University of Pennsylvania Carey Law School

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RESEARCH PAPER NO. 24-06

Minutes Are Worth the Minutes: Good Documentation Practices Improve Board Deliberations and Reduce Regulatory and Litigation Risk

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Discussion Paper No. 2024-2

3/2024

Harvard Law School
Cambridge, MA 02138

21st Annual Albert A. DeStefano Lecture on Corporate, Securities and Financial Law

February 27, 2024

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Forthcoming in Fordham Journal of Corporate & Financial Law

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ABSTRACT

In this article, which was originally the basis for the 21st Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law on February 27, 2024, at Fordham University School of Law, the importance of good corporate minuting and board documentation practices is addressed. Using lessons from Delaware cases where the quality of these practices has determined the outcome of motions and cases, the article identifies effective and efficient practices to better address this decidedly not sexy, but unquestionably essential, corporate governance task. The recent Delaware cases underscore the importance of quality and timely documentation of board decision-making, the material benefits of doing things right, and the considerable downside of sloppy, tardy practices.

JEL Codes: G32, G34, K20, K22, K41, M12

Keywords: Board Governance, Book-and-records Requests, Business Administration, Caremark, Corporate Governance, Fiduciary Duties, Litigation Risk, Minutes, Risk Management

For corporate lawyers, managers, and directors, time spent drafting, discussing, editing and finalizing minutes and board resolutions is the professional equivalent of eating your least favorite vegetable, either you do it hastily, as infrequently as you can, or, if you can get away with it, not at all. The very fact that you are reading this article knowing its subject may single you out from the herd as someone who understands that simply because a task is the opposite of savory does not mean it is not healthy and important for you to accomplish it. Many of the most quotidian, painstaking tasks are vital to doing a job well, and that is certainly true of quality practices for documenting the important deliberations and decisions of corporate boards.

Mustering the motivation to put this knowledge into actual practice remains an enduring challenge. To make it easier, I draw on a source to which corporate directors tend to and should pay attention: the Delaware Judiciary. In recent decades, corporate cases in many contexts have been influenced by the quality of corporate minuting and documentation practices. Where these practices have inspired confidence, by providing a thorough, contemporaneous, and consistent record of the basis for the board's decision, the Delaware courts have given greater weight to the minutes as evidence and to director testimony consistent with those minutes, been more likely to dismiss complaints that incorporate them, and have found those formal materials sufficient to satisfy stockholder demands for books

and records. By stark contrast, where corporate minutes have failed to cover key topics, been approved long after the meetings they document, do not reference advisor presentations, and otherwise undermine the court's confidence that they accurately document the material factors that motivated the board's actions, then they have been given little weight as positive evidence favoring the directors' position in litigation. Poor minuting practices have also opened the door to wide-ranging production of emails, texts, and managerial level documents in response to stockholders' requests for books and records.

This article follows the carrot and stick approach of the Delaware courts in this area by identifying the positive practices that the courts have found confidence-inspiring and the benefit this has provided to corporate defendants, and the corresponding poor practices that have been the subject of judicial criticism and negative consequences for corporate defendants. By focusing on the importance the Delaware courts have reasonably placed on credible minuting practices, I hope to stimulate corporate lawyers, managers, and, perhaps, most importantly, independent directors, to have the patience to document the critical work of the board and top management in a timely, reliable, and consistent way. The Delaware cases make the case: the minutes are worth the minutes.

I proceed this way. I identify practices the Delaware Judiciary has articulated as confidence-inspiring — and, as important, the opposite — and the

implications for corporate defendants of meeting or not meeting the mark. I then give practical suggestions for how in-house counsel, top management, and boards can better ensure that their minuting and documentation practices are of high quality and best position them and their companies to minimize regulatory and litigation risk.

I. The Court Expects Minutes to Address the Material Factors and Incorporate the Key Documents the Board Considered in Making Its Decision

The Delaware courts have made plain their expectation that minutes covering critical issues — like the consideration of a material legal compliance risk under *Caremark*[1] or its evaluation of an M&A transaction — set forth the material factors the board considered in its deliberative process. Consistent with this expectation, the courts also expect that board minutes will refer specifically to written materials, such as advisor presentations or reports by management, that the board considered in its deliberations. Importantly, though, the courts have been careful to distinguish between high-quality minutes of this kind and a meeting transcript, and in a recent case said this: "Minutes are not transcripts — they do not need to be."[2] Rather, what the cases emphasize is the need for minutes to

[1] *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).
[2] *In re Zendesk, Inc. Section 220 Litig*., 2023 WL 5496485, at *12 (Del. Ch. Aug. 25, 2023). In *Zendesk*, a Court of Chancery magistrate rejected claims for sweeping electronic discovery into emails and texts because the formal record of board minutes, advisor presentations, and resolutions involving a lengthy strategic M&A process were sufficient to the petitioner's purpose

capture the factors that the board considered material to its decision-making.[3] Also, that the minutes reference the key materials that the board received in connection with meetings. This latter point seems mundane, but is not, because advisor presentations are often critical sources of the factors that the board took into account, and the failure of minutes to incorporate them and have them work together to create a reliable and consistent record of the board's deliberative process deprives the board and management of credible memory aids and opens up their testimony to credibility attacks.[4] In some cases, the company has failed to keep advisor presentations for all meetings (sometimes because, as a matter of eyebrow-raising course, they were shredded after board meetings) or to adequately keep minutes, and, thus, reliable memory aids for the directors, managers, and

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of investigating whether a claim for breach of fiduciary duty could be brought. Notably, the Court of Chancery found that minutes that were informative and covered the material issues the board considered were sufficient, holding that "the extensive information already provided in the Formal Board Materials" made it unnecessary for the petitioners to receive the broad electronic information they sought. *Id*. The Court emphasized that "Formal Board Materials are the starting point — and typically the ending point — for a sufficient inspection." *Id.* at *10.

[3] Then-Vice Chancellor, now Chancellor McCormick, made this expectation plain: "At a minimum, corporate board minutes record actions taken by the Board. . . . Optimally, Board minutes would be more comprehensive." *Riskin* v. *Burns*, 2020 WL 7861209, at *2 & n.10 (Del. Ch. Dec. 31, 2020). The decision then went on to cite an article indicating that the Delaware courts expect minutes to be "'comprehensive, definitive, and inclusive of all of the materials, at least by reference, that the board considered prior to making its decision.'" *Id.* (quoting Cullen M. Godfrey, *In re The Walt Disney Company Derivative Litigation: A New Standard for Corporate Minutes*, 17 BUS. L. TODAY 47, 49 (2008)).

