

# Clients & Friends Memo

## **Corwin Cleansing Denied Again: Delaware Court of Chancery Green Lights Claims Alleging Loyalty Breaches Tainting Company Sales Process in *In re Pattern Energy Group Inc. Stockholders Litigation***

**May 18, 2021**

On May 6, 2021, Vice Chancellor Zurn of the Delaware Court of Chancery issued a 200-page decision denying a motion to dismiss in *In re Pattern Energy Group Inc. Stockholders Litigation*, a class action challenging the \$6.1 billion go-private, all-cash sale of Pattern Energy Group Inc. (“Pattern Energy” or the “Company”) to Canada Pension Plan Investment Board (“Canada Pension”)<sup>1</sup>. The transaction was narrowly approved by 52% of the Pattern Energy stockholders on March 10, 2020, with both ISS and Glass Lewis recommending stockholders vote against the sale. The sale closed on March 16, 2020.

Despite having many of the traditional hallmarks of a sound sales process—a disinterested and independent special committee authorized to conduct the process, non-conflicted legal and financial advisors counseling the special committee, and multiple viable potential buyers submitting offers—the Court denied a motion to dismiss in light of allegations that the special committee and certain officers running the sales process improperly tilted the playing field in favor of Canada Pension as the preferred choice of Riverstone Pattern Energy Holdings, L.P. (“Riverstone”), a private equity fund that formed Pattern Energy and controlled its upstream supplier of energy projects (“Supplier”). Specifically, Plaintiff alleged that the special committee, Riverstone, Supplier, and certain conflicted Pattern Energy directors and officers breached their fiduciary duties (or aided and abetted such breaches) by prioritizing Riverstone’s interests over the stockholders’, tortiously interfered with stockholders’ prospective economic advantage, and conspired to favor a deal beneficial to Riverstone at the expense of the stockholders. Additionally, the Court found that *Corwin* cleansing was not available because majority shareholder approval was obtained in part through the affirmative vote of a significant shareholder that was contractually bound, pre-disclosure, to vote in favor of the transaction.

This case is yet another reminder that director protective devices such as an exculpatory charter provision and *Corwin* cleansing, while important, provide limited protection at the pleadings stage due to the plaintiff-friendly standard on a motion to dismiss. The ruling also

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<sup>1</sup> Memorandum Op., *In re Pattern Energy Grp. Inc. S’holders Litig.*, No. 2020-0357-MTZ (Del. Ch. May 6, 2021).

serves as a warning that non-stockholders (such as Riverstone) that are in a contractual relationship with, or who otherwise exercise “soft power” (i.e. power other than in the form of voting) over, a company may, by virtue of such positions, constitute a control group and thereby subject challenged transactions to non-deferential entire fairness review. Finally, as we have previously discussed,<sup>2</sup> boards and their advisors should identify potential conflicts early in the sales process and minimize the role those directors and officers play in the sales process, including the preparation of proxy materials.

## Background

In 2012, Riverstone formed Pattern Energy for the purpose of operating renewable energy facilities developed by another Riverstone affiliate. At the time of the acquisition by Canada Pension, Riverstone was not a Pattern Energy stockholder, but allegedly maintained control over it through Supplier, a Riverstone sponsored and controlled entity of which Pattern Energy became a limited partner. Supplier was also Pattern Energy's primary upstream supplier, in that it developed and created most of the energy projects the Company operated and therefore provided most of the Company's business. At the time of the transaction, Pattern Energy held a 29% stake in Supplier (with Riverstone owning the remaining 71%), and Supplier (and therefore Riverstone) had a consent right over Pattern Energy's transfer or sale of that stake (“Consent Right”) via a provision in the Supplier's Partnership Agreement prohibiting such a transfer by any limited partner other than Riverstone absent Supplier's consent. Riverstone also wielded influence over the Company via many “overlapping fiduciaries” serving as Pattern Energy officers and directors, including its present CEO, President, and CFO, who had longstanding relationships with Riverstone and held leadership positions at both Riverstone and Supplier. Importantly, the Consent Right only restricted transfers if Pattern Energy sold its stake; it did not prohibit all transactions with a third party, thereby leaving “an opportunity to structure a potential [Pattern Energy] merger to avoid triggering the Consent Right.”<sup>3</sup> As for the seven members of Pattern Energy's Board at the time of the merger, two had initially been appointed by Riverstone, including Michael Garland, who also served as Supplier's President and CEO of Pattern Energy. The other five members were concededly unaffiliated with Riverstone or Supplier.

