

THE PRESUMPTION OF INDEPENDENCE FOR DIRECTORS IN
MERGER AND ACQUISITION SHAREHOLDER LITIGATION AT
SUMMARY JUDGMENT

BY: KEITH BARLETT

ABSTRACT

The presumption of independence for directors plays an important role in Delaware’s corporate legal system. The system tends to defer business matters to those who work in business because they have the requisite skills and acumen. Essentially, the system recognizes that the court is not an expert in business and is thus wary of deciding that a corporation’s directors acted improperly. But that deference is not unlimited. Indeed, sometimes it seems to disappear completely. This Comment explores the functioning of the presumption of independence. Specifically, it looks at how the presumption of independence is working in merger and acquisition shareholder litigation at the summary judgment stage and considers potential changes to the presumption of independence.

I. INTRODUCTION	610
II. LEGAL STANDARDS	610
<i>A. Summary Judgment</i>	610
<i>B. Director Independence</i>	611
III. CASE ILLUSTRATIONS	612
<i>A. In re MFW Shareholders Litigation</i>	613
<i>B. In re BGC Partners, Inc. Derivative Litigation</i>	615
<i>C. In re Oracle Corporation Derivative Litigation</i>	615
IV. STATE OF THE LAW	617
<i>A. Nullification of the Presumption of Independence</i>	617
<i>B. Delaware Court of Chancery Rule 1</i>	619
1. Just.....	619
2. Speedy	620
3. Inexpensive	620
V. CHANGING THE PRESUMPTION OF INDEPENDENCE.....	623
<i>A. Changing the Court’s Discretion</i>	623
<i>B. Changing the Presumption of Independence Directly</i>	624
<i>C. Changing the Standard for Summary Judgment</i>	625
VI. PRACTICAL GUIDANCE	625
<i>A. Governance</i>	625
<i>B. Litigation</i>	626
VII. CONCLUSION.....	627

I. INTRODUCTION

Case law surrounding directors' presumption of independence is slowly coalescing.¹ But its analysis differs dramatically in different contexts and at different stages of litigation.² Likewise, its functionality appears to differ in varying scenarios. This Comment explores what the presumption of independence looks like in recent merger and acquisition ("M&A") shareholder litigation at the summary judgment stage. Next, the discussion analyzes its functionality through the lens of the Delaware Court of Chancery rules. It then assesses possible changes to the presumption of independence, and concludes by proffering practical guidance on how this information may be used.

II. LEGAL STANDARDS

The Delaware Court of Chancery's standards for summary judgment and director independence must be laid out before being analyzed.

A. Summary Judgment

The path to satisfying the requirements under Rule 56³ for granting summary judgment is "well-worn."⁴ The evidentiary record must be examined for disputes of material fact.⁵ Summary judgment may only be granted if no disputes of material fact exist and the moving party, as a matter of law, is entitled to judgment.⁶ But "[t]here is no 'right' to summary judgment."⁷ The court must give any reasonable inferences based on undisputed facts in favor of the non-moving party.⁸ Any competing inferences that may be drawn from the undisputed facts are not

¹ *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *14 (Del. Ch. May 2, 2022).

² *See id.* at *14–15.

³ Del. Ct. Ch. R. 56.

⁴ *In re Oracle Corp. Deriv. Litig.*, 2022 WL 3136601, at *22 (Del. Ch. May 20, 2022).

⁵ *Id.*

⁶ *Sciabacucchi*, 2022 WL 1301859, at *12.

⁷ *In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, at *3 (Del. Ch. Feb. 4, 2020) (citing *Telxon Corp. v. Meyerson*, 802 A.2d 257, 262 (Del. 2002)).

⁸ *Oracle*, 2022 WL 3136601, at *22.

weighed at this stage.⁹ If disputes of material fact do exist, then summary judgment is denied.¹⁰ Indeed, “if there is any reasonable hypothesis by which the opposing party may recover,” summary judgment should not be granted.¹¹ But the “existence of a scintilla of evidence in support of the non-moving party’s position, however, is not sufficient.”¹²

B. Director Independence

The presumption of director independence has its roots in the business judgment rule.¹³ The rule imposes upon directors a duty of loyalty.¹⁴ But it also presumes that directors are loyal.¹⁵ Under the duty of loyalty, directors must give the corporation and its shareholders’ interests precedence over the directors’ or a controlling shareholder’s interests.¹⁶ It is from the business judgment rule’s presumption of loyalty that the presumption of independence stems.¹⁷

While less travelled, the path to determining director independence is nonetheless evident. To start, “[d]irectors are presumed to be independent.”¹⁸ But there is no bright-line test, and the analysis is done on a case-by-case, fact-specific inquiry.¹⁹ The court must take a holistic view of reasonable inferences drawn from the facts of the case.²⁰ Specifically, the search is for facts that show a director is “‘beholden’ to the [interested] party ‘or so under [the interested party’s] influence that [a director’s] discretion would be sterilized.’”²¹ The facts plaintiffs present to create the inference of a lack of independence must be material.²² And that materiality must be looked at in relation to the specific director in

⁹ *Id.*; *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *5 (Del. Ch. Sept. 20, 2021) (“At this stage in the case, the court will not weigh evidence.”).

¹⁰ *Sciabacucchi*, 2022 WL 1301859, at *12.

¹¹ *In re Good Tech. Corp. S’holder Litig.*, 2017 WL 2537347, at *1 (Del. Ch. May 12, 2017).

