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Balancing Power and Rights:

Reconciling Shareholder's Rights with Board Duties in the Post - Moelis Era

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I. Introduction

Delaware has long been regarded as the cornerstone of corporate law in the United States. This small state's leader position in the business world is largely due to its well-established *Delaware General Corporation Law (DGCL)*[1], a flexible and business-friendly legal framework that has evolved over the years to meet the needs of a very dynamic marketplace. Adding to its appeal is the Delaware Court of Chancery, a specialized bench known for its expertise in handling complex corporate disputes. Its business laws have solidified Delaware's reputation as a "corporate heaven," attracting companies seeking a stable and reliable legal environment and making Delaware the preferred jurisdiction for incorporation.

However, recent legislative rulings, particularly *Moelis v. West Palm Beach Firefighters' Pension Fund*[2] and *Tornetta v. Musk*[3], have sparked significant doubts regarding the future of Delaware as the Leader forum for Corporate Governance. To address the growing concerns, Delaware lawmakers have introduced Senate Bills 313[4] and 21[5], each aimed at reforming and clarifying key aspects of the state's corporate law. SB 313[6], particularly the new provision § 122(18)[7], permits corporations to enter into contracts with current or prospective stockholders or beneficial owners, even if such agreements constrain the board's powers, as long as such agreements do not violate the *DGCL*[8] or the corporation's charter. The provision directly addresses and overturns the

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[1] Del. Code Ann. tit. 8 (2024).

[2] *Moelis & Co. v. West Palm Beach Firefighters' Pension Fund*, No. 2023-0309-JTL, 2024 WL 1214206 (Del. Ch. Mar. 29, 2024).

[3] *Tornetta v. Musk*, No. 2021-0620-JTL, 2023 WL 4440058 (Del. Ch. July 7, 2023).

[4] Del. S.B. 313, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[5] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[6] Supra note 4.

[7] Del. Code Ann. tit. 8, § 122(18) (2024).

[8] Del. Code Ann. tit. 8 (2024).

Moelis[9] decision, whose ruling sparked widespread controversy and brought the board - shareholder relationship at the forefront of corporate law discussions.
SB 21[10], on the other hand, proposes important changes in the classification of controlling shareholders and the treatment of transactions involving them: the reconceptualization of the "controlling shareholders" term directly impacts high-profile corporate figures like Elon Musk, especially considering the legal battles he has faced regarding his $101 billion pay package from Tesla[11]. Under the new framework, similar transactions —which were previously subject to being overturned—may now receive legal protection.

These bills aim to adjust the balance of power between corporate boards and shareholders, signaling a shift in Delaware's approach to corporate governance. While proponents argue that the amendments are necessary to keep Delaware's corporate laws in line with the market evolving[12], critics warn that these changes could undermine core principles of Corporate Governance. As Delaware works to reaffirm its status as the preferred jurisdiction for incorporation, it must also navigate the growing tension between business flexibility and governance integrity.

Chapter II will introduce the fundamental principles of corporate governance, outlining its core components and the legal framework that supports board and shareholder roles. Chapter III will examine in detail the *Moelis v. West Palm Beach Firefighters' Pension Fund*[13] decision, the legislative response through Senate Bill 313[14] and the enactment of

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[9] *Moelis & Co. v. West Palm Beach Firefighters' Pension Fund*, No. 2023-0309-JTL, 2024 WL 1214206 (Del. Ch. Mar. 29, 2024).

[10] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[11] Samantha Delouya, *Elon Musk's Massive, Multibillion-Dollar Tesla Pay Package Was Blocked by a Judge Again*, *CNN* (DEC. 2, 2024), https://www.cnn.com/2024/12/02/elon-musk-tesla-pay-package-judge-blocked/index.html.

[12] Jordan Howell, *Sparks Fly in Final Hearing on Corporate Law Amendments: Amid Political Division in the House, Former Chancellor William Chandler Took Shots at Chancellors McCormick and Laster for Speaking Out Against the Bill*, THE NEWS JOURNAL, June 22, 2024.

[13] *Moelis & Co. v. West Palm Beach Firefighters' Pension Fund*, No. 2023-0309-JTL, 2024 WL 1214206 (Del. Ch. Mar. 29, 2024).

[14] Supra note 4.

DGCL[15] § 122(18)[16], as well as the broader legal and practical consequences of these developments. Chapter IV will address the critical reactions to SB 313[17], exploring both positive and negative responses raised by scholars, practitioners, and commentators. Finally, Chapter V will place the debate in a broader context by analyzing the emerging "DExit"[18] phenomenon, which is Delaware's growing risk of corporate exodus, the introduction of the SB 21[19] and the potential long-term implications for the state's dominance in corporate law.

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[15] Del. Code Ann. tit. 8 (2024).

[16] Del. Code Ann. tit. 8, § 122(18) (2024).

[17] Del. S.B. 13, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[18] Staff, *DExit: Why Companies Are Leaving Delaware and What It Means for Business*, THE RIO TIMES (Apr. 1, 2024), https://www.riotimesonline.com/dexit-why-companies-are-leaving-delaware-and-what-it-means-for-business/.

[19] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

II. Corporate Governance Frameworks and the Role of Judiciary

The relationship between the Board of Directors and Shareholders has long been one of intricate complexity, with each party holding distinct and vital roles in ensuring the long-term growth and profitability of a Corporation. Traditionally, the responsibilities of these two entities have been clearly defined: the Board, tasked with overseeing the company's operations and strategic direction, and the shareholders, who invest capital and expect accountability for the company's performance. However, in recent years, the balance of power between these two groups has become increasingly blurred. The growing influence, wealth, and decision-making power of certain shareholders are dramatically altering the dynamics that once defined corporate governance. The introduction of Senate Bill 21[20] and Senate Bill 13[21], which aimed at adjusting this volatile equilibrium, represents an unprecedented shift in how corporate law will address the interactions between directors and stockholders. These legislative amendments, marking a significant departure from traditional legal frameworks, have the potential to reshape the governance structure of corporations. To fully understand the rationale behind these bills, the forces that have led to their introduction and the consequences they may bring, it is essential to first examine the key elements, such as the role of the Board or the rights of the Shareholders, of Corporate Governance.

A. Overview of Corporate Governance Principles and Board Duties

Corporate Governance refers to all the methods, structures, and processes by which a company is directed and controlled. It encompasses the mechanisms through which companies are governed, ensuring that the interests of all the corporate players are aligned and protected. The broader objectives of corporate governance are: "*to protect interest of shareholders and various other stakeholders including customers, suppliers,*

[20] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[21] Del. S.B. 13, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

employees and society at large, to ensure full transparency and integrity in communication and to make available complete, accurate and clear disclosure to all concerned"[22]. Making sure that the corporation is well managed is essential to ensure long-term success for the business. To guarantee an effective corporate governance, a board of directors that is transparent and reliable is needed.

"The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation".[23]

The board of directors is in charge to manage the affairs of the corporation. Theoretically, Section 141(b)[24] of the *DGCL*[25] allows for a minimum of one director as part of the Board: in practice, most corporations, especially larger ones, have multiple directors to guarantee a diversity of opinions and perspectives. The number of directors is generally determined by the corporation's bylaws. Regardless of the number of its members, all boards share similar functions and roles. First of all, the Board is vested with extensive powers: the way in which the board uses these powers to increase the value of the firm is what sets apart an efficient Board from a negligent one[26]. The board's responsibilities span across different areas of the firm. The board is responsible for overseeing management to ensure the firm operates efficiently and ethically: this includes monitoring financial performance and complying with laws and regulations accordingly. Furthermore, the Board sets the overall strategic direction of the company: determines the long - term goals of the firm, supervises how the organization adapts to ever - changing market conditions and ensures that the firms does not lose its competitive advantage. Through the member's network of Connections, the Board provides access to external resources that most of the time are crucial for the firm's

[22] Dr. Pankaj M. Madhani, *Diverse Roles of Corporate Board: Review of Various Corporate Governance Theories*, THE IUP JOURNAL OF CORPORATE GOVERNANCE (2017).

[23] Del. Code Ann. tit. 8, § 141(a) (2023).

[24] 8 Del. C. § 141(b) (2024).

[25] Del. Code Ann. tit. 8 (2024).

[26] Johnson et al.,1996.

growth. Among their functions, the Board also hires, evaluates, and, eventually, terminates the CEO and the others top executives.
The Board is one of the most important internal mechanisms used by the shareholders to monitor and influence the management's choices: when deciding, the directors are compelled to prioritize the stockholder's interests. This occurs because the directors of a corporation owe fiduciary duties[27]: when stockholders invest in a corporation, they entrust their capital to the corporation's directors. While the capital belongs to the investors, the directors are the ones in charge. Through this arrangement, the directors act as agents for the stockholders, managing the corporation and trying to make it profitable for the investors. Nonetheless, the relationship between shareholders and directors has always been a complex one, with shareholders always trying to increase their control and tension rising, especially in the last few years.

The Board, for all the reasons mentioned above, has generally been perceived as the backbone of corporate governance: its leadership and governance structure underpin the stability and future growth of the organization[28]. The relationship of the board with all the members of the environment in which the firm operates is essential for the business to thrive: confusion regarding roles, responsibilities, powers can, in the end, lead to catastrophic situations. Everyone's role should be clearly defined and in no situation should they exceed the boundaries of their areas of authority.

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1. Board's Fiduciary Duties

As already mentioned before, directors bear fiduciary duties: when accepting their seat on the board, directors are indirectly committing to always prioritizing shareholder's needs.

[27]Thomson Reuters (2023), *Practical Law Corporate & Securities, Fiduciary Duties of the Board of Directors, Practical Law Practice Note Overview,* STAN. L. REVIEW, https://law.stanford.edu/wp-content/uploads/2023/01/Fiduciary-Duties-of-the-Board-of-Directors.pdf.

[28] Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine,* 38 FLA. ST. U. L. REV. 209 (2011), also available as CARDOZO LEGAL STUDIES RESEARCH PAPER NO. 299 (2010), https://ssrn.com/abstract=1582255.

The fiduciary duties are legal and ethical obligations that require board members to act in the best interests of the corporation and its shareholders[29]. These duties ensure that the board exercises proper governance and decision-making. Directors owe two core fiduciary duties: the Duty of Care, which requires directors to make informed business decisions and to refrain from conduct that injures the corporation[30], and the Duty of Loyalty, which requires that directors act and make decisions in the best interests of the corporation, not in their own personal interest[31].

a. Duty of Care

Codified in California[32] and New York[33] but not in Delaware, the Duty of Care has been defined *"as the obligation to use the amount of care that an ordinarily careful and prudent person would use in similar circumstances"*[34]. The duty of care does not mandate the board to take any specific actions or decisions. Instead, it sets a standard of conduct that emphasizes how decisions should be made, not the actions that should be taken: directors are expected to choose after a thoughtful consideration, having all the informations existent at hand. Director's choices are always closely scrutinized and no errors are permitted: however, sometimes, to gain a competitive advantage and increase the firm's profits, directors are faced with complex situations that involve significant risks. Delaware courts have always known that businesses, especially in competitive or volatile industries, have to take calculated chances to promote growth and profitability. At the same time, judges and courts are aware that they lack of expertise and deep knowledge in most businesses's fields: as a result, courts generally refrain from overturning a board's decision. Shareholders are even less qualified to evaluate a

[29] Meghan Day, *Fiduciary Duty 101: Definitions, Breaches, and Prevention Tips, Boards & Governance* (Mar. 25, 2024), https://www.example.com/blog/fiduciary-duty-101.

[30]Stanford Law School, *Fiduciary Duties of the Board of Directors* (2023), STAN. L. REVIEW, https://law.stanford.edu/wp-content/uploads/2023/01/Fiduciary-Duties-of-the-Board-of-Directors.pdf.

[31] Id.

[32] Cal. Corp. Code § 309(a).

[33] NYBCL § 717(a).

[34] *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985).

business decision because, even though they might possess the expertise Courts lack, most of the time they do not have all the information and insights directors have. To overcome the inability of both the Courts and the Shareholders to assess the rationality behind a board's choice, the Business Judgment Rule was introduced.

The Business Judgement Rule is the most prominent standard of judicial review under corporate law[35]. It protects the decisions of a company's board of directors from judicial scrutiny, as long as those decisions are made in good faith, with due care and in the honest belief that directors acted in the best interests of the company and its shareholders.

