INSIGHTS

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DELAWARE LAW

2024 Amendments to the Delaware General Corporation Law

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On July 17, 2024, the Governor of the State of Delaware signed legislation enacting several significant changes to the Delaware General Corporation Law (DGCL).[1] The 2024 amendments became effective on August 1, 2024, and apply to all contracts made by a corporation, all agreements, instruments or documents approved by the board of directors, and all agreements of merger or consolidation entered into by a corporation, in each case whether made or approved before or after August 1, 2024. The 2024 amendments do not, however, apply to or affect any civil action or proceeding completed or pending before August 1, 2024.

John Mark Zeberkiewicz *is a director of Richards, Layton & Finger, P.A. Attorneys at Richards, Layton & Finger, including Mr. Zeberkiewicz, were involved in the drafting of the amendments to the Delaware General Corporation Law summarized herein. In addition, attorneys at Richards, Layton & Finger were involved in some of the cases cited herein.*

Section 122: Agreements with Stockholders and Beneficial Owners

Section 122 of the DGCL, which enumerates express powers that a corporation may exercise,[2] was amended in response to the Delaware Court of Chancery's opinion in *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*[3] In *Moelis*, the Court held that most of the provisions of a stockholders' agreement between the corporation and its eponymous founder were facially invalid, as they violated Section 141(a) of the DGCL, which provides that, except as otherwise provided in the certificate of incorporation, the business and affairs of the corporation shall be managed by or under the direction of the board of directors.[4]

Recognizing that corporations routinely enter into contracts that, directly or indirectly, infringe on the board's powers to manage the corporation, the Court articulated a multi-factor test to distinguish between third-party agreements and internal governance agreements.[5] Applying that test, the Court found that the stockholders' agreement at issue was an internal governance agreement. The Court then declared that multiple provisions of the agreement—those granting the founder veto rights over 18 categories of corporate acts, those requiring the board to recommend the founder's nominees for election, and those giving the founder control over the size of the board as well as limited powers to fill board vacancies and direct board committee appointments—impermissibly infringed on the board's statutory powers and were therefore facially invalid, meaning that there were no circumstances under which they could operate lawfully.[6]

The 2024 amendments were adopted in large part to remove the taint of facial invalidity from various types of internal governance agreements and to ensure that corporations would have the power and authority to enter into such agreements. For that reason, the 2024 amendments addressing the validity of internal governance agreements were placed in Section 122 of the DGCL, which enumerates specific powers that are conferred upon a corporation.[7]

The 2024 amendments added new Section 122(18), which now provides that, notwithstanding Section 141(a) of the DGCL, a corporation is expressly authorized to make contracts with current or prospective stockholders and beneficial owners of its stock in exchange for minimum consideration determined by the board of directors.[8]

Section 122(18) expressly states that, through such contracts, the corporation may agree to (a) restrict or prohibit itself from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract, and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract. No provision of any contract, however, will be enforceable against the corporation if it is contrary to the certificate of incorporation or would be contrary to Delaware law (other than Section 115 of the DGCL)[9] if included in the certificate of incorporation.[10]

Section 122(18) specifies, however, that a restriction, prohibition or covenant in any governance agreement that relates to any specified action will not be deemed contrary to Delaware law or the certificate of incorporation due to a provision of the DGCL or the certificate of incorporation that authorizes or empowers the board of directors (or any one or more directors) to take an action. The synopsis to the legislation makes clear that an express provision of the certificate of incorporation could restrict the board's power to make contracts under Section 122(18), but a general recitation in the certificate of incorporation of the board's powers, such as a standard provision that recites nearly verbatim the first sentence of Section 141(a), would not render Section 122(18) inoperative.[11]

The statutory requirement for "minimum consideration" need not be expressly fixed by the board; rather, based on the language of the statute, the board's approval of an agreement from which it is clear that some form of consideration is flowing to the corporation will satisfy the statutory requirement that the board make a determination as to the minimum consideration. The "minimum consideration" requirement is designed principally to distinguish between contracts involving bargained for rights and benefits, on the one hand, and governance arrangements not involving consideration from a current or prospective stockholder, such as rights plans (where the counterparty is a rights agent) or stockholder-adopted bylaws.

