IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

GREGORY FREIBERG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 2026-0093-KSJM
	)	
XONAR TECHNOLOGY INC.,	)	
	)	
Defendant.	)	

POST-TRIAL MEMORANDUM OPINION

Date Submitted: July 24, 2026
Date Decided: September 15, 2026

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McCORMICK, C.

In January 2026, stockholders of the defendant executed written consents to remove the plaintiff from the company's board of directors. The plaintiff filed this summary proceeding under Section 225 of the Delaware General Corporation Law challenging his removal. The complaint alleged that the company's capitalization table inaccurately reflected the plaintiff's common stock ownership such that the written consents were not executed by a majority of stockholders. In response, the company secured additional written consents. The company also stipulated to the plaintiff's allegations for the purpose of narrowing these proceedings to two triable issues. To win this action, the plaintiff must prevail on both issues. One of the issues concerned whether the defendants may count the later-secured stockholder consents toward the tally. The plaintiff failed to prove that they should be excluded. Because the plaintiff failed to prove one of the two critical issues, this post-trial decision does not reach the second. The court enters judgment for the defendant.

I. FACTUAL BACKGROUND

Trial took place on a paper record over one half-day. The record comprises 159 trial exhibits, deposition testimony from three fact witnesses, and 14 stipulations of fact. These are the facts as the court finds them after trial.[1]

[1] This decision cites to: C.A. No. 2026-0093-KSJM docket entries (by docket "Dkt." number); trial exhibits (by "JX-" number); Freiberg's trial demonstrative, Dkt. 154 (by "PDX-1"); the trial transcript, Dkt. 153 ("Trial Tr."); and stipulated facts in Section II of the Stipulated Joint Pre-Trial Order, Dkt. 133 ("PTO"). The parties lodged the deposition transcript of Hans Hufschmid (Xonar's Chief Executive Officer). The deposition transcript is cited by "Hufschmid Dep. Tr." The parties also lodged written deposition testimony from Xonar stockholders Brian McFadden and Jeff McFadden. The written deposition testimony is cited by the witnesses' first initials, last names, and "Written Dep."

A. Freiberg Joins Xonar.

Xonar Technology Inc. ("Xonar" or the "Company") develops artificial intelligence-powered event security systems.[2] In 2018, Andrea Dulberg, August Nunziata, and Ira Rosenblum (collectively with Hans Hufschmid, the "Founders"), along with Brian McFadden and Jeff McFadden, owned Xonar.[3] Hans Hufschmid joined the Company as chairman and CEO in 2019.[4] Hufschmid led Xonar through several rounds of fundraising, including a Series A-1 in 2020, Series A-2 in 2021, and Series A-3 in 2023.[5] Greg Freiberg invested in each of those rounds.[6]

In the spring of 2023, the parties discussed Plaintiff Gregory Freiberg coming to work at Xonar. Xonar envisioned that Freiberg would build out Xonar's sales organization and help raise capital.[7]

On May 11, 2023, Freiberg proposed terms of his compensation in a text to Hufschmid:

> 15% vesting 4 years 1 year cliff monthly vest there after [*sic*], any event fully vests. 15% of current outstanding shares $2.88mm. After $5mm raise, will have approx. 12-13%. 83(b) time vest.

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[2] PTO ¶ 49.

[3] Hufschmid Dep. Tr. at 35:17–36:14, 38:5–8, 51:9–19. This decision refers to Brian and Jeff McFadden by their first names. The court intends no familiarity or disrespect.

[4] *Id.* at 38:9–14, 42:12–21.

[5] JX-10; JX-12; JX-15.

[6] JX-9 at 10; JX-13 at 10; JX-16 at 10.

[7] Hufschmid Dep. Tr. at 16:5–17:3, 20:20–21:7.

> 3% additional equity potential for $5mm external (60bps per external million) 83(b) event vest.
>
> $100K salary
>
> Board seat
>
> Management committee
>
> President & Chief Development Officer
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> Cause clearly defined to sex harass and fraud[.][8]

Later that day, Freiberg asked if the 15% of current outstanding shares he proposed was "now less than 13%" or "more like a 10%" in light of outstanding options.[9] Hufschmid told Freiberg that he would get him the numbers and that the outstanding options were valued at zero because they had not vested.[10] Hufschmid also told Freiberg that Xonar would "have option grants every year."[11]

Freiberg and Hufschmid approached Freiberg's proposed equity compensation differently. Freiberg fixated on potential dilution. Hufschmid tried to reorient Freiberg to dollar value based on share price. For example, on May 12, Hufschmid texted Freiberg:

> I know you have a focus on dilution but another way to think about this is as follows: we give you 4.35M dollars [*sic*] worth of shares by giving you 435,000 shares at 10 dollars representing 15% of current outstanding. The goal is to maximize that share price. If we get the share price

[8] JX-19 at 7.

[9] *Id.* at 14.

[10] *Id.*

[11] *Id.* at 15.

> to 100, you get 43.5M regardless of how many shares outstanding we have.[12]

Freiberg responded, "Sounds great Hans."[13] Hufschmid reiterated, "Point is that if you focus on share price, dilution won't matter," and "we need to step away from this dilution focus. It is not helpful because it detracts from the actual value you get."[14] Quoting Hufschmid's summation—"435,000 shares at 10 dollars representing 15% of current outstanding"—Freiberg said, "This is the agreement no? It works for me."[15] Hufschmid concurred: "435k shares, vesting over 4 years, President and Chief Development Officer, board seat . . . , 50k salary going to 100k after raise."[16] Freiberg responded with champagne emojis.[17]

On May 22, 2023, the parties memorialized their agreement on Freiberg's equity compensation through a Restricted Stock Agreement, which granted Freiberg 425,067 shares of common stock.[18] Freiberg was named President and Chief Development Officer and paid a $50,000 annual salary in addition to his equity compensation.[19]

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[12] JX-20.

[13] JX-21 at 1.

[14] *Id.* at 2.