The Business Judgment Rule provides directors with an extremely helpful shield: if directors are able to satisfy 6 preconditions, they are generally protected from liability, even if the decision does not lead to the desired outcome. First, the Business Judgement Rule is relevant only when directors actually exercise business judgment: a decision to refrain from action is an action itself. Inaction will be scrutinized under Duty of Care. Second, the decision-maker must act without conflicts of interest, ensuring personal interests do not interfere with their duty to the corporation. Third, the decision cannot be tainted by fraud or illegality: illegal acts, even if they benefitted the corporation, will not be protected. Fourth, the BJR does not protect actions amounting to waste. Fifth, the Business Judgment Rule will preclude the review of an action if this can be attributed to a rational business purpose: the shield will not apply if the board "acted in a manner that cannot be attribute to any rational business purpose"[36]. Lastly, the decision must be informed, requiring that directors gather and consider all material information reasonably available before acting [37]. When these six preconditions are met, courts typically refrain from second-guessing the decision. If the Business Judgment Rule is

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[35] Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 19, 2017), https://corpgov.law.harvard.edu/2017/01/19/the-importance-of-the-business-judgment-rule/.

[36] *Brehm v. Eisner*, 746 A.2d 244 (Del. 2000).

[37] Adam B. Badawi, *The Business Judgment Rule* (May 31, 2023), UNPUBLISHED MANUSCRIPT, https://ssrn.com/abstract=4460833.

rebutted because the plaintiff is able to demonstrate that the directors did not satisfy at least one of the elements mentioned above, Delaware courts examine directors' actions under another standard of review, the Entire Fairness Standard[38].

"*Liability can be imposed where the directors acted in bad faith, did not reasonably believe the action to be in the corporation's best interest, were not properly informed, were not independent, engaged in self-dealing, or failed to exercise oversight "*[39].

Alleged breaches of duty of Loyalty are not protected under the Business Judgement Rule.

b. Duty of Loyalty

The Duty of Loyalty addresses situations involving conflicts of interests. Conflicts of interest arise when a director's personal interests interfere with their fiduciary duties: directors could be compelled to make decisions that benefit themselves rather than the company, therefore undermining the trust and the stability of the corporate structure. The duty of loyalty requires corporate directors and officers to act in the best interests of the corporation and its shareholders, prohibiting self-dealing, misuse of corporate opportunities and any actions that place the individual's personal gain above the welfare of the corporation.

In Delaware common law, the duty of Good Faith is analyzed as a component of the duty of loyalty, not as an independent fiduciary duty.[40] *"The duty of good faith has been defined as honesty in fact in the conduct or transaction concerned"*[41] .

The Directors and officers of a corporation are obligated to act in good faith, meaning they must conduct themselves with honesty, integrity, and a genuine intent to serve the best interests of the corporation. It requires that directors refrain from intentional misconduct, knowing violations of law, or decisions that exhibit a conscious disregard

[38] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 643 (Del. 2014).

[39] MBCA §8.31(a)(2).

[40] *Stone v. Ritter*, 911 A.2d 362, 370 (Del. 2006).

[41] *Heritage Surveyors & Eng'rs, Inc. v. Nat'l Penn Bank,* 801 A.2d 1248.

for their responsibilities. Delaware courts, particularly in cases such as *In re Walt Disney Co. Derivative Litigation*[42], have clarified that, although there is no single, universally accepted definition of bad faith, it is not merely poor judgment or negligence but involves a knowing and deliberate indifference to corporate welfare. Good faith is the critical ethical threshold in the exercise of corporate power.

For a short period of time, the duty of good faith was considered by Delaware courts to be an independent fiduciary duty, separate from the duties of care and loyalty.

The Delaware Supreme Court's decision in *Stone v. Ritter* [43] marked a significant shift. In this occasion, the Delaware Supreme Court explicitly affirmed that the duty of good faith is *"subsidiary to the duty of loyalty"*[44]. This means that when a director acts in bad faith, they are essentially disloyal to the corporation, even if they do not directly benefit personally from the misconduct. A failure to act in good faith constitutes a breach of the duty of loyalty.

After *Stone v. Ritter* [45], consciously disregarding one's oversight responsibilities constituted a breach of duty of loyalty as well.

Oversight Duties refer to the responsibilities of a board of directors to actively monitor and supervise the management of a corporation: these include monitoring the company's compliance with laws and regulations, implementing internal controls and systems, ensuring transparency and accountability. In general, directors have to *"be reasonably informed concerning the corporation"*[46].

"*Caremark* claims" are claims that directors breached their fiduciary duties by not making "*a good faith effort to oversee the company's operations.*"[47] In *re Caremark*

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[42] *In re Walt Disney Derivative Litig.*, 906 A.2d 27 (Del. Ch. 2006).

[43] Stone v. Ritter, 911 A.2d 362 (Del. 2006).

[44] Id.

[45] Id.

[46] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[47] Gail Weinstein, Warren S. de Wied & Philip Richter, *Caremark Liability for Regulatory Compliance Oversight*, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP (July 8, 2019), https://corpgov.law.harvard.edu/2019/07/08/caremark-liability-for-regulatory-compliance-oversight/.

International Inc. Derivative Litigation[48], the shareholders who filed the lawsuit claimed the board failed in its duty to oversee the company's compliance with laws and regulations concerning healthcare fraud and abuse. The Delaware Court of Chancery ruled that corporate directors must actively monitor and oversee the corporation's operations and must, when needed, implement appropriate monitoring systems: a lack of such oversight constitutes a breach of the directors' fiduciary duty.

This case set a significant precedent: since then, to determine whether a corporate director failed to fulfill his oversight duties, the Caremark Standard is applied. Was the director proactive in establishing mechanisms for detecting and preventing legal violations or corporate misconduct? Did the director consciously disregard red flags that would indicate that the company is at risk of violating the law or acting inappropriately? For a director to be found liable for failure of oversight, at least one of these elements must be satisfied.

Delaware courts are aware that industries are unpredictable and directors are not expected to eliminate all possible threats: however, neglecting their oversight responsibilities, failing to address known risks or overlooking the implementation of proper monitoring systems can lead to liability under *Caremark*.

Violations of Duty of Loyalty can present themselves in other forms as well.

The Corporate Opportunity Doctrine prohibits directors and officers from taking business opportunities for themselves that rightfully belong to the corporation. A board's decision will be deemed invalid by the Court if the plaintiff is able to show that the directors usurped a corporate opportunity. In order to determine whether a corporate opportunity was wrongfully taken by a director or officer, the standard to use is the Guth Test[49]. In *Guth v. Loft*[50], the central legal issue was whether Charles Guth, as president of Loft, Inc., had wrongfully exploited a business opportunity that properly belonged to the corporation because it fell within Loft's existing line of business.

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[48] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[49] *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

[50] *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. 1939).

Loft was a prominent chain of soda and candy shops that relied on Pepsi-Cola syrup for its beverages. When the Pepsi-Cola Company faced financial difficulties, Guth personally acquired it without informing Loft or offering the company the opportunity to make the acquisition. He then used Loft's resources to develop the Pepsi brand for his own benefit. The court found that Guth had violated his fiduciary duty of loyalty by usurping a corporate opportunity that rightfully belonged to Loft.

The Guth Test looks at three key factors: 1. Is the Opportunity in the Corporation's Line of Business? 2. Does the corporation have an interest or expectancy in the opportunity? 3. In which capacity did the corporate fiduciary discover the opportunity? Personal or as a corporate fiduciary?

If the plaintiff can satisfy all the prongs of the test, the defendant will be held liable for breaching the duty of Loyalty.

B. Shareholders Rights and Responsibilities

As of right now, our analysis of the corporation has been solely focused on the directors's side: the powers they own, the duties they bear, the demanding choices they must make. But there is another important player whose perspective must be taken into account as well. The other side of the corporate coin: the shareholders.

(1) "Shareholder" means a holder of record of stock in a stock corporation, or a person who is the beneficial owner of shares of such stock held either in a voting trust or by a nominee on behalf of such person".[51]

In simpler terms, Shareholders are the owners of the corporation. Through the investment of their capital, they are responsible for the functioning of the firm: they make the day-to-day operations possible. As owners, they are entitled to the profits of the company: if a company is successful, shareholders benefit from increased stock valuations or higher dividends. At the same time, if the company is going through a

[51] Del. Code Ann. tit. 8, § 220 (2021).

rough patch, shareholders experience losses and, if the situation appears to be irreversible, they might exit the company altogether.

Therefore, the success of the corporation is of the utmost importance for them.

The Shareholder's role comes with many rights and responsibilities. Being a shareholder means having a voice on the decision-making process of a corporation: they have the ability to vote on major decisions such as electing the board of directors, approving mergers and acquisitions, authorize new equity issues or amend the firm's articles of organization.

However, not all shareholders hold the same power. The degree of influence a shareholder has depends on different factors: the type of shares and the number of shares they own, how the corporate structure is shaped and the governance policies adopted by the corporation.

Under DGCL § 212[52]:

(a) *Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder [...].*

(b) *Each stockholder entitled to vote at a meeting of stockholders or to express consent or dissent to corporate action in writing without a meeting may authorize another person or persons to act for such stockholder by proxy [...].*

So, unless provided otherwise, all stockholders own at least one vote and therefore can, in small part, shape the decisions of the corporation.

But Shareholders are in general entitled to a range of rights. As mentioned before, they are entitled to the profits of the corporation, hence they have the right to receive dividends when the company declares them.

In addition, the old Section 220 of the *DGCL*[53] granted shareholders the right to inspect the corporation's books and records[54]. However, this right is limited to requests made

52 Del. Code Ann. tit. 8, § 212 (2024).

53 Del. Code Ann. tit. 8 (2024).

54 Del. Code Ann. tit. 8, § 220 (2020).

for "*proper purposes*"[55], meaning shareholders must demonstrate that their inquiry will ultimately benefit the company. Investing misconduct or wrongdoing or evaluating a business decision are considered proper purposes. Under the revised section 220[56], which will be throughly analyzed in the upcoming chapters, the same right is still granted but it now comes with additional limitations.

Shareholders can also file derivative lawsuits on behalf of the corporation against directors or officers who breach their fiduciary duties and they have the right to attend shareholders meetings, where they can voice their concerns and ask questions about the company's performance.

The rights they enjoy depend on the type of shares they own. Many Companies usually issue two types of Stock: Common and Preferred. Common Shareholders hold common stock, which entitles them to vote on corporate matters and receive dividends if declared. Preferred shareholders hold preferred stock, which typically does not come with voting rights but offers priority claim to dividends: their dividends are usually fixed even if the profits decrease while Common stock dividends may decline or not be paid at all during periods of crisis.

Some companies further divide their shares according to the number of votes they carry: most of the time, Class A shares carry ten votes per share while Class B shares hold only one vote per share.

A shareholder's classification as either a majority or minority shareholder depends on the proportion of the company's shares they own. A Majority shareholder owns and controls more than 50% of a company's outstanding shares, granting them significant control over corporate decision. Minority shareholders own less than 50% of the company's shares and, as a result, have limited control over decisions.

Shareholder's Voting Rights are fundamental aspects of corporate governance, defining the relationship between a corporation and its shareholders. For a firm to perform at its

[55] Del. Code Ann. tit. 8, § 220 (2020).

[56] Del. Code Ann. tit. 8, § 220 (2025).

maximum, a stable relationship between the two is needed: unfortunately, this is not a guarantee and sometimes things worsen faster than anyone could have predicted.

As a result, Corporate Governance is constantly evolving: there is an ongoing development of clearer, more comprehensive frameworks to better handle complex business challenges and to prevent situations where the roles, the responsibilities, or the decision-making processes become unclear or lead to conflicts.

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1. Controlling Shareholders

While enumerating the different, possible types of shareholders, majority shareholders were briefly mentioned and were defined as the owners and controllers of more than 50% of a company's outstanding shares. Majority Shareholders own the largest single stake in the company which ensures them a decisive vote in most matters, such as mergers, acquisitions or changes in governance structures. Therefore, their influence over corporate decisions can be exercised by simply voting.

The term Majority Shareholder is often erroneously interchanged with the term Controlling Shareholder. A Controlling Shareholder is an individual or an entity with enough "power" to influence or direct a company's major decisions.

