

**Delaware
Corporate Law**
2025 Year in Review

**Potter
Anderson**

Celebrating **200** Years



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2025: DELAWARE CORPORATE JURISPRUDENCE IN REVIEW

In 2025, Delaware continued to demonstrate why it is—and has been for decades—the go-to jurisdiction for corporations. No event in 2025 was more consequential to Delaware corporate law than the passage of Senate Bill 21 (“SB21”) on March 25, 2025. SB21 amended certain provisions of the Delaware General Corporation Law related to safe harbors for conflict transactions and books and records demands. While stockholder plaintiffs in certain suits before the Court of Chancery challenged the constitutionality of SB21, the Delaware Court acted quickly to address those challenges. The Court of Chancery promptly certified the constitutional challenges to the Delaware Supreme Court, which issued its decision upholding the amendments on February 27, 2026.¹

SB21 represents a welcome step in providing guidance and certainty to corporations, while still preserving important pathways for stockholders to obtain information and bring claims. SB21 demonstrates once again that Delaware is capable of adapting quickly to address the needs of its corporate constituencies.

Justice Karen Valihura announced that she will step down from the Delaware Supreme Court when her term expires in July 2026. In her twelve years at the Supreme Court, Justice Valihura authored many important opinions, including *In re Tesla Motors, Inc. Stockholder Litigation*, 298 A.3d 667 (Del. 2023) and *Morrison v. Berry*, 191 A.3d 268 (Del. 2018). She will be remembered for her service to Delaware and her well-reasoned and forceful opinions and dissents.

The Court of Chancery saw over 1,500 new cases filed in 2025, an increase of nearly 200 cases from 2024. Reflecting the continued growth of its docket, the Court of Chancery has continued to expand, adding two new magistrate positions, bringing the total number to seven. To fill those new positions, the Court appointed Magistrate Caroline Brittingham and Magistrate Jessie Benavides in September 2025. Magistrate Brittingham previously spent over twelve years with the Delaware Department of Justice, including as the head of its Human Trafficking Unit. Magistrate Benavides joined the bench after years in private practice where she litigated a wide variety of disputes across Delaware’s courts.

Senior Magistrate Selina Molina resigned from her position effective February 28, 2026. Senior Magistrate Molina was the longest-serving Magistrate at the time,

¹ Potter Anderson represented Governor Matt Meyer, who intervened in the litigation to support the constitutionality of SB21.

and she served as the first Senior Magistrate after the Court created that position in early 2025. Senior Magistrate Molina played an integral role in the growth of the Magistrate bench and its assumption of a greater role in hearing and deciding cases in vital areas of our corporate law including books and records demands and advancement rights for directors and officers.

2025 Amendments to Section 144 of the DGCL

On March 25, 2025, Delaware's governor signed into law Senate Bill No. 21, enacting significant amendments to Section 144 of the General Corporation Law of the State of Delaware. Prior to the 2025 amendments, Section 144 provided that certain interested director and officer transactions would not be void or voidable solely as a result of such interest. Now, following the 2025 amendments, Section 144 provides for safe harbors with respect to certain conflict transactions involving directors, officers, and controlling stockholders. It also provides statutory definitions for, among other things, "controlling stockholder" and "control group," whether a person has a "material interest" or a "material relationship" with a person with a "material interest," and whether a person is "disinterested" in the transaction, and addresses other procedural matters relating to conflict transactions.

Safe Harbors

Section 144 provides safe harbors for three different categories of acts or transactions. We take these in turn below.

Section 144(a) – Conflicted Director or Officer Transactions

The first safe harbor, Section 144(a), covers acts or transactions involving or between a corporation, on one hand, and one or more of the corporation's directors or officers or an entity in which one or more of the corporation's directors or officers are directors, stockholders, partners, managers, members or officers, on the other hand. If one of the following three procedures is satisfied, then the conflicted director or officer transaction may not be the subject of equitable relief, or give rise to an award of damages, against such a director or officer because of the conflict, the receipt of any benefit in the transaction by such director or officer, or the participation of the director or officer in the transaction:

1. *Board or Committee Approval.* The material facts as to the director's or officer's relationship or interest *and* as to the act or transaction, including any involvement in the initiation, negotiation, or approval of the act or transaction, are disclosed or known to all members of the board of directors or a committee, and the board of directors or committee in good faith and without gross negligence authorizes the act or transaction by the affirmative votes of a majority of the disinterested directors then serving on the board of directors or such committee (as applicable), even if the disinterested directors are less than a quorum.

Note that if less than a majority of the members of the board of directors are disinterested directors with respect to the act or transaction, the safe harbor

requires the approval, or recommendation for approval, by a committee consisting of two or more directors, each of whom the board of directors has determined to be a disinterested director with respect to the act or transaction.

2. *Disinterested Stockholder Approval.* The transaction is approved or ratified by an informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders.
3. *Entire Fairness.* The transaction is fair as to the corporation and the corporation's stockholders.

The synopsis to the 2025 amendments makes clear that this concept of fairness is the same as "entire fairness" under the common law.

Section 144(b) – Controlling Stockholder Transactions Other Than Going Private Transactions

The second safe harbor, Section 144(b), covers controlling stockholder transactions that are not going private transactions. If one of the following three procedures is satisfied, such controlling stockholder 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:

1. *Committee Approval.* 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 consisting of at least two directors, each of whom the board of directors has determined to be a disinterested director with respect to the controlling stockholder transaction, 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.
2. *Disinterested Stockholder Approval.* Such controlling stockholder transaction is conditioned, by its terms, as in effect at the time it is submitted to stockholders, 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.

3. *Entire Fairness*. Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

Section 144(c) – Controlling Stockholder Transactions That Are Going Private Transactions

The third and final safe harbor, Section 144(c), covers controlling stockholder transactions that are going private transactions. If one of the following two procedures is satisfied, such controlling stockholder transaction will receive the same protections as described above with respect to Section 144(b):

1. *Committee + Disinterested Stockholder Approval*. Such controlling stockholder transaction is approved or recommended for approval in accordance with the committee approval described above in (1) under the description of Section 144(b) and approved in accordance with the disinterested stockholder approval described above in (2) under the description of Section 144(b).
2. *Entire Fairness*. Such controlling stockholder transaction is fair as to the corporation and the corporation's stockholders.

Definitions

Control group means two 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.

Controlling stockholder means any person that, together with such person's affiliates and associates satisfies one of the below-listed criteria:

- *Ownership or Control of a Majority of the Voting Power*. A person is a controlling stockholder if such person 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.
- *Contractual Control (Majority of the Board)*. A person is a controlling stockholder if such person 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 directors or directors who have a majority in voting power.
- *At Least One-Third of the Voting Power + Power Functionally Equivalent to a Stockholder With Ownership or Control of a Majority of the Voting Power*. A person is a controlling stockholder if such person 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 $\frac{1}{3}$ 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 and power to exercise managerial authority over the business and affairs of the corporation.

Under Section 144, no person is a controlling stockholder or control group unless they satisfy the definition of “controlling stockholder” or “control group” described above.

Controlling stockholder transaction means an act or transaction between the corporation, 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.

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.

Note that, with respect to corporations with a class of stock that is listed on a national securities exchange, there is a heightened presumption of independence for directors that satisfy listing requirements for independence from the corporation and, if applicable, with respect to the act or transaction, and the controlling stockholder or control group (treating the controlling stockholder and control group as if they were the corporation for purposes of applying such criteria).

This heightened presumption is rebuttable only by substantial and particularized facts that such director has a material interest in such act or transaction or a material relationship with a person with a material interest in such act or transaction.

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.

Going private transaction means:

- For publicly held corporations, a “Rule 13e-3 transaction;” and
- For privately held corporations, 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.

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, would be material to such stockholder or such other person.

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.

Other Procedural Matters

- 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 act or transaction.
- Designating, nominating or voting in the election of the director to the board of directors by any person that has a material interest in an act or transaction is not, by itself, evidence that such director is not a disinterested director.
- Controlling stockholders and control groups are not liable to the corporation or its stockholders for monetary damages for breach of fiduciary other than breaches of the duty of loyalty to the corporation or other stockholders, acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law or any transactions from which the person derived an improper personal benefit.
- Section 144 does not eliminate claims for knowingly aiding and abetting a breach of fiduciary duty by one or more directors of the corporation.

Takeaways

Committees Remain a Powerful Tool in Navigating Conflict Transactions: A core component of Section 144 is the role committees of disinterested directors can play in helping parties navigate conflict transactions. Approval of an act or transaction falling under Section 144(a) or Section 144(b) by a committee of

disinterested directors alone can secure the applicable safe harbor for such act or transaction. And for acts or transactions falling under Section 144(c), a committee of disinterested directors, coupled with the informed, uncoerced, affirmative vote of a majority of the votes cast by the disinterested stockholders, secures such safe harbor.

Key Departures from Common Law: Section 144 also addressed certain concerns raised by practitioners around the potential for procedural violations under the common law. Among other things, for purposes of the safe harbors created by Section 144, there is no requirement that a committee be established, or a majority of the minority approval condition be put in place, *ab initio* similar to the common law requirements set forth in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014). The safe harbors also ensure that, so long as the board of directors has determined that all of the directors serving on the committee are disinterested directors, a judicial finding that one or more directors is not actually disinterested will not preclude the applicability of the safe harbor.

