

Confronting the Problem of Fraud on the Board

By Joel Edan Friedlander*

Recent precedents make it difficult to challenge transactions approved by a board of directors and a stockholder majority. When should such cases be filed, proceed beyond the pleading stage, and prevail? My answer is that judicial intervention should remedy and deter tortious misconduct that corrupts board decision-making (i.e., misconduct that the Delaware Supreme Court has called “illicit manipulation of a board’s deliberative processes” or “fraud upon the board”). Commission of fraud on the board is an omnipresent temptation for self-interested controllers, activist stockholders, officers, financial advisors, and their legal counsel. Fraud can be used to put a company in play, steer a sale process toward a favored bidder, suppress the sale price to a controller, or make a favored bid look more attractive. I argue that confronting the problem of fraud on the board has three components. First, virtually all successful breach of fiduciary duty actions should be reinterpreted as occasions when courts determined that a board decision was corrupted by fraud or related tortious misconduct. Second, stockholders should be entitled to examine contemporaneously created books and records to detect fraud on the board. Third, when committed by a non-fiduciary, fraud on the board should be considered a freestanding tort without the need to establish that duped directors breached their fiduciary duties. Recognizing a tort of fraud on the board would be consistent with tort principles and a sound stockholder litigation regime.

INTRODUCTION

Corporate law litigation has entered a new phase. Decades-old canonical cases—*Weinberger v. UOP, Inc.*,¹ *Unocal Corp. v. Mesa Petroleum Co.*,² *Revlon v. MacAndrews & Forbes Holdings, Inc.*,³ *Blasius Industries, Inc. v. Atlas Corp.*,⁴ and

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1. 457 A.2d 701 (Del. 1983).

2. 493 A.2d 946 (Del. 1985).

3. 506 A.2d 173 (Del. 1986).

4. 564 A.2d 651 (Del. Ch. 1988).

*Unitrin v. American General Corp.*⁵—and the associated procedural weapons of enhanced judicial scrutiny and expedited discovery no longer carry much salience to a corporate law litigator. Under the current dispensation, and the new leading cases of *In re Synthes, Inc. Shareholder Litigation*,⁶ *Kahn v. M&F Worldwide Corp.* (“MFW”),⁷ *C&J Energy Services, Inc. v. City of Miami General Employees’ & Sanitation Employees’ Retirement Trust*,⁸ *Corwin v. KKR Financial Holdings LLC*,⁹ *In re Trulia, Inc. Stockholder Litigation*,¹⁰ and *Dell Inc. v. Magnetar Global Event Driven Master Fund Ltd.*,¹¹ the default litigation landscape for a variety of transaction structures is judicial consideration of defendant-drafted public filings at the pleading stage, no discovery, dismissal in the event of an affirmative stockholder vote, and a worse outcome if pursuing appraisal.

The rationale for the new litigation regime is that managerial preference for a particular form of change-of-control transaction—or no transaction at all—is an obsolete problem. Stockholder activism is rampant, CEO and director compensation is tied to the stock price, and stockholder value maximization is a deeply embedded norm. No longer is the central question in corporate law how to adjudicate between the presumptive authority of a board of directors and a temporary stockholder majority. Cases are not filed by hostile bidders claiming to speak for the best interests of stockholders. There are almost no occasions to refine levels of judicial scrutiny for board decisions that alter a battle for corporate control. Virtually all deal litigation this century has challenged transactions approved by a unanimous board of directors and supported by the great majority of stockholders.

The current litigation environment reflects an unchallenged consensus about the parameters of judicial review: a board of directors consisting almost exclusively of independent outsiders should have broad discretion to oversee or reject a sale process; decisions of disinterested and independent directors should not be second-guessed as unreasonable;¹² and the approval of a third-party transaction by a fully informed stockholder majority consisting largely of sophisticated institutions should be conclusive. As stated in *Corwin*, “the core rationale of the business judgment rule . . . is that judges are poorly positioned to evaluate the

5. 651 A.2d 1361 (Del. 1995).

6. 50 A.3d 1022 (Del. Ch. 2012).

7. 88 A.3d 635 (Del. 2014).

8. 107 A.3d 1049 (Del. 2014).

9. 125 A.3d 304 (Del. 2015).

10. 129 A.3d 884 (Del. Ch. 2016).

11. 177 A.3d 1 (Del. 2017).

12. In the most recent significant case filed by a hostile bidder, the Court of Chancery upheld the reasonableness of maintaining a poison pill for a company with a staggered board of directors because independent and fully informed directors supported that decision. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 123 (Del. Ch. 2011) (“Air Products['] . . . three nominees got elected to the Airgas board and then questioned the directors about their assumptions. (They got answers.) They looked at the numbers themselves. (They were impressed.) They requested outside legal counsel. (They got it.) They requested a third outside financial advisor. (They got it.) And in the end, they *joined in the board’s view* that Air Products’ offer was inadequate. John Clancey, one of the Air Products Nominees, grabbed the flag and championed Airgas’s defensive measures, telling the rest of the board, ‘We have to protect the pill.’”).

wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders).¹³

These premises, unchallenged here, raise the question of what proper role exists for stockholder deal litigation. For transaction structures that implicate irrebuttable business judgment rule review, when should stockholder litigation be filed, proceed beyond the pleading stage, and prevail on the merits? What cases and doctrines should retain their vitality and be developed further?

My short answer is that properly administered stockholder litigation should remedy and deter tortious misconduct that corrupts board decision-making—what the Delaware Supreme Court has described as “illicit manipulation of the Board’s deliberative processes,”¹⁴ or more colloquially, “fraud upon the board.”¹⁵ In this article, I use the latter shorthand descriptor. Such tortious misconduct can take several forms. As Vice Chancellor Laster recently observed, “coercion, the misuse of confidential information, secret conflicts, or fraud” can lead to liability and damages, notwithstanding negotiation of a fair price.¹⁶

If not detected and disclosed while a deal is pending, fraud on the board becomes a fraud on the stockholders. If fraud on the board is established and disclosed in advance of a stockholder vote, then going forward with the vote raises the specter of stockholder coercion. Deference to the decision-making of independent directors and sophisticated stockholders necessarily presumes the absence of fraud or coercion. Yet commission of fraud on the board is an omnipresent temptation for self-interested controllers, activist stockholder/directors, officers, financial advisors, and their legal counsel. Any of them can deploy fraud to put a company in play, steer a sale process toward a favored bidder, suppress the sale price to a controller, or make a favored bid look more attractive.¹⁷ In notable cases, stockholder plaintiffs have revealed fraud on the board. When fraud on the board is discovered, Delaware courts do not countenance it.

My thesis is that the corporate law rules applied in stockholder litigation should be focused on deterring and redressing fraud on the board. Embedded within that thesis are three propositions, which correspond to the three parts of this article.

13. *Corwin*, 125 A.3d at 313–14.

14. *RBC Capital Mkts. LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015) (affirming *In re Rural Metro Corp. S’holders Litig.*, 88 A.3d 54 (Del. Ch. 2014) (finding liability against RBC); *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205 (Del. Ch. 2014) (determining damages)); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1279 (Del. 1989).

15. *Macmillan*, 559 A.2d at 1283.

16. *ACP Master, Ltd. v. Sprint Corp.*, C.A. No. 8508-VCL, 2017 WL 3421142, at *19 (Del. Ch. July 21, 2017, corrected Aug. 8, 2017), *aff’d*, 184 A.3d 1291 (Del. 2018) (Table).

17. Fiduciaries may also commit fraud on an arm’s-length counterparty to obtain an unwarranted sale price for a company, a problem dealt with by contract drafting and common law fraud doctrine. *See, e.g.*, *Abry Partners V, L.P. v. F & W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006) (discussing the effect of anti-reliance contract provisions on fraud claims in a dispute between two private equity firms over the sale of a company).

First, fraud on the board should be seen as an enduring and central problem for corporate governance. It has not been eradicated by evolution in the market for corporate control. In Part I, I argue that a prohibition against fraud on the board lies at the heart of the most meritorious breach of fiduciary duty cases adjudicated in recent decades. Well-pled allegations of fraud on the board are also central to significant settled and pending cases. Corporate law doctrine is not articulated in these terms, but standards of enhanced scrutiny can be reinterpreted as determinations of when it is appropriate to inquire into whether a board decision was corrupted by fraud or related tortious misconduct. Put differently, I wonder whether any board decision would be deemed unreasonable, unfair, disloyal, or the product of bad faith—or whether any transaction would be enjoined—absent some element of fraud or coercion.¹⁸

Second, recent rules restricting stockholder litigation need to be confronted so fraud on the board can be detected and deterred. Building on a prior article, I discuss in Part II what I refer to as the “*El Paso* problem.”¹⁹ The *El Paso* problem is that notable post-*In re El Paso Corp. Shareholder Litigation* precedents—*Synthes*, *MFW*, *C&J*, *Corwin*, *Trulia*, and *Dell*—operate in combination to diminish the opportunities and incentives for contingently compensated stockholder plaintiffs’ counsel to discover and establish fraud on the board. A proposed solution has evolved in response to *Corwin*. Stockholder plaintiffs now seek to inspect corporate books and records underlying proxy disclosures for the purpose of testing whether a stockholder vote was fully informed. Nascent case law supports this innovative application of section 220 of the Delaware General Corporation Law. This development is vital to the integrity of the current stockholder litigation regime. For it to be effective, use of section 220 requires access to contemporaneously created electronic records, and not just after-the-fact, lawyer-drafted board minutes.

Third, in the context of a non-fiduciary who commits fraud on a board without conspiring with a fiduciary, substantive corporate law should recognize a tort of fraud on the board. Under current law, fraud on a board committed by a fiduciary is a breach of the duty of loyalty. If committed by a non-fiduciary in league with a fiduciary, fraud on the board is aiding and abetting a breach of fiduciary duty. But what if a non-fiduciary intentionally dupes an innocent board of directors into making a value-destroying decision? Is there no claim for an injunction or damages due to the absence of a predicate breach of fiduciary duty?

18. Two clarifications to this general statement come to mind. First, elements of fraud and coercion are present when a board or special committee is populated with directors who are denominated as “independent” but lack disinterest or independence. Second, a close cousin of coercion is when directors of a controlled company operate “in the altered state of a controlled mindset.” *In re S. Peru Corp. S’holder Derivative Litig.*, 52 A.3d 761, 802 (Del. Ch. 2011), *aff’d sub nom.* *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213 (Del. 2012).

19. Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 *BUS. LAW.* 623, 642–48 (2017) (discussing evolutions in corporate law since *In re El Paso Corp. S’holder Litig.*, 41 A.3d 432 (Del. Ch. 2012)).

In Part III, I discuss this problem, which I refer to as the “TIBCO problem.”²⁰ Under *TIBCO* and other cases, a third party duping an innocent (or merely negligent) board of directors may present a wrong without a remedy. Under current law, there is no recognized stockholder claim against the non-fiduciary absent a finding that the board breached its duty of care. Establishing a breach of the duty of care is no small feat, creating a gap in the law that could allow a financial advisor to escape penalty for having duped a board of directors for self-interested purposes. Misconduct by a financial advisor in connection with the sale of a target corporation may only give rise to a breach-of-contract claim by the client target corporation—a claim that will not be enforced by the post-closing parent corporation acquiror who benefited at the expense of the target corporation’s former stockholders.

This gap in the law has been hidden by the legal fiction that duped boards of directors breached their duty of care. To close the gap when the legal fiction is untenable, I advocate a new legal rule. A non-fiduciary’s corruption of a board’s decision-making processes should be considered a freestanding tort without the need to establish a breach of fiduciary duty by the board. Recognizing such a tort would be consistent with tort principles and a sound stockholder litigation regime.

I. THE ENDURING PROBLEM OF FRAUD ON THE BOARD

The nomenclature of stockholder claims shifts over time. Cases are rarely overruled, but older conceptions gradually disappear or no longer shape the manner in which a case is presented or decided. Categories with lost or diminished meaning include constructive fraud, sale of corporate office, the improper purpose test, *Revlon* claims, *Unocal/Unitrin* claims, *Blasius* claims, the duty of good faith, fair dealing claims, and intermediate scrutiny. A practitioner today analyzes whether a given transaction fits within the paradigms of *Corwin* or *MFW*.

“Fraud on the board” is a phrase or concept that appears in some notable Delaware cases, but it has not been thought of as a freestanding claim. It is a form of prohibited behavior that may be conceptualized as triggering entire fairness review, creating liability under *Revlon*, or forming the basis for a claim of aiding and abetting a breach of the duty of care.

Fraud on the board is better understood as a foundational tort at the center of corporate law. The standards of prohibited conduct by fiduciaries may expand or shrink, but such debates operate within a common assumption that fraud is forbidden. The statutes and contracts governing the operation of mergers and their legal effect are subordinate to the rights of stockholders not to be compelled to submit to a transaction tainted by fraud. The formulations of fiduciary duties and standards of review may change, but no one defends a right to

20. See *In re TIBCO Software Inc. Stockholders Litig.*, C.A. No. 10319, 2015 WL 6155894 (Del. Ch. Oct. 20, 2015).

defraud a special committee, a board of directors, or unaffiliated stockholders. If established, fraud on the board cannot be defended within the rubrics of entire fairness, the business judgment rule, or stockholder ratification. Defending a claim of fraud on the board is more akin to defending a claim of common law fraud. Operative questions include the pleading of requisite facts, scienter, and proximate causation of damages to the corporation or its stockholders.

The foundational nature of fraud was expressed in 1931 by Chancellor Josiah Wolcott, relying on cases outside Delaware:

[I]f consent to the merger be induced by fraud practiced upon a consenting company, a stockholder is under no duty to elect whether he will abide by a merger so induced or take his money. In such a case equity holds that no just alternatives are presented to him for a choice. . . . The exercise of the statutory right of merger is always subject to nullification for fraud. The cases so hold.²¹

This summary does not discriminate based on the origin of the fraud, whether it was committed by the counterparty to the merger or the corporation's own fiduciaries. The rules of corporate law operate within a legal universe that respects a general prohibition against fraud.

Chancellor Wolcott expounded on the distinction between “actual fraud” and “constructive fraud”: “The fraud charged [in the present case] however is not actual fraud on the part of the directors and majority stockholders. It is constructive fraud based on an alleged discriminatory undervaluation of assets”²² Actual fraud is in the nature of common law fraud. Constructive fraud is a defect in board decision-making deemed to be the legal equivalent of actual fraud. Our evolving fiduciary duty case law can be thought of as elaborations on what Chancellor Wolcott described as constructive fraud:

When the fraud charged is of this nature [(i.e., constructive fraud)] it must be so plainly made out as to disclose a breach of trust or such maladministration as works a manifest wrong to the dissentients. The overvaluation or undervaluation as the case may be must be such as to show a conscious abuse of discretion before fraud in law can be made out.

. . . .

. . . [M]ere inadequacy of price will not reveal fraud. The inadequacy must be so gross as to lead the court to conclude that it was due not to an honest error of judgment but rather to bad faith, or to a reckless indifference to the rights of others interested.²³

21. *Cole v. Nat'l Cash Credit Ass'n*, 156 A. 183, 187 (Del. Ch. 1931) (citations omitted).

22. *Id.*

23. *Id.* at 187–88 (citation omitted); *see also id.* at 188–90 (“There is a presumption that the judgment of the governing body of a corporation, whether at the time it consists of directors or majority stockholders, is formed in good faith and inspired by a bona fides of purpose. . . . I fail to see anything in the proposed plan of merger which reveals any fraud, actual or constructive.”); 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 922, at 626 (5th ed. 1941) (“Constructive fraud is simply a term applied to a great variety of transactions, having little resemblance either in form or nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud”).

Almost a century later, I wonder whether the outcome of breach of fiduciary duty litigation today turns on anything other than tortious interference with a board's deliberative processes (e.g., fraud on the board). Extensive case law and dicta elaborating fiduciary duty principles obscure the fundamental question of whether independent directors were deprived of decision-making power based on all reasonably available material information, free of coercion. Corporate law may prohibit additional forms of misconduct. It cannot prohibit less.

To develop this argument, I discuss three groups of cases. First, I consider leading corporate law precedents that resulted in judgments in favor of the plaintiff for which the presence of fraud on the board was critical to the outcome. Second, I discuss significant settled cases in which an important issue left open for adjudication was whether fraud on the board occurred. Third, I discuss very recent opinions addressing alleged fraud on the board. I argue that the black-letter rules recited or established in these groups of cases can largely be disregarded. These cases—some of them iconic and others obscure—can be reinterpreted as focused on a particular mixed question of fact and law: did any person engage in fraud or coercion that impermissibly manipulated the deliberative processes of the board of directors? The legal standards in breach of fiduciary duty cases respecting M&A transactions are subordinate to the question of the presence or absence of actual fraud.

A. LEADING DECISIONS FINDING FRAUD ON THE BOARD

Some of the most significant decisions favoring stockholder plaintiffs in the past forty years featured findings of fraud committed against independent directors.

1. *Weinberger v. UOP, Inc.*

The Delaware Supreme Court's decision in *Weinberger* set forth the now-familiar, multi-factor, non-bifurcated test of entire fairness for evaluating an interested merger, such as the parent–subsidiary, cash-out merger between UOP, Inc. (“UOP”) and its majority owner, The Signal Companies, Inc. (“Signal”).²⁴ In the same opinion, the court jettisoned the “business purpose” test and liberalized the rules governing the judicial valuation of stock.²⁵

For purposes of disposing of the appeal before them, which challenged the Court of Chancery's finding that the merger between UOP and Signal was fair, the Delaware Supreme Court ruled that reversal was mandated by a fraud on the UOP board. Certain Signal-affiliated directors had not disclosed to UOP's outside directors an analysis they had prepared for the benefit of Signal—the “Arledge-Chittea report”:

A primary issue mandating reversal is the preparation by two UOP directors, Arledge and Chittea, of their feasibility study for the exclusive use and benefit of

24. 457 A.2d 701, 711 (Del. 1983).

25. *Id.*

Signal. This document was of obvious significance to both Signal and UOP. Using UOP data, it described the advantages to Signal of ousting the minority at a price range of \$21–\$24 per share.²⁶

In holding that fair dealing was not established, the Delaware Supreme Court noted the absence of an independent committee of outside directors negotiating at arm's length and the nondisclosure to the other UOP directors of the price range set forth in the Arledge-Chittea report:

As we have noted, the matter of disclosure to the UOP directors was wholly flawed by the conflicts of interest raised by the Arledge-Chittea report. All of those conflicts were resolved by Signal in its own favor without divulging any aspect of them to UOP.

