Fireside Chat with Vice Chancellor Paul A. Fioravanti, Jr.

<u>Panelist</u>

The Honorable Paul Fioravanti, Vice Chancellor | Delaware Court of Chancery

<u>Moderators</u>

Meredith Kotler, Partner & Co-Head of US Securities & Shareholder Litigation Freshfields

Adam Badawi, Professor of Law University of California, Berkeley

1. **Initial Remarks re Recent Amendments to Delaware General Corporation Law**

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314 A.3d 1108
Supreme Court of Delaware.

CITY OF DEARBORN POLICE AND FIRE REVISED RETIREMENT SYSTEM (Chapter 23), Martin Rosson, and Noah Wright, on behalf of themselves and all other similarly situated former stockholders of Terraform Power, Inc., Plaintiffs Below, Appellants, v. BROOKFIELD ASSET MANAGEMENT INC., Brookfield Infrastructure Fund III GP LLC, Orion US GP LLC, Orion US Holdings I LP, Harry Goldgut, Brian Lawson, Richard Legault, Sachin Shah, John Stinebaugh, Brookfield Renewable Partners, L.P., and Brookfield Renewable Corporation, Defendants Below, Appellees.

No. 241, 2023
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Submitted: January 17, 2024
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Decided: March 25, 2024

Synopsis
Background: Minority stockholders in alternative energy corporation brought action alleging breaches of fiduciary duty arising from a controller squeeze-out merger. The Court of Chancery, Kathaleen S. McCormick, Vice Chancellor, 2023 WL 5046772, dismissed for failure to state a claim. Stockholders appealed.

Holdings: The Supreme Court, en banc, Valihura, J., held that:

[1] controller did not engage in coercion of special committee that would defeat application of business judgment review;

[2] financial interest that special committee's financial advisor had in controller should have been disclosed in proxy statement;

[3] proxy statement's use of term "may" in addressing financial advisor's interest in controller was misleading;

[4] conflicts of special committee's legal advisor should have been disclosed in proxy statement;

[5] proxy statement did not adequately disclose projected management fees for controller;

[6] potential benefit to controller from debt refinancing did not need to be disclosed in proxy statement;

[7] proxy statement adequately disclosed estimated dilution of dividends; and

[8] advice to special committee regarding timing and process of merger did not need to be disclosed in proxy statement.

Affirmed in part and reversed in part.

West Headnotes (30)

[1] **Appeal and Error** De novo review

Supreme Court reviews de novo the chancery court's dismissal of a complaint for failure to state a claim. Del. Ch. Ct. R. 12(b)(6).

[2] **Appeal and Error** Failure to state claim, and dismissal therefor

On review of the chancery court's grant of a motion to dismiss for failure to state a claim, the Supreme Court must accept as true all of the plaintiff's well-pleaded facts and draw all reasonable inferences in plaintiff's favor. Del. Ch. Ct. R. 12(b)(6).

[3] **Equity** Motion and determination thereof

Chancery court should deny a motion to dismiss for failure to state a claim if the facts pled support a reasonable inference that the plaintiff can succeed on his claims. Del. Ch. Ct. R. 12(b)(6).

[4] **Corporations and Business Organizations** Duties of directors and officers in general; business judgment rule

In the context of a controller freeze-out merger, special committee approval and a favorable majority-of-the-minority vote must be established prior to trial in order for the transaction to be afforded the deferential business judgment standard of review.

1 Case that cites this headnote

[5] **Corporations and Business Organizations** Business judgment rule in general

Under the "business judgment rule," a corporate board's decision will be upheld unless it cannot be attributed to any rational business purpose.

1 Case that cites this headnote

[6] **Corporations and Business Organizations** Assent of Shareholders

Controlling stockholder's submission of a "no growth" financial model for alternative energy corporation to board's special committee during diligence for proposed squeeze-out merger did not constitute implicit coercion of special committee that would defeat application of business judgment review to the merger; claim of implicit coercion rested on attenuated and unreasonable inferences, and the special committee, which was fully empowered and independent, actively engaged in arms-length bargaining resulting in increased consideration for the benefit of minority stockholders after meeting at least 19 times during the transaction process.

[7] **Corporations and Business Organizations** Assent of Shareholders

Controlling stockholder's statement, in its offer to acquire the remaining outstanding shares of alternative energy corporation, that controlling stockholder would not support transactions other than its preferred deal did not suggest a type of coercion of board's special committee that would defeat application of the business judgment review to the squeeze-out merger.

[8] **Corporations and Business Organizations** Duties of directors and officers in general; business judgment rule

Standard for determining whether a board's special committee breached its duty of care in hiring and managing its advisors for considering a proposed merger is whether it is reasonably conceivable that the committee exhibited gross negligence.

[9] **Corporations and Business Organizations** Disclosure of information in general

Materiality of a fact that is omitted from a proxy statement for a proposed merger is to be assessed from the viewpoint of the reasonable stockholder.

2 Cases that cite this headnote

[10] **Corporations and Business Organizations**Disclosure of information in general

A $470 million investment that financial advisor for board's special committee had in controlling stockholder was a material conflict and should have been disclosed in proxy statement concerning proposed squeeze-out merger of alternative energy corporation, when viewed from the perspective of a reasonable stockholder.

[11] **Corporations and Business Organizations**Disclosure of information in general

The law places great importance on the need for transparency in the reliance of a board's special committee on its financial advisors in evaluating a proposed merger; it is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts.

1 Case that cites this headnote

[12] **Corporations and Business Organizations**Disclosure of information in general

Whether the opinion of a financial advisor to a board's special committee is ultimately influenced by the advisor's conflict of interest does not matter in determining whether the conflict was a material fact that should have been disclosed in a proxy statement for a proposed merger; presence of an undisclosed conflict is still significant, and there is no rule that conflicts of interest must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict.

2 Cases that cite this headnote

[13] **Corporations and Business Organizations**Disclosure of information in general

Statement, in proxy disclosure for proposed squeeze-out merger, that financial advisor for board's special committee "may" have committed and "may" commit in future to invest in private equity funds that were managed by controlling stockholder of alternative energy corporation was misleading, where advisor had already invested nearly a half a billion dollars in controlling stockholder at time of statement.

[14] **Corporations and Business Organizations**Disclosure of information in general

Just as a corporate disclosure to shareholders concerning a proposed merger cannot omit material information, the disclosure cannot be materially misleading.

[15] **Corporations and Business Organizations**Disclosure of information in general

To determine whether proxy statement for proposed squeeze-out merger of alternative energy corporation was deficient in failing to disclose conflicts that legal advisor for board's special committee had due to its prior relationship and concurrent representation of controlling stockholder, court would ask whether a reasonable stockholder would consider the information regarding the conflicts important in deciding how to vote.

1 Case that cites this headnote

[16] **Corporations and Business Organizations**Disclosure of information in general

Conflicts that legal advisor for board's special committee had due to advisor's prior relationship and concurrent representation of controlling stockholder and its affiliates were material conflicts that should have been disclosed in proxy statement for proposed squeeze-out merger of alternative energy corporation; advisor's concurrent engagement with a counter-party to the transaction could have presented legitimate concerns regarding advisor's objectivity.

2 Cases that cite this headnote

[17] **Corporations and Business Organizations**Disclosure of information in general

Although a proxy disclosure for a proposed merger must disclose material facts to stockholders, the law does not require corporate boards to engage in "self-flagellation" in their public disclosures.

[18] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

Corporate directors must exercise active and direct oversight of the process of merger, and this oversight includes learning about actual and potential conflicts of corporate advisors, and not merely checking a box at the outset based upon conclusory representations which are not properly vetted.

[19] **Corporations and Business Organizations**Disclosure of information in general

The $130 million in projected management fees that controlling stockholder would receive following proposed squeeze-out merger of alternative energy corporation was a material fact that should have been disclosed in proxy statement for the merger; it was reasonably conceivable that the proxy statement's failure to disclose the projected management fees likely significantly altered the total mix of information for shareholder voting.

2 Cases that cite this headnote

[20] **Corporations and Business Organizations**Disclosure of information in general

Proxy statement's disclosure of formula, but not the amount, of the $130 million in projected management fees that controlling stockholder would receive following proposed squeeze-out merger of alternative energy corporation was not an adequate disclosure of the amount of projected fees, where formula contained vague language, and some of the variables needed to complete the calculation of fees were missing.

[21] **Corporations and Business Organizations**Disclosure of information in general

Information disclosed to shareholders in a proxy statement for a proposed merger should be presented in a clear and transparent manner.

[22] **Corporations and Business Organizations**Disclosure of information in general

Although stockholders are entitled to a fair summary of a financial advisor's work in a proxy statement for a proposed merger, proxy disclosures must be sufficient for the stockholders to usefully comprehend, not recreate, the analysis.

[23] **Corporations and Business Organizations**Disclosure of information in general

Facts are not necessarily material facts that are subject to disclosure in a proxy statement for a proposed merger merely because a stockholder may find them to be helpful.

[24] **Corporations and Business Organizations**Disclosure of information in general

The potential $1 billion benefit to controlling stockholder from refinancing the debt of alternative energy corporation was not a material fact requiring disclosure in proxy statement for proposed squeeze-out merger, where the potential benefit was inherently speculative, and the proxy statement disclosed certain and known information about corporation's current outstanding debt, the respective maturity dates, and the respective interest rates.

[25] **Corporations and Business Organizations**Disclosure of information in general

A proxy statement for a proposed merger need not disclose information that is hypothetical and inherently speculative.

[26] **Corporations and Business Organizations**Disclosure of information in general

The estimated five percent dilution of dividends to stockholders through a given year was a material fact subject to disclosure in proxy statement for proposed controller squeeze-out merger of alternative energy corporation, where the main attractiveness for investors in a yield company like corporation was the regular distribution of dividends.

[27] **Corporations and Business Organizations**Disclosure of information in general

Proxy statement for proposed controller squeeze-out merger of alternative energy corporation adequately disclosed the estimated five percent dilution of dividends to stockholders through a given year, where proxy statement disclosed that the merger's impact on dividends was uncertain with the possibility of no distributions or dividends in the future or at all, the information needed to determine the merger's dilutive effect on dividends was not buried in disclosures, and relatively simple multiplication could have shown the merger's dilutive effect on dividends.

[28] **Corporations and Business Organizations**🔑Disclosure of information in general

The law governing proxy statements for proposed mergers does not require a stockholder to engage in a scavenger hunt in which the stockholder must piece together the answer from information buried in the statements.

[29] **Corporations and Business Organizations**🔑Disclosure of information in general

Financial advisor's advice to board's special committee regarding the timing and process of proposed controller squeeze-out merger of alternative energy corporation was not a material fact subject to disclosure in proxy statement for the merger, where advisor's comments concerning the "optimal" timing and necessity for a "robust market check" were from an earlier "pitch" to the board's special committee that was given before negotiations with controlling stockholder began, and special committee later reasonably concluded that a market check was unnecessary.

[30] **Corporations and Business Organizations**🔑Disclosure of information in general

The law governing proxy statements for proposed mergers does not require a play-by-play description of every consideration or action taken by a board; doing so would make proxy statements so voluminous that they would be practically useless.

***1112** Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0097

Upon appeal from the Court of Chancery. **REVERSED**.

Attorneys and Law Firms

Ned Weinberger, Esquire, Mark Richardson, Esquire, Brendan W. Sullivan, Esquire (argued) Labaton Sucharow LLP, Wilmington, Delaware. Peter B. Andrews, Esquire, Craig J. Springer, Esquire, David M. Sborz, Esquire, Jackson E. Warren, Esquire, Andrews & Springer LLC, Wilmington, Delaware. Of Counsel: John Vielandi, Esquire, Labtaton Sucharow LLP, New York, New York. Jeremy Friedman, Esquire, David Tejtel, Esquire, Friedman Oster & Tejtel PLLC, Bedford Hills, New York, Douglas E. Julie, Esquire, W. Scott Holleman, Esquire, Garam Choe, Esquire, Julie & Holleman LLP, New York, New York. Brian J. Robbins, Esquire, Stephen J. Oddo, Esquire, Robbins LLP, San Diego, California for Appellants.

Kevin G. Abrams, Esquire, Eric A. Veres, Esquire, Abrams & Bayliss LLP, Wilmington, Delaware. Of Counsel: John A. Neuwirth, Esquire (argued), Stefania D. Venezia, Esquire, Amanda K. Pooler, Esquire, Elizabeth M. Sytsma, Esquire, Tanner S. Stanley, Esquire, Weil, Gotshal & Manges LLP, New York, New York for Appellees.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices, constituting the Court en Banc.

VALIHURA, Justice:

***1113** *INTRODUCTION*

This is an appeal of the Court of Chancery's bench ruling granting Defendants Below-Appellees' motion to dismiss in full. Plaintiffs Below-Appellants filed suit in the Court of Chancery challenging a squeeze-out merger (the "Merger"). They asserted several breach of fiduciary duty claims. Defendants argued that the claims must be dismissed because the Merger satisfied the elements of

Kahn v. M & F Worldwide Corp. ("*MFW*")[1] — entitling the board's actions to business judgment review. The Court of Chancery, in a telephonic ruling, granted Defendants' motion to dismiss.[2]

On appeal, Appellants raise two claims of error. First, they assert that the trial court erred in finding that they failed to adequately allege coercion under *MFW*. Second, they assert that the trial court erred in finding that *MFW* was satisfied because they failed to adequately plead that the proxy statement was materially deficient.

We affirm the trial court's dismissal of the coercion claim. As to the second claim, we conclude that the minority stockholders were not adequately informed of certain alleged conflicts of interest between the special committee's advisors and the counterparty to the Merger. The Court of Chancery recognized that this was a close call, and we agree. But, upon a review of the record, we hold that the Court of Chancery erred as to certain of the disclosure issues concerning the special committee's financial and legal advisors' conflicts of interest.

Accordingly, we REVERSE the Court of Chancery's judgment.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[3]

A. The Parties[4]

Plaintiffs Below-Appellants are City of Dearborn Police and Fire Revised Retirement System (Chapter 23) ("Dearborn"), Martin Rosson, and Noah Wright (collectively, "Appellants"). Prior to the Merger, they were stockholders of TerraForm Power, Inc. ("TerraForm"). TerraForm was a Delaware corporation with its principal place of business in New York City. TerraForm acquired, owned, and operated solar and wind energy facilities in North America and Western Europe. TerraForm completed its IPO on July 23, 2014.

Defendants Below-Appellees are affiliates, officers, and other executives of Brookfield Asset Management Inc. ("BAM"), an alternative asset manager (collectively, "Brookfield").[5] Defendant BEP is an exempted limited partnership formed under the laws of Bermuda and is ***1114** an affiliate of Brookfield. BAM and BEP controlled TerraForm. Defendant BEPC is a corporation incorporated under the laws of British Columbia and is an affiliate of Brookfield. Defendant John Stinebaugh served as Managing Partner in Brookfield's Infrastructure Group and served, at all relevant times, as TerraForm's Chief Executive Officer under a 2017 governance agreement between TerraForm and Brookfield. Defendants Brian Lawson, Harry Goldgut, Richard Legault, and Sachin Shah were each, at all relevant times, senior executives of Brookfield and served on the TerraForm board (the "Director Defendants").

B. Background of the Private Placement

On March 6, 2017, Brookfield entered into an agreement to acquire 51% of TerraForm's outstanding Class A common stock pursuant to a merger and sponsorship transaction agreement.[6] The transaction was completed on October 16, 2017, after which Brookfield became TerraForm's controller.[7] Soon thereafter, TerraForm and Brookfield entered into several ancillary agreements that granted Brookfield the right to control significant aspects of TerraForm's governance. Specifically, Brookfield acquired the exclusive power to appoint TerraForm's Chief Executive Officer, Chief Financial Officer, and General Counsel.[8] And as long as Brookfield qualified as TerraForm's controlling stockholder under applicable exchange listing rules, Brookfield would have the right to designate four of TerraForm's seven board members. Brookfield designated Lawson, Goldgut, Legault, and Shah as TerraForm board members, and they served at the time of the Merger.

Under TerraForm's charter, the three remaining board members were required to be "independent" as defined under SEC and NASDAQ rules and regulations. The three independent board members at the time of the Merger were: Mark McFarland, Carolyn Burke, and Christian Fong. These independent directors formed the conflicts committee ("Conflicts Committee"), which reviewed and approved material transactions that potentially posed a conflict of interest between Brookfield and TerraForm.

In January 2018, Brookfield presented TerraForm with the opportunity to acquire Saeta Yield, S.A. (or "Saeta") for $1.2 billion (the "Saeta Acquisition"). Saeta was a publicly-traded Spanish yield company that owned and operated wind and solar energy assets. Saeta was an attractive target for TerraForm because TerraForm's management predicted that the acquisition would cause an increase in average dividends per share of 6.5% over the first five years — creating more than $100 million in incremental value for its stockholders.[9] At first, TerraForm's management believed that the company could fund the Saeta Acquisition with its existing liquidity.[10] However, as negotiations progressed, ***1115** Brookfield's and TerraForm's management presented a proposal to the Conflicts Committee that envisioned raising between $600 and $700 million through an equity issuance in the public markets. On February 6, 2018, the Conflicts Committee approved a financing plan that included $800 million of TerraForm's available funds and $400 million in public equity issuances including a backstop agreement for Brookfield to purchase all of the unpurchased equity in the offering for $10.66 per share (the "Backstop").[11] TerraForm's stockholders approved the equity issuance at TerraForm's annual meeting on May 23, 2018.[12]

Soon after the stockholder vote, the TerraForm board held a meeting and discussed increasing the equity issuance and the Backstop from $400 million to $650 million. In a subsequent Conflicts Committee meeting, Brookfield stated that it preferred that the entire $650 million equity offering be a backstopped private placement with Brookfield itself (the "Private Placement"). The Conflicts Committee, in turn, approved the Private Placement on June 4, issuing $650 million in equity in a private placement to Brookfield at a per-share price of $10.66. This transaction increased Brookfield's ownership of TerraForm's outstanding common stock from 51% to 65.3%. With this Private Placement funding, TerraForm executed the tender offer for Saeta's shares and then acquired it through a short form merger on July 2, 2018.[13]

In response to the Private Placement, TerraForm stockholder, Martin Rosson, filed a derivative and class action complaint in the Court of Chancery on September 19, 2019, challenging the Private Placement as unfair to TerraForm's minority stockholders. Soon thereafter, on January 27, 2020, another stockholder, Dearborn, filed its own class action and derivative complaint in the Court of Chancery similarly challenging the Private Placement. The complaint asserted claims against certain Brookfield affiliates arising out of Brookfield's purchase of $650 million in shares of TerraForm stock to finance TerraForm's acquisition of Saeta.[14] The trial court consolidated the actions on February 13, 2020, and designated the complaint filed by Dearborn as the operative complaint in the consolidated action (the "Private Placement Action").[15]

C. Background of the Merger

Early in 2020, Brookfield's subsidiary, BEP, made an all-stock proposal on January 11 to acquire the remaining outstanding shares of TerraForm other than the 62% already owned by Brookfield.[16] BEP's ***1116** offer contemplated an exchange ratio of 0.36x for each share of TerraForm stock. BEP's proposal stated that it had no interest in selling any of its shares or participating in any alternative merger involving a third party. Additionally, because this was a squeeze-out merger, BEP conditioned its proposal on the approval of an independent special committee and a majority of the minority stockholders in an effort to comply with the *MFW* requirements.

1. The Special Committee is Formed

TerraForm's board convened to discuss the proposal the same day. After the board meeting, the Conflicts Committee met to discuss forming a special committee. The Conflicts Committee contemplated that the special committee would have the same members as the Conflicts Committee with McFarland serving as Chair.[17] The Conflicts Committee also discussed financial advisors and decided to request presentations from Greentech Capital Advisors Securities LLC ("Greentech") and Morgan Stanley & Co. LLC ("Morgan Stanley"). The board executed a unanimous written consent on January 12, 2020, to form a special committee consisting of Burke, Fong, and McFarland (Chair) (the "Special Committee").

The TerraForm board granted the Special Committee the exclusive power and authority to: (i) review and evaluate the terms and conditions of the offer, and determine its advisability and any alternative thereto; (ii) negotiate with BEP or any other party as the Special Committee deemed appropriate with respect to the offer or any alternative thereto; (iii) determine whether the offer or any alternative thereto negotiated by the Special Committee was fair to, and in the best interests of TerraForm and all of its stockholders other than BEP and its affiliates; (iv) reject the offer and any other alternative transaction and recommend to the TerraForm board what action, if any, should be taken; and (v) take any and all other actions it deemed necessary and advisable in light of any offer or alternative thereto. The board also delegated to the Special Committee the authority to retain its own legal and financial advisors. The Special Committee retained Richards, Layton & Finger, P.A. ("RLF") as its legal advisor.

2. The Special Committee's Retention of Advisors

Consistent with this authority, the Special Committee met on January 12, 2020 to discuss the offer and retain a financial advisor. It interviewed Greentech, who had previously served as a financial advisor to the Conflicts Committee. In its January 12 presentation, Greentech told the Special Committee that "(a) it was not the optimal time to realize maximum value for TerraForm[,] (b) third parties might be willing to value [TerraForm]'s minority stake higher than Brookfield, and (c) a robust market check is a must to ensure maximum value for TerraForm's public shareholders, and to execute the Special Committee[']s fiduciary duty[.]"[18] Greentech also highlighted that Brookfield's offer came at a time when the relative exchange ratio between BEP and TerraForm share prices was at a twelve-month low from TerraForm's perspective.

***1117** TerraForm signed an engagement letter that same day with Greentech.[19] The Special Committee convened the next day to hear a presentation from Morgan Stanley. In its January 13, 2020 presentation, Morgan Stanley noted that Brookfield would realize significantly increased management services fees by consolidating TerraForm into BEP. Morgan Stanley deemed Brookfield's expected increase in management fees from any transaction to be "a Key Consideration for the Special Committee" that would warrant a higher premium.[20] Morgan Stanley also stated that a market check might be impracticable because Brookfield's majority ownership might have a negative effect on a third party's willingness to introduce an outside bid. The Special Committee signed an engagement letter with Morgan Stanley on January 17 for Morgan Stanley to serve as a financial advisor to the transaction.[21]

Both Brookfield and TerraForm had previously engaged Morgan Stanley in prior, unrelated matters. Morgan Stanley had received $65 to $90 million in fees from Brookfield in the prior two years and had received $5 to $15 million in fees from TerraForm in the same period. Additionally, Morgan Stanley and its affiliates held a collective stake of $470 million in Brookfield-related entities, and Morgan Stanley was concurrently serving as a lender and participant in certain financings for Brookfield affiliates. Morgan Stanley's engagement letter did not disclose those conflicts.[22] At least as alleged, the Special Committee never asked for a conflicts disclosure from Morgan Stanley, nor did it attempt to mitigate Morgan Stanley's conflicts through limitations on its representation or supervision of its negotiations or interactions with Brookfield.

Third, shortly after retaining its financial advisors, the Special Committee retained Kirkland & Ellis LLP ("Kirkland") as its legal counsel for the Merger. Kirkland had previously advised Brookfield affiliates on prior unrelated transactions and was also concurrently advising Brookfield on a separate equity investment. None of this information was disclosed to the Special Committee. In fact, despite this prior relationship and concurrent representation of Brookfield, Kirkland told the Special Committee "that it did not have any conflicts of interest that would affect its ability to serve as legal counsel to the [Special] Committee[.]"[23] The Special Committee never requested a conflict disclosure from ***1118** Kirkland, nor did it discuss the appropriateness of Kirkland serving as the Special Committee's legal advisor given Kirkland's prior relationship and concurrent representation of Brookfield.

3. Negotiations with Brookfield Proceed

The Special Committee met with both Greentech and Morgan Stanley on January 29, 2020, to discuss the diligence necessary to evaluate a potential transaction with Brookfield. Greentech and Morgan Stanley discussed a Barclays research report that predicted the positive effect on BEP from an acquisition of TerraForm at Brookfield's proposed 0.36x exchange ratio. Greentech and Morgan Stanley attributed at least part of the accretion to a thirty-five-basis-point improvement from refinancing TerraForm debt under BEP's investment grade balance sheet and removing TerraForm's existing management service fees.[24]

At a meeting on February 4, 2020, the Special Committee advised Greentech and Morgan Stanley that they should not consider transactions with alternative third parties because Brookfield had stated in its initial offer that it would not consider alternative transactions.

The Special Committee met again on February 6, 7, 11, and 18 to discuss Greentech's and Morgan Stanley's other diligence findings. The Special Committee decided against soliciting alternatives due to the very low probability that a third party would have an interest in, and ability to, present a proposal that offered more value to TerraForm's stockholders in view of Brookfield's position.

On January 29, 2020, Dearborn submitted a letter to the board demanding that the Special Committee ensure that the derivative claims of the Private Placement Action be given adequate weight in negotiations. Dearborn's January 29 letter claimed that potential damages from the Private Placement Action could exceed $400 million based on TerraForm's then-trading stock price. Dearborn also requested an in-person meeting with the Special Committee to discuss the value of these claims and to ensure that they were factored into the purchase price.

When the Special Committee did not respond to this initial outreach, Rosson and Dearborn sent a letter on February 13. The letter expressed concerns that the Special Committee did not intend to obtain fair value for the claims in negotiating a potential merger. Rosson and Dearborn claimed that the total damages could now exceed $576 million because of increases to TerraForm's stock price. As with the earlier letter, Rosson and Dearborn requested an in-person conference with the Special Committee. The Special Committee's counsel forwarded both letters to the Special Committee.

The Special Committee requested that its counsel consider the effect of the Private Placement Action on negotiations and discussed counsel's analysis at its meeting on February 19. The Special Committee concluded that the claims had, at most, a *de minimis* value and were not sufficiently material to factor into the negotiation of economic terms of the proposed transaction. The Special Committee declined to meet with Dearborn and Rosson.

The Special Committee met again on February 26, 2020 to receive presentations from Greentech and Morgan Stanley regarding their respective financial analyses of the 0.36x exchange ratio offered by Brookfield. Both advisors discussed the implications of rejecting the offer. Greentech stated that TerraForm depended on Brookfield for growth, but it noted that BEP's five-year forecasts for TerraForm ***1119** excluded future growth at the TerraForm level. Greentech's analysis showed that TerraForm's implied exchange ratio would be reduced from an overall valuation range of 0.33x–0.44x to 0.24x–0.34x when excluding growth. It advised the Special Committee that one of the "Key Valuation Issues" was that TerraForm was "nearly fully reliant on Brookfield for growth[,]" and that without Brookfield's continued support absent a deal, TerraForm's value would plummet.[25] Greentech reported that TerraForm management's and BEP's five-year forecasts for TerraForm did not align because "BEP's model excludes future growth at the [TerraForm] level[.]"[26] Greentech summed up the issues by pointing out that agreeing to a deal with Brookfield would alleviate the concerns about the ability and willingness of BEP to grow TerraForm as a standalone entity.

Morgan Stanley also highlighted that TerraForm was dependent on Brookfield for future growth and that rejecting Brookfield's offer could sour the relationship, which Plaintiffs translated into a potential for "Brookfield to retaliate by denying [TerraForm] growth opportunities[.]"[27] Plaintiffs alleged that "Brookfield's refusal to commit to supporting [TerraForm]'s future growth plans in the absence of a merger had the effect of coercing the Special Committee into agreeing to a deal."[28]

Morgan Stanley's presentation also relayed that Brookfield was incentivized to purchase TerraForm to reduce its interest expense and increase its management fees from TerraForm by refinancing its debt after the Merger.[29] Morgan Stanley calculated the net present value to Brookfield from this debt refinancing at over $1 billion.

Finally, according to the Plaintiffs, the presentations by both Morgan Stanley and Greentech demonstrated that Brookfield's offer was opportunistic, as it occurred when the implied exchange ratio "was nearly the lowest it had been in two years, significantly favoring Brookfield."[30]

After these presentations, the Special Committee decided to maintain its course and not solicit any third-party interest in a transaction given Brookfield's stated unwillingness to support an alternative transaction, but agreed to re-raise the issue if negotiations with Brookfield faltered. The Special Committee proposed a counteroffer to Brookfield of a 0.42x exchange ratio and a list of noneconomic terms. Brookfield agreed to most of the noneconomic terms, including that TerraForm's minority stockholders would have the option to receive stock in either a limited partnership entity or a corporation under the Brookfield umbrella.

The parties then went back and forth on the exchange ratio. On March 6, 2020, Brookfield countered with a ratio of 0.365x, which Morgan Stanley and Greentech estimated would be dilutive to TerraForm's stockholders' dividends per share. The Special Committee met with its advisors to discuss the offer and determined that an ***1120** exchange ratio of over 0.37x would be economically advantageous to minority stockholders.

On March 10, 2020, the Special Committee responded with a 0.40x exchange ratio.[31] On March 11, Brookfield countered with a 0.37x exchange ratio. The same day, the Special Committee countered with a 0.39x exchange ratio and determined that it would not accept any counter from Brookfield of less than a 0.38x exchange ratio. Brookfield refused the 0.39x offer and responded with a counteroffer of 0.375x.

On March 12, the Special Committee and Brookfield engaged further with the Special Committee pressing its 0.39x offer and Brookfield indicating that it was unwilling to agree to a ratio of 0.39x and was unwilling to go higher than 0.38x. The Special Committee then proposed an exchange ratio of 0.381x, which Brookfield accepted.[32] The Special Committee asked its financial advisors to present their analyses on March 16, 2020.

The Special Committee met with Greentech and Morgan Stanley on March 16, 2020. Both advisors delivered their opinions that the transaction was financially fair to TerraForm's minority stockholders. Using BEP's closing price on March 13, the 0.381x exchange ratio yielded an implied purchase price for TerraForm's stock of $16.34 per share.[33] Based on BEP's March 15, 2020 closing share price, the implied consideration was $14.36 per share (which was below the values calculated by Morgan Stanley and Greentech).[34] Greentech and Morgan Stanley presented a host of valuations for TerraForm's stock under different conditions and assumptions. The mid-point of Greentech's valuation pegged TerraForm's per-share value at $15.375 per share. The mid-point in Morgan Stanley's valuations priced TerraForm at $18 per share.[35] Based on the number of TerraForm shares outstanding as of the signing of the Merger Agreement, the Merger valued TerraForm at approximately $3.3 billion.

After noting that BEP's five-year forecasts for TerraForm did not include any growth at the TerraForm level and that "[TerraForm] is fully dependent on Brookfield for future growth," Greentech explained that excluding growth from TerraForm's projections would significantly reduce its implied valuation range for TerraForm.[36] Greentech presented financial analyses for TerraForm under both scenarios depending on whether Brookfield ***1121** would support TerraForm's future growth. Morgan Stanley also reiterated that Brookfield had substantial influence over TerraForm and could significantly impact TerraForm's ability to execute its business plan.

After receiving these presentations, the Special Committee recommended that the board approve Brookfield's offer at an exchange ratio of 0.381x. On March 16, 2020, TerraForm's directors convened to consider the offer.[37] All directors present voted to approve the Merger, and the board instructed authorized officers to prepare and file a proxy statement concerning the proposed Merger.

D. The Proxy Disclosure

TerraForm filed its proxy statement soliciting a stockholder vote on the proposed Merger on June 29, 2020 (the "Proxy").[38] As noted by the trial court, the Proxy was "light on details" concerning the Special Committee's advisors' diligence throughout the process and did not include specifics about any third-party interests. The Proxy did disclose that both TerraForm and Brookfield had previously engaged Morgan Stanley and the fees earned from those engagements for the past two years. The Proxy disclosed that "the [TerraForm] acquisition will likely provide a number of significant benefits to the Brookfield Renewable group[.]"[39] Specifically, the acquisition would simplify the Brookfield Renewable Group's ownership structure, eliminate public company costs, expand Brookfield's portfolio in North America and Western Europe, and increase Brookfield's annual $20 million management fee by 1.25% of Brookfield's increased post-Merger value. Additionally, the Proxy disclosed that the Merger would be accretive to Brookfield's cash flows. The Proxy disclosed that the Merger's impact on dividends was uncertain — "there can be no assurance that Brookfield Renewable or BEPC will make comparable distributions or dividends in the future[.]"[40] It also disclosed the existence of the Private Placement Action but stated that the action had a *de minimis* value and, therefore, was not of much relevance.

E. The Court of Chancery Proceedings

Plaintiffs filed their original complaint in this action in the Court of Chancery on January 28, 2022. Defendants subsequently filed their motions to dismiss. The parties then submitted a dismissal of Burke, ***1122** Fong, and McFarland, which the trial court granted on June 15, 2022. On June 21, Plaintiffs filed the operative amended complaint seeking damages for Defendants' alleged breach of fiduciary duties stemming from the Merger. The amended complaint asserted three counts. In Count I, Plaintiffs alleged that the Brookfield entities breached their fiduciary duties in their capacity as controller. In Count II, Plaintiffs alleged that the Director Defendants breached their fiduciary duties in approving the Merger and issuing a misleading Proxy. In Count III, Plaintiffs alleged that Stinebaugh, in his capacity as CEO, breached his fiduciary duties by participating in, preparing, and disseminating the Proxy. Generally, Plaintiffs alleged that Defendants failed to satisfy the framework set forth by this Court in *MFW*. Consequently, in their view, the Merger must be analyzed under the exacting entire fairness standard as opposed to the business judgment standard of review.

Defendants, in turn, moved to dismiss the complaint on August 26, 2022, pursuant to Rules 12(b)(1) and 12(b)(6). They argued that Plaintiffs' claims were deficient because the transaction satisfied the elements of *MFW*, entitling the board's actions to the business judgment standard of review. The motion was fully briefed, and the trial court heard oral argument on February 14, 2023. Of the six *MFW* factors, Plaintiffs did not contest three: that Brookfield conditioned the transaction *ab initio* on approval of the Special Committee and a majority of the minority stockholders; that the Special Committee was independent; and that there was no coercion of the minority stockholders.

Instead, Plaintiffs focused their challenge on the third, fourth, and fifth factors arguing that, because the Special Committee was not fully empowered, it failed to meet its duty of care, and the stockholder vote was not informed. They argued that Brookfield had furnished the Special Committee with a set of projections that excluded any growth at TerraForm, and that these projections implicitly threatened that Brookfield would prevent TerraForm's growth if the Special Committee rejected the Merger. They alleged that the Special Committee ultimately acquiesced and recommended a Merger at a sub-optimal price.

The trial court granted Defendants' motion to dismiss in full following a telephonic bench ruling on June 9, 2023. In granting the motion to dismiss, the court determined that Plaintiffs had failed to demonstrate that the dual prongs of the *MFW* framework were not met in the transaction — those two prongs being the approval of a wholly independent special committee and a majority of the minority stockholders. The court issued a letter supplementing the ruling on June 21, 2023, and issued an order dismissing the complaint on June 23, 2023.

The trial court held that Plaintiffs failed to adequately allege coercion under *MFW* because the allegedly coercive conduct was less extreme than that alleged in *In re Dell Techs. Inc. Class V S'holders Litig.*,[41] which we discuss in more detail later. Unlike in *Dell*, Plaintiffs did not allege that Brookfield signaled that it intended to "bypass" the formal process if the Special Committee chose not to approve the transaction. In short, the trial court concluded that Plaintiffs' theory of coercion depended upon attenuated and unreasonable inferences.

The trial court then addressed Plaintiffs' claims that the Special Committee failed to satisfy its duty of care by (i) failing to conduct a market check, (ii) selecting conflicted advisors, and (iii) assigning *de minimis* ***1123** value to the derivative Private Placement Action claims.[42] It rejected all three claims.

As to the market check theory, relying on *BridgeBio Pharma*,[43] the trial court ruled that a failure to conduct a market check can be a factor supporting a claim challenging a sale process, but in this case, it did not impugn the Special Committee's exercise of due care and did not constitute gross negligence.

The court next addressed Plaintiffs' claim that the Special Committee breached its duty of care by selecting Morgan Stanley and Kirkland — both of whom were conflicted. The court approached the issue by focusing on whether the conflicts were material. Starting with Morgan Stanley, the trial court stated that when a plaintiff challenges financial advisors' independence based on its holdings in the counterparty, whether the advisor's financial interest in the transaction is material can inform the analysis.[44] In this case, Plaintiffs challenged Morgan Stanley's $470 million stake in Brookfield entities and its concurrent representation of Brookfield in an unrelated financing matter. Although the trial court determined that the $470 million stake was not material, it expressed its discomfort with the facts:

> I'll be honest, I don't love the fact that Morgan Stanley has this level of financial ties to the controller. But plaintiffs have not pled facts sufficient for this to give rise to a duty of care violation by the special committee. Morgan Stanley was one of two financial advisors to the special committee. Its ownership stake was small relative to its overall holdings, constituting only .1 percent of its portfolio value. This court has found that an investment bank's holdings in a counterparty amounting to .16 percent of its overall portfolio was insufficient to create a material conflict. The plaintiffs have failed to provide a compelling rationale as to why this case should come out differently. Moreover, the fees Morgan Stanley had accrued from both Brookfield and TerraForm were disclosed in the proxy, demonstrating that the special committee knew of these payments.[45]

The trial court similarly dispensed with Plaintiffs' claims against Kirkland as follows:

> Plaintiffs point to Kirkland's prior representation of Brookfield affiliates and its concurrent work for Brookfield on an unrelated equity transaction as a basic carbon copy. Again, I do not love these alleged conflicts. I wish Kirkland had not concurrently represented Brookfield in an unrelated equity transaction. But the allegations fail to cast doubt on the reasonableness and the good faith nature of the special committee's decision to hire Kirkland following its own diligence. Plaintiffs do not allege that Kirkland represented Brookfield or its affiliates as counterparties to the merger or on any related transaction.[46]

***1124** The court concluded its discussion of the Morgan Stanley and Kirkland conflicts/due care claims by concluding that Plaintiffs had not alleged any facts suggesting that "the special committee was grossly negligent in hiring Kirkland[ ]"[47] or that they were entitled "to an inference of gross negligence simply because the special committee, knowing of this issue, still retained Morgan Stanley."[48] The court then summed up its due care analysis as follows:

> Taken separately and in the aggregate, plaintiffs' allegations fail to impugn the special committee's exercise of [due] care. The special committee convened at least 19 times between February and March 2020 and engaged in feedback with advisors. It successfully bid up the deal price from the initial proposed .36 ratio to a .381 ratio with favorable noneconomic terms. Plaintiffs failed to plead a reasonably conceivable basis to find that the special committee acted with gross negligence.[49]

Next, the court addressed the disclosure claims. It determined that it had already addressed seven of the nine categories of claims. Because it viewed its decision on the due care claims as having mooted the seven, it addressed them summarily.

To start, the court rejected Plaintiffs' first two claims that the Proxy improperly omitted Greentech's view about the need for a market check and Greentech's view that it was not an optimal time for a transaction. For the market check issue, the court based its reasoning on its prior conclusion that the Special Committee had reasonably concluded that a market check was not needed. As for the timing issue, the court concluded that the statement was merely part of a pitch and that Greentech had ultimately recommended in favor of the transaction at the 0.381x exchange ratio.

Third, the court dispensed with Plaintiffs' theory that the Proxy failed to disclose Brookfield's coercion of the Special Committee by saying that it had "rejected the theories of coercion rendering this disclosure immaterial."[50] Fourth, it rejected Plaintiffs' disclosure claim regarding the value of the derivative Private Placement claims.

In a similar vein, the court rejected Plaintiffs' fifth and sixth claims that the Proxy failed to disclose material information regarding Morgan Stanley's and Kirkland's conflicts because the court had already found that Plaintiffs failed to plead "that Morgan Stanley or Kirkland were meaningfully conflicted as to the merger, rendering those omissions immaterial."[51] Seventh, the court rejected Plaintiffs' claim that the Proxy failed to disclose how the Special Committee managed Morgan Stanley's and Kirkland's conflicts. It summarily held that "similar to disclosures regarding the alleged conflict, the omission was immaterial."[52]

The court more closely examined the final two disclosure categories: (i) the benefits Brookfield stood to receive from the Merger (including both increased management fees and the interest expense savings if it opted to refinance TerraForm's debt); and (ii) the dilutive effect of the Merger on dividends. As to the management fees, the court was satisfied with the Proxy's statement that the acquisition would "likely provide a number of significant benefits to Brookfield," including simplifying BEP's ownership structure, ***1125** eliminating public company costs, and generating increased cash flows.[53] In addition, the Proxy disclosed "the method for calculating Brookfield's management fees, an annual management fee of $20 million, plus 1.25 percent of the amount by which the market increased."[54] Accordingly, it held that "the management fees were fully described."[55] The question for the court was "whether the proxy adequately disclosed Morgan Stanley's presentation that Brookfield's five-year gain in management fees would be approximately $130 million."[56]

Although it found the question to be a "close call," the trial court concluded that this was "the kind of level of detail that doesn't have to be disclosed."[57] It was persuaded that "[t]he disclosure states the exact same methodology that Morgan Stanley used to calculate its $130 million five-year projection."[58] Also, the Proxy disclosed BEP's management fees for the preceding year and "[s]tockholders had enough information to ascertain that Brookfield would receive an increased management fee following the merger."[59] Thus, the court held that the stockholders "were not entitled to further detail in this case."[60]

As to the debt refinancing issue, the trial court held that the alleged omission of the benefits of the debt refinancing fell into the category of hypothetical information. The court ruled that the Proxy disclosed what was certain at the time, namely, Brookfield's outstanding debt, the maturity dates, and the interest rates. A reasonable investor could conclude that refinancing would be advantageous to Brookfield. Beyond that, "[r]equiring a target to disclose their own calculations of hypothetical benefits to an acquirer, a decision over which the target itself has no control, would not necessarily assist stockholders in making an informed vote."[61]

Finally, as for the dilutive effect of the Merger on dividends, the court concluded that the Proxy disclosed the known, certain information by disclosing both

TerraForm's and Brookfield's forecasted standalone dividends per share. Morgan Stanley relied on these forecasts to calculate the expected dilution to TerraForm's stockholders following the Merger. The court found that "[a] stockholder could reach the same conclusion on their own."[62] To conclude, on the whole, the court rejected Plaintiffs' disclosure challenges.

Plaintiffs filed a Notice of Appeal on July 6, 2023.

F. Contentions on Appeal

Appellants raise several arguments on appeal. First, Appellants argue that judicial cleansing is unavailable under *MFW* because they adequately pleaded that the Special Committee had been coerced. The lynchpin of this assertion is that Brookfield threatened the Special Committee by signaling that it would block TerraForm's future growth if it did not agree to a deal with Brookfield.

Second, they contend that judicial cleansing is unavailable under *MFW* because ***1126** they adequately pleaded that material facts were either not disclosed or were disclosed in a misleading fashion in the Proxy. In particular, they assert that the trial court erroneously rejected their arguments that the Proxy failed to disclose: (i) the Special Committee's advisors' conflicts of interest; (ii) the Special Committee's failure to apprise itself of its legal and financial advisors' conflicts by seeking routine conflict disclosures, and that Morgan Stanley and Kirkland concealed their conflicts from the Special Committee; (iii) the benefits that Brookfield stood to receive from the Merger in the form of increased management fees and the $1 billion in interest expense savings from refinancing its debt; (iv) that the Merger would be dilutive to TerraForm's minority stockholders; and (v) Greentech's caution to the Special Committee that it was a suboptimal time to sell and that a market check was imperative.

II. STANDARD OF REVIEW

[1] [2] [3]"We review *de novo* the dismissal by the Court of Chancery of a complaint under Rule 12(b)(6)."[63] "At the motion to dismiss stage, we must 'accept as true all of the plaintiff's well-pleaded facts,' and 'draw all reasonable inferences' in plaintiff's favor."[64] A motion to dismiss should be denied if the facts pled support a reasonable inference that the plaintiff can succeed on his claims.[65]

III. ANALYSIS

A. The Coercion Claim was Properly Dismissed

1. The MFW Framework and Relevant Aspects at Issue

In *In re Tesla Motors, Inc. S'holder Litig.*,[66] we reviewed the development of our law concerning certain procedural devices that could alter the burden of proof in a conflicted transaction. We observed that *MFW* held that " 'the business judgment standard appl[ies] to controller freeze-out mergers where the controller's proposal is conditioned on both Special Committee approval and a favorable majority-of-the-minority vote[.]' "[67] *MFW* adopted the following standard:

> To summarize our holding, in controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[68]

[4] [5]Both procedural protections must be "established *prior to trial*[.]"[69] ***1127** And when they are established, the transaction is then afforded the deferential business judgment standard of review. Under Delaware's business judgment rule, " 'the board's decision will be upheld unless it cannot be attributed to any rational business purpose.' "[70]

2. The Court of Chancery Correctly Dismissed the Coercion Claim

[6]Appellants' argument that the Special Committee was coerced "hinges on its contention that, in diligence, BEP's management provided TerraForm with a financial model that did not include growth for TerraForm."[71] Appellants' key piece of evidence is the single set of No Growth Projections. They argue that submission of this "no

growth" model was an "implicit threat" from Brookfield that, "if the special committee recommended against the transaction, Brookfield would let TerraForm wither on the vine."[72]

According to Appellants, the Special Committee and its advisors understood Brookfield's message and its capacity for retribution.[73] They point to the Special Committee's advisors' various warnings regarding TerraForm's reliance on Brookfield for its planned growth and TerraForm's limited ability to operate without Brookfield's continued support, including Morgan Stanley's warning that:

> While any subsequent decrease in [TerraForm]'s stock price resulting from Brookfield's actions would have a near-term impact on the value of Brookfield's stake in [TerraForm], it could also give Brookfield an opportunity to re-bid for the outstanding Class A shares at a lower price at a later point in time.[74]

Appellants also highlight the following note in Greentech's presentation: "Note: [TerraForm] management's 5-year forecast does not align with BEP management's 5-year forecast for [TerraForm] (BEP's model excludes future growth at the [TerraForm] level)."[75] They argue that Brookfield's "implicit threat" undermined the Special Committee's ability to bargain at arms-length and to definitively say "no."

[7]Appellees argue that it would not make sense for Brookfield to "punish a company in which it owned 62% of the equity for an indefinite period of time simply to negotiate a better deal for the remaining 38%."[76]

***1128** The Court of Chancery held that deducing a threat from these facts "requires inferring that Brookfield through BEP was trying to send a message by submitting its five-year financials exclusive of TerraForm's growth, and that the special committee perceived this as a threat, and ... felt deprived of a meaningful choice as a result."[77] It found Plaintiffs' implicit coercion claim to be a "stretch" and "inconsistent with the type of coercion allegations that [the Court of Chancery] has found to defeat this element of *MFW*."[78] We agree with the trial court's rejection of the "implicit coercion" claim.

First, the Note and five-year financials upon which Appellants' implicit coercion claim is based, as well as the statements by the financial advisors, reflected the reality that existed in this sponsor-backed, controlled company — namely, that Brookfield had substantial control and influence over TerraForm and TerraForm was fully reliant on Brookfield for growth. The Proxy disclosed Brookfield's substantial control over TerraForm.[79] It also described the suite of agreements entered into by TerraForm and Brookfield and certain of its affiliates providing for various services, sponsorship, and governance arrangements.[80]

The Special Committee's advisors recognized that "[TerraForm] is fully dependent on Brookfield for future growth[.]"[81] The Special Committee was independent, disinterested, and actively engaged in arms-length bargaining resulting in increased consideration for the benefit of the minority stockholders. On appeal, Appellants have abandoned the duty of care claim they pressed against the Special Committee below.[82] According to the Proxy, the ***1129** Special Committee met at least nineteen times during the transaction process. It caused Brookfield to raise its bid on four occasions, achieving an increase in the exchange ratio to 0.381x from 0.36x, along with securing non-economic concessions. It considered a number of factors regarding TerraForm's financial condition and standalone prospects, including TerraForm's potential near- and long-term performance on a standalone basis, its financial projections prepared by management, and the role of and reliance on Brookfield as TerraForm's sponsor.[83] It is not reasonably conceivable that there was an attempt to bypass the Special Committee, or that its ability to freely negotiate and bargain effectively was impeded by the submission of the "no-growth" financials. We agree with the Chancellor that the implicit coercion claim rests on attenuated and unreasonable inferences.

Second, as the Chancellor observed, *Dell* is distinguishable:

> Unlike in *Dell*, plaintiffs do not allege that Brookfield indicated publicly and privately that it intended to "bypass" the formal process if the special committee chose not to approve the transaction, nor that it had a "contingency plan" to do so. Plaintiffs' allegations fail to carry the day on *MFW*'s third prong.[84]

But Appellants are correct that the court in *Dell* recognized that even more subtle conduct may be coercive.[85] In *Dell*, a company had partially financed an acquisition by issuing new shares of Class V stock. The company retained the option to force a conversion of the Class V shares to Class C stock. That was the least attractive option for the Class V holders.[86] When the company later sought to consolidate the holdings in that target, its board charged the special committee with negotiating a redemption of the Class V shares, conditioned upon the *MFW* requirements. The redemption would have been more favorable to the Class V stockholders, but looming in the back of the process, the company wielded its less advantageous forced conversion right.

The Court of Chancery in *Dell* found it to be reasonably conceivable that the special committee had been coerced in light of plaintiffs' allegations that there was "a steady drumbeat of actions by which the Company signaled its intent to exercise the Conversion Right in the absence of a negotiated redemption."[87] For example, during the negotiation period, the company had leaked to the press that it was considering taking action to exercise the conversion,[88] reiterated its right to do so, and ***1130** disclosed in SEC filings that it has explored exercising the conversion right as a contingency plan if the redemption negotiations fell through. By reserving the right to bypass the special committee and engage in a forced conversion, it was reasonably conceivable that the company created a coercive environment that undermined the special committee's ability to bargain effectively and effectively disempowered the committee.[89]

The illustrations given in *Dell* also supported the inference that the stockholders had an incentive to vote in favor of the transaction for reasons other than its merits, rendering the stockholder vote ineffective for purposes of *MFW*.[90] By contrast, the allegations here do not logically support an inference of coercion.

B. The Disclosure Issues

1. The Special Committee's Advisors' Conflicts

a. Morgan Stanley's $470 Million Investment in Brookfield

We next address the Proxy's omission of Morgan Stanley's $470 million investment in Brookfield. Appellants maintain that the Proxy's failure to disclose Morgan Stanley's $470 million holdings in Brookfield was a material omission that rendered the minority stockholders' vote uninformed. They also highlighted Morgan Stanley's other financial engagements with Brookfield: Morgan Stanley received tens of millions of dollars in advisory fees from Brookfield prior to the Merger and Morgan Stanley concurrently advised Brookfield affiliates. The trial court, with some hesitation, held that Plaintiffs failed to plead sufficient facts to give rise to a duty of care violation by the Special Committee. Relying on the Court of Chancery's decision in *Micromet*,[91] the trial court resolved the due care claim by holding that Morgan Stanley's conflict was not material given the size of Morgan Stanley's stake in Brookfield compared with the size of Morgan Stanley's overall portfolio.[92] It then resolved the disclosure issue by referring back to its due care analysis.

The trial court's analysis is problematic. First, whether the Special Committee breached its duty of due care in the retention of the advisors does not adequately address the question of whether the conflict was sufficiently material to require disclosure in the Proxy. Second, that materiality ***1131** determination must include an examination of the alleged omission from the perspective of the stockholder, not just a comparative analysis based upon the overall size of the advisor's portfolio of business.

[8]The legal standard for determining whether a special committee breached its duty of care in hiring and managing its advisors is whether it is reasonably conceivable that the committee exhibited "gross negligence."[93] By contrast, whether a special committee's advisor's conflicts were material information requiring disclosure is a different inquiry. Our Court recently described the "materiality" standard in *Morrison v. Berry*:

> An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. Framed differently, an omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available. But, to be sure, this materiality test does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote.[94]

[9]" 'Materiality is to be assessed from the viewpoint of the 'reasonable' stockholder ....' "[95] Therefore, we first consider whether the Proxy's omission of Morgan Stanley's $470 million stake in Brookfield was material from the stockholders' perspective.

The Proxy disclosed the following information concerning Morgan Stanley's relationship with Brookfield and its affiliates:

> In the two years prior to the date it rendered its opinion in connection with the [TerraForm] acquisition, in addition to the services described in this proxy statement/prospectus, Morgan Stanley and its affiliates provided financial advisory services to TerraForm Power and its affiliates, and received aggregate fees of approximately $5 to $15 million in connection with such services. In addition, in the two years prior to the date it rendered its opinion in connection with the

> [TerraForm] acquisition, Morgan Stanley and its affiliates provided financial advisory or financing services for BEP or its affiliates, including certain portfolio companies or affiliates of BAM (an affiliate of BEP), and received aggregate fees of approximately $65 to $90 million in connection with such services.[96]
> As of March 1, 2020, Morgan Stanley or one of its affiliates was a lender and a participant in certain financings for certain affiliates of BAM, which in each case is unrelated to the transactions contemplated by the transaction documents and for which Morgan Stanley would expect to receive additional customary fees if such transactions are completed.[97]
> In addition, Morgan Stanley, its affiliates, directors or officers, including individuals ***1132** working with the Special Committee in connection with the [TerraForm] acquisition, *may* have committed and *may* commit in the future to invest in private equity funds managed by BAM or its affiliates.[98]

[10] [11]It is reasonably conceivable that from the viewpoint of a stockholder, Morgan Stanley's nearly half a billion-dollar holding in Brookfield was material and would have been material to a stockholder in assessing Morgan Stanley's objectivity. Delaware law places great importance on the need for transparency in the special committee's reliance on its advisors: " 'it is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts ....' "[99] Further, "[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives, [the Court of Chancery] has required full disclosure of investment banker compensation and potential conflicts."[100]

[12]It does not matter whether the financial advisor's opinion was ultimately influenced by the conflict of interest; the presence of an undisclosed conflict is still significant: " '[t]here is no rule ... that conflicts of interest must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict.' "[101] Although the size of the investment vis-à-vis the size of Morgan Stanley's overall portfolio may be considered in the analysis, the stockholder's perspective is paramount.

In any event, *Micromet* is distinguishable. *Micromet* involved plaintiff-shareholders of a target company seeking a preliminary injunction to enjoin an all-cash negotiated tender offer made by a large biopharmaceutical company — Amgen. The plaintiffs argued that the price of the offer was unfair and was the result of an unfair process and that the disclosure materials recommending the tender offer contained materially false and misleading information. One of the plaintiffs' alleged disclosure deficiencies concerned the board's failure to disclose the amount of fees paid by Micromet to its financial advisor in the transaction, Goldman Sachs, and Goldman Sachs' holdings of both Micromet's and Amgen's stock.[102] Goldman held approximately $336 million in Amgen stock, representing approximately 0.16% of its overall investment holdings.

In this case, Morgan Stanley's holdings in Brookfield amounted to 0.10% of its total investment portfolio — an amount less than Goldman's holdings in a counterparty in *Micromet*. But in *Micromet*, Goldman's ***1133** holdings in Amgen were largely held "on behalf of its clients."[103] Here, Morgan Stanley's stake in Brookfield was invested for its own benefit.[104] And unlike Morgan Stanley here, it is not apparent that Goldman provided any concurrent advisory services to Amgen or its affiliates during the challenged transaction. In sum, the trial court needed to examine the materiality question not just by looking at the stake in comparison to Morgan Stanley's overall portfolio, but also by looking at its materiality to the TerraForm stockholders. We conclude that the $470 million investment, when viewed from the perspective of a reasonable stockholder, was material and should have been disclosed.