In 2018, despite Pattern Energy's repeated public statements touting its viability and profitability without the need to “raise common equity capital through acquisition,” the Board decided to commence a sales process for the Company. To that end, it formed what ultimately became a five-person special committee (the “Committee”) comprising disinterested directors to conduct the sales process. Two of the Company's directors, Garland, an officer and director

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<sup>2</sup>See, e.g., Halper et al., *Delaware Court of Chancery allows merger-based breach of fiduciary duty claims to proceed against target company CEO, financial advisor and acquirer stemming from sale of Presidio, Inc.*, Cadwalader, Wickersham & Taft (Mar. 1, 2021), <https://www.cadwalader.com/resources/clients-friends-memos/delaware-court-of-chancery-allows-merger-based-breach-of-fiduciary-duty-claims-to-proceed-against-target-company-ceo-financial-advisor-and-acquirer-stemming-from-sale-of-presidio-inc/>; Halper et al., *Director who led merger negotiations, without disclosing details of a lucrative pay package he was offered to lead the post-merger company must face fiduciary duty claims*, Cadwalader, Wickersham & Taft (July 15, 2020), <https://www.cadwalader.com/resources/clients-friends-memos/director-who-led-merger-negotiations-without-disclosing-details-of-a-lucrative-pay-package-he-was-offered-to-lead-the-post-merger-company-must-face-fiduciary-duty-claims/>; Halper et al., *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, Cadwalader, Wickersham & Taft (July 8, 2019), <https://www.cadwalader.com/resources/clients-friends-memos/a-24-stockholder-of-seller-and-sellers-board-must-face-fiduciary-duty-claims-due-to-flawed-sales-process-and-inadequate-merger-related-disclosures-another-merger-challenge-demonstrates-the-limits-of-corwin/>; Halper, et al., *M&A Update: The Importance of a High-Quality Sales Process in Determining the Outcome of an Appraisal Proceeding*, Cadwalader, Wickersham & Taft (Aug. 7, 2018), <https://www.cadwalader.com/resources/clients-friends-memos/ma-update-the-importance-of-a-high-quality-sales-process-in-determining-the-outcome-of-an-appraisal-proceeding>.

<sup>3</sup> *In re Pattern Energy Grp. Inc. S'holders Litig.* at 15.

of, and stockholder in, Supplier, and Edmund John Philip Browne, a partner and managing director of Riverstone, were conflicted due to their ongoing connections with Riverstone and were thus excluded from the Committee. Despite acknowledging their conflicting interests, the Committee delegated primary responsibility for engaging with potential bidders to Garland, while Browne attended many Committee meetings as Riverstone's representative, including executive sessions from which Company management was excluded.

The Committee sought bidders and soon began negotiations with Brookfield Management Asset Inc. ("Brookfield"). Brookfield's initial offer was explicitly not conditioned on an acquisition of Supplier, and a March 2019 term sheet recognized the need to structure the deal in a way that avoided triggering the Consent Right. Then, in April 2019, Garland attended a meeting, which had not been pre-approved by or even disclosed to the Committee, between Riverstone and Canada Pension, a pension fund that had previously invested over \$700 million in Riverstone funds. Garland suggested Canada Pension as a potential bidder at the next Committee meeting without disclosing this unauthorized conversation. As the sales process progressed, Garland and Daniel Elkort, Pattern Energy's Chief Legal Officer, who was also an officer of Supplier, repeatedly emphasized the Consent Right and maintained that Riverstone's agreement was required for any potential merger, notwithstanding that this was not in fact the case. The Committee also "explicitly told bidders that internalizing [Supplier] was the preferred course of conduct and pressed bidders to structure offers toward that end, despite knowing that it would require the Company's stockholders to compete for transaction consideration"<sup>4</sup> as any money offered to acquire Supplier would not benefit the stockholders.