Litigation Expected to Test the Application of Section 144 and its Intersection with the Common Law: As Section 144 is newly amended, and the synopsis to the 2025 amendments provides that it is not intended to displace the common law, we expect to see litigation to test the breadth of this amendment and the intersection between the common law and Section 144 and whether and to what extent common law principles remain applicable in the context of conflicted director or officer and controlling stockholder transactions. These questions include, among others, whether the definitions of “controlling stockholder” and “disinterested director” under Section 144 are intended to apply generally or only in the context of Section 144’s safe harbors.

Challenges to the Constitutionality of Senate Bill 21

After the announcement of SB21, some commentators and members of the bar asserted that SB21 violated Section 10 of Article IV of the Delaware Constitution because it “reduce[d] the Court of Chancery’s equity jurisdiction below the jurisdiction of the High Court of Chancery of Great Britain.”

On April 3, 2025, in a case challenging the reincorporation of DropBox from Delaware to Nevada, a stockholder plaintiff alleged that SB21 was unconstitutional as an improper reduction of the Court of Chancery’s equity jurisdiction. Soon after, several other stockholders challenged the constitutionality of SB21. In almost a dozen cases, parties challenged SB21 on constitutional grounds, both based on the purported degradation of the Court of Chancery’s equitable jurisdiction and on the retroactive application of SB21.

One of those cases was *Rutledge v. Clearway Energy Group LLC, et al.*² On May 22, 2025, the plaintiff in Clearway filed a Motion to Certify Constitutional Questions to the Delaware Supreme Court. On May 27, 2025, the plaintiff provided the Court of Chancery with its proposed certification of the questions of law. On June 6, 2025, the Court of Chancery granted plaintiff's Certified Questions of Law.

On June 9, 2025, the State of Delaware *ex rel* Governor Meyer filed a Motion to Intervene in *Clearway* for the limited purpose of briefing the constitutional issues presented in the certification of questions of law. This same day, the Court of Chancery stayed the litigation in *DropBox* pending resolution of the certified questions in *Clearway*. On June 10, 2025, the State of Delaware *ex rel* Governor Meyer's Motion to Intervene in *Clearway* was granted.³ And on June 11, 2025, the Delaware Supreme Court accepted the certified questions and directed the parties to schedule briefing.

The parties briefed the certified questions between July and September, 2025. The Appellants asserted that SB21 violated the Delaware Constitution because it narrowed the Court of Chancery's jurisdiction, which included the ability to provide equitable relief for fiduciary breaches, and the safe harbors in SB21 eliminated the ability of the Court of Chancery to do so for certain breaches of fiduciary duty. Appellants also argued that the retroactive reach of SB21 was unconstitutional because it eliminated causes of action that had already vested. Appellees argued that the General Assembly has the power to pass laws shaping fiduciary duties, and that the exercise of that power in SB21 did not change the Court of Chancery's jurisdiction. Appellees argued that the retroactivity of SB21 was reasonable and therefore satisfied constitutional requirements and that stockholders did not have a vested right in derivative claims. Argument was held on November 5, 2025 before the Delaware Supreme Court *en banc*. On February 27, 2026, the Delaware Supreme Court issued its decision, rejecting appellants' arguments and upholding the constitutionality of SB21 in all respects.

² C.A. No. 2025-0499-LWW (Del. Ch.) ("Clearway Dkt.").

³ Potter Anderson represented Governor Meyer in this litigation.

Noteworthy Decisions of 2025

W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.

No. 340, 2024 (Del. Jan. 20, 2026)
(Justice Traynor)

In the wake of a highly debated Court of Chancery decision and a subsequent amendment to Section 122 of the General Corporation Law of the State of Delaware (the “DGCL”), the Supreme Court (the “Court”) reversed the lower court’s holding that certain provisions in a stockholders agreement that the plaintiff contended violated Section 141(a) of the DGCL were void, not voidable. This conclusion required further reversal of the lower court’s determination that equitable defenses, specifically the doctrine of laches, could not be asserted against the plaintiff’s claim, as equitable defenses can be asserted if acts are voidable, but not if they are void.

At the core of the underlying dispute was a stockholders agreement containing a selection of provisions that allegedly inhibited the defendant’s board of directors from exercising its full authority in contravention of Section 141(a) of the DGCL. The plaintiff sought a declaratory judgment to this effect, namely a determination “that certain provisions . . . were facially invalid and unenforceable because the provisions interfere[d] with the corporate board’s management of the business and affairs . . . as required by 8 *Del. C.* § 141(a).” The defendant, in turn, asserted that not only was the stockholders agreement “facially valid,” but that even if it were not, the plaintiff’s claim, filed almost nine years after the stockholders agreement’s execution, was either (i) “time-barred expressly by 10 *Del. C.* § 8106’s three-year statute of limitations or by analogy under the doctrine of laches” or (ii) unripe.

Following cross-motions for summary judgment, the Court of Chancery ruled in favor of the plaintiff and rendered two opinions in connection with the same.

In its first opinion, the Court of Chancery entertained the defendant’s non-substantive arguments, namely that the plaintiff’s claim was either time-barred or unripe. The Court of Chancery assumed for purposes of the opinion that the contested provisions violated Section 141(a) of the DGCL and were therefore void. Accordingly, the Court of Chancery rejected the defendant’s argument that the plaintiff’s claim was time-barred on the grounds that equitable defenses, including laches, were not available, as equitable defenses cannot validate void acts. Relatedly, the Court of Chancery noted that even if the doctrine of laches had been an available defense, the plaintiff’s claim would still not have been time-barred and the Court of Chancery was “not bound to follow the traditional rule governing limitations of actions” because “the

wrong for which it [the plaintiff] sought a remedy was ongoing and therefore its claim did not accrue [upon the stockholders agreement's execution]." As a final matter, the Court of Chancery rejected the defendant's alternative argument that the plaintiff's claim was unripe.

In its second opinion, the Court of Chancery evaluated the substantive aspects of the plaintiff's claim, namely whether the challenged provisions violated Section 141(a) of the DGCL. To aid in its assessment of the same, the Court of Chancery first analyzed whether the stockholders agreement was an "internal governance arrangement" or an "external commercial agreement," of which only the former is subject to Section 141(a) of the DGCL, eventually concluding that the stockholders agreement was an "internal governance arrangement." The Court of Chancery subsequently held that: (i) certain of the challenged provisions interfered extensively with the board's ability to operate and thereby facially violated Section 141(a) of the DGCL and (ii) such provisions were void and unenforceable. Following this decision, the Court of Chancery awarded the plaintiff attorney fees.

On appeal, the defendant argued that: (i) the Court of Chancery's "conclusion that the plaintiff's claims were not time-barred by laches was erroneous as was its determination that the challenged provisions are facially invalid" and (ii) the "award of attorney fees was an abuse of discretion."

Before delving into its analysis in earnest, the Court qualified its opinion in several respects. First, the Court stated that because it agreed with the defendant's timeliness argument, it "need not address its contentions as to the facial validity of the challenged provisions". Second, the Court acknowledged the aforementioned statutory amendment to Section 122 of the DGCL. The Court noted in relevant part as follows:

Three months after the court issued its merits opinion, legislation was introduced in the General Assembly to mitigate – if not annul – the effects of the court's opinion. . . . The original synopsis of the bill left little doubt that it was drafted and passed in response to the Court of Chancery's decision. The General Assembly stipulated, however, that the amended statute "shall not apply to or affect any civil action or proceeding completed or pending on or before such date." Thus, the enactment of new § 122(18) does not moot this appeal. . . . It could be argued that the General Assembly's adoption of Senate Bill 313 clarified or announced the public policy of Delaware, but the synopsis . . . and this limitation on the application of Section 122(18) require us to ignore that public policy. This is a curious circumstance, but we have not considered the implications of Senate Bill 313 in deciding that laches bars the plaintiff's facial challenge.

Third, the Court expressed that: (i) the Court of Chancery’s determination that “a corporate action taken in a manner that is at odds with the DGCL is necessarily void rather than voidable” was “inconsistent with our cases that draw a distinction between void and voidable contractual provisions” and (ii) the Court’s present evaluation of the void versus voidable distinction was not to be construed as an “assess[ment] [of] the enforceability of the challenged provisions”.

The Court commenced its analysis by drawing on a long line of precedent, explaining that the relevant question in determining the void versus voidability distinction was “not whether the method actually chosen by the Moelis board to implement the challenged provisions was valid under the DGCL[, but rather] whether the plaintiff has demonstrated that there are no lawful means by which Moelis could accomplish its desired governance arrangements, making the challenged provisions susceptible to cure and therefore voidable.” The Court emphasized that such “framework appropriately considers whether the arrangements agreed to in a challenged contract are themselves contrary to public policy instead of whether the means by which they are agreed to are at odds with public policy.” Following supplemental briefing, the Court concluded that: (i) the defendant had successfully asserted that the challenged provisions “could have been lawfully implemented through the certificate of incorporation under § 102(b)(1) and § 141(a) of the DGCL”; (ii) the plaintiff had not presented “any mandatory provision of the DGCL or other Delaware law that would stand in the way of the adoption of the challenged provisions by charter amendment or other method”; and (iii) as such, the plaintiff failed to carry its burden of demonstrating that the challenged provisions were void. Accordingly, the Court concluded that the challenged provisions were voidable, not void, and that the plaintiff’s claim was therefore subject to equitable defenses.

