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I. FIDUCIARY STANDARDS

A. The Business Judgment Rule Is The Touchstone For Fiduciary Analysis Of Board Action. In general terms, the business judgment rule provides that a decision by a board of directors in which the directors possess no direct or indirect personal interest, which is made with reasonable awareness of all reasonably available material information, and after prudent consideration of the alternatives, and which is in good faith furtherance of a rational corporate purpose, will not be interfered with by the courts, either prospectively by injunction, or retrospectively by imposition of liability for damages upon the directors, even if the decision appears to have been unwise or to have caused loss to the corporation or its stockholders.

- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914, 928 (Del. 2003) (“The business judgment rule embodies the deference that is accorded to managerial decisions of a board of directors. ‘Under normal circumstances, neither the courts nor the stockholders should interfere with the managerial decision of the directors.’”).

- *McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) (holding that the business judgment rule “combines a judicial acknowledgement of the managerial prerogatives that are vested in the directors of a Delaware corporation by statute with a judicial recognition that the directors are acting as fiduciaries in discharging their statutory responsibilities to the corporation and its shareholders”).

- *Unitrin, Inc. v. American Gen. Corp*, 651 A.2d 1361, 1373 (Del. 1995) (holding that “a decision made by a loyal and informed board will not be overturned by the courts unless it cannot be ‘attributed to any rational business purpose’”).

- *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (holding that the business judgment rule “is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”).

- *In re The Goldman Sachs Group, Inc. S’holders Litig.*, C.A. No. 5215-VCG, 2011 Del. Ch. LEXIS 151, at *78 (Del. Ch. Oct. 12, 2011) (“Through the business judgment rule, Delaware law encourages corporate fiduciaries to attempt to increase stockholder wealth by engaging in those risks that, in their business judgment,
are in the best interest of the corporation ‘without the debilitating fear that they will be held personally liable if the company experiences loss.’

- **Gagliardi v. Trifoods Int’l, Inc.,** 683 A.2d 1049, 1053 (Del. Ch. 1996) (holding that the business judgment rule “provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty”).

**B. Duty of Care.** The board of directors must exercise due care in connection with a merger or other business combination.

- **Smith v. Van Gorkom,** 488 A.2d 858 (Del. 1985) (holding that in the specific context of a proposed merger, directors have a duty to act in an informed and deliberative manner in determining whether to approve a merger agreement before submitting proposal to the stockholders).

- **Aronson v. Lewis,** 473 A.2d 805 (Del. 1984) (holding that directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them; having become so informed, they must then act with requisite care in the discharge of their duties).

- **McMullin v. Beran,** 765 A.2d 910 (Del. 2000) (holding that complaint adequately stated claim that directors failed to exercise due care when they approved a merger negotiated by the majority stockholder without adequately informing themselves about the transaction and without determining whether the merger consideration equaled or exceeded the value of the company as a going concern).

- **McPadden v. Sidhu,** C.A. No. 3310-CC, 2008 Del. Ch. LEXIS 123 (Del. Ch. Aug. 29, 2008) (finding plaintiff adequately pled a duty of care violation in connection with a corporation’s sale of a subsidiary corporation to management where: (1) the board delegated the task of selling the subsidiary to its vice-president, the leader of the management group that sought to acquire the subsidiary; (2) the board did very little to oversee the process of selling the subsidiary and therefore provided no check on the vice-president’s “half-hearted” efforts to solicit bids for the subsidiary; (3) the vice-president did not contact any of the subsidiary’s competitors, who were its most likely buyers; and (4) the sale price was at the lowest end of the valuation range generated by the corporation’s financial advisor).
C. Change in Control: Revlon. A number of cases have imposed a heightened standard on directors approving a change in control transaction. In such a situation, directors must maximize the short-term value of the consideration to be received by the stockholders, and courts will scrutinize the methods utilized to do so. But see Malpiede v. Townson, 780 A.2d 1075, 1084 (Del. 2001) (explaining that even where “the Revlon doctrine imposes enhanced judicial scrutiny of certain transactions involving a sale of control, it does not eliminate the requirement that plaintiffs plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale”). The Supreme Court has held that this standard will be applied: (1) ‘when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company’; (2) ‘where, in response to a bidder’s offer, a target abandons its long term strategy and seeks an alternative transaction involving the breakup of the company’; or (3) ‘when approval of a transaction results in a ‘sale or change of control”’). Arnold v. Soc’y for Sav. Bancorp, Inc., 650 A.2d 1270 (Del. 1994). The Revlon standard does not apply simply because a corporation is “in play.” Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009).

- Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1989) (stating that pursuant to Revlon, in the context of sale of corporate control, the responsibility of directors is to get the highest value reasonably attainable for the shareholders).

- Krim v. ProNet, Inc., 744 A.2d 523 (Del. 1999) (stating that Delaware law requires that once a change of control of a company is inevitable the board must assume the role of an auctioneer in order to maximize shareholder value).

1. Does Revlon apply?

(a) Cash-out Merger with a Third Party. Revlon, Inc. v MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (holding that when directors decide to sell the company in a cash-out merger, their role changes from protectors of the corporate entity to “auctioneers” whose duty is to get the best price for stockholders).

(b) Cash-out Merger with a Controlling Stockholder.

- Bershad v. Curtiss-Wright Corp., 535 A.2d 840 (Del. 1987) (holding Revlon standard is not applicable when a controlling stockholder cashes out minority stockholders).

- Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994) (“This obligation the board faces is rather similar to the obligation that the board assumes when it bears what have been called ‘Revlon duties,’ but the obligations are not identical.”).
• In re Best Lock Corp. S’holders Litig., C.A. No. 16281, 2001 Del. Ch. LEXIS 134, at *92-*93 n.139 (Del. Ch. Oct. 29, 2001) (finding that directors did not have duty under Revlon to auction corporation where majority stockholder could block transaction and the director’s duty to ‘obtain the greatest value reasonably attainable’ meant the “greatest value reasonably attainable from the controlling shareholder, in accordance with the entire fairness standard”).

(c) Stock-for-Stock Merger.

(i) Non-controlled Acquiror.

• Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1990) (holding duty to maximize the value of consideration to be received by stockholders under Revlon was not triggered by a stock-for-stock merger that left control of the surviving entity in “a fluid aggregation of unaffiliated shareholders representing a voting majority,” or in other words, in the market).

• Arnold v. Soc’y for Sav. Bancorp, Inc., 650 A.2d 1270 (Del. 1994) (Revlon not implicated in a stock for stock transaction in which control of the combined company remains in a “large, fluid, changeable, changing market”) (citations omitted).

(ii) Controlled Acquiror.

• Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) (holding that duty to maximize stockholder value was triggered in a stock-for-stock merger that resulted in a shift in control to the acquiror’s single controlling stockholder).

(d) Sale of a Controlled Corporation.

• In re Paxson Communication Corp. S’holders Litig., C.A. No. 17568, 2001 Del Ch. LEXIS 95 (Del. Ch. July 10, 2001) (holding that duty to maximize stockholder value was not triggered where majority stockholder that owned 75% of the company’s voting power gave a call right to a third party, because either the majority stockholder or holder of the call right retained control of the company and the minority stockholders would never be in the position to collectively control the company and receive a control premium for their shares).

• McMullin v. Beran, 765 A.2d 910 (Del. 2000) (reversing Chancery Court’s ruling that Revlon duties did not apply to transaction initiated and negotiated by controlling stockholder, and holding
that in the specific context presented, the directors’ Revlon duties required an informed good faith decision by the directors whether to recommend to minority stockholders to accept the merger consideration or seek appraisal rights).

- **Orman v. Cullman**, 794 A.2d 5, 42 n.141 (Del. Ch. 2002) (where controlling stockholder retained control and shares owned by public were sold to third party that had right to purchase controlling stake in three years, Revlon was not implicated because company was not “being broken up nor was control being transferred or sold via the challenged merger”).

- **In re CompuCom Systems, Inc. S’holders Litig.**, Cons. C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. September 29, 2005) (when the board, at the suggestion of the corporation’s majority stockholder, undertook to find a buyer for the whole company, it had an obligation to obtain the maximum value reasonably attainable for all the stockholders).

(e) **Mixed Consideration.**

- **In re Santa Fe Pac. Corp. S’holders Litig.**, 669 A.2d 59 (Del. 1995) (holding a transaction with a voluntary 33% cash component did not necessarily implicate Revlon).

- **In re Lukens Inc. S’holders Litig.**, 757 A.2d 720 (Del. Ch. 1999) (stating that a stock and cash transaction “in which over 60% of the consideration is cash” triggered duties under Revlon).

- **Flake v. Hoskins**, 55 F. Supp. 2d 1196 (D. Kansas 1999) (applying Revlon standard under Missouri law and finding that transaction with up to 40% cash component did not trigger Revlon where stockholders could choose all cash).

- **In re NYMEX S’holder Litig.**, C.A. Nos. 3621 & 3835-VCN, 2009 Del. Ch. LEXIS 176 (Del. Ch. Sept. 30, 2009) (acknowledging, but not deciding, dispute between parties as to whether Revlon applied to transaction involving 56% stock and 44% cash).

- **In re Smurfit-Stone Container Corp. S’holder Litig.**, 2011 Del. Ch. LEXIS 79 (Del. Ch. May 20, 2011) (concluding, “based on economic implications and relevant judicial precedent,” in deciding a motion to preliminarily enjoin a merger, that Revlon duties applied to a stock and cash transaction in which 50% of the consideration is cash and 50% of the consideration is stock but noting that the matter is “not free from doubt” because the Supreme Court “has not yet addressed this issue directly”).
• **In re Synthes, Inc. S’holder Litig.,** 50 A.3d 1022, 1048 (Del. Ch. 2012) (stating that a mixed consideration deal of 65% stock—in a widely traded, public company—and 35% cash did “not qualify as a change of control under our Supreme Court’s precedent” and, therefore, did not implicate Revlon).

• **But see Steinhardt v. Howard Anderson,** C.A. No. 5878-VCL, tr. at 4 (Del. Ch. Jan. 24, 2011) (TRANSCRIPT) (suggesting, but not holding, in context of transaction involving 50% stock and 50% cash that Revlon should apply regardless of the composition of consideration because there is a “final stage transaction,” meaning “[t]his is the only chance that [target] stockholders have to extract a premium, both in the sense of maximizing cash now, and in the sense of maximizing their relative share of the future entity’s control premium”).

(f) **Post-Signing.** **McGowan v. Ferro,** 859 A.2d 1012 (Del. Ch. 2004) (expressing doubt that Revlon applied to post-bid negotiations when there was “no evidence of any alternative value maximizing transaction” but finding that, even if Revlon standard of enhanced scrutiny applied, directors satisfied their fiduciary duties).

(g) **Change in Control Considered but not Effected.**

• **Arnold v. Soc. for Sav. Bancorp, Inc.,** 650 A.2d 1270 (Del. 1994) (finding that, although the market was initially canvassed for potential acquirors of the whole company, Revlon was not implicated because the board did not initiate an active bidding process and the resulting transaction did not involve a change in control).

• **Wells Fargo & Co. v. First Interstate Bancorp,** Cons. C.A. Nos. 14696, 14623, 1996 Del. Ch. LEXIS 3 (Del. Ch. Jan. 10, 1996) (holding that Revlon did not apply because no change in control occurred in the transaction, and stating “the fact that, as alleged, the First Interstate board talked to a number of other transaction-partners does not itself constrain the usual scope of board authority and does not invoke . . . special duties”).

• **In re NCS Healthcare, Inc. S’holders Litig.,** 825 A.2d 240 (Del. Ch. 2002), rev’d on other grounds, 818 A.2d 914 (Del. 2003) (stating “a Revlon analysis is not implicated solely by seeking to conduct an auction that, if successful, might end with a change in control,” and holding that because the transaction ultimately approved did not involve a sale or change in control, Revlon was not implicated even though the board originally initiated a “stalking horse” strategy).
(h) Review of a Board Decision Not to Engage in a Sale Process.

- **TW Services, Inc. v. SWT Acquisition Corp.,** C.A. Nos. 10427, 10298, 1989 Del. Ch. LEXIS 19 (Del. Ch. Mar. 2, 1989) (stating, in the context of an unsolicited offer to purchase a company at a 50% premium rejected by the board (after consulting with its financial advisor) in order to pursue the company’s long-term strategy, that “[i]nsofar as [the buyer’s offer] constitutes a proposal to negotiate a merger, I understand the law to permit the board to decline it, with no threat of judicial sanction providing it functions on the question in good faith pursuit of legitimate corporate interests and advisedly”).

- **Paramount Commcn’s v. Time, Inc.,** 571 A.2d 1140 (Del. 1990) (finding that a board, that had signed up a merger agreement with another party, was under “no obligation” to negotiate with an unsolicited bidder and stating that “[d]irectors are not obliged to abandon a deliberately conceived corporate plan for a short-term shareholder profit unless there is clearly no basis to sustain the corporate strategy”).

- **Kahn v. MSB Bancorp, Inc.,** C.A. No. 14712, 1998 Del. Ch. LEXIS 112 (Del. Ch. July 16, 1998) (applying the business judgment rule to a board’s decision to reject an unsolicited expression of interest in acquiring the company made after the company had signed an agreement to purchase certain assets and stating “there was no defensive action. The board merely voted not to negotiate the merger offer. . . . Because the board’s actions were not defensive and were authorized by statute, . . . it is particularly appropriate to apply the business judgment presumption in this case.”).

- **Phelps Dodge Corp. v. Cyprus Amax Minerals Co.,** C.A. No. 17427, 1999 Del. Ch. LEXIS 202 (Del. Ch. Sep. 27, 1999) (holding that a target board, that had already approved a merger agreement with another buyer, had no duty to negotiate with an unsolicited third-party bidder, so long as it did so on an informed basis; stating “[a] target can refuse to negotiate . . . but it should be informed when making such refusal”).

- **Lyondell Chemical Co. v. Ryan,** 970 A.2d 235 (Del. 2009) (stating that a board’s decision to adopt a “wait and see” approach—i.e., not putting the company up for sale or instituting defensive measures—after it learned of a potential buyer’s interest in purchasing the company “was an entirely appropriate exercise of the directors’ business judgment”).

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• *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (concluding that a board’s decision to reject bids from potential buyers and instead implement a management-sponsored reclassification to take the company private would be reviewed for entire fairness because a majority of the directors were interested in the going-private transaction, but also stating that “a board’s decision not to pursue a merger opportunity is normally reviewed within the traditional business judgment framework. In that context the board is entitled to a strong presumption in its favor, because implicit in the board’s statutory authority to propose a merger, is also the power to decline to do so.”).

• Hostile Tender Offer Rejected by Board. The Court of Chancery has also held that *Revlon* will not apply when a board resists a hostile offer by adopting or maintaining a rights plan, unless the board initiates an alternative transaction that constitutes a change in control. See *Air Products and Chemicals, Inc. v. Airgas, Inc.*, C.A. No. 5249-CC, 2011 Del. Ch. LEXIS 22 (Del. Ch. Feb. 15, 2011) (holding that only *Unocal* (discussed below), and not *Revlon*, applies when a board determines to reject an unsolicited tender offer, declines to redeem the company’s rights plan in response to the offer, declines to put the company up “for sale,” and instead pursues its long-term business plan for the company). The Court approvingly cited *TW Services* and distinguished the facts before it from a circumstance where, in response to a hostile offer, a board initiates a transaction that constitutes a change in control (citing *Paramount Commc’ns, Inc. v. Time, Inc.*, 571 A.2d 1140 (Del. 1995), *Grand Metro Pub. Ltd. Co. v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988), and *Capital City Assocs. Ltd. P’ship v. Interco Inc.*, 551 A.2d 787 (Del. Ch. 1988)).

2. **How is value maximized?**

• Generally, there is “no single blueprint” to maximizing value. *Barkan v. Amsted Indus., Inc.*, 567 A.2d 1279, 1286 (Del. 1989). Thus it has been noted that directors may exercise their business judgment whether value should be maximized through an auction or other shopping process. *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (“Whether it is wiser for a disinterested board to take a public approach to selling a company versus a more discreet approach relying upon targeted marketing by an investment bank is the sort of business strategy question Delaware courts ordinarily do not answer.”). See also *In re Netsmart Technologies, Inc. S’holders Litig.*, C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35, at *72 (Del. Ch. Mar. 14, 2007) (“The ‘no single blueprint’ mantra is not a one way principle. The mere fact that a technique was used in different market circumstances by another
board and approved by the court does not mean that it is reasonable in other circumstances that involve very different market dynamics”); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 242 (Del. 2009) (“No court can tell directors exactly how to … [satisfy their Revlon duties], because they will be facing a unique combination of circumstances many of which will be outside their control.”); *Wayne County Employees’ Retirement Sys. v. Corti*, C.A. No. 3534-CC, 2009 Del. Ch. LEXIS 126, at *53 (Del. Ch. July 24, 2009) (“Revlon does not proscribe any specific steps that must be taken by a board before selling a company.”).

- A post-signing market check may be an acceptable method for maximizing value. See *In re Fort Howard Corp. S’holders Litig.*, C.A. No. 9991, 1988 Del. Ch. LEXIS 110 (Del. Ch. Aug. 8, 1988) (although special committee of independent directors did not conduct an auction prior to signing agreement, it fulfilled its fiduciary duties by negotiating provisions intending to permit an effective check of the market prior to closing of the transaction); *In re Pennaco Energy, Inc. S’holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (board met its fiduciary duties by aggressively negotiating with a single bidder and insuring that transaction was subject to a post-signing market check unobstructed by onerous deal protection measures that would impede a topping bid); *In re MONY Group Inc. S’holders Litig.*, 852 A.2d 9 (Del. Ch. 2004) (holding that board’s decision to limit merger negotiations to one bidder and to rely on a five month, post-signing market check complied with Revlon and was reasonable in light of the company’s circumstances); *Lyondell Chem. Co. v. Ryan*, 970 A.2d 235, 244 (Del. 2009) (A board’s decision to rely on a post-signing market check to satisfy its Revlon duties was not made in bad faith where the board: (1) met several times to consider a premium offer, (2) was generally aware of the value of the company and the market in which the company operated, (3) solicited and followed the advice of its financial and legal advisors, (4) attempted to negotiate a higher offer even though all of the evidence indicated that the offer was a “blowout” price, and (5) approved the merger agreement “because it was simply too good not to pass along [to the stockholders] for their consideration.”); *In re 3Com S’holders Litig.*, C.A. No. 5067-CC, 2009 Del. Ch. LEXIS 215 (Del. Ch. Dec. 18, 2009) (denying a motion for expedited discovery related to Hewlett-Packard’s strategic acquisition, with a 4% break fee and matching rights, negotiated without a pre-signing market check, because the disclosure claims were unpersuasive, the protective provisions “have been repeatedly upheld by this court” as standard and “not per se unreasonable,” the plaintiff failed to demonstrate how such provisions would stifle another bid, and the Court pointed to the “notable absence of any other interested bidders”);
In re Plains Exploration & Production Co. S’holder Litig., Consol. C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013) (denying motion for a preliminary injunction of a merger between two natural resource companies where the board pursued a single-bidder strategy, with a post-signing window shop, where the directors met multiple times to consider the proposed merger, the merger agreement’s other deal protections were not “onerous” and the target had received no topping bids in the five months since execution of the merger agreement).

• But see Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013) (holding that, although the board was permitted under Revlon to use a “one-bidder” strategy, the plaintiffs had shown a reasonable probability of success on the merits—but denying an injunction on other grounds—on their claim that a board of directors breached its Revlon duties where the board (i) did not conduct a pre-signing market check, (ii) agreed to a post-signing window shop with a short (approximately two month) period between execution of the merger agreement and the closing of the transaction, (iii) did not waive “don’t-ask-don’t-waive” standstill provisions with potential private equity buyers prior to entering into the merger agreement, which prohibited waiver of the standstills and (iv) relied upon a “weak” fairness opinion).

• The court may be suspicious of a merger with a private equity buyer if the post-signing market check is in the form of a passive “no shop” with a fiduciary out, at least when management has an interest in continuing on with the business and a board has not sufficiently analyzed the existence of other potential bidders. Compare Forgo v. Health Grades, Inc., C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (denying motion for preliminary injunction but explaining that plaintiffs demonstrated a probability of success on the merits where record did not establish adequate support for failing to contact other potential bidders and where buyer and management had “very comfortable” relationship) with In re Dollar Thrifty S’holder Litig., 14 A.3d 573 (Del. Ch. 2010) (denying a motion for a preliminary injunction where a board pursued a single-bidder strategy with a strategic buyer and did not reach out to another strategic that had made overtures in the past, where the latter had “walked” from past discussions and faced financial and antitrust constraints, and where board agreed to a “relatively lenient” no-shop with match rights, a lengthy period between signing and the stockholder vote, and a 3.9% termination fee); In re Atheros Comm’ns., Inc., C.A. No. 6124-VCN, Noble, V.C., slip. op. (Del. Ch. Mar. 4, 2011) (denying a motion for a preliminary injunction with respect to Revlon claims where a target
board—after being approached by a strategic buyer, considering other strategic and financial buyers with its financial advisor, contacting three potential buyers, and signing an exclusivity agreement with the initial suitor after two of the parties declined a transaction and one responded slowly in a manner that the board believed jeopardized the bird in hand—signed a merger agreement containing no-shop and match right provisions and providing for a termination fee of 3.3% of deal value; see also In re Netsmart Technologies, Inc. S’holders Litig., C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35 (Del. Ch. Mar. 14, 2007) (finding that in the context of a sale of a micro-cap public company, where the record did not support any basis for financial advisor’s concurrence with management that post-signing market check would turn up any would-be bidders, “an inert, implicit post-signing market check does not . . . suffice as a reliable way to survey interest by strategic players”).

A post-signing market check may take the form of a “go-shop” allowing the target affirmatively to contact potential acquirors for a specified period of time. E.g., In re Lear Corp. S’holders Litig., Consol. C.A. No. 2728-VCS, 2007 Del. Ch. LEXIS 88 (Del. Ch. June 15, 2007) (finding overall approach to Revlon duties, including foregoing broad pre-signing auction process and instead entering into merger agreement providing for 45-day go-shop period, reasonable in light of (a) limited pre-signing market check directed solely to financial buyers, (b) prior elimination of the target’s rights plan, (c) previous equity investments made by investor that indicated that target could have been in play, and (d) market premium represented by “bird in hand”); In re The Topps Co. S’holders Litig., Cons. C.A. Nos. 2786-VCS, 2998-VCS, 2007 Del. Ch. LEXIS 82 (Del. Ch. June 14, 2007) (board’s decision to take “bird-in-hand” proposal that permitted 40-day go-shop period was reasonable in light of (a) board’s skepticism that auction process would result in more attractive proposal, (b) fact that bird-in-hand suitor indicated it would withdraw its offer if auction commenced, and (c) board’s concern about effect of failed auction); see also Miramar Firefighters Pension Fund v. AboveNet, C.A. No. 7376-VCN, 2013 WL 4033905, at *7-8 (Del. Ch. July 31, 2013) (holding that, unlike Netsmart, the board was allowed to conduct a post-signing, 30-day go-shop to actively solicit strategic bidders; plaintiff’s allegations that the board intended to conduct a “sham go-shop” by hiring a financial advisor who had never conducted one before, and that the “delay in soliciting strategic acquirers prejudiced the sales process,” were insufficient to show that the board had failed to canvass the market for strategic buyers).
• Initial bid may be pre-emptive. See Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989) (holding that when “directors possess a body of reliable information with which to evaluate the fairness of a transaction, they may approve [a] transaction without conducting an active survey of the market”).

• In re BJ’s Wholesale Club, Inc. S’holders Litig., C.A. No. 6623-VCN, 2013 WL 396202, at *9 (Del. Ch. Jan. 31, 2013) (rejecting complaint that “it took only ten days” for a target to decide not to entertain an expression of interest by noting that “Delaware law does not require that a board consider a proposal for a certain length of time” and by stating that, “at best” such a complaint states a duty of care claim that would be exculpated under target’s 102(b)(7) provision).

3. **What is reasonable varies with the circumstances.**

• *Golden Cycle, LLC v. Allan*, C.A. No. 16301, 1998 Del. Ch. LEXIS 237 (Del. Ch. Dec. 10, 1998) (“I am not prepared to say that the board had a duty to call [a previously interested bidder] to inquire whether it was ready to raise its bid. The board had some justifiable concern that calling [the previously interested bidder] would risk losing the transaction with [the current high bidder], with whom they had an exclusive dealing agreement.”).

• *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (holding that directors did not fail to maximize value by proceeding with a year-long publicly announced search for strategic alternative, pursuing in particular a sale of a single division, and then offering to sell the whole company to the final bidders for the single division).


• *Wayne County Employees’ Retirement Sys. v. Corti*, C.A. No. 3534-CC, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009) (finding that plaintiffs’ failed to state a *Revlon* claim premised on a breach of the duty of good faith where: (1) a corporation’s board of directors formed a committee of outside directors to oversee the sale process, (2) the board of directors and the committee met
several times in the months leading up to the transaction, (3) the board of directors regularly evaluated financial reports and analysis, (4) no alternative bidder emerged in the roughly seven-month period between signing and closing of the transaction, and (5) the board of directors received a fairness opinion from its financial advisor, which had been advising the board throughout the sale process).

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_forgo v. health grades, inc., c.a. no. 5716-vcs (del. ch. sept. 3, 2010)_ ("i’m not asking anybody to go on ebay. that’s not what revlon says. but . . . the board[] . . . didn’t position itself. it didn’t . . . sift through possible strategic and private equity buyers and make a judgment about whether there might be someone who would be interested” before signing a merger with a private equity buyer, subject to a no-shop with fiduciary out).

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_in re smurfit-stone container corp. s’holder litig., 2011 del. ch. lexis 79 (del. ch. may 20, 2011)_ (board had reasonable basis to conclude that pre-signing market check was unnecessary because (1) company had gone through functional equivalent of market check when it was available for sale during recently concluded bankruptcy proceedings, (2) no bidders responded to company’s post-bankruptcy attempt to sell certain operating assets, (3) industry was aware company was a takeover target, (4) only other unsolicited bidder had made much lower offer and refused to increase it, and (5) company’s financial advisor opined that merger price was fair).

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_in re openlane, inc. s’holders litig., 2011 wl 4599662 (del. ch. sept. 30, 2011)_ (holding that, although sale process of board of a small-cap company traded OTC on the pink sheets “was not a model to be followed,” plaintiffs failed to show a reasonable likelihood of success on their revlon claim where board: (1) “performed a targeted market check over the course of about a year, and seriously pursued transactions with two legitimate strategic buyers”; (2) had not received a fairness opinion, but had used advice, albeit partly stale advice, from a financial advisor to make its decision to enter into merger agreement; (3) had not sought out any financial buyers based in part on the view of two directors active in the PE community that the company would not be an attractive target to a financial acquiror; and (4) possessed “impeccable knowledge” of the company).

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_in re Synthes, inc. s’holder litig., 50 a.3d 1022, 1045 (del. ch. 2012)_ (rejecting plaintiffs’ argument “that the duty of loyalty required the [target] board to be more brazen” and reach out to one bidder again to seek a higher price even after the other bidder had
not matched its earlier bid; “[e]ven when Revlon applies, it requires only that a board take reasonable measures to ensure that it gets the highest price reasonably attainable. It does not require the board to engage in deceptive or even edgy negotiating tactics. Such tactics are not only unseemly, but also have real economic costs”).

• In re Micromet, Inc. S’holder Litig., C.A. No. 7197-VCP, 2012 Del. Ch. LEXIS 41 (Del. Ch. Feb. 29, 2012) (denying motion to enjoin tender offer and finding sale process at a development stage drug company was likely reasonable where board (i) conducted a targeted market check of seven strategic buyers that had expressed prior interest in partnering to develop the company’s most promising drug and who had the financial capacity to undertake the acquisition and bring the drug to market, (ii) eschewed contacting private equity buyers where target needed both capital and technical expertise to bring its drugs to market, (iii) limited the due diligence period to one week given that six of the seven potential bidders had conducted prior diligence related to the target’s leading drug candidate and (iv) entered into a merger agreement with a no-shop period).

• In re Celera Corp. S’holder Litig., C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012) (in the context of approving a settlement of derivative litigation, (i) stating that plaintiffs’ Revlon claims challenging a sale process that did not involve a full canvass of all potential bidders immediately before signing up the deal had “some merit” and that a “sale process” running from 2009 to 2011 could be reasonably characterized as “a series of attempted and aborted negotiations” and (ii) suggesting that by 2011, the market might have thought that the target’s willingness to sell itself in 2009 was stale, but noting that the failure to do a full market check was not necessarily unreasonable and recognizing that over the course of 2009-2011, the board had “accumulated a wealth of information about the Company’s inherent value and the state of the market”).

• In re Comverge Inc. S’holder Litig., C.A. No. 7368-VCP (Del. Ch. Apr. 27, 2012) (TRANSCRIPT) (granting a motion to expedite process claims where the company had been shopped pre-signing and the merger agreement contained a go-shop provision, but the tender offer price was below the pre-announcement market price and below prior indications of interest; stating that plaintiffs made a colorable argument that accepting the lower price would have been unreasonable if, as plaintiffs alleged, the target had the ability to prevent a liquidity crisis—allegedly justifying accepting the below market price bid—at the company brought about by a
threatened acceleration of certain notes held by an affiliate of the acquiror); see also In re Converge Inc. S’holder Litig., C.A. No. 7368-VCP (Del. Ch. May 8, 2012) (TRANSCRIPT) (denying preliminary injunction and concluding that although the “objective reasonableness” of the target board’s decisions was “not clear,” plaintiffs had not shown a reasonable probability of success in light of the lengthy market check, aggressive negotiations with the acquiror and refusal to grant exclusivity).

• In re Novell, Inc. S’holder Litig., Consol. C.A. No. 6032-VCN, 2012 WL 6761917 (Del. Ch. Jan. 3, 2013) (denying motion to dismiss plaintiffs’ claims that outside directors breached their fiduciary duties by “treat[ing] a serious bidder in a materially different way and that approach might have deprived shareholders of the best offer reasonably attainable” in connection with a sale of the company transaction where target corporation’s financial advisor contacted over fifty potential buyers in a pre-signing market check, but plaintiffs alleged that (1) the board treated two bidders who had submitted roughly comparable bids—the eventual winning bidder and “Party C”—differently by permitting the winning bidder, but not Party C, to partner with other investors and by providing the winning bidder, but not Party C, with certain information that, if known to Party C, might have led to an increased bid and (2) one director who was previously affiliated with one of the winning bidder’s partners provided information regarding confidential board deliberations to his former affiliate; noting that the board “could have dealt with bidders differently if the shareholders’ interests justified such a course,” but that the court could not determine if such reasons existed on a motion to dismiss).

• But cf. In re BJ’s Wholesale Club, Inc. S’holders Litig., C.A. No. 6623-VCN, 2013 WL 396202, at *8 n.75 (Del. Ch. Jan. 31, 2013) (distinguishing Novell and granting a motion to dismiss complaint alleging that the target board treated strategic competitor “Party A” differently from the financial acquiror by explaining that the BJ’s board “was making an initial assessment, in its business judgment,” whether Party A’s expression of interest was serious and “raised serious regulatory issues,” while the board in Novell provided an “asymmetrical distribution of information . . . after the board had determined that the bidder was a serious participant”).

• Miramar Firefighters Pension Fund v. AboveNet, C.A. No. 7376-VCN, 2013 WL 4033905, at *7 (Del. Ch. July 31, 2013) (finding, on a motion to dismiss, that the board’s decision to offer financing to private equity buyers and not to the strategic buyer who eventually acquired the corporation was “reasonably justified”
because the strategic buyer either did not need the financing or had found it elsewhere, and further noting that no facts existed that the financing would have caused the buyer to raise its offer price; “[t]hus, it is not reasonably conceivable that the shareholders were deprived of the best price reasonably attainable”).

4. **Revlon not a guarantee that stockholders receive “highest” price.**

- *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, C.A. No. 6623-VCN, 2013 WL 396202, at *9 (Del. Ch. Jan. 31, 2013) (upholding target board’s decision to approve a merger with a financial acquiror rather than pursue a higher indication of interest from strategic competitor “Party A,” in part because “the Board had legitimate concerns about the potential antitrust risks”; recognizing that “[i]f regulatory approval is denied or drawn out in a costly delay, then a higher price does not necessarily mean a greater return for stockholders”).

- *In re BJ’s Wholesale Club, Inc. S’holders Litig.*, C.A. No. 6623-VCN, 2013 WL 396202, at *7 (Del. Ch. Jan. 31, 2013) (though a target was considering a sale of the company, [i]t had no obligation under its *Revlon* duties to pursue this fundamentally different proposal [i.e., that the target should instead effect a recapitalization, pay a dividend and itself acquire a subsidiary of “Party B”] based upon Party B’s speculative estimation of what the value of such a transaction would be worth,” apparently exceeding the merger price).