¹² *BGC*, 2021 WL 4271788, at *5 (internal quotation marks and alterations omitted) (citing *Haft v. Haft*, 671 A.2d 413, 419 (Del. Ch. 1995)).

¹³ *See Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985).

¹⁴ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993).

¹⁵ *Id.* at 362.

¹⁶ *Id.* at 361.

¹⁷ *See id.* at 361–62.

¹⁸ *In re Oracle Corp. Deriv. Litig.*, 2022 WL 3136601, at *21 (Del. Ch. May 20, 2022).

¹⁹ *Id.* at *15

²⁰ *Id.*

²¹ *In re MFW S’holders Litig.*, 67 A.3d 496, 509 (Del. Ch. 2013) (quoting *Rales v. Blasband*, 634 A.2d 927, 936 (Del.1993)), *aff’d sub nom.* *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

²² *Id.*

question.²³ The ultimate goal in analyzing independence is to identify facts that would render a director incapable of keeping the best interests of the corporation in the forefront of her decision-making process, whether it is because she is beholden, self-interested, or any other material reason.²⁴ “To grant summary judgment, the record must be such that [the court] finds that the [p]laintiffs cannot meet their burden to rebut [the presumption of] independence at trial, as a matter of law.”²⁵

III. CASE ILLUSTRATIONS

Findings on director independence on a motion for summary judgment in the context of M&A litigation can go one of three ways:

- (1) the presumption of independence goes un rebutted because the plaintiffs failed to “set forth specific facts showing that there is a genuine issue for trial”²⁶;
- (2) a director is found independent because the non-movant friendly reasonable inferences fail to rebut the presumption of independence;²⁷ or
- (3) the non-movant friendly reasonable inferences successfully rebut the presumption of independence, creating a triable issue of fact.²⁸

In many of these opinions, the facts are, as the court has noted, “legion.”²⁹ For that reason, these case illustrations focus primarily on the facts the

²³ *Id.* at 509–10.

²⁴ *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917, 938 (Del. Ch. 2003).

²⁵ *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *16 (Del. Ch. May 2, 2022).

²⁶ Del. Ct. Ch. R. 56; *see In re MFW*, 67 A.3d at 509–14. Many readers will likely be familiar with *MFW*, and its high court counterpart, *M & F*, for deciding that “business judgment is the standard of review . . . where [a] merger is conditioned *ab initio* upon both the approval of an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders.” *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 644 (Del. 2014).

²⁷ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *5–8 (Del. Ch. Sept. 20, 2021).

²⁸ *See In re Oracle Corp. Deriv. Litig.*, 2022 WL 3136601, at *11–13 (Del. Ch. May 20, 2022).

²⁹ *Id.* at *2.

court found relevant to the independence analysis. But know that they all take place in the context of M&A transactions.³⁰

A. In re MFW Shareholders Litigation

In *MFW*, the court analyzed three directors, ultimately finding that all three were independent because the plaintiffs failed to plead specific facts that rebutted the presumption of independence.³¹ The court began its analysis of the directors' independence by drawing attention to two "overarching problems" in the plaintiff's argument.³² First, the plaintiffs failed, despite "extensive discovery," to allege material facts about the directors' economic circumstances.³³ Second, the defendant directors qualified as independent under the New York Stock Exchange ("NYSE") rules governing director independence.³⁴ This fact alone did not prove independence, but because the NYSE rules were influenced by experience in Delaware and subject to intensive study, they were a "useful source" for analyzing director independence.³⁵ The court then moved to its director-by-director analysis.

MFW director Martha Byorum was found independent because the plaintiffs failed to plead specific facts creating a reasonable inference of a lack of independence.³⁶ The plaintiffs illustrated that Byorum worked in finance and had numerous personal and professional relationships within the industry.³⁷ While those relationships existed and were ongoing, the plaintiffs failed to provide evidence of their material importance or emotional depth to Byorum.³⁸ Likewise, the nature of her professional relationships was not demonstrated.³⁹ Merely "com[ing] into contact" with others was insufficient to be material.⁴⁰ Further, the plaintiffs failed to show how a \$100,000 fee to Byorum (which is one tenth of the amount needed to trigger a lack of independence under the NYSE rules) would

³⁰ See *MFW*, 67 A.3d at 499; *BGC*, 2021 WL 4271788, at *1; *Oracle*, 2022 WL 3136601, at *1.

³¹ See *MFW*, 67 A.3d at 509–14.

³² *Id.* at 509–10.

³³ *Id.* at 510.

³⁴ *Id.*

³⁵ *MFW*, 67 A.3d at 510.

³⁶ *Id.* at 510–11.

³⁷ *Id.* at 511.

³⁸ *Id.*

³⁹ *MFW*, 67 A.3d at 511.

⁴⁰ *Id.* (internal quotation marks omitted).

have been material to her given her personal, professional, and economic circumstances.⁴¹

Similarly, the court found *MFW* director Viet Dinh independent because of the plaintiffs' failure to present material facts rebutting the presumption of independence.⁴² Again, a fee of \$200,000 was not considered material given Dinh's personal and professional circumstances.⁴³ The court noted that this amount also does not trigger the NYSE rules for director independence.⁴⁴ The plaintiffs pointed to Dinh being offered another directorship later in time.⁴⁵ But because he had already fulfilled his duties in his current role at the time of that offer, it was not logically possible for that offer to have influenced his decision-making process.⁴⁶

Finally, the court found *MFW* director Carl Webb independent because the plaintiffs "ignored [his] economic circumstances . . .", the same reasoning given for Byorum and Dinh.⁴⁷ The court found Webb's share in the sale of a \$5 billion dollar investment relevant to his independence despite the plaintiffs arguing otherwise.⁴⁸ The only argument the court gave credence to was a "distant business relationship," which it deemed insufficient as a challenge to independence.⁴⁹

In sum, the court was looking for facts both specific and material to independence.⁵⁰ The court also sought facts showing that the NYSE rules on director independence had been violated.⁵¹ Absent any facts of that nature, the presumption of independence went un rebutted,⁵² there was no triable issue of fact, and summary judgment was granted.⁵³

⁴¹ *Id.* at 511–12.