[4] For a more comprehensive examination of the specific importance of documenting the process used to consider important mergers and acquisitions situations, including those involving conflicts of interest and unsolicited takeover bids, *see* Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-making and Reduce the Litigation Target Zone*, 70 BUS. LAW. 679 (2015).

advisors are lacking, leading to inconsistent recollections of key events.[5] Companies that take this undisciplined approach also tend to lack rigorous practices for highlighting changes in key documents — such as financial advisor updates in M&A situations — leading directors to miss important developments and fail to adequately address them.

By contrast, when minutes meet the reasonable expectations the Delaware cases have articulated, they have helped corporate defendants convince the court that the board's actions were motivated by proper considerations — the key issue in terms of the fiduciary duty of loyalty — and resulted from a reasoned deliberative process — the key issue in terms of the fiduciary duty of care. Delaware law accords deference to well-motivated, informed decisions by independent directors under the business judgment rule, and even under the more intensive review standards like *Unocal*[6] and *Revlon*[7] that often apply in the M&A context. When quality minutes incorporate and are consistent in substance with other high-quality decision-making information, such as investment banker advice or the results of a deep management inquiry into a difficult compliance issue, and

[5] As a judge, I heard many cases in which variations of this theme played out and many distinguished practitioners have told me that they have been involved in the same kinds of situations that fortunately for their clients did not manifest themselves as problems in litigation or regulatory proceedings.
[6] *Unocal Corp.* v. *Mesa Petroleum Co.,* 493 A.2d 946 (Del. 1985).
[7] *Revlon, Inc.* v. *MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173 (Del. 1986).

document that the board's deliberative process was careful and its decision was justified by proper business considerations, they buttress the credibility of the board and materially increase the likelihood that the court will not second-guess the board's business judgment.[8] This reality has been exemplified in the high-stakes context of whether to enjoin an M&A transaction[9] and whether to dismiss a complaint under *Caremark* alleging that the board had failed to monitor a material legal compliance risk. Thus, even in situations where a corporation had committed legal violations resulting in serious economic, regulatory, and reputational harm to the company, the documentation in corporate minutes and incorporated advisor presentations that the board had in fact made a good-faith effort to monitor the risk in question has resulted in the dismissal of *Caremark* claims against the board.[10]

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[8] *In re Orchid Cellmark, Inc. S'holder Litig.*, 2011 WL 1938253, at *5 (Del. Ch. May 12, 2011) (giving deposition testimony more weight because the testimony and the meeting minutes pointed in the same direction).

[9] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573 (Del. Ch. 2010).

[10] By way of recent example, the Court of Chancery recently dismissed a *Caremark* claim against a liability insurer that had failed to maintain adequate loss reserves. Because the pleading record contained abundant evidence in the form of audit committee and board minutes and related presentations regarding the relevant risks, the plaintiffs eschewed any argument that the board had failed in their monitoring duties and were forced to rely on the argument that the board had failed to act on red flags. The Court said that the plaintiffs were "wise to abdicate their oversight claim" because the record "details the engagement of auditors and actuarial advisors, oversight of management charged with the Company's underwriting functions, meetings to discuss severity trends and reserves, and Board-level updates on large accounts." *In re Proassurance Corp. S'holder Derivative Lit.*, 2023 WL 6426294, at *13 (Del. Ch. Oct. 2, 2023). Likewise, the Court found that the identification of risks in these materials, *i.e.*, the so-called red flags, evidenced that the board had in fact focused on the business risks involved, and that the board's good-faith decision not to bank more reserves provided no basis for a *Caremark* claim because that decision violated no regulatory law governing the company. *Id.*

In stark contrast, however, the failure of minutes to create a reliable record of decision-making has worked in the other direction. By way of example, where minutes did not include discussion of a factor that a director or advisor claimed at deposition or trial was material to the board's decision, the omission was found to undermine the credibility and reliability of the witness's testimony, and to support an inference that the factor was not actually considered by the board.[11] Just as a record that the board tried in good faith to monitor a serious risk can aid the board in obtaining dismissal of a *Caremark* complaint even when a company has suffered serious regulatory and reputational harm,[12] a series of board and committee

[11] Cases of this kind include: *Forsythe* v. *ESC Fund Mgmt. Co. (U.S.), Inc.*, 2010 WL 3168407, at *7 (Del. Ch. Aug. 11, 2010) (board made investment decisions, but its minutes lacked any explanation for those decisions: "Nothing in the minutes and supporting materials reflects discussion or evaluation of any particular investment."); *Maric Cap. Master Fund, Ltd.* v. *Plato Learning, Inc.*, 11 A.3d 1175, 1176 (Del. Ch. 2010) (enjoining a merger because the seller's board failed to disclose discrepancies in its discounted cash flow model because the relevant committee's meeting minutes did not reference the factors the defendants said made those discrepancies immaterial); Tr. of Plaintiffs' Mot. for Preliminary Injunctions and the Court's Ruling 217, *In re Ancestry.com Inc. S'holder Litig.*, C.A. No. 7988-CS (Del. Ch. Dec. 17, 2012) (criticizing minutes for failing to reference key information that the board relied upon in choosing to sell the company, such as slide presentations and bankers' recommendations, especially because the defendants got "to write the script").

