DELAWARE

Laws Governing

BUSINESS ENTITIES

Annotated Statutes and Rules

Amounts Payable by Business Entities Under Delaware Law
General Corporation Law
Delaware Revised Uniform Partnership Act
Delaware Revised Uniform Limited Partnership Act
Limited Liability Company Act
Uniform Unincorporated Nonprofit Association Act
Statutory Trust Act
Uniform Commercial Code: Articles 1, 8, and 9

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Rule	Effect	Effective Date
3	Amended	January 1, 2007
5	Amended	January 1, 2007
23	Amended	January 1, 2007
23.1	Amended	January 1, 2007
23.2	Amended	January 1, 2007

Table of Sections Affected by 2006 Legislation

Code Citation	Act Citation	Effect
6, § 15-101	75 Del. Laws, c. 416, § 1	Amended
6, § 15-105	75 Del. Laws, c. 416, § 2	Amended
6, § 15-111	75 Del. Laws, c. 416, §§ 3-5	Amended
6, § 15-407	75 Del. Laws, c. 416, § 6	Amended
6, § 15-901	75 Del. Laws, c. 416, §§ 7, 8	Amended
6, § 15-903	75 Del. Laws, c. 416, §§ 9-14	Amended
6, § 15-904	75 Del. Laws, c. 416, §§ 15-21	Amended
6, § 15-905	75 Del. Laws, c. 416, §§ 22-32	Amended
6, § 15-1004	75 Del. Laws, c. 416, § 33	Added
6, § 15-1102	75 Del. Laws, c. 416, § 34	Amended
6, § 15-1210	75 Del. Laws, c. 416, §§ 35, 36	Amended
6, § 17-101	75 Del. Laws, c. 414, § 1	Amended
6, § 17-102	75 Del. Laws, c. 414, § 2	Amended
6, § 17-104	75 Del. Laws, c. 414, §§ 3, 4	Amended
6, § 17-203	75 Del. Laws, c. 414, § 5	Amended
6, § 17-206	75 Del. Laws, c. 414, § 6	Amended
6, § 17-214	75 Del. Laws, c. 414, §§ 7, 8	Amended
6, § 17-215	75 Del. Laws, c. 414, §§ 9-15	Amended
6, § 17-216	75 Del. Laws, c. 414, §§ 16-26	Amended
6, § 17-217	75 Del. Laws, c. 414, §§ 27-33	Amended
6, § 17-219	75 Del. Laws, c. 414, §§ 34-39	Amended

Table of New Annotations

Code Citation	Case Citation	General Topic
6, § 17-604	Hillman v. Hillman, 910 A.2d 262; 2006 Del. Ch. LEXIS 217 (Aug. 23, 2006)	The General Assembly intended to include within the coverage of § 17-604
6, § 17-604	Hillman v. Hillman, 910 A.2d 262, 2006 Del. Ch. LEXIS 217 (Aug. 23, 2006)	Capital contribution not forfeited
6, § 18-108	Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572, 2006 Del. Ch. LEXIS 204 (Dec. 6, 2006)	"Hold harmless"
6, § 18-108	Majkowski v. Am. Imaging Mgmt. Servs., LLC, 913 A.2d 572, 2006 Del. Ch. LEXIS 204 (Dec. 6, 2006)	"Indemnify and hold harmless" is a legal term of art that does not include
6, § 18-402	Facchina v. Malley, 2006 Del. Ch. LEXIS 142 (Aug. 1, 2006)	An "understanding" is not a substitute for an agreement
6, § 18-402	Facchina v. Malley, 2006 Del. Ch. LEXIS 142 (Aug. 1, 2006)	Applicable state law
8, § 102	In re PNB Holding Co. S'holders Litig., 2006 Del. Ch. LEXIS 158 (Aug. 18, 2006)	Timing of exculpation defense
8, § 111	Cornerstone Brands, Inc. v. O'Steen, 2006 Del. Ch. LEXIS 172 (Sept. 20, 2006)	Legislative intent
8, § 141	Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 2006 Del. Ch. LEXIS 139 (Aug. 10, 2006)	Specificity of pleading cognizable breach of duty
8, § 141	Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006)	The fiduciary duty of loyalty is not limited
8, § 141	Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006)	A failure to act in good faith is not conduct that results, ipso facto, in the direct imposition of fiduciary liability
8, § 141	Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006)	The obligation to act in good faith does not establish an independent fiduciary duty

Required Annual Payments by Corporations and Alternative Business Entities under Delaware Law

Under Delaware law, most Delaware business entities and foreign entities qualified to do business in Delaware must make annual payments to the State of Delaware. There is no annual amount payable, however, by a statutory trust under the Delaware Statutory Trust Act. The table below provides relevant deadlines and amounts payable by corporations and alternative business entities under Delaware law.