[15] *Id.* at 3.

[16] *Id.*

[17] *Id.*

[18] JX-27 at 1. 425,067 shares is 15% of 2,833,783, the exact number of Xonar's then-outstanding shares. JX-24 at 7.

[19] *See, e.g.*, JX-032 at 31, 33.

B. Relationships Fray.

Freiberg's first fundraising project at Xonar was its Series A-4 offering, which closed in September 2023.[20] Xonar raised approximately $4 million from outside investors, some sourced through Freiberg and some through Hufschmid.[21] Hufschmid himself invested around $1 million.[22]

It soon became clear that the parties were not on the same page about Freiberg's equity compensation. Freiberg remained fixated on dilution. In December 2023, Freiberg expressed concern that Xonar planned to create a pool of 400,000 options for Hufschmid and Rosenblum in which Freiberg would not be included.[23]

Displeased, Hufschmid thought Freiberg was angling for more equity based on his fundraising in the Series A-4. Hufschmid told Rosenblum that Freiberg "has this thing with getting 15% if he raised 5m" and thought he could have sold Hufschmid's portion of the round to outside investors, increasing his resulting equity award to 3%.[24] Hufschmid elaborated,

> I said at some point in June that he could get options and that [it] was possible that he could get more than 15%. He insisted that this was this year. Not true.
>
> He got 13.04% in shares pre raise. That means another 63k shares would get him to 15%. I am inclined to just do that and swallow hard. It will leave a bad taste in my mouth. He'll probably complain that this should be based on today's outstanding shares but we made it clear that he

[20] JX-40.

[21] *Id.*; JX-47 at 5.

[22] JX-40.

[23] JX-144 at 2; JX-145.

[24] JX-46 at 1.

> was not getting anti dilutions. He'll probably challenge that too.
>
> [. . .]
>
> He said he has this anxiety because he got f[***]ed at his previous job but now I'm starting to think that he might have been the problem.[25]

Freiberg thought of the option pool as performance-related and separate from his entitlement based on the Series A-4. Despite being told "this has NOTHING to do with your performance," Freiberg continued to press Hufschmid and Rosenblum, trying to sell them on his achievements.[26] Hufschmid ultimately asked Freiberg to propose for discussion how Xonar might allocate the 400,000 options among Hufschmid, Rosenblum, and Freiberg.[27]

Freiberg sent Hufschmid screenshots of their May 11 texts about dilution and annual option grants and wrote, "I know it's a fact of life that things change when money gets involved, but wanted you to see that this is what I was going off of when we were negotiating."[28] A few minutes later, Freiberg texted again that he had decided not to propose dividing the options because he didn't "like how it will look and [thought] it's unhealthy from a team perspective."[29]

Discussions did not end there. On December 21, Hufschmid texted Rosenblum, "Good luck with Greg tomorrow… I am so sick of it. Rational arguments don't make

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[25] *Id.* at 1–2.

[26] JX-148 at 4.

[27] JX-149 at 4.

[28] JX-150 at 3.

[29] *Id.* at 4.

it anymore. He twists and turns. The deal he agreed and had does not do it anymore so he wants something else."[30] According to Hufschmid, that "deal" in Freiberg's mind was "essentially 20k options for every one million he raised (works out to 60 bp). . . . If, as he claims, he should get credit for 4M (which includes more than 2M from my investors), he would get 80k shares. I think he wants more than that."[31]

Hufschmid's assessment was correct. Freiberg later pitched three scenarios. Freiberg proposed two similar equity allocations: one, from a pool of 450,000 options, giving 112,500 to Freiberg and 337,500 to Hufschmid and Rosenblum, and another, from a pool of 600,000 options, with 150,000 to Freiberg and 450,000 to Hufschmid and Rosenblum.[32] Alternately, Freiberg proposed that he "ha[ve a] total of 15% of shares outstanding on a fully diluted basis (as would be calculated in PPM if we raised capital after our year end options granted not vested) and Hans and Ira give themselves whatever amount of options they deem appropriate."[33] In all scenarios, Freiberg received a board seat by the end of 2023.[34]

Hufschmid reminded Freiberg that the pool was only 400,000 options and asked what happened to "the deal" for 60 basis points per $1 million Freiberg raised.[35]

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[30] JX-47 at 2.

[31] *Id.* at 5.

[32] JX-48 at 3.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 3–4.

Freiberg argued that this was separate and based on his "massive other performance this year."[36]

Hufschmid was displeased with Freiberg's proposals. He expressed that displeasure at length over email the next day, underscoring that Freiberg's May 11 terms contemplated "3% additional equity potential for $5mm external."[37] Because Freiberg raised $1.4 million of external capital, with 3,350,000 outstanding shares, Hufschmid calculated that Freiberg was entitled to 28,140 options.[38]

Still, a week later, Dulberg, Xonar's general counsel, sent Freiberg an agreement granting him 60,000 options, roughly equivalent to what Hufschmid calculated would bring Freiberg to 15% of pre-Series-A-4 outstanding shares.[39] And in March 2024, Freiberg joined Xonar's board.[40]

C. Conditions Worsen.

For a time, tensions seem to ease. In October 2024, Xonar conducted a Series A-5 round and sold all 333,333 authorized shares at $15 per share for a total of $5 million.[41] Freiberg accepted another grant of 64,000 options to purchase common stock on January 27, 2025.[42]

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[36] *Id.* at 4.

[37] JX-49 at 2.

[38] *Id.*

[39] JX-51; JX-52; *see* JX-46 at 1.

[40] PTO ¶ 48.

[41] *See* JX-54 at 2, 13.

[42] JX-56 at 1, 5.

