SOAP OPERA SUMMER: FIVE PREDICTIONS ABOUT DELAWARE LAW'S RESPONSE TO NEW DGCL 122(18)

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Predictability and stability are often cited as leading reasons for why Delaware's corporate law system dominates the competition for domiciling business entities. However, the first half of 2024 was anything but predictable and stable for Delaware's legal community. Rarely has an amendment to the Delaware General Corporation Law ("DGCL") triggered as much public debate as SB 313, which became effective as of August 1, 2024. Normally staid legal policy discussions triggered high passions to declare which was the greater risk to Delaware's standing as the global leader in corporate law: a few recent judicial opinions that would have altered certain market practices or the legislative amendment seeking to nullify those opinions.

This article focuses on the most controversial aspect of SB 313. New DGCL Section 122(18) overrides the Court of Chancery's February 23, 2024, opinion in West Palm Beach Firefighters' Pension Fund v. Moelis & Company ("Moelis"), by broadly allowing corporate boards to contractually delegate to any stockholder or prospective stockholder the power to cause the company to act or refrain from acting in almost any manner, including many decisions traditionally reserved for the board itself.

Now that the debate about the impetus behind and wisdom of the new legislation is over, this article attempts to assess how the new law will actually affect Delaware's corporate legal landscape. Looking beyond the atypical drama of the past six months, this article offers five predictions and observations about how new Section 122(18) may affect the corporate world going forward.

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Introduction

On July 17, 2024, Delaware's Governor signed Senate Bill (SB) 313 into law, concluding an unusually turbulent round of amendments to the Delaware General Corporation Law ("DGCL"). While several aspects of SB 313 triggered debate, new DGCL Section 122(18), which overrules by legislation any future application of the Court of Chancery's February 23, 2024 opinion in *West Palm Beach Firefighters' Pension Fund v. Moelis & Company* ("Moelis"),[1] generated passionate (and arguably overheated) rhetoric.

Supporters of Section 122(18) asserted that the *Moelis* ruling, if left untouched, could destabilize and undermine the First State's credibility as the recognized thought and policy leader in the world of corporate law.[2] According to this view, Section 122(18) prevented the invalidation of hundreds of existing stockholder agreements, saving Delaware from creating corporate chaos" with "unacceptable corporate uncertainty.

In stark contrast, SB 313's opponents fear that the new Section 122(18) creates more more uncertainty and damages" with "corporate chaos and harms Delaware's legal system more than *Moelis* ever would. They say that the DGCL's newest rule undermines the board-centric model that has long served as the bedrock of Delaware's hard-earned status as the world's most trustworthy, balanced, and emulated corporate law system.[3]

The reality of corporate life under Section 122(18) will surely fall somewhere in between these overly polarized viewpoints. Delaware's legal system is not a soap opera, and SB 313 will be neither a meteor-killer nor the meteor itself. SB 313 will, however, significantly affect the corporate law landscape. This essay offers the following five predictions and observations about how the new law could affect Delaware corporate law doctrine and practice:

A. Limited Judicial Review of Stockholder Agreements with Non-Controllers

B. Lower Volume of Dual-Class Capital Structure IPOs

C. Expanded Definition of "Controlling Stockholder" and "Conflicted Board"

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[1] 311 A.3d 809 (Del. Ch. 2024).

[2] *E.g.,* Lawrence Hamermesh, *Del. Needs to Urgently Pass Post-Moelis Corporate Law Bill*, May 29, 2024, Law360, https://www.law360.com/articles/1841709/del-needs-to-urgently-pass-post-moelis-corporate-law-bill [https://perma.cc/HKZ6-3XFN] ("The *Moelis* decision called into question what it acknowledged has been market practice, creating confusion and uncertainty for untold numbers of Delaware corporations and their executives, employees, investors and advisers.").

[3] *See* Jill E. Fisch and Anat Alon-Beck, *Does the Moelis Decision Warrant a Quick Legislative Fix?*, Colum. L. Sch. Blue Sky Blog (June 10, 2024), https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix/ [https://perma.cc/4RLQ-XQ7P]

D. Modified Approach to Fee Awards for Serial/Copycat Governance Cases

E. Altered Relationship Among the Delaware Bench and Bar

Before expanding upon these predictions, below I summarize the *Moelis* ruling and how Section 122(18) overrules any future effect of *Moelis*.

I. The Moelis Problem And The Section 122(18) Cure

A. *Moelis: What prevails when market practice diverges from the law?*

Vice Chancellor Laster's February 24, 2024, *Moelis* opinion, which invalidated a stockholder agreement between Ken Moelis and the boutique investment bank he founded, Moelis & Co., triggered controversy. The stockholder agreement at issue, entered as of the company's IPO, delegated to Ken Moelis an intricate combination of veto and pre-approval rights. The combination of these rights gave him nearly all the rights and powers associated with the traditional status of a board of directors. While one might infer that the stockholder agreement at issue was an extreme departure from both the law and conventional wisdom, the Court pointedly observed that current market practice regarding stockholder agreements had regularly departed from a seemingly uncontroversial legal premise, writing as follows:

> Internal corporate governance arrangements that do not appear in the charter and deprive boards of a significant portion of their authority contravene Section 141(a). The Delaware courts have regularly considered challenges to contractual governance arrangements under Section 141(a) and have frequently invalidated arrangements that improperly constrain a board's authority.
>
> Crashing into this traditionally immovable object is the seemingly irresistible force of market practice. Corporate planners now regularly implement internal governance arrangements through stockholder agreements. The new wave of stockholder agreements does not involve stockholders contracting among themselves to address how they will exercise their stockholder-level rights. The new-wave agreements contain extensive veto rights and other restrictions on corporate action.[4]

Moelis reviewed decades of case precedent before concluding that although third party corporate contracts legally can and do incidentally restrict the ability of a board to manage the corporation's business and affairs, a contract among the company and a stockholder that fundamentally regulates a corporation's

[4] *Moelis*, 311 A.3d at 817.

internal affairs is governed by Section 141(a). Under Section 141(a), restrictions on the board's core authority are invalid unless adopted pursuant to statutorily permissible methods, including, primarily, direct or indirect inclusion in the corporation's charter. The Vice Chancellor identified what the Court described as the following "simple test" for differentiating between third parties commercial agreements that remain immune from judicial invalidation, governance related stockholder agreements, which potentially contravene the statute:

> These principles point to a simple test for determining when a provision in a stockholder agreement is not subject to Section 141(a): Does the contractual provision address an action that a stockholder individually or a group of stockholders collectively could take? If yes, then a stockholder can contract over that action in advance, without risking any violation of the corporate hierarchy. The stockholder gets to choose whether to exercise those rights and can agree contractually to constrain its exercise of those rights.
>
> If a stockholder agreement tries to do more, then the corporate hierarchy and Section 141(a) may invalidate the attempt. "[S]tockholders of a corporation subject to the DGCL 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." A provision in a stockholder agreement that purports to enable stockholders to manage the business and affairs of a corporation is invalid.[5]

The above test might be summarized as follows: A stockholder agreement can validly regulate any action or decision that stockholders can achieve on their own, but if an action requires board action or acquiescence, the stockholder agreement delegating such board action or acquiescence must comply with Section 141(a). Vice Chancellor Laster made clear that certain provisions of the agreement that gave Moelis recommendation and nomination rights would be valid, but the Court invalidated various aspects of the Moelis stockholder agreement that effectively gave Ken Moelis the final call on decisions statutorily allocated to the board itself. In doing so, the Court observed that in the legal hierarchy, markets follow case law, which follows statutory law, writing:

> When market practice meets a statute, the statute prevails. Market participants must conform their conduct to legal requirements, not the other way around. Of course, the General Assembly could enact a provision stating what stockholder agreements can do. Unless and until it does, the statute controls.[6]

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[5] *Id.* at 863.
[6] *Id.* at 881.

There should be nothing surprising or controversial about a judge saying that when a market practice runs afoul of the law, the law prevails, and the market must change. Nevertheless, *Moelis* unsettled the corporate bar.