This cannot but undermine a conclusion that this merger meets any reasonable test of fairness. The outside UOP directors lacked one material piece of information generated by two of their colleagues, but shared only with Signal.²⁷

This undisclosed fraud on the board foreclosed a finding of entire fairness. Absent fraud, the defendants could have established entire fairness based on the fairness of the price. The court observed that “in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger.”²⁸

2. *Smith v. Van Gorkom*

*Smith v. Van Gorkom*²⁹ does not strictly belong in this group of cases. There was no factual finding that the board of directors of Trans Union Corporation (“Trans Union”) was defrauded or coerced by CEO Jerome Van Gorkom into approving a merger agreement with an affiliate of the Jay Pritzker-controlled Marmon Group on September 20, 1980—the same day that the board was informed of the proposed sale transaction and the day before Pritzker's offer was set to expire.

The Delaware Supreme Court majority held that the directors, “at a minimum, were grossly negligent in approving the ‘sale’ of the Company upon two hours’ consideration, without prior notice, and without the exigency of a crisis or emergency.”³⁰ Justice McNeilly disagreed, writing in dissent:

Directors of this caliber are not ordinarily taken in by a “fast shuffle.” I submit they were not taken into this multi-million dollar corporate transaction without being fully informed and aware of the state of the art as it pertained to the entire corporate

26. *Id.* at 712–15.

27. *Id.* at 712.

28. *Id.* On remand, the Court of Chancery awarded damages of \$1 per share, as a matter of equity, in light of Signal's non-disclosure to the minority stockholders of the substance of the Arledge-Chittea report, which might have been “done unintentionally, as Signal claims, rather than deliberately.” *Weinberger v. UOP, Inc.*, C.A. No. 5642, 1985 WL 11546, at *2 (Del. Ch. Jan. 3, 1985), *aff'd*, 497 A.2d 792 (Del. 1985) (order).

29. 488 A.2d 858 (Del. 1985).

30. *Id.*

panorama of Trans Union. . . . These men knew Trans Union like the back of their hands and were more than well qualified to make on the spot informed business judgments concerning the affairs of Trans Union including a 100% sale of the corporation. Lest we forget, the corporate world of then and now operates on what is so aptly referred to as “the fast track”.³¹

I include this controversial stockholder plaintiff victory on liability in light of abundant scholarship about the case.³² A subsequently developed rationale for ruling in favor of the plaintiff is that Van Gorkom’s conduct was tantamount to tortious corruption of the board’s deliberative processes. Professor Jonathan Macey used two insider accounts, including a book written in 1986 by a former inside lawyer at Trans Union, to conclude:

In other words, it appears as though Mr. Van Gorkom acted autocratically and self-interestedly in the way he approached this transaction. He also appears to have provided limited opportunities for his fellow directors and managers to become involved either in negotiating the transaction or in discussing its merits. . . .

. . . Van Gorkom placed pressure on the board. He maneuvered the board into a position from which it was virtually impossible to exercise its fiduciary duty of care.³³

Professor Robert Miller argues, based on the same former inside lawyer’s book, that the clearest ground for liability is that Van Gorkom prevented his subordinates from developing a competing management buyout offer with Kohlberg, Kravis, Roberts Co. (“KKR”):

[Van Gorkom] practically rejected the [KKR] offer because of the financing contingency. . . . [T]he board and Van Gorkom hamstringed the buyout group by requiring that Van Gorkom be involved in all its internal discussions. . . . Rather than taking reasonable steps to allow his executives to participate in the KKR transaction if they wished to do so, Van Gorkom interrogated them as if they had done something wrong and created the impression that participating in the offer could endanger their futures with the company.³⁴

Miller also notes that “it was widely believed that anything Van Gorkom learned about the [KKR] buyout effort would immediately be channeled to Pritzker.”³⁵

The full facts of Van Gorkom’s involvement in the senior-management discussions respecting a management buyout with KKR were not provided to the board. The board was told the following on that subject on January 26, 1981,

31. *Id.* at 895.

32. A recent law review article gathers the “vast scholarly and professional commentary” about the case and analyzes it in light of subsequent developments in Delaware law. Robert T. Miller, *Smith v. Van Gorkom and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WM. & MARY BUS. L. REV. 65, 70 & n.3 (2017).

33. Jonathan R. Macey, *Smith v. Van Gorkom: Insights About C.E.O.s, Corporate Law Rules, and the Jurisdictional Competition for Corporate Charters*, 96 NW. U. L. REV. 607, 613–14 (2002) (citing WILLIAM M. OWEN, *AUTOPSY OF A MERGER* (1st ed. 1986); Herbert Greenberg, *Behind the Turmoil at Trans Union*, *CRAIN’S BUS. DAILY* (Jan. 12, 1981)).

34. Miller, *supra* note 32, at 186; *see id.* at 181–85 (citing OWEN, *supra* note 33, at 9, 59–60, 138, 139, 143, 145–46, 149, 151, 188).

35. *Id.* at 185 (quoting OWEN, *supra* note 33, at 143).

when asked whether it continued to recommend the proposed merger with Marmon Group:

(n) The fact that certain members of senior management had had extensive discussions with the firm of Kohlberg, Kravis, Roberts & Co. (“KKR”) about the possibility of a “leveraged buyout” of Trans Union pursuant to which certain members of senior management would become members of senior management of the acquiring company.

(o) The fact that at initial discussions among certain members of senior management concerning the possibility of a leveraged buyout, Messrs. Van Gorkom and Chelberg had expressed concern about the potential conflicts of interest in a transaction in which members of senior management would have an interest.

(p) The fact that on December 2, 1980, KKR had proposed, in writing, the acquisition of Trans Union at \$60 per share in cash, subject to the obtaining by KKR of financing, and that such proposal had been withdrawn about three hours following its receipt, in part because a senior official at Union Tank Car Company, Trans Union’s most important subsidiary, had declined to participate in the KKR proposal.³⁶

Assuming a hypothetical trial in which the soon-to-be-obsolete liability theory of unexculpated gross negligence was unavailable (in light of the enactment of Del. Code Ann. tit. 8, § 102(b)(7)), but in which the plaintiff had access to the full factual record filled in by subsequent scholarship, a hypothetical post-trial ruling of coercion of the board on September 20, 1980, and fraud on the board on January 21, 1981, based on the rationales recorded above could be justified. Such a ruling would have been less controversial than the actual holding was and would support my thesis that the factual scenarios of successful stockholder litigation can be reinterpreted as cases in which the plaintiff established misconduct amounting to fraud or coercion respecting the board’s deliberative process.

3. *Mills Acquisition Co. v. Macmillan, Inc.*

In *Macmillan*,³⁷ the Delaware Supreme Court analyzed a fraud on the board of directors of Macmillan, Inc. (“Macmillan”) in the context of an auction for corporate control. The fraud was the nondisclosure by the insiders and their financial advisor of tips given to the favored bidder. The Delaware Supreme Court reversed the Court of Chancery’s denial of a preliminary injunction sought by the competing bidder.

The court stated that the insider directors breached their fiduciary duties in a manner that “tainted the evaluative and deliberative processes of the Macmillan board, thus adversely affecting general stockholder interests.”³⁸ It reasoned that

36. Affidavit of William B. Moore at para. 4, *Smith v. Pritzker*, C.A. No. 6342, 1980 (Del. Ch. Jan. 29, 1981), <https://www.law.upenn.edu/live/news/6989-smith-v-van-gorkom-488-a2d-848-del-1985/news/delaware-news.php#opinions>.

37. 559 A.2d 1261 (Del. 1989).

38. *Id.* at 1264.

“illicit manipulation of a board’s deliberative processes” triggered entire fairness review:

[T]his judicial reluctance to assess the merits of a business decision ends in the face of illicit manipulation of a board’s deliberative processes by self-interested corporate fiduciaries. Here, not only was there such deception, but the board’s own lack of oversight in structuring and directing the auction afforded management the opportunity to indulge in the misconduct which occurred. In such a context, the challenged transaction must withstand rigorous judicial scrutiny under the exacting standards of entire fairness.³⁹

“Fair dealing” was described as encompassing a duty on the part of fiduciaries “to disclose all material information relevant to corporate decisions from which they may derive a personal benefit.”⁴⁰ “Fair price” in this context was a duty to obtain “the highest price reasonably available.”⁴¹

To issue an injunction, the Delaware Supreme Court did not need to invoke the concept of entire fairness, much less the “enhanced duty imposed . . . in *Unocal*” or the “slightly different” two-part test that becomes applicable “[w]hen *Revlon* duties devolve upon directors.”⁴² The real work in the opinion was performed by fraud law.

In holding that corporate insiders and their financial advisor may not deceive a board of directors into approving a merger agreement, the court relied on fraud cases, not corporate law precedents:

Evans’ and Reilly’s knowing concealment of the tip at the critical board meeting of September 27th utterly destroys their credibility. Given their duty of disclosure under the circumstances, this silence is an explicit acknowledgment of their culpability. See *Nicolet, Inc. v. Nutt*, Del. Supr., 525 A.2d 146, 149 (1987); *Stephenson v. Capano Development, Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983); *Gibbons v. Brandt*, 170 F.2d 385, 391 (7th Cir.1948).

. . . .

Given the materiality of these tips and the silence of Evans, Reilly and Wasserstein in the face of their rigorous affirmative duty of disclosure at the September 27 board meeting, there can be no dispute but that such silence was misleading and deceptive. In short, it was a fraud upon the board. See generally *Nicolet v. Nutt*, 525 A.2d at 149; *Stephenson v. Capano*, 462 A.2d at 1074.⁴³

Nicolet v. Nutt involved an alleged conspiracy among asbestos manufacturers to intentionally misrepresent and suppress information concerning the health hazards of asbestos. It relied on *Stephenson v. Capano Development, Inc.*, a case about damages for false advertising under Delaware’s Consumer Fraud Act:

39. *Id.* at 1279.

40. *Id.* at 1280.

41. *Id.*

42. *Id.* at 1287, 1288 (discussing *Unocal* and *Revlon*).

43. *Id.* at 1282–83.

To establish a prima facie case of intentional misrepresentation (fraudulent concealment), the following elements must be proven:

- (1) Deliberate concealment by the defendant of a material past or present fact, or silence in the face of a duty to speak;
- (2) That the defendant acted with scienter;
- (3) An intent to induce plaintiff's reliance upon the concealment;
- (4) Causation; and
- (5) Damages resulting from the concealment.

See *Stephenson v. Capano Development, Inc.*, Del. Supr., 462 A.2d 1069, 1074 (1983). Generally, there is no duty to disclose a material fact or opinion, unless the defendant had a duty to speak. However, where one *actively* conceals a material fact, such person is liable for damages caused by such conduct.

In *Stephenson*, this Court outlined the different theories upon which a tort action for fraud may be based: “. . . [F]raud does not consist merely of overt misrepresentations. It may also occur through *deliberate concealment* of material facts, *or* by silence in the face of a duty to speak” *Id.* at 1074 (emphasis added). Further, one who actively and fraudulently conceals information is liable for the physical harm caused by such conduct. Thus, it has also been said that:

A single word, even a nod or a wink or a shake of the head or a smile or gesture intended to induce another to believe in the existence of a nonexisting fact may be fraud.

Gibbons v. Brandt, 170 F.2d 385, 391 (7th Cir. 1948), *cert. denied*, 336 U.S. 910, 69 S. Ct. 511, 93 L. Ed. 1074, *reh'g denied*, 336 U.S. 929, 69 S. Ct. 643, 93 L. Ed. 1090 (1949).⁴⁴

The finding of fraud on the board meant the merger agreement with the winning bidder could be enjoined:

[W]hen a board is deceived by those who will gain from such misconduct, the protections girding the decision itself vanish. Decisions made on such a basis are voidable at the behest of innocent parties to whom a fiduciary duty was owed and breached, and whose interests were thereby materially and adversely affected.

. . . .

. . . Moreover, where the decision of the directors, granting the lockup option, was not informed or was induced by breaches of fiduciary duties, such as those here, they cannot survive.⁴⁵

The lengthy discussion in *Macmillan* about standards of enhanced scrutiny was unnecessary to the result. Whatever guidance that dictum may have provided for judicial evaluation of corporate control contests, it is now obsolete. What survives is judicial enforcement of a prohibition against fraud on a board.

44. *Nicolet, Inc. v. Nutt*, 525 A.2d 146, 149 (Del. 1987).

45. *Macmillan*, 559 A.2d at 1284.

4. *In re Emerging Communications, Inc. Shareholders Litigation*

Justice Jacobs’s post-trial decision in *In re Emerging Communications, Inc. Shareholders Litigation*⁴⁶ was a rare occasion when a stockholder plaintiff successfully challenged a freeze-out merger through final judgment. The Court of Chancery’s lengthy opinion thoroughly analyzed the accompanying appraisal claim, various procedural issues, the many elements of entire fairness, and whether each of the directors was exculpated from monetary liability.

Liability for breach of fiduciary duty against the company’s controller, Jeffrey Prosser, turned on—among other things—a fraud he committed. Prosser did not disclose recent projections to the special committee, board of directors, or minority stockholders:

Prosser withheld the June projections, and knowledge of their existence, from the Committee and its advisors, Houlihan and Paul Hastings. As a consequence, Goodwin and Houlihan were deprived of information that was essential to an informed assessment of the fair value of ECM and of the gross inadequacy of [the] merger price Prosser was offering. . . . That nondisclosure, without more, was enough to render the Special Committee ineffective as a bargaining agent for the minority stockholders.

. . . .

. . . The board’s approval was not informed, however, because the voting board members were ignorant of the existence of the June Projections and of the inadequacy of the Houlihan valuation that was based upon the March projections.

. . . .

. . . [T]he Proxy Statement omitted to disclose to the minority shareholders the existence of the June projections and the fact that those projections had been furnished to [Prosser’s financial advisor and lender], but were withheld from the Special Committee and its advisors.⁴⁷

These findings—among others—meant the merger was “the product of unfair dealing” and “not entirely fair to the minority stockholders.”⁴⁸

5. *In re Dole Food Co., Inc. Stockholder Litigation*

More than a decade later, a challenge to the squeeze-out merger of the public stockholders of Dole Food Company, Inc. (“Dole”) by its controlling stockholder, David Murdock, was litigated under new legal rules. The business judgment rule would apply under the following conditions:

if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee

46. C.A. No. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004, rev. June 4, 2004).

47. *Id.* at *35–37.

48. *Id.* at *38.

meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.⁴⁹

After fact discovery, the defendants moved for summary judgment on the ground that the conditions were satisfied for invocation of the business judgment rule. Vice Chancellor Laster denied the motions, reasoning that fact issues existed respecting satisfaction of various conditions. None of the stated reasons implicated fraud on the board.⁵⁰

After trial, Vice Chancellor Laster held that the defendants had not satisfied the above-stated conditions for applicability of the business judgment rule or *Weinberger's* multi-factor test for entire fairness.⁵¹ The formalism of the applicable legal standards does not best explain the outcome. Vice Chancellor Laster made clear that the case was really about the plaintiffs having established at trial a fraud on Dole's special committee perpetrated by Murdock and his right-hand man, director and officer C. Michael Carter:

[W]hat the Committee could not overcome, what the stockholder vote could not cleanse, and what even an arguably fair price does not immunize, is fraud. . . . [A]fter Murdock made his proposal, Carter provided the Committee with lowball management projections. . . . Carter gave Murdock's advisors and financing banks more positive and accurate data. . . . Critically for purposes of the outcome of this litigation, the Committee never obtained accurate information about Dole's ability to improve its income by cutting costs and acquiring farms.⁵²

This is not a case that requires an overly granular analysis of the *Weinberger* factors. Carter engaged in fraud According to the common law nostrum, *fraus omnia corrumpit*—fraud vitiates everything.⁵³

[B]y engaging in fraud, Carter deprived the Committee of its ability to obtain a better result on behalf of the stockholders, prevented the Committee from having the knowledge it needed to potentially say 'no,' and foreclosed the ability of the stockholders to protect themselves by voting down the deal.⁵⁴

Fraud on the board dictated the findings of personal liability and damages. The doctrinal frameworks of *MFW* and *Weinberger* were conceptually extraneous.

6. *RBC Capital Markets, LLC v. Jervis*

The only *Revlon* case litigated successfully by a stockholder plaintiff through final judgment and appeal arose out of the acquisition of Rural/Metro Corp. ("Rural/Metro"). The Delaware Supreme Court affirmed a damages award against RBC Capital Markets, LLC ("RBC"), the primary financial advisor to

49. *In re Dole Food Co., Inc. S'holder Litig.*, C.A. No. 8703, 2015 WL 496534, at *2 (Del. Ch. Feb. 5, 2015) (citing *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 651 (Del. 2014)).

50. *See id.* at *2–3.

51. *In re Dole Food Co., Inc. S'holder Litig.*, C.A. Nos. 8703 & 9079, 2015 WL 5052214 (Del. Ch. Aug. 27, 2015).

52. *Id.* at *2.

53. *Id.* at *26.

54. *Id.* at *38.

Rural/Metro's board of directors. The amount of damages awarded against RBC was reduced based on post-trial rulings that two director defendants were joint tortfeasors with RBC who would have been personally liable for damages had they not settled before trial.⁵⁵

The liability rulings invoked a variety of corporate law doctrines. The board of directors of Rural/Metro was found to have breached its fiduciary duties under *Revlon* when putting Rural/Metro up for sale and when approving the merger. The board also was found to have breached its duty to disclose all available material facts to the stockholders. Two Rural/Metro directors—Chairman of the Board and Chair of the Special Committee Christopher Shackelton and CEO Michael DiMino—were found to have acted self-interestedly and unreasonably when putting Rural/Metro up for sale. RBC was found to have aided and abetted the board's breaches of its duty of care in the two contexts of non-compliance with *Revlon* and non-compliance with the duty of disclosure.

An alternative reading of the post-trial rulings is that Shackelton, DiMino, and RBC each committed frauds on the board that were not disclosed to Rural/Metro's stockholders. Shackelton and DiMino put Rural/Metro up for sale without board approval and without disclosing their personal interests in a prompt sale. RBC committed fraud in multiple respects. I identify below each fraud that is found in the post-trial rulings of the Court of Chancery or affirmed by the Delaware Supreme Court.

