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REASSESSING A DEFUSED "TIME BOMB": A FRESH LOOK AT CORPORATE FOOT FAULTS AND THE BENEFITS CONFERRED BY THEIR DISCOVERY

BY JOHN MARK ZEBERKIEWICZ AND ROBERT B. GRECO[*]

[*] John Mark Zeberkiewicz and Robert B. Greco are directors of Richards, Layton & Finger, P.A., in Wilmington, Delaware. Richards, Layton & Finger was involved in some of the cases discussed in this article; however, the views expressed herein are those of the authors and are not necessarily the views of Richards, Layton & Finger or its clients.

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In *Garfield v. Boxed, Inc.*, the Delaware Court of Chancery questioned the validity of amendments to the certificates of incorporation of numerous former special purpose acquisition companies, or "SPACs."[1] This led to a flood of petitions brought in the Court of Chancery by former SPACs under Section 205 of the Delaware General Corporation Law (the "DGCL").[2] In cases such as *In re Lordstown Motors Corp.*, the Court of Chancery has allowed equity to prevail and restored the expectations of all interested constituents in granting relief sought by these petitions.[3] While this has showcased the speed and adaptability of the Delaware courts and the DGCL, as well as their ability to facilitate just outcomes consistent with the expectations of investors and other constituents, the present circumstances are not without cost to the court, affected public corporations, and their respective stockholders.

These circumstances and costs are the result of a series of rulings over the past several years in which the Delaware courts have, in cases such as *Boxed*, ordered corporations to pay sizeable attorneys' fee awards approaching—or even exceeding—seven figures to those who identified technical defects in past or proposed corporate action.[4] In finding support for awards of this magnitude, the courts have attributed significant benefits to the revelation of technical missteps, looking to the drastic consequences that have historically accompanied corporate defects, even characterizing them as a "ticking time bomb."[5] As illustrated by *Lordstown* and other granted section 205 petitions, however, sections 204 and 205 of the DGCL have defused this time bomb, with inadvertent defects no longer presenting an impending explosion that is likely to obliterate a corporation's foundation.[6] Nevertheless, due to precedent developed in the pre-ratification and validation era that has built upon itself, fee awards in corporate defect cases have continued to place substantial weight on the impact of technical missteps, despite the fact that, as a practical matter, the defects are no longer incapable of cure. This has led to fee awards disproportionate to the benefits actually conferred on the corporations

[1] *See generally* Garfield v. Boxed, Inc., No. 2022-0132-MTZ, 2022 WL 17959766 (Del. Ch. Dec. 27, 2022).

[2] *See In re* Lordstown Motors Corp., 290 A.3d 1, 3 (Del. Ch. 2023).

[3] *See, e.g.*, *id.*

[4] *Boxed*, 2022 WL 17959766, at *11.

[5] *Boxed*, 2022 WL 17959766, at *11. ("These are all material benefits. And preventive action is as beneficial as corrective action, if not more: diffusing a ticking time bomb can be more valuable than cleaning up shrapnel."); Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 21, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022) ("[D]iffusing a ticking time bomb is perhaps more valuable than cleaning up the shrapnel.").

[6] *See Lordstown*, 290 A.3d at 12.

ordered to pay them.[7] Far from advancing the corporate benefit doctrine's foundational principles of equity, fee awards of this nature erode stockholder value without producing a meaningful return for corporations or stockholders. Moreover, any societal benefit that these disproportionate fee awards serve as a disincentive against non-compliance with corporate formalities is far outweighed by multiple factors, including the stress that litigation costs and fee awards impose on corporations that could more profitably deploy the funds, the diversion of scarce judicial resources, and the general prohibition for a court of equity to award punitive damages.[8] In order to carry out the equitable mandate, we believe the corporate benefit doctrine's application to inadvertent corporate defects should be recalibrated in a way that recognizes the diminution, following the enactment of Sections 204 and Section 205, in the real-world effect of corporate foot-fault litigation. We believe fee awards should be based on an assessment of the benefits, if any, conferred on a corporation from the discovery of the defects, taking into account various equitable factors, including those set forth in section 205(d) of the DGCL,[9] those underlying the "*Sugarland* factors"[10] and—where appropriate —the size of the corporation or transaction at issue.

I. THE CORPORATE BENEFIT DOCTRINE AND TECHNICAL DEFECTS

Delaware traditionally follows "the so-called 'American Rule,'" under which "prevailing litigants are responsible for the payment of their own attorney's fees."[11] There are, however, certain exceptions to the American Rule based on fee-shifting statutes and equitable doctrines.[12] This includes the corporate benefit doctrine, an equitable exception to the American Rule based on the "principle that those who have profited from litigation should share its costs."[13] In Delaware, the doctrine vests the Court of Chancery with the discretion to order the payment of attorneys'

[7] *See, e.g.*, *Boxed*, 2022 WL 17959766, at *12, *15; Plaintiff's Motion for Approval of Proposed Settlement, *supra* note 5 at 21–23.

[8] *See* Beals v. Wash. Int'l, Inc., 386 A.2d 1156, 1160 (Del. Ch. 1978) (holding that the Court of Chancery lacks the jurisdiction to award "punitive or exemplary damages," the "purpose" of which "is to impose a penalty or deterrent to prevent conduct which is deemed to be bad or harmful," absent express statutory authority).

[9] 8 DEL. C. § 205(d) (2015).

[10] *See infra* notes 16–17 and accompanying text.

[11] Goodrich v. E.F. Hutton Grp., Inc., 681 A.2d 1039, 1043–44 (Del. 1996) (quoting Walsh v. Hotel Corp. of Am., 231 A.2d 458, 462 (Del. 1967)).

[12] *Id.* at 1044.

[13] *In re* Orchard Enters., Inc., No. 7840, 2014 WL 4181912, at *3 (Del. Ch. Aug. 22, 2014) (quoting *Goodrich*, 681 A.2d at 1044 (Del. 1996)).

fees and expenses to plaintiffs whose efforts result in a corporate benefit.[14] This may include benefits causally resulting from a corporate defendant's settlement or mooting of a plaintiff's meritorious claim before its full adjudication.[15] Awards may even be supported by a non-pecuniary benefit, provided the benefit is "significant and substantial" in nature.[16]

The size of any award granted under the corporate benefit doctrine is determined based on the factors articulated in *Sugarland Industries, Inc. v. Thomas*,[17] which the Delaware courts have distilled down to: "1) the results achieved; 2) the time and effort of counsel; 3) the relative complexities of the litigation; 4) any contingency factor; and 5) the standing and ability of counsel involved."[18] Delaware courts have generally placed the greatest weight on the first of these factors—the result achieved—looking to the size of the benefit conferred.[19]

For a benefit that "is not easily quantifi[able]," the Delaware courts "often look[] to '[p]recedent awards from similar cases'" based on the belief that the approach "promotes fairness and fulfills the equitable principle that 'like cases should be treated alike.'"[20] Precedent awards have proven to be particularly relevant in cases where "plaintiff's counsel obtains a corporate benefit by protecting shareholder voting rights."[21] In *EMAK Worldwide, Inc. v. Kurz*, the Delaware Supreme Court stated that, in this context, "the benefit's size does not depend on the corporation's monetary value" for purposes of fee awards under the corporate benefit doctrine.[22] The Supreme Court's statement in *EMAK* was notable given that, in a line of prior cases, the Court of Chancery scaled back fee awards otherwise supported by precedent to serve equity where the awards were sought for disclosures obtained from micro-cap companies or in

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[14] *See* San Antonio Fire & Police Pension Fund v. Bradbury, No. 44460, 2010 WL 4273171, at *7 (Del. Ch. Oct. 28, 2010) (quoting Tandycrafts, Inc. v. Initio Partners, 562 A.2d 1162, 1164 (Del. 1989)).

[15] *Id*.

[16] *Id.*

[17] 420 A.2d 142 (Del. 1980); *see, e.g.*, EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429, 432–34 (Del. 2012) (holding the Court of Chancery's application of the *Sugarland* factors to award attorney's fees was warranted under the corporate benefit doctrine).

[18] Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1254 (Del. 2012).

[19] *In re* Sauer-Danfross Inc., 65 A.3d 1116, 1136 (Del. Ch. May 3, 2011) (quoting *In re* Anderson Clayton, No. 8387, 1988 WL 97480, at *3 (Del. Ch. Sept. 19, 1998)).

[20] Sciabacucchi v. Salzberg, No. 2017-0931, 2019 WL 2913272, at *1 (Del. Ch. July 8, 2019) (quoting Olson v. ev3, Inc., No. 5583, 2011 WL 704409, at *8 (Del. Ch. Feb. 21, 2011)), *judgment entered*, 2019 WL 3502495 (Del. Ch. Aug. 1, 2019) ("ev3"), *vacated on other grounds*, 2020 WL 1985048 (Del. Ch. Apr. 24, 2020).

[21] *EMAK*, 50 A.3d at 433.

