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1. *8 Del. C. § 141*
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8 Del. C. § 141

This document is current through 84 Del. Laws, c. 254.

Delaware Code Annotated > Title 8 Corporations (Chs. 1 — 6) > Chapter 1 General Corporation Law (Subchs. I — XVIII) > Subchapter IV Directors and Officers (§§ 141 — 146)

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonstock corporations; reliance upon books; action without meeting; removal.

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than ⅓ of the total number of directors. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

(c)

(1) All corporations incorporated prior to July 1, 1996, shall be governed by this paragraph (c)(1) of this section, provided that any such corporation may by a resolution adopted by a majority of the whole board elect to be governed by paragraph (c)(2) of this section, in which case this paragraph (c)(1) of this section shall not apply to such corporation. All corporations incorporated on or after July 1, 1996, shall be governed by paragraph (c)(2) of this section. The board of directors may, by resolution passed by a majority of the whole board, designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not the member or members present constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any

such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the certificate of incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in § 151(a) of this title, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series), adopting an agreement of merger or consolidation under § 251, § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the bylaws of the corporation; and, unless the resolution, bylaws or certificate of incorporation expressly so provides, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to § 253 of this title.

(2) The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation.

(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee. Except for references to committees and members of committees in subsection (c) of this section, every reference in this chapter to a committee of the board of directors or a member of a committee shall be deemed to include a reference to a subcommittee or member of a subcommittee.

(4) A majority of the directors then serving on a committee of the board of directors or on a subcommittee of a committee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater or lesser number, provided that in no case shall a quorum be less than ⅓ of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the certificate of incorporation, the bylaws, a resolution of the board of directors or a resolution of a committee that created the subcommittee requires a greater number.

(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes;

the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. The certificate of incorporation or bylaw provision dividing the directors into classes may authorize the board of directors to assign members of the board already in office to such classes at the time such classification becomes effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. Any such provision conferring greater or lesser voting power shall apply to voting in any committee, unless otherwise provided in the certificate of incorporation or bylaws. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

(f) Unless otherwise restricted by the certificate of incorporation or bylaws, (1) any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission, and (2) a consent may be documented, signed and delivered in any manner permitted by § 116 of this title. Any person (whether or not then a director) may provide, whether through instruction to an agent or otherwise, that a consent to action will be effective at a future time (including a time determined upon the happening of an event), no later than 60 days after such instruction is given or such provision is made and such consent shall be deemed to have been given for purposes of this subsection at such effective time so long as such person is then a director and did not revoke the consent prior to such time. Any such consent shall be revocable prior to its becoming effective. After an action is taken, the consent or consents relating thereto shall be filed with the minutes of the proceedings of the board of directors, or the committee thereof, in the same paper or electronic form as the minutes are maintained.

(g) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors of any corporation organized under this chapter may hold its meetings, and have an office or offices, outside of this State.

(h) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.

(i) Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by the board, may participate in a meeting of such board, or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.

(j) The certificate of incorporation of any nonstock corporation may provide that less than $^1/_3$ of the members of the governing body may constitute a quorum thereof and may otherwise provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section. Except as may be otherwise provided by the certificate of incorporation, this section shall apply to

such a corporation, and when so applied, all references to the board of directors, to members thereof, and to stockholders shall be deemed to refer to the governing body of the corporation, the members thereof and the members of the corporation, respectively; and all references to stock, capital stock, or shares thereof shall be deemed to refer to memberships of a nonprofit nonstock corporation and to membership interests of any other nonstock corporation.

(k) Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except as follows:

(1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, stockholders may effect such removal only for cause; or

(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against such director's removal would be sufficient to elect such director if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which such director is a part.

Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole.

History

8 Del. C. 1953, § 141; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 3; 57 Del. Laws, c. 148, §§ 5, 6; 57 Del. Laws, c. 421, § 1; 59 Del. Laws, c. 437, §§ 2-5; 64 Del. Laws, c. 112, § 6; 65 Del. Laws, c. 127, § 3; 66 Del. Laws, c. 136, §§ 2, 3; *70 Del. Laws, c. 79*, § 7; *70 Del. Laws, c. 186*, § 1; *70 Del. Laws, c. 349*, § 2; *71 Del. Laws, c. 339*, §§ 11-13; *72 Del. Laws, c. 343*, §§ 4-6; *73 Del. Laws, c. 298*, § 2; *74 Del. Laws, c. 84*, § 2; *74 Del. Laws, c. 326*, § 2; *75 Del. Laws, c. 30*, § 1; *75 Del. Laws, c. 306*, §§ 3, 4; *76 Del. Laws, c. 145*, § 1; *77 Del. Laws, c. 253*, §§ 10-12; *79 Del. Laws, c. 327*, § 3; *80 Del. Laws, c. 265*, §§ 3-5; *82 Del. Laws, c. 45*, § 4; *82 Del. Laws, c. 256*, § 8.

Annotations

Cross references.

Research References and Practice Aids

Revisor's note.

Section 20 of *72 Del. Laws, c. 343*, provides: "This act shall become effective July 1, 2000."

Section 16 of *73 Del. Laws, c. 298*, provides: "This act shall become effective July 1, 2002."

Section 21 of *74 Del. Laws, c. 84*, provides: "This act shall become effective on August 1, 2003."

Section 9 of *74 Del. Laws, c. 326*, provides: "This act shall become effective August 1, 2004."

Section 80 of *75 Del. Laws, c. 30*, provides: "This act shall become effective August 1, 2005."

Section 8 of *75 Del. Laws, c. 306* provided: "Sections 1 through 7 of this act shall become effective on August 1, 2006."

Section 17 of *76 Del. Law, c. 145*, provided: “Sections 1 through 10 shall be effective on August 1, 2007.”

Section 71 of *77 Del. Laws, c. 253*, provides: “Effective date. Sections 1 through 46, 51 through 60, and 63 through 70 shall be effective on August 1, 2010.”

Section 8 of *79 Del. Laws, c. 327*, provided: “This act shall become effective on August 1, 2014, except that § 7 shall be effective with respect to merger agreements entered into on or after August 1, 2014.”

Section 16 of *80 Del. Laws, c. 265*, provided in part: “Sections 1, 3 through 6, and 12 through 15 shall be effective on August 1, 2016.”

Section 22 of *82 Del. Laws, c. 45*, provided: “Sections 1 through 14 and Sections 16 through 20 of this act shall be effective on August 1, 2019.”

Section 22 of *82 Del. Laws, c. 256*, provided: “Each of Sections 1 through 3, Sections 5 through 13, Section 16, and Sections 17 (other than with respect to the repeal of Section 363(b)(2) [of Title 8]) through 21 of this act shall be effective upon its enactment into law.” The act became effective upon the signature of the Governor on July 16, 2020.

Effect of amendments.

79 Del. Laws, c. 327, added the last two sentences in (f).

80 Del. Laws, c. 265, deleted “except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum” at the end of the penultimate sentence in (b); added the final sentence in (c)(3); added (c)(4); and deleted “or subcommittee” following “any committee” in the penultimate sentence of (d).

82 Del. Laws, c. 45, effective Aug. 1, 2019, in (f), deleted “and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee” following “electronic transmission” from the end of the first sentence, deleted the former second sentence, and added the final sentence.

82 Del. Laws, c. 256, effective July 16, 2020, in the first sentence of (f), added the “(1)” designation and clause (2).

Cross references.

Certificate of incorporation, contents, § 102 of this title.

Corporate officers, limitation of actions, *§ 8114 of Title 10*.

Director’s bonds, limitation of actions, *§ 8114 of Title 10*.

Merger of domestic corporations, § 251 of this title.

Nonstock corporations, applicability, § 114 of this title.

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I. In General.

Applicability.

Where there is no clear contractual language that preempts default fiduciary duty rules, the courts of Delaware will continue to apply them. *Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318, 2003 Del. Ch. LEXIS 15 (Del. Ch. 2003)*.

Authority of corporation.

Both §§ 102(b)(1) and 141(a) of the Delaware General Corporation Law (DGCL) provide authority for charter provisions to restrict the authority that directors have to manage firms, unless those restrictions are contrary to the laws of the State; these statutory provisions are important expressions of the wide room for private ordering authorized by the DGCL when such private ordering is reflected in the corporate charter. *Jones Apparel Group v. Maxwell Shoe Co., 883 A.2d 837, 2004 Del. Ch. LEXIS 74 (Del. Ch. 2004)*.

Company's charter provision, which restricted the board's ability to set a record date for consent solicitations, was a valid exercise of authority under *8 Del. C. §§ 102(b)(1)* and *141(a)*; moreover, it was not contrary to the law of the Delaware General Corporation Law, including *8 Del. C. §§ 213(b)* and *394*, or Delaware common law; thus, hostile bidder was entitled to summary judgment in its action seeking to obtain a ruling that the record date for its consent solicitation was the date the first consent was delivered to the company, and the company's motion seeking to dismiss the complaint under Del. Ch. Ct. R. 12(b)(6) was denied. *Jones Apparel Group v. Maxwell Shoe Co., 883 A.2d 837, 2004 Del. Ch. LEXIS 74 (Del. Ch. 2004)*.

Where the parties disputed whether defendant was terminated from the position as CEO, judgment on the pleadings for plaintiffs was denied because the question of whether the Board could justify defendant's removal because the directors could have removed defendant without cause was deferred until after trial. *Spencer v. Kuldeep Malik, — A.3d —, 2021 Del. Ch. LEXIS 362 (Del. Ch. Feb. 23, 2021)*.

Judgment on the pleadings was granted in favor of the plaintiffs establishing that the Board had the authority to exercise corporate power to remove defendant as CEO and appoint a successor, assuming the Board exercised that authority properly. *Spencer v. Kuldeep Malik, — A.3d —, 2021 Del. Ch. LEXIS 362 (Del. Ch. Feb. 23, 2021)*.

Bylaw amendments.

Rule of Schnell—that inequitable action does not become permissible simply because it is legally possible—applies to bylaw amendments. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

Board of directors validly amended corporate bylaws, including a provision that allowed for mandatory retroactive advancement rights to directors, through unanimous written consent, and no meeting was required to adopt the amended bylaws, as there was nothing in the corporate bylaws that "otherwise restricted" the power of the board to

amend the bylaws in such manner; absent such a restriction, the unanimous written consent of the board was an authorized manner of adoption of an amendment pursuant to *8 Del. C. § 141(f)*. *Underbrink v. Warrior Energy Servs. Corp., 2008 Del. Ch. LEXIS 65 (Del. Ch. May 30, 2008)*.

Status quo order was warranted in an action arising from a dispute over control of a corporation, wherein 4 validly elected directors often ended in deadlock, because plaintiffs established that defendants' amendment to the bylaws regarding removal of officers would irreparably harm the corporation and its shareholders; the amendment created uncertainty concerning the composition of a legitimate board of directors and could encroach on the board's managerial powers. *Salamone v. Gorman, 2014 Del. Ch. LEXIS 147 (Del. Ch. July 31, 2014)*.

Construction with other laws.

Maryland statutory enactments that would mandate changes in the number and qualifications of directors of a health care service holding company with which a Delaware health care service corporation was affiliated necessarily affected the protections of the Delaware corporation and its subscribers by changing provisions contained in the bylaws; this fact was an important component in a reviewing court's determination that substantial evidence supported Delaware's Insurance Commissioner's decision to withdraw the approval previously given to the affiliation. *In re Proposed Affiliation of BCBSD, Inc. with CareFirst, Inc., 2004 Del. Super. LEXIS 333 (Del. Super. Ct. Oct. 4, 2004)*, aff'd, *865 A.2d 521, 2004 Del. LEXIS 583 (Del. 2004)*.

In shareholders' suit alleging directors transferred control block of the corporation to a friendly buyer to avoid *8 Del. C. § 203* requirements, in a transaction that involved the major shareholder's sale of stock at a premium to that buyer and a subsequent buy back of the corporation's shares on the market, the court denied summary judgment to the directors, but granted it in part, determining that damages could not be based on: (1) the corporation's possible investment income if it had not bought back stock as a part of the entrenchment plan; or (2) the director not reporting potential breaches of fiduciary responsibilities or for the effect that had on inflating and then deflating the stock's market price. *In re Fuqua Indus., Inc., 2005 Del. Ch. LEXIS 60 (Del. Ch. May 6, 2005)*.

In shareholders' suit alleging directors transferred control block of the corporation to a friendly buyer to avoid *8 Del. C. § 203* requirements, in a transaction that involved the major shareholder's sale of stock at a premium to that buyer and a subsequent buy back of the corporation's shares on the market, the court denied summary judgment to the directors, in part, on the issue of rescissory damage; rescissory damages could be appropriate in cases where directors were found to have breached their duty of loyalty. *In re Fuqua Indus., Inc., 2005 Del. Ch. LEXIS 60 (Del. Ch. May 6, 2005)*.

Duty of care.

Level of due care that is the litmus test for director liability, absent an exculpatory charter provision, is gross negligence; pleading it successfully requires the articulation of facts that suggest a wide disparity between the process the directors use to ensure the integrity of the company's financial statements and that which is rational. *Guttman v. Jen-Hsun Huang, 823 A.2d 492, 2003 Del. Ch. LEXIS 48 (Del. Ch. 2003)*.

To state a claim for a breach of the duty of care, a plaintiff must allege more than simple negligence. *Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318, 2003 Del. Ch. LEXIS 15 (Del. Ch. 2003)*.

By failing to promptly release derivative proceeds to a corporation, failing to seek judicial guidance regarding the payment of derivative proceeds, and failing to remit a $5,278,222.95 award even after a declaratory judgment was entered in the corporation's favor, former company directors breached their duty to the corporation. *OptimisCorp v. Atkins, — A.3d —, 2023 Del. Ch. LEXIS 137 (Del. Ch. June 1, 2023)*.

II. Officers.

A. In General.

Bylaws.

Shareholder was granted summary judgment in its declaratory judgment action against a corporation because, disregarding the corporation's extrinsic evidence purporting to create an ambiguity in the corporation's bylaws, a provision of the corporation's bylaws creating a classified board under *8 Del. C. § 141(d)* was clear and unambiguous; equitable principles could not be employed to change the terms of the authoritatively binding corporate documents. *Lions Gate Entm't Corp. v. Image Entm't, Inc., 2006 Del. Ch. LEXIS 108 (Del. Ch. June 5, 2006)*.

Control and management.

While the corporation is the owner of the assets, yet their control and management rest in the officers and directors, whose relation to the assets is one of fiduciary character. *Harden v. Eastern States Public Service Co., 14 Del. Ch. 156, 122 A. 705, 1923 Del. Ch. LEXIS 15 (Del. Ch. 1923)*.

In certain areas the directors rather than the stockholders or others are granted the power by the State to deal with questions of management policy. *Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893, 1956 Del. Ch. LEXIS 102 (Del. Ch. 1956)*, modified, *36 Del. Ch. 102, 125 A.2d 588, 1956 Del. Ch. LEXIS 117 (Del. Ch. 1956)*, vacated in part, *36 Del. Ch. 371, 130 A.2d 338, 1957 Del. LEXIS 80 (Del. 1957)*.

The board of directors acting as a board must be recognized as the only group authorized to speak for "management" in the sense that under this section they are responsible for the management of the corporation. *Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852, 1957 Del. Ch. LEXIS 93 (Del. Ch. 1957)*.

The business of every corporation "shall be managed by a board of directors." Whether that business consists of the operations of the usual going concern or but a single task, the corporation requires management, that is, a board of directors and such officers as may be necessary to accomplish its purpose or purposes. *Olson Bros., Inc. v. Englehart, 42 Del. Ch. 348, 211 A.2d 610, 1965 Del. Ch. LEXIS 88 (Del. Ch. 1965)*, aff'd, *245 A.2d 166, 1968 Del. LEXIS 243 (Del. 1968)*.

Under Delaware law, board of directors comprises the management of the corporation. *Gould v. American Hawaiian S.S. Co., 351 F. Supp. 853, 1972 U.S. Dist. LEXIS 10815 (D. Del. 1972)*.

The directors, not the stockholders, are the managers of the business affairs of the corporation. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Relying on the General Assembly's determination under subsection (a) of this section that the business and affairs of every corporation shall be managed by or under the direction of a board of directors, courts defer to decisions made by boards of directors on how to run the corporation's affairs; generally, shareholders have only 2 protections against perceived inadequate business performance, they may sell their stock or they may vote to replace incumbent board members. *In re MONY Group Inc. S'holder Litig., 853 A.2d 661, 2004 Del. Ch. LEXIS 35 (Del. Ch. 2004)*.

In order for a significant shareholder to be deemed a controlling shareholder, there must be a judicial finding of actual control over the business and affairs of the corporation; that the "business and affairs" of a Delaware corporation are under the direction of the board, pursuant to *8 Del. C. § 141(a)*, suggests that questions of control by a significant shareholder should be assessed at the board level in terms of whether the board's capacity to exercise its judgment independently has been impaired. *Superior Vision Servs. v. ReliaStar Life Ins. Co., 2006 Del. Ch. LEXIS 160 (Del. Ch. Aug. 25, 2006)*.

Directors.

— Agents.

Directors, in the ordinary course of their service as directors, do not act as agents of the corporation; it would be an analytical anomaly to treat corporate directors as agents of the corporation when they are acting as fiduciaries of the stockholders in managing the business and affairs of the corporation. *Arnold v. Society for Sav. Bancorp, 678 A.2d 533, 1996 Del. LEXIS 245 (Del. 1996)*.

— Charter amendments.

The board of directors alone is empowered to act on behalf of the corporation, including taking action to initiate an amendment to the corporation's charter. *AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1188, 1999 Del. Ch. LEXIS 156 (Del. Ch. 1999)*.

— De facto directors.

Where the corporate director was not a legally elected director but had acted as such under color of right at various directors' meetings since the action of the board purporting to elect him, he must therefore be regarded as a de facto officer. *Drob v. National Memorial Park, Inc., 28 Del. Ch. 254, 41 A.2d 589, 1945 Del. Ch. LEXIS 44 (Del. Ch. 1945)*.

The status of an illegally elected director who has acted in his or her position for some time after his or her election is not insulated from direct attack in subsequent proceedings by some extension of the de facto theory. *Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299, 1954 Del. Ch. LEXIS 83 (Del. Ch. 1954)*.

— Duty of care.

Stockholder's claim alleging that directors breached their fiduciary duty of care, a viable theory because there was no exculpatory provision, was denied; demand futility was not shown as to business decisions failing to cause the directors to face a substantial risk of personal liability, absent allegations showing that the directors' reliance on reports lacked good faith or identifying any specific action taken at a stockholder meeting where proper notice was not provided. *Buckley Family Trust v. McCleary, — A.3d —, 2020 Del. Ch. LEXIS 114 (Del. Ch. Mar. 31, 2020)*.

— Duty of good faith.

In a shareholder's derivative action brought against officers and directors of a biopharmaceutical company after the release of an adverse FDA report that differed from the corporation's prior released statements, dismissal was warranted because: (1) the shareholder failed to meet the heightened pleading standard for demand futility; (2) the shareholder did not plead that a majority of the board faced a substantial likelihood of liability where the complaint lacked a reasonable inference that a majority of the board acted with scienter; and (3) the complaint did not contain any particularized allegations of intentional misconduct as to a single outside director. *Owens v. Mayleben, — A.3d —, 2020 Del. Ch. LEXIS 59 (Del. Ch. Feb. 13, 2020)*, aff'd, *241 A.3d 218, 2020 Del. LEXIS 363 (Del. 2020)*.

— Election.

Director who lawfully is in office before election which later is found invalid continues in office until a successor is duly elected and qualified. *Halle & Stieglitz, Filor, Bullard, Inc. v. Empress International, Ltd., 442 F. Supp. 217, 1977 U.S. Dist. LEXIS 13147 (D. Del. 1977)*.

— Validity.

It was neither the intended nor the unintended effect of the 1974 amendment to subsection (d) to invalidate certificate provisions creating class-designated directorships that do not state the term of such directorships or their voting power. *Insituform of North America, Inc. v. Chandler, 534 A.2d 257, 1987 Del. Ch. LEXIS 500 (Del. Ch. 1987)*.

Former corporate CEO validly filled a common director seat on the board through a consent document because that seat was vacant, based on the locations of the various director designations in the corporate governance documents and the CEO's continuing status as a director. *Klaassen v. Allegro Dev. Corp., 2013 Del. Ch. LEXIS 247 (Del. Ch. Oct. 11, 2013)*, aff'd, *82 A.3d 730, 2013 Del. LEXIS 640 (Del. 2013)*, aff'd, *106 A.3d 1035, 2014 Del. LEXIS 119 (Del. 2014)*.