For various reasons relating to his role as managing director of an activist hedge fund he had co-founded, "Shackelton's personal circumstances inclined him to favor a near-term sale."⁵⁶ "[W]hen seeking successfully to put Rural into play without Board authorization, Shackelton was . . . motivated by his personal interests and those of his fund . . ."⁵⁷ In the midst of "campaign[ing] for a near-term sale" of Rural/Metro, "Shackelton told the board he "had not formulated a preference among [three strategic alternatives]."⁵⁸ Instead of carrying out a directive of the board to analyze strategic alternatives, "the Special Committee hired RBC to sell the Company, [and] then RBC and Shackelton put Rural in play without Board authorization."⁵⁹

DiMino supported a near-term sale of Rural/Metro "in deference to Shackelton and [another director] and because it advanced his personal financial interests."⁶⁰ DiMino had opposed a near-term sale until he was "chastised by Shackelton and [another director]," after which "he fell into line."⁶¹

RBC engaged in "illicit manipulation of the Board's deliberative processes for self-interested purposes."⁶² When retained by Rural/Metro's special committee,

55. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 869–71 (Del. 2015).

56. *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 255 (Del. Ch. 2014).

57. *Id.*

58. *Id.* at 256.

59. *In re Rural Metro. Corp. S'holders Litig.*, 88 A.3d 54, 91 (Del. Ch. 2014).

60. *Rural Metro. Corp. S'holders Litig.*, 102 A.3d at 258.

61. *Id.* at 258–59.

62. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 863 (Del. 2015).

RBC “did not disclose that it planned to use its engagement as Rural’s advisor to capture financing work from the bidders for [Rural’s competitor,] EMS.”⁶³ RBC proceeded to design a sale process schedule “that favored its own interest in gaining financing work from bidders for EMS” without disclosing “the disadvantages of its proposed schedule.”⁶⁴ As summarized by the Delaware Supreme Court: “Rural’s Board was unaware of the implications of the dual-track structure of the bidding process and that the design was driven by RBC’s motivation to obtain financing fees in another transaction with Rural’s competitor.”⁶⁵

At the conclusion of the sale process, when private equity firm Warburg Pincus LLC (“Warburg”) submitted the only bid, “RBC did not disclose to its client that it continued to seek a buy-side financing role with [Warburg].”⁶⁶ “When directed by the Special Committee to engage in final price negotiations with Warburg, RBC again did not disclose that it was continuing to seek a buy-side financing role with Warburg.”⁶⁷ Days later, when the proposed merger was presented to the board for approval, “the directors were unaware of RBC’s last minute efforts to solicit a buy-side financing role from Warburg.”⁶⁸

Meanwhile, “RBC worked to lower the analyses in its fairness presentation so Warburg’s bid looked more attractive.”⁶⁹ “[W]hen the Board approved the merger, the directors . . . did not know about RBC’s manipulation of its valuation metrics.”⁷⁰ Not only was RBC’s precedent transaction analysis “artificial and misleading,” but also RBC supplied information for the Proxy Statement “about its precedent transaction analysis [that] was material and false.”⁷¹

The following sentences by the Delaware Supreme Court summarize how the Rural/Metro board of directors and the stockholders were defrauded by RBC: “the stockholders—and the Board—were unaware of RBC’s conflicts and how they potentially impacted the Warburg offer. . . . [B]oth the board and the stockholders were operating on the basis of an informational vacuum created by RBC.”⁷²

B. SETTLED CASES IMPLICATING FRAUD ON THE BOARD

In various cases since 2001 that resulted in substantial settlements, plaintiffs obtained discovery suggesting that a defendant had committed fraud on the board or otherwise tortiously interfered with the board’s deliberative processes. These cases were litigated under various theories of breach of fiduciary duty, but evidence of fraud on the board was instrumental in achieving the result in each.

63. *Id.* at 830.

64. *Id.*

65. *Id.* at 855.

66. *Id.* at 841.

67. *Id.* at 842.

68. *Id.* at 845.

69. *Id.* at 842.

70. *Id.* at 845.

71. *Id.* at 860.

72. *Id.* at 856.

This list of settled cases is hardly exhaustive, but it illustrates the importance of adducing evidence of fraud or coercion to obtain a significant settlement.

1. *In re TeleCorp PCS, Inc. Shareholders Litigation*

In fall 2001, TeleCorp PCS, Inc. (“TeleCorp”) entered into a merger agreement with its 23 percent stockholder and operational partner, AT&T Wireless Services, Inc. (“AT&T”). Two TeleCorp directors voted against the merger. In discovery, plaintiffs uncovered facts inimical to the proper functioning of a board of directors. Before any pertinent TeleCorp board meeting, AT&T secretly negotiated merger terms with large TeleCorp stockholders who were looking for an orderly way to liquidate their shares.

Vice Chancellor Strine discussed the manipulation of the TeleCorp board’s deliberative processes when denying a motion to dismiss filed by two defendants—a subsidiary of Consec, Inc. (“Consec”) and Gary Wendt, Consec’s CEO:

Consec had desired to liquidate its Telecorp holdings in order to meet increasingly pressing cash needs. . . .

. . . .

In September of 2001, Consec was able to procure a board seat at Telecorp . . . which it was anticipated that Wendt would fill once the Telecorp board met again. . . .

Most important, [when] the merger dance began between AT&T Wireless [and] Telecorp . . . , Consec was permitted to have one of its executives participate in the key-deliberations by certain Telecorp directors and officers [that] really facilitated the most important response in many ways to AT&T Wireless’ interest in the merger

[W]hat is most notable about Consec’s ability to have an executive on the inside is that these deliberations about how to respond to what seems to be a time-sensitive and serious interest on the part of AT&T Wireless on the merger, was that [these] deliberations preceded any meeting of the full Telecorp board. Indeed, the record supports the conclusion that the chairman of the Telecorp board was deliberately kept in the dark during these early discussions.

. . . .

Now, during these deliberations that preceded [any] full meeting of the Telecorp board, a negotiating strategy was forged. And the inference can be drawn that this negotiating strategy was designed to allow Telecorp’s largest investors to accomplish their objective of rapid liquidity at a price that was acceptable to them but which was below the intrinsic or fair market value of Telecorp as a going concern. . . .

. . . .

. . . AT&T Wireless didn’t just fall off the turnip truck, and they had to know this group’s support would go a long way to securing full board support. In fact, by the time that Wendt was formally elected to the board . . . arguably the basic economic terms of the merger [were] already sort of understood, because *this so-called consensus position* was on the table of *what the largest stockholders, including Consec, would accept*. [If] that is true, then that *really compromised the ability of the Telecorp board to*

do much, because . . . it's an unlikely strategy to get someone to pay more than that price.

. . . AT&T Wireless was driving a hard bargain. AT&T Wireless [was] putting [the] negotiators under great pressure by threatening to veto any other deal [and] by threatening to abandon merger talks . . . if Telecorp's negotiators didn't give up, frankly, a very hasty assent to a hasty transaction.⁷³

Arrangement of—or participation in—secret, ad hoc merger negotiations with conflicted stockholder–directors can entail both fraud and coercion against a target's board of directors. Shortly before trial, AT&T agreed to pay \$47.5 million to settle the entire case. That cash payment equated to a “4.3 percent improvement of the deal terms . . . in a case that had . . . subtle and difficult liability and standard of review questions, not to mention . . . difficult damage questions.”⁷⁴ Any allegation that stockholder–directors breached their fiduciary duties will present difficult questions of black-letter law.⁷⁵ Part of what made *TeleCorp* a compelling case to litigate was evidence that fiduciaries with idiosyncratic economic interests preempted the deliberative processes of TeleCorp's board of directors.

2. *In re Chaparral Resources, Inc. Stockholders Litigation*

Chaparral Resources, Inc. (“Chaparral”) owned an interest in an oil field in Kazakhstan. The minority stockholders of Chaparral were bought out by Chaparral's majority stockholder, a subsidiary of the Russian oil giant OAO Lukoil (“Lukoil”). Unbeknown to the special committee and the consultants it was relying upon, a Lukoil “special project team” had been exploring ways to expand production from the oil field. Lukoil's director designees also made undisclosed threats to the special committee to shut in the field if a buyout deal were not struck.⁷⁶

The fraud and coercion were discovered during expedited discovery. At trial, the special committee members defended the case on the basis that they had been defrauded. They argued that they had no knowledge of Lukoil's plans to accelerate and enhance production at the oil field prior to the plaintiff's discovery of Russian-language documents to that effect; that they then requested additional information from Lukoil, which Lukoil did not provide; and that they then caused those facts to be disclosed in a proxy supplement.⁷⁷ After

73. Transcript of Oral Argument on Defendants CTIHC, Inc. and Gary C. Wendt's Motion to Dismiss and Ruling of the Court at 83–87, *In re TeleCorp PCS, Inc. S'holders Litig.*, C.A. No. 19260 (Del. Ch. June 17, 2002) (emphasis added).

74. Transcript of Settlement Hearing, Plaintiff's Motion for Class Certification and Award of Attorneys' Fees and Expenses, and Rulings of the Court at 92, *In re TeleCorp PCS Inc. S'holders Litig.*, C.A. No. 19260 (Del. Ch. Aug. 20, 2003).

75. See Friedlander, *supra* note 19, at 652–55.

76. Affidavit of Joel Friedlander at paras. 6, 8, *In re Chaparral Res., Inc. S'holders Litig.*, C.A. No. 2001-VCL (Del. Ch. Mar. 6, 2008).

77. Special Committee Defendants' Pretrial Brief at 2, 25–27, 43, *In re Chaparral Res., Inc. S'holders Litig.*, C.A. No. 2001-VCL (Del. Ch. Oct. 15, 2007).

trial, the Lukoil-related defendants settled for an amount equivalent to 45 percent above the merger price.⁷⁸

3. *In re Del Monte Foods Co. Shareholders Litigation*

In 2010, the board of directors of Del Monte Foods Co. (“Del Monte”) approved the sale of Del Monte to a consortium of private equity firms led by KKR. Stockholder plaintiffs filed suit, obtained expedited discovery, and moved for a preliminary injunction. In his opinion granting a limited injunction, Vice Chancellor Laster explained how discovery had uncovered a fraud committed by Del Monte’s financial advisor, Barclays Capital (“Barclays”), against the Del Monte board. Barclays’s fraud allowed it to be retained originally by Del Monte and then by KKR as a provider of buy-side financing:

*Barclays secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees. On multiple occasions, Barclays protected its own interests by withholding information from the Board that could have led Del Monte to retain a different bank, pursue a different alternative, or deny Barclays a buy-side role. Barclays did not disclose the behind-the-scenes efforts of its Del Monte coverage officer to put Del Monte into play. Barclays did not disclose its explicit goal, harbored from the outset, of providing buy-side financing to the acquirer. Barclays did not disclose that in September 2010, without Del Monte’s authorization or approval, Barclays steered Vestar into a club bid with KKR, the potential bidder with whom Barclays had the strongest relationship, in violation of confidentiality agreements that prohibited Vestar and KKR from discussing a joint bid without written permission from Del Monte.*⁷⁹

The court analogized Barclays’s misconduct to that of the conflicted fiduciaries in *Macmillan*: “Like the directors in [*Macmillan*], the Del Monte Board was deceived. . . . As in [*Macmillan*], ‘there can be no dispute but that such silence was misleading and deceptive. In short, it was a fraud upon the board.’”⁸⁰

Vice Chancellor Laster ruled preliminarily that Del Monte’s board of directors “sought in good faith to fulfill its fiduciary duties, but failed because it was misled by Barclays.”⁸¹ The board’s good faith meant no director was exposed to monetary liability. However, the board was preliminarily found to have breached its fiduciary duties “[b]y failing to provide the serious oversight that would have checked Barclays’ misconduct.”⁸² That ruling enabled the court to issue an injunction: “For purposes of equitable relief, the Board is responsible.”⁸³ The

78. Transcript of Settlement Hearing at 3–7, *In re Chaparral Res., Inc. S’holders Litig.*, C.A. No. 2633-VCL (Del. Ch. Mar. 13, 2008).

79. *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 817 (Del. Ch. 2011) (emphasis added).

80. *Id.* at 836.

81. *Id.* (quoting *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1283 (Del. 1989)).

82. *Id.*

83. *Id.*

court enjoined the merger vote for twenty days to allow an alternative bidder to emerge.⁸⁴ It also enjoined the parties to the merger agreement from enforcing its deal protection measures during the pre-vote period.⁸⁵ No higher bid emerged, and the original merger agreement closed.⁸⁶ Amidst post-closing discovery, the case settled for \$89.4 million.⁸⁷

4. *In re El Paso Corp. Shareholder Litigation*

In 2011, Kinder Morgan, Inc. (“Kinder Morgan”) negotiated a merger agreement to buy El Paso Corp. (“El Paso”). Kinder Morgan intended to keep El Paso’s pipeline business and sell its exploration and production (“E & P”) business.⁸⁸ Stockholder plaintiffs filed suit, obtained “truncated, expedited discovery,”⁸⁹ and moved for an injunction that would allow El Paso to sell itself, either in parts or in whole. Chancellor Strine “reluctantly”⁹⁰ denied the injunction application, finding that the plaintiffs had a reasonable likelihood of success to prove the merger “was tainted by disloyalty.”⁹¹

The opinion identified several troubling aspects of the transaction. What Chancellor Strine deemed “[w]orst of all”⁹² was evidence that El Paso’s CEO and lead negotiator, Doug Foshee, had defrauded his board of directors by not disclosing his interest in pursuing with Kinder Morgan a potential management buyout of the E & P business:

The CEO did not disclose to the El Paso board of directors . . . his interest in working with other El Paso managers in making a bid to buy the E & P business from Kinder Morgan. He kept that motive secret, negotiated the Merger, and then approached Kinder Morgan’s CEO on two occasions to try to interest him in the idea. In other words, when El Paso’s CEO was supposed to be getting the maximum price from Kinder Morgan, he actually had an interest in not doing that.⁹³

Separately, the lead banker at Goldman, Sachs & Co. (“Goldman”), which was advising El Paso, “failed to disclose his own personal ownership of approximately \$340,000 in Kinder Morgan stock, a very troubling failure that tends to undercut the credibility of his testimony and of the strategic advice he gave.”⁹⁴ El Paso adjourned its stockholder meeting by three days for the express

84. *Id.* at 840.

85. *Id.*

86. *In re Del Monte Foods Co. S’holder Litig.*, C.A. No. 6027-VCL, 2011 WL 2535256, at *6 (Del. Ch. June 27, 2011).

87. *See In re Del Monte Foods Co. S’holder Litig.*, C.A. No. 6027-VCL, 2011 WL 6008590 (Del. Ch. Dec. 1, 2011) (approving the settlement and awarding attorneys’ fees of \$ 22,300,000).

88. *In re El Paso Corp. S’holder Litig.*, 41 A.3d 432, 434 (Del. Ch. 2012).

89. *Id.* at 452.

90. *Id.*

91. *Id.* at 434.

92. *Id.* at 443.

93. *Id.* at 434. I represented Foshee after issuance of the opinion denying the injunction application. Nothing in this article should be construed as personal commentary about the merits of the claim against him.

94. *Id.* at 442.

purpose of providing stockholders additional time to evaluate the court's opinion.⁹⁵ One proxy advisory firm changed its recommendation and opposed the merger,⁹⁶ but the great majority of El Paso's stockholders voted in favor of it. During post-closing fact discovery, the stockholder plaintiffs settled their claims for \$110 million.⁹⁷

5. *In re Activision Blizzard, Inc. Stockholder Litigation*

The 2013 transaction by which Vivendi S.A. ("Vivendi") sold its controlling stake in Activision Blizzard, Inc. ("Activision") was uniquely structured. Vivendi retained some of its Activision shares, sold most back to Activision, and sold a significant portion (approximately 25 percent of the Activision shares outstanding post-closing) to a newly created investment vehicle controlled by two Activision senior officers, Robert Kotick and Brian Kelly, who each invested \$100 million in it.

A stockholder plaintiff brought class and derivative claims that did not fit squarely into any familiar paradigm.⁹⁸ The case settled shortly before trial for payment of \$275 million to Activision. In a lengthy opinion approving the settlement, Vice Chancellor Laster did not discuss any particular line of cases respecting liability. Instead, he wrote, "The magnitude of the Settlement reflects that Lead Counsel advanced strong claims for breach of the duty of loyalty."⁹⁹

The duty of loyalty claims against Kotick and Kelly can be characterized as alleging fraud and coercion directed by them against Activision's board and independent directors. Kotick and Kelly secretly put together a proposed transaction over months, which is a form of fraud on the board:

In July 2012, Vivendi announced its interest in selling its Activision stake. In August, Kotick and Kelly began pursuing a transaction that would benefit themselves. They prepared a pitch book to raise \$2–3 billion for an investment vehicle that would buy 38–44% of Activision. They presented the idea to Peter Nolan, then the Managing Partner of Leonard Green & Partners, L.P. ("Leonard Green"). They also approached other parties with whom Activision had relationships, including Activision's strategic partners in China. *The independent directors were unaware of Kotick and Kelly's efforts.*¹⁰⁰

95. *El Paso Corporation to Adjourn and Reconvene Special Meeting of Stockholders*, U.S. SEC. & EXCHANGE COMMISSION (Mar. 5, 2012), https://www.sec.gov/Archives/edgar/data/1066107/000089882212000094/pressrelease_adjournmeeting3.htm.

96. *Proxy Adviser Opposes El Paso–Kinder Morgan Deal*, REUTERS (Mar. 6, 2012, 8:01 PM), <https://www.reuters.com/article/us-el-paso-kindermorgan-vote/proxy-adviser-opposes-el-paso-kindermorgan-deal-idUSTRE8251EK20120307>.

97. See *In re El Paso Corp. S'holder Litig.*, C.A. No. 6949-CS, 2012 WL 6057331 (Del. Ch. Dec. 3, 2012) (approving the settlement and awarding attorneys' fees of \$26 million).

98. See *In re Activision Blizzard, Inc. S'holder Litig.*, 124 A.3d 1025, 1072 (Del. Ch. 2015) ("[T]he Restructuring was a bespoke transaction; it was not a familiar scenario such as a controller squeeze-out or a third-party [M&A] deal.")

99. *Id.* at 1064.

100. *Id.* at 1032 (emphasis added).