[12] Among the cases where major corporations suffered substantial regulatory, reputational, or financial harm but were able to get a *Caremark* claim dismissed because the corporate records made plain that the board had made a good-faith effort, however ultimately unsuccessful, to monitor and address the relevant legal compliance risk, *see, e.g.*, *Clem* v. *Skinner*, 2024 WL 668523 (Del. Ch. Feb. 19, 2024) (where the books and records incorporated into the complaint demonstrated board efforts to address the compliance risks the plaintiffs' *Caremark* complaint raised and made any pleading stage inference of a breach irrational, the complaint was dismissed and the court went further and expressed disappointment that the plaintiffs had wasted the company's money by bringing a complaint when a fair reading of the books and records should have made plain that any *Caremark* claim would fail); *In re McDonald's Corp. S'holder Derivative Litig.*, 291 A.3d 652, 683-84 (Del. Ch. 2023) (dismissing claims that the board failed

minutes during the relevant time period that are devoid of any rational consideration of an important compliance risk has supported a pleadings-stage inference that the board failed to engage in good-faith monitoring efforts and thus that a claim for possible liability even under the plaintiff-unfriendly *Caremark* standard could proceed to full discovery.[13] Similarly, minutes that contain no

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to act on red flags the company had a serious problem with addressing sexual harassment because the documentary record demonstrated good-faith efforts to follow-up on the flags and there was thus no basis to infer bad faith on the part of the independent directors); *Richardson as Tr. of Richardson Living Tr.* v. *Clark*, 2020 WL 7861335, at *4-7 (Del Ch. Dec. 31, 2020) (*Caremark* claim dismissed even where company was under regulatory order and suffered imposition of $125 million in additional restitution to victims and restrictions for failure to have adequate controls on money laundering; the evidence of good-faith efforts to monitor in the board minutes and advisor presentations made it impossible to infer a bad faith lack of effort on the part of the independent directors); *Oklahoma Firefighters Pension & Ret. Sys.* v. *Corbat*, 2017 WL 6452240, at *13-18 (Del Ch. Dec. 18, 2017) (dismissing *Caremark* claim even though company had been the subject of serious regulatory action for violations of financial laws because the board and committee recorded demonstrated that the board had made good-faith monitoring efforts and attempted to follow up on red flags); *In re Gen. Motors Co. Derivative Litig.*, 2015 WL 3958724, at *9 (Del. Ch. June 26, 2015) (citing to board and committee records evidencing good faith efforts to monitor in dismissing *Caremark* claim where ignition switches in cars were unsafe, had to be recalled, multiple deaths occurred, and the company suffered over $1 billion in financial losses and a $35 million fine, which was the highest fine paid as a result of a National Highway Traffic Safety Administration investigation into a recall).

[13] In several prominent cases, the absence of evidence in the minutes and materials of the board and relevant committees to efforts to monitor or address a material compliance risk has been a factor in the court's determining that a viable complaint under *Caremark* had been stated. *E.g.*, *Marchand* v. *Barnhill*, 212 A.3d 805, 812-13, 822-23 (Del. 2019) (finding a potential *Caremark* claim for alleged lack of board-level compliance monitoring and reporting of food safety issues and noting substantial harm to consumers, employees, and stockholders); *In re Boeing Co. Derivative Litig.*, 2021 WL 4059934, at *5-7, *14-15 (Del. Ch. Sept. 7, 2021) (finding a potential *Caremark* claim for alleged lack of board-level oversight of airplane safety and noting tens of billions of dollars of costs incurred by the company and substantial damages to its credibility, reputation, and business prospects); *Hughes* v. *Xiaoming Hu*, 2020 WL 1987029, at *14-16 (Del. Ch. Apr. 27, 2020) (finding a potential *Caremark* claim for alleged lack of board-level system for monitoring financial reporting and noting significant reputational harm to the company and costs incurred with restatements). Because *Caremark* is a director-friendly standard that precludes liability if the directors made a good-faith effort — *i.e.*, tried — to monitor or follow up on a relevant risk, the failure of the non-redacted portions of minutes

reference to the board's discussing material issues relevant to a challenged decision, such as agreeing to a lucrative compensation contract for a top executive, have helped plaintiffs convince a court to deny a motion to dismiss.[14] Likewise, when the minutes seem to conflict with the version of events reflected in information that the board received during its deliberative process, this had boded poorly for the board.[15]

As experienced corporate lawyers and directors know, the ability to win a motion to dismiss is critical in minimizing the costs, length, and distraction of litigation challenging director action as a breach of fiduciary duty. Precisely because plaintiffs do not have access to full discovery to plead their complaints, the motion to dismiss standard is plaintiff-friendly and requires that rational inferences from the complaint and the documents it incorporates be drawn against

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produced in response to a Section 220 demand and incorporated in the pleading record to reflect any effort to that end has been found by the Delaware courts to support a rational pleading-stage inference that no such effort was made. *E.g.*, *Ontario Provincial Council of Carpenters' Pension Tr. Fund, et al.* v. *Walton*, 2023 WL 309350, at *3-4, *20-21 (Del. Ch. Apr. 26, 2023); *In re McDonald's Corp. S'holders Derivative Litig*., 289 A.3d 343, 354-55 (Del. Ch. 2023).

[14] The failure of the minutes of the Disney board to reflect a discussion of material issues and questions relevant to the employment contract of Michael Ovitz played a key role in the denial of the motion to dismiss in that case, which was then only won by the defendants after four years of exhaustive discovery and a lengthy trial. *In re Walt Disney Co. Derivative Litig.*, 825 A.2d 275, 278 (Del. Ch. 2003) (citing to absence of discussion in minutes in determining not to dismiss); *see also Valeant Pharms. Int'l* v. *Jerney*, 921 A.2d 732, 747-48 (Del. Ch. 2007) (Failure of minutes to reflect a careful consideration of a substantial options grant to a powerful insider motivated denial of motion to dismiss because it suggested the board rubber-stamped a "predetermined outcome dictated by . . . management.").

[15] *In re MAXXAM, Inc.*, 659 A.2d 760, 766 & n.7 (Del. Ch. 1995).

the defendants.[16] The objective record that the corporate minutes, resolutions, advisor presentations, and SEC filings create is at that crucial stage the key factual foundation plaintiffs use to frame their complaints.[17] But, even under that plaintiff-friendly standard of review, especially in derivative suits where a plaintiff must plead particularized facts, defendants have a viable chance to terminate litigation at the starting gate when the board minutes, incorporated presentations, and the company's SEC filings that plaintiffs typically rely upon to write their complaints document a careful, well-motivated board process that resulted in decisions grounded in proper business considerations.[18] The Delaware courts have policed complaints that mischaracterize what incorporated materials say and have been willing to dismiss when the plaintiffs cannot plead facts that support an inference the board acted for improper reasons.[19] But they have also been correspondingly

[16] *E.g.*, *In re McDonald's Corp. S'holders Derivative Litig*., 291 A.3d at 664.