But in August 2025, Freiberg's relationships with the Founders again began to deteriorate. In attempts to clean up Xonar's capitalization table before potentially seeking venture capital investment, Xonar enlisted Perkins Coie LLP to amend the company's governance documents and convert preferred shares into common stock.[43] On August 5, 2025, a Perkins Coie attorney asked Freiberg to sign a stockholder consent for that conversion and explained that, once the company obtained the requisite stockholder approvals, Freiberg's preferred shares would be converted into the same amount of common shares.[44]

Xonar's directors, except Freiberg, executed written board consents approving the conversion on August 22.[45] Hufschmid, who wanted to notify investors before leaving for a festival, followed up when Freiberg had not signed several hours later.[46] Freiberg responded, "Sounds good. Trying to read it in a cab! Damn I received it 20min ago can I review what I'm signing?"[47] Hufschmid replied, "Read what?? You are paranoid," and, a few minutes later, "Lemme know if I signed away some more shares to you. Important since I did not read it."[48]

A few hours later, Freiberg told Hufschmid that he had retained personal counsel to advise him on the consent's import.[49] According to Hufschmid, this

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[43] *See* JX-59 at 1; Hufschmid Dep. Tr. at 118:19–119:9.

[44] JX-59 at 1.

[45] JX-60 at 5.

[46] JX-62; Hufschmid Dep. Tr. at 114:7–23.

[47] JX-62.

[48] *Id.*

[49] *See* JX-63; JX-64 at 2.

launched a "downward spiral" in their relationship.[50] Freiberg's attorney spoke to Dulberg the morning of August 26 and followed up in a record-making email, explaining that Freiberg had enlisted him to "review and explain to Greg the[] consequences" of the written consent so that Freiberg could "discharge [his] fiduciary duties."[51] Freiberg's counsel rejected Xonar's offer that Perkins Coie would review the documents with Freiberg, asserting that independent review "in light of management's recent actions and hostility is both appropriate and warranted."[52] Hufschmid was livid and told Freiberg as much over text on September 3:

> As you head to Aspen, I want you to understand how disappointed and disgusted I am with your behavior. You have been selfish, immature and grossly damaging to Xonar. I gave you the title and the board seat, along with more than 40,000 of my own personal options – potentially worth $1.5M today – but you have not lived up to any of your responsibilities. Instead, you've undermined me, created severe disruption among your partners and put our fund raise in serious jeopardy. I have no interest in discussing this further until I can talk to you in person once you return. In the meantime, I will figure out how to deal with the consequences for Xonar and for you.[53]

Freiberg ultimately signed the consent on September 10, but tensions continued to build.[54]

In September, Xonar proposed revising the Founders' Restricted Stock Agreements to grant the Founders terms that Freiberg had negotiated. On

[50] Hufschmid Dep. Tr. at 113:20–114:23.

[51] JX-64 at 2.

[52] *Id.* at 3.

[53] JX-65.

[54] JX-60 at 5.

September 22, Dulberg emailed Xonar's board advising that, after discussing with counsel, the company would revise the Founders' stock agreements to include single-trigger change-in-control vesting, which Freiberg already had.[55] Dulberg explained that the change would "provide[] greater balance among directors, . . . strengthen[] our ability to retain and incentivize our leadership team in the eyes of potential acquirers," and ensure the "founders will be fully aligned to pursue a transaction that maximizes shareholder value."[56]

Freiberg refused to sign the implementing board resolutions.[57] He claimed that Perkins Coie told him existing investors would only find out about the resolutions if they made a books and records demand or "happened to participate" in the next raise.[58] As a "disinterested director," Freiberg wrote, "I believe strongly, that if we are taking an action that we are not comfortable announcing to our shareholders, that action, as a fiduciary, should not be taken."[59] Hufschmid told Freiberg that Freiberg did not understand what Perkins Coie had said and noted that Freiberg had been "missing in action" lately.[60] The Founders, as Xonar's other four directors, approved the resolutions with Freiberg absent.[61]

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[55] JX-66 at 1.

[56] *Id.*

[57] JX-67 at 1.

[58] *Id.* at 2.

[59] *Id.*

[60] *Id.* at 1.

[61] JX-68 at 1.

Freiberg served the next volley on November 19. His counsel sent Perkins Coie a draft demand from Freiberg in his capacity as a director to inspect Xonar's books and records under 8 *Del. C.* § 220.[62] The demand stated that Freiberg would formally serve it on November 25 if the parties could not reach agreement by then.[63] The demand included an expansive preservation notice directed to Xonar and a multitude of related parties, including Perkins Coie, implicitly threatening litigation.[64]

Freiberg's Section 220 demand's description of the "potential wrongdoing" that Freiberg sought to investigate included not only the stock conversion and single-trigger disputes but also extensive gripes about Freiberg's compensation.[65]

December 2025 brought two new sources of conflict. First, Xonar sought to add two directors to the board: Ayman Hindy and Bert Centofante, "two of the Company's longest-standing and largest investors."[66] Freiberg considered both conflicted based on their connections to Hufschmid.[67] Second, on December 29, Dulberg circulated to the directors proposed board and stockholder consents authorizing amendments to Xonar's certificate of incorporation and equity plan. The amendments would increase the amount of shares available for issuance to comply with compliance "health checks" required by Xonar's new equity management platform.[68]

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[62] JX-69 at 1, 3.

[63] *Id.* at 1.

[64] *Id.* at 19.

[65] *Id.* at 3–13.

[66] JX-70 at 1.

[67] JX-72 at 12.

[68] JX-71 at 1.

On December 30, 2025, Freiberg formally served his Section 220 demand, now amended to allege wrongdoing related to Hindy and Centofante's appointment to the board and the proposed increase in authorized common shares.[69] Xonar's response was due January 7, 2026.

