Delaware Court of Chancery Midyear 2024: Valuation Case Summaries

GRIFFING GROUP

Introduction

The Delaware Court of Chancery (the Court) is the preeminent forum for corporate disputes in the United States. Renowned for its specialization in fiduciary duty and valuation disputes, the Court's decisions are followed closely by corporate executives, litigators, and judges around the country. Below we provide summaries of nine of the Court's key valuation-related decisions issued between July 2023 to June 2024. The cases include topics ranging from appraisal actions to equity compensation and damages analyses.[1]

For more than 25 years, litigators and their clients have trusted experts from The Griffing Group to provide best-in-class valuation and damages analysis and testimony in major cases before the Court. With five seasoned experts who have testified in more than 50 Chancery cases, the depth of our experience and the strength of our track record is unparalleled among expert firms. We continuously monitor developments in the Court and are pleased to provide summaries of the following cases:

1.) NetApp, Inc. v. Albert E. Cinelli, et al.

C.A. No. 2020-1000-LWW (Del. Ch. August 2, 2023)

Judge: Vice Chancellor Will

Key Issues: Damages, Financial Statement Misrepresentation, Market Multiples, DCF Method

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2.) HBK Master Fund L.P., et al. v. Pivotal Software, Inc.

C.A. No. 2020-0165-KSJM (Del. Ch. August 14, 2023, Corrected March 12, 2024)

Judge: Chancellor McCormick

Key Issues: Appraisal, Control Premiums, Stock Price Efficiency, Deal Price Reliability, DCF Method, GPC Method, Reliability of Projections

3.) Gener8, LLC and Symbient Product Development, LLC v. Scott Castanon

C.A. No. 2022-0426-LWW (Del. Ch. September 29, 2023)

Judge: Vice Chancellor Will

Key Issues: Damages, Non-Compete Agreement, Workforce Damages, Lost Profits

[1]Please note that the summaries focus on valuation issues contained within the opinions. The Griffing Group is not providing legal, accounting, or valuation advice in this document. Readers should consult the full opinions for each case with links provided herein.

4.) In re Straight Path Communications Inc. Consol. Stockholder Litigation

C.A. No. 2017-0486-SG (Del. Ch. October 3, 2023)

Judge: Vice Chancellor Glasscock

Key Issues: Damages, Valuation of Legal Claims

5.) In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation

C.A. No. 2019-0798-JTL (Del. Ch. January 24, 2024)

Judge: Vice Chancellor Laster

Key Issues: Appraisal, Liquidation Value, Conflicted Transactions, Fiduciary Duty Claims, DCF Method

6.) Richard J. Tornetta v. Elon Musk, et al.

C.A. No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024)

Judge: Chancellor McCormick

Key Issues: Equity Compensation, Corporate Control, Entire Fairness Standard

7.) Paul S. Buddenhagen v. Barry L. Clifford

C.A. No. 2019-0258-NAC (Del. Ch. May 10, 2024)

Judge: Vice Chancellor Cook

Key Issues: Damages, Entire Fairness, Manipulation of Corporate Records, Blockage Discounts, Corporate Control

8.) William J. Brown v. Matterport, Inc. and Matterport Operating, LLC

C.A. No. 2021-0595-LWW (Del. Ch. May 28, 2024)

Judge: Vice Chancellor Will

Key Issues: Equity Compensation, Blockage Discount, Stock Efficiency

9.) Vivint Solar, Inc. v. Jim Lundberg

C.A. No. 2020-0988-PAF (Del. Ch. May 30,2024, Corrected June 18, 2024)

Judge: Vice Chancellor Fioravanti

Key Issues: Equity Compensation, Highest Immediate Value, Blockage Discount, Option Valuation

NetApp, Inc. v. Albert E. Cinelli, et al.

C.A. No. 2020-1000-LWW (Del. Ch. August 2, 2023) | Click here for full opinion

In November 2020, NetApp filed a complaint in the Delaware Court of Chancery against defendants Albert E. Cinelli, et al., related to its $35 million purchase of Cloud Jumper, a virtual desktop infrastructure company. NetApp claimed damages related to misrepresented financial statements disclosed during merger negotiations.