[13] [14]Further, the Proxy's use of the word "may" in addressing Morgan Stanley's holdings in Brookfield was misleading.[105] "Just as disclosures cannot omit material information, disclosures cannot be materially misleading."[106] In *Morrison*, we explained the standard for evaluating whether partial disclosures are materially misleading:

> As we said in *Arnold v. Society for Savings Bancorp, Inc.*, "once defendants traveled down the road of partial disclosure of the history leading up to the Merger ... they had an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events." And, in *Zirn v. VLI Corp.*, we explained that, "even a non-material fact can, in some instances, trigger an obligation to disclose additional, otherwise non-material facts in order to prevent the initial disclosure from materially misleading the stockholders."[107]

The use of "may" in the Proxy is misleading because Morgan Stanley had indeed already invested nearly half a billion dollars.[108] This misleading language also makes it less likely that a stockholder would have been prompted to locate Morgan Stanley's Brookfield holdings in its publicly filed form 13F.

b. Kirkland's Conflicts were Problematic

We turn next to the Proxy's non-disclosure of Kirkland's conflicts of interest. The trial court similarly held that Plaintiffs failed "to cast doubt on the reasonableness and the good faith nature of the special committee's decision to hire Kirkland following its own diligence."[109] It held that Plaintiffs "have not alleged any facts suggesting ***1134** that the special committee was grossly negligent in hiring Kirkland."[110]

[15] [16]Again, the trial court resolved the disclosure issue by applying the "gross negligence" standard in determining whether the Special Committee breached its duty of care in hiring and managing Kirkland. It then summarily dismissed the disclosure claim. To resolve the issue of whether the Proxy was deficient for failing to disclose Kirkland's conflicts, we instead ask whether a reasonable stockholder would consider the information regarding Kirkland's conflicts important in deciding how to vote.[111] Again, because an advisor's concurrent engagement with a transaction counterparty can present legitimate concerns regarding the advisor's objectivity, we disagree with the Chancellor's determination that those representations were not material.[112]

Kirkland's conflicts at issue involved prior representations of Brookfield and its affiliates and a concurrent representation of a Brookfield affiliate on an unrelated transaction. Kirkland's prior representations of Brookfield and its affiliates included: (i) advising Brookfield Infrastructure Partners L.P. concerning its over $500 million term loan facility from December 2019 to January 2020;[113] (ii) representing Brookfield Super-Core Infrastructure Partners on the sale of its $2 billion Cove Point interest to Dominion Energy, Inc. in the fall of 2019, as well as a separate engagement with Brookfield in late 2019 to finance that transaction;[114] and (iii) counseling Brookfield Business Partners L.P. on its take-private of Teekay Offshore Partners L.P. during the Fall of 2019.[115] Kirkland concurrently advised BAM on its $260 million equity investment in Superior Plus Corp. when serving as the Special Committee's legal counsel.[116]

The Proxy failed to disclose Kirkland's prior and concurrent conflicts. Even though, standing alone, Kirkland's prior conflicts with Brookfield may not have been sufficient to state a claim,[117] we hold that it is reasonably conceivable that the details of Kirkland's conflicts, and particularly, the concurrent conflict, were material facts for stockholders that required disclosure.[118] Kirkland's ongoing relationship with Brookfield raises the legitimate concern ***1135** that Kirkland might not want to push Brookfield too hard given the nature of their ongoing lawyer-client relationship which includes the ethical duty of zealous advocacy.

The Court of Chancery, in *In re PLX Tech. Inc.* ("*PLX*"),[119] drew a similar conclusion concerning a special committee's advisor's concurrent conflict. *PLX* involved an activist campaign that pressured PLX into a sale. A potential bidder soon emerged and expressed an interest in purchasing PLX. The potential bidder was represented by Deutsche Bank on an unrelated acquisition, the same financial advisor that concurrently represented PLX's special committee. In addressing Deutsche Bank's concurrent representation on an unrelated transaction, the court stated that "Deutsche Bank's ongoing relationship with [the bidder] gave it a powerful incentive 'to maintain good will and not push too hard' during the negotiations."[120]

Appellants are not contending that the existence of such conflicts is necessarily disabling. Rather, they contend that at the very least, Kirkland's material conflicts should have been disclosed to stockholders. We agree that the stockholders were entitled to know about these conflicts so that they could consider them and decide for themselves how to weigh the advice in light of them.[121] Accordingly, we hold that it is reasonably conceivable that the details of Kirkland's conflicts were material and should have been disclosed.

2. The Special Committee's Failure to Apprise Itself of its Advisors' Conflicts

Next, Appellants argue that the Proxy failed to disclose material information concerning the Special Committee's handling of its advisors' conflicts. The trial court summarily held that "similar to disclosures regarding the alleged conflict, the omission [of how the Special Committee managed Morgan Stanley's and Kirkland's conflicts] was immaterial."[122] Appellants contend that the Proxy should have disclosed that the Special Committee merely accepted at face-value and without proper follow-up, the advisors' conclusory representations that they had no material conflicts.

[17] [18]We have already determined that it is reasonably conceivable that Kirkland's and Morgan Stanley's conflicts were material and should have been disclosed in the Proxy. Although a proxy disclosure must disclose material facts to stockholders, Delaware law does not require boards to engage in "self-flagellation" in their public disclosures.[123] Appellants are correct that as alleged, the Special Committee's process in retaining advisors was ***1136** flawed.[124] But, as noted above, Appellants have

abandoned their due care claim on appeal. We think that it is sufficient that we have ruled that certain of the advisors' conflicts were material and should have been disclosed.

3. The Failure to Adequately Disclose the Benefits Brookfield Stood to Receive

Next, we address the Proxy's failure to disclose the "extraordinary benefits" that Brookfield would receive from the Merger. Appellants argue that the Proxy omitted material information concerning the extraordinary value that Brookfield stood to derive from the Merger: (i) $130 million from increased management fees; and (ii) more than $1 billion in interest expense savings from refinancing TerraForm's debt.[125] They contend that knowing the amount of the benefits would have allowed the stockholders to evaluate (as the Special Committee did) whether Brookfield paid a fair price and whether the Special Committee appropriately leveraged that anticipated value. We conclude that the Proxy's omission of the $130 million Brookfield would receive from the increase in management fees is problematic, but we agree with the trial court's dismissal of the debt refinancing claim.

a. The Brookfield Management Fee

With regard to the $130 million increase in management fees, the Proxy disclosed that the TerraForm Merger will "likely provide a number of significant benefits" to Brookfield.[126] The Proxy identified these benefits as follows:

> [T]he Brookfield Renewable group is expected to be one of the largest, integrated, pure-play renewable power companies in the world; the Brookfield Renewable group will continue to be sponsored by BAM; the [TerraForm] acquisition would simplify the Brookfield Renewable group's ownership structure and eliminate the public company costs associated with TerraForm Power being a publicly listed company; the [TerraForm] acquisition is expected [to] be accretive to the Brookfield Renewable group's cash flows; a significant portion of TerraForm Power's revenue is under long-term contracts, enhancing the Brookfield Renewable ***1137** group's contract profile; the [TerraForm] acquisition will further expand the Brookfield Renewable group's portfolio in North America and Western Europe; and the public float of the BEPC exchangeable shares will increase, enhancing liquidity of such shares.[127]

The Proxy also included a complex formula to calculate Brookfield's management fees:

> [I]n exchange for the management services provided to the Brookfield Renewable group by the Service Providers, Brookfield Renewable pays an annual management fee to the Service Providers of $20 million (adjusted annually for inflation at an inflation factor based on year-over-year United States consumer price index) plus 1.25% of the amount by which the market value of the Brookfield Renewable group exceeds an initial reference value. The base management fee is calculated and paid on a quarterly basis. For purposes of calculating the base management fee, the market value of the Brookfield Renewable group is equal to the aggregate value of all outstanding BEP units on a fully-diluted basis, preferred units and securities of the other Service Recipients (including BEPC exchangeable shares) that are not held by Brookfield Renewable, plus all outstanding third party debt with recourse to a Service Recipient, less all cash held by such entities. BRP Bermuda GP Limited L.P., a subsidiary of Brookfield, also receives incentive distributions based on the amount by which quarterly distributions on BRELP units (other than BRELP Class A Preferred Units), as well as economically equivalent securities of the other Service Recipients, including BEPC, exceed specified target levels as set forth in BRELP's limited partnership agreement.[128]

Appellants contend that merely disclosing the formula and not the amount of the projected fees was insufficient.[129] The trial court recognized that this was a "close call," but it ultimately determined that the formula in the Proxy was a sufficient disclosure and that the inclusion of the amount of the anticipated management fees would not have altered the "total mix" of information for stockholders.

[19]We disagree and hold that it is reasonably conceivable that the Proxy's failure to disclose Brookfield's $130 million in projected management fees likely significantly altered the "total mix" of information. As noted by the trial court, a "reasonable stockholder could very well consider a valuable, nonratable [benefit][130] paid to the controller when deciding how to vote."[131] In rejecting the claim, the Chancellor described the $130 million increase as more of a "business opportunity to Brookfield to reduce costs and increase value[,]"[132] as ***1138** opposed to a non-ratable, unique benefit paid to the controller. Even crediting that characterization, we think that Morgan

Stanley's description of these fees as a "Key Consideration for the Special Committee" that would warrant a higher premium distinguishes this information from the kind of "tell me more" request which the trial court viewed as more apt.[133]

[20]We next address the question of whether the disclosure of the formula, in the absence of the disclosure of the amount, was a sufficient substitute. We disagree with the trial court that the fees were "fully described" and that the Proxy provided the "exact formula" that would be used to calculate the fee.

[21]Appellants persuasively argue that the Proxy does not fairly set forth the formula needed to calculate Brookfield's total fees. To calculate Brookfield's management fees over a five-year period, a stockholder would need to know the multiple variables listed above that go into calculating the base management fee. Such an endeavor requires consideration of the increase in the market value of the Brookfield Renewable group, the initial reference value, the outstanding third-party debt with recourse to a Service Recipient, the amount of cash held by such "entities," and the potential impact of payments to BRP Bermuda GP Limited L.P. It is not clear where in the Proxy, or elsewhere, a stockholder must look to find the inputs to calculate the base management fee.[134] Information disclosed in a proxy statement should be presented in a "clear and transparent manner[.]"[135]

[22] [23]Merely because some of the variables needed to complete the calculation are missing does not necessarily equate to a disclosure violation. Although stockholders are entitled to a "fair summary" of a financial advisor's work, disclosures must " 'be sufficient for the stockholders to usefully comprehend, not recreate, the analysis.' "[136] But here we have already determined that the projected amount of fees — $130 million — was material. The vague language in the formula cannot reasonably be described as "clear and transparent" or as a sufficient substitute for disclosure of the projected amount of fees. Consequently, even though stockholders are assumed to be "skilled readers,"[137] the disclosure of the anticipated management fees was inadequate.

***1139** *b. The Debt Financing Benefit*

[24] [25]On the other hand, we are not persuaded by Appellants' argument that the Proxy was deficient because it failed to disclose the $1 billion that Brookfield stood to receive from refinancing TerraForm's debt. A proxy need not disclose information that is "hypothetical" and "inherently speculative."[138] Appellants' own complaint acknowledges the speculative nature of these benefits. For example, they allege that "Brookfield *could* receive significant interest expense savings and incremental management fees from [TerraForm] refinancing its debt[.]"[139] The $1 billion in interest expense savings depends on multiple external factors. Brookfield has no control over future interest rates and market trends, both of which could impact its plan to refinance TerraForm's debt. Delaware law requires that proxies only disclose "certain, known information[.]"[140] The certain, known information that was disclosed here was Brookfield's current outstanding debt, the respective maturity dates, and the respective interest rates.[141] This information sufficiently disclosed Brookfield's current debt status without speculating on future hypotheticals. Accordingly, the $1 billion in benefit that would inure to Brookfield from refinancing TerraForm's debt was inherently speculative and, consequently, was not a material fact requiring disclosure.

4. Whether the Proxy Failed to Disclose that the Merger Would Dilute the Dividends to TerraForm Stockholders

[26] [27]Next, we address Appellants' argument that the Proxy failed to adequately disclose the estimated 5% dilution of dividends to TerraForm stockholders through 2024.[142] They contend that this reduction of dividends was "critical information" for stockholders to know before they voted on the Merger because the main attractiveness for investors in a yield company, such as TerraForm, is the regular distribution of dividends.[143] Accordingly, a 5% dilution of those dividends would alter the total mix of information for stockholders and, therefore, it should have been adequately disclosed in the Proxy.[144] We agree with the trial court's determination that the dilution of the dividends was adequately disclosed in the Proxy.

First, the Proxy disclosed that the Merger's impact on dividends was uncertain: "there can be no assurance that Brookfield Renewable or BEPC will make comparable distributions or dividends in the future or at all."[145]

***1140** [28]Second, TerraForm stockholders could have reasonably deduced the Merger's impact on future dividends as the trial court concluded.[146] Although Delaware law does not require a stockholder to engage in a "scavenger hunt" in which they must "piece together the answer from information buried in the disclosures[,]"[147] the information needed to determine the dilutive effect on dividends was not buried in the disclosures. Unlike the situation with Brookfield's management fees, to calculate the dilutive effect of the Merger on dividends, a "skilled reader" could first locate TerraForm's and Brookfield's forecasted standalone dividends per share in the Proxy. The Proxy includes TerraForm's "Five-Year Business Plan Model," and explains that the model "reflects, for the years 2020–2024, TerraForm Power's *existing* portfolio of assets[.]"[148] In the accompanying chart, the column titled "Dividends per share" forecasts future dividends for the five-year projection period.[149] On the *following* page, there is a sub-heading titled "Certain BEP Forecasts."[150] Two pages later, there is a chart that discloses BEP's five-year Management Forecasts that includes a column titled "[d]istributions per unit."[151] Relatively simple multiplication can show the Merger's dilutive effect on TerraForm's dividends.[152] The inputs needed for such a calculation were adequately disclosed in the Proxy within a few pages of each other — unlike the situation with the management fees. The exchange ratio of 0.381x was noted multiple times in the Proxy. The two relevant tables, TerraForm's Five-Year Business Plan Model and the BEP Management Forecasts, were within three pages of each other in the Proxy.[153] These facts differ from those in Appellants' cited precedent, *Vento*, in which stockholders had to sort through two voluminous documents that were filed ten weeks apart from one another.[154] For these reasons, we find no error with the trial court's dismissal of this claim.

***1141** *5. Whether the Proxy Failed to Disclose Greentech's Advice to the Special Committee Regarding Timing and Process*

[29] [30]Last, we consider whether the trial court erred with respect to the Proxy's failure to disclose Greentech's advice to the Special Committee regarding the timing and process of the Merger. Appellants contend that the Proxy failed to disclose Greentech's statements to the Special Committee that it was not the "optimal time" to realize the ideal value for TerraForm and that a "robust market check" was necessary.[155] We agree with the trial court's conclusion that this omitted information was not material because Greentech's comments concerning the "optimal" timing and necessity for a "robust market check" are from a January 12, 2020 "pitch" by Greentech to the Special Committee given before negotiations began.[156] Delaware law does not require a "play-by-play description of every consideration or action taken by a Board[,]" because doing so would "make proxy statements so voluminous that they would be practically useless."[157] Here, Greentech's January 12, 2020 presentation to the Special Committee occurred over two months before the Merger's closing and before the substantive negotiations with Brookfield began.

Turning to the presentation's comments on performing a "robust market check," the trial court correctly held that the Special Committee "later reasonably concluded that a market check was not necessary, making this disclosure immaterial."[158] The Proxy explicitly disclosed that the Special Committee decided "not to solicit alternative proposals or transactions[.]"[159] This was consistent with Morgan Stanley's advice. It should not be assumed that every suggestion made in an initial pitchbook is worthy of pursuit. We agree with the Chancellor that the absence of a market check here does not impugn the Special Committee's exercise of due care. Greentech ultimately determined that the 0.381x exchange ratio was fair, from a financial point of view, to the holders of TerraForm's outstanding shares, other than shares held by Brookfield stockholders. We are satisfied with the trial court's resolution of the disclosure issues regarding Greentech's advice.

IV. CONCLUSION

Because the Proxy was deficient in its failure to disclose certain of the Special Committee's advisors' conflicts of interest and certain management fees Brookfield anticipated from the Merger, and for the reasons set forth above, we REVERSE the Court of Chancery's grant of Defendants' motion to dismiss.

All Citations

314 A.3d 1108

Footnotes

1 88 A.3d 635 (Del. 2014), *overruled on other grounds by Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

2 *See* Court of Chancery's telephonic bench ruling on June 9, 2023 [hereinafter "Bench Ruling"]. Opening Br., Ex. A.

3 The facts, except as otherwise noted, are taken from the Verified Amended Stockholder Class Action Complaint filed on June 21, 2022 [hereinafter "complaint" or "Compl."] and the Bench Ruling. In this procedural posture, they are presumed to be true.

4 When addressing the lower court proceedings, we refer to Appellants as "Plaintiffs" and Appellees as "Defendants."

5 BAM is a Canadian corporation with its principal executive offices in Toronto. BAM conducts its business primarily through direct and indirect subsidiaries, many of which are Delaware entities. A37 (Compl. ¶¶ 16, 17). In their complaint, Plaintiffs defined the Brookfield defendants to include: Brookfield Infrastructure Fund III GP LLC ("BIF"), Orion US GP LLC ("Orion GP"); Orion US Holdings I LP ("Orion LP"), Brookfield Renewable Partners, L.P. ("BEP"), and Brookfield Renewable Corporation ("BEPC"). A30 (Compl., Introduction). Also named as defendants were: Harry Goldgut, Brian Lawson, Richard Legault, Sachin Shah, and John Stinebaugh.

6 A42 (Compl. ¶¶ 34, 35).

7 The trial court noted that TerraForm's subsequent SEC filing disclosed that it was a "controlled company[,]" and that Brookfield's interests may diverge from those of the public stockholders. Bench Ruling 5–6.

8 These three executive officers are not employees of TerraForm and their services are provided under a management services agreement with BAM and certain of its affiliates. A307 (Veres Aff., Ex. 1) (Proxy at 139).

9 A53 (Compl. ¶ 54); Bench Ruling at 7.

10 Plaintiffs alleged that TerraForm had the debt capacity to fund most — if not all — of the $1.2 billion purchase price for Saeta. A82 (Compl. ¶ 111).

11 TerraForm publicly announced the Saeta Acquisition on February 7, 2018, and filed a Form 8-K containing details of the financing proposal the following day. A69 (Compl. ¶ 75).

12 Bench Ruling at 8. On May 3, 2018, TerraForm commenced a tender offer to acquire Saeta.

13 A81 (Compl. ¶ 108). TerraForm's stock price increased in the aftermath of the Saeta Acquisition and by June 25, 2018, TerraForm's stock was trading at $11.77 per share, 10.4% above the $10.66 per share Private Placement price, representing an unrealized profit of $68 million to Brookfield. A81 (Compl. ¶ 109).

14 The case was captioned *In re TerraForm Power, Inc. S'holders Litig.*, Consol. C.A. No. 2019-0757.

15 A88 (Compl. ¶ 126).

16 A88 (Comp. ¶ 127). In October 2019, TerraForm conducted a $250 million public offering for 14,907,573 shares of common stock at a price of $16.77 per share. Concurrently, Brookfield entered into a second private placement purchasing 2,981,514 shares of TerraForm common stock for $16.77 per share. A363 (Veres Aff., Ex. 1) (Proxy at 199). As a result, Brookfield's equity percentage decreased from 65.3% to 61.5%. The Proxy states that the January 11, 2020 offer represented a premium of 11% over the unaffected closing price of the TerraForm common stock on January 10, 2020, based on the unaffected closing price of BEP units as of such date. A315 (Veres Aff., Ex. 1) (Proxy at 151).

17 A92 (Compl. ¶ 138).

18 A93 (Compl. ¶ 141) (internal quotation marks omitted).

19 We note that the Proxy states that the Special Committee decided to retain Greentech on January 13, not January 12 as alleged in the complaint. A316 (Veres Aff., Ex. 1) (Proxy at 152). This difference is not material to our analysis. Greentech's $6 million fee "was contingent, with Greentech being paid for providing a fairness opinion recommending a transaction and upon closing of such a transaction." A98 (Compl. ¶ 145).

20 A99 (Compl. ¶ 147). Morgan Stanley explained that Brookfield's management fee would increase because BEP's management fee structure was based on market capitalization and would allow Brookfield to realize significantly increased management service fees simply by consolidating TerraForm into BEP. A98–A99 (Compl. ¶ 147).

21 Morgan Stanley's "entire $13 million fee was contingent, with Morgan Stanley being paid for providing a fairness opinion recommending a transaction and upon closing of such a transaction." A101 (Compl. ¶ 152).

22 A1142 (Weinberger Aff., Ex. 1) (Morgan Stanley Engagement Letter) ("Morgan Stanley has confirmed that there are no (i) current, active and material engagements of Morgan Stanley, or (ii) material engagements of Morgan Stanley that have been active during the two-year period prior to the date of this letter agreement, directly by: [Brookfield], to provide financial advisory or financing services to such entities for which fees paid to Morgan Stanley exceeded $100,000.").

23 A103 (Compl. ¶ 155) (internal quotation marks omitted).

24 A104 (Compl. ¶157); Bench Ruling at 12–13.

25 A110 (Compl. ¶ 170) (internal quotation marks omitted).

26 A111 (Compl. ¶ 171) (internal quotation marks and citation omitted).

27 A112 (Compl. ¶ 172); Bench Ruling at 15.

28 A113 (Compl. ¶ 173).

29 According to Plaintiffs, Morgan Stanley determined that Brookfield could receive significant interest expense savings (worth $1.77 per share to Brookfield) and incremental management fee increases (worth $1.19 per share to Brookfield) from TerraForm refinancing its debt pursuant to or after the Merger, which Morgan Stanley calculated had a net present value to *pro forma* Brookfield of over $1 billion. A137 (Compl. ¶ 216).

30 A115 (Compl. ¶ 175).

31 It appears that the trial court mistakenly stated that the Special Committee's March 10, 2020 counteroffer was a 0.41x exchange ratio instead of 0.40x. Bench Ruling at 17; A119 (Compl. ¶ 180).

32 A322 (Veres Aff., Ex. 1) (Proxy at 158). According to the Proxy, the 0.381x exchange ratio represented "(i) a premium of 17% to the unaffected closing price of $15.60 per share of [TerraForm] common stock on January 10, 2020, based on the closing price of $38.07 per BEP unit as of such date and (ii) a premium of 20% to the closing price of $12.01 per share of [TerraForm] common stock on March 16, 2020 ...."

33 A123 (Compl. ¶ 189).

34 Plaintiffs alleged that the implied $14.36 per share value of the Merger consideration was significantly below Greentech's sum-of-the-parts going-concern valuation of TerraForm of $19.60 to $21.53 based on management's growth plan. A138–A139 (Compl. ¶ 217). They alleged that it was also below Morgan Stanley's DCF valuation for TerraForm based upon TerraForm's net asset value, five-year business plan, and dividend discount model. A139 (Compl. ¶ 218). Finally, they alleged that the implied $14.36 per share value was below Wall Street analysts' price targets for TerraForm. A140 (Compl. ¶ 219).

35 Bench Ruling at 17–18; A121 (Compl. ¶ 186).

36 A120 (Compl. ¶ 185).

37 A324 (Veres Aff., Ex. 1) (Proxy at 160); A125–A126 (Compl. ¶¶ 192, 193). The Bench Ruling states that the Board approved the Merger on March 12. Bench Ruling at 18. This appears to be an error. *See also* A752–A759 (Veres Aff., Ex. 25) (Minutes of a Meeting of the Special Committee dated March 16, 2020); A765–A767 (Veres Aff., Ex. 26) (Minutes of a Meeting of the Board of Directors of TerraForm Power, Inc. dated March 16, 2020).

38 Because the Plaintiffs in the Private Placement Action ceased to be stockholders of TerraForm following the Merger, they could no longer maintain their derivative claims, and the court dismissed those claims. The defendants in the Private Placement Action filed a motion to dismiss the direct claims in the Private Placement Action which was argued on July 16, 2020. The Court of Chancery denied the motion on October 30, 2020. *See In re TerraForm Power, Inc. S'holders Litig.*, 2020 WL 6375859 (Del. Ch. 2020). On December 14, 2020, this Court accepted an interlocutory appeal and issued a decision on September 20, 2021 reversing. *See Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021). We held that plaintiffs' remaining purportedly direct claims were actually derivative claims for which they lacked standing, and we overruled *Gentile v. Rossette*, 906 A.2d 91 (Del. 2006). Because the Merger had extinguished the derivative claims, the Private Placement Action ended.

39 A330 (Veres Aff., Ex. 1) (Proxy at 166).

40 A405 (Veres Aff., Ex. 1) (Proxy at 241); Bench Ruling at 44.

41 2020 WL 3096748 (Del. Ch. 2020).

42 On June 21, 2023, the Court of Chancery issued a supplemental letter ruling regarding the valuation of the Private Placement Action's derivative claims based on *In re Primedia, Inc. S'holders Litig*., 67 A.3d 455 (Del. Ch. 2013), *adopted by Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121 (Del. 2021). Plaintiffs did not appeal this ruling which concluded that Plaintiffs lacked standing to challenge the fairness of the Merger. We do not address the issue further herein.

43 *Smart Local Unions and Councils Pension Fund v. BridgeBio Pharma, Inc.*, 2022 WL 17986515 (Del. Ch. 2022), *aff'd,* 303 A.3d 51, 2023 WL 5091086 (Del. 2023) (ORDER).

44 Bench Ruling at 29–30.

45 *Id.* at 30.

46 *Id.* at 31.

47 *Id.*

48 *Id*. at 30–31.

49 *Id.* at 33.

50 *Id.* at 35.

51 *Id*.

52 *Id.* at 36.

53 *Id*. at 37 (internal quotation marks omitted).

54 *Id*.

55 *Id*. at 38.

56 *Id*.

57 *Id*.

58 *Id*. at 40.

59 *Id.*

60 *Id*.

61 *Id.* at 43.

62 *Id.* at 44.

63 *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001) (internal citation omitted).

64 *Olenik v. Lodzinski*, 208 A.3d 704, 714 (Del. 2019) (quoting *Allen v. Encore Energy Partners, L.P.*, 72 A.3d 93, 100 (Del. 2013)).

65 *Id*.

66 298 A.3d 667 (Del. 2023).

67 *Id.* at 707 (quoting *MFW*, 88 A.3d at 639).

68 *Id.* at 707–08 (quoting *MFW*, 88 A.3d at 645 (emphasis in original)). In *Synutra*, we clarified that "[t]o avoid one of *Lynch*'s adverse consequences—using a majority-of-the-minority vote as a chit in economic negotiations with a Special Committee—*MFW* reviews transactions under the favorable business judgment rule if 'these *two protections are established up-front*.' " 195 A.3d at 762 (quoting *MFW*, 88 A.3d at 644) (emphasis added).

69 *MFW*, 88 A.3d at 646 (emphasis in original).

70 *Telsa,* 298 A.3d at 708 (quoting *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (internal quotation marks and citation omitted)).

71 Bench Ruling at 24.

72 *Id*.

73 As noted earlier, when addressing the appellate proceedings, we refer to the Plaintiffs-Below as "Appellants."

74 A112–A113 (Compl. ¶ 172).

75 A952 (Veres Aff., Ex. 38) (Greentech Presentation to the Special Committee dated February 26, 2020, at 12); A111 (Compl. ¶ 171).

76 Answering Br. at 24 (internal quotation marks omitted). *See also* *In re Morton's Rest. Grp., Inc. S'holders Litig.*, 74 A.3d 656, 662 (Del. Ch. 2013) ("Delaware law presumes that large shareholders have strong incentives to maximize the value of their shares in a

change of control transaction.") (internal citation omitted)). Moreover, Brookfield's statement in its offer that it would not support transactions other than its preferred deal also does not suggest a type of coercion that would defeat *MFW's* application. *MFW*, 88 A.3d at 651 ("Moreover, under Delaware law, MacAndrews & Forbes had no duty to sell its block, which was large enough, again as a practical matter, to preclude any other buyer from succeeding unless MacAndrews & Forbes decided to become a seller."); *BridgeBio Pharma*, 2022 WL 17986515, at *11 ("[A] controlling stockholder is not required to accept a sale to a third party or to give up its control, and its stated refusal to do so does not preclude review under the *MFW* framework.").

77 Bench Ruling at 26.

78 *Id*. at 24.

79 A247 (Veres Aff., Ex. 1) (Proxy's Introduction Letter) (referencing Brookfield's ownership of 62% of TerraForm's outstanding shares). The Proxy also highlighted other aspects of Brookfield's control over TerraForm:

> Brookfield also is able to control the appointment and removal of BEPC's directors and the directors of BEP's general partner and, accordingly, exercises substantial influence over BEPC and BEP. Simultaneously with the completion of the [TerraForm] acquisition, BEPC intends to enter into voting agreements with BEP and certain indirect subsidiaries of Brookfield to transfer the power to vote their respective shares held of TerraForm Power (or its successor entity) to BEPC. As a result, BEPC (and indirectly BEP) will control and consolidate [TerraForm] upon completion of the [TerraForm] acquisition.

A368 (Veres Aff., Ex. 1) (Proxy at 204).

80 *See* A359–A361 (Veres Aff., Ex. 1) (Proxy at 195–97).

81 A703 (Veres Aff., Ex. 24) (Greentech Presentation to the Special Committee dated March 16, 2020, at 18)); A691 (Veres Aff., Ex. 24) (*Id.* at 6) ("With no in-house project development efforts and no/limited M&A staff, [TerraForm] is nearly fully reliant on the Sponsors for growth[.]").

82 In this case, Appellants confirmed during oral argument that they were not pursuing a due care claim against the Special Committee:

> **The Court**: Is your disclosure claim attempting to encompass at all the duty of care exercised by the Special Committee? Because much of your brief and the complaint complains about the Special Committee sort of taking at face value the Morgan Stanley statements that they had no material engagements with Brookfield and that they never asked for a conflicts disclosure form, same with Kirkland. So, is it strictly limited to disclosure or are you really trying to articulate a care claim?
>
> **Counsel**: No, it's strictly limited to disclosure at this point. We did challenge those aspects below and we have not appealed them.

Oral Argument, at 16:12–58, https://vimeo.com/903752923.

83 A326–A327 (Veres Aff., Ex. 1) (Proxy at 162–63).

84 Bench Ruling at 26–27.

85 *See In re Dell Techs. Inc. Class V S'holders Litig.*, C.A. No. 2018-0816, at 40 (Del. Ch. Mar. 13, 2020) (TRANSCRIPT) (observing that, "[t]he stereotypical mobster is more subtly caring by saying, 'You better be careful on the way home. I'd hate for something to happen to you.' That's subtle, that's indirect, but fairly communicative."); *see also* *Dell*, 2020 WL 3096748, at *29 ("[A] controller's explicit or *implicit threats* can prevent a committee from fulfilling its function and having a concomitant effect on the standard of review.") (emphasis added) (citing *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *12 n.38 (Del. Ch. 2009) (noting that a controller can undermine the effectiveness of a committee by engaging in "threats, coercion, or fraud"))).

86 The Class V shares were subject to a conversion right whereby if the company listed its Class C shares on a national exchange, then it could forcibly convert the Class V shares into Class C shares pursuant to a pricing formula. *Dell*, 2020 WL 3096748, at *1.

87 *Id.* at *31.

88 The company leaked to *Bloomberg* that it was considering an initial public offering of the Class C stock. An initial public offering would have enabled the company to exercise the conversion right. After publication of that article, the trading price of the Class V stock plummeted. *Id*. at *6.

89 In particular, the court in *Dell* determined that:

> By failing to include the exercise of the Conversion Right within the definition of a Potential Class V Transaction and the universe of actions that the Company would not take without satisfying the twin-*MFW* conditions, the Company failed to comply with the requirements of *MFW*. The Company did not empower the Special Committee and the Class V stockholders with the ability to say no.

Id. at *16. In other words, the scope of the special committee's mandate in *Dell* was insufficient to satisfy *MFW*. *Id*. at *17 ("By excluding the Forced Conversion from the scope of the Special Committee's authority, the Company deprived the Special Committee of the full power to say 'no' that is necessary for *MFW* to function."). That is not the case here. The Special Committee here was fully empowered and independent. As the Chancellor noted, "Plaintiffs do not dispute that the special committee was facially empowered to complete these tasks by the board's unanimous written consent." Bench Ruling at 24.

90 *Dell*, 2020 WL 3096748, at *35. The court observed that "what mattered for purposes of coercing the Special Committee and the Class V stockholders was the Company's repeated references to the possibility of exercising the Conversion Right." *Id*. at *34.

91 *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785 (Del. Ch. 2012).

92 Bench Ruling at 30.

93 *Synutra*, 195 A.3d at 768 ("[T]he Court of Chancery appropriately read *MFW* as requiring it to determine, under the high standard

of gross negligence, whether the plaintiff had stated a due care claim.”).

94 191 A.3d 268, 282–83 (Del. 2018) (internal quotation marks omitted) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (adopting the standard set forth in *TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976))).

95 *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 18 (Del. Ch. 2002) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994)).

96 A344 (Veres Aff., Ex. 1) (Proxy at 180).

97 *Id.*

98 A345 (Veres Aff., Ex. 1) (Proxy at 181) (emphasis added).

99 *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 860 (Del. 2015) (quoting *In re Rural Metro Corp.*, 88 A.3d 54, 105 (Del. Ch. 2014) (internal citation omitted)). *See also* *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114 (Del. Ch. 2007) (requiring disclosure of a CEO's conflict of interest, when the CEO acted as a negotiator and observing that, “a reasonable stockholder would want to know an important economic motivation of the negotiator singularly employed by a board to obtain the best price for the stockholders, when that motivation could rationally lead that negotiator to favor a deal at a less than optimal price, because the procession of a deal was more important to him, given his overall economic interest, than only doing a deal at the right price.”).

100 *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011) (internal citation omitted); *Kihm v. Mott*, 2021 WL 3883875, at *17 (Del. Ch. 2021), *aff'd*, 276 A.3d 462, 2022 WL 1054970 (Del. 2022) (ORDER).

101 *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16.

102 *Micromet*, 2012 WL 681785, at *11.

103 *Id.*

104 A100 (Compl. ¶ 150).

105 This point was candidly addressed by Brookfield's counsel at oral argument:

> **The Court**: [Counsel], I have a couple questions on the half a billion-dollar stake issue. First of all, the Proxy said Morgan Stanley may have committed and may commit in the future to invest in private equity funds.

Counsel: Yeah.

The Court: So that's not exactly saying straight up that they had in fact invested $470 million dollars.

Counsel: It's not. And I think that's the same, but the answer is, it's not. It says may, it doesn't say has, but stockholders could gather that information from the 13F, which did have ....

....

The Court: But that part of the schedule wasn't in our record.

Counsel: I believe the only thing that's in the record is the information showing the entire size of Morgan Stanley's portfolio.

Oral Argument, at 36:39–37:54, https://vimeo.com/903752923.

106 *Morrison*, 191 A.3d at 283.

107 *Id.* (alteration in original) (quoting *Arnold*, 650 A.2d at 1280, and then quoting *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996)).

108 A877 (Veres Aff., Ex. 35) (Morgan Stanley Form 13F) (Feb. 14, 2020).

109 Bench Ruling at 31.

110 *Id.*

111 *See Kahn v. Tremont Corp.*, 694 A.2d 422, 429 (Del. 1997) ("[P]rofessional advisors have the ability to influence directors who are anxious to make the right decision but who are often *in terra cognito*."). *See also Harcum v. Lovoi*, 2022 WL 29695, at *21 (Del. Ch. 2022) ("Although advisor conflicts should be disclosed, a plaintiff must provide sufficient facts to establish that the conflict or potential conflict was *material*.") (internal citation omitted) (emphasis added)).

112 *See In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *43 (Del. Ch. 2018) (finding that an advisor's "ongoing relationship with [a transaction counterparty] gave [the advisor] a powerful incentive to maintain good will and not push too hard during the negotiations.") (internal quotation marks and citation omitted)), *aff'd*, 211 A.3d 137, 2019 WL 2144476 (Del. 2019) (ORDER).

113 A102 (Compl. ¶ 154).

114 A102–A103 (Compl. ¶ 154).

115 A103 (Compl. ¶ 154).

116 *Id.*

117 *See, e.g.*, *In re Inergy L.P.*, 2010 WL 4273197, at *14 (Del. Ch. 2010) (declining to enjoin a transaction and concluding that a financial advisor's "prior dealings" with a counterparty to the proposed transaction "[did] not show that [the transaction committee]'s decision to retain [that advisor] ... was unreasonable[.]"); *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *22 n.104 (Del. Ch. 2017) (an "advisor's prior dealings with a counterparty to a transaction, *standing alone*, will not be adequate to plead a conflict of interest.") (emphasis added)).

118 *See Tornetta v. Maffei*, C.A. No. 2019-0649, at 18 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) (describing a proxy's omission of an advisor's concurrent engagement with a counterparty on an unrelated transaction as a glaring deficiency).

119 2018 WL 5018535.

120 *Id.* at *43 (quoting *In re Rural Metro Corp.*, 88 A.3d at 94); *see also* *Harcum*, 2022 WL 29695, at *21 (addressing plaintiff's allegation concerning a legal advisor's conflicts: "[a]lthough advisor conflicts should be disclosed, a plaintiff must provide sufficient facts to establish that the conflict or potential conflict was material.") (internal citation omitted)).

121 *See, e.g.*, *David P. Simonetti Rollover IRA v. Margolis*, 2008 WL 5048692, at *14 (Del. Ch. 2008) ("[S]tockholders are entitled to know what material factors, if any, may be motivating the financial advisor."); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *17 ("[T]he compensation and potential conflicts of interest of the special committee's advisors are important facts that generally must be disclosed to stockholders before a vote.").

122 Bench Ruling at 36.

123 *In re Xura, Inc., S'holder Litig.*, 2018 WL 6498677, at *13 (Del. Ch. 2018) (citing *Stroud v. Grace*, 606 A.2d 75, 84 n.1 (Del. 1992)).

124 We note that in denying the motion to dismiss in *PLX*, the Court of Chancery held that:

> In my view, the allegations of the complaint support a reasonable inference that the committee did not take sufficient steps at the outset to determine whether Deutsche Bank faced conflicts of interest before retaining the firm in August 2013. The complaint supports a reasonable inference instead that the committee hired Deutsche because of the tail provision without conducting adequate inquiry into Deutsche Bank's relationships, whether they could interfere with the sale process and what steps could be taken to address issues. I also think the allegations of the complaint support a reasonable inference that the committee did not take sufficient steps while overseeing the sale process to determine whether conflicts for Deutsche emerged.

In re PLX Tech. Inc. S'holders Litig., C.A. No. 9880, at 39 (Del. Ch. Sept. 3, 2015) (TRANSCRIPT). As we said in *RBC Capital Markets*, directors must exercise active and direct oversight of the transaction process. This oversight includes learning about actual and potential conflicts — not merely checking a box at the outset based upon conclusory representations which are not properly vetted. *RBC Cap. Mkts.*, 129 A.3d at 855 (directors "need to be active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest.") (internal citation omitted)).

125 Opening Br. at 32.

126 Bench Ruling at 37; *see also* A330–A331 (Veres Aff., Ex. 1) (Proxy at 166–67).

127 A330–A331 (Veres Aff., Ex. 1) (Proxy at 166–67).

128 A482 (Veres Aff., Ex. 1) (Proxy at 348).

129 A150 (Compl. ¶ 237). *See also* A934 (Veres Aff., Ex. 37) (Morgan Stanley Presentation to the Special Committee dated February 26, 2020, at 51) (calculating the "Net Change in Fees to BAM" to be approximately $130 million over five years).

130 A non-ratable benefit "exists when the controller 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." *In re Viacom Inc. S'holders Litig.*, 2020 WL 7711128, at *16 (Del. Ch. 2020) (internal quotation marks and citation omitted).

131 Bench Ruling at 36 (internal quotation marks omitted).

132 *Id.* at 36–37.

133 *Id.* at 39; A98–A99 (Compl. ¶ 147). *See* *Dent v. Ramtron Int'l Corp.*, 2014 WL 2931180, at *13 (Del. Ch. 2014).

134 *See* *Voigt v. Metcalf*, 2020 WL 614999, at *24 (Del. Ch. 2020) (quoting *Vento v. Curry*, 2017 WL 1076725, at *3–*4 (Del. Ch. 2017) (" 'A stockholder should not have to go on a scavenger hunt,' then 'piece together the answer from information buried' in a lengthy proxy statement.")).

135 *Vento*, 2017 WL 1076725, at *4.

136 *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *10 (Del. Ch. 2017) (quoting *In re Merge Healthcare Inc.*, 2017 WL 395981, at *10 (Del. Ch. 2017)). *See also* *Sommer v. Sw. Energy Co.*, 2022 WL 2713426, at *2 (D. Del. 2022) (a proxy "need not list every variable[,]" rather, "it need only give investors a fair summary of the factors underlying its calculations.") (internal quotation marks and citations omitted)); *Dent*, 2014 WL 2931180, at *12 ("[S]tockholders are entitled only to a fair summary of a financial advisor's work, not the data to make an independent determination of fair value."). In addition, facts are not necessarily

material merely because a stockholder may find them to be "helpful." *Skeen v. Jo-Ann Stores, Inc.*, 750 A.2d 1170, 1174 (Del. 2000) ("Appellants are advocating a new disclosure standard in cases where appraisal is an option. They suggest that stockholders should be given all the financial data they would need if they were making an independent determination of fair value. Appellants offer no authority for their position and we see no reason to depart from our traditional standards.").

137 *See Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018) ("[T]he important point is that although stockholders are assumed to be skilled readers, proxy statements are not intended to be mysteries to be solved by their audience.").

138 *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *17 (Del. Ch. 2017). *See also In re Fam. Dollar Stores, Inc. S'holder Litig.*, 2014 WL 7246436, at *21 (Del. Ch. 2014) ("Because the magnitude of potential synergies is dependent, at least in part, on the magnitude of divestitures, and because the required divestitures are not currently known, any statement in the Proxy about potential synergies would amount to speculation, which is not an appropriate subject for a proxy disclosure.") (internal quotation marks and citation omitted)); *Arnold*, 650 A.2d at 1280 ("Delaware law does not require disclosure of inherently unreliable or speculative information which would tend to confuse stockholders or inundate them with an overload of information.").

139 A116 (Compl. ¶ 176) (emphasis added).

140 *Crane*, 2017 WL 7053964, at *18.

141 Bench Ruling at 42.

142 Opening Br. at 46.

143 *Id.* at 46–47.

144 *Id.*

145 A405 (Veres Aff., Ex. 1) (Proxy at 241).

146 Bench Ruling at 44 (a "stockholder could [have] reach[ed] the same conclusion on their own[ ]" when calculating the expected dilution to dividends following the Merger).

147 *Salladay v. Lev*, 2020 WL 954032, at *16 (Del. Ch. 2020) (internal quotation marks and citations omitted).

148 A374 (Veres Aff., Ex. 1) (Proxy at 210) (emphasis added) (we view the use of the term "existing" as reasonably meaning

TerraForm's then-current assets prior to the Merger).

149 *Id.*

150 A375 (Veres Aff., Ex. 1) (Proxy at 211).

151 A377 (Veres Aff., Ex. 1) (Proxy at 213).

152 *See* *Kahn on Behalf of DeKalb Genetics Corp. v. Roberts*, 679 A.2d 460, 467 (Del. 1996) ("Simple multiplication would have revealed the allegedly omitted fact. Thus, no material information was withheld and no breach of duty occurred."). As Appellees suggest, one could do simple multiplication to calculate the dilutive effect of the Merger: "multiplying the distributions per unit under BEP's Management Forecasts by the exchange ratio, which is repeated throughout the Proxy, and comparing that figure to the dividends per share under [TerraForm]'s Five-Year Business Plan Model." Answering Br. at 44–45 (internal citation omitted).

153 *See* A374 (Veres Aff., Ex. 1) (Proxy at 210) (TerraForm's Five-Year Business Model); A377 (Veres Aff., Ex. 1) (Proxy at 213) (BEP Management Forecasts).

154 *Vento*, 2017 WL 1076725, at *3 ("[A] stockholder can only make a guess about this information by attempting (with great difficulty) to piece together the answer from information buried in a 248-page Amended Registration Statement and an equally lengthy Form 8–K filed more than ten weeks before the Amended Registration Statement.").

155 Opening Br. at 48. Appellants support this claim by adding that Greentech was "uniquely positioned" to provide advice to TerraForm because it consistently advised it for years prior to the Merger and, therefore, "had a thorough understanding of [TerraForm] and its assets." *Id.* at 50 (internal quotation marks and citation omitted).

156 A832 (Veres Aff., Ex. 34) (Greentech Proposal to Advise the Special Committee dated January 12, 2020). We note that the presentation's second slide incorrectly states the date as "January 12, 2019" instead of January 12, 2020.

157 *Crane*, 2017 WL 7053964, at *13 (internal quotation marks and citations omitted).

158 Bench Ruling at 34.

159 A321 (Veres Aff., Ex. 1) (Proxy at 157).

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320 A.3d 239
Supreme Court of Delaware.

Ted D. KELLNER, Plaintiff Below, Appellant/Cross-Appellee,
v.
AIM IMMUNOTECH INC., Thomas Equels, William Mitchell, Stewart Appelrouth, and Nancy K. Bryan, Defendants Below, Appellees/Cross-Appellants.

No. 3, 2024
|
Submitted: April 10, 2024
|
Decided: July 11, 2024

Synopsis
Background: Shareholder of publicly traded pharmaceutical corporation, after a failed attempt by shareholder to nominate new directors, sued corporation and its board members seeking declarations that corporation's amended bylaws governing advance notice of directorship nominations were invalid, that board unlawfully and inequitably applied the amended bylaws to reject shareholder's notice of nominations, and that directors breached their fiduciary duties by adopting the amended bylaws and rejecting shareholder's notice. Defendants counterclaimed, seeking declarations that the amended bylaws were valid, that shareholder's notice did not comply with the amended bylaws and was thus validly rejected, and that directors did not breach their fiduciary duties. After a bench trial, the Court of Chancery, Lori W. Will, Vice Chancellor, 307 A.3d 998, found that four of the six main amended bylaws were invalid, reinstated an earlier version of one invalidated bylaw, and found that board's rejection of shareholder's nominations was nonetheless equitable. Shareholder appealed, and defendants cross-appealed, challenging the invalidation of four of the amended bylaws.

Holdings: The Supreme Court, Seitz, C.J., held that:

[1] five out of six of corporation's amended advance-notice bylaws were valid;

[2] one out of six of corporation's amended advance-notice bylaws was invalid because it was unintelligible;

[3] board's improper purpose in amending its advance-notice bylaws caused the amended bylaws to fail the first prong of enhanced-scrutiny review, and they were thus inequitable and unenforceable;

[4] bylaw requiring disclosure by a party nominating a board member of all agreements, arrangements, or understandings (AAUs) was unreasonable and unenforceable;

[5] earlier version of bylaw requiring disclosure by a party nominating a board member of all AAUs could not be reinstated because amended version, though unenforceable, was valid;

[6] bylaw requiring disclosure by a party nominating a board member of all AAUs between a stockholder or a "Stockholder Associated Person" (SAP) within a 10-year window and regarding consulting, investment advice, or a previous nomination for a publicly traded company was unreasonable and unenforceable;

[7] bylaw requiring nominator and nominees to list any person who acted in "support" of a stockholder proposal was unreasonable and unenforceable; but

[8] no further action in shareholder's favor was warranted in light of deceptive conduct by shareholder and his nominees.

Affirmed in part and reversed in part.

See also 2022 WL 16543834.

West Headnotes (41)

[1] **Corporations and Business Organizations** Notice

In a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance-notice bylaws that is ripe for judicial review, the court should consider the following: first, if contested, whether the advance notice bylaws are valid as consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and second, whether the board's adoption, amendment, or application of the advance-notice bylaws was equitable under the circumstances of the case.

[2] **Appeal and Error**Verdict and Findings in General

On appeal, the Supreme Court accepts the trial court's factual findings if they are sufficiently supported by the record and are the product of an orderly and logical deductive process; only when they are clearly wrong, and the doing of justice requires their overturn, is the Supreme Court free to make contradictory findings of fact.

[3] **Appeal and Error**De novo review

The Supreme Court reviews de novo the trial court's legal conclusions.

[4] **Appeal and Error**Corporations and other organizations

In shareholder suits, the Supreme Court reviews the results of a trial court's enhanced-scrutiny analysis and interpretation of corporate bylaws de novo.

[5] **Corporations and Business Organizations**Validity in general
Corporations and Business Organizations Construction, operation, and effect

Corporate bylaws are presumed to be valid and must be interpreted in a manner consistent with the law.

[6] **Corporations and Business Organizations**Validity in general

A facially valid corporate bylaw is one that is authorized by the Delaware General Corporation Law (DGCL), consistent with the corporation's certificate of incorporation, and not otherwise prohibited.

[7] **Corporations and Business Organizations**Validity in general

When a corporate bylaw is challenged in court, it is insufficient for a plaintiff to simply assert that under some circumstances, the bylaw might conflict with a statute, or operate unlawfully; instead, the plaintiff must demonstrate that the bylaw cannot operate lawfully under any set of circumstances.

[8] **Corporations and Business Organizations**Validity in general

Even if a corporate bylaw's facial validity is not at issue, the bylaw is still subject to judicial review.

[9] **Corporations and Business Organizations**Adoption, amendment, and

repeal
Corporations and Business Organizations🔑Construction, operation, and effect

If the court has before it a genuine, extant controversy involving the adoption, amendment, or application of bylaws, the Court of Chancery reviews corporate acts not only for their legality but also for their equity.

[10] **Corporations and Business Organizations**🔑General Statutes
Corporations and Business Organizations🔑Fiduciary duty in general
Corporations and Business Organizations🔑Fiduciary nature of relation

The legislature's capacious grant of power to businesses through the Delaware General Corporation Law (DGCL) is policed in large part by the common law of equity, in the form of fiduciary-duty principles.

[11] **Corporations and Business Organizations**🔑Scope of Corporate Power in General

Inequitable action by a corporation does not become permissible simply because it is legally possible.

[12] **Corporations and Business Organizations**🔑Extent and Exercise of Powers in General

When corporate action is challenged, it must be twice-tested—first for legal authorization, and second by equity.

[13] **Corporations and Business Organizations**🔑Notice

Advance-notice bylaws adopted by a corporation's board are subject to the same principles as other bylaws, meaning that they must be reviewed both for their legality and for their equity.

[14] **Action**🔑Moot, hypothetical or abstract questions

A court should hear claims about bylaw adoption, amendment, and application only if the claims are ripe for judicial determination.

[15] **Action**🔑Moot, hypothetical or abstract questions

A bylaw dispute is ripe when litigation is unavoidable and the material facts are static.

[16] **Corporations and Business Organizations**🔑Validity in general

To pass judicial review, corporate bylaws must, as a matter of equity, be reasonable in their application and not unfairly interfere with stockholder voting.

[17] Corporations and Business Organizations🔑Notice

If a corporate board adopts, amends, or enforces advance-notice bylaws during a proxy context, courts must engage in two-step enhanced-scrutiny review: at the first step, the court should review whether the board faced a real, not pretextual, threat to an important corporate interest or to the achievement of a significant corporate benefit, and the board's motivations must be proper and not selfish or disloyal; if the board's actions pass muster at the first step, then the court considers whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise.

[18] Corporations and Business Organizations🔑Notice

A threat to a corporation offered by its board as a justification for advance-notice bylaws adopted, amended, or enforced during a proxy contest cannot be justified on the grounds that the board knows what is in the best interests of the stockholders.

[19] Corporations and Business Organizations🔑Notice

If a corporate board adopted advance-notice bylaws for a selfish or disloyal motive—meaning for the primary purpose of precluding a challenge to its control—the remedy is to declare the advance-notice bylaws inequitable and unenforceable.

[20] Corporations and Business Organizations🔑Right to Vote in General

To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat; the board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way.

[21] Corporations and Business Organizations🔑Right to Vote in General

Enhanced-scrutiny review when a board of directors interferes with a corporate election or a stockholder's voting rights in contests for control ensures that the board's actions are sufficiently tailored to the threat at hand such that those actions do not unfairly impede the free exercise of the stockholder franchise.

[22] Corporations and Business Organizations🔑Election

If a corporation's board is motivated to counter a legitimate threat related to a contest for control, but its response is disproportionate, the Court of Chancery has the discretion, and broad power, to impose an equitable remedy.

[23] Corporations and Business Organizations🔑Notice

In the context of advance-notice bylaws, if the bylaws were adopted for a proper purpose but some of the advance-notice provisions were disproportionate to the threat posed and preclusive, the Court of Chancery has the discretion to decide whether to enforce, in whole or in part, the bylaws that can be applied equitably.

[24] **Corporations and Business Organizations**🔑Validity in general

Although it may be necessary to assess how bylaws work together, one problematic bylaw does not invalidate others when the board has a proper motive.

[25] **Corporations and Business Organizations**🔑Validity in general

Just as the Court of Chancery will not endorse a tripwire in corporate bylaws against an activist stockholder, it should not endorse a reverse tripwire by the activist.

[26] **Corporations and Business Organizations**🔑Anti-Takeover Measures and Devices
Equity🔑Application and operation in general

The restriction placed upon a defensive measure taken by a corporate board during a proxy contest is that the directors may not have acted solely or primarily out of a desire to perpetuate themselves in office; to this is added the further caveat that inequitable action may not be taken under the guise of law.

[27] **Corporations and Business Organizations**🔑Actions

The standard of proof in an action challenging a board of directors' defensive actions during a proxy contest is designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good-faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct.

[28] **Corporations and Business Organizations**🔑Fiduciary Duties of Directors and Officers

If a defensive measure by a corporate board during a proxy contest is to come within the ambit of the business-judgment rule, the measure must be reasonable in relation to the threat posed.

[29] **Corporations and Business Organizations**🔑Validity in general

An invalid corporate bylaw is ab initio void. 8 Del. Code § 109(b).

[30] **Corporations and Business Organizations**🔑Validity in general

A valid corporate bylaw, when inequitable, is rendered unenforceable.

[31] **Corporations and Business Organizations**🔑Validity in general

When a validity challenge to a corporate bylaw is raised, a court should undertake an analysis distinct from enhanced-scrutiny review; to assess validity, the court reviews whether the bylaw is contrary to law or the certificate of incorporation and addresses a proper subject matter.

[32] **Corporations and Business Organizations**🔑Validity in general

A corporate bylaw is presumed valid, and the court should not consider hypotheticals or speculate whether the bylaw might be invalid under certain circumstances; instead, the burden is on the party asserting invalidity to demonstrate that the bylaw cannot be valid under any circumstance.

[33] **Corporations and Business Organizations**🔑Notice

Five out of six of pharmaceutical corporation's amended bylaws governing advance notice of directorship nominations, and challenged by shareholder in suit alleging that board had wrongly rejected shareholder's notice of nominations to board, were valid, where corporation's board had the power, under both the Delaware General Corporation Law (DGCL) and corporation's certificate of incorporation, to adopt, amend, or repeal bylaws, and the bylaws were not outside the broad subject matter permitted by the legislature. 8 Del. Code § 109(b).

1 Case that cites this headnote

[34] **Corporations and Business Organizations**🔑Notice

One out of six of pharmaceutical corporation's amended bylaws governing advance notice of directorship nominations, and challenged by shareholder in suit alleging that board had wrongly rejected shareholder's notice of nominations to board, was facially invalid because it was unintelligible; the provision, a single 1099-word sentence with 13 discrete parts, was excessively long, contained vague terms, and imposed virtually endless requirements on a stockholder seeking to nominate directors. 8 Del. Code § 109(b).

[35] **Corporations and Business Organizations**🔑Validity in general

An unintelligible corporate bylaw is invalid under any circumstances.

[36] **Corporations and Business Organizations**🔑Election

The improper purpose of pharmaceutical corporation's board in amending corporation's advance-notice bylaws, namely the purpose of thwarting shareholder's proxy contest and maintaining control of corporation, caused the amended bylaws to fail the first prong of enhanced-scrutiny review in shareholder's suit alleging that board had wrongly rejected his notice of nominations to board, and those bylaws were thus inequitable and unenforceable.

[37] **Corporations and Business Organizations**🔑Notice

Pharmaceutical corporation's amended advance-notice bylaw requiring disclosure by a party nominating a board member of all agreements, arrangements, or understandings

(AAUs), a bylaw that included a broad definition of a "Stockholder Associated Person" (SAP), was unreasonable and unenforceable with respect to shareholder whose petition had been rejected; bylaw required a nominator to gather information about agreements and understandings between members of a potentially limitless class of third parties unknown to the nominator, it did not further the board's stated purpose of preventing shareholders from misconstruing or evading disclosure requirements, it functioned as a tripwire rather than a tool to gather information, and it showed an intent to block shareholder's effort.

[38] **Corporations and Business Organizations**Notice

Because amended advance-notice bylaw of pharmaceutical corporation that required disclosure by a party nominating a board member of all agreements, arrangements, or understandings (AAUs) was unenforceable but was also facially valid, previous version of corporation's AAU bylaw could not be applied with respect to shareholder's nominating petition, which board had rejected for failure to comply with corporation's amended bylaws; reversion to prior bylaw was not possible in light of amended bylaw's validity.