Nothing in new Section 122(18), however, should disturb the well-settled law surrounding stockholder-adopted bylaws or the adoption and maintenance of rights plans, or otherwise cast doubt on the sufficiency of the consideration supporting the validity of rights plans at common law.

The amendments recognize that, unlike a charter-based provision adopted pursuant to Section 141(a), an agreement-based provision under Section 122(18) may not have the effect of ensuring that a stockholder or beneficial owner, in and of itself and without further corporate action on the part of the board or one or more other parties, can implement corporate action. But such an agreement-based provision may give rise to a remedy for breach of contract or attempted breach of contract. Broadly speaking, the amendments to Section 122(18) should insulate an agreement pursuant to which a corporation provides one or more of its stockholders or beneficial owners broad-based veto rights over the consummation of transactions against a finding of statutory invalidity.

In addition, carefully drafted contract-based provisions that require the appointment of specified directors to committees of the board or require the consent or approval of specified directors for the consummation of various corporate actions should be facially valid.

While the plain language of the new subsection would appear to give the board the power to bind the corporation to take fundamental action, such as approving a merger, at the direction of a stockholder, the real-world operation of any provision included in a stockholders' agreement will be much more limited. Although an agreement adopted pursuant to new Section 122(18) may require a corporation to cause fundamental action to be taken, nothing in the statute expressly provides that individual directors may be parties to the agreement and expressly bound thereto in their directorial capacities. Moreover, nothing in Section 122(18) enables a corporation to deliver any vote or consent of stockholders required by the DGCL or the certificate of incorporation.

In connection with the addition of Section 122(18), Section 122(5), which relates to the corporation's power to appoint officers and agents and provide them suitable compensation, was amended to clarify that any contract delegating power to an officer or agent is subject to Section 141(a), to the extent applicable. Thus, the amendments make clear that a board may not, for example, delegate fundamental board-level functions to officers and agents, absent a charter provision allowing such a delegation of power.

Section 147: Approval of Agreements, Documents and Instruments

The 2024 amendments also added new Section 147 to the DGCL, which deals with the authorization of agreements, documents and instruments that are required by the DGCL to be approved by the board of directors.[12] New Section 147 was designed in response to the Court of Chancery's opinion in *Sjunde AP-fonden v. Activision Blizzard, Inc.*, where the Court declined to grant a motion to dismiss plaintiff's claims that the target corporation's board failed to adequately authorize a merger agreement in accordance with Section 251.[13]

The *Activision* Court observed that there are competing views under Delaware law as to whether the board must approve the final merger agreement or an "essentially final" form of the merger agreement.[14] Nevertheless, the Court concluded that it was not required to resolve that question, given that the merger agreement as approved by the target company's board omitted several key terms and was therefore not in essentially final form.[15]

New Section 147 enables a board of directors to approve, in either final form or "substantially final" form, any agreement, instrument or document for which the DGCL expressly requires board approval. Although new Section 147 does not expressly define what constitutes "substantially final," the synopsis to the legislation enacting it states that an agreement, document or other instrument should be deemed to be in substantially final form if, at the time of board approval, all of the material terms are either set forth in the agreement, instrument or document or are determinable through other information or materials presented to or known by the board.[16]

Although new Section 147 is being adopted in response to *Activision,* which related to the authorization of a merger agreement, it applies more broadly to other types of agreements, documents or instruments requiring board approval under the DGCL, such as amendments to the certificate of incorporation, including certificates of designation. The new section was drafted to apply to all relevant provisions of the DGCL, not just those relating to mergers, to avoid creating a trap for the unwary.

New Section 147 provides that if the board of directors has acted to approve or take other action with respect to an agreement, instrument or document that is required to be filed with the Secretary of State or referenced in a certificate so filed (for example, a certificate of merger), the board may, after providing such approval or taking such action and before the effectiveness of such filing, ratify the agreement, instrument or document at any time before such filing becomes effective, and such ratification will satisfy any requirement under the statute relating to the board's authorization, whether in terms of the manner or sequence in which it is provided.

The ratification provision is available as an option to provide greater certainty in circumstances where there may be a question as to whether the agreement, document, or instrument as initially approved was in substantially final form at the time of its approval. Although a board may elect to use Section 147's procedure to ratify an agreement, document or instrument that it previously had approved in substantially final form, no such ratification is required for the valid authorization of any such agreement, document or instrument.