In early 2020, Cloud Jumper began merger talks with data management firm, NetApp. Cloud Jumper's historical financials that were provided during due diligence contained an error that overstated the software business revenues by ~40%. This overstatement was compounded as management projected a nearly 200% increase in sales year-over-year, based off a single year's sales figure. Without knowledge of the error, NetApp sent a non-binding letter of intent to Cinelli to acquire Cloud Jumper with the ultimate transaction closing on April 28, 2020, at $35 million. The merger agreement included stipulations that the information provided was fairly presented and GAAP compliant.

By June of 2020, NetApp began to question the results of Cloud Jumper after significantly missing revenue expectations. Soon thereafter, NetApp discovered the erroneous financial statements and eventually initiated litigation against the sellers of Cloud Jumper.

NetApp's expert opined damages based on a benefit of the bargain where he valued the company on a synergistic basis as represented at $86 million compared to an "actual" value of $48 million, resulting in damages of approximately $38 million (more than the purchase price).

The defendants' expert opined on damages ranging from $0 to $4.6 million by comparing the purchase price to the fair market value, applying a guideline public companies (GPC) method, guideline transactions method, and discounted cash flow (DCF) method using NetApp's merger model.

The Court opined that Cloud Jumper breached multiple representations in the Merger Agreement and committed fraud by a preponderance of evidence, and therefore awarded damages of $4.6 million, essentially based on the defendants' expert's GPC method. In rejecting the $38 million asserted damages by the plaintiff's expert, the Court acknowledged that "...awarding NetApp damages in excess of the purchase price would amount to a ***windfall.***" [emphasis added]

HBK *Master Fund L.P., et al. v. Pivotal Software, Inc.*

C.A. No. 2020-0165-KSJM (Del. Ch. August 14, 2023, Corrected: March 12, 2024) | Click here for full opinion

On March 5, 2020, HBK Master Fund L.P. and HBK Merger Strategies Master Fund L.P., former Class A common stockholders of Pivotal Software, Inc., sought appraisal of their shares following the acquisition of Pivotal by VMware, Inc. for $15.00 per share. The petitioners' expert opined the fair value of Pivotal's stock at the time of the merger was $20.00 per share while the respondent's expert opined the fair value was $12.17 per share. After giving equal weight to the GPC method and DCF method, the Court concluded that the fair value was $15.44 per share (corrected opinion), a ~3% premium to deal value.

The petitioner's appraisal consisted of a GPC method (undisclosed value per share) as well as a comparable transaction analysis (~$22.50 per share) to arrive at $20.00 per share. The respondent's expert relied on a DCF analysis to estimate the fair value of Pivotal's shares of $12.17 per share. The expert further argued that the deal price of $15.00 should act as a ceiling as the transaction was conditioned on *MFW* protections under Delaware law. To support the asserted fair value, the respondent's expert also pointed to the unaffected stock price of $8.30 per share.

In the Court's view, the unaffected stock price, deal price, and the comparable transactions method should not be given explicit weight. The deal price was considered but otherwise not given weight due to the transaction occurring "in the context of a controller squeeze-out." While the underlying stock had indicia of efficiency (*e.g.*, significant trading volume, numerous analysts covering the stock, numerous market makers, and statistical analyses by an expert supporting its efficiency), the unaffected stock price was deemed unreliable because of the existence of non-public material information on the relevant date and a controlling shareholder overhanging the stock price. After further research into the comparable transactions analysis, the Court found that only four of the ten transactions had

sufficient comparability, deeming this analysis unreliable as too short of a list that failed to match the Court's industry weighting in the GPC method.

The Court applied a DCF using the respondent's expert's model but adjusted it by (i) removing the size premium, (ii) increasing the PGR from 0% to 2.5%, and (iii) removing a market adjustment for returns between announcement and deal close. The Court's DCF rendered a fair value of $16.13 per share.

