, the SLC had completed ten interviews. *See* SLC Rep. App. C.

192 *See* Oral Arg. Tr. 35.

ii. *The Lockdown Interview Update*

***15** On April 8, 2020, Ebel emailed Simonelli to discuss predicted European demand for liquified natural gas amid the COVID-19 pandemic.[193] Simonelli replied, offering his thoughts on the subject.[194] Ebel then sent a three-paragraph response to Simonelli.[195] The first paragraph of that response addressed industry predictions. The second paragraph addressed Baker Hughes public disclosures about the pandemic. The third paragraph stated:

> Also had a good interview today with [Baker Hughes Managing Director] Marco Forgione in Florence[, Italy] on the special litigation front. Good outcome despite taking 3 hours. You can tell thing are getting old with the lockdown [t]here.[196]

193 Pls.' Answering Br. Ex. 91 at -068.

194 *Id.* at -067.

195 *Id.*

196 *Id.*

Ebel's description of a "[g]ood outcome" did not refer to the substance of Forgione's interview or the SLC's investigation. Rather, Ebel credibly testified that it referred to the interview having been completed despite the COVID-19 lockdown in Italy.[197] His testimony is corroborated by the documentary evidence. Ebel's reply itself was part of a chain about Baker Hughes's pandemic response. Further, the Forgione interview memorandum notes that the interview was beset by a spotty internet connection.[198]

197 Oral Arg. Tr. 37-38; *see also* Ebel Decl. ¶ 11(b); Ebel Dep. 106-08. Around this time, Italy announced a nationwide lockdown due to the pandemic. *See* Allison McCann, Nadja Popovich, & Jin Wu, *Italy's Virus Shutdown Came Too Late. What Happens Now?*, N.Y. Times (Apr. 5, 2020).

198 Forgione Interview Mem. 1 n.2.

The April 8 email does not—as the plaintiffs suggest—show that Simonelli and Ebel are friends or that they "regularly" communicated about the SLC's investigation.[199] Undoubtedly, Ebel had no reason to tell Simonelli about the quality of the SLC's interview.[200] But the email was non-substantive and innocuous. It does not raise a meaningful question about Ebel's independence from Simonelli.

199 Pls.' Answering Br. 52-53.

200 *See* Oral Arg. Tr. 56.

iii. *"Thanks for the Wine"*

On June 30, 2020, Ebel texted Simonelli:

> Excellent discussion I thought. Seems like a really good choice. I am on an slc video interview for next 3 hours with Geoff Beattie and a bunch of lawyers (lucky me). Perhaps we can chat later in day quickly. Say 4:30. If not perhaps tomorrow. Thanks for the wine btw![201]

Ebel testified that the first two sentences referred to recruiting a new executive.[202] A further discussion about the potential hire would be delayed because of the SLC interview.

201 Pls.' Answering Br. Ex. 95 at -063.

202 Oral Arg. Tr. 39, 61; *see also* Ebel Decl. ¶ 11(e); Ebel Dep. 113.

The plaintiffs appear to accept this premise but say that the text raises two concerns. First, they argue that the text suggests Ebel failed to investigate with "full vigor."[203] This contention is belied by the record. Ebel participated in most of the SLC interviews, which he prepared for alongside his counsel.[204] He oversaw the investigation, reviewed documents gathered by counsel, and routinely met with his advisors.[205] Ebel understood that "[he] had a task to do and did it."[206] He was simply not thrilled about spending three more hours with a "bunch of lawyers."[207]

203 Pls.' Answering Br. 55 (quoting *Oracle II*, 824 A.2d at 941 (noting the "dangers posed by investigators who harbor reasons not to pursue the investigation's targets with full vigor")).

204 *See* SLC Rep. App. C. Scheduling conflicts prevented Ebel from attending two of the twenty-two interviews.

Id. at 181; *see Alpha Venture Cap. P'rs. v. Pourhassan*, C.A. No. 2020-0307-PAF, at 27-28 (Del. Ch. Apr. 19, 2021) (TRANSCRIPT) (citing directors' attendance at interviews as demonstrating engagement); *Kikis v. McRoberts*, C.A. No. 9654-CB, at 93 (Del. Ch. May 19, 2016) (TRANSCRIPT) (same). By the time of the June 30 text, the SLC had completed twelve interviews. *See* SLC Rep. App. C.

205 *See infra* note 232 and accompanying text.

206 Ebel Dep. 113.

207 *Id.*; *see* Oral Arg. Tr. 39 ("[Q.] What were you communicating there? A. [Ebel]. Nothing other than it was -- there were a lot of interviews in going through that, and it was just not a choice event. I would just say it was long, drawn-out things over Zoom and Teams, et cetera.").

***16** Second, the plaintiffs aver that Simonelli's gift of wine creates "a clear material fact issue as to whether that friendly relationship 'would be on the mind of [Ebel] in a way that generates an unfair risk of bias.' "[208] But it was not as though Ebel were singled out. Simonelli had organized virtual "social events" for the full Board during the pandemic and sent wine to each director to share together over video.[209] "[I]t would be a strained and artificial rule requiring a director to be unacquainted or uninvolved with fellow directors in order to be regarded as independent."[210]

208 Pls.' Answering Br. 56 (quoting *Oracle II*, 824 A.2d at 947).

209 Oral Arg Tr. 40; *see also* Ebel Dep. 113-14. If anything, it would have been strange for Simonelli to exclude Ebel from the Board social event.

210 *Diep*, 280 A.3d at 152 (quoting *Sutherland v. Sutherland*, 958 A.2d 235, 241 (Del. Ch. 2008) [hereinafter "*Sutherland II*"]).

b. Ebel's Relationship with Cazalot

Next, the plaintiffs aver that connections to Cazalot undercut Ebel's independence. Cazalot and Ebel served together on another board from 2013 until 2019.[211] Cazalot recommended Ebel as one of several possible Board candidates with industry experience who could replace Craighead.[212]

211 In November 2013, Cazalot joined the board of Spectra Energy Corp., while Ebel served as Spectra's Chairman, CEO, and President. In 2018, Spectra merged with Enbridge, Inc., and both Cazalot and Ebel joined the Enbridge board—with Ebel becoming the Chairman. Cazalot left the Enbridge board in 2019. *See* SLC Rep. 171-73; Oral Arg. Tr. 8-9.

212 Pls.' Answering Br. Ex. 77 at 18-20.

Cazalot was not, however, a defendant in the Action during the SLC investigation.[213] The plaintiffs assert that Cazalot remained interested because he hypothetically could have become a defendant again.[214] But he never did. Even if Cazalot were a defendant, his overlapping board service with and recommendation of Ebel would not raise a genuine issue of fact about Ebel's independence.[215]

213 *See* Dkt. 29.

214 Pls.' Answering Br. 56-57.

215 *See Carlton Invs. v. TLC Beatrice Int'l Hldgs., Inc.*, 1997 WL 305829, at *11 (Del. Ch. May 30, 1997) (rejecting the plaintiffs' challenge to an SLC member's independence based on the manner in which he was recommended for board service); *see also Highland Legacy Ltd. v. Singer*, 2006 WL 741939, at *5 (Del. Ch. Mar. 17, 2006) (holding in the demand futility context that directors were independent despite having "served together" with an interested director "on a few boards of unaffiliated companies"); *McElrath v. Kalanick*, 224 A.3d 982, 995 (Del. 2020) (explaining in the demand futility context that "being nominated or elected by a director who controls the outcome is insufficient by itself to reasonably doubt a director's independence because that is the usual way a person becomes a corporate director" (internal quotation marks omitted)); *In re MFW S'holders Litig.*, 67 A.3d 496, 511 (Del. Ch. 2013) (observing that "allegations of friendliness," including that a director asked a special committee member to serve on the board, were "exactly of the immaterial and insubstantial kind our Supreme Court held were not material in *Beam v. Stewart*"), *aff'd sub nom. Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *supra* note 161.

c. The SLC's Counsel

Finally, the plaintiffs argue that the SLC's counsel lack independence. The only basis for that assertion is that other Quinn Emmanuel and Abrams & Bayliss attorneys uninvolved with the SLC investigation previously represented GE.[216] The SLC's counsel repeatedly stated that none of the attorneys working on the SLC engagement had represented GE.[217] The SLC's counsel also represented that they were willing to sue GE.[218] In fact, both Quinn Emmanuel and Abrams & Bayliss have done so in the past.[219] There is no indication that the SLC's counsel were biased or acted with impropriety during the investigation.[220]

216 Pls.' Answering Br. Exs. 96-105.

217 *See* SLC's Reply Br. 14-15; SLC Rep. 174; Oral Arg. Tr. 14.

218 Oral Arg. Tr. 106.

219 *See*, *e.g.*, *Monument Peak Ventures, LLC v. GE Healthcare, Inc.*, No. 18-CV-1158 JLS (S.D. Cal.); *Gen. Elec. Co. v. Monument Peak Ventures, LLC*, No. IPR2019-00993 (P.T.A.B.); *Wind Point P'rs VII-A, L.P. v. Insight Equity A.P. X Co., LLC*, C.A. No. N19C-08-260 EMD CCLD (Del. Super.).

220 *See Kaplan*, 499 A.2d at 1190 (rejecting an argument that a special litigation committee did not act in good faith where the committee's legal advisors were named defendants in another action brought by the plaintiff's counsel and contributed to the $50 million settlement of that action).

2. The SLC Conducted a Thorough Investigation in Good Faith.

***17** The SLC also bears the burden of proving that it "acted in good faith and conducted a thorough investigation."[221] A good faith investigation is one that is pursued in an unbiased manner and without a predetermined conclusion.[222] "[T]he SLC must investigate all theories of recovery asserted in the ... complaint" by "explor[ing] all relevant facts and sources of information that bear on the central allegations."[223]

221 *Kindt II*, 2003 WL 21453879, at *3 (Del. Ch. May 30, 2003); *Diep*, 280 A.3d at 155 (explaining that the court must consider "whether disputed issues of material fact were raised about the scope of the investigation").

222 *See Biondi v. Scrushy*, 820 A.2d 1148, 1156 (Del. Ch. 2003), *aff'd sub nom. In re HealthSouth Corp. S'holders Litig.*, 847 A.2d 1121 (Del. 2004); *London*, 2010 WL 877528, at *15.

223 *London*, 2010 WL 877528, at *17.

The SLC and its advisors spent more than 6,300 hours on the investigation.[224] The SLC began its process by meeting with the plaintiffs' counsel to understand the plaintiffs' theories of the Action.[225] The SLC then engaged in extensive fact gathering, which involved reviewing more than 110,000 documents and interviewing 22 witnesses.[226] The SLC investigated not only the claims and allegations in the Complaint but also issues not raised by the plaintiffs.[227] There is no evidence indicating that the SLC worked toward a predetermined conclusion.[228] Its work resulted in a 320-page report that cites to 242 exhibits and 22 witness interview memoranda.

224 SLC Rep. 2.

225 *Id.* at 184-85; *see id.* Ex. 216.

226 *See infra* note 281 (describing the topics and sources of information collected and reviewed). The interviewees included: (1) Simonelli; (2) Worrell; (3) current and former Baker Hughes directors, including the members of the Conflicts Committee; (4) Baker Hughes employees involved in negotiating the 2018 Transactions; (5) GE CFO Miller; (6) a senior GE in-house attorney who was involved in negotiating the 2018 Transactions; (7) a senior GE employee who was involved in negotiating amendments to the Master Agreement Framework on behalf of GE Aviation; (8) representatives of the financial advisors for Baker Hughes, the Conflicts Committee, and GE; and (9) a representative of Baker Hughes's outside counsel for the 2018 Transactions. SLC Rep. 181-83. The SLC determined that the witnesses appeared credible and (with one exception) were forthcoming. Mulva, GE designee to the Board, declined to answer any questions relating to his role as a GE board member or GE's internal deliberations about its negotiating positions. He responded to all other questions. *Id.*

227 For example, the Complaint lacks any allegations about the Conflicts Committee's process. Yet the SLC investigated whether GE attempted to undermine it. SLC Rep. 218-21. The SLC also examined potential weaknesses in the process leading to the 2018 Transactions that were not addressed in the Complaint. *Id.* at 237-52. Similarly, the SLC investigated Simonelli's actions as a Baker Hughes officer, even though the

Complaint did not advance a claim against Simonelli in that capacity. *Id.* at 303-05. *See* *Kindt II*, 2003 WL 21453879, at *4 (concluding that an SLC acted in good faith because, among other things, the "SLC also rooted out additional facts not even alleged by plaintiff"); *cf.* *Sutherland II*, 958 A.2d 242-44 (holding that an SLC failed to demonstrate its good faith where it did not address a central transaction, produced interview summaries with limited information, and reviewed evidence in a cursory manner).

228 *See* Oral Arg. Tr. 11-12; Ebel Dep. 25-26, 123-24; *see also* *Katell*, 1995 WL 376952, at *9 (rejecting the plaintiffs' assertion that an SLC "sought to uncover as little evidence as possible, and then reach the predetermined conclusion to dismiss the lawsuit"); *Kaplan*, 484 A.2d at 514-15, 519 (rejecting the plaintiffs' challenge to an SLC's good faith based on the purported animosity the SLC's counsel had toward the plaintiff's counsel and the failure to investigate key issues). The plaintiffs suggest that the SLC prejudged the outcome of its investigation because it began drafting the report before the SLC met with Brattle or reached formal conclusions. Pls.' Answering Br. 73. But the SLC's counsel had only prepared a draft fact section of the report, which was provided to Ebel before the SLC's September 22, 2020 meeting. *See* Ebel Dep. 118-19, 152-53; Hutchings Dep. 128; Smith Dep. 172; SLC's Reply Br. Ex. E at 1. This is neither unusual nor inappropriate given the time and effort required to prepare a thorough report and the "static" factual narrative. *See* Oral Arg. Tr. 107. The SLC's preliminary draft did not contain any conclusions or recommendations; it summarized the facts found by the SLC. *See* SLC's Reply Br. Ex. E at 1; Ebel Dep. 123-24. The SLC did not decide whether to terminate the Action until its September 24, 2020 meeting. *See* Pls.' Answering Br. Ex. 88 (SLC meeting minutes); Ebel Dep. 123-24.

***18** Nonetheless, the plaintiffs contend that the SLC cannot meet its burden for several reasons. They assert that the SLC hid behind privilege, that the SLC did not adequately investigate advisor conflicts, and that certain information sources were overlooked.[229] None of these issues raise material questions of facts about whether the SLC's investigation was reasonable in scope and conducted in good faith.

229 Certain arguments raised by the plaintiffs about the SLC's process restate those made about the SLC's independence. The plaintiffs again aver that Ebel lacked "enthusiasm" and that Ebel's communications with Simonelli put the SLC's good faith in doubt. These arguments fail for the reasons discussed above. *See supra* notes 203-07 and accompanying text.

a. The Cloak of Privilege

According to the plaintiffs, the SLC "chose to cloak the investigation in privilege and shield information necessary for an adequate evaluation of the investigation."[230] First, the plaintiffs complain that the SLC's counsel—not Ebel—led the investigation. There is, however, no legitimate issue of fact that would lead me to "second guess the SLC's decisions regarding the role which counsel played."[231] The SLC report, SLC meeting minutes, and Ebel's testimony demonstrate his active oversight of counsel and the investigation.[232] The SLC's reliance on experienced advisors "is not only allowed but is 'evidence [of] good faith and the overall fairness of the process.' "[233]

230 Pls.' Answering Br. 60-61.

231 *Carlton*, 1997 WL 305829, at *12. The plaintiffs imply that the SLC's counsel interacted with Baker Hughes's counsel at Davis Polk too frequently. *See* Pls.' Answering Br. 38-39. But the SLC's counsel communicated with Davis Polk only to obtain document discovery, to set up interviews, and for other administrative issues. *See* SLC Rep. 184; *see also* *Kaplan*, 484 A.2d at 513, 519 (rejecting attacks to a special litigation committee's process based on the involvement of the nominal defendants' counsel). Ebel testified that Davis Polk played no role in the substance of the SLC's investigation. Oral Arg. Tr. 68.

232 *See* SLC Rep. 176; Oral Arg. Tr. 15-20; Ebel Dep. 11-13, 37-39, 47-49, 72-75, 121-23. Although the SLC's counsel was primarily responsible for writing the report, Ebel directed the drafting process and reviewed the report before approving it. Ebel Dep. 93, 155, 213-14; *see* SLC's Reply Br. Ex. E at 1.

233 *In re W. Nat'l Corp. S'holders Litig.*, 2000 WL 710192, at *23 n.67 (Del. Ch. May 22, 2000) (quoting *Cinerama Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1142 (Del. Ch. 1994), *aff'd*, 663 A.2d 1156 (Del. 1995)); *see* *Carlton*, 1997 WL 305829, at *12 ("While the directors bear ultimate responsibility for making informed judgments, good faith reliance by a SLC on independent, competent counsel to assist the SLC in investigating claims is legally acceptable, practical, and often necessary.").

Relatedly, the plaintiffs find fault with the SLC's counsel serving as an intermediary between Ebel and Brattle, which they characterize as forgoing "education" for "insulation."[234] Brattle's model evaluating the economic terms of the 2018 Transactions, for example, was not provided to Ebel or included in the SLC report. But Ebel was not required to independently review Brattle's model or its internal communications.[235] He periodically received updates from counsel about Brattle's progress and met with Brattle before reaching his conclusions.[236] This approach was reasonable and consistent with the SLC's good faith reliance on its advisors.[237]

234 Pls.' Answering Br. 62-63, 70-71; *see also* Oral Arg. Tr. 140-41.

235 *See Kikis*, C.A. No. 9654-CB, at 59, 67-68, 110 (rejecting an argument that an SLC had to analyze purported comparables underlying expert's conclusions). Brattle's work for the SLC was consistent with Brattle's regular practice of coordinating with counsel before providing information to the ultimate client. *See* Smith Dep. 79-80; Hutchings Dep. 84.

236 *See* Oral Arg. Tr. 19; Ebel Dep. 121-23; SLC's Reply Br. Exs. D-F. Ebel directly interacted with Brattle at a September 22, 2020 SLC meeting. During this meeting, Brattle presented its analyses of the 2018 Transactions and Ebel asked Brattle questions. *See* Pls.' Answering Br. Ex. 109 at 1-3; *see also* Ebel Dep. 128-51; Smith Dep. 188-89, 198-200; Hutchings Dep. 183-89.

237 *See supra* note 233 and accompanying text.

***19** Next, the plaintiffs say that certain documents, including drafts of the SLC report and materials prepared by Brattle, were withheld from them. The SLC opted not to assert privilege against the plaintiffs. It relied on work product protection for a limited set of documents.[238]

238 The SLC produced meeting minutes to the plaintiffs without work product redactions. *See* Dkt. 132. It also chose to produce its interview memoranda rather than assert work product protection. *See In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407, at *6 (Del. Ch. July 9, 2020) [hereinafter "*Oracle NetSuite*"] ("The contents of the Interview Memoranda ... easily fit within the recognized bounds of work product.").

In any event, the plaintiffs' desired documents fall outside the limits of *Zapata* discovery.[239] The discovery the plaintiffs obtained—12,190 pages of documents and depositions of Ebel and two Brattle representatives—was sufficient to explore the adequacy of the SLC's investigation.[240] *Zapata* discovery "must be limited in scope ... and focused in light of its purpose, *i.e.*, verification of the independence and good faith of the committee."[241] The plaintiffs were not entitled to a fishing expedition or the sort of broad discovery available in a plenary dispute.[242]

239 Earlier, the plaintiffs filed a motion to compel documents between the SLC's counsel and anyone other than the SLC, its counsel, or its financial expert about the SLC process. I denied this motion because the SLC had already produced sufficient information about the investigation. There was "no need for the plaintiffs to sift through the granularities of every discovery decision made by the SLC and its counsel." MTC Ruling 53-54. Delaware courts have declined to compel the production of the sort of documents the plaintiffs complain were withheld from them. *See, e.g.*, *Oracle NetSuite*, 2020 WL 3867407, at *8-9; *Kindt I*, 2001 WL 1671438, at *2; *Sutherland I*, 2007 WL 1954444, at *4; *Primedia*, C.A. No. 1808-VCL, at 53; *Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Servs. of Cincinnati, Inc.*, 1995 WL 347799, at *3 (Del. Ch. May 17, 1995); *Rohm & Haas Co. v. Dow Chem. Co.*, 2009 WL 537195, at *2 (Del. Ch. Feb. 26, 2009).

240 *See* MTC Ruling 53-54; *supra* notes 125-26 and accompanying text.

241 *Kindt v. Lund*, 2001 WL 1671438, at *1 (Del. Ch. Dec. 14, 2001) [hereinafter "*Kindt I*"]; *see* MTC Ruling 55-56.

242 *See Sutherland I*, 2007 WL 1954444, at *3.

b. The Adequacy of the Investigation

The plaintiffs next argue that the SLC performed an inadequate and selective investigation into their entire fairness claims. In particular, the plaintiffs focus on whether the SLC addressed the independence of the 2018 Transactions advisors. More generally, they aver that the SLC's process excluded certain sources of information.

i. *Advisor Conflicts*

Certain advisors to the 2018 Transactions—J.P. Morgan and Davis Polk for Baker Hughes, and Lazard for the Conflicts

Committee—had represented GE and its affiliates on other transactions.[243] The SLC report highlights that the Conflicts Committee had "Access To Independent And Knowledgeable Advisors" but does not address the advisors' relationships with GE.[244] The plaintiffs argue that this omission raises a genuine question of material fact about the thoroughness of the SLC's investigation. Although the SLC report does not explicitly address the transaction advisors' independence, the SLC has shown that it reasonably investigated these potential conflicts in good faith.

243 *See*, *e.g.*, *In re Dollar Thrifty S'holders Litig.*, 14 A.3d 573, 582 (Del. Ch. 2010) (explaining that an investment banker having a business relationship with a counterparty "is evidence of one of the facts of business life—that most of the top, if not all, banks have relationships with the major private equity firms"); *see also* Pls.' Answering Br. Ex. 84 ("Jannis Interview Mem.") at 8 (Baker Hughes Head of Business Development explaining he believed "GE was probably working with every major law firm in New York City in some way").

244 SLC Rep. 216-17; *see also id.* at 191, 211; Oral Arg. Tr. 68, 74-75.

***20** J.P. Morgan. J.P. Morgan served as Baker Hughes's financial advisor for the 2018 Transactions.[245] It did not represent the Conflicts Committee.[246] The plaintiffs argue that the SLC overlooked the length and scope of J.P. Morgan's relationship with GE. In particular, the plaintiffs say the SLC did not consider certain documents reflecting the amount of work J.P. Morgan performed for or the fees J.P. Morgan received from GE.[247] But the SLC demonstrated that it appropriately evaluated this matter.[248]

245 J.P. Morgan principally advised Baker Hughes on the Capital Markets Transactions. Oral Arg. Tr. 75, 112. J.P. Morgan did not "engag[e] directly in negotiations" over the amendments to the Master Agreement Framework. Pls.' Answering Br. Ex. 107 at 4 ("Weir Interview Mem.") (summarizing the interview of the J.P. Morgan Managing Director who led the team advising Baker Hughes in the 2018 Transactions); *see* SLC Rep. 130-32. Rather, J.P. Morgan performed valuation analyses on the terms of the amendments. *See* Weir Interview Mem. 3-4; SLC Rep. 106-08 & figs. 13-14.

246 SLC Rep. 216-17; *see also* Pls.' Answering Br. Ex. 17 ("Brenneman Interview Mem.") at 10; Pls.' Answering Br. Ex. 37 ("Scott Interview Mem.") at 4-5 (summarizing the interview of the Lazard Director who advised the Conflicts Committee in the 2018 Transactions).

247 Pls.' Answering Br. Exs. 20-22.

248 Ebel testified at his deposition that "the SLC [did nothing] to vet JP Morgan's independence in connection with its investigation of the 2018 [Transactions]." Ebel Dep. 183. When testifying before the court, he stated that "[the SLC] asked [the advisors] what process they had followed, you know, had the advisors had a process in particular [regarding conflicts]." Oral Arg. Tr. 48. He "remember[ed the SLC] had the J.P. Morgan folks walk through what their process was to make sure there weren't conflicts." *Id.* This testimony is corroborated by the documentary evidence showing that the SLC inquired into this potential conflict. *See infra* notes 249-52 and accompanying text.

The SLC reviewed thousands of documents produced by J.P. Morgan.[249] It asked interviewees about J.P. Morgan's potential conflicts and interactions with the Conflicts Committee.[250] A J.P. Morgan Managing Director told the SLC that J.P. Morgan has a "strict and rigorous conflicts process" and confirmed that no member of the J.P. Morgan team represented GE while working on Project SAW.[251] A representative of Baker Hughes management also told the SLC that he had "no concerns" about J.P. Morgan's work or loyalties.[252] The SLC's failure to focus on specific documents the plaintiffs would have highlighted does not invalidate the SLC's investigation.[253]

249 SLC Rep. 177-78; *see* Oral Arg. Tr. 109.

250 *See* Weir Interview Mem. 3; Jannis Interview Mem. 7; Pls.' Answering Br. Ex. 108 ("Harbour Interview Mem.") at 3-4 (summarizing the interview of the Lazard Managing Director who advised Baker Hughes in the 2018 Transactions).

251 Weir Interview Mem. 3.

252 Jannis Interview Mem. 7; *id.* Ex. 5 at -719. The SLC identified a December 2017 email from J.P. Morgan to the interviewee stating that J.P. Morgan's work for Baker Hughes did not prevent another J.P. Morgan team from "pursuing other related opportunities within GE." *Id.* Ex. 5 at -719. The interviewee told the SLC that he was aware that J.P. Morgan was not prevented from seeking work from GE in separate matters. *Id.* at 7.

253 *See* Carlton, 1997 WL 305829, at *19 ("While in an ideal world the SLC would have been aware of this

document prior to the settlement, it is understandable that a document of potential relevance could have been overlooked or misplaced in an investigation involving the magnitude of documents produced in this action.... This alone does not suggest that the SLC failed to perform an adequate investigation or acted in bad faith.").

***21** Davis Polk. Baker Hughes retained its "long-time attorneys at Davis Polk" for Project SAW.[254] While advising Baker Hughes on the 2018 Transactions, Davis Polk separately advised GE on other matters.[255] In July 2018—months before the 2018 Transactions were finalized—a GE representative told a Baker Hughes executive that Davis Polk "ha[d] been doing an enormous amount of work for GE" and could not be expected "to be adverse to GE."[256] The Conflicts Committee subsequently charged Simpson Thacher with "taking the lead in negotiations with GE."[257]

254 Brenneman Interview Mem. 5.

255 Pls.' Answering Br. Exs. 23-25.

256 Pls.' Answering Br. Ex. 26 at -066.

257 Pls.' Answering Br. Ex. 27 at -317.

The record demonstrates that the SLC meaningfully examined Davis Polk's potential conflict. The SLC interviewed Davis Polk's lead attorney on the engagement and asked him whether Davis Polk was conflicted with respect to Project SAW.[258] He told the SLC that "Davis Polk did not believe it had an actual conflict" but that Davis Polk had "recommended that the Conflicts Committee retain independent counsel to avoid even the appearance of a potential conflict."[259] The SLC also asked Baker Hughes's Head of Business Development about the company's retention of Davis Polk. This executive told the SLC that he "was not concerned that Davis Polk's work for GE might have affected its work for [Baker Hughes]."[260] The SLC further explored the role Simpson Thacher played as the Conflicts Committee's independent legal advisor.[261]

258 Pls.' Answering Br. Ex. 79 (Bason Interview Mem.) at 6.

259 *Id.*

260 Jannis Interview Mem. 8-9; *see also* SLC's Reply Br. Ex. H (Craighead Interview Mem.) at 5-6 n.7.

261 *See* SLC Rep. 214 (noting that the Conflicts Committee held executive sessions with only its advisors and without Davis Polk); Scott Interview Mem. 4; *see also* Brenneman Interview Mem. 10; Harbour Interview Mem. 4.

The plaintiffs also assert that Davis Polk's purported conflicts infected the SLC itself because Davis Polk advised the Board on the SLC's formation and engaged with the SLC during its investigation.[262] This hardly impugns the good faith of the SLC's process. An independent SLC, represented by independent counsel, was formed to remove the taint of any Board-level conflicts.[263] Beyond that, Davis Polk's "interact[ion]" with the SLC "to identify key participants in the relevant transactions, coordinate interviews, and follow up on information requested during interviews" was appropriately aimed at gathering information.[264] Ebel's testimony confirmed that Davis Polk did not assist the SLC in the substance of the investigation.[265]

262 *See* Dkts. 34, 45, 66; Pls.' Answering Br. Ex. 77 at 25-26.

263 *See Zapata*, 430 A.2d at 786 (explaining that "the board, tainted by the self-interest of a majority of its members, can legally delegate its authority to a committee of two disinterested directors").

264 SLC Rep. 184; *supra* note 231.

265 Oral Arg. Tr. 68.

Lazard. Lazard advised the Conflicts Committee on the 2018 Transactions.[266] The plaintiffs assert that the SLC neglected to assess whether Lazard's work for GE before and concurrently with the 2018 Transactions created a conflict.[267] The SLC has, however, demonstrated that it adequately investigated Lazard's independence.

266 Like J.P. Morgan, Lazard was "not directly involved in the commercial negotiations" over the amendments to the Master Agreement Framework. Harbor Interview Mem. 3; *see also* Scott Interview Mem. 3-4 (stating that "she did not know of any Lazard bankers directly negotiating with GE or its advisors"). Lazard primarily advised Baker Hughes on the Capital Markets Transactions and worked on valuing the financial effects of the amendments to the Master Agreement Framework. *See* Oral Arg. Tr. 75, 112; SLC Rep. 140-42.

267 Pls.' Answering Br. Exs. 38-39; *see* Scott Interview Mem. 2.

***22** The SLC questioned Baker Hughes management and each member of the Conflicts Committee about the retention of Lazard.[268] None of the interviewees identified issues with Lazard's role.[269] Conflicts Committee member Cazalot, for example, told the SLC that he "had no concerns" that Lazard was not providing "independent advice."[270] The SLC also interviewed two Lazard representatives about Lazard's work for GE and neither was aware of any conflicts on their teams.[271]

268 Pls.' Answering Br. Ex. 11 ("Cazalot Interview Mem.") at 6; Jannis Interview Mem. 7-8; Brenneman Interview Mem. 5-6; Pls.' Answering Br. Ex. 18 ("Elsenhans Interview Mem.") at 5.

269 Cazalot Interview Mem. 10 n.11; Jannis Interview Mem. 8; *see also* Brenneman Interview Mem. 5-6; Elsenhans Interview Mem. 5

270 Cazalot Interview Mem. 10 n.11.

271 Scott Interview Mem. 2 (stating that Scott told the SLC that she "was not involved in any representations of GE or its affiliates" after "a minor role" in a 2014 GE transaction); Harbour Interview Mem. 2 (stating that Harbour told the SLC that he "was not aware of Lazard's prior relationships, if any, with GE").

* * *

Although the SLC report's silence on the independence of J.P. Morgan, Davis Polk, and Lazard is unfortunate, it is not fatal.[272] The SLC has shown that it uncovered relevant documents and inquired into whether the 2018 Transactions advisors were conflicted. The SLC's counsel represented to the court that the report did not address the purported conflicts because "[the SLC] did not identify [them] as a weakness in the process."[273] There is no issue of material fact putting in doubt the SLC's good faith investigation of these issues.

272 Notably, the SLC report dedicated a full section to weaknesses in the negotiation process of the 2018 Transactions. SLC Rep. 237-53.

273 Oral Arg. Tr. 111.

A comparison to *Sutherland v. Sutherland* is instructive.[274] There, a special litigation committee's report lacked any mention of suspicious payments, even though "they represented the very sort of suspected activity that motivated [the plaintiff] to file the complaint and were the largest identified payments by the companies to any of the individual defendants."[275] The SLC omitted this problematic information while "includ[ing] exculpatory information of a similar character."[276] The plaintiff only learned about the payments after she "won a hard-fought motion to compel."[277] The court concluded that this seemingly intentional omission, which went "to the very heart" of the complaint, cast doubt on whether the single-member committee had conducted a good faith investigation.[278]

274 *Sutherland II*, 958 A.2d at 235; *see also* *Sutherland v. Sutherland*, 968 A.2d 1027, 1030 (Del. Ch. 2008) [hereinafter "*Sutherland III*"] (denying a motion for reargument of the *Sutherland I* decision).

275 *Sutherland III*, 968 A.2d at 1030.

276 *Sutherland II*, 958 A.2d at 243.

277 *Sutherland III*, 968 A.2d at 1030.

278 *Id.*; *see* *Sutherland II*, 958 A.2d at 243.

Here, by contrast, there is no reason to suspect that the SLC concealed evidence. The SLC report details flaws in the transaction process. The SLC voluntarily produced documents discussing its investigation into potential conflicts.

Even if the plaintiffs were right that the SLC's assessment of these issues was inadequate, the outcome of the present motion would not change. The independence of the negotiating parties' advisors would be a single factor in the holistic analysis of whether the 2018 Transactions were entirely fair.[279] As discussed below, the SLC concluded—after weighing the process strengths and weaknesses—that the court would likely find the 2018 Transactions resulted from a fair process. The fact that an advisor had done work for GE would not make that conclusion unreasonable.[280]

279 These purported conflicts were not mentioned in the Complaint or the plaintiffs' December 17, 2019 presentation to the SLC.

280 The financial advisors primarily worked on the Capital Market Transactions, which were "largely at market, where they're not all that reliant on the bankers to get the number right." SLC Rep. 112; *see also id.* at 75; SLC Rep. 273-83. Similarly, the negotiations over the Master Agreement Framework were "the domain of specialized industry experts" rather than lawyers or bankers. Oral

Arg. Tr. 113; *see also* SLC Rep. 85-127, 235-36; *see infra* Section II.A.3.a (discussing the presence of reasonable bases for the SLC's conclusions).

ii. *Information Sources*

***23** The plaintiffs also critique the SLC's document collection and review efforts. The SLC reviewed documents from numerous sources that covered a range of relevant topics.[281] Despite this, the plaintiffs fault the SLC for not obtaining text messages from any custodian or emails from Mulva, a GE designee to the Board.

281 These topics included: (1) the original Master Agreement Framework; (2) GE's November 2017 announcement, and Baker Hughes's reaction to that announcement; (3) GE's strategic review of its Baker Hughes stake; (4) Baker Hughes's ordinary course stock repurchase program; (5) Baker Hughes's negotiation preparations, including the analyses Baker Hughes management, J.P. Morgan, and Lazard performed; (6) Baker Hughes's proposals to and negotiations with GE and its subsidiaries related to the 2018 Transactions; (7) GE's negotiation of the 2018 Transactions; (8) the Conflicts Committee's actions in connection with Baker Hughes's ordinary course stock repurchase program and the 2018 Transactions; (9) the Baker Hughes Board's actions in connection with Baker Hughes's ordinary course stock repurchase program and the 2018 Transactions; (10) GE's financial position during November 2017 to November 2018, including market commentary; and (11) the market's reaction to the 2018 Transactions. SLC Rep. 177-78.
The document sources included: (1) Conflicts Committee members; (2) Lazard; (3) Simpson Thacher; (4) current and former Baker Hughes directors; (5) current and former Baker Hughes officers and employees; (6) J.P. Morgan; (7) Davis Polk; (8) current and former GE directors, officers, and employees; (9) Morgan Stanley, GE's financial advisor; and (10) Shearman & Sterling LLP, GE's legal advisor. *Id.* at 177.

The SLC initially requested text messages from certain custodians but opted not to insist on their production.[282] In reaching that decision, the SLC considered the extensive record available from emails and other electronic documents, and representations that certain custodians did not use text messages for business communications.[283] The SLC weighed the likelihood that substantive text messages existed against the distraction, burden, and delay of collecting data from multiple custodians' personal devices.[284] Given the substantial record that it reviewed, there are no grounds to conclude that the SLC's reasoned choice not to collect text messages creates a genuine dispute about the completeness of its investigation.

282 The SLC collected and produced Ebel's text messages.

283 *Id.* at 180.

284 *Id.*

The SLC's decision not to collect Mulva's email is similarly inconsequential. Mulva did not produce emails to the SLC because his general practice "going back 30 years" is to delete them soon after receipt.[285] He did not change this practice in response to a litigation hold notice.[286] The SLC considered numerous factors in deciding how to respond, including the availability of documents from other GE Board designees and GE's agreement to produce internal communications.[287] This approach was reasonable.[288]

285 *Id.* at 179.

286 *Id.*

287 *Id.* at 179-80.

288 *See Kikis*, C.A. No. 9654-CB, at 102-03 (rejecting quibbles with SLC's investigative approach); *Katell*, 1995 WL 376952, at *9 (same); *Kaplan*, 484 A.2d at 515-16 (same); *Carlton*, 1997 WL 305829, at *8 n.38 (addressing the SLC's inability to interview certain potential witnesses); *Ironworkers Dist. Council of Phila. & Vicinity Ret. & Pension Plan v. Andreotti*, 2015 WL 2270673, at *26 n.255 (Del. Ch. May 8, 2015) (concluding that a demand review committee's investigation was reasonable though the committee did not interview current and former CEOs), *aff'd*, 132 A.3d 748 (Del. 2016).

3. <u>The SLC Reached Reasonable Conclusions</u>.

***24** The third inquiry under *Zapata*'s first step is whether the special litigation committee had reasonable grounds for its conclusions.[289] "In reviewing the [committee's] conclusions, the Court does not take an independent look at the merits of lawsuit."[290] A reasonable conclusion is not necessarily an objectively correct one.[291] The court also need not assess every subsidiary conclusion made by a special litigation committee.[292] Instead, the court looks to whether "the result as a whole is reasonable and the product of independent, informed action of directors acting in good faith."[293]

289 *See Kindt II*, 2003 WL 21453879, at *3 (citing *Zapata*, 430 A.2d at 788).

290 *Katell*, 1995 WL 376952, at *12; *see also London*, 2010 WL 877528, at *18 (explaining that the court must "avoid considering the merits of plaintiffs' claims").

291 *See Carlton*, 1997 WL 305829, at *16 (concluding that the SLC's determinations were "one reasonable interpretation of the record" and explaining that "[w]hether they were correct is not in issue at this stage").

292 *See id.* at *20; *Kikis*, C.A. No. 9654-CB, at 98, 107.

293 *Carlton*, 1997 WL 305829, at *20.

To meet its burden, a special litigation committee "must show that it correctly understood the law relevant to the case" and reasonably applied the law to the facts.[294] Here, the SLC appropriately identified that entire fairness review would apply to the plaintiffs' claims.[295] The SLC also reasonably determined that the burden of proof would shift to the plaintiffs because of the Conflicts Committee's role in negotiating the 2018 Transactions.[296]

294 *London*, 2010 WL 877528, at *17; *see also Katell*, 1995 WL 376952, at *12 ("The Special Committee has to demonstrate the reasonableness of the bases of its conclusions with undisputed facts. This requires the Special Committee to show that Plaintiffs do not dispute the existence of information or evidence relied on by the Special Committee, but it does not require the Special Committee to show that the parties do not dispute material facts regarding Plaintiffs' allegations. The Special Committee can use undisputed information to form its own conclusions as to factual disputes concerning Plaintiffs' allegations.").

295 SLC Rep. 223-25; *see* MTD Ruling 101.

296 SLC Rep. 221-22; *see* MTD Ruling 102 (noting the possible application of *Kahn*, 638 A.2d at 1117).

The SLC concluded that process leading to the 2018 Transactions "proceeded fairly and pursuant to a process that simulated arms'-length bargaining."[297] The SLC also concluded that "the economic terms of the 2018 Transactions fell within the range of fairness."[298] It determined that "[b]ased on the evidence it reviewed, ... the 'process' and price' of the 2018 Transactions mutually reenforced the SLC's conclusions ... that each of [the challenged] transactions likely fell within the range of fairness."[299] The SLC therefore explained that "Baker Hughes could not reasonably expect to recover meaningful damages or settlement payments from the prosecution of Plaintiffs' claims."[300] The SLC "determined in the exercise of its business judgment that terminating the [Action] with prejudice would best serve the interests of [Baker Hughes] and its stockholders."[301]

297 SLC Rep. 226; *see id.* at 226-53.

298 *Id.* at 289; *see id.* at 253-89.

299 *Id.* at 289-90.

300 *Id.* at 319.

301 *Id.* at 320.

The plaintiffs take a scattershot approach to challenging the reasonableness of these conclusions.[302] They raise, by my count, at least twelve separate criticisms that largely amount to disagreements with the SLC's analyses.[303] The first step of *Zapata* is not, however, an opportunity for the plaintiffs to litigate the merits of their claims. "[T]he question is not whether there were disputed issues of material fact about the merits-based issues raised" by the plaintiffs.[304] Rather, the relevant inquiry is "whether disputed issues of material fact were raised about ... the reasonableness of the SLC's conclusions."[305]

302 *See Kaplan*, 484 A.2d at 511 (describing the analytical difficulties presented when plaintiffs "pull out all stops" and "throw every possible argument imaginable into the controversy, no matter how minor or picayune"); *see also Auriga Cap. Corp. v. Gatz Props.*, 40 A.3d 839, 882 n.184 (Del. Ch. 2012) ("[I]t is more time-consuming to clean up the pizza thrown at a wall than it is to throw it."), *aff'd*, 59 A.3d 1206 (Del. 2012).

303 *See Kaplan*, 484 A.2d at 519 ("[I]t is the Special Litigation Committee which is under examination at this first-step stage of the proceedings, and not the merits of the plaintiff's cause of action.").

304 *Diep*, 280 A.3d at 155.

305 *Id.*

a. Fair Process

***25** The SLC evaluated the strengths and weaknesses of the 2018 Transactions process. Strengths included the leverage Baker Hughes held over GE while the Lockup remained, Baker Hughes's proactive and prepared approach to the negotiations, the Conflicts Committee's assertiveness, and the industry expertise of the Baker Hughes negotiators.[306] Flaws included the negotiators' status as legacy GE employees, the potential disclosure of Baker Hughes confidential information to GE, GE's potential non-disclosure of information to Baker Hughes, and rumors that GE might fire Simonelli.[307] The SLC viewed the process as "imperfect" but concluded that it was fair.[308]

306 SLC Rep. 226-37.

307 *Id.* at 237-52.

308 *Id.* at 252-53; *see In re BGC P'rs, Inc. Deriv. Litig.*, 2022 WL 3581641, at *18 (Del. Ch. Aug. 19, 2022) (holding that an "imperfect" process was fair).

The plaintiffs raise multiple objections to this conclusion, most of which ask the court to substitute the plaintiffs' judgment for that of the SLC.[309] Though it would suffice to say that a debate on the merits is inappropriate under *Zapata*, I briefly consider each of the plaintiffs' arguments for the sake of completeness.[310] None raises a genuine issue of material fact about the reasonable bases supporting the SLC's conclusion that the process was fair.

309 Pls.' Answering Br. 74-80. Among other contentions, the plaintiffs make a one-sentence argument that the SLC's conclusion is unreasonable because it "utterly failed to adequately investigate the independence of the advisors on the Transactions." *Id.* at 76. I have already considered and rejected this argument. *See supra* Section II.A.2.b.i.

310 *See Kikis*, C.A. No. 9654-CB, at 96-97.

<u>Baker Hughes's Negotiating Leverage</u>. The plaintiffs aver that the SLC unreasonably "concluded that [Baker Hughes] lacked meaningful negotiating leverage over GE."[311] The SLC, however, found that Baker Hughes *had* leverage.[312] The SLC report recounts Baker Hughes and the Conflicts Committee's belief that the Lockup gave Baker Hughes the upper hand.[313] The SLC described this leverage as a "melting ice cube" that would disappear once the Lockup expired in July 2019.[314] Thus, according to the SLC, Baker Hughes was incentivized to act promptly.[315]

311 Pls.' Answering Br. 76.

312 SLC Rep. 81-85, 227.

313 *Id.*

314 *Id.* at 83-85, 228.

315 *Id.* The plaintiffs argue that a "smoking gun" document undermines the SLC's conclusion. Pls.' Answering Br. 76. But the plaintiffs misrepresent and selectively quote from the relevant document. Read in full, the document recognizes that the Conflicts Committee's leverage would end in July 2019. It states: "OPEN QUESTION: DOESN'T THE CONFLICTS COMMITTEE HOLD ALL OF THE CARDS ANYWAY? IE. CAN'T THEY DISALLOW ANY SELLDOWN OF GE HOLDINGS UNTIL JULY 2019?" Pls.' Answering Br. Ex. 1 at -000; *see* Pls.' Answering Br. 76 (omitting the "OPEN QUESTION" text in suggesting that the statement was a definitive conclusion).

<u>Beattie's Actions</u>. The SLC identified the Conflicts Committee's assertiveness as a strength of the process leading to the 2018 Transactions.[316] The SLC devoted a section of its report to assessing whether GE attempted to undermine the Conflicts Committee.[317] It found there was "no evidence that GE threatened the Conflicts Committee, attempted to remove the Conflicts Committee's authority, or attempted to circumvent the Conflicts Committee's veto over the 2018 Transactions."[318]

316 SLC Rep. 231-34. The SLC report describes the Conflicts Committee members as proactive and assertive against GE during negotiations. *Id.* at 38-41, 44-51, 54-58, 78, 134, 229-31, 274-75.

317 *Id.* at 218-21.

318 *Id.* at 220.

***26** The plaintiffs disagree. They contend that the SLC ignored two emails suggesting that Beattie (a GE-designated Board member) was actively involved in the process and sought to limit the Conflicts Committee's involvement.[319] Reasonable minds may differ about which documents the SLC should have relied on.[320] Yet neither document indicates that the SLC's conclusion was unreasonable.[321]

319 Pls.' Answering Br. 77.

320 *See* Carlton, 1997 WL 305829, at *20 ("While reasonable minds might differ over any number of decisions ... I conclude that the result as a whole is reasonable and the product of independent, informed action of directors acting in good faith.").

321 In the first email, Beattie wrote that he would bring the Conflicts Committee "into the discussion so they feel part of it." Pls.' Answering Br. Ex. 54 at -911. In the second email, Beattie expressed his desire to avoid "negotiation." Pls.' Answering Br. Ex. 4 at -913. Beattie's statement to the SLC that "his role was limited to connecting key decision-makers so that they could work through roadblocks" is consistent with these documents. SLC Rep. 81; *see* Pls.' Answering Br. Ex. 12 (Beattie Interview Mem.) 6-9 (same).

Simonelli's Relationship with GE. The SLC report identified Baker Hughes's negotiators—namely, CEO Simonelli and CFO Worrell—as legacy GE employees.[322] The SLC considered whether these roles created a weakness in the process, but "identified no evidence that this was the case."[323] The SLC found that these negotiators "did not pull their punches with GE negotiations" and that they were incentivized to push for Baker Hughes's best interests because they were compensated based on Baker Hughes's performance.[324]

322 SLC Rep. 237-38.

323 *Id.* at 238.

324 *Id.*; *see id.* at 78-79.

The plaintiffs refute this assessment, citing evidence that Simonelli worked closely with GE, Miller, and Beattie on the 2018 Transactions.[325] It is unsurprising that Simonelli communicated with his counterparty. In all, the plaintiffs' arguments amount to a dispute over how the SLC construed and weighed the available evidence, which does not create a genuine issue of fact as to the reasonableness of the SLC's conclusion.[326]

325 Pls.' Answering Br. 23-30 (citing Pls.' Answering Br. Exs. 4, 57, 65-66, 69); *id.* at 77-78 (citing Pls.' Answering Br. Exs. 8-9).

326 *See* SLC's Reply Br. 39-42 (discussing the evidence on which the SLC relied); SLC Rep. 77-78, 109, 136, 235-36, 238-39.

The plaintiffs also maintain that Simonelli's personal relationships with Beattie and Rice impaired his impartiality during negotiations. Pls.' Answering Br. 78-79. The SLC investigated this issue, and its conclusion is supported by the evidence summarized in the interview memoranda. *See* Pls.' Answering Br. Ex. 6 (Rice Interview Mem.) 6 (explaining that Simonelli "left no friends" at GE and drove a "very hard bargain."), Pls.' Answering Br. Ex. 8 (Simonelli Interview Mem.) 2-3 (describing Simonelli's relationships with Beattie and Rice).

GE's Disclosures to Baker Hughes. The plaintiffs question the SLC's conclusion that the process was fair despite GE's failure to disclose material information to Baker Hughes.[327] The SLC report unequivocally states that the SLC "considered whether GE wrongfully withheld any information from [Baker Hughes]."[328] The report addresses two specific non-disclosures that the SLC identified.[329] It also explains that "Delaware law would likely not require negotiating counterparties to disclose potential weaknesses in their financial position during arms'-length bargaining."[330]

327 Pls.' Answering Br. 79. The plaintiffs focus on negative information about GE Power's performance in the fall of 2018. *Id.* at 26, 79.

328 SLC Rep. 245.

329 *Id.* at 245-47.

330 *Id.* at 247; *see id.* at 247 n.876 (citing authorities).

***27** Worrell's Job Security. Another potential process flaw considered by the SLC involved rumors that GE might fire Simonelli.[331] The SLC determined this issue did not affect the fairness of the process.[332]

331 *Id.* at 249-52.

332 *Id.*

The plaintiffs criticize the SLC for not also addressing whether GE considered firing Baker Hughes CFO Worrell, who was involved in negotiating the 2018 Transactions.[333] This objection does not call into question the reasonableness of the SLC's conclusion. The SLC asked Worrell whether GE pressured him in connection with the 2018 Transactions; he confirmed that GE did not.[334] The SLC also observed that GE lacked the power to unilaterally fire Baker Hughes officers.[335]

333 Pls.' Answering Br. 79-80.

334 Pls.' Answering Br. Ex. 49 (Worrell Interview Mem.) 7 & n.6.

335 SLC Rep. 251.

b. Fair Price

The SLC analyzed the economic terms of the 2018 Transactions with the assistance of its advisors. Its assessment included specific aspects of the overall deal—such as the AGT components of the amendments to the Master Agreement Framework, the HDGT Supply Agreement, the Secondary Offering, and the Repurchase. The SLC concluded that the terms as a whole fell within the range of fairness.[336]

336 *See id.* at 253-89.

The plaintiffs contend that this conclusion "suffers from multiple flaws," mostly due to purported shortcomings in Brattle's analysis.[337] Their objections ignore that the SLC was entitled to rely on Brattle and to evaluate Brattle's analyses with advice from the SLC's counsel. The plaintiffs' arguments are also unsupported, and none raise a genuine issue of material fact about the reasonableness of the SLC's conclusion that the price was fair.

337 Pls.' Answering Br. 80.

The SLC's Frame of Reference. The SLC determined that the appropriate frame of reference for its analysis was a comparison between the economic terms of the 2018 Transactions and those Baker Hughes "would likely have received in an arms'-length negotiation with GE (or another turbine supplier) *after* the Trigger Date occurred."[338] The plaintiffs insist that the SLC should have compared the terms of the amended Master Agreement Framework to the original Master Agreement Framework.[339]

338 SLC Rep. 256 (emphasis in original).

339 Pls.' Answering Br. 82; *cf.* SLC Rep. 253-58, 262. The SLC and Brattle also considered the terms Baker Hughes might receive from non-GE suppliers. *See* SLC Rep. 87-88, 115, 256 58, 267-68, 287-88; Hutchings Dep. 175, 275-76. "[W]itnesses uniformly stated that [Baker Hughes] could not have changed turbine manufacturers in the short term without exposing itself to significant risk." SLC Rep. 267.

Irrespective of its accuracy, the SLC's approach was reasonable. The SLC report explained that parts of the original Master Agreement Framework would expire at or near the Trigger Date. "After the Lockup expired on July 3, 2019, [Baker Hughes] could not prevent the Trigger Date."[340] The SLC also interviewed multiple witnesses who supported the SLC's frame of reference.[341]

340 SLC Rep. 255.

341 *Id.*

The plaintiffs fault this approach because the SLC did not identify any contemporaneous model from 2018 that adopted it, other than a Boston Consulting Group report commissioned by GE "in support of GE Aviation's proposed [AGT] pricing."[342] But the SLC merely considered the Boston Consulting Group report to be "helpful" and accounted for its potential biases.[343] According to the SLC report, the AGT pricing margins Baker Hughes negotiated in the Master Agreement Framework amendments were "significantly lower than the margins BCG identified as 'market' or 'more optimal [for GE].' "[344]

342 *Id.* at 104, 257-58; *see also* Pls.' Answering Br. Ex. 3.

343 SLC Rep. 258, 264-65; *see* Pls.' Answering Br. Ex. 7 (Godsman Interview Mem.) 5 & n.5 (GE Aviation executive describing his view that the Boston Consulting Group report was unfavorable to GE Aviation in some respects).

344 That is, the AGT pricing margins in the 2018 Transactions were more favorable to Baker Hughes than those margins identified as "market" or "more optimal" in the Boston Consulting Group report. SLC Rep. 264-65.

***28** The SLC further considered a contemporaneous internal analysis that Baker Hughes used to evaluate a hypothetical "no deal" scenario, in which Baker Hughes could not extend the supply agreements for AGTs and HDGTs before the Master Agreement Framework terminated.[345] This scenario was "pretty close" to the SLC's frame of reference.[346] Compared to the projected financial effect of the Master Agreement Framework amendments, the "no deal" scenario "reflected substantially lower financial performance for [Baker Hughes]."[347]

345 *See id.* at 91-93, 256-58; Jannis Interview Mem. 8.

346 Hutchings Dep. 312. The "no deal" scenario was arguably optimistic compared to the SLC's frame of reference because the former assumed that Baker Hughes still had free, total access to GE intellectual property. In other words, if the 2018 Transactions compared favorably to the "no deal" scenario, they would also compare favorably to the SLC's frame of reference. *See* SLC Rep. 257.

347 *Id.*

Brattle's "Bifurcated" Analysis. Brattle tasked different experts with addressing the Capital Markets Transactions and the amendments to the Master Agreement Framework.[348] The plaintiffs submit that this approach meant Brattle's economic analysis of the amendments did not consider Baker Hughes's leverage in negotiating the Capital Markets Transactions.[349] The record shows, however, that Brattle considered the negotiating parties' relative leverage.[350] The SLC reasonably relied on each Brattle expert and drew conclusions about Baker Hughes's leverage based on the record as a whole.[351]

348 Hutchings Dep. 277-81, 295-96; Smith Dep. 194-95.

349 Pls.' Answering Br. 80.

350 *See* Hutchings Dep. 276-80; Ebel Dep. 131-33; SLC Rep. 112, 269, 273-75, 289. The minutes of the penultimate SLC meeting state that Brattle representatives "summarized their analyses of the amendments to the Master Agreement Framework, including their analyses of ... evidence concerning the parties' relative leverage in negotiations." Pls.' Answering Br. Ex. 109 at 1.

351 *See* SLC Rep. 112, 269.

Damages from the Capital Markets Transactions. The SLC report explains that Baker Hughes prevailed on all negotiating points affecting the Capital Markets Transactions, including the key issue of the Repurchase price.[352] The SLC determined that the Repurchase occurred at a favorable time because a drop in Baker Hughes's stock price lowered its repurchase price and limited the amount of stock GE would sell in the Secondary Public Offering.[353] The Repurchase also minimized downward pressure on Baker Hughes stock from the Secondary Public Offering.[354] The SLC further found that the Capital Markets Transactions worked toward addressing the GE overhang on Baker Hughes stock, and that GE's liquidity needs enabled Baker Hughes to obtain beneficial amendments to the Master Agreement Framework.[355]

352 *Id.* at 132-39, 273-83; *see also* Smith Dep. 196-97.

353 SLC Rep. 132, 149-50, 279 n.978.

354 *Id.* at 129-30; Smith Dep. 220-22.

355 SLC Rep. 34-35, 42-44, 129-30, 133-36, 269, 275-79.

Despite this record, the plaintiffs contend that the SLC's economic analysis lacks a reasonable foundation because Brattle did not perform a damages analysis of the Capital Markets Transactions.[356] Brattle's expert testified that it "did not quantify damages because [Brattle] did not come to a financial or economic opinion that there were damages."[357] The plaintiffs' disagreement with this opinion does not amount to a meritorious challenge to the SLC's conclusion.

356 Pls.' Answering Br. 80-81.

357 Smith Dep. 204; *see also id.* at 209-11.

c. The Decision to Terminate the Action

***29** Because it determined that the 2018 Transactions fell within the range of fairness, the SLC concluded the derivative claims asserted against GE and the remaining director defendants "were unlikely to have value" as a litigation asset of Baker Hughes.[358] The SLC also considered the monetary, operational, and reputational costs associated with continued litigation.[359] On balance, the SLC determined that terminating the Action would best serve Baker Hughes and its stockholders.[360]

358 SLC Rep. 290, 292, 305-06, 319; *see also id.* at 226, 319.

359 *Id.* at 316-19; *see supra* at 23 (describing factors considered by the SLC).

360 *Id.* at 320; *see id.* at 316-20.

The plaintiffs insist that this conclusion was unreasonable because the SLC did not value the plaintiffs' claims.[361] There is no requirement that an SLC conduct an expected-value calculation.[362] Even if there were some potential for a positive monetary recovery, the SLC was not obliged to pursue the litigation if its good faith judgment indicated that doing so was not best for the corporation.[363] "The whole point of recognizing the board's authority and responsibility in this context is to allow the board's judgment *concerning what is in the long-run best interest of the corporation* to be acted upon."[364]

361 Pls.' Answering Br. 69-70.

362 If anything, the SLC would have valued the recoverable monetary damages to be zero because it concluded that the 2018 Transactions likely fell within the range of fairness. *See* SLC Rep. 290, 305-06, 319-20; Smith Dep. 204, 209-11.

363 *Carlton*, 1997 WL 305829, at *11 ("[T]he SLC is not required to attempt to maximize returns from the lawsuit."). Parties often settle entire fairness cases after the pleadings stage if defense costs exceed a settlement payment.

364 *Id.* (emphasis in original).

B. The Second *Zapata* Step

"Proceeding to the second step of the *Zapata* analysis is wholly within the discretion of the court."[365] If the court chooses to do so, it applies "its own business judgment to the facts to determine whether the corporation's best interests would be served by dismissing the suit."[366] "The second step is intended to thwart instances where corporate actions meet the criteria of [*Zapata*'s] step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest."[367]

365 *Kaplan*, 499 A.2d at 1192; *see also* *Diep*, 280 A.3d at 158.

366 *London*, 2010 WL 877528, at *11.

367 *Kaplan*, 484 A.2d at 508; *see* *Biondi*, 820 A.2d at 1164 n.40 ("Although this is said to be an oxymoronic judicial exercise of 'business judgment,' its purpose is to provide a safeguard against the danger that the difficult-to-detect influence of fellow-feeling among directors (*i.e.*, so-called 'structural bias') does not cause cessation of meritorious litigation valuable to the company.").

I have carefully reviewed the evidentiary record and, after an exhaustive analysis, determined that the SLC has met its burden under step one of *Zapata*. The SLC has demonstrated its independence, that its process was thorough and unbiased, and that its conclusions rest on reasonable bases. I have no reason to believe that termination of the litigation is " 'irrational' or 'egregious' or some other extreme word."[368] Accordingly, I decline to conduct an independent evaluation of the merits.[369]

368 *Carlton*, 1997 WL 305829, at *2 (describing the "conceptual[ ] difficult[y]" of *Zapata*'s second step as "designed to offer protection for cases in which, while the court could not consciously determine on the first leg of the analysis that there was no want of independence or good faith, it nevertheless 'felt' that the result reached" was unsound); *see also* *Kindt II*, 2003 WL 21453879, at *5.

369 *See Kikis*, C.A. No. 9654-CB, at 106-07 (explaining, in an entire fairness action, that the court was "not ... compelled" to conduct a *Zapata* step two analysis after concluding the special litigation committee satisfied step one).

III. CONCLUSION

***30** The SLC has met its burden of proof. The SLC's motion to terminate the Action is therefore granted.

All Citations

Not Reported in Atl. Rptr., 2023 WL 2967780

290 A.3d 1
Court of Chancery of Delaware.

IN RE LORDSTOWN MOTORS CORP.

C.A. No. 2023-0083-LWW
|
Date Submitted: February 20, 2023
|
Date Decided: February 21, 2023

Synopsis
Background: Company originally formed as special purpose acquisition company (SPAC) filed petition to validate and declare effective a potentially defective amendment to its certificate of incorporation and stock issued in reliance on such amendment. Hearing was conducted.

Holdings: The Court of Chancery, Lori W. Will, Vice Chancellor, held that:

SPAC and board of directors approved amendment in good faith;

SPAC and board consistently treated amendment and stock issued thereunder as valid and effective;

validation of amendment would not cause harm;

denying petition would cause harm; and

validation would be just and equitable.

Petition granted.

Attorneys and Law Firms

***2** Raymond J. DiCamillo, Kevin M. Gallagher, Alexander M. Krischik, Edmond S. Kim & Nicholas F. Mastria, RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware; Attorneys for Petitioner Lordstown Motors Corp.

OPINION

WILL, Vice Chancellor

This decision addresses a company's petition under 8 *Del. C.* § 205 to validate and ***3** declare effective an amendment to its certificate of incorporation and stock issued in reliance on that amendment. The petitioner is not alone in seeking this relief. Dozens of companies—all formed as special purpose acquisition companies (SPACs)—have filed similar petitions.

In connection with de-SPAC mergers, these companies proposed amendments to their certificates of incorporation to increase the number of authorized Class A common shares. Believing Class A shares to be of a series of common stock, the companies did not hold a separate Class A vote on the proposed amendments. Rather, the charter amendments were approved by a majority of the common shares entitled to vote, voting as a single class. Subsequently, the amendments were effectuated and billions of shares were issued with the understanding that they were authorized by the companies' certificates of incorporation.

That perception was shaken in December 2022 when the Court of Chancery issued a decision in *Garfield v. Boxed, Inc.*[1] There, the court considered a fee petition filed after a SPAC—in response to a stockholder demand—held a separate Class A vote on a proposed charter amendment to increase the number of authorized Class A common shares. In considering whether the demand was meritorious when made, the court determined that the company's Class A shares were a separate class of stock based upon the plain text of the company's certificate of incorporation. The separate class vote undertaken by the company because of the demand "defuse[d] a ticking time bomb," warranting a fee award for the stockholder's counsel.[2]

1 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

2 *Id.* at *11.

Many post-de-SPAC companies, met with sudden doubts about the soundness of their capital structures, were left to "clean[ ] up the shrapnel"[3]—years after the relevant stockholder votes. These companies could no longer determine which shares of their widely-traded stock were valid, threatening to undermine their financial positions and create market disruption. Equity financings critical to the companies' ongoing operations have been put in jeopardy. Certain companies now face difficulties in filing Form 10-Ks and the possibility of stock exchange delisting.

3 *Id.*

A flood of Section 205 petitions followed, each seeking to validate similar corporate acts with varying degrees of potential flaws. If separate Class A votes on the share increase charter amendments were required under 8 *Del. C.* § 242(b), many amendments did not obtain sufficient support. Some companies potentially overissued hundreds of millions of shares beyond that authorized by the prior iterations of their certificates of incorporation. Others, though obtaining the requisite number of votes, disclosed the wrong voting standard. Regardless of whether these matters render the corporate acts at issue defective as a technical matter, the companies are experiencing the same pervasive uncertainty and risk of harm.

****2** Fortunately, the Delaware General Assembly had the foresight to provide an equitable solution for such seemingly incurable problems. Section 205 grants this court the authority to declare corporate acts and putative stock to be valid. In assessing a request for validation, the court may consider any factors it deems just and equitable.

***4** In the instant case, validation is appropriate for numerous reasons. The company had a good faith belief in the validity of its charter amendment. It, along with third parties, acted in reliance on that belief for years. Ratification will restore confidence in the company's capital stock and assuage market fears. A contrary ruling would invite untold chaos.

I. FACTUAL BACKGROUND

The background is drawn from the petitioner's Verified Petition for Relief Pursuant to 8 *Del. C.* § 205 (the "Petition"), the documents incorporated by reference, and documents subject to judicial notice.[4]

4 Verified Pet. for Relief Pursuant to 8 *Del. C.* § 205 (Dkt. 1) ("Pet."); *see In re Books-A-Million, Inc. S'holders Litig.*, 2016 WL 5874974, at *1 (Del. Ch. Oct. 10, 2016) (explaining that the court may take judicial notice of "facts that are not subject to reasonable dispute" (citing *In re Gen. Motors (Hughes) S'holder Litig.*, 897 A.2d 162, 170 (Del. 2006))); *Omnicare, Inc. v. NCS Healthcare, Inc.*, 809 A.2d 1163, 1167 n.3 (Del. Ch. 2002) ("The court may take judicial notice of facts publicly available in filings with the SEC.").

A. The 2019 Charter

Petitioner Lordstown Motors Corporation ("Lordstown" or the "Company") was incorporated in Delaware on November 13, 2018 as a special purpose acquisition company.[5] The Company amended and restated its initial certificate of incorporation on February 27, 2019 (the "2019 Charter").[6] The 2019 Charter authorized the Company to issue:

> 111,000,000 shares, consisting of (a) 110,000,000 shares of common stock (the "Common Stock"), including (i) 100,000,000 shares of Class A Common Stock (the "Class A Common Stock"), and (ii) 10,000,000 shares of Class B Common Stock (the "Class B Common Stock"), and (b) 1,000,000 shares of preferred stock (the "Preferred Stock").[7]

5 Pet. ¶ 11.

6 Pet. Ex. A ("2019 Charter").

7 2019 Charter § 4.1 (emphases omitted). Section 4.1 of the Company's initial certificate of incorporation was identical to Section 4.1 of the 2019 Charter. *Compare* DiamondPeak Hldgs. Corp., Registration Statement (Form S-1) (Jan. 18, 2019) Ex. 3.1 § 4.1 *with* 2019 Charter § 4.1.

The Company's Class A Common stock traded (and continues to trade) on the NASDAQ.[8]

8 Pet. ¶ 3; *Lordstown Motors Corp. Class A Common Stock*, NASDAQ, https://www.nasdaq.com/market-activity/stocks/ride (last visited Feb. 21, 2023).

B. The Charter Amendment

On August 1, 2020, the Company agreed to a business combination—a so-called de-SPAC transaction—with Lordstown EV Corporation ("Legacy Lordstown"), an electric vehicle automaker.[9] Upon closing, a wholly-owned subsidiary of the Company would merge with and into Legacy Lordstown, with Legacy Lordstown surviving as a wholly-owned subsidiary of the Company.[10] A special meeting for stockholders to vote on the merger was set for October 22, 2020.[11]

9 Pet. Ex. B ("2020 Proxy") at 18.

10 2020 Proxy at 18.

11 *Id.* at Cover Page; Pet. ¶ 2.

At the special meeting, stockholders would also be asked to vote on proposed amendments to the 2019 Charter. One proposed amendment would increase the number of authorized shares of Class A Common Stock from 100,000,000 to 300,000,000 ***5** (the "Charter Amendment").[12] The Charter Amendment was needed to "provide adequate authorized share capital" to facilitate the de-SPAC merger and related transactions, such as a private investment in public equity (PIPE).[13] The Charter Amendment would also "provide flexibility for future issuances of capital stock" determined by the Board of Directors to be in the Company's best interest.[14]

12 Specifically, the proposed Charter Amendment would "increase the number of authorized shares of [the Company's] capital stock, par value $0.0001 per share, from 111,000,000 shares, consisting of (i) 110,000,000 shares of common stock, including 100,000,000 shares of Class A common stock and 10,000,000 shares of Class B common stock, and (ii) 1,000,000 shares of preferred stock, to 312,000,000 shares, consisting of (i) 300,000,000 shares of Class A common stock and (ii) 12,000,000 shares of preferred stock." 2020 Proxy at 1, 6, 69, 90, 126.

13 *Id.* at 126 (describing the purposes for the Charter Amendment).

14 *Id.*

****3** The Company solicited stockholder approval for the merger and the Charter Amendment through an October 8, 2020 proxy statement.[15] The proxy statement explained that the Charter Amendment required the "affirmative vote ... of the holders of a majority of the outstanding shares of Class A [C]ommon [S]tock and Class B [C]ommon [S]tock entitled to vote thereon at the special meeting, voting as a single class."[16]

15 Pet. ¶ 12.

16 2020 Proxy at Cover Page, 7, 86, 128.

There were 35,000,000 shares of Common Stock outstanding and entitled to vote at the special meeting, consisting of 28,000,000 shares of Class A Common Stock and 7,000,000 shares of Class B Common Stock.[17] A Form 8-K filed by the Company after the special meeting disclosed that the Charter Amendment received the affirmative vote of 18,292,011 shares of Common Stock.[18] This tally included—but did not distinguish between—shares of Class A Common Stock and Class B Common Stock.[19] Because a majority of the Common shares entitled to vote supported the Charter Amendment, the Company believed that the requisite vote had been obtained and that the Charter Amendment had been approved.[20]

17 Pet. ¶ 14 (citing 2020 Proxy at 25).

18 *Id.* (citing DiamondPeak Hldgs. Corp., Current Report (Form 8-K) (Oct. 22, 2020)).

19 DiamondPeak Hldgs. Corp., Current Report (Form 8-K) (Oct. 22, 2020).

20 Pet. ¶ 14.

C. The Share Issuances

On October 23, 2020, the Company filed its Second Amended and Restated Certificate of Incorporation (the "2020 Charter") with the Delaware Secretary of State.[21] The same day, the Company closed its merger with Legacy Lordstown and changed its name to Lordstown Motors Corporation.[22]

21 *Id.* ¶ 2; Pet. Ex. C ("2020 Charter") § 4.1.

22 Pet. ¶ 3.

The Company issued an aggregate of 86,949,893 shares of Class A Common Stock in connection with the merger and the conversion of other outstanding securities into Class A Common Stock.[23] Just before closing, the Company also issued 50,000,000 shares of Class A Common Stock in a PIPE financing transaction.[24] Overall, as a result of the merger and ***6** related transactions, the number of outstanding shares of Class A Common Stock increased from 28,000,000 to 164,948,923.[25]

23 *Id.*

24 *Id.*

25 *Id.*

After closing, the Company issued another 50,171,320 shares before amending the 2020 Charter in August 2022 to further increase the number of authorized shares of Class A Common Stock.[26] In total, the Company issued 115,120,243 shares of Class A Common Stock beyond that authorized by the 2019 Charter.[27]

26 This amendment increased the number of authorized Class A Common shares from 300,000,000 to 450,000,000. *Id.*; Lordstown Motors Corp., Current Report (Form 8-K) (Aug. 17, 2022).

27 Pet. ¶ 3.

D. The Stockholder Demand

In March 2022—eighteen months after the 2020 Charter became effective—the Company received a demand letter from three purported Company stockholders (the "Demand Letter").[28] The Demand Letter challenged whether the correct voting standard had been applied to the stockholder vote on the Charter Amendment under the terms of the 2019 Charter and 8 *Del. C.* § 242(b)(2).[29] The Demand Letter asserted that the Class A Common Stock was a separate class of stock and that the Charter Amendment required the approval of holders of a majority of the outstanding shares of Class A Common Stock voting as a separate class.[30] Because the Charter Amendment did not receive such approval, the stockholders maintained that the Charter Amendment was unauthorized.[31]

28 *Id.* ¶ 4; Pet. Ex. D ("Demand Ltr.").

29 Section 242(b)(2) provides that "[t]he holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would increase or decrease the aggregate number of authorized shares of such class." 8 *Del. C.* § 242(b)(2). A company may opt out of the separate class vote requirement by adopting an opt-out provision in its certificate of incorporation. *Id.* (stating that an opt-out provision could be "provided in the original certificate of incorporation, in any amendment thereto which created such class or classes of stock or which was adopted prior to the issuance of any shares of such class or classes of stock, or in any amendment thereto which was authorized by a resolution or resolutions adopted by the affirmative vote of the holders of a majority of such class or classes of stock"). The Company did not have an opt-out provision in its 2019 Charter. *See* 2019 Charter; Demand Ltr. at 5.

30 Demand Ltr. at 5.

31 *Id*. at 5-6. The Demand Letter stated that a total of 28,000,000 shares of Class A Common Stock were entitled to vote on the Charter Amendment but deduced that only 11,292,011 Class A Common shares voted in favor. *Id.*; Pet. ¶ 2. According to the Demand Letter, all 7,000,000 shares of Class B Common Stock voted in favor of the Charter Amendment. Pet. ¶ 14 (citing Demand Ltr. at 6); *In re Lordstown Motors Corp.*, C.A. No. 2023-0083-LWW, at 38-39, 290 A.3d 1 (Del. Ch. Feb. 20, 2023) (TRANSCRIPT).

E. The Legal Opinion

****4** The Company sought the advice of several law firms, including Delaware counsel, regarding the assertions in the Demand Letter.[32] An April 1, 2022 opinion of Delaware counsel (the "Legal Opinion") concluded that "a separate class vote of the Class A Common Stock was not required under either the [2019 Charter] or the DGCL to approve the [Charter Amendment]" because "[t]he Class A Common Stock [was] a series of the Common Stock, and not a separate class of capital stock of ***7** the Company."[33] The Legal Opinion provided several bases for that conclusion:

- The DGCL allows for the division of the total authorized capital stock into one or more classes of stock, which classes may be further divided into series.[34]

- The 2019 Charter provided that the Company was authorized to issue "110,000,000 shares of [Common Stock], including (i) 100,000,000 shares of Class A Common Stock ... and (i) 10,000,000 shares of Class B Common Stock."[35] The use of the word "including" and the fact that the shares of Class A Common Stock and Class B Common Stock sum to the total shares of Common Stock indicated, in counsel's view, that "Class A Common Stock and Class B Common Stock are two subtypes that together comprise the broader category of Common Stock."[36]

- The 2019 Charter referred to "series of Common Stock" and "series of Preferred Stock," which counsel interpreted to indicate that the Company had two classes of stock—"Common" and "Preferred."[37]

- The Delaware Division of Corporations' records indicated that it interpreted the language in Section 4.1 of the 2019 Charter as creating two authorized "stock classes" of capital stock denoted "Common" and "Preferred."[38]

32 Pet. ¶ 5; *see e.g.*, Pet. Ex. E ("Legal Op.").

33 Legal Op. at 3, 5.

34 *Id.* at 3-4 & nn.3-6 (citing 8 *Del. C.* §§ 102(a)(4), 102(b)(3), 141(c), 151(a), 151(c), 151(e)-(g); 204(d)(1)-(2), 214, 223, 242(a)-(b), 251(d), 251(h)(2)-(3); *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 118201, at *4 (Del. Ch. Mar. 9, 1998) (recognizing that "the [DGCL] regards 'classes' of stock as separate and distinct from 'series' within a class"))).

35 2019 Charter § 4.1.

36 Legal Op. at 4.

37 *Id.*; *see e.g.*, 2019 Charter §§ 4.2, 4.3(iii), 4.3(c), 4.3(d).

38 Legal Op. at 4.

On April 1, 2022, the Company filed a Form 8-K explaining that its Board of Directors had reviewed the assertions in the Demand Letter and determined, in reliance on the advice of several law firms and the Legal Opinion, that the Demand Letter was wrong.[39] That is, the Board concluded that "a separate class vote of the Class A [C]ommon [S]tock was not required to approve the [Charter Amendment]" to increase the shares of Class A Common Stock.[40]

39 Pet. ¶ 5; Lordstown Motors Corp., Current Report (Form 8-K) (Apr. 1, 2022) ("Apr. 1, 2022 Form 8-K").

40 Apr. 1, 2022 Form 8-K.

F. The *Boxed* Decision

The Company was not alone in receiving a stockholder demand regarding the voting standard required to approve a share increase charter amendment. Some SPACs—like Lordstown—resisted these stockholder demands because they interpreted their charters as designating two series of common stock that were part of a single class. Others responded by supplementing their proxy materials to obtain a separate class vote to effect an authorized share increase.[41] Petitions seeking fee ***8** awards for causing the separate class vote followed.[42]

41 *See, e.g.*, Order, *Delman v. Fusion Acq. Corp.*, C.A. No. 2021-0752-JRS, 2021 WL 4149882 (Del. Ch. Sept. 10, 2021) (Dkt. 9); Order, *Bass v. Mudrick Cap. Acq. Co.*, C.A. No. 2021-0690-LWW, 2021 WL 3633809 (Del. Ch. Aug. 16, 2021) (Dkt. 12). In these cases, a plaintiff stockholder had filed an action challenging the charter amendment. After the SPAC supplemented its proxy materials, the parties voluntarily dismissed the action as moot, and the court retained jurisdiction to determine plaintiff's counsel's application for an award of attorneys' fees and expenses. The plaintiff's counsel has not yet applied for such fees and expenses.

42 *See, e.g.*, Pl.'s Opening Br. in Supp. of Appl. for Fees and Expenses, *Franchi v. dMY Tech. Grp., Inc. IV*, C.A. No. 2021-0841-KSJM (Del. Ch. Oct. 20, 2022) (Dkt. 7); Pl.'s Opening Br. in Supp. of Appl. for Fees and Expenses, *Franchi v. CM Life Scis. III Inc.*, C.A. No. 2021-0842-KSJM (Del. Ch. Oct. 20, 2022) (Dkt. 10); Verified Compl., *Drulias v. Pardes Biosciences, Inc.*, C.A. No. 2022-0432-LWW, 2022 WL 1601083 (Del. Ch. May 18, 2022) (Dkt. 1); Pl.'s Appl. for an Award of Att'ys' Fees, *Umbright v. Khosla Ventures Acq. Co. II*, C.A. No. 2021-0762-LWW, 2022 WL 826440 (Del. Ch. Mar. 14, 2022) (Dkt. 18); Verified Compl. Seeking Award of Att'ys' Fees and Expenses, *Elstein v. Hagerty, Inc.*, C.A. No. 2022-0214-LWW (Del. Ch. Mar. 7, 2022) (Dkt. 1); Verified Compl. Seeking Award of Att'ys' Fees and Expenses, *Solak v. Redbox Ent., Inc.*, C.A. No. 2022-0099-LWW, 2022 WL 279018 (Del. Ch. Jan. 28, 2022) (Dkt. 1).

****5** On December 27, 2022, the Court of Chancery issued a memorandum opinion in *Garfield v. Boxed, Inc.* addressing one such fee petition.[43] There, the plaintiff's counsel (the same who sent the Demand Letter to the Company) had demanded that a SPAC count the votes of Class A common stockholders separately from Class B common stockholders in voting on a charter amendment to increase the number of authorized Class A common shares.[44] The defendant company responded by providing Class A common stockholders with a separate class vote on the proposed amendment.[45] The plaintiff's counsel subsequently demanded a fee award from the company.[46]

43 2022 WL 17959766.

44 *Id.* at *3.

45 *Id.*

46 *Id.*

In assessing whether the plaintiff had conferred a corporate benefit meriting a fee award, the court reviewed the plaintiff's assertion that the share increase amendment "would have violated Section 242(b)(2) if voted on by the Class A and Class B stockholders together."[47] This analysis "hinge[d] on" whether the company's original certificate of incorporation "authorized Class A and Class B as two classes of common stock, or as series within a single class."[48] The court interpreted the plain meaning of the relevant charter provision to provide that Class A and Class B common shares were "classes" rather than "series" of stock.[49] Thus, the ***9** court concluded that the amendment to increase the number of authorized Class A common shares "required a separate Class A vote" under Section 242(b)(2).[50] The court awarded fees to the plaintiff's counsel since the actions taken as a result of the demand letter "prevented a cloud from hanging over the Company's capital structure."[51]

47 *Id.*

48 *Id.* at *6.

49 *Id.* (explaining that "Delaware courts interpret contract terms [such as a company's certificate of incorporation] according to their plain, ordinary meaning" and that the relevant charter provision "use[d] only the word 'class' not the word 'series,' to describe the authorized common shares").
The court also noted that 8 *Del. C.* § 102(a)(4) prescribes that a corporation's certificate of incorporation set forth the number of shares of all classes and of each class and whether the shares are par or no-par. No such preemptive recitation is required for series. *Id.* at *8. Because the certificate of incorporation listed the number of shares of Class A common stock, the number of shares of Class B common stock, and the number of shares of preferred stock, and set forth the par value of the shares for each, the court read the certificate as authorizing three classes of stock in compliance with Section 102(a)(4). *Id.* at *9. Further, the section of the charter addressing preferred stock vested the board with the authority to provide for "one or more series of Preferred Stock" and to establish "the number of shares to be included in each such series" by resolution, complying with Section 102(a)(4)'s prescription for granting a board authority to fix by resolution the number and terms of series of stock. *Id.* By contrast, the charter did not include a similar provision granting the board authority to fix series of common stock. *Id.*

50 *Id.*

51 *Id.* at *11.

G. Subsequent Developments

The charter provision at issue in *Boxed* is substantially identical to Section 4.1 of the Company's 2019 Charter.[52] Under *Boxed*, the 2019 Charter could be read to have designated Class A Common Stock and Class B Common Stock as two classes of Common Stock. In that case, the Charter Amendment would have required the approval of the holders of Class A Common Stock voting as a separate class. Such approval was not obtained. The *Boxed* decision therefore cast doubts on the validity of the Charter Amendment and the shares of Class A Common Stock issued, or to be issued, in reliance on the Charter Amendment.[53]

52 *Compare* 2019 Charter §§ 4.1 & 4.2 *with Boxed*, 2022 WL 17959766, at *7.

53 Pet. ¶¶ 7-9.

****6** This conundrum is not unique to Lordstown. A significant number of SPACs had certificate of incorporation provisions that—like that addressed in *Boxed*—referred to the shares of common stock existing at the time as "Class A" and "Class B." It has been customary for SPACs to present charter amendments to increase the number of authorized shares of Class A common stock for approval by a majority of the Class A and Class B common stockholders voting as a single class. Consequently, these post-de-SPAC companies are experiencing uncertainty over their capital structures and the validity of their stock.

H. The Petition

On January 26, 2023, the Company filed a Verified Petition for Relief Pursuant to 8 *Del. C.* § 205. The Petition asks the court to validate and declare effective the Charter Amendment and the 115,120,243 shares of Class A Common Stock issued in reliance on the effectiveness of that amendment.[54]

54 *Id.* at Prayer for Relief.

The Company also filed a motion for expedited proceedings, which I granted in a February 3 letter decision and order (the "Letter Order").[55] The Letter Order required the Company to provide notice to stockholders of a hearing on the Petition.[56] On February 8, in accordance with the Letter Order, the Company filed a Form 8-K that attached the Petition, described the relief sought in the Petition, informed stockholders of the time, date, and location of the hearing on the Petition, and explained how stockholders could appear and be heard at or in advance of the hearing.[57] A hearing on the Petition was held on February 20.[58] No stockholders filed objections to the Petition or appeared at the hearing to object.[59]

55 Dkt. 3 ("Ltr. Order").

56 *Id.* at 1-2.

57 Dkt. 7; *see* Ltr. Order at 2.

58 *See* Dkt. 12.

59 On February 3, 2023, Lordstown stockholders pursuing class action breach of fiduciary duty claims in a separate action (*In re Lordstown Motors Corp. Stockholders Litigation*, Consol. C.A. No. 2021-1066-LWW, 2023 WL 2064311 (Del. Ch.)) filed a letter in this action requesting an opportunity to take expedited discovery and to appear as interested parties. Dkt. 6. On February 13, I issued a letter opinion in this action explaining that the stockholders were "welcome to appear and be heard at the hearing [on the Petition]," but I declined to order expedited discovery. *In re Lordstown Motors Corp.*, C.A. No. 2023-0083-LWW, at 2, 5, 2023 WL 1974708 (Del. Ch. Feb. 13, 2023). Those stockholders did not file objections or appear at the hearing.

Although Lordstown was the first company to seek validation after *Boxed*, it is ***10** far from the last.[60] I heard five similar Section 205 petitions—in addition to the Company's Petition—on February 20 and others are scheduled to be heard in the coming weeks. The legal analysis that follows is addressed to the specific relief requested by Lordstown, but my reasoning should prove instructive to other companies seeking the court's assistance to validate similar corporate acts.[61]

60 At the time of this decision, 36 similar petitions pursuant to Section 205 have been filed in this court.

61 Specific reasoning applicable to each petition will be addressed in bench rulings or orders in the relevant Section 205 proceeding, as appropriate.

II. LEGAL ANALYSIS

The Company asks the court to exercise its authority under 8 *Del. C.* § 205 to validate a potentially defective corporate act.[62] Enacted on June 30, 2013 and effective April 1, 2014, Sections 204 and 205 "established two statutory methods that parties can use to fix defective corporate acts that otherwise might be void."[63] "Section 204 is 'a self-help provision that allows the board of directors, by following specified procedures, to validate a defective corporate act.' "[64] "Section 205 is a judicial mechanism under which identified parties can 'petition the Delaware Court of Chancery to enter an order validating or invalidating, as the case may be, the defective act' " if self-help is unavailable or subject to challenge.[65]

62 Pet. ¶ 10; *see* 8 *Del. C.* § 204(a) (stating that "no defective corporate act or putative stock shall be void or voidable solely as a result of a failure of authorization if ratified as provided in this section or validated by the Court of Chancery in a proceeding brought under § 205 of this title").

63 *Applied Energetics, Inc. v. Farley*, 239 A.3d 409, 435 (Del. Ch. 2020); *see* 8 *Del. C.* §§ 204, 205.

64 *Applied Energetics*, 239 A.3d at 435 (quoting C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporate Acts*, 69 Bus. Law. 393, 402 (2014) [hereinafter *Restoring Equity*]).

65 *Id.* (quoting *Restoring Equity*, *supra* note 64, at 402).

A. Applicability of Section 205(a)

****7** Under 8 *Del. C.* § 205(a), this court may determine "the validity of any corporate act or transaction and any stock" and the validity and effectiveness of any defective corporate act.[66] The term "defective corporate act" is defined to include:

> any act or transaction purportedly taken by or on behalf of the corporation that is, and at the time such act or transaction was purportedly taken would have been, within the power of a corporation under [8 *Del. C.* §§ 121-27] (without regard to the failure of authorization identified in [8 *Del. C.*] § 204(b)(1)(D) ...), but is void or voidable due to a failure of authorization.[67]

A "failure of authorization" includes:

> (i) the failure to authorize or effect an act or transaction in compliance with (A) ***11** the provisions of [the DGCL], [or] (B) the certificate of incorporation or bylaws of the corporation, or (C) any plan or agreement to which the corporation is a party or the disclosure set forth in any proxy or consent solicitation statement, if and to the extent such failure would render such act or transaction void or voidable.[68]

66 8 *Del. C.* § 205(a)(4); *see generally id.* § 205(a).

