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DELAWARE SUPREME COURT CONFIRMS HIGH STANDARD FOR FINDING ACQUIROR AIDING AND ABETTING LIABILITY

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It has become typical in recent years for stockholders challenging an M&A transaction as a breach of the selling directors' fiduciary duties to also sue the acquiror under an aiding and abetting theory. The Delaware Supreme Court has made this more difficult recently and on June 17, 2025, the Delaware Supreme Court (the "**Court**") reversed the Delaware Court of Chancery's June 2023 aiding and abetting verdict against TC Energy Inc. ("**TC Energy**"), formerly known as TransCanada Corp., with respect to its acquisition of Columbia Pipeline Group Inc. ("**Columbia**").[1]

Relying on its December 2024 decision in *In re Mindbody, Inc. Stockholder Lit.*,[2] which was decided after the Court of Chancery's 2023 decision, the Court found that "for an acquiror to be held liable for aiding and abetting a sell-side breach of fiduciary duty, the acquiror must have *actual* knowledge of both the target's breach and the wrongfulness of its own conduct" (emphasis added). The Court noted that the Court of Chancery had applied a since-overturned standard of constructive knowledge to the facts of the case and therefore the Court did not find that TC Energy had the requisite level of actual knowledge to attach aiding and abetting culpability. For this reason, the Court overturned the Chancery Court's decision and in doing so erased the $199.2 million judgment against TC Energy.

Background

TC Energy initially offered to acquire Columbia for $26 per share following negotiations between TC Energy and several of Columbia's officers who stood to receive significant change-in-control payments as a result of the contemplated transaction. After news of the companies' negotiations leaked, Columbia's CFO informed TC Energy that the board of Columbia favored a quick sale to avoid a negative market reaction. TC Energy lowered its offer to $25.50 and reportedly warned that it would announce that the deal was off if Columbia did not accept promptly, which would be in violation of the parties' standstill agreement. Columbia accepted the revised price and the parties signed the merger agreement in March 2016.

In September 2017, certain Columbia stockholders challenged the fairness of the price in an appraisal action, but the Chancery Court in 2019 upheld the $25.50 valuation while concluding that Columbia's proxy statement (the "**Proxy**") contained material misstatements and omissions regarding the deal process. Separately, a group of stockholders sued Columbia's CEO, CFO and former board directors, alleging that they had breached their fiduciary duties of loyalty, care and disclosure in connection with the deal process and the Proxy and that TC Energy aided and abetted such breaches. The Columbia executives settled for $79 million before the Chancery Court's 2023 judgment, which found that TC Energy, in part

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through leveraging the media leak of the potential transaction, threatening disclosure in violation of its standstill agreement and failing to correct or disclose material information in the Proxy, had constructive knowledge of the board's and executives' misconduct and had aided and abetted their breaches. The Court of Chancery awarded $199.2 million in damages against TC Energy as a result.

June 2025 Delaware Supreme Court Decision

The Court determined that TC Energy was not liable for aiding and abetting the Columbia fiduciaries' breaches because it lacked actual knowledge of their misconduct and therefore could not have knowingly participated in the breaches. In issuing the ruling in favor of TC Energy, the Court reaffirmed how Delaware courts assess whether a third party knowingly participated in a breach of a fiduciary's duty to stockholders.

When evaluating a claim of a third party's aiding and abetting a fiduciary's breach, Delaware courts assess among other factors whether the third party "knowingly participated" in the alleged fiduciary breach. The Court stated that it had clarified in *Mindbody* last December that this determination is a mixed question of law and fact and has two elements: (i) whether the acquiror had actual knowledge of the sell-side fiduciary breach; and (ii) whether the acquiror had actual knowledge that its own conduct was improper. The Court noted that this tort is among the most difficult to prove, particularly where it is asserted against an arm's length buyer in an M&A transaction.

As the Court noted, the Court of Chancery correctly bifurcated its analysis of the "knowing participation" factor by first addressing the third party's knowledge—namely "whether [TC Energy] knew that the sell-side fiduciaries were breaching their duties and was correspondingly aware that its own conduct was wrongful." Then the court focused on the third party's participation, asking "whether [TC Energy] culpably participated in the breach."

The Court pointed out that the Chancery Court found that TC Energy only *constructively* knew that the sell-side fiduciaries were breaching their duties. In the intervening period between the Chancery Court's decision and the Supreme Court's decision, the Court had decided *Mindbody*, which made clear that the requisite culpability is limited to cases of actual knowledge. The Court concluded that the facts here did not support a finding of actual knowledge.

The Court also disagreed with the Chancery Court's finding that TC Energy had culpably participated in the breach with a bargaining tactic, *i.e.*, the Chancery Court found that the company had crossed the line "by reneging on the $26 deal, making the $25.50 offer, and backing it up with a coercive threat that violated the NDA." However, the Supreme Court noted that TC Energy's alleged "threat" to disclose the offer if it fell through was "merely another example of hard bargaining protected by our long-standing rule that arm's length bargaining is privileged," which did not rise to actual knowledge that its own conduct was wrongful.

In following the same reasoning above in reviewing whether TC Energy "knowingly participated" in the sell-side fiduciaries' breaches of its disclosure duty in the Proxy, the Court declined to find TC Energy liable when TC Energy did not take affirmative action to assist the sell-side disclosure breaches and Columbia knew everything TC Energy knew, despite TC Energy having an affirmative contractual obligation to provide all material information necessary to be included in the Proxy and to notify Columbia of any factual deficiencies in the Proxy.

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Conclusion

The Court's decision in *Columbia Pipeline* emphasizes the need to prove actual knowledge for third-party liability in aiding and abetting breaches of fiduciary duty. Further, this case stands as a reminder of the distinction between permissible hard-bargaining tactics by a third-party arm's length acquiror and culpable participation as an actor in fiduciary misconduct. This decision, together with the Court's previous decision in *Mindbody,* should provide acquirors with comfort that they have less to fear in stockholder transaction challenges on an aiding and abetting theory as long as they are not actively participating in a primary actor's fiduciary duty breach.

ENDNOTES:

[1] *See In re Columbia Pipeline Group, Inc. Merger Litigation*, 2025 WL 1693491 (Del. 2025).

[2] *In re Mindbody, Inc., Stockholder Litigation*, 332 A.3d 349 (Del. 2024).

TWO RECENT ENTIRE FAIRNESS DECISIONS—WITH IMPLICATIONS FOR THE NEW DGCL SAFE HARBORS

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Two recent Court of Chancery decisions—*Roofers v. Fidelity* (May 2025)[1] and *Wei v. Levinson* ("*Zoox*") (June 2025)[2]—highlight the far easier route to business judgment review of conflicted transactions that is available under the new safe harbors established by the 2025 amendments to the Delaware General Corporation Law (the "Amendments")[3] as compared to the prerequisites for business judgment review of such transactions that has been available under *MFW*.

In both of these cases, the Amendments were not applicable because the litigation was already pending on February 17, 2025. And in both cases, the transactions at issue—as is not uncommon for conflicted transactions—were not structured to comply with *MFW*. Therefore, the court applied the entire fairness standard of review—which requires that both the process and the price were fair to the minority (or disinterested) stockholders. In *Roofers*, the court dismissed the case at the pleading stage, holding that although the process may have been flawed, the price appeared to be fair. In *Zoox*, by contrast, the court *rejected* dismissal of the case at the pleading stage, holding that the allegations that a majority of the board that approved the transaction was conflicted was itself sufficient to indicate that both the process and the price may have been unfair—even though the transaction at issue appeared to provide more value to the stockholders than any other transaction proposed to the board.

The decisions highlight the unpredictability of results when entire fairness is applied. Notably, if the Amendments had been applicable, the transactions in both cases readily could have come within the safe harbors—and both cases would have been dismissed at the pleading stage, without regard to fairness of the process or the price.

New Safe Harbors

The Amendments provide that there will be no liability for fiduciary breaches in a conflicted transaction (other than a going-private transaction) if the transaction was approved by a special committee comprised of at least two independent directors. Unlike *MFW*, the safe harbors do not require approval also by the minority or disinterested stockholders (except in the case of going-privates); the approval condition can be imposed at any time (unlike *MFW*, where the conditions must be imposed *ab initio*); and, if a member of the special committee is later determined not to have been independent, the special committee approval is not defeated so long as the transaction was approved by at least two independent directors and the board made the initial independence determination in good faith and without gross negligence.