Annual Deadline and Payment Information, by Entity Type

Entity	*Tax/Fee*	*Amount Owed*	*Date Due*	*Statute*
Corporations[1]	Annual Franchise Tax Report Filing Fee	$25	March 1	8 *Del. C.* §§ 391(a)(18), 501, 502
	Annual Franchise Tax(see text following this table)	Minimum tax $35 (certain corporations exempt); Maximum tax $165,000	March 1	8 *Del. C.* §§ 501, 502, 503
Limited Liability Companies	Annual Tax	$200	June 1	6 *Del. C.* § 18-1107 (b),(c)
Partnerships	Annual Tax	$200	June 1	6 *Del. C.* § 15-1208 (a),(b)
Limited Liability Partnerships	Annual Report Filing Fee (based on number of partners)	$200 per partner, with a maximum fee of $120,000	June 1	6 *Del. C.* §§ 15-1003 (a),(b), 15-1207(a)(3)
Limited Partnerships	Annual Tax	$200	June 1	6 *Del. C.* § 17-1109 (a),(b)
Limited Liability Limited Partnerships	Annual Report Filing Fee (based on number of partners)	$200 per partner, with a maximum fee of $120,000	June 1	6 *Del. C.* §§ 17-214(a), 15-1003(a), (b), 15-1207 (a)(3)

[1] A foreign corporation qualified to do business in Delaware must pay an annual report filing fee of $60 on or before June 30 of each year. 8 *Del. C.* §§ 374, 391(a)(8).

Franchise Tax Payable under the Delaware General Corporation Law

There are two methods for calculating the amount of franchise tax owed by a Delaware corporation:

1. Total Authorized Shares Method, 8 *Del. C.* § 503(a)(1); or
2. Alternative Method, 8 *Del. C.* § 503(a)(2).

You can use whichever method produces the lesser amount payable. Generally, corporations that have 1,000,000 shares or more employ the Alternative Method. In no case shall the tax on any corporation for a full taxable year, as computed under either of the two methods, be more than $165,000 or less than $35. 8 *Del. C.* § 503(c). Corporations whose annual franchise tax assessment is $5,000 or more are required to pay franchise tax on a quarterly basis. 8 *Del. C.* § 504(a)(1)-(4). Regulated investment companies pay on a different scale. 8 *Del. C.* § 503(h).

1. *Total Authorized Shares Method* **(**Based on total number of shares of stock the corporation is authorized to issue under its certificate of incorporation):

Up to 3,000 shares	$35 (Minimum)
3,001 to 5,000 shares	$62.50
5,001 to 10,000 shares	$112.50
10,001+	$112.50, plus $62.50 for each additional 10,000 shares or portion thereof

For Example:

- A corporation with 10,005 authorized shares pays $175 ($112.50 + $62.50).
- A corporation with 100,000 authorized shares pays $675 ($112.50 + $562.50 [$62.50 x 9]).

2. *Alternative Method* (Based on the total number of shares of no-par value stock and par value stock, the corporation is authorized to issue under its certificate of incorporation and the applicable assumed capital associated with such stock):

A. No-par value stock

Under the Alternative Method, if the corporation has ***assumed no-par capital*** (which is calculated as described below), then the tax is as follows:

Up to $300,000 assumed no-par capital	$35
$300,001 to $500,000 assumed no-par capital	$62.50
$500,001 to $1,000,000 assumed no-par capital	$112.50
$1,000,001+	assumed no-par capital $112.50, plus $62.50 for each additional $1,000,000 assumed no-par capital or part thereof

For Example:

A corporation having 1,000,000 authorized shares of stock without par value would:

(1) Multiply $100 by the number of authorized shares of stock without par value. The result is the ***assumed no-par capital.***

$100 x 1,000,000 shares without par value = $100,000,000 assumed no-par capital.

(2) Figure the tax based upon the scale set forth above.

A corporation with $100,000,000 assumed no-par capital pays $6,300 ($112.50 + $6,187.50 [$62.50 x 99]).

B. Par value stock

Under the Alternative Method, if the corporation has ***assumed par value capital*** (which is calculated as described below), then the tax is $250 per each $1,000,000 or fraction thereof of assumed par value capital, and if the assumed par value capital is less than $1,000,000, then

2006 AMENDMENTS TO THE

GENERAL CORPORATION LAW OF THE STATE OF DELAWARE

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Introduction

The General Corporation Law of the State of Delaware, 8 *Del. C.* § 101 *et seq.* (the "DGCL"), has been amended in 2006, as it is periodically, for the purpose of keeping it current and maintaining its preeminence. The 2006 amendments to the DGCL were contained in Delaware State Senate Bill No. 322, and became effective August 1, 2006.[1] *See* 75 Del. Laws, c. 306. Among the provisions of the DGCL that have been amended are those concerning: the name of a corporation; resignation of directors; terms and classes of directors; stockholder-adopted bylaws prescribing the vote required for the election of directors; registered agents; and renewal, revival, extension, and restoration of the certificate of incorporation. Other amendments set forth in Senate Bill No. 322 effect changes in regard to the annual franchise tax report that must be filed by a corporation.

