SPECIAL COMMITTEE REPORT

This issue of the Debevoise & Plimpton Special Committee Report surveys corporate transactions announced during the period from January through June 2022 that used special committees to manage conflicts and key Delaware judicial decisions during this period ruling on the effectiveness of such committees.

S.B 21 in Transition: Statutory Recalibration, Post-Enactment Case Law, Constitutional Boundaries, and Emerging Structural Tensions

Delaware's Senate Bill 21 (S.B. 21), enacted in March 2025, represents one of the most significant statutory recalibrations of fiduciary review in recent decades.[1] The statute amended § 144 of the Delaware General Corporation Law (DGCL) to create statutory safe harbors applicable to interested director transactions and conflicted controller transactions (both take-private and non-take-private). S.B. 21 also amended § 220 of the DGCL, altering the books-and-records regime that has become the principal gateway to modern fiduciary litigation.

Although S.B. 21 has now been in effect for nearly a year, its impact on Delaware's jurisprudence has not yet been meaningfully tested, largely because the statute applies only to cases filed after February 17, 2025. Most of the significant decisions issued by the Court of Chancery since S.B. 21's enactment apply pre-amendment doctrine because they involve cases that were filed before that date. Meanwhile, constitutional challenges to S.B. 21 introduced additional uncertainty, although that uncertainty has now been substantially resolved: on February 27, 2026, the Delaware Supreme Court upheld the constitutionality of amended § 144 in *Rutledge v. Clearway Energy Group LLC*.[2] As a result, the amended statutory framework will govern conflict-of-interest transactions going forward, and courts will apply its safe-harbor structure as written.

This article surveys the first wave of post-enactment decisions to identify how traditional equitable doctrines continue to operate and how those disputes might be analyzed under amended § 144 and § 220, examines the constitutional issues resolved in *Clearway Energy*, and addresses an emerging structural tension in going-private transactions: the asymmetry between SB 21's "majority of disinterested votes cast" standard and *Corwin's* "majority of outstanding disinterested shares" requirement.

What S.B 21 Changed

S.B. 21 reorganized § 144 into a structure that distinguishes among three categories of conflicted transactions: (i) interested director transactions, (ii) conflicted controller transactions that are not take-privates, and (iii) controller take-private transactions.

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1 For more detailed information on those changes, see this Debevoise Update and our article *DGCL Amendments' Impact on Going Private Transactions* in the Spring 2025 issue of MarketCheck.

2 No. 248, 2025 (Del. Feb. 27, 2025).

Interested Director Transactions

Historically, § 144 provided that a transaction in which one or more directors had an interest would not be void or voidable solely because of that interest if the material facts of the director's interest were disclosed and the transaction was approved in good faith by disinterested directors or stockholders. Critically, however, compliance with § 144 did not determine the standard of review. Delaware courts repeatedly held that satisfaction of § 144 merely prevented automatic invalidation; it did not displace further scrutiny where fiduciary principles otherwise required them. The concepts of "interest" and "independence" were largely creatures of equitable doctrine, developed through case law addressing material personal benefit, disabling financial ties, or relationships that compromised a director's ability to act impartially.

As amended by S.B. 21, § 144 provides that where one or more directors are conflicted, the transaction will not be subject to equitable relief or an award of damages if either: (i) the transaction is approved by a majority of the votes cast by fully informed disinterested stockholders, or (ii) the transaction is approved by a majority vote of disinterested directors, whether the entire board or a committee thereof, provided that when more than half of the directors are conflicted, the transaction must be approved by a fully disinterested special committee of at least two directors. Amended § 144 also more expressly defines when a director is "interested" in a transaction by providing defined terms and presumptions that govern whether a director is considered interested, including: (i) defined terms setting out what interests and relationships are considered "material" and (ii) creating a heightened presumption of disinterestedness (with respect to acts or transactions to which the director is not a party) based on a determination of director independence for national securities exchange purposes, which presumption can only be rebutted by "substantial and particularized facts."

Conflicted Controller Transactions (Non–Take Privates)

S.B. 21 also addressed transactions involving a controlling stockholder that do not constitute take-privates. In this context, the statute first narrows the definition of "controlling stockholder" for purposes of § 144. Under amended § 144, a stockholder holding less than one-third of the voting stock cannot be a controlling stockholder unless that stockholder has a right to cause the election of directors having a majority of the voting power on the board. Transaction-specific control theories—under which a minority stockholder could be deemed a controller based on alleged influence over a particular transaction—are also displaced for safe-harbor purposes. There continues to be some debate, however, about whether S.B. 21's controlling stockholder definition operates only for purpose of the safe harbor, meaning that prior case law regarding transaction-specific control might continue to apply when the safe harbor is not invoked or is invoked unsuccessfully. This debate was not resolved by the Delaware Supreme Court's *Clearway Energy* decision, although that decision noted that S.B. 21 "redirects the . . . judicial development of the concept of 'control' by defining the term 'controlling stockholder.'"

For transactions that qualify as controller transactions under the amended definition, § 144 provides statutory approval pathways similar to those applicable to interested director transactions. If the transaction is approved in accordance with the statute's disinterested decision-maker requirements and disclosure predicates, it falls within the statute's protection and is removed from traditional equitable review.

Before S.B. 21, controller transactions were presumptively subject to entire fairness review absent compliance with the dual procedural protections articulated in *Kahn v. M&F Worldwide Corp.* (*MFW*). The amended statute replaced that common-law framework with a rule-based statutory mechanism. Instead of asking whether *MFW* was satisfied and whether entire fairness applies, courts are directed to determine whether the statutory predicates have been met.

Controller Take-Private Transactions

For controller take-private transactions, amended § 144 retains the dual *MFW* requirements (i.e., both a disinterested special committee and a majority-of-the-minority stockholder vote), but it makes obtaining early dismissal easier and more predictable by removing the "*ab initio*" requirement (which had required that these procedural protections be implemented at the outset, prior to any substantive negotiations), lowering the disinterested stockholder voting threshold from a majority of the outstanding disinterested shares to a majority of the disinterested shares voted, and focusing on the board's determination that all members of the special committee are disinterested (together with the heightened presumption of disinterestedness for directors meeting national securities exchange independence requirements).

Importantly, however, compliance remains litigable. Plaintiffs may still challenge whether: (i) the approving directors were truly disinterested; (ii) the stockholder vote was fully informed and uncoerced; (iii) the disclosures were complete and accurate; and (iv) the statutory approval process was followed.