Turning to the timeliness argument, the Court determined that the plaintiff’s claim was barred by laches. In reaching this result, the Court first explained that “a cause of action accrues – and, thus, the statute of limitations begins to run – upon the commission of the wrongful act giving rise to the cause of action.” The Court then recounted the defendant’s and the plaintiff’s arguments with respect to the relevant date of accrual.

The defendant argued that the claim began to accrue in 2014, the year in which the stockholders agreement was executed. The plaintiff, by contrast, asserted that the claim did not accrue in 2014, but rather that the continuous application of the challenged provisions constituted a “continuing wrong” which effectively prevented the limitations period from ever starting. The Court disagreed with the Court of Chancery’s acceptance of the plaintiff’s “continuing wrong” theory, and instead determined that a separate method for determining when a claim accrues, the “discrete act method,” was more appropriate. This method “applies when a claim arises at a distinct point in time and is effectively complete as of that date, even if

it has ongoing effects or implications.” The Court explained that the plaintiff’s claim fell squarely within this description, as the stockholders agreement, which was the “purportedly unlawful act,” was executed on a certain date, and that the challenged provisions did not constitute a “continuing wrong,” but rather were “ongoing effects or implications” of the underlying stockholders agreement. Accordingly, the Court, after extensively discussing and distinguishing a collection of cases, concluded that the plaintiff’s claim accrued in 2014 and therefore far exceeded the applicable three-year limitations period, rendering the claim time-barred.

As a final step, the Court analyzed whether the defendant would be prejudiced by defending the lawsuit following the plaintiff’s delay. Rejecting, as inconsistent with precedent, the Court of Chancery’s view that the defendant “could not suffer prejudice if required to defend this case because the facts are undisputed and thus there has been no ‘loss of evidence or faded memories’,” the Court determined that because no “unusual conditions” or “extraordinary circumstances” were present, the plaintiff’s “lengthy delay in filing its complaint outside the analogous limitation period was presumptively prejudicial, and the record does not support a finding that this presumption has been rebutted.”

Finally, the Court ordered that the award of attorney fees be vacated.

Takeaways

Distinguishing void acts from voidable acts remains an intricate task, but it is clear that plaintiffs carry a heavy burden in proving that an act is void under Delaware law: The Court’s decision contributes to the existing literature and case law seeking to distinguish void acts from voidable acts, a distinction that “has long vexed courts and legal scholars alike,” by emphasizing that a plaintiff carries a heavy burden in asserting that an action is void, namely that to prevail, a plaintiff must allege that a contested action could not have been achieved by any means.

The resulting implications of the statutory amendment to Section 122 of the DGCL remain to be seen: In its analysis, the Court noted that it had not considered Section 122(18) in its determination of whether laches barred the plaintiff’s facial challenge, and had not otherwise considered Section 122(18) with respect to plaintiff’s challenges because the statutory amendment did not apply to this case, as it was pending before the effective date of the amendment. Practitioners will therefore need to await additional challenges and judicial developments to fully understand the amendment’s effects and applications.

In re The Trade Desk, Inc. Derivative Litigation⁴
C.A. No. 2022-0461-PAF (Feb. 14, 2025)
(Vice Chancellor Fioravanti)

Beginning in late 2020 and continuing through 2021, the Compensation Committee (the “Committee”) of the Board of Directors (the “Board”) of The Trade Desk, Inc. (“Trade Desk”) discussed and evaluated a substantial performance based equity grant for Jeff Green, who is Trade Desk’s Chief Executive Officer and also its co-founder and controlling stockholder. The Committee ultimately recommended, and the Board approved, a performance based equity award for Green, which, had a grant date fair value of \$819 million and, if realized over a ten year period, would grant Green options to purchase up to 4% of the Company’s outstanding equity. For Green to earn the full value of the equity grant, Trade Desk’s stock price would need to increase by approximately 400% over 10 years and Green would need to satisfy other conditions in the equity grant. Because Green was the controlling stockholder of Trade Desk, this equity grant, if challenged, would be presumptively subject to entire fairness review, as the Board and Green had not opted to utilize the MFW framework under Delaware law.⁵

Following the approval of this equity grant, plaintiff stockholders brought suit against certain Trade Desk directors who approved the equity grant, asserting that those directors had breached their fiduciary duties in awarding the equity grant to the corporation’s controlling stockholder. The plaintiffs did not make a pre-suit demand on the board, which reflected their belief that at least a majority of the board could not impartially consider a demand to pursue the litigation associated with these claims.

The defendants moved to dismiss the complaint under Court of Chancery Rules 23.1 (failure to plead demand futility) and 12(b)(6) (failure to state a claim). Because the plaintiff stockholders sought to assert a claim on behalf of Trade Desk (i.e., a derivative claim), the Court’s analysis began, and ultimately ended, with evaluating whether the Board at the time the litigation was filed could impartially consider the demand to institute litigation in connection with the Green equity grant. At the time that the plaintiff stockholders filed the complaint, the Board consisted of 8 directors.

At the outset of the Court’s demand futility analysis under Court of Chancery Rule 23.1 and *United Food & Commercial Workers Union v. Zuckerberg (Zuckerberg II)*, 262 A.3d 1034 (Del. 2021), the Court concluded that there was no doubt that one director, Andrea Cunningham, could impartially consider a demand and that Green

⁴ On November 6, 2025, the Delaware Supreme Court affirmed the Court of Chancery’s dismissal of this suit.

⁵ The Committee’s recommendation and Board’s approval of this equity grant also preceded the implementation of the statutory safe harbors under Section 144 of the DGCL.

would not be able to impartially consider a demand. The plaintiff, therefore, bore the burden of demonstrating a reasonable doubt that at least 3 directors out of the remaining 6 directors could not impartially consider the demand.

The Court then addressed plaintiff's claims that four members of the Board were not independent of Green for purposes of the demand futility analysis. The Court determined that one director, David Pickles, was not independent of Green, because he was a director and officer of Trade Desk, had a long standing professional relationship with Green extending back to 2007, and derived a principal amount of his income from his officer position at Trade Desk, in which Green was the controlling stockholder. The Court, however, determined that there was no reason to doubt that the other directors whose independence had been challenged, Eric Paley, Lise Buyer and Kathryn Falberg, were independent of Green. The Court held that Paley's early investment and long-standing service on the Board, his favorable comments regarding Trade Desk and Green on social media, the return on his venture capital firm's investment in Trade Desk and Green's investments in his venture capital firm's funds, either individually or in the aggregate, did not compromise Paley's independence from Green. The Court also found that Buyer's prior consulting work for Trade Desk, her listing of Trade Desk as a reference for her consulting business, her fees for her Board service and the fact that at one point she was not classified as an independent director for NASDAQ rules, either individually or in the aggregate, did not render her non-independent from Green. Finally, the Court explained that Falberg's prior, brief employment with, and investment in an earlier Green founded entity, her fees from her Board service and her significant ownership of Trade Desk stock, either individually or in the aggregate, did not render her non-independent from Green.

Next, the Court considered whether directors Falberg, Gokul Rajaram, David Wells, Buyer and Paley faced a substantial likelihood of liability as a result of the breach of fiduciary duty claims relating to their recommendation (if applicable) and approval of Green's equity grant. Because Trade Desk's certificate of incorporation included an exculpatory provision for monetary damages for breaches of a director's duty of care and none of Falberg, Rajaram, Wells, Buyer and Paley had a financial interest in or were otherwise interested in Green's equity award grant, the plaintiffs were left with only arguments that the directors had acted in bad faith in structuring, recommending and approving, as applicable, Green's equity grant. In attempting to demonstrate that the Committee members operated within a "controlled mindset" and therefore, acted in bad faith, the plaintiff stockholders pointed to Green's or his counsel's presence at Committee meetings where Green's equity award was discussed, the Committee's supposed awareness that granting a substantial equity award to Green was unnecessary to retain him as Chief Executive Officer of Trade Desk, the Committee's purported disregard of its compensation consultant's recommendations, and the Committee's recommendation and Board's approval of Green's substantial equity grant as evidence of bad faith conduct. The Court did

not find that any of these arguments were persuasive for finding bad faith conduct and noted that bad faith conduct is based on “extreme facts” and that allegations of an unfair process did not constitute bad faith conduct that would give rise to a substantial likelihood of liability for these director defendants.

Because the Court determined that 6 out of the 8 directors on the Board at the time the complaint was filed could impartially consider a demand to institute litigation in connection with the grant of Green’s equity award, the Court held that plaintiffs had failed to plead demand futility and dismissed the complaint.