[22] *Id.*

connection with relatively small M&A transactions.[23] The court has seemingly applied this type of adjustment less frequently following *EMAK* and, in at least two cases, has questioned the continued vitality of this line of cases in light of *EMAK*.[24]

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[23] *See, e.g.*, Transcript of Settlement Hearing and Ruling of the Court at 55–59, *In re* Icagen, Inc., No. 6692 (Del. Ch. Apr. 5, 2012) (granting "a generous fee of $350,000" for disclosures of "modest utility" that was far less than the $1.25 million sought by plaintiffs, stating that "what's requested is essentially 2.5 percent of a premium-generating deal" and "a big thing" even though there was doubt as to whether "a reasonable investor would want to pay much of anything for the disclosures obtained," and explaining that "[i]f investors are going to sue in a $50 million case and they end up with a $50 million deal and there's no economic change, the idea that you can ignore what's at stake as a total economic thing in sizing the fee is just wrong from an economic standpoint"); Transcript of Settlement Hearing, *In re* Access to Money, Inc., No. 6816 (Del. Ch. May 31, 2012) (questioning the extent to which the size of a challenged $10 million deal involving a corporation whose shares traded over-the-counter should affect the size of the plaintiffs' fee award and granting a fee award of $275,000, which was less than the $450,000 award sought by plaintiffs); *In re* Craftmade Int'l, Inc., No. 6950 (Del. Ch. Nov. 10, 2011) ("In the ordinary case, the degree of relief that the plaintiff obtained would easily justify a rather substantial fee. The problem is the small capitalization of the company, which at the time of the deal at least was between $24 million and $25 million. Our precedents, particularly decisions by Chancellor Strine and my predecessor, Vice Chancellor Lamb, have talked about a micro-cap discount, which essentially recognizes that there needs to be some adjustment for the small size of the target when pricing disclosure benefits . . . . So this is a $24-to-$25-million market cap. So what I am going to do is I am going to value it as if it were a $100-million-plus deal, and I'm going to take a fourth of it."); Transcript of Settlement Hearing at 61–63, Jeffrey Benison IRA v. Critical Therapeutics, Inc., No. 4039 (Del. Ch. Feb. 26, 2009) (granting a $175,000 fee award, rather than the $450,000 fee award sought by plaintiffs, and expressing concern as to the size of the fee sought "as a percentage of the value of this entity, and more specifically, the value of [the corporation] at the time of the transaction" which would "amount to something approaching or maybe exceeding five percent of the total market value of the company" given its "microcap size," and observing that this "seem[ed] grossly excessive"); Transcript of Rulings of the Court on Plaintiff's Application for a Disclosure Fee Award Under the Mootness Doctrine at 16–17, Schmelzer v. Teramedica, Inc., No. 10558 (Del. Ch. July 27, 2015) (ordering payment of a $600,000 fee award as compared to the fee award of approximately $2 million sought by plaintiffs and, despite stating that it was "not directly apply[ing] the *Craftmade* analysis," explaining that one of the reasons for the reduced fee award was the fact that "this was a relatively small transaction" and "[i]t is a matter of common sense and equity—and here I echo *Craftmade* — that the value of disclosures must reflect the smaller size of this transaction so as to avoid a punitive result."); *see also In re* Sauer-Danfoss, 65 A.3d 1116, 1136 ("A court can readily look to fee awards granted for similar disclosures in other transactions because enhanced disclosure is an intangible, non-quantifiable benefit. Consequently, the magnitude of the benefit does not vary with the size of the deal. Indeed, the underlying vote could involve an issue like the election of directors that lacks any explicit linkage to quantifiable value. Only for a microcap company would the Court need to consider adjusting a disclosure-only award downward to avoid a punitive result.").

[24] Transcript of Settlement Hearing and Ruling of the Court at 100–01, *In re* Cheniere Energy, Inc., No. 9710 (Del. Ch. Mar. 16, 2015) ("When we provide votes for stockholders in Delaware, we don't price it based on the underlying item that the stockholders are voting on. So in a deal, the value of the vote isn't measured by the value of the deal. When somebody gets disclosures to protect the vote on the deal, those disclosures aren't priced as if you obtained a $1 or $2 billion benefit, or whatever the size of the transaction is. To the contrary, the Delaware Supreme Court explained, in *EMAK Worldwide v. Kurz*, that the benefit to the stockholders of

In recent years, the Delaware courts have granted fee awards approaching or exceeding seven figures under the corporate benefit doctrine in favor of those who discovered defects with respect to proposed or completed corporate actions.[25] In ordering many of these awards, the courts have looked to *Olson v. ev3, Inc.*, a case in which the Court of Chancery approved a $1.1 million fee award in connection with a settlement that cured alleged statutory defects in a top-up option intended to facilitate a $2.6 billion merger.[26] In finding that "[a]n award of $1 million [was] fair and reasonable compensation for a settlement that cured serious statutory flaws[]", the *ev3* court observed that the challenged top-up option and any shares issued upon its exercise "likely were void," which would have undermined the validity of the merger.[27]

When *ev3* was decided in 2011, these types of statutory flaws posed a real threat of dire consequences. Historically, the Delaware courts have held that many significant corporate actions, including stock issuances,[28] charter amendments,[29] and mergers,[30] that fail to comply with applicable statutory requirements were void *ab initio* and incapable of being cured or

providing a vote doesn't vary up or down with price, because it's an intangible benefit. Now, that's good when you're bringing a case involving a small-cap company or another small issuer, where the size of the deal is small. It means you get the amount, as in *EMAK*, that is suggested by the cases for the vote, even though the size of the issuer is small."); Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 22-23, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022) ("The company has also argued that because it has a smaller market capitalization than the companies in precedent cases, such as *Cheniere Energy*, plaintiff's counsel's fee award should be correspondingly reduced. While I am sympathetic to the company's circumstances, our law does not contemplate caling the benefit of such changes for the size or resources of the company. As the *Cheniere Energy* decision noted, the value of intangible benefits, such as a stockholder vote and disclosures to protect that vote, are necessarily intangible and, per the Delaware Supreme Court's decision in *EMAK v. Kurz*, do not vary up or down with the deal price or the company's market cap. A major corporate landmine in a small cap company is a major corporate landmine all the same. The company's market capitalization does not justify any downward adjustment."). *But see generally* Transcript of Settlement Hearing, *In re* Access to Money, No. 6816 (Del. Ch. May 31, 2012); Transcript of Rulings of the Court on Plaintiff's Application for a Disclosure Fee Aware Under the Mootness Doctrine, Schmelzer, No. 10558 (Del. Ch. July 27, 2015).

[25] *See, e.g.*, *ev3*, 2011 WL 704409, at *15–16 (granting a $1.1 million fee award and discussing precedent that influenced the court's decision).

[26] *Id.*

[27] *Id.* at *11, *15.

[28] *See, e.g.*, STAAR Surgical Co. v. Waggoner, 588 A.2d 1130 (Del. 1991); Liberis v. Europa Cruises Corp., No. 13101, 1996 WL 73567 (Del. Ch. Feb. 8, 1996), *aff'd*, 702 A.2d 926 (Del. 1997) (unpublished table decision).

[29] *See, e.g.*, Blades v. Wisehart, No. 5317, 2010 WL 4638603 (Del. Ch. Nov. 17, 2010), *aff'd sub nom*, Wetzel v. Blades, 35 A.3d 420 (Del. 2011) (unpublished table decision); AGR Halifax Fund, Inc. v. Fiscina, 743 A.2d 1118, 1192–95 (Del. Ch. 1999).

[30] *See, e.g.*, Tansey v. Trade Show News Networks, Inc., No. 18796, 2001 WL 1526306, at *6–7 (Del. Ch. Nov. 27, 2001); Jackson v. Turnbull, No. 13042, 1994 WL 174668, at *2, *6 (Del. Ch. Feb. 8, 1994).

ratified at common law, irrespective of whether the invalidation of that action is inequitable.[31] Effective April 1, 2014, however, the Delaware General Assembly adopted sections 204 and 205 of the DGCL for the express purpose of overturning this dramatic common law result and allowing these types of technical defects to be remedied in a manner that restored equity to this area of corporate law.[32] These statutes "established two statutory methods that parties can use to fix defective corporate acts that otherwise might be void" or voidable.[33] "Section 204 is 'a "self-help" provision that allows the board of directors, by following specified procedures, to validate a defective corporate act,'" while "Section 205 is a judicial mechanism under which identified parties can 'petition the Delaware Court of Chancery to enter an order validating or invalidating, as the case may be, the defective act.'"[34]

Following the adoption of sections 204 and 205 of the DGCL, enterprising plaintiffs' attorneys began seeking out technical corporate defects and—once the defects were cured through these statutes—petitioning for fee awards.[35] At the time the Delaware courts began to rule on these fee petitions in 2015, a considerable degree of caution was likely harbored by practitioners and the judiciary alike in applying these new statutory mechanisms for overriding longstanding common law.[36] The apprehension may have played a role in the Delaware courts' initial rulings on these fee applications in 2015, in which the court looked to *ev3* as precedent and approved fee awards that generally fell within a similar ballpark of up to $1 million.[37]

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[31] *See generally* C. Stephen Bigler & John Mark Zeberkiewicz, *Restoring Equity: Delaware's Legislative Cure for Defects in Stock Issuances and Other Corporation Acts*, 69 BUS. LAW. 393 (2014).

[32] H.R. 127, 147th Gen. Assemb., Reg. Sess. (Del. 2013); *see also* Bigler & Zeberkiewicz, *supra* note 31; Applied Energetics, Inc. v. Farley, 239 A.3d 409, 435 (Del. Ch. 2020) (quoting Bigler & Zeberkiewicz, *supra* note 31, at 394).

[33] *Applied Energetics*, 239 A.3d at 435.

[34] *Id.* (quoting Bigler & Zeberiewicz, *supra* note 31 at 402).

[35] *See infra* note 37 and accompanying text.