Amendments to § 220 and the Evidentiary Pipeline

Books-and-records demands have become the dominant pre-suit mechanism for developing the factual record necessary to plead non-exculpated claims, challenge committee independence, or contest safe-harbor compliance. By narrowing the categories of inspectable materials to an enumerated list of formal board materials and introducing heightened standards for certain requests, the amended statute potentially shifts the battleground to the inspection stage. Pre-S.B. 21, some Delaware courts had ordered corporations to produce directors' emails and text messages in response to stockholder books-and-records demands pursuant to § 220. These decisions significantly increased the material available to plaintiffs, leading to expansive pre-suit discovery. The obtained information was then often used in an effort to support allegations that the parties failed to comply with the requirements for procedural protections that would result in business judgment review or a shift to plaintiffs of the burden of proof. Post-S.B. 21, the materials available pursuant to books-and-records demands are more narrowly circumscribed outside of certain specific exceptions. While stockholders retain access to a defined set of core materials, requests for records beyond those enumerated categories—such as informal electronic communications—are now subject to a heightened showing. A stockholder seeking such broader discovery must demonstrate a "compelling need" for the specific documents requested to further a proper purpose and must establish, by clear and convincing evidence, that the particular records sought are "necessary and essential" to advancing that purpose.

In a post-S.B. 21 world, § 220 disputes may increasingly center on whether stockholders can obtain the materials necessary to test statutory predicate compliance under § 144. As a result,

litigation that once unfolded primarily through entire fairness arguments may instead turn on inspection rights and the sufficiency of statutory approval mechanics.

Post-Enactment Decisions and Their S.B 21 Counterfactuals

Because S.B. 21 is not retroactive for cases filed prior to February 17, 2025, early post-enactment decisions apply pre-amendment doctrine. Below we survey the first wave of post-enactment decisions to identify how traditional equitable doctrines continue to operate and how those disputes might be analyzed differently under amended § 144 and § 220.

Witmer v. Armistice Capital, LLC (Del. Ch. Aug. 14, 2025)

Witmer arose from acquisitions by Aytu Biopharma involving entities affiliated with Armistice Capital, which owned approximately 41.4% of Aytu's equity and had board representation. Plaintiffs alleged that Armistice exercised transaction-specific control over the acquisitions.

The complaint asserted controller-based fiduciary duty claims, relying heavily on allegations of influence, economic leverage, and close involvement in the deal process. The Court of Chancery dismissed the claims in full, holding that transaction-specific control requires well-pled facts demonstrating that the alleged controller actually dictated the board's decisions. Allegations of influence, advocacy, or access were insufficient absent facts showing decisive authority or domination of the board's deliberative process.

Under amended § 144, plaintiffs would first need to satisfy the statute's narrower definition of 'controlling stockholder' by making allegations that the minority stockholder had the "power functionally equivalent" to that of a majority stockholder and the "power to exercise managerial authority over the business" of the company. If plaintiffs were unsuccessful in doing so, the safe harbor would not apply, potentially foreclosing the litigation at an earlier stage. Of course, as referenced above, there is some debate as to whether any version of transaction-specific control survives the amended § 144; should it survive, the amendments would have little impact on the decision.

Roofers Local 149 Pension Fund v. Fidelity National Financial (Del. Ch. May 9, 2025)

Roofers involved a preferred stock investment by a controlling stockholder that was negotiated and approved by a special committee. Plaintiffs alleged that the controller extracted unfair benefits and that the committee was not independent due to affiliate relationships and other ties.

The Court of Chancery dismissed the claims, but only after carefully examining the committee's composition, authority, and process. The court reviewed contemporaneous minutes, advisor presentations, and evidence of negotiations to determine whether the committee exercised genuine bargaining authority. Although dismissal was granted, the analysis was fact-intensive and emphasized the contextual nature of independence.

Under amended § 144, the analysis would begin with statutory compliance—whether a majority of disinterested directors approved and whether the committee satisfied statutory independence criteria. But *Roofers* suggests that courts will continue to scrutinize independence substantively, even within the statutory framework, by examining the underlying facts that support or rebut the heightened presumption of disinterestedness.

Wei v. Levinson (Del. Ch. June 3, 2025)

Wei v. Levinson arose from Amazon's 2020 acquisition of Zoox, a venture-backed autonomous vehicle company with a complex capital structure that included multiple series of preferred stock and convertible notes. At the time of the sale, Zoox was financially distressed and faced liquidity pressures. Plaintiffs—holders of common stock—alleged that the transaction disproportionately favored preferred stockholders and insiders, leaving little residual value for common holders. They contended that directors and officers faced disabling conflicts, including preferred equity positions that created incentives differing from those of the common stockholders, as well as post-closing employment arrangements and retention incentives negotiated with Amazon.

Among other things, the complaint asserted claims against directors and officers for breaches of the duty of loyalty in the sale process, alleging that conflicts tainted negotiations and that the board failed to maximize value for the common stockholders.

Because the transaction constituted a change of control, the Court of Chancery analyzed the claims under *Revlon*'s enhanced scrutiny. Certain claims against individual directors survived the motion to dismiss where plaintiffs had pled non-exculpated breaches of the duty of loyalty—specifically, where alleged conflicts tied to preferred holdings and employment incentives created a reasonable inference of disloyal conduct affecting the sale process. The court found that these allegations were sufficiently particularized to avoid dismissal at the pleading stage.

Importantly, Wei serves as a reminder that S.B. 21 did not displace *Revlon* in sale-of-control transactions. Even under the amended statute, a non-controller going-private remains subject to enhanced scrutiny absent *Corwin* cleansing, which requires approval by a fully informed and uncoerced majority of the outstanding disinterested shares. That standard creates a contrast with controller-led going-privates governed by amended § 144. For those transactions, assuming the statutory dual protections are satisfied, stockholder approval is measured by a majority of the disinterested votes cast. As discussed below, this divergence in voting standards creates a structural asymmetry between controller-led and non-controller going-private transactions.

In re Aspen Technology, Inc. (Del. Ch. Oct. 6, 2025)

Aspen involved a books-and-records demand under § 220 in connection with a challenged transaction involving Emerson and Aspen Technology. Stockholders sought production of special committee minutes, advisor materials, and documents relating to potential conflicts. The company resisted broad production, arguing that the requests exceeded what was 'necessary and essential' to the stated purpose.