Takeaways

Demand futility remains a threshold issue in derivative litigation under Delaware law, including if the claims underlying such derivative litigation presumptively give rise to the entire fairness standard of review: This opinion reemphasizes that a derivative claim that would presumptively trigger the entire fairness of review under Delaware law does not automatically result in a judicial finding of demand futility. The opinion also underscores the importance of independent directors on the boards of directors of public corporations, both for purposes of evaluating transactions with controlling stockholders and being able to impartially consider whether to bring litigation on behalf of the corporation.

Impugning director independence for purposes of the demand futility analysis requires more than identifying relationships between controllers and directors: The plaintiff stockholders in this case had identified numerous relationships between the directors on the Board and Green. However, the plaintiffs failed to demonstrate, with particularity, how the vast majority of these relationships created a reasonable doubt about a director’s independence and were material to the directors. The opinion, therefore, demonstrates that the existence of relationships without additional facts creating a doubt about a director’s independence is insufficient to render a director non-independent for purposes of the demand futility analysis.

Approval of a substantial equity grant for a chief executive officer, even if such person is a controlling stockholder, is not presumptively evidence of bad faith conduct: The plaintiff stockholders had argued that, because Falberg, Rajaram, Wells, Buyer and Paley recommended and/or approved the substantial equity award to Green through an alleged unfair process and thus acted in bad faith, those directors faced a substantial likelihood of liability in connection with the recommendation and/or approval of the Green equity grant. However, the Court emphasized, even in the context of executive compensation for persons who are controlling stockholders, when independent directors show up and take “steps to make a reasoned decision, their decisions are entitled to considerable deference under our law, and only extreme facts can give rise to a reasonable inference of bad faith conduct.”

Sjunde AP-Fonden v. Activision Blizzard, Inc.
C.A. No. 2022-1001-KSJM (Del. Ch. Oct. 2, 2025)
(Chancellor McCormick)

On the heels of investigative reporting into and regulatory actions regarding “pervasive sexual harassment” at Activision Blizzard, Inc. (the “Company”), the Company’s Chief Executive Officer, Robert Kotick, spearheaded the Company’s response to acquisition interest from, and ultimate acquisition by, Microsoft Corporation (“Microsoft”), a long-time business partner of the Company. During the lead up to the approval of the acquisition by the Company’s board of directors, Kotick and a subset of the Company’s board were alleged to have fixed and communicated to Microsoft a price per share range for an acquisition that was below the price per share range implied by a recently adopted long range plan for the Company, acted expeditiously in facilitating a transaction with Microsoft, and allowed Microsoft’s head start to cut off meaningful alternative acquisition discussions with other potential counterparties.

A little more than two weeks after learning of Microsoft’s outreach, the full board agreed to sell the Company, at a value that was alleged to be depressed due to the recent regulatory actions and publication of investigative reporting regarding sexual harassment at the Company. The full board, in leading up to the agreement on price with Microsoft, had received and considered a revised set of financial projections, which had been adjusted downward from the long term plan approved by the board about a month earlier. The full board also received and considered additional amendments to these projections, which were further revised downward. At a later board meeting to consider the approval of the merger agreement for the acquisition, the Company’s board approved an incomplete draft of the merger agreement and delegated to a committee of the board the power to negotiate and finalize a key term relating to the payment of Company dividends between signing and closing. The final merger agreement also included a number of provisions that provided comfort to Kotick that he would not lose his job and would be afforded greater liability protection than what he currently had at the Company.

During the pre-closing process, the parties ran up against the termination date in the merger agreement. The Company’s performance had improved during this time period, but the Company, without allegedly considering alternatives, entered into a letter agreement to extend the termination date in exchange for the elimination of the Company’s right to collect a termination fee on the termination date, the narrowing of the Company’s rights to terminate the merger agreement, and the elimination or waiver of certain closing conditions. The letter agreement also allowed the Company to pay a one-time dividend, which the Company ultimately paid to its stockholders and on treasury shares held by the Company,

and provided for replacement termination fees at different intervals prior to the new termination date.

Prior to the closing of the transaction, plaintiff brought suit, alleging that the directors of the Company breached their fiduciary duties in connection with approving the acquisition of the Company by Microsoft and the letter agreement extending the termination date in exchange for favorable terms for Microsoft. Plaintiff also alleged that the Company had violated a number of DGCL requirements in connection with the merger and that the directors breached their fiduciary duties in connection with approving a merger agreement that did not abide by basic requirements under Delaware law and by paying a dividend on the Company's treasury stock. Finally, plaintiff also alleged that Microsoft aided and abetted the director's breaches of fiduciary duties in connection with the approval of the merger agreement providing for Microsoft's acquisition of the Company and the parties subsequent letter agreement extending the termination date for the merger. The Company, the directors and Microsoft filed a motion to dismiss these claims under Court of Chancery Rule 12(b)(6).

The Court first addressed the sales process fiduciary duty claims lodged against the Company's director defendants. Although the plaintiff had argued that the entire fairness standard of review applied because a majority of the Company's directors had conflicts of interest when approving the merger agreement, the Court determined to bypass this standard of review and instead evaluate plaintiff's allegations under *Revlon* (i.e., enhanced scrutiny) review. Having established that *Revlon* review applied in these circumstances, the Court examined whether *Corwin* cleansing was available to shift the standard of review from enhanced scrutiny to business judgment. The Court determined that *Corwin* cleansing was unavailable because it was reasonably conceivable (i) that the Company's stockholder vote on the merger agreement did not comply with statutory formalities and (ii) the Company's proxy statement to its stockholders included misleading and incomplete disclosures regarding the sexual misconduct issues at the Company and their impact on the Company's sales process and negotiations with Microsoft, and the proxy statement did not disclose that Microsoft had negotiated for benefits that potentially offset the negative consequences of the termination fee that Microsoft would be required to pay under certain circumstances.

With *Corwin* cleansing unavailable, the Court then evaluated plaintiff's sales process breach of fiduciary duty claims under *Revlon*. The Court determined that it was reasonably conceivable that "Kotick tainted the sale process by undercutting Activision's negotiating efforts, stiff-arming alternative bidders, delaying and limiting disclosures to the Board, and reducing management projections to justify Microsoft's price." Therefore, the Court explained that plaintiff stated a claim under *Revlon*. The Court also evaluated whether any of the directors had a *Cornerstone*

defense, in that plaintiff had failed to state a non-exculpated claim against them. The Court found that plaintiff had adequately alleged that it was reasonably conceivable that Kotick had sought a merger between the Company and Microsoft “to avoid termination, secure his change-of-control benefits, and insulate himself from liability” and had stated a loyalty claim against him. The Court further found that a *Cornerstone* defense was unavailable for the other Company director defendants, as plaintiff had demonstrated that it was reasonably conceivable that “they knew Kotick was conflicted, did nothing to manage Kotick’s conflicts, and prioritized Kotick’s interests over a process that would secure the highest deal price” and therefore had acted in bad faith.

Having found that plaintiff had stated a claim that the Company director defendants breached their fiduciary duties in connection with approving the merger agreement, the Court then analyzed whether Microsoft had aided and abetted the Company director defendants’ sales process breaches of fiduciary duty. Applying the Delaware Supreme Court’s guidance in *Mindbody* and *Columbia Pipeline*, the Court held that plaintiff had failed to meet the high bar required for a third-party aiding and abetting claim because plaintiff had not demonstrated that Microsoft “knew that Kotick was breaching his fiduciary duties, knew that making a bid under these circumstances was wrongful, and substantially assisted Kotick in his breach as opposed to passively creating the circumstance under which Kotick could breach his fiduciary duties.” Therefore, the Court dismissed the sales process aiding and abetting claim against Microsoft.

Following its analysis of plaintiff’s claims in connection with the Company’s sales process, the Court then addressed plaintiff’s allegations that the Company director defendants had breached their fiduciary duties in connection with having the Company enter into the letter agreement with Microsoft and that Microsoft aided and abetted the directors’ fiduciary breaches. Acknowledging that the “decision to terminate or extend the termination date presented another fiduciary decision for the Board,” the Court held that it was reasonably conceivable that the Company’s directors “chose to double down” on their earlier “wrongful acts” and that entering into the letter agreement was unreasonable under *Revlon*, especially in light of the Company director’s failure to evaluate other strategic alternatives. The Court, however, dismissed the aiding and abetting claim against Microsoft in connection with the letter agreement, noting that “[a] third party negotiating a good deal for itself, standing alone, is not enough to support an inference that the third party knowingly or substantially participated in a fiduciary breach.”

Next, the Court addressed plaintiff’s claims that the Company and the Company’s director defendants had violated a number of provisions of the DGCL in connection with approving the merger agreement, effectuating the merger and in making a dividend contemplated by the letter agreement.

First, the Court held that, while the Court's prior ruling that it was reasonably conceivable that the Company's director defendants had violated Section 141(c) of the DGCL by delegating to a committee of the Board the decision to approve a material term of the merger agreement was the law of the case, the Company director defendants had not meaningfully developed an argument regarding whether the later dividend in connection with the letter agreement mooted all or some aspects of plaintiff's claim. The Court denied the Company defendants' motion to dismiss without prejudice to allow the Company defendants to argue later that this claim is moot.