Kotick and Kelly waited until Activision was under pressure from Vivendi before unfurling their proposed alternative, which is a form of coercion:

In December 2012, Vivendi’s CEO informed Kotick . . . that at the next meeting of the Board, the Vivendi representatives would propose a special dividend of roughly \$3 billion to be funded with cash on hand and new debt.

. . . .

At a Board meeting on February 14, 2013, Kotick informed the independent directors about [his and Kelly’s] proposal and asked that the Board form a special committee (the “Committee”) to oversee the transaction process¹⁰¹

Kotick and Kelly ratcheted up their coercion by threatening not to support an alternative transaction under consideration by the special committee, which interpreted Kotick’s stance as a threat to resign as CEO at a time of corporate vulnerability:

On May 25, 2013, the Committee discussed Kotick and Kelly’s positions and decided that a debt or equity offering “would not be actionable” without Kotick’s support. *The Committee again discussed the risk that Kotick would resign if Activision agreed to a transaction he did not like*, as well as JP Morgan’s refusal to finance a deal without Kotick. To avoid a special dividend—the worst possible outcome for Activision’s unaffiliated stockholders—the Committee asked Vivendi to propose a transaction that included Kotick and Kelly.¹⁰²

Kotick then forced the disbandment of the special committee and negotiated terms directly with Vivendi that the board ultimately accepted.¹⁰³

After the transaction terms were fully negotiated, Kotick obtained a board seat for Elaine Wynn without disclosing the closeness of their friendship:

After the Stockholders Agreement was finalized but before it became effective, Kotick arranged for Nolan and Elaine Wynn to join the Board

Wynn was a longtime friend of Kotick whose personal relationship with Kotick rose to the level of an immediate family member. . . . Kotick refers to [Steve] Wynn as “Uncle Steve” and has said [he] is “like my dad.” Kotick makes a point of buying a Mother’s Day gift for Elaine Wynn, just as he does for his mother and his wife¹⁰⁴

The challenged transaction structure was the product of undisclosed fraud on the board and undisclosed coercion of the special committee. Stockholder approval was not required or obtained, though Activision did file a preliminary proxy statement, due to a subsequently reversed preliminary injunction ruling that Activision’s charter required a stockholder vote.¹⁰⁵ The preliminary proxy statement omitted the secret efforts by Kotick and Kelly to put together the transaction structure as

101. *Id.*

102. *Id.* at 1034 (emphasis added).

103. *See id.* at 1034–35.

104. *Id.* at 1036–37.

105. *Id.* at 1037–39.

well as Kotick's threat to resign.¹⁰⁶ When approving the settlement, Vice Chancellor Laster noted that "Lead Counsel had to engage in careful detective work to understand what happened."¹⁰⁷

6. *Virtus Capital L.P. v. Eastman Chemical Co.*

The sale of Sterling Chemicals, Inc. ("Sterling") to an unaffiliated third party was a transactional structure that could have been subject to the business judgment rule under *Synthes*.¹⁰⁸ However, no such motion to dismiss was filed because the class action litigation arose out of an appraisal petition. Information learned during appraisal discovery allowed claims of breach of fiduciary duty or aiding and abetting to be stated against (i) the fund complex that controlled Sterling ("Resurgence"), (ii) Resurgence's controller ("Sass"), (iii) the other Resurgence designees on Sterling's board, (iv) Sterling's financial advisor ("Moelis"), (v) Sterling's CEO, (vi) a non-director officer of Sterling, (vii) the members of Sterling's special committee, and (viii) the purchaser of Sterling, Eastman Chemical Co. ("Eastman").

The case settled shortly before trial. Vice Chancellor Laster's summary of the claims at the settlement hearing can be interpreted as variants of fraud on Sterling's special committee. Evidence was adduced that (i) Resurgence had a keen interest in selling Sterling that was not disclosed to the entirety of the special committee, (ii) conflicted Sterling fiduciaries (including one member of the special committee) tipped off Eastman about Resurgence's keen interest in selling Sterling, and (iii) Moelis had an undisclosed conflict of interest respecting Eastman and provided misleading analyses to Sterling's special committee. This combination of facts allegedly disabled the special committee from negotiating effectively with Eastman and undermined the special committee's approval of the merger:

The gist of the complaint was that Resurgence breached its duty of loyalty by causing Sterling to be sold at a fire sale price to address a liquidity crisis at the Resurgence funds. The complaint contained numerous e-mails between Sass and others that corroborated this allegation.

The complaint also identified various procedural deficiencies in the negotiation process that had been led by a special committee. These included allegations that one of the Sterling directors, who was a member of the committee and had close ties to Sass, was, in fact, conflicted in that role and was seeking to serve Resurgence's liquidity needs. It was alleged that *the special committee's financial advisor met with the acquirer to discuss future work while representing the special committee*. It was alleged that *disclosures were made by the committee and other sell-side fiduciaries to the effect that Resurgence needed to sell, thereby undermining their negotiating position*. It was further alleged that *Moelis aided and abetted breaches of fiduciary duty by manipulating its fairness opinion to undervalue Sterling and make the merger appear fair*. And,

106. *Id.* at 1039.

107. *Id.* at 1073.

108. See Friedlander, *supra* note 19, at 654–55.

finally, Eastman was alleged to have aided and abetted the breaches of fiduciary duty by exploiting the conflicts that the sell-side fiduciaries had and Moelis' desire for future work.

At the pleading stage, these claims were quite strong

Notwithstanding these difficulties, the plaintiffs obtained a settlement fund [that] amounts to a 565 percent premium over what the common stock received in the merger.¹⁰⁹

7. *In re Good Technology Corp. Stockholder Litigation*

The original complaint challenging the sale of Good Technology Corporation (“Good”), a privately held Silicon Valley technology company, focused on alleged conflicts of interest of venture capital investors on the Good board who held Good preferred stock, following the precedent of *In re Trados Inc. Shareholder Litigation*.¹¹⁰ During discovery, the plaintiffs amended their complaint to assert a claim of aiding and abetting breach of fiduciary duty against Good’s financial advisor, J.P. Morgan Securities LLC (“JP Morgan”), based on allegations of fraud on the board of Good.

Shortly before trial, Vice Chancellor Laster denied the defendants’ requests for leave to file motions for summary judgment.¹¹¹ The plaintiffs presented evidence that JP Morgan had steered Good’s board of directors away from certain transaction alternatives for self-interested reasons. In rejecting summary judgment, the court identified evidence that JP Morgan had “[lied] to the Board about the prospects for completing an [IPO] in March 2015.”¹¹² The court explained: “Shortly before the scheduled launch, J.P. Morgan concluded that the IPO should be delayed until the Company received its first quarter results. J.P. Morgan did not immediately advise the Board to delay the IPO, instead telling the Board that the IPO could proceed as scheduled.”¹¹³ A few days later, “J.P. Morgan at last told the Company that it would not launch the IPO the next day,” notwithstanding evidence that the IPO could have proceeded as scheduled.¹¹⁴

Separately, the Court identified evidence that “J.P. Morgan favored Blackberry when the Company began negotiating with potential buyers in June and July 2015.”¹¹⁵ “There is evidence J.P. Morgan provided Blackberry with a lower asking price than it gave other bidders. There is also evidence that J.P. Morgan lied to the Board about providing Blackberry with price guidance.”¹¹⁶ Two partial

109. Transcript of Settlement Hearing and Rulings of the Court at 42–44, *Virtus Capital L.P. v. Eastman Chem. Co.*, C.A. No. 9808-VCL (Del. Ch. Dec. 9, 2016) (emphasis added).

110. 73 A.3d 17 (Del. Ch. 2013).

111. *In re Good Tech. Corp. S'holder Litig.*, C.A. No. 11580, 2017 WL 2537347 (Del. Ch. May 12, 2017).

112. *Id.* at *3.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

settlements followed: the officers, directors, and venture capital firms settled collectively for \$17 million, and JP Morgan settled for \$35 million.¹¹⁷

8. *City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Group, Inc.*

The acquisition of ExamWorks Group, Inc. (“ExamWorks”) by private equity firm Leonard Green was structured from the outset to contemplate a management rollover of shares. The rollover participants included Executive Chairman Richard Perlman and Chief Executive Officer James Price. Despite the anticipated and actual participation of Perlman and Price in the rollover, the transactional lawyer for ExamWorks, its board of directors, its special committee, and its management had represented numerous Perlman/Price-related entities and had invested in numerous Perlman/Price ventures.¹¹⁸ Allegedly, the lawyer never suggested the retention of independent counsel, delayed in creating a special committee, and allowed Perlman and Price to serve on the special committee until a week before the merger agreement was signed.¹¹⁹

The stockholder plaintiff obtained expedited discovery and settled the case approximately eight months after the deal closed, just before trial. The individual defendants, financial advisors, and acquiror settled for \$40 million. Paul Hastings LLP (“Paul Hastings”) settled for \$46.5 million. When approving the settlement, Vice Chancellor Laster characterized the claims as “quite strong in terms of liability both on the merits and for aiding and abetting.”¹²⁰ The court noted that “there were a lot of reasons to be highly concerned about the actions that were taken, not only by the fiduciaries, but also by their advisors. And in particular—and perhaps most disturbingly—by their legal counsel.”¹²¹

According to the plaintiff’s settlement brief, Paul Hastings “failed to fully disclose to and advise the Board concerning [its] own conflict”; “failed to address known management and director conflicts with the Board”; “failed to advise the Board to identify and address the bankers’ conflicts”; “participated in the Board’s failure to address and neutralize known conflicts”; “assisted Perlman in steering the Company’s sale to LGP”; and “falsif[ied] minutes, resolutions and Proxy disclosures.”¹²² “Paul Hastings even rewrote the Board resolutions creating the Special Committee—*after* the Merger Agreement was signed.”¹²³

117. See *In re Good Tech. Corp. S’holder Litig.*, C.A. No. 11580, 2018 WL 1672986 (Del. Ch. Apr. 5, 2018) (approving the JP Morgan settlement); *In re Good Tech. Corp. S’holder Litig.*, C.A. No. 11580-VCL (Del. Ch. Nov. 9, 2018) (approving the fiduciary settlement).

118. Plaintiff’s Brief in Support of Class Certification, the Settlement and an Award of Attorneys’ Fees and Expenses at 4, *City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Grp., Inc.*, C.A. No. 12481-VCL (Del. Ch. Aug. 29, 2017), 2017 WL 3840587 [hereinafter *ExamWorks Settlement Brief*].

119. *Id.* at 4, 16, 23.

120. Transcript of Settlement Hearing and Rulings of the Court at 25, *City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Grp., Inc.*, C.A. No. 12481-VCL (Del. Ch. Sept. 12, 2017).

121. *Id.*

122. *ExamWorks Settlement Brief*, *supra* note 118, at 37–38, 40.

123. *Id.* at 3.

This kind of alleged misconduct interferes with the deliberative processes of the board and its independent directors and defrauds stockholders about the ineffectiveness of the board and the special committee.

C. FIVE RECENT DECISIONS

Important precedents have radically shrunk the docket of stockholder litigation, but they have not eliminated occasions for the Delaware courts to consider allegations or evidence of fraud committed against a board of directors. Five recent decisions illustrate their role in breach of fiduciary duty cases.

1. *In re Oracle Corporation Derivative Litigation*

The complaint in this action alleged that senior management of Oracle Corp. (“Oracle”) orally raised the idea of acquiring NetSuite, Inc. (“NetSuite”), a company controlled by Oracle founder and Chairman Lawrence Ellison, at a board retreat. The board authorized Oracle’s co-CEOs to contact NetSuite but told them not to discuss price.¹²⁴ In denying a motion to dismiss as to Ellison and co-CEO Safra Catz, Vice Chancellor Glasscock described what allegedly happened next:

Less than a week after the Board first discussed the possibility of acquiring NetSuite, Catz reached out to NetSuite’s CEO, Zach Nelson. Catz apparently ignored the Board’s instruction not to discuss price, because Nelson later described his discussion with Catz “as a loose, pre-due-diligence, exploratory conversation where a price range of \$100–\$125 was discussed.” That price range represented a premium of 42% to 78% above NetSuite’s \$70.21 per share closing price on January 21, 2016, the day of the conversation.

. . . .

. . . Catz violated the Board’s instruction not to discuss price with NetSuite’s CEO, and she later concealed her secret negotiations from the other directors. Moreover, Catz allegedly attempted to manipulate the sale process to steer the Special Committee toward Ellison’s preferred price range.¹²⁵

The board appointed a special litigation committee to investigate the claims. The special litigation committee later determined that the stockholder plaintiff should be allowed to proceed with the derivative litigation on behalf of Oracle.¹²⁶

2. *Morrison v. Berry*

In 2016, Apollo Global Management, LLC (“Apollo”) purchased The Fresh Market, Inc. (“Fresh Market”) in collaboration with Ray Berry, the founder

124. *In re Oracle Corp. Derivative Litig.*, C.A. No. 2017-0337, 2018 WL 1381331, at *5 (Del. Ch. Mar. 19, 2018).

125. *Id.* at *5, *22 (emphasis added) (footnotes omitted).

126. See Alison Frankel, *Oracle Directors: Shareholders Can Go Ahead with Billion-Dollar Derivative Suit*, REUTERS (Aug. 19, 2019, 4:38 PM), <https://www.reuters.com/article/otc-oracle/oracle-directors-shareholders-can-go-ahead-with-billion-dollar-derivative-suit-idUSKCN1V91UJ>.

and chairman of Fresh Market, and his son, former Fresh Market CEO Brett Berry (collectively, the “Berrys”). The Berrys owned 9.8 percent of Fresh Market’s shares in the aggregate and rolled over their equity to end up with an approximate 20 percent stake in the company upon closing.

A board meeting in October 2015 addressed Apollo’s expressed interest in buying Fresh Market in exclusive partnership with the Berrys. Ray Berry denied having any agreement with Apollo. The board then authorized a public exploration of strategic alternatives. Several weeks later, after Apollo submitted a second letter expressing interest in buying Fresh Market with the Berrys, Ray Berry acknowledged in a November 28 email through his lawyer to Fresh Market’s counsel that he had agreed in October 2015 “that, in the event Apollo agreed on a transaction with [Fresh Market], he would roll his equity interest over into the surviving entity.”¹²⁷ The same November 28 email stated that if the board did not authorize a sale of Fresh Market, Ray Berry would “give serious consideration to selling his stock.”¹²⁸ The board authorized the solicitation of bids for Fresh Market, and only Apollo submitted one.

The Delaware Supreme Court reversed a dismissal that had been granted on *Corwin* grounds and remanded the case for further proceedings. It concluded that the “Plaintiff’s complaint alleges facts showing that the Company failed to disclose troubling facts regarding director behavior . . . [that] would have shed light on the depth of the Berrys’ commitment to Apollo, the extent of Ray Berry’s and Apollo’s pressure on the Board, and the degree that this influence may have impacted the structure of the sale process.”¹²⁹ A subheading in the Delaware Supreme Court’s opinion highlights the allegation of fraud on the board of directors of Fresh Market: “*Plaintiff alleges serious misrepresentations—both to the Board, and to stockholders—about Ray Berry’s ‘agreement’ with Apollo.*”¹³⁰ A separate subheading highlights an allegation that Fresh Market’s board of directors was coerced or pressured by Ray Berry into initiating a sale process: “*Plaintiff adequately alleges that the 14D-9’s omission of Ray Berry’s ‘threat’ to sell his shares is material.*”¹³¹ The court characterized the relevant portion of the November 28 email as not necessarily a threat but rather “an economically relevant statement of intent.”¹³²

3. *In re PLX Technology Inc. Stockholders Litigation*

In a post-trial ruling in *In re PLX Technology Inc. Stockholders Litigation*,¹³³ Vice Chancellor Laster found that the sole remaining defendant, activist investor Potomac Capital Partners II, L.P. (“Potomac”), had knowingly participated in breaches of fiduciary duty, but the plaintiffs failed to show causally related

127. *Morrison v. Berry*, 191 A.3d 268, 278 (Del. 2018).

128. *Id.* at 281, 286 n.90.

129. *Id.* at 275 (internal quotation and footnotes omitted).

130. *Id.* at 277.

131. *Id.* at 286.

132. *Id.*

133. C.A. No. 9880, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).

damages. The Delaware Supreme Court affirmed the judgment in favor of Potomac due to this failure without addressing whether any breach of fiduciary duty or aiding and abetting had occurred.¹³⁴ Given that appellate history, the vice chancellor’s decision lacks precedential value on liability. Nevertheless, the factual findings are instructive.

Potomac’s director designee, Eric Singer, learned about the possibility of selling PLX Technology Inc. (“PLX”) to a particular buyer, Avago Technologies Wireless (U.S.A.) Manufacturing Inc. (“Avago”), in a particular future time frame at a particular price, but he did not inform his fellow board members or the management team. On schedule, several months later, Singer arranged a sale transaction to Avago at the specified price.¹³⁵

According to Vice Chancellor Laster, the underlying standard of review for director conduct in the sale process was enhanced scrutiny (i.e., whether the directors’ conduct fell outside the range of reasonableness, with added judicial skepticism of the directors in the event of undisclosed conflicts of interest). In the absence of full disclosure to the stockholders, the standard did not shift to business judgment review.¹³⁶ The vice chancellor determined that Potomac’s liability turned on one fact—Singer’s fraud on the board:

Taken as a whole, this evidence suggests that Potomac and Singer undermined the Board’s process and led the Board into a deal that it otherwise would not have approved. Yet in spite of this evidence, I could not conclude that the Board’s decisions fell outside the range of reasonableness without one other critical fact: Krause’s secret tip to Deutsch[e] Bank in December 2013 about Avago’s plans for PLX. In my view, *by withholding this information from the rest of the Board, Singer breached his fiduciary duty and induced the other directors to breach theirs*. For present purposes, by withholding this information, he fatally undermined the sale process.

No one can tell what would have happened if Singer and Deutsche Bank had been candid, but the Board might well have proceeded differently

. . . .

Viewing the record as a whole, and *with particular emphasis on Singer and Deutsche Bank’s failure to disclose Krause’s tip*, . . . plaintiffs . . . proved a breach of duty in connection with the sale process.

. . . .

. . . By failing to share Krauser’s tip with the Board, Singer *created a critical informational gap* that contributed to the Board’s breach of duty.¹³⁷

The key precedents cited by the vice chancellor were *Macmillan*, *RBC Capital Markets*, *Del Monte*, and *El Paso*.¹³⁸

134. *In re PLX Tech. Inc. S’holders Litig.*, 211 A.3d 137 (Del. 2019) (order).