After months of negotiations, Brookfield and Canada Pension submitted their final offers in October 2019. Brookfield proposed a stock-only transaction that offered Pattern Energy shareholders a 45% premium, but was not predicated on an agreement with or transaction involving Supplier. In contrast, Canada Pension made an all-cash offer at a 14.8% premium on Pattern Energy's share price. Canada Pension's offer also included an offer to buy Supplier at 1.8x the amount of Riverstone's invested capital, subject to a contingent earnout provision potentially increasing that payment to 2.25x. Unlike Brookfield's proposal, under Canada Pension's offer, Riverstone would be able to maintain equity in Supplier, and the Company and Supplier's management would remain in place. Riverstone approved of Canada Pension's offer, and the Committee was adamant that Brookfield's offer include an agreement with Riverstone regarding Supplier as well. After several days of back-and-forth, the Committee's advisors requested that Brookfield provide definitive documents the next day, and Brookfield, believing that Riverstone would not cooperate, withdrew from the bidding. Canada Pension was then the last bidder standing.

Pattern Energy's Board approved the merger two days later and gave all authority to draft and disseminate the merger proxy (the "Proxy") to the Company's officers. The Company filed the Proxy on February 4, 2020 and filed supplemental disclosures on March 4. Ultimately, 52% of shareholders voted in favor of the Proxy. Notably, 10.4% of those shares were issued the previous October to affiliates of CBRE Caledon Capital Management Inc. ("CBRE") in a private placement. Under the terms of CBRE's purchase agreement, it was required to vote in favor of any merger recommended by the Board, even though the terms, and indeed the chosen bidder, were not yet finalized at the time of the agreement.

### **The Court of Chancery's Decision**

After the merger was completed, two shareholders filed class action complaints, which were consolidated into one action alleging: (i) breach of fiduciary duty against Pattern Energy's directors and officers, (ii) aiding and abetting breach of fiduciary duty and tortious interference

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<sup>4</sup> *Id.* at 152.

against Riverstone and Supplier, and (iii) conspiracy against all defendants. Defendants moved to dismiss.

First, the Court rejected Defendants' arguments that they should be shielded from liability due to the exculpatory provision in the Company's charter, which precludes monetary liability for duty of care violations absent bad faith. The Court determined that Plaintiff adequately pled that the individual defendants acted in bad faith when they prioritized Riverstone over stockholders and mishandled conflicts of interest on the board, giving rise to duty of loyalty (not care) violations, which cannot be excused.

Second, Defendants also argued that under the Delaware Supreme Court's decision in *Corwin v. KKR Financial Holdings, LLC*,<sup>5</sup> the sale was "cleansed" (and therefore subject to the deferential business judgment rule rather than the more exacting enhanced scrutiny standard) because it was approved by an un-coerced, disinterested, fully informed vote of minority stockholders. The Court found that *Corwin* cleansing did not apply because CBRE (whose votes were necessary to reach a majority) contracted to vote in favor of the merger without knowing the terms and was therefore neither fully informed nor disinterested. The Court also found that the Committee inappropriately delegated drafting the Proxy to conflicted officers and that the Proxy was inadequate, thereby precluding an "informed" vote.

