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Delaware Court Refuses to Dismiss Common Stockholder's Challenge to Redemption of Preferred Stock Owned by Controlling Stockholder

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DELAWARE CORPORATE LAW BULLETIN

Delaware Court Refuses to Dismiss Common Stockholder's Challenge to Redemption of Preferred Stock Owned by Controlling Stockholder

*Robert S. Reder**

Fiduciary standard of conduct requires board to maximize long-term value of common stock when exercising discretion in connection with contract rights of preferred stockholders

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INTRODUCTION

In *The Frederick Hsu Living Trust v. ODN Holding Corporation,*[1] Vice Chancellor J. Travis Laster of the Delaware Court of Chancery ("*Chancery Court*") presents a thorough and well-organized analysis of the considerations relevant to resolving a dispute between a corporation's common and preferred stockholders. Although the corporation in question spent its first decade as a growth-oriented enterprise, its controlling stockholder—a preferred stock investor with a right to require redemption of its shares—allegedly began to fear that "the Company would become a sideways situation and wanted to get its capital back as soon as possible."[2] Consistent with this investor's interests, the corporation, although not legally required to do so, radically changed its business strategy from growth to maximization of cash to fund redemption of the preferred stock. Upon learning of these developments, a common stockholder—one of the corporation's founders—brought suit in Chancery Court alleging, among other things, breach of fiduciary duty on the part of the controlling stockholder, the members of the board of directors and the corporation's officers.

Vice Chancellor Laster, ruling on defendants' preliminary motion to dismiss, sided with the common stockholder on nearly every count. What makes *ODN Holding* particularly instructive is not the ultimate ruling requiring that the parties go to trial (or settle)—the Vice Chancellor's conclusions are not surprising given the detailed nature of plaintiff's pleadings and do not necessarily break new ground[3]—but rather the manner in which the opinion carefully explores the full gamut of considerations relevant to a legal analysis in this area: (i) the standard of conduct applicable under Delaware law to the fiduciaries' actions, (ii) the selection of the appropriate standard for reviewing whether the fiduciaries satisfied the standard of conduct, (iii) the application of that standard of review to the fiduciaries' challenged actions, and (iv) the strength of defenses and immunities offered by the defendant fiduciaries. As such, the Vice Chancellor's *ODN Holding* opinion should be a must-read for any legal advisor retained to help a

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1. C.A. No. 12108-VCL, 2017 WL 1437308 (Del Ch. Apr. 25, 2017) [hereinafter "*ODN Holding*"].
2. *Id.* at *28.
3. For the Vice Chancellor's analysis of another dispute between preferred and common stockholders, see also *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013).

board of directors make the difficult choices often confronted in a high-stakes corporate transaction.

I. FACTUAL BACKGROUND

A. Oak Hill Gains Control of ODN

ODN Holding Corporation ("*ODN*") was organized to own the stock of Oversee.net ("*Company*"), "a 'leading provider of technology-based marketing solutions to online publishers and advertisers worldwide.' "[4] In 2008, funds sponsored by Oak Hill Capital Partners, a prominent west coast venture capitalist ("*Oak Hill*"), invested $150 million in exchange for shares of ODN Series A Preferred Stock ("*Preferred Stock*"). The Preferred Stock terms gave Oak Hill the right to demand repayment in full beginning on the fifth anniversary of its investment ("*Mandatory Redemption*"), subject to ODN having "funds legally available therefor."[5] To the extent such funds were not available, ODN was required to

> . . . take all ***reasonable*** actions (as determined by the [Company's] Board of Directors ***in good faith and consistent with its fiduciary duties***) to generate, as promptly as practicable, sufficient legally available funds to redeem all outstanding shares of [Preferred Stock], including by way of incurrence of indebtedness, issuance of equity, sale of assets, effecting a [merger or sale of assets] or otherwise . . . .[6]

The very next year, Oak Hill invested an additional $24 million to purchase enough shares of ODN common stock from Lawrence Ng, one of the Company's co-founders, to become the controlling stockholder. Oak Hill thereby obtain voting control over ODN's stock and exercised that power to engineer the expansion of ODN's board of directors ("*Board*") to eight members, three of whom were Oak Hill executives ("*Oak Hill Directors*"). The other five members of the Board were ODN's CEO and four putatively independent, non-management directors ("*Non-Management Directors*").[7]

B. Change in Business Strategy

From its founding in 2000 by Mr. Ng and his co-founder, Frederick Hsu, through 2011, the Company was successful, growing