Former corporate CEO validly removed only 1 of 2 directors on the corporate board without cause, because the CEO had a majority of the outstanding voting power but had restricted removal ability to a certain extent in a consent document; to the extent that the corporate bylaws conflicted with the statutory law with respect to restricting removal in certain regards, and to avoid invalidity, they were read in such a way as to avoid conflict. *Klaassen v. Allegro Dev. Corp., 2013 Del. Ch. LEXIS 247 (Del. Ch. Oct. 11, 2013)*, aff'd, *82 A.3d 730, 2013 Del. LEXIS 640 (Del. 2013)*, aff'd, *106 A.3d 1035, 2014 Del. LEXIS 119 (Del. 2014)*.

Validity of meetings.

Directors of corporation cannot act by proxy. *Stevens v. Acadia Dairies, Inc., 15 Del. Ch. 248, 135 A. 846, 1927 Del. Ch. LEXIS 18 (Del. Ch. 1927)*.

Where election of president of the corporate board was illegal, it follows that the purported calls for meetings by him as president were invalid and the subsequent meetings insofar as their validity depended upon such calls were nullities. *Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299, 1954 Del. Ch. LEXIS 83 (Del. Ch. 1954)*.

When the new board members of a corporation met and agreed to send certain instructions to the previous board members, the fact that they met telephonically and without prior written notice was not important, under subsection (i) of this section. *Liebermann v. Frangiosa, 844 A.2d 992, 2002 Del. Ch. LEXIS 142 (Del. Ch. 2002)*.

B. Powers and Duties.

Authority of attorney.

Settlement agreement negotiated by corporation's attorney was enforceable as it contained agreement (through the eyes of a reasonable negotiator) on all of the essential terms, including the payment of attorney fees in the event of a breach of the agreement; the agreement was not contingent upon the corporation's board's approval, based upon the presumption that an attorney had that authority and based upon lack of any statement or indication by the corporation's attorney to the contrary. *Loppert v. Windsortech, Inc., 865 A.2d 1282, 2004 Del. Ch. LEXIS 121 (Del. Ch. 2004)*, aff'd, *867 A.2d 903, 2005 Del. LEXIS 53 (Del. 2005)*.

Authority of directors.

— Limitation.

Wherever may be the location of the bright line that separates the shareholders' bylaw-making power under *8 Del. C. § 109* from the directors' exclusive managerial authority under *8 Del. C. § 141(a)*, a proposed bylaw that limited director authority by permitting the reimbursement of reasonable proxy expenses did not invade the territory demarcated by *8 Del. C. § 141(a)*. *CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227, 2008 Del. LEXIS 329 (Del. 2008)*.

Pursuant to *8 Del. C. § 141(a)*, the directors, and not the stockholders, manage the business and affairs of a corporation. *FLI Deep Marine LLC v. McKim, 2009 Del. Ch. LEXIS 56 (Del. Ch. Apr. 21, 2009)*.

Where a former corporate CEO challenging removal from that position by the board of directors relied on equitable principles to support claims against the board, the CEO was subject to equitable defenses; the board's actions were voidable, but not void, because the CEO did not allege that the board violated a mandatory bylaw. *Klaassen v.*

Allegro Dev. Corp., 2013 Del. Ch. LEXIS 247 (Del. Ch. Oct. 11, 2013), aff'd, *82 A.3d 730, 2013 Del. LEXIS 640 (Del. 2013)*, aff'd, *106 A.3d 1035, 2014 Del. LEXIS 119 (Del. 2014)*.

8 Del. C. § 141(a), inquiry involves two elements: initially, a court must determine whether the challenged provision is part of an internal governance arrangement, and If not, then the inquiry ends; if so, then the court must apply the Abercrombie test to determine whether the provision imposes a restriction that violates § 141(a). *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

If a stockholder agreement tries to do more than address an action that a stockholder individually or a group of stockholders collectively could take, then the corporate hierarchy and *8 Del. C. 141(a)*, may invalidate the attempt; stockholders of a corporation subject to the Delaware General Corporation Law may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Pre-approval requirements in a stockholder agreement violated *8 Del. C. 141(a)*, where they were explicit and direct limitations on the board's ability to take action, they were framed as prohibitions rather than consent rights, and they had the effect of removing from the directors in a very substantial way their duty to use their own best judgment on virtually every management matter. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Stockholder agreement requirement that board recommend in favor of certain designees for director positions was facially invalid per *8 Del. C. 141(a)*, where it removed from the directors in a very substantial way their duty to use their own best judgment on a management matter, viz., who should serve as a director. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Size requirement for the board in a stockholder agreement was facially invalid per *8 Del. C. 141(a)*, where it established a ceiling of 11 seats that could not be exceeded without the founder's consent. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Provision in a stockholder agreement that enabled the founder to specify individuals as potential candidates for election as director was not facially invalid per *8 Del. C. 141(a)*, where it only gave the founder the ability to propose a specific number of designees; it did not force the board or the company to do anything with the designees. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Provision in a stockholder agreement obligating the company to include the founder's designees in the company's slate of nominees for board directors was not facially invalid per *8 Del. C. 141(a)*, where the ability to nominate candidates was an important stockholder right, and nominating candidates was not an exclusive board power. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

Provision in a stockholder agreement obligating the company to take all reasonable actions to cause the founder's designees to be elected to the board of director was facially invalid per *8 Del. C. 141(a)*, where it required the board to include a proportionate number of the founder's designees on each committee, thus removing from the directors in a very substantial way their duty to use their own best judgment on a management matter, viz., who should serve on a committee. *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., — A.3d —, 2024 Del. Ch. LEXIS 52 (Del. Ch. Feb. 23, 2024)*.

— Speaking for board.

The right to speak for the board of directors may be given or withheld by those in control of the board as they see fit, and if one purports to speak on its behalf without authority, the board acting through the corporate entity should

be able to and can prevent it, whether it be in a proxy contest or otherwise. *Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741, 1946 Del. Ch. LEXIS 58 (Del. Ch. 1946)*.

— Speaking for corporation.

The incumbent board of directors, so long as they maintain that status, are alone entitled to speak for or to authorize others to speak for the corporation. *Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741, 1946 Del. Ch. LEXIS 58 (Del. Ch. 1946)*.

The actions of the board of directors, speaking through the majority of its members, must be recognized no matter which particular faction may be in control. *Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741, 1946 Del. Ch. LEXIS 58 (Del. Ch. 1946)*.

Pursuant to *8 Del. C. § 141(a)*, when a corporation suffers harm, the board of directors is the institutional actor legally empowered under Delaware law to determine what, if any, remedial action the corporation should take, including pursuing litigation against the individuals involved. *South v. Baker, 62 A.3d 1, 2012 Del. Ch. LEXIS 229 (Del. Ch. 2012)*.

In a proxy dispute between a dissident shareholder and a board of directors, the parties manifested assent to a settlement in which no standstill was required, the corporation would add two directors of the shareholder's choosing, and the parties would issue a joint press release; the director chosen to negotiate had actual and apparent authority to bind the corporation to the oral settlement agreement, including the agreement to appoint directors as permitted by *8 Del. C. §§ 141(b)*, *223(a)(1)*. *Sarissa Capital Domestic Fund LP v. Innoviva, Inc., 2017 Del. Ch. LEXIS 842 (Del. Ch. Dec. 8, 2017)*.

Business judgment rule.

Use of corporate funds to acquire shares of dissident stockholder faction is proper exercise of business judgment where it is done to eliminate what appears to be a clear threat to the future business or the existing, successful business policy of a company and is not accomplished for the sole or primary purpose of perpetuating the control of management. *Kaplan v. Goldsamt, 380 A.2d 556, 1977 Del. Ch. LEXIS 128 (Del. Ch. 1977)*.

— Applicability.

The business judgment rule, rather than the rule of fairness, was applied to test the validity of a stock transaction between the corporation and a stockholder group which included insider directors, where there was no showing of fraud, no showing of domination of the outside directors, and no testimony which even tended to show that the terms of the transaction had been dictated by the group or any member thereof. *Puma v. Marriott, 283 A.2d 693, 1971 Del. Ch. LEXIS 137 (Del. Ch. 1971)*.

Application of business judgment rule, of necessity, depends upon a showing that informed directors did, in fact, make a business judgment authorizing the transaction under review. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

Where there is no conscious decision by directors to act or refrain from acting, the business judgment rule has no application. *Rales v. Blasband, 634 A.2d 927, 1993 Del. LEXIS 454 (Del. 1993)*.

— Control and dominion.

“Control” and “domination” may be exercised directly or through nominees. But, at minimum, the words imply (in actual exercise) a direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling. *Kaplan v. Centex Corp., 284 A.2d 119, 1971 Del. Ch. LEXIS 142 (Del. Ch. 1971)*.

— — Proof.

A plaintiff who alleges domination of a board of directors and/r control of its affairs must prove it. *Kaplan v. Centex Corp., 284 A.2d 119, 1971 Del. Ch. LEXIS 142 (Del. Ch. 1971)*.

Stock ownership alone, at least when it amounts to less than majority, is not sufficient proof of domination or control. *Kaplan v. Centex Corp., 284 A.2d 119, 1971 Del. Ch. LEXIS 142 (Del. Ch. 1971)*.

To rebut the business judgment rule, a shareholder plaintiff assumes the burden of providing evidence that directors, in reaching their challenged decision, breached any one of the triads of their fiduciary duty — good faith, loyalty or due care; if a shareholder plaintiff fails to meet this evidentiary burden, the business judgment rule attaches to protect corporate officers and directors and the decisions they make. *Cede & Co. v. Technicolor, 634 A.2d 345, 1993 Del. LEXIS 398 (Del. 1993)*, modified, *636 A.2d 956, 1994 Del. LEXIS 414 (Del. 1994)*, dismissed, *663 A.2d 1134, 1994 Del. Ch. LEXIS 178 (Del. Ch. 1994)*.

Enthusiasm for a merger between 2 corporations did not amount to directors' breach of the duty of loyalty to shareholders and to the corporation, as shareholders were unable to rebut the presumption under the business judgment rule that the directors acted properly and with the corporate interests in mind when they supported the merger. *In re Transkaryotic Therapies, Inc., 954 A.2d 346, 2008 Del. Ch. LEXIS 76 (Del. Ch. 2008)*.

Former shareholder's claim of breach of the duty of loyalty by 2 corporate directors did not survive a dismissal motion where the shareholder did not successfully rebut the presumption of the business judgment rule under *8 Del. C. § 141(a)*, as the former shareholder failed to show that the directors were interested in the transaction which resulted in an entity acquiring a majority of the voting stock in the corporation; although those directors received substantial benefits under the new employments agreements, there was no showing that the directors dominated and controlled the corporate board when it approved those agreements. *Wayne County Emples. Ret. Sys. v. Corti, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009)*, aff'd, *996 A.2d 795, 2010 Del. LEXIS 238 (Del. 2010)*.

— Court interference.

Unwise business management, while a source of irritation to disappointed stockholders, does not in itself necessarily show recoverable grounds of action against those responsible therefor. *Freeman v. Hare & Chase, Inc., 16 Del. Ch. 207, 142 A. 793, 1928 Del. Ch. LEXIS 22 (Del. Ch. 1928)*.

Courts will not upset the decisions of either directors or stockholders as to questions of policy and business management. *Mercantile Trading Co. v. Rosenbaum Grain Corp., 17 Del. Ch. 325, 154 A. 457, 1931 Del. Ch. LEXIS 50 (Del. Ch. 1931)*.

In stockholders' suit to cancel a voting trust, where the directors of the corporation produced evidence that they had acted in good faith and free from disqualifying interest in settling the complaint, the suit will be defeated, and with that finding on the corporation's behalf, equity court will not inquire into the merits of the settlement. *Perrine v. Pennroad Corp., 28 Del. Ch. 342, 43 A.2d 721, 1945 Del. Ch. LEXIS 54 (Del. Ch. 1945)*, aff'd, *29 Del. Ch. 531, 47 A.2d 479, 1946 Del. LEXIS 18 (Del. 1946)*.

In the absence of a showing of bad faith on the part of the directors or of a gross abuse of discretion, the business judgment of the directors will not be interfered with by the courts. *Kaplan v. Centex Corp., 284 A.2d 119, 1971 Del. Ch. LEXIS 142 (Del. Ch. 1971)*.

Wide discretion in the matter of valuation is confided to directors, and as long as they appear to act in good faith, with honest motives, and for honest ends, the exercise of their discretion will not be interfered with. *Muschel v. Western Union Corp., 310 A.2d 904, 1973 Del. Ch. LEXIS 115 (Del. Ch. 1973)*; *Kaplan v. Goldsamt, 380 A.2d 556, 1977 Del. Ch. LEXIS 128 (Del. Ch. 1977)*.

Board's actions, taken as defensive measures to takeover threat, were entitled to the protection of the business judgment rule. *Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1987 Del. LEXIS 1261 (Del. 1987)*.

Motion to dismiss a stockholder's complaint in a derivative action was granted under Ch. Ct. R. 23.1, because demand should have been made before pursuing the action; the stockholder failed to allege facts with particularity indicating that the corporations' directors either lacked independence or took action to create a reasonable doubt that the challenged transactions were other than the product of a valid exercise of business judgment under *8 Del. C. § 141(a)*. *Highland Legacy Ltd. v. Singer, 2006 Del. Ch. LEXIS 55 (Del. Ch. Mar. 17, 2006)*.

Claim by a litigation trust for an insolvent wholly-owned subsidiary that the directors of the parent corporation breached their fiduciary duties by engaging in what turned out to be a poor investment and expansion strategy lacked merit as it was based on conclusory allegations, did not plead deficiencies in the deliberative process that was used by the parent board of directors to evaluate the mergers, and the fact that decisions proved inadequate for coverage of damages and debts did not show that the board acted outside of its exculpatory immunity. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 2006 Del. Ch. LEXIS 139 (Del. Ch. 2006)*, aff'd, *931 A.2d 438, 2007 Del. LEXIS 357 (Del. 2007)*.

Where claim by a litigation trust for an insolvent wholly-owned subsidiary that the directors of the parent corporation breached their fiduciary duties lacked merit, there was even less of an inference for sustaining a claim of gross negligence in the decision making, as the complaint suggested that the amount of insurance coverage on the anticipated material risk was based on advice from professional advisors, pursuant to *8 Del. C. § 141(e)*; therefore, the claim was dismissed. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 2006 Del. Ch. LEXIS 139 (Del. Ch. 2006)*, aff'd, *931 A.2d 438, 2007 Del. LEXIS 357 (Del. 2007)*.

Mandatory retroactive advancement provision in amended bylaws was subject to review under the deferential business judgment rule rather than under the entire fairness review standard; the corporation failed to show that there was a lack of consideration for the amendment of the bylaws to add such a provision or that the provision was unreasonable. *Underbrink v. Warrior Energy Servs. Corp., 2008 Del. Ch. LEXIS 65 (Del. Ch. May 30, 2008)*.

Shareholders failed to plead facts with sufficient particularity pursuant to Ch. Ct. R. 23.1 for purposes of demand futility in an action alleging that corporate directors failed in their duty of disclosure with respect to the corporation's dire financial circumstances; shareholders' claims (that the directors faced a threat of personal liability that would render them incapable of exercising independent and disinterested business judgment in responding to a demand) were baseless, as the directors were protected by *8 Del. C. § 141(e)* in their reliance on others' financial reports and had no knowledge that any disclosures or omissions were false or misleading. *In re Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 2009 Del. Ch. LEXIS 25 (Del. Ch. 2009)*.

— Defined.

Business judgment rule is merely presumption of propriety accorded decisions of corporate directors. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

— — Bad faith.

An attempt to take corporate action without a directors' meeting when all the directors did not approve of that action, while apparently in violation of this section, did not compel an inference of bad faith, where there was nothing surreptitious about the proceedings; those holding the minority view were informed of the proposed action, were given the opportunity to record their dissent, and approved in the procedure, apparently in the interest of saving the expense of getting the directors together for a meeting. *Bowers v. Columbia General Corp., 336 F. Supp. 609, 1971 U.S. Dist. LEXIS 10225 (D. Del. 1971)*.

— Fairness.

An initial judicial determination that a given breach of a board's fiduciary duties has rebutted the presumption of the business judgment rule does not preclude a subsequent judicial determination that the board action was entirely fair, and is, therefore, not outcome-determinative per se. *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1995 Del. LEXIS 251 (Del. 1995)*.

— Fraud or illegal misconduct.

Fraud, actual or presumed, or illegal or ultra vires misconduct must be shown to justify an interference by the courts with questions of corporate policy and management. *Mercantile Trading Co. v. Rosenbaum Grain Corp., 17 Del. Ch. 325, 154 A. 457, 1931 Del. Ch. LEXIS 50 (Del. Ch. 1931)*.

In the absence of fraud, either express or implied, the action of the governing body of a corporation, in matters of internal management of this nature, will not be disturbed by a court of equity. *Hartford Acci. & Indem. Co. v. W. S. Dickey Clay Mfg. Co., 26 Del. Ch. 16, 21 A.2d 178, 1941 Del. Ch. LEXIS 20 (Del. Ch. 1941)*, aff'd, *26 Del. Ch. 411, 24 A.2d 315, 1942 Del. LEXIS 8 (Del. 1942)*.

Courts will not undertake, in the absence of fraud, to review the exercise by a corporation's directors of their business judgment as to what is required for the best interests of the corporation. *Sandler v. Schenley Indus., Inc., 32 Del. Ch. 46, 79 A.2d 606, 1951 Del. Ch. LEXIS 88 (Del. Ch. 1951)*.

It is not the proper function of the Court of Chancery to overturn a business transaction duly ratified by the stockholders absent a showing of fraud, a gift of assets, illegality, or ultra vires action. *Lewis v. Hat Corp. of America, 38 Del. Ch. 313, 150 A.2d 750, 1959 Del. Ch. LEXIS 87 (Del. Ch. 1959)*.

Lead financial advisor found liable to a class of stockholders for actions involving a merger was entitled to a settlement credit in the amount of 17% of the total damages from the corporation and others who entered into a settlement; it could not claim a settlement credit for actions that resulted in a fraud on the board. *In re Rural/Metro Corp. Stockholders Litig., 102 A.3d 205, 2014 Del. Ch. LEXIS 202 (Del. Ch. 2014)*, aff'd sub nom. *RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 2015 Del. LEXIS 629 (Del. 2015)*.

— Good faith.

Good faith may always be brought in question where it appears that the settlement of a dispute between stockholders of a corporation is so grossly inadequate that one is required to reach the decision that the directors were reckless and indifferent as to the rights of the stockholders and did not exercise reasonable business judgment. *Perrine v. Pennroad Corp., 29 Del. Ch. 531, 47 A.2d 479, 1946 Del. LEXIS 18 (Del. 1946)*, cert. denied, *329 U.S. 808, 67 S. Ct. 620, 91 L. Ed. 690, 1947 U.S. LEXIS 2758 (U.S. 1947)*.

Motion to dismiss this action which alleged breach of fiduciary duty was denied because: (1) the complaint sufficiently alleged that, by engaging in substantive economic discussions with the company's largest minority stockholder before committing itself to the twin *Kahn v. M & F Worldwide Corp., 88 A. 3d 635 (Del. 2014)* protections, the 70%-ownership stockholder failed to disable and subject itself to the pressures of negotiating with the special committee with those protections in place; and (2) the complaint supported a rational inference that the directors could not be presumed to act independently from the 70% stockholder and acted to support its self-interest by approving the transaction. *In re HomeFed Corp. Stockholder Litig., — A.3d —, 2020 Del. Ch. LEXIS 235 (Del. Ch. July 13, 2020)*.

— Liability for fraud.

In cases of fraud, ultra vires acts or acts of negligence on the part of those charged with the duty of managing the affairs of a corporation, the offending officers, and not the aggrieved corporation, are the proper parties to account. *Harden v. Eastern States Public Service Co., 14 Del. Ch. 156, 122 A. 705, 1923 Del. Ch. LEXIS 15 (Del. Ch. 1923)*.

— Limits.

Business judgment rule does not irrevocably shield decisions of corporate directors from challenge. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

— Merger.