The Court also gave weight to a revised GPC method after adjustments for (i) inclusion of a larger set of GPCs, (ii) weighting the companies based on industry, and (iii) excluding any control premium, indicating a fair value of $14.75 per share. The Court rejected the application of a control premium to remove an implicit minority discount (IMD) due to the petitioner's expert failure to analyze whether the GPCs had any indicia of suffering minority discounts and the failure to remove the impact of synergies from the calculated control premium derived from acquisition premiums, among other reasons.

Weighting the GPC method ($14.75) and DCF ($16.13) methods equally, the Court reached a fair value of $15.44 per share.

Gener8, LLC and Symbient Product Development, LLC v. Scott Castanon

C.A. No. 2022-0426-LWW (Del. Ch. September 29, 2023) | Click here for full opinion

On May 16, 2022, Gener8, LLC and Symbient Product Development, LLC filed a Verified Complaint in the Delaware Court of Chancery against Scott Castanon. Gener8 claimed that Castanon, after selling Symbient to Gener8 for $14.4 million in February 2020, violated restrictive covenants prohibiting him from competing with Symbient and soliciting its employees or customers.

Shortly after leaving Symbient, Castanon became involved in launching a company called Protoshop, ostensibly founded by his stepson, but primarily driven by Castanon. Castanon provided substantial startup assistance, including securing office space, guaranteeing equipment loans, and providing startup capital. He also solicited former Symbient employees and customers for Protoshop, directly competing with Symbient.

At trial, it was proven that Protoshop engaged in the same business as Symbient, targeting Symbient's customer base and using its marketing materials. The Court found that Castanon breached his restrictive covenants by forming a competing business and soliciting Symbient's employees and customers. It was also established that Castanon attempted to conceal his involvement, including deleting electronic evidence that would have otherwise illuminated his dissent.

Plaintiffs' expert opined damages due from the defendant ranging from $1.5 million to $2.3 million based on lost profits analyses.

In rebuttal, the defendant's expert opined damages be limited to the cost to replace the lost employees of approximately $100k.

While the Court entered judgment in favor of the plaintiffs on their breach of contract claims, recovery was limited to $100k based on the opinion as proffered by the defendant's expert. The Court noted that the plaintiff's disgorgement and lost profits claims were

unfounded and would potentially result in a "windfall." The Court also issued sanctions against Castanon for spoliation of evidence and contempt of a Court order barring him from assisting Protoshop during the litigation. These sanctions included adverse inferences and additional financial penalties.

In re Straight Path Communications Inc. Consol. Stockholder Litigation

C.A. No. 2017-0486-SG (Del. Ch. October 3, 2023) | Click here for full opinion

On July 5, 2017, the Delaware Court of Chancery received a complaint filed by the plaintiffs against IDT Corporation, et al. The plaintiffs, minority stockholders of Straight Path Communications, Inc., alleged that Howard Jonas and his affiliated entities breached their fiduciary duties by orchestrating an unfair transaction that stripped value from the minority stockholders.

Straight Path was a public company spun off from IDT Corporation in 2013. As part of the spin-off, Straight Path received intellectual property (IP) assets and a portfolio of wireless spectrum licenses from IDT. Howard Jonas, the founder and chairman of IDT, controlled both IDT and Straight Path via his substantial voting power. The spectrum licenses, initially deemed not particularly valuable, appreciated significantly due to changes in Federal Communications Commission (FCC) regulations and the growing demand for cellular spectrum.

In late 2015, an anonymous short-seller report alleged that IDT had fraudulently renewed the spectrum licenses through temporary installations that did not comply with FCC regulations. This led to an FCC investigation into both IDT and Straight Path. On January 11, 2017, Straight Path entered into a consent decree with the FCC, agreeing to pay an initial fine of $15 million and forfeit 196 of its spectrum licenses. The consent decree also required Straight Path to choose one of three additional penalties: (1) pay an additional penalty of $85 million, (2) terminate the remaining spectrum licenses, or (3) forfeit 20% of the proceeds from selling the remaining spectrum licenses.

Following the consent decree, Straight Path's board of directors decided to sell the company to resolve the remaining FCC liabilities. This initiated a competitive bidding process involving major telecom companies, including Verizon and AT&T. The independent directors of Straight Path believed that the company could seek indemnification from IDT for the penalties under the consent decree. However, they were concerned that an acquirer might not value the indemnification claim, leading them to explore ways to preserve it for the stockholders.