4. ODN Holding, C.A. No. 12108-VCL, 2017 WL 1437308 at *3.
5. *Id.*
6. *Id.* at *4 (emphasis added).
7. *Id.* at *5. The Non-Management Directors included a long-time corporate attorney from the Company's regular outside counsel and three others who served on a number of Silicon Valley boards with various relationships with Oak Hill. *Id.*

internally through reinvestment of funds generated by operations and externally through acquisitions. All this changed in 2011 when the Company, apparently at Oak Hill's behest, "switched into liquidation mode,"[8] which "turned a once-promising company into a shell of its former self."[9] Among other actions, during this two-year period the Company:

- retained a new management team that was incentivized via a bonus arrangement to redeem at least $75 million in Preferred Stock ("*Bonus*");
- made no further acquisitions;
- sold three of its four lines of business, and a key part of the fourth line, all at prices below the respective purchase prices; and
- abandoned internal growth through reinvestment in favor of accumulating cash to fund Preferred Stock redemptions.

Accordingly, ODN's revenue-generating capabilities withered[10] while its cash holdings increased several fold. Even so, ODN lacked sufficient funds to fully redeem the Preferred Stock while maintaining adequate reserves to operate the remaining, albeit scaled-down, business. With the February 2013 date on which Oak Hill could first trigger Mandatory Redemption looming, the Board established a special committee of two Non-Management Directors ("*Committee*") "charged with evaluating the Company's alternatives for raising capital for redemptions and to negotiate with Oak Hill over the terms of any redemptions."[11]

C. Mandatory Redemption

Oak Hill triggered the full $150 million Mandatory Redemption on "the earliest possible date," February 13, 2013.[12] When banks were understandably reluctant to lend the Company the additional funds necessary to satisfy the Mandatory Redemption, management "conveniently" revised downward its estimate of the reserves required for the business. With additional funds now available, the Board, with the Oak Hill Directors abstaining, voted on March 18th to apply $45 million—the maximum surplus then available under Delaware law—to

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8. *Id.* at *1.
9. *Id.*
10. *Id.* at *9. This decreased occurred by a factor of 92% from 2011 to 2015. *Id.*
11. *Id.* at *6. The Special Committee included the corporate attorney from the Company's regular outside counsel. *See supra* note 7.
12. *Id.* at *7.

redeem Preferred Stock.[13] Following another divestiture and various cost-savings measures, the Company had enough additional cash for the Board to authorize a $40 million redemption payment on September 2nd. In exchange, Oak Hill agreed to forebear from demanding further redemptions until March 31, 2015. The second redemption in turn triggered payment of the Bonus, including a $587,184 payment to the Company CEO, who also served on the Board.

D. Litigation Ensues

On March 15, 2016, following receipt of the Company's financial statements and a books and records investigation, Mr. Hsu asked the Chancery Court to award damages against Oak Hill and ODN's directors and officers. Among Mr. Hsu's claims was an allegation that the "individual defendants and Oak Hill breached their duty of loyalty by seeking in bad faith to benefit Oak Hill by maximizing the value of Oak Hill's redemption right, rather than by striving to maximize the value of the corporation over the long-term for the benefit of the undifferentiated equity,"[14] that is, the holders of ODN's common stock, including Mr. Hsu ("*Fiduciary Duty Claims*").[15]

The defendants moved to dismiss. Following a preliminary hearing, the Vice Chancellor sided with Mr. Hsu on nearly all counts, largely rejecting defendants' motions.[16]

II. VICE CHANCELLOR LASTER'S ANALYSIS OF THE FIDUCIARY DUTY CLAIMS

Vice Chancellor Laster divided his analysis of defendants' motion to dismiss the Fiduciary Duty Claims into three segments: (i) determination of the standard of conduct, (ii) application of the

13. *Id.* at *8. Although, when Oak Hill triggered the Mandatory Redemption, management reclassified the full $150 million of Preferred Stock as a liability on the Company's balance sheet, the Board only treated the $45 million payment as a current liability, thereby maintaining sufficient surplus to make the payment. *Id.*

14. *Id.* at *1.

15. In addition to the Fiduciary Duty Claims, Mr. Hsu alleged that the redemption payments were illegal "because the Company lacked sufficient funds legally available" under applicable provision of the Delaware General Corporation Law [hereinafter, "*DGCL*"] and that the defendants' actions gave rise to claims for aiding and abetting on the part of Oak Hill, corporate waste and unjust enrichment. *Id.* at *1.