- *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573 (Del. Ch. 2010) (refusing to grant a preliminary injunction against a transaction, even though a competing bidder had submitted an indication of interest with a higher price, where the competing bidder faced antitrust and financing constraints and refused to agree to a reverse termination fee).

- *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (“Critically, in the wake of Revlon, Delaware courts have made clear that the enhanced judicial review Revlon requires is not license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith.”).

- *Optima Int’l of Miami, Inc., v. WCI Steel, Inc.*, C.A. No. 3833-VCL, tr. at 24 (Del. Ch. June 27, 2008) (TRANSCRIPT) (denying plaintiffs’ application for a preliminary injunction even though the corporation’s board of directors did not choose the highest bidder for the sale of the corporation where contractual constraints made
it highly unlikely that a transaction with the highest bidder could be consummated).


- Malpiede v. Townson, C.A. No. 15943 (Del. Ch. Sept. 29, 1997) (TRANSCRIPT) (“[R]ules of the game are not that the highest offer always wins no matter what the circumstances. This Court will intervene, but only if there is some showing measured by some appropriate evidentiary standard that the lower price was the product of a breach of fiduciary duty. It will not intervene if the price is merely the product of a complex business judgment which itself was the product of highly unusual circumstances.”).

- Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1994) (“A court applying enhanced judicial scrutiny should be deciding whether directors make a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second guess that choice even though it might have decided otherwise or subsequent events have cast doubt on the board’s determination.”).

5. Directors may be found to act unreasonably under Revlon if they permit their financial advisors to proceed with conflicts in a manner that may taint the sale process.

- In re El Paso Corp. S’holder Litig., 41 A.3d 432 (Del. Ch. 2012) (concluding that plaintiffs had shown a reasonable probability of success on their Revlon claims challenging a merger where, among other issues, (1) target board retained target’s longtime investment bank to represent the target in connection with a spin-off that was being considered as the main alternative to the merger where the financial advisor held a disclosed $4 billion stake in the acquiror and the lead banker on the financial advisor’s team representing the target held an undisclosed $340,000 stake in the acquiror and (2) the valuation advice and tactics of a second financial advisor retained to advise target in connection with the merger—to “cleanse” any conflict of the longtime advisor—were “questionable” because, at the insistence of the target’s longtime banker, the second financial advisor was not entitled to any fee in connection with the spin-off; declining to enjoin the merger
because the balancing of the harms weighed against issuing an injunction).

- In re Del Monte Foods Co. S’holders Litig., C.A. No. 6027-VCL, 2011 Del. Ch. LEXIS 30 (Del. Ch. Feb. 14, 2011) (enjoining a stockholder vote on a merger for 20 days, and the application of no-solicitation, match-right, and termination fee provisions relating to topping bids during that period, and holding that plaintiffs had a reasonable probability of success in showing that directors breached their fiduciary duties under Revlon, where: (1) the target board’s financial advisor, “secretly and selfishly manipulated the sale process” by seeking permission from the board to provide buy-side financing before a price was agreed upon with the buyers, failing to disclose that it had sought to provide such financing from the beginning of the process, and, in further concealment from the board, pairing bidders in a manner that violated “no-teaming” provisions in the bidders’ confidentiality agreements and limited price competition between bidders (one of whom, KKR, was a significant client of the advisor), and (2) the board, although unaware of the extent of the advisor’s activities, approved its request to provide buy-side financing, in the absence of any need to do so, permitted the advisor to continue to run the process, including the go-shop period, and approved the pairing orchestrated by the advisor; also holding that there was a reasonable probability that KKR, as buyer, aided and abetted the directors’ breaches).

- In re Ness Technologies, Inc. S’holders Litig., C.A. No. 6569- VCN, 2011 Del. Ch. LEXIS 107 (Del. Ch. Aug. 3, 2011) (holding that plaintiffs “possibly” stated colorable price/process and disclosure claims that the target corporation’s financial advisors suffered from conflicts of interest that impaired their ability to render impartial fairness opinions given statements in the proxy that the advisors had in the past provided, and would continue to provide, financial advisory and financing services to the acquiror).

- In re Rural Metro Corp. S’holders Litig., C.A. No. 6350-VCL (Mar. 7, 2014) (finding the Rural Metro board’s financial advisor liable for aiding and abetting board’s breach of its duty of care by providing sell-side funding while pursuing a role in a related M&A transaction and favoring bidders from the parallel transaction if they used the financial advisor for buy-side financing in a bid for Rural Metro; the Court of Chancery observed that plaintiffs had the burden of proof on all elements of the aiding and abetting claim, including the existence of a breach of fiduciary duty, because they already settled with the director defendants, but the “highly compensated [financial] advisors on whom the directors are
entitled (and encouraged) to rely” could not claim the affirmative
defense of a 102(b)(7) exculpatory provision; “the prospect of
aiding and abetting liability for investment banks who induce
boards of directors to breach their duty of care creates a powerful
financial reason for the banks to provide meaningful fairness
opinions and to advise boards in a manner that helps ensure that
the directors carry out their fiduciary duties when exploring
strategic alternatives and conducting a sale process . . . . Another
part of providing active and direct oversight is acting reasonably to
learn about actual and potential conflicts faced by directors,
management, and their advisors. . . . Because of the central role
played by investment banks in the evaluation, exploration,
selection, and implementation of strategic alternatives, directors
must act reasonably to identify and consider the implications of the
investment banker’s compensation structure, relationships, and
potential conflicts. . . . It was during the final stages of the
negotiations between Rural and [its eventual acquiror] that direct
and active oversight by independent directors was needed most.
[the financial advisor] led this phase of the negotiations, which
forced [the financial advisor] to confront powerfully conflicting
incentives. Although a contingent compensation arrangement that
pays an agent a percentage of deal value generally will align the
interests of the agent in getting more compensation with the
principal’s desire to obtain the best value, the interests of the agent
and principal diverge over whether to take the deal in the first
place. The agent only gets paid if the deal happens, but for the
principal, the best value may be not doing the deal at all. The same
divergent interests play out on a smaller scale during final
negotiations over price. The contingently compensated agent has a
greater incentive to get the deal done rather than push for the last
quarter, particularly if pushing too hard might jeopardize the deal
and if the terms on offer are already defensible. If the agent is a
repeat player, the agent can generate greater aggregate
compensation by completing more total transactions with slightly
less compensation on each deal. When the opposite side in the
negotiation is a repeat player that has used and could continue to
use the agent’s services, then the incentives to maintain goodwill
and not push too hard become all the greater.” The court criticized
the special committee for failing to provide guidance, make
inquiries, or impose practical checks on the financial advisor’s
financing activities. “Because the Board’s financial advisors did
not provide the directors with valuation materials until the final
board meeting, just hours before the merger was approved, the
directors did not have an opportunity to examine those materials
critically and understand how the value of the merger compared to
Rural’s value as a going concern [and] . . . there was no time to seek follow-up information or probe inconsistencies.”

D. **Unocal.** In *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), the Court held that when a board unilaterally—i.e., without stockholder approval—adopts defensive measures, it must establish that the board had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and that its response to that threat was reasonable. This rule is generally applied to mergers that are designed to fend off hostile bids to acquire the corporation.

1. **Some cases have indicated that deal protections have the effect of fending off competing offers and are therefore “defensive.”** Thus, even where the heightened standard of *Revlon* does not apply, courts may apply the heightened *Unocal* standard to deal protections.

   - *In re Santa Fe Pac. Corp. S'holders Litig.*, 669 A.2d 59 (Del. 1995) (applying enhanced judicial scrutiny under *Unocal* to board’s entering into a joint tender offer with acquiror, adopting a poison pill rights plan exempting one bidder, amending the pill to allow one bidder to increase its ownership, and authorizing a stock repurchase program).

   - *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, C.A. No. 17398, 1999 Del. Ch. LEXIS 202, at *5 (Del. Ch. Sept. 27, 1999) (indicating that *Unocal* would apply to board’s decision to enter into a merger agreement containing a 6.3% termination fee, stating that such fee “certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point”).

   - *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 108 (Del. Ch. 1999) (“When corporate boards assent to provisions in merger agreements that have the primary purpose of acting as a defensive barrier to other transactions not sought out by the board, some of the policy concerns that animate the *Unocal* standard of review might be implicated. In this case, for example, if [the no-talk provision of the merger agreement] is read as precluding board consideration of alternative offers—no matter how much more favorable—in this non-change of control context, the [target] board’s approval of the Merger Agreement is as formidable a barrier to another offer as a non-redeemable poison pill.”).

   - *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (applying *Unocal* standard of enhanced scrutiny to board’s adoption of deal protections when such “defensive measures” were challenged in context of competing higher bid; declining to determine whether *Revlon* applied).
• *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009) (finding that *Unocal* did not apply to a board’s rejection of a friendly merger offer because the rejection of a merger offer is not a defensive action in the absence of any hostile takeover attempt or similar threatened conduct).

• *Gaines v. Narachi*, C.A. No. 6784-VCN, 2011 Del. Ch. LEXIS 145 (Del. Ch. Sept. 30, 2011) (denying motion to expedite brought by stockholder of *acquiror* and holding that *Unocal* was not implicated when acquiror rejected a third-party’s unsolicited offer to buy acquiror as an alternative to an already-signed merger agreement in which acquiror agreed to acquire target and issue to target’s stockholders 39% of the combined entity and which included “relatively routine” deal protections because the third-party had not emerged at the time the deal protection provisions were instituted; *Revlon* was not implicated because there was no change of control).

• *Reis v. Hazelett Strip-Casting Corp.*, 2011 WL 303207 (Del. Ch. Jan. 21, 2011) (stating that “Delaware has three tiers of review for evaluating director decision-making” and discussing *Unocal* review and *Revlon* review each as an example of the same “intermediate standard of review,” i.e., “enhanced scrutiny”).

• *High River Ltd. P’ship v. Dell Inc.*, C.A. No. 8762-CS, tr. at 16, 25-26 (Del. Ch. Aug. 16, 2013) (TRANSCRIPT) (denying plaintiff’s motion to expedite fiduciary duty claims arising from the special committee’s decision to set a new meeting date to consider plaintiff’s slate of directors and proposed recapitalization plan separate from the meeting to consider defendants’ proposed management-led buy-out merger; no argument existed under “*Unocal*, *Blasius* or some hybrid claim,” that the special committee’s decision was coercive, preclusive or disenfranchised the stockholders; rather, the special committee’s purpose was to enfranchise a new stockholder base that had been excluded due to a “stale” record date: “What the moving plaintiff is essentially trying to get the Court to do is usurp the authority of the special committee’s conduct of a value maximization process by setting a court-mandated meeting at which two separate votes have to be taken on the same day. . . . Having provided the Court with no colorable basis to conclude that the special committee has acted in anything other than good faith, and having provided the Court with no rational basis to believe that the board’s chosen approach will coerce stockholders into voting for a suboptimal merger or preclude a genuine topping bid or the election of the [plaintiff] group’s slate at an annual meeting, if the stockholders choose to
reject the merger, it would be inconsistent with equity to intrude at this sensitive time”).

2. Other cases have suggested that, outside of Revlon, the business judgment rule is the appropriate standard to apply.

- In re IXC Communication, Inc. S’holders Litig., C.A. Nos. 17324, 17334, 1999 Del. Ch. LEXIS 210, at *20 (Del. Ch. Oct. 27, 1999) (refusing to accept contention that a board consisting of three of the largest individual shareholders would actively shirk their fiduciary duties and in the process ignore their own economic self interest by not shopping the company, Court held that “[a]bsent convincing evidence that the board skewed the process in order to prevent a shareholder from voting knowledgeably and intelligently on the merger agreement, no court should apply an artificial barrier to market consideration of that business judgment”).

- McMillan v. Intercargo Corp., 768 A.2d 492 (Del. Ch. 2000) (in appearing to apply the business judgment rule, stating “[i]n contrast to the usual Revlon/Unocal case involving defendants who have resisted a sale, this complaint attempts to state a claim against a board with a disinterested majority that engaged an investment banker to search for strategic buyers, that consummated a merger agreement with a third-party purchaser, and that put up no insuperable barriers to a better deal.”).

- In re MONY Group Inc. S’holders Litig., 853 A.2d 661 (Del. Ch. 2004) (holding that Unocal did not apply when none of the directors were to retain positions with the surviving company; explaining that Unocal (and potentially Blasius) review are implicated when a board acts to impede the stockholder franchise and the board’s control of the corporation is at risk).

E. Blasius. In Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988), the Delaware Court of Chancery held that a board’s action in adding two new members to the board in order to thwart a consent solicitation seeking to take control of the board was invalid even though the board may have acted in good faith and with appropriate care. The Blasius standard applies to board actions taken with the “primary purpose of preventing or impeding” a stockholder vote. Such action will be found invalid unless the board has a compelling justification for thwarting the stockholder vote.

- In Mercier v. Inter-Tel, Inc., 929 A.2d 786 (Del. Ch. 2007), the Delaware Court of Chancery applied the Blasius standard of review to a board’s decision to postpone a stockholder vote on a merger. However, in this case the Court noted that where it was clear that the merger was about to be voted down the Unocal
standard of review might be more appropriate, and analyzed the board’s action under that standard as well. If *Unocal* applied, the Court stated that the directors postponing the vote would bear the burden of showing a legitimate corporate objective for postponing the meeting. As part of that burden, the board would have to prove that its motivation was proper and not selfish, and “[t]o ultimately succeed, the directors must show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way.” Id. at *69. The Court also applied the more traditional *Blasius* compelling justification test to the directors’ actions and held: “In the corporate context, compelling circumstances are presented when independent directors believe that: (1) stockholders are about to reject a third-party merger proposal that the independent directors believe is in their best interests; (2) information useful to the stockholders’ decision-making process has not been considered adequately or not yet been publicly disclosed; and (3) if the stockholders vote no, the acquiror will walk away without making a higher bid and that the opportunity to receive the bid will be irretrievably lost.” Id. at *95. The Court ultimately found that, under either standard of review, the board satisfied its fiduciary duties when it acted to postpone the vote on the merger.

F. **Duties to Creditors.**

- In *North American Catholic Educational Programming Foundation, Inc. v. Gheewalla*, 930 A.2d 92, 101-03 (Del. 2007), the Delaware Supreme Court held that directors of an insolvent corporation or a corporation in the “zone of insolvency” do not owe direct fiduciary duties to creditors. However, the Court held that “creditors of an insolvent corporation” take the place of stockholders as residual beneficiaries of any increased value and may maintain derivative suits against directors on behalf of the corporation. *Id.* at 101-02. See also *Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corp.*, 805 A.2d 221 (Del. Ch. 2002) (refusing to enjoin merger where creditors of insolvent surviving corporation claimed that directors breached fiduciary duties to noteholders and preliminarily concluding that business judgment rule applied and protected the directors’ decisions from such claims of creditors).

- Although *Gheewalla* did not address explicitly whether creditors of a corporation in the zone of insolvency may maintain derivative suits against directors on behalf of the corporation, in *Production Resources Group, L.L.C. v. NCT Group, Inc.*, C.A. No. 114-N (Del. Ch. Nov. 17, 2004), the Court of Chancery held that directors
in the zone of insolvency have the protection of the business judgment rule and that Section 102(b)(7) limits the liability of directors when creditors’ claims are derivative. See also Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 195 n.75 (Del. Ch. 2006) (“The judicial decisions indicating that directors owe fiduciary duties to the firm when it is insolvent . . . seem to [be] . . . a judicial method of attempting to reinforce the idea that the business judgment rule protects the directors of solvent, barely solvent, and insolvent corporations, and that the creditors of an insolvent firm have no greater right to challenge a disinterested, good faith business decision than the stockholders of a solvent firm.”).

- In one of Vice Chancellor Laster’s first bench rulings, he stated that Trenwick held that it was a question within the “business judgment” of directors of an equitably insolvent corporation whether or not to consider creditor interests. Global Asset Capital, LLC v. Rubicon US REIT, Inc., C.A. No. 5071-VCL, tr. at 59 (Del. Ch. Nov. 16, 2009) (TRANSCRIPT) (“You will not be held to have breached your duty of loyalty to stockholders if you do consider creditors’ interests. In fact, you are expected to consider all corporate constituencies, because the duties run to the corporation. But that is very different from some free-standing duty to creditors.”).

- But see CML V, LLC v. Bax, 28 A.3d 1037 (Del. 2011) (holding that creditors of an insolvent limited liability company do not have standing to bring derivative claims).

G. **Entire Fairness.** Where the board of a target corporation does not consist of a majority of disinterested directors, entire fairness scrutiny may apply to acquisition transactions.

1. **When the entire fairness test applies, a transaction must be fair as to both price and process.**

   - Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (holding “fair dealing” embraces questions of process, particularly how the transaction was timed, initiated, structured, negotiated, and disclosed, and how the approvals of the directors and the stockholders were obtained, and that “fair price” relates to the economic and financial terms of the transaction).

2. **To minimize conflict issues, inside deals should be negotiated after all deal terms that affect stockholders have been finalized.**
In re Plains Exploration & Production Co. S’holder Litig., Consol. C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013) (noting that the board had “properly managed” potential conflicts of interest of the CEO who led negotiations but was interested in continuing to work for the post-merger company where post-merger employment was not discussed until the parties had agreed upon the merger consideration).

Wayne County Employees’ Ret. Sys. v. Corti, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009) (recognizing that management conflicts were mitigated by keeping disinterested directors informed and deferring compensation discussions until after an agreement was reached on merger consideration; recognizing that management incentives might have been different if the board was weighing a “management sponsored offer” against a “less-management-friendly bid”); but cf. Forgo v. Health Grades, Inc., C.A. No. 5716-VCS, tr. at 20-22 (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (acknowledging that the board instructed management not to negotiate management discussions until after the transaction was consummated, but finding that the relationship between management and the private equity buyer suggested that all parties knew a management retention agreement would eventually be reached and holding that that implied that management had “a totally different incentive system than everybody else”).

In re Toys “R” Us, Inc., S’holder Litig., 877 A.2d 975, 1003-04 (Del. Ch. 2005) (finding that plaintiffs’ claim that a CEO had a conflict of interest and thus tainted a bidding process was without merit, in part because the CEO refused to consider any employment offers from any bidder until the board had concluded a deal).

Parnes v. Bally Entm’t Corp., C.A. No. 15192, 2001 Del. Ch. LEXIS 34 (Del. Ch. Feb. 20, 2001) (concluding that business judgment rule applied and directors acted in good faith where interested director’s severance agreement, consulting agreement, and purchase of certain warrants were negotiated after the parties reached an understanding regarding price, price protections and basic structure of the merger agreement, and interested director recused himself from any board discussions regarding his inside agreements), aff’d, 788 A.2d 131 (Del. 2001).

3. **A Court may apply the entire fairness standard to a board’s decision to reject a merger.**
In *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), the Delaware Supreme Court confirmed that a board’s decision to reject a merger offer is generally subject to the business judgment standard of review, but held that the entire fairness standard would apply if the plaintiffs could show that the board’s decision to reject the merger offer was not made in the good faith pursuit of a legitimate corporate purpose. In this case, the Court found that plaintiffs had met this burden by showing that a majority of the members of the board acted disloyally.

4. **There are many types of potential conflicts:**
   
   (a) “Interest” v. “Independence”.

   *Orman v. Cullman*, 794 A.2d 5 (Del. Ch. 2002), discussed the difference between director disinterest and director independence. A director is interested when he or she stands on both sides of a transaction, or will benefit or experience some detriment that does not flow to the corporation or the stockholders generally. Absent self-dealing, the benefit must be material to the individual director. In contrast, a director is not independent where the director’s decision is based on “extraneous considerations or influences” and not on the “corporate merits of the subject.” The stockholder must plead particularized facts that show that the director is under the control of or beholden to another such that he or she is unable to exercise discretion in decision-making.

   (b) Employment or Consulting Relationships.

   *Frank v. Elgamal*, C.A. No. 6120-VCN 2012 Del. Ch. LEXIS 62, (Del. Ch. Mar. 30, 2012) (denying motion to dismiss fiduciary duty claims against a director based on his receipt of a $250,000 fee for his work in connection with negotiating a merger; stating that allegations that directors worked at hospitals that had contractual relationships with one of target’s subsidiaries were “insufficient as a matter of law to suggest that [such directors] were not independent” with respect to a merger).

   *Freedman v. Adams*, C.A. No. 4199-VCN 2012 Del. Ch. LEXIS 74, (Del. Ch. Mar. 30, 2012) (holding that plaintiff had not pled facts indicating that outside directors were not independent from inside directors, but suggesting that a court could infer that outside directors were not independent if such directors “routinely behaved in the manner of employees—that is to say that their actions demonstrated that an interested director, like an employer, controlled the performance of their duties”).
i. The court denied a motion to dismiss where a director did not recuse himself from voting on Barnes & Noble’s acquisition of B&N College, which was privately owned by the chairman and 30% stockholder of Barnes & Noble where the B&N chairman had invested $20-25 million in that director’s investment fund and made substantial political contributions through him. The court noted that “the reality is if you’re a conduit for contributions, if you’re seen as someone who can raise money in a political process where people who run for office have to seek contributions in order to fund their campaigns if they’re not independently wealthy, that is a source of stature” and that “to be seen as someone who is a gateway to raising money from a very wealthy and incredible head of a long-standing public company in a community, that can be a useful thing.”

ii. On length of board membership as an alleged conflict: “There’s a certain freshness that’s lost after 16 years. But learned judgments have been made by both exchanges in our nation about independence requirements. And, frankly, length of service is not one of them. There’s no indication from our Supreme Court that mere length of service deprives someone of independence.” Compare In re BJ’s Wholesale Club, Inc. S’holders Litig., C.A. No. 6623-VCN, 2013 WL 396202, at *6 n.63 (Del. Ch. Jan. 31, 2013) (allegation that director had “nearly twenty years of Board service . . . and a long-term relationship” with management “does not raise a reasonable doubt as to the independence of a director under Delaware law”).

- Yucaipa Am. Alliance Fund II, L.P. v. Riggio, C.A. No. 5465-VCS, 2010 Del. Ch. LEXIS 172 (Del. Ch. Aug. 12, 2010) (finding a director independent and rejecting the claim that she was beholden to the company’s founder and former CEO because she previously served as CFO under him, where it had been 10 years since she served as a company executive and where she satisfied the New York Stock Exchange’s “cooling-off period”).

- Selectica, Inc. v. Versata Enterprises, Inc., C.A. No. 4241-VCN, 2010 Del. Ch. LEXIS 39, at *48-*50 (Feb. 26, 2010) (finding that payments to two “co-chair” directors of $164,125 and $274,273 were “material,” but noting that, in reference to the directors’ other income and desire to retire from such positions, it was not “personally material”).
• *Gantler v. Stephens,* 965 A.2d 695 (Del. 2009) (finding director to be interested in a decision not to accept a merger proposal where the acceptance of the proposal would likely result in the termination of a substantial business relationship between the target and a business operated by the director).

• *In re infoUSA, Inc. S’holders Litig.*, 2007 WL 2419611, at *18 (Del. Ch. Aug. 13, 2007, revised Aug. 20, 2007) (holding that plaintiffs raised reasonable doubt as to a director’s independence for purposes of considering a demand where the director was a named partner in a law firm that provided legal services to the company in return for payments (averaging $500,000 per year and equaling $1.1 million in the most recent year) that came close to or exceeded a reasonable estimate of the annual yearly income per partner at the law firm and concluding that the “threat of withdrawal of one partner’s worth of revenue from a law firm is arguably sufficient to exert considerable influence over a named partner such that . . . his independence may be called into question.”).

• *Krasner v. Moffett,* 826 A.2d 277 (Del. 2003) (holding that, despite use of independent committee to negotiate merger with third party, entire fairness standard would apply if majority of the board was not disinterested and independent; determination whether two directors who received income from companies related to the other merger party were disinterested and independent would control the determination of the appropriate standard of review).

• *Biondi v. Scrushy,* C.A. No. 19896, 2003 Del. Ch. LEXIS 7 (Del. Ch. Jan. 16, 2003) (questioning the independence of two members of a special committee formed to investigate charges against the CEO because committee members served with the CEO as directors of two organizations and the CEO and one committee member had “long-standing personal ties” that included making large contributions to certain sports programs).

• *In re NCS Healthcare, Inc., S’holders Litig.*, C.A. No. 19786, 2002 Del. Ch. LEXIS 133 (Del. Ch. Nov. 22, 2002) (rejecting argument that two directors were conflicted based on their agreements with the acquiror because, with the exception of one consulting agreement, the payments by acquiror were based on prior obligations; noting that, despite consulting agreements, the level of the directors’ stock ownership aligned the directors’ interests with the stockholders’ interests in receiving the highest value for their shares) *rev’d on other grounds, Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).
• **In re The Ltd., Inc. S’holders Litig.,** C.A. No. 17148, 2002 Del. Ch. LEXIS 28 (Del. Ch. March 27, 2002) (finding, in context of demand futility analysis, that the plaintiffs had cast reasonable doubt on the independence of certain directors in a transaction that benefited the founder, Chairman, CEO and 25% stockholder of the company, where one director received a large salary for his management positions in the company’s wholly-owned subsidiary, one director received consulting fees, and another director had procured, from the controlling stockholder, a $25 million grant to the university where he formerly served as president).

• **Orman v. Cullman,** 794 A.2d 5 (Del. Ch. 2002) (questioning the independence of one director who had a consulting contract with the surviving corporation and also questioning the disinterestedness of another director whose company would earn a $3.3 million fee if the deal closed).

• **In re Ply Gem Indus., Inc. S’holders Litig.,** C.A. No. 15779-NC, 2001 Del. Ch. LEXIS 84 (Del. Ch. June 26, 2001) (holding that plaintiffs raised reasonable doubt as to directors’ independence where interested director as Chairman of the Board and CEO was in a position to exercise considerable influence over directors serving as President and COO; director serving as Executive Vice President; a director whose small law firm received substantial fees over a period of years; and directors receiving substantial consulting fees).


(c) **Family Relationships.**

• **Harbor Fin. Partners v. Huizenga,** 751 A.2d 879 (Del. Ch. 1999) (holding that director who was brother-in-law of CEO and involved in various businesses with CEO could not impartially consider a demand adverse to CEO’s interests).

• **Chaffin v. GNI Group, Inc.**, C.A. No. 16211, 1999 Del. Ch. LEXIS 182 (Del. Ch. Sept. 3, 1999) (finding that director lacked independence where a transaction benefited son financially).

• *In re Barnes & Noble S’holders Deriv. Litig.*, C.A. No. 4813-VCS, tr. at 160-61 (Del. Ch. Oct. 21, 2010) (TRANSCRIPT) (suggesting that a CEO/director was unable to evaluate a transaction fairly because it was proposed by his brother; suggesting that abstention may be insufficient to remedy such conflict).

(d) **Liquidity.** A court may find a director/stockholder interested in a transaction because of his or her need for liquidity. In *N.J. Carpenters Pension Fund v. InfoGROUP, Inc.*, C.A. No. 5334-VCN, 2011 Del. Ch. LEXIS 147, at *34 (Del. Ch. Sept. 30, 2011), the court found that the plaintiff sufficiently alleged that a director and 37% stockholder was materially interested in a merger because the transaction provided him with desperately needed liquidity to defeat a motion to dismiss. He had no salary, owed over $25 million, and had plans to launch a new business entirely with his own money. He received $100 million in the merger, which he initiated and pursued through a “pattern of threats” and the “domination” of the rest of the board.

• *In re Answers Corp. S’holders Litig.*, C.A. No. 6170-VCN, 2012 Del. Ch. LEXIS 76 (Del. Ch. Apr. 11, 2012) (finding that plaintiffs’ complaint adequately alleged facts sufficient to infer that (1) two directors appointed by a 30% stockholder were interested in a merger where the 30% stockholder desired to exit its otherwise illiquid investment and (2) otherwise disinterested and independent directors acted in bad faith by consciously failing to seek the highest value reasonably available for all stockholders based on allegations that, against their own financial advisor’s advice, those directors acquiesced in an expedited sale process in order to accommodate the 30% stockholder; noting that the court “wonder[ed] if an explanation will emerge [for the independent directors’ decision to conduct an expedited market check] because disinterested and independent directors do not usually act in bad faith”); *In re Answers Corp. S’holders Litig.*, C.A. No. 6170-VCN (Feb. 3, 2014) (granting summary judgment that directors had not acted in bad faith while obtaining increased acquisition offers from $8.00 to $10.50 per share over 11-month process, by using exclusive bidding rights, expense reimbursement, and improved quarterly results as enticements to bidder, determining from management’s previous discussions with potential financial buyers and financial advisor’s two-week market check involving ten potential strategic acquirors that no dark horse topping bidder existed, and receiving financial advisor’s fairness opinion and
advice that bidder would not further raise its offer price, in the context of increasing market competition, the board’s plausible concerns about the company’s stability and future success, and the company’s poor quarterly results at the early stages of the sale and bargaining process).

• See also McMullin v. Beran, 765 A.2d 910 (Del. 2000) (denying motion to dismiss plaintiffs claims based on theory that controlling stockholder conducted a “fire sale” of its 80%-owned subsidiary in order to obtain cash to fund a $3.3 billion acquisition where 8 of the 12 subsidiary directors were affiliated with the controller); In re Southern Peru Copper Corp. S’holder Deriv. Litig., C.A. No. 961-CS, 2011 Del. Ch. LEXIS 162 (Del. Ch. Oct. 14, 2011, revised Dec. 20, 2011) (finding that, although board designee of 14% stockholder in a controlled company did not act in “less than good faith” in negotiating a transaction involving registration rights for the stockholder’s illiquid 14% equity stake, the liquidity interest of the stockholder meant that its board designee was “less than ideally situated to press hard” in negotiations with the controller), aff’d sub nom. Americas Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

• But see In re Synthes, Inc. S’holder Litig., 50 A.3d 1022, 1036 (Del. Ch. 2012) (suggesting that, at least in the context of a transaction in which all stockholders receive the same pro rata consideration, there are “very narrow circumstances in which a controlling stockholder’s immediate need for liquidity could constitute a disabling conflict of interest” and that “[t]hose circumstances would have to involve a crisis, fire sale where the controller, in order to satisfy an exigent need (such as a margin call or default in a larger investment) agreed to a sale of the corporation without any effort to make logical buyers aware of the chance to sell, give them a chance to do due diligence, and to raise the financing necessary to make a bid that would reflect the genuine fair market value of the corporation”).

• Cf. Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013) (rejecting claim that company conducted a “fire sale” at the behest of its largest stockholder where the facts demonstrated that the stockholder was focused on obtaining the highest price attainable for its shares); In re CompuCom Systems, Inc. S’holders Litig., Consol. C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005) (dismissing claims that company conducted a “fire sale” at the behest of its majority stockholder where the company conducted a 2-year long sale process); Van de Walle v. Unimation, Inc., C.A. No. 7046, 1991 Del. Ch. LEXIS 27 (Del. Ch. Mar. 6, 1991)
(rejecting plaintiff’s claim that majority stockholder had pursued a sale of the company in response to a “liquidity crisis” where, *inter alia*, the company conducted a seven-month long sale process).

(e) Affiliation with Acquiror or Controlling Stockholder.

- *S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co.*, C.A. No. 4729-CC, 2011 Del. Ch. LEXIS 43, at *38 (Del. Ch. Mar. 9, 2011) (holding that a “mere nomination of a director by a majority stockholder . . . is insufficient to demonstrate lack of independence” and rejecting the claim that a director was beholden to a controlling stockholder because the controlling stockholder made significant contributions to a university on whose boards the director served and for whom the director raised funds and with whom the director held a three-month employment position, the salary for which he ultimately returned to the university).

- *Kahn v. Tremont Corp.*, 694 A.2d 422 (Del. 1997) (holding members of special committee had significant prior business relationship with majority stockholder/acquiror such that the committee lacked independence triggering entire fairness).

- *Heineman v. Datapoint Corp.*, 611 A.2d 950 (Del. 1992) (holding that allegations of “extensive interlocking business relationships” did not sufficiently demonstrate the necessary “nexus” between the conflict of interest and resulting personal benefit necessary to establish directors’ lack of independence).

- *Citron v. Fairchild Camera & Instrument Corp.*, 569 A.2d 53 (Del. 1989) (holding mere fact that a controlling stockholder elects a director does not render that director non-independent).

- *Compare N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, C.A. No. 5334-VCN, 2011 Del. Ch. LEXIS 147, at *35 (Del. Ch. Sept. 30, 2011) (holding that plaintiff sufficiently alleged that defendant directors were not disinterested or independent for purposes of voting on merger where they were “dominated” by one interested director through a “pattern of threats” where that director was also a 37% stockholder and was facing an extreme liquidity crisis) with *In re Alloy, Inc. S’holder Litig.*, C.A. No. 5626-VCP, 2011 Del. Ch. LEXIS 159 (Del. Ch. Oct. 13, 2011) (holding that (i) conclusory allegations that two management directors, holding a combined 15% of the company’s stock, “dominated” the seven outside directors did not support an inference that the outside directors were not independent and (ii) while a “threat” by management to “abandon” the company could undermine the independence of outside directors, the mere allegation that
management directors “were in a position” to make such a threat did not undermine the outside directors’ independence) In re Novell, Inc. S’holder Litig., Consol. C.A. No. 6032-VCN, 2012 WL 6761917 (Del. Ch. Jan. 3, 2013) (dismissing claims that a 7.1% stockholder dominated a sale of the company process and noting that the “possible initiation of a proxy contest is not sufficient to establish domination” and that proposing a course of action that the board later pursues is not “sufficient evidence of domination”); and In re BJ’s Wholesale Club, Inc. S’holders Litig., C.A. No. 6623-VCN, 2013 WL 396202, at *6 (Del. Ch. Jan. 31, 2013) (finding that “conclusory allegations that management . . . influenced the Company’s disinterested directors” in order to approve a merger agreement with a financial acquiror, rather than further investigate an indication of interest from a competitor “lacked any facts buttressing that conclusion,” and accordingly granting a motion to dismiss the complaint).