Second, the Court dismissed plaintiff's claim that the Company's failure to abide by the statutory requirements in Section 251 of the DGCL caused the Company defendants to violate Section 262 of the DGCL, noting that a violation of Section 251 of the DGCL does not have "knock-on effects" and that plaintiff would have been required to separately plead a violation of Section 262 of the DGCL to sustain that claim.

Third, the Court evaluated plaintiff's claims that the Company defendants had converted Company stockholders' shares (i) in the merger, (ii) by filing a false certificate of merger in violation of the DGCL and (iii) by entering into the merger agreement. The Court explained that, in a prior decision, the Court had held that plaintiff had stated a claim under its conversion by merger theory and that this was the law of the case. The Court also held that plaintiff had stated a claim that filing a false certificate of merger in violation of the DGCL resulted in the conversion of the Company stockholder's shares, as it was "just a version of the conversion-by-[m]erger theory." However, the Court stated that plaintiff had failed to state a claim that the Company stockholder's shares had been converted at the time the Company signed the merger agreement, as plaintiff "failed to identify any rights impaired by [the Company] merely signing the [m]erger [a]greement."

Finally, the Court considered plaintiff's claim that the Company defendants violated the DGCL and the Company's certificate of incorporation by paying dividends on the Company's treasury shares. Because of the legal issues raised by the Company defendants and the fact that the Company defendants relied on documents outside the pleadings, the Court converted Company defendants' motion to dismiss on this claim into a motion for summary judgment.

On top of plaintiff's claims that the Company defendants violated various provisions of the DGCL in connection with approving the merger agreement, effectuating the merger and in making a dividend contemplated by the letter agreement, the plaintiff also argued that the Company director defendants breached their fiduciary duties in connection with these violations or by causing the Company to violate the DGCL. Observing that "Delaware law distinguishes between flawed efforts and

intentional wrongdoing[.]” the Court then dismissed these breach of fiduciary duty claims against the Company director defendants because plaintiff had not alleged any facts to demonstrate that it was reasonably conceivable that the Company director defendants knowingly violated the DGCL when undertaking these actions.

Takeaways

Corwin cleansing is unavailable if the stockholder vote does not comply with the DGCL’s statutory formalities. Boards of directors and transactional planners should pay close attention to the DGCL’s statutory requirements for stockholder votes in connection with the adoption of merger agreements to ensure the availability of *Corwin* to cleanse any potential sale process breaches under enhanced scrutiny review.

Boards of directors must play an active role in a sale process and properly manage conflicts, and Boards should especially monitor the potential conflicts of the lead negotiators in any M&A deal. Delaware courts continue to emphasize the expectation that directors must identify and manage potential conflicts of interest, especially when the lead negotiator on an M&A transaction has interests that may diverge from the Company’s stockholders generally. The decision also underscores the importance of documenting the board’s decisions in a comprehensive manner during an M&A process to ensure that the record, even at a preliminary stage in litigation, reflects the detailed deliberations with respect to the Board’s decision-making.

Claims against third-party acquirors for aiding and abetting target director breaches of fiduciary duty must exceed a high bar to survive a motion to dismiss. On the heels of the Delaware Supreme Court’s decisions in *Mindbody* and *Columbia Pipeline*, the Court of Chancery has reinforced the Delaware Supreme Court’s messaging, in that it is extremely difficult to plead a third-party acquiror aiding and abetting claim in the absence of facts demonstrating that the acquiror had actual knowledge of the director defendants’ breaches of fiduciary duty.

Brola v. Lundgren
C.A. No. 2024-1108-LWW (Del. Ch. Dec. 1, 2025)
(Vice Chancellor Will)

In this memorandum opinion, the Court of Chancery dismissed a breach of fiduciary duty claim against a director and former officer of a closely held corporation arising from his sexual harassment of two employees that led to monetary judgments of the corporation. While the Court described the defendant’s conduct as “abhorrent,” it found that the conduct at issue was interpersonal, not a matter of corporate internal affairs, and could not form the basis for a breach of fiduciary duty.

Plaintiff Alex Brola and Defendant Christopher Lundgren were the sole directors and stockholders of Credit Glory Inc. (“Credit Glory” or the “Company”). Lundgren allegedly sexually harassed and made racist comments to employees, including via sending offensive text messages and excluding an employee whose advances she rejected from meetings until she resigned. Lundgren also sent degrading messages and improper requests to another employee until she resigned. Those former employees brought suit, resulting in judgments of over \$1.8 million against Lundgren and Credit Glory.

Brola brought a derivative suit on behalf of Credit Glory against Lundgren for breach of fiduciary duty in connection with the misconduct, and Lundgren moved to dismiss.

The Court first rejected Lundgren’s argument that he was not subject to personal jurisdiction in Delaware because the basis for jurisdiction was his service as a director, and the actions at issue were in support of a personal objective. The Court held that the use of the corporate seat to commit the misconduct was sufficient to satisfy due process.

However, the Court then determined to dismiss the complaint for failure to plead demand futility because Lundgren, one of the two directors, did not face a substantial likelihood of liability for the fiduciary duty claim. The Court found that, although the actions alleged were reprehensible, they were not tied to his capacity as a director or officer. Instead, the Court found those actions to all be tied to his role as a supervisor of employees, and any midlevel manager could have committed the same wrongdoing. Therefore, the Court held that the claim fell into the category of interpersonal harms that Delaware corporate law does not govern and there was no viable claim for breach of fiduciary duty.

The Court also noted that there were several policy concerns that weighed against permitting the fiduciary duty claim against Lundgren to go forward. First,

the Court believed that allowing fiduciary duty suits for this type of misconduct could encourage parties to attempt end runs around state and federal law that governed employment law. Second, the Court considered that the internal affairs doctrine is meant to govern interpersonal law between directors and officers, not interpersonal matters which other states' laws govern. Third, the Court stated that allowing fiduciary duty suits for sexual harassment could commodify trauma and subject victims to "unwanted scrutiny" in collateral litigation.

Los Angeles City Employees' Retirement System v. Sanford

C.A. No. 2024-0998-KSJM (Del. Ch. Jan. 16, 2026)
(Chancellor McCormick)

In this memorandum opinion, the Court of Chancery addressed claims for breach of fiduciary duty arising from a series of alleged sexual assaults at eXp World Holdings, Inc. (“eXp” or the “Company”), a cloud-based real estate company. The Court refused to dismiss breach of fiduciary duty claims against the Company’s CEO and directors. However, the Court dismissed claims against members of a controlling stockholder group related to their alleged failure to exercise oversight duties as controllers.

Glenn Sanford founded the Company in 2009 to provide cloud-based real estate services. The Company operated through agents who would recruit other agents, becoming their “sponsor.” Sponsors would receive a portion of revenue generated by agents they recruited and agents those agents recruited, referred to as a sponsor’s “downline.” Top agents were known as “influencers” and often hosted events to recruit other agents. Two influencers, Michael Bjorkman and David Golden had “systematically harassed, drugged, assaulted, and raped agents” at Company events from 2018 to 2020. After agents reported this misconduct, in September 2020, the Company terminated Bjorkman as an agent, but allowed him to continue earning revenue from agents he had recruited and approved an accelerated compensation package for him. The Company did not terminate Golden after a top agent in Sanford’s downline threatened to resign if Golden was terminated.

In April 2022, another agent emailed the Board concerning sexual misconduct, including allegations that “Rohypnol, the rape drug” was part of “the corporate culture” and asked the Board to “make a difference.” That same month, a whistleblower on the Company’s Board sent a message to the rest of the Board describing reports of sexual misconduct they had heard and providing advice they received from outside counsel. In response, the Company launched an internal investigation but did not follow outside counsel’s advice on how to carry out the investigation. The Company also decided not to renominate the whistleblower to the Board after previously committing to do so. In 2023 and 2024, agents filed three anti-trafficking suits against the Company, and *The New York Times* published an expose about sexual misconduct at the Company. In 2023, the Company suspended Golden.

In October 2024, the plaintiff brought suit asserting that Sanford breached his fiduciary duties as a director and officer, and that other directors and officers of the Company breached their duty of oversight. The complaint also asserted claims against a group of stockholders for breach of the duty of oversight, including Sanford and his former spouse, and two other directors, Eugene Frederick and

Jason Gesing, who collectively owned more than 50% of the Company's stock and who, in December 2020, executed a voting agreement committing to vote together on director elections and other matters.

Before addressing the merits of the claims, the Court discussed *Brola* and whether acts of harassment and sexual misconduct could be breaches of fiduciary duty. The Court took a broader view of the scope of fiduciary duties than in *Brola*, finding that the key question is whether a fiduciary acted disloyally, not why they did so. Therefore, the Court found that it was of no distinction whether they did so for venal purposes, and it noted that the misuse of human resources in other contexts had long been recognized as a breach of fiduciary duty. Although the Court was sympathetic to some of the policy concerns *Brola* raised, the Court noted that there are procedural safeguards that could address them. Thus, the Court reached a different conclusion than in *Brola* and stated that sexual harassment or abuse of employees could be a breach of fiduciary duty.

The Court found that the complaint stated a claim against Sanford for breaching his duty of loyalty by reaching a deal to keep Golden at the Company to prevent Gove, who was in Sanford's downline, from leaving, approving Bjorkman's accelerated compensation, and by retaliating against the whistleblower after such person had reported the misconduct to the Board. The Court found that this was sufficient to allege that Sanford intentionally withheld information about the misconduct from the Board and therefore acted in a disloyal manner.