16. Specifically, the Vice Chancellor refused to dismiss the Fiduciary Duty Claims against Oak Hill and the directors (other than a Non-Management Director who had left the Board in 2011) and certain officers (including the CEO). He also refused to dismiss the aiding and abetting and unjust enrichment claims. However, he ruled that the redemption payments were not illegal under the DGCL. *Id.* at *1-2.

standard of review, and (iii) determination whether any of the defendants successfully asserted defenses or immunities.

A. *Standard of Conduct*

According to the Vice Chancellor, "Delaware corporate law starts from the bedrock principle that '[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors.' "[17] This broad grant of authority to the corporate board does have limits, however, including "certain fundamental fiduciary obligations to the corporation and its shareholders."[18] As such, the standard of conduct "describes what directors are expected to do and is defined by the content of the duties of loyalty and care."[19] Because directors of Delaware corporations generally are exculpated from personal liability for breaches of their duty of care,[20] the Vice Chancellor's analysis of the Fiduciary Duty Claims focused on the duty of loyalty.

In this connection, the Vice Chancellor explained that "[t]he duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally."[21] For instance, when a fiduciary "intentionally acts with a purpose other than that of advancing the best interests of the corporation,"[22] she fails to act in "good faith, which is 'a subsidiary element, *i.e.*, a condition, of the fundamental duty of loyalty.' "[23] Corporations "may take steps, such as giving charitable contributions or paying higher wages, that do not maximize corporate profits currently," because "such activities are rationalized as producing greater profits over the long-term."[24] However, "Delaware case law is clear that the board of directors . . . must . . . treat stockholder welfare as *the only end*, considering other interests only to the extent that doing so is rationally related to stockholder welfare."[25]

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17. *Id.* at *16.
18. *Id.*
19. *Id.* at *15.
20. DGCL § 102(b) (7) authorizes corporations to include such an exculpation provision in their certificates of incorporation. ODN's certificate of incorporation included such a provision. [hereinafter, "*Exculpation Provision*"]
21. ODN Holding, C.A. No. 12108-VCL, 2017 WL 1437308 at *16.
22. *Id.*
23. *Id.*
24. *Id.* at *17.
25. *Id.* (emphasis added).

Therefore, to satisfy their standard of conduct, directors "must seek 'to promote the value of the corporation for the benefit of its stockholders.' "[26] But in the case of a corporation, such as ODN, having two classes of stockholders, which stockholders? For Vice Chancellor Laster, the answer is:

> [T]he fiduciary relationship requires that the directors act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital, as warranted for an entity with a presumptively perpetual life in which the residual claimants have locked in their investment.[27]

The fact that some stockholders may be "market participants who . . . prefer a higher near-term market price . . . does not alter the presumptively long-term fiduciary focus."[28] To the contrary, directors "need not seek to maximize current market value for the benefit of the subset of stockholders who hope to sell in the near term and capture capital gains from the trade."[29]

In the case of a corporation that has issued both preferred and common stock, the Vice Chancellor showed no hesitation identifying which class's rights fiduciaries must treat as paramount: "Preferred stockholders are owed fiduciary duties only when they do not invoke their special contractual rights and rely on a right shared equally with the common stock."[30] Thus, "it generally 'will be the duty of the board, where discretionary judgment is to be exercised, to prefer the interests of common stock—as the good faith judgment of the board sees them to be—to the interests created by the special rights, preferences, *etc.*, of preferred stock.' "[31] In fact, when the interests of common and preferred stockholders are opposed, "it is possible that a director could breach her duty by improperly favoring the interests of the preferred stockholders over those of the common stockholders."[32] Responding to defendants' contention that ODN was bound by charter provisions establishing preferred stockholder's right to trigger Mandatory Redemption and, therefore, the directors had no discretion but to comply, the Vice

26. *Id.*

27. *Id.* at *18.

28. *Id.* at *19.

29. *Id.* Vice Chancellor Laster explained that the focus on long-term benefit does not necessarily mean that fiduciaries may not entertain a "near-term sale or other shorter-horizon initiative." For instance, a short-term strategy (such as paying a dividend or repurchasing shares) could be "value maximizing even when judged against the long-term," or the "fiduciaries might conclude that continuing to manage the corporation for the long-term would be value destroying because of external market forces or other factors." *Id.*

30. *Id.* at *21.

31. *Id.* at *22.