67 *Id.* § 204(h)(1).

68 *Id.* § 204(h)(2).

The historical corporate acts at issue in the Petition are the sort that Section 205 was designed to address.[69] If the Company's Class A Common Stock were a separate class of capital stock, Section 242(b)(2) would have required a separate class vote of the Class A Common Stock. Arguably, a sufficient number of shares of a class could vote to approve such a charter amendment irrespective of the disclosed single class voting structure, authorizing the amendment as a practical matter.[70] In the Company's case, however, the requisite approval of a majority of the Class A Common shares was not obtained.[71] If the Charter Amendment did not validly increase the number of shares of Class A Common Stock authorized for issuance, then the Company overissued shares.[72]

69 *See In re Mullen Auto., Inc. S'holder Litig.*, C.A. No. 2022-1131-LWW, at 43 (Del. Ch. Jan. 23, 2023) (TRANSCRIPT) (observing that the "filing and effectiveness" of a charter amendment and the "validity of [s]ecurities issued in reliance on the [a]mendment's validity" fell within Section 205(a)(4)); *see also Restoring Equity*, *supra* note 64, at 422-23 (noting that the failure to obtain a vote of a majority of common stock, voting as a separate class, on a charter amendment would constitute a "failure of authorization").

70 For example, the petitioner in one matter sought to validate its amended charter and stock issued in reliance thereon using Section 205—even though the charter amendment proposal had secured the support of a majority of the Class A Common shares. Verified Pet. for Relief ¶ 16, *In re EVgo Inc.*, C.A. No. 2023-0132-LWW (Del. Ch. Feb. 3, 2023) (Dkt. 1). The petitioner asserted that the vote's validity could nonetheless be challenged "because it was not structured and disclosed upfront as a class-by-class vote as *Boxed* appears to require." *Id.* ¶ 27 (quoting *Boxed*, 2022 WL 17959766, at *10-11). But —despite the vote—questions from auditors and others about the soundness of the petitioner's capital structure post-*Boxed* threatened dire consequences. Section 205 provides the most effective and efficient path to certainty in the unique circumstances confronting the petitioner (and others like it). *See In re EVgo Inc.*, C.A. No. 2023-0132-LWW, at 13-15 (Del. Ch. Feb. 20, 2023) (TRANSCRIPT).

71 *See supra* note at 31.

72 Pet. ¶ 3.

****8** Regardless of whether these acts are technically void or voidable due to a failure of authorization, the Company has encountered sudden and pervasive uncertainty as to its capitalization. Section 205 provides the court "with a mechanism to eliminate equitably any uncertainty" where questions of validity persist.[73] The statute confers "substantial discretion on the court ***12** and, absent obvious procedural requirements, does not set a rigid outer boundary on the Court's power."[74] The Delaware General Assembly intended Section 205 to provide an "adaptable, practical framework" for correcting blemished corporate acts "without disproportionately disruptive consequences."[75]

73 *In re Genelux Corp.*, 126 A.3d 644, 666-67 (Del. Ch. Oct. 2015) *vacated in part sub nom.*, *Genelux Corp. v. Roeder*, 143 A.3d 20 (Del. 2016); *see also* 8 *Del. C.* §§ 205(a)(4) (allowing the court to "[d]etermine the validity of any corporate act"), 205(d)(5) (allowing the court to consider "[a]ny other factors or considerations the [it] deems just and equitable"); *In re Baxter Int'l Inc.*, C.A. No. 11609-CB, at 21 (Del. Ch. June 22, 2016) (TRANSCRIPT) (validating a charter amendment despite the petitioner's belief in its validity where "[l]itigable questions" and "a history of uncertainty" surrounded the validity of the original charter provision); *Mullen*, C.A. No. 2022-1131-LWW, at 40, 45 (granting relief pursuant to Section 205 where the company believed that a charter amendment was validly approved by stockholders, in part because there was "a cloud of uncertainty" about the results of the vote and the company's capitalization); 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 6.33 (4th ed. 2023-1 Supp.).

74 *In re Numoda Corp. S'holders Litig.*, 2015 WL 402265, at *7 (Del. Ch. Jan. 30, 2015), *aff'd sub nom. In re Numoda Corp.*, 2015 WL 6437252, 128 A.3d 991 (Del. 2015) (TABLE).

75 *Id.* at *8 (citing *Restoring Equity*, *supra* note 64, at 393-94, 399-401); *see also In re Numoda Corp.*, 2015 WL 6437252, at *3.

I therefore go on to consider whether the court should exercise its authority under Section 205 to validate and declare effective the Charter Amendment and the shares issued in reliance on the effectiveness of the Charter Amendment.

B. Section 205(d) Analysis

Section 205(d) sets out five factors that the court "may consider" when determining whether to validate a corporate act:

> (1) Whether the defective corporate act was originally approved or effectuated with the belief that the approval or effectuation was in compliance with the provisions of

this title, the certificate of incorporation or bylaws of the corporation;

(2) Whether the corporation and board of directors has treated the defective corporate act as a valid act or transaction and whether any person has acted in reliance on the public record that such defective corporate act was valid;

(3) Whether any person will be or was harmed by the ratification or validation of the defective corporate act, excluding any harm that would have resulted if the defective corporate act had been valid when approved or effectuated;

(4) Whether any person will be harmed by the failure to ratify or validate the defective corporate act; and

(5) Any other factors or considerations the Court deems just and equitable.[76]

The list is neither exclusive nor mandatory but meant to guide the court's exercise of its discretion.[77]

76 8 *Del. C.* § 205(d).

77 *See* *Genelux*, 126 A.3d at 666 (describing the factors as "non-exclusive [and] non-mandatory"); *Mullen*, C.A. No. 2022-1131-LWW, at 43 (noting that the Section 205(d) factors are "meant to guide the trial court").

****9** Each factor supports granting the relief sought in the Petition.

1. Good Faith Belief in Validity

First, I have no reason to doubt that the Company and Board approved and effectuated the Charter Amendment with the good faith belief that the amendment complied with Delaware law and the 2019 Charter.[78] Upon receiving the Demand Letter, the Board undertook a review of the matters raised with the assistance of outside counsel uninvolved in the transactions in question.[79] The Board, relying on that advice—including the Legal Opinion—determined that a separate class vote of the Class A Common Stock was not required to approve the Charter Amendment.[80] No litigation against the Company has questioned the validity of the Charter Amendment.[81] It was not until the *Boxed* decision that the Company perceived a risk ***13** that the Charter Amendment could be viewed as potentially defective.[82]

78 Pet. ¶ 19; *see Mullen*, C.A. No. 2022-1131-LWW, at 43-44.

79 Pet. ¶ 19; Apr. 1, 2022 Form 8-K.

80 Pet. ¶ 19; Apr. 1, 2022 Form 8-K.

81 Pet. ¶ 19.

82 *Id.*

2. Treatment of the Act as Valid

Second, the record demonstrates that the Company and Board have consistently treated these corporate acts as valid and effective.[83] Since effectuating the Charter Amendment, the Company has issued 115,120,243 shares in excess of the 100,000,000 shares authorized under the 2019 Charter.[84] The Company has disclosed theses issuances in various public filings.[85] For example, a July 7, 2022 proxy statement disclosed that the Company had issued 205,871,561 shares of Class A Common Stock and had reserved over 43,000,000 shares for further issuance.[86] And an August 18, 2022 Form 8-K announced that stockholders had approved an amendment to the Company's 2020 Charter to increase the number of authorized shares of Class A Common Stock from 300,000,000 to 450,000,000.[87]

83 *Id.* ¶ 15; *see Mullen*, C.A. No. 2022-1131-LWW, at 45.

84 Pet. ¶ 15.

85 *Id.*

86 Lordstown Motors Corp., Proxy Statement (Schedule 14A Information) (July 7, 2022) ("2022 Proxy"); Pet. ¶ 15. This proxy statement solicited stockholder approval for an amendment to increase the number of authorized shares of Class A Common Stock from 300,000,000 to 450,000,000. 2022 Proxy at 4.

87 This amendment was approved by a majority of the issued and outstanding shares of Class A Common Stock at an August 17, 2022 special meeting. At the time, there were no outstanding shares of Class B Common stock. Lordstown Motors Corp., Current Report (Form 8-K) (Aug. 18, 2022); Pet. ¶ 15.

Third parties have also acted in reliance on the validity of the Charter Amendment since it was adopted more than two years ago. The participants in the de-SPAC merger and related transactions, such as the PIPE, relied upon the terms of the 2020 Charter because it set forth the terms of the securities they received as a result of the business combination.[88] The Company's employees and directors, who have been compensated with equity grants issued under the 2020 Charter, assumed that their grants would be honored.[89] Purchasers of Class A Common Stock or other securities convertible or exercisable for Class A Common Stock did so with the expectation that they would receive the securities they bargained and paid for.

88 Pet. ¶ 3.

89 *Id.* ¶ 18; 2022 Proxy at 5 (discussing the Company's equity incentive plan).

3. Harm From Validation

****10** Third, I cannot conceive of any legitimate harm that would result from validating the Charter Amendment.[90] Other than the stockholders who sent the Demand Letter, Company stockholders and market participants appear to have expected that the 2020 Charter—and stock issued in reliance thereon—was valid.[91] Validation ***14** would give effect to the de-SPAC merger on the terms understood and accepted by its participants in 2020. It would also restore settled expectations of the Company and its stockholders with respect to the Company's certificate of incorporation and capitalization. It is unsurprising, then, that no stockholder objected to the Petition.

90 Pet. ¶ 29. *Boxed* highlighted the importance of achieving statutory compliance and vindicating the stockholder franchise. 2022 WL 17959766, at *10-11. That is not to say, however, that validation will itself impair such important interests. *See Mullen*, C.A. No. 2022-1131-LWW, at 44 (describing this factor as "neutral" where the "actions" leading to the potential invalidity arguably impaired the stockholder franchise).

91 It bears noting that the counsel who sent the Demand Letter on behalf of purported Lordstown stockholders (and pursued a fee petition in *Boxed*) has sought substantial fees for making similar demands against other companies. *See supra* notes 41-42 and accompanying text; *Almond ex rel. Almond Fam. 2001 Tr. v. Glenhill Advisors LLC*, 2018 WL 3954733, at *21 (Del. Ch. Aug. 17, 2018), *aff'd*, 224 A.3d 200 (Del. 2019) (TABLE).

4. Harm Without Validation

Fourth, absent validation, a number of parties would face widespread harm.[92] The potential invalidity of shares of Common Stock issued, or to be issued, in reliance on the Charter Amendment casts doubt on the Company's capital structure.[93] This uncertainty could cause market disruption, impair the Company's commercial relationships, chill strategic opportunities, and jeopardize employee relationships.

92 Pet. ¶¶ 16-18; *see Mullen*, C.A. No. 2022-1131-LWW, at 45.

93 Pet. ¶ 17.

Without validation, past and future results of stockholder votes would be called into question.[94] For example, the Company would not know how many shares it has outstanding and able to vote at its upcoming annual meeting.[95] The Company may not be able to issue public filings, especially if its auditors raise concerns about the effect of uncertainties on the Company's financial statements. The Company could also risk delisting from the NASDAQ.[96]

94 *Id.*

95 *Id.*

96 *Id.*

If the Petition is denied, the Company may be unable to obtain the substantial capital needed to achieve production targets, develop additional vehicles, and continue operations.[97] The Company has equity financing transactions pending with a key business partner and, as a condition to closing, will need to certify the number of shares outstanding and authorized for issuance—not to mention the validity of the shares to be sold in the financings.[98] The Company also recently entered into an at-the-market financing arrangement, which closing is subject to the accuracy of the Company's representations on its capitalization. Without these financing transactions, the Company's liquidity position, operations, and future prospects will suffer.[99]

97 *Id.* ¶ 18.

98 *Id.*

99 *Id.*

5. Other Factors

Additional considerations indicate that validation would be "just and equitable."[100] Relief under Section 205 is the most efficient and conclusive—and perhaps the only—recourse available to the Company. Validation is consistent with Section 205's purpose to provide a means to remedy "defective corporate acts that would otherwise be considered incurable."[101]

100 *See* 8 *Del. C.* § 205(d)(5).

101 *See Cirillo Fam. Tr. v. Moezinia*, 2018 WL 3388398, at *8-9 (Del. Ch. July 11, 2018) (explaining that the purpose of Section 205 "fundamentally concerns a company having taken an act with the intent and belief that it is valid and later petitioning the Court to correct a technical defect and thereby remedy incidental harm"), *aff'd*, 220 A.3d 912 (Del. 2019) (TABLE).

****11** Ratification of the Charter Amendment under Section 204 is not a practicable alternative because it is not clear which ***15** stockholders would be entitled to vote on a ratification proposal. In the years since the vote on the Charter Amendment, the Company's Class A Common Stock has been actively traded on the NASDAQ. The Company lacks a practical way to effectively trace the shares that were issued before the Charter Amendment became effective. Even the 100,000,000 shares of Class A Common Stock authorized under the 2019 Charter could not be fully identified because many were issued simultaneously with shares issued pursuant to the Charter Amendment.[102]

102 Pet. ¶ 20.

* * *

For these reasons, I conclude that the corporate acts at issue should be validated pursuant to Section 205(a)(4).[103] The Company filed and effected the Charter Amendment with the good faith belief that it was adopted in compliance with Delaware law and the 2019 Charter. The Company and third parties—including market participants, financing sources, business partners, stockholders, employees, and directors—have treated the Charter Amendment as valid and acted in reliance on the Charter Amendment's validity. The Company issued 115,120,243 shares of Class A Common Stock in reliance on the effectiveness of the Charter Amendment and has described those shares as issued and outstanding in its SEC filings, financial statements, and third-party agreements. Although it is not apparent that any persons would be harmed by validating the Charter Amendment, the Company, its stockholders, and other parties face substantial damage absent relief.

103 Section 205(a)(3) also appears applicable. *See* 8 *Del. C.* § 205(a)(3) (stating that the court may "[d]etermine the validity and effectiveness of any defective corporate act not ratified or not ratified effectively pursuant to § 204"); *Applied Energetics*, 239 A.3d 409 at 436 & n.15 (discussing how a corporate action could fall within both Sections 205(a)(3) and 205(a)(4)).

III. CONCLUSION

The relief sought in the Petition is granted. The Charter Amendment, including the filing and effectiveness thereof, is hereby validated and declared effective pursuant to 8 *Del. C.* § 205. The 115,120,243 shares of Class A Common Stock issued in reliance on the effectiveness of the Charter Amendment are hereby validated and declared effective pursuant to 8 *Del. C.* § 205. IT IS SO ORDERED.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

IN RE MINDBODY, INC., STOCKHOLDER LITIGATION

CONSOLIDATED C.A. No. 2019-0442-KSJM
|
Submitted: July 28, 2022
|
Dated: March 15, 2023

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POST-TRIAL MEMORANDUM OPINION

McCORMICK, C.

***1** This case arises from the 2019 acquisition of Mindbody, Inc. ("Mindbody" or the "Company") by Vista Equity Partners Management, LLC ("Vista") for $36.50 per share (the "Merger"). The story begins in 2018, when Mindbody's visionary founder, Richard Stollmeyer, had grown frustrated with his inability to monetize his holdings of Mindbody stock, fearful of the volatility and fickleness of the public markets, and uncertain about his ability to lead Mindbody through its next stage of its growth. A sale of the Company would solve his problems, and Stollmeyer decided it was a good time to sell.

Regrettably, Stollmeyer set the sale process in motion largely without the involvement or knowledge of the Company's board of directors (the "Board"). In August 2018, Stollmeyer met with a banker that had close relationships with multiple private equity firms. The banker immediately introduced Stollmeyer to one of those firms, Vista. Stollmeyer met with Vista shortly after and told Vista that he was looking for a "good home" for his company and its management team. He later accepted Vista's invitation to attend the "CXO Summit" for CEOs of ex-public companies (hence "CXO") that Vista had acquired. At the summit, Vista made presentations advertising the immense wealth that CXOs had achieved by selling to and working for Vista. During the summit, Stollmeyer texted another Mindbody executive about his "mind blowing" experience and that he "loved" Vista. Stollmeyer quickly came to believe that selling to Vista gave him the unique opportunity to both gain liquidity and remain as CEO in pursuit of post-acquisition equity-based upside.

After the Vista conference, Stollmeyer's focus seemed to shift. He no longer was interested in just any sale of the Company. He wanted to sell to Vista. And Stollmeyer let Vista know what he wanted. Vista responded by expressing interest in buying Mindbody.

Vista's *modus operandi* is speed. Vista leverages its ability to move quickly from an expression of interest, through confirmatory diligence, to a firm offer, thereby truncating the process and reducing interloper risk. Vista calls it "sprinting," and for Vista, that's good business. For a target company seeking to maximize stockholder value, however, a truncated timeline can present challenges. It takes time to develop alternatives to promote competition and extract the best price. By sprinting to the finish line, Vista seeks to prevent a target company from doing that.

Shortly after the CXO Summit and before Vista sent its expression of interest, the banker who introduced Stollmeyer to Vista warned him about the firm's need for speed and the risks of rushing a sale process. In response to this advice, Stollmeyer did not adequately involve the Board or erect, much less adhere, to speed bumps to ensure a value-maximizing process. Rather, Vista-smitten Stollmeyer effectively greased the wheels for Vista by stalling the Board process.

Vista's expression of interest came in on a Monday. Stollmeyer sent an email to his management team on a Wednesday telling them not to fear for their jobs and to let Stollmeyer "socialize" the topic with the Board. On Thursday, Stollmeyer spoke for an hour with Eric Liaw, the director representative of Institutional Venture Partners XIII, L.P. ("IVP"). IVP was Mindbody's largest stockholder, and for reasons of its own, IVP wanted a near-term exit. Stollmeyer checked Vista's references on Friday. Meanwhile, Vista accelerated to deal velocity, contracted for a detailed market study, and put itself in a position to make a firm offer long before other bidders could react.

***2** It was not until the following week that Stollmeyer started dribbling out messages about Vista's expression of interest to the other Board members. Unaware of the full extent of Stollmeyer and Vista's courtship, the Board did not form a transaction committee to consider running a sale process until two weeks later. Stollmeyer asked Liaw to chair the committee, and when Liaw began playing a leadership role, the other directors accepted his leadership without discussing or voting on who would serve as chair. Liaw lobbied for the committee to hire the same banker who had already introduced Stollmeyer to Vista, which it did.

To its credit, the transaction committee established guidelines to cabin management's communications with potential bidders, but Stollmeyer ignored them and tipped Vista that a formal sale process was beginning. And the banker tipped Vista as to Stollmeyer's target price. By the time the committee had authorized its banker to contact financial bidders, Vista was poised to pounce.

In response to the banker's outreach, Vista made a firm offer. The Board asked other bidders to respond promptly with best-and-final offers of their own, but they were still in the early stages of their work and could not respond within that timeframe. The committee countered, and Vista raised its final bid to $1 per share below where its deal team thought the deal price would land. Rather than making another counter, the Board approved it.

The plaintiffs are entities affiliated with Luxor Capital Partners, L.P. (collectively "Luxor" or "Plaintiffs").[1] Those entities own the second largest block of Mindbody stock. They filed this action on behalf of a class of Mindbody's stockholders.[2] They claim that Stollmeyer and the other Board members breached their fiduciary obligations in connection with the Merger and that Vista aided and abetted those breaches. By the time of trial, all of the defendants except Stollmeyer and Vista had either settled or been dismissed. Plaintiffs tried their claims against Stollmeyer and Vista (together, "Defendants").

1 Plaintiffs are Luxor Capital Partners, L.P., Luxor Partners Offshore Master Fund, LP, Luxor Wavefront, LP, and Lugard Road Capital Master Fund, LP.

2 Luxor also petitioned for appraisal and litigated the appraisal claim in parallel with the breach of fiduciary duty claims. This decision does not resolve Luxor's claim for appraisal.

Plaintiffs advance two main theories of breach. The first is that Stollmeyer breached his fiduciary duties by tilting the process in favor of Vista. The second is that Stollmeyer committed disclosure violations by failing to disclose facts about the sale process and omitting information concerning Mindbody's actual revenue results.

The facts of this case offer multiple analytical frameworks to choose from. The parties agree that one possible framework is enhanced scrutiny under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc*.[3] Under that standard of review, Stollmeyer loses. He did not strive in good faith to pursue the best transaction reasonably available. He instead pursued a fast sale to Vista to further his personal interests. Because he tilted the sale process in Vista's favor for personal reasons, the process did not achieve a result that falls within the range of reasonableness.

3 506 A.2d 173 (Del. 1986).

As a remedy, Plaintiffs seek the lost transaction price that Vista would have paid if the process had not been tilted in its favor. Plaintiffs peg that figure at $40 per share. This decision accepts Plaintiffs' theory of liability but rejects the evidentiary basis for a $40 per share figure. The record demonstrates that Vista would have paid $37.50 per share. Stollmeyer is therefore liable for $1 per share.

***3** In contrast to Stollmeyer, Vista prevails on the sale-process claim, but only because of a procedural foot fault. Plaintiffs failed to assert a claim against Vista for aiding and abetting in the sale-process breaches until trial. Plaintiffs tried to fix their error through a motion to amend the pleadings to conform to the evidence presented at the close of trial, but to grant that motion would be prejudicial to Vista.

On the disclosure claim, however, Plaintiffs prevail against both Stollmeyer and Vista. Plaintiffs proved that Stollmeyer breached his duty of disclosure. He failed to disclose the full extent of his involvement with Vista, which was a material omission. Plaintiffs proved that Vista aided and abetted Stollmeyer's breach by failing to correct the proxy materials to include a full and fair description of its own interactions with Stollmeyer. Vista was contractually obligated to review the proxy materials and inform the Company if there were material omissions from the proxy materials. The record shows that Vista personnel who interacted with Stollmeyer reviewed the proxy materials. Vista knew about its own interactions, and it was evident that Stollmeyer was not disclosing them. Vista knowingly participated in the breach by not speaking up.

As a remedy for the disclosure claims, Plaintiffs seek compensatory damages calculated using a quasi-appraisal methodology. That remedy, however, requires proof of reliance and causation, which Plaintiffs made no effort to demonstrate. Plaintiffs, therefore, are only entitled to nominal damages as a remedy.

To set nominal damages, this decision turns to a venerated authority—*Weinberger v. UOP, Inc.*[4] There, Chancellor Brown encountered similar difficulty in compensating the minority stockholders for an obvious wrong when there was no mathematical basis for deriving a damages figure. He reasoned that "equity will not suffer a wrong without a remedy."[5] The facts of that case demonstrated that the acquirer would have paid at least $1 more for the target, and at that price, the transaction still would be profitable for the acquirer. Engaging in a classic exercise of equitable discretion, he awarded nominal damages in the amount of $1 per share.

4 1985 WL 11546 (Del. Ch. Jan. 30, 1985), *aff'd sub nom. Weinberger v. UOP, Inc.*, 497 A.2d 792 (Del. 1985).

5 *Id.* at *9.

Similar case-specific factors warrant the same relief here. The record demonstrates that Vista had authority to bid up to $40 per share, but that figure was a stretch. Internal Vista communications show that Vista was prepared to increase its bid to $37.50 per share, and the most senior person on the deal team predicted that the bidding would end at that price. Vista's modeling demonstrates that a deal at that price remained profitable for Vista. As in *Weinberger*, the court exercises its equitable discretion to award damages of $1 per share for the disclosure violations. Stollmeyer and Vista are jointly and severally liable for the resulting amount.

Plaintiffs are only entitled to one recovery. It makes no difference whether Stollmeyer pays $1 per share in damages for the sale-process claims, or whether Stollmeyer and Vista pay $1 per share in damages for the disclosure claims.

Plaintiffs are awarded pre- and post-judgment interest at the legal rate, compounded quarterly, with the rate varying with changes in the reference rate. Plaintiffs are awarded costs as the prevailing party.

I. FACTUAL BACKGROUND

***4** The record comprises 1,865 joint trial exhibits, trial testimony from eighteen fact and six expert witnesses, deposition testimony from twenty-four fact witnesses, and 123 stipulations of fact in the pre-trial order.[6] These are the facts as the court finds them after trial.

6 C.A. No. 2019-0442-KSJM, Docket ("Dkt.") 492, Joint Schedule of Evid.; Dkt. 445, Pre-Trial Stipulation and Order ("PTO"). This decision cites to trial exhibits (by "JX" number); the trial transcript, Dkts. 461–68 (by "Trial Tr. at" page, line, and witness); the post-trial oral argument, Dkt. 493 (by "Post-Trial Oral Arg. Tr. at" page and line); and the deposition transcripts of Dominic Calvani, Christopher Cernich (expert), Jeffrey Chang, Court Cunningham, Jamie d'Almeida (expert), Daniel Fischel (expert), Doug Friedman, Gail Goodman, David Handler, Craig Heinle, Cipora Herman, Michael Kass, Derek Klomhaus, Christian Leone, Eric Liaw, Kimberly Lytikainen, Michael Mansbach, Kevin Murphy (expert), Drew Pascarella (expert), Monti Saroya, Brian Sheth, Graham Smith, Nicolas Stahl, Richard Stollmeyer, Vista Equity Partners LLC (30(b)(6)), and Brett White (by the deponent's last name and "Dep. Tr. at" page and line).

A. Setting The Stage

Mindbody founder Stollmeyer is the key protagonist in this drama. Stollmeyer is an impressive person. He started his business career as a child helping in his parents' retail lighting fixture store.[7] He attended the United States Naval Academy and served as a nuclear submarine officer for six years after graduation.[8] He next landed a position as a program manager at Vandenberg Air Force Base, which took him to California's Central Coast.[9]

[7] Trial Tr. at 336:22–337:9 (Stollmeyer).

[8] *Id.* at 337:22–338:16 (Stollmeyer).

[9] *Id.* at 338:17–339:3 (Stollmeyer).

In the mid-1990s, a friend showed Stollmeyer software he had written to support owners of yoga, Pilates, and spinning studios.[10] This software inspired Stollmeyer to launch Mindbody with his friend.[11] By fall 2000, Stollmeyer "leapt off a cliff," in his words, by quitting his engineering job and taking out a second mortgage to start Mindbody in his garage in San Luis Obispo.[12]

[10] *Id.* at 339:13–17 (Stollmeyer).

[11] *Id.* at 339:7–340:15 (Stollmeyer).

[12] *Id.* at 340:2–18 (Stollmeyer).

From these humble beginnings, Stollmeyer grew Mindbody into a software-as-a-service ("SaaS") platform that serves the fitness, wellness, and beauty industry. Stollmeyer took Mindbody public in 2015.[13]

[13] PTO ¶ 89.

1. Stollmeyer Is Ready To Sell.

By 2018, Stollmeyer had grown Mindbody to over $1 billion market capitalization, yet Stollmeyer had never experienced a big liquidity event.[14] And he had made substantial financial commitments in the meantime. Stollmeyer had (i) invested nearly $1 million into his wife's wellness company, (ii) invested at least $300,000 into "Stollmeyer Technologies, LLC," (iii) loaned his brothers and his former business partner money for their own real estate purchases, and (iv) pledged $3 million to a local college, of which $2.4 million was unpaid.[15]

[14] *See* JX-1441 at 10 ("[F]or the entrepreneur or particularly for the CEO, [an IPO] is not a liquidity event.").

[15] JX-1142 at 2; Dkt. 474 ("Defs.' Demonstrative 12") at 1–2.

Stollmeyer described his unhappiness with his pre-Merger financial situation in a post-Merger interview for Alejandro Cremades's "dealmakers" podcast.[16] During the interview, Stollmeyer described how "98% of [his] net worth" was "locked inside" Mindbody's "extremely volatile" stock, while Stollmeyer could only sell "tiny bits" of his stake in the public market under his 10b5-1 plan.[17] Stollmeyer described those sales as "kind of like sucking through a very small straw":

> ***5** [F]or the entrepreneur or particularly for the CEO, [an IPO] is not a liquidity event. Your capital is locked inside the business, and you can sell tiny bits of it, called the 10b5-1 plan where you decide essentially a year in advance, a couple of quarters in advance, you come up with a plan that says sell off a little bit on these predefined dates. It doesn't matter if the stock got hammered, it doesn't matter if the stock's high. So, it's kind of like sucking through a very small straw. For me, I had been at it for a long time....
>
> We were public in 2015, so I'd been at it for 15 years. We would have public investors. I would have them challenge me that I was selling my own stock, and he was like, "Don't you believe in your own company, Rick?" 98% of my net worth is in the stock of my company, which is extremely volatile. I'm in my 50s now, and I've got kids in college. What kind of question is that?[18]

[16] JX-1441.

[17] *Id.* at 10.

[18] *Id.*

In February 2018, Stollmeyer asked his financial advisor to "estimate [his] cash position" in light of his impending expenses.[19] Stollmeyer stated that the timing and amount of his 10b5-1 sales were "top of mind" because of "greater than expected H1 cash outlays[.]"[20] To meet his commitments, Stollmeyer had to "dig[ ] into [his] LOC [line of credit]."[21]

[19] JX-145 at 1.

[20] *Id.*

[21] *Id.*

Stollmeyer made similar statements in his book on building a wellness business, which was published in 2021 while this litigation was pending.[22] In a chapter about early financing, he described his efforts to obtain money for Mindbody from family and friends, and then referenced his own experience "contributing a significant portion of the cash needed to help my nephew, wife, and son start their own businesses."[23] Stollmeyer also explained that completing the $1.9 billion Merger "doesn't make me a billionaire."[24] He, nevertheless, took "great pleasure" in knowing that "after many years of living at or near the precipice of financial ruin, my family and I don't have to worry about money anymore."[25]

22 JX-1647 (titled *Building a Wellness Business That Lasts*).

23 *Id.* at 183.

24 *Id.* at 181.

25 *Id.*

At trial, Stollmeyer denied that he needed liquidity in early 2018.[26] To bolster his testimony, Stollmeyer introduced testimony from his financial advisor and from an expert on executive compensation.[27] The financial advisor claimed that Stollmeyer had never expressed concerns about liquidity pressures that would require him to sell off his entire Mindbody stake.[28] The executive compensation expert reviewed Stollmeyer's financial decisions during the five years preceding the Merger and opined that Stollmeyer did not seem to be in need of liquidity.[29] He conceded that Stollmeyer faced significant cash demands in the period leading up to the Merger.[30] Both the expert and Stollmeyer's financial advisor acknowledged that Stollmeyer frequently relied on a line of credit to pay expenses.[31]

26 Trial Tr. at 486:7–20 (Stollmeyer).

27 *Id.* at 240:10–241:5 (Calvani); *id.* at 1813:16–1814:1 (Murphy).

28 *Id.* at 238:5–24 (Calvani).

29 *Id.* at 1821:18–1823:17 (Murphy).

30 *Id.* at 1843:12–1849:19 (Murphy).

31 *Id.* at 226:16–227:4 (Calvani); *id.* at 1813:3–5 (Murphy).

Ultimately, Stollmeyer's own pre-litigation and intra-litigation statements reflecting his personal and financial circumstances are far more persuasive than the trial testimony of Stollmeyer or the other witnesses. Stollmeyer said it himself: He was tired. He was tired of "sucking through a very small straw." He was ready to sell.

***6** And 2018 seemed the time to do it. One reason was that Stollmeyer held shares of super-voting Class B stock that would automatically convert to shares of common stock in October 2021.[32] As of 2018, those shares enabled Stollmeyer to control 19.8% of Mindbody's fully diluted voting power, giving him the second largest block of votes.[33] After October 2021, those same shares would carry less than 4% of the Company's fully diluted voting power.[34] Tactically, it was best to for Stollmeyer to move before the sunset loomed, so that another party seeking to neutralize his influence did not try to wait him out.

32 PTO ¶ 70.

33 *Id.*

34 *Id.* ¶¶ 70, 77; JX-1138 at 90.

Another reason, discussed more below, was that Mindbody's largest stockholder—IVP—faced the same sunset provision and was looking to exit.[35] If that happened, then the Board seat held by Liaw would likely transition to a representative from Luxor. Stollmeyer had spoken with both firms. He knew that IVP wanted a near-term sale, while Luxor did not.[36] It behooved Stollmeyer to strike while his major ally also held a position of power.

35 PTO ¶¶ 70, 77.

36 Trial Tr. at 33:1–34:7 (Friedman).

Additionally, Stollmeyer was exhausted by the struggles that Mindbody faced during 2018. The Company made two strategic acquisitions at the beginning of the year: FitMetrix, a company that integrated workout equipment and wearable fitness trackers with performance feedback technology, and Booker, a cloud-based business management company for salons and spas.[37] Mindbody also shifted its sales strategy to focus on high-value customers.[38] In addition to integrating the acquisitions and reorienting the sales strategy, Stollmeyer was simultaneously serving as the CEO and CTO of Mindbody after the Board terminated the CTO in April.[39] During trial, Stollmeyer testified at length about the difficulties he faced.[40] He stated that by late 2018, he was "physically and emotionally exhausted[.]"[41] Understandably, he wanted out.

37 PTO ¶ 90.

38 JX-293 at 105; Trial Tr. at 51:1–17 (Friedman); *id.* at 1991:10–20 (White).

39 Trial Tr. at 359:21–360:14 (Stollmeyer).

40 *Id.* at 669:18–22 (Stollmeyer); *see also id.* at 1991:10–1992:17 (White).

41 *Id.* at 364:12–22 (Stollmeyer).

2. Mindbody's Largest Stockholder Is Ready To Sell.

In 2018, the Company's largest stockholder was IVP, a venture capital investor that had held Mindbody super-voting Class B stock shares since the Company's IPO in 2015.[42] Through a combination of super-voting Class B stock and regular Class A stock, IVP held shares carrying approximately 24.6% of the Company's voting power.[43] Together, IVP and Stollmeyer controlled over 44% of the Company's voting power.[44] After October 2021, however, the Class B stock would automatically convert into Class A, and IVP's share of the Company's fully diluted voting power would fall to 6%.[45]

42 JX-1138 at 90 (showing IVP's holdings in Mindbody Class A and Class B shares); PTO ¶ 77; Trial Tr. at 1401:2–13 (Liaw).

43 PTO ¶ 77.

44 *Id.* ¶¶ 70, 77.

45 JX-1138.

Liaw served as IVP's representative on the Board. No other institutional investors enjoyed representation on the Board.[46]

46 Trial Tr. at 1394:9–13 (Liaw).

Liaw was one of IVP's eight general partners and thus owed fiduciary duties to IVP. That meant that if IVP wanted a near-term sale, then Liaw had a fiduciary duty to IVP and its investors to pursue a near-term sale. But if a near-term sale was not in the best interests of the Company, then Liaw also had a fiduciary duty as a director of the Company not to pursue a near-term sale. Liaw's position was rife with the potential for conflict.

***7** In March 2018, Liaw emailed Stollmeyer that IVP "may be contemplating a disposition" of its Mindbody stock.[47] IVP had internal reasons to exit. By August 2018, IVP's position in Mindbody reflected an unrealized gain of $68 million.[48] During a meeting on August 13, IVP's partners "agreed to target at least $200M in additional liquidity by year end."[49] Mindbody was listed as one of five positions that would contribute to meeting this goal, and Liaw was directed to "evaluate/recommend evaluate [*sic*] distributing 50% of position by 12/15[.]"[50]

47 JX-153.

48 JX-224 at 1; Trial Tr. at 1499:4–22 (Liaw).

49 JX-236 at 2.

50 *Id.*

3. The Other Mindbody Directors

In addition to Stollmeyer and Liaw, there were six other members of the Board: Katherine Blair Christie, Court Cunningham, Gail Goodman, Cipora Herman, Adam Miller, and Graham Smith.[51]

51 PTO ¶ 79.

Christie had served in multiple C-suite positions, including as Chief Development Officer at Landit Inc. and Chief Marketing Officer at Cisco Systems, Inc.[52] She had also been a director of museums, institutes, and societies.[53] She had not served on the board of any other for-profit company and had no experience with a sale process.[54]

52 JX-1483 at 1–2.

53 *Id.* at 3.

54 *Id.* at 1.

Cunningham had been an executive officer of several private companies, including as CEO of Yodle Inc.[55] Cunningham participated in the sales process for Yodle in 2016 to Web.com.[56] Cunningham had also served two other private company boards.[57] Cunningham had not served on any public company board aside from Mindbody and had no experience selling a public company.[58]

55 JX-1482 at 1; Trial Tr. at 875:16–876:9 (Cunningham).

56 Trial Tr. at 875:16–876:9 (Cunningham).

57 JX-1482 at 1.

58 *Id.*

Herman had been the Vice President of Finance during Facebook's early years and stayed with that company through its IPO.[59] Herman then served as the CFO for the San Francisco 49ers and the CFO for the Los Angeles 2028 Olympic Games Committee.[60] Herman had not served on the board of any public company before Mindbody and had no experience selling a public company.[61]

59 Trial Tr. at 1870:14–1872:19 (Herman).

60 *Id.* at 1870:14–1872:19 (Herman).

61 *Id.* at 1874:12–14 (Herman).

Miller founded and served as CEO, President, and director of Cornerstone OnDemand, Inc., which he took public.[62] He had no experience selling a public company.[63]

62 JX-168 at 15.

63 *Id.*

Smith had been CFO of large software companies, including Salesforce, Advent Software, and Vitria.[64] He had also served on the boards of several public companies that specialized in software.[65] He had no experience selling a public company.

64 Trial Tr. at 2155:5–9 (Smith).

65 *Id.* at 2154:7–2155:3 (Smith).

Goodman was the lead independent director of Mindbody at the time of the sale process and the only director with experience selling a public company.[66] She had served as the president and CEO of a publicly traded online marketing and SaaS company for over 15 years, and she participated in the sale of that company to Endurance International for $1 billion.[67]

66 *Id.* at 1285:4–18 (Goodman).

67 *Id.* at 1250:23–1252:12 (Goodman).

4. Mindbody's Prospects

The directors testified that when Mindbody embarked on its sale process, they viewed its prospects as highly uncertain for many reasons.

For starters, the integration of FitMetrix and Booker had been rocky. Herman recalled participating in a Q2 2018 guide-down based on a reduction in sales productivity "during this integration period."[68] The Company's CFO Brett White testified that the investments were underperforming.[69] In contemporaneous statements to the Board and the Company's investors, however, Stollmeyer expressed optimism about these investments. At Mindbody's annual analyst conference in September 2018, he declared in his presentation slides that "The Integration is Working."[70] Goodman also believed the investments would pay off.[71]

68 *Id.* at 1880:19–1881:13 (Herman).

69 *Id.* at 2041:23–2042:12 (White).

70 JX-293 at 7.

71 Trial Tr. at 1366:20–22 (Goodman).

***8** The directors also cited the shift toward high-value customers. Cunningham testified that the optimism about high-value subscribers "ended up not panning out over the subsequent year [2018]."[72] Liaw and White testified that Mindbody's high-value subscribers had declined in 2018 for two quarters in a row.[73] Again, the contemporaneous documents paint a different picture, with White's slides at the same conference proclaiming "Our Customer Base is Healthier than Ever"[74] and "Subscriber Base Shifting To Higher Priced Tiers."[75]

72 *Id.* at 882:3–883:3 (Cunningham).

73 *Id.* at 1461:20–1462:7 (Liaw); *id.* at 2090:1–8 (White).

74 JX-293 at 104.

75 *Id.* at 105.

Mindbody's results for Q3 2018 were mixed. The highlights were an increase of 19% in year-over-year average revenue per subscriber and the first organic increase in net new subscribers in two years.[76] The lowlights included a revenue miss of $2.4 million against Mindbody's internal plan and $0.2 million against the analyst consensus.[77]

76 JX-414 at 3.

77 *Id.* at 3.

The consensus view was that if Mindbody could weather a year or so of challenges, then the future was bright. Stollmeyer estimated in October 2018 that "[f]ull realization of the synergies" from the Booker and FitMetrix acquisitions "will take 1–2 years."[78] At trial, he confirmed that expectation.[79] By October 2018, Goodman "absolutely believed the investments would pay off" and saw no need for cash infusions.[80]

78 JX-476 at 2.

79 Trial Tr. at 610:17–611:10 (Stollmeyer).

80 *Id.* at 1366:20–1367:1 (Goodman).

At trial, Stollmeyer and Vista sought to show that because of the risks that the Company faced, the Board viewed a sale as the best option for stockholders, and there is support for that conclusion in the record.[81] Yet, crediting that the Board reached that conclusion does not require crediting that the Merger was the best transaction reasonably available, and that was because of how the sale process played out. The Board comprised many talented individuals, but only Goodman had any experience selling a public company. The Company's outside counsel described the Board as "super green" and recommended thorough training regarding what a process would entail.[82]

81 *See id.* at 1347:19–1348:5 (Goodman) (testifying that she "thought this was an excellent price that would derisk the future for our shareholders"); *id.* at 2188:21–2189:17 (Smith) (testifying that "the premium that the company was getting in a cash transaction was definitely worth accepting versus the uncertainty of potentially several years of uncertain execution").

82 JX-577.

At the time the Board embarked on a sale process, the Board was not aware of the conflicts afoot. Although Defendants proved that the Board knew that Stollmeyer wanted to resign as CEO within two to three years,[83] the Board did not know that he wanted to sell the Company sooner or that IVP was in lockstep with Stollmeyer toward this goal. Stollmeyer did not disclose his need for liquidity to any Mindbody director at any time during the sale process. Neither Stollmeyer nor Liaw disclosed IVP's desire to exit. And Stollmeyer concealed many of his interactions with Vista from the Board.

83 Goodman testified that Stollmeyer approached her in August 2018 to suggest that the Board start looking for a successor because the next year would be his last year, that "he openly admitted that he was getting tired," and that she informed the other directors of Stollmeyer's intentions. Trial Tr. at 1265:5–1266:8 (Goodman). Herman and Cunningham testified that the Board discussed potential CEO replacements at their September 2018 dinner. *Id.* at 1890:15–1891:16 (Herman); *id.* at 884:21–885:8 (Cunningham).

B. Events Before The Board Process

***9** On August 7, 2018, Stollmeyer met with Jeff Chang, an investment banker with Qatalyst Partners.[84] Stollmeyer and Chang had been meeting from time to time over the course of five years.[85] Chang testified that before August 2018, Stollmeyer "had never been open-minded to having dialogue" with private equity.[86] During the August 7 meeting, however, something was different, and Stollmeyer was "more open to having a dialogue."[87]

84 JX-231 at 1.

85 Trial Tr. at 255:14–257:1 (Chang).

86 *Id.* at 255:20–259:1 (Chang).

87 *Id.* at 260:18–24 (Chang).

Stollmeyer had kept in contact with a couple of private equity shops.[88] Before Mindbody's IPO, Vista and Thoma Bravo had each approached Mindbody about an acquisition.[89] Stollmeyer thought they would be good places to start. Chang had a good relationship with Vista. He had sold about four or five companies to them and advised Vista or its affiliates.[90] Monti Saroya, a Vista principal, had been involved in transactions where Chang represented the seller.

88 *Id.* at 362:23–363:13 (Stollmeyer) (regarding communications throughout 2014–2017); *id.* at 365:11–367:16 (Stollmeyer) (regarding communications with Thoma Bravo and H & F in 2016 and 2018); JX-618 (reflecting communications with Thoma Bravo); JX-243 (reflecting communications with H & F); JX-1804 at 2 (reflecting Vista's reconnection with Stollmeyer in 2017); JX-176 (reflecting May 2018 meeting with CCO of GoDaddy); JX-1543 (reflecting February 2018

meeting with Qatalyst); JX-1509 (reflecting August 2018 meeting with Centerview); JX-196 (reflecting June 2018 meeting with TCV).

89 JX-231 at 1.

90 Trial Tr. at 251:3–254:24 (Chang); *see also* JX-591 at 2.

1. Qatalyst Reconnects Stollmeyer And Vista.

During the August 7 lunch meeting, Chang offered to reconnect Stollmeyer to Vista. Immediately after lunch, Chang did so by email.[91] Chang wrote to Saroya:

> I was with Rick [Stollmeyer] today, ... I know you all have met before but thought a direct thread might be helpful to get you, Brian [Sheth] and Rick together some time in the future. Nothing pressing, but thought it'd be helpful for you all to meet.[92]

Saroya responded about seven minutes later to set up a meeting.[93]

91 JX-230.

92 *Id.* at 2.

93 *Id.* at 1.

Shortly after, Chang forwarded the email chain to George Boutros, a senior partner at Qatalyst.[94] In the forwarding email, Chang provided the following report:

> Known them [Mindbody] since pre-IPO and founder/CEO [Stollmeyer] has never wanted to sell. Vista and Thoma [Bravo] tried to acquire them pre-IPO.
>
> Met with him [Stollmeyer] today and he immediately talked about how he is tired of being public and wanted me to re-connect him w[ith] Vista and Thoma. Probably a 2019 deal is my guess.[95]

By 7 p.m. that same day, Saroya and Stollmeyer had scheduled a meeting for "late Aug/ early Sep."[96]

94 JX-231.

95 *Id.* at 1.

96 JX-230 at 1.

Chang waited a week to connect Stollmeyer with two other private equity firms, Thoma Bravo and Hellman & Friedman ("H & F").[97] Stollmeyer did not meet with those firms until mid-October and early November.[98]

97 JX-238; JX-239; JX-250 at 2.

98 JX-566; *see also* JX-317; Stollmeyer Dep. Tr. at 292:18–293:2.

2. Stollmeyer Takes Luxor's Temperature.

On August 9, 2019, two days after reconnecting with Vista, Stollmeyer met with Luxor, which had owned shares of Mindbody since 2016. By August 2018, Luxor had accumulated a 14% stake in the Company,[99] but Luxor does not fit the mold of an "activist" investor. Luxor does not seek to take control of companies. It is not in the habit of demanding to inspect books and records of its investments. And it had not petitioned for appraisal or sought to be lead plaintiff in a representative action before this lawsuit.[100]

99 JX-266 at 3.

100 Trial Tr. at 17:1–18 (Friedman).

***10** Stollmeyer wanted to know where Luxor stood on a sale. If IVP followed through on its stated intention to exit, Luxor would be Mindbody's largest public investor. Even if IVP did not exit, Luxor would become Mindbody's largest investor as soon as the super-voting Class B shares converted to Class A in October 2021.

Historically, Luxor had worked constructively with Mindbody management and the Board. And Luxor was extremely knowledgeable of Mindbody's business. Luxor conducted substantial research on its investment in Mindbody, including collecting and analyzing data on the number of users downloading the Mindbody app monthly, the transaction behavior of Mindbody customers, and the progress of Mindbody's dynamic pricing model.[101] Stollmeyer described Luxor as having "unparalleled knowledge of MB," "unfettered access to [CFO] Brett White and me for years," and as being "more [knowledgeable] about this company than any other public investor."[102]

101 Trial Tr. at 26:7–29:5 (Friedman).

102 JX-1118 at 2; Stollmeyer Dep Tr. at 816:16–819:15.

Stollmeyer had met with Luxor as recently as June 2018. At that point, the discussion focused on having Luxor's Doug Friedman join the Board.[103] Stollmeyer was initially receptive to the idea, as he expected Liaw to be leaving his position on the Board, making room for an alternative institutional stockholder representative.[104] By the August 9 meeting, however, Stollmeyer's tune had changed, and he wanted to know whether Luxor would support a sale.[105] Friedman responded that Luxor would not support a near-term sale because Luxor expected much higher return over the long term.[106]

103 Trial Tr. at 429:10–431:24 (Stollmeyer).

104 *Id.* at 429:10–431:24 (Stollmeyer).

105 *Id.* at 32:20–34:7 (Friedman); *id.* at 33:1–34:7 (Friedman); *id.* at 429:10–431:24 (Stollmeyer).

106 *Id.* at 33:1–34:7 (Friedman).

Concerned about resistance to a sale, after the August 9 meeting, Stollmeyer instructed one of Mindbody's long-time advisers, David Handler of Centerview Partners LLC ("Centerview"), to create a comprehensive dossier on Luxor, including any activist campaigns.[107]

107 JX-265; JX-266; Trial Tr. at 528:5–12 (Stollmeyer).

3. Stollmeyer Meets With Vista.

On September 4, 2018, Stollmeyer met with Saroya and another Vista representative, senior vice president Nicolas Stahl.[108] Saroya and Stahl were the lead Vista representatives for the Mindbody deal.

108 JX-264; JX-277.

Saroya and Stahl testified at trial that they did not recall the specifics of the September 4 meeting. Stahl, however, prepared a contemporaneous summary of the meeting consistent with Vista's practices.[109] It stated:

> We met with Rick [Stollmeyer]. Rick mentioned he would like to find a good home for his company. He is getting tired and expects to stay in his seat 2-3 more years. He has 2 folks (one from Booker acq[uisition]) that he thinks could succeed him.[110]

During the meeting, Saroya invited Stollmeyer to join them for the CEO dinner at Vista's CXO Summit.[111] Saroya did not remember any of those details. He recalled that they "talked about how excited he is for the market, how well Mindbody has done historically, and how he thinks Mindbody has a bright future."[112]

109 Trial Tr. at 781:9–782:8 (Stahl).

110 JX-277.

111 JX-264.

112 Trial Tr. at 1033:21–1034:4 (Saroya).

***11** Stollmeyer did not have Board authorization to disclose that he was planning to step down in two or three years or that he had two people in mind to succeed him.[113] After the September 4 meeting, Stollmeyer did not tell the Board that he had disclosed this information to Vista.[114] Stollmeyer admitted that he did not provide this information to any other potential acquirers in August, September, or October 2018.[115]

113 *Id.* at 524:15–525:7 (Stollmeyer).

114 Stollmeyer Dep Tr. at 298:23–300:8; Lytikainen Dep Tr. at 85:6–89:17; Liaw Dep Tr. at 134:10–135:11.

115 Trial Tr. at 524:15–525:7 (Stollmeyer).

The fact that Stollmeyer told Vista that he was looking for a "good home" for Mindbody was a bad fact for Defendants. It indicated that Stollmeyer had tipped off Vista that Mindbody was considering a near-term sale and that Stollmeyer would be leading the process. So, at trial, Stollmeyer denied it. He asserted that he never would have used the words "good home," claiming "the idea that I was looking for something like that and I would say that to them, it just doesn't feel like something I would say. I don't recall saying it."[116] He also said that he would never refer to Mindbody as "my" company.[117] That testimony was not credible. As to finding a "good home" for Mindbody, Stahl used this "home" terminology describing Stollmeyer's position in not one, but two contemporaneous documents.[118] As to calling Mindbody "my company," Stollmeyer used this exact terminology during his post-Merger podcast interview with Cremades.[119] More likely than not, Stahl's notes of the meeting provide an accurate account of what occurred.

116 *Id.* at 374:18–375:13 (Stollmeyer).

117 *Id.*

118 *See* JX-277; JX-344.

119 JX-1441 at 10.

4. Stollmeyer Gives The Board A Partial Account Of His Meeting With Vista.

At an informal Board dinner in Santa Monica on September 5, 2018, Stollmeyer advised the Board that he had met with Vista, but he did not give a full report on the meeting.[120] He did not report on his discussion with Qatalyst about a potential sale.[121] The Board instructed Stollmeyer to keep them in the loop, not get "too far advanced" in his conversations, and to "get smart on the topic" of selling the Company.[122] That was also the day that Centerview provided Stollmeyer with the dossier on Luxor.[123]

120 Trial Tr. at 978:6–981:2 (Cunningham); *id.* at 1363:4–24 (Goodman).

121 *Id.* at 972:10–18 (Cunningham); *id.* at 1360:8–10, 1362:1–4, 1362:1–23 (Goodman).

122 *Id.* at 1268:8–1269:17, 1364:1–5 (Goodman).

123 JX-265.

The Board meeting that followed on September 6 was seemingly uneventful. The minutes reflect that members of management presented on Mindbody's growth, retention, and integration performance.[124] White covered Q2 highlights, areas of growth, and management's second-half outlook.[125] The minutes do not mention Stollmeyer's meeting with Saroya and Stahl, nor the invitation to attend the CXO Summit.

124 JX-270.

125 *Id.* at 2.

A few days later, on September 9, Handler copied Stollmeyer on an email to Mindbody's Chief Legal Officer, Kimberly Lytikainen, asking for a meeting to "discuss the various elements of dealing with the Luxor situation."[126] On September 10, Stollmeyer asked Centerview to "add an analysis of my voting power if I exercised all of my vested options as of the end of the year."[127] Centerview provided this information on September 17.[128]

126 JX-1617 at 2.

127 *Id.* at 1.

128 *Id.*

5. Stollmeyer Attends Vista's CXO Summit And Is Blown Away.

***12** Vista's CXO Summit is an annual gathering of senior executives from Vista portfolio companies and select industry guests. Vista uses the conference to prospect for acquisition targets.[129] Saroya testified that the CXO Summit gives CEOs from potential targets "a flavor of what it feels like to work for Vista" and helps "take away the myth that [Vista] might be a slash-and-burn shop."[130]

129 JX-264; Stahl Dep. Tr. at 34:9–35:19; *see also* Stollmeyer Dep Tr. at 286:6–287:18.

130 Trial Tr. at 1123:12–20 (Saroya).

Stollmeyer accepted Saroya's invitation to attend the CXO Summit on October 9.[131] At the summit, he met with executives from Vista portfolio companies.[132] After the first day, Stollmeyer texted Saroya to ask for a one-on-one meeting with Vista's founder Robert Smith, Vista's President Brian Sheth, or Vista portfolio company CEO Reggie Aggarwal.[133] Stollmeyer asked Vista to put him in touch with Aggarwal because he wanted "to know what it's like to sell to Vista as a founder."[134] Stollmeyer pitched Mindbody to Robert Smith in a brief meeting on October 9.[135]

131 *Id.* at 980:13–19 (Cunningham); *id.* at 1274:6–1274:11, 1364:9–12 (Goodman); *id.* at 2170:17–2171:1 (Smith).

132 *Id.* at 389:20–23 (Stollmeyer).

133 JX-327.

134 JX-344; *see also* Stollmeyer Dep. Tr. at 384:9–385:21.

135 Trial Tr. at 389:20–390:23 (Stollmeyer).

Stollmeyer watched presentations from both Robert Smith and Sheth at the summit.[136] Smith's presentation included estimated wealth creation for CXOs who took their companies private with Vista and noted that Vista portfolio company executives had earned $488.6 million since 2017.[137]

136 *Id.*

137 JX-343 at 124–25.

Stollmeyer texted Saroya that the "[p]resentations are very impressive."[138] He texted Mindbody's President Michael Mansbach that the presentations are "mind blowing/ inspiring."[139] Stollmeyer told Mansbach later that day that Vista "really love[s] me, I love them."[140] Stollmeyer also told Mansbach that the CXO Summit helped him "center on what is nagging from my subconscious."[141] Stollmeyer sent Mansbach a series of screenshots, which Stollmeyer described as "money shots," from a presentation that Sheth gave.[142] Two of the screenshots focused on Vista's 2016 acquisition of Marketo for $1.8 billion and subsequent sale of Marketo in 2018 for $4.75 billion.[143] At trial, Stollmeyer admitted that Marketo made an interesting parallel to Mindbody and that Marketo was "purchased by Vista and then Vista sold them in a fairly short order ... with a really strong return."[144] Friedman testified that Stollmeyer later touted to Luxor "that Vista had bought [Marketo] and then sold it 18 months later for 3x the price."[145] Stollmeyer would later tell his financial advisor that, after a sale to Vista, "he could make as much money over the next three years as he did the first go around."[146]

138 JX-327.

139 JX-328.

140 Stollmeyer Dep. Tr. at 326:8–328:12.

141 JX-332 at 1, 3.

142 JX-333.

143 JX-334; JX-335; *see also* Stollmeyer Dep. Tr. at 364:5–366:14.

144 Trial Tr. at 532:13–533:3 (Stollmeyer).

145 *Id.* at 72:18–74:6 (Friedman).

146 JX-1262.

Stahl set up a meeting between Stollmeyer and Aggarwal. In a text to Aggarwal on October 9, Stahl explained that Stollmeyer wanted "to know what it's like to sell to Vista as a founder."[147] Stahl's text also used the concept of a "home" for Vista, adding that Stollmeyer "is hyper focused on maintaining culture and ensuring his business finds the right home that will accelerate growth, not cause it to falter."[148]

147 JX-344.

148 JX-344.

***13** The Board was aware that Stollmeyer was attending the CXO Summit, but Stollmeyer did not have Board authorization to tell Vista that he was focused on finding a home for Mindbody.[149] Stollmeyer never told the Board that he had done so.[150]

149 Stollmeyer Dep Tr. at 313:12–18.

150 Lytikainen Dep Tr. at 86:14–20; Liaw Dep. Tr. at 134:10–135:11.

The CXO Summit changed the way Stollmeyer viewed a sale to a private equity firm, or at least a sale to Vista. He explained: "what I saw there really shifted my paradigm a bit on how private equity operates. Classically, you think of private equity firms as purchasing companies and kind of stripping out the investments to yield maximum cash flow."[151] Centerview's Handler agreed that the CXO Summit changed Stollmeyer's perception of private equity and that Stollmeyer saw Vista as "his solution."[152] Consistent with his text to Mansbach, Stollmeyer admitted at trial that he left the CXO Summit with the impression that Vista really loved him and he loved them.[153] Vista felt the same, touting internally that Stollmeyer "loved" them and that they "built a strong relationship with [Stollmeyer]."[154]

151 Trial Tr. at 393:21–394:16 (Stollmeyer).

152 *Id.* at 183:5–11 (Handler) ("I would describe it as he had a sea change in terms of his impression of the PE world, and he had gone from really one end of the spectrum to another. You know, hated and despised to beloved. You know, this was his solution.").

153 *Id.* at 535:22–536:1 (Stollmeyer).

154 JX-350; JX-372 at 1.

After the CXO Summit, Vista began drafting a memorandum about Mindbody for its Investment Committee, the group tasked with deciding whether to approve or reject an acquisition.[155] The draft recounted Stollmeyer's attendance at the CXO Summit and noted that Stollmeyer "mentioned to Nicolas how impressed he had been with Robert [Smith] and Vista's vision, reiterating his intention to explore a take-private for Mindbody."[156] Stollmeyer conceded at trial that he did not have authorization to tell Vista in mid-October 2018 that he intended to explore a take-private for Mindbody.[157]

155 JX-1461.

156 *Id.* at 1.

157 Trial Tr. at 538:18–22 (Stollmeyer).

6. Stollmeyer Works With Qatalyst To Kick Off A Sale Process.

After the CXO Summit, Stollmeyer became laser focused on a sale to Vista. On October 11, 2018, Chang and Stollmeyer discussed beginning "preparatory work prior to kicking off a process for Mindbody[.]"[158] Stollmeyer asked Chang to provide references for Vista.[159] Chang provided two, one of whom had sold his company to Vista in a deal where he was represented by Qatalyst.[160]

158 JX-129 at 1; JX-410 at 1.

159 JX-356.

160 JX-410.

In that same email, Chang cautioned Stollmeyer that whenever Vista asked Mindbody for non-public information, Stollmeyer should confer with Chang "because it is at that juncture they will use their ability to move quickly to their advantage[ ]" and "it is very important to get the right 'process' and messaging from the start to optimize for value."[161] Stollmeyer later commented that "[t]his advice proved to be prescient and important."[162]

161 JX-410 at 2.

162 Trial Tr. at 545:17–18 (Stollmeyer).

7. Vista Expresses An Interest In Acquiring Mindbody.

***14** On October 15, 2018, Saroya called Stollmeyer, and the two spoke for twenty-five minutes.[163] During the call, Saroya delivered an oral expression of interest to acquire Mindbody.[164] Saroya told Stollmeyer that Vista would pay a substantial premium to Mindbody's recent trading price, which closed at $33.27 on October 15.[165] Stollmeyer understood that Vista saw Mindbody's recent stock correction as a buying opportunity.[166] At trial, Stollmeyer testified that he told Saroya that Mindbody was "not for sale" but that he would relay Vista's interest to the Board.[167] Those statements do not take twenty-five minutes to say.

163 PTO ¶ 97.

164 *Id.* ¶ 98.

165 Trial Tr. at 549:13–550:11 (Stollmeyer).

166 *Id.* at 549:13–550:11 (Stollmeyer).

167 *Id.* at 400:5–12 (Stollmeyer).

8. Vista Initiates Its Internal Process.

Vista is a pro at acquiring companies. As Chang had warned Stollmeyer, Vista's advantage is speed. Vista likes to engage "in significant background work" and is "[p]ro-active in making friendly unsolicited approaches and prefer[s] to kick-off processes vs. reacting to outreach."[168] Vista then capitalizes on its ability to "move very quickly through both business and confirmatory diligence" and leverages its early analysis "to truncate processes and reduce the ability for other potential acquirers to be able to complete diligence and provide certainty at the finish line[.]"[169] The record at trial involved precedent transactions in which Vista used this strategy, and Vista representatives testified about the strategy and its competitive advantages.[170] In internal communications, Vista representatives call it "Sprinting,"[171] capitalizing the word as if it were defined term.

168 JX-593 at 46.

169 *Id.*

170 Trial Tr. at 1151:4–7 (Saroya).

171 *See, e.g.*, JX-378.

Vista deployed its go-early-and-fast strategy after the CXO Summit. Stahl texted Saroya on October 11, "MB down another 6% today. Thoughts on going to IC next week to get a hunting license?"[172] Saroya then texted Stahl on October 14, suggesting, "[l]et's get the list of stuff we need from MB ready. I'm going to try and catch [Stollmeyer] tomorrow and tell him I want to send him the list ASAP and get going."[173] Stahl texted a fellow Vista deal team member on October 14:

> I've been back and forth with Monti today and we are likely going to Sprint hard on Mindbody (they have now engaged a banker) and may be trying to sign a deal in the next 2-3 weeks. Would it be possible to upgrade / add to our team to enable us to Sprint?[174]

When presented with these texts at trial, Saroya agreed that Vista was "gearing up and trying to push hard to get to a signing very fast."[175]

172 JX-1457 at 1.

173 *Id.*

174 JX-378.

175 Trial Tr. at 1048:18–23 (Saroya).

Initially, Vista set a goal of signing an agreement before the Company's next earning's call, which was fewer than three weeks away. On October 14, 2018, Stahl texted Vista deal team member Derek Klomhaus that "Monti wants to announce before their earnings. What day is that in November? Have Mike add to all of our calendars (incl[uding] Monti)."[176] On October 15, Stahl texted Saroya suggesting that "even if the earnings call is 10/25, we could still Sprint to sign beforehand."[177] Vista's goal was to "try to get ahead of" any competitors in the Company's sale process.[178]

176 JX-1781.

177 JX-1490 at 29.

178 JX-409.

Vista also gamed out ways to block other bidders. As early as October 15, Stahl noted that Vista's outside counsel was already "thinking through how to reduce interloper risk / goshop risk."[179] Chang wanted to reach out to other companies before Vista could act.[180]

179 JX-1490 at 29. At trial, Saroya claimed unpersuasively not to know what his text meant. Trial Tr. at 1164:2–10 (Saroya).

180 Trial Tr. at 303:20–304:7 (Chang).

***15** Vista started requesting a market study—a third-party analysis of a particular market for an acquisition. On October 19, Stahl texted Saroya to ask permission to conduct a market study on Mindbody.[181] Saroya texted back "yes" in less than thirty seconds,[182] and Vista retained Bain & Co. to conduct the study.[183] A typical market study takes between two to five weeks to complete, so it was an advantage for Vista to request it before the Company launched its sale process. The study was expensive—the final price tag for the four-week analysis was $960,000[184]—so Vista would not have contracted for it without some confidence that Mindbody would be running a sale process.[185]

181 JX-423.

182 JX-424.

183 JX-681.

184 JX-1644.

185 Trial Tr. at 705:11–15 (Klomhaus).

9. Stollmeyer Tells His Team About Vista's Interest.

While Vista was revving up its internal process, Stollmeyer began dribbling out news about the expression of interest. Stollmeyer told his management team first. On October 17, 2018, Stollmeyer sent an email to Mansbach, White, and Lytikainen with the heading "Highly Confidential – For Your Eyes and Ears Only. Do not forward or discuss outside this group without my permission[.]"[186] Stollmeyer relayed Vista's expression of interest and that Vista "would pay a substantial premium to recent trading range and see the stock correction an opportunity."[187]

186 JX-410 at 1.

187 *Id.*

Stollmeyer tried to give his team some comfort, stating that he believed that a private equity sale might be Mindbody's best option to achieve its long-term vision, but that a sale would not be an "automatic 'exit' " for management.[188] Overall, Stollmeyer seemed excited about a deal with Vista and described the possibility as "lean[ing] into an acquirer who sees our current capabilities, gets our huge potential, and has the resources to accelerate our results over the 3 year planning window, and expedite the full realization of what [*sic*] our Vision and Purpose."[189]

188 *Id.*

189 *Id.*

Stollmeyer told the email recipients that he "plan[ned] to socialize this possibility to the Board [of] Directors individually over the next week" and further said "[p]lease do not hint or otherwise discuss with them or anyone else until I have a chance to do so and give you the green light."[190] Stollmeyer acknowledged that the "conversation" with Vista was "progressing rapidly."[191]

190 *Id.*

191 *Id.*

Next, Stollmeyer told Liaw of Vista's expression of interest during an hour-long conversation on October 18.[192] Liaw texted Stollmeyer later that same day, asking him to "[p]lease keep me posted on the other conversations."[193] Stollmeyer replied that he appreciated hearing Liaw's perspective and "our alignment on the key elements."[194]

192 Trial Tr. at 574:21–575:12 (Stollmeyer).

193 JX-1618 at 1.

194 *Id.* at 2.

On October 19, before he had spoken with any Board member other than Liaw, Stollmeyer spoke for thirty-one minutes with Andre Durand, the founder and CEO of a company that sold to Vista. Durand was one of the two references that Chang had provided for Qatalyst.

Stollmeyer testified that Durand was incredibly positive about his experience with Vista on this call.[195] Durand reported to Saroya that the conversation turned out to be a reference call for Vista."[196] Saroya replied, "Yup I was aware[.]"[197] Stollmeyer did not tell the Board about his conversation with Durand.[198]

195 Trial Tr. at 559:1–560:2 (Stollmeyer).

196 JX-421 at 1.

197 JX-422 at 1.

198 Trial Tr. at 560:3–9 (Stollmeyer).

10. Stollmeyer Informs The Other Directors Of Vista's Interest.

Stollmeyer waited until October 23—eight days after Vista's expression of interest—to begin contacting the remaining Board members.[199] When he spoke with the directors, Stollmeyer omitted key elements of his discussions with Vista[200] and key pieces of information that he had shared with his management team.

199 JX-1442; Trial Tr. at 574:9–575:5 (Stollmeyer).

200 Herman Dep Tr. at 88:5–89:8; Lytikainen Dep Tr. at 101:3–102:18.

***16** Four of Mindbody's six outside directors—Cunningham, Goodman, Herman and Smith—testified at trial. All four admitted that they were unaware of key facts as of October 23. They agreed that none of them knew about IVP's desire for a near-term exit.[201] To varying degrees, they agreed that they did not know that Vista viewed the downturn in Mindbody's stock price as a buying opportunity or that Vista planned to make an offer based on a premium over the Company's trading price, which meant that a further downturn in the Company's stock price would result in a lower bid.[202] The directors' testimony also indicates that they did not know that Stollmeyer had already interacted with Vista on multiple occasions, had spoken with a portfolio company CEO about his experience selling to Vista, and had told Vista that he planned to step down in two to three years.

201 Trial Tr. at 920:3–5, 968:13–16 (Cunningham); *id.* at 1383:24–1384:6 (Goodman); *id.* at 1492:15–1493:1 (Liaw).

202 *Id.* at 890:21–891:3 (Cunningham) (testifying that he did not know about Vista's plan to price its offer based on Mindbody's trading price); Goodman Dep. Tr. at 114:14–19 (testifying that she was not aware that Vista viewed the downturn in Mindbody's stock as a buying opportunity); Smith Dep. Tr. at 69:8–72:18 (testifying that he did not know that Vista intended to price its offer based on Mindbody's trading price). Herman claimed not to recall anything about her conversation with Stollmeyer. Herman Dep. Tr. at 88:5–14.

C. The Formal Sale Process Begins.

During a regularly scheduled Board meeting on October 26, 2018, the Board discussed Vista's expression of interest and whether to form a transaction committee to explore a potential acquisition (the “Transaction Committee”).[203] This portion of the meeting occurred in executive session. Stollmeyer remained present, but other members of management were excused.[204]

203 PTO ¶ 111; JX-1426 at 180; Trial Tr. at 895:10–896:7 (Cunningham).

204 JX-1426 at 181.

At some point on or before October 26, Stollmeyer asked Liaw to serve as chair of the Transaction Committee, and Liaw agreed.[205] During the meeting, Liaw started acting like the chair, and everyone else went along. The other Board members did not know when or how Liaw became the presumptive chair of the committee. Goodman testified that Liaw's role as chair was just “assumed” at the October 26 board meeting.[206] The Board did not know at that time that IVP was looking to exit and therefore did not discuss whether IVP's interest in selling would affect Liaw's ability to consider strategic alternatives independently.[207]

205 Trial Tr. at 576:6–10 (Stollmeyer): *id.* at 1429:24–1430:4 (Liaw).

206 *Id.* at 1382:19–1383:2 (Goodman); *see also id.* at 2196:6–12 (Smith) (testifying that he did not know who proposed the membership of the committee or how Liaw was chosen as its chair).

207 *Id.* at 1383:24–1384:2 (Goodman); *id.* at 1895:15–1896:2 (Herman).

During the meeting, Liaw asked for volunteers to join the Transaction Committee, warning directors that a sales process can be time-consuming and that they should not “volunteer lightly.”[208] Goodman texted Liaw to volunteer.[209] Later that day, Liaw asked Stollmeyer to “take the lead on conversations to fill out the rest of the committee,” but Liaw seemed to continue to play a vetting role.[210] Cunningham joined the committee after talking through the commitment with Liaw.[211]

208 *Id.* at 895:10–896:7 (Cunningham).

209 PTO ¶ 112.

210 JX-454.

211 Trial Tr. at 895:16–896:7 (Cunningham).

The Board created the Transaction Committee by unanimous written consent on October 30, 2018.[212] It comprised Liaw, Goodman, and Cunningham, with Liaw as chair.[213]

212 JX-1426 at 182–84.

213 *Id.*

The Transaction Committee's initial mandate was to interview financial advisors and make a recommendation to the Board on whether to engage one or more financial advisors to assist in reviewing strategic alternatives.[214] That was it.

214 PTO ¶ 114.

***17** On October 31, the Transaction Committee met with Mindbody's Chief Legal Officer and outside counsel who advised the Board on a regular basis.[215] Among other things, the committee members reviewed the initial expectations, their mandate, and set the date of November 14 to interview potential financial advisors.[216] During a closed session of the meeting that excluded Stollmeyer and other management members, the Committee discussed

> the importance of establishing a process ... that was independent and free of any influence from members of management or other directors who, depending on the circumstances, could have (or could be viewed to have) a potential conflict with respect to any specific financial advisor or potential strategic partner.[217]

Toward that end, the committee requested sample “ ‘neutrality’ guidelines to serve as a framework for ensuring that management understood its role in any potential process.”[218]

215 JX-475.

216 JX-487 at 1; JX-475 at 1.

217 JX-475.

218 *Id.* at 2.

With the assistance of outside counsel, the Transaction Committee prepared “guidelines for communications, potential conflicts and disclosure matters” (the “Guidelines”).[219] The Guidelines required management to obtain "authorization for outbound communications to potential strategic parties or financial advisors, timely reporting of indications of interest or strategic inquiries to the board or Strategic Transaction Committee and flagging any potential conflicts."[220]

219 JX-487 at 1; JX-475 at 1.

220 JX-487 at 3–4.

The Transaction Committee adopted the Guidelines during the October 31 meeting, and Lytikainen emailed the Guidelines to the Board on November 2.[221] Stollmeyer received and reviewed the Guidelines.[222]

221 *Id.*; Trial Tr. at 898:20–899:9 (Cunningham) ("The point of the guidelines was to make sure that they weren't disclosing price, talking about structure, talking about their employment, very strategic, needy things[.]"); *id.* at 1587:3–10 (Lytikainen) (similar); *id.* at 2201:22–2202:8 (Smith) (similar).

222 Stollmeyer Dep. Tr. at 651:10–18.

D. The Company Lowers Guidance.

During late October and early November, the Company was preparing to release Q4 guidance. Investors watched the Company's guidance closely, and the stock price had a history of reacting to it.

Mindbody had been struggling to hit its publicly disclosed targets throughout 2018. In the first half of 2018, Mindbody revised its 2018 full-year guidance to well below Street expectations.[223] And at the end of Q2 2018, Mindbody reduced the midpoint of its full-year revenue guidance by approximately $1 million.[224] During the second half of 2018, Mindbody continued to miss targets.[225] Its Q3 revenue ($63.8 million) missed the midpoint of Mindbody's already-reduced Q3 revenue guidance ($64 million).[226] By September 2018, Mindbody's internal Q4 revenue forecast stood at $69.40 million, down from May's $72 million forecast.[227]

223 JX-179 at 7; Trial Tr. at 1432:6–1433:16 (Liaw); *id.* at 2037:2–22 (White).

224 JX-210 at 8; *see also* Trial Tr. at 1433:20–1434:15 (Liaw).

225 Trial Tr. at 411:5–15 (Stollmeyer).

226 JX-414 at 29.

227 JX-1860 at 9; JX-1861 at 12.

By October 2018, Mindbody's Q4 revenue forecast had slipped to approximately $68 million.[228] On October 26, White provided the Audit Committee a "first pass, preliminary view of Q4'18 guidance" of $65–$67 million against a forecast of $67.8 million.[229] On November 2, Mindbody's head of financial planning and analysis ("FP & A"), Craig Heinle, advised that his best estimate had risen to $67.8–$68.2 million.[230]

228 JX-1433; JX-503 at 2.

229 JX-456.

230 JX-496; Heinle Dep. Tr. at 123:12–124:12.

***18** Stollmeyer felt that because of the Company's prior difficulties meeting estimates, the Board and the FP & A team "had now swung the pendulum to being overly conservative."[231] Stollmeyer wanted to "guide to the closest thing we could to our reality."[232] On November 5, Stollmeyer emailed Gold and members of the Mindbody management team that he had "never played a game of lowered expectations" and that "[i]f I change my tune now, that would be inauthentic and disheartening. It would also sound weird to those who know me."[233] On the morning of November 5, after digging into the forecast, Stollmeyer suggested guiding to $67–69 million.[234] That evening, however, Stollmeyer and White presented a revised forecast of $68.1 million and a revised proposed guidance range of $66–68 million, for which "the mid point would give us $1.1M in cushion."[235]

231 Trial Tr. at 414:23–415:12 (Stollmeyer).

232 Stollmeyer Dep. Tr. at 542:7–543:10.

233 JX-510.

234 JX-507; Trial Tr. at 415:13–24, 584:5–10 (Stollmeyer); *id.* at 2044:22–2045:1 (White).

235 JX-531; JX-508 at 2.

The revised guidance range of $66–68 million was conservative. The $1.1 million cushion between the forecast and the midpoint of the guidance was more than the previous quarter,[236] even though management was unusually confident because the October flash report was "basically spot-on."[237] There was only $305,000 of risk in the forecast, meaning that management did not foresee a scenario in which revenue would fall below $67.5 million.[238] Adjusted for high, medium, and low probability risks and opportunities, the forecast was greater than $68 million across the board.[239]

236 JX-206 at 28.

237 Heinle Dep. Tr. at 95:9–14, 120:24–121:7.

238 JX-508 at 1.

239 *Id.*

The Audit Committee convened by phone the evening of November 5. Audit Committee members Liaw and Herman were present, along with Stollmeyer and White.[240] Committee chair Smith had signed off on guiding $66–68 million before the meeting.[241] Liaw favored lower guidance because "the only way to rebuild [credibility] or start to rebuild that is to show that [Mindbody] can hit, and ideally beat, future guidance."[242] Herman agreed that guidance should position Mindbody to "beat and raise."[243] They recommended guidance of $65–67 million.[244]

240 JX-531.

241 JX-506; JX-531; Smith Dep. Tr. at 193:11–194:17.

242 Trial Tr. at 1440:21–1441:13 (Liaw).

243 *Id.* at 1980:23–1981:16 (Herman); *see also id.* at 1314:20–1315:8 (Goodman) (describing "beat and raise" as a "perfect kind of managing-the-street scenario"); *id.* at 2172:21–2173:15 (Smith).

244 *Id.* at 1439:13–23 (Liaw); *id.* at 1900:23–1901:14 (Herman); *id.* at 2048:6–8 (White).

Stollmeyer and Liaw spoke immediately after the Audit Committee meeting for sixteen minutes.[245]

245 JX-1442; Trial Tr. at 1528:3–1530:11 (Liaw).

Three minutes after hanging up with Liaw, Stollmeyer texted White that he was "adding a new second paragraph in [his] script noting our challenges."[246] Later that night, Stollmeyer circulated the revised script to his management team.[247] He deleted the portion of his script that noted Mindbody's substantial progress integrating Booker.[248] He pulled other "good stuff" from his script, deciding to "save [it] for future use."[249]

246 JX-504; *see also* Trial Tr. at 598:16–599:4 (Stollmeyer) (acknowledging that he made the script more negative after speaking with Liaw).

247 JX-523.

248 *Compare* JX-1434 *with* JX-523 at 3.

249 JX-523 at 1.

Stollmeyer led the November 6 earnings call during which Mindbody announced its Q3 revenue miss and issued Q4 guidance of $65–67 million.[250] He threw "Booker under the bus"[251] and referred to management's failed execution, noting that "we've been humbled by the last couple of quarters in dealing with the magnitude of integrating these businesses and ramping up growth at the same time."[252] Centerview employees observed in real time that Stollmeyer "sounded too apologetic [and] strange."[253] Friedman recalled Stollmeyer sounding "depressed" and listened to the call "in shock."[254]

250 *Id.* at 3, 9.

251 JX-397.

252 JX-527 at 10.

253 JX-516.

254 Trial Tr. at 41:24–42:6 (Friedman).

***19** After the earnings call, Mindbody stock fell 20%—from a November 6 close of $32.63 per share to a November 7 close of $26.18 per share.[255] The stock fell so far that Stollmeyer suggested to Liaw that Mindbody buy back shares.[256]

255 JX-130 at 3.

256 JX-1626.

Plaintiffs argue that Stollmeyer lowered guidance to depress Mindbody's stock price and make a deal seem more attractive. Certainly, Stollmeyer knew the guidance could affect the stock price. He told White and Mansbach a few days earlier that "a few hundred thousand of Q4 revenue makes a huge difference [on] Tuesday,"[257] and he testified that guiding $1 million higher would have affected Mindbody's stock price.[258] When asked at trial whether he was considering how guidance could impact the sales process, Stollmeyer acknowledged that, "a low guide, I certainly knew, was going to be a really unfortunate message to send to potential acquirers as we were talking to them and trying to rev up their excitement about our company."[259]

257 JX-495 at 1.

258 Trial Tr. at 579:2–13, 597:23–598:13 (Stollmeyer).

259 *Id.* at 589:6–21 (Stollmeyer).

Liaw also knew that lowered guidance would make a sale more attractive. He and a colleague discussed that "the PE guys will drag it out if they think we will miss numbers."[260] Liaw later suggested to Goodman that lowering Q4 guidance would facilitate a sale, explaining that "if we are missing [guidance] they will slow roll us. Hence good to guide down as far as we did."[261] During his deposition, Liaw claimed that his recommendation to lower Q4 guidance was not in any way based on the prospective sale process.[262] He withdrew this statement at trial and admitted that the sale process was not "completely absent from my mind."[263] He testified, however, that his "primary focus" when the Company lowered guidance "was figuring out how the company could start to rebuild credibility."[264]

260 JX-101 at 6.

261 *Id.* at 14.

262 Liaw Dep. Tr. at 398:18–399:13.

263 Trial Tr. at 1483:5–1484:13, 1442:16–24 (Liaw).

264 *Id.* at 1442:16–24 (Liaw).

In the end, the facts surrounding the Q4 guidance are murky. They reflect both a desire to establish a figure that the Company could hit and a recognition of the effect that low guidance would have for the attractiveness of a sale.[265]

265 In a side debate, Defendants argued that the Audit Committee gave Stollmeyer "direction" and a "directive" on where to guide. *See* Dkt. 447 ("Defs.' Pre-Trial Br.") at 11, 13). But the Audit Committee members uniformly testified that the decision was up to management. Trial Tr. at 1952:16–1953:13 (Herman); *id.* at 2217:14–20 (Smith); *id.* at 1528:13–17 (Liaw). Herman went so far as to describe Defendants' word choice ("directive") as "unfortunate." *Id.* at 1954:8–21 (Herman). Defendants' counterfactual narrative on this point was unnecessary. In the end, Stollmeyer understood that it was his decision where to guide. *See* JX-499 at 3–4. He took Liaw's advice, but Plaintiffs failed to prove that Liaw's advice or Stollmeyer's decision on this issue emanated from a malicious intent to cater to an acquirer.

E. Qatalyst Tips Vista About Stollmeyer's Target Price.

The drop in Mindbody's stock price after the November 6 earnings call caught Vista's attention.[266] Vista equated a lower stock price with a lower deal price,[267] leading to a greater profit in a future exit. Vista had recognized huge gains on software companies by purchasing them when they experienced stock price "dislocation," then selling on the "rebound."[268]

266 JX-533 ("MB down 16% after earnings. Should we sprint?"); JX-557 ("You see mb earnings? Tanked"); JX-558 ("Absolutely demolished").

267 Trial Tr. at 698:21–24, 701:24–702:5 (Klomhaus); *id.* at 1564:11–1566:7 (Sheth).

268 JX-1465 at 30.

***20** On the evening of November 6, Stahl texted Saroya about Mindbody's stock drop: "MB down 16% after earnings."[269] Stahl asked, "Should we sprint?"[270] He also asked if Saroya had heard anything from Chang.[271] Saroya called Chang and spoke for five minutes.[272]

269 JX-533.

270 *Id.*

271 *Id.*

272 JX-1452.

After the call, Saroya texted Stahl that "Jeff [Chang is] all over it" and that "*[h]e wants 40 min.*"[273] Saroya then inquired about the implications of a $40 per share price for Vista's financial model, which Stahl had just reported was "in good shape," and Stahl responded that Vista "can lean in to get there," and that it would be easier to do so if Vista assumed a "7x+ exit multiple" rather than the "6x forward" they were currently running.[274] In other words, Stahl explained to Saroya how to make it work under the model to pay $40 per share for Mindbody.

273 JX-533 (emphasis added).

274 *Id.* On October 11, Saroya had texted Stahl that he "would pay 6-7x forward" for Mindbody. JX-365 at 12.

The statement that "he wants 40 min" received a great deal of attention at trial. The clear implication of this text is that the pronoun ("he") referred to Stollmeyer, and that Chang tipped Vista that Stollmeyer wanted a deal price of at least $40 per share. Other contemporaneous evidence shows that Stollmeyer wanted a deal price of at least $40 per share. Stollmeyer had implied it in mid-October when he described the expression of interest to his management team and wrote that Vista was willing to pay a "substantial premium" over Mindbody's stock price after it closed at $33.27 per share.[275] Chang said it in mid-November, writing internally that "Rick's bogey is $2bn,"[276] which equates to $40 per share.[277] Liaw said it in mid-December, telling Goodman and Cunningham that he was "modestly concerned that Rick still seems *focused on a 4-handle* by year end."[278] That is deal talk for at least $40 per share.[279]

275 JX-410 at 1; JX-130 at 3.

276 JX-589.

277 Mindbody had 48,016,533 shares outstanding at that time, JX-1138 at 16, which means that a $2 billion deal price would translate into $41.65/share.

278 JX-750 (emphasis added).

279 Trial Tr. at 915:21–916:3 (Cunningham).

Chang's pricing tip to Vista was a bad fact for Defendants. Unable to deny that the text was sent, Defendants attempted to explain it away, suggesting that the "40 min" text was sent accidentally and that Chang had meant to communicate to someone else at Vista (not Stahl) about a different transaction (Apptio). There is no support for that in the record. Both Saroya and Chang had zero recollection of what they discussed on the phone that day.[280] Unfortunately, there is little other contemporaneous evidence on this issue, because before this litigation arose, Saroya lost his phone and was unable to recover any text messages from the entire year of 2018,[281] and Chang had deleted potentially responsive texts from 2018 through 2019.[282]

280 *Id.* at 1195:20–1196:7 (Saroya); *id.* at 288:4–9 (Chang).

281 *Id.* at 1105:11–1106:17 (Saroya).

282 *Id.* at 246:14–247:7 (Chang).

The record on this issue is limited to Stahl's text with Saroya. The text is clear. The text references a "40 min," which was Stollmeyer's minimum. The text prior to the "40 min" was about Mindbody. The text after the "40 min" was about Mindbody. And Vista called Chang in between to discuss Mindbody. All indicators are that the communication was not about Apptio at all. It was about Mindbody.

F. Stollmeyer Tips Vista About The Formal Sale Process.

***21** The Guidelines required management to obtain authorization "for outbound communications to potential strategic parties,"[283] but Stollmeyer ignored them. On November 10, he texted Saroya asking to speak.[284] They talked by phone later that day.[285]

283 JX-489 at 2.

284 JX-573.

285 JX-1442.

During his deposition, Stollmeyer testified that he informed Saroya during this call that Mindbody would be running a sales process: "Q. So it's your testimony today that on November 10th you notified Mr. Saroya of the process? A. Yes, I believe so."[286] Stollmeyer repeated that admission later in his deposition. When asked, "So it's fair to say that as of November the 10th, your testimony is that you told Mr. Saroya, hey, we're going to be doing a process. Right?" Stollmeyer replied: "I believe I did."[287]

286 Stollmeyer Dep. Tr. at 626:12–23.

287 *Id.* at 627:13–18.