The *Roofers* Decision

In *Roofers*, the plaintiff challenged the $250 million investment in convertible Preferred Stock of F&G Annuities & Life that F&G's controlling stockholder, Fidelity National Financial, made two years after it had spun off F&G. The plaintiff alleged that: the terms of the investment were highly favorable to Fidelity; Fidelity had pushed F&G into doing the transaction; and F&G should have pursued one of numerous other capital-raising alternatives that were available rather than engaging in the conflicted-controller transaction. The court, applying entire fairness, found that the pro-

cess may have been flawed, but the plaintiff failed to allege sufficiently that the price was unfair.

The process may have been flawed. The transaction was approved by a special committee of F&G's board, composed of two concededly independent directors (the "Committee"). The court agreed with the plaintiff, however, that the timing of the parties' announcement of the transaction—coming just after the parties first met to discuss the transaction and before the Committee began to meet—suggested that Fidelity may have "preordained" the transaction and "forced" it on F&G. The court noted that the Committee was fully authorized and had explored alternative transactions in depth, which suggested an opposite conclusion. The court stated that, at the pleading stage, the questionable timing of the announcement was sufficient to support the plaintiff-friendly inference that the process may have been unfair.

The price appeared fair. The court stressed that the plaintiff did not "identify any term of the investment that was unfair or even sub-market." While the plaintiff criticized the significant annual dividends and advantageous conversion rate, it "ignore[d] what F&G received in exchange," the court stated. Notably, the price represented a premium of more than 17.5% per share to F&G's then-existing market price. The plaintiff's allegations that the company should have taken on debt or sold equity to a third party instead "[did] not suggest that the [Preferred Stock] transaction lack[ed] substantive fairness," the court stated. Also, the Committee had received an opinion from its independent financial advisor that the financial terms of the transaction were "commercially reasonable" to the company, In addition, the Committee had evaluated alternative sources of funding and the record reflected its business reasons for rejecting them.[4] Notably, the Committee members and its advisors all had "agreed that any Preferred Stock transaction with [Fidelity] [would have to] proceed on terms at least as favorable as those that could be obtained in a public market deal."

The *Zoox* Decision

In *Zoox*, the plaintiffs challenged the $1.3 billion sale of Zoox, Inc. to Amazon.com, Inc. (the "Merger"). Under Zoox's capital structure, the first $1.1 billion of proceeds from any sale of the company was payable to holders of Zoox's convertible Notes and Preferred Stock, with the holders of Preferred Stock then not sharing in any further proceeds unless the proceeds exceeded $2 billion. Due to the liquidation preferences, the common stockholders received only about $100 million in the Merger. The plaintiffs alleged that a majority of the board that approved the Merger was conflicted, and that the Merger was unfair to the common stockholders. The court, at the pleading stage, rejected dismissal of the case, finding it reasonably conceivable, based on the alleged conflicts, that the transaction was not fair as to either process or price.

The Merger was considered by a special committee comprised of the three directors that Zoox's board of directors (the "Board") determined were independent. However, the Board later determined that one of the Committee members (the Noteholder Director—as described below) had become non-independent; therefore, the full Board negotiated and approved the Merger.

Majority of Board was conflicted. The court concluded that six of the eight directors were conflicted:

- *Preferred-Stockholder Directors*. Three directors (the "Preferred-Stockholder Directors") were found to be conflicted because they had been appointed to the Board by the venture capital firms that owned Zoox's Preferred Stock. Each of them held a leadership or control position at those firms. The court found it reasonably conceivable that their interests were not aligned with the common stockholders' interests because the owners of the Preferred Stock had no incentive to push for a price above the $1.3 billion price (given the "dead zone" in which they would not share in further proceeds until the price exceeded $2 billion).

- *Noteholder Director*. One director (the "Noteholder Director") was conflicted because he owned Zoox Notes. During the sale process, the Board engaged in negotiations over the funding of an employee-retention Bonus Plan, the result of which was that the Plan would be funded partly by Amazon, and partly from proceeds that otherwise would have gone to the Preferred Stock holders and the common stockholders—and no funding would come from proceeds that otherwise would have gone to the Notes holders. These negotiations, the court held, rendered the Noteholder Director conflicted in the process.

- *Management Directors.* Two directors, who were Zoox's CEO and CTO (the "Management Directors"), were conflicted because they were promised material, non-ratable financial benefits in the Merger,[5] and they "had every expectation of continuing in their roles post-closing." Also the court credited the plaintiffs' "mission-driven conflicts theory" as providing further evidence that the Management Directors were conflicted (see the discussion in "Our Observations" below). In addition, the court noted that, during the process, the CEO told Amazon ("off the record") that once Amazon's price exceeded the liquidation preference threshold, she and the CTO would be willing to "fall on a sword [to] force investors" to take the Amazon deal.

Unfairness based on conflicts. Notably, the court did not analyze fairness of the process or price in any detailed way. Rather, the court stressed that unfairness of both process and price could be reasonably inferred from the allegations that a majority of the Board was conflicted—even though, we note, the two clearly *non*-conflicted directors on the Board approved the Merger, and it was apparent that none of the other transactions proposed to the Board could have delivered more value to the common stockholders.

Our Observations

The New DGCL Safe Harbors

As noted, the transactions in both *Roofers* and *Zoox* readily could have met the requirements for safe harbor protection (if the Amendments had been applicable) based on approval by the special committees. Although in *Zoox* one of the committee members became non-independent during the process, under the DGCL Amendments (unlike *MFW*) that would not have defeated the safe harbor protection, as there were still two independent directors who approved the transaction and the Board's initial determination of independence was in good faith and without gross negligence given that the non-independence arose during the process due to the negotiations over the Bonus Plan. Thus, if the Amendments had been applicable, both cases would have been dismissed at the pleading stage, without regard to fairness of the process or the price.

*Reconciling **Roofers** and **Zoox**—Context Matters*

In *Roofers*, the court dismissed the case on the basis that the price appeared to be fair; while in *Zoox*, the court rejected dismissal of the case even though the transaction delivered more value than any other transaction proposed to the board could have. We note the different overall factual context in each case.

Roofers involved a transaction with a conflicted controller—but the transaction was approved by two concededly independent directors, and the process was apparently pristine other than for a question about fairness based on the timing of the parties' announcement of the transaction. The independent special committee was fully authorized, functioned well, and was focused on ensuring that the transaction be on terms at least equivalent to "a public market deal." *Zoox*, involved a sale to a third-party buyer following a process with multiple bidders, none of whose proposals provided as much value to the common stockholders—but the transaction was approved by a majority-conflicted board. There was no "distance" between the Preferred Stock holders and the directors they had appointed; the officer-directors were promised material non-ratable personal financial benefits; and the officer-directors had spoken of "forc[ing]" the deal on the stockholders.

Conflicts of Directors Designated by Preferred Stock Holders

In *Zoox*, the court characterized the Preferred-Stockholder Directors as "prototypical dual fiduciaries," and found that their interests diverged from those of the common stockholders. The court stressed that, in "commonly occurring sale scenarios," due to liquidation preferences, preferred stockholders may have "no incentive to press for a better deal within the dead zone above the liquidation preferences and had every incentive to agree to the bird in hand rather than press for a better deal for the common stockholders."

The court rejected the Preferred-Stockholder Directors' argument that, as the $1.3 billion price did not *fully* cover the liquidation preference,[6] they were not indifferent to increases in the purchase price above $1.3 billion. The court responded that the Preferred-Stockholder Directors' "lack of indifference" in obtaining a higher purchase price "only applie[d] up to a certain amount of consideration; it d[id] not align the preferred stockholders' interests with those of the common." The court noted that Vice Chancellor Laster, in *Trados I* (2009), held that, in the merger challenged in that case, in which the Trados preferred stockholders received all of the merger consideration when Trados was sold, the preferred stockholders' interests were not aligned with the common stockholders' interests even though the preferred stock's liquidation preference was not fully covered by the merger price. Vice Chancellor Laster stressed that the Trados preferred stockholders had received $53 million, while the common stockholders had received zero *and* had "lost the ability to ever receive anything of value in the future for their ownership interest in Trados."

The court also noted Vice Chancellor Laster's discussion in *Trados II* (2023), where he explained that liquidation preferences can cause the holders of preferred stock, and the directors affiliated with them, to favor "lower-risk, lower-value" deals or investment strategies over those that are "higher-risk, higher-value." This is especially so in "intermediate cases" like *Zoox*, the Chancellor stated—where the company is "neither a complete failure nor a stunning success," so that the preferred stockholders will receive merger consideration while the common stockholders will receive little or nothing.