Under Delaware law, a controlling stockholder is a stockholder who either (1) "*controls a majority of the company's voting power* or (2) exercises *a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock*."[57]

Hence, when the shares are widely dispersed among the shareholders and no shareholder has a significant voting power over the others, it is possible for a stockholder who does not own the majority of shares to become a Controlling one: it can occur in companies with a dual-class share structure, where some shares have more voting power than others.

[57] *Corwin v. KKR Fin. Holdings LLC,* 125 A.3d 304, 307 (Del. 2015) (en banc) (footnote omitted). Unaffiliated stockholders may constitute a controlling stockholder group, regardless of whether or not they would individually constitute a controlling stockholder, if the stockholders execute an agreement that gives them voting power, demonstrate a history of cooperation and coordination, or are connected in another "legally significant way."

Notably, the introduction of SB 21[58] reconceptualized the term 'Controlling Stockholder,' resulting in substantial legal and practical implications which will be further discussed in the following paragraphs.

The focus now lies more on distinguishing controlling stockholders from majority ones, rather than comparing the two definitions.

The main difference is the degree of influence the two holds: while a majority shareholder always has control and is able to exert this influence through its ownership, a controlling shareholder can influence the company even with a minority stake, often through strategic positioning or arrangements that give them an outsized influence compared to their shareholding.

An increasing number of firms are nowadays shifting their long - term goals to satisfy the demands of high-stake shareholders.

As the attention towards controlling stockholders' demands continues to grow, some ambiguity around their rights and powers still remains. On this note, Senate Bill 21[59] addresses the definition of a “controlling stockholder.” Prior to SB 21[60], Delaware case law allowed courts to determine controlling stockholder status based on a variety of factors, including ownership percentage and influence over corporate decisions. This approach led to uncertainty and inconsistent application. The provision, on the other hand, codifies a controlling stockholder as one who either owns a majority of the corporation’s voting power, has the ability to control the election of directors, or holds at least one-third of the voting power along with managerial influence. This definition establishes a clearer and more predictable standard, reducing ambiguity in determining controlling stockholder status.

Controlling shareholders and their activities in publicly traded companies have long stirred debate and controversy: nonetheless, with the ongoing evolution of market

[58] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[59] Id.

[60] Id.

practices and controlling shareholders playing an increasingly influential role in shaping corporate governance, the Courts seem to be more and more inclined to pass along favorable decisions, transitioning from a “board - centric “ view to a "shareholder - centric” one. With the overturning of prior decisions, the introduction of new legal provisions, and a notable shift in corporate governance dynamics, the landscape of corporate law is undergoing significant transformation and the consequences are yet to be determined.

In the following chapters, we will analyze in depth the changes the newly - issued Senate Bills have brought to the corporate ecosystem.

III. Understanding the *Moelis v. West Palm Beach Firefighters' Pension Fund* Decision

The case of *Moelis v. West Palm Beach Firefighters*[61] serves as a compelling example of the ongoing transformation within the American corporate landscape. It highlights the increasing tension between long-standing principles of corporate governance and contemporary contractual mechanisms designed to grant more and more control and power in the hands of select and influential individuals. In the case at hand, which will be thoroughly analyzed in the following paragraphs, the Delaware Court of Chancery initially issued a ruling that reaffirmed the central authority of the Board of Directors while restricting shareholder's demands. However, the subsequent introduction of Senate Bill 313[62] effectively overturned that decision.

A. Facts of the Case

"Moelis & Company" is a global independent investment bank that provides advisory services on mergers and acquisitions (M&A), restructuring, capital raising, and other financial matters. Founded in 2007, the company was known for its expertise and its personalized services. By 2013, it was generation $400 million in annual revenues.

The company's founder, Ken Moelis, sits as CEO and Chairman of the Board.

In 2014, after years of success operating as a private entity, the company decided to go public.

Before the IPO, Moelis transferred the banks business to the "Moelis & Company Group LP", also known as "The Group", a newly formed Delaware Limited Partnership. This new entity issued General Partner Units and Class A Limited Partnership Units. Then, "The Company" was formed and set out by Moelis to be the Public Traded Entity: the Company holds all member interests in a Limited Liability Company which functions as the general partner of the Group. The Company owns Class A units, which

[61] *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, No. 2023-0309-JTL, 2024 WL 1214206 (Del. Ch. Mar. 29, 2024).

[62] S. 313, 153rd Gen. Assemb., Reg. Sess. (Del. 2024).

grant it a 27% economic interest in the Group. The remaining 73% of Class A units were allocated to Moelis & Company Partner Holdings LP , known as “Holdings”, another entity whose equity was owned by Moelis, along with other bankers and employees. The Company has 2 authorized classes of common stock: Class A Shares, which carry one vote per share and are traded on the New York Stock Exchange, and Class B Shares, which carry 10 votes per share. Only Holdings received Class B common stock. The Class B shares carry ten votes per share as long as Moelis

(A) *maintains directly or indirectly ownership of an aggregate of at least 4,458,445 shares of Class A Common Stock . . . .;*

(B) maintains directly or indirectly beneficial ownership of at least five percent (5%) of the issued and outstanding Class A Common Stock [and Class A units issued by the Group, which are convertible into Class A shares];

(C) has not been convicted of a criminal violation of a material U.S. federal or state securities law that constitutes a felony or a felony involving moral turpitude;

(D) is not deceased; and

(E) *has not had his employment agreement terminated . . . because of a breach of his covenant to devote his primary business time and effort to the business and affairs of the [Company] or because he suffered an Incapacity*.[63]

One day before the Company’s shares began trading publicly, on April 13th, Moelis, three of his affiliates, and the Company entered into a Stockholder Agreement. Said Agreement contains a significant number of provisions that influence how the Company operates and what the Board can and cannot do.

The “Pre-Approval Requirements” mandates that the Company’s Board of Directors must obtain Moelis’ prior written consent before taking action in eighteen different categories. These categories cover virtually every action the Board could take, meaning the Board can only proceed with Moelis' approval.

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[63]DX 3, Charter art. 4, pt. 2(a)(ii) (formatting added). The Charter authorized the issuance of one billion shares of Class A common stock, and the Company issued 160 million shares in its IPO. The requirement to hold 4,458,445 shares of Class A common stock or instruments convertible into shares equates to owning approximately 0.4% of the authorized shares and 2.7% of the shares issued in the IPO.

The "Board Composition Provisions" require the Board to ensure that Moelis can appoint a majority of its members. The Board is contractually obligated to limit its size to no more than eleven seats, with Moelis having the right, as stated in the "Designation Right," to name designees for a majority of those seats. The Board is required to nominate Moelis' designees as candidates for election (the "Nomination Requirement") and recommend that stockholders vote in favor of them (the "Recommendation Requirement"). The Company must make reasonable efforts to help Moelis' designees get elected and remain in their positions (the "Efforts Requirement"). Furthermore, if a Moelis designee's seat becomes vacant, the Board must fill the vacancy with another Moelis designee (the "Vacancy Requirement”). A final provision in the Stockholder Agreement addresses the composition of the Board's committees. The "Committee Composition Provision" mandates that any committee created by the Board must include Moelis' designees in proportion to their representation on the full Board: therefore, the Board cannot form committees with a different number of Moelis designees or establish independent committees without Moelis' approval.

West Palm Beach Firefighters' Pension Fund, a stockholder of the Company, filed a lawsuit against Moelis & Company on behalf of itself and other Class A stockholders, challenging the validity of the provisions under the Delaware Corporate Law. The plaintiff, a stockholder of the Company, argued that the Pre-Approval Requirements, the Board Composition Provisions, the Committee Composition Provision violate Section 141(a)[64] of corporate law. The Composition Provision violate also Section 141(c)[65].

B. Legal Issues and Arguments

The plaintiff’s argument is rooted in the decision in *Abercrombie v. Davies*[66] by Chancellor Seitz in 1995. In such circumstance, the court highlighted the importance of

[64] Del. Code Ann. tit. 8, § 141(a) (2024).

[65] Del. Code Ann. tit. 8, § 141(c) (2024).

[66] *Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957).

Board's freedom when exercising their power: the court held that governance restrictions that "*effectively remove from directors, to a very substantial extent, their duty to exercise their own best judgment on management matters*"[67] are to be considered invalid under Section 141(a)[68] of the *Delaware General Corporation Law*[69].
Section 141(a)[70] of the *DGCL*[71] deals with the powers of the board of directors and states that "*the business and affairs of every corporation [...] shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.*"[72]
From the *Abercrombie v. Davies*[73] case, an important legal standard was derived. The *Abercrombie Test*[74] has been applied by the court in numerous occasions and it is a very helpful tool to address issues related to governance and control provisions in corporate agreements.

According to the Plaintiff, the Challenged Provisions do not meet the test: first, the Pre-Approval Requirements give Moelis the power to dictate the actions the Board can take, depriving the directors of their ability to make independent decisions. Furthermore, the directors must seek Moelis' approval before taking any action, preventing them from expressing their power as they please and from using their own judgement. Similarly, the Board Composition Provisions restrict the directors' discretion in recommending candidates, filling vacancies and determining the size of the Board. The Committee Composition Provision, in addition, limits the directors' control over committee

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[67] Id.

[68] Del. Code Ann. tit. 8, § 141(a) (2024).

[69] Del. Code Ann. tit. 8 (2024).

[70] Del. Code Ann. tit. 8, § 141(a) (2023).

[71] Del. Code Ann. tit. 8 (2024).

[72] Del. Code Ann. tit. 8, § 141(a) (2023).

[73] *Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957).

[74] Id.

formation by requiring that each committee include Moelis' designees in proportion to their representation on the full Board, further curbing the directors' autonomy.

The company's defense is a "*one-size-fits-all response*"[75]: the Stockholder Agreement the company entered is nothing different from a contract. Delaware corporations possess the power to contract and contracts by definition constrain a board's freedom of action: Section 141(a)[76] does not provide a mechanism for invalidating contracts nor it gives us specific guidelines to determine which contracts are rightfully under the law. Because there is nowhere to draw the line, Section 141(a)[77] cannot invalidate any contracts at all.

But the Court argued that the challenged agreement has some features that make the situation more complex: the contract was entered into just before the Company's shares began trading publicly and the only parties involved in the agreement are the Company, Moelis and three entities under his control. The Challenged Provisions are specifically designed to bind the Board rather than the Company itself. Unlike commercial contracts, the Stockholder Agreement is an indefinite agreement that the Board cannot terminate: only Moelis can end it.

For the reasons listed above, the Stockholder Agreement cannot be considered similar to a supply agreement, a credit agreement or any other type of external commercial contract which are examples of legal, lawful contracts.

Therefore, the question now is whether the Stockholder Agreement can pass the *Abercrombie test.*[78]

[75] *West Palm Beach Firefighters' Pension Fund v. Moelis & Co***.**, C.A. No. 2023-0309-JTL, 2024 WL 12345678 (Del. Ch. Feb. 23, 2024).

[76] Del. Code Ann. tit. 8, § 141(a) (2024).

[77] Id.

[78] *Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957).

1. The Abercrombie Test

As stated above, the *Abercrombie Test*[79] is used to determine whether certain governance restrictions unlawfully restrict the power of the Board or not.

The Test is made up of two steps. The inquiry begins by determining whether the challenged provision is part of an internal governance arrangement. If it is not, the inquiry ends. If it is, the second step of the test is applied. Under *Abercrombie*[80], governance restrictions violate Section 141(a)[81] when they *"have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters"*[82]*:* should the challenged provisions curb director's ability to use their own judgment in any way, they will be deemed invalid under Section 141(a)[83].

2. Internal Governance

To assess if the challenged provision is part of an internal governance arrangement, we must first define what constitutes a company's internal governance and what is included under this definition.

Internal Governance of a corporation refers to all the structures, rules, and processes that determine how a corporation is managed and controlled. The *DGCL*[84] defines what powers the corporation can exercise by establishing statutory provisions that shape corporate decision-making. The powers the corporation has are only the ones provided by the *DCGL*[85]: when a corporation tries to take an action which is outside the jurisdiction defined by the *DCGL*[86], that action is ultra vires and void.

[79] Id.

[80] *Abercrombie v. Davis*, 130 A.2d 338 (Del. 1957).

[81] Del. Code Ann. tit. 8, § 141(a) (2024).

[82] *Abercrombie v. Davis*, 130 A.2d 338 (Del. 1957).