Finally adopted merger agreement that contained four deal protection measures ((1) a fixed termination fee of $247.5 million, equal to 3.75% of equity value or 3.25% of enterprise value—payable for the most part only if the acquired corporation terminated the merger agreement in order to sign up another acquisition proposal within a year; (2) an agreement to pay up to $30 million in documented expenses after a naked no vote; (3) a relatively non-restrictive no-shop clause that permitted the consideration of unsolicited bids; and (4) a temporally-limited 3-day match right) was considered to be reasonable to secure a superior merger proposal and allowed a subsequent bidder room to make a bid that was within the range of estimated values for the corporation that would still net the corporation more money after paying the termination fee; a 50% "trigger" to allow the board to consider a superior offer did not preclude the board from changing its recommendation if such a bid was received, although that decision would also have triggered the payment of a termination fee. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Adding a control premium on top of a discounted cash flow (DCF) is not intuitively or theoretically logical; indeed, because a Gordon growth model DCF is not infected by a minority discount, it is the model most consistent with what a company's stockholders would receive in an appraisal (their pro rata share of the company's value) which is precisely the kind of information the Delaware Supreme Court has said it should have. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Second-guessing the board's decision not to insist on a smaller termination fee, more like 2.5% or 3.0%, and the abandonment of the matching right, was precisely the sort of quibble that did not suffice to prove a *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985)* claim. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Argument that financial buyers for the corporation were typically more deterred by termination fees than strategic buyers (because financial buyers could not reap the gains from operational synergies) was rejected because those were exactly the same universe of buyers that had already been broadly solicited at the commencement of the strategic review, and were therefore least likely to have missed out on the opportunity to bid on the company; the unknown, synergistic strategic bidder that the plaintiff shareholders hoped was waiting in the wings was precisely the least likely buyer to be deterred by existing deal protections. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

It was reasonable for board not to consider selling the company's most marginally profitable and fastest growing retail business, while retaining the more mature business, based, in part, on the profound adverse tax implications of such a strategy. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Board's procedure to conduct as independent a search for merger proposal bidders as it could include a requirement that the its investment banker not discuss financing with any bidders before the merger was finalized; the investment banker's request to the board to finance the high bidder (made 2 months after the merger was finalized, but before the shareholder vote to approve the merger) created the appearance of impropriety, playing into already heightened suspicions about the ethics of investment banking firms, but was not considered to be causally related to the board's merger decisions. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Board was not found to have considered an unreasonably low value for the entire company, where it excluded a 25% control premium that it might have been able to later obtain (if it retained 1 of its divisions), because, associated with retention of just that 1 division, there were: (1) increased expenses; (2) complications related to ongoing operations that interfered with the sale of the other divisions, because of the divisions' interrelated facilities and services; (3) no assurances the control premium could be obtained; and (4) no assurances the projected basic

value could be obtained, because the potential buyers would primarily include the buyer who successfully bought the other divisions and would likely bid a lower amount because of the interrelationships. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Board was not to be faulted for considering a value for the entire company that included the investment banker's discounted cash flow value (DCF) for 1 division at the value that division had if it was retained by the company (which DCF did not include a control premium, because the shares would have traded on a minority basis in the marketplace), because that had been value the investment banker derived under the company's strategic plan to retain that division until it was presented with whole-company sale proposals; the DCF the board received was consistent with what the Delaware Supreme Court required. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

In a consolidated class action whereby shareholders of a target corporation (TC) challenged a stock-for-stock merger between the TC and an acquiring corporation, shareholders did not allege sufficient facts to rebut the business judgment rule because at least 4 of the 7 board members of the TC, and perhaps as many as 6, were disinterested and independent with regard to the challenged merger transaction; entire fairness review was not required. *In re Crimson Exploration Inc. Stockholder Litig., 2014 Del. Ch. LEXIS 213 (Del. Ch. Oct. 24, 2014)*.

Business judgment rule did not apply to a consolidated class action whereby shareholders of a target corporation (TC) challenged a stock-for-stock merger between the TC and an acquiring corporation because bad faith was not evidenced by the 7.7% premium, reliance on professional advice or the deal protection measures approved by the TC's directors; the shareholder's disagreement with the board's decision did not equate to bad faith. *In re Crimson Exploration Inc. Stockholder Litig., 2014 Del. Ch. LEXIS 213 (Del. Ch. Oct. 24, 2014)*.

In a putative class action challenging the propriety of a merger, the complaint failed to state a claim upon which relief could be granted; in the absence of a controlling stockholder that extracted personal benefits, the effect of disinterested stockholder approval of the merger was reviewed under the irrebuttable business judgment rule, even if the transaction might otherwise have been subject to the entire fairness standard due to conflicts faced by individual directors. *Larkin v. Shah, 2016 Del. Ch. LEXIS 134 (Del. Ch. Aug. 25, 2016)*.

— Presumption.

— — Existence.

Judgment of directors of corporation enjoys benefit of presumption that it was formed in good faith and was designed to promote the best interests of the corporation they serve. *Davis v. Louisville Gas & Electric Co., 16 Del. Ch. 157, 142 A. 654, 1928 Del. Ch. LEXIS 25 (Del. Ch. 1928)*; *Karasik v. Pacific Eastern Corp., 21 Del. Ch. 81, 180 A. 604, 1935 Del. Ch. LEXIS 21 (Del. Ch. 1935)*.

It is presumed that directors form their business judgment in good faith. *Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136, 1960 Del. Ch. LEXIS 92 (Del. Ch. 1960)*.

Presumption of sound business judgment reposed in directors will not be disturbed if any rational business purpose can be attributed to its decision. *Kaplan v. Goldsamt, 380 A.2d 556, 1977 Del. Ch. LEXIS 128 (Del. Ch. 1977)*.

Court dismissed (for failure to adequately state a claim upon which relief could be granted) a 35 percent shareholder's claim that a 45 percent shareholder/director/officer (SDO) breached the SDO's fiduciary duty, by not including an alleged 15 percent permissible profit margin in the corporation's government contract bids, based on insufficient showings: (1) that the SDO's and the corporation's interests differed; and (2) of the negative effect, factually, on the corporation. *Ronsdorf v. Jacobson, 2004 Del. Ch. LEXIS 137 (Del. Ch. Sept. 16, 2004)*.

— — Overcoming.

In order to overcome presumption that decision of directors is proper under the business judgment rule and successfully assail the directors' decision, a derivative plaintiff must first show facts which, if true, would remove the directors' decision from the protection of the rule. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

When the business judgment rule is applied to defend directors against personal liability, as in a derivative suit, the plaintiff has the initial burden of proof and the ultimate burden of persuasion. *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

In order to rebut the protection of the business judgment rule, the burden on the plaintiffs will be to demonstrate, by a preponderance of the evidence, that the directors' decisions were primarily based on (1) perpetuating themselves in office or (2) some other breach of fiduciary duty such as fraud, overreaching, lack of good faith, or (3) being uninformed. *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

The entire fairness standard applies only if the presumption of the business judgment rule is defeated, and requires judicial scrutiny regarding both "fair dealing" and "fair price." *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

— Protected behaviors.

But rule does not protect fraudulent, illegal or reckless decisions by directors. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Officer-director's decisions concerning the level of compensation and benefits to provide a corporation's employees after the termination of a former employee, who was also a minority stockholder, did not breach the duty of loyalty or duty of care because the mere lack of a formal written policy regarding the awarding of bonuses did not render such decision-making process unreasonable; the officer-director's decisions were entitled to the presumption of legality under the business judgment rule. *Zutrau v. Jansing, 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014)*, aff'd, *123 A.3d 938, 2015 Del. LEXIS 403 (Del. 2015)*.

There was no breach of the duty of loyalty by former corporate directors, because: (1) they reasonably believed that an advisors' information and advice was sound; (2) they acted in good faith; and (3) there was no showing they were grossly negligent in their reliance. *OptimisCorp v. Waite, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015)*, aff'd on other grounds, *137 A.3d 970, 2016 Del. LEXIS 254 (Del. 2016)*.

— Purpose.

When a stockholder's derivative suit challenges the propriety of a decision of the directors, the business judgment rule protects the directors from liability by a presumption that the decision is proper. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Rule permits directors to exercise their discretion in managing corporation's business affairs in the manner they deem in the corporation's best interests. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

"Business judgment rule" evolved to give recognition and deference to directors' business expertise when exercising their managerial power. *Zapata Corp. v. Maldonado, 430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Central purpose of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1985)*, is to ensure the fidelity of fiduciaries, not to serve as a license for the judiciary to set arbitrary limits on the contract terms that fiduciaries acting loyally and carefully can shape in the pursuit of their stockholders' interest; even less is it the purpose of Revlon to push the pricing of sales transactions to the outer margins (or beyond) of their social utility. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

The Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., Del. Supr., 506 A.2d 173 (1985), doctrine does not exist as a license for courts to second-guess reasonable, but arguable, questions of business judgment in the change of control context, but to ensure that the directors take reasonable steps to obtain the highest value reasonably attainable and that their actions are not compromised by impermissible considerations, such as self-interest; so long as the directors made reasonable decisions for a proper purpose, they meet their duty under Revlon and the court must defer. *In re El Paso Corp. S'holder Litig., 41 A.3d 432, 2012 Del. Ch. LEXIS 46 (Del. Ch. 2012)*.

— Requirements.

Business judgment rule requires utmost loyalty from directors to corporation and its interests. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

— Shield for directors.

Rule provides shield with which directors may oppose stockholders' attacks on the decisions made by them. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

— Standard of review.

Because the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation; thus where a board takes action designed to defeat a threatened change in control of a company, a flexible, intermediate form of judicial review is appropriate. First, there must be shown some basis for the board to have concluded that a proper corporate purpose was served by implementation of the defensive measure and, second, that measure must be found reasonable in relation to the threat posed by the change in control that instigates the action. *AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 1986 Del. Ch. LEXIS 460 (Del. Ch. 1986)*.

— — Error in law.

When a board acts under misconception of the law on a vital point, judicial review is in order, without there being any question of bad faith. *Gottlieb v. Heyden Chemical Corp., 33 Del. Ch. 82, 90 A.2d 660, 1952 Del. LEXIS 112 (Del. 1952)*.

— — Honest mistake.

Honest mistake of business judgment on part of directors is not reviewable by courts. *Karasik v. Pacific Eastern Corp., 21 Del. Ch. 81, 180 A. 604, 1935 Del. Ch. LEXIS 21 (Del. Ch. 1935)*.

In the settlement of disputes in which corporations are interested, the directors of the corporation, who are its duly accredited managers, are called upon to exercise honest business discretion, and if it appears that they acted honestly, they are not responsible for mere mistakes, and under such circumstances courts will not interfere with their action or attempt to assume their authority to act. *Perrine v. Pennroad Corp., 29 Del. Ch. 531, 47 A.2d 479, 1946 Del. LEXIS 18 (Del. 1946)*, cert. denied, *329 U.S. 808, 67 S. Ct. 620, 91 L. Ed. 690, 1947 U.S. LEXIS 2758 (U.S. 1947)*.

In a suit alleging that defendant board of directors breached their fiduciary duties in a series of note transactions, defendants were entitled to summary judgment as to the allegations of accounting abuses because the board of directors relied upon a clean accounting report (shielding them from liability under subsection (e) of this section). *Cantor v. Perelman, 235 F. Supp. 2d 377, 2002 U.S. Dist. LEXIS 25090 (D. Del. 2002)*.

— Takeover attempts.

Preferred share purchase rights plan giving shareholders one right per common share upon announcement of tender offer for 30% of corporation's shares or acquisition of 20% of corporation's shares by any single entity or group was authorized by this section and constituted a legitimate exercise of business judgment by directors concerned over takeovers. *Moran v. Household International, Inc., 500 A.2d 1346, 1985 Del. LEXIS 557 (Del. 1985)*.

Where company adopted plan to sell repurchased stock to newly formed employee stock ownership plan as defensive measure, a proper corporate purpose was served by the defensive measure but action was not reasonable in relation to the threat posed. *AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 1986 Del. Ch. LEXIS 460 (Del. Ch. 1986)*.

The presence of 10 outside directors out of 13 on the board of a corporation, coupled with the advice rendered by an investment banker and legal counsel that the stock held by certain investors posed a threat to the corporation, constituted a prima facie showing of good faith and reasonable investigation supporting the board's decision to buy out the investors at a premium. *Polk v. Good, 507 A.2d 531, 1986 Del. LEXIS 1054 (Del. 1986)*.

When a board considers a takeover bid, it is obliged to determine whether the offer is in the best interests of the corporation and its shareholders and, if the board gives a negative answer to that inquiry, a Delaware court will not substitute its judgment for that of the board, provided that the answer the board gave can be attributed to any rational business purpose. *Grand Metropolitan Public, Ltd. v. Pillsbury Co., 558 A.2d 1049, 1988 Del. Ch. LEXIS 158 (Del. Ch. 1988)*.

Directors of corporation acted in good faith and with due care in recommending one takeover offer over another, accordingly, the board's decision was entitled to the presumption of the business judgment rule. *Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 1989 Del. LEXIS 469 (Del. 1989)*.

In responding to a takeover threat, neither a board's failure to become adequately informed nor its failure to apply the analysis of *Unocal Corp. v. Mesa Petroleum Co., Del. Supr., 493 A.2d 946 (1985)* where such an approach is required, will automatically invalidate a corporate transaction; under either circumstance, the business judgment rule will not be applied and the transaction at issue will be scrutinized to determine whether it is entirely fair. *Shamrock Holdings, Inc. v. Polaroid Corp., 559 A.2d 257, 1989 Del. Ch. LEXIS 2 (Del. Ch. 1989)*.

Evidence sufficient to find that actions of board of directors in response to takeover bid were entitled to protection of business judgment rule and that the actions were proper and in fulfillment of the board's fiduciary duties to the corporation and all its shareholders. *Gilbert v. El Paso Co., 575 A.2d 1131, 1990 Del. LEXIS 180 (Del. 1990)*.

The business judgment rule applies to the conduct of directors in the context of a takeover. *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

— — Dead hand provision.

Complaint challenging the validity of a "dead hand" provision in a poison pill rights plan stated violations of subsections (b) and (d) because the plan conferred the right to redeem the pill only upon some, but not all, directors; vested the pill redemption power exclusively in continuing directors which transgressed the shareholders' right to elect directors who would be so empowered; and impermissibly interfered with the directors' statutory powers to manage the business and affairs of the corporation. *Carmody v. Toll Bros., 723 A.2d 1180, 1998 Del. Ch. LEXIS 131 (Del. Ch. 1998)*.

— — Poison pill plan.

Adoption of "poison pill" plan, by which shareholders receive the right to be bought out by the corporation at a substantial premium on the occurrence of a stated triggering event, was consistent with the directors' fiduciary duty in facing a takeover threat perceived as detrimental to corporate interests. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 1986 Del. LEXIS 1053 (Del. 1986)*.

The adoption of the poison pill and the limited repurchase of stock program were not coercive. *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

Where it was alleged that the corporation and the board of directors breached a contract that required them to obtain shareholder approval for renewal of the poison pill, the contract was not inconsistent with the *8 Del. C. § 141(a)* grant of managerial authority to the board, as the shareholders' decision to exercise power over the poison pill trumped the board's authority under *8 Del. C. § 141(a)*. *UniSuper Ltd. v. News Corp., 2005 Del. Ch. LEXIS 205 (Del. Ch. Dec. 20, 2005)*.

Corporate board acted reasonably and in good faith under *8 Del. C. § 141(e)* when it undertook the defensive measure of a shareholder rights agreement — a "poison pill" — in order to diffuse a potential ownership change that would decrease the value of net operating loss carryforwards pursuant to *26 U.S.C. § 382* where: (1) the measure was not coercive or preclusive; (2) the carryforwards represented a potentially significant asset of the corporation; and (3) the board had relied on expert advice in determining how to act to diffuse the threat. *Selectica, Inc. v. Versata Enters., 2010 Del. Ch. LEXIS 39 (Del. Ch. Feb. 26, 2010)*, aff'd, *5 A.3d 586, 2010 Del. LEXIS 506 (Del. 2010)*.

Protection of a corporation?s net operating loss (NOL) carryforwards may be an appropriate corporate policy that merits a defensive response when the corporation is threatened; a NOL poison pill must be analyzed under Unocal Corp. v. Mesa Petroleum Co., *493 A.2d at 955* because of its effect and its direct implications for hostile takeovers. *Versata Enters. v. Selectica, Inc., 5 A.3d 586, 2010 Del. LEXIS 506 (Del. 2010)*.

Poison pills and a dilutive exchange provision adopted by directors to protect the corporation's net operating loss carryforwards from being extinguished under *26 U.S.C. § 382* were valid under the Unocal Corp. v. Mesa Petroleum Co., *493 A.2d at 955* test, because these defensive measures were not preclusive; they would not preclude a hostile bidder's ability to win a proxy contest. *Versata Enters. v. Selectica, Inc., 5 A.3d 586, 2010 Del. LEXIS 506 (Del. 2010)*.

Poison pills and a dilutive exchange provision adopted by directors to protect the corporation?s net operating loss (NOL) carryforwards from being extinguished under *26 U.S.C. ??382* were valid under the Unocal Corp. v. Mesa Petroleum Co., *493 A.2d at 955* test, because these defensive responses were reasonable in relation to the threat to the NOLs posed by appellant?s acquisition of 5% or more of the corporation?s stock. *Versata Enters. v. Selectica, Inc., 5 A.3d 586, 2010 Del. LEXIS 506 (Del. 2010)*.

Construction with other laws.

Although a proposed bylaw did not violate *8 Del. C. § 109*, it did violate *8 Del. C. § 141(a)*; the internal governance contract—which took the form of a bylaw—was 1 that would also prevent the directors from exercising their full managerial power in circumstances where their fiduciary duties would otherwise have required them to deny reimbursement to a dissident slate. That this limitation would be imposed by a majority vote of the shareholders rather than by the directors themselves, did not legally matter; only if the bylaw provision were enacted as an amendment to the corporation's certificate of incorporation would that distinction be dispositive under *8 Del. C. §§ 102 (b)(1)* and *242*. *CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227, 2008 Del. LEXIS 329 (Del. 2008)*.

By its terms *8 Del. C. § 109(a)* vests in the shareholders a power to adopt, amend or repeal bylaws that is legally sacrosanct, i.e., the power cannot be nonconsensually eliminated or limited by anyone other than the legislature itself. But *8 Del. C. § 109(a)* does not exist in a vacuum; it must be read together with *8 Del. C. § 141(a)*. *CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227, 2008 Del. LEXIS 329 (Del. 2008)*.

Definitions.

— Reasonable doubt.

The concept of reasonable doubt in corporate derivative jurisprudence is akin to the concept that the stockholder has a reasonable belief that the board lacks independence or that the transaction was not protected by the business judgment rule. *Grimes v. Donald, 673 A.2d 1207, 1996 Del. LEXIS 154 (Del. 1996)*, overruled in part, *Brehm v. Eisner, 746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000)*, overruled in part, *In re EZCORP Inc., 2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016)*, overruled in part, *Obeid v. Hogan, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016)*.

Directors.

— Duty of care.

The degree of care required of corporate directors in the selection and supervision of employees is that each case of alleged negligence must be considered on its own facts, giving regard to the nature of the business, its size, the extent, method and reasonableness of delegation of executive authority, and the existence or nonexistence of zeal and honesty of purpose in the directors' performance of their duties. *Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328, 1962 Del. Ch. LEXIS 95 (Del. Ch. 1962)*, aff'd, *41 Del. Ch. 78, 188 A.2d 125, 1963 Del. LEXIS 127 (Del. 1963)*.

The duty of the directors of a company to act on an informed basis forms the duty of care element of the business judgment rule; duty of care and duty of loyalty are of equal and independent significance. *Cede & Co. v. Technicolor, 634 A.2d 345, 1993 Del. LEXIS 398 (Del. 1993)*, modified, *636 A.2d 956, 1994 Del. LEXIS 414 (Del. 1994)*, dismissed, *663 A.2d 1134, 1994 Del. Ch. LEXIS 178 (Del. Ch. 1994)*.

Plaintiffs were not entitled to inspect a company's books under *8 Del. C. § 220* in order to investigate possible mismanagement because 1) their evidence regarding whether the company was required to calculate and disclose its deferred tax liability did not address the board's compliance with its oversight duties under *In re Caremark International Inc. Derivative Litigation, 698 A.2d 967 (Del. Ch. 1996)*, and plaintiffs did not show a credible basis to infer mismanagement or wrongdoing by the board; and 2) under this section, the board's reliance on expert opinion that the financial statements were prepared in accordance with general accepted accounting principles protected the board from the claims plaintiffs sought to investigate. *Beatrice Corwin Living Irrevocable Trust v. Pfizer, Inc., 2016 Del. Super. LEXIS 447 (Del. Super. Ct. Aug. 31, 2016)*.