Importantly, the court noted in *Zoox* that the venture capital firms that owned the Preferred Stock had not designated directors who otherwise were independent. There was not "any distance" between the Preferred-Stockholder Directors and the firms. One of the directors was a partner at one of the firms; another controlled one of the firms; and another was Chairman of one of the firms.

Price As the Predominant Factor in Entire Fairness

Roofers follows a line of Delaware decisions issued in recent

years in which the court has emphasized that, while the entire fairness standard demands a *unitary* analysis with respect to both price *and* process, price may be the *predominant* factor in the analysis.[7] We note, however, that in the most recent entire fairness decision, *Jacobs v. Akademos*, the Delaware Supreme Court stressed that, while price may be the "paramount consideration" in an entire fairness analysis, fairness of the process still must be considered.[8]

"Mission-Based Conflict Theory"

In *Zoox*, the court stated that a conflict can arise from a director's or manager's having a "mission" or view "dream" with respect to the company. In post-closing interviews, the CTO stated that he and the CEO were "on a unique and important mission" for Zoox; that Amazon, unlike other buyers, understood and "loved" their vision; and that a deal with Amazon would be "kind of a dream come true" for them. The CEO stated that she and the CTO "weren't looking for the biggest valuation. This was not about what's the best exit you can get and then moving on to the next thing . . . . This is not a job . . . . This is a mission." The court wrote: "[I]t is reasonable to infer that [the officers] meant what they said. They weren't looking for the biggest valuation or working in good faith to maximize common stockholder value. Rather, they were advocates of a transaction with Amazon because it offered them a unique path to achieve the[ir] dream. . .for Zoox."

Dismissal of Aiding and Abetting Claim

In *Zoox*, the court dismissed the claims asserted against Amazon for aiding and abetting the alleged sell-side breaches. Notably, the court stressed that the significant concessions Amazon made on deal terms during its negotiations with Zoox supported a conclusion that, whether or not Amazon had been aware of the conflicts, there was note evidence that Amazon had tried to create or exploit the conflicts. The court wrote: "Zoox extracted concessions from Amazon that benefitted all [Zoox's] equityholders at nearly every turn"—and that "is not a basis from which the court can infer Amazon knowingly participated in a fiduciary breach." The court noted that Amazon agreed to Zoox's first counterproposal, which more than doubled Amazon's initial asking price; and that, when the deal almost fell through due to infighting relating to funding of the Bonus Plan, Amazon agreed to fund 30% of it, even though the parties' term sheet did not provide for Amazon to fund any of it.

*Court Did Not Address Whether **Corwin** Cleansing Applied*

In *Zoox*, the court noted that the defendants' pleadings asserted only that Zoox's directors and officers did not commit any unexculpated acts, and therefore that the plaintiffs' claims should be dismissed under *Cornerstone*. The defendants did not argue that entire fairness should not apply; and did not argue that, if entire fairness did not apply, then *Revlon* enhanced scrutiny would apply and any fiduciary breaches would be cleansed under *Corwin* given approval of the merger by the stockholders. The court surmised in the opinion that the defendants may not have made the *Corwin* argument "because the common stockholder approval had no effect on the approvals for the transaction, which had already been secured" by written consents on the date the Merger Agreement was signed. In other words, it seems, the vote arguably would not have been "fully informed" as is required under *Corwin*.

Practice Points

The following practice points arise based on *Roofers* and *Zoox*:

Consider structuring conflicted transactions to come within the new DGCL safe harbors. The requirements for availability of the safe harbors are far easier to satisfy than the *MFW* prerequisites for business judgment review, particularly as (other than for going-private transactions) only approval by an independent special committee (and not by the minority or disinterested stockholders) is required.

Consider including at least two independent directors on the board—so that conflicted transactions can be structured to come within the new safe harbors. The board should establish a record, when making independence determinations, that it obtained all relevant information and carefully considered the issue. Preferred stockholders appointing directors should carefully consider the benefits and disadvantages of appointing directors who hold control or leadership positions with the preferred stockholder.

Contextualize fairness of price. When entire fairness applies (*i.e.*, when the new DGCL safe harbors and *MFW* are unavailable), it still may be possible to obtain pleading-stage dismissal of fiduciary claims challenging conflicted transactions—at least where, as in *Roofers*, the plaintiff fails sufficiently to allege unfairness of the price and there was a strong (even if somewhat flawed) process. Analysis of fairness of the price should include what the company received in exchange for what it gave, as well as a comparison of the terms to what would be market. Although fairness of the price may be the predominant consideration, fairness of the process always should be addressed as well, no matter how fair the price.

Other process points:

- A special committee should establish a record that it considered alternatives, and the reasons it rejected them.
- A buyer, to protect against claims of aiding and abetting sell-side fiduciary breaches, should maintain a record of deal term concessions made during the negotiations.

- A transaction generally should not be announced before the special committee has done any work.
- Management and directors should avoid statements about a personal vision, mission or dream for the company—although the court's view as to whether such statements indicate motivation based on "personal interests" will no doubt depend on the specific language used and the overall factual context.
- Management and directors should understand that comments they make to a counterparty during a sale process, purportedly "off the record," are likely to come to light in the event of litigation and could have serious negative consequences.

ENDNOTES:

[1]*Roofers Local 149 Pension Fund (derivatively on behalf of Nominal Defendant F&G Annuities & Life, Inc.) v. Fidelity National Financial, Inc.*, C.A. 2024-0562-LWW (Del. Ch. May 9, 2025).

[2]*Wei et al v. Levinson et al,* C.A. 2023-0521-KSJM (Del. Ch. June 3, 2025).

[3]DGCL § 144 (enacted March 25, 2025, and effective to acts taken before or after enactment, but not applicable to litigation filed on or before February 17, 2025).

[4]For example, the Committee concluded that, given a recent increase in the price of F&G's common stock, it would be most beneficial for F&G to raise equity capital, and that the issuance of mandatory convertible preferred equity in particular would minimize dilution. The Committee also concluded that focusing on a private transaction with Fidelity would be preferable to a public offering because, based on the financial advisor's advice, hedge funds likely would be unwilling to participate in a public deal given the low levels of publicly traded F&G stock, and a transaction with Fidelity would allow for a quick process, which was important given the volatility of F&G's stock price.

[5]The CEO was promised a $3.4 million executive bonus; $8 million of Amazon restricted stock units ("RSUs"); and stock appreciation rights ("SARs") equivalent to 1.5% of Zoox's fully diluted share capital. The CTO owned a significant amount of common stock, but also was promised $5 million of Amazon RSUs and SARs equivalent to 1.5% of Zoox's fully diluted share capital. The court found it reasonably conceivable that these benefits were material to the CEO and the CTO, whose annual salaries at Zoox were $800,000 and $300,000, respectively. In addition, the Management Directors "had every expectation of continuing [as CEO and CTO] post-closing." Unlike other bidders in the sale process, Amazon proposed that Zoox would be run as an independent subsidiary, rather than being merged into a subsidiary that already had a CEO and a CTO.

[6]The preference was not fully covered because part of the funding for the employee-retention Bonus Plan would come from proceeds that would have gone to the Preferred Stock holders.

[7]Other cases in which the court has applied entire fairness but dismissed claims at the pleading stage, notwithstanding a finding that the transaction process may have been flawed (in some cases, seriously flawed) include: *Skillsoft Stockholders Litig.* (Mar. 27, 2025); *Trade Desk, Inc. Deriv. Litig.* (Feb. 14, 2025); *Hennessy Capital Acquisition Corp. Stockholder Litig.* (Feb. 7, 2025); *BGC Partners* (2022, affirmed by the Delaware Supreme Court 2023); *Hsu Living Trust v. Oak Hill* (2020); and *ACP Master v. Sprint/Clearwater* (2017).

[8]*Jacobs et al v. Akademos, Inc. et al,* C.A. 2021-0346 (Del. July 14, 2025). In *Jacobs*, the Supreme Court noted that, in the decision below, the Court of Chancery had stated that, in this case, "the fair price evidence [was] sufficiently strong to carry the day without any inquiry into fair dealing." The Supreme Court wrote: "Our Court has not gone so far." The Supreme Court stated that entire fairness requires "a unitary analysis, and both fair dealing and fair price must be scrutinized by the [court]." The Supreme Court was satisfied that, notwithstanding the Court of Chancery's comment, it actually had considered both price and process in *Jacobs*—that is, it had viewed price as the "paramount consideration," but had viewed "the evidence as a whole," including evidence of fair dealing.

