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REVLON IS A STANDARD OF REVIEW: WHY IT'S TRUE AND WHAT IT MEANS

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*6 INTRODUCTION

Powerful imagery from the *Revlon* decision [1] has long influenced Delaware's mergers and acquisitions ("M&A") jurisprudence. In that landmark 1986 opinion, the Delaware Supreme Court stated that when a board of directors stops resisting a hostile takeover and decides to sell the corporation, the directors' role changes "from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company." [2] Adding bite to the metaphor, the court held that the Revlon directors breached their fiduciary duties in selling the corporation for cash to their chosen bidder, and the court enjoined the parties from complying with certain aspects of the merger agreement. [3] Both the language and result of the decision suggested the existence of special *"'%7FRevlon* duties," a set of affirmative conduct obligations imposed by the Delaware courts in particular factual circumstances that require directors to take certain actions and forgo others.

Nearly thirty years of subsequent judicial development have readied this stereotypical interpretation for well-deserved retirement. *Revlon* is now understood to be a form of enhanced scrutiny, the innovative standard of review created in *Unocal*. [4] *Revlon* does not establish special duties or impose particular conduct obligations on directors. [5] Rather, it is a standard of review under which the extent of judicial deference given to board decisions narrows from rationality to range-of-reasonableness.[6]

Although post-millennial Delaware opinions consistently describe *Revlon* as a standard of review, echoes of *'%7FRevlon* duties" reverberate in Delaware law's nominally disparate treatment of third-party mergers.[7] If the merger consideration consists of cash, then *Revlon* applies. If the merger consideration takes the form of stock, then *Revlon* does not apply. But, if the consolidated entity would have a controlling ***7** stockholder, then *Revlon* applies again.[8] The divergent treatment stems from two well-known Delaware Supreme Court decisions: *Time-Warner*[9] and *QVC*.[10] Both of these cases involved Paramount Communications Corporation, so the resulting patchwork of standards appropriately can be labeled the *"'%7FParamount* doctrine."[11]

Because *Revlon* is a standard of review, Delaware law no longer needs the *Paramount* doctrine.[12] As decisions by the Delaware Supreme Court and the Court of Chancery explain, the potential conflicts of interest present in a negotiated acquisition provide the impetus for applying enhanced *Revlon* scrutiny.[13] Those conflicts exist regardless of the form of consideration or whether the post-merger entity would have a controlling stockholder.[14] Therefore, enhanced scrutiny should apply to all negotiated acquisitions, and as a practical matter, it already does.[15] Only the Delaware Supreme Court can get rid of the *Paramount* doctrine, and in my personal view, the high court can and should officially bid it farewell.

*8 I. FROM *UNOCAL* TO *REVLON*

Until the watershed year of 1985, Delaware recognized only two standards of review for evaluating board decisions: the business judgment rule[16] and the entire fairness test.[17] The two doctrines reflected a binary world view in which directors fell into one of two categories: independent and disinterested directors who made decisions that a court would have no cause to second-guess and interested directors who made decisions that were inherently suspect.

In *Unocal*, the Delaware Supreme Court recognized that when responding to a takeover bid, target management and the incumbent directors face a potential conflict of interest.[18] The directors are not "interested" in the traditional sense as they would be if they were transacting with the corporation.[19] However, they are not truly disinterested or independent either, because the hostile bid threatens their positions with the corporation.[20] The resulting structural conflict muddies the waters for purposes of judicial review. If the directors resist a hostile bid, they could well be acting in good faith and loyally for the commendable purpose of protecting the stockholders' interests. ***9** Or they could be succumbing to their own self-interest. *Unocal* famously described this potential conflict as the "omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders."[21]

To address this concern, *Unocal* announced a new, intermediate standard of review under which the directors bear the burden of showing (i) "reasonable grounds for believing that a danger to corporate policy and effectiveness existed" and (ii) a response to the danger that was "reasonable in relation to the threat posed."[22] The Delaware Supreme Court required that the directors satisfy this test to "ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders."[23] Enhanced scrutiny--an intermediate standard of review--was born.

One year after *Unocal*, the Delaware Supreme Court's *Revlon* decision applied the new intermediate standard to the sale of a corporation.[24] Although the high court repeatedly stated that it was applying *Unocal* to the facts of the case, the *Revlon* opinion had a different tone and reached a strikingly different outcome.[25] In *Unocal*, the Delaware Supreme Court found for the defendants and praised their actions.[26] Even though the directors adopted a discriminatory debt-for-equity exchange offer in response to a hostile bid, the Delaware Supreme Court held that the defensive response was reasonable in relation to the threat posed.[27] By contrast, in *Revlon*, the plaintiffs won.[28] The Delaware Supreme Court criticized the directors' conduct and held that they breached their fiduciary duties by agreeing to sell the corporation for cash in a premium-generating transaction.[29] As a remedy, the Delaware Supreme Court enjoined the defendants from ***10** proceeding with certain aspects of the merger agreement.[30] For those who confronted the decisions in real time, the Delaware Supreme Court seemed not to have simply applied *Unocal*, but rather to have done something radically different.[31]

Doctrinally, at least two aspects of *Revlon* appeared to depart from *Unocal*. The first was *Revlon*'s failure to clearly identify a potential conflict. In *Unocal*, the Delaware Supreme Court specifically cited entrenchment as the potential conflict and invoked the "omnipresent specter" of director self-interest.[32] In *Revlon*, the Delaware Supreme Court did not clearly identify a potential conflict, and the fact that the directors were selling the company seemed to negate any entrenchment motive.[33] To the extent that concerns of potential disloyalty animated *Unocal*, similar concerns did not leap off the page in *Revlon*.

A second distinguishing factor was *Revlon*'s prominent language that seemed to contemplate affirmative duties for the selling board, including a potential duty to auction.[34] In the ringing words of the ***11** opinion, once the Revlon directors decided to sell the company, they became "auctioneers charged with getting the best price."[35] To fully appreciate the contemporary effect of this language, recall that just one year earlier, in *Smith v. Van Gorkom*, the Delaware Supreme Court held directors personally liable for breaching their fiduciary duties by selling their corporation for cash in a single-bidder process that the court deemed inadequate.[36] Taken together, *Revlon* and *Van Gorkom* seemed to tell directors to conduct auctions or else. It is difficult to imagine a more effective way of searing into the minds of deal planners a belief that certain situations impose special duties on directors.

A. THE POTENTIAL CONFLICT DRIVING *REVLON*

Over the ensuing three decades, the Delaware courts have identified the potential conflicts of interest that warrant applying enhanced scrutiny in a *Revlon* scenario: those inherent in the sale of the corporation. Just as *Unocal* focused on the potential conflicts created by a hostile bid,[37] *Revlon* focused on the potential conflicts created by a sale.[38] The *Revlon* decision really was applying *Unocal*, just as the Delaware Supreme Court said.[39]

Numerous Delaware decisions have explained these conflicts. In the words of the *El Paso* opinion, "the potential sale of a corporation has enormous implications for corporate managers and advisors, and a range of human motivations, including but by no means limited to greed, can inspire fiduciaries and their advisers to be less than faithful."[40] The *Dollar Thrifty* case elaborates on this point:

> The heightened scrutiny that applies in the *Revlon* (and *Unocal*) contexts are, in large measure, rooted in a concern that the board ***12** might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders. Most traditionally, there is the danger that top corporate managers will resist a sale that might cost them their managerial posts, or prefer a sale to one industry rival rather than another for reasons having more to do with personal ego than with what is best for stockholders.[41]

Executives may have "an incentive to favor a particular bidder (or type of bidder)," especially if "some bidders might desire to retain existing management or to provide them with future incentives while others might not."[42] Alternatively, managers may seek out a transaction that ***13** protects their personal wealth at a time when their individual investment horizons differ from those of diversified stockholders.[43]

The potential conflicts in a sale may involve non-financial considerations. As the *RJR Nabisco* case explains,
[g]reed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, or, as is here alleged, shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation.[44]

In *Time-Warner*, for example, when evaluating the Time board's deep-seated commitment to its chosen transaction with Warner, Chancellor Allen observed that
[t]here may be at work here a force more subtle than a desire to maintain a title or office in order to assure continued salary or prerequisites. Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm. The mission of the firm is not seen by those ***14** involved with it as wholly economic, nor the continued existence of its distinctive identity as a matter of indifference.[45]
Consequently, the "paradigmatic context for a good *Revlon* claim ... is when a supine board under the sway of an overweening CEO bent on a certain direction [] tilts the sales process for reasons inimical to the stockholders' desire for the best price."[46] Those inimical reasons may be financial, non-financial, or both.

When the Delaware Supreme Court issued the *Revlon* opinion, the arresting vision of directors transforming into auctioneers overwhelmed the references to the conflicts that infected the Revlon directors' decisions. Subsequent analysis has identified at least two conflicts. First, the Delaware Supreme Court was concerned that "Revlon's CEO, Michel Bergerac, rebuffed Pantry Pride's acquisition overtures in part because of the 'strong personal antipathy' felt by Bergerac towards Pantry Pride's CEO, Ron Perelman, who was an upstart from Philly and not someone whom the Supreme Court believed Bergerac wanted running his storied company."[47] Second, the directors appeared fixated on obtaining a transaction that would "shor[e] up the sagging market value of [recently issued notes] in the face of threatened litigation by their holders."[48] Although the note holders were former Revlon stockholders who received their notes as part of the board's initial defensive response to Pantry Pride,[49] the directors' continuing concern ***15** about the note holders carried overtones of self-interest that derived from the risk of personal liability and reputational damage.[50] The Delaware Supreme Court concluded that "under all the circumstances[,] the directors allowed considerations other than the maximization of shareholder profit to affect their judgment."[51] Confirming that the conflicts drove the analysis, the Delaware Supreme Court described *Revlon* three years later as "merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions."[52]

These actual and potential conflicts arise because "a negotiated corporate acquisition is a paradigmatic example of a final period problem."[53] Economists use this term to refer to a recurring setting in which humans struggle with self-interest:

> ***16** In a situation where parties expect to have repeated transactions, the recognition that a party who cheats in one transaction will be penalized by the other party in subsequent transactions reduces the incentive to cheat. However, when a transaction is the last (or only) in a series--that is, the final period--the incentive to cheat reappears because, by definition, the penalty for doing so has disappeared.[54]

Similar incentives "are manifest in a number of our commonly held intuitions regarding human behavior, including the landlord's suspicion that tenants may skip out on their final month's rent and the possibility that temporary or short term employees may shirk."[55]

When a corporation operates in the ordinary course of business, the ability of managers to shirk or self-deal is ordinarily constrained not only by legal duties but also by a range of markets, including the product markets, capital markets, employment markets, and the market for corporate control.[56] However, when the manager/stockholder relationship enters its final period, market constraints have less bite

because the target's shareholders will be bought out by the acquirer. Target management is no longer subject to market discipline because the target, by definition, will no longer operate in the market as an independent agency. As a result, management is less vulnerable to both shareholder and market penalties for self-dealing.[57]

***17** With typical constraints loosened, the bidder and management may find ways to "effectively divert[] a portion of the merger consideration from the shareholders to the management team."[58] Available vehicles include "an equity stake in the surviving entity, employment or noncompetition contracts, substantial severance payments, continuation of existing fringe benefits[,] or other compensation arrangements."[59] Even if the diverted consideration does not materially decrease the price that the bidder would pay to the public stockholders, "side payments may affect management's decision making by causing them to agree to an acquisition price lower than that which could be obtained from hard bargaining or open bidding."[60]

The final period also "signals a time when otherwise common behavioral biases may lead to serious deviations from the welfare of the corporation and its shareholders."[61] These include familiar cognitive biases such as overconfidence, excessive optimism, groupthink, reactive devaluation, and in-group/out-group thinking.[62] As Chancellor Allen recognized, the human psyche has a powerful ability "to rationalize as right that which is merely personally beneficial."[63] Chancellor Chandler similarly understood that "[h]uman judgment can be clouded by subtle influences like the prestige and perquisites of board membership, personal relationships with management, or animosity towards a bidder."[64]

The existence of these influences does not mean that managers and directors inevitably breach their duties. Delaware law does not embrace "the notion that persons suffering from conflicts are invariably incapable of putting them aside," but it also does not "ignore the reality that American business history is littered with examples of managers who exploited the opportunity to work both sides of a deal."[65] It is the *risk* of favoritism that provides "good reason to be skeptical of management ***18** claims to be acting in the shareholders' best interests."[66] Therefore, a negotiated acquisition is one of those "rare situations which mandate that a court take a more direct and active role in overseeing the decisions made and actions taken by directors."[67] "[T]he resulting need in this context to hold the board accountable for its mistakes appropriately trumps the usual tendency towards judicial deference to the board's authority."[68]

In short, just like *Unocal*, *Revlon* addresses a situation in which potential conflicts of interest call for applying greater scrutiny than the business judgment rule permits.