⁴² *Id.* at 512.

⁴³ *MFW*, 67 A.3d at 512.

⁴⁴ *Id.* at 513.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *MFW*, 67 A.3d at 514.

⁴⁸ *Id.* at 513–14; *id.* at 514 (“[The plaintiffs] only begrudgingly conceded that Webb might be ‘seriously rich.’”).

⁴⁹ *Id.* at 514.

⁵⁰ *Id.* at 510.

⁵¹ *MFW*, 67 A.3d at 510.

⁵² *Id.* at 509.

⁵³ *Id.* at 514.

B. *In re BGC Partners, Inc. Derivative Litigation*

In *BGC*, defendant director Linda Bell was found independent.⁵⁴ Bell's income from her directorship for BGC Partners, Inc. was 7.6% of her annual income, which was in the "low six figures."⁵⁵ The court said that there was not enough supporting evidence to show that Bell would risk her reputation for a small percentage of her income.⁵⁶

The primary relationship the plaintiffs presented was between Bell (the interested party), Howard Lutnik, and their connection to Haverford College.⁵⁷ Bell served as the college's provost for several years, while Lutnik had been on the college's board of managers.⁵⁸ Lutnik played no direct role in her appointment,⁵⁹ but he was a major donor to Haverford.⁶⁰ By the time the transaction at bar occurred, Bell had not been working at Haverford for five years.⁶¹ The court found no plausible way for Lutnik's relationship with Haverford to influence Bell's decision-making process in the merger.⁶² The court, viewing the inferences drawn on the evidence presented, combined with the presumption of independence, concluded that there were no triable issues of fact as to Bell's independence.⁶³

C. *In re Oracle Corporation Derivative Litigation*

In *Oracle*, the court concluded that there was a triable issue of fact regarding defendant director Renée James' independence.⁶⁴ The path to that conclusion is, however, a bit convoluted.⁶⁵ Because of this, some background facts become necessary:

⁵⁴ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *8 (Del. Ch. Sept. 20, 2021).

⁵⁵ *Id.* at *7.

⁵⁶ *Id.*

⁵⁷ *Id.* at *6.

⁵⁸ *BGC*, 2021 WL 4271788 at *3.

⁵⁹ *Id.*

⁶⁰ *Id.* at *7; *id.* at *3 ("[Lutnik] has donated tens of millions of dollars to the college.").

⁶¹ *Id.* at *7.

⁶² *BGC*, 2021 WL 4271788, at *7.

⁶³ *See id.* Although Bell was found independent, a majority of the directors' independence still had triable issues of fact, and the motion for summary judgment was ultimately denied. *Id.* at *9. After trial, the court found the remaining directors independent. *In re BGC Partners, Inc. Deriv. Litig.*, 2022 WL 3581641, at *1 (Del. Ch. Aug. 19, 2022), *judgment entered sub nom. In re BGC Partners, Inc.*, 2022 WL 3581641 (Del. Ch. Aug. 19, 2022) ("The evidence presented by the defendants, however, carried the day. The special committee and its advisors were independent.").

⁶⁴ *In re Oracle Corp. Deriv. Litig.*, 2022 WL 3136601, at *13 (Del. Ch. May 20, 2022).

⁶⁵ *Id.* at *12.

The Plaintiffs' argument . . . can be summarized as follows: James had ambitions in the technology industry going forward, including serving as a CEO for a company; she was friends with [Safra] Catz, a woman presently in the position of co-CEO at a technology company, and James discussed her career with Catz, at least once seeking advice; James was aware that Catz, and, by inference, [Larry] Ellison, wanted [a merger] to go forward in 2016; and finally, James was aware that Catz and Ellison could frustrate—or advance—her future ambitions to become a CEO in the technology industry, and James was therefore conflicted in carrying out her fiduciary duties.⁶⁶

With the case in sufficient context, the court's analysis of independence can be properly examined.

The court began by noting “a degree of difficulty in the [p]laintiffs' syllogism.”⁶⁷ In essence, the plaintiffs must have presented sufficient facts to create a reasonable inference that James was beholden to Catz, Catz was intertwined with Ellison, and therefore James was beholden to Ellison.⁶⁸ The facts connecting James and Ellison were bare—Ellison was influential in the industry in which James was attempting to become a CEO.⁶⁹ Because this fact on its own was not enough to create an inference that James was beholden to Ellison, the plaintiffs focused on James' relationship with Catz.⁷⁰ This required the court to infer that Catz was intertwined with Ellison, an inference it found “justified given the non-movant-friendly standard.”⁷¹

The court then moved on to James and Catz's personal relationship.⁷² It focused on the fact that they occasionally had dinner together and shared a connection of both being women in leadership positions in the same field.⁷³ Despite discovery occurring, this is the full extent of facts the plaintiffs presented regarding their personal relationship, which the court did not believe would, on its own, be material.⁷⁴ The court noted that facts demonstrating “very warm and thick

⁶⁶ *Id.* at *11.