[17] Because Section 220 is the only method by which derivative plaintiffs can obtain nonpublic information before filing a complaint in Delaware, the Delaware Courts have long encouraged plaintiffs to take advantage of the chance to seek books and records so as to use them to plead more viable and factually well-grounded complaints. *Cal. State Tchrs.' Ret. Sys.* v. *Alvarez*, 179 A.3d 824, 839 (Del. 2018) ("[T]his Court has repeatedly admonished plaintiffs to use the 'tools at hand' and to request company books and records under Section 220 to attempt to substantiate their allegations before filing derivative complaints."). Recognizing that potential plaintiffs are limited in their ability to obtain information to plead a viable claim if Section 220 petitioners are put to too high a burden, the Court of Chancery has been vigilant in enforcing reasonable requests for books and records when a petitioner makes a colorable showing of possible wrongdoing. *See generally Pettry* v. *Gilead Scis., Inc*., 2020 WL 6870461 (Del. Ch. Nov. 24, 2020).

[18] *See supra* note 11.

[19] *E.g.*, *Fletcher Int'l, Ltd.* v. *ION Geophysical Corp.*, 2011 WL 1167088, at *3 n.17 (Del. Ch. Mar. 29, 2011); *see also Midland Food Servs., LLC* v. *Castle Hill Holdings V, LLC*, 792 A.2d

evenhanded, by according plaintiffs their right to fair inferences against the board, when corporate minutes fail to mention what seem to be material issues or reflect a cursory or non-extant role for the board in addressing an important transaction or risk factor.[20]

The inability to get a case dismissed results in the plaintiffs, having access to wide-ranging discovery into corporate records going well beyond formal minutes and advisor presentations. When the minutes are not of high quality, this discovery will compound the credibility problems for the defendants, because the number of arguably important inconsistencies in the evidentiary record will grow and be used by the plaintiffs to suggest that the board was sloppy or acted intentionally to favor an insider to the detriment of the other stockholders. Depositions of the directors and advisors will be taken, often a long time after the events crucial to the litigation occurred. When minutes are not reliable and complete, they do not serve as a useful memory aid, and when a director or advisor testifies that factors not mentioned in the minutes were in fact considered, obvious questions get asked: if that factor was important and actually a subject of serious discussion, why was it not included in the minutes? And relatedly, if you are a careful director and

920, 925 n.5 (Del. Ch. 1999) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 69 (Del. 1995)).

[20] *See supra* note 12.

thought this subject was material to your decision, why did you vote to approve minutes not mentioning it?

Although the Delaware courts are careful to review the whole record and have resolved such credibility contests for boards even in the face of minutes that do not back their testimony, contradictions in the evidentiary record of this kind increase the risk of an adverse ruling and tend to rule out any resolution of the case without a trial. These realities, along with the basic costs of discovery itself, mean that cases that pass the motion-to-dismiss stage typically have seven-figure settlement value. That is on top of the substantial reputational risks to the company, management, and the board that attend litigation highlighting poor corporate governance practices.

II. When Minutes Are Created and Approved Matters

Precisely because drafting, reviewing, and approving minutes is the favorite task of no one involved in the process required to finalize minutes, and because there is no immediate reward, emotional or material, to counsel or the directors for well-crafted, timely minutes, it is often a task that falls well down the priority list. In particular, during intense transactional processes, minute drafting and approval

can seem a distraction from tasks seen as more pressing to get to a desired outcome.

But that natural temptation has serious downside risk. For starters, the failure of counsel, management, and the board to document and review what they did at the last meeting at the next meeting impoverishes the deliberative process itself, not just the record. If counsel (both in-house and outside counsel, if they are engaged on the matter) promptly minute the meeting and capture as accurately as possible the material factors that the board considered, and present a draft to management and the board in reasonable time before the next meeting, they provide their clients with a solid source for reflecting on their decision-making process to date and whether there are other considerations the board should be addressing going forward. That is especially so if the directors are encouraged to read the draft minutes carefully in concert with the advisor and management materials for the prior meeting, and in light of the relevant materials for the meeting at which the minutes will be considered for approval. By this means the process for drafting, reviewing, and approving minutes becomes an iterative process that is not just to fulfill the vital function of making an accurate record of the board's decision-making process, but also becomes a tool for thinking more deeply about the material issues the board is working on and making sure the process takes into account all the factors it should.

The benefits of this approach are underscored by the skepticism that the Delaware courts have about minutes that are not the product of a timely, diligent real-time effort to document in good faith the board's deliberations.[21] If, instead of timely approving minutes for a prior meeting within the next couple of meetings, bundles of minutes are approved in one fell swoop at the end of a lengthy transactional or investigative process, the courts have given them less credence for reasons difficult to fault. For one thing, when directors approve a large bunch of minutes many months after the meetings that occurred, there is a rational concern their memories of the meetings have faded and their review of the minutes was cursory and perfunctory, rather than careful. As important, when minutes are drafted and approved after the result of a process is known, a reasonable inference arises that the minutes were crafted with hindsight bias and reflect an attempt to make whatever outcome eventually happened look favorable by shaping the record of the board's past narrative to position the board to look the best to a regulator or a court.[22]

[21] *E.g.*, *Forsyth*, 2010 WL 3168407, at *7 (criticizing minutes as being "created a year later by someone who was not even present at the meeting"); *Phillips* v. *Hove*, 2011 WL 4404034, at *11 (Del. Ch. Sept. 22, 2011) (criticizing minutes as being drafted after the date on which they purported to have been created).

[22] *In re Columbia Pipeline Grp., Merger Litig.*, 299 A.3d 393, 449 (Del. Ch. June 30, 2023) ("The minutes were not prepared contemporaneously [but] retrospectively after the outcome of the sale process was known. That fact undercuts their evidentiary value.").

For these reasons, the Delaware courts have refused to give evidentiary credit to minutes that were prepared long after the events in question, especially when the minutes for many meetings were reviewed and approved in an omnibus fashion after the board had made its final decision on the key matter under challenge in the litigation.[23] The worst situation for a board is when the minutes were approved after the company had filed its preliminary proxy statement relating to the transaction and plaintiffs used that preliminary proxy to write their complaint.[24] At that stage, the minute writers and the board not only knew the outcome of the process but had access to the plaintiffs' arguments why the board's decision was improper. The Delaware courts understandably view minutes of this kind as subject to an Orwellian temptation to rewrite the past in order to defeat the

[23] *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 191 (Del. Ch. 2007) ("After this litigation commenced, the Special Committee met on December 21, 2006 and approved formal minutes for ten meetings ranging from August 10, 2006 through November 28, 2006. That tardy, omnibus consideration of meeting minutes is, to state the obvious, not confidence-inspiring, especially when considered along with the total absence of minutes for the May 19 board meeting and the lack of clarity whether the Special Committee ever met to approve the limited set of private equity firms to be canvassed."); *In re Rural Metro Corp.*, 88 A.3d 54, 72 (Del. Ch. 2014) (also critiquing belated omnibus consideration).