(f) Allocation Issues. Where there is more than one class/series of stock, directors may have conflicts with stockholders because of their affiliation with one or more classes or series of stock. See also Part VI(D)(1) regarding fiduciary issues concerning preferred stock.

• In re Delphi Financial Group S’holder Litig., Consol. C.A. No. 7144-VCG, 2012 Del. Ch. LEXIS 45 (Del. Ch. Mar. 6, 2012) (finding a reasonable probability of success on the merits that founder and controlling stockholder with high-vote stock and target board breached their fiduciary duties by negotiating and approving a merger in which the founder received a premium for his high-vote stock at the expense of the low-vote stock largely held by the public when a charter provision required that the two classes receive the same consideration, but denying a preliminary injunction based on the balancing of the equities).

• In re Hanover Direct, Inc. S’holders Litig., 2010 Del. Ch. LEXIS 201, at *1, *2 & *9 (Del. Ch. Sept. 24, 2010) (finding, in a post-trial decision, that a going-private merger by a controlling stockholder was entirely fair where the public common stockholders were cashed out at $.25 per share (even though the company’s equity had no value), where the company was “heading toward insolvency,” and where the company’s “debt commitments combined with its contractual obligations to its preferred stockholders together exceeded the value of its common stock”; noting that company “had long been struggling financially” and that the board, although it did not use a special committee, had conducted a fair process).
• Morgan v. Cash, 2010 WL 2803746 (Del. Ch. July 16, 2010) (dismissing aiding and abetting claim against buyer who negotiated with preferred stockholder-affiliated board to acquire target company for a 10% “hair-cut” to the preferred’s liquidation preference and nothing for the common stockholders; “It is not a status crime under Delaware law to buy an entity for a price that does not result in a payment to the selling entity’s common stockholders.”).

• LC Capital Master Fund, Ltd. v. James, 990 A.2d 435, 446 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a $25 per share liquidation preference), denying motion that directors, who owned common stock, breached their fiduciary duties to the preferred stockholders and finding “no basis to find that the directors sought to advantage the common stockholders at the unfair expense of the preferred stockholders,” and recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).

• In re Trados Inc. S’holders Litig., C.A. No. 1512-CC, 2009 Del. Ch. LEXIS 128 (Del. Ch. July 24, 2009) (finding, on a motion to dismiss, that the plaintiff had adequately rebutted the presumption of the business judgment rule by alleging that a majority of the members of a corporation’s board, who had ties to holders of a large percentage of the company’s preferred stock, were interested in a merger where the preferred stockholders received cash and the common stockholders received nothing in the merger); see also In re Trados Inc. S’holders Litig., C.A. No. 1512-VCL, 2013 WL 4511262, at *18 n.16 (Del. Ch. Aug. 16, 2013) (noting in the post-trial opinion that, “[s]ome scholars . . . have argued that in lieu of a common stock valuation maximand, directors should have a duty to maximize enterprise value, defined in the common-preferred context as the aggregate value of the returns to the common stock plus the preferred stock, taking into account the preferred stock's contractual rights. . . . Delaware case law as I read it does not support the enterprise value theory. As long as a board complies with its legal obligations, the standard of fiduciary conduct calls for the board to maximize the value of the corporation for the benefit of the common stock”).

• Carsanaro v. Bloodhound Tech’s, Inc., 2013 WL 1104901, at *33 n.16 (Del. Ch. Mar. 15, 2013) (finding that, where directors employed by various venture capital firms owning different classes of preferred stock had approved several dilutive issuances of
preferred stock, followed by a merger that delivered most of the consideration to preferred stockholders and to directors and officers in the form of payments under a management incentive plan, “the complaint has pled facts calling for entire fairness review because of director interest, not because of Lynch,” i.e., not because of the existence of a controlling stockholder or control group—see Part G.5, below).

- **Encite LLC v. Soni**, C.A. No. 2476-VCG, 2011 Del. Ch. LEXIS 177 (Del. Ch. Nov. 28, 2011) (denying motion for summary judgment on plaintiff’s claims that preferred stockholder affiliated directors had breached their duty of loyalty in running an unfair bidding process to sell the assets of a financially-troubled company and preferring a bid from a consortium including the preferred stockholder; summary judgment was also denied on aiding and abetting claims against the preferred stockholder).

- **Oliver v. Boston University**, C.A. No. 16570-NC, 2006 Del. Ch. LEXIS 75, at *119 (Del. Ch. Apr. 14, 2006) (Boston University (“BU”), the company’s controlling stockholder, held common stock as well as several series of preferred stock. After approving a merger, the company’s board (the majority of whom were interested due to affiliations with BU), company insiders, and other stakeholders negotiated primarily against each other as to how the merger proceeds should be allocated, with no one representing the minority common stockholders. Holding that allocation of merger proceeds between various stakeholders was unfair, the Court stated that no steps were taken to ensure fairness to the minority common stockholders, and further found that “[m]ore disturbing is that, although representatives of all of the priority stakeholders were involved to some degree in the negotiations, no representative negotiated on behalf of the minority common stockholders”).

- **In re Tele-Communications, Inc. S’holders Litig.,** C.A. No. 16470, 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005) (stating that “because a clear and significant benefit of nearly $300 million accrued” to board members because of their holdings of Series B common stock “at the expense of another class of shareholders to whom was owed a fiduciary duty,” the entire fairness test applies).

- **In re CompuCom Systems, Inc. S’holders Litig.,** Cons. C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005) (plaintiffs did not challenge and the Court did not address the preferred stockholder’s receipt of its liquidation preference in light of the common stockholders’ payment of $4.60 per share).
• *Orman v. Cullman*, 794 A.2d 5, 25 (Del. Ch. 2002) (four related directors, who were treated together as a controlling stockholder group, were interested because they “received benefits from the transaction that were not shared” with the other stockholders, including the initial ability to enter into a private sale with the acquiror and the right to put their remaining interest to the company three years after the merger). But see *Angelo, Gordon & Co., L.P. v. Allied Riser Communications Corp.*, 805 A.2d 221 (Del. Ch. 2002) (applying business judgment rule even though board owed a duty to creditors and the board owned common stock, not debt).

• *In re FLS Holdings, Inc. S’holders Litig.*, C.A. No. 12623, 1993 Del. Ch. LEXIS 57 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or directors who were affiliates of the company’s controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock).

• *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986) (applying entire fairness test to allocation of merger consideration where one element of consideration was apportioned wholly to the shares of the controlling stockholder).

• *Lewis v. Great W. United Corp.*, C.A. No. 5397, 1978 Del. Ch. LEXIS 723 (Del. Ch. Mar. 28, 1978) (applying entire fairness test where a corporation that was controlled by a 65% common stockholder structured a merger treating preferred less favorably than common).

(g) **Equity-Based Compensation/Acceleration.**

• *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (holding that the accelerated vesting of director-owned options, which resulted from a merger, does not create a conflict of interest “because the interests of the shareholders and directors are aligned in obtaining the highest price” and noting that the acceleration of unvested options could be viewed as an inducement to effectuate a merger but was not an inducement in this case because the directors’ shares and vested options were significant enough that any benefit resulting from the acceleration of unvested options was minor in comparison); see also *In re BioClinica, Inc.*, C.A. No. 8272-VCG, 2013 WL 673736, at *1 n.12 (Del. Ch. Feb. 25, 2013) (finding that the acceleration of the vesting of directors’ stock options is “insufficient grounds for expedition” of litigation).
• *In re Ancestry.com Inc. S’holder Litig.*, C.A. No. 7988-CS, tr. at 84 (Del. Ch. Sept. 27, 2013) (TRANSCRIPT) (“It’s actually seen as an aligning interest, and the vesting of options is routine in merger agreements. [I]t’s designed to . . . grease the skids for change-of-control transactions.”).

• *In re K-Sea Transportation Partners L.P. Unitholders Litig.*, 2011 WL 2520209 (Del. Ch. June 10, 2011) (distinguishing *Globis Partners* and holding that accelerated vesting of directors’ restricted phantom units in limited partnership, resulting from a merger, rendered otherwise independent directors interested where restricted phantom units approximately equaled directors’ unrestricted holdings and restricted units were granted immediately prior to beginning of discussions with acquiror).

(h) Indemnification Rights.

• *Louisiana Mun. Police Employees’ Ret. Sys. v. Crawford*, C.A. Nos. 2635-N, 2663-N, 2007 Del. Ch. LEXIS 27, at *13 n.8 (Del. Ch. Feb. 23, 2007) (suggesting, in the context of potential claims against directors for backdating executive stock options, contractual indemnification rights contained in a merger agreement indemnifying directors to the fullest extent permitted by law may be broader than statutory-based indemnification rights (including those in a corporation’s charter or bylaws) and thus constitute conflicted interests).

• *Globis Partners, L.P. v. Plumtree Software, Inc.*, 2007 WL 4292024, at *8 (Del. Ch. Nov. 30, 2007) (holding that receiving indemnification benefits pursuant to a merger agreement does not create a conflict of interest for directors because there “is no basis for inferring the receipt of indemnification benefits is material or likely to taint the [directors’] judgment.”).

(i) Management Continuity.

• *In re SS&C Technologies, Inc. S’holders Litig.*, 911 A.2d 816, 820 (Del. Ch. 2006) (a CEO who used corporate resources “to identify a transaction in which he could both realize a substantial cash payout for some of his shares and use his remaining shares and options to fund a sizeable investment in the resulting entity” was described as having “an array of conflicting interests that made him an unreliable negotiator.”).

• *In re Lear Corp. S’holders Litig.*, 926 A.2d 94, 118 (Del. Ch. 2007) (stating that a merger negotiation conducted by a CEO who would continue to manage the company after consummation of the
merger was “far from ideal and unnecessarily raise[d] concerns about the integrity and skill of those trying to represent Lear’s public investors”).

- **Wayne County Employees’ Retirement Sys. v. Corti,** C.A. No. 3534-CC 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009) (complaint failed to state claim that management directors breached their fiduciary duty of loyalty to target’s stockholders in negotiating a business combination even though the directors would continue as managers of the combined entity following a business combination where: (1) there were no allegations that the management directors would lose their jobs if they did not pursue that particular transaction, (2) the buyer assumed from the start of negotiations that the management directors would retain positions in the combined entity, and (3) the complaint did not allege that there was a competing bidder that would be hostile to existing management).

- **In re Alloy, Inc. S’holder Litig.,** C.A. No. 5626-VCP, 2011 Del. Ch. LEXIS 159 (Del. Ch. Oct. 13, 2011) (holding, on a motion to dismiss, that plaintiffs failed to state a claim that special committee acted in bad faith in negotiating a merger in which management directors would (i) retain management roles following the transaction, (ii) receive an equity stake in the new parent company in the merger and (iii) receive an initial profits interest in the parent, where the acquiror insisted on these terms as a condition to the merger).

- **In re El Paso Corp. S’holder Litig.,** C.A. No. 6949-CS, 2012 Del. Ch. LEXIS 46 (Del. Ch. Feb. 29, 2012) (finding that plaintiffs alleged facts sufficient to suggest that target’s CEO was interested in merger negotiations when he was secretly considering making a management bid to acquire a portion of target’s business after the merger agreement was signed).

- **In re Celera Corp. S’holder Litig.,** C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012) (finding, in approving a settlement, that claims challenging the CEO-led sale process were weak where the board also held 16 meetings to discuss the sale and claims that CEO had “sabotaged” an earlier negotiation process when the negotiations turned to her employment agreement—which was a condition of buyer’s offer—were also unsupported, but noting that an allegation that a CEO whose job was in jeopardy supported a deal with a buyer that would retain the CEO might support a claim for breach of the duty of loyalty).
(j) **Controlling stockholders.** If a board of directors allows a controlling stockholder to dictate the terms of a transaction to the detriment of minority stockholders, plaintiff may state a claim for the breach of the duty of loyalty. *Louisiana Municipal Police Employees’ Retirement Sys. v. Fertitta*, C.A. No. 4339-VCL, 2009 Del. Ch. LEXIS 144 (Del. Ch. July 28, 2009). In *Fertitta*, a company entered into a going-private merger with an entity controlled by its Chairman, CEO and 39% stockholder. The Court found that minority stockholders had stated a
claim for breach of the duty of loyalty where the directors: (1) allowed the controlling stockholder to negotiate on behalf of the company the refinancing of its debt, (2) allowed the controlling stockholder to engage in a creeping takeover instead of adopting a poison pill, and (3) terminated the merger agreement instead of forcing the controlling stockholder to close or pay a termination fee. See also In re Barnes & Noble S’holders Deriv. Litig., C.A. No. 4813-VCS, tr. at 128-29 (Del. Ch. Oct. 21, 2010) (TRANSCRIPT) (finding no “safe harbor” for a director/officer to “[ake] himself out” of analysis of a transaction proposed by his controlling stockholder brother simply because of such conflict).

5. Mergers with majority or controlling stockholders are generally subject to entire fairness test.

• Kahn v. Lynch Communication Sys., Inc., 638 A.2d 1110 (Del. 1994) (“It is a now well-established principle of Delaware corporate law that in an interested merger, the controlling or dominating shareholder proponent of the transaction bears the burden of proving its entire fairness.”).

• Emerald Partners v. Berlin, 787 A.2d 85 (Del. 2001) (explaining that entire fairness standard applied, ab initio, to merger in which the controlling stockholder stood on both sides of the transaction and holding that exculpatory provision in charter could not shield directors from liability until Court had undertaken entire fairness analysis).

• Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002) (discussing at length the difference between transactions involving the entire fairness standard of review and those that call for application of business judgment rule in the context of a merger with an unaffiliated third party where, because of the presence of a controlling stockholder group, the corporation used a special committee and submitted the merger to a vote of the minority stockholders).

• In re Cysive, Inc. S’holders Litig., 836 A.2d 531 (Del. Ch. 2003) (holding that 35% stockholder and founder of company was controlling stockholder and applying entire fairness test despite presence of majority of disinterested, independent directors and effective special committee process; concluding after trial that management buy-out was entirely fair). But see, In re Dell Inc. S’holder Litig., C.A. No. 8329-CS, tr. at 36-37 (Del. Ch. June 19, 2013) (TRANSCRIPT) (refusing to find that the CEO and 16% stockholder of the target in a proposed management-led buy-out was a controlling stockholder even under Cysive—the “edgiest” of the cases in terms of who can be a controlling shareholder, where
16% is far below the 35% block at issue in 

_Cysive_, and the stockholder’s voting power had been “neutralized”: (1) his vote did not count in support of his own deal and (2) he was required to vote in favor of a superior proposal); _Frank v. Elgamal_, C.A. No. 6120-VCN (Del. Ch. Mar. 10, 2014) (finding that stockholders holding 68% of common stock were not a control group during initial stages of sale process because those stockholders didn’t put company up for sale, dictate terms of market canvass, or negotiate different merger consideration in two of three offers, and the court stated it was immaterial whether the group first proposed rolling into the surviving company, but the court found a reasonable (if not the best) inference that a control group was formed by letter agreements and selected the transaction most favorable to itself although a member of rollover group attended only one of 14 special committee meetings and the special committee negotiated a fair total offer value for the company; because the stockholders formed a control group later in the sale process, and there was no condition to obtain majority-of-the-minority approval, entire fairness review applied only to that period for which the court examined whether the merger consideration was fairly allocated between the control group and minority stockholders).

- _In re Southern Peru Copper Corp. S’holder Deriv. Litig.,_ C.A. No. 961-CS, 2011 Del. Ch. LEXIS 162 (Del. Ch. Oct. 14, 2011, revised Dec. 20, 2011) (applying entire fairness standard to review merger in which NYSE-listed company (Southern Peru) acquired its majority stockholder’s (Grupo Mexico) 99% stake in a mining corporation (Minera); holding, post trial, that Grupo Mexico and the Grupo Mexico affiliated directors on Southern Peru’s board breached their duty of loyalty and awarding $1.26 billion (plus interest) in damage), _aff’d sub nom. Americas Mining Corp. v. Theriault_, 51 A.3d 1213 (Del. 2012).

- _In re Cox Communications, Inc. S’holders Litig.,_ 879 A.2d 604 (Del. Ch. 2005) (suggesting that, in a majority stockholder squeeze-out, the business judgment rule ought to apply if a special committee approved the transaction and the transaction was approved by a majority of the minority stockholders).

- There is, however, an exception for short form mergers (described in part 6, below) and a possible exception for transactions structured pursuant to the _Cox Communications_ “unified standard” (described in part 11, below).

6. Courts have declined to apply the entire fairness test to mergers with controlling stockholders structured as two-step transactions (i.e.,
tender offers followed by short-form mergers), but there is uncertainty as to what procedures must be followed in order to obtain business judgment, rather than entire fairness, review of such a transaction.

(a) **Siliconix: Non-coercion test**

- *In re Siliconix Inc., S’holders Litig.*, C.A. No. 18700, 2001 Del. Ch. LEXIS 83 (Del. Ch. June 19, 2001) (Absent coercion or disclosure violation, directors had no duty to demonstrate the entire fairness of tender offer by 80% stockholders. The Court distinguished *McMullin v. Beran* on the basis that it involved a merger pursuant to § 251 which imposes statutory duties with “attendant fiduciary duties.” In addition, the minority shareholders in Siliconix had the power to thwart the tender offer because it required a majority of the minority shares to be tendered.).

- *In re Aquila, Inc. S’holders Litig.*, 805 A.2d 184 (Del. Ch. 2002) (controlling stockholder’s tender offer followed by short form merger was not subject to entire fairness review; stockholders could freely choose whether to accept or reject the offer because transaction was structured to allow a majority of the minority to make the decision).

- *In re Life Techs., Inc., S’holders Litig.*, C.A. No. 16513, 2001 Del. Ch. LEXIS 83 (Del. Ch. Nov. 24, 1998) (declining to enjoin a tender offer by a majority stockholder and holding that noncoercive tender offer by parent was not subject to entire fairness review).

(b) **Pure Resources: Four-part standard**

- *In re Pure Resources, Inc. S’holders Litig.*, 808 A.2d 421 (Del. Ch. 2002) (controlling stockholder’s tender offer followed by a short form merger analyzed under business judgment review applicable if the tender offer is (1) subject to a non-waivable majority of the minority tender condition; (2) the controller promises to consummate a prompt short-form merger at the same price if it obtains more than 90% of the shares; (3) the controller has made no retributive threats; and (4) the controller permits the independent directors “both free rein and adequate time to react” to the tender offer).

- *Next Level Communications, Inc. v. Motorola*, 834 A.2d 828 (Del. Ch. 2003) (where majority stockholder made full and fair disclosure, its post-*Pure Resources* tender offer, conditioned on a majority of the minority shares tendering and committing majority
stockholder to complete short form merger at same price was not coercive even though made when stock price depressed and majority holder had inside information).

- In re Cox Radio, Inc. S’holders Litig., 2010 Del. Ch. LEXIS 102 (Del. Ch. May 6, 2010) (following Pure Resources to determine business judgment review would likely apply to a controlling stockholder tender offer conditioned on non-waivable majority-of-the-minority tender and a commitment to effect a short form merger if it got to 90% ownership; stating that “[c]ontrolling shareholder tender offer cases are relatively straightforward”).

(c) CNX: “Unified Standard” of Cox Comm’ns

- In re Cox Comm’ns Inc. S’holders Litig., 879 A.2d 604 (Del. Ch. 2005) (discussing the possibility of unifying one-step and two-step freeze-out standards of review through increasing procedural requirements for a tender offer freeze-out to gain the benefit of business judgment review).

- In re Revlon, Inc. S’holders Litig., 990 A.2d 940, 960 (Del. Ch. 2010) (citing Cox Comm’ns and indicating the possibility of “invoking the protections of the business judgment rule” in the context of a controlling stockholder freeze-out if the additional procedural steps described in Cox Comm’ns are followed).

- In re CNX Gas Corp. S’holders Litig., 2010 Del. Ch. LEXIS 119 (Del. Ch. May 25, 2010) (applying the “unified standard” described in Cox Communications to a controlling stockholder’s tender offer; suggesting that business judgment review could be obtained if the transaction were conditioned on both majority-of-the-minority stockholder approval and approval of the transaction by a special committee of independent directors exercising “authority comparable to what a board would possess in a third-party transaction,” including authority to seek alternatives, file a lawsuit against the controller, and deploy a poison pill).

- In re CNX Gas Corp. S’holders Litig., 2010 Del. Ch. LEXIS 139 (Del. Ch. July 5, 2010) (granting application to certify interlocutory appeal of preliminary injunction ruling to the Supreme Court in light of the conflict in the Court of Chancery created by the disparate Siliconix, Pure Resources and Cox Communications standards).

- Liang v. Cohen, C.A. No. 5721-VCL (Del. Ch. Aug. 19, 2010) (TRANSCRIPT) (suggesting that entire fairness, not business judgment, would likely apply to a controlling stockholder tender
offer structured as a Pure Resources offer, because consummation of the tender was “not conditioned on the receipt of an affirmative recommendation from the special committee”).

- **S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co.,** C.A. No. 4729-CC, 2011 Del. Ch. LEXIS 43, at *35 n.73 (Del. Ch. Mar. 9, 2011) (noting that “[i]f the controlling stockholder permits the use of both protective devices [an independent special committee and informed majority of the minority], then the transaction could avoid entire fairness review”) (brackets and emphasis in original).

- **See also In re MFW S’holders Litig.,** C.A. No. 6566-CS, 2013 WL 2326879 (Del. Ch. May 29, 2013) (applying the “unified standard” and holding that the business judgment rule applied to a squeeze-out transaction by a controlling stockholder structured as a one-step merger where the transaction was conditioned upfront on the approval of both a special committee and a majority of the minority stockholders and certain additional procedures were followed, see Part G.11 below).

(d) **Short-form merger: Appraisal is the only remedy**

- **Glassman v. Unocal Exploration Corp.,** 777 A.2d 242 (Del. 2001) (holding that (a) absent fraud or illegality appraisal is the exclusive remedy available to stockholders in a § 253 short form merger, entire fairness doctrine does not apply and (b) no need for subsidiary to use a special committee since there is no opportunity to “deal” with majority holder).

- **Gilliland v. Motorola, Inc.,** 859 A.2d 80 (Del. Ch. 2004) (even though extensive information had been made publicly available to Next Level stockholders in connection with the tender offer and cash out merger, notice of appraisal rights sent to stockholders following the merger was inadequate because it failed to include summary financial information, i.e., two years of stock price information and five years of summary financial data, and directions as to how to obtain more detailed information).

7. **Cash-outs by controlling stockholders effected in the form of a reverse stock split, or recapitalizations negotiated with a controlling stockholder, without sufficient procedural protections, will be subject to the entire fairness standard.**

minority stockholders without any procedural protections, the transaction will be reviewed for entire fairness with the burden of proof on the defendant fiduciaries,” stating that a “reverse split under those circumstances is the ‘functional equivalent’ of a cash-out merger,” and indicating that the “unified standard” approach of Cox Communications, as discussed above and below, should apply to such a transaction).

- S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co., C.A. No. 4729-CC, 2011 Del. Ch. LEXIS 43 (Del. Ch. Mar. 9, 2011) (applying entire fairness with a burden shift to a recapitalization negotiated with a controlling stockholder, where a special committee, but not a majority of the minority condition, was used).

8. **Issues raised by sale of controlled company to a third party.**

- **Sinclair Oil Corp. v. Levien**, 280 A.2d 717 (Del. 1971) (holding that since dividends had been distributed to the minority stockholders and parent alike, adoption of the dividend policy was not self-dealing).

- **McMullin v. Beran**, 765 A.2d 910 (Del. 2000) (holding that the minority stockholder stated a claim for breach of the duty of loyalty by alleging that the board was not independent from the controlling stockholder, and in particular, that the conflicted directors on the board did not abstain from approving the transaction that the controlling stockholder had negotiated).

- **In re CompuCom Systems, Inc. S’holders Litig.,** C.A. No. 499-N, 2005 Del. Ch. LEXIS 145 (Del. Ch. Sept. 29, 2005) (no finding of breach of fiduciary duty in a sale of a controlled corporation because the plaintiff did not allege sufficient facts to support a claim that (a) subsidiary’s board or special committee was dominated and controlled by parent, (b) board or special committee lacked independence necessary to objectively consider the transaction, (c) special committee and board’s interests were not aligned with the stockholders, (d) parent forced a quick sale because of its need for cash, (e) parent received different consideration, (f) parent received special benefits, or (g) “the merger was anything other than an arms-length transaction with an unaffiliated third party pursuant to the goal of maximizing shareholder value by attaining the best possible price”).

different consideration from the minority stockholder would have been subject to business judgment review if the transaction had been contingent upon a non-waivable, fully informed vote of a majority of the outstanding minority stockholders and was negotiated by an effective special committee of independent directors; see also 984 A.2d 124 (Del. 2009) (denying petition for interlocutory appeal); 2011 Del. Ch. LEXIS 1, at *7 n.5 (Del. Ch. Jan. 14, 2011) (finding, in a post-trial decision, that the Court was not required to apply the entire fairness standard of review because the controlling stockholder did not actually use “his controlling position to divert merger consideration disproportionately to himself” but applying it nonetheless “because defendants easily satisfy it”).

• Frank v. Elgamal, C.A. No. 6120-VCN, 2012 Del. Ch. LEXIS 62 (Del. Ch. Mar. 30, 2012) (holding that third party merger in which the controlling stockholders retained a stake in the surviving entity while minority stockholders were cashed out was subject to entire fairness review—even though plaintiffs did not allege that the controlling stockholders negotiated the consideration received by the minority—but would have been subject to the business judgment rule if it had been “recommended by a disinterested and independent special committee” and conditioned on approval of the outstanding minority stockholders; rejecting defendants’ argument that entire fairness should not apply where the controlling stockholders are “net sellers” because, on a motion to dismiss, it was reasonable to infer that a controlling stockholder might agree to “a lower sale price in order to secure a greater profit from his investment in . . . [the surviving entity]”).

• In re Ancestry.com Inc. S’holder Litig., C.A. No. 7988-CS (Del. Ch. Sept. 27, 2013), tr. at 82, 85 (TRANSCRIPT) (dismissing fiduciary claims against directors who approved a sale to a third party despite allegations that a 31% stockholder exercised effective control over the target’s board, causing the board to discriminate against a higher bidder and ultimately select a lower offer where: (1) 31% did not amount to a controlling stake and the stockholder did not exercise actual control over the corporation; (2) the alleged controller did not dominate the board; (3) neither the stockholder nor management had any prior relationship with the winning bidder that would create a conflict of interest; (4) plaintiffs gave no reason why the stockholder or management would discriminate against other bidders for impermissible reasons; and (5) although the stockholder had agreed to roll over its equity and retain a stake in the post-merger corporation, this did not constitute a conflict of interest, particularly where the acquiror, not the stockholder, sought the rollover—“[I]f you read the complaint fairly . . . the
only inference is that the rollover was despite, rather than because of. . . . [w]hich is, we’ll do this deal despite the fact we’re being asked to roll over, rather than we’re doing this deal because we’ve got an opportunity to roll over”.

- **Se. Pa. Transp. Auth. v. Volgenau**, C.A. No. 6354-VCN, 2013 WL 4009193, at *28 (Del. Ch. Aug. 5, 2013) (finding, on a motion for summary judgment, that a merger between a controlled company and a third party should be reviewed under the business judgment rule where the controlling stockholder did not stand on both sides of the transaction despite receipt of an equity interest in the merged entity; further finding, under *Hammons*, that the merger would have been reviewed under the business judgment rule because the merger was approved by a disinterested and independent special committee and a non-waivable majority of the minority vote—“[a]s does *MFW*, this case serves as an example of how the proper utilization of certain procedural devices can avoid judicial review under the entire fairness standard and, perhaps in most instances, the burdens of trial”).

- **In re Morton’s Rest. Grp. Inc. S’holders Litig.**, C.A. No. 7122-CS, 2013 WL 4106655 (Del. Ch. July 23, 2013) (finding, on a motion to dismiss, that the board met its burden under *Revlon* to get the best price for the sale of the corporation; the mere presence of a 27.7% stockholder was insufficient to subject the sale to entire fairness review or to show that the board had breached its duty of loyalty by acquiescing to a fire sale, as plaintiff-minority stockholders alleged no facts showing that the “controlling stockholder” had a conflict of interest necessitating a quick sale or the power to dominate the board, particularly where: (1) the “controlling stockholder” had only two executives on the otherwise disinterested and independent ten-member board; (2) received the same pro rata consideration as the other stockholders; (3) had no affiliation with the acquiror; (4) supported the corporation’s desire to engage in an extended market check, which consisted of contacting over 100 potential bidders and signing up over 50 confidentiality agreements over the course of nine months; (5) the acquiror made the highest offer; and (6) over 90% of the corporation’s stockholders tendered their shares).

9. **Effective use of committees of independent directors can shift burden of proof back to plaintiff (or, under certain circumstances, can invoke business judgment review).**

- **Kahn v. Lynch Communication Sys., Inc.**, 638 A.2d 1110 (Del. 1994) (approval of cash-out merger transaction initiated by controlling stockholder by independent committee or informed
majority of minority stockholders shifts burden on issue of fairness from controlling stockholder to plaintiff).


- *Clements v. Rogers*, 790 A.2d 1222 (Del. Ch. 2001) (holding that special committee did not act properly where (a) its chairman did not understand that he had no duty to the 84% parent proposing the merger and to reject the proposed transaction and (b) committee was uninformed as to its financial advisors’ conformation of its valuation opinion to the parent’s offer).

- In *Levco Alternative Fund Ltd. v. Reader’s Digest Ass’n, Inc.*, 803 A.2d 428 (Del. 2002), the Class A stockholders of Reader’s Digest sought to enjoin a recapitalization of Reader’s Digest that included a plan to purchase all of the Class B voting stock at premium ratio for newly issued common stock and to recapitalize all Class A nonvoting stock into shares of voting common. Reader’s Digest formed a special committee to evaluate the recapitalization because certain Funds controlled half of the Class B voting stock and two Reader’s Digest directors served as directors of the Funds. The special committee focused on the effects of the recapitalization on the corporation as a whole and on the stockholders other than the Funds but did not specifically consider the transaction from the perspective of the Class A stockholders and did not procure a fairness opinion specifically regarding the effects on the Class A holders. Because the special committee did not properly consider the interests of the Class A stockholders in the recapitalization, the Supreme Court reversed the Court of Chancery’s denial of the preliminary injunction motion.

- *In re Tele-Communications, Inc. S’holders Litig.*, C.A. No. 16470, 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005) (finding a special committee ineffective to shift the burden to plaintiff stockholders where holders of high vote common stock, including a majority of the board, would receive a premium for their stock in a merger and: (1) members of the special committee were confused about the committee’s mandate to protect the interests of the low vote common stock; (2) one of the two members of the committee owned more high vote than low vote common stock; (3) special committee used the company’s financial advisor, which was compensated on a contingent basis, and used that financial advisor’s attorneys, as its only advisors; (4) committee was not fully informed in making its determination because it did not
investigate historical premiums, and did not investigate whether
premiums for high-vote stock were as common as equal treatment;
and (5) evidence pointed to a lack of arm’s length bargaining).

• **Gesoff v. IIC Indus. Inc.**, C.A. Nos. 19473, 19600, 2006 Del. Ch.
LEXIS 91 (Del. Ch. May 18, 2006) (use of a special committee
was flawed because: (1) committee was only composed of one
member; (2) committee’s mandate was vague and it was unclear
whether the committee had the power to veto the transaction;
(3) committee member was confused as to the structure of the
transaction, which was changed mid-process from a tender offer
followed by a short-form merger to a long-form merger; and
(4) advisors chosen by committee were essentially “handpicked,”
and controlled by, the company).

• **In re Loral Space & Commcn’s Inc. Litig.**, C.A. No. 3022-VCS,
special committee was flawed where the special committee’s lead
negotiator had substantial ties to the party proposing the
transaction, the special committee’s mandate was too narrow, and
the special committee allowed the party proposing the transaction
to dictate the terms of the transaction. The Court concluded that
“it is the sheer accumulation of examples of timorousness and
inactivity that contributes to [the] conclusion that this Special
Committee did not fulfill its intended function.”).