[W]here heightened scrutiny applies, the predicate question of what the board's true motivation was comes into play. The court must take a nuanced and realistic look at the possibility that personal interests short of pure self-dealing have influenced the board to block a bid [*Unocal*] or to steer a deal to one bidder rather than another [*Revlon*]. Through this examination, the court seeks to assure itself that the board acted reasonably, in the sense of taking a logical and reasoned approach for the purpose of advancing a proper objective, and to thereby smoke out mere pretextual justifications for improperly motivated decisions. In this sense, the reasonableness standard requires the court to consider for itself whether the board is truly well motivated (i.e., is it acting for the proper ends?) before ultimately determining whether its means were themselves a reasonable way of advancing those ends. As one would expect, when the record reveals no basis to question the board's good faith desire to attain the proper end, the court will be more likely to defer to the board's judgment about the means to get there.[69]

Revlon applies to negotiated acquisitions because "there is a basis for concern that directors without a pure self-dealing motive might be influenced by considerations other than the best interests of the corporation and other stockholders."[70]

*19 B. THE CHIMERA OF *REVLON* DUTIES

As noted, although *Revlon* literally applied the still-new *Unocal* standard of review, language in the opinion suggested affirmative conduct obligations for directors.[71] Over the ensuing decades, the Delaware courts have clarified that *Revlon* does not impose specific conduct requirements. *Revlon* instead calls upon a court to determine whether the directors' decisions fell within a "range of reasonableness"--precisely the same standard applied under *Unocal*.[72] Neither decision imposes affirmative conduct obligations. Both applied an intermediate standard of review now recognized as enhanced scrutiny.

The Delaware Supreme Court squarely held in *QVC* that the standard for a *Revlon* analysis is "range-of-reasonableness," just like *Unocal*:

> There are many business and financial considerations implicated in investigating and selecting the best value reasonably available. The board of directors is the corporate decision-making body best equipped to make those judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding whether the directors made **a reasonable** decision, not **a perfect** decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business ***20** judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.[73]

The duty to act reasonably requires that a reasonable course of action be taken under the circumstances.[74] Because there could be several reasoned ways to proceed in a situation, "the court cannot find fault so long as the directors chose a *reasoned* course of action."[75]

Consistent with *Revlon* operating as a reasonableness standard, the Delaware Supreme Court has repeatedly stated that there are no specific *Revlon* duties.[76] Examining the particular duties that *Revlon* was once thought to impose makes this fact all the more clear.

1. No Duty to Conduct an Auction or Follow Judicially Prescribed Steps

Revlon does not create a duty to auction or require that directors adhere to judicially prescribed steps to maximize stockholder value.[77] ***21** The Delaware Supreme Court has stated explicitly that "there is no single blueprint that a board must follow to fulfill its duties[, and a] stereotypical approach to the sale and acquisition of corporate control is not to be expected."[78] In *Dollar Thrifty*, the Court of Chancery summarized these principles:

> As is well known, *Revlon* does not require that a board, in determining the value-maximizing transaction, follow any specific plan or roadmap in meeting its duty to take reasonable steps to secure--i.e., actually attain-- the best immediate value .... Thus, although the level of judicial scrutiny under *Revlon* is more exacting than the deferential rationality standard applied to run-of-the-mill decisions by the business judgment rule, at bottom *Revlon* is a test of reasonableness: directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there.[79]

The reviewing court looks at whether the board acted reasonably "by undertaking a logically sound process to get the best deal that is realistically attainable."[80]

A board acting reasonably can decide to negotiate with a single bidder.[81] A board faced with competing offers may choose a nominally lower bid that provides more certainty of value or poses fewer risks.[82] A ***22** board can grant favorable treatment to a particular bidder or class of bidders if the board reasonably seeks to promote stockholder interests.[83] If circumstances warrant, a board may reasonably decide not to contact "a known interested party who might be willing to offer more."[84]

The Delaware Supreme Court's decision in *Lyondell* should have eliminated any lingering belief that *Revlon* might impose some form of conduct requirement.[85] There, the Delaware Supreme Court held that the Court of Chancery erred by identifying several possible means by which the directors could have done more to explore alternatives before agreeing to a transaction.[86] In the Delaware Supreme Court's view, the Court of Chancery erroneously concluded "that directors must follow one of several courses of action to satisfy their *Revlon* duties."[87] In correcting the trial court's error, the Delaware Supreme Court stated that "no court can tell directors exactly how to accomplish [the goal of obtaining the best value reasonably available] because they will be facing a unique combination of circumstances, many of which will be outside their control."[88] And if no court can tell directors what to do ***23** when pursuing a negotiated acquisition, then *Revlon* cannot impose specific conduct requirements.

2. No Obligation to Retain the Right to Terminate to Take a Better Deal

Revlon also does not mandate that a board retain the right to terminate a merger agreement to take a better deal, nor does it magically confer such a right on directors by virtue of their status as fiduciaries. The Delaware Supreme Court addressed these issues in *Van Gorkom*,[89] which "established that Delaware law does not give directors, just because they are fiduciaries, the right to accept better offers, distribute information to potential new bidders, or change their recommendation with respect to a merger agreement even if circumstances have changed."[90] The Delaware Supreme Court has never modified or overruled *Van Gorkom* on these points, and it certainly did not do so in *Revlon*, which twice cited *Van Gorkom* with approval.[91] Nor did *Revlon* announce a new, post-*Van Gorkom* rule: to the contrary, the Delaware ***24** Supreme Court has held that *Revlon*'s principles applied retroactively to pre-1986 transactions because the *Revlon* opinion's holding was "derived from fundamental principles of corporate law" and "did not produce a seismic shift in the law governing changes of corporate control."[92] There are no grounds to distinguish *Revlon* from *Van Gorkom* based on transaction structure: the *Van Gorkom* decision involved a negotiated cash deal to which *Revlon* indisputably would have applied.[93] Indeed, there is now a broad consensus that *Van Gorkom* was not actually a duty-of-care case, but rather the Delaware Supreme Court's initial-- albeit unacknowledged--enhanced scrutiny case.[94]

***25** Under *Van Gorkom*, "Delaware entities are free to enter into binding contracts without a fiduciary out [allowing them to take a better offer] so long as there was no breach of fiduciary duty involved when entering into the contract in the first place."[95] There is no *'%7FRevlon* duty" that compels a properly informed and motivated board of directors to act otherwise.

3. No Special Duty to Get the Best Price

Although Delaware decisions conclusively demonstrate that enhanced scrutiny does not impose a list of specific "Revlon duties," opinions continue to reference one supposedly overarching *'%7FRevlon* duty": the duty to get the best price.[96] This language is unfortunate because it implies that unless enhanced scrutiny applies, directors need not seek to maximize stockholder value.[97] In my view, however, even this is not a *"'%7FRevlon* duty," because the duty to strive to maximize the value of the corporation for the benefit of its residual claimants is the universal, loyalty-based standard of conduct that directors of a

Delaware ***26** corporation always must pursue. What changes under enhanced scrutiny is not the standard of conduct but the standard of review.

Delaware corporate law is marked by a divergence between standards of conduct and standards of review.[98] The standard of conduct supplies the substantive content for the core fiduciary duties of loyalty and care: it describes what directors are expected to do.[99] The standard of review describes what a plaintiff must plead or prove to overcome a defendant's motion and ultimately prevail in the case.[100] Courts apply the latter to determine whether liability should be imposed, a transaction be enjoined, or another equitable remedy be awarded.[101] Regardless of what standard of review applies, the directors' standard of conduct does not change. Moreover, in every situation, the standard of review is more forgiving of directors and more onerous for stockholder plaintiffs than the standard of conduct.[102] This divergence is warranted for diverse policy reasons typically cited as justifications for the business judgment rule.[103]

Delaware law imposes two fiduciary duties on directors--the duty of care and the duty of loyalty.[104] In *Graham v. Allis-Chalmers Manufacturing Co*., the Delaware Supreme Court stated that the duty of care calls upon directors "to use that amount of care which ordinarily ***27** careful and prudent men would use in similar circumstances."[105] So stated, the duty of care resembles the obligation to use reasonable care that generally prevails in tort.[106] This formulation describes the *standard of conduct*. The *standard of review* is different. Depending on the situation, the standard of review ranges from gross negligence, to reasonableness, to fairness.

The duty of loyalty exhibits similar divergence. In *Guth v. Loft, Inc*., the Delaware Supreme Court articulated a strict standard that would seem to prohibit any conflict of interest.[107] But again, this is the *standard of conduct*. The standard of review ranges from a threshold determination of materiality, to reasonableness, to fairness.

A subsidiary element of the duty of loyalty is the requirement that directors act in good faith.[108] The *eBay* decision teaches that when managing a corporation, directors must seek "to promote the value of the corporation for the benefit of its stockholders."[109] "[A] corporation may take steps, such as giving charitable contributions or paying higher wages, that do not maximize profits currently ... because such activities are rationalized as producing greater profits over the long-term."[110] Decisions of this nature benefit the corporation as a whole, and by ***28** increasing the value of the corporation, the directors increase the share of the corporation's value beneficially owned by and available for the residual claimants.[111] Accordingly, Delaware decisions commonly refer to directors owing fiduciary duties "to the corporation and its shareholders."[112] This formulation captures the intuition that directors owe duties to the corporation for the ultimate benefit of the residual claimants.[113] "[S]tockholders' best interest must always, within legal limits, be the end. Other constituencies may be considered only instrumentally to advance that end."[114]

As Henry Ford and the founder of craigslist learned, directors who concededly act to benefit constituencies other than the stockholders without explaining the instrumental rationale for doing so breach their duty of good faith because they have admitted violating the applicable standard of conduct.[115] Similarly, special committee members have ***29** been found to have fallen short in challenges to transactions governed by entire fairness when the directors did not understand that their job was not to merely accept a fair transaction, but rather to seek the best transaction available for the minority stockholders and strive for "the highest possible price."[116]

Absent an intentional or unwitting admission, the standard of review for good faith once again diverges dramatically from the standard of conduct. When the business judgment rule applies, a reviewing court does not look closely at the motivations of the directors.[117]

[B]ecause the board is disinterested and thus has no apparent motive to do anything other than act in the best interest of the corporation and its stockholders[,] ... the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives.[118] ***30** A court will infer bad faith and a violation of the duty of loyalty only when a decision lacks any rationally conceivable basis for benefitting stockholders.[119]

However, when a Delaware court applies enhanced scrutiny, the metric for fiduciary duty review is range of reasonableness:

> What is important and different about the *Revlon* [enhanced scrutiny] standard is the intensity of judicial review that is applied to the directors' conduct. Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the *Revlon* standard contemplates a judicial examination of the reasonableness of the board's decision-making process. Although linguistically not obvious, this reasonableness review is more searching than rationality review, and there is less tolerance for slack by the directors.[120]

***31** In other words, when enhanced scrutiny applies, directors must provide *reasonable* grounds to believe they acted in good faith.

If the standard of review increases to entire fairness, the range of deference narrows to intrinsic fairness, and directors must prove their good faith as part of that standard.[121] What does not change regardless of the standard of review is the underlying standard of conduct, which requires that directors strive to maximize the value of the corporation for the benefit of the corporation's residual claimants, viz, its stockholders. The duty of loyalty always imposes that core fiduciary obligation.[122]

In *Barkan v. Amsted Industries, Inc*., the Delaware Supreme Court noted that *Revlon* “did not produce a seismic shift in the law governing changes of corporate control.”[123] *Revlon*'s holding instead follows logically from the duty of loyalty that requires fiduciaries to strive to maximize value when selling assets held for their beneficiaries.[124] ***32** Trustees who undertake to sell the *res* have always been expected to strive to maximize value.[125] This obligation translates into the law of corporations when directors sitting in a fiduciary relationship with stockholders seek to sell corporate assets or the corporation as whole.[126]

The bedrock principle that a board owes a duty to shareholders to act only in pursuit of their interests is the principle that explains *Revlon*. Where the company is to be sold, it cannot be in conformity with that obligation to defeat a higher offer in favor of a lower one regardless of other considerations. So understood, *Revlon* is consistent with a very long line of cases.[127]

Consequently, “Revlon was not a radical departure from existing law (*i.e*., it has ‘always' been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price).”[128]

Given these principles, it is incorrect, in my view, to say that the duty to strive to maximize value is a **“***Revlon* duty.**”** It is also misleading because it would suggest that if enhanced scrutiny did not apply, directors would not need to strive to maximize value. In reality, the core value-maximizing duty does not arise only when enhanced scrutiny is the standard of review. It always exists. What changes is ***33** that a court looks to whether the directors acted *reasonably* in support of this goal, rather than merely whether their conduct was rational. Enhanced scrutiny is a standard of review, and there are *no* so-called *‘%7FRevlon* duties.”

II. ENHANCED SCRUTINY LOGICALLY APPLIES TO PURE STOCK-FOR-STOCK DEALS

Enhanced scrutiny is thus a standard of review that applies to negotiated acquisitions because of concerns about potential conflicts. Recognizing this fact has at least one major implication: enhanced scrutiny should apply to all negotiated acquisitions. The Delaware Supreme Court therefore can and should retire the *Paramount* doctrine.

A. CONCERN ABOUT CONFLICTS

Conflicts are not unique to *Revlon* deals. The CEO and members of management can be retained or replaced by the acquirer after either a *Revlon* deal or a stock-for-stock deal.[129] Directors and executives may receive transaction-related compensation or other employment benefits in a *Revlon* deal or a stock-for-stock deal.[130] A board and its ***34** management could be just as enchanted or disenchanted with the idiosyncrasies of a particular acquirer in a stock-for-stock deal as in a *Revlon* deal. Indeed, management interests may loom largest in mergers of equals, where "social issues," like CEO-succession and board composition, frequently rank among the most critical and heavily negotiated aspects of the transaction.[131] As then-Vice Chancellor Strine ***35** rhetorically asked in 2001, "[i]s it really the case that the directors and managers are less likely to be acting to preserve their positions in a non*Revlon* transaction?'DD'DD[132] Put simply, if potential conflicts drive enhanced scrutiny, then enhanced scrutiny should apply to negotiated acquisitions, regardless of the form of consideration.