[24] *FrontFour Cap. Grp. LLC* v. *Taube*, 2019 WL 1313408, at *10 n.98 (Del. Ch. Mar. 22, 2019) (When minutes "were [not] finalized until after [the plaintiff] commenced this litigation," the court denied the minutes "any presumptive weight, but rather use[d] them to summarize [the] [d]efendants' litigation position."); *see also City of Hialeah Emps' Ret. Sys.* v. *Insight Venture Partners*, 2023 WL 8948218, at *2 n. 6 (Del. Ch. Dec. 28, 2023) (where many minutes were approved not only months after the relevant board meetings, but after a books-and-records demand for those meeting minutes, the court would "treat the minutes with skepticism at an evidentiary stage").

plaintiffs' claims, rather than being a good-faith attempt in real time to document what the board in fact did and considered.

III. The Importance of Good Minuting Practices to Limiting The Breadth and Intrusiveness of Requests for Books and Records . . . and Discouraging the Big Dogs from Biting . . .

With growing institutional investor ownership and constant securities and corporate law litigation, corporations have faced a corresponding increase in books-and-records demands. This increase has also resulted because pleading standards under the federal securities law have tightened and the Delaware courts encourage plaintiffs in derivative suits to seek books and records in order to meet their burden to plead demand excusal.

In the pre-digital era, when companies faced a statutory books-and-records request, the company typically had to go no further than board minutes, resolutions, financial statements, and communications with shareholders: the iconic "books and records" to which statutes like 8 *Del. C.* § 220 speak.[25] But, given the ubiquity of emails, texts, and the ease of producing multiple drafts of documents, stockholders seeking books and records now regularly request that the corporation go beyond formal, board-level documents like minutes and advisor presentations and produce director and management texts on the subject of their

[25] 8 *Del. C.* § 220, "Inspection of books and records," addresses the rights of stockholders and directors to examine the books and records of a Delaware corporation.

inquiry, and management-level drafts and informal communications regarding matters that either did or, in some instances, did not go to the board.

The need for corporate boards, managers, and their advisors to update their practices in light of current informational technology is a broad subject in itself, which goes well beyond the need for high-quality minute practices. But the reality that corporate leaders, including directors, are increasingly using informal means of communication to conduct corporate business, including discussing topics that are before the board, has implications in the books-and-records litigation context that are important.

There is an evident purpose for stockholders' being given access to books and records: to allow them an adequate basis to take action to protect their legitimate rights. This includes the ability to secure access to information necessary to make a determination whether the board may have breached its fiduciary duties and to draft a complaint to challenge that alleged breach. It also includes the ability to gain information that might be necessary to mount a proxy contest. The Delaware courts have been careful to distinguish between what a stockholder is entitled to under Section 220 in terms of books and records — what is necessary, for example, for a potential plaintiff stockholder to determine whether to file a suit where it is shown a colorable basis to suspect wrongdoing — and giving a Section 220 petitioner full access to the broad-ranging discovery that is

afforded in the American judicial system to litigants who have filed a viable complaint that survives a motion to dismiss. But when a petitioner identifies with specificity a board decision or failure to act that colorably suggests possible wrongdoing, such as a breach of the duty of loyalty, and when the corporation cannot produce formal board-level materials, such as minutes, resolutions, and advisor presentations that document what the board did and why, the protection afforded stockholders to receive books and records would be rendered illusory if the court did not allow the petitioner access to other corporate documents necessary to illuminate what corporate action was taken and the basis for that action.[26]

Thus, in books-and-records cases, the scope of access that is awarded to petitioners is now importantly and sensibly influenced by whether the corporation has formal, board-level documents that adequately cover what the board did, when, and the basis for its actions. When a corporation can timely produce the minutes, resolutions, and advisor presentations for a transactional process or special investigation, the Delaware courts have made clear that those formal documents

[26] *Saito* v. *McKesson HBOC, Inc.*, 806 A.2d 113, 115 (Del. 2002) ("A stockholder who demands inspection for a proper purpose should be given access to all of the documents in the corporation's possession, custody or control, that are necessary to satisfy that proper purpose. Thus, where a § 220 claim is based on alleged corporate wrongdoing, and assuming the allegation is meritorious, the stockholder should be given enough information to effectively address the problem, either through derivative litigation or through direct contact with the corporation's directors and/or stockholders.").

will typically be sufficient to meet the petitioners' needs and will refuse to allow access to informal information like emails or texts, or even to communications among managerial subordinates that were not communicated to the board.[27] Put plainly, when good old-school practices of timely and thorough documentation are used, the company's exposure to wide-ranging, discovery-like orders to produce books and records is markedly diminished.

By contrast, when the formal record is full of gaps and it is plain that the board and management conducted much of their decision-making outside the boardroom, by means of texts and emails, the Delaware courts have granted access to that information because that information was in effect the books and records essential to determine what the board eventually did and why.[28] The Delaware courts do not look to make corporations produce such wide-ranging electronic

[27] *KT4 Partners LLC* v. *Palantir Techs. Inc.*, 203 A.3d 738, 742 (Del. 2019) ("Ultimately, if a company observes traditional formalities, such as documenting its actions through board minutes, resolutions, and official letters, it will likely be able to satisfy a § 220 petitioner's needs solely by producing those books and records. But if a company instead decides to conduct formal corporate business largely through informal electronic communications, it cannot use its own choice of medium to keep shareholders in the dark about the substantive information to which § 220 entitles them."); *Oklahoma Firefighters Pension & Ret. Sys.* v. *Amazon.com, Inc.*, 2022 WL 1760618, at *1 (Del. Ch. June 1, 2022). In *Oklahoma Firefighters*, the court reasoned first that "[f]ormal board-level documents are often the beginning and end of a Section 220 production where a plaintiff aims to investigate whether directors exercised proper oversight." *Id.* at 12. And because the plaintiff could not show an "atypical circumstance[] necessitating a broader inspection," such as failure to "'honor traditional corporate formalities' or that 'traditional materials, such as board resolutions or minutes' are wanting," the plaintiff could not seek documents beyond traditional board-level documents. *Id.* (quoting *Palantir*, 203 A.3d at 742).