135. *PLX*, 2018 WL 5018535, at *1.

136. *Id.* at *27–32, *38–41, *44, *47–50.

137. *Id.* at *47–49 (emphasis added) (footnotes omitted).

138. *See id.* at *46 n.545, *47 n.554, *49 n.566.

4. *FrontFour Capital Group LLC v. Taube*

The post-trial decision in *FrontFour Capital Group LLC v. Taube*¹³⁹ enjoined the planned combination of an asset-management firm, Medley Management, Inc. (“Medley Management”), and two business-development corporations advised by Medley Management—Medley Capital Corp. (“Medley Capital”) and Sierra Income Corp. (“Sierra”)—pending the issuance of corrective disclosures. The majority owners of Medley Management—Brook and Seth Taube—were directors of Medley Capital. The transaction process was described in the proxy statement as arm’s length, but Vice Chancellor McCormick found that the special committee of Medley Capital was deprived of critical information. The Taube brothers chose not to inform their fellow directors of Medley Capital about prior failed sale processes of Medley Management, including the fact that about thirty potential bidders for Medley Management were barred by standstill agreements from bidding for Medley Capital. “The Medley Capital special committee[] did not know *any* of this information before this litigation. They were not told. They did not ask.”¹⁴⁰

The vice chancellor’s analysis of the fair dealing prong of the entire fairness standard turns in part on a finding of fraud on the board: “In the events leading up to the Proposed Transactions, the Taube brothers created an information vacuum, which they then exploited.”¹⁴¹ The vice chancellor’s application of enhanced scrutiny to the deal protections turns on the same factual findings: “Due to extreme process flaws that led to the Proposed Transactions, the deal protections are not within the range of reasonableness.”¹⁴² Similarly, the disclosure violations turned on the fraud on the Medley Capital special committee: “The Proxy and [the Company’s] other public filings . . . fail to mention that the Special Committee only learned of these items after the execution of the Merger Agreement (and in some cases only after this litigation began). The timing of the Board’s knowledge is a critical fact that would impact any stockholder’s assessment of the quality of the transaction process.”¹⁴³ A proposed settlement that implemented a curative sales process and contemplates a net payment to stockholders valued by plaintiff at \$38 to \$47 million is currently pending.¹⁴⁴

5. *In re Towers Watson & Co. Stockholders Litigation*

Vice Chancellor McCormick recently dismissed a claim that a merger of equals between Towers Watson & Co. (“Towers”) and Willis Group Holdings plc

139. C.A. No. 2019-0100, 2019 WL 1313408 (Del. Ch. Mar. 11, 2019, rev. Mar. 22, 2019).

140. *Id.* at *2.

141. *Id.* at *26.

142. *Id.* at *27.

143. *Id.* at *29 (footnotes omitted).

144. See Plaintiff’s Corrected Reply Brief in Support of Their Motion for Final Approval of Settlement and Award of Attorneys’ Fees and Expenses, *In re Medley Capital Corp. S’holder Litig.*, C.A. No. 2019-0100, 2019 WL 5456821 (Del. Ch. Oct. 18, 2019).

(“Willis”) was tainted by fraud on the board.¹⁴⁵ At issue was the significance of compensation negotiations regarding post-merger employment between the CEO of Towers and representatives of Willis while the merger terms were being renegotiated. Citing a draft of this article, the vice chancellor noted that breach of fiduciary duty claims sounding in fraud “enjoy a long history under Delaware law.”¹⁴⁶ Factually, however, the vice chancellor held that the pleaded facts “do not support a finding of deceptive silence, fraud on the board, or a conflicted negotiator gone rogue.”¹⁴⁷ That dismissal is currently on appeal.

Following the dismissal of the Court of Chancery action, the U.S. Court of Appeals for the Fourth Circuit decided an appeal from a dismissal of federal securities law claims arising out of the same factual allegations. A divided panel reinstated the claims, reasoning that a jury could “reasonably conclude that disclosing the secret compensation discussions . . . would have changed the total mix of information available to shareholders.”¹⁴⁸ The dissenting judge deemed it “important to note . . . that . . . the Delaware Court of Chancery . . . rejected the same theory advanced by Plaintiffs. . . . Like the district court, the Delaware court got it right. Regrettably, we have not.”¹⁴⁹

The proceedings in the Court of Chancery and in federal court suggest the close analogy between a claim of breach of fiduciary duty predicated on fraud on the board and a claim of federal securities fraud.

II. CONFRONTING THE *EL PASO* PROBLEM

El Paso and the earlier-settled cases discussed in Part I.B above, such as *TeleCorp*, *Chaparral*, and *Del Monte*, were litigated during a prior era of stockholder class action litigation. In that era, stockholder plaintiffs had strong incentives to challenge pending transactions. Enhanced judicial scrutiny was the default legal standard, and expedited discovery was freely available. Information learned during expedited discovery could be presented to the Court of Chancery during the pendency of a transaction without fear of triggering a case-dispositive affirmative defense based on stockholder ratification. The Court of Chancery would evaluate the merits of a *Revlon* challenge at a preliminary injunction hearing with the potential for some form of injunctive relief, as in *Del Monte*, or dicta critical of the loyalty of a participant in the sale process, as in *El Paso*. Either outcome could lead to a post-closing monetary settlement and fee award proportionate to that recovery. Less ambitious plaintiffs’ counsel

145. *In re Towers Watson & Co. S’holders Litig.*, C.A. No. 2018-0132, 2019 WL 3334521 (Del. Ch. July 25, 2019). In a prior proceeding before a different vice chancellor, I represented a stockholder that lost the leadership contest. That same stockholder is lead plaintiff in the parallel federal securities law action discussed below, in which I am not involved.

146. *Id.* at *8 n.43.

147. *Id.*

148. *In re Willis Towers Watson PLC Proxy Litig.*, 937 F.3d 297, 305 (4th Cir. 2019).

149. *Id.* at 315 (Quattlebaum, J., dissenting).

knew that challenges to pending transactions could be resolved through disclosure settlements.¹⁵⁰

That comparatively permissive stockholder litigation regime created opportunities for stockholder plaintiffs to ferret out evidence of fraud on the board, whether through expedited, appraisal, post-closing third-party, or objector discovery. Such evidence does not reveal itself in proxy statements. As Vice Chancellor Laster stated in *Del Monte*, “discovery disturbed the patina of normalcy surrounding the transaction.”¹⁵¹

The comparatively permissive litigation environment that enabled *El Paso* and *Del Monte* no longer exists in Delaware. Legal rules that incentivized the mass filing of unproductive litigation (and the occasional pursuit of productive litigation) were changed.¹⁵² What I refer to as the “*El Paso* problem” is a consequence of the abandonment of the prior regime. The leading post-*El Paso* cases—*Synthes*, *MFW*, *C&J*, *Corwin*, *Trulia*, and *Dell*—operate to diminish incentives and eliminate scenarios by which stockholder plaintiffs will discover and present evidence of fraud on the board.

Certain of these precedents authorized new bases for motions to dismiss. *Synthes* enabled pleading-stage dismissals when a controlling stockholder arranges the sale of a corporation for pro-rata merger consideration, a default rule Chancellor Strine referred to as a “safe harbor” for controlling stockholders.¹⁵³ *MFW*’s progeny enabled pleading-stage dismissals when a controlling stockholder buys out the minority stockholders pursuant to certain procedures.¹⁵⁴ *Corwin* authorized pleading-stage dismissals of third-party mergers in the absence of pleaded facts that the stockholder vote was not fully informed or was coerced.¹⁵⁵

Other of these precedents foreclosed or reduced opportunities for discovery. *C&J* prohibited the Court of Chancery from issuing preliminary injunctions that modify deal protections in merger agreements, eliminating a rationale for expedited discovery.¹⁵⁶ *Trulia* all but eliminated disclosure settlements, thereby eliminating more occasions for expedited discovery as well as potential objector discovery into that expedited discovery.¹⁵⁷ Vice Chancellor Laster extended *Trulia* by rejecting expedited discovery into weak disclosure claims to avoid

150. See generally Joel E. Friedlander, *How Rural/Metro Exposed the Systemic Problem of Disclosure Settlements*, 40 DEL. J. CORP. L. 877 (2016) (discussing the history of disclosure settlements and advocating for their rejection).

151. *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 817 (Del. Ch. 2011).

152. See generally Friedlander, *supra* note 19 (discussing stockholder litigation reforms in the context of empirical observations of frequent paltry litigation outcomes and infrequent data points of successful litigation outcomes).

153. *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1024, 1035 (Del. Ch. 2012).

154. I discuss the evolution of this rule in Friedlander, *supra* note 19, at 649–51.

155. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 312 (Del. 2015) (“[A] fully informed, uncoerced stockholder vote invokes the business judgment rule.”).

156. *C & J Energy Servs., Inc. v. City of Miami Gen. Emps.’ & Sanitation Emps.’ Ret. Tr.*, 107 A.3d 1049, 1054 (Del. 2014) (“To blue-pencil a contract as the Court of Chancery did here is not an appropriate exercise of equitable authority in a preliminary injunction order.”).

157. *In re Trulia, Inc. Stockholder Litig.*, 129 A.3d 884, 898 (Del. Ch. 2016) (“[T]he supplemental disclosure [must] address a plainly material misrepresentation or omission, and the subject matter of the proposed release [must be] narrowly circumscribed to encompass nothing more than the

enabling mootness fee dismissals.¹⁵⁸ *Dell* made it more difficult for an appraisal petitioner to obtain a valuation exceeding the deal price,¹⁵⁹ thereby disincentivizing future appraisal petitions and reducing the number of occasions when appraisal discovery can be used to pursue a breach of fiduciary duty claim.

Given these diminished opportunities for discovery post-*El Paso*, I wrote in 2017 that “there is no clear path for pleading a case that a sale process has been disloyally manipulated by an insider or a financial advisor.”¹⁶⁰ In the same paragraph, I hinted at a new path then being forged by my colleagues for pleading a stockholder class action—the use of section 220 of the Delaware General Corporation Law.¹⁶¹

Section 220 authorizes books and records inspections by a stockholder “for any proper purpose.”¹⁶² During the *El Paso* era, the availability of expedited discovery from parties and non-parties meant stockholder class action plaintiffs had no need for section 220. After all, a section 220 action—if successful—would only allow a plaintiff to obtain limited books and records of the corporation itself, while discovery casts a wider net. Only electronic discovery from a financial advisor, for example, could be expected to reveal direct evidence that the financial advisor committed fraud on the board.

Post-*Corwin*, recourse to section 220 is often a practical necessity for stockholder plaintiffs. A corporation’s internal documents such as board minutes, board presentations, and emails may be the only means to question the accuracy and completeness of a proxy statement. Another potential virtue of a section 220 inspection (from the stockholder plaintiff’s perspective) is that the corporate documents often are not produced until after a stockholder vote, when it is too late for the defendants to satisfy *Corwin* by making supplemental disclosures.

No one knew in 2017 whether section 220 could be used successfully to present evidence of undisclosed fraud on the board. Could a section 220 action be maintained after a target corporation was merged out of existence? Was the goal of circumventing a *Corwin* defense a proper purpose under section 220? Would a stockholder be permitted to inspect a sufficient quantity of documents question the integrity of a board’s deliberative process?

The *Fresh Market* litigation presented these issues. The stockholder plaintiff alleged in a pre-closing section 220 complaint that public information about the Fresh Market acquisition created “a credible basis to suspect wrongdoing,”¹⁶³ based in part on disclosures in Apollo’s tender offer materials calling into

disclosure claims and the fiduciary duty claims concerning the sale process, if the record shows that such claims have been investigated sufficiently.”)

158. See Friedlander, *supra* note 19, at 642–43 (discussing a publication and transcript ruling by Vice Chancellor Laster).

159. *Dell Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1, 19 (Del. 2017) (“[T]he facts fail to support the Court of Chancery’s reasoning for disregarding, in particular, the deal price.”).

160. Friedlander, *supra* note 19, at 648.

161. See *id.* (“Section 220 inspections are a pale substitute for expedited discovery.”).

162. DEL. CODE ANN. tit. 8, § 220(b) (2019).

163. Defendant’s Answer to Verified Complaint at para. 3, *Morrison v. Fresh Mkt., Inc.*, C.A. No. 12243-VCG (May 9, 2016).

question whether Ray Berry had been candid with his fellow directors about his interactions and relationship with Apollo.¹⁶⁴ Fresh Market's answer in the section 220 action, filed post-closing, asserted numerous defenses, including lack of standing and failure to state a proper purpose for inspection.¹⁶⁵

Fresh Market promptly moved for judgment on the pleadings, arguing that the closing of the merger erased the plaintiff's standing to obtain relief under section 220. Fresh Market made textual arguments of statutory construction and urged the Court of Chancery not to follow two cases that had granted post-closing section 220 relief: "To the extent *Cutlip* or *Deephaven* would be deemed to cover this scenario, this Court should decline to follow them as contrary to the plain language of Section 220."¹⁶⁶ Fresh Market also made a public policy argument that the court should not make it easy for a stockholder to challenge a transaction:

Allowing a former stockholder to proceed in this circumstance would also lead to absurd results, opening the floodgates to enterprising plaintiffs' lawyers who could submit Section 220 demands on the eve of deals in the hopes of generating leverage or circumventing discovery rules. Indeed, that appears to be precisely what is driving this case.¹⁶⁷

The parties settled the section 220 action. Fresh Market made a limited production of documents, which included board minutes that referenced a key email that Fresh Market ultimately agreed to produce. The Delaware Supreme Court later described that email, dated November 28, 2015, as "a crucial email from Ray Berry's counsel to the Company's lawyers."¹⁶⁸ With that crucial e-mail in hand, the stockholder plaintiff decided not to press for additional documents or test the boundaries of section 220 law in this setting.

The *Fresh Market* litigation demonstrates how a limited section 220 inspection that included board minutes and one email was sufficient to overcome a *Corwin* defense and reveal evidence of fraud on a board of directors. A passage in the Delaware Supreme Court opinion reversing a *Corwin* dismissal addresses both issues:

Plaintiff alleges that the phrase "as he did in October" in the November 28 E-mail should have informed directors that Ray Berry "lied" at their October 15 meeting, but that agreement and its eventual disclosure to the directors was never disclosed to the Company's stockholders. . . .

We agree with the Plaintiff that this Agreement Omission was material. *A reasonable stockholder would want to know the facts showing that Ray Berry had not been forthcoming about his agreement with Apollo* (among other information discussed

164. *Id.* at para. 8.

165. *Id.* at 21–23.

166. Defendant's Motion for Judgment on Pleadings at para. 12, *Morrison v. Fresh Mkt., Inc., C.A. No. 12243-VCG* (Del. Ch. May 11, 2016) (citing *Cutlip v. CBA Int'l, Inc.*, I No. 14168, 1995 WL 694422 (Del. Ch. Oct. 27, 1995); *Deephaven Risk ARB Trading Ltd. v. UnitedGlobalCom, Inc.*, No. Civ. A. 379, 2005 WL 1713067 (Del. Ch. July 13, 2005)).

167. *Id.* at para. 13.

168. *Morrison v. Berry*, 191 A.3d 268, 273 (Del. 2018).

below), as directors have an “unremitting obligation” to deal candidly with their fellow directors¹⁶⁹

The Delaware Supreme Court had no reason to address the propriety of a section 220 action filed pre-closing with the objective of inspecting contemporaneous documents that would allow the stockholder to overcome a *Corwin* defense. Nothing in the court’s opinion called the litigation tactic into question. It noted, “Plaintiff’s allegation that Ray Berry lied to the directors is not based on disclosed facts, but rather on [the] November 28 Counsel E-mail obtained through her Section 220 Litigation—particularly the portions omitted from the description of the e-mail in the 14D-9.”¹⁷⁰

During the pendency of the *Corwin* stage of the *Fresh Market* litigation in the Court of Chancery and Delaware Supreme Court, the former issued two important decisions about the propriety of section 220 as a means to overcome *Corwin*. One decision dealt with the statutory language of section 220 respecting post-merger standing, while the other dealt with the proper-purpose requirement.

In *Weingarten v. Monster Worldwide, Inc.*, Vice Chancellor Glasscock addressed what he described as a “discrete issue of law that appears to be of first impression.”¹⁷¹ The question was whether a former stockholder could proceed with a section 220 action based on a demand letter served before the date of the merger, even though the complaint was filed after the merger closed. The vice chancellor dismissed the case for lack of standing due to noncompliance with the statutory requirement that the plaintiff establish that “[s]uch stockholder is a stockholder.”¹⁷² Importantly, the Court distinguished *Cutlip* and *Deephaven* on the ground that the plaintiffs in those cases were stockholders “at the time suit was filed.”¹⁷³ *Weingarten* thus created no legal barrier for future plaintiffs who filed section 220 actions before a merger closed and pursued them post-closing.

However, *Weingarten* creates a practical constraint for stockholder plaintiffs and their counsel. To make use of section 220 and obtain documents that might allow for the pursuit of a class claim that could survive a motion to dismiss under *Corwin*, a potential stockholder plaintiff must be educated about the strategy of filing a section 220 action before the transaction closes. Given the enactment in 2013 of section 251(h) of the Delaware General Corporation Law and subsequent amendments which allow for expansive use of tender offers followed by a second-step merger,¹⁷⁴ getting a section 220 action on file is essentially a race against the closing of the tender offer. Such a race would be unnecessary

169. *Id.* at 284 (citations and footnotes omitted) (emphasis added).

170. *Id.* at 284 n.74.

171. C.A. No. 12931, 2017 WL 752179, at *1 (Del. Ch. Feb. 27, 2017).

172. DEL. CODE ANN. tit. 8, § 220(c)(1) (2019).

173. *Weingarten*, 2017 WL752179, at *5.