[36] *See, e.g.*, *In* re Numoda Corp., No. 9163, 2015 WL 402265, at *7 (Del. Ch. Jan. 30, 2015) (noting, in a 2015 opinion issued shortly following the adoption of sections 204 and 205, that "[g]uidance on how to apply these new provisions in a contested situation is not developed in detail"), *aff'd*, 128 A.3d 991 (Del. 2015) (unpublished table decision); Boris v. Schaheen, No. 8160, 2013 WL 6331287, at *13 n.168 (Del. Ch. Dec. 2, 2013) (observing, in a December 2013 case following the legislature's approval of the amendments to the DGCL adopting sections 204 and 205 but prior to the statutes' effectiveness, that "it remains to be seen how this Court will interpret and apply" these statutes).

[37] *See, e.g.*, Settlement Hearing, *In re* Cheniere Energy, Inc., No. 9710 (Del. Ch. Mar. 16, 2015) (granting a $1 million fee award based on *ev3*'s precedent in respect of the validation of challenged grants issued under an amendment to a corporation's equity plan that was allegedly not duly approved by its stockholders because the corporation incorrectly applied the applicable voting standard to the stockholders' vote on the amendment); Transcript of Hearing Regarding

A. *Garfield v. Boxed, Inc*

The Delaware Court of Chancery has continued to rely on this line of precedent dating back to *ev3* in awarding similar fee awards for the discovery of inadvertent technical flaws in corporate actions.[38] Notably, in its December 2022 *Boxed* ruling, the court awarded $850,000 in fees and expenses to attorneys who alleged technical flaws related to a proposed amendment to a SPAC's certificate of incorporation to increase the number of authorized shares of common stock in connection with the SPAC's initial business combination.[39] As with most SPACs, the SPAC's certificate of incorporation at the time set forth the total number of shares of capital stock it was authorized to issue, and then provided for a class of "common stock," which included both "Class A common stock" and "Class B common stock," and a class of preferred stock.[40] On this basis, and believing the Class A and Class B common stock to be separate series of common stock, the SPAC initially disclosed that the adoption of the proposed amendment would require the affirmative vote of the holders of a majority in voting power of the outstanding shares of "common stock"—*i.e.*, with the Class A common stock and Class B common stock voting as a single class.[41] Before the stockholder vote, a letter was delivered to the SPAC's board on behalf of a stockholder asserting that the Class A and Class B common stock were separate classes—rather than separate series—therefore, the proposed voting structure for the amendment did not account for the separate class voting right that the stockholder alleged the Class A common stockholders had under section 242(b)(2) of the DGCL.[42] Unless the certificate of incorporation provides otherwise, section 242(b)(2) of the DGCL requires a separate vote of the holders of a class of

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Partial Settlement and Rulings of the Court, *In re* Xencor, Inc., No. 10742 (Del. Ch. Dec. 10, 2015) (looking to *ev3* and *Cheniere* as precedent and awarding $950,000 in connection with the validation of charter amendments and related restructurings that were challenged on the basis that they were not validly approved because certain consents approving them were sequenced or dated in contravention of the DGCL's technical requirements or lacked the appropriate exhibits); Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses, and Rulings of the Court, *In re* Colfax Corp., No. 10447 (Del. Ch. Apr. 2, 2015) (granting a plaintiff's fee request of $375,000, after previously directing the parties to *ev3*, with respect to a challenge to the conversion of shares of a series of preferred stock that involved an additional payment in alleged violation of a restriction in the series' certificate of designations, which could have been but was not amended by the parties involved in the transaction, in connection with the validation of the challenged act under section 205).

[38] *Boxed*, 2022 WL 17959766, at *11.

[39] *Id.* at *2, *11.

[40] *Id.* at *1.

[41] *Id.* at *2.

[42] *Boxed*, 2022 WL 17959766, at *3.

stock on any proposed amendment that would increase or decrease the authorized number of shares of the class.[43]

In response to the letter, the SPAC amended its merger agreement and supplemented its proxy statement to require a separate vote of the holders of its Class A common stock for approval of the amendment.[44] As this issue faced numerous SPACs with similar certificates of incorporation, the letter was one of many sent on behalf of stockholders by the same plaintiffs' firm beginning in mid-2021 to numerous other SPACs with pending business combinations—and former SPACs that already completed their initial business combinations—that were not conditioned on receiving a separate vote of the SPAC's Class A common stockholders.[45]

The stockholder then filed an action in the Court of Chancery seeking an award of attorneys' fees and expenses for the benefits he allegedly conferred on the corporation and its stockholders by facilitating this change.[46] In determining whether the plaintiff had conferred a corporate benefit worthy of fees and expenses, the court considered whether the plaintiff's demand was meritorious—*i.e.*, whether the failure to have sought and obtained a separate vote of the Class A common stock (and to have relied instead on a combined vote of the Class A common stock and Class B common stock) would have violated section 242(b)(2).[47] This question turned on whether the Class A common stock and Class B common stock authorized under the SPAC's certificate of incorporation were two classes of common stock or different series within a single class of common stock.[48] Rejecting the defendant's argument that structural features of the certificate of incorporation, including references to "series of Common Stock," supported the view that the two groups of stock were series of a single class of stock, the *Boxed* court observed, among other things, that features of the statement of authorized capitalization, including the deployment of the term "class" rather than "series" therein, indicated that the Class A common stock and Class B common stock were separate classes of common stock rather than series of a singular class of common stock.[49]

Irrespective of whether the demand was meritorious, several factors appeared, at least facially, to undermine the significance of any potential

[43] 8 DEL. C. § 242(b)(2).
[44] *Boxed*, 2022 WL 17959766, at *3.
[45] *Id.* at *13.
[46] *Id.* at *3.
[47] *Id.* at *10.
[48] *Boxed*, 2022 WL 17959766, at *3.
[49] *Id.* at *10.

corporate benefit resulting from the SPAC seeking a separate vote of its Class A common stockholders on the amendment.[50] First, the amendment was overwhelmingly approved by the holders of approximately 90% of the outstanding shares of Class A common stock, strongly implying that the amendment would have received the approval of the holders of a majority of the outstanding shares of Class A common stock even if the merger agreement and proxy statement did not expressly require such a vote.[51] Second, a fall in the post-transaction public company's stock price reduced its market capitalization below $13.5 million, which seemingly limited the value of any benefit associated with the SPAC expressly seeking a separate vote of its Class A common stockholders.[52] Despite these considerations, the *Boxed* court approved a fee award of $850,000, equating to roughly 6.3% of the public company's equity value at the time of the ruling.[53] In finding that identification of the alleged defects conferred a "material benefit" that supported an award of this magnitude, the *Boxed* court analogized the alleged defects to "a ticking time bomb" and the process of curing them to "cleaning up shrapnel."[54] In at least one other case, *De Felice v. Kidron*, the Court of Chancery has made similar observations in granting a separate fee award of $850,000.[55]

B. *In re Lordstown Motors Corp*

The *Boxed* court's determination that a SPAC's certificate of incorporation divided its common stock into separate classes, rather than series, of common stock called into question the validity of the charter

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[50] *Boxed*, 2022 WL 17959766, at *11.

[51] *Id.* at *3; *see also* Seven Oaks Acquisition Corp., Current Report to Announce Events Shareholders Should Know About (Form 8-K) (Dec. 7, 2021).

[52] On December 27, 2022—the date the *Boxed* fee award ruling was issued—Boxed's trading price fell to $0.183 per share. *See Boxed*, 2022 WL 17959766, at *1; *BOXDQ Historical Data*, INVESTING (Dec. 27, 2022), https://www.investing.com/equities/seven-oaks-acquisition-historical-data. Based on Boxed's most recent public disclosures regarding its capitalization at the time, which reported that 72,663,598 shares of Boxed's Common Stock were outstanding as of November 4, 2022, Boxed's $0.183 per share trading price observed on December 27, 2022 implied a market capitalization of approximately $13.3 million. Boxed, Inc., Quarterly Report for Quarterly Period Ended September 30, 2022 (Form 10-Q) (Nov. 9, 2022).

[53] This percentage was derived by dividing the amount of the fee award by Boxed's market capitalization as calculated in the preceding footnote. *Boxed*, 2022 WL 17959766, at *11; *see supra* note 52 and accompanying text for market capitalization calculation.

[54] *Boxed*, 2022 WL 17959766, at *11 ("These are all material benefits. And preventive action is as beneficial as corrective action, if not more: diffusing a ticking time bomb can be more valuable than cleaning up shrapnel.").