The Court of Chancery ordered limited production, emphasizing tailoring and specificity. Formal committee-level materials reflecting deliberations were deemed necessary and essential, while broader requests, including more informal board materials and officer-level materials, were denied. The order underscores the centrality of committee minutes in fiduciary litigation and the disciplined approach courts apply to inspection disputes.

Under amended § 220, disputes over the scope of inspection may become even more consequential. A stockholder seeking to challenge statutory safe-harbor compliance under § 144 may argue that committee minutes are necessary to test independence and disclosure adequacy.

Companies may counter that expanded categories require a showing of 'compelling need.' Thus, § 220 litigation may become the first—and sometimes decisive—stage of post-S.B 21 controller disputes.

DrugCrafters, L.P. v. Loh (Del. Ch. Nov. 26, 2025)

DrugCrafters arose from a transaction in which a financial sponsor acquired the company through a merger approved by a special committee and submitted to a stockholder vote. Plaintiffs—former stockholders—asserted fiduciary duty claims against directors and officers, alleging that the sale process was tainted by conflicts and that the proxy statement contained material disclosure deficiencies. Specifically, plaintiffs contended that certain directors had relationships with the buyer or its affiliates, that the committee process was insufficiently robust, and that the proxy failed to disclose material details regarding conflicts, valuation methodologies, and financial projections.

The defendants moved to dismiss, invoking *Corwin* cleansing. They argued that the transaction had been approved by a fully informed and uncoerced majority of the outstanding disinterested shares and that, as a result, business judgment review applied. The central dispute therefore focused on whether the stockholder vote was adequately informed and whether any alleged conflicts or disclosure omissions were material.

The Court of Chancery undertook a detailed review of the proxy disclosures and the sale process. The court rejected plaintiffs' disclosure claims, finding that the proxy adequately described the alleged conflicts, the financial advisor's compensation and potential incentives, the valuation analyses performed, and the background of the merger negotiations. The court emphasized that Delaware law does not require "play-by-play" disclosure of every negotiation detail, but rather disclosure of material information necessary for stockholders to make an informed decision.

Because the court concluded that the vote was fully informed and uncoerced, *Corwin* cleansing applied. As a result, the claims were dismissed in full at the pleading stage. *DrugCrafters* provides a contemporary roadmap for how courts analyze disclosure challenges in the *Corwin* context—an analysis that should not be affected by S.B. 21—reinforcing that careful and transaction-specific proxy disclosures can be outcome-determinative.

Clearway Energy and Article IV Constitutional Boundaries

In *Clearway Energy*, the Delaware Supreme Court upheld the constitutionality of amended § 144 in a unanimous, *en banc* decision. The Court answered two certified questions from the Court of Chancery: (i) whether S.B. 21 unconstitutionally divests the Court of Chancery of its equitable jurisdiction by foreclosing equitable relief or damages where the statutory safe-harbor procedures are satisfied, and (ii) whether the statute's retroactive application to transactions not subject to pending litigation at the time of its introduction impermissibly eliminates accrued or vested causes of action. The Court rejected both challenges.

The Court held that amended § 144 does not divest the Court of Chancery of its jurisdiction to adjudicate fiduciary claims, noting that breach of fiduciary claims remain within the undisputed jurisdiction of the Court of Chancery, albeit subject to a different review framework. The Court likened the amended § 144 to other exercises of permissible legislative power, such as § 102(b)(7) of the DGCL, which allows corporate charters to exculpate directors and officers

from personal liability for breaches of the duty of care, as well as other DGCL provisions, such as § 253, which authorizes a streamlined process for short-form mergers. The Court also upheld S.B. 21's retroactivity provisions, explaining that while laws can apply retroactively "only where the General Assembly has made its intent plain and unambiguous," the General Assembly here had done so, and that nothing about the provision offended due process because S.B. 21 was reasonably related to a permissible legislative objective. The Court rejected the plaintiff's argument that S.B. 21 extinguished his right of action, explaining that his fiduciary duty arguments could still be made, albeit reviewed under a different standard.

The practical consequence of *Clearway Energy* is significant. The constitutional cloud over amended § 144 has been removed. Going forward, courts will apply the statute's safe-harbor framework as written, and challenges to its displacement of traditional equitable review are unlikely to succeed. The focus of fiduciary litigation will therefore shift from constitutional boundaries to statutory compliance.

For deal practitioners, the immediate consequence is clarity: transactions structured to comply with amended § 144's safe-harbor predicates can now proceed with confidence that the constitutional foundation of those protections will not be disturbed. The *Clearway Energy* decision also carries implications for pending transactions that had been structured with constitutional risk in mind. Parties that adopted belt-and-suspenders approaches (maintaining both statutory and common-law *MFW* compliance) may now feel comfortable relying solely on the statutory framework.

S.B 21 and *Corwin*: Voting-Threshold Asymmetry

One of the more subtle but potentially consequential features of S.B. 21 emerges in the going-private context. Under amended § 144, a controller take-private can satisfy the safe harbor requirements if the transaction is approved by both (i) a disinterested special committee and (ii) a *majority of the disinterested votes cast*. Abstentions do not count against approval. By contrast, if a going-private transaction does not involve a controlling stockholder, it does not fall within amended § 144's controller provisions. Instead, it remains subject to Delaware's traditional change-of-control jurisprudence under *Revlon*. In those transactions, the board's obligation is to act reasonably to maximize stockholder value in a sale-of-control context, and enhanced scrutiny applies unless *Corwin* cleansing occurs. Under *Corwin*, a transaction must be approved by a fully informed and uncoerced *majority of the outstanding shares* held by disinterested stockholders, for business judgment review to apply. Under that standard, abstentions are counted as votes against.

The result illustrates an anomaly of S.B. 21: the vote required for the safe harbor for a controller going-private transaction (majority of the disinterested votes cast) is *lower* than the vote required to cleanse (under *Corwin*) a going-private transaction with a non-controller (majority of the outstanding shares held by disinterested stockholders).