[83] Id. 79

[84] Del. Code Ann. tit. 8 (2024).

[85] Id.

[86] Id.

The *DCGL*[87] addresses Internal Affairs Issues. Therefore, Section 141(a)[88] of the DCGL[89] addresses Internal Affair Issues as well: in particular, Section 141(a)[90] ensures that any limitations or guidelines imposed within the company on the board's decision-making must be in line with legal and corporate standards. But a contract really represents the External Exercise of the corporate Power. If the Courts is dealing with an external expression of corporate power, why should Section 141(a)[91], which governs internal corporate management, be the one to apply to assess the lawfulness of the contract? How can the two things coexist? In such specific situation, the challenged contract is indeed seeking to implement internal restrictions and it is actively trying to curb the power of the board: the Section 141(a)[92], after analyzing the situation, assess whether the limitation are legal or not. The Company, when bringing their arguments in front of the court, affirms that it is not possible to make a clear distinction between internal governance arrangements and external commercial agreements.

The Court disagrees. A distinction is very much possible. "H*umans in general, and legal professionals in particular, think in categories. Categories are based on prototypes, with penumbral cases that move progressively further away from the prototypes. Judges and lawyers examine precedent to find key characteristics, then reason from those precedents to apply the law to a new set of facts. Using prototypes and categories, courts can identify provisions that allocate authority among internal corporate actors and seek to constrain the board"*[93]. The Court found that governance

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[87] Id.

[88] Del. Code Ann. tit. 8, § 141(a) (2024).

[89] Del. Code Ann. tit. 8 (2024).

[90] Del. Code Ann. tit. 8, § 141(a) (2024).

[91] Del. Code Ann. tit. 8, § 141(a) (2024).

[92] Id.

[93] Claire A. Hill, *Beyond Mistakes: The Next Wave of Behavioural Law and Economics*, 29 QUEEN'S L.J. 563, 573 (2004) ("My focus in this paper is on what may be the main way people make sense of the world and of themselves: the process of 'categorization'— putting things into categories."); Ronald Chen & Jon Hanson, *Categorically Biased: The Influence of Knowledge Structures on Law and Legal Theory,* 77 S. CAL. L. REV. 1103, 1131 (2004).

arrangements usually have features that make them stand out: the Six Factors below make the categorization way easier. Firstly, Governance agreements often have a statutory grounding in the Delaware General Corporation Law[94]. The nature of the Counter - parties of governance agreements is a very common second factor: usually, counter - parties are internal corporate actors, such as officers, directors, stockholders, or their affiliates, as opposed to external entities like suppliers or customers which act as counter - parties in commercial contracts. Unlike this last type of contract, governance agreements define how intra-corporate actors authorize the corporation's exercise of its corporate power. They are focused on the allocation of control rights within the corporation and they do not involve the exchange of a specific good or service. In addition, governance agreements are harder to terminate and, in case of a breach, while commercial contracts often rely on monetary damages, governance agreements typically seek equitable relief to enforce control rights, limiting the breaching party's ability to act freely. If a contract has one or more of these factors it is a Governance Agreement. If the Challenged Provision appears in a Governance Arrangement, then the Court applies the *Abercrombie Test*[95].

Examining the Stockholder Agreement under review, all the Company's counterparties are intra-corporate actors (Moelis and his affiliates). Except for the Nomination Requirement and the Efforts Requirement, all the Challenged Provision are designed to restrict the board and their exercise of power. In addition, there is no exchange of any good or service between the parties, no sign of any commercial bargain: the purpose of the whole agreement was only to locate control rights to Moelis. Lastly, the Board has no ability to terminate the contract. The Stockholder Agreement explicitly states that the Board cannot remove Moelis as CEO without his prior approval while the Secondary Class B Condition is in effect. The Secondary Class B Condition will be in effect for as long as the Stockholder Agreement remains in place. The Board cannot terminate the Stockholder Agreement unilaterally and cannot either terminate it by causing the Class

[94] Del. Code Ann. tit. 8 (2024).

[95] *Abercrombie v. Davies*, 130 A.2d 338 (Del. 1957).

B Condition to fail. The Board's only potential way of causing failure would be by terminating Moelis' employment agreement if he *"breaches his covenant to devote his primary business time and effort to the business and affairs of the Company and its subsidiaries or because he suffered an Incapacity"*[96]. But even this condition is outside the reach of the board. The amount of time and effort Moelis dedicates to the Company is at his choosing, and the Board has no control over whether he suffers an Incapacity or not. Furthermore, under the Pre-Approval Requirements, the Board must seek Moelis' prior approval for the *"removal or appointment of any officer of the Company that is, or would be, subject to Section 16 of the Exchange Act."*[97]*:* his approval would be needed anyway.

For all the reasons listed above, the Stockholder Agreement is in fact an Internal Governance Agreement and the challenged Provisions, which appear in it, are subject to the second step of the Abercrombie Test.

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3. Restriction of Power?

As already stated before, under *Abercrombie*,[98] governance restrictions violate Section 141(a)[99] when they *"have the effect of removing from directors in a very substantial way their duty to use their own best judgment on management matters"*[100]. According to the plaintiff, the Challenged Provisions are direct limitations of what a board can do. This can be inferred by reading only the first sentences of the Agreement: "*As long as the Class B Condition is satisfied, the Board shall **not** authorize, approve or ratify any of the following actions or any plan with respect thereto without the prior approval (which approval may be in the form of an action by written consent) of [Moelis]"*[101].

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[96] DX 3, Charter art. 4, pt. 2(a)(ii).

[97] Id.

[98] *Abercrombie v. Davis*, 130 A.2d 338 (Del. 1957).

[99] Del. Code Ann. tit. 8, § 141(a) (2024).

[100] *Abercrombie v. Davis*, 130 A.2d 338 (Del. 1957).

[101] DX 3, Charter art. 4, pt. 2(a)(ii).

The company argued that those contested provisions were part of a Stockholder Agreement which is indeed permitted by the Delaware Governance Corporate Law.

The Court, once again, did not agree. It is true that Section 218(c)[102] of the *DGCL*[103] authorizes *"[a]n agreement between 2 or more stockholders, if in writing and signed by the parties thereto, may provide that in exercising any voting rights, the shares held by them shall be voted as provided by the agreement, or a*s *the parties may agree, or as determined in accordance with a procedure agreed upon by them"* but it also states that these type of Agreements are permitted as long as they focus on how stockholders will exercise their voting rights. In no way, a stockholder agreement can try to alter an internal governance structure that the *DGCL*[104] mandates: within the corporate hierarchy, the *DGCL*[105], along with the charter and the bylaws, takes precedence over any contractual arrangement. "*[S]tockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation*"[106]: a provision in a stockholder agreement that tries to enable stockholders to manage the business of a corporation is invalid. Therefore, are all the provisions of the Stockholder Agreement invalid? In order to determine which ones of these are unlawful and which are not, we must address each provision separately. The plaintiff argues that the Pre-Approval Requirements, the Board Composition Provisions, the Committee Composition Provision violate Section 141(a)[107] of corporate law.

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102 Del. Code Ann. tit. 8, § 218(a) (2024).

103 Del. Code Ann. tit. 8 (2024).

104 Del. Code Ann. tit. 8 (2024).

105 Id.

106 Del. Code Ann. tit. 8, § 141(a) (2023).

107 Del. Code Ann. tit. 8, § 141(a) (2024).

C. Court's Ruling and Reasoning

Let's start with the Pre - Approval Requirements. The way in which the Pre - approval Requirements are framed is a perfect example of how a provision may try to change the corporate order: the board cannot take any action without a written and prior consent of Moelis. Therefore, Moelis is indirectly managing the corporation by deciding which action gets approved and which doesn't: he owns a power way higher than what his role mandates. The Company defended themselves by clarifying that the Pre - Approval Requirements are just "consent rights"[108]. The Consent rights, by definition, give one party the authority to approve or veto specific actions or decisions made by the other party involved in the agreement. They do not constrain the board to do anything. The Board can indeed act as it pleases and *"occasionally Moelis might disagree"*[109]. The argument cannot stand in court. If another party can review board decisions, *"then the directors' power would become merely advisory rather than authoritative."* [110] The Company's reasoning might have held if the players were different: since the "other party" of the agreement is the Board itself, things are more complicated. A right to prevent the Board from acting is limiting the Board's authority. The directors can only act to the extent Moelis lets them. The Pre-Approval Requirements significantly reduce the directors' ability to exercise their own judgment on all management decisions: as a consequence, they are facially invalid under the *Abercrombie Test*. There are six Board Composition Provisions: the Size Requirement, the Designation Right, the Nomination Requirement, the Recommendation Requirement, the Efforts Requirement, and the Vacancy Requirement. Let's address each one of them separately.

Firstly, the Recommendation Requirement. The Recommendation Requirement mandates that the Board recommend in favor of Moelis's designees. Section 251(b)[111] provides that *"[t]he board of directors of each corporation which desires to merge or*

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[108] In *re Cox Communications, Inc. Shareholders Litigation,* 879 A.2d 604 (Del. Ch. 2005).

[109] DX 3, Charter art. 4, pt. 2(a)(ii).

[110] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

[111] Del. Code Ann. tit. 8, § 251(b) (2021).

consolidate shall adopt a resolution approving an agreement of merger or consolidation and declaring its advisability." The Section implies that the Board must be the first one to approve or to advise on a possible decision. Then, under Section 251(c)[112] after board approval, the decision must be submitted to stockholders. Not the other way around. In addition, the duty of loyalty[113] mandates that directors act in stockholders' best interests: the directors have to make informed, truthful decisions. The same logic applies when recommending candidates. When recommending candidates, the board must choose and propose individuals whom it does actually believes should be directors. The Recommendation Requirement disregards completely this idea: the Board has to recommend Moelis's candidates, regardless of what they actually think about them. This obligation infringes upon the *Abercrombie test*[114] by significantly stripping the directors of their duty to exercise independent judgment on management decisions. The Recommendation Requirement cannot operate and it is invalid under Section 141(a)[115].

The Vacancy Requirement mandates the Board to fill any vacancy in a seat previously held by a Moelis designee with another Moelis designee. But Article Fifth, Part (5) of the Charter[116] gives this power exclusively to the Board. "*Subject to the terms of any one or more classes or series of Preferred Stock, any vacancy on the Board of Directors that results from an increase in the number of directors may be filled only by a majority of the Board of Directors then in office, provided that a quorum is present, and any other vacancy occurring on the Board of Directors may be filled only by a majority of the Board of Directors then in office, even if less than a quorum, or by a sole remaining director."*[117] Under these provisions, the authority to fill vacancies is solely vested in the Board. This power includes the discretion to choose the individual who will occupy the

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[112] el. Code Ann. tit. 8, § 251(c) (2024).

[113] Del. Code Ann. tit. 8, § 141(a) (2020).

[114] *Abercrombie v. Davis*, 126 A.3d 189 (Del. 2015).

[115] 8 Del. C. § 141(a) (2024).

[116] *Moelis & Co.*, Charter Art. 5, § 5 (Del. 2024).

[117] Id.

vacant position. If the Board cannot choose the person to fill a vacancy, its power is being restricted. The Vacancy Requirement violates the *Abercrombie test*[118] and the provision is invalid under Section 141(a)[119].

The Size Requirement mandates that the Company tries its best to maintain a Board with not more than eleven seats, unless Moelis approves a different number. This Provision, at the moment, is superfluous because the Charter and the Bylaws already prevent the Board from having more than eleven seats. Article FIFTH, Part (3)[120] of the Charter states: *"The Board of Directors shall consist of not less than three (3) nor more than eleven (11) members, the exact number of which shall be fixed from time to time by resolution adopted by the affirmative vote of a majority of the Board of Directors then in office".*[121] The Board is already being constrained by the Charter. Nonetheless, the Size Requirement is facially invalid. The Size Requirement can only become operative if the Charter and Bylaws were amended to authorize the Board to have more seats. But, in that case, the Size Requirement would violate the *Abercrombie Test*[122] by removing from the Board of Directors the freedom to choose the number of the board's seats.