D. Xonar Ousts Freiberg.

Freiberg's relationship with Xonar and the Founders had deteriorated irreparably. In the company's view, not only had Freiberg failed at his job, but in pursuing his own self-interest, he also created a toxic environment that was spreading to rank-and-file employees and distracting from the company's business.[70] Thus, on January 5, 2026, the Founders, Centofante (on behalf of stockholders Thornecrest LLC-BC and Jacient LLC-BC), Hindy, and stockholder Schnell Trading executed written stockholder consents removing Freiberg from Xonar's board (the "January 5 Consents").[71]

Those who executed the consents believed that the removal was effective on January 5. The company's bylaws permit any director to be removed without cause by the holders of a majority of shares then entitled to vote, and the stockholders who signed on January 5 represented such a majority under the signatories' estimation. The January 5 Consents accordingly identify "Effective Date: January 5, 2026" in the

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[69] JX-72 at 1, 11–13.

[70] *See, e.g.*, Hufschmid Dep. Tr. at 124:7–125:9, 154:12–155:21.

[71] JX-74 at 3–6.

header, and the resolution says it is "effective immediately."[72] Consistent with Section 228 of the DGCL, however, the preface explains,

> In accordance with Section 228 of the Delaware General Corporation Law . . . and the Amended and Restated Bylaws . . . of Xonar . . . the undersigned, constituting the holders of outstanding shares of capital stock of the Company having not less than the minimum number of votes that would be necessary to authorize or take the actions set forth herein at a meeting of stockholders at which all shares entitled to vote thereon were present and voted, hereby adopt the following resolutions, *effective on the date as of which consents representing the minimum number of shares required to approve the actions herein have been obtained*[.][73]

Xonar provided notice of this action to stockholders under Section 228 the next morning on January 6.[74] Dulberg's cover email to investors stated that the actions were approved by "a majority of the Company's stockholders."[75]

On January 7, Xonar's outside counsel responded to Freiberg's Section 220 demand. The company stated that Freiberg was no longer a director as of January 5 and did not have standing to pursue inspection in the capacity of a director.[76] Among other objections, Xonar disagreed with the substance of Freiberg's allegations and argued that Freiberg's true purpose for demanding inspection was "to pursue his own equity compensation and to increase the number of shares he owns."[77]

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[72] *Id.* at 3.

[73] *Id.* (emphasis added).

[74] JX-75 at 1.

[75] *Id.*

[76] JX-76 at 1.

[77] *Id.* at 1–2.

E. Litigation Ensues.

On January 22, 2026, Freiberg commenced this expedited action against Xonar.[78] Although it is replete with allegations concerning Freiberg's many varied grievances, Freiberg's complaint contains a single count seeking a declaration under Section 225 of the DGCL that Freiberg remains a director of Xonar.[79] The Complaint alleges that the January 5 Consents were ineffective "because Xonar's cap table is wrong, such that the stockholders who thought they held majority control to change the board do not actually hold that majority."[80] Freiberg also moved for and obtained a status quo order.[81]

F. The McFaddens Execute Additional Stockholder Consents.

Xonar took the position that a majority of voting shares signed the January 5 Consents. In an abundance of caution, however, the signing stockholders decided to shore up the vote. They reached out to Brian and Jeff McFadden, who undisputedly owned a combined 132,158 shares of Xonar common stock as of January 5, 2026.[82]

On January 23, because of their tenure as investors and the size of their holdings, Hufschmid emailed the McFaddens:

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[78] Dkts. 1 (Compl.), 2.

[79] Compl. ¶¶ 180–85. Additionally, while the lone count seeks relief under Section 225, Freiberg's prayer for relief seeks a more expansive declaration, including that the Founders breached their fiduciary duties, that the resulting corporate actions are void or voidable, that he "has an equal right of access to the legal advice file" of Perkins Coie to Xonar, and the "correct identity of classes, series, types, and holders" of Xonar stock. *Id.* at 56–57.

[80] *Id.* ¶ 18.

[81] Dkts. 3, 21, 25.

[82] *See, e.g.*, JX-126 at Rows 82–94.

> As you are aware, the stockholders of the Company previously approved, by the requisite majority, the removal of Greg Freiberg from the Board of Directors. That action has already taken effect. Greg is now challenging his removal.
>
> In light of that proceeding, we are asking a small number of additional stockholders who hold a meaningful equity stake in the Company to execute a written stockholder consent confirming the action that was already approved. Your execution of the consent would further evidence stockholder support for the Board's composition and help reduce uncertainty and distraction for the Company at a time when management is focused on operations, customers, and long-term value creation.
>
> Attached is the stockholder consent for your review and signature. Executing the consent does not impose any new obligations on you and does not change your economic rights as stockholders; it simply confirms an action that has already been approved by a majority of the Company's stockholders.[83]

Hufschmid offered Dulberg up for questions and attached the same consent used on January 5, this time with "Effective Date: January __, 2026" and blank signature lines for Brian and Jeff.[84] The Docusigns sent to the McFaddens explained that, "[w]hile this has already been approved by a majority of the Company's stockholders, we are asking you [both] to bolster support for the action."[85]

Neither McFadden signed promptly, leaving Dulberg, Hufschmid, and Rosenblum to follow up. On a January 26 phone call, Jeff told Dulberg that "Brian

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[83] JX-79 at 1; *see also* Hufschmid Dep. Tr. at 183:2–14.

[84] JX-79 at 1–2, 6–7.

[85] JX-83 at 1; JX-84 at 1.

was running it by his attorney to be sure there were no potential liability issues," though "they didn't expect any" and thought they would likely sign "shortly."[86]

Brian followed up the next day. By email, he asked Dulberg and Hufschmid for "a brief letter (or short written confirmation) from the Board stating the business purpose and confirming that granting the consent does not violate or conflict with any corporate documents or existing agreements of the Company? A simple line covering that point is perfect."[87] Dulberg responded,

> The business purpose of the stockholder consent is to remove Greg as a director. The other stockholders of Xonar who signed this consent believe that a change in Board composition is in the best long-term interests of the Company. Under Xonar' [*sic*] Certificate of Incorporation and Bylaws, and applicable Delaware law, , [*sic*] holders of common stock, including each of you and each person who has already signed the consent, have the right to elect or remove directors and may do so at a shareholder meeting or by written consent in lieu of a meeting.[88]

Both McFaddens signed their consents (the "McFadden Consents") on January 27.[89]

G. The Court Limits The Scope Of These Proceedings.

Freiberg sought expansive discovery on his single claim. Through the winter and spring of 2026, Freiberg propounded expansive discovery requests. On February 13, 2026, he served 45 interrogatories, covering the preferred-to-common stock conversion, the adoption of single-trigger vesting for the other directors, Hindy and

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[86] JX-85 at 2; JX-153 at 1–2.