The practical impact of this asymmetry could be significant. In a typical public company vote, some percentage of disinterested shares are not voted. Under S.B. 21's "votes cast" formulation for controller going-privates, those abstentions are ignored: a controller need only secure a majority of the shares that actually show up and vote. Under *Corwin*, by contrast, every abstention functions as a "no" vote because approval is measured against the full base of

outstanding disinterested shares. To illustrate: assume that a company has 300 issued and outstanding shares and 30% of those shares (90 shares in total) are disinterested. Of those disinterested shares, only 60 (2/3rds) are voted at the meeting. In that example, a controller going-private can clear its stockholder hurdle with the affirmative vote of approximately 31% of the outstanding disinterested shares, while a non-controller going-private would need more than 50% of outstanding disinterested shares to achieve *Corwin* cleansing. The result is counterintuitive: the conflicted transaction receives more lenient treatment than the unconflicted one. It will be interesting to see whether this asymmetry affects deal design.

Conclusion

S.B. 21 reshaped Delaware's statutory architecture, but fiduciary litigation will likely evolve rather than disappear. Controller status disputes may narrow, yet battles over statutory predicates, disclosure adequacy, independence, and inspection rights are likely to intensify. With the Delaware Supreme Court's decision in *Clearway Energy* confirming the constitutionality of amended § 144, attention now turns to how rigorously courts will apply the statute's safe-harbor predicates and how the amended framework will interact with existing doctrines such as *Revlon* and *Corwin*.

Three areas warrant particular attention. First, the § 220 inspection battleground is likely to become the fulcrum of post-S.B. 21 litigation strategy. Because the statute narrows the materials available through books-and-records demands while simultaneously creating new statutory predicates that plaintiffs must challenge, the "compelling need" and "necessary and essential" standards likely will become the subject of intensive and iterative judicial development. Second, the voting-threshold asymmetry between controller and non-controller going-privates is likely to produce deal-structuring arbitrage, and courts will eventually need to determine whether transactions designed to exploit this gap warrant heightened scrutiny. Third, the scope of the heightened presumption of disinterestedness (and specifically what qualifies as "substantial and particularized facts" sufficient to rebut it) will likely become one of the most frequently litigated issues under the amended statute, as plaintiffs seek to test the outer limits of the new independence framework.

Recent Delaware Decisions Affecting Special Committees

Transaction-Specific Control Requires Allegations that the Defendant Actually Controlled the Board's Decision[3]

In *Witmer v. Armistice Capital, LLC, et al.*, plaintiff stockholders challenged a series of transactions involving Aytu Biopharma, Inc. (Aytu), a public company, and Armistice Capital, a

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[3] As indicated in our main article, most of the recent decisions affecting special committees relate to cases that were filed prior to February 17, 2025, meaning that the Court of Chancery is relying on pre-S.B. 21 law when conducting its analysis. Had *Witmer* been filed after that date, under amended § 144, plaintiffs would first need to satisfy the statute's narrower definition of 'controlling stockholder' by making allegations that the minority stockholder had the "power functionally equivalent" to that of a majority stockholder and the "power to exercise managerial authority over the business" of the company. If plaintiffs were unsuccessful in doing so, the safe harbor would not apply, potentially foreclosing the

significant stockholder with board representation. Plaintiffs alleged that Armistice and its designated board representative, Steven Boyd, exercised transaction-specific control over Aytu's decisions to acquire two companies that Armistice held an interest in and used their influence and access to confidential information to advance Armistice's interests at the expense of Aytu's other stockholders. At the time of the transactions, Armistice held a 41.4% interest in Aytu. The complaint asserted controller-based fiduciary duty claims, as well as aiding-and-abetting claims against Armistice and Boyd. Plaintiffs relied heavily on allegations of access, communications with management, and Armistice's economic leverage. Defendants moved to dismiss, arguing that the pleadings failed to establish control or any actionable breach.

The Court of Chancery granted defendants' motion to dismiss in full. The court held that the complaint failed to plead facts supporting a reasonable inference that Armistice exercised transaction-specific control over the challenged decisions. Allegations of access, influence, or advocacy—without facts showing that Armistice actually dictated outcomes or overrode board decision-making—were insufficient to establish controller status. *Witmer* reinforces the demanding pleading standard for controller and influence-based claims, particularly where plaintiffs rely on generalized allegations of access or economic leverage. For special committees and boards, the opinion underscores the value of clear documentation showing that ultimate decision-making authority remained with disinterested directors or committees. Minutes, resolutions, and voting records demonstrating independent deliberation can be decisive at the pleading stage. The case is also a useful reminder that "transaction-specific control" requires more than persuasion or participation—it requires facts showing decisive authority. *Paul Witmer v. Armistice Capital, LLC, et al.*, C.A. No. 2022-0807-MTZ (Del. Ch. Aug. 14, 2025).

Foreclosure by a Creditor/Equity Holder Does Not Automatically Trigger Controller Status, a Stockholder Vote, or Direct Fiduciary Claims

In *Glean Tech Fund II v. McIntosh*, stockholders of Clutter Holdings, Inc. challenged a series of transactions culminating in a foreclosure sale of all of the company's assets by the senior secured lender, followed by a public auction sale of operating assets to the junior secured creditor (Iron Mountain) and a subsequent partial equity sale to certain former stakeholders. The plaintiffs asserted that (i) the foreclosure sale constituted a sale of "substantially all" assets requiring a stockholder vote under Section 271 of the Delaware General Corporation Law (DGCL), (ii) Iron Mountain was a controlling stockholder who owed fiduciary duties in the transaction, and (iii) the company's directors breached their fiduciary duties by failing to prevent the allegedly unfair process that wiped out minority equity interests.

The Court of Chancery dismissed all claims on a motion to dismiss. The court held that the plaintiffs failed to allege that Iron Mountain's 27% equity interest conferred either general or transaction-specific control over Clutter Holdings such that Iron Mountain owed fiduciary duties as a controlling stockholder. In analyzing control, the court reiterated that a plaintiff must plead facts showing actual ability to influence corporate action—mere contractual

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litigation at an earlier stage. Of course, there is some debate as to whether any version of transaction-specific control survives the amended § 144; should it survive, the amendments would have little impact on the decision.

relationships or percentage interests are not enough absent governance rights or demonstrated influence over board composition or transactions.[4]

The court also rejected plaintiffs' fiduciary duty claims against the directors, applying the Delaware Supreme Court's *Tooley* test and holding that the claims were derivative, not direct, because plaintiffs failed to allege any injury independent of the injury to the corporation. Attempts to characterize the extinguishment of equity value as a special injury were insufficient under controlling Delaware precedent. Moreover, plaintiffs failed to plead demand futility, which was required before asserting derivative claims against the directors.