B. CONCERN ABOUT DEFENSIVE MEASURES

When defensive measures are used to insulate a transaction, the reduction in market oversight accentuates the risk that the transaction may have been infected by self-interest.[133] Defensive measures are just as much of an issue in stock-for-stock deals as in *Revlon* deals.[134]

Stock-for-stock transactions regularly incorporate a suite of defensive measures that practitioners and even Delaware decisions have started to refer to as "standard merger terms."[135] This package includes ***36** a no-shop clause, restrictions on the board's ability to provide information in response to a competing bid, a matching right and other restrictions on the board's ability to terminate the agreement to accept a competing bid, a healthy termination fee (with or without separate expense reimbursement), and support agreements from significant stockholders.[136] If defensive measures can be problematic in *Revlon* deals because they insulate management's chosen transaction, then they are equally problematic in stock-for-stock deals.

The Delaware Supreme Court has held that enhanced scrutiny applies to the defensive measures used to protect a stock-for-stock deal.[137] In doing so, the court recognized the existence of potential ***37** conflicts sufficient to justify enhanced scrutiny.[138] If those conflicts are sufficiently present to warrant reasonableness review of the defensive measures, the same conflicts should be sufficiently present to warrant reasonableness review of the transaction as a whole, thereby dispensing with the *Paramount* doctrine.

C. THE LOGIC OF *QVC*

The logic of *QVC* itself supports eliminating the *Paramount* doctrine and applying enhanced scrutiny more broadly to all negotiated acquisitions. Carried to their logical conclusion, the principles on which the Delaware Supreme Court relied to justify applying enhanced scrutiny to the Paramount-Viacom combination militate in favor of extending enhanced scrutiny to all stock-for-stock deals.

According to *QVC*, whether the post-transaction entity will have a controlling stockholder makes a difference for the standard of review because of the resulting loss in voting power inflicted on target stockholders.[139] Without procedural protections, "stockholder votes are likely to become mere formalities."[140] Among other things, "minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger."[141] Having described these potential consequences, the Delaware Supreme Court in *QVC* quickly jumped to the concept of a control premium:

> The acquisition of majority status and the consequent privilege of exerting the powers of majority ownership come at a price. That price is usually a control premium which recognizes not only the ***38** value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power.[142]

On the facts before it, the court held that "[b]ecause of the intended sale of control, the Paramount-Viacom transaction has economic consequences of considerable significance to the Paramount stockholders."[143] A principal consequence was that once control shifted, "the current Paramount stockholders [would] have no leverage in the future to demand another control premium."[144] Therefore, the Paramount directors "had an obligation to take the maximum advantage of the current opportunity to realize for the stockholders the best value reasonably available."[145]

Restated in less lofty language, the *QVC* court applied enhanced scrutiny because the Paramount-Viacom merger presented a one-time opportunity to obtain value, and the Paramount board needed to go out and get everything that it could.[146] These propositions are equally true for stock-for-stock deals.

***39** Although *QVC* accurately observed that the corollary of a change-of-control is usually some type of control premium, that is one of the many instances in which correlation does not equate to causation.[147] The potential for a change-in-control by itself does not confer value on stockholders. For example, in a creeping acquisition, the acquirer builds a controlling position without the board or other stockholders taking notice.[148] In a street sweep, the buyer quickly accumulates a large or controlling position before the board or other stockholders can react.[149] In both cases, the acquirer strives to avoid paying any control premium, or at a minimum to avoid paying the premium for as many shares as possible. That proposition can be generalized for rational acquirers: in any acquisition, an acquirer will prefer to pay the lowest possible price (and premium).[150]

Negotiated acquisitions are bargaining situations. Value is not conferred charitably on sell-side stockholders; it must be extracted. If ***40** an acquirer expects a transaction to generate synergies, the acquirer should be willing to share a portion of the synergies with the target as the price of getting the deal done and achieving the remaining gains. In a cash deal, the gain-sharing takes the form of a higher dollar figure. In a stock deal, the gain-sharing takes the form of a larger share of the post-transaction entity. In either case, the gains are allocated through negotiation.

The same is true for the control premium. Scholars have debated the reasons why an acquirer would pay a premium to purchase control.[151] For purposes of the negotiation principle, the source of the control premium does not matter. Regardless of its origins, the value of control is something that the acquirer would prefer to keep rather than share. The acquirer will share a portion of this value only if it is extracted through negotiation. In a negotiated acquisition, the sell-side fiduciaries act as bargaining agents for disaggregated stockholders.[152] When sell-side fiduciaries obtain a premium for their stockholders, it reflects their success in extracting a portion of the combinatorial value.

Professor Lawrence A. Hamermesh has documented that sell-side fiduciaries routinely bargain for premiums in pure stock-for-stock transactions.[153] This unsurprising finding demonstrates that even when ***41** ownership of a post-merger entity will remain in a "large, fluid, changeable and changing market,"[154] the merger negotiation creates a unique opportunity to extract a share of the combinatorial value. Moreover, the opportunity to extract value through a particular negotiation is, by definition, unique to that negotiation. For humans, time only runs one way. Once the negotiation is over and the deal completed, the value exchanged in that negotiation cannot be reallocated.

Readers of *QVC* often seem fixated on the Delaware Supreme Court's comment that "[o]nce control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium," inferring that if a future control premium could be available, then enhanced scrutiny should not apply.[155] This is a logical fallacy. The statement that enhanced scrutiny will apply if no future control premium is available does not imply that enhanced scrutiny will not apply if a future control premium is available, any more than the statement that coffee will be available if you arrive by 1:00 p.m. implies that coffee will not be available if you arrive after 1:00 p.m. Coffee *may* be available if you arrive after 1:00 p.m. You are just not guaranteed to get it.[156]

Regardless, there is no corporate law limit of one premium per stockholder. The control premium that could be extracted in a future deal is just that--a share of the combinatorial value of the future deal. It represents a separate and distinct negotiating opportunity for the future board that is neither exclusive of nor co-extensive with the present negotiating opportunity. Even if the stockholders of the merged company may someday have an opportunity to have their future fiduciaries extract a control premium on their behalf as part of a future transaction, the exchange ratio fixed in the current stock-for-stock merger would determine the post-merger ownership of the firm. The stock-for-stock merger therefore represents the only time when the selling stockholders of the acquired corporation can extract a premium ***42** from the buyer as the price of acquiring their current entity, because their resulting ownership stake determines how much of any aggregate future control premium the stockholders of the acquired corporation receive.

Then-Vice Chancellor Strine made these same points in a 2001 article, in which he posited a stock-for-stock merger between two corporations--Zuckerman and Angstrom--in which Zuckerman stockholders would receive Angstrom shares. He explained that regardless of whether the consideration was stock or cash, "the Zuckerman stockholders arguably face[d] their last real chance to get full value for the company."[157] Although the consolidated entity might later be sold for a control premium,

[i]n the real world, this theoretical reality would provide little solace to the Zuckerman stockholders. They would rightly be worried about whether the *current* merger represented an unfair transfer of wealth from the Zuckerman stockholders to the Angstrom stockholders. That is, the fairness of the exchange ratio would be critical to the Zuckerman stockholder because it fixes their claim on the assets of the combined entity--and thus their share of any future control premium. Put differently, the merger will be their final opportunity to be afforded payment for their now exclusive ownership of Zuckerman.[158]

Exactly.

A board negotiating a pure stock-for-stock merger is therefore in a position analogous to the Paramount board in *QVC* in both respects that the Delaware Supreme Court found critical: (i) the merger negotiation provides an opportunity to extract for the stockholders a share of combinatorial value that the acquirer otherwise would prefer to keep, and (ii) the opportunity is a one-time chance to obtain this value that will not recur, even if the combined corporation can later be sold.[159] Because these basic realities were deemed sufficient to impose enhanced ***43** scrutiny in *QVC*, they should be sufficient for stock-for-stock deals generally.[160]

D. DECISIONS INVOLVING MULTIPLE ALTERNATIVES

The *Paramount* doctrine also should be abandoned because it fails to accommodate the reality that boards routinely confront a range of strategic alternatives. One choice typically will be to go it alone. Another may be to sell for cash. Yet another may be a recapitalization in which a new investor will take a controlling equity stake. Still others could involve stock-for-stock mergers with acquirers who may or may not have controlling stockholders. And perhaps one of the potential bidders will turn hostile. In my experience, unhampered by the current formalism of Delaware law, directors typically ask the right question: which of the alternatives provides the best risk-adjusted value for the stockholders. But when lawyers steeped in the *Paramount* doctrine enter the picture, they advise the directors that the different alternatives are subject to different standards of review and that the obligation to maximize stockholder value only arises sometimes. This advice can skew the decision-making process by placing too much emphasis on legal exposure and its potential mitigation via transaction structure.

Directors should not be distracted by the overly formal legalisms of the *Paramount* doctrine. They should do (and be advised to do) what they would naturally do: seek in good faith to obtain the best transaction for the stockholders, which could well be no transaction at all.

Evaluating competing alternatives may be a complex and judgment-laden task, but it is not impossible. To be certain, there are real-world distinctions among alternatives that affect how a board assesses the values of those alternatives. For example, when weighing a transaction for consideration of 100% cash, the board may consider obvious issues like the likelihood of closure, the timing of payment, and tax effects.[161] If the payment is in a foreign currency, the board might ***44** consider exchange rate risk. The board may consider other constituencies instrumentally, but only to the extent necessary to secure the cash deal. Stay-bonuses to management, for example, may be necessary to keep the management team together until closing to ensure that the company is delivered intact to the buyer. However, the board cannot consider the degree to which benefits to other constituencies might generate greater corporate value over the long term.[162] There remains room for judgment, but the use of cash eliminates many of the discretionary assessments that directors must make.

If the alternative is remaining independent, then a wider range of judgmental factors comes into play. Most significantly, the board may consider and give significant weight to the possibility that benefits to constituencies other than the stockholders may result in superior value creation over time such that when viewed on a present-value, risk-adjusted basis, remaining independent would generate greater value for stockholders than selling for cash. The board may also anticipate that the company could be sold in the future for consideration which, when viewed on a present-value, risk-adjusted basis, makes remaining independent for the present the optimal choice. In making these determinations, the board is not required to rely on a company's stock market price to conduct the projecting and discounting exercise.[163] The board is also not bound by the results of a discounted cash flow analysis or other valuation technique. Directors are entitled to and must exercise judgment.

***45** When evaluating a transaction where the consideration takes the form of stock, the directors' task more closely resembles the type of analysis that a board would conduct regarding the alternative of remaining independent. Because stockholders will receive an ownership interest in an ongoing entity, the directors are entitled to consider how that entity will generate value over the long-term. Just as when considering the alternative of remaining independent, the board may anticipate that the company could be sold at some point in the future. In a synergistic transaction, directors may account for the value that would be created by combining the two companies. Any or all of these factors, when weighed by the board, may cause the directors to conclude that the share of the entity that the corporation's pre-transaction stockholders would own post-transaction represents the best alternative available. To the extent an alternative involves a combination of cash and stock, the relative size of the equity stake that the selling stockholders receive necessarily affects the degree to which value can be derived from the ongoing business and any eventual sale of the combined entity. As in the standalone setting, the board is not required to rely on the stock market or the results of a discounted cash flow analysis.

In *QVC*, the Delaware Supreme Court called upon boards to make precisely these types of determinations.[164] The court explained that when considering alternatives, "the directors should analyze the entire situation and evaluate in a disciplined manner the consideration being offered."[165] The court admonished that "[w]here stock or other non-cash consideration is involved, the board should try to quantify its value, if feasible, to achieve an objective comparison of the alternatives."[166] In a footnote, the court stressed that "[w]hen assessing the value of non-cash consideration, a board should focus on its value as of the date it will be received by the stockholders."[167] In reiterating its prior holdings that directors are not bound by the market price, the court stated that "[n]ormally, such value will be determined with the assistance of ***46** experts using generally accepted methods of valuation." [168] Therefore, a board is "not limited to considering only the amount of cash involved" and may account for "its view of the future value of a strategic alliance." [169] The court also stressed that

the board may assess a variety of practical considerations relating to each alternative, including an offer's fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; the risk of non-consummation; the bidder's identity, prior background and other business venture experiences; and the bidder's business plans for the corporation and their effects on stockholder interests. [170]

The flexible process described in *QVC* can apply just as easily to stock-for-stock deals as *Revlon* deals. If anything, the absence of a post-transaction controlling stockholder should make the analysis more straightforward. In *QVC*, the post-transaction entity would have had a single person as its controlling stockholder, making the value of the strategic combination highly contingent. [171] Without a post-transaction controlling stockholder, the board should have greater confidence in and be able to more readily assess "the future value of a strategic alliance." [172]

Directors must act in good faith and on an informed basis to pursue a course that maximizes value for stockholders. This means that the directors must reach the conclusion that the alternative they have chosen does just that. Enhanced scrutiny, as a standard of review, does not affect this core obligation, and *QVC* and its progeny demonstrate that judgmental factors can be pivotal in the board's calculation. Applying enhanced scrutiny to stock-for-stock deals makes clear that even though directors necessarily have greater occasion to weigh and assess ***47** judgmental factors when stockholders will hold or receive equity, the directors must conclude that the course they have adopted best maximizes value for stockholders, regardless of the transactional form selected. Overruling the *Paramount* doctrine reunites the legal advice with the business reality facing the board.

E. THE REASONABLENESS OF *REVLON* REVIEW

For many, the desire to distinguish between *Revlon* deals and stock-for-stock transactions appears driven by the belief that *Revlon* imposes specific conduct obligations on directors. Under this view, *Revlon* is like the bogey-man. It is big and bad and should be avoided if possible. As already discussed, *Revlon* does not impose specific conduct obligations and need not be feared.

That said, any change in the standard of review, however small and theoretically tidy, could have knock-on effects for litigation. Given the high stakes involved in M&A lawsuits, courts must approach any tinkering with great care. On this point, there is good news. Applying enhanced scrutiny to stock-for-stock deals will not change the way Delaware courts review transactions or affect the already excessive number of lawsuits challenging deals. Although the standards of review under the *Paramount* doctrine nominally remain separate, in terms of actual litigation practice, the two types of transactions already have merged.

1. No Effect on Litigation Volume

If enhanced scrutiny caused stock-for-stock transactions to be examined more strictly, one logical consequence should include an increase in the number of suits against stock-for-stock deals and greater associated transaction costs. As a practical matter, in the current litigation environment, stockholder plaintiffs do not discriminate between *Revlon* deals and stock-for-stock deals. [173] Plaintiffs file and ***48** seek pre-closing injunctive relief by alleging breaches of the duty of disclosure, which applies to all transactions, and by challenging the defensive provisions in the merger agreement, which are governed by enhanced scrutiny regardless. The vast majority of M&A lawsuits settle for supplemental disclosures and an award of attorneys' fees, regardless of the form of consideration. [174]

2. No Distinction in the Injunction Phase

If a case proceeds to a decision during the injunction phase, there is no distinction in how the Delaware courts handle *Revlon* deals versus stock-for-stock deals. In both contexts, the Delaware courts examine the disclosures and defensive measures, and then leave the decision on value to the stockholders.

When considering an injunction application, a Delaware court initially focuses on whether stockholders have the necessary information to vote on the transaction, including information about actual and potential conflicts. The court then defers to the stockholders' decision. When a plaintiff asks the Court of Chancery "to enjoin a transaction and another higher-priced alternative is not immediately available, [the court] has been appropriately modest about playing games with other people's [i.e., the stockholders'] money." [175] This is true even when the plaintiff has shown a reasonable probability of success on the merits. [176] After all, even when a sufficient merits showing is made by a plaintiff, this court is justifiably reluctant to enjoin a premium-generating transaction when no other option is available, except insofar as is necessary for the disclosure of additional information to ***49** permit stockholders to make an informed decision whether to tender. [177]

There is no *Paramount* doctrine for disclosure issues. In a stock-for-stock transaction, just as in a *Revlon* deal, directors must make a merger recommendation. [178] In both contexts, directors must comply with their fiduciary duty of disclosure. [179] If disclosure deficiencies threaten to render the stockholder vote uninformed, Delaware courts regularly find that irreparable harm exists and enjoin the vote pending the issuance of supplemental disclosures. [180] "By issuing an injunction ***50** requiring additional disclosure, the court gives stockholders the choice to think for themselves on full information, thereby vindicating their rights as stockholders to make important voting and remedial decisions based on their own economic self-interest." [181]

Delaware courts also examine the deal-protection devices in the merger agreement. As already explained, there is no *Paramount* doctrine here either, and the standard of review is always enhanced scrutiny. [182] From a practical standpoint, because Delaware courts examine the defensive measures in stock-for-stock merger agreements using enhanced scrutiny, the Delaware courts are already reviewing the transaction process in precisely the same manner as they would if enhanced scrutiny applied to the transaction as a whole. A reviewing court must conduct this analysis because when directors develop greater information about alternatives and conduct greater price-discovery before signing a deal, the directors can reasonably grant greater deal protections in connection with the deal. By contrast, when directors are less informed, their lack of knowledge calls for retaining greater flexibility for price-discovery and the development of alternatives to occur after signing. [183] The judicial task of determining whether the ***51** directors acted reasonably in protecting their transaction is not appreciably different from determining whether the directors acted reasonably in selecting their transaction.

3. No Distinction in the Post-Closing Phase

For those cases that reach the post-closing phase, there is still no distinction between stock-for-stock transactions and *Revlon* deals.

The fact that a corporate board has decided to engage in a change of control transaction invoking so-called *Revlon* duties does not change the showing of culpability a plaintiff must make in order to hold the directors liable for monetary damages. For example, if a board unintentionally fails, as a result of gross negligence and not of bad faith or self-interest, to follow up on a materially higher bid and an exculpatory charter provision is in place, then the plaintiff will be barred from recovery, regardless of whether the board was in *Revlon*-land. [184]

Complaints against *Revlon* transactions are subject to dismissal on the pleadings for failure to plead facts sufficient to overcome an exculpatory charter provision. [185] Challenges to *Revlon* transactions are likewise ***52** susceptible to motions for summary judgment unless the plaintiff can produce evidence that the board "utterly failed to attempt to attain" the transaction offering the best value for stockholders. [186]

Even for directors serving those rare corporations without exculpatory provisions in their charters, the approach to determining liability should not change. A transactional standard of review is, at its core, an inquiry designed to address whether the court should respect the *transaction itself* or whether, for equitable reasons, it should set it aside or impose an alternative remedy. The court's analysis of the transaction "has only a crude and potentially misleading relationship to the liability of any particular fiduciary." [187] Director culpability is assessed and a potential damages remedy imposed on a director-by-director basis. [188] The likelihood of an actual liability finding remains low for directors who did not receive transaction-specific benefits. Therefore, applying ***53** enhanced scrutiny to all negotiated acquisitions, regardless of the form of consideration, should not affect litigation rates or outcomes.

III. A CALL TO CLARIFY THE LAW

In my view, Delaware law could be helpfully clarified and simplified if the Delaware Supreme Court clearly announced that (i) *Revlon* is a form of enhanced scrutiny, and (ii) enhanced scrutiny applies to negotiated acquisitions, regardless of the form of consideration, because of the final period problem. Only the Delaware Supreme Court sitting *en banc* can accomplish this change because it would require overruling the *Paramount* doctrine.

Recognizing *Revlon* as a form of enhanced scrutiny that turns on reasonableness would foreclose still-recurring arguments about the parameters of so-called '*%7FRevlon* duties" and what actions are supposedly required (or forbidden) in the "radically altered state." [189] This limited exercise in doctrinal pruning also would eliminate the debate over what standard of review should apply to mergers in which the consideration is a mix of cash and stock. Parties in litigation over mixed consideration transactions currently devote significant resources to debating the standard of review. Likewise, parties litigating pure stock-for-stock transactions would not have to differentiate in their briefing between the merger itself, to which the business judgment rule now applies, and the defensive measures in the merger agreement, to which enhanced scrutiny applies. Parties in both settings would know that enhanced scrutiny was the standard of review, allowing them to focus their efforts on presenting or attacking the reasonableness of the board's purposes and the means selected to achieve them.

More importantly, by making this announcement, the Delaware Supreme Court would give clear guidance to directors and advisors that a board of directors of a Delaware corporation must always seek to maximize the value of the corporation for the benefit of the undifferentiated equity, and that the only factor that changes from a legal standpoint is the standard of review used to evaluate the directors' decisions. When faced with competing strategic alternatives involving different forms of consideration, directors could focus squarely on ***54** seeking the best transaction reasonably available for the stockholders rather than being told that different third-party transaction structures would subject them to different duties or different standards of review.

For reasons already discussed, changing the law in this fashion should not alter the substance of how mergers are reviewed. It would not create an expanded universe of transactions in which directors must conduct auctions or follow judicially drafted checklists, precisely because there is no such universe to begin with. Nor would it require boards to eschew stock transactions in favor of cash deals.

In fact, under this approach, *Time-Warner* would have come out precisely the same way. The proof lies in Chancellor Allen's trial court decision, where after distinguishing *Revlon*, he conducted the type of enhanced scrutiny analysis that this Article envisions under the heading of a separate application of *Unocal* review. After weighing the evidence, he concluded that the Time board had carried its burden of proof and showed that it *reasonably* believed, in good faith, that in the long run, the Time-Warner combination would produce greater benefits to stockholders than Paramount's cash bid would. [190] The value available to Time's post-transaction stockholders included not only the present value of the long-term benefits achievable through the combination, but also the present value of the possibility of a control premium in a future sale. [191] A board considering a stock-for-stock transaction could rely on these and other considerations to conclude that the value of the stock-for-stock alternative was the best transaction reasonably available.

CONCLUSION

"[I]n the law, to an extent present in few other human institutions, there may be in the long run as much importance ascribed to the reasoning said to justify action, as there is in the actions themselves."[192] *Revlon* did not sufficiently or clearly explain why enhanced scrutiny ***55** applied, and the powerful metaphor of director-auctioneers overwhelmed other aspects of the opinion.[193] Delaware decisions now consistently recognize that the Delaware Supreme Court applied enhanced scrutiny in *Revlon* because of concern about potential conflicts of interest.[194] This rationale applies equally to stock-for-stock deals.[195] By issuing an opinion overruling the *Paramount* doctrine and applying enhanced scrutiny to stock-for-stock deals, the Delaware Supreme Court would confirm that *Revlon* is a form of enhanced scrutiny and provide a comprehensible and coherent rationale for how the Delaware courts approach negotiated acquisitions. It also would simplify an unnecessarily complex area of Delaware jurisprudence. These benefits in turn will enhance the legitimacy of Delaware's legal system.

Footnotes

d1 **The lecture was held at Fordham University School of Law on March 6, 2013.**

a1 Vice Chancellor, Court of Chancery of the State of Delaware. Vice Chancellor Laster presented a version of this Article as the Thirteenth Annual Albert A. DeStefano Lecture on Corporate, Securities & Financial Law at the Fordham Corporate Law Center on March 6, 2013.

aa1 J. Travis Laster is a Vice Chancellor of the Court of Chancery of the State of Delaware.

1 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

2 *Id*. at 182.

3 *See id*.

4 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

5 *See* discussion *infra* Part I.B.

6 *See* discussion *infra* Parts II and III.

7 *See* discussion *infra* Part I.B.

8 To simplify the terminology in this Article, "stock-for-stock merger" refers to a stock-for-stock transaction in which the surviving company emerges without a controlling stockholder, and "Revlon deal" refers to a cash sale or transaction in which the surviving company emerges with a controlling stockholder.

9 Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140 (Del. 1989). Chancellor Allen's written opinion, which the Delaware Supreme Court affirmed as to result on the *Revlon* issues, remains equally important. *See*Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

10 Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34 (Del. 1993).

11 By 1995, two Delaware Supreme Court decisions had crystallized the *Paramount* doctrine into a formalistic three-part test for triggering so-called *'%7FRevlon* duties." *See In re* Santa Fe Pac. S'holders Litig., 669 A.2d 59, 71 (Del. 1995); Arnold v. Soc'y

for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994). Although the triggering test largely ossified at that point, *Revlon* praxis continued to evolve.

12 *See* discussion *infra* Part III.

13 *See* discussion *infra* Part II.

14 *See id*.

15 *See id*.

16 *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by*Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (formulating the business judgment rule in its contemporary form); Gottlieb v. Heyden Chem. Corp., 90 A.2d 660, 663 (Del. 1952) (citing "the universally acknowledged principle of law which leaves many matters to be finally settled by the sound business judgment of the directors" but finding that judicial review is required "[w]hen a board acts under a misconception of the law on a vital point"); Perrine v. Pennroad Corp., 47 A.2d 479, 486 (Del. 1946) ("If it appears that [the board of directors] acted honestly, they are not responsible for mere mistakes, and under such circumstances, Courts will not interfere with their action or attempt to assume their authority to act.").

17 *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (formulating entire fairness test in its contemporary form); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109 (Del. 1952) ("Since [the defendant directors] stand on both sides of the transaction, they bear the burden of establishing its entire fairness, and it must pass the test of careful scrutiny by the courts."); Keenan v. Eshleman, 2 A.2d 904, 908 (Del. 1938) (explaining that where directors were interested in the challenged transaction, they "assumed the burden of showing the entire fairness of the transaction") (citing Geddes v. Anaconda Copper Mining Co., 254 U.S. 590 (1921)).

18 *See*Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

19 *See id*. at 957.

20 *See id*.

21 *Id*. at 954.

22 *Id*. at 955.

23 *Id*.

24 *See*Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

25 *See id*. at 180-82.

26 *Unocal*, 493 A.2d at 956-57.

27 *See id*.

28 *Revlon*, 506 A.2d at 185.

29 *See id*.

30 *See id*.

31 *See, e.g.*, Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 802 (2006) [hereinafter Bainbridge, *Director Primacy*] ("[F]or many, the differences between *Unocal* and *Revlon* loomed large."); Ross W. Wooten, *Restructurings During a Hostile Takeover: Directors' Discretion or Shareholders' Choice?*, 35 HOUS. L. REV. 505, 519 (1998) ("It is apparent that there are two standards ...."); Robert A. Ragazzo, *Unifying the Law of Hostile Takeovers: The Impact of* QVC *and Its Progeny*, 32 HOUS. L. REV. 945, 962 (1995) ("[T]here is much practical difference between the *Unocal* and *Revlon* modes of analysis.").

32 *Unocal*, 493 A.2d at 954.

33 *See* Paul L. Regan, *The Unimportance of Being Earnest:* Paramount *Rewrites the Rules for Enhanced Scrutiny in Corporate Takeovers*, 46 HASTINGS L.J. 125, 158-65 (1994).