32. *Id.*

Chancellor explained that while directors' status as fiduciaries "does not give them Houdini-like powers to escape from valid contracts,"[33] their decisions "how to handle those contractual obligations" must be taken with a view to the standard of conduct applicable to them as fiduciaries.[34]

Turning to the Fiduciary Duty Claims, Vice Chancellor Laster theorized that "the Board could have continued to manage the Company for the benefit of the undifferentiated equity without having to make a massive redemption payment."[35] Not only did the "existence and binding nature of the Redemption Right . . . not foreclose the fiduciary standard of conduct from operating in this context," but "the Board's obligation to raise funds to support a redemption is constrained by its fiduciary obligation to the undifferentiated equity,"[36] that is, ODN's common stockholders. In other words,

> What Oak Hill possessed and could enforce was a contractual right to require the Company to redeem the Preferred Stock to the extent the Company had surplus and legally available funds. What the Redemption Provisions do not foreclose is a claim by the undifferentiated equity that the directors breached their fiduciary duties when generating surplus and legally available funds. Consequently, there is room for a fiduciary duty theory on the facts of this case.[37]

B. *Standard of Review*

1. Entire Fairness vs. Business Judgment

To determine whether ODN's fiduciaries complied with their fiduciary standard of conduct by funding the challenged Mandatory Redemption payments, Vice Chancellor Laster examined their actions "through the lens of a standard of review."[38] In this connection, the Vice Chancellor had two alternatives from which to choose:

- The "default standard of review," the deferential business judgment rule under which "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives"; or

33. *Id.* at *23.

34. *Id.* at *24. Similarly, "even with an iron-clad contractual obligation, there remains room for fiduciary discretion because of the doctrine of efficient breach" under which "directors may choose to breach if the benefits (broadly conceived) exceed the costs (again broadly conceived)." *Id.*

35. *Id.* at *24.

36. *Id.* at *24-25.

37. *Id.* at *25.

38. *Id.* at *25.

- the "most onerous standard," the entire fairness test,[39] under which "defendants must establish 'to the *court's* satisfaction that the transaction was the product of both fair dealing *and* fair price," regardless of the defendants' underlying motivation.[40]

According to the Vice Chancellor, this choice requires a "director-by-director analysis" whether plaintiff pled facts demonstrating that the director in question either

- was not *disinterested* because she received "a personal benefit from a transaction not received by the [stockholders] generally";
- was not *independent* because she was a "dual fiduciary . . . sufficiently loyal to, beholden to, or otherwise influenced by an interested party to undermine the director's ability to judge the matter on its merits"; or
- failed to act "in good faith" by "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation," regardless of personal motivations.[41]

Vice Chancellor Laster determined that the Fiduciary Duty Claims "adequately call into question the interests of seven directors"[42]—a clear majority of the Board—who could not be viewed as independent or disinterested for purposes of choosing the applicable standard of review.

Oak Hill Directors. This was not a difficult determination, as these directors (two of whom were Oak Hill principals and the other of whom was a senior Oak Hill officer) clearly "owed fiduciary duties to Oak Hill" and, therefore, were "dual fiduciaries."[43] Oak Hill, of course, not only was ODN's controlling stockholder, but also owned Preferred Stock having "special rights that create specific economic incentives that differ from those of the common stock."[44]

ODN's CEO. A senior corporate officer who serves on the board of her employer rarely qualifies as independent. ODN's CEO was no exception. Not only was the CEO "a highly compensated senior officer in a Company controlled by Oak Hill" who derived her "principal income" from her position with ODN, but she also was the recipient of a significant Bonus tied directly to successful completion of the

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39. *Id.* at *26.
40. *Id.*
41. *Id.* at *16.
42. *Id.* at *27.
43. *Id.* at *27, *30.
44. *Id.* at *28.