Finally, the court held that Section 271 did not require a stockholder vote to approve the foreclosure sale. Drawing on precedent, it explained that a judicial foreclosure initiated by a creditor does not constitute a corporate action requiring stockholder approval where, as here, the company took no affirmative action to facilitate the foreclosure. *Glean Tech Fund II v. McIntosh*, C.A. No. 2024-0032-PAF (Del. Ch. Sept. 2, 2025).

Material Non-Ratable Benefits from Fiduciary Duty Waiver Can Trigger Entire Fairness Review

In *Daniel S. Peña v. MacArthur Group, Inc.*, the Court of Chancery confronted fiduciary duty claims brought by a minority stockholder after a stock-for-stock merger that effectively converted MacArthur Group, Inc. into a limited liability company. The transaction, approved by nearly all stockholders except the plaintiff (a non-director stockholder), included a fiduciary duty waiver in the LLC operating agreement that eliminated fiduciary duties for managers and certain covered persons post-conversion.

Plaintiff's claims arose in large part from appraisal discovery, which revealed extensive allegations that the CEO/controller and the CFO had repeatedly used company funds for personal expenditures, insider loans, bonuses, and other questionable conduct throughout the company's history. After appraisal discovery confirmed these facts, plaintiff amended his petition to assert breach of fiduciary claims, alleging that the merger was engineered to insulate the controlling stockholder and CFO from liability for past and future misconduct by eliminating fiduciary duties under the Delaware LLC Act.

The court denied defendants' motion to dismiss the breach of fiduciary duty claims against the controller (CEO) and CFO, holding that the complaint plausibly alleged that the merger conferred a material non-ratable benefit because the fiduciary duty waiver (in the LLC agreement) eliminated potential liability for future misconduct. Citing *Maffei v. Palkon*[5] and

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[4] Note that under amended § 144, the controller analysis would begin with the statute's narrowed definition of "controlling stockholder." A 27% stockholder would not qualify as a controller absent either (i) the right to cause the election of a majority of the board or (ii) ownership of at least one-third of the voting power coupled with functional-equivalent control and managerial authority. On the pleaded facts, Iron Mountain would likely fail to satisfy that threshold as a matter of statutory definition, potentially foreclosing controller-based safe-harbor analysis at an even earlier stage.

[5] No. 125, 2024 (Del. Feb. 4, 2025). For a more in-depth discussion of *Maffei v. Palkon*, please refer to our blurb *Delaware Supreme Court Clarifies Standard of Review for Controlled*

other authority, the court explained that the non-ratable benefit analysis must consider whether the waiver was executed in the shadow of actual or inchoate litigation risk, and whether it realistically diminished the fiduciaries' liability exposure. Here, unlike in *Maffei*, because the waiver was prospective but eliminated duties (including the duty of loyalty) while actual litigation risk existed, the waiver was sufficiently material to trigger entire fairness review.

Importantly, the opinion clarifies that the viability of such claims hinges not on corporate form alone but on whether the fiduciary duty waiver produced a distinct, material benefit to particular fiduciaries that is not shared ratably with all stockholders. The decision reinforces that materiality and timing of benefits matter in the controller conflict inquiry, especially where fiduciary duties are waived post-transaction. *Daniel S. Peña v. MacArthur Group, Inc., et al.*, C.A. No. 2023-0412-MTZ (Del. Ch. Oct. 1, 2025).

Directors May Face Breach-of-Fiduciary-Duty Claims Where Sale Process and Statutory Approval Failures Raise Doubts About an Informed Vote

The Court of Chancery's decision in *Sjunde AP-Fonden v. Activision Blizzard, Inc.* relates to the long-running litigation occasioned by Activision's 2022 sale to Microsoft. Applying enhanced scrutiny under *Revlon*, the court declined to dismiss claims that Activision's CEO and other directors breached their fiduciary duties by agreeing to the merger with Microsoft. The transaction followed a period of intense public scrutiny of Activision related to workplace misconduct allegations, internal investigations, and stock-price volatility. The complaint alleged that Activision's CEO, facing potential personal and professional consequences from the unfolding crisis, assumed a leading role in shaping the company's response, briefing only a small group of directors and personally conducting substantial portions of the preliminary negotiations.

Applying *Revlon*, the court examined whether it was reasonably conceivable that the board failed to undertake a reasonable process to maximize value. The opinion focused on allegations concerning (i) the timing of negotiations in light of the company's public crisis, (ii) the board's degree of involvement relative to management in early deal discussions, and (iii) whether the full board meaningfully supervised and evaluated the evolving sale process. At the pleading stage, the court concluded that the complaint supported a reasonable inference that the board's oversight of management's conduct and negotiations warranted further scrutiny under *Revlon*. The court emphasized that enhanced scrutiny under *Revlon* is not satisfied merely by the presence of independent directors on the board or transaction committee. Rather, directors must actively supervise the sale process, critically evaluate management's recommendations, and ensure that negotiations and strategic judgments are not driven by conflicted interests. The complaint plausibly alleged that Activision's directors ceded substantial control over the process to management—particularly with respect to negotiations with Microsoft and the framing of valuation expectations—raising a reasonable inference that the board failed to exercise the level

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Companies Seeking to Redomesticate Outside Delaware in the Spring 2025 issue of MarketCheck.

of informed and engaged oversight required under *Revlon* and warranting further factual development.

Defendants argued that the fully informed, uncoerced stockholder vote approving the merger restored business-judgment review. The court disagreed, holding that it was reasonably conceivable that *Corwin* did not apply for two independent reasons. First, the complaint raised questions about strict compliance with DGCL approval mechanics in how the merger agreement was authorized and presented to stockholders. Second, the plaintiff adequately alleged potential disclosure deficiencies concerning the sale process, including the role of management and the sequence of negotiations. Where statutory compliance and disclosure adequacy are subject to reasonable dispute, *Corwin* cannot be invoked to terminate the case at the pleading stage.

Activision underscores that even in non-controller transactions, boards must rigorously supervise management during a sale process and ensure careful adherence to DGCL formalities. It also illustrates that *Corwin* cleansing depends not only on the absence of a controller, but on strict statutory compliance and comprehensive, process-level disclosure. Where those elements are credibly challenged, courts will apply enhanced scrutiny and permit fiduciary claims to proceed. *Sjunde AP-Fonden v. Activision Blizzard, Inc.*, C.A. No. 2022-1001-KSJM (Del. Ch. Oct. 2, 2025).