• **S. Muoio & Co. LLC v. Hallmark Entertainment Investments Co.**, 
Mar. 9, 2011) (finding, in a post-trial decision, special committee
effective, shifting entire fairness burden to plaintiff, and upholding
fairness of the challenged recapitalization with a controlling
stockholder where, among other things, the special committee was
independent, negotiated at arm’s length, had independent advisors,
and had a broad mandate; noting generally that “[a]s respected
practitioners have noted, in the context of a conflict transaction, the
importance of the committee’s charter cannot be overstated. In
addition to being independent, a well-constituted special
committee must have a clear mandate setting out its powers and
responsibilities in negotiating the interested transaction. This Court
has stated that this mandate should include the power to fully
evaluate the transaction at issue, and, ideally, include what this
court has called the critical power to say ‘no’ to the transaction.”)
(internal citations omitted).

• **Cf. In re Southern Peru Copper Corp. S’holder Deriv. Litig.**, C.A.
14, 2011, revised Dec. 20, 2011) (finding, post trial, that because
the special committee “was not ‘well functioning,’” defendants bore the burden to prove fairness; suggesting, in dicta, that the determination of whether defendants were entitled to a burden shift should not focus on whether a committee is “well functioning,” but rather on factors that can be determined early in litigation “like the independence of the committee and the adequacy of its mandates”), aff’d sub nom. Americas Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

- The court will review a transaction with a controlling stockholder under business judgment “[i]f a controller agrees up front, before any negotiations begin, that the controller will not proceed with the proposed transaction without both (i) the affirmative recommendation of a sufficiently authorized board committee composed of independent and disinterested directors and (ii) the affirmative vote of a majority of the shares owned by stockholders who are not affiliated with the controller.” The special committee in this transaction faced “a stark and self-interested choice: a lower price with a majority-of-the-minority vote, which would give the Special Committee members greater personal protection against liability, or a higher price without the increased personal protection.” The Court of Chancery noted that a “board acting loyally may take action to oppose, constrain, or even dilute a large or controlling stockholder.” In re Orchard Enters., Inc. S’holder Litig., C.A. No. 7840-VCL (Feb. 28, 2014) (discussing the Quest Software special committee that “took counter-balancing action against a CEO and large blockholder” by using a dilutive option to negotiate with potential bidders and the large blockholder as described in In re Quest Software Inc. S’holders Litig., 2013 WL 5978900 (Del. Ch. Nov. 12, 2013)).

- The Court of Chancery found that a special committee’s decision, supported by a conflicted financial advisor, to initiate a sale of the company “falls short under enhanced scrutiny because it was not made by an authorized corporate decisionmaker.” While the board had authorized that special committee to analyze alternatives previously discussed by the full board and make a recommendation to the board, the special committee hired a conflicted financial advisor and put the company in play without board approval. In re Rural Metro Corp. S’holders Litig., C.A. No. 6350-VCL (Mar. 7, 2014).

- This special committee did not see M&A as its expertise so it relied on others to negotiate on its behalf. The Court of Chancery stated, “Foremost among the indicia relevant to the Court’s assessment of whether a special committee is well functioning is whether the committee is well informed. . . . Material
information—especially material information about the fair value of the corporation and the minority stock—should not be withheld from the special committee or its advisors. . . . If the controlling stockholder recommends or has a pre-existing, material relationship with a financial advisor, the special committee’s reliance on that advisor may cast doubt on the committee’s independence and access to adequate information. Although it may not be per se inappropriate for the special committee to not negotiate directly with a potential acquirer, the advisor charged with the direct negotiations must be faithful to the special committee and its utmost duty to protect the interests of minority stockholders, and the special committee should be informed about material actions by its advisors and material developments in the negotiations—particularly related to price.” Because the record lacked evidence that the special committee was adequately informed about the allocation of merger consideration (which was found to be an otherwise fair enterprise value) between the control group and minority stockholders in three different offer options, it could not conclude that the special committee was well functioning as required to shift the burden of proof to the plaintiff. Frank v. Elgamal, C.A. No. 6120-VCN (Del. Ch. Mar. 10, 2014).

10. **Stockholder ratification of an interested transaction may not obviate the need for judicial review of the substantive fairness of such transaction.**

- In Gantler v. Stephens, 965 A.2d 695 (Del. 2009), the Delaware Supreme Court held that the doctrine of stockholder ratification does not apply where a company obtains stockholder approval simply because stockholder approval is statutorily required for a transaction. The Court also made clear that with the exception of a claim of a lack of authority, a ratifying stockholder vote will not extinguish a claim altogether, but will only provide for business judgment review of the challenged transaction.

11. **Business judgment review might be applicable for one- and two-step “going private” transactions under a “unified standard” of judicial review proposed in, and applied by, the Court of Chancery.**

- In re Cox Commc’ns Inc. S’holders Litig., 879 A.2d 604 (Del. Ch. 2005) (observing in the abstract that minority stockholders would be better protected under Delaware law if controlling stockholder freezeouts—both long form mergers and two-step tender offers—could trigger business judgment review if a process was designed to “mirror[] both elements of an arms-length merger: 1) approval by disinterested directors; and 2) approval by disinterested stockholders,” i.e., applying the business judgment standard
instead of entire fairness if a transaction was subject to both negotiation by a special committee of independent directors and majority-of-the-minority stockholder approval).

- **In re CNX Gas Corp. S’holders Litig.,** 2010 Del. Ch. LEXIS 119 (Del. Ch. May 25, 2010) (applying the “unified standard” described in Cox Communications to a tender offer structured under the Pure Resources rubric; denying motion for preliminary injunction after concluding that entire fairness would apply because the majority-of-the-minority condition improperly included conflicted stockholders and because the special committee was not provided with “authority comparable to what a board would possess in a third-party transaction” because it was not given the power to seek leverage against the controlling stockholder by seeking alternatives, filing a lawsuit, or deploying a poison pill).

- **In re CNX Gas Corp. S’holders Litig.,** 2010 Del. Ch. LEXIS 139 (Del. Ch. July 5, 2010) (granting application to certify interlocutory appeal of preliminary injunction ruling to the Supreme Court; suggesting the possibility of a Kahn v. Lynch burden-shift for entire fairness review might still apply; recognizing that a “controller that uses its influence over the target board to restrict [its] authority . . . affirmatively chooses to stand on both sides of the transaction, thereby triggering entire fairness review; noting that “the transaction that the Pure Resources court declined to review likely would not satisfy the Cox Communications test” because the controller did not provide the special committee with the power to adopt a poison pill); **In re CNX Gas Corp. S’holders Litig.,** No. 333, 2010, 2010 Del. LEXIS 324 (Del. July 8, 2010) (Supreme Court refusing to accept application for interlocutory review).

- **Liang v. Cohen,** C.A. No. 5721-VCL (Del. Ch. Aug. 19, 2010) (TRANSCRIPT) (explaining that a challenge to a 55% stockholder’s tender offer, structured as a Pure Resources offer, but with the specific power to adopt a poison pill, would be governed under the “Cox Communications unified standard” and likely would apply entire fairness because consummation of the tender was “not conditioned on the receipt of an affirmative recommendation from the special committee”).

- **In re MFW S’holders Litig.,** C.A. No. 6566-CS, 2013 WL 2326879 (Del. Ch. May 29, 2013) (applying the business judgment rule to a squeeze-out merger by a controlling stockholder structured as a one-step merger where the transaction was conditioned upfront on both the approval of a special committee and approval of a
majority of the minority stockholders; holding that the business judgment rule would only apply to such a transaction if the following conditions were met: “(i) the controller conditions the procession of the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee is independent; (iii) the special committee is empowered to freely select its own advisors and to say no definitively; (iv) the special committee meets its duty of care; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority”).

- As noted by Chancellor Strine in *MFW*, the Delaware Supreme Court has not directly addressed the question of the appropriate standard of review where a transaction is conditioned upon the approval of both a special committee and a majority of the minority stockholders.

H. **Intersection Between Fiduciary Duties And Contractual Obligations.** A board of directors does not breach its fiduciary duties when complying with its contractual obligations. In *Hokanson v. Petty*, C.A. No. 3438-VCS, 2008 Del. Ch. LEXIS 182 (Del. Ch. Dec. 10, 2008), a corporation in financial distress entered into a contract with a third party in 2003 to provide a capital infusion in exchange for a “buyout option” that allowed the third party to purchase outstanding securities of the corporation at any time during a three-year period at a specified price and to dictate the form of the transaction. The third party subsequently exercised the option in 2007 and, under the merger agreement with the corporation, the preferred stockholders received a percentage of their liquidation preference and the common stockholders received nothing. Plaintiffs bought suit claiming that the corporation’s board breached its fiduciary duties by failing to obtain more consideration in the merger. The Court dismissed the plaintiffs’ claim because the merger price was dictated by the terms of the buyout option and the distribution of the consideration was in accordance with the requirements of the corporation’s charter. According to the Court: “Parties cannot repudiate their contracts simply because they wish they had gotten better terms…. The plaintiffs have cited no authority suggesting that the … directors were mandated to cause the company to breach a contract and avoid the Merger.” However, it should be noted that the issue of whether the corporation’s board breached its fiduciary duties by entering into the buyout option in 2003 was not before the Court because any such claim was time-barred under the doctrine of laches. In other words, the only issue before the Court was whether the board breached its fiduciary duties at the time the buyout option was exercised.

II. **THE POISON PILL UNDER DELAWARE LAW.**

A. **Rights plans upheld as a technical matter.** Delaware courts have rejected technical challenges to the concept of a rights plan under Delaware law.
Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985) (rejecting the argument that the adoption of a rights plan violated Section 157 of the DGCL and upholding the validity of a “flip-over” provision).

Leonard Loventhal Account v. Hilton Hotels Corp., 780 A.2d 245 (Del. 2001) (rejecting, among other things, the claim that, contractually, a rights plan is not binding unless all stockholders agree to the rights plan and the claim that a rights plan, absent such an agreement, impermissibly places transfer restrictions on the common shares to which rights attach).

B. Unocal standard of review: adoption and maintenance. A board’s decision to adopt or maintain a rights plan is subject to the Unocal standard of review, regardless of whether a specific takeover threat exists at the time of the plan’s adoption. In addition, rights plans and other defensive measures that are related or adopted contemporaneously may be examined collectively under a Unocal analysis.

Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (requiring directors to show that in adopting a defensive device, they had “reasonable grounds for believing that a danger to corporate policy and effectiveness” existed and that the defensive measure must be “reasonable in relation to the threat posed”); see also Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1367 (Del. 1995) (holding further that the initial test is that the defensive measure may not be “draconian,” which means that the measure may not be preclusive or coercive).

Moran v. Household Int’l, Inc., 500 A.2d 1346 (Del. 1985) (applying the Unocal standard of review to the adoption of a rights plan as a preventive measure, in the absence of a specific takeover threat, and also stating that the decision whether to redeem rights is subject to the same standard).

Nomad Acquisition Corp. v. Damon Corp., C.A. Nos. 10173 & 10189, 1988 Del. Ch. LEXIS 133, at *15 (Del. Ch. Sept. 20, 1988) (“A board is held to the same fiduciary standards in deciding whether to accept or reject a tender offer as it had when it adopted a rights plan... A board, therefore, does not have unfettered discretion in refusing to redeem Rights.”).

In re DeSoto Inc. S’holder Litig., C.A. Nos. 11221 & 11222, 1990 Del. Ch. LEXIS 15, at *15 (Feb. 5, 1990) (examining a rights plan and stating that “[b]ecause corporate directors face an inherent conflict when confronted with possible loss of corporate control,
the responsive action in adopting or maintaining an anti-takeover defense must be reasonable in relation to the threat posed.”

- **In re Gaylord Container Corp. S’holders Litig., C.A. No. 14616, 1996 Del. Ch. LEXIS 149 (Del. Ch. Dec. 19, 1996)** (confirming that the adoption of a rights plan, whether occurring on a “clear day” or in response to a specific takeover threat, is subject to the Unocal standard of review and also noting that when a rights plan and other measures are adopted in concert, they may be collectively examined under the Unocal standard).

- **eBay Domestic Holdings, Inc. v. Newmark, C.A. No. 3705-CC, 2010 Del. Ch. LEXIS 187 (Del. Ch. Sept. 9, 2010)** (reviewing and rescinding a rights plan under Unocal where the defendant directors, controlling stockholders, and officers of craigslist adopted the rights plan to protect the craigslist “corporate culture” against the company’s other stockholder, eBay, and to prevent eBay from obtaining control upon the defendants’ deaths).

**C. Rights plans and proxy contests.** With regard to the specific issue of proxy contests, rights plans have been upheld by Delaware courts so long as they do not “fundamentally restrict” the right of stockholders to conduct a proxy contest.

- **Moran v. Household Int’l, Inc., 500 A.2d 1346, 1355 (Del. 1985)** (noting, in examining the validity of the challenged rights plan, that “[t]he issue . . . is whether the restriction upon individuals or groups from first acquiring 20% of shares before waging a proxy contest fundamentally restricts stockholders’ right to conduct a proxy contest” and noting the Court of Chancery’s “finding that the effect upon proxy contests will be minimal”).

- **The Henley Group, Inc. v. Santa Fe Southern Pacific Corp., C.A. No. 9569, 1988 Del. Ch. LEXIS 32 (Del. Ch. Apr. 18, 1988)** (holding that the adoption of a rights plan with a 20% trigger, in the face of a possible joint proxy solicitation and hostile offer by stockholders jointly holding 21% of the company’s stock, did not impermissibly restrict a proxy contest and violate the Unocal test, where the rights plan was amended to add a carve-out for joint proxy solicitations, and stating that the Court would have viewed the rights plan “more darkly” prior to defendant revising the rights plan “to eliminate proxy solicitation activity from its coverage”).

- **Stahl v. Apple Bancorp, Inc., C.A. No. 11510, 1990 Del. Ch. LEXIS 121 (Del. Ch. Aug. 9, 1990)** (denying motion for summary judgment by a 30.6% stockholder conducting a tender offer for the company and a proxy contest to elect directors who would redeem the rights and who challenged the company’s rights plan as invalid.
on the basis that although it contained a carve-out for revocable proxies or consents given in response to a public proxy or consent, it otherwise precluded him from reaching agreements or understandings with other stockholders concerning the voting of stock or the formation of a joint slate; finding that given the size of the stockholder’s block and his above-market price tender offer, the prohibitions would have only a minimal impact on his prospects in the proxy contest).

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Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310, 313 (Del. Ch. 2010) (upholding, in a post-trial opinion, the rights plan adopted by Barnes & Noble’s board of directors with a 20% trigger and a provision grandfathering a founding stockholder who held 30% of the company’s stock, after Yucaipa acquired 17% of the company’s stock, sought to mount a proxy contest, and appeared potentially aligned with another stockholder of equal size to it; the Court reasoned, among other things, that the rights plan did not preclude a successful proxy contest because it permitted public solicitation of revocable proxies, that it was possible for Yucaipa to mount a successful proxy contest, and that the rights plan would be “subject to a stockholder vote this year, a feature that further limits its inhibiting potency”).

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Versata Enterprises, Inc. v. Selectica, Inc., 5 A.3d 586, 601 (Del. 2010) (upholding a rights plan with a 4.99% trigger, in part because evidence showed that the rights plan did not render a proxy contest “mathematically impossible” or “realistically unattainable” and therefore was not preclusive).

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Compare In re Chrysler Corp. S’holders Litig., C.A. No. 11873, 1992 Del. Ch. LEXIS 152, at *14-*15 (Del. Ch. July 27, 1992) (rejecting a motion to dismiss a challenge to a board’s amendment of a rights plan lowering the trigger from 20% to 10%, after a 5% stockholder refused to sign a standstill agreement and increased his ownership to 9.8%, based on an allegation that the pill “significantly impair[s] and hinder[s] a third party’s ability to effectuate a successful tender offer for the Company by substantially reducing the number of shares which can be acquired prior to triggering the Rights…[and] impair[s] the ability of [the target’s] shareholders to oppose management or otherwise influence corporate policy by preventing shareholders from owning individually or collectively more than 10% of [the target’s] common stock thereby limiting concerted action through proxy contests or contests for control”) (emphasis in original).
D. **Pill as auction or negotiating device.** Several decisions have upheld a board’s decision to adopt or maintain a pill in order to promote an orderly auction process or to cause bidders to negotiate with the board.

- *Air Products & Chemicals, Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011) (upholding board decision to keep pill in place in face of hostile, fully-financed, all-cash, all-shares tender offer where target board had spent over a year communicating its conclusion that the offer was inadequate, which conclusion was supported by bidder’s nominees who had won election to the board, even though the board conceded that stockholders had enough information to decide whether to accept offer; reasoning that the pill/staggered board combination present was not preclusive where it was “realistically attainable” for bidder to win a majority of the target board seats through a second proxy contest).

- *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (upholding the adoption of a note purchase rights plan in response to an offer the board of directors, with the input of advisors, believed was inadequate, where the rights plan led to a significant increase in the offeror’s price).

- *Facet Enterprises, Inc. v. The Prospect Group, Inc.*, C.A. No. 9746, 1988 Del. Ch. LEXIS 51 (Del. Ch. Apr. 15, 1988) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, adopted in response to a hostile tender offer, where the board believed the offer price was inadequate, desired to conduct an orderly auction process, and sought to encourage negotiation with the board, despite the offeror’s argument that its offer was not coercive).

- *Tate & Lyle PLC v. Staley Continental, Inc.*, C.A. No. 9813, 1988 Del. Ch. LEXIS 61, at *26 (Del. Ch. May 9, 1988) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, which was adopted on a “clear day” and maintained in the face of a tender offer, where the board sought to pursue an auction process and achieve an increase in price, and noting that “while the market price is greater than the tender price, the rights plan is obviously serving a useful purpose in allowing the Board to seek a more realistic offer”; also refusing to enjoin board’s decision to lower rights plan trigger from 40% to 20%).

- *Nomad Acquisition Corp. v. Damon Corp.*, C.A. Nos. 10173 & 10189, 1988 Del. Ch. LEXIS 133, at *13 (Del. Ch. Sept. 20, 1988) (denying a motion for a preliminary injunction against the adoption of a rights plan in response to a stockholder’s 13-D filing disclosing the acquisition of 9.97% of the company’s stock and a
possible intention to acquire the company, after which filing the stockholder launched a tender offer for the company; finding that the board adopted the rights plan to encourage negotiations with the board, and stating that “a board need not be faced with a specific threat before adopting a rights plan” and that “a rights plan can be validly adopted where a board reasonably believes that the corporation may be vulnerable to coercive acquisition techniques”).

- *Doskocil Cos. Inc. v. Griggy*, C.A. No. 10,095, 1988 Del. Ch. LEXIS 132 (Del. Ch. Oct. 7, 1988) (denying a motion for a preliminary injunction redeeming a rights plan, where, in the face of two pending tender offers, a target board concluded that keeping the rights plan in place could lead to an increase in price or give stockholders time to consider both offers, even though the company had been in an auction process for ten weeks and a majority of shares had been tendered to one of the bidders).

- *In re Holly Farms Corp. S’holders Litig.*, C.A. No. 10350, 1988 Del. Ch. LEXIS 164, at *18 (Del. Ch. Dec. 30, 1988) (finding, on a motion for a preliminary injunction, that a board failed to satisfy its Revlon duties in choosing to sell the company to one of two bidders, but refusing to require the board to redeem the company’s rights plan, on the rationale that “[t]here is no evidence that the Board is presently using the poison pill for any improper purpose and it may still have a role in maximizing values. At some future time, the poison pill may no longer serve a valid purpose but that time has not yet arrived.”); see also 564 A.2d 342 (Del. Ch. 1989) (continuing to refuse to grant a preliminary injunction ordering the redemption of the rights plan, where the maintenance of the rights plan allowed the stockholders to vote on a transaction the board believed was economically superior, without interference from the competing bidder, and where the rights plan could help achieve an increased price for the company).

- *Compare Mills Acquisition Co. v. MacMillan, Inc.*, C.A. No. 10168, 1988 Del. Ch. LEXIS 138 (Del. Ch. Oct. 17, 1988), rev’d on other grounds, 550 A.2d 35 (Del. 1988) (granting a preliminary injunction against a rights plan and holding that once an auction was concluded, and there were two fair bids “on the table,” there was no longer any corporate purpose served by maintaining the rights plan against one of the bidders).

E. **Adopting or maintaining a rights plan in response to “inadequate” offers.**

1. Delaware courts have upheld decisions by boards, under a variety of circumstances, to refuse to redeem rights plans in the face of a hostile
tender offer that the board believes offers inadequate value to stockholders.

- **MAI Basic Four, Inc. v. Prime Computer, Inc.**, C.A. No. 10428, 1988 Del. Ch. LEXIS 161, at *10-*11 (Del. Ch. Dec. 20, 1988) (denying a motion for a preliminary injunction against a rights plan adopted in response to a tender offer where the directors were disinterested, the board “immediately after being advised of the tender offer . . . retained two outside independent financial advisors who expressed their opinion that the $20 per share offer was inadequate,” the offer represented “a relatively small premium over the recent selling price” of the company’s shares, the company had “recently obtained new management and [was] on the verge of reaping the economic benefits of its recent acquisition” of another company, the “tender offer ha[d] been pending for less than a month, and less than 1% of the stockholders ha[d] tendered their shares,” the “tender offer contain[ed] numerous contingencies which ha[d] not yet been fulfilled, and plaintiff [offeror] ha[d] been less than candid in revealing the value its experts have established” for the company, and it “appear[ed] that plaintiff [was] prepared, and [was] in a position, to offer more than $20 per share but only the existence of the anti-takeover devices [would] compel it to do so”).

- **BNS, Inc. v. Koppers Co.**, 683 F. Supp. 458 (D. Del. 1988) (denying a motion for a preliminary injunction either declaring a rights plan invalid or ordering directors to redeem the rights, where the rights plan was maintained in the face of a hostile tender offer for the company that the directors believed was inadequate).

- **Moore Corp. Ltd. v. Wallace Computer Servs., Inc.**, 907 F. Supp. 1545 (D. Del. 1995) (denying a motion for a preliminary injunction ordering the redemption of a rights plan, even though holders of nearly 75% of the target’s stock had tendered into a hostile tender offer, and finding that the maintenance of the rights plan appeared reasonable in response to the threat that, if the hostile tender offer closed and the offeror proceeded with a follow-up merger, the stockholders would be deprived of what the target board viewed as an imminent increase in the company’s value resulting from years of technological advances within the company).

- **Air Products and Chemicals, Inc. v. Airgas, Inc.**, C.A. No. 5249-CC, 2011 Del. Ch. LEXIS 22 (Del. Ch. Feb. 15, 2011) (upholding, in a post-trial opinion, albeit with explicit reluctance, a board’s ongoing decision, over the course of more than one year, not to redeem a rights plan and allow a non-discriminatory, all-cash, all-shares, fully financed tender offer to proceed, despite periodic
increases in the offeror’s price, where the board believed that continuing the company as a standalone business and executing the company’s business plan would result in greater value for stockholders, even though the stockholders were fully informed and the offer was not structurally coercive).

- Compare *In re DeSoto Inc. S’holder Litig.*, C.A. Nos. 11221 & 11222, 1990 Del. Ch. LEXIS 15, at *24 (Del. Ch. Feb. 5, 1990) (finding, on a motion for preliminary injunction, that a board of directors did not act reasonably in rejecting a tender offer (such as by refusing to elicit a fairness range from its banker with respect to the offer or by failing to attempt to elicit the highest bid from the offeror), and stating that in “the absence of other factors, this would likely result in the ordering of the immediate redemption of the [company’s] poison pill,” but refusing to order the redemption of the pill, on the rationale that business circumstances were in flux at the company and the “court [was] . . . ill-equipped to make th[e] determination” whether the offer was fair).

2. Case law suggests that a board cannot use a rights plan to favor a particular change in control transaction over a hostile bid offering comparable value, but its reach may be unclear or limited after *Airgas*.

- *Grand Metropolitan plc v. Pillsbury Co.*, 558 A.2d 1049 (Del. Ch. 1988) (granting a preliminary injunction against a rights plan and holding that directors did not act reasonably under *Unocal* in refusing to redeem rights in the face of a hostile tender offer in order to favor an alternative plan that involved spinning off or selling parts of the company’s business, where 87% of the stockholders tendered into the offer and stockholders could conclude that the alternatives were of similar value).

- *City Capital Associates Ltd. v. Interco, Inc.*, 551 A.2d 787 (Del. Ch. 1988) (granting a preliminary injunction against a rights plan and holding that directors did not act reasonably under *Unocal* in refusing to redeem rights in order to favor a restructuring of the company over a hostile bid of similar value, where the maintenance of the rights plan no longer appeared to serve “to increase the options available to shareholders or to improve the terms of those options” and appeared simply to “foreclose” stockholder choice).

- *TW Services, Inc. v. SWT Acquisition Corp.*, C.A. Nos. 10427 & 10298, 1989 Del. Ch. LEXIS 19 (Del. Ch. Mar. 2, 1989) (suggesting that the precedential value of *Interco* and *Grand Metropolitan* was limited to certain circumstances by stating that “[i]n few instances has this court issued an order requiring a board
of directors to redeem a defensive stock rights plan. In those instances, the board itself had elected to pursue either an outright sale of the company and had completed an auction process, or had elected to pursue a defensive restructuring that in form and effect was (so far as the corporation itself was concerned) a close approximation of and an alternative to a pending all cash tender offer for all shares. In those instances, it was thought that the central purpose of a pill -- to give a board time to negotiate on shareholders’ behalf or to consider alternatives to a tender offer or street sweep that threatened to coerce or otherwise injure shareholders -- had been fully served”).

- Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140, 1153 (Del. 1990) (questioning the reach of Interco and stating that “Plaintiffs’ position [that a board could not reject an offer for the company in order to pursue the board’s long-term plan, which it believed offered greater long-term value for stockholders] represents a fundamental misconception of our standard of review under Unocal principally because it would involve the court in substituting its judgment as to what is a ‘better’ deal for that of a corporation’s board of directors. To the extent that the Court of Chancery has recently done so in certain of its opinions, we hereby reject such approach as not in keeping with a proper Unocal analysis. See, e.g., Interco, 551 A.2d 787, and its progeny . . .”).

- Airgas also provides extensive commentary on Interco and Pillsbury. The Airgas Court compared the case before it to Interco by noting that “here, the takeover battle between Air Products and Airgas seems to have reached an ‘end stage.’ Air Products has made its ‘best and final’ offer. Airgas deems that offer to be inadequate. And we’re not ‘talking nickels and quarters here’ — an $8 gulf separates the two. The Airgas stockholders know all of this. At this stage, the pill is serving the principal purpose of precluding the shareholders from tendering into Air Products’ offer. As noted above, however, the Supreme Court rejected the reasoning of Interco in Paramount. Thus, while I agree theoretically with former-Chancellor Allen’s . . . conception [in Interco] of substantive coercion and its appropriate application, the Supreme Court’s dictum in Paramount (which explicitly disapproves of Interco) suggests that, unless and until the Supreme Court rules otherwise, that is not the current state of our law.” 2011 Del. Ch. LEXIS 22, at *137. The Court also described TW Services as follows: “Chancellor Allen shed light on two then-recent cases where the Court of Chancery had attempted to order redemption of a poison pill. He noted that the boards in those cases (i.e., Pillsbury and Interco) had ‘elected to pursue a defensive restructuring that in form and effect was (so far as the corporation
itself was concerned) a close approximation of and an alternative to a pending all cash tender offer for all shares.’ In other words, in Pillsbury and Interco, the boards were responding to a hostile offer by proposing ‘a management endorsed breakup transaction that, realistically viewed, constituted a functional alternative to the resisted sale.’ Importantly, ‘[t]hose cases did not involve circumstances in which a board had in good faith . . . elected to continue managing the enterprise in a long term mode and not to actively consider an extraordinary transaction of any type.’ The issue presented by a board that responds to a tender offer with a major restructuring or recapitalization is fundamentally different than that posed by a board which ‘just says no’ and maintains the status quo.’) (emphasis in original). Id. at *142-*143.

Cf. In re Orchid Cellmark Inc. S’holder Litig., C.A. No. 6373-VCN, 2011 Del. Ch. LEXIS 75, at *19-*21 (Del. Ch. May 12, 2011) (rejecting a motion for a preliminary injunction against a tender offer on Revlon grounds and upholding a merger agreement provision in which the target agreed, absent terminating the merger agreement for a superior proposal and paying a termination fee, not to “amend or waive [its] Rights Agreement, redeem the Rights or take any action which would allow” anyone other than the acquiror to obtain 20% of the target without triggering the pill).

In re BioClinica, Inc. S’holder Litig., C.A. No. 8272-VCG, 2013 WL 673736, at *2 n.23; *4 (Del. Ch. Feb. 25, 2013) (upholding continued use of a poison pill following target board’s approval of a two-step merger agreement, notwithstanding standstill agreements signed by losing bidders prohibiting them from making tender offers other than offers for all of the outstanding stock made at a price higher than a third party tender offer recommended by the target; finding that the target board could redeem the pill after the higher tender offer is announced but before “the teeth of the Rights Plan are . . . exposed,” and that “a sophisticated buyer could navigate [these] shoals if it wanted to make a serious bid”).

F. Other Delaware cases in which rights plans have been upheld. In addition to many of the above cases, there are several other Delaware cases in which rights plans have withstood challenges to their validity.

Chrysogelos v. London, C.A. No. 11910, 1992 Del. Ch. LEXIS 61 (Del. Ch. Mar. 25, 1992) (dismissing claims attacking adoption of rights plan and lowering of trigger from 20% to 15%, following the expiration of a dual class structure and a shift in control to the public stockholders, where complaint alleged no present injury to the corporation, but finding that such actions were relevant to other claims, which the court did not dismiss, alleging that the board had
an entrenchment motive in rejecting an acquisition proposal and repurchasing shares).


- **Hollinger Int’l, Inc. v. Black**, 844 A.2d 1022 (Del. Ch. 2004) (upholding adoption of a rights plan by independent directors in order to prevent a controlling stockholder who had breached his fiduciary duties to the company from violating a restructuring agreement between the company and the stockholder and from subverting the company’s agreed-upon strategic process).

- **In re Atmel Corp. S’holders Litig.**, C.A. No. 4161-CC (Del. Ch. May 19, 2009) (TRANSCRIPT) (denying a motion for a preliminary injunction, and instead requiring claims to proceed to trial, where plaintiffs argued that language in a rights plan including derivative instruments within the definition of beneficial ownership was so vague and unclear that it was facially invalid and constituted a per breach of the directors’ fiduciary duties).


**G. Limits on the board’s power to adopt a rights plan.**

1. Delaware courts have struck down pills that place unlawful constraints on the board’s power to manage the corporation.

- **Carmody v. Toll Bros., Inc.**, 723 A.2d 1180 (Del. Ch. 1998) (refusing to dismiss a complaint challenging a rights plan with a “dead hand” feature (i.e., providing that the rights plan could only be redeemed by the current board or by directors approved by the current board for the full ten-year life of the rights plan) on the basis that such feature violated Sections 141(a) and 141(d) of the DGCL and constituted a breach of the directors’ fiduciary duties under *Blasius* and *Unocal*).

- **Quickturn Design Systems, Inc. v. Shapiro**, 721 A.2d 1281 (Del. Ch. 1998) (invalidating a “no hand” provision in a rights plan (i.e.,
providing that a newly elected board of directors could not redeem rights issued under the plan for six months after taking office) as a violation of Section 141(a) of the DGCL).

- **Cf. Cal. Pub. Employees Ret. Sys. v. Coulter**, C.A. No. 19191, Del. Ch. LEXIS 54 (Del. Ch. Apr. 21, 2005) (refusing to extend *Carmody* to a contractual provision in golden parachute agreements, and holding that such provision did not violate Section 141(d) of the DGCL, where the provision provided that change-in-control payments would be due, if among other things, the board ceased to consist of “existing directors”—those serving at the time the agreements were executed and their approved successors).

2. Other claims against rights plans succeeded or were permitted to go forward where the rights plan violated earlier agreements binding the board.

- **In re Nat’l Intergroup, Inc. Rights Plan Litig.**, C.A. Nos. 11484 & 11511, 1990 Del. Ch. LEXIS 94 (Del. Ch. July 3, 1990) (granting summary judgment to plaintiff stockholders and holding that the board’s amendments to a rights plan lowering the trigger from 20% to 10%, introducing an automatic trigger feature that was no longer contingent upon a self-dealing transaction, eliminating the flip-over feature, and implementing an exchange right, three years after the plan’s adoption, were sufficiently significant to constitute a new plan, in violation of a resolution adopted by the board and stockholders at the time the plan was adopted providing that after three years, the board could not adopt a new rights plan without stockholder approval).