[39] **Corporations and Business Organizations**Notice

Pharmaceutical corporation's amended advance-notice bylaw requiring disclosure by a party nominating a board member of all agreements, arrangements, or understandings (AAUs) between a stockholder or a "Stockholder Associated Person" (SAP) within a 10-year window and regarding consulting, investment advice, or a previous nomination for a publicly traded company was unreasonable and unenforceable with respect to shareholder whose petition had been rejected; bylaw imposed ambiguous requirements across a lengthy term, sought only marginally useful information, gave the board license to reject a notice based on a subjective interpretation of its imprecise terms, and, at worst, was draconian.

[40] **Corporations and Business Organizations**Notice

Pharmaceutical corporation's amended advance-notice bylaw requiring nominator and nominees to list any person who acted in "support" of a stockholder proposal was unreasonable and unenforceable with respect to shareholder whose petition had been rejected; bylaw required a nominating stockholder to respond not only based on personal knowledge, but also as to an ill-defined daisy chain of persons, and the provision impeded the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure.

[41] **Corporations and Business Organizations**Election

Deceptive conduct by shareholder and his nominees for board of pharmaceutical corporation in connection with shareholder's nominating petition meant that no further court action in favor of shareholder was warranted in his suit challenging corporation's rejection of his nominating petition, even though certain amended advance-notice bylaws adopted by corporation to thwart shareholder's proxy contest were either invalid or, if valid, were inequitable and unenforceable.

***244** Court Below: Court of Chancery of the State of Delaware, C.A. No. 2023-0879

Upon appeal from the Court of Chancery. **AFFIRMED** in part, **REVERSED** in part.

Attorneys and Law Firms

John M. Seaman, Esquire, Eliezer Y. Feinstein, Esquire, ABRAMS & BAYLISS LLP, Wilmington, Delaware; Teresa Goody Guillén, Esquire, Richard Raile, Esquire (argued), BAKER & HOSTETLER LLP, Washington, D.C.; Marco Molina, Esquire, BAKER & HOSTETLER LLP, Costa Mesa, California; Alexandra L. Trujillo, Esquire, BAKER & HOSTETLER LLP, Houston, Texas for Plaintiff Below, Appellant/Cross-Appellee Ted D. Kellner.

William R. Denny, Esquire, Matthew F. Davis, Esquire, Nicholas D. Mozal, Esquire, Caneel Radinson-Blasucci, Esquire, Eric J. Nascone, Esquire, POTTER ANDERSON & CORROON LLP, Wilmington, Delaware; Stefan Atkinson, Esquire (argued), Mary T. Reale, Esquire, Mason E. Reynolds, Esquire, Joseph Taglienti, Esquire, KIRKLAND & ELLIS LLP, New York, New York; Michael F. Williams, Esquire, Don Hong, Esquire, KIRKLAND & ELLIS LLP, Washington D.C. for Defendants Below, Appellees/Cross-Appellants AIM ImmunoTech Inc., Thomas Equels, William Mitchell, Stewart Appelrouth, and Nancy K. Bryan.

Brett M. McCartney, Esquire, Sarah T. Andrade, Esquire, BAYARD, P.A., Wilmington, Delaware; Edward J. Fuhr, Esquire, Steven M. Haas, Esquire, Johnathon E. Schronce, Esquire, James M. Lockerby, Esquire, HUNTON ANDREWS KURTH LLP, Richmond, Virginia for Amicus Curiae, Chamber of Commerce of the United States of America, in support of Appellees.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices; constituting the Court en Banc.

Opinion

SEITZ, Chief Justice:

***245** A group of AIM ImmunoTech, Inc. stockholders thought that the board of directors was mismanaging the company. They launched an activism campaign and proxy contest to elect new directors. The insurgents included two felons convicted of wire fraud, insider trading, and other crimes. The campaign escalated into two attempts to nominate directors to the AIM board.

The board rejected both nomination notices under its existing bylaws, which led to a lawsuit over the second notice. The Court of Chancery denied the insurgents' request for a mandatory preliminary injunction to place their nominees on the annual meeting ballot. The court held that factual disputes about the veracity of the insurgents' disclosures precluded temporary mandatory injunctive relief.

Undeterred, the insurgents reshuffled their membership, with Ted D. Kellner leading a third attempt to nominate three new directors to the AIM board. Meanwhile, the board amended its bylaws to include sweeping new advance notice provisions. The amended bylaws required detailed disclosures by Kellner and his nominees. Many of the amendments were approved by the AIM board as a direct response to the insurgents' campaign.

The AIM board once again rejected Kellner's nominations for failing to comply with the new advance notice bylaws. Kellner filed suit. After trial, the Court of Chancery invalidated four of the six main advance notice bylaws and reinstated the 2016 version of one of the invalidated bylaws. Ultimately, the court upheld the board's rejection of the third nomination notice because it failed to comply with the two advance notice bylaws left standing, including the reinstated 2016 bylaw provision.

On appeal, Kellner argues that the court improperly used the 2016 bylaw to reject his notice because the AIM board did not rely on it as a basis for rejection. In addition, according to Kellner, the enactment of the amended bylaws repealed the 2016 bylaw, which meant that the court had no basis to reinstate it. He also argues that the court erred when it held that two of the amended bylaws withstood enhanced scrutiny when, at the same time, the court found that many of the other bylaws were preclusive and adopted for an improper purpose. Finally, Kellner contends that the court erred when it found that the nomination notice did not comply with the amended bylaws left standing.

By way of cross appeal, the defendants object to the Court of Chancery's invalidation of four of the amended bylaws. As they argue, the Court of Chancery erred when it confused a "facial" challenge to the bylaws with an "as-applied" challenge. According to the defendants, Kellner brought only an as-applied challenge. The court, therefore, should not have invalidated the amended bylaws. The defendants also contend that, in any event, the amended bylaws withstand enhanced scrutiny review.

***246** [1]In a challenge to the adoption, amendment, or enforcement of a Delaware corporation's advance notice bylaws that is ripe for judicial review, the court should consider the following: first, if contested, whether the advance notice bylaws are valid as consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and second, whether the board's adoption, amendment, or application of the advance notice bylaws were equitable under the circumstances of the case.

Applying this framework to the current appeal, we hold that: (1) one "unintelligible" bylaw is invalid; (2) the remaining amended advance notice bylaws subject to this appeal are valid because they are consistent with the certificate of incorporation, not prohibited by law, and address a proper subject matter; and (3) the AIM board acted inequitably when it adopted the amended bylaws for the primary purpose of interfering with, and ultimately rejecting, Kellner's nominations. Thus, the remaining bylaws challenged on appeal are unenforceable.

I.

A.

We rely on the facts as found after trial.[1] AIM ImmunoTech, Inc. is a publicly traded pharmaceutical company incorporated in Delaware and headquartered in Florida. AIM develops treatments for immune system disorders, viral diseases, and cancers. Its lead product is the investigational drug Ampligen. AIM has a four-member board of directors – Thomas Equels, William Mitchel, Stewart Appelrouth, and Nancy K. Bryan. Equels is AIM's Chief Executive Officer, having served in his role since 2008. Mitchell, a scientist who has studied Ampligen since the 1980s, is the chairman of the board. Appelrouth, an accountant, has served on the board since 2016. Bryan, the President of BioFlorida Inc., an LLC of which AIM is a member, is the latest addition, beginning her board tenure in March, 2023. The directors and the company are the defendants in the litigation.

Ted D. Kellner, the plaintiff in this litigation, is a retired founder, portfolio manager, philanthropist, minority owner of a professional basketball team, and a major AIM stockholder. In 2023, Kellner sought to nominate a competing slate of directors to serve on the AIM board. The competing slate of directors was Kellner himself, Todd Deutsch, and Robert Chioini. Deutsch, a private investor, has known Kellner for over two decades and is the owner of about 3.5% of AIM's shares. Chioini is the co-founder of Rockwell Medical Technologies, a dialysis company, and was its Chief Executive Officer until the Rockwell board terminated his employment in 2018. Chioini is not an AIM stockholder.

Deutsch and Chioini were both involved in a prior nomination effort led by Franz Tudor – a business associate of Deutsch. The prior nomination dispute was the subject of a separate and related Court of Chancery action – *Jorgl v. AIM ImmunoTech, Inc.* – where Tudor led the effort to place nominees on AIM's universal proxy card.[2] In 2009, Tudor pleaded guilty to securities fraud and insider trading. Tudor is permanently enjoined from engaging in certain activities relating to penny stocks – a class of microcap publicly-traded companies that includes AIM.

B.

Since 2016, AIM's stock price has fallen precipitously. In the summer of 2020, Tudor ***247** contacted AIM management. He wanted to "be taken seriously."[3] Tudor told the board that he represented over one million AIM shares between his ownership and the funds he consults. He sought a formal role with AIM. Equels investigated Tudor's past and discovered his criminal background.

When AIM management did not respond, Tudor attempted to contact other directors and AIM representatives but, once again, was ignored. Tudor began to represent to third parties that he was formally associated with AIM. In response, AIM demanded that Tudor stop his misrepresentations. Tudor ignored the demand, which caused AIM to file suit against him in Florida state court. Tudor eventually agreed to a stipulated permanent injunction, which enjoined Tudor from contacting any of AIM's business relationships regarding AIM or its products and activities.[4]

Other Tudor associates joined the pressure campaign. Deutsch, Tudor's former colleague, who had suffered significant losses from his AIM investment, began working with Tudor to engage with the board. Tudor also recruited others to the activism effort: Chioini – whom he had worked with at Rockwell – and acquaintances Daniel Ring and Walter Lautz. Lautz sent AIM a notice to nominate Ring and Chioini to the board. Tudor drafted the notice without Lautz's review. It did not mention Tudor or his involvement in the nomination.

The AIM board rejected Lautz's notice for noncompliance with federal securities law. In reaction to the rejection, Chioini sought financial support from his fellow Rockwell co-founder, Michael Xirinachs. Later, in the same year, Xirinachs pleaded guilty to criminal charges involving fraudulent securities trading, promotion and material misrepresentations to investors, and misuse of funds.

Chioini sent Xirinachs a copy of AIM's bylaws and flagged the advance notice provisions. Tudor began working with counsel at Baker & Hostetler LLP on a potential proxy contest. He continued to contact AIM about his nomination effort. Tudor was met with silence to which he responded, "you now get the gloves off."[5]

Meanwhile Deutsch kept Kellner, his fellow AIM stockholder, apprised of the nomination effort. Kellner first purchased AIM stock in early 2021 at Deutsch's suggestion. Deutsch would send Kellner information from Tudor about AIM's stock performance – mostly by forwarding him emails written by Tudor. Kellner saw promise in AIM but, like the other insurgents, thought it was mismanaged. One day after the Lautz nomination notice, Deutsch sent Kellner an investment analysis prepared by Tudor. Kellner marked up the analysis by hand and scribbled "48 million shares. What do we own? 15 to 18%[?]"[6] Kellner was later surprised to learn that Tudor owned significantly fewer shares than Kellner had believed. Deutsch vouched for Tudor, stating "I promise [you] he is as smart [as] they come in [the] space."[7] Kellner answered that Tudor "doesn't need to worry nor you about Teddy!!![13 emojis, including thumbs up and ***248** smiley faces]."[8]

At this point the nomination effort hit another obstacle. Tudor expected Lautz to submit a new nomination notice to the board. But Lautz told Tudor that he had been the subject of "a FINRA investigation" and "was terminated from one of the largest brokerage houses on the planet," which "may not be a good look" for the nomination effort.[9] AIM's counsel later told Deutsch, Kellner, and Tudor's counsel that they had to comply with Section 13(d) of the Securities and Exchange Act of 1934. The advice came about after counsel learned that Deutsch was attempting to have Tudor attend "as an undisclosed party, a telephone conference between AIM's [investor relations] firm," Deutsch, and Kellner.[10] The AIM communication revealed to Kellner, for the first time, that Tudor was a felon subject to a permanent injunction against AIM.[11] Kellner hand wrote on a printed copy of AIM's letter, "FRANZ TUDOR – IS A FELON?" and "INSIDER TRADING?"[12] Kellner also wrote the names "Robb [sic] Chioini" and "Michael Zeaniack [Xirinachs]," noting: "our plans – get a lawyer."[13]

Ring dropped out and with Lautz no longer the nominator, the nomination effort needed both a stockholder to make the nomination and a new nominee. Chioini recruited a business associate, Michael Rice, to be his co-nominee. Rice supplied the face of the investor, a friend he surfed with – Jonathan Jorgl. Jorgl had never heard of AIM when Rice made his request. Rice and Xirinachs made sure that Jorgl held shares recorded to his name before the nomination deadline.

On July 8, 2022, Jorgl submitted a notice with Chioini and Rice as his proposed nominees. Shortly thereafter, AIM rejected Jorgl's nomination notice because the notice, as AIM's General Counsel put it, "fail[ed] to satisfy Section 1.4 of [AIM's] [b]ylaws and applicable law by, among other things, making false and misleading statements in lieu of providing [the required] information."[14] Section 1.4(c) of AIM's bylaws, as adopted in 2016, required a stockholder proposal to disclose "arrangements or understandings ... pursuant to which the nomination(s) are to be made."[15]

AIM's rejection triggered the first round of litigation in the Court of Chancery, *Jorgl v. AIM ImmunoTech, Inc.*[16] Following expedited discovery, the court declined to grant Jorgl judgment as a matter of law because, on the record before it, the court could not conclude that Jorgl's nomination notice complied with the existing bylaw requirements. The court also concluded that the "swirl of lingering factual disputes" also precluded mandatory preliminary injunctive relief.[17] AIM continued to prosecute claims in Florida against Tudor, Deutsch, Kellner, Jorgl, Lautz, Chioini, and Rice. In the Florida action, AIM alleged that the investor group violated Section 13(d) of the Exchange Act – later amending its complaint to drop Chioini ***249** and Rice. AIM sought an injunction against the group to prohibit them from further violating federal securities law.[18]

Meanwhile, Kellner prepared for AIM's 2022 annual meeting. He drafted an update to his college investment club, for which he managed the investment portfolio, which included AIM stock. In the update, Kellner said he was "now a party to that proxy fight."[19] Kellner attended AIM's annual meeting in person. He was disappointed by the lack of engagement and felt "angry" over what had occurred.[20] Kellner reached out to the investment group to gauge their level of commitment to continue their nomination efforts.

C.

Following the 2022 annual meeting, the AIM board took a new look at its governance structure. In response to stockholder feedback, the board sought to add additional directors who would "bring diversity and additional biotechnology commercialization experience."[21] Chioini viewed this as an opportunity to get onto the board. He instructed his counsel, John Harrington of BakerHostetler, to relay to AIM his and Rice's continued interest. Harrington informed AIM's Delaware counsel at Potter Anderson & Corroon LLP that Chioini and Rice wanted to "avoid another proxy contest" and instead would be amenable to "mutually agreeable directors" joining the board.[22] Harrington stressed that they were otherwise "ready to come out guns blazing" next year.[23] Soon after, Chioini and Kellner spoke for the first time. Chioini told Harrington that Kellner was "very interested in working with [them] to remove these guys" and "want[ed] to keep in touch."[24]

Before the 2023 annual meeting, the board considered amendments to AIM's advance notice bylaws. The board engaged Potter Anderson for the review. Potter Anderson circulated a proposed set of amendments. The proposed bylaw amendments were intended to respond "to significant activist activity during 2022 in which an activist group ... engag[ed] in efforts to conceal who was supporting and who was funding the nomination efforts and to conceal the group's plans for the Company," and to modernize and bring the bylaws in line with recent amendments to the Delaware General Corporation Law ("DGCL") and federal law.[25] Potter Anderson presented the amendments at a board meeting where counsel discussed the Jorgl nomination. The board concluded that the bylaw provisions were not "preclusive or unreasonably restrictive" of stockholders' ability to make proposals or nominations.[26] The board made minor changes and thereafter adopted the bylaws by unanimous vote (the "Amended Bylaws").[27]

As the third nomination effort commenced, Tudor, who was supposedly employed by Deutsch to do back-office tasks, dropped out of sight. The remaining individuals ***250** were Kellner, Deutsch, Chioini, and Rice. They met with their counsel to strategize. Kellner promised to fund the effort if Chioini and Deutsch also made a smaller contribution. Kellner, Deutsch, and Chioini signed an engagement letter with BakerHostetler.[28]

BakerHostetler contacted AIM on Kellner's behalf to request the company's director and officer (D&O) questionnaire and a representation and agreement referred to in the Amended Bylaws. The Amended Bylaws gave AIM five days to complete and send the questionnaire, during which the board revised the questionnaire to require additional information from Kellner and his nominees. Kellner submitted a Schedule 13D filing with the Securities and Exchange Commission. Equels contacted the board to schedule a discussion about the "second attempt of [a] hostile takeover."[29] On August 3, 2023, the evening before the nomination deadline – Kellner submitted his notice that he intended to nominate himself, Chioini, and Deutsch as director candidates at the 2023 annual meeting.[30]

The twenty-page notice contained lengthy disclosures.[31] It contained information regarding the nominees such as: biographical details;[32] employment history;[33] group agreements;[34] statements on affiliations with Lautz, Tudor, Rice, Jorgl, and Xirinachs;[35] prior board service;[36] meeting dates;[37] equity ownership in AIM and its competitors by the nominees and their families;[38] and intent to solicit stockholders.[39] Notably, the notice rejected the existence of any sort of agreement, arrangement, or understanding ("AAU") involving Tudor for the Jorgl nomination;[40] disclosed that Chioini had no AAUs with Lautz or Tudor, despite Chioini having been nominated by Lautz in the invalid 2022 attempt;[41] disclosed no AAUs of Chioini despite Chioini incurring significant legal fees with no equity ownership of AIM stock;[42] and did not disclose any AAU of Xirinachs, despite his financial support of the activist effort.

The nominees' D&O questionnaires contained information regarding the nominees such as their: educational background;[43] trade qualifications;[44] prior board service;[45] criminal history;[46] financial information;[47] regulatory action;[48] diversity;[49] group ***251** agreements;[50] economic interest in the nomination;[51] and social media presence.[52]

Four days later, AIM's outside communications advisor sent a draft press release concerning the nomination to Equels, AIM's counsel, and AIM's investor relations team. The draft stated, "[a] hostile takeover of the Board would not only put shareholders' investments at risk, it would also be detrimental to the patients for whom we are working to bring new life-saving oncology therapies to market – most notably by repurposing our lead drug, Ampligen."[53] Counsel recommended revisions to the messaging as "no determination ha[d] been made yet as to whether the notice complies with AIM's advance notice bylaws."[54]

The board met over three sessions in a two-week period to discuss the nomination. In an August 8 meeting, Equels emphasized that "protecting stockholders was paramount" considering the overlapping people between the prior and current nomination efforts and their troubling backgrounds.[55] The board hired Potter Anderson and Kirkland & Ellis LLP to evaluate the notice. In addition, AIM filed a motion seeking to revive the dismissed

Florida action, characterizing the Kellner notice as misleading and a continuation of the 2022 activism.[56] Based on the omissions and misstatements, AIM's complaint characterized Kellner, Deutsch, and the other group members as posing an "ongoing ... threat to AIM and its shareholders."[57]

At the August 21 meeting, counsel advised the board that the Kellner notice did not comply with the Amended Bylaws. Specifically, absent from the notice, as interpreted by counsel, were: (1) undisclosed AAUs among the activists; (2) disclosure of known supporters of the nomination; (3) disclosure of the specific date, rather than windows of time, of first contact between the activists; and (4) other information, such as past adverse recommendations for public board service from independent proxy advisory firms. After explaining the purported deficiencies, counsel reviewed litigation options with the board. The board concluded that it required additional time to consider its course of action.

The following morning, the board reconvened to reject unanimously Kellner's nomination notice for not complying with the Amended Bylaws. The board concluded that the notice was "designed to omit and conceal information and to provide incomplete or misleading disclosures that destabilize the important disclosure function that [AIM's] Advance Notice Provisions were designed to serve."[58] The board authorized a letter to notify Kellner of the rejection. AIM's counsel notified BakerHostetler of the rejection by letter.[59] The rejection letter sent to Kellner, which explained the various disclosure deficiencies, stated that the deadline for submitting a ***252** timely notice had passed. The board would not, therefore, consider an updated notice for the 2023 annual meeting. Kellner issued a press release announcing that he had filed litigation and urged AIM stockholders to disregard board proxy contest communications.

The rejection letter described several instances of non-compliance with AIM's bylaws – but was primarily focused on the deficient disclosure of AAUs.[60] The notice alleged that Kellner failed to disclose various AAUs relating to the 2022 and 2023 annual meetings.[61] Among other things, AIM found it not credible that nominee Chioini had no AAUs other than the July 2023 agreement based on the factual history between the company and the insurgents, as well as the fact that Chioini owned no shares of AIM and expended both time and money on the nomination effort.[62] Similarly, AIM doubted that Xirinachs lacked AAUs given his extensive history of working with Chioini and Tudor on nominating new board members.[63]

Additionally, the letter identified "other" instances of "material" omissions, such as: providing materially false information regarding nominee qualifications;[64] material omission of nominee biographical information;[65] failure to disclose certain affiliations;[66] failure to disclose certain ownership information;[67] failure to disclose relevant dates;[68] failure to disclose information required by the proxy rules;[69] and making an inaccurate certification regarding compliance with legal requirements.[70]

D.

Kellner filed a complaint in the Court of Chancery, naming AIM and its board members as defendants.[71] In his complaint, Kellner asked for declarations that the Amended Bylaws are unlawful, or in addition and in the alternative, that the defendants' application of the bylaws to reject his notice is unlawful and/or inequitable; that each of Equels, Mitchell, and Appelrouth breached their fiduciary duties by adopting the Amended Bylaws; and that the board breached its fiduciary duties by rejecting the notice under the Amended Bylaws.[72] The defendants answered and counterclaimed against Kellner, seeking declarations that: the Amended Bylaws are lawful and valid; the notice did not comply with the Amended Bylaws; the notice was lawfully and validly rejected for failing to comply with the Amended Bylaws; and that AIM's directors did not breach their fiduciary duties by adopting the Amended Bylaws or by rejecting Kellner's notice.[73] Following a three-day expedited trial, the court concluded that many of the provisions in the Amended Bylaws were invalid, but the board's rejection of Kellner's nominations ***253** was nevertheless equitable.[74]

First, the court determined that the Amended Bylaws were not adopted on a clear day.[75] As such, the court treated the Amended Bylaws adoption as a defensive measure, applied the enhanced scrutiny standard of review, and placed the burden of proof on the defendants.[76] The court focused its analysis on six bylaws used to support the notice's rejection:

- Section 1.4(c)(1)(D), "the **AAU Provision**," requiring "a complete and accurate description of all agreements, arrangements or understandings [AAUs] (whether written or oral, and including promises)" between a broadly defined group of people including any "Holder" and "Stockholder Associated Person [SAP]," "with respect to the nominations or [AIM] ... existing presently or existing during the prior twenty-four (24) months ...."[77]
  - A Holder is defined as "the Noticing Stockholder and each beneficial owner, if any, on whose behalf

the nomination is made or other business is being proposed."[78]

• A SAP is defined "as to any Holder, (i) any person acting in concert with such Holder with respect to the Stockholder Proposal or the Corporation, (ii) any person controlling, controlled by, or under common control with such Holder or any of their respective Affiliates and Associates, or a person acting in concert therewith with respect to the Stockholder Proposal or the Corporation, and (iii) any member of the immediate family of such Holder or an Affiliate or Associate of such Holder."[79]

• Section 1.4(c)(1)(E), "the **Consulting/Nomination Provision**," requiring disclosure of AAUs "between or among each Holder and/or any Stockholder Associated Person ... to consult or advise on any investment or potential investment in a publicly listed company ... and/or ... to nominate, submit, or otherwise recommend the Stockholder Nominee for appointment, election or re-election ... to any officer, executive officer or director role of any publicly listed company ... during the past ten (10) years ...."[80]

• Section 1.4(c)(4), "the **Known Supporter Provision**," requiring the names and contact info "of other stockholders ... known by any Holder or Stockholder Associated Person to support such Stockholder Proposal or Stockholder Proposals ...."[81]

• Section 1.4(c)(3)(B), "the **Ownership Provision**," a 1,099-word run-on sentence of 13 subsections, requiring, among other things, disclosures relating to ownership of any equity interest in AIM and "any principal competitor" of AIM, by a broadly defined group of people including SAPs.[82]

***254** • Section 1.4(c)(1)(H), "the **First Contact Provision**," requiring "the dates of first contact between any Holder and/or Stockholder Associated Person, on the one hand, and the Stockholder Nominee, on the other hand, with respect to (i) [AIM] and (ii) any proposed nomination or nominations of any person or persons (including, without limitation, any Stockholder Nominee) for election or re-election to the Board of Directors."[83]

• Sections 1.4(c)(1)(L) and 1.4(e), "the **Questionnaire Provisions**," requiring director nominees to complete a form of the D&O questionnaire. Upon request for a form questionnaire, the corporate secretary must issue the form within five business days. The form questionnaire required disclosure, "to the extent known" of any adverse recommendations by proxy advisory firms.[84]

Next, the court considered whether the board responded to a legitimate threat.[85] The court held that, given the composition and history of the insurgent group, the board was reasonable when it concluded that it faced a threat to its objective of gathering complete information regarding director nominations, including the identity of those making and supporting the nominations.[86]

The court reviewed next whether the board's defensive acts were reasonable and not preclusive of a proxy contest.[87] After engaging in a context-specific analysis of each of the six provisions, the court held that four of the six challenged bylaws were inequitable and "facially invalid." The four invalidated bylaws, and the court's reasoning, follow:

• The **AAU Provision** was more "akin to tripwire than an information gathering tool."[88] The bylaw's disclosure requirements coupled with the definition of a SAP resulted in vague and overbroad requirements ripe for subjective interpretation by the board.[89]

• The **Consulting/Nomination Provision** imposed ambiguous and onerous requirements across a lengthy term. The provision contains the same SAP requirement as the AAU and goes even further than the AAU, by requesting any investment advice involving any public company over a ten-year term. The court concluded that "[a]t worst, it is draconian," because "it would give the board license to reject a notice based on a subjective interpretation of the provision's imprecise terms."[90]

• The **Known Supporter Provision** was vague about what qualifies as "support." A similar bylaw, which withstood scrutiny in a separate action in the Court of Chancery, only requested "financial" information. The bylaw here was unqualified in the nature of the support sought, and therefore impeded the stockholder franchise.[91]

***255** • The **Ownership Provision** was "indecipherable" and seemingly designed to preclude a proxy contest."[92]

The court found that the First Contact and Questionnaire Provisions survived enhanced scrutiny review. As the court held, the First Contact Provision was not preclusive because the information requested was readily discernible.[93] And Kellner only challenged the timing aspect of the Questionnaire Provisions, which the court held was reasonable.[94]

After finding the AAU Provision "invalid," the court reverted to AIM's prior, valid AAU version.[95] The 2016 AAU Provision, which the court reviewed in the *Jorgl* litigation and was a subset of the 2023 AAU Provision, lacked the SAP terms which rendered the 2023 AAU Provision inequitable.[96] Central to the court's reasoning was that "[g]iven the vital corporate considerations at risk if nominating stockholders conceal AAUs, it would risk further inequity to excuse the Kellner Notice from disclosing them when AIM had a validly enacted provision in place pre-amendment."[97]

The court then held that Kellner's notice and the director nominees' D&O responses did not comply with the 2016 AAU Provision, the First Contact Provision, and the Questionnaire Provisions. Specifically, the court ruled that: the notice was misleading because it did not disclose the actual date when an AAU among Kellner, Deutsch, and Chioini arose;[98] Kellner did not disclose the date of his first contact with Deutsch and only provided a vague date for his contact with Chioini;[99] and the D&O responses were false as all three of the nominees had prior adverse recommendations from proxy advisors.[100] In light of the noncompliance with the prior version of the bylaws, the court held that, after applying enhanced scrutiny, the board acted reasonably when it rejected Kellner's notice.[101] The court also found that the board's actions were not manipulative nor was the rejection "preordained," and the nominees were the ones engaging in manipulative conduct.[102]

The Court of Chancery concluded as follows: "[r]egarding Kellner's claim concerning the validity of the Amended Bylaws and AIM's counterclaim, judgment is entered for Kellner in part and for AIM in part. Regarding Kellner's claim concerning his compliance with the Amended Bylaws and the board's rejection of the Kellner Notice, judgment is entered in favor of the defendants."[103]

E.

Kellner raises three issues on appeal.[104] First, he claims that the court erroneously determined that his notice was deficient ***256** under the 2016 AAU Provision.[105] He argues that the board did not rely on the 2016 AAU Provision to reject his notice, and therefore the court cannot apply an after-the-fact reason for the board's rejection.[106] In the alternative, he argues that the 2016 AAU Provision was repealed in March 2023 and therefore cannot support the rejection many months later.[107]

Next, according to Kellner, the court erred by concluding that certain bylaw amendments satisfied enhanced scrutiny.[108] He argues that the court failed to evaluate "inextricably related bylaws together" and that it cannot be the case that some bylaws were inequitably designed to thwart the nomination effort while others supported an equitable rejection of the notice.[109] And regardless, he claims, the isolated provisions the court upheld fail enhanced scrutiny.[110]

Kellner also argues that the First Contact Provision is inequitable because it serves no important corporate interest, is preclusive, and unreasonable.[111] Further, according to Kellner, the Questionnaire Provisions solicited unimportant information and the five-business-day window to produce the questionnaire allowed for gamesmanship by the board.[112] Kellner points out that the court did not address the portion of Kellner's complaint that sought a declaration that the board violated its fiduciary duties – despite finding four of the bylaws inequitable.[113]

Finally, Kellner argues that the court erroneously upheld the rejection by not applying the Amended Bylaws properly to the notice.[114] He contends that his notice complied in all material respects with the 2016 AAU Provision and would have ensured an informed stockholder vote.[115] Kellner also argues that the notice complied with the First Contact Provision and Questionnaire Provisions by providing the dates of first contact, and that the nominees disclosed the adverse recommendations by proxy advisors "to the extent known."[116]

The defendants raise three issues on cross-appeal and ask that we affirm the rest of the court's decision.[117] First, they contend that the court misconstrued Kellner's as-applied challenge as a facial challenge.[118] According to the defendants, Kellner made only an as-applied challenge.[119] Second, they claim the court misapplied the facial validity standard.[120] The defendants argue that, under Delaware law, bylaws are presumed valid, and the burden is on the plaintiff to demonstrate that they " 'cannot operate lawfully or equitably under any circumstances.' "[121] As such, the ***257** court erred when it invalidated four of the Amended Bylaws by applying enhanced scrutiny. And third, they argue that the court erred by finding that four provisions of the Amended Bylaws failed enhanced scrutiny review because they are all proportional to the threat of an uninformed stockholder vote.[122]

[2] [3] [4]On appeal, we accept the court's factual findings if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process."[123] Only when they are "clearly wrong and the doing of justice requires their overturn" are we "free to make contradictory findings of fact."[124] We review *de novo* the court's legal conclusions.[125] We review the results of the court's enhanced scrutiny analysis and interpretation of corporate bylaws *de novo*.[126]

II.

The DGCL is broadly enabling and offers "immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise."[127] Consistent with this legislative choice, the DGCL places minimal procedural and substantive requirements on stockholders and directors when addressing bylaws.[128] As a matter of procedure, stockholders have the "power to adopt, amend or repeal bylaws,"[129] and directors may do so if authorized by the certificate of incorporation.[130] As a matter of substance, bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[131]

Advance notice bylaws require stockholders to provide the board with prior notice of, and information about, their director nominations. They are "designed and function to permit orderly meetings ***258** and election contests and to provide fair warning to the corporation so that it may have sufficient time to respond to shareholder nominations."[132] Advance notice bylaws assist the board's "information-gathering and disclosure functions, allowing boards of directors to knowledgeably make recommendations about nominees and ensuring that stockholders cast well-informed votes."[133] They have evolved over time to meet changing market conditions and to adjust to evolving federal securities regulations.[134]

A.

[5] [6] [7]Under Delaware law, bylaws are "presumed to be valid" and must be interpreted "in a manner consistent with the law."[135] A facially valid bylaw is one that is "authorized by the Delaware General Corporation Law (DGCL), consistent with the corporation's certificate of incorporation, and not otherwise prohibited."[136] When a bylaw is challenged in court, it is insufficient for a plaintiff to simply assert that "under some circumstances, a bylaw might conflict with a statute, or operate unlawfully."[137] Instead, the plaintiff must demonstrate that the bylaw cannot operate lawfully under any set of circumstances.[138]

B.

[8] [9] [10] [11] [12] [13] [14] [15]Even if facial validity is not at issue, bylaws are still subject to judicial review. If the court has before it a "genuine, extant controversy" involving the adoption, amendment, or application of bylaws, the Court of Chancery reviews corporate acts not only for their legality but ***259** also for their equity.[139] The General Assembly's "capacious grant of power is policed in large part by the common law of equity, in the form of fiduciary duty principles."[140] As we have repeated time and again since our 1971 decision in *Schnell v. Chris-Craft Industries, Inc.*, "inequitable action does not become permissible simply because it is legally possible."[141] In other words, when corporate action is challenged, it must be twice-tested – first for legal authorization, and second by equity.[142] The same principles apply to board-adopted advance notice bylaws.

[16]Delaware courts scrutinize closely corporate acts that affect stockholder voting. As Chancellor Allen famously stated in *Blasius Industries, Inc. v. Atlas Corp.*, "[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."[143] Advance notice bylaws can be misused to thwart stockholder choice and entrench the existing board of directors. To pass judicial review, bylaws must, as a matter of equity, "be reasonable in their application" and not unfairly interfere with stockholder voting.[144]

C.

[17] [18] [19]In *Coster v. UIP Companies, Inc.*, we folded *Schnell* and *Blasius* review into *Unocal* enhanced scrutiny review when a board interferes with a corporate election or a stockholder's voting rights in contests for control.[145] If a board adopts, ***260** amends, or enforces advance notice bylaws during a proxy context, *Coster* requires a two-part analysis. As explained in *Coster*, for the first step:

> the court should review whether the board faced a threat "to an important corporate interest or to the achievement of a significant corporate benefit." The threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal. As Chancellor Allen stated long ago, the threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders.[146]

If the board adopted advance notice bylaws for a selfish or disloyal motive – meaning for the primary purpose of precluding a challenge to its control – the remedy is to declare the advance notice bylaws inequitable and unenforceable.[147]

[20]Second, if the board's actions pass muster under the first step of enhanced scrutiny review, then the court considers:

> whether the board's response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise. To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat. The board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way.[148]

***261** [21] [22] [23] [24] [25]Enhanced scrutiny review ensures that a board's actions are sufficiently tailored to the threat at hand such that the act does not unfairly impede the free exercise of the stockholder franchise.[149] If a board is motivated to counter a legitimate threat, but its response is disproportionate, the Court of Chancery has the discretion to impose an equitable remedy.[150] In the context of advance notice bylaws, if the bylaws were adopted for a proper purpose but some of the advance notice provisions were disproportionate to the threat posed and preclusive, the Court of Chancery has the discretion to decide whether to enforce, in whole or in part, the bylaws that can be applied equitably.[151]

[26] [27] [28]The *Coster* two-part enhanced scrutiny review – first, discerning a threat and board motive, and second, determining whether the board's actions were proportionate to the threat posed and not preclusive or coercive – is meant to balance the legitimate concerns of the board to respond to real threats with the equally legitimate concern of allowing fully-informed stockholders to have the final say. As stated in *Unocal*:

> The restriction placed upon a [defensive measure] is that the directors may not have acted solely or primarily out of a desire to perpetuate themselves in office. Of course, to this is added the further caveat that inequitable action may not be taken under the guise of law. *Schnell v. Chris-Craft Industries, Inc.*, Del.Supr., 285 A.2d 437, 439 (1971). The standard of proof ... is designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct. ... However, this does not end ***262** the inquiry. A further aspect is the element of balance. If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed.[152]

III.

[29] [30]In this appeal, it is apparent that confusion existed in the Court of Chancery between a "validity" challenge and an "enforceability" challenge. Some of that confusion might be attributed to how courts, including this Court, have used different words or expressions to describe the outcome of a successful bylaw challenge.[153] The Court of Chancery understood that Kellner "argue[d] that the Amended Bylaws are invalid," and assessed whether the Amended Bylaws were "facially valid."[154] But instead of undertaking a facial validity analysis, the court employed enhanced scrutiny review to declare four of six Amended Bylaws invalid. The court relied on several hypothetical scenarios where the bylaws would be patently unreasonable if applied in that fashion.[155]

[31] [32]When a validity challenge is raised, as might have been the case here, the court should undertake an analysis distinct from enhanced scrutiny review.[156] ***263** As explained earlier, to assess validity, the court reviews whether the bylaw is contrary to law or the certificate of incorporation and addresses a proper subject matter.[157] A bylaw is presumed valid, and the court should not consider hypotheticals or speculate whether the bylaw might be invalid under certain circumstances. Instead, the burden is on the party asserting invalidity to demonstrate that the bylaw cannot be valid under any circumstance.[158]

[33]Here, with one exception, we have no trouble concluding that the Amended Bylaws are valid. As explained earlier, under the DGCL, and as provided in AIM's certificate of incorporation, the directors have the "power to adopt, amend or repeal bylaws."[159] Kellner has not argued that the AIM board lacked such power. And AIM's bylaws "may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees."[160] Kellner has not argued that the Amended Bylaws are outside the broad subject matter permitted by the General Assembly. With one exception, the Amended Bylaws are valid.

[34] [35]The one exception is the Ownership Provision. The Court of Chancery concluded that the 1,099-word single-sentence provision was "indecipherable."[161] We agree. The bylaw, with its thirteen discrete parts, is excessively long, contains vague terms, and imposes virtually endless requirements on a stockholder seeking to

nominate directors.[162] AIM's chairman stated "that the bylaw was written in such a way that 'no one would read it.' "[163] As he testified, if the directors had started reading it "line by line" during their March 2023 board meeting, they "would still be in the meeting."[164] An unintelligible bylaw is invalid under "any circumstances."[165]

IV.

[36]The Court of Chancery found that, before amending AIM's bylaws, the ***264** board "had an objective of obtaining transparency from a stockholder seeking to nominate director candidates."[166] The court also found that the AIM board made a reasonable assessment that its current advance notice bylaws were insufficient to prevent a repeat of the manipulative, misleading, and improper conduct in the 2022 nomination process.[167]

Given the insurgents' troubling history, we agree with the Court of Chancery that there was a threat to the board's information-gathering function, and that the AIM board identified an important corporate objective in amending its bylaws – transparency in board elections. The court also found, however, that the AIM board likely acted with an improper purpose when adopting the Amended Bylaws that, unsurprisingly, were used to reject Kellner's nomination, most notably the AAU Provision.

Of the six Amended Bylaws that are the focus of this appeal, one was nonsensical and therefore invalid. According to the Court of Chancery, the invalid bylaw "seem[ed] designed to preclude a proxy contest for no good reason; none were given."[168] The court also found that, in essence, the AIM board acted inequitably when it adopted the three remaining Amended Bylaws. It observed that the bylaws "suggest[ed] an intention to block the dissident's effort,"[169] were "akin to a tripwire,"[170] could be "draconian,"[171] and "exceed[ed] any reasonable approach to ensuring thorough disclosure."[172] The court concluded that, when the AIM board adopted various advance notice provisions in the Amended Bylaws, their actions "seem[ed] designed to thwart an approaching proxy contest, entrench the incumbents, and remove any possibility of a contested election."[173]

We consider these findings dispositive on appeal to the enhanced scrutiny motive inquiry. As explained below, the Court of Chancery's assessment about the unreasonableness of a majority of the Amended Bylaws lead us to conclude that the AIM board amended its bylaws for an improper purpose – to thwart Kellner's proxy contest and maintain control.[174] The board's conduct fails the first prong of enhanced scrutiny review.

A.

[37]The AAU Provision required the disclosure of all arrangements, agreements, or understandings, "whether written or oral, and including promises," relating to a board nomination.[175] The Court of Chancery found the SAP term unreasonable.[176] It noted that the "Holder" SAP definition included:

> (i) any person acting in concert with such Holder with respect to the Stockholder ***265** Proposal or the Corporation, (ii) any person controlling, controlled by, or under common control with such Holder or any of their respective Affiliates and Associates, or a person acting in concert therewith with respect to the Stockholder Proposal or the Corporation, and (iii) any member of the immediate family of such Holder or an Affiliate or Associate of such Holder.[177]

The SAP provision, according to the court, created an ill-defined web of disclosure requirements through the interaction of terms such as "acting in concert," "Associate," "Affiliate," and "immediate family."[178] The defendants argue on appeal that the AAU Provision is equitable because the board relied on counsel and had a legitimate objective in seeking multi-level relationships among the activists.[179] They contend that the AAU does not require knowledge the nominator does not know and could not obtain.[180] We disagree. As the Court of Chancery determined, the SAP term in the AAU Provision requires a nominator to disclose not only personal knowledge but also to take steps to gather information about agreements and understandings between any members of potentially limitless class of third parties and individuals unknown to the nominator.[181]

[38]We agree with the Court of Chancery that the AAU Provision, as drafted, did not further the AIM board's stated purpose of preventing stockholders from misconstruing or evading the Amended Bylaws' disclosure requirements. Instead, it functioned as a "tripwire" rather than an information-gathering tool and "suggest[ed] an intention to block the dissidents' effort."[182]

B.

[39]Next, the court determined that the Consulting/Nomination Provision was unreasonable.[183] The provision required disclosure of AAUs spanning a ten-year window "between the nominating stockholder or an SAP, on one hand, and any stockholder nominee, on the other hand, regarding consulting, investment advice, or a previous nomination for a publicly traded company within the last ten years."[184] The court held that the bylaw suffers from the same SAP problem as the AAU Provision by imposing "ambiguous requirements," this time "across a lengthy term."[185]

The court also held that the Provision was unreasonable because it sought AAUs involving other publicly traded companies over an onerous ten-year period and between and among a broadly defined set of third parties. The defendants argue that the court's reading is incorrect and that the provision only sought information involving the nominee.[186] We disagree. The provision requires the nominating stockholder to disclose, as to each nominee, AAUs between or among each nominator ***266** and/or any SAP, and the nominee.[187] This is not just a requirement to disclose AAUs involving the nominee, but also among the vague categories of SAPs and the nominee.

The defendants do not address the problematic lengthy ten-year term encompassing any public company. AIM's Chairman characterized the relevance of the information sought by the Provision as "arguable."[188] We agree with the Court of Chancery that the Provision imposed ambiguous requirements across a lengthy term; sought only marginally useful information; gave the board "license to reject a notice" based on a subjective interpretation of its imprecise terms; and, at worst, was "draconian."[189]

C.

[40]The Court of Chancery was also troubled by the unreasonableness of the Known Supporter Provision, which requires the nominator and nominees to list any person who acted in "support" of a stockholder proposal.[190] The defendants argue that this provision is similar in scope and purpose to a bylaw approved by the Court of Chancery in *Rosenbaum v. CytoDyn, Inc*.[191] The court observed that, unlike the *CytoDyn* bylaw, which only sought disclosure of known "financial support" from stockholders, the AIM provision operates more broadly and seeks disclosure of any support whatsoever from both stockholders and SAPs.[192]

The defendants point out that the bylaw in *CytoDyn* and the Known Supporter Provision use virtually identical language.[193] Even so, the court took issue with the use of the troubling SAP term in the bylaw, which rendered the bylaw's requirements far more expansive than the one at issue in *CytoDyn*. Like the AAU Provision, the nominating stockholder must not only respond based on personal knowledge, but also an ill-defined daisy chain of persons. We agree with court's conclusion that the Known Supporter Provision "impedes the stockholder franchise while exceeding any reasonable approach to ensuring thorough disclosure."[194]

D.

We have also described earlier the problematic nature of the Ownership Provision. As the court held, it is "unintelligible" and "seems designed to preclude a proxy contest for no good reason; none were ***267** given."[195] A stockholder "could not fairly be expected to comply."[196]

V.

In the middle of a proxy contest, the AIM board adopted one unintelligible bylaw and three unreasonable bylaws. It then used the Amended Bylaws to reject Kellner's nomination notice. The Court of Chancery found that the Amended Bylaws "seem[ed] designed to thwart an approaching proxy contest, entrench the incumbents, and remove any possibility of a contested election."[197] It also observed that the Amended Bylaws precluded stockholders, such as Kellner, from a "fair opportunity to nominate candidates."[198] The unreasonable demands of most of the Amended Bylaws show that the AIM board's motive was not to counter the threat of an uninformed vote. Rather, the board's primary purpose was to interfere with Kellner's nomination notice, reject his nominees, and maintain control. As the product of an improper motive and purpose, which constitutes a breach of the duty of loyalty, all the Amended Bylaws at issue in this appeal are inequitable and therefore unenforceable.[199]

[41]We also note that, according to the Court of Chancery, Kellner submitted false and misleading responses to some of the requests.[200] Given the court's countervailing findings about Kellner's and his nominees' deceptive conduct, no further action is warranted. The judgment of the Court of Chancery is affirmed in part and reversed in part. The case is closed.

All Citations

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Footnotes

1 *Kellner v. AIM ImmunoTech Inc.*, 307 A.3d 998 (Del. Ch. 2023).

2 *Jorgl v. AIM ImmunoTech Inc.*, 2022 WL 16543834 (Del. Ch. Oct. 28, 2022).

3 *Kellner*, 307 A.3d at 1007 (quoting the record).

4 *AIM ImmunoTech, Inc. v. Tudor*, No. 21-CA-393 (Fla. Cir. Ct. Aug. 13, 2021) (order granting permanent injunction).

5 *Kellner*, 307 A.3d at 1010 (quoting the record).

6 *Id.* at 1009 (quoting the record).

7 *Id.* at 1011 (quoting the record).

8 *Id.* (alteration in original) (quoting the record).

9 *Id.* at 1011 (quoting the record).

10 *Id.* (alteration in original) (quoting the record).

11 *Id.* at 1012.

12 *Id.* (quoting the record).

13 *Id.* (quoting the record).

14 *Id.* at 1013 (alterations in original) (quoting the record).

15 *Id.* (quoting the record).

16 2022 WL 16543834.

17 *Id.* at *17.

18 *AIM ImmunoTech, Inc. v. Tudor et al.*, No. 5:22-cv-323 (M.D. Fla.). The court dismissed the complaint as moot following the 2022 annual meeting.

19 *Kellner*, 307 A.3d at 1013 (quoting the record).

20 *Id.* at 1014 (quoting the record).

21 *Id.* (quoting the record).

22 *Id.* at 1015 (quoting the record).

23 *Id.* (quoting the record).

24 *Id.* (alterations in original) (quoting the record).

25 *Id.* at 1016 (quoting the record).

26 *Id.* (quoting the record).

27 A408.

28 A541.

29 *Kellner*, 307 A.3d at 1018 (alteration in original) (quoting the record).

30 A683.

31 A683–702.

32 A685.

33 *Id.*

34 A688.

35 A690–91.

36 A692.

37 A693.

38 A697–99.

39 A701.

40 A690.

41 *Id.*

42 A689.

43 A717.

44 *Id.*

45 A718.

46 *Id.*

47 *Id.*

48 A722.

49 A724.

50 A730.

51 A732.

52 A733.

53 *Kellner*, 307 A.3d at 1018 (alteration in original) (quoting the record).

54 *Id.* (alteration in original) (quoting the record).

55 *Id.* at 1019 (quoting the record).

56 *AIM ImmunoTech, Inc. v. Tudor et al*., No. 5:22-cv-323 (M.D. Fla.). The motion was denied.

57 *Kellner*, 307 A.3d at 1019 (quoting the record).

58 *Id.* at 1020 (alteration in original) (quoting the record).

59 A1055.

60 A1055–68.

61 A1057, 59.

62 A1060.

63 *Id.*

64 *Id.*

65 A1062.

66 *Id.*

67 A0163.

68 A1064.

69 *Id.*

70 A1067.

71 B588.

72 B635.

73 Dfs.' Ans. Ver. Compl. and Ver. CC. at 100.

74 *Kellner*, 307 A.3d at 1045.

75 *Id.* at 1024.

76 *Id.*

77 A409.

78 A412.

79 *Id.*

80 A409.

81 A411.

82 A410. Mitchell, AIM's board chair, testified that if the directors had read the bylaw "line by line" they "would still be in the meeting." *Kellner*, 307 A.3d at 1034 (quoting the record). Like AIM's board, we will not lengthen this opinion by reviewing line-by-line the Ownership Provision's requirements.

83 A409.

84 A410–11.

85 *Kellner*, 307 A.3d at 1025–26 (citing *Coster v. UIP*, 300 A.3d 656 (Del. 2023)).

86 *Id.* at 1026.

87 *Id.* at 1027.

88 *Id.* at 1030.

89 *Id.*

90 *Id.* at 1031.

91 *Id.* at 1032 (citing *Rosenbaum v. CytoDyn, Inc.*, 2021 WL 4775140, at *19 (Del. Ch. Oct. 13, 2021)).

92 *Id.* at 1034.

93 *Id.* at 1035.

94 *Id.* at 1036.

95 *Id.* at 1038 (citing *Hollinger Int'l, Inc. v. Black*, 844 A.2d 1022 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005); *Rainbow Mountain, Inc. v. Begeman*, 2017 WL 1097143 (Del. Ch. Mar. 23, 2017)).

96 *Id.* (citing *Jorgl*, 2022 WL 16543834, at *11); A277–78.

97 *Kellner*, 307 A.3d at 1038.

98 *Id.* at 1040.

99 *Id.* at 1041.

100 *Id.*

101 *Id.* at 1042–43.

102 *Id.* at 1043–44.

103 *Id.* at 1044–45.

104 Opening Br. at 3.

105 *Id.*at 12.

106 *Id.*

107 *Id.* at 15.

108 *Id.* at 18.

109 *Id.* at 19 (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1387 (Del. 1995)).

110 *Id.* at 27.

111 *Id.*

112 *Id.* at 29.

113 *Id.* at 31.

114 *Id.* at 32.

115 *Id.* at 33, 37.

116 *Id.* at 43–44.

117 Answering Br. at 6.

118 *Id.* at 27.

119 *Id.*

120 *Id.* at 30.

121 *Id.* (quoting *Salzberg v. Sciabacucchi*, 227 A.3d 102, 113 (Del. 2020)).

122 *Id.* at 34–40.

123 *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

124 *Id.*

125 *Coster*, 300 A.3d at 663.

126 *Id.*; *Airgas, Inc. v. Air Prod. & Chemicals, Inc*., 8 A.3d 1182, 1188 (Del. 2010).

127 *Salzberg*, 227 A.3d at 116.

128 *See* 8 *Del. C.* § 211(b) ("Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws."); *id.* § 211(e) ("All elections of directors shall be by written ballot unless otherwise provided in the certificate of incorporation; if authorized by the board of directors ....").

129 8 *Del. C.* § 109(a). This power must be read with Section 141(a) of the DGCL. *CA, Inc. v. AFSCME Emps. Pension Plan*, 953 A.2d 227, 232 (Del. 2008) ("[T]he shareholders' statutory power to adopt, amend or repeal bylaws is not coextensive with the board's concurrent power and is limited by the board's management prerogatives under Section 141(a).").

130 8 *Del. C.* § 109(a) ("[A]ny corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors ...."). As a result of Section 109's enabling language, stockholders, through the certificate of incorporation, may "assent to not having to assent to board-adopted bylaws." *Boilermakers Loc. 154 Ret. Fund & Key W. Police & Fire Pension Fund v. Chevron Corp*., 73 A.3d 934, 956 (Del. Ch. 2013) (citing *CA*, 953 A.2d at 231). Regardless of the authority vested in the board, stockholders retain the power to adopt and amend bylaws and may repeal bylaws adopted by the board. *Id.*

131 8 *Del. C.* § 109(b).

132 *Openwave Sys. Inc. v. Harbinger Cap. Partners Master Fund I, Ltd*., 924 A.2d 228, 239 (Del. Ch. 2007).

133 *Paragon Techs., Inc. v. Cryan*, 2023 WL 8269200, at *7 (Del. Ch. Nov. 30, 2023) (internal quotation marks omitted).

134 Early advance notice bylaws required advance notice of the nomination accompanied by basic information. Donald F. Parsons & Jason S. Tyler, *Activist Stockholders, Corporate Governance Challenges, and Delaware Law*, Research Handbook on Mergers and Acquisitions 7 n.13 (Claire A. Hill & Steven Davidoff Solomon eds., 2016). Over time, bylaws imposed more onerous disclosure requirements about the stockholder nominator and nominees. *Id.* The information sought typically related to the nominator's financial positions with respect to the company, such as any derivative positions held, and the identities of persons acting in concert with the nomination group. *Id.* Until recently, dissident stockholders had a separate proxy card, meaning stockholders could only vote between competing slates. In 2021, the SEC adopted Rule 14a-19, which mandated a single universal proxy card. It allowed stockholders to pick directors from both the incumbent and rival slates from the same card. 17 CFR § 240.14a-19. The universal proxy rules prompted further evolution of advance notice bylaws to better conform to the rules. Aaron Wendt & Krishna Shah, *2023 Proxy Season Briefing: Key Trends and Data Highlights*, Harvard Law School Forum on Corporate Governance (Aug. 17, 2023), https://corpgov.law.harvard.edu/2023/08/17/2023-proxy-season-briefing-key-trends-and-data-highlight/ ("More than 685 companies in our coverage amended advance notice bylaws in response to universal proxy[.]").

135 *Frantz Mfg. Co. v. EAC Indus*., 501 A.2d 401, 407 (Del. 1985).

136 *ATP v. Deutscher Tennis Bund*, 91 A.3d 554, 557–58 (Del. 2014).

137 *Id.*

138 *Id*. *See also* *Salzberg*, 227 A.3d at 113 ("[T]he plaintiff must show that the charter provisions 'cannot operate lawfully or equitably under any circumstances.' Plaintiffs must demonstrate that the charter provisions 'do not address proper subject matters' as defined by statute, 'and can never operate consistently with law.' " (quoting *Cedarview Opportunities Master Fund, L.P. v. Spanish Broad. Sys., Inc*., 2018 WL 4057012, at *20 (Del. Ch. Aug. 27, 2018); *Boilermakers*, 73 A.3d at 949)).

139 *Boilermakers*, 73 A.3d at 949 ("Thus, a plaintiff can challenge the real-world enforcement of a forum selection bylaw. But that review happens when there is a genuine, extant controversy in which the forum selection bylaw is being applied."). A court should only hear bylaw adoption, amendment, and application claims that are "ripe for judicial determination." *Stroud v. Milliken Enterprises, Inc*., 552 A.2d 476, 480 (Del. 1989). A bylaw dispute is ripe when litigation is "unavoidable" and the "material facts are static." *Id.* at 481 (citing *Stabler v. Ramsay*, 88 A.2d 546, 550 (Del. 1952); *Rollins Int'l, Inc. v. Int'l Hydronics Corp*., 303 A.2d 660, 662 (Del. 1973)). Fiduciary review standards are meant to address "real-world concerns when they arise in real-world and extant disputes, rather than hypothetical and imagined future ones." *Boilermakers*, 73 A.3d at 963. Here, the AIM board amended its bylaws during a prolonged proxy contest with dissidents, and ultimately used those bylaws to keep the insurgents off the ballot. The defendants have not argued that the dispute is premature for adjudication.

140 *Hollinger*, 844 A.2d at 1078.

141 285 A.2d 437, 439 (Del. 1971).

142 *See In re Invs. Bancorp, Inc. S'holder Litig*., 177 A.3d 1208, 1222 (Del. 2017) ("[D]irectors' exercise of [their] authority must be done consistent with their fiduciary duties."); *Hollinger*, 844 A.2d at 1077–78 ("In general, there are two types of corporate law claims. The first is a legal claim, grounded in the argument that corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, such as a contract. The second is an equitable claim, founded on the premise that the directors or officers have breached an equitable duty that they owe to the corporation and its stockholders.").

143 564 A.2d 651, 659 (Del. Ch. 1988).