Corwin Cleansing Applies Where an Independent Transaction Committee Controls a Sale Process and Stockholders Receive Full Disclosure of Management's Incentives

DrugCrafters, L.P. v. Loh arose out of the 2023 all-cash sale of Paratek Pharmaceuticals, Inc. to Gurnet Point Capital and Novo Holdings. Plaintiffs sued five company officers (two of whom also served as directors), alleging that their personal incentives "hijacked" the sale process—triggering entire fairness and, alternatively, defeating *Corwin* because the stockholder vote was not fully informed.

Amid financial challenges, Paratek's board explored strategic alternatives and formed a transaction committee of three independent directors to evaluate and approve any potential transaction. After negotiating with multiple parties, and with the recommendation of the transaction committee and approval by the company's board, Paratek agreed to a deal with Gurnet and Novo providing $2.15 per share in cash plus a contingent value right (CVR) worth up to $0.85 per share upon achievement of specified post-closing milestones.

Plaintiffs contended that defendants were conflicted because they stood to receive change-in-control payments and potential post-merger employment. Although the transaction committee was concededly independent, plaintiffs argued that entire fairness applied under a "fraud on the board" theory—asserting that management withheld material information and manipulated the committee. Alternatively, plaintiffs alleged that disclosure deficiencies rendered *Corwin* inapplicable.

The court rejected both theories. As to "fraud on the board," the court held that plaintiffs failed to plead facts making it reasonably conceivable that management deceived or overrode the committee. The record, as pled, showed the opposite: the committee controlled negotiations, restricted management's communications when conflicts arose, and directly handled discussions concerning management incentives. Allegations that management "convinced,"

"urged," or "persuaded" the committee—without well-pled facts showing falsity or concealment—were insufficient to establish a loyalty breach.

Because the transaction constituted a sale of control, the court applied *Revlon* enhanced scrutiny as the default standard, but held the deal was subject to *Corwin* cleansing if approved by a fully informed, uncoerced stockholder vote. Plaintiffs' disclosure challenges centered on management's incentive arrangements and role in negotiations. The court found those disclosures adequate, emphasizing that the proxy described the incentive plan in detail and disclosed when retention and compensation topics arose during the process. The court rejected speculative "tell me more" theories, reiterating that Delaware law requires disclosure of material facts—not a granular, play-by-play narrative beyond the material "total mix."

With entire fairness unavailable and no viable disclosure claim, *Corwin* applied, restoring business-judgment review and resulting in dismissal. *DrugCrafters* underscores that a properly empowered independent committee—paired with clear, transaction-specific disclosure of management incentives—can preserve *Corwin* and dispose of post-closing fiduciary claims at the pleading stage. *DrugCrafters, L.P. v. Loh*, C.A. No. 2024-0111-PAF (Del. Ch. Nov. 26, 2025).

Supreme Court Reverses Rescission of Performance Award—Clarifying Limits on Equitable Rescission as a Remedy

In *In re Tesla, Inc. Derivative Litigation*, long-running litigation over Tesla's unprecedented 2018 performance-based compensation plan for CEO Elon Musk culminated in a Delaware Supreme Court decision clarifying the proper scope of equitable rescission. The underlying dispute arose after a Tesla stockholder filed a derivative suit challenging the plan, which would grant Musk substantial stock-option awards as tranches of market capitalization and operational milestones were met. The Court of Chancery found that Musk, who exercised transaction-specific control over Tesla such that entire fairness review applied, and the board breached their fiduciary duties in approving the plan. Applying entire fairness, the Court of Chancery held that the performance award was unfair in process and price and, as its primary remedy, ordered rescission of the 2018 plan, effectively canceling the unexercised grant.

On December 19, 2025, the Delaware Supreme Court reversed the Court of Chancery's rescission remedy in a unanimous per curiam opinion. The Court emphasized fundamental principles of equitable rescission: a plaintiff seeking rescission must demonstrate both (i) that it is a viable remedy under the circumstances and (ii) that the court can return the parties to the status quo ante—that is, restore them to their prior condition before the challenged transaction. The Court held that the lower court erred because rescission of Musk's performance award could not restore the parties to the status quo ante: rescission would leave Musk uncompensated for six years of performance that had already provided value to Tesla and its stockholders, and there was no practical way to undo that value or substitute appropriate consideration for the work performed. The Court did not disturb the underlying findings of fiduciary breach but focused narrowly on the impropriety of rescission as relief when the prerequisites for that extraordinary remedy were not satisfied. Instead, the Court awarded nominal damages of $1 to the plaintiff and adjusted the attorneys' fee award to a quantum meruit basis.

Tesla thus clarifies Delaware's approach to equitable rescission in fiduciary litigation. Even if a controlling fiduciary transaction fails entire fairness review, the availability of rescission

depends on a strict status quo ante analysis, not simply the finding of a fiduciary breach. Where the conduct at issue cannot be undone—because the challenged benefit has been fully realized or materially altered the economic relationship between the parties—rescission may be inappropriate, and damages, if any, may be nominal or otherwise limited. This decision will influence how courts approach remedies in high-stakes fiduciary-duty litigation, particularly in cases involving long-standing performance awards, complex equity arrangements, or other situations where undoing the transaction is practically unworkable. *In re Tesla, Inc. Derivative Litigation*, 298 A.3d 667 (Del. Dec. 19, 2025).

Special Committee Transactions Overview

Transaction Summary and Reasons for Special Committee	On June 11, 2025, TELUS Corporation (TELUS) submitted an unsolicited non-binding indication of interest to acquire 100% of the issued and outstanding Subordinate Voting Shares (SVSs) and Multiple Voting Shares (MVSs) of TELUS International (Cda) Inc. (TELUS Digital) not already owned by TELUS, to take TELUS Digital private. TELUS Digital is a dual-class company. TELUS, together with its affiliates, owns all of the MVSs and 5.4% of the SVSs, representing approximately 92.7% of the total voting power of TELUS Digital. The transaction was unanimously approved by a special committee comprised solely of disinterested, independent directors appointed by TELUS Digital's board of directors. The transaction required the approval of at least (a) two-thirds of the votes cast by the holders of MVSs and the holders of SVSs, present in person or represented by proxy at the meeting, voting together as a single class; and (b) a simple majority of the votes cast by the holders of SVSs, present in person or represented by proxy at the meeting (excluding any SVSs owned by TELUS). The transaction was approved by the required shareholder votes on October 27, 2025, as well as the Supreme Court of British Columbia on October 29, 2025.
Announced Date	06/12/2025
Target Name	TELUS International (Cda) Inc.
Acquirer Name	TELUS Corporation
Equity Value	$539m
Transaction Status	Completed
DGCL Safe Harbors	Not applicable. Transaction governed under the laws of British Columbia.