The Nomination Requirement obliges the Company to include the Moelis designees in the Company's slate of nominees. The Provision is not invalid. The ability to nominate candidates is a stockholder right, not exclusive to the board. *"The right of shareholders to participate in the voting process includes the right to nominate an opposing slate."*[123]

The Efforts Requirement decrees the Company must use reasonable efforts to ensure that Moelis' designees are elected and continue to serve on the Board. This Requirement is not Invalid. "Use Reasonable Efforts" means that the Company is required to take

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118 *Abercrombie v. Davis,* 126 A.3d 189 (Del. 2015).

119 8 Del. C. § 141(a) (2024).

120 *Moelis & Co.*, Charter Art. 5, § 3 (Del. 2024).

121 Id.

122 *Abercrombie v. Davis*, 126 A.3d 189 (Del. 2015).

123 *Linton v. Everett,* 1997 WL 441189, at 9 (Del. Ch. July 31, 1997); accord *Hubbard v. Hollywood Park Realty Enters., Inc.*, 1991 WL 3151, at 5 (Del. Ch. Jan. 14, 1991).

necessary actions to facilitate the consideration of Moelis' nominees and possibly ensure their election: these necessary actions include adding Moelis' designees to the Company's proxy card or including information about them in the Company's proxy statement.

Lastly, the Committee Composition Provision. Section 141(c)(2)[124] empowers the board to create committees and to select their members. The Bylaws confirm that this rule applies to the Company though Section 3.10[125] which states that *"the Board of Directors may designate one or more committees ... The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meetings of such committee".* The Board has the Power to Establish and select the members. The Committee Composition Provision violates the Abercrombie test and the provision is considered invalid under Section 141(a)[126] and (c)[127].

D. Introduction of Amendment 122(18)

For much of the past century, some of the core corporate law's rules, such as statutory shareholder rights, the fiduciary duties or the central role of the board, were considered to be untouchable. That era seems to be over now and, especially in the last five years, the Corporate Community has witnessed a striking escalation in challenges to the mandatory content of corporate law. Recent advancements, ever - evolving trends, new perspectives have breathed new life into the debate, forcing courts, practitioners, professors and scholars alike to reconsider corporate law's unalterable foundations. Delaware's courts are now regularly tasked with interpreting intricate shareholder agreements and sometimes they are forced to overrule historic precedents.

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[124] Del. Code Ann. tit. 8, § 141(c) (2020).

[125] Moelis & Co., Bylaws § 3.10 (2024).

[126] 8 Del. C. § 141(a) (2024).

[127] 8 Del. C. § 141(c) (2024).

The *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*[128] case, and the consequent introduction of Amendment 122(18)[129], provide us a perfect example of how the corporate landscape is changing. The decision of the Court on *Moelis*[130] left many speechless and it was harshly criticized for a variety of reasons. For decades, stockholder agreements containing provisions similar to those at issue in *Moelis*[131] have been customary and an accepted feature of Delaware corporate practice. These agreements have served as a primary mechanism for granting significant stockholders contractual governance rights and enabling them to play a role in key decision-making processes within the corporate enterprise. The *Moelis*[132] decision, by casting doubt on the enforceability of such provisions, disrupted this long-established market norm: if left untouched, said ruling could destabilize and undermine the Delaware's credibility as the recognized policy leader in the world of corporate law[133]. The ruling was particularly unexpected among corporate practitioners, given Delaware's historically pro-contract stance and its support for private ordering. It raised widespread concern that the decision could open the door to a wave of litigation targeting existing agreements that grant special governance rights to specific investors thereby creating substantial legal uncertainty for corporations and investors alike[134].

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128 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

129 S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

130 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

131 Id.

132 Id.

133 As Professor Larry Hamermesh pointedly wrote in an editorial calling for Section 122(18)'s approval, "*The Moelis decision called into question what it acknowledged has been market practice, creating confusion and uncertainty for untold numbers of Delaware corporations and their executives, employees, investors and advisers*." See Lawrence Hamermesh, "*Del. Needs to Urgently Pass PostMoelis Corporate Law Bill,*" May 29, 2024, LAW360.

134 Christopher Giordano & Carina Meleca, *Delaware Adopts 2024 "Market Practice" Amendments to DGCL*, KRAMER LEVIN (July 24, 2024), https://www.kramerlevin.com/en/perspectives-search/delaware-governor-signs-into-law-amendments-to-delawares-general-corporation-law.html.

The Council of the Corporation Law Section of the Delaware State Bar Association[135] acted quickly in response and, on March 28, 2024, it released a set of proposed amendments to the *DGCL*[136]. As explained by the signatories of the document, this set of amendments, known as Senate Bill 313[137], is a response to a general increase in the use of stockholder agreements: it has been noted that the growing complexity of these agreements could benefit from a more explicit statutory guidance. Senate Bill 313[138] was signed into law on July 17, 2024, and became effective on August 1, 2024. Delaware lawmakers expressed concerns also regarding the speed with which the bill was introduced and passed: the haste with which it moved through the legislative process raised questions about whether lawmakers had sufficient time to fully consider its long-term implications and the state's legal framework[139]. The legislation introduced significant changes, most notably the addition of Section 122(18)[140] to the *DGCL*[141]. Under the new Section, Delaware corporations are allowed to enter into agreements with stockholders or prospective stockholders, even if such agreements constrain the board's powers, as long as such agreements do not violate the *DGCL*[142] or the corporation's charter. Specifically, the new amendment "*authorizes a corporation to enter into contracts with one or more of its stockholders or beneficial owners of its stock, for such minimum consideration as approved by its board of directors, and provides a non-exclusive list of contract provisions by which a corporation may agree to: a. restrict or prohibit future corporate actions specified in the contract; b. require the approval or consent of one or more persons or bodies (including the board of*

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135 DELAWARE STATE BAR ASSOCIATION, *About the Section*, (last visited Nov. 8, 2024), https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/.

136 8 Del. C. (2024).

137 S. 313, 153rd Gen. Assemb., Reg. Sess. (Del. 2024).

138 Id.

139 Jordan Howell, *Dissent in House Judiciary over Controversial Corporate Amendments*, DEL. CALL (June 19, 2024), https://delawarecall.com/2024/06/19/dissent-in-house-judiciary-over-controversial-corporate-amendments/.

140 S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

141 8 Del. C. (2024).

142 Id.

directors or one or more current or future directors, stockholders or beneficial owners of stock) before the corporation may take actions specified in the contract; and c. covenant that the corporation or one or more persons or bodies (including the board of directors or one or more current or future directors, stockholders or beneficial owners of stock) will take, or refrain from taking, future actions specified in the contract"[143] . Additionally, the corporation may only enter a contract pursuant to Section 122(18)[144] in exchange for a consideration from the counter-party: said consideration may include inducing the stockholder or beneficial owner to take or refrain from taking an action.

The Senate Bill 313[145] is completely altering the Delaware Law as we know it. The amendment broadens the potential for negotiations between stockholders and corporations, reshaping long-standing principles that have historically governed the relationship between these two. It represents a shift from rigid statutory frameworks to a more flexible, contractual approach: this legislative response directly addressed and effectively overturned *Moelis*[146], which invalidated a similar stockholder agreements for "infringing" on the board's authority. Yet, even under these circumstances, the proposed resolution failed to achieve a general consensus and it ignited a passionate debate among judges, practitioners, scholars, and policymakers: should corporations enjoy total contractual freedom to reshape their governance, or are there fundamental rules that must remain inviolable?

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[143] Del. Code Ann. tit. 8, § 122(18) (2020).

[144] Id.

[145] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

[146] *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co*., C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

IV. Criticism towards the Amendment 122(18)

Amendment 122(18)[147] has sparked significant debate in corporate governance and legal circles, reflecting broader concerns about the evolving balance of power within American Corporations. Supporters of the bill firmly believe that changes to the law are necessary as Delaware's corporate landscape evolves: the Delaware's Corporate Law must be kept *"in line with market practice"* [148] as this one evolves. They also contend that as private equity arrangements and shareholder agreements become more common, the law must provide corporations with greater contractual flexibility: supporters have highlighted the need to maintain Delaware as the preferred jurisdiction for incorporation, as many are thinking of relocating. On the other hand, the Bill 313[149] has generated significant concerns: critics argue that the amendment risks undermining well-established fiduciary norms by allowing shareholder agreements to override core board functions. Specifically, they assert that it threatens the independence and authority of directors by enabling shareholders to enforce contractual provisions that could dictate board decisions. It also significantly deviates from past cases which have been continually upheld by the Courts, including *Unocal Corp. v. Mesa Petroleum Co.*[150]. and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[151], which consistently reinforced the board's primacy in corporate governance.

In June 2024, over 50 of the most prominent corporate law professors took a public stance against SB313[152]. The professors noted that they "*disagree over corporate law issues. [They] are unanimous in [their] belief that the appropriate response to the Moelis decision is to [appeal] to the Delaware Supreme Court . . . not hasty legislative*

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147 S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

148 Jordan Howell, *Sparks Fly in Final Hearing on Corporate Law Amendments: Amid Political Division in the House, Former Chancellor William Chandler Took Shots at Chancellors McCormick and Laster for Speaking Out Against the Bill*, THE NEWS JOURNAL, June 22, 2024.

149 S. 13, 153rd Gen. Assemb., Reg. Sess. (Del. 2024).

150 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

151*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

152 S.B. 313, 152nd Gen. Assemb. (Del. 2024).

action …allow corporate boards to unilaterally contract away their powers without shareholder input."[153] Professors Kahan and Rock believe that the proposed amendments could have *"potentially far reaching effects on Delaware law, as well as introduce uncertainty"[154].* To strike a balance between legal certainty and the preservation of core governance principles, they propose a temporary compromise: authorize stockholder governance agreements for a period of three years, during which their validity would not be challenged. This limited safe harbor would offer immediate clarity to market participants while maintaining Delaware's board-centric model by requiring that longer-term governance arrangements ultimately comply with Section 141(a)[155] or be included in the charter. In doing so, their proposal aims to protect established market practices without fundamentally altering the structure of Delaware corporate law.[156] Distinguished legal scholars such as Professor Lawrence Hamermesh and former Chief Justice Leo Strine have voiced apprehension that the amendment could dilute the core principles of the Board and their fiduciary duties.

The corporate bar, on the other hand, largely supported the proposed amendment. Skadden, a major law firm, asserted that DGCL § 122(18)[157] would "*provide greater certainty . . . in negotiating and entering into stockholders' agreements …with the*

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[153] Sarath Sanga, Gabriel Rauterberg & Eric Talley, *Letter in Opposition to the Proposed Amendment to the DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 7, 2024), https://corpgov.law.harvard.edu/2024/06/07/letter-in-opposition-to-the-proposed-amendment-to-the-dgcl/.

[154] Marcel Kahan & Edward Rock, *Section 122(18) DGCL: A Proposed Compromise*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 10, 2024), https://corpgov.law.harvard.edu/2024/06/10/section-12218-dgcl-a-proposed- compromise/.

[155] Del. Code Ann. tit. 8, § 141(a) (2024).

[156] Marcel Kahan & Edward Rock, *Section 122(18) DGCL: A Proposed Compromise*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 10, 2024), https://corpgov.law.harvard.edu/2024/06/10/section-12218-dgcl-a-proposed- compromise/.

[157] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

corporation's business and affairs"[158] while MorrisNichols, another leading Delaware firm, noted that DGCL § 122(18) would *"bring law in line with [market] practice."[159]*

These potential changes in the corporate environment worry many lawmakers. The balance of power and responsibility that has traditionally existed between corporate boards and shareholders has always been extremely delicate and the fear is that this shift of power from board to shareholders could undermine long-term strategic decision-making and create governance instability. By permitting shareholder agreements to bind boards to predetermined decisions, critics argue that Amendment 122(18)[160] could severely restrict directors' ability to act in the best interests of all shareholders and many believe that it could create ambiguity and weaken the clarity that Delaware law has historically provided.

A. How the Moelis Decision Aligns or Deviates from Precedent

The new Section 122(18)[161] of the *DGCL[162]* permits corporations to enter into stockholder agreements that may constrain the power of the board of directors. These agreements cannot violate the *DGCL[163]* but they can, nonetheless, include provisions that may restrict or prohibit Corporate Actions, establish Approval or Consent Requirements or specific covenants to act or refrain from Acting[164].

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[158] Allison L. Land, Edward B. Micheletto & Lauren N. Rosenello, *Proposed DGCL Amendments Would Expressly Authorize Stockholders' Agreements and Align DGCL Provisions with Current M&A Practices*. SKADDEN, (Apr. 4, 2024), https://www.skadden.com/insights/publications/2024/04/proposed-dgcl-amendments.