The fact that the statute offers a ratification as a failsafe should not be viewed as undermining the prior due authorization of any agreement, document or other instrument subject to the statute if it was in fact approved in final form or substantially final form. Ratification under Section 147's procedure, where available, is an alternative to ratification under Section 204 of the DGCL, which provides corporations with a "self-help" procedure for ratifying defective acts, and Section 205 of the DGCL, which gives corporations and others the right to seek an order of the Court of Chancery validating a corporate act.[17] Ratification under Section 147 dispenses with the formalities applicable to a ratification under Section 204 and, more important, dispenses with any need for a determination that the underlying act is or may be defective due to some failure in its authorization. As with ratification under Sections 204 and 205, however, the board's ratification of its original approval of an agreement, document or other instrument under Section 147 relates back to the time of the original board approval.

New Section 147 does not undercut any public policy in favor of ensuring that the terms expressly required by statute to be included in a merger agreement have largely come to rest by the time the board takes action to approve the merger agreement. By statute, the only matters required to be included in a merger agreement are the terms and conditions of the merger, the mode of carrying it into effect, the amendments or changes of the certificate of incorporation of the surviving corporation to be affected by the merger, and the manner of converting shares into merger consideration or cancelling some or all of the shares. Any of the terms of the merger agreement, including those required by statute to be set forth therein, can be made dependent upon the operation of extrinsic facts.[18]

Moreover, before 1983, when the statute was amended to provide express authority for amendments to a merger agreement to be made, it was customary to negotiate the material terms of a transaction in a reorganization agreement, which had attached to it as an exhibit a bare-bones, short-form merger agreement that formally implemented the merger.[19] These features of the statute and historical practice may provide some gloss on which terms of a merger agreement will be most critical in connection with any assessment as to whether the board had approved a "substantially final" form of the agreement.

Section 232: Notice

The 2024 amendments also added new Section 232(g) in response to another technical defect identified in *Activision* regarding the notice of the stockholders' meeting to approve the merger. In *Activision*, the plaintiff alleged that the defendants violated the provisions of Section 251(c) requiring that a notice of the meeting to act on the merger must contain either the merger agreement or a brief summary of the agreement.[20]

The defendants claimed that the notice satisfied the statutory requirement for the following reasons: (1) the notice referenced that the merger agreement was attached as an annex to the proxy statement accompanying the notice, and (2) the proxy statement summarized the merger agreement. The Court rejected the first argument, noting that the copy of the merger agreement attached to the proxy statement omitted the surviving company's charter and was therefore incomplete.[21] The Court then rejected the second argument, noting that "[t]he Proxy Statement is not the notice."[22]

New Section 232(g) provides that each document enclosed with the notice or annexed or appended to the notice will be deemed part of the notice solely for purposes of determining whether notice was duly given under the DGCL, the certificate of incorporation or the bylaws. While the statute deems the other documents part of the notice, it was drafted to make clear that the information in those other documents is not material *per se*.[23]

Section 261: Remedies for Breach of a Merger Agreement; Stockholders' Representatives

Remedies for Breach of a Merger Agreement

The 2024 amendments add new Section 261(a)(1)[24] to provide an outcome different from the one that would result from an application of the Delaware Court of Chancery's reasoning in *Crispo v. Musk*.[25] In that case, a former Twitter stockholder, Luigi Crispo, brought suit against Elon Musk and his affiliates seeking specific performance and damages after they attempted to terminate a merger agreement with Twitter.

After Musk and his affiliates dropped their suit against Twitter and closed the acquisition, Crispo sought a fee award based on the assertion that his claims contributed to the buyer group's decision to change course and close the deal. The *Crispo* Court ruled that the plaintiff was not entitled to a mootness fee, finding that his claims were not meritorious since he either lacked status as a third-party beneficiary to bring the claims or, to the extent he was a third-party beneficiary, his ability to exercise his rights as such had not vested.[26]

In reaching this conclusion, however, the Court followed the reasoning in the Second Circuit Court of Appeals' decision in *Consolidated Edison, Inc. v. Northeast Utilities*[27] to the effect that a target corporation in a proposed merger could not seek on behalf of its stockholders the loss of any premium the stockholders would have enjoyed had the buyer not breached the merger agreement beyond the damages incurred by the target itself. While the *Crispo* Court recognized that M&A agreements may confer third-party beneficiary status on stockholders allowing them to seek damages for any lost premium, it suggested that Delaware law aligns with *ConEd*, signaling that a corporation would not be entitled to appoint itself as an agent to pursue a damages remedy in the form of lost premium.[28]

While the Court's opinion appeared to provide stockholders greater protection in the form of a direct right to pursue claims for damages against buyers if the target failed to seek or obtain an award of specific performance, it gave rise to the practical concern that target corporations would lose negotiating leverage, as buyers would routinely resist any effort to name the target's stockholders as third-party beneficiaries or include a lost damages premium as a potential measure of damages.