Where Chapter 7 bankruptcy trustee claimed that debtor's officers and directors perpetuated the illusion of the debtor as a financially viable entity, while looting company for their own benefit, the trustee's fiduciary duty claims against certain officers were not barred by statute of limitations; the company's audit committee was not aware of any issues prior to its investigation. *Guiliano v. Ferdinand (In re Liquid Holdings Grp., Inc.), 2018 Bankr. LEXIS 1665 (Bankr. D. Del. June 6, 2018)*.

— Duty of good faith.

Directors of corporation are trustees for the stockholders, and their acts are governed by the rules applicable to such a relation, which exact of them the utmost good faith and fair dealing, especially where their individual interests are concerned. *Lofland v. Cahall, 13 Del. Ch. 384, 118 A. 1, 1922 Del. LEXIS 5 (Del. 1922)*; *Finch v. Warrior Cement Corp., 16 Del. Ch. 44, 141 A. 54, 1928 Del. Ch. LEXIS 29 (Del. Ch. 1928)*; *Keenan v. Eshleman, 23 Del. Ch. 234, 2 A.2d 904, 1938 Del. LEXIS 7 (Del. 1938)*; *Bovay v. H. M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808, 1944 Del. LEXIS 20 (Del. 1944)*.

Directors of a corporation stand in a position of trustees with the stockholders. As such, the utmost good faith and fair dealing are required of directors, especially where their individual interests are concerned. *Petty v. Penntech Papers, Inc., 347 A.2d 140, 1975 Del. Ch. LEXIS 178 (Del. Ch. 1975)*.

If the shareholders succeeded in proving that a merger was unfair, only the majority stockholder would be liable for self-dealing on that basis alone, requiring the court to conduct a director-by-director analysis of the members of the merger board to determine whether they acted with a culpable state of mind; pertinent to that inquiry would be the

directors' subjective beliefs about the fairness of the merger, the viability of the *Brophy v. Cities Service Co., 31 Del. Ch. 241, 70 A.2d 5 (Del. Ch. 1949)* claim lodged against the majority stockholder, the directors' reliance on counsel's advice and the special litigation committee's determinations also would be relevant to their ability to invoke the protection from liability afforded by *8 Del. C. § 141(e)*. *In re Primedia Inc., 67 A.3d 455, 2013 Del. Ch. LEXIS 120 (Del. Ch. 2013)*.

Class of stock option holders was awarded damages for breach of a stock incentive plan because the board of directors engaged in an arbitrary and capricious valuation process wherein the fair market value was not determined in good faith. *Fox v. CDX Holdings, Inc., 2015 Del. Ch. LEXIS 194 (Del. Ch. July 28, 2015)*, aff'd, *141 A.3d 1037, 2016 Del. LEXIS 334 (Del. 2016)*.

Defendant directors were shielded by *8 Del. C. § 141* when their interests in the merger were aligned with those of other stockholders and there was no question as to their independence; they acted in good faith by reasonably relying on long-time corporate counsel to prepare a notice. *Cirillo Family Trust v. Moezinia, 2018 Del. Ch. LEXIS 230 (Del. Ch. July 11, 2018)*, aff'd, *220 A.3d 912, 2019 Del. LEXIS 465 (Del. 2019)*.

— Duty of loyalty.

Public policy demands of directors undivided loyalty to corporation to the end that there shall be no conflict between duty and self-interest. *Italo-Petroleum Corp. v. Hannigan, 40 Del. 534, 14 A.2d 401, 1940 Del. LEXIS 9 (Del. 1940)*; *Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503, 1939 Del. LEXIS 13 (Del. 1939)*.

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his or her duty, not only affirmatively to protect the interests of the corporation committed to his or her charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his or her skill and ability might properly bring to it, or to enable it to make in the reasonable and lawful exercise of its powers. *Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503, 1939 Del. LEXIS 13 (Del. 1939)*.

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests. While technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. *Guth v. Loft, Inc., 23 Del. Ch. 255, 5 A.2d 503, 1939 Del. LEXIS 13 (Del. 1939)*.

Directors are required to demonstrate both their utmost good faith and the most scrupulous inherent fairness of transactions in which they possess a financial, business or other personal interest which does not devolve upon the corporation or all stockholders generally. *Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1989 Del. LEXIS 149 (Del. 1989)*.

Disclosure of conflicts of interest may preclude a claim for breach of the duty of loyalty; a stockholder cannot complain of corporate action in which, with full knowledge of all the facts, he or she has concurred; nonetheless, it cannot be said that certain boilerplate disclosures convey full knowledge of all of the facts. *Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318, 2003 Del. Ch. LEXIS 15 (Del. Ch. 2003)*.

Former shareholder's claim of breach of the duty of loyalty by corporate directors who approved an acquisition that gave an entity the majority of voting shares did not withstand a dismissal motion, as the former shareholder did not successfully rebut the presumption of the business judgment rule under *8 Del. C. § 141(a)*; the directors fulfilled their fiduciary duties in the sale of control despite the fact that the shareholders did not obtain a "control premium" in exchange for ceding the voting control to the acquirer. *Wayne County Emples. Ret. Sys. v. Corti, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009)*, aff'd, *996 A.2d 795, 2010 Del. LEXIS 238 (Del. 2010)*.

Former shareholder's claim of breach of the duty of loyalty by corporate directors, in that they allowed 2 allegedly interested directors to control the negotiations that ultimately resulted in an acquisition that gave an entity the majority of voting shares, did not withstand a dismissal motion, as the presumption of the business judgment rule

under 8 Del. C. § 141(a) was not successfully rebutted; the directors acted within the scope of their fiduciary duties in voting to approve the acquisition and were not required to obtain independent outside experts to review that decision. *Wayne County Emples. Ret. Sys. v. Corti, 2009 Del. Ch. LEXIS 126 (Del. Ch. July 24, 2009)*, aff'd, *996 A.2d 795, 2010 Del. LEXIS 238 (Del. 2010)*.

— — Breach.

Where the directors in whose control the company's stock was vested as its trustees, gave it to themselves for nothing in pursuance of a deliberate plan to retain control over its affairs, there was a clear breach of trust. *Bowen v. Imperial Theatres, Inc., 13 Del. Ch. 120, 115 A. 918, 1922 Del. Ch. LEXIS 30 (Del. Ch. 1922)*.

Evidence supports breach of fiduciary duty. *Smith v. Van Gorkom, 488 A.2d 858, 1985 Del. LEXIS 421 (Del. 1985)*, overruled in part, *Gantler v. Stephens, 965 A.2d 695, 2009 Del. LEXIS 33 (Del. 2009)*.

A court must determine whether the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand; if the derivative plaintiff satisfies this burden, then demand will be excused as futile. *Rales v. Blasband, 634 A.2d 927, 1993 Del. LEXIS 454 (Del. 1993)*.

A director is being independent only when the director's decision is based entirely on the corporate merits of the transaction and it not influenced by personal or extraneous considerations; by contrast, a director who receives a substantial benefit from supporting a transaction cannot be objectively viewed as disinterested or independent. *Cede & Co. v. Technicolor, 634 A.2d 345, 1993 Del. LEXIS 398 (Del. 1993)*, modified, *636 A.2d 956, 1994 Del. LEXIS 414 (Del. 1994)*, dismissed, *663 A.2d 1134, 1994 Del. Ch. LEXIS 178 (Del. Ch. 1994)*.

One director's colorable interest in a challenged transaction is not sufficient, without more, to deprive a board of the protection of the business judgment rule presumption of loyalty. *Cede & Co. v. Technicolor, 634 A.2d 345, 1993 Del. LEXIS 398 (Del. 1993)*, modified, *636 A.2d 956, 1994 Del. LEXIS 414 (Del. 1994)*, dismissed, *663 A.2d 1134, 1994 Del. Ch. LEXIS 178 (Del. Ch. 1994)*.

In assessing a challenge to defensive actions by a target corporation's board of directors in a takeover context, the Court of Chancery should evaluate the board's overall response, including the justification for each contested defensive measure and the results achieved thereby. *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

A material interest of one or more directors less than a majority of those voting would rebut the application of the business judgment rule if the plaintiff proved that the interested director controls or dominates the board as a whole or the interested director failed to disclose an interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the proposed transaction. *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1995 Del. LEXIS 251 (Del. 1995)*.

The standard for liability for failures of oversight requires a showing that the directors have breached their duty of loyalty by failing to attend to their duties in good faith; the directors should be conscious of the fact that they are not doing their jobs under this standard set out in *In Re Caremark Int'l Derivative Litig., 698 A.2d 959 (Del. Ch. 1996)*. *Guttman v. Jen-Hsun Huang, 823 A.2d 492, 2003 Del. Ch. LEXIS 48 (Del. Ch. 2003)*.

In a shareholders' derivative action, once the shareholders had made a showing that the corporation's former chief executive officer (CEO) had used stock (the inflated price of which was due entirely to inaccurate financial information that the CEO had signed) to pay back a loan from the corporation, the burden of production shifted to the CEO (whose arguments that the board, which was entitled to rely on information supplied by officers, was somehow in pari delicto or that the CEO was the victim of subordinates' misrepresentations), were entirely inadequate; the court therefore entered summary judgment rescinding the stock buyback agreement. *In re HealthSouth Corp. S'holders Litig., 845 A.2d 1096, 2003 Del. Ch. LEXIS 128 (Del. Ch. 2003)*, aff'd, *847 A.2d 1121, 2004 Del. LEXIS 175 (Del. 2004)*.

In the context of an action involving a director's breach of fiduciary duties, the chancery court stated that there are 2 types of corporate law claims: (1) a legal claim, grounded in the argument that corporate action is improper because it violates a statute, the certificate of incorporation, a bylaw or other governing instrument, such as a contract; and, (2) an equitable claim, founded on the premise that the directors or officers have breached an equitable duty that they owe to the corporation and its stockholders. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

Although the directors did not adopt protective provisions, failed to consider the common stockholders and sought to exit without recognizing the conflicts of interest due to the merger, the directors nevertheless proved that the transaction was fair and without breach of the duty of loyalty; because the common stock had no economic value before the merger, the shareholders received the substantial equivalent in value when they received nothing for the stock. *In re Trados Inc. S'holder Litig., 73 A.3d 17, 2013 Del. Ch. LEXIS 207 (Del. Ch. 2013)*.

Officer-director breached the duty of loyalty after the termination of a former employee-minority shareholder because the officer-director charged personal expenditures on a corporate credit card and failed to provide any substantive evidence that the contested charges were for business purposes. *Zutrau v. Jansing, 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014)*, aff'd, *123 A.3d 938, 2015 Del. LEXIS 403 (Del. 2015)*.

Officer-director breached the duty of loyalty after the termination of a former employee-minority shareholder because the officer-director intentionally withdrew $250,000 from the corporation's credit line, forcing the minority shareholder to remain financially responsible for that amount as co-guarantor, despite the fact that the withdrawal did not further any legitimate business purpose; the officer-director did not give the minority shareholder any notice nor attempt to negotiate about the guarantee. *Zutrau v. Jansing, 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014)*, aff'd, *123 A.3d 938, 2015 Del. LEXIS 403 (Del. 2015)*.

Issuance of a mandatory injunction requiring redemption of a stockholder rights plan that was intended to insulate corporate management from activists trying to influence the control of a corporation, or a so-called poison pill, was appropriate; the directors of the corporation breached the fiduciary duties when adopting the plan and failed to show that the plan fell within the range of reasonable responses. *In re Williams Cos. Stockholder Litig., — A.3d —, 2021 Del. Ch. LEXIS 34 (Del. Ch. Feb. 26, 2021)*.

Derivative plaintiffs owed fiduciary duties to the company and all stockholders because a claim pursued in arbitration on the company's behalf was a corporate asset, resulted in an award that belonged to the company and left the company's board with authority over the award after it became a final judgment; allegations that the derivative plaintiffs wrongfully withheld the award, causing financial harm by forcing the company to take unfavorable loans, stated a claim for breach of the fiduciary duty of loyalty. *OptimisCorp v. Atkins, — A.3d —, 2021 Del. Ch. LEXIS 153 (Del. Ch. July 15, 2021)*.

— — Independence.

Stockholders' consolidated derivative action against some members of the board of directors and the chief financial officer, alleging that they breached their fiduciary duties and engaged in insider trading, withstood a dismissal motion based on the failure to make a demand on the board without excuse because the shareholders pled: (1) viable claims alleging that the members used insider, nonpublic knowledge of a product's material design flaws and attempts to fix them; (2) personal profit by the board members from the company's stock issuances; and (3) particularized facts raising reasonable doubt that a majority of the board could impartially consider the alleged claims at the time the first complaint was filed. *In re Fitbit, Inc., 2018 Del. Ch. LEXIS 571 (Del. Ch. Dec. 14, 2018)*.

— — No breach.

Officer-director did not breach the duty of loyalty by not filling a former employee-minority shareholder's position with people to provide oversight because: (1) the officer hired 2 people to replace the former employee (who was also a former officer); (2) the 2 people performed most of the functions the former employee had performed; and (3)

the former employee failed to show the 2 people were hired to facilitate the officer's self-dealing. *Zutrau v. Jansing, 2014 Del. Ch. LEXIS 156 (Del. Ch. July 31, 2014)*, aff'd, *123 A.3d 938, 2015 Del. LEXIS 403 (Del. 2015)*.

There was no merit to a claim of breach of the duty of loyalty against former corporate directors who failed to advise the CEO in advance of potential termination so that the CEO could replace the directors and thwart the board; such power in the CEO was not supported by the bedrock principles of Delaware corporate law which provided that the board managed the corporate affairs. *OptimisCorp v. Waite, 2015 Del. Ch. LEXIS 222 (Del. Ch. Aug. 26, 2015)*, aff'd on other grounds, *137 A.3d 970, 2016 Del. LEXIS 254 (Del. 2016)*.

— — Pleading.

Family directors were paid according to the standard compensation package; challenges to their level of director participation and credentials did not state claims for bad faith or disloyalty. *Friedman v. Dolan, 2015 Del. Ch. LEXIS 178 (Del. Ch. June 30, 2015)*.

— Duty to inform.

The question whether shareholders have been provided with appropriate information upon which an informed choice on a matter of fundamental corporate importance may be made, is not a decision concerning the management of business and affairs of the enterprise of the kind the business judgment rule is intended to protect; it is rather a matter relating to the directors' duty to shareholders. *In re Anderson, Clayton Shareholders' Litigation, 519 A.2d 669, 1986 Del. Ch. LEXIS 428 (Del. Ch. 1986)*.

— Equity capital restriction.

Equity capital restriction of a stock sale agreement that limited a corporate board's issuance of equity capital for a period of years was not a violation of the board's legal authority, under *8 Del. C. § 141(a)*, as contractual limitations could be used to obtain a higher price from buyers, to the net benefit of the corporation. *Sample v. Morgan, 914 A.2d 647, 2007 Del. Ch. LEXIS 16 (Del. Ch. 2007)*.

— Fiduciary relationship.

A director will be held as a trustee for the corporation he or she has undertaken to represent, and must account for the profits resulting from an unlawful act done to promote his or her own interest, because he or she cannot derive any personal benefit or advantage by reason of his or her position distinct from other stockholders. *Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225, 1938 Del. Ch. LEXIS 37 (Del. Ch. 1938)*, aff'd, *23 Del. Ch. 255, 5 A.2d 503, 1939 Del. LEXIS 13 (Del. 1939)*.

Directors of corporation stand in fiduciary relation to corporation and its stockholders. Their acts are subject to be tested by the familiar rules that govern the relations of a trustee to the trustee's beneficiary. *Loft, Inc. v. Guth, 23 Del. Ch. 138, 2 A.2d 225, 1938 Del. Ch. LEXIS 37 (Del. Ch. 1938)*, aff'd, *23 Del. Ch. 255, 5 A.2d 503, 1939 Del. LEXIS 13 (Del. 1939)*; *Bovay v. H. M. Byllesby & Co., 27 Del. Ch. 381, 38 A.2d 808, 1944 Del. LEXIS 20 (Del. 1944)*.

Corporate officers and directors are not permitted to use their position of trust and confidence to further their private interests and while technically not trustees, they stand in a fiduciary relation to the corporation and its stockholders. *Gottlieb v. McKee, 34 Del. Ch. 537, 107 A.2d 240, 1954 Del. Ch. LEXIS 101 (Del. Ch. 1954)*.

Each case of director's breach of fiduciary duty must be decided on its own facts. *Kors v. Carey, 39 Del. Ch. 47, 158 A.2d 136, 1960 Del. Ch. LEXIS 92 (Del. Ch. 1960)*.

Under Delaware law a stockholder who in fact controls the management of a Delaware corporation owes a fiduciary duty to that corporation and its shareholders. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

Prior to the date of distribution, the interests held by a spin off subsidiary's prospective stockholders were insufficient to impose fiduciary obligations on the parent and the subsidiary's directors, thus, corporate parent and directors of a wholly-owned subsidiary did not owe fiduciary duties to the prospective stockholders of the subsidiary after the parent declares its intention to spin-off the subsidiary. *Anadarko Petroleum Corp. v. Panhandle Eastern Corp., 545 A.2d 1171, 1988 Del. LEXIS 188 (Del. 1988)*.

— — Creditors.

Creditor's derivative claims on behalf of a corporation against the directors for breaches of fiduciary duties required only a showing that the corporation was insolvent at the time the creditor filed suit, without any requirement to plead and prove continuing insolvency during the litigation; the traditional balance sheet test, and not the higher standard of irretrievable insolvency required for the appointment of a receiver, determined whether the corporation was insolvent when suit was filed. *Quadrant Structured Prods. Co., LTD. v. Vertin, 115 A.3d 535, 2015 Del. Ch. LEXIS 129 (Del. Ch. 2015)*.

— — Majority stockholder.

A fiduciary duty may arise from the exercise of a stockholder power by a majority stockholder in his or her capacity as such, absent any intrusion in the affairs of the board of directors. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

Special board committee's claim that a controlling shareholder (CS) would replace board members with others who would approve a merger, and that the CS would potentially interfere with issuance of shares that would dilute the CS's voting rights could be remedied by the court; there were not such extraordinary circumstances present as to impair the directors' authority or as would warrant a temporary restraining order against the CS's conduct. *CBS Corp. v. Nat'l Amusements, Inc., 2018 Del. Ch. LEXIS 157 (Del. Ch. May 17, 2018)*.

— — Non-directors.

A nonstockholder who usurps the function of the board of directors of a Delaware corporation or otherwise directs its activities assumes the same fiduciary duty as its directors have. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

One who exercises control over a corporation which in turn exercises control over a Delaware corporation may have a fiduciary duty to the latter corporation. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

— — Source.

Under the Delaware cases which speak of fiduciary duty to a corporation or its stockholders, that duty arises from the exercise of power with respect to that corporation. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

— — When assumed.

It is only when a person affirmatively undertakes to dictate the destiny of the corporation that he or she assumes such a fiduciary duty. *Harriman v. E. I. Du Pont de Nemours & Co., 372 F. Supp. 101, 1974 U.S. Dist. LEXIS 12756 (D. Del. 1974)*.

— Limits on power.

Directors' powers do not include power to give away corporate property; they cannot make gifts except as authorized by *8 Del. C. § 122*. *Taussig v. Wellington Fund, Inc., 187 F. Supp. 179, 1960 U.S. Dist. LEXIS 5164 (D. Del. 1960)*, aff'd, *313 F.2d 472, 1963 U.S. App. LEXIS 6348 (3d Cir. Del. 1963)*.

— — Actions without meeting.

Because *8 Del. C. § 141* permits any action that is required or permitted to be taken at any meeting of the board of directors or of any committee thereof to be taken without a meeting if all members of the board or committee consent in writing, a mere showing that a board of directors of a debtor did not convene formal meetings was not evidence that any action taken by the debtor was in fact directed by the board of a different entity. *Teleglobe USA, Inc. v. BCE Inc. (In re Teleglobe Communs. Corp.), 392 B.R. 561, 2008 Bankr. LEXIS 2130 (Bankr. D. Del. 2008)*.

— — Adjournment.

Where motion to adjourn a meeting of corporate directors appears to be defeated, but was actually approved by a majority of the legally elected directors, the meeting was legally adjourned, and subsequent action of the meeting was void. *Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299, 1954 Del. Ch. LEXIS 83 (Del. Ch. 1954)*.

— — Attorney-client privilege.

Because a company could not pick and choose which directors get information by asserting the attorney-client privilege against only 1 director, that director had a right of equal access to materials sought in the capacity of a director of the company and in light of the director's status as a joint client of the subpoenaed law firms; where the injuries to the director resulted directly from the remaining members' actions, and a favorable decision would remedy the director's injuries by potentially invalidating the votes taken at the meetings and the resulting transactions, the director was entitled to compel the production of relevant, discoverable documents in connection with the director's direct claims. *Kalisman v. Friedman, 2013 Del. Ch. LEXIS 100 (Del. Ch. Apr. 17, 2013)*, dismissed in part sub nom. *OTK Assocs. v. Friedman, 85 A.3d 696, 2014 Del. Ch. LEXIS 14 (Del. Ch. 2014)*.