- **KLM Royal Dutch Airlines v. Checchi**, 698 A.2d 380 (Del. Ch. 1997) (denying a motion to dismiss, on ripeness grounds, a claim challenging a newly adopted rights plan brought by a stockholder who, under a preexisting agreement with the corporation and in exchange for an investment in the corporation, held an option to purchase additional shares of the corporation, but could not exercise the option without triggering the newly adopted rights plan); cf. **Creo Inc. v. Printcafe Software, Inc.**, C.A. No. 20164-CC (Del. Ch. Feb. 21, 2003) (TRANSCRIPT) (rejecting motion for temporary restraining order against rights plan adopted after a would-be acquiror signed agreements to purchase shares amounting to a majority stake in the target, but before purchases were consummated).

bound to stockholders by its previously announced policy that it would not extend the corporation’s rights plan without a stockholder vote), cert. for interlocutory appeal denied, 906 A.2d 138 (Del. 2006).

H. **Other cases in which claims against rights plans were permitted to proceed or succeeded.** Notwithstanding the Delaware courts’ general respect for rights plans, there are other circumstances in which Delaware courts have either permitted claims to go forward against or rescinded rights plans.

- **In re Chrysler Corp. S’holders Litig.**, C.A. No. 11873, 1992 Del. Ch. LEXIS 152, at *14-*15 (Del. Ch. July 27, 1992) (rejecting a motion to dismiss a challenge to a board’s amendment of a rights plan lowering the trigger from 20% to 10%, after a 5% stockholder refused to sign a standstill agreement and increased his ownership to 9.8%, based on an allegation that the pill “significantly impair[s] and hinder[s] a third party’s ability to effectuate a successful tender offer for the Company by substantially reducing the number of shares which can be acquired prior to triggering the Rights…[and] impair[s] the ability of [the target’s] shareholders to oppose management or otherwise influence corporate policy by preventing shareholders from owning individually or collectively more than 10% of [the target’s] common stock thereby limiting concerted action through proxy contests or contests for control”) (emphasis in original).

- **Wells Fargo & Co. v. First Interstate Bancorp**, C.A. No. 14623, 1996 Del. Ch. LEXIS 3 (Del. Ch. Jan. 18, 1996) (denying motion to dismiss Unocal claim challenging refusal to redeem rights to allow stockholders to consider a hostile exchange offer following target board’s approval of a friendly merger).

- **In re Gaylord Container Corp. S’holders Litig.**, C.A. No. 14616, 1996 Del. Ch. LEXIS 149 (Del. Ch. Dec. 19, 1996) (denying a motion to dismiss a breach of fiduciary duty claim against directors who, prior to control shifting to public stockholders following the expiration of a dual class structure, adopted a rights plan and charter and bylaw amendments implementing a number of defensive measures, where the rights plan and charter and bylaw amendments were, collectively, “arguably disproportionate to their purported purpose” and “where the circumstances permit an inference that entrenchment was their true purpose”); but see 753 A.2d 462 (Del. Ch. 2000) (ultimately granting summary judgment to defendants and noting, among other things, that the expiration of the dual class structure constituted a legitimate threat, that the rights plan was “a garden-variety poison pill,” and that a would-be acquiror could still mount an effective proxy contest).
eBay Domestic Holdings, Inc. v. Newmark, C.A. No. 3705-CC, 2010 Del. Ch. LEXIS 187, at *82 (Del. Ch. Sept. 9, 2010) (rescinding, in a post-trial decision, a rights plan where the defendant directors, controlling stockholders, and officers of craigslist failed to prove, under Unocal, that they analyzed the threats they argued justified the rights plan (alleged threats to “corporate culture” posed by the other stockholder, eBay, and threats eBay allegedly would pose when stock held by the defendants passed to their heirs in the future) and where the rights plan was not reasonable, in that the defendants could, without the rights plan, protect their vision of the company as long as they controlled it, and would not be permitted to “adopt the Rights Plan now so that their vision of craigslist’s culture can bind future fiduciaries and stockholders from beyond the grave”) (emphasis in original).

I. Could a board be obligated to adopt a pill?

Louisiana Municipal Police Employees’ Retirement Sys. v. Fertitta, C.A. No. 4339-VCL, 2009 Del. Ch. LEXIS 144, at *31 (Del. Ch. July 28, 2009) (“To say that there is no per se duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board’s failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover.”). In Fertitta, a company entered into a going-private merger with an entity controlled by its Chairman, CEO, and 39% stockholder. After the merger agreement was signed, the CEO purchased shares on the open market, and, “although the board and its advisors must have been aware of [the CEO’s] continuing open market purchases, which threatened to (and ultimately did) deliver majority control of the company to [the CEO] without his consummation of the merger agreement at a premium price, the board did nothing to stop [the CEO] from continuing to accumulate shares.” Id. at *17. The Court found that, given other facts, which also suggested that the corporation’s board was more interested in accommodating the controlling stockholder than protecting the corporation’s minority stockholders’ interests, the plaintiff had stated a claim for the breach of the duty of loyalty.

NACCO Indus., Inc. v. Applica, Inc., 997 A.2d 1 (Del. Ch. 2009) (adopting a pill to cap the company’s largest stockholder “is an action that [the target] logically would have taken in response to the threat of a creeping takeover”).
In re CNX Gas Corp. S’holders Litig., 2010 Del. Ch. LEXIS 119 (Del. Ch. May 25, 2010) (applying the “unified standard” described in Cox Communications (discussed above) to a controlling stockholder’s tender offer; suggesting that business judgment review could be obtained if the transaction were conditioned on both majority-of-the-minority stockholder approval and approval of the transaction by a special committee of independent directors exercising “authority comparable to what a board would possess in a third-party transaction,” including authority to seek alternatives, file a lawsuit against the controller, and deploy a poison pill).

Cf. In re infoUSA, Inc. S’holders Litig., 953 A.2d 963 (Del. Ch. 2007) (dismissing claim that directors breached their fiduciary duties by permitting CEO to remain exempt from rights plan, where directors instead entered into standstill agreement with CEO following acquisitions of stock by him).

III. MERGER AGREEMENT PROVISIONS: DEAL PROTECTION.

A. No Talk/No Solicitation. Many merger agreements prohibit solicitation of bids once a deal is signed up, although the provisions generally permit targets to negotiate with unsolicited topping bidders.

1. More aggressive agreements may prevent targets from even talking to such unsolicited bidders. Is this “willful blindness”?

Phelps Dodge Corp. v. Cyprus Amax Minerals Co., C.A. No. 17398, 1999 Del. Ch. LEXIS 202 (Del. Ch. Sept. 27, 1999) (considering prospective competitor’s challenge to “no-talk” provision under which target could not talk to prospective acquirors, Court stated that clause appeared to impose upon the target board “willful blindness” in violation of the board’s fiduciary duty to be informed of all material information reasonably available).

Ace Ltd. v. Capital Re Corp., 747 A.2d 95 (Del. Ch. 1999) (suggesting that agreement to a “no-talk” provision—i.e., a provision without an effective carve-out permitting it to talk with unsolicited bidders—in a merger for which the stockholder vote was locked up would violate a board’s duty of care).

In re IXC Communications, Inc. S’holders Litig., C.A. Nos. 17324, 17334, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999) (dismissing stockholder claim that their directors breached their fiduciary duties by agreeing to a “no-talk” clause, where the
provision was agreed to late in the negotiation process after a thorough examination of possible alternatives).

- *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1207 (Del. Ch. 2001) (holding that under directors’ heightened duty to obtain best price reasonably available, “directors cannot be precluded by the terms of an overly restrictive ‘no-shop’ provision from all consideration of possible better transactions” and that directors are “required to consider all available alternatives in an informed manner until such time as [the transaction is] submitted to the stockholders for approval”).

- *See* Part A.4, below, discussing the potential “informational vacuum” of including a no solicitation provision when a company has executed standstill agreements with losing bidders that contain “Don’t Ask, Don’t Waive” provisions.

2. The courts may be questioning of overly “buyer-friendly” no-shop provisions.

- *In re Compellent Technologies, Inc. S’holder Litig.*, C.A. No. 6084-VCL, 2011 Del. Ch. LEXIS 190 (Del. Ch. Dec. 9, 2011) (characterizing the following fiduciary out provisions to a no-shop as a “procedural gauntlet”: (1) requirement of strict compliance with no-shop with no materiality, intent or causation limitations; (2) required conclusion that failure to act “would constitute a breach”, rather than “could”, “would be reasonably likely to” or “would be inconsistent with” formulations; (3) obligated topping bidder to sign 275-day standstill, with target only having ability to waive if, after giving acquiror 4 days’ notice, target determined failure to do so “would constitute a breach” of fiduciary duties; (4) non-public information had to be provided to acquiror 24 hours before it was given to any topper; and (5) target had to provide acquiror with topping bidder’s identity 2 days before talking to the topper; other deal protections included: (1) ongoing information rights for acquiror if target met the standard to talk to topper; (2) change of recommendation provision that (x) included notice and 4-business day delay before target board could change recommendation, (y) provided that change from unanimous recommendation to majority recommendation by special committee constituted a change of recommendation and (z) was potentially not workable because target board could not adjourn/postpone the stockholder meeting without acquiror’s consent (particularly with a force-the-vote provision and 29% of stockholders locked-up in a support agreement with a nine-month tail); (3) target adopted poison pill, carving out current deal, which could only be pulled through similar procedures to the fiduciary
out; and (4) termination fee of 3.85% of equity value (5% in the case of an intervening event) and the superior proposal break fee could be triggered by acquiror if it simply terminated after target responded to a topping bidder).

3. Interpretation of a provision prohibiting actions that may impair or delay the consummation of a merger.

- Energy Partners, LTD. v. Stone Energy Corp., C.A. Nos. 2402-N, 2374-N, 2006 Del. Ch. LEXIS 182 (Del. Ch. Oct. 11, 2006) (when read in context of entire merger agreement, a provision that prevented an acquiror from taking action that could “reasonably be expected to materially impair the ability of [the parties] to consummate the Merger... or materially delay such consummation...” did not prevent the acquiror from investigating, negotiating, or pursuing a certain tender offer or any other Third Party Acquisition Proposal).

4. Some agreements may prohibit targets from talking to bidders who previously agreed to standstill agreements by prohibiting the waiver of such provisions.

- In re The Topps Co. S’holders Litig., Consol. C.A. Nos. 2786-VCS, 2998-VCS, 2007 Del. Ch. LEXIS 82 (Del. Ch. June 14, 2007), a third-party bidder was prohibited by a standstill agreement from making public any information about its discussion with the target or proceeding with a tender offer for the target’s shares without permission from the target board. The target board refused to waive the standstill agreement. The Court found that where: (a) the target refused to negotiate with a third-party bidder, who then made an unsolicited bid for the target’s shares at a materially higher price than was being offered in the target’s current deal; (b) the target board did not use the standstill agreement as a negotiating tool to extract concessions from the bidder; (c) the board’s refusal to waive the standstill agreement meant that the stockholders were foreclosed from considering the bidder’s offer; and (d) the target board disparaged the seriousness of the bidder’s offer while using the standstill agreement to prevent the bidder from telling its side of the story, then the standstill agreement was not being used for a legitimate purpose and the refusal to waive it was inconsistent the board’s fiduciary duties under Revlon. The Court enjoined a merger vote of the target until after the target board waived the standstill agreement to: (1) allow the third-party bidder to make a tender offer; and (2) allow the bidder to communicate with the target’s shareholders about its version of relevant events.
i. See also In re RehabCare Group, Inc. S’holders Litig., C.A. No. 6197-VCL (Del. Ch. Sept. 8, 2011) (TRANSCRIPT) (approving settlement of litigation involving, among other things, target waiving standstill provisions prohibiting bidders from requesting a waiver of the standstill to make a topping bid; stating “I do think it is weird that people persist in the ‘agree not to ask’ in the standstill. When is that ever going to hold up if it’s actually litigated, particularly after Topps? It’s just one of those things that optically looks bad when you’re reviewing the deal facts. It doesn’t give you any ultimate benefit because you know that the person can get a Topps ruling making you let them ask, at a minimum, or can ask in a back channel way. Why would you hurt yourself in terms of the optics by asking for that? One of those strange things in life.”).

• Compare In re Ancestry.com Inc. S’holder Litig., Consol. C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (TRANSCRIPT) (noting that “per se rulings where judges invalidate contractual provisions across the bar are exceedingly rare in Delaware”; suggesting that, in an auction process, there are circumstances in which standstill provisions prohibiting a bidder from requesting a waiver of the standstill to make a topping bid can have “value-maximizing purposes” to “allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you’re creating an auction, there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process”) with Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013) (concluding that plaintiffs had shown a reasonable probability of success on the merits, but denying a preliminary injunction based upon a balancing of the equities, with respect to their claim that a board acted unreasonably when, after pursuing a single-bidder sale of the company strategy, it entered into a merger agreement prohibiting the waiver of standstills and (i) in connection with a prior unrelated effort to facilitate a sale of a 31% stockholder’s stake, certain potential private equity buyers were party to standstill provisions prohibiting them from requesting a waiver of the standstills to make a bid for the whole company and (ii) the board had failed to consider whether the standstills should remain in effect before approving the merger agreement); In re Celera Corp. S’holder Litig., C.A. No. 6304-VCP, 2012 Del. Ch. LEXIS 66 (Del. Ch. Mar. 23, 2012) (characterizing as possibly “problematic” the combination of a standstill provision prohibiting bidders who had
signed the standstill from asking the board to waive the standstill with a no-shop provision because it created a potential informational vacuum and suggesting that the likely remedy for a successful claim challenging such a standstill would be an injunction against its enforcement); and In re Complete Genomics, Inc. S’holder Litig., C.A. No. 7888-VCL (Del. Ch. Nov. 9, 2012) (TRANSCRIPT) (recognizing that “Delaware entities are free to enter into binding contracts without a fiduciary out so long as there is no breach of fiduciary duty involved when entering into the contract in the first place” but finding that plaintiffs had shown a reasonable probability of success on their claims challenging standstills prohibiting a bidder from privately requesting a waiver to make a topping bid and a merger agreement provision that prohibited the company from waiving or modifying standstills because the board “impermissibly limited its ongoing statutory and fiduciary obligations to properly evaluate a competing offer, disclose material information, and make a meaningful merger recommendation to its stockholders”).

5. The court may evaluate the “body language” of a no-talk provision when considering its reasonableness and its signaling effect to potential topping bidders.

- In re Fort Howard Corp. S’holders Litig., C.A. No. 9991, 1988 Del. Ch. LEXIS 110 (Del. Ch. Aug. 8, 1988) (noting that the joint press release announcing the no-shop merger explained that “the Special Committee” directed the Company’s management and [its financial advisor] to be available to receive inquiries from any other parties interested in a possible acquisition . . . and, [for the financial advisor] as appropriate, to provide information and . . . enter into discussions and negotiations . . . .”); Forgo v. Health Grades, Inc., C.A. No. 5716-VCS (Del. Ch. Sept. 3, 2010) (TRANSCRIPT) (evaluating the merits of ordering a Fort Howard-style announcement and the signaling effect of failing to make such a press release).

B. Right to Terminate for Superior Proposal.

1. The Delaware General Corporation Law authorizes “exclusive” merger agreements.

- Section 146 allows a corporation to agree to submit any matter to its stockholders whether or not the board of directors determines subsequent to its approval that such matter is no longer advisable.

- Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003) (holding that, by approving voting agreements that assured
stockholder approval of merger coupled with a force the vote provision, the directors irrevocably locked up the merger and took measures that were unreasonable and preclusive).

2. **To preserve a termination right, it should be clear that the right is a right to terminate for a defined superior proposal, rather than relying upon some inherent requirement that “fiduciary duties” require termination.**

   - *Smith v. Van Gorkom*, 488 A.2d 858, 888 (Del. 1985) (explaining that merger agreement, which provided that the directors “may have a competing fiduciary obligation to the shareholders under certain circumstances,” did not permit the board to terminate the merger agreement to accept a better offer, stating that the board’s only options were to (i) proceed with merger and stockholders’ meeting, with the board’s recommendation of approval or (ii) rescind the merger agreement, withdraw its approval of the merger and notify its stockholders that the proposed stockholders’ meeting was cancelled).

   - *See Corwin v. deTrey*, C.A. No. 6808, 1989 Del. Ch. LEXIS 166, at *10 (Del. Ch. Dec. 1, 1989) (“In such a third-party transaction, the directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed.”).


C. **May a Board Limit its Right to Change its Recommendation?**

1. **Directors may present a merger agreement to stockholders that they no longer recommend.**

   - Prior to 1998, the board recommendation was a technical but necessary requirement for holding a stockholders meeting. *See Smith v. Van Gorkom*, 488 A.2d 858, 887-88 (Del. 1985) (stating that board could neither (i) recommend that the stockholders vote against the merger nor (ii) take a noncommittal position on the merger).

   - Since 1998, there has not been a technical requirement that a board continue to recommend to present a merger agreement to stockholders. From 1998 to 2003, Section 251(c) permitted a merger agreement to require that the agreement be submitted to the stockholders (i.e., a force the vote provision) whether or not the
board of directors determined subsequent to declaring its advisability that the agreement was no longer advisable and recommended that the stockholders reject it. In 2003, Section 146 was added to replace Section 251(c). Section 146 provides that a corporation may agree to submit any matter (including a merger agreement) to its stockholders for approval whether or not the board of directors determines after approving any such matter that it is no longer advisable and recommends that stockholders vote against the matter.

- See *In re Berkshire Realty Co., Inc. S’holders Litig.*, C.A. No. 17242, 2002 Del. Ch. LEXIS 146, at *13 (Del. Ch. Dec. 18, 2002) (Although charter provision required board of directors to submit liquidation plan to stockholders, the board had no duty to recommend stockholder approval of the plan. In fact, “if the board, in the exercise of its business judgment, determined that liquidation was not in the best interests of the corporation and its stockholders, it could not have recommended a liquidation without violating its fiduciary duty to the stockholders.”).

- In *Frontier Oil Corp. v. Holly Corp.*, C.A. No. 20502, 2005 Del. Ch. LEXIS 57 (Del. Ch. April 29, 2005), the Court stated that a merger agreement “was not an ordinary contract. Before the merger could occur, the shareholders of [the target corporation] had to approve it. The directors of [the target] were under continuing fiduciary duties to the shareholders to evaluate the proposed transaction.” The Court noted that the merger agreement accommodated those duties by providing that the board could, in certain circumstances, change or withdraw its recommendation that stockholders approve the merger. In holding that the target had not repudiated the merger agreement, Vice Chancellor Noble stated that “[r]evisiting the commitment to recommend the merger was not merely something that the merger agreement allowed the [target] Board to do; it was the duty of the [target] Board to review the transaction to confirm that a favorable recommendation would continue to be consistent with its fiduciary duties.” *Id.* at *102.

- *Mercier v. Inter-Tel, Inc.*, 929 A.2d 786, 809 (Del. Ch. 2007) (discussing the intricacies of the Blasius standard of review and noting that “[a]s a matter of fiduciary duty, directors should not be advising stockholders to vote for transactions or charter changes unless the directors believe those measures are in the stockholders’ best interests.”).

2. **Strong case law language regarding the board’s fiduciary duty of disclosure.**
• Frontier Oil Corporation v. Holly Corporation, C.A. No. 20502, 2005 Del. Ch. LEXIS 57 (Del. Ch. April 29, 2005) (noting that duty of disclosure could require a board to change its recommendation).

• See Malone v. Brincat, 722 A.2d 5 (Del. 1998) (board of directors owes a fiduciary duty of disclosure in connection with disclosures to its stockholders even when the board is not seeking stockholder action, and that directors who knowingly disseminate false information that results in corporate injury or damage to an individual stockholder thereby violate their fiduciary duty to the corporation and its stockholders).

• ODS Technologies, L.P. v. Marshall, 832 A.2d 1254, 1261 (Del. Ch. 2003) (emphasizing the duty of disclosure in the context of a stockholder vote on various charter amendments and stating that “Delaware law requires full and fair explanation of the rationale for a proposal that directors are recommending stockholders to approve”).

• Many agreements purport to limit the circumstances under which directors can change their recommendation to certain defined, “superior proposals.” But there may be other developments that would require a board to change its recommendation. There may be an unforeseen positive development with respect to the target or an unexpected decline in an acquiror’s stock price. A requirement that the board continue to “recommend” a transaction in the face of such a development may place directors in an untenable position.

• Marmon v. Arbinet-Thexchange, Inc., C.A. No. 20092, 2004 Del. Ch. LEXIS 44, at *16 (Del. Ch. April 28, 2004) (stating, in the context of Section 220 (books and records demand), that the “directors of a Delaware corporation have a duty to disclose material facts to all of the corporation’s shareholders. The directors are not free arbitrarily to pick and choose the shareholders to whom they will or will not make disclosure. Nor can the corporation be heard to defend such a practice on the basis that it has bound itself contractually not to make such disclosures. [The Company’s] directors were not free to contract away disclosure obligations that they had a fiduciary duty to observe. Nor could they rely upon a certificate provision prohibiting disclosure to avoid a shareholder’s inspection right conferred by statute.”) (footnotes omitted).

• Cavalcade Oil Corp. v. Texas American Energy Corp., C.A. No. 7605, 1984 Del. Ch. LEXIS 603 (Del. Ch. May 22, 1984) (holding that charter amendments would not become effective until
corporation made additional disclosures because, inter alia, board of directors had unanimously recommended in favor of the amendments but, after proxy statements were mailed, two directors changed their position and one director resigned in opposition to the amendments).

3. **Directors may recommend a merger that is unlikely to be approved by stockholders.**

- *In re Lear Corp. S’holder Litig.*, C.A. No. 2728-VCS, 2008 Del. Ch. LEXIS 121, at *44 (Del. Ch. Sept. 2, 2008) (rejecting claim that directors breached their duty of loyalty by recommending a merger agreement to stockholders while knowing that approval of the agreement was unlikely and stating “in the merger context, directors are free to adopt a merger agreement and seek stockholder approval if they believe that the stockholders will benefit upon adoption, even if they recognize that securing approval will be a formidable challenge”).

D. **Break-Up Fees.**

1. **What standard applies?**

- *In re IXC Communications, Inc. S’holders Litig.*, C.A. Nos. 17324, 17334, 1999 Del. Ch. LEXIS 210 (Del. Ch. Oct. 27, 1999) (holding that where a termination fee is not a defensive mechanism instituted to respond to a perceived threat from a potential acquiror, or the result of disloyalty or lack of care, the courts will review break-up fees under deferential business judgment standard).

- *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261 (Del. 1989) (where break-up fee is adopted as a defensive measure in the context of a sale of control favoring one bidder over others, heightened judicial scrutiny will be applied).


2. **Magic number?**

- *In re Answers Corp. S’holders Litig.*, C.A. No 6170-VCN, 2011 Del. Ch. LEXIS 57, at *19 n.47 (Del. Ch. Apr. 11, 2011) (refusing to preliminarily enjoin transaction with a termination fee equal to 4.4% of the target’s equity value and 5% of its enterprise value and noting as follows: “The break-up fee, at 4.4% of equity value, is
near the upper end of a ‘conventionally accepted’ range. This is a relatively ‘small’ transaction [at approximately $127 million]; a somewhat higher than midpoint on the ‘range’ is not atypical. The Plaintiffs argue that the meaningful percentage is one calculated in reference to [the target’s]’ enterprise value and not to its equity value. The argument is plausible. This, however, is not a matter of first impression. Our law has evolved by relating the break-up fee to equity value. The Plaintiffs have offered no compelling reason for deviating from that approach.”) (internal citations omitted).

- **In re Dollar Thrifty S’holder Litig.**, 14 A.3d 573 (Del. Ch. 2010) (refusing to preliminarily enjoin transaction with 3.5% termination fee based on deal value and 3.9% taking into account the additional payment of expenses).

- **In re Cogent, Inc. S’holder Litig.**, 7 A.3d 487 (Del. Ch. 2010) (finding termination fee reasonable where it represented 3% of the equity value or 6.6% of the enterprise value of the target and holding that equity value was the appropriate measure given the facts before the Court).

- **In re 3Com S’holders Litig.**, C.A. No. 5067-CC, 2009 Del. Ch. LEXIS 215 (Del. Ch. Dec. 18, 2009) (4% break fee has “been repeatedly upheld by this Court” and is “not per se unreasonable”).

- **In re Lear Corp. S’holders Litig.**, 926 A.2d 94 (Del. Ch. 2007) (3.5% of equity value and 2.4% of enterprise value termination fee following go-shop period reasonable notwithstanding that banker presentation indicated 2.9% was median fee in such cases).

- **In re The Topps Co. S’holders Litig.**, Cons. C.A. Nos. 2786-VCS, 2998-VCS, 2007 Del. Ch. LEXIS 82, at *78-*79 (Del. Ch. June 14, 2007) (two-tiered termination fee of approximately 3% of deal value (inclusive of expenses) for termination during first 40-day period following execution of merger agreement and approximately 4.3% of deal value (inclusive of expenses) for termination after 40-day period not unreasonable; although 4.3% “a bit high” in percentage terms, court noted inclusion of expenses and stated percentage “can be explained by relatively small size of the deal” (total purchase price $385 million)).

- **Berg v. Ellison** , C.A. No. 2949-VCS, tr. at 7, 16-17 (Del. Ch. June 12, 2007) (TRANSCRIPT) (indicating a willingness to expedite injunction proceedings focused on the issue of the size of the break fee “if the plaintiffs can in good faith come back after discussions with the defendants and say the defendants are wrong,
this termination fee is four and a half percent or more of the real equity or enterprise value of the deal,” but opting not to expedite where termination fee was “something more like three, three and a half percent” on a fully diluted basis).

- *Louisiana Mun. Police Employees’ Ret. Sys. v. Crawford*, C.A. Nos. 2635-N, 2663-N, 2007 Del. Ch. LEXIS 27 (Del. Ch. Feb. 23, 2007) (“Though a ‘3% rule’ for termination fees might be convenient for transaction planners, it is simply too blunt an instrument, too subject to abuse, for this Court to bless as a blanket rule.”).

- *In re Netsmart Technologies, Inc. S’holders Litig.*, C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35 (Del. Ch. Mar. 14, 2007) (“modest [3%] termination fee . . . is not triggered simply on a naked no vote, and, in any event, has not been shown to be in any way coercive or preclusive”).

- *In re Toys “R” Us, Inc. S’holders Litig.*, 877 A.2d 975 (Del. Ch. 2005) (3.75% breakup fee, which had been negotiated down from the 4.0% fee initially requested, was not impermissible, particularly when the winning bidder was paying $350 million, or 5.6% more, than the next highest bidder).


- *In re Pennaco Energy, Inc. S’holders Litig.*, 787 A.2d 691 (Del. Ch. 2001) (holding break-up fee of 3% was “modest and reasonable”).

- *McMillan v. Intercargo Corp.*, 768 A.2d 492 (Del. Ch. 2000) (holding 3.5% break-up fee “was at the high end” of fees approved by Delaware courts, but within a reasonable range).

- *In re IXC Communications, Inc. S’holders Litig.*, C.A. Nos. 17324, 17334, 1999 Del. Ch. LEXIS 210, at *28 (Del. Ch. Oct. 27, 1999) (stating “[i]t is very difficult to say that any termination fee is so excessive on its face that it is unenforceable. Termination fees are most properly evaluated in the context of the merger agreements under which they arise.”).

- *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, C.A. No. 17398, 1999 Del. Ch. LEXIS 202, at *5 (Del. Ch. Sep. 27, 1999) (stating that 6.3% termination fee “certainly seems to stretch the
• *Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.*, 729 A.2d 280, 291-92 n.15 (Del. Ch. 1998) (citing authority referring to break-up fees as “liquidated damages provisions,” acknowledging that fees in the range of one to five percent of the proposed acquisition price are reasonable and upholding 4.98% break-up fee (including expense reimbursement) based on the number of shares outstanding as of date of merger agreement).

• *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34 (Del. 1994) (1.2% termination fee coupled with uncapped stock option entitling bidder to 19.9% of target’s stock upon triggering of termination fee was an “improper” and “counter-productive” measure in violation of the board’s fiduciary duties).

3. **What is included in the percentage?** Expenses? Profit on stock option?

   Is the percentage based on the equity value of the transaction or the enterprise value?

   • *In re Novell, Inc. S’holder Litig.*, Consol. C.A. No. 6032-VCN, 2012 WL 6761917 (Del. Ch. Jan. 3, 2013) (stating that “the Plaintiffs’ argument that the termination fee constituted 8% of the actual purchase price, and thus was actionable, fails because the proper measure of a termination fee is based on its percentage [2.7%] of equity value”).

   • *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1030 (Del. Ch. 2012) (stating that “the Board agreed to a termination fee of $650 million, which represented approximately 3.05% of the equity value of the Merger at the time of signing, and an even lower percentage of enterprise value (approximately 2.9%), which is typically the more relevant measure for assessing the preclusive effect of a termination fee on a materially better topping bid”).

   • *In re Answers Corp. S’holders Litig.*, C.A. No 6170-VCN, 2011 Del. Ch. LEXIS 57, at *19 n.47 (Del. Ch. Apr. 11, 2011) (refusing to preliminarily enjoin transaction with a termination fee equal to 4.4% of the target’s equity value and 5% of its enterprise value and noting as follows: “The break-up fee, at 4.4% of equity value, is near the upper end of a ‘conventionally accepted’ range. This is a relatively ‘small’ transaction [at approximately $127 million]; a somewhat higher than midpoint on the ‘range’ is not atypical. The Plaintiffs argue that the meaningful percentage is one calculated in reference to [the target’s]’ enterprise value and not to its equity value. The argument is plausible. This, however, is not a matter
of first impression. Our law has evolved by relating the break-up fee to equity value. The Plaintiffs have offered no compelling reason for deviating from that approach.”) (internal citations omitted).

- **In re Dollar Thrifty S’holder Litig.**, 14 A.3d 573, 613 (Del. Ch. 2010) (calculating fee based on deal value and including within the denominator options, restricted stock units, and performance units that would have to be paid by the acquiror and a special dividend that would be paid by the target company to its stockholders only upon consummation of the merger, and also taking into account the target’s agreement to pay expenses).

- **In re Cogent, Inc. S’holder Litig.**, 7 A.3d 487, 504 (Del. Ch. 2010) (finding that equity value was the appropriate measure for determining reasonableness of a termination fee, where termination fee was 3% of equity value or 6.6% of enterprise value (due to fact that company had essentially no debt and sizable cash assets); citing language from Dollar Thrifty for proposition that the “relevant transaction value is logically quantified as the amount of consideration flowing into stockholders’ pockets—not the amount of money coming exclusively from bidder and bidder alone”) (internal citations omitted).

- **In re The Topps Co. S’holders Litig.**, Cons. C.A. Nos. 2786-VCS, 2998-VCS, 2007 Del. Ch. LEXIS 82, at *78-*79 (Del. Ch. June 14, 2007) (finding a fee that was 4.3% of the deal value reasonable in part because that percentage included expenses and the deal itself was relatively small).

- **Berg v. Ellison**, C.A. No. 2949-VCS, tr. at 10 (Del. Ch. June 12, 2007) (TRANSCRIPT) (suggesting that the “actual cost of acquisition”—which Court defined as the merger consideration multiplied by the number of shares on a fully diluted basis—not the number of shares outstanding—is the appropriate denominator for calculating the percentage value of termination fees).

- **In re Netsmart Technologies, Inc. S’holders Litig.**, C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35 (Del. Ch. Mar. 14, 2007) (termination fee was 3% of equity value and was inclusive of the acquiror’s expenses).

- **In re Toys “R” Us, Inc. S’holders Litig.**, 877 A.2d 975 (Del. Ch. 2005) (noting that termination fee of $247.5 million was 3.75% of equity value and a “more modest” 3.25% of enterprise value).
• *In re MONY Group Inc. S’holders Litig.*, 852 A.2d 9 (Del. Ch. 2004) (holding that termination fee that represented 3.3% of the equity value and 2.4% of the transaction value was “well within the range of reasonableness”).

• *In re NCS Healthcare, Inc., S’holders Litig.*, C.A. No. 19786, 2002 Del. Ch. LEXIS 133 (Del. Ch. Nov. 22, 2002) (holding that termination fee that was 2% of total transaction value was not “coercive or preclusive”; instructing that because board owed duties to stockholders and creditors, debt should be included in calculation of transaction value), rev’d on other grounds, *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003).


• *In re Lear Corp. S’holders Litig.*, Consol. C.A. No. 2728-VCS, 2007 Del. Ch. LEXIS 88, at *71 (Del. Ch. June 15, 2007) (“For purposes of considering the preclusive effect of a termination fee on a rival bidder, it is arguably more important to look at the enterprise value metric because, as is the case with Lear, most acquisitions require the buyer to pay for the company’s equity and refinance all of its debt.”).

4. **Vote coercion.** Analysis of fee may be different if triggered solely by stockholder vote against deal. Does triggering fee based on board recommendation change raise similar issue? What if company has no cash?

• *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 615 (Del. Ch. 2010) (finding that deal protections were not coercive where termination fee would only be payable upon a no-vote by stockholders and the acceptance of another more valuable transaction within a year).

• *In re Lear Corp. S’holders Litig.*, C.A. No. 2728-VCS, 2008 Del. Ch. LEXIS 88, at *49 (Del. Ch. Sept. 2, 2008) (finding that target board of directors did not breach its fiduciary duties in agreeing to a 0.9% termination fee payable on a naked no-vote in exchange for
a 3.4% increase in the merger consideration and noting that “this court has approved termination fees contingent solely on a ‘naked no vote’ of up to 1.4% of transaction value”).

