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Text: Plaintiffs have not shown that Morelli demanded that the Director Defendants provide such written consents before Amendment No. 2 was adopted. Nor have Plaintiffs shown how Morelli still had the contractual right to require the Director Defendants to sign written consents when he did make his demand.589

note 589: Plaintiffs must prove the existence of the provision that allegedly was breached. Defendants have asserted that Section 3.3(a) could not have been breached because it had been amended out of existence. Plaintiffs seem to argue that Amendment No. 2 never took effect. The burden is on Plaintiffs, however, to prove that Section 3.3(a) remained in force at the time of the alleged breach, i.e., to prove that Amendment No. 2 did not take effect. Two elements were necessary to effectuate Amendment No. 2:(1) the votes of a majority of the stockholder-parties to the underlying agreement; and (2) approval by the Board. In their post-trial briefing, Plaintiffs seemingly contested only the latter of those requirements. But, the Board did approve Amendment No. 2. The only way that approval would not have completed the amendment process was if the Board’s actions were void. The Delaware Supreme Court, however, has held that board action “taken in violation of an equitable rule” is voidable, not void. Klaassen v. Allegro Dev. Corp., 106 A.3d 1035, 1046–47 (Del.2014). Accordingly, even though the parties settled the 225 Action in March 2013 and determined that “any actions of the board purportedly taken at [the October 20 Meeting] were void,” JX 684.0004, I am not persuaded that that means Amendment No. 2 was not effective when Morelli attempted to act by the written consents. Rather, I assume that the actions taken at the October 20 Meeting were only voidable, as the holding in Klaassen suggests, and therefore remained in force until voided by the settlement agreement. See generally C. Stephen Bigler & Seth Barrett Tillman, Void or Voidable?—Curing Defects in Stock Issuances Under Delaware Law, 63 BUS. LAW. 1109, 1115–16 (August 2008) (discussing the distinction between void and voidable and noting that the latter is capable of ratification); see also Klaassen, 106 A.3d at 1046 (noting that voidable acts are susceptible to equitable defenses).

[end]