On March 29, 2017, a meeting took place between the Special Committee of Straight Path's board and Howard Jonas. The Special Committee, composed of independent directors, sought to preserve the indemnification claim. Howard Jonas, leveraging his control, pressured the Special Committee to release the indemnification claim for $10 million and a contingent payment right (CPR) of 22% of the net profits from the IP assets.

Despite the Special Committee's efforts to preserve the claim, they ultimately capitulated to Howard Jonas's demands due to the intense pressure and the threat of Jonas using his control to remove them as directors. On April 9, 2017, Straight Path publicly announced the terms of the settlement, which included the release of the indemnification claim and the sale of the IP assets to IDT for $6 million plus the CPR.

The sale process continued, and on April 10, 2017, Straight Path announced a deal with AT&T for $1.6 billion. However, Verizon made an unsolicited offer of $1.8 billion, leading to a bidding war. Verizon ultimately prevailed with a bid of approximately $3.1 billion, providing a significant premium to Straight Path stockholders.

The plaintiffs argued that Howard Jonas used his control to influence the board's decision in an unfair manner, breaching his fiduciary duties. The Court found that while Howard Jonas did breach his fiduciary duties by pressuring the Special Committee to settle the indemnification claim, the plaintiffs did not suffer substantial damages as a result. The Court arrived at the nominal damages determination by valuing the indemnification claim against the company by the following steps:

1. Estimating the face value of the claim (*i.e.*, amount that could be awarded upon successful outcome) of $293 million.
2. Reduce the amount above by the expense required to litigate the claim of $30 million, leaving $263 million net value.
3. Multiply the net claim value by the probability of succeeding at various stages of the litigation, which was a 3.2% probability of success on a conditional basis, leaving an expected net value of ~$8 million.

As the Court's claim valuation of approximately $8 million was less than the $10 million received by the company to settle the claims, the Court only awarded nominal damages to the plaintiffs, acknowledging that the final sale to Verizon provided a significant benefit to the stockholders.

In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation

C.A. No. 2019-0798-JTL (Del. Ch. January 24, 2024, Corrected: July 2, 2024) | Click here for full opinion

On January 24, 2024, the Delaware Court of Chancery issued a post-trial opinion in the consolidated stockholder litigation against Sears Hometown and Outlet Stores, Inc. (SHOS). The plaintiffs, minority stockholders, alleged that Edward S. Lampert and his affiliated entities breached their fiduciary duties by blocking a proposed liquidation plan for SHOS's Hometown segment.

The case centered around SHOS, a company spun off from Sears Holdings Corporation in 2012, which operated two segments: the Hometown and Hardware Segment and the Sears Outlet Segment. Following years of financial decline, SHOS management proposed a plan to liquidate the struggling Hometown segment and focus on the more profitable Outlet segment.

In late 2018, as Sears Holdings faced bankruptcy, SHOS management began considering the liquidation of the Hometown segment. Lampert, who controlled SHOS through his investment firm ESL Investments, opposed this plan, arguing that it would destroy value due to the potential liabilities

and negative impact on relationships with independent dealers.

In April 2019, Lampert made an offer to acquire SHOS for $2.25 per share, which the SHOS special committee rejected as too low. As negotiations continued, Lampert took unilateral action on April 15, 2019, by amending SHOS's bylaws to prevent the liquidation without his approval and removing two special committee members who supported the liquidation. Eventually the deal closed with minority shareholders receiving $3.21 per share in total consideration.

At trial the plaintiffs' expert relied on a sum-of-the-parts analysis, combining a DCF method to value Outlet with a liquidation method for Hometown, resulting in a value of $9.38 per share. Per the Court, the DCF relied on "overly optimistic projections."

The defendants' expert opined on a value of $2.77 per share. The expert prepared a sum-of-the-parts analysis, valuing Outlet at its sales price and adding the liquidation value of Hometown from an excluded expert.

Both experts also used the DCF method to value the company as a whole, but the Court found these valuations unpersuasive; the plaintiff's expert used "overly optimistic projections" which included errors, while the defendants' expert made "excessive" downward adjustments to the management projections.

The Court held that while Lampert acted within his rights as a majority stockholder, his actions were subject to enhanced scrutiny due to his conflicts of interest. The Court found that Lampert did not intend to harm the corporation or its stockholders but acted to prevent a value-destructive liquidation plan. However, the Court determined that the end-stage transaction, which eliminated the minority stockholders' interests, was not entirely fair due to the undervaluation of SHOS assets.

The Court then needed to value SHOS assets to determine damages. After deeming both sides' valuations as unreliable, the Court adopted a blended approach, valuing the Outlet segment using its sales price (~$120 million net) and the Hometown segment using an estimated liquidation value at 72% of book value (~$98 million). After consideration of NOLs and debt, the net value of equity of the company was approximately $113 million or $4.99 per share.

Subtracting the $3.21 received from the $4.99 per share indicates damages of $1.78 per share or total damages of ~$18 million before consideration of interest.

In a new opinion issued July 2, 2024, the Court revisited its concluded valuation based on a motion contending the Court "appear[ed] to have inadvertently failed to account for certain other payables, liabilities, and adjustments necessarily associated with liquidating the Hometown Segment." The Court opined that an adjustment for additional liquidation costs of $35.7 million was appropriate, but it would not be appropriate to include adjustments for both the additional liquidation costs and $14.3 million of increased third-party liabilities. After modification to include additional liquidation costs and exclude increased third-party liabilities, the Court's indicated value per share declined from $4.99 to $4.06, resulting in corrected damages of ~$8.7 million before interest.

Richard J. Tornetta v. Elon Musk, et al.

C.A. No. 2018-0408-KSJM (Del. Ch. Jan 30, 2024) | Click here for full opinion

On June 5, 2018, Richard J. Tornetta, a Tesla Shareholder filed his complaint against Elon Musk and the directors of Tesla, claiming they breached fiduciary duties by extending a $55.8 billion performance-based equity compensation package to Elon Musk. Due to questions of fairness, the Court ruled in favor of the plaintiff, Richard J. Tornetta, and found that the compensation package was not entirely fair.

Throughout the latter half of 2017 into 2018 the Tesla Board met several times to discuss potential moves to motivate Musk to drive profitability and operational efficiency throughout the firm despite his various other business ventures. This plan offered Musk the opportunity to secure 12 tranches of options, each representing 1% of Tesla's outstanding shares as of January 21, 2018. For a tranche to vest, Tesla's market capitalization had to increase by $50 billion, and Tesla had to achieve either an adjusted EBITDA target or a revenue target in four consecutive fiscal quarters. The plan had a maximum value of $55.8 billion and a grant date fair value of $2.6 billion, making it the largest potential compensation opportunity ever observed in public markets. On March 21, 2018, the shareholders approved the pay package at a special meeting, with 73% of the votes in favor.

The Court acknowledged that the equity compensation package was used to reduce agency costs and better align managers' interests with that of shareholders. In this case, the Court found it to be excessive and unnecessary as Musk was already the largest individual shareholder while pointing out countless other visionary founders that forego compensation entirely.

The Court also criticized the process leading to the approval of the plan, noting that it was deeply flawed and lacked meaningful negotiation, writing, "[t]he timeline reflected a reckless approach to a fiduciary process...." Many of the directors tasked with negotiating the plan had close personal and professional relationships with Musk, which compromised their independence.

Despite not attaining mathematical voting control, the Court found that Musk controlled Tesla, at least specifically regarding the grant transaction. Identified indicia of Musk's "control" included his 21.9% equity stake, significant influence over the company and its directors, and a dominant role in the approval process of the compensation plan. The Court determined this was a conflicted-controller transaction leaving the case subject to review under the stringent entire fairness standard.

The Court found that the proxy statement provided to stockholders was misleading, which meant that the stockholder vote approving the plan was not fully informed. As a result, the shareholder vote failed to shift the burden of proof to the plaintiff. The defendants, Tesla's directors, bore the burden of proving that the plan was fair but failed to do so at trial per the Court.