Despite ample reason to anticipate that stockholder agreements through which individuals effectively supplant the board of directors are dubious, nearly every major corporate law firm had repeatedly advised their board and investor clients to execute such stockholder agreements prior to *Moelis*. As a result, many of these agreements faced potential invalidation under the *Moelis* opinion's reasoning. Mass invalidation of common agreements raised a wide range of problems for the companies and investors who signed those agreements, as well as the experts who advised on those deals. Unless corrective legislation applied retroactively, even a statutory amendment addressing Vice Chancellor Laster's prior reasoning would not salvage already-executed stockholder agreements.[7]

B. Section 122(18): The Council Makes the Law Conform to Market Practice

Although potentially complex and uncomfortable renegotiations of existing contracts were required, companies and investors who were parties to potentially offensive stockholder agreements had an opportunity to modify their contracts in response to the *Moelis* ruling. Indeed, by April 2024, the National Venture Capital Association ("NVCA") had already updated both the model Investors' Rights Agreement and the model Stock Purchase Agreement to account for the *Moelis* ruling.[8] However, the stockholder plaintiffs' bar moved faster, filing several lawsuits seeking to invalidate public company stockholder agreements signed before *Moelis* was decided, and filing a number of further challenges promptly after the opinion was issued.

In response to what would likely become a flood of investor suits to challenge pre-*Moelis* opinion stockholder agreements, and without regard to the fact that the NVCA proposed new model forms would likely avoid Section 141(a) problems going forward, the Council of the Corporate Law

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[7] As an aside, while reasonable minds may differ, I do not read Vice Chancellor Laster's comment regarding legislative amendment in the final sentence quoted above to be an invitation to the Council to act. In context, I interpret the court's comment about changing the law to be somewhat rhetorical, and consistent with the way any judge would explain its decision to the losing party who ran afoul of the statute, i.e., "unless the law changes, your actions violate the law."

[8] *See* Michael Gold, Sarah Nichols & Eric Orlinsky, *The NVCA Revises Its Model Documents to Address Holding in West Palm Beach Firefighters' Pension Fund vs. Moelis*, JD Supra (June 13, 2024) https://www.jdsupra.com/legalnews/the-nvca-revises-its-model-documents-to-6396939/ [https://perma.cc/S9B5-KV9R]; *see also* NVCA, *Model Legal Documents* (2024) https://nvca.org/model-legal-documents/ [https://perma.cc/8A9B-RCK5] (links to April 2024 amendments).

Section of the Delaware State Bar Association (the "Council") jumped into action. On March 28, 2024, just over a month after *Moelis*'s issuance, the Council proposed SB 313, which addressed several Court of Chancery rulings the corporate bar viewed as problematic. One of Delaware's most prominent law firms harkened to the Vice Chancellor's above-quoted formulation about market practices conforming to the law, explaining the Council's motivation as follows: "recent cases recognized that the legal requirements identified in the cases were not necessarily in line with market practice. *The Amendments are designed to bring existing law in line with such practice*."[9]

Proposed new DGCL Section 122(18) prevented *Moelis* from becoming a roadmap for extensive "copycat" litigation invalidating all or parts of scores (or hundreds) of similar public company stockholder agreements.[10] In pertinent part, new Section 122(18) states as follows:

> (18) Notwithstanding § 141(a) of this title, [a company's board can] make contracts with one or more current *or prospective* stockholders … in exchange for such minimum consideration as determined by the board of directors (which may include inducing stockholders or beneficial owners of stock to take, or refrain from taking, one or more actions); provided that no provision of such contract shall be enforceable against the corporation to the extent such contract provision is contrary to the certificate of incorporation *or would be contrary to the laws* of this State (other than § 115 of this title) *if included in the certificate of incorporation*. Without limiting the provisions that may be included in any such contracts, the corporation may agree to: (a) *restrict or prohibit itself* from taking actions specified in the contract, (b) *require the approval or consent of one or more persons or bodies* before the corporation may take actions specified in the contract …, and (c) covenant that the corporation or one or more persons or bodies *will take, or refrain from taking, actions specified in the contract* ….[11]

Although subsequent caselaw may further shape the amendment's effect in practice, the statutory language facially permits companies to delegate to a current or potential investor much or all the power and responsibility

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[9] Melissa A. DiVincenzo et al., *Proposed Amendments to the Delaware General Corporation Law Would Address Recent Caselaw Regarding Stockholder Agreements and Merger Agreements*, Morris Nichols Arsht & Tunnell (Mar. 28, 2024) https://www.morrisnichols.com/insights-proposed-2024-amendments-delaware-general-corporation-law [https://perma.cc/Z5BW-QP6A] (emphasis added).

[10] Somewhat ironically, while the stockholder agreement at issue in *Moelis* was invalidated and will not be saved by SB 313, a nearly identical agreement signed next week by another company (or Moelis & Co. itself) would be statutorily valid. And as explained below, depending on whether the counterparty is a controlling stockholder, a board's endorsement of such an agreement may escape equitable review.

[11] 8 *Del C.* §122(18) (emphasis added).

traditionally allocated to boards of directors who owe fiduciary duties. For example, a Section 122(18) agreement could give an investor much of the judgment surrounding board decisions required by the DGCL (potentially including every step and judgment leading and attendant to the formal action of recommending a merger agreement pursuant to DGCL Section 251(b)) and can provide an effective veto on any topic.

The limitation in Section 122(18) that any restriction on the board's authority must not be contrary to Delaware law if it were included in the charter itself was not in the initial statutory proposal. This carveout was added when outside observers noted to the Council the seeming absurdity of allowing negotiated agreements that never received stockholder approval to permit actions prohibited in corporate charters.

This "fix" to the language is likely so narrow as to have limited meaning. In theory, every corporate action is already limited by whether such action would be permissible if included in the terms of charter provisions under Section 102(b)(1). In all events, this exception—a late-stage correction in all events—will not meaningfully restrain boards or current or potential investors from delegating virtually all the powers of a corporate board despite knowledge that the pre-existing stockholders would never endorse such provisions in a charter amendment.

According to SB 313's opponents, the *Moelis* ruling followed extensive case law making clear that while boards are empowered to exercise their discretion to delegate a wide range of corporate matters, certain "core" decisions and actions must always be left with the board itself. According to this view, the rushed and overbroad language of Section 122(18) effectively allows a board to sign away the board-centric governance model that lies at the heart of Delaware's success.[12]

The bill's proponents, however, say that industry practices supported by the bar's collective "conventional wisdom"—whether or not that wisdom a correct application of the statute and case law—made it critical to save stockholder agreements from invalidation under *Moelis*.

Moreover, proponents asserted, even if Section 122(18) is imperfect, we can trust Delaware's widely respected and expert Court of Chancery bench to intervene and make things right when a statutorily valid stockholders agreement presents real governance problems. Thus, the Council relied upon the same Chancery bench blamed for causing a corporate crisis by ruling that

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[12] *See* Sarath Sanga, Gabriel Rauterberg & Eric Talley, *Letter in Opposition to the Proposed Amendment to the DGCL*, Harv L. Sch. F. Corp. Governance (June 7, 2024) https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/ [https://perma.cc/2EJ2-TXRM]; *see also* Marcel Kahan, *Section 122(18) DGCL: A Proposed Compromise*, Harv L. Sch. F. Corp. Governance (May 10, 2024) https://corpgov.law.harvard.edu/2024/06/10/section-12218-dgcl-a-proposed-compromise/ [https://perma.cc/BGK7-NSUZ]

prior market practices had to change to conform to the prior law (and not the other way around), to ensure that future market practices conform to the newly amended law.

In sum, Delaware's legal system is known, in part, for its stability, predictability, and respect for the rule of law. While law is always evolving, it typically moves incrementally, like a pendulum swinging the balance of power gradually between stockholders and fiduciaries. The corporate community disagreed with the several recent opinions. Historical Delaware law practice would foretell a period of thoughtful public and private discussion about those opinions (amongst practitioners, academics and even clients affected by the rulings), an appellate process, possibly the further development of the law when different fact patterns raising the same legal issues emerged, and a reliance on legislative override only if the judicial system proved ill-equipped to fix any genuine problems those controversial opinions created. But in this unique instance, the adverse judicial opinions triggered atypically dramatic industry responses, culminating in a peculiarly rushed and controversial amendment to the DGCL. Where does that drama go from here?

II. Five Predictions About How Section 122(18) Will Affect Delaware Doctrine and Practice

With that background, consider five observations and predictions about what comes next for Delaware's corporate law, doctrinally and in practice:

A. Limited Judicial Oversight of Most Stockholder Agreements

When confronted about the facial breadth of the statutory language used for Section 122(18), the Council could have clarified or even narrowed the proposed legislative wording. Instead, SB 313's supporters testified that even if the broadly-worded Section 122(18) results in unintended or problematic instances of stockholder agreements immune from statutory invalidation, these agreements remain subject to judicial review—including invalidation or injunction when appropriate—on equitable and fiduciary duty grounds.[13] The Council did not articulate how or under what circumstances the bench would protect investors from that broad statutory language.