[159] Proposed Amendments to the Delaware General Corporation Law Would Address Recent Caselaw Regarding Stockholder Agreements and Merger Agreements, MORRIS NICHOLS ARSHT & TUNNELL, (Mar. 28, 2024), https://www.morrisnichols.com/insights-proposed-2024-amendments-delaware-general-corporation-law.

[160] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

[161] Id.

[162] Del. Code Ann. tit. 8 (2024).

[163] Id.

[164] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

The new amendment shook many heads, particularly among the eldest members: it deviates from precedents that have long been the foundation of the Delaware Corporate Law. *Moelis*[165] departs significantly from traditional corporate governance precedents like *Revlon*[166] and *Unocal*[167] by allowing contractual arrangements that challenge the conventional boundaries of board authority. *Revlon*[168] and *Unocal*[169] are two cornerstone cases that have significantly shaped corporate governance.

Under *Revlon*[170], in a context of change of control, the board must take efforts to achieve the highest value reasonably attainable for the stockholders. Failing to do so implies liability.

Unocal[171]*'s* standard is applied when directors unilaterally adopt defensive mechanisms in response to an alleged threat to corporate control: such defensive mechanisms must pass a test of both reasonableness and proportionality. If the defense is found to be irrational and unproportional, the board of directors will be considered liable.

In both cases, the board is regarded as the primary decision-making body, empowered to manage corporate businesses in the best interests of shareholders.

The amendment, on the other hand, allows for the bypassing of traditional governance structures, limiting board's discretion and potentially giving stockholders or beneficial owners more influence over corporate decisions. By allowing agreements that constrain or impede the board's ability to take independent actions and granting shareholders significantly more power, the control dynamics within governance are redefined: what was once the board's primary responsibility now appears to rest in the hands of influential stakeholders, departing from previous structures and reversing past judgments.

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165 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

166 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

167 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

168 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

169 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

170 *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

171 *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

B. Erosion of Board Authority and Weakening Directors Independence

One of the most prominent criticisms of Amendment 122(18)[172] is the potential Erosion of Board Authority. Corporate Boards oversee managing the affairs of the corporation[173]: they have been entrusted with the responsibility of making strategic decisions that affect the long-term health and performance of the company. Apart from its oversight duties, the Board has to make sure that the company follows a coherent vision and a sustained growth trajectory. Directors are expected to exercise their judgment and to make business decision that will protect the interests of the company and benefit all its stakeholders. Amendment 122(18)[174] alters this dynamic: the new provision grants stockholders an unprecedented influence, diminishing the authority of the board and allowing a potential shift of objectives for the firm. The board could become more reactive to the demands of big shareholders, fostering a culture of micromanagement where the short-term and profit-driven interests of these individuals would take precedence over the company's long - term goals. The board, which has a broader perspective and deeper expertise, may find itself under constant pressure to make decisions that appease shareholders rather than make long - term strategic decisions that benefit the company's growth. Directors would no longer be objective and impartial in their decision-making and the board may become more focused on short - term opportunities rather than addressing the broader challenges the company might be facing. Overall, the amendment could weaken the board's ability to provide the leadership necessary to gain a competitive edge in the industry.

Furthermore, Corporate Law should not automatically conform to whatever practices emerge in the private market. While market participants often act to maximize value, there are instances in which they may be motivated to adopt arrangements that could actually harm long-term corporate or shareholder interests. In such cases, the role of

[172] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

[173] "The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation", Del. Code Ann. tit. 8, § 141(a) (2023).

[174] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

corporate law is not to accommodate these practices but to provide necessary constraints[175].

Additionally, Section 122(18)[176] alters not only the scope of board's authority but also the process by which that authority is exercised. The old rule required that any modification of board authority must be made in the charter[177] and that required a process involving firm-wide participation. This mechanism ensured a degree of transparency, deliberation and democratic participation. But under the new rule of Section 122(18)[178], such modifications can now be made through a narrower contractual process, weakening the board's role and eroding the influence of shareholders who are not part of the agreement. This shift to a contract-based process introduces a number of significant worries. First and foremost, it reduces transparency and inclusivity in corporate governance. When changes to board authority no longer require a public shareholder vote or a charter amendment, they become more difficult for minority shareholders and outside stakeholders to monitor or contest.

The amendment prioritizes the contractual freedom of a corporation over key shareholder's rights. While these agreements may be extremely beneficial for certain parties, they could undermine the traditional role of both the board and shareholders who, we must remember, are the owners of the corporation.

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[175] Lucian A. Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements/.

[176] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

[177] Del. Code Ann. tit. 8, § 109(b) (2024); "After a corporation other than a nonstock corporation has received any payment for any of its stock, the power to adopt, amend or repeal bylaws shall be in the stockholders entitled to vote. In the case of a nonstock corporation, the power to adopt, amend or repeal bylaws shall be in its members entitled to vote. Notwithstanding the foregoing, any corporation may, in its certificate of incorporation, confer the power to adopt, amend or repeal bylaws upon the directors or, in the case of a nonstock corporation, upon its governing body. The fact that such power has been so conferred upon the directors or governing body, as the case may be, shall not divest the stockholders or members of the power, nor limit their power to adopt, amend or repeal bylaws".

[178] S. 313, 153rd Gen. Assemb., Reg. Sess. § 122(18) (Del. 2024).

Furthermore, under Section 122(18)[179], there exists a potential risk to undermine the coherence and predictability of corporate governance norms by creating a fragmented governance regime, where different sets of rules apply to different stakeholders depending on their contractual relationships with the company. Rather than having one clear set of governing documents —the charter and bylaws—companies may now have overlapping and potentially conflicting governance provisions scattered across multiple private contracts, making it difficult to determine whose interests are being protected and how.

C. Altering Rules

Discussions surrounding these matters have existed since the early days of American Corporate Law. Nonetheless, it seems that the Decision in *Moelis*[180] is what ultimately sparked the flame and ignited the debate again. The Chancery court held that shareholders cannot contract around Section 141(a)[181] which upholds the "board - centric model" of governance. Yet within weeks of that ruling, the corporate bar proposed and the Delaware legislature eventually adopted, a new statutory provision, Section 122(18)[182]. This provision overturned *Moelis* and empowered boards to delegate their core powers to a shareholder by contract, a modification that previously would have required a charter amendment.

The provision was met with both approval and criticism: the ambiguity of Delaware Corporate Law, coupled with the constantly evolving environment in which it operates, is making it increasingly difficult to define roles and responsibilities and a clearer guidance is eagerly anticipated by everyone. However, the Bill fell short of its own expectations and the main question remained unanswered: should the Delaware's

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[179] Id.

[180] *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL (Del. Ch. Feb. 23, 2024) (Laster, V.C.).

[181] Del. Code Ann. tit. 8, § 141(a) (2024).

[182] Del. Code Ann. tit. 8, § 122(18) (2024).

Corporate Law return to rigid, mandatory rules or should push even more the limits of a company's contractual freedom?

In the midst of this confusing moment for the judicial community, a third perspective presented itself and offered an unexpected solution. According to Gabriel V. Ratunberg and Sarath Sanga[183], the best approach to overcome the challenge ahead lies neither in binding mandatory rules nor unchecked contractual freedom but in appropriately designing the mechanisms that structure how corporations opt out of default arrangements. Such mechanisms are known as Altering Rules. Structuring these mechanisms in an efficient way can avoid incurring in intricate situations.

Altering Rules define how companies can opt out of a default governance agreement: these mechanisms provide flexibility for a company to establish its own governance structure beyond the default rules that typically apply in a particular jurisdiction. They define who must agree for a change to happen and who is bound by these changes. Through the Altering rules, it is therefore possible to create distinct bargaining environments. Bargaining Environment refers to the specific conditions, structures, and rules that shape the negotiation process between parties and they define the setting within which such negotiations occur. Distinct bargain environments imply different levels of flexibility, of scrutiny, different power's allocation: overall, they are able to affect how corporate insiders negotiate over governance changes.

Delaware's altering rules offer many benefits to the companies that adopt them.

Firstly, they provide maximum flexibility. No two companies are alike, especially when dealing with startups, family businesses, or large public companies. By allowing companies to modify default legal rules, Delaware enables businesses to craft a governance model that matches their structure, industry, and risk profile.

In addition, altering rules clearly defined in both statutes and case law what can and cannot be done and therefore courts know what choices should be enforced and how: this predictability makes it easier for boards and shareholders to rely on the legal framework.

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[183] Gabriel V. Rautenberg and Sarath Sanga, *Altering Rules: The New Frontier for Corporate Governance*, YALE JOURNAL ON REGULATION (2025).

By using altering rules, corporations and investors can negotiate the exact terms of their relationships and write those terms into the charter or bylaws. Delaware courts respect those choices: when a dispute arises, if altering rules were used correctly, instead of litigating what the default rule should be, courts focus on enforcing the parties' chosen terms. This reduces uncertainty, accelerates litigation and lowers legal costs.

Nevertheless, it is essential that these rules are thoughtfully crafted and maintain a fair and balanced structure[184].

A loose altering rule, which implies an easy to change rule with limited consent needed, gives more flexibility but may hurt minority shareholders. A strict altering rule, which implies a rule hard to change with broad consent required, may protect against abuse but may limit innovation or custom governance.

[184] Id.

V. SB 21, DExit and Consequences

Delaware has long been the preferred state of incorporation for many due to its business - friendly legal environment. However, recent cases have prompted concerns among leaders: Delaware Courts have showed that they are not afraid to rule against big corporate executives or influential controlling stockholders when their demands are too far out of line.

Moelis[185]*'s* ruling is a perfect example of this trend: the Court ruled in favor of the plaintiffs, holding the CEO of the company accountable and revoking his actions.

Recently, also Elon Musk's had his troubles with the Delaware's Courts. His compensation package, worth $101 billion, was rescinded by the Supreme Delaware Court. Chancellor Kathaleen McCormick voided the pay plan and ruled that Musk had dictated the terms of his compensation in a way that was considered to be "unfair"[186].

Even though Tesla later conducted a shareholder vote at its annual meeting asking investors to "ratify" Musk's pay plan, the judge did not reverse her decision: the power Musk holds over Tesla's board and shareholders is exceptionally strong and no decision can be considered impartial[187].

Such severe decisions of the Courts have led some corporations to consider relocating their legal domicile. The threat of corporations leaving Delaware has become a trend especially over recent months and it now knows as "DExit"[188] . This exodus has raised many concerns, specifically among Delaware's Politicians: Delaware's "fee of

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185 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 1189896 (Del. Ch. Mar. 25, 2024).

186 Michael Liedtke, *Judge Upholds Ruling Invalidating Elon Musk's $101B Tesla Pay Package*, AP NEWS (Mar. 21, 2024), https://apnews.com/article/tesla-elon-musk-executive-pay-compensation-shareholders.

187 Id.

188 Staff, *DExit: Why Companies Are Leaving Delaware and What It Means for Business*, THE RIO TIMES (Apr. 1, 2024), https://www.riotimesonline.com/dexit-why-companies-are-leaving-delaware-and-what-it-means-for-business/.

incorporation" brings in more than $2 billion every year, one - third of Delaware's budget[189].

To try and stop this phenomenon, Senate Bill 21[190] was introduced to provide greater legal protections for transactions involving controlling shareholders and executives. The bill aims to clarify and expand the circumstances under which such transactions are shielded, thereby reinforcing Delaware's position as a leading jurisdiction for corporate governance. But the Bill has been highly controversial since it was first introduced in the Delaware Senate. Many believe that changes are necessary for Delaware to maintain its competitive edge as the best home for American corporations but not everyone thinks this is the best way to achieve so.

A. The "DExit" Phenomenon

For over a century, Delaware has dominated the competition for corporate charters, especially among public corporations. When newly formed firms are choosing a state of incorporation, they rarely sort through the laws of all 50 states. At this initial stage, most corporations chose to remain in their original state of incorporation. As for those who opt to incorporate outside their home state, most opt for Delaware: after having chosen Delaware, corporations rarely opt to relocate their legal home. Over the last several decades, however, a number of states have attempted to chip away Delaware's lead. The most successful of these competitors has been Nevada, but other states such as Texas, Maryland, and Wyoming have also tried to gain incorporations[191]. To add to this fierce competition, recent rulings of the Delaware Supreme Court have been frowned upon by many and the dissatisfaction has indirectly helped the competition. Delaware is now facing a growing exodus of companies, phenomena known as "DExit", where big and influential corporations are moving away. Elon Musk himself has moved

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[189] Cris Barrish, *Delaware Moves to Protect Lucrative Incorporation 'Franchise'*, WHYY (Apr. 9, 2024), https://whyy.org/articles/dexit-delaware-franchise-incorporation-industry-billionaires-bill/.