34 *See, e.g.*, *Revlon*, 506 A.2d at 181 (explaining that "the fiduciary standards outlined in *Unocal* ... require the directors to determine the best interests of the corporation and its stockholders, and impose an enhanced duty to abjure any action that is motivated by considerations other than a good faith concern for such interests"); *id*. at 182 (stating that "[t]he Revlon board's authorization permitting management to negotiate a merger or buyout with a third party was a recognition that the company was for sale" and that "[t]he duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit"); *id*. at 184 (stating that "[t]he no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder"); *id*. ("[W]hen bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions."); *id*. ("[T]he shareholders' interests necessitated that the board remain free to negotiate.").

35 *Id*. at 182.

36 488 A.2d 858 (Del. 1985), *overruled on other grounds by*Gantler v. Stephens, 965 A.2d 695 (Del. 2009).

37 *See Unocal*, 493 A.2d 946.

38 *See Revlon*, 506 A.2d 173.

39 *See id*. at 180-81.

40 *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012).

41 *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010); *see also*Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256 (7th Cir. 1986) ("No one likes to be fired, whether he is just a director or also an officer.").

42 *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 194 (Del. Ch. 2007); *see El Paso*, 41 A.3d at 445 (noting that a post-sale MBO of certain assets "would allow [the CEO] to monetize a large part of his company-specific investment in El Paso, while permitting him the chance to continue to participate in managing key assets he knew and for another equity pop in the future"); *In re* Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 692-93 (Del. Ch. 2001) (noting that target company's top officers bargained for increased severance compensation in anticipation of potential sale); Goodwin v. Live Entm't Inc., No. Civ.A. 15765, 1999 WL 64265, at *19 (Del. Ch. Jan. 25, 1999) (noting that management was "likely to be retained, had discussed better contracts, and might obtain such contracts after the merger"); *see also Netsmart*, 924 A.2d at 198 ("Rightly or wrongly, strategic buyers might sense that CEOs are more interested in doing private equity deals that leave them as CEOs than strategic deals that may, and in this case, certainly, would not."); *cf. In re* SS & C Techs. Inc. S'holders Litig., 911 A.2d 816, 820 (Del. Ch. 2006) (declining to approve disclosure-only settlement where record supported inference that CEO "instigated this transaction through the use of corporate resources, but without prior authorization from the board of directors ... in order to identify a transaction in which he could both realize a substantial cash pay-out for some of his shares and use his remaining shares and options to fund a sizeable investment in the resulting entity"). Private equity buyers are not the only acquirers who retain management. Top executives may well favor those strategic buyers who have expressed interest in retaining, or would be more likely to retain, the existing team. A large strategic buyer considering a "bolt-on" acquisition in which existing management would continue to operate the business unit might seem more attractive and be favored over a smaller strategic acquirer for whom removal of existing management would become part of the synergies gained from the deal. *See, e.g.*, *In re* Atheros Commc'ns, Inc., C.A. No. 6124-VCN, 2011 WL 864928, at *11-12 (Del. Ch. Mar. 4, 2011) (requiring disclosure of the fact that CEO would be employed by strategic acquirer). Advisors may have reasons of their own to favor particular buyers, categories of buyers, or types of transactions. *See, e.g.*, *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 542 (Del. Ch. 2003) (noting that target's financial advisor "had an incentive to prefer a sale over a liquidation of the company because its fee agreement provided it with additional payments for a sale"); *Netsmart*, 924 A.2d at 199 (noting that for the target's financial advisor, "[t]he path of dealing with a discrete set of private equity players was attractive to its primary client contact--management--and the quickest (and lowest cost) route to a definitive sales agreement").

43 *See In re* Lear Corp. S'holder Litig., 926 A.2d 94, 114-15 (Del. Ch. 2007) (finding CEO nearing retirement was motivated by his desire to secure his nest egg); *In re* Prime Hospitality, Inc., No. Civ.A. 652-N, 2005 WL 1138738, at *12 (Del. Ch. May 4, 2005)

(refusing to approve settlement of stockholder litigation in part because of a CEO conflict of interest that made the compromised claims relatively strong).

44 *In re* RJR Nabisco, Inc. S'holders Litig., 14 DEL. J. CORP. L. 1132, 1159 (Del. Ch. 1989); *see El Paso*, 41 A.3d at 439 ("[A] range of human motivations ... can inspire fiduciaries and their advisors to be less than faithful to their contextual duty to pursue the best value for the company's stockholders."). *See generally* Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1947 (2003) [hereinafter Griffith, *Last Period*] ("Directors and managers may favor one deal over another because it is more in line with their self image and view of the world or because it is more likely to cause them to be remembered fondly by employees or the business press.").

45 Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 715 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989); *accord*Upper Deck Co. v. Topps Co. (*In re* Topps Co. S'holders Litig.), 926 A.2d 58, 90 (Del. Ch. 2007) ("[I]t is often the case that founders (and sons of founders) believe that their businesses stand for something more than their stock price. Founders therefore often care how their family legacy--in the form of a corporate culture that treats workers and consumers well, or a commitment to product quality--will fare if the corporation is placed under new stewardship.").

46 *In re* Toys "R" Us, Inc. S'holders Litig., 877 A.2d 975, 1002 (Del. Ch. 2005); *see Topps Co*., 926 A.2d at 64 ("When directors bias the process against one bidder and toward another not in a reasoned effort to maximize advantage for the stockholders, but to tilt the process toward the bidder more likely to continue current management, they commit a breach of fiduciary duty.").

47 *El Paso*, 41 A.3d at 439 n.24 (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986)).

48 506 A.2d at 182.

49 *See id*. at 177.

50 *See id*. at 184.

51 *Id*. at 185.

52 Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989); *see In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 731 (Del. Ch. 1999), *aff'd*, 757 A.2d 1278 (Del. 2000) (describing *Revlon* as "an important comment on the need for heightened judicial scrutiny when reviewing situations that present unique agency cost problems"); W. Point-Pepperell, Inc. v. J.P. Stevens & Co. (*In re* J.P. Stevens & Co., Inc. S'holders Litig.), 542 A.2d 770, 771 (Del. Ch. 1988) (positing that *Revlon* is best viewed as a duty of loyalty case); *In re* Fort Howard Corp. S'holders Litig., 14 DEL. J. CORP. L. 699, 722 (Del. Ch. 1988) (observing that *Revlon* was "essentially a breach of loyalty case in which the board was not seen as acting in the good faith pursuit of the shareholders' interests").

53 Bainbridge, *Director Primacy*, *supra* note 31, at 789; *accord* Stephen M. Bainbridge, *The Story of* Smith v. Van Gorkom, *in*CORPORATE LAW STORIES 219, 223 (J. Mark Ramseyer, ed., 2009) [hereinafter Bainbridge, *Story of* Van Gorkom] ("Corporate acquisitions are a classic example of what game theories refer to as 'final period problems."'); *see* Sean J. Griffith, *The Costs and Benefits of Precommitment: An Appraisal of* Omnicare v. NCS Healthcare, 29 J. CORP. L. 569, 616 (2004) [hereinafter Griffith, *Precommitment*] ("Acquisitions create a last period scenario for target managers and directors because the reorganization of the corporate structure following the transaction is likely either to end their tenure or, at the very least, significantly change their role in the company."); Griffith, *Last Period*, *supra* note 44, at 1945 ("Although the drama and hyperbole of a bust up acquisition is typically not present in the context of a 'friendly' merger--after all, the business continues to operate and many employees keep their jobs--last period features are still present at the level of the board of directors and senior management, many of whom are likely to be in the last period of their employment."); Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 536 (2002) [hereinafter Black & Kraakman, *Hidden Value*] ("In [negotiated acquisitions], the target's managers and board will likely lose their positions. They face a strong conflict of interest, yet they are in a final period where reputation and fear of future discipline lose their force as constraints on self-interested behavior."); Ronald J. Gilson & Reinier Kraakman, *What Triggers* Revlon?, 25 WAKE FOREST L. REV. 37, 54 (1990) ("A friendly merger in which the ownership of a constituent company remains diffuse but de facto control shifts from one management team to another, is no less a control shift than a transaction that gives rise to a control block .... [T]he absence of [a controller] ... does not reduce the danger that [stockholder] interests will suffer under the merger terms negotiated by their own management.").

54 Ronald J. Gilson & Bernard S. Black, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 720 (David L. Shapiro et al. eds., 2d ed. 1995).

55 Griffith, *Precommitment*, *supra* note 53, at 616.

56 Bainbridge, *Director Primacy*, *supra* note 31, at 785 ("Corporate directors operate within a pervasive web of accountability mechanisms that substitute for monitoring by residual claimants. A variety of market forces provide important constraints. The capital and product markets, the internal and external employment markets, and the market for corporate control all constrain shirking by firm agents.").

57 *Id*. at 789.

58 Griffith, *Last Period*, *supra* note 44, at 1947 (footnotes omitted).

59 Bainbridge, *Director Primacy*, *supra* note 31, at 788 (footnotes omitted).

60 *Id*. (footnote omitted).

61 Griffith, *Last Period*, *supra* note 44, at 1948.

62 *See id*. at 1949-53.

63 City Capital Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 796 (Del. Ch. 1988).

64 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 30 (Del. Ch. 2010).

65 *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 117 (Del. Ch. 2007).

66 Bainbridge, *Story of* Van Gorkom, *supra* note 53, at 224.

67 Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34, 42 (Del. 1993).

68 Bainbridge, *Story of* Van Gorkom, *supra* note 53, at 224.

69 *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598-600 (Del. Ch. 2010) (footnotes omitted).

70 *Id*. at 599 n.181; *see QVC*, 637 A.2d at 42 & n.9 (contrasting "those rare situations which mandate that a court ... subject[] the directors' conduct to enhanced scrutiny" with situations where "[a]ctual self-interest is present and affects a majority of the directors," to which entire fairness applies). *See generally* Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 870-83 (2004).

71 *See supra* notes 35-37 and accompanying text.

72 *See*Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1385-86 (Del. 1995) (adopting "range of reasonableness" test for *Unocal* review); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (holding that directors must prove that they selected a response that was "reasonable in relation to the threat posed"); *see also* Lawrence A. Cunningham & Charles A. Yablon, *Delaware Fiduciary Duty Law After* QVC *and* Technicolor: *A Unified Standard (and the End of* Revlon *Duties?)*, 49 BUS. L. 1593, 1605-20 (1994) (describing evolution of Delaware cases towards single standard of reasonableness).

73 637 A.2d at 45.

74 *See In re* Lear Corp. S'holder Litig., 926 A.2d 94, 115 (Del. Ch. 2007).

75 *Id*.; *see QVC*, 637 A.2d at 42 ("[A] court subjects the directors' conduct to enhanced scrutiny to ensure that it is reasonable."); *Dollar Thrifty*, 14 A.3d at 599 n.181 (explaining that as a form of enhanced scrutiny, *Revlon* "requir[es] that the directors demonstrate that their decision was well-motivated and was a reasonable way to advance the proper interests they must serve, which are the best interests of the corporation and the stockholders").

76 *See*Malpiede v. Townson, 780 A.2d 1075, 1083 (Del. 2001) ("In our view, *Revlon* neither creates a new type of fiduciary duty in the sale-of-control context nor alters the nature of the fiduciary duties that generally apply."); *see also*Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) ("[T]here are no legally prescribed steps that directors must follow to satisfy their *Revlon* duties."); *QVC*, 637 A.2d at 43 ("The directors' fiduciary duties in a sale of control context are those which generally attach. In short, 'the directors must act in accordance with their fundamental duties of care and loyalty."'); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("[T]he basic teaching of [*Revlon* and *Unocal*] is simply that the directors must act in accordance with their fundamental duties of care and loyalty."); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989) ("Beyond [seeking the alternative offering the best value reasonably available for stockholders], there are no special and distinct "'*Revlon* duties."D'); *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 731 (Del. Ch. 1999) ('*'%7FRevlon* duties' refer only to a director's performance of his or her duties of care, good faith and loyalty in the unique factual circumstance of a sale of control over the corporate enterprise.").

77 *See Barkan*, 567 A.2d at 1286 ("Revlon does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest."); *Dollar Thrifty*, 14 A.3d at 595-96 (describing judicial scrutiny under *Revlon*); *id*. at 600 ('*%7FRevlon* is often mistakenly referred to as creating a duty to auction."); *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007) ("The mere fact that a board did not, for example, do a canvass of all possible acquirers before signing up an acquisition agreement does not mean that [the board] necessarily acted unreasonably.").

78 *Barkan*, 567 A.2d at 1286; *accord Netsmart*, 924 A.2d at 192 ("This duty, often called a *Revlon* duty, does not, of course, require every board to follow a judicially prescribed checklist of sales activities.").

79 *Dollar Thrifty*, 14 A.3d at 595-96 (footnotes and internal quotation marks omitted).

80 *Netsmart*, 924 A.2d at 192.

81 *Barkan*, 567 A.2d at 1286; *Dollar Thrifty*, 14 A.3d at 604.

82 *See, e.g.*, Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 65-68 (Del. 1989) (finding no breach of duty under either business judgment review or enhanced scrutiny where a board rejected potentially higher two-tier offer for an all-cash bid and holding that board acted reasonably in determining that two-tier bid delivered less value because of conditionality); Golden Cycle, LLC v. Allan, 24 DEL. J. CORP. L. 688, 714-15 (Del. Ch. 1998) (finding no breach of duty under enhanced scrutiny where board rejected facially higher cash bid and accepted nominally lower cash bid and holding board acted reasonably in determining that facially higher bid delivered less value because of time-value of money, conditionality, and greater risk of non-consummation); Norberg v. Young's Mkt. Co., 16 DEL. J. CORP. L. 351, 358-59 (Del. Ch. 1989) (refusing to enjoin a management buyout based on speculation that a higher offer could be procured); *In re* RJR Nabisco, Inc. S'holders Litig., 14 DEL. J. CORP. L. 1132, 1159 (Del. Ch. 1989) (finding that board acted reasonably in choosing nominally lower bid over competing management buyout); Freedman v. Rest. Assocs. Indus., Inc., 13 DEL. J. CORP. L. 651, 667 (Del. Ch. 1987) (noting that board may prefer a nominally lower bid that has a higher likelihood of closing).