CALCULATING PHARMA EARNOUT DAMAGES: STRATEGIC LESSONS FOR DESIGNING MILESTONE FRAMEWORKS

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In designing the earnout structure, parties should anticipate how expectation damages would be determined by a court using a discounted, probability-weighted mathematical method.[1]

On June 11, 2025, the Delaware Court of Chancery established an important framework for how courts may approach the calculation of earnout damages in pharma milestone disputes in its most recent decision in *Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.*[2] In an earlier opinion (the "September Opinion"), the Court found that a buyer, Alexion, was liable for breach of contract for its failure to use commercially reasonable efforts to achieve milestones for which future earnout payments may have become due to the selling securityholders of Syntimmune, Inc.[3] The June 11 opinion adopted a probability-based mathematical framework to determine the amount of damages owed and it provides a number of important takeaways:

1. **Expected value damages** are recoverable for breached earnout obligations.

2. **Internal buyer assessments** can be used as primary evidence of milestone probabilities.

3. **Different discount rates** apply based on risk characteristics of milestone types.

4. **Sequential dependencies** can create compounding effects in damages calculations.

Background of the Dispute

The Transaction Structure

The dispute arose from Alexion's September 2018 acquisition of Syntimmune, Inc., a biotechnology company developing a monoclonal antibody treatment, ALXN1830, for treating rare diseases.

The acquisition provided for a $400 million upfront payment plus $800 million in earnout payments tied to the following eight specific drug development lifecycle milestones:

- **Milestone 1**: $130 million for completion of successful Phase 1 Clinical Trial (already achieved and paid);
- **Milestone 2**: $120 million for first dosing in Pivotal Clinical Trial (first indication);
- **Milestone 3**: $120 million for first dosing in Pivotal Clinical Trial (second indication);
- **Milestone 4**: $150 million for FDA regulatory approval (first indication);
- **Milestone 5**: $150 million for FDA regulatory approval (second indication);
- **Milestone 6**: $25 million for EMA regulatory approval (first indication);
- **Milestone 7**: $25 million for EMA regulatory approval (second indication); and
- **Milestone 8**: $80 million for net sales across all indications exceeding $1 billion in a fiscal year.[4]

Development Challenges and Strategic Shifts

ALXN1830 initially focused on treating pemphigus vulgaris ("PV"), generalized myasthenia gravis ("gMG"), and warm autoimmune haemolytic anaemia ("WAIHA") indications.[5] However, the program faced significant obstacles including contaminated drug supply, adverse patient reactions requiring trial pauses, and COVID-19 impacts that halted trials while competitors continued advancing.[6]

The strategic landscape changed significantly in July 2021 when AstraZeneca acquired Alexion. The new parent company launched a portfolio review seeking $500 million in recurring synergies. In this cost-cutting environment, Alexion deprioritized the gMG and WAIHA programs in favor of thyroid eye disease ("TED") and chronic antibody-mediated rejection ("cAMR") indications where it could potentially be first to market.[7]

Decision to Terminate Programs

Despite receiving promising HV-108 study data in September 2021 and an outside consultant's November conclusion that the data supported resuming studies, Alexion made the decision to terminate the ALXN1830 program entirely on December 14, 2021.[8] The September Opinion concluded that this termination breached Alexion's efforts obligation, finding that "the preponderance of the evidence supports the conclusion that the decision was influenced, motivated by, or driven by AstraZeneca's pursuit of merger synergies."[9]

The Court's Damages Methodology

Following the liability determination, the court held that the selling securityholders' injury is best understood as the lost expected value of each milestone, calculated by comparing values before and after Alexion's breach of its efforts obligation.[10] The court set out to determine the amount of the lost expected value, using a four-step process outlined below.

1. Selecting the Probability Data

The court evaluated four distinct sources of estimated probabilities for achieving the milestones:

- **Target-Side Analysis**: Shortly after Alexion acquired Syntimmune, Syntimmune's largest former stockholder Apple Tree Partners ("ATP") valued its right to future distributions from Milestones 2 through 8 based on the milestone amounts and probabilities of achievements. ATP estimated the milestone probabilities based on discussions with management and considering the current status of clinical trials, as well as observed clinical trial success rates.[11]
- **Buyer's Pre-Clinical Trial Prediction**: Shortly before Alexion's breach of its efforts covenant, Alexion produced a set of internal predictions of clinical and regulatory success, set by those with detailed knowledge of the ALXN1830 program and untainted by a desire to terminate the program.[12]

However, these predictions were made without the benefit of data received from Phase 1 trial.

- **Buyer's Post- Clinical Trial Prediction**: Following the Phase 1 trial, Alexion reduced the probabilities of successful Phase 2 study and overall probability of technical and regulatory success at a time it already determined to terminate ALXN1830.[13]

- **Expert's Database Analysis**: An expert witness offered calculations based on his open-source database "of experimental medicines and their likelihood of being approved" called the Clinical Drug Experience Knowledgebase ("CDEK").

After weighing the credibility and reliability of these predictions, the court acknowledged that none of these four sources is perfect, but buyer's pre-clinical trial prediction ("Pre-HV-108 Data") was the strongest evidence.[14]

2. Defining Probability Inquiries

The Pre-HV-108 Data assigned a probability of success for Phase 2 trial and a probability for FDA approval for each of the two indications, TED and cAMR, as we illustrate below. Relying on probability data adduced at trial, the Court calculated each Milestone's probability of success as follows.[15]

Milestones	Probability Inquiry	Probabilistic Calculation
Milestone 2: $120 million for first dosing in Pivotal Clinical Trial for the first indication	What is the probability that *either* TED *or* cAMR achieves a first dosing in a PCT?	$P(PCT_{TED} \cup PCT_{cAMR}) = 0.715$
Milestone 3: $120 million for first dosing in Pivotal Clinical Trial for the second indication	What is the probability that *both* TED *and* cAMR achieve a first dosing in a PCT?	$P(PCT_{TED} \cap PCT_{cAMR}) = 0.215$
Milestone 4: $150 million for FDA regulatory approval for the first indication	What is the probability that *either* TED *or* cAMR obtains FDA approval?	$P(FDA_{TED} \cup FDA_{cAMR}) = 0.538$
Milestone 5: $150 million for FDA regulatory approval for the second indication	What is the probability that *both* TED *and* cAMR obtain FDA approval?	$P(FDA_{TED} \cap FDA_{cAMR}) = 0.102$
Milestone 6: $25 million for EMA and country-specific regulatory approval for the first indication	What is the probability that *either* TED *or* cAMR obtains the requisite European approvals?	$P(EA_{TED} \cup EA_{cAMR}) = 0.295$
Milestone 7: $25 million for EMA and country-specific regulatory approval for the second indication	What is the probability that *both* TED *and* cAMR obtain the requisite European approvals?	$P(EA_{TED} \cap EA_{cAMR}) = 0.0256$

It is worth noting that, for purposes of Milestone 6 and Milestone 7, while the Pre-HV-108 Data did not assign any probability approval for EMA or country-specific regulatory approvals, the court assumed that EMA approval will be obtained as long as FDA approval is received (*i.e.*, 100% probability of getting EMA approval once the FDA approval is obtained), and that after that, the country-specific approval would be "likely" to be obtained (*i.e.*, a 50.1% probability).[16]

With respect to Milestone 8 (based on $1 billion in net sales in a fiscal year across all indications), the court relied on Alexion's 2021 model in which it expected the indications' combined revenues to surpass $1 billion in five years, including $1.35 billion peak annual sale. The court therefore viewed the achievement of Milestone 8 as "likely" (*i.e.*, a 50.1% probability) and multiplied the probability for Milestone 5 by 50.1% to arrive at the probability of achieving Milestone 8 of 0.0511.[17]

3. Calculating Expected Milestone Payments

Following the calculation of each milestone's probability, the court multiplied the full amount of each milestone payment by its corresponding probability to determine the "expected" milestone payment.[18]

4. Discounting to Present Value

The court then discounted each expected milestone payment to its present value at the time of Alexion's breach to put the security-holders of Syntimmune in the same economic position they would have been in absent a breach.