### Takeaways

1. Delegating Significant Responsibility for Conducting a Sales Process to a Conflicted Director or Officer, Without Appropriate Disclosure and Oversight, Has Repeatedly Been Held to Be a Breach of a Board's Fiduciary Duties. Here, the Committee was aware that Garland was conflicted given his ties to Riverstone and Supplier, and the Committee even established "conduct guidelines for management and Board members who were not members of the Special Committee 'in order to help insure that the Special Committee would be able to function independently and effectively execute its mandate.' These guidelines prohibited Company management from engaging with any potential parties to a strategic transaction without the Special Committee's express consent."<sup>6</sup> Notwithstanding these guidelines, Garland held an unauthorized meeting with Riverstone and Canada Pension and likely revealed confidential information about the sales process. Indeed, the Committee "took no steps to reestablish control of the merger process" even after learning that Garland had unauthorized communications with Canada Pension, but instead "continued delegating substantial authority and responsibility to Garland."<sup>7</sup> Such conduct has repeatedly led Delaware courts to find a sales process tainted and to hold the board responsible for breaching their fiduciary duties.<sup>8</sup> Directors need to unearth any potential conflicts and ensure via ongoing oversight that those issues do not adversely impact the independence of a committee-led process.
2. Board or Committee Management of Conflicts Extends to Financial Advisors Retained by the Committee. The Committee retained a second financial advisor ("Financial Advisor 2") in the midst of the sales process, notwithstanding that it had already retained a primary financial advisor and, when it initially did so, determined at that time not to retain Financial Advisor 2, which had been recommended by Garland and Michael Lyon, the Company's CFO and then President who also had ties to Riverstone. The Committee knew that Financial Advisor 2 had

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<sup>5</sup> 125 A.3d 304 (Del. 2015).

<sup>6</sup> *In re Pattern Energy Grp. Inc. S'holders Litig.* at 24.

<sup>7</sup> *Id.* at 40.

<sup>8</sup> See, e.g., *City of Fort Myers Gen. Empls.' Pension Fund v. Haley*, 235 A.3d 702, 717 n.49 (Del. 2020); *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816 (Del. 2015).

a substantial relationship with Riverstone, including owning at least a 12% stake in Riverstone and having received tens of millions of dollars in fees from Riverstone in recent years, and that it had previously advised Riverstone on a potential take-private of the Company. Moreover, under the terms of the engagement letter for Financial Advisor 2, Canada Pension, Riverstone, and conflicted management, via a discretionary post-transaction bonus, effectively “had the ability to pay or withhold nearly a third of [its] total fee,” which in turn incentivized it to “push the Special Committee toward Canada Pension’s offer.”<sup>9</sup> This is a rare case wherein hiring an additional financial advisor was not “conflict-cleansing” but rather “further contaminated the process,”<sup>10</sup> and it serves as a reminder of the importance that Delaware courts place on a sell-side financial advisor’s role and the resulting need on the part of the seller’s board to unearth and monitor potential conflicts that could undermine the independence of the advisor’s advice.

3. The Court Addressed the Potential Interplay Between *Revlon* Enhanced Scrutiny and Entire Fairness Review. The Court observed that “*Revlon*’s intermediate standard of enhanced scrutiny is applied when board members face ‘potential conflicts of interest because of situational dynamics present in particular’ transactions. ‘*Revlon* enhanced scrutiny applies to final stage transactions, including a cash sale, a break-up, or a transaction like a change of control that fundamentally alters ownership rights’ because in those transactions directors may be more prone to pursue self-interest and engage in selfish action” and there is no “long run” for stockholders.<sup>11</sup> As a result, a board or committee’s duty to shareholders is “inconsistent with acts not designed to maximize present share value.”<sup>12</sup> The plaintiff, however, sought entire fairness review based on Company officers having committed a “fraud on the board” (i.e., illicit manipulation of a board’s deliberative process) that led the Committee to favor Canada Pension. In rejecting this theory of implicating entire fairness here, the Court found that Garland’s “tardy half-truths” to the Committee regarding his communications with Canada Pension did not, as pled by Plaintiff, impact the Committee’s decision-making. According to the Court, the complaint offered a “theory of director breach that tracks the paradigmatic *Revlon* narrative of an overweening CEO and supine board,” while failing to “elevate the standard of review” by alleging outright fraud that detrimentally deceived the Board into altering the sales process.<sup>13</sup>
4. The Court of Chancery Appears Hesitant to Dismiss Control Theory Claims on a Motion to Dismiss. Plaintiff advocated for entire fairness review, Delaware’s most stringent standard of review, on the additional ground that Riverstone and the conflicted officers (“Officer Defendants”) acted as a control group that stood on both sides of the transaction.