[190] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[191] Stephen M. Bainbridge, *Dexit Drivers: Is Delaware's Dominance Threatened?*, LAW & ECON. RSCH. PAPER NO. 24-04 (UCLA Sch. of L. 2024).

Tesla out of Delaware to reincorporate in Texas, and Meta, Dropbox, and Pershing Square Capital Management have openly discussed the possibility of reincorporating in other states. Although Delaware accounts for less than one-third of one percent of the United States' population, it is the legal home for two-thirds of the Fortune 500 companies[192]. As for the broader set of all public corporations, Delaware is home to more than half of the corporations listed for trading on U.S. stock exchanges[193]. Discontent with recent judicial decisions and rising tensions with Courts of Chancery are prompting CEOs worldwide to reconsider and seriously explore the option of relocating. The stakes are high for Delaware, where 2.2 million businesses are incorporated in the nation's second-smallest state[194]. Amazon, JPMorgan Chase, Nvidia and the corporate parents of Google and Facebook and Instagram are among about 1,350 Large Corporate Filers who bring in over $250,000 apiece in taxes[195]. The so called "incorporation revenues" are projected to directly generate $2 billion for the state treasury this year [196]. Governor Meyer, in office from January 2025, reiterated how important the profits Delaware earns from corporate registrations are and how these make up about one-third of the state's budget[197]. To avoid financial instability and severe budget deficits, it's essential to secure these revenues.

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[192] Stephen M. Bainbridge, *Dexit Drivers: Is Delaware's Dominance Threatened?*, LAW & ECON. RSCH. PAPER NO. 24-04 (UCLA Sch. of L. 2024).

[193] Id.

[194] Cris Barrish, *Is 'DExit' a Real Threat to Delaware's $2B-a-Year Incorporation Kingdom, and Will Proposal Protect or Destroy 'the Franchise'?,* WHYY (Mar. 5, 2025), https://whyy.org/articles/dexit-delaware-corporate-law-sb21/.

[195] Id.

[196] Id.

[197] Johnny Perez-Gonzalez & Sarah Mueller, *Delaware Gov. Meyer Takes on Trump Administration Amid Federal Financial Uncertainties*, WHYY (Apr. 10, 2025), https://whyy.org/articles/delaware-gov-meyer-takes-on-trump-administration-amid-federal-financial-uncertainties.

1. DExit Drivers: Present Study

The motivations listed below relate to why some businesses or corporations might consider relocating their operations from Delaware to another jurisdiction[198]:

1. A business may decide to move its incorporation to a different jurisdiction if they expect to save money on franchise taxes;
2. Businesses want laws that are up to date with current business practices and evolving needs: a company might believe that a different jurisdiction might have corporate laws more suited to their needs;
3. A business might move to a jurisdiction because it perceives the local corporate laws as more "comprehensive" or "flexible";
4. Delaware has a long history of case law that can sometimes make the legal environment complex and harder to predict;
5. The company may expect that the new jurisdiction will offer better protection from meritless lawsuits, making it harder for plaintiffs to file frivolous claims;
6. A business may prefer a new jurisdiction because it provides greater protection from personal liability for its directors and officers: the jurisdiction may offer broader exclusions of liability or limit the circumstances under which personal liability can be imposed on individuals running the company;
7. A company might decide to move its incorporation to a jurisdiction that is geographically closer to where its operations, headquarters, or key management are based;
8. The company may prefer a jurisdiction with minimal reporting and disclosure requirements, especially if it desires to keep shareholder identities private or avoid the burdens of extensive corporate reporting.

In conclusion, while analyzing the motivations for relocating corporate operations from Delaware, it becomes clear that businesses are driven by a combination of economic, legal, and strategic factors, each one of them with a different weight.

Overall, it is noticeable how the corporate mindset is shifting: rather than defaulting to

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[198] Stephen M. Bainbridge, *Dexit Drivers: Is Delaware's Dominance Threatened?*, LAW & ECON. RSCH. PAPER NO. 24-04 (UCLA Sch. of L. 2024).

Delaware, companies are increasingly evaluating how well a jurisdiction aligns with their specific governance goals, risk tolerance, and growth strategies. The choice of incorporation is no longer just a legal formality—it's a tailored decision rooted in business priorities.

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2. Viability of DExit

The DExit movement has sparked a divided debate with respected scholars offering contrasting views on the future of Delaware's dominance in corporate law.

Professor Bainbridge argues, at first, that the current trend of DExit will not have a significant impact on Delaware's position as the dominant jurisdiction for incorporation. He believes that the relatively small number of companies reincorporating out of Delaware and, again, small number of companies incorporating in other jurisdictions are overshadowed by the overwhelming flow of companies incorporating in Delaware every day. Bainbridge notes that the state's legal framework has long provided stability and predictability for businesses, with Delaware's courts offering a sophisticated and pro-business environment. Bainbridge also points to the strong role that plaintiffs' lawyers will continue to play in scrutinizing reincorporations based on liability and fairness grounds, arguing that this will deter companies from attempting to leave Delaware.

However, after the controversial ruling in the *Tornetta*[199] case, in which Delaware's Chancery Court rescinded Elon Musk's compensation package, Bainbridge acknowledged that DExit could become more significant if Delaware continues to antagonize powerful groups, such as large investors or *"those with significant influence in Washington"*[200]. Despite this, Bainbridge maintains that *Delaware's inerti*a — its long-established dominance and the benefits corporations continue to derive from being incorporated here —remains a powerful force that will likely keep most businesses from leaving.

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[199] *Tornetta v. Musk*, No. 2021-0620-JTL, 2023 WL 4440058 (Del. Ch. July 7, 2023).

[200] Stephen M. Bainbridge, *Next Steps in the Tornetta v. Musk Saga: Can Elon Leverage his bromance with Donald Trump to Take Vengeance on Delaware?*, PROFESSORBAINBRIDGE.COM (Dec. 3, 2024), https://www.professorbainbridge.com/professorbainbridgecom/2024/12/next-steps-in-the-tornetta-v-musk-saga-can- elon-leverage-his-bromance-with-donald-trump-to-take-veng.html.

On the other hand, Professor Macey takes a more cautious view, asserting that Delaware's corporate law dominance may be more vulnerable than Bainbridge suggests[201]. Macey argues the recent decision which weakened the position of controlling shareholders pose a significant threat to the state's standing in corporate law: the Professor highlighted recent Delaware court rulings, including *Tornetta*[202] and *Moelis*[203]. In the *Tornetta*[204] case, a sophisticated group of investors supported the compensation package for Tesla's CEO Elon Musk, and yet the Delaware court struck it down, which Macey views as a break from Delaware's historical pro-management stance. This, he argues, could send a signal to investors that Delaware's courts are no longer as favorable to corporate management as they once were, and may encourage companies to look for jurisdictions with more lenient corporate governance frameworks. In general, Professor Macey signals an overall shift in Delaware's approach, moving away from its long-standing tradition of protecting corporate boards' authority and favoring shareholder primacy.
He notes that this shift could encourage corporations to reconsider their reliance on Delaware's corporate laws and seek more favorable alternatives in states like Nevada or Texas.

Despite the differing views, both Bainbridge and Macey acknowledge that the outcome of this debate will have significant implications for the future of corporate governance in the United States. The DExit movement, although still in its early stages, has drawn attention to potential vulnerabilities in Delaware's legal framework and prompted a broader conversation about the future of state-based corporate law. While Bainbridge believes that Delaware will continue to thrive, Macey raises important concerns about the state's ability to adapt to changing business dynamics and the shifting balance of

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201 Jonathan Macey, *Leaving for Las Vegas*, 50 J. CORP. L. (forthcoming 2025).

202 *Tornetta v. Musk*, No. 2021-0620-JTL, 2023 WL 4440058 (Del. Ch. July 7, 2023).

203 *Moelis & Co. v. West Palm Beach Firefighters' Pension Fund*, C.A. No. 2023-0309-JTL, 2023 WL 4072332 (Del. Ch. June 1, 2023).

204 *Tornetta v. Musk*, No. 2021-0620-JTL, 2023 WL 4440058 (Del. Ch. July 7, 2023).

power within corporate governance[205]. This debate, fueled by significant legal rulings and emerging trends, will likely continue to shape the discourse surrounding Delaware's place in corporate law for years to come.

B. Senate Bill 21

Before the introduction of the SB21[206], the Delaware Supreme Court's decision in *In Re Match Group, Inc. Derivative Litigation* [207] served as reminder of the standards and rules governing transactions involving controlling stockholders.

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1. In Re Match Group, Inc. Derivative Litigation

In re Match Group, Inc. Derivative Litigation[208], a stockholder filed a suit with the Court of Chancery alleging that the separation between IAC/InterActiveCorp and its subsidiary Match Group, Inc. was unfair: according to the plaintiff, IAC/InterActiveCorp, a controlling stockholder of Match, received benefits in the transaction at the expenses of the Match minority stockholders. The challenged transaction is the reverse spinoff through which IAC/InterActive Corp. separated from Match Group.
The Court of Chancery found that the challenged transaction could be protected under the Business Judgement Rule: since the transaction was approved by both a special committee and the majority of the minority stockholders, the "*MFW*[209] mechanism" could be applied. The court of Chancery dismissed the Case.

The stockholder's then appealed to the Supreme Delaware's Court, alleging that the Court erred in applying the Business Judgment Rule since the *MFW*[210] framework was not actually satisfied: one of the members of the committee lacked independence and

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[205] *See* Alexander Hook, *Reform or Remove: Tornetta, Moelis, Stockholder Agreements & DExit*, 50 J. CORP. L. (2025).

[206] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[207] *In re Match Grp., Inc. Derivative Litig.*, No. 368, 2022, 2024 WL 1747050 (Del. Apr. 4, 2024).

[208] Id.

[209] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

[210] Id.

was able to dominate the committee's decision. According to the Chancery Court, a committee is considered to be independent if at least 50% of its members are independent and if the conflicted members do not have the power or the influence to dominate or "infect" the decision made by the committee: McIerney, the conflicted member, was not able to influence or coerce the decision of the committee. The court stated that the conflicts of McIenry and the ties that linked him to Diller - Chairman, Senior Executive, and large stockholder of IAC/Inter Active Corp. - were adequately disclosed. McInerney worked at IAC from 1999 to 2012 – including a seven- year term as IAC's CFO: he earned over $55 million during his employment at IAC, which lasted over 10 years. McInerney also served as a director of various IAC-affiliated companies since 2008, including Old Match.

The Delaware Supreme Court disagreed with the Court of Chancery: in order for the committee's decision to be considered as fair and adequate and replicate an arm's length bargain, all the members of the committee must be independent and not just the majority of it. The Supreme Delaware Court believes that McIernney did not coerce or "infected" the committee's decision: nevertheless, in order for the *MFW*[211] framework to be satisfied, all members of the committee must be independent. The *MFW*[212] framework is not satisfied: the standard to be applied is the Entire Fairness Standard.

Through this decision, the Delaware's Supreme Court reaffirmed that a transaction involving a controlling stockholders will be shielded by the Business Judgement Rule if said transaction is approved by a special, throughly independent committee and if the vote of the majority of the minority shareholders is fully informed, disinterested and uncoerced. Hence, if the *MFW*[213] framework applies: the *MFW*[214] structure can be applied every time the transaction involves a controller who (1) is on both sides of the transaction and (2) receives a non ratable benefit.

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[211] Id.

[212] Id. 188

[213] Id. 188

[214] Id. 188

Kahn v. M&F Worldwide Corp.[215] had established that the standard of review for transactions involving controlling stockholders is typically Entire Fairness. However, if the transaction satisfies the procedural safeguards outlined in the *MFW* framework[216]—namely, approval by both an independent special committee and a fully informed, uncoerced vote of the minority stockholders—then the more deferential Business Judgment Rule will apply instead.