⁶⁷ *Id.* at *12.

⁶⁸ *See Oracle*, 2022 WL 3136601, at *12.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Oracle*, 2022 WL 3136601, at *12.

⁷³ *Id.*

⁷⁴ *Id.*

personal ties of respect, loyalty, and affection” could have contributed to materiality.⁷⁵ Nonetheless, the relationship still had to be included in the holistic evaluation of independence.⁷⁶

Next, the court considered James’ business relationships.⁷⁷ What the court found to be most material to a showing of a lack of independence was James’ simultaneous work on Oracle’s acquisition and another potential acquisition for a different company.⁷⁸ The court then made the non-movant friendly inferences that James knew Ellison and Catz wanted Oracle’s acquisition to go through, and that James knew Ellison could “help or hinder” her ambitions of becoming a CEO.⁷⁹ The court also inferred that James hoped the potential acquisition she was pursuing for another company would lead to her becoming the CEO of that acquired company.⁸⁰ Oracle was a potential secondary investor in the acquisition and was capable of altering the outcome of that investment, further entangling James’ future with Ellison.⁸¹ Based on these “plausible” or reasonable inferences, the court concluded that James could lack independence from Ellison and Catz.⁸²

IV. STATE OF THE LAW

With the standards for summary judgment and director independence laid out, along with several examples of how those standards play out in the world, an analysis of how the presumption of director independence is functioning in M&A litigation at the summary judgment stage may commence.

A. Nullification of the Presumption of Independence

Summary judgment is a limited use tool in the Delaware Court of Chancery.⁸³ The court’s guidelines state that “it is often unhelpful to seek

⁷⁵ *Id.* (citation omitted).

⁷⁶ *Oracle*, 2022 WL 3136601, at *12.

⁷⁷ *Id.* at *13.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Oracle*, 2022 WL 3136601, at *13.

⁸¹ *See id.* at *13.

⁸² *Id.* James was dismissed by stipulation because evidence at trial did not support her being beholden to Catz or Ellison. Stipulation and Order of Voluntary Dismissal with Prejudice of Renée James at 1, *In re Oracle Corp. Deriv. Litig.* (No. 2017-0337-SG) (Del. Ch. Dec. 27, 2022) (ORDER).

⁸³ *See* DEL. CTS., GUIDELINES TO HELP LAWYERS PRACTICE IN THE COURT OF CHANCERY § C(6)(d)(i) (Aug. 2021), <https://courts.delaware.gov/chancery/guidelines.aspx> (in the first sentence, click the “Guidelines” hyperlink).

summary judgment.”⁸⁴ They even suggest that parties set provisions requiring leave before a motion for summary judgment can be filed.⁸⁵ However, that leave is not always granted.⁸⁶ This applies to all cases and not solely M&A litigation.⁸⁷ So, before the presumption of independence enters the equation, summary judgment’s application is already narrowed.

Summary judgment is further restricted by the unlikelihood that a director will be found independent given the non-movant friendly inferences. One 2022 opinion stated “[i]t has become a commonplace that motions for summary judgment are not sustainable in most internal-affairs corporate litigation in [the] Court [of Chancery].”⁸⁸ This is, in part, because the allegations have already survived a motion to dismiss and had enormous amounts of discovery, and because issues of directors’ intentions and motives are best judged at trial.⁸⁹

But there may be another reason summary judgment’s usefulness is impeded—the presumption of independence carries no weight. At the summary judgment stage, competing inferences are not weighed.⁹⁰ While the *presumption* of independence is not an *inference*, it is also not weighed.⁹¹ Thus, the inferences of a lack of independence the plaintiffs need to show need not be greater than the presumption of independence to survive summary judgment. Nor do plaintiffs need inferences that are stronger than those showing that a director is independent. They need only create some inference, beyond a mere allegation,⁹² that a director *could* lack independence.

⁸⁴ *Id.*

⁸⁵ *Id.* at § C(6)(d)(ii).

⁸⁶ Order Denying Leave to Move for Summary Judgment at *1, *In re Physicians Formula Holdings, Inc.*, 2014 WL 4652621 (Del. Ch. Sep. 18, 2014) (“Leave to move for summary judgment is DENIED.”) (No. 7794-VCL) (emphasis in original) (ORDER); see also *In re Mindbody, Inc., S’holder Litig.*, 2021 WL 5565172, at *1, n.1 (Del. Ch. Nov. 29, 2021) (granting the defendant leave to move for summary judgment, but warning that “[t]he likelihood of [the court] granting summary judgment in advance of a bench trial is extremely low, given the facts in play;” the court explained that it is “extraordinarily unlikely” and a “slim chance” that it would view the material facts concerning the claims against [the defendant] as undisputed, and that the “likely outcome of that motion is a one-word ruling from [the court]: denied.”).

⁸⁷ DEL. CTS., *supra* note 83, § C(6).

⁸⁸ *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *1 (Del. Ch. May 2, 2022).

⁸⁹ *Id.*

⁹⁰ *In re Oracle Corp. Deriv. Litig.*, 2022 WL 3136601, at *22 (Del. Ch. May 20, 2022).

⁹¹ *Sciabacucchi*, 2022 WL 1301859, at *1.

⁹² *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 356 (Del. Ch. 2008, revised June 24, 2008).