Name of a corporation [§§ 102 and 371]. Sections 102(a)(1) and 371(c) of the DGCL require that the name of a Delaware corporation or a foreign corporation registered in Delaware must be distinguishable from the names of other entities organized, registered, or reserved in Delaware. Senate Bill No. 322 made technical amendments in regard to this requirement. Also, a new subsection (e) has been added to Section 102, establishing procedures for the reservation of a corporate name.

Resignation of directors [§ 141]. A sentence inserted into Section 141(b) in 2006 states explicitly that a director may resign effective upon the occurrence of one or more future events. Another newly included sentence provides for the irrevocability of a resignation that by its terms is irrevocable and is conditioned on the director failing to receive a specified vote for reelection. (This provision does not address whether a director resignation tendered in another context may be made irrevocable.) As so amended, Section 141(b) allows for the implementation of policies and other measures that in effect may modify the plurality vote standard for the election of directors, which is applicable as a default matter under Section 216 of the DGCL.

Terms and classes of directors [§ 141]. Section 141(d) of the DGCL has been amended to clarify that the classified terms of the members of a classified board of directors commence after the classification has become effective. This expressly permits provisions in the certificate of incorporation or bylaws establishing classification of the board effective at a future time. Further, new language in Section 141(d) permits the board of directors, pursuant to a provision in the certificate of incorporation or bylaws, to assign to classes of the board directors who are already in office when the classification takes effect.

Stockholder-adopted bylaws prescribing the vote required for election of directors [§ 216]. Under Section 216 of the DGCL, absent specification in the certificate of incorporation or bylaws, directors are to be elected by a plurality vote of shares present at a meeting and entitled to vote thereon. A new sentence has been added at the end of Section 216 to provide that a bylaw adopted by the stockholders, prescribing the vote required for the election of directors, may not be amended or repealed by the board of directors. This allows stockholders to implement standards (such as a majority vote requirement) for the election of directors without concern that such action may be thwarted by subsequent amendment or repeal of the bylaw by a board having authority to do so. This 2006 amendment to Section 216 does not, however, address any other stockholder-adopted bylaw which the board may act to amend or repeal.

Registered Agents [§ 132]. Section 132 of the DGCL has been amended in various respects, including the addition of a new subsection (b) that more explicitly sets forth the duties of a registered agent. Another new provision, in Section 132(d), requires that every Delaware corporation and every foreign corporation registered in Delaware must provide to its registered agent contact information for a natural person who is authorized to receive communications from the registered agent. This provision also requires the registered agent to maintain that information in its records. Moreover, pursuant to new subsection (e) of Section 132, the

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[1] The amendments to Sections 132 and 312 of the DGCL contained in Senate Bill No. 322, however, become effective on January 1, 2007. *See* 75 Del. Laws, c. 306, §§ 9-17. Amendments to Sections 502, 503, 510, 511, 514, and 517 of Title 8 of the Delaware Code, relating to the annual corporate franchise tax report and also contained in Senate Bill No. 322, become effective on January 1, 2008. *See* 75 Del. Laws, c. 306, §§ 18-27.

§ 135. Resignation of registered agent coupled with appointment of successor

The registered agent of 1 or more corporations may resign and appoint a successor registered agent by filing a certificate with the Secretary of State, stating the name and address of the successor agent, in accordance with § 102(a)(2) of this title. There shall be attached to such certificate a statement of each affected corporation ratifying and approving such change of registered agent. Each such statement shall be executed and acknowledged in accordance with § 103 of this title. Upon such filing, the successor registered agent shall become the registered agent of such corporations as have ratified and approved such substitution and the successor registered agent's address, as stated in such certificate, shall become the address of each such corporation's registered office in this State. The Secretary of State shall then issue a certificate that the successor registered agent has become the registered agent of the corporations so ratifying and approving such change and setting out the names of such corporations. (8 Del. C. 1953, § 135; 56 Del. Laws, c. 50; 70 Del. Laws, c. 587, § 10.)