Mandatory Redemption, "a personal financial benefit not equally shared by the stockholders."[45]

Non-Management Directors. Three of the Non-Management Directors played key roles in the process that led to the Mandatory Redemption payments: two of them served on the Committee and the third, Mr. Ng, the Company co-founder, sold illiquid shares of common stock to Oak Hill that enabled it to become ODN's controlling stockholder. The Vice Chancellor found that the Fiduciary Duty Claims relating to these directors detailed "a constellation of actions, all of which favored the interests of Oak Hill by maximizing the value of its Redemption Right."[46] These included the 180° shift in the Company's business strategy, the size, timing and terms of the divestitures "at prices far below what the Company had paid to acquire the assets," approval of the Bonus, and the nature of the negotiations with Oak Hill, in which, although "Oak Hill had no effective means of enforcing" its right, the Committee "offered a material benefit to Oak Hill . . . for little if anything in return."[47] While the Vice Chancellor found "this course of conduct by itself . . . sufficient to call into question the motives" of these three Non-Management Directors, he also noted that they "acted in the shadow of a controlling stockholder" and "had additional reasons to favor Oak Hill's interests."[48]

2. Impact of the Committee

Defendants argued that the Board's use of the Committee should either "de-escalate" the standard of review from entire fairness to business judgment or, failing that, "shift the burden of proof under the entire fairness standard from the defendants to the plaintiffs."[49] Vice Chancellor Laster rejected each of contentions, leaving defendants with the difficult burden of establishing the entire fairness of the Mandatory Redemption. Specifically,

- Due to Oak Hill's status as ODN's "controlling stockholder," "the presence of a committee alone is not sufficient to lower the standard of review from entire fairness."[50] To achieve that transformation, defendants also would have had to seek "a majority-of-the-minority" vote of ODN's stockholders approving the Mandatory

45. *Id.* at *30.
46. *Id.* at *31.
47. *Id.*
48. *Id.* at *32.
49. *Id.* at *33-34.
50. *Id.* at *34.

Redemption under the standards developed by the Delaware Supreme Court in *Kahn v. M&F Worldwide Corp.*[51]

- In light of the Vice Chancellor's conclusion that the Fiduciary Duty Claims supported "a reasonable inference that the Committee was not effective,"[52] a "burden shift" under *Kahn v. Lynch Communications Systems, Inc.*[53] was not available to defendants at the pleading stage.

3. Application of Entire Fairness

Vice Chancellor Laster next determined he could reasonably infer from the Fiduciary Duty Claims, at least for purposes of defendants' motion to dismiss, that the "directors acted to maximize the value of Oak Hill's Preferred Stock rather than seeking to promote the long-term value of the Company for the benefit of the undifferentiated equity, and that the resulting transactions were unfair to the Company's common stockholders."[54] The Vice Chancellor cited a number of factors in support of his conclusion that defendants had not carried their burden of proving either fair process or fair price. In this connection, he examined "when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained,"[55] focusing on well-pled allegations that:

- the Company "radically altered its business strategy in the shadow of Oak Hill's Redemption Right,"[56] representing a shift from growing the business internally and externally to a near liquidation aimed at amassing cash to fund Mandatory Redemption payments;
- the Board made concessions to Oak Hill even though "Oak Hill did not have the ability to force the Company

51. 88 A.3d 635 (Del. 2014) ("*M&F Worldwide*"). For a more detailed discussion of the operation of the so-called *M&F Worldwide* "playbook," see Robert S. Reder & Lauren Messonnier Meyers, *Delaware Supreme Court Affirms Pleading-Stage Dismissal of Control Stockholder Buyout Litigation*, 69 VAND. L. REV. EN BANC 17 (2016) and Robert S. Reder, *Delaware Court Grants Pleading-Stage Dismissal of Litigation Challenging Control Stockholder-Led Buyout*, 70 VAND. L. REV. EN BANC 217 (2017).

52. ODN Holding, C.A. No. 12108-VCL, 2017 WL 1437308 at *34.

53. 638 A.2d 1110 (Del. 1994).

54. ODN Holding, C.A. No. 12108-VCL, 2017 WL 1437308 at *36. The Vice Chancellor ruled similarly, and for much the same reasons, in respect of several of ODN's officers. *Id.* at *39-40. The officers, he explained, "owe fiduciary duties that are identical to those owed by corporate directors." *Id.* at *39.

55. *Id.* at *34.

56. *Id.* at *35.

to make redemptions beyond the funds that were legally available";[57]

- "[o]ver a long-term time horizon, the Company conceivably could have grown its business, gradually redeemed all of the Preferred Stock, and then generated returns for its common stockholders";[58] and
- despite the foregoing, "the directors engaged in hasty divestitures at seemingly fire-sale prices that virtually wiped out the Company's ability to generate income."[59]

For similar reasons, the Vice Chancellor allowed the Fiduciary Duty Claims against Oak Hill to survive its motion to dismiss.[60] These allegations, he noted,

> support a reasonable inference that Oak Hill used its power as a controlling stockholder to cause the Company to sell assets and stockpile cash so that funds would be available when the Redemption Right ripened, when a loyal fiduciary would have deployed those funds for the benefit of the Company and its residual claimants.[61]

While the fiduciary duties of controlling stockholders "do not require self-sacrifice for the benefit of the minority stockholders," Oak Hill was not entitled, as Mr. Hsu alleged, to "selfishly use[] its power over the Company to extract *more* than Oak Hill could have . . . obtained if loyal fiduciaries had been managing the Company's affairs."[62]

C. *Defenses and Immunities*

Certain of the defendants offered defenses and immunities against the Fiduciary Duty Claims, none of which were availing.

1. Exculpation

The Oak Hill Directors, the CEO and the Non-Management Directors who served on the Committee all sought refuge under the Exculpation Provision. However, DGCL §102(b)(7) only permits a corporation to exempt its directors from personal liability for breaches of the duty of care, but not from breaches of the duty of loyalty or actions taken in bad faith. Due to the Vice Chancellor's finding that the Fiduciary Duty Claims against these directors supported "a reasonable

57. *Id.*
58. *Id.*
59. *Id.* at *36.
60. The Vice Chancellor also refused to dismiss Mr. Hsu's alternative aiding and abetting claims against Oak Hill. *Id.* at *41.
61. *Id.* at *40.
62. *Id.* at *40.

inference that they acted disloyally," none of them was entitled to exculpation.[63]

2. Abstention

The Oak Hill Directors argued that because they recused themselves on the two Board votes approving Preferred Stock redemptions, they should have no liability under the Fiduciary Duty Claims. The Vice Chancellor readily acknowledged that "a director who plays no role in the process of deciding whether to approve a challenged transaction cannot be held liable on a claim that the board's decision to approve that transaction was wrongful." [64] On the other hand, "[a]n absent director also might be held liable if the director 'play[ed] a role in the negotiation, structuring, or approval of the proposal.' "[65] Given their alleged role in the process, the Vice Chancellor found "a reasonable inference that the Oak Hill Directors each participated sufficiently . . . to be liable for breaching their duty of loyalty. The fact that they abstained from two discrete votes does not provide grounds for a pleading-stage dismissal."[66]

CONCLUSION

Vice Chancellor Laster was careful to caution that, given the pleading-stage posture of the litigation, his conclusions were based on Mr. Hsu's allegations and a different result may obtain if and when a full trial record is developed. Regardless, *ODN Holding* makes a number of points whose import should not be discounted:

- The standard of conduct applicable to Delaware corporate fiduciaries requires they "act prudently, loyally, and in good faith to maximize the value of the corporation over the long-term for the benefit of the providers of presumptively permanent equity capital . . . ."[67] The interests of other constituents may be considered only in relation to the impact of actions taken for their benefit on stockholders.[68] And the existence of

63. *Id.* at *37.
64. *Id.* at *38.
65. *Id.*
66. *Id.*
67. *Id.* at *18. *See supra* notes 26-29.
68. *See supra* note 29.

stockholders having a short-term horizon does not alter that equation.[69]

- Common stockholder interests are paramount to preferred stockholder contract rights. When those interests are opposed, directors may breach their fiduciary duty of loyalty by failing to favor common interests over preferred.[70]
- Selection of the appropriate judicial standard for reviewing fiduciaries' satisfaction of their standard of conduct—the deferential business judgment rule or the onerous entire fairness test—requires a "director-by-director analysis" whether a majority of the board is independent and disinterested and acted in good faith.[71]
- Both an independent board committee and a majority-of-the-minority stockholder vote are required to "de-escalate" the standard of review from entire fairness to business judgment when a controlling stockholder stands on both sides of a transaction or receives benefits not shared by the minority.[72] Moreover, defendants will be denied a "burden shift" at the pleading stage if plaintiff alleges facts producing a reasonable inference that a committee "was not effective."[73]
- Although "self-sacrifice" is not required when a controlling stockholder deals with the corporation it controls, the controlling stockholder's fiduciary duties prevent it from taking actions that favor itself at the expense of the minority.[74]
- A director may not merely abstain from a board vote to escape potential liability for actions taken by the board; rather, the director must actually refrain from participating in and influencing the board action.[75]

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69. *Id.*
70. *See supra* notes 31-32.
71. *See supra* note 41.
72. *See supra* notes 49-51.
73. *See supra* notes 52-53.
74. *See supra* note 62.
75. *See supra* notes 64-66.