Stollmeyer's tip was yet another bad fact for Defendants. At trial, Stollmeyer tried to recant. When confronted with his deposition testimony, he stated that he had "done a lot of thinking about it," that he had been deposed for "12 to 14 hours" by the time he was asked this line of questioning and, "[a]t that point" he was "confused about dates."[288] He continued: "I'm not sure that I ever told Monti we're having a process."[289] The deposition testimony at issue, however, occurred during the morning of the second day of his deposition, not at the end of a long day. Stollmeyer could have corrected his testimony by errata sheet, but he did not do so.

Circumstantial evidence makes it likely that Stollmeyer did exactly what he described in his deposition. Plaintiffs proved that Stollmeyer tipped Vista to the sales process on November 10.

288 Trial Tr. at 622:9–623:3 (Stollmeyer).

289 *Id.* at 622:9–623:3 (Stollmeyer).

There was at least one other instance in which Stollmeyer violated the Guidelines by contacting Vista. On November 17, Saroya texted Stollmeyer about an invitation to a charity event in Miami.[290] Stollmeyer replied, despite the prohibition in the Guidelines on outbound communications to potential acquirers, saying that it would be "worth the trip" and asking if he could bring his wife.[291] Stollmeyer then asked Chang if he should attend, and Chang said no.[292] That was the right answer, but Chang did not give that advice because the Guidelines plainly barred the contact. Rather, Chang texted Stollmeyer, "The more they think or feel you're in their camp, the less $ they'll pay."[293] Stollmeyer was undaunted: "On the other hand, I [c]an show a little leg and get them frothing at the mouth to get me and MB in the portfolio [.]"[294] Although Stollmeyer eventually declined the invitation, the communications speak volumes as to Stollmeyer's mindset at the time.[295]

290 JX-1490 at 43.

291 *Id.* at 44.

292 JX-617.

293 *Id.*

294 JX-552.

295 Trial Tr. at 564:5–17 (Stollmeyer).

G. Mindbody Retains Qatalyst As Its Financial Advisor.

On November 14, 2018, the Transaction Committee convened to decide on hiring an investment banker.[296] Vista conveyed its expression of interest on October 15. It was now one month later, and Mindbody still had not retained a financial advisor. Both Centerview and Qatalyst had provided advisory services to Mindbody in the past, and both were invited to pitch for the business.[297]

296 JX-607.

297 PTO ¶ 118.

***22** Centerview's presentation emphasized its experience on deals in the technology sphere, where Mindbody operated.[298] Picking up on Stollmeyer's request for a dossier on Luxor, Centerview also cited its experience in mergers that faced activist challenges.[299] Centerview depicted Mindbody as a company facing near-term challenges but with excellent long-term prospects. The near-term challenges included "Recent Execution Issues"[300] and the recent downturn in SaaS company valuations.[301] The presentation also showed the extent to which the downward changes in Mindbody's guidance negatively impacted the Company's stock price.[302] According to Centerview, this "Recent Noise" masked Mindbody's "Strong Healthy Underlying Business."[303] Centerview's calculations of Mindbody's earning potential "Impl[ied] a Significant Value Dislocation in the Market."[304] Handler agreed that these materials showed how Mindbody's depressed valuation correlated with its Q4 guidance.[305]

298 JX-595 at 12.

299 *Id.* at 14.

300 *Id.* at 22.

301 *Id.* at 24.

302 *Id.* at 25 ("Small Revenue Re-sets – Large Stock Impact").

303 *Id.* at 27.

304 *Id.* at 28; Handler Dep. Tr. at 287:15–25.

305 Handler Dep. Tr. at 291:21–292:8.

Turning to the sale process, Centerview explained how its approach would achieve the goal of "Keeping MINDBODY's Special Committee in Control of the Process."[306] Centerview's proposed timeline contemplated an initial phase during which Centerview and management would develop a baseline valuation. After that, Centerview would contact potential acquirers. Interested bidders would respond. If the Committee decided to pursue an offer, then the process would move toward closing.[307] According to Centerview's presentation, the process could take somewhere between 60–190 days.[308] Lytikainen's notes suggest that Centerview saw no need for a near-term transaction and that for purposes of a sale, the "time frame is two years."[309]

That comment reflected the reality that Mindbody's prospects would improve as the Company worked through its near-term challenges.

306 JX-595 at 40.

307 *Id.* at 56.

308 *Id.*

309 JX-607 at 2.

Qatalyst's pitch emphasized its experience on deals with Vista.[310] One of the slides showed potential transaction prices and highlighted $38.50 per share as corresponding to the revenue multiple Vista had paid in its Apptio acquisition.[311] Qatalyst also described Vista's ability to "move very quickly through both business and confirmatory diligence" and "to truncate processes and reduce the ability for other potential acquirers to be able to complete diligence and provide certainty at the finish line[.]"[312] Qatalyst envisioned a much quicker sale process and contemplated a closing as early as December 31 "if a party provides a pre-emptive bid that the Board finds compelling and other parties indicate lower ranges of value."[313] That comment described Vista's preferred strategy.

310 JX-593.

311 *Id.* at 30.

312 *Id.* at 46.

313 *Id.* at 42.

After the presentations from Centerview and Qatalyst, the Transaction Committee authorized the Company to engage Qatalyst.[314]

314 JX-600 at 2.

At trial, the directors lauded Qatalyst's experience with technology companies as the basis for their choice.[315] That testimony was credible, but there is also evidence that Liaw—who knew of Stollmeyer's interactions with Vista—pushed to retain Qatalyst. The strongest proof of this fact is found in an email that Liaw sent to himself. When preparing to negotiate Qatalyst's fee, Liaw emailed himself a set of talking points that included "I lobbed this up for you guys to dunk it"; "You know I went to bat for you"; and "Everyone knows this a high probability outcome just based on the inbound interest and overall set up[.]"[316] At trial, Liaw tried to minimize the significance of these comments as containing "a degree of embellishment for the purpose of negotiating a lower fee for Mindbody," and that testimony was credible. Even discounting the statements for embellishment, it is undeniable that Liaw had advocated to retain the adviser who emphasized its relationship with Vista and recommended a quick sale process.

315 Trial Tr. at 1903:2–19 (Herman); *id.* at 1316:19–1317:1 (Goodman); *id.* at 2029:6–13 (White).

316 JX-614; *see also* Trial Tr. at 1486:23–1491:10 (Liaw).

H. Qatalyst Contacts Potential Buyers.

***23** With Qatalyst's help, Mindbody identified fourteen potential buyers, including both financial sponsors and strategic acquirors.[317] Stollmeyer rejected one candidate because he didn't "want to work for a payments company."[318]

317 JX-623 at 1.

318 JX-670; JX-671 ("Qatalyst had them on the list, and we pulled them from early outreach.").

Qatalyst planned to approach the strategic bidders beginning on November 19 and the financial sponsors beginning on November 30.[319] Qatalyst wanted to contact the strategic bidders first because they often moved slower than the financial sponsors.[320]

319 JX-1138 at 36.

320 *See* JX-625 at 1 ("As you know, sponsors will be phased in later."); *see also* Trial Tr. at 910:6–20 (Cunningham) ("[I]n my experience, this is a common thing to do.").

Under that schedule, Vista was not supposed to know that Mindbody had started a sale process until November 30 at the earliest. But Vista already knew and was ready to sprint. Vista had provided its expression of interest on October 15. Stollmeyer had tipped Vista about the process on November 10. There is even evidence that Vista gained additional insight into the schedule, because on November 27, Stahl texted a colleague that "Monti and I are going to be sprinting at Mindbody starting next week."[321]

321 JX-652.

Chang formally contacted Vista on November 30.[322] Chang did not contact the other financial sponsors until December 3 and 4.[323]

322 JX-960.

323 *Id.*

Interested buyers attended management presentations from Stollmeyer and his executive team. They met with H & F on the morning of December 11.[324] He texted his wife that the meeting "went really well. Like those guys."[325] Later that day, the team met with Vista.[326] Stollmeyer joined Sheth and Saroya for drinks afterward and texted Chang: "Am with Brian and Monti at Battery. Going great!"[327] Stollmeyer treated the two firms differently.

324 JX-730.

325 *Id.*

326 *Id.*; JX-960.

327 JX-727.

I. Vista's Investment Committee Approves A Range.

On December 12, Saroya texted his team that Sheth wanted to convene Vista's Investment Committee on "Friday [December 14] and move fast on [Mindbody]."[328] Vista received Bain's final market study on December 13, 2018,[329] two days before other financial sponsors gained access to Mindbody's data room. Klomhaus testified that the Bain study gave Vista "more conviction that we knew more about the market than we otherwise would have."[330] Another Vista deal team member later wrote, "[w]e were able to conduct all of our outside-in work before the process launched allowing us to gain conviction early that this is a must own business."[331]

328 JX-744.

329 JX-755; JX-756.

330 Trial Tr. at 711:21–712:2 (Klomhaus).

331 JX-968.

At trial, Defendants stressed that when the Investment Committee met, Vista still believed that it faced competition for Mindbody. That was true. Saroya messaged his team on December 13 instructing them to "[s]olve for approval up to 39. We are going to have a lot of competition on this one[.]"[332] After learning that Vista's estimated internal rate of return at $39 per share would be the same as the Apptio transaction, Saroya instructed his team: "I think we show 35 but ask for approval up to 40."[333] Vista wanted the ability to compete if it ended up facing competition, but Vista also hoped that by sprinting, it could eliminate the competition.

332 JX-763 at 1.

333 *Id.* at 8.

***24** The drafting of the Investment Committee materials corroborate that Vista knew in advance about the sale process. An early draft of the slide deck stated that Qatalyst had informed Vista of Mindbody's sale process in "Late October 2018."[334] That was true, and it revealed the informational advantage that Vista received. In the final presentation, the date was adjusted to November 30, which was the official date when Qatalyst was authorized to contact financial sponsors.[335] In between drafts, Stahl sent a text to the drafter of the deck saying "dont tell them about process."[336]

334 JX-739 at 6.

335 JX-781 at 7.

336 JX-758.

The deal team made similar changes to the summary memorandum distributed to the Investment Committee along with the presentation. An early draft contained a lengthy description of Vista's interactions with Stollmeyer:

> In August of 2018, Monti met with Rick and introduced him to Nicolas Stahl. The three of them had lunch in San Luis Obispo, where the Company is currently headquartered. *Rick mentioned that he would like to find a good home for his Company and expects to stay as the CEO for 2-3 more years*, citing two qualified internal candidates who would make good successors. In October at the CXO conference in San Diego, *Rick mentioned to Nicolas how impressed he has been with Robert and Vista's vision, reiterating his intention to explore a take-private for Mindbody.* Shortly after the conclusion of CXO, Rick reached out to Jeff Chang at Qatalyst Partners in order to begin preparatory work prior to kicking off a process for Mindbody after the Company's Q3 2018 Earnings Call on November 6th.[337]

The final version omitted that paragraph and stated only that Saroya and Stahl met with Stollmeyer on August 23 and that Stollmeyer attended the CXO Summit.[338] The final draft omitted Stollmeyer's other interactions with Vista and stated incorrectly that Vista first learned of a potential sale process on November 30.[339]

337 JX-1461 at 1 (emphasis added).

338 JX-1462 at 1.

339 *Id.*

On December 14, Vista's Investment Committee authorized a formal bid for Mindbody.[340] No minutes or other record evidence reflects the discussion or the decision. Stahl testified that he did not recall what was said at the meeting.[341] When asked at trial whether the Investment Committee approved a range, Saroya testified that the Investment Committee approved a "cap of $35."[342]

340 Trial Tr. at 824:13–19 (Stahl).

341 *Id.* at 824:24–825:2 (Stahl).

342 *Id.* at 1078:1–9 (Saroya).

Saroya's testimony about a cap conflicted with his instructions to his team to prepare documents to obtain approval for a range of over $35 and "ask for approval *up to 40*."[343] It is also inconsistent with a slide showing purchase prices at increasing revenue multiples up to $40/share.[344]

343 JX-763 at 1, 8 (emphasis added).

344 JX-781 at 11.

Saroya's testimony conflicted with the testimony of Sheth, Vista's President. Sheth explained that the Investment Committee's practice was to provide a range, not a cap, and that they followed that practice for Mindbody.[345] When presented with Sheth's testimony at trial, Saroya deferred to Sheth's recollection.[346]

345 Trial Tr. at 1570:23–1571:23 (Sheth).

346 *Id.* at 1225: 2–5 (Saroya).

Saroya's testimony conflicted with how Vista acted. Vista started the bidding at $35 per share, which would be strange if that was a cap. Saroya testified that increasing a price beyond what the Investment Committee had authorized required an additional round of approval from the Investment Committee.[347] Vista increased its bid, and Saroya had no recollection of getting an additional approval to go beyond the cap.[348]

347 *Id.* at 1078:10–13, 1222:8–1123:4 (Saroya).

348 *Id.* at 1226:1–6 (Saroya).

***25** Saroya's testimony is inconsistent with his deal team's internal communications. Vista employees took bets on what price Vista would pay to acquire Mindbody. This came out in trial through a text from Stahl to Saroya, which attached a photo that Stahl called "[t]he line."[349] The image had a line set at $37.50—halfway between $35 and $40.[350] Vista employees submitted their over-under guesses of the eventual deal price.[351] The lowest prediction was $36.50, and the highest prediction was $40.[352] Over half of the participating employees guessed that the price would be greater than $37.50.[353] The highest prediction by a deal team member was $38.50/share.[354] In response to this image, Saroya said, "37.5 is a good guess[.]"[355] Stahl replied, "I thought so too."[356]

349 JX-883 at 1–2.

350 *Id.* at 2.

351 *Id.*

352 *Id.*

353 *Id.*

354 Trial Tr. at 835:11–24 (Stahl).

355 JX-883 at 3.

356 *Id.* at 5.

In light of this evidence, Saroya's testimony about a cap at $35 per share was not credible. The Investment Committee approved a bidding range that went up to $40 per share.

J. Mindbody Grants Data Room Access To Potential Acquirers.

Ultimately, seven parties signed non-disclosure agreements and gained access to Mindbody's data room.[357] The data room opened on December 15.[358] All parties received the same documents, which were designed to provide what a generic private equity fund would want to have for its “first-level diligence.”[359] Parties began dropping out after receiving data room access.[360]

357 JX-787 at 1.

358 *Id.*

359 JX-1221; Trial Tr. at 307:15–308:2 (Chang); *id.* at 2050:13–21 (White).

360 JX-886 at 3.

Vista moved forward. Stahl testified at trial that Vista's outlook on Mindbody's value initially soured after gaining access to the data room,[361] because “there was less near-term growth than what we have previously anticipated.”[362] Stahl testified that Vista also had concerns about Mindbody's customer retention, its ability to upsell products to customers, declining organic revenue, and competitive threats.[363] The contemporaneous evidence shows that like Mindbody management, Vista viewed those issues as near-term hurdles that the Company could overcome. After processing the information from the data room, Saroya texted Sheth that “our key finding is that if we fix the go to market engine we can accelerate growth meaningfully” and that “we will be lined up to preempt after you and I discuss.”[364] Saroya minimized the near-term challenges that the Company faced, stating, “[w]e see the same issues in most of these businesses.”[365]

361 Trial Tr. at 748:11–754:21 (Stahl).

362 *Id.* at 748:17–749:5 (Stahl).

363 *Id.* at 748:2–749:8 (Stahl).

364 JX-820 at 1.

365 *Id.* at 3.

Vista became more excited after meeting with Mindbody's sales team.[366] Stahl texted Saroya that “the sale strategy was terrible and they have started fixing a lot of things.”[367] Stahl believed that Vista could achieve significant long-term gains after buying Mindbody.[368]

366 JX-852.

367 JX-855.

368 Trial Tr. at 748:17–749:5 (Stahl).

K. Vista Makes A Formal Offer.

On December 18, 2018, three days after the data room opened, Vista submitted an offer to acquire the Company for $35 per share.[369] Vista imposed a 24-hour deadline for acceptance. After that, the offer would expire. Vista conditioned its offer on Stollmeyer and IVP entering into a voting and support agreement.[370]

369 JX-825.

370 *Id.* at 1.

That same day, Stahl sent Saroya the photo of the bidding line at $37.50, and Vista employees began betting on the final price.[371] In his deposition, Stahl testified that the guesses were just a “game” that “wasn't based on anything.”[372] At trial, Saroya claimed to not recall what the “line” was even about.[373] Saroya's other texts give him away. Referring to a bet of $40 per share by an employee named Luke, he wrote, “Luke has no faith in me huh.”[374]

371 JX-883 at 2.

372 Stahl Dep. Tr. at 112:23–113:22.

373 Trial Tr. at 1227:9–16 (Saroya).

374 JX-883 at 4.

***26** The Transaction Committee convened on December 19, 2018, to discuss Vista's offer of $35 per share.[375] Later that day, the Transaction Committee directed Qatalyst to communicate to all potential bidders that there was pressing need for them to submit prompt indications of interest.[376] The remaining potential bidders were much further behind in their diligence than Vista. One Qatalyst employee emailed Chang on December 19 to note that one bidder, Thoma Bravo, was not as far in their process: “They are just much further behind in their thinking.... Level of questions is much more basic so far.”[377]

375 JX-1729.

376 JX-1138 at 39.

377 JX-876 at 1.

Thoma Bravo dropped out of the process on December 20.[378] Evidencing that Vista continued to have privileged access to what was happening in the deal process, Vista had expected to learn after 3:00 p.m. Pacific Time that day whether Thoma Bravo had submitted a bid.[379]

378 JX-895.

379 JX-902; JX-903.

Another bidder, Recruit, was also still early in diligence.[380] Recruit's impression from the management presentation was that Stollmeyer seemed "checked out."[381] Stollmeyer told Centerview that he was uncomfortable with Recruit because he did not want to work with a Japanese company, as they required a translator.[382]

380 JX-877.

381 JX-1605.

382 Trial Tr. at 72:18–74:6 (Friedman).

By December 20, only Vista and one other bidder, H & F, remained.[383] Qatalyst had initiated follow-up calls with H & F on Mindbody's go-to-market and financial performance, but H & F had not submitted an offer.[384]

383 JX-886 at 3.

384 JX-885 at 5.

L. Mindbody Counters And Vista Makes A "Best And Final Offer."

Mindbody's Board convened on December 20 to discuss Vista's initial offer with Qatalyst.[385] During the meeting, the Board authorized Qatalyst to make a counteroffer of $40 per share.[386] Qatalyst had recommended that figure,[387] which matched both the top of Vista's range and the number that Stollmeyer had said he wanted.

385 JX-885.

386 *Id.* at 2.

387 JX-884 at 2.

After receiving the counter, Saroya circulated a slide within Vista that identified potential synergies with other Vista portfolio companies.[388] He wrote that "[o]ur team believes these synergies allow us to move up on our initial bid."[389] At trial, Saroya claimed that the model presented to the Investment Committee only supported a maximum price between $36 and $37 per share and that he did not recall any discussion about a higher range.[390] The evidence shows that the Investment Committee had already given Saroya authority to go above $35 per share.

388 JX-914.

389 *Id.* at 1.

390 Trial Tr. at 1090:5–16 (Saroya).

On December 20, Vista bumped to $36.50 per share. Vista described its bid as its "best and final" offer, but the evidence shows that Vista could and would gone higher if it had been pressured to do so. Qatalyst first contacted Stollmeyer to communicate the offer.[391] Stollmeyer then texted Liaw that Vista had given their "best and final" offer of $36.50.[392] Liaw responded, "I'm kind of disappointed actually ...."[393]

391 *Id.* at 455:14–23 (Stollmeyer).

392 JX-890; JX-891.

393 JX-892.

Qatalyst reached out to H & F on December 21.[394] H & F responded that they were "processing" and would need "2 more weeks to sign" up a transaction.[395] On price, H & F told Qatalyst that they had "no path to $40."[396]

394 JX-906 at 1–2.

395 JX-951.

396 *Id.*

At this point, the Transaction Committee seemed to discontinue meeting, and the full Board convened to discuss Vista's $36.50 per share bid on December 21.[397] Without other bidders, the Board had to decide whether or not to take Vista's bid of $36.50. On December 21, Liaw told his partners that he "personally thought Vista would get up to $38," but that the market volatility and lack of other interested buyers made [$36.50] the most attractive offer.[398] Goodman thought $36.50 per share was "an excellent price that would derisk the future for our shareholders."[399] Smith thought that the premium "was definitely worth accepting versus the uncertainty of potentially several years of uncertain execution."[400]

397 JX-906.

398 JX-904.

399 Trial Tr. at 1347:19–1348:3 (Goodman).

400 *Id.* at 2188:21–2189:17 (Smith).

***27** The deal price of $36.50 per share represented a premium of approximately 68% over the closing price of Mindbody's Class A common stock on December 21.[401] Qatalyst said it could render a fairness opinion for the $36.50 per share offer.[402] On December 21, the Board directed management to accept the bid and negotiate a merger agreement.[403]

401 JX-1138 at 42.

402 JX-921 at 1.

403 JX-906 at 1–2.

M. The Parties Sign The Merger Agreement.

On December 23, 2018, the Board approved the Agreement and Plan of Merger (the "Merger Agreement"), and the parties signed it.[404] If the Merger closed, then each share of Mindbody common stock would be converted into the right to receive $36.50 per share in cash, subject to the stockholder's right to eschew the merger consideration and seek appraisal.[405] Stollmeyer and IVP agreed vote shares carrying 32.1% of Mindbody's outstanding voting power in favor of the Merger.[406]

404 PTO ¶ 3.

405 *Id.*

406 *Id.* ¶ 120.

The Merger was publicly announced on December 24, 2018.[407] Immediately after announcement, Stollmeyer texted his financial advisor: "Vista's in love with me (and me with them). No retirement in my headlights."[408]

407 *Id.* ¶ 121.

408 JX-956; *see also* JX-954 ("Vista loves me and wants us to step on the gas. No retirement in my headlights."); JX-958 ("Best part – they want me to still run the company. Merry Christmas[.]").

In an internal email, Vista's Mike McMullan described how Vista had secured the deal. He bragged that Vista was "able to conduct all of our outside-in work before the process launched," which enabled Vista "to move swiftly in the process to provide the MINDBODY Board with a highly certain offer within 3 days of receiving data room access."[409]

409 JX-968.

N. The Go-Shop

The Merger Agreement authorized a 30-day go-shop.[410] Beginning on Christmas Eve, Qatalyst reached out to 52 potential bidders, 38 of which were entities that were not part of the sale process.[411] Only eight received the management presentation and signed a non-disclosure agreement. Only two expressed interest in continuing diligence thereafter.[412]

410 PTO ¶ 122.

411 JX-1138 at 41.

412 JX-1015 at 3.

On January 5, 2019, Stollmeyer informed Vista that Luxor and another large stockholder were trying to put together a bid.[413] Stollmeyer told Vista that it was a "low likelihood" outcome because those parties "likely could only write $100-200mm checks."[414] Stollmeyer conceded at trial that he should not have revealed this information to Vista.[415] In any event, Luxor refused to sign an NDA, and Friedman admitted at trial that Luxor wanted to preserve the ability to vote against the merger and bring an appraisal claim in the future.[416] No bid emerged.

413 JX-1038.

414 *Id.*

415 Trial Tr. at 663:19–665:1 (Stollmeyer).

416 *Id.* at 128:13–129:6 (Friedman).

On January 6, halfway through the go-shop process, Stollmeyer went on vacation to Costa Rica.[417] He instructed management in an email to decline go-shop presentations in his absence, "[u]nless it's urgent."[418] Stollmeyer was signaling his lack of interest in a competing offer.

417 JX-1489 at 42.

418 *Id.*

O. The Proxy Materials

The Merger Agreement granted Vista rights and obligations related to the preliminary proxy, the definitive proxy, and any subsequent supplemental disclosures (all together, the "Proxy Materials"). The parties agreed that the Proxy Materials must not "contain any untrue statement of a material fact or omit to state any material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they are made, not false or misleading."[419] Section 6.3(b) gave Vista the right to "a reasonable opportunity to review and comment" on the Proxy Materials before they were filed.[420] The Merger Agreement mandated that Mindbody "may not file the Proxy Statement or any Other Required Company Filing with the SEC without first providing [Vista] and its counsel a reasonable opportunity to review and comment thereon[.]"[421] Section 6.3(d) obligated Vista to notify Mindbody if it became aware of any facts that, if not disclosed, would render the Proxy Materials materially misleading or incomplete.[422]

419 *Id.*

420 JX-1138 at 157.

421 *Id.* at 157.

422 *Id.* at 158.

***28** Saroya and Stahl both received a summary of Mindbody's proposed "Background of the Merger" section.[423] Both the summary and the version filed with the SEC stated only that "[i]n October 2018, representatives of Vista and Mr. Stollmeyer discussed Vista's investment strategy and the firm's interest in learning more about MINDBODY's approach to the fitness, beauty and wellness services industries."[424] The preliminary proxy omitted any references to Stollmeyer's meeting with in August, Stollmeyer's attendance at the CXO Summit in October, or Vista's expression of interest on October 15.[425] Nevertheless, Stahl replied that the description "makes sense to me," and Saroya replied, "This works."[426]

423 JX-1044.

424 JX-1058 at 26.

425 *Id.*

426 JX-1044 at 1.

Mindbody filed the preliminary proxy on January 9, 2019.[427] Stahl texted Saroya on January 10 to remind him to stick to their story, which required saying that "Jeff [Chang] called you on 11/30 inviting us into the process[.]"[428]

427 JX-1058.

428 JX-1066.

On January 11, Luxor filed a Schedule 13D stating that the proposed Merger Agreement "significantly undervalues" Mindbody.[429] On January 14, Friedman spoke to Stollmeyer and asked him why Mindbody had guided down for Q4.[430] Stollmeyer responded that he had "kitchen-sinked" the guidance.[431] On January 18, 2019, Mindbody stockholder Luxor issued a demand for books and records under 8 *Del. C.* § 220 seeking, among other things, "the Company's actual or anticipated Q4 performance, including subscriber accounts by tier."[432]

429 JX-1077.

430 Trial Tr. at 79:24–80:23 (Friedman).

431 *Id.*; *id.* at 82:8–19 (Friedman).

432 JX-1111 at 9.

Stahl and Klomhaus also received a copy of Mindbody's proposed definitive proxy.[433] Klomhaus did not have any comments or edits.[434] Stahl noted that he had "had some discussions" with counsel about the documents and wanted to review the changes.[435] At trial, Stahl testified that he did not believe there were any undisclosed aspects of the Merger that should have been disclosed.[436] Like the preliminary proxy, the definitive proxy omitted any reference to Stollmeyer's meeting with Vista in August, Stollmeyer's attendance at the CXO Summit in October, or Vista's expression of interest on October 16.[437]

433 JX-1139.

434 *Id.*

435 *Id.*

436 Trial Tr. at 774:2–10 (Stahl).

437 JX-1138 at 26.

Stollmeyer reviewed and signed the definitive proxy as CEO.[438] On January 23, 2019, Mindbody filed the definitive proxy with the SEC.[439]

438 *Id.* at 183; Trial Tr. at 466:11–20 (Stollmeyer).

439 PTO ¶ 9; JX-1138.

P. The "Massive Beat"

On January 4, 2019, Mindbody determined preliminarily that its Q4 revenue had come in around $68.3 million.[440] Stollmeyer texted White that day, "$68.3M Q4. Awesome!"[441] He advised his management team that this figure reflected 37% growth year over year and a "massive beat against the Street's $66 million consensus midpoint."[442]

440 JX-1037 at 2.

441 JX-1032.

442 JX-1037 at 1.

On January 6, Stollmeyer texted White again about the Q4 results: "One question: should we plan one last Earnings Call? My script: 'here's our big beat. Adios mutha f******s.' "[443]

443 JX-1042 (text altered).

On January 24, after Mindbody filed the definitive proxy, White emailed the Audit Committee to convey his belief that Mindbody should disclose the preliminary Q4 results.[444] White noted that Q4 revenue "exceeded consensus pretty meaningfully" and that the information should be publicly released by February 7 "so the shareholders have the information before they vote" on February 14.[445] Liaw agreed but expressed concern that Luxor "may use this information to bolster their position[.]"[446] Smith also expressed concern about the effect of the disclosure on the Merger vote: "What happens (hypothetically) if the vote fails on Feb. 14th? Just want to understand that first."[447] By asking about the effect on the vote, they demonstrated that they thought the information could be important for the vote.

444 JX-1141 at 1.

445 *Id.*

446 *Id.*

447 *Id.*

***29** By January 31, Mindbody's outside counsel had drafted a press release announcing the preliminary Q4 results.[448] As required by the Merger Agreement, Mindbody sent the draft to Vista.[449] After speaking with outside counsel, Klomhaus asked Stahl for "a minute to chat about my concerns."[450]

448 JX-1165; JX-1463.

449 JX-1165.

450 *Id.*

The Audit Committee met on February 6.[451] Mindbody's outside counsel reported on Vista's position.[452] The Audit Committee voted against disclosing the Q4 results, Neither the discussions nor the purported determination appear in the minutes.[453]

451 JX-1188.

452 Trial Tr. at 2140:15–19 (White).

453 *Id.* at 2185:21–2186:12 (Smith).

During this litigation, the Audit Committee members provided several reasons for their recommendation. Both Liaw and Smith testified that they were concerned with setting a precedent of pre-announcing quarterly results if the Merger failed.[454] The fact that a merger vote was pending provided an obvious distinction from ordinary course situations. There was also already information in the market on the subject, because Mindbody had issued the Proxy Materials that included Mindbody's 2019 projections.[455] If the Merger failed, Mindbody would not be in the same position for future quarters.

454 *Id.* at 1463:2–20 (Liaw); *id.* at 2184:4–2185:20 (Smith).

455 JX-1138 at 51.

Herman, Smith, and Cunningham all testified at trial that the amount of the revenue beat was not material.[456] That testimony is hard to square with Stollmeyer and White's contemporaneous reactions, and it is inconsistent with Company counsel's preparation of a press release that would announce the results. This is another issue on which Stollmeyer changed his testimony at trial. He had acknowledged in his deposition that this information would be material to an investor, but he maintained at trial that the information would not be material to a stockholder voting on the Merger.[457]

456 Trial Tr. at 1971:18–1972:1 (Herman); *id.* at 2178:11–2179:23 (Smith); *id.* at 949:1–18 (Cunningham).

457 Stollmeyer Dep. Tr. at 527:14–21, 830:9–831:13.

Liaw, White, and Smith also testified that releasing the Q4 results, without context, would be misleading to investors.[458] It is not clear why that would be true. Investors know what preliminary results are. Regardless, the draft press release provided context.[459]

458 Trial Tr. at 1463:21–1465:9 (Liaw); *id.* at 2090:17–2091:22 (White); *id.* at 2184:4–2185:20 (Smith).

459 JX-1165; JX-1463.

Q. Litigation Ensues.

Before the Merger closed, Mindbody stockholders filed federal securities class actions in California and Delaware.[460] In the Court of Chancery, Mindbody stockholders Philip Ryan, Jr. and Donald Friedman filed suit under 8 *Del. C.* § 225 challenging the validity of the stockholder vote (the "Section 225 Action").[461] The next day, Luxor filed an enforcement action in this court under 8 *Del. C.* § 220 to obtain books and records concerning the Merger (the "Section 220 Action").[462]

460 JX-1194 at 3.

461 PTO ¶ 19.

462 *Id.* ¶ 20.

To moot the federal suits and aspects of the Section 225 Action, Mindbody issued supplemental disclosures (the "Supplemental Disclosures").[463] As with the previous SEC filings related to the Merger, Vista had the opportunity to review the Supplemental Disclosures before filing. Multiple Vista personnel, including Saroya and Stahl, received a copy before filing.[464] Vista's outside counsel said they were "scrubbing one more time."[465] On February 7, Mindbody issued the Supplemental Disclosures, which added details about the sale process and other issues.[466]

463 JX-1194 at 3–7, 50–83.

464 JX-1192 at 1.

465 *Id.*

466 JX-1194.

***30** ISS and Glass Lewis recommended that stockholders vote for the transaction.[467] Analysts also supported the Merger.[468] The stockholders approved the Merger during a special meeting on February 14, 2019.[469] The Merger closed the next day.[470]

467 JX-1172.

468 *See, e.g.*, JX-551; JX-945; JX-969; JX-1181.

469 PTO ¶¶ 16–17.

470 *Id.* ¶ 1.

R. Vista Hires Stollmeyer.

On February 17, two days after the Merger closed, Stollmeyer retained employment counsel and began negotiating with Vista over the terms of his post-acquisition employment. Unlike the formal sale process, those negotiations took months.[471]

471 JX-1218; JX-1302; JX-1303; JX-1304; JX-1305.

The terms of Stollmeyer's post-deal employment resembled his pre-deal employment. Stollmeyer took the same salary and bonus in 2019.[472] He received a stock grant equal to 1.7% of the post-transaction equity, assuming full vesting and no forfeiture.[473]

472 JX-1305; Trial Tr. at 474:19–22 (Stollmeyer).

473 JX-1304; JX-1330; JX-1410 at 17.

S. This Litigation Takes The Main Stage.

After the Merger closed, the litigation landscape shifted. Mindbody produced documents in response to the Section 220 action, which Luxor voluntarily dismissed in August 2019.[474]

474 PTO ¶ 20.

The Section 225 Action moved forward, with discovery concluding in April 2019.[475] That same month, Luxor filed an appraisal petition (the "Appraisal Action").[476] In June 2019, Luxor filed a class action lawsuit alleging breach of fiduciary duty claims against Stollmeyer, White, and Liaw (the "Luxor Action").[477]

475 *Id.* ¶ 23.

476 *Id.* ¶ 24. The court will address Luxor's appraisal petition in a later decision to the extent necessary.

477 *Id.* ¶ 27.

In October 2019, the court consolidated the Section 225 Action, the Appraisal Action, and the Luxor Action into this proceeding. The court named Luxor as the lead plaintiff for purposes of the claims raised in the Luxor Action but permitted the plaintiffs who had filed the Section 225 Action to continue pursuing the Section 225 claim.

The Section 225 claim moved forward rapidly, and the court held a trial on a paper record on December 9, 2019.[478] After trial, the parties then agreed to a settlement of the Section 225 claim, which the court approved on December 15, 2020.[479]

478 *Id.* ¶¶ 23, 32.

479 *Id.* ¶ 35.

Luxor amended its complaint to strengthen its claims for breach of fiduciary duty, and the defendants moved to dismiss.[480] The court issued a decision that dismissed the claims against Liaw and otherwise denied the motion.[481] The decision noted that Liaw's dismissal was without prejudice and that "[i]f discovery shows that [Liaw] had a more significant and compromising role, then subject to the law of the case doctrine, [the plaintiff] can seek to revisit [Liaw's] dismissal, should future developments provide a compelling reason for doing so."[482] Stollmeyer and White filed answers and discovery ensued.[483]

480 *Id.*

481 *In re Mindbody, Inc.*, 2020 WL 5870084 (Del. Ch. Oct. 2, 2020) [hereinafter, "Dismissal Decision"].

482 *Id.* at *34 n.309 (quoting *In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *43 (Del. Ch. June 11, 2020)).

483 PTO ¶ 39.

After fact discovery closed, Luxor sought leave to amend its complaint. After receiving leave, Luxor filed the operative complaint on July 27, 2021.[484] It dropped White as a defendant, reasserted claims against Liaw, and added aiding and abetting claims against IVP and Vista.[485] Liaw, IVP, and Vista moved for dismissal.[486] Stollmeyer moved for summary judgment.[487] The court denied all three motions.[488]

484 *Id.*

485 *Id.* ¶ 40.

486 *Id.* ¶ 42.

487 *Id.* ¶ 43.

488 *Id.* ¶¶ 45–46. *See* Dkts. 398, 399, 401 (*In re Mindbody, Inc., S'holder Litig.*, 2021 WL 5565172 (Del. Ch. Nov. 29, 2021); *In re Mindbody, Inc., S'holder Litig.*, 2021 WL 5564687 (Del. Ch. Nov. 29, 2021); *In re Mindbody, Inc., S'holder Litig.*, 2021 WL 5834263 (Del. Ch. Dec. 9, 2021)).

***31** Liaw and IVP agreed to a settlement, which the court approved.[489] That left only Stollmeyer and Vista as defendants.

489 Dkt. 481.

The court held trial February 28, 2022, through March 9, 2022.[490] Post-trial briefing concluded on July 14, 2022, and post-trial argument was heard on July 28, 2022.[491] The parties submitted their joint schedule of evidence on August 11, 2022.[492]

490 Dkts. 461–68.

491 Dkt. 477 ("Pls.' Opening Post-Trial Br."); Dkt. 478 ("Defs.' Opening Post-Trial Br."); Dkt. 484 ("Pls.' Answering Post-Trial Br."); Dkt. 485 ("Defs.' Answering Post-Trial Br."); Dkt. 493 ("Post-Trial Oral Arg. Tr.").

492 Dkt. 492.

II. LEGAL ANALYSIS

Stollmeyer was an officer and director of a Delaware corporation. In each capacity, he owed duties of loyalty and care to the corporation and its stockholders as residual claimants.[493] As a function of those duties, Stollmeyer owed a duty to disclose all material information in connection with the Merger.[494] Plaintiffs claim that Stollmeyer breached his fiduciary duties by tilting the sale process in Vista's favor and by failing to disclose material information. Plaintiffs contend that Vista aided and abetted those breaches.

493 *In re Rural Metro Corp.*, 88 A.3d 54, 80 (Del. Ch. 2014); *In re McDonald's Corp. S'holder Deriv. Litig*, 2023 WL 387292, at *13–15 (Del. Ch. Jan. 26, 2023). In his capacity as a director, Stollmeyer was protected by an exculpatory charter provision, which means that Plaintiffs would have to prove that Stollmeyer acted disloyally or in bad faith to prevail on a claim against him as a director. Mindbody's exculpatory charter provision did not protect Stollmeyer from liability when he was acting as an officer. Generally, when a defendant acted in both exculpated and unexculpated capacities, the court must distinguish in which capacity the defendants acted to resolve the claim for liability. *See, e.g.*, *In re Oracle Corp. Deriv. Litig.*, 2021 WL 2530961, at *2 (Del. Ch. June 21, 2021). Because Plaintiffs have proven that Stollmeyer acted disloyally, however, this decision need not make that distinction and the exculpatory charter provision plays no role in the legal analysis.

494 *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992) ("[The duty of candor] represents nothing more than the well-recognized proposition that directors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action.").

A. The Claims Against Stollmeyer

When determining whether corporate fiduciaries have breached their duties, a court applying Delaware law evaluates their conduct through the lens of a standard of review.[495] The standard of review informs the evidentiary burden and provides a framework for legal analysis. Here, the parties identified an abundance of potential and, at times, competing legal standards for the claims against Stollmeyer. To chart an analytical course as to those claims, this decision begins by outlining the complex system of potential legal standards implicated by the parties' arguments.

495 *See Chen v. Howard-Anderson*, 87 A.3d 648, 666 (Del. Ch. 2014); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 35–36 (Del. Ch. 2013).

***32** Delaware law has three transactional standards of review: the business judgment rule, enhanced scrutiny, and entire fairness.[496]

496 *Chen*, 87 A.3d at 666 (quoting *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011)).

Where a stockholder challenges a change-of-control transaction like an all-cash merger, enhanced scrutiny supplies the presumptive standard of review. In an M & A setting, the key features of the enhanced scrutiny test require "(a) a judicial determination regarding the adequacy of the decision[-]making process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[497] The defendant fiduciaries bear the burden of proof on both elements.[498]

497 *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994).

498 *Id.*

Where enhanced scrutiny under *Revlon* presumptively applies, defendant fiduciaries can invoke *Corwin* to lower the standard to an irrebuttable version of the business judgment rule. To lower the standard, the transaction must have been "approved by a fully informed, uncoerced majority of the disinterested stockholders."[499] A single disclosure deficiency will defeat *Corwin* cleansing.[500] The plaintiff bears the initial burden of identifying alleged disclosure problems, but the defendants bear the burden of proving at trial that the stockholder vote was fully informed.[501]

499 *Corwin v. KKR Fin. Hldgs. LLC*, 125 A.3d 304, 305–06 (Del. 2015).

500 *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *12 (Del. Ch. Dec. 10, 2018); *van der Fluit v. Yates*, 2017 WL 5953514, at *8 n.115 (Del. Ch. Nov. 30, 2017).

501 *In re Solera Hldgs., Inc. S'holder Litig.*, 2017 WL 57839, at *7–8 (Del. Ch. Jan. 5, 2017).

Where a conflicted fiduciary uses their position to mislead a board in a sale process, committing "fraud on the board," there are other potential legal frameworks for evaluating the claim. One framework incorporates the conduct that constituted fraud on the board as part of an analysis using the entire fairness standards of review.[502] Another framework examines whether the plaintiff proved the traditional elements of a claim for common law or equitable fraud, but with the focus on the board rather than the plaintiff as the victim.[503] The different frameworks have different approaches to burden allocation.

502 *See* Dismissal Decision at *25 n.229 (discussing cases); *see also* *Cinerama, Inc. v. Technicolor, Inc. (Technicolor Plenary III)*, 663 A.2d 1156, 1170 n.25 (Del. 1995) (suggesting that, when the default standard of review is the business judgment rule, fraud on the board causes the standard of review to escalate to entire fairness); *Mills Acq. Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283–84 & n.33 (Del. 1989) (suggesting that, where enhanced scrutiny applies, fraud on the board causes the standard of review to escalate to entire fairness). Applying a traditional fiduciary standard makes the most sense when evaluating how a proven fraud on the board affects the potential liability of defendant fiduciaries who were misled or manipulated by the fraudster. In that scenario, if the fiduciaries can satisfy the transactional standard, then they did not breach their duties, regardless of having been misled or manipulated. If the misled or manipulated directors cannot prove that the transaction satisfied the fiduciary standard of review, then they have committed a fiduciary breach, albeit likely a breach of the duty of care for which they would be exculpated.

503 *See* *Firefighters' Pension Sys. of City of Kansas City, Missouri Trust v. Presidio, Inc.*, 251 A.3d 212, 274–55 (Del. Ch. 2021) (citing Joel Edan Friedlander, *Confronting the Problem of Fraud on the Board*, 75 Bus. Law. 1441 (2020)). There is merit to treating fraud on the board as a separate theory of liability that can be committed by anyone, including a non-fiduciary. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 865 (Del. 2015) (explaining that trial court's award of money damages against a contractual counterparty, a financial advisor, "was premised on [the financial advisor]'s 'fraud on the Board' "). Ultimately, fraud-on-the-board theory is a developing area of Delaware law, which this decision does not address given the selected legal standard.

***33** In certain circumstances, a plaintiff can pursue a claim for breach of the duty of disclosure as an independent path to liability.[504] When a corporation seeks stockholder action, the duties of loyalty and care manifest themselves contextually in a "duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action[.]"[505] Unlike under *Corwin*, where the defendants have the burden of proof, the plaintiff bears the burden of proving the elements of a disclosure claim.[506]

504 When entire fairness applies, disclosure becomes one element of the fair process dimension, rather than an independent claim for fiduciary breach. *See, e.g.*, *Weinberger*, 457 A.2d at 711 ("Part of fair dealing is the obvious duty of candor .... [O]ne possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy.").

505 *Stroud*, 606 A.2d at 84.

506 *Solomon v. Armstrong*, 747 A.2d 1098, 1128 (Del. Ch 1999) ("As far as claims of material misstatements, omissions, and coercion go, the law is clear that plaintiff bears the burden of proof that disclosure was inadequate, misleading, or coercive.").

In briefing, the parties grappled with the complicated surfeit of standards described above. Plaintiffs briefed enhanced scrutiny, entire fairness, and disclosure as independent paths to liability.[507] Stollmeyer argued that enhanced scrutiny is the presumptive standard, but that *Corwin* cleansing applies, resulting in an irrebuttable version of the business judgment rule governing the case.[508] The parties' respective positions read like a legal version of a choose-your-own-adventure story, where all of Plaintiffs' adventures lead to liability and all of Stollmeyer's adventures lead to exoneration.

507 *See* Pls.' Opening Post-Trial Br. at 68–83; Pls.' Answering Post-Trial Br. at 15–40.

508 *See* Defs.' Opening Post-Trial Br. at 52–58; Defs.' Answering Post-Trial Br. at 12–13.

For a court, a one-adventure approach is desirable. This decision applies the approach urged by Stollmeyer —addressing Plaintiffs' claims against Stollmeyer under *Revlon*, evaluating the viability of *Corwin*, and assessing disclosure as an independent path to liability.[509] Adopting Stollmeyer's approach, this decision finds that the conduct leading to the Merger fell outside of the range of reasonableness.

509 This approach has the added benefit of aligning the court's legal analysis with the parties' focus in briefing. *Compare* Pls.' Opening Post-Trial Br. at 68–74 (devoting six pages to addressing *Revlon* arguments) and Defs.' Opening Post-Trial Br. at 62–94 (devoting over thirty pages to addressing same), *with* Pls.' Opening Post-Trial Br. at 80–83 (devoting fewer than three pages to addressing entire fairness arguments) and Defs.' Opening Post-Trial Br. at 59–63 (devoting fewer than four pages to addressing same).

Notably, there is a conflict between the allocation of the burden of proof on *Corwin* cleansing and the claim for breach of the duty of disclosure. Rather than conducting the analysis twice, once with the burden of proof on Stollmeyer under *Corwin* and once with the burden of proof on Plaintiffs for the breach of fiduciary duty claim, this decision conducts the analysis once with the burden on Plaintiffs. Using that framework, this decision finds that *Corwin* cleansing is not available because Stollmeyer failed to disclose material information. That finding also provides the predicate for Plaintiffs' claim for breach of the duty of disclosure. Because Plaintiffs prevail, allocating the burden of proof to them proves inconsequential to the outcome and avoids the need to analyze the disclosure issues twice.

1. The Sale-Process Claim

***34** Under *Revlon*, " 'directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there.' "[510] The question posed is whether the fiduciaries have exercised their powers "in the service of a specific objective: maximizing the sale price of the enterprise."[511] Generally speaking, to satisfy enhanced scrutiny under *Revlon*, defendants bear the burden of demonstrating both (i) the reasonableness of the decision making process employed by the directors, including the information on which the directors based their decision, and (ii) the reasonableness of the directors' action in light of the circumstances then existing.[512]

510 *In re Answers Corp. S'holders Litig.*, 2011 WL 1366780, at *3 (Del. Ch. Apr. 11, 2011) (quoting *In re Dollar Thrifty S'holder Litig.*, 2010 WL 5648895, at *17 (Del. Ch. Sept. 8, 2010)).

511 *Malpiede v. Townson*, 780 A.2d 1075, 1083 (Del. 2001) (citing *Revlon*, 506 A.2d at 183); *see also Revlon*, 506 A.2d at 182–83 (explaining that, in the change-of-control context, the duty of loyalty requires "the maximization of the company's value at a sale for the stockholders' benefit"); *Paramount*, 637 A.2d at 44 ("In the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end.").

512 *Paramount*, 637 A.2d at 45.

Under Delaware law, "[w]hen directors bias the process against one bidder and toward another not in a reasoned effort to maximize advantage for the stockholders, but to tilt the process toward the bidder more likely to continue current management, they commit a breach of fiduciary duty."[513] This is also true when a single board member causes the board to favor a bidder "not in a reasoned effort to maximize advantage for the stockholders," but because of "personal reasons."[514] "The sins of just one fiduciary can support a viable *Revlon* claim."[515] Thus, "the paradigmatic context for a good *Revlon* claim ... is when a supine board under the sway of an overweening CEO bent on a certain direction[ ] tilts the sales process for reasons inimical to the stockholders' desire for the best price."[516] Reframed more generally, "the paradigmatic *Revlon* claim involves a conflicted fiduciary who is insufficiently checked by the board and who tilts the sale process toward his own personal interests in ways inconsistent with maximizing stockholder value."[517]

513 *In re Topps Co. S'holders Litig.*, 926 A.2d 58, 64 (Del. Ch. 2007).

514 *In re Columbia Pipeline Gp., Inc. Merger Litig.*, 2021 WL 772562, at *41 (Del. Ch. Mar. 1, 2021).

515 Dismissal Decision at *14 (citing *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.4 (Del. 2018) (ORDER)); *MacMillan*, 559 A.2d at 1283; *Xura*, 2018 WL 6498677, at *13; *Toys "R" Us*, 877 A.2d 975, 1002–03 (Del. Ch. 2005).

516 877 A.2d at 1002 (quoted favorably in *Kahn*, 2018 WL 1341719, at *1 n.4).

517 Dismissal Decision at *13.

When a plaintiff proves a paradigmatic *Revlon* claim, that showing calls into question the reasonableness of the decision-making process employed and the reasonableness of the directors' action in light of the circumstances then existing.

Plaintiffs proved that this case fits the paradigm. Stollmeyer suffered a disabling conflict because he had an interest in near-term liquidity, a desire to sell fast, and an expectation that he would receive post-Merger employment accompanied by significant equity-based incentives as a Vista CXO. Stollmeyer tilted the sale process by strategically driving down Mindbody's stock price and providing Vista with informational and timing advantages during the due-diligence and go-shop periods. And the Board failed to adequately oversee Stollmeyer.

***35** Because facts concerning the sale-process breaches were not disclosed to stockholders, the stockholder vote was not fully informed. Defendants, therefore, are not entitled to

Corwin cleansing and Plaintiffs have provide their disclosure claim against Stollmeyer.

a. Stollmeyer Suffered Disabling Conflicts.

"Delaware law recognizes that liquidity is one benefit that may lead directors to breach their fiduciary duties if a desire to gain liquidity caused them to manipulate the sales process and subordinate the best interests of the corporation and the stockholders as a whole."[518] "Delaware law also recognizes that management's prospect of future employment can give rise to a disabling conflict in the sale context."[519] "Regardless of the underlying theory, the key in evaluating whether financial interests gave rise to a disabling conflict is to look to the subjective intent of the fiduciary."[520]

518 Dismissal Decision at *15 (cleaned up) (collecting cases).

519 *Id.* (cleaned up) (collecting cases).

520 *Id.* at *16 (cleaned up) (collecting cases).

Plaintiffs proved at trial that, in 2018, Stollmeyer was subjectively motivated in large part by his need for liquidity. To recap, by 2018:

- Stollmeyer had never experienced a big liquidity event.[521]
- He had made substantial financial commitments by investing, loaning, or pledging: (i) nearly $1 million into his wife's wellness company, (ii) $300,000 into "Stollmeyer Technologies, LLC," (iii) money to his brother and his former business partner for their own real estate purchases, and (iv) $3 million to a local college, of which $2.4 million was unpaid.[522]
- He openly and unapologetically described his unhappiness with his pre-Merger financial situation in a post-merger interview for Cremades's "dealmakers" podcast, stating how "98% of his net worth" had been "locked inside" "extremely volatile" Mindbody stock, and when he faced the expense of "kids in college," he regularly sold "tiny bits" of his stake in the public market under his 10b5-1 plan.[523]
- He described sales made pursuant to his 10b5-1 plan as "kind of like sucking through a very small straw."[524]
- He emailed his financial advisor to ask that he "estimate my cash position" in light of his impending expenses, stating that the timing and amount of his 10b5-1 sales were "top of mind" because of "greater than expected H1 cash outlays[.]"[525]
- His spending required him to "dig[ ] into his LOC [line of credit]" to fund additional financial commitments.[526]
- He described his pre-Merger financial position in his book as the "living at or near the precipice of financial ruin," and he further wrote that, post-Merger, "my family and I don't have to worry about money anymore."[527]

521 JX-1337 at 10 ("[F]or the entrepreneur or particularly for the CEO, [an IPO] is not a liquidity event.").

522 JX-1142; Defs.' Demonstrative 12 at 1–2.

523 JX-1337 at 10.

524 *Id.*

525 JX-145 at 1.

526 *Id.*

527 JX-1647 at 181.

Plaintiffs further proved that Stollmeyer became uniquely smitten with Vista before the formal sale process began. To recap:

- Stollmeyer met with Qatalyst's Chang on August 7, and although Stollmeyer "had never been open-minded to having dialogue" with private equity before that time, his posture had changed by that point, and he was "more open to having a dialogue" with private equity firms.[528]

***36** • Chang connected Stollmeyer to Saroya immediately after the meeting,[529] and Stollmeyer met with Vista on September 4.[530] Chang waited a week to connect Stollmeyer with other private equity firms,[531] and Stollmeyer did not meet with those firms until mid-October and early November.[532]

- Chang reported internally that Stollmeyer had "talked about how he is tired of being public and wanted me to re-connect him w[ith] Vista and Thoma. Probably a 2019 deal is my guess."[533]

- During the September 4 meeting, Stollmeyer told Vista that he was looking to "find a good home for his company" and that he was "getting tired" but did still expect to "stay in his seat 2-3 more years."[534]

- Stollmeyer attended the CXO Summit, where he saw presentations from Vista leadership about the wealth of portfolio company CEOs. Stollmeyer described the presentations as "very impressive"[535] and "mind blowing/inspiring."[536]

- Stollmeyer sent a colleague "money shots," from the Vista presentation,[537] two of which focused on Vista's 2016 acquisition of Marketo for $1.8 billion and subsequent sale of Marketo in 2018 for $4.75 billion.[538]

- Stollmeyer pitched Mindbody to Vista during the CXO Summit,[539] asked Vista to put him in touch with a founder who had sold to Vista,[540] and gave Vista the impression that he was "hyper focused on maintaining culture and ensuring his business finds the right home that will accelerate growth, not cause it to falter."[541]

- Stollmeyer told Mansbach after the CXO Summit that Vista "really love[s] me, I love them."[542]

- Vista understood that they had largely sold Stollmeyer on a transaction, touting internally that Stollmeyer "loved" them and that they "have built a strong relationship with [Stollmeyer]."[543]

- After meeting his interactions with Vista, Stollmeyer saw Vista as "his solution."[544] He could keep his position as CEO, reload with equity, and participate in a follow-on sale.[545] Stollmeyer told his financial advisor that "he could make as much money over the next three years as he did the first go around."[546]

528 Trial Tr. at 255:22–257:1 (Chang).

529 JX-230.

530 JX-264; JX-277.

531 JX-238; JX-239.

532 JX-566; *see also* JX-317; Stollmeyer Dep. Tr. at 292:18–293:2.

533 JX-231 at 1; Trial Tr. at 374:18–376:13 (Stollmeyer) (stating that "maybe I was conveying that with my body language. It was a really tough and challenging time for me personally, wearing both hats of CEO and CTO and trying to find our new CTO").

534 JX-277.

535 JX-327.

536 JX-328.

537 JX-333.

538 JX-334; JX-335; *see also* Stollmeyer Dep. Tr. at 364:5–366:14.

539 Trial Tr. at 389:20–390:23 (Stollmeyer).

540 JX-344; *see also* Stollmeyer Dep. Tr. at 384:9–385:21.

541 JX-344.

542 Stollmeyer Dep. Tr. at 326:8–328:12.

543 JX-350; JX-372.

544 Trial Tr. at 183:5-11 (Handler).

545 *Id.* at 72:18–74:6 (Friedman).

546 JX-1262.

Moreover, Plaintiffs proved that timing was an issue for Stollmeyer. In 2018, he needed liquidity, was tired of running a public company, and had a relatively limited window for effectuating a transaction. He knew that it was advantageous to before the sunset of the super-voting shares loomed. It would also be easier to sell while Liaw remained on the Board, and before Luxor, who had told Stollmeyer it would oppose a sale of Mindbody, joined. Topping things off, Qatalyst cautioned Stollmeyer on October 11, 2018, to be careful providing non-public information to Vista because they liked to move fast. For Stollmeyer, that was a plus. Rather than taking steps to slow Vista down, he helped them get ahead.

***37** In response to this compelling factual record, Defendants beat on the same dead horse that they championed at the dismissal stage. They argue that because of his large stock holdings, Stollmeyer's interests had to be aligned with the stockholders as a whole. It is true "that material amounts of stock ownership can serve to align the interests of fiduciaries with the interests of other stockholders."[547] But that does not mean that owning material amounts always align the interests of a fiduciary with the interest of the other stockholders.

547 Dismissal Decision at *14 (collecting cases).

In this case, Stollmeyer's stock ownership did not result in fully aligned interests. Defendants' mathematical argument assumes, counterfactually, that Stollmeyer valued the immediate incremental dollar value per share in a sale over everything else. It ignores Stollmeyer's craving for a liquidity event, his fear of near-term market risk, and the upside Stollmeyer expected to capture under Vista ownership. Defendants' counterfactual theory requires the court to ignore everything Stollmeyer said and did.

The record overwhelmingly supports Plaintiffs' theory. To sum it up, Stollmeyer wanted to sell for idiosyncratic reasons. He wanted to sell fast to a "good home" sheltered from the pressures of being a public company. He wanted both near-term liquidity and a potential for post-closing upside. And Vista offered all of this. He said it best himself: He loved Vista, and they loved him.

b. Stollmeyer Tilted The Sale Process In Vista's Favor.

Plaintiffs proved that Stollmeyer created advantages for Vista in the sale process. The record is riddled with instances when Stollmeyer tilted the playing field in Vista's favor.

Stollmeyer did not have Board authorization to explore a sale of Mindbody until mid-October 2018.[548] Before then, he met twice with Vista and signaled that Mindbody could be an acquisition target. During his first meeting with Vista on September 4, Stollmeyer said that he "would like to find a good home for his company."[549] Stollmeyer then pitched Mindbody to Vista during the CXO Summit on October 9.[550] After the summit, Vista had the impression that Stollmeyer "is hyper focused on maintaining culture and ensuring his business finds the right home that will accelerate growth, not cause it to falter."[551] Vista immediately began drafting a memorandum for its Investment Committee and preparing its expression of interest.[552]

548 Trial Tr. at 538:18–22 (Stollmeyer).

549 JX-277.

550 Trial Tr. at 389:20–390:23 (Stollmeyer).

551 JX-344.

552 JX-1461 at 1.

At least by October 11, Stollmeyer knew that Vista might attempt to move fast to gain a competitive advantage.[553] Rather than slowing Vista down, Stollmeyer helped Vista get ahead. After receiving Vista's expression of interest on October 15, Stollmeyer took his time telling his fellow directors. He informed management on October 17, but he swore them to secrecy.[554] He informed Liaw on October 18. He called Vista's references on October 19. It was not until October 23 that Stollmeyer informed the other directors through a series of individual conversations that let him control the message.[555] During the same period, his conversations with Vista were "progressing rapidly."[556] By delaying before informing the Board, Stollmeyer postponed the formal commencement of a sale process and gave Vista a head start.

553 Trial Tr. at 545:14–18 (Chang).

554 JX-410 at 1.

555 *See Weinberger*, 457 A.2d at 711–12.

556 JX-410 at 1.

Vista used that head start to rev up its process. Vista knew that Stollmeyer was looking for a good home for his company, was a willing seller, and had contacted Vista's references.[557] Based on that information, Saroya authorized retaining Bain to prepare an "outside-in" market analysis of Mindbody that would take four to six weeks to complete.[558] By starting the process in mid-October, Vista was positioned to make a firm offer in early December.[559] None of the strategic bidders so much as heard about the process until November 19. No other financial bidders were contacted until December 3 and 4.

557 JX-421 (Saroya: "Yup, I was aware.").

558 JX-681.

559 JX-825.

***38** The skewed sale process had an obvious effect. When Vista was ready to make a firm offer in early December, the other bidders were still in the early stages.[560] By December 20, only Vista and H & F remained in the process.[561] Vista made its "best and final" offer on December 20.[562] When

Qatalyst tried to prompt H & F to bid, H & F lamented internally that they needed more time.[563]

560 JX-876 at 1 (Qatalyst employee emailing Chang on December 19 that Thoma Bravo was "just much further behind in their thinking .... Level of questions is much more basic so far"); JX-877 (Recruit still early in diligence by the time Vista had made an offer).

561 JX-886 at 3.

562 JX-917.

563 JX-951 ("[W]e are processing, need 2 more weeks to sign.").

Stollmeyer was unabashed in his preference for Vista. After the Transaction Committee adopted the Guidelines requiring management to obtain "authorization for outbound communications to potential strategic parties or financial advisors," Stollmeyer made an unauthorized call to Vista to tip them that Mindbody would be commencing a formal sale process.[564] He later entertained an invitation to attend a Vista-sponsored charity event, thinking he would "show a little leg."[565] Meanwhile, he rejected bidders that he disliked for personal reasons.[566]

564 Stollmeyer Dep. Tr. at 626:12–23; JX-487.

565 JX-552.

566 JX-670; JX-671; Trial Tr. at 72:18–74:6 (Friedman).

Stollmeyer did not tell other bidders in September that he was looking for a good home for his company. Stollmeyer did not check other bidders' references in October. Stollmeyer did not tip other bidders in November that Mindbody was commencing a formal sale process. Stollmeyer did not breach the Guidelines to communicate with other bidders. Stollmeyer did not suggest showing other bidders "a little leg."[567] No other bidder knew that Stollmeyer had a deal price bogey of $40 per share. No other bidder knew to get approval to bid up to $40 per share. No other bidder could say "[w]e were able to conduct all of our outside-in work *before the process launched*."[568] No other bidder was able "to move swiftly in the process to provide the MINDBODY Board with a highly certain offer within 3 days of receiving data room access."[569]

567 JX-552.

568 JX-968.

569 *Id.*

Chang warned Stollmeyer that "[t]he more [that Vista personnel] think or feel you're in their camp, the less $ they'll pay."[570] And that is what happened. Vista had the authority from the Investment Committee to pay up to $40 per share, but it had no reason to get there. Without competitive pressure, the Company had no leverage to extract a higher price. Vista ended up paying $36.50 per share, less than the midpoint of their range and below the predictions of the most knowledgeable deal-team members. Without Stollmeyer's help, Vista would not have gotten the Company for $36.50 per share.

570 JX-617.

c. The Board Process

Directors can manage conflicts if they are aware of them. The Mindbody Board did not know about the conflicts that infected the sale process. Not surprisingly, the Board did not manage them effectively.

To recap:

- The Board did not know about Stollmeyer's need for liquidity or IVP's desire for a near-term exit their Mindbody investment.
- The Board did not know the details of Stollmeyer's September 5 meeting with Vista.
- The Board did not know that Stollmeyer found the presentations at the CXO Summit to be "mind blowing/inspiring."[571]

***39**

- The Board did not know that during the CXO Summit, Stollmeyer told Vista that he wanted to find a home for his Company.
- The Board did not know that after the CXO Summit, Stollmeyer felt that the Vista team "really love[s] me, I love them."[572]
- The Board did not know that Stollmeyer checked Vista's references before informing the majority of the Board of Vista's expression of interest.
- The Board did not know that Qatalyst leaked Stollmeyer's "40 min" price.

- The Board did not know that Stollmeyer had tipped Vista about the start of the formal sale process.
- The Board did not know that Stollmeyer wanted to "show a little leg" to encourage Vista.[573]
- The Board did not know of Vista's huge head start.

571 JX-328.

572 Stollmeyer Dep. Tr. at 326:8–328:12.

573 JX-552.

In short, the Board was in the dark. Stollmeyer's actions deprived the Board of the information needed to employ a reasonable decision-making process. Given the Board's lack of knowledge, Stollmeyer cannot rely on the Board's actions to support the reasonableness of the sale process or the ultimate outcome.

2. *Corwin* Cleansing And The Disclosure Claim

When enhanced scrutiny under *Revlon* is the presumptive standard of review, a defendant can restore the business judgment rule through *Corwin* cleansing by demonstrating that the transaction was "approved by a fully informed, uncoerced majority of the disinterested stockholders."[574] Ordinarily, the directors bear the burden of proof at trial to establish *Corwin* cleansing. For the reasons already discussed, the court has allocated the burden to Plaintiffs to establish a disclosure violation.

574 *Corwin*, 125 A.3d at 305–06.

In this case, the stockholders were as in the dark as the Board. Generally, when a plaintiff proves the paradigmatic *Revlon* claim, a defendant will not be able to show that the stockholder vote was fully informed, precisely because the Board did not know about and could not disclose information about the officer's machinations.[575] This generalization plays out here. The stockholders were not made aware of Stollmeyer's conflicts or the way in which the process favored Vista. This is more than sufficient to defeat a *Corwin* defense. The *Corwin* analysis could end here. Because, however, Plaintiffs' disclosure theories are also relevant to the aiding and abetting analysis, a more thorough review is warranted.

575 *See, e.g.*, Dismissal Decision at *26; *Xura*, 2018 WL 6498677, at *12–13; *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114–15 (Del. Ch. 2007).

Plaintiffs contend that Stollmeyer breached his duty of disclosure by keeping secret his pre-acquisition interactions with Vista (the "process-based disclosures") and by joining Stollmeyer's decision not to disclose the Q4 results before the shareholder vote (the "Q4-results disclosures").

An omitted fact is material where "there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[576] To be material, an omitted fact must have "significantly altered the 'total mix' of information made available."[577] When assessing materiality, courts must balance "the benefits of additional disclosures against the risk that insignificant information may dilute potentially valuable information."[578] Although a fiduciary need not give a play-by-play account, "when fiduciaries choose to provide the history of a transaction, they have an obligation to provide shareholders with 'an accurate, full, and fair characterization of those historic events.' "[579] "[O]nce defendants travel[ ] down the road of partial disclosure of the history leading up to the [transaction] ..., they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[580]

576 *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

577 *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994) (quoting *TSC Indus.*, 426 U.S. at 449).

578 *In re Volcano Corp. S'holder Litig.*, 143 A.3d 727, 749 (Del. Ch. 2016); *see also Solomon*, 747 A.2d at 1128 ("The theory goes that there is a risk of information overload such that shareholders' interests are best served by an economy of words rather than an overflow of adjectives and adverbs in solicitation statements.").

579 *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *12 (Del. Ch. June 27, 2008) (quoting *Globis P'rs, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *14 (Del. Ch. Nov. 30, 2007)); *see also Clements v. Rogers*, 790 A.2d 1222, 1242–43 (Del. Ch. 2001) ("In a transaction where the outcome is foreordained by the majority stockholder's voting power and where that voting power precludes the Special Committee from finding other purchasers, the effective functioning of the Special Committee as an informed and

aggressive negotiating force is of obvious importance to the public stockholders. When a Proxy Statement details the functioning of that process, it must do so in a fair and balanced manner that does not create a materially misleading impression of how the Committee actually operated in fact.") (citations omitted).

580 *Arnold*, 650 A.2d at 1280.

***40** A violation of the duty of disclosure can implicate the duties of either loyalty or care. A "violation of the duty of loyalty is implicated where the required disclosure was made in 'bad faith, knowingly or intentionally.' "[581] For a non-exculpated officer like Stollmeyer, liability can be premised on gross negligence.[582]

581 *Crescent/Mch I P'rs, L.P. v. Turner*, 846 A.2d 963, 987 (Del. Ch. 2000) (quoting *O'Reilly v. Transworld Healthcare, Inc.*, 745 A.2d 902, 915 (1999)).

582 *See Harcum v. Lovoi*, 2022 WL 29695, at *27 (Del. Ch. Jan. 3, 2022) ("As discussed above, the Complaint does not state a claim that the Proxy contained material omissions or inaccurate disclosures. Even if any of the alleged omissions or inaccurate disclosures were material, I am not persuaded that they were the product of gross negligence on the part of [individual defendants] in their capacities as officers of the Company."); *In re Pattern Energy Gp. Inc. S'holders Litig.*, 2021 WL 1812674, at *66 (Del. Ch. May 6, 2021) ("An officer's compliance with the duty of care is evaluated for gross negligence."); *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *15 (Del. Ch. Oct. 27, 2020) ("Under Delaware law, the standard of care applicable to the fiduciary duty of care of an officer is gross negligence.").

Stollmeyer read the definitive proxy and the Supplemental Disclosures before they were filed, and he signed the Proxy Materials as CEO.[583] He was also in a unique position of informational asymmetry at the time of the stockholder vote, as only he and Vista employees knew of the nature and even existence of some of their interactions leading up to the Merger. Stollmeyer knowingly withheld information from the stockholders by painting his interactions with Vista in a sterile light. The sterilized narrative begins with Stollmeyer's September 4 meeting with Stahl and Saroya. The Supplemental Disclosures state that

> a representative of Vista emailed Stollmeyer, offering to meet for lunch, which took place on September 4, 2018, and at which Mr. Stollmeyer provided the representative of Vista with a general overview of MINDBODY and its approach to the fitness beauty and wellness services industries as was typical for Mr. Stollmeyer to present to potential investors.[584]

It is true that Stollmeyer met with Vista on September 4. The Supplemental Disclosures fail to state that Stollmeyer invited discussions about an acquisition by saying he wanted to find a "good home" for his company, that he was "getting tired," and that he expected to "stay in his seat 2–3 more years."[585] Contrary to the disclosure, the meeting was not "typical" for Stollmeyer—he did not provide this information to any other potential acquirers in August, September, or October 2018.[586]

583 JX-1138 at 183; Trial Tr. at 466:11–20 (Stollmeyer).

584 JX-1195 at 4.

585 JX-277.

586 Trial Tr. at 525:8–526:11 (Stollmeyer).

The Supplemental Disclosures next describe Stollmeyer's attendance at the CXO Summit as if it were a run-of-the-mill industry gathering.

> In October 2018, at that "meet and greet" annual conference hosted by Vista, at which Mr. Stollmeyer was present as an attendee on October 8th and 9th, representatives of Vista and Mr. Stollmeyer discussed Vista's investment strategy and the firm's interest in learning more about MINDBODY's approach to the fitness, beauty and wellness services industries.[587]

***41** The disclosure omits that during the CXO Summit, Stollmeyer reiterated his intention to explore a sale of Mindbody,[588] without any Board authorization to do so.[589]

587 JX-1195 at 4.

588 JX-1461 at 1.

589 Trial Tr. at 538:18–22 (Stollmeyer).

The Supplemental Disclosures also provide an anodyne description of Vista's October 15 expression of interest, stating only that "Vista indicated to Mr. Stollmeyer that it was interested in pursuing strategic transaction discussions with MINDBODY."[590] In reality, Saroya and Stollmeyer spoke for 25 minutes over the phone, and Saroya shared that Vista saw Mindbody's stock price correction as a buying opportunity, was willing to pay a "substantial premium" to Mindbody's then-trading stock price of $33.27 per share, and did not see any need for an "automatic exit" for management.[591]

590 JX-1195 at 4.

591 JX-410 at 1.

In addition to the partial disclosures sterilizing the description of Stollmeyer's interactions with Vista, the Proxy Materials are completely silent as to the following events:

- Stollmeyer's reference call with a Vista portfolio CEO on October 19.[592]
- Chang's tip to Vista on November 6 that Stollmeyer wanted $40 per share.[593]
- Stollmeyer's call to Saroya on November 10, in violation of the Guidelines, tipping him that Mindbody would be running a sale process.[594]
- Saroya's invitation for Stollmeyer to attend a charity event in Miami, and Stollmeyer's initial acceptance as long as he could bring his wife.[595]

592 JX-1442; Trial Tr. at 543:10–19, 559:3–6 (Stollmeyer).

593 JX-533.

594 Stollmeyer Dep. Tr. at 626:12–23.

595 JX-1490 at 44.

The Proxy Materials create a false narrative in which Stollmeyer met casually with Vista on September 4 and October 9, Vista expressed general interest in a transaction on October 15, and then Vista learned of the formal sale process with other potential acquirers on November 30. This is not an "accurate, full and fair characterization" of those events.[596]

596 *Arnold*, 650 A.2d at 1280.

Perhaps one of these disclosure issues, standing alone, would not meet the materiality standard. Taken together, however, the partial and complete omissions altered the total mix of information available to Mindbody's stockholders. Plaintiffs proved that Stollmeyer breached his fiduciary duties in the process-based disclosures.

Because the Plaintiffs proved one disclosure violation, this decision does not rule on the Q4-results disclosure.

B. The Claims Against Vista

Plaintiffs advance two theories of liability for aiding and abetting against Vista. They first argue that Vista aided and abetted Stollmeyer's sale-process breaches, but that claim is procedurally improper. The viability of Plaintiffs' claim against Vista turns on whether Vista aided and abetted the disclosure violations, which it did.

1. The Sale-Process Breaches

In almost three years of litigation and through four iterations of its complaint, including the last version when Vista was added as a party following the conclusion of fact discovery, Plaintiffs never asserted that Vista aided and abetted the sale-process breaches. Vista moved to dismiss Plaintiffs' claims, and the parties fully briefed that motion.[597] Nowhere in the parties' briefing did Plaintiffs raise (or did Vista expressly anticipate Plaintiffs raising) an argument that Vista aided and abetted in the sale-process breaches. Plaintiffs asserted this theory for the first time in post-trial briefing, relying primarily on an oral motion made at the conclusion of trial pursuant to Court of Chancery Rule 15(b).[598]

597 Dkt. 342 (Vista's Mot. to Dismiss); Dkt. 343 (Vista's Opening Br. in Support of Mot. to Dismiss); Dkt. 363 (Pls.' Answering Br. in Opposition to Mot. to Dismiss); Dkt. 385 (Vista's Reply Br. in Support of Mot. to Dismiss).

598 Pls.' Opening Post-Trial Br. at 84 n.480.

***42** Whether to permit post-trial amendment is a matter for this court's discretion.[599] The primary consideration "is prejudice to the opposing party."[600] Although not required by law, the court routinely denies parties' attempts to raise new claims in post-trial briefing.[601] In at least two cases, this court has refused to allow a party to assert aiding and abetting claims in post-trial briefing.[602] This general approach derives from the principle that "[p]leadings are intended to provide fair notice to the opposing party of the legal and factual theories and claims to be litigated."[603]

599 *Those Certain Underwriters at Lloyd's, London v. Nat'l Installment Ins. Servs., Inc.*, 2008 WL 2133417, at *7 (Del. Ch. May 21, 2008) [hereinafter "*Lloyd's*"].

600 *Id.* at *8.

601 *See Zhou v. Deng*, 2022 WL 1024809, at *7 (Del. Ch. Apr. 6, 2022) (dismissing newly asserted aiding and abetting claim introduced in post-trial briefing because it was "too late" and the argument was waived); *CanCan Dev., LLC v. Manno*, 2015 WL 3400789, at *22 (Del. Ch. May 27, 2015) (same), *aff'd*, 132 A.3d 750 (Del. 2016); *see also In re Est. of DeGroat*, 2020 WL 2078992, at *26 (Del. Ch. Apr. 30, 2020) (finding that defendant had waived counterclaim by failing to present evidence on the claim at trial and only "referenc[ing] the claim briefly in post-trial briefing").

602 *Zhou*, 2022 WL 1024809, at *7; *CanCan Dev.*, 2015 WL 3400789, at *22.

603 *Zutrau v. Jansing*, 2014 WL 6901461, at *7 (Del. Ch. Dec. 8, 2014).

Rule 15(b) authorizes post-trial amendments to the pleadings to conform to issues "tried by express or implied consent of the parties."[604] It is "designed to cure the situation where the course of the trial departs so materially from the image of the controversy pictured in the pleadings or by the discovery process that it becomes necessary to adjust the pleadings to reflect the case as it actually was litigated in the courtroom."[605] Implied consent can arise when an opposing party acquiesces to the introduction of evidence that only relates to the unpled issue.[606] To support a finding of implied consent in this context, " 'it must appear that parties understood evidence introduced without objection was aimed at the unpleaded issue.' "[607]

604 Ct. Ch. R. 15(b).

605 *Lloyd's*, 2008 WL 2133417, at *9 (cleaned up).

606 *Id.* at *8.

607 *Id.* at *9 (quoting *Laird v. Buckley*, 539 A.2d 1076, 1080 (Del. 1988)). It is this jurist's preference to consider motions made under Rule 15(b) in the context of post-trial briefing.

Plaintiffs contend that Vista impliedly consented to amend the pleadings to include a claim that Vista aided and abetted the sale-process breaches by failing to object to Plaintiffs' Rule 15(b) motion at the close of trial, but Plaintiffs did not state the purpose of its motion when raising it. Rather, Plaintiffs raised its Rule 15(b) motion as "a technical matter."[608] Nor did the court grant the or invite argument when it was raised.[609] The court deferred the issue for post-trial briefing. Vista's silence was not consent.

608 Trial Tr. at 2547:24–2548:6.

609 *Id.*

Vista also did not implicitly consent through its actions at trial. The evidence Plaintiffs introduced did not speak only to a claim for aiding and abetting. All of the evidence also related to the sale-process claim against Stollmeyer.[610] The evidence did not suggest a new claim, so Vista had no reason to object.

610 Post-Trial Arg. Tr. at 53:3–5.

Allowing an amendment at this stage would impose substantial prejudice on Vista. Neither party raised the claim in their pre-trial briefs.[611] Vista had no reason to mount a defense to the claim at trial.

611 Dkt. 443 (Pls.' Pre-Trial Br.); Defs.' Pre-Trial Br.

***43** Plaintiffs argue that they alerted Vista to the potential claim by identifying the following as an open issue of law and fact that remains to be litigated in the pre-trial order: "Whether Vista aided and abetted the breaches of fiduciary duty by Stollmeyer and/or the other Mindbody directors in approving the Merger, recommending the Merger to Mindbody's stockholders, and seeking stockholder approval of the Merger based on false and misleading disclosures[.]"[612] On different facts, that could be enough to preserve an issue, but not here. Plaintiffs needed to do more to put Vista on notice that it faced a claim for aiding and abetting sale-process breaches. Plaintiffs may not advance that claim.

612 PTO ¶ 133.

Based on Plaintiffs' failure to timely assert its claim, Plaintiffs may not advance a claim for aiding and abetting based on Stollmeyer's sale-process breaches.

2. The Disclosure Breaches

In contrast to their failed claim for aiding and abetting sale-process breaches, Plaintiffs proved that Vista aided and abetted disclosure breaches.

To prevail on an aiding and abetting claim after trial, a plaintiff must demonstrate: "(1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, ... (3) knowing participation in that breach by the defendants, and (4) damages proximately caused by the breach."[613] Generally, a plaintiff bears the burden of proving a claim for aiding and abetting.[614]

613 *Malpiede*, 780 A.2d at 1096.

614 *In re Rural Metro Corp.*, 88 A.3d at 85 & n.11 (collecting cases). The second element of a claim for aiding and abetting—a fiduciary breach—presents a recurring exception to the general rule of burden allocation. Often, the burden of proof for the predicate claim of breach shifts to the defendant fiduciaries. For example, under enhanced scrutiny, the defendant fiduciaries bear the burden of proving the absence of a fiduciary breach. If the claims against the fiduciaries are tried and the fiduciaries fail to satisfy their burden, then the finding of breach applies to the aiding and abetting claim. The court need not re-analyze the claim for fiduciary breach with the plaintiff bearing the burden of proof.

Of the four elements, the first is not disputed (Stollmeyer was a fiduciary), the second is established (Stollmeyer breached his duty of disclosure), and the fourth (damages) is addressed in the next section. This section focuses on the third element, knowing participation.

"The element of knowing participation involves two concepts: knowledge and participation. To establish knowledge, 'the plaintiff must demonstrate that the aider and abettor had actual or constructive knowledge that their conduct was legally improper.' "[615] The standard for knowing participation is "stringent" and "turn[s] on proof of scienter."[616] " '[T]he requirement that the aider and abettor act with scienter makes an aiding and abetting claim among the most difficult to prove.' "[617] "[T]he question of whether a defendant acted with scienter is a factual determination."[618]

615 *Presidio*, 251 A.3d at 275 (quoting *RBC*, 129 A.3d at 862).

616 *Id.*

617 *Id.* (quoting *RBC*, 129 A.3d at 865–66).

618 *RBC*, 129 A.3d at 862.

Vista knew that the Proxy Materials omitted the pre-process disclosures. Vista knew that Stollmeyer had said on September 4 that he was tired and looking for a "good home" for his company. Vista knew that Stollmeyer reiterated his intention to explore a take-private at the CXO Summit. Vista knew that its expression of interest to Stollmeyer contemplated a price based on a premium over market and envisioned retaining some members of management. Vista knew that Stollmeyer called one of its portfolio company CEOs as a reference. Vista knew that Chang had tipped them on November 6 about Stollmeyer's minimum price of $40 per share. Vista knew that Stollmeyer had tipped them on November 10 about the timing of the sale process. Vista knew that on November 17, Saroya had invited Stollmeyer to a charity event in Miami. Other than Stollmeyer (and on some issues, Chang), Vista was the *only* party who knew this information.

***44** Vista knew the significance of the information that was omitted from the Proxy Materials. Vista scrubbed the same incriminating information from the Investment Committee materials. Stahl texted Klomhaus before the Investment Committee meeting to remind him, "dont tell them about process."[619] Vista changed the slide deck to omit the statement that "Qatalyst Partners call[ed] Vista to indicate that Mindbody will come to market" in late October 2018[620] and falsely assert that Vista was not contacted about a potential sale until November 30.[621] Vista changed the deal-team memorandum to omit an entire paragraph about Stollmeyer's interactions with Vista from August through November, including Stollmeyer "reiterating" at the CXO "his intention to explore a take-private for Mindbody."[622] Stahl later texted Saroya after Mindbody filed its preliminary proxy statement to remind him to stick to this story that "Jeff called you on 11/30 inviting us into the process."[623] Vista hid these details precisely because they did not reflect well on them. This all sheds light on Vista's knowledge.

619 JX-758.

620 JX-739 at 6.

621 JX-781 at 7.

622 *Compare* JX-1461 at 1, *with* JX-1462 at 1.

623 JX-1066.

Plaintiffs also proved that Vista participated in the breach. "For purposes of a board decision, the requirement of participation can be established if the third party 'participated in the board's decisions, conspired with [the] board, or otherwise caused the board to make the decisions at issue.' "[624] "Because the involvement of secondary actors in tortious conduct can take a variety of forms that can differ vastly in their magnitude, effect, and consequential culpability, the element of 'knowing participation' requires that the secondary actor have provided 'substantial assistance' to the primary violator."[625]

624 *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *48 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019) (quoting *Malpiede*, 780 A.2d at 1098).

625 *In re Dole Food Co., Inc. S'holder Litig.*, 2015 WL 5052214, at *41 (Del. Ch. Aug. 15, 2015) (quoting *Kuhns v. Bruce A. Hiler Delaware QPRT*, 2014 WL 1292860, at *21 (Del. Ch. Mar. 13, 2014)).

The Merger Agreement introduced a contractual obligation for Vista to correct any material omissions in the Proxy Materials. The Merger Agreement mandates that Mindbody "may not file the Proxy Statement or any Other Required Company Filing with the SEC without first providing [Vista] and its counsel a reasonable opportunity to review and comment thereon[.]"[626] If Vista discovered that any information omitted from the Proxy Materials would result in a materially misleading disclosure, the Merger Agreement obligated Vista to "promptly notify [Mindbody], and an appropriate amendment or supplement to such filing describing such information will be promptly prepared and filed with the SEC."[627]

626 JX-1138 at 157.

627 *Id.* at 158.

In accordance with this contractual language, Vista had multiple opportunities to review the Proxy Materials. Saroya, Stahl, and Klomhaus routinely received copies of Mindbody's proposed disclosures before filing. Saroya and Stahl both reviewed the preliminary proxy statement on January 5, and both approved the proposed language.[628] Stahl and Klomhaus both received and reviewed the definitive proxy statement on January 21, and neither suggested any changes to the disclosures.[629] Vista participated in the drafting of the Proxy Materials.

628 JX-1044.

629 JX-1141.

This court has described "an aiding and abetting claim based on a third-party's alleged failure somehow to *prevent* a board from providing misleading disclosures" as "resting on thin ice."[630] Here, the ice is plenty thick. Vista had an obligation to correct the material omissions discussed above and failed to do so. Vista thus withheld information from the stockholders. Vista is liable for aiding and abetting in Stollmeyer's process-based disclosure breaches.

630 *Xura*, 2018 WL 6498677, at *15.

C. Damages

"Once a breach has been established, this court's powers are complete to fashion any form of equitable and monetary relief as may be appropriate."[631] "Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly."[632] "Damages must be 'logically and reasonably related to the harm or injury for which compensation is being awarded,' "[633] but "[a]s long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, mathematical certainty is not required."[634] Any uncertainties in calculating damages must be "resolved against the wrongdoer."[635]

631 *Dole*, 2015 WL 5052214, at *44 (cleaned up).

632 *Thorpe v. CERBCO, Inc.*, 676 A.2d 436, 445 (Del. 1996).

633 *Dole*, 2015 WL 5052214, at *44 (quoting *In re J.P. Morgan Chase & Co. S'holder Litig.*, 906 A.2d 766, 773 (Del. 2006)).

634 *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 814 (Del. Ch. 2011) (quoting *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000)); *see also Red Sail Easter Ltd. P'rs, L.P. v. Radio City Music Hall Prod., Inc.*, 1992 WL 251380, at *7 (Del. Ch. Sept. 29, 1992).

635 *Thorpe v. CERBCO, Inc.*, 1993 WL 443406, at *12 (Del. Ch. Oct. 29, 2013); *see also Dole*, 2015 WL 5052214, at *46 (applying wrongdoer rule).

***45** Plaintiffs have proven that Stollmeyer breached the duty of loyalty and committed disclosure violations and that Vista aided and abetted in the disclosure violations. They seek transaction damages for their sale-process claim in the amount of $3.50 per share and quasi-appraisal damages for their disclosure claim in the amount of $5.75 per share. In response, Defendants defend the deal price as more than fair and further argue that Plaintiffs' disclosure claims can only generate nominal damages.

1. Damages For The Sale-Process Breaches

As a remedy for their sale-process claim, Plaintiffs seek damages from Stollmeyer in the amount that Vista would have paid, which Plaintiffs peg at $40 per share. The lost-transaction theory of damages finds firm footing in Delaware law. As Vice Chancellor Laster has explained:

> When seeking post-closing damages for a breach of fiduciary duty in a sale process, the measure of damages logically depends on what the plaintiffs contend would have happened absent the breach. If the plaintiffs prove that the defendants could have sold the corporation to the same or to a different acquirer for a higher price, *then the measure of damages should be based on the lost transaction price.*[636]

That is true even if the merger price falls within the range of reasonableness. "Factors such as ... secret conflicts or fraud could lead a court to hold that a transaction that fell within the range of fairness was nevertheless unfair compared to what faithful fiduciaries could have achieved. Under those circumstances, the appropriate remedy can be a 'fairer' price[.]"[637]

636 *PLX*, 2018 WL 5018535, at *51 (emphasis added); *see also* *Columbia Pipeline*, 2021 WL 772562, at *56 & n.26 (citation and quotation marks omitted) (collecting authorities).