§ 136. Resignation of registered agent not coupled with appointment of successor

(a) The registered agent of 1 or more corporations may resign without appointing a successor by filing a certificate of resignation with the Secretary of State, but such resignation shall not become effective until 30 days after the certificate is filed. The certificate shall be executed and acknowledged by the registered agent, shall contain a statement that written notice of resignation was given to each affected corporation at least 30 days prior to the filing of the certificate by mailing or delivering such notice to the corporation at its address last known to the registered agent and shall set forth the date of such notice.

(b) After receipt of the notice of the resignation of its registered agent, provided for in subsection (a) of this section, the corporation for which such registered agent was acting shall obtain and designate a new registered agent to take the place of the registered agent so resigning in the same manner as provided in § 133 of this title for change of registered agent. If such corporation, being a corporation of this State, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall declare the charter of such corporation forfeited. If such corporation, being a foreign corporation, fails to obtain and designate a new registered agent as aforesaid prior to the expiration of the period of 30 days after the filing by the registered agent of the certificate of resignation, the Secretary of State shall forfeit its authority to do business in this State.

(c) After the resignation of the registered agent shall have become effective as provided in this section and if no new registered agent shall have been obtained and designated in the time and manner aforesaid, service of legal process against the corporation for which the resigned registered agent had been acting shall thereafter be upon the Secretary of State in accordance with § 321 of this title. (8 Del. C. 1953, § 136; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 2; 64 Del. Laws, c. 112, § 5; 69 Del. Laws, c. 233, §§ 1-3; 70 Del. Laws, c. 79, §§ 5, 6; 70 Del. Laws, c. 587, § 11.)

Subchapter IV.
Directors and Officers

§ 141. Board of directors; powers; number, qualifications, terms and quorum; committees; classes of directors; nonprofit corporations; reliance upon books; action without meeting; removal

(a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall

effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

(g) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors of any corporation organized under this chapter may hold its meetings, and have an office or offices, outside of this State.

(h) Unless otherwise restricted by the certificate of incorporation or bylaws, the board of directors shall have the authority to fix the compensation of directors.

(i) Unless otherwise restricted by the certificate of incorporation or bylaws, members of the board of directors of any corporation, or any committee designated by the board, may participate in a meeting of such board, or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this subsection shall constitute presence in person at the meeting.

(j) The certificate of incorporation of any corporation organized under this chapter which is not authorized to issue capital stock may provide that less than 1/3 of the members of the governing body may constitute a quorum thereof and may otherwise provide that the business and affairs of the corporation shall be managed in a manner different from that provided in this section. Except as may be otherwise provided by the certificate of incorporation, this section shall apply to such a corporation, and when so applied, all references to the board of directors, to members thereof, and to stockholders shall be deemed to refer to the governing body of the corporation, the members thereof and the members of the corporation, respectively.

(k) Any director or the entire board of directors may be removed, with or without cause, by the holders of a majority of the shares then entitled to vote at an election of directors, except as follows:

(1) Unless the certificate of incorporation otherwise provides, in the case of a corporation whose board is classified as provided in subsection (d) of this section, shareholders may effect such removal only for cause; or

(2) In the case of a corporation having cumulative voting, if less than the entire board is to be removed, no director may be removed without cause if the votes cast against such director's removal would be sufficient to elect such director if then cumulatively voted at an election of the entire board of directors, or, if there be classes of directors, at an election of the class of directors of which such director is a part.

Whenever the holders of any class or series are entitled to elect 1 or more directors by the certificate of incorporation, this subsection shall apply, in respect to the removal without cause of a director or directors so elected, to the vote of the holders of the outstanding shares of that class or series and not to the vote of the outstanding shares as a whole. (8 Del. C. 1953, § 141; 56 Del. Laws, c. 50; 56 Del. Laws, c. 186, § 3; 57 Del. Laws, c. 148, §§ 5, 6; 57 Del. Laws, c. 421, § 1; 59 Del. Laws, c. 437, §§ 2-5; 64 Del. Laws, c. 112, § 6; 65 Del. Laws, c. 127, § 3; 66 Del. Laws, c. 136, §§ 2, 3; 70 Del. Laws, c. 79, § 7; 70 Del. Laws, c. 186, § 1; 70 Del. Laws, c. 349, § 2; 71 Del. Laws, c. 339, §§ 11-13; 72 Del. Laws, c. 343, §§ 4-6; 73 Del. Laws, c. 298, § 2; 74 Del. Laws, c. 84, § 2; 74 Del. Laws, c. 326, § 2; 75 Del. Laws, c. 30, § 1; 75 Del. Laws, c. 306, §§ 3, 4.)

2006 Revisor's Note. — Section 8 of 75 Del. Laws, c. 306, provides that this section shall become effective on August 1, 2006.

Blackline Showing Effect of 2006 Amendments. — (a) The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or

imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.