My first Section 122(18) prediction is that while reliance on the bench provided a convenient answer to legislator's inquiries about the breadth of the new rule's language, the opportunities for judicial review of Section 122(18)

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[13] *See* Jordan Howell, *Dissent in House Judiciary over controversial corporate amendments,* Delaware Call, (June 19, 2024) https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporate-amendments/ [https://perma.cc/GKK8-KQAU] (highlighting some of the testimony before the Delaware legislature).

agreements will be limited. The judiciary will have to alter or expand current doctrine in order to intervene in most instances of challenged stockholder agreements. Specifically, unless the counterparty to a stockholder agreement is deemed to be a "controller" or the board signing the agreement is deemed to be "majority conflicted," the path for equitable judicial review for consequences unintended by the broad statutory language is unclear.

Consider a simple hypothetical to illustrate this prediction. Suppose a public company investor seeks to challenge a stockholder agreement that broadly transfers future critical board decisions to a new investor in the company. How will a court assess that challenge? Will it be subject to entire fairness review or enhanced scrutiny? Will the Court be limited to highly deferential business judgment rule review?

When stockholder agreements benefiting founders or controllers are executed pre-IPO, investors who acquire their shares on the public markets will be unable to challenge the fiduciary decision to grant those rights.[14] Grants of further contractual control rights to existing controllers in public companies can be challenged for fairness. But in recent years, stockholder rights agreements increasingly were used to resolve activist campaigns.[15]

Unless the stockholder agreement counterparty is an existing controller or the board executing the agreement is itself conflicted with respect to the agreement, judicial challenges by company investors will likely fail.[16] A stockholder agreement of this sort can be challenged in two windows of time: when initially executed by the board or when the counterparty exercises its contractual rights. The former would be treated as a "facial" challenge, while the latter would be an "as applied" challenge.

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[14] *See* In re Nanthealth, Inc. S'holder Litig., 2020 WL 211065, at *4 (Del. Ch. Jan. 14, 2020) (finding no standing for pre-IPO statements when the plaintiff was not an investor at that time).

[15] *See, e.g.,* Liza Andrews et al., *Important Chancery Decision Upends Practice of Providing Certain Governance Rights in Stockholder Agreements—Moelis*, Fried, Frank, Harris, Shriver & Jacobson LLP (Mar. 4, 2024), *https://www.friedfrank.com/news-and-insights/important-chancery-decision-upends-practice-of-providing-certain-governance-rights-in-stockholder-agreements-moelis-11629* [https://perma.cc/3W6H-7C5E]; Douglas Rappaport, Jason Koenig & Jacqueline Yecies, *Delaware Chancery's Moelis II Decision Provides Cautionary Tale for Boards and Activists*, Harv L. Sch. F. Corp. Governance (Mar. 20, 2024) https://corpgov.law.harvard.edu/2024/03/20/delaware-chancerys-moelis-ii-decision-provides-cautionary-tale-for-boards-and-activists/ [https://perma.cc/68GC-Z2KV] (discussing the multiple forms of agreement, including activist campaign resolutions, that were potentially implicated by *Moelis*)

[16] Notably, before *Moelis*, few lawsuits challenged stockholder agreements on validity grounds. I suspect the attention paid to these agreements during Section 122(18)'s passage would typically trigger greater focus amongst investors and their counsel. Then again, if those counsel assess their options consistent with this paper, they will quickly figure out the futility of bringing most such lawsuits.

1. Most if Not All Challenges to Stockholder Agreements Before Contract Performance Are Likely to Fail

The "facial" challenge to a stockholder agreement after execution but before performance is all but doomed. The closest comparable to a Section 122(18) stockholder agreement is a board-approved bylaw. When investors challenge a typical board-approved bylaw—which are enforceable under standard contract law principles—after board-adoption but before the bylaw is applied, the Court of Chancery typically must uphold that contract as valid unless the contract or bylaw "cannot operate validly ***in any conceivable circumstance***."[17]

The "*per se* invalidity" argument to support a facial challenge necessarily fails. By virtue of its wording, Section 122(18) instructs the Court of Chancery that a stockholder agreement adopted in accordance with the statute necessarily has terms that could, under some hypothetical circumstance, be valid. So, absent independent reasons to apply a stricter judicial standard of review, the stockholder agreement is immune from invalidation at the time of signing.[18] And, black-letter standing rules immunize stockholder agreements entered pre-IPO from challenge by any post-IPO investors.

Potential uncertainty about pre-performance challenges to even facially absurd stockholder agreements was likely put to rest by the July 11, 2024, Delaware Supreme Court opinion in *Kellner v. AIM Immunotech, Inc.*[19] Specifically, despite accepting the Court of Chancery's factual determination that several advance notice director nomination bylaws were unreasonably drafted (and thus would seem to be facially improper), the Court reversed a finding of *per se* invalidity, finding that because the nominal topic of the bylaws was valid, the bylaws could only be challenged through ripened "as-applied" suits under *Unocal* review.[20]

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[17] Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013); *see also* Salzberg v. Sciabacucchi, 227 A.3d 102, 113 (Del. 2020) ("In asserting its facial challenge, the plaintiff must show that the charter provisions 'cannot operate lawfully or equitably under any circumstances.'" (citation omitted)).

[18] To be fair, the *Revlon* doctrine provides another theoretical path for a challenge upon execution of a stockholder agreement. If a stockholder agreement can be said to actually transfer control of a corporation such that the pre-existing stockholder base would no longer be able to enjoy a control premium in a subsequent merger or acquisition transaction, the board executing the agreement could theoretically be sued for not acting reasonably to maximize stockholder value. For reasons that go beyond this paper, this author is skeptical any court will go there absent the most extreme fact pattern.

[19] 2024 WL 3370273 at **14–15 (Del. July 11, 2024).

[20] Though not a topic of this article, the Supreme Court's *Kellner* opinion articulates the ripeness doctrine in a manner that may effectively preclude challenges to bylaws and stockholder agreements before they are exercised by the board or contractual counterparty. Thus, the deterrent or other preemptive effect of those devices, despite creating a harmful status quo for stockholders, may be judicially immune.

Would a fiduciary duty action fare any better? If the board itself is controlled or conflicted, the judicial standard for reviewing the board's fiduciary conduct in enacting that bylaw should be more demanding than the business judgment rule, which requires the Court to defer to the board's judgment in adopting the challenged agreement. However, defense counsel will surely argue (perhaps successfully) that the Court's ability to restrain a bylaw (or similar contract) based solely on fiduciary principles before that contract has any real-world effect is itself unripe or an impermissible advisory ruling.[21]

Boards of non-controlled companies execute stockholder agreements to resolve a threatened proxy contest or other stockholder activist challenge. In light of the broad endorsement of board-approved delegation of board-level decisions to actual *or prospective* investors, one should expect that stockholder activists and potential investors alike will be emboldened to demand ever-more aggressive types of control over board decisions as a *quid pro quo* for ending their threat or providing their new capital to the corporation. Will outside stockholders of widely-held companies have any claim to challenge stockholder agreements executed in these circumstances?

If a board delegates to activists decisions normally assigned to fiduciaries, outside stockholders can theoretically allege that the board's response to an activist threat warrants enhanced scrutiny under the *Unocal* doctrine. Similarly, when a board uses a stockholder agreement to ensure future voting support from a new investor providing new capital, *Unocal* may provide for enhanced judicial scrutiny of the board's decision.[22] While this path seems sensible doctrinally, the Court may quickly find itself facing a pragmatic hurdle. If the board executes an agreement in avoidance of a proxy fight, judicial invalidation of the agreement effectively forces the activist and the board to continue the proxy fight based on the objection of a stockholder who is not itself funding or pursuing a proxy fight. While the judges at the time may well see things differently, it seems plausible that a busy and pragmatic judge might permit the agreement upon execution (thus allowing the parties to resolve the proxy fight), opting instead to just warn the parties that the agreement remains subject to challenge upon performance.[23]

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[21] *See* In re Allergan Stockholder Litig., 2014 WL 5791350 at *9 (Del. Ch. Nov. 7, 2014) (declining to interpret statutorily valid bylaw on ripeness grounds); *Bebchuk v. CA, Inc.*, 902 A.2d 737, 742 (Del. Ch. 2006) (ruling that question as to bylaw validity is unripe absent certainty of its adoption—and resulting immediate effect on board authority—or obvious invalidity).

[22] In re Edgio, Inc. S'holders Litig., 2023 WL 3167648, at **15–17 (Del. Ch. May 1, 2023).

[23] Although not within the Delaware law focus of this article, if boards delegate material decisions to current or prospective stockholders, they may find themselves facing complex federal securities law issues, such as when and whether to issue a Form 8-K for a material event or decision.