637 *ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017) (collecting authorities), *aff'd*, 184 A.3d 1291 (Del. 2018).

In response, Defendants argue the lost transaction price should supply the measure of damages only when a controller sets out to extract value rapaciously from the minority or freezes out "the minority to capture the value of opportunities that the corporation was on the verge of achieving and in which the minority would otherwise have shared."[638] They argue that where, as here, the liable party did not reap the rewards of the lowered deal price directly, the lost transaction price serves as an inequitable measure of damages.

638 *Reis*, 28 A.3d at 467–68; *see also* Defs.' Opening Post-Trial Br. at 100–02.

Defendants cite *Reis v. Hazelett Strip-Casting Corp.*, but it does not stand for the limiting principle that they advance.[639] In *Reis*, the court applied entire fairness review to a controller-led reverse stock split under 8 *Del. C.* § 155. In granting relief, the *Reis* court recognized the "remedial breadth afforded by a plenary breach of fiduciary action" and its statement that, "[d]epending on the facts and the nature of the loyalty breach, the answer can be a 'fairer' price."[640]

639 Defs.' Opening Post-Trial Br. at 100–02.

640 *Reis*, 28 A.3d at 467–68.

Defendants do not point to any other authority that would limit the availability of lost-transaction damages to controller transactions. Such a rule ignores the harm to the injured class and would run contrary to the bedrock principle that "[o]nce a breach of duty has been established, this court's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate.' "[641]

641 *Dole*, 2015 WL 5052214, at *44; *see also* *Thorpe*, 676 A.2d at 445 ("Delaware law dictates that the scope of recovery for a breach of the duty of loyalty is not to be determined narrowly.").

***46** Alternatively, Defendants dispute that Vista would have paid $40 per share. To be clear, the record reflects that Vista had authority to bid *up to* $40 per share, but that does not mean that Vista would have bid that amount. In the Investment Committee materials, $40 was at the highest end of Vista's modeling. Using the same private equity model, H & F saw "no path to $40."[642] If Mindbody had been able to introduce competition, then Vista might have stretched to reach $40 per share, but Vista also could have declined to go that high.

642 JX-951.

The internal Vista bets provide the most compelling evidence as to what Vista would have paid. Recall that Vista employees, including the deal team members, bet on what the deal price would be in a range of $36.50 (the then-current offer) and $40 (the high-end of the approved range). The line was at $37.50. Over half guessed that the price would be greater than $37.50, and the highest prediction by a deal team member was $38.50/share. Two of Vista's most informed deal team members believed that the deal price was likely to be $37.50.[643] Only one employee, who was not on the deal team, thought that Vista would pay $40.

643 JX-883.

The evidence demonstrates that Vista would have paid $37.50 had Stollmeyer not corrupted the process. If Mindbody had countered a second time off Vista's $36.50 figure, such as by matching Vista's $1.50 increment and going from $40 to $38.50, then Vista would have made a further move. This would not have been outlandish—Qatalyst's pitch deck showed $38.50 per share as corresponding to the revenue multiple Vista had paid in its Apptio acquisition.[644] Whether Vista split the difference by going straight to $37.50 or engaging in more fractional bidding, the likely result was a deal at $37.50. Plaintiffs are therefore entitled to lost-transaction damages in the amount of $1 per share.

644 JX-593 at 30.

2. Damages For The Disclosure Breaches

Plaintiffs seek quasi-appraisal damages on their disclosure claims, which is a measure of compensatory damages. The Delaware Supreme Court has held that when a plaintiff seeks more than nominal damages, the plaintiff must prove "reliance [and] causation."[645] Plaintiffs made no effort to prove either. Plaintiffs therefore are only entitled to nominal damages.

645 *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020).

In this context, nominal need not be minimal. In *Weinberger*,[646] Chancellor Brown was instructed on remand to award damages for a breach of fiduciary duty where the breach turned on the failure to disclose the substance of the now famous Arledge-Chitea report. Chancellor Brown did not believe the plaintiff class had suffered any compensatory damages, leaving nominal damages as the only possible remedy. He chose to award damages of $1 per share on a deal price of $21 per share, reflecting damages equal to 4.8% of the deal price. He reasoned as follows:

> The approval of the minority secured in the face of the inadequate proxy information enabled [the acquirer] to get what it wanted at the price it wanted to pay, and it seems without question that achieving sole ownership of [the target] has proven quite profitable to [the acquirer]. Under these circumstances, I feel that the minority should be compensated for the wrong done to them even though a damage figure cannot be ascertained from a comparison of selected stock values and hypotheticals with any degree of precision. Quite simply, equity will not suffer a wrong without a remedy.[647]

This court has cited that ruling favorably.[648]

646 1985 WL 11546, at *9–10.

647 *Id.*

648 *See, e.g.*, *Oliver v. Boston Univ.*, 2006 WL 1064169, at *35 (Del. Ch. Apr. 14, 2006) ("Nominal damages of $1.00 per share have been awarded in certain circumstances in which a rational basis can be found in the record for the award.") (citing *Weinberger*, 1985 WL 11546, at *10).

***47** Chancellor Brown derived the $1-per-share remedy by relying upon evidence that, at the time of the merger, a per-share price of $22 rather than the $21 per share actual price would have represented a beneficial deal for the acquirer.[649] The acquirer's expert also conceded that $22 per share would "not have been out of line for the acquisition" and opined that the information available at the time of the merger would have supported a fair price range of $20–22.[650] The award in *Weinberger* thereby approximated a fair division of the merger surplus comparable to what could have been reached if the information had been shared.

649 *Weinberger*, 1985 WL 11546, at *10.

650 *Id.*

Here, as in *Weinberger*, the Company's stockholders were harmed by the inadequate disclosures, which deprived them of a fair opportunity to vote down the Merger. As in *Weinberger*, the precise extent of the harm cannot be established.[651] It is clear, however, that a $1 increase in the per share price would not have rendered the deal undesirable for Vista, nor would it represent a windfall to the class. Based on a deal price of $36.50 per share, an award of $1 per share reflects damages of 2.7%. In these circumstances, a $1-per-share award of nominal damages is appropriate.[652]

651 *Id.*

652 This case is distinguishable from another circumstance where the Delaware Supreme Court questioned the rationale behind a $1-per-share award. In *Gaffin v. Teledyne, Inc.*, 611 A.2d 467 (Del. 1992), this court had awarded $1 per share in damages based on *Weinberger* without providing any accompanying evidentiary support. The Supreme Court noted that nothing in the evidentiary record supported the trial court's award. Because the defendant failed to cross-appeal on that issue, however, the award remained intact.

Id. at 476. By contrast, here there is ample evidence to support the $1-per-share award.

3. Stollmeyer And Vista Are Jointly And Severally Liable For The Damages Award.

"A defendant who aids and abets a breach of fiduciary duty is jointly and severally liable for the damages resulting from the breach. Under this liability standard, 'the injured person is entitled to recover his damages from [any] of the tortfeasors, without distinction, subject to the limitation that his total recovery may not exceed the full amount of his damage.' "[653] This decision has already found that Stollmeyer breached his duty of loyalty and duty of disclosure, and that Vista aided and abetted in Stollmeyer's duty of disclosure breach. As a result, Stollmeyer and Vista jointly and severally liable for the damages award of $1 per share.

653 *In re Rural Metro Corp. S'holders Litig.*, 102 A.3d 205, 221 (Del. Ch. 2014) (citations omitted) (quoting *Brown v. Comegys*, 500 A.2d 611, 613 (Del. Super. 1985)); *see also* *Laventhol, Krekstein, Horwath & Horwath v. Tuckman*, 372 A.2d 168, 170 (Del. 1976) ("Persons who knowingly join a fiduciary in an enterprise which constitutes a breach of his fiduciary duty of trust are jointly and severally liable for any injury which results.") (citing *Jackson v. Smith*, 254 U.S. 586 (1921)).

Only Stollmeyer is liable for the damages award of $1 per share on the sale-process claims. Plaintiffs, however, are not entitled to a double recovery. All that the class can recover is $1 per share.

D. Interest And Costs

"A successful plaintiff is entitled to interest on money damages as a matter of right from the date liability accrues."[654] Under Delaware law, where neither party submits evidence showing the appropriate rate of interest, the court typically awards 5% over the Federal Reserve discount rate compounded quarterly. Such an award is appropriate here.

654 *Summa Corp. v. TransWorld Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988).

***48** Court of Chancery Rule 54(d) provides that costs "shall be allowed as of course to the prevailing party unless the court otherwise directs."[655] Under Rule 54(d), the "prevailing" party is a party who successfully prevails on the merits of the main issue or the party who prevailed on most of their claims.[656] Since Plaintiffs have prevailed on their claims against Stollmeyer and Vista in this action, they are entitled to their related costs.

655 Ct. Ch. R. 54(d).

656 *Brandin v. Gottlieb*, 2000 WL 1005954, at *27 (Del. Ch. July 13, 2000).

III. CONCLUSION

Judgment will be entered in Plaintiffs' favor and against Stollmeyer on Count I for breach of fiduciary duty. Judgment will be entered in Plaintiffs' favor and against Vista as to Count II for aiding and abetting breaches of fiduciary duty. Defendants are jointly and severally liable for $1 per share in damages, plus interest and costs consistent with this opinion. The parties shall confer on a form of order implementing this decision.

Plaintiffs' petition for appraisal was litigated in parallel with their breach of fiduciary duty claims. The Delaware Supreme Court has instructed that when a merger gives rise to both a plenary action for breach of fiduciary duty and a statutory appraisal proceeding, the court should rule on the plenary claims first, because a finding of liability and the resultant remedy could moot the appraisal proceeding.[657] "[R]egardless of the Court's substantive findings, the plaintiffs are limited to, and statutorily assured of, a single recovery."[658] This decision therefore does not reach the appraisal claims. The parties shall confer and inform the court whether further proceedings to address the appraisal claims are necessary.[659]

657 *Cede & Co. v. Technicolor, Inc.*, 542 A.2d 1182, 1189 (Del. 1988).

658 *Bomarko*, 794 A.2d at 1177.

659 *See* *Dole*, 2015 WL 5052214, at *47 ("It may be that the parties can resolve these issues in the first instance. Rather than burdening an overly long opinion with further analysis of appraisal and its contingent relevance, the parties shall meet and confer about whether further rulings are necessary.").

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

IN RE ORACLE CORPORATION DERIVATIVE LITIGATION

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MEMORANDUM OPINION

GLASSCOCK, Vice Chancellor

***1** In this derivative matter, the Plaintiff stockholders of Oracle Corporation allege that Oracle overpaid to acquire NetSuite Corporation. They seek damages on behalf of Oracle. The initial complaint was filed on May 3, 2017, and has been vigorously litigated[1] since. The matter has been tried. What follows is my post-trial decision.

1 The matter was stayed to accommodate consideration of the derivative claim by a special litigation committee on Oracle's behalf.

At its heart, the instant complaint alleges that Defendant Larry Ellison, the founder and a director and officer of Oracle, used his outsized influence at the company to cause it to acquire NetSuite at a premium. Because he owned a larger percentage of NetSuite than he did Oracle, it was in his interest, financially at least, that Oracle overpay. Because Ellison, per Plaintiffs, was a conflicted controller, the transaction must be reviewed under the entire fairness standard, a burden (again per Plaintiffs) that Ellison and his co-Defendant Oracle CEO Safra Catz cannot carry.

I find based on the trial record that Ellison, a corporate fiduciary, withdrew from Oracle's consideration of the NetSuite acquisition just before the initial presentation to the Oracle board, and that the remaining directors empowered a special committee to conduct the negotiation of any acquisition of NetSuite. This is adequate to cleanse Ellison's conflict as a director and officer standing on both sides of the transaction. The Plaintiffs assert, however, that these actions cannot remove the review of the transaction from the purview of entire fairness, because Ellison must be viewed as a controller.

This Court has had many occasions to comment on the fiduciary duties of corporate controllers. Nonetheless, our jurisprudence is not entirely clear.[2] My understanding may be summarized as follows. A stockholder who owns a majority of the voting stock of a company, or who, as a result of voting ability combined with other opportunities, may control the actions of the board, nonetheless remains a stockholder to whom fiduciary duties *run*, from the directors and the officers. As fiduciaries potentially subject to conflicts with respect to corporate decisions, the directors and officers are held to a standard of fidelity to the entity and the stockholders. Where these fiduciaries cause the corporation to engage in a transaction in which they are conflicted, they are liable unless the transaction was entirely fair.[3] But when does a controlling stockholder become liable *herself* for fiduciary duties to the entity?

2 *See* Lawrence A. Hammermesh, Jack B. Jacobs, and Leo E. Strine, Jr., *Optimizing the World's Leading Corporate*

Law: A Twenty-Year Retrospective and Look Ahead, 77 Bus. Law. 321, 339 (2022) (discussing the development of the inherent coercion doctrine).

3 *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710–11 (Del. 1983).

The answer is: when the control that the stockholder enjoys over the directors is leveraged by the stockholder in a way that diminishes the directors' ability to bring business judgment to bear on the exercise of their duties. In that scenario, the controlling stockholder exercises dominion over the property of others—the minority stockholders—and thus becomes a fiduciary herself. At the pleading stage, the well-pled allegation of a controller who receives a non-ratable benefit is typically sufficient to defeat a motion to dismiss, absent employment of procedural safeguards that replicate an arms-length transaction.[4] This is because of the inherently-coercive nature of the presence of a controller who can benefit from a transaction, with respect to the directors whom she is able to control.[5] The resulting conflicted transaction is subject to entire fairness review, accordingly.

4 *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *30 (Del. Ch. Jan. 25, 2016); *see Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014).

5 *Ezcorp*, 2016 WL 301245, at *11.

***2** The coercive nature of the conflicted controller applies most compellingly in the case of a squeeze-out merger. The instant case involves an acquisition *by*, not a sale *of*, Oracle. Nonetheless, decisions of this Court hold that the inherent coercion rationale applies in such transactions with a conflicted controller, compelling entire fairness review.[6] Under the *Ezcorp* rationale, if Ellison was a controller, and if the protections of *MFW* (requiring negotiation and approval by a special committee of independent directors and approval by a majority of the non-controlled shares) were not in place, entire fairness review must result. The transaction under review here did not require, or involve, a stockholder vote.[7]

6 *See id.* at *11–30 (explaining inherent coercion in the context of controller cases).

7 Because I find Ellison was not a controller and did not attempt to control the transaction at issue, I need not decide whether the existence of a well-functioning special committee can cleanse a non-squeeze out transaction involving a conflicted controller, which did not require a stockholder vote.

Ellison is not a majority stockholder of Oracle. Our caselaw has recognized that, in certain scenarios, minority stockholders may be deemed controllers if they have control of the corporate machinery which they employ for their own benefit, even without the ability to oust the directors by majority vote. The Plaintiffs allege that one such example is present here: a large blockholder, also a director and officer, who, as founder, is so identified with the company and so respected by the other directors and officers that he has the ability to influence decisions of the board to an extent that fiduciary duties attach, for the reasons expressed above. In case-dispositive motion practice, I found the facts alleged (and in the case of summary judgment, the factual issues remaining) sufficient to bring this matter to trial. In deciding the standard of review post-trial, I must determine, on a full and final record, whether Ellison was a controller.

Ellison held roughly a quarter[8] of the voting equity of Oracle. He was not in control of Oracle generally; he relinquished even executive control in 2014 when he resigned as CEO and became Oracle's Chief Technology Officer. The evidence demonstrates that he did not control Oracle, and that he absented himself from the acquisition of NetSuite. Moreover, the directors appointed a special committee, and I find that body well-functioning and independent of Ellison.

8 "As of September 19, 2016, Ellison beneficially held 1,166,041,236 shares of Oracle common stock, an approximate ownership stake in Oracle of 28.4%." Joint Pre-Trial Order ¶ 46, Dkt. No. 734

Ellison is a force at Oracle, no doubt; he is the main creative party and a face of the company. I acknowledge that it is plausible that Ellison *could have* influenced the directors' decision here, had he made an effort to do so, which he did not. The concept that an individual—without voting control of an entity, who does not generally control the entity, and who absents himself from a conflicted transaction—is subject to entire fairness review as a fiduciary *solely* because he is a respected figure with a potential to assert influence over the directors, is not Delaware law, as I understand it.

All application of equity involves a balance of interests. In a perfect world, the standard of review would be applied in such a way that the onerous burden of entire fairness would never be imposed where directors could and did apply their untainted business judgment on the corporation's behalf, but would always be imposed where they could not. In reality, a court of equity can only aspire to approach that ideal; thus the presumption of inherent coercion in the context of a controller who receives a non-ratable benefit from a corporate transaction. Plaintiff-friendly presumptions were sufficient to carry this matter to trial, but post-trial I find that Ellison was not a controller and that the facts do not invoke entire fairness.

***3** That does not end the matter. Ellison is a fiduciary, as an officer and director of Oracle; Catz, as CEO and a director, is also bound by fiduciary duties. The Plaintiffs allege that both breached duties of loyalty by misinforming the Special Committee, to conceal material facts regarding the acquisition on behalf of Oracle, thus defrauding the Special Committee and invoking entire fairness review. In that scenario, the Defendants would be liable for damages for breach of the duty of loyalty. On the evidence presented at trial, I find those allegations unsupported as well.

My reasoning follows.

I. BACKGROUND

A. Factual Background

The following factual findings were either stipulated to by the parties or proven by a preponderance of the evidence at trial.[9] Trial lasted ten days.[10]

9 Citations in the form of "JX__ at __" refer to exhibits jointly submitted at trial, they are referred to according to the numbers provided on the parties' joint exhibit list and with page numbers derived from the stamp on each JX page. Citations in the form of "PTO __" refer to paragraphs in the Joint Pre-Trial Order, Dkt. No. 734. Citations in the form of "Tr. __:__ refer to Trial Transcript - Volume I, Dkt. No. 769, Trial Transcript - Volume II, Dkt. No. 770, Trial Transcript - Volume III, Dkt. No. 771, Trial Transcript - Volume IV, Dkt. No. 772, Trial Transcript - Volume V, Dkt. No. 772, Trial Transcript - Volume VI, Dkt. 774, Trial Transcript - Volume VII, Dkt. No. 775, Trial Transcript - Volume VIII, Dkt. No. 776, Trial Transcript - Volume IX, Dkt. No. 777, Trial Transcript - Volume X, Dkt. No. 778.

10 *See* Tr. 2636.

1. Ellison, the Companies, and the Industry

Nominal Defendant Oracle Corporation ("Oracle") is a Delaware incorporated, California headquartered technology company in the business of selling hardware, software, and cloud computing products.[11] Defendant Lawrence J. Ellison founded Oracle in 1977 and has served on its board of directors since that time.[12] Ellison also served as Oracle's CEO until September 2014 when he assumed the role of Chief Technology Officer and Executive Chairman of the Board.[13] Catz became CEO at that time.[14]

11 PTO ¶ 51.

12 PTO ¶ 44.

13 PTO ¶ 44.

14 PTO ¶ 49. Catz served as co-CEO with Hurd until the death of the latter in 2019.

Starting in the 2000's, Oracle ramped up its strategy of growth by acquiring other companies.[15] Strategic acquisitions allowed Oracle to minimize the risks of research and development, which are particularly pronounced for companies in the enterprise resource planning ("ERP") space, in part because of the stickiness of customers.[16] ERP software allows businesses to automate and manage business processes such as accounting, risk management, and supply chain operations.

15 Tr. 530:5–531:24; JX2469 at 8; JX391 at 11.

16 *See* Tr. 2668:12-2670:13.

Between 2006 and 2015, Oracle closed 111 acquisitions,[17] through which it purchased both revenue and products.[18] In 2006, Doug Kehring became Oracle's Head of Corporate Development[19] and institutionalized Oracle's mergers and acquisitions strategy by implementing a standard framework to assess potential targets.[20] As part of this framework, Oracle's Corporate Development team kept dossiers on potential takeover targets which it routinely kept up to date.[21] One of those monitored companies was NetSuite.

17 JX612 at 12.

18 Tr. 530:9–535:18.

19 Tr. 529:21–531:2.

20 Tr. 529:11–531:2, 549:20–23, 551:14–552:20.

21 *See* Tr. 455:5–14.

2. NetSuite, the Target

Prior to its acquisition by Oracle, NetSuite was a Delaware-incorporated, California headquartered company in the business of selling cloud-based financials/ERP and omnichannel commerce software suites.[22]

22 PTO ¶ 56.

***4** More than 20 years after Oracle's formation, Ellison co-founded NetSuite with Evan Goldberg, a former Oracle employee, in 1998.[23] Both Oracle and NetSuite sell, and at the time of the transaction sold, ERP software. Oracle primarily sold on-premises customized products to large customers,[24] and NetSuite primarily sold off-the-shelf cloud-based software to smaller customers.[25]

23 PTO ¶ 57; Tr. 1831:17–1832:3.

24 JX2470 at 24–40, 83–87.

25 JX2470 at 40–49, 83–87.

3. Oracle Considers Acquiring NetSuite

At the time of the transaction, Ellison owned approximately 28.4% of Oracle common stock[26] and 39.8% of NetSuite stock.[27]

26 PTO ¶ 46 (“As of September 19, 2016, Ellison beneficially held 1,166,041,236 shares of Oracle common stock, an approximate ownership stake in Oracle of 28.4%.”).

27 PTO ¶ 48 (“As of February 28, 2015, through NetSuite Restricted Holdings LLC, Ellison held 31,964,891 shares (41.3%) of NetSuite's common stock. When combined with 5,660,599 shares held by his family members, trusts for their benefit, and related entities, Ellison and his affiliates beneficially owned, in aggregate, roughly 48.6% of NetSuite's common stock as of February 28, 2015.”).

Ellison was a longtime proponent of an Oracle acquisition of NetSuite and regularly made this known to “anyone who would listen” and “even to people who wouldn't.”[28] This included officers and directors at both NetSuite and Oracle.[29] As far as Ellison was concerned, the question was when, not if, the acquisition should occur.[30]

28 Tr. 1664:15–23, 1980:4–15.

29 Tr. 1664:15–23.

30 Tr. 1953:1–5 (“To me, it was simply a matter of the right timing.”).

After Ellison stepped down as Oracle's CEO in 2014,[31] discussions at Oracle of whether to purchase NetSuite began in earnest.[32] In February 2015, Ellison and Oracle's co-CEOs, Mark Hurd and Safra Catz, met to discuss a potential acquisition of NetSuite, but determined the timing was not right.[33] While Hurd supported the purchase of NetSuite at that time, Catz was neutral if not slightly opposed, and Ellison was strongly opposed to a transaction.[34] Ellison's reasons for opposing a deal at that date were several and ultimately echoed by Catz.[35] At the time, NetSuite was trading at a multiple that would have made a deal dilutive to Oracle's earnings.[36] Ellison also believed that Oracle was in a state of transition and a transaction between Oracle and NetSuite had the potential to both distract management and cause “confusion in the marketplace.”[37]

31 PTO ¶ 49. Hurd passed away in 2019 prior to the opportunity to take his testimony in this action.

32 JX328 at 1–3; JX400 at 1–2; Tr. 577:19-583:4.

33 Tr. 1959:24–1963:9.

34 Tr. 1962:8–19.

35 Tr. 1407:9–1408:5.

36 Tr. 1960:14–1961:19.

37 Notice of Lodging of Dep. Transcripts and Video Recordings Ex. 23, at 67:14–68:2, Dkt. No. 731; Tr. 1956:8–1957:3.

Oracle, which had primarily functioned by licensing its software to customers who ran that software on their own on premises machines,[38] determined that a sea change was occurring with the development of cloud computing.[39] This allowed cloud-based product offerings that were sold by subscription rather than license.[40] Oracle's cloud-based ERP product, Fusion, was a ground-up rewrite of its software that took around ten years to develop.[41] In 2015, Fusion was just gaining traction in the market.[42] Ellison feared that if Oracle purchased NetSuite, a cloud ERP company, it would hinder the rollout of Oracle's similar product.

38 Tr. 534:18–536:5.

39 Tr. 535:5–14.

40 Tr. 535:19–536:5.

41 Tr. 1772:24–1773:2, 1899:5–23.

42 Tr. 1773:3–1774:15. Oracle launched Fusion in 2011.

***5** As a result of this discussion, Oracle did not pursue an acquisition of NetSuite in 2015.

4. <u>NetSuite Struggles to Meet Projections</u>

On July 8, 2015, Ellison called Goldberg and expressed concern with NetSuite's direction.[43] Ellison criticized NetSuite's growth rate, stating that Oracle was going to "crush" NetSuite and that Workday, another tech company, had "blown by" NetSuite.[44] Similarly, Ellison expressed concern with NetSuite's ability to compete in its up-market, and with the company's lack of verticals.[45]

43 JX485 at 3–4; JX484; Tr. 793:5–796:5.

44 JX485 at 3–4; JX484; Tr. 793:5–796:5.

45 JX485 at 3–4; JX484; Tr. 793:5–796:5.

In September 2015, NetSuite was not meeting the projections that its CEO Zachary Nelson had set for year-on-year bookings increases.[46] The original expectation was a 35 percent year-on-year increase in bookings for 2015, 2016, and 2017, but NetSuite adjusted that target down to 25 percent for those three years.[47] Ellison was aware of and displeased by this change.[48]

46 JX528 at 60.

47 JX528 at 60.

48 Tr. 1943:3–1944:9.

The slowdown in bookings was caused by NetSuite's pursuit of customers who required significant customization.[49] Although these customers brought in revenue for customization, that revenue was non-recurring and low margin.[50] Further, the required customization bogged down implementation.[51]

49 Tr. 920:3–921:3, 1781:13–1782:12, 1787:7–1788:13, 1790:3–1792:3.

50 Tr. 884:21-886:10; 1778:4–1781:10.

51 Tr. 1037:15-1038:19.

5. <u>Ellison Redirects NetSuite</u>

To counter NetSuite's now flagging growth numbers, Ellison laid out (with Goldberg, Jim McGeever, and Nelson) a strategy of investment in verticals and micro-verticals,[52] which he and NetSuite President McGeever had previously recommended.[53]

52 JX549. Verticals and micro-verticals are specialized slivers of markets/industries that could be beneficially addressed with limited customization after building features for those markets. Tr. 607:15–24.

53 Tr. 1921:13–24, 900:2–901:13.

The result was Project Atlas, NetSuite's implementation of Ellison and McGeever's plans to invest in verticals and micro-verticals. Project Atlas, later called SuiteSuccess, was a tool to streamline sales and implementation of NetSuite.[54] The goal was to "sell what [NetSuite] delivered and deliver what [NetSuite] sell[s]."[55] Rather than spending time creating "a flashy demo" based on a guess of what the customer wanted, wiping the slate clean, and then building software based on customer conversations, SuiteSuccess was created to sell prebuilt software designed for the customer's industry.[56] This process would only leave the "last-mile implementation" for each customer to tailor the software to "the things that were very unique to their situation."[57] The benefit to the customer was less implementation and thus lower upfront cost and time.[58] The benefit to NetSuite was less low-margin implementation fees, less time to implement, and improved customer sentiment.[59] To do this, Atlas/SuiteSuccess focused on verticals and would be most efficient where limited customization was required.[60] The Atlas plan was focused on building out these verticals for specific industries, with the intention of doing one to two per year.[61]

54 Tr. 910:22–913:2.

55 Tr. 912:2–5.

56 Tr. 912:2–913:2.

57 Tr. 912:17–913:2.

58 Tr. 910:22–913:2, 936:3–938:10.

59 Tr. 919:3–920:21, 936:3–938:10; *see* Tr. 910:22–913:2.

60 Tr. 916:18–917:1.

61 Tr. 752:17–754:16, 921:4–14.

6. The 2016 Negotiation and Tender Offer

a. The Preliminary Stages

***6** On January 14–15, 2016, the Oracle board held an annual offsite meeting at Porcupine Creek, Ellison's property in California.[62] At that meeting, among other issues discussed, Kehring presented on three potential takeover targets, one of which was NetSuite.[63] This was the first time that Oracle management approached the board with the proposal to purchase NetSuite.[64]

62 PTO ¶ 58.

63 PTO ¶ 59; JX624 at 5–6. Kehring also informed the board that negotiations with another takeover target had ceased.

64 Tr. 463:5–7. Management, including Ellison, discussed the potential NetSuite acquisition prior to adding it to the Porcupine Creek agenda. Tr. 1416:1–9.

Prior to the presentation on NetSuite, Ellison left the room and recused himself from the discussion.[65] Per Catz, at this time and prior to leaving the room, Ellison did not advocate for or against the acquisition, he was "not not supportive."[66] The wind had shifted since 2015. Specifically, Fusion had settled on the market and NetSuite had grown, but its trading price had decreased as a function of a market wide software as a service ("SaaS") downturn.[67] As a result, 2016 NetSuite was a more attractive acquisition target than 2015 NetSuite had been.

65 JX624 at 6 ("Mr. Ellison noted that he would recuse himself from any discussions related to Napa-given his ownership interest in Napa."). Plaintiff attempted to show that Ellison's recusal was ineffective, however, the evidence at trial showed that he left the meeting. Tr. 1415:9–24, 1136:2–9, 40:4–23.

66 Tr. 1661:23–1662:21, 1665:17–1666:21.

67 Tr. 1967:9–1971:2, 587:15–588:24, 1410:3–21; JX716 at 1, 6.

After Ellison left the room, the board, Catz, Hurd, and Kehring discussed the strategic benefits and challenges associated with a potential transaction involving NetSuite.[68] Following the discussion, the Oracle board decided to continue to explore a potential transaction involving NetSuite, and directed Catz and Hurd to assess NetSuite's interest in an acquisition.[69] However, the board instructed the co-CEOs not to discuss price.[70]

68 JX624 at 6.

69 JX624 at 6.

70 JX624 at 6.

Catz then set up a dinner with NetSuite's CEO, Zachary Nelson, for January 19, 2016.[71] Although the Oracle board instructed Catz not to discuss price, on the day of the meeting, Kehring sent Catz a presentation that included an accretion/dilution analysis and other information about NetSuite.[72] At dinner, Catz asked Nelson if NetSuite would be open to an offer for Oracle to purchase NetSuite.[73] Nelson testified that his response was that an acquisition would have to garner a "Concur-type multiple," a revenue multiple similar to what SAP, another technology company, paid for Concur Technologies in 2014.[74] As the Oracle board had instructed, Catz did not engage with Nelson in substantive price negotiations[75] or make an offer at this initial meeting.[76]

71 JX630.

72 JX633.

73 Tr. 1425:17–1429:3.

74 Tr. 1062:5–1063:4.

75 Nelson testified "And I brought up the subject that, you know, we would expect something at least as high as what SAP paid for Concur, which was a recent transaction in the marketplace. And she said, well, what does that equate to? I said, oh, it's something like — this is all sort of off the cuff — something like ten times revenue.

And she said, well, what does that mean in terms of stock price? And that, I didn't really have. I sort of did some quick math in my head. I said, it's something like 100 or $125 a share. And as I recall, she said, wow, that's a big number. And that was really sort where we left it .... She didn't [give any indication about price], other than to say, wow, that's a big number." Tr. 1062:14–1063:6. Catz testified that she did not believe the Concur multiple was mentioned at dinner. Tr. 1428:6–20.

76 Tr. 1436:19–1437:1.

***7** Nelson followed up with Catz by telephone on each of the next two days.[77] Both phone calls lasted twelve minutes.[78] Although Nelson again mentioned the "Concur multiple," he did not explain what it meant or express it in dollars per share.[79] While the evidence was in conflict as to these discussions, I find based on the preponderance of the evidence that, beyond Nelson's mention of the "Concur-Type" multiple, Catz did not engage with Nelson in price discussions.[80] Instead, the pair primarily discussed that Ellison's former NetSuite co-founder, Evan Goldberg—NetSuite's Chief Technology Officer and Chairman of the Board[81]—was unwilling to sell.[82]

77 JX2435. Nelson and Catz also exchanged text messages on the 23rd. Tr. 1620:1–12.

78 Tr. 1620:1–12; JX2435.

79 Tr. 1432:1–1433:12.

80 *See* Tr. 1620:1–23. Unofficial notes from a NetSuite board meeting held on January 25 mention the Concur multiple and list "Z at $120. S more at $100." JX703 at 2. Non-contemporaneous internal documents at T. Rowe Price ("TRP"), a major NetSuite stockholder, reference a Catz-Nelson discussion of a $100 to $125 per share price range. JX1541 at 1; JX1555 at 4. These numbers are likely derived from the Concur multiple, and when coupled with Catz and Nelson's believable testimony that Catz did not proffer a price, they suggest that a specific price range was not discussed. *See* Tr. 1431:20–1433:12, 1620:13–1621:5.

81 PTO ¶ 57.

82 Tr. 1620:1–1622:1 ("Then the next day or the day after that, I start hearing about Evan. And Evan came back, it's just about Evan. That's what the conversations were all about.").

Eight days after Catz's dinner with Nelson, on January 27, 2016, Goldberg called Ellison on the telephone[83] and asked whether Oracle's decision to pursue NetSuite was punishment.[84] Ellison replied in the negative and explained that Oracle and NetSuite together "could be more successful than ... separate."[85] Nonetheless, Goldberg was not excited about a potential return to Oracle, a company he left almost 20 years earlier.[86] Goldberg was used to, and enjoyed, being his own boss.[87] He was unhappy about the potential of coming back to Oracle where he would once again be a subordinate.[88] Goldberg was concerned about NetSuite's level of independence following a potential acquisition, and whether NetSuite would be a Global Business Unit ("GBU"), and thus retain some autonomy, if acquired.[89]

83 Tr. 834:5–9.

84 Tr. 834:10–12. A prior unrelated interpersonal issue sat in the background of this phone call. Tr. 781:1–24. Ellison said, "I mean, he and I had very different points of view on a specific issue, and neither one of us are shy about expressing our views." Tr. 1832:4–21.

85 Tr. 834:13–16.

86 Tr. 1831:17–1832:3.

87 Tr. 1831:17–1832:3.

88 Tr. 1831:17–1832:3.

89 Tr. 834:17–835:15, 1679:1–1680:15. Rather than coalescing into Oracle, many of Oracle's acquisitions operate as GBUs, which sit under Oracle's umbrella, answer to Oracle management, and use Oracle resources, but remain quasi-independent. Tr. 1831:9–16. Goldberg and Ellison had previously discussed NetSuite's level of independence following an Oracle acquisition. Tr. 1829:24–1831:8.

Ellison assured Goldberg that, in the event of a transaction, Oracle's intention was to retain NetSuite's management team with Goldberg at the helm, that Goldberg would report to Hurd, or Ellison if he preferred, and that Hurd "liked running the larger acquisitions as global business units."[90] Further, Ellison provided some insight into Oracle's strategy for NetSuite post acquisition, which included building out a human capital management product, exporting NetSuite to more countries, creating more verticals, and generally increasing the company's growth rate.[91] Ellison told Goldberg that he would not "force [him] to do anything," which

Goldberg took to mean that the decision to sell was properly with NetSuite's directors and officers.[92] In essence, Ellison told Goldberg that he was recusing from NetSuite's decision-making process. Goldberg reported the conversation and Ellison's intention to recuse from NetSuite's decision to the NetSuite board.[93]

90 Tr. 1679:1–1680:15, 1829:24–1831:8.

91 Tr. 1679:21–1681:9.

92 Tr. 836:4–22.

93 JX1497 at 21; Tr. 1833:9–1834:20.

b. The First Round of Offers

***8** Following the January 15–16, 2016 offsite meeting at Porcupine Creek, Oracle's board began taking steps to prepare for negotiations with NetSuite. Oracle's directors completed a conflict questionnaire.[94] Counsel recommended Renee James, Leon Panetta and George Conrades, who each reported no conflicts,[95] to serve as an independent special committee (the "Special Committee") designated to negotiate the potential transaction with NetSuite (the "Transaction") on behalf of Oracle.[96]

94 JX683; JX687; JX688.

95 JX683; JX687; JX688.

96 JX743.

On March 18, 2016, the Oracle board, except for Ellison who recused, met to discuss the creation of the Special Committee.[97] Catz reported NetSuite was open to a bid,[98] but she did not report the phone calls with Nelson or his mention of a "Concur multiple."[99] Ellison was not present and did not disclose his January 27, 2016, phone call with Goldberg.[100] The Oracle board approved the creation of the Special Committee comprised of James, Panetta, and Conrades[101] and empowered it to:

a) evaluate alternatives to the Potential Transaction, including alternative acquisition targets and internal development opportunities, available to the Corporation;

b) establish, approve, modify, monitor and direct the process and procedures related to the negotiation, review and evaluation of the Potential Transaction, including the authority to determine not to proceed with any such process, procedures, review or evaluation;

c) formulate, structure, propose and negotiate terms with respect to, and review, negotiate, evaluate and document the terms and conditions of, the Potential Transaction;

d) determine on behalf of the Board and the Corporation whether the Potential Transaction is advisable and fair to, and is in the best interests of, the Corporation and its stockholders;

e) reject or approve the Potential Transaction;

f) effectuate the Potential Transaction; and

g) take such other actions as the Special Committee may deem to be necessary or appropriate in order for the Special Committee to discharge its duties[.][102]

The Special Committee was further empowered to retain its own independent legal counsel, and to hire consultants and other advisors of its choosing.[103]

97 PTO ¶ 60.

98 JX759 at 1.

99 JX759 at 1; Tr. 1584:4–1585:7, 1625:12–1626:1 ("If it had been a demand, and I had considered it seriously in any way, I would have immediately told the board that there was nothing for us to talk about because a Concur multiple was not in the view of what we were thinking in January of 2016. The market had gone down dramatically at that time. And it didn't even register when he said it because had it, we would have had nothing to discuss.").

100 Tr. 2001:20–2002:18.

101 PTO ¶ 60.

102 JX759 at 2–3.

103 JX759 at 3–5 ("6. The Special Committee is hereby authorized and empowered to retain independent legal counsel, at the expense of the Corporation, to advise it and assist it in connection with fulfilling its duties as delegated by the Board;
7. The Special Committee is hereby authorized and empowered to retain such other consultants and agents, including, without limitation, independent financial advisors, at the expense of the Corporation, as the Special Committee may deem necessary or appropriate to advise

it and assist it in connection with fulfilling its duties as delegated by the Board and to perform such services and render such opinions as may be necessary or appropriate in order for the Special Committee to discharge such duties;

8. The Special Committee is hereby authorized and empowered to enter into (and to cause the Corporation to enter into) such contracts providing for the retention, compensation, reimbursement of expenses and indemnification of such legal counsel, investment bankers, consultants and agents as the Special Committee may deem necessary or appropriate, and that the Corporation is hereby authorized and directed to pay all fees, expenses and disbursements of such legal counsel, investment bankers, consultants and agents on presentation of statements approved by the Special Committee, and that the Corporation shall pay all fees, expenses, and disbursements of such legal counsel, investment bankers, consultants, and agents and shall honor all other obligations of the Corporation under such contracts; and any such contract entered into (or approved) by the Special Committee is hereby approved, adopted, confirmed and ratified, and, to the extent necessary or appropriate, the officers of the Corporation are hereby authorized and directed to execute any such contract, for and on behalf of the Corporation, and the execution shall represent the Corporation's acknowledgement and acceptance of the terms and conditions thereof;").

***9** Over the course of the next seven months, the Special Committee met fifteen times to assess the Transaction.[104] On April 8, 2016, the Special Committee held a meeting, with Skadden, Arps, Slate, Meagher, and Flom LLP ("Skadden") and members of management, including Catz and Kehring, in attendance.[105] At this first meeting, the Special Committee elected James as its chair,[106] engaged Skadden as its independent legal advisor,[107] and heard from Catz and Kehring on the strategic rationale of the Transaction.[108] Kehring and the Corporate Development team created a Powerpoint presentation which Catz presented to the board.[109] The presentation noted the importance of keeping pace, the complementary nature of the two companies' offerings, and the synergies available by virtue of Oracle's infrastructure.[110]

104 Compendium of Defendants' Trial Demonstratives Ex. 9, Dkt. No. 764.

105 JX779 at 1. Catz and Kehring were only present for the discussion of the strategic rationale of the Transaction. Skadden was not present for the discussion of and vote to retain its legal services.

106 PTO ¶ 64.

107 PTO ¶ 65.

108 JX779 at 2–3.

109 JX820 at 2–9.

110 JX820 at 3.

After reviewing four potential independent financial advisors and narrowing the choice to Evercore Group LLC ("Evercore") and Moelis & Company LLC ("Moelis"), the Special Committee held a meeting on April 19, 2016 to determine which advisor to engage.[111] Members of Evercore, members of Moelis, and lawyers from Skadden were in attendance.[112] Each of the two finalists proposed a contingent fee structure and the Special Committee determined that this structure benefited Oracle because of the possibility that a transaction would not occur.[113] The Special Committee discussed whether there "were any personal or financial conflicts that would call into question the independence of each of the potential financial advisors."[114] Ultimately, the Special Committee engaged Moelis based on that firm's emphasis on alternatives to the Transaction, including no acquisition; its demonstrated ability to challenge management; and its commitment to devote senior management attention to the Special Committee's needs.[115] In exchange for its assistance, Moelis was to receive $1 million if the engagement did not result in an acquisition and $17 million if it did.[116]

111 PTO ¶ 66; *see* JX779 at 2–3; JX797 at 1–4.

112 JX797 at 1.

113 JX797 at 2.

114 JX797 at 3.

115 JX797 at 3.

116 JX912 at 2; Tr. 2525:8–2526:21. The Special Committee was also able to negotiate a reduction in Moelis's fee. Tr. 2343:1–19.

On April 26, 2016, Moelis began its diligence by asking Catz and Kehring a series of prepared questions.[117] Moelis's intent was to begin by evaluating Oracle, its present and future capabilities, its customers, its geographic goals, the ERP/SaaS landscape, and alternatives to the Proposed Transaction.[118] After examining Oracle and the market generally, Moelis was to move to an examination of NetSuite based on public and available non-public information.[119]

117 JX815.

118 JX815 at 5.

119 JX815 at 5.

On May 5, 2016, James joined Moelis, Skadden, Kehring, and two other Oracle employees for an all-day diligence session with NetSuite representatives.[120] Based on its research, Moelis concluded that although Fusion was seeing success in the "enterprise" and "near enterprise" market, that is, with larger companies,[121] it was not as well received by small and medium-sized businesses.[122] In its evaluation of NetSuite, Moelis determined that NetSuite was strong in the areas where Fusion was weak.[123]

120 PTO § 68.

121 Tr. 2349:16–2350:8 ("So those larger like medium, mid-market companies that were leaning more towards size and capabilities like the enterprise, that's where Oracle was seeing—to the extent they were seeing success, that's where they were seeing success.").

122 Tr. 2349:16–2350:8 ("In that mid-market, though, in sort of the bulk of the market in the SME market, that's not where their product was showing great traction.").

123 Tr. 2351:10–2352:1 ("Again, just the opposite. Having great success. So when I think about that part of the market, they don't need all the feature functions that the large enterprises need.... they had a simpler feature function set that really met the needs of that middle market, and they were finding success there."); *see* Tr. 2513:24–2514:16.

***10** While Oracle's target customer base was the Fortune 500,[124] NetSuite's target customer base has "affectionally been referred to as the Fortune 5 million."[125] That is not to say that NetSuite did not serve or sell to large customers.[126] While the bulk of NetSuite's business was the mid-market,[127] the company also sold to larger organizations in a number of ways. NetSuite's sales team sold to larger customers because they had an incentive to do so.[128] Management did not push back because these larger customers came with benefits, and as the product got better, it was better able to serve larger customers.[129] However, these larger customers also came with downsides. As NetSuite's CFO, Ron Gill, phrased it, "larger customers will pull you towards features and functions for larger customers."[130] In other words, these larger customers require customization, which is non-recurring and low margin revenue.[131] Further, customization is time-consuming, and led to service backlogs, delayed implementation, and delayed revenue recognition.[132]

124 *See* JX2470 at 24–40, 83–87.

125 Tr. 691:16–692:17.

126 Tr. 996:22–997:6 ("Splunk, Slack, Spotify, Snapchat, Groupon, and Box, we would run the financials for those companies. And these were examples of the unicorn, well-known brand names that we would use to market to growing customers, to show them you could grow with us.").

127 Tr. 721:23–722:6. Notably, there is no singular market size classification scheme within the industry (or even within each organization) and market size can be defined by either customer revenue or number of employees. In one stratification Oracle's up-market coalesced at above one billion dollars in revenue, the mid-market at 250 million to one billion dollars in revenue, and the small and medium business ("SMB") market at below 250 million dollars in revenue. Tr. 398:1–9. In another stratification, the mid-market was divisible at 1000 employees with the upper-mid-market occupying 1000-5000 employees or 50 million to three billion dollars in revenue and the lower-mid-market occupying under 1000 employees and below 50 million dollars in revenue. JX453 at 5. Markets were similarly squishy at NetSuite, Tr. 716:22–717:18, but its enterprise market encompassed companies with above 50 to 100 million dollars in revenue, Tr. 801:12–15. To NetSuite the mid-market was companies with between five million and 100 million dollars in revenue and up to 1000 employees. Tr. 800:17–801:11, 854:6–10.

128 Tr. 722:21–723:13 ("The gravity is such that the sales organization will pull you up-market because they want to sell a larger deal.").

129 Tr. 722:12–724:13.

130 Tr. 722:21–723:1.

131 Tr. 883:20–886:10, 1778:13–1781:10.

132 Tr. 1037:15–1038:19.

NetSuite also sought large customers in the form of subsidiaries of enterprise companies.[133] The distinction between selling to the enterprise's subsidiaries and the enterprise itself is known as two-tier deployment.[134] As described above, tier one was the replacement of the ERP system at a company's headquarters such that NetSuite would become the system of record for the entire company.[135] Tier two was a sale to a subsidiary such that the enterprise would maintain their existing ERP but the subsidiary would use NetSuite.[136] NetSuite's Enterprise Sales Team was thus tasked with selling to a subsidiary of a larger enterprise with the hope that implementation would go well and successive sales to that enterprise's other subsidiaries would follow.[137]

133 Tr. 742:24–743:21, 995:21–996:18.

134 Tr. 921:19–922:13.

135 Tr. 922:7–10.

136 Tr. 921:22–922:6.

137 Tr. 720:2–721:22.

NetSuite made use of a "land and expand" strategy and took advantage of selling to smaller but growing customers.[138] NetSuite was a full ERP suite; its smaller customers would adopt the software for its accounting functionality and would then expand to use other functionality.[139] The use of these additional features fortified the business's reliance on NetSuite's ERP software and would increase the number of users, which increased NetSuite's revenue from that customer.[140] Similarly, NetSuite's model of pay per user allowed its fees to grow as its customers grew.[141]

138 Tr. 880:24–882:13.

139 Tr. 880:24–881:16.

140 *See* Tr. 881:2–882:13.

141 Tr. 881:2–882:13.

***11** On May 13, 2016, the Special Committee held a meeting with Skadden in attendance.[142] No member of Oracle management was present.[143] James reported on the May 5 diligence session, noting the "potentially complementary nature of the two companies and their respective addressable markets."[144]

142 JX931 at 1.

143 *See* JX931 at 1.

144 JX931 at 1; Tr. 1154:1–1155:18 ("So I had learned from Mr. McGeever's presentation ... how NetSuite viewed the market. And I think I had a fairly good view of Oracle's view of the market, and I was at Intel and Oracle prior to Fusion, the on-premise product user. So after listening to the presentation and seeing how they think about the market, versus how the market, you know, really works in enterprise software, I found them very complementary.").

On May 20, 2016, the Special Committee held a meeting with lawyers from Skadden, members of Moelis, and members of Oracle management, including Catz and Kehring, in attendance.[145] Catz and Kehring gave a presentation on the importance of offering "best-of-breed" software, the need for further investment in ERP software so that Oracle could offer a "gracefully" migratable "spectrum of solutions," and NetSuite's strategic fit.[146] The presentation specifically noted, "[NetSuite] generally used by customers wanting a solution where robustness of services is most important" and "Oracle generally used by customers wanting a solution where robustness of software features is most important."[147] Oracle management recommended that the Special Committee move forward with the acquisition.[148] After management left the meeting, Moelis made a presentation to the Special Committee.[149] Moelis's presentation similarly touted that a NetSuite acquisition could "directly address the [Oracle] shortcomings in Cloud ERP," which "should be viewed as a strategic imperative."[150] The presentation noted that "Corporate IT spending is rapidly moving towards the Cloud and [Oracle] lacks a meaningful presence in Cloud ERP" but further explained that this was particularly the case "with companies seeking narrow functionality."[151] It further explained that the acquisition would complement Oracle's current offerings, allow it to provide a two-tier solution, and that the time was right strategically to pursue the transaction.[152]

145 PTO § 69.

146 JX947 at 4.

147 JX947 at 4.

148 JX952 at 1–2.

149 JX952 at 2.

150 JX948 at 4.

151 JX948 at 6.

152 JX949 at 2.

The Special Committee determined that "acquisition of [NetSuite] could be highly beneficial to [Oracle], that alternatives for participation in this market segment were unattractive or not ready or timely available and that an acquisition of [NetSuite] could fill a strategic gap for [Oracle] that it was important for [Oracle] to address."[153] Further, the Special Committee believed that it was time to make an offer and tasked Moelis and Oracle management with valuing NetSuite and addressing the "tactical considerations" of an initial offer.[154] Nonetheless, the Special Committee determined that it would "remain open-minded about potential alternatives if they were to emerge."[155]

153 JX949 at 2.

154 JX949 at 2.

155 JX949 at 2.

On May 23, 2016, representatives of Oracle and Moelis spoke over the phone and discussed a preliminary financial model for NetSuite and the underlying assumptions.[156] Three days later, on the afternoon of May 26, 2016, Skadden shared rules of recusal, which had been approved by the Special Committee, with Oracle management, who forwarded them to Ellison.[157] The rules of recusal prohibited Ellison from discussing the Transaction with anyone but the Special Committee, required Oracle employees brought in to assess the Transaction to be made aware of Ellison's recusal, and forbade Oracle officers and other employees from participating in the negotiation process absent Special Committee direction.[158]

156 JX975 at 5.

157 JX972 at 1.

158 JX971 at 1.

***12** That same day, Catz had a conversation with Goldberg during which Goldberg expressed a lack of desire to sell NetSuite, but that he understood his fiduciary duties, and that Oracle would need to offer a good price.[159] Catz reassured him that Oracle intended to run NetSuite independently.[160] After the call, Goldberg reported the conversation to NetSuite's in-house counsel.[161]

159 JX988; *see also* Tr. 784:9–786:15.

160 Tr. 784:9–19, 982:4–10.

161 JX988; Tr. 785:12–13.

On May 27, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[162] Oracle management and Moelis separately presented their valuations to the Special Committee.[163] Oracle management prepared an incremental model, discounted cash flow analyses, and multiples based on precedent transactions.[164] Kehring, with the assistance of Catz and Hurd, set the assumptions underlying these models.[165] The incremental model projected NetSuite revenues lower than Wall Street's projections of NetSuite as a standalone company and did not include revenue synergies for Oracle.[166] On the assumption of use of Oracle's infrastructure and resources, NetSuite's EBIT margins gravitated towards those of Oracle.[167] Oracle's management recommended an opening bid of $100.00 per share.[168] Prior to her exit from the meeting,[169] Catz failed to report her May 26, 2016 conversation with Goldberg to the Special Committee.[170]

162 JX979 at 1–2.

163 PTO § 70.

164 JX979 at 1; JX980.

165 Tr. 479:16–480:11.

166 JX973 at 13; JX1287 at 19; Tr. 550:2–555:1, 1544:12–1546:4, 1548:4–14.

167 Tr. 560:4–560:15; *see* JX980 at 2.

168 JX979 at 2.

169 JX979 at 2.

170 Tr. 1577:3–5.

Moelis reviewed these models, performed diligence on their assumptions, questioned management about them, and concluded that they were reasonable.[171] Moelis's own presentation, which it gave after management departed the meeting,[172] reported public market price targets, revenue multiples, and precedent transactions.[173]

171 Tr. 2389:10–2393:9; 2398:20-2399:15 ("Yeah, we believed them—we certainly took note of them. They were reasonable. From a cost savings perspective, they struck us as reasonable. And then we looked at the revenue scale, interestingly enough, if I remember correctly, it was maybe even conservative.").

172 JX979 at 2.

173 JX975; JX979 at 2.

The Special Committee discussed price and preliminarily settled on an initial offer of $102.00 to $105.00 per share.[174] After discussing the risks associated with an offer lower than that range, and noting management's support of an initial proposal of $100.00 per share, the Special Committee determined that Moelis should communicate an offer of $100.00 per share to NetSuite's financial advisor.[175] Moelis communicated the initial proposal on June 1, 2016.[176]

174 JX979 at 2; Tr. 1163:6–19; 56:15–20, 215:20–216:21.

175 JX979 at 2–3 (The Special Committee determined that the Potential Transaction should be subject to i) approval by a fully empowered independent special committee of NetSuite and ii) subject to a non-waivable condition requiring a majority of the minority vote of shares not owned or associated with Ellison and his children); Tr. 1163:15–1165:6, 55:23–57:5, 216:2–217:7.

176 JX1005 at 1.

On June 7, 2016, NetSuite responded with a counterproposal of $125.00 per share.[177] The next day, the Special Committee (except for Conrades)[178] held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[179] The Special Committee discussed NetSuite's June 7 counterproposal and decided to raise its offer, via Moelis, to $106.00 per share.[180] The Special Committee's 106.00 per share offer was intended to maintain room to negotiate below a $110.00 ceiling.[181] Both the ceiling and the offer were informed by Oracle management's opinion.[182] Specifically, $110.00 was the limit at which the acquisition would no longer be accretive.[183]

177 PTO ¶ 71.

178 JX1026 at 1.

179 JX1026 at 1.

180 PTO ¶ 72; JX1026 at 1–3.

181 Tr. 1167:1–1169:8.

182 Tr. 1167:1–1168:10.

183 Tr. 1167:11–20 ("Well, you know, we had a—a presentation from management that said, you know, from their perspective and their financial model, that they could support nothing above—in their opinion, nothing above 110. And, you know, Secretary Panetta and Mr. Conrades and I felt that the supportability of a deal, you know, has to fit in a P&L. So we were very attentive to this number 110.").

***13** On June 11, 2016, NetSuite countered at $120.00 per share and indicated that it had little room left to negotiate a lower price.[184] On June 14, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[185] Catz expressed frustration with the counterproposal because she believed it was not proportional to the Special Committee's move.[186] Kehring noted Microsoft's recent acquisition of LinkedIn and how this expenditure had removed Microsoft from potential competition for NetSuite.[187] Management, including Catz, recommended that the Special Committee decline to counter NetSuite's offer.[188] Then, the members of Oracle management left the meeting, and Moelis stated its agreement that $120.00 per share was unreasonable and that declining to counter would "send a very strong message."[189] After weighing the risks, the Special Committee directed Moelis to inform NetSuite's advisor that it would not provide a counter-proposal.[190] The Special Committee was prepared to let the deal die.[191]

184 PTO ¶ 73; JX1046 at 1–2.

185 JX1046 at 1.

186 JX1046 at 2; Tr. 1471:12–1472:1.

187 JX1046 at 2.

188 JX1046 at 2.

189 JX1046 at 2.

190 PTO ¶ 74; JX1046 at 2.

191 Tr. 1173:6–1173:9.

On June 22, 2016, Catz called Goldberg.[192] Over the course of the 17-minute phone call,[193] Goldberg expressed concern that Ellison was angry with him,[194] in part because Goldberg had not received an invitation to Ellison's cherry blossom party.[195] Catz explained that Ellison was not permitted to have contact with Goldberg.[196]

192 Tr. 1633:18–1635:13.

193 Tr. 1633:18–1635:13.

194 Tr. 1636:11–17.

195 Tr. 1636:18–1637:4, 1649:14–1650:7.

196 Tr. 1636:18–1637:2.

c. The Second Round of Offers and Price Agreement

By June 28, 2016, the deal appeared to be dead.[197] In fact, Oracle's chief financial advisor, Stuart Goldstein, was on vacation when he received a call from NetSuite's financial advisor, Qatalyst Partners ("Qatalyst"), indicating an interest in moving the deal forward and stating that NetSuite had more flexibility than previously communicated,[198] given market turmoil surrounding the Brexit vote.[199]

197 JX1086. Nonetheless, Proactive Investors published a story entitled "NetSuite advances over takeover rumors", which noted the swirl of continuing rumors about that company and the potential of an Oracle takeover. JX1088:1.

198 Notice of Lodging of Dep. Transcripts and Video Recordings Ex. 13, at 199:1–25, 253:7–14, 273:7–19, Dkt. No. 730; JX1104 at 1–2.

199 JX1104 at 1–2.

On June 30, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[200] Catz did not report her June 22, 2016 call with Goldberg to the Special Committee.[201] Catz and Kehring recommended that the Special Committee organize a diligence session to understand NetSuite's soon-to-be-published Q2 financials.[202] After the members of Oracle management left the meeting, the Special Committee decided to engage in additional diligence, which could inform its decision of whether to re-engage in negotiations.[203] Although there was a risk that the window of opportunity to ink a deal would close, the Special Committee thought that requesting diligence signaled toughness on price and a lack of anxiety to re-start negotiations.[204] "The Special Committee then directed and authorized Moelis to communicate back to Qatalyst that the Special Committee requested a due diligence session with" NetSuite management.[205]

200 JX1104 at 1.

201 Tr. 1636:3–8.

202 JX1104 at 2; Tr. 1174:6–16.

203 JX1104 at 2.

204 JX1104 at 2.

205 JX1104 at 3.

On July 6, 2016, Gill presented NetSuite's Q2 results to Oracle management and James.[206] NetSuite had met its earnings projections; nonetheless, NetSuite's SaaS bookings growth was down.[207]

206 PTO ¶ 77.

207 JX1138 at 1–2; Tr. 1477:6–15.

On July 8, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[208] Catz reported on the July 6 diligence call.[209] "The Special Committee discussed with Management and Moelis whether [NetSuite's Q2] results indicated a softening in [NetSuite]'s core business and how these financial results might impact the incremental financial model for the acquisition."[210] After Oracle management left the meeting, the Special Committee determined that from a "tactical and substantive standpoint," the correct course of action was to ask for more information.[211] The intention was to impress upon NetSuite's transaction committee why Oracle's current offer of $106.00 was reasonable.[212]

208 JX1138 at 1.

209 PTO ¶ 78; Tr. 1477:6–1480:8 (Catz relayed that NetSuite had a lumpy and disappointing quarter and that she believed the Special Committee could use it as negotiating leverage).

210 JX1138 at 2.

211 JX1138 at 2.

212 *See* JX1138 at 2.

***14** On July 11, 2016, NetSuite stock saw unusual options activity, and on July 12, 2016, rumor of the Transaction leaked to the financial press.[213] To reflect NetSuite's Q2 results and the recent diligence, Catz revised Oracle's incremental model for NetSuite downwards.[214] On July 12, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[215] During that meeting, Oracle management reviewed the additional diligence, presented its revised model, and answered questions before leaving.[216] The Special Committee authorized Moelis to convey to NetSuite that the Special Committee's prior offer of $106.00 was still available but that it was not raising its offer at that time.[217] After the Special Committee meeting, NetSuite countered the Special Committee's non-bid by offering to accept $111.00 per share, down substantially from its last offer of $120.[218]

213 JX1176.

214 JX1183 at 7–8; Tr. 1481:2–1482:1.

215 PTO ¶ 79; JX1186 at 1.

216 JX1186 at 1–2; Tr 1481:2–1482:9.

217 JX1186 at 2; Tr. 1183:1–7.

218 PTO ¶ 80.

On July 13, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[219] Oracle management presented revised incremental models reflecting conservative, base, and upside results.[220] The conservative model matched the revised model that was presented to the Special Committee on July 12, 2016, and the base case matched the original model that was before the Special Committee.[221] Catz reverted to the use of the un-revised base case after reflection on questioning from the Special Committee.[222] Specifically, Panetta noted the regularity of lumpiness within NetSuite bookings growth and questioned if a downwards revision was truly warranted.[223] Catz acknowledged she made an analytical mistake in shifting from the original model.[224]

219 PTO ¶ 81; JX1206 at 1.

220 JX1206 at 2; JX1204 at 2–5.

221 *See* JX1204 at 2–4; JX1183 at 7-8; JX1215.

222 Tr. 1484:22–1485:22.

223 Tr. 1484:22–1485:15.

224 Tr. 1484:22–1485:22; JX1215.

The Special Committee discussed the three models with Oracle management as well as next steps.[225] When asked how to counter NetSuite's $111.00 offer, Catz recommended that the Special Committee offer $108.50 to split the difference.[226] Oracle management left the meeting, and the Special Committee discussed how to proceed with Moelis.[227] Moelis recommended communicating a "best and final" offer and the Special Committee agreed.[228] The members of the Special Committee felt that deal dynamics favored an offer at a full dollar increment and directed Moelis to convey a best and final offer of $109.00 to NetSuite.[229] That same day, July 13, 2016, NetSuite accepted the $109.00 per share offer.[230] The Special Committee paid a dollar less than their ceiling.

225 JX1206 at 2.

226 Tr. 1186:19–21, 1488:15–24.

227 JX1206 at 2.

228 JX1206 at 2.

229 PTO ¶ 81; JX1206 at 2; Tr. 1186:22–1189:3, 2454:16–2455:15.

230 PTO ¶ 82.

d. Price Agreement to Closing

On July 15, 2016, Oracle and NetSuite " 'entered into an exclusive period of diligence.' "[231] Oracle management, Moelis, and Skadden held a diligence meeting on July 17, 2016.[232] Following this meeting, on the week of July 18, 2016, members of Oracle management held additional diligence meetings.[233] On July 25, 2016, the Special Committee held a meeting with Skadden and Moelis in attendance.[234] Moelis presented its valuation analyses to the Special Committee.[235] Moelis noted that Oracle management's conservative case for projected revenue was below those Wall Street analysts while the base case and upside case straddled NetSuite's projections.[236] Although it used the incremental models' projections, Moelis performed its own DCF analyses.[237] Moelis similarly created its own list of comparable companies and transactions.[238] Overall, Moelis reported that it was prepared to provide a written fairness opinion stating that $109.00 per share was fair to Oracle stockholders from a financial point of view.[239]

231 PTO ¶ 83.

232 PTO ¶ 84.

233 PTO ¶ 84.

234 JX1291 at 1.

235 PTO ¶ 85.

236 Tr. 2460:21–2463:2; *see* JX1287 at 19.

237 Tr. 2466:23–2468:12, 2396:23–2400:16; JX1287 at 27–29.

238 Tr. 2463:8–2466:19, 2468:7–2468:12; JX1291 at 2; JX1287 at 25–26.

239 PTO ¶ 85. Moelis's engagement letter entitled it "to assume that financial forecasts and projections [Oracle], the [Special Committee] or [NetSuite made] available to [it were] reasonably prepared on bases reflecting the best currently available estimates and judgments of the management of [Oracle] or [NetSuite]." JX912 at 3.

***15** Two days later, on July 27, 2016, the Special Committee held a meeting with Skadden, Moelis, and Oracle management, including Catz and Kehring, in attendance.[240] Oracle management updated the Special Committee on its "bring-down" diligence and presented a financial model.[241] Oracle management confirmed that NetSuite and Fusion would "coexist in the marketplace" and that its diligence provided confidence in the incremental model.[242] After Oracle management left the meeting,[243] Moelis presented an oral version of its fairness opinion and confirmed that it would provide a written fairness opinion that $109.00 per share was fair to Oracle's stockholders.[244] The Special Committee approved the Agreement and Plan of Merger between Oracle and NetSuite (the "Merger Agreement"), subject to receiving a formal fairness opinion from Moelis.[245] Oracle and NetSuite executed and announced the Merger Agreement on July 28, 2016.[246] Following the signing of the Merger Agreement, Catz was quoted as saying " 'We expect this acquisition to be immediately accretive to Oracle's earnings on a non-GAAP basis in the first full fiscal year after closing.' "[247] Moelis delivered its formal fairness opinion on July 29, 2016.[248]

240 PTO ¶ 86; JX1329 at 1.

241 PTO ¶ 86.

242 JX1306 at 2, 5, 15; JX1329 at 1–2; Tr. 1497:19–1498:4, 1511:1–12.

243 JX1329 at 2

244 PTO ¶ 86.

245 PTO ¶ 86.

246 PTO ¶ 89; JX1405.

247 Jx1405 at 1.

248 PTO ¶ 86.

e. The Tender Offer

The Merger Agreement structured the deal as a tender offer, requiring a majority of NetSuite shares not affiliated with Ellison, NetSuite's officers, or NetSuite's directors to tender in support of the transaction.[249] Absent an extension, if the requisite number of shares were not tendered by September 15, 2016, the transaction would fail.[250] Additionally, the transaction was conditioned on the Department of Justice's antitrust approval.[251] The Department of Justice completed its review quickly and approved the transaction on September 26, 2016.[252]

249 JX1405 at 1.

250 JX51497 at 5; JX1498 at 9.

251 PTO ¶ 93.

252 PTO ¶ 95; JX1636.

T. Rowe Price ("TRP") was NetSuite's largest stockholder other than Ellison.[253] In a letter dated September 6, 2016, TRP indicated to the NetSuite transaction committee that it would refuse to tender its shares at $109.00 per share.[254] It provided a number of reasons why NetSuite's negotiation was deficient: among these was mention of Catz's January 19, 2016 dinner with Nelson, which it described as a "loose, pre-due-diligence, exploratory conversation where a price range of $100-125 was discussed."[255] TRP believed this discussion anchored the price too low.[256]

253 JX1555 at 3.

254 JX1555 at 3, 5.

255 JX1555 at 4; Nelson made TRP aware of the conversation with Catz at an August 30, 2016, meeting between NetSuite management and directors and TRP. JX1555 at 3.

256 JX1555 at 4.

On September 9, 2016, the Special Committee extended the deadline to tender shares to October 6, 2016 in order to facilitate the completion of the Department of Justice's antitrust review.[257] TRP and another large stockholder, who together owned approximately 45.5% of NetSuite's outstanding, unaffiliated shares, had not tendered by October 4, 2016.[258] The Special Committee held a meeting with Skadden and Oracle management, including Catz and Kehring, in attendance.[259] Management recommended extending the deadline to tender shares but not raising Oracle's offer.[260] After Oracle management left the meeting, the Special Committee determined that it would extend the deadline one final time to November 4, 2016, and would not raise Oracle's offer.[261]

257 PTO ¶ 94; JX1571 at 1.

258 JX1649 at 1.

259 JX1649 at 1.

260 JX1649 at 1; Tr. 2478:6–17 (Oracle's banker noted, "I'll quote. Safra Catz, quote, unquote, we are not going to pay a single penny more.").

261 PTO ¶ 96; JX1649 at 2; JX1658 at 1.

As they had done previously,[262] Oracle management continued to publicly state that $109.00 was Oracle's "best and final" offer.[263] On October 27, 2016, TRP sent a letter to the Special Committee stating that it would tender its shares if Oracle increased its offer to $133.00 per share.[264] TRP reasoned that its valuation was consistent with the valuations of the financial advisors consulted by Oracle and NetSuite.[265] The Special Committee reviewed the letter, determined that $109.00 was the price,[266] and responded by publicly filing TRP's letter with a statement that insufficient tender by NetSuite's unaffiliated stockholders for $109.00 per share will terminate the deal.[267]

262 JX1601.

263 JX1733 at 1.

264 JX1753 at 3.

265 JX1753 at 3.

266 JX2727.

267 JX1762 at 3.

***16** The Special Committee held a meeting on November 4, 2016, with, Moelis, and Oracle management, including Catz and Kehring, in attendance.[268] The Special Committee met to consider the potential outcomes of the tender offer, which was due to expire later that evening.[269] Ultimately, the tender offer period expired on November 4, 2016, with 53.2% of NetSuite's unaffiliated shares tendered, and the acquisition closed on November 7, 2016.[270]

268 JX1792 at 1.

269 JX1792 at 1–2.

270 PTO ¶¶ 97–98.

B. Procedural History

This is my seventh memorandum opinion in this action, which was initiated more than six years ago, on May 3, 2017.[271] Since filing, it has taken a somewhat circuitous and procedurally complex path to trial. I outline that path below.

271 PTO ¶ 4; *See In re Oracle Corp. Deriv. Litig.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018); *In re Oracle Corp. Deriv. Litig.*, 2019 WL 6522297 (Del. Ch. Dec. 4, 2019); *In re Oracle Corp. Deriv. Litig.*, 2020 WL 3410745 (Del. Ch. June 22, 2020); *In re Oracle Corp. Deriv. Litig.*, 2020 WL 3867407 (Del. Ch. July 9, 2020); *In re Oracle Corp. Deriv. Litig.*, 2021 WL 2530961 (Del. Ch. June 21, 2021); *In re Oracle Corp. Derivative Litig.*, 2022 WL 3136601 (Del. Ch. May 20, 2022).

The initial complaint was filed on May 3, 2017, and a separate action was filed was filed on July 18, 2017, following a books and records inspection.[272] The two actions were consolidated under the caption *In re Oracle Corporation*

Derivative Litigation, C.A. No. 2017-0337-JTL.[273] Vice Chancellor Laster appointed Firemen's Retirement System of St. Louis ("Firemen's") as the lead plaintiff for the consolidated action.[274]

272 PTO ¶¶ 4–5.

273 PTO ¶ 6.

274 PTO ¶ 7.

On January 11, 2018, the case was reassigned to me.[275] On March 19, 2018, following briefing and oral argument, I denied Ellison's and Catz's motions to dismiss under Court of Chancery Rules 23.1 and 12(b)(6),[276] concluding that the Plaintiffs had adequately alleged facts that made it reasonably conceivable that a majority of the Oracle board lacked independence from Ellison[277] and that Ellison and Catz had acted disloyally with respect to the Transaction.[278] Plaintiffs voluntarily dismissed former Defendants Hurd, Jeffrey Henley, Michael Boskin, Jeffrey Berg, Hector Garcia-Molina, Naomi Seligman, Conrades, Bruce Chizen, Panetta, James, and H. Raymond Bingham without prejudice on March 28, 2018.[279]

275 Case Reassignment Letter, Dkt. No. 65.

276 PTO ¶ 8.

277 *In re Oracle Corp. Derivative Litig.*, 2018 WL 1381331, at *20 (Del. Ch. Mar. 19, 2018).

278 *Id.*

279 PTO ¶ 9.

On May 4, 2018, Oracle's board of directors formed a special litigation committee to investigate the claims asserted in this action (the "SLC").[280] I stayed the action pending that committee's investigation.[281] In February of 2019, I lifted the stay to allow the SLC to seek non-party discovery from TRP.[282] I similarly lifted the stay in July 2019 to allow Plaintiffs to file an amended complaint, which reasserted claims against the voluntarily-dismissed Oracle directors and officers and asserted new claims against Goldberg and Nelson.[283]

280 PTO ¶ 10.

281 PTO ¶ 11.

282 PTO ¶ 13.

283 PTO ¶ 15.

In a move that could fairly be called "surprising," the SLC declined either to take over this derivative litigation or to dismiss it.[284] The case was returned to the Plaintiffs because there were risks to both plaintiff and defendants stemming from the likelihood that the question of the standard of review would not be resolved until trial.[285] This proved prescient.

284 PTO ¶ 16; *see In re Oracle Corp. Derivative Litig.*, 2019 WL 6522297, at *1, 17 n.246 (Del. Ch. Dec. 4, 2019).

285 PTO ¶ 16.

***17** From late August to mid-September 2019, Defendants fired a salvo of motions to dismiss.[286] On November 27, 2019, Firemen's filed its Verified Second Amended Derivative Complaint.[287] Henley, Conrades, James, Panetta, Boskin, Berg, Garcia-Molina, Seligman, Chizen, Bingham, and Paula R. Hurd as Trustee of the Hurd Family Trust moved to dismiss the second amended complaint on December 13, 2019.[288] Upon stipulation by the parties, I dismissed Boskin, Berg, Garcia-Molina, Seligman, Conrades, Chizen, Bingham, and Panetta with prejudice.[289]

286 PTO ¶¶ 17–19.

287 PTO ¶ 20.

288 PTO ¶ 21.

289 PTO ¶ 22.

Plaintiffs filed their third amended complaint on February 18, 2020, which removed claims against the proximately dismissed defendants.[290] On February 20, 2020, Henley, James, and Paula R. Hurd as Trustee of the Hurd Family Trust filed a motion to dismiss the third amended complaint.[291]

290 PTO ¶ 23.

291 PTO ¶ 24.

On April 29, 2020, I granted Plaintiff Robert Jessup's motion to intervene.[292] Ellison and Catz filed a motion for summary judgment against Firemen's for lack of standing.[293] In July, following briefing and oral argument, I held that motion in abeyance and granted an order appointing Jessup as co-lead Plaintiff.[294]

292 PTO ¶ 25.

293 PTO ¶ 26.

294 PTO ¶¶ 28–29.

On October 22, 2022, the Plaintiffs requested, and I granted, leave to file a fourth amended derivative complaint.[295] This complaint removed claims against Nelson and Goldberg, who were previously successful in their motions to dismiss Count II of the Verified Third Amended Derivative Complaint.[296] On December 11, 2020, Plaintiffs again requested, and I granted, leave to file an amended complaint.[297] Plaintiffs' filed their Verified Fifth Amended Derivative Complaint that same day.[298] On June 21, 2021, following briefing and oral argument, I denied James' motion to dismiss, but granted the motions to dismiss of Henley and Paula R. Hurd (as Trustee of the Hurd Family Trust).[299]

295 PTO ¶ 30.

296 PTO ¶¶ 27, 30.

297 PTO ¶ 31.

298 PTO ¶ 31.

299 PTO ¶ 32.

The Parties took discovery, exchanged expert reports, and took depositions between February 2019 and December 2021.[300] James moved for summary judgment on December 23, 2021.[301] Following briefing and oral argument, I granted James' motion for summary judgment as to the allegation that James acted in bad faith, but denied the motion as to the allegation that she breached her duty of loyalty by acting to advance the self-interest of an interested party—Ellison—from whom she could not be presumed to act independently, finding that pertinent factual issues remained for trial.[302]

300 PTO ¶¶ 33–35.

301 PTO ¶ 36.

302 PTO ¶ 36.

On July 6, 2022, the parties filed their pre-trial briefs.[303] A ten day Trial was scheduled for July 18 to July 29, 2022.[304] The first five days, July 18 to July 22 were held in person.[305] An outbreak of Covid forced the trial to move to a hybrid format for July 25.[306] The Parties used July 26 to work out the logistics for moving the remainder of the trial to Zoom.[307] The last three regularly scheduled days, July 27 to July 29, took place over Zoom,[308] and I held the final day of trial over Zoom on August 16, 2022.[309] The Parties completed post-trial briefing on November 1, 2022.[310] I held post-trial oral argument in Dover on November 18, 2022.[311] The Parties stipulated to the dismissal with prejudice of James on December 22, 2022, and I granted that order on December 27, 2022.[312] I consider the matter fully submitted as of December 27, 2022.[313]

303 PTO ¶ 37.

304 PTO ¶ 39.

305 Tr. 1:1–3:12, 312:1–314:12, 632:1–634:12, 958:1–960:12, 1202:1–1204:12.

306 Tr. 1492:1–1495:18.

307 Tr. 1752:2–1753:13.

308 Tr. 1756:1–1758:12, 2038:1–2040:12, 2328:1–2330:15.

309 Tr. 2636:1–2638:15.

310 *See* Answering Post-Trial Br. Defs. Safra A. Catz and Lawrence J. Ellison, Dkt. No. 814.

311 *See* Tr. Post-Trial Oral Arg., Dkt. No. 823.

312 *See* Stipulation and [Proposed] Order of Voluntary Dismissal with Prejudice of Renee J. James, Dkt. No. 825; Order of Voluntary Dismissal with Prejudice of Renee J. James, Dkt. No. 826.

313 Unfortunately, circumstances beyond my control delayed my consideration of the matter and the issuance of this post-trial opinion.

II. ANALYSIS

A. Legal Standard

***18** Plaintiffs seek to prove a derivative[314] overpayment claim. Plaintiffs theorize that Ellison, who had a financial incentive to prefer the interests of NetSuite over Oracle, and Catz, seeking to advance Ellison's interests, manipulated the Oracle Special Committee to overpay for NetSuite.[315] Specifically, per Plaintiffs, " 'Ellison wanted Oracle to buy NetSuite before industry participants and market analysts realized what Ellison already knew: [That] NetSuite's business strategy of moving up-market was doomed in light of Oracle's rollout of ... Fusion.' "[316] Further, the Plaintiffs argued that Ellison and Catz "caused ... Oracle to pay more for NetSuite because they were paying for part of NetSuite's business that Oracle did not need, did not want, and ... was of little or no value because Oracle was already poised to dominate that part of the" market.[317] Finally, the Plaintiffs contend that "immediately after acquisition, and" on a continuing basis, "the company that Oracle has in NetSuite and is using in NetSuite isn't as valuable as the company that" Ellison, Catz, and Oracle management "presented to ... the [S]pecial [C]ommittee, in order to cause" it to move forward with that transaction.[318]

314 That is, the claim was originally derivative. It is being pursued now with the consent of the Special Litigation Committee.

315 Tr. 42:21–43:17.

316 Tr. 43:7–15.

317 Tr. 44:8–17.

318 Tr. 45:1–8.

"Delaware's default standard of review is the business judgment rule."[319] Absent a showing by the Plaintiff that the business judgment rule has been rebutted, that rule will serve as the lens of review.[320]

319 *In re Columbia Pipeline Grp., Inc.*, 2021 WL 772562, at *30 (Del. Ch. Mar. 1, 2021).

320 *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1162 (Del. 1995).

To bring the transaction within the exacting standard of entire fairness, Plaintiffs proffer two theories. First, the Plaintiffs argue that Ellison was a controller who sat on both sides of the transaction.[321] Second, the Plaintiffs contend that Ellison, on his own and through Catz, misled the Oracle board and the Special Committee, thereby rendering the transaction a product of fraud.[322]

321 Pls.' Corrected Opening Post-Trial Br. 88, Dkt. No. 795.

322 *Id.*

These theories are addressed, below.

1. Ellison Was a Conflicted Director

Delaware's default standard of review is business judgment.[323] That standard is inapplicable, however, "[w]here at least half of the directors who approved the transaction were not disinterested or independent."[324]

323 *Columbia Pipeline*, 2021 WL 772562, at *30.

324 *In re KKR Fin. Holdings LLC S'holder Litig.*, 101 A.3d 980, 990 (Del. Ch. 2014), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

Here Ellison, an Oracle director and officer, received a benefit from the sale of his stock in NetSuite that Oracle's other stockholders did not receive.[325] Appropriately, Ellison insulated himself from the board's discussion of NetSuite acquisition, throughout the process. Moreover, in light of Ellison's conflict of interest, Oracle's board formed a Special Committee with the power to assess alternatives, negotiate the Transaction, and approve or reject the Transaction.[326] The Special Committee was composed of three members. The Plaintiffs did not contend at trial that two members, Conrades and Panetta, were dependent on Ellison or interested in the transaction, or otherwise conflicted. The evidence at trial proved that the third member, James, was likewise unconflicted, and Plaintiffs, post trial, dismissed claims against James as well.[327] In other words, Plaintiffs abandoned their theory at trial, which was that James had ambitions to be a CEO in the tech industry, an ambition for which she was reliant on Ellison; Plaintiffs' theory was that she accordingly skewed the transaction in his favor, and breached her own duty of loyalty to Oracle. The evidence at trial did not support this theory.[328] I find by the preponderance of the evidence that James, like her fellow committee members, was independent of Ellison.

325 *See* PTO ¶¶ 44–48, 98 (noting Ellison's holdings in both companies).

326 JX759 at 2–5.

327 Order of Voluntary Dismissal with Prejudice of Renee J. James, Dkt. No. 826; Order of Dismissal as to Certain Defs., Dkt. No. 304.

328 This theory, strongly disproved, in my view, by the trial evidence, had some odor of denigrating the abilities of women executives to succeed based on their merits.

***19** The appropriate standard of review is business judgment, unless the Plaintiffs have proven either of their theories; that Ellison was a controller with respect to the transaction,[329] or that he and Catz defrauded the Board.

329 Because I find Ellison was not a controller, I need not address whether his recusal, and the establishment by the remainder of the Board of an independent and fully-functioning special committee, would be sufficient under the facts here to cleanse a controller conflict.

2. Was Ellison a Controller?

An individual (or entity) holding more than 50% of the voting power of a corporation is in hard control of the entity, because of her ability to remove, and thus influence, the directors.[330] Ellison, however, held less than 30 % of the voting power in Oracle, and did not enjoy hard control.[331]

> [A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status. For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporation conduct.[332]

Of course, more than mere allegation is required post-trial. A plaintiff must show that the alleged controlling stockholder *in actuality* dominated the corporate conduct, either generally or with respect to the transaction in question, to hold the stockholder to duties as a fiduciary.

330 *See* *Williamson v. Cox Commc'ns, Inc.*, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (citing *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1113–14 (Del. 1994)).

331 PTO ¶¶ 45–46.

332 *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)).

Did Ellison control the operation of Oracle at the time of the transaction, thus usurping the power of the directors and imposing upon himself fiduciary duties? I find from the evidence that he did not.

"The inquiry of actual control seeks to answer whether, 'as a practical matter, [the alleged controller was] no differently situated than if it had majority voting control.' "[333] The Delaware Supreme Court has identified various potential indicia of "general control," including the ability to:

> (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests.[334]

Bearing these and other indicia of control in mind, for an individual or entity to exercise general control over the corporate machinery, the power of the putative controller must be such that independent directors " 'cannot freely exercise their judgment' " for fear of retribution.[335]

333 *In re GGP, Inc. Stockholder Litig.*, 2021 WL 2102326, at *20 (Del. Ch. May 25, 2021), *aff'd in part, rev'd in part and remanded*, 282 A.3d 37 (Del. 2022), *reargument denied* (Aug. 10, 2022) (quoting *In re PNB Holding Co. Shareholders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006)).

334 *Id.* (quoting *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 43 (Del. 1994)).

335 *In re Morton's Rest. Grp., Inc. Shareholders Litig.*, 74 A.3d 656, 665 (Del. Ch. 2013) (quoting *In re PNB Holding Co. S'holders Litig.*, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006)).

***20** In post-trial briefing, Plaintiffs highlighted Ellison's status as Oracle's founder and "visionary leader,"[336] his control over Oracle's product direction,[337] and his Oracle stock ownership, which "dwarf[ed] the ownership of the board as a whole or any institutional investor."[338] Further, Plaintiffs noted that, "in light of Oracle's director majority voting policy," Ellison's voting block "was indispensable to reelecting incumbent outside directors,"[339] providing, as one example, the 2013 reelection of Chizen, Conrades, and Seligman in which Ellison's votes were purportedly indispensable.[340]

336 Pls.' Corrected Opening Post-Trial Br. 83, 100, Dkt. No. 795.

337 *Id.* at 100.

338 *Id.* at 99–100.

339 *Id.* at 100.

340 *Id.*

The evidence presented at trial demonstrated that the Oracle board vigorously debated assumptions and was not afraid to stand opposed to Ellison.[341] For example, in one instance, the board forced Ellison to fire a senior member of his team over his strong objection.[342] In light of that evidence, I find Ellison had clout, but did not exercise general control. The same can be said of Ellison's relationship with Catz and Hurd, Oracle's co-CEOs. For example, when Catz determined that it was not in Oracle's best interest to pursue multi-cloud with Microsoft and shut the project down, it took Ellison in his capacity as CTO a year to convince her to change her mind.[343] In both relationships, senior management gave Ellison's ideas a respectful hearing but did not appear cowed or overawed by him. In 2016, the executive function of Oracle resided in its dual CEOs, Catz and Hurd. While Ellison remained a potent force in Oracle, his role at the time of the merger was Chief Technology Officer. The record does not show that he controlled the day-to-day function of Oracle, or dictated the operation of the company to the Board. I cannot find actual control of the Company from the evidence presented at trial.

341 Tr. 197:9–198:4 ("Debating assumptions is a characteristic of Oracle meetings."), 27:18–28:15 (noting that there were times that Ellison was in favor of an idea and after raising it with the board it was not pursued).

342 Tr. 1871:7–1872:1.

343 Tr. 1865:18–1866:20.

I do find it, however, more likely than not that the Ellison could have exerted control as to particular transactions, if he had so desired. Ellison was so closely identified with Oracle that an insistence on a particular policy or result had the potential to sway the business judgment of the directors and the executives of Oracle. At trial and in briefing, the Plaintiffs highlighted instances where Catz referred to Ellison as her boss[344] or Oracle's "visionary leader."[345] For example, Plaintiffs excerpted from a 2019 public interview where Catz said:

> It's a team effort. It's a team sport. You have to have a leader. Larry Ellison is it. Don't let titles fool you. I am – I am very, very helpful, as is Mark Hurd, who is my co-CEO. We are good executors, good editors on his vision, but like many of you who are also founders and CEOs and chairmen, you're guiding lights of your company, and there's no substitute for what you do. None. It is, though, quite helpful to have others on the team who share your vision. Who are focused on executing your vision. Who have no individual alternative agenda. The one thing Larry can count on, in my case, I am now finishing my 20th year at Oracle, and I'm one of the new kids, and – is he never has to worry that I've got an agenda any different than to make – to make Oracle successful and to make his vision come true.[346]

344 Pls.' Corrected Opening Post-Trial Br. 5, 85 n.473, Dkt. No. 795.

345 *Id.* at 100 (citing Tr. 1701).

346 Tr. 1702:1–17; JX2856.

***21** Did Ellison attempt to wield this potential control in regard to the NetSuite acquisition? The evidence demonstrates that he did not.

The timeline of the transaction is instructive. Oracle historically had an aggressive policy of growth by acquisition.[347] Prior to the annual offsite meeting at Porcupine Creek on January 14–15, 2016, Hurd and Catz discussed the acquisition of NetSuite with Ellison.[348] Ellison's lack of opposition was necessary to any transaction due to his ownership position in NetSuite.[349] Ellison did not oppose an acquisition.[350] Accordingly, Catz put the purchase of NetSuite as one of several potential acquisitions to be discussed with the board.[351] At the meeting with the board, when a NetSuite deal was broached, Ellison left the meeting.[352] Oracle's directors agreed to consider an acquisition.[353] Catz and Hurd were authorized by the directors (without Ellison) to approach NetSuite to see if it was open to a discussion of a merger, but the Oracle executives were instructed not to discuss price terms.[354] Once Catz reported that NetSuite might entertain a deal,[355] the Board (again without Ellison) created a Special Committee, fully empowered to negotiate an acquisition and consider alternatives, including not buying NetSuite.[356] Thereafter, Ellison scrupulously avoided any discussion of the transaction with the Special Committee.[357] I find, accordingly, that Ellison, although he had the potential to influence the transaction, did not attempt to do so, and that the Special Committee completed the transaction unmolested by his influence.