— — Minutes.

Approval of minutes of preceding directors' meeting is simply assertion that secretary had properly recorded them and is not a legalizing of invalid acts recorded therein. *In re Chelsea Exchange Corp., 18 Del. Ch. 287, 159 A. 432, 1932 Del. Ch. LEXIS 20 (Del. Ch. 1932)*.

When a board of directors approves an act which is void because the meeting of the board was illegal for lack of a quorum, the approval of the minutes of such meeting at a subsequent meeting is not an approval of such an unauthorized act. *Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5, 1946 Del. Ch. LEXIS 69 (Del. Ch. 1946)*.

Minutes of meetings of corporate directors are prima facie correct. *Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299, 1954 Del. Ch. LEXIS 83 (Del. Ch. 1954)*.

Where the oral testimony of corporate directors is in conflict as to the results of an election to fill a vacancy, the court will accept the minutes of the directors' meeting as depicting what occurred. *Young v. Janas, 34 Del. Ch. 287, 103 A.2d 299, 1954 Del. Ch. LEXIS 83 (Del. Ch. 1954)*.

— — Quorums.

Where the bylaws of a corporation required specific number to constitute a quorum of directors, an action by the directors with less than that number present is unauthorized. *Drob v. National Memorial Park, Inc., 28 Del. Ch. 254, 41 A.2d 589, 1945 Del. Ch. LEXIS 44 (Del. Ch. 1945)*.

The fact that directors owning a majority of the stock vote in favor of certain corporate action cannot be substituted for the quorum requirements imposed by law concerning meetings of the board of directors. *Belle Isle Corp. v. MacBean, 29 Del. Ch. 261, 49 A.2d 5, 1946 Del. Ch. LEXIS 69 (Del. Ch. 1946)*.

Former director and officer of a corporation could not validly issue shares of common stock in the corporation or grant an annual salary to the director because: (1) as the sole remaining director on a 3-member board of directors,

the director could not satisfy the quorum requirement for a meeting; (2) the director could not bypass the quorum requirement in taking action by written consent as the sole remaining director; and (3) the director's acts would need to be validated to overcome the defects in authorization. *Applied Energetics, Inc. v. Farley, 239 A.3d 409, 2020 Del. Ch. LEXIS 255 (Del. Ch. 2020)*.

— — Voting.

Votes of interested directors cannot be counted to make up majority of the board and if a majority of the directors are adversely interested, any transaction between themselves and the corporation as represented by its board is a case of officers dealing with themselves. *Italo-Petroleum Corp. v. Hannigan, 40 Del. 534, 14 A.2d 401, 1940 Del. LEXIS 9 (Del. 1940)*.

Where a statute requires a vote of a majority of directors present to pass a resolution, a director who is present and does not vote at all on the resolution is counted in the negative for the purpose of determining whether the resolution has been carried by a majority vote. *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

In the absence of certificate provisions providing otherwise, directors, including those designated by a special class of stock, are elected annually pursuant to *8 Del. C. § 211* and each director has a single vote on each matter that occasions board action pursuant to subsection (b). *Insituform of North America, Inc. v. Chandler, 534 A.2d 257, 1987 Del. Ch. LEXIS 500 (Del. Ch. 1987)*.

— Misrepresenting action of board.

Director who misrepresents action of board of directors is thereby misrepresenting action of corporation, because under this section the directors are authorized to manage the business of the corporation. *Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741, 1946 Del. Ch. LEXIS 58 (Del. Ch. 1946)*.

— Power to oust.

Where members were responsible for the foundation's creation and continued endowment and electing its directors, the members' power was intended to resemble that of stockholders, and as a result, the foundation's members could not be ousted by the very directors whom they had elected, for any other interpretation would render the foundation's corporate structure fundamentally unstable. *Oberly v. Kirby, 592 A.2d 445, 1991 Del. LEXIS 179 (Del. 1991)*.

Plaintiffs' motion for summary judgment was denied in part as to whether 1 of 2 limited liability company managers had the authority to terminate defendant from positions as president and chief executive officer of a related corporation; a material fact was in dispute regarding whether the 1 manager met the qualifications necessary to act as the independent manager at the time written consent to terminate defendant was exercised. *Godden v. Franco, 2018 Del. Ch. LEXIS 283 (Del. Ch. Aug. 21, 2018)*.

— Presumption of good faith.

The presumption that boards of directors act in good faith has been consistently reaffirmed and broadened with respect to the sale of corporate assets over the past several decades. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

An important aspect of the presumption that boards of directors act in good faith has generally come to be known as the "business judgment rule." *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

— Purpose of actions.

The fact that charter or bylaw provisions may technically permit an action contemplated by the directors does not automatically insulate directors against scrutiny of purpose. *Petty v. Penntech Papers, Inc., 347 A.2d 140, 1975 Del. Ch. LEXIS 178 (Del. Ch. 1975)*.

— Reliance on others.

— — Compensation consultant.

Company's compensation committee was entitled to the protections of *8 Del. C. § 141(e)* in relying upon an executive compensation consultant, as the compensation committee reasonably believed that the analysis of the terms of the company's president's employment agreement was within the consultant's professional or expert competence, and the consultant's analysis was not so deficient that the compensation committee would have reason to question it; furthermore, the consultant appeared to have been selected with reasonable care, especially in light of the consultant's previous engagements with the company in connection with past executive compensation contracts. *In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 2005 Del. Ch. LEXIS 113 (Del. Ch. 2005)*, aff'd, *906 A.2d 27, 2006 Del. LEXIS 307 (Del. 2006)*.

Chancellor correctly applied *8 Del. C. § 141(e)* in upholding the reliance of corporate board members upon the information that members of the corporation's compensation committee and an executive compensation consultant furnished them in considering and approving the no-fault termination terms of the corporation's president's employment agreement; to accept opposing shareholders' narrow reading of that statute would eviscerate its purpose, which was to protect directors who relied in good faith upon information presented to them from various sources. *Brehm v. Eisner (In re Walt Disney Co. Derivative Litig.), 906 A.2d 27, 2006 Del. LEXIS 307 (Del. 2006)*.

— — Counsel.

Reasonable reliance upon expert counsel is a pertinent factor in evaluating whether corporate directors have met a standard of fairness in their dealings with respect to corporate powers. *Cinerama, Inc. v. Technicolor, 663 A.2d 1134, 1994 Del. Ch. LEXIS 178 (Del. Ch. 1994)*, aff'd, *663 A.2d 1156, 1995 Del. LEXIS 251 (Del. 1995)*.

— — Financial consultant.

Former stockholder's allegations that a financial advisor was not selected with "reasonable care" by the former board of directors in a merger transaction lacked merit because the stockholder did not allege that the board had no basis for selecting the advisor; it only alleged that the board did not inquire as to whether the advisor had ever run a go-shop before. *Miramar Firefighters Pension Fund v. Abovenet, Inc., 2013 Del. Ch. LEXIS 200 (Del. Ch. July 31, 2013)*.

— — Reports.

Board of directors of corporation is entitled to rely on summaries, reports and corporate records in making broad policy decisions. *Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 188 A.2d 125, 1963 Del. LEXIS 127 (Del. 1963)*.

Subsection (e) of this section "protects" directors relying in good faith upon certain reports made to the corporation. *David J. Greene & Co. v. Dunhill International, Inc., 249 A.2d 427, 1968 Del. Ch. LEXIS 39 (Del. Ch. 1968)*.

Subsection (e) of this section fully protects directors of a corporation where they rely in good faith on books of account and reports made by any of its officials, or by an independent certified public accountant. *Prince v. Bensinger, 244 A.2d 89, 1968 Del. Ch. LEXIS 49 (Del. Ch. 1968)*.

Under subsection (e), report must be pertinent to the subject matter upon which a board is called to act, and be entitled to good faith, not blind reliance. *Smith v. Van Gorkom, 488 A.2d 858, 1985 Del. LEXIS 421 (Del. 1985)*, overruled in part, *Gantler v. Stephens, 965 A.2d 695, 2009 Del. LEXIS 33 (Del. 2009)*.

While a board of directors may rely in good faith upon "information, opinions, reports or statements presented" by corporate officers, employees and experts "selected with reasonable care," pursuant to subsection (e), it may not avoid its active and direct duty of oversight in a matter as significant as the sale of corporate control, particularly where insiders are among the bidders. *Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1989 Del. LEXIS 149 (Del. 1989)*.

— — Tax professionals.

Directors were protected under *8 Del. C. § 141(e)* against a stockholder's duty of care claim with respect to the payment of a flat-fee system for accounting and tax services, because they had relied in good faith on the advice of a tax professional regarding the setting of fair fees; further, the setting and annual review of the flat fees by the professional was not so deficient that the board would have had reason to question it. *Sutherland v. Sutherland, 2013 Del. Ch. LEXIS 140 (Del. Ch. May 30, 2013)*.

— Resignation.

Where a director's purported oral, conditional resignation was not sufficiently definite to constitute an objective manifestation of intent to resign, the director could challenge a subsequent unconditional resignation by asserting that it had been obtained through misrepresentation; he director reasonably relied on material misrepresentations in submitting an unconditional resignation and was therefore entitled to reinstatement. *Martin v. Med-Dev Corp., 2015 Del. Ch. LEXIS 272 (Del. Ch. Oct. 27, 2015)*.

Director resignations are statutory rather than contractual. *Martin v. Med-Dev Corp., 2015 Del. Ch. LEXIS 272 (Del. Ch. Oct. 27, 2015)*.

Director who also served as a consultant had not manifested an intent to resign because: (1) the director's failure to respond to communications, and to attend at least 3 board meetings, was probably due to the director's poor health, and (2) a statement the director made to another consultant, that the director's health would no longer allow the director to serve the corporation and asking that the consultant recommend potential future clients, likely referred to the director's need to step back from consulting work. *Villette v. MondoBrain, Inc., — A.3d —, 2020 Del. Ch. LEXIS 375 (Del. Ch. Dec. 29, 2020)*.

— Self-compensation decisions.

Directors' failure to carry their initial burden under *Unocal Corp. v. Mesa Petro. Co., Del. Supr., 493 A.2d 946 (1995)* does not, ipso facto, invalidate the board's actions; instead, once the Court of Chancery finds the business judgment rule does not apply, the burden remains on the directors to prove "entire fairness." *Unitrin, Inc. v. American Gen. Corp. (In re Unitrin, Inc.), 651 A.2d 1361, 1995 Del. LEXIS 13 (Del. 1995)*.

Directorial self-compensation decisions lie outside the business judgment rule's presumptive protection, so that, where properly challenged, the receipt of self-determined benefits is subject to an affirmative showing that the compensation arrangements are fair to the corporation. *In re Walt Disney Co. Derivative Litig., 825 A.2d 275, 2003 Del. Ch. LEXIS 52 (Del. Ch. 2003)*.

— Source of power.

Directors derive their managerial decision making power from subsection (a) of this section. *Zapata Corp. v. Maldonado, 430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

— Standard of review.

Directors of a corporation are spoken of as its trustees; their acts are scanned in the light of those principles which define the relationship existing between trustee and cestui que trust. *Bowen v. Imperial Theatres, Inc., 13 Del. Ch. 120, 115 A. 918, 1922 Del. Ch. LEXIS 30 (Del. Ch. 1922)*.

The law imposes upon the directors the duty of disposing of the shares in the interest of the corporation; the manner in which they perform that duty must meet the exacting standards required of a fiduciary acting in an office of trust and confidence. *Cahall v. Burbage, 14 Del. Ch. 55, 121 A. 646, 1923 Del. Ch. LEXIS 24 (Del. Ch. 1923)*.

— Wrongdoing by employees.

Wrongdoing by employees is not required to be anticipated as a general proposition, and it is only where the facts and circumstances of an employee's wrongdoing clearly throw the onus for the ensuing results on inattentive or supine directors that the law shoulders them with the responsibility. *Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328, 1962 Del. Ch. LEXIS 95 (Del. Ch. 1962)*, aff'd, *41 Del. Ch. 78, 188 A.2d 125, 1963 Del. LEXIS 127 (Del. 1963)*.

Though corporate directors, particularly of a small corporation, may cause themselves to become personally liable when they foolishly or recklessly repose confidence in an untrustworthy officer or agent and in effect turn away when corporate corruption could be readily spotted and eliminated, such principle is hardly applicable to a large corporation, whose operation is hedged about with numerous and sometimes conflicting federal and state controls. *Graham v. Allis-Chalmers Mfg. Co., 40 Del. Ch. 335, 182 A.2d 328, 1962 Del. Ch. LEXIS 95 (Del. Ch. 1962)*, aff'd, *41 Del. Ch. 78, 188 A.2d 125, 1963 Del. LEXIS 127 (Del. 1963)*.

Insurance.

In a dispute with an insurer over supplemental uninsured motorists coverage for a deceased spouse, the surviving spouse's cause of action against the insurer was precluded; the decedent did not have such coverage under the employer's policy because its application was limited to directors, officers, partners or owners of the business and did not include mere managers. *Stoms v. Federated Serv. Ins. Co., 2014 Del. Super. LEXIS 602 (Del. Super. Ct. Nov. 20, 2014)*, aff'd, *125 A.3d 1102, 2015 Del. LEXIS 551 (Del. 2015)*.

An uninsured motorist provision in an insurance policy issued to the insured was not ambiguous because: (1) when read in the context of the policy, "director" and "officer" referred to those terms as used in corporate law; and (2) an employee of the insured was not a director or officer within those corporate law definitions. *Stoms v. Federated Serv. Ins. Co., 125 A.3d 1102, 2015 Del. LEXIS 551 (Del. 2015)*.

Pleadings.

— Deliberate indifference.

The business judgment rule has no application where the directors have profited at the expense of the corporation. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Shareholder's pleading is sufficient to withstand a motion to dismiss where the shareholders' claims are based on an alleged knowing and deliberate indifference to a potential risk of harm to the corporation; where a director consciously ignores duties to the corporation, thereby causing economic injury to its stockholders, the director's actions are either not in good faith or involve intentional misconduct. *In re Walt Disney Co. Derivative Litig., 825 A.2d 275, 2003 Del. Ch. LEXIS 52 (Del. Ch. 2003)*.

Management.

— Bylaws.

A bylaw giving the president the power to submit matters for stockholder action presumably only embraces matters which are appropriate for stockholder action. So construed the bylaws do not impinge upon the statutory right and duty of the board to manage the business of the corporation. *Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852, 1957 Del. Ch. LEXIS 93 (Del. Ch. 1957)*.

Although a director stated a colorable claim by alleging that 2 bylaws of a joint venture were invalid because they conferred disproportionate voting power on other directors, the director failed to identify a sufficient threat of irreparable harm to support an expedited hearing on a request for a preliminary injunction. *Sinchareonkul v. Fahnemann, 2015 Del. Ch. LEXIS 17 (Del. Ch. Jan. 22, 2015)*.

— Definition.

Duties of directors are administrative and relate to supervision, direction and control, the details of the business being delegated to inferior officers, agents and employees and this is what is meant by management. *Cahall v. Lofland, 12 Del. Ch. 299, 114 A. 224, 1921 Del. Ch. LEXIS 20 (Del. Ch. 1921)*, aff'd, *13 Del. Ch. 384, 118 A. 1, 1922 Del. LEXIS 5 (Del. 1922)*.

— Delayed redemption provision.

Delayed redemption provision was invalid since it would have prevented a new board of directors from managing the corporation by redeeming a rights plan to facilitate a transaction that would have served the stockholders' best interests, even under circumstances where the board would have been required to do so because of its fiduciary duties to stockholders. *Quickturn Design Sys. v. Shapiro, 721 A.2d 1281, 1998 Del. LEXIS 496 (Del. 1998)*.

— Duties.

— — By certificate of incorporation.

There is no conflict with the general principle that directors may not delegate their duty to manage the corporate enterprise where the delegation of duty, if any, is made not by the directors but by stockholder action via the certificate of incorporation. *Lehrman v. Cohen, 43 Del. Ch. 222, 222 A.2d 800, 1966 Del. LEXIS 163 (Del. 1966)*.

— — Bylaws.

The words of *8 Del. C. § 141(c)(2)* plainly subordinate board resolutions, creating and empowering committees, to overriding bylaw provisions. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

Since a provision in bylaw amendments eliminating a committee did not contravene *8 Del. C. § 141(c)(2)*, the question became whether that and the other bylaw amendments were impermissible because they were adopted for an inequitable purpose; the trial court determined that the amendments were ineffective because they were adopted for an inequitable purpose that involved a breach of the fiduciary duty of a controlling shareholder who was a director. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

— — Delegable.

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— — Litigation.

When a corporation suffers harm, the board of directors is the institutional actor legally empowered under 8 Del. C. § 141(a) to determine what remedial action the corporation should take, including pursuing litigation against the individuals involved. In re China Agritech, Inc., 2013 Del. Ch. LEXIS 132 (Del. Ch. May 21, 2013).

— — Non-delegable.

But directors may not delegate their duty to manage corporate enterprise. Adams v. Clearance Corp., 35 Del. Ch. 459, 121 A.2d 302, 1956 Del. LEXIS 53 (Del. 1956).

The general rule forbidding the directors to delegate managerial duties applies as well to a delegation of a single duty as to the delegation of several or of all duties. Adams v. Clearance Corp., 35 Del. Ch. 459, 121 A.2d 302, 1956 Del. LEXIS 53 (Del. 1956).

Retired federal judge could not serve as the sole member of a special litigation committee for a limited liability company adopting a corporate-style governance structure because the judge was not a director thereof. Obeid v. Hogan, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016).

— — Options.

Where committee was not empowered to grant options, but only to recommend to the board the grant of options to employees, thereafter, the board in its discretion, and in the exercise of its business judgment, was required to approve the grant of options, the options committee was not the type of committee subject to subsection (c) of this section which governs the creation of committees authorized to exercise the powers of the board of directors in the management of the business and affairs of the corporation. Elster v. American Airlines, Inc., 39 Del. Ch. 476, 167 A.2d 231, 1961 Del. Ch. LEXIS 49 (Del. Ch. 1961).

— — To committee.

Delegation by the board of directors to its president and secretary to determine whether a sale of assets of the corporation would be made, and if so upon what terms, is a violation of 8 Del. C. § 271 and of the stockholders' resolution empowering the board to sell, because subsection (c) of this section authorizes delegation of directors' powers to directors, not to officers. Clarke Memorial College v. Monaghan Land Co., 257 A.2d 234, 1969 Del. Ch. LEXIS 79 (Del. Ch. 1969).

Purpose of independent committee, delegated authority to decide whether to pursue pending derivative action, is to act as an independent arm of the ultimate power given to a board of directors under subsection (a) of this section to determine whether or not derivative plaintiff's pending suit brought on behalf of the corporation should be maintained when measured against the overall best interests of the corporation. Abbey v. Computer & Communications Technology Corp., 457 A.2d 368, 1983 Del. Ch. LEXIS 390 (Del. Ch. 1983).

The setting of a record date for a stockholder vote must be accomplished by a board resolution adopted before the record date, and under subsection (c)(2), a board may delegate this task to a one-person board committee, but this board committee must itself comply with § 213(a) of this title by adopting a resolution fixing a future record date. In re Staples, Inc. S'holders Litig., 792 A.2d 934, 2001 Del. Ch. LEXIS 79 (Del. Ch. 2001).

— — — Compensation.

Corporate directors do not breach their fiduciary duty by delegating authority to a compensation committee to grant stock options. Michelson v. Duncan, 386 A.2d 1144, 1978 Del. Ch. LEXIS 494 (Del. Ch. 1978), aff'd in part and rev'd in part, 407 A.2d 211, 1979 Del. LEXIS 422 (Del. 1979).

— — — Merger.

The question of the independence of the members of a special committee that recommended a merger turned upon the reality of the interests and incentives affecting the independent directors; as the full board of directors had to act to approve a merger agreement and recommend the merger to the stockholders for approval, a committee could not be empowered to perform that necessary board function, under subsection (c) of this section and *8 Del. C. § 251(b)*. *Krasner v. Moffett, 826 A.2d 277, 2003 Del. LEXIS 334 (Del. 2003)*.