[55] Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 21, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022) ("[D]iffusing a ticking time bomb is perhaps more valuable than cleaning up the shrapnel.").

amendments adopted by numerous former SPACs in connection with their respective initial business combinations.[56] Like the SPAC in *Boxed*, many former SPACs with similar certificates of incorporation believed that their shares of common stock were divided into separate series, rather than classes, of common stock and did not seek or obtain—and/or did not disclose that the SPAC was required, at least under the reasoning employed in *Boxed*, to obtain— a separate class vote of their respective Class A common stockholders on amendments increasing the authorized number of shares of common stock in connection with its initial business combination.[57] A number of these former SPACs previously received demand letters similar to that received by Boxed but did not take the same type of remedial action, either because of this belief or due to the fact that their business combinations had already been consummated.[58]

One such former SPAC, Lordstown Motors Corp. ("Lordstown"), adopted an amended and restated certificate of incorporation in connection with its initial business combination without obtaining a separate vote of the SPAC's Class A common stockholders.[59] In March 2022, eighteen months after consummating the business combination, Lordstown received a demand letter from a purported stockholder regarding this issue.[60] Lordstown sought legal advice after receiving the letter, and in reliance on a formal legal opinion rendered by outside counsel, responded to the letter by stating its view that the SPAC's common stock was divided into classes, rather than series, and that a separate vote of the Class A common stockholders was not required to adopt its amended and restated certificate of incorporation.[61]

In light of *Boxed*, on January 26, 2023, Lordstown filed a petition in the Court of Chancery to validate its amended and restated certificate of incorporation under section 205.[62] After Lordstown filed the first petition by a former SPAC seeking to cure the potential issues arising from *Boxed*, several other former SPACs facing similar issues followed suit.[63] Dozens of similarly situated corporations then petitioned the Court of Chancery seeking validation of their certificates of incorporation and/or stock.[64]

[56] *See, e.g.*, *In re* Lordstown Motors Corp., 290 A.3d 1 (Del. Ch. 2023).
[57] *See, e.g.*, *In re* Lordstown Motors Corp., 290 A.3d 1 (Del. Ch. 2023).
[58] *See, e.g.*, *id.*
[59] *Id.* at 6.
[60] *Id.*
[61] *Id.* at 6.
[62] *Lordstown*, 290 A.3d at 9.
[63] *Id.* at 3.
[64] *Id.*

On February 20, 2023, the court held hearings on Lordstown's petition, and five others subsequently filed by other former SPACs.[65] The court entered an order granting the relief requested by each of these petitions and issued an opinion on February 21, 2023, outlining its reasoning in *Lordstown*, which the court then referenced in its orders granting the relief sought by the other five petitions.[66]

In its *Lordstown* opinion, the court reviewed numerous factors that it found to support the validation of the potential defects raised in each petition.[67] The court first reviewed the history and purpose of sections 204 and 205 of the DGCL, explaining that "[t]he Delaware General Assembly intended Section 205 to provide an 'adaptable, practical framework' for correcting blemished corporate acts 'without disproportionately disruptive consequences.'"[68] The court stated, "Regardless of whether these acts are technically void or voidable due to a failure of authorization, the Company has encountered sudden and pervasive uncertainty as to its capitalization. Section 205 provides the court 'with a mechanism to eliminate equitably any uncertainty' where questions of validity persist."[69] In this regard, the court observed that "[t]he statute confers 'substantial discretion on the court and, absent obvious procedural requirements, does not set a rigid outer boundary on the Court's power.'"[70] The court then reviewed each of the five factors set forth in section 205(d) of the DGCL[71] that it "'may consider' when determining whether to validate a corporate act[]" under section 205, finding each of them to support the relief sought in the *Lordstown* petition.[72]

First, the court found that Lordstown and its board of directors approved and effectuated the amendment with the good faith belief that it was validly adopted.[73] The court also observed that, upon receiving the

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[65] *Lordstown*, 290 A.3d at 3.

[66] The Court of Chancery initially granted the broadly framed relief sought by the *Lordstown* petition, which not only sought validation of the matters specifically referenced in the petition, but also generally sought validation of all other corporate actions and transactions taken or effected in reliance on the matters specifically referenced in the petition. The *Lordstown* court later determined that it was preferable to grant a narrower form of relief that granted all of the necessary relief sought by Lordstown (without validating the same broad catch-all set of other corporation action that may not directly be related to issues outlined in the petition), and the court entered an order to that effect on February 28, 2023. Amended Final Order and Judgment, *In re* Lordstown Motors Corp., No. 2023-0083 (Feb. 28, 2023).

[67] *Lordstown*, 290 A.3d at 12.

[68] *Id.* (quoting *Numoda Corp*., 2015 WL 402265, at *7).

[69] *Id.* at 11 (quoting *In re* Genelux Corp., 126 A.3d 644, 666–67 (Del. Ch. 2015), *vacated in part sub nom.* Genelux Corp. v. Roeder, 143 A.3d 20 (Del. 2016)).

[70] *Id.* at 11–12 (quoting *Numoda Corp.*, 2015 WL 402265, at *7).

[71] 8 DEL. C. § 205(d).

[72] *Lordstown*, 290 A.3d at 12 (quoting 8 DEL. C. § 205(d)).

[73] *Id.*

demand letter following its business combination, Lordstown rejected the demand after receiving a legal opinion from outside counsel.[74]

Second, the court found that Lordstown and its board consistently treated the acts as valid and effective, which was reflected by Lordstown's public disclosures.[75] In addition, the court explained that third parties acted in reliance on the validity of the acts, including the participants in Lordstown's business combination and PIPE and purchasers of Lordstown's Class A common stock, as well as Lordstown's directors and employees who have provided services in return for equity grants.[76]

Third, the court explained it could not "conceive of any legitimate harm that would result from validating the Charter Amendment."[77] In this regard, the court explained that "[c]ompany stockholders and market participants appear to have expected that the 2020 Charter—and stock issued in reliance thereon—was valid."[78] In addition, the court explained that, "[v]alidation would give effect to the de-SPAC merger on the terms understood and accepted by its participants in 2020" and "would also restore settled expectations of the Company and its stockholders with respect to the Company's certificate of incorporation and capitalization."[79]

Fourth, the court found that "absent validation, a number of parties would face widespread harm."[80] The court noted that this potential harm included the doubt that would be cast on Lordstown's capital structure from "[t]he potential invalidity of shares of Common Stock issued, or to be issued, in reliance on the Charter Amendment . . . could cause market disruption, impair the Company's commercial relationships, chill strategic opportunities, and jeopardize employee relationships."[81] The court further observed a number of other prospective harms that could result in the absence of validation: "past and future results of stockholder votes would be called into question"; "the Company may not be able to issue public filings, especially if its auditors raise concerns about the effect of uncertainties on the Company's financial statements"; "[t]he Company could also risk delisting from the NASDAQ"; "the Company may be unable to obtain the substantial capital needed to achieve production targets, develop additional vehicles, and continue operations"; and Lordstown's pending financing transactions and arrangements could be

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[74] *Lordstown*, 290 A.3d at 12
[75] *Id.* at 13.
[76] *Id.*
[77] *Id.*
[78] *Lordstown*, 290 A.3d at 13.
[79] *Id.* at 14.
[80] *Id.*
[81] *Id*.

jeopardized, and "[w]ithout these financing transactions, the Company's liquidity position, operations, and future prospects will suffer."[82]

Finally, the court found that additional relevant considerations indicated that validation was just and equitable.[83] Explaining that "[r]atification of the Charter Amendment under Section 204 is not a practicable alternative because it is not clear which stockholders would be entitled to vote on a ratification proposal," the court determined "[r]elief under Section 205 is the most efficient and conclusive—and perhaps the only—recourse available to the Company."[84] Additionally, the court observed that "[v]alidation is consistent with Section 205's purpose to provide a means to remedy 'defective corporate acts that would otherwise be considered incurable.'"[85]

For these reasons, the court granted relief in *Lordstown*, as well with respect to the five other petitions for which hearings were held on February 20, 2023.[86] Subsequently, the court granted similar relief in response to numerous other petitions brought by other former SPACs based on the same reasoning outlined in *Lordstown*.[87] This includes at least one case, *In re Hyliion Holdings Corp.*, in which the court granted relief under section 205 to a former SPAC in spite of a formal opposition filed by a stockholder who previously sent a letter demanding that the corporation's board remedy the section 242(b)(2) issue raised by *Boxed*.[88] Despite this objection, the *Hyliion* court found relief under section 205 to be appropriate in the circumstances based on, among other factors, the fact that it may not have been feasible for the corporation to ratify the alleged defects on its own under section 204.[89]

II. RECONSIDERING THE CORPORATE BENEFIT DOCTRINE'S APPLICATION TO INADVERTENT DEFECTS

In 2015, when the Court of Chancery initially began granting fee awards for the discovery of technical corporate defects later cured through

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[82] *Lordstown*, 290 A.3d at 14.

[83] *Id.*

[84] *Id.* at 14–15.

[85] *Id.* at 14 (quoting Cirillo Fam. Tr. v. Moezinia, No. 101160, 2018 WL 3388398, at *8–9 (Del. Ch. July 11, 2018), *aff'd*, 220 A.3d 912 (Del. 2019) (unpublished table opinion)).

[86] *See Lordstown*, 290 A.3d at 15.

[87] *See, e.g.*, Transcript of Hearings on Verified Petitions for Relief Under 8 Del. Code Section 205 and Rulings of the Court, *In re* Hyliion Holdings Corp., No. 2023-0176 (Del. Ch. Mar. 6, 2023).

[88] Hearings on Verified Petitions, *supra* note 87, at 60–61, 65, 68.

[89] Transcript of Hearings on Verified Petitions for Relief Under 8 Del. Code Section 205 and Rulings of the Court at 65–68, *In re* Hyliion Holdings Corp., No. 2023-0176 (Del. Ch. Mar. 6, 2023).

sections 204 or 205 shortly following the statutes' adoption, the court looked to the $1 million fee award in *ev3* as precedent in approving awards that generally fell within a similar range.[90] At the time, sections 204 and 205 were not only new statutes but entirely novel corporate law concepts that completely reversed longstanding common law regarding defective corporate acts.[91]

As *Lordstown* illustrates, these statutory means for curing corporate defects are now well-established features of the corporate landscape.[92] Today, sections 204 and 205 are widely used to ratify or validate defective corporate acts with relative ease and often at relatively little cost.[93] In many cases, the ratification statutes allow corporations to cure the same technical defects that may have historically had dire—and potentially incurable—repercussions without any practical consequence on the corporation or its stockholders.[94] Indeed, in many cases, both the factors set forth in section 205(d) of the DGCL and general principles of equity will weigh in favor of curing defective corporate acts arising from inadvertent technical missteps.[95] As in *Lordstown*, an act whose validity is jeopardized by inadvertent defects will generally: be taken with the good faith belief it is valid; be treated as though it is valid by all relevant constituents prior to being discovered; not lead to any harm resulting from its validation because its validation will merely confirm the expectations of all relevant

[90] *See, e.g.*, Transcript of Settlement Hearing and Ruling of the Court, *In re* Cheniere Energy, Inc., No. 9710 (Del. Ch. Mar. 16, 2015); Transcript of Hearing Regarding Partial Settlement and Rulings of the Court, *In re* Xencor, Inc., No. 10742 (Del. Ch. Dec. 10, 2015); Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses, and Rulings of the Court, *In re* Colfax Corp., No. 10447 (Del. Ch. Apr. 2, 2015).