347 Tr. 530:5–531:24; JX2469 at 8; JX391 at 11.

348 Tr. 1981:16–1982:11; *see also* Tr. 1661:23–1662:21 ("Larry did not say let's not do it. He said he wouldn't object to it. And he left, and then it just left me, unfortunately, just left me and Mark to argue it out and talk with our board in January").

349 *See* PTO ¶¶ 47–48 (providing Ellison's stake in NetSuite).

350 Tr. 1661:23–1662:21, 1665:17–1666:21.

351 *See* Tr. 1415:16–21 ("It only made sense to do it last, because then we could have Larry in for all the other conversations, and then when this one came up, he could go out.").

352 Tr. 1415:9–24, 1136:2–9, 40:4–23.

353 JX624 at 6.

354 JX624 at 6.

355 JX759 at 1.

356 JX759 at 2–5.

357 Tr. 1828:23–1829:23; *see also* JX624 at 6 (noting Ellison's intent to recuse given his ownership interest in NetSuite).

This is evidenced not only by the lack of contact between Ellison and the Special Committee; it is also clear from examination of the Special Committee's negotiations. Prior to making an offer, the Special Committee investigated alternatives to and the prudence of the acquisition itself.[358] In its initial offer of $100.00 per share, the Special Committee weighed the risks of posing an offer below the range of $102.00 to 105.00 per share, the range it initially settled upon.[359] Following NetSuite's disappointing June 11, 2016 offer, the Special Committee declined to counter.[360] In the intervening period between June 11, 2016 and June 28, 2016, the deal appeared to be dead.[361] On the resumption of negotiations, the Special Committee held fast to its non-offer and sought diligence to understand and strengthen its negotiating position despite the risk such delay posed to the potential deal.[362] The Special Committee maintained this tack in its request for further diligence on July 8, 2016,[363] and ultimately reaffirmed its non-bid on July 12, 2016.[364] NetSuite bid against itself on July 12, 2016, a month after Oracle had declined to counter-offer.[365] The Special Committee ultimately negotiated a deal at $109.00 per share, which was a dollar less than its price ceiling.[366]

358 JX949 at 2.

359 JX979 at 2–3 (The Special Committee also determined that the transaction, if any, should be subject to i) approval by a fully empowered independent special committee of NetSuite and ii) subject to a non-waivable condition requiring a majority of the minority vote of NetSuite shares not owned by, or associated with, Ellison and his children); Tr. 1163:15–1165:6, 55:23–57:5, 216:2–217:7.

360 PTO ¶ 74; JX1046 at 2.

361 JX1086.

362 JX1104 at 2.

363 JX1138 at 2.

364 JX1186 at 2; Tr. 1183:1–7.

365 PTO ¶ 80.

366 PTO ¶ 82; Tr. 1167:1–1169:8.

***22** Moreover, when the requisite approval from the NetSuite minority appeared not to be forthcoming, the Special Committee was prepared to let the deal die rather than increase Oracle's offer.[367]

367 JX1649 at 2; JX1658 at 1.

The record, in other words, demonstrates that the Special Committee, aided by its advisors, negotiated in a hard-nosed fashion that reduced the deal price in a way that—given Ellison's greater interest in the target than in Oracle—was against Ellison's interest.

Plaintiffs, however, maintain that Ellison nonetheless wielded actual control of the transaction. Their theory primarily rests on Ellison's publicly held view that a transaction with NetSuite, eventually, would make sense, as well as Ellison's January 27, 2016 phone call with Goldberg, and Catz's loyalty to Ellison, which, per Plaintiffs, allowed him to control the transaction through her.[368] I address these in turn, below.

368 Pls.' Corrected Opening Post-Trial Br. 101–102, Dkt. No. 795.

i. Ellison Did Not Propose the Transaction

Based upon the evidence at trial, the Plaintiffs contend that Ellison raised the concept of buying NetSuite.[369] As noted, Ellison had been a longtime, vocal proponent of a merger with NetSuite.[370] However, in early 2015, Ellison, Catz, and Hurd debated whether to purchase NetSuite, and Ellison, at that time, was the driving force *against* the transaction, which he felt would be confusing to the marketplace, and overpriced.[371] In early 2016, NetSuite was one of the companies that Kehring regularly monitored as a potential takeover target, and corporate development again raised the idea of purchasing NetSuite.[372]

369 *Id.* at 101; Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 7–8, Dkt. No. 813.

370 Tr. 1664:7–23, 1980:4–1981:22.

371 Tr. 1962:8–19, 1407:9–1408:5.

372 Tr. 1408:11–21, 462:8–463:4.

In the weeks preceding the 2016 Oracle board's offsite meeting at Porcupine Creek, Catz and Ellison had a series of private conversations around purchasing NetSuite.[373] Ellison's prior worries about the purchase had been assuaged.[374] First, given the then-recent downturn of cloud stocks, NetSuite was effectively on sale.[375] Second, Fusion was now mature enough that the purchase would not cause disproportionate marketplace confusion.[376] Ellison told Catz that he would not oppose the Transaction.[377] Ellison's agreement with the concept of the Transaction, under these facts, does not show actual control.[378]

373 Tr. 1966:10–1972:14.

374 Tr. 1972:4–10.

375 Tr. 1967:9–1971:2, 587:15–588:24, 1410:3–21; JX716 at 1, 6.

376 Tr. 1967:9–1971:2.

377 Tr. 1972:4–10, 1662:5–21, 1665:17–1666:21.

378 *See In re Rouse Properties, Inc.*, 2018 WL 1226015, at *20 (Del. Ch. Mar. 9, 2018) (discussing *Morton's Rest. Grp.*, 74 A.3d at 662) (noting that initiation of the transaction in question, when coupled with other factors, was not enough to confer actual control); *see also Kahn v. Tremont Corp.*, 694 A.2d 422, 431 (Del. 1997) ("Initiation[,] ... standing alone, is not incompatible with the concept of fair dealing so long as the controlling shareholder does not gain financial advantage at the expense of the controlled company"). Further, the Plaintiffs' contentions that Ellison directed the timing of the transaction to overcome familial financial needs were decidedly unconvincing, and I find by a preponderance of the evidence that neither Ellison or his son were in need of a cash infusion sufficient to motivate an action by Ellison against Oracle's interests.

***23** Plaintiffs also attempted to demonstrate that Ellison was the driving force behind the Transaction because at Oracle's annual offsite board meeting at Porcupine Creek, he spoke to the board on " 'the benefits, challenges, and opportunities associated with the continued evolution of [Oracle's] suite of cloud products' immediately before Kehring's discussion of ... NetSuite."[379] They contend that the presentation "ensured [a] lack of 'resistance or second thoughts from other fiduciaries.' "[380] This theory borders, to my mind, the metaphysical. Ellison's presentation on Oracle's move to the cloud did not numb the minds or overcome the business judgment of the other directors.[381] The move to the cloud had been a decade-long undertaking and one that the board rightfully should have been regularly updated on. Thus, these presentations were within the ordinary course of business. Although necessary to the board's determination of whether to investigate the potential transaction, these presentations, I find, are manifestly insufficient to show that Ellison drove Oracle's board in any particular direction or trampled over the "resistance or second thoughts [of] other fiduciaries."[382] It does not show any control over the Special Committee, who independently investigated both the prudence and price of the NetSuite merger.

379 Pls.' Corrected Opening Post-Trial Br. 101, Dkt. No. 795 (citing JX624 at 5).

380 *Id.* (quoting *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693, at *28 (Del. Ch. July 6, 2018)).

381 *See Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC*, 2018 WL 3326693, at *28 (Del. Ch. July 6, 2018), *aff'd sub nom. Davenport v. Basho Techs.*

Holdco B, LLC, 221 A.3d 100 (Del. 2019) ("Probative evidence can include statements by participants or other contemporaneous evidence indicating that a defendant was in fact exercising control over a decision. A court also can consider whether the defendant insisted on a particular course of action, whether there were indications of resistance or second thoughts from other fiduciaries, and whether the defendant's efforts to get its way extended beyond ordinary advocacy to encompass aggressive, threatening, disruptive, or punitive behavior.").

382 *Id*

ii. Ellison Did Not Control the Transaction Through His January 27 Call with Goldberg

Plaintiffs also contend that Ellison indirectly controlled merger negotiations through his control over principals of NetSuite. Although Ellison recused himself on both sides of the transaction,[383] the Plaintiffs' argument is essentially that Ellison's NetSuite holdings were coercive such that Goldberg felt an obligation to sell. Perhaps this argument would make sense if the Plaintiffs represented *NetSuite* stockholders and believed the transaction to have garnered too *low* a price, but that theory does not translate well to the buy side. Obviously, Ellison was conflicted, and, at least, an influential blockholder of NetSuite. This evidence fails to show that Ellison controlled *Oracle* with respect to the transaction.

383 JX624 at 6; JX1497 at 21; Tr. 1828:23–1829:23, 1833:9–1835:24.

For similar reasons, Plaintiffs focus on a January 27, 2016 call between Ellison and Goldberg, but this call does not demonstrate Ellison's control over the merger negotiations on behalf of Oracle. After Catz and Nelson had dinner to determine if NetSuite would be open to an offer and the NetSuite board met to discuss that dinner,[384] Goldberg called Ellison on January 27, 2016.[385] During that conversation, Ellison told Goldberg that he would recuse from NetSuite's consideration of the transaction, and that NetSuite's decision was out of his hands.[386] Ellison did indicate that Oracle's intention was to retain NetSuite management and that he expected Hurd to run the company as a global business unit.[387]

384 JX645 at 2–3.

385 Tr. 834:5–9.

386 Tr. 1833:9–1835:24.

387 Tr. 1679:1–1680:15, 1829:24–1831:8.

This was not an act of control of the transaction itself, nor did it make overpayment likely. As I understand the Plaintiffs' argument to the contrary, they posit that this conversation foreclosed the Special Committee's ability to launch a hostile tender offer because Goldberg now knew that Oracle's intention was to keep management. *But Plaintiffs conceded that the Special Committee did not know about this conversation*, because Ellison walled himself off from the Special Committee.[388] Thus, the Special Committee's decision not to "go hostile" was its own.

388 I do not mean to imply that it was best practice for Ellison not to report this conversation, but simply that it was not an exercise of control over the Special Committee.

iii. Ellison Did Not Control the Transaction Through Catz

***24** The Plaintiffs theorize that Ellison drove the deal through Catz, who provided faulty information to the Special Committee in order to cause Oracle to overpay for NetSuite.[389] They aver that Catz was not independent of Ellison because of their long friendship and because he controlled her employment.[390] This theory fails, as Plaintiffs failed to prove at trial that Catz, as a putative controller's surrogate, ran the negotiation process or took actions to advance Ellison's interests.[391]

389 Pls.' Corrected Opening Post-Trial Br. 84–85, 88, 93–97, 101, Dkt. No. 795.

390 *Id.* at 84.

391 *See FrontFour Capital Grp. LLC v. Taube*, 2019 WL 1313408, at *22–25 (Del. Ch. Mar. 11, 2019) (examining director independence in a specific actual control analysis).

First, the Special Committee, not Catz, ran the negotiation process. The Special Committee engaged its own independent and highly experienced advisors, performed its deliberations after management left its meetings, and questioned management's assumptions. In an attempt to show that Catz coopted the Special Committee's decision-making process on behalf of Ellison, the Plaintiffs point to an email from the Special Committee chairwoman James, post transaction, thanking Catz "for all the babysitting and strategy to get this done."[392] This tongue-in-cheek email simply thanks Catz for her time, not for her oversight. As the primary representative of Oracle management, Catz was fundamental to the ultimate deal. However, the Special Committee and its advisors ran the process.

392 Pls.' Corrected Opening Post-Trial Br. 101, Dkt. No. 795 (citing JX1800).

Although Ellison openly discussed his opinions about NetSuite with Catz,[393] the Plaintiffs were unable to produce any persuasive evidence of collusion to orchestrate the merger. In short, there is nothing to indicate that Ellison attempted to, or did, assert control over Catz to control the negotiations or acquisition, to secure an overpayment or otherwise, as his surrogate.

393 Tr. 1957:20–1959:5.

Catz's actions with respect to the negotiations in fact demonstrate loyalty to the company, not Ellison's conflicted interests. During negotiations, Catz showed herself to be a tough negotiator on behalf of Oracle, who was prepared to let the deal die if it was not in Oracle's best interests to pursue. On June 11, 2016, after NetSuite countered Oracle's offer of $106.00 per share with an offer of $120.00 per share and a note that NetSuite had little room to negotiate, Catz and Oracle management recommended that the Special Committee *decline to counter.*[394] This was the course of action the Special Committee took.[395] When the deal was resuscitated by market turmoil stemming from the Brexit vote,[396] Catz and Oracle management recommended diligence, not rapid reengagement.[397] As the Special Committee noted, such a measured approach required time and posed the risk of closing the window of opportunity.[398] Similarly, at the fourteenth meeting of the Special Committee on November 4, 2016, when determining whether to extend the tender offer deadline and raise Oracle's offer, Catz recommended standing firm, saying, "we are not going to pay a single penny more."[399] Throughout the process, Catz agitated for Oracle to pay the *lowest* price possible and her advice led to several stalls that jeopardized the transaction. These actions are incongruent with the theory that Catz drove the deal as an agent of Ellison. Ellison did not control the transaction through Catz.

394 JX1046 at 1–2.

395 PTO ¶ 74; JX1046 at 2.

396 JX1104 at 1–2.

397 JX1104 at 2; Tr. 1174:6–13.

398 JX1104 at 2.

399 Tr. 2478:6–17; JX1649 at 1.

***25** To recapitulate, at the time of the transaction, Ellison did not have hard control of Oracle. He did not exercise control generally in regard to Oracle's operations. He did not attempt to assert control in the transaction by which Oracle acquired NetSuite, and as a director and officer abstained from participation in the transaction. He was, I find by a preponderance of evidence, a holder of potential control over a transaction in which he was interested. Does such a finding mandate entire fairness review?

The Defendants point to caselaw defining control over a transaction, outside the context of pure voting control, narrowly. To exercise actual control such that a minority stockholder is deemed a controller, she must "exercise[ ] such formidable voting and managerial power that, as a practical matter, [she] is no differently situated than if [she] had majority voting control."[400] In wielding such power, a minority stockholder deemed controller can "either (i) control ... the corporation's business and affairs in general or (ii) control ... the corporation specifically for purposes of the challenged transaction."[401] Because I have found neither, under this understanding, Ellison was not a controller and business judgment applies.

400 *In re Rouse*, 2018 WL 1226015, at *11 (quoting *Morton's Rest. Grp.*, 74 A.3d at 664–65) (internal quotations omitted).

401 *Voigt v. Metcalf*, 2020 WL 614999, at *11 (Del. Ch. Feb. 10, 2020).

It is instructive to consider here, I think, the development of the fiduciary concept of the controller, starting with *Kahn v. Lynch*.[402] Delaware courts have long held that " 'a shareholder owes a fiduciary duty only if it owns a majority interest in or *exercises control* over the business affairs of the corporation.' "[403] " '[A] plaintiff must allege domination by a minority shareholder through actual control of corporate conduct' " in order to show an exercise of control.[404] In *Kahn v. Lynch*, the Delaware Supreme Court held that an interested squeeze-out merger by a controlling stockholder would undergo entire fairness review despite receiving "the informed approval of a majority of minority stockholders or an independent committee of disinterested directors."[405] The court reasoned that entire fairness was required in the squeeze-out context because minority stockholders may hesitate to vote in their own economic interest given the risk of subsequent retaliation by the controlling stockholder if they vote against the merger.[406] The court later held in *MFW* that a squeeze-out merger involving a conflicted controller could regain business judgment protection when conditioned *ab initio* on both the approval of an independent, adequately empowered special committee that fulfills its duty of care *and* the informed, uncoerced vote of a majority of the minority stockholders.[407]

402 638 A.2d 1110 (Del. 1994).

403 *Id.* at 1113–14 (quoting *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) (emphasis added)).

404 *Id.* at 1114 (quoting *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53, 70 (Del. 1989)).

405 *Id.* at 1117. In *Kahn*, the court found that the controller had exercised actual control over the company despite an ownership stake of only 43.3%. *Id.* at 1113-17.

406 *Id.* at 1116.

407 *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014), *overruled on other grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018) (clarifying that a plaintiff can plead a duty of care violation only by showing the special committee acted with gross negligence, not by merely questioning the sufficiency of price).

***26** Eight years after *Lynch*, then-Vice Chancellor Strine extended the reach of the doctrine of inherent coercion, in *In re Cysive*.[408] As in *Lynch*, the transaction at issue in *Cysive* was a conflicted squeeze-out merger involving an alleged controller.[409] However, rather than assess the minority stockholder's actual control of the company, the *Cysive* Court looked to the purported controller's ability "to be the dominant force in any contested Cysive *election*" and the inherently coercive threat that ability presented "to the independent directors and public stockholders" in the squeeze-out merger context.[410] In reaching this conclusion, the Court held:

> [I]t cannot be that the mere fact that [the controller] did not interfere with the special committee is a reason to conclude that he is not a controlling stockholder .... the analysis of whether a controlling stockholder exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes.[411]

408 836 A.2d 531 (Del. Ch. 2003).

409 Accounting for options and holdings by family members, plaintiffs alleged holdings as high as 44%. *Id.* at 535.

410 *Id.* at 552–53 (emphasis added).

411 *Id.*

This Court's decision in *Ezcorp* also extended the theory of inherent coercion, this time from controlled squeeze-out mergers to *all* conflicted transactions involving a controller.[412] *Ezcorp* involved a dual class share structure in which an individual holding a minority equity position nonetheless retained 100% of the company's voting power —thus, the defendant had hard control.[413] There, the challenged transactions involved consulting agreements between the company and entities affiliated with the controlling stockholder.[414] After a thorough and scholarly review of the caselaw, the Court found that entire fairness was the appropriate standard of review at the pleadings stage.[415]

412 *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016).

413 *Id.* at *2.

414 *Id.* at *2–7.

415 *See id.* at *11–30.

Following *MFW* and *Ezcorp*, this Court has issued relatively few post-trial opinions involving challenges to conflicted controller transactions.[416] Each of these cases found the principal defendant to be a controller[417] based on a combination of stock holdings and, importantly, affirmative actions taken to control the transaction. Cases more analogous to the situation here have also survived a motion to dismiss.[418] However, they have done so with the benefit of plaintiff-friendly inferences. Indeed, buoyed by such inferences, the present case survived a motion to dismiss in which I found that Plaintiffs had pled sufficient facts to support, at that stage of the litigation, the allegation that Ellison was a controller.[419] I now have, however, a full trial record on which to assess Ellison's attempt to control this transaction, or lack thereof.

416 *Basho Techs.*, 2018 WL 3326693; *FrontFour*, 2019 WL 1313408; *In re Tesla Motors, Inc. Stockholder Litig.*, 2022 WL 1237185 (Del. Ch. Apr. 27, 2022), *judgment entered sub nom. In re Tesla Motors, Inc.* (Del. Ch. 2022); *In re BGC Partners, Inc. Derivative Litig.*, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022), *judgment entered sub nom. In re BGC Partners, Inc.* (Del. Ch. 2022).

417 With the notable exception of *Tesla*, where the Court assumed Elon Musk to be a controller but ultimately found that the transaction occurred at a fair price. *In re Tesla Motors*, 2022 WL 1237185.

418 *See, e.g., Voigt*, 2020 WL 614999 (involving similar allegations of a controller who caused the company to acquire a controller affiliate).

419 *See In re Oracle Corp. Derivative Litig.*, 2018 WL 1381331 (Del. Ch. Mar. 19, 2018).

***27** Based on the facts produced at trial as laid out above, and applying the doctrine of our caselaw as I understand it, I determine that Ellison did not function as a controller here. He neither possessed voting control, nor ran the company *de facto*. He likely had the *potential* to control the transaction at issue, but made no attempt to do so; in fact, he scrupulously avoided influencing the transaction. In addition, the transaction was negotiated by a special committee of independent directors who hired independent advisors. The Special Committee vigorously bargained for price and demonstrated a willingness to walk away from the transaction. I find, in light of these facts, that this is not a controlled transaction. Accordingly, business judgment applies, unless I determine that the Defendants breached fiduciary duties arising outside the controller context, allegations of which I address below.

The Plaintiffs posit that Defendants committed fraud on the Special Committee, disabling its ability to negotiate with NetSuite. I address that theory, below.

3. Fraud on the Board

To shift the standard of review governing the Transaction from the business judgment rule to entire fairness, Plaintiffs posit that Ellison and Catz perpetrated a fraud on the board. Specifically, they argue that "Ellison and Catz manipulated the deliberative process of the Board and the Special Committee, by not disclosing material facts relating to the value of NetSuite and their interactions with NetSuite."[420]

420 Pls.' Corrected Opening Post-Trial Br. 88, Dkt. No. 795.

To shift the standard of review under a "fraud on the board" theory, Plaintiffs must prove 1) that the fiduciary was materially interested, 2) that the board was inattentive or ineffective, 3) that the fiduciary deceived or manipulated the board, 4) that the deception was material, and 5) that the deception tainted the decisionmaking process of the board.[421] At minimum, for a fraud on the board claim to result in entire fairness, a defendant must have manipulated a supine board.[422] Here, the first element is satisfied.

421 *See In re Pattern Energy Grp. Inc. Stockholders Litig.*, 2021 WL 1812674, at *33 (Del. Ch. May 6, 2021) (providing the standard for fraud on the board at the motion to dismiss stage); *see also City of Warren Gen. Empls.' Ret. Sys. v. Roche*, 2020 WL 7023896, *10, 15, 17 (Del. Ch. Nov. 30, 2020).

422 *Pattern Energy*, 2021 WL 1812674, at *34.

"[A]n omission is 'material' to a board if the undisclosed fact is relevant and of a magnitude to be important to directors in carrying out their fiduciary duty of care in decisionmaking."[423] In other words, the Court must determine if a defendant caused a deprivation of material information that corrupted the board or committee's decision making process.[424]

423 *Id.* at *33 (quoting *In re Mindbody, Inc.*, 2020 WL 5870084, at *23 (Del. Ch. Oct. 2, 2020)). "[T]he term "material," when used in the context of a director's obligation to be candid with the other members of the Board, is distinct from the use of the term 'material' in the quite different context of disclosure to stockholders in which [a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *City of Fort Myers Gen. Employees' Pension Fund v. Haley*, 235 A.3d 702, 719 (Del. 2020) (internal quotation omitted).

424 *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *20 (Del. Ch. Oct. 27, 2020).

As explained below, at trial, Plaintiffs were unable to prove that Ellison or Catz perpetrated a fraud on the board or, more cogently, on the Special Committee.

a. Ellison Did Not Defraud the Oracle Board or the Special Committee

The Plaintiffs contend that Ellison misled the Special Committee by failing to disclose to the board or the Special Committee (i) his critiques of NetSuite's business strategy, (ii) the business strategies that he planned to implement at NetSuite following the Merger, and (iii) his January 27, 2016 phone call with Goldberg.[425] These supposed omissions fail to convince me that Ellison perpetrated a fraud on the board. I assess them in turn.

425 Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 44–45, Dkt. No. 813.

i. Critiques of NetSuite's Business Strategy

***28** Plaintiffs first argue that Ellison materially misled the Oracle board by failing to disclose his belief that NetSuite was on a path to be "crushed" by Oracle if it did not correct its course.[426] Plaintiffs contend that NetSuite was moving up-market while Oracle, with Fusion, was moving down-market.[427] The inevitable clash, which Plaintiffs aver was already occurring and NetSuite was going to lose,[428] was going to depress NetSuite's future share price, and Ellison knew this.[429]

426 Pls.' Corrected Opening Post-Trial Br. 91, Dkt. No. 795.

427 *Id.* at 90–91.

428 *Id.* at 22–27, 29–32.

429 *Id.* at 90–91; Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 30, Dkt. No. 813.

The Plaintiffs' theory that Ellison materially misled the board by not voicing his criticisms of NetSuite relies, in part, on his supposed knowledge that competition between Oracle and NetSuite in the future would be such that only one could thrive. It also relies on a lack of action by NetSuite to adjust course in response to Ellison's advice to NetSuite's management, supposedly dooming NetSuite's prospects. Plaintiffs put forward a significant amount of evidence regarding competition, and I include the most compelling examples below. However, in light of the evidence below, I find that the two companies were not significant competitors, although they competed at the margins. Further, Ellison's critiques of NetSuite's business strategy would not have been material to the Special Committee because NetSuite was in the process of implementing them.

In April 2015, Oracle executive Rod Johnson reported to Oracle's Committee on Independence Issues regarding competition between Oracle and NetSuite.[430] He noted that although NetSuite "competes"[431] were growing in the upper mid-market, they were still a low percentage of potential ERP sales.[432] However, he expected such competes to grow in number as Oracle grew coverage in the mid-market.[433] He noted that Oracle "dominate[ed]" in the larger opportunities.[434] Overall, however, Johnson did not believe that NetSuite was a "significant or major" Oracle competitor.[435]

430 JX427.

431 That is, Johnson used "compete" as a noun, meaning what native speakers of English might refer to, quaintly, as "an instance of competition." I reluctantly adopt Johnson' usage throughout.

432 JX427 at 17.

433 JX427 at 17.

434 JX427 at 17.

435 JX440 at 1.

In May 2015, Jeff Henley, a salesman and Vice Chairman of the board, was seeing NetSuite "trying to come up market" while Oracle, with Fusion, was going "down to smaller and smaller" companies.[436] In an email to a fellow Oracle salesman, Henley agreed to call or email any smaller company that was thinking of making the switch to Oracle.[437] As an exclamation and to show his enthusiasm Henley wrote, "Love crushing Ne[t]Suite!"[438]

436 Tr. 22:3–13.

437 JX933.

438 JX933 at 1.

In August 2015, Catz received a presentation deck that showed 26% of Oracle's cloud wins in the first three fiscal quarters were over NetSuite.[439] That presentation, however, did not state the number of competes or losses.[440] Later, in August 2016, an Oracle presentation on ERP wins and losses showed Oracle as winning 75% of the deals they compete in against NetSuite in the upmarket and 58% in the mid-market.[441] There was no discussion of how these win-rates relate to either company's broader deal flow.

439 JX512 at 9.

440 *See* JX512 at 9.

441 JX1471 at 4.

***29** When discussing the anti-trust risks of the Proposed Transaction, Kehring wrote,

> I don't see anything below that is harmful from an antitrust perspective. the only area I think we should be careful in is not to suggest different markets for SMEs, enterprises etc but to position the different target customer categories as fluid and constraining each other and part of a broader market. While it might be tempting to say that [NetSuite] serves e.g. only smaller businesses and therefore they are in a different antitrust market and there is no or very small overlap with us, that type of rigid segmentation is something we have consistently argued against since Peoplesoft.[442]

442 JX765 at 1 (errors in original).

Oracle displayed Fusion's functionality at the OpenWorld conference in September, 2016.[443] This provided NetSuite the opportunity to investigate its soon to be sister product.[444] A NetSuite employee wrote that Fusion was a better product than he had thought; it was indeed a ground up re-write, but not a unified codebase.[445] Fusion was meant to be adopted piecemeal to allow a gradual transition for existing customers, which meant NetSuite would "continue to have an opportunity to differentiate and sell to customers who value a unified suite rather than a well-integrated one."[446] As far as customer targets, the employee wrote, "there is currently more overlap ... than I had previously thought," "they're starting by getting good for the mid-market and then adding sophistication to move up," and "[t]wo-tier ERP is a focus for them too."[447] That said, he also noted that the biggest limitations in the mid-market for Fusion were that "platform-implementations may be too expensive," the sales team may not be good at reaching the mid-market, and high operations cost.[448] The employee's conclusion was "I think their functionality and usability for the upper mid-market means we should focus on the lower- and mid-mid-market and the larger small businesses — the 20–1000 employee market."[449]

443 Tr. 2742:3–17, 2867:2–5.

444 *See* JX1623.

445 JX1623 at 1.

446 JX1623 at 1.

447 JX1623 at 3.

448 JX1623 at 3.

449 JX1623 at 3.

As they contend Oracle was pushing downwards, the Plaintiffs argue that NetSuite was pushing upwards and out of its core market. They cite to NetSuite's 2016 Plan, which calls for that company to "double down on areas of Enterprise success,"[450] a May 5, 2016 diligence presentation which noted, "moving up market and going global with One World" was a part of NetSuite's winning strategy,[451] and a post-acquisition presentation which noted that prior to acquisition, NetSuite was "making a big push to move upmarket" but after acquisition it was "re-focusing on the mid-market and the Suite."[452]

450 JX596 at 26.

451 JX889 at 3.

452 JX1974 at 13.

Although there was competition between Oracle and NetSuite at the margins, I find that the two were not significant competitors. To quote NetSuite's other founder, Goldberg, "We used to have a saying about Oracle ERP, that if both of us were in the same room, one of us was in the wrong room."[453] When viewed as a percentage of NetSuite deals in Q1 2014 and Q1 2015, Oracle was a competitor in 3% and 2% of NetSuite deals respectively.[454] NetSuite won 50% of the 28 total deals and 55% of the annual recurring revenue.[455] When looking at the six financial quarters of competition from 2015 to mid-year 2016, out of 9,000 NetSuite sales opportunities, Oracle was identifiably present 11% of the time and Oracle won less than a quarter of those interactions.[456] The two companies excelled in different markets, and it was not fraudulent for Ellison not to affirmatively declare otherwise to the Special Committee.

453 Tr. 941:2–4.

454 JX430 at 2; Tr. 746:12–748:16; *see also* Tr. 2688:8–2690:9 ("9,000 sales opportunities that occurred over that six-quarter period. Oracle was identifiably present at the same firm about 11 percent of the time, 942 opportunities. And of those, Oracle won the opportunity — they got the contract — 2 1/2ish percent of the time. And this, I think, gives you some initial sense that, yes, Oracle and NetSuite do encounter each other, but it's not a big part of NetSuite's sales book. And, in fact, the encounters between Oracle and NetSuite are relatively rare.").

455 JX430 at 2.

456 Tr. 2688:8–2690:9. This dataset was likely overinclusive of competition as it did not take into account instances where NetSuite and Oracle were bidding for different projects within the same company. Tr. 2690:23–2691:17.

***30** At trial, the Plaintiffs suggested that I should confine my analysis to the overlapping market segment.[457] In that segment, they argue, there was increasing competition between Oracle and NetSuite, and NetSuite was fighting a losing war.[458] In my view, Plaintiffs' position is logically flawed and incongruent with the data.[459]

457 Tr. 2722:5–2741:12.

458 Tr. 2722:5–2741:12.

459 *See* Tr. 2695:2–2696:7.

First, despite the Plaintiffs' protestations,[460] NetSuite had not abandoned its down-market to push upwards. Plaintiffs' evidence for this abandonment was a single bullet point on NetSuite market strategy in the notes of an Oracle employee who attended a diligence presentation given to Oracle.[461]

460 Tr. 2719:22–2720:12 (citing JX921 at 5).

461 Pls.' Corrected Opening Post-Trial Br. 23, Dkt. No. 795 (quoting JX921) ("Do not go after small companies (<100 employees)").

In fact, NetSuite was in the process of implementing changes to address Ellison's 2015 concerns and the Special Committee knew about these efforts. Though he disagreed at first, Goldberg came around to Ellison's way of thinking.[462] NetSuite developed project Atlas, later marketed as SuiteSuccess, to increase its profitability and ability to scale.[463] Rather than focusing on expensive one-off customizations, the purpose of project Atlas was to create templates for industries—"verticals"—and subsections of industries—"micro-verticals"—that could be tailored to each customer with little customization.[464] Atlas and the verticalization of NetSuite were priorities of NetSuite following the discussion with Ellison and part of the company's "Winning Growth Strategy."[465] However, individual verticals take time and NetSuite planned to build one to two per year,[466] starting with the retail apparel vertical.[467]

462 JX525 at 3.

463 Tr. 1044:9–1045:1, 930:12–932:12.

464 Tr. 916:4–917:1.

465 *See* JX889 at 3; *see also* Tr. 752:17–754:17.

466 Tr. 921:4–16, 752:17–53; JX546 at 2 (indicating that NetSuite intended first to adopt a pilot industry for its verticalization initiative, and then develop 1 to 2 additional verticals per year); JX584 at 13.

467 Tr. 757:8–15, 930:20–931:1.

Plaintiffs contend that NetSuite failed to abandon its push upmarket, noting that "moving up market and going global with OneWorld" was part of NetSuite's "Winning Growth Strategy."[468] That same presentation included "Key Business Drivers" such as "[g]rowing [the] average selling price in the mid-market" in part by "selling to larger, mid-size enterprises" and increasing enterprise customer count as well as deal size.[469] Plaintiffs further noted NetSuite's target market, the "Fortune 5 Million: US Enterprise & Mid-Market SMBs," included firms with over 1000 employees as well as the substantial percentage of its revenue, 15%, that NetSuite derived from these large businesses.[470]

468 Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 15, Dkt. No. 813 (citing JX889 at 3).

469 JX889 at 18.

470 Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 15–16, Dkt. No. 813 (citing JX1242 at 23, 7).

NetSuite did have some large customers and, for a time, it was moving upmarket. However, NetSuite tempered its indiscriminate move upmarket when it began developing Atlas.[471] Further, of the two initiatives, Atlas and verticalization in the mid-market was the initiative that got more resources.[472] NetSuite was not designed for "large" customers[473] and James, from her own experience, noted that the software did not function above a certain number of users.[474] NetSuite sought larger customers opportunistically, but many of their enterprise clients were "tier two" deployments of NetSuite to subsidiaries.[475] Further, there was no indication that NetSuite's win rate against Oracle was on a downward trend.[476]

471 Tr. 953:2–21.

472 Tr. 953:2–21.

473 Tr. 874:23–876:3.

474 Tr. 1304:6–1305:2.

475 Tr. 921:17–922:13, 1850:10–17; JX903 at 1.

476 Tr. 2741:7–12 ("I did test whether or not Oracle generally had a trend in increasing win rates, and that was not significant. It wasn't even close.").

***31** The ambiguous nature of competition in the cloud segment described above in perhaps excessive detail demonstrates that Ellison did not defraud the Special Committee by not providing it with his views. Beyond this, the Special Committee performed diligence and was not supine or naive. James was an experienced executive who worked at Intel for decades and presided over a myriad of acquisitions.[477] Conrades was a similarly experienced executive who "spent 61 years marketing and selling hardware and software to business enterprises and governments around the world."[478] Panetta, a former CIA director and Secretary of Defense, lacked the executive experience of James and Conrades but brought poignant analytical skills to the Special Committee.[479]

477 Tr. 192:2–21.

478 Tr. 177:19–190:16.

479 Tr. 191:4–192:1.

The Special Committee brought their collective experience to bear in the performance of diligence. At the Special Committee's first meeting on April 8, 2016, after Oracle management presented on the strategic rationale of the acquisition of NetSuite, the Special Committee requested a "more in depth presentation" of the topic and potential alternatives.[480] On May 5, 2016, James attended a six hour in-person diligence meeting with the Special Committee's advisors, members of Oracle management (not including Catz), and representatives of NetSuite.[481] That meeting included a discussion of NetSuite's "market positioning" and "competitive environment,"[482] and on May 13, 2016, James reported the "potentially complimentary nature" of Oracle and NetSuite as well as their "respective addressable markets."[483] On May 20, 2016, Oracle management and Moelis separately presented to the Special Committee on the strategic rationale of acquiring NetSuite and potential alternatives.[484] In its presentation, Moelis noted Oracle's lack of a small and medium business ERP product and that NetSuite could "address [Oracle's] shortcomings in Cloud ERP."[485] The Special Committee's advisor also noted the importance of quick action given the lack of competitors in that market segment.[486] In consideration of the presentations, the Special Committee came to the conclusion that "an acquisition of [NetSuite] could be highly beneficial to [Oracle], that alternatives for participation in this market segment were unattractive or not readily or timely available and that an acquisition of [NetSuite] could fill a strategic gap for [Oracle] that it was important for [Oracle] to address."[487] At this point, one and a half months after its formation, the Special Committee determined that it was ready to consider making an initial offer for NetSuite.[488]

480 JX779 at 2–3.

481 PTO ¶ 68; JX1265.

482 JX1265 at 5.

483 JX931 at 1.

484 PTO ¶ 69; Tr. 1155:24–1157:14 ("I thought Moelis's presentation was extraordinarily helpful. This presentation was very detailed, and it looked at the market, and they had — they had their own assessment of Oracle, which I think was very important for us to get somebody else's view of what Oracle — you know, how Oracle's Fusion is seen in the market, and alternatives, and, you know, what's out there."), 592:21–594:9.

485 JX977 at 33; Tr. 2349:16–2350:8, 2377:4–22, 2372:15–2374:10.

486 Tr. 2356:12–2357:23 ("Again, and this also was validated in our third-party research and our own understanding of the market, this market was evolving quickly. I think it was very, very important while there was still a lot of untapped issues, I think we had approximately like 50 percent of the market was still greenfield, it was important to have your solution now, because a lot of other people saw this market as highly attractive too."); JX977 at 33–35.

487 JX949 at 2.

488 JX949 at 2.

In sum, I do not find any evidence that Ellison or Catz breached fiduciary duties by "concealing" the extent of competition between Oracle and NetSuite.

ii. Post-Closing Business Strategies

***32** Plaintiffs contend that Ellison's failure to disclose his post-close business strategies for NetSuite was a fraud on the board because, if followed, Ellison's strategies would entail "significant cost and risk, as well as reduced revenues," which were not accounted for in the analyses given to the Special Committee.[489] Per Plaintiffs, the evidence for this claim is found in Ellison's January 27, 2016 phone call with Goldberg.[490]

489 Pls.' Corrected Opening Post-Trial Br. 93, Dkt. No. 795.

490 *Id.* at 92.

As discussed below, in acquiring NetSuite, Oracle followed its usual practice in M&A transactions. Typically, in Oracle's acquisitions, post-close plans and structuring are not decided until after a deal is signed and Oracle's Financial Planning and Analysis team draws up an operating budget for the soon to be acquired entity. Therefore, Ellison's thoughts on the post-close running of NetSuite, addressed to Goldberg or otherwise, would have had no impact on the Special Committee's deliberations and therefore were immaterial.

Oracle institutionalized its M&A strategy in 2006 after Kehring took over Corporate Development.[491] This included the implementation of a standard framework to assess potential targets.[492] Corporate Development kept tabs on potential takeover targets and frequently presented them to the executive team.[493] Once a potentially viable target was lined up and the financial framework was ready, Corporate Development sat down with leadership, typically Catz and Hurd, to discuss the use of the business as part of Oracle.[494] To assess a potential acquisition target, the Corporate Development team created an incremental model based on public information and any diligence that had been performed.[495] "The purpose of the incremental model is to reflect the incremental revenue and expenses as a result of owning the target by which [they thought], over a five-year horizon, [Oracle could] accomplish."[496] These models were not operating plans; rather, they were financial plans.[497] Corporate Development projected the potential target's revenue based on its prior performance rather than its expected performance based on synergies and cross-sales with Oracle products.[498] However, when examining costs, the model took into account additional costs to Oracle as well as synergies and savings.[499] Thus, the incremental cost to Oracle, such as hiring additional personnel within Oracle's various divisions to accommodate the putative target, were added to the model.[500] Similarly, cost savings to the putative target, such as use of Oracle's database that the company was previously paying for, were incorporated into the model.[501] Oracle's prior acquisitions, overall corporate activities, and financial results helped to inform the inputs for the model, which were ultimately provided by Catz and Hurd.[502] As due diligence progressed and new information came to light, the model was updated to reflect that information.[503]

491 Tr. 529:11–531:2, 549:20–23, 551:14–552:1.

492 Tr. 569:14–570:8, 529:11–531:2, 549:20–23, 551:14–552:20.

493 *See* Tr. 455:5–14.

494 Tr. 550:2–14.

495 Tr. 550:22–551:6.

496 Tr. 548:7–17.

497 Tr. 550:15–21.

498 Tr. 554:11–555:1 (“Q. Does Oracle include the projected revenue from those cross-sales in its incremental models? A. No. On the revenue side, in order to be conservative, we only project out the revenue of the acquired company's products and services.”).

499 Tr. 556:7–20.

500 Tr. 555:17–556:20.

501 Tr. 555:17–20, 501:19–502:12.

502 Tr. 557:1–558:1.

503 Tr. 557:1–8.

***33** In addition to the incremental model, the Corporate Development team assessing an acquisition performed several other analyses.[504] These included a discounted cash flow analysis, discounted future value analysis, accretion/dilution analysis, comparable publicly traded company multiples analysis, comparable M&A transaction multiples analysis, review of 52-week highs, and institutional analyst price targets analysis.[505]

504 Tr. 567:5–24.

505 Tr. 567:18–24.

While the incremental model was Oracle's primary assessment tool before signing and remained an important barometer post-acquisition,[506] Oracle management's modeling method changed post-signing. Post-signing, Oracle's Financial Planning and Analysis team built a “bottoms-up” operating budget.[507] The operating budget treated pre-existing expenditures differently than an incremental model would.[508] As such, the operating budget assigned to the target a portion of Oracle's pre-existing expenditures useful to that company.[509] For example, the incremental model would not include a cost for use of Oracle's database or previously unused Oracle office space, where the operating budget would.[510]

506 Tr. 551:14–552:14.

507 Tr. 540:24–542:1, 225:1–18.

508 Tr. 540:24–545:6.

509 Tr. 540:24–545:6.

510 *See* 501:19–504:7, 1543:3–1544:5.

The NetSuite transaction followed the same framework as Oracle's other deals. Oracle management prepared an incremental model, discounted cash flow analyses, and multiples based on precedent transactions.[511] Kehring with the assistance of Catz and Hurd set the assumptions underlying these models.[512] On receipt of more information, Catz revised the incremental model of NetSuite downwards taking a more *conservative* view of NetSuite's value.[513] As a result of Special Committee questioning and push-back, she later acknowledged that this downwards shift was an analytical mistake[514] and provided the revised model to the Special Committee alongside two other models.[515] In doing so, Catz left the decision of what model to follow to the Special Committee, and the transaction followed the usual pre-signing path.

511 JX979 at 1–2; JX980.

512 Tr. 479:16–480:12, 492:20–493:23.

513 JX1183 at 7–8; Tr. 1481:2–1482:9.

514 Tr. 1485:1–22.

515 JX1206 at 2; JX1204 at 2–5.

Further, Ellison's failure to reveal managements’ post-closing plans was not material to Oracle or the Special Committee's deliberation process. Post-close, Oracle invested heavily in NetSuite, focused on international expansion, and continued the verticalization efforts.[516] There is no reason to think that these actions were taken to decrease Oracle/NetSuite's value; to the contrary, all the fiduciaries had an incentive to maximize NetSuite's value to Oracle, post-acquisition.

516 JX1667; JX1785; Tr. 294:2–11, 1499:18–1500:5, 1527:10–1528:18.

The same reasoning, I note, applies to Plaintiffs’ allegations on this matter concerning Catz.

iii. Ellison's “Assurances” to Goldberg

Plaintiffs contend that Ellison's failure to inform the board of the “assurances” he made to Goldberg were a fraud on the board because they deprived the Oracle board of negotiating leverage.[517] In their conversation on January 27, 2016, initiated by Goldberg, Ellison stated his expectations for how Hurd would treat NetSuite. Similarly, he said that Oracle's intent was to continue to employ NetSuite management. This was consistent with Oracle's standard practice in many of its large acquisitions, which was to treat the acquired companies as global business units.[518] This conversation should have been, and was not, disclosed to the board or Special Committee, presumably because Ellison was recused from discussions with the board over NetSuite. Though it would have been prudent for Ellison to err on the side of greater disclosure, Plaintiffs did not show, and logic does not dictate, that Ellison's failure to disclose the telephone conversation to the Special Committee corrupted the Special Committee's process.

517 Pls.' Corrected Opening Post-Trial Br. 94, Dkt. No. 795.

518 Notice of Lodging of Dep. Transcripts and Video Recordings Ex 19, at 75:6–16, Dkt. No. 730; *see* Tr. 1452:21–1453:4 (highlighting that Oracle had eight global business units at the time of the NetSuite acquisition).

***34** Plaintiffs' theory has already been addressed and rejected; they contend that the failure to disclose this conversation gave up Oracle negotiating leverage by foreclosing hostile negotiation tactics[519] and "greased the skids for a deal."[520] As discussed earlier, the Special Committee independently chose not to engage in hostile negotiation.

519 Pls.' Corrected Opening Post-Trial Br. 94, Dkt. No. 795.

520 Pls.' Answering Post-Trial Br. in Response to the Opening Post-Trial Br. of Defs. Safra A. Catz and Lawrence J. Ellison 36, Dkt. No. 813.

In fact, even if Ellison's non-committal statements assuaged Goldberg's concerns, I fail to see how this is an issue for *Oracle's* Special Committee such that it tainted *their* process. In other words, Ellison's effort to open Goldberg's mind to a potential transaction, if the call can be characterized as such, in no way impacted the Special Committee's deliberations about or negotiations regarding the transaction.

b. Catz Did Not Defraud the Oracle Board or the Special Committee

Plaintiffs contend that Catz breached her fiduciary duties by failing to disclose her "assurances to Goldberg," by failing to inform the board and the Special Committee of her "prohibited price discussion" with Nelson, by not "truthfully and completely" answering Moelis's questions about the competitive landscape, and by providing "Moelis and the Special Committee with phony projections."[521]

521 Pls.' Corrected Opening Post-Trial Br. ii, 94–99, Dkt. No. 795.

i. Catz's "Assurances" to Goldberg

Plaintiffs contend that Catz made assurances to Goldberg and that these assurances deprived the Special Committee of negotiating leverage.[522] Underlying this claim are Catz's May 26, 2016,[523] and June 22, 2016,[524] calls with Goldberg, which she did not report to the Oracle board.[525] Plaintiffs aver that "Catz [was] ... in selling mode when speaking to Goldberg" and "NetSuite was empowered to demand a high price, secure in the knowledge that" Oracle would not "take a hard line in negotiations, criticize NetSuite, or otherwise go public or go hostile."[526] I do not find this theory consistent with the evidence.

522 *Id.* at 94.

523 JX988; Tr. 784:9–786:15.

524 Tr. 1633:18–1636:17.

525 Pls.' Corrected Opening Post-Trial Br. 94, Dkt. No. 795.

526 *Id.*

During the first conversation on May 26, 2016, Goldberg expressed a lack of desire to sell NetSuite, that he understood his fiduciary duties, and that Oracle would need to offer a good price.[527] Catz did try to overcome his unwillingness to sell by stating that the plan was to keep NetSuite independent.[528] During the second conversation, Catz testified credibly that the pair did not discuss the transaction.[529] As stated in respect to Ellison, because the Special Committee was unaware of the conversations, its decision not to go hostile was its own. No leverage was lost. The Special Committee process was not corrupted. While the conversations should have been reported, failure to do so did not amount to a fraud on the Special Committee.

527 JX988; *see also* Tr. 784:9–786:15.

528 Tr. 784:16–19, 982:4–21.

529 Tr. 1649:14–1650:7, 1636:18–1637:4.

ii. Price Discussion with Nelson

Plaintiffs contend that Catz negotiated with Nelson and that the discussion of a Concur multiple anchored price negotiations at $125 per share.[530] From there, they contend that this discussion anchored Catz's thinking in the creation of projections and that the Special Committee should have been made aware of this.[531]

530 Pls.' Corrected Opening Post-Trial Br. 95–96, Dkt. No. 795.

531 *Id.*

***35** I have found that despite the mention of the Concur multiple, Catz and Nelson did not negotiate a price for NetSuite. Catz did not mention the requested multiple to the Special Committee. I cannot find that the omitted information was material to the Special Committee so as to justify a finding of fraud on the board.

The Special Committee made the opening bid, and its deliberative process was clear. Catz and Oracle management presented their analyses to the Special Committee and recommended an opening bid of $100.00 per share.[532] That figure was based on NetSuite's 52 week high of $99.73 and the roughly 25% premium over the trading price that $100.00 per share represented.[533] Moelis reviewed the models, questioned management about them, and concluded they were reasonable.[534] After management left the meeting,[535] Moelis gave its report and analyses on public market price targets, revenue multiples, and precedent transactions.[536] Based on its own analyses, Moelis also suggested $100.00 per share.[537] Their reasoning rested on similar grounds: NetSuite's 52 week high, trading multiples for SaaS companies, and the psychological necessity of starting with a "three-figure" price per share.[538] Despite initially settling on $102.00 to $105.00 per share, the Special Committee reflected on the advice of Oracle management and its advisors and offered $100.00 per share.[539] Catz's and management's recommended first offer was in line with that of Moelis's independent advice.

532 PTO § 70; JX979 at 1–2.

533 Tr. 618:21–621:3, 1459:10–1465:20; JX980 at 7.

534 Tr. 2389:16–2393:9, 2398:20–2399:22 ("Yeah, we believed them — we certainly took note of them. They were reasonable. From a cost savings perspective, they struck us as reasonable. And then we looked at the revenue scale, interestingly enough, if I remember correctly, it was maybe even conservative."); *see* JX975.

535 JX979 at 2.

536 JX979 at 2; JX975.

537 *See* Tr. 2420:12–22.

538 Tr. 2419:3–2420:22.

539 JX979 at 2; Tr. 1163:6–1165:6; 56:8–57:5; 215:9–216:21.

While Catz should have informed the Committee of the "Concur multiple" suggested by Nelson, Catz's actions did not materially mislead the Oracle Special Committee or corrupt its proceedings.

iii. Competitive Landscape

As with Ellison, Plaintiffs contend that Catz withheld knowledge of competition between Oracle's fusion product and NetSuite, and that she provided Moelis with inaccurate information on Oracle's cloud ERP capabilities.[540] I have already found, above, that the Special Committee process was not corrupted by misleading the Special Committee as to competition between the products.

540 Pls.' Corrected Opening Post-Trial Br. 96–97, Dkt. No. 795.

The Special Committee and its advisors were apprised of the level of competition between NetSuite and Oracle. By virtue of their presence at the meeting, the members of the Special Committee were aware of Olsen's reports at Porcupine Creek.[541] Similarly, Moelis provided the Special Committee with analyst reports highlighting the potential of competition between the Oracle and NetSuite.[542] Overall, the level of competition was not deliberately hidden from the Special Committee, on the contrary, the Special Committee was briefed and aware of the two companies' positions within the market. The Special Committee and its advisors were free to draw on or request information from a broad range of sources including those cited by the Plaintiffs. Catz was not the exclusive source for this information and, given the limited competition between the two entities, Catz did not breach her fiduciary duties with respect to non-disclosure of materials relating to the competition between NetSuite and Oracle.

541 JX624; JX614; JX637.

542 Tr. 2444:1–2445:20; JX1131.

iv. "Phony" Projections

***36** Plaintiffs contend that "Catz oversaw the creation of artificial and inflated financial projections."[543] The incremental model for NetSuite, they claim, was overly aggressive and "did not reflect Ellison's actual plans for NetSuite" or the eventual operating budget.[544] I have already rejected this allegation regarding fraud on the Special Committee by Ellison; the allegations against Catz suffer the same fate.

543 Pls.' Corrected Opening Post-Trial Br. 97, Dkt. No. 795.

544 *Id.*

As discussed above, Oracle followed its M&A playbook in acquiring NetSuite. The seeming incongruence between the incremental model and the operating budget are therefore unsurprising, as the two had entirely different purposes.[545] By Plaintiffs own contention, Catz's analytical role concluded with bidding.[546] Overall, the Plaintiffs contentions boil down to an assertion that Catz's model did not match what Oracle ultimately did with NetSuite and that Catz used incorrect, aggressive assumptions.[547] The record does not indicate that Catz breached fiduciary duties in this regard, or that the Special Committee was defrauded by Catz.

545 Tr. 501:19–504:7, 540:24–545:6, 1543:3–1544:5.

546 Pls.' Corrected Opening Post-Trial Br. 62, Dkt. No. 795.

547 *Id.* at 97–98.

III. CONCLUSION

This transaction was negotiated at arm's length by a fully empowered Special Committee. Ellison was conflicted, but recused from the acquisition process. He did not exercise control over the transaction, nor did he or Catz materially mislead or defraud the Special Committee so as to taint the process. After the foregoing review of the post-trial record, I find that business judgment obtains. Accordingly, I find for the Defendants.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

Jonathan Thomas JORGL, Plaintiff,
v.
AIM IMMUNOTECH INC., Thomas K. Equels, William Mitchell, and Stewart Appelrouth, Defendants.

C.A. No. 2022-0669-LWW
|
Date Submitted: October 6, 2022
|
Date Decided: October 28, 2022

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MEMORANDUM OPINION

WILL, Vice Chancellor

***1** The plaintiff in this matter, Jonathan Thomas Jorgl, has been a stockholder of AIM ImmunoTech, Inc. since June 27, 2022. Jorgl first learned of AIM just days before buying stock when his surfing buddy Michael Rice, who desired a seat on AIM's board, asked Jorgl to buy shares for the purpose of nominating him. Jorgl bought about $800 worth of AIM stock and transferred the shares into his name of record with the guidance of Rice, Rice's former colleague Robert Chioini who also wished to be a board candidate, and Chioini's business associate Michael Xirinachs. None of Rice, Chioini, or Xirinachs were AIM stockholders.

On July 8, Jorgl (working with Rice, Chioini, and counsel) submitted a notice to AIM that proposed the nominations of Rice and Chioini to AIM's board of directors. The board suspected that Jorgl's nomination was not submitted out of the blue given that another stockholder, Walter Lautz, had tried to nominate Chioini in April.

The board deduced that Lautz had been working on behalf of stockholder Franz Tudor, who had been vexing AIM since 2020 with threatening emails and interference with AIM's business contacts. Tudor's actions had led AIM to seek injunctive relief against him in Florida and to send cease-and-desist letters requesting that Tudor comply with federal securities laws. The quick succession and commonalities between the failed Lautz nomination and the Jorgl nomination prompted the board to investigate.

After reviewing information showing that Rice and Chioini also had ties to Tudor, the board came to believe that Jorgl's notice omitted to mention arrangements or understandings with an undisclosed group. Such disclosure was required by AIM's advance notice bylaw. The board voted to reject Jorgl's notice and to commence litigation against Jorgl, Chioini, Rice, Tudor, and others for potential violations of federal securities laws.

Jorgl responded by filing litigation in this court, seeking a preliminary mandatory injunction requiring the board to accept his nomination and include his nominees on a universal proxy card. Despite Jorgl's insistence that no discovery was necessary to prove his claim, expedited discovery ensued. That discovery indicated that a web of individuals had worked together to bring Jorgl's nomination forward.

The facts read like a game of telephone. Tudor, desiring to take control of the board, asked Lautz to nominate Chioini (and another individual). When Lautz failed, Tudor, Chioini, and Xirinachs regrouped to find another stockholder to be the public face of their effort. Chioini asked Rice to run alongside him, and Rice asked Jorgl to become a stockholder. Jorgl then bought shares and transferred them into record name with the help of Xirinachs. Rice promised Jorgl he would not be on the hook for any expenses, and Jorgl submitted his nomination notice to AIM. Xirinachs and Chioini then formally engaged counsel and Xirinachs officially agreed to provide funding.

Other than describing a potential agreement for Chioini and Rice to reimburse certain costs, Jorgl did not mention any arrangements or understandings with Tudor or Xirinachs in his nomination notice. Jorgl argues that his notice was compliant because he knew nothing about the involvement of Tudor or Xirinachs at the time he submitted it. Maybe so. But the evidence put forward by the defendants indicates that Jorgl's notice was—at best—misleading.

***2** Jorgl also asserts that the board's rejection of his notice was inequitable, requiring this court to step in. He argues that the board sought to entrench itself at the expense of his rights as a stockholder. The limited record before me, however, suggests that the directors concluded a clandestine plan was afoot. I cannot say that they were wrong or that they acted unreasonably.

At bottom, there are myriad factual disputes that make the imposition of mandatory relief impossible. Without the benefit of a trial, I cannot resolve these questions of fact. And—in light of the evidence presented by the defendants—I certainly cannot find that Jorgl is entitled to a judgment as a matter of law.

Jorgl's motion for a preliminary mandatory injunction is therefore denied.

I. FACTUAL BACKGROUND

This background is drawn from the undisputed facts in the plaintiff's Verified Complaint and the record developed in connection with the plaintiff's motion for a preliminary injunction.[1] The record includes over 100 exhibits and the deposition testimony of 12 witnesses.[2] Based on the current record, the following facts are those that I conclude are likely to be found after trial.[3]

1 *See* Dkt. 1 (“Compl.”).

2 Citations in the form “PX__” refer to exhibits to the Transmittal Affidavit of Jeffrey J. Lyons to Plaintiff's Motion for Preliminary Injunction. Dkt. 114. Citations in the form “DX__” refer to exhibits to the Transmittal Affidavit of Shelby M. Thornton in Support of Defendants’ Answering Brief in Opposition to Plaintiff's Motion for Preliminary Injunction. Dkt. 130. Deposition transcripts are cited as “[Name] Dep.”

3 *See In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 578 (Del. Ch. 2010).

A. AIM and Its Board

AIM ImmunoTech, Inc. (“AIM” or the “Company”) is an immuno-pharma company focused on the research and development of therapeutics to treat cancers, immune disorders, and viral diseases.[4] Its common stock is publicly traded on the NYSE American exchange.[5] AIM has three directors: defendants Thomas Equels, Dr. William Mitchell, and Stewart Appelrouth.[6]

4 Compl. ¶ 15.

5 *Id.*

6 *Id.* ¶¶ 12-14, 18.

In 2015, AIM's board of directors (the “Board”) was composed of its then-Chief Executive Officer Dr. William Carter, Peter Rodino, Iraj Kiani, Equels, and Mitchell. In February 2016, the Board removed Carter from his position as CEO, and Carter resigned from the Board.[7] The remaining directors resolved to appoint Equels (a lawyer by training) as CEO and Mitchell (an academic with experience overseeing clinical trials) as Chairman.[8]

7 DX 4; DX 100 (“Equels Dep.”) 46-51; DX 98 (“Mitchell Dep.”) 23-24; DX 96 (“Rodino Dep.”) 106.

8 PX 4; PX 5.

In June 2016, Kiani resigned from the Board, leaving Equels, Mitchell, and Rodino as its sole members.[9] Rodino then resigned from the Board to become AIM's General Counsel.[10] Appelrouth, who had previously performed accounting and investigatory services for AIM, was nominated and elected as the third Board member at the 2016 annual stockholder meeting.[11]

9 PX 6.

10 Rodino Dep. 10, 62-65. Rodino took on other executive roles as well. *Id.*

11 PX 7; PX 8; Equels Dep. 79-80; DX 5 at 73.

The Board has been composed of Equels, Mitchell, and Appelrouth ever since. They have been reelected in unopposed elections each year through the present.[12] At

AIM's 2021 annual meeting, the incumbent directors received slight majorities "for" their unopposed reelection bids, with each director receiving about 79% support excluding abstains.[13]

12 Compl. ¶ 19.

13 *See* PX 22 Ex. A at 7.

B. Tudor's Outreach

***3** Franz Tudor is an AIM stockholder who made himself known to AIM and its directors in 2020. At first, Tudor sought to become AIM's business development consultant.[14] AIM's executives felt it would be problematic for Tudor to serve in that role after learning that Tudor had been "convicted of insider trading."[15] In 2009, Tudor pleaded guilty to securities fraud and conspiracy to commit securities fraud. He was enjoined from, among other things, engaging in certain activities related to "penny stocks."[16]

14 Equels Dep. 124.

15 *Id.* at 124-25; *see also id.* at 103-04, 117-18; Rodino Dep. 180-82; DX 18. Equels, who was deposed in this action, submitted an affidavit detailing his interactions with Tudor. *See* DX 85. I attribute little weight to his "non-adversarial proffer[ ]." *In re W. Nat. Corp. S'holders Litig.*, 2000 WL 710192, at *19 (Del. Ch. May 22, 2000) (describing witness affidavits and explaining that the court will "ordinarily attach little if any weight to such inherently self-serving and non-adversarial proffers"). I take the same approach to the affidavit of Robert Chioini submitted by the plaintiff. PX 22. I focus, instead, on the contemporaneous documents and deposition testimony.

16 *See* DX 85 Ex. A; DX 18.

After AIM declined to offer Tudor a consulting role, a "barrage of activity" followed.[17] For example, Tudor reached out to AIM's business contacts and to a lobbyist who then purportedly contacted the FDA.[18] These interactions prompted AIM to send a cease-and-desist letter to Tudor.[19]

17 Equels Dep. 125.

18 DX 14; DX 15; DX 17; *see also* DX 19.

19 *See* DX 16; Equels Dep. 104; Rodino Dep. 181-83; *see also* Mitchell Dep. 58-59.

In February 2021, AIM commenced litigation against Tudor in Florida state court, seeking injunctive relief. On August 13, 2021, the Florida court entered a stipulated injunction indefinitely enjoining Tudor from contacting AIM's business relations.[20] Tudor subsequently contacted AIM's financial advisor and its investor relations firm.[21] At times, Tudor has made varying representations about his own stockholder status and claimed that he represents stockholders holding more than one million shares of AIM stock.[22]

20 *See* PX 34; PX 35.

21 *See* Rodino Dep. 183; DX 55.

22 *See* DX 10 (Tudor writing, "I now represent over 1 mil shares btwn the various funds i consult and my own ownership. Why do you think stock didn't break 2.65 today? That was us buying every share sub 2.70."); DX 12 (Tudor stating, "I am an AIM shareholder and represent some of AIMs largest shareholders"); DX 13 (Tudor describing himself as "a shareholder of record and speaking for multiple large shareholders of record" he was "in direct contact with"); *but see* Tudor Dep. 64 (saying that he made these representations to get AIM's attention).

AIM stockholder Todd Deutsch—who had worked with Tudor at Galleon Group[23]—also engaged in outreach to AIM and its investor relations consultant to express his concerns with and criticisms of the company. In a May 2022 email, Deutsch represented to AIM that he owned about 2 million shares of AIM stock.[24] In June, he wrote that he owned 4.9% of AIM and "5 plus times the amount of stock" owned by Equels.[25] Deutsch was communicating with Tudor, and Ted Kellner—another AIM stockholder—about AIM during this time.[26]

23 Equels Dep. 107, 182 (testifying that Tudor and Deutsch were "part of" and "testified" in connection with an insider trading probe concerning Galleon Group).

24 DX 54.

25 DX 57.

26 *See* DX 59 (Deutsch emailing Tudor and Kellner, inadvertently copying AIM and its investor relations firm, asking Tudor to participate in a call).

C. The Lautz Nomination

***4** In late 2021, Walter Lautz, who also claimed to be a "significant shareholder of AIM," emailed Equels and AIM's investor relations firm, critiquing the company's performance and telling Equels to "[s]tep up or get out."[27] Lautz had been introduced to Tudor in late 2020. By December 2021, they were communicating about AIM's performance and the need to have an "activist ... come in" and to "oust[ ]" the Board.[28]

27 DX 24.

28 *See* DX 23 ("Aim needs an activist to come in now."); *see also* DX 21 ("We need to find a way to get [T]om [Equels] ousted."); DX 22 ("[T]his board needs to be ousted."); Tudor Dep. 35-36, 44-46. The plaintiff objects to the defendants' introduction of DX 21, DX 22, and DX 23 (among others) on hearsay grounds. *See* Pl.'s Reply Br. 5. But these documents are not being offered to prove the truth of the matter asserted. They are offered to prove that Tudor made statements to Lautz. *See Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 866 A.2d 1, 21 (Del. 2005) ("A statement is not hearsay if offered only to prove that the statement was made, rather than for the truth of any matter asserted." (citing D.R.E. 801(c))); *Hunt v. State*, 1987 WL 36369, at *2 (Del. Feb. 11, 1987) (TABLE) (explaining that testimony was not hearsay when it was "not being offered to prove the truth of any matter asserted, but rather to prove that the statement was made" (citing D.R.E. 801(c))). This is likewise the case for other exhibits that are the subject of the plaintiff's hearsay objection: DX 30, DX 31, DX 32, DX 33, DX 50, DX 55, DX 56, DX 58, DX 60, DX62, DX 63, DX 65, DX 67, DX 71, DX 79, and DX 80.

In April 2022, Lautz and Tudor discussed the possibility of Lautz nominating two candidates for the AIM Board. Tudor set out to find potential nominees.[29] Tudor contacted Robert Chioini, who he had known since 2011 or 2012 when Tudor had worked as "a business development consultant for [Chioini]" with Rockwell Medical Technologies, Inc.[30] Chioini was a founder of Rockwell Medical and served as its CEO until he was terminated in 2018.[31] Tudor also reached out to his friend Daniel Ring about serving as a Board candidate.[32] Tudor relayed to Deutsch that Ring could "be on the AIM B[oard]" and wrote "[w]e will need a shareholder to make the nomination and [I] will get everything together."[33]

29 *See* Tudor Dep. 46-47.

30 *Id.* at 38-39. Tudor had ongoing business ties to Chioini until March 2021. *Id.*

31 *Id.*

32 *Id.* at 48; DX 101 ("Ring Dep.") 7-10.

33 DX 30.

On April 18, Tudor introduced Ring and Chioini to Lautz.[34] Tudor also sent Chioini an email with the subject line: "Rob Chioini – AIM BOD Nomination Acceptance Letter."[35] Later that day, Lautz submitted a letter to AIM purporting to nominate Ring as a candidate for the Chairman of the Board and Chioini as a director candidate.[36]

34 DX 31; DX 33; *see* DX 97 ("Chioini Dep.") 28-29; Ring Dep. 8; DX 103 ("Lautz Dep.") 47-48.

35 DX 32.

36 DX 37; Lautz Dep. 29-30 (testifying that Tudor drafted the nomination letter and that Lautz reviewed but made no changes to it).

On April 25, Chioini sent the 2021 AIM proxy statement to his business associate, Michael Xirinachs.[37] Xirinachs was, like Chioini, a founder of Rockwell Medical.[38] Chioini and Xirinachs had partnered on various endeavors regarding medical device and drug companies.[39] Chioini hoped that Xirinachs would work with him on the AIM "opportunit[y]."[40] Xirinachs was facing legal trouble at the time of Chioini's outreach (and recently pleaded guilty to two counts of federal wire fraud).[41] Xirinachs and Chioini continued to engage over the ensuing weeks.

37 DX 43; *see* Chioini Dep. 71-74.

38 DX 1 at 7-8.

39 Chioini Dep. 73-74.

40 *Id.* at 74.

41 DX 91 at 19.

D. The Renewed Nomination Effort

***5** On April 28, AIM rejected Lautz's proposal to nominate Chioini and Ring as Board candidates. AIM's letter to Lautz explained that the proposal failed to comply with the Securities Exchange Act.[42] AIM then obtained confirmation of its rejection from the SEC.[43] Equels and others suspected that Tudor was involved with the Lautz nomination.[44]

42 *See* DX 48.

43 DX 85 Ex. C.

44 *See* Equels Dep. 174-75, 215-17; Mitchell Dep. 54; Appelrouth Dep. 99.

After the failed Lautz proposal, Chioini continued to seek a path onto the Board.[45] On April 29, Chioini sent AIM's bylaws to Xirinachs, pointing out the advance notice provision and timing considerations to submit a director nomination.[46] The next day, Chioini emailed Xirinachs about setting up a call with Tudor regarding the "AIM deal."[47] On May 3, Tudor and Xirinachs were invited to a call with Chioini and counsel from Baker & Hostetler LLP with the subject "Potential Engagement: Proxy Contest."[48]

45 *See* Chioini Dep. 30-33.

46 DX 49 ("The window to submit a director nomination is 90-120 days prior to the anniversary of last year's annual meeting.... The bylaws with some relevant provisions highlighted are attached.").

47 DX 50 ("I also want to have a call with [Tudor] today re AIM deal, preferably before 6PM because I am supposed to speak with the lawyer afterward tonight, so let [m]e know what time you can do the call.").

48 DX 52; *see also* DX 51.

On May 17, Tudor sent an email to AIM's outside investor relations firm, copying Equels. Tudor expressed frustration at being rebuffed, writing: "By totally ignoring me and not acting professionally you now get gloves off.... This is just [d]isgusting."[49] Equels assumed that Tudor's email was prompted by the rejection of the Lautz proposal.[50]

49 DX 55.

50 *See* Equels Dep. 180-82.

AIM's outside counsel subsequently sent letters to Deutsch, Kellner, and Tudor's counsel highlighting "a series of actions about which [AIM] ha[d] serious concerns."[51] The letters asked Deutsch, Kellner, and Tudor to comply with the requirements of Section 13(d) of the Exchange Act.[52] AIM anticipated that Tudor and others would commence a proxy contest.[53]

51 DX 61.

52 *Id.*; DX 66; *see also* DX 92 at 19.

53 Equels Dep. 179-80.

On June 2, Tudor emailed Deutsch to report that he had "2 strong candidates to run and get control of the BOD" and "a shareholder who [wa]s will[ing] to have their name as the lead" but had been unsuccessful in finding "anyone to front the $150K" of associated costs.[54] Tudor and Chioini asked Lautz if he would launch a second nomination effort.[55]

54 DX 56.

55 DX 58; Tudor Dep. 45, 47-50.

Lautz initially considered it, though he questioned whether his involvement would be a "good look" since he had been the subject of a FINRA investigation.[56] Tudor forwarded Lautz's email to Chioini, who added Xirinachs to the chain. Chioini responded that he would "have the attorney look at it."[57]

56 DX 60.

57 *Id.*

Lautz subsequently declined to submit another nomination, writing that he "c[ould] not be the face of this partaking" given the risks to his reputation.[58] A few days later, Lautz asked if Tudor had been "able to find someone to be the face of the activist[.]"[59] Tudor responded: "We are still looking."[60]

58 DX 62.

59 *Id.*

60 *Id.*

In mid-to-late June, Chioini contacted Michael Rice, whose investor relations firm had served Rockwell Medical while Chioini was CEO, to ask if Rice would consider being a Board nominee.[61] Rice agreed.[62] Chioini sent Rice's contact information to Tudor, and Tudor sent Rice a write-up about AIM.[63] The three subsequently had a call about AIM.[64]

61 *See* Chioini Dep. 33; DX 94 ("Rice Dep.") 34-35.

62 *See* Rice Dep. 46-47.

63 DX 63; DX 64.

64 Rice Dep. 37.

E. The Jorgl Nomination

***6** In late June, Rice asked plaintiff Jonathan Jorgl, with whom he had a longstanding personal relationship, to purchase AIM stock in order to submit the nomination.[65] Jorgl agreed.[66] On June 23, Chioini texted Xirinachs and Rice saying: "Let's talk in the morning regarding 1000 share purchase and what needs to be done. The most critical part will be to get the shares once they're purchased sent to the shareholder[']s physical address immediately by DTC or the transfer agent."[67]

65 *See* Compl. ¶ 43; Rice Dep. 78-80 (explaining that Rice met Jorgl "on the beach surfing").

66 *See* Compl. ¶ 43; Rice Dep. 80-82.

67 DX 65.

The next day, Chioini emailed Rice instructions that detailed how Jorgl would buy 1,000 AIM shares and move them into Jorgl's name of record.[68] Rice then texted the instructions to Jorgl.[69] Meanwhile, Tudor forwarded Chioini an email from Tudor's counsel concerning AIM's assertion that Tudor breached the Florida injunction.[70]

68 DX 67.

69 DX 70.

70 DX 68.

On June 27, after texting with Rice, Jorgl bought 1,000 shares of AIM stock.[71] Separately, Chioini and Xirinachs exchanged emails about AIM titled "AIMNominationLetter" and "SummaryofRequiredInfoandDefinitions."[72]

71 DX 71; DX 95 ("Jorgl Dep.") 178-79.

72 *See* DX 93 at 4-5. The contents of those emails were withheld from production on the basis of a common interest privilege. *Id.* The plaintiff objects to the defendants' citations to Chioini's privilege log and argues that the log constitutes inadmissible hearsay. *See* Pl.'s Reply Br. 23 n.3. This court regularly considers privilege logs, where appropriate, in making fact findings. *See e.g.*, *In re Cogent, Inc. S'holder Litig.*, 7 A.3d 487, 512 n.91 (Del. Ch. 2010) (looking to privilege log entries to assess the timing of communications); *Bandera Master Fund LP v. Boardwalk Pipeline P'rs*, 2021 WL 5267734, at *46 (Del. Ch. Nov. 12, 2021) (discussing that a privilege log revealed heavy involvement of certain individuals). Jorgl cites no authority demonstrating that doing so is improper. As for his hearsay objection, it is once again overruled. The defendants offer the log to demonstrate that a communication occurred and the basis on which it was withheld. It is difficult to understand how they could offer the log for the communication's truth or substance when that communication was withheld entirely. *See supra* note 28.

Efforts then began to move Jorgl's shares into record name. On July 5, Chioini copied Xirinachs on an email with Baker Hostetler titled "1000 share trade."[73] Xirinachs was assisting with the transfer of Jorgl's shares from street name into record name because "every minute counted" and Xirinachs "had experience ... and offered to help."[74] Xirinachs called Jorgl to provide guidance on how to complete the transfer over the July 4th holiday weekend.[75]

73 DX 73.

74 Chioini Dep. 106-07.

75 Jorgl Dep. 66-68; DX 72 (Chioini to Jorgl: "His name is Michael and he should be calling you now.").

Having successfully transferred the 1,000 shares into his name, Jorgl hesitated when it came time to sign an engagement letter with Baker Hostetler. He texted Chioini: "Sorry not trying to be difficult just not comfortable taking on that obligation."[76] He asked Chioini and Rice to include language in the letter making "it clear [Jorgl] was not responsible for the retainer or the fees" but that the fees "would be paid by a third party."[77] Chioini assured Jorgl multiple times in writing that Jorgl "would not be on the hook," emphasizing "[w]e" (i.e., not Jorgl) "are paying [the] fees."[78]

76 DX 76. Jorgl objects to the introduction of this communication on hearsay grounds. But the statement is admissible under Delaware Rule of Evidence 801(d)(2)(A). The same is true regarding DX 75 and DX 77, which are also subjects of the plaintiff's hearsay objection.

77 DX 77; *see also* Chioini Dep. 210-12.

78 DX 75; DX 77; Chioini Dep. 111-12, 207-11. Insofar as the messages are introduced to demonstrate that communications occurred (or the frequency by which they were made), such use is also permissible. *See supra* note 28.

***7** On July 8, Jorgl's notice of intent (the "Notice") to nominate Chioini and Rice as candidates for election at AIM's 2022 annual meeting was delivered to AIM.[79] It was drafted by Baker Hostetler with input by Chioini, Rice, and Jorgl.[80] The Notice represented that Jorgl owned 1,000 shares of AIM common stock, that he purchased the shares on June 27 for $0.87 per share, and that he had not purchased or sold any other shares of AIM common stock in the preceding two years.[81] Jorgl also disclosed that his nominees, Chioini and Rice, did not own any shares of AIM common stock.

79 DX 84 Ex. C ("Notice").

80 Jorgl Dep. 145-46.

81 Notice at 4.

The following day, Tudor had a call with Kellner about the nominations.[82] Kellner's handwritten notes of the call state: "Franz [Tudor] submitted 2 new directors on Friday July 8th: 1. Mike Rice 2. Rob Chioini."[83] Jorgl's nomination was not yet public.

82 DX 78. The plaintiff objects to the introduction of Kellner's notes on hearsay grounds. But the notes are admissible under Delaware Rule of Evidence 803(1). They are also admissible under Rule 801(d)(1)(A) insofar as the notes are inconsistent with Kellner's deposition testimony. *See* Kellner Dep. 10 ("That was incorrect. I learned later, when I got information from the attorneys, it was not [Tudor], but it was a gentleman named Jorgl.").

83 DX 78.

On July 11, Xirinachs wrote to Chioini about the "AIM process," which he described as being in "full swing."[84] He wrote: "The way I hope this all plays out is we get control of AIM ... we continue to look for opportunities to either acquire, (to spin off at a later time), license technology, or possibly merger with."[85] He twice referred to Jorgl's slate as "our slate."[86]

84 DX 79. The plaintiff objects to the introduction of this communication on hearsay grounds. Insofar as the document is relied upon to show that the communication was made to Chioini, it is not hearsay. *See supra* note 28. To the extent that it is relied upon for the truth of the matter (if at all), it would be admissible under Delaware Rule of Evidence 804(b)(3) as a statement against interest. Xirinachs was unavailable to testify, and the defendants were unable to procure his attendance by reasonable means.

85 DX 79.

86 *Id.*

F. Formal Agreements Are Reached.

Despite Chioini and others having communicated with Baker Hostetler about the nominations since April 28, no engagement letter was executed before Jorgl's Notice was submitted.[87] On July 11—the first business day after the Notice was submitted—Xirinachs emailed Baker Hostetler with the subject "Engagement Letter."[88] A slew of communications among Baker Hostetler, Chioini, and Xirinachs followed.[89] On July 15, an email with the subject "Completed: Please DocuSign: Engagement Letter (Baker Hostetler)" was sent to Chioini.[90] The date of Xirinachs' execution is unknown because he did not respond to the subpoenas served on him in connection with this litigation.[91]

87 *See* Chioini Dep. 50-53 ("[A]n engagement letter actually was ... executed after the Jorgl notice went in on July 8th.").

88 DX 93 at 7.

89 *Id.* at 7-8.

90 *Id.* at 8.

91 The defendants have also moved for adverse inferences arising from what they allege to be Jorgl's "intentional refusal to disclose highly relevant information" and concealment of "the involvement of Michael Xirinachs." *See* Mot. to Compel and for Adverse Inferences 1 (Dkt. 110). The defendants' motion was prompted by Jorgl's failure to disclose Xirinachs in his interrogatory responses concerning: the identities of persons with knowledge of the facts alleged in the Complaint; the identity of individuals or entities providing financing or funding for the litigation; and communications with any person about his nomination effort. *See id.* at 3; *id.* Ex. 2. The defendants argue that Jorgl's incomplete responses left them unable to learn the extent of Xirinachs' involvement until documents including Xirinachs were produced late in discovery. This gave the defendants limited time to serve subpoenas on Xirinachs, which he ultimately did not respond to.
The fact that the defendants learned about Xirinachs late in the game is not ideal. Nonetheless, I decline

to impose an adverse inference. That sanction "is appropriate where a litigant intentionally suppresses or destroys pertinent evidence." *Sears, Roebuck and Co. v. Midcap*, 893 A.2d 542, 552 (Del. 2006); *see also* *Triton Constr. Co., Inc. v. E. Shore Elec. Servs., Inc.*, 2009 WL 1387115, at *7 (Del. Ch. May 18, 2009) (issuing an adverse inference when, knowing that litigation was imminent, the defendant intentionally or recklessly deleted thousands of electronic files that were largely irretrievable); *Kan-Di-Ki, LLC v. Suer*, 2015 WL 4503210, at *30 (Del. Ch. July 22, 2015) (granting an adverse inference where the plaintiff recklessly failed to preserve potentially responsive information on his cell phone). Even if Jorgl was not forthcoming, his conduct does not rise to the level that would justify an adverse inference. He has not destroyed evidence and I lack grounds to conclude that he intentionally or recklessly concealed it. The defendants' motion is therefore denied.

***8** Efforts to confirm funding arrangements were also made. On July 11, Xirinachs contacted Paul Tusa of River Rock Advisors LLC about a "potential consulting agreement that involved AIM."[92] On July 12, Xirinachs introduced Tusa to Chioini, telling Chioini that Tusa was "aware of our plans regarding AIM and will add valuable assistance in this process."[93]

92 PX 88 ("Tusa Dep.") 48; *see also* Rice Dep. 153-55 (testifying that Tusa was involved in the nomination because he was contributing part of the fees).

93 DX 80.

Xirinachs also told Tusa there would be "an investment opportunity" requiring Tusa to pay certain expenses, though they "never really discussed ... what the expenses would be."[94] Tusa was interested in investing, but River Rock was struggling. River Rock's bank account was about to close due to inactivity before Xirinachs gave Tusa $5,000 to keep the account open.[95] Tusa later changed his mind and never made a contribution concerning AIM.[96]

94 Tusa Dep. 49-50.

95 *See id.* at 30-33.

96 *Id.* at 71-72, 103.

The proxy statement subsequently filed by Jorgl, Chioini, and Rice stated that Xirinachs "paid certain expenses on behalf of River Rock [ ] and agreed to be jointly responsible for expenses with Mr. Chioini going forward."[97]

97 DX 91 at 19.

G. The Board Rejects Jorgl's Proposal.

The Board was suspicious upon receiving Jorgl's notice. It seemed strange that Jorgl had recently purchased a small number of shares and that neither of his nominees were stockholders. It was also striking that he had nominated Chioini, who Lautz sought to nominate a few months earlier.[98]

98 *See, e.g.*, Appelrouth Dep. 93; Mitchell Dep. 54; Equels Dep. 209 ("[T]he idea that Jonathan Jorgl woke up 10 days before this nomination, ran out to buy a thousand shares of AIM, which is exactly the same number as Walter Lautz in his proxy proposal, and then ... nominated Mr. Chioini, who is the same person that was nominated by Walter Lautz, struck me as not only implausible but impossible.").

Equels and Rodino decided to investigate. Their research of publicly available information revealed ties among Tudor, Chioini, and Rice. In particular, they learned that Tudor and Chioini had worked together at Rockwell Medical before Chioini was terminated, that Rice had served as an advisor to Rockwell Medical, and that Chioini and Tudor had also worked together at SQI Diagnostics.[99]

99 *See* Rodino Dep. 216-17.

On July 14, the AIM Board met to consider whether the Notice complied with the advance notice provisions in AIM's bylaws.[100] The Board discussed, among other things, the Jorgl Notice, the prior Lautz proposal, and Tudor's interactions with AIM. The directors considered Jorgl's recent stock purchase and Chioini's role in both the Lautz and Jorgl nominations. They also assessed "various information and evidence" suggesting that a nameless group was working together "with the intent o[f] taking control of the company and potentially raiding it or taking other action adverse to the stockholders."[101]

100 *See* DX 81 at 2.

101 Equels Dep. 229; *see* DX 81; Mitchell Dep. 54-55; *see also* DX 92 at 20-21.

The Board determined there was a strong likelihood that the Notice was prompted by undisclosed arrangements or understandings.[102] The individuals identified as potential participants were Tudor, Deutsch, Kellner, Jorgl, Lautz, Chioini, and Rice based on "both information publicly available and e-mails that the Company received from a number of th[o]se players."[103] The Board voted unanimously to reject the Notice.[104]

102 Mitchell Dep. 55; Appelrouth Dep. 98-100; Equels Dep. 229-232.

103 DX 81 at 3.

104 *Id.* at 1-2.

***9** The Board also authorized AIM to file a complaint in the United States District Court for the Middle District of Florida against Jorgl, Chioini, Rice, Tudor, Deutsch, Kellner, and Lautz for failing to file a Schedule 13D notice reflecting that they were a group for purposes of federal securities laws.[105] That complaint was filed on July 15, 2022.[106]

105 DX 85 ¶ 25.

106 *See* PX 43; *see also* DX 87.

On July 19, Jorgl was notified that his Notice had been rejected.[107]

107 DX 84 Ex. D.

H. This Litigation

Jorgl filed his Verified Complaint in this court on July 29.[108] The Complaint advances a single count seeking a declaration that the defendants have not complied with AIM's advance notice bylaw.

108 Dkt. 1.

On August 1, Jorgl filed a Motion for Preliminary Injunction.[109]

109 Dkt. 5.

On August 19, the court granted an order governing expedited discovery and briefing in advance of a preliminary injunction hearing.[110]

110 Dkt. 30.

After briefing on the preliminary injunction motion was completed, oral argument was held on October 5.[111]

111 *See* Dkts. 164, 201.

II. LEGAL ANALYSIS

"The extraordinary remedy of a preliminary injunction is granted sparingly and only upon a persuasive showing that it is urgently necessary, that it will result in comparatively less harm to the adverse party, and that, in the end, it is unlikely to be shown to have been issued improvidently."[112] To obtain a preliminary injunction, Jorgl must demonstrate: "(1) a reasonable probability of ultimate success on the merits at trial; (2) that the failure to issue a preliminary injunction will result in immediate and irreparable injury before the final hearing; and (3) that the balance of hardships weighs in the movant's favor."[113]

112 *Cantor Fitzgerald, L.P. v. Cantor*, 724 A.2d 571, 579 (Del. Ch. 1998) (citation omitted).

113 *La. Mun. Police Empls.' Ret. Sys. v. Crawford*, 918 A.2d 1172, 1185 (Del. Ch. 2007).

There is no fixed approach to how the court should weigh these elements relative to one another. "A strong showing on one element may overcome a weak showing on another element."[114] But a failure to prove any of the three elements defeats the application.[115]

114 *Cantor Fitzgerald*, 724 A.2d at 579.

115 *Id.*

The first element of the injunction test requires Jorgl to establish a reasonable probability of success on the merits of his claim. That showing "falls well short of that which would be required to secure final relief following trial, since it explicitly requires only that the record establish a reasonable probability that this greater showing will ultimately be made."[116] Jorgl's sole claim seeks a declaration that the defendants have not complied with AIM's bylaws regarding director nominations.

116 *Id.*

But, as Jorgl recognizes, a higher merits standard applies.[117] He asks that the court enjoin the defendants from "refusing to acknowledge the July 8, 2022 notice" and from "preventing" Chioini and Rice from being "voted on at the annual meeting and included in AIM's proxy materials."[118] In effect, he is asking the court to order the defendants to acknowledge his nominees as valid, permit his nominees to stand for election, and include his nominees on a universal proxy card.[119] That amounts to a request for mandatory injunctive relief.[120]

117 Pl.'s Suppl. Opening Br. 33 ("Although Jorgl submits this brief in support of his Motion for a Preliminary Injunction, he recognizes that when a plaintiff seeks the same relief through a preliminary injunction that he hopes to receive through a final decision on the merits, then a higher mandatory injunction standard is proper."); Pl.'s Reply Br. 17.