The amendments to Section 261(a)(1) allow commercial parties to contract for an outcome different from that contemplated by the *ConEd* construct that the *Crispo* opinion signaled would otherwise apply under Delaware law. The new subsection provides that parties to a merger agreement may include provisions for penalties or consequences (including a requirement to pay lost premium damages) upon a party's failure to perform or consummate the merger, regardless of any otherwise applicable provisions of contract law, such as those addressing liquidated damages and unenforceable penalties.

Consistent with the DGCL's role as an enabling statute, the new subsection provides that constituent corporations may, through express provision in the merger agreement, allocate the risk of non-performance. Thus, a target corporation may, acting on behalf of stockholders, seek a damages award from a buyer in the form of the stockholders' lost premium. Moreover, the target corporation may retain any such damages award it collects—and need not distribute the proceeds to stockholders or to any group of stockholders.

The new subsection, in and of itself, does not exclude remedies that might otherwise be available to a party at law or in equity, nor does it alter the fiduciary duties of directors in determining whether to approve or enforce any provision of a merger agreement. Thus, the new subsection will not displace the well-developed common law governing the circumstances under which a target's termination fee may operate lawfully, or when it may be struck down as preclusive of other bids or coercive of a stockholder vote.

Appointment of Stockholders' Representatives

In light of the statements in *Crispo* regarding agency appointments, to eliminate any doubt regarding the validity of a typical arrangement in a private company merger agreement providing for the appointment of a stockholders representative, new Section 261(a)(2)[29] is being adopted to provide that parties to a merger agreement may, through express provision in the agreement, appoint one or more persons to serve as the representative of stockholders of any constituent corporation, including stockholders whose shares shall be canceled, converted or exchanged in the merger or consolidation, and to delegate to such person(s) the exclusive authority to enforce the rights of such stockholders, such as rights to receive payments and enforce stockholders' rights under earn-out, escrow or indemnification provisions, and to enter into settlements with respect thereto. The stockholders' representative may be appointed at or after the stockholders' adoption of the merger agreement, and the appointment will thereafter be binding on all stockholders.

In private company transactions, it is customary for the merger agreement to provide for the appointment of a stockholders' representative to act as the agent of the stockholders whose shares are cancelled in the merger to address post-closing matters. Accordingly, new Section 261(a)(2) provides express authorization for these representative provisions, avoiding any implication that such an arrangement is an impermissible agency appointment. It further provides that a stockholders' representative appointed pursuant to the terms of a merger agreement may be delegated powers, exercisable after the effectiveness of the merger, in addition to the power to make adjustments in respect of the nature or amount of merger consideration.

The amendments to Section 261(a)(2) do not allow for a provision of an agreement of merger or consolidation empowering a stockholders' representative to exercise powers beyond those related to the enforcement of the rights of stockholders under the agreement. Thus, for example, the amendments do not empower a stockholders' representative, acting solely pursuant to a provision adopted under new Section 261(a)(2), to waive, compromise or settle, in the name of any stockholder, any rights to appraisal under Section 262 or any direct claim for breach of fiduciary duty that such stockholder is entitled to assert following a merger or consolidation, nor do the amendments empower the stockholders' representative to consent, in the name of any stockholder, to restrictive covenants, such as a covenant not to compete or a non-solicitation covenant.

An individual stockholder or a group of stockholders, however, would still be entitled in their own capacity to grant any such powers to a stockholders' representative or other agent, whether through execution of a joinder to a merger agreement, consent or support agreement or other instrument evidencing assent to the grant of such power.