144 *Frantz*, 501 A.2d at 407 (citing *Schnell*, 285 A.2d at 437); *Hubbard v. Hollywood Park Realty Enterprises*, Inc., 1991 WL 3151, at *11 (Del. Ch. Jan. 14, 1991) (holding that an advance notice bylaw must "afford the shareholders a fair opportunity to nominate candidates").

145 300 A.3d at 672 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985)). Prior to our decision in *Coster*, there was debate in the Court of Chancery over whether *Blasius*' "compelling justification" standard should function as an independent standard of review from enhanced scrutiny review. *See, e.g.*, *Mercier v. Inter-Tel (Delaware), Inc*., 929 A.2d 786, 788 (Del. Ch. 2007) (stating that, rather than functioning as a standard of review, *Blasius* was more an "an after-the-fact label placed on a result"); *Chesapeake Corp. v. Shore*, 771 A.2d 293, 323 (Del. Ch. 2000) ("Given this interrelationship and the continued vitality of *Schnell v. Chris–Craft*, one might reasonably question to what extent the *Blasius* 'compelling justification' standard of review is necessary as a lens independent of or to be used within the *Unocal* frame."). *Blasius* is now subsumed in enhanced scrutiny review. 300 A.3d at 672.

146 300 A.3d at 672 (quoting *Phillips v. Insituform of N. Am., Inc*., 1987 WL 16285, at *7 (Del. Ch. Aug. 27, 1987)). "When *Unocal* is applied in this context, it can 'subsume[ ] the question of loyalty that pervades all fiduciary duty cases, which is whether the directors have acted for proper reasons' and 'thus address[ ] issues of good faith such as were at stake in *Schnell*.' " *Id.* (alterations in original) (quoting *Mercier*, 929 A.2d at 807).

147 *Schnell*, 285 A.2d at 437; *see Frantz*, 501 A.2d at 407 ("*Schnell* prohibits incumbent management from entrenching itself by taking action which, though legally possible, is inequitable."). *MM Companies, Inc. v. Liquid Audio, Inc*., 813 A.2d 1118, 1132 (Del. 2003) (citing *Schnell*, 285 A.2d at 439) (holding that a bylaw amendment expanding the board's size was intended to interfere with the stockholder franchise, invalidating the appointment of new board members, thereby rendering the expansion bylaw unenforceable); *AB Value Partners, LP v. Kreisler Mfg. Corp.*, 2014 WL 7150465, at *5 (Del. Ch. Dec. 16, 2014) (holding that "[p]laintiff must provide compelling facts indicating that enforcement of the [advance notice bylaw] is inequitable" to enjoin application of an otherwise valid bylaw under *Schnell*); *Hollinger*, 844 A.2d at 1081 (finding bylaw amendments implemented by controller to facilitate a favored transaction and neutralize board's opposition "were clearly adopted for an inequitable purpose and have an inequitable effect"); *Hubbard*, 1991 WL 3151, at *13 (ordering waiver of an advance notice bylaw to allow shareholders to nominate an opposing director slate in response to a material change in company policy instituted after nomination deadline); *Lerman v. Diagnostic Data, Inc.*, 421 A.2d 906, 914 (Del. Ch. 1980) (holding that a 70-days' notice bylaw was inequitable in a situation where the board announced the annual meeting only 63 days before it was to occur, rendering compliance impossible); *Linton v. Everett*, 1997 WL 441189, at *10 (Del. Ch. July 31, 1997) ("[D]irectors' decision to provide only thirty days' notice, which would inevitably trigger the advance notice provision in a manner foreseeably adverse to any shareholders desiring to nominate an opposing slate, constituted an inequitable manipulation of the election process.").

148 *Coster*, 300 A.3d at 672 (citing *Blasius*, 564 A.2d at 656).

149 *Id.* ("*Unocal* can also be applied with the sensitivity *Blasius* review brings to protect the fundamental interests at stake – the free exercise of the stockholder vote as an essential element of corporate democracy.").

150 Following proportionality review, the Court of Chancery "has broad power to fashion an equitable remedy." *Unitrin, Inc. v. Am. Gen. Corp*., 651 A.2d 1361, 1391 (Del. 1995); *see also* *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 176 (Del. 2002) ("[T]he Court of Chancery's 'powers are complete to fashion any form of equitable and monetary relief as may be appropriate.' " (quoting *Weinberger v. UOP, Inc*., 457 A.2d 701, 714 (Del. 1983))).

151 Kellner relies on *Unitrin* to argue that all defensive actions by a board must stand and fall together. In *Unitrin*, we held that when defensive actions are "inextricably related," they should be "scrutinized collectively" under the proportionality prong of *Unocal*. 651 A.2d at 1387. *Unitrin*'s relatedness language refers to the method of analysis, not a limitation on what relief is available. *Id.* at 1391. As noted in the current case, it may be necessary to assess how bylaws work together, but one problematic bylaw does not invalidate others when the board has a proper motive. Overbroad invalidation would be extreme and unnecessary when the board acted with proper motive to protect a legitimate corporate interest. *Kellner*, 307 A.3d at 1037 & n.331. *Unitrin* does not require an all-or-nothing approach to relief but rather stresses that defensive actions should be assessed "individually and collectively." 651 A.2d at 1390. Just as the Court of Chancery will not endorse a tripwire against an activist stockholder, it should not endorse a reverse tripwire by the activist. *See also* *Mentor Graphics Corp. v. Quickturn Design Sys., Inc.,* 728 A.2d 25, 44 & n.47 (Del. Ch.)*, aff'd sub nom.* *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281 (Del. 1998) (after determining that there was no dispute as to motive, that under enhanced scrutiny, the court held that a bylaw amendment could operate equitably, but not a redemption plan); *QVC Network, Inc. v. Paramount Commc'ns Inc*., 635 A.2d 1245, 1271 (Del. Ch.), *aff'd and remanded*, 637 A.2d 828 (Del. 1993) (enjoining most, but not all defensive measures taken by the board in responding to a corporate takeover).

152 493 A.2d at 955 (citations omitted).

153 The confusion stems from the use of different words or expressions like invalid, void, inequitable, unenforceable, nullified, struck down, and no force and effect. The choice of words has been imprecise regarding the "thorny area" of voidness. *Holifield v. XRI Inv. Holdings LLC*, 304 A.3d 896, 930 (Del. 2023). For example, in *Hollinger*, the Court of Chancery referred to bylaw amendments as being "inequitable," "ineffective," "of no force and effect," and "struck down." 844 A.2d 1022. This Court in *Frantz* equated "strik[ing] down" a bylaw with rendering it "void." 501 A.2d at 407. Other decisions have described the exercise of the board's authority under a facially valid but inequitable bylaw as being "nullif[ied]," "invalid," and "not being permitted to stand." *Schnell*, 285 A.2d at 440 (nullifying the change in a meeting date for a stockholder vote, under a legal bylaw); *Liquid Audio*, 813 A.2d at 1132 (invalidating a board expansion carried out under a valid bylaw). As described above, a facially valid bylaw must be consistent with the DGCL, the certificate of incorporation, and not otherwise prohibited by law. 8 *Del. C.* § 109(b). An invalid bylaw is *ab initio* void. *See* *Michelson v. Duncan*, 407 A.2d 211, 218–19 (Del. 1979) ("The essential distinction between voidable and void acts is that the former are those which may be found to have been performed in the interest of the corporation but beyond the authority of management, as distinguished from acts which are *ultra vires* ...."). A valid bylaw, when inequitable, is rendered unenforceable. *See, e.g.*, *Hollinger*, 844 A.2d 1022; *Hubbard*, 1991 WL 3151, at *13 (enjoining the board's use of a valid bylaw after conducting review under *Blasius* and *Schnell*). *See also* *Liquid Audio*, 813 A.2d at 1132 ("At issue in this case is not the validity generally of either a bylaw that permits a board of directors to expand the size of its membership or a board's power to appoint successor members to fill board vacancies. In this case, however, the incumbent board timed its utilization of these otherwise valid powers to expand the size and composition of the Liquid Audio board for the primary purpose of impeding and interfering with the efforts of the stockholders' power to effectively exercise their voting rights in a contested election for directors.").

154 *Kellner*, 307 A.3d at 1021.

155 *Id.* at 1027–35 (conducting a proportionality analysis of the AAU Provision, Consulting/Nominating Provision, Known Supporter Provision, and Ownership Provisions).

156 We do not fault the Court of Chancery for the confusion. It appears that the parties were less than clear about the nature of their claims. Kellner argues that this Court has applied enhanced scrutiny to invalidate bylaws through "adoption" claims. Reply Br. at 34. In each of the decisions cited, the reviewing court either held the bylaw unenforceable, not invalid or void – or invalidated a corporate act which misused a valid bylaw. *Schnell*, 285 A.2d at 439–40; *Liquid Audio*, 813 A.2d at 1132; *Blasius*, 564 A.2d at 655 (invalidating an act, not a bylaw); *In re Williams Companies S'holder Litig.*, 2021 WL 754593, at *40 (Del. Ch. Feb. 26, 2021), ***aff'd*** *sub. nom.* *Williams Cos., Inc. v. Wolosky*, 264 A.3d 641 (Del. 2021) (TABLE) (holding an inequitable shareholder rights plan unenforceable).

157 *ATP*, 91 A.3d at 558.

158 *Id*. *See also* *Salzberg*, 227 A.3d at 113 (applying the same rule for charter provisions).

159 8 *Del. C.* § 109(a).

160 *Id.* § 109(b).

161 *Kellner*, 307 A.3d at 1034 ("Though I have tried to read and understand it, the bylaw—with its 1,099 words and 13 subparts—is indecipherable.").

162 The defendants do not meaningfully defend the structure or drafting of the bylaw, only its subject matter. Answering Br. at 39. The court considered the subject matter of the bylaw and concluded that "[a]ny justifiable objectives that might be served by aspects of the Ownership Provision are buried under dozens of dense layers of text." *Kellner*, 307 A.3d at 1035.

163 *Kellner*, 307 A.3d at 1034 (quoting the record).

164 *Id.* (quoting the record).

165 The defendants argue that Kellner did not "bring a facial relief claim" and therefore the Court of Chancery should not have invalidated any of the bylaws. Answering Br. at 30. As Kellner points out, he challenged the Amended Bylaws' adoption, and with respect to the Ownership Provision, he correctly argued that "it fails any and every standard of review." Reply Br. at 35, 45. In any

case, the defendants put the issue before the court when they sought a declaration that the bylaws are "valid and lawful." Dfs.' Ans. Ver. Compl. and Ver. CC. at 100.

166 *Kellner*, 307 A.3d at 1026.

167 *Id*.

168 *Id.* at 1034–35.

169 *Id.* at 1031.

170 *Id.* at 1030.

171 *Id.* at 1031.

172 *Id.* at 1032.

173 *Id.* at 1036.

174 We limit our ruling to the six Amended Bylaws on appeal. Other bylaws were amended for different purposes and were not challenged on appeal. As the court noted, "[c]ertain of the Amended Bylaws reflect changes to address Rule 14a-19 and cohere with the DGCL," and are unaffected by our decision. *Kellner*, 307 A.3d at 1025.

175 A409.

176 *Kellner*, 307 A.3d at 1030.

177 A412.

178 *Kellner*, 307 A.3d at 1030.

179 Answering Br. at 37.

180 *Id.* at 36.

181 *Kellner*, 307 A.3d at 1030.

182 *Id.* at 1031. The court, after invalidating the AAU Provision, applied the 2016 AAU Provision to reject the notice. As we have determined, the AAU Provision is still valid, even if unenforceable, and thus a reversion to the 2016 bylaw is not possible.

183 *Kellner*, 307 A.3d at 1031.

184 *Id.* (citing A409).

185 *Id.*

186 Answering. Br. at 38.

187 A409.

188 *Kellner*, 307 A.3d at 1031(quoting the record).

189 *Id.* at 1030.

190 *Id.* (citing A409).

191 2021 WL 4775140, at *19 (approving a bylaw that mandated disclosure of supporters).

192 *Kellner*, 307 A.3d at 1032.

193 *Compare* *CytoDyn*, 2021 WL 4775140, at *9 ("[I]dentification of the names and addresses of other stockholders (including beneficial owners) known by any of the Proposing Persons to support nominations or other business proposal(s), and to the extent known the class and number of all shares of the Corporations' capital stock owned beneficially or of record by such other stockholder(s) or other beneficial owner(s) …."), *with* *Kellner*, 307 A.3d at 1031 n.306 ("the names (including, if known, the full legal names and any alias names used) and addresses of other stockholders (including beneficial owners) known by any Holder or Stockholder Associated Person to support such Stockholder Proposal or Stockholder Proposals (including, without limitation, any

nominations), and to the extent known, the class or series and number of all shares of the Corporation's capital stock owned beneficially or of record by each such other stockholder or other beneficial owner.").

194 *Kellner*, 307 A.3d at 1031.

195 *Id.* at 1034–35.

196 *Id.*

197 *Id.* at 1036.

198 *Id.* at 1036.

199 *Kreisler Mfg. Corp.*, 2014 WL 7150465, at *5 ("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.").

200 *Kellner*, 307 A.3d at 1039–40 & n.353 (finding that Kellner's AAU disclosures were "false" and "omitted and misrepresented meaningful AAUs," and that the 2022 AAU disclosures concealed Tudor's role in the nomination process); *Kellner v. AIM ImmunoTech Inc.*, 2024 WL 62666, at *2 (Del. Ch. Jan. 5, 2024) (Letter Op.) ("The resolution of that claim turned on factual findings that arrangements or understandings animating Kellner's nomination were obfuscated from AIM's board and stockholders. Kellner was required to disclose these arrangements or understandings. He did not.").

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319 A.3d 271
Supreme Court of Delaware.

CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, Steamfitters Local 449 Pension Fund, and Steamfitters Local 449 Retirement Security Fund, Plaintiffs Below, Appellants,
v.
INOVALON HOLDINGS, INC., Keith R. Dunleavy, Meritas Group, Inc., Meritas Holdings, LLC, Dunleavy Foundation, André Hoffmann, Cape Capital SCSp, Sicar-Inovalon Sub-Fund, Isaac S. Kohane, Mark A. Pulido, Denise K. Fletcher, William D. Green, William J. Teuber, and Lee D. Roberts, Defendants Below, Appellees.

No. 305, 2023
|
Submitted: February 21, 2024
|
Decided: May 1, 2024

Synopsis
Background: Minority stockholders brought putative class action against corporation, which was provider of cloud-based platforms related to healthcare industry, corporation's chief executive officer (CEO), directors, and companies controlled by CEO, asserting claims for breach of fiduciary duty, unjust enrichment, and breach of corporation's charter, all arising from corporation's acquisition by private equity consortium. Defendants moved to dismiss for failure to state a claim. The Court of Chancery, Kathaleen S. McCormick, Vice Chancellor, granted motion, and stockholders appealed.

Holdings: The Supreme Court, Valihura, J., held that:

[1] alleged omission of exact terms of post-merger management incentive plan was not material;

[2] stockholders plausibly alleged proxy inadequately disclosed concurrent conflict of interest on the part of special committee's financial advisor;

[3] stockholders plausibly alleged proxy inadequately disclosed compensation that financial advisor to corporation received from concurrent representation of counterparties; and

[4] stockholders plausibly alleged proxy inadequately disclosed advisor's conflicts of interest arising from past representation of counterparties.

Reversed and remanded.

West Headnotes (14)

[1] **Appeal and Error**—De novo review

The Supreme Court reviews de novo the dismissal by the Court of Chancery of a complaint for failure to state a claim. Del. Ch. Ct. R. 12(b)(6).

[2] **Corporations and Business Organizations**—Conflicts of Interest and Self-Dealing in General

When the procedural protections for conflicted transactions set forth in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, are established prior to trial, the challenged transaction is then afforded the deferential "business judgment" standard of review.

[3] **Corporations and Business Organizations**—Business judgment rule in general

Under the "business judgment rule," a corporate board's decision will be upheld unless it cannot be attributed to any rational business purpose.

[4] **Corporations and Business Organizations**Disclosure of information in general

Alleged omission, from proxy regarding cloud-services corporation's proposed acquisition by private equity consortium, of term sheet for post-merger management incentive plan did not affect total mix of information available to stockholders, and thus, did not preclude stockholders' vote from being sufficiently informed to subject merger, as allegedly conflicted controller transaction, to business judgment rule in minority stockholders' action against CEO and others for breach of fiduciary duty and other claims; term sheet, which was attached to CEO's equity rollover agreement, was nonbinding proposal rather than concrete future business plan, and proxy disclosed that CEO was rolling over $700 million in equity and that there would be equity incentive program for certain employees.

[5] **Corporations and Business Organizations**Disclosure and ratification

The materiality of undisclosed information, for purposes of determining whether a stockholder vote to approve a conflicted transaction is adequately informed to subject the transaction to the "business judgment" standard of review, is to be assessed from the viewpoint of the reasonable stockholder, not from a director's subjective perspective.

[6] **Corporations and Business Organizations**Disclosure and ratification

For purposes of determining whether a minority-stockholder vote approving a conflicted transaction was sufficiently informed to subject the transaction to the "business judgment" standard of review, conflicts on the part of a financial advisor to a special committee formed to consider the transaction are uniquely important considerations for minority stockholders when deciding how to vote, as it is imperative for the stockholders to be able to understand what factors might influence the advisor's analytical efforts.

1 Case that cites this headnote

[7] **Corporations and Business Organizations**Disclosure of information in general

Minority stockholders adequately alleged that statement, in proxy regarding corporation's proposed acquisition, that special committee's financial advisor "may provide financial advisory or other services to the Company and the Acquiror and their respective affiliates…in the future" and "may receive compensation" for such services was materially misleading for failure to disclose advisor's actual conflict of interest, as necessary for stockholder vote to be insufficiently informed to subject acquisition to "business judgment" standard of review in stockholders' action for breach of fiduciary duty; stockholders alleged advisor and its affiliates were in fact concurrently providing services to counterparties in proposed acquisition, namely bidder and co-investor.

1 Case that cites this headnote

[8] **Corporations and Business Organizations**Disclosure of information in general

There is no brightline rule holding that the work performed by affiliates of a retained entity, or fees received and paid by such affiliates, insulates the retained entity from disclosure requirements, such as those regarding advisors retained by a board of directors to evaluate a proposed merger transaction.

[9] **Corporations and Business Organizations**Disclosure of information in general

There is no hard and fast rule that requires financial advisors to always disclose the specific amount of their fees from a counterparty in a corporate merger transaction, for purposes of determining whether a proxy seeking stockholder approval for the transaction adequately discloses conflicts of interest; rather, the materiality standard governs whether a financial advisor's exact amount of fees collected from a counterparty requires disclosure.

[10] **Corporations and Business Organizations**Disclosure of information in general

Minority stockholders adequately alleged that statement, in proxy regarding corporation's proposed acquisition, that financial advisor retained by corporation in connection with merger would receive "customary compensation" for concurrently representing four counterparties to acquisition in unrelated transactions was insufficient to permit informed stockholder vote on approval of acquisition, as basis for acquisition to be subject to "business judgment" standard of review in minority stockholders' action for claims including breach of fiduciary duty; in order to contextualize and evaluate advisor's conflicts of interest, stockholders needed to be able to compare amount of fees advisor received from corporation to specific amounts it received from counterparties.

[11] **Corporations and Business Organizations**Disclosure of information in general

Minority stockholders adequately alleged that proxy statement regarding corporation's proposed acquisition by private equity consortium insufficiently disclosed conflicts of interest that corporation's financial advisor had from its past representation of consortium members, such that stockholder vote was insufficiently informed to subject acquisition to "business judgment" standard of review; stockholders alleged proxy only disclosed that advisor had received $15.2 million from one consortium member during two years before acquisition and that advisor received compensation pursuant to its relationships with other members, not that advisor received nearly $400 million in fees from consortium members during same period, roughly ten times the fee it would earn in instant transaction.

[12] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

When a board of directors chooses to disclose a course of events or to discuss a specific subject, it cannot do so in a materially misleading way by disclosing only part of the story and leaving the reader with a distorted impression.

[13] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

A corporate fiduciary's disclosures to stockholders must provide a balanced, truthful account of all matters they disclose, and partial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations.

[14] **Corporations and Business Organizations** Disclosure of information to corporation and shareholders or members

Boards, committees, and their advisors should take care in accurately describing the events and the various roles played by board and committee members and their retained advisors when seeking stockholder approval for a transaction.

***274** Court Below: Court of Chancery of the State of Delaware, C.A. No. 2022-0698

Upon appeal from the Court of Chancery. **REVERSED** and **REMANDED**.

Attorneys and Law Firms

Ned Weinberger, Esquire (argued), Brendan W. Sullivan, Esquire, Labaton Sucharow LLP, Wilmington, Delaware. Of Counsel: John Vielandi, Esquire, Labaton Sucharow LLP, New York, New York. Jeremy Friedman, Esquire, David Tejtel, Esquire, Friedman Oster & Tejtel PLLC, Bedford Hills, New York. Lee D. Rudy, Esquire, Eric L. Zagar, Esquire, J. Daniel Albert, Esquire, Geoffrey C. Jarvis, Esquire, Grant D. Goodhart, III, Esquire, Kessler Topaz Meltzer & Check, LLP, Radnor, Pennsylvania for Appellants.

Raymond J. DiCamillo, Esquire, Kevin M. Gallagher, Esquire (argued), Craig K. Ferrere, Esquire, Richards, Layton & Finger, P.A., Wilmington, Delaware for Appellees Inovalon Holdings, Inc., Isaac S. Kohane, Denise K. Fletcher and Lee D. Roberts.

William M. Lafferty, Esquire, Ryan D. Stottmann, Esquire, Alexandra M. Cumings, Esquire, Morris Nichols Arsht & Tunnell LLP, Wilmington, Delaware. Of Counsel: Blair Connelly, Esquire (argued), Latham & Watkins LLP, New York, New York. Kristin N. Murphy, Esquire, Ryan A. Walsh, Esquire, Latham & Watkins LLP, Costa Mesa, California for Appellees Mark A. Pulido, William D. Green, and William J. Teuber.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices, constituting the Court en Banc.

VALIHURA, Justice:

INTRODUCTION

This is an appeal of the Court of Chancery's bench ruling granting Defendants Below-Appellees' motions to dismiss in full. Plaintiffs Below-Appellants filed suit in the Court of Chancery challenging an acquisition of Inovalon Holdings, Inc. ("Inovalon" or the "Company") by a private equity consortium led by Nordic Capital, a Swedish private equity firm (the "Transaction").[1] Plaintiffs asserted several breach of fiduciary duty claims, an unjust enrichment claim, and a claim alleging a breach of the Company's charter. Defendants argued that the claims must be dismissed because the Transaction satisfied the elements of *Kahn v. M & F Worldwide Corp.* ("*MFW*"),[2] thereby subjecting the board's actions to business judgment review.

***275** On appeal, Appellants challenge the Court of Chancery's dismissal under the *MFW* framework because: (i) the Company failed to condition the Transaction *ab initio* on the approval of the special committee; and (ii) the vote of the minority stockholders was not informed because the proxy disclosure (the "Proxy") omitted material information. Because we conclude that the Court of Chancery erred in holding that the vote of the minority stockholders was adequately informed, we REVERSE the decision of the Court of Chancery.

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND[3]

A. The Parties[4]

Plaintiffs Below-Appellants are City of Sarasota Firefighters' Pension Fund, Steamfitters Local 449

Pension Fund, and Steamfitters Local 449 Retirement Security Fund (collectively, "Appellants").[5] Appellants were holders of Inovalon Class A Common Stock at all times relevant to the Action.[6]

Defendant Below-Appellee Inovalon is a provider of cloud-based platforms related to the healthcare industry with diverse capabilities for use in connection with healthcare plans and providers, as well as life-sciences companies and pharmacy organizations.[7] Defendant Below-Appellee Dr. Keith Dunleavy founded Inovalon in 1998, served as the Company's CEO through the 2021 Transaction, and currently serves as Inovalon's CEO following the Transaction.[8] Dunleavy held a substantial amount of Inovalon stock both personally and through his controlled companies, which are also named defendants in the Complaint: Meritas Group, Inc. ("Meritas Group"); Meritas Holdings, LLC ("Meritas LLC"); and the Dunleavy Foundation (collectively, the "Dunleavy Defendants").[9]

Defendant André Hoffmann served on Inovalon's board from 2008 until July 2020 and owned a significant amount of Inovalon stock — amounting to 22.8% of Inovalon's outstanding voting power. He held the stock both personally and through his controlled company, Cape Capital SCSp, SICAR-Inovalon Sub-Fund ("Cape Capital") (collectively, the "Hoffmann Defendants").[10]

***276** The Complaint also named as defendants Inovalon's board that issued the Proxy — Dunleavy, Isaac S. Kohane, Mark A. Pulido, Denise K. Fletcher, William D. Green, William J. Teuber, and Lee D. Roberts (collectively, the "Director Defendants").[11] Pulido, Green, and Teuber served on the special committee (the "Special Committee").[12]

B. Background of Inovalon

1. Capitalization

Inovalon launched its IPO in 2015 at $27 per share. After the IPO, Inovalon had two classes of common stock: publicly traded Class A common stock that entitled its holders to one vote per share; and non-publicly traded, super-voting Class B common stock that entitled its holders to ten votes per share. Inovalon's charter required that if there were ever a change of control transaction, its Class A and Class B stockholders must be treated equally — absent the differential treatment being approved by a separate vote of each class.[13]

At the time of the Transaction, Dunleavy held 70.4% of Inovalon's Class B stock and less than 1% of its Class A stock both directly and indirectly through his controlled entities. Despite owning less than 50% of Inovalon's total outstanding shares, Dunleavy controlled 64.1% of Inovalon's total voting power. Hoffmann held the second largest block of Inovalon's Class B shares both personally and through Cape Capital. Hoffmann controlled roughly 23% of Inovalon's total voting power at the time of the Transaction.[14] Together, Dunleavy and Hoffmann controlled approximately 86% of Inovalon's stockholder voting power at the time of the Transaction.

2. Inovalon's Recent Successes

In recent years, Inovalon experienced substantial success.[15] The Company reported annual revenue of over $642 million in 2019 and $667.5 million in 2020. Other metrics demonstrated the Company's strong financial health: year-over-year adjusted EBITDA increased 23% in Q1 of 2021; cash flows from operations grew by 22% in 2020; and, as Dunleavy noted, the Company was seeing "robust, expanding sales pipelines despite successive quarters of very strong deal closures."[16]

Much of Inovalon's growth was fueled by several key acquisitions and partnerships. Inovalon acquired Avalere Health, Inc. in 2015; Creehan Holding Co., Inc. in 2016; and Ability in 2018. Additionally, Inovalon had recently executed partnerships with the United States government, Walmart Inc., AstraZeneca plc, Humana Inc., and Cardinal Health, Inc., among others. ***277** [17] Following these developments, Inovalon reported a 17% increase in revenue for the second quarter of 2021 over the second quarter of 2020 and, according to the Complaint, "multiple market analysts assigned a target price for the Company of $45 per share."[18]

C. Inovalon Explores its Strategic Options

Inovalon's continued success did not go unnoticed. In late 2020, Thoma Bravo, LP, an American private equity firm, expressed an interest in acquiring Inovalon. Dunleavy, in response, met via teleconference with Thoma Bravo without any other board members on December 2, 2020. Two days later, he informed Teuber that he had met with Thoma Bravo and that he would handle future negotiations with the firm. On February 1, 2021, Dunleavy met with a large technology company and, according to the Proxy, discussed "future opportunities for strategic partnerships, commercial arrangements or other transactions between [the technology company] and [Inovalon]."[19] At an Inovalon board meeting on February 11, 2021, Dunleavy "provided an overview of his engagement with [Thoma Bravo] and [the technology company] to date ...."[20] Following his presentation, the board authorized Dunleavy to "engage in discussions with financial advisors who could potentially assist the [board] with an exploration of various strategic alternatives, including methods for raising strategic capital."[21] In April 2021, Nordic Capital entered the scene.

1. Nordic Expresses an Interest in Acquiring Inovalon

On April 20, 2021, Nordic partner Daniel Berglund contacted an Inovalon representative concerning a potential acquisition of the Company. In response, Inovalon's board invited J.P. Morgan Securities LLC ("J.P. Morgan") to the May 3, 2021 board meeting to present on strategic alternatives. During the board meeting, the board authorized J.P. Morgan to explore a capital raise from a third-party and the exploration of potential strategic partnerships. It did not, according to Plaintiffs, authorize J.P. Morgan to explore an acquisition of the Company.[22] Dunleavy met virtually with Nordic representatives on May 26, 2021, while J.P. Morgan was conducting its initial outreach. At this meeting, Nordic shared that one of its investment funds might be interested in a potential acquisition of Inovalon.[23] J.P. Morgan was formally retained by Inovalon's board on June 2. The retention agreement authorized J.P. Morgan to explore a potential merger and made J.P. Morgan's payment contingent on Inovalon completing a transaction.[24]

A week later, at a board meeting on June 9, 2021, J.P. Morgan updated the board on its outreach efforts concerning, first, potential equity and debt offerings ***278** and, second, potential mergers.[25] At the meeting, J.P. Morgan relayed that it had engaged with thirteen parties, held management discussions with seven potential acquirers, and received proposals from three parties.[26] The board then approved J.P. Morgan's continued engagement with potential strategic partners and buyers. On June 11, 2021, Inovalon retained the law firm Latham & Watkins LLP ("Latham") to serve as its legal advisor.[27] On June 24, Nordic signed a non-disclosure agreement ("NDA") with Inovalon. At this point, other parties who were interested in a possible merger were also in the mix: one had submitted an indication of interest offering an acquisition price of $38 per share and at least three other parties had expressed an interest in pursuing an acquisition.

On July 5, 2021, Dunleavy met with representatives of Nordic to discuss a potential transaction. At this meeting, Nordic indicated that it would follow up with a written indication of interest.[28] During this meeting, Nordic informed Dunleavy that in similar transactions, Nordic typically has requested that members of management participate in equity rollovers of their investment.[29] On July 6, Dunleavy received a communication from Permira Advisors LLC ("Permira") expressing a desire to submit an indication of interest.[30]

On July 12, 2021, Nordic submitted a formal letter of interest to acquire Inovalon for $43 per share.[31] Nordic stated that it was confident it could fund 100% of the purchase price with a mix of debt and equity but, if an equity rollover involving management were necessary, a special committee would be required.[32] It added that if an equity rollover were part of a final transaction, the transaction must be approved by a "majority of [the Company's minority] shareholders[.]"[33] Lastly, Nordic emphasized its commitment to Inovalon's existing management in executing their business plan.[34]

In response to Nordic's letter, the board convened the next day to consider Nordic's ***279** offer and compare it with a potential offer from Permira.[35] Permira had verbally indicated that it was prepared to submit a non-binding indication of interest with a target price per share in the low $40s, payable in cash. Permira, however, needed an additional six weeks to complete due diligence.

Given Permira's noncommittal stance, Inovalon's board authorized J.P. Morgan and management to move forward with Nordic. The board instructed J.P. Morgan to propose a price of at least $44 per share for 100% of Inovalon and a $3.5 billion equity commitment from Nordic in exchange for an exclusivity agreement through August 2, 2021 (something that Nordic requested in its letter).[36] On July 14, 2021, Dunleavy again met with Nordic and relayed the board's instructions. Later that day, Nordic submitted an indication of interest at $44 per share and again stated that it expected to obtain 100% financing for the deal, which included a $3.5 billion equity commitment from Nordic as well as other equity commitments of $2.55 billion from its co-investors (collectively, the "Equity Consortium") and debt financing of $1.75 billion.[37] Nordic reiterated its commitment to current management: "[f]or the avoidance of doubt, we do not foresee any changes to Inovalon's organization or employees following the completion of the Proposed Transaction."[38]

Permira dropped out of consideration that same day.[39] On July 16, Latham (Inovalon's counsel) met with Kirkland & Ellis LLP (Nordic's counsel) and "discussed the fact that [Inovalon's] Board was meeting soon to consider and approve the establishment of a special committee and also that they would each expect the special committee would need to evaluate whether [Inovalon] should enter into any exclusivity arrangement with [Nordic]."[40]

The board's next meeting was July 18, 2021. At the meeting, Dunleavy relayed that Nordic had "increasing confidence" that it could provide $3.5 billion in equity; the potential for co-investors; and that Nordic had expressed a preference that Dunleavy roll over a portion of his equity in connection with the proposed merger.[41] In response to Nordic's preference for an equity rollover in a potential transaction, Latham reviewed with the board its fiduciary duties.[42] That day, the board appointed a Special Committee consisting of: Teuber, Green, and Pulido. Teuber was appointed as chair two days later.

2. The Special Committee Oversees the Transaction

The Special Committee first convened on July 20, 2021. At that meeting, the ***280** Special Committee selected Latham as its legal advisor;[43] planned to retain another financial advisor in addition to J.P. Morgan; and concluded that it would be willing to entertain Nordic's exclusivity request if Nordic were willing to improve its offer.[44] The Special Committee refrained from making a final decision regarding exclusivity until it received more information concerning Nordic's financing proposal.

The following day, July 21, 2021, Nordic formally requested that Dunleavy roll over a portion of his equity into the post-Transaction entity. Dunleavy promptly informed the Special Committee of this request. On July 22, the Special Committee held its second meeting during which it learned that Latham "continued to communicate with the legal counsel of [Nordic] as well as other potential parties that may participate as co-investors with [Nordic]."[45]

On July 23, the Special Committee retained Evercore, Inc. ("Evercore") as its financial advisor. Evercore confirmed that it had no "material relationships" with Inovalon.[46] Evercore indicated that it would submit a written memorandum summarizing its material relationships with potential counterparties. Evercore had worked with Nordic in the past and Nordic had paid Evercore $9 million in advisory fees in the two years preceding August 18, 2021. Additionally, Evercore concurrently advised Nordic in a separate, unrelated transaction, which it later disclosed to the Special Committee. Evercore also had conflicts with members of the Equity Consortium: it had collected "tens of millions of dollars" in fees prior to the Transaction from members of the Equity Consortium,[47] and it was concurrently advising a member of the Equity Consortium in an unrelated transaction. As to the concurrent representation, according to the Complaint, "Evercore advised Insight on its fundraise for its Fund XII and Growth Buyout Fund (valued at $20 billion), an engagement that seemingly began in or around May 2021 and continued through the Transaction."[48] Evercore's fee for its advisory services to the Special Committee was $3 million, with an additional $7 million payment subject to the Special Committee's discretion.[49]

In the meetings that followed, the Special Committee repeatedly instructed Evercore to review J.P. Morgan's outreach efforts.[50] On July 28, 2021, J.P. Morgan ***281** submitted a summary of relationships disclosure in which it disclosed business that it had previously conducted with Nordic, which generated $15–$16 million in fees for J.P. Morgan. The disclosure did not include J.P. Morgan's prior business with members of the Equity Consortium and other co-investors (whose identities were likely known at that time) that generated tens of millions of dollars in fees.[51] J.P Morgan disclosed those conflicts to the board on August 30, 2021, two weeks after the parties had signed the merger agreement. According to Plaintiffs, there was no indication that the Special Committee ever asked J.P. Morgan whether it had any relationship with Nordic's co-investors.

On July 30, 2021, Dunleavy informed the Special Committee that he and other rollover participants (such as Hoffmann) had also hired Latham as their counsel in negotiating their rollovers. During this period, Dunleavy informed the Special Committee that he was willing to participate in an equity rollover of up to $400 million and Hoffmann was willing to roll over up to $300 million in equity even though Nordic was not likely to proceed unless Dunleavy agreed to roll over at least $700 million.[52]

On August 9, 2021, the Special Committee learned that Nordic had only raised $2.2 billion in equity financing for the acquisition — short of the projected $3.5 billion. Consequently, on August 10, Nordic verbally informed J.P. Morgan that a price of $44 per share was no longer feasible because of its failure to secure additional equity financing. Therefore, Nordic planned to resubmit an updated indication of interest at $40.50 per share and a requirement that Dunleavy increase his equity rollover to $1 billion.[53]

The Special Committee, upon learning of this development, determined that accepting Nordic's offer at $40.50 per share would not be in the best interest of the Company and its stockholders and that it would also not approve any transaction in which Dunleavy was required to roll over more than $700 million in equity. Later that day, Nordic officially submitted its revised proposal of $40.25 per share (instead of $40.50), with a combined rollover from both Dunleavy and Hoffmann of $1.1 billion. The Special Committee concluded that the revised offer was not in the best interests of the Company or its stockholders.

The Special Committee then instructed J.P. Morgan to engage with other interested parties. After looking elsewhere, J.P. Morgan informed the Special Committee that other buyers might be able to offer a price comparable to Nordic's, but they required more time for due diligence. Consequently, the Special Committee instructed J.P. Morgan to continue negotiations with Nordic while simultaneously engaging with other potential buyers.

At an August 13, 2021 meeting, the Special Committee determined that the Company should continue negotiating with ***282** Nordic to maintain Nordic's commitment to pursuing a transaction, "particularly at a price of $41 per share or higher," as that "would be in the best interest of the Company."[54] J.P. Morgan presented to the Special Committee the state of its outreach attempts to other interested parties: one interested party indicated that it could do a $41 per share offer; however, it required that Dunleavy roll over 80% of the deal proceeds; another interested party had verbally indicated that $42 per share might be too expensive; a third interested party stated that it could potentially approach $42 per share; and two other parties expressed some interest.[55]

Later that same day, on August 13, 2021, Nordic submitted a revised offer of $41 per share, proposing equity rollovers from Dunleavy and Hoffmann of $700 million and $542 million, respectively.[56] The Special Committee, still not satisfied, instructed J.P. Morgan to continue its outreach to other parties. Two days later, on August 15, Nordic submitted its "best and final offer" of $41 per share, which contemplated a $700 million equity rollover from Dunleavy and a $600 million equity rollover from Hoffmann. Nordic also requested that the go-shop provision be eliminated from the proposed merger agreement. In response, the Special Committee convened that day and instructed J.P. Morgan to continue its outreach with other parties.

As of August 16, 2021, there were other remaining bidders that might have been able to offer comparable prices to Nordic, but they needed more time for due diligence. The Special Committee directed Latham to accept the deletion of the go-shop provision in exchange for a smaller termination fee, a larger reverse termination fee, and an extended outside date. At this point, according to Plaintiffs, Dunleavy continued to negotiate with Nordic, and he told the board that the specific terms of his rollover agreement were not yet acceptable to him. J.P. Morgan continued its market outreach. On August 17, "Dunleavy advocated for the Transaction[ ]" at a board meeting.[57]

3. The Special Committee and the Board Approve the Transaction

At an August 18, 2021 meeting of the Company's independent directors, J.P. Morgan and Evercore orally opined that Nordic's offer at $41 per share was fair, from a financial point of view, to Inovalon's public stockholders. The Proxy states that on this date, Evercore delivered to the Special Committee an update to its written memorandum "disclosing [its] material relationships with respect to several potential counterparties, including [Nordic] and Dr. Dunleavy."[58] That same day, the Special Committee recommended that the board approve the Transaction. The independent directors and the audit committee approved the Transaction.[59] Dunleavy and Hoffmann, and their affiliates, concurrently executed agreements laying out the terms of their equity rollovers. Prior to the ***283** Transaction, Dunleavy and Hoffmann held 11% and 9.4% of Inovalon's shares, respectively.[60] Following the rollover agreements, Dunleavy and Hoffmann would hold 15.6% and 13.4% of the post-Transaction entity, respectively.[61]

Annex B, a supplement to Dunleavy's equity rollover agreement, was referred to as the "MIP Term Sheet."[62] It outlined Nordic's commitment to implement a management incentive plan (or "MIP") following the Transaction's closing. Under the MIP term sheet, the MIP would hold equity interests consisting of 8% of the fully diluted common equity of the post-Transaction entity. Additionally, the MIP would grant 5% of the interests to employees at closing and reserve an additional 3% for future issuances. Despite Dunleavy's equity rollover agreement stating that the post-Transaction entity would implement a MIP consistent with the term sheet after closing,[63] the MIP term sheet explicitly stated that it was not legally binding, did not contain all of the terms and conditions applicable, was subject to material change(s), and was "being distributed for discussion purposes only."[64]

4. Inovalon Issues its Proxy and the Minority Stockholders Approve the Transaction

Inovalon filed the Proxy soliciting stockholder approval of the Transaction on October 15, 2021. On November 5, 2021, it issued supplemental disclosures that stated there were no discussions between Nordic's and Inovalon's management regarding post-Transaction employment other than those regarding Dunleavy's equity rollover.[65] On November 16, at a special class meeting of Inovalon stockholders, its Class A and Class B stockholders voted separately to approve the merger, with over 99% of the Company's minority stockholders voting to approve the Transaction.[66]

D. Court of Chancery Proceedings

Following the Transaction's approval, Plaintiffs made a demand for books and records pursuant to Delaware General Corporation Law ("DGCL") § 220.[67] Inovalon produced the responsive documents. Plaintiffs then filed the Complaint on August 9, 2022 asserting five counts. In Count I, Plaintiffs alleged that the Dunleavy Defendants breached their fiduciary duties as controllers by negotiating disparate consideration in the merger. In Count II, Plaintiffs alleged that the board breached their fiduciary duties by approving a merger that was unfair to minority stockholders and by issuing a misleading proxy. In Count III, Plaintiffs alleged that Dunleavy breached his fiduciary duty as CEO by negotiating for himself non-ratable benefits. ***284** [68] In Count IV, Plaintiffs alleged that the Dunleavy Defendants and the Hoffmann Defendants were unjustly enriched by the Transaction. Lastly, in Count V, Plaintiffs alleged that Inovalon and the board breached the Company's charter because the Transaction treated Class A and Class B stockholders unequally in connection with an uninformed stockholder vote.

Defendants moved to dismiss the Complaint under Rule 12(b)(6). The parties then stipulated to a voluntarily dismissal of the Hoffmann Defendants without prejudice. The motions were fully briefed as to the remaining defendants, and the court heard oral argument on April 5, 2023.

Following oral argument, the court issued a bench ruling on July 31, 2023, in which it held that the requirements of *MFW* were met and granted Defendants' motions to dismiss in their entirety with prejudice. Plaintiffs challenged only three of *MFW's* requirements: the *ab initio* requirement; the Special Committee's duty of care; and the informed stockholder vote requirement.

1. The Ab Initio Requirement

As to the *ab initio* requirement, Plaintiffs argued that Inovalon failed to condition the Transaction *ab initio* on the approval of the Special Committee. The trial court first determined that "*MFW*'s procedural requirements extend to one-sided conflicted controller transactions."[69] It then relied on two decisions from this Court to determine the contours of the *ab initio* requirement: *Flood*[70] and *Olenik*.[71] In *Flood*, this Court clarified that *MFW*'s *ab initio* requirement is satisfied if the controller conditions its offer on the key protections "at the germination stage" of the negotiations process — such as when the committee is selecting its advisors, establishing its method of proceeding, and beginning diligence.[72] In *Olenik*, this Court held that the plaintiff had pled facts to support a reasonable inference that *MFW*'s procedural protections were not put in place early enough, *i.e.* before substantive economic negotiation occurred.

The trial court here found that the conflicts did not arise until Nordic "formally" requested that Dunleavy participate in an equity rollover as part of its written offer on July 21, 2021.[73] This request did not occur until after the Special Committee had been formed on July 18. Although Nordic had suggested that it would "expect" a similar equity rollover in initial negotiations with Dunleavy on July 5, the rollover was not part of Nordic's July 12 indication of interest to acquire Inovalon for $43 per share, or its July 14 $44 per share offer, and the parties, at that stage, "had not made it to 'advanced negotiations[.]' "[74] The trial court was "content" that the *MFW* protections operated as they should have in this circumstance.

2. The Special Committee's Duty of Care

The trial court next addressed Plaintiffs' contention that the Special Committee ***285** breached its duty of care in three ways: (i) by selecting conflicted advisors; (ii) by allowing Dunleavy and J.P. Morgan to negotiate directly with Nordic; and (iii) by forgoing the go-shop provision in the merger agreement.[75] The trial court determined that none of these arguments was persuasive.

The court first considered whether the Special Committee breached its duty of care in its hiring and management of conflicted advisors. Starting with Latham, it held that Latham's prior month-long representation of Inovalon in June 2021 was "the kind of relatively minor and infrequent representation that generally is difficult to conclude rises to the level of a conflict that implicates a duty of care violation."[76] Moreover, Latham's prior representation was disclosed in the Proxy. The court was "slightly more trouble[ed]" by Latham's concurrent conflicts with Nordic on unrelated deals. Nonetheless, it concluded that the allegations failed to cast doubt on the reasonableness and good faith nature of the Special Committee's decision to hire Latham because Latham represented that it did not have any material conflicts and there were no facts suggesting gross negligence by the Special Committee.

The court next focused on Plaintiffs' allegations concerning Evercore's conflicts. Concerning Evercore's and its affiliates' prior dealings with Nordic and its affiliates on unrelated transactions, the court recognized the business reality "that most financial advisors have relationships with major private equity firms."[77] Evercore represented to the Special Committee that it did not have any material conflicts and, in the court's opinion, its disclosures were adequately vetted by the Special Committee. Therefore, the trial court concluded that Plaintiffs had not alleged that the Special Committee was grossly negligent in retaining Evercore.

In analyzing J.P. Morgan's alleged conflicts, the trial court summarily held that, like Latham and Evercore, Plaintiffs failed to allege facts sufficient to show that the Special Committee was grossly negligent in retaining J.P. Morgan. Despite J.P. Morgan's alleged concurrent and prior representations of Nordic-affiliated entities, the Special Committee hired Evercore "to help with the process."[78] The Special Committee had received the information it needed and "layered on advisory services from multiple advisors in order to mitigate the possibility that any one immaterial conflict even could taint the process."[79] Therefore, the court was satisfied that the allegations did not sufficiently impugn the Special Committee's duty of care.

The trial court next addressed the claim that the Special Committee was grossly negligent in allowing Dunleavy and J.P. Morgan to negotiate with Nordic given their conflicts, and that it improperly delegated Inovalon's entire negotiation to them. As to J.P. Morgan, the court reasoned that it had already determined that the allegations surrounding J.P. Morgan's alleged conflicts were unpersuasive. As to Dunleavy, the trial court stated that it did not find this argument persuasive either: "Dunleavy's employment and equity rollover terms remained fluid throughout the process, and his conflicts were disabled by the *MFW* protections before substantive negotiations took place as to those issues." ***286** [80]

Addressing the Plaintiffs' broader argument concerning the Special Committee's delegation of the negotiations to Dunleavy and J.P. Morgan, the trial court reiterated that the Special Committee's conduct must be evaluated under the "lens of due care[ ]" and, often, "no single factor will completely resolve the analysis."[81] It determined that the Special Committee "undertook substantial efforts to evaluate the potential field of buyers, pushed Nordic to increase its offer from $40.25 per share to $41 per share, and limited Dunleavy's equity rollover."[82] The court then rejected the claim holding that "[m]aking good faith decisions, while having J.P. Morgan carry out marching orders, does not rise to the level of gross negligence."[83]

Lastly, the trial court addressed Plaintiffs' claim that the Special Committee's decision to eliminate the go-shop provision constituted gross negligence. The court rejected the claim observing that "Delaware courts have held that foregoing a go-shop [provision] or agreeing to a no-shop provision is not *per se* unreasonable."[84] Here, the Special Committee eliminated the go-shop provision in exchange for concessions from Nordic namely, a reduced seller termination fee, an increased buyer termination fee, and an extended outside date.[85] Plaintiffs' argument thus boiled down to "their disagreement with the value that the special committee placed on these exchanged terms[.]"[86]

In summarizing its due care analysis, the court held that Plaintiffs' allegations failed to impugn the Special Committee's duty of care. It held:

> The special committee convened 23 times between July and August of 2021 and engaged with its advisors. It considered its advisors' feedback. It conducted extensive third-party outreach. When Nordic retracted its initial bid and reduced its offer, the special committee successfully bid up the deal price to $41 per share with favorable non-economic terms. So in these circumstances, plaintiffs fail to plead facts making it reasonably conceivable that the special committee acted with gross [negligence].[87]

3. The Sufficiency of the Stockholder Vote

Plaintiffs alleged that the Proxy was materially deficient in six ways in failing to disclose: (i) J.P. Morgan's and Evercore's conflicts; (ii) the non-ratable benefits to management from the Transaction; (iii) that Dunleavy and Nordic believed Inovalon was worth at least $44 per share; (iv) that J.P. Morgan conducted third-party outreach, not Evercore; (v) that Dunleavy's and Hoffmann's ownership interests increased ***287** in the post-Transaction entity; and (vi) that there was continued third-party interest in acquiring Inovalon. The trial court rejected each assertion.

First, the trial court summarily dispensed with the allegedly material omission of J.P. Morgan's and Evercore's conflicts because it had already determined, in assessing the Special Committee's alleged breach of the duty of care, that those conflicts were not material.[88]

Second, the trial court addressed the Proxy's omission of the MIP. It reasoned that whether the MIP Term Sheet would have been a material omission depended on whether it was better classified as a "concrete side deal" for Dunleavy or whether it was a proposed but not concrete future business plan.[89] It held that the MIP was "merely a term sheet that the parties agreed to attempt to negotiate further."[90] Moreover, the term sheet explicitly stated that it was not legally binding, it did not contain all of the terms and conditions applicable, it was subject to material change(s), and it was being distributed for discussion purposes only.[91] The court reasoned that nothing in the merger agreement or ancillary documents required that the MIP be implemented according to the parties' positions laid out in the term sheet and, at the time of the stockholders' vote, "the MIP was still gestational."[92]

Third, the trial court addressed the Proxy's omission of Dunleavy's and Nordic's belief that Inovalon was worth at least $44 per share. It held that Plaintiffs failed to allege any non-conclusory facts to support this allegation. The Proxy adequately disclosed that Nordic's second offer was $44 per share and that it later decreased that offer. The trial court further reasoned that, although the Special Committee's meeting minutes from August 9, 2021 state that Dunleavy was "prepared" to set his equity rollover at $700 million at $44 per share, this did not say anything about Dunleavy's purported belief about Inovalon's value.

Fourth, the court addressed Plaintiffs' allegations concerning the roles of J.P. Morgan and Evercore in advising the Special Committee and whether the Proxy overstated Evercore's role, thereby giving the misleading impression that it was able to mitigate J.P. Morgan's conflicts. The trial court held that Plaintiffs' position is hard to square with the "practical realties[ ]" of the Transaction which included the fact that J.P. Morgan had a one-month head start over Evercore and it was evident, based on the allegations, that Evercore did, in fact, engage in the outreach process. Further, the court had already determined that J.P. Morgan was not materially conflicted.

Fifth, the trial court focused on the Proxy's omission of the fact that Dunleavy's and Hoffmann's combined equity rollover increased from 20.4% of Inovalon's pre-Transaction equity to 29% of the post-Transaction equity. The Proxy disclosed Dunleavy's and Hoffmann's individual rollover agreements, the number of shares they rolled over, and the number of post-Transaction shares they received. The trial ***288** court did not view it as necessary for the Company to disclose the precise percentages that Dunleavy and Hoffmann would have received in the post-Transaction entity.

Sixth, and finally, the trial court turned its attention to the Proxy's omission of continued third-party interest in acquiring Inovalon. The Proxy stated that, as of August 13, 2021, "no potential counterparty had expressed an interest in offering a price at or above $41 per share."[93] Plaintiffs pointed to J.P. Morgan's August 13, 2021 presentation to the Special Committee that identified three potentially interested parties. However, the court determined that the Proxy disclosure was consistent with J.P Morgan's presentation to the Special Committee because none of the other supposedly interested parties had made a better offer than Nordic's (at $41 per share), and none of them ultimately made an actual offer. It concluded that the Proxy's omission of other nonbinding informal communications was not material.

In sum, the trial court held that Plaintiffs failed to plead sufficient facts to demonstrate that the Transaction did not comply with the *MFW* framework, and thus, the Transaction was subject to business judgment review. Accordingly, the court held that Plaintiffs failed to state a claim as to Counts I, II, and III.

Lastly, the trial court held that Plaintiffs' remaining counts similarly rose and fell with the *MFW* analysis. The court found that the unjust enrichment claim against the Dunleavy Defendants in Count IV was predicated on the same facts that formed the basis of Plaintiffs' claims for breach of fiduciary duty against the Dunleavy Defendants. Because those claims were deficient, so were the unjust enrichment claims. Count V alleged that Inovalon and the board violated provisions of Inovalon's charter requiring that Class A and Class B shares be treated equally in a change-of-control transaction. Plaintiffs argued that although Inovalon did conduct separate voting for Class A and Class B, these voters were uninformed and that therefore, the votes were invalid. The court dismissed this count because it had already determined that the minority stockholders were adequately informed by the Proxy when they voted to approve the Transaction.

E. Contentions on Appeal

Appellants argue that judicial cleansing is unavailable under the *MFW* framework for two separate reasons. First, they say that Dunleavy engaged in substantive economic negotiations with Nordic before the Special Committee's formation — thereby violating the *ab initio* requirement of the *MFW* framework. Because we reverse on the second ground, we do not address this claim of error.

Instead, we focus our attention on Appellants' second argument that judicial cleansing under the *MFW* framework is unavailable because the Proxy omitted material information that rendered the minority stockholders' vote to approve the Transaction uninformed. They base this claim on three allegedly material omissions in the Proxy discussed below.

II. STANDARD OF REVIEW

[1]"We review *de novo* the dismissal by the Court of Chancery of a complaint under Rule 12(b)(6)."[94]

***289** *III. ANALYSIS*

[2] [3]In the last decade, our Court has issued several decisions concerning certain procedural devices that could alter the burden of proof in a conflicted transaction. In *MFW*, a case involving a controller freeze-out transaction, we adopted the following standard:

> To summarize our holding, in controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[95]

In *In re Tesla Motors, Inc. S'holder Litig.*,[96] we reiterated that *MFW*'s procedural protections must be "established *prior to trial*[.]"[97] And when they are established, the transaction is then afforded the deferential business judgment standard of review. Under Delaware's business judgment rule, " 'the board's decision will be upheld unless it cannot be attributed to any rational business purpose.' "[98] In our most recent decision in *In re Match Grp., Inc. Derivative Litig.*,[99] we held that where a controlling stockholder stood on both sides of a transaction with a controlled corporation and received a non-ratable benefit, entire fairness was the presumptive standard of review.[100]

Here, Appellants assert that *MFW* "cleansing" is unavailable because the stockholder vote was not fully informed. Appellants allege that the Proxy failed to adequately disclose: (i) the MIP, a material and non-ratable benefit providing Dunleavy and others with hundreds of millions of dollars in value; (ii) Evercore's and J.P. Morgan's concurrent representations of Nordic and members of the Equity Consortium and their respective affiliates, as well as J.P. Morgan's fees earned from members of the Equity Consortium and their affiliates in prior representations; and (iii) Evercore's role in the market outreach to potential bidders. We address each in turn.

A. The Proxy Adequately Disclosed the MIP

[4]As to the MIP term sheet, Appellants challenge the trial court's determination that it would not have altered the "total mix" of information available to stockholders.[101] That was because the MIP term sheet was best classified as a proposal, as opposed to a concrete future business ***290** plan and, accordingly, did not require disclosure. This is a close call, but we hold that the trial court did not err in rejecting this claim.