(b) The board of directors of a corporation shall consist of 1 or more members, each of whom shall be a natural person. The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors. Each director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal. Any director may resign at any time upon notice given in writing or by electronic transmission to the corporation. A resignation is effective when the resignation is delivered unless the resignation specifies a later effective date or an effective date determined upon the happening of an event or events. A resignation which is conditioned upon the director failing to receive a specified vote for reelection as a director may provide that it is irrevocable. A majority of the total number of directors shall constitute a quorum for the transaction of business unless the certificate of incorporation or the bylaws require a greater number. Unless the certificate of incorporation provides otherwise, the bylaws may provide that a number less than a majority shall constitute a quorum which in no case shall be less than 1/3 of the total number of directors except that when a board of 1 director is authorized under this section, then 1 director shall constitute a quorum. The vote of the majority of the directors present at a meeting at which a quorum is present shall be the act of the board of directors unless the certificate of incorporation or the bylaws shall require a vote of a greater number.

(c) (1) All corporations incorporated prior to July 1, 1996, shall be governed by paragraph (1) of this subsection, provided that any such corporation may by a resolution adopted by a majority of the whole board elect to be governed by paragraph (2) of this subsection, in which case paragraph (1) of this subsection shall not apply to such corporation. All corporations incorporated on or after July 1, 1996, shall be governed by paragraph (2) of this subsection. The board of directors may, by resolution passed by a majority of the whole board, designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not the member or members present constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to amending the certificate of incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the board of directors as provided in subsection (a) of § 151 of this title, fix the designations and any of the preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or the conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares of any series of stock or authorize the increase or decrease of the shares of any series), adopting an agreement of merger or consolidation under § 251, § 252, § 254, § 255, § 256, § 257, § 258, § 263 or § 264 of this title, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property and assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the bylaws of the corporation; and, unless the resolution, bylaws or certificate of incorporation expressly so provides, no such committee shall have the power or authority to declare a dividend, to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to § 253 of this title.

(2) The board of directors may designate 1 or more committees, each committee to consist of 1 or more of the directors of the corporation. The board may designate 1 or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. The bylaws may provide that in the absence or disqualification of a member of a committee, the member or members present at any meeting and not disqualified from voting, whether or not such member or members constitute a quorum, may unanimously appoint another member of the board of directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the board of directors, or in the bylaws of the corporation, shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have the power or authority in reference to the following matter: (i) approving or adopting, or recommending to the stockholders, any action or matter (other than the election or removal of directors) expressly required by this chapter to be submitted to stockholders for approval or (ii) adopting, amending or repealing any bylaw of the corporation.

(3) Unless otherwise provided in the certificate of incorporation, the bylaws or the resolution of the board of directors designating the committee, a committee may create 1 or more subcommittees, each subcommittee to consist of 1 or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

(d) The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting ~~next ensuing~~ held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification ~~and election~~ becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire. The certificate of incorporation or bylaw provision dividing the directors into classes may authorize the board of directors to assign members of the board already in office to such classes at the time such classification becomes effective. The certificate of incorporation may confer upon holders of any class or series of stock the right to elect 1 or more directors who shall serve for such term, and have such voting powers as shall be stated in the certificate of incorporation. The terms of office and voting powers of the directors elected separately by the holders of any class or series of stock may be greater than or less than those of any other director or class of directors. In addition, the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in this chapter to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.

(e) A member of the board of directors, or a member of any committee designated by the board of directors, shall, in the performance of such member's duties, be fully protected in relying in good faith upon the records of the corporation and upon such information, opinions, reports or statements presented to the corporation by any of the corporation's officers or employees, or committees of the board of directors, or by any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation.

(f) Unless otherwise restricted by the certificate of incorporation or bylaws, any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission and the writing or writings or electronic transmission or transmissions are filed with the minutes of proceedings of the board, or committee. Such filing shall be in paper form if the minutes are maintained in paper form and shall be in electronic form if the minutes are maintained in electronic form.

Business judgment rule is merely presumption of propriety accorded decisions of corporate directors. *Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980),* rev'd on other grounds, *430 A.2d 779 (Del. 1981).*

And rule permits directors to exercise their discretion in managing corporation's business affairs in the manner they deem in the corporation's best interests. *Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980),* rev'd on other grounds, *430 A.2d 779 (Del. 1981).*

When a stockholder's derivative suit challenges the propriety of a decision of the directors, the business judgment rule protects the directors from liability by a presumption that the decision is proper. *Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980),* rev'd on other grounds, *430 A.2d 779 (Del. 1981).*

"Business Judgment Rule" evolved to give recognition and deference to directors' business expertise when exercising their managerial power. *Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).*