174. See, e.g., Neil R. Markel, *Smoothing the Pathway to Use of Tender Offers in Private Equity Acquisitions*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 20, 2016), <https://corpgov.law.harvard.edu/2016/12/20/smoothing-the-pathway-to-use-of-tender-offers-in-private-equity-acquisitions>.

if section 220 were amended to allow merged-out stockholders to pursue inspection rights relating to the merger.¹⁷⁵

In *Lavin v. West Corp.*,¹⁷⁶ the defendant corporation challenged the propriety of a section 220 action filed with the aim of inspecting documents that would allow the plaintiff to plead around *Corwin*. Vice Chancellor Slight's rejected that argument and encouraged the use of section 220, reasoning:

[I]t would be naïve to believe, in most instances, that the stockholder plaintiff will not face significant challenges to meet her pleading burden in anticipation of a *Corwin* defense if all she has in hand to prepare her complaint are the public filings of the company whose board of directors she proposes to sue. That is . . . precisely the reason this court should encourage stockholders, if feasible, to demand books and records before filing their complaints when they have a credible basis to suspect wrongdoing in connection with a stockholder-approved transaction and good reason to predict that a *Corwin* defense is forthcoming.¹⁷⁷

Vice Chancellor Slight's added that standing problems could be avoided "in the merger or tender offer context if the stockholder moves promptly."¹⁷⁸

Clearing away the issues of law discussed above, the critical factual questions that remain in section 220 litigation are whether the plaintiff establishes a credible basis to infer wrongdoing and, if so, the proper scope of the inspection. Vice Chancellor Slight's held that the complaint in *Lavin* satisfied the "low Section 220 evidentiary threshold"¹⁷⁹ on the question whether the board favored a less valuable sale of the company over an allegedly more valuable sale of its segments for self-interested reasons. Five of the thirteen requested categories of documents were deemed "necessary and essential" for pursuing the stockholder's stated purposes.¹⁸⁰ Vice Chancellor Slight's ordered the production of communications, including emails, of certain individuals on a particular topic over a period of eighteen months.¹⁸¹

The use of section 220 demands as a potential means to plead around *Corwin* has become a settled practice. What remains to be seen is whether section 220 inspections will yield information sufficient to plead facts that withstand a motion to dismiss under *Corwin* and sufficient to establish the seeming predicate for liability—fraud on the board. The answer to the recurring factual question of the scope of requested documents that must be made available for inspection will determine whether there exists a practicable solution to the *El Paso* problem. Like proxy statements, board minutes are drafted after the fact by lawyers for prospective defendants. They are subject to manipulation. On the other hand,

175. In the alternative entity context, the Revised Uniform Limited Partnership Act provides for a dissociated partner to inspect books and records for the period when the person was a partner, and seventeen states and the District of Columbia have extended inspection rights to disassociated members of limited liability companies ("LLCs"). Allen Sparkman, *Information Rights—A Survey*, 2 BUS. ENTREPRENEURSHIP & TAX L. REV. 41, 52–54, 93, 97 & n.311 (2018).

176. C.A. No. 2017-0547, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017).

177. *Id.* at *9 (citing Friedlander, *supra* note 19, at 644–48).

178. *Id.* at *9 n.70.

179. *Id.* at *13.

180. *Id.* at *14.

181. *Id.*

contemporaneous communications such as emails or text messages can provide insight into the unedited thoughts of the defendants themselves, especially if they are created and produced in bulk.

A post-closing section 220 inspection is an appropriate setting for a plaintiff to inspect electronic documents and assess whether a claim is worth pursuing. It is arguably a more equitable and efficient setting for electronic discovery than was expedited discovery challenging pending transactions in the prior era of stockholder litigation. In a section 220 action, multiple defendants and third parties are not faced with expedited time pressure to review and produce massive amounts of documents. The plaintiff lacks the negotiating leverage of a pending transaction and the twisted incentives created by the ability to confer a release. As in stockholder derivative actions, the parties are well situated to negotiate and litigate step by step and assess the costs and benefits associated with further litigation over the extensiveness of the books and records inspection. For these reasons, the inspection of electronic documents in a post-closing section 220 action should be considered a default setting for stockholder litigation. Absent that default setting, the *El Paso* problem will surely persist.

III. CONFRONTING THE *TIBCO* PROBLEM

Establishing fraud on the board may be a predicate for liability in a stockholder class action, but fraud on the board is not recognized as a tort. Delaware law only recognizes fraud on the board as wrongful when it is committed by a fiduciary or a third person aiding and abetting a fiduciary's breach of duty. Absent an underlying breach of fiduciary duty by a corporate officer or director, there is no recognized basis for liability against—for example—a financial advisor who deceives a board of directors for personal gain to the detriment of the corporation or its stockholders.¹⁸² The salient question for Delaware law is

182. Potential alternative claims by the stockholder against the financial advisor would be breach of fiduciary duty or breach of contract, but both are deeply problematic. There is no generally recognized claim of breach of fiduciary duty against the financial advisor. Professor Andrew Tuch, an advocate of this theory of liability, has assembled what he describes as “the sparseness of cases” on the unsettled question whether a financial advisor owes fiduciary duties to its M&A client or the subsidiary unresolved questions of the content of such duties or the validity of near-universal contractual disclaimers of fiduciary duties in banker–client engagement letters. Andrew F. Tuch, *Fiduciary Principles in Banking Law* 4 (Wash. U. Sch. of L. Legal Stud. Research Paper No. 18-07-01, July 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3211548. Tuch also notes that any banker's fiduciary duty “would be owed to the client (often, a corporation) and only rarely to its shareholders.” *Id.* at 19. A cashed-out stockholder cannot maintain a derivative claim to enforce the contractual standard of liability in the banker–client engagement letter. Delaware's continuous ownership doctrine bars such a derivative claim. See *Ala. By-Products Corp. v. Cede & Co.*, 657 A.2d 254, 265 (Del. 1995) (“Once the derivative plaintiff ceases to be a stockholder in the corporation on whose behalf the suit was brought, he no longer has a financial interest in any recovery pursued for the benefit of the corporation.” (citing *Lewis v. Anderson*, 477 A.2d 1040, 1046 (Del. 1984))). The “fraud exception” to the continuous ownership doctrine does not permit the maintenance of a derivative claim on the theory that a challenged merger was the product of fraud. *Ark. Teacher Ret. Sys. v. Countrywide Fin. Corp.*, 75 A.3d 888, 890 (Del. 2013). Only direct claims for breach of fiduciary duty may be brought by the cashed-out stockholder, and there is no recognized fiduciary relationship between the banker and its client's stockholders.

whether a non-fiduciary's duping of an uninformed board of directors is a legal wrong or perfect crime.

The Delaware Supreme Court's most recent pronouncement on aiding and abetting liability reveals this hole in Delaware law. In *Singh v. Attenborough*,¹⁸³ the court spoke forcefully about the imperative of holding to account financial advisors who dupe directors in bad faith. But in doing so, the court reinforced the liability hurdle that the plaintiff must plead to prove the duped directors breached their fiduciary duties:

[T]o the extent the Court of Chancery purported to hold that an advisor can only be held liable if it aids and abets a non-exculpated breach of fiduciary duty, that was erroneous. Delaware has provided advisors with a high degree of insulation from liability by employing a defendant-friendly standard that requires plaintiffs to prove scienter and awards advisors an effective immunity from due-care liability. As held in *RBC Capital Markets, LLC v. Jervis*, however, *an advisor whose bad-faith actions cause its board clients to breach their situational fiduciary duties* (e.g., the duties *Revlon* imposes in a change-of-control transaction) *is liable for aiding and abetting*. The advisor is not absolved from liability simply because its clients' actions were taken in good-faith reliance on misleading and incomplete advice tainted by the advisor's own knowing disloyalty. *To grant immunity to an advisor because its own clients were duped by it would be unprincipled* and would allow corporate advisors a level of unaccountability afforded to no other professionals in our society. In fact, most professionals face liability under a standard involving mere negligence, not the second highest state of scienter—knowledge—in the model penal code.¹⁸⁴

The phrase “situational fiduciary duties” refers to the differing black-letter liability rules that may apply respecting the underlying breach of fiduciary duty. If the financial advisor's fraud on the board occurs in the *Revlon* sale-of-control context, the stockholder plaintiff must establish that the board failed to act within a range of reasonableness, which is the rough equivalent of a negligence standard.¹⁸⁵ If the fraud occurred in a context that does not trigger *Revlon* enhanced scrutiny, then the plaintiff must establish gross negligence, which has been described as requiring “a wide disparity between the process the directors used . . . and that which would have been rational.”¹⁸⁶

The problem of nondisclosure to a board, coupled with the difficulty of establishing either a *Revlon* violation or gross negligence, gives rise to what I call the “*TIBCO* problem.” In this part, I first discuss how the *TIBCO* motion to dismiss decision frames the doctrinal problem. I then discuss two recurring situations in which Delaware courts have faced the *TIBCO* problem. One involves outside advisors who embed an entrenchment mechanism in corporate contracts, while the other involves contingently compensated financial advisors

183. 137 A.3d 151 (Del. 2016).

184. *Id.* at 152–53 (footnotes omitted) (emphasis added).

185. See *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 89–99 (Del. Ch. 2014) (discussing how board conduct failed under the “range of reasonableness” standard and how aiding-and-abetting liability can be predicated on an underlying breach of fiduciary duty that sounds in negligence).

186. *Guttman v. Huang*, 823 A.2d 492, 507 n.39 (Del. Ch. 2003).

who steer a strategic-review process to a preferred transaction. I then discuss my proposed solution to the *TIBCO* problem: judicial recognition of the tort of fraud on the board.

A. *TIBCO*

The *TIBCO* litigation concerned a \$100 million share-count error discovered shortly after execution of the merger agreement between *TIBCO Software Inc.* (“*TIBCO*”) and an affiliate of private equity firm *Vista Equity Partners* (“*Vista*”). Both parties operated under the mistaken belief that the aggregate equity value implied by the transaction was approximately \$4.244 billion. However, the price expressed in the merger agreement was \$24 per share, and a share-count error meant that the actual amount payable by *Vista* was approximately \$4.144 billion. *TIBCO* did not attempt to recover the \$100 million difference from *Vista*.¹⁸⁷

TIBCO stockholders brought a variety of claims, including (i) breach of fiduciary duty against *TIBCO*’s directors; (ii) aiding and abetting breach of fiduciary duty against *TIBCO*’s financial advisor, *Goldman*; and (iii) professional malpractice against *Goldman*. Chancellor Bouchard’s adjudication of those three claims in a post-closing motion to dismiss frames the *TIBCO* problem.

The chancellor ruled that factual allegations about the board’s failure to explore a reformation claim or to ask basic questions of *Goldman* respecting the share-count error were insufficient to state a claim for breach of the duty of loyalty as to the disinterested and independent members of the board but were sufficient to state a claim for breach of the duty of care.¹⁸⁸ The chancellor explained what types of facts are needed to plead gross negligence:

[T]he Complaint’s well-pled allegations . . . portray a sufficiently wide gulf between what was done and what one rationally would expect a board to do after discovering a fundamental flaw in a sale process One rationally would expect, for example, the Board to press *Goldman* . . . for a complete explanation concerning the circumstances of the share count error . . . and for whatever information it could provide concerning *Vista*’s understanding of the share count error.

. . . [T]he failure to make such basic inquiries does raise litigable questions over whether the Board . . . failed to satisfy its duty of care during the period between the discovery of the share count error and closing of the Merger.¹⁸⁹

For the aiding and abetting claim, the chancellor held that the plaintiff adequately alleged *Goldman*’s knowing participation in the board’s failure to inform itself. *Goldman* had learned “that *Vista* had relied on the erroneous share count in the Final Cap Table in making its Final Bid, but never informed the Board about this critical fact.”¹⁹⁰ *Goldman*’s contingent fee of approximately

187. *In re TIBCO Software Inc. Stockholders Litig.*, C.A. No. 10319, 2015 WL 6155894, at *1–2 (Del. Ch. Oct. 20, 2015).

188. *Id.* at *23.

189. *Id.*

190. *Id.* at *24.

\$47 million and its close relationship with Vista, the ultimate payer of the contingent fee, created an incentive for Goldman to “intentionally create[] an informational vacuum by failing to disclose material information to the Board” respecting its options in seeking to secure the \$100 million in additional equity value.¹⁹¹

The chancellor rejected the malpractice claim against Goldman under the law of California, the jurisdiction in which TIBCO was headquartered, interpreting it to recognize a “classic distinction in tort law, where in ‘situations in which the plaintiff has neither suffered personal injury nor damage to tangible property American law is generally opposed to recovery on a negligence theory.’”¹⁹²

The disposition of the above claims allows liability to attach only in one factual scenario—if the TIBCO board made no “basic inquiries” of Goldman (a duty of care violation) and Goldman intentionally and selfishly chose not to inform the board of material information. But what if Goldman intentionally and selfishly withheld information in circumstances in which the board satisfied its duty of care? Would liability attach to Goldman in that scenario? Plaintiffs in *TIBCO* asserted no claim addressing that hypothetical set of facts. The absence of such a recognized claim is what I mean by the “*TIBCO* problem.”

B. THE FAILURE OF JUDICIAL EXHORTATION

The *TIBCO* problem arises whenever uninformed directors are determined to have acted in conformity with their fiduciary duties. Consider Vice Chancellor Lamb’s decision in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc.*¹⁹³ The *Amylin* case concerned “proxy puts”—provisions in debt instruments by which the election of a new board majority can trigger acceleration of the debt.¹⁹⁴ The stockholder plaintiff claimed that the proxy put was an entrenchment device and that the directors on the pricing committee had breached their duty of care by approving an indenture without discovering the existence of the proxy put.

Vice Chancellor Lamb held that the directors were not grossly negligent because they had retained advisers and a director had asked a pertinent question of outside counsel:

191. *Id.* at *26.

192. *Id.* at *29 (quoting Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111, 112 (1998)) (omission in the original). For a recent article summarizing the conclusions reached by the American Law Institute respecting the economic loss rule, see Ward Farnsworth, *The Economic Loss Rule*, 50 VAL. U. L. REV. 545 (2016). The article notes that an exception to the economic loss rule allows negligence claims against providers of professional services, but only by their clients, and that such a negligence claim is typically duplicative of a breach of contract claim. *Id.* at 560–61.

193. 983 A.2d 304 (Del. Ch.), *aff’d*, 981 A.2d 1173 (Del. 2009) (Table).

194. For a recent discussion of this area of the law, see Sean J. Griffith & Natalie Reisel, *Dead Hand Proxy Puts and Shareholder Value*, 84 U. CHI. L. REV. 1027 (2017); see also Guhan Subramanian, *The Emerging Problem of Embedded Defenses: Lessons from Air Line Pilots Ass’n, International v. UAL Corp.*, 120 HARV. L. REV. 1239, 1242 (2007) (“[T]he validity of embedded defenses remains murky territory in corporate law.”).

The board retained highly-qualified counsel. It sought advice from Amylin’s management and investment bankers as to the terms of the agreement. *It asked its counsel if there was anything “unusual or not customary” in the terms of the Notes, and it was told there was not.* Only then did the board approve the issuance of the Notes under the Indenture.¹⁹⁵

If merely asking a general question bars a challenge to the adoption of a contract that infringes on stockholder voting rights, then legal and financial advisors have an incentive to enable officers and directors to remain in office by keeping them in the dark.

Vice Chancellor Lamb recognized the “troubling reality” that outside counsel “routinely negotiate” contract terms that can “impinge on the free exercise of the stockholder franchise,” a set of rights of which directors “must be especially solicitous”:

This case does highlight the troubling reality that corporations and their counsel routinely negotiate contract terms that may, in some circumstances, impinge on the free exercise of the stockholder franchise. In the context of the negotiation of a debt instrument, this is particularly troubling, for two reasons. First, as a matter of course, there are few events which have the potential to be more catastrophic for a corporation than the triggering of an event of default under one of its debt agreements. Second, the board, when negotiating with rights that belong first and foremost to the stockholders (i.e., the stockholder franchise), must be especially solicitous to its duties both to the corporation and to its stockholders. This is never more true than when negotiating with debtholders, whose interests at times may be directly adverse to those of the stockholders.¹⁹⁶

The vice chancellor’s proposed solution was to highlight the problem and exhort outside counsel to bring proxy puts to the attention of boards of directors:

Outside counsel advising a board in such circumstances should be especially mindful of the board’s continuing duties to the stockholders to protect their interests. Specifically, terms which may affect the stockholders’ range of discretion in exercising the franchise should, even if considered customary, be highlighted to the board. In this way, the board will be able to exercise its fully informed business judgment.¹⁹⁷

This judicial rhetoric is no solution. It lacks the threat of a legal sanction and fails to consider that outside counsel are serving the entrenchment interest of their client representatives—the corporation’s officers and directors—by *not* flagging the existence of an entrenchment device embedded in a corporate contract. Vice Chancellor Lamb’s dicta does not aspire to be law, and it fails the Holmesian “bad man” test of what is law: “If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his

195. 983 A.2d at 318 (emphasis added) (footnote omitted).

196. *Id.* at 319.

197. *Id.* (emphasis added).

reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”¹⁹⁸

In the absence of legal rules (i) requiring directors to inquire of officers or their outside advisors about the existence of embedded defenses and/or (ii) requiring outside counsel or officers to disclose to the board the existence of embedded defenses, proxy puts continued to proliferate after *Amylin*. If anything, the judicial exhortation in *Amylin* may have operated as a roadmap for unscrupulous counsel. In litigation several years later challenging the adoption of a proxy put at ARRIS Group, Inc., a senior officer submitted an affidavit setting forth the same script as in *Amylin*:

. . . I did not focus on the Continuing Directors Provision during my negotiations with BANA. . . .

. . . Prior to approving the Credit Agreement, the Arris Board asked me regarding whether the Credit Agreement contained any terms that were unusual or required the special attention of the Arris Board. I responded that the Credit Agreement’s terms were typical for agreements of this nature and did not require special attention. At no time during the board meeting did anyone identify the Continuing Director Provision for consideration by the Arris Board¹⁹⁹

What prompted some boards to eliminate proxy puts was a transcript ruling involving *Healthways, Inc.*, holding that in certain factual circumstances, fiduciaries could be held liable for breach of the duty of loyalty, and the lender could be held liable for aiding and abetting.²⁰⁰ In *Pontiac General Employees Retirement System v. Ballantine* (“*Healthways*”), the proxy put “arose in the context of a series of pled events and after decisions of this Court that should have put people on notice that there was a potential problem here such that the inclusion of the provision was, for pleading-stage purposes, knowing.”²⁰¹

On the pleaded facts of *Healthways*, the essential element of fiduciary knowledge could be inferred at the pleading stage: “the rise of stockholder opposition, the identified insurgency, the change from the historical practice in the company’s debt instruments, the lack of any document produced to date suggesting informed consideration of this feature, the lack of any document produced to date suggesting negotiation with respect to this feature, etc.”²⁰² For other companies, the available facts may not be sufficient to plead a claim. For purposes of

198. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897). In Delaware, a non-client litigant lacks standing to enforce the Delaware Rules of Professional Conduct, absent misconduct that taints the proceeding and obstructs the orderly administration of justice. *In re Appeal of Infotechnology, Inc.*, 582 A.2d 215 (Del. 1990).