118 *See* Dkt. 5 ¶ 1; Dkt. 4.

119 Pl.'s Suppl. Opening Br. 34. Jorgl initially also asked that the court enjoin the defendants from disparaging him or his nominees during the proxy contest. His preliminary injunction brief no longer seeks that relief and his request for a preliminary injunction on that basis is waived. *See* *Emerald P'rs v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) ("Issues not briefed are deemed waived.").

120 *See* *Rosenbaum v. CytoDyn Inc.*, 2021 WL 4775140, at *12 (Del. Ch. Oct. 13, 2021) (declaring that an order forcing a board to include on the ballot the nominees from the rejected nomination notice amounted to mandatory injunctive relief); *AB Value P'rs, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *3 (Del. Ch. Dec. 16, 2014) (explaining that where the plaintiff requested injunctive relief allowing it to run a dissident slate, it effectively sought a mandatory injunction requiring the board to waive the company's advance notice bylaw).

***10** "[I]t is a well settled principle of equity that a preliminary mandatory injunction will not issue unless the legal right to be protected is clearly established."[121] To obtain mandatory relief, Jorgl must make the more onerous "showing that [he] is entitled as a matter of law to the relief [he] seeks based on undisputed facts."[122] That is, he must "make a showing sufficient to support a grant of summary judgment."[123]

121 *Steiner v. Simmons*, 111 A.2d 574, 575 (Del. 1955).

122 *Alpha Nat. Res., Inc. v. Cliff's Nat. Res., Inc.*, 2008 WL 4951060, at *2 (Del. Ch. Nov. 6, 2008); *see also* *BlackRock Credit Allocation Income Tr. v. Saba Cap. Master Fund, Ltd.*, 224 A.3d 964, 976-77 (Del. 2020) ("There is a 'higher mandatory injunction standard where, instead of seeking to preserve the status quo as interim relief, [plaintiffs], as a practical matter, seek the very relief they would hope to receive in a final decision on the merits." (quoting *Alpha Builders, Inc. v. Sullivan*, 2004 WL 2694917, at *3 (Del. Ch. Nov. 5, 2004))).

123 *Saba Cap.*, 224 A.3d at 977; *see also* *C & J Energy Servs., Inc. v. City of Miami Gen. Empls.*, 107 A.3d 1049, 1053-54 (Del. Ch. 2014) ("To issue a mandatory injunction requiring a party to take affirmative action ... the Court of Chancery must either hold a trial and make findings of fact, or base an injunction solely on undisputed facts.").

My analysis of the merits of Jorgl's claim proceeds in two steps. I begin by considering whether he has demonstrated that the Board breached the bylaws when it rejected the Notice. Because my inquiry does not end there, I then consider whether the defendants' rejection of the Notice was unreasonable or inequitable.

I conclude that Jorgl has not satisfied the applicable standard. It is doubtful that he could show a reasonable probability of success on the merits—much less that he is entitled to a judgment as a matter of law. Moreover, given the number of important factual disputes that were raised during this proceeding, it would be inappropriate for this court to award a mandatory injunction.

A. Whether the Notice Complied with the Bylaws

"The bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers and stockholders formed within the statutory framework of the Delaware General Corporation Law."[124] The court is bound by principles of contract interpretation when assessing them.[125] The terms of the bylaws will be "given their commonly accepted meaning."[126] If a bylaw is unambiguous, the court "need not interpret it or search for the parties' intent."[127] Any ambiguity in an advance notice bylaw is resolved "in favor of the stockholder's electoral rights."[128]

124 *Hill Int'l, Inc. v. Opportunity P'rs L.P.*, 119 A.3d 30, 38 (Del. 2015).

125 *Brown v. Matterport*, 2022 WL 89568, at *3 (Del. Ch. Jan. 10, 2022) ("When construing a corporation's bylaws, the court is bound by the principles of contract interpretation."), *aff'd*, 2022 WL 2960331 (Del. July 27, 2022) (ORDER).

126 *Hill Int'l*, 119 A.3d at 38 (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010)).

127 *Gentile v. SinglePoint Fin., Inc.*, 788 A.2d 111, 113 (Del. 2001).

128 *Saba Cap.*, 224 A.3d at 977 (quoting *Hill Int'l*, 119 A.3d at 38).

Section 1.4 of AIM's bylaws describes the requirements for providing advance notice of the nomination of individuals to stand for election as directors.[129] The nominating stockholder must be a stockholder of record at the time the notice is delivered. The notice must be filed "not less than ninety (90) nor more than one hundred twenty (120) days prior to the anniversary date of the immediately preceding annual meeting of the stockholders."[130]

129 DX 84 Ex. B ("Bylaws") Art. I § 1.4.

130 *Id.* § 1.4(a)(2).

***11** The bylaws also set out categories of information that must be disclosed by the nominating stockholder. Relevant here, Section 1.4(c) provides:

> For any Stockholder Proposal that seeks to nominate persons to stand for election as directors of the Corporation, the stockholder's notice also shall include (i) a description of all arrangements or understandings between such stockholder and each proposed nominee and any other person or persons (including their names) pursuant to which the nomination(s) are to be made.[131]

That provision further requires the disclosure of information relating to the nominating stockholder or the nominees "that would be required to be disclosed in a proxy statement ... pursuant to Section 14 of the Securities Exchange Act[.]"[132]

131 *Id.* § 1.4(c).

132 *Id.*

For Jorgl to prevail on his claim that the Board violated Section 1.4(c) when it refused to accept his nominations (without regard to whether the Board acted inequitably), he must first demonstrate that his Notice satisfied that provision. "Clear and unambiguous advance notice bylaw conditions act, in some respects as conditions precedent to companies being contractually obligated to take certain actions."[133] Jorgl has failed to show that his Notice undisputedly the bylaw's terms.

133 *Strategic Inv. Opportunities LLC v. Lee Enters., Inc.*, 2022 WL 453607, at *13 n.142 (Del. Ch. Feb. 14, 2022); *see also* *Saba Cap.*, 224 A.3d at 979-81 (holding that a stockholder was not excused from its failure to comply with the letter of an advance notice bylaw, thus giving the board grounds to reject its nomination).

1. <u>The Arrangement or Understanding Disclosure Requirement</u>

The Company's letter rejecting Jorgl's Notice stated that he failed to provide the information required by Article I, Section 1.4, subsection (i).[134] That subsection requires the disclosure of "a description of all arrangements or understandings" between the nominating stockholder "and each proposed nominee and any other person or persons ... pursuant to which the nomination(s) are being made."[135]

134 DX 84 Ex. D.

135 Bylaws § 1.4(c).

The terms "arrangement" and "understanding" are not defined in AIM's bylaws. In such circumstances, Delaware courts "look to dictionaries for assistance in determining the plain meaning" of contractual terms.[136]

136 *Lorillard Tobacco Co. v. Am. Legacy Found.*, 903 A.2d 728, 738 (Del. 2006).

An "arrangement" is defined by Black's Law Dictionary as "a measure taken or plan made in advance of some occurrence sometimes for a legal purpose; an agreement or settlement of details made in anticipation."[137] An "understanding" is defined as an "an agreement, especially of an implied or tacit nature."[138] Other definitions of those terms are similar.[139] The definitions of "arrangement" and "understanding" are consistent with the interpretation of the phrase "agreement, arrangement or understanding" in other corporate and securities law contexts.[140]

137 *Arrangement*, Black's Law Dictionary (11th ed. 2019).

138 *Understanding*, Black's Law Dictionary (11th ed. 2019). An "agreement" is a "mutual understanding between two or more persons about their relative rights and duties regarding past or future performances; a manifestation of mutual assent by two or more persons"; and the

"parties' actual bargain as found in their language or by implication from other circumstances, including course of dealing, usage of trade, and course of performance." *Agreement*, Black's Law Dictionary (11th ed. 2019) (first and second definitions).

139 *See Arrangement*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/arrangement (last visited Oct. 26, 2022) ("something arranged: such as [ ] a preliminary measure ... [or] an informal agreement or settlement especially on personal, social, or political matters"); *Arrangement*, Oxford English Dictionary (2d. ed. 1989) ("Disposition of measures for the accomplishment of a purpose; preparations for successful performance."); *Understanding*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/understanding (last visited Oct. 26, 2022) ("[A] mutual agreement not formally entered into but in some degree binding on each side."); *Understanding*, Oxford English Dictionary (2d. ed. 1989) ("A mutual arrangement or agreement of an informal but more or less explicit nature.").

140 *See, e.g.*, *Totta v. CCSB Fin. Corp.*, 2022 WL 1751741, at *24-25 (Del. Ch. May 31, 2022) (discussing the definition of "acting in concert" as tracking "the general corporate law understanding that persons act in concert when they have an agreement, arrangement, or understanding regarding the voting or disposition of shares"); 17 C.F.R. § 240.13d-5 (discussing when individuals form a group for purposes of federal securities laws); 8 *Del. C.* § 203(c)(9)(iii); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 353 (Del. Ch. 2000) (discussing, in the context of Section 203, that the terms "agreement," "arrangement," or "understanding" "permit a fairly high degree of informality in the form in which the parties come together" but "presuppose[ ] a meeting of the minds"); *see also* Modernization of Beneficial Ownership Reporting, 87 Fed. Reg. 13873-72 (proposed Mar. 10, 2022) (proposing amendments to Rule 13D that would broaden the SEC's view of when persons should be treated as a "group").

***12** Giving the terms "arrangement" and "understanding" their commonly accepted meanings, Section 1.4(c) required Jorgl to disclose any advance plan, measure taken, or agreement—whether explicit, implicit, or tacit—with any person towards the shared goal of the nomination. At one extreme, a quid pro quo was not (as Jorgl argues) required.[141] Although an "arrangement" can be shown by an "agreement," for example, it can also take the form of a "measure" or "plan" before an event.[142] At the other extreme, the occurrence of discussions, a prior business or personal relationship, or an exchange of information is not alone sufficient to show an "arrangement or understanding."[143]

141 The plaintiff relies on then-Vice Chancellor Strine's decision in *Yucaipa American Alliance Fund* in arguing that an "arrangement" may indicate a "back and forth" that results in some type of "quid pro quos." *See* Pl.'s Suppl. Opening Br. 42 (quoting *Yucaipa Am. All. Fund II, L.P. v. Riggio*, 1 A.3d 310 (Del. Ch. Aug. 12, 2010)). His reliance on *Yucaipa* is misplaced. The passage relied upon is discussing whether a rights plan left the board free to enter into "understandings" and notes that it is "possible to think that the [ ] board might engage in back and forth with holders during the proxy solicitation process that would raise the potential for improper quid pro quos." *Yucaipa Am. All. Fund*, 1 A.3d at 357 n.245; *see also Portnoy v. Cryo-Cell Int'l, Inc.*, 940 A.2d 43, 66, 71 (Del. Ch. 2008) (discussing an "arrangement" in the context of illegal vote-buying). It does not indicate that the court must find a quid pro quo to conclude that an arrangement or understanding was reached.

142 *See supra* note 137 and accompanying text.

143 *See Totta*, 2022 WL 1751741, at *25 (discussing, in the context of an "acting in concert" provision, that a showing that "the stockholder plans to vote the same way as another stockholder, is acquainted with another stockholder, or even has a business relationship with another stockholder" is insufficient to demonstrate a group).

That description is "not odd or technical, but common sense."[144] Nor is the phrase "arrangement or understanding" ambiguous, making the canon of construction resolving ambiguities in favor of stockholders' rights inapt.[145]

144 *CytoDyn*, 2021 WL 4775140, at *18.

145 *See Saba Cap.*, 224 A.3d at 977 ("If charter or bylaw provisions are unclear, we resolve any doubt in favor of the stockholder's electoral rights." (quoting *Hill Int'l*, 119 A.3d at 38)).

2. Jorgl's Notice

The clear language of the bylaws obligated Jorgl to disclose any arrangements or understandings pursuant to which his nomination was made. Jorgl's Notice stated, in relevant part:

> Although the Nominating Stockholder and the Nominees do not have a formal agreement as of the date of this

> Notice, it is expected that the Nominees will pay or contribute to the costs of the solicitation of proxies for their election, including the costs and expenses of the Nominating Stockholder. Except for the foregoing, as of the date of this Notice, the Nominating Stockholder is not party to any agreements, arrangements or understandings with any other stockholders of the Company nor with the Nominees or any other person pursuant to which the nominations are being made.[146]

Jorgl maintains that this narrative satisfied the requirements of Section 1.4(c). The defendants disagree, arguing that it failed to disclose arrangements or understandings with Xirinachs and Tudor.[147]

146 Notice at 3.

147 The defendants point to other so-called conspirators that they say were parties to arrangements or understandings, such as Deutsch. I decline to address every potentially involved person given that the roles of Tudor and Xirinachs are most apparent (despite the dearth of discovery about Xirinachs).

***13** Based on the limited factual record before me, it appears that Tudor and Xirinachs were working with Chioini and others to devise legal strategies and formulate a plan for the proxy contest. They engaged in advance planning towards a common end: to find an AIM stockholder who would transfer shares into record name and serve as the "face" of their nomination. That stockholder was Jorgl.

The evidence also indicates that Tudor's and Xirinachs's actions went beyond loose discussions about the nominations. Their actions appear purposefully directed toward a shared goal of taking control of the Board. They were coordinated and constructed over a period of weeks.

Tudor launched the effort in the spring, leading to Lautz's nomination of Chioini and Ring. When that failed, Tudor tried again. Chioini put Tudor in touch with Rice as a possible nominee, and Rice asked Jorgl to become a stockholder and serve as the nominator. Tudor went dark around the time Jorgl entered the picture in late June,[148] though Kellner's contemporaneous notes the day after the Notice was submitted make clear that Tudor maintained some involvement.[149]

148 *Cf.* Tudor Dep. 60, 119 (testifying that he "had no idea" the Jorgl nomination "was happening" until he "got sued or [ ] saw the press releases").

149 DX 78.

Xirinachs's direct contact with Jorgl before July 8 was focused on helping Jorgl transfer his shares into record name—a measure necessary for the nomination to succeed. Behind the scenes, Xirinachs was working with counsel and Chioini to put the "AIM process in[to] full swing."[150] He joined discussions with counsel about the "nomination, proxy contest, and strategy" before the Notice was submitted.[151] Between June 2 and July 8, Xirinachs appears on Chioini's privilege log 37 times.[152] The extent and subject of these communications seem to belie Jorgl's position that Xirinachs remained on the periphery through July 8.

150 DX 79.

151 DX 93; *see also* DX 50; DX 52; DX 65.

152 *See* DX 93. These communications were also withheld on the basis of a common interest privilege. *Id.* The assertion of the common interest privilege implies that the parties to the communication were working together towards a shared objective. *See Jedwab v. MGM Grand Hotels, Inc.*, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986) ("Rule 502(b) is a recognition that a disclosure may be regarded as confidential even when made between lawyers representing different clients if in circumstances, those clients have interests that are so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers."); *Titan Inv. Fund II, LP v. Freedom Mortg. Corp.*, 2011 WL 532011, at *4 (Del. Super. Feb. 2, 2011) (describing common interest privilege as applying to "parties engaged in a common enterprise").

Irrespective of this evidence, Jorgl insists that the information he provided in the Notice was truthful and to the best of his knowledge at the time. He contends that there was no arrangement or understanding with Tudor to disclose because he does not know Tudor and never communicated with him.[153] As to Xirinachs, Jorgl asserts that they only reached an arrangement or understanding *after* the Notice was submitted. Setting aside that Jorgl's argument would require me to overlook questions of fact without the benefit of live testimony to resolve them, I cannot accept it for several reasons.

153 *See* Jorgl Dep. 71; Tudor Dep. 44, 113-14.

***14** First, if Jorgl was uninformed about the extent of Tudor's and Xirinachs's involvement, that would not necessarily mean that his Notice was complete. The statement that Jorgl was not a "party to any agreements, arrangements or understandings" essentially told AIM and its stockholders that Jorgl was working alone (except for some informal agreement that Chioini and Rice would pay Jorgl's costs and expenses).[154] The evidence suggesting that Jorgl was part of an overarching arrangement or understanding that formed before July 8 puts the veracity of that statement in doubt.

154 Notice at 3.

Second, the communications that Jorgl was a party to suggest that his disclosure about "arrangements or understandings" was at least misleading. The Notice did not disclose an arrangement pursuant to which Jorgl was asked to purchase AIM shares and put them into record name. It did not disclose the understanding that Jorgl would not have to pay any expenses if he submitted the notice.[155] And it disclosed that Rice might provide some funding, which is contradicted by the record.[156]

155 To the extent that a quid pro quo is required to demonstrate an arrangement or understanding, as the plaintiff contends, this could be it.

156 Rice Dep. 121, 156-57.

Third, even if Jorgl did not know the extent of Tudor's and Xirinachs' roles in the nomination, Chioini knew. Chioini had direct involvement in the preparation of the Notice. But he, too, stayed silent.[157]

157 *See* Pl.'s Suppl. Opening Br. 19-21.

Jorgl has therefore failed to show that the Notice complied with the bylaws. Section 1.4(c) unambiguously required him to disclose any "arrangements or understandings" pursuant to which his nomination was submitted. I cannot conclude, on this record, that Jorgl's Notice provided all such information. Accordingly, Jorgl is not entitled to a judgment as a matter of law that the Board breached the bylaws by refusing to accept his nomination.

B. Whether the Board's Rejection of the Notice Was Equitable

The fact that the Notice did not satisfy the unambiguous requirements of the bylaws is not the end of my inquiry. The Board's technical entitlement to reject the Notice does not necessarily mean that equity will allow it to stand. The court must go on to consider whether the directors' actions comport with the overarching principles of *Schnell* that "inequitable action does not become permissible simply because it is legally possible."[158] Here, too, Jorgl cannot demonstrate his entitlement to a judgment as a matter of law.

158 *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437, 439 (Del. 1971); *Lee Enters.*, 2022 WL 453607, at *15 ("Delaware law necessarily leaves room for assessing whether a board's actions in enforcing a clear advance notice bylaw were justified, consistent with the doctrine of *Schnell*.").

1. Standard of Review

The parties agree that some form of enhanced scrutiny must guide the court's review of the Board's enforcement of the bylaw. They disagree on the standard's label and requirements. Jorgl asserts that the defendants must show a "compelling justification" for their actions as set forth in *Blasius*.[159] The defendants, for their part, assert that enhanced scrutiny review—"[w]hether labeled as *Unocal* or *Blasius*"—that looks to the reasonableness of the Board's actions should apply.[160]

159 *See* Pl.'s Suppl. Opening Br. 38; *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988).

160 *See* Defs.' Answering Br. 52 (quoting *Lee Enters.*, 2022 WL 453607, at *15).

"*Blasius* does not apply in all cases where a board of directors has interfered with a shareholder vote."[161] If the court were required to make a "find[ing] that the board acted for the primary purpose of disenfranchisement to trigger a more stringent review, it will have already made a normative judgment about whether the board engaged in manipulative conduct requiring judicial intervention."[162] Delaware courts apply that exacting review "sparingly, and only in circumstances in which self-interested or faithless fiduciaries act to deprive stockholders of a full and fair opportunity to participate in the matter."[163]

161 *State of Wis. Inv. Bd. v. Peerless Sys. Corp.*, 2000 WL 1805376, at *9 (Del. Ch. Dec. 4, 2000); *see also CytoDyn*, 2021 WL 4775140, at *1.

162 *Lee Enters.*, 2022 WL 453607, at *14.

163 *In re MONY Grp. Inc. S'holder Litig.*, 853 A.2d 661, 674 (Del. Ch. 2004).

***15** Still, this court must "reserve[ ] space for equity to address the inequitable application of even validly-enacted advance notice bylaws."[164] Its careful scrutiny of directorial actions that affect the stockholder franchise "cannot appropriately be confined to the sort of blunt efforts to disenfranchise stockholders confronted in *Blasius*."[165] In such circumstances, enhanced scrutiny supplies a framework to assess whether directors acted in compliance with their fiduciary duties in applying an advance notice bylaw.[166]

164 *CytoDyn*, 2021 WL 4775140, at *15 (emphasis removed).

165 *Lee Enters.*, 2022 WL 453607, at *15.

166 *Id.* at *14-15; *see also CytoDyn*, 2021 WL 4775140, *18, *22 (discussing whether the board's actions were "reasonable").

Enhanced scrutiny requires a "context-specific application of the directors' duties of loyalty, good faith, and care."[167] The Board must " 'identify the proper corporate objectives served by their actions' and 'justify their actions as reasonable in relation to those objectives.' "[168] If the Board's actions function as a reasonable limitation on the rights of stockholders to nominate directors, those actions "will generally be validated."[169] The court must, however, keep a "gimlet eye out for inequitably motivated electoral manipulations or for subjectively well-intentioned board action that has preclusive or coercive effects."[170]

167 *Lee Enters.*, 2022 WL 453607, at *16.

168 *Id.* (quoting *Mercier v. Inter-Tel (Del.) Inc.*, 929 A.2d 786, 810 (Del. Ch. 2007)).

169 *Id.*

170 *Chesapeake Corp.*, 771 A.2d at 323.

2. <u>Application of Enhanced Scrutiny</u>

Advance notice bylaws are "commonplace" tools for public companies to ensure "orderly meetings and election contests."[171] They serve two primary functions. "The first is to set a time period by which stockholders must give notice of their intention to nominate director candidates in advance of an annual meeting. The second is an informational requirement that serves an important disclosure function, allowing boards of directors to knowledgably make recommendations about nominees and ensuring that stockholders cast well-informed votes."[172]

171 *Lee Enters.*, 2022 WL 453607, at *9.

172 *Id.*

The defendants maintain that the requirements of Section 1.4(c) are intended to serve the latter function. Jorgl does not question the Board's intentions in adopting its advance notice bylaw. The bylaw was adopted on a clear day in 2017—long before Tudor, Xirinachs, or Jorgl entered the picture.[173] The Board did not change its policies or its interpretation of the bylaws to make compliance challenging.[174] The requirements of Section 1.4(c) are not unusual or difficult to comply with.[175]

173 *See CytoDyn*, 2021 WL 4775140, at *14 (discussing bylaws adopted "years before th[e] putative proxy contest was conceived").

174 *See Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, *12 (Del. Ch. Jan. 14, 1991) (finding that a board had a duty to waive an advance notice bylaw because a "radical shift in position, or a material change in circumstances" occurred after the deadline for nominations passed).

175 *See CytoDyn*, 2021 WL 4775140, at *19 (explaining that advance notice bylaw "provisions asking stockholders to disclose supporters are ... ubiquitous"); *AB Value P'r*, 2014 WL 7150465, at *3 ("The clearest set of cases providing support for enjoining an advance notice bylaw involves a scenario where a board, aware of an imminent proxy contest, imposes or applies an advance notice bylaw so as to make compliance impossible or extremely difficult, thereby thwarting the challenger entirely.").

***16** Rather, Jorgl questions the provision's potential breadth and inequity in application. By his logic, if the phrase "arrangements or understandings" is not limited to circumstances where exchanges of promises are made, the standard becomes unworkable.

One can envision an advance notice bylaw with so broad a reach that it mandated the disclosure of mere discussions among stockholders. But I need not decide whether such a bylaw would have a legitimate corporate purpose or if a board's enforcement of it in rejecting a stockholder nomination would be reasonable. As previously discussed, the plain language of the bylaw at issue is not so sweeping.[176]

176 *See supra* note 143 and accompanying text.

By its terms, Section 1.4(c) required the disclosure of information about "arrangements or understandings"—that is, agreements, measures, or plans taken towards a common end.[177] That mandate was not unreasonable. There are legitimate reasons why the Board would want to know whether a nomination was part of a broader scheme relating to the governance, management, or control of the Company. More critically, that information would have been important to stockholders in deciding which director candidates to support.[178]

177 *See supra* notes 140-43 and accompanying text.

178 *See Hubbard*, 1991 WL 3151, at *6 ("As the nominating process circumscribes the range of the choice to be made, it is a fundamental and outcome-determinative step in the election of officeholders."); *CytoDyn*, 2021 WL 4775140, at *21 (discussing a nomination notice that failed to provide information that would have been material to stockholders in voting on director nominees).

The parties clash over whether the Board's rejection of the Notice was a reasonable response in relation to these corporate purposes. The defendants assert that the current record shows the Board surmised, based on the information available to it, that the Notice was part of a scheme involving undisclosed arrangements and understandings and acted accordingly. Jorgl disagrees, pointing to facts that he says show the Board acted to entrench itself at the expense of his right to nominate directors.

This factual dispute alone makes an award of a mandatory injunction unattainable. Yet, Jorgl argues that the court can find the Board was unquestionably motivated by ill intent or acted manipulatively. Making that determination would ignore several issues that seem to undermine his position.

To start, the context in which the Board received and considered Jorgl's Notice cannot be ignored.[179] The Board knew that Tudor had previously been convicted of securities fraud, was the subject of an SEC injunction, and had interfered with AIM to the point that AIM sought injunctive relief in Florida.[180] The Board also understood that AIM management suspected Tudor was behind the defective Lautz nomination and that, after the Lautz nomination was rejected, Tudor had threatened to take the "gloves off."[181]

179 *See CytoDyn*, 2021 WL 4775140, at *16 (discussing the "context" in which a notice was "submitted and then considered by the incumbent Board").

180 *See supra* notes 15-16, 20 and accompanying text; Equels Dep. 215-16.

181 DX 50; Equels Dep. 216-17.

The Board had grounds to question Jorgl's motives when he emerged on the scene—having purchased shares just 10 days before submitting his Notice—to nominate two individuals (who owned no AIM stock) including Chioini, who Lautz had attempted to nominate.[182] Of course, stockholders can buy shares just before making a nomination and can nominate whomever they like. The confluence of information the directors had after receiving the Notice would, however, have piqued their suspicions. The July 14 Board minutes explain that the directors rejected the Notice based on "information the Company and its advisors had learned to date regarding the group of individuals behind the nomination notice."[183]

182 *See* Equels Dep. 209.

183 DX 81 at 1.

***17** Jorgl argues that the Board cannot justify its rejection of the Notice based on after-discovered information, such as the role of Xirinachs, that the defendants uncovered during this litigation. That is true. But genuine suspicions based on known facts that are later corroborated can be a basis for a board to act.[184] Here, the directors assert that they were concerned Tudor and other undisclosed participants were acting "with the intent o[f] taking control of the Company and potentially raiding it or taking other action adverse to stockholders."[185] The evidence obtained through discovery prevents me from rejecting that concern out of hand.

184 *See CytoDyn*, 2021 WL 4775140, at *21 (explaining that the board's rejection of the notice was appropriate where it "legitimately suspected" that undisclosed motivations

were behind a nomination and evidence discovered in litigation corroborated those suspicions).

185 Equels Dep. 229; *see, e.g.*, DX 79.

That is not to say that the plan conceived of by those behind Jorgl's nomination is bad for AIM or its stockholders or that Chioini and Rice would not be worthy director candidates. Ideally, the stockholders—not the Board or this court—should decide the path for AIM. But if the nomination played a role in a broader scheme led by undisclosed supporters, that information would have been necessary for stockholders to make an informed choice on the matter.

If such arrangements or understandings were concealed, the sanctity of the stockholder franchise would not be furthered by this court invalidating the Board's actions. In that case, those working through Jorgl—not the Board—would be the ones engaging in manipulative conduct. Equity cannot bless the perverse incentives that would be created if nominating stockholders could avoid disclosure requirements through purposeful ignorance.

Ultimately, these are matters that I need not presently decide. The swirl of lingering factual questions prevents me from granting judgment as a matter of law in Jorgl's favor. He has simply not proven his entitlement to mandatory injunctive relief.

III. CONCLUSION

For the reasons stated above, the plaintiff's Motion for a Preliminary Injunction is denied.

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

ONTARIO PROVINCIAL COUNCIL OF CARPENTERS' PENSION TRUST FUND, Police & Fire Retirement System of the City of Detroit, and Norfolk County Retirement System, Derivatively on Behalf of Walmart Inc., Plaintiffs,
v.
S. Robson WALTON, Gregory B. Penner, Steuart Walton, Timothy P. Flynn, Thomas W. Horton, Marissa A. Mayer, Doug McMillon, Steven S. Reinemund, Phyllis Harris, and Jay Jorgensen, Defendants,
and
Walmart Inc., Nominal Defendant.

C.A. No. 2021-0827-JTL
|
Date Submitted: January 13, 2023
|
Date Decided: April 26, 2023

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MEMORANDUM OPINION

LASTER, V.C.

***1** Walmart Inc. operates over 5,000 pharmacies that dispense prescription opioids. Until April 2018, Walmart also acted as a wholesale distributor of prescription opioids. From 2006 to 2012 alone, Walmart distributed over five billion opioid pills.

Based on its involvement with prescription opioids, Walmart currently faces thousands of lawsuits from private litigants, state attorneys general, and the U.S. Department of Justice. In November 2022, Walmart announced that it had agreed to a $3.1 billion nationwide opioid settlement (the "Nationwide Settlement") designed to resolve substantially all of the opioid lawsuits pending in federal multidistrict litigation (the "Opioid MDL"), plus potential lawsuits by state, local, and tribal governments. Walmart has incurred millions of dollars in defense costs and suffered reputational harm.

The plaintiffs own stock in Walmart. They seek to shift responsibility for the harm that Walmart has suffered to the fiduciaries whom they say caused it. They maintain that the directors and officers of Walmart breached their fiduciary duties to the corporation and its stockholders by (i) knowingly causing Walmart to fail to comply with a settlement between the U.S. Drug Enforcement Agency ("DEA") and Walmart (the "DEA Settlement"); (ii) knowingly causing Walmart to fail to comply with its obligations under the federal Controlled Substances Act and its implementing regulations (collectively, the "Controlled Substances Act") when acting as a dispenser of opioids through its retail pharmacies, and (iii) knowingly causing Walmart to fail to comply with its obligations under the Controlled Substances Act when acting as a wholesale distributor of opioids for its retail pharmacies.

As to each of the three categories of alleged misconduct, the plaintiffs have advanced three species of claims: a *Massey* Claim, a Red-Flags Claim, and an Information-Systems Claim.[1] The *Massey* Claim asserts that Walmart's directors and officers knew that Walmart was failing to comply with its legal obligations and made a conscious decision to prioritize profits over compliance. The Red-Flags Claim asserts that a series of red flags put Walmart's directors and officers on notice of Walmart's noncompliance or potential corporate trauma, yet the directors and officers consciously ignored them. The Information-Systems Claim asserts that Walmart's directors and officers knew that they had an obligation to establish a monitoring system to address a core compliance risk, yet consciously failed to make a good faith effort to fulfill that obligation.

1 This theory has been called a "prong one" *Caremark* claim, but that sterile nomenclature carries little informational content, and when not immersed in a *Caremark* case, I have difficulty remembering which theory is prong one and which is prong two. In one decision, I called the prong one theory a "Reporting-Systems Theory" or a "Reporting-Systems Claim." *Collis*, 287 A.3d at 1176. More recently, I called it an "Information-Systems Theory" or an "Information-Systems Claim." *In re McDonald's Corp. S'holder Deriv. Litig.* (*McDonald's Officers*), 289 A.3d 343, 359–60 (Del. Ch. 2023). Either works. As between the two, the reporting-systems label is narrower and could imply only humans reporting up the chain. Oversight systems should be broader and include technology. The more expansive label of information-systems therefore seems preferable. Traditionalists may stick to prong one and prong two. Lawyers communicating with me can assist my comprehension by using the more descriptive labels.

***2** The defendants have moved to dismiss the plaintiffs' claims for failing to support an inference of demand futility. The plaintiffs argue that the demand is futile because the complaint alleges facts supporting a reasonable inference that at least half of the directors in office when the lawsuit was filed face a substantial threat of liability or, in the alternative, lack independence.

This decision denies the motion to dismiss as to claims relating to the DEA Settlement and claims relating to Walmart's compliance with its obligations as a dispenser under the Controlled Substances Act. The motion is granted as to the claims relating to Walmart's compliance with its obligations as a distributor under the Controlled Substances Act.

I. FACTUAL BACKGROUND

The facts are drawn from the operative complaint, the documents it incorporates by reference, and pertinent public documents that are subject to judicial notice.[2] At this stage of the proceedings, the complaint's allegations are assumed to be true, and the plaintiffs receive the benefit of all reasonable inferences, including inferences drawn from the documents.

2 The operative complaint incorporates by reference documents produced in federal proceedings involving Walmart. The operative complaint also incorporates documents filed with the U.S. Securities and Exchange Commission (the "SEC"). The court may consider both sets of documents at this stage of the proceedings. *See, e.g.*, *In re Rural Metro Corp. S'holders Litig.*, 2013 WL 6634009, at *7 (Del. Ch. Dec. 17, 2013) ("Applying [Delaware] Rule [of Evidence] 201, Delaware courts have taken judicial notice of publicly available documents that 'are required by law to be filed, and are actually filed, with federal or state officials.' " (quoting *In re Tyson Foods, Inc. Consol. S'holder Litig.*, 919 A.2d 563, 584 (Del. Ch. 2007))); *Aequitas Sols., Inc. v. Anderson*, 2012 WL 2903324, at *3 n.17 (Del. Ch. June 25, 2012) (taking judicial notice of a pleading filed in a related action); *Prather v. Doroshow, Pasquale, Krawitz & Bhaya*, 2011 WL 1465520, at *1 n.2 (Del. Super. Ct. Apr. 14, 2011) ("For purposes of the instant motion to dismiss, this Court takes judicial notice of the federal docket of the Pennsylvania litigation and the foregoing decision of the Court of Appeals for the Third Circuit."); *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *9 (Del. Ch. Sept. 28, 2007) ("When considering a motion to dismiss, the court also may take judicial notice of publicly filed documents, such as documents publicly filed in litigation pending in other jurisdictions." (footnote omitted)).
Citations in the form "Compl. ¶ —" refer to the paragraphs of the operative complaint. Citations in the form "Ex. [number] at —" refer to exhibits that the defendants filed with their opening brief in support of their motion to dismiss. *See* Dkt. 30. Citations in the form "Ex. [letter] at —" refer to exhibits that the plaintiffs filed with their answering brief. *See* Dkt. 40. Citations in the form "PSB Ex. [letter] at —" refer to exhibits that the plaintiffs filed with their supplemental brief. *See* Dkt. 64.

Page citations refer to the internal pagination or, if there is none, then to the last three digits of the control number.

Before filing suit, the plaintiffs used Section 220 of the Delaware General Corporation Law to obtain books and records. Walmart certified that between the documents it produced and those it listed on its privilege log, "Walmart's production is complete with respect to every category of documents that Walmart is required to produce."[3] Given this certification, if the record lacks documentation relating to a particular event, and if it is reasonable to expect that documentation would exist if the event took place, then the plaintiffs are entitled to a reasonable inference that the event did not occur.[4]

3 Final Order and Judgment at 7, *See Police & Fire Ret. Sys. of the City of Det. v. Walmart, Inc.*, C.A. No. 2020-0478-JTL, Dkt. 39 (Del. Ch. Oct. 29, 2020).

4 *See* D.R.E. 803(7) (treating as non-hearsay and permitting fact-finder to consider the absence of a record of a regularly conducted activity, such as board or committee meetings); *see also Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1119 n.7 (Del. 1994) ("[T]he production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse."); *Smith v. Van Gorkom*, 488 A.2d 858, 878 (Del. 1985) ("It is a well established principle that the production of weak evidence when strong is, or should have been, available can lead only to the conclusion that the strong would have been adverse." (citing *Interstate Circuit v. United States*, 306 U.S. 208, 226 (1939) and *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983))), *overruled on other grounds by Gantler v. Stephens*, 965 A.2d 695 (Del. 2009); *accord Young v. Red Clay Consol. Sch. Dist.*, 159 A.3d 713, 791 n.510 (Del. Ch. 2017) (quoting *Kahn v. Lynch* and *Smith v. Van Gorkom*); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 300–01 & n.7 (Del. Ch. 2000) (same).

***3** The confidentiality agreement governing the Section 220 production included an incorporation-by-reference condition. Relying on that condition, the defendants submitted eighty-two exhibits with their opening brief, plus another five exhibits with their supplemental brief. The defendants relied on the exhibits to contest the account in the complaint.

The incorporation-by-reference doctrine does not enable a court to weigh evidence on a motion to dismiss. It permits a court to review the actual documents to ensure that the plaintiff has not misrepresented their contents and that any inference the plaintiff seeks is a reasonable one. The doctrine limits the ability of a plaintiff to take language out of context, because the defendants can point the court to the entire document. The doctrine does not change the pleading standard that governs a motion to dismiss.[5] If the complaint contains well-pled allegations that could support different interpretations, then the court must credit the plaintiffs' interpretation. If the record could support different inferences, and if the plaintiff seeks a reasonable inference, then the court must grant the plaintiff the inference.[6]

5 *See, e.g.*, *In re CBS Corp. S'holder Class Acton & Deriv. Litig.*, 2021 WL 268779, at *18 n.257 (Del. Ch. Jan. 27, 2021) (collecting authorities).

6 *See Savor, Inc. v. FMR Corp.*, 812 A.2d 894, 896–97 (Del. 2002).

Many of the documents in the record can support several reasonable interpretations or inferences.[7] At this stage of the case, the plaintiffs receive the benefit of their reasonable interpretations and inferences.

7 *See, e.g.*, Ex. 6 at '035, '044–47; Ex. 39 at '330, '332, '336; Ex. 46 at '601; Ex. 49 at '822, '825; Ex. B at 8–9.

Walmart laid the foundation for the plaintiffs to seek damaging inferences by redacting documents extensively. In many cases, only a few words survive. The resulting documents indicate that a topic was addressed, but the redactions deprive the court of insight into the context, the substance of the discussion, and any decision that might have been made. For a typical document, one possible inference is that the substance of the discussion and any decision would favor the plaintiffs' theory of the case. Another possible inference is that the substance of the discussion and any decision would favor the defendants' position. At this stage, the court must draw the inference that favors the plaintiffs.[8]

8 *See In re McDonald's Corp. S'holder Deriv. Litig. (McDonald's Directors)*, ––– A.3d ––––, 2023 WL 2293575, at *33 (Del. Ch. Mar. 1, 2023) ("When the documents from a Section 220 production contain gaps, a plaintiff can seek inferences about what the redacted material might say. A court can credit those inferences, and that outcome could be worse for the defendants than if the Company had produced the documents without redactions.").

In some cases, Walmart made partial-sentence redactions, purportedly for non-responsiveness. The court has acknowledged that when producing books and records, a company may redact "material unrelated to the subject matter of a demand."[9] Measured under that standard, a partial-sentence redaction is dubious, because it depends on the premise that the author incoherently injected an unrelated topic into an otherwise responsive sentence.[10] The partial-sentence redactions played into the plaintiffs' hands.

9 *Okla. Firefighters Pension & Ret. Sys. v. Amazon.com, Inc.*, 2022 WL 1760618, at *13 (Del. Ch. June 1, 2022).

10 *See McDonald's Officers*, 289 A.3d at 355 & n.2.

***4** On many occasions, Walmart redacted or withheld documents for privilege. The Delaware Rules of Evidence provide that "[t]he claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by judge or counsel" and that "[n]o inference may be drawn therefrom."[11] The parties have not addressed whether this rule applies only at trial or also at earlier stages, such as a motion to dismiss. To be safe, this decision assumes the rule applies and therefore does not speculate or draw inferences about the content of the privileged communication.[12]

11 D.R.E. 512(a).

12 *See ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *39 n.300 (Del. Ch. July 21, 2017) ("Sprint withheld relevant materials on grounds of attorney-client privilege. Aurelius requested an adverse inference against Sprint in post-trial briefing, but this is improper."), *aff'd*, 184 A.3d 1291 (Del. 2018).

In their briefs, the defendants argued that the existence of the privileged documents and passages showed that the Board and its committees received reports on compliance issues. That seems like a fair inference to draw, and this decision assumes that to be the case.[13] What the court cannot do is draw the defense-friendly inference that the content of the discussions favored the defendants, such as by reflecting an assessment that Walmart's compliance efforts were on track. Another reasonable inference is that the content of the discussions favored the plaintiffs, such as by reflecting an assessment that Walmart's compliance efforts were off track. The passages and documents for which Walmart asserted privilege could inferably cloak reports that Walmart had not devoted sufficient resources to compliance, had failed to implement or was behind schedule in implementing key initiatives, and would not be able to fulfill its obligations without a significant investment of resources that would cut into profits.

13 *See Conduent State Healthcare, LLC v. AIG Specialty Ins. Co.*, 2023 WL 2256052, at *5 (Del. Super. Ct. Feb. 14, 2023) (citing D.R.E. 512(a)) ("The parties were strictly instructed that information contained in the logs could be used for the sole and very limited purpose of demonstrating, for example, that a meeting took place on a certain date, who attended the meeting, and the general topic of the meeting.").

Although this decision does not draw inferences from any of the passages or documents for which Walmart has asserted privilege, it does draw inferences from an *absence* of non-privileged documents containing discussions or decisions about the business issues necessarily involved in (i) taking the steps necessary to comply with the DEA Settlement and the Controlled Substances Act, (ii) responding to red flags of noncompliance, and (iii) assessing the effectiveness of the compliance efforts. Legal advice undoubtedly is an *input* into those discussions and decisions, but if directors and officers are doing their jobs, then there will be non-privileged discussions and decisions about what are inherently and ultimately business decisions (which the business judgment rule generally will protect). Walmart represented that its Section 220 production was complete, so when there are no indications of non-privileged discussions, the plaintiffs are entitled to an inference that the discussions and decisions did not occur.

A. Walmart And Its Governance

Walmart is a Delaware corporation with its principal place of business in Bentonville, Arkansas. Walmart operates three primary business segments: Sam's Club, Walmart International, and Walmart U.S. As of 2022, the Walton family controls approximately 47.51% of Walmart's voting shares, either directly or through Walton Enterprises, LLC and the Walton Family Holdings Trust.

***5** Walmart has a board of directors (the "Board") charged with overseeing the business and affairs of the corporation. The Board's duties include "overseeing the Company's policies with respect to compliance with applicable laws and regulations and adopting policies of corporate conduct designed to assure compliance with applicable laws and regulations and to assure maintenance of necessary accounting, financial, and other controls." Ex. 4 at 3. The Board meets at least four times per year. *Id.* at 4.

The Board has established six committees: the Executive Committee, the Audit Committee, the Compensation and Management Development Committee, the Nominating and Governance Committee, the Strategic Planning and Finance Committee, and the Technology and eCommerce Committee. *Id.* at 5. The Executive Committee and the Audit Committee are the most pertinent to this decision.

The Executive Committee "[i]mplements policy decisions of the Board" and "[a]cts on the Board's behalf between Board meetings." Ex. 80 at 28. The Executive Committee meets "as often as it determines to be necessary or appropriate." Ex. 70 at 50. The Executive Committee's Chairperson "may direct appropriate members of management and staff to prepare draft agendas and related background information for each Executive Committee meeting." *Id.* The Chairperson must approve the agenda and materials before they are distributed to the other committee members. *Id.* "At the request of the Board or as the Chairperson determines necessary, reports of meetings of the Executive Committee shall be made to the Board at its next regularly scheduled meeting." *Id.*

The Audit Committee oversees and monitors "compliance by the Company with legal and regulatory requirements." Ex. 5 at 1. The Audit Committee meets at least quarterly and reports to the Board. The Audit Committee meets "no less than annually" with Walmart's ethics and compliance executives "regarding the implementation and effectiveness of the Company's ethics and compliance programs." *Id.* at 8.

B. Walmart's Legal Obligations As A Dispenser Of Prescription Opioids

Through its Health and Wellness Division, Walmart operates one of the largest pharmacy chains in the United States, with more than 5,000 retail pharmacies located in its Walmart and Sam's Club stores. The Health and Wellness Division has generated at least 8% of Walmart's annual revenues since 2011. Ex. 2 at 33. Through its retail pharmacies, Walmart dispenses prescription opioids under a DEA license that requires compliance with the Controlled Substances Act.[14] In its public filings, Walmart acknowledges that its business depends on complying with its legal obligations. *See, e.g.*, Ex. 1 at 22.

14 21 C.F.R. § 1301.11(a).

The Controlled Substances Act establishes a closed system for controlled substances, in which everyone from the manufacturer to the physician to the distributor to the pharmacist must register with the DEA and fulfill statutory and regulatory obligations. Registered manufacturers may sell controlled substances only to registered distributors. Registered distributors may distribute controlled substances only to registered pharmacy dispensers. And a registered dispenser may dispense controlled substances only under a legitimate prescription written by a registered prescriber.[15]

15 *See* 21 U.S.C. § 822.

As a "dispenser,"[16] Walmart must establish and maintain effective controls and procedures to guard against theft and diversion of controlled substances.[17] The regulations for dispensers include specific requirements that pharmacies must meet. A pharmacy must implement security measures to maintain control over its inventory of controlled substances (the "Inventory Control Requirement").[18] The security measures must enable the pharmacy to identify instances of loss or theft and notify the DEA.[19]

16 *See* 21 C.F.R. § 1300.01 ("Dispenser means an individual practitioner, institutional practitioner, *pharmacy or pharmacist* who dispenses a controlled substance." (emphasis added)); *see* 21 U.S.C. § 802(10) (a dispenser is "a practitioner who so delivers a controlled substance to an ultimate user").

17 21 C.F.R. § 1301.71(a); *see In re Nat'l Prescription Opiate Litig.* (*Opioid MDL Abatement Decision*), ––– F. Supp. 3d ––––, 2022 WL 3443614, at *29 n.71 (N.D. Ohio Aug. 17, 2022), *appeal pending*, *Trumbull Cnty. v. Purdue Pharma, L.P.*, No. 22-3753 (6th Cir.).

18 21 C.F.R. § 1301.75.

19 *Id.* § 1301.76.

***6** A pharmacist can fill only legitimate prescriptions for controlled substances. Under the Controlled Substances Act, a prescription is legitimate if "issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[20] A pharmacist has a responsibility not to knowingly fill an illegitimate prescription.[21] The prevailing professional standard requires that a pharmacist identify and investigate any red flags, such as large, repeat orders, early refills, or prescriptions from out-of-state prescribers.[22] Pharmacists must use their professional judgment and refuse to fill orders that they determine are suspicious, report the refusal to the DEA, and maintain internal records regarding red-flagged prescriptions (the "Refusal-To-Fill Obligation").[23]

20 *Id.* § 1306.04(a).

21 *See id.* §§ 1306.04(a) & 1306.06.

22 "[D]ispensers of controlled substances are obligated to check for and conclusively resolve red flags of possible diversion prior to dispensing those substances." *See In re Nat'l Prescription Opiate Litig.* (*Opioid MDL Dismissal Ruling*), 477 F. Supp. 3d 613, 629 (N.D. Ohio 2020), *clarified on denial of recons.*, 2020 WL 5642173 (N.D. Ohio Sept. 22, 2020).

23 *See* Compl. ¶¶ 9, 92–93.

A pharmacy-registrant like Walmart must (1) employ properly licensed pharmacists, (2) work collaboratively with the pharmacists to dispense controlled substances properly to avoid diversion, and (3) collect and maintain specific records and data regarding its dispensing activities.[24] The records that registrants must maintain are extensive (the "Recordkeeping Requirement").[25] For a dispenser, the Recordkeeping Requirement includes maintaining information on

> the number of units or volume [of controlled substances that are] dispensed, including the name and address of the person to whom it was dispensed, the date of dispensing, the number of units or volume dispensed, and the written or typewritten name or initials of the individual who dispensed or administered the [controlled] substance on behalf of the dispenser.[26]

Many of the red flags that the DEA expects pharmacists to examine are "very difficult, if not impossible, for a human pharmacist to identify consistently absent a system to aggregate, analyze, and provide feedback to the pharmacist about the prescription," because "some prescriptions are not suspicious on their face but raise bright red flags when compared with other prescriptions in a database."[27]

24 *Opioid MDL Dismissal Ruling*, 477 F. Supp. 3d at 630.

25 *See* 21 C.F.R. pt. 1304.

26 *Id.* § 1304.22(c).

27 *Opioid MDL Dismissal Ruling*, 477 F. Supp. 3d at 630.

A pharmacy-registrant like Walmart must provide its pharmacists with the time and other resources necessary to carry out their obligations, including the Refusal-To-Fill Obligation. For example, a pharmacy-registrant may provide pharmacists with access to a computerized recordkeeping system so that the pharmacists can investigate red flags.[28] A pharmacy is not legally required to provide access to a computerized recordkeeping system—"[i]t remains true, however, that a pharmacy may not fill a prescription that it knows or has reason to know is invalid and may not remain deliberately ignorant or willfully blind of the prescription information it has (including computerized reports it generates)."[29] "Pharmacies may not do nothing with their collected data and leave their pharmacist-employees with the sole responsibility to ensure only proper prescriptions are filled."[30]

28 *See id.* at 629–31.

29 *In re Nat'l Prescription Opiate Litig.*, 2020 WL 5642173, at *3 (N.D. Ohio Sept. 22, 2020).

30 *Id.* (cleaned up).

The Controlled Substances Act does not mandate strict compliance with its requirements. Substantial compliance is sufficient.[31]

31 *In re Nat'l Prescription Opiate Litig.*, 2021 WL 3917174, at *3 (N.D. Ohio Sept. 1, 2021) (citing 21 C.F.R. § 1301.71(b)).

C. The Order To Show Cause And Walmart's Response

***7** On November 13, 2009, the DEA issued an order to show cause against a Walmart pharmacy in San Diego, California (the "Order to Show Cause"). Ex. A. The Order To Show Cause asserted that the San Diego pharmacy:

> (1) improperly dispensed controlled substances to individuals based on purported prescriptions issued by physicians who were not licensed to practice medicine in California;
>
> (2) dispensed controlled substances to individuals located in California based on Internet prescriptions issued by physicians for other than a legitimate medical purpose and/or outside the usual course of professional practice in violation of federal and state law; and
>
> (3) dispensed controlled substances to individuals that [the San Diego pharmacy] knew or should have known were diverting controlled substances.

Id. § II. Walmart disputed the factual assertions and "disagreed with DEA's position that the DEA registration of [the San Diego pharmacy] should be revoked." *Id.*

Also in 2009, Walmart commissioned McKinsey & Company to conduct a risk assessment for the Health and Wellness Division. Ex. 6 at '037. Walmart has claimed the review triggered various actions, including a host of "new compliance projects." *Id.* That is a defense-friendly inference. Documents regarding those projects were either not produced as part of Walmart's Section 220 production or were so heavily redacted that no inference can be drawn about the substance of the redacted text.

In November 2010, the President of the Walmart Stores segment sent a memorandum to the Audit Committee to provide an update on "Health & Wellness Transforming Compliance and Quality Assurance." *See* Ex. 39. Senior officers, including Robson Walton, were copied. *Id.* at '330.

In his memo, the President gave a mixed report on Walmart's compliance efforts. To the good, he stressed some positive steps:

> Since our last report we have restructured our field operations management structure to improve oversight. We have built a dedicated Professional Affairs group headed by a vice president to oversee quality and compliance assurance. This group includes a new staff of auditors and quality assurance specialists. It also includes a credentialing team to assure compliance with licensure laws. We have also established a group to train professionals in the field including pharmacy technicians. A process for tracking key performance indicators of thousands of pharmacy technicians will be in place in all stores within the next 6 months.

Id. But after that leadup, the President gave a more conservative assessment of existing efforts and the work yet to come: "Frankly, we are not satisfied with our progress addressing many challenges that we know to exist." *Id.*

The memo identified two significant challenges. The first challenge, identified in a single sentence, was redacted. The redaction was marked "NR/ACP/AWP," for non-responsive, attorney-client privilege, attorney work product. Because the single sentence redaction appears in an otherwise responsive paragraph, the redaction is dubious, and with three possibilities provided, the basis for it is unclear. At the pleading stage, the plaintiffs are entitled to an inference that the redacted text referenced a compliance failure that Walmart was not addressing. The second challenge was implementing ConnexUs, a dispensing software program that would assist pharmacists in managing their work and complying with legal requirements. Referring to both challenges, the President noted that "these are areas where we've still got work to do." *Id.*

***8** The memo attached an eight-page presentation on compliance. Virtually all of the presentation was redacted as non-responsive. That claim is dubious for a presentation that dealt with the status of compliance in the Health and Wellness Division.

D. The DEA Settlement

In February 2011, Walmart and the DEA entered into the DEA Settlement. *See* Ex. A. The DEA Settlement required Walmart to implement and maintain a compliance program for all of its pharmacies. The principal provision states:

> Walmart agrees to maintain a compliance program, updated as necessary, designed to detect and prevent diversion of controlled substances as required by the Controlled Substances Act ("CSA") and applicable DEA regulations. This program shall include procedures to identify the common signs associated with the diversion of controlled substances including but not limited to, doctor-shopping, requests for early refills, altered or forged prescriptions, prescriptions written by doctors not licensed to practice medicine in the jurisdiction where the patient is located, and prescriptions written for other than a legitimate medical purpose by an individual practitioner acting outside the usual course of his professional practice. The program shall also include procedures to report thefts and significant losses of controlled substances ... and the routine and periodic training of all Walmart employees, including new employees, responsible for controlled substances regarding their responsibilities under the CSA and regarding relevant elements of the compliance program.

Id. § III.4.a.

Through this paragraph, Walmart committed to the DEA to establish and maintain a compliance system that would result in its pharmacies being able to satisfy the Inventory Control Requirement, the Recordkeeping Requirement, and the Refusal-To-Fill Obligation.

Other sections of the DEA Settlement identified additional features that Walmart's compliance program needed to include, as well as problems that it had to address. For example:

- Walmart committed to notifying the local DEA office within seven business days of any refusal-to-fill decision by one of its pharmacists. *Id.* § III.4.b.

- Walmart committed to having a system that would record and maintain identifying information from a person picking up a controlled substance prescription in a form that would be readily retrievable. *Id.* § III.4.c.

- Walmart committed to instituting policies and procedures to block early refills of controlled substances. § III.4.i.

Walmart expressly agreed that the obligations in the DEA Settlement "do not fulfill the totality of its obligations under the CSA and its implementing regulations." *Id.* § III.4.a.

The term of the DEA Settlement ran from March 11, 2011 to March 11, 2015. *Id.* at § III.13. Because the DEA Settlement spoke of *maintaining* a compliance program and *updating* it as necessary, it is plain that the DEA was not setting March 11, 2015 as a deadline date by which Walmart had to achieve compliance. Instead, the DEA Settlement required that Walmart work in good faith to achieve compliance earlier, then remain in compliance for the remainder of the term of the DEA Settlement, while updating its systems as necessary.

E. Walmart's Efforts To Comply With The DEA Settlement

***9** By August 2011, Walmart had created a summary overview of its formal compliance program for the Health and Wellness Division. *See* Ex. 15. The summary described a reporting structure, concepts, and principles that tracked what a Fortune 500 company's compliance program should have. The summary included an "Index of Health and Wellness Procedures" that included more than 150 procedures for pharmacies to follow. *Id.* at 16–19. Walmart produced a number of the policies that were in effect at that time, which told pharmacy employees how to handle a variety of tasks.[32]

32 *See* Exs. 17, 19, 21, 22, 23, 25–29, 31–32, 37, 39. Walmart also produced some policies that were adopted later. Ex. 18 (June 2015); Ex. 20 (Aug. 2012); Ex. 24 (Oct. 2014); Ex. 30 (Aug. 2014); Ex. 33 (Apr. 2017). These documents and other exhibits support an inference that Walmart's compliance program became more detailed over time.

On paper, the effort to establish a compliance system that would satisfy the DEA Settlement seemed off to a good start. The problem lay in the funding and staffing for the work necessary to create the controlled substance monitoring program that would provide the infrastructure for the words on the paper. The team responsible for doing the work estimated that it needed $40 million to accomplish the tasks. Management only provided a budget of $11 million. Ex. 82 at '364. In an internal email, a team member described that amount as "just enough to cover [existing] compliance projects" with "all development [projects] to be evaluated on a project by project basis." *Id.* at '363. Another team member stated that they faced a "Sophie's Choice" that required selecting "one high need project over another." *Id.* at '363. Walmart did not produce a final budget for the Health and Wellness Division as part of its Section 220 document production, entitling the plaintiffs to an inference that a budget sufficient to fund the projects necessary to comply with the DEA Settlement did not exist.

Two entries on Walmart's privilege log indicate that management reported to the Audit Committee on the Health and Wellness compliance program in November 2011. Ex. 14 at Item Nos. 34 & 41. The privilege log describes the discussions as addressing "Walmart's Health & Wellness Compliance Program, including compliance with DEA regulations and agreements, controlled-substance training, and an inventory variance reporting tool." Ex. 14 Item No. 34 at 4. There are no non-privileged documents in the Section 220 production reflecting any non-privileged discussion or decisions about the business issues associated with achieving compliance with the DEA Settlement, such as the amount of money that the team responsible for implementing the projects needed to accomplish its work. Read together, the internal email about a lack of funding, the privilege log entries regarding an Audit Committee meeting, and the absence of any indication of responsive action support a pleading-stage inference, favorable to the plaintiffs, that management told the Audit Committee about the budgeting issue and that the Audit Committee took no action in response.

F. The 2012 Memo

In January 2012, nine months into the term of the DEA Settlement, Walmart's Chief Administrative Officer updated the Audit Committee and the Executive Committee about compliance efforts in the Health and Wellness Division. Ex. 6 (the "2012 Memo"). The cover memorandum acknowledged that compliance efforts had fallen behind schedule and stated bluntly that "[s]ignificant compliance issues remain unresolved." *Id.* at '035. Walmart's central compliance group ("Corporate Compliance") had taken the effort away from the Health and Wellness Division, and the memo gives the impression of a full reboot. To that end, the memo advises that a "Five-year Health & Wellness compliance strategy is being developed." *Id.* The strategy did not already exist, nor had it been implemented. It was being created.

***10** A supporting slide deck elaborated on those high-level points. Reinforcing the impression of a full reboot, one slide stated under "The Path Forward" that a "New compliance plan [is] being developed." *Id.* at '037. The next slide identified four phases of planned activity that the program "will involve": (1) "Develop Commitments," (2) "Assess Gaps," (3) "Mitigate Risks," and (4) "Maintain and Monitor." *Id.* at '038. It is reasonable to infer at the pleading stage that none of those stages had happened yet. Along similar lines, the slide stated that the "Proposed Health & Wellness Compliance Plan" would start with creating a "Road map of Health & Wellness regulatory obligations" and a "Road map of business activities that require controls." *Id.* at '039.

The slide deck observed that the project needed "[s]easoned leadership that strikes the proper balance between business and compliance considerations." *Id.* at '040. At the pleading stage, the plaintiffs are entitled to an inference that the memo's reference to a "proper balance between business and compliance considerations," meant limiting compliance efforts when they threatened profitability.

An appendix to the slide deck identified a list of items that Walmart had completed during fiscal years 2011 and 2012. *See id.* at '044–'045. Walmart starts its fiscal year on February 1 of the prior year, so fiscal year 2011 ran from February 1, 2010 to January 31, 2011, and fiscal year 2012 ran from February 1, 2011 to January 31, 2012. Significant portions of the appendix are redacted. The reasonable inference is that the Health and Wellness Division had accomplished some things, but their effort had fallen far short, so Corporate Compliance took over and restarted the project. The list of completed activities conspicuously omits significant items identified in the DEA Settlement, such as testing for doctor shopping, flagging requests for early refills, or checking for altered or forged prescriptions.

Read together, the 2012 Memo and accompanying materials support a pleading-stage inference that the Health and Wellness Division had created a summary of what a nice compliance program would look like, then never did the work to implement one. It was now 2012, and Corporate Compliance was proposing to develop a five-year plan to implement a new compliance program. That implementation would not be accomplished until 2017, two years after the DEA Settlement expired in March 2015. To state the obvious, Walmart would not comply with the DEA Settlement.

The 2012 Memo and accompanying materials were presented to the Audit Committee and the Executive Committee, so those committees knew. Minutes from an Audit Committee meeting in February 2012 reflect that the Audit Committee received a report—from the Chief Administrative Officer who authored the 2012 Memo—on the state of Walmart's Health and Wellness compliance efforts, the transition to Corporate Compliance, and the proposed five-year plan that Walmart was developing. Ex. 7. Minutes from an Audit Committee meeting in March 2012 reflect that the Audit Committee received another report on the state of Walmart's "Health and Wellness Compliance landscape." Ex. 8 at 6.

The Board met six times during fiscal year 2013. The pleading-stage record does not include any meeting minutes for any Board meeting. The plaintiff-friendly inference is that the Board was not monitoring compliance with the DEA Settlement or the Controlled Substances Act and was relying on the Audit Committee to fulfill its monitoring duties.

G. Maximizing Sales Through Opioid Prescriptions

During the same period that Walmart failed to invest in and build out a system of compliance, Walmart used the filling of opioid prescriptions to enhance its bottom line.

***11** One initiative was to incentivize pharmacists to fill more prescriptions. Walmart implemented Pharmacy Facility Incentive Plans that paid bonuses to pharmacists based on the number of prescriptions filled, the amount of profit generated, and customer relations metrics. Walmart advocated within the National Association of Chain Drug Stores DEA Compliance Working Group for permission to include controlled substances within the pharmacist incentive programs, insisting that "[i]ncentive programs should be entirely agnostic as to the type of prescriptions (controlled substances or non-controlled drugs) filled." Compl. ¶ 120. Walmart opposed a proposal to treat "[e]xcessive volume and rate of growth of dispensing controlled substances" as a red flag. *Id.* ¶ 120 n.50. Consistent with those positions, Walmart's Pharmacy Facility Incentive Plan for 2012 did not distinguish between prescriptions for controlled substances and other prescriptions. As pharmacists filled more prescriptions, their incentive payments increased.

Walmart also introduced a Management Incentive Plan that provided for bonuses to eligible employees once the number of prescriptions filled in a year exceeded 190,000. The plan did not contain any metrics for patient safety or red flag detection. *Id.* ¶ 120.

Through these incentive plans, Walmart provided pharmacists with financial inducements to fill more prescriptions and to disregard their Refusal-To-Fill Obligation. Walmart also imposed direct pressure on pharmacists by setting a goal of filling a prescription in less than twenty minutes, and that target was later reduced to fifteen minutes. That short period did not enable a pharmacist to perform the due diligence and fill out the forms necessary to investigate a prescription and, if warranted, refuse to fill it. *Id.* ¶ 119.

Walmart also took steps to bring more users of prescription opioids to its pharmacies. Walmart collaborated with McKesson on trial offers, savings cards, and e-coupons for opioids such as OxyContin, Butrans, Hysingla, Ultram, Magnacet, and Nucynta. For the Magnacet loyalty program, Walmart and CVS handled 49% of all claims. For Nucynta, Walmart was in the top four pharmacies by the number of claims. Walmart also partnered with Purdue Pharma on direct mail campaigns to sell Butrans, using Walmart's prescription data to target patients who had used opioids. *Id.* ¶¶ 115–116.

Walmart's opioid marketing campaigns not only generated sales for its pharmacies, but also helped cross-sell other products. By bringing customers into its stores to fill opioid prescriptions, Walmart had the opportunity to sell them other products. *Id.* ¶ 119.

The complaint's allegations support a pleading-stage inference that Walmart sought to increase the number of opioid prescriptions that it filled as a means of increasing profits. Walmart did not exhibit comparable initiative on the compliance front. The plaintiff-friendly inference is that Walmart had a business plan of prioritizing profits over compliance.

H. The Whistleblower

In August 2012, a whistleblower notified the Chairman of the Board and Walmart's Global Ethics Office about concerns regarding controlled substance prescriptions. The whistleblower was a full-time floater pharmacist who filed a *qui tam* complaint in 2013 that outlined his concerns. He asserted that the following events took place during the six weeks between July 14 and August 30, 2012:

- He observed Walmart pharmacists filling prescriptions that bore red flags, failing to comply with the Recordkeeping Requirement, and failing to comply with the Refusal-To-Fill Obligation.
- He received significant pushback from the Health and Wellness Division about his complaints and was terminated.

The complaint was not unsealed until 2018.[33]

33 The defendants argue that the plaintiffs waived any arguments based on the whistleblower by not spelling them out in their answering brief. The complaint was 135 pages long and contained 316 numbered paragraphs. The plaintiffs could not reproduce every factual assertion in their brief, nor did they have to. Like the defendants, the plaintiffs made legal arguments in their brief based on their complaint. The complaint, the documents it incorporates by reference, and documents subject to judicial notice establish the factual record for a motion to dismiss. The briefs spell out the legal arguments for and against dismissal. The plaintiffs did not waive their factual allegations about the whistleblower.

***12** The plaintiff-friendly inference is that the whistleblower put the Chairman of the Board and Walmart's Global Ethics Office on notice about the consequences that were flowing from a business strategy that prioritized filling opioid prescriptions over building the compliance infrastructure and investing in the resources necessary to comply with the DEA Settlement and the Controlled Substances Act. That red flag reached the highest levels of Walmart management, including the member of the Board entrusted with primary responsibility for Walmart's governance.

I. Reports To Senior Officers, The Audit Committee, And The Board

The next event for which Walmart provided responsive documents in the Section 220 production took place on November 8, 2012, when the "Global Compliance and Ethics Committee" met. That was a committee of compliance executives and employees, so this decision calls it the Employee Compliance Committee.

Walmart produced a copy of the meeting minutes, which comprise seven pages. All of the substantive portions of the minutes were redacted for non-responsiveness and attorney-client privilege with the exception of the following sentence: "Ms. Harris then provided an update to the Committee on the overall status of Health and Wellness Compliance projects." Ex. 11 at 2. "Ms. Harris" presumably refers to defendant Phyllis Harris, who was then the Senior Vice President and Chief Compliance Officer for the Walmart Stores segment. *See* Compl. ¶ 56. Without any substantive text to draw on, one possible inference is that the report was good (as in, "we are making great progress"). Another possible inference is that the report was bad (as in, "we are falling further behind in our compliance efforts, know we are not complying with the DEA Settlement, and know we will not be able to achieve compliance"). There are no non-privileged documents reflecting the Employee Compliance Committee making any business decisions or taking any action. At the pleading stage, the absence of evidence about action by the Employee Compliance Committee supports a plaintiff-friendly inference that the Employee Compliance Committee failed to take action to promote compliance with the DEA Settlement.

In March 2013, Harris and Jay Jorgensen, Senior Vice President and Global Chief Compliance Officer for Walmart, reported to the Audit Committee on the status of various compliance projects. It is reasonable to infer that Jorgensen and Harris reported on the state of compliance with the DEA Settlement.

The written report gave each project a color to indicate its status: green for "on schedule," yellow for "watch list," and red for "major issues." *See* Ex. 46 at '601. The report stated that the "diversion analytics tool to monitor suspicious controlled substance activity remains in a status of red." *Id.* Walmart needed that tool to "monitor and detect drug diversion indicators and suspicious activity related to controlled substances." *Id.* at '604. Monitoring and detecting drug diversion and suspicious activity was a central requirement of the DEA Settlement. The Audit Committee was on notice that Walmart was not creating one.

Development of the order monitoring tool had stopped because of a problem with Walmart's Data Centralization project, which also had a status of red. Walmart had purchased a limited amount of database capacity, and until a decision was made to buy more capacity, nothing else could be done. Without a decision to buy more capacity, Walmart would have a read-only database that could not support "several critical business and compliance initiatives." *Id.* at '601.

***13** It is reasonable to infer that the Audit Committee knew from Harris's written and oral reports that Walmart was not complying with the DEA Settlement and had not allocated the resources necessary to achieve compliance. There is no indication in the pleading-stage record of the Audit Committee engaging in any discussion of the business need to acquire more database capacity, nor is there any indication that the Audit Committee made a decision to acquire more capacity. There is no indication of any business-oriented discussion about the state of the drug diversion analytics system. At the pleading stage, the plaintiffs are entitled to an inference that the Audit Committee knew that a critical requirement for the DEA Settlement was in a status of red and took no action in response.

Walmart's privilege log contains entries indicating that the Employee Compliance Committee met on July 18, 2013 and on October 10, 2013. The descriptions on the log refer to discussions about the "Health and Wellness compliance program, including controlled-substance related compliance initiatives pertaining to dispensing and documentation controls, and diversion analytics." Ex. 14 at Item Nos. 143, 144, 158, 159. Once again, there are no non-privileged documents reflecting the Employee Compliance Committee making any business decisions or taking any action. At the pleading stage, the absence of evidence supports a plaintiff-friendly inference that the Employee Compliance Committee knew about and did not take any action to address problems with Walmart's compliance system, such as the code-red status of the diversion analytics tool to monitor suspicious controlled substance activity.

During a two-day meeting of the Board in September 2013, the Audit Committee, two members of the Executive Committee, and Walmart's CEO had a "legal, compliance, and ethics session." Ex. 47 at 18. Jorgensen presented a report on health and wellness compliance. The Board meeting minutes span eighteen pages. Walmart redacted everything except for the following: "Mr. Williams reported that the [Audit] Committee had conducted a legal, compliance and ethics session. He stated that during this session, the Committee had received [REDACTED] ... reports regarding Walmart's health and wellness compliance initiatives...." *Id.* Mr. Williams is inferably Christopher J. Williams, then a director and Chair of the Audit Committee.

One inference from the redacted portion is that Mr. Williams told his fellow directors that everything was on track. Another inference is that Mr. Williams told his fellow directors that key aspects of Walmart's program were not on track, that those components were in a status of red, and that Walmart was not complying with the DEA Settlement. At this stage of the proceedings, the plaintiffs are entitled to the latter inference.

In October 2013, the Health and Wellness Division prepared an assessment of Walmart's controlled substances risk. Dkt. 40 at 15. The assessment showed the status of various compliance projects and reported that the project to "[d]esign & operate a systems [sic] to detect suspicious orders and report to the DEA when discovered" remained in red. Ex. C. at '751. The summary reported that the project to "[e]stablish additional maximum order limits of highly abused drugs" was in yellow. *Id.* Neither project had a delivery date. For both, the delivery date was marked "TBD." *Id.*

Developing and maintaining a system to detect suspicious orders and report them to the DEA was one of Walmart's core obligations under the DEA Settlement. The four-year term of the DEA Settlement was scheduled to end on March 11, 2015. As of October 2013, Walmart had used up two years and seven months of the four-year term. Walmart had only seventeen months left to implement the mandates in the DEA Settlement, including a full-scale suspicious order monitoring system.

***14** Although Walmart had failed to implement a suspicious order monitoring system, Walmart had succeeded in attracting more customers with opioid prescriptions. In a June 2012 Health and Wellness Division survey, pharmacists reported that they "lacked sufficient staff to handle the workload and did not have enough time to conduct their duties in a manner that protected patient safety." Compl. ¶ 125. Only 59% of pharmacy employees reported that their locations had sufficient staff. In February 2013, a pharmacy manager in Oklahoma reported that a particular clinic had been writing prescriptions for a large number of narcotic pain relievers. She emphasized that "[o]ther chain and independent pharmacies in the area have stopped accepting prescriptions from this clinic, which is causing them to funnel in to [sic] our Wal-Mart stores."[34] She added:

> Not a single one of us ever feel comfortable about filling these prescriptions, and if questioned, we wouldn't be able to justify this type of prescribing.... I think that if we continue this we are going to be in serious trouble and quickly trigger an investigation. We do not want to continue filling from this clinic. Other pharmacies are stopping and I feel that it is imperative that we follow suit. It will look bad if we are the ones allowing these drugs to be abused or even on the street.

Compl. ¶ 187. These allegations support a reasonable inference that Walmart was not providing its pharmacists with the time and other resources they needed to fulfill their Refusal-To-Fill Obligation.

34 Compl. ¶ 187 (citing Pls.' Trial Ex. P-26892_00001, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804-DAP (N.D. Ohio Oct. 28, 2021), ECF No. 4094-34). *See e.g.*, *Nelson v. Emerson*, 2008 WL 1961150, at *2 n.2 (Del. Ch. May 6, 2008) (taking judicial notice of "documents filed in the related federal court proceedings" in addressing a motion to dismiss). *See generally* *In re Career Educ. Corp. Deriv. Litig.*, 2007 WL 2875203, at *9 (Del. Ch. Sept. 28, 2007) ("When considering a motion to dismiss, the court also may take judicial notice of publicly filed documents, such as documents publicly filed in litigation pending in other jurisdictions."(footnote omitted)).

J. Walmart Prioritizes Internal Inventory Diversion.

Until January 2014, Walmart's pharmacists were using a jerry-rigged combination of two different computer systems to review orders. A pharmacist primarily used ConnexUs, a workflow management system that tracked prescriptions as they moved through the order-fulfillment process. A pharmacist could use ConnexUs to determine whether a licensed prescriber wrote the prescription, but ConnexUs did not have any capability to identify other red flags. To check for red flags, the pharmacist needed to log into a second, state-run prescription monitoring program that tracked early refills and other indicia of illegitimate prescriptions. In states that did not offer a state-run prescription monitoring program, Walmart's pharmacists had nothing to access.

It is reasonable to infer that this patchwork system did not satisfy Walmart's obligations as a dispenser under the Controlled Substances Act and the DEA Settlement. Walmart's pharmacists did not have the time or resources to fulfill their Refusal-To-Fill Obligation, and they did not have access to a Walmart computer system that could help them identify and conduct due diligence on red flags.

In March 2014, Walmart publicly disclosed improvements to its Health and Wellness compliance program that included "[c]reating a diversion analytics tool to deter, detect, and remedy attempts at pharmaceutical diversion in U.S. Walmart and Sam's Club" stores. Compl. ¶ 352; Dkt. 40 at 51;

accord Wal-Mart Stores, Inc., Definitive Additional Materials (Schedule 14A), at 9 (Apr. 23, 2014). Walmart's new system only monitored for theft and loss of controlled substances *within* Walmart. Put differently, the new system addressed the Inventory-Control Requirement, but did not address other aspects of Walmart's obligations as a pharmacy operator, such as supporting its pharmacists in their efforts to comply with their Refusal-To-Fill Obligation. It is reasonable to infer that Walmart took steps to meet the compliance obligation that helped its bottom line, while not taking steps to meet compliance obligations that did not confer that benefit. *See* Compl. ¶ 191.

***15** Also in March 2014, the head of compliance for the Health and Wellness Division reported to the Audit Committee on the division's compliance priorities for fiscal year 2015. *See* Ex. B. Supporting slides included a photograph dated July 12, 2012, from a Walmart pharmacy in Tampa, Florida that depicted scores of patrons waiting in line at 7:00 a.m., two hours before the pharmacy opened, with a "very high number of prescriptions for Oxycodone." Compl. ¶ 185. The presentation reported that after the July 2012 incident, the compliance team "began to assess our processes" to avoid the "risk of our pharmacies becoming the pharmacy of choice for 'pill mills.' " *See* Ex. B.

The Audit Committee meets quarterly, so it is reasonable to infer that Walmart had done nothing until three months before the Audit Committee meeting in March 2014, to address the risk that its pharmacists were filling prescriptions for pill mills. The photograph pre-dated the Audit Committee meeting by over eighteen months, yet the head of compliance reported that his team had just started to assess Walmart's processes. Instead, Walmart had been following a business strategy that sought to increase opioid prescription traffic at its pharmacies, while reducing the ability of its pharmacists to meet their Refusal-To-Fill Obligation.

It is reasonable to infer that the Audit Committee knew that Walmart was facing problems complying with its obligations as a dispenser of prescription opioids. To the good, the compliance officer told the Audit Committee that *after* seeing the photograph, the compliance team had implemented additional operational controls in Florida, where the controls appeared to have some effect. *See id.* at 11. It is not clear whether the controls were implemented throughout the company. For that snapshot in time, the members of the Audit Committee could believe that management was taking action. At the very least, they had been shown another red flag regarding the state of Walmart's compliance systems and the consequences of a business strategy that sought to increase the number of opioid prescriptions that its pharmacists filled.

K. Additional Reports On Walmart's Failures To Comply With The DEA Settlement And The Controlled Substances Act

In May 2014, the Audit Committee received a fourteen-page report that summarized the status of compliance efforts in the Health and Wellness Division. Ex. 49. The report was authored by Jorgensen, Harris, and James Langman, Vice President of Health and Wellness Compliance for the U.S. The report discussed Walmart's new diversion analytics tool and explained that it had been operational since November 2013. That was the tool that addressed internal inventory diversion. With the tool in place, the compliance team uncovered major instances of internal opioid diversion, including a shortfall of 16,000 dosage units from a pharmacy in Indiana and a shortfall of 4,689 dosage units from two pharmacies in Maryland. *Id.* at '822–23.

The report provided a high-level discussion of Walmart's obligations under the Controlled Substances Act and observed that Walmart had experienced a 114% increase in incidents relative to the prior year. *Id.* at '824. The report attributed those figures to the new analytics tool identifying internal theft, plus enhanced communication about how to report a controlled substance theft or loss. Another indicator of increasing problems was the number of violations that regulators identified. During fiscal year 2014, state and federal regulatory agencies made 2,096 visits to Walmart pharmacies, with 547 visits (26%) resulting in violations of recordkeeping requirements, associate licensing requirements, equipment deficiencies, prescription discrepancies, incomplete logs, or instances of internal diversion. *Id.* at '825.

***16** The report generally conveys a feel-good message that everything is fine. The report did not mention the DEA Settlement, Walmart's obligations under it, or the status of Walmart's efforts to comply with those obligations. Only ten months remained before the term of the DEA Settlement ended.

In June 2014, the Health and Wellness Division evaluated the progress of the suspicious order monitoring project. *See* Ex. D. The assessment recognized that the project was part of the DEA Settlement and that a suspicious order monitoring system still was not in place. The assessment included the following question: "Is the Risk being mitigated today by manual, systemic, or a combination of both today [sic] (regardless of optimal or not)?" *Id.* at '701. The assessment gave a pointed answer: "No." *Id.* The suspicious order monitoring project had "no process in place." *Id.* The report stated that the project was "Board Informed," supporting an inference that the Board had been informed of the situation. *Id.*

In October 2014, a survey of Walmart's pharmacists generated grim results. Only 43% of pharmacy employees reported having sufficient staffing to handle the workload. In the October 2014 survey, "a substantial proportion of pharmacy employees reporting that they felt rushed with processing prescriptions." Ex. E ¶ 121. It is reasonable to infer that Walmart was not supporting its pharmacists in complying with the Refusal-To-Fill Obligation. Walmart was continuing to prioritize profits by seeking to fill prescriptions.

One month later, in November 2014, the Board reviewed Walmart's compliance with the DEA Settlement and the Controlled Substances Act. Walmart withheld the meeting minutes in their entirety, noting on its privilege log that the discussion involved the "Health & Wellness compliance program, including compliance with the Controlled Substances Act." Compl. ¶ 222; *see* Ex. 14 at Item No. 49. There are no documents from the Section 220 production indicating that the Board had any business discussions or made any business decisions about compliance with the DEA Settlement. Given what other documents show about the state of Walmart's noncompliance with the DEA Settlement, it is reasonable to infer that the Board knew about Walmart's noncompliance and took no action other than to receive legal advice.

In February 2015, just one month before the DEA Settlement expired, a pharmacist in Texas wrote to one of Walmart's compliance directors for controlled substances. The pharmacist expressed concern about filling prescriptions for a pill-mill doctor. Compl. ¶¶ 27, 124, 260. The compliance director responded by candidly explaining how Walmart had approached the DEA Settlement:

> The [DEA Settlement] that requires the reporting of Refusal to fill expires in 30 days. We have not invested a great amount of effort in doing analysis on the data since the agreement is virtually over. Driving sales and patient awareness is a far better use of our Market Directors and Market manager's time.

Id. ¶ 27. That statement openly prioritized profits ("Driving sales") over compliance.

Similarly, during the Opioid MDL, a former employee testifying as Walmart's 30(b)(6) representative stated that Walmart chose not to adopt a more rigorous system in connection with the DEA Settlement and the Controlled Substances Act because it "didn't make sense for the business." *Id.* ¶ 240. That testimony likewise indicates that Walmart prioritized profits over compliance.

***17** On March 11, 2015, the DEA Settlement expired. There are no documents from December 2014 or from January, February, or March 2015 indicating that the Board discussed any business issues or made any business decisions regarding the DEA Settlement. That noteworthy absence stands out against the background of the October 2014 pharmacy survey, the exchange between the pharmacist and the compliance director, and the testimony of the employee. Considered together, it is reasonable to infer that the Board knew that Walmart was not complying with the DEA Settlement, that the Board was not enabling pharmacists to comply with their Refusal-To-Fill Obligation, and that the Board did nothing in response.

L. Walmart Continues To Undermine The Refusal-To-Fill Obligation.

After the DEA Settlement term expired, Walmart's pharmacists continued to lack an internal system that they could use to access information about prescriptions as part of fulfilling their Refusal-To-Fill Obligation. *See* Compl. ¶ 251. Walmart did introduce a software program called Archer that captured information about prescriptions that pharmacists refused to fill. But Walmart prohibited other pharmacists from accessing that information, thus limiting the pharmacists' ability to investigate red flags and to make informed decisions about whether to refuse to fill a prescription. As of March 4, 2016, even regional directors could not access the information. *Id.* ¶ 253. As of July 9, 2018, pharmacists still could not access the information. *Id.* ¶ 255.

In November 2016, the successor committee to the Employee Compliance Committee held a meeting. Ex. 13. For simplicity, this decision continues to refer to the committee using the same name. The minutes of the meeting are redacted virtually in their entirety. Only one substantive sentence survived: "Mr. Jorgensen noted that the materials for the Committee's October 13, 2016 meeting included U.S. Health and Wellness Compliance training materials." *Id.* at '683.

That elliptical statement supports competing inferences. One is that Jorgensen provided a positive update about the state of the training program. Another is that Jorgensen reported on inadequacies in the training program. At this stage of the proceedings, the plaintiffs receive the benefit of the latter inference.

Walmart's privilege log contains entries suggesting that the Employee Compliance Committee met on twenty other occasions from 2016 through 2020. Walmart withheld all of the relevant meeting minutes, noting on its privilege log only that the discussions involved "controlled substances,"[35] "opioids,"[36] or Walmart's "Health & Wellness compliance program."[37] There are no indications that the committee had any business discussions, made any business decisions, or took any type of action. If Walmart's assertions of privilege are to be believed, then as the opioid epidemic raged, Walmart's senior compliance employees did nothing except receive and consider legal advice. They knew about the problem and took no action whatsoever. Although that seems highly unlikely, that is the record that Walmart created through its highly redacted Section 220 production.

35 *See* Ex. 14 at Item Nos. 123–124, 126–130, 133–138, 140, 142.

36 *See id.* at Item Nos. 131–132.

37 *See id.* at Item Nos. 123–124, 126–127, 139–141.

The fact that so many meetings took place supports an inference that the officers and employees on the Employee Compliance Committee closely monitored Walmart's compliance with its obligations under the Controlled Substances Act. At the same time, the allegations in the complaint, together with other documents in the record, support an inference that Walmart was failing to comply with its obligations as a dispenser of prescription opioids and, in particular, was undermining its pharmacists' ability to fulfill the Refusal-To-Fill Obligation. The court therefore must infer that the Employee Compliance Committee knew about Walmart's failure to fulfill its obligations as a dispenser of prescription opioids. The absence of any indication that the Employee Compliance Committee did anything except gather to receive and discuss legal advice, supports a pleading-stage inference that the members of the committee consciously ignored Walmart's compliance failures.

M. Walmart's Obligations As A Distributor Of Prescription Opioids

***18** The discussion to this point has focused on Walmart's role as a dispenser of prescription opioids through its retail pharmacies. Until April 2018, Walmart engaged in the wholesale pharmaceutical distribution business, and it supplied its retail pharmacies with prescription opioids under a DEA license that required compliance with the Controlled Substances Act.[38]

38 21 C.F.R. § 1301.11(a).

While operating as a wholesale distributor of prescription opioids, Walmart had an obligation to maintain "effective control against diversion of [opioids] into other than legitimate medical, scientific, and industrial channels."[39] Walmart also had more specific obligations. A distributor must "design and operate a system" to identify "suspicious orders of controlled substances" and report them to the DEA (the "Reporting Requirement").[40] "Suspicious orders include orders of unusual size, orders deviating substantially from a normal pattern, and orders of unusual frequency."[41] Once a distributor has reported a suspicious order, the distributor must either decline to ship the order or conduct due diligence to determine whether the order is likely to be diverted into illegal channels. The distributor can only ship the order if it determines after conducting due diligence that the order is *not* likely to be diverted into illegal channels (the "Shipping Requirement").[42]

39 21 U.S.C. § 823(b)(1).

40 21 C.F.R. § 1301.74(b).

41 *Id.*

42 *See Masters Pharm., Inc. v. Drug Enf't Admin.*, 861 F.3d 206, 212 (D.C. Cir. 2017) (discussing distributor obligation under *Southwood Pharm., Inc.*, 72 Fed. Reg. 36,487, 36,501 (Drug Enf't Admin. July 3, 2007)).

From the early 2000s until April 2018, Walmart distributed opioids to its pharmacies from its distribution center in Bentonville, Arkansas, which was the only distribution center that handled those products. Between 2006 and 2012, the Bentonville distribution center shipped an increasing number of opioid pills each year, with the total shipped exceeding five billion pills across the six-year period. Before November 2010, Walmart had no written policies or procedures in place to govern monitoring for suspicious orders in its distribution business. Instead, Walmart charged its hourly wage employees—who had no medical, pharmaceutical, or public health training—with the responsibility for identifying anything that looked suspicious. Walmart did not provide any standards, training, or processes to assist these unqualified employees in making that determination.[43]

43 Compl. ¶¶ 133-134; *see In re Nat'l Prescription Opiate Litig.* (*Opioid MDL SJ Decision*), 2020 WL 425965, at *1 (N.D. Ohio Jan. 27, 2020).

In November 2010, Walmart implemented its first written policy for its distribution business. Titled "Identifying and Reporting Purchases of Controlled Substances," it contemplated employees at the Bentonville distribution center reviewing a monthly report by hand and identifying any orders for controlled substances that constituted more than 3.99% of a single pharmacy's total drug purchases during the prior month. Compl. ¶ 139. The November 2010 policy did not identify other criteria that could render an order suspicious. The employees were instructed to "forward the reports to the appropriate [Walmart] Drug Diversion Coordinator for further review." *Id.* ¶ 140. There were no further written policies about what the Drug Diversion Coordinator was supposed to do. The Executive Committee and the Audit Committees were briefed on this policy during a meeting that same month. *Id.* ¶ 141.