Transaction Summary and Reasons for Special Committee	On July 17, 2025, FONAR Corporation (FONAR) and a proposed acquisition group led by FONAR's CEO delivered a supplemental proposal to acquire all outstanding shares of FONAR not owned by the group at $19.00 per share in cash. The CEO and his affiliates control a majority of FONAR's voting power through their sole ownership of FONAR's Class C Common Stock, which is entitled to 25 votes per share (as opposed to the publicly traded common stock which is entitled to one vote per share). The transaction was unanimously approved by a special committee of FONAR's board of directors comprised solely of disinterested and independent directors. The merger cannot be completed without (a) the affirmative vote of shares representing a majority of the Company Capital Stock outstanding and entitled to vote, voting together as a single class, after giving effect to the respective voting powers of each class of Company Capital Stock, and (b) the affirmative vote of a majority of the votes cast at the Special Meeting by disinterested stockholders of their shares of Company Capital Stock.
Announced Date	07/17/2025

Target Name	FONAR Corporation
Acquirer Name	Management Buyout
Equity Value	$125m
Transaction Status	Pending
DGCL § 144(c) Safe Harbor	Yes

Transaction Summary and Reasons for Special Committee	On August 20, 2025, Guess?, Inc. (Guess) entered into a definitive agreement with Authentic Brands Group LLC (Authentic Brands), pursuant to which Authentic agreed to acquire 51% of Guess' intellectual property. As part of the transaction, certain stockholders of Guess (members of the Marciano family) (referred to herein as the Rolling Stockholders) have agreed to rollover all of their stock in Guess, meaning that they will own the remaining 49% of Guess' intellectual property following the transaction. All outstanding Guess common stock not owned by the Rolling Stockholders will be acquired in an all-cash transaction valued at approximately $1.4 billion, including debt. The transaction was approved by a special committee of independent, disinterested directors appointed by the Guess board, and was conditioned on the approval of both (i) a majority of outstanding shares and (ii) a majority of votes cast by shareholders unaffiliated with the Rolling Stockholders.
Announced Date	08/20/2025
Target Name	Guess?, Inc.
Acquirer Name	Authentic Brands Group LLC
Equity Value	$862m
Transaction Status	Completed
DGCL § 144(c) Safe Harbor	Yes

Transaction Summary and Reasons for Special Committee	On August 24, 2025, Crescent Energy Company (Crescent) and Vital Energy, Inc. (Vital) entered into a definitive agreement pursuant to which Crescent will acquire all outstanding shares of Vital in an all-stock transaction valued at approximately $3.1 billion, inclusive of Vital's net debt, by means of a merger of a wholly owned subsidiary of Crescent with and into Vital. Vital shareholders will receive 1.9062 shares of Crescent Class A common stock for each share of Vital common stock. Upon closing, Crescent shareholders will own approximately 77% of the combined company and Vital shareholders will own approximately 23% of the combined company, on a fully diluted basis. An affiliate of KKR has the right to appoint the full board of Crescent. Because the KKR-affiliate will be obtaining benefits in the transaction not shared by Crescent's other stockholders (e.g., an increased management fee), a special committee of Crescent's board was formed to approve the acquisition. The transaction was unanimously approved by a special committee of Crescent's board of directors comprised solely of disinterested and independent directors and was subject to the approval by (i) for Vital, the affirmative vote of a majority of shares of Vital common stock and (ii) for Crescent, the affirmative vote of a majority of the votes cast on such matter (i.e., a majority of the votes casted by the Class A common stockholders).
Announced Date	08/25/2025
Target Name	Vital Energy, Inc.
Acquirer Name	Crescent Energy Company
Equity Value	$733m
Transaction Status	Completed
DGCL § 144(b) Safe Harbor	Yes

Transaction Summary and Reasons for Special Committee	In March 2025, the board of directors of Grindr Inc. (Grindr) authorized a stock repurchase program permitting Grindr to repurchase up to $500 million of its outstanding common stock during the period from March 7, 2025, through March 6, 2027 (the Repurchase Program). The Repurchase Program became potentially conflicted when continued repurchases risked increasing the beneficial ownership of G. Raymond Zage, III, a member of the board and Grindr's largest stockholder, to 50% or more of the outstanding common stock. In August 2025, the Grindr board formed a special committee comprised solely of independent and disinterested directors to evaluate the impact of continued repurchases on Mr. Zage's beneficial ownership. The special committee determined that continuation of the Repurchase Program—including repurchases that would result in Mr. Zage beneficially owning more than 50% of the outstanding common stock—was advisable, fair to, and in the best interests of Grindr and its other stockholders, and it authorized the repurchases.
Announced Date	09/19/2025

Target Name	Grindr Inc.
DCGL § 144(b) Safe Harbor	Yes

Transaction Summary and Reasons for Special Committee	On October 26, 2025, Janus Henderson Group plc (Janus Henderson) received a non-binding acquisition proposal letter from Trian Fund Management, L.P. and its affiliated funds (Trian) and General Catalyst Group Management, LLC and its affiliated funds (General Catalyst), seeking to acquire all of the outstanding ordinary shares of Janus Henderson not already owned or controlled by Trian for $46.00 per share in cash. Given Trian's significant share ownership (approximately 20.7% of the issued and outstanding stock) and board representation, Janus Henderson's board of directors announced it would appoint a special committee of independent directors to evaluate the proposal. Subsequently, on December 22, 2025, Janus Henderson, Trian and General Catalyst entered into a definitive agreement for the acquisition of Janus Henderson in an all-cash transaction at an equity value of approximately $7.4 billion, at $49.00 per share in cash, representing an ~18% premium to the unaffected share price as of October 24, 2025, the last trading day prior to the delivery of the proposal letter. The transaction was unanimously approved by the special committee but remains subject to approval by the stockholders of Janus Henderson. To obtain the requisite vote, the transaction must be approved by the affirmative vote, where quorum is present, of the holders of at least two-thirds (2/3) of the shares of company common stock present and voting either in person or by proxy at the stockholders' meeting.
Announced Date	10/27/2025
Target Name	Janus Henderson Group PLC
Acquirer Name	Trian Fund Management, L.P. & General Catalyst Group Management, LLC
Equity Value	$6b
Transaction Status	Pending
DGCL Safe Harbors	Not applicable. The agreement is generally governed by the laws of Delaware but the statutory and fiduciary and other duties of the directors of Janus Henderson, and the implementation and effects of the merger, are governed by the laws of Jersey.