Whether an individual or group exercises control is not necessarily determined by the magnitude of their stock holdings. Rather, even minority stockholders (or in this case entities such as Riverstone and Supplier that owned no stock) may be found to exercise “*de facto* control” via “broader indicia of control,” such as relationships with directors or advisors, certain contractual rights, or the existence of key commercial relationships that provide leverage over the Company.<sup>14</sup> To plead the existence of a control group, a plaintiff must allege that the connection among the members of the group is legally sufficient, meaning that the group is connected by contract, common ownership, or other type of agreement. Here, the Court found that Plaintiff adequately alleged that the control group had an actual agreement to work

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<sup>9</sup> *In re Pattern Energy Grp. Inc. S’holders Litig.* at 149-50.

<sup>10</sup> *Id.* at 149.

<sup>11</sup> *Id.* at 89-90 (quoting *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013); *Huff Energy Fund, L.P. v. Gershen*, 2016 WL 5462958, at \*13 (Del. Ch. Sep. 29, 2016)).

<sup>12</sup> *Id.* at 90.

<sup>13</sup> *Id.* at 93, 97.

together based on “relevant historical and transaction ties” such as Riverstone’s long history with the Company and its officers; Riverstone’s creation and subsequent use of the Company to serve its own ends; Garland’s outsized influence in the sales process; and the repeated, inaccurate insistence that the Consent Right required Riverstone’s approval of any potential sale. But given the fact-intensive nature of this inquiry, the Court declined to decide whether the alleged control group maintained *de facto* control over the Company at the pleadings stage, describing the inquiry as “holistic,” requiring analysis of all the various modes of influence and authority, and thus not the type of allegation that should be decided at the pleadings stage.

5. Controllers Need Not Be Stockholders. As noted, Plaintiff alleged that Riverstone, Supplier, and the Officer Defendants constituted a control group, notwithstanding the fact that Riverstone and Supplier were not stockholders at the time of the merger. Plaintiff’s theory turned on the fact that Riverstone and Supplier exercised their control over the Company through the Officer Defendants and the Consent Right. Although Delaware courts have routinely dismissed claims against alleged controllers who were not stockholders, those cases “left open the possibility that, if a plaintiff pleads sufficient sources of influence, controller status and its attendant fiduciary duties may extend to a nonstockholder.”<sup>15</sup> The Court further elaborated: “Fiduciary duties arise from the separation of ownership and control. . . . If a stockholder, as one co-owner, can owe fiduciary duties to fellow co-owners because the stockholder controls the thing collectively owned, surely an ‘outsider[]’ that controls something it does not own owes duties to the owner.”<sup>16</sup> In its discussion of such soft power, the Court listed a number of factors that can contribute to a finding of a control group, such as relationships with particular directors; relationships with key managers or advisors; the exercise of contractual rights to lead the company to a particular outcome; the existence of commercial relationships that provide leverage over the company; ownership of a significant equity stake; the right to designate directors; contractual augmentation of the power of a minority shareholder or board-level position; and the ability to exercise outsized influence in the board room or on committees, such as through positions like CEO, Chairman, or founder.

The Court acknowledged that it is “an open question under Delaware law whether [Defendants’] soft power alone” can support including them in a control group,<sup>17</sup> but observed here that Riverstone and Supplier held three forms of soft power: (1) their longstanding relationship with the Company, including via overlapping fiduciaries; (2) Supplier’s position as the Company’s primary upstream supplier; and (3) the contractual Consent Right. Though Riverstone and Supplier held no Company stock at the time of the merger, the Court noted that the Consent Right, and Riverstone’s willingness to litigate it, bolstered by the other forms of soft power (such as Riverstone’s control over Supplier, “an essential part of the Company’s upstream supply chain”), had an effect similar to that of a majority shareholder veto, allowing them to refuse any transaction not to their liking. Still, the Court refrained from deciding the presence of *de facto* control, and therefore of a control group, at the pleadings stage, stating that the “Defendants’ duties and resultant standard of review can only be known after the record is developed through discovery.”<sup>18</sup>

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<sup>15</sup> *Id.* at 107-11 (discussing *Klein v. H.I.G. Capital, L.C.C.*, 2018 WL 6719717, at \*13 (Del. Ch. Dec. 19, 2018); *Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd.*, 2020 WL 881544, at \*24-29 (Del. Ch. Feb. 24, 2020)); see also Apfelroth, et al., *M&A Update: Delaware Chancery Court Finds Elon Musk May Be Controlling Stockholder of Tesla Motors*, Cadwalader, Wickersham & Taft (Apr. 16, 2018), <https://www.cadwalader.com/resources/clients-friends-memos/delaware-chancery-court-finds-elon-musk-may-be-controlling-stockholder-of-tesla-motors>.