- **Number of Periods**: In determining the number of years implicit in the present valuation calculation, the court relied on an internal Alexion presentation deck, which laid out the timeline for achieving Milestones 2 through 5 and extrapolated the timing of Milestones 6 and 7.[19] For Milestone 8, the court relied on Alexion's internal projection of the peak sale year of 2036.[20]

- **Discount Rates for Milestones 2-7**: In determining the annual discount rate, the court concluded that, for Milestones 2 through 7, the discount rate is the risk-free rate plus Alexion's credit risk premium, which is equivalent to 3.58%, the

Moody's Seasoned Baa Corporate Bond Yield as of January 2022 (the time of the breach).[21] The court held that the rate should not be further adjusted for issuer-specific risks because such risks were already fully taken into account in the probability analysis above.[22]

- **Discount Rate for Milestone 8**: The court held that the net sales metric carries additional issuer-specific risk and requires an additional risk premium.[23] Accordingly, the court adopted Alexion's weighted average cost of capital of 9% from 2018 as the discount rate for Milestone 8.[24]

By totaling the present value of all expected milestone payments described above, the Court calculated the aggregate pre-interest expectation damages for Alexion's breach of its efforts covenant to be $180,944,915.32.[25]

Buyer's Strategic Playbook: Minimizing Expected Value Exposure

1. Tactically Allocate Earnout Value Across Development Cycle

The Syntimmune structure created sequential dependencies where later milestones depend on earlier ones. As shown in the table above, the probability of achieving the later milestones decreases significantly. A buyer can minimize overall expected value through thoughtful design of each milestone and the sequencing of the milestones relative to each other, and by allocating a higher proportion of value to later milestones, since the probability of achieving those milestones will typically be much smaller.

2. Leverage Discount Rate Differentials

The court applied dramatically different discount rates based on risk characteristics:

- **Development/Regulatory Milestones**: 3.58%; and
- **Financial Performance Milestones:** 9%.

To illustrate the significance of the different discount rates used, Milestone 2 has an expected value of $85.8M and a present value of $75.5M, a mere 12% discount after applying the 3.58% discount rate, while Milestone 8 has an expected value of $4.1M and a present value of $1.1M, a whopping 73% discount after applying the 9% discount rate.[26]

A buyer may therefore favor earnouts with higher proportions of financial performance milestones (*e.g.*, sales targets and profitability metrics).

3. Incorporate Additional Regulatory Requirements

In this case, Milestones 6 and 7 required additional reimbursement/pricing approvals in three of five European countries, adding regulatory complexity that reduced probability estimates. In defining a regulatory milestone, adding more conditions can have a significant probabilistic impact on the amount of potential expectation damages.

4. Importance of Contemporaneous Records

A buyer's contemporaneous records on a "clear day" speaking to the probability of achieving milestones will have persuasive value in later disputes. The Court ultimately adopted a version of such records as the most reliable source of probability.

The Court's present-value calculations show that extended timelines reduce damages exposure. If a buyer documents realistic but extended development timelines, each additional year of delay would reduce present value through compounding discount effects.

Seller's Strategic Playbook: Maximizing Expected Value Protection

1. Front-Load High-Value, High-Probability Milestones

Milestone 1 ($130 million) was achieved and paid, demonstrating the value of front-loading significant payments at earlier, higher-probability stages. Any probability analysis along the lines adopted by the Court in this case is likely to establish higher probabilities for earlier-in-time milestones.

A seller should therefore seek to concentrate larger payments in early-stage, high-probability milestones to secure value before program risks elevate.

2. Favor Development/Regulatory Milestones Over Financial Metrics

The Court's discount rate methodology heavily favors development and regulatory milestones, which were assigned a lower 3.58% discount rate, over the financial milestone, which has a higher 9% discount rate.

Sellers should structure earnouts with emphasis on development and regulatory milestones rather than sales-based metrics to preserve more present value in damages calculations.

3. Create Multiple Indication Pathways

The Syntimmune structure included separate milestones for the first and second indications (M2/M3 for dosing, M4/M5 for FDA approval, M6/M7 for EMA approval), creating multiple pathways

to value realization. This diversification strategy increases overall expected value by providing alternative success routes.

4. Break Out Larger Milestones into Multiple Smaller Milestones

The calculation of Milestones 6 and 7 suggests that receiving both EMA approval and certain country specific approval pushed the probability of each milestone down by one decimal point. The seller would be better served by breaking each of Milestones 6 and 7 into "mini milestones" correlated to each of EMA approval and country-specific approvals.

Conclusion: The Earnout Calculus

In the high-stakes world of pharmaceutical M&A and licensing, milestone design has become a sophisticated application of probability theory, financial planning, and legal strategy.

The *Alexion* decision provides useful guidance on pharmaceutical earnout strategy by creating a detailed roadmap for damages calculation. Buyers and sellers should consider the probability of milestone achievement, whether certain milestones should be decoupled, and the expected value consequences of breach across different milestone types and timeframes.

ENDNOTES:

[1]This article follows up on our prior analysis of the Delaware Court of Chancery's liability determination in the Alexion-Syntimmune case, *available at* https://www.clearygottlieb.com/news-and-insights/publication-listing/delaware-court-of-chancery-finds-buyer-failed-to-use-commercially-reasonable-efforts-in-pharma-milestone-payment-case.

[2]*Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.*, 2025 WL 1661215 (Del. Ch. 2025).

[3]*Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.*, 2024 WL 4052343 (Del. Ch. 2024) (hereinafter, "Sep. Op.").

[4]*Shareholder Representative Services LLC v. Alexion Pharmaceuticals, Inc.*, 2025 WL 1661215 at *2 (Del. Ch. 2025).

[5]*Id.* at *3.

[6]*Id.* at *3-4.

[7]*Id.*

[8]*Id.* at *4.

[9] *Id.* (quoting Sep. Op. at *48).

[10]*Id.* at *17.

[11]*Id.* at *2-3.

[12]*Id.* at *18.

[13]*Id.* at *3-4.

[14]*Id.* at *18.

[15]*Id.*

[16]*Id.* at *11.

[17]*Id.* at *18, *21.

[18]*Id.* at *18.

[19]*Id.* at *19-21.

[20]*Id.* at *21.

[21]*Id.*

[22]*Id.*

[23]*Id.*

[24]*Id.*

[25]*Id.* at *22.

[26]*Id.* at *22.

BANK MERGER AND ACQUISITION POLICY CHANGES: THE OPPORTUNITY IS NOW

By Jayant W. Tambe, Larissa C. Bergin, Nathan S. Brownback, Michael Dawson, Kevin B. Hart, Randi C. Lesnick and Nicholas J. Podsiadly

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The Situation: For the past few years, bank regulators and the Department of Justice (the "DOJ") adopted a deeply skeptical approach to consideration of bank mergers and acquisitions, freezing large- and mid-sized banks in place.

The Change: Now, under new leadership in Washington, banking agencies and the DOJ have signaled an openness to bank M&A where the combined institutions will enhance competition, customer benefits, technological innovation, and enterprise risk management.

Looking Ahead: Banks now have an opportunity for dealmaking considered nearly impossible for several years. But banks in search of opportunities should ensure any proposed transaction aligns with policy priorities of the banking agencies, the DOJ, and leading voices on Capitol Hill.

Under the current administration, both the bank regulators and

the DOJ quickly acted to rescind Biden-era guidance on bank merger review. These actions restored the formal status quo regarding the bank merger approval process, but more importantly signaled that the administration welcomes new bank merger activity. Additionally, in March 2025, Treasury Secretary Scott Bessent criticized the prior administration's regulatory "mission drift," stating that "[p]roductive and synergistic mergers are often slowed due to immaterial supervisory issues."[1] He called for a refocus of financial regulation on bank safety and soundness, affordability of goods and services, and facilitating economic growth.

Regulatory Actions

Policy statements in 2024 from the Office of the Comptroller of the Currency (the "OCC") and the Federal Deposit Insurance Corporation (the "FDIC") expressed the agencies' process for heightened scrutiny of bank M&A and, in effect, put a stop to most bank merger activity. However, in May 2025, the FDIC rescinded[2] its 2024 policy statement on bank merger review and instead reinstated familiar guidance from 1998. The OCC also issued[3] an interim final rule that rescinded the 2024 policy statement and reinstated regulatory provisions allowing for automatic expedited processing for specified eligible M&A. President Trump subsequently signed a joint resolution[4] under the Congressional Review Act, which, among other things, prevents an agency from reissuing a substantially similar rule, further cementing the shift in regulatory approach. With the FDIC and OCC reinstating their pre-2024 policies, applicants once again face a more predictable merger approval process and, for qualifying transactions, a 15-day pathway[5] for applications to be deemed approved is once again available.