- In re Netsmart Technologies, Inc. S’holders Litig., C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35, at *10 (Del. Ch. Mar. 14, 2007) (refusing to enjoin merger, in part because “[t]he modest termination fee in the Merger Agreement is not triggered simply on a naked no vote, and, in any event, has not been shown to be in any way coercive or preclusive”).

- Brazen v. Bell Atl. Corp., 695 A.2d 43, 50 (Del. 1997) (stating that “the mere fact that the stockholders knew that voting to disapprove the merger may result in activation of the termination fee does not constitute stockholder coercion”; rather, the “determination of whether a particular stockholder vote has been robbed of its effectiveness by impermissible coercion depends on the facts of the case”) (citations omitted).

- McMillan v. Intercargo Corp., 768 A.2d 492 (Del. Ch. 2000) (stating that structure in which termination fee was payable only if stockholders rejected the merger and there was another acquisition proposal within one year was significant in Court’s determination that the breakup fee was not preclusive or coercive).

- Orman v. Cullman, C.A. No. 18039, 2004 Del. Ch. LEXIS 150 (Del. Ch. Oct. 20, 2004) (upholding transaction in which majority stockholders with high vote stock agreed to vote shares pro rata in accordance with public stockholders where majority stockholders also agreed not to vote in favor of another transaction for 18 months following termination and stating that such a transaction was not coercive because there was no penalty to public stockholders for voting against the transaction).

E. **Top-Up Options.** Several decisions together indicate that (1) top-up options are, as a general matter, valid under Delaware law, (2) parties can likely contractually agree to exclude the effects of an exercise of a top-up option from appraisal valuations, and (3) a board’s approval of a merger agreement with a top-up option must sufficiently set forth certain terms.

- In re Cogent, Inc. S’holder Litig., 7 A.2d 487, 504-05 (Del. Ch. 2010) (denying a motion for a preliminary injunction and rejecting claims (1) that the directors, in granting a top-up option, were not sufficiently informed under the DGCL provisions governing the issuance of stock; (2) that the option, because it “technically” could allow the acquiror to exercise the top-up option without receiving a majority of the shares in the tender offer, would allow the acquiror “to take control of the Company against the wishes of minority
stockholders, even if a majority of shares are not tendered” as “far too speculative to warrant injunctive relief” and depending “on the occurrence of more than one highly unlikely event”; (3) that the option was a “sham” transaction because the acquiror could pay for the top-up shares with a promissory note and thus nothing but a “promise to pay itself,” where the note was an enforceable obligation providing for recourse against the parent; and (4) that the appraisal rights of stockholders would be diluted as a result of the issuance of the new shares, where the parties had agreed in the merger agreement that the fair value of the shares would be determined without regard to the top-up option or shares).

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  *Olson v. ev3, Inc.*, C.A. No., 5583-VCL, 2011 WL 704409, at *9-*14 (Del. Ch. Feb. 21, 2011) (holding, for purposes of determining plaintiff’s counsel’s fees and the benefits conferred by plaintiffs’ claims in the context of a settlement that required the merger agreement to be amended to provide that the top-up shares and related consideration would not be considered in an appraisal proceeding and, along with the board resolutions approving the amendments, more precisely set forth the terms of the top-up option and promissory note with which the acquiror would pay for the top-up shares, (1) that plaintiffs’ “appraisal dilution” claim with respect to the top-up option was of “minimal benefit,” since the exclusion of top-up shares would likely be required under the appraisal statute, which provides for excluding “any element of value…arising from the …expectation of the merger….,” and the nature of the appraisal process, and because parties can contractually provide for such exclusion, and (2) that plaintiffs’ statutory claims, i.e., that any top-up shares would be void, did confer a “meaningful benefit,” because, under the merger agreement and apparently the resolutions adopted by the target board, the material terms of the promissory note with which the acquiror would pay for the top-up shares were not set forth (“including the terms of repayment, provisions for interest, whether the note will be secured, negotiable or transferable, or other terms…”), in violation of Section 157(b) of the DGCL, which requires that option terms be set forth in a company’s certificate of incorporation or in a board resolution, and in violation of Sections 152, 153, and 157(d) of the DGCL, under which directors must determine the consideration received for shares).

- Turberg v. ArcSight, Inc., C.A. No. 5021-VCL, tr. at 41 (Del. Ch. Sept. 20, 2011) (TRANSCRIPT) (stating that “it was a different world in September 2010,” i.e., before Cogent was decided and resolved possible challenges to top-up options).

F. **Voting Agreements.**

- *Omnicare, Inc. v. NCS Healthcare, Inc.*, 818 A.2d 914 (Del. 2003) (reversing the Court of Chancery and holding that NCS board had impermissibly “locked up” a merger with a third party bidder
where directors agreed to a “force the vote” provision and approved agreements between the bidder and two stockholders (who owned shares having a majority of the voting power) that obligated the stockholders to vote for the merger. The directors’ approval of the voting agreements and force the vote provision in the merger caused the board to abdicate its fiduciary duties during the period between the signing and the vote, because the board was unable to react to the subsequent offer).

- **Optima Int’l of Miami, Inc., v. WCI Steel, Inc.,** C.A. No. 3833-VCL, tr. at 24 (Del. Ch. June 27, 2008) (TRANSCRIPT) (rejecting plaintiffs’ argument that defendants had impermissibly “locked up” a merger without an effective fiduciary-out where the merger agreement required the target’s stockholders to approve the agreement by written consent within twenty-four hours of being approved by the target’s board and stating: “if it is your state of knowledge that you know that at least 50% of your shares are going to be voted in favor of this transaction immediately thereafter, in what sense can it be a breach of fiduciary duty to authorize the transaction without … a fiduciary-out period?” The Court also stated that “Omnicare is of questionable continued vitality.”).

- **In re Synthes, Inc. S’holder Litig.,** C.A. No. 6452-CS, 2012 Del. Ch. LEXIS 196 (Del. Ch. Aug. 17, 2012) (rejecting challenges to deal protections including an agreement by 49% stockholders to vote 37% of the outstanding stock in favor of the merger where the merger agreement contained a force-the-vote provision (in which case the stockholders were only obligated to vote 33% in favor of the deal), noting that the votes “locked-up” were “far less than a majority, and even less in a force-the-vote context,” and characterizing the combined deal protections as not of a size that would prevent a serious topping bid from a motivated buyer).

- **In re OPENLANE, Inc. S’holders Litig.,** 2011 WL 4599662 (Del. Ch. Sept. 30, 2011) (rejecting argument that board had improperly “locked-up” merger where the directors approved a merger agreement that the directors and officers, as holders of 68% of the company’s stock, adopted the next day by written consent, in light of the absence of any voting agreements and the right of the board to terminate the merger agreement, without having to pay a termination fee, if a majority of the shares had not consented to the merger within 24 hours after execution of the merger agreement).

- **Forgo v. Health Grades, Inc.,** C.A. No. 5716-VCS (Del. Ch. Aug. 18, 2010) (noting that the fact that support agreements from management to tender their 20% stake would fall away if the target
board changed its recommendation “reduces some of the vibrancy of some of the color I see” for purposes of ruling on a motion for expedited proceedings, but nevertheless granting expedition, in part because the support agreements are “a very strong signal that management is happy with this particular deal”).

- *Orman v. Cullman*, C.A. No. 18039, 2004 Del. Ch. LEXIS 150 (Del. Ch. Oct. 20, 2004) (upholding transaction in which majority stockholders with high vote stock agreed to vote shares pro rata in accordance with public stockholders where majority stockholders also agreed not to vote in favor of another transaction for 18 months following termination and stating that such a transaction was not coercive because there was no penalty to public stockholders for voting against the transaction).

- *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999) (noting that acquiror’s ownership of 12.3% of target’s stock and voting agreements with respect to another 33.5%, gave acquiror, as a “virtual certainty,” the votes to consummate the merger even if a materially more valuable transaction became available).

- *In re IXC Communications, Inc. S’holders Litig.*, C.A. Nos. 17324, 17334, 1999 Del. Ch. LEXIS 210, at *24 (Del. Ch. Oct. 27, 1999) (stating, in reference to a transaction where an independent majority of the target’s stockholders owning nearly 60% of the target’s shares could freely vote for or against the merger, “‘[a]lmost locked up’ does not mean ‘locked up,’ and ‘scant power’ may mean less power, but it decidedly does not mean ‘no power,’” and finding that the voting agreement did not have the purpose or effect of disenfranchising the remaining majority of stockholders) (citations omitted).

- *Am. Bus. Info., Inc. v. Faber*, C.A. No. 16265 (Del. Ch. Mar. 27, 1998) (oral ruling) (refusing to enjoin grant of lock-up to high bidder because of “credible risk” that high bidder “may abandon the picture, leaving only [lower bidder] in the picture”).

**G. Target Options.** Options granted by a target corporation to purchase shares of the target’s stock serve several purposes including (i) providing the acquiror an upside in the event a merger is consummated with another party, and (ii) generally deterring third-party bidders. Historically, options granted by a target corporation also made pooling of interests accounting treatment difficult or unavailable for a third party; however, since pooling of interests accounting treatment for corporate acquisitions was eliminated in 2001, use of such options has become less common.

1. **Size of option? Should the option be capped?**

• Paramount Communications, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994) (invalidating a 19.9% stock option, the terms of which permitted the acquiror to exercise the option by payment of a note of questionable marketability instead of cash and had a put feature permitting the acquiror to put the stock to the target for the difference between a strike price and the market price of the target’s stock, without a cap to limit its maximum dollar value, finding the option to be unreasonable and draconian).


H. Other Covenants.

1. Can target board covenant to leave rights plan in place to fend off other acquirors?

• Quickturn Design Sys. v. Shapiro, 721 A.2d 1281 (Del. 1998) (invalidating delayed redemption provision of rights plan that prohibited a newly elected board from redeeming the rights for six months because such provision prevented a newly elected board from completely discharging its fundamental managerial duties to the corporation and its stockholders).

• Chesapeake Corp. v. Shore, 771 A.2d 293, 333 (Del. Ch. 2000) (suggesting that the decision to leave defensive measures in place, except for a limited time to insure that stockholders are sufficiently informed, is an unreasonable response to the threat of stockholder confusion).

• In re Pure Resources, Inc. v. S’holders Litig., 808 A.2d 421 (Del. Ch. 2002) (finding that the subsidiary’s board had no duty to adopt poison pill to fend off a non-coercive tender offer and suggesting that board might have obligation to remove rights plan in face of non-coercive third party tender offer).

• In re Compellent Technologies, Inc. S’holder Litig., C.A. No. 6084-VCL, 2011 Del. Ch. LEXIS 190 (Del. Ch. Dec. 9, 2011) (characterizing as “novel” and “bidder friendly” a merger agreement provision requiring target to adopt a rights plan, carving
out the current deal and providing that target board could only redeem the pill if (1) there had been no breach—with no materiality or other qualifier—of the no-shop provision, (2) the failure to pull the pill “would constitute” a breach of fiduciary duties and (3) target provided acquiror with 4 business days’ prior notice of its intent to redeem the pill).

2. **Can target board agree not to waive standstill agreement?**

- **In re The Topps Co. S’holders Litig., Cons. C.A. Nos. 2786-VCS, 2998-VCS, 2007 Del. Ch. LEXIS 82, at *94 (Del. Ch. June 14, 2007)** (stating that it is “important” for a target board to reserve the right to waive a standstill agreement “if its fiduciary duties required” where there was no shopping prior to signing merger agreement and finding that target board was required to waive standstill in context where it had released misleading disclosures regarding potential interloper’s bid and potential interloper sought to make a tender offer with limited conditions at price approximately 10.25% greater than bird in hand, but noting that in a scenario where a broad market canvass occurred prior to signing, “[o]ne can easily imagine how a board striving in good faith to extract the last dollar they could for their stockholders might promise the three remaining bidders that the top bidder . . . will get very strong deal protections including a promise from the target not to waive the Standstill as to the losers”).

- **In re Transatlantic Holdings Inc. S’holders Litig., C.A. Nos. 6574-CS & 6776-CS, tr. at 7, 88 (Del. Ch. Aug. 22, 2011) (TRANSCRIPT)** (noting that “[t]he standstill, obviously, is freighted with fiduciary character, which is supposed to be used in an appropriate way” and explaining that after a potential topping bidder has signed a confidentiality agreement with a standstill, if the topping bidder believes it has made a superior proposal but the target board disagrees, the topping bidder might then file suit for “misuse of the standstill, because that is when [the board members] would have, as a fiduciary, discretion”)

IV. **OTHER MERGER AGREEMENT PROVISIONS.**
A. **Material Adverse Change/Effect.**


(a) **Showing of Liability in Litigation.** The Court of Chancery stated: “in assessing whether the risk of litigation (as contrasted with the cost of litigation) may have a Material Adverse Effect, the mere existence of a lawsuit cannot be determinative. There must be some showing that there is a basis in law and fact for the serious adverse consequences prophesized by the party claiming the MAE.”

(b) **Dollar Value.** The Court noted that $15-$20 million was not an MAE to a company with a net present value on a stand alone basis of approximately $338 million.

(c) **MAE v. “Material”.** In *Holly*, the Court stated that “[i]n the context of the Merger Agreement, the concept of ‘Material Adverse Effect’ and ‘material’ are analytically distinct, even though their application may be influenced by the same factors.” *Id.* at 145-46.

- *In re IBP, Inc. S’holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) (finding that a broadly-written Material Adverse Effect clause was not breached, and stating “even where a Material Adverse Effect condition is . . . [broad], that provision is best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner. A short-term hiccup should not suffice . . .”).

- *Hexion Specially Chem., Inc. v. Huntsman Corp.*, C.A. No. 3841-VCL, 2008 Del. Ch. LEXIS 143, at *53 (Del. Ch. Sept. 29, 2008) (A court’s focus in determining the occurrence of an MAE is “whether there had been an adverse change in the target’s business that is consequential to the company’s long-term earnings power over a commercially reasonable period, which one would expect to be measured in years rather than months.” Thus, evidence of a significant decline in earnings by a target prior to closing is irrelevant for purposes of determining the existence of an MAE unless the “poor earnings are expected to persist significantly into the future.” Moreover, because MAE provisions are essentially “backstops” to account for unknown events that threaten the target company’s long-term earnings potential, the buyer bears a heavy burden when it seeks to terminate based on an MAE. Indeed, the Court found, that absent clear language in the merger agreement to the contrary, the burden of proving the occurrence of an MAE rests
on the party seeking to excuse performance regardless of whether the MAE is reflected as a closing condition or a representation.

- **Raskin v. Birmingham Steel Corp.**, C.A. No. 11365, 1990 Del. Ch. LEXIS 194, at *15 (Del. Ch. Dec. 4, 1990) (“While it is possible that on a full record and placed in a larger context one might conclude that a reported 50% decline in earnings over two consecutive quarters might not be held to constitute a material adverse development, it is, I believe unlikely to think that might happen.”).

- **Ameristar Casinos, Inc. v. Resorts Int’l Holdings, LLC**, 2010 Del. Ch. LEXIS 107, at *11 (Del. Ch. May 11, 2010) (accepting premise, although not deciding, that material adverse effect had occurred where target asset underwent a 248% increase in its property tax assessment, which would have amounted to a tax liability of $18 million per year for an asset producing $30 million per year in net income).

- **Osram Sylvania Inc. v. Townsend Ventures, LLC**, C.A. No. 8123-VCP (Nov. 19, 2013) (finding a likelihood of an MAE where sales were manipulated by shipping and billing excess product, misapplying credits and discounts during the pre-effective period in breach of seller’s representations, and not disclosing material failures to meet forecasted sales in breach of seller’s warranties during the post-effective pre-closing period; but rejecting the assertion that seller’s loss of two salespeople might have led to a MAE).

**B. Best Efforts.**

- **Carteret Bancorp, Inc. v. The Home Group, Inc.**, C.A. Nos. 9380, 9386, 1988 Del. Ch. LEXIS 2 (Del. Ch. Jan. 13, 1988) (dismissing a claim that target corporation breached its obligation to use “best efforts in good faith” to close a merger as quickly as possible because there could be no present breach of the best efforts clause while regulatory approvals were still pending, but suggesting that if regulators required divestiture of certain assets, target’s refusal to make such divestitures might constitute a breach; cautioning that even if the court had found a breach of the best efforts clause, it might be hesitant to order specific performance in the context of a complex transaction because doing so would “risk involving the court in the detailed administration of this contract”).

- **Corwin v. DeTrey**, C.A. No. 6808, 1989 Del. Ch. LEXIS 166 (Del. Ch. Dec. 1, 1989) (rejecting an argument that a company should have avoided the merger agreement by not obtaining necessary
financing and stating such argument was based “on the faulty premise that the ‘best efforts’ clause is unenforceable,” and that “such clauses are not illusory . . . [t]hey are fairly routine and the failure of a party to exercise best efforts can form the basis for liability in a breach of contract action”).

• Conley v. Dan-Webforming Int’l A.S. (Ltd.), C.A. No. 91-401 MMS (D. Del. 1992) (“the best efforts clause . . . should be read to provide some additional obligation upon the defendants” above the otherwise outstanding obligations set out in the agreement).

• Hexion Specially Chem., Inc. v. Huntsman Corp., C.A. No. 3841-VCL, 2008 Del. Ch. LEXIS 143 (Del. Ch. Sept. 29, 2008) (finding that a buyer breached its obligations under a merger agreement to use its reasonable best efforts to take all actions necessary to secure financing for a merger and to not take any action to impair, delay or prevent consummation of the financing, by obtaining, publishing and circulating among its lenders an opinion that the target would be insolvent at closing).

• Alliance Data Systems Corp. v. Blackstone Capital Partners V LP, 963 A.2d 746 (Del. 2009) (finding that buyer did not breach an obligation under a merger agreement to use its reasonable best efforts to obtain regulatory approvals for a merger by failing to cause its parent to obtain the approvals where the parent was not a party to the merger agreement, and the merger agreement did not impose any affirmative obligation on the buyer to cause its parent to obtain the regulatory approvals).

• WaveDivision Holdings, LLC v. Millenium Digital Media Systems, L.L.C., C.A. No. 2993-VCS, 2010 Del. Ch. LEXIS 194 (Del. Ch. Sept. 17, 2010) (holding that a seller of assets breached “no solicit” and “reasonable best efforts” clauses contained in an asset purchase agreement where the seller was obligated by agreement to secure consent of certain noteholders and senior lenders to the asset sale, but, instead of seeking their consent, consciously facilitated an alternative and mutually exclusive transaction; awarding $15 million in expectation damages to the jilted buyer).

• Narrowstep, Inc. v. Onstream Media Corp., C.A. No. 5114-VCP, 2010 Del. Ch. LEXIS 250 (Del. Ch. Dec. 22, 2010) (concluding, on a motion to dismiss, that acquiror may have breached its obligation under a merger agreement to use its “reasonable best efforts” to make required securities filings and close the merger expeditiously when the acquiror (i) failed to timely file the required registration statement with the SEC, (ii) repeatedly
manufactured reasons to postpone closing and (iii) refused to close until the target agreed to multiple price reductions).

C. **Contractual Indemnification.**

1. **Limitations Period for Indemnification Claims.**

   - **Statute of Limitations for Breach of Contract.** 10 Del. C. § 8106 ("[N]o action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute . . . shall be brought after the expiration of 3 years from the accruing of the cause of such action . . . .")

   - **Alteration of Statutory Limitations Period.** Generally under Delaware law, subject to a “reasonableness” standard, parties to a contract can shorten a statutory limitations period, but an extension of a statute of limitations is contrary to public policy and unenforceable. See generally Shaw v. Aetna Life Ins. Co., 395 A.2d 384 (Del. Super. Ct. 1978) (stating that “an express provision in a contract which abbreviates the time frame for filing a claim, so long as it remains a reasonable time, hastens the enforcement and complements the policy behind the statute of limitations” but also that a “contractual limitations period of limitations which attempts to lengthen or extend the period otherwise contained in a statute violates . . . public policy . . . . Two parties contracting between themselves cannot agree to circumvent the law as mandated by the legislature in its attempt to protect the public interests.”).

   - **Effect of a Survival Clause on the Statutory Limitations Period.** GRT, Inc. v. Marathon GTF Technology, C.A. No. 5571-VCS, 2011 Del. Ch. LEXIS 99 (Del. Ch. July 11, 2011) (holding that an unambiguous survival clause in a securities purchase agreement providing that representations and warranties would, together with any right of indemnification, survive for one year after closing and then terminate created a contractual limitations period and effectively shortened the default three-year statutory limitations period; suggesting that the court would interpret a provision providing for the indefinite survival of representations and warranties as providing for a survival period ending at the statutory limitations period).

   - **ENI Holdings, LLC v. KBR Group Holdings, LLC** C.A. 8075-VCG (Del. Ch. Nov. 27, 2013) (holding that an unambiguous survival clause in a stock purchase agreement providing that representations and warranties would terminate on the termination date, despite remaining silent on the survival of related remedies.
created a contractual limitations period thereby shortening the applicable statutory limitations period).

- **Accrual of Claim.** *Certainteed Corp. v. Celotex Corp.*, C.A. No. 471, 2005 Del. Ch. LEXIS 11 (Del. Ch. Jan. 24, 2005) (finding that provisions in a merger agreement providing indemnification for breaches of representations and warranties accrued at the date of closing of the merger agreement and the statute of limitations expired on the third year anniversary of such date, while indemnification for liabilities to third parties accrued under the common law principles of indemnification, that is, the three-year statute of limitations began to run when indemnifiable liabilities to third parties were incurred and the dispute concluded, which in this case, occurred when Certainteed settled its third party product liability claims).

2. **Applications of Contractual Indemnification Provisions.**

- *Osram Sylvania Inc. v. Townsend Ventures, LLC*, C.A. No. 8123-VCP (Nov. 19, 2013) (holding that acquiror had stated a claim for contractual indemnification, under a stock purchase agreement that eliminated materiality qualifiers for breaches of representations or warranties and required a threshold of $200,000 in indemnifiable damages, for seller’s alleged manipulation and concealment of matters relevant to the purchase price).

- *Winshall v. Viacom International Inc.*, C.A. No. 6074-CS, 2012 WL 6200271 (Del. Ch. Dec. 12, 2012) (holding that acquiror was not entitled to contractual indemnification for alleged breaches of representations and warranties because the alleged breaches, relating to infringement of intellectual property, occurred after the closing of the transaction; holding, in the alternative, the acquiror was not entitled to indemnification on certain claims because it failed to comply with a provision requiring it to give notice of any claim for indemnification within a specified time period, *aff’d*, No. 39, 2013, 2013 WL 5526290 (Del. Oct. 8, 2013).

- *Pharmaceutical Product Development, Inc. v. TVM Life Science Ventures VI, L.P.*, C.A. No. 5688-VCS, 2011 Del. Ch. LEXIS 33 (Del. Ch. Feb. 16, 2011) (addressing claim for indemnification for damages resulting from breach of representation in a merger agreement related to the efficacy of drugs, where “special” damages were expressly excluded from the indemnification obligation; discussing the difference between “general” and “special” damages; arguably suggesting, without deciding, that the development costs of drugs (the main assets of the acquired corporation) were not special damages because any acquiring
company would likely want and need to continue to fund drug development).

- **Sage Software, Inc. v. CA, Inc.**, C.A. No. 4912-VCS, 2010 Del. Ch. LEXIS 242 (Del. Ch. Dec. 14, 2010) (finding that although a merger agreement required seller to indemnify buyer for tax losses allocable to the period prior to closing, payment on that indemnification obligation was not required until the final tax payment was due and all appeal procedure were exhausted; reasoning that the buyer bearing the interim costs of non-finality of the tax losses did not “shock the conscience” as it was “the bargained for risk allocation” under the language of the merger agreement), aff’d, 27 A.3d 552 (Del. 2011).

- **Ameristar Casinos, Inc. v. Resorts International Holdings, LLC**, C.A. No. 3685-VCS, 2010 Del. Ch. LEXIS 107 (Del. Ch. May 11, 2010) (denying motion to dismiss buyer’s suit seeking order requiring seller to indemnify buyer pursuant to a securities purchase agreement in which seller had represented that as of closing no extraordinary taxes had been incurred and (after signing but before closing) seller learned that property taxes would increase by 248%; finding that damages floor providing that neither party was required to indemnify the other for damages below a certain amount did not apply because buyer had pled a “willful breach” of the tax representation and in such case the agreement provided that this floor was inapplicable).

- **Rexnord Indus., LLC v. RHI Holdings, Inc.**, C.A. No. 07C-10-057 RRC, 2008 Del. Super. LEXIS 347 (Del. Super. Ct. Sept. 17, 2008) (holding that buyer was entitled under a stock purchase agreement to indemnification for costs incurred in defending against environmental claims pursuant to a provision requiring the seller to indemnify the buyer for any losses that the buyer incurred as a result of environmental contamination caused by the seller).

- **Matria Healthcare, Inc. v. Coral SR LLC**, C.A. No. 2513-N, 2007 Del. Ch. LEXIS 32 (Del. Ch. Mar. 1, 2007) (using traditional principles of contract interpretation to determine the forum where a dispute over an escrow fund established to satisfy certain post-closing adjustments should be resolved, and finding that the fact that “a judge may believe that [a certain arbitrator] would be the preferable forum for resolution of the dispute does not (nor should it) trump the agreement of the parties.”).

**D. Choice of Law.**
Under the Delaware statute (6 Del. C. § 2708), the parties to any contract may agree in writing that the contract will be governed by Delaware law and the contract will be “conclusively presumed to be a significant, material and reasonable relationship” to Delaware if:

(a) the parties are subject to the jurisdiction of a Delaware court;

(b) the parties may be served with legal process; and

(c) the contract involves at least $100,000.

The Synopsis to the bill enacting Section 2708 notes that the statute “is intended to supersede all Delaware common law limitations on the enforceability of Delaware choice of law provisions (including any restrictions contained in the Restatement (Second) Conflict of Laws), as well as limitations on contractual consent to jurisdiction or service of process.” 137th Gen. Assembly, House Bill no. 291 (1993).

In ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006), the Court of Chancery appeared to interpret Section 2708 as not overruling one common law limitation on the enforceability of Delaware choice of law provisions—that Delaware choice of law provisions will not be enforced if application of Delaware law would offend a fundamental policy of a state with a material greater interest in the litigation. Nevertheless, the Court seemingly narrowed this limitation by emphasizing Delaware’s strong interest in having its law apply to its citizens (including Delaware entities).

E. **Non-Reliance Clauses.**

- **ABRY Partners V, L.P. v. F&W Acquisition LLC,** 891 A.2d 1032 (Del. Ch. 2006) (holding that a non-reliance clause may eliminate liability for reliance upon representations and warranties not within the four corners of the document, but that such a provision may not eliminate liability for reliance upon representations and warranties within the four corners of the document if the party making the representation was a “conscious participant in the communication of lies”—i.e., if that party knew that the contractual representations and warranties were false and did not inform the relying party, or if that party directly lied).

F. **Limits on Liability.**
ABRY Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032 (Del. Ch. 2006) (stating that “murky integration clauses, or standard integration clauses without explicit anti-reliance representations will not relieve a party of its oral and extra-contractual fraudulent representations” and advising that in order for an integration clause to act as a limit on liability, such a clause must contain “language that...can be said to add up to a clear anti-reliance clause by which the plaintiff has contractually promised that it did not rely upon statements outside the contract’s four corners in deciding to sign the contract.” (citation and internal quotations omitted)).

RAA Management, LLC v. Savage Sports Holdings, Inc., 45 A.3d 107 (Del. 2012) (finding that an extra-contractual representation disclaimer coupled with a no liability provision was sufficient to bar a claim for fraud based on representations and warranties outside the four corners of a confidentiality agreement).

Anvil Holding Corp. v. Iron Acquisition Co., C.A. No. 7975-VCP, and Iron Acquisition Co. v. Anvil Holding Corp., C.A. No. N12C-11-053-DFP [CCLD], 2013 WL 2249655 (Del. Ch. May 17, 2013) (holding that a standard integration clause and an extra-contractual representation disclaimer in a purchase agreement for all the outstanding equity interests in a limited liability company, but without clear anti-reliance language, did not bar a fraud claim at the motion to dismiss stage; suggesting, in dicta, that another provision, with language similar to the provision at issue in RAA, might not bar a fraud claim against individual defendants who were equity holders and managers of the LLC and who were the individuals who made the alleged misrepresentations at issue).


G. Specific Performance.

Availability of Specific Performance in Mergers and Acquisitions. In a merger where stockholders had the election of accepting stock in the surviving entity, one Delaware Court (applying New York
Law) has held that because a target corporation “is unique and will yield value of an unquantifiable nature, once combined with the acquiring company” specific performance was available and there was no “compelling reason why sellers in mergers and acquisitions transactions should have less of a right to demand specific performance than buyers. . . .” In re IBP, Inc. S’holders Litig., 789 A.2d 14, 83 (Del. Ch. 2001) (citing Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153 (3d Cir. 1999), C&S/Sovran Corp. v. First Federal Savings Bank of Brunswick, 463 S.E.2d 892, 894-96 (Ga. 1995)).


- An order of specific performance is “a compulsory remedy [and] is not typical and should not be lightly issued, especially given the availability of the more usual legal remedy of money damages.” In re IBP, Inc., 789 A.2d 14 (Del. Ch. 2001) (citing In re Estate of Getchell, 1994 Del. Ch. LEXIS 150, at *11 n.3, (Del. Ch. Aug. 4, 1994)).

- Parties may Provide by Contract that no Adequate Remedy at Law Exists. Because specific performance is an equitable remedy the party seeking to enforce a contract must demonstrate that there is no adequate legal remedy such as money damages. Collins v. American Int’l Group, Inc., 1998 Del. Ch. LEXIS 67 (Del. Ch. Apr. 28, 1998), aff’d without op., 719 A.2d 947 (Del. 1998).

Generally speaking, parties cannot by contract confer equitable jurisdiction upon the Court of Chancery. El Paso Natural Gas Co. v. Transamerican Natural Gas Corp., 669 A.2d 36, 39 (Del. 1995). Nevertheless, “given Delaware’s public policy of favoring freedom of contract” a separate inquiry into whether an adequate remedy at law exists may not be necessary when the parties’ agreement expressly provides for specific performance and the provision is not a “sham” or meant simply “as a means to confer jurisdiction on th[e] court.” Gildor v. Optical Solutions, Inc., 2006 Del. Ch. LEXIS 110, at *36-*39 & n.35; see also Amaysing Tech. Corp. v. Cyberair Comm., Inc., 2004 Del. Ch. LEXIS 72, at *9 (Del. Ch. May 28, 2004) (“[a]lthough not controlling, the fact that the parties’ Agreement contains a provision agreeing to jurisdiction in the Court of Chancery supports the analysis which follows on the availability of specific performance as a remedy and the lack of an adequate remedy at law.”).
• If a contract is ambiguous and the extrinsic evidence is inconclusive, the Court may consider the parties’ subjective belief when considering whether specific performance is available. In *United Rentals, Inc. v. Ram Holdings, Inc.*, 937 A.2d 810 (Del. Ch. 2007), the Court of Chancery found that the parties had contracted away the right to specific performance where a contract provided both that the parties’ “sole and exclusive” remedy was the recovery of the termination fee and that the parties could “enforce specifically” the terms and provisions of the agreement and guarantees “to prevent breaches” or “enforce compliance.” Based on these two provisions, the Court concluded that the contract supported two equally reasonable interpretations and the agreement was therefore ambiguous. Then, by reference to the extrinsic evidence and, in particular, the parties’ negotiations, the Court applied the “forthright negotiator principle” to conclude that the “buyer understood the agreement to preclude the remedy of specific performance and that seller knew or should have known of this understanding.

H. **Transfer of Assets.**

• **Control of the Attorney-Client Privilege.** In the absence of a contractual carve-out, the attorney-client privilege (and communications covered thereby) pass in a merger with all corporate assets to the surviving corporation by operation of law under Section 259. Selling stockholders and representatives of the target company asserted the attorney-client privilege over communications allegedly reflecting their fraudulent inducement of the buyer-plaintiffs to enter into the merger. The Court declined to create an exception for the attorney-client privilege from Section 259 which states that all assets, rights, and privileges pass to the surviving corporation in a merger. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLP*, C.A. No. 7906-CS (Nov. 15, 2013).

V. **STRUCTURAL ISSUES.**

A. **Section 203: Delaware’s Business Combination Statute.** Section 203 imposes severe restrictions on transactions between corporations and stockholders who own more than 15% of its voting stock, unless the stockholder obtains board approval before crossing the 15% threshold.

1. **Public companies.** Section 203 does not apply to companies that do not have a class of voting stock that is: (1) listed on a national securities exchange; or (2) held of record by more than 2,000 stockholders, unless such company opts into Section 203 in its certificate of incorporation.
2. **Target shares.** Make sure that acquiror does not get a 15% stake in company prior to board approval. Note that definition of ownership is very broad.