Regardless of the path the litigation challenge takes, challenges at the time of executing stockholder agreements not involving an existing controlling stockholder with likely fail.

2. Challenges to Stockholder Agreements Upon Contractual Performance Will Typically Fail

The above brings us to the second stage of this hypothetical. Suppose that two years later, the investor/contractual counterparty either causes the board to refrain from an action by threatening to veto it, or the counterparty exercises its contractual right to compel a corporate decision that would typically be reserved to the board. Will the judiciary have a meaningful opportunity to engage at that time?

There are numerous reasons to doubt that litigation upon performance will achieve much. Performance may not implicate actions by fiduciaries at all, and judicial override of board decisions to honor presumptively valid contracts would test Delaware's commitment to a "contractarian" philosophy of law. Since Delaware does not lightly override an agreement negotiated at arms'-length, compelling fiduciaries to breach contracts is surely disfavored.

Moreover, it is uncertain how any outside investor would ever learn that its board backed away from a corporate strategy because the counterparty indicated that it would use a contractual veto to block that path.[24] Investor litigation challenging publicly disclosed corporate actions fares little better. If the later-challenged action does not require board action at all, then the only way under current doctrine to stop the investor from exercising its valid contract rights is to deem that investor a controller.[25]

If, on the other hand, a Section 122(18) stockholder agreement lets the contractual counterparty compel the board to take action, then the board's performance as required by the contract arguably remains subject to fiduciary duty review. However, once a board signs away its discretion pursuant to a statutorily valid contract, the contractual counterparty enjoys vested contract rights.[26] As then Chancellor Strine explained when dismissing investor claims challenging a transfer of control resulting from the terms of a board-approved stockholder agreement in *In re Sirius XM Shareholders Litig.*, "[t]he use of [contractual] rights to obtain control in the situations specifically

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[24] In fact, even assuming that board decisions compelled by a stockholder agreement must be disclosed to investors, it is not a given that the board would publicly admit that they previously preferred an alternative path but discarded their plan due to an expected counterparty veto.

[25] *See infra* pp. 16–18.

[26] If the Board validly delegated an important board-level decision in the first place, the contractual counterparty's right to exercise that right is vested, and can expect that the board will not disavow that contractual grant of power at a later date absent the most extreme of circumstances.

contemplated by those contracts does not constitute a fiduciary breach."[27] *In re Sirius* relied on the dismissal of a stockholder challenge to a merger required by a pre-existing investment agreement in *Hokanson v. Petty*, which held that investors "cannot state a breach of fiduciary duty claim by arguing that the [] board should have caused the corporation to commit a breach of contract."[28]

Despite this precedent, proponents of the bill suggested that because every Delaware corporate contract remains subject to fiduciary duties or efficient breach principles, the broad statutory language would remain constrained by judicial oversight. That assertion, while effective advocacy at the moment, is tough to reconcile with long-standing cases against "blue-penciling" of contracts[29] and requiring an express fiduciary out provision rather than imputing one under common law.[30] The notion behind the doctrine is sensible: on what objective (and hence, predictable) basis would a court override an independent board's business judgment to perform an otherwise binding contract? Unless the board is "beholden" to the contractual counterparty, current doctrine does not allow a court to compel or permit board-endorsed non-compliance with a valid corporate agreement.

In sum, when a counterparty under a stockholder agreement adopted under Section 122(18) exercises its vested (and statutorily valid) contractual rights, that decision will often be made by the contractual counterparty alone and may not even require or involve any board-level action. Thus, unless the contractual counterparty is deemed to be a controlling stockholder with fiduciary duties, there may be no basis for judicial assessment of fiduciary duty compliance at the time of contractual performance.[31] And if the board is required by the contract to take some action or refrain from action, the basis for a court to instruct an independent board to ignore or breach otherwise valid contractual obligations is narrow, if not illusory.

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[27] 2013 WL 5411268, *9 (Del. Ch. Sept. 27, 2013).

[28] 2008 WL 5169633, at *1 (Del. Ch. Dec. 10, 2008)

[29] *See* C&J Energy Services, Inc. v. City of Mia. Gen. Employees' Ret. Sys., 107 A.3d 1049, 1072 (Del. 2014) (discussing standards required to "blue-pencil" contractual provisions).

[30] *See, e.g.,* Cyprus Amax Corp. v. Phelps Dodge Minerals Corp., 1999 WL 1054255, **1–2 (Del. Ch. Sept. 27, 1999) (finding likely invalidity of no-talk provision in merger agreement that did not expressly include fiduciary out); Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 98–99 (Del Ch. 1999) (invalidating no-talk provision due to insufficiently broad fiduciary out language in merger agreement).

[31] To be sure, if contract performance takes place within the three year statute of limitations period for breach of fiduciary duty, a court could conceivably invalidate the contract based on the board's still actionable decision to enter the agreement. *But see* In re Sirius XM S'holder Litig., 2013 WL 5411268 (Del. Ch. Sept. 27, 2013) (granting motion to dismiss shareholder challenge to stockholders' agreement terms based on passage of limitations period, but also questioning judicial basis to allow board to extract contractual benefits from counterparty and then allow company to decline to honor agreement.).

Based on the above, I predict that the Court will have to alter existing doctrine if it is to prove correct the Council's and corporate bar's assertion that judicial review is a sufficient answer to Section 122(18)'s broad language.

B. Lower Volume of Dual-Class Capital Structure IPOs

My second prediction, which at first glance bodes well for investors, is a declining number of dual-class capital structure companies. Before Section 122(18) allowed stockholder agreements to re-allocate corporate decision making away from a board and to controllers, dual-class capital structures were the most common way for corporate founders and other influential investors to preserve or assume effective control over corporate decision-making, even if their economic equity stakes declined to non-controlling or even nominal levels.[32]

In the past, industry players (and their advisors) periodically employ certain governance practices, like poison pills and staggered boards, that cause significant consternation among investors. Over time, market pressure from investors and proxy advisors provided reason for boards and management to veer away from those practices, rendering their use less common or only when necessary.

Dual-class capital structures trigger strong opposition from the institutional investor community.[33] Investors opposed dual-class structures whenever they could, with certain institutions that rarely engage in stockholder litigation entering the fray when they perceived dual-class structures being abused.[34]

The academic community echoed investor pushback against dual-class structures. Widely-respected corporate law and finance professors wrote

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[32] For typical examples of how dual-class companies separate voting power from economic interest, consider the Liberty Global family of companies, the entities formerly known as CBS and Viacom who are now combined under Paramount Global, and much of the IAC family of companies. For a more exotic form of dual-class capital structure permitting (and perpetuating) absolute control without more than a marginal economic interest, consider Palantir and the companies that followed its capital structure form.

[33] *See, e.g.,* Sophie Baker, *Investor Coalition Report Calls for End of Dual-Class Share Structures*, Pensions & Investments (Nov. 30, 2023), https://www.pionline.com/esg/investor-coalition-report-calls-end-dual-class-share-structures [https://perma.cc/R4KC-5BS4]

[34] Amalgamated Bank and AP7, both large and sophisticated institutional investors, were the court-appointed lead plaintiffs in *In re Facebook, Inc. Class C Reclassification Litig.*, 2018 WL 11224034 (Del. Ch. Oct. 24, 2018). CalPERS, among the largest and most sophisticated public pension systems in the world, was the lead plaintiff in *In re IAC/InterActiveCorp Class C Reclassification Litigation*, C.A. LEXIS 856 (Del. Ch. June 26, 2017). Both cases involved recapitalization transactions that would have perpetuated the power of those companies' existing controllers. It is possible that one response to investor resistance to the use of non-voting stock classes to perpetuate founder control resulted in increased use of stockholder agreements to achieve that purpose.

papers broadly exploring and articulating the misaligned incentives that too often result from dual-class capital structures.[35]

Investor and academic focus on the ills of dual-class structures affected the common law. Both the Court of Chancery and the Delaware Supreme Court recognized, discussed, and took steps to assure meaningful judicial review of potentially conflicted decisions by stockholders exercising influence disproportionate to their economic interests in the company by virtue of dual-class capital structures.[36]

One theoretically positive outcome of Section 122(18) should be a meaningful decrease in the use of dual-class capital structures. The reason, for better or worse, is simple: dual-class capital structures only offer the beneficiary stockholder-level voting powers, while a Section 122(18) stockholder agreement allows for direct involvement and control over day-to-day boardroom decisions. Thus, founders and large investors achieve all the personal control benefits available through the much-maligned dual-class structure, but without the stigma.