The Federal Reserve, for its part, has not issued new M&A regulations or policy statements (and it is responsible for reviewing and approving applications involving both state member banks and bank holding companies). However, in April 2025, the Federal Reserve (along with the OCC)[6] approved[7] Capital One's merger with Discover, signaling a willingness to clear large deals where competitive, managerial, and Community Reinvestment Act ("CRA") factors can be adequately addressed. This decision is another signal that the agencies are open to large-scale mergers.

Industry Effects

Since the start of 2025, deal activity has accelerated in the marketplace, and some recent reports of resurgent first-quarter dealmaking indicate merger activity could return to pre-2021 levels.

To succeed in the current environment, banks must demonstrate robust risk management processes as well as alignment with agency priorities. Banks should focus on: (i) managerial, CRA, and systemic risk factors; (ii) strong compliance with anti-money laundering ("AML") and sanctions rules; (iii) a strong record aligning with agency priorities regarding fair access and debanking; and (iv) compliance with antidiscrimination law. Besides varied compliance measures, banks should also ensure that proposed acquisitions meet the requirements for antitrust-related approval issues, both from the DOJ and from the banking agencies.

Current Priorities

Fair Access. Fair access and debanking issues could also pose a major obstacle to potential bank mergers. Early into his administration, President Trump gave his agencies the mandate[8] to "protec[t] and promo[te] fair and open access to banking services" and the banking agencies have taken steps to further that directive, aiming to ensure that banks provide services based on neutral, risk-based criteria rather than political, religious, or other nonfinancial factors. Banks seeking merger approvals should prioritize documented, risk-based customer onboarding policies that tie any decision not to provide banking services to customers on a group basis to objective, legal criteria. The regulatory environment has shifted decisively against the use of reputational risk as a standalone justification for account closures or refusals. Institutions should be prepared for increased scrutiny of past account closures or refusals and the need to justify decisions with clear, objective evidence, as both federal and state regulators may investigate alleged discriminatory practices.

Additionally, equal-opportunity compliance remains critical for successful bank M&A approval. Executive orders curtailing mandatory diversity, equity, and inclusion metrics do not relieve banks of their federal antidiscrimination duties. Antidiscrimination law has been recently clarified in the Supreme Court's ruling in *Ames v. Ohio Department of Youth Services,*[9] which applied the same standard for proving discrimination to a heterosexual woman as to someone with additional background circumstances. This case demonstrates the need for strictly merit-based hiring, promotion, and procurement practices by banks. Banks not in compliance with Title VII and other applicable laws risk litigation and regulatory investigations that could derail any potential merger or acquisition.

Antitrust Concerns. Antitrust and competition considerations now implicate additional factors beyond traditional measures of market concentration.

Unlike the banking agencies, which recently reverted to 1990s-era guidance, the DOJ still operates under the 2023 Merger Guidelines after withdrawing[10] from the 1995 Bank Merger Guidelines. Under the 2023 Merger Guidelines, agencies apply a more stringent Herfindahl-Hirschman Index ("HHI") threshold: Mergers are presumed to be anticompetitive if there is a change in HHI greater

than 100 points, rather than the previous baseline of 200 points, which is currently used by the OCC and FDIC. Besides imposing stricter HHI limits, the newer approach also focuses more on "market realities," encompassing a wider range of factors, including the impact of a potential bank merger on rural and underserved consumers. The 2023 Merger Guidelines indicate that the DOJ will evaluate not only deposit concentration but also product-specific overlaps, pricing, network effects, and customer service; the guidelines allow the DOJ to challenge transactions on qualitative grounds even if traditional market share thresholds are not exceeded. Banks should seek to harmonize with the current administration's interests in certain community needs. Dominance in a particular market by a select number of large firms may be disfavored if lower-income consumers cannot readily access products or services that are available elsewhere. Anticipated branch closures and job losses within banks upon a merger or acquisition may also affect M&A approvals. Such additional qualitative considerations suggest more nuanced reviews by the DOJ that could delay deal activity if banks do not anticipate certain key priorities.

Banking agencies also weigh anticompetitive effects during the M&A approval process. Recently, the agencies have reinstated policies that resurrect traditional HHI thresholds to measure market concentration. The FDIC and OCC have recently revised their M&A review policies, with the FDIC explicitly reserving the right to consider broader competitive dynamics, including nontraditional business lines and regional or national market effects. The evolving landscape underscores the importance of preemptive competitive analysis, thorough due diligence, robust documentation, and proactive communication with all relevant agencies to navigate the M&A approval process.

AML and Sanctions. AML and sanctions compliance remains critical to successful merger review. Executive orders[11] early in the Trump administration designated additional terrorist organizations and therefore created additional obligations for banks for AML and sanctions compliance. And ever-increasing sanctions targets[12] highlight the need for transaction monitoring, regular risk assessments, and effective controls. Banks with deficiencies in their AML and sanctions compliance programs may find that these can impair their ability to gain approvals for combinations, particularly if the deficiencies relate to crimes the administration has prioritized for enforcement, such as fentanyl trafficking, human trafficking, and money laundering by Mexican drug cartels.

Three Key Takeaways

- The current regulatory climate presents a window of opportunity for well-structured deals. Understanding the key political and regulatory priorities is critical.
- Changes in regulation signal openness to potential large-scale bank M&A.
- Fluctuations in bank M&A regulation over the past few years underscore this area as significant for policymaking. Future administrations may reverse current updates, just as the Trump administration quickly adjusted course on bank M&A policy.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1] https://home.treasury.gov/news/press-releases/sb0045.

[2] https://www.federalregister.gov/documents/2025/07/03/2025-12493/statement-of-policy-on-bank-merger-transactions.

[3] https://www.occ.gov/news-issuances/news-releases/2025/nr-occ-2025-44.html.

[4] https://www.congress.gov/bill/119th-congress/senate-joint-resolution/13.

[5] http://www.occ.gov/news-issuances/news-releases/2025/nr-occ-2025-44a.pdf.

[6] https://www.occ.treas.gov/news-issuances/news-releases/2025/nr-occ-2025-36.html.

[7] https://www.federalreserve.gov/newsevents/pressreleases/orders20250418a.htm.

[8] https://www.whitehouse.gov/presidential-actions/2025/01/strengthening-american-leadership-in-digital-financial-technology/

[9] *Ames v. Ohio Department of Youth Services*, 605 U.S. 303, 145 S. Ct. 1540, 221 L. Ed. 2d 929 (2025).

[10] https://www.justice.gov/atr/media/1368576/dl.

[11] https://www.whitehouse.gov/presidential-actions/2025/01/designating-cartels-and-other-organizations-as-foreign-terrorist-organizations-and-specially-designated-global-terrorists/.

[12] https://www.jdsupra.com/legalnews/president-trump-issues-executive-order-3698044/.

COURT PERMITS "DO-OVER" FOR NON-COMPLIANT NOMINATION NOTICE UNDER COMPANY'S ADVANCE NOTICE BYLAW—*IONIC DIGITAL*

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In *Vejseli v. Duffy* ("*Ionic*")[1] the Delaware Court of Chancery, in a post-trial decision, held that the directors of Ionic Digital, Inc., who were facing an imminent proxy contest over control of the board, (i) breached their fiduciary duties when they reduced the size of the board so that only one director would be elected at the upcoming annual meeting; but (ii) did *not* breach their fiduciary duties when they rejected Plaintiffs' nomination notice on the basis that it did not comply with the requirement under the company's advance notice bylaw that all agreements relating to the nominations be disclosed. The court ordered that, given the directors' breach in reducing the board size, the company had to reopen its window for nominations so that all stockholders, including Plaintiffs, could nominate the two directors that would have been up for election if the board size had not been reduced.

Key Points

- **The court stressed the critical informational function served by an advance notice bylaw requirement that all agreements relating to the nomination be disclosed**. Of note, the court suggested that even such agreements that had been *recently terminated* potentially had to be disclosed. And, in any event, the court held, a provision in a terminated agreement that survived termination of the agreement had to be disclosed.

- **The court permitted Plaintiffs a "do-over" although they had submitted a non-compliant nomination.** The court explained that, although normally a party that submitted a non-compliant nomination notice would not be permitted to submit a corrected notice, in this case, where it was the wrongful conduct of board that necessitated reopening the nomination window, there was no reason not to permit Plaintiffs to submit a new nomination notice.