<sup>16</sup> *In re Pattern Energy Grp. Inc. S’holders Litig.* at 113.

<sup>17</sup> *Id.* at 107.

<sup>18</sup> *Id.* at 127-28.



6. Inadequate Disclosure Continues to Result in Delaware Courts Refusing to Apply *Corwin* Cleansing. Relying on the Delaware Supreme Court's decision in *Corwin*, Defendants argued that the Court should apply the business judgment rule, Delaware's most lenient standard of review, instead of enhanced scrutiny because the sale was approved by a fully informed, uncoerced majority of disinterested stockholders. Business judgment rule review almost certainly would have resulted in dismissal of the complaint absent allegations of corporate waste. But the Court found that Defendants met none of the *Corwin* requirements. First, CBRE, whose votes were necessary to attain majority approval, was not fully informed when it voted. A fully informed vote requires each stockholder to consider "all material information" relating to the transaction. Under a stock purchase agreement entered before any definitive details concerning the transaction were known to CBRE or the Board, CBRE agreed to vote its shares consistently with the Board's recommendation. As a result, the Court found CBRE's "uninformed assent to the merger" was insufficient for purposes of *Corwin* cleansing. Second, the Court determined that CBRE was not disinterested since it had a separate economic interest in the merger. Indeed, CBRE faced contractual penalties if it did not vote in favor of the merger. CBRE also negotiated additional benefits, beyond those enjoyed by the other stockholders, if the merger went through. Finally, the Court found CBRE's vote in favor of the merger was not voluntary because CBRE was contractually obligated to vote in favor of the transaction. Recognizing that the Court has previously "excluded from a *Corwin* calculus votes by stockholders who contractually agreed to vote their shares in favor of a transaction[.]" the Court held that CBRE's vote was "not a ratification of the Merger" but instead "a dutiful performance under the Purchase Agreement" and therefore, not voluntary.<sup>19</sup> This outcome, the Court noted, is consistent with *Corwin*'s teachings—that ratification only occurs when independent stockholders evaluate and exercise their voting rights on a fully informed and independent basis.<sup>20</sup>
7. Sufficient Allegations of Bad Faith Conduct Defeat Protective Devices. The Court acknowledged that the Committee took many reasonable, responsible steps throughout the sales process, including hiring independent financial and legal advisors, twice implementing protocols requiring its authorization before conflicted directors spoke with potential bidders, actively engaging at least a dozen bidders in sale discussions, executing confidentiality agreements with select bidders while resisting exclusivity provisions, and encouraging Brookfield to remain at the table by offering to cover its going-forward costs and extending deadlines multiple times. Nevertheless, the Court found that Plaintiff adequately alleged that the directors placed the interests of Riverstone, Supplier, and the conflicted officers above the interests of shareholders. In so finding, the Court pointed to the involvement of conflicted officers, directors, and advisors throughout the sales process; the Committee's focus on securing a deal that included the internalization of Supplier; and the Committee's choice to proceed with Canada Pension despite acknowledging that Brookfield's offer was superior. As discussed below, the Court further found bad faith in the Board's delegation of responsibilities with regards to the Proxy. These missteps undermined the protections that the Company and

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<sup>19</sup> *Id.* at 178.