Oracle demonstrates this low hurdle.⁹³ There, the plaintiffs’ “bank-shot” argument relied on two layers of plaintiff-friendly inferences.⁹⁴ First, they had to show that a middlewoman’s interests were “intertwined” with those of an interested party.⁹⁵ Then they had to show that the director was beholden to the middlewoman.⁹⁶ Finally, through a transitive relation, the court could infer that the director may be beholden to an interested party to the transaction and may lack independence.⁹⁷ Thus, even indirect inferences are enough to rebut the presumption of independence.⁹⁸

In addition, in *BGC* and *MFW*, the presumption of independence played no part in the analysis of independence. In *BGC*, the defendant director was found independent not because the presumption of independence prevailed, but because there was not enough evidence for an inference of a lack of independence.⁹⁹ Likewise, the defendant directors in *MFW* prevailed because the plaintiffs failed to present facts that could create inferences rebutting the presumption of independence.¹⁰⁰ The directors in these cases did not *need* the presumption of independence.

B. Delaware Court of Chancery Rule 1

The Delaware Court of Chancery has a duty to “secure the just, speedy and inexpensive determination of every proceeding.”¹⁰¹ The near impossibility of defendant directors prevailing on summary judgment, despite the presumption of independence, would seem to frustrate the goals of this Rule 1.

1. Just

While the presumption of independence plays little to no role at the summary judgment stage, it does not necessarily follow that it is unjust. At trial, discovery is complete, and the full record is before the court.¹⁰²

⁹³ *Oracle*, 2022 WL 3136601, at *11–13.

⁹⁴ *Id.* at *12.

⁹⁵ *Id.*

⁹⁶ *Id.* at *12–13.

⁹⁷ *Oracle*, 2022 WL 3136601, at *13.

⁹⁸ The argument presented in *Oracle* was fairly sophisticated and did have case law supporting it. *See id.* at *12.

⁹⁹ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *6–8 (Del. Ch. Sept. 20, 2021). Interestingly, in *BGC*, the analysis does not discuss the “holistic” approach. *Id.*

¹⁰⁰ *In re MFW S’holders Litig.*, 67 A.3d 496, 509–14 (Del. Ch. 2013), *aff’d* sub nom. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

¹⁰¹ Del. Ct. Ch. R. 1.

¹⁰² *See In re Straight Path Commc’ns Inc. Consol. S’holder Litig.*, 2022 WL 484420, at *8 (Del. Ch. Feb. 17, 2022).

Further, the intentions and motivations of parties may be assessed through live testimony, which the court seems to prefer.¹⁰³ At trial, the court will be able to weigh the facts against the weight of the presumption of independence.¹⁰⁴ The court having access to more relevant and reliable facts gives it ample opportunity to assess their relative weights. Under such circumstances, a just outcome may be more likely than it would be without a full evidentiary record or live testimony.

2. Speedy

It is difficult to argue that the Court of Chancery is not speedy. As the country's preeminent corporate court,¹⁰⁵ it has a reputation for "temporal efficiency."¹⁰⁶ Not only do the Court of Chancery rules call for speed,¹⁰⁷ its internal operating procedures call for adherence to the "90-day rule," which requires it to have "matters under advisement" decided within ninety days of days of being heard.¹⁰⁸ Further, the court may prohibit directors from moving for summary judgment if it believes that success is unlikely;¹⁰⁹ proceeding straight to (a likely inevitable) trial is far more efficient than delaying its start with failed summary judgment proceedings. In sum, there are a host of items that point to the Court of Chancery adhering to its call to be speedy.

3. Inexpensive

"Inexpensive" is a complex term in the context of corporate litigation. Data regarding corporations' litigation costs is notoriously difficult to obtain.¹¹⁰ Further, while the ability to eliminate portions of

¹⁰³ *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *1 (Del. Ch. May 2, 2022).

¹⁰⁴ *See id.*

¹⁰⁵ COURT OF CHANCERY, <https://courts.delaware.gov/chancery/> (last visited Feb. 15, 2023).

¹⁰⁶ Margaret K. Ryder et al., *Twitter v. Musk: Will the Court of Chancery Break New Ground in Delaware Corporate Law?*, DEL. J. CORP. L.: BLOG (Aug. 8, 2022), <https://djcl.org/twitter-v-musk-will-the-court-of-chancery-break-new-ground-in-delaware-corporate-law/> (citation omitted).

¹⁰⁷ Del. Ct. Ch. R. 1.

¹⁰⁸ OPERATING PROCEDURES FOR THE DELAWARE JUDICIAL BRANCH, § VI.3. App. D-4, <https://courts.delaware.gov/aoc/operating-procedures/op-full.aspx> (last visited Feb. 15, 2023).

¹⁰⁹ *See discussion infra* Section V.A.

¹¹⁰ LAWYERS FOR CIVIL JUSTICE ET AL., LITIGATION COST SURVEY OF MAJOR COMPANIES 2 (2010) https://www.uscourts.gov/sites/default/files/litigation_cost_survey_of_major_companies_0.pdf.

litigation should bring costs down, deeper analysis reveals that this may not always be true. Also, “inexpensive” is a relative term, and what constitutes expensiveness varies based on the party. Finally, the role of directors and officers (“D&O”) insurance must be factored into the equation.

To begin, there are few empirical studies on the cost of litigation.¹¹¹ And what figures do exist do not provide solid footing for analysts because corporations and law firms face confidentiality concerns in revealing data.¹¹² Figures are further clouded because when companies do report litigation costs, they have likely been categorized and recorded in dissimilar ways.¹¹³ The inability to obtain definitive dollar amounts obfuscates the analysis of litigation costs.

