Sustainability in the Boardroom:

Reconsidering Fiduciary Duty under Revlon in the Wake of Public Benefit Corporation Legislation

Rugger Burke[a] and Samuel P. Bragg[b]

[I]f you should take the bond of goodwill out of the universe no house or city could stand, nor would even the tillage of the fields abide. – Cicero, *Laelius de Amicitia*

Introduction

On July 17, 2013, Delaware Governor Jack Markell signed into law legislation establishing a new type of corporate entity: the public benefit corporation.[1] A benefit corporation, similar to but distinguished from a Certified B Corp,[2] is a voluntary alternative corporate form that focuses on adherence to higher standards of corporate purpose,

[a] B.S., Mathematics, Southern Methodist University; J.D., SMU Dedman School of Law; Principal and General Counsel of Satori Capital, LLC; Director of Fitz Aerospace, Inc., Gibraltar Business Capital, LLC, and Ranger Wireless Holdings, LLC.

[b] B.S., Mathematics 2007, University of Texas at Dallas; J.D. candidate 2015, SMU Dedman School of Law.

[1] *Governor Markell Signs Public Benefit Corporation Legislation*, STATE OF DELAWARE - DIVISION OF CORPORATIONS (Jul. 17, 2013), http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation/.

[2] "Benefit Corporations and Certified B Corporations are often, and understandably, confused. Both are sometimes called B Corps. They share much in common and have a few important differences. Certified B Corporation is a certification conferred by the nonprofit B Lab. Benefit corporation is a legal status administered by the state. Benefit corporations do NOT need to be certified. Certified B Corporations have been certified as having met a high standard of overall social and environmental performance, and as a result have access to a portfolio of services and support from B Lab that benefit corporations do not." CERTIFIED B CORPORATION WEBSITE, http://www.bcorporation.net/what-are-b-corps/legislation (last visited July 25, 2013).

accountability, and transparency.[3] As states like Delaware adopt public benefit corporation legislation, household names like Ben & Jerry's, Patagonia, and New Belgium Brewery (the makers of Fat Tire Beer), who have already embraced extralegal Certified B Corp status, now have the opportunity to assume legal public benefit corporation status.[4]

Directors of public benefit corporations pledge to manage the corporation in a way that balances rather than ignores the interests of the company's primary stakeholders (e.g., employees, shareholders, vendors and suppliers, customers, the community).[5] The new benefit corporation legislation is of particular importance because it redefines the fiduciary duties of directors not only with respect to an ongoing enterprise, but also in the event of a sale or change of control of the company.[6]

For those adopting it, this new legislation upends the century-old legal scheme first enunciated in *Dodge v. Ford Motor Co.*, holding that a business operates primarily for the profit of its shareholders.[7] This theory was subsequently extended and sharpened by the Delaware

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[3] *Policy Initiatives for Investors*, GIIRS RATINGS & ANALYTICS, http://giirs.org/about-giirs/policy-initiatives-for-investors (last visited Aug. 2, 2013).

[4] *Supra* note 2. The ranks of Certified B Corps also include such companies as: Dansko, Etsy, and Patagonia, Inc. *Id.*

[5] "The term 'stakeholder' is commonly used to refer to a person, group, or organization that has a direct or indirect stake in an organization because it can affect or be affected by the organization's actions, objectives and policies. [Primary] stakeholders in a business organization include customers, directors, employees, shareholders, suppliers, the community from which the business draws its resources, etc." WILLIAM H. CLARK, JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC. 5 n.21 (2013), *available at* http://benefitcorp.net/for-attorneys/benefit-corp-white-paper (last visited July 29, 2013).

[6] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[7] *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

Supreme Court in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, in the context of a sale or change of control.[8] Following *Revlon*, at the time of sale, a company's board is required to pursue and recommend the bid of the highest offer reasonably available without regard for the negative, long-run impacts to the corporation and its primary stakeholders. The board's sole criterion for its decision is maximizing shareholder value, no matter how unpalatable it may find the outcome.[9] For example, a board would be forced to recommend the offer of the highest bidder even if the bidder advanced a slash-and-burn strategy that would destroy goodwill the company had built over years or even decades. In contrast, under the new benefit corporation legislation a board is not limited to maximizing shareholder wealth; rather, it must consider the additional interests of the public and the other primary stakeholders, and could cognizably reject a high but unsuitable bid.

To appreciate the magnitude of this historