

DELAWARE CORPORATE LAW UPDATE — July 2024

YOUNG
CONAWAY

FEATURED:

Sciannella v. AstraZeneca UK Limited

Pope v. Hycroft Mining Holding Corp

Kellner v. AIM ImmunoTech Inc.

Bricklayers Pension Fund of W. PA. v. Brinkley

In re Kraft Heinz Demand Refused Derivative Stockholder Litig.

Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC

Sciannella v. AstraZeneca UK Limited, 2024 WL 3327765 (Del. Ch. July 8, 2024) (Stockholder who owned 26.72% of stock and appointed two of eight directors did not have general control of the company or control over the challenged transaction and so did not owe fiduciary duties as a controlling stockholder.)

Dismissing breach of fiduciary duty claims against AstraZeneca in connection with the 2021 acquisition of Viela Bio by Horizon Therapeutics. AstraZeneca owned 26.72% of Viela and Plaintiff alleged that AstraZeneca owed fiduciary duties as Viela's controlling stockholder. Plaintiff claimed that AstraZeneca breached those duties by pushing for a quick sale of Viela to the detriment of unaffiliated stockholders to facilitate AstraZeneca's acquisition of Viela's rival. But the Court held that AstraZeneca had neither general nor transactional control over Viela. Among other things, the Court noted that only two of eight Viela directors—one of whom resigned a month before the board approved the merger and neither of whom were on Viela's management team or chaired the board—were allegedly AstraZeneca designees. The Court also rejected Plaintiff's attacks against the independence of the remaining directors. The Court then ruled that Viela's disclosures about the acquisition were adequate and the deal was therefore cleansed under *Corwin* by virtue of a fully-informed stockholder vote.

Pope v. Hycroft Mining Holding Corp, 2024 WL 3352852 (Del. Ch. July 9, 2024) (Pro se plaintiffs barred from bringing representative actions as a matter of law. Plaintiff must pick between asserting individual or class claims due to potential conflict of interest with the putative class.)

Granting in part motion to dismiss on procedural grounds. The Court held that *pro se* plaintiffs are not permitted to bring class or derivative claims because they are inadequate representatives under Delaware Rules 23 and 23.1. The Court noted that representative actions depend in large part on counsel's competence, and a *pro se* plaintiff "almost always lacks the requisite experience and knowledge of the law" to be entrusted with representative claims. The Court also held that one of the plaintiffs, who was represented by counsel, must choose between bringing individual and class claims because bringing both posed a "meaningful risk" that the plaintiff would favor his own individual claims over those of the class, and so continuing "with both would be inconsistent with his obligations to the putative class."

***Kellner v. AIM ImmunoTech Inc.*, 2024 WL 3370273 (Del. July 11, 2024) (Advance notice bylaws facially valid, but unenforceable in equity. Activist stockholder nevertheless not entitled to relief due to their deceptive conduct.).**

Affirming in part and reversing in part a Court of Chancery post-trial decision enforcing advance notice bylaws. The company implemented six advance notice bylaws to ward off a proxy contest. The activists then attempted to hide the involvement of two convicted felons among them by submitting false and misleading responses to the company's information requests. The Supreme Court held that all but one of the bylaws—which was an indecipherable 1,099-word single-sentence provision—were facially valid since Delaware law allows bylaws to “contain any provision . . . relating to the business of the corporation.” All of the bylaws were, however, unenforceable breaches of fiduciary duty under the applicable enhanced scrutiny standard because the board's motive in passing them was not to counter the threat of an uninformed vote, but to interfere with the activist's nomination and maintain control. But the Supreme Court nevertheless refused to grant the activists any relief on account of their “deceptive conduct.”

***Bricklayers Pension Fund of W. PA. v. Brinkley*, 2024 WL 3384823 (Del. Ch. July 12, 2024) (Information systems and red flag Caremark claims dismissed for failure to plead demand futility.).**

Granting Defendants' motion to dismiss *Caremark* claims for failure to plead demand futility. Among other claims, Plaintiff alleged that the board of Centene, a healthcare company that administers Medicaid plans, failed to implement systems for monitoring Medicaid compliance and ignored red flags of an illegal scheme by certain officers to increase their incentive-based compensation by causing Centene subsidiaries to seek reimbursements for which they were not entitled. Notably, the Court distinguished Plaintiff's information systems claim from comparable claims in *Marchand* and *Boeing*, noting that the Centene board oversaw improvements to the company's Medicaid compliance system during the relevant period and had three committees responsible for overseeing Medicaid compliance. The Court also rejected Plaintiff's red flags claim, holding that various instances of regulatory and legal scrutiny did not put the board on notice of the alleged officer misconduct. Further, Plaintiff failed to show that the board, which accepted management's statements that the compliance and regulatory risks were being handled, ignored relevant information in bad faith. Demand was therefore not excused, and by extension, Plaintiff's claims against Centene's officers also failed for failure to plead demand futility.

***In re Kraft Heinz Demand Refused Derivative S'holder Litig.*, 2024 WL 3493957 (Del. Ch. July 19, 2024) (Dismissing derivative claims for failure to plead that demand was improperly refused, holding that Plaintiffs conceded the board's impartiality by making the demand and that directors conducted a robust good faith investigation summarized in a 110-page report.).**

Dismissing derivative claims for failure to plead that demand had been wrongfully refused. A significant stockholder sold its ownership interest in The Kraft Heinz Company just before the company announced a \$15.4 billion impairment charge. Plaintiffs alleged that the stock sale occurred based on material non-public information that Kraft Heinz officers and directors concealed from the market. The Court had previously dismissed similar claims brought by another group of plaintiffs for failure to plead demand futility, which the Delaware Supreme Court affirmed. Plaintiffs sent a litigation demand to the board, which then formed a working group to consider the demands. The working group rejected the

demand and the full board agreed. In response, Plaintiffs sued. The Court held that the board did not improperly refuse the demand. The Court reasoned that, by making the demand, Plaintiffs tacitly conceded that the board could impartially consider the demand. The Court also held that the board's response to the demand was the product of good faith and due care, noting that the working group "hired independent legal counsel and a forensic accountant to assist with its investigation. It and its advisors reviewed more than 150,000 documents, interviewed a dozen people, and considered a detailed prior investigation led by outside counsel. After a two-year process, the working group authored a 110-page report summarizing its analysis."

Hyde Park Venture Partners Fund III, L.P. v. FairXchange, LLC, C.A. No. 2022-0344-JTL (July 30, 2024) (Appraisal awarding deal price and applicable interest in a mixed-consideration merger, but declining to adjust the award for a pre-merger reduction in consideration value caused by drop in buyer's stock price.)

Post-trial appraisal decision awarding the deal price of \$330 million plus pre- and post-judgment interest relating to Coinbase's acquisition of derivatives platform FairX for \$265 million in Coinbase stock and \$65 million in cash. Coinbase's stock declined before closing, which lowered the value of the merger consideration from \$330 million to \$310.4 million. But the Court declined to adjust the award to reflect this decrease, holding that "a decline in an acquirer's stock price does not necessarily correspond to a change in the target's value, particularly when the acquirer is comparatively large and the target comparatively small."