83 *See Dollar Thrifty*, 14 A.3d at 617 (finding reasonable board's decision to enter into a merger agreement that "set a floor under the market price ..., left its stockholders with the choice of turning down the deal at relatively low cost, and [created] the chance to reap more from a bidder ... who might show up"); *In re* Fort Howard Corp. S'holders Litig., 14 DEL. J. CORP. L. 699, 722 (Del. Ch. 1988) ("Revlon explicitly recognized that a disinterested board ... may enter into lock-up agreements if the effect was to promote, not to impede shareholder interests. That can only mean if the *intended* effect is such, for the validity of the agreement itself cannot be made to turn upon how accurately the board did foresee the future.").

84 *Golden Cycle*, 24 DEL. J. CORP. L. at 712.

85 *See*Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).

86 *See id*. at 242.

87 *Id*.

88 *Id*.

89 488 A.2d 858 (Del. 1985).

90 R. Franklin Balotti & A. Gilchrist Sparks, III, *Deal-Protection Measures and the Merger Recommendation*, 96 NW. U. L. REV. 467, 468-69 (2002) (footnote omitted); *accord* William T. Allen, *Understanding Fiduciary Outs: The What and the Why of an Anomalous Concept*, 55 BUS. LAW. 653, 654 (2000) ("One of the holdings of the Delaware Supreme Court in *Van Gorkom* was that corporate directors have no fiduciary right (as opposed to power) to breach a contract.") (footnotes omitted); John F. Johnston, *Recent Amendments to the Merger Sections of the DGCL Will Eliminate Some--But Not All--Fiduciary Out Negotiation and Drafting Issues*, 1 MERGERS & ACQUISITIONS L. REP. (BNA) No. 20, 777, 778 (1998) ("[T]here is ... no public policy that permits fiduciaries to terminate an otherwise binding agreement because a better deal has come along, or circumstances have changed."); A. Gilchrist Sparks, III, *Merger Agreements Under Delaware Law--When Can Directors Change Their Minds?*, 51 U. MIAMI L. REV. 815, 817 (1997) ("[*Van Gorkom*] makes it clear that under Delaware law there is no implied fiduciary out or trump card permitting a board to terminate a merger agreement before it is sent to a stockholder vote."); John F. Johnston & Frederick H. Alexander, *Fiduciary Outs and Exclusive Merger Agreements--Delaware Law and Practice*, 11 INSIGHTS, NO. 2, 15, 15 (1997) ("[T]he Delaware Supreme Court held that directors of Delaware corporations may not rely on their status as fiduciaries as a basis for (1) terminating a merger agreement due to changed circumstances, including a better offer; or (2) negotiating with other bidders in order to develop a competing offer.").

91 Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179, 185 (Del. 1986).

92 Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 n.2 (Del. 1989); *accord*Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367 (Del. 1993) (applying enhanced scrutiny under *Revlon* to a pre-*Revlon* transaction).

93 *See, e.g.*, *Van Gorkom*, 488 A.2d at 868-69 (describing terms of challenged merger as acquisition of TransUnion by an entity controlled by the Pritzker family for $55 per share in cash).

94 *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 602 (Del. Ch. 2010) ("Van Gorkom, after all, was really a *Revlon* case.") (footnotes omitted); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) ("I count [*Van Gorkom*] not as a 'negligence' or due care case involving no loyalty issues but as an early, as of its date not yet fully rationalized '*Revlon*' or 'change of control' case."); *see also* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, n.39 (2002) [hereinafter Allen, Jacobs, & Strine, *Realigning the Standard*] (*'%7FVan Gorkom* ... must also be viewed as part of the Delaware courts' effort to grapple with the huge increase in mergers and acquisitions activity in the 1980s and the new problems that posed for judicial review of director conduct."); William T. Allen, *The Corporate Director's Fiduciary Duty of Care and the Business Judgment Rule Under U.S. Corporate Law*, *in*COMPARATIVE CORPORATE GOVERNANCE--STATE OF THE ART AND EMERGING RESEARCH 307, 325 (Klaus J. Hopt et al. eds., 1998) ("In retrospect, [*Van Gorkom*] can be best rationalized not as a standard duty of care case, but as the first case in which the Delaware Supreme Court began to work out its new takeover jurisprudence."); Black & Kraakman, *Hidden Value*, *supra* note 53, at 522 (*'%7FVan Gorkom* should be seen not as a business judgment rule case but as a takeover case that was the harbinger of the then newly emerging Delaware jurisprudence on friendly and hostile takeovers, which included the almost contemporaneous *Unocal* and *Revlon* decisions."); Jonathan R. Macey & Geoffrey P. Miller, Trans Union *Reconsidered*, 98 YALE L.J. 127, 128 (1988) (*"Trans Union* is not, at bottom, a business judgment case. It is a takeover case."); Stephen M. Bainbridge, *Why A Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 51-52 (2002) (interpreting "the oft-maligned decision in *Smith v. Van Gorkom*" as addressing a breakdown in the group decision-making process in which the board "blindly relied on Van Gorkom," thereby enabling Van Gorkom to not disclose and the board to not discover "key facts suggesting that the deal was not as attractive as it seemed on first look").

95 WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C., No. 2993, 2010 WL 3706624, at *17 (Del. Ch. Sept. 17, 2010); *accord*Corwin v. DeTrey, 16 DEL. J. CORP. L. 267, 273 (Del. Ch. Dec. 4, 1989) ("[T]he directors of the selling corporation are not free to terminate an otherwise binding merger agreement just because they are fiduciaries and circumstances have changed.").

96 Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) ("There is only one *Revlon* duty--to 'get the best price for the stockholders at the sale of the company.'"); *see also*Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34, 44 (Del. 1993) ("In the sale of control context, the directors must focus on one primary objective--to secure the transaction offering the best value reasonably available for the stockholders--and they must exercise their fiduciary duties to further that end.").

97 *See, e.g.*, *Lyondell*, 970 A.2d at 242 ("The duty to seek the best available price applies only when a company embarks on a transaction--on its own initiative or in response to an unsolicited offer--that will result in a change of control."); Air Prods. & Chems., Inc. v.

Airgas, Inc., 16 A.3d 48, 101 (Del. Ch. 2011) ("It is not until the board is under *Revlon* that its duty 'narrow[s]' to getting the best price reasonably available for stockholders in a sale of the company.").

98 *See* Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519, 553-58 (2012); Allen, Jacobs, & Strine, *Realigning the Standard*, *supra* note 94, at 451-52; Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 461-67 (1993).

99 Eisenberg, *supra* note 98, at 437.

100 *Id*.

101 *See* Velasco, *supra* note 98, at 521; Eisenberg, *supra* note 98, at 437.

102 Eisenberg, *supra* note 98, at 454.

103 *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 263 (Del. 2000) (explaining justifications for business judgment rule); Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996) (same); Velasco, *supra* note 98, at 54 (explaining similar justifications for divergence between standards of conduct and standards of review); Allen, Jacobs, & Strine, *Realigning the Standard*, *supra* note 94, at 451-52 (same); Eisenberg, *supra* note 98, at 444 (same).

104 Schoon v. Smith, 953 A.2d 196, 206 (Del. 2008) ("In discharging their management function, 'directors owe fiduciary duties of care and loyalty to the corporation and its shareholders."') (footnote omitted).

105 188 A.2d 125, 130 (Del. 1963). As part of this obligation, "directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must then act with requisite care in the discharge of their duties." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by*Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

106 Eisenberg, *supra* note 98, at 439 (describing the standard of conduct as simply "a special case of the duty of care imposed throughout the law .... [I]f a person assumes a role whose performance involves the risk of injury to others, he is under a duty to perform that role carefully ....").

107 5 A.2d 503, 511 (Del. 1939); *see also* Julian Velasco, *How Many Fiduciary Duties Are There in Corporate Law?*, 83 S. CAL. L. REV. 1231, 1240 (2010) (discussing *Guth*).

108 Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

109 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010); *accord*Dodge v. Ford, 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end.").

110 Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Firms Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012) [hereinafter Strine, *For-Profit Firms*].

111 *Id*. at 147-48.

112 N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 99 (Del. 2007); *accord*Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998) ("The directors of Delaware corporations stand in a fiduciary relationship not only to the stockholders but also to the corporations upon whose boards they serve."); Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) ("Our starting point is the fundamental principle of Delaware law that the business and affairs of a corporation are managed by or under the direction of its board of directors. DEL. CODE ANN. tit. 8, § 141(a) (2013). In exercising these powers, directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders."); TW Servs. v. SWT Acquisition Corp., 14 DEL. J. CORP. L. 1169, 1183 (Del. Ch. 1989) (describing as "non-controversial" the proposition that "the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run").

113 *See* Strine, *For-Profit Firms*, *supra* note 110, at 147-48.

114 *See id*. at 147 n.34.

115 This statement assumes that the certificate of incorporation has not modified the directors' managerial authority and concomitant duties. *See*DEL. CODE ANN. tit. 8, § 141(a) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, *except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation*.") (emphasis added). The language of Section 141(a) indicates that while the duty of loyalty cannot be eliminated, it could be expanded or redirected to include additional or different beneficiaries. Consequently, the principle that corporations must be operated for the benefit of the common stockholders is likely itself a default rule that the parties to the corporate contract can modify. *See id*.; *see also id*. § 102(b)(1) (authorizing the charter to contain "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders ... if such provisions are not contrary to the laws of this State"). "[S]hareholders are not inherently privileged relative to other corporate constituents. Instead, as with the rights of other corporate constituents, the rights of shareholders are established through bargaining, even though the form of the bargain is a take-it-or-leave-it standard form contract provided off-the-rack by the default rules of corporate law and the corporation's organic documents." Bainbridge, *Director Primacy*, *supra* note 31, at 777.

116 *In re* Trans World Airlines, Inc. S'holder Litig., 14 DEL. J. CORP. L. 870, 881 (Del. Ch. 1988) (observing that special negotiating committee members who understood their obligation was only to determine fairness and not the maximization of stockholder value had an "an imperfect appreciation of the proper scope and purpose of such a special committee"); *see In re* First Bos., Inc. S'holders Litig., No. 10338, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) (explaining that directors who serve on a special committee to evaluate an interested transaction are expected "to approve only a transaction that is in the best interests of the public shareholders, [and] to say no to any transaction that is not fair to those shareholders and is not the best transaction available").

117 *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010).

118 *Id*.; *see also*Thomas v. Kempner, 398 A.2d 320, 323-24 (Del. Ch. 1979); Robinson v. Pittsburgh Oil Ref. Co., 126 A. 46, 48 (Del. Ch. 1924). *See generally* Bainbridge, *Director Primacy*, *supra* note 31, at 778 ("While the law clearly establishes shareholder wealth maximization as one of the default contractual rights of shareholders, the business judgment rule effectively precludes courts from reviewing corporate decisions that allegedly further interests other than that of shareholder wealth maximization.") (footnote omitted); Allen, Jacobs, & Strine, *Realigning the Standard*, *supra* note 94, at 452 ("[T]he business judgment review standard ('rationality') diverges from, and becomes more lenient than, the normative standard of conduct ('reasonableness').'DD') (footnote omitted).

119 *See* Allen, Jacobs, & Strine, *Realigning the Standard*, *supra* note 94, at 453 (defining an irrational decision as "one that is so blatantly imprudent that it is inexplicable, in the sense that no well-motivated and minimally informed person could have made it"); *see also*Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Irrationality is the outer limit of the business judgment rule. Irrationality may be the functional equivalent of the waste test or it may tend to show that the decision is not made in good faith, which is a key ingredient of the business judgment rule."). The two possibilities identified in *Brehm* are synonymous, because waste is defined as a transaction "so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration," i.e. no one could have reached such a conclusion in good faith. *Id*. at 263; *see also*White v. Panic, 783 A.2d 543, 553-55 (Del. 2001); W. Point-Pepperell, Inc. v. J.P. Stevens & Co. (*In re* J.P. Stevens & Co., Inc. S'holders Litig.), 542 A.2d 770, 780-81 (Del. Ch. 1988) ("A court may, however, review the substance of a business decision made by an apparently well motivated board for the limited purpose of assessing whether that decision is so far beyond the bounds of reasonable judgment that it seems essentially inexplicable on any ground other than bad faith.").

120 *In re* Netsmart Techs. S'holder Litig., 924 A.2d 171, 192 (Del. Ch. 2007); *accord Dollar Thrifty*, 14 A.3d at 596 n.170 (quoting *Netsmart*, 924 A.2d at 192); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1000 (Del. Ch. 2005) ("[In *Revlon*,] the Supreme Court held that courts would subject directors subject to ... a heightened standard of reasonableness review, rather than the laxer standard of rationality review applicable under the business judgment rule.").