Business judgment rule requires utmost loyalty from directors to corporation and its interests. *Maldonado v. Flynn, 413 A.2d 1251 (Del. Ch. 1980),* rev'd on other grounds, *430 A.2d 779 (Del. 1981).*

The concept of reasonable doubt in corporate derivative jurisprudence is akin to the concept that the stockholder has a reasonable belief that the board lacks independence or that the transaction was not protected by the business judgment rule. *Grimes v. Donald, 673 A.2d 1207 (Del. 1996).*

Determining whether self-interest of directors overcame loyalty. — A court must determine whether the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand; if the derivative plaintiff satisfies this burden, then demand will be excused as futile. *Rales v. Blasband, 634 A.2d 927 (Del. 1993).*

A director is being independent only when the director's decision is based entirely on the corporate merits of the transaction and it not influenced by personal or extraneous considerations; by contrast, a director who receives a substantial benefit from supporting a transaction cannot be objectively viewed as disinterested or independent. *Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).*

One director's colorable interest in a challenged transaction is not sufficient, without more, to deprive a board of the protection of the business judgment rule presumption of loyalty. *Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).*

In assessing a challenge to defensive actions by a target corporation's board of directors in a takeover context, the Court of Chancery should evaluate the board's overall response, including the justification for each contested defensive measure and the results achieved thereby. *Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995).*

A material interest of one or more directors less than a majority of those voting would rebut the application of the business judgment rule if the plaintiff proved that the interested director controls or dominates the board as a whole or the interested director failed to disclose an interest in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the proposed transaction. *Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995),* aff'd, *663 A.2d 1156 (Del. 1995).*

Duty of care. — The duty of the directors of a company to act on an informed basis forms the duty of care element of the business judgment rule; duty of care and duty of loyalty are of equal and independent significance. *Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993).*

Loyalty-based standard. — The standard for liability for failures of oversight requires a showing that the directors have breached their duty of loyalty by failing to attend to their duties in good faith; the directors should be conscious of the fact that they are not doing their jobs under this standard set out in *In Re Caremark Int'l Derivative Litig., 698 A.2d 959 (Del. Ch. 1996). Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003).*

Duty of loyalty. — Disclosure of conflicts of interest may preclude a claim for breach of the duty of loyalty; a stockholder cannot complain of corporate action in which, with full knowledge of all the facts, he or she has concurred; nonetheless, it cannot be said that certain boilerplate disclosures convey full knowledge of all of the facts. *Werner v. Miller Tech. Mgmt., L.P., 831 A.2d 318 (Del. Ch. 2003).*

The fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith. As the Court of Chancery aptly put it in *Guttman*, a director cannot act loyally towards the corporation unless she acts in the good faith belief that her actions are in the corporation's best interest. *Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

A failure to act in good faith is not conduct that results, *ipso facto*, in the direct imposition of fiduciary liability. The failure to act in good faith may result in liability because the requirement to act in good faith "is a subsidiary element[,]" i.e., a condition, "of the fundamental duty of loyalty." It follows that because a showing of bad faith conduct, in the sense described in *Disney* and *Caremark*, is essential to establish director oversight liability, the fiduciary duty violated by that conduct is the duty of loyalty. *Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

The obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly. *Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

Oversight liability. — *Caremark* articulates the necessary conditions predicate for director oversight liability: (a) the directors utterly failed to implement any reporting or information system or controls; *or* (b) having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention. In either case, imposition of liability requires a showing that the directors knew that they were not discharging their fiduciary obligations. Where directors fail to act in the face of a known duty to act, thereby demonstrating a conscious disregard for their responsibilities, they breach their duty of loyalty by failing to discharge that fiduciary obligation in good faith. *Stone v. Ritter, 911 A.2d 362, 2006 Del. LEXIS 597 (Nov. 6, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

Deepening insolvency doctrine rejected. — If the board of an insolvent corporation, acting with due diligence and good faith, pursues a business strategy that it believes will increase the corporation's value, but that also involves the incurrence of additional debt, it does not become a guarantor of that strategy's success. That the strategy results in continued insolvency and an even more insolvent entity does not in itself give rise to a cause of action. Rather, in such a scenario the directors are protected by the business judgment rule. To conclude otherwise would fundamentally transform Delaware law. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 2006 Del. Ch. LEXIS 139 (Aug. 10, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

The rejection of an independent cause of action for deepening insolvency does not absolve directors of insolvent corporations of responsibility. Rather, it remits plaintiffs to the contents of their traditional toolkit, which contains, among other things, causes of action for breach of fiduciary duty and for fraud. The contours of these causes of action have been carefully shaped by generations of experience, in order to balance the societal interests in protecting investors and creditors against exploitation by directors and in providing directors with sufficient insulation so that they can seek to create wealth through the good faith pursuit of business strategies that involve a risk of failure. If a plaintiff cannot state a claim that the directors of an insolvent corporation acted disloyally or without due care in implementing a business strategy, it may not cure that deficiency simply by alleging that the corporation became more insolvent as a result of the failed strategy. *Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 2006 Del. Ch. LEXIS 139 (Aug. 10, 2006).* ***[For the full text of this case opinion, please see Volume 2 of Delaware Laws Governing Business Entities.]***