The existence of an equity incentive program for certain employees in the post-Transaction entity was disclosed to stockholders. The Proxy provided a chronology of the negotiation process prior to the Transaction. It stated that the Special Committee held meetings with its advisors in which they discussed updates on "the Company's management's proposal regarding treatment of equity incentives for employees[.]"[102] The Proxy indicated that Dunleavy was involved in these discussions: "[a]t the end of the meeting, the Special Committee invited Dr. Dunleavy to join the meeting to provide his views to the Special Committee regarding the potential treatment of equity incentive compensation in connection with a potential sale transaction."[103] Additionally, an FAQ document that was attached as an exhibit to a supplemental proxy filing[104] disclosed that "there will be a profit share equity unit incentive program that will give eligible associates access to the upside of the Company."[105] The Proxy's Q&A section also urged readers to review the Form 13E-3 and related exhibits.[106]

Appellants point to the Special Committee's meeting minutes claiming that the Proxy's references to equity incentives for employees refer exclusively to the treatment of unvested equity under *existing* employee incentive programs in the Transaction as opposed to the MIP. But, the minutes could be more broadly read as they state:

> Dr. Dunleavy presented a detailed summary of his *proposed* treatment of unvested outstanding equity for employees. Dr. Dunleavy stated that in his view the proposed acceleration of vesting and escrow arrangement to support *future* payments of incentive compensation would be crucial to achieving the continued focus and engagement of key Company employees required to deliver the performance of the Company *anticipated* as reflected in management's projections.[107]
>
> Following discussion, members of the Special Committee concluded that Dr. Dunleavy's proposal *would provide* sufficient incentives to key Company employees to increase the likelihood that conditions to closing will be satisfied and anticipated *future* performance will be achieved in each case without compromising the benefits of a transaction to the Company's stockholders. The Special Committee instructed Latham to revise the draft merger agreement ... and authorized Dr. Dunleavy to discuss his proposal with representatives of Nordic Capital.[108]

Appellants also point out that Annex B to Dunleavy's rollover agreement states that the Company will implement a MIP ***291** consistent with the term sheet.[109] Annex B was omitted from the Proxy. But Annex B to the term sheet explicitly stated that "[t]his Term Sheet is not legally binding, does not contain all of the terms and conditions applicable to the contemplated arrangements described herein, is subject to material change and is being distributed for discussion purposes only."[110] The Proxy did contain the form of rollover agreement that revealed that Dunleavy was rolling over $700 million in equity.[111] The stockholders therefore knew that he would have a significant stake in the resulting entity. The Proxy also explicitly stated that Dunleavy would continue as CEO in the post-Transaction entity.[112] Thus, although the exact terms of the MIP were not disclosed in the Proxy, the stockholders were reasonably informed of the existence of equity incentives that would be provided to certain employees, including Dunleavy, who would continue in the post-Transaction entity.

B. The Proxy Failed to Adequately Disclose the Nature and Extent of the Special Committee's Advisors' Conflicts

Appellants contend that the trial court erred when it rejected their disclosure claims concerning J.P. Morgan's and Evercore's conflicts with Nordic and members of the Equity Consortium.[113] The trial court summarily held: "I've already discussed one of those categories, J.P. Morgan and Evercore's conflicts. And since I've already found that those allegations weren't entirely persuasive, I do not believe that the precise information that plaintiffs deem a disclosure deficiency would have altered the total mix of information available to stockholders."[114] Thus, the trial court decided that the Special Committee was not grossly negligent in retaining and managing its advisors and then summarily dispensed with the disclosure issues by relying on that duty of care analysis.

In *Brookfield*,[115] we held that the trial court's duty of care analysis did not adequately address the separate disclosure issues which required an assessment of the materiality of the conflicts from the perspective of the stockholders. In this case, we similarly hold that the trial court's due care analysis concerning the retention and management of the advisors did not sufficiently address all of the disclosure issues — some of which arose after the advisors' retention.[116]

***292** [5] [6]" 'Materiality is to be assessed from the viewpoint of the 'reasonable' stockholder, not from a director's subjective perspective.' "[117] A special committee's advisor's conflicts are uniquely important considerations for minority stockholders when deciding how to vote: "it is imperative for the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts ...."[118] Moreover, " '[b]ecause of the central role played by investment banks in the evaluation, exploration, selection, and implementation of strategic alternatives,' " Delaware courts have required full disclosure of investment banker compensation and potential conflicts.[119] As we explain below, we hold that the Proxy failed to adequately disclose Evercore's and J.P. Morgan's conflicts.

1. Evercore's Concurrent Conflicts

We first address Appellants' contention that the Proxy failed to adequately disclose Evercore's concurrent conflicts. Regarding Evercore and its affiliates, the Proxy disclosed the following:

> During the period January 1, 2019 to August 18, 2021, Evercore and its affiliates have not been engaged to provide financial advisory or other services to the Company and Evercore has not received any compensation from the Company during such period. During the period January 1, 2019 to August 18, 2021, Evercore and its affiliates have provided financial advisory services to Nordic Capital X and/or certain of its affiliates and received fees for the rendering of these services in the amount of approximately $9 million. During the period January 1, 2019 to August 18, 2021, Evercore and its affiliates have provided financial advisory services to GIC and certain of its affiliates and received fees for the rendering of these services in the amount of approximately $46 million. During the period January 1, 2019 to August 18, 2021, Evercore and its affiliates have provided financial advisory services to Insight and certain of its affiliates and received fees for the rendering of these services in the amount of approximately $57 million. *Evercore may provide financial advisory or other services to the Company and the Acquiror and their respective affiliates, including Nordic Capital X, GIC, Insight and their respective affiliates, in the future, and in connection with any such services Evercore may receive compensation*.[120]

Evercore provided its initial summary of relationships disclosure on July 29, 2021. It disclosed that it had received approximately $45 million in fees from GIC, but failed "to disclose that it had provided $57 million in services to Insight over the preceding ***293** two years."[121] Evercore provided an updated conflicts disclosure on August 18, 2021.[122] Evercore acknowledged that during the period from January 1, 2019 to August 18, 2021, it had earned investment banking advisory fees from Insight and GIC. Those fees were disclosed in the Proxy.[123] Evercore also disclosed to the Special Committee that it concurrently represented Nordic on a potential unrelated transaction.[124] Plaintiffs alleged, citing a press release, that this apparently referred to Nordic's exit in Vizrt Group to a new Nordic-led consortium.[125]

They further alleged that Evercore concurrently was advising Insight on its fundraise for its Fund XII and Growth Buyout Fund (valued at $20 billion).[126] They alleged that Evercore alluded to this representation in its August 18, 2021 memorandum.[127] There Evercore acknowledged that "an affiliate of Evercore is currently providing confidential financial advisory services to one of the Relevant Parties on a matter that is unrelated to [Inovalon].[128] On appeal, Appellants reassert their contention that the Proxy failed to adequately disclose Evercore's concurrent representation of (i) Nordic on its exit in Vizrt Group and (ii) Insight on its fundraise.[129]

Appellees assert that the following Proxy's reference to Evercore's concurrent conflicts was sufficient: "*Evercore may provide financial advisory or other services to the Company and the Acquiror and their respective affiliates, including Nordic Capital X, GIC, Insight and their respective affiliates, in the future, and in connection with any such services Evercore may receive compensation*."[130] The question is whether this disclosure adequately addressed Evercore's concurrent conflicts with Nordic and with Insight, a member of the Equity Consortium.

[7]In *Brookfield*, we held that a similar use of "may" in a proxy disclosure was materially misleading because it failed to provide adequate notice to stockholders of a special committee's financial advisor's then-existing material conflict with a ***294** transaction counterparty.[131] In this case, it was similarly misleading for the Proxy to state that Evercore "may" provide advisory services to Nordic and Insight when, in fact, it was providing such services, and thus there was an actual concurrent conflict. Evercore's concurrent representation, in unrelated transactions, of Nordic, the bidder of the Company, and Insight, a co-investor, were material facts.[132] Accordingly, we hold that the Proxy failed to adequately disclose Evercore's concurrent conflicts.

[8]We reject Appellees' argument that these conflicts did not require disclosure because they involved affiliates of Evercore.[133] First, as Appellants point out, the Complaint alleged that Evercore itself — as opposed to its affiliates — was involved in the challenged representations. The Complaint cites a press release regarding the Nordic/Vizrt Group transaction that stated that "Nordic Capital was advised in the process by, among others, Evercore as financial advisor[.]"[134] Appellants argue further that Evercore stated on its website that it advised Insight on the fundraise.[135] Even if the entities retained were affiliates of Evercore, under Delaware law, there is no brightline rule holding that the work performed by affiliates, or fees received and paid by affiliates, insulates the retained entity from disclosure requirements.[136] Rather, the materiality standard ***295** is the operative test as applied to the well-pled allegations. In addition to the fact that one or more of the representations at issue are alleged to have involved Evercore, as opposed to its affiliates, we note that the Proxy refers to "Evercore and its affiliates" when discussing Evercore's potential conflicts. On this record, we are persuaded that even if some of the work was performed by Evercore's affiliates, the Proxy failed to adequately disclose these concurrent conflicts.[137]

2. J.P. Morgan's Concurrent Conflicts

Appellants also challenge the Proxy's omission of J.P. Morgan's concurrent conflicts. The Proxy disclosed the following information concerning J.P. Morgan's conflicts:

> During the two years preceding the date of J.P. Morgan's opinion, neither J.P. Morgan nor its affiliates have had any other material financial advisory or other material commercial or investment banking relationships with the Company, Parent, Meritas Group, Inc., which holds approximately 30% of the capital stock of the Company, GIC Pte. Ltd., Insight Venture Partners, L.P. or 22C Capital LLC. *During the two years preceding the date of J.P. Morgan's opinion, J.P. Morgan and its affiliates have had and continue to have commercial or investment banking relationships with certain affiliates of Parent, including Parent's parent company, Nordic Capital X, as well as certain affiliates of each of GIC Pte. Ltd., Insight Venture Partners, L.P. and 22C Capital LLC, for which J.P. Morgan and such affiliates have received, or will receive, customary compensation. In addition, J.P. Morgan's commercial banking affiliate is an agent bank and a lender under outstanding credit facilities of certain affiliates of GIC Pte. Ltd. and certain affiliates of Insight Venture Partners, L.P., for which it receives customary compensation or other financial benefits. In addition, J.P. Morgan and its affiliates hold, on a proprietary basis, less than 1% of the outstanding common stock of the Company.* During the two year period preceding delivery of its opinion ending on August 18, 2021, the aggregate fees recognized by J.P. Morgan from Nordic Capital X were approximately $15.2 million. During the two year period preceding delivery of its opinion ending on August 18, 2021, J.P. Morgan did not recognize any fees from the Company or Parent. In the ordinary course of their businesses, J.P. Morgan and its affiliates may actively trade the debt and equity securities or financial instruments (including derivatives, bank loans or other obligations) of the Company for their own accounts or for the accounts of customers and, accordingly, they may at any time hold long or short positions in such securities or other financial instruments.[138]

According to the Complaint, J.P. Morgan concurrently represented Nordic on at least two other transactions: (i) Nordic's offer of its Intrum AB (publ) shares to institutional investors in June 2021; and (ii) Nordic's potential sale of Veonet GmbH, announced in September 2021 and valued at $2.4 to $3 billion.[139] Additionally, J.P. Morgan "also appeared to be concurrently representing" GIC, a member of the Equity Consortium, on two other transactions: ***296** (i) representing GIC portfolio company Pagaya on its backdoor listing through an $8.5 billion merger with special purpose acquisition vehicle ("SPAC") EJF Acquisition Corp., which was announced on September 15, 2021; and (ii) GIC's $240 million investment in Arctic Green Energy, which was announced in late July 2021.[140]

We address Appellants' contention that the amounts of the undisclosed fees from J.P. Morgan's concurrent representations were material facts requiring disclosure. Appellants cite a number of cases suggesting that when a financial advisor faces a conflict, both the relationship and the amount of fees should be disclosed.[141] Most recently, in *Brookfield*, we held that a financial advisor's nearly half a billion-dollar holding in a counterparty to the transaction was material and should have been specifically disclosed because it would have been relevant to a stockholder in assessing that advisor's objectivity.[142] Similarly, in *Rodden v. Bilodeau*, the Court of Chancery held that it was reasonably conceivable that payments in the two years preceding the merger to its financial advisor totaling $9 million (consisting of $4.9 million by the target and $4.1 million by the acquirer) would be deemed material because disclosure of those payments would help the target's stockholders to "contextualize the magnitude of the [financial advisor]'s conflict of interest."[143]

[9]Again, there is no hard and fast rule that requires financial advisors to always disclose the specific amount of their fees from a counterparty in a transaction.[144] Rather, the materiality standard governs whether a financial advisor's exact amount of fees collected from a counterparty to a transaction requires disclosure.[145] In this case, the Plaintiffs alleged that J.P. Morgan concurrently represented two separate counterparties to the Transaction ***297** — Nordic and GIC — on unrelated transactions while representing the Special Committee. The Proxy disclosed the existence of these representations, but it did not disclose the specific amount of fees that J.P. Morgan stood to earn from these representations:

> During the two years preceding the date of J.P. Morgan's opinion, J.P. Morgan and its affiliates *have had and continue to have* commercial or investment banking relationships with certain affiliates of Parent, including Parent's parent company, Nordic Capital X, as well as certain affiliates of each of [GIC], [Insight], and [22C Capital], *for which J.P. Morgan and such affiliates have received, or will receive, customary compensation*. In addition, J.P. Morgan's commercial

> banking affiliate is an agent bank and a lender under outstanding credit facilities of certain affiliates of [GIC] and certain affiliates of [Insight], for which it receives customary compensation or other financial benefits.[146]

[10]We conclude that the Proxy's statement that J.P. Morgan will receive "customary compensation" in connection with these four concurrent representations is not sufficient. First, absent disclosure of the amount of the fees, the stockholders could not compare J.P. Morgan's concurrent fees from counterparties with the fees collected from the Company in this Transaction — approximately $42 million.[147] This lack of disclosure prevented stockholders from contextualizing and evaluating J.P. Morgan's concurrent conflicts of interest.[148] We hold that it is reasonably conceivable that J.P. Morgan's concurrent conflicts with counterparties to the Transaction would have altered the total mix of information available to stockholders and, therefore, should have been disclosed.[149]

***298** *3. J.P. Morgan's Prior Representations Were Not Adequately Disclosed*

We turn next to J.P. Morgan's prior representations of Nordic and members of the Equity Consortium.[150] Appellants argue that the Proxy failed to adequately disclose nearly $400 million in fees that J.P. Morgan had earned from members of the Equity Consortium in the two years preceding the Transaction.[151] Instead, it only explicitly disclosed that J.P. Morgan received $15.2 million in fees from Nordic in that same two-year span.[152] As noted above, the trial court summarily rejected the claim.[153]

[11]We hold that the Proxy failed to adequately disclose J.P. Morgan's prior conflicts with members of the Equity Consortium.[154] In contrast to the approximately $15.2 million in advisory fees received from Nordic,[155] J.P. Morgan, in the same time period, received nearly $400 million in fees from members of the Equity Consortium: (i) $250 million to $270 million from GIC; (ii) $78 million to $83 million from Insight; (iii) and $20 million to $30 million from 22C Capital.[156] Instead of explicitly disclosing J.P. Morgan's fees ranging from $348 to $383 million received from members of the Equity Consortium in the same time period, the Proxy stated that:

> During the two years preceding the date of J.P. Morgan's opinion, J.P. Morgan and its affiliates have had and continue to have commercial or investment banking relationships with certain affiliates of Parent, including Parent's parent company, Nordic Capital X, as well as certain affiliates of each of GIC Pte. Ltd., Insight Venture Partners, L.P. and 22C Capital LLC, for which J.P. Morgan ***299** and such affiliates have received, or will receive, customary compensation. In addition, J.P. Morgan's commercial banking affiliate is an agent bank and a lender under outstanding credit facilities of certain affiliates of GIC Pte. Ltd. and certain affiliates of Insight Venture Partners, L.P., for which it receives customary compensation or other financial benefits.[157]

Although the Proxy stated that J.P. Morgan has "had and continue[d] to have commercial or investment banking relationships" with Nordic and members of the Equity Consortium, for which it and its affiliates will receive "customary compensation[,]" this disclosure created a misleading impression as to the "rough scale" of the omitted fees.[158] The undisclosed fees were roughly twenty-five times the disclosed fees and ten times the fees earned in the Transaction. By disclosing the amount of fees earned in the prior two years from Nordic — namely $15.2 million — stockholders could be misled into thinking that the undisclosed fees earned in the concurrent representations were of a similar magnitude.

C. The Proxy's Description of Evercore's Role in the Market Outreach

Finally, we address the Proxy's disclosure of Evercore's role in the third-party market outreach. Appellants contend that J.P. Morgan was solely responsible for conducting market outreach and, consequently, the Proxy misleadingly implied that Evercore had a substantive role in conducting market outreach.[159] They contend that the allegedly false statements were material "because they gave stockholders the misleading impression that Evercore mitigated [J.P. Morgan]'s conflicts, ostensibly legitimizing a tainted market check conducted solely by conflicted Dunleavy's representative."[160]

Plaintiffs presented the following chart in their Complaint[161] in an attempt to illustrate the Proxy's overstatement of Evercore's role in the market outreach process:

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Proxy	Special Committee Minutes
On August 11, 2021, the Special Committee . . . ***instructed the representatives of J.P. Morgan and Evercore*** to reach out to a specified list of other potential buyers and strategic partners, in addition to those that had been contacted previously, to assess whether another party would be willing to offer a price that exceeded Nordic Capital X's updated proposal. The Special Committee also ***instructed the representatives of J.P. Morgan and Evercore to re-solicit interest*** of the strategic and private equity bidders who had previously shown interest in exploring a transaction with the Company, including PE Firm B.[162]	August 11, 2021 Special Committee Minutes: Following discussion with JP Morgan, Evercore Group L.L.C., independent financial advisor to the Special Committee ("Evercore"), and Latham & Watkins LLP, independent legal advisor to the Special Committee ("Latham"), ***the Special Committee indicated that JP Morgan should actively expand and engage in buyer outreach and negotiations with potential buyers*** other than Nordic Capital as quickly as possible.[163]
Between August 11, 2021 and August 13, 2021, . . . ***As instructed by the Special Committee, representatives of Evercore and J.P. Morgan also reached out to 10 potential counterparties***, including PE Firm B and Company D as well as other strategic counterparties and financial sponsors, to gauge their interest in a potential acquisition of the Company at a price at or above $41.00 per share.[164]	August 12, 2021 Special Committee Minutes: ***JPM Update. Representatives of J.P. Morgan Securities LLC, financial advisor to the Company ("JP Morgan")*** . . . reported on the progress in the past 24 hours of, among other things, (i) negotiations with Nordic Capital and sources of equity financing in connection with funding the transaction and (ii) the buyer outreach and negotiations conducted with potential buyers other than Nordic Capital. * * * ***Following discussion with JP Morgan, the Special Committee indicated that JP Morgan should simultaneously continue*** negotiations with Nordic Capital and continue ***the buyer outreach and negotiations with potential buyers other than Nordic Capital*** to determine whether a transaction with a new consortium of investors to sell the Company on equal or more favorable terms was likely to be feasible in a reasonable period of time.[165]

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The Special Committee held a meeting on August 13, 2021 . . . ***Representatives of J.P. Morgan and Evercore also provided an update on their outreach to other potential counterparties that may be interested in an acquisition of the Company. Representatives of J.P. Morgan and Evercore reported*** that certain potential counterparties declined to participate further in a sale process, other potential counterparties responded with varying degrees of interest, but no potential counterparty had expressed an interest in offering a price at or above $41.00 per share.[166]	August 13, 2021 Special Committee Minutes: ***JPM Update; Additional Outreach. [JP Morgan] proceeded to present an update on the expanded buyer outreach and negotiations conducted with potential buyers other than Nordic Capital***, including new buyers who had not previously been contacted. * * * Following discussion with Evercore and JP Morgan, ***the Special Committee indicated that JP Morgan should simultaneously*** . . . (ii) continue to reach out to and negotiate with potential buyers other than Nordic Capital, in particular the three potential buyers who were conducting preliminary analyses. * * * ***The Special Committee indicated that the Company should . . . (ii) continue to engage in active buyer outreach through JP Morgan.***[167]
After extensive discussions [at the August 16 Special Committee meeting], and noting: (1) ***the extensive bidder outreach activity by J.P. Morgan and Evercore since May 2021*** (including outreach to over 30 potential bidders, 14 of which signed confidentiality agreements and commenced due diligence) . . . the Special Committee determined that it would be reasonable to accept the removal of the "go shop" provision . . .[168]	[At the August 16 Committee meeting] representatives of Evercore presented . . . ***an overview of the buyer outreach, market check, and negotiations conducted by JP Morgan***, including the continued and expanded outreach conducted following Nordic Capital's revised offer reducing the price from the previous $44 per share . . . .[169] * * * [At the August 17 Committee meeting] Mr. Hiltz remarked that while a go-shop provision would be beneficial to the Company by allowing the Company to meaningfully negotiate with other parties during the go-shop period, ***given the robust buyer outreach, market check, and negotiations conducted by JP Morgan***, including the continued and expanded outreach conducted following Nordic Capital's revised offer reducing the price from the previous $44 per share, and the Bloomberg article in late July, the real-world benefits of such a provision were in his view likely to be limited.[170]

[**Editor's Note:** The preceding images contain the references for footnotes[162,163,] ***302** [164,165,166,167,168,169,170]].

Appellees respond that Appellants have "cherry-picked" statements to create an inaccurate impression. Based upon our review of the Proxy and the minutes, the chart persuades us that the answer lies somewhere in between the two positions but is closer to Appellants' version.

The Proxy does suggest that Evercore had at least an oversight role in the process even though J.P. Morgan, according to the minutes, was directly involved in the contacts and negotiations with Nordic and other potential bidders. The Proxy states, for example:

> On July 25, 2021, at a meeting of the Special Committee attended by representatives of J.P. Morgan, Evercore and [Latham], J.P. Morgan presented a detailed preliminary summary of the bidder outreach conducted and indications of interest received to date and the criteria used to seek out these potential bidders. After J.P. Morgan left the meeting, the Special Committee discussed the presentation and its overall

> assessment of bidder outreach extensively with representatives of Evercore and [Latham].[171]
>
> During this meeting [on August 1, 2021], the members of the Special Committee and [Latham] updated the independent directors of the Board who are not on the Special Committee about the Special Committee's activities, Evercore's views regarding the outreach to potential acquirers of the Company conducted by J.P. Morgan and Nordic Capital X's ongoing due diligence efforts and equity and debt financing activities.[172]

The meeting minutes of the Special Committee and the board of directors suggest that Evercore assisted in a review and analysis of that process:

> *July 25, 2021 Meeting Minutes/Special Committee:* Members of the Special Committee discussed the importance of the review and analysis by [Evercore], independent financial advisor to the Special Committee, of the buyer outreach and market check conducted by [J.P.] Morgan to date.[173]
>
> ....
>
> *August 6, 2021 Meeting Minutes/Independent Directors:* [An Evercore Representative] reported that Evercore has been focused on, among other matters, (i) reviewing the [J.P. Morgan] Process in connection with considering [an] exclusivity arrangement with Nordic Capital as well as proposing a "go-shop" provision in the merger agreement and (ii) conducting ***303** a valuation analysis of the Company ... reviewing the 10-year financial model prepared by [J.P.] Morgan ....[174]
>
> ....
>
> *August 12, 2021 Meeting Minutes/Special Committee:* Noting that the Company is not required to enter into any transaction, with Nordic Capital or otherwise, to sell the Company, the Special Committee discussed with Latham and Evercore potential alternative transactions available to the Company, including a transaction to sell the Company to a different consortium of investors or not to enter into any transaction .... Questions were asked by members of the Special Committee and answered by representatives of Latham and representatives of Evercore.[175]
>
> ....
>
> *August 13, 2021 Meeting Minutes/Special Committee:* The Special Committee further indicated that Evercore, as independent financial advisor to the Special Committee, should coordinate with [J.P.] Morgan and offer to the extent helpful, to be directly involved in such discussion with Nordic Capital and other potential buyers.[176]
>
> ....
>
> *August 16, 2021 Meeting Minutes/Special Committee:* Among other matters, representatives of Evercore presented (i) a summary of the premia and transaction multiples implied by the Current Merger Consideration, (ii) an overview of the buyer outreach, market check, and negotiations conducted by [J.P.] Morgan, including the continued and expanded outreach conducted following Nordic Capital's revised offer reducing the price from the previous $44 per share ....[177]
>
> ....
>
> *August 17, 2021 Meeting Minutes/Special Committee:* [A J.P. Morgan Representative] proceeded to present an update on the expanded buyer outreach and negotiations conducted by [J.P.] Morgan, with the participation of [Evercore], independent financial advisor to the Special Committee[.][178]

The minutes depict Evercore's role as more of an analytical and supervisory one. If the minutes are accurate, as alleged in the Complaint (and chart), then the Proxy does appear to overstate the role that Evercore played in the outreach efforts in mid-August 2021.[179]

***304** There is nothing wrong with J.P. Morgan taking the lead. As the Chancellor observed, J.P. Morgan was involved in the negotiations a month before Evercore was retained by the Special Committee.[180] But J.P. Morgan had certain conflicts and the trial court based its dismissal of this claim partly on its view that J.P. Morgan was not conflicted.[181] Here, we have held that the Proxy failed to adequately disclose conflicts relating to both Evercore and J.P. Morgan. The Proxy's suggestions of a more active role for Evercore takes on added significance in a scenario where J.P. Morgan, as the lead advisor, faced conflicts. The Proxy's version of the facts suggests that Evercore was in a better position than it actually was to mitigate any effects of J.P. Morgan's conflicts. The trial court recognized the importance of this mitigation role when it said that "[t]o the extent that the special committee perceived [J.P. Morgan's] conflicts, they hired Evercore to help with the process."[182] According to the Complaint, Evercore's mitigation role was affected not only by its own conflicts but also by its secondary and more limited role in the outreach process. It would not be a stretch to say that it is reasonably conceivable that the alleged facts could make a difference to stockholders in analyzing and weighing the advice of the advisors and in evaluating the overall effectiveness of the market outreach.

[12] [13]As we cautioned in *Appel v. Berkman*, "when a board chooses to disclose a course of events or to discuss a specific subject, it has long been understood that it cannot do so in a materially misleading way, by disclosing only part of the story, and leaving the reader with a distorted impression."[183] Rather, "[d]isclosures must provide a balanced, truthful account of all matters they disclose."[184] And "[p]artial disclosure, in which some material facts are not disclosed or are presented in an ambiguous, incomplete, or misleading manner, is not sufficient to meet a fiduciary's disclosure obligations."[185]

[14]In view of our reversal of the trial court's dismissal of the claims concerning the advisors' conflicts, we need not "pile on" another basis for reversal. Suffice it to say that the Proxy's description of Evercore's role in the market outreach efforts do not sit comfortably with the corresponding accounts set forth in the minutes. Boards, committees, and their advisors should take care in accurately describing the events and the various roles played by board and committee members and their retained advisors.

In sum, because the Proxy was deficient in its failure to disclose certain of the Special Committee's advisors' conflicts of interest, we REVERSE the Court of Chancery's dismissal of the Complaint.

IV. CONCLUSION

For the reasons set forth herein, we REVERSE the decision of the Court of ***305** Chancery and remand for further proceedings consistent with this opinion.

All Citations

319 A.3d 271

Footnotes

1 We refer to Nordic Capital, together with its affiliates, as "Nordic."

2 88 A.3d 635 (Del. 2014), *overruled on other grounds by* *Flood v. Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

3 The facts, except as otherwise noted, are taken from the Verified Class Action Complaint filed on August 9, 2022 [hereinafter "Complaint" or "Compl."] and the Court of Chancery's telephonic bench ruling on July 31, 2023 [hereinafter "Bench Ruling"]. *See* Opening Br., Ex. A. In this procedural posture, they are presumed to be true.

4 When addressing the proceedings below, we refer to Appellants as "Plaintiffs" and Appellees as "Defendants."

5 A33 (Compl. ¶ 10).

6 *Id.*

7 A33 (Compl. ¶ 11). Inovalon is incorporated in Delaware and headquartered in Bowie, Maryland.

8 A33 (Compl. ¶ 12). Dunleavy also served as the Chair of Inovalon's board of directors from the board's creation in 2006 through

the Transaction. *Id.*

9 Meritas Group is a Delaware corporation. Dunleavy is its sole officer and director. It owned 42,356,820 shares of Inovalon Class B stock at the time of the Transaction, and it rolled over 17,073,171 of those shares in the Transaction. Meritas LLC is a Delaware LLC that owned 7,470,435 shares of Inovalon Class B stock at the time of the Transaction. Dunleavy is the sole non-member manager of the LLC. The Dunleavy Foundation is a Delaware non-profit organization that owned 5,120,000 Inovalon Class B shares at the time of the Transaction. A33–A35 (Compl. ¶¶ 13–16).

10 A35–A36 (Compl. ¶¶ 17–18). Cape Capital is a Luxembourg Company controlled by Hoffmann. It rolled over 14,634,147 Class B shares in the Transaction. A36 (Compl. ¶ 19).

11 A36–A40 (Compl. ¶¶ 20–26); *see also* A227–A481 (Cumings Aff., Ex. 1) (Schedule 14A Proxy Statement of Inovalon) (Oct. 15, 2021) [hereinafter "Proxy"].

12 A40 (Compl. ¶ 30). The Complaint also highlighted the longstanding professional and personal relationships that certain board members had with Dunleavy and Hoffmann and some of the board members' compensation from Inovalon. A36–A40 (Compl. ¶¶ 20–26).

13 A41 (Compl. ¶ 33) (quoting Article IV Section D(2)(c) of Inovalon's Second Amended and Restated Certificate of Incorporation).

14 A42 (Compl. ¶ 36). Hoffmann retired from his position on the board in July 2020, but maintained his Class B ownership.

15 A45 (Compl. ¶ 41) (detailing that Inovalon generates a substantial majority of its revenue through the sales or subscription licensing of its platform solutions, as well as from related arrangements for advisory, implementation, and support services).

16 A45–A46 (Compl. ¶¶ 42–43) (internal quotation marks and citation omitted).

17 A48 (Compl. ¶ 47). During the Covid-19 pandemic, Inovalon was able to partner with Medicare and Medicaid Services to distribute software that helped Covid-19 vaccine administration across the country.

18 A50 (Compl. ¶ 51).

19 A259 (Cumings Aff., Ex. 1) (Proxy at 22).

20 *Id.*

21 *Id.*

22 A53 (Compl. ¶ 59).

23 Specifically, Nordic's fund — Nordic Capital Epsilon SCA, SICAV-RAIF — a Luxembourg investment fund, would acquire Inovalon. A30 (Compl. ¶ 2).

24 A54–A55 (Compl. ¶ 62) (alleging that the retention agreement did not mention any form of capital or debt raise; instead, it only addressed an acquisition or merger).

25 A55–A56 (Compl. ¶ 64).

26 *Id.* Nordic was not one of the parties that had met with Inovalon management or J.P. Morgan. A56 (Compl. ¶ 65).

27 A56–A57 (Compl. ¶ 67) (Latham had previously worked with Nordic on unrelated mergers and acquisitions). *See id.* (listing Latham's prior representations of Nordic, including: (i) Nordic's early 2021 acquisition of Advanz Pharma; (ii) Nordic's early 2021 merger with Bioclinica; and (iii) Nordic's portfolio company, Clario, in a late 2021 divestiture).

28 A58–A59 (Compl. ¶ 72).

29 *Id. See also* Rollover Equity, Wall Street Prep (last updated Feb. 20, 2024), https://www.wallstreetprep.com/knowledge/rollover-equity/ ("Rollover equity refers to the exit proceeds reinvested by a seller into the equity of the newly formed entity post-acquisition. An equity rollover is therefore designed to align the economic incentives among participants in the post-transaction entity."). It is at this point, according to Plaintiffs, that "the specter of Dunleavy's overriding conflict of interest should have been clear to the Board, necessitating a special committee to ensure a fair process." A59 (Compl. ¶ 73).

30 A59 (Compl. ¶ 74) (adding that Dunleavy immediately forwarded Permira's communication to J.P. Morgan and, on July 7, Permira signed an NDA).

31 A59 (Compl. ¶ 75).

32 *Id.*

33 A547 (Cumings Aff., Ex. 6) (Nordic's Letter of Interest) (July 12, 2021).

34 A60 (Compl. ¶ 76) (noting that Nordic's letter explicitly stated: "the current management team of Inovalon is critical for the future success of the Company" and that Nordic "would be committed to supporting the management in executing on its business plan and strategy for the Company.") (internal quotation marks and citation omitted).

35 A60 (Compl. ¶ 77). It appears that the trial court mistakenly stated that this meeting occurred on June 13 as opposed to July 13. Bench Ruling at 9.

36 A60–A61 (Compl. ¶ 78).

37 A61 (Compl. ¶ 80).

38 A62 (Compl. ¶ 81) (internal quotation marks and citation omitted).

39 A62 (Compl. ¶ 82) (noting that Permira dropped out because it was unable to conduct its due diligence in light of how quickly the Transaction was moving).

40 A62–A63 (Compl. ¶ 83) (internal quotation marks and citation omitted).

41 A63–A64 (Compl. ¶ 85).

42 A64 (Compl. ¶ 86) (Latham proceeded to provide "an overview of the use and establishment of a special committee in the context of transactions in which a[n] existing controlling shareholder may form part of the consortium proposing to acquire 100% of the company.") (internal quotation marks and citation omitted).

43 *See* A263 (Cumings Aff., Ex. 1) (Proxy at 26) (stating that "although [Latham] had been retained in June 2021 as counsel to the Company, [Latham] was not the Company's historic counsel and was independent of Company management and Dr. Dunleavy.").

44 A65–A66 (Compl. ¶¶ 87–89).

45 A67 (Compl. ¶ 92) (internal quotation marks and citation omitted). Plaintiffs alleged that, "[t]hus, by at least July 22, 2021, the Special Committee and/or Latham were likely aware of the identity of some (if not all) of Nordic's proposed co-investors who would later form the Consortium." *Id.*

46 A68 (Compl. ¶ 93).

47 A69 (Compl. ¶ 95) (referring to, in addition to Nordic, Insight Venture Partners, L.P. ("Insight"), GIC Pte. Ltd. ("GIC"), and 22C Capital LLC ("22C")). *See also* A290 (Cumings Aff., Ex. 1) (Proxy at 53) (disclosing Evercore's advisory fees from members of the Equity Consortium in the preceding years).

48 A69–A70 (Compl. ¶ 96) (internal citations omitted).

49 A70 (Compl. ¶ 98). Plaintiffs interpreted this fee structure to mean that "Evercore's fee was entirely based upon a successful conclusion of a transaction[.]" A71 (Compl. ¶ 98).

50 A71 (Compl. ¶ 99) (noting that the "Committee discussed the importance of the review and analysis by Evercore ... of the buyer outreach and market check conducted by JP Morgan to date.") (internal quotation marks and citation omitted); A74 (Compl. ¶ 104) (detailing that on July 28, 2021, the Special Committee told Evercore to continue its review of J.P. Morgan's process by specifically "determin[ing] whether there were potential financial and strategic buyers that should have been, but were not yet, contacted, and the extent to which JP Morgan engaged potential buyers in meaningful dialogue.") (internal quotation marks and citation omitted).

51 A74–A75 (Compl. ¶ 106). *See also* A75 (Compl. ¶ 108) (detailing that "since July 2019, JP Morgan had received fees of $78 to $83 million from business with Insight, $250-$270 million from business with GIC, and $20-$30 million from business with 22C.") (internal citation omitted). On July 28, 2020, Insight, one of Nordic's co-investors, signed an NDA with Inovalon. A75 (Compl. ¶ 106).

52 A78 (Compl. ¶ 113) (citing A265 (Cumings Aff., Ex. 1) (Proxy at 28)).

53 A266 (Cumings Aff., Ex. 1) (Proxy at 29).

54 A88 (Compl. ¶ 135) (internal quotation marks and citation omitted).

55 A88–A89 (Compl. ¶ 136).

56 A89 (Compl. ¶ 137). The Plaintiffs allege that "[t]he Proxy falsely stated that the total required rollover was only $1 billion

(Dunleavy $700 million, Hoffmann $300 million)." *Id*. (internal citation omitted).

57 A95 (Compl. ¶ 150).

58 A268 (Cumings Aff., Ex. 1) (Proxy at 31).

59 The Proxy states that "the independent members of the Company Board (consisting of all members of the Company Board other than Dr. Dunleavy, who recused himself) unanimously approved and declared advisable the Merger Agreement ...."). A269 (Cumings Aff., Ex. 1) (Proxy at 32).

60 A98 (Compl. ¶ 156).

61 *Id.*

62 A611 (Cumings Aff., Ex. 14) (Annex B to Terms and Conditions of [the LP] Agreement).

63 A620 (Cumings Aff., Ex. 14) (Annex B to Terms and Conditions of [the LP] Agreement, at 9) ("Upon or as soon as practicable after the Closing, the Company will implement a MIP on terms and conditions consistent with those set forth in MIP Term Sheet attached as Annex I hereto.").

64 A621 (Cumings Aff., Ex. 14) (Annex B, Project Ocala, Management Incentive Plan Term Sheet).

65 A102 (Compl. ¶ 165). The trial court mistakenly stated that Inovalon issued the supplemental disclosures on November 15, as opposed to November 5. Bench Ruling at 19.

66 A117 (Compl. ¶ 188 n.186) (citing Inovalon's Form 8-K (Nov. 16, 2021)).

67 Bench Ruling at 19.

68 A136–A137 (Compl. ¶¶ 242–47).

69 Bench Ruling at 22.

70 *Flood*, 195 A.3d 754.

71 *Olenik v. Lodzinski*, 208 A.3d 704 (Del. 2019).

72 *Flood*, 195 A.3d at 763.

73 Bench Ruling at 27.

74 *Id.* As the Chancellor observed, even in August 2021, the Special Committee "instructed J.P. Morgan to actively engage in buyer outreach with other interested parties." *Id.* at 13. Appellees also argued to this Court that it would not have made sense to stop in the middle of an active outreach process at that point — to form a Special Committee — when only one bidder had expressed interest in a rollover. Oral Argument, at 30:45–31:30, https://vimeo.com/913043373.

75 Bench Ruling at 28–29.

76 *Id.* at 30.

77 *Id.* at 31.

78 *Id*.

79 *Id.* at 32.

80 *Id.* at 33.

81 *Id.*

82 *Id.* at 35.

83 *Id.*

84 *Id.* at 36.

85 *Id.* The trial court also noted that the Special Committee's timing in dropping the go-shop provision was relevant:

> By this point, the special committee had instructed J.P. Morgan to conduct outreach to over 30 potential bidders, 13 of which signed NDAs and three of which submitted bids before declining to proceed. Despite all these efforts, no other bidder was willing to give Inovalon more than Nordic had offered. By conducting a market check, the special committee apprised itself of any other potential third-party interest before signing. So it's not reasonably conceivable to me that agreeing to drop the go-shop provision constituted gross negligence.

Id. at 37.

86 *Id.*

87 *Id.* at 37–38.

88 *Id.* at 39 (holding that, "since I've already found that those allegations weren't entirely persuasive, I do not believe that the precise information that plaintiffs deem a disclosure deficiency would have altered the total mix of information available to stockholders.").

89 *Id.* at 40.

90 *Id.* at 42.

91 *Id. See also* A621 (Cumings Aff., Ex. 14) (Annex B, Project Ocala, Management Incentive Plan Term Sheet).

92 Bench Ruling at 43.

93 A267 (Cumings Aff., Ex. 1) (Proxy at 30).

94 *Malpiede v. Townson*, 780 A.2d 1075, 1082 (Del. 2001) (internal citation omitted).

95 *MFW*, 88 A.3d at 645 (emphasis in original). In *Flood*, we clarified that "[t]o avoid one of *Lynch*'s adverse consequences—using a majority-of-the-minority vote as a chit in economic negotiations with a Special Committee—*MFW* reviews transactions under the favorable business judgment rule if 'these *two protections are established up-front*.' " 195 A.3d at 762 (quoting *MFW*, 88 A.3d at

644) (emphasis added)).

96 298 A.3d 667 (Del. 2023).

97 *Id.* at 708 (quoting *MFW*, 88 A.3d at 646 (emphasis in original)).

98 *Id.* (quoting *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (internal quotation marks and citation omitted)).

99 2024 WL 1449815 (Del. 2024).

100 *Id.* at *1.

101 Bench Ruling 39–43 (discussing *City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, Inc.*, 2022 WL 3009959 (Del. Ch. 2022)).

102 A264 (Cumings Aff., Ex. 1) (Proxy at 27).

103 A266 (Cumings Aff., Ex. 1) (Proxy at 29).

104 A670 (Cumings Aff., Ex. 24) (Additional Proxy Soliciting Material on Schedule 14A) (Aug. 19, 2021). As noted by Appellees, the proxy supplement was filed publicly two months before the Proxy, it was available on the SEC's website, the Company's website, and to any stockholder that requested a copy from the Company. Answering Br. at 41–42.

105 A673 (Cumings Aff., Ex. 24) (Additional Proxy Soliciting Material on Schedule 14A) (Aug. 19, 2021).

106 A256 (Cumings Aff., Ex. 1) (Proxy at 19).

107 A597 (Cumings Aff., Ex. 13) (Minutes of a Meeting of the Special Committee dated August 2, 2021) (emphasis added).

108 *Id.* (emphasis added).

109 Opening Br. at 35. Appellants argue that the "MIP was a legally binding Transaction Term[ ]" because the LP Agreement provided that "[u]pon or as soon as practicable after the Closing, the Company *will implement a MIP* on terms and conditions consistent with those set forth in [the] MIP Term Sheet." Reply Br. at 9 (emphasis in original) (internal quotation marks and citation omitted).

110 A621 (Cumings Aff., Ex. 14) (Annex B, Project Ocala, Management Incentive Plan Term Sheet).

111 A469 (Cumings Aff., Ex. 1) (Annex A to Rollover Agreement).

112 A228 (Cumings Aff., Ex. 1) (Proxy Introduction) ("Dr. Dunleavy will continue to be a substantial shareholder in the Company, serve on the Company Board and continue as Inovalon's CEO.").

113 Opening Br. at 41.

114 Bench Ruling at 38–39.

115 *City of Dearborn Police and Fire Revised Ret. Sys. v. Brookfield Asset Mgmt., Inc.*, 2024 WL 1244032 (Del. 2024).

116 We note that our decision in *Brookfield* came after the Court of Chancery had decided both *Brookfield* and this case and thus, the court did not have the benefit of our decision in *Brookfield* when deciding the similar issues here.

117 *Millenco L.P. v. meVC Draper Fisher Jurvetson Fund I, Inc.*, 824 A.2d 11, 18 (Del. Ch. 2002) (quoting *Arnold v. Soc'y for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1277 (Del. 1994)).

118 *Brookfield*, 2024 WL 1244032, at *17 (internal quotation marks and citation omitted). *See also In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *16 (Del. Ch. 2009) ("There is no rule ... that conflicts of interest must be disclosed only where there is evidence that the financial advisor's opinion was actually affected by the conflict."); *Millenco L.P.*, 824 A.2d at 15 ("[T]he relevant inquiry is not whether an actual conflict of interest exists, but rather whether full disclosure of potential conflicts of interest has been made.") (internal quotation marks and citation omitted).

119 *Brookfield*, 2024 WL 1244032, at *17 (quoting *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 832 (Del. Ch. 2011)).

120 A290 (Cumings Aff., Ex. 1) (Proxy at 53) (emphasis added).

121 A75 (Compl. ¶ 107) (internal citation omitted).

122 A1136 (Cumings Aff., Ex. 33) (Evercore Summary of Relationships) (Aug. 18, 2021).

123 A69 (Compl. ¶ 95) (citing A290 (Cumings Aff., Ex. 1) (Proxy at 53)).

124 A1137 (Cumings Aff., Ex. 33) (Evercore Summary of Relationships) (Aug. 18, 2021) (stating that, "[i]n addition, we note that one of Evercore's affiliated businesses has been in discussions with Nordic Capital regarding a potential transaction that is unrelated to the Company or this engagement. Such discussions may result in an active engagement in the near term with potential customary fees.").

125 A68 (Compl. ¶ 94).

126 A69–A70 (Compl. ¶ 96).

127 *See generally*, A68 (Compl. ¶ 94) ("Evercore belatedly admitted to the Board in its conflict disclosure that while it was representing the Committee it was also exploring concurrent engagements with Nordic[.]"); A69 (Compl. ¶ 96) ("Evercore acknowledged that it was providing confidential financial advisory services—concurrent with its work for the Special Committee on the Transaction—to one of the Relevant Parties [to the Transaction] on a matter that is unrelated to the Company.") (internal quotation marks and citation omitted).

128 A1138 (Cumings Aff., Ex. 33) (Evercore Summary of Relationships) (Aug. 18, 2021).

129 Opening Br. at 44; *see also* A109 (Compl. ¶ 177) (alleging that "Evercore's engagements with Nordic and Insight, which were concurrent with Evercore's engagement by the Special Committee on the Transaction, were not disclosed to stockholders in the Proxy.").

130 A290 (Cumings Aff., Ex. 1) (Proxy at 53) (emphasis added).

131 *Brookfield*, 2024 WL 1244032, at *18 (holding that "[t]he use of 'may' in the Proxy is misleading because [the financial advisor] had indeed already invested nearly half a billion dollars[,]" and that "[t]his misleading language also makes it less likely that a stockholder would have been prompted to locate [the financial advisor]'s [counterparty] holdings in its publicly filed form 13F.") (internal citation omitted).

132 *See, e.g., id.* at *18 (observing that "an advisor's concurrent engagement with a transaction counterparty can present legitimate concerns regarding the advisor's objectivity[.]"); *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *43 (Del. Ch. 2018) (a "[financial advisor]'s ongoing relationship with [a potential bidder] gave it a powerful incentive to maintain good will and not

push too hard during the negotiations.") (internal quotation marks and citations omitted), *aff'd*, 211 A.3d 137, 2019 WL 2144476 (Del. 2019) (ORDER).

133 *See* Answering Br. at 48–49 ("To be sure, Evercore did *not* concurrently represent Nordic or other Consortium members while advising the Committee. As Plaintiffs admit, any concurrent work was performed by Evercore's *affiliates*, not Evercore itself, on entirely unrelated matters. No additional disclosure obligation arises in these circumstances.") (emphasis in original) (internal quotation marks and citations omitted).

134 Reply Br. at 16–17. *See also* A68–A69 (Compl. ¶ 94, n.68) (citing to Press Release), *Nordic Capital exits investment in Vizrt Group to a new Nordic Capital-led consortium to further support successful growth journey* (Dec. 28, 2021), https://www.nordiccapital.com/news-views/press-releases/nordic-capital-exits-investment-in-vizrt-group-to-a-new-nordic-capital-led-consortium-to-further-support-successful-growth-journey/.

135 Reply Br. at 16–17 (citing A69–A70 (Compl. ¶ 96, n.73)).

136 Our Court has acknowledged that work performed by an affiliate of a retained entity may present a conflict of interest:

> In our view, the Special Committee established to negotiate the purchase of the block of NL stock did not function independently .... The Special Committee's advisors did little to bolster the independence of the principals. The financial advisor ... was recommended by [a member of the Special Committee] and [was] quickly retained by the full Special Committee. In the past, an *affiliate* bank of [the financial advisor] had derived significant fees from [controller's] controlled companies and at the time of the transaction was affiliated with [a member of the Special Committee]'s current employer.

Kahn v. Tremont Corp., 694 A.2d 422, 429–30 (Del. 1997) (emphasis added).

137 *See* A290 (Cumings Aff., Ex. 1) (Proxy at 53).

138 A283 (Cumings Aff., Ex. 1) (Proxy at 46) (emphasis added).

139 A105 (Compl. ¶ 171).

140 A105–A106 (Compl. ¶ 171).

141 *See* *Kihm v. Mott*, 2021 WL 3883875, at *18 (Del. Ch. 2021) ("When a financial advisor faces a conflict, this Court has *generally* required disclosure of the relationship itself *and* the amount of fees the advisor received.") (emphasis added) (citing *In re Saba Software, Inc. S'holder Litig.*, 2017 WL 1201108, at *11 (Del. Ch. 2017) ("What was material, and disclosed, was the prior working relationship and the amount of fees.")), *aff'd*, 276 A.3d 462, 2022 WL 1054970 (Del. 2022) (ORDER).

142 *Brookfield*, 2024 WL 1244032, at *17. *See also* *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 860 (Del. 2015) ("[I]t is imperative for

the stockholders to be able to understand what factors might influence the financial advisor's analytical efforts ....") (internal quotation marks and citation omitted).

143 *Rodden v. Bilodeau*, C.A. No. 2019-0176, at 20–21 (Del. Ch. Jan. 27, 2020) (TRANSCRIPT). There, the Vice Chancellor also concluded that references to "customary fees" would have been meaningful to stockholders in calculating the amount of past fees only if they knew what fees would be customary for the kind of work performed. The court was "not inclined to assume that level of familiarity among [the target's] stockholders on this record." *Id.* at 21.

144 *See, e.g., Assad v. Botha*, 2023 WL 7121419, at *6 (Del. Ch. 2023) ("Generally, the disclosure of the specific fees a financial advisor received from unrelated work for a transactional counterparty is immaterial where the relationship and its rough scale are disclosed.").

145 *In re Micromet, Inc. S'holders Litig.*, 2012 WL 681785, at *12 (Del. Ch. 2012) ("Nevertheless, Plaintiffs claim that this partial disclosure requires supplementation to provide the actual amounts received by [the financial advisor]. They fail to provide any persuasive explanation, however, as to why the actual amount of fees paid by [the target company] to [the financial advisor] would be material to shareholders or to cite any Delaware case law mandating such disclosures. This is not a situation in which [the target company], apart from [the acquirer], would be a potential source of future business.").

146 A283 (Cumings Aff., Ex. 1) (Proxy at 46) (emphasis added).

147 *Id.* ("For financial advisory services rendered in connection with the Merger, the Company has agreed to pay J.P. Morgan an estimated fee of $42 million, $3.0 million of which became payable to J.P. Morgan at the time J.P. Morgan delivered its opinion and the remainder of which is contingent and payable upon the consummation of the Merger.").

148 Disclosure of a special committee's advisor's conflicts of interest enables minority stockholders to weigh that advisor's opinion in light of those conflicts:

> Omitting those advisors' conflicts was materially misleading. The Proxy failed to disclose that [financial advisor #1] was providing services to [counterparty] while advising the Transaction Committee, and that [financial advisor #1]'s services to [counterparty] netted it hundreds of millions of dollars. It also failed to disclose that [financial advisor #2], retained to provide a fairness opinion, received $14.2 million in fees from [counterparty] engagements. This information would certainly help [target] stockholders contextualize the financial advisors' potential conflict of interest. A more balanced disclosure ... would have significantly altered the total mix of information available to the individual ... stockholder.

Allen v. Harvey, 2023 WL 7122641, at *7 (Del. Ch. 2023) (internal quotation marks and citations omitted).

149 *See Tornetta v. Maffei*, C.A. No. 2019-0649, at 18–19 (Del. Ch. Feb. 23, 2021) (TRANSCRIPT) (determining that a financial advisor's alleged concurrent representation of a counterparty on an unrelated transaction was a material fact requiring disclosure because that representation was "twice the size" of the transaction at issue and the financial advisor's fees from the concurrent representation "represented the largest source of [that advisor]'s revenues[.]"); *see also In re Art Tech. Grp., Inc. S'holders Litig.*, C.A. No. 5955, at 101–102 (Del. Ch. Dec. 20, 2010) (TRANSCRIPT) (holding that, given the nature of a disclosure in the proxy concerning a financial advisor's prior advisory services to a counterparty to the transaction, there needed to be a supplemental disclosure of that advisor's fees from the counterparty "given the magnitude of the fees on the [counterparty]'s side[.]").

150 Appellees assert that the prior fees that Appellants claim were omitted "were those [J.P. Morgan] purportedly earned from Consortium members' *affiliates*." Answering Br. at 52 (emphasis in original) (internal citation omitted). Appellants counter that the Complaint cites press releases indicating that all four concurrent engagements directly involved J.P. Morgan, and that three of those engagements related to work performed directly for an Equity Consortium member or Nordic, not one of their affiliates (*i.e.*, its work for Nordic on two transactions and GIC on its Arctic Green investment). A105–106 (Compl. ¶ 171). Based on the record before us, we are not persuaded that Appellees' attempted distinction regarding affiliates of Equity Consortium members should alter our materiality analysis.

151 Opening Br. at 45.

152 *Id.*

153 Bench Ruling at 38–39.

154 This issue was highlighted at oral argument:

> **The Court**: It does say customary compensation in the Proxy. So your position is the actual amounts have to be disclosed? There are cases that say that the actual amount is not always necessary to be disclosed. Right?
>
> **Appellants' Counsel**: Well, that is certainly right your Honor, but I think when you look at the context ... I think the fair reading of the Proxy, a reasonable stockholder who picks it up would say, "okay, J.P. Morgan is earning approximately $45 million from this Transaction from the Company, and they have earned a small fraction of that in the preceding two years from Nordic." And sure, what does customary mean? I think the strong implication from the Proxy is that past fees pale in comparison to what J.P. Morgan is earning from this Transaction when it is actually the opposite, when [past fees from members of the Equity Consortium] are many, many, many, many, many times greater than what J.P. Morgan is earning from the Company for advising them on the sale."

Oral Argument, at 17:07–18:23, https://vimeo.com/913043373.

155 A283 (Cumings Aff., Ex. 1) (Proxy at 46).

156 A104 (Compl. ¶ 170).

157 A283 (Cumings Aff., Ex. 1) (Proxy at 46). According to Plaintiffs, J.P. Morgan's initial conflicts disclosure on July 28, 2021, listed only business it had previously conducted with Nordic which generated fees of $15–16 million. A74–A75 (Compl. ¶ 106). That disclosure omitted the relationships with Equity Consortium members. The Special Committee allegedly did not inquire about such relationships. It was not until August 30, 2021, two weeks after the merger agreement was executed, that J.P. Morgan informed the Special Committee that "it had in fact earned up to nearly $400 million in fees from Nordic and its co-investors in just the last two years (ending June 30, 2021 no less)." A120–A121 (Compl. ¶ 196). Appellants argue that although J.P. Morgan identified those fees as relevant in its disclosure memorandum, "[t]he Board simply chose to omit them." Reply Br. at 20.

158 *Pfeffer v. Redstone*, 965 A.2d 676, 689 (Del. 2009) (Even if a proxy statement discloses certain material information, it can still be insufficient if the way in which it presents this information creates a false impression: "[i]t is well settled that '[W]hen fiduciaries undertake to describe events, they must do so in a balanced and accurate fashion, which does not create a materially misleading impression.' ") (quoting *Clements v. Rogers*, 790 A.2d 1222, 1240 (Del. Ch. 2001)); *Zirn v. VLI Corp.* 681 A.2d 1050, 1058 (Del. 1996) (observing that the goal of disclosure is "to provide a balanced and truthful account of those matters which are discussed in a corporation's disclosure materials."); *see also Assad*, 2023 WL 7121419, at *6.

159 Opening Br. at 48.

160 *Id.* (internal citation omitted).

161 A109–A112 (Compl. ¶ 178).

162 A266–A267 (Cumings Aff., Ex. 1) (Proxy at 29–30) (emphasis added).

163 A698 (Cumings Aff., Ex. 26) (Minutes of a Meeting of the Special Committee dated August 11, 2021) (emphasis added).

164 A267 (Cumings Aff., Ex. 1) (Proxy at 30) (emphasis added).

165 A706 (Cumings Aff., Ex. 28) (Minutes of a Meeting of the Special Committee dated August 12, 2021) (emphasis added).

166 A267 (Cumings Aff., Ex. 1) (Proxy at 30) (emphasis added).

167 A710–A711 (Cumings Aff., Ex. 29) (Minutes of a Meeting of the Special Committee dated August 13, 2021) (emphasis added).

168 A268 (Cumings Aff., Ex. 1) (Proxy at 31) (emphasis added).

169 A716 (Cumings Aff., Ex. 30) (Minutes of a Meeting of the Special Committee dated August 16, 2021) (emphasis added).

170 A722 (Cumings Aff., Ex. 31) (Minutes of a Meeting of the Special Committee dated August 17, 2021) (emphasis added).

171 A264 (Cumings Aff., Ex. 1) (Proxy at 27).

172 A266 (Cumings Aff., Ex. 1) (Proxy at 29).

173 A702 (Cumings Aff., Ex. 27) (Minutes of a Meeting of the Special Committee dated July 25, 2021).

174 A1045 (Sullivan Aff., Ex. F) (Minutes of a Meeting of the Independent Directors dated August 6, 2021).

175 A705 (Cumings Aff., Ex. 28) (Minutes of a Meeting of the Special Committee dated August 12, 2021).

176 A711 (Cumings Aff., Ex. 29) (Minutes of a Meeting of the Special Committee dated August 13, 2021). Appellants interpret this passage to mean that up until that point, Evercore had not been involved in such discussions with Nordic and other potential buyers.