Next, the Court evaluated the oversight claims against the directors who were on the Board at the time of the misconduct. The Court determined that it was a reasonable inference that a viral Facebook post in which an agent declared she had been raped at an eXp event and an eleven page memo an agent sent to the Company's CEO describing Bjorkman's pattern of misconduct put the Board on notice of sexual misconduct issues at the Company. The Court reached that conclusion even though there were no mentions of the Facebook post or memo in Board minutes because the circumstances surrounding them, including the large number of people who liked or commented on the Facebook post, the arrest of Bjorkman shortly after publication of the Facebook post, and the CEO's receipt of the memo, suggested it was a reasonable inference that the Board was aware of them.

The Court also found that the April 2022 agent email was a red flag. Although the director defendants argued it was not specific enough to apprise the Board of potential wrongdoing, the references to Rohypnol being part of the Company's culture was sufficient.

The Court held that it was reasonably conceivable that the Board did not respond to the red flags adequately, notwithstanding the fact that defendants had pointed to three actions taken in response: 1) the termination of Bjorkman; 2) the 2022

internal investigation; and 3) the suspension of Golden. The Court found flaws with each of these actions: Bjorkman was allowed to continue earning revenue; the internal investigation came two years after the Board learned of the wrongdoing and placed individuals involved in a decision to reject a request from the April 2022 agent to change her sponsor in charge of the investigation; and Golden's suspension came years after the Board learned of his misconduct. Thus, the Court found that the complaint stated a claim against the directors for failure to exercise their oversight duties.

The Court then addressed the fiduciary duty claims against three members of the alleged control group by failing to address the sexual misconduct, including *Caremark* claims for failure to exercise oversight responsibilities. The Court rejected the argument that controlling stockholders or control groups have fiduciary duties of oversight. While acknowledging some authority stating that controllers have the same fiduciary duties as directors, the Court could not find any authority supporting imposing liability on a controller for inaction. Moreover, the Court expressed concern that imposing liability for oversight on controllers would force controllers to second guess boards constantly out of fear for liability. Therefore, the Court dismissed the oversight claims against the control group.

The Court last considered whether demand was excused. The Court found that, even applying the more stringent test for demand futility, Sanford and another director faced a substantial likelihood of liability for the *Caremark* claims asserted against them. The Court also found that another director who earned the majority of such director's income from eXp, including half from work such director did as an independent contractor, was not independent from Sanford. Therefore, since those three directors were half of the six person demand board, demand was not excused.

Takeways:

Delaware Courts Are Still Deciding The Scope Of Fiduciary Duty Claims Relating To Sexual Misconduct: *Brola* and *Sanford* suggest different results as to whether sexual misconduct or harassment is a breach of fiduciary duty. Ultimately, it may come down to the Delaware Supreme Court to resolve the issue, as Chancellor McCormick suggested in *Sanford*. However, regardless of how the courts come out on when sexual harassment or assault itself is a breach of fiduciary duty, directors and officers owe oversight duties related to sexual harassment and assault and reporting that misconduct, and *Sanford* shows the continued viability of those claims.

Controllers Do Not Have A Duty Of Oversight: While Delaware law has long held that controlling stockholders or control groups owe fiduciary duties, the exact scope of those duties has not always been clear. *Sanford* provides that those duties do not extend to the duty of oversight. The Court's ruling also suggests that a claim against a controlling stockholder or control group for breach of fiduciary duty must be tied to action, not inaction.

Brewer v. Turner
C.A. No. 2023-1284-KSJM (Del. Ch. Sept. 29, 2025)
(Chancellor McCormick)

In this opinion, the Court of Chancery denied a motion to dismiss a stockholder derivative complaint against the majority of the board of Regions Financial Corporation (“Regions” or the “Company”). The Court held that the plaintiff successfully pled a *Caremark* oversight claim, alleging the directors acted in bad faith by consciously ignoring “red flags” regarding illegal overdraft fee practices. The Court rejected the defense that the Board was merely taking time to correct the issue, finding a strategy to delay compliance to find “replacement revenue” supports an inference of bad faith.

The lawsuit arose from Regions’ use of “Authorize-Positive-Settle-Negative” (“APSN”) overdraft fees. From 2018 to 2021, Regions settled debits in sub-batches, delaying posting. This allowed other debits to reduce the account balance, causing overdraft fees based on funds available at *posting*, even if the customer had funds at *authorization*. The Consumer Financial Protection Bureau (“CFPB”) found this practice unfair and abusive and issued a Consent Order requiring Regions to pay \$191 million.

A Regions stockholder then filed a derivative suit against Regions directors and officers, asserting that the fiduciaries breached their duties by allowing the APSN practice to continue despite knowing it was illegal. The defendants moved to dismiss for failure to plead demand futility and failure to state a claim.

The Court analyzed the risk of liability under both prongs of an oversight claim under *Caremark*: (1) failure to implement information systems (an Information Systems claim); and (2) conscious failure to monitor operations (a Red Flags claim). The Court dismissed the Information Systems claim because Regions had Audit and Risk Committees. However, when evaluating the Red Flags claim, the Court found that, because Regions offers retail banking services, deceptive overdraft practices constituted a “central compliance risk” requiring active board monitoring.

Plaintiff identified a few different events that it claimed were sufficient to put the Regions’ directors on notice of the illegality of the APSN practice. The Court rejected Plaintiff’s claim that letters from a set of U.S. Senators were red flags because they neither alleged illegality nor suggested regulatory enforcement. The Court then considered a 2019 Consent Order against USAA for other unlawful overdraft fee practices and a related Federal Reserve Bulletin. The Court held that this order and bulletin provided necessary context by alerting the Board to the regulatory environment, but they did not constitute “red flags” because they did not concern the same overdraft fee practices.

Plaintiff also identified a 2019 draft complaint from Regions' former Deputy General Counsel Jeffrey Lee. The Lee Complaint sent that draft complaint to the Audit Committee alleging he was fired for warning about illegal fees and that executives delayed compliance to find "replacement revenue." The Court found it reasonably conceivable that this specific warning from a senior legal officer alerted the Board to potential wrongdoing because it specified why the APSN overdraft fees were illegal under federal law.

Defendants argued that the response to the Lee Complaint showed that they acted in good faith. The Court rejected the defense that hiring a law firm to investigate proved good faith and explained that merely hiring a lawyer is not a shield if the Board continues the illegal practice. As the CFPB found, Regions "could have stopped charging these fees sooner" but chose to wait. The Court distinguished the defendants' reliance on *In re McDonald's Corporation Stockholder Derivative Litigation* by noting that, in that case, once the board learned of misconduct, management immediately shifted from "business as usual" to proactively addressing the misconduct. By contrast, Regions' Board allegedly delayed terminating an illegal practice to protect the Company's financial performance, which the Court held led to an inference that the Board acted in bad faith. Thus, the majority of the demand board faced a substantial likelihood of liability, excusing demand.

The Court then considered whether the complaint stated a claim against the defendants, and it granted the motion to dismiss as to directors who left the Board before the key red flags or joined after the misconduct had ended, and the officer defendants because plaintiff waived the claims against the officers by not addressing them in briefing.

Takeaways

Delay Can Be Bad Faith: One of the fundamental principles of Delaware law is that Delaware permits corporations to carry on lawful business. Thus, once directors or officers become aware of unlawful conduct, they have a duty to ensure that it is terminated promptly. While delay may be helpful to mitigate some of the financial impact from stopping the wrongdoing, that delay may be inconsistent with directors' or officers' fiduciary duties. As the Court said "[e]veryone knows that delay can be intentional and a tactic to avoid the consequences of acting appropriately."

Specificity Matters for Red Flags: The Court distinguished Lee's complaint from other red flags because it specifically identified how the APSN practice was illegal. Thus, when evaluating whether a communication or event should put directors or officers on notice of potential wrongdoing, it is important to consider whether the directors would understand specifically that there is likely wrongdoing occurring and how it is wrongful. Mere context, like the consent order against USAA for a different type of unlawful overdraft fee practice, will not suffice.

Siegel v. Morse
C.A. No. 2024-0628-NAC (Del. Ch. Apr. 14, 2025)
(Vice Chancellor Cook)

In *Siegel v. Morse*, the Court of Chancery considered a stockholder’s as applied challenge to advance notice bylaws adopted by The AES Corporation, seeking a declaration that the bylaws were unenforceable and that the directors breached their fiduciary duties by adopting them. The defendants moved to dismiss the complaint.

Critically, the plaintiff did not intend to nominate a director and could not identify any stockholder who planned to do so. No proxy contest was pending or threatened. The plaintiff also could not identify any of the disclosure requirements he was challenging that would apply to him. Although the plaintiff characterized his claims as challenging the inequitable chilling effect of the bylaws through the “Acting in Concert” definition and the “Ownership Provision,” he expressly disclaimed a facial validity challenge.