- *Chesapeake Corp. v. Shore*, 771 A.2d 293, 351 (Del. Ch. 2000) (given the broad language of Section 203, it is “plausible that an agreement could create such substantial economic incentives for the seller with respect to purchased shares that the agreement could also, as a practical matter, constitute an ‘agreement, arrangement or understanding for the purpose of . . . voting’ other shares still held by the seller”).

- *Matador Capital Mgmt. Corp. v. BRC Holdings, Inc.*, 729 A.2d 280 (Del. Ch. 1998) (holding that acquiror did not become “owner,” within meaning of Section 203, of shares of target corporation stock pursuant to agreement where stockholder of target corporation agreed to tender 20% block to acquiror and abstain from taking any actions which would encourage another bidder to make a competing proposal, because evidence showed that board approved the merger with the acquiror prior to the stockholder’s execution of the agreement).

- *Siegman v. Columbia Pictures Entm’t, Inc.*, 576 A.2d 625, 634 (Del. Ch. 1989) (noting that intent of Section 203, as set forth in the legislative history thereof, is to force acquirors to approach the board before buying a significant interest in a corporation: “[T]he essential element to avoid a stockholder vote is the approval by the board of the about-to-be-acquired corporation before the board becomes beholden to the acquiror.”).

- *Siegman v. Columbia Pictures Entm’t, Inc.*, C.A. No. 11152, 1993 Del. Ch. LEXIS 1 (Del. Ch. Jan. 12, 1993) (stating that agreement by stockholder of target corporation giving acquiror option to purchase 49% of target’s stock which stated that it was contingent upon approval by the boards of target and stockholder, would prevent an “agreement, arrangement or understanding” under the definition of owner in Section 203 from coming into being until the contingencies were removed but holding that despite stated contingency, there was a disputed question of fact as to whether the agreement was contingent upon such board approval).

3. **Target interest in public companies.** If target owns a stake in a Delaware corporation, then, following an acquisition, any “business combination” involving that Delaware company and the combined entity may be subject to the restrictions of Section 203. Business combination is broadly defined.
• In re Digex, Inc. S’holders Litig., 789 A.2d 1176 (Del. Ch. 2000) (finding at preliminary injunction stage that defendants were not reasonably likely to meet their burden as to the entire fairness of the decision of the interested directors of a subsidiary corporation to waive proscriptions of Section 203 that would otherwise apply to acquiring corporation as result of merger with parent-target corporation, due to independent directors’ lack of “meaningful participation” in negotiations leading to the Section 203 waiver).

4. Competing bid exception. Section 203(b)(6) provides that, subsequent to a public announcement or notice of certain management approved transactions (including mergers), and prior to the completion or abandonment of such transaction, a bidder may propose a business combination; and such business combination will not be subject to the restrictions of Section 203.

B. Class Votes. Delaware law does not provide for class voting in mergers. Compare 8 Del. C. § 251 (no class vote in mergers) with 8 Del. C. § 242 (charter amendments require class vote of a class of stock if the rights, preferences and powers thereof are amended so as to adversely affect them). However, preferred stock provisions often do provide for class votes in connection with adverse changes to the stock. The case law provides some guidance as to whether these provisions are triggered by mergers. Generally, a close reading of the provision is required to determine whether such a vote is required.

• Warner Communications Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962 (Del. Ch. 1989) (provision of Warner charter requiring a class vote of preferred stock to amend, alter or repeal any provision of charter which adversely affects the preferred stock did not require class vote in triangular merger where Warner preferred stock was converted into Time preferred stock and Warner charter was amended to delete the terms of the preferred stock because the conversion of the preferred stock in the merger created the adverse effect, not the amendment), aff’d, 567 A.2d 419 (Del. 1989).

• Sullivan Money Mgmt., Inc. v. FLS Holdings, Inc., C.A. No. 12731, 1992 Del. Ch. LEXIS 236 (Del. Ch. Nov. 20, 1992) (provision of charter requiring class vote of the preferred stock to change, by amendment to the charter “or otherwise” the terms and provisions of the preferred stock so as to affect adversely the rights and preferences thereof, did not trigger class vote in merger where the preferred stock was converted into cash, because “or otherwise” cannot be interpreted to mean merger where other provisions of charter specifically required class vote of another series of preferred stock to amend the terms of such preferred stock so as to affect adversely the rights thereof “either directly or
indirectly or through merger or consolidation with any other corporation”).

- **Elliott Assocs., L.P. v. Avatex Corp.,** 715 A.2d 843 (Del. 1998) (charter provision requiring class vote of preferred stock for the amendment, alteration or repeal, “whether by merger, consolidation or otherwise,” of any provision of the Avatex charter that would adversely affect the rights of the preferred stock applied to merger where Avatex did not survive and preferred stock was converted into common stock of surviving corporation, because the adverse effect was caused by the repeal of the charter and the stock conversion, and because the Avatex charter contained the phrase “whether by merger, consolidation or otherwise”).

- **Starkman v. United Parcel Serv. of Am., Inc.,** C.A. No. 17747 (Del. Ch. Oct. 18, 1999) (TRANSCRIPT) (applying Avatex and stating that charter provision requiring supermajority vote to amend or delete right of first refusal in charter was not triggered in holding company merger where corporation survived and charter was not amended as there was no amendment or deletion to charter and reasoning, in dicta, that the supermajority voting requirement would not apply even if the charter of the surviving corporation in the merger amended or deleted the right of first refusal because the critical language, referring to “merger, consolidation or otherwise,” present in Avatex but absent in Warner, was not found in the charter provision at issue).

- In **Benchmark Capital Partners IV, L.P. v. Vague,** C.A. No. 19719, 2002 Del. Ch. LEXIS 90 (Del. Ch. July 15, 2002), the company’s charter required a series vote for corporate action that would “materially adversely change the rights, preferences and privileges” of the junior stock. The charter required a series vote to issue or authorize securities senior to or on parity with junior preferred stock, but the vote could be waived where the contemplated corporate action would “diminish or alter the liquidation preference or other financial or economic rights” of the junior preferred. The Court held that the first series vote provision did not expressly extend to mergers and therefore, the preferred stockholders were not entitled to a series vote. With respect to the waiver of the second series vote, the Court rejected a broad reading of the limitation on the waiver and found that the issuance of senior stock did not “diminish or alter . . . financial or economic rights of the existing preferred” under the principle that preferences must be express and will not be presumed. The Supreme Court affirmed this holding in **Benchmark Capital Partners IV, L.P. v. Juniper Fin. Corp.,** 822 A.2d 396 (Del. 2003).
• Watchmark Corp. v. ARGO Global Capital, LLC, C.A. No. 711-N, 2004 Del. Ch. LEXIS 168 (Del. Ch. Nov. 4, 2004) (confirming that provision in certificate of incorporation requiring 80% vote of each series of preferred stock to amend certificate of incorporation to create a new series of preferred stock did not apply to a merger to eliminate the high vote provision).

C. **Business Combination and Fair Price Provisions.** This type of provision is often long and complex but, in general, requires a supermajority vote to approve a merger with an interested stockholder, i.e., a stockholder that owns more than a fixed percentage of the company’s stock. These provisions often require close and creative reading.

D. **Rights Plans.**

• Before a merger agreement can be signed, it is often necessary to amend the company’s rights plan in order to exempt the acquiror from the terms thereof, particularly where the acquiror is entering into voting agreements with stockholders or a stock option agreement with the company, which would otherwise make it an “acquiring person,” and trigger the pill.

• It is important to give the rights agent some notice so that the amendment can be signed over the weekend, if necessary.

• Because Section 251 does not permit the conversion of securities other than stock in a merger, the rights plan must be amended so that it will not be triggered in the merger, unless the company plans to actually redeem the rights.

• Avoid issuing rights as merger consideration—doing so may trigger appraisal rights. 8 Del. C. § 262 (appraisal rights triggered if stockholders are required to accept anything other than stock or depository receipts in a merger).

• While there is no **per se** duty to enact a rights plan in response to a stockholder’s creeping takeover, a board must consider whether, given a certain set of facts, not employing a pill will implicate the duty of loyalty. See, e.g., Louisiana Municipal Police Employees’ Retirement Sys. v. Fertitta, C.A. No. 4339-VCL, 2009 Del. Ch. LEXIS 144, at *31 (Del. Ch. July 28, 2009) (“To say that there is no per se duty to employ a poison pill to block a 46% stockholder from engaging in a creeping takeover does not refute the conclusion that the board’s failure to employ a pill, together with other suspect conduct, supports a reasonable inference at the motion to dismiss stage that the board breached its duty of loyalty in permitting the creeping takeover.”). In *Fertitta*, a company
entered into a going-private merger with an entity controlled by its Chairman, CEO, and 39% stockholder. After the merger agreement was signed, the CEO purchased shares on the open market, and, “although the board and its advisors must have been aware of [the CEO’s] continuing open market purchases, which threatened to (and ultimately did) deliver majority control of the company to [the CEO] without his consummation of the merger agreement at a premium price, the board did nothing to stop [the CEO] from continuing to accumulate shares.” *Id.* at *17. The Court found that, given other facts, which also suggested that the corporation’s board was more interested in accommodating the controlling stockholder than protecting the corporation’s minority stockholders’ interests, the plaintiff had stated a claim for the breach of the duty of loyalty.

E. **Control Premiums.**

1. **Courts have approved receipt of a premium by controlling stockholders.**

- *In re Delphi Financial Group S’holder Litig.*, Consol. C.A. No. 7144-VCG, 2012 Del. Ch. LEXIS 45 (Del. Ch. Mar. 6, 2012) (acknowledging that “a controlling stockholder is, with limited exceptions, entitled under Delaware law to negotiate a control premium for its shares” but finding that plaintiffs had shown a reasonable probability of success on the merits of their claim that controlling stockholder had breached his fiduciary duties by extracting a control premium for his high-vote stock because, the court reasoned, the controlling stockholder had already received a control premium in connection with the company’s IPO in which the company added a provision to its certificate of incorporation providing that the high-vote and low-vote stock would receive the same consideration in any future merger).

- *In re Tele-Communications, Inc. S’holders Litig.*, C.A. No. 16470, 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005) (questioning why a premium was paid to all holders of high-vote stock “if only [the controlling stockholder] was entitled to a control premium as a control shareholder”).

- *Mendel v. Carroll*, 651 A.2d 297, 305 (Del. Ch. 1994) (“The law has acknowledged, albeit in a guarded and complex way, the legitimacy of the acceptance by controlling shareholders of a control premium.”).

- *In re BHC Communications, Inc. S’holders Litig.*, 789 A.2d 1 (Del. Ch. 2001) (holding directors of controlling stockholder corporation
properly agreed to accept control premium of wholly owned subsidiary and indirectly owned subsidiary without implicating fiduciary duties to minority stockholders of subsidiaries and mere fact that controlling stockholder corporation received premium not shared by minority stockholders of subsidiaries did not support inference of breach of fiduciary duties).

- *In re Synthes Inc. S’holder Litig.*, 50 A.3d 1022, 1035-40 (Del. Ch. 2012) (explaining that “[i]t is, of course, true that controlling stockholders are putatively free under our law to sell their own bloc for a premium or even to take a different premium in a merger. As a practical matter, however, that right is limited in other ways that tend to promote equal treatment”; noting that “there is a good deal of utility to making sure that when controlling stockholders afford the minority pro rata treatment, they know that they have docked within the safe harbor created by the business judgment rule. If, however, controlling stockholders are subject to entire fairness review when they share the premium ratably with everyone else, they might as well seek to obtain a different premium for themselves. . .”).

2. **“Fair Price” includes control value.** Delaware case law indicates that “fair price” in a merger is equivalent to the value of the equity of a company, including any control premium, divided by the number of shares outstanding.

- *Wayne County Employees Ret. Sys. v. Corti*, C.A. No. 3534-CC, 2009 Del. Ch. LEXIS 126, at *55 (Del. Ch. July 24, 2009) (“Any ‘control premium’ received by the selling company would be included in the consideration received by the shareholders in exchange for what is given to the acquirer, including voting control. There is certainly no requirement that the board obtain some separate consideration that could be separately identified as a ‘control premium.’”).

- *Andaloro v. PFPC Worldwide, Inc.*, C.A. Nos. 20336, 20289, 2005 Del. Ch. LEXIS 125, at *65 (Del. Ch. Aug. 19, 2005). (“It is generally recognized that shares trading on the market reflect the price of minority shares: that is, shares without any accompanying benefit of control. The price of these shares therefore is generally thought to include a minority discount. To honor the Supreme Court’s teaching that plaintiffs should receive their pro rata share of the entity as a going concern, this court’s decisions adjust minority trading multiples to account for the implied discount, in order to accurately arrive at a fair value of the entire entity.”).
• *Agranoff v. Miller*, 791 A.2d 880 (Del. Ch. 2001) (appraisal action in which the Court of Chancery stated that, in the comparable companies analysis, a control premium must be added to the equity value of the corporation to correct the minority discount implicit in the methodology).

• *Borruso v. Communications Telesystems Int’l*, 753 A.2d 451 (Del. Ch. 1999) (in an appraisal action, the Court of Chancery noted that Delaware law recognizes that the comparable companies analysis results in a minority valuation of the shares that requires a control premium adjustment and found that the control premium must be applied to the equity value, not the enterprise value).

• *Bomarko, Inc. v. Int’l Telecharge, Inc.*, 794 A.2d 1161 (Del. Ch. 1999) (in determining that a merger was not entirely fair and calculating damages based on the fair value of the minority shares, the Court stated that the values produced by the comparable companies analysis must be adjusted to account for the inherent minority discount), *aff’d sub nom*, 766 A.2d 437 (Del. 2000).

• *Citron v. E.I. DuPont de Nemours & Co.*, 584 A.2d 490, 508 (Del. Ch. 1990) (analyzing fair price under the entire fairness standard and concluding that a determination of fair price requires “fair or intrinsic valuation, which is to value the entire corporation and allocate that pro-rata to each of its shares”).


• *Highfields Capital, LTD. v. AXA Financial, Inc.*, C.A. No. 804-VCL, slip. op. at 45-47 (Del. Ch. Aug. 17, 2007) (rejecting two comparable companies analyses that applied a control premium and stating in a footnote that adding a control premium in a comparable companies analysis by removing the implicit minority discount in the target’s stock is not always appropriate in a valuation).

3. **“Fair price” requires “fair allocation” of control premium.** *In re Tele-Communications, Inc. S’holders Litig.*, C.A. No. 16470, 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005) (suggesting that if a control premium is provided to controlling stockholders, a board of directors must consider not only whether the price to be paid to minority stockholders is fair from a general perspective, but also whether the price to be paid to those stockholders is fair as compared to that to be paid to the controlling stockholders).
VI. **APPRAISAL RIGHTS.**

A. **The Availability of Appraisal Rights.**

1. **Mergers and consolidations.** With some exceptions, appraisal rights are available to stockholders of constituent corporations in mergers and consolidations effected pursuant to Sections 251, 252, 253, 254, 255, 256, 257, 258, 263 or 264 of the Delaware General Corporation Law (the “DGCL”). 8 Del. C. § 262(b).

2. **Other transactions.** A corporation’s certificate of incorporation may also provide for appraisal rights for shares of any class or series of stock following an amendment to the certificate of incorporation, a sale of all or substantially all of the assets of the corporation, or any merger or consolidation in which appraisal rights would not otherwise be available. 8 Del. C. § 262(c).

3. **Section 262 applies without regard to voting rights.** Appraisal rights are generally available to all stockholders, whether or not their shares are entitled to vote on the merger. However, a certificate of designation may contract around appraisal rights by providing that a class or series receive consideration pursuant to a specified metric. See In re Appraisal of Metromedia Int’l Group, Inc., 971 A.2d 893 (Del. Ch. 2009); In re Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973 (Del. Ch. 1997).

4. **Section 251(f).** Section 262 denies appraisal rights for stockholders of the constituent corporation surviving the merger if their vote was not required to approve the merger under Section 251(f). 8 Del. C. § 262(b)(1). As a general matter, Section 251(f) eliminates the requirement of approval of a merger by the stockholders of a surviving corporation if the outstanding shares and charter of the surviving corporation are unaffected by the merger, and if the surviving corporation issues 20% or less of its shares in connection with the merger. 8 Del. C. § 251(f).

5. **Section 253 short-form mergers.** Appraisal rights are not available to the stockholders of a parent corporation in a short-form merger. 8 Del. C. § 253.

6. **Section 251(g) holding company mergers.** Appraisal rights are not available in holding company mergers accomplished pursuant to Section 251(g). Section 251(g) allows a corporation to effect a merger to create a holding company structure without a stockholder vote if a somewhat complex set of provisions, intended to protect stockholder rights, is satisfied. 8 Del. C. § 251(g).

7. **Market Out.** Section 262 begins with the premise that appraisal rights exist for the shares of each class or series of stock of each constituent
corporation. The statute then denies appraisal rights if the corporation’s shares qualify for the “market out.”

(a) **Double Test:**

(i) **Part One.** Section 262 denies appraisal rights to shares of a class or series that, as of the record date fixed for the vote on the merger, are:

(1) listed on a national securities exchange; or

(2) held of record by more than 2,000 stockholders (multiple owners holding through a single record owner should not be counted in applying the 2,000 stockholder limit).

(ii) **Part Two.** Even if the market out would otherwise apply, the statute reinstates appraisal rights if the holders are required to accept cash or other consideration in the merger other than:

(1) shares of stock of the surviving corporation;

(2) shares of stock that at the effective date of the merger (not the record date) are:

   a. listed on a national securities exchange; or

   b. held by record of more than 2,000 stockholders; or

(3) cash in lieu of fractional shares. 8 Del. C. § 262(b)(2)(a)-(d).

(b) **Appraisal Rights are not Available in a Merger Providing for a Cash or Stock Election, not Subject to Proration.** Krieger v. Wesco Fin. Corp., C.A. No. 6176-VCL (Del. Ch. Oct. 13, 2011) (holding that appraisal rights were not available in a merger providing for a cash or stock election, not subject to proration, with cash as the default form of consideration; declining plaintiff’s invitation to take a “stockholder-by-stockholder” approach to determining the availability of appraisal rights).

(c) **A Special Cash Dividend may be Treated as Merger Consideration, thus Triggering Appraisal Rights.** In Louisiana Municipal Police Employees’ Retirement Sys. v. Crawford, C.A. Nos. 2635-N, 2663-N, 2007 Del. Ch. LEXIS 27 (Del. Ch. Feb. 23, 2007), Caremark entered into a merger agreement with CVS pursuant to which Caremark would merge with CVS and the Caremark stockholders would receive CVS stock in
consideration for their shares. After receiving a competing offer, it was decided that the Caremark stockholders would receive a special cash dividend payable by Caremark if the merger was approved. The Court of Chancery found this special cash dividend was “fundamentally cash consideration paid to Caremark shareholders on behalf of CVS” and thus appraisal rights were available. Notably, the Court found that the special dividend did not have legal significance independent of the merger despite being approved and payable by Caremark because the dividend was conditioned on stockholder approval of the merger agreement, payment would not become due until on or after the effective date of the merger and Caremark’s public disclosures stated that the dividend could be treated as merger consideration for tax purposes. In a subsequent ruling, however, the Court of Chancery stated “I suppose in the most hypertechnical of senses, Caremark shareholders might not be considered to receive cash in exchange for their shares as a result of this merger.” Louisiana Mun. Police Employees’ Ret. Sys. v. Crawford, C.A. Nos. 2635-N, 2663-N (Del. Ch. Mar. 7, 2007) (TRANSCRIPT). The Court noted that, instead, the Caremark stockholders could be regarded as receiving CVS shares and a waiver on the part of CVS of the restrictive interim covenant in the merger agreement prohibiting the payment of dividends by Caremark. The Court noted that such a waiver does not constitute the form of consideration mentioned in Section 262(b)(2) of the DGCL as an exception to the triggering of appraisal rights.

(d) Exception to the Market Out: Short-Form Mergers under Section 253. The market out does not apply to short-form mergers accomplished pursuant to Section 253 of the DGCL. In a short-form merger, the shares of the parent corporation have no appraisal rights, and the shares of the subsidiary have appraisal rights if the parent owns less than all of the subsidiary’s stock, regardless of the number of record holders or the nature of the merger consideration.

B. Who May Seek Appraisal.

1. General rule. The right to pursue appraisal extends to any stockholder of record who: (1) owns shares of stock on the date that the stockholder demands appraisal; (2) continues to hold the shares through the effective date of the merger or consolidation; and (3) neither votes in favor of the merger or consolidation nor executes a written consent in favor of the transaction. 8 Del. C. § 262(a).

2. Stockholders of record. Stockholders of record must take the first step in perfecting appraisal rights—demanding appraisal for shares prior to the vote on the adoption of the merger agreement. In 2007, Section 262(e) was amended expressly to permit beneficial owners of shares of stock held either in a voting trust or by a nominee on their behalf to commence an
appraisal proceeding by filing a petition, in their own names, in the Court of Chancery.

3. **Shares acquired after the merger is announced or post-record date.** Stockholders who purchase stock after the announcement of a merger and stockholders who become stockholders of record after the record date for the merger or consolidation are not disqualified from pursuing appraisal if the other statutory requirements are met. *Salomon Bros. v. Interstate Bakeries Corp.*, 576 A.2d 650 (Del. Ch. 1989). However, if shares are voted in favor of the merger and then sold, it is not clear whether the new holder would have appraisal rights.

4. **Shares held in street name.** In *In re Appraisal of Transkaryotic Therapies, Inc.*, C.A. No. 1554-CC (Del. Ch. May 2, 2007), the Court found that a beneficial owner that acquired shares after the record date but before the date of the vote on the merger and who held the stock in street name through Cede & Co. was not required to prove that each of its specific shares for which it sought appraisal had not been voted in favor of the merger by the previous beneficial owner. The Court noted that only a record holder may claim and perfect appraisal rights and that, therefore, the record holder’s actions determine perfection of the right to seek appraisal. Since Cede & Co., the record owner of the shares at issue, owned more than 16,000,000 shares of stock that had not been voted in favor of the merger, and the petitioners only sought appraisal for approximately 11,000,000 shares, the Court permitted the appraisal action to proceed.

5. **Stockholders who dispose of shares between the date of demand and the effective date of the merger or consolidation do not have appraisal rights.** Because the statute requires stockholders to hold their shares continuously through the period following the date of demand until the effective date, any stockholder that was a record holder as of the date of demand but sold his or her shares only to reacquire other shares so as to become a stockholder of record on the effective date will not be entitled to appraisal. R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* § 9.43[B] (3d ed. 2005).

6. **“Hedging.”** A stockholder of record holding shares for more than one beneficial owner may vote some shares in favor of a merger and seek appraisal for others. *Reynolds Metals Co. v. Colonial Realty Corp.*, 190 A.2d 752 (Del. 1963).

- In a short-form merger, a stockholder may demand appraisal as to some shares while accepting the merger consideration for the rest. *Olivetti Underwood Corp. v. Jacques Coe & Co.*, 217 A.2d 683
In one case involving a long-form merger, the Court of Chancery permitted a stockholder who voted all of his shares against the merger and demanded appraisal to withdraw the demand and accept the merger price as to some (but not all) of his shares, as long as all the shares held by such owner (who was also the record owner) were voted against the merger. *The Union Illinois 1995 Inv. Ltd. P’ship v. Union Fin. Group, Ltd.*, 847 A.2d 340 (Del. Ch. 2003).

7. **Stockholders who vote in favor of the merger or consolidation do not have appraisal rights.**


- A stockholder who waives appraisal rights by submitting a letter of transmittal may be able to withdraw that waiver and demand appraisal if the stockholder is still able to comply with the requirements of Section 262. *Roam-Tel Partners v. AT&T Mobility Wireless Operations Holdings Inc.*, C.A. No. 5745-VCS, 2010 Del. Ch. LEXIS 247 (Del. Ch. Dec. 17, 2010) (holding, in the context of a short-form merger cashing out the minority stockholders, that a stockholder who had submitted a letter of transmittal expressly accepting the merger consideration in lieu of demanding appraisal was able to proceed with its appraisal petition even though the company had cancelled the stock certificate and mailed the stockholder a check where the stockholder had not cashed the check, sent the check back to the company and was able to comply with all of the express requirements appraisal statute; suggesting that if the stockholder had cashed the check for the merger consideration, the company could have argued that the waiver of appraisal rights could not be rescinded because the company had relied on the waiver).

- It is unclear under Delaware law whether consents voted pursuant to Section 228 in favor of a merger or consolidation that are delivered after approval of the transaction constitute a vote in favor
of the transaction. It could be argued that once sufficient consents are delivered, the vote has been concluded, and thus the later delivered consents do not amount to a waiver of appraisal rights. 8 Del. C. § 228.

8. **Withdrawal.** A stockholder who properly demands appraisal may withdraw the demand as follows:

- At any time within 60 days of the effective date of the merger, the stockholder may withdraw his or her demand unilaterally as long as the stockholder has not commenced an appraisal proceeding or joined that proceeding as a named party. 8 Del. C. § 262(e).

- After the period of 60 days following the effective date of the merger has passed but before the petition for appraisal is filed, the stockholder can only withdraw his or her demand for appraisal with the written consent of the surviving corporation. 8 Del. C. § 262(k).

- After the petition for appraisal has been filed, a stockholder can only withdraw his or her demand for appraisal with court approval. 8 Del. C. § 262(k).

- Dismissal will not be granted by the court if 60 days have passed after the effective date and the surviving corporation opposes dismissal. 8 Del. C. § 262(k). See Salomon Bros., Inc. v. Interstate Brands Corp., C.A. No. 10054, 1991 Del. Ch. LEXIS 129 (Del. Ch. July 12, 1991).

C. **Fair Value.**

1. **The Court of Chancery determines fair value.** After the Court of Chancery determines the stockholders entitled to appraisal, an appraisal proceeding will be conducted in accordance with the rules of the Court of Chancery. In an appraisal proceeding, the Court will determine the fair value of the shares, excluding any value arising from the accomplishment or expectation of the merger or consolidation. 8 Del. C. § 262(h).

2. **Interest to be paid on the amount determined to be fair value.** Section 262(h) of the DGCL establishes a presumption that interest will be paid on the amount determined to be fair value. Unless the Court of Chancery, in its discretion, determines otherwise for good cause shown, interest from the effective date of the merger through the date of payment of the judgment shall be compounded quarterly and shall accrue at 5% over the Federal Reserve discount rate (including any surcharge) as established from time to time during the period between the effective date of the merger and the date of payment of the judgment. 8 Del. C. § 262(h).
D. Required Filings, Notices, and Demands.

1. Notice of appraisal rights and the effective date.

(a) For Mergers Approved at a Stockholder Meeting:

- **Notice of Appraisal Rights.** The corporation must notify all stockholders that were stockholders on the record date of the meeting for which appraisal rights are available of the availability of appraisal rights, and such notice must include a copy of Section 262. *See Nebel v. Southwestern Bancorp., Inc.*, C.A. No. 13618, 1999 Del. Ch. LEXIS 30 (Del. Ch. Mar. 9, 1999) (finding that the erroneous inclusion of a page from another state’s appraisal statute in the notice of appraisal rights was a material misdisclosure and substantive statutory violation for which a quasi-appraisal was the appropriate remedy). Such notice must be sent not less than 20 days prior to the meeting; *Berger v. Pubco Corp.*, 976 A.2d 132 (Del. 2009) (outlining procedure for a quasi-appraisal remedy after appraisal notice failed to disclose material information necessary to decide whether or not to seek appraisal and incorrectly included an outdated version of Section 262). 8 Del. C. § 262(d)(1). *See also Jackson v. Turnbull*, C.A. No. 13042, 1994 Del. Ch. LEXIS 25 (Del. Ch. Feb. 8, 1994) (holding that a corporation may not vary the statutory time periods set forth in Section 262, where corporation stated in notice that a stockholder’s demand and petition for appraisal must be made within 20 and 120 days, respectively, following the mailing of a valuation), aff’d, 653 A.2d 506 (Del. 1994).

- **Stockholder Demand.** Each stockholder demanding appraisal must deliver a written demand for appraisal to the corporation before the vote on the merger or consolidation is taken. A proxy or vote against the transaction will not constitute a demand. 8 Del. C. § 262(d)(1).

- **Notice of Effective Date.** Within 10 days after the effective date of such merger or consolidation, the surviving or resulting corporation must notify each stockholder that properly demanded appraisal under Section 262 of the effective date of the merger or consolidation. 8 Del. C. § 262(d)(1).

(b) For Mergers Approved by Written Consent or under the Short-Form Provisions of Section 253:

- **Notice of Appraisal Rights.** Notice of appraisal rights must be given to each of the holders of any class or series of such constituent corporation who are entitled to appraisal rights.
(1) Such notice may be given by the constituent corporation before the effective date of the merger to all stockholders entitled to appraisal rights on the record date fixed by the corporation. Such notice should state that the merger or consolidation was approved and that appraisal rights are available, and shall include a copy of Section 262. 8 Del. C. § 262(d)(2).

(2) Such notice may be given by the surviving corporation within 10 days after the effective date of the merger to all stockholders entitled to appraisal rights as of the effective date, and must state that the merger or consolidation was approved, provide the effective date of the transaction, state that appraisal rights are available, and include a copy of Section 262. 8 Del. C. § 262(d)(2).

- **Stockholder Demand.** Any stockholder entitled to appraisal rights may, within 20 days after the mailing by the corporation of the notice of appraisal rights, demand appraisal of such holder’s shares in writing. 8 Del. C. § 262(d)(2).

- **Notice of Effective Date.** If the notice of appraisal rights did not notify stockholders of the effective date of the merger or consolidation, either (1) each such constituent corporation shall send a second notice before the effective date of the merger or consolidation notifying each of the holders of any class or series of stock of such constituent corporation that are entitled to appraisal rights of the effective date of the merger or consolidation; or (2) the surviving or resulting corporation shall send such a second notice to all such holders on or within 10 days after such effective date. If such second notice is sent more than 20 days following the sending of the first notice, such second notice need only be sent to each stockholder who is entitled to appraisal rights and who has demanded appraisal of such holder’s shares in accordance with Section 262(d)(2). 8 Del. C. § 262(d)(2).

- **Record Date.** For the purpose of determining the stockholders entitled to receive either the first or second notice, each constituent corporation may fix a record date that shall not be more than 10 days prior to the date notice is given, provided that if the notice is given on or after the effective date of the merger or consolidation, the record date shall be such effective date. If no record date is fixed and the notice is given prior to the effective date, the record date shall be the close of business on the day next preceding the day on which the notice is given. 8 Del. C. § 262(d)(2).
2. **Section 262(e) notice.** Within 120 days after the effective date of the merger or consolidation, any stockholder who has complied with Section 262 (including a beneficial owner) shall, upon written request, be entitled to receive from the corporation surviving the merger or resulting from the consolidation a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares. Such written statement shall be mailed to the stockholder within 10 days after such stockholder’s written request is received by the corporation or within 10 days after expiration of the period for delivery of demands for appraisal under Section 262(d), whichever is later. *8 Del. C. § 262(e).*

3. **Filing of petition for appraisal.** Within 120 days after the effective date of the merger or consolidation, the surviving or resulting corporation or any stockholder who has complied with Section 262 (including a beneficial owner) may file a petition in the Court of Chancery demanding a determination of the value of the stock of all such stockholders. *8 Del. C. § 262(e).*

4. **Section 262(f) verified list filing.**

   (a) **Procedure if a Stockholder Files the Petition for Appraisal.** Upon the filing of any petition by a stockholder, service of a copy thereof shall be made upon the surviving or resulting corporation, which surviving or resulting corporation shall, within 20 days after such service, file in the office of the Register in Chancery in which the petition was filed a duly verified list containing the names and addresses of all stockholders who have demanded payment for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation. *8 Del. C. § 262(f).*

   (b) **Procedure if the Surviving or Resulting Corporation Files the Petition for Appraisal.** The duly verified list containing the names and addresses of all stockholders who have demanded appraisal for their shares and with whom agreements as to the value of their shares have not been reached by the surviving or resulting corporation shall accompany the petition. *8 Del. C. § 262(f).*

5. **Notice by the Registry in Chancery.** If so ordered by the Court, the Register in Chancery shall give notice of the time and place fixed for the hearing of such petition by registered or certified mail to the surviving or resulting corporation and to the stockholders set forth in the duly verified list. Such notice shall also be given by 1 or more publications at least 1 week before the day of the hearing, in a newspaper of general circulation published in Wilmington, Delaware or such publication as the Court deems advisable. The forms of the notices must be approved by the Court.
and the costs of such notices must be borne by the surviving or resulting corporation. 8 Del. C. § 262(f).

E. **Content of Notices.**

1. **Contents of notice of appraisal rights.** The notice of appraisal must contain: (1) a statement making known the availability of appraisal rights; (2) a copy of Section 262; (3) instructions regarding how to perfect appraisal rights (under Delaware case law, minimally, it is advisable to inform stockholders that a demand for appraisal must be made by or on behalf of the holder of record, as such holder is identified on the records of the corporation (see Enstar Corp. v. Senouf, 535 A.2d 1351 (Del. 1987)); and (4) information material to the stockholder’s decision to accept the merger consideration or demand appraisal (see Part V(F) below for a discussion of the duty of disclosure). 8 Del. C. § 262(d).