[91] Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses, and Rulings of the Court, *In re* Colfax Corp., No. 10447 (Del. Ch. Apr. 2, 2015).

[92] *See generally In re* Lordstown Motors Corp., 290 A.3d 1 (Del. Ch. 2023).

[93] *See, e.g.*, *Lordstown*, 290 A.3d at 12 (finding relief under section 205 appropriate); Transcript of Hearings on Verified Petitions for Relief Under 8 Del. Code Section 205 and Rulings of the Court at 65–68, *In re* Hyliion Holdings Corp., No. 2023-0176 (Del. Ch. Mar. 6, 2023) (same).

[94] *See Lordstown*, 290 A.3d at 14.

[95] *See, e.g.*, Almond v. Glenhill Advisors LLC, No. 10477, 2018 WL 3954733, at *21 n.199 (Del. Ch. Aug. 17, 2018) (finding that even where plaintiffs asserted that section 204 ratification "was approved by a conflicted Board and does not meet the entire fairness test," numerous considerations contemplated by section 205(d) "demonstrate[ed] that the Section 205(d) factors overwhelmingly weigh in favor of judicial validation as the only equitable outcome" and "equally support[ed] the conclusion that the Board's ratification under Section 204 was entirely fair."), *aff'd*, 224 A.3d 200 (Del. 2019) (unpublished table opinion); Cirillo Fam. Tr. v. Moezinia, No. 101160, 2018 WL 3388398, at *8–9 (Del. Ch. July 11, 2018) (granting summary judgment in connection with an opposed section 205 petition relating to inadvertent technical defects upon finding "all five of the Section 205(d) factors [to] weigh in favor of judicial validation.").

constituents; often pose the prospect of significant harm, including to innocent third parties, given the draconian common law treatment of defective corporate acts and the frequency with which such defects, either directly or through a domino effect, affect the validity of a corporation's stock and capital structure;[96] and often result in stockholders favoring the ratification of the act under section 204, given the potentially drastic consequences that could result without ratification.[97] In cases where section 204 may not be a viable option, such as *Lordstown* and *Hyliion*, the corporation's inability to viably use section 204 should generally be another factor favoring validation under section 205.[98] For these reasons, there is often little, if any, practical risk that the significant common law consequences otherwise stemming from an unwitting technical defect will ever be realized.

As a result, we believe consideration should be given to jettisoning reliance on *ev3* and similar precedent, and the precedent stemming therefrom, in this context, with the amount of fee awards reduced to a size commensurate with the benefits obtained taking into account the relative ease of statutory ratification or validation (as compared with intractable voidness that corporations faced before the enactment of Sections 204 and 205).[99] For example, in *Boxed* and *De Felice*, the court awarded $850,000

[96] *See, e.g.*, Holifield v. XRI Inv. Holdings LLC, 304 A.3d 896, 930(Del. 2023) ("Void acts create serious difficulties because of a 'domino effect' in which one defective corporate act can infect subsequent acts." (quoting XRI Inv. Holdings LLC v. Holifield, 283 A.3d 581, 654 (Del. Ch. 2022))).

[97] *See Lordstown*, 290 A.3d at 14–15.

[98] *See Genelux Corp.*, 126 A.3d at 668–69, *vacated in part,* 143 A.3d 20 (Del. 2016) ("Section 205(d) identifies several factors that the Court of Chancery may take into account when resolving matters pursuant to Subsections (a) and (b). The first two factors concern whether the company believed the act was valid and treated it that way, the third concerns whether validating the act would cause harm that the act itself originally would not have caused, and the fourth concerns whether failing to validate the act would cause harm. These provisions contemplate a petitioner seeking to validate a defective corporate act because the company originally intended it to be valid, the company treated it as though it was valid, validating the act would not create additional harm that the company did not intend originally, or declining to validate the act would create or enable harm that the company never intended. Thus, Section 205 fundamentally concerns a company having taken an act with the intent and belief that it is valid and later petitioning the Court to correct a technical defect and thereby remedy incidental harm."); *see also Cirillo*, 2018 WL 3388398, at *8 (quoting *Genelux Corp.*, 126 A.3d at 669) ("[T]he underlying purpose of [section 205] 'fundamentally concerns a company having taken an act with the intent and belief that it is valid and later petitioning the Court to correct a technical defect and thereby remedy incidental harm.'").

[99] *See In re* Oxbow Carbon LLC Unitholder Litig., No. 12447, 2018 WL 818760, at *47 (Del. Ch. Feb. 12, 2018) ("Historically, if a corporation failed to follow corporate formalities when issuing shares, then a party challenging the issuance had strong grounds to contend that the issuance was void and could not be validated in equity, whether through the invocation of equitable defenses or otherwise. To mitigate the harshness of this rule, the General Assembly added two sections to the Delaware General Corporation Law: (i) Section 204, which provides

in fees and expenses to plaintiffs' attorneys who alleged technical flaws in corporate actions.[100] In each case, the court found the award supported by the material benefit conferred by the identification of the applicable defect based on the court's analogies of the alleged defect to "a ticking time bomb" and the process of curing the defect to "cleaning up shrapnel."[101] While these awards were in line with precedent—and the plaintiff's actions were geared toward technical defects—we believe the availability and

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a statutory path for ratifying invalid issuances and other defective corporate acts and (ii) Section 205, which empowers the Court of Chancery to validate defective corporate acts."), *aff'd in part, rev'd in part on other grounds sub nom.* Oxbow Carbon & Minerals Holdings., Inc. v. Crestview-Oxbow Acq., LLC, 202 A.3d 482 (Del. 2019); *XRI*, 283 A.3d at 656 ("Likely because of the major consequences of a declaration of incurable voidness, our law has moved steadily away from imposing it. The concept of a lack of corporate power that could give rise to an act being void ab initio was an 'oft-recurring theme' in the 'formative years of corporation law in the 19th and early 20th centuries,' when parties frequently invoked the ultra vires doctrine to challenge the validity of corporate action. One of the goals of the major revision to the DGCL that took place in 1967 was to eliminate questions about corporate power and de-fang the ultra vires doctrine. The adoption of Sections 204 and 205 of the DGCL represents a further step toward eliminating these historical legacies.") (quoting 1 DAVID A. DREXLER ET AL., DELAWARE CORPORATION LAW AND PRACTICE § 11.01, at 11-1, 11-10 (2019)), *aff'd in part, rev'd in part on other grounds*, 304 A.3d at 930–31 ("At least prior to the General Assembly's enactment of Sections 204 and 205 of the DGCL, a void act could essentially be unfixable in the corporate context. Void acts create serious difficulties because of a 'domino effect' in which one defective corporate act can infect subsequent acts. In 2014, the General Assembly enacted Sections 204 and 205 of the DGCL. Those sections were designed to provide mechanisms for a corporation to unilaterally ratify defective corporate acts or seek relief from the Court of Chancery to validate any corporate act under certain circumstances. The new sections gave corporations multiple avenues to remedy certain transactions including stock and option issuances, for example, that under prior case law, might otherwise have been void and incapable of ratification as a result of noncompliance with governing law or the corporation's own organizational documents. They also provided a means of ratifying other corporate acts that may not have been properly authorized in the first instance. Section 205 (upon application by specified interested parties), gave corporations the ability to seek a determination of the validity of acts that were not susceptible to being cured under Section 204. Accordingly, we acknowledge that recent legislative efforts, by providing equitable solutions to otherwise incurable defects, have moved in the direction of trying to ameliorate the harsh consequences of defective corporate acts.") (internal quotation marks omitted).

[100] *Boxed*, 2022 WL 17959766, at *15; Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 21, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022).