Paul S. Buddenhagen v. Barry L. Clifford, et al.

C.A. No. 2019-0258-NA (Del. Ch. May 10, 2024) | Click here for full opinion

On April 3, 2019, Paul S. Buddenhagen, a shareholder of Maritime Explorations, Inc. (MEI), filed his complaint against Barry L. Clifford and the estate of Robert T. Lazier, claiming they breached fiduciary duties by engaging in a series of improper actions, culminating in an unfair merger in 2018. The Court ruled in favor of Buddenhagen, finding that the merger was not entirely fair.

Barry L. Clifford, an explorer, discovered the Whydah Galley pirate shipwreck in 1982. The ship, commanded by pirate Sam Bellamy, sank in 1717 with rumored treasure. Clifford formed Maritime Explorations, Inc. (MEI) in 1983 to facilitate the excavation of the *Whydah*. In 1987, MEI entered a joint venture with Whydah Partners Limited Partnership (WPLP) to manage the excavation and conservation of Whydah artifacts.

After working together for a couple of years, it was clear that WPLP was using the Management Committee, the governing party over the joint venture, to pursue their own interests, despite Clifford's objections. As a result, in November 1991, Paul S. Buddenhagen, an experienced business consultant, was brought onto the Management Committee to help negotiate on behalf of Clifford. Buddenhagen was employed until 1996 after which his consultation contract was not renewed due to tensions with Clifford and other investors. Through this work, he accumulated 1,450,000 shares in MEI. From this point until 2018, there was minimal contact between Clifford and Buddenhagen.

MEI's Board consisted of two members: Barry Clifford and Robert Lazier. The Court found 17 drafts of the minutes from a 1996 board meeting with conflicting information about a disputed 2,100,000 shares issued to Clifford. In 2004, the board issued Clifford 4,100,000 shares, including those supposedly from 1996. This discovery confirmed concerns about potential manipulation of stock issuances and ownership of the company.

Prior to the death of Lazier, in 2018, the defendants orchestrated a merger between MEI and another entity they owned and controlled. The Court found this merger was conducted without fair process or a reasonable evaluation of the fairness of the price. The merger allowed Clifford and Lazier to grant themselves additional equity in the merged entity. This further consolidated their control and ownership of the Whydah assets.

To try to support the fairness of the merger, defendants' expert valued the treasure at approximately $1 million based on an analysis of the price of silver. The plaintiff's expert relied on trading prices for the treasure and analyses of blockage discounts in addition to appraisal reports commissioned by the defendants in arriving at a value of $73 million.

The Court rejected the defendant's valuation outright as unreasonable, relying in part on the asserted $200 million values by the defendants as well as testimony from a defendant regarding potentially finding the "mother lode." The merger was deemed unfair and ordered to be rescinded by the Court.

William J. Brown v. Matterport, Inc. and Matterport Operating, LLC

C.A. No. 2021-0595-LWW (Del. Ch. May 28, 2024) | Click here for full opinion

On July 19, 2021, William J. Brown, a shareholder of Matterport, Inc., filed his complaint against the directors of Matterport, claiming they breached fiduciary duties by imposing a transfer restriction on his shares, which prevented him from selling his block of stock for a period of time. The Court ruled in favor of the plaintiff and found that the transfer restrictions were not entirely fair, awarding damages of approximately $79 million.

In early 2018, the Matterport Board discussed various strategies to address the company's capital-raising challenges and operational issues. William J. Brown, the former CEO of Matterport, was looking to sell his shares due to his departure from the company and the desire to diversify his investments. Brown held nearly 1.4 million shares of Matterport stock after exercising his options and purchasing additional shares.

In July 2021, Matterport went public through a de-SPAC transaction. As part of this merger, new bylaws were adopted, including a 180-day lockup period restricting the sale of shares by legacy Matterport stockholders. Brown challenged this lockup period in Court, arguing that it was illegal and inequitable, and that his shares were not subject to these restrictions. The proceeding was bifurcated between expedited Count I (plaintiff's claim that his shares were not covered by the terms of the transfer restriction) and the non-expedited remaining counts.