[28] *Palantir*, 203 A.3d at 753.

information.[29] But they will, if necessary to ensure that the statutory rights of stockholders to information crucial to protecting their rights is meaningful. Thus, companies that have been unable to produce quality, formal, board-level information addressing the legitimate needs of petitioners have been ordered to produce wide-ranging electronic information in the form of emails and texts from the files of directors, top managers, and sometimes even lower-level employees.[30] This wider range of production has also been ordered when the minutes created by the company relevant to a transactional process were found to be inconsistent with the preliminary proxy, thus leading the court to conclude that it was necessary for the petitioner to receive access to draft minutes and officer-level materials to allow

[29] This is illustrated by the restraint by the Court of Chancery in refusing to require the production of emails in a case where the defendant corporation argued that was beyond the scope of a Section 220 case, only on appeal to admit that there were no minutes in existence addressing the decision the board had made that was the subject of legitimate inquiry. *Palantir*, 203 A.3d at 742 (noting this change in position on a key representation that the trial judge had reasonably relied upon).

[30] Among decisions where informality in communication predominated and resulted in wider-ranging production of emails, text, and officer-level communications are *Palantir*, 203 A.3d at 753 (key communications among directors and officers relevant to petitioners' demand were informal and not reflected in formal materials and thus required to be produced); *Wal-Mart Stores, Inc.* v. *Ind. Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1273 (Del. 2014) (because officers directly communicated certain information concerning an investigation to directors and there was a reasonable inference that more information sharing had occurred not documented in the formal board materials produced by the company, the court found that "officer-level documents are necessary and essential to determining whether and to what extent mismanagement occurred and what information was transmitted to Wal-Mart's directors and officers."); *Amalgamated Bank* v. *Yahoo! Inc.*, 132 A.3d 752, 795 (Del. Ch. 2016), *abrogated on other grounds by Tiger* v. *Boast Apparel, Inc.*, 214 A.3d 933 (Del. 2019) (fact that the official record of a relevant board committee for a key month was "decidedly sparse" and that informal means of communication likely were used to keep the board informed supported reasonableness of requiring additional informal documents).

it to investigate that discrepancy.[31] Responding to such orders is expensive, and when petitioners get that information before plenary litigation begins, they are able to exploit the inconsistencies and stray references that inevitably arise in informal communications that are not the product of a careful vetting and review process to help them file a complaint that casts the board and management in a poor light and is more likely to withstand a motion to dismiss.

There are two other positives to good minuting practices that bear highlighting. Good minutes and formal board documents can convince the court that the petitioner has no proper basis for obtaining books and records at all. By way of recent example, a stockholder sought books and records to challenge the response of the Disney board to Florida's so-called "Don't Say Gay" statute, which had generated a strong adverse reaction from Disney's Florida-based employees. The stockholder argued that Disney's board had somehow improperly elevated their personal social beliefs over their fiduciary duties and sought wide-ranging production of electronic records relating to the board's and management's reaction to the statute. The Court of Chancery denied that requested relief and found that the board's decision to speak out against the statute, for reasons documented in its minutes, was a proper exercise of its business judgment in view of the importance Disney's employees placed on working in a state that was welcoming to all,

[31] *Hightower* v. *SharpSpring, Inc.*, 2022 WL 3970155, at *10 (Del. Ch. Aug. 31, 2022).

including the many members of the LGBTQ community who worked at Disney itself.[32]

The other positive is something that doesn't happen as much if you can promptly produce a decision-making record that has credibility and demonstrates the good faith and care with which the board acted: the big dogs don't bite. When important regulators can be provided with a quality record of this kind, it is more likely that the company will be able to convince them that there is no need for enforcement action or that any concerns can be remedied by agreement on an efficient, less costly basis for the company. Likewise, the most effective plaintiffs' lawyers screen the cases they bring and will take a pass on situations where the company provides them with a decisional record that supports the company's contention that the board's action resulted from a diligent consideration of the relevant factors and addressed in a reasoned way any potential conflicts of interest. This does not mean, of course, that some plaintiff will not sue the board; ubiquitous lawsuits are an unfortunate reality of current corporate life. But it matters greatly whether the company is the subject of regulatory action by a credible federal or state agency or a plaintiff's firm with a track record of going to the mat and winning substantial recoveries, or just has to address a suit by a

[32] *Simeone* v. *The Walt Disney Co.*, 302 A.3d 956 (Del. Ch. June 27, 2023), *judgment entered*, 2023 WL 4996130 (Del. Ch. Aug. 3, 2023).

frequent-filer lacking a credibility-enhancing track record. Put simply, having a solid record of formal board-level documents in place from the get-go gives the company the high ground to minimize litigation risk and facilitate low-cost, efficient resolutions that allow the company to move on and focus on the business of business.

IV. Applying Judicial Learning in a Practical Way

I recognize that even public companies range widely in terms of the resources that can be brought to bear to document corporate decision-making. But limitations in resources make it more, not less imperative, that counsel, management, and the board think hard about how to perform this essential corporate function effectively and efficiently. To that end, I distill a few best practices suggested explicitly or implicitly by the real-world effect of corporate minuting practices in litigation in Delaware.

A. Have a General Protocol for Minuting Meetings and Be Thoughtful When Deviating from that Protocol

The expansion of mandated board committees and required board actions stresses the minute-taking capacity of even large-cap companies and puts severe pressure on smaller companies. The more that a company needs to spread the minuting load across company personnel, with the occasional aid of an array of outside advisors, the greater the risk of inconsistencies in style. Some companies put together minutes by combining after-the-fact descriptions and pre-drafted

sections (*e.g.*, adding meeting notes to a lengthy tax-related section that was, for convenience, prepared before the meeting even took place). This practice can generate an odd record in which an item that might have been discussed only briefly by the board occupies more space in the written minutes than an item discussed for ninety minutes that is only briefly documented. Faced with such minutes in court, directors can appear deceptive in testifying that in fact the shorter paragraph on an M&A process reflected an hour-long, in-depth discussion while the two-and-a-half-page tax section described an issue the board voted on after five minutes.