Second, it is not clear that eliminating summary judgment makes litigation materially more expensive. Discovery is an expensive portion of litigation.¹¹⁴ Discovery in corporate litigation is arguably even more expensive given that millions of documents may be produced.¹¹⁵ Because discovery has already been substantially completed at the summary judgment stage,¹¹⁶ granting or denying summary judgment has no effect on these costs. Further, prohibiting motions for summary judgment when they are unlikely to prevail could make litigation cheaper. Costs of drafting motions, briefings, supplemental briefings, oral arguments, and other related tasks quickly add up.¹¹⁷ Thus, while instinct might lead one to think that avoiding trial *will* reduce costs, that only holds true *if* trial is avoided.

Third, the concept of what is expensive to a party is relative to the party’s assets.¹¹⁸ For example, if A has \$100 in assets and spends \$10, A

¹¹¹ *Id.*

¹¹² *Id.* at 5.

¹¹³ *Id.*

¹¹⁴ See INST. FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYS., ELECTRONIC DISCOVERY: A VIEW FROM THE FRONT LINES 5 (2008) https://iaals.du.edu/sites/default/files/documents/publications/ediscovery_view_front_lines2007.pdf.

¹¹⁵ LAWYERS FOR CIVIL JUSTICE ET AL., *supra* note 110, at 3 (“[O]n average, 4,980,441 pages of documents were produced in discovery in major cases that went to trial . . .”).

¹¹⁶ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *1 (Del. Ch. Sept. 20, 2021).

¹¹⁷ CLIO, *How much do lawyers charge in Delaware?*, <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/de/#:~:text=What%20is%20the%20hourly%20rate,%24152%20and%20%24555%20per%20hour> (last visited Feb. 15, 2023) (the average hourly rate of Delaware corporate attorneys is \$406). This amount is 11–15% higher than the national average. See CLIO, LEGAL TRENDS REPORT 72 (2022) <https://www.clio.com/resources/legal-trends/2022-report/read-online/>.

¹¹⁸ See *In re MFW S’holders Litig.*, 67 A.3d 496, 512 (Del. Ch. 2013), *aff’d* sub nom. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (“The concept of materiality is an inherently comparative one, requiring consideration of whether something is material to

has spent 10% of her assets. If B, on the other hand, has \$1,000,000 in assets and spends \$1,000, B has only spent 0.1% of her assets. Despite B spending a hundred times more than A, B has used up a hundred times less of her assets. Thus, \$10 would likely be expensive to A, but \$1,000 would be *inexpensive* to B.

To put this in a real world context, the director in *Sciabacucchi*, Eric Zinterhofer, had a net worth in excess of \$88 million dollars and an annual income of \$5 million dollars.¹¹⁹ Similarly, in *Oracle*, director Renée James' average annual income serving as a director for Oracle was \$483,000,¹²⁰ an amount she did not consider "lucrative."¹²¹ James also served on the boards for Carlyle,¹²² Vodafone,¹²³ Citi,¹²⁴ Sabre,¹²⁵ and VMware¹²⁶—all paid positions.¹²⁷ James served on so many boards that she had to consider being "overboarded."¹²⁸ But even to these high income, high net worth directors, the cost of litigation could still be expensive if the directors were required to pay the bill.¹²⁹

It is rarely of personal concern to directors whether litigation is expensive, though, because the corporations they work for are typically paying the bill.¹³⁰ And if it might be expensive to a director, it is probably inexpensive to a corporation because of their deep pockets.¹³¹

something else."); *see also* WIKIPEDIA, *Value (ethics and social sciences)*, [https://en.wikipedia.org/wiki/Value_\(ethics_and_social_sciences\)#Relative_or_absolute](https://en.wikipedia.org/wiki/Value_(ethics_and_social_sciences)#Relative_or_absolute) (last visited Feb. 15, 2023).

¹¹⁹ *See Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *18 & n.217 (Del. Ch. May 2, 2022).

¹²⁰ *See* Pl.'s Demonstrative Ex. 8 at 3, *In re Oracle Corp. Deriv. Litig.* (No. 2017-0337-SG) (Del. Ch. Aug. 17, 2022).

¹²¹ *See* Trial Tr. – Volume V at 1247:5–7, *In re Oracle Corp. Deriv. Litig.* (No. 2017-0337-SG) (Del. Ch. Aug. 8, 2022).

¹²² Trial Tr. – Volume IV at 1121:19–22, *In re Oracle Corp. Deriv. Litig.* (No. 2017-0337-SG) (Del. Ch. Aug. 8, 2022).

¹²³ *Id.* at 1124:24–1125:1.

¹²⁴ *Id.* at 1125:5–6.

¹²⁵ *Id.* at 1126:4–5.

¹²⁶ Trial Tr. – Volume IV, *supra* note 122, at 1127:14.

¹²⁷ *See id.* at 1130:11–12, 1130:14–15 (differentiating her directorships from her "volunteer" work).

¹²⁸ *See id.* at 1127:4–7 ("the British board [Vodafone] doesn't count against being overboarded. But you can only be on so many public boards in the U.S.").

¹²⁹ *See* Edward McNally, *The Perils of Advancement*, MORRIS JAMES (Mar. 14, 2017) <https://www.morrisjames.com/newsroom-articles-Perils-of-Advancement-legal-fees.html> (noting that advancement claims can be for millions of dollars).