- **The court, applying the *Coster* standard of review to both actions by the board, focused on the directors' motivations and justifications**. The court reaffirmed that the standard established in *Coster v. UIP*[2] applies to board actions that are defensive in nature, not adopted on a "clear day," and affect the stockholder franchise. While some practitioners speculated that the *Coster* standard might be more objective than the former *Blasius* standard, with less focus on directors' motivations and justifications, in each case in which the new standard has been applied (*Coster*, *Kellner v. AIM* (2024), and *Ionic*), the judicial focus has been on the directors' motivations and justifications—suggesting that the court's analyses and outcomes may not be significantly different than they were under *Blasius*.

Background

In January 2024, as part of the Chapter 11 bankruptcy plan of Celsius Network, LLC (a cryptocurrency lending platform), Celsius' digital currency mining assets were spun off into a new entity, Ionic. Many Celsius creditors, including Plaintiffs, thus became Ionic stockholders. By the summer of 2024, Ionic's stockholders were publicly venting frustration with Ionic's leadership, particularly with respect to their failure to have publicly listed Ionic's shares. In the 17 months from Ionic's formation, five of the directors on its eight-seat classified Board had left; there had been three different CEOs, two CFOS and two CLOs; and the company's auditor had resigned.

In May 2024, Figure Markets Inc., which runs a blockchain exchange for digital assets, had proposed to Ionic's board (the "Board") that Ionic's securities be listed on Figure Market's exchange. Also, GXD Labs, LLC, a Bitcoin mining service provider, had proposed to the Board that GDX replace U.S. Bitcoin ("Hut 8") (the bankruptcy plan sponsor) as Ionic's service provider. The Board had rejected both proposals.

Plaintiffs—three Ionic stockholders who had been vocal and public about their discontent—partnered with Figure Markets and GXD (neither of which was an Ionic stockholder) to call a special meeting to replace two directors on the then four-person Board. Their plan then changed to conducting a proxy contest at Ionic's first annual meeting, at which two Class I directors were to be elected. In October 2024, Plaintiffs, Figure Markets and GXD, and their legal counsel, met with the Board and encouraged it to replace

directors, appoint a new CEO, immediately list Ionic's stock, and replace its service provider with GXD. Plaintiffs continued to engage with the Board through January 2025.

On February 4, 2025, the Board adopted a resolution by unanimous written consent, setting the date for the annual meeting on March 17, 2025 and reducing the size of Class I of the Board so that only one director (rather than two) would be up for election at the annual meeting. There also remained a vacant seat in Class I, to be filled by Ionic's CEO when a new one was hired. Ionic announced the meeting date, but did not disclose the reduction in the Board's size. Announcement of the meeting date triggered opening of a 10-day window, under Ionic's Advance Notice Bylaw, to submit nomination notices. On February 14, Plaintiffs, Figure Markets and GDX agreed with one another, in a Solicitation Agreement, that Figure Markets and GDX would support Plaintiffs' efforts to elect nominees at the annual meeting. Also on that date, Plaintiffs submitted a notice (the "Nomination Notice") nominating two individuals for the two Class I director seats they believed were up for election.

The 10-day nomination window closed on February 17. On February 20, Ionic updated its website to disclose that the Board size had been reduced. The board's Nominating Committee met twice and concluded that Plaintiffs' nominees were unsatisfactory and that reelecting the existing Class I director was in Ionic's best interests. On February 28, the Board rejected the Nomination Notice as not compliant with the requirement in the Advance Notice Bylaw that all agreements relating to the nomination be disclosed. On March 5, Plaintiffs, while claiming the Board's issues with the Nomination Notice were pre-textual, sent the Board copies of the undisclosed agreements.

Plaintiffs brought suit, claiming that Ionic's directors breached their fiduciary duties by reducing the size of the Board and by rejecting the Nomination Notice. Vice Chancellor Bonnie W. David held that the reduction in the Board's size was a breach of fiduciary duties, but that the rejection of the Nomination Notice was not. To restore Ionic stockholders' ability to elect *two* Class I directors at the annual meeting, the Vice Chancellor ordered the Board to open a new 10-day nomination window to permit any stockholders, including Plaintiffs, to submit nominations for the two seats.

Discussion

Rejection of Nomination Notice

Of note, the court suggested that even recently terminated agreements might have had to be disclosed in the Nomination Notice. The Advance Notice Bylaw required disclosure in a nomination notice of all material agreements relating to the nomination. Plaintiffs' Nomination Notice disclosed the Solicitation Agreement, but did not disclose earlier agreements among Plaintiffs, Figure Markets and GDX relating to Plaintiffs' nominations. Plaintiffs argued that they did not have to disclose the earlier agreements because those agreements "were no longer operative at the time of the Nomination Notice." Specifically, Plaintiffs stated: on October 7, 2024, the parties' "Second Group Agreement" had amended and restated their "First Group Agreement"; on October 21, 2024, their "Third Group Agreement" had "disbanded the group" under the Second Group Agreement; and on February 14, 2025—the same day the Nomination Notice was submitted—the Solicitation Agreement had terminated the Third Group Agreement. The court emphasized that the function of a requirement to disclose agreements about a nomination is to allow a board "to knowledgably make recommendations about nominees and ensur[e] that stockholders cast well-informed votes." The court wrote that those informational purposes are "ill served if a stockholder omits disclosing an agreement terminated the *same day* it submits a nomination notice, as Plaintiffs did here." The court added: "There is little doubt that stockholders would want to know about recently terminated agreements when deciding how to vote their shares."

The court held that a material provision in a terminated agreement that survived the termination had to be disclosed in the Nomination Notice. The court stated that, even assuming Plaintiffs were only required to disclose extant agreements, the Nomination Notice failed to disclose a material provision in a terminated agreement that survived the termination. Specifically, Paragraph 7 of the Third Group Agreement stated that, for one year, "no Member of the Group shall enter into any agreement, arrangement or understanding with Ionic relating to the Purpose [of the Agreement]" unless such agreement, arrangement or understanding included certain specified commitments by Ionic—including its forming board committees to search for a new CEO, to conduct a strategic and operating review of the business, and to consider replacing Ionic's service provider with GXD and consider listing Ionic's securities on Figure Markets' exchange. Plaintiffs argued that this provision was "moot because the focus of the Group ha[d] shifted from holding a special meeting [(the subject of the prior agreements)] to running a proxy contest at the Annual Meeting [(the subject of the Solicitation Agreement)]." The court stressed, however, that the contractual obligation set forth in Paragraph 7 had not been terminated or waived before the Nomination Notice was sent—and that "the existence of a commitment to support the types of proposals described in Paragraph 7 would have been important to stockholders in deciding which director candidates to support."

The court applied the *Coster* standard of review to determine whether the Board's rejection of the Nomination Notice, although legally permissible, was inequitable. The court reiterated

in *Ionic* that the *Coster* standard applies "enhanced scrutiny under *Unocal*, with sensitivity to the stockholder franchise under *Blasius*." The former *Blasius* standard required a board to have a "compelling justification" for actions that interfered with the stockholder franchise. Under the *Coster* standard, however, the court considers, first, whether the Board reasonably perceived a threat to corporate policy or effectiveness (which threat must have been real and not pretextual), with the board having been motivated by valid corporate interests rather than selfish or disloyal interests; and, if so, then, whether the action the board took in response was reasonable in relation to the threat posed and not preclusive of the stockholder franchise. The court found the Ionic Board faced a real threat to corporate control in light of the planned proxy contest, particularly as the "Nomination Notice was backed by two non-stockholders motivated by separate commercial interests." The Board acted for a valid corporate purpose, namely ensuring that stockholders were informed of all agreements relating to nominations for directors so that they could decide on an informed basis whom to support. The court viewed the directors as having "credibly testified that they believed understanding the specifics of all arrangements between Plaintiffs, Figure Markets, and GXD would be highly material to stockholders deciding who to support at the Annual Meeting." The court also readily concluded that rejection of the Nomination Notice was not preclusive. Preclusive in this context means that a board's action made it impossible as a practical matter for a proxy contest to succeed. In this case, Plaintiffs were not precluded "from submitting a compliant Nomination Notice," the court wrote. "[They] could have complied with the Advance Notice Bylaw's disclosure requirements, but they did not." Consequently, the rejection of the notice was not preclusive, even though, without the reopening of the nomination window, Plaintiffs could not have proceeded with a proxy contest.