***19** Walmart later determined that it needed a computerized system. Rather than obtaining a specialized compliance system, Walmart repurposed an existing inventory tool called Reddwerks that had not been designed for compliance. To flag suspicious orders, Walmart implemented "hard limits" on orders of more than 2,000 dosage units of oxycodone and 5,000 dosage units of other opioid medications. *Id.* ¶ 174. The Reddwerks system had no ability to flag suspicious orders based on other criteria. *Id.* ¶ 176.

Walmart was supposed to flag orders that exceeded those hard limits and report them to the DEA, but Walmart chose a more profit-friendly approach. Walmart adopted a practice of cutting back flagged orders to the hard-limit thresholds and filling them as if they were non-suspicious orders. Walmart then passed along the balance of the orders to another distributor to fill. Walmart thus ensured that the full order was filled, even though the order exceeded the hard limits. *Id.* ¶¶ 101, 173–175, 177.

The cutback system resulted in Walmart reporting almost no suspicious orders to the DEA. At this stage of the proceedings, the plaintiffs are entitled to an inference that Walmart knowingly circumvented its own suspicious order monitoring system.

In January 2014, Walmart hired an external consulting outfit, MuSigma, to evaluate the repurposed Reddwerks system and its hard limits. MuSigma identified serious flaws and recommended modifications to enable the tool to do more than simply cap prescriptions at hard limits. The modifications would have cost $185,000. Walmart rejected the proposal. *See id.* ¶ 218–220. The modifications would have cost $185,000. Walmart rejected the proposal. One of the largest companies in the world rejected a proposal to update a key component of its order monitoring system that would have cost only a bit more than a single pharmacist's annual pay.[44]

44 According to salary.com, a Walmart pharmacist makes between $76 and $84 per hour. *Hourly Wage for Walmart Inc. In Store Pharmacist Salary in the United States*, salary.com, https://perma.cc/2U57-H4TG (last visited Apr. 25, 2023). Assuming a forty-hour week and fifty workweeks per year, a Walmart pharmacist earns between $152,000 and $168,000. That is the same ballpark as the amount that Walmart declined to spend to update Reddwerks. I acknowledge that the salary.com figure is a 2023 figure and that I have not adjusted the Reddwerks expense for inflation.

Walmart did not contemplate implementing a true suspicious order monitoring system until 2015. At a meeting on February 5, 2015, the Audit Committee reviewed Walmart's compliance objectives for fiscal year 2016. Compl. ¶ 224. Shortly before, the Global Chief Compliance Offer (Jorgensen) sent a memorandum to the Audit Committee, copying then-CEO Doug McMillon, that identified Walmart's compliance objectives. Walmart redacted the vast majority of the memo as non-responsive. Walmart produced text indicating that management set compliance objectives based on data-collection efforts, risk assessments in all retail markets, and progress made in prior years. Ex. 51 at '065. Walmart produced text for only the following objective: "In the U.S., implement controlled substance suspicious-order monitoring enhancements (which include both software and personnel changes) in the U.S. distribution facilities." *Id.* at '002.

The Audit Committee signed off on the plan, which called for implementation to begin in August 2015. The full Board met the following day, and the Audit Committee reported that it had approved Walmart's compliance objectives. *See* Compl. ¶¶ 228–233.

N. The Board Acknowledges An "Opioid Crisis" In The Midst Of A Barrage Of Lawsuits.

***20** During 2016 and 2017, Walmart faced a barrage of lawsuits based on its roles as a dispenser and distributor of prescription opioids. By the end of 2017, thousands of plaintiffs had filed cases against Walmart, and proceedings were underway to consolidate the suits in the Opioid MDL. During the same period, on December 7, 2016, Walmart learned that the U.S. Attorney for the Eastern District of Texas was conducting a criminal investigation into Walmart. Compl. ¶ 258.

At a November 2, 2017 Audit Committee meeting, Jorgensen provided an update on "a recent health and wellness compliance matter." Ex. 60 at 4. Without any context for guidance, it is reasonable to infer that Jorgensen was reporting to the Audit Committee on compliance issues related to Walmart's exposure from its role in the opioid crisis.

After Jorgensen introduced the topic, another senior compliance executive discussed "modifications to the Company's process for reporting suspicious controlled substance orders from its pharmacies." *Id.* Over two years earlier, in February 2015, the Audit Committee had approved management's first plan to modify Walmart's suspicious order monitoring system for its pharmacies. The November 2017 references support a plaintiff-friendly inference that Walmart's system had proven inadequate, created a serious risk of legal noncompliance and corporate harm, and that corrective action was required. It had taken over two years for that issue to reach the Audit Committee.

The Board also met in November 2017, and the minutes of that meeting span sixty-eight pages. Ex. 61. Only three sentences of substantive text survived the redaction tool. The first reads: "Timothy P. Flynn, Chair of the Audit Committee, then provided the Audit Committee report." *Id.* at 15. The following partially redacted text appears on the next page: "He concluded his report by stating that the Audit Committee had received updates from management regarding various other matters including ... [REDACTED] ... enhanced processes and training for pharmacists regarding filling prescriptions of controlled substances." *Id.* at 16. The redactions were marked for non-responsiveness, attorney-client privilege, and attorney work product. The unredacted text provides no basis to infer that the Board or Audit Committee had any business-oriented discussion about compliance issues or made any business decisions about compliance issues.

A few pages later, the minutes read: "Dr. James I. Cash, Jr., Chair of the Nominating and Governance Committee (the 'NGC'), then presented the NGC report." *Id.* at 18. The next few pages are completely redacted for non-responsiveness before the following text appears:

> Next, Dr. Cash ... [REDACTED – NOT RESPONSIVE] ... noted that in 2018 an external advisor would be engaged to conduct the Board evaluation process, including questionnaires and interviews with all Directors and members of executive management of the Company beginning in February. Dr. Cash concluded his report by stating that a speaker had been engaged for a director education presentation in December regarding trends in healthcare regulations, including with regard to the opioid crisis.

Id. at 21–22.

The director education session about trends in healthcare regulations, including with regard to the opioid crisis, took place in December 2017. Ex. 62. After introductory remarks from Cash and Jorgensen, the Board, the "Executive Council," the "Walton Family," and Walmart's general counsel received an hour-long presentation on "the state of health care in the US; and the opioid crisis" from Michael Leavitt, the former Secretary of the U.S. Department of Health and Human Services. *Id.* at '693. After the presentation, the group engaged in a thirty-minute discussion. McMillon closed the meeting.

***21** Walmart redacted the entire director education presentation on the basis of the attorney-client privilege and work product doctrine. Because of those redactions, the only possible inference is that during a meeting specifically called to address the opioid crisis, Walmart's directors and senior executives and unidentified members of the Walton family did not discuss any business issues, consider any business initiatives, or make any business decisions. All they did was receive and consider legal advice. Although that is hard to believe, Walmart's redactions necessarily lead to that inference.

In November 2017, after the Audit Committee and Board meetings but before the director education session, Walmart management decided to stop acting as a distributor of prescription opioids. Walmart wound down that business and, starting in April 2018, began to rely exclusively on third-party distributors. The complaint alleges that management did not tell the Audit Committee about its decision until September 2018, nearly one year after they made the decision and four months after Walmart exited the business. *See* Compl. ¶ 271; Ex. 75. That allegation is difficult to credit, but nothing in the record supports a contrary inference. For example, there are no minutes in which Walmart management reports to the Audit Committee in November or December 2017 about the decision to exit from the opioid distribution business.

The events of November 2017 and December 2017 support competing interpretations. The defense-friendly view interprets the documents as showing the Audit Committee, Board, and management were monitoring opioid issues, including Walmart's suspicious order monitoring system. From that perspective, the directors could take comfort in the proposal from Walmart's compliance team to improve the system, and the information session with Secretary Leavitt provided already-educated board members, executives, and members of the Walton Family with additional insight into a situation that they already were handling well.

The plaintiff-friendly view interprets the record as showing that after approving management's plan for an updated suspicious order monitoring system in August 2017, the directors checked out. During 2016 and 2017, as more and more plaintiffs filed lawsuits against Walmart, the directors did nothing. In December 2016, when Walmart learned that the U.S. Attorney for the Eastern District of Texas was conducting a criminal investigation into the company, they did nothing. It was not until November 2017 that management raised an issue about Health and Wellness compliance and proposed enhancements to Walmart's systems.

At that point, knowing that Walmart had suffered a serious compliance failure, the directors, senior management, and the Walton Family scheduled an education session with Secretary Leavitt to educate themselves on an issue they had not previously understood. Even then, however, the directors did nothing but listen to lawyers. They did not consider any business issues or make any business decisions. Only management took action by deciding to exit the distribution business. No one did anything about the pharmacy business.

O. The Opioid MDL

In December 2017, the federal cases that thousands of plaintiffs had filed across the country were consolidated into the Opioid MDL. The bellwether complaint against Walmart in the Opioid MDL alleged that Walmart failed to:

• "adequately train their pharmacists and pharmacy technicians on how to properly and adequately handle prescriptions for opioid painkillers";

• "put in place effective policies and procedures to prevent their stores from facilitating diversion and selling into a black market";

***22** • "conduct adequate internal or external reviews of their opioid sales to identify patterns regarding prescriptions that should not have been filled";

• "effectively respond to concerns raised by their own employees regarding inadequate policies and procedures regarding the filling of opioid prescriptions"; and

• "take meaningful action to investigate or to ensure that they were complying with their duties and obligations under the law with regard to controlled substances."

Compl. ¶ 289.

Walmart responded in January 2018 by sending an internal newswire on "Opioid Stewardship" to its pharmacists. Ex. 63. The newswire reminded pharmacists to comply with state-specific requirements for opioid training, to review an internal Walmart procedure about dispensing naloxone, and to watch a video. *Id.* at '913. There is no indication in the record that Walmart did anything to alter the system of compensation plans and other incentives that were driving the business model of filling as many prescriptions as possible.

P. Walmart Tries To Avoid Criminal Prosecution.

In May 2018, the U.S. Attorney for the Eastern District of Texas informed Walmart that it planned to criminally indict the company for its role in the opioid epidemic. Walmart's directors had ignored those red flags, but the threat of a criminal indictment generated a response.

First, Walmart amended its pharmacy operating manual. Rewriting procedures and creating new documents is relatively easy, and the new manual detailed a number of prescriber and patient red flags. Walmart also sought to capture the public-relations high ground by issuing a press release titled, "Walmart Introduced Additional Measures to Help Curb Opioid Abuse And Misuse." Ex. H. The press release promised that within the next sixty days, Walmart would restrict initial acute opioid prescriptions to no more than a seven-day supply. That was a step Walmart could have taken in 2014, when the Audit Committee saw the photograph showing a Walmart pharmacy with scores of patrons waiting in line at 7:00 a.m., two hours before the pharmacy opened, to fill their prescriptions for Oxycodone. Or Walmart could have taken that step in 2016 or 2017, when plaintiffs were filing the thousands of lawsuits that led to the Opioid MDL, or in December 2016, when Walmart learned that the U.S. Attorney's Office was conducting a criminal investigation. Walmart also announced in its press release that in just under two years (starting in January 2020), it would require e-prescriptions for controlled substances.

Next, Walmart sought to negotiate a settlement with the Eastern District of Texas. Those efforts proved unsuccessful, and in July 2018, the U.S. Attorney's Office reiterated its intention to indict Walmart.

After the failure to achieve a settlement, the Board implemented a policy under which pharmacists gained access to the refusal-to-fill information in Walmart's pharmacy management system. In an email dated July 29, 2018, Jacob Creel, Walmart's Director for U.S. Ethics and Compliance for Health and Wellness Practice Compliance, explained that although Walmart's Archer system collected and stored refusal-to-fill forms, Walmart's pharmacists "do not have easy access to this information, especially if the pharmacist is from another store," even though it "could be used to clear red flags, or identify red flags that may indicate that the prescription was not issued for a legitimate medical reason."[45] Walmart also announced that its pharmacists would have access to NarxCare, a controlled substance tracking tool, in states where the system was available. Still seeking to capture the public-relations high ground, Walmart issued a press release announcing these initiatives. *See* Ex. 65 at '995; *see also* Ex. 12 at 4.

45 Compl. ¶ 255 (citing Plaintiffs Trial Exhibit P-26705_00001, *In re: Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804-DAP (N.D. Ohio Nov. 8, 2021), ECF No. 4128-31).

***23** Having taken these steps, Walmart contacted its friends in Washington, D.C. In August 2018, Walmart's counsel sent a letter to senior DOJ officials asking them to quash the indictment. Throughout the balance of 2018 and well into 2019, Walmart continued its lobbying efforts. In September 2019, Walmart's counsel sent another letter, this time to the co-head of an opioid working group made up of DOJ officials and fifteen U.S. Attorneys' Offices. The group was evaluating potential lawsuits against Walmart and other participants in the opioid epidemic, and Walmart threatened to stop producing documents to the group.

Around the same time, Walmart hired Rachel Brand, the DOJ's former Associate Attorney General. Brand became the point-person for an "internal investigation regarding controlled substances." Ex. 71. Brand updated the Audit Committee on the investigation during Audit Committee meetings in April, May, and July 2018. *See* Exs. 71–73. Both Flynn and Brand updated the full Board during a "Legal Private Session" on November 8, 2019. Ex. 74 at 6. Walmart redacted or withheld everything about the investigations based on the attorney-client privilege and work product doctrine.

Shortly thereafter, the U.S. Attorney for the Eastern District of Texas was instructed by the highest levels of the DOJ to drop the criminal indictment and any civil complaint against Walmart. In October 2019, the head of the Civil Division of the U.S. Attorney's Office for the Eastern District of Texas resigned in protest.

Q. The *ProPublica* Article

In March 2020, *ProPublica* published an article detailing Walmart's role in the opioid epidemic. Before the article was published, Walmart's stockholders did not know about the DEA Settlement. The article revealed that between 2000 and 2018, the DEA sent fifty letters of admonition to Walmart about its dispensing practices. The article reported that multiple pharmacists had raised concerns about pill-mill doctors, well before the DEA Settlement expired.

On April 14, 2020, the Board met virtually. There was no discussion of compliance issues in the Health and Wellness Division. Ex. 78.

On September 14, 2020, Walmart issued a nine-page report summarizing "important components of Walmart's response to the opioid crisis and the Board's oversight of Walmart's activities related to the dispensing of prescription opioid medications in the United States." *See* Ex. 12 at 1. The report asserted that "[a]s a whole and through its committees, Walmart's Board of Directors oversees Walmart's risk management policies and practices, including related [sic] to prescription opioids." *Id.* According to the report, the Board oversaw Walmart's "risk tolerance" and received "regular reports from Board committee chairpersons and members of senior management regarding risk related matters." *Id.* The report discussed the Audit Committee's oversight of global compliance and emphasized that the committee consisted "solely of independent directors." *Id.* Taken at face value, the report describes a good compliance program. The report does not identify when the various components of the program went into effect. The report did not engage with the compensation programs and other incentive structures that can overwhelm the most well-intentioned compliance program.

When it came to identifying steps that Walmart actually took to respond to the opioid crisis, the report highlighted the availability of NarxCare. The report then discussed Walmart's deference to its pharmacists' discretion in refusing to fill orders:

> We support our pharmacists when they exercise their professional judgment not to fill a controlled substance. Individual Walmart pharmacists may refuse to fill a particular prescription of concern (known as a "refusal to fill" or "RTF"), based on the presence of certain unresolved "red flags" (warning signs that a prescription might not be for a legitimate medical purpose) or combinations of unresolved red flags. If a pharmacist has more general concerns about a prescriber's controlled-substance prescribing practices, the pharmacist may refuse to fill all controlled-substance prescriptions written by that provider (a "blanket refusal to fill" or "BRTF").

***24** *Id.* at 4.

The policy that Walmart claimed to follow contrasts starkly with the allegations regarding Walmart's actual practices. At best, the press release described the policy that the Board believed it had implemented in July 2018 when it faced a threat of indictment.

R. The DOJ Sues Walmart, And Walmart Sues The DOJ.

In October 2020, Walmart sued the DOJ and the Attorney General in the U.S. District Court for the Eastern District of Texas. *Walmart, Inc. v. Barr*, No. 4:20-cv-817-SDJ (E.D. Tex.). Walmart sought the following declaratory judgments:

- Pharmacists may be liable under the Controlled Substances Act and its regulations only when they fill a prescription that they know was not issued for a legitimate medical purpose by a prescriber acting in the usual course of the prescriber's professional practice or when pharmacists knowingly abandon all professional norms;
- The Controlled Substances Act does not require pharmacists to second-guess a registered and licensed doctor's decision that a prescription serves a legitimate medical purpose;
- The Controlled Substances Act and its regulations do not require pharmacists to refuse to fill entire categories of prescriptions without regard to individual facts and circumstances;
- The Controlled Substances Act and its regulations do not require pharmacists to document in writing why filling a prescription was appropriate;
- Pharmacies do not have an affirmative obligation under the Controlled Substances Act and its regulations to analyze and share aggregate prescription data across its stores and with line pharmacists;
- Pharmacies do not have an affirmative obligation under the Controlled Substances Act and its regulations to impose corporation-wide refusals-to-fill for particular doctors;
- The Controlled Substances Act and its regulations do not require distributors not to ship suspicious orders after reporting them;
- The Controlled Substances Act and its regulations did not impose monetary penalties for failure to report suspicious orders to DEA during the time Walmart self-distributed; and
- Defendants must follow their own regulations and may not base any enforceable legal positions on the alleged violation of agency guidance rather than obligations found in a statute or duly promulgated rule or regulation.[46]

Each of these declarations sought judicial approval for the business plan that Walmart had followed. The federal judge overseeing the Opioid MDL had ruled against Walmart on many of these issues. Through its complaint, Walmart sought to relitigate those losses.

46 Compl. ¶¶ 281, 286; *accord Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300 (5th Cir. 2021).

Two months later, the DOJ filed a civil complaint against Walmart in the U.S. District Court for the District of Delaware (the "DOJ Action").[47] The DOJ sought injunctive relief to restrain Walmart's continuing violations of the law and alleged that Walmart repeatedly violated the Controlled

Substances Act, both as a pharmacy operator and as a wholesale distributor. Compl. ¶¶ 300, 350; Dkt. 40 at 24.

47 *See U.S. v. Walmart Inc.*, No. 1:20-cv-01744-CFC (D. Del.).

***25** The DOJ alleged that from June 2013 to November 2017, while acting as a distributor of controlled substances, Walmart shipped an estimated 37.5 million orders to its pharmacies. Walmart reported only 2,014 suspicious orders to the DEA. By comparison, Walmart's backup distributor, McKesson Corporation, reported more than 13,000 suspicious orders from Walmart's pharmacies during the same period, despite shipping far fewer doses. Compl. ¶ 25.

In response, Walmart publicly accused the DOJ of "blaming pharmacists for not second-guessing the very doctors the Drug Enforcement Administration (DEA) approved to prescribe opioids." *See* Public Statement, Walmart Inc., Walmart Statement in Response to DOJ Lawsuit (Dec. 22, 2020). Walmart bragged about having sued the federal government, claiming: "Walmart already sued the Department and DEA to stand up for our pharmacists, and we will keep defending our pharmacists as we fight this new lawsuit in court." *Id.* Walmart claimed it "always empowered pharmacists to refuse to fill problematic opioids prescriptions," unlike the "DEA's well-documented failures in keeping bad doctors from prescribing opioids in the first place." *Id.*

S. Liability In Opioid MDL And Dismissal Of The Suit Against The DOJ

On November 23, 2021, after six weeks of trial, a jury in the Opioid MDL found that two Ohio counties "prove[d]" that Walmart "engaged in intentional and/or illegal conduct which was a substantial factor" in the "oversupply of legal prescription opioids, and diversion of those opioids into the illicit market outside of appropriate medical channels."[48] The jury found that "widespread prevalence of opioid use disorder ... and addiction" was "the direct and foreseeable result of the oversupply of legal prescription opioids, and diversion of these opioids ..., caused by [Walmart's] wrongful conduct." *Id.* at *13. The jury also found that Walmart engaged in improper dispensing conduct" as "evidenced by [its] systemic failures to investigate and resolve red-flag prescriptions...." *Id.* at *30. "[S]pecific evidence ... demonstrated that [Walmart] dispensed massive quantities of red-flagged prescriptions without taking adequate measures to investigate or otherwise ensure the prescriptions were appropriately dispensed." *Id.* From this, "[t]he jury reasonably concluded that [Walmart] dispensed opioids without having in place effective controls and procedures to guard against diversion—controls and procedures they knew were required and knew they had not adequately employed." *Id.* at *32.

48 *Opioid MDL Abatement Decision*, 2022 WL 3443614 at *4.

During the trial, the jury heard from Susanne Hiland, a Walmart employee from the Health and Wellness Division, who observed that Walmart did not provide enough funding to pursue anti-diversion initiatives. During her testimony, Hiland confirmed that, as late as March 4, 2016, regional directors did not have access to refusal-to-fill reports. Hiland also confirmed that pharmacists could not determine from Walmart's prescription-filling system whether another Walmart pharmacy had refused to fill the prescription. Compl. ¶ 253–254.

In advance of the trial, the judge in the Opioid MDL had denied Walmart's motion for summary judgment. He held that record evidence concerning the suspicious order monitoring program that Walmart had in place in February 2015 "suggests obvious deficiencies that a layperson could plainly recognize." *Opioid MDL SJ Decision*, 2020 WL 425965, at *2 n.12; *see* Compl. ¶¶ 295–296.

***26** Walmart issued a fervid response to the jury's verdict:

> We will appeal this flawed verdict, which is a reflection of a trial that was engineered to favor the plaintiffs' attorneys and was riddled with remarkable legal and factual mistakes.... Plaintiffs' attorneys sued Walmart in search of deep pockets while ignoring the real causes of the opioid crisis—such as pill mill doctors, illegal drugs, and regulators asleep at the switch—and they wrongly claimed pharmacists must second-guess doctors in a way the law never intended and many federal and state health regulators say interferes with the doctor-patient relationship. As a pharmacy industry leader in the fight against the opioid crisis, Walmart is proud of our pharmacists, who are dedicated to helping patients in the face of a tangled web of conflicting federal and state opioid guidelines.[49]

Walmart once again portrayed itself as a champion of its pharmacists. By contrast, the pleading-stage record supports an inference that during the term of the DEA Settlement and continuing at least through the threatened criminal indictment in 2018, Walmart pursued a business strategy that sought to maximize the number of prescriptions that its pharmacists filled as a tool for generating higher profits, while at the same time depriving its pharmacists of the resources they needed to perform their jobs.

49 *See* Public Statement, Walmart Inc., Statement by Walmart Inc. with respect to the Jury Verdict in the Liability phase of a Single, Two County Trial in the Multidistrict Litigation in the U.S. District Court for the Northern District of Ohio involving Opioids (Nov. 23, 2021).

After the jury verdict, the federal court held a bench trial to determine the appropriate remedy. In August 2022, the court directed Walmart, CVS, and Walgreens to pay $650.6 million into an abatement fund.[50] The court entered an injunction order requiring Walmart to adopt reforms to remediate deficient controls and reporting systems that failed to achieve substantial compliance with the Controlled Substances Act.[51] The fact that the federal court ordered Walmart to remediate its controls supports an inference that Walmart's controls and reporting systems were still noncompliant in August 2022.

50 Judgment Order, *In re Nat'l Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio Aug. 22, 2022), 2022 WL 4099669, *appeal pending*, *Trumbull Cnty., Ohio v. Purdue Pharma, L.P.*, No. 22-3753 (6th Cir.).

51 Injunction Order, *In re Natl Prescription Opiate Litig.*, No. 1:17-MD-2804 (N.D. Ohio Aug. 17, 2022), ECF No. 4611-1, *appeal pending*, *Trumbull Cnty., Ohio v. Purdue Pharma*, L.P., No. 22-3753 (6th Cir.).

Meanwhile, on February 4, 2021, the U.S. District Court for the Eastern District of Texas dismissed Walmart's complaint against the DOJ on the grounds that the DOJ enjoyed sovereign immunity. Walmart lost again on appeal. *See Walmart Inc. v. U.S. Dep't of Justice*, 21 F.4th 300, 305 (5th Cir. 2021).

T. The Books And Records Action

On May 4, 2020, two months after the *Pro Publica* article, two of the three plaintiffs sent Walmart a demand to inspect books and records under Section 220. Walmart rejected the demand in its entirety. *See* Compl. ¶¶ 57–63.

***27** On June 17, 2020, Plaintiff Police and Fire Retirement System of the City of Detroit pursued its enforcement actions.[52] Plaintiff Norfolk County Retirement System pursued its enforcement action on the same date.[53] Plaintiff Ontario Provincial Council of Carpenters' Pension Trust Fund filed its enforcement action on August 21, 2020.[54] The three plaintiffs agreed to coordinate their Section 220 actions. On October 19, 2020, the court found that Walmart lacked any reasonable basis to dispute the proper purpose element for production under Section 220 and that the plaintiffs were entitled to many of Walmart's books and records that they requested. *See Walmart*, C.A. No. 2020-0478-JTL, Dkt. 37 at 50–51. By final order dated October 29, 2020, the court required Walmart to produce various categories of documents. *See Walmart*, C.A. No. 2020-0478-JTL, Dkt. 39.

52 *See* Verified Complaint Pursuant to 8 *Del. C.* 220 to Compel Inspection of Books and Records, *Police & Fire Ret. Sys. of City of Detroit v. Walmart Inc.*, C.A. No. 2020-0478-JTL, Dkt. 1 (Del. Ch. June 17, 2020).

53 *See* Verified Complaint Pursuant to 8 *Del. C.* 220 to Compel Inspection of Books and Records, *Norfolk Cnty. Ret. Sys. v. Walmart Inc.*, C.A. No. 2020-0482-JTL, Dkt. 1 (Del. Ch. June 17, 2020).

54 *See* Verified Complaint Pursuant to 8 *Del. C.* 220 to Compel Inspection of Books and Records, *Ontario Provincial Council of Carpenters' Pension Trust Fund v. Walmart Inc.*, C.A. No. 2020-0697-JTL, Dkt. 1 (Del. Ch. Aug. 21, 2020).

On January 27, 2021, Walmart purported to complete its production of books and records and produced a certification of completeness. The plaintiffs asserted that Walmart's Section 220 production and its privilege log were utterly deficient. After additional correspondence between the parties, Walmart produced a revised privilege log on April 9, 2021, and a supplemental production on April 12, 2021.

U. This Litigation

The plaintiffs filed their initial complaint on September 27, 2021. Dkt. 1. The complaint was thorough and evidenced considerable effort. It was 135 pages long and contained 316 numbered paragraphs. It was not a pastiche of prolix invective, but rather a detailed effort to assert viable derivative claims.

The defendants moved to dismiss the complaint in its entirety, and the plaintiffs filed an amended complaint as contemplated by Court of Chancery Rule 15(aaa). The plaintiffs filed the currently operative complaint on February 22, 2022. Dkt. 23. It is 162 pages long and contains 379 numbered paragraphs.

It names as defendants eight members of the Board and two Walmart officers who were not on the Board. Three members of the Board also served as company officers, as defined by Walmart's bylaws.

In Count I, the operative complaint asserts that the directors breached their fiduciary duties by consciously failing to ensure that Walmart complied with the Controlled Substances Act and the DEA Settlement. Compl. ¶ 363. The complaint alleges that the directors also failed to make a good faith effort "to implement and monitor internal reporting policies and systems." *Id.* ¶ 364.

In Count II, the operative complaint asserts that the officers breached their fiduciary duties in the same manner as the directors. An additional, officer-specific theory asserts that the officers breached their fiduciary duties "by failing to inform the Board about Walmart's regulatory compliance failures in dispensing and self-distributing opioids." *Id.* ¶ 375.

On June 24, 2022, Walmart moved to dismiss the amended complaint in its entirety. Walmart argued that the plaintiffs' claims were time-barred, that the plaintiffs had not established demand futility under Rule 23.1, and that the claims against two of the officer defendants should be dismissed under Rule 12(b)(6). Alternatively, Walmart requested a stay of litigation pending resolution of the DOJ Action. On September 28, 2022, the court heard oral argument on this motion.

V. The Nationwide Settlement

***28** On November 15, 2022, Walmart announced that it had agreed to the Nationwide Settlement, which it described as "a $3.1 billion nationwide opioid settlement framework designed to resolve substantially all opioid lawsuits and potential lawsuits by state, local, and tribal governments, if all conditions are satisfied."[55] If the conditions for the Nationwide Settlement are met, then Walmart's directors and officers will be released from liability to the signatory plaintiffs. PSB Ex. A § I.P.

55 Press Release, Walmart, Inc., Walmart Announces Nationwide Opioid Settlement Framework (Nov. 15, 2022).

The Nationwide Settlement did not resolve all of the opioid cases involving Walmart. Most notably, the DOJ Action remains pending.

In the Nationwide Settlement, Walmart denied all claims and allegations of wrongdoing. At the same time, Walmart agreed to implement expansive procedures and controls, including procedures to avoid diversion of controlled substances. It is reasonable to infer that before the Nationwide Settlement, even though Walmart had taken some steps to improve its oversight policies, its controls remained inadequate. Otherwise, the controls could not have been part of the consideration for the settlement.

By letter dated as of November 21, 2022, the court asked the parties to address whether the settlement had implications for the court's consideration of the pending motions. The parties submitted supplemental briefs on that topic on January 13, 2023.

This decision addresses the defendants' motion to dismiss the complaint pursuant to Court of Chancery Rule 23.1—on the grounds that the plaintiff did not make a demand on the board and failed to plead that demand would have been futile—and pursuant to Court of Chancery Rule 12(b)(6). This decision also addresses the defendants' request to stay the proceedings.

II. LEGAL ANALYSIS

The director defendants have moved to dismiss the complaint under Court of Chancery Rule 23.1 for failure to plead demand futility. In its entirety, Rule 23.1(a) states:

> In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

The innocuous language of the second sentence supports the edifice of Rule 23.1 jurisprudence. *See Lebanon Cnty. Empls' Ret. Fund v. Collis* (*Collis Demand Decision*), 2022 WL 17841215, at *13 (Del. Ch. Dec. 22, 2022).

Rule 23.1's second sentence is the "procedural embodiment" of substantive principles of Delaware law. *Rales v. Blasband*, 634 A.2d 927, 932 (Del. 1993). When a corporation suffers harm, the board of directors is the institutional actor legally empowered to determine what, if any, remedial action the corporation should take, including pursuing litigation against the individuals involved. *See* 8 *Del. C.* § 141(a). "A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation." *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984).[56] "Directors of Delaware corporations derive their managerial decision making power, which encompasses decisions whether to initiate, or refrain from entering, litigation, from 8 *Del. C.* § 141(a)." *Zapata Corp. v. Maldonado*, 430 A.2d 779, 782 (Del. 1981) (footnote omitted). "The board's authority to govern corporate affairs extends to decisions about what remedial actions a corporation should take after being harmed, including whether the corporation should file a lawsuit against its directors, its officers, its controller, or an outsider." *Zuckerberg*, 262 A.3d at 1047.

56 In *Brehm v. Eisner*, 746 A.2d 244, 253–54 (Del. 2000), the Delaware Supreme Court overruled seven precedents, including *Aronson* to the extent that they reviewed a Rule 23.1 decision by the Court of Chancery under an abuse of discretion standard or otherwise suggested deferential appellate review. *Brehm*, 746 A.2d at 253 n.13 (overruling in part on this issue *Scattered Corp. v. Chi. Stock Exch.*, 701 A.2d 70, 72–73 (Del. 1997); *Grimes v. Donald*, 673 A.2d 1207, 1217 n.15 (Del. 1996); *Heineman v. Datapoint Corp.*, 611 A.2d 950, 952 (Del. 1992); *Levine v. Smith*, 591 A.2d 194, 207 (Del. 1991); *Grobow v. Perot*, 539 A.2d 180, 186 (Del. 1988); *Pogostin v. Rice*, 480 A.2d 619, 624–25 (Del. 1984); and *Aronson*, 473 A.2d at 814). The *Brehm* Court held that going forward, appellate review of a Rule 23.1 determination would be *de novo* and plenary. *Brehm*, 746 A.2d at 254. The seven partially overruled precedents otherwise remain good law. This decision does not rely on any of them for the standard of appellate review. Having described *Brehm*'s relationship to these cases, this decision omits their cumbersome subsequent history. More recently, the Delaware Supreme Court overruled *Aronson* and *Rales*, to the extent that they set out alternative tests for demand futility. *United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1059 (Del. 2021). The high court adopted a single, unified test for demand futility. Although the *Zuckerberg* test displaced the prior tests, cases properly applying *Aronson* and *Rales* remain good law. *Id.* This decision therefore does not identify any precedents, including *Aronson* and *Rales*, as having been overruled by *Zuckerberg*.

***29** "In a derivative suit, a stockholder seeks to displace the board's decision-making authority over a litigation asset and assert the corporation's claim." *Id.* (cleaned up). Unless the board of directors permits the stockholder to proceed, a stockholder only can pursue a cause of action belonging to the corporation if (i) the stockholder demanded that the directors pursue the corporate claim and they wrongfully refused to do so, or (ii) demand is excused because the directors are incapable of making an impartial decision regarding the litigation. *Id.*

Rule 23.1 imposes a pleading requirement so that demand principles can be applied at the outset of a case to determine whether the plaintiff has standing to sue. *See id.* at 1048. To satisfy the pleading requirements of Rule 23.1, the plaintiff "must comply with stringent requirements of factual particularity that differ substantially from ... permissive notice pleadings...." *Brehm*, 746 A.2d at 254. Under the heightened pleading requirements of Rule 23.1, "conclusionary [sic] allegations of fact or law not supported by allegations of specific fact may not be taken as true." *Grobow*, 539 A.2d at 187.

"When considering a motion to dismiss a complaint for failing to comply with Rule 23.1, the Court does not weigh the evidence, must accept as true all of the complaint's particularized and well-pleaded allegations, and must draw all reasonable inferences in the plaintiff's favor." *Zuckerberg*, 262 A.3d at 1048. Rule 23.1 requires that a plaintiff allege specific facts, but "he need not plead evidence." *Aronson*, 473 A.2d at 816; *accord* *Brehm*, 746 A.2d at 254 ("[T]he pleader is not required to plead evidence.").

The plaintiffs in this case chose not to make a pre-suit demand that asked the Board to consider asserting the claims in their complaint. The question under Rule 23.1 is therefore whether "demand is excused because the directors are incapable of making an impartial decision regarding whether to institute such litigation." *Stone v. Ritter*, 911 A.2d 362, 367 (Del. 2006).

When conducting a demand futility analysis, a Delaware court proceeds on a claim-by-claim and director-by-director basis.[57] As to each claim, the court asks for each director,

(i) whether the director received a material personal benefit from the alleged misconduct that is the subject of the litigation demand;

(ii) whether the director faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand; and

(iii) whether the director lacks independence from someone who received a material personal benefit from the alleged misconduct that would be the subject of the litigation demand or who would face a substantial likelihood of liability on any of the claims that are the subject of the litigation demand.

Zuckerberg, 262 A.3d at 1059. "If the answer to any of the questions is 'yes' for at least half of the members of the demand board, then demand is excused as futile" for purposes of that claim. *Id.* If another set of claims arises out of a different nucleus of operative facts or concerns a different transaction, then the court moves on to the next claim and repeats the process.

57 *See, e.g.*, *Khanna v. McMinn*, 2006 WL 1388744, at *14 (Del. Ch. May 9, 2006) ("This analysis is fact-intensive and proceeds director-by-director and transaction-by-transaction."); *Beam v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003) ("Demand futility analysis is conducted on a claim-by-claim basis"), *aff'd*, 845 A.2d 1040 (Del. 2004).

How to organize the analysis in this case presents a challenge. The plaintiffs have advanced three species of claims:

***30** • The plaintiffs assert that Walmart's directors and officers knew that Walmart was not complying with the Controlled Substances Act and the DEA Settlement and made conscious decisions to prioritize profits over legal compliance, thereby intentionally choosing to violate the law (the "*Massey* Claim").

• The plaintiffs assert that Walmart's directors and officers were put on notice by a steady stream of red flags indicating that Walmart was failing to comply with its obligations under the Controlled Substances Act and the DEA Settlement, yet consciously ignored those warnings (the "Red-Flags Claim").

• The plaintiffs assert that Walmart's directors and officers knew they had an obligation to establish information systems sufficient to enable them to monitor Walmart's compliance with the Controlled Substances Act and the DEA Settlement, yet consciously failed to make a good faith effort to fulfill that obligation (the "Information-Systems Claim").

The plaintiffs seek to apply these claims to three categories of alleged wrongdoing.

• The plaintiffs maintain that the directors and officers breached their fiduciary duties in connection with Walmart's failures to fulfill its obligations as an opioid dispenser under the DEA Settlement (the "DEA Settlement Issues").

• The plaintiffs maintain that the directors and officers breached their fiduciary duties in connection with Walmart's failures to comply with its obligations as an opioid dispenser under the Controlled Substances Act (the "Pharmacy Issues").

• The plaintiffs maintain that the directors and officers breached their fiduciary duties in connection with Walmart's failures to comply with its obligations as an opioid distributor under the Controlled Substances Act (the "Distributor Issues").

Three different legal theories applied to three categories of wrongdoing work out to nine separate claims.[58]

58 This decision makes one simplifying assumption. During the term of the DEA Settlement, both the DEA Settlement Issues and the Pharmacy Issues are in play. The plaintiffs understandably prioritize the DEA Settlement during its term of existence: Through that agreement, Walmart made specific and enforceable commitments to its primary regulator about establishing and maintaining a compliance system, and Walmart agreed to a time frame for accomplishing its commitments. This decision therefore focuses on the DEA Settlement Issues for the period of time when the DEA Settlement was in effect. There is no need to review the same time period a second time under the guise of the Pharmacy Issues.

Now add the directors. When the plaintiffs filed this action, the Board had twelve members (the "Demand Board"). Eight are defendants: S. Robson Walton, Gregory Penner, Steuart Walton, Douglas McMillon, Steven Reinemund, Timothy Flynn, Marissa Mayer, and Thomas Horton. Four are not defendants: Carla Harris, Sarah Friar, Cesar Conde, and Randall Stephenson. To adequately allege demand futility, the plaintiffs must plead particularized facts that provide a reason to doubt that at least six members of the Demand Board could have objectively considered a demand to assert the claims advanced in the complaint.

The plaintiffs seek to establish that the eight directors named as defendants could not have properly considered a demand. A thorough and methodical march through the combinations would result in seventy-two different units of analysis (3 claims * 3 issues * 8 directors). That would be painful to write and even more painful to read.

***31** In an attempt to make the analysis more manageable, this decision starts by discussing the common features that unite a *Massey* Claim, a Red-Flags Claim, and an Information-Systems Claim. At bottom, each is a means of identifying bad faith conduct, and although the claims nominally target different types of culpable action, the difference is one of degree, not of kind. Treating each type of claim as distinct can be analytically helpful. In a case like this one, it can be burdensome. The more efficient path is to examine each category of underlying misconduct and ask whether the particularized facts support an inference that the directors acted in bad faith, using the three species of claims as paradigms to guide the analysis, rather than as forms of action that the allegations must fit.

A. Three Similar Claims

A *Massey* Claim, a Red-Flags Claim, and an Information-Systems Claim each rest on the same concept: a breach of the duty of loyalty grounded on bad faith action. Each also strives to address situations where the defendant fiduciaries have not made a single, easily identifiable decision, such as a decision to sell the company or approve a self-interested transaction. "Instead, there will be a period of time (perhaps prolonged) marked by a combination of inaction and occasional action, followed by a corporate trauma in which the corporation suffers substantial harm." *Ontario Provincial Council of Carpenters' Pension Tr. Fund v. Walton* (*Walmart Laches*), 2023 WL 2904946, at *18 (Del. Ch. Apr. 12, 2023). The core question in that setting is whether there is a basis to hold the corporate fiduciaries accountable for allowing the trauma to happen. *Id.*

Intuitively, the concept of allowing a corporate trauma to happen sounds like negligence, perhaps even gross negligence, but in any event an inquiry grounded in the duty of care. Corporate fiduciaries might have caused the trauma by making decisions that led to a tragic outcome, but disinterested and independent directors who were not also sociopaths would not intentionally cause a corporate trauma to happen. It follows that the duty of oversight generally derives from the duty of care, rather than from the duty of loyalty. In *Graham v. Allis Chalmers Manufacturing Co.*, the Delaware Supreme Court's initial foray into this area, the justices seemed to envision that oversight liability might result from a breach of either the duty of loyalty or the duty of care. 188 A.2d 125, 130 (Del. 1963). In his landmark decision in *Caremark*, Chancellor Allen also seemed to contemplate both paths, and he most often framed the duty of oversight in the language of care. *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 960, 964, 967, 671 (Del. 1996). In one passage, however, he posited that liability only would exist if the oversight failure was sufficiently egregious such that a court could infer that the directors had acted in bad faith. *Id.* at 971. Writing as a member of this court, Chief Justice Strine took up the question and held that liability for a breach of the duty of oversight always derives from the duty of loyalty, with no room for care. *See Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003). The Delaware Supreme Court subsequently adopted that formulation and held that a breach of the duty of loyalty, such as action in bad faith, is a "necessary condition to liability." *Stone*, 911 A.2d at 369–70.

An Information-Systems Claim, a Red-Flags Claim, and a *Massey* Claim each operate within that loyalty-based framework. An Information-Systems Claim and a Red-Flags Claim become loyalty-based through the premise that a conscious decision not to act is just as much of a decision as an affirmative act and thus can be the product of bad faith. The *Massey* Claim looks for or implies an affirmative decision to violate the law, which is similarly a decision to act in bad faith. *See Walmart Laches*, 2023 WL 2904946, at *21.

***32** Sophisticated and well-advised individuals do not formally document bad faith decisions, so rarely will there be direct evidence to support an Information-Systems Claim, a Red-Flags Claim, or a *Massey* Claim. Instead, for each theory, "the court looks at a series of fiduciary inactions and actions, made over time, to determine whether they support an inference that the corporate fiduciaries were operating in bad faith." *Id.*

- A strong pattern of conduct can support an inference that the corporate fiduciaries intentionally decided to cause the corporation to violate the law, typically because the costs and other burdens associated with compliance would cut into profits. "The inference that corporate fiduciaries made a decision to violate the law is the foundation for a *Massey* Claim." *Id.*

- A less strong pattern of conduct can support an inference that the corporate fiduciaries were put on notice that the corporation was violating the law or otherwise headed for a corporate trauma, but willfully ignored the evidence and consciously decided to do nothing. "That inference is the foundation for a Red-Flags Claim." *Id.*

- A final pattern of conduct addresses the situation where information did not reach the corporate fiduciaries. If the corporate trauma resulted from a central compliance area that fiduciaries acting in good faith would monitor, and if the corporate fiduciaries did not have a monitoring system that reflects a good faith effort to bring timely and actionable information to their attention, then the absence of such a system may support an inference that the corporate fiduciaries willfully blinded themselves to a known risk. "That inference is the foundation for an Information-Systems Claim." *Id.*

In practice, the three theories are not so different after all. Each involves looking at the pleading-stage record, using the innate human capacity to deploy the theory of mind, and drawing inferences about what the corporate fiduciaries could have believed or intended. *See id.*

Because of their similarities, plaintiffs often try to plead the theories in the alternative. Simultaneously advancing both a Red-Flags Claim and an Information-Systems Claim can seem counterintuitive, because to successfully plead a Red-Flags Claim requires facts supporting an inference that red flags reached the relevant fiduciary, and the fact that the red flags reached the fiduciary may suggest that an information system existed. But that will not always be so. Warnings or indications may reach the board episodically or by happenstance, without the directors having implemented an appropriate board-level system of protocols and processes designed to generate timely and actionable information. *See* *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019). Or a red flag may come from outside the corporation. In *Boeing*, the first crash of the 737 MAX was a blazing red flag, and the Boeing directors did not need an internal information system to learn about it. Nor did that horrific form of notice suggest that the Boeing board had adequate reporting systems in place. *See* *In re Boeing Co. Deriv. Litig.*, 2021 WL 4059934, at *33–34 (Del. Ch. Sept. 7, 2021). There would be no impediment to asserting both species of claims in those types of scenarios.

An Information-Systems Claim and a Red-Flags Claim can also coexist when an issue becomes more serious over time. Envision that a fiduciary may have failed to try to put an information system in place for a particular risk. Time and attention are scarce commodities, and that decision initially could be a proper exercise of business judgment. The decision might then become dubious as evidence accretes indicating that the risk has evolved into a core compliance risk. Once a tipping point is reached, the fiduciary's failure to implement an information system could support an Information-Systems Claim. After a fortunate period without a corporate trauma, notwithstanding the absence of an information system, a red flag may put the fiduciary on notice about an area of legal noncompliance or a threat of serious harm. If the fiduciary does nothing and a corporate trauma results, then an Information-Systems Claim may exist for the full period from the tipping point through the corporate trauma, and a Red-Flags Claim may exist for the period after the red flag through the corporate trauma.

***33** Simultaneously advancing a *Massey* Claim with either a Red-Flags Claim or an Information-Systems Claim poses fewer conceptual difficulties. A *Massey* Claim requires an aggregation of pled facts sufficient to support an inference that a corporate fiduciary made a conscious decision to violate the law. The facts may include hallmarks of other claims, such as a persistent failure to implement a monitoring system for an obvious central compliance risk or a pattern of chancing upon red flags, yet persistently failing to act or resorting to only cosmetic action. The most telling indications include steps to encourage, enable, or profit from noncomplaint behavior.[59] At some point, a pattern that could provide support for an Information-Systems Claim or a Red-Flags Claim may reach the level where it supports an inference that the board was consciously condoning illegal conduct.

59 *E.g.*, *Collis Demand Decision*, 2022 WL 17841215, at *8, 18 (discussing board approval of double trigger for suspicious order reporting that cut suspicious orders by two orders of magnitude); *La. Mun. Police Empls.' Ret. Sys. v. Pyott*, 46 A.3d 313, 352–53 (Del. Ch. 2012) (discussing board approval of business plan with targets that only could be achieved through company promotion of off-label uses), *rev'd on other grounds*, 74 A.3d 612 (Del. 2013); *In re Am. Int'l Grp., Inc.*, 965 A.2d 763, 794-99 (Del. Ch. 2009) (Strine, V.C.) (multifaceted financial fraud), *aff'd sub nom. Teachers' Ret. Sys. of Louisiana v. PricewaterhouseCoopers LLP*, 11 A.3d 228 (Del. 2011). *Cf.* *City of Birmingham Ret. & Relief Sys. v. Good*, 177 A.3d 47, 68–69 (Del.

2017) (Strine, C.J., dissenting) (considering totality of company's recidivist violations of regulatory restrictions, reliance on political influence to reduce regulatory consequences, and regulators' rejection of settlement with company when deal was subjected to scrutiny). Other cases have upheld *Massey*-style oversight claims involving accounting improprieties or complicity in self-dealing. *See* *Stewart v. Wilm. Tr. SP Servs. Inc.*, 112 A.3d 271, 281, 301 (Del. Ch. 2015) (denying motion to dismiss by director who "went along without raising a peep" with a "fraudulent scheme year after year"); *ATR-Kim Eng. Fin. Corp. v. Araneta*, 2006 WL 3783520, at *1, *19 (Del. Ch. Dec. 21, 2006) (entering judgment against two directors who acted with "complicity" and as "stooges" for a controlling stockholder and board chair who engaged in self-dealing; holding outside directors liable for breach of the duty of loyalty in failing to monitor the controlling shareholder); *Saito v. McCall*, 2004 WL 3029876, at *1, 7 (Del. Ch. 20, 2004) (denying motion to dismiss oversight claim alleging that directors "presided over a fraudulent accounting scheme").

The line between the claims can also blur because of the distinction between legal risk and illegality. A core part of a director's job is to identify and assess risk, including legal risk, and to make business judgments about whether a project is likely to increase the long-term value of the corporation for the ultimate benefit of its stockholders. *See generally* *Frederick Hsu Living Tr. v. ODN Hldg. Corp.*, 2017 WL 1437308, at *17–21 (Del. Ch. Apr. 14, 2017). Some projects involve more legal risk than others and, depending on the outcome, can expose the corporation to civil liability. When directors make a business decision that carries legal risk, but which otherwise involves legally compliant conduct, then the business judgment rule protects that decision. The same principle applies to a board's decision to act or not act in response to red flags. "Simply alleging that a board incorrectly exercised its business judgment and made a 'wrong' decision in response to red flags, however, is insufficient to plead bad faith." *Melbourne Mun. Firefighters' Pension Tr. Fund v. Jacobs*, 2016 WL 4076369, at *9 (Del. Ch. Aug. 1, 2016), *aff'd*, 158 A.3d 449 (Del. 2017). To establish the requisite inference of bad faith, a plaintiff would have to plead (and later prove) that the directors knew from the red flags that the corporate trauma was coming and nevertheless forged ahead for reasons unrelated to the best interests of the corporation. "The decision about what to do in response to a red flag is one that an officer or director is presumed to make loyally, in good faith, and on an informed basis, so unless one of those presumptions is rebutted, the response is protected by the business judgment rule." *McDonald's Directors*, 2023 WL 2293575, at *17.

***34** What a corporate fiduciary cannot do, however, is make a business judgment to cause or allow the corporation to break the law. "Delaware law does not charter law breakers." *In re Massey Energy Co.*, 2011 WL 2176479, *20 (Del. Ch. May 31, 2011). As the *Massey* decision explains,

> Delaware law allows corporations to pursue diverse means to make a profit, subject to a critical statutory floor, which is the requirement that Delaware corporations only pursue "lawful business" by "lawful acts." As a result, a fiduciary of a Delaware corporation cannot be loyal to a Delaware corporation by knowingly causing it to seek profit by violating the law.

Id. at *20 (footnoted omitted). "[I]t is utterly inconsistent with one's duty of fidelity to the corporation to consciously cause the corporation to act unlawfully. The knowing use of illegal means to pursue profit for the corporation is director misconduct." *Desimone v. Barrows*, 924 A.2d 908, 934–35 (Del. Ch. 2007) (cleaned up). "[A] fiduciary may not choose to manage an entity in an illegal fashion, even if the fiduciary believes that the illegal activity will result in profits for the entity." *Metro Commc'n Corp. BVI v. Advanced Mobilecomm Techs. Inc.*, 854 A.2d 121, 131 (Del. Ch. 2004).

The business judgment rule plays no role in a decision to proceed in a way that violates the law. As a result, there is a fundamental difference between the following two scenarios, each involving a legal assessment.

- In one hypothetical scenario, the lawyers say: "Although there is some room for doubt and hence some risk that our regulator may disagree, we believe the company is complying with its legal obligations and will remain in compliance if you make the business decision to pursue this project."

- In the other hypothetical scenario, the lawyers say: "The company is not currently in compliance with its legal obligations and faces the risk of enforcement action, and if you make the business decision to pursue this project, the company is likely to remain out of compliance and to continue to face the risk of an enforcement action. But the regulators are so understaffed and overworked that the likelihood of an enforcement action is quite low, and we can probably settle anything that comes at minimal cost and with no admission of wrongdoing."

In the former case, the directors can make a business judgment to pursue the project. In the latter case, the decision to pursue the project would constitute a conscious decision to violate the law, the business judgment rule would not apply, and the directors would be acting in bad faith.

Because of the similarities among the three types of claims, this decision does not analyze each of the three categories of issues using each of the three legal frameworks. For each category, the core question is whether the plaintiffs have alleged particularized facts supporting an inference that the directors acted in bad faith. Reframed for purposes of demand futility under the second prong of *Zuckerberg*, the question is whether there is sufficient reason to think that the director acted in bad faith such that the director faces a substantial likelihood of liability. For two of the directors who are members of the Walton family, a question also arises about whether they can validly consider a demand to assert claims that would result in Robson Walton, a patriarch of the Walton family, facing a substantial likelihood of liability.

B. The DEA Settlement Issues

***35** The first category of alleged wrongdoing involves the DEA Settlement Issues. During the term of the DEA Settlement, the directors in office received a series of reports about Walmart's compliance with its requirements. The pleading-stage record supports an inference that the directors learned that Walmart was not complying with the DEA Settlement and could not achieve compliance before the agreement expired, yet consciously chose not to take action to achieve compliance, such as by instructing management to devote more resources to compliance initiatives. Walmart's redactions to its Section 220 documents contribute to this result, because they support an inference that, as the reality of noncompliance became clearer and the term of the DEA Settlement loomed, Walmart's directors and officers did nothing other than talk with lawyers. Walmart's directors and officers did not have non-privileged discussions about the business issues that the situation presented, nor did they make non-privileged business decisions about what to do.

Importantly, the contention is not that Walmart did nothing on the compliance front. The pleading-stage record shows that Walmart initially drafted an extensive set of policies and procedures that described a nice-sounding compliance program for its pharmacies. Walmart eventually created an inventory control system that targeted internal diversion. But Walmart did not take the steps necessary to comply with the DEA Settlement. The pleading-stage record supports an inference that the directors knew about the noncompliance and allowed it to happen, meaning that they consciously condoned illegality.

The pleading-stage record also points to a motive for the conscious decision not to devote more resources to compliance: Walmart was driving opioid prescription traffic to its pharmacies both to generate pharmacy sales and get customers into Walmart's stores so that they would buy other products. Walmart was simultaneously incentivizing and pressuring its pharmacists to fill more prescriptions and do it faster. Devoting more resources to achieving compliance with the DEA Settlement would have cost money and undercut those initiatives.

1. The Director-by-Director Analysis

For demand futility, the dispositive issue is whether the complaint alleges particularized facts providing reason to doubt that a majority of the directors on the Demand Board could make a disinterested and independent decision about whether to assert claims relating to the DEA Settlement Issues. Conducting that inquiry requires a director-by-director analysis.

a. S. Robson Walton

S. Robson Walton is the son of Walmart founder Sam Walton. He joined Walmart in 1969 and became a director in 1978. He served as Chairman (later Chairperson) of the Board from 1992 until 2015. Under Walmart's bylaws, the Chairman is an executive officer with particular responsibility for "focusing on oversight and governance matters."[60] As Chairman, Walton served as an executive officer while the DEA Settlement was in effect.[61]

60 Wal-Mart Stores, Inc., Definitive Proxy Statement (Schedule 14A), at 33 (Apr. 23, 2014) ("Our Chairman, on the other hand, is charged with presiding over all meetings of the Board and our shareholders, and providing advice and counsel to the CEO and our company's other officers regarding our business and operations, as well as focusing on oversight and governance matters."); *see, e.g.*, *id.* ("Chairman: S. Robson Walton – presides over meetings of the Board and shareholders; provides advice and counsel to the CEO and other officers; focuses on oversight and governance matters"(formatting omitted)).

61 *See* Walmart Inc., Amended and Restated Bylaws, Art. IV § 1 ("The officers of the Corporation shall consist of a President, a Chief Financial Officer, a Secretary and a Treasurer, and such other officers as the Board may appoint, including but not limited to a Chairman of the Board, a Chief Executive Officer, a Chief Operating Officer, one or more Executive Vice Presidents, one or more Senior Vice Presidents, one or more Vice Presidents, one or more Assistant Secretaries, and one or more Assistant Treasurers.").

***36** The plaintiffs have pled facts supporting an inference that Walton knew about the DEA Settlement. He was Chairman when Walmart received the Order to Show Cause in November 2009, and he was Chairman when Walmart entered into the DEA Settlement in February 2011. Given Walton's responsibilities as Chairman and the material risk that losing Walmart's DEA licenses posed to its business, it is inconceivable that Walton did not know about those developments.

Through the DEA Settlement, Walmart committed to implement and maintain a compliance system for its pharmacies during the term of the DEA Settlement, which ran from March 11, 2011 to March 11, 2015. By August 2011, Walmart had created the paperwork necessary for a nice-sounding pharmacy compliance program, including policies and procedures for its pharmacists to follow. *See* Ex. 15. But by October 2011, the actual implementation of the program had foundered due to inadequate funding. *See* Ex. 82. In January 2012, the Audit Committee and the Executive Committee received the 2012 Memo, which reported that compliance efforts had fallen behind schedule and stated bluntly that "[s]ignificant compliance issues remain unresolved." Ex. 6 at '035. The 2012 Memo reported that "a proposed five-year plan" was "being developed," implying that a plan currently did not exist and forecasting that compliance could not be achieved until 2017, two years after the DEA Settlement expired. *Id.*

Walton was a member of the Executive Committee and received the 2012 Memo, which called out Walton as a recipient. It is reasonable to infer that Walton, the other members of the Executive Committee, and the members of the Audit Committee knew in January 2012 that Walmart was failing to meet its obligations under the DEA Settlement and would not be able to achieve compliance within the term of that agreement.

In August 2012, Walton learned about more compliance issues when a whistleblower notified him that pharmacists were filling prescriptions for controlled substances that bore numerous red flags. That was the same behavior that led to the DEA Settlement in the first place. There is no indication in the record that Walton took action in response.

In April 2013, Walton attended a meeting of the Audit Committee. Ex. 10. Just a month earlier, the committee received another report about compliance in the Health and Wellness Division, this time from Harris. The report warned that the "diversion analytics tool to monitor suspicious controlled substance activity remains in a status of red," which indicated that the project had "major issues." Ex. 46 at '601. The report also showed that Walmart's Data Centralization project was in a status of red because Walmart had only purchased a limited amount of database capacity. One of the largest companies in the world was failing to achieve a core compliance goal because it had skimped on database capacity. It is reasonable to infer that the Audit Committee, Walton, and other meeting attendees discussed the March 2013 report at the April 2013 Audit Committee meeting. A properly motivated Audit Committee would have taken steps to ensure that the funds were provided. The pleading-stage record provides no indication that Walton or the Audit Committee took action.

Walton next attended a two-day meeting of the Board in September 2013, where the Chair of the Audit Committee reported to the Board about the status of Walmart's compliance initiatives. Ex. 47 at '207; *see* Ex. 7. The minutes are heavily redacted and provide no insight into the tenor of the discussion. At the pleading stage, the plaintiffs are entitled to an inference that the report conveyed the same message that the Audit Committee had received in March 2013, namely that key aspects of Walmart's compliance programs were not on track, that Walmart was not complying with the DEA Settlement, and that Walmart could not achieve compliance during the settlement's term. It is reasonable to infer that all of the directors then in office learned about those issues from that report. Walmart had used up two years and seven months of the four-year term and had only seventeen months left to comply with the DEA Settlement.

***37** Other than creating the paperwork for a nice-sounding pharmacy compliance program, Walmart's one compliance success was implementing an internal anti-theft system for its pharmacies. By reducing internal theft, Walmart helped its bottom line.

For other aspects of pharmacy compliance, Walmart had a long way to go. Evidencing what was happening with prescription opioids, the head of compliance for the Health and Wellness Division provided the Audit Committee in March 2014 with a photograph from July 2012. That picture is worth a thousand procedures. It depicted scores of patrons waiting in line at 7:00 a.m., two hours before the pharmacy opened, with a "very high number of prescriptions for Oxycodone." Compl. ¶ 185. It was only in the lead-up to a March 2014 meeting that the Health and Wellness compliance team "began to assess our processes" to avoid the "risk of our pharmacies becoming the pharmacy of choice for 'pill mills.' " *See* Ex. B at 8.

The time lag between the photograph and the report to the Audit Committee speaks volumes and supports an inference that Walmart had done nothing meaningful to address real-world problems at its pharmacies. Instead, Walmart had been taking steps to drive prescription traffic to its pharmacies while reducing the ability of its pharmacists to meet their Refusal-To-Fill Obligation. Management told the Audit Committee that *after* seeing the photograph, the compliance team had implemented additional operational controls in Florida, where the controls appeared to have had some effect. *See id.* at 10. There is no indication that the Audit Committee took any action in response to this disturbing report, such as requiring management to address what was happening in other states.

In June 2014, nine months before the DEA Settlement was scheduled to expire, the Health and Wellness Division evaluated the progress of Walmart's suspicious order monitoring project. *See* Ex. D. The assessment noted that a suspicious order monitoring system was not in place. *Id.* at '701 ("Is the Risk being mitigated today by manual, systemic, or a combination of both today (regardless of optimal or not)?"; "No."). The report identified the issue as "Board informed." *Id.* It is reasonable to infer that as Chairman of the Board, Walton was one of those on the Board who were informed.

In November 2014, Walton and the rest of the Board reviewed Walmart's compliance with the DEA Settlement. Walmart withheld the meeting minutes in their entirety on the basis of privilege. *See* Ex. 14 at Item No. 49. By doing so, Walmart represented that the Board did not discuss any business topics, evaluate any business considerations, or make any business decisions. It is reasonable to infer from documents in the record that Walmart was not in compliance with the DEA Settlement, that the directors knew about it, and that they took no action in response.

The complaint contains factual allegations and incorporates documents supporting an inference that Walmart failed to achieve compliance with the DEA Settlement because it prioritized profits:

- Walmart underfunded the internal team charged with implementing the compliance projects necessary to comply with the DEA Settlement. Walmart provided only $11 million of funding rather than the $40 million that the team estimated was needed. Ex. 82 at '364.

***38** • The slide deck that supported the 2012 Memo stated that the reboot of the Health and Wellness Division's compliance program needed "[s]easoned leadership that strikes the proper balance between business and compliance considerations." Ex. 6 at '040.

- Compliance efforts broke down in late 2012 and early 2013 because Walmart had failed to purchase enough database capacity to support a read-write database for pharmacy compliance. Ex. 46 at '601.

- In February 2015, one month before the DEA Settlement expired, one of Walmart's compliance directors for controlled substances told Walmart pharmacists that Walmart prioritized profits over compliance. Compl. ¶ 27.

- A Walmart employee from the Health and Wellness Division testified in the Opioid MDL trial that Walmart did not provide enough funding to pursue anti-diversion initiatives. *Id.* ¶ 253–254.

- Walmart engaged in substantial efforts to drive prescription opioid traffic to its pharmacies through trial offers, savings cards, e-coupons, and loyalty programs for opioids. *Id.* ¶¶ 115–119.

- Walmart created incentives for pharmacists to fill more prescriptions, including opioid prescriptions, while limiting the amount of time in which a pharmacist was expected to fill a prescription. *Id.* ¶¶ 119–120.

- Walmart delayed implementing a computer system that could help pharmacists identify red flags until 2015, then denied pharmacists access to the data in the system. *Id.* ¶¶ 25, 253, 255.

To be sure, none of these documents creates a direct connection to Walton or the Board, and there is no smoking gun at this stage of the case. Instead, the other documents in the pleading-stage record help explain why the directors consciously accepted Walmart's noncompliance with the DEA Settlement.

Walton was the Chairman during the term of DEA Settlement, a member of the Executive Committee, and a representative of the Walton family. It is reasonable to infer that he understood the course that Walmart was taking and approved the failure to comply with the DEA Settlement. It is reasonable to infer that he consciously accepted and approved Walmart's noncompliance with its obligations under the DEA Settlement.

Whether framed as a Red-Flags Claim or a *Massey* Claim, Walton faces a substantial risk of liability for acting in bad faith on the DEA Settlement Issues. He is not capable of considering a demand to assert those claims.

b. Gregory Penner

Gregory Penner is Walton's son-in-law. After marrying into the Walton family in 2006, he took on increasing responsibilities at Walmart. He joined the Board in 2008, held a number of senior roles at Walmart from 2008 to 2014, and served as the Board's Vice Chairman from June 2014 to June 2015. Penner was thus a senior officer at Walmart during the term of the DEA Settlement, and he served as Vice Chairman for the last nine months of the DEA Settlement. Like the position of Chairman, the position of Vice Chairman is an executive officer role. In June 2015, Penner succeeded Walton as Chairman, becoming the first Chairman who is not part of the Walton family by blood. Compl. ¶ 46.

The allegations about Penner largely parallel the allegations against Walton. Penner was on the Board for the same meetings and received the same information. The same conclusion applies regarding his substantial risk of liability for the DEA Settlement Issues. A reasonable doubt exists regarding his ability to consider a demand relating to those issues.

***39** Penner is also not disinterested regarding the DEA Settlement Issues because of his family connections to Walton. "The existence of a very close family relationship between directors should, without more, generally go a long (if not the whole) way toward creating a reasonable doubt."[62] "While there is nothing wrong with family members serving together on a board, ... a 'reasonable doubt' is raised when a demand would require a director to support a suit contrary to the interests of a close family member." *Mizel*, 1999 WL 550369, at *4. Delaware precedents have treated similar degrees of familial relationships between a director and a defendant who faces a substantial risk of liability as sufficient to render the director unable to consider a demand.[63] For that additional reason, a reasonable doubt exists about Penner's ability to consider a demand regarding the DEA Settlement Issues.

62 *Mizel v. Connelly*, 1999 WL 550369, at *4 (Del. Ch. July 22, 1999) (Strine, V.C.); *Harbor Fin. P'rs v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (Strine, V.C.) ("Close familial relationships between directors can create a reasonable doubt as to impartiality."); *Grimes*, 673 A.2d at 1216–17 (noting that a "familial interest" can disable a director).

63 *See* *In re Cooper Co., Inc. S'holders Deriv. Litig.*, 2000 WL 1664167, at *6 (Del. Ch. Oct. 31, 2000) ("The Complaint alleges that director Feghali was interested and/or lacked independence because he was Steven Singer's father in law. That family relationship is sufficient to create a reason to doubt Mr. Feghali's ability to impartially consider a demand."); *Grace Bros., Ltd. v. UniHolding Corp.*, 2000 WL 982401, at *10 (Del. Ch. July 12, 2000) (Strine, V.C.) (finding reasonable doubt about whether a director impartially could consider a demand adverse to the interests of his brother-in-law); *Harbor Fin.*, 751 A.2d at 889 (granting inference at pleading stage that reasonable doubt existed as to director's ability to consider a litigation demand impartially when the proposed defendant was his brother-in-law). *See generally* *Chaffin v. GNI Gp., Inc.*, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999) ("[M]ost parents would find it highly difficult, if not impossible, to maintain a completely neutral, disinterested position on an issue, where his or her own child would benefit substantially if the parent decides the issue a certain way").

c. Steuart Walton

Steuart Walton[64] has been a director since June 2016. He is Sam Walton's grandson, Robson's nephew, and Penner's cousin-in-law. The complaint does not plead particularized facts that could support Steuart facing a substantial likelihood of liability for the DEA Settlement Issues, but his familial relationships with Robson and Penner raise a reasonable doubt as to his independence.

64 To avoid confusion with Robson Walton, this decision refers to Steuart by his first name, without implying familiarity or disrespect.

d. Doug McMillon

Doug McMillon has worked for Walmart since 1990. He was named Walmart's next CEO in November 2013, when he also became a member of the Board. He took over as CEO on February 1, 2014. After becoming CEO, he joined the Executive Committee. McMillon was thus a senior officer and later CEO during the term of the DEA Settlement. He was a member of the Employee Compliance Committee and frequently attended Audit Committee meetings, including at least five when senior management reported on Health and Wellness compliance.[65]

65 Ex. 7 at '095; Ex. 43 at '511; Ex. 45 at '203–04; Ex. 48 at '117; Ex. 52 at '181–82.

It is reasonable to infer that McMillon knew about the DEA Settlement. It is also reasonable to infer that McMillon learned about Walmart's compliance issues during the February 2012 Audit Committee meeting, which he attended. Ex. 7. He also attended the Employee Compliance Committee meeting in November 2012, where Harris provided an update on Health and Wellness Compliance projects. Ex. 11 at 2. He attended the two-day September 2013 Board meeting when the Chairman of the Audit Committee reported on the state of compliance efforts, and he received the May 2014 Audit Committee report that showed Walmart was (i) facing ongoing diversion issues, (ii) had experienced a year-over-year increase in incidents of 114%, and (iii) had over one-fourth of its visits from state and federal regulators result in violations. Ex. 49 at 8–9, 10, 64. He was also a director when the June 2014 assessment acknowledged there was no suspicious order monitoring system in place and that the Board had been informed. *See* Ex. D at 4.

***40** For these reasons, McMillon faces a substantial threat of liability on the DEA Settlement Issues and cannot consider a demand. It is also reasonable to infer that McMillon is beholden to the Walton family, because the Walton family controls Walmart, and McMillon's position as CEO depends on pleasing the Walton family. The complaint alleges that McMillon is a "tried-and-true company man." Compl. ¶¶ 4, 70. He has been well-compensated for his service, having made over $150 million as a Walmart executive. *Id.* ¶ 70. Because of his loyalty to the Walton family and his position as CEO, there is reason to doubt whether McMillon could consider a demand to assert claims over the DEA Settlement Issues because of the risk they pose to Walton and Penner.

e. Steven Reinemund

Steven Reinemund joined the Board in 2010 and retired from the Board effective June 1, 2022. He served on the Strategic Planning and Finance Committee from 2014 to 2017. Unlike the directors considered up to this point, who were either members of the Walton family, insiders, or both, Reinemund was an outside director.

Reinemund served on the Board during the full term of the DEA Settlement. He is thus similarly situated to Walton and Penner in terms of his knowledge about Walmart's degree of compliance with the DEA Settlement. Although he was an outside director and was not a member of the Audit Committee, he otherwise received the same information, made the same decisions, and failed to act in the same manner. He therefore also faces a substantial risk of liability, and there is reason to doubt whether Reinemund could consider a demand.

The court reaches this conclusion reluctantly, because Reinemund is a person of stature who has had an impressive career. He graduated from the United States Naval Academy and served in the Marine Corps, rising to the rank of Captain. After leaving the military, Reinemund enjoyed success in the business world, culminating in the position of Chairman and CEO of PepsiCo from 2001 to 2003. From 2008 to 2014, he served as Dean of the Wake Forest University Business School. In addition to serving as a director at Walmart, he has served on the boards of other major public companies.

Why would an outside director like Reinemund ignore red flags about noncompliance with the DEA Settlement, much less make a conscious decision not to achieve compliance with the DEA Settlement? The answers likely lie in the redacted portions of the documents in Walmart's Section 220 production.

It would not be a stretch to think that the Board received legal advice along the following lines: "The Controlled Substances

Act requires substantial compliance, not strict compliance, so the DEA is likely to require only substantial compliance with the DEA Settlement. Walmart has taken some steps to comply with the DEA Settlement and the Controlled Substances Act and has made progress toward compliance. Although the company is not in full compliance and will not achieve full compliance before the DEA Settlement expires, counsel is of the opinion that Walmart has achieved substantial compliance." If Reinemund relied on that type of advice in getting comfortable with Walmart's failure to achieve full compliance with the DEA Settlement, then he could be fully protected under Sections 141(e) of the Delaware General Corporation Law. 8 *Del. C.* § 141(e). To my knowledge, no Delaware decision has addressed reliance on the advice of counsel in the context of an oversight claim, but it seems logical that directors would be fully protected in relying on advice of that sort, absent some blatant and obvious flaw in the advice that would undercut good faith reliance. *Cf. Boardwalk Pipeline P'rs, LP v. Bandera Master Fund LP*, 288 A.3d 1083 (Del. 2022).

***41** At this stage of the case, it is also possible that counsel may have advised the directors that Walmart had not achieved substantial compliance with the DEA Settlement, or that the DEA would require a higher level of compliance, but that the risk of a DEA enforcement action was low. The record shows that both during and after a meeting in November 2014 to discuss the DEA Settlement, the directors made no business decisions and took no action. If the directors consciously decided not to cause Walmart to comply with its legal obligations based on that advice, then they consciously chose a path of noncompliance and acted in bad faith.

Because of Walmart's redactions, the record that might vindicate Reinemund and his fellow directors does not yet exist. The court must draw the plaintiff-friendly inference that Reinemund and his colleagues knew that Walmart was not in compliance with the DEA Settlement, knew that Walmart could not achieve compliance by the time the DEA Settlement terminated, and consciously did nothing to bring Walmart into compliance. Those facts support a claim that Reinemund acted in bad faith. The court is therefore compelled to conclude that a reasonable doubt exists about Reinemund's ability to consider a demand based on the DEA Settlement Issues.

f. Timothy Flynn

Timothy Flynn became a director and a member of the Audit Committee in July 2012. He became Chairman of the Audit Committee in June 2014. Flynn served on the Board during the bulk of the term of the DEA Settlement, including the period when Walmart's noncompliance became clear.

Flynn is situated similarly to Reinemund. The only difference is that Flynn joined the Board and the Audit Committee after the 2012 Memo, the Audit Committee meeting where it was discussed, and the Board meeting where the Audit Committee reported on those matters. Otherwise, he and Reinemund received the same information, made the same decisions, and failed to act in similar ways.

Flynn is like Reinemund in another way too. He has had a distinguished career as an accountant and business leader, including serving as CEO of KPMG LLP in the U.S. from 2005 to 2008, and as Charmain of KPMG International from 2007 until 2011. In addition to his service on the Board, Flynn has served as a member of the boards of other major public companies and significant institutions.

As with Reinemund, it is hard to believe that an outside director like Flynn would ignore red flags about noncompliance with the DEA Settlement, much less make a decision not to comply with it. Once again, the answers likely lie in the redacted portions of the documents in Walmart's Section 220 production. Unfortunately, because of Walmart's compulsive redacting of documents, the pleading-stage record supports an inference that Flynn knew that Walmart was not in compliance with the DEA Settlement, knew that Walmart could not achieve compliance by the time the DEA Settlement terminated, and did nothing to bring the company into compliance. The court is therefore compelled to conclude that a reasonable doubt exists about Flynn's ability to consider a demand based on the DEA Settlement Issues.

2. The Conclusion Regarding Demand Futility

The pleading-stage record supports an inference that the foregoing directors could not consider a demand. The strongest precedent for a contrary outcome is *Horman v. Abney*.[66] There, the New York Attorney General launched an investigation into deliveries of unstamped and untaxed cigarettes by United Parcel Services, Inc. ("UPS"). To resolve the investigation, UPS entered into an Assurance of Discontinuance Agreement (the "UPS Agreement") that placed affirmative obligations on UPS to set up policies, programs, and procedures to ensure compliance with New

York state law. These measures included "investigating shippers, creating a database of tobacco shippers and sharing that list with the State of New York, auditing the shippers, refusing to ship untaxed cigarettes and imposing progressive discipline against non-compliant shipping customers up to and including a ban on those customers from using any UPS service."[67] UPS also agreed to conduct compliance audits, maintain associated records, implement a "UPS Cigarette Policy," and regularly train its employees on how to ensure enforcement of the policy.[68] One year into the agreement, a UPS compliance officer told the UPS board of directors (the "UPS Board") that UPS had achieved compliance. Years later, the City and State of New York filed suit against UPS in federal court, alleging that UPS had violated the UPS Agreement and state and federal law. The enforcement action sought damages of at least $180 million.[69]

66 2017 WL 242571 (Del. Ch. Jan. 19, 2017).

67 *Id.* at *3.

68 *Id.*

69 *Id.* at *5.

***42** Stockholders of UPS filed a derivative lawsuit that sought to hold the UPS Board liable for breaching their fiduciary duty of loyalty by consciously failing to monitor and manage UPS's compliance with state and federal laws governing the transportation and delivery of cigarettes. Vice Chancellor Slights dismissed the claim under Rule 23.1.

Because *Horman* involved an agreement that bears a resemblance to the DEA Settlement, the dismissal in *Horman* is a natural precedent for the defendants. The facts of *Horman*, however, are distinguishable in multiple ways.

First, the plaintiffs in *Horman* argued that after initially achieving compliance with the UPS Agreement, the UPS Board began to "ignore their oversight responsibilities" to a degree that caused UPS to "operate in violation of the [UPS Agreement] and applicable state and federal laws governing the shipment of cigarettes."[70] In this case, there was no initial period of compliance. Walmart never achieved compliance. Instead, compliance personnel reported to the Board that Walmart was failing to achieve compliance.

70 *Id.* at *4.

Second, the plaintiffs in *Horman* argued that documents produced in response to their Section 220 demand "reveal an absence of any Board minutes or other Board materials relating to the monitoring of compliance with the [UPS Agreement] from January 1, 2010 to February 12, 2014," and they sought an inference that the defendants "did absolutely nothing to oversee UPS's compliance with the [UPS Agreement] or cigarette laws in any way."[71] In this case, the pleading-stage record shows reports to the Audit Committee and the Board. The question is not whether the Walmart directors engaged in monitoring, but rather whether the directors were put on notice of Walmart's noncompliance with the DEA Settlement. The pleading-stage record supports that inference.

71 *Id.* at *8.

Third, the plaintiffs in *Horman* argued that the UPS Board should have engaged in greater monitoring because of the UPS Agreement. Vice Chancellor Slights held that the UPS Board made a good faith effort to engage in monitoring.[72] Again, the issue in this case is not whether the Board engaged in monitoring, but rather whether they ignored red flags or consciously allowed Walmart to violate the law.

72 *Id.* at *9-10.

Fourth, in *Horman*, Vice Chancellor Slights held that allegations of the complaint did not support an inference that the directors had ignored red flags. The plaintiffs cited the UPS Agreement and three documents that went to the Audit Committee. The Vice Chancellor declined to view the UPS Agreement as a red flag because UPS initially achieved compliance. At the same time, he acknowledged that

> [t]here might well be a reasonably conceivable scenario where the [UPS Agreement] itself could have taken the form of a red flag. For instance, if UPS had entered the [UPS Agreement] in 2005 and then continued a pattern of non-compliant shipments immediately thereafter and through 2014, one might reasonably infer that the Board had consciously disregarded UPS's commitments under the [UPS Agreement] and its own oversight responsibilities.[73]

That is precisely what the pleading-stage record indicates happened in this case.

73 *Id.* at *11.

Turning to the reports to the Audit Committee, Vice Chancellor Slights declined to draw an inference that the materials addressed instances of noncompliance or that the chair of the Audit Committee informed the board about those instances.[74] Citing a case from the U.S. Court of Appeals for the Eighth Circuit, he observed that Delaware courts decline to infer that directors must have known about an issue because someone was supposed to report to them about it.[75] Whether the pled facts support an inference that information was provided depends on the case. The Delaware Court of Chancery has declined to presume that officers or directors necessarily provide information to other directors, but that is not a universally applicable rule.[76] One Delaware decision has drawn an inference that a subset of directors shared information with other directors,[77] and the Delaware Supreme Court has acknowledged that a plaintiff may establish an inference of director knowledge "by establishing that certain ... officers were in a reporting relationship to [the] directors, that those officers did in fact report to specific directors, and that those officers received key information regarding the [matter at issue]."[78] In this case, the pleading-stage record supports an inference that information flowed from management to the Audit Committee and Executive Committee and from there to the full Board.

74 *Id.* at *12-13.

75 *Id.* at *13 (citing *Cottrell v. Dukes*, 829 F.3d 983, 988 (8th Cir. 2016)).

76 *See Desimone*, 924 A.2d at 943.

77 *Saito v. McCall*, 2004 WL 3029876, at *7 n.68 (Del. Ch. Dec. 20, 2004), *overruled on other grounds by Lambrecht v. O'Neal*, 3 A.3d 277 (Del. 2010)

78 *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014) (cleaned up).

***43** Finally, Vice Chancellor Slights declined to infer that the directors in *Horman* consciously approved legal noncompliance by UPS in the pursuit of greater profit. The court declined to credit that inference given the magnitude of the total deliveries that UPS made relative to the number of illegal delivers: "UPS makes more than 18.3 million package deliveries per day. The Complaint alleges that UPS made approximately 78,000 shipments of illegal cigarettes between 2010 and 2014. This is hardly a ratio that alone would support an inference of bad faith."[79]

79 *Horman*, 2017 WL 242571, at *14

This case is different. The pleading-stage record supports the existence of a business plan to drive prescription traffic to Walmart's pharmacies as a means of increasing pharmacy revenue and getting customers into its stores. The record also supports an inference that Walmart incentivized pharmacists to fill prescriptions quickly, set unrealistic goals for the time to fill each prescription, and deprived pharmacists of information that they could use to fulfill their Refusal-To-Fill Obligation. During the same period, Walmart underfunded its efforts to comply with the DEA Settlement. The extent of the pleading-stage record on this subject and the involvement of the directors supports an inference that they knew Walmart was sacrificing compliance for profits.

Horman was a very different case. It does not help the defendants here.

Walton, Penner, Steuart, McMillon, Reinemund, and Flynn comprise half of the Demand Board. They could not consider a demand. This decision therefore need not consider whether Marissa Mayer or Thomas Horton could consider a demand. Demand is futile as to claims based on the DEA Settlement Issues

C. The Pharmacy Issues

The next category of alleged wrongdoing involves the Pharmacy Issues, where the timeframe starts after the DEA Settlement expired in March 2015. Although the court has separated the DEA Settlement Issues from the Pharmacy Issues, that does not mean that the analysis of the Pharmacy Issues starts from a clean state. The day that the DEA Settlement expired did not result in Walmart suddenly being in compliance with the Controlled Substances Act. Instead, the red flags of noncompliance remained unfurled. Walmart was still seeking to drive prescription traffic to its pharmacies to generate sales and get customers into its stores, and Walmart was still not interested in undermining that business plan by making significant investments in compliance. Taken as a whole, the allegations of the complaint support an inference that the directors consciously continued Walmart's business practice of failing to comply with the Controlled Substances Act until the Nationwide Settlement in 2022.

1. Director-by-Director Analysis

To render demand futile for the Pharmacy Issues, the plaintiffs must tie the arc of Walmart's noncompliance to a sufficient number of directors to deprive the Demand Board of a disinterested, independent majority. Conducting that inquiry again requires a director-by-director analysis.

a. McMillon

For the Pharmacy Issues, the demand futility analysis begins with McMillon, because he became Walmart's CEO in February 2014 and led the company throughout the relevant period. He was a member of the Employee Compliance Committee and regularly attended their meetings, where compliance issues were discussed. He also frequently attended Audit Committee meetings. It is reasonable to infer that as CEO, McMillon was responsible for the business strategy of increasing traffic at Walmart stores by incentivizing and pressuring pharmacists to fill prescriptions quickly. It is also reasonable to infer that as CEO, McMillon was responsible for the decision to sue the DOJ on the theory that Walmart knew more about compliance than its regulator.

***44** Based on the allegations of the complaint as a whole, it is reasonable to infer that McMillon knew that after the DEA Settlement term expired, Walmart continued its noncompliance with its obligations as a dispenser under the Controlled Substances Act. That said, the first event to take place after the DEA Settlement term expired is helpful to McMillon and the defendants. At meetings in February 2015, approximately one year after the DEA Settlement expired, the Audit Committee and the Board reviewed Walmart's compliance objectives for fiscal year 2016 and approved an effort to enhance its suspicious order monitoring system. Management's proposal suggested an effort to comply with one aspect of the Controlled Substances Act.

But then came the barrage of lawsuits in 2016 and 2017 and the news in December 2016 that the U.S. Attorney's Office for the Eastern District of Texas was conducting a criminal investigation into Walmart's pharmacies. In November 2017, management reported to the Audit Committee and the Board about compliance problems in the Health and Wellness Division. Viewed collectively and evaluated at the pleading stage, those events negate the positive impact of the decisions made in February 2015 and support an inference that Walmart was still not complying with its legal obligations.

Whether allegations about investigations, subpoenas, and lawsuits rise to the level of red flags "depends on the circumstances." *Fisher v. Sanborn*, 2021 WL 1197577, at *12 (Del. Ch. Mar. 30, 2021). "A settlement of litigation or a warning from a regulatory authority—irrespective of any admission or finding of liability—may demonstrate that a corporation's directors knew or should have known that the corporation was violating the law." *Rojas v. Ellison*, 2019 WL 3408812, at *11 (Del. Ch. July 29, 2019). When considering an avalanche of lawsuits against another defendant in the Opioid MDL, this court held that the lawsuits "put the directors on notice of problems at the Company. The directors did not just see red flags; they were wrapped in them." *Collis Demand Decision*, 2022 WL 17841215, at *16. The same reasoning applies here.

It is reasonable to infer that McMillon and the other directors knew about the red flags from the avalanche of lawsuits. Not only that, but McMillon attended an Audit Committee meeting on November 2, 2017 when Jorgensen and other executives reported on Health and Wellness compliance issues. Ex. 60 at 4. McMillon also attended the Board meeting the next day, when Flynn as Chair of the Audit Committee reported to the full Board. Ex. 61 at 15–16.

The next question is whether McMillon and his fellow directors consciously disregarded their obligations to respond to the red flags. Here again, McMillon and his fellow directors were not *completely* inactive, because the directors scheduled an education session about the opioid crisis for December 2017. But that event is ultimately not helpful to McMillon and the directors at this stage, because Walmart withheld or redacted everything about the director education session. Walmart's withholding of those documents constitutes a representation that after a briefing on the opioid crisis, the directors did not consider a single business issue, engage in any business discussions, or make any business decisions.

After that, there is no indication that the directors took any action to address compliance issues at its pharmacies until May 2018, when the U.S. Attorney's Office for the Eastern District of Texas threatened to criminally indict Walmart for its role in the opioid crisis. As CEO, McMillon necessarily knew about that threat, and it is reasonable to infer that McMillon led the response.

From a compliance standpoint, Walmart amended its pharmacy operating manual. Rewriting procedures and creating new documents is relatively easy. That was what Walmart did in response to the Order To Show Cause in 2009, and it's what Walmart did again in response to the indictment threat. The new manual detailed a number of prescriber and patient red flags for pharmacists to consider. Walmart also issued a press release in which the company promised that within the next sixty days, it would restrict initial acute opioid prescriptions to no more than a seven-day supply. Ex. H. Walmart could have taken that step years before, in 2014, when the Audit Committee saw the photograph showing a Walmart pharmacy with scores of patrons waiting in line at 7:00 a.m., two hours before the pharmacy opened, to fill their prescriptions for Oxycodone. Rather than suggesting that the Walmart directors were responding appropriately to a massive red flag, the belated action reinforces the inference that Walmart's directors and officers had not been engaging in good faith efforts to comply with the law.