SB 21[217] effectively overturns the Delaware Supreme Court's 2024 decision and lowers the requirements of *MFW*[218].

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2. Introduction of Senate Bill 21

The Senate Bill 21[219] was introduced by Delaware State Senator Bryan Townsend On February 17, 2025. On March 2025 SB 21[220] was passed by both chambers of the Delaware General Assembly and signed into law by Governor Matt Meyer. SB 21[221] aims to recalibrate Delaware corporate law by expanding the scope of *DGCL*[222] Section 144[223] —which traditionally governs the voidability of contracts and transactions involving interested directors and officers—to also encompass transactions involving controlling stockholders. Controlling stockholders transactions are now dividend into 2 categories: Regular Controlling Stockholder Transactions, governed by §144(b)[224], or Going - Private Transactions, governed by 144(c)[225].

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215 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

216 Id.

217 Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

218 *M&F Worldwide,* 88 A.3d.

219 Id. 211

220 Id. 211

221 Id.

222 Del. Code Ann. tit. 8 (2024).

223 Del. Code Ann. tit. 8, § 144 (2024).

224 Del. Code Ann. tit. 8, § 144 (b) (2024).

225 Del. Code Ann. tit. 8, § 144(c) (2024).

Under the amended Section 144(a)[226], transactions that meet one of 3 procedural safeguards are not just protected from being invalidated but they are also shielded from equitable remedies and monetary damages arising from fiduciary duty claims. For transactions involving directors or officers, liability will not arise if one of the following conditions is met: Approval by Disinterested Directors[227], Approval by Disinterested Stockholders[228] or Fairness Standard[229].

The First procedural safeguard states that if the transaction is authorized in good faith, without gross negligence, by a fully informed majority of disinterested directors then liability will not arise. On the other hand, if a majority of the board is conflicted, approval must come from a special committee composed of at least two disinterested directors, as stated in § 144(a)(1)[230].

The Second procedural safeguard states that if the transaction is approved or ratified by a fully informed, uncoerced affirmative vote of a majority of the votes cast by disinterested stockholders, liability will not arise as well: §144(a)(2)[231] shields these kinds of transactions.

Finally, the third procedural safeguard states that if the transaction is considered to be fair to the corporation and its stockholders, under § 144(a)(3)[232], the transaction will be protected by the law.

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[226] Del. Code Ann. tit. 8, § 144(a) (2024).

[227] § 144(a)(1).

[228] § 144(a)(2).

[229] § 144(a)(3).

[230] Del. Code Ann. tit. 8, § 144(a)(1) (2024).

[231] Del. Code Ann. tit. 8, § 144(a)(2) (2024).

[232] Del. Code Ann. tit. 8, § 144(a)(3) (2024).

In a move that marks a clear departure from existing Delaware case law, SB 21[233] introduces new paragraphs (b) and (c) into Section 144[234], which protects controlling stockholders. Previously, under the framework established in *In re MFW Shareholders Litigation*[235], controlling stockholders could only obtain the benefit of the business judgment rule—and avoid the heightened scrutiny of the entire fairness standard—if the transaction was approved from the start by both an independent special committee and the informed, uncoerced majority of disinterested stockholders. Paragraph (b) of the amended Section 144[236] dramatically relaxes these requirements for transactions that do not involve going-private mergers. Going forward, a controlling stockholder can receive statutory protection from equitable or monetary liability by satisfying just one of these two conditions, rather than both. The special committee must still consist of at least two directors who are entirely independent, but the stockholder approval threshold is also reduced—from a majority of the disinterested shares outstanding, as under *MFW*[237], to a majority of the disinterested votes actually cast. Paragraph (c) of the revised Section 144[238] applies specifically to going-private transactions, also knows as squeeze - out mergers which are those where a controlling stockholder seeks to buy out minority shareholders. In these cases, the bill retains the dual approval requirement of both a special committee and disinterested shareholders but continues the more relaxed approach to the shareholder vote described above.

Additionally, paragraph (c) omits the "*ab initio*" requirement established in *MFW*[239], which had required that the conditions met above be in place before the start of the transaction. Instead, SB 21[240] merely mandates that the transaction be conditioned on

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233 Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

234 Del. Code Ann. tit. 8, § 144 (2024).

235 *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013).

236 Del. Code Ann. tit. 8, § 144 (2024).

237 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

238 Del. Code Ann. tit. 8, § 144 (2024).

239 *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

240 Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

disinterested stockholder approval “at or prior to the time it is submitted” for ratification, granting companies more freedom and flexibility in their decisions.

SB 21[241] also addresses another major point of contention: the ambiguous and evolving definition of a “controlling stockholder.” S.B. 21[242] defines “controlling stockholders” as stockholders that (1) have majority voting power, (2) have the right by contract or otherwise to elect a selected nominee and the voting power of the majority of the board or (3) own or control a third in voting power and have the capability through that power to exercise managerial authority over the business[243]. The amendments also clarify that controlling stockholders cannot be held liable for monetary damages for breaches of duty of care. This effectively overrules recent case law, including *In re Sears Hometown*[244]*. In re Sears Hometown & Outlet Stores, Inc. Stockholder Litigation*[245] is a significant Delaware Court of Chancery case decided on January 24, 2024 where the court addressed the fiduciary duties of controlling stockholders, particularly when exercising their voting power. The Court held that controlling stockholders owe fiduciary duties of loyalty and care to minority shareholders and they are required to act in good faith and not harm the corporation through grossly negligent actions.

SB 21[246]’s amendments significantly change Section 144[247] but also Section 220[248]. The amendments to Section 220[249] of the DGCL reflect a significant effort to narrow the

[241] Id.

[242] Id.

[243] 21 Sub. 1, 153rd Gen. Assemb. (De. 2025), *available at* https://legis.delaware.gov/BillDetail?legislationId=141930 (amendments to DGCL §144 (e)(2)).

[244] *In re Sears Hometown & Outlet Stores, Inc. Stockholder Litig.*, C.A. No. 2019-0798-JTL, 2024 WL 1747050 (Del. Ch. Apr. 4, 2024).

[245] Id.

[246] Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

[247] Del. Code Ann. tit. 8, § 144 (2024).

[248] Del. Code Ann. tit. 8, § 220 (2024).

[249] Id.

scope of what documents shareholders can demand access to in books and records actions. Prior to the Introduction of the SB21[250], §220 stated:

"*As used in this section:*

(1) "Books and records" means all of the following:

a. The "certificate of incorporation," […]

b. The bylaws then in effect, [.]

c. Minutes of all meetings of stockholders and the signed consents […]

d. All communications in writing or by electronic transmission to stockholders generally within the past 3 years […]

e. Minutes of any meeting of the board of directors or any committee of the board of directors and records of any action of the board of directors or any such committee […]

A stockholder may inspect and copy the corporation's books and records only if all of the following apply:

a. The stockholder's demand is made in good faith and for a proper purpose.

b. The stockholder's demand describes with reasonable particularity the stockholder's purpose and the books and records the stockholder seeks to inspect.

c. The books and records sought are specifically related to the stockholder's purpose"[251] .

Section 220[252] has given to stockholders the right to inspect the book and records of the competition for a proper purpose and if the demand was made in good faith since forever. The amendment does not revoke these shareholder's rights but it has clarified what can be defined as "books and records" of the corporation that can be inspected.

The statute now defines "books and records" to include essential governance materials such as charters, bylaws, stockholder meeting minutes, board and committee minutes, board information packages, and annual financial statements: it explicitly excludes

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[250] Id. 211

[251] Del. Code Ann. tit. 8, § 220 (2024).

[252] Id.

emails and text messages between directors and officers, the disclosure of which had become increasingly common in shareholder litigation and was often viewed as invasive. The amendments further limit inspection of materials from within three years of the request and require shareholders to make demands in good faith, with particularity, and for a proper purpose. The standard moves beyond the current “credible basis” threshold and now permits broader access only if shareholders demonstrate a “compelling need” with “clear and convincing evidence.” Corporations are also explicitly authorized to impose confidentiality or restrictions, redact non-relevant content, require plaintiffs to incorporate any accessed records into future complaints[253].

Additionally, the S.B. 21[254] codifies new definitions of the terms “material interest” and “material relationships.” Specifically, “material interest” means an actual or potential benefit to a director or a stockholder that (1) “would reasonably be expected” to impair the objectivity of a director’s judgment or (2) be material to a stockholder. Similarly, the term “material relationship” means a relationship that (1) “would reasonably be expected” to impair the objectivity of a director’s judgment or (2) be material to a stockholder. A director is presumed to be “disinterested” where the director has been deemed an independent director from the corporation, and if applicable, the controlling stockholder. To overcome this presumption, a shareholder must plead substantial and particularized facts demonstrating that the director has either (1) a material interest in the transaction or (2) a material relationship to a person with a material interest in the transaction[255].

C. Consequences

The future of Delaware is now uncertain: many questions remain unanswered and the legal community remains divided. While some hail SB 313[256] as a pragmatic response

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253 Amendments to DGCL § 220 , Del. S.B. 21, 152nd Gen. Assemb., Reg. Sess. (Del. 2025).

254 Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

255 Amendments to DGCL §144 , DGCL §144 (d)(2) & (e)(4).

256 Del. S.B. 13, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

to evolving governance needs, critics argue that it will instead deeply undermine corporate governance and will shield billionaires from potential misconduct claims.

At the heart of the controversy lies a broader concern: when a corporation or its stakeholders hold sufficient economic and political power to directly influence laws and rules, is that influence legally and ethically appropriate?

Can it be deemed legitimate for corporate actors to effectively overturn decades of established legal precedent, particularly when that precedent originates from Delaware's own Court of Chancery, one of the most esteemed and influential legislative body?

As corporations grow larger and their ties to legislators more complex, the line between private interest and public principles becomes more and more blurred. Delaware now finds itself at a crossroads: whether SB 313[257] represents a necessary modernization or a dangerous concession to concentrated power only time will tell.

It is, nonetheless, a question that will continue to shape the discourse around corporate law in the years to come.

[257] Id.

VI. Conclusions

The future of Delaware is now facing an unprecedented period of uncertainty. Long considered the standard for corporate law due to its well-established legal framework, expert judiciary and business-friendly statutes, Delaware is experiencing growing tension between its courts, legislature and corporate stakeholders. Recent high-profile rulings from the Court of Chancery—particularly *Tornetta v. Musk*[258] and *Moelis v. West Palm Beach Firefighters' Pension Fund*[259] —have triggered a wave of backlash. Chancellor McCormick's decision to void Elon Musk's compensation package sent shockwaves through the business community, casting doubt on Delaware's approach to shareholder's rights and board authority. At the same time, Vice Chancellor Laster's ruling in *Moelis*[260] disrupted what had previously been viewed as a widely accepted market practice by striking down specific governance agreements involving stockholders. In response, the Delaware legislature moved swiftly to enact Senate Bill 313[261], introducing § 122(18)[262] to restore legal certainty for such agreements, and Senate Bill 21[263], to expand the shielded transactions involving controlling stockholders. While this legislative fix may calm short-term concerns, it has sparked broader debates about the direction in which Delaware corporate law is evolving.

Critics argue that both bills prioritize appeasing powerful, influential shareholders interests at the expense of long-standing principles of Corporate Governance. Others contend that it reflects a pragmatic effort to preserve Delaware's dominance in corporate governance amidst competitive pressures from states like Nevada and Texas. The term "DExit" has emerged to describe the growing number of companies considering leaving Delaware due to its unpredictability.

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258 *Tornetta v. Musk*, C.A. No. 2018-0408-KSJM, 2019 WL 4932148 (Del. Ch. Oct. 7, 2019).

259 *W. Palm Beach Firefighters' Pension Fund v. Moelis & Co.*, C.A. No. 2023-0309-JTL, 2024 WL 550750 (Del. Ch. Feb. 12, 2024).

260 Id.

261 Del. S.B. 313, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

262 Del. Code Ann. tit. 8, § 122(18) (2024).

263 Del. S.B. 21, 153rd Gen. Assemb., Reg. Sess. (Del. 2025).

Meanwhile, academic voices remain divided: some celebrate Delaware’s adaptability and responsiveness to market demands, while others warn that these kinds of reforms risk undermining the coherence and integrity of Delaware’s tradition.
As debates continue, the future of Delaware corporate law is no longer assured: it is now a contested and evolving battleground where Delaware’s entire model of corporate governance is being challenged.

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