121 Evidence of bad faith can be sufficient to rebut the business judgment rule. *See*Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27, 53 (Del. 2006) ("Our law clearly permits a judicial assessment of director good faith for that former purpose [of rebutting the business judgment rule]."); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 40 (Del. Ch. 2010) ("Under Delaware law, when a plaintiff demonstrates the directors made a challenged decision in bad faith, the plaintiff rebuts the business judgment rule presumption, and the burden shifts to the directors to prove that the decision was entirely fair to the corporation and its

stockholders."); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 760-79 (Del. Ch. 2005), *aff'd*, 906 A.2d 27, 50 (Del. 2006) (addressing whether board of directors breached its duties in connection with termination of corporation's president).

122 Freedman v. Rest. Assocs. Indus., Inc., 13 DEL. J. CORP. L. 651, 661 (Del. Ch. 1987); Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 741 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989) ("Revlon was not a radical departure from existing law (*i.e.*, it has 'always' been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price) ...."); City Capital Assocs. Ltd. P'ship v. Interco Inc., 551 A.2d 787, 802 (Del. Ch. 1988) (*'%7FRevlon* ... can be seen as an application of traditional Delaware law: a fiduciary cannot sell for less when more is available on similar terms.").

123 567 A.2d 1279, 1286 n.2 (Del. 1989).

124 *Toys "R" Us*, 877 A.2d at 1000 (noting that the obligation to maximize stockholder value "is rooted in old trust principles and is mundane to those who believe that stockholders are the only corporate constituency whose best interests are an end, rather than an instrument, of the corporate form").

125 *See id*.; *see also* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 927 n.25 (2001) [hereinafter Strine, *Categorical Confusion*] (stating that the "Revlon principle grows out of the traditional principle that fiduciaries must sell trust assets for their highest value" and citing Wilmington Trust Co. v. Coulter, 200 A.2d 441, 448 (Del. 1964), and Robinson v. Pittsburgh Oil Ref. Corp., 126 A. 46, 49 (Del. Ch. 1924), as demonstrating that principle).

126 *See*Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34, 44 (Del. 1993) (citing *Wilmington Trust Co*., 200 A.2d 441, a trust case, as one of the sources of the directors' duty to seek the best transaction available for stockholders).

127 *Freedman*, 13 DEL. J. CORP. L. at 661; *see also City Capital Assocs. Ltd. P'ship*, 551 A.2d at 802 ("Revlon ... can be seen as an application of traditional Delaware law: a fiduciary cannot sell for less when more is available on similar terms.").

128 Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 741 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

129 *See, e.g*., WILLIAM J. CARNEY, MERGERS & ACQUISITIONS: CASES AND MATERIALS 294 (3d ed. 2011) (citing empirical evidence that 50% of top executives leave their employment within three years of a change of control); James F. Cotter & Marc Zenner, *How Managerial Wealth Affects the Tender Offer Process*, 35 J. FIN. ECON. 63, 88-94 (1994) (finding empirical support for proposition that managers resist tender offers out of self-interest); Kenneth J. Martin & John J. McConnell, *Corporate Performance, Corporate Takeovers and Management Turnover*, 46 J. FIN. 671, 677 (1991) ("The dramatic increase in the turnover rate of top managers following takeovers ... indicates that takeovers are an important device for altering the top management of target firms."); James P. Walsh, *Top Management Turnover Following Mergers and Acquisitions*, 9 STRATEGIC MGMT. J. 2 (citing empirical evidence that management turnover in acquired or merged firms was higher than standalone firms over one, two, three, four, and five year periods); Jay C. Hartzell, et al., *What's In It for Me? CEOs Whose Firms Are Acquired*, 17 REV. FIN. STUD. 37, 37-61 (2004) (citing empirical evidence that target CEOs are infrequently retained and that turnover for target CEOs is significantly higher than CEOs of standalone companies; and reviewing extensive literature yielding consistent results).

130 Chancellor Chandler commented on the irony of a transaction that is not a "change-in-control" for purposes of *QVC* nevertheless triggering change-in-control benefits when ruling on litigation challenging the board of Caremark RX, Inc.'s decision to proceed with its stock-for-stock merger with CVS Corporation in the face of a competing bid by Express Scripts, Inc.:

Even defendants such as Crawford, who will retain substantial authority as Chairman [after the merger], benefit from this "change of control" acceleration of their options. Defendants insist that this "merger of equals" does not, however, constitute a corporate change of control for purposes of this Court's jurisprudence under *Revlon* .... This brings to mind Lewis Carroll's Humpty Dumpty, who made a similar assertion when he claimed that "[w]hen I use a word ... it means just what I choose it to mean--neither more nor less."

La. Mun. Police Emps.' Ret. Sys. v. Crawford, 918 A.2d 1172, 1180 n.6 (Del. Ch. 2007). He regarded the Caremark directors' position as having "a very *Through the Looking Glass* feel to it." *Id*. While recognizing that "words may change in legal significance depending upon their context," he nevertheless found it "an unfortunate and disappointing spectacle" for "a board of directors [to] insist that it simultaneously deserves the protection of the business judgment rule because the company is not changing hands, while a massive personal windfall is bestowed because it is." *Id*. In *Crawford*, the Caremark directors also faced an additional subtle conflict, also applicable regardless of the form of consideration: the existing merger agreement, unlike a competing proposal, provided for broad third-party indemnification that could extend to claims against directors for backdating stock options, which implicated the duty of loyalty and raised questions about their good faith. *Id*. at 1189-90.

131 Julie Wulf, *Do CEOs in Mergers Trade Power for Premium? Evidence from "Mergers of Equals,"* 20 J. LAW & ECON. 60, 96 (2004) (citing empirical evidence suggesting that target CEOs negotiate shared control in mergers in exchange for lower deal premiums); Strine, *Categorical Confusion*, *supra* note 125, at 931 ("Is it not the case that issues relating to managerial and board positions frequently dominate the discussions?"); John C. Coates, IV, *Measuring the Domain of Mediating Hierarchy: How Contestable Are U.S. Public Corporations?*, 24 J. CORP. L. 837, 858-59 & n.107 (1999) (noting that in most friendly deals the "managers and directors of the target company will lose control over the future of the organization"); *see also*ROBERT E. SPATT & ARIANA S. COOPER, SIMPSON THACHER & BARTLETT LLP, SOCIAL ISSUES IN SELECTED RECENT MERGERS AND ACQUISITIONS TRANSACTIONS 2004 - 2012 SUPPLEMENT (2012) (cataloguing the results of board and management negotiations over control and governance of merged companies); Buhui Qiu & Fadi Yakoub, Do Target CEOs Trade Premiums for Personal Benefits? Evidence from the Last Two Merger Waves (Aug. 2011) (unpublished manuscript), *available at* http:// business.uc.edu/content/dam/business/departments/finance/docs/CEO%20Retention %CC20and%CC20Severance%CC20Pay%C1#82011-full%20copy.pdf (citing empirical evidence suggesting that CEOs trade severance payments for deal premium).

132 Strine, *Categorical Confusion*, *supra* note 125, at 930.

133 *See In re* El Paso Corp. S'holders Litig., 41 A.3d 432, 444-45 (Del. Ch. 2012) (observing that the loyalty issues raised by concealed motives and financial interests of CEO and financial adviser led to negotiation failures that were "compounded by a deal protection package that (1) precluded termination of the Merger Agreement if a favorable bid for the E&P business emerged; and (2) made it very expensive for a bidder for the pipeline business to make an offer because of the $650 million termination fee and Kinder Morgan's matching rights"); Griffith, *Last Period*, *supra* note 44, at 1947 ("If the management team is able to protect the self-serving transaction with deal protection provisions, it will be further insulated from the disciplinary effect of the market for corporate control, leaving the outgoing management team free to serve their own self-interest with relative impunity.").

134 Although this Article argues only for the doctrinal equivalence of *Revlon* deals and stock-for-stock deals, an article by then-Vice Chancellor Strine went a step further and analogized stock-for-stock transactions to interested transactions. *See* Strine, *Categorical Confusion*, *supra* note 125, at 939 ("Because of the importance of the merger transactions and their profound effect on management's future, deal protection measures that protect management's favored deal tend to give a stock-for-stock merger agreement the flavor of an interested transaction.").

135 *In re* 3Com S'holders Litig., No. 5067, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009); *accord In re* Atheros Commc'ns, Inc., No. 6124, 2011 WL 864928, at *7 n.61 (Del. Ch. Mar. 4, 2011) (quoting *3Com*, 2009 WL 5173804, at *7); *see also In re* Smurfit-Stone Container Corp. S'holder Litig., 37 DEL. J. CORP. L. 261, 21 (Del. Ch. 2011) (referring to deal protections as "standard in form"); *In re* BJ's Wholesale Club, Inc. S'holders Litig., 38 DEL. J. CORP. L. 311, 13 (Del. Ch. 2013) (observing that combination of no-shop, match rights, termination fee, and force-the-vote provision has "routinely been upheld"). *But see In re* Compellent Techs. Inc. S'holder Litig., No. 6084, 2011 WL 6382523, at *5 (Del. Ch. Dec. 9, 2011) ("M & A practitioners have developed a taxonomy of familiar provisions that frequently appear in merger agreements, such as no-shop clauses, information rights, matching rights, and termination fees. Embracing these generic terms, the defendants have listed the types of provisions found in the Original Merger Agreement and labeled them 'customary.' But to identify defensive measures by type without referring to their details ignores the spectrum of forms in which deal protections can appear."); *Crawford*, 918 A.2d at 1181 n.10 (disagreeing that deal protections should be rubber-stamped as "customary").

136 *See*AM. BAR ASS'N, 2012 STRATEGIC BUYER/PUBLIC TARGET MERGERS & ACQUISITIONS DEAL POINTS STUDY (2012) (detailing the use of deal protections, including no-shops, no-talks, match rights, and breakup fees, in cash or stock transactions over $100 million announced in 2011); *see also*ACE Ltd. v. Capital Re Corp., 747 A.2d 95, 97-99, 108 (Del. Ch. 1999) (describing defensive measures in merger agreement governing all-stock transaction; and observing the practice of "imbed[ding] provisions in stock-for-stock mergers that are intentionally designed to prevent another bidder, through a tender offer or rival stock-for-stock bid, from preventing the consummation of a transaction").

137 Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 931 (Del. 2003) (reaffirming the position that "defensive devices ... must withstand enhanced judicial scrutiny under the *Unocal* standard of review, even when that merger transaction does not result in a change of control"); Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140, 1151 (Del. 1989)

("structural safety devices" in a merger agreement "are properly subject to a *Unocal* analysis"); *accord*McMillan v. Intercargo Corp., 768 A.2d 492, 506 n.62 (Del. Ch. 2000) ("Under a 'duck' approach to the law, 'deal protection' terms self-evidently designed to deter and make more expensive alternative transactions would be considered defensive and reviewed under the [*Unocal*] standard."). *See generally* Strine, *Categorical Confusion*, *supra* note 125 (arguing for *Unocal* review of defensive measures in stock-for-stock merger agreements).

138 *See Omnicare*, 818 A.2d at 928.

139 Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34, 42 (Del. 1993) ("When a majority of a corporation's voting shares are acquired by a single person or entity, or by a cohesive group acting together, there is a significant diminution in the voting power of those who thereby become minority stockholders.").

140 *Id*.

141 *Id*.

142 *Id*. at 43.

143 *Id*.

144 *Id*.

145 *Id*.

146 A strong argument can be made that *QVC*'s change-of-control rationale does not justify elevating the standard of review because many decisions that boards make have "economic consequences of considerable significance" for stockholders. *Id*. Respect for board decision-making is generally not undermined by the magnitude of the decision. *See Regan*, *supra* note 33, at 129 ("[T]he undisputed significance of a change-of-control transaction is, without more, an insufficient doctrinal basis to displace the deference otherwise accorded to decisions made in good faith by informed and disinterested directors, even in the context of a corporate takeover."). What should be required to elevate the standard of review is some form of actual or threatened conflict that undermines the legal system's confidence in the fiduciaries' decisions. A potential loss of voting power has significance, but significance does not necessarily mean conflict, which arises from the divergent interests endemic to negotiated acquisitions when managers and directors are (or perceive that they could be) in their final period. The fact that the post-transaction entity would have a controlling stockholder accentuates the final period problem because after the deal closes, the controller has greater flexibility to restructure the entity at will. To protect against the uncertainty this creates, managers may be more inclined to bargain in their own interests rather than those of the stockholders. However, this is a matter of degree, not a difference in kind, because every negotiated acquisition gives rise to the final period problem. Without the taint of conflict, the change-in-control rationale is insufficient to support enhanced scrutiny. Once the role of conflict is recognized, the change-in-control rationale is no longer necessary.

147 *QVC*, 637 A.2d at 43.

148 *See, e.g.*, Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310, 313 (Del. Ch. 2010), *aff'd*, 15 A.3d 218 (Del. 2011) (finding adoption of rights plan was reasonable response to threat of creeping acquisition); NACCO Indus., Inc. v. Applica Inc., 997 A.2d 1, 30 (Del. Ch. 2009) (discussing possible responses to alleged creeping acquisition by hedge fund); La. Mun. Police Emps.' Ret. Sys. v. Fertita, No. 4339, 2009 WL 2263406, at *8 (Del. Ch. July 28, 2009) (declining to dismiss claim that board breached its fiduciary duties by failing to employ a rights plan to block a creeping acquisition attempt, when considered "together with other suspect conduct").

149 *Cf.*Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1337 (Del. 1987) (approving reasonableness of board's facilitation of street sweep by friendly investor).