Application of business judgment rule, of necessity, depends upon a showing that informed directors did, in fact, make a business judgment authorizing the transaction under review. *Gimbel v. Signal Cos., 316 A.2d 599* (Del. Ch.), aff'd, *316 A.2d 619 (Del. 1974).*

Where there is no conscious decision by directors to act or refrain from acting, the business judgment rule has no application. *Rales v. Blasband, 634 A.2d 927 (Del. 1993).*

DELAWARE

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BRUCE M. BAKERMAN, Plaintiff, v. SIDNEY FRANK IMPORTING CO., INC., ESTATE OF SIDNEY E. FRANK, LEE R. EINSIDLER, JOHN R. FRANK. STUART W. MOSELMAN, WILLIAM F. THOMPSON, and THOMAS BRUNO, Defendants, and GREY GOOSE BOTTLING CO., L.L.C., Nominal Defendant.

Civil Action No. 1844-N

COURT OF CHANCERY OF DELAWARE, NEW CASTLE

2006 Del. Ch. LEXIS 180

August 31, 2006, Submitted

October 10, 2006, Decided

SUBSEQUENT HISTORY: [*1] Revised October 16, 2006.

COUNSEL: Norman Monhait, of ROSENTHAL, MONHAIT & GODDESS, P.A., Wilmington, Delaware; OF COUNSEL: William T. Reid, IV, Lisa Tsai, and Eric D. Madden, of DIAMOND MCCARTHY TAYLOR FINLEY & LEE, LLP, Austin, Texas, and Eric D. Madden, of DIAMOND MCCARTHY TAYLOR FINLEY & LEE, LLP, Dallas, Texas, Attorneys for Plaintiff.
Stephen C. Norman, of POTTER ANDERSON & CORROON LLP, Wilmington, Delaware, OF COUNSEL: Jay W. Waks, Gregory J. Wallance, Christine A. Neagle, and William Poorten, of KAYE SCHOLER LLP, New York, New York, Attorneys for Defendants.

JUDGES: CHANDLER, Chancellor.

OPINION BY: CHANDLER

OPINION:

MEMORANDUM OPINION

CHANDLER, Chancellor

In 2000, a company's chief legal counsel was granted a membership interest in a non-wholly owned subsidiary. Four years later, the company negotiated a multi-billion dollar sale of it and its subsidiary's assets to a third party that required the unanimous consent of the subsidiary's members. After receipt of such consents, the transaction was consummated. One month following the sale, the chief legal counsel to the parent was terminated. He has since brought this lawsuit, claiming among other things that the managers [*2] of the subsidiary breached their fiduciary duty by abdicating nearly all of the consideration paid by the third party acquiror to the subsidiary's parent. In addition, he alleges that his consent as a member of the subsidiary was coerced.

Before me is defendants' motion to dismiss the complaint. For the reasons set forth below, the motion is granted in part and denied in part. Part I of this Opinion sets out the factual background that gave rise to this lawsuit. Part II delineates plaintiff's claims, defendants' responses to those claims, and the standard to be applied at this stage of the proceedings. Part III examines and applies the legal principles governing each claim. This Part concludes that two claims, for tortious interference with contract and for unjust enrichment, must be dismissed. The remaining claims — direct and derivative claims related to fiduciary breaches and to contractual breaches — all survive the defendants' challenge at this stage. Finally, Part IV summarizes the conclusions.

I. FACTUAL BACKGROUND

As required, the facts are drawn from the complaint, the documents it incorporates, and facts not subject to reasonable dispute.[1]

[*3]

A. The Makings of a Superpremium Vodka

Sidney Frank began working in the liquor business for his in-laws in the 1940's and for thirty years sold Scotch all over the world. After a falling out with the family in 1972, Sidney Frank formed Sidney Frank Importing Co. ("SFIC"). SFIC purchased the U.S. rights to a brandy and a then little-known German sipping liqueur called Jagermeister and plodded on until the mid-1980's, when Frank discovered a bar in New Orleans that served shots of chilled Jagermeister. Promoting chilled shots of Jagermeister in college bars, and sending out teams of models to college barrooms to sell and dispense the shots and other merchandise, SFIC began enjoying a period of relative success and created a network of solid relationships with major liquor distributors

[1] *See In re Gen. Motors (Hughes) S'holder Litig.,* 897 A.2d 162, 169 (Del. 2006) (on a motion to dismiss, trial court may properly take judicial notice of matters that are not subject to reasonable dispute).

throughout the country that would later prove very useful.