Relying on the Delaware Supreme Court’s guidance in *Kellner*, the Court dismissed the action for lack of subject matter jurisdiction as the dispute was not ripe. The Court explained that equitable review of advance notice bylaws is not available in the abstract. An as applied or enforceability challenge requires a ripe, concrete controversy that allows the Court to determine how the bylaw operates in practice and against whom enforcement is sought.

Without a nomination, a threatened nomination, or even a factual allegation that any identifiable stockholder was chilled from acting, the Court concluded that the dispute was hypothetical. The plaintiff’s critique of the bylaws’ breadth and deterrent effect, even if forceful, did not supply the real-world facts necessary to trigger equitable review. In substance, the Court found that the plaintiff was attempting to repackage a facial challenge—one he had expressly disclaimed—as an as applied challenge, while seeking relief that would effectively invalidate the bylaw across the board.

The Court also rejected an argument from the plaintiff analogizing “Wolfpack” and “Daisy Chain” provisions to those that Delaware courts have found unlawful in the context of stockholder rights’ plans and dead hand proxy puts. The Court compared the “immediate and devastating” impact of stockholders rights’ plans and proxy puts, which could massively dilute a stockholder, with the impact of an advance notice bylaw, as stockholders equity interests in the corporation could still engage with the corporation or sue after the rejection of nominees.

Wright v. Farello
2024-0306-KSJM (Del. Ch. Oct. 27, 2025)
(Chancellor McCormick)

Wright v. Farello presented the Court with a different posture, in that a stockholder asserted a facial challenge to an advance notice bylaw adopted by Better Home & Finance Holding Company (“Better Home”). There was no pending or threatened proxy contest, and no nomination had been submitted under the bylaw. The plaintiff nevertheless sought a declaratory judgment that the bylaw was invalid and that the directors breached their fiduciary duties by adopting it. The defendants moved to dismiss the complaint.

The challenged bylaw was lengthy and highly detailed, and certain definitions contained many subparts. The plaintiff argued that the bylaw was facially invalid because it was unintelligible and impossible to comply with, pointing to the breadth of the “acting in concert” definition, supposed daisychain features, and the investigative burden it would purportedly place on stockholders.

As a threshold matter, the defendants argued that the facial challenge was unripe in the absence of any nomination or enforcement of the bylaw. The Court disagreed. Drawing on *Kellner*, the Court explained that a facial validity challenge “presents a pure question of law, the material facts are static, and there is thus no need to postpone resolution to allow for the question to arise in a more concrete form.” The Court explained that requiring facts sufficient to ripen an as applied challenge before considering facial validity would risk leaving inoperable governance provisions in place. The Court also noted that the high standard *Kellner* placed on stockholders asserting a facial challenge acted as an adequate disincentive for frivolous suits.

Turning to the merits, however, the Court rejected the plaintiff’s challenge, which focused on the definitions of “Proposing Person,” “Associated Person,” and “Acting in Concert.” Applying the Delaware Supreme Court’s instruction that a facial challenge can succeed only if a bylaw “cannot operate lawfully under any set of circumstances,” the Court concluded that the Better Home bylaw—while dense, broad, and burdensome—was not unintelligible. Unlike the ownership disclosure provision invalidated in *Kellner*, the bylaw could be understood with effort and could be complied with in at least some factual scenarios. That a bylaw is onerous, confusing, or suboptimal, the Court emphasized, does not render it facially invalid.

Carroll v. Burstein
024-0317-LWW (Del. Ch. Aug. 25, 2025)
(Vice Chancellor Will)

Carroll v. Burstein involved a similar facial attack on an advance notice bylaw as in *Wright*, this time to a bylaw adopted by Stoke Therapeutics, Inc. (“Stoke”). The challenged provisions had roots in bylaws adopted in anticipation of the company’s IPO, and no stockholder had sought to nominate a director candidate since Stoke’s IPO. As such, as in *Wright*, there was no live or threatened proxy contest, and no stockholder had attempted to nominate a director. The plaintiff sought a declaration that the advance notice bylaw was invalid, illegal, and void, and the defendants moved to dismiss the complaint.

The plaintiff alleged that the bylaw was facially invalid because its “Acting in Concert” definition—particularly its “wolf pack” and “daisy chain” provisions—rendered the nomination process impossible or unintelligible, thereby chilling the stockholders’ right to nominate directors.

The Court first confirmed that the claim was a facial validity challenge, not an as applied or enhanced scrutiny claim. Because the plaintiff did not challenge any application or enforcement of the bylaw, and because the bylaw was adopted on a “clear day,” the relevant inquiry was whether the bylaw could operate lawfully in any circumstance.

Applying the “formidable” *Kellner* standard, the Court concluded that it could. The Court first reasoned that even a bylaw requiring disclosure of broad categories of relationships and parallel conduct can operate lawfully where, for example, a nominating stockholder acts alone or coordinates only with known parties. Hypotheticals about difficult or burdensome compliance, the Court held, are insufficient to sustain a facial challenge. Second, the Court also rejected the argument that the bylaw was “unintelligible,” distinguishing it from the “1,099-word run-on sentence with 13 subsections” ownership provision struck down in *Kellner*.

Notably, the Court stressed that its ruling did not bless the bylaw as a matter of best practice. Corporate governance considerations may counsel in favor of simpler and more transparent drafting. But absent a showing that the bylaw can never operate lawfully, those concerns do not support invalidation in a facial challenge.

Takeaways:

Facial Challenges Are Ripe: *Wright’s* rejection of the defendants’ argument that the facial challenge to the bylaw was unripe drew a key distinction from *Siegel*, where the plaintiff disclaimed a facial validity challenge. Thus, stockholders have a clear path to bring facial challenges to advance notice bylaws at any time.

Stockholders Face An Uphill Battle To Challenge Advance Notice Bylaws:

The findings in *Wright* and *Carroll* show that the Courts view the test for a facial challenge to advance notice bylaws as creating a high hurdle for a plaintiff. The challenge in *Carroll*, for example, failed because the Court found that a lone stockholder who never disclosed the stockholder's plan to nominate a director would be able to satisfy the challenged bylaw. As-applied challenges, while facing a lower burden, require a plaintiff to allege facts showing that the bylaw is actually impeding director nominations. The Courts will be wary of as-applied challenges that effectively seek to invalidate the bylaw in all circumstances. Even so, practitioners should note the Court's words in *Carroll* explaining that "[g]ood corporate governance counsels in favor of clear and straightforward bylaws."

Kim v. FemtoMetrix, Inc.
C.A. No. 2025-0025-LWW (Del. Ch. Aug. 8, 2025)
(Vice Chancellor Will)

Background

In 2020 plaintiff Avaco Co., Ltd. (“Avaco”), a publicly traded Korean company providing mass production manufacturing services, invested in FemtoMetrix, Inc. (“FemtoMetrix”), a privately held Delaware corporation that develops and sells metrology instruments for the microchips industry. In connection with the investment, FemtoMetrix entered into a Voting Agreement with Avaco and its other stockholders. Section 1.2(a) of the Voting Agreement provided Avaco with the right to designate one person to the FemtoMetrix board, which it exercised to designate plaintiff Charles Kim in 2024.

Over time, the parties’ relationship deteriorated and, in 2024, Avaco sued FemtoMetrix in the Republic of Korea seeking to enjoin the sale of a FemtoMetrix product and in California for breach of contract. Kim also initiated a books and records action against FemtoMetrix in the Court of Chancery.

While those actions were pending, FemtoMetrix and the holders of a majority of its stock purported to amend Sections 1.4 and 1.7 of the Voting Agreement by prohibiting “Conflicted Director[s]” from serving the on board (the “Amendment”). The Amendment defined “Conflicted Director” as a person “employed by or an Affiliate of any Person that is engaged in commercial litigation against” FemtoMetrix. FemtoMetrix and the holders of a majority of its stock then removed Kim from the Board, pursuant to a procedure prescribed in the Amendment.

In January 2025, Kim and Avaco initiated an action in the Court of Chancery, pursuant to 8 *Del. C.* § 225, which challenged the Amendment and Kim’s removal from the board. On August 8, 2025, the Court resolved the parties’ cross-motions for summary judgment in FemtoMetrix’s favor.

The primary issue was whether the Amendment complied with Section 7.8 of the Voting Agreement. Section 7.8 generally permitted amendments to the Voting Agreement approved by FemtoMetrix, certain “Key Holders,” and the holders of a majority of the company’s stock, except for five exceptions. Kim and Avaco asserted that the Amendment triggered two exceptions, requiring Avaco’s consent.

First, Section 7.8(a) of the Voting Agreement provided that an amendment “with respect to any Investor” cannot be made “without the written consent of such Investor ... unless such amendment ... applies to all Investors in the same fashion.” Kim and Avaco argued that the Amendment did not apply to all Investors in the

same fashion because Avaco was the only Investor in commercial litigation with FemtoMetrix at the time it was approved. The Court rejected this argument, noting that the Amendment was facially neutral and explaining that equal application (as contemplated by the exception) is not the same as equal effect (argued by the plaintiffs).