177 A716 (Cumings Aff., Ex. 30) (Minutes of a Meeting of the Special Committee dated August 16, 2021).

178 A722 (Cumings Aff., Ex. 31) (Minutes of a Meeting of the Special Committee dated August 17, 2021).

179 The minutes even break-out the market outreach discussion with a separate heading — "JPM Update." *See generally* A698 (Cumings Aff., Ex. 26) (Minutes of a Meeting of the Special Committee dated August 11, 2021); A706 (Cumings Aff., Ex. 28) (Minutes of a Meeting of the Special Committee dated August 12, 2021); A710 (Cumings Aff., Ex. 29) (Minutes of a Meeting of the Special Committee dated August 13, 2021).

180 As noted by the trial court, "[i]t makes sense that J.P. Morgan would continue to spearhead with Evercore's involvement. It also makes sense that J.P. Morgan would be the one to pick up the phone and initiate contact once they had already started the process." Bench Ruling at 45–46.

181 *Id.* at 45 (observing that Plaintiffs "rely on the characterization of J.P. Morgan as conflicted[,]" but that the court "already concluded that that's not a very persuasive argument.").

182 *Id.* at 31.

183 180 A.3d 1055, 1064 (Del. 2018).

184 *Id*. (internal quotation marks and citation omitted).

185 *Id*. (internal quotation marks and citation omitted).

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2024 WL 4926910
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Supreme Court of Delaware.

IN RE MINDBODY, INC., Stockholder Litigation

No. 484, 2023
|
Submitted: September 11, 2024
|
Decided: December 2, 2024

Synopsis
Background: Stockholders of pre-merger company, a software-as-a-service (SaaS) platform provider, brought class actions against company's directors and chief executive officer (CEO), company's acquiror, and company's former largest stockholder, challenging validity of stockholder vote, seeking appraisal, and asserting claims of breach of fiduciary duty and aiding and abetting breach of fiduciary duty in connection with take-private acquisition. Actions were consolidated, lead plaintiff was named for purposes of fiduciary-duty claims, and claims against formerly-largest stockholder and its appointed director were settled. Following bench trial on fiduciary-duty claims, the Court of Chancery, Kathaleen S. McCormick, Chancellor, 2023 WL 2518149, held that CEO breached his fiduciary duties of loyalty and disclosure and that acquiror aided and abetted CEO's breach of duty of disclosure, and awarded $1 per share in damages, then, 2023 WL 7704774, held that CEO and acquiror waived their right to seek settlement credit. CEO and acquiror appealed.

Holdings: The Supreme Court, Valihura, J., held that:

[1] CEO breached fiduciary duty of loyalty by failing to maximize company's sale price for stockholders' benefit;

[2] stockholder vote approving merger was not fully informed;

[3] omission of acquiror's informational advantages from proxy statement was material;

[4] as a matter of first impression, acquiror's failure to correct material omissions in proxy statement did not satisfy "knowing participation" element of aiding-and-abetting claim;

[5] as a matter of first impression, acquiror's contractual duty to notify company of material omissions did not create independent fiduciary duty of disclosure to company's stockholders;

[6] sufficient evidence supported finding that lost-transaction price would have been $1 higher than price actually paid; and

[7] CEO and acquiror waived settlement credit under Delaware Uniform Contribution Among Tortfeasors Act (DUCATA).

Affirmed in part and reversed in part.

West Headnotes (45)

[1] **Appeal and Error**—Corporations and other organizations

The Supreme Court's review of a trial court's application of enhanced scrutiny to a corporate board's action necessarily implicates a review of law and fact, in which the Supreme Court reviews the trial court's conclusions of law de novo and its factual findings for clear error.

[2] **Corporations and Business Organizations**—Rights and Remedies Of, and Actions By, Dissenting Shareholders

When a stockholder challenges a change-of-control transaction, such as an all-cash merger, enhanced scrutiny pursuant to *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, is the presumptive standard of review.

1 Case that cites this headnote

[3] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

In the context of a sale of control over a company, directors and officers must exercise their fiduciary duties to maximize the company's value for the stockholders' benefit.

[4] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

There is no particular path that corporate fiduciaries must follow to maximize value in the context of a change-of-control transaction, so long as the chosen path is reasonable.

[5] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

The key elements of enhanced scrutiny of a corporate change-of-control transaction require both (i) reasonableness of the decision-making process employed by the directors, including the information on which the directors based their decision, and (ii) reasonableness of the directors' action in light of the circumstances then existing.

[6] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

When a plaintiff proves a claim of breach of fiduciary duty in connection with a change-of-control transaction based on 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, that showing calls into question the reasonableness of the decisionmaking process employed and the reasonableness of the directors' action in light of the circumstances then existing required under enhanced scrutiny.

1 Case that cites this headnote

[7] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

Disabling conflicts of interest on the part of software-as-a-service (SaaS) company's CEO, who was also its founder and holder of block of super-voting shares, supported stockholder's claim that CEO breached fiduciary duty of loyalty by failing to maximize company's value in take-private merger for all stockholders' benefit; CEO urgently needed liquidity to avoid personal financial ruin, CEO developed "love" for ultimately-successful bidder before start of formal sale process, particularly because CEO expected that if company were sold to that bidder he could keep his CEO position and make more money from a subsequent sale, and CEO had limited time to effectuate transaction before sunset of super-voting shares and loss of allied director on company's board.

[8] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

Software-as-a-service (SaaS) company's CEO, who was also its founder, tilted process of company's sale in favor of ultimately-successful bidder, supporting stockholder's claim that CEO breached fiduciary duty of loyalty by failing to maximize company's value in take-private merger for all stockholders' benefit; CEO met with successful bidder twice before board authorized him to explore company's sale, CEO signaled favoritism to bidder and provided it with exclusive information such as minimum sale price, meetings prompted bidder to begin market analysis earlier than its competitors, CEO delayed formal start of sale process, no competitor was ready to bid when successful bidder made best and final offer, and without competitive pressure, company had no leverage to raise sale price.

[9] **Corporations and Business Organizations**Duties of directors and officers in general; business judgment rule

Software-as-a-service (SaaS) company's CEO, who was also its founder and holder of block of super-voting shares, deprived company's board of information board required to manage CEO's conflicts of interest and engage in reasonable decisionmaking when approving company's sale to CEO's favored bidder in take-private merger, supporting stockholders' claim that CEO breached his fiduciary duty of loyalty by failing to maximize company's value for stockholders' benefit in merger; company's board did not know that CEO and largest stockholder wanted fast sale, that CEO urgently needed liquidity and had "love" for favored bidder, that favored bidder was tipped off regarding minimum share price, and that CEO gave favored bidder head start on sale process, precluding competitive bidding.

[10] **Corporations and Business Organizations**Assent of shareholders

When enhanced scrutiny under *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, is the standard of review of a change-of-control transaction without a controlling stockholder, a defendant can restore the standard of review under the business judgment rule through *Corwin* cleansing, 125 A.3d 304, by showing that the transaction was approved by a fully informed, uncoerced majority of the disinterested stockholders.

1 Case that cites this headnote

[11] **Corporations and Business Organizations**Disclosure of information in general

Stockholder vote approving software-as-a-service (SaaS) company's acquisition in take-private merger was not fully informed, and thus, doctrine of *Corwin* cleansing, 125 A.3d 304, did not allow business judgment rule to govern stockholder's claim against company's CEO for breach of fiduciary duty of loyalty based on CEO's failure to maximize company's value in merger for benefit of all stockholders; board was unable to fully inform stockholders because CEO deprived company's board of information material to a reasonable decisionmaking process, including that CEO's personal need for liquidity motivated him to effectuate merger quickly, that CEO favored acquiror over other bidders due to his conflicts, and that CEO gave acquiror exclusive information and massive head start on bidding process.

[12] **Corporations and Business Organizations**Trial

Whether disclosures to shareholders are adequate, for purposes of a claim of breach of the fiduciary duty of disclosure, is a mixed question of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and the significance of those inferences to the individual shareholder.

[13] **Appeal and Error**Entire record
Appeal and Error Authority to find facts

On appeal from a judgment following a bench trial, when reviewing a mixed question of law and fact, the Supreme Court has the authority to review the entire record and to make its own findings of fact in a proper case.

[14] **Appeal and Error**Mixed questions of law and fact
Appeal and Error Judge as factfinder below in general

If the trial judge's findings on a mixed question of law and fact at a bench trial are sufficiently supported by the record and are the product of an orderly and logical deductive process, then the Supreme Court accepts them, even though independently the Court might have reached opposite conclusions.

[15] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

Directors and officers owe a fiduciary duty of disclosure to the corporation and its stockholders.

[16] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

The "duty of disclosure" owed by corporate directors is not an independent duty but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty.

[17] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members
Corporations and Business Organizations Disclosure of information in general

When directors and officers seek stockholder action, such as stockholder approval for a merger, they have a fiduciary duty to disclose fully and fairly all material information within their control.

[18] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

Corporate fiduciaries can breach their duty of disclosure under Delaware law by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading.

[19] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

Omitted information is material, for purposes of a claim of breach of the fiduciary duty of disclosure, if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available.

[20] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

Directors' and officers' fiduciary duty of disclosure extends to partial omissions, because disclosures cannot be materially misleading.

[21] **Corporations and Business Organizations**Disclosure of information in general

Once directors or officers have traveled down the road of partially disclosing to stockholders the history leading up to a proposed merger, they have an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events.

[22] **Corporations and Business Organizations**Disclosure of information to corporation and shareholders or members

Pursuant to the fiduciary duty of disclosure, even the disclosure of a non-material fact can, in some instances, trigger an obligation to disclose additional, otherwise non-material facts in order to prevent the initial disclosure from materially misleading the stockholders.

[23] **Corporations and Business Organizations**Disclosure of information in general

Facts that ultimate acquiror of software-as-a-service (SaaS) company had received exclusive information, about three weeks prior to its formal invitation into sale process, that company's CEO wanted $40 per share and that company would be running a sale process would have been material to company's stockholders when voting on whether to approve take-private acquisition, and thus, by failing to disclose such facts to stockholders in advance of vote, CEO breached fiduciary duty of disclosure; tips gave acquiror informational advantage over other potential bidders regarding how to structure its pricing models and what price range would be acceptable and gave acquiror three-week head start over other bidders, indicating sale process was potentially flawed in favor of acquiror.

[24] **Appeal and Error**Corporations and other organizations

On acquiring company's appeal from judgment in favor of acquired company's stockholder following bench trial, in reviewing trial court's holding that acquiring company aided and abetted acquired company's CEO in breaching his fiduciary duty of disclosure, Supreme Court would review trial court's factual findings for clear error and its conclusions of law de novo.

[25] **Fraud**Persons liable

The four-part test for proving **aiding** and **abetting** a breach of fiduciary duty requires (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.

3 Cases that cite this headnote

[26] **Corporations and Business Organizations**🔑**Aiding** and **abetting**

A third party's knowing participation in a board's breach of fiduciary duty, as an element of a claim against the third party for **aiding** and **abetting** the breach of fiduciary duty, requires that the third party act with the knowledge that the conduct advocated or assisted, that is, the primary party's conduct, constitutes such a breach.

3 Cases that cite this headnote

[27] **Fraud**🔑Persons liable

As an element of a claim of **aiding** and **abetting** a breach of fiduciary duty, the requirement that the aider and abettor must know that its own conduct regarding the breach was legally improper is distinct from knowledge that the primary party's conduct was a breach; in other words, it is the aider and abettor that must act with scienter.

[28] **Fraud**🔑Intent

The question of whether a defendant acted with scienter, as an element of **aiding** and **abetting** a breach of fiduciary duty, is a factual determination.

[29] **Corporations and Business Organizations**🔑Duties of directors and officers in general; business judgment rule

A bidder's attempts to reduce the sale price for a merger through arm's-length negotiations cannot give rise to liability for **aiding** and **abetting** a breach of fiduciary duty.

[30] **Corporations and Business Organizations**🔑Duties of directors and officers in general; business judgment rule

A buyer in a merger may be liable to a target company's stockholders for **aiding** and **abetting** a breach of fiduciary duty if the buyer attempts to create or exploit conflicts of interest in the target company's board or where the bidder and the board conspire in or agree to the fiduciary breach.

[31] **Corporations and Business Organizations**🔑**Aiding** and **abetting**

A defendant's passive awareness does not constitute substantial assistance to any breach resulting from a primary violator's failure to disclose material facts to stockholders, as an element of a claim against the defendant for **aiding** and **abetting** breach of the fiduciary duty of disclosure.

2 Cases that cite this headnote

[32] **Corporations and Business Organizations**🔑Disclosure of information in general

Acquiror's knowledge of severity and clarity of breaches, by target company's CEO, of his fiduciary duty of disclosure with respect to proxy materials for stockholder vote on company's take-private acquisition weighed in favor of finding that acquiror gave substantial assistance to CEO in his breach, supporting scienter element of stockholder's claim against acquiror for **aiding** and **abetting** breach of fiduciary duty; CEO withheld from stockholders facts that acquiror had been given exclusive tip that CEO's minimum sale price was $40 per share and that CEO told acquiror company would be running a sale process three weeks before acquiror was formally invited to process, and reasonable stockholder would find giving tips to only one potential acquiror to indicate possible flaws in sale process.

[33] **Corporations and Business Organizations** Disclosure of information in general

Acquiror's failure to correct material omissions in proxy materials submitted to software-as-a-service (SaaS) company's stockholders in advance of their vote to approve take-private acquisition did not constitute substantial assistance to company's CEO in his breach of fiduciary duty of disclosure, and thus, did not satisfy "knowing participation" element of stockholder's claim against acquiror for **aiding** and **abetting** such breach, even though acquiror was contractually obligated to review and correct company's proxy materials; acquiror did not participate in drafting of proxy statement and took no other actions to facilitate or assist in CEO's omissions of facts, known to both CEO and acquiror, that indicated proposed merger did not maximize company's sale price.

[34] **Corporations and Business Organizations** **Aiding** and **abetting**

Generally, the participation element of **aiding** and **abetting** a breach of the fiduciary duty of disclosure requires more than the passive awareness of a fiduciary's disclosure breach, as would come from simply reviewing draft proxy materials prepared by the fiduciary.

1 Case that cites this headnote

[35] **Corporations and Business Organizations** Disclosure of information in general

Acquiror's obligation, under merger agreement with target company, to promptly notify company of any materially misleading omissions in proxy materials for stockholder vote on merger did not impose on acquiror independent duty of disclosure to company's stockholders that might have supported stockholder's claim against acquiror for **aiding** and **abetting** breach of fiduciary duty of disclosure on the part of company's CEO, based on CEO's withholding from information, known to acquiror, indicating bidding was not competitive and based on acquiror's inaction regarding such omissions; acquiror's contractual obligations were owed only to company itself, and holding otherwise would collapse arms'-length distance between parties and require bidders to second-guess boards' materiality determinations.

[36] **Corporations and Business Organizations** Disclosure of information in general

Acquiror's edits to information presented to its internal investment committee regarding proposed take-private acquisition of software-as-a-service (SaaS) company, including omission of information about CEO giving acquiror head start on bidding process and informational advantage versus other potential buyers, were insufficient to establish that acquiror acted with scienter in failing to notify company of related, material omissions from proxy materials for merger vote of company's stockholders, and thus, did not support claim against acquiror for **aiding** and **abetting** company's CEO in breaching his duty of disclosure; at most, edits indicated acquiror's awareness that its conduct was not above suspicion, but not that its conduct wrongfully contributed to CEO's disclosure violations.

[37] **Appeal and Error**Discretion of lower court; abuse of discretion

On an appeal from a judgment following a non-jury trial, the Supreme Court reviews findings as to damages by the Court of Chancery for an abuse of discretion.

[38] **Equity**Grounds of jurisdiction in general

The Court of Chancery has the power to grant such relief as the facts of a particular case may dictate.

[39] **Fraud**Elements of compensation

In an action for breach of fiduciary duty, as long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, mathematical certainty is not required.

[40] **Corporations and Business Organizations**Damages or amount of recovery

Sufficient evidence supported finding by Court of Chancery, upon holding that software-as-a-service (SaaS) company's CEO breached fiduciary duty of loyalty by providing unfair advantages to favored bidder in ways that served CEO's personal interest and failed to maximize company's merger price for benefit of stockholders, that lost-transaction price under uncorrupted, competitive bidding process would have been $37.50 per share, supporting damages of $1 per share based on difference between lost-transaction price and merger price of $36.50 per share; note and text messages indicated that acquiror's employees placed internal bets on what merger price would be, with $37.50 as approximate median guess, and two most informed deal team members guessed deal price would be $37.50.

[41] **Appeal and Error**Statutory or legislative law

The Supreme Court reviews questions of statutory construction de novo.

[42] **Appeal and Error**Briefs and argument in general

Issues not briefed are deemed waived.

[43] **Appeal and Error**Failure to Assert or Adequately Discuss Error

The general rule that a party waives any argument it fails properly to raise on appeal shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance.

[44] **Contribution**Defenses

A non-settling defendant's failure to prove joint tortfeasor status at a bench trial does not automatically prohibit them from seeking a settlement credit post-trial under the Delaware Uniform Contribution Among Tortfeasors Act

(DUCATA). 10 Del. Code §§ 6302, 6304(a).

[45] **Contribution**Defenses

Pre-merger company's CEO and acquiror, as non-settling defendants in stockholders' action for breach of fiduciary duty, **aiding** and **abetting** breach of fiduciary duty, and other claims arising from take-private merger, waived settlement credit under Delaware Uniform Contribution Among Tortfeasors Act (DUCATA) based on pre-trial settlement of claims against company's directors and other defendants; CEO and acquiror failed to raise DUCATA issue until last footnote on last page of last post-trial brief, lead plaintiff's trial strategy was influenced by CEO's and acquiror's failure to raise DUCATA issue before trial, settling defendants explicitly refused to admit liability, and trial court, at bench trial, did not determine if settling defendants were joint tortfeasors. 10 Del. Code § 6306(d).

Court Below: Court of Chancery of the State of Delaware, C.A. No. 2019-0442

Upon appeal from the Court of Chancery. **AFFIRMED** in part, **REVERSED** in part.

Attorneys and Law Firms

Lisa Schmidt, Esquire, Robert L. Burns, Esquire, Matthew D. Perri, Esquire, John M. O'Toole, Esquire, RICHARDS LAYTON & FINGER, Wilmington, Delaware. Of Counsel: Andrew J. Rossman, Esquire (argued), David M. Cooper, Esquire, Charles H. Sangree, Esquire, Judrick Fletcher, Esquire, QUINN EMANUEL URQUHART & SULLIVAN, LLP, New York, New York. Matthew Solum P.C., John P. Del Monaco, Esquire, Yosef J. Riemer, P.C., KIRKLAND & ELLIS LLP, New York, New York for Appellants.

Joel Friedlander, Esquire (argued), Jeffrey M. Gorris, Esquire, Christopher M. Foulds, Esquire, FRIEDLANDER & GORRIS, P.A., Wilmington, Delaware. Gregory V. Varallo, Esquire, Andrew E. Blumberg, Esquire, BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, Wilmington, Delaware. Of Counsel: Jeroen van Kwawegen, Esquire, BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP, New York, New York for Appellees.

Before SEITZ, Chief Justice; VALIHURA, TRAYNOR, LEGROW, and GRIFFITHS, Justices, constituting the Court en Banc.

VALIHURA, Justice:

I. INTRODUCTION

***1** This appeal arises from Vista's take-private acquisition of Mindbody in 2019 for $36.50 per share (the "Acquisition"). The Court of Chancery held that Richard Stollmeyer, Mindbody's founder and CEO, breached his "*Revlon*" duties after deciding that he wanted to monetize his Mindbody investment and sell Mindbody to Vista. Stollmeyer and Vista do not challenge any of the trial court's detailed post-trial fact-findings. Stollmeyer initiated the flawed sales process without board authorization and enabled Vista to obtain a headstart and "sprint" ahead of other potential acquirors. He gave the Mindbody board incomplete information about his back-channel communications with Vista. After finding Stollmeyer liable for breaching his *Revlon* duties, the court found him liable for damages of $1 per share. He asks our Court to reverse both the *Revlon*-related liability and damages holdings.

Vista had a contractual right to review Mindbody's proxy materials before they were distributed to Mindbody's stockholders. Vista was obligated to notify Mindbody if it became aware of any facts that, if not disclosed, would render the proxy materials materially misleading or incomplete. The trial court found that Stollmeyer breached his duty of disclosure and that Vista had aided and abetted that breach. The trial court assessed damages of $1 per share against Vista and Stollmeyer for that violation as well but ruled that Plaintiffs were only entitled to one recovery of $1 per share. Vista and Stollmeyer challenge these holdings along with the court's subsequent ruling that Defendants waived their right to any settlement credit.

This appeal followed.

We hold the following. First, we affirm the trial court's holding that Stollmeyer breached his fiduciary duty of loyalty under *Revlon* by having disabling conflicts and tilting the sale process in Vista's favor for his own personal interests in ways inconsistent with maximizing stockholder value. Second, we affirm the trial court's determination that Stollmeyer breached his fiduciary duty of disclosure by allowing material omissions in Mindbody's proxy materials. Third, we reverse the trial court's holding that Vista aided and abetted Stollmeyer's disclosure breach. Fourth, we affirm the trial court's award of damages for Stollmeyer's *Revlon* breach. Finally, we affirm the trial court's holding that Appellees waived their right to seek a settlement credit under DUCATA by failing to timely raise the issue below. Because we reverse the **aiding** and **abetting** determination, we do not reach the issue of the trial court's award of disclosure damages.

II. FACTUAL BACKGROUND

The trial record consists of 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. This opinion recites the facts, substantially verbatim, as the Court of Chancery found them after trial.[1]

A. The Parties

***2** Defendants-Below Appellants are Richard Stollmeyer, Vista Equity Partners Management, LLC ("Vista"), and Mindbody.[2]

Plaintiffs-Below Appellees are Luxor Capital Partners, L.P., Luxor Partners Offshore Master Fund, LP, Luxor Wavefront, LP, (collectively "Luxor"), and Lugard Road Capital Master Fund Master Fund, LP.

1. Stollmeyer Is Ready To Sell

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. By 2018, Stollmeyer had grown Mindbody to over $1 billion market capitalization, yet Stollmeyer had never experienced a big liquidity event. 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.

Stollmeyer described his unhappiness with his pre-Merger financial situation in a post-Merger interview for Alejandro Cremades's "dealmakers" podcast. 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. Stollmeyer described those sales as "kind of like sucking through a very small straw."

....

In February 2018, Stollmeyer asked his financial advisor to "estimate [his] cash position" in light of his impending expenses. Stollmeyer stated that the timing and amount of his 10b5-1 sales were "top of mind" because of "greater than expected H1 cash outlays[.]" To meet his commitments, Stollmeyer had to "dig[ ] into [his] LOC [line of credit]."

....

At trial, Stollmeyer denied that he needed liquidity in early 2018. To bolster his testimony, Stollmeyer introduced testimony from his financial advisor and from an expert on executive compensation. The trial court found that Stollmeyer's own pre-litigation and intra-litigation statements reflecting his personal and financial circumstances were far more persuasive than his trial testimony or the testimony of other witnesses.

Stollmeyer was motivated to sell in 2018. He held shares of super-voting Class B stock that would automatically convert to shares of common stock in October 2021. 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. After October 2021, those same shares would carry less than 4% of the Company's fully diluted voting power. Tactically, it was best for Stollmeyer to move before the October 2021 sunset. Further, Mindbody's largest stockholder— IVP—faced the same sunset provision and was looking to exit. If that happened, then the Board seat held by IVP's nominee, 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. It behooved Stollmeyer to strike while his major ally also held a position of power.

***3** 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. Mindbody also shifted its sales strategy to focus on high-value customers. 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. During trial, Stollmeyer testified at length about the difficulties he faced. He stated that by late 2018, he was "physically and emotionally exhausted[.]" Understandably, he wanted out.

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. 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. Together, IVP and Stollmeyer controlled over 44% of the Company's voting power. 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%.

Liaw served as IVP's representative on the Board. No other institutional investors enjoyed representation on the Board. 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.

In March 2018, Liaw emailed Stollmeyer that IVP "may be contemplating a disposition" of its Mindbody stock. IVP had internal reasons to exit. By August 2018, IVP's position in Mindbody reflected an unrealized gain of $68 million. During a meeting on August 13, IVP's partners "agreed to target at least $200M in additional liquidity by year end." 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[.]"

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.

....

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." The Company's CFO, Brett White, testified that the investments were underperforming. 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." Goodman also believed the investments would pay off.

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]." Liaw and White testified that Mindbody's high-value subscribers had declined in 2018 for two quarters in a row. The contemporaneous documents painted a different picture, with White's slides at the same conference proclaiming "Our Customer Base is Healthier than Ever" and "Subscriber Base Shifting To Higher Priced Tiers."

***4** 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. The lowlights included a revenue miss of $2.4 million against Mindbody's internal plan and $0.2 million against the analyst consensus.

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." At trial, he confirmed that expectation. By October 2018, Goodman "absolutely believed the investments would pay off" and saw no need for cash infusions.

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. The trial court found support for that conclusion in the record. Yet, for the trial court, crediting that the Board reached that conclusion did 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.

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, 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. As found by the trial court, Stollmeyer concealed many of his interactions with Vista from the Board.

B. Events Before The Board Process

On August 7, 2018, Stollmeyer met with Jeff Chang, an investment banker with Qatalyst Partners. Stollmeyer and Chang had been meeting from time to time over the course of five years. Chang testified that before August 2018, Stollmeyer "had never been open-minded to having dialogue" with private equity. During the August 7 meeting, however, something was different, and Stollmeyer was "more open to having a dialogue." Stollmeyer had kept in contact with a couple of private equity shops. Before Mindbody's IPO, Vista and Thoma Bravo had each approached Mindbody about an acquisition. 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. Monti Saroya, a Vista principal, had been involved in transactions where Chang represented the seller.

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. 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.

***5** Saroya responded about seven minutes later to set up a meeting. Shortly after, Chang forwarded the email chain to George Boutros, a senior partner at Qatalyst. 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.

By 7 p.m. that same day, Saroya and Stollmeyer had scheduled a meeting for "late Aug/early Sep."

Chang waited a week to connect Stollmeyer with two other private equity firms, Thoma Bravo and Hellman & Friedman ("H&F"). Stollmeyer did not meet with those firms until mid-October and early November.

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, but Luxor did not fit the mold of an "activist" investor. Luxor did not seek to take control of companies. It was 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.

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.

....

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. 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. By the August 9 meeting, however, Stollmeyer's tune had changed, and he wanted to know whether Luxor would support a sale. Friedman responded that Luxor would not support a near-term sale because Luxor expected much higher return over the long term.

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.

3. Stollmeyer Meets With Vista

On September 4, 2018, Stolleyer met with Saroya and another Vista representative, senior vice president Nicolas Stahl. Saroya and Stahl were the lead Vista representatives for the Mindbody deal.

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. 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.

***6** During the meeting, Saroya invited Stollmeyer to join them for the CEO dinner at Vista's CXO Summit. 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."

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. After the September 4 meeting, Stollmeyer did not tell the Board that he had disclosed this information to Vista. Stollmeyer admitted that he did not provide this information to any other potential acquirers in August, September, or October 2018.

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. Stollmeyer denied it at trial. 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." He also said that he would never refer to Mindbody as "my" company. 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. As to calling Mindbody "my company," Stollmeyer used this exact terminology during his post-Merger podcast interview with Cremades. The trial court found that more likely than not, Stahl's notes of the meeting provided an accurate account of what occurred.

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. He did not report on his discussion with Qatalyst about a potential sale. 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. That was also the day that Centerview provided Stollmeyer with the dossier on Luxor.

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. White covered Q2 highlights, areas of growth, and management's second-half outlook. The minutes did not mention Stollmeyer's meeting with Saroya and Stahl, nor the invitation to attend the CXO Summit.

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." 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." Centerview provided this information on September 17.

5. Stollmeyer Attends Vista's CXO Summit And Is "Blown Away"

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. 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."

***7** Stollmeyer accepted Saroya's invitation to attend the CXO Summit on October 9. At the summit, he met with executives from Vista portfolio companies. 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. 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." Stollmeyer pitched Mindbody to Robert Smith in a brief meeting on October 9.

Stollmeyer watched presentations from both Robert Smith and Sheth at the summit. 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.

Stollmeyer texted Saroya that the "[p]resentations are very impressive." He texted Mindbody's President, Michael Mansbach, that the presentations are "mind blowing/inspiring." Stollmeyer told Mansbach later that day that Vista "really love[s] me, I love them." Stollmeyer also told Mansbach that the CXO Summit helped him "center on what is nagging from my subconscious." Stollmeyer sent Mansbach a series of screenshots, which Stollmeyer described as "money shots," from a presentation that Sheth gave. 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. 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." Friedman testified that Stollmeyer later touted to Luxor "that Vista had bought [Marketo] and then sold it 18 months later for 3x the price." 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."

Stahl set up a meeting between Stollmeyer and Aggarwhal. 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." 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."

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. Stollmeyer never told the Board that he had done so.

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." Centerview's Handler agreed that the CXO Summit changed Stollmeyer's perception of private equity and that Stollmeyer saw Vista as "his solution." 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. Vista felt the same, touting internally that Stollmeyer "loved" them and that they "built a strong relationship with [Stollmeyer]."

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. 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." 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.

6. Stollmeyer Works With Qatalyst To Kick Off A Sale Process

***8** 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[.]" Stollmeyer asked Chang to provide references for Vista. Chang provided two, one of whom had sold his company to Vista in a deal where he was represented by Qatalyst.

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." Stollmeyer later commented that "[t]his advice proved to be prescient and important."

7. Vista Expresses An Interest In Acquiring Mindbody

On October 15, 2018, Saroya called Stollmeyer, and the two spoke for twenty-five minutes. During the call, Saroya delivered an oral expression of interest to acquire Mindbody. Saroya told Stollmeyer that Vista would pay a substantial premium to Mindbody's recent trading price, which closed at $33.27 on October 15. Stollmeyer understood that Vista saw Mindbody's recent stock correction as a buying opportunity. 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. The trial court noted that those statements do not take twenty-five minutes to say.

8. Vista Initiates Its Internal Process

Vista was 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." 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[.]" The record at trial involved precedent transactions in which Vista used this strategy, and Vista representatives testified about the strategy and its competitive advantages. In internal communications, Vista representatives call it "Sprinting," capitalizing the word as if it were defined term.

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?" 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." 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?

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."

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)." On October 15, Stahl texted Saroya suggesting that "even if the earnings call is 10/25, we could still Sprint to sign beforehand." Vista's goal was to "try to get ahead of" any competitors in the Company's sale process.

***9** 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." Chang wanted to reach out to other companies before Vista could act.

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. Saroya texted back "yes" in less than thirty seconds, and Vista retained Bain & Co. to conduct the study. 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—so Vista would not have contracted for it without some confidence that Mindbody would be running a sale process.

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[.]" 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."

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. 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."

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." Stollmeyer acknowledged that the "conversation" with Vista was "progressing rapidly."

Next, Stollmeyer told Liaw of Vista's expression of interest during an hour-long conversation on October 18. Liaw texted Stollmeyer later that same day, asking him to "[p]lease keep me posted on the other conversations." Stollmeyer replied that he appreciated hearing Liaw's perspective and "our alignment on the key elements."

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. Durand reported to Saroya that the conversation turned out to be a reference call for Vista." Saroya replied, "Yup I was aware[.]" Stollmeyer did not tell the Board about his conversation with Durand.

10. Stollmeyer Informs The Other Directors Of Vista's Interest

***10** Stollmeyer waited until October 23—eight days after Vista's expression of interest—to begin contacting the remaining Board members. When he spoke with the directors, Stollmeyer omitted key elements of his discussions with Vista and key pieces of information that he had shared with his management team.

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. 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. The directors' testimony also indicated to the trial court 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.

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"). This portion of the meeting occurred in executive session. Stollmeyer remained present, but other members of management were excused.

At some point on or before October 26, Stollmeyer asked Liaw to serve as chair of the Transaction Committee, and Liaw agreed. 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. 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.

....

The Board created the Transaction Committee by unanimous written consent on October 30, 2018. Its members were Liaw, Goodman, and Cunningham, with Liaw as chair. 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. That was it.

On October 31, the Transaction Committee met with Mindbody's Chief Legal Officer and outside counsel who advised the Board on a regular basis. Among other things, the committee members reviewed the initial expectations, their mandate, and set the date of November 14 to interview potential financial advisors. 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.

***11** 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." With the assistance of outside counsel, the Transaction Committee prepared "guidelines for communications, potential conflicts and disclosure matters" (the "Guidelines"). 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."

The Transaction Committee adopted the Guidelines during the October 31 meeting, and Lytikainen emailed the Guidelines to the Board on November 2. Stollmeyer received and reviewed the Guidelines.

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. And at the end of Q2 2018, Mindbody reduced the midpoint of its full-year revenue guidance by approximately $1 million. During the second half of 2018, Mindbody continued to miss targets. Its Q3 revenue ($63.8 million) missed the midpoint of Mindbody's already-reduced Q3 revenue guidance ($64 million). By September 2018, Mindbody's internal Q4 revenue forecast stood at $69.40 million, down from May's $72 million forecast.

By October 2018, Mindbody's Q4 revenue forecast had slipped to approximately $68 million. 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. 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.

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." Stollmeyer wanted to "guide to the closest thing we could to our reality." 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." On the morning of November 5, after digging into the forecast, Stollmeyer suggested guiding to $67–69 million. 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."

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, even though management was unusually confident because the October flash report was "basically spot-on." 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. Adjusted for high, medium, and low probability risks and opportunities, the forecast was greater than $68 million across the board.

The Audit Committee convened by phone the evening of November 5. Audit Committee members Liaw and Herman were present, along with Stollmeyer and White. Committee chair Smith had signed off on guiding $66–68 million before the meeting. 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." Herman agreed that guidance should position Mindbody to "beat and raise." They recommended guidance of $65–67 million.

***12** Stollmeyer and Liaw spoke immediately after the Audit Committee meeting for sixteen minutes. Three minutes after hanging up with Liaw, Stollmeyer texted White that he was "adding a new second paragraph in [his] script noting our challenges." Later that night, Stollmeyer circulated the revised script to his management team. He deleted the portion of his script that noted Mindbody's substantial progress integrating Booker. He pulled other "good stuff" from his script, deciding to "save [it] for future use."

Stollmeyer led the November 6 earnings call during which Mindbody announced its Q3 revenue miss and issued Q4 guidance of $65–67 million. He threw "Booker under the bus" 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." Centerview employees observed in real time that Stollmeyer "sounded too apologetic [and] strange." Friedman recalled Stollmeyer sounding "depressed" and listened to the call "in shock."

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. The stock fell so far that Stollmeyer suggested to Liaw that Mindbody buy back shares.

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," and he testified that guiding $1 million higher would have affected Mindbody's stock price. 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."

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." 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." During his deposition, Liaw claimed that his recommendation to lower Q4 guidance was not in any way based on the prospective sale process. He withdrew this statement at trial and admitted that the sale process was not "completely absent from my mind." He testified, however, that his "primary focus" when the Company lowered guidance "was figuring out how the company could start to rebuild credibility."

The trial court found that the facts surrounding the Q4 guidance were murky. They reflected 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.

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. Vista equated a lower stock price with a lower deal price, 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."

On the evening of November 6, Stahl texted Saroya about Mindbody's stock drop: "MB down 16% after earnings." Stahl asked, "Should we sprint?" He also asked if Saroya had heard anything from Chang. Saroya called Chang and spoke for five minutes.

***13** After the call, Saroya texted Stahl that "Jeff [Chang is] all over it" and that *"[h]e wants 40 min."* 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. In other words, Stahl explained to Saroya how to make it work under the model to pay $40 per share for Mindbody.

The statement that "he wants 40 min" received a great deal of attention at trial. The trial court found the clear implication of this text to be 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 showed 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. Chang said it in mid-November, writing internally that "Rick's bogey is $2bn," which equates to $40 per share. 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." The trial court found that that was deal talk for at least $40 per share.

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). The trial court found no support for that in the record. Both Saroya and Chang "had zero recollection" of what they discussed on the phone that day. Unfortunately, there is little other contemporaneous evidence on the issue.

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 were that the communication was not about Apptio at all. It was about Mindbody.

F. Stollmeyer Tips Vista About The Formal Sale Process

The Guidelines required management to obtain authorization "for outbound communications to potential strategic parties," but Stollmeyer ignored them. On November 10, he texted Saroya asking to speak. They talked by phone later that day.

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." 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."

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." He continued: "I'm not sure that I ever told Monti we're having a process." 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. For the trial court, circumstantial evidence made it likely that Stollmeyer did exactly what he described in his deposition. The court found that Plaintiffs had proved that Stollmeyer tipped Vista to the sales process on November 10.

***14** 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. 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. Stollmeyer then asked Chang if he should attend, and Chang said no. 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." 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[.]" For the trial court, although Stollmeyer eventually declined the invitation, the communications spoke volumes as to Stollmeyer's mindset at the time.

G. Mindbody Retains Qatalyst As Its Financial Advisor

On November 14, 2018, the Transaction Committee convened to decide on hiring an investment banker. 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.

Centerview's presentation emphasized its experience on deals in the technology sphere, where Mindbody operated.

Centerview depicted Mindbody as a company facing near-term challenges but with excellent long-term prospects.

....

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." According to Centerview's presentation, the process could take somewhere between 60–190 days. Lytikainen's notes suggested that Centerview saw no need for a near-term transaction and that for purposes of a sale, the "time frame is two years." That comment reflected the view that Mindbody's prospects would improve as the Company worked through its near- term challenges.

Qatalyst's pitch emphasized its experience on deals with Vista. 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. 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[.]" 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." That comment described Vista's preferred strategy.

After the presentations from Centerview and Qatalyst, the Transaction Committee authorized the Company to engage Qatalyst.

At trial, the directors lauded Qatalyst's experience with technology companies as the basis for their choice. The trial court found that testimony to be credible, but there was also evidence that Liaw—who knew of Stollmeyer's interactions with Vista—pushed to retain Qatalyst. The strongest proof of this fact was 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[.]" 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, the trial court found it to be undeniable that Liaw had advocated to retain the adviser who emphasized its relationship with Vista and recommended a quick sale process.

H. Qatalyst Contacts Potential Buyers

***15** With Qatalyst's help, Mindbody identified fourteen potential buyers, including both financial sponsors and strategic acquirors. Stollmeyer rejected one candidate because he didn't "want to work for a payments company."

Qatalyst planned to approach the strategic bidders beginning on November 19 and the financial sponsors beginning on November 30. Qatalyst wanted to contact the strategic bidders first because they often moved slower than the financial sponsors.

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."

Chang formally contacted Vista on November 30. Chang did not contact the other financial sponsors until December 3 and 4. Interested buyers attended management presentations from Stollmeyer and his executive team. They met with H&F on the morning of December 11. He texted his wife that the meeting "went really well. Like those guys." Later that day, the team met with Vista. Stollmeyer joined Sheth and Saroya for drinks afterward and texted Chang: "Am with Brian and Monti at Battery. Going great!" Stollmeyer treated the two firms differently.

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]." Vista received Bain's final market study on December 13, 2018, 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." 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."

At trial, Defendants stressed that when the Investment Committee met, Vista still believed that it faced competition for Mindbody. The trial court found that to be 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[.]" 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." Vista wanted the ability to compete if it ended up facing competition, but Vista also hoped that by sprinting, it could eliminate the competition.

The drafting of the Investment Committee materials corroborated 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 "[l]ate October 2018." 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. In between drafts, Stahl sent a text to the drafter of the deck saying "dont tell them about process."

***16** 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.

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. 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.

On December 14, Vista's Investment Committee authorized a formal bid for Mindbody. 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. When asked at trial whether the Investment Committee approved a range, Saroya testified that the Investment Committee approved a "cap of $35."

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*." It is also inconsistent with a slide showing purchase prices at increasing revenue multiples up to $40/share.

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. When presented with Sheth's testimony at trial, Saroya deferred to Sheth's recollection.

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. Vista increased its bid, and Saroya had no recollection of getting an additional approval to go beyond the cap.

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." The image had a line set at $37.50—halfway between $35 and $40. Vista employees submitted their over-under guesses of the eventual deal price. The lowest prediction was $36.50, and the highest prediction was $40. Over half of the participating employees guessed that the price would be greater than $37.50. The highest prediction by a deal team member was $38.50/share. In response to this image, Saroya said, "37.5 is a good guess[.]" Stahl replied, "I thought so too."

***17** In light of this evidence, the trial court deemed Saroya's testimony about a cap at $35 per share to be 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. The data room opened on December 15. 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." Parties began dropping out after receiving data room access.

Vista moved forward. Stahl testified at trial that Vista's outlook on Mindbody's value initially soured after gaining access to the data room, because "there was less near-term growth than what we have previously anticipated." 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. The contemporaneous evidence showed 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." Saroya minimized the near-term challenges that the Company faced, stating, "[w]e see the same issues in most of these businesses."

Vista became more excited after meeting with Mindbody's sales team. Stahl texted Saroya that "the sale strategy was terrible and they have started fixing a lot of things." Stahl believed that Vista could achieve significant long-term gains after buying Mindbody.

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. 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.

That same day, Stahl sent Saroya the photo of the bidding line at $37.50, and Vista employees began betting on the final price. In his deposition, Stahl testified that the guesses were just a "game" that "wasn't based on anything." At trial, Saroya claimed to not recall what the "line" was even about. According to the trial court, 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."

The Transaction Committee convened on December 19, 2018, to discuss Vista's offer of $35 per share. 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. 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."

***18** Thoma Bravo dropped out of the process on December 20. 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.

Another bidder, Recruit, was also still early in diligence. Recruit's impression from the management presentation was that Stollmeyer seemed "checked out." 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.

By December 20, only Vista and one other bidder, H&F, remained. 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.

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. During the meeting, the Board authorized Qatalyst to make a counteroffer of $40 per share. Qatalyst had recommended that figure, which matched both the top of Vista's range and the number that Stollmeyer had said he wanted.

After receiving the counter, Saroya circulated a slide within Vista that identified potential synergies with other Vista portfolio companies. He wrote that "[o]ur team believes these synergies allow us to move up on our initial bid." 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. The evidence shows that the Investment Committee had already given Saroya authority to go above $35 per share.

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. Stollmeyer then texted Liaw that Vista had given their "best and final" offer of $36.50. Liaw responded, "I'm kind of disappointed actually ...."

Qatalyst reached out to H&F on December 21. H&F responded that they were "processing" and would need "2 more weeks to sign" up a transaction. On price, H&F told Qatalyst that they had "no path to $40."

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. 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. Goodman thought $36.50 per share was "an excellent price that would derisk the future for our shareholders." Smith thought that the premium "was definitely worth accepting versus the uncertainty of potentially several years of uncertain execution."

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. Qatalyst said it could render a fairness opinion for the $36.50 per share offer. On December 21, the Board directed management to accept the bid and negotiate a merger agreement.

M. The Parties Sign The Merger Agreement

***19** On December 23, 2018, the Board approved the Agreement and Plan of Merger (the "Merger Agreement"), and the parties signed it. 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. Stollmeyer and IVP agreed to vote shares carrying 32.1% of Mindbody's outstanding voting power in favor of the Merger.

The Merger was publicly announced on December 24, 2018. Immediately after announcement, Stollmeyer texted his financial advisor: "Vista's in love with me (and me with them). No retirement in my headlights."

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."

N. The Go-Shop

The Merger Agreement authorized a 30-day go-shop. Beginning on Christmas Eve, Qatalyst reached out to 52 potential bidders, 38 of which were entities that were not part of the sale process. Only eight received the management presentation and signed a non-disclosure agreement. Only two expressed interest in continuing diligence thereafter.

On January 5, 2019, Stollmeyer informed Vista that Luxor and another large stockholder were trying to put together a bid. Stollmeyer told Vista that it was a "low likelihood" outcome because those parties "likely could only write $100-200mm checks." Stollmeyer conceded at trial that he should not have revealed this information to Vista. 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. No bid emerged.

On January 6, halfway through the go-shop process, Stollmeyer went on vacation to Costa Rica. He instructed management in an email to decline go-shop presentations in his absence, "[u]nless it's urgent." Stollmeyer was signaling his lack of interest in a competing offer.

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." Section 6.3(b) gave Vista the right to "a reasonable opportunity to review and comment" on the Proxy Materials before they were filed. 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[.]" 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.

Saroya and Stahl both received a summary of Mindbody's proposed "Background of the Merger" section. 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." The preliminary proxy omitted any references to Stollmeyer's meeting with Vista in August,[3] Stollmeyer's attendance at the CXO Summit in October, or Vista's expression of interest on October 15. Nevertheless, Stahl replied that the description "makes sense to me," and Saroya replied, "This works." Mindbody filed the preliminary proxy on January 9, 2019. 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[.]"

***20** On January 11, Luxor filed a Schedule 13D stating that the proposed Merger Agreement "significantly undervalues" Mindbody. On January 14, Friedman spoke to Stollmeyer and asked him why Mindbody had guided down for Q4. Stollmeyer responded that he had "kitchen-sinked" the guidance. 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."

Stahl and Klomhaus also received a copy of Mindbody's proposed definitive proxy. Klomhaus did not have any comments or edits. Stahl noted that he had "had some discussions" with counsel about the documents and wanted to review the changes. At trial, Stahl testified that he did not believe there were any undisclosed aspects of the Merger that should have been disclosed. Like the preliminary proxy, the definitive proxy omitted any reference to Stollmeyer's meeting with Vista in August,[4] Stollmeyer's attendance at the CXO Summit in October, or Vista's expression of interest on October 16.

Stollmeyer reviewed and signed the definitive proxy as CEO. On January 23, 2019, Mindbody filed the definitive proxy with the SEC.

P. The "Massive Beat"

On January 4, 2019, Mindbody determined preliminarily that its Q4 revenue had come in around $68.3 million. Stollmeyer texted White that day, "$68.3M Q4. Awesome!" 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."

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.' "

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. 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. Liaw agreed but expressed concern that Luxor "may use this information to bolster their position[.]" 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." By asking about the effect on the vote, they demonstrated that they thought the information could be important for the vote.

By January 31, Mindbody's outside counsel had drafted a press release announcing the preliminary Q4 results. As required by the Merger Agreement, Mindbody sent the draft to Vista. After speaking with outside counsel, Klomhaus asked Stahl for "a minute to chat about my concerns."

The Audit Committee met on February 6. Mindbody's outside counsel reported on Vista's position. The Audit Committee voted against disclosing the Q4 results. Neither the discussions nor the purported determination appear in the minutes.

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. 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. If the Merger failed, Mindbody would not be in the same position for future quarters.

***21** Herman, Smith, and Cunningham all testified at trial that the amount of the revenue beat was not material. The trial court found that testimony is hard to square with Stollmeyer and White's contemporaneous reactions, and that it was inconsistent with Company counsel's preparation of a press release that would announce the results. This was 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. Liaw, White, and Smith also testified that releasing the Q4 results, without context, would be misleading to investors.

....

Q. Litigation Ensues

Before the Merger closed, Mindbody stockholders filed federal securities class actions in California and Delaware. 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"). The next day, Luxor filed an enforcement action in the Court of Chancery under 8 *Del. C.* § 220 to obtain books and records concerning the Merger (the "Section 220 Action").

To moot the federal suits and aspects of the Section 225 Action, Mindbody issued supplemental disclosures (the "Supplemental Disclosures"). 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. Vista's outside counsel said they were "scrubbing one more time." On February 7, Mindbody issued the Supplemental Disclosures, which added details about the sale process and other issues.

ISS and Glass Lewis recommended that stockholders vote for the transaction. Analysts also supported the Merger. The stockholders approved the Merger during a special meeting on February 14, 2019. The Merger closed the next day.

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.

The terms of Stollmeyer's post-deal employment resembled his pre-deal employment. Stollmeyer took the same salary and bonus in 2019. He received a stock grant equal to 1.7% of the post-transaction equity, assuming full vesting and no forfeiture.

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.

The Section 225 Action moved forward, with discovery concluding in April 2019. That same month, Luxor filed an appraisal petition (the "Appraisal Action"). In June 2019, Luxor filed a class action lawsuit alleging breach of fiduciary duty claims against Stollmeyer, White, and Liaw (the "Luxor Action").

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. After trial, the parties then agreed to a settlement of the Section 225 claim, which the court approved on December 15, 2020.

Luxor amended its complaint to strengthen its claims for breach of fiduciary duty, and the defendants moved to dismiss. The court issued a decision that dismissed the claims against Liaw and otherwise denied the motion. The decision noted that Liaw's dismissal was without prejudice.

***22** ....

After fact discovery closed, Luxor sought leave to amend its complaint. After receiving leave, Luxor filed the operative complaint on July 27, 2021. It dropped White as a defendant, reasserted claims against Liaw, and added **aiding** and **abetting** claims against IVP and Vista. Liaw, IVP, and Vista moved for dismissal. Stollmeyer moved for summary judgment. The court denied all three motions. Liaw and IVP agreed to a settlement, which the court approved. That left only Stollmeyer and Vista as defendants.

The court held trial February 28, 2022, through March 9, 2022. Post-trial briefing concluded on July 14, 2022, and post-trial argument was heard on July 28, 2022. The parties submitted their joint schedule of evidence on August 11, 2022.

III. THE TRIAL COURT'S RULINGS

With that unchallenged set of detailed fact-findings carefully crafted by the Chancellor, we proceed to our discussion and analysis. The trial court issued its post-trial opinion on March 15, 2023 (the "March Opinion"). The Chancellor found that: (i) Stollmeyer breached his fiduciary duties under *Revlon* by "tilt[ing] the sale process in Vista's favor for personal reasons[;]"[5] (ii) Stollmeyer breached his duty of disclosure by "fail[ing] to disclose the full extent of his involvement with Vista, which was a material omission[;]"[6] and (iii) Vista aided and abetted Stollmeyer's breach of his duty of disclosure by "failing to correct the proxy materials to include a full and fair description of its own interactions with Stollmeyer."[7] Accordingly, the trial court awarded damages equal to "$1 per share in damages, plus interest and costs consistent with this opinion."[8]

Before entering final judgment, the trial court issued another opinion on November 15, 2023 (the "November Opinion").[9] The November Opinion responded to the parties' numerous disputes over the form of the March Opinion's final order and judgment. In the only ruling relevant to this appeal, the trial court held that Stollmeyer and Vista (the "Non-Settling Defendants") had waived their right to seek a settlement credit by not raising the issue pre-trial.[10]

A. The Trial Court Ruled That Stollmeyer Breached His Fiduciary Duty of Loyalty under Revlon

The trial court found that Plaintiffs proved a paradigmatic *Revlon* claim where a conflicted fiduciary who is insufficiently checked by the board tilted the sale process toward his own personal interest in ways inconsistent with maximizing shareholder value. The trial court found that 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. He 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. The Board also failed to adequately oversee Stollmeyer because he did not fully inform them.

***23** Although Defendants argued that the *Corwin* defense should apply, the trial court held that Mindbody's proxy disclosure deficiencies defeated *Corwin* cleansing because the stockholder vote was not fully informed. Thus, the trial court held that the disclosure violations defeated the *Corwin* defense to Stollmeyer's breach of fiduciary duty. The trial court rejected Plaintiffs' claim that Vista aided and abetted Stollmeyer's *Revlon* breach because Plaintiffs failed to timely assert that claim before or during trial.

B. The Trial Court Ruled that Stollmeyer Breached His Fiduciary Duty of Disclosure

The trial court found that Plaintiffs prevailed against both Stollmeyer and Vista on the disclosure claim. The trial court found that even after Mindbody issued Supplemental Disclosures, Mindbody's Proxy Materials contained partial and complete omissions about the sale process that rendered the Proxy Materials materially misleading. The trial court held that Stollmeyer's failure to disclose his full involvement with Vista in Mindbody's proxy statements was a material omission in violation of his duty of disclosure.

C. The Trial Court Ruled that Vista Aided and Abetted Stollmeyer's Breach of His Duty of Disclosure

According to the trial court, Vista aided and abetted Stollmeyer's disclosure breach by failing to correct the Proxy Materials to include a full and fair description of its own interactions with Stollmeyer. In reaching this conclusion, the trial court relied on Vista's contractual obligation to review the Proxy Materials and notify Mindbody if there were any material omissions. The trial court found that Vista personnel reviewed the Proxy Materials, knew about Vista's interactions that were omitted and the significance of those omissions, and failed to speak up.

D. The Trial Court Awarded Damages for the Revlon Breach

Plaintiffs sought the lost transaction price that Vista would have paid if the process had not been tilted in its favor. Plaintiffs argued that the price was $40 per share. The trial court accepted Plaintiffs' theory of liability but rejected the $40 per share figure as lacking a sufficient evidentiary basis. Instead, the trial court found that the record supported that Vista would have paid $37.50 per share. Accordingly, the trial court held Stollmeyer liable for $1 per share.

E. The Trial Court Awarded Damages for the Disclosure Breach

The trial court awarded nominal damages of $1 per share for the disclosure breach in the Proxy Materials — which totaled over $35 million (not counting appraisal petitioners and prejudgment interest). In calculating this award, the court first held that Plaintiffs were only entitled to nominal damages because they made "no effort" to prove "reliance and causation."[11]

The court relied primarily on *Weinberger v. UOP, Inc.*[12] in formulating its nominal damages award. The trial court noted that, on remand, the Chancellor in *Weinberger* was tasked with awarding damages for a breach of fiduciary duty stemming from a failure to disclose certain material information.[13] The *Weinberger* court awarded damages of "$1 per share on a deal price of $21 per share, reflecting damages equal to 4.8% of the deal price."[14] This $1 per share remedy was calculated "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."[15] With this framework in mind, the trial court in this case derived a $1 per share calculation.[16]

***24** Because the trial court held that Vista aided and abetted Stollmeyer's disclosure breach, the trial court held Stollmeyer and Vista jointly and severally liable for the $1 per share disclosure breach damages. Stollmeyer was also liable for $1 per share in *Revlon* breach damages, but the trial court held that Plaintiffs were entitled to only one recovery of $1 per share.

F. The Trial Court Held that Defendants Waived Their Settlement Credit Argument

In its November Opinion, the Court of Chancery held that the Non-Settling Defendants had waived their right to seek a settlement credit under the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA").[17] The trial court reasoned that although Defendants' failure to prove joint tortfeasor status at trial did not automatically bar them from seeking DUCATA settlement credit post-trial, Defendants had waived their right to seek a settlement credit because they did not preserve the issue in any way before trial. Instead, they did not raise the issue until the last footnote on the last page of their last post-trial brief. The trial court concluded that Defendants' failure to timely raise the issue meant that Plaintiffs were not on notice of the need to defend against these arguments, which their trial strategy reflected, and that allowing Defendants to raise the issue post-trial would be unfair to Plaintiffs.

IV. CONTENTIONS ON APPEAL

First, Appellants contend that the trial court erred in ruling that Stollmeyer breached his fiduciary duty of loyalty under *Revlon* and his duty of disclosure. Second, Appellants argue that the trial court erred in ruling that Vista aided and abetted Stollmeyer's disclosure breaches. Third, Appellants argue that the court erred in awarding any damages because there were no damages from either the sale-process breach or the disclosure breach, and that the court erred when it awarded tens of millions of dollars in "nominal" damages. Finally, Appellants contend that the trial court erred in holding that Defendants waived their statutory right to seek a settlement credit based on Plaintiffs' settlement with the settling defendants, thereby giving Plaintiffs a pure windfall.

V. ANALYSIS

A. Stollmeyer's Revlon Breach Is Supported by the Record

The trial court's holding that Stollmeyer breached his fiduciary duty of loyalty is based on the Chancellor's detailed set of fact-findings set forth above. Appellants challenge none of the fact-findings — only the conclusions drawn from the facts. After reviewing the possible standards of review, the trial court applied the standard of review urged by Stollmeyer — *Revlon* — and found that his conduct fell outside the range of reasonableness.[18] Further, it found that *Corwin* cleansing was not available because he failed to disclose material information, which rendered the stockholder vote uninformed.

[1]"Our review of a trial court's application of enhanced scrutiny to board action necessarily implicates a review of law and fact."[19] We review the Court of Chancery's conclusions of law *de novo*[20] and its factual findings for *clear error*.[21] We agree with the trial court's analysis and affirm its holding that Stollmeyer breached his duty of loyalty under *Revlon*.