In this sense, the number of dual-class capital structures may be reduced. But the reality of corporate practice may undermine the real-world benefit to investors of this outcome. Some researchers have found that even before Section 122(18) gave preferential treatment to stockholder agreements, many companies that were single-class structure in form were already using stockholder-type agreements to hand out dual-class "like" rights and powers.[37] Similarly, dual-class companies have used, and can continue to use, stockholder agreements to supplement the powers inherent to super-voting stock. Thus, Section 122(18)-sanctioned stockholder agreements may well give the beneficiary of those agreements governance rights and powers that go far beyond what is seen in traditional dual-class structures.[38]

Contrast the dual-class structure, which is popularly disfavored by institutional investors and may result in lower corporate valuations at the IPO stage and thereafter, with stockholder agreements, which were already a popular way to avoid the stigma while still doling out control rights and now enjoy the statutory seal of approval. It stands to reason that the next corporate founder looking to cash out all, or most, of their economic stake while

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[35] *See, e.g.*, Martjin Cremers, Beni Lauterbach & Anete Pajuste, *The Life-Cycle of Dual Class Firm Valuation*, 13 Rev. Corp. Fin. Studies 459 (2022); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 Va. L. Rev. 585 (2017).

[36] *See, e.g.,* In re Ezcorp Inc. Consulting Agreement Derivative Litig., 2016 WL 301245 (Del. Ch. Jan. 25, 2016) (discussing the "wedge" between economic and voting control inherent to dual-class capital structures).

[37] *See, e.g.*, Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 Yale J. Reg. 1343 (2022); Dhruv Aggarwal et al., *The Rise of Dual-Class Stock IPOs*, 144 J. Fin. Econ. 1 (2021).

[38] For example, despite the value of dual-class structures to the holder of high-vote stock, some studies have shown that CEOs are removed in dual-class structures with surprising frequency. *See* Yifat Aran & Elizabeth Pollman, *Ousted*, 25 Theoretical Inquiries L. 231 (2024).

keeping corporate control, will seriously explore the limits of what one can do with stockholder agreements endorsed by the new Section 122(18) instead of the more traditional dual-class structure. While the institutional investor community may well "catch up" and oppose stockholder agreements just like it opposes dual-class structures, the first movers on the corporate side may well avoid investor criticism.

The dual-class capital structure is statutorily permissible, yet creates the opportunity for misaligned personal interests and resulting misconduct. The Court of Chancery regulates this potential misconduct by applying traditional fiduciary principles. Judicial doctrines applicable to dual-class capital structures could potentially apply to address the rights and obligations of investors whose board influence comes from a statutorily-approved Section 122(18) agreement.

However, Section 122(18) agreements will trigger a wide-range of defense arguments for greater judicial deference than is typical in the dual-class context. The Section 122(18) stockholder agreement, however, adds a countervailing set of legal considerations. Such agreements are not just statutorily permissible and ostensibly subject to fiduciary principles, but they are also the source of contractual rights and obligations on both the investor beneficiary of the agreement and the board and company obligated thereby. The Court thus must inherently weigh additional legal and policy considerations, which defense counsel can use to their clients' benefit.

In short, there is reason to infer that the number of public company dual-class structures will decline over time, as founders and large stockholders find that stockholder agreements are a less controversial way to preserve control while de-risking their economic stakes. Instead of placing a large target on the company to investors who dislike dual-class capital structures, controllers will prefer to either impose a stockholder agreement at the time of an IPO or negotiate a stockholder agreement with a board at a later date while sidestepping any need to put the agreement to a stockholder vote. To the extent that companies with existing dual-class capital structures are perceived to result in lower market valuations than single-class peers, one might even see the likes of John Malone, Barry Diller or Peter Thiel replacing the complexity of their unpopular dual-class structures with the simplicity of a Section 122(18) stockholder agreement.

Before the investing community celebrates the reduction in dual-class structures, however, the possibility that Section 122(18) agreements will create even worse governance paradigms must be considered. In fact, with the statutory validity of stockholder agreements no longer a restraint on corporate advisors, one might expect the terms of newly signed agreements to be even more aggressive than the agreement struck in *Moelis*. The Court, therefore, will be forced to decide whether to apply to the Section 122(18) stockholder agreement the same or similar legal reasoning that it used to justify expansive judicial review of dual-class governance problems. This tension brings us to the next prediction.

C. Expanded Definition of "Controller" and What Makes a Board "Conflicted"

How will judges rectify potential misuse of Section 122(18) notwithstanding the doctrinal hurdles discussed above? My next prediction reflects that common law evolves like flowing water, moving towards open spaces when the prior path is impeded.

In order to prove true the corporate bar's promise that the bench can judicially rectify potential misuse of Section 122(18) stockholder agreements, the judiciary may become more willing to categorize an investor holding less (maybe far less) than 50% of a company's voting power as a controlling stockholder. Or, the Court may find that boards that seem otherwise independent *are* conflicted with respect to the challenged agreement. To be blunt, this prediction is not a mere change to the status quo. I believe that lowering the threshold definition of a controller or making it easier to allege board conflict, would constitute a 180-degree reversal of a trend that would have emerged absent Section 122(18)'s passage.

On April 4, 2024, the Delaware Supreme Court issued its much-anticipated Opinion in *In re Match Group, Inc. Deriv. Litigation*.[39] That case gained prominence because the Delaware Supreme Court, *sua sponte*, signaled a potential major narrowing in application of the entire fairness standard to corporate transactions in which a controlling stockholder's interests are not aligned with the company or its minority stockholders. Following extensive briefing and argument, however, the Delaware Supreme Court not only stood by longstanding entire fairness practice, but broadly held that, absent the use of both a unanimously independent special committee and an informed and non-coerced majority of the minority stockholder vote, judicial review of conflicted controller transactions must remain the exacting entire fairness standard.

The defense bar's significant doctrinal loss in *Match* may nevertheless have provided a consolation prize of sorts. Post-*Match*, the judiciary would inevitably see an uptick in stockholder lawsuits challenging a broad range of conflicted-controller transaction.[40]

Assuming the plaintiffs' bar pushes to apply *Match* beyond a point that the Court of Chancery's jurists believe makes sense under fiduciary duty doctrine and policy, the bench would have a simple tool to reign in the volume of undesirable litigation: narrowing the definition of who constitutes a controller, and thereby limiting the number of cases subject to *Match*'s broad dictate.

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[39] 315 A.3d 446 (Del. 2024).

[40] Even assuming one supports applying entire fairness to conflicted controller deals generally, the *Match* opinion mandated no materiality threshold, and otherwise used broad language. Rent-seeking in the form of previously weak cases, now ostensibly governed by *Match*, seems inevitable.

By making it harder for plaintiffs to plead control, the Court could balance the important policy objective of deterring controller overreach with the pragmatic need to limit overreliance on a standard of review not generally conducive to pre-discovery dismissal.[41]

Ironically, the defense bar's victory in pushing through Section 122(18) may undermine the consolation prize logically resulting from the plaintiffs' bar inevitably placing too much reliance on *Match*'s broad language. As noted above, Section 122(18) is itself drafted so broadly that few, if any, corporate transfers of powers or rights to a particular stockholder will raise a genuine concern about statutory validity. Yet, just as investor's counsel can push their own favorable legal rules and rulings beyond the point judges can swallow, so too, corporate counsel will test broad statutory boundaries until the allocation of corporate decision-making power makes judicial intervention necessary. If (and when) corporate boards execute stockholder agreements that give statutorily valid, but doctrinally improvident, powers to stockholder activists, private equity funds, or other influential investors, the judiciary will (and should) rectify misuses of the statute.

Judges can maintain authority over potentially improper Section 122(18) stockholder agreements by broadly interpreting the circumstances when fiduciary duties attach to a "controller" and when a board majority is "conflicted." By using the legal doctrines relating to control and conflicted actions, the court sidesteps the deference of the business judgment rule.

The terms of Section 122(18) agreements can become the basis, on their own or when coupled with additional "control factors," to find that a particular investor-counterparty is a controller with fiduciary duties, despite holding less than 50% of a company's voting power. Alternatively, the business judgment rule is inapplicable, and equitable review is available for a Section 122(18) agreement executed by a conflicted board. For example, the board members may have perceived a threat to their own employment and powerful positions (typically because the contractual counterparty expressly or implicitly threatened to engage in activist campaigns). If the court finds it plausible that the board gave away key stockholder protections through a stockholder agreement as *quid pro quo* to perpetuate their continued board seats, enhanced judicial scrutiny outside the limitations of the business judgment rule follows.[42]

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[41] *See* In re Hennessy Capital Acquisition Corp. IV Stockholder Litig., C.A. No. 2022-0571-LWW (Del. Ch. May 31, 2024) (discussing the circumstances where pleading an entire fairness claim is not, in and of itself, an automatic pass through a motion to dismiss).