¹³⁰ *Id.*

¹³¹ *See* Oracle Corp. Annual Report (Form 10-K) at 67 (Fiscal Year 2021) (reporting \$13–15 billion in revenue in 2019–21) (emphasis added); BGC Partners, Inc. Annual Report (Form 10-K) at 136 (Fiscal Year 2021) (reporting \$2 billion in revenue in 2019–21); Liberty Broadband Corp. Annual Report (Form 10-K) at II-28 (Fiscal Year 2021) (reporting \$732

Finally, evaluating the actual cost of litigation is further fuddled by the fact that publicly traded corporations can¹³² and do¹³³ have D&O insurance. If litigation is brought against a corporation, D&O insurance can cover the costs associated with the lawsuit, which includes legal fees incurred while defending the corporation's directors and officers.¹³⁴

V. CHANGING THE PRESUMPTION OF INDEPENDENCE

Assuming there is an issue with the presumption of independence at the summary judgment stage, it is not enough to simply identify the problem—a solution must also be developed. To that end, there are three possible sources to look for resolution. The first is the amount of discretion the court has over the independence analysis. The second is an adjustment to the presumption of independence. Finally, the third is a possible change to the standard for summary judgment.

A. *Changing the Court's Discretion*

The Court of Chancery has broad discretion in a number of matters.¹³⁵ And that discretion is given a “high level of deference.”¹³⁶ Similarly, factual findings by the court are given “significant deference.”¹³⁷ The question then becomes, “Why should the court not trust itself to make a ruling on director independence on a motion for summary judgment?” It can recognize that the plaintiff-friendly inferences may not be able to

million in revenue in 2021 and \$398 in 2020); M & F Worldwide Corp. Annual Report (Form 10-K) at 41 (Fiscal Year 2010) (reporting \$1.7–1.9 billion in revenue in 2008–10).

¹³² DEL. CODE ANN. tit. 8, § 145(g) (West).

¹³³ See Priya Cherian Huskins, Esq., *Guide to D&O Insurance for IPOs and Direct Listings, 2023 Edition*, WOODRUFF SAWYER (Oct. 25, 2022) <https://woodruffawsawyer.com/do-notebook/do-insurance-ipo-direct-listings/#:~:text=The%20IPO%2FD%26O%20Insurance%20Timeline,days%20out%2C%20if%20not%20sooner.>

¹³⁴ Julia Kagan, *Directors and Officers (D&O) Insurance: What Is It, Who Needs It?*, INVESTOPEDIA (July 10, 2022) <https://www.investopedia.com/terms/d/directors-and-officers-liability-insurance.asp>.

¹³⁵ *Hightower v. SharpSpring, Inc.*, 2022 WL 3970155, at *8 (Del. Ch. Aug. 31, 2022) (“[T]he [Court of Chancery] has broad discretion when [determining the scope of books and records demands].”); *Wei v. Zoux, Inc.*, 268 A.3d 1207, 1212 (Del. Ch. 2022) (“The [Court of Chancery] has broad discretion in determining the scope of discovery.”); *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 409 (Del. 1988) (“[The Court of Chancery] has broad discretion . . . in fixing the [pre-judgment interest rate].”); *Jagodzinski v. Silicon Valley Innovation Co., LLC*, 2012 WL 593613, at *2 (Del. Ch. Feb. 14, 2012) (“[The Court of Chancery] has broad discretion in formulating a remedy for violations of its orders.”).

¹³⁶ *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 526 (Del. 1999).

¹³⁷ JOAN M. ROCKLIN ET AL., AN ADVOCATE PERSUADES 97 (2016).

overcome the presumption of independence at trial.¹³⁸ If the court can recognize the weaknesses in the inferences, why will it not rely on its own judgment to decide, at summary judgment, that the presumption of independence will ultimately prevail?

The answer is because the Court of Chancery is trusting itself. In reaching its reasonable inferences and comparing them to the presumption of independence, it finds that there exists a material factual dispute that is “best resolved at trial.”¹³⁹ It has reasoned that these factual disputes involve the directors’ “intentions and motivations” and are “best resolved following live testimony.”¹⁴⁰ Thus, reliance on the court’s discretion is an ineffective solution, as the court already trusts its discretion to conclude that trial is a better forum for determining director independence.

B. Changing the Presumption of Independence Directly

Changing the presumption of independence itself could provide a solution. But this proposition quickly falls apart before any speculation on *how* the presumption of independence could be changed. The presumption of independence is linked to standards of review (business judgment and entire fairness), special committees in M&A litigation, stockholder derivative litigation, and special litigation committees.¹⁴¹ The presumption of independence has tendrils that reach into many areas of corporate law.¹⁴² Changing it alters how it works in all of those contexts and would have unknown consequences.¹⁴³ Because of these unknown

¹³⁸ *Sciabacucchi v. Liberty Broadband Corp.*, 2022 WL 1301859, at *1 (Del. Ch. May 2, 2022) (“If it were the movants’ burden here merely to convince [the court] that it is more likely than not that [the court] will find the majority of the board of directors independent after trial, the result might, perhaps, be different.”).

¹³⁹ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *13 (Del. Ch. Sept. 20, 2021).

¹⁴⁰ *Sciabacucchi*, 2022 WL 1301859, at *1 (“[I]ssues of a party’s motivations and intentions are particularly suited to evaluation of their [trial] testimony.”).