199. Affidavit of David B. Potts at paras. 10–11, *Fire & Police Pension Fund, San Antonio v. Stanzone*, Cons. C.A. No. 10078-VCG (Del. Ch. Jan. 30, 2015).

200. See, e.g., F. William Reindel, “*Dead Hand Proxy Puts*”—*What You Need to Know*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 10, 2015) (discussing the effects of Oral Argument on Defendants’ Motions to Dismiss and Rulings of the Court, *Pontiac Gen. Emps. Ret. Sys. v. Ballantine*, C. A. No. 9789-VCL (Del. Ch. Oct. 14, 2014)), <https://corpgov.law.harvard.edu/2015/06/10/dead-hand-proxy-puts-what-you-need-to-know>.

201. *Healthways*, *supra* note 200, at 81.

202. *Id.* at 76.

further litigation in *Healthways*, surmounting the *TIBCO* problem at a later stage of litigation would turn on factually establishing what the directors actually knew when they were approving the corporate contract and what inquiries they made concerning potential entrenchment. The *TIBCO* problem remains in the absence of disclosure to the board of the operative facts.

C. THE HALF-SOLUTION OF *REVLON* DUTY OF CARE VIOLATIONS

The *TIBCO* problem is of particular concern as applied to contingently compensated financial advisors. As in *TIBCO*, it is commonly the case that the financial advisor to an acquisition target (i) is retained on terms that contemplate a large contingent fee if the corporation is sold, (ii) has substantial, ongoing business relationships with various prospective buyers, (iii) has no expectation of working again for the target company, and (iv) interacts with prospective buyers outside the direct supervision of any fiduciary. If the financial advisor commits misconduct that is hidden from the board, and the company is sold to a particular bidder at an unfair price, the direct beneficiary of that misconduct will be the new owner, who will not pursue a breach of contract claim on behalf of the acquired target company against its former financial advisor.

The problem of a contingently compensated financial advisor misleading a board of directors exists in other transactional contexts. If the financial advisor is retained contingently to evaluate a potential conflicted acquisition, the danger exists that the financial advisor will mislead the special committee into approving an overpriced deal. In the master limited partnership context, financial advisors are routinely retained on a contingent basis to evaluate potential “drop-downs” or similar conflict transactions between affiliates. In a derivative action challenging such a transaction, Vice Chancellor Laster found as follows post-trial regarding a financial advisor that was not named as a defendant:

For the dropdowns, Tudor practiced a different kind of art: the crafting of a visually pleasing presentation designed to make the dropdown of the moment look as attractive as possible. . . . Tudor manipulated its presentations in unprincipled ways to justify the deal.

. . . .

. . . Instead of helping the Committee develop alternatives, identify arguments, and negotiate with the controller, Tudor sought to make the price that Parent proposed look fair. Tudor’s real client was the deal, and the firm did what it could to justify the Fall Dropdown, get to closing, and collect its contingent fee.²⁰³

In the *Revlon* context of enhanced scrutiny respecting sale-of-control transactions, Delaware law has innovated and developed a half-solution. When imposing liability on bankers who defrauded boards of directors (or finding potential liability on a preliminary basis), the Court of Chancery and Delaware Supreme

203. *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, C.A. No. 7141, 2015 WL 1815846, at *22–24 (Del. Ch. Apr. 20, 2015), *rev’d sub nom.* *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016) (reversing due to lack of post-merger standing to maintain the derivative claim).

Court have declared that the board breached its duty of care. Such a declaration of limited wrongdoing by the board has the following practical effects: (i) it establishes a predicate element of aiding and abetting liability against the financial advisor, (ii) it creates a basis for injunctive relief, and (iii) it allows disinterested and independent directors to be exculpated from an award of money damages. Only the financial advisor is answerable in damages. In *Del Monte*, Vice Chancellor Laster explained the doctrinal utility of finding that the board breached its duty of care:

Unless further discovery reveals different facts, the one-two punch of exculpation under Section 102(b)(7) and full protection under Section 141(e) makes the chances of a judgment for money damages [against the directors] vanishingly small. The same cannot be said for the self-interested aiders and abettors. But while the directors may face little threat of liability, they cannot escape the ramifications of Barclays' misconduct. For purposes of equitable relief, the Board is responsible.²⁰⁴

The expedient of finding a breach of the duty of care bears the hallmarks of a legal fiction. Legal fictions pervade the common law and have been indispensable to its development. Sir Henry Maine used the term “to signify any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified.”²⁰⁵ Lon Fuller defined a legal fiction as “either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”²⁰⁶ Declaring a defrauded board in breach of its duty of care has a ring of falseness, but it innovates in a practical way by allowing relief to be granted in extraordinary circumstances not previously confronted.

No legal fiction was required in the foundational fraud-on-the-board case of *Macmillan*. The elements for liability were factually established against all relevant actors. Inside directors Evans and Reilly were primary wrongdoers, while financial advisor Bruce Wasserstein was held liable for “knowingly join[ing] with a fiduciary” in disloyal conduct.²⁰⁷ The entire board was found to have breached “its fundamental duties of loyalty and care in the conduct of this auction” due to its “virtual abandonment of its oversight functions in the face of Evans’ and Reilly’s patent self-interest.”²⁰⁸ The court’s description of the governance of the sale process provided a factual foundation for finding fault with the outside directors: “The board was torpid, if not supine, in its efforts to establish a truly independent auction, free of Evans’ interference and access to confidential data. By placing the entire process in the hands of Evans, through his own chosen financial advisors, with little or no board oversight, the board materially

204. 25 A.3d 813, 818 (Del. Ch. 2011).

205. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 25 (A. Montagu ed. 1986) (1861).

206. LON L. FULLER, *LEGAL FICTIONS* 9 (1967).

207. 559 A.2d 1261, 1284 n.33 (Del. 1989).

208. *Id.* at 1284 n.32.

contributed to the unprincipled conduct of those upon whom it looked with a blind eye.”²⁰⁹

Contrast those facts with *Del Monte*. Vice Chancellor Laster candidly acknowledged that “the Board predominantly made decisions that ordinarily would be regarded as falling within the range of reasonableness for purposes of enhanced scrutiny”²¹⁰ and “sought in good faith to fulfill its fiduciary duties, but failed because it was misled by Barclays.”²¹¹ He extended the affirmative obligation of board oversight to support a finding of a breach of the duty of care and faulted the *Del Monte* board for not making an informed decision respecting the “sur-reptitious and unauthorized pairing of Vestar and KKR” into a single bidding group.²¹² Yet the opinion strongly suggests that the board was unaware of the pairing. The opinion quotes a colloquy of deposition testimony by the chairman of the strategic committee about how he did not recall any board discussion or knowledge of the subject.²¹³

The vice chancellor drew the following legal conclusion: “Although the blame for what took place appears at this preliminary stage to lie with Barclays, the buck stops with the Board.”²¹⁴ The seeming falseness of that legal conclusion is surpassed only by its utility. The court granted a preliminary injunction delaying closing of the deal and allowing a superior bid to emerge while also setting the stage for a potential damages award against Barclays, the principal wrongdoer, in the event the challenged merger was consummated.

In *RBC Capital*, the Delaware Supreme Court adopted this doctrinal half-solution to the *TIBCO* problem. *RBC* was found to have committed fraud on the board, for which *RBC* was held liable for the resulting damages to Rural/Metro’s former stockholders. The board was found to have breached its duty of care, principally through the lack of proper oversight of *RBC*. Findings of negligence by the board allowed *RBC* to be held liable for aiding and abetting breaches of fiduciary duty. In the words of the Delaware Supreme Court, “*RBC*’s illicit manipulation of the Board’s deliberative processes for self-interested purposes was enabled, in part, by the Board’s own lack of oversight.”²¹⁵

The legal innovation adopted in *RBC Capital* was to elaborate on how directors’ due care obligations in the context of *Revlon*²¹⁶ include the active oversight of conflicted financial advisors, which entails an affirmative obligation to take protective measures:

209. *Id.* at 1280; see also *id.* at 1282 (pointing to the lack of “board planning and oversight to insulate the self-interested management from improper access to the bidding process, and to ensure the proper conduct of the auction by truly independent advisors selected by, and answerable only to, the independent directors”).

210. *In re Del Monte Foods Co. S’holders Litig.*, 25 A.3d 813, 817 (Del. Ch. 2011).

211. *Id.* at 818.

212. *Id.* at 833–34.

213. *Id.* at 834.

214. *Id.* at 835.

215. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015).

216. *Id.*

[D]irectors need to be active and reasonably informed when overseeing the sale process, including identifying and responding to actual or potential conflicts of interest. . . . A board's consent to the conflicts of its financial advisor necessitates that the directors be especially diligent in overseeing the conflicted advisor's role in the sale process. . . . [T]he board should require disclosure of, on an ongoing basis, material information that might impact the board's process. For instance, the board could, when faced a conflicted advisor, as a contractual matter, treat the conflicted advisor at arm's-length, and insist on protections to ensure that conflicts that might impact the board's process are disclosed at the outset and throughout the sale process.²¹⁷

Various doctrinal aspects of Delaware law had to fall into place to hold RBC responsible for a claim predicated on findings of breach of fiduciary duty committed by Rural's board. Slightly different contextual facts and legal rulings would have presented the *TIBCO* problem and allowed RBC to escape liability.

The determination that the board's conduct in *RBC Capital* was subject to *Revlon's* enhanced judicial scrutiny (i.e., applying a range of reasonableness standard akin to negligence rather than gross negligence) was not preordained. *Corwin* had been decided just three months earlier—immediately after oral argument in *RBC Capital*—and it questioned the continuing vitality of *Revlon* in the absence of a real-time battle for corporate control. In a footnote, the court in *RBC Capital* quoted the following passage from *Corwin*:

Unocal and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M&A decisions in real time, before closing. They were not tools designed with post-closing money damages claims in mind, the standards they articulate do not match the gross negligence standard for director due care liability under *Van Gorkom*²¹⁸

Other questions existed about the applicability of *Revlon*. Neither party had argued in the Court of Chancery that *Revlon* governed the board's conduct. In the Delaware Supreme Court, RBC argued that a due care violation required a finding of gross negligence—not unreasonableness. It acknowledged the applicability of *Revlon* to the ultimate decision to sell Rural/Metro but argued that *Revlon* scrutiny was inapplicable at the initiation of the sale process, when the board had charged the special committee with evaluating strategic alternatives.²¹⁹

The Delaware Supreme Court held that *Revlon* applied from the outset of the sale process but confined its holding to the “unusual facts” of the case.²²⁰ An unusual fact of particular importance was that the board subsequently ratified the initiation of a sale process by certain key individuals without prior board

217. *Id.* at 855–56 & nn.129–30.

218. *Id.* at 857 n.139 (quoting *Corwin*, 125 A.3d at 312). *But cf. In re PLX Tech. Inc. S'holders Litig.*, No. 9880-VCL, 2018 WL 747180, at *2–3 (Del. Ch. Feb. 6, 2018) (collecting cases regarding the application of enhanced scrutiny post-closing).

219. *RBC*, 129 A.3d at 848–49.

220. *Id.* at 853.

authorization.²²¹ The Delaware Supreme Court also gave weight to “the parties’ agreement on appeal that *Revlon* applies” and the parties’ acceptance of “the predicate ‘facts as found.’”²²²

More important than the above idiosyncratic aspects of the case, the court appeared persuaded by the utility of holding that inadequate board oversight in the *Revlon* context creates liability for those who commit fraud on the board. It noted the practical consequences of not applying *Revlon*:

*To sanction an argument that Revlon applies only at the very endpoint of the sale process—and not during the course of the overall sale process—would afford the Board the benefit of a more lenient standard of review where the sale process went awry, partially due to the Board’s lack of oversight. Such a result would potentially incentivize a board to avoid active engagement until the very end of a sale process by delegating the process to a subset of directors, officers, and/or advisors. . . . [T]o sanction RBC’s contention would allow the Board to benefit from a more deferential standard of review during the time when, due to its lack of oversight, the Special Committee and RBC engaged in a flawed and conflict-ridden sale process.*²²³

The presence of a legal fiction is suggested by the court’s acknowledgement that from the perspective of the disinterested members of the board, the sale process appeared to be objectively reasonable:

We agree with the trial court’s suggestion that the reasonableness of *initiating a sale process to run in tandem with the EMS auction, absent conflicts of interest*, would be one of the many debatable choices that fiduciaries and their advisors must make . . . and it would fall within the range of reasonableness

The record indicates that Rural’s Board was unaware of the implications of the dual-track structure of the bidding process and that the design was driven by RBC’s motivation to obtain financing fees in another transaction with Rural’s competitor.²²⁴

A combination of factors in *RBC Capital* permitted a determination that enhanced judicial scrutiny applied to the board’s oversight of RBC. Applying *Revlon* was consistent with earlier case law, the parties agreed on appeal that *Revlon* scrutiny was triggered at some point, there were unusual facts about the initiation of the sale process, and *Revlon* scrutiny allowed for a liability finding against RBC. One can imagine related scenarios in which *Revlon* scrutiny would not fit (i.e., a stock-for-stock merger, a financing transaction, or an acquisition of another company). In such circumstances, the *TIBCO* problem remains.

A second legal conclusion that solved the *TIBCO* problem in *RBC Capital* was that the board breached the duty of disclosure. The transaction structure in *RBC Capital* required an affirmative vote by public stockholders, which allowed for a finding that the board was negligent respecting false and misleading disclosures about RBC’s wrongdoing and conflicts. The two sets of disclosure violations in *RBC Capital*

221. *Id.*

222. *Id.* at 854.

223. *Id.* at 853–54, 853 n.121 (emphasis added).

224. *Id.* at 854–55 (emphasis added).

were (i) the disclosure of an RBC-created valuation range that was “artificial and misleading” and the disclosure of information about EBITDA that was “material and false”²²⁵ and (ii) the failure to disclose conflicts of interest and misconduct by RBC (i.e., “how RBC used the Rural sale process to seek a financing role in the EMS transaction”²²⁶ and RBC’s “pursuit of Warburg’s financing business”).²²⁷

The breach of the duty of disclosure in *RBC Capital* is itself a form of legal fiction. It exists in name only as to the directors and is of questionable grounding in fiduciary principles.²²⁸ The information in question was deemed “reasonably available” to the directors,²²⁹ but it was neither gathered by the directors nor known to them. RBC hid information from the board, and the directors were deemed negligent without the possibility of damages against them. That deemed violation of fiduciary duty had the immense utility of allowing the court to hold RBC liable in damages for aiding and abetting.

RBC was deemed solely responsible for damages flowing from its various frauds on the board. The Delaware Supreme Court affirmed the Court of Chancery’s ruling that as a matter of equity, RBC was foreclosed from availing itself of Delaware’s joint tortfeasor statute to reduce its liability, despite the common liability of certain director defendants and RBC being the only non-settling defendant, to the extent RBC’s liability was predicated on fraud on the board.²³⁰ This result was compelled by a principle of equity: “[I]f RBC were permitted to seek contribution for these claims from the directors, then RBC would be taking advantage of the targets of its own misconduct.”²³¹

But what if a financial advisor commits fraud on the board in a context in which there is no *Revlon* scrutiny or public stockholder vote? In such circumstances, the financial advisor can make a strong argument that it is not liable because there is no underlying breach of fiduciary duty.

In sum, the Delaware Supreme Court’s elaboration of director-oversight obligations in a sale process solved the *TIBCO* problem in the factual and legal context of *RBC Capital* by confirming a path for monetary liability against RBC, an active wrongdoer that was not found to have conspired with any fiduciary. However, the Delaware Supreme Court did not create rules that would allow for monetary liability whenever a financial advisor engages in “illicit manipulation of the Board’s deliberative processes for self-interested purposes,”²³² regardless of the transaction structure.

225. *Id.* at 860.

226. *Id.* at 860–61.

227. *Id.* at 861.

228. See generally Lawrence A. Hamermesh, *Calling Off the Lynch Mob: The Corporate Director’s Fiduciary Disclosure Duty*, 49 VAND. L. REV. 1087, 1172–73 (1996) (“In the absence of lack of care in gathering and presenting material information, there simply is no fiduciary ‘wrong’ in this context [the fiduciary recommendation disclosure duty] at all.”).

229. *RBC*, 129 A.3d at 859.

230. *Id.* at 876. Shackelton and DiMino shared liability for approving an unreasonable sale process that served their respective personal agendas.

231. *Id.*

232. *Id.* at 863.

D. A PROPOSED GENERAL SOLUTION TO THE *TIBCO* PROBLEM

A general solution to the *TIBCO* problem requires a theory of liability against financial advisors that does not depend on the culpability of directors for breaching their fiduciary duties. The principle of not “grant[ing] immunity to an advisor because its own clients were duped by it”²³³ implies the sufficiency of pleading and proving that the corporation or its stockholders were harmed as a consequence of a fraud perpetrated against a duped board of directors.

My proposed solution to the *TIBCO* problem is recognition of a tort for knowing misconduct that corrupts board decision-making. Recognizing fraud on the board as a distinct tort would eliminate an element of proof that is not logically an aspect of the wrong. If an advisor’s fraud proximately causes a distinct injury to the corporation’s stockholders, then a stockholder should be able to assert a direct claim against the advisor for fraud on the board. The stockholder plaintiff who establishes fraud on the board should not also have to prove that a duped board of directors breached its fiduciary duties. This extension of *RBC Capital* is informed by a scholarly debate that arose during its litigation and is consistent with tort law principles.

The *RBC Capital* litigation gave rise to various doctrinal debates about financial advisor liability, including whether any proper claim existed against financial advisors outside a hypothetical contract claim by their corporate clients (which would pass to the acquirer in a merger).²³⁴ A lightning rod for controversy was a dictum by Vice Chancellor Laster characterizing financial advisors as corporate “gatekeepers,” supported by citations to academic articles on “gatekeeper liability.”²³⁵ If accepted as a matter of Delaware law, this dictum would create a basis for claims against financial advisors in a wide variety of situations.