[42] *See* In re Edgio, Inc. Stockholders Litigation, 2023 WL 3167648, at **15–17 (Del. Ch. May 1, 2023); Williams Cos. S'holder Litig., 2021 WL 754593, at *30 (Del. Ch. Feb. 26, 2021), *aff'd sub. nom.* Williams Cos., Inc. v. Wolosky, 264 A.3d 641 (Del. 2021).Vice Chancellor Zurn's *Unocal* analysis in *Edgio*, together with the Chancellor's application of *Unocal* precedent in connection with anti-activist poison pills in *Williams*, would provide a roadmap to rule that stockholder agreements that delegate "core" board powers, can be reviewed under the enhanced

Regardless of how that review is achieved, a judicial willingness to critically consider a Section 122(18) agreement's specific terms and circumstances in determining control or conflicting interests would show respect for the legislature's broad endorsement of the use of such agreements, while preserving (some might say restoring) the bench's critical role in ensuring that the levers of corporate power are used only for loyal and proper purposes. Moreover, notwithstanding corporate bar concern about "uncertainty" in the law, there is a benefit to leaving corporate advisors and decision-makers a bit queasy about where the precise lines of judicial review reside. It only takes one or two rulings imposing fiduciary duties based on how much control is transferred through a stockholder agreement to make subsequent actors think twice about how far they want to push the limits with a stockholder agreement.[43]

In sum, by taking an expansive view of existing equitable doctrines, including the definition of "control" and when a board is "conflicted," Delaware can preserve its "contractarian" ideal of respecting the rights of contracting parties while still maintaining necessary oversight of over-aggressive stockholder agreements. Post-*Match* and pre-amendment, the court may have taken a narrower view of what constitutes a "controller" (thereby narrowing the circumstances in which non-majority investors owe fiduciary duties). The new Section 122(18) may reverse this trend, as the Court is required to assess aggressively drafted stockholder agreements involving counterparties who would previously have not appeared to be controllers. And, once the definition of controller evolves, one can foresee situations outside the scope of the Section 122(18) stockholder agreement in which outside investors make compelling arguments for the imposition of fiduciary duties to investors who might not previously have been considered controllers.

scrutiny framework, rather than the deferential business judgment rule that would bar most challenges to Section 122(18) stockholder agreements. Time will tell whether or not the Delaware Supreme Court's distinction between the proverbial "clear day" and a more traditional defensive response in its recent ruling in *Kellner v. AIM Immunotech, Inc.,* discussed above, alters the path to judicial review of stockholder agreements.

[43] While I believe the court might "push back" on the breadth of Section 122(18)'s language by creating uncertainty about the precise lines of what makes a controlling stockholder on a case-by-case basis, there is a more certain way to expand the definition of control beyond current caselaw that would surely cause more severe fits and consternation among the corporate bar. If the bar wants clear lines and the bench decides it is required to maintain better control over the terms of stockholder agreements than Section 122(18) seems to imply, the court could simply adopt the very expansive definition of "control" set forth in DGCL Section 203. Despite the mere 15% trigger for labeling an investor a controller, this outcome is not so far-fetched. *See, e.g.*, *Travis Laster, Wondering About "Control"? The General Assembly Already Defined It*, LinkedIn (Feb. 4, 2024), https://www.linkedin.com/pulse/wondering-control-general-assembly-already-defined-travis-laster-4czme/?trackingId=z0LWs2IkRp2XYUDjRMT2Fw%3D%3D [https://perma.cc/UHS2-SJ8F]

D. Modified Approach to Fee Awards for Serial/Copycat Governance Cases

My fourth predicted change in Delaware practice post-SB 313 relates to the Court of Chancery's handling of attorneys' fees. The bench may decide to deter (or at least give lesser reward to) the filing of "copycat" suits challenging an already identified (and effectively rectified) problematic governance practice.

The stockholder-side plaintiffs' bar thus plays a key role in the development of corporate law and governance practices. While big money "bread and butter" merger cases get lots of media attention and tend to bring in the largest fees,[44] the Delaware law system depends, in part, on creative investors' counsel identifying problematic yet common governance practices. Governance practices, good and bad alike, tend to replicate themselves and become more aggressive for various reasons. Corporate law firms readily copy publicly available forms and agreements from prior similar situations, but may then try to do outdo each other as part of the natural competition for clients and business. The corporate bar may sometimes simply miss an issue of concern to investors. Sophisticated corporate counsel may also find it more palatable to tell their clients, "we may be able to get away with pushing the lines." The court should reward the sophistication, ingenuity, and productive creativity of counsel who identify, challenge, and successfully correct or improve problematic governance practices.

On the other hand, when the Court agrees with investors' counsel and critiques or stops a particular widespread governance practice, other members of the plaintiffs' bar often pile on by filing nearly identical versions of the same claim against other companies that made the same governance misstep. Those "copycat" suits arguably do not to take on meaningful risk, yet historically have still resulted in premium fee awards.

Historic examples of widespread governance practices that are first challenged by creative and attentive plaintiffs' counsel, but then result in a large number of "pile on" or "copycat" suits attacking the same practice at other companies, is evident in the litigation history relating to dead-hand proxy puts,[45] "don't ask don't waive" standstill agreements,[46] charter provisions

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[44] For the Delaware Supreme Court's most recent discussion of the First State's approach to fees in cases achieving a monetary recovery, *see* In re Dell Technologies Inc. Class V Stockholders Litigation, 2024 WL 3811075 (Del. August 14, 2024).

[45] For cases developing underdeveloped law, *see* San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals, Inc., 983 A2d 304 (Del. Ch. 2009); Kallick v. Sandridge Energy, Inc., 68 A3d 242 (Del. Ch. 2013); and Transcript of Oral Argument on Defendants' Motions to Dismiss and Rulings of the Court, Pontiac General Employees Retirement System v. Ballantine, Civil Action No 9789-VCL (Del. Ch. Oct 14, 2014) (available on Westlaw at 2014 WL 6388645) ("Healthways Transcript"). These cases were followed by various "copycat" suits challenging the same legal issue.

[46] First identified but resolved before court decision in Minneapolis Firefighters' Relief Assoc. v. Ceridian Corp., C.A. No. 2996-CC (Del. Ch. Dec. 20, 2007) (stockholder class action

purporting to require director removal only for cause,[47] anti-activism poison pills,[48] erroneously tabulated stockholder voting thresholds on de-SPAC transactions,[49] and most recently, overly aggressive nomination bylaws.[50]

What do copycat stockholder suits have to do with SB 313? For all of the interesting policy-driven debates surrounding SB 313's substance, I submit that the corporate bar's rapid mobilization to override *Moelis* and other opinions that triggered this "crisis" partly reflects a rather simple motivation. After the plaintiffs' lawyers in *Moelis* and *Activision* identified and successfully challenged certain widespread governance practices that were ignored or endorsed by too many corporate law firms, the plaintiffs' bar rapidly filed a large number of "copycat" suits challenging nearly identical practices at other companies.

Moelis and *Activision* might be seen as a natural judicial response to a corporate bar failing to set boundaries for their own clients. After *Moelis*, however, the plaintiffs' bar moved faster to capitalize on these rulings than corporate firms could act proactively to solve their clients' problems. Investors rapidly filed suits challenging numerous potentially invalid stockholder agreements and seeking generous attorney fee awards for doing so. Thus, the follow-on effect to the initial and successful lawsuits caused a new problem for the corporate bar. Admitting to your client that you gave questionable (or worse, incorrect) advice on a material corporate transaction is bad enough. Given time, lawyers could find reasonable ways to advise their clients and correct those bad practices.

Now, however, in addition to the frustrating but manageable embarrassment of giving overly-aggressive advice about stockholder agreements, corporate law firms had to tell clients they risked paying a second round of attorneys' fees on those agreements—this time in the form of fees paid to plaintiffs' lawyers who corrected the corporate firms' aggressive advice about stockholder agreement limitations.

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resulting in settlement eliminating standstill agreement and other merger agreement provisions limiting possibility of higher bidder emerging); then litigated in In re Celera Corp. S'holder Litig., C.A. No. 6304-VCP, 2012 WL 1020471, at *20 (Del. Ch. Mar. 23 2012), *aff'd in part, rev'd in part on other grounds*, 59 A.3d 418 (Del. Dec. 27, 2012). Numerous follow-on suits later followed, often seeking similar fee awards.