Section 268: Amendments to Surviving Corporation Certificate of Incorporation; Disclosure Schedules

Amendments to the Surviving Corporation Certificate of Incorporation

New Section 268(a)[30] provides that if an agreement of merger (other than a holding company reorganization under Section 251(g), that is, a holding company reorganization not requiring a stockholder vote) entered into pursuant to subchapter IX of the

DGCL provides, with respect to a constituent corporation, that all of the shares of capital stock of the constituent corporation issued and outstanding immediately before the effective time of the merger are converted into or exchanged for cash, property, rights or securities (other than stock of the surviving corporation), then the merger agreement approved by the board need not include any provision relating to the certificate of incorporation of the surviving corporation. Rather, under new Section 268(a), the board of directors of the target or buyer that will be the sole stockholder of the surviving corporation following the merger, or any person acting at either of their direction, may approve any amendment or amendment and restatement of the certificate of incorporation of the surviving corporation. Additionally, no alteration or change to the certificate of incorporation of the surviving corporation will be deemed to constitute an amendment to a merger agreement within the scope of Section 268(a).

New Section 268(a) is being adopted in light of the *Activision* opinion discussed above, in which the plaintiff also alleged that the board of directors did not approve the post-merger certificate of incorporation of the surviving corporation. Among other things, the amendment will provide flexibility to a buyer in a typical "reverse triangular merger" to adopt the terms of the certificate of incorporation of the surviving corporation that, following the effectiveness of the merger, will be wholly owned and controlled by the buyer.

Despite the additional statutory flexibility, a target corporation may insist, however, that the merger agreement expressly provide that the certificate of incorporation of the surviving corporation be adopted in a specified form or contain specified provisions, such as those relating to exculpation, indemnification and advancement of expenses of directors, officers and others, as applicable.

Disclosure Schedules, Disclosure Letters and Other Similar Documents

The 2024 amendments also add new Section 268(b), which provides that a disclosure letter or disclosure schedules or any similar documents or instruments delivered in connection with an agreement of merger or consolidation that modify, qualify, supplement or make exceptions to representations, warranties, covenants or conditions in the merger agreement will not, unless otherwise provided by the agreement, be deemed part of the agreement for purposes of the DGCL.[31]

New Section 268(b) is being adopted to avoid any implication from the Court's decision in *Activision* that, in order for a merger agreement to have been duly authorized, the board of directors must have approved final or substantially final disclosure schedules (or similar documents), or that the disclosure schedules (or similar documents) must be submitted to or adopted by the stockholders. In most instances, boards would be well advised to review final or substantially final versions of the schedules. Counsel should be mindful of the provision of the merger agreement stating which documents form part of the agreement. If the schedules are expressly included as part of the merger agreement, they should be approved in final or substantially final form. In many cases, it will be advisable to make clear in the merger agreement that the schedules are not part of the agreement.

Conclusion

The 2024 amendments to the DGCL make several significant changes, continuing Delaware's commitment to updating its corporate law annually to address issues affecting corporations and practitioners.

Notes

1. *See* S.B. 313, 152nd Gen. Assem. (Del. 2024).
2. 8 *Del. C.* § 122.
3. West Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).
4. 8 *Del. C.* § 141(a).
5. *Moelis*, 311 A.3d at 859–860 (articulating factors). The Court stated: "Every contract restricts board authority to some degree, so how does a court distinguish contractual provisions that violate Section 141(a) from

those that do not? To answer that question, this decision surveys the Section 141(a) precedents. That effort is tedious but fruitful, because it reveals a clear rule. Although none of the cases say so expressly, they show that a court applying Section 141(a) must first determine whether the challenged provision constitutes part of the corporation's internal governance arrangement. If not, then the inquiry ends. If so, then Section 141(a) applies." *Id.* at 828.