The court did not conclude that the 9 independent directors of 10 total directors were either too enamored with the opportunity of reaping the gains that would flow to them from their accelerated options that became vested in the event of a change of control merger, or too poorly informed to step forward and demand a better process, because the 9 directors: (1) did not have improper motives; (2) engaged in a reasonable corporate process to determine a fair whole-company sale value; and (3) made a reasonable decision to execute a merger agreement containing the challenged termination fee and matching rights. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

Board's procedure to remain as independent as it could while it considered merger proposals included that the board and the executive committee be committed to avoiding discussion of future management equity, cash compensation, or positions with bidders early in the process; as a means of enforcing that commitment, meetings with bidders were held only in the presence of the investment banker and with all of the final 4 bidders. *In re Toys 'R' Us, Inc., S'holder Litig., 877 A.2d 975, 2005 Del. Ch. LEXIS 90 (Del. Ch. 2005)*.

— — To officers.

The powers of a president of a corporation over its business and property are merely the powers of an agent, for a corporation can speak in no other manner. The control over the company's business and property is vested in the board of directors, but subject to this control certain powers are delegated by implication to certain officers. *Joseph Greenspon's Sons Iron & Steel Co. v. Pecos Valley Gas Co., 34 Del. 567, 156 A. 350, 1931 Del. Super. LEXIS 13 (Del. Super. Ct. 1931)*.

— Lock-ups.

Lock-ups (options to purchase assets of corporation) and related agreements are permitted under Delaware law where their adoption is untainted by director interest or other breaches of fiduciary duty. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 1986 Del. LEXIS 1053 (Del. 1986)*.

Standing.

Because a stockholder derivative action was available to redress any breach of fiduciary duty, pursuant to *8 Del. C. § 327*, the Delaware Supreme Court declined to extend the doctrine of equitable standing to allow a director, pursuant to *8 Del. C. § 141(a)*, to bring a similar action. *Schoon v. Smith, 953 A.2d 196, 2008 Del. LEXIS 67 (Del. 2008)*.

Nonparty director had standing to assert declaratory judgment claims arising from allegedly invalid bylaws and voting rights involving a joint venture; the director had an interest in having director rights respected and standing to sue to enforce them. *Sinchareonkul v. Fahnemann, 2015 Del. Ch. LEXIS 17 (Del. Ch. Jan. 22, 2015)*.

Stockholders.

— Limits.

The Delaware corporation law does not permit actions or agreements by stockholders which would take all power from the board to handle matters of substantial management policy. *Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893, 1956 Del. Ch. LEXIS 102 (Del. Ch. 1956)*, modified, *36 Del. Ch. 102, 125 A.2d 588, 1956 Del. Ch. LEXIS 117 (Del. Ch. 1956)*, vacated in part, *36 Del. Ch. 371, 130 A.2d 338, 1957 Del. LEXIS 80 (Del. 1957)*.

If an agreement between stockholders and directors tends to limit in a substantial way the freedom of director decisions on matters of management policy it violates the duty of each director to exercise his or her own best judgment on matters coming before the board. *Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893, 1956 Del. Ch. LEXIS 102 (Del. Ch. 1956)*, modified, *36 Del. Ch. 102, 125 A.2d 588, 1956 Del. Ch. LEXIS 117 (Del. Ch. 1956)*, vacated in part, *36 Del. Ch. 371, 130 A.2d 338, 1957 Del. LEXIS 80 (Del. 1957)*.

The Court of Chancery cannot give legal sanction to agreements which have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters. *Abercrombie v. Davies, 35 Del. Ch. 599, 123 A.2d 893, 1956 Del. Ch. LEXIS 102 (Del. Ch. 1956)*, modified, *36 Del. Ch. 102, 125 A.2d 588, 1956 Del. Ch. LEXIS 117 (Del. Ch. 1956)*, vacated in part, *36 Del. Ch. 371, 130 A.2d 338, 1957 Del. LEXIS 80 (Del. 1957)*.

— Ratification.

Courts generally look with apprehension upon ratification of previous corporate acts after action has been instituted questioning validity of such acts. However, in the absence of fraud subsequent action by the board within director authority will be held to be valid. *Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581, 1948 Del. LEXIS 24 (Del. 1948)*.

Stockholders' ratification of voidable acts of directors is effective for all purposes unless the action of the directors constituted a gift of corporate assets to themselves or was ultra vires, illegal or fraudulent. *Kerbs v. California Eastern Airways, Inc., 33 Del. Ch. 69, 90 A.2d 652, 1952 Del. LEXIS 111 (Del. 1952)*.

Voting.

— Rights.

Provision aimed solely at limiting eligibility for golden parachute agreements to situations involving a true change of control in a corporation that was otherwise eager to retain certain senior managers was not an impermissible change in the voting rights of directors without authorization in the corporate charter; the provision expired after 2 years and did not have an effect of actually expanding or contracting voting, but only affected eligibility for extra compensation benefits. *Cal. Pub. Emples. Ret. Sys. v. Coulter, 2005 Del. Ch. LEXIS 54 (Del. Ch. Apr. 21, 2005)*.

— Trust amendment.

Shareholder agreement amended a voting trust agreement by obligating the voting trustees to vote their shares in a specific manner that would guarantee that the 4 shareholder groups subject to the shareholder agreement: (1) had equal director representation on the corporation's board; (2) had combined director representation that would constitute a majority of the corporation's board; and (3) had a veto fixing the number of directors at 6, unless each of the 4 shareholder groups consented; these rights and obligations had the effect of altering the original terms of the voting trust, and therefore the shareholder agreement was considered an amendment to the voting trust agreement. *President & Fellows of Harvard College v. Glancy, 2003 Del. Ch. LEXIS 25 (Del. Ch. Mar. 21, 2003)*.

C. Election.

Annual meeting.

— Early.

Bylaw requiring that a corporation hold the corporation's next annual meeting approximately 4 months after the last annual meeting was invalid because: (1) directors on the corporation's staggered board served until the annual meeting held in the third year following the year in which the directors were elected, so the bylaw shortened the terms of directors whose terms expired at the next annual meeting, contrary to the corporation's charter's annual meeting term alternative; and (2) the annual meeting term alternative historically meant, both within the corporation

and generally, that directors served 3-year terms. *Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 2010 Del. LEXIS 585 (Del. 2010)*.

Bylaw requiring that a corporation hold the corporation's next annual meeting approximately 4 months after the last annual meeting, where the corporation's charter provided that classes of directors served until the annual meeting held in the third year following the year in which the directors were elected, was invalid; the bylaw amounted to a de facto removal without cause of directors without the affirmative vote of 67% of all shares entitled to vote, as the charter required. *Airgas, Inc. v. Air Prods. & Chems., Inc., 8 A.3d 1182, 2010 Del. LEXIS 585 (Del. 2010)*.

— Elections.

Directors shall be elected at annual meeting of stockholders, and it is the duty of those holding proxies to attend the meeting as well as vote the stock they represent and the election should not be prevented by objections of a purely technical character interposed by stockholders who are disappointed or dissatisfied because of their inability to control the meeting. *Duffy v. Loft, Inc., 17 Del. Ch. 376, 152 A. 849, 1930 Del. LEXIS 7 (Del. 1930)*.

In an action involving competing claims regarding control of a majority of a corporate board of directors, a preferred stockholder faction that purportedly amended the bylaws in order to reduce the size of the board from 5 directors to 3 directors acted in conflict with *8 Del. C. § 141(k)*, such that the amendment to the bylaws was void; the bylaw amendment contemplated the calling of a special meeting in order to elect a "successor" director, which was not statutorily appropriate unless it was done at an annual meeting. *Kurz v. Holbrook, 989 A.2d 140, 2010 Del. Ch. LEXIS 24 (Del. Ch.)*, aff'd in part and rev'd in part, *992 A.2d 377, 2010 Del. LEXIS 182 (Del. 2010)*.

Directors.

— Acceptance.

Acceptance on newly elected director's part is necessary and by reason of his refusal to serve on the board of directors he did not become a director and no notice of directors' meeting should have been given to him, and any action taken by the board without notice to him was valid. *Blish v. Thompson Automatic Arms Corp., 30 Del. Ch. 538, 64 A.2d 581, 1948 Del. LEXIS 24 (Del. 1948)*.

— Business judgment rule.

The plaintiffs failed to produce evidence creating a genuine issue of material fact regarding whether the board's actions were entitled to the protection of the business judgment rule where they produced no evidence; (1) that the independence or disinterestedness of the corporate directors was compromised, (2) that the board acted without due care or for improper purposes, or (3) that the defensive measures did not have a rational business purpose. *In re Gaylord Container Corp. Shareholders Litig., 753 A.2d 462, 2000 Del. Ch. LEXIS 16 (Del. Ch. 2000)*.

— Nomination.

In shareholder's suit against casino corporation in which it owned 49 percent of shares, shareholder was awarded right to nominate 2 directors (instead of 1); the charter's and bylaws' ambiguities, under contract construction principles, were resolved in favor of the right of a shareholder to participate in the board electoral process, restrictions of which (including consideration of external evidence) were enforceable only if they were clear and convincing. *Harrah's Entm't, Inc. v. JCC Holding Co., 802 A.2d 294, 2002 Del. Ch. LEXIS 85 (Del. Ch. 2002)*.

— Number.

Reasonably construed, this section explicitly authorizes the adoption of a bylaw provision which fixes a method of determining the number of directors to be elected. *Ellin v. Consolidated Caribou Silver Mines, Inc., 31 Del. Ch. 149, 67 A.2d 416, 1949 Del. Ch. LEXIS 88 (Del. Ch. 1949)*.

Delaware law allows the board to fix the number of directors within the restrictions imposed by the certificate of incorporation. *Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306, 1988 Del. Ch. LEXIS 38 (Del. Ch. 1988)*.

— Qualifications.

In the absence of express statutory provision, a director need not be a holder of any shares at the time of his or her election, but it will be sufficient if the director qualifies himself or herself by becoming a holder of the requisite number of shares before he or she enters upon the office of director. *Triplex Shoe Co. v. Rice & Hutchins, Inc., 17 Del. Ch. 356, 152 A. 342, 1930 Del. LEXIS 9 (Del. 1930)*.

The certificate of incorporation can provide for reasonable director qualifications. *Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306, 1988 Del. Ch. LEXIS 38 (Del. Ch. 1988)*.

— Resignation.

The phrase "written notice to the corporation," used in subsection (b) of this section in connection with the resignation of a director, means actual written notice to each and every member of the board of directors or actual written notice to an agent of the corporation, such as its chairperson of the board, president or secretary. *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

Giving actual written notice to an agent of the corporation would, in the normal case, meet the requirements of this section, but not where the corporate agent's relation to the subject matter is substantially adverse to the corporation. *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

Directors of Delaware corporations have no vested right to hold office in defiance of a properly expressed will of the majority of stockholders. *Roven v. Cotter, 547 A.2d 603, 1988 Del. Ch. LEXIS 68 (Del. Ch. 1988)*.

Because emails on which a community center relied were not resignations and, to the extent they could be construed as such, were improperly obtained, 3 members did not resign from the center's board; reading their communications literally, 2 of the members each wrote that they would be resigning in writing in the future, and a third member merely declined to serve on what that member understood to be a new advisory committee. *Hockessin Cmty. Ctr., Inc. v. Swift, 59 A.3d 437, 2012 Del. Ch. LEXIS 232 (Del. Ch. 2012)*.

Oral resignations of directors were effective (absent written notice) and were proven by subsequent actions, which included signing franchise tax reports in which they were not listed as directors. *Boris v. Schaheen, 2013 Del. Ch. LEXIS 292 (Del. Ch. Dec. 2, 2013)*.

— Right to office.

Stockholders, under Delaware law, do not have a fundamental right to be directors. *Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306, 1988 Del. Ch. LEXIS 38 (Del. Ch. 1988)*.

Where the corporation's nominees were not re-elected because the "withhold authority" proxy cards were required to be counted, the nominees continued to be in office as holdovers and had a right to remain in office only until their successors were elected and qualified. *North Fork Bancorporation, Inc. v. Toal, 825 A.2d 860, 2000 Del. Ch. LEXIS 155 (Del. Ch. 2000)*, aff'd, *781 A.2d 693, 2001 Del. LEXIS 42 (Del. 2001)*.

Amendment to corporate bylaws that purported to elect a director's successor before the incumbent's term expired was in conflict with the Delaware General Corporation Law, such that it was void; it contradicted the means in which a director's term could end under *8 Del. C. § 141(b)*, the specific mechanism for director removal set forth in *8 Del.*

C. § 141(k), and the concept of an annual meeting at which directors were elected under 8 Del. C. § 211(b). Crown Emak Partners, LLC v. Kurz, 992 A.2d 377, 2010 Del. LEXIS 182 (Del. 2010).

Oral statements were sufficient for a director's resignation; evidence that included the draft minutes from a board meeting at which the director's resignation and immediate replacement were discussed supported the conclusion that the director resigned and was replaced. Biolase, Inc. v. Oracle Partners, L.P., 97 A.3d 1029, 2014 Del. LEXIS 278 (Del. 2014).

— Terms.

Corporation need not provide in its certificate for staggered terms for its directors; this section is permissive. Essential Enterprises Corp. v. Automatic Steel Products, Inc., 39 Del. Ch. 93, 159 A.2d 288, 1960 Del. Ch. LEXIS 96 (Del. Ch. 1960).

Staggered board amendments approved by 2 directors did not work an inequity or show a breach in fiduciary duty because: (1) the minority investor failed to prove that the 2 majority investors and directors approved the staggered board amendments in bad faith; (2) the staggered board amendments were intended to prevent the minority investor, a business competitor, from having access to confidential corporation board discussions; and (3) the amendments were exactly the sort of consequence a minority investor accepted would occur if the minority investor decided to compete with the corporation. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 2010 Del. Ch. LEXIS 187 (Del. Ch. 2010).

Pleadings.

Minority shareholder's claim that board breached its fiduciary duty when it appointed a new president was not dismissed since that claim was a shareholder claim and it was pleaded with sufficient particularity as to why the appointment by the board breached a fiduciary duty to the shareholder; the shareholder alleged that the new president was not qualified and was appointed primarily because of being related to the controlling shareholder. Dweck v. Nassar, 2005 Del. Ch. LEXIS 183 (Del. Ch. Nov. 23, 2005).

D. Removal.

Actions against board.

Where plaintiff stockholder has been properly removed as a director of defendant corporation under a bylaw adopted by defendant's incorporators and approved by defendant's directors, which is consistent with this section, she is in no position to attack its application to her. Everett v. Transnation Dev. Corp., 267 A.2d 627, 1970 Del. Ch. LEXIS 109 (Del. Ch. 1970).

Trial court denied relief sought by a former executive director of a non-profit corporation who brought a declaratory judgment action challenging removal, the expansion of the original board of directors, and the decision of the remaining directors to dissolve the corporation, because the directors' decision to remove the former executive director was supported by the fact that the former executive director was arrested by federal marshals with regard to unrelated criminal acts and the director's handling of the corporation's funds thereafter came into question in that facts indicated that the former executive director paid social club fees for one of the executive director's children with the corporation's grant money; further, the fact that the former executive director waited over 1 year to bring suit to challenge the directors' various actions, including removal, caused acquiescence and laches to bar the claim. Nevins v. Bryan, 885 A.2d 233, 2005 Del. Ch. LEXIS 76 (Del. Ch.), aff'd, *884 A.2d 512, 2005 Del. LEXIS 384 (Del. 2005)*.

Authority of board.

— Removal for cause.

The phrase “classified as provided in subsection (d)”, which is used in subsection (k)(1) but not in the last sentence of subsection (k), was meant to refer only to staggered boards (pursuant to the first sentence of subsection (d)) and not to specially designated directorships. *Insituform of North America, Inc. v. Chandler, 534 A.2d 257, 1987 Del. Ch. LEXIS 500 (Del. Ch. 1987)*.

Although a director may have possessed the personal right to invoke the Fifth Amendment privilege, that did not immunize that director from all collateral consequences that came from invoking the privilege; given the director’s choice not to cooperate with the Securities and Exchange Commission, the director left the corporation’s other directors with no practical option other than to remove that director as chairman of the board of directors. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

Chancery Court would not set a stockholder’s declaratory judgment action, relating to a special meeting of stockholders of a corporation to vote on whether to remove directors for cause, for an expedited hearing or permit expedited discovery; the stockholder did not demonstrate a sufficient possibility of a threatened irreparable harm that was both imminent and nonspeculative. *Platinum Partners Value Arbitrage Fund L.P. v. Echo Therapeutics, Inc., 2014 Del. Ch. LEXIS 236 (Del. Ch. Nov. 14, 2014)*.

— Removal without cause.

To allow the board to remove 1 of its own members at any time without cause would seem to be completely violative of shareholder rights. *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

Authority of shareholders.

— Removal for cause.

The stockholders have the power to remove a director for cause even where there is a provision for cumulative voting. *Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852, 1957 Del. Ch. LEXIS 93 (Del. Ch. 1957)*.

The stockholders have power to remove directors for cause. *Campbell v. Loew's, Inc., 36 Del. Ch. 563, 134 A.2d 852, 1957 Del. Ch. LEXIS 93 (Del. Ch. 1957)*; *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

— Removal without cause.

Corporate bylaws may provide for removal of a director without cause by the shareholders. *Dillon v. Berg, 326 F. Supp. 1214, 1971 U.S. Dist. LEXIS 13411 (D. Del. 1971)*, aff'd, *453 F.2d 876, 1971 U.S. App. LEXIS 6327 (3d Cir. Del. 1971)*, disapproved, *Wylie v. Marley Co., 891 F.2d 1463, 1989 U.S. App. LEXIS 19021 (10th Cir. Kan. 1989)*.

Shareholders are permitted to amend a certificate of incorporation, thereby eliminating a bylaw establishing a classified board of directors, so that the stockholders can then remove a director without cause. *Roven v. Cotter, 547 A.2d 603, 1988 Del. Ch. LEXIS 68 (Del. Ch. 1988)*.

Director/member’s ousting of his siblings could be viewed as exhibiting a lack of familial regard, but in his capacity as member and director of the foundation, he owed no fiduciary duties to other directors, only to the foundation, and as long as director’s actions posed no threat to the foundation, director’s status as member gave director the power to oust the siblings for any reason or even for no reason at all. *Oberly v. Kirby, 592 A.2d 445, 1991 Del. LEXIS 179 (Del. 1991)*.

Automatic.

Certificate of incorporation could provide for automatic termination of directors upon a predetermined occurrence, where only the failure to remain qualified would cause a director to be removed. *Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306, 1988 Del. Ch. LEXIS 38 (Del. Ch. 1988)*.

Stockholder's right to remove directors for cause did not preclude the automatic termination of a director upon failure to be qualified under the categories set forth in proposed certificate of incorporation. *Stroud v. Milliken Enterprises, Inc., 585 A.2d 1306, 1988 Del. Ch. LEXIS 38 (Del. Ch. 1988)*.

Board shrinkage.

In an action involving competing claims regarding control of a majority of a corporate board of directors, a preferred stockholder faction that purportedly amended the bylaws in order to reduce the size of the board from 5 directors to 3 directors acted in conflict with *8 Del. C. § 141(b)*, such that the amendment of the bylaws was void; the amendment to the bylaws contemplated ending 2 directors' terms through board shrinkage, which was not 1 of the methods allowed in *8 Del. C. § 141(b)*. *Kurz v. Holbrook, 989 A.2d 140, 2010 Del. Ch. LEXIS 24 (Del. Ch.)*, aff'd in part and rev'd in part, *992 A.2d 377, 2010 Del. LEXIS 182 (Del. 2010)*.

In an action involving competing claims regarding control of a majority of a corporate board of directors, a preferred stockholder faction that purportedly amended the bylaws in order to reduce the size of the board from 5 directors to 3 directors acted in conflict with *8 Del. C. § 141(b)*, as continuing but seatless directors would conflict with the statutory mechanism for determining a quorum; accordingly, the amendment to the bylaws was void. *Kurz v. Holbrook, 989 A.2d 140, 2010 Del. Ch. LEXIS 24 (Del. Ch.)*, aff'd in part and rev'd in part, *992 A.2d 377, 2010 Del. LEXIS 182 (Del. 2010)*.

Consent to remove.

— Secret.

Although 2 directors of a family corporation secretly obtained *8 Del. C. § 228* written stockholder consents and utilized them to remove a third director and his sons as officers under *8 Del. C. §§ 141(k)*, *142(b)*, the consents were deemed valid where they conformed to the strict requirements of *8 Del. C. § 228* and were made by consenting shareholders who had received adequate disclosures; it was unreasonable for insiders of a private family corporation, when faced with removal by written consents under *8 Del. C. § 228*, to insist that those seeking their removal under *8 Del. C. § 141(k)* were required to meet a higher disclosure standard that was more akin to that of a public company. *Unanue v. Unanue, 2004 Del. Ch. LEXIS 153 (Del. Ch. Nov. 3, 2004)*.