[87] JX-86 at 1–2; *see also* JX-159 (Brian: "Good morning, sent you an email request for a simple one liner confirming corporate governance and then will be happy to sign.").

[88] JX-86 at 1.

[89] JX-87 at 1, 7; JX-89 at 1, 8.

Centofante's election to the board, employee option grants, potential sales of the company, and more.[90] Freiberg concurrently served 66 even broader requests for production and 51 requests for admission.[91] A few days later, Freiberg filed notices of intent to serve Perkins Coie and its lead partner on Xonar matters with subpoenas for documents, including the entire Xonar client file, and testimony.[92] Xonar served responses and objections on March 13, asserting that Freiberg's requests frequently sought information beyond the scope of his claim regarding the validity of his removal from the board under Section 225.[93]

After Freiberg refused to narrow his discovery requests, Xonar proposed a creative solution. Xonar offered to stipulate to Freiberg's allegations as "necessary to test the vote count" for his removal.[94] Xonar would agree, for this action only, that:

- All Series A-1, A-2, and A-3 preferred stock "shall be treated as non-voting" and not counted for the consents;
- "The purported September 2025 conversion of preferred stock into common stock shall be ignored in its entirety for purposes of determining the number of outstanding voting shares as of January 5, 2026"; and
- Freiberg would "be treated as having received the full amount of common stock necessary to constitute 15% of the Company's fully diluted equity as of January 5, 2026."[95]

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[90] JX-95.

[91] JX-96; JX-97.

[92] Dkts. 35–36. Freiberg again filed notices of intent to serve Perkins Coie on March 11 and its partner on April 14, 21, and 22. Dkts. 38, 48, 55, 57.

[93] JX-103; JX-104; JX-105.

[94] JX-108 at 2.

[95] *Id.* at 5–6.

Freiberg declined to stipulate. And after Xonar moved the court to enter a protective order adopting its stipulations, Freiberg filed three simultaneous motions to compel discovery.[96]

The court denied Freiberg's motions and granted Xonar's protective order to streamline the summary 225 proceeding (the "Protective Order").[97] The Protective Order had the effect of narrowing the action to two triable issues: First, may the court count the McFadden Consents toward Freiberg's removal? Second, what methodology should the court use to calculate Freiberg's share ownership?[98]

The court held a trial on the papers on July 10, 2026.[99] The parties submitted their joint schedule of evidence on July 24, 2026.[100] The parties forewent post-trial briefing and post-trial argument.

II. LEGAL ANALYSIS

Freiberg asks the court to declare under Section 225 that his purported removal from Xonar's board was ineffective and that he remains a Xonar director.[101] "The purpose of [S]ection 225 is to provide a quick method for review of the corporate election process to prevent a Delaware corporation from being immobilized by controversies about whether a given officer or director is properly holding office."[102]

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[96] JX-109; JX-111; JX-112; JX-113.

[97] Dkts. 96, 97, 102 at 3:22–9:10.

[98] Dkt. 102 at 6:12–7:5.

[99] Dkt. 150.

[100] Dkt. 156.

[101] Compl. at 56.

[102] *Box v. Box*, 697 A.2d 395, 398 (Del. 1997).

"A Section 225 proceeding is summary in character, and its scope is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer."[103]

To obtain relief, Freiberg must show both that the court must exclude the McFadden Consents from the tally of stockholder consents in favor of his removal and that Freiberg's share ownership is what he represents.[104]

Freiberg disputes that the court should have limited this action to these two issues. Freiberg asks the court to vacate the Protective Order and reopen discovery. He claims that he has been prejudiced because the Protective Order limited what he could obtain "to verify the capitalization table figures on which the Triable Issues depend."[105] This decision first denies Freiberg's motion to vacate the Protective Order.

On the merits, Freiberg repeatedly conceded that he needs to win on both triable issues to win this case.[106] Freiberg bears the burden of proving by a preponderance of the evidence that he is entitled to relief.[107] Because the court finds

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103 *Genger v. TR Invs., LLC*, 26 A.3d 180, 199 (Del. 2011).

104 Dkt. 102 at 7:2–5.

105 Dkt. 123 ("Pl.'s Opening Br.") at 66.

106 Dkt. 140 at 12:24–13:6 ("And I can be direct with Your Honor. I think we have to win on both of those issues to win. We're right on the 50 percent. . . . But if the McFaddens['] after-the-fact vote count comes in, I believe we will still be under 51 percent and we would lose the argument. So we have to prove both things."); Trial Tr. at 75:17–18 ("I need to win on both issues."); *see also* Dkt. 102 at 7:6–9 (Freiberg "does not dispute that he must prevail on both theories for a favorable judgment, even if all other allegations in his complaint are taken as true.").

107 *Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 453 (Del. Ch. 2012).

Freiberg failed to meet his burden on the first issue, this opinion does not reach the second.

A. The Motion To Vacate Is Denied.

Freiberg asks the court to vacate the Protective Order and reopen discovery to allow him "to verify the capitalization table figures on which the Triable Issues depend."[108] But Xonar has stipulated to accept as true Freiberg's version of the figures on which he seeks discovery. So that discovery would not alter the outcome of this litigation. For that reason, the Protective Order does not prejudice Freiberg.

Freiberg points to very little by way of actual discovery he thinks he was denied. Other than his vague references to "documents, communications, and calculations" purportedly needed to verify the capitalization table, Freiberg says he wanted to depose Dulberg and the McFaddens.[109] But Freiberg agreed to accept Dulberg's declaration rather than deposing her, and the court gave Freiberg leave to depose the McFaddens.[110] Freiberg chose to depose the McFaddens in writing because it was "easier" than doing so in person.[111] He must live with that choice now.