Adding to the morass, companies often use a lumpy mixture of long- and short-form minutes without a consistent approach. Verbose renditions of some deliberations are interspersed with terse summaries of others. Sloppy long-form minutes like these often involve the worst combination of the specific and general. They have some of the qualities of a transcript but omit key points, leaving directors who remember issues discussed but not mentioned looking less credible. And long-form minutes too often fail to accurately state the precise action the board took and whether the decision was unanimous.

There is no perfect approach to the difficult task of minuting, but the board and management are best served by settling on an approach thoughtfully and endeavoring to implement that approach professionally and consistently. For

companies with fewer resources, this might involve a general commitment to high-quality short-form minutes that scrupulously record key information (such as the length of the board meeting, who was present, and the action taken) and summarize succinctly the considerations the board took into account but do not attempt to be exhaustive or characterize the views or statements of any particular director. Companies taking this general policy approach should be clear that in certain situations, such as an internal investigation or a special transactional committee, the company may deviate and take a long-form approach with the help of outside advisors. When deviation is warranted, that should be reflected by a board decision explaining the limited purpose for which long-form minutes will be used. With a policy of this kind, the company makes clear what it is and is not attempting to do with minutes, and also uses scarce resources effectively. To create a complete record, the policy should require that all management and advisor presentations for particular meetings be stored with the minutes in the company's files so that the full record is available for document production and as a memory aid for witnesses.

Companies that prefer long-form minutes for all meetings should set forth specific criteria that must be adhered to by all company minute-takers. In general, it is unwise for even long-form minutes to put words in the mouths of specific directors, rather than to identify a subject that was discussed and the material

considerations that arose. Minutes that refer to some, but not all, directors imply that those not mentioned did not speak or participate actively, and that is not always the case. The more that minutes look like an attempt at a transcript, the less room there is for participants to credibly testify later on other questions or issues that were raised in the meeting but not reflected in the minutes. Ironically, fulsome minutes of that kind often fail to record important information of a more objective kind, such as the individuals presenting information or leading a discussion and the names of all the advisors present during the meeting.

B. Transform the Minuting Approval Process into an Active, Iterative Part of the Deliberative Process

Let's fess up, few individuals involved in corporate governance have not occasionally given approval to circulated minutes without adequate reflection or study. Part of the problem with the approval of minutes is that it is difficult to focus on the past when pressing business is on the table. Minute-approval processes could benefit from the general counsel or corporate secretary directing the participants to the most crucial parts of the minutes, describing the most important decisions to ensure the participants — managers and directors —focus on whether the minutes accurately capture the decision taken, and, as important, fairly summarize the major factors the board considered. This highlighting process should include reference to key documents considered in the meeting. Also, it should occur not as if it were disconnected from the meeting at hand, which will

often involve the board considering next steps regarding the issues considered at the prior meeting — in particular when the minutes address an ongoing transactional, compliance, or investigation issue. Rather, the consideration of the minutes of the prior meeting should be a time when the board and management reflect on the prior meeting, make sure that the material issues it considered are reflected accurately in the minutes, and use that as a launching point for the current meeting's consideration of that issue. By having minute approval be conducted in this more active, engaged, and relevant manner, it changes from a rote matter of perfunctory hand raising into an active consideration of the process to date and a useful starting point for the next stage in the deliberative process. But that, of course, cannot happen unless something else does.

C. Ideally, Minutes for the Prior Meeting Should Be Approved at the Very Next Meeting

The best, most credible time for a board or committee to approve minutes for the prior meeting is at the very next one. That is when the directors will have the freshest memory and, by focusing on the minutes for one meeting, are best positioned to make sure the minutes accord with their recollection of the material factors considered and what was decided. As just discussed, when minutes are considered in this timely fashion, the consideration of the minutes can act as the foundation for the current day's work, because it focuses the directors, management, and their advisors on the status of the board's consideration to date

and acts as a natural and sound bridge to the next stage of the board's work on the issue.

Perfection and humanity are oxymoronic concepts. But best practice should be the goal and deviations from the goal should be the exception, not an ongoing rule. Perhaps, a couple of sets of minutes might be approved at a time, if necessary. Or the board, as to a particularly important subject for consideration — such as a transaction or investigation — commits to approving the parts of the minutes that address that subject in a timely manner — and makes a formal record it has approved the parts of the minute addressing a particular subject and will come back to the rest of the minutes at a later time.

Minutes are the spinach that must be eaten. If they are fresh, sautéed nicely and digested promptly in small portions, they are more palatable than if they are eight boxes of frozen spinach, defrosted in a microwave, and gagged down in a slimy mess all at once. And impatient CEOs and directors are more likely to tolerate the spinach if its role is transformed into a healthy part of an effective, iterative, and efficient deliberative process. This is true not just for the board, but for the counsel who must do the hard work of doing the first draft of the minutes. Drafting does not get easier with the passage of time and the accumulation of meetings. It gets harder and more unreliable. If the disciplined expectation is that the primary minute-taker will come out of the meeting and use her notes and the

advisor presentations to craft an outline for the minutes, and then works with relevant colleagues to turn that outline into a draft promptly, less total time will be taken, accuracy will increase, and the minute-takers will build credibility with the board and top management because they will provide them with timely, quality drafts in easily digestible portions.

D. Ideally, Key Minutes Should Be Approved at Meetings, Not by Written Consent

Sometimes the impatience with minutes is so substantial that their approval is accomplished by way of written consent. But it is not always possible to anticipate what might become salient, and, thus, the approval of all board and committee minutes and the assurance that they accurately reflect the board's work in a careful, professional manner is always a required part of prudent corporate governance. Realizing that there is a temptation for even review and approval to be perfunctory at meetings themselves, seeking review and approval by written consent is not ideal and can contribute to there being no reasoned discussion by directors of whether the minutes cover all the necessary issues. This approach also runs into the reality that not all directors are as facile with electronic editing and communication techniques as members of Generation Z.

The appearance problem that arises in litigation, if the consent method of review is used, is also real. That will be compounded if an omnibus resolution is used to approve a large bunch of minutes at the end of an important process and

long after most of the meetings occurred. If minutes were not timely prepared and approved and a bunch of them must be approved at one time, then courts will likely give those minutes less weight. But that makes it even more important that the board meet in earnest when approving those late-arriving minutes, that the legal advisors go through them carefully, make sure that the board is engaged and asks questions, and considers the minutes in concert with the materials that were considered at the meetings. If this seems like a hassle, it of course is. The best way to avoid it is to make sure that minutes are approved in a timely manner in reasonable portions, and not in some "Man v. Food"-sized mass.