The Court issued an opinion as to Count I, finding that Brown's shares were not subject to the lockup and should have been free to trade. Upon the issuance of that opinion, 5.7 million shares were delivered to Brown's brokerage account on January 11, 2022. With the lockup to expire January 18, 2022, Brown liquidated his entire stake in a compressed window between January 11 and 18, selling at a weighted average price of $14.09 and resulting in $80.4 million in proceeds.

In the non-expedited proceedings for the remaining claims, Brown sought damages in excess of $140 million from Matterport's misreading of the bylaw, which halted Brown's ability to sell his shares sooner at a higher price. The Court acknowledged precedent from *Duncan v. TheraTx* that simply used the highest price observed during the time frame, but states it is "ill-suited for this case" as "[t]here is neither significant factual uncertainty nor a wrongdoer to construe uncertainty against."

The Court used the average price over a reasonable period (*i.e.*, an amount of time needed to sell shares without putting downward pressure on the stock price). The Court opined that by Friday, November 19, 2021, without any restrictions Brown could have requested the shares be transferred, making them tradable by Monday, November 22, 2021. Using a 20% participation rate, consistent with that used by Rockwood (Mr. Brown's broker), as well as the 30-day average daily volume from October 19 to November 19 of 5.7 million shares, the Court found it would take approximately five (5) trading days to liquidate his position at a volume-weighted average price of $27.92 per share, with proceeds equaling $159.5 million. Comparing the $159.5 million in theoretical proceeds to actual proceeds of $80.4 million resulted in net damages to be awarded as $79.1 million before interest.

Vivint Solar, Inc. v. Jim Lundberg

C.A. No. 2020-0988-PAF (Del. Ch. May 30, 2023, Corrected June 18, 2024) | Click here for full opinion

On May 30, 2024, the Court issued a memorandum opinion in the case of *Vivint Solar, Inc. vs. Jim Lundberg* in a case regarding a dispute over equity incentive awards.

Jim Lundberg received several equity incentive awards under Vivint Solar's 2014 Equity Incentive Plan while employed at the company. In the summer of 2016, Lundberg left Vivint Solar to join Vivint Smart Home, Inc., which shared a common parent with Vivint Solar. Upon his departure, Vivint Solar canceled Lundberg's unvested awards, which he claimed he did not realize until 2020 when he inquired about his awards following an announcement of a merger.

The Court concluded that both Vivint Solar and Vivint Smart Home were under the common control of their parent company, and therefore, based on the language of the plan, Lundberg's awards should have continued to vest. The Court determined that Vivint Solar breached the plan by canceling Lundberg's awards after he transitioned to Vivint Smart Home. However, the Court also found that Lundberg breached the plan by initially filing claims in Utah instead of Delaware, as stipulated by the plan's exclusive forum provision. Despite this, the Court ruled that Vivint Solar was not entitled to monetary damages or a permanent injunction for Lundberg's breach.

Lundberg's expert estimated damages of $5.7 million using the highest intermediate share price during two 60-day measurement periods assuming all equity awards were reinstated.

Vivint Solar's expert valued the unfairly canceled equity awards using a "dribble-out" method to avoid the sales of shares negatively impacting the stock price, with a range of damages from $200k to $2.5 million under various scenarios.

The Court declined to accept either side's expert damage calculations, as it did not accept the assumptions upon which the parties directed their experts to rely. Instead, the Court relied on its own interpretation. The Court begins by setting the "reasonable time" to 90 days after the breach date for each tranche of RSUs. The Court determined the start date (or breach date) for each tranche was 60 days after the vesting date, when Vivint Solar was required to deliver the shares. The 90-day period for reasonable time is based on the Court's assessment of the specific facts of this case and aligns with precedent. Using the highest intermediate value method, the Court awarded Lundberg $296k in total base damages from the nine tranches of RSUs.

For out-of-the money options, the Court noted it lacked any evidence in the record to do such a valuation (*e.g.*, options pricing model) and instead awarded nominal damages of $12 ($1 per tranche) to signify Vivint Solar's wrongdoings in relation to Lundberg's unfairly cancelled options.

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