Freiberg must also accept the consequences of his decision to pursue a summary proceeding under Section 225. Freiberg argues in briefing that he is being "force[d] . . . to try claims involving fiduciary breaches, consent solicitations, undisclosed conflicts, and disputed share counts without the targeted discovery

[108] Pl.'s Opening Br. at 66.

[109] *Id.*; Dkt. 144 ("Pl.'s Reply Br.") at 40.

[110] Dkt. 152 at 16:11–17, 17:5–16.

[111] *Id.* at 17:21–18:13.

needed," but the point is that this case is far narrower.[112] In a separate action, he has asserted claims for breach of contract, fraud, tortious interference, conversion, and more against Xonar, the Founders, Hindy, and Centofante.[113] In this action, however, Freiberg is trying a single, summary claim under Section 225 concerning his board removal. Freiberg wanted Section 225's fast pace, and he got it, along with the narrow scope of proceedings that pace requires.

Again, Section 225 provides "a quick method" of review to prevent a company from "being immobilized by controversies" about who is properly on its board.[114] The "summary" Section 225 proceeding "is limited to determining those issues that pertain to the validity of actions to elect or remove a director or officer."[115] "Consistent with their purpose, the court endeavors to resolve Section 225 claims on an expedited basis."[116] The Protective Order made that expedited resolution of Freiberg's status possible, and the court declines to vacate it.

B. The McFadden Consents Are Included.

Freiberg advances three theories for excluding the McFadden Consents from the count of stockholder consents for his removal. He first argues that "Xonar necessarily 'closed' the consent period by treating Plaintiff's removal as effective on January 5," such that the January 5 Consents and McFadden Consents cannot be

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[112] Pl.'s Reply Br. at 41.

[113] *Freiberg v. Hufschmid, et al.*, C.A. No. 2026-0663-KSJM, Dkt. 2.

[114] *Box*, 697 A.2d at 398.

[115] *Genger*, 26 A.3d at 199.

[116] *Totta v. CCSB Fin. Corp.*, 2021 WL 4892218, at *5 (Del. Ch. Oct. 20, 2021).

aggregated (the "closed-meeting theory").[117] He next argues that the McFadden Consents rendered the January 5 Consents "facially defective" because the consents indicated a January 5 "effective date" (the "retroactivity challenge").[118] Finally, Freiberg contends that the Founders obtained the McFadden Consents through fiduciary breach, so those consents should be disregarded (the "fiduciary-breach contention").[119] Each theory fails.

1. The Closed-Meeting Theory

Section 228 permits stockholders to take action by written consent "in lieu of [a] meeting."[120] If stockholders take action by written consent that is less than unanimous, "prompt notice" must be provided to the stockholders who have not consented and would have been entitled to notice of the foregone stockholder meeting, had one been called.[121]

Stockholder action may be accomplished by one or multiple consents.[122] If accomplished by multiple consents, those consents need not all be signed on the same date. The statute requires that all consents be obtained and delivered within sixty days. Section 228 states that "[n]o consent shall be effective to take the corporate action referred to therein unless consents signed by a sufficient number of holders . . .

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117 Pl.'s Reply Br. at 32.

118 Trial Tr. at 38:16–39:4; PDX-1 at 25.

119 Pl.'s Reply Br. at 33–39.

120 8 *Del. C.* § 228.

121 *Id.* § 228(e).

122 *Id.* §§ 228(a), (c).

to take action are delivered to the corporation . . . within 60 days of the first date on which a consent is so delivered to the corporation."[123]

It is undisputed that the McFadden Consents were delivered on January 27, within 60 days of the January 5 Consents. It is also undisputed that Xonar promptly provided notice under Section 228(e) on January 6, after it received consents from what it believed was a majority of common stockholders.

Freiberg asks the court to impose an additional restriction beyond Section 228's 60-day rule and notice requirement. Freiberg argues that Xonar's consents should be treated as "analogous to a meeting," rather than "in lieu of" a meeting.[124] In his view, Hufschmid and the others "initiated a stockholder meeting on January 5, 2026," voted, and effectively "closed the meeting" by removing Freiberg and providing Section 228(e) notice to other stockholders the next day.[125] Then, "[o]n January 27, 2026, a separate meeting took place in which only the McFaddens voted."[126] According to Freiberg, the January 5 Consents and McFadden Consents were votes on "separate actions" and cannot be aggregated because the January 5 "meeting" was closed when Xonar carried out the corporate action described in the consents and removed him.[127]

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123 *Id.* § 228(c).

124 Pl.'s Opening Br. at 43–44.

125 *Id.* at 44.

126 *Id.*

127 PDX-1 at 24. Over time, Freiberg has argued that different events "closed" the "meeting," but he seems to have landed on his removal as the trigger. *See, e.g.*, Pl.'s Opening Br. at 44; Pl.'s Reply Br. at 32; Trial Tr. at 35:22–36:7, 40:15–18, 113:6–9.

But stockholder written consents do not operate like stockholder meetings. They are "in lieu of" and "without a meeting."[128] Section 228 explicitly contemplates that the two are different—that is why, for example, written consents require an absolute majority even to accomplish actions that could be authorized by a simple majority of those present and voting at an actual meeting.[129] Under Section 228, the consent period is not "closed" until the earlier of 60 days or the delivery of the requisite number of consents.[130]

Freiberg points to no authority adopting his view that consents authorizing the same action and signed on different dates within the 60-day window constitute "separate stockholder actions" that cannot be aggregated. This court has treated consents delivered on different dates during the 60-day window as effective upon delivery of the final consent."[131] Applying this approach, Xonar's alleged failure to aggregate a majority on January 5 did not render the January 5 Consents invalid.

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[128] 8 *Del. C.* § 228(a).