The court ordered reopening of the 10-day window for nominations, including for Plaintiffs. Ionic's directors argued that Plaintiffs should be precluded from submitting a new nomination notice, as they should not be afforded a "do-over" after submitting a non-compliant notice. The court agreed that this would normally be the case, but should not be in this case, given "the unusual facts," where it was *the Board's* wrongful conduct (in having reduced the size of the Board) that necessitated reopening the nomination window; Plaintiffs had not "intentionally concealed" material information; and the directors had offered "no real reason why Plaintiffs should not be permitted to submit a new nomination notice during the reopened nomination window so that, with the benefit of full disclosure, Ionic's stockholders, who have not been able to exercise their voting rights since the Company's incorporation, can finally decide for themselves who should serve on the Board."

Reducing the Board's Size

The court applied the *Coster* standard to the Board's reducing the size of the Board. The *Coster* standard again applied, because the Board did not decide on a "clear day" to reduce the size of the Board. Rather, when it resolved to reduce the size, it was aware of Plaintiffs' plans to mount a proxy contest to replace Ionic directors. The court thus considered whether the action was reasonable and non-preclusive.

The court found the directors' purported purposes in reducing the Board size were pre-textual. The directors contended that their purpose in reducing the Board's size was to promote efficiency, reduce expenses, and avoid deadlocks. The court concluded that these purposes were pre-textual. The court noted that there was no contemporaneous evidence that the Board had considered these purposes; and, during trial, Plaintiffs had offered "shifting explanations" as to their purposes. The court credited the testimony of one Ionic director as being the most credible—he testified that the board size was reduced because it would be difficult for the Board to recruit a high-quality board member to fill the vacant Class I seat unless the Board first "calmed the waters a bit" by changing the Board's composition. The court responded that "[r]educing the number of directors so that the Board, rather than the stockholders, could later identify better candidates is not a legitimate corporate purpose."

Further, the court concluded that, irrespective of the Board's purposes, reducing the size of the Board was not a reasonable response and was preclusive. The court stated that, even if the Board's purported purposes were the actual purposes, the reduction was not necessary to accomplish those objectives. For example, if saving costs had been the purpose, "the Board could have explored other solutions for saving costs that did not involve eliminating a director seat immediately prior to the stockholders' first opportunity ever to elect directors"—and there was no record that any alternative cost saving measures were considered. Also, reducing the Board by one seat did not accomplish the purpose of avoiding deadlocks, because, while it led to an odd number of seats, there was still a vacant seat, so, after the size reduction, the actual number of directors was an even number. In addition, the reduction in the size of the board was preclusive, the court found—as it "made success in a proxy contest realistically unattainable by eliminating the possibility of success for two seats."

Practice Points

- **A board should understand and be able to articulate the specific corporate purpose for which it rejects a nomination notice**. Even if rejection of a nomination notice may be legally permissible on the basis that it does not comply with

the company's advance notice bylaw requirements, the rejection also must be equitable—that is, done for the purpose of advancing a legitimate corporate purpose, and not for pretextual, selfish, or disloyal reasons.

- **When considering a nomination notice, a board should consider whether the notice complies with the requirement that all agreements relating to the nomination must be disclosed**. Given the court's focus in *Ionic* on the validity and importance of this requirement for an informed stockholder vote, a board evaluating a nomination notice should carefully consider what its advance notice bylaw requires with respect to disclosure of agreements and whether the requirement has been met.

- **Boards should consider specifying in an advance notice bylaw that recently terminated agreements and surviving provisions of terminated agreements must be disclosed**. Even if (as in *Ionic*) the bylaw does not so provide expressly, the board should consider whether non-disclosure of such agreements or provisions renders the nomination notice at issue non-compliant.

- **A board should make governance changes on a "clear day" when possible.** Such actions, even if defensive in nature, will be reviewed under the business judgment rule. If such actions are defensive, affect the stockholder franchise, and are not adopted on a clear day, then enhanced scrutiny under the *Coster* standard will apply instead.

- **Boards should draft advance notice bylaws clearly and with careful attention to the (still-evolving) parameters as to their permissible breadth**. We note that, in *Kellner v. AIM*,[3] the court invalidated advance bylaw notice provisions that it viewed as being overbroad, ambiguous, and/or so "dense" as to be incomprehensible. The court viewed such defects as: restricting the stockholder franchise without accomplishing a reasonable approach to information gathering; suggesting an intention to block dissidents' nomination efforts; and giving the board license to reject a nomination notice based on the board's "subjective interpretation" of the provisions.

- **There remains an open issue as to how broadly the *Coster* standard applies.** It has not been clear whether the *Coster* standard applies only to board responses taken on a "rainy day" when they relate to the election of directors or issues touching on control—or, instead, as may be suggested by certain language in *Coster*, it applies to all stockholder votes. As *Coster* and *Kellner*, and now *Ionic*, all have involved elections of directors, the question remains unanswered.

- ***Siegel v. Morse***. In another recent Court of Chancery decision on advance notice bylaws,[4] the court rejected a challenge to The AES Corp.'s advance notice bylaw that was adopted on a "clear day." The plaintiffs in *Siegel* did not challenge the facial validity of the bylaw, but, rather, claimed only that the bylaw was "unenforceable" because it was adopted for defensive purposes and had a "chilling effect on the stockholder franchise." The plaintiff had no intention of nominating director candidates and knew of no stockholder who had such an intention. The court stressed that it would not consider an equitable challenge to an advance notice bylaw where the plaintiff could not identify a stockholder who was deterred by the challenged bylaw from nominating a director candidate. Equitable review of a bylaw is only appropriate, the court stated, when there is a "genuine, extant controversy involving the adoption, amendment, or application" of the bylaw.

ENDNOTES:

[1] *Veton Vejseli, et al. v. Scott Duffy, et al.*, 2025-0232-BWD (Del. Ch. May 21, 2025).

[2] *Coster v. UIP Companies, Inc.*, (Del. Sup. Ct. June 28, 2023).

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

[4] *Siegel v. Morse, et al.,* C.A. No. 2024-0628-NAC (Del. Ch. Apr. 14, 2025).

FROM THE EDITOR

The Winds of Summer

The M&A summer so far? A faster pace of merger approvals while the Trump administration's antitrust regulators are reversing a number of actions taken by their predecessors.

For instance, in July the FTC lifted its bans on the CEOs of two target companies from joining the boards of their acquirors. The FTC, under Chair Lina Khan, had made these bans a condition of clearing Exxon's purchase of oil producer Pioneer Natural Resources and Chevron's acquisition of Hess.

The FTC's decision to set aside the order allows Pioneer CEO Scott Sheffield to join Exxon's board and Hess CEO John Hess to join the board of Chevron. When it imposed the bans, the FTC had said it was concerned that the CEOs, installed on the boards of their acquirors, could potentially coordinate "messaging" with members of the Organization of the Petroleum Exporting Countries. Commissioner Andrew Ferguson, who now heads the FTC, and Republican Commissioner Melissa Holyoak had dissented, saying that the orders exceeded FTC authority.

In the Hess case, the FTC said that upon review, it found its earlier complaint "failed to plead any antitrust law violation under Section 7 of the Clayton Act; contained no allegations that Chevron's acquisition of Hess would be anticompetitive; did not allege that the acquisition would materially increase market concentration or that it would increase the potential for coordination among oil producers, and disregarded the FTC's Merger Guidelines and decades of precedent."

There's also been an uptick in deal clearances. In June, the FTC approved Mars' $36 billion takeover of Kellanova and in the same week, the advertising agency Omnicom was cleared for its $13.5 billion purchase of rival Interpublic. The latter deal got the green light in less than seven months since announcement, after the company agreed to restrictions on its ability to steer ad dollars based on political considerations.

The emerging philosophy of the Trump antitrust regulators appears to be vigilance against what they perceive as competitive abuse in some sectors (tech in particular) but an easing of regulatory actions against mega-deals in general. "Chairman Ferguson has been clear since day one. The Trump-Vance FTC is committed to getting out of the way of mergers if there are no competition concerns," an FTC spokesperson told Reuters.

More than 100 transactions have been granted shorter reviews since the beginning of Trump's second term, according to FTC data. Eyes are now turning to UnitedHealth's $3.3 billion acquisition of Amedisys, which is facing a court challenge brought by the Biden administration. The DOJ and the merging companies are scheduled to start mediation within weeks.

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