2. **Contents of notice of effective date.** The notice of effective date must notify the stockholders entitled to appraisal of the effective date of the merger or consolidation. 8 Del. C. § 262(d).

3. **Contents of 262(e) notice.** This notice must contain a statement setting forth the aggregate number of shares not voted in favor of the merger or consolidation and with respect to which demands for appraisal have been received and the aggregate number of holders of such shares.

F. **Fiduciary Duty of Disclosure.**

1. **Duty of disclosure.**

   - Directors “have a fiduciary duty to disclose to the shareholders the available material facts that would enable them to make an informed decision, pre-merger, whether to accept the merger consideration or demand appraisal.” Turner v. Bernstein, C.A. No. 16190, 1991 Del. Ch. LEXIS 18, at *19-*20 (Del. Ch. Feb. 9, 1999) (citations omitted).

   - A board may be required to disclose certain financial projections used in valuing the company. In re Netsmart Technologies, Inc. S’holders Litig., C.A. No. 2563-VCS, 2007 Del. Ch. LEXIS 35 (Del. Ch. Mar. 14, 2007) (in finding that the proxy’s failure to disclose all projections used by the company’s financial advisor in preparing its DCF valuation rendered it materially incomplete, the Court stated that when “[f]aced with the question of whether to accept cash now in exchange for forsaking an interest in [the company’s] future cash flows, [the company’s] stockholders would obviously find it important to know what management and the
company’s financial advisor’s best estimate of those future cash flows would be”).

- The Court of Chancery found a breach of the duty of disclosure where the proxy statement informed stockholders that the special committee’s financial advisor had received the right to provide staple financing because it could provide a source of financing that might not otherwise be available to potential buyers, when the board had not actually made that determination. In re Rural Metro Corp. S’holders Litig., C.A. No. 6350-VCL (Mar. 7, 2014).


- The same standard of materiality exists as in other disclosure contexts. Skeen v. Jo-Ann Stores, 750 A.2d 1170, 1173 (Del. 2000).

- The Delaware Supreme Court has held that, where there is a breach of the duty of disclosure in connection with a short-form merger, the appropriate remedy is a quasi-appraisal remedy i.e., a class action to recover the difference between “fair value” and the merger consideration wherein the minority stockholders are automatically treated as members of the class with no obligation to opt-in or to escrow any portion of the merger consideration. Berger v. Pubco Corp., 976 A.2d 132 (Del. 2009).

- Statutorily required notices, such as the description of a proposed charter amendment in a notice of meeting, are “material per se.” In connection with a squeeze-out merger, “quasi-appraisal damages are one possible remedy for breaches of the duty of disclosure . . . [b]ut more importantly, as noted at the outset, the quasi-appraisal damages measure is simply a remedy, and it can be awarded for other breaches of fiduciary duty as well.” If a transaction is found to be not entirely fair to the stockholders, then the court would calculate quasi-appraisal damages as the difference between the appraised value and the merger consideration. In re Orchard Enters., Inc. S’holder Litig., C.A. No. 7840-VCL (Feb. 28, 2014).

- Expedited proceedings may be allowed if plaintiffs bring colorable disclosure claims. Ortsman v. Green, C.A. No. 2670-N, 2007 Del. Ch. LEXIS 29, at *5-*6 (Del. Ch. Feb. 28, 2007) (“The court recognizes that there is no automatic right to expedition. Nonetheless where, as here, there are colorable disclosure claims,
the better course is to address them in advance of a stockholder vote when appropriate disclosure-based relief is available. Only by remediying proxy deficiencies in advance of a vote can irreparable harm be avoided.””) (citations omitted).

- The Delaware Court of Chancery cannot grant monetary or injunctive relief for disclosure violations in connection with a proxy solicitation in favor of a merger three years after that merger has been consummated where there is no evidence of breach of the duty of loyalty or good faith by the directors who authorized the disclosures. See In re Transkaryotic Therapies, Inc., C.A. No. 2776-CC, 2008 Del. Ch. LEXIS 76 (Del. Ch. June 19, 2008).

2. **Duty of disclosure in a short-form merger.** The Court of Chancery has held that even if disclosure was made in connection with a tender offer in a two-step transaction and remains publicly available, the notice of appraisal following the second step short-form merger should include summary financial information, instructions as to how to obtain more detailed information and an explanation of the method by which the board set the merger consideration. Berger v. Pubco Corp., C.A. No. 3414-CC, 2008 Del. Ch. LEXIS 63 (Del. Ch. May 30, 2008), rev’d on other grounds, 976 A.2d 132 (Del. 2009); see also Gilliland v. Motorola, Inc., 859 A.2d 80 (Del. Ch. 2004) (suggesting that two years of stock data and five years of summary financial information was an example of adequate disclosure of the target’s financials).

3. **Duty of disclosure in connection with a Section 228(e) notice.** In Dubroff v. Wren Holdings, LLC, C.A. No. 3940-VCN, 2009 Del. Ch. LEXIS 89 (Del. Ch. May 22, 2009), the Delaware Court of Chancery declined to dismiss a claim that a corporation’s directors had breached their fiduciary duty of disclosure by failing to make certain disclosures about a recapitalization in a notice of action by written consent sent pursuant to Section 228(e) of the DGCL. Specifically, the Court declined to dismiss plaintiff’s claims that the disclosures in the notice were insufficient because the notice did not disclose the nature of the benefits received by the defendant directors pursuant to the recapitalization or that the defendant directors were the primary beneficiaries of the recapitalization. The Court declined to delineate the parameters of the duty of disclosure in the Section 228(e) context, and found that regardless of the scope of disclosure, the plaintiffs had sufficiently pled a disclosure violation.

VII. **PREFERRED STOCK AND NEGOTIATED ACQUISITIONS.**

A. **Voting Rights.**

1. **Voting under statute.**
(a) No Class Vote in Merger under Section 251 of the DGCL.

(i) In a Merger with No Class Vote Required by the DGCL, Shares may be:

- left outstanding
- cancelled
- cashed out
- changed by amending terms ($251(b)(3)$ and (e))
- subrogated to new series
- converted into stock of acquirer
- recapitalized into preferred or common stock of same corporation. See Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940) (discussed in Part VI(B)(3)(6)).

(ii) Holders of shares may have appraisal rights under Section 262 of the DGCL. See Part V.

(b) Limited Class Votes in Amendments under Section 242(b)(2) of the DGCL.

(i) Section 242(b)(2). This section provides that the “holders of the outstanding shares of a class shall be entitled to vote as a class upon a proposed amendment, whether or not entitled to vote thereon by the certificate of incorporation, if the amendment would . . . alter or change the powers, preferences, or special rights of the shares of such class so as to affect them adversely.”

(ii) Adverse Effect. No class vote for Section 242 charter amendments unless the peculiar legal characteristics of a class are altered adversely.

- Hartford Accident & Indem. Co. v. W.S. Dickey Clay Mfg. Co., 24 A.2d 315 (Del. 1942). In Hartford Accident, the Court construed the predecessor to Section 242(b)(2) of the DGCL, which granted a class vote on charter amendments that “alter or change the preferences, special rights or powers given to any one or more classes of stock, by the Certificate of Incorporation, so as to affect such class or classes of stock adversely.” Id. at 318. The Court held that a charter amendment that increased the authorized number of shares of preferred stock did not require a class vote of
the common stock regardless of any dilutive effect on the common
because a class vote is required only when an amendment changes
the “rights incident to that class as compared with other classes of
shares.” Id. at 318. “Where the corporate amendment does no
more than to increase the number of the shares of a preferred or
superior class, the relative position of subordinated shares is
changed in the sense that they are subjected to a greater burden.
The peculiar, or special, quality with which they are endowed, and
which serves to distinguish them from shares of another class,
remains the same.” Id. at 318-19.

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  Ch. Dec. 30, 1993). In *Orban*, the common stockholders argued
  that the creation of a new class of preferred stock that diluted the
  voting power of the common stock required a class vote. The
  *Orban* Court relied on *Hartford Accident* and explained that the
  right to vote is not a “peculiar or special characteristic of common
  stock in the capital structure of [the corporation].” Id. at *22.
  Therefore, an amendment to the certificate of incorporation that
  creates a new class of preferred stock does not require a class vote
  of the common stockholders because the amendment does not
  adversely affect “the peculiar legal characteristics of that class of
  stock.” Id. In addition, the Court explained that the new issuance
diluted the voting power of all of the classes of stock, not simply
the common stock. Similarly, the Court rejected the plaintiffs’
argument that the amendments to the certificate of designation
increasing the number of shares of certain series, and changing the
conversion ratios and redemption provisions of other series
required a class vote of the common stock, relying on Hartford
Accident and finding that “no special rights of common
shareholders were adversely affected by those changes.” Id. at
*24.

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  *Mariner LDC v. Stone Container Corp.*, 729 A.2d 267, 272 n.4
  (Del. Ch. 1998) (stating that amendment to terms of preferred
  stock granting voting rights to a class formerly having none
  “cannot in any way, be interpreted as having an adverse [e]ffect on
the ‘preferences, rights or powers’ of those shares” and finding that
since merger implicated terms of anti-destruction provision which
required adjustment of conversion rights, amendment of charter to
adjust conversion rights did not adversely affect preferred
stockholders such that they were entitled to a class vote on
amendment).

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  Special Considerations:

    → Does a reverse stock split create an adverse effect?
Although creation of senior stock is not, per se, an adverse effect, the terms of the junior stock should be reviewed to insure that creation of senior stock does not otherwise result in adverse effect on powers, preferences or special rights of junior stock, e.g., provision that a series will be junior only to, or share in a liquidation pool exclusively with, specified other series.

(iii) Series Vote?

- Section 242(b)(2) of the DGCL provides that if a proposed amendment “would alter or change the powers, preferences, or special rights of 1 or more series of any class so as to affect them adversely, but shall not so affect the entire class, then only the shares of the series so affected by the amendment shall be considered a separate class for purposes of [the statute].”

- Consider reclassification of multiple series of preferred stock into common stock; amendment to add “pay to play” conversion term to multiple series.

(iv) Class Vote to Increase or Decrease Number of Authorized Shares?

- Class vote required under Section 242.

- This class vote (but not the others provided for by Section 242(b)) may be denied in corporation’s certificate of incorporation. See 8 Del. C. § 242(b)(2).

2. Voting under charter.

(a) No Class Vote for Mergers Unless Charter Expressly Requires. Case law suggests that to require a class vote in a merger, even if the merger effects amendments to the charter, the terms of the stock must expressly require a class vote for mergers.

Warner Communications Inc. v. Chris-Craft Indus., Inc., 583 A.2d 962 (Del. Ch. 1989). In Warner, the provision of the Warner charter at issue required a 2/3 class vote of the preferred stock to amend, alter or repeal any provision of the charter if such action adversely affected the preferences, rights, powers or privileges of the preferred stock. Warner merged with a Time subsidiary and was the surviving corporation. In the merger, the Warner preferred stock was converted into Time preferred stock and the Warner charter was amended to delete the terms of the preferred stock. The Court rejected the argument that holders of the preferred stock were entitled to a class vote on the merger, reasoning that any adverse effect on the preferred stock was caused not by an amendment of the terms of the stock but solely by the conversion of the stock into a new security pursuant to Section 251 of the DGCL. The Court also reasoned that the language of the class vote provision at issue was similar to Section 242 and did not expressly apply to mergers.

Sullivan Money Mgmt., Inc. v. FLS Holdings, Inc., C.A. No. 12731, 1992 Del. Ch. LEXIS 236 (Del. Ch. Nov. 20, 1992), aff’d, 628 A.2d 84 (Del. 1993). Sullivan involved the interpretation of a charter provision of FLS Holdings, Inc. which required a class vote of the preferred stockholders for the corporation to “change, by amendment to the Certificate of Incorporation . . . or otherwise,” the terms and provisions of the preferred stock so as to affect adversely the rights and preferences of the preferred stock. Id. at *7. In that case, the preferred stock of FLS was converted into cash but FLS survived. The plaintiff argued that the conversion to cash was an elimination of the preferred stock and, therefore, was a change, by amendment “or otherwise” to the terms of the preferred stock. The Court disagreed, holding that “or otherwise” cannot be interpreted to include a merger. The Court pointed to other provisions of the charter where the drafters specifically required a class vote of another series of preferred stock to amend the terms of the preferred stock so as to affect adversely the rights of such stock, “either directly or indirectly or through merger or consolidation with any other corporation.” The Court reasoned: “The word ‘merger’ is nowhere found in the provision governing the Series A Preferred Stock. The drafters’ failure to express with clarity an intent to confer class voting rights in the event of a merger suggests that they had no intention of doing so, and weighs against adopting the plaintiffs’ broad construction of the words ‘or otherwise.’” Id. at *17.

Elliott Assocs. v. Avatex Corp., 715 A.2d 843 (Del. 1998). In Avatex, the Court construed a provision that expressly gave
preferred stockholders a class vote on the “amendment, alteration or repeal, whether by merger, consolidation or otherwise” of provisions of the charter of Avatex Corporation so as to adversely affect the rights of the preferred stock. The challenged transaction involved the merger of Avatex into its wholly owned subsidiary, Xetava Corporation, in which the Avatex preferred stock was converted into common stock of the surviving corporation. The Court, for purposes of its opinion, assumed that the preferred stock was adversely affected. The Court distinguished Warner because the Avatex charter contained the “whether by merger, consolidation or otherwise” language and held that the preferred stock had a right to a class vote on the merger because the adverse effect was caused by the repeal of the Avatex charter and the stock conversion. The Court concluded that the “path for future drafters to follow in articulating class vote provisions is clear”: “When a certificate (like the Warner certificate or the Series A provisions here) grants only the right to vote on an amendment, alteration or repeal, the preferred have no class vote in a merger. When a certificate (like the First Series Preferred certificate here) adds the terms ‘whether by merger, consolidation or otherwise’ and a merger results in an amendment, alteration or repeal that causes an adverse effect on the preferred, there would be a class vote.” Id. at 855.

• Starkman v. United Parcel Serv. of America, Inc., C.A. No. 17747 (Del. Ch. Oct. 18, 1999) (TRANSCRIPT). Starkman involved a holding company merger where UPS formed two subsidiaries, one immediately below UPS and the second immediately below that first-tier subsidiary. UPS then merged with the second-tier subsidiary and its stockholders received stock of the first-tier subsidiary, New UPS, in exchange for their shares. UPS continued as a wholly owned subsidiary of New UPS and its charter was not amended in the merger. The plaintiffs in that case argued that the merger triggered a supermajority vote in the UPS charter that required an 80% vote for the amendment or deletion of a transfer restriction in the charter. The Court disagreed, noting that the charter of UPS, which became a wholly owned subsidiary of New UPS, was not amended in the merger. In addition, citing Avatex and Warner, the Court found that the supermajority vote provision would not have been triggered even if the charter provision of UPS had been amended in the merger, stating:

I reach this conclusion because the Supreme Court in Avatex rested its holding on the presence of language in the Avatex certificate of incorporation specifically referring to the possibility of an amendment, alteration or repeal by merger, consolidation or otherwise. The critical language, referring to merger, consolidation or otherwise, was not found
in *Warner* and is not found here. Thus, *Warner*, which was reaffirmed by the Supreme Court, requires that I read [the supermajority vote provision] to pertain only to charter amendments proposed in accordance with Section 242 of the Delaware General Corporation Law. Because the transaction at issue is a merger proposed under the authority of Section 251 of the Delaware General Corporation Law, *Warner* requires a finding that [the supermajority provision] has no application.

*Id.*, transcript at 19-20.

(b) However, other protective provisions may be triggered in a merger or recap transaction, e.g., a provision requiring a class vote to authorize or issue senior equity. *See Benchmark Capital Partners IV, LP v. Vague*, C.A. No. 19719 (Del. Ch. July 15, 2002), *aff’d*, 822 A.2d 396 (Del. 2003).

**B. Deemed Liquidation Provisions.**

1. **Typical private company preferred.**
   - Fixed liquidation amount for each series.
   - A “deemed liquidation” provision generally contemplates a so-called “waterfall” payout of liquidation amounts in any transaction “deemed a liquidation,” including, for example:
     - mergers
     - a transaction (or series of transactions) resulting in a 50% change in voting power
     - sale, lease or other disposition of substantially all of the assets of the corporation

2. **Interpretation problem.**
   - Transaction such as asset sale or sale of 50% voting power may not involve any distribution to stockholders.
   - Is deemed liquidation provision intended to force a distribution or to require a particular allocation of proceeds in a merger?
   - If requiring a mandatory dividend prior to merger:
     - Must be clear and express
     - Corporation must have sufficient surplus
Potential for director liability for payment of unlawful dividend


(a) Section 102(b)(1). Although there is freedom of contract in drafting preferred stock terms, Section 102(b)(1) of the DGCL provides that a corporation’s charter cannot contain provisions “contrary to the laws of this State.”

(b) Case Law: No Vested Rights.

- Federal United Corp. v. Havender, 11 A.2d 331 (Del. 1940). In Havender, the defendant corporation formed a wholly owned subsidiary and merged the subsidiary into itself in order to convert outstanding preferred stock into shares of a new series of preferred stock and common stock. Plaintiffs objected to the merger because it destroyed the accrued dividend right of the preferred stock, which, at that time, could not be accomplished by a charter amendment. The Court rejected this argument and held that the preferred stockholders’ right to accrued dividends could validly be eliminated in a merger that converted the preferred stock into new stock. The Court reasoned that the Delaware statute permitting mergers put every stockholder on notice that contract rights in a charter were “defeasible” in a merger.

- Langfelder v. Universal Labs., Inc., 163 F.2d 804 (3d Cir. 1947). The charter provision at issue in Langfelder gave preferred stockholders the right to a specified cash payment plus accrued dividends in the “event of any reduction in the capital stock of the corporation resulting in a reduction of the preferred stock either as to number of shares or as to the par value thereof.” Id. at 805 n.2. The corporation effected a merger with a wholly owned subsidiary which converted the preferred stock into new preferred stock with a reduced par value and eliminated the accumulated dividends on the former preferred stock. The Court found that the quoted provision applied in such a merger. However, finding that it was bound by Havender, the Court concluded that the provision was no different from any other contractual right incidental to stock ownership—and thus was subject to defeasance in a statutory merger.

- See Richard M. Buxbaum, Preferred Stock—Law and Draftsmanship, 42 CAL. L. REV. 243, 307 (1954) (reading Langfelder to mean that an “absolute provision that a merger shall have a given effect on the stock cannot control a validly consummated merger which does not provide for that effect”).
• **Cf. Dawson v. Pittco Capital Partners, L.P.,** C.A. No. 3148-VCN, 2012 Del. Ch. LEXIS 92 (Del. Ch. Apr. 30, 2012) (holding that the *Havender* and *Langfelder* only permit elimination by merger of rights arising from an equity interest and, therefore, did not permit elimination of notes in a merger even where those notes were marketed as part of a single “unit” along with a preferred equity interest in a limited liability company).

• **But see In re: Appraisal of Metromedia Int’l Group, Inc.,** 971 A.2d 893, 901 (Del. Ch. 2009) (finding that the valuation of preferred stock in an appraisal proceeding “must be viewed through the defining lens of its certificate of designation, unless the certificate is ambiguous or conflicts with positive law”); *In re Appraisal of Ford Holdings,* 698 A.2d 973, 974 (Del. Ch. 1997) (stating that “properly expressed terms of a Certificate of Designation of preferred stock may establish the consideration to which holders of the stock will be entitled in the event of a merger and, when the documents creating the security do so, that the amount so fixed or determined constitutes the ‘fair value’ of the stock for the purposes of dissenters’ rights under Section 262 of the Delaware General Corporation Law”).

4. **Avoiding deemed liquidation uncertainty.**

• Draft provision as protective vote, e.g., merger requires separate vote of Series X unless that series receives its liquidation amount.

• Draft provision as mandatory redemption or put right, or automatic conversion or exchange, triggered immediately prior to any “deemed liquidation” event.

• Amend the provision to exempt the subject transaction. See Part VI(A) for discussion of required votes.

5. **Does deemed liquidation value limit value of stock in appraisal proceeding?**

• *In re Appraisal of The Orchard Enterprises, Inc.,* C.A. No. 5713-CS, 2012 Del. Ch. LEXIS 165 (Del. Ch. July 18, 2012) (holding, in the context of a squeeze-out merger by a controlling stockholder that owned all of the company’s preferred stock which remained outstanding following the merger, that in valuing appraisal petitioners’ common stock the court would not subtract the preferred’s $25 million liquidation preference from the company’s enterprise value because that liquidation preference was the type of “speculative event” excluded from an appraisal valuation and instead valuing the preferred on an as-converted basis where (1)
the liquidation preference was not payable upon a merger and (2) the preferred participated in dividends on an as-converted basis).

- *Shiftan v. Morgan Joseph Holdings, Inc.*, C.A. No. 6424-CS, 2012 Del. Ch. LEXIS 11 (Del. Ch. Jan. 13, 2012) (holding, at the summary judgment stage, that a provision providing for mandatory redemption of preferred stock in exchange for the preferred’s liquidation preference six months after the merger at issue would be relevant in the ultimate fair value determination because that mandatory redemption provision was a “specific, non-speculative contract right of the preferred,” even though the merger itself did not trigger the liquidation preference).

- *LC Capital Master Fund, Ltd. v. James*, 990 A.2d 435 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a $25 per share liquidation preference), recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).

- *In re: Appraisal of Metromedia Int’l Group, Inc.*, 971 A.2d 893, 901 (Del. Ch. 2009) (finding that where a certificate of designation fixed the precise value to which preferred stockholders were entitled in the event of a merger, the preferred stockholders were entitled to that value and no more in a statutory appraisal proceeding).

- *In re Appraisal of Ford Holdings*, 698 A.2d 973, 978 (Del. Ch. 1997) (holding that provision of certificate of designation setting forth the value to be paid to stockholders if they are forced to give up their shares in a cash-out merger was unambiguous and stating that “the shareholders can not now come to this court seeking additional consideration in the merger through the appraisal process”).

- *See also Gearreald v. Just Care, Inc.*, C.A. No. 5233-VCP, 2012 Del. Ch. LEXIS 91 (Del. Ch. Apr. 30, 2012) (treating convertible preferred stock on an as-converted basis for the purposes of determining a corporation’s cost of capital, where the company had never paid a dividend on the preferred stock and the company had the ability to convert the preferred into common in the event of a merger; based on the briefing and the final order, the court appears to have valued the preferred stock on an as-converted basis in its ultimate appraisal determination, but this approach was not strongly contested by the parties in their briefing).
C. **No Impairment Provisions.**

1. **Typical provision.**
   - A typical “no impairment” provision prohibits a company from amending the charter, merging or taking any other action to avoid or impair preferred terms or rights, although it is often limited to conversion terms and rights.

2. **Interpretation problem.**
   - Is the provision limited to mergers and other acts affecting the conversion rights only or does it apply to all rights of the stock?
   - Can a corporation, in a certificate of designation, limit its power regarding certain matters such as engaging in mergers?
   - Is provision intended to prohibit changes to the preferred’s rights, or only other actions that do not expressly change the preferred’s rights but effectively undermine them?

3. **Enforceability issue.**
   - The enforceability of the “no impairment” provisions may be limited for the same reasons the enforceability of “deemed liquidation” provisions may be limited, i.e., Delaware case law provides that existing rights may be subject to defeasance in a valid statutory merger or by charter amendment. See Part VI(B)(3).
   - *Kumar v. Racing Corp. of America*, C.A. No. 12039, 1991 Del. Ch. LEXIS 75 (Del. Ch. Apr. 26, 1991) (finding, on a motion for preliminary injunction, that the plaintiff had not established the likelihood of success on the merits of its claim that a merger that converted preferred stock into cash violated a no impairment clause).

D. **Fiduciary Duty Issues Concerning Preferred Stock.**

1. **Allocation issues.** Where there is more than one class or series of stock, directors may have conflict with stockholders because of their affiliation with one or more classes or series of stock, thereby requiring application of entire fairness standard. See also Part I(G)(4)(e).

   (a) **Case Law – Conflict.**

dismiss, that the plaintiff had adequately rebutted the presumption of the business judgment rule by alleging that a majority of the members of a corporation’s board, who had ties to holders of a large percentage of the company’s preferred stock, were interested in a merger where the preferred stockholders received cash and the common stockholders received nothing in the merger; see also In re Trados Inc. S’holders Litig., C.A. No. 1512-VCL, 2013 WL 4511262, at *46 (Del. Ch. Aug. 16, 2013) (holding in the post-trial decision, that even though the directors did not employ a fair process due to their failure to implement “a procedural device such as a special committee,” the directors did not breach their duty to the common stock “by agreeing to a Merger in which the common stock received nothing” because the “common stock had no economic value before the Merger, and the common stockholders received in the Merger the substantial equivalent in value of what they had before”).

- **Encite LLC v. Soni**, C.A. No. 2476-VCG, 2011 Del. Ch. LEXIS 177 (Del. Ch. Nov. 28, 2011) (denying motion for summary judgment on plaintiff’s claims that preferred stockholder affiliated directors had breached their duty of loyalty in running an unfair bidding process to sell the assets of a financially-troubled company and preferring a bid from a consortium including the preferred stockholder; summary judgment was also denied on aiding and abetting claims against the preferred stockholder).

- **In re FLS Holdings, Inc. S’holders Litig.**, C.A. No. 12623, 1993 Del. Ch. LEXIS 57 (Del. Ch. Apr. 2, 1993) (requiring a board comprised exclusively of directors owning large amounts of common stock or directors who were affiliates of the company’s controlling stockholder to demonstrate the fairness of an allocation of consideration that clearly favored the common stock over the preferred stock).

- **Jedwab v. MGM Grand Hotels, Inc.**, 509 A.2d 584 (Del. Ch. 1986) (applying entire fairness test to allocation of merger consideration where one element of consideration was apportioned wholly to the shares of the controlling stockholder).

- **Lewis v. Great W. United Corp.**, C.A. No. 5397, 1978 Del. Ch. LEXIS 723 (Del. Ch. Mar. 28, 1978) (applying entire fairness test where a corporation that was controlled by a 65% common stockholder structured a merger treating preferred less favorably than common).

(b) Case Law – No Conflict.
LC Capital Master Fund, Ltd. v. James, 990 A.2d 435, 446 (Del. Ch. 2010) (denying motion to enjoin merger that preferred stockholders argued undervalued their stock because they were treated on an as-converted basis, without crediting the value of other terms of the preferred (including a $25 per share liquidation preference), denying motion that directors, who owned common stock, breached their fiduciary duties to the preferred stockholders and finding “no basis to find that the directors sought to advantage the common stockholders at the unfair expense of the preferred stockholders,” and recognizing that the preferred stockholders had appraisal rights that they could exercise following consummation of the merger).

In re General Motors Class H S’holders Litig., 734 A.2d 611 (Del. Ch. 1999). In General Motors, the plaintiffs alleged that the directors breached their duty of loyalty to the holders of General Motors Class H Common Stock because a recapitalization transaction favored the General Motors $1 2/3 Common Stock. The plaintiffs alleged that the directors owned more $1 2/3 Common Stock, in terms of number of shares and dollar value, than Class H Common Stock and that, accordingly, the entire fairness standard should apply. The Court rejected the plaintiffs’ argument, holding that the business judgment rule applied, noting that the amount of $1 2/3 Common Stock held by the directors was not “so substantial as to have rendered it improbable that [the] directors could discharge their fiduciary obligations in an even-handed manner.” Id. at 618.

Giammalvo v. Sunshine Mining Co., C.A. No. 12842, 1994 Del. Ch. LEXIS 6 (Del. Ch. Jan 31, 1994), aff’d, 651 A.2d 787 (Del. 1994). The challenged transaction in Sunshine involved the directors’ decision to refrain from paying dividends on the preferred stock. The plaintiff had argued that due to the directors’ ownership of common stock, the market price of which allegedly would have been adversely affected if the dividend had been paid on the preferred stock, the directors breached their duty of loyalty to the preferred stockholders. The Court rejected the plaintiff’s argument and held that the plaintiff had not rebutted the presumption of loyalty that is accorded the directors under the business judgment rule, noting that the plaintiff offered no evidence to establish that the directors received any personal benefit from their decisions with respect to the preferred stock.

(c) Use of Committee of Independent Directors may Shift Burden to Plaintiffs
**Kahn v. Lynch Communication Sys., Inc.**, 638 A.2d 1110 (Del. 1994) (approval of cash-out merger transaction initiated by controlling stockholder by independent committee or informed majority of minority stockholders shifts burden on issue of fairness from controlling stockholder to plaintiff).

**In re CNX Gas Corp. S’holders Litig.,** 2010 Del. Ch. LEXIS 139 (Del. Ch. July 5, 2010) (implying that a *Kahn v. Lynch* burden shift is still available under the *Cox Communications* “unified standard” if either an effective special committee or majority-of-the-minority vote (but not both) is utilized).

**In re W. Nat’l Corp. S’holders Litig.,** C.A. No. 15927, 2000 Del. Ch. LEXIS 82 (Del. Ch. May 22, 2000) (holding that use of independent committee triggered more deferential business judgment standard of review in absence of controlling stockholder or group).

2. **“Waterfall” may not be “fair.”** Transaction involving payment of waterfall liquidation amounts may not leave any consideration to be paid to common stockholders although common stock may have value.

- Should the board refrain from doing a deal under these circumstances? See *Equity-Linked Investors, L.P. v. Adams*, 705 A.2d 1040 (Del. Ch. 1997). The *Equity-Linked* Court found no breach of fiduciary where the board took steps to continue the corporate enterprise at a time when its liquidation would have made the preferred stockholders whole, recognizing that the action taken by the board imposed economic risks upon the preferred stock which the holders of the preferred stock did not want and was taken for the benefit largely of the common stock. See also *In re Trados Inc. S’holders Litig.*, C.A. No. 1512-CC, 2009 Del. Ch. LEXIS 128 (Del. Ch. July 24, 2009) (stating that “the interests of the preferred stockholders and common stockholders were [not] aligned with respect to the decision of whether to pursue a sale of the company or continue to operate the company without pursuing a transaction” and declining to dismiss plaintiff’s claim that the board breached its fiduciary duties by entering into a merger in which the preferred stockholders received cash consideration due to their liquidation preference and the common stockholders received nothing: note, however, that in the post-trial opinion—*In re Trados Inc. S’holders Litig.*, C.A. No. 1512-VCL, 2013 WL 4511262, at *46 (Del. Ch. Aug. 16, 2013)—after subjecting the board’s process to entire fairness review, the Court ultimately held that the board had not breached its duty to the common stockholders because “[t]he common stock had no economic value.
before the Merger, and the common stockholders received . . . the substantial equivalent in value of what they had before”); *Oliver v. Boston Univ.*, C.A. No. 16570-NC, 2006 Del. Ch. LEXIS 75, at *119 (Del. Ch. Apr. 14, 2006) (finding that allocation of merger consideration was unfair because common stockholders not appropriately represented in allocation process and awarding damages to common stockholders even though claims of preferred stockholders exceeded consideration offered). *But see Orban v. Field*, C.A. No. 12820, 1997 Del. Ch. LEXIS 48 (Del. Ch. Apr. 1, 1997) (rejecting attack on merger where common stock received no merger consideration and preferred stock received all merger consideration in accordance with liquidation preference of preferred stock).

3. **Fiduciary duties owed to the preferred stockholders.**

- Duties to preferred stockholders are primarily contractual and fiduciary duties generally are not implicated by matters relating to the specific preferences or limitations of the preferred stock.

- *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584 (Del. Ch. 1986). In *Jedwab* the plaintiff, a preferred stockholder, argued that the preferred were entitled to fair apportionment of the merger consideration and that the directors breached their fiduciary duties to the preferred in the negotiation of the merger. The *Jedwab* Court explained that, generally, directors do not owe fiduciary duties to preferred stockholders in “matters relating to preferences or limitations that distinguish preferred stock from common.” *Id.* at 594. Instead, the relationship between the corporation and the preferred stock is contractual in nature and “the scope of the duty is properly defined by reference to the specific words evidencing that contract.” *Id.*. However, where the right asserted is “a right shared equally with the common, the existence of such right and the scope of the correlative duty may be measured by equitable as well as legal standards.” *Id.*. See also *Quadrangle Offshore LLC v. Kenetech Corp.*, C.A. No. 16362, 1999 Del. Ch. LEXIS 213, at *24-*25, (Oct. 13, 1999) (reciting rule that preferred stockholder’s rights are usually set forth in certificate of designation but where “their interests are harmonious, preferred shareholders share with common shareholders the right to demand loyalty and care from the fiduciaries entrusted with managing the corporation” and finding that preferred stockholders’ liquidation preference created “economically antagonistic relationship” with common such that terms of certificate controlled).