***45** Further supporting that inference, Walmart only took another incremental step toward compliance in July 2018, after failing to negotiate a settlement with the U.S. Attorney's Office. At that point, the Board adopted a policy under which pharmacists could access the refusal-to-fill information in Walmart's pharmacy management system. Walmart could have given the pharmacists access when it implemented the Archer system in 2015, but that would have resulted in pharmacists using the data and taking more time to fill prescriptions. They also likely would have rejected some prescriptions based on the information they saw. That was not good for Walmart's bottom line. Walmart wanted pharmacists filling prescriptions quickly. The belated granting of access to that information further reinforces the inference that Walmart's directors and officers had not been engaging in good faith efforts at compliance.

Walmart's most effective strategy was to contact its friends in Washington and convince the bigwigs at the DOJ to quash the indictment. It is reasonable to infer that one of the reasons that the DOJ quashed the indictment was Walmart's agreement to have a former DOJ Associate Attorney General, whom Walmart had hired as its Executive Vice President of Global Governance, conduct an internal investigation. *See* Ex. 71. It is reasonable to infer that McMillon signed off on the hiring of the new Executive Vice President and the plan to conduct an internal investigation. It is reasonable to infer that McMillon monitored the progress of the investigation, because he attended Audit Committee meetings in April, May, and July 2018 where the committee received reports on that topic. McMillon also attended the full Board meeting in November 2019 where the directors received a final report. *See* Exs. 71–74.

In the abstract, having a distinguished former prosecutor conduct an internal investigation is a good thing. But at this stage of the case, the court cannot draw any inferences from that effort, because Walmart redacted or withheld everything about the investigations based on the attorney-client privilege or work product doctrine. Because Walmart withheld everything, the court must infer that the investigation did not result in any business decisions by McMillon or his fellow Walmart directors or any changes in Walmart's business practices. The plaintiffs are entitled to an inference that Walmart continued engaging in the noncompliant practices that had led to the thousands of suits that were consolidated in the Opioid MDL and that had caused the U.S. Attorney for the Eastern District of Texas to threaten to criminally indict the company.

In October 2020, Walmart sued the DOJ. That was a major move that McMillon necessarily approved. At this stage of the proceedings, it is reasonable to infer that the decision to sue the DOJ was an effort to deflect attention away from Walmart's own violations of the Controlled Substances Act. In that lawsuit, Walmart sought declarations validating the practices it had followed and rulings in its favor on many issues that Walmart had lost in the Opioid MDL. Like the defendants in *Massey*, Walmart was claiming that it knew more about compliance than its regulators. *Massey*, 2011 WL 2176479, at *21.

Jury findings rendered in 2021 in the Opioid MDL provide further support for the inference that, under McMillon's leadership, Walmart did not change its policies and continued violating the law. In a recent decision, this court considered findings of fact made by a federal court when evaluating the strength of a plaintiffs' allegations regarding illegal conduct. *See Collis Demand Decision*, 2022 WL 17841215, at *3. There, the plaintiffs had alleged facts that would have supported a Red-Flags Claim and a *Massey* Claim against the directors of an opioid distributor, except for post-trial factual findings by the U.S. District Court for the Southern District of West Virginia. After a two-month trial, during which seventy witnesses testified either live or by deposition, that court held that the distributor had not violated their anti-diversion obligations. In light of those findings, the plaintiffs' allegations could not support a reasonable inference of noncompliance. *Id.* at *17, 19.

***46** For Walmart, the situation is reversed. In November 2021, a jury in the bellwether case of the Opioid MDL found that Walmart engaged in "improper dispensing conduct" as "evidenced by [its] systemic failures to investigate and resolve red-flag prescriptions"; "dispensed massive quantities of red-flagged prescriptions without taking adequate measures to investigate or otherwise ensure the prescriptions were appropriately dispensed"; and "dispensed opioids without having in place effective controls and procedures to guard against diversion—controls and procedures they knew were required and knew they had not adequately employed." *Opioid MDL Abatement Decision*, 2022 WL 3443614 at *4, *30, *32.

In denying Walmart's motion for judgment as a matter of law notwithstanding the verdict, the federal judge presiding over the Opioid MDL found that "Walmart knew it was required to resolve red flags before dispensing opioids," and "[d]espite this knowledge, there was evidence that Walmart knew it did not have sufficient policies in place to ensure compliance." *In re Nat'l Prescription Opiate Litig.* (*Opioid MDL JNOV Ruling*), 589 F. Supp. 3d 790, 804 (N.D. Ohio 2022). The judge determined that "a jury could reasonably conclude that [Walmart] intentionally dispensed opioids under circumstances which it knew or was substantially certain would interfere with public health or public safety." *Id.* at 806.

As part of the remedy against Walmart, the federal judge issued an injunction requiring Walmart to adopt substantially compliant reforms to remediate deficient controls and reporting systems under the Controlled Substances Act. *Opioid MDL Abatement Decision*, 2022 WL 3443614, at *32. The court explained that "[t]he evidence at trial" showed that Walmart "failed at these tasks of resolution / documentation / rejection of suspicious prescriptions," and he entered an injunction requiring that Walmart carry out those tasks. *Id.* at *37. It is reasonable to infer from the court's order that Walmart's controls and reporting systems were not in compliance with the Controlled Substances Act.

And that is not all. In November 2022, Walmart agreed to implement extensive procedures and controls as part of the Nationwide Settlement. Although Walmart denied any liability, it is reasonable to infer that before the Nationwide Settlement, similar procedures were not in place, because otherwise the changes could not have been part of the consideration for the settlement. It is also reasonable to infer that Walmart did not fix its compliance problems until it entered into the Nationwide Settlement, which provided its directors and officers with a broad release.

McMillon was at the helm throughout this period. It is reasonable to infer that he faces a substantial threat of liability on the Pharmacy Issues and therefore cannot consider a demand.

b. Walton

The next director is Walton, who served as Chairman of the Board until June 2015, when Penner succeeded him. He remained a director after giving up the chairmanship. He was thus a director throughout the relevant period for the Pharmacy Issues.

Walton was a director during the onslaught of lawsuits in 2016 and 2017. He was a director in December 2016, when Walmart learned that the U.S. Attorney's Office for the Eastern District of Texas was conducting a criminal investigation into Walmart's pharmacies. He was present at the Board meeting in November 2017 when the Audit Committee reported on the compliance issues associated with the Opioid MDL, and he attended the director education session in December 2017. That was the meeting when the directors learned about the opioid crisis and yet engaged in no non-privileged discussions of business issues and made no non-privileged business decisions. The plaintiffs are entitled to a pleading-stage inference that in the face of powerful evidence of noncompliance, Walton and his fellow directors did nothing.

***47** Walton was a director in 2018 when the U.S. Attorney for the Eastern District of Texas threatened to criminally indict Walmart. He was a director when Walmart crafted its response. He was also a director when Walmart sued the DOJ, evidencing a belief that it knew more about compliance than its regulators.

Walton was a director in 2021 when the jury in the Opioid MDL ruled against Walmart. And he was a director in 2022 when the federal judge issued an injunction against Walmart. He was also a director when Walmart entered into the Nationwide Settlement.

Based on the events that took place between 2016 and 2022, it is reasonable to infer that Walton faces a substantial risk of personal liability for having acted in bad faith. During that period, Walton was presented with extensive evidence that Walmart was failing to comply with its legal obligations under the Controlled Substances Act, yet the pleading-stage record supports an inference that he and the other directors did not take action to fix Walmart's compliance problems until

Walmart entered into the Nationwide Settlement that provided its directors and officers with a release.

c. Penner

Penner was a director throughout the period covered by the Pharmacy Issues. He succeeded Walton as Chairman in 2015, and he joined the Executive Committee in 2016. All of the reasons that Walton faces a substantial likelihood of liability apply equally to Penner. In addition, as with the DEA Settlement Issues, Penner is not disinterested regarding the Pharmacy Issues because of his familial connections to Walton.

d. Steuart

Steuart became a director in 2016, early in the period covered by the Pharmacy Issues, at a time when Walmart faced the deluge of lawsuits that became the Opioid MDL, and shortly before Walmart learned that the U.S. Attorney's Office for the Eastern District of Texas was conducting a criminal investigation into its pharmacies. All of the reasons why Walton and Penner face a substantial likelihood of liability apply equally to Steuart. As with the DEA Settlement Issues, Steuart also is not disinterested regarding the Pharmacy Issues because of his familial connections to Walton and Penner.

e. Flynn

Flynn was a director and Chair of the Audit Committee throughout the period covered by the Pharmacy Issues. All of the reasons that Walton, Penner, and Steuart face a substantial likelihood of liability apply equally to Flynn. In addition, as Chair of the Audit Committee, Flynn was more deeply involved in the compliance issues that management identified in November 2017 and the internal investigation that Walmart conducted in 2018 and 2019. Walmart redacted or withheld everything about the investigations on the basis of the attorney-client privilege and the work product doctrine, so the court must infer that the investigation did not result in any business decisions by Flynn or other Walmart directors and no changes in Walmart's business practices.

For Flynn, the Pharmacy Issues create the same conundrum as the DEA Settlement Issues, because it is again hard to believe that an outside director like Flynn would ignore red flags about noncompliance with the Controlled Substances Act or endorse conscious noncompliance. As before, the answers likely lie in the redacted portions of the documents in Walmart's Section 220 production. Unfortunately, because of Walmart's redaction practices, the pleading-stage record supports an inference that Flynn knew that Walmart was not in compliance with the Controlled Substances Act and did not make a good faith effort to bring the company into compliance until the Nationwide Settlement. The court is therefore compelled to conclude that a reasonable doubt exists about Flynn's ability to consider a demand based on the Pharmacy Issues.

f. Thomas Horton

***48** For purposes of the DEA Settlement issues, this decision did not consider Horton. In lieu of considering whether Reinemund could consider a demand to assert claims over the Pharmacy Issues, this decision examines Horton, because he was both a director and member of the Audit Committee throughout the relevant period.

Like Reinemund and Flynn, Horton is a distinguished individual who has achieved great success in business. From 2011 to 2013, Horton served as Chairman, President, and CEO of American Airlines, Inc. and its parent corporation, AMR Corp. From 2013 to 2014, Horton served as Chairman and CEO of American Airlines Group, Inc., which became the world's largest airline as a result of the merger of AMR and US Airways.

Because of his term of service and membership on the Audit Committee, all of the reasons why Flynn faces a substantial likelihood of liability apply equally to Horton. The same caveats about Horton ignoring red flags and consciously condoning violations of law also apply. Nevertheless, given the pleading-sage record, the court must draw an inference that there is reason to doubt Horton's ability to consider a demand because of a substantial threat of liability on the Pharmacy Issues.

2. The Conclusion Regarding Demand Futility

McMillon, Walton, Penner, Steuart, Flynn, and Horton comprise half of the Demand Board, rendering demand futile as to the Pharmacy Issues. This decision does not consider whether Mayer or Reinemund could consider a demand regarding the Pharmacy Issues.

D. The Distributor Issues

The final category of alleged wrongdoing involves the Distributor Issues. This category of alleged wrongdoing predated the DEA Settlement, then continued until April 2018, when Walmart completed its exit from the business. Walmart's obligations as a distributor were not affected by the DEA Settlement, which only addressed Walmart's duties as a dispenser.

The complaint supports an inference that Walmart failed to comply with its obligations as a distributor, including by chronically violating both the Reporting Requirement and the Shipping Requirement. According to the complaint:

• Before November 2010, Walmart had no written policies or procedures in place to govern monitoring for suspicious orders in its distribution business. Walmart relied on untrained employees, operating without any guidance, to bring orders to management's attention if something did not seem right.

• Starting in November 2010, Walmart implemented a policy that contemplated having employees at the Bentonville distribution center review a monthly report, identify any orders for controlled substances that constituted more than 3.99% of a single pharmacy's total drug purchases during the prior month, and send the reports to the appropriate Drug Diversion Coordinator. The November 2010 policy did not identify other criteria that could render an order suspicious, and the Section 220 production is devoid of guidance about what the Drug Diversion Coordinator was supposed to do.

• From 2011 until 2015, Walmart implemented a cutback system that flagged orders that exceeded hard limits. Walmart shipped the orders up to the limits, then referred the excess orders to another distributor to ship the balance.

• In 2014, a consulting firm proposed to modify the Reddwerks system that Walmart was using so the tool could do more than just implement the hard limits. The modifications would have cost $185,000. Walmart rejected the proposal.

***49** Those allegations support an inference that Walmart violated its legal obligations.[80]

80 *Accord Opioid MDL SJ Decision*, 2020 WL 425965, at *2 ("Walmart argues Plaintiffs cannot show its opioid distributions substantially caused their alleged injuries.... Plaintiffs have produced evidence upon which a jury could reasonably conclude Walmart's distribution activities caused Plaintiffs' alleged injuries.").

What the plaintiffs have failed to do is tie those allegations to the members of the Demand Board. The complaint alleges that shortly after November 2010, when Walmart implemented its initial policy about reviewing reports for orders that exceeded 3.99% of a pharmacy's total drug purchases during the prior month, management briefed the Executive Committee and the Audit Committee on the policy. Compl. ¶ 141. The complaint's allegations do not support an inference that the directors knew that the policy failed to comply with Walmart's obligations as a distributor, nor that it would have constituted a red flag that Walmart was violating the law.

Walmart's use of the cutback system seems like a blatant violation of both the Controlled Substances Act and Walmart's own policy regarding suspicious orders. But the plaintiffs have not shown that any member of the Demand Board knew about the cutback system.

The complaint also alleges that in February 2015, Walmart's Global Chief Compliance Offer informed the Audit Committee that Walmart was undertaking an initiative to "implement controlled substance suspicious-order monitoring enhancements (which include both software and personnel changes) in the U.S. distribution centers." Ex. 51 at '002. That information would have been reassuring for the directors. It would not have suggested that Walmart was failing to comply with its obligations as a distributor, nor constitute a red flag that Walmart was violating the law. Both the Audit Committee and the Board signed off on the plan to move forward with the enhancements. *See* Compl. ¶¶ 228–233.

The barrage of legal actions that Walmart faced during 2016 and 2017 included claims based on its role as a distributor. As with the Pharmacy Issues, those lawsuits were a crimson flag, but management responded. In November 2017, Walmart management made the decision to stop acting as a distributor of prescription opioids and wound down that business, with the exit completed in April 2018. The Audit Committee learned that Walmart had exited from the business in September 2018.

It is reasonably conceivable that between the beginning of the onslaught of lawsuits and September 2018, Walmart's directors should have done something about the distribution business. But the plaintiffs have not alleged particularized facts regarding what the directors should have done or failed to do during this period. Not only that, but management began winding down the distribution business in November 2017. The plaintiffs would have to explain what causally related harm resulted from the directors not taking action before the management team did.

In a last-ditch effort, the plaintiffs argue that the decision to exit the opioid distribution supports a reasonably conceivable inference that the Board "never attempted to bring Walmart's distribution operations into compliance with [the Controlled Substances Act]." Compl. ¶ 269; *see also id.* ¶ 270 ("The fact that Walmart would rather pay for distribution from third parties, rather than bring its distribution facilities into CSA compliance, underscores how broken the status quo was (and had been for years)."). How does that allegation translate into a claim? Walmart exited the business and ended its noncompliance. That Walmart did so by paying for third-party distribution does not alter the fact that Walmart took action to address its compliance failures. The plaintiffs have not alleged that Walmart continued violating the Controlled Substances Act by using third-party distributors. By exiting the business, the officers made a protected business judgment. *See, e.g.*, *McDonald's Directors*, 2023 WL 2293575, at *17 ("When making those decisions [about which risks to monitor], officers and directors are presumed to act loyally, in good faith, and with due care (*i.e.*, on an informed basis). Unless one of those presumptions is rebutted, the decision is protected by the business judgment rule.").

***50** The plaintiffs thus have failed to allege facts supporting a claim regarding the Distributor Issues that could result in a substantial risk of liability for any of the members of the Demand Board. The plaintiffs have not pled facts that would support a Red-Flags Claim or a *Massey* Claim. There might be the makings of an Information-Systems Claim, but the plaintiffs would have to deal with the reports to the Board in November 2010 and February 2015.

Perhaps the plaintiffs could have pled a viable Information-Systems Claim by arguing that the defendants had an obligation to develop a board-level reporting system with systematized procedures that reflected a good faith effort to bring to the Board's attention instances of illegality or criminality in the opioid distribution operation. Although it is difficult to make an assessment based on the highly redacted documents in the pleading-stage record, there are indications that Walmart's compliance reports were less focused on surfacing incidents of illegal or criminal conduct and more geared to providing positive readouts about training programs, policies, and procedures, and other compliance success stories.

Scholars have suggested that well-intended compliance programs can become Panglossian protective devices, while the business leaders with P&L responsibility relentlessly respond to key metrics, promotion criteria, compensation programs, and corporate cultures that emphasize profits over compliance.[81] Some scholars have argued that to address this problem, the Delaware courts should make clear that oversight is not exclusively about agency costs; instead, "the aspect of good faith that is focused on legal compliance also, or perhaps primarily, serves a public purpose and legitimizing role for corporate law."[82]

81 *See, e.g.*, John Armour et al., *Taking Compliance Seriously*, 37 Yale J. on Reg. 1, 20–31 (2020) (modeling how stock-based pay gives managers incentives to underinvest in compliance); Donald C. Langevoort, Caremark *and Compliance: A Twenty-Year Lookback*, 90 Temp. L. Rev. 727, 739–40 (2018) (discussing why "[i]t is a difficult managerial task to simultaneously drive profits and growth while preserving a strong sense of compliance" given that "the former is directly rewarded via raises and promotions and the latter more through exhortations and soft praise"). *See generally* Donald C. Langevoort, *Selling Hope, Selling Risk* 35–45 (2016) (discussing the causes of corporate fraud).

82 Elizabeth Pollman, *Corporate Oversight and Disobedience*, 72 Vand. L. Rev. 2013, 2027 n.73 (2019).

Under that model, the key measure of an information system would be the extent to which it brings actionable and timely information about illegality or criminality to the attention of the board so that the directors can investigate and terminate misconduct and provide information to enforcement officials.[83] Delaware courts would not merely sign off on the existence of an information system, but would look to whether the information system reflected a good faith effort to achieve that goal. Having such a focus would provide a unifying orientation for an Information-Systems Claim, just as the fiduciary goal of maximizing the long-term value of the corporation for the ultimate benefit of its stockholders provides a polestar when evaluating fiduciary decision-making.

83 *E.g.*, *Principles of the Law, Compliance and Enforcement for Organizations* § 5.18 (Am. L. Inst. 2021); Jennifer Arlen, *Evolution of Director Oversight Duties and Liability under* Caremark: *Using Enhanced Information-Acquisition Duties in the Public Interest* (Feb 2023); Jennifer Arlen, *The Story of* Allis-Chalmers, Caremark, *and* Stone at 326–27, 344, *in Corporate Stories* (2009).

***51** While the policy rationale for that step makes sense, how to implement it is unclear, because it would involve the court evaluating at least one dimension of the effectiveness of a compliance program, rather than deferring to the directors' business judgment. True, the analysis of an Information-Systems Claim would be more targeted, because compliance system components like policies and procedures, employee training, whistleblower hotlines, and the like would have reduced significance for the fiduciary claim. They would remain important to the overall health of the organization and for purposes of the Organizational Sentencing Guidelines, but the focus of the Information-Systems Claim would narrow to whether the system was designed to bring information about illegality and criminality to the board's attention. That inquiry could risk becoming a check-the-box exercise, because if the board required management to provide regular reports and followed through on receiving them, then that dimension of the oversight obligation would be satisfied. But the proponents of the model view that as a feature, because once the information reaches the board, the oversight rubric shifts to a Red-Flags Claim or a *Massey* Claim with an attendant impetus for the directors to take remedial action. Driving adverse information to the board-level thus becomes the mechanism for improved compliance. This decision provides no opportunity to explore those issues.

The plaintiffs lack a comprehensible theory of how the Walmart directors acted in bad faith regarding the Distributor Issues. It is therefore not necessary to conduct a director-by-director analysis. Demand is not futile as to the Distributor Issues and the claims relating to those issues are dismissed.

E. The Officer Defendants' Motion To Dismiss

The plaintiffs have sued Jorgensen and Harris, who served as compliance officers during the actionable period. Both have moved to dismiss under Rules 23.1 and 12(b)(6). For purposes of the Distributor Issues, Rule 23.1 is dispositive. Just as demand is not futile for the directors, it is not futile for the officers. For purposes of the DEA Settlement Issues and the Pharmacy Issues, the converse is true. Just as the Demand Board cannot consider whether to assert claims based on those issues against the director defendants, they likewise cannot consider whether to assert claims based on those issues against the officer defendants, because if Walmart were to proceed against the officer defendants, then the claims could implicate the directors themselves.

The Rule 12(b)(6) motion does not provide an independent basis for dismissal. The officers argued that they did not owe oversight duties, but this court has resolved that issue against them. *See McDonald's Officers*, 289 A.3d at 378–79. The officer defendants were Walmart's principal compliance officers while the DEA Settlement was in effect and later when Walmart was confronting the Pharmacy Issues. It is reasonably conceivable that they failed to take the steps necessary to cause Walmart to comply with the DEA Settlement and with the Controlled Substances Act and that they did not make a sufficient effort to report to the Board regarding Walmart's shortcomings. The complaint states facts supporting claims against the Officer Defendants for both the DEA Settlement Issues and the Pharmacy Issues.

F. Next Steps

The defendants have asked for a stay of this case if the court does not dismiss it entirely. The defendants want the case stayed pending the outcome of the DOJ Action.

This court has "inherent power to manage its own docket, including the power to stay litigation on the basis of comity, efficiency, or simple common sense."[84] The request for a stay is not based on a prior-filed action under *McWane* and its progeny. The argument is rather that we should find out how the DOJ Action ends before this action proceeds. If the DOJ Action results in further harm to Walmart, then this action could be a vehicle for remedying it. And if the DOJ Action results in factual findings, those findings may be persuasive and assist in simplifying the case. *See Collis Demand Decision*, 2022 WL 17841215, at *3 (treating federal court's findings on related issues as persuasive).

84 *Paolino v. Mace Sec. Int'l, Inc.*, 985 A.2d 392, 397 (Del. Ch. 2009); *see Salzman v. Canaan Cap. P'rs,* 1996 WL 422341, at *5 (Del. Ch. July 23, 1996) ("To enable courts to manage their dockets, courts possess the inherent power to stay proceedings."); *Phillips Petroleum Co. v. ARCO Alaska, Inc.*, 1983 WL 20283, at *4 (Del. Ch. Aug. 3, 1983) (granting stay in favor of pending arbitration based on "common sense").

***52** A stay is not warranted. The DOJ Action is itself stayed pending the outcome of two appeals to the Supreme Court of the United States. The plaintiffs can pursue their liability theories independently of the DOJ Action. The outcome of the DOJ Action may affect the quantum of damages, but it will not affect the parties' ability to litigate the question of liability.

To further facilitate the orderly progression of this case, the court will bifurcate the issues of liability for breach of fiduciary duty from the issues of causally related damages. The federal district court took the same approach in the Opioid MDL by holding a separate trial on liability before fashioning remedies. Bifurcation will promote efficiency because if there is no breach, then there will not be any need to reach the question of causally related damages. This approach will also provide time for the DOJ Action to resume and proceed to trial so that any harm that Walmart suffers as a result of the DOJ Action can be taken into account during the remedial phase. If a stay of the case is warranted to allow the DOJ Action to reach completion, then the case can be stayed after the issue of liability has been determined.

III. CONCLUSION

The defendants' motion to dismiss under Rule 23.1 is denied as to the DEA Settlement Issues and the Pharmacy Issues. The motion is granted as to the Distributor Issues. The officer defendants' motion to dismiss is granted as to the Distributor Issues and denied as to the DEA Settlement Issues and the Pharmacy Issues. The case will not be stayed. Proceedings will be bifurcated, with the parties initially litigating the issue of liability.

All Citations

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CRIMINAL LAW

WHO'S CRIME IS IT ANYWAY?

Panelists

The Honorable Danielle J. Brennan
Superior Court of the State of Delaware

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Delaware Department of Justice

Sonia Augusthy, Esquire
Office of Defense Services

The Honorable Danielle J. Brennan was appointed to the Superior Court of Delaware by Governor John Carney on July 1, 2021. She received her Juris Doctor from the Villanova University School of Law in 2003 and her Undergraduate degree, a Bachelor of Arts in Criminal Justice, is from the University of Delaware.

Before coming to the bench, she served for seventeen (17) years with Delaware's Department of Justice, handling cases at every level, trial and appellate. She served as the head of both the Misdemeanor and Felony Trial Units during various portions of her career at the Department, as well as handled cases statewide in various roles. She also took an active role in the DOJ training committee for new prosecutors entering the office. During her tenure with the Department of Justice, she also worked on various legislative matters. Prior to the DOJ, worked in civil litigation at Marks, O'Neill, O'Brien and Courtney, P.C.

In addition, she has previously taught Business Law at Delaware Technical Community College, Wilmington Campus for two semesters. Conducted hundreds of state-wide trainings for law enforcement in the areas of Constitutional Law, Investigation Skills and Trial Testimony Preparation. Judge Brennan will be teaching at the Delaware Law School, Widener University starting in the fall.

Judge Brennan is a member of the Delaware State Bar Association Women and the Law and Criminal Law sections, as well as the Rodney and Holland Inns of Courts, as well as a member of the American Bar Association.

Abigail Rodgers currently serves as the Chief Prosecutor for New Castle County with the Delaware Department of Justice. Prior to this role, Ms.Rodgers served six years as the Attorney General's Director of the Family Division, and four years as the Commander of the Child Predator Task Force — a statewide Task Force designed to combat internet-based crimes against children.

Ms. Rodgers is the former chairwoman of the Human Trafficking Coordinating Council for the State of Delaware. She has served as the President of the Board of Directors for Prevent Child Abuse Delaware, as a member of the Board of Directors of Delaware Guidance Services, and as a member of the Richard K. Herrmann Technology Inn of Court. She also served on the editorial board of *The Advocate*, a publication of Delaware Trial Lawyers Association. As an adjunct professor with Widener University's Delaware Law School, she has taught classes in the area of child exploitation.

Ms. Rodgers has been honored with the Delaware Department of Justice Distinguished Service Award. Most recently, she was awarded the Kids Count Leadership in Government Award recognizing "leadership, creativity and courage in the child welfare arena and advocating and developing public policies that have a positive impact on the lives of children." She is a graduate of Gettysburg College and Villanova University School of Law She was named a Woman of Distinction by Gettysburg College, and currently serves as a member of the Board of Trustees at Ursuline Academy.

Sonia Augusthy is a litigator in Superior Court, handling criminal cases. She has been an attorney with the Office of Defense Services, for the past three years, where she represents indigent clients on a variety of felony charges. Prior working as a defense attorney, she worked for the Delaware Department of Justice (DDOJ) for 11 years. During her time with DDOJ she worked in various roles within the Criminal Division before serving as the Director of the Office of Civil Rights & Public Trust. She lives in Wilmington with her family.

Bench and Bar 2023

“Whose Crime Is It Anyway?”

Criminal Law Update

The Honorable Danielle J. Brennan
Sonia Augusthy, Esquire - Office of Defense Services
Abigail Rodgers, Esquire – Department of Justice

Overview

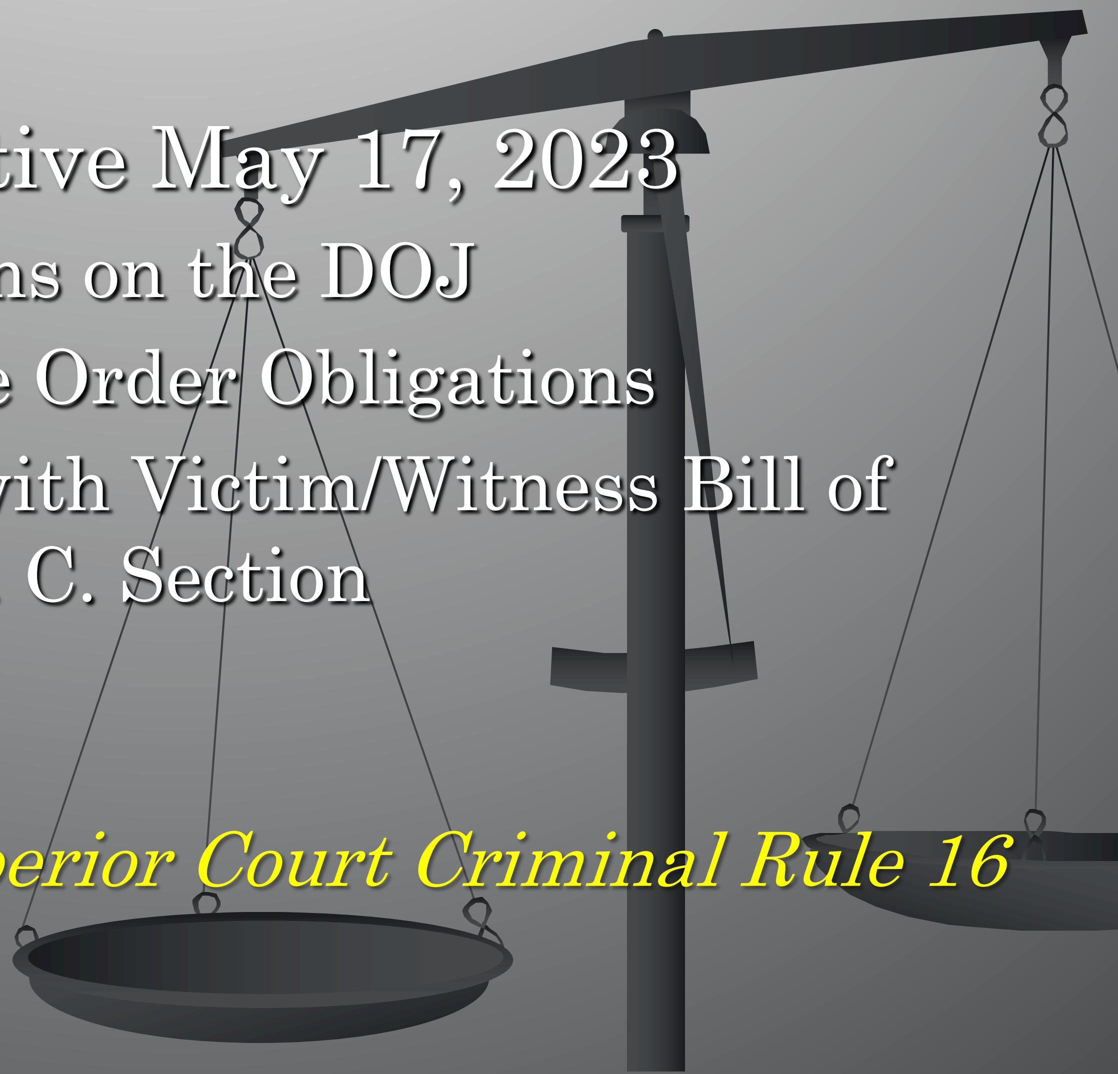
This panel will discuss an update to Brady obligations and the new proposed change to Criminal Rule 16. It will also touch upon a criminal best practices and update on any recent new Supreme Court decisions in the field.

Life of a Criminal Case

- DOJ Initiates
  - Intake
  - Preliminary Hearing
  - Grand Jury
  - Felony Screening Role
- ODS/Conflict/Private Counsel Role
- Motions to Dismiss

Discovery Obligations

- New Rule 16
- Amended effective May 17, 2023
  - New Obligations on the DOJ
  - New Protective Order Obligations
  - Construction with Victim/Witness Bill of Rights (11 Del. C. Section



Superior Court Criminal Rule 16

Notable Changes

- Discovery Prior to Indictment
- Witness Statements

Redaction and Restricted Dissemination Material
Under Rule 16(c)

Formerly known as Protective Orders

Names and Statements of Witnesses

- Rule 16(b)(1)(C) now provides "…the State shall disclose to the defendant the names of all persons other than law enforcement personnel whom the state knows to have evidence or information relevant to any offense charged."
- However, the new rule includes subsection (c) which provides procedure to redact personal identifying information and regulates the use of protective orders.

Redaction: Rule 16(c)(1)

- The State may redact personal identifying information.
- The defense can file a motion to disclose.
- Standard is good cause.
- If the Court finds good cause, then the Court can impose “any condition that it deems necessary to the orderly adjudication of the case…”

Protective Orders: Rule 16(c)(2)

- The state may designate, and the court may order discovery as restricted dissemination by marking it as such.
- Now, the parties can simply agree to mark it protected and the State need not provide written certification that there is either a child witness or reasonable probability that disclosure will result in danger to safety, danger of intimidation, or compromise to an ongoing investigation or law enforcement technique.

Protective Orders

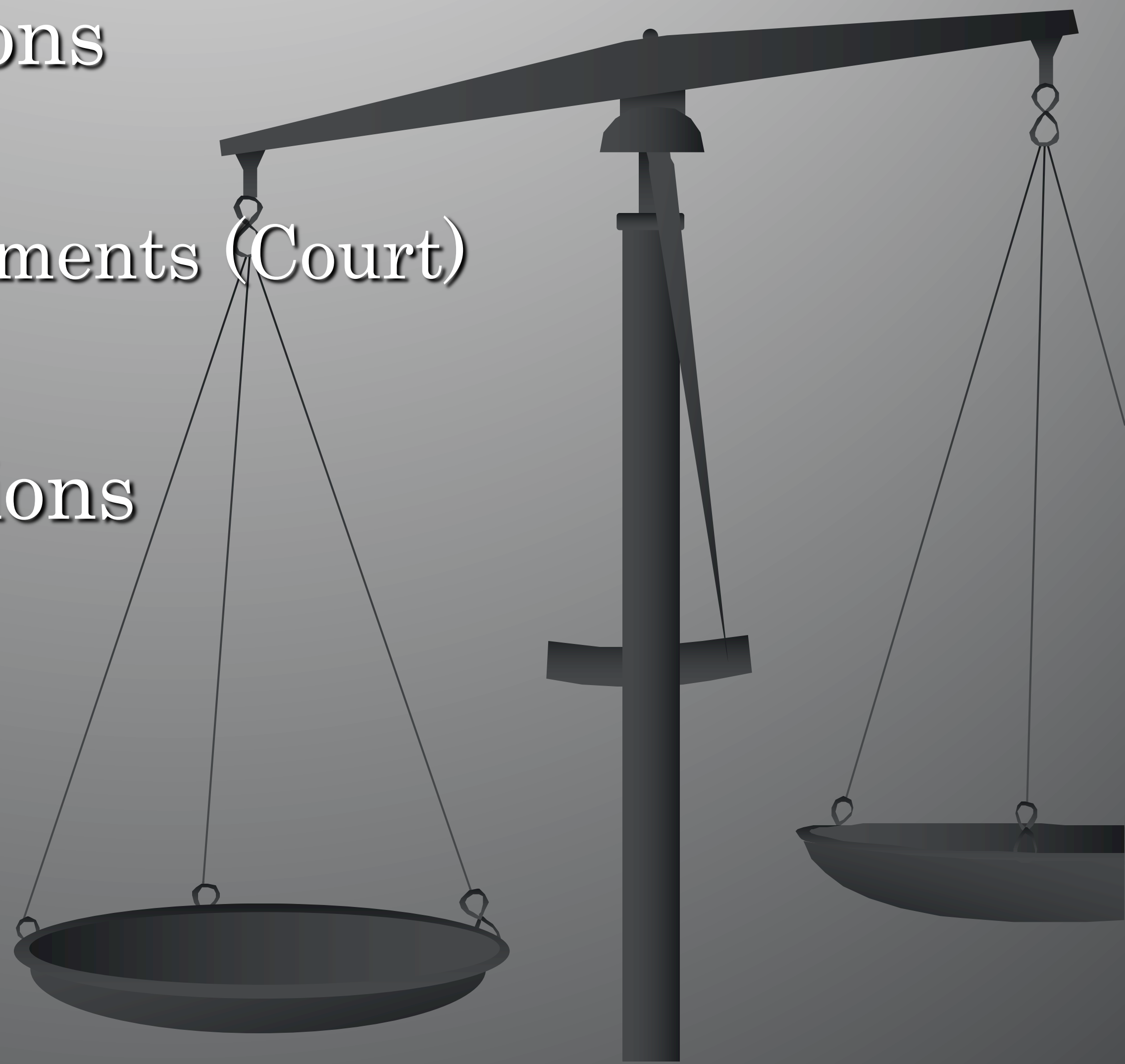
- If restricted, the material stays within defense counsel's office, or to an expert with notification of its restricted dissemination status.
- If the state marks an item as restricted, the defendant, at any time, can file a motion to remove the designation.
- Standard is good cause.
- Court has discretion, if it finds good cause, to add conditions that are necessary to the orderly adjudication of the case or the fair administration of justice.

Brady and *Jencks*

- Differences
- Obligations
- Timing
- Application to Defense?

Best Practices

- Pre-Trial Motions
  - Timing
  - Special Assignments (Court)
- Jury Selection
- Post Trial Motions



Filings from Represented Inmates

- Court Procedure – send to Attorney
- Docket Notated
- Applies for 30 days post-final conviction

Rule 61: Appointment of Counsel

- Criminal Rules 61(e)(2) and 61(e)(3) permit the court, in its discretion, to appoint counsel for other timely filed first postconviction motions if the underlying conviction resulted from a guilty plea or was imposed following a trial for a less serious crime. The Rules now set forth the specific criteria for those cases in which the court may exercise such discretion.
- (Amended 2016)

First postconviction motions in guilty plea cases. The judge may appoint counsel for an indigent movant's first timely postconviction motion and request for appointment of counsel if the motion seeks to set aside a judgment of conviction that resulted from a plea of guilty or nolo contendere only if the judge determines that:

- (i) the conviction has been affirmed by final order upon direct appellate review or direct appellate review is unavailable;
- (ii) the motion sets forth a substantial claim that the movant received ineffective assistance of counsel in relation to the plea of guilty or nolo contendere;
- (iii) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody;

and (iv) specific exceptional circumstances warrant the appointment of counsel.

Other first postconviction motions. The judge may appoint counsel for any other first postconviction motion only if the judge determines that:

1) the motion is an indigent movant’s first timely postconviction motion and request for appointment of counsel;

2) the motion seeks to set aside a judgment of conviction after a trial that has been affirmed by final order upon direct appellate review;

3) the motion sets forth a substantial claim that the movant received ineffective assistance of trial or appellate counsel;

4) the motion sets forth a substantial claim that the movant is in custody in violation of the United States Constitution or the Delaware Constitution;

5) granting the motion would result in vacatur of the judgment of conviction for which the movant is in custody;

and

6) specific exceptional circumstances warrant the appointment of counsel.

A Few Rule 61 PCR Notes

Discovery not available in postconviction – – unless movant demonstrates "good cause"

Dawson v. State, 673 A.2d 1186 (Del. 1996).

- "Superior Court Criminal Rule 61 makes no provision for additional discovery. The trial court concluded, however, that it possessed 'the inherent authority under Rule 61 in the exercise of its discretion to grant particularized discovery for good cause shown.' [. . . .] [T]hese materials are not discoverable under a good cause standard because Dawson has shown *no compelling reason* for their discovery."

Ineffective Assistance of Counsel Standard

Sixth Amendment Claim saying that:

- Trial/sentencing attorney's representation fell below an objective standard of reasonableness;

AND

- That there is a reasonable probability that but for the lawyer's errors, the result of the proceeding would have been different.

Strickland v. Washington (1984)

Trial

A reasonable probability that trial counsel's conduct or advice caused a different negative outcome than would otherwise have been reached at trial.

Flamer v. State (1990)

PLEA

". . . there is a reasonable probability that, but for counsel's errors, [inmate] would not have pleaded guilty and would have insisted on going to trial."

Albury v. State (1988)

Rejected Plea

". . . but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (*i.e.*, that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed."

Lafler v. Cooper (2012)

Sentencing

"... there is a reasonable probability that, but for counsel's errors, the result of [inmate's] sentencing would have been different."

Brawley v. State (1992)

<u>Sentencing</u>

". . . there is a reasonable probability that, had [inmate's] counsel fulfilled his advisory obligations, [inmate] would have received a shorter sentence"

Harden v. State (2018)

Sentencing Enhancement

". . . must be a reasonable probability that but for counsel's errors, the result of his habitual criminal status and sentencing proceeding would have been different. To carry his prejudice burden in these circumstances [an inmate] must prove counsel's *Strickland*-level deficient performance resulted in the application of a specific, demonstrable sentencing enhancement that would not have occurred but for counsel's error."

State v. Peters (2022)

Supreme Court Update

A few recent relevant decisions from Supreme Court

Ray v. State

280 A.3d 627 (Del. 2022)

"We conclude that the Superior Court's erroneous felony-murder instruction—an instruction that, by everyone's lights, does not embody an accurate statement of the law—and Ray's counsel's failure to object or to raise the error on direct appeal warrant the entry of postconviction relief in the form of a new trial on the felony-murder charge and the related firearm charge."

The instruction given in this 2014 trial was based on the text of felony-murder statute as it existed before the Delaware General Assembly amended the felony-murder statute in 2004.

McCrary v. State

290 A.3d 442 (Del. 2023)

Affirming convictions for unlawful sexual contact of children at the preschool where he was an aide.

The Court found:

(1) The Superior Court's admission of prior, out-of-court statements of one of the victims under 11 *Del. C.* § 3513 (the Tender-years Exception) was proper; McCrary was not denied his right to confront the witnesses against him in violation of the Sixth Amendment to the United States Constitution.

(2) The Superior Court properly admitted another victim's prior, out of-court statement under 11 *Del. C.* § 3507; the State laid a proper foundation for the statement's admission.

Williams v. State

__ A.3d ___, 2023 WL 3065564 (Del. Apr. 25, 2023)

The Supreme Court affirmed the Superior Court’s denial of Defendant’s repeated requests for a mistrial following conviction for multiple sexual offenses committed against two children. On appeal, Defendant argued that multiple statements made by prosecution witnesses were unfairly prejudicial and infringed on his constitutional right to be tried by an impartial jury. Defendant specifically highlights (1) an outburst by the mother of the two children and (2) repeated references to the Defendant living with another minor, despite a pretrial ruling that precluded such evidence.

Williams v. State cont'd

- The Court noted that the four-factor *Taylor* analysis—the test governing whether a witness's outburst necessitates a new trial—is not a "mechanical score-keeping exercise." In other words, even one factor can outweigh the other three. Such determinations are left to the trial court's discretion and reviewed for an abuse of discretion. In this case, the Court found multiple factors cut against ordering a new trial and determined the trial court did not abuse its discretion.

Williams v. State cont'd

- Defendant was not prejudiced by multiple witnesses testifying that he lived with a minor, despite the trial judge's pretrial ruling determining such statements as inadmissible.

- The record of, and reasoning behind, the trail judge's ruling was not presented to the Court. Despite this, the Court found that Defendant was not prejudiced because (1) defense counsel repeatedly declined the trial court's offer to provide a curative instruction; (2) it would have been nearly impossible for that evidence not to come in given the facts of the case; and (3) by acquitting the Defendant on sexual offense charges as to a third child, the jury had demonstrated it did not assume that Defendant abused every child who spent time in his home.

Lloyd v. State

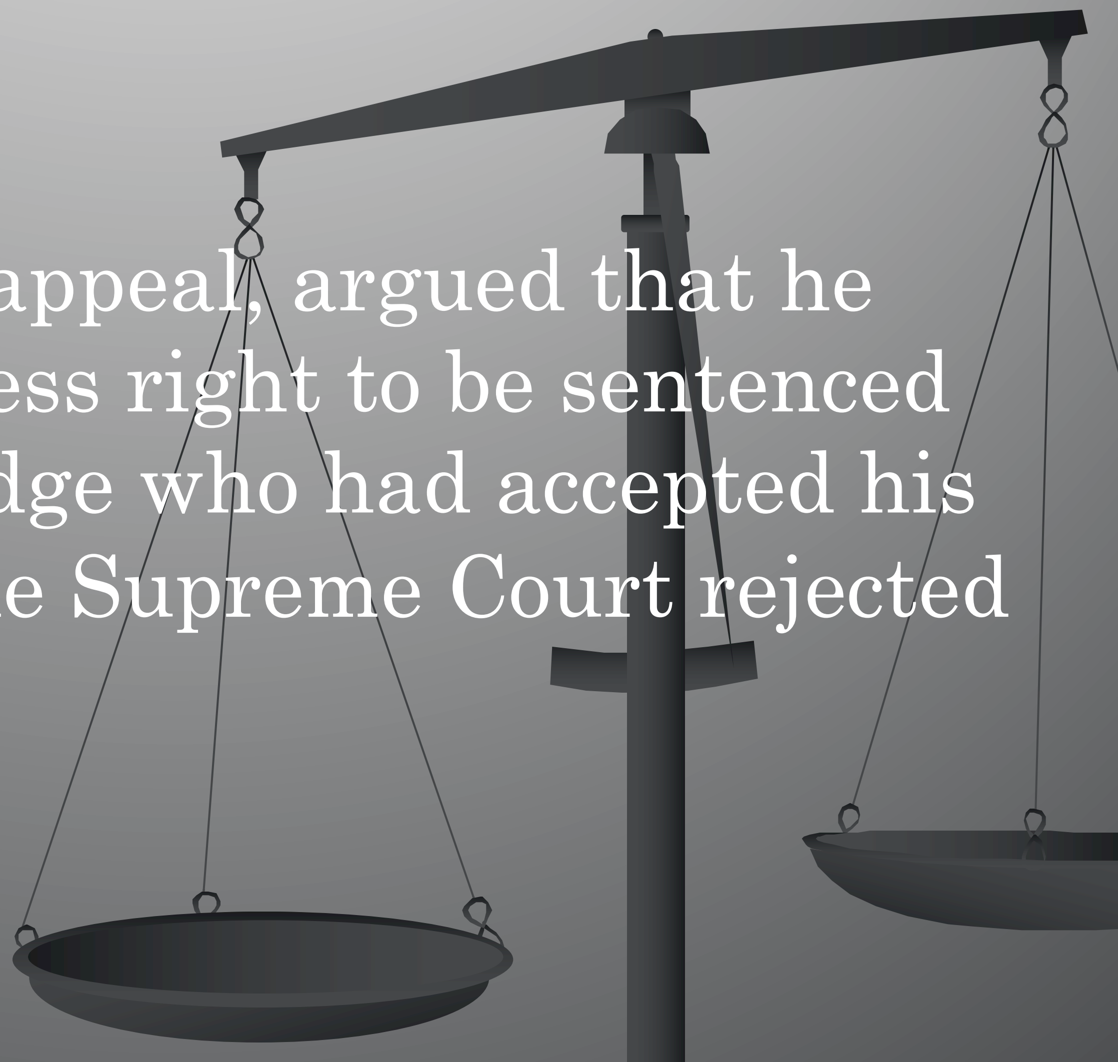
280 A.3d 627 (Del. 2023)

"'Procedure 7.19 allows for a search of a probationer's "living quarters" if the probation officer: (i) "has knowledge or sufficient reason to believe the offender possesses contraband'; or (ii) 'has knowledge or sufficient reason to believe the offender is in violation of probation[.]' [The PO] had observed Lloyd in possession of marijuana and heroin. [The PO] cleared the search of the residence first with his supervisor, [ ]. Thus, the exigent circumstances requirement is not applicable in the context of the search of the residence. Our case law supports the conclusion that [The PO] had reasonable suspicion to search Lloyd's home. The authorized residential search then led to the discovery of the firearm and ammunition that are the basis for Lloyd's PFBPP and PABPP convictions."

Perrigan v. State

2023 WL 2656853 (Del. Mar. 27, 2023).

- Defendant, on appeal, argued that he had a due process right to be sentenced by the same judge who had accepted his guilty plea. The Supreme Court rejected his claim.



Technology Improvements

- For the Record
- Updated Courtrooms
- Bye bye "Elmo"?

QUESTIONS?

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ORDER AMENDING RULE 16
OF THE
SUPERIOR COURT RULES OF CRIMINAL PROCEDURE

This __17th__ day of __May__, 2023, **IT IS ORDERED** that:

(1) Superior Court Criminal Rule 16 is hereby amended by striking the current wording of that rule in its entirety and substituting in lieu thereof a new Criminal Rule 16 that is attached here as Exhibit A.

(2) This amendment shall take effect on September 1, 2023, and shall apply to all cases initiated in this Court by filing of a Criminal Information or return of an Indictment on or after that date.

(3) An original of this Order shall be filed with the Prothonotary for each county.

/s/ Jan R. Jurden
President Judge Jan R. Jurden

SUPERIOR COURT CRIMINAL RULE 16.
DISCOVERY AND INSPECTION

(a) *GENERAL PROVISIONS*

(1) A party may satisfy the requirement to permit the opposing party to inspect, copy, or photograph any item designated herein by providing a duplicate, facsimile, or copy of the item in compliance with applicable time limits and redaction standards under this Rule.

(2) Any material or evidence disclosed pursuant to this Rule and filed with the prothonotary, including any inventory of materials provided, shall be placed under seal until it is either admitted as an exhibit at trial or hearing or the court enters an order unsealing the specified material as evidence.

(3) Notwithstanding any limitation or restriction on discovery under this Rule, the State shall disclose as soon as is practicable any and all evidence favorable to the defendant in the determination of either guilt or punishment, including, but not limited to, all facts of an exculpatory nature, disclosure of all promises or inducements made to witnesses that the State intends to present at trial, and the existence of criminal convictions of any witness that the State intends to present at trial, when such conviction could be used to impeach the witness.

(b) *DISCLOSURE OF EVIDENCE BY THE STATE*

(1) Information Subject to Disclosure

(A) ***Statement of Defendant.*** Upon request of a defendant, the state shall disclose to the defendant and make available for inspection, copying, or photographing: any relevant written, recorded or oral statements made by the defendant or a codefendant (whether or not charged as a principal, accomplice or accessory in the same or in a separate proceeding), or copies thereof, within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the state; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a state agent; and recorded testimony of the defendant before a grand jury that relates to the offense charged. Where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who (1) was, at the time of that testimony, so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant as to conduct constituting the offense, or (2) was, at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as a director, officer, employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness was involved.

(B) ***Investigative Reports and Search Warrants.*** Upon request of a defendant, the state shall permit the defendant to inspect and review any relevant reports prepared by law enforcement officers and made in connection with the particular case, including any written witness statements or written summaries of oral statements contained within such reports, and search warrants that are known to be in the possession, custody or control of the state. This obligation to provide for inspection and review of these reports shall be subject to the provisions of paragraph (c) of this Rule regarding redaction and restrictions on dissemination of designated material.

(C) ***Names and Statements of Witnesses.*** Upon request of the defendant and subject to the provisions of paragraphs (c), (f), and (i) of this Rule, the state shall disclose to the defendant the names of all persons other than law enforcement personnel whom the state knows to have evidence or information relevant to any offense charged. The state shall make available for inspection, copying, or photographing any relevant written or recorded statements of said witnesses, within the possession, custody, or control of the state, the existence of which is known or, by the exercise of due diligence, may become known, to the state. The term "statement" as used in this Rule includes a written statement made by the person and signed or otherwise adopted or approved by the person and any statement of any kind or manner made by the person and written or recorded or summarized by law enforcement or the state in any writing or recording. The term "statement" is specifically intended to include all police and investigative reports of any kind prepared for or in connection with the case but shall not include the notes from which those reports are compiled unless the substance of those notes is otherwise discoverable under this Rule or under any other statute, rule, or principles governing the proceeding.

(D) ***Defendant's Prior Record.*** Upon request of the defendant, the state shall furnish to the defendant such copy of the defendant's prior criminal record, if any, as is within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the state.

(E) ***Documents and Tangible Objects.*** Upon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody or control of the state and that are material to the preparation of the defendant's defense or are intended for use by the state as evidence in chief at the trial, or were obtained from or belong to the defendant.

(F) ***Reports of Examinations and Tests.*** Upon request of a defendant, the state shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the state that are material to the preparation of the defense or are intended for use by the state as evidence in chief at the trial.

(G) ***Expert Witnesses.*** Upon request of a defendant, the state shall disclose to the defendant any evidence which the state may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(2) Information Not Subject to Disclosure

(A) Except as provided by subpart (b)(1)(B), this Rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents prepared by the state or its agents in connection with the investigation or prosecution of a case that may reasonably be considered confidential, privileged, or subject to the attorney work-product doctrine To the extent a witness is interviewed by the state in anticipation of trial and the witness reveals material items in addition to or different from the substance of that witness's previous interview(s), there remains a duty to disclose those material additions or inconsistencies to the defendant before trial, notwithstanding the provisions of this subpart.

(B) Except as provided by subpart (b)(1)(C), or by order entered under this Rule, this Rule does not require the disclosure of any personal identifying information of any witness.

(C) ***Grand Jury Transcripts.*** Except as provided in Rules 6 and 26.2, and subdivision (b)(1)(A) of this Rule, this Rule does not require the disclosure, discovery, or inspection of recorded proceedings of a grand jury.

(c) ***Redaction and Restricted Dissemination Material***

(1) **Redaction.** As to any material or evidence provided under this Rule, the state may redact personal identifying information, including the name, date of birth, residential address, telephone number, email address and place of employment of any witness or victim, or any member of a witness's or victim's family. If the state redacts personal identifying information under this subparagraph of the Rule, the defendant may file a motion seeking disclosure of the redacted information. Should the court find good cause for disclosure, it shall order the state to provide the redacted information subject to any condition that it deems necessary to the orderly adjudication of the case or to the fair administration of justice. In its discretion, the court ordering the provision of redacted personal identifying information may order that the information be identified as "Restricted Dissemination Material" under subparagraph (c)(2) of this Rule.

(2) **Restricted Dissemination Material.** The state may designate, and the court may order, evidence or material disclosed under this Rule as "Restricted Dissemination Material" by prominently stamping or otherwise marking such items as "Restricted Dissemination Material."

(A) ***Designation.*** The state may designate any evidence or material subject to disclosure pursuant to this Rule as "Restricted Dissemination Material," without supporting certification, if the defendant agrees to the designation. In the absence of an agreement by the defendant, the state may designate any evidence or material as "Restricted Dissemination Material" by stamping or otherwise marking it as such and providing a certification in writing, upon information and belief, that: (i) the designated material relates to the statement of a child victim or witness; or (ii) there is a reasonable probability that disclosure of the designated material will result in (a) danger to the safety or security of a witness or victim, (b) danger of a witness being intimidated or tampered with, or (c) compromising an ongoing criminal investigation or confidential law enforcement technique.

(B) Except as otherwise provided by order of the court or these Rules, "Restricted Dissemination Material" may only be disclosed to the defendant's attorney, the agents, or employees of the defendant's attorney, or to an expert witness who shall be advised of the designation associated with the material. The defendant's attorney may orally communicate the content of "Restricted Dissemination Material" to the defendant or allow the defendant to view the content of such material but shall not provide the defendant with copies of material so designated. If the defendant's attorney chooses to communicate or show the content of "Restricted Dissemination Material" to the defendant, the defense attorney shall not communicate or show the name of any victim or witness, date of birth, the residential address, telephone number, email address and place of employment of any witness or victim, or any other identifying information pertaining to the witness or victim or member of a witness's or victim's family. "Restricted Dissemination Material" may not otherwise be reproduced, copied, or disseminated in any way.

(C) ***Relief from Restriction.*** If the state designates evidence or material as "Restricted Dissemination Material" under subpart (c)(2)(A) of this Rule, the defendant may at any time file a motion seeking to remove that designation from such evidence or material. Should the court find good cause to remove the designation, it shall order that the evidence or material no longer be designated as "Restricted Dissemination Material," subject to any condition that it deems necessary to the orderly adjudication of the case or to the fair administration of justice.

(D) ***Defendants not represented by Counsel.*** In any case in which the defendant is not represented by counsel, the state may file a motion seeking to limit the scope of discovery under this Rule. For good cause shown, the court may order any limitation or restriction on the provision of discovery to a defendant who is unrepresented by an attorney as the court in its discretion deems appropriate.

(d) *Disclosure of Evidence by the Defendant*

(1) Information Subject to Disclosure

(A) ***Documents and Tangible Objects.*** If the defendant requests disclosure under subparts (b)(1)(B) or (E) of this Rule, upon compliance with such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, that are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) ***Reports of Examination and Tests.*** If the defendant requests disclosure under subparts (b)(1)(F) or (G) of this Rule, upon compliance with such request by the state, the defendant, on request of the state, shall permit the state to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, that the defendant intends to introduce as evidence in chief at the trial or that were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness's testimony.

(C) ***Expert Witnesses.*** If the defendant requests disclosure under subpart (b)(1)(G) of this Rule, upon compliance with the request by the state, the defendant, on request of the state, shall disclose to the state any evidence the defendant may present at trial under Rules 702, 703, or 705 of the Delaware Uniform Rules of Evidence. This disclosure shall be in the form of a written response that includes the identity of the witness and the substance of the opinions to be expressed.

(D) ***Witness List.*** If the defendant requests disclosure under subpart (b)(1)(C) of this Rule, upon compliance with such request by the state, the defendant, on request of the state, shall furnish to the state a written list of the names of all witnesses whom the defendant expects to call as witnesses at the trial or hearing.

(E) ***Witness Statements.*** When the state discloses the names of witnesses under subpart (b)(1)(C) of this Rule, upon request by the state the defendant shall furnish to the state the statement of any person listed. The term "statement" is defined in (b)(1)(C) of this Rule.

(F) ***Notice of Defenses.*** If the defendant requests disclosure under subparts (b)(1)(A), (B), (C), (D), (E), (F) or (G) of this Rule, upon compliance with such request by the state, the defendant, on request of the state, shall provide written notice to the state specifying the following defenses if the defendant intends to assert such at trial: alibi; insanity; any defense alleging mental illness, defect, psychiatric disorder or any other mental or emotional condition of the defendant bearing upon the issue of guilt or punishment; any defense based upon public authority; or, entrapment.

(2) **Information Not Subject to Disclosure.** Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or prepared by the defendant's attorneys or its agents in connection with the investigation or defense of the case that may reasonably be considered confidential, privileged, or subject to the attorney work-product doctrine, or of statements made by the defendant.

(e) ***CONTINUING DUTY TO DISCLOSE.*** If, before or during trial, a party discovers additional evidence or material previously requested or ordered that is subject to discovery or inspection under this Rule or that an additional notice must be made, such party shall promptly notify the other party or that other party's attorney or the court of the existence of the additional evidence or material and/or make such notice.

(f) ***PROTECTIVE AND DISCLOSURE ORDER***

(1) Upon the motion of either party and for good cause, the court may enter a protective or disclosure order as to the discovery or inspection required by this Rule. The court in its discretion may order any condition that it deems necessary to the orderly adjudication of the case or to the fair administration of justice. These conditions may include:

(A) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered under this Rule in any public forum, including any website;

(B) a requirement that the parties not disclose the contents of any material or evidence disclosed or discovered pursuant to this Rule to any third-party who is not an agent or employee of the parties or an expert witness;

(C) authorization to either party to withhold the residential address, telephone number, email address or place of employment of any witness not otherwise covered by the terms of paragraphs (b), (c), or (d) of this Rule;

(D) a requirement that either party disclose specified personal identifying information, including the name, date of birth, residential address, telephone number, email address and place of employment of any witness; or

(E) authorization for either party in appropriate circumstances to withhold from disclosure or place additional restrictions on dissemination of information otherwise discoverable but not exculpatory.

(2) A party who believes in good faith that the terms of a protective order entered by the court have been violated may move the court to enforce the order and to impose any necessary and appropriate sanction authorized by Delaware law.

(g) ***Witness Interview as Alternative.*** If the state withholds a witness's name and/or contact information under paragraph (b) or (c) of this Rule, upon request of counsel for the defendant, it shall take reasonable steps to make that witness available to counsel for the defendant for a timely interview. In such case, disclosure of the witness's name or contact information to the defendant shall not be required.

(h) ***Failure to Comply With a Request.*** If at any time during the course of the proceedings the court determines that a party has failed to comply with this Rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. In determining an appropriate remedy, the court shall consider whether the party seeking a remedy moved to compel compliance with this Rule.

(i) ***Procedure***

(1) **Request.** The defendant may serve a request under paragraph (b) of this Rule after preliminary hearing. The state may serve a request under paragraph (d) of this Rule after service on the attorney general of such request by the defendant or such other time as ordered by the court. The request of either party shall set forth the items sought

with reasonable particularity and shall specify a reasonable time, place, and manner of compliance with the request.

(2) Response.

(A) ***Initial Response by the State.*** Except in those cases where the court has entered an order setting dates for responses under this Rule, the state shall serve an initial response within 45 days of the request. An initial response shall include statements by the defendant and co-defendant, investigative reports, and search warrants.

(B) ***Supplemental Responses by the State.*** The state shall file a supplemental response, or specify any objection to any request, as soon as practicable. The response may specify a reasonable alternative time, place, and manner of compliance without undue delay. Any response shall address specifically and accurately each of the defendant's discovery requests.

(C) ***Responses by the Defendant.*** The defendant shall serve an initial response within 60 days of the state's request and any supplemental response shall be provided without undue delay. Any response shall address specifically and accurately each of the state's discovery requests.

(3) Motion to Compel. If a party fails to comply with a request the opposing party may move for an order compelling compliance with the request. A motion to compel shall be filed within ten days after the time for response or at such other time as ordered by the court.

(4) Service and Filing.

(A) All requests for discovery under this Rule and responses thereto shall be served on other counsel or parties but shall not be filed with the court. In lieu thereof, the party requesting discovery and the party responding shall file with the court a "Notice of Service" certifying that a request or response was served and the date and manner of service. The party responsible for service shall retain custody of the original. In cases involving out-of-state counsel, Delaware counsel shall be the custodian. When a party uses any part of a request or response at trial or in proceedings on a motion, that party shall file it with the court. When a discovery request or anything produced in response to such a request is needed for any reason, the court, on its own motion, on motion by any party, or by stipulation of counsel, shall order the custodian to deliver it to the court. When a party files discovery material with the court other than during trial, the party shall file a notice stating, in no more than one page, the reason for filing the material and setting forth an itemized list thereof.

(B) Service of requests and responses upon the defendant and the state may, in addition to the manner authorized by these rules, be made by electronic mail delivered to counsel of record.

(5) Disclosure of Personal Identifying Information. Any disclosure of any personal identifying information of any victim or witness shall be minimized to include only that information consistent with the person's specific contact with the particular criminal matter and shall be provided in a manner demonstrating respect for the victim or witness's safety, dignity and privacy.

FAMILY LAW

The LINK: Domestic Violence, Animal Abuse, and Child Welfare

Panelists

The Honorable Michael K. Newell
Chief Judge, Family Court of the State of Delaware

The Honorable Jennifer B. Ranji
Family Court of the State of Delaware

Kara M. Swasey, Esquire
Bayard, P.A.

Tania Marie Culley, Esquire
Office of the Child Advocate

Jenna R. Milecki, Esquire
Delaware Department of Justice

Janine N. Howard-O'Rangers, Esquire
Delaware Volunteer Legal Services, Inc.

Biography

Michael K. Newell became the Chief Judge of the Family Court of Delaware in 2015. He previously served as a Family Court Judge for over ten years.

Chief Judge Newell graduated from the University of Delaware with a Bachelor's Degree in 1975 and received a Master's Degree from Northeastern University in 1976. He received his Juris Doctor Degree from Widener University Delaware Law School in 1981.

Chief Judge Newell began his career in Family Court in 1978 as an Executive Assistant to then-Chief Judge Robert Thompson. He later served as a Master in Family Court. In 1983, he joined Bayard, Brill, and Handelman (now Bayard) and became a Director and Shareholder. In 2000, he joined Connolly, Bove, Lodge & Hutz. Chief Judge Newell's private practice concentration was in family law.

Chief Judge Newell is the Chair of the Domestic Violence Coordinating Council and is a member of the Executive Committee of the Child Protection Accountability Commission, Delaware Criminal Justice Council, and Delaware Juvenile Justice Advisory Group. Chief Judge Newell is the Chair of the Violence Against Women Act Implementation Committee. He is a member on the Delaware Supreme Court's Commission on Law and Technology, and he was a member of the Delaware Judicial Ethics Advisory Committee for two terms.

In July 2019, Chief Judge Newell was elected to the Board of Directors of the National Council of Juvenile and Family Court Judges and was appointed to a second term in 2022. He currently is Chair of the Family Violence and Domestic Relations Advisory Committee (FVDRAC), Co-Chair of the NCJFCJ Governance Committee, and he serves on the NCJFCJ Diversity Committee.

The Honorable Jennifer Ranji

Judge, Family Court of the State of Delaware

Judge Ranji has served on the Delaware Family Court since 2015, when she was appointed by Governor Jack Markell. Judge Ranji serves as the Court's domestic violence liaison judge. Prior to being appointed to the Bench, Judge Ranji served as Cabinet Secretary for the Delaware Department of Services for Children, Youth, and their Families. In that role, then-Secretary Ranji led a 1,200-person state agency overseeing Delaware's foster care, juvenile justice, and child behavioral health services.

Judge Ranji served as Policy Advisor to Governor Markell from September 2009 to July 2012. She played a leading role in developing and implementing the Governor's education policy agenda and early childhood initiatives, as well as in the passage of the animal shelter standards law and creation of the Office of Animal Welfare.

Judge Ranji also served as Deputy Legal Counsel in the Office of Governor Thomas Carper, where she was responsible for policy and legislative initiatives in the areas of domestic violence and child welfare. Before joining Governor Carper's Administration, Judge Ranji was Director of Legal Affairs for Family Court and Deputy Director of the Domestic Violence Coordinating Council. Judge Ranji also practiced law with Drinker, Biddle & Reath, LLP, during which she provided *pro bono* representation to domestic violence victims, child abuse victims, and animal welfare agencies.

Judge Ranji received her B.A. from Rutgers University in 1991 and earned her law degree from Widener University School of Law in 1995. She currently chairs the Advisory Board for the Brandywine Valley SPCA. She is a former chair of the Women and the Law Section of the Delaware State Bar Association, the Delaware Child Protection Accountability Commission, and the Children and Domestic Violence Subcommittee of the DVCC, as well as former co-chair of the Delaware Child Death Review Commission.

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CHILD ADVOCATE – DELAWARE
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Tania Culley became Delaware's first Child Advocate in February of 2000, and has led Delaware's Office of the Child Advocate since that time. As Child Advocate, she manages an office of 40 employees and contractors, including eleven attorneys who primarily represent children in Family Court proceedings. Her office supervises a pool of over 250 volunteer attorneys, 200 CASAs, the CASA Program, the Office of the Investigation Coordinator, as well as provides legislative, policy and educational advocacy and training to Delaware's child protection community.

Tania is Executive Director of the Child Protection Accountability Commission, Delaware's Citizen Review Panel, which also reviews all Delaware child abuse deaths and near deaths, and is a Commissioner on Delaware's Child Death Review Commission. She serves on many committees and task forces focusing on child abuse, court improvement, youth aging out of foster care and juvenile justice. Over the years, Tania has drafted and lobbied for many statutory changes to Delaware laws on behalf of children and has conducted many trainings and professional development forums relating to abused and neglected children.

A Delaware native, Tania is a graduate of Christiana High School, the University of Delaware and Widener University School of Law, and is a Certified Child Welfare Law Specialist through the National Association of Counsel for Children.

JANINE N. HOWARD-O'RANGERS, ESQUIRE
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Janine N. Howard-O'Rangers is the Executive Director of Delaware Volunteer Legal Services, Inc. ("DVLS") and a Legal Consultant to the Widener University Delaware Law School Delaware Civil Clinic. Before becoming Executive Director, Ms. Howard-O'Rangers was a staff attorney for DVLS where she represented victims of domestic violence with family law issues and recruited *pro bono* attorneys. She graduated *cum laude* from Temple University in 1992 with a Bachelor's degree in Political Science and *cum laude* from Widener University Delaware Law School in 1995. She was admitted to the Delaware Bar in 1995 and the Pennsylvania Bar in 1997. She is a member of the Family Law Sections of the American Bar Association and the Delaware State Bar Association ("DSBA"). Ms. Howard-O'Rangers is a former Chair of the DSBA Family Law Section. In addition, Ms. Howard-O'Rangers serves on a number of committees that address access to justice and domestic violence issues. Ms. Howard-O'Rangers is an Adjunct Professor of Law at the Delaware Law School teaching courses on Interviewing & Counseling and Legal Problem Solving.

The Link

Domestic Violence, Child Abuse, and Child Welfare

Agenda

Family Court Chief Judge Newell and grandpup

- **Background of DE Initiative**
- **Overview of the Issues**
- **What We Know About the LINK**
- **What Can We Do With This Knowledge?**

Vinn the Family Court Therapy Dog

History

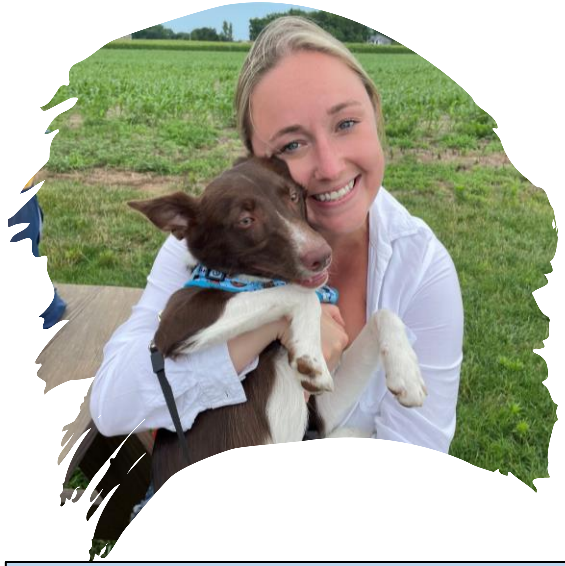
- Informal workgroup started meeting ~2 years ago
- Planned and held seminar on the LINK in April 2022
- LINK is focus area for NCJFCJ, they've been a partner and sponsor
- Fall 2022, informal workgroup created as DVCC LINK Committee

Whixie Hitchings: Family of Delaware attorney Timothy Hitchings

Approximately 70% of US households own pets and 98% of pet owners consider their pet to be an important part of their family

Pets are intricately woven into family life –
and that is generally good for us!

Playing with pets increases natural serotonin and dopamine production



Pets decrease stress levels more than spouses, family members and friends

Pet owners report higher self-esteem, less fearfulness, and more extroversion and exercise

The non-judgmental nature of pets helps to alleviate child anxiety and increase child empathy, and children rank pets above parents and friends as most likely to be there for them no matter what

Children are more likely to grow up with a pet in the household than with their biological father

Children who had a pet during their childhood were more empathetic, more prone to enter a helping profession, and more oriented toward social values than those without a pet

The LINK: DV and animal abuse

Judge Ranji and Max Cat

Tanya's Story


Severity of perpetrated abuse on animals increases with severity of abuse towards human victim
97% of survivors reported that keeping their pet was an important factor in seeking shelter
Abusive males who were also abusive to animals used more forms of violence and more controlling behaviors
Women in DV shelters are 11x more likely to report partner had hurt or killed their pet than women not reporting DV
On average, victims call police after 10 violent incidents, but where pet abuse is present, will wait until experience 20-40 incidents
91% of survivors report that their pets' emotional support and physical protection are significant in their ability to survive and heal
56% delayed leaving their abuser to seek shelter because their pet was also being abused

DAG Jenna Milecki's
Doggy B-day

Family of Delaware Superior Court Judge Mary Johnston

THE LINK: CHILD ABUSE AND ANIMAL ABUSE

The LINK: Child Abuse and Animal Abuse

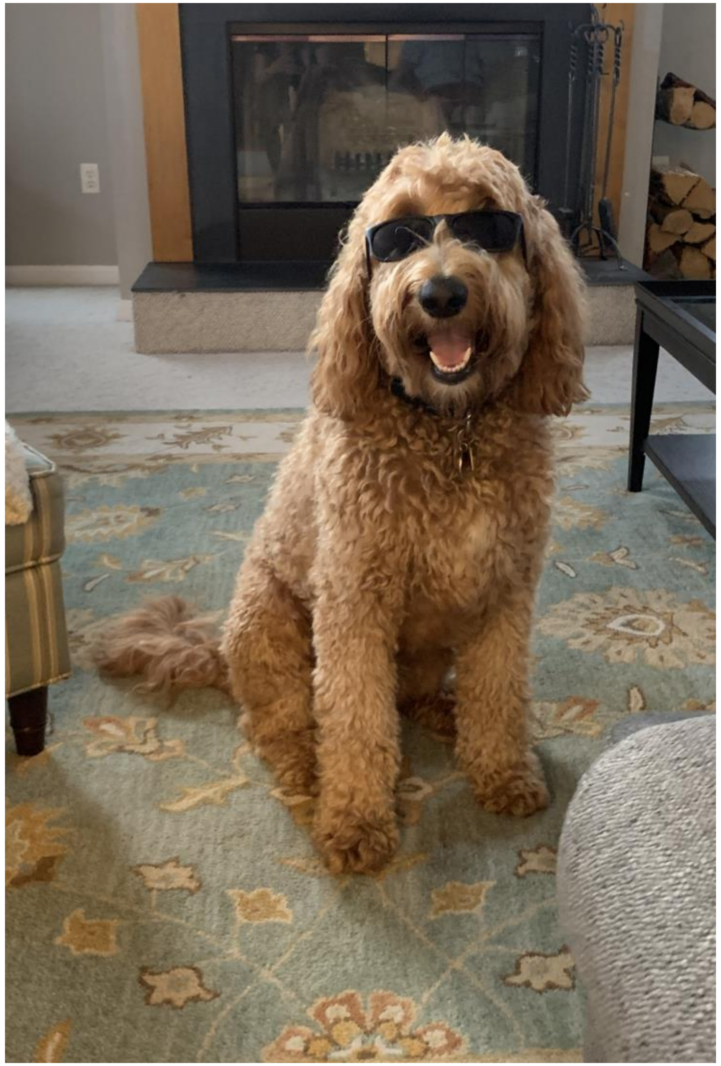
57% of youth who witnessed animal abuse also reported being victims of physical abuse, vs. 17% in non-animal abuse group

Evidence of animal abuse/neglect was present in 60% of families substantiated for child abuse/neglect

Judge Johnston's puppies!

61.5% of women residing at a DV shelter reported their children had heard/seen pets being abused, compared with 2.9% of women not experiencing DV

Angie's Story



CHIEF JUDGE NEWELL'S COOL PUP

THE RANJIS

Angela's Story

What we know about the LINK to other forms of violence

"One of the most dangerous things that can happen to a child is to kill and torture an animal and get away with it."

Margaret Mead

Link to Mass Shootings

ANIMAL ABUSE AND MASS MURDERS

Reading the Signs: When Will We Ever Learn?

"[A] review of school shootings from 1988 to 2012 found that 43 percent of the shooters had histories of animal cruelty, and the perpetrator of the 2018 high school massacre in Parkland, FL was a chronic animal abuser as well."

"The accused mass shooters in the horrific Buffalo, N.Y. supermarket and Uvalde, Texas elementary school massacres have become the latest in a string of alleged mass murderers whose ignored early warning signs included a history of torturing animals."

We Need to Talk About Animal Cruelty and Mass Shooters

"Both disturbed 18-year-olds bragged about and posted online content describing or depicting their abuse of cats and other animals."

Animal Cruelty LINKs to Mass Shootings
From National Link Coalition: The National Resource Center on The LINK between Animal Abuse and Human Violence
June 2022

ANIMAL ABUSE AS A PREDICTOR OF SCHOOL SHOOTINGS & MASS MURDERS

LINK to Animal Fighting

"Many communities report growing involvement of juvenile offenders in dogfighting, often as a part of gang involvement … virtually all dogfight raids involve the discovery and seizure of illegal drugs, and about two-thirds result in the seizure of illegal weapons … Disputes over dogfights have also been associated with serious assaults and several homicides."

NEWS

1 dog dies, 13 others saved following investigation into dog fighting. 5 men are charged

Esteban Parra
Delaware News Journal

Published 1:55 p.m. ET Jan. 11, 2023 | Updated 5:29 p.m. ET Jan. 11, 2023

LINK to Animal Fighting

“Cockfighting – which involves tying metal knives or “gaffs” onto the legs of aggressive chickens and forcing them to fight in a ring, often to the death – is illegal nationwide.”

CRIME

Animal rights advocates warn of cockfighting dangers amid reported fight in Felton

Hannah Edelman
Delaware News Journal

Published 6:11 a.m. ET May 18, 2023 | Updated 5:35 p.m. ET May 18, 2023

“The cockfight in Felton was caught on video by a drone after activist group Showing Animals Respect and Kindness received a tip about the fight. In the footage, groups of spectators — including a few children — could be seen in a building watching the fight.”

Cluck Norris and Dan Swasey

“Some attempted to kill the birds outside after fights, and other chickens — both alive and dead — were piled onto a small loader machine for disposal.”

Challenges in Prosecution

Mark Vavala's Good Boy

Consideration of Animals in Divorce Cases

Family Court Judge Hitch and Copper

The Harpells

How Can We Use This Knowledge About the LINK?

Pup of Rebecca Baird, Rebecca Baird, DSBA Director of Communications

“Canary in the coal mine”

- Swiper Scache part of the family of Delaware Attorney Achille Scache
- Chicken/Child of Kara Swasey, Esq. (Bayard, P.A.)
- Bunker Dougherty part of the family of Delaware Attorney Megan McGovern (Bayard, P.A.)

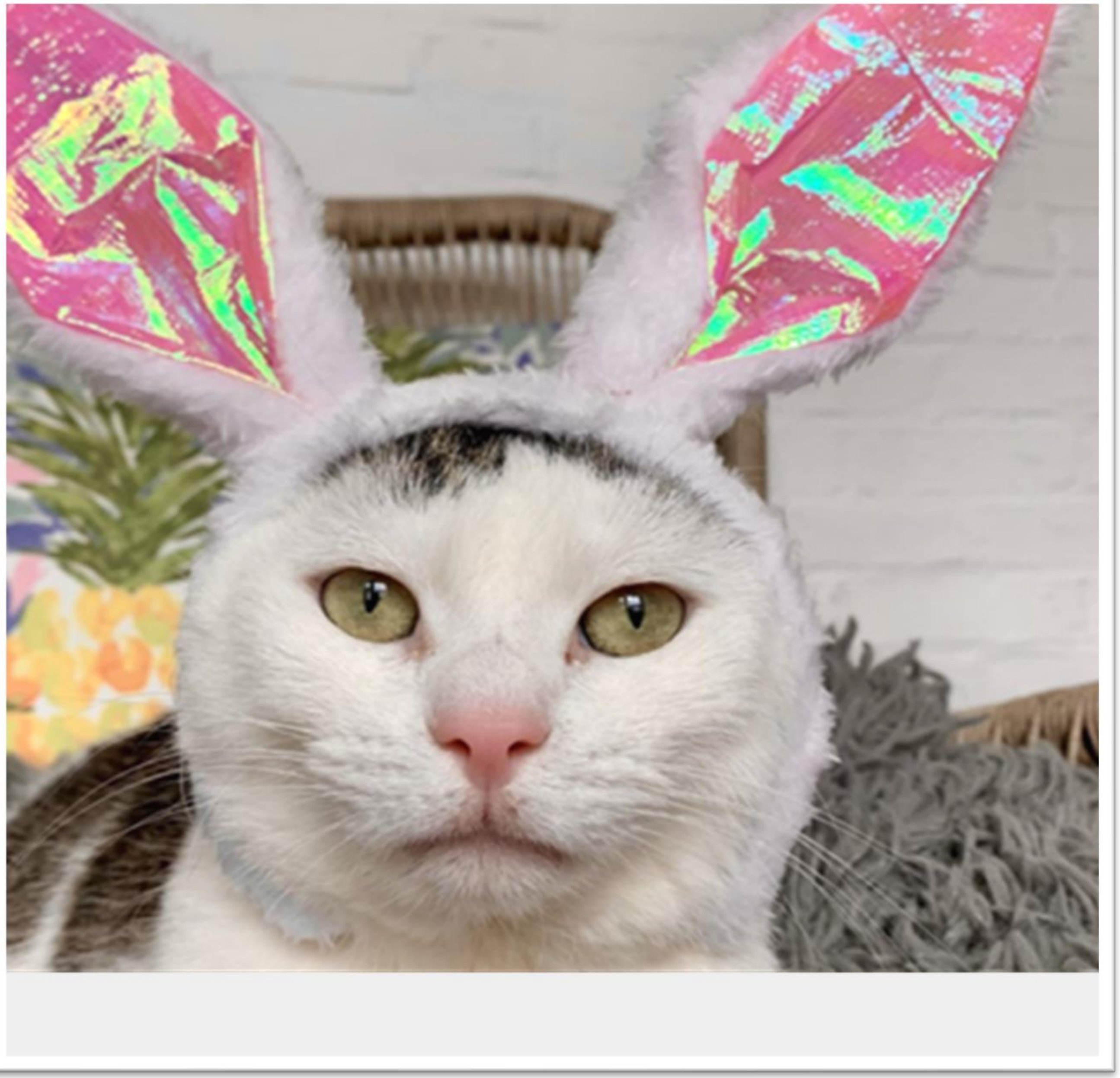
Ryan Newell and family

Janine Howard O'Ranger's photogenic pets

Cross-Reporting Abuse

- **Senate Bill 71** was supported and put forth by the Domestic Violence Coordinating Council based on the recommendation of the LINK Committee
- Requires professionals responding to child abuse cases to report suspected animal abuse to Office of Animal Welfare
- Provides immunity to anyone reporting animal abuse in good faith
- Clarifies that such reports are to be made to OAW
- Sponsored by Sen. Hansen, bill passed both chambers, awaiting Governor's signature

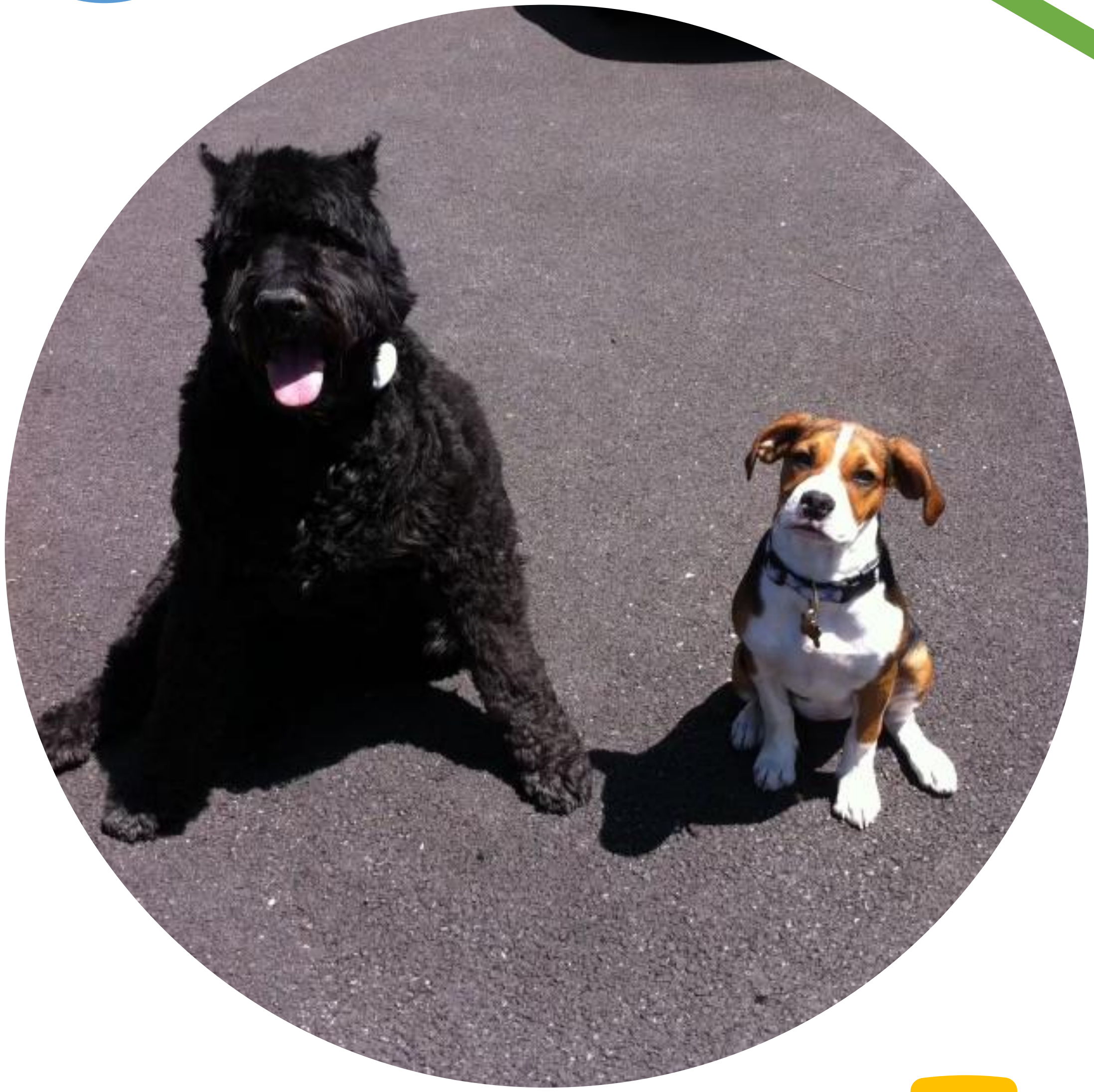
BVSPCA Critter Camp



Cat/Rabbit of Caroleena Goldman (DSBA Director for Access to Justice and Small Firms)

Animal Abuse and PFAs

- SB70 was supported and put forth by the Domestic Violence Coordinating Council based on the recommendation of the LINK Committee
- Adds abuse of pets as a form of abuse recognized within the PFA statutes
- Adds awarding possession of a pet as a form of relief in PFA statute
- Sponsored by Sen. Poore, bill passed Senate, released from House Committee, awaiting action on House floor



Chief Judge Newell’s doggos

Pets and Property Division

HB95 requires Family Court to consider and award ownership of pets that are marital property and to do so after considering the pets’ well-being

Lists factors to consider in making that determination

Provides opportunity for sharing of costs

Sponsored by Rep. Krista Griffith, the bill has passed both Chambers and awaits the Governor’s signature

Interventions

Tania Culley, Esq., Finley, and Cali

Judges Ranji and Ostroski at the April 2022 Seminar on the LINK!

Educating the Public

- Victim awareness of resources/options
- Cross-sector trainings of first-responders
- Education of the public at large about the LINK

Thank you for learning about The LINK!

CHIEF JUDGE NEWELL GRANDPUPS CLAIRE AND SALLY!