In setting forth what is best practice, I also understand that the board's time is limited and that there may be circumstances when approval by written consent is efficient and does not present any basis for suspicion about the accuracy of the minutes, or the care with which they were approved. But in any circumstance when approval is sought by written consent, it is important to emphasize to directors the importance of careful review, and to encourage the directors and officers to comment on the circulated minutes and not just rotely approve what is sent. In particular, in the context of a high-stakes transactional process or investigation, active director and officer focus on ensuring the minutes cover the material issues that were the subject of the board's deliberations is critical. The Pandemic was a human tragedy, but it has taught us all how to use virtual meetings

more effectively and that can facilitate gathering the directors in a less burdensome manner to review minutes.

E. Make Sure Minutes and Advisor Presentations Cover Key Evolving Issues and Tie Up Loose Ends

Prompt consideration of minutes reduces the hazard that inconsistencies and omissions will occur in the deliberative record. Directors at committee and board meetings often ask important questions and seek follow-up. Sometimes it happens but, because minutes are not promptly prepared, that reality is not in the record, and when witness testimony that it did happen is given, it is not as credible because the minutes and advisor presentations do not record the interaction.

When minutes are prepared promptly and in concert with the materials for the next meeting, it is more likely that areas for follow-up will be documented in the draft minutes, and that the materials for the next meeting will refer to the areas where the board asked for follow-up. By having the minutes and advisor materials form an iterative, interactive basis not just for documenting what happened at the past meeting but ensuring that the next meeting addresses the follow-up work and next steps that the board desired, the decisional process of the board is enhanced, at the same time as the company is making the most credible possible record of the basis for the board's decisions.

This process, of course, requires that the advisors and the board itself reflect on what happened at committee and board meetings in the time period after they

occur, and use that process of reflection to determine the company's path forward. Materials for the next board meeting must be prepared with a fresh eye taking into account the board's last meetings, rather than just being a rote update of a canned slide deck. The advantage is that these requirements also track what is most likely to produce a reasoned process in which the active business judgment of the board comes together with the active best input from management and advisors to create a basis for making sound decisions and for documenting that basis in real time accurately and credibly.

F. Use Approved Minutes to Craft Important Documents Such as Preliminary Proxies and Committee Reports in the Most Careful, Credible Manner

The optimal source material for drafting documents like the background section of a preliminary proxy relating to an M&A transaction is a set of approved board minutes and advisor presentations relevant to the board's approval of the transaction being recommended for approval by stockholders. Less credible is a preliminary proxy drafted first, on the basis of random notes, and often with the primary drafters being lawyers who were not present at meetings. Also, having the board approve minutes after the company has filed a rendition of events with the Commission, under requirements that that rendition be materially accurate, is the opposite of best practice, because it looks like the preliminary proxy has driven the

writing of the minutes rather than a timely rendition of the board's process having been the driver of an accurate summary of that process in the preliminary proxy.

Timely prepared minutes will pay off when it comes time to draft a preliminary proxy or the final report of an investigative committee because they provide a solid, chronological foundation for the key narrative of material events. As important, because the client directors and managers will have been engaged throughout the process in a timely, reflective consideration of the minutes, they are more likely to provide informed input on the final versions of any report they are asked to approve or on parts of the preliminary proxy that require their direct input.

G. Realize the Connection Between Quality Documentation Practices, Integrity In Corporate Decision-Making, and the Judicial Perception of Both Corporate Fiduciaries and Corporate Lawyers

It is too often forgotten that the sample of cases brought to courts is unrepresentative of corporate decision-making generally. This sample represents those situations where, in a nation with robust disclosure, active institutional investors, regular elections and voting, and constant market eyeballs on corporate conduct, someone has taken the time and effort to sue. In an American market place where independent boards are the norm, takeover defenses are down, M&A

markets are vibrant, pro rata treatment of minority investors is more the rule than the exception, and self-dealing is low, the incidence of lawsuits remains very high.

But the suits that get brought nonetheless remain a biased sample. And that biased sample is one that yields a quite low percentage of cases where corporate boards and managers have been found to have engaged in conscious wrongdoing or yielded an economically unfair outcome to the public stockholders. It is therefore always important to be careful about generalizing from that sample, but there is a natural temptation to suspect that when bad behavior has occurred in a case before the court, it may be part of a larger pattern that is not perceptible and that when that behavior involves not just corporate fiduciaries, but the company's outside lawyers, that our profession is not playing its proper role.

Sound lawyers who make sure that corporate decision-makers document why and what they have decided in a high-minded way do not just position their clients for success in court. Rather more importantly, their integrity in this respect, when combined with their commitment to counsel their clients on the importance of fulfilling their fiduciary duties, leads to the things that courts and regulators don't see: the many, many instances in which a potentially harmful, self-interested action has been avoided, when a conflicted party has recognized its proper responsibilities to others, when a company has increased its compliance efforts to

protect consumers or the environment, or removed an officer whose conduct or performance was not up to snuff.

That this high-integrity conduct happens out of public sight —and in a context where the professional duties of lawyers require that they not trumpet their role in helping to produce other-regarding outcomes that accord with good corporate citizenship and high fiduciary standards — does not mean it does not happen. And those companies that have board documentation practices that enforce rational decisionmaking by making sure that the basis for all important board decisions are well-documented, and thus underscoring that it is vital that any decision be justified by reference to the best interests of the company and all its stakeholders, are the ones most likely to avoid costly litigation or regulatory proceedings. And when the inevitable suits come, as they will to any public company, it is those same companies who are best positioned to resolve them at low cost and in a way demonstrating the continued reality that the American system of corporate governance, as a general matter, provides the highest level of investor protection of any on Earth.

V. Conclusion

Documenting the basis for corporate action in a timely, credible way will never be sexy. But with a recognition that promptness, not procrastination, is both more efficient and effective, it can become less, not more, burdensome. By seeing

the crafting and approving of minutes, resolutions, and other decisional information as integral to an iterative, active process of thinking in a business-like way about important issues, a more lively and active deliberative process emerges in which it is more likely that all reasonable perspectives will be vetted and that the board's eventual decision is well-grounded. Using this approach will result not just in lower legal, regulatory, and reputational risk; it will also lead to better business decisions, more ethical behavior, and a stronger company that is well-positioned to create sustainable value for its investors and treat all its key stakeholders with respect.