150 *See In re* Dunkin' Donuts S'holders Litig., 16 DEL. J. CORP. L. 1443, 1459 (Del. Ch. 1990) ("A bidder's objective is to identify an underpriced corporation and to acquire it at the lowest price possible. It is a straightforward investment decision. When the bidder, as in the typical situation, owes no direct duty to stockholders, it has no obvious reason to try to 'maximize shareholder value.' Indeed, its interest, if successful, will minimize shareholder value."); *accord*Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 789 A.2d 1216, 1227 (Del. Ch. 2001), *aff'd sub nom.*, Mentor Graphics Corp. v. Shapiro, 818 A.2d 959 (Del. 2003) ("The *Dunkin' Donuts* Court recognized the reality that bidders have economic interests that are inherently and structurally in conflict with the target company's

stockholders' interest in receiving maximum available value. A bidder for control, like any rational buyer, wants (and has a fiduciary duty to its own investors) to acquire the target company as cheaply as possible.").

151 *See, e.g.*, Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119 (2005) (discussing varying theories for source of control premium and their legal implications); Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127 (2001) (same); John C. Coates, *'%7FFair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251 (1999) (same).

152 *See* Brian J.M. Quinn, *Bulletproof: Mandatory Rules for Deal Protection*, 32 J. CORP. L. 865, 878 (2007) ("Negotiated acquisitions are, in principle, bargaining problems. Bargaining over price represents a division of the economic surplus between the buyer and the seller.") (footnote omitted); Lucian Ayre Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1045 (1982) ("Premiums are raised in unfriendly takeovers in which management actually seeks competing offers, and in negotiated acquisitions in which management ... bargain[s] for increased premiums.").

153 *See* Lawrence A. Hamermesh, *Premiums in Stock-for-Stock Mergers and Some Consequences in the Law of Fiduciary Duties*, 152 U. PA. L. REV. 881, 886 (2003) (reporting a mean premium from 1999-2002 of 30% of stock-for-stock mergers versus 36% in cash acquisitions and a median premium of 28.26% for stock-for-stock mergers, essentially identical to the median of 28.07% in cash acquisitions).

154 Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34 (Del. 1993) (quoting Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 739 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989)).

155 *Id*. at 43.

156 This is simply a matter of propositional logic.

157 Strine, *Categorical Confusion*, *supra* note 125, at 929-30.

158 *Id*. at 930.

159 *See generally QVC*, 637 A.2d 34.

160 *See generally* Morgan White-Smith, *Revisiting* Revlon: *Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177 (2012).

161 *See, e.g.*, *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 578 (Del. Ch. 2010) (noting that when evaluating competing bids, the target board appropriately considered relative antitrust risk and contractual provisions addressing regulatory issues, indicating that "[v]alue is not value if it is not ultimately paid").

162 TW Servs. v. SWT Acquisition Corp., 14 DEL. J. CORP. L. 1169, 1184 (Del. Ch. 1989) ("For [stockholders being eliminated for cash,] it does not matter that a buyer who will pay more cash plans to subject the corporation to a risky level of debt, or that a buyer who offers less cash will be a more generous employer for whom labor peace is more likely.").

163 *Dollar Thrifty*, 14 A.3d at 612 ("[O]ur law does not require a well-motivated board to simply sell the company whenever a high market premium is available (such as at a distress sale) or to eschew selling when a sales price is attractive in the board's view, but the market premium is comparatively low, because the board believes the company is being valued quite fully."); Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 739 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989) ("But just as the Constitution does not enshrine Mr. Herbert Spencer's social statics, neither does the common law of directors' duties elevate the theory of a single, efficient capital market to the dignity of a sacred text.").

164 *See generally*Paramount Commc'ns Inc. v. QVC Network Inc. (*In re* Paramount Commc'ns Inc. S'holder Litig.), 637 A.2d 34 (Del. 1993).

165 *Id*. at 44.

166 *Id*.

167 *Id*. at n.14.

168 *Id*. at 44 (citing *In re* RJR Nabisco, Inc. S'holders Litig., 14 DEL. J. CORP. L. 1132, 1161 (Del. Ch. 1989) (upholding Special Committee's reliance on financial advisor and finding "quite sufficient bases to conclude that the opinions of the Special Committee's advisors concerning prospective value of the respective packages (which largely reduced to quite different assessments of the relative values of the converting debentures and the convertible preferred) were competent and reached in good faith").

169 *Id*.

170 *Id*. (internal quotation marks and alterations omitted).

171 *See generally id*.

172 *Id*. at 44.

173 *See* Leo E. Strine Jr., et al., Putting Stockholders First, Not the First-Filed Complaint 9-10 (Jan. 10, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200499 ("In 2010 and 2011, 91% of *all deals* worth over $100 million were litigated, and these deals were targeted with an average of 5.1 lawsuits each.") (footnote omitted) (emphasis added); *see also*ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, RECENT DEVELOPMENTS IN SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 3 (2012) (providing statistics supporting theory that all transactions regardless of form of consideration are litigated).

174 *See*DAINES & KOUMRIAN, *supra* note 173, at 8 (cataloging the disposition of 565 challenged transactions in 2010-2011, finding "153 (27 percent) were voluntarily dismissed by the plaintiffs, twenty-three (4 percent) were dismissed by the court with prejudice, and 389 (69 percent) settled," and noting the "large majority of settlements ... settled for additional disclosures only").

175 *In re* Netsmart Techs. S'holder Litig., 924 A.2d 171, 208 (Del. Ch. 2007).

176 *See generally In re* Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 715 (Del. Ch. 2001).

177 *Id*.; *accord In re* El Paso Corp. S'holders Litig., 41 A.3d 432, 433 (Del. Ch. 2012) (finding reasonable likelihood of success on merits but denying preliminary injunction where "the stockholders of El Paso, as the seller, have a choice whether to turn down the Merger themselves"); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 618 (Del. Ch. 2010) (ruling that balance of harms tilted against injunction because stockholders could decide for themselves to vote deal down and take the chance of receiving an actionable higher bid); *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 516 (Del. Ch. 2010) ("[W]here a selling Board's alleged *Revlon* violations occur in the absence of another viable bid, this Court often finds injunctive relief to be inappropriate because it would be imprudent to terminate the only deal available, when the stockholders can make that decision for themselves.") (footnote omitted); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1023 (Del. Ch. 2005) ("[T]he bottom line is that the public shareholders will have an opportunity ... to reject the merger if they do not think that the price is high enough in light of the Company's stand-alone value and other options."); H.F. Ahmanson & Co. v. Great W. Fin. Corp., 23 DEL. J. CORP. L. 633, 12 (Del. Ch. 1997) (declining to enjoin vote on friendly merger to allow stockholders first to elect hostile bidder's nominees: "If Great Western's shareholders wish to elect Ahmanson's nominees to the board, they need only vote down the Washington Mutual merger proposal at the merger meeting, and then vote for Ahmanson's nominees at the rescheduled annual meeting").

178 DEL. CODE ANN. tit. 8, § 251(b)-(c) (2013).

179 *See*Stroud v. Grace, 606 A.2d 75, 84 (Del. 1992) ("[D]irectors of Delaware corporations are under a fiduciary duty to disclose fully and fairly all material information within the board's control when it seeks shareholder action."); Zirn v. VLI Corp., 681 A.2d 1050, 1057 (Del. 1996) (finding a disclosure violation in a cash transaction where a partial disclosure was "misleading"); Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1277 (Del. 1994) (finding a potential disclosure violation in a stock-for-stock transaction where "partial disclosures" were "misleading").

180 *See, e.g*., Berger v. Pubco Corp., No. 3413, 2008 WL 2224107, at *4 (Del. Ch. May 30, 2008), *rev'd on other grounds*, 976 A.2d 132 (Del. 2009) ("A disclosure violation results in an irreparable injury."); *Netsmart*, 924 A.2d at 207 ("[T]his court has typically found a threat of irreparable injury to exist when it appears stockholders may make an important voting decision on inadequate disclosures."); Allen v. News Corp., No. 979, 2005 WL 415095, at *1 (Del. Ch. Feb. 3, 2005) ("At this early stage, plaintiffs have demonstrated a 'sufficiently colorable claim' that the disclosures contained in News' proxy materials are materially deficient or misleading and that

there is a 'possibility of a threatened irreparable injury,' namely the loss of the ability by the Fox shareholders to have all pertinent information available at the time they decide whether to tender their shares into the exchange offer, if expedition is not granted.") (footnote omitted); *In re* MONY Group Inc. S'holder Litig., 852 A.2d 9, 18 (Del. Ch. 2004) ("This disclosure violation threatens irreparable harm because stockholders may vote "yes' on a transaction they otherwise would have voted 'no' on if they had access to full or nonmisleading disclosures regarding the CICs.").

181 *Netsmart*, 924 A.2d at 207.

182 *See*Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 931 (Del. 2003); Paramount Commc'ns, Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140, 1151 (Del. 1989).

183 *See* David Fox & Daniel Wolf, *Deal Protection: One Size Does Not Fit All*, PRAC. L. J. (Mar. 2010) (noting that the extensiveness of a pre-signing market check ought to be considered in evaluating the use of deal protections); Mark Lebovitch & Peter B. Morrison, *Calling a Duck a Duck: Determining the Validity of Deal Protection Provisions in Merger of Equals Transactions*, 2001 COLUM. BUS. L. REV. 1, 51-52 (2001) ("Under the framework that we believe the Delaware courts are applying, the severity of the particular Deal Protections used bears a positive correlation to the need for a thorough market check and/or broad fiduciary out. Put simply, not all Deal Protections function in a similar fashion, boards can perform market checks of varying intensity, and boards can adopt fiduciary outs of varying breadth. Therefore, the framework operates on a sliding scale."); Mark A. Morton & Roxanne L. Houtman, GoShops: Market Check Magic or Mirage? (2009) (unpublished manuscript), *available at* http://blogs.law.harvard.edu/corpgov/files/2007/05/20070509%20Go%20Shops-- Market%20Check%CC20Magic%CC20***o***r%20Mirage.pdf ("A transaction that follows a full auction or involves multiple bidders may warrant more restrictive deal protections, such as a higher termination fee, a matching right and a more limited no shop provision, because the market has been canvassed for potential bidders.").

184 McMillan v. Intercargo Corp., 768 A.2d 492, 502 (Del. Ch. 2000).

185 *See, e.g.*, Malpiede v. Townson, 780 A.2d 1075, 1085-95 (Del. 2001) (holding "that the facts alleged in the complaint do not state a cognizable claim [under *Revlon*]" and that "even if plaintiffs had stated a claim for gross negligence, such a well-pleaded claim is unavailing because defendants have brought forth the Section 102(b)(7) [exculpatory] charter provision"); *see also In re* BJ's Wholesale Club, Inc. S'holders Litig., 38 DEL. J. CORP. L. 311, 7 (Del. Ch. 2013) ("The [c]omplaint does not allege facts that support a reasonable inference that the Board consciously disregarded its so-called *Revlon* duties."); *In re* Lear Corp. S'holder Litig., 967 A.2d 640, 641 (Del. Ch. 2008) ("[W]here ... the directors are protected by an exculpatory charter provision, it is critical that the complaint plead facts suggesting a fair inference that the directors breached their duty of loyalty by making a bad faith decision to approve the merger for reasons inimical to the interests of the corporation and its stockholders. Where a complaint ... does not even create an inference of mere negligence or gross negligence, it certainly does not satisfy the far more difficult task of stating a non-exculpated duty of loyalty claim."); *McMillan*, 768 A.2d at 496 ("[T]he complaint alleges no facts from which a reasonable inference can be drawn that any conflicting self-interest or bad faith motive caused the defendant directors to fail to meet their obligations to seek the highest attainable value."); *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 731-32 (Del. Ch. 1999), *aff'd sub nom*., Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) ("If a complaint merely alleges that the directors were grossly negligent in performing their duties in selling the corporation, without some factual basis to suspect their motivations, any subsequent finding of liability will, necessarily, depend on finding breaches of the duty of care, not loyalty or good faith.").

186 Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009).

187 Venhill Ltd. P'ship v. Hillman, 33 DEL. J. CORP. L. 982, 22 (Del. Ch. 2008) (discussing the entire fairness standard of review).

188 *See In re* Emerging Commc'ns, Inc. S'holders Litig., No. 16,415, 2004 WL 1305745, at *38-43 (Del. Ch. May 3, 2004) ("The liability of the directors must be determined on an individual basis because the nature of their breach of duty (if any), and whether they are exculpated from liability for that breach, can vary for each director."); *see also* GPC XLI L.L.C. v. Loral Space & Commc'ns Inc. (*In re* Loral Space & Commc'ns Inc.), 34 DEL. J. CORP. L. 670, 22 (Del. Ch. 2008) (assessing individual culpability of members of a special negotiating committee in approving an interested transaction with a controlling stockholder); *Venhill*, 2008 WL 2270488, at *29-33 (assessing the culpability of the general partner in executing self-interested transactions and fashioning an appropriate remedy).

189 TW Servs. v. SWT Acquisition Corp., 14 DEL. J. CORP. L. 1169, 1185 (Del. Ch. 1989).

190 *See*Paramount Commc'ns Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 15 DEL. J. CORP. L. 700, 733 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989) ("Directors may operate on the theory that the stock market valuation is 'wrong' in some sense, without

breaching faith with shareholders. No one, after all, has access to more information concerning the corporation's present and future condition.").

191 *See id*. (noting that the combined entity would not be too large to acquire).

192 *In re* RJR Nabisco, Inc. S'holders Litig., 14 DEL. J. CORP. L. 1132, 1156 n.13 (Del. Ch. 1989).

193 *See* discussion *supra* Part I.A.

194 *See* discussion *supra* Part II.A.

195 *See* discussion *supra* Part II.

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