[101] *Boxed*, 2022 WL 17959766, at *11 ("These are all material benefits. And preventive action is as beneficial as corrective action, if not more: diffusing a ticking time bomb can be more valuable than cleaning up shrapnel."); Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 21, De Felice v. Kidron, No. 2021-0255 ("[D]iffusing a ticking time bomb is perhaps more valuable than cleaning up the shrapnel."); *see also* Knott Partners, L.P. v. Boudett, No. 2022-0376, 2023 WL 4276912, at *1–2 (relying, in part, on the precedent fee awards from *De Felice* and *ev3* in ordering a $300,000 fee award in respect of the defective acts later ratified pursuant to section 204, explaining that "the benefit conferred upon the corporation, while therapeutic in nature, [wa]s substantial" because the "litigation caused the Company to validate a series of defective actions, preempting an array of potential future challenges").

widespread acceptance of sections 204 and 205 have already accomplished much of the work needed to defuse the bomb or render it impotent.[102]

There is no longer the same threat of an impending explosion that, at common law, often followed the potential "ticking time bomb" of corporate defects. Corporate defects can now easily be remedied in most cases with little, if any, practical risk of corporations or their stockholders ever experiencing the draconian common law result of invalidation that historically posed a legitimate risk of crippling a corporation's foundation beyond repair. The ability of corporations to cure technical corporate defects and avoid these consequences, and the ability of corporations to defuse or render impotent the metaphorical time bomb, is attributable to sections 204 and 205, not the efforts of plaintiffs' attorneys who point out defects.[103]

As epitomized by *Boxed*, we believe right-sizing fee awards to factor in the availability of ratification and invalidation will honor the principles of equity from which the corporate benefit doctrine originates. *Lordstown* provides a compelling basis to believe that, in light of the availability of section 205, there would have been a very remote chance of Boxed's amended and restated certificate of incorporation and capital structure ever being incurably invalidated if it failed to seek the separate vote of its then Class A common stockholders in response to the demand letter. Any benefit realized by Boxed from seeking this vote was further diluted by the fact that the amendment was overwhelmingly approved by the holders of approximately 90% of the outstanding shares of Class A common stock (and almost certainly would have been approved regardless of whether this separate vote was sought).[104] For these reasons, there was

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[102] *See, e.g.*, *XRI*, 304 A.3d at 930–31 ("In 2014, the General Assembly enacted Sections 204 and 205 of the DGCL. Those sections were designed to provide mechanisms for a corporation to unilaterally ratify defective corporate acts or seek relief from the Court of Chancery to validate any corporate act under certain circumstances . . . . Section 205 (upon application by specified interested parties), gave corporations the ability to seek a determination of the validity of acts that were not susceptible to being cured under Section 204. Accordingly, we acknowledge that recent legislative efforts, by providing equitable solutions to otherwise incurable defects, have moved in the direction of trying to ameliorate the harsh consequences of defective corporate acts.").

[103] *XRI*, 304 A.3d at 930–31.

[104] If the SPAC in *Boxed* did not specifically seek a separate vote of its Class A common stockholders on the amendment or disclose that such a vote was required, but still received such vote as it likely would have in light of the Class A common stockholders' overwhelming approval of the amendment, this failure could possibly have given rise to a disclosure deficiency but would not have rendered the amendment invalid. *See* Arnold v. Society for Sav. Bancorp, Inc., 678 A.2d 533, 536–37 (Del. 1996) ("A good faith violation of the common law duty of disclosure may give rise, in certain circumstances, to equitable relief or to directorial liability. But such a violation does not render void ab initio a merger which complies with the statutory requirements.").

almost no practical likelihood that the demand letter received by Boxed or the remedial action it took in response to the letter would have ultimately affected the validity of Boxed's amended and restated certificate of incorporation or outstanding stock. The fee award of $850,000, representing a 6.3% of Boxed's equity value (an amount that, if recast as a break-up fee in an M&A transaction, would "stretch the definition of range of reasonableness and probably stretch[] the definition beyond its breaking point"),[105] would have been subject to a substantial downward adjustment under our framework. With the benefit of hindsight, we note that Boxed filed a petition for bankruptcy under chapter 11 of the U.S. Bankruptcy Code merely three months after the court ordered it to pay the $850,000 fee award.[106] Rather than furthering the interests of Boxed's stockholders, the fee award helped bring Boxed to bankruptcy and was even included in Boxed's bankruptcy petition, with the plaintiffs' attorneys listed as one of Boxed's largest unsecured creditors.[107]

In a subsequent case, *Garfield v. Getaround, Inc.*, the plaintiff sought a $850,000 fee award, approximately one year after the *Boxed* decision was issued, in respect of a demand raising the same issues addressed in *Boxed*.[108] Remarkably, the fee award was sought notwithstanding a sworn affidavit from the corporation's chief financial officer attesting that a fee award of this size would render the corporation insolvent.[109] The court criticized the plaintiffs' $850,000 fee request in *Getaround* for "a minuscule number of hours of work" as "value-destructive."[110] The Court nevertheless found that the "plaintiffs conferred a corporate benefit," and that the corporation, which failed to offer any alternative fee proposal of its, "presumably [could] pay more than zero."[111] Thus, despite its criticism of the plaintiffs' request, the Court asked the parties to resume negotiations in an attempt to reach agreement on a stipulated fee award, noting that there "need[ed] to be some movement" on the part of the corporation and implying that some type of fee award was justified.

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[105] *See supra* notes 52–53 and accompanying text; Phelps Dodge Corp. v. Cyprus Amax Minerals Co., No. 17398, 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999) (observing that a 6.3% termination fee "certainly seems to stretch the definition of range of reasonableness and probably stretches the definition beyond its breaking point.").

[106] *See generally* Voluntary Petition for Non-Individuals Filing for Bankruptcy, *In re* Boxed, Inc., No. 23-10397, (Bankr. D. Del. Apr. 2, 2023).

[107] *Id.* at 18.

[108] *See* Transcript of Statement of the Court Regarding Plaintiff's Motion for Summary Judgment and Application for an Award of Attorneys' Fees and Expenses at 4, 6, Garfield v. Getaround, Inc., No. 2023-0445 (Del. Ch. Feb. 15, 2024).

[109] *Id.* at 5.

[110] *Id.* at 4–6.

[111] *Id.* at 6.

These requests for substantial fee awards from corporations on the brink of bankruptcy epitomize the misalignment between the current application of the corporate benefit doctrine to inadvertent technical defects, on the one hand, and the modern realities of Delaware corporate law and the real-world impact of these defects on corporations, on the other hand. Similar concerns are raised by the relative size of fee awards granted in respect of corporate foot faults in cases like *De Felice*, which have required smaller-cap corporations to make payments approaching or exceeding the annual compensation of certain senior executives to merely confirm the long-settled expectations of all relevant constituents.[112]

Based on the prospect of earning substantial fee awards for the discovery of unintended technical defects, a class of plaintiffs' attorneys have begun combing through current and past SEC filings and other documents to uncover inadvertent foot faults and to make over-aggressive and scattershot allegations seeking to create corporate defects, even where none exist.[113] Many of these attorneys adopt strained, albeit sometimes facially appealing, interpretations and constructions of corporate law to manufacture alleged wrongdoing.[114] Given the historical significance of corporate defects, the Delaware courts may have traditionally viewed the efforts of this well-heeled group of private attorneys general as worthwhile.[115]

But it is not without cost and leads corporations to incur additional legal expenses in analyzing, addressing, and responding to allegations of corporate defects, as well as those they may be ordered or agree to pay to the plaintiffs' attorneys making the allegations, all of which are ultimately borne by stockholders.[116] The current application of the corporate benefit

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[112] Transcript of Plaintiff's Motion for Approval of Proposed Settlement at 21, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022) (ordering $850,000 in attorneys' fees for defects alleged in a corporation's purportedly improper treatment of broker non-votes at its 2019 and 2020 annual meeting while the annual total compensation of one individual serving as Chief Scientific Officer and a director of the corporation fell between $616,166–688,700 during this same period and that of the corporation's Chief Operating & Business Officer only reached $608,833 in 2020).

[113] *See, e.g.*, *In re* AMC Ent. Holdings, Inc., No. 2023-0215, 2023 WL 5165606 (Del. Ch. Aug. 11, 2023); W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., No. 2023-0309, 2024 WL 550750, at *6 (Del. Ch. Feb. 12, 2024) ("[E]ntrepreneurial plaintiffs' lawyers monitor public filings.").

[114] *See, e.g.*, *AMC*, 2023 WL 5165606, at *22 (observing, after extensive litigation led to a settlement and a fee award request from plaintiffs, that "[t]he parties agree[d] the statutory claim was weak" and "[t]he parties agree[d] Plaintiffs' claim under Section 242(b)(2) was meritless.").

[115] *See infra* note 128 and accompanying text.

[116] *See In re* MFW, 67 A.3d 496, 534–35 (Del. Ch. 2013) ("[I]t is unavoidable that it is investors themselves who are injured if the litigation system does not function with a rational benefit-to-cost ratio. Ultimately, litigation costs are borne by investors in the form of higher D

doctrine in this context imposes these costs—which are significant even for many public companies—on corporations and their stockholders in exchange for the prospect of confirming the long-settled expectations universally shared by stockholders and other relevant constituents, resulting in a "benefit" that has been extremely diluted by sections 204 and 205 and is unlikely to alter the economic interests of stockholders in any respect beyond the detrimental costs that accompany it.[117] Rather than furthering the interests of stockholders or "encourag[ing] *wholesome* levels of litigation" by granting fee awards commensurate with the actual benefits resulting from challenges to corporate defects,[118] this practice incentives litigation that furthers the interests of private attorneys over Delaware corporations and their stockholders.[119]

In addition to causing misallocations of corporate resources, this practice results in the devotion of scarce judicial resources to esoteric issues that are of little consequence to stockholders, such as whether a proxy statement—in disclosing the voting standard set forth in an ill-phrased bylaw—properly characterized the voting requirement on a run-of-the-mill proposal as either a majority of the votes cast or a majority of shares present in person and entitled to vote at the meeting, despite the fact that the actual tally of the votes would have satisfied either standard.[120] In *Boxed*, for example, this practice resulted in the overburdened Court of

& O insurance fees and other costs of capital to issuers that reduce the return to diversified investors. If those costs are not justified in a particular context by larger benefits, stockholders are hurt, not aided."), *aff'd sub nom.,* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); Thorpe v. CERBCO, Inc., No. 11713, 1997 WL 67833, at *2 n.1 (Del. Ch. Feb. 6, 1997) (noting the "substantial cost that will be borne of course by the shareholders indirectly" in defending litigation and stating that "in principle I cannot imagine why an inquiry into net benefit of the litigation to the corporation would not be a sound technique for judging the equity of fee shifting in a case where defendants prevail on the most central issues . . . ."), *aff'd*, 703 A.2d 645 (Del. 1997) (unpublished table decision); Frechter v. Cryo-Cell Int'l, Inc., No. 11915, 2016 WL 5864583, at *2 (Del. Ch. Oct. 7, 2016) (adjusting the fee award otherwise supported by a plaintiff's meritorious claim downward, as "equity requires," because the plaintiff's second claim "was not meritorious when filed" and, although this claim was later withdrawn, "it required some effort by the Corporation and its counsel, which was a cost imposed, ultimately, on stockholders.").