SFIC was not alone in creating sensations in the liquor market. In 1979, a Swedish distillery repackaged its vodka into a clear Swedish medicine bottle with crisp blue lettering. With the help of an original and hugely popular ad campaign, Absolut launched vodka from a well drink to a hip drink. Over fifteen years later, following on a [*4] more recent trend in the mid-1990's of superpremium vodkas offered in frosted bottles, Sidney Frank decided to launch his own superpremium vodka.

In the late 1990's, however, SFIC was merely a liquor distribution company, which had built its fortune as the U.S. distributor of Jagermeister.

SFIC enlisted the help of H. Mounier ("Mounier"), a company already engaged in liquor production in the Cognac region of France. Mounier concocted and developed the formulas and production processes for Grey Goose Vodka, using water that had been filtered through champagne limestone from the Gente Springs of Cognac, France. SFIC developed a distinctive bottle that was frosted and taller than the rest, with a cutaway of geese in flight, and the French flag.

Mounier, as the exclusive manufacturer of Grey Goose Vodka, began full-scale production in 1997. SFIC, in turn, imported and distributed Grey Goose Vodka, primarily in the United States, the only major market at the time. During 1997, the first year of production, SFIC sold only about 45,000 cases of Grey Goose Vodka. In 1998, Grey Goose Vodka received the number one vodka rating from the Beverage Testing Institute, a company that produces [*5] Consumer Reports-style rankings of alcoholic beverages. By 1999, sales were up to 190,000 cases. SFIC continued to market Grey Goose Vodka as one of the best vodkas in the world, and as a result of the ensuing success, Mounier began producing flavored versions of the vodka, including orange, citrus, and vanilla variations.

B. Problems with Mounier and the Creation of the LLC and SAS

Throughout this time period, SFIC and Mounier operated without any written contract between them. Mounier considered its relationship with SFIC to be a partnership, while SFIC claimed sole rights to the formulas and production processes for Grey Goose Vodka. In September 1999, Mounier's corporate parent filed for bankruptcy protection in France.

In November 1999, Sidney Frank hired Bakerman to serve as his special assistant at SFIC. Several months later, Sidney Frank promoted Bakerman, a licensed attorney, to the position of SFIC's Chief Legal Counsel. Shortly after joining SFIC, Bakerman developed a strategy that would protect and enhance SFIC's and Sidney Frank's interests in Grey Goose Vodka, while also minimizing their potential tax and other liability exposure.

On May 22, 2000, Bakerman, [*6] Sidney Frank and Lee Einsidler (collectively, the "Founding Members"), formed Grey Goose LLC (the "LLC"). The LLC served as the holding company for a second company formed in July 2000, Grey Goose Bottling France S.A.S. ("SAS"), which would acquire Mounier's interests in the formulas and productions processes for Grey Goose Vodka. The Founding Members intended for the LLC and SAS to generate their own significant profits from the production and sale of vodka.

The SAS bylaws charged management to the individual managers of the LLC; any transfer, assignment or other action with respect to the intellectual property rights of SAS, however, required the approval of the LLC itself. On August 2, 2000, the Founding Members approved the issuance of membership units in the LLC as follows:

Member	Units
SFIC	100
Sidney Frank	25
Eugene Frank	15
Bruce Bakerman	10
Thomas Bruno	10
Lee Einsidler	10
John Frank	10
Stuart Moselman	10
William Thompson	10
Total:	200 units

According to the LLC's Articles of Organization, the members received their ownership interests due to "their individual [*7] efforts and work in organizing the [LLC]," which represented "full and satisfactory consideration for their respective Membership Interests." On more than one occasion, Bakerman communicated to Sidney Frank and Lee Einsidler that he had a potential conflict of interest in obtaining a membership interest in the LLC. Independent legal counsel, White & Case LLP, advised SFIC and the LLC throughout the formation of the LLC and did not object to Bakerman's membership in the LLC.

The LLC's Operating Agreement contained several important riders, the most important of which required the unanimous written consent by the members for, among other things, any sale of all or substantially all of the LLC's business or assets.

During the next few years, SAS operated as a subsidiary of SFIC (controlled through the LLC). SAS obtained the trademark and trade dress of Grey Goose Vodka in approximately 40 countries. Finally resolving the dispute with Mounier in 2002, SAS secured complete control of the production process and rights in the formula for Grey Goose Vodka. SAS further received significant controls over Mounier's actual production of the vodka. With the dispute resolved, SAS entered into [*8] numerous distribu-