Second, Kim and Avaco argued that the Amendment breached Section 7.8(e), which required Avaco's approval to amend Section 1.2(a), the source of Avaco's designation right. The Court rejected this argument because the Amendment did not amend Section 1.2(a) and Section 7.8(e) did not prohibit amendments to other provisions in the Voting Agreement effecting Avaco's designation rights. This conclusion was buttressed by the fact that other provisions in the Voting Agreement governed director qualifications and director removal but were not covered by Section 7.8(e). Thus, Avaco's director designation right was not sacrosanct.

In their briefing, Kim and Avaco also argued that the Amendment breached an efforts clause in the Voting Agreement and the implied covenant of good faith and fair dealing, but the Court rejected these new theories as procedurally improper because they were first raised in summary judgment briefing.

Takeaways

Equal Application Is Not The Same As Equal Impact: The Court's rejection of the plaintiffs' invocation of the provision that an amendment "with respect to any Investor" cannot be made "without the written consent of such Investor ... unless such amendment ... applies to all Investors in the same fashion" shows that the Court will interpret voting agreements in accordance with their terms. Even though the Amendment would clearly impact Avaco specifically at the time of the adoption, that impact did not change how it would affect all stockholders, dooming plaintiffs' challenge. Drafters of voting agreements should consider this when preparing similar exceptions and consider if additional protections for stockholders are warranted.

Stockholders Seeking Broad Protection Of A Voting Agreement Protections Broadly: The Court narrowly interpreted the provision requiring Avaco's consent to an amendment to Section 1.2(a), which contained its designation right. While the Amendment clearly impacted Avaco's ability to designate directors, it did not run afoul of the specific contractual protections of that right. Reliance on similar provisions in the future may prove inadequate for stockholders that are parties to voting agreements.



**Corporate Litigation, Transactional
and Counseling Team**

EXECUTIVE COMMITTEE CHAIR



Peter J. Walsh, Jr.
Partner
302.984.6037
pwalsh@potteranderson.com

PRACTICE GROUP LEADERS



T. Brad Davey
Partner
302.984.6021
bdavey@potteranderson.com

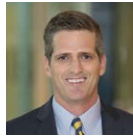


Michael A. Pittenger
Partner
302.984.6136
mpittenger@potteranderson.com

Members of Corporate Litigation, Transactional and Counseling Team



Joshua S. Almond
Associate
302.984.6067
jalmond@potteranderson.com



Matthew F. Davis
Partner
302.984.6105
mdavis@potteranderson.com



Lauren Angelina
Associate
302.984.6023
langelina@potteranderson.com



Alexander DiRienzo
Associate
302.984.6024
adirienzo@potteranderson.com



Olivia C. Arasim
Associate
302.984.6053
oarasim@potteranderson.com



Emma K. Diver
Associate
302.984.6111
ediver@potteranderson.com



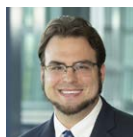
Berton W. Ashman, Jr.
Partner
302.984.6180
bashman@potteranderson.com



Timothy R. Dudderar
Partner
302.984.6168
tdudderar@potteranderson.com



Joy A. Barrist
Partner
302.984.6022
jbarrist@potteranderson.com



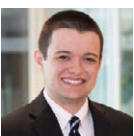
Ryan M. Ellingson
Associate
302.984.6048
rellingson@potteranderson.com



J. Matthew Belger
Partner
302.984.6152
mbelger@potteranderson.com



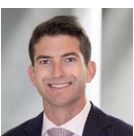
Wenjun (Sybil) Fan
Associate
302.984.6055
wfan@potteranderson.com



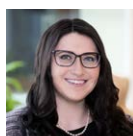
Joseph M. Crowley
Associate
302.984.6107
jcrowley@potteranderson.com



Matthew E. Fischer
Partner
302.984.6153
mfischer@potteranderson.com



Ryan M. Crowley
Associate
302.984.6040
rcrowley@potteranderson.com



Heather M. Fithian Romansky
Associate
302.984.6220
hromansky@potteranderson.com



Shira R. Freiman
Associate
 302.984.6169
 sfreiman@potteranderson.com



Alyssa Gerace Frank
Partner
 302.984.6127
 afrank@potteranderson.com



Mathew A. Golden
Partner
 302.984.6059
 mgolden@potteranderson.com



Samuel G. Gustafson
Associate
 302.984.6205
 sgustafson@potteranderson.com



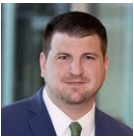
Evan W. Hockenberger
Associate
 302.984.6133
 ehockenberger@potteranderson.com



Roxanne L. Houtman
Partner
 302.984.6177
 rhoutman@potteranderson.com



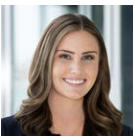
Ellis H. Huff
Associate
 302.984.6090
 ehuff@potteranderson.com



Justin T. Hymes
Associate
 302.984.6132
 jhymes@potteranderson.com



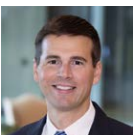
Callan R. Jackson
Partner
 302.984.6182
 cjackson@potteranderson.com



Jamie G. Judefind
Associate
 302.984.6100
 jjudefind@potteranderson.com



Adriane M. Kappauf
Associate
 302.984.6166
 akappauf@potteranderson.com



Christopher N. Kelly
Partner
 302.984.6178
 ckelly@potteranderson.com



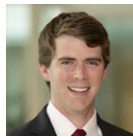
Tyler J. Leavengood
Partner
 302.984.6183
 tleavengood@potteranderson.com



Madison E. Lesgart
Associate
 302.984.6157
 mlesgart@potteranderson.com



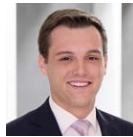
Jaclyn C. Levy
Partner
 302.984.6095
 jlevy@potteranderson.com



Garrett B. Lyons III
Associate
 302.984.6075
 glyons@potteranderson.com



Michael P. Maxwell
Partner
 302.984.6121
 mmaxwell@potteranderson.com



Tyler D. Mayhew
Associate
 302.984.6164
 tmayhew@potteranderson.com



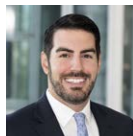
Megan A. Minnich
Associate
 302.984.6028
 mminnich@potteranderson.com



Nina N. Monzack
Associate
 302.984.6209
 nmonzack@potteranderson.com



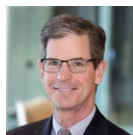
Mark A. Morton
Partner
 302.984.6078
 mmorton@potteranderson.com



Nicholas D. Mozal
Partner
 302.984.6036
 nmozal@potteranderson.com



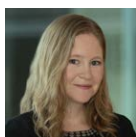
Stephen C. Norman
Partner
 302.984.6038
 snorman@potteranderson.com



Matthew J. O'Toole
Partner
 302.984.6114
 motoole@potteranderson.com



Brian C. Ralston
Partner
 302.984.6292
 bralston@potteranderson.com



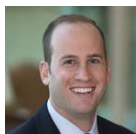
Laura G. Readinger
Partner
 302.984.6167
 lreadinger@potteranderson.com



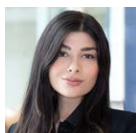
Jacqueline A. Rogers
Partner
 302.984.6216
 jrogers@potteranderson.com



Alyssa K. Ronan
Partner
 302.984.6144
 aronan@potteranderson.com



Daniel M. Rusk IV
Partner
 302.984.6163
 drusk@potteranderson.com



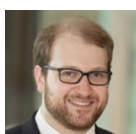
Angela J. Sadat
Associate
 302.984.6186
 asadat@potteranderson.com



Rebecca E. Salko
Partner
 302.984.6134
 rsalko@potteranderson.com



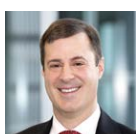
Pam R. Schools
Associate
 302.984.6197
 pschools@potteranderson.com



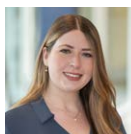
David A. Seal
Counsel
 302.984.6185
 dseal@potteranderson.com



Kevin R. Shannon
Partner
 302.984.6112
 kshannon@potteranderson.com



Aaron R. Sims
Partner
 302.984.6149
 asims@potteranderson.com



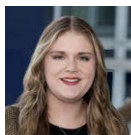
Ciara E. Sprance
Associate
 302.984.6160
 csprance@potteranderson.com



Myron T. Steele
Of Counsel
 302.984.6030
 msteele@potteranderson.com



Camilia R. Stoyanova
Associate
 302.984.6087
 cstoyanova@potteranderson.com



Megan R. Thomas
Associate
 302.984.6287
 mthomas@potteranderson.com



Heather S. Townsend
Associate
 302.984.6196
 htownsend@potteranderson.com



Lilianna Anh P. Townsend
Partner
 302.984.6184
 ltownsend@potteranderson.com



Michael B. Tumas
Partner
 302.984.6029
 mtumas@potteranderson.com



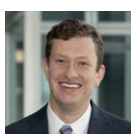
Chamyra L. Upshur
Associate
 302.984.6290
 cupshur@potteranderson.com



Julianne M. Weidman
Associate
 302.984.6009
 jweidman@potteranderson.com



Michael W. Whittaker
Partner
 302.984.6104
 mwhittaker@potteranderson.com



Charles P. Wood
Associate
 302.984.6190
 cwood@potteranderson.com



Potter Anderson

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1313 North Market Street, 6th Floor
Wilmington, Delaware 19801
302.984.6000 | potteranderson.com

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