[117] *See, e.g.*, *Boxed*, 2022 WL 17959766 (compelling a public company to pay a fee award equal to 6.3% of its market capitalization that helped lead the company to bankruptcy); Transcript of Hearing for Plaintiff's Motion for Approval of Proposed Settlement at 21–23, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022) (ordering a public company to pay a fee award for past defects nearly $200,000 more than the annual total compensation of one individual who served as a director and Chief Scientific Offer of the company and another individual who served as the Company's Chief Operating & Business Offer during the time of the defects).

[118] Anderson v. Magellan Health, Inc., 298 A.3d 734, 755 (Del. Ch. 2023) (quoting *In re* Xoom Corp., No. 11263, 2016 WL 4146425, at *5 (Del. Ch. Aug. 4, 2016)).

[119] *See id.*

[120] *See generally Boxed*, 2022 WL 17959766, at *3.

Chancery devoting time to write an opinion analyzing whether a separate vote of Class A stockholders was required with respect to a matter that the Class A stockholders overwhelmingly approved (and would have overwhelmingly approved regardless of whether Boxed specifically sought a separate vote of its Class A stockholders in response to the plaintiff's demand).[121]

While it may be desirable to incentivize compliance with the DGCL and other corporate formalities, fee awards in the context of technical defects should not be justified on the basis of the deterrent they may serve to prevent future corporations from running afoul of statutory requirements.[122] Previously, the Delaware courts have relied on this rationale, at least in part, to justify significant fee awards consistent with precedent despite the emergence of sections 204 and 205.[123] Despite its support in past cases, this cannot serve as the basis for an award in a court of equity, such as the Delaware Court of Chancery, which lacks the power to grant exemplary or punitive relief in this circumstance.[124]

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[121] *Boxed*, 2022 WL 17959766, at *3.

[122] *See* Transcript of Settlement Hearing and Rulings of the Court at 80–81, *In re* Galena Biopharama, Inc., No. 2017-0423 (Del. Ch. June 14, 2018); *see also* Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses, and Rulings of the Court at 35–36, *In re* Colfax Corp., No. 10447 (Del. Ch. Apr. 2, 2015).

[123] *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 80–81, *In re* Galena Biopharma, Inc., No. 2017-0423 ("I think giving meaningful awards where plaintiffs raise issues that result in companies taking validative action has important incentive effects, particularly now that Section 204 and 205 are on the books, and that companies can, with a relatively straightforward procedure, take steps to fix things. The problem with that is that it can lead companies and corporate counsel in real time to adopt a more cavalier attitude, with the belief that they can simplify things later merely for the cost of a few corporate documents from a fine firm like Richards Layton. I think that counsel and issuers should not have a cavalier attitude toward statutory compliance or fiduciary compliance and that they should be upholding their obligations under Delaware law. As a result, I think that when a plaintiff identifies a problem, even if it is one that the company can fix by pursuing action through 204 or 205, the plaintiff should get credit for identifying that issue. And I think that this is part of what ideally will induce companies to continue to do things right in the first place rather than to risk being cavalier and only turning to things later after the fact."); Transcript of Oral Argument on Defendants' Motion for Judgment on the Pleadings, Plaintiffs' Motion for Award of Attorneys' Fees and Expenses, and Rulings of the Court at 35–36, *In re* Colfax Corp., No. 10447 ("I don't think we want people to be cavalier in terms of compliance with the Delaware statute. I think that there is some risk that statutory violations won't be detected or identified and, hence, when one is identified, we should err on the higher side—I'm not saying for a windfall—but to err on the higher side to make sure people are careful.").

[124] *See, e.g.*, Beals v. Wash. Int'l, Inc., 386 A.2d 1156, 1160 (Del. Ch. 1978).

A. *A Refined Approach*

As the corporate benefit doctrine has historically looked to precedent in awarding fees for intangible corporate benefits, the Delaware courts have relied heavily on *ev3* and precedent dating back to the adoption of sections 204 and 205. In our view, consideration of this precedent, and the subsequent precedent arising therefrom, should take into account the effect of sections 204 and 205, both of which have largely eliminated the doomsday aspects of technical defects.[125] This, in our view, would ensure practical consideration is given to the actual benefits realized by the corporation and its stockholders from the discovery of unwitting corporate defects.

We believe that the factors set forth in section 205(d), which are used to determine whether a defective act merits validation and include whether the act was originally consummated with the belief that it was validly authorized, provide a solid guidepost for helping to evaluate the magnitude of the corporate benefit created in a technical validity case.[126] *Lordstown*'s thorough discussion and evaluation of these factors is an exemplary overview of the considerations that will often be relevant to this undertaking.[127] In finding these considerations to weigh in favor of validation, *Lordstown* supports the attribution of relatively less importance to the discovery of inadvertent technical defects.[128] In addition, we believe the amount of the fee award should take into account the size of the corporation or transaction—a safeguard that the Delaware courts have previously recognized is necessary "so as to avoid a punitive result."[129]

Such a check should even extend to cases in which stockholders' voting rights may be protected. During the past several years, the Delaware courts have relied on *EMAK*'s holding that "the benefit's size does not depend on the corporation's monetary value" to grant significant fee awards without necessarily conducting a practical assessment of an alleged benefit or discounting awards to reflect the size of smaller cap corporations or smaller transactions.[130] Notably, in *De Felice*, the court rejected the argument that the $850,000 fee award ordered by the court

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[125] *See ev3*, 2011 WL 704409.

[126] *See* 8 DEL. C. § 205.

[127] *See Lordstown*, 290 A.3d.

[128] *See id.*

[129] Transcript of Rulings of the Court on Plaintiff's Application for a Disclosure Fee Award Under the Mootness Doctrine at 16, Schmelzer v. Teramedica, Inc., No. 10558 (Del. Ch. July 27, 2015); *see also In re* Sauer-Danfoss, 65 A.3d 1116, 1136 (Del. Ch. 2011) ("Only for a microcap company would the Court need to consider adjusting a disclosure-only award downward to avoid a punitive result.").

[130] *EMAK*, 50 A.3d at 433.

should be adjusted downward because the corporation had a smaller market capitalization than those in precedent cases.[131] Rather, the court held that a "major corporate landmine in a small cap company is a major corporate landmine all the same" and that, under *EMAK*, "the value of intangible benefits, such as a stockholder vote and disclosures to protect that vote, are necessarily intangible and . . . do not vary up or down with the deal price or the company's market cap."[132]

We would argue that equitable principles should be used to support an assessment of the practical benefits conferred by the underlying benefit. We believe developments in Delaware case law, such as *In re Trulia, Inc. Stockholder Litigation*, support this position.[133] In *Trulia* and its progeny, the Delaware courts have found that not all material disclosures support a disclosure-only settlement.[134] Rather, in the mootness fee context, the Delaware courts have held that the appropriate fee award for causing supplemental disclosures in connection with a stockholder vote may not always be significant or even comparable to precedent and must instead "be commensurate with the value of the benefit conferred" to stockholders by the disclosures.[135]

In order to align with these principles, we believe *EMAK* should be viewed in light of its specific facts—which encompassed credible duty of loyalty claims and were not limited to inadvertent technical defects[136]—and should not be extended to every circumstance. This narrowed interpretation of *EMAK* is supported by at least two recent cases in which the Court of Chancery distinguished *EMAK* on its facts in granting fee

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[131] Transcript of Hearing for Plaintiff's Motion for Approval of Proposed Settlement at 22–23, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022).

[132] Transcript of Hearing for Plaintiff's Motion for Approval of Proposed Settlement at 22–23, De Felice v. Kidron, No. 2021-0255 (Del. Ch. Apr. 27, 2022); *See also* Transcript of Settlement Hearing and Ruling of the Court at 101, *In re* Cheniere Energy, Inc., No. 9710 (Del. Ch. Mar. 16, 2015) (noting that, under *EMAK*, "the benefit to the stockholders of providing a vote doesn't vary up or down with price, because it's an intangible benefit," which is "good when you're bringing a case involving a small-cap company or another small issuer, where the size of the deal is small."); Transcript of Settlement Hearing and Rulings of the Court at 78–79, *In re* Galena Biopharama, Inc., No. 2017-0423 (Del. Ch. June 14, 2018) (weighing the fact that the corporation was "a smaller issuer" in favor of a higher fee award because "[s]mall companies . . . often have problems" and "it's the smaller issuers where we need a higher degree of oversight from plaintiffs' counsel").

[133] *In re* Trulia, Inc., 129 A.3d 884 (Del. Ch. 2016).

[134] *Id*. at 898 n.46; *see, e.g.*, *Xoom Corp*., 2016 WL 4146425, at *5.