During the twenty-one months that elapsed between the vice chancellor’s liability opinion and the Delaware Supreme Court’s opinion on appeal, scholars who agreed with the outcome of *RBC Capital* but disagreed with the dictum about gatekeeper liability debated over how to conceptualize the role of financial advisors in M&A transactions. The conceptual question would have practical import for the assertion of future claims against financial advisors.

Professors William Bratton and Michael Wachter focus on banker–client contracting in their analysis of the problem.²³⁶ They argue that boards should deal with advisors at “arm’s-length” and oversee them proactively, “monitoring the advisor’s activities and using contract to facilitate oversight and position the board

233. *Singh v. Attenborough*, 137 A.3d 151, 153 (Del. 2016).

234. See, e.g., Martin Lipton, *The Delaware Courts and the Investment Banks*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 30, 2015), <https://corpgov.law.harvard.edu/2015/10/30/the-delaware-courts-and-the-investment-banks> (identifying during the pendency of the *RBC Capital* appeal “difficult policy and doctrinal questions raised by this line of decisions” for the Supreme Court to address, including, “Does the use of tort principles to allow stockholder plaintiffs to directly challenge the work of bankers impair the ability of boards and financial advisors to privately order their affairs through contract?”).

235. *In re Rural Metro Corp. S’holders Litig.*, 88 A.3d 54, 88–89, 89 nn.14–15 (Del. Ch. 2014).

236. William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 64–65 (2014).

to take appropriate action.”²³⁷ Their approach was championed in an article by two practitioners who counseled corporations on how to draft their banker engagement letters.²³⁸

On the other side of the scholarly debate is Professor Tuch. He argues that “the more plausible characterization of the bank is that it remains a fiduciary of its client” and owes a duty of loyalty during the course of an M&A engagement.²³⁹ According to Tuch, “the gatekeeper label is inapposite to the M&A advisors’ role” because “the wrong here is inflicted by the M&A advisor upon the client,” while the gatekeeper label “targets the wrongs of the client by imposing responsibilities on the gatekeeper to deter those wrongs.”²⁴⁰

The debate was crystallized in an appellate brief filed by the Securities Industry and Financial Markets Association (“SIFMA”) as *amicus curiae*. SIFMA argued that “gatekeeper” inaccurately characterizes the role of the financial advisor, and that . . . label should not become a fulcrum to superimpose a new quasi-fiduciary common law structure on relationships that have long been based on contracts negotiated between sophisticated parties.”²⁴¹ In a lengthy footnote 191, the Delaware Supreme Court rejected the “gatekeeper” characterization and adopted the contractual framework advocated by Bratton, Wachter, and SIFMA:

The trial court’s [gatekeeper] description does not adequately take into account the fact that the role of a financial advisor is primarily contractual in nature, is typically negotiated between sophisticated parties, and can vary based upon a myriad of factors. Rational and sophisticated parties dealing at arm’s-length shape their own contractual arrangements and it is for the board, in managing the business and affairs of the corporation, to determine what services, and on what terms, it will hire a financial advisor to perform in assisting the board in carrying out its oversight function.²⁴²

The next move in the scholarly debate was by Professor Deborah DeMott, who wrote two essays in the aftermath of the Delaware Supreme Court decision in *RBC Capital*.²⁴³ Both essays argue that RBC was an intentional tortfeasor and that the finding of liability against RBC fell comfortably within established categories of

237. *Id.* at 61.

238. Eric S. Klinger-Wilensky & Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-Rural/Metro Thoughts and Observations*, 71 *BUS. LAW.* 53 (2015).

239. Andrew F. Tuch, *Disclaiming Loyalty: M&A Advisors and Their Engagement Letters: In Response to William W. Bratton & Michael L. Wachter*, *BANKERS AND CHANCELLORS*, 93 *TEX. L. REV.* SEE ALSO 211 (2015).

240. Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 *TEX. L. REV.* 1079, 1154 (2016).

241. See Brief of the Securities Industry and Financial Markets Association as *Amicus Curiae* in Support of Appellant in Support of Reversal at 7, *RBC Capital Mkts., LLC v. Jervis, C.A. No. 140*, 2015 (Del. May 28, 2015).

242. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 865 n.91 (Del. 2015) (citing Bratton & Wachter, *supra* note 236, at 36).

243. Deborah A. DeMott, *Fiduciary Breach, Once Removed*, 94 *TEX. L. REV.* SEE ALSO 238 (2016); Deborah A. DeMott, *Culpable Participation in Fiduciary Breach*, in *RESEARCH HANDBOOK ON FIDUCIARY LAW* 219 (D. Gordon Smith & Andrew S. Gold eds., 2018).

intentional tort. DeMott explains: “Thus framed, the outcomes in recent M&A cases are not departures from well-established tort doctrine.”²⁴⁴ DeMott adds the following gloss to footnote 191 of the Delaware Supreme Court decision: “knowingly to dupe one’s client to its detriment constitutes an intentional tort that carries legal consequences, which are likely to follow regardless of how the parties’ contractual arrangements defined the advisor’s responsibilities.”²⁴⁵

DeMott’s grounding of banker misconduct under the heading of “intentional tort” helps explain why intentional misconduct by a financial advisor is actionable apart from contract law. “By committing an intentional tort, accessory actors breach duties they themselves owe.”²⁴⁶ Stockholders of the financial advisor’s client are logical plaintiffs for a claim of intentional tort: “[W]e have a right ‘good against the world’ not to be the subject of another’s action that constitutes an intentional tort.”²⁴⁷ From the perspective of the wrongdoer, “[a]ctors who culpably participate in a fiduciary’s breach themselves, as intentional tortfeasors, breach a duty to the fiduciary’s beneficiary; they contravene the beneficiary’s right not to be mistreated in this particular fashion.”²⁴⁸

DeMott’s two essays identify three intentional torts that can be applicable to financial advisor misconduct—aiding and abetting breach of fiduciary duty, fraud, and intentional interference with contract. Each of these torts has its shortcomings for purposes of identifying a claim of general applicability.

DeMott defends the Delaware courts’ reliance on aiding and abetting doctrine: “the salience of this tort to recent M&A litigation represents neither a doctrinal innovation nor an extension of prior law, just the application of well-settled tort doctrine to conduct in connection with a large transaction in which most—but not all—of the target’s directors were negligent, not conflicted or otherwise disloyal.”²⁴⁹ But as discussed above, outside the *Revlon* or duty-of-disclosure context, negligence by a fiduciary is not sufficient to state a claim for breach of fiduciary duty.

DeMott notes that the intentional tort of fraud has particular resonance in *RBC Capital*: “the Supreme Court’s factual narrative underlies its parsing of elements requisite for aiding and abetting liability in terms that appear congenial to a complementary account of liability—fraud—to sustain the judgment against the appellant. . . . Knowingly to mislead another through a material misrepresentation to induce that person to act or refrain from acting is a predicate of common law fraud.”²⁵⁰ However, it is problematic for the stockholder of the client corporation to assert a claim of fraud against the financial advisor:

[O]nly the recipient of a fraudulent misrepresentation may recover against the maker of the statement. The required match between recipient, reliance, and loss suffered through reliance is not a perfect fit with the configuration in *RBC Capital*, in which

244. DeMott, *Culpable Participation in Fiduciary Breach*, *supra* note 243, at 219.

245. DeMott, *Fiduciary Breach, Once Removed*, *supra* note 243, at 248.

246. DeMott, *Culpable Participation in Fiduciary Breach*, *supra* note 243, at 219.

247. *Id.* at 229 (quoting ROBERT STEVENS, *TORTS AND RIGHTS* 100 (2007)).

248. *Id.* at 237.

249. *Id.* at 231.

250. DeMott, *Fiduciary Breach, Once Removed*, *supra* note 243, at 243–44 (footnotes omitted).

the target's directors were the recipients of the misrepresentations but the loss was suffered by the shareholders whose company was sold. For this reason (and no doubt others) aiding and abetting a breach of fiduciary duty is a more plausible theory of liability.²⁵¹

DeMott points to wrongful interference with contract as an intentional tort that may apply to financial-advisor misconduct when the client is an alternative entity that disclaims the existence of fiduciary duties: "It's hard to see a principled basis for a categorical exclusion of accessory liability in the alternative-entity world. After all, unjustified interference with another party's contractual rights is a well-established tort."²⁵² The absence of an express contractual standard in an LLC or limited partnership agreement is no barrier to accomplice liability in tort against the financial advisor: "[T]ortious interference claims are not limited to expressly delineated contractual terms but extend to the implied covenant of good faith and fair dealing. . . . By attempting to take advantage of a procedure specified in a contractual variant of fiduciary duty—such as obtaining a fairness opinion from a qualified financial advisor to bless a conflicted M&A transaction—a general partner may breach the implied covenant when its conduct is arbitrary or unreasonable."²⁵³

DeMott's discussion of how the above doctrines of intentional tort support existing Delaware case law suggests a basis for extending the law. The *TIBCO* problem exists due to the lack of a recognized intentional tort for knowing misconduct that corrupts board decision-making regardless of the culpability of the board. Such a claim of intentional tort would allow a stockholder of a corporation whose board was duped by a self-interested financial advisor to sue the financial advisor without running afoul of the economic loss rule.²⁵⁴

Recognizing a tort of fraud on the board is tantamount to recognizing that stockholders have a protected expectancy that disinterested directors, when presented with a potential transaction, will be fully informed so they can choose what they perceive to be the value-maximizing alternative.²⁵⁵ A financial advisor that defrauds a board into making a value-destroying choice would be answerable in tort to any proper plaintiff (i.e., the corporation or its stockholders) who suffers an injury proximately caused by the fraud.

251. *Id.* at 244 n.39 (citing RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 (Tentative Draft No. 2, 2014)). This doctrinal issue does not appear insuperable, especially if a stockholder/director were defrauded, or if the fraud were transmitted to the stockholder through a proxy statement. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 11 cmt. b (Tentative Draft No. 2, 2014) ("To recover under this Section, a plaintiff's reliance may be indirect; in other words, the plaintiff may in some cases rely on a statement received second-hand.").

252. DeMott, *Culpable Participation in Fiduciary Breach*, *supra* note 243, at 237.

253. *Id.* at 227–36 (citing *NAMA Holdings, LLC v. Related WMC LLC*, C.A. No. 7394, 2014 WL 6436647 (Del. Ch. Nov. 17, 2013); *Gerber v. Enter. Holdings, LLC*, 67 A.3d 400, 420 (Del. 2013), *overruled on other grounds by Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808 (Del. 2013)).

254. See *supra* note 192 and accompanying text.

255. See, e.g., Transcript at 112, *In re Activision Blizzard, Inc. S'holder Litig.*, Cons. C.A. No. 8885-VCL (Del. Ch. June 6, 2014) ("What the stockholders had before was shares that included a range of possible expectancies. Even in the nonfiduciary context, we recognize claims when people tortiously interfere with business expectancies.").

This notion is consistent with a recent, authoritative elaboration of tort doctrine. Section 17 of the approved draft Restatement (Third) of Torts: Liability for Economic Harm, entitled “Interference with Economic Expectation,” provides as follows:

A defendant is subject to liability for interference with economic expectation if:

- (a) the plaintiff had a reasonable expectation of an economic benefit from a relationship with a third party;
- (b) the defendant committed an independent and intentional legal wrong;
- (c) the defendant intended to interfere with the plaintiff’s expectation; and
- (d) the defendant’s wrongful conduct caused the expectation to fail.²⁵⁶

For present purposes, consider the plaintiff to be the stockholder, the defendant to be the financial advisor, and the third party to be the board of directors. Consider fraud on the board to be an “intentional legal wrong” that interferes with the stockholder’s expectation of economic benefit from its relationship with a board of directors that is presented with a potential transaction.

Section 17 “generally involves cases in which a defendant’s intentional wrong prevents the plaintiff from making a contract with another party or otherwise pursuing economic gain.”²⁵⁷ Notably, the plaintiff may be injured as a consequence of a defendant’s fraud directed at a third party:

The rationale for such liability is strongest when a defendant commits a wrong that injures the plaintiff, but for which the plaintiff cannot sue directly because the immediate victim of the wrong was someone else. If a defendant commits a fraud against a third party, and as a result the third party cancels a planned transaction with the plaintiff, the plaintiff cannot sue the defendant for fraud. But the fraud may have caused great damage to the plaintiff, and less damage—possibly none—to the third party who was the immediate victim. . . . It is true that a plaintiff ordinarily cannot sue to recover for economic losses that result from a tort committed against someone else. . . . But when the defendant’s misconduct is intentional and satisfies the other elements of this Section, the case for recovery is compelling.

. . . For example, a defendant may be held liable under this Section for making fraudulent statements to a third party that interfere with the plaintiff’s business expectation, and the claim survives even if the third party suffered no damage and so would not be able to sue for fraud.²⁵⁸

One fact situation that falls within the language and stated rationale of section 17 would be a disappointed bidder who is injured by a financial advisor who fraudulently foists an alternative, inferior merger transaction on its client. The disappointed bidder could assert a claim against the financial advisor. One of

256. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON HARM § 17 (Tentative Draft No. 3, 2018). Tentative Draft No. 3 was approved by the American Law Institute at its 2018 annual meeting, subject to the discussion at the meeting and the usual editorial prerogative, and it represents the institute’s official position until the official text of the entire project is published. See *Restatement of the Law Third, Torts: Liability for Economic Harm*, AM. L. INST., <https://www.ali.org/publications/show/torts-liability-economic-harm/#drafts> (last visited Oct. 6, 2019).

257. RESTATEMENT (THIRD) OF TORTS, *supra* note 256, § 17 cmt. a.

258. *Id.* § 17 cmt. b (citations omitted) (emphasis added).

the illustrations to section 17 reads in part: "Consultant receives an attractive bid from Buyer and is poised to submit the bid with a favorable recommendation to Corporation. Rival then bribes Consultant to make Buyer's bid less attractive by falsifying its terms."²⁵⁹ In such circumstances, Consultant is subject to liability to Buyer.

Put differently, section 17 allows a disappointed bidder to sue the financial advisor of a prospective target corporation for fraud on the board of directors of the target. There exists a strong analogy between a fraud-on-the-board claim brought by a disappointed bidder and the same claim brought on behalf of a stockholder of the target. The immediate victim of the fraud is the board of directors of the prospective merger partner, but the duped directors suffer no injury. A permissible plaintiff is the disappointed suitor. Can a stockholder of the target also bring suit?

The stockholders are injured by having an inferior transaction imposed on them. The stockholders have a reasonable expectation that a deal will be pursued if and only if it is superior to the available alternatives. If the financial advisor has committed an "independent and intentional legal wrong" (e.g., fraud on the board) to selfishly pursue an inferior alternative, then the stockholders are deprived of the benefit of the superior alternative. The case for recovery would seemingly be as compelling as the claim brought against the financial advisor by the disappointed bidder.

It would be incongruous for the law to give greater protection to the disappointed bidder than it does to the stockholder of the target. After all, the most sympathetic plaintiffs in the hostile takeover battles of the 1980s were disappointed bidders who were prevented from consummating superior transactions. Bidders such as Mills Acquisition Co. in the *Macmillan* litigation sued in their capacity as minority stockholders who had purchased nominal stakes in the target corporation, not as disappointed bidders. They brought breach of fiduciary duty claims, not claims for interference with economic expectation.

Tort law (i.e., section 17) does not require that the defrauded immediate victim be culpable for the injured plaintiff to maintain a claim against the defendant that committed the fraud. It would be consistent with tort law to eliminate the element of director culpability in a stockholder claim based on tortious interference with the deliberative process of disinterested, independent directors.

Moreover, as discussed in Part I, our current stockholder litigation regime can be reconceived as protecting an expectancy of stockholders that the board of directors (or special committee of the board) negotiating on their behalf has not been defrauded or coerced and is not engaged in fraud or coercion. Judicial protection of that stockholder expectancy should not turn on the identity of the person or persons who are committing tortious misconduct directed against the board of directors. A stockholder's ability to challenge a transaction tainted by fraud on the board should not depend on whether the fraud was committed by a fiduciary or financial advisor or whether the directors were culpable participants

259. *Id.* § 17 ill. 19.

in a fraud committed by a financial advisor. The operative claim is that a defendant's intentional misconduct that constituted an independent legal wrong (i.e., fraud or coercion) tortiously interfered with the deliberative processes of the board of directors and proximately caused damage to the stockholders or the corporation.²⁶⁰

CONCLUSION

This article is the third in a trilogy about the contested legacy of *RBC Capital*.²⁶¹ Is *RBC Capital* a case about an aberrant set of facts litigated under near-obsolete procedural rules (i.e., expedited discovery in anticipation of a disclosure settlement, objector discovery, *Revlon* enhanced scrutiny, and no *Corwin* defense), or is its affirmed finding of an “illicit manipulation of the Board’s deliberative processes for self-interested purposes”²⁶² revelatory of an omnipresent temptation for fiduciaries and their advisors that corporate law properly aims to deter and remedy? This article argues for confronting the enduring problem of tortious misconduct that corrupts board decision-making, which continues to animate Delaware breach of fiduciary duty jurisprudence. The substantive and procedural law of Delaware would benefit from its express recognition. In the specific context of tortious misconduct committed by a non-fiduciary against the deliberative processes of a board of directors, I recommend judicial recognition of a freestanding tort consistent with the elements of intentional interference with economic expectation.

260. Another potential application of this proposed rule would be to hold liable a non-fiduciary stockholder activist or potential acquirer who uses extortionate tactics against incumbent directors to gain advantage in a control contest. One control contest gave rise to such allegations. See *Karmanos v. Bedi*, No. 336577, 2018 WL 6252038, at *1 (Mich. Ct. App. Nov. 29, 2018) (dismissing for lack of standing a claim by a former CEO that a stockholder activist had told three board members that dossiers containing private information about them had been compiled and that the information would be embarrassing to them if revealed); *Adelman v. Compuware Corp.*, No. 333209, 2017 WL 6389899, at *12 (Mich. Ct. App. Dec. 14, 2017) (“While Henderson[, one of the three board members,] believed that Elliott attempted to engage in intimidation, Henderson averred that Elliott was not successful.”), *appeal denied*, 917 N.W.2d 374 (Mich. 2018).

261. See Friedlander, *supra* note 150; Friedlander, *supra* note 19.

262. *RBC Capital Mkts., LLC v. Jervis*, 129 A.3d 816, 863 (Del. 2015).