[129] *Id.*

[130] *Id.* § 228(c).

[131] *See, e.g.*, *Brown v. Kellar*, 2018 WL 6721263, at *2 n.17 (Del. Ch. Dec. 21, 2018) ("The parties appear to agree that the June 29 Consent alone did not represent a sufficient number of shares to effect the corporate action. The corporate action could only have been effective upon delivery of the July 5 Consent." (citations omitted)); *Rainbow Mountain, Inc. v. Begeman*, 2017 WL 1097143, at *2 n.12 (Del. Ch. Mar. 23, 2017) ("Throughout this opinion, the dates on which written consents are found to be signed and delivered are the dates that the last signatory signed and delivered the written consent. All members signing written consents upon which this opinion relies signed and delivered within 60 days of the earliest dated consent that was delivered. . .").

Rather, it rendered them ineffective until the company received the McFadden Consents.[132]

Freiberg's closed-meeting theory provides no basis for excluding the McFadden Consents.

2. The Retroactivity Challenge

Freiberg's next theory is that the McFadden Consents were "backdated" and are thus "facially defective" because they cannot operate retroactively.[133]

Freiberg's theory fails foremost as a factual matter. The McFadden Consents were not backdated. In fact, they specify no effective date. Where the earlier consents state "Effective Date: January 5, 2026," the McFadden Consents state "Effective Date: January __, 2026."[134] But that is largely beside the point. Section 228 distinguishes between stockholder written consent and stockholder action. Where stockholder action is taken by multiple stockholder written consents, Section 228 allows stockholders to execute those consents on different dates. Whatever date appears on the stockholder consent, the stockholder action is not effective until the last consent toward a majority was delivered. Thus, as discussed above, the stockholder consents in this action were effective on January 27 at the latest. There was no backdating; they were not "retroactively" applied.

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[132] Freiberg also argues that his removal was an intervening act that closed the meeting. He identifies no authority in the statute or case law to support this view. Nor does he supply any compelling reason to adopt this principle as law.

[133] PDX-1 at 26; Trial Tr. at 38:24–39:4.

[134] *Compare* JX-74 at 3, *with* JX-87 at 3, *and* JX-89 at 3.

Freiberg relies on *Mehta v. Mobile Posse, Inc.*, but that case is distinguishable.[135] There, after the company agreed to a merger, defendants sought written consents from stockholders to ratify executive parachute payments due on consummation of the merger.[136] The consents stated that they were "effective as of March 28, 2018," although they were executed after that date.[137] The court warned that Section 228 does not permit retroactive effective dates.[138] But the court did not invalidate the later-executed consents nor consider them "facially defective," as Freiberg urges here.[139] Rather, the court treated the effective date of the consents as the date the majority was delivered.[140] That is the appropriate outcome here.

Freiberg has not proven that the McFadden Consents are invalidly retroactive.

3. The Fiduciary-Breach Contention

Freiberg's third and final argument is that the McFadden Consents should be disregarded because they were obtained through fiduciary breach.

"[I]f a fiduciary breaches his or her disclosure obligations in connection with soliciting stockholders' votes or consents, and the Court finds that such breaches 'inequitably tainted the election process,' that could be grounds for setting aside

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[135] 2019 WL 2025231 (Del. Ch. May 8, 2019).

[136] *Id.* at *3–4.

[137] *Id.* at *4.

[138] *Id.* at *7 n.55.

[139] 2019 WL 2025231, at *7.

[140] *Id.* at *7 n.55.

otherwise valid votes or consents."[141] But the party challenging the consents bears the burden, which "is a heavy one" in a case "where a majority of stockholders have executed written consents" authorizing removal and the removed director "asks this Court to set aside the consents on equitable grounds."[142]

Freiberg thus bears the burden of proving that a Xonar fiduciary made a materially misleading statement to the McFaddens when seeking their consents. "An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[143] In other words, "an omitted fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available."[144]

Freiberg has not identified any material omission.[145] He argues that the McFaddens would have viewed the following information as material when determining whether to execute their written consents: the Founders ousted Freiberg before Xonar's deadline to respond to his Section 220 demand, they "had been trying

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141 *Kerbawy v. McDonnell*, 2015 WL 4929198, at *12 (Del. Ch. Aug. 18, 2015) (citing *Portnoy v. Cryo-Cell Int'l, Inc.*, 940 a.2d 43, 72 (Del. Ch. 2008)).

142 *Id.* at *13.

143 *Morrison v. Berry*, 191 A.3d 268, 282 (Del. 2018), *as revised* (July 27, 2018) (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985)).

144 *Id.* at 283 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (cleaned up).

145 Because the parties did not focus on this issue, this decision does not address what role fiduciary duties play when stockholders who occupy a fiduciary role solicit other stockholders' written consents.

to thwart Freiberg's investigation into their breaches and self-dealing for months," and Freiberg had filed this action challenging the January 5 Consents.[146]

This information was not likely to alter the total mix of information available to the McFaddens. It is undisputed that the McFaddens, as Xonar stockholders, received the company's January 6 Section 228(e) notice stating the Company's position that a majority of stockholders had executed written consents removing Freiberg effective as of January 5. And when requesting additional consents from the McFaddens on January 23, Hufschmid reiterated the Company's position that Freiberg had already been removed. He wrote:

> Greg is now challenging his removal.
>
> In light of that proceeding, we are asking a small number of additional stockholders who hold a meaningful equity stake in the Company to execute a written stockholder consent confirming the action that was already approved. Your execution of the consent would further evidence stockholder support for the Board's composition and help reduce uncertainty and distraction for the Company at a time when management is focused on operations, customers, and long-term value creation.[147]

Freiberg points to the McFaddens' testimony as evidence of a material omission, but that testimony does not aid Freiberg. Freiberg asked whether, if any of the following had been disclosed, each McFadden would have "considered those facts to be material in deciding whether or not to provide" consents:

> (i) that Mr. Freiberg had already been removed from the board on January 5, 2026, (ii) that Mr. Freiberg had already sued the Company over the Disputed Removal on

[146] Pl.'s Opening Br. at 49.