Improper procedure.

CEO's' motion for partial summary judgment was granted in an action pursuant to *8 Del. C. § 225*, and it was determined that CEO retained the position; directors' attempt to remove the CEO failed as the board of directors did not unanimously consent to the action in writing, as required by subsection (f) of this section. *Solstice Capital II, Ltd. P'shp v. Ritz, 2004 Del. Ch. LEXIS 39 (Del. Ch. Apr. 6, 2004)*.

Where individual directors gathered to terminate a chief executive officer (CEO), the board's action was void ab initio and failed to terminate the CEO prior to the CEO's call for a special meeting, as: (1) the gathering did not constitute a proper meeting of the board, since there was no formal call to the meeting and no vote; (2) the exchange was unidirectional; and (3) the CEO's attendance was obtained by deception. *Fogel v. U.S. Energy Sys., 2007 Del. Ch. LEXIS 178 (Del. Ch. Dec. 13, 2007)*.

In an action under *8 Del. C. § 225*, an ousted corporate officer was entitled to a stay pending appeal under Ch. Ct. R. 62(d) because the former officer would suffer irreparable harm, and might prevail on appeal based on 4 cases recognizing a special equitable notice requirement in favor of a super-director whose powers trumped the board of director's statutory authority under *8 Del. C. § 141(a)*. *Klaassen v. Allegro Dev. Corp., 2013 Del. Ch. LEXIS 275 (Del. Ch. Nov. 7, 2013)*.

In a continued dispute over the proper composition of a corporate board, an amended bylaw that authorized the stockholders to remove corporate officers over the board's objection was not valid; it involved a substantive business decision and unduly interfered with the directors' management prerogatives. *Gorman v. Salamone, 2015 Del. Ch. LEXIS 202 (Del. Ch. July 31, 2015)*.

Corporate bylaw requiring a supermajority vote of at least 2/3 of the voting power of all outstanding shares in order to remove directors was inconsistent with law because: (1) this statute unambiguously conferred on a majority the power to remove directors; and (2) the contrary provision in the company bylaws was unlawful. *Frechter v. Zier, 2017 Del. Ch. LEXIS 14 (Del. Ch. Jan. 24, 2017)*.

Pleading standards.

Minority shareholder's claim that board breached its fiduciary duty when it terminated employment as president was dismissed since that claim was a personal claim, not a shareholder claim, and since it was otherwise not pleaded with sufficient particularity as to why the termination by the board breached a duty to the minority shareholder. *Dweck v. Nassar, 2005 Del. Ch. LEXIS 183 (Del. Ch. Nov. 23, 2005)*.

Defendants' motion to dismiss a derivative action was denied, in part, because the complaint did more than assert conclusory allegations and met the low pleading burden regarding director compensation, presenting facts implying lack of entire fairness; the directors' average compensation was nearly twice that of its peer companies' directors, despite managing an entity no larger nor more profitable than its peers. *Stein v. Blankfein, 2019 Del. Ch. LEXIS 199 (Del. Ch. May 31, 2019)*.

Voting trustee.

Although voting trustees may have extremely broad discretion in the management of the trust, where they have given preferential consideration to the interests of certain beneficiaries without considering the interest of the disfavored beneficiary, then these alleged facts give rise to an inference that the voting trustees have acted in such a manner as to have negligently discharged their duties, which can be grounds for removing a voting trustee. *President & Fellows of Harvard College v. Glancy, 2003 Del. Ch. LEXIS 25 (Del. Ch. Mar. 21, 2003)*.

III. Sale or Purchase of Assets or Control.

Business judgment rule.

— Decision to sell.

Business judgment rule weighs in favor of directors' decision to sell assets unless the complaining shareholders can prove fraud or a clearly inadequate sale price. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

In a declaratory judgment action brought by a majority shareholder and member plaintiffs of a limited liability company (LLC) wherein Delaware law applied, the federal District Court held that the plaintiffs did not breach any fiduciary duties in connection with the sale of the LLC's operating divisions since they were significantly undercapitalized and that the LLC was not required to indemnify them for the failed operations; further, the plaintiffs failed to prove bad faith on the part of the LLC by their counterclaims asserting various fiduciary duty breaches. *In re ALH Holdings LLC, 675 F. Supp. 2d 462, 2009 U.S. Dist. LEXIS 120096 (D. Del. 2009)*.

Under Delaware's long arm statute, *10 Del. C. § 3104(c)*, the court had personal jurisdiction over a nonresident individual controlling the defendant corporation and that publicly traded Delaware corporation itself because they purposefully availed themselves of the benefits of Delaware law by allegedly causing the corporation to be sold at a fire-sale price to alleviate a liquidity crisis that the individual defendant was facing. *Virtus Capital L.P. v. Eastman Chem. Co., 2015 Del. Ch. LEXIS 34 (Del. Ch. Feb. 11, 2015)*, dismissed without prejudice in part, *2016 Del. Ch. LEXIS 216 (Del. Ch. Dec. 9, 2016)*.

— Fraud.

The burden is on the shareholders to establish some fraud, or what amounts to fraud, on the part of the corporation in order to prevail. *Muschel v. Western Union Corp., 310 A.2d 904, 1973 Del. Ch. LEXIS 115 (Del. Ch. 1973)*.

It is incumbent on the shareholders to prove that the directors against whom relief is sought were either guilty of actual fraud or that the price fixed for the sale of assets was so clearly inadequate as constructively to carry the badge of fraud. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

— Inadequate price.

In order to enjoin a proposed merger on the theory of constructive fraud based on a claimed discriminatory undervaluation or overvaluation of corporate assets, it must be plainly demonstrated that the overvaluation or undervaluation, as the case may be, is such as to show a conscious abuse of discretion before fraud at law can be made out. *Muschel v. Western Union Corp., 310 A.2d 904, 1973 Del. Ch. LEXIS 115 (Del. Ch. 1973)*.

There are limits on business judgment rule which fall short of intentional or inferred fraudulent misconduct and which are based simply on gross inadequacy of price in the sale of assets. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

In entering a preliminary injunction to restrict entities who controlled a subsidiary from selling controlling interest in the parent in order to allow the buyer to obtain indirect control of a newspaper owned by the subsidiary, the court: (1) declared the stockholder rights plan was permissibly adopted; (2) declared bylaws allowing the sale in bad faith and ineffective; (3) prevented the selling entities and parent from further breaches of the restructuring proposal contract; and (4) ordered the parent to submit an implementing order for the court to approve. *Hollinger Int'l v. Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004)*, aff'd, *872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005)*.

— Not protected decisions.

Board's decision to keep the poison pill in place was not reasonable in relationship to any threat posed and, therefore, the board's decision is not protected by the business judgment rule. *Grand Metropolitan Public, Ltd. v. Pillsbury Co., 558 A.2d 1049, 1988 Del. Ch. LEXIS 158 (Del. Ch. 1988)*.

Court did not approve proposed settlement of shareholders' consolidated class action suit against their hotel corporation, its directors, and entity that allegedly bought it for too little, as court was to protect interests of the unrepresented class, and (after piercing the settlement proponents' facially sterile record) it had too many concerns to exercise its business judgment and conclude settlement was fair; the court's specific concerns generally related to whether the defendants' only superficially complied with fiduciary standards and whether the class was settling its claims for too little, when the buying entity sold part of the assets for more than it paid for all the assets immediately after the transaction. *In re Prime Hospitality, Inc. S'holders Litig., 2005 Del. Ch. LEXIS 61 (Del. Ch. May 4, 2005)*.

— Protected decisions.

Tender offer and sale of corporate assets held protected by business judgment rule. *Thompson v. Enstar Corp., 509 A.2d 578, 1984 Del. Ch. LEXIS 552 (Del. Ch. 1984)*.

— Reliance on advisors.

For purposes of claims of breach of fiduciary duties asserted by former shareholders against a former board of directors, arising from a buyout of all of the outstanding corporate shares, the complaint failed to survive challenge by a motion to dismiss pursuant to Ch. Ct. R. 12(b)(6) where, pursuant to *8 Del. C. § 102(b)(7)*, *8 Del. C. § 141(a)* and (e), the board's reliance on its legal advisors was accorded the same effects as a board's reliance upon an

investment banker's fairness opinion; the shareholders did not rebut the presumption that the directors acted in good faith or that reasonable care was not exercised in selecting the financial advisor. *In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013)*.

— Requirements to challenge.

Actual fraud, whether resulting from self-dealing or otherwise, is not necessary to challenge a sale of assets. *Gimbel v. Signal Cos., 316 A.2d 599, 1974 Del. Ch. LEXIS 113 (Del. Ch.)*, aff'd, *316 A.2d 619, 1974 Del. LEXIS 330 (Del. 1974)*.

Directors.

— Responsibilities.

The responsibility of the directors in a sale of corporate control is to get the highest value reasonably attainable for the shareholders. *Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1989 Del. LEXIS 149 (Del. 1989)*.

For purposes of claims of breach of fiduciary duties asserted by former shareholders against a former board of directors, arising from a buyout of all of the outstanding corporate shares, the complaint failed to survive challenge by a motion to dismiss pursuant to Ch. Ct. R. 12(b)(6) where, pursuant to *8 Del. C. § 102(b)(7)* and *8 Del. C. § 141(a)*, there was no showing of bad faith with respect to a claim that the directors should have done more to resolve regulatory concerns with a potential buyer; the fact that it took 10 days to decline involvement in a transaction with the party was not an indication of bad faith. *In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013)*.

For purposes of claims of breach of fiduciary duties asserted by former shareholders against a former board of directors, arising from a buyout of all of the outstanding corporate shares, the complaint failed to survive challenge by a motion to dismiss pursuant to Ch. Ct. R. 12(b)(6) where, pursuant to *8 Del. C. § 102(b)(7)* and *8 Del. C. § 141(a)*, there was no showing of bad faith with respect to a claim that the board issued a misleading and inaccurate proxy statement; any inaccurate disclosure was not material and mitigated by the issuance of a truthful revision. *In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013)*.

In a suit seeking to shift corporate responsibility to its fiduciaries for a nationwide opioid settlement, defendants' motion to dismiss was denied, in part, as the complaint sufficiently pled that the compliance officers failed to take the steps necessary to cause the corporation to comply with the DEA Settlement and with the Controlled Substances Act and that they did not make a sufficient effort to report to the Board regarding the corporation's shortcomings. *Ont. Provincial Council of Carpenters' Pension Trust Fund v. Walton, — A.3d —, 2023 Del. Ch. LEXIS 92 (Del. Ch. Apr. 26, 2023)*.

Expenses.

The incumbent board of directors of a corporation may look to the corporation for payment of expenses incurred by them in soliciting proxies where a question of policy is involved. *Empire Southern Gas Co. v. Gray, 29 Del. Ch. 95, 46 A.2d 741, 1946 Del. Ch. LEXIS 58 (Del. Ch. 1946)*.

Injunctions.

Stockholders did not establish that permitting a proposed transaction to close would cause irreparable harm to the stockholders where they conceded that all relevant facts relating to the transaction were before the stockholders (including, for example, the rise in the price of stock since the announcement of the transaction); thus, the argument that an injunction might provide a possibility of permitting a topping bid to materialize was speculative and insufficient to constitute irreparable harm. *In re Smurfit-Stone Container Corp. S'holder Litig., 2011 Del. Ch. LEXIS 79 (Del. Ch. May 20, 2011)*.

Standard of review.

— Board member independence.

Fact issues existed as to whether 1 inside board member was independent, based upon: (1) employment being under the control of a non-independent director; and (2) the member's pervasive duties to all corporations in a corporate group, despite a non-independent board member having a degree of control over that group. *In re Freeport-McMoRan Sulphur S'holder Litig., 2005 Del. Ch. LEXIS 96 (Del. Ch. June 30, 2005)*.

There were potential fact issues as to whether a corporation's outside director, who was a university employee, was independent; the university received contributions from the group of corporations, of which the corporation was a member. *In re Freeport-McMoRan Sulphur S'holder Litig., 2005 Del. Ch. LEXIS 96 (Del. Ch. June 30, 2005)*.

For purposes of claims of breach of fiduciary duties asserted by former shareholders against a former board of directors, arising from a buyout of all of the outstanding corporate shares, the complaint failed to survive challenge by a motion to dismiss pursuant to Ch. Ct. R. 12(b)(6) where, pursuant to *8 Del. C. § 102(b)(7)* and *8 Del. C. § 141(a)*, there was a failure to prove that a majority of the board was not disinterested and independent; conclusory allegations that management influenced the disinterested directors were not supported by any facts. *In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013)*.

Shareholder sufficiently alleged that a presuit demand on a corporate board of directors was futile because the shareholder's allegations supported a reasonable inference that all directors had material, nonpublic information when selling the directors' stock, but did not disclose significant problems with physician acceptance of the company's sole product, inhibiting the product's sale. *Silverberg v. Gold, 2013 Del. Ch. LEXIS 312 (Del. Ch. Dec. 31, 2013)*.

Shareholder sufficiently alleged that a presuit demand on a corporate board of directors was futile because 2 directors' scienter was reasonably inferred, given that the directors knew of a significant risk of physician reluctance to prescribe the company's product due to cost and reimbursement concerns, but did not publicly disclose that information; as a result, the directors faced a substantial likelihood of liability such that most of the board could not independently evaluate the shareholder's suit demand. *Silverberg v. Gold, 2013 Del. Ch. LEXIS 312 (Del. Ch. Dec. 31, 2013)*.

— Business judgment rule.

Where the evidence did not establish that the board of directors of the acquiring corporation failed to make an informed judgment when the merger plan was presented, they were entitled to the presumption of having made an informed judgment in good faith which could be attributed to a rational business purpose. *Muschel v. Western Union Corp., 310 A.2d 904, 1973 Del. Ch. LEXIS 115 (Del. Ch. 1973)*.

A board's decision to defer the annual meeting to a later time in conformity with the company's bylaws and this section is not a decision that threatens the legitimacy of the electoral process and the propriety of such decision is to be measured by the permissive business judgment form of review. *Stahl v. Apple Bancorp, Inc., 579 A.2d 1115, 1990 Del. Ch. LEXIS 63 (Del. Ch. 1990)*.

Controlling shareholders have no inalienable right to usurp the asset sales authority of boards of directors that they elect, since a central premise of the *8 Del. C. § 141* vests most managerial power over the corporation in the board (and not in the stockholders); that the majority of a company's voting power is concentrated in one stockholder does not mean that that stockholder must be given a veto over board decisions when such a veto would not also be afforded to dispersed stockholders who collectively own a majority of the votes. *Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 2004 Del. Ch. LEXIS 100 (Del. Ch. 2004)*.

— Inadequate price.

Mere inadequacy of price will not reveal fraud, but rather the disparity must be so gross as to lead the court to conclude that it was not due to an honest error of judgment, but rather to bad faith, or to reckless indifference to the rights of others interested. *Muschel v. Western Union Corp., 310 A.2d 904, 1973 Del. Ch. LEXIS 115 (Del. Ch. 1973)*.

For purposes of claims of breach of fiduciary duties asserted by former shareholders against a former board of directors, arising from a buyout of all of the outstanding corporate shares, the complaint failed to survive challenge by a motion to dismiss pursuant to Ch. Ct. R. 12(b)(6); there was no showing of bad faith under either *8 Del. C. § 102(b)(7)* or *8 Del. C. § 141(a)*, where the alleged facts did not show that the directors utterly failed to attempt to obtain the best sale price or that the decision to sell was so far beyond the bounds of reasonable judgment that it could have been nothing else except bad faith. *In re BJ's Wholesale Club S'holders Litig., 2013 Del. Ch. LEXIS 28 (Del. Ch. Jan. 31, 2013)*.

— Merger.

Price per share offered in a merger was fair and might have been the best reasonably obtainable in the market, but the board of directors did nothing (or virtually nothing) to confirm the superiority of price but, nonetheless, it provided the acquiring company a full complement of deal protections; thus, the board was not entitled to summary judgment on a claim challenging the merger approval and recommendation, pursuant to *8 Del. C. § 141(a)*. *Ryan v. Lyondell Chem. Co., 2008 Del. Ch. LEXIS 105 (Del. Ch. July 29, 2008)*, rev'd, *970 A.2d 235, 2009 Del. LEXIS 152 (Del. 2009)*.

The Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) standard of review applied where: (1) 100% of a company's stockholders who elected to participate in the merger would see approximately 50% of their investment cashed out; (2) the acquiring company had no controlling stockholder; (3) the stockholders would not be relegated to a minority status in the post merger entity; but (4) half of their investment would be liquidated. *In re Smurfit-Stone Container Corp. S'holder Litig., 2011 Del. Ch. LEXIS 79 (Del. Ch. May 20, 2011)*.

Although a board of directors failed to pursue any financial buyers for the company, the board did not breach its duty to secure the best value reasonably attainable for the company's shareholders because the board possessed an impeccable knowledge of the company's business; the board, along with the company's executive officers, held over 60% of the company's outstanding stock and had more to lose or gain from a change of control transaction than any other company shareholder. *In re Openlane, Inc. S'holders Litig., 2011 Del. Ch. LEXIS 156 (Del. Ch. Sept. 30, 2011)*.

— — Board independence.

Fact issues as to whether an acquiree's 2 inside directors were independent created fact issues as to whether its 7-member board and independent committee were independent; as a result, fact issues remained whether the proxy statement made fair disclosures of the directors' interests, and whether the merger exchange ratio was fair to the shareholders. *In re Freeport-McMoRan Sulphur S'holder Litig., 2005 Del. Ch. LEXIS 96 (Del. Ch. June 30, 2005)*.

Nondisclosure of the plan to reasonably compensate the members of the special committee, which was to review the terms of a proposed merger for fairness, was material; the uncertain, contingent, and potentially large nature of the compensation, without any objective benchmarks or other measures, could have given the committee members additional and undisclosed financial interests in the transaction that might have affected their judgments. *In re Tele-Comms., Inc. S'holders Litig., 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005)*.

Board failed to show that it was being entirely fair under the business judgment rule, in its selection of a special committee to review merger terms party, because of failure to describe to both classes of shares: the committee's duties; the method of compensation, that could have influenced the committee; the committee's use of the board's advisor's; and one committee member's ownership a proportionately large number of B shares with respect to which he was to receive a 10 percent premium. *In re Tele-Comms., Inc. S'holders Litig., 2005 Del. Ch. LEXIS 206 (Del. Ch. Dec. 21, 2005)*.

Former stockholder's complaint against corporate directors (alleging a breach of fiduciary duty by their actions in allowing a merger such that the corporation became a wholly-owned subsidiary of another company) withstood a dismissal motion based on the successful rebuttal of the presumption of the business judgment rule pursuant to *8 Del. C. § 141(a)*, as the stockholder showed that directors were interested or lacked independence because they owned preferred stock and had relationships with preferred stockholders, who reaped benefits from the merger; the common and preferred stockholders interests were not aligned with respect to the merger, as such action triggered the liquidation interest of the preferred stockholders while the common stockholders received nothing of value as a result of the merger. *In re Trados Inc. S'holder Litig., 2009 Del. Ch. LEXIS 128 (Del. Ch. July 24, 2009)*.

While it appeared that a board of directors sought in good faith to fulfill its fiduciary duties with regard to a merger agreement, but failed due to having been misled by a financial advisor, the directors could not escape the ramifications of the financial advisor's misconduct; thus, a preliminary injunction as to a proposed merger was appropriate. *In re Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 2011 Del. Ch. LEXIS 30 (Del. Ch. 2011)*.

IV. Stockholders.

Construction with other laws.

Stockholders of a corporation subject to the Delaware General Corporation Law may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation; therefore, the shareholders' *8 Del. C. § 109(a)* power to adopt, amend or repeal bylaws is not coextensive with the board's concurrent power and is limited by the board's management prerogatives under *8 Del. C. § 141(a)*. *CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227, 2008 Del. LEXIS 329 (Del. 2008)*.

Controlling stockholder requirement.

While corporate directors as a group were charged by *8 Del. C. § 141(a)* with a duty to manage the business and affairs of the corporation they served, a court could not aggregate the stockholdings of the corporation's directors to satisfy the controlling stockholder requirement for a cofounder of the corporation to maintain a direct claim for equity dilution. *Feldman v. Cutaia, 956 A.2d 644, 2007 Del. Ch. LEXIS 111 (Del. Ch. 2007)*, aff'd, *951 A.2d 727, 2008 Del. LEXIS 249 (Del. 2008)*.