1. The Revlon Standard of Review

***25** **[2]** **[3]** **[4]** **[5]**When a stockholder challenges a change-of-control transaction, such as the all-cash merger at issue in this case, enhanced scrutiny under *Revlon* is the presumptive standard of review.[22] *Revlon* did not create a new fiduciary duty or change the nature of existing fiduciary duties. Rather, in the sale of control context, directors and officers must exercise their fiduciary duties to maximize the company's value for the stockholders' benefit.[23] There is no particular path that fiduciaries must follow to maximize value, so long as the chosen path is reasonable.[24] The key elements of *Revlon* enhanced scrutiny require both (i) reasonableness of the decision-making process employed by the directors, including the information on which the directors based their decision, and (ii) reasonableness of the directors' action in light of the circumstances then existing.[25]

[6]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.[26] The trial court found that 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" required under enhanced scrutiny.[27] We agree.

2. The Record Evidence Supports the Finding of Breach

***26** We next highlight some of the trial court's key factual determinations regarding Stollmeyer's disabling conflicts, his tilting of the sale process to favor Vista, and the state of the board's knowledge throughout the process. We conclude that the Chancellor's detailed findings adequately support the conclusion that Stollmeyer breached his *Revlon* duties.

[7]First, the trial court examined Stollmeyer's "subjective intent" and found that he suffered disabling conflicts. Specifically, the trial court found that Stollmeyer was subjectively motivated in large part by his need for liquidity, based on the fact that by 2018, Stollmeyer had never experienced a big liquidity event, had made several million dollars' worth of unpaid financial commitments, spent money in a way that required him to dig into his line of credit to fund additional financial commitments, and described his pre-Merger financial position as "living at or near the precipice of financial ruin."[28]

The trial court also found that Stollmeyer became "uniquely smitten" with Vista before the start of the formal sale process. After meeting with Vista twice, and particularly after the CXO Summit where he saw presentations about the wealth of Vista portfolio company CEOs that he called "very impressive" and "mind blowing/inspiring," Stollmeyer described himself as loving Vista. Stollmeyer also gave Vista that impression, and Vista "tout[ed] internally that Stollmeyer 'loved' them" and that they had forged a strong relationship with him.[29] Part of Stollmeyer's favoritism of Vista was his expectation that if Mindbody were sold to Vista, he could keep his position as CEO, reload with equity, and "make as much money over the next three years as he did the first go around" after a second sale of the company.

Another component of Stollmeyer's disabling conflicts was his time crunch and his "desire to sell fast."[30] The trial court found that Plaintiffs proved Stollmeyer needed liquidity, was tired of running a public company, and "had a relatively limited window for effectuating a transaction."[31] He knew that it would be easier to sell while Liaw remained on the board and before Luxor, who opposed a sale of Mindbody, joined the board. He also knew that it was advantageous to sell before the looming sunset of the super-voting shares. Chang had warned Stollmeyer that Vista liked to move fast, and the trial court found that for Stollmeyer, Vista's speed was a plus. The trial court found that contrary to Defendants' argument, Stollmeyer's stock ownership did not result in his interests being aligned with other stockholders and that the record "overwhelmingly" supported Plaintiffs' theory of Stollmeyer's disabling conflicts. We agree.

[8]Second, the trial court made detailed findings that Stollmeyer tilted the sale process in Vista's favor. Although Stollmeyer did not have Board authorization to explore a sale of Mindbody until mid-October 2018, the trial court found that Stollmeyer met with Vista twice prior to authorization and signaled in both meetings that Mindbody could be an acquisition target. In response, Vista began drafting a memorandum for its Investment Committee and preparing its expression of interest. At least by October 11, when Chang warned Stollmeyer that Vista liked to move fast, Stollmeyer knew that Vista might attempt to move fast to gain a competitive advantage. Instead of slowing Vista down to ensure a competitive process, Stollmeyer helped Vista get ahead. By waiting eight days after Vista's expression of interest on October 15 to inform all the board members of that interest, Stollmeyer delayed the formal start of the sale process and gave Vista a head start.

***27** Vista used that head start to accelerate its process. Based on Stollmeyer's signal that Mindbody would be sold and his obvious "love" for Vista, Saroya retained Bain & Co. in mid-October to conduct an expensive outside-in market analysis of Mindbody that would take four to six weeks to complete. Beginning the process so early positioned Vista to make a firm offer in early December.

The trial court found that this skewed sale process had an "obvious effect."[32] No other bidder heard about the process until November 19, and no other financial bidders were contacted until December 3 or 4. When Vista was ready to make a firm offer in early December, other potential bidders were still in early stages. By the time Vista made its best and final offer on December 20, H & F was Vista's only competitor, and H & F "lamented internally that they needed more time."[33] The trial court also found that no other bidder received such informational advantages before the start of the formal sale process, Stollmeyer did not communicate with any other bidders in breach of the Transaction Committee's Guidelines, none of the others knew the specific financial range to target, and none could say "[w]e were able to conduct all of our outside-in work *before the process launched*" like Vista.[34] Based on these factual findings, the trial court concluded that without competitive pressure, Mindbody had no leverage to extract a higher price, and that without Stollmeyer's help, Vista would not have acquired Mindbody for $36.50 per share. Stollmeyer tilted the sale process to favor Vista.

[9]Third, the trial court made detailed findings about what the Board did not know. The trial court observed that directors can manage conflicts if they are aware of them but found that the Mindbody Board did not know about the conflicts that infected the sale process.[35] Specifically, the trial court found that the Board did not know about Stollmeyer's need for liquidity, IVP's desire for a near-term exit of their Mindbody investment, the details of Stollmeyer's September 4 meeting with Vista, Stollmeyer's impression of the CXO Summit as "mind blowing/inspiring," Stollmeyer's communicated desire to find a "good home" for his company, Stollmeyer's "love" for Vista, Chang's tip to Vista about Stollmeyer's $40 minimum share price, Stollmeyer's November 10 tip to Vista about the start of the formal sale process, or Vista's "huge head start."[36] The trial court concluded that the Board was "in the dark" and that Stollmeyer deprived the Board of the information it needed to employ the kind of reasonable decision-making process required under *Revlon* enhanced scrutiny.[37]

3. The Corwin Defense Does Not Apply

[10]Appellants argue on appeal that *Corwin* cleansing should apply. When enhanced scrutiny under *Revlon* is the standard of review, a defendant can restore the business judgment rule through *Corwin* cleansing for a transaction without a controlling stockholder by showing that the transaction was "approved by a fully informed, uncoerced majority of the disinterested stockholders."[38] The trial court noted that generally when a plaintiff proves a 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 the information about the officer's machinations."[39] That generalization proves true in this case because the stockholders were not made aware of Stollmeyer's disabling conflicts or the way the sale process favored Vista. The trial court concluded that these omissions defeat the *Corwin* defense.[40]

***28** **[11]**The trial court's findings support its ultimate conclusion that Plaintiffs proved a paradigmatic *Revlon* claim and that *Corwin* cleansing was not available to Stollmeyer. In sum, Stollmeyer was a conflicted fiduciary who tilted the sale process toward Vista for personal reasons and was not adequately overseen by the Board. As a result, Stollmeyer's actions were not reasonable under the circumstances and the Board was not able to conduct a reasonable decision-making process. Because Stollmeyer kept material information from the Board, the Board could not fully inform the stockholders before the vote and *Corwin* cleansing does not apply. We affirm the ruling of the trial court that Stollmeyer breached his duty of loyalty under *Revlon*.

B. Stollmeyer's Disclosure Breach Is Supported by the Record

The trial court's holding that Stollmeyer breached his fiduciary duty of disclosure is based on the Chancellor's fact-findings set forth above. The trial court's analysis focused on assessing the materiality of "partial and complete omissions" in the Mindbody Proxy Materials that remained undisclosed after Mindbody issued its Supplemental Disclosures on February 7.[41] The trial court identified three partial and four complete omissions before analyzing the materiality of the omissions taken as a whole. Appellants challenge none of the Chancellor's fact-findings and argue that these omissions are not material. We agree with the trial court that there were material omissions, and therefore we affirm the trial court's ruling that Stollmeyer breached his duty of disclosure. Our reversal of the **aiding** and **abetting** determination means that we need not address the challenges directed to the disclosure damages award.

[12] [13] [14]"Whether disclosures are adequate 'is a mixed [question] of law and fact, requiring an assessment of the inferences a reasonable shareholder would draw and the significance of those inferences to the individual shareholder.' "[42] We have the "authority to review the entire record and to make [our] own findings of fact in a proper case."[43] However, if the trial judge's findings "are sufficiently supported by the record and are the product of an orderly and logical deductive process," then "we accept them, even though independently we might have reached opposite conclusions."[44]

1. The Duty of Disclosure

[15] [16] [17] [18] [19]Directors and officers owe a fiduciary duty of disclosure to the corporation and its stockholders. The duty of disclosure "is not an independent dut[y] but the application in a specific context of the board's fiduciary duties of care, good faith, and loyalty."[45] When directors and officers seek stockholder action, such as stockholder approval for a merger, they have a fiduciary duty to "disclose fully and fairly all material information within [their] control."[46] This means that "corporate fiduciaries can breach their duty of disclosure under Delaware law ... by making a materially false statement, by omitting a material fact, or by making a partial disclosure that is materially misleading."[47] Omitted information is material if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available."[48]

***29** **[20] [21] [22]**The duty of disclosure also extends to partial omissions because "disclosures cannot be materially misleading either."[49] "[O]nce defendants [have] traveled down the road of partial disclosure of the history leading up to the Merger ... they ha[ve] an obligation to provide the stockholders with an accurate, full, and fair characterization of those historic events."[50] "[E]ven a non-material fact can, in some instances, trigger an obligation to disclose additional, otherwise non-material facts in order to prevent the initial disclosure from materially misleading the stockholders."[51]

2. The Partial Omissions

The trial court first assessed three alleged partial omissions. The trial court found that although the Supplemental Disclosures disclosed Stollmeyer's meetings with Vista on September 4 and at Vista's CXO Summit on October 8 and 9, the disclosures omitted certain details that "paint[ed] his interactions with Vista in a sterile light."[52] The Supplemental Disclosures described the September 4 meeting in the following way:

> [A] representative of Vista emailed [Mr.] 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.[53]

The trial court found that this description omitted that Stollmeyer "invited discussions about an acquisition" by stating that 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."[54]

Next, the Supplemental Disclosures described Stollmeyer's attendance at Vista's CXO Summit as follows:

> 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.[55]

The trial court found that this description of the CXO Summit as a "run-of-the-mill industry gathering" omitted the fact that Stollmeyer "reiterated his intention to explore a sale of Mindbody, without any Board authorization to do so."[56]

Finally, the Supplemental Disclosures disclosed Vista's October 15 expression of interest, but the trial court found the disclosure to be "anodyne" because it stated only that "Vista indicated to Mr. Stollmeyer that it was interested in pursuing strategic transaction discussions with MINDBODY."[57] According to the trial court, this description omitted the details that Stollmeyer spoke with Saroya for 25 minutes 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."[58]

3. The Complete Omissions

***30** The trial court then listed four "complete omissions" that were not disclosed in the Proxy Materials at all. The four complete omissions were: Stollmeyer's reference call with a Vista portfolio CEO on October 19, Chang's tip to Vista on November 6 that Stollmeyer wanted $40 per share, Stollmeyer's tip to Vista on November 10 that Mindbody would be running a sale process, and Saroya's invitation for Stollmeyer to attend a charity event in Miami followed by "Stollmeyer's initial acceptance as long as he could bring his wife."[59]

The trial court found that the Proxy Materials, taken as a whole, "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."[60] The trial court then concluded that this was not an " 'accurate, full and fair characterization' of those events."[61] We agree.

[23]The strongest record support for Stollmeyer's breach of his disclosure duty is the omission of the two tips to Vista. The first was the omission of Chang's tip to Vista on November 6 that Stollmeyer wanted $40 per share.[62] The second was the omission of Stollmeyer's tip to Saroya on November 10, when he called Saroya in violation of the Transaction Committee's Guidelines to tell him that Mindbody would be running a sale process. These tips occurred approximately three weeks before Vista was formally invited into the process by Qatalyst on November 30. If Vista had not already begun its acquisition process, the November 10 tip would have given Vista virtual certainty that Mindbody was coming to market and a three-week head start over any other bidder. The November 6 tip gave Vista an informational advantage about how to structure its pricing models and what price range would likely be acceptable. We believe any reasonable stockholder would find these tips to one potential acquirer and not any others indicative of a potentially flawed sale process that would significantly alter the total mix of information and would be important in considering whether to vote to approve the merger. Accordingly, the tips were material. We affirm the trial court's holding that Stollmeyer breached his duty of disclosure.

C. Whether Vista Aided and Abetted Stollmeyer's Breaches

[24]We turn next to whether the trial court erred in holding that Vista aided and abetted Stollmeyer's disclosure breaches. The trial court's holding that Vista aided and abetted Stollmeyer's disclosure breaches was based on both findings of fact and conclusions of law. This Court reviews the trial court's factual findings for *clear error*.[63] We review the trial court's conclusions of law *de novo*.[64]

The trial court held that Vista's "contractual obligation" in the merger agreement to review Mindbody's proxy statements and "correct" any misstatements or omissions, and Vista's subsequent failure to correct omissions, amounted to "knowing participation" in Stollmeyer's breach of his duty of disclosure. Analyzing whether the trial court erred in this holding raises a number of novel issues for this Court, including the issue of when third-party buyers can be held liable for **aiding** and **abetting** fiduciary breaches, whether contractual undertakings in merger agreements can create fiduciary duties for third parties to the target's stockholders, and whether a passive failure to act rather than active participation or "substantial assistance" can give rise to liability. The case law is thin and the briefing by the parties was scant on all of these novel issues.

*1. The Elements of an **Aiding** and **Abetting** Claim and Our Holding*

***31** [25]The basic four-part test for proving an **aiding** and **abetting** claim is well-settled under Delaware law and was articulated by this Court in *Malpiede*. The test requires "(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."[65] As the trial court noted, the existence of a fiduciary relationship (between Stollmeyer and Mindbody's stockholders) was never in dispute. The second element, the breach of the fiduciary's duty, was established above when we affirmed the trial court's ruling that Stollmeyer breached his duty of disclosure. The trial court's analysis focused on the third element, the defendant's (Vista's) "knowing participation." The trial court divided the "knowing participation" prong of the **aiding** and **abetting** test into two parts, knowledge (or *scienter*) and participation. The trial court analyzed Vista's knowledge first and recounted factual findings that supported its conclusion that Vista acted with *scienter*.

The trial court held that Vista also "participated" in Stollmeyer's disclosure breaches. The linchpin of the trial court's analysis was that Vista was contractually obligated to review Mindbody's proxy statements and to "correct" any misstatements or omissions, which Vista failed to do. The trial court reasoned that "Vista participated in the drafting of the Proxy Materials. ... 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."[66] As a result, the trial court held that Stollmeyer and Vista were jointly and severally liable for the disclosure breaches and awarded damages of $1 per share.[67]

Appellants argue that no claim for **aiding** and **abetting** is available based solely on a buyer's failure to correct the seller's Proxy Materials to its stockholders. Specifically, they argue that such a failure constitutes only a passive awareness of Stollmeyer's breach of disclosure and that third parties have no duty, imposed by law or equity, to "ensure that all material facts are disclosed, by fiduciaries to their principals."[68] They point out that plaintiffs did not assert any such breach of contract claim.[69] We hold that the Merger Agreement's contractual provision did not transform Vista's inaction into a "knowing participation" in Stollmeyer's disclosure breach. Based upon the record before us, the "participation" requirement has not been established. Further, aspects of the *scienter* requirement, namely, Vista's knowledge of the wrongfulness of its own conduct regarding the disclosure breach, also fall short on this record. Accordingly, the "knowing participation" element of the **aiding** and **abetting** test is not satisfied, and we reverse the trial court's holding that Vista aided and abetted Stollmeyer's disclosure breach.

2. Overview of "Knowing Participation"

Like the trial court, we focus our analysis on the "knowing participation" inquiry. This element is often the most difficult to prove and involves two distinct concepts that are sometimes analyzed separately: knowledge and participation. We turn first to the knowledge prong of "knowing participation" and analyze what our case law requires for a plaintiff to establish *scienter*. We then review the case law on what constitutes participation in this **aiding** and **abetting** context. We also consider guidance offered by the Restatement (Second) of Torts "substantial assistance" multi-factor test as a helpful analytical framework that addresses both aspects of "knowing participation" in a wholistic fashion. We then apply the case law and Restatement factors to assess whether the trial court erred in determining that Vista knowingly participated in Stollmeyer's breach of his disclosure duty.

a. The Law of Scienter

***32** [26] [27] [28]We turn first to the knowledge part of the "knowing participation" analysis. To prove *scienter* for an **aiding** and **abetting** claim, a plaintiff must prove two types of knowledge. As this Court first held in *Malpiede*, "[k]nowing participation in a board's fiduciary breach requires that the third party act with the knowledge that the conduct advocated or assisted constitutes such a breach."[70] Since *Malpiede*, this rule requiring that an aider and abettor know that the *primary party's* conduct constitutes a breach has been restated in many cases.[71] Knowledge that the primary party has breached its fiduciary duty is not enough, however. This Court clarified in *RBC* that to prove *scienter* in an **aiding** and **abetting** claim, a plaintiff must also demonstrate that the aider and abettor had actual knowledge "that their conduct was legally improper."[72] This rule has also been restated in many cases since *RBC*.[73] This requirement that the aider and abettor must know that *its own* conduct regarding the breach was legally improper is distinct from knowledge that the primary party's conduct was a breach. In other words, "[i]t is the aider and abettor that must act with *scienter*."[74] "[T]he question of whether a defendant acted with *scienter* is a factual determination."[75] As we said in *RBC*, "the requirement that the aider and abettor act with *scienter* makes an **aiding** and **abetting** claim among the most difficult to prove."[76]

b. The Law of What Constitutes "Participation"

[29] [30]Participation can also involve a nuanced analysis. In an M&A case, the role of the alleged aider and abettor in the transaction is important and can raise the level of difficulty of proving this already difficult claim to prove. When an **aiding** and **abetting** claim is brought against a potential acquirer negotiating at arms'-length, participation should be the most difficult to prove.[77] This is because Delaware law protects arms'-length negotiations and "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for **aiding** and **abetting**."[78] A buyer may be liable to a target's stockholders if the buyer "attempts to create or exploit conflicts of interest in the board" or "where the bidder and the board conspire in or agree to the fiduciary breach," however.[79] The participation requirement "protects acquirors, and by extension their investors, from the high costs of discovery where there is no reasonable factual basis supporting an inference that the acquiror was involved in any nefarious activity."[80] The participation requirement also benefits target stockholders "by ensuring that potential acquirors are not deterred from making bids by the potential for suffering litigation costs and risks on top of the considerable risk that already accompanies buying another entity[.]"[81]

***33** Settling on the proper analytical framework for assessing participation is essential. In this case, that is an especially difficult task given the novelty of the issues and the fact that the novel issues that we must analyze were not presented by the parties in any depth in the proceedings below.

Delaware trial courts have held that participation in an **aiding** and **abetting** claim requires that the aider and abettor provide "substantial assistance" to the primary violator.[82] This substantial assistance can take many forms. Some courts have accepted the idea that a failure to act might constitute substantial assistance.[83] However, in the corporate context, these instances appear to be limited primarily to the federal securities law arena.[84] The parties here have cited no such case in the corporate governance context. Rather, our case law in the corporate governance context has found liability only where there has been overt participation such as active "attempts to create or exploit conflicts of interest in the board" or an overt conspiracy or agreement between the buyer and the board as described above.[85]

[31]This substantial assistance requirement can also be understood as requiring active participation rather than "passive awareness."[86] As the Court of Chancery explained in *Buttonwood*, "passive awareness on the part of [the defendant] does not constitute 'substantial assistance' to any breach resulting from [the primary violator's] failure to disclose the facts."[87] In *RBC*, we affirmed **aiding** and **abetting** liability for a financial advisor who "purposely misled the [seller's] Board so as to proximately cause the Board to breach its duty of care."[88] In *Buttonwood*, however, the Court of Chancery held that a financial advisor was not liable for "passive awareness ... of the omission of material facts in disclosures to the stockholders, made by fiduciaries *who themselves were aware of the information*."[89]

***34** The parties cite no Delaware case finding liability against a third-party bidder for **aiding** and **abetting** a breach of fiduciary duty. Rather, as the Court of Chancery noted in *Xura* after the plaintiff "unsurprisingly" cited no case law in support of their argument, "an **aiding** and **abetting** claim based on a third-party's alleged failure somehow to *prevent* a board from providing misleading disclosures to stockholders rests on thin ice."[90] The court implied an active participation requirement, explaining that the plaintiff pled no facts that would support an inference that the defendant "knowingly *facilitated* alleged disclosure deficiencies or otherwise 'knowingly participated' in that aspect of the alleged breach of fiduciary [duty]."[91]

The requirement of substantial assistance for a finding of "knowing participation" emanates from the Restatement (Second) of Torts § 876(b). Many Delaware cases have cited § 876(b) as persuasive authority for what the "knowing participation" element requires.[92] Section 876 reads in its entirety:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or

> pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[93]

The first instance of a Delaware court requiring "substantial assistance" to the primary violator in an **aiding** and **abetting** tort claim occurred in the Superior Court decision *Patton v. Simone*.[94] In *Patton*, the Superior Court relied on multiple United States Court of Appeals cases citing the Restatement (Second) of Torts § 876 and a West Virginia Supreme Court case to support its holding that there must be knowledge "linked to the substantial assistance" of an aider and abettor, and that without a third party's independent duty to a plaintiff, there can be no liability for a failure to act.[95] More recently, in 2014, the Court of Chancery quoted the "substantial assistance" requirement when describing the elements of an **aiding** and **abetting** claim in two cases, *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*[96] and *Kuhns v. Bruce A. Hiler Delaware QPRT*.[97]

***35** Reliance on § 876(b) solidified in 2015, when the Court of Chancery conducted a thorough analysis of the requirements for "knowing participation" in the context of a claim for **aiding** and **abetting** a breach of fiduciary duty in *In re Dole Food Co., Inc. Stockholder Litigation*.[98] The court stated that because secondary actors can be involved in tortious conduct in a variety of ways "that can differ vastly in their magnitude, effect, and consequential culpability," knowing participation "requires that the secondary actor have provided 'substantial assistance' to the primary violator."[99] Since *Dole*, many Delaware cases have cited *Dole* and § 876(b)'s substantial assistance requirement, including the trial court in this case.[100]

The court in *Dole* then quoted the "substantial assistance" requirement from the Restatement (Second) of Torts § 876(b) and listed "illustrative factors" drawn from *Kuhns* and *Patton* for analyzing whether a secondary actor "knowingly provided substantial assistance."[101] The "illustrative factors" from *Dole* ultimately derive from the Restatement (Second) of Torts § 876, comment d, which sets forth five factors to consider when analyzing whether the defendant's assistance or participation is substantial enough for liability:

> The assistance of or participation by the defendant may be so slight that he is not liable for the act of the other. In determining this, [1] the nature of the act encouraged, [2] the amount of assistance given by the defendant, [3] his presence or absence at the time of the tort, [4] his relation to the other[,] and [5] his state of mind are all considered.[102]

The relevance of each factor depends on the facts of the case, and not all factors are relevant in all situations.[103] The factors have been phrased and expanded upon differently by different courts. The Restatement factors analyzed in *Dole* are the following:

- The nature of the tortious act that the secondary actor participated in or encouraged, including its severity, the clarity of the violation, the extent of the consequences, and the secondary actor's knowledge of these aspects;

- The amount, kind, and duration of assistance given, including how directly involved the secondary actor was in the primary actor's conduct;

- The nature of the relationship between the secondary and primary actors; and
- The secondary actor's state of mind.[104]

Some Delaware trial courts have used the Restatement substantial assistance factors as an analytical framework to assess an **aiding** and **abetting** claim.[105] We also find these Restatement factors to be a helpful analytical framework for assessing substantial assistance, knowledge, and participation. Accordingly, we structure our analysis around them.

3. Applying the Restatement Test and Whether Vista's Conduct Constituted "Substantial Assistance"

***36** Next, we apply the case law and Restatement factors to assess whether the trial court erred in determining that Vista knowingly participated in Stollmeyer's breach of his disclosure duty. Ultimately, we conclude that the "knowing participation" element of the **aiding** and **abetting** test is not satisfied.

a. The Severity and Clarity of the Violation, and Vista's Knowledge of These Aspects

In assessing the severity and clarity of Stollmeyer's disclosure breach and Vista's knowledge of the severity and clarity of that violation, it is helpful to analyze the trial court's factual findings to assess the weight and materiality of the various omissions that formed the basis of Stollmeyer's disclosure breach. This analysis goes to the first knowledge requirement for a finding of *scienter* under the "knowing participation" element of an **aiding** and **abetting** claim: whether Vista acted "with the knowledge that the conduct advocated or assisted constitutes such a breach."[106]

The details that were left out of the "partial omissions" the trial court found included Stollmeyer's September 4 statement that he was looking for a "good home" for his company and was "tired" of running a public company, Stollmeyer's statement of intention to explore a take-private merger at the CXO Summit, and Vista's October 15 expression of interest to Stollmeyer in a 25 minute phone call that contemplated a price with a significant premium over market value and retention of some members of management.

The four complete omissions the trial court found included Stollmeyer's reference call to one of Vista's portfolio company CEOs, Chang's November 6 tip about Stollmeyer's minimum price of $40 per share, Stollmeyer's November 10 tip about the timing of the sale process, and Saroya's November 17 invitation for Stollmeyer to attend a charity event in Miami along with Stollmeyer's "initial acceptance as long as he could bring his wife."

The four complete omissions are not of equal weight. We take them each in turn. Saroya's invitation for Stollmeyer to attend a charity event in Miami is less weighty in terms of materiality, for example. The trial court found Stollmeyer's response to be an "initial acceptance as long as he could bring his wife."[107] The text messages indicate that after Saroya invited Stollmeyer to the event, Stollmeyer responded: "Hi Monti – having a good weekend. Thank you for the invite. This sounds like an amazing cause and worth the trip. Will see if I can juggle a few things, and get back to you soon. Are spouses appropriate?"[108] The extent of this interaction between Stollmeyer and Saroya is that Saroya invited Stollmeyer to an event, Stollmeyer asked a question about the event, and then Stollmeyer ultimately declined to attend.[109] This omission appears to us to be of less "magnitude and effect" compared with the others and, thus, we could understand that Vista could see it as being of questionable materiality.

***37** [32]The remaining three omissions are more clearly material. Stollmeyer's reference call with a Vista portfolio CEO on October 19 could have indirectly indicated Stollmeyer's growing preference for Vista or given Vista reason to be more confident that Mindbody would come to market. Accordingly, a reasonable stockholder could find that the reference call significantly alters the total mix of information.

As we noted above, the clearest instances of Stollmeyer breaching his disclosure duty are the omissions of Chang's tip to Vista on November 6 and Stollmeyer's tip to Saroya on November 10. Chang's tip to Vista on November 6 that Stollmeyer wanted $40 per share gave Vista an information advantage over other bidders and allowed Vista to configure its pricing model to get to a potential $40 per share price for Mindbody. Stollmeyer tipped Saroya on November 10 when he called Saroya in violation of the Transaction Committee's Guidelines to tell him that Mindbody would be running a sale process. These tips occurred approximately three weeks before Qatalyst formally invited Vista into the process by on November 30. Stollmeyer's tip gave Vista a three-week head start over other potential bidders. As we held above in the disclosure breach analysis, any reasonable stockholder would find these tips to one potential acquirer and not any others indicative of a potentially flawed sale process that would significantly alter the total mix of information available to the stockholders in deciding how to vote. The omissions of Chang's November 6 tip and Stollmeyer's November 10 tip to Vista were undoubtedly material.

Accordingly, these omissions adequately support the trial court's holding that Stollmeyer breached his disclosure duty, as we affirmed above. The nature of the disclosure violation and its materiality to the target stockholders should be considered in assessing the "severity and clarity of the violation" from Vista's perspective. Although the disclosure violations may not be of equal weight, the record, particularly as to the November 6 and November 10 tips, supports the conclusion that Vista likely knew that the conduct of the primary violator, Stollmeyer, constituted a breach. This knowledge satisfies the first type of required knowledge for a finding of *scienter*. This Restatement factor weighs in favor of holding that Vista gave "substantial assistance" to Stollmeyer in his breach. This is only one part of the *scienter* analysis, however, as we have only addressed the state of the record regarding Vista's knowledge of Stollmeyer's conduct constituting a breach in this section. We address the state of the record as to Vista's knowledge of the wrongfulness of its own conduct later in our analysis.

b. The Amount, Kind, and Duration of Assistance Given, Including Whether There Was Direct Involvement

[33]The next factor we analyze is the amount, kind, and duration of assistance that Vista gave to Stollmeyer,

including whether Vista was directly involved in Stollmeyer's breach. Here, Vista provided no affirmative assistance at all and took no action that actively furthered Stollmeyer's disclosure breach. Instead, Plaintiffs' argument is premised on Vista's failure to act.

The trial court held that the plaintiffs "proved that Vista participated in the breach."[110] The trial court based this ruling on its finding that the Merger Agreement contained language that, in the trial court's words, created a "contractual obligation for Vista to correct any material omissions in the Proxy Materials."[111] The trial court characterizes the provision this way based on two sections of the Merger Agreement. The first is § 6.3(b), which states that:

> ***38** [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, and [Mindbody] will give due consideration to all reasonable additions, deletions or changes suggested thereto by [Vista] or its counsel.[112]

The second is § 6.3(d) of the Merger Agreement, which states that:

> Each of [Mindbody], on the one hand, and [Vista], on the other hand, will furnish all information concerning it and its Affiliates, if applicable, as the other Party may reasonably request in connection with the preparation and filing with the SEC of the Proxy Statement and any Other Required Company Filing or any Other Required Parent Filing. If at any time prior to the Company Stockholder Meeting any information relating to [Mindbody], [Vista], or any of their respective Affiliates should be discovered by [Mindbody], on the one hand, or [Vista], on the other hand, that should be set forth in an amendment or supplement to the Proxy Statement, any Other Required Company Filing or any Other Required Parent Filing, as the case may be, so that such filing would not include any misstatement of a material fact or omit to state any material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances under which they were made, not misleading, then the Party that discovers such information **will promptly notify the other**, and an appropriate amendment or supplement to such filing describing such information will be promptly prepared and filed with the SEC by the appropriate Party and, to the extent required by applicable law or the SEC or its staff, disseminated to the Company Stockholders.[113]

The trial court also found that based on these provisions, Vista had multiple opportunities to review the Proxy Materials. Saroya and Stahl both received and reviewed a copy of the preliminary proxy statement on January 5, after which they both approved the proposed language without offering any comments or changes.[114] On January 21, Stahl and Klomhaus both received and reviewed a copy of the proposed definitive proxy statement, and neither suggested changes. The trial court concluded, therefore, that "Vista participated in the drafting of the Proxy Materials."[115]

We can infer from the trial court's analysis of participation that the court equated Vista reviewing and failing to suggest changes to the Proxy Materials with Vista actively participating in the drafting of the Proxy Materials, and by extension participating in Stollmeyer's disclosure breach. The trial court essentially states this conclusion in its final analysis of Vista's **aiding** and **abetting** liability: "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."[116]

The trial court's analysis and conclusion present several novel issues for this Court on appeal. The first issue arises from the trial court's second sentence, "Vista thus withheld information from the stockholders," which implies a duty of disclosure between Vista and Mindbody's stockholders. The question we confront is whether a contractual obligation between a target corporation and a third-party buyer to notify the other of potential disclosure violations creates an independent duty of disclosure between the third-party buyer and the target's stockholders that can form the basis for secondary **aiding** and **abetting** liability? We conclude that in the case before us, it does not.

***39** We begin by noting how thin the case law is on this issue. As we explained above, we have never held a third-party arms'-length buyer liable for **aiding** and **abetting** a fiduciary breach. We have also never held that a contractual obligation and a failure to act gives rise to **aiding** and **abetting** liability. Even absent a contractual obligation, we have never held that a failure to act or mere passive awareness gives rise to **aiding** and **abetting** liability. There is no case we are aware of until this one that has imposed liability under these or similar circumstances in the corporate governance arena.

We also preface our discussion of the contract with the observation that the contractual obligation in the Merger Agreement, relied on by the trial court, was the subject of scant briefing by the parties in the proceedings below and on appeal. Thus, we address these points in a narrow fashion in an effort to resolve this case efficiently without more broadly foreclosing different outcomes based upon different facts or legal arguments that might or could be presented in future cases.[117]

Appellants devote only two sentences in their Opening Brief to this important issue, and argue that the trial court attempted to use Vista's contractual obligation to "bypass" the Court of Chancery rule that "[a] general duty on third parties to ensure that all material facts are disclosed, by fiduciaries to their principals" is "not a duty imposed by law or equity."[118] They also argue that there is no breach of contract claim in this case. Plaintiffs responded in their Answering Brief by describing the contractual provisions at issue and only cited the Court of Chancery's decision in *Columbia* in support of their argument, a case presently on appeal that follows and relies on the trial court's opinion in this case.[119] The briefing below by the parties was equally scant.[120]

One argument that Appellants did make in their Reply Brief on appeal is that Plaintiffs (and presumably the trial court) misread Merger Agreement § 6.3(b) by saying that Vista was obligated to "correct any material omissions in the Proxy Materials."[121] Appellants argue that the Merger Agreement did not give Vista a right to change Mindbody's Proxy Materials, only to "review it and make suggestions."[122] Appellants ignore, however, the affirmative obligation at issue in § 6.3(d).

***40** Turning to the Merger Agreement provisions at issue, § 6.3(b) does state that "[Mindbody] may not file the Proxy Statement ... without first providing [Vista] and its counsel a reasonable opportunity to review and comment thereon, and [Mindbody] will give due consideration to all reasonable additions, deletions or changes suggested thereto by [Vista] or its counsel."[123] This provision gives Vista the right to review and comment on draft proxy statements, and obligates Mindbody to consider suggested changes.

Section 6.3(d), however, states that if "any information relating to [either party] should be discovered by [either party] ... that should be set forth in an amendment or supplement to the Proxy Statement" to avoid the statement being materially misleading, "then the Party that discovers such information **will promptly notify the other**" so an appropriate supplement can be filed.[124] At a minimum, this provision creates an affirmative obligation for Vista to notify Mindbody of any information that Vista discovered, the omission of which would render the proxy statements materially misleading. As we explained, the record adequately supports that Vista knew about Stollmeyer's breach of his disclosure duty.

[34]The question thus remains whether Vista's affirmative contractual obligation to notify Mindbody of material omissions and Vista's subsequent failure to notify constituted "substantial assistance" in Stollmeyer's disclosure breaches. The trial court found that Vista "participated in the drafting of the Proxy Materials."[125] Based on our review of the record on appeal, this finding is not supported by the record evidence, and the trial court made no factual finding that Vista actively contributed to drafting or editing the Proxy Materials in any way. To the contrary, the trial court found that no one at Vista who reviewed the draft Proxy Materials suggested any changes.[126] Our law generally requires that participation for the purposes of **aiding** and **abetting** liability requires more than the passive awareness of a fiduciary's disclosure breach that would come from simply reviewing draft Proxy Materials. The trial court itself noted that "knowing participation" requires that the secondary actor "have provided substantial assistance" to the primary actor.[127]

The parties have cited no case law or other legal authority in support of the argument that a failure to act, without some kind of active role, constitutes "substantial assistance" for **aiding** and **abetting** a fiduciary breach. We have never held that it does. On these facts and with the scant briefing provided by the parties, we decline to do so now.

RBC is perhaps the most directly relevant precedent to the facts and claims asserted in this case. But this case is easily distinguished from *RBC*. In *RBC*, this Court held that the board breached its fiduciary duty of disclosure after being misled and "intentionally duped" by RBC.[128] This Court held that the board's financial advisor, RBC, aided and abetted the board's breach when RBC took advantage of the board's failure to oversee the sale process by committing "fraud on the Board."[129] Further, RBC purposefully misled the board and created an informational vacuum, which proximately caused the board's breach of its fiduciary duty of disclosure.[130] In that case, RBC knew all of the relevant information and the board knew none of it.

***41** Here, Stollmeyer is the primary violator who breached his duty of disclosure, and unlike the board in *RBC*, Stollmeyer was not operating in an informational vacuum. On the contrary, the trial court found that Stollmeyer knew everything that Vista knew.[131] Consequently, Vista, as an alleged aider and abettor, is in a very different position in this case than RBC was in that case. Vista did not create an informational vacuum, or purposely mislead Stollmeyer, or proximately cause his disclosure breach. Stollmeyer already had all of the information that was omitted from the Proxy Materials. Vista took no action to facilitate or assist Stollmeyer in his breach, but rather passively stood by while Stollmeyer breached his disclosure duty. On these facts, Vista did not substantially assist Stollmeyer's breach.

Under this Restatement factor, assessing the amount, kind, and duration of assistance that Vista gave to Stollmeyer in his disclosure breaches, we find that Vista gave no active assistance to Stollmeyer at all. This factor weighs against concluding that Vista "participated" in Stollmeyer's disclosure breach and against holding that Vista gave "substantial assistance" to Stollmeyer in his breach.

c. The Nature of the Relationships Between the Secondary and Primary Actors

The next factor we analyze under the Restatement substantial assistance test is the nature of the relationship between Vista and Stollmeyer. Here, Vista is an arms'-length third-party buyer of Mindbody. As we explained above, when an **aiding** and **abetting** claim is brought against a third-party acquirer negotiating at arms'-length, participation should be the most difficult to prove.[132] This is because Delaware law protects arms'-length negotiations and "a bidder's attempts to reduce the sale price through arm's-length negotiations cannot give rise to liability for **aiding** and **abetting**."[133] However, liability can still attach for third parties who "create or exploit conflicts of interest in the board" or "where the bidder and the board conspire in or agree to the fiduciary breach."[134] As noted above, plaintiffs waived any claim that Vista aided and abetted the *Revlon* breach.

With respect to the substantial assistance analysis, Vista's status as a third-party bidder affords it some protection in its negotiations with potential target companies and the directors and officers of those companies.[135] This general protection afforded to Vista in this context weighs against holding that Vista gave substantial assistance to Stollmeyer in his disclosure breaches. We ask now whether § 6.3 of the Merger Agreement vitiates this protection. We think it does not.

Once the Merger Agreement was executed, Vista and Mindbody had a contractual relationship and contractual obligations to each other, including around reviewing the Proxy Materials. This means that either party could bring a breach of contract claim against the other for failure to meet contractual obligations, including the obligation to notify the other party of material omissions. Vista could have discharged its contractual duties by notifying the Mindbody board of any remaining suspected omissions after the Supplemental Disclosures were filed. But even failing to fulfil that contractual obligation and potentially subjecting itself to a breach of contract claim, we ask whether Vista's failure to notify Mindbody (of items Stollmeyer already knew) should lead to a finding that Vista is secondarily liable to Mindbody's stockholders for Stollmeyer's disclosure breaches.

***42** **[35]**This brings us back around to our more specific focus of whether Vista had an independent duty to Mindbody's stockholders, and if not, whether Vista could be liable for **aiding** and **abetting** Stollmeyer's disclosure breaches. Recall that the trial court's participation analysis and conclusion ended with: "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."[136] The trial court's middle sentence, "Vista thus withheld information from the stockholders," implies a duty of disclosure between Vista and Mindbody's stockholders. The parties have provided us with no record-based explanation to support a conclusion that such a duty existed. Nor have we been presented with any Delaware authority to support a reading that this contractual obligation creates independent fiduciary duties between a third-party buyer and a target company's stockholders. Accordingly, we conclude that the contractual obligations in § 6.3(b) and § 6.3(d) of the Merger Agreement do not give rise to a separate duty of disclosure owed by Vista to Mindbody's stockholders. If such a duty did exist, it would potentially create direct liability for Vista to Mindbody's stockholders for any breach of its disclosure duty relating to the Proxy Statements.

Although we have found no Delaware cases on point, our examination of cases elsewhere offers some support for our conclusion that Vista's inaction, absent a duty to Mindbody's stockholders to act, does not constitute substantial assistance in Stollmeyer's disclosure breach. Many courts, in other corporate contexts, have held that a failure to act can constitute participation for **aiding** and **abetting** liability only where an independent duty exists between the alleged aider and abettor and the plaintiff.[137] Scholars have also noted that "absent a duty of disclosure, possessing knowledge of the primary wrongdoer's conduct does not trigger **aiding**-and-**abetting** liability for actors who remain silent, even when doing so furthers their own interests."[138]

***43** Plaintiffs did not bring a breach of fiduciary duty claim against Vista. They brought a breach of fiduciary duty claim against Stollmeyer. They brought an **aiding** and **abetting** claim against Vista based on Stollmeyer's breach of his fiduciary duty of disclosure. The requirements of the two claims are different. An aiding and abetting claim, as explained above, is one of the most difficult claims to prove and requires a showing of both *scienter* and substantial assistance to the primary actor amounting to participation in that actor's breach. These exacting requirements would be diluted by implying that contractual rights and obligations related to proxy disclosures between merger partners create an independent duty of disclosure between Vista and Mindbody's stockholders.

Finally, there are also compelling public policy reasons not to read contractual disclosure-based obligations between a third-party buyer and a target company as implying independent fiduciary duties between the third-party buyer and the target's stockholders. Such a duty would collapse the arms'-length distance between the third-party buyer and the target, forcing the buyer to consider its duty to the target's stockholders instead of to its own stockholders. Moreover, such a duty would require a potential third-party bidder to second-guess the materiality determinations and legal judgment of the target's board of directors, which already owes fiduciary duties to its stockholders.

For these reasons, the nature of the relationships between Vista, Stollmeyer, and Mindbody also weighs against a finding that Vista gave "substantial assistance" to Stollmeyer in his disclosure breach.

d. Vista's State of Mind

We read this final factor from the Restatement "substantial assistance" test as concerning the other knowledge requirement for a finding of *scienter*: the requirement that the aider and abettor must know that *its own* conduct was legally improper.[139]

Above, we reviewed the evidence upon which the trial court based its finding of *scienter*. Without disturbing the fact findings, although some omissions are more "severe" than others, we affirmed the finding of a disclosure violation. In assessing *scienter*, the less obvious the violation, the harder it is to find that a third-party buyer, acting at arms'-length, acted with *scienter* as to both the primary party's conduct and its own conduct.

Focusing on the three partial omissions and four complete omissions, the trial court largely based its finding of Vista's *scienter* on the fact that Vista "scrubbed" this same "incriminating" information from its own internal Investment Committee materials.[140] This "scrubbing" consisted of Stahl texting Klomhaus, another member of the deal team, before the Investment Committee meeting where the deal team would seek internal approval to bid on Mindbody to tell Klomhaus not to "tell them about process."[141] The deal team then changed the slide deck before the Investment Committee presentation, altering a bullet point on the slide that gave transaction background from "Late October 2018: Qatalyst Partners calls Vista to indicate that Mindbody will come to market" to "November 30, 2018: Qatalyst Partners informs Vista that Mindbody has retained them as advisor on a potential sell-side transaction."[142] The trial court also found that Vista "changed the deal-team memorandum" that accompanied the Investment Committee presentation "to omit an entire paragraph about Stollmeyer's interactions with Vista from August through November."[143]

***44** The only other evidence the trial court found that went to Vista's *scienter* was Stahl's text to 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.' "[144] The actual text message only says, however, "Jeff called you on 11/30 inviting us into the process," without any other context or text messages.[145] The trial court's factual findings thus largely center around omissions in Vista's internal materials prepared for its own Investment Committee meeting—almost a month before Mindbody drafted its Proxy Materials.

[36]There are many possible reasons that some employees of a company might frame the narrative of a deal in a particular way to the Investment Committee of their own company—perhaps to avoid extraneous detail that might distract the committee, perhaps because the process did not follow their own internal best practices, or perhaps to clean up their paper trail.[146] We agree with the trial court that such changes, and even use of the word "scrubbing" to describe its actions, indicates that Vista had at least some awareness that its own actions during the sale process were not above suspicion. However, whatever the reason for the deal team removing some details and adding others in its own internal documents, this evidence does not adequately support a finding of *scienter* and aiding and abetting liability for the proxy disclosure violations.

The remaining text message from Stahl to Saroya after the preliminary proxy statement, "Jeff called you on 11/30 inviting us into the process[,]" does not, in our view, fill the evidentiary gap. The trial court summed up its analysis of Vista's knowledge by saying: "Vista hid these details precisely because they did not reflect well on them. This all sheds light on Vista's knowledge."[147]

The trial court may well be correct that Vista hid such details because they did not reflect well on Vista. Vista may have been aware that some of its conduct during the sale process was not above suspicion. But the knowledge that matters for the second prong of *scienter* is knowledge that the aider and abbettor's (Vista's) *own* conduct wrongfully assisted the primary violator (Stollmeyer) in his disclosure breach, not his sale-process *Revlon* breach. The trial court made no finding that indicated that Vista knew that its failure to abide by its contractual duty to notify Mindbody of potential material omissions in the Proxy Materials was wrongful and that its failure to act could subject it to liability to Mindbody's stockholders.

As we have said, the question of whether a defendant acted with *scienter* is a factual determination. We have found no basis to find that Vista had an independent duty to Mindbody's stockholders. The record evidence cited by the trial court, largely consisting of Vista's edits to its own internal memoranda, does not adequately support a finding that Vista knew that *its own* conduct wrongfully contributed to Stollmeyer's disclosure violations. As to the fourth factor in the Restatement substantial assistance test, Vista's state of mind, this factor does not weigh in favor of finding that Vista substantially assisted Stollmeyer in his breach of his duty of disclosure.

Ultimately, after assessing the various Restatement factors and evaluating them in a wholistic fashion, we hold that the record does not sufficiently support a determination that Vista's conduct rises to the level of "substantial assistance" or "participation" in Stollmeyer's breach. Consequently, plaintiffs have failed to prove that Vista aided and abetted Stollmeyer's disclosure breach. Accordingly, we reverse the holding of the trial court and hold that Vista is not liable for **aiding** and **abetting** Stollmeyer's breach of his duty of disclosure.

D. The Revlon Breach Damages

***45** [37] [38] [39]This Court "review[s] findings as to damages by the Court of Chancery for an abuse of discretion."[148] The Court of Chancery has the power "to grant such ... relief as the facts of a particular case may dictate."[149] "As long as there is a basis for an estimate of damages, and the plaintiff has suffered harm, mathematical certainty is not required."[150]

[40]The trial court accepted Plaintiffs' lost-transaction theory of damages but rejected Plaintiffs' suggested transaction price of $40 per share as having an insufficient evidentiary basis.[151] Although Vista did have authorization to bid up to $40 per share, there was no indication in the record that Vista would have actually bid that amount and $40 was at the upper limit of Vista's modeling. The trial court found that if Mindbody had been able to introduce competition it was possible Vista might have paid $40 per share, but Vista also could have declined to go that high. On the other hand, the trial court found that "the most compelling evidence" as to the price Vista would have actually paid was "internal Vista bets" from employees betting on what the ultimate deal price was likely to be. In a range from $36.50 (the then-current offer) to $40 (the upper price limit), various Vista employees guessed the final deal price. The line was at $37.50 with one employee betting on the line and more than half betting the deal would close higher than $37.50 per share. These findings are largely based on a photograph of a Post-it note that Stahl texted to Saroya, which drew the line at $37.50 and noted what each employee's bet was.[152] Stahl's name is written on the Post-it with a bet of $37.26.

Defendants observe that the trial court "makes much of a Post-it note" and it does.[153] But the Post-it note was not the only evidentiary basis for finding a lost-transaction price of $37.50 per share. Importantly, the trial court also found that "[t]wo of Vista's most informed deal team members believed that the deal price was likely to be $37.50."[154] To support this finding, the trial court cited to the string of text messages that followed Stahl sending the photograph of the Post-it note to Saroya.[155] In these text messages, after Stahl sent the photograph to Saroya, Saroya responded with "37.5 is a good guess" and Stahl replied, "I thought so too."[156] These text messages from Stahl and Saroya show that a deal price of $37.50 was not just rampant speculation on the part of Vista employees or the trial court, but a realistic, even likely, possible outcome. It is evidence that, as the trial court found, if Stollmeyer had not corrupted the process, Vista would have paid $37.50 per share.

***46** Had the Post-it note stood alone, without the affirming text messages of Saroya and Stahl, it likely would not have been enough. But the trial court had broad discretion to fashion a remedy particular to the facts of this case so long as there was some evidentiary basis for that determination, and there is enough of a basis here that we will not find that the trial court abused its discretion. Accordingly, notwithstanding some misgivings about the thinness of the evidence, we affirm the trial court's award of $1 per share in damages for Stollmeyer's duty of loyalty breach.

E. The Disclosure Breach Damages

Given that we have held that Vista is not liable for **aiding** and **abetting**, given that Plaintiffs are entitled to only one recovery of $1 per share in damages, and given that we have upheld the damages award for the *Revlon* breach, we need not reach this issue.

F. Defendants Waived Their Right to Seek a Settlement Credit

The final issue on appeal is whether the trial court correctly held that Defendants waived their right to seek a settlement credit under the Delaware Uniform Contribution Among Tortfeasors Act ("DUCATA"). DUCATA codified the right of contribution among joint tortfeasors and created the legal framework that applies when a plaintiff releases only some joint tortfeasors through a settlement.[157] Under DUCATA, a release of some joint tortfeasors does not discharge the non-settling joint tortfeasors unless the release so provides, but instead reduces the claim against the remaining tortfeasors "in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid."[158]

After the trial court issued its post-trial opinion, Defendants asked the trial court to apply DUCATA to reduce the total damages award in the amount of the $27 million consideration that the Settling Defendants paid. Plaintiffs did not dispute that if the Settling Defendants were joint tortfeasors, then Defendants were entitled to a credit equal to the $27 million settlement consideration. Instead, Plaintiffs argued that a settlement credit was inappropriate because Defendants waived their right to seek a credit when they failed to raise the argument before their post-trial answering brief. After a thorough and well-reasoned analysis of waiver in the settlement credit context, the trial court held that Defendants waived their right to seek a settlement credit under DUCATA.[159] We agree.

[41]We review "questions of statutory construction"[160] and "the Court of Chancery's conclusions of law *de novo*."[161]

1. The Law of Waiver in the Settlement Credit Context

[42] [43]"Issues not briefed are deemed waived."[162] "The general rule ... that a party waives any argument it fails properly to raise shows deference to fundamental fairness and the common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance."[163] The trial court summarized the Court of Chancery's long-running struggle to define when a defendant has waived its ability to seek a settlement credit. This struggle "stems in part from the tension between the competing desires of avoiding trial by ambush" on the one hand and the awkwardness of "forcing defendants to present evidence on joint tortfeasor status at a bench trial" while also arguing they should not be held liable.[164] There are two relevant cases from this Court and the Court of Chancery that illustrate this underlying tension involving joint tortfeasors and provide guidance, *Ikeda v. Molock*[165] and *In re Rural/Metro Corp. S'holders Litig.*[166]

***47** This Court held in *Ikeda* that, in the context of a *jury trial*, a defendant seeking damages based on relative fault must file a cross-claim against settling tortfeasors *before* trial to allow the jury to make factual findings related to that claim.[167] *Ikeda* was a medical malpractice suit in which a defendant moved to amend his pleadings on the morning of trial to assert cross-claims against the two defendants that had settled with the plaintiff.[168] The trial court denied the defendant's motion and held that because no cross-claims had been filed, the jury would not be instructed to prorate damages based upon the fault attributable to the settling defendants. On appeal, this Court reversed, holding that the defendant was entitled to amend his pleadings to assert cross-claims against the two settling defendants and that a defendant seeking damages based on relative fault *must* file a cross-claim against settling joint-tortfeasors *before* trial to allow the jury to make factual findings concerning that claim.[169]

Rural/Metro addressed whether the requirements of *Ikeda* applied in bench trials. *Rural/Metro* involved a stockholder class action lawsuit against directors of a corporation for breach of fiduciary duty stemming from the sale of a corporation and against the investment bank (RBC) for **aiding** and **abetting** the breaches. Prior to the trial, all of the defendants but RBC settled with the plaintiffs.[170] RBC then filed a cross-claim against the settling defendants requesting that the court reduce the damages recoverable against RBC under DUCATA based upon their relative degrees of fault.[171] RBC's cross-claim did not allege any wrongdoing by the settling defendants or contend that "any of the individual [settling defendants] were joint tortfeasors and liable to the plaintiffs for money damages."[172] Thus, the plaintiffs argued that RBC had waived its right to argue in post-trial proceedings that the settling defendants were joint tortfeasors.[173] The Court of Chancery disagreed with the plaintiffs and concluded that RBC had not waived its right to argue post-trial that the settling defendants were joint tortfeasors and that damages should be allocated according to fault. Instead, the "[plaintiffs] simply had to do so based on the record created at trial and in light of the factual findings in the [post-trial opinion]."[174] This Court affirmed.[175]

[44]Accordingly, under *Rural/Metro*, a non-settling defendant's failure to prove joint tortfeasor status at a bench trial does not automatically prohibit them from seeking a DUCATA settlement credit post-trial. However, as the trial court correctly noted, "the question remains whether the waiver doctrine should preclude a settlement credit under the circumstances of this case."[176] We agree with the trial court that the waiver doctrine precludes a settlement credit based on the facts of this case.

2. Defendants Waived Their Right to Seek a Settlement Credit under DUCATA by Not Timely Raising the Issue

***48** [45]The Non-Settling Defendants waived their ability to seek a settlement credit because they did not raise this issue until the last footnote (footnote 493) on the very last page (page 121) of their very last post-trial brief. This is distinguishable from *Rural/Metro*, in which RBC (the non-settling defendant) filed a cross-claim and raised the settlement credit issue in the *pre-trial* stipulation and order.[177] In the context of the trial court's waiver analysis in this case, the trial court reasoned that RBC's actions in *Rural/Metro* "though relatively ministerial, were the bare minimum necessary to place the plaintiffs on notice that RBC intended to claim a settlement credit, which gave the plaintiffs the opportunity to defend against this possibility."[178]

Additionally, the Non-Settling Defendants' decision not to raise this issue until the last footnote of the last page of their final post-trial briefing would conflict with "fundamental fairness" and the "common sense notion that, to defend a claim or oppose a defense, the adverse party deserves sufficient notice of the claim or defense in the first instance."[179] As noted by the trial court, the Non-Settling Defendants' failure to raise the DUCATA issue influenced Luxor's strategy at trial:

> At trial, Luxor elicited testimony that would speak to the Settling Defendants' joint tortfeasor status. ... It is hard to believe that Luxor would have gone so aggressively after [the settling defendants] had they known that they would have [been] stuck later defending the actions of [the settling defendants] to avoid a settlement credit under DUCATA.[180]

In other words, had the Non-Settling Defendants raised their intention to seek a settlement credit under DUCATA, Luxor would have likely pursued a different trial strategy. This seems like the quintessential context justifying a finding of waiver.

Next, contrary to Appellants' assertion, it is not readily apparent that the Non-Settling Defendants signaled their intention of seeking a settlement credit under DUCATA based on the language in the Settlement Agreement.[181] Appellants point out that the settlement agreement signed by the settling defendants (the "Settlement Agreement") states the following:

> [A]ny joint damages recoverable against all other alleged tortfeasors, including Non-Settling Defendants, will be reduced by the greater of (a) the Settlement Amount, and (b) the pro rata share of the responsibility for such damages, if any, of Settling Defendants, *should it be determined that any of the Settling Defendants are joint tortfeasors*.[182]

Although this excerpt signals that the Non-Settling Defendants intended to seek a settlement credit, it is contradicted by a later portion of the Settlement Agreement, in which the settling defendants explicitly refused to admit liability.[183]

The settling defendants refused to admit any wrongdoing and the trial court did not determine whether they were joint tortfeasors. Thus, because DUCATA only applies to settlements among joint tortfeasors, the failure of the Non-Settling Defendants to timely submit the issue of joint tortfeasor status to the trier of fact supports Appellees' argument for waiver.[184]

***49** This Court addressed a similar scenario in *RBC*. Specifically, on appeal, RBC took issue with the Court of Chancery's opinion adjudging liability in which it required RBC to litigate its contribution claims upon the record created at trial in light of the factual findings.[185] This Court, however, was unconvinced by RBC's argument and did not relieve RBC "of its burden" to prove the joint tortfeasor status of the other settling defendants:

> To the extent that RBC claims prejudice due to the timing of the eve-of-trial settlements between the plaintiffs and all other defendants, that is simply a function of RBC being the last non-settling defendant. This situation does not relieve RBC of its burden to prove the joint tortfeasor status of the other defendants. After the agreements in principle were reached, the settling defendants remained parties to the action for purposes of trial. RBC had the opportunity to develop a record in support of its contribution claims at trial. Three of the individual defendants testified at trial.