[147] JX-88 at 2.

> January 25, 2026, (iii) that the aforementioned lawsuit alleged that the Company had removed Mr. Frieberg [*sic*] with less than 50% of the vote and therefore the Company needed your Written Consent to render the removal lawful after the fact, and (iv) that Mr. Freiberg had a pending books and records request to the Company regarding an allegation that the Company's September 2025 preferred-to-common stock conversion was legally defective, and challenging a potentially improper award of golden parachutes to certain Xonar directors and insiders.[148]

Neither McFadden said he would have considered any of that information to be material. Brian responded:

> I lack sufficient recollection to state with certainty what I would have done under the hypothetical circumstances described in this question. I relied on the information reflected in the documents in deciding whether to provide my Written Consent. I do not want to speculate as to what additional weight, if any, I would have given to any facts not disclosed to me at the time. If additional information was provided, I would have likely asked follow up questions.[149]

Jeff's response is the same as Brian's but omits the final sentence.[150] Even with Brian's addition, the McFaddens' responses speak primarily to their processes, rather than to the weight or impact of any unspecified "additional information." Indeed, all indications are that the McFaddens received the information they requested and thought was necessary.[151] Freiberg has not identified any material omissions.

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[148] B. McFadden Written Dep. at Questions 5–6; J. McFadden Written Dep. at Questions 5–6. As discussed above, the McFaddens, in fact, did receive contemporaneous notice of item (i), and Hufschmid's January 23 email to them referenced, at least generally, items (ii) and (iii). *See* JX-88 at 2.

[149] B. McFadden Written Dep. at Response 6.

[150] J. McFadden Written Dep. at Response 6.

[151] JX-88 at 1–2; *see also* JX-159.

Freiberg has also not identified any materially false representation. Freiberg points to a single allegedly false statement: the Founders' representation to the McFaddens that they had already secured a majority.[152] This court addressed a similar argument in *Kerbawy v. McDonnell*, a Section 225 action in which the defendants sought to set aside written stockholder consents on equitable grounds.[153]

In *Kerbawy*, the defendants sought to set aside the written consents solicited by an email from the plaintiff stating that "a majority of the stockholders had voted to replace the Board."[154] Although the plaintiff believed the statement to be true, it was in fact "not true at th[e] moment" the email was sent.[155] The court held that the plaintiff's "prediction of victory" was not a "material" misstatement, in part because it was unclear what effect, if any, the statement had on the vote.[156] As the court observed, the alleged misstatement did "not cut clearly in one direction or the other"—it may just as well "have resulted in a reasonable stockholder deciding not to vote on the theory that, if the outcome already was clear, their consent would not make a difference anyway."[157]

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[152] Pl.'s Opening Br. at 49.

[153] 2015 WL 4929198 (Del. Ch. Aug. 18, 2015).

[154] *Id.* at *17.

[155] *Id.* at *17–18.

[156] *Id.* at *18.

[157] *Id.* at *17.

The same is true here. The allegedly false statement is not material because Freiberg has not proven that it made any difference or, put differently, altered the total mix of information. Freiberg has failed to show a material misrepresentation.

Finally, Freiberg claims that Hufschmid improperly induced the McFaddens to execute written consents. He argues that the McFaddens were "not interested in helping until Mr. Hufschmid starts talking about money" and that Hufschmid essentially bribed them to sign.[158] But the record does not support Freiberg's narrative. When Hufschmid reached out to confirm the McFaddens' receipt of the draft consents—which at least Jeff initially had not received—the McFaddens were reasonably responsive over the January 24 weekend, before Hufschmid said anything about "money."[159] Hufschmid then texted Jeff (and only Jeff) once about a lab visit and updates on "our units and . . . liquidation" on January 25 before Jeff signed his consent.[160] Hufschmid's second offer of a visit and updates "on liquidity and progress" came *after* both McFaddens executed their consents, and Freiberg's interpretation of those texts as offering "favorable treatment in any future M&A event" is a stretch.[161]

Moreover, the McFaddens have been involved with Xonar for years, with Brian even surrendering his own equity as original co-owner to make room for new hires'

[158] Trial Tr. at 34:4–21; Pl.'s Reply Br. at 36–38.

[159] JX-158.

[160] JX-160 at 3.

[161] *Id.*; Pl.'s Reply Br. at 37–38.

equity awards.[162] There is no reason to believe the McFaddens needed to sign the consents to maintain "continued access and goodwill," as Freiberg argues.[163]

Freiberg has proven neither that any fiduciary made a materially misleading statement to the McFaddens nor that their consents were improperly induced. The court will not set aside the McFadden Consents on this basis.

III. CONCLUSION

Freiberg has failed to prove that the McFadden Consents should not be counted. He therefore has failed to prove that his removal from the board was improper. Judgment is entered for Xonar. The parties are ordered to submit a form of order or competing forms of order implementing this decision within ten business days. Xonar's request to shift fees is denied.[164]

[162] Hufschmid Dep. Tr. at 36:8–14, 39:7–40:18, 51:16–19.

[163] Pl.'s Reply Br. at 37.

[164] Xonar asks the court to shift fees because Freiberg "prolonged and delayed this narrow summary proceeding by repeatedly trying to inject irrelevant ancillary issues into the case, . . . misrepresent[ed] to Xonar and the Court the 'limited discovery' he would require[, and] . . . fil[ed] seriatim motions to compel without ever meeting and conferring." Dkt. 138 at 44–45. Freiberg's conduct may have been annoying to Xonar, but it did not amount to bad faith that justifies shifting fees. *Horsey v. Horsey & Sons, Inc.*, 2016 WL 1274021, at *1 (Del. Ch. Mar. 21, 2016) (explaining that courts will shift "fees only where bad faith is manifest, as where the litigation appears clearly vexatious or without a good-faith belief").