[47] *See* In re VAALCO Energy, Inc. S'holder Litig., C.A. No. 11775–VCL (Del. Ch. Dec. 21, 2015) (invalidating charter provision unlawfully permitting director removal only for cause); Frechter v. Zier, No. CV 12038-VCG, 2017 WL 345142, at *2 (Del. Ch. Jan. 24, 2017) (denying motion to dismiss), followed by numerous copycat suits.

[48] *See* Williams Cos. S'holder Litig., 2021 WL 754593, at *30 (Del. Ch. Feb. 26, 2021), *aff'd sub. nom.* Williams Cos., Inc. v. Wolosky, 264 A.3d 641 (Del. 2021); various follow-on suits challenging anti-activism pills.

[49] *See* Garfield v. Boxed, Inc., 2022 WL 17959766 (Del. Ch. Dec. 27, 2022). Many copycat suits followed.

[50] *See* Kellner v. AIM ImmunoTech Inc., 307 A.3d 998 (Del. Ch. 2023), *judgment entered*, (Del. Ch. 2024), *and aff'd in part, rev'd in part*, 320 A.3d 239 (Del. 2024). Copycat suits followed.

The Court of Chancery may infer that some of the corporate bar's rush to override *Moelis* was a need to stem the tide of the plaintiffs' bar "piling on" and filing suits challenging repeat instances of the same improper governance practices. Whether or not it finds the corporate bar's actions sympathetic, the Court may seek to deter a similar rush of filings in the future. By applying a modest twist to existing precedent, the Court has an easy way to lower fee awards when a third, fourth or tenth "copycat" suit is filed.

Under the standard set forth by *Sugarland Indus., Inc. v. Thomas*, the most important factor in assessing a motion for attorneys' fees in a governance case is the benefit achieved for the corporation and its stockholders.[51] Another factor, which has typically received fairly rote consideration, is the novelty and risk assumed in bringing the suit. Bringing contingency cases involves risk. Delaware has wisely incentivized productive risk taking by awarding healthy multipliers and hourly rate premia.

When an investor, through contingency plaintiffs' counsel, is the first to identify a problematic corporate legal practice, that investor and its counsel can and should be generously rewarded by the Court. On the other hand, when the first one or two cases to raise an important governance issue are resolved and the broader corporate law community takes note, there is little—or at least rapidly declining—value in repetitive suits simply exploiting the fact that many companies pursued the same improper practice.

To avoid the "pile-on effect" of follow-on lawsuits that exhibited itself so prominently evident after *Moelis*, the Court can, and perhaps should, make clear that even though the corporation-specific benefit achieved by the first and tenth case to challenge a governance practice are conceptually identical, fee awards will take into account that the first one or two suits to identify a broader problem benefits the broader governance community. And once the law is clear, the fee award for copycat suits will decline rapidly. The Court can achieve this outcome by modestly clarifying the way it defines corporate benefit and the risk factor under *Sugarland*.

Specifically, the benefit achieved—the most important of the *Sugarland* factors—can take into account value beyond the company at issue and its stockholders. The Court can make express something I believe it has implicitly done: the benefit supporting a fee award includes the broader value a suit creates by improving governance practices generally.[52] The Court has touched upon the notion of awarding a fee premium for novelty and lowering awards

[51] 420 A.2d 142, 149–50 (Del. 1980).

[52] Indeed, many institutional investors care about governance because of the portfolio-wide effects of improved practices, even though the financial harm of poor governance practices at any individual company may be nominal or tough to isolate. Thus, investors should not be offended by a single company paying a premium fee award for a governance related suit because the fee reflects benefits that should manifest itself portfolio-wide.

to reflect the diminishing risk of pile-on repetitive lawsuits raising the same topic, but the law is inconclusive at this time.[53]

The plaintiffs' bar will quickly adjust its practices if the Court expressly states that, unless a later-filed suit genuinely raises a new and unique twist on a recently-corrected governance practice, or the defendant company has adopted or maintained a knowingly unlawful practice after being notified of the legal deficiency, the level of fee award will rapidly decline to the level of a modest hourly rate.

Such an approach would effectively embrace the logic underlying the premium fee award for novelty and importance articulated in *Sciabacucchi v. Salzberg* and decline the preference for equal treatment of fees regardless of whether the suit was the first or tenth to tackle a topic articulated in the *Boxed* case. While some would argue that it is unfair to the company that happens to be the first to be sued on a common, yet improper, governance practice to endorse a declining scale for fee awards, the broader jurisprudential benefit of encouraging novel suits that help improve better governance practices without rewarding "pile-on" and "copycat" lawsuits readily justifies this outcome. Indeed, if the Court wants to encourage private resolution of governance disputes without the filing of lawsuits, it might even offer lower fees on copycat suits than it would pay on privately resolved demands for board action.[54]

In short, lawyers, like everyone else, respond to economic incentives. A partial explanation for the corporate bar's rush to override Court of Chancery rulings was to avoid reputational and financial harm as clients had to confront investors' counsel that seeking to make lots of money by filing duplicates of the cases triggering those rulings. The Court may find itself drawn towards a regime that expressly rewards plaintiffs' counsel for bringing the first or second suit bringing to light a problematic practice, but rapidly lowering fees if it sees counsel just "piling on."

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[53] *Compare* Sciabacucchi v. Salzberg, 2019 WL 2913272, at *8 (Del. Ch. July 8, 2019), *judgment entered*, (Del. Ch. 2019), *vacated*, (Del. Ch. 2020) (recognizing that case involving question of first impression supported premium fee award) *with* Garfield v. Boxed, Inc., 2022 WL 17959766, at *13 (Del. Ch. Dec. 27, 2022) ("With corporate benefit as my north star, and cognizant of pattern and practice before this Court, I see no principled reason to saddle the unlucky first company to have its fee award set by the Court with fees that exceed the benefit that company received.").

[54] In other words, once the first one or two public lawsuits shows a widespread practice to be likely invalid or unlawful, other boards should have a nominal window of time to self-correct and bring their actions into conformity with the law, and to encourage non-litigious resolutions, the court may reward firms that send private demand letters to otherwise non-conflicted boards with generous fees on those letters, but can use smaller fee awards to dis-incentivize the filing of lawsuits that should be resolved by a simple letter.

E. Altered Relationship Among Delaware Bench and Bar

My final prediction is the most important, yet least likely to publicly manifest itself. There is ample reason to perceive that the corporate bar's speed in drafting and promoting SB 313, including an arguably heavy-handed critique of the judiciary with respect to these issues, harmed the historically close and respectful relationship among Delaware's bench and corporate bar. Part of what makes Delaware so sought-after by corporations and investors alike is the ongoing dialogue among sophisticated judges and leading practitioners, which is part of what many call "the Delaware way." After the dramatic summer of 2024, however, the bench/bar relationship is in need of repair.

The corporate bar's response to *Moelis* and *Activision* could have been to simply admit a pattern of over-aggressiveness in advising clients, resulting in excessive legal line-crossing that smart lawyers should have avoided. To the extent that recent Court of Chancery opinions might have caused serious corporate policy problems requiring a course correction, the corporate bar knows how to privately (and even publicly) educate the members of the Court. Historically, those communications can be blunt, and particularly when stated from the courtroom podium, can approach hyperbolic. For example, anyone practicing in Delaware for long enough will see one litigator or another warn that an adverse ruling could bring the Republic crumbling to its proverbial knees.

But this round of the bar's reaction to rulings favoring investors took a decidedly different tone. The corporate bar did not merely complain in private, or even resort to overblown courtroom rhetoric. Instead of deferring to the bench as the arbiter of the law even when industry practices happened to cross legal lines, the corporate bar pursued rapid legislative override of adverse judicial opinions. Recall that *Smith v. Van Gorkom* was decided in January 1985 and raised legitimate concerns that people would decline to serve as directors of Delaware corporations, which truly would destroy the Delaware dominance in business incorporations. Yet the Delaware legal bar and legislature only passed Section 102(b)(7) in mid-1986.

Following *Moelis*, notwithstanding public insistence that quick action was needed in order to salvage Delaware's place in the corporate landscape, the corporate bar arguably was also seeking to vindicate (or at least insulate) their problematic prior legal advice by forcing the law to conform with that advice. And when some of the judges who questioned SB 313's process or substance did so publicly, members of the bar aggressively attacked those jurists for meddling or overstepping.[55] In doing so, the bar arguably took

[55] *See* Joel Edan Friedlander, *Former Chancellor Chandler's Unjust Criticism of Chancellor McCormick and Vice Chancellor Laster*, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4901375 [https://perma.cc/XK7S-H7YD] (documenting how certain members of the corporate bar attacked the judiciary with respect to SB 313).

two steps that may well harm the traditionally respectful dialogue among the bench and bar.