> RBC could have issued trial subpoenas as to the others. RBC was permitted to file a post-trial brief in support of its contribution defenses. Further, the settling defendants were not released from the case until six months after trial and RBC did not object to the settlement or to the entry of the Partial Final Judgment.
>
> ....
>
> Nor would the settling defendants be "tortfeasors" as a result of the settlement. In *Medical Center of Delaware, Inc. v. Mullins*, we concluded that a release providing for a reduction in a plaintiff's recovery in accordance with Section 6304 does not establish a settling defendant as a joint tortfeasor by its nature. *In other words, a release, absent an admission, is insufficient to establish a settling defendant as a joint tortfeasor*. As the Court of Chancery observed, DUCATA applies only to joint tortfeasors. [The settling defendants] were not adjudicated joint tortfeasors, nor did the Settlement Stipulation or Partial Final Judgment contain an admission of liability establishing them as such. *Accordingly, here, as in Mullins, the applicable release predicated any settlement reduction upon an adjudication of the settling defendants' liability as joint tortfeasors. Thus, the trial court correctly concluded that the settlement did not establish the joint tortfeasor status of the settling defendants.*[186]

In this case, as in *RBC*, the Non-Settling Defendants' were not relieved of their burden to prove the joint tortfeasor status of the other defendants.

But the Non-Settling Defendants did not explicitly raise the settlement credit issue until the last footnote of the last page of their final post-trial brief. It seems unlikely that raising this issue in a last-minute, extraneous footnote can be considered "squarely raising" the issue in this context. Moreover, contrary to Appellants' characterization, the trial court did not break "new ground in holding that a party in a bench trial must preserve the setoff issue pre-trial, even though it will be addressed post-trial."[187] Instead, the trial court merely assessed the facts of this case and determined that, following our guidance set forth in *RBC*, the Non-Settling Defendants did not fairly apprise Luxor that they intended to seek a settlement credit under DUCATA.[188]

***50** Accordingly, the trial court did not err in determining that the Non-Settling Defendants, by their pre-trial silence, waived the right to establish post-trial that the settling defendants were joint tortfeasors for purposes of DUCATA.

VI. CONCLUSION

For the reasons set forth herein, we AFFIRM in part and REVERSE in part.

All Citations

--- A.3d ----, 2024 WL 4926910

Footnotes

1 *See* *In re Mindbody, Inc., S'holder Litig.*, 2023 WL 2518149 (Del. Ch. Mar. 15, 2023). Because the parties do not challenge any of the trial court's factual findings, we also accept them as the foundation for our legal analysis. For readability, the portions of the Court of Chancery's fact-findings in this "Factual Background" section that are taken substantially verbatim from the Court of Chancery's post-trial opinion appear after headings II.A.1 – II.S, which are in bold font.

2 When addressing the proceedings below, we refer to Appellants as "Defendants" and Appellees as "Plaintiffs."

3 There was some confusion in the trial record and in the trial court's opinion as to when Stollmeyer first met with Vista. After Chang connected Stollmeyer with Saroya via email on August 7, there was only one initial in-person meeting between Stollmeyer, Saroya, and Stahl that occurred on September 4 at Mindbody's headquarters. Stollmeyer did not meet with anyone from Vista again until he attended Vista's CXO Summit on October 8 and 9. The trial court opinion sometimes refers to Stollmeyer's initial meeting with Vista as occurring "in August" – no such meeting ever occurred. It appears to us that these references are a misdated reference to the initial September 4 meeting. The confusion seems to stem from the original draft of an internal Vista memorandum that was circulated to Vista's Investment Committee that referred to the initial meeting as occurring "in August of 2018." This part of the memorandum is quoted in the trial court's opinion and the date is repeated again here. *Mindbody*, 2023

WL 2518149, at *24, *28 (Del. Ch. Mar. 15, 2023).

4 *See supra* note 3.

5 *Mindbody*, 2023 WL 2518149, at *2.

6 *Id.* at *3.

7 *Id.*

8 *Id.* at *48.

9 *In re Mindbody, Inc. S'holder Litig.*, 2023 WL 7704774 (Del. Ch. Nov. 15, 2023) [hereinafter "November Opinion"].

10 *Id.* at *6.

11 *Mindbody*, 2023 WL 2518149, at *46 (quoting *Dohmen v. Goodman*, 234 A.3d 1161, 1175 (Del. 2020)).

12 1985 WL 11546 (Del. Ch. Jan. 30, 1985), *aff'd*, 497 A.2d 792 (Del. July 9, 1985) (TABLE).

13 *Mindbody*, 2023 WL 2518149, at *46.

14 *Id. See also Weinberger*, 1985 WL 11546, at *9 ("The approval of the minority secured in the face of the inadequate proxy information enabled [acquirer] to get what it wanted at the price it wanted to pay, and it seems without question that achieving sole ownership of [target] has proven quite profitable to [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.").

15 *Mindbody*, 2023 WL 2518149, at *47 (internal citation omitted). *See also Weinberger*, 1985 WL 11546, at *10 (adding that the acquirer's own expert stated that $22 per share "would not have been out of line for the acquisition of the 49.5% minority interest" of the target and that a price "within the range of $20–$22 would have been fair to the [target] minority.").

16 *Mindbody*, 2023 WL 2518149, at *47.

17 *November Opinion*, 2023 WL 7704774, at *3. *See* 10 *Del. C.* §§ 6301–08.

18 *Mindbody*, 2023 WL 2518149, at *33.

19 *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 849 (Del. 2015) (citing *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1385 (Del. 1995)).

20 *Unitrin*, 651 A.2d at 1385; *RBC*, 129 A.3d at 849.

21 *RBC*, 129 A.3d at 849 (citing *DV Realty Advisors LLC v. Policemen's Annuity and Ben. Fund of Chicago*, 75 A.3d 101, 108–09 (Del. 2013)).

22 *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

23 *See Revlon*, 506 A.2d at 182 (explaining that once a sale of the company became inevitable, the duty of the board "changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit"); *RBC*, 129 A.3d at 849 (quoting *Malpiede v. Townson*, 780 A.2d 1075, 1083–84 (Del. 2001)) ("[E]nhanced scrutiny under *Revlon* does not change the nature of the fiduciary duties owed by directors: *Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply. Rather, *Revlon* emphasizes that the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."); *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994) ("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.").

24 *See C & J Energy Srvcs., Inc. v. City of Miami Gen. Emps.*, 107 A.3d 1049, 1067 (Del. 2014) ("As this Court has made clear, 'there is no single blueprint that a board must follow to fulfill its duties,' and a court applying *Revlon*'s enhanced scrutiny must decide 'whether the directors made a *reasonable* decision, not a *perfect* decision.' ") (internal citations omitted) (emphasis in original); *see also Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) ("[A] court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.") (emphasis in original).

25 *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 45 (Del. 1994) (describing the key features of enhanced scrutiny as: "(a) a judicial determination regarding the adequacy of the decisionmaking 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.").

26 *See* *In re Toys "R" Us, Inc. S'holder Litig.*, 877 A.2d 975, 1002 (Del. Ch. 2005) ("[T]he 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.") (quoted favorably in *Kahn v. Stern*, 183 A.3d 715, 2018 WL 1341719, at *1 n.4 (Del. Mar. 15, 2018) (TABLE); *Mindbody*, 2023 WL 2518149, at *34 (quoting the same).

27 *Mindbody*, 2023 WL 2518149, at *34.

28 *Id.* at *35.

29 *Id.* at *36.

30 *Id.* at *34.

31 *Id.* at *36.

32 *Id*. at *38

33 *Id.*

34 *Id.* (emphasis in original).

35 *Id.* ("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.").

36 *Id.* at *38–39.

37 *Id.* at *39 ("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.").

38 *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 305–06 (Del. 2015) (affirming the Court of Chancery's holdings that the plaintiff did not plead facts supporting an inference that the defendant was a controlling stockholder and that "the business judgment rule is invoked as the appropriate standard of review for a post-closing damages action when a merger that is not subject to the entire fairness standard of review has been approved by a fully informed, uncoerced majority of the disinterested stockholders.").

39 *Mindbody*, 2023 WL 2518149, at *39 (citing *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *12–13 (Del. Ch. Dec. 10, 2018); *In re Lear Corp. S'holder Litig.*, 926 A.2d 94, 114–15 (Del. Ch. 2007)).

40 *Mindbody*, 2023 WL 2518149, at *39.

41 *Id.* at *40–41.

42 *RBC*, 129 A.3d at 857–58 (quoting *Shell Petroleum, Inc. v. Smith*, 606 A.2d 112, 114 (Del. 1992).

43 *Shell Petroleum*, 606 A.2d at 114 (quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

44 *Id.* (quoting *Levitt*, 287 A.2d at 673).

45 *RBC*, 129 A.3d at 858 (quoting *Malpiede*, 780 A.2d at 1086).

46 *In re GGP, Inc. S'holder Litig.*, 282 A.3d 37, 62 (Del. 2022) (quoting *Stroud v. Grace*, 606 A.2d 75, 84 (Del. 1992); *see also Appel v. Berkman*, 180 A.3d 1055, 1057 (Del. 2018) ("Precisely because Delaware law gives important effect to an informed stockholder decision, Delaware law also requires that the disclosures the board makes to stockholders contain the material facts and not describe events in a materially misleading way."); *Pfeffer v. Redstone*, 965 A.2d 676, 686 (Del. 2009) ("Directors must fully and fairly disclose all material information within [their] control when seeking shareholder action.).

47 *RBC*, 129 A.3d at 858 (quoting *Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009)).

48 *Morrison v. Berry*, 191 A.3d 268, 283 (Del. 2018) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976).

49 *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 713 (Del. 2023) (quoting *Morrison*, 191 A.3d at 283) (internal quotations omitted).

50 *Morrison*, 191 A.3d at 283 (quoting *Arnold v. Soc'y For Sav. Bancorp, Inc.*, 650 A.2d 1270, 1280 (Del. 1994)).

51 *Id.* (quoting *Zirn v. VLI Corp.*, 681 A.2d 1050, 1056 (Del. 1996)).

52 *Mindbody*, 2023 WL 2518149, at *40.

53 *Id.* (quoting Supplemental Disclosures); *see also* App. to Opening Br. at 1846 (Supplemental Disclosures at 4).

54 *Id.*

55 *Id.* (quoting Supplemental Disclosures); *see also* App. to Opening Br. at 1846 (Supplemental Disclosures at 4).

56 *Id.* at *40–41.

57 *Id.* at *41.

58 *Id.*

59 *Id.*

60 *Id.*

61 *Id.* (quoting *Arnold*, 650 A.2d at 1280).

62 As to Chang's tip to Saroya that Stollmeyer wanted $40 per share, the trial court made a general finding in its **aiding** and **abetting** analysis that "[o]ther than Stollmeyer (and on some issues, Chang), Vista was the *only* party who knew this information." *Id.* at *43. Chang's tip was included in the list of things that comprised "this information." *Id.* Accordingly, as to Chang's tip, we think this general finding is best read as a finding that Stollmeyer did know about Chang's tip to Vista on November 6.

63 *See* *RBC*, 129 A.3d at 861 (citing *DV Realty Advisors*, 75 A.3d at 109).

64 *See* *Unitrin*, 651 A.2d at 1385; *RBC*, 129 A.3d at 861.

65 *Malpiede*, 780 A.2d at 1096 (internal citations omitted).

66 *Mindbody*, 2023 WL 2518149, at *44.

67 *Id.* at *47.

68 Opening Br. at 46 (quoting *Buttonwood Tree Value P'rs, L.P. v. R. L. Polk & Co.*, 2017 WL 3172722, at *10 (Del. Ch. July 24, 2017)).

69 *Id.* at 47.

70 *Malpiede*, 780 A.2d at 1097.

71 *See, e.g.*, *RBC*, 129 A.3d at 861–62; *Gatz v. Ponsoldt*, 925 A.2d 1265, 1276 (Del. 2007); *Chester County Emps. Retirement Fund v. KCG Holdings, Inc.*, 2019 WL 2564093, at *18 (Del. Ch. June 21, 2019); *Mesirov v. Enbridge Energy Co.*, 2018 WL 4182204, at *13 (Del. Ch. Aug. 29, 2018).

72 *RBC*, 129 A.3d at 862 (quoting *Wood v. Baum*, 953 A.2d 136, 141 (Del. 2008) (internal quotation marks omitted)).

73 *See, e.g.*, *Firefighters' Pension Sys. of Kansas City, Mo. Trust v. Presidio, Inc.*, 251 A.3d 212, 275 (Del. Ch. 2021); *New Enter. Assocs. 14, L.P. v. Rich*, 292 A.3d 112, 175 (Del. Ch. 2023).

74 *RBC*, 129 A.3d at 862. In *RBC*, this requirement that the aider and abettor, RBC, act with *scienter* was satisfied when RBC "knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum." *Id.*

75 *Id.*

76 *RBC*, 129 A.3d at 865–66; *see also* *Singh v. Attenborough*, 137 A.3d 151, 153 (Del. 2016) ("In fact, most professionals face liability under a standard involving mere negligence, not the second highest state of scienter—knowledge—in the model penal code.").

77 *See, e.g.*, *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010) ("[T]he long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute **aiding** and **abetting** helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism."); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *26 (Del. Ch. May 4, 2005) ("This Court has consistently held that 'evidence of arm's-length negotiation with fiduciaries negated a claim of **aiding** and **abetting**, because such evidence precludes a showing that the defendants knowingly participated in the breach by the fiduciaries.' ") (quoting *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *3 n.8 (Del. Ch. July 9, 1998)).

78 *Malpiede*, 780 A.2d at 1097. *See also* *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813, 837 (Del. Ch. 2011) ("A third-party bidder who negotiates at arms' length rarely faces a viable claim for **aiding** and **abetting**."); *In re Frederick's of Hollywood, Inc. S'holders Litig.*, 1998 WL 398244, at *4 (Del. Ch. July 9, 1998) ("[A]n offeror who conducts arm's-length negotiations leading to an acquisition agreement cannot be said to be knowingly participating in an alleged breach of fiduciary duty by the target board.").

79 *Malpiede*, 780 A.2d at 1097–98 (citing *Gilbert v. El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984) ("[A]lthough an offeror may attempt to obtain the lowest possible price for stock through arm's-length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders.")); *see also In re Hechinger Inv. Co. of Del., Inc.*, 278 F.App'x 125, 130–31 (3d Cir. 2008) (citing *Malpiede* and observing that "[w]hen a party, such as LGP, is merely negotiating a deal at arm's length—and not trying to create, exploit, or otherwise profit from fiduciaries' conflicts—it by definition is not knowingly participating in anything but a normal business transaction.").

80 *Morgan v. Cash*, 2010 WL 2803746, at *8 (Del. Ch. July 16, 2010).

81 *Id.*

82 *See, e.g.*, *In re Dole Food Co. S'holder Litig.*, 2015 WL 5052214, at *41 (Del. Ch. Aug. 27, 2015) ("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.") (quoting *Kuhns v. Bruce A. Hiler Del. QPRT*, 2014 WL 1292860, at *21 (Del. Ch. Mar. 31, 2014)); *Patton v. Simone*, 1992 WL 183064, at *8, *12 (Del. Super. June 25, 1992) (quoting Restatement (Second) of Torts § 876(b) for the "substantial assistance" requirement and analyzing whether the defendant provided substantial assistance by loaning money to the primary violator); *see also* Restatement (Second) of Torts § 876(b) (1979) (making a secondary actor liable "[f]or harm resulting to a third party from the tortious conduct of another" if the secondary actor "knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself").

83 *See* Sarah L. Swan, ***Aiding** and **Abetting** Matters*, 12 J. Tort L. 255, 271 (2019) (explaining that "some courts *have* recognized that knowledge and a failure to act can, in some circumstances, rise to the level of providing substantial assistance") (internal citations omitted).

84 The cases that have found such liability are generally in the federal securities violation sphere and suggest that where inaction forms the basis of the claim, only "scienter of the high 'conscious intent' variety" should meet the scienter requirement. *See, e.g.*, Nathan Isaac Combs, *Civil **Aiding** and **Abetting** Liability*, 58 Vand. L. Rev. 241, 271–73 (2005) (collecting authorities and quoting *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975)).

85 *Malpiede*, 780 A.2d at 1097.

86 *Buttonwood*, 2017 WL 3172722, at *10. Scholars have noted that there can be a distinction between "inaction which does nothing to assist and inaction which serves as substantial assistance," such as a lookout for a criminal conspiracy, but that analogy does not seem to apply to these facts. Sarah L. Swan, ***Aiding** and **Abetting** Matters*, 12 J. Tort L. 255, 272 (2019).

87 *Id.* ("The Plaintiffs allege only a passive awareness on the part of a non-fiduciary of the omission of material facts in disclosures to the stockholders, made by fiduciaries *who themselves were aware of the information*. Such passive awareness on the part of SRR does not constitute 'substantial assistance' to any breach resulting from the Individual Defendants' failure to disclose the facts.") (emphasis in original).

88 *RBC*, 129 A.3d at 865. In *RBC*, the requirement that the aider and abettor, RBC, act with *scienter* was satisfied when RBC "knowingly induced the breach by exploiting its own conflicted interests to the detriment of Rural and by creating an informational vacuum." *Id.* at 862. The analytical focus was on RBC's knowledge of the wrongfulness of *its own* conduct, not the conduct of the board of directors that RBC duped. *Id.* at 865–66 ("[T]he claim for **aiding** and **abetting** was premised on RBC's 'fraud on the Board,' and that RBC aided and abetted the Board's breach of duty where, for RBC's own motives, it 'intentionally duped' the directors into breaching their duty of care. The record evidence amply supports the trial court's conclusion that RBC purposely misled the Board so as to proximately cause the Board to breach its duty of care. Accordingly, our holding is a narrow one that should not be read expansively to suggest that any failure on the part of a financial advisor to *prevent* directors from breaching their duty of care gives rise to a claim for **aiding** and **abetting** a breach of the duty of care.") (emphasis in original). *See also Singh*, 137 A.3d at 152–53 ("As held in *RBC Capital Markets, LLC v. Jervis*, however, an advisor whose bad-faith actions cause its board clients to breach their situational fiduciary duties (e.g. the duties *Revlon* imposes in a change-of-control transaction) is liable for **aiding** and **abetting**.").

89 *Buttonwood*, 2017 WL 3172722, at *10 (emphasis in original).

90 *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *15, *15 n.148 (Del. Ch. Dec. 10, 2018).

91 *Id.* (emphasis in original).

92 *See, e.g.*, *Dole*, 2015 WL 5052214, at *41; *Patton*, 1992 WL 183064, at *8; *Lake Treasure Holdings, Ltd. v. Foundry Hill GP LLC*, 2014 WL 5192179, at *11 (Del. Ch. Oct. 10, 2014); *FrontFour Cap. Group LLC v. Taube*, 2019 WL 1313408, at *31 (Del. Ch. Mar. 11, 2019). Courts from other jurisdictions have cited to § 876(b) as well. *See, e.g.*, *Landy v. Fed. Deposit. Ins. Corp.*, 486 F.2d 139, 162 (3d Cir. 1973), ***cert. denied***, 416 U.S. 960, 94 S.Ct. 1979, 40 L.Ed.2d 312 (1974); *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 185 (Minn. 1999); *Future Group, II v. Nationsbank*, 324 S.C. 89, 478 S.E.2d 45, 50 (1996); *Bondi v. Citigroup, Inc.*, 2005 WL 975856, at *17 (N.J. Super. Ct. Law Div. Feb. 28, 2005); *see also* Jorge Freeland, B. Edwin W. Merrick & Lawrence M. Scheinert, ***Aiding*** *and* ***Abetting*** *Branches of Fiduciary Duties May Lead to Purchaser Liability*, 14 No. 6 M & A Law. 7, 1 (June 2010) (observing that "[m]any states have adopted this section of the Restatement and explicitly recognize a cause of action for **aiding** and **abetting** a breach of fiduciary duty," and that "[t]hough the language describing the elements may vary, the analysis in each jurisdiction is essentially the same.").

93 Restatement (Second) of Torts § 876 (1979).

94 1992 WL 183064 (Del. Super. June 25, 1992).

95 *Patton*, 1992 WL 183064, at *9–11 (citing among others *FDIC v. First Interstate Bank of Des Moines*, 885 F.2d 423, 431 (8th Cir. 1989); *Friedman v. F.E. Myers Co.*, 706 F.Supp. 376 (E.D. Pa. 1989); *Price v. Halstead*, 177 W.Va. 592, 355 S.E.2d 380 (1987)).

96 *Lake Treasure*, 2014 WL 5192179, at *11 (quoting the Restatement (Second) of Torts § 876 when discussing the "knowing participation" element of an **aiding** and **abetting** breach of fiduciary duty claim).

97 *Kuhns*, 2014 WL 1292860, at *21 (quoting *Anderson v. Airco, Inc.*, 2004 WL 2827887, at *4 (Del. Super. Nov. 30, 2004)) ("Liability for **aiding** and **abetting** a third party's commission of a tort requires proof of three elements: underlying tortious conduct, knowledge, and substantial assistance.") (internal brackets omitted).

98 *Dole*, 2015 WL 5052214, at *41–42.

99 *Id.* at *41 (quoting *Kuhns*, 2014 WL 1292860, at *21.

100 *Mindbody*, 2023 WL 2518149, at *44. At least twelve cases since *Dole* involving a claim for **aiding** and **abetting** a breach of fiduciary duty have cited *Dole* for the "substantial assistance" requirement of "knowing participation." *See, e.g.*, *Buttonwood*, 2017 WL 3172722, at *9; *In re Oracle Corp. Derivative Litig.*, 2020 WL 3410745, at *11 (Del. Ch. June 22, 2020); *BrandRep, LLC v. Ruskey*, 2019 WL 117768, at *5 (Del. Ch. Jan. 7, 2019); *Lockton v. Rogers*, 2022 WL 604011, at *16 (Del. Ch. Mar. 1, 2022).

101 *Dole*, 2015 WL 5052214, at *41–42 (citing *Kuhns*, 2014 WL 1292860, at *21; *Patton*, 1992 WL 183064, at *12).

102 Restatement (Second) of Torts § 876, cmt. d (1979).

103 *See* *Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1163 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070, 107 S.Ct. 2463, 95 L.Ed.2d 872 (1987) (listing six factors drawn from the Restatement (Second) of Torts § 876, cmt. d and observing that "all six of these factors are not necessarily relevant in all types of situations").

104 *Dole*, 2015 WL 5052214, at *42.

105 *See* *id.*; *Oracle*, 2020 WL 3410745, at *11; *Patton*, 1992 WL 183064, at *12; *Kuhns*, 2014 WL 1292860, at *21; *see also* *Landy*, 486 F.2d at 163. *Dole* and *Oracle* applied the Restatement substantial assistance factors in a corporate context, while *Patton* and *Kuhns* applied the factors in other tort contexts.

106 *Malpiede*, 780 A.2d at 1097; *see supra* Section V.C.2.a (discussing the law of *scienter* and the two types of knowledge required for a finding of *scienter*).

107 *Mindbody*, 2023 WL 2518149, at *41.

108 App. to Answering Br. at B540.

109 The trial court also noted that Stollmeyer asked Chang whether Stollmeyer should attend the event. After Chang said no, Stollmeyer texted Chang, "I [c]an show a little leg and get them frothing at the mouth to get me and MB in the portfolio." *Mindbody*, 2023 WL 2518149, at *21. Although relevant to Stollmeyer's state of mind, this was not a communication between Stollmeyer and Saroya, and these details would have greater weight if Stollmeyer had ultimately accepted the invitation.

110 *Mindbody*, 2023 WL 2518149, at *44.

111 *Id.*

112 App. to Opening Br. at A1771 (Definitive Proxy Statement at 157).

113 *Id.* at A1772 (Definitive Proxy Statement at 158) (emphasis added).

114 *Mindbody*, 2023 WL 2518149, at *44.

115 *Id.*

116 *Id.*

117 For example, we note that *In re Columbia Pipeline Group, Inc. Merger Litig.*, 299 A.3d 393 (Del. Ch. 2023) is on appeal right now and addresses similar issues with different facts.

118 Opening Br. at 46–47 (quoting *Buttonwood*, 2017 WL 3172722, at *10).

119 Answering Br. at 36–37.

120 Plaintiffs' Opening Post-Trial Brief had only one sentence on this issue and relied on the Court of Chancery's Motion to Dismiss Opinion in *Columbia*, which stated that because a defendant was "contractually obligated" to take action to prevent materially misleading proxy statements, it was "reasonable to infer" at the motion-to-dismiss stage that the defendant had "knowingly participated" in the alleged material omissions. *In re Columbia Pipeline Group, Inc.*, 2021 WL 772562, at *58–59 (Del. Ch. Mar. 1, 2021). Vista's Post-Trial Answering Brief also gave this point limited attention but pointed out that while reasonably conceivable that a contractual requirement to review disclosures could be sufficient to survive a motion to dismiss, such a contractual requirement does not establish an **aiding** and **abetting** claim. Post-Trial Answering Br. at 62–63, n.235.

121 Reply Br. at 25 (quoting Answering Br. at 36; *Mindbody*, 2023 WL 2518149, at *44).

122 *Id.*

123 App. to Opening Br. at A1771 (Definitive Proxy Statement at 157).

124 *Id.* at A1772 (Definitive Proxy Statement at 158) (emphasis added).

125 *Mindbody*, 2023 WL 2518149, at *44.

126 *Id.*

127 *Id.* (quoting *Dole*, 2015 WL 5052214, at *41) (cleaned up).

128 *RBC*, 129 A.3d at 863, 865–66.

129 *Id.* at 865.

130 *Id.* at 862, 865 ("[RBC] 'intentionally duped' the directors into breaching their duty of care. The record evidence amply supports the trial court's conclusion that RBC purposely misled the Board so as to proximately cause the Board to breach its duty of care."). *Id.* at 865. *See also supra* notes 74, 88.

131 *Mindbody*, 2023 WL 2518149, at *43.

132 *See Morgan*, 2010 WL 2803746, at *8 ("[T]he long-standing rule that arm's-length bargaining is privileged and does not, absent actual collusion and facilitation of fiduciary wrongdoing, constitute **aiding** and **abetting** helps to safeguard the market for corporate control by facilitating the bargaining that is central to the American model of capitalism."); *see also supra* notes 77–78.

133 *Malpiede*, 780 A.2d at 1097.

134 *Id.* at 1097–98 (citing *Gilbert*, 490 A.2d at 1058 ("[A]lthough an offeror may attempt to obtain the lowest possible price for stock through arm's-length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders.")).

135 *See id.*; *see also supra* notes 77–78.

136 *Mindbody*, 2023 WL 2518149, at *44.

137 *See, e.g.*, *IIT, an Intern. Inv. Trust v. Cornfeld*, 619 F.2d 909, 927 (2d Cir. 1980) ("[I]naction can create aider and abettor liability only when there is a conscious or reckless violation of an independent duty to act."); *Dillon v. Militano*, 731 F.Supp. 634, 639 (S.D.N.Y. 1990) ("Inaction may be found to be substantial assistance only where the independent duty to act was a duty owed to the [plaintiff]."); *Stander v. Fin. Clearing & Servs. Corp.*, 730 F.Supp. 1282, 1287 (S.D.N.Y. 1990) ("A simple allegation of inaction can make out a claim of aider and abettor liability 'only where there is a conscious or reckless violation of an independent duty to act.' ") (quoting *Cornfeld*, 619 F.2d at 927); *In re Amaranth Natural Gas Commodities Litig.*, 587 F.Supp.2d 513, 545 (S.D.N.Y. 2008), *aff'd*, 730 F.3d 170 (2d Cir. 2013) (same, quoting *Stander*); *Kolbeck v. LIT Am., Inc.*, 939 F.Supp. 240, 247 (S.D.N.Y. 1996), *aff'd*, 152 F.3d 918 (2d Cir. 1998) ("[I]naction constitutes substantial assistance only when an independent duty to act was a duty owed to the [plaintiff]. That is, inaction, or a failure to investigate, constitutes actionable participation only when a defendant owes a fiduciary duty directly to the plaintiff; that the primary violator owes a fiduciary duty to the plaintiff is not enough.") (internal citations omitted) (citing W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 46 at 323–24 (5th ed. 1984) ("Since there is ordinarily no duty to take affirmative steps to interfere, mere presence at the commission of the wrong ... is not enough to charge one with responsibility.")); *Kaufman v. Cohen*, 307 A.D.2d 113, 126, 760 N.Y.S.2d 157 (N.Y.A.D. 2003) ("[T]he mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff."); *In re Sharp Int'l Corp.*, 403 F.3d 43, 52 (2d Cir. 2005) (finding in the context of an alleged **aiding** and **abetting** breach of fiduciary duty claim that "silence and forbearance did not assist the [wrongful conduct] *affirmatively*") (emphasis in original); *Ryan v. Hunton & Williams*, 2000 WL 1375265, at *10 (E.D.N.Y. Sept. 20, 2000) ("[A] defendant may provide substantial assistance by failing to act only when it was required to act. Absent a confidential or fiduciary relationship between the plaintiff and the aider and abettor, the inaction of the latter does not constitute substantial assistance warranting aider and abettor liability.") (internal citations omitted); *Glidden Co. v. Jandernoa*, 5 F.Supp.2d 541, 556 (W.D. Mich. 1998) ("[I]n the absence of a confidential or fiduciary relationship between plaintiff and defendant giving rise to a duty of disclosure, the defendant's silence does not amount to the substantial assistance that is a required element of aider or abettor liability."); *Fremont Reorganizing Corp. v. Duke*, 811 F.Supp.2d 1323, 1348 (E.D. Mich. 2011) (applying § 876(b) and stating that "[a] failure to act generally does not constitute substantial assistance") (citing *Glidden*, 5 F.Supp.2d at 556–57).

138 Deborah A. DeMott, *Fiduciary Breach, Once Removed*, 94 Tex. L. Rev. See Also 238, 241 (2016).

139 *RBC*, 129 A.3d at 861; *see supra* Section V.C.2.a (discussing the law of *scienter* and the two types of knowledge required for a finding of *scienter*).

140 *Mindbody*, 2023 WL 2518149, at *44.

141 *Id.*

142 *Id.*; App. to Answering Br. at B234, B282.

143 *Mindbody*, 2023 WL 2518149, at *44. This appears to be not entirely accurate. The paragraph in the deal-team memorandum was edited to remove some detail, and other detail was added, but the paragraph is not omitted from the final version. For a comparison of the two paragraphs, see App. to Answering Br. at B360 and Trial Ex. JX-1462 at 1.

144 *Mindbody*, 2023 WL 2518149, at *44 (quoting Trial Ex. JX-1066); App. to Answering Br. at B333.

145 App. to Answering Br. at B333.

146 The trial court did not make an explicit finding, supported by evidence, as to why these references were removed.

147 *Mindbody*, 2023 WL 2518149, at *44.

148 *RBC*, 129 A.3d at 866 (citing *Gotham Partners, L.P. v. Hallwood Realty Partners*, 817 A.2d 160, 175 (Del. 2002)).

149 *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1251 (Del. 2012) (quoting *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. 1983)).

150 *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 814 (Del. Ch. 2011), *aff'd*, 51 A.3d 1213 (Del. 2012) (quoting *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1184 (Del. Ch. 1999), *aff'd*, 766 A.2d 437 (Del. 2000)) (internal citations omitted).

151 *Mindbody*, 2023 WL 2518149, at *46.

152 App. to Opening Br. at A1455.

153 Opening Br. at 38.

154 *Mindbody*, 2023 WL 2518149, at *46.

155 App. to Opening Br. at A1454–61.

156 *Id.* at A1456, A1458.

157 10 *Del. C.* § 6302.

158 10 *Del. C.* § 6304(a).

159 *November Opinion*, 2023 WL 7704774, at *6.

160 *Ikeda v. Molock*, 603 A.2d 785, 786 (Del. 1991).

161 *RBC*, 129 A.3d at 869.

162 *Emerald Partners v. Berlin*, 726 A.2d 1215, 1224 (Del. 1999) (citing *Murphy v. State*, 632 A.2d 1150, 1152 (Del. 1993)).

163 *PharmAthene, Inc. v. SIGA Techs., Inc.*, 2011 WL 6392906, at *2 (Del. Ch. Dec. 16, 2011) (internal citation omitted).

164 *November Opinion*, 2023 WL 7704774, at *4.

165 603 A.2d 785 (Del. 1991).

166 102 A.3d 205 (Del. Ch. 2014), *aff'd*, 129 A.3d 816 (Del. 2015).

167 *Ikeda*, 603 A.2d at 787 (observing that "10 *Del. C.* § 6306(d) requires the filing of a cross-claim between parties to the litigation before a jury may prorate liability based upon proportionate fault[,]" and "[a]ccordingly, the filing of a cross-claim is a prerequisite to the apportionment of liability between joint tort-feasors based upon relative degrees of fault.").

168 *Ikeda*, 603 A.2d at 785–86.

169 *Id.* at 787 (observing that "[t]he conclusion that 10 *Del. C.* Ch. 63 requires a cross-claim to be filed before a jury may determine relative degrees of fault is further supported by the proposition that juries should not determine matters which are not litigated before them[,]" and that "[a] jury may not properly fulfill its role as trier of fact unless the questions to be decided by the jury are litigated at trial.").

170 *See Rural/Metro*, 102 A.3d at 217–18.

171 *Id.* at 216–17.

172 *Id.* at 217 ("Consistent with the stipulation, RBC's cross-claim did not actually allege any wrongdoing by the [settling defendants] that could give rise to liability to the Class.").

173 *Id.* at 244.

174 *Id.* at 245.

175 *RBC*, 129 A.3d at 871 ("Given that this case involved a bench trial, however, RBC acknowledges that the Court of Chancery correctly determined that RBC did not waive its right to argue during post-trial proceedings that the settling defendants were joint tortfeasors.").

176 *November Opinion*, 2023 WL 7704774, at *5.

177 *Rural/Metro*, 102 A.3d at 216–17.

178 *November Opinion*, 2023 WL 7704774, at *5.

179 *PharmAthene*, 2011 WL 6392906, at *2

180 *November Opinion*, 2023 WL 7704774, at 5.

181 *See* B545–B592 (Stipulation and Agreement of Settlement, Compromise, and Release with Defendants Liaw and IVP Entities at 1–48) [hereinafter "Settlement Agreement"].

182 B570 (Settlement Agreement at 26) (emphasis added).

183 *See* B579–B580 (Settlement Agreement at 35–36) ("NO ADMISSION OF WRONGDOING").

184 *See* *RBC*, 129 A.3d at 871 ("RBC contends that Section 6306(d) requires actual litigation between the joint tortfeasors before proceeding on anything other than a *pro rata* basis. This Court has stated that when one or more pretrial settlements have occurred, joint tort[ ]feasor status is ... resolved judicially by submitting the liability of a settling defendant to the trier of fact for a determination.") (internal quotation marks and citations omitted) (quoting *Med. Ctr. of Del., Inc. v. Mullins*, 637 A.2d 6, 9 (Del. 1994)).

185 *Id.*

186 *Id.* at 871–72 (internal citations omitted) (emphasis added).

187 Opening Br. at 52.

188 Additionally, as the trial court pointed out, because the trial court held that Plaintiffs had waived their claim that Vista aided and abetted Stollmeyer's sale process breaches by failing to adequately preserve the claim prior to trial, there was parity in also holding that the Non-Settling Defendants waived their right to seek a settlement credit after failing to adequately raise the issue prior to trial. *See* *November Opinion*, 2023 WL 7704774, at *6.

End of Document

SPONSOR: Sen. Townsend & Sen. Sokola & Sen. Lockman & Sen. Hocker & Sen. Pettyjohn & Rep. Griffith & Rep. Minor-Brown & Rep. Harris & Rep. Osienski & Rep. Dukes & Rep. Spiegelman
Sens. Huxtable, Seigfried

DELAWARE STATE SENATE
153rd GENERAL ASSEMBLY

SENATE SUBSTITUTE NO. 1
FOR
SENATE BILL NO. 21

AN ACT TO AMEND TITLE 8 OF THE DELAWARE CODE RELATING TO THE GENERAL CORPORATION LAW.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Two-thirds of all members elected to each house thereof concurring therein):

Section 1. Amend § 144, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 144. Interested ~~directors;~~ directors and officers; controlling stockholder transactions; quorum.

(a) ~~No contract~~ Except for a controlling stockholder transaction under subsection (b) or (c) of this section, an act or transaction involving or between a ~~corporation~~ corporation, or 1 or more of the corporation's subsidiaries, on the one hand, and 1 or more of ~~its~~ the corporation's directors or officers, on the other hand, or involving or between a ~~corporation~~ corporation or 1 or more of the corporation's subsidiaries, on the one hand, and any other corporation, partnership (general or limited), limited liability company, statutory trust, association, or any other entity or organization in which 1 or more of its directors or ~~officers,~~ officers are directors, stockholders, partners, managers, members, or officers, or have a financial interest, ~~shall be void or voidable solely for this reason, or solely because~~ on the other hand, may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation because of the foregoing circumstances or the receipt of any benefit by any such director, officer, entity, or organization or because the director or officer is present at or participates in the meeting of the board or committee which authorizes the ~~contract~~ act or transaction~~,~~ ~~or solely because any such~~ or was involved in the initiation, negotiation, or approval of the act or transaction (including by virtue of a director's ~~or officer's votes are~~ vote being counted for such ~~purpose,~~ purpose), if:

(1) The material facts as to the director's or officer's relationship or interest and as to the ~~contract~~ act or ~~transaction~~ transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction, are disclosed or are known to all members of the board of directors or ~~the committee,~~ a committee of the board of directors, and the board or committee in good faith and without gross negligence authorizes the ~~contract~~ act or

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transaction by the affirmative votes of a majority of the disinterested ~~directors,~~ directors then serving on the board of directors or such committee (as applicable), even though the disinterested directors be less than a quorum; provided that if a majority of the directors are not disinterested directors with respect to the act or transaction, such act or transaction shall be approved (or recommended for approval) by a committee of the board of directors that consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the act or transaction; or

(2) The ~~material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract~~ act or transaction is ~~specifically~~ approved or ratified ~~in good faith~~ by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or

(3) The ~~contract~~ act or transaction is fair as to the ~~corporation as of the time it is authorized, approved or ratified by the board of directors, a committee or the stockholders.~~ corporation and the corporation's stockholders.

(b) A controlling stockholder transaction (other than any going private transaction) may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation or any controlling stockholder or member of a control group, by reason of a claim based on a breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

(1) The material facts as to such controlling stockholder transaction (including the controlling stockholder's or control group's interest therein) are disclosed or are known to all members of a committee of the board of directors to which the board of directors has expressly delegated the authority to negotiate (or oversee the negotiation of) and to reject such controlling stockholder transaction, and such controlling stockholder transaction is approved (or recommended for approval) in good faith and without gross negligence by a majority of the disinterested directors then serving on the committee; provided that the committee consists of 2 or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction; or

(2) Such controlling stockholder transaction is conditioned, by its terms, as in effect at the time it is submitted to stockholders for their approval or ratification, on the approval of or ratification by disinterested stockholders, and such controlling stockholder transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders; or

(3) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

(c) A controlling stockholder transaction constituting a going private transaction may not be the subject of equitable relief, or give rise to an award of damages, against a director or officer of the corporation or any controlling stockholder or member of a control group by reason of a claim based on breach of fiduciary duty by a director, officer, controlling stockholder, or member of a control group, if:

(1) Such controlling stockholder transaction is approved (or recommended for approval) in accordance with paragraph (b)(1) of this section and approved in accordance with paragraph (b)(2) of this section; or

(2) Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

~~(b)~~(d)(1) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the ~~contract~~ act or transaction.

(2) Any director of a corporation that has a class of stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the board of directors shall have determined that such director satisfies the applicable criteria for determining director independence from the corporation and, if applicable with respect to the act or transaction, the controlling stockholder or control group, under the rules (and interpretations thereof) promulgated by such exchange (treating the applicable controlling stockholder and control group as if the controlling stockholder and control group were the corporation for purposes of applying such criteria to determine independence from a controlling stockholder or control group), which presumption shall be heightened and may only be rebutted by substantial and particularized facts that such director has a material interest in such act or transaction or has a material relationship with a person with a material interest in such act or transaction.

(3) The designation, nomination, or vote in the election of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party.

(4) No person shall be deemed a controlling stockholder unless such person satisfies the criteria in paragraph (e)(2) of this section. No 2 or more persons that are not controlling stockholders shall be a control group unless they satisfy the criteria in paragraph (e)(1) of this section.

(5) No person who is a controlling stockholder or member of a control group shall be liable in such capacity to the corporation or its stockholders for monetary damages for breach of fiduciary duty other than for:

a. A breach of the duty of loyalty to the corporation or the other stockholders;

b. Acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; or

c. Any transaction from which the person derived an improper personal benefit.

(6) Nothing in subsections (a), (b), or (c) of this section shall:

<u>a. Limit or eliminate the right of any person to seek equitable relief on the grounds that an act or transaction, including a controlling stockholder transaction, was not authorized or approved in compliance with the procedures set forth in this chapter, was not authorized or approved in compliance with the certificate of incorporation or bylaws of the corporation, or is in violation of any plan, agreement, or order of any governmental authority to which the corporation is a party or subject; or</u>

<u>b. Limit judicial review for purposes of injunctive relief of provisions or devices designed or intended to deter, delay, or preclude a change of control or other transaction involving the corporation or a change in the composition of the board of directors; or</u>

<u>c. Limit or eliminate the right of any person to seek relief on the grounds that a stockholder or other person knowingly aided and abetted a breach of fiduciary duty by one or more of the directors of the corporation.</u>

<u>(7) Shares irrevocably accepted for purchase or exchange pursuant to an offer contemplated by § 251(h) of this title shall be deemed voted in favor of the act or transaction and shares owned or controlled by disinterested stockholders that have not been irrevocably accepted for purchase or exchange pursuant to such an offer shall be deemed voted against the act or transaction for purposes of determining whether the act or transaction has been approved for purposes of paragraphs (a)(2), (b)(2), and (c)(1) of this section.</u>

<u>(e) For purposes of this section:</u>

<u>(1) "Control group" means 2 or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder.</u>

<u>(2) "Controlling stockholder" means any person that, together with such person's affiliates and associates:</u>

<u>a. Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors;</u>

<u>b. Has the right, by contract or otherwise, to cause the election of nominees who are selected at the discretion of such person and who constitute either a majority of the members of the board of directors or directors entitled to cast a majority in voting power of the votes of all directors on the board of directors; or</u>

<u>c. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting</u>

power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.

(3) “Controlling stockholder transaction” means an act or transaction between the corporation or 1 or more of its subsidiaries, on the one hand, and a controlling stockholder or a control group, on the other hand, or an act or transaction from which a controlling stockholder or a control group receives a financial or other benefit not shared with the corporation’s stockholders generally.

(4) “Disinterested director” means a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction.

(5) “Disinterested stockholder” means any stockholder that does not have a material interest in the act or transaction at issue or, if applicable, a material relationship with the controlling stockholder or other member of the control group, or any other person that has a material interest in the act or transaction.

(6) “Going private transaction” means:

a. For a corporation with a class of equity securities subject to § 12(g) or 15(d) of the Securities Exchange Act of 1934 or listed on a national securities exchange, a Rule 13e-3 transaction (as defined in 17 CFR § 240.13e-3(a)(3) or any successor provision); and

b. For any other corporation to which paragraph (e)(6)a. of this section does not apply, any controlling stockholder transaction, including a merger, recapitalization, share purchase, consolidation, amendment to the certificate of incorporation, tender or exchange offer, conversion, transfer, domestication or continuance, pursuant to which all or substantially all of the shares of the corporation’s capital stock held by the disinterested stockholders (but not those of the controlling stockholder or control group) are cancelled, converted, purchased, or otherwise acquired or cease to be outstanding.

(7) “Material interest” means an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director’s judgment when participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder or any other person (other than a director), would be material to such stockholder or such other person.

(8) “Material relationship” means a familial, financial, professional, employment, or other relationship that (i) in the case of a director, would reasonably be expected to impair the objectivity of the director’s judgment when

participating in the negotiation, authorization, or approval of the act or transaction at issue and (ii) in the case of a stockholder, would be material to such stockholder.

Section 2. Amend § 220, Title 8 of the Delaware Code by making deletions as shown by strike through and insertions as shown by underline as follows:

§ 220. Inspection of books and records.

(a) As used in this section:

(1) "Books and records" means all of the following:

a. The certificate of incorporation, as defined in § 104 of this title, including a copy of any agreement or other instrument incorporated by reference in the certificate of incorporation.

b. The bylaws then in effect, including a copy of any agreement or other instrument incorporated by reference in the bylaws.

c. Minutes of all meetings of stockholders and the signed consents evidencing all action taken by stockholders without a meeting, in each case for the 3 years preceding the date of the demand under subsection (b) of this section.

d. All communications in writing or by electronic transmission to stockholders generally within the past 3 years preceding the date of the demand under subsection (b) of this section.

e. Minutes of any meeting of the board of directors or any committee of the board of directors and records of any action of the board of directors or any such committee.

f. Materials provided to the board of directors or any committee of the board of directors in connection with actions taken by the board of directors or any such committee.

g. Annual financial statements of the corporation for the 3 years preceding the date of the demand under subsection (b) of this section.

h. Any agreement entered into under § 122(18) of this title.

i. Director and officer independence questionnaires.

(2) "Proper purpose" means a purpose reasonably related to a stockholder's interest as a stockholder.

~~(1)~~(3) "Stockholder" means a person who is a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person.

~~(2)~~(4) "Subsidiary" means any entity directly or indirectly owned, in whole or in part, by the corporation of which the stockholder is a stockholder and over the affairs of which the corporation directly or indirectly exercises control, and includes, without limitation, corporations, partnerships, limited partnerships, limited liability partnerships, limited liability companies, statutory trusts and/or joint ventures.

~~(3)~~(5) "Under oath" includes statements the declarant affirms to be true under penalty of perjury under the laws of the United States or any state.

(b)(1) ~~Any~~ Subject to paragraph (b)(2) of this section, any stockholder, in person or by attorney or other agent, shall, upon written demand under oath ~~stating the purpose thereof~~, have the right during the usual hours for business to inspect for any proper purpose, and to make copies and extracts from:

~~(1)~~a. The corporation's stock ledger, a list of its stockholders, and its other books and records; and

~~(2)~~b. A subsidiary's books and records, to the extent that:

~~a.~~1. The corporation has actual possession and control of such records of such subsidiary; or

~~b.~~2. The corporation could obtain such records through the exercise of control over such subsidiary, provided that as of the date of the making of the demand:

~~1.~~A. The stockholder inspection of such books and records of the subsidiary would not constitute a breach of an agreement between the corporation or the subsidiary and a person or persons not affiliated with the corporation; and

~~2.~~B. The subsidiary would not have the right under the law applicable to it to deny the corporation access to such books and records upon demand by the corporation.

(2) A stockholder may inspect and copy the corporation's books and records only if all of the following apply:

a. The stockholder's demand is made in good faith and for a proper purpose.

b. The stockholder's demand describes with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect.

c. The books and records sought are specifically related to the stockholder's purpose.

(3) The corporation may impose reasonable restrictions on the confidentiality, use, or distribution of books and records and may require, as a condition to producing books and records to a stockholder under any demand under this subsection, that the stockholder agree that any information included in the corporation's books and records is deemed incorporated by reference in any complaint filed by or at the direction of the stockholder in relation to the subject matter referenced in the demand. The corporation may redact portions of any books and records produced to such stockholder under this subsection to the extent the portions so redacted are not specifically related to the stockholder's purpose.

(4) This section does not affect:

a. The right of a stockholder to seek discovery of books and records if the stockholder is in litigation with the corporation, to the same extent as any other litigant; or

b. The power of a court, independently of this chapter, to compel the production of corporate records for inspection and to impose reasonable restrictions as provided in paragraph (b)(3) of this section, provided that, in the case of production of books and records defined in paragraph (a)(1) of this section at the request of a stockholder, the stockholder has met the requirements of this subsection.

(5) In every instance where the stockholder is other than a record holder of stock in a stock corporation, or a member of a nonstock corporation, the demand under oath shall state the person's status as a stockholder, be accompanied by documentary evidence of beneficial ownership of the stock, and state that such documentary evidence is a true and correct copy of what it purports to be. ~~A proper purpose shall mean a purpose reasonably related to such person's interest as a stockholder.~~

(6) In every instance where an attorney or other agent shall be the person who seeks the right to inspection, the demand under oath shall be accompanied by a power of attorney or such other writing which authorizes the attorney or other agent to so act on behalf of the stockholder.

(7) The demand under oath shall be directed to the corporation at its registered office in this State or at its principal place of business.

(d) Any director shall have the right to examine the corporation's stock ledger, a list of its ~~stockholders and~~ stockholders, its ~~other~~ books and ~~records~~ records, and other corporate records for a purpose reasonably related to the director's position as a director. The Court of Chancery is hereby vested with the exclusive jurisdiction to determine whether a director is entitled to the inspection sought. The Court may summarily order the corporation to permit the director to inspect ~~any and all books and records,~~ the stock~~ ledger and~~ ledger, the list of ~~stockholders~~ stockholders, the books and records, and other corporate records and to make copies or extracts therefrom. The burden of proof shall be upon the corporation to establish that the inspection such director seeks is for an improper purpose. The Court may, in its discretion, prescribe any limitations or conditions with reference to the inspection, or award such other and further relief as the Court may deem just and proper.

(e) Except as otherwise expressly provided in subsection (f) or subsection (g) of this section, in any proceeding brought by a stockholder under subsection (c) of this section to compel the inspection of books and records, the Court of Chancery may not order the corporation to produce any records of the corporation other than the books and records set forth in paragraph (a)(1) of this section.

(f) If the corporation does not have any of the books and records described in paragraphs (a)(1)c., (a)(1)e., or (a)(1)g. of this section or, in the case of a corporation that has a class of stock listed on a national securities exchange, paragraph (a)(1)i. of this section, the Court of Chancery may order the corporation to produce additional records of the corporation constituting the functional equivalent of any such books and records in response to a demand for inspection brought by a stockholder under subsection (b) of this section only if and to the extent the stockholder has met the requirements of subsection (b) of this section, and only to the extent necessary and essential to fulfill the stockholder’s proper purpose.

(g) In any proceeding brought by a stockholder under subsection (c) of this section to compel the inspection of books and records, the Court of Chancery may order the corporation to produce, in addition to any books and records or other records ordered to be produced under subsection (e) of this section, other specific records of the corporation only if and to the extent:

(1) Such stockholder has met the requirements of subsection (b) of this section;

(2) Such stockholder has made a showing of a compelling need for an inspection of such records to further the stockholder’s proper purpose; and

(3) Such stockholder has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

(h) The Court of Chancery may impose reasonable restrictions as provided in paragraph (b)(3) of this section to any records of the corporation produced under subsection (f) or subsection (g) of this section.

Section 3. Sections 1 and 2 of this Act take effect on the enactment of this Act and apply to all acts and transactions, whether occurring before, on, or after the enactment of this Act, except that Sections 1 and 2 of this Act do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025.

SYNOPSIS

Section 1 of this Act amends § 144 of Title 8 to provide safe harbor procedures for acts or transactions in which one or more directors or officers as well as controlling stockholders and members of control groups have interests or relationships that might render them interested or not independent with respect to the act or transaction. Under revised § 144(a), certain acts or transactions involving such directors or officers will be protected if approved or recommended by a majority of the disinterested directors, either serving on a board of directors or a committee of the board of directors, or approved or ratified by a majority of the votes cast by the disinterested stockholders entitled to vote thereon, in each case upon disclosure or in full knowledge of the material facts giving rise to the conflict or potential conflict. If a majority of the directors are not disinterested directors with respect to the act or transaction, any such disinterested director approval or recommendation must be provided through a disinterested director committee. In addition, the amendments define what parties constitute a controlling stockholder or control group and provide safe harbor procedures that can be followed to insulate from challenge specified acts or transactions from which a controlling stockholder or control group receives a unique benefit. Under new § 144(b), a controlling stockholder transaction that does not constitute a “going private transaction” may be entitled to the statutory safe harbor protection if it is negotiated and approved or recommended, as applicable, by a majority of the disinterested directors then serving on the committee, or is conditioned on the approval or ratification by disinterested stockholders and is approved or ratified by a majority of the votes cast by the disinterested stockholders. Under new § 144(c), a controlling stockholder transaction that constitutes a "going private transaction" may be entitled to the statutory safe harbor protection if it is negotiated and approved or recommended, as applicable, by a majority of the disinterested directors then serving on the committee and is conditioned on the approval of or ratification by disinterested stockholders and is approved or ratified by a vote of a majority of the votes cast by the disinterested stockholders. With respect to any approval or recommendation by a committee, the safe harbor only applies if the act or transaction or controlling stockholder transaction, as applicable, was approved by a committee consisting of at least 2 directors, all of whom, in the first instance, have been determined by the board of directors to be disinterested directors. Revised § 144 provides that any approval or recommendation, as applicable, of disinterested directors or a disinterested director committee must be made in good faith and without gross negligence, making clear that the statute does not displace the common law requirements regarding core fiduciary conduct as contemplated by cases such as Flood v. Synutra International, Inc., 195 A.3d 754 (Del. 2018), and In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013), aff'd sub nom., Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del.2014). Revised § 144 does not limit the right of any person to seek relief on the grounds that a stockholder or other person aided and abetted a breach of fiduciary duty by one or more directors. Consistent with existing case law, the stockholder or other person must have knowingly participated in a breach of fiduciary duty to establish an aiding and abetting claim. In re Mindbody, Inc., 2024 WL 4926910 (Del. Dec. 2, 2024). The amendments to § 144 also set forth criteria for determining the independence and disinterestedness of directors and stockholders. The amendments provide that controlling stockholders and control groups, in their capacity as such, cannot be liable for monetary damages for breach of the duty of care.

Section 144 is intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders and with respect to when the safe harbors in § 144(b) and (c) apply. Section 144 does not provide for the elimination of liability or safe harbors for stockholders who are not controlling stockholders or part of a control group because those stockholders do not owe fiduciary duties to the corporation or other stockholders. The amendments do not displace any safe harbor procedures or other protections available at common law, including processes and procedures that comply with the pre-amendment common law but do not conform to the § 144 safe harbors. The references in § 144 to an act or transaction being "fair as to the corporation and the corporation's stockholders", which would apply if the applicable disinterested director and disinterested stockholder safe harbors are not used, is intended to be consistent with the entire fairness doctrine developed in the common law.

Section 2 of this Act amends § 220 of Title 8 to define the materials that a stockholder may demand to inspect pursuant to a request for books and records of the corporation. The amendments also set forth certain conditions that a stockholder must satisfy in order to make an inspection of books and records. The amendments make clear that information from books and records obtained by a stockholder from a production under § 220 will be deemed to be incorporated by reference into any complaint filed by or at the direction of a stockholder on the basis of information obtained through a demand for books and records. New § 220(b)(4) preserves whatever independent rights of inspection exist under the referenced sources and does not create any rights, either expressly or by implication. New § 220(f) provides that if the corporation does not have specified books and records, including minutes of board and committee meetings, actions of board or any committee, financial statements and director and officer independence questionnaires, the Court of Chancery may order the production of additional corporate records necessary and essential for the stockholder's proper purpose. New § 220(g) provides that a stockholder may obtain additional specific records if the stockholder has made a showing of a compelling need to further a proper purpose for the inspection and has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further such purpose.

Section 3 of this Act provides that Sections 1 and 2 of this Act take effect on the enactment of this Act and apply to all acts and transactions, whether occurring before, on, or after the enactment date of this Act, except that Sections 1 and 2 of this Act do not apply to or affect any action or proceeding commenced in a court of competent jurisdiction that is completed or pending, or any demand to inspect books and records made, on or before February 17, 2025.

This Act requires a greater than majority vote for passage because § 1 of Article IX of the Delaware Constitution requires the affirmative vote of two-thirds of the members elected to each house of the General Assembly to amend the general corporation law.

Author: Senator Townsend