Transaction Summary and Reasons for Special Committee	On November 4, 2025, Sonida Senior Living, Inc. (Sonida) entered into a definitive agreement to acquire 100% of the outstanding common stock of and CNL Healthcare Properties, Inc. (CNL) in a combined cash-and-stock transaction valued at approximately $1.8 billion, creating a combined entity with an enterprise value of approximately $3.0 billion upon closing. To help finance the transaction, Sonida's controlling stockholder, Confluent, and another significant stockholder (Silk) agreed to participate in a private placement to purchase newly issued shares of Sonida common stock totaling approximately $110 million. Because those stockholders would receive a benefit through their participation in the private placement not shared by other stockholders, the board of directors of Sonida formed a special committee comprised solely of independent and disinterested directors for the purpose of approving any financing of the transaction. CNL also formed a special committee of independent and disinterested directors to approve the transaction. CNL is an externally managed REIT with a sponsor/advisor complex that can create perceived or actual conflicts when evaluating liquidity events (sale, liquidation, business combination). The special committee was designed to ensure the process was driven by directors who meet CNL's independence standards and are not tied to the sponsor/advisor. The transaction was approved by the respective special committees of both CNL and Sonida. The transaction will also be submitted for approval by a majority of the shares of CNL's common stock entitled to vote on the transaction at a special meeting of shareholders. Sonida shareholders will be asked to approve the issuance of Sonida common stock to CNL shareholders (as merger consideration) and to Confluent and Silk in the private placement; the vote required is a majority of the votes cast by Sonida stockholders at the special meeting of shareholders.
Announced Date	11/05/2025
Target Name	CNL Healthcare Properties, Inc.
Acquirer Name	Sonida Senior Living, Inc.
Equity Value	$1.8b
Transaction Status	Pending
DGCL § 144(b)	Yes

Transaction Summary and Reasons for Special Committee	After receiving indications of interest from both insiders and strategic acquirors in a potential going-private transaction, Forge's board of directors decided to form a special committee of independent and disinterested directors in June 2023. The special committee was given the authority to evaluate, negotiate, reject and recommend any strategic transaction. On November 5, 2025, Forge Global Holdings, Inc. (Forge) and the Charles Schwab Corporation (Schwab) entered into a definitive merger agreement, pursuant to which Schwab will acquire all of Forge's issued and outstanding common shares for $45.00 in cash per share in an all-cash transaction valued at approximately $660 billion. The transaction was unanimously approved by the special committee of Forge's board of directors, but remains subject to the approval of Forge stockholders.
Announced Date	11/06/2025
Target Name	Forge Global Holdings, Inc.
Acquirer Name	The Charles Schwab Corporation
Equity Value	$660m
Transaction Status	Pending
DGCL Safe Harbor	DGCL safe harbors under § 144 are likely inapplicable because this is a third-party going-private transaction (Schwab acquiring Forge), meaning that the transaction would be reviewed under the enhanced scrutiny standard established under *Revlon*, with *Corwin* as the cleansing mechanism.

Transaction Summary and Reasons for Special Committee	On December 7, 2025, International Business Machines Corporation (IBM) and Confluent, Inc. (Confluent) entered into a definitive merger agreement, pursuant to which IBM will acquire all of the issued and outstanding common shares of Confluent in an all-cash transaction at $31.00 per share, representing an enterprise value of approximately $11 billion. The deal is structured as a merger of a wholly IBM-owned entity with and into Confluent, with Confluent surviving as a wholly owned subsidiary of IBM. Confluent is a dual-class company, with its founders (and their affiliates), collectively controlling approximately 61% of Confluent's voting stock. Certain of those founders will receive benefits in the transaction not shared by other stockholders, including change of control payments and employment offers. The transaction was unanimously approved by a special committee appointed by Confluent's board and comprised solely of independent and disinterested directors. The transaction is subject to approval by the affirmative vote of a majority of the voting power of all issued and outstanding shares of Confluent's common stock entitled to vote on the proposal (voting together as a single class).
Announced Date	12/08/2025
Target Name	Confluent, Inc.

Acquirer Name	International Business Machines Corporation
Equity Value	$11b
Transaction Status	Pending
DGCL Safe Harbors	The founders qualify as a controlling stockholder group under amended § 144, and the transaction has the structural characteristics of a controller take-private, but because not all controlling stockholders are receiving identical non-ratable benefits, the safe harbor under § 144(c) may not be available on its terms. The benefits accrue to some controllers but not all, which complicates the analysis of whether this is properly a "controlling stockholder" transaction or an interested director transaction.

Debevoise & Plimpton LLP has decades of experience in assisting special committees in transactions involving conflicted fiduciaries and other parties including controlling stockholders, other conflicted fiduciaries and transactional counterparties in transactions involving special committees. We keep databases of information relevant to the formation of special committees and regularly present on topics relating to special committees. We welcome the opportunity to speak with corporate general counsel, directors, advisors and others regarding these matters.

Please do not hesitate to contact us with any questions.

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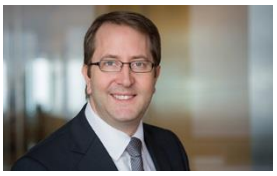

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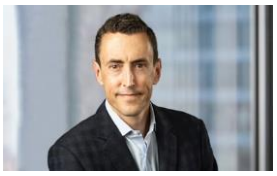

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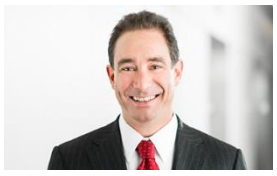

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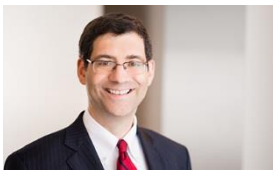

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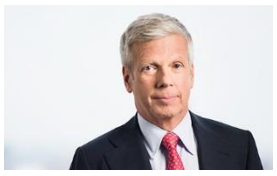

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