¹⁴¹ Lewis H. Lazarus & Katherine J. Neikirk, *Think satisfying the director independence standards under Sarbanes-Oxley and stock exchange rules means that a director must be independent under Delaware law? Think again—and understand the potential litigation consequences of a lack of director independence under Delaware law* 4–5, MORRIS JAMES (2007) https://www.morrisjames.com/media/article/44_LHL,KJN_Lack%20of%20Director%20Independence%20Under%20Delaware%20Law_%20What%20You%20Need%20to%20Know.pdf.

¹⁴² *See id.*

¹⁴³ *See* JOHN GALL, *THE SYSTEMS BIBLE* 95–96 (3d ed. 2002) (“[T]read softly. You may be disturbing another system that is actually working.”) (emphasis omitted). Although the book is a tongue in cheek “collection of pragmatic insights,” the author draws on years of firsthand experience and real-world examples. *Id.* at 7.

consequences, changing the presumption of independence directly is an untenable route.

C. Changing the Standard for Summary Judgment

Some argue that the Delaware Court of Chancery should adopt a more relaxed standard for summary judgment.¹⁴⁴ Particularly, it was encouraged to adopt the federal courts' standard.¹⁴⁵ The federal standard does not allow for a weighing of the evidence.¹⁴⁶ But it does allow judges to *weigh competing inferences*.¹⁴⁷ This, it is argued, would "promote judicial economy" by allowing summary judgment to be granted more easily.¹⁴⁸ While this may¹⁴⁹ make it more likely for defendant directors to win because of the presumption of independence, the standard would apply to all cases. This could have unknown side effects that disturb areas of law where the current standard is working, or it could make other areas, which may need a stricter standard, worse.¹⁵⁰ Perhaps this is not a Pyrrhic solution, but certainly a heavy-handed one for something that is not obviously broken.¹⁵¹

VI. PRACTICAL GUIDANCE

Whether counseling on governance issues, representing plaintiffs, or representing defendants, counsel should be mindful of the Delaware Court of Chancery's methods of analyzing independence.

A. Governance

While evaluating independence before M&A transactions, counsel should keep several things in focus:

¹⁴⁴ See generally William M. Lafferty & W. Leighton Lord III, *Towards a Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. L. 921 (1990) (proposing the Delaware Court of Chancery adopt the federal courts' standard for summary judgment).

¹⁴⁵ *Id.* at 939.

¹⁴⁶ *Id.* at 938.

¹⁴⁷ *Id.*

¹⁴⁸ Lafferty & Lord, *supra* note 144, at 939.

¹⁴⁹ See GALL, *supra* note 143, at 21 ("Things not only don't work out well, they work out in strange, even paradoxical ways. Our plans not only go awry, they produce results we never expected. Indeed, they often produce the opposite result from the one intended.").

¹⁵⁰ See quotation *supra* note 143.

¹⁵¹ See discussion *supra* Section IV.

1. If directors are compensated, analyze the amount for materiality against the directors' income and assets.¹⁵²
2. Do not rely on NYSE, NASDAQ, Sarbanes-Oxley, or other independence standards to determine independence; the Delaware Court of Chancery *considers* those standards in its analysis, but the court has its own standard.¹⁵³
3. If there is a majority of independent directors under another standard, there might not be a majority under Delaware's standard.¹⁵⁴
4. Reevaluate independence when creating special committees for M&A transactions.¹⁵⁵

B. *Litigation*

Although plaintiffs' ability to survive a motion for summary judgment has a lighter burden, they should not "[do] nothing"¹⁵⁶:

1. Do not rely on allegations alone until trial.¹⁵⁷
2. During discovery, search for *material* facts in the directors' personal and business relationships with interested parties; this will be fact-specific to each director.¹⁵⁸

On the other hand, defendants must work significantly harder to convince the court to grant a motion for summary judgment:

1. Search for material facts that show an interested party is indebted or beholden to a director.¹⁵⁹

¹⁵² See *BGC*, 2021 WL 4271788, at *7.

¹⁵³ *In re MFW S'holders Litig.*, 67 A.3d 496, 510 (Del. Ch. 2013), *aff'd* sub nom. Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); LAZARUS & NEIKIRK, *supra* note 141, at 1–2.

¹⁵⁴ LAZARUS & NEIKIRK, *supra* note 141, at 1–2.

¹⁵⁵ *Id.* at 8.

¹⁵⁶ *MFW*, 67 A.3d at 510.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 509–10.

¹⁵⁹ *In re BGC Partners, Inc. Deriv. Litig.*, 2021 WL 4271788, at *7–8 (Del. Ch. Sept. 20, 2021).

2. Evaluate the viability of the court's advice of *not* moving for summary judgment;¹⁶⁰ trial may have the same result without significant differences in time or cost.¹⁶¹
3. Hope the plaintiffs do nothing.¹⁶²

VII. CONCLUSION

The presumption of independence for directors has been effectively nullified at the summary judgment stage. But this nullification seems to have little effect on legal outcomes. At worst, it has removed summary judgment from counsel's toolbox. Further, there seems to be no feasible method of undoing the nullification. At its core, the presumption of independence for directors is, perhaps, not in an ideal condition, but is not in such a state that it is broken. M&A litigation can still lead to just outcomes, but those outcomes will likely be decided at trial.

¹⁶⁰ DEL. CTS., *supra* note 85, § C(6)(d)(i).

¹⁶¹ *See* discussion *supra* Section IV.B.

¹⁶² *MFW*, 67 A.3d at 510.