<sup>20</sup> See, e.g., *In re Columbia Pipeline Grp., Inc.*, 2021 WL 772562, at \*36 (Del. Ch. Mar. 1, 2021); *Firefighters' Pension System of the City of Kansas City v. Presidio, Inc.*, 2021 WL 298141 (Del. Ch. Jan. 29, 2021); *Chester Cty. Emps.' Ret. Fund v. KCG Holdings, Inc.*, 2019 WL 2564093 (Del. Ch. June 21, 2019); *Morrison v. Berry*, 191 A.3d 268 (Del. 2018); see also Halper et al., *Delaware Court of Chancery allows merger-based breach of fiduciary duty claims to proceed against target company CEO, financial advisor and acquirer stemming from sale of Presidio, Inc.*, *supra* note 2; Halper et al., *Corporate Governance Litigation & Regulation: A Periodic Review and Predictions for the Remainder of 2019*, Cadwalader, Wickersham & Taft (May 23, 2019), [https://www.cadwalader.com/resources/clients-friends-memos/corporate-governance-litigation-regulation-a-periodic-review-and-predictions-for-the-remainder-of-2019#\\_ftn122](https://www.cadwalader.com/resources/clients-friends-memos/corporate-governance-litigation-regulation-a-periodic-review-and-predictions-for-the-remainder-of-2019#_ftn122); Halper et al., *A 24% stockholder of seller and seller's board must face fiduciary duty claims due to flawed sales process and inadequate merger-related disclosures: Another merger challenge demonstrates the limits of Corwin*, *supra* note 2.

its directors otherwise could have enjoyed from *Corwin* and the Company's exculpation provision, which does not protect directors from claims that the directors "were interested in the transaction, lacked independence, or acted in bad faith."<sup>21</sup> Significantly, the Court added that if "a plaintiff alleges 'well pleaded facts that track the paradigmatic *Revlon* theory,' they will generally be sufficient to support a nonexculpated claim at the motion to dismiss phase."<sup>22</sup> This case serves as an important reminder to boards and practitioners that while certain devices, such as the formation of special committees and the disqualification of conflicted directors, are necessary to preserve the integrity of the sales process, the process will still be subject to challenges where the Court views those devices as lip service in light of allegations that conflicted directors and/or officers had a hand in the process.

8. A Company's Board of Directors Should Retain and Exercise Oversight Over Proxy Statements. The Board delegated to conflicted officers the power to "prepare and execute" the Proxy and to file the Proxy with the SEC without the Board's review. The Court held Plaintiff sufficiently pled that Defendants "delegated to conflicted management total and complete authority to prepare and file the Proxy" and that the Board did not review the Proxy before filing. The Court further found that Plaintiff sufficiently alleged that the directors failed to correct information and omissions they knew were false or misleading in supplemental disclosures. If true, this was an improper delegation and thus an abdication of the board's duty of disclosure, which is evidence of a breach of the duty of loyalty. Though a board may delegate such responsibilities, it "must retain the ultimate freedom to direct the strategy and affairs of the Company for the delegation decision to be upheld."<sup>23</sup> Whether a delegation constitutes abdication is a fact-intensive question, and the Court will consider to whom the responsibility was delegated, the scope of the delegation, and whether material information was actually withheld from shareholders. The Court's discussion here shows that, though delegating to disinterested parties may be acceptable, boards and their counsel should still review proxy statements before filing.

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<sup>21</sup>*In re Pattern Energy Grp. Inc. S'holders Litig.* at 134 (quoting *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at \*15 (Del. Ch. Oct. 27, 2020)). Delaware law recognizes three forms of bad faith: "(i) subjective bad faith, in conduct motivated by an intent to do harm; (ii) intentional dereliction of duty or conscious disregard of duty; and (iii) 'allow[ing] interests other than obtaining the best value reasonably available for [the company's] stockholders to influence [director] decisions during the sale process, given that they made decisions falling outside of the range of reasonableness.'" *Id.* at 135 (quoting *Chen v. Howard-Anderson*, 87 A.3d 648, 677-78 (Del. Ch. 2014)).

<sup>22</sup> *Id.* at 134-35 (quoting *In re Mindbody, Inc.*, 2020 WL 5870084, at \*13 (Del. Ch. Oct. 2, 2020)).

<sup>23</sup> *Id.* at 165 (quoting *In re Bally's Grand Deriv. Litig.*, 1997 WL 305803, at \*4 (Del. Ch. June 4, 1997)).