First, the corporate bar personalized attacks on both Delaware jurists who publicly questioned SB 313's wisdom. A rather mild example of a public critique of the supposed "instability" triggered by the recent rulings came from Wilson Sonsini.[56] Later published remarks and testimony from advocates for the legislation became even more aggressive.

On April 12, 2024, Chancellor McCormick sent a private letter to the Delaware State Bar raising questions about how SB 313 came to be. That letter was made public with the May 28, 2024 edition of The Chancery Daily.[57] The Chancellor's actions were not very different from prior actions by jurists regarding changes to the DGCL.[58] The main distinction between prior instances of judicial comment on proposed legislation and the Chancellor's April 12 letter seems to be that in the past, the judiciary agreed with the corporate bar. In all events, the bar's harsh reaction to the Chancellor's benign letter-writing seemed unwarranted and arguably disrespectful.

The corporate bar's criticism towards Vice Chancellor Laster's practice of posting law-related comments—including about SB313—on his LinkedIn page approached vitriol. This response was particularly puzzling. It is hard to believe that a judge inviting discussion and collaboration with the general public about cutting-edge legal issues is harmful, yet judges doing the same thing in a semi-private educational conference is not.

Second, by pushing through a rapid legislative override without even allowing the appeal process to unfold (much less waiting for other members of the Court of Chancery to consider and write about the issues raised in the recent cases), the corporate bar sent a detrimental message about hierarchical power over the Court of Chancery itself. In the long run, Delaware is harmed if the bench perceives that rulings that anger the corporate bar will rapidly result in legislative rebuke or other negative consequences to the Court's reputation and status. Judges are imperfect, but Delaware's Chancellor and Vice Chancellors plainly offer the world's deepest reserve of judicial wisdom and

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[56] *See* Amy Simmerman et al., *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, Harv. L. Sch. F. Corp. Governance (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ [https://perma.cc/9ZJS-HY9V]

[57] *See* Jordan Howell, *Top Delaware Judge Calls for More Debate Over Contentious Corporate Amendments,* Delaware Call (May 29, 2024), https://delawarecall.com/2024/05/29/top-delaware-judge-calls-for-more-debate-over-contentious-corporate-amendments/ [https://perma.cc/2PWF-2PP6] (linking both the Chancellor's letter and its first public release).

[58] For example, Court of Chancery Rule 15(aaa) was likely proposed and surely supported in private by members of the bench who did not appreciate the way a Delaware Supreme Court ruling regarding when a dismissal of a suit should be with or without prejudice to amendment. Similarly, members of the Chancery and Supreme Court commented extensively about the legislative correction of the fee shifting aspects of *ATP Tour, Inc. v. Deutscher Tennis Bund*.91 A.3d 554 (Del. 2014) (endorsing corporate bylaws imposing fee shifting on investor-plaintiffs).

sophistication on corporate matters. While leading local attorneys play a key role in shaping legal developments, even the most well-intentioned scions of the corporate bar have clients to whom they answer. Hard problems get solved in Delaware when solutions to those problems are discussed in a context in which the bar and academia can advocate positions, but the judges (whose only priority should be the law itself) are superior and ultimately decide.

This brings us to my fifth prediction. While the corporate defense bar's input and wisdom about business law is an essential component of the "Delaware way," it has to make things right with the Delaware bench. The leaders of the Delaware corporate practice may well find ways to recognize that their response to *Moelis* and *Activision* (even if grounded solely in genuinely held beliefs about good corporate law policy) was not as respectful as the bench can and should expect. The corporate bar may seek ways to make clear that the Court's independence and freedom to rule as it sees fit must remain the jurists' core expertise and will be respected going forward.

It is unclear how the manner in which these recent opinions were overridden might influence the outcome of future governance cases. One possibility is that the court, having been effectively reprimanded by the corporate community, may become more cautious in issuing rulings that could displease corporate interests. In this sense, the amendment of Section 122(18) can be seen as the corporate bar claiming a superior position in the intra-Delaware power hierarchy, indicating that the judiciary should cater to corporate interests rather than expecting the corporate world to conform to judicial rulings based on precedent. If so, the result may be a risk-adverse judiciary, hesitant to interpret the law in ways that upset corporate directors and officers. In other words, the court itself would be pressed into supporting a "race to the bottom" that protects fiduciaries over their beneficiaries.

Conversely, the passage of Section 122(18) might provoke the court to adopt a less conciliatory stance towards the bar. If the court perceives that the corporate bar has overstepped boundaries, it might dispense with the practice of writing long and cautious opinions that attempt to justify a controversial outcome by detailing the judge's nuanced approach to the issue. Instead of producing detailed and carefully reasoned opinions in controversial cases such as *Moelis* (where the judge took great lengths to lay out a nuanced analysis and decision because the court knew that the outcome would be controversial), future opinions might become more direct and critical when corporate actors overstep the lines of the law. A judge might, for instance, bluntly state that certain stockholder agreement terms are practically absurd and exceed any reasonable interpretation of the law. Instead of the bench's typical caution in describing even the most clear of cases of corporate error, the judiciary might assume a stronger tone, using their opinions to firmly present cases against corporate overreach and thereby discourage legislative revisions.

The Delaware bench is exceptionally talented and deserves respect, including being given the time and room to sort out where the law should go, without public rebuke (and legislative override) coming from the bar. A good starting point would be to stop the years-long practice of overblown griping about how much rulings for investors could destabilize the business world. The nature of the Delaware legal community allows participants to respectfully – and privately – express concerns about particular judicial rulings. The corporate bar publicly complaining about adverse rulings should stop.

Another steps towards showing respect to the bench with respect to legal developments could be to ensure a full and fair opportunity for the Council to solicit judicial input into proposed legislative changes well before the Council sends those proposals to the legislature. The gist of Chancellor McCormick's much-maligned letter focused on process and the speed with which the Council was changing the law. While some members of the bar critiqued the Chancellor for sending the letter, she should never have needed to send it in the first place. The Council can show respect by committing to allow the full Court of Chancery ample private opportunity to consider, evaluate and meet and discuss any concerns about any future proposed DGCL amendments.[59]

Another step towards restoring the historical level of respect among the Delaware bench and bar includes a change in how the bar perceives the use of social media. The Delaware law ecosystem enjoys a long-standing and immeasurably valuable "dialogue" between its various constituents, along with academia. Extending that discussion to publicly available platforms may seem populist to some. Yet a broader and more open dialogue among interested people should be encouraged, not criticized.

The bench itself can take steps towards this objective. If the Chancellor and/or other members of the bench begin to offer their own public "test balloons" for legal debate in public, perhaps critics of Vice Chancellor Laster's use of LinkedIn would more likely accept judicial use of social media to publicly discuss interesting and evolving legal issues, and not turn social media usage into a criticism. While social media posts cannot replace the value of in-person academic and professional panels and personal discussions about important issues, the broader Delaware ecosystem will not be harmed by embracing public bench-bar communications.

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[59] The corporate bar may already be cautious before proposing new legislation to override a judicial ruling, considering the very public airing of grievances resulting in Section 122(18) in the first place. The corporate bar arguably moved more forcefully to change the law than ever before, including the tumultuous debates and events resulting in DGCL Sections 102(b)(7) and 203. This is not a call to silence the corporate bar. Rather, it is institutionally important for all counsel practicing in Delaware to avoid being heavy-handed, if not outright disrespectful to the judiciary, the next time a ruling causes some level of market turmoil. The bar can offer some type of tangible reconciliation effort now.

Finally, the Delaware Supreme Court's handling of the appeal in *Moelis* may be an opportunity to restore the Court of Chancery's primacy over the bar. Although the Council successfully caused Delaware law to conform to the "market practices" the corporate bar permitted, a strongly worded affirmance may remind the bar that it is important to hold firm in ensuring that their clients operate within legal norms.

Regardless of the means, the bench's dominance in the Delaware law ecosystem should be respected and restored. The onus is on the members of the Council.

III. Conclusion

In light of the legislative endorsement of stockholder agreements as a tool to delegate board-level powers, controllers, activists, directors, and managers will likely now find increasingly creative and aggressive ways to use these agreements to achieve their preferred outcomes. This trend is expected to continue until, and unless, the judicial system develops effective mechanisms to curb this practice and set clear boundaries that the corporate world must respect.

As time progresses, the true impact of Section 122(18) on Delaware law will become clear. Regardless of whether these comments turn out to be correct or completely misplaced, hopefully they are received as respectful and thought-provoking: the "Delaware Way" in action.