Direct action.

Shareholder's claim against a company and its chairman, regarding violation of the structural relationship between the company and its shareholders by allowing an unauthorized director to take certain actions in approving a loan transaction, and by prohibiting an authorized director from participating in the approval process in violation of *8 Del. C. § 141*, stated a direct claim, such that Ch. Ct. R. 23.1 did not apply or require dismissal of the claim for failure to comply therewith; the claim alleged a direct harm to the shareholders, and sought injunctive relief, such that it was correctly characterized as a direct claim. *Grayson v. Imagination Station, Inc., 2010 Del. Ch. LEXIS 169 (Del. Ch. Aug. 16, 2010)*.

Preferred stockholder, who was a pre-initial public offering investor and subject to a lockup, did not have to make a presuit demand upon the corporation's board because the harm asserted by the stockholder was a direct harm regarding the transferability of the stockholder's shares after the restructuring of certain directors' lockups and not any injury, direct or indirect, to the corporation itself. *Lee v. Pincus, 2014 Del. Ch. LEXIS 229 (Del. Ch. Nov. 14, 2014)*.

Powers.

— Eliminate committees.

Chancery court rejected the argument that *8 Del. C. § 141(c)(2)* empowered only directors to eliminate a committee established by a board resolution, and not stockholders acting through an *8 Del. C. § 109(b)* bylaw. *Hollinger Int'l v.*

Black, 844 A.2d 1022, 2004 Del. Ch. LEXIS 13 (Del. Ch. 2004), aff'd, 872 A.2d 559, 2005 Del. LEXIS 156 (Del. 2005).

Procedure for redress.

In the usual case, a shareholder's remedy for a perceived wrong against the corporation is limited to a demand upon the board that the corporation pursue redress. The board, in the exercise of its statutorily conferred managerial powers, then makes the ultimate decision of whether or not to prosecute the claim. Heineman v. Datapoint Corp., 611 A.2d 950, 1992 Del. LEXIS 274 (Del. 1992), overruled in part, Brehm v. Eisner, 746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000), overruled in part, In re EZCORP Inc., 2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016), overruled in part, Obeid v. Hogan, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016).

— Demand futile.

A court should not apply the Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984) test for demand futility where the board that would be considering the demand did not make a business decision which is being challenged in the derivative suit; this situation would arise in three principal scenarios: (1) Where a business decision was made by the board of a company, but a majority of the directors making the decision have been replaced; (2) where the subject of the derivative suit is not a business decision of the board; and (3) where the decision being challenged was made by the board of a different corporation. Rales v. Blasband, 634 A.2d 927, 1993 Del. LEXIS 454 (Del. 1993).

Although 8 Del. C. § 141(a) provided that the business and affairs of a corporation were to be managed by or under the discretion of the corporation's board of directors, a shareholder was not required under Ch. Ct. R. 23.1 to have made a pre-suit demand of the corporation's directors before bringing a derivative action on behalf of the corporation because the shareholder showed that the demand would have been futile. Feldman v. Cutaia, 2006 Del. Ch. LEXIS 70 (Del. Ch. Apr. 5, 2006).

There was reasonable doubt as to whether approval of the transaction was the product of a valid exercise of the board's business judgment, as the shareholders' complaint involving board members' breach of fiduciary duties regarding the acquisition of another entity pled with sufficient particularity that the board: (1) had members with significant, material interests in the transaction; (2) ignored a management that objected to the acquisition almost uniformly; (3) failed to evaluate management's due diligence findings that expressed serious concerns about the transaction; and (4) knew of significant conflicts held by the investment banker rendering the fairness opinion on which the board relied. Khanna v. McMinn, 2006 Del. Ch. LEXIS 86 (Del. Ch. May 9, 2006).

Where the compensation committee which allegedly approved the granting of backdated stock options to the corporate founder in violation of a stock option plan and stock incentive plan was composed of 3 of the 6 corporate directors and a 4th director approved the transactions, there were sufficient allegations by a shareholder, who filed a derivative action against the corporate board and compensation committee members for an alleged breach of their duties of due care and loyalty, to raise a reason to doubt the disinterestedness of the board. Ryan v. Gifford, 918 A.2d 341, 2007 Del. Ch. LEXIS 22 (Del. Ch. 2007).

Chancery Court Rule 23.1 did not bar a stockholder's derivative action for breach of fiduciary duty regarding the alleged backdating of stock options because the complaint adequately alleged demand futility as 2 of the corporation's 10 directors allegedly received backdated options, and 3 of the remaining directors served on the compensation committee which authorized the option grants. Conrad v. Blank, 940 A.2d 28, 2007 Del. Ch. LEXIS 130 (Del. Ch. 2007).

— — Issue preclusion.

Where shareholders brought a derivative action against a corporation and directors based on insider trading and lack of oversight, issue preclusion barred the shareholders from relitigating the issue of demand futility as a prior

derivative action involving the same claims and facts pertaining to demand futility had been dismissed. *In re Career Educ. Corp. Derivative Litig., 2007 Del. Ch. LEXIS 184 (Del. Ch. Sept. 28, 2007)*.

— — Not shown.

Demand futility was not shown as to approval of a services agreement by an audit committee consisting of less than a majority of the board because: (1) a director's past employment with the service provider did not overcome the presumption of independence; (2) the complaint did not allege with particularity facts showing the agreement was so facially unfair that approval was in bad faith; and (3) the service provider's alleged controlling interest did not affect the board's authority to make litigation decisions. *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 2015 Del. Ch. LEXIS 185 (Del. Ch. 2015)*.

Where directors are protected by an exculpatory charter provision adopted pursuant to *8 Del. C. § 102(b)(7)*, a plaintiff seeking to show demand futility must allege that a majority of the board faces a substantial likelihood of liability for nonexculpated claims in order to raise a reason to doubt that the challenged decision was not a valid exercise of business judgment under the second prong of *Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984)*; in the instant case, demand was not excused as futile because plaintiff only pleaded nonexculpated claims against 1 director. *Lenois v. Lawal, 2017 Del. Ch. LEXIS 784 (Del. Ch. Nov. 7, 2017)*.

— Derivative suit.

Mismanagement which depresses the value of stock is a wrong to the corporation, and therefore to the stockholders collectively, and thus is one which must be remedied through a derivative action. *Reeves v. Transport Data Communications, Inc., 318 A.2d 147, 1974 Del. Ch. LEXIS 91 (Del. Ch. 1974)*.

When stockholders are dissatisfied with a decision of the directors with respect to the corporation, their recourse is to bring a stockholder's derivative suit. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

— — Attorneys' fees.

Trial court properly awarded a minority stockholder's attorney a fee of $304 million (15% of a $2.031 billion judgment) in a derivative suit since Law Prof. Conduct R. 1.5(c) contemplated fees that were based on a percentage; the trial court properly made a reasonableness determination based on the *Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980)* factors. *Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 2012 Del. LEXIS 459 (Del. 2012)*.

The extraordinary benefit that was achieved by plaintiff minority shareholder in a derivative suit merited a very substantial award of $304 million in attorneys' fees where: (1) plaintiff's attorneys pursued the case on a contingent fee basis, invested a significant number of hours, incurred more than $1 million in expenses, attorneys reviewed approximately 282,046 pages in document production and traveled outside the United States to take multiple depositions; (2) plaintiffs indisputably prosecuted the action through trial and secured an immense economic benefit; (3) plaintiff had to deal with very complex financial and valuation issues, while being up against major league, first-rate legal talent; (4) with prejudgment interest, the benefit achieved through the litigation amounted to more than $2 billion; and (5) postjudgment interest accrued at more than $212,000 per day. *Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 2012 Del. LEXIS 459 (Del. 2012)*.

Award of $304 million in attorneys' fees in a derivative suit was properly based upon the total damage award, which included prejudgment interest; the Court of Chancery's decision to include prejudgment interest in its determination of the benefit achieved was not arbitrary or capricious, but rather was the product of a logical and deductive reasoning process which took into account the slow pace of litigation and any part plaintiffs might have played in that pace. *Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 2012 Del. LEXIS 459 (Del. 2012)*.

Award of $304 million in attorneys' fees in a derivative suit, based upon a calculation of 15% of a $2.031 billion judgment, was proper due to the complexity of the case and valuable benefits conferred; the fact that plaintiff's counsel spent 8,597 hours on this case, meaning that the award would represent a per hour payment of approximately $35,000 an hour, was irrelevant because the benefit achieved by the litigation was the common yardstick by which a plaintiff's counsel should be compensated in a successful derivative action. *Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 2012 Del. LEXIS 459 (Del. 2012)*.

— — Burden of proof.

Shareholders in a derivative suit alleging that allowance and acceptance of payments under executive stock option compensation plan were breaches of fiduciary duty had the burden of demonstrating that the compensation plan itself, having been added by a majority of disinterested directors and later ratified by shareholders with no allegation of inadequate disclosure in proxy materials, was so devoid of legitimate corporate purpose as to be a waste of assets. *Pogostin v. Rice, 480 A.2d 619, 1984 Del. LEXIS 355 (Del. 1984)*, overruled in part, *Brehm v. Eisner, 746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000)*, overruled in part, *In re EZCORP Inc., 2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016)*, overruled in part, *Obeid v. Hogan, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016)*.

Shareholder's allegations of ownership and repricing of stock options did not provide a basis to support an inference that there was a repricing scheme or conspiracy; the award of options was a form of director compensation authorized under subsection (h) of this section. *Cal. Pub. Emples. Ret. Sys. v. Coulter, 2002 Del. Ch. LEXIS 144 (Del. Ch. Dec. 18, 2002)*.

— — Dismissal.

Dismissal with prejudice "as to the world" (as opposed to a single named shareholder) was not warranted under Ch. Ct. R. 15 with respect to a stockholder's derivative complaint, because Ch. Ct. R. 23.1 would require notice to stockholders before dismissal would have been required; dismissal prior to such notice was precluded by the *8 Del. C. § 141* as well as the Due Process Clause in *U.S. Const. amend. 14* and prevented a judgment from binding the corporation or other stockholders in a derivative action until the action survived the Ch. Ct. R. 23.1 procedure. *In re EZCORP Consulting Agreement Derivative Litig., 130 A.3d 934, 2016 Del. Ch. LEXIS 3 (Del. Ch. 2016)*, dismissed in part, *2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016)*.

— — Pleading.

When a complaint simply alleged that the directors took the good and the bad that came with a nondiscretionary plan, by receiving their options annually on a specified date regardless of the positive or negative nature of the regularly-issued quarterly report preceding the grants, no breach of fiduciary duty claim was stated, and plaintiff's derivative action suit asserting wrongdoing with regard to outside director stock option grants was dismissed for failure to state a claim. *Desimone v. Barrows, 924 A.2d 908, 2007 Del. Ch. LEXIS 75 (Del. Ch. 2007)*.

Master recommended granting a dismissal motion in a stockholder's double derivative action against the boards of directors of a corporation and its majority-owned subsidiary, arising from the allegedly wrongful refusal of the stockholder's demand that the boards remedy alleged breaches of fiduciary duty and other wrongful conduct; the board's actions in conducting an investigation into the stockholder's demand did not rise to the level of wrongful refusal, because they were not shown to be unreasonable, procedurally improper or lacking in good faith. *Belendiuk v. Carrion, 2014 Del. Ch. LEXIS 126 (Del. Ch. July 22, 2014)*.

Stockholders pursuing a derivative action failed to plead demand futility with particularity because: (1) the corporation's charter contained an exculpatory clause; and (2) conclusory allegations that a majority of the board faced a substantial likelihood of liability for breach of fiduciary duty regarding the corporation's inability to meet its revenue guidance were insufficient to show that the board, in bad faith, had affirmatively engaged in misconduct or neglected its duty of oversight. *In re GoPro, Inc. Stockholder Derivative Litig., — A.3d —, 2020 Del. Ch. LEXIS 165 (Del. Ch. Apr. 28, 2020)*.

— — Ripeness.

Stockholder's individual right to bring derivative action does not ripen until the stockholder has made a demand on the corporation which has been met with a refusal by the corporation to assert its cause of action or unless the stockholder can show a demand to be futile. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

Derivative action, alleging that directors breached fiduciary duties by pursuing reclassification of shares, had to be dismissed because: (1) no presuit demand was made; (2) the complaint failed to plead facts suggesting a majority of directors acted in bad faith, were not exculpated or could not exercise disinterested and independent judgment regarding a demand; (3) futility was evaluated on a director-by-director basis; and (4) the board did not have a new majority and had some conflicted directors. *UFCW & Participating Food Indus. Empls Tri-State Pension Fund v. Zuckerberg, 250 A.3d 862, 2020 Del. Ch. LEXIS 319 (Del. Ch. 2020)*, aff'd, *262 A.3d 1034, 2021 Del. LEXIS 298 (Del. 2021)*.

— — Special litigation committee.

For case discussing motion generated by special litigation committee to dismiss stockholders' derivative suit under the authority of *Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981)*, see *Kaplan v. Wyatt, 484 A.2d 501, 1984 Del. Ch. LEXIS 500 (Del. Ch. 1984)*, aff'd, *499 A.2d 1184, 1985 Del. LEXIS 486 (Del. 1985)*.

Voluntary dismissal of an action by derivative plaintiff stockholders was denied where the corporation appointed a special litigation committee, as dismissal of the action would impinge on the committee's range of action, and would usurp its function. *In re Oracle Corp. Derivative Litig., 808 A.2d 1206, 2002 Del. Ch. LEXIS 92 (Del. Ch. 2002)*, dismissed in part, *2018 Del. Ch. LEXIS 92 (Del. Ch. Mar. 19, 2018)*.

Because there were material questions of fact as to the independence of a special litigation committee (SLC), the reasonableness of its investigation, and the bases for its conclusions (including its finding that the *8 Del. C. § 102(b)(7)* provisions in the company's charter precluded rescission), the SLC's motion to dismiss was denied. *London v. Tyrrell, 2010 Del. Ch. LEXIS 54 (Del. Ch. Mar. 11, 2010)*.

In connection with an action brought by a corporation's special committee on behalf of the corporation against entities that allegedly breached a contractual obligation to purchase the company's stock in a tender offer, the corporation was ordered to turn over information sought by the special committee because: (1) directors of a Delaware corporation are presumptively entitled to obtain the corporation's privileged information as a joint client of the corporation; and (2) any curtailment of that right cannot be imposed unilaterally by corporate management untethered from the oversight/ultimate authority of the corporation's board of directors. *In re WeWork Litig., 250 A.3d 901, 2020 Del. Ch. LEXIS 270 (Del. Ch.)*, dismissed in part, *— A.3d —, 2020 Del. Ch. LEXIS 326 (Del. Ch. 2020)*, dismissed in part, *— A.3d —, 2020 Del. Ch. LEXIS 365 (Del. Ch. 2020)*.

— Director response.

Directors cannot compel dismissal of pending stockholder's derivative suit which seeks redress for an apparent breach of fiduciary duty by merely reviewing the suit and making a business judgment that it is not in the best interests of the corporation. *Maldonado v. Flynn, 413 A.2d 1251, 1980 Del. Ch. LEXIS 430 (Del. Ch. 1980)*, rev'd, *430 A.2d 779, 1981 Del. LEXIS 321 (Del. 1981)*.

The task of a board of directors in responding to a stockholder demand letter is a 2-step process: First, the directors must determine the best method to inform themselves of the facts relating to the alleged wrongdoing and the considerations, both legal and financial, bearing on a response to the demand; second, the board must weigh the alternatives available to it, including the advisability of implementing internal corrective action and commencing legal proceedings. *Rales v. Blasband, 634 A.2d 927, 1993 Del. LEXIS 454 (Del. 1993)*.

— — Double derivative suit.

A plaintiff in a double derivative suit is still required to satisfy the *Aronson v. Lewis, 473 A.2d 805, 814, 1984 Del. LEXIS 305 (Del. 1984)*, overruled in part, *Brehm v. Eisner, 746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000)*, overruled in part, *In re EZCORP Inc., 2016 Del. Ch. LEXIS 14 (Del. Ch. Jan. 25, 2016)*, overruled in part, *Obeid v. Hogan, 2016 Del. Ch. LEXIS 86 (Del. Ch. June 10, 2016)*.

The Aronson v. Lewis, Del. Supr., 473 A.2d 805, 814 (1984) test does not apply in the context of a double derivative suit where the board was not involved in the challenged transaction. *Rales v. Blasband, 634 A.2d 927, 1993 Del. LEXIS 454 (Del. 1993)*.

— — Majority stockholder.

In a suit wherein a former director acted alone in initially transferring 25 million shares of stock to that director's own self, with 20 million shares of that stock later transferred to a limited liability company owned by the director's spouse, the corporation was granted a preliminary injunction to prevent defendants from selling the 25 million shares of stock at issue during the pendency of litigation because: (1) in the absence of a preliminary injunction, the corporation could suffer an inability to restart its business and possible bankruptcy; and (2) the injunction would prevent defendants from realizing a profit of any sale of that stock. *Applied Energetics, Inc. v. Farley, 2019 Del. Ch. LEXIS 30 (Del. Ch. Jan. 23, 2019)*.

— Review.

Stockholders who make a demand upon the board of directors which is refused, subject the board's decision to judicial review according to the traditional business judgment rule. *Spiegel v. Buntrock, 571 A.2d 767, 1990 Del. LEXIS 80 (Del. 1990)*.

Where a court denied dismissal to corporate defendants of shareholders' breach of contract claim (alleging that they were promised a shareholder vote on any extension of the corporate stockholder rights plan upon their agreement to approve a re-organization), such denial established a legal right in opposition to the defense of unenforceability asserted by defendants under *8 Del. C. § 141(a)*; further, as a resolution on appeal had the potential to fully resolve the litigation, considerations of justice supported certification of an interlocutory appeal pursuant to Sup. Ct. R. 42. *UniSuper Ltd. v. News Corp., 2006 Del. Ch. LEXIS 11 (Del. Ch. Jan. 19, 2006)*.

Ratification.

— Equity incentive plans.

Trial court's decision dismissing the stockholders' complaints, challenging the directors' fiduciary duties in awarding themselves compensation, was reversed because: (1) the stockholders properly alleged that when exercising their discretion under an equity incentive plan, the directors acted inequitably in granting themselves unfair and excessive awards; (2) the stockholders did not ratify the specific awards; and (3) therefore, the affirmative defense of ratification could not be used to dismiss the complaint. *In re Inv'rs Bancorp, Inc. Stockholder Litig., 177 A.3d 1208, 2017 Del. LEXIS 517 (Del. 2017)*.

— Self-interested deals.

Where management seeks and receives approval of a self-interested transaction from a majority of disinterested stockholders, the Chancery Court will defer to the stockholders' endorsement. *In re Walt Disney Co. Derivative Litig., 731 A.2d 342, 1998 Del. Ch. LEXIS 186 (Del. Ch. 1998)*, aff'd in part and rev'd in part, *746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000)*. But see *Brehm v. Eisner, 746 A.2d 244, 2000 Del. LEXIS 51 (Del. 2000)*.

Stockholder action.

Proposed bylaw that provided for the reimbursement of reasonable proxy expenses, even though infelicitously couched as a substantive-sounding mandate to expend corporate funds, had both the intent and the effect of

regulating the process for electing directors of a corporation; therefore, the proposed bylaw was a proper subject for shareholder action under *8 Del. C. §§ 109* and *141*. *CA, Inc. v. AFSCME Emples. Pension Plan, 953 A.2d 227, 2008 Del. LEXIS 329 (Del. 2008)*.

— Special litigation committee.

In derivative litigation, the lead plaintiff was presumptively entitled to all relevant documents considered by the special litigation committee (SLC) because: (1) the SLC's conclusions and its evaluation of a risk-adjusted recovery were indicia of the value added to the litigation asset; (2) the SLC was empowered to make a decision regarding disposition of the asset; and (3) the SLC determined the corporation's interests required it to be administered by the lead plaintiff on behalf of the corporation. *In re Oracle Corp. Derivative Litig., 2019 Del. Ch. LEXIS 1381 (Del. Ch. Dec. 4, 2019)*.

In derivative litigation, privileged communications given by a corporation to the special litigation committee (SLC) and relied upon by the SLC in concluding that litigation by the lead plaintiff was in the corporate interest had to be produced to the lead plaintiff; the corporation did not advance a single reason why, in its business judgment, the corporate interest in nondisclosure of those same communications to the lead plaintiff outweighed its interest in vindication of the asset. *In re Oracle Corp. Derivative Litig., 2019 Del. Ch. LEXIS 1381 (Del. Ch. Dec. 4, 2019)*.

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Hierarchy Notes:

8 Del. C. Title 8

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