[135] *Trulia*, 129 A.3d at 898 n.46 ("The amount of the fee in the mootness scenario, however, would be commensurate with the value of the benefit conferred. Thus, for example, a supplemental disclosure of nominal value would warrant only a nominal fee award."); *see, e.g.*, *Xoom*, 2016 WL 4146425, at *5 (finding that supplemental disclosures only "worked a modest benefit on the stockholders" and, as a result, granting a mootness fee award of $50,000 in respect of the disclosures rather than the $275,000 fee award sought by plaintiffs).

[136] *See EMAK*, 50 A.3d at 434.

awards considerably lower than those sought by plaintiffs and rejecting plaintiffs' arguments that the $2.5 million award granted in *EMAK* supported a higher award.[137] It is further supported by other post-*EMAK* decisions that have continued to downward adjust fee awards in respect of smaller corporations and transactions.[138]

The narrowed interpretation of *EMAK* that we advance draws support from the Delaware Supreme Court's and Court of Chancery's reasoning in their respective opinions in *EMAK*. [139] Indeed, in upholding a $2.5 million fee award granted by the Court of Chancery in *EMAK*, the Delaware Supreme Court stated that the fee award was based, in part, on the fact that "EMAK . . . paid significant bonuses to senior management during this corporate control dispute, including to individuals whose loyalty to the corporation has been called into question by the considerable evidentiary record developed by the plaintiffs."[140] Moreover, the Court of Chancery's ruling granting the fee award upheld in *EMAK* repeatedly cited

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[137] Berger v. Adkins, No. 2022-0487, 2023 WL 5162408, at *5–6 (Del. Ch. Aug. 8, 2023) (declining to grant the $2.2 million fee award sought by plaintiff for purportedly causing a waiver of three standstill provisions based on the $2.5 million award granted in *EMAK* and other precedent and distinguishing this precedent as involving "much greater benefits than Plaintiff has obtained here," explaining that: "In *EMAK*, the plaintiff challenged the sole preferred stockholder's attempt to seize control of a corporation by negotiating voting rights for its non-converted shares and decreasing the size of the board. The plaintiff successfully defeated both changes, and this court awarded $2.5 million in fees. The Delaware Supreme Court affirmed, reiterating Vice Chancellor Laster's finding as to the benefits conferred: 'This was a strong challenge brought to a transaction where there was . . . real evidence of loyalty breaches; and rescinding the transaction fundamentally changed the corporate governance landscape.'") (quoting *EMAK*, 50 A.3d at 434); Transcript of Hearing for Plaintiffs' Motion for Order Awarding Attorney's Fees and Expenses at 54–57, *In re* Mullen Auto., Inc., No. 2022-1131, (Del. Ch. May 25, 2023) (granting a $50,000 award in respect of certain claims rather than the $1.7 million award plaintiffs sought based on *EMAK*, explaining: "I believe there are multiple factual distinctions between [*EMAK*] and the present case. For example, *EMAK* involved a purported controller seeking to increase its voting power in a heated proxy contest. Also, the rescinded transaction in *EMAK* clearly had an effect on the stockholder vote. As the Court said, it 'fundamentally changed the corporate governance landscape.' Here, it was unknown when this case was filed whether the Series AA stock would be needed for the reverse stock split vote, and it turned out that it wasn't needed. The company ultimately obtained the requisite vote. The only real change in response to the lawsuit is that the company essentially held the Series AA preferred stock vote in abeyance. Hypothetically, I could see a world where this might have had some effect on stockholder voting patterns, but that's entirely speculative, which I believe is a key distinction from *EMAK*.").

[138] *See, e.g.*, Transcript of the Settlement Hearing, *In re* Access to Money, Inc., No. 6816 (Del. Ch. May 31, 2012); Transcript of Rulings of the Court on Plaintiff's Application for a Disclosure Fee Award Under the Mootness Doctrine at 16, Schmelzer v. Teramedica, Inc., No. 10558 (Del. Ch. July 27, 2015).

[139] *See generally* Kurz v. Holbrook, No. 5019, 2010 WL 3028003 (Del. Ch. July 29, 2010), *aff'd sub nom* EMAK Worldwide, Inc. v. Kurz, 50 A.3d 429 (Del. 2012); *EMAK,* 50 A.3d at 429.

[140] *EMAK*, 50 A.3d at 432 (quoting *Kurz*, 2010 WL 3028003, at *3).

the "substantial and credible evidence" of these breaches of the duty of loyalty, which evidence, the trial judge said, "influence[d] my fee application greatly."[141] While the principles espoused in *EMAK* could support a fee award otherwise disproportionate to the underlying practical benefits conferred in cases where the court has considerable discretion to fashion a rescissory or other remedy so that equity may prevail over breaches of the duty of loyalty or similar misconduct, the case should not be used to support an award in respect of innocent technical defects that exceeds the practical benefits realized by the corporation upon the defects' discovery. As noted, we argue that *EMAK*'s current application cannot be justified by any deterrent effect that it may have on preventing violations of the DGCL or corporations' certificates of incorporation or bylaws as a result of the equitable foundations of the corporate benefit doctrine and the Court of Chancery's inability to award punitive damages under this doctrine.

Any fee award supported by this framework should be further adjusted, as appropriate, to carry out equity based on the other *Sugarland* factors.[142] In one recent case, for example, the Court of Chancery deemed litigation challenging corporate defects to give rise to "a substantial corporate benefit," but nevertheless applied the other *Sugarland* factors to conclude that the litigation supported a fee award considerably lower than cited precedent because it was settled at an early stage and its "core issue—whether the actions of the board complied with the foundational documents—was not novel or complex."[143] Less risky and less complex claims, such as those contesting the validity of matters based on legal issues that have already been squarely decided by the Delaware courts, should also support lower fee awards.[144] When meritorious claims are

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[141] Transcript of the Rulings of the Court at 7, Kurz v. Holbrook, No. 5019 (Del. Ch. July 19, 2010) ("I will say this, because it does influence my fee application greatly. I think there is substantial and credible evidence that Mr. Holbrook breached his duty of loyalty in connection with the exchange transaction. I think there is substantial and credible evidence that Mr. Holbrook misled the board and/or withheld material information in connection with the events leading up to the exchange transaction."); *id.* at 18 ("This action was meritorious when mooted. This was a case, again, where there were substantial loyalty issues."); *id.* at 34 ("And finally, as a public policy matter, I do think this is the type of litigation that Delaware needs to reward. This isn't pro forma litigation. This was a strong challenge brought to a transaction where there was, as I've already discussed, real evidence of loyalty breaches; and rescinding the transaction fundamentally changed the corporate governance landscape.").

[142] *See generally* Sugarland Indus., Inc. v. Thomas, 420 A.2d 142 (Del. 1980).

[143] Knott Partners v. Boudett, No. 2022-0376, 2023 WL 4276912, at *1–2 (Del. Ch. June 29, 2023).

[144] *See, e.g.*, Frechter v. Cryo-Cell Int'l, Inc., No. 11915, 2016 WL 5864583, at *1–2 (Del. Ch. Oct. 7, 2016) (citing Transcript of Hearing on Defendants' Motion for Summary Judgment, *In re* VAALCO Energy, Inc., No. 11775 (Del. Ch. Dec. 21, 2015)) (finding that a claim challenging the validity of a bylaw purporting to limit the ability of stockholders to remove

asserted with additional claims of lesser merit, the results achieved by these claims should be assessed collectively for purposes of the *Sugarland* factors, with a lower fee supported when corporations incur costs, "imposed, ultimately, on stockholders," in defending against non-meritorious claims.[145] In addition to giving continued effect to Delaware's well-established *Sugarland* factors, these types of adjustments are as "equity requires" and support equitable outcomes and corrected incentive structures aimed at furthering the interests of corporations and their stockholders.

III. CONCLUSION

As a result of the widespread acceptance and use of sections 204 and 205 of the DGCL, the ticking time bomb that may have historically been associated with inadvertent technical corporate defects has now been defused, and these defects no longer present an impending explosion that poses a probable threat of ultimately striking at a corporation's foundation. In recent years, the Delaware Court of Chancery's application of the corporate benefit doctrine in granting fee awards resulting from inadvertent technical defects has, in our view, been misaligned with this modern reality, leading to fee awards that have strayed from the equitable foundations of both the Court of Chancery and the corporate benefit doctrine. In order to restore equity, reduce the burdens on the Delaware judiciary, corporations, and stockholders, and align the incentives of all relevant constituents with the ultimate goal of maximizing value for corporations and their respective stockholders, we believe the corporate benefit doctrine's application in this context should be refined with a refreshed evaluation of the practical benefits conferred on a corporation from the discovery of unwitting defects. This assessment should be based on real-world equitable considerations, including the factors set forth in section 205(d) of the DGCL, safeguards that look to the size of the corporation or transaction at issue, and other equitable considerations underlying the *Sugarland* factors.

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directors without cause "was largely a risk-free pursuit," making "the contingency factor [] of negligible importance" and supporting a downward adjustment in the fee award sought by plaintiff's counsel, in light of the Court of Chancery's prior invalidation of such a bylaw in *In re* VAALCO Energy, Inc.).

[145] *See id.* at *2 ("I also note that the original complaint included a second count, seeking to hold the Company's directors liable for breaches of fiduciary duty in enacting the Provision. In fact, the current directors did not create the Provision. While that count was withdrawn, it required some effort by the Corporation and its counsel, which was a cost imposed, ultimately, on stockholders. This count was not meritorious when filed, and I have adjusted the contemplated fee downward, as I believe equity requires.").