6. *Id.* at 828–829.
7. 8 *Del. C.* § 122.
8. *Id.* § 122(18).
9. Section 115 of the DGCL provides that no provision of the certificate of incorporation may prohibit "internal corporate claims" from being brought in the Delaware courts. Thus, the exclusion of Section 115 operates to permit internal governance agreements to select for the resolution of disputes thereunder, in addition to the courts in the State of Delaware, the courts of a non-Delaware jurisdiction or an arbitral forum.
10. In *Wagner v. BRP Group, Inc.*, 316 A3d 826 (Del. Ch. 2024), which was decided before the enactment of the 2024 amendments, the Court indicated that a "Charter Pre-Approval Requirement"—that is, a provision that contractually designated a stockholder "as the gatekeeper for whether the Company can amend its charter" and prevented the board from initiating the process to amend the charter without his consent—violated Section 242. The Court stated: "Importantly, the Charter Pre-Approval Requirement is not an additional vote that the corporation must obtain before a transaction can close. Transaction agreements often provide for additional votes, such as by requiring that a transaction can only close if, in addition to the statutorily required vote, it also receives approval from a majority of the unaffiliated shares. The Charter Pre-Approval Requirement does not call for a specific additional vote as an additional requirement at the end of the line. The Charter Pre-Approval Requirement purports to introduce a threshold requirement before the statutory mechanism can proceed. That mechanism violates Section 242." Although such a pre-approval requirement, if included in the certificate of incorporation, could be viewed as a valid limitation on corporate power (and thus should not be viewed as a provision that would violate Delaware law if included in the certificate of incorporation), practitioners drafting consent rights in stockholders' agreements should consider structuring them such that the consent is "in addition to" any vote or consent required by law and is required for the consummation of the transaction (and not for initiation of the otherwise applicable statutory authorization procedures).
11. S.B. 313, 152nd Gen. Assem. (Del. 2024).
12. 8 *Del. C.* § 147.
13. Sjunde AP-fonden v. Activision Blizzard, Inc., 2024 WL 863290 (Del. Ch. Feb. 29, 2024).
14. *Id.* at *5-6.
15. *Id.* at *8 ("It is reasonably conceivable that the Board failed to satisfy the minimal requirements of Section 251(b) by failing to approve an essentially complete version of the Merger Agreement. Plaintiff alleges that the Draft Merger Agreement omitted the consideration, the Disclosure Letter, the Disclosure Schedules, the Survivor's Charter, and the Dividend Provision. There was a lot of important stuff missing from the Draft Merger Agreement. The consideration was essential. The Disclosure Letter was referenced 45 times in the Merger Agreement and contained information that was important to the agreement. Section 251(b) specifically calls out the Survivor's Charter in the list of six statutorily mandated items. The Dividend Provision was a "key open" issue. Perhaps the Disclosure Schedules were not essential, as Defendants argue. Reasonable minds could reach different conclusions on this point. The court need not drill down that deep at the pleading stage. Wherever the line in this context is drawn, the Draft Merger Agreement inferably crossed it.")
16. S.B. 313, 152nd Gen. Assem. (2024).
17. *See* 8 *Del. C.* §§ 204 & 205.
18. *See* 8 *Del. C.* § 251(b); Aveta Inc. v. Cavallieri, 23 A.3d 157 (Del. Ch. 2010).
19. R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations, § 9.9, at 9-16 (4th ed. 2023-2 Supp.). "An agreement of merger can be a simple document containing only the statutory requisites, or it can be a complex document covering every conceivable contingency and containing all possible

representations and warranties. . . . Because of the complexity and length of the documents and the lack of statutory authority (prior to 1983) to modify agreements of merger, the practice evolved of the parties . . . signing agreements of reorganization that would contain the details of the merger. A brief merger agreement was customarily attached as an exhibit and used as the formal document to effect the merger."

20. *Activision*, 2024 WL 863290, at *8.
21. *Id.*
22. *Id.*
23. *See* In re Orchard Enterprises, Inc. S'holder Litig., 88 A.3d 1, at 19 (Del. Ch. 2014) ("The DGCL does not require that stockholders receive many items of information, but those that it does require are material *per se*.").
24. 8 *Del. C.* § 261(a).
25. 304 A.3d 567 (Del. Ch. 2023).
26. *Id.* at 570.
27. Consolidated Edison, Inc. v. Northeast Utilities 426 F.3d 524 (2d Cir. 2005).
28. *Crispo*, 304 A.3d, at 583-84 ("A party cannot recover damages for consideration that it would not expect to receive had the contract been performed. Such provisions are considered penalties. If a contractual provision defines damages to include penalties, then it is unenforceable. A target company has no right or expectation to receive merger consideration, including the premium, under agreements that operate like the Merger Agreement.").
29. 8 *Del. C.* § 261(a)(2).
30. 8 *Del. C.* § 268(a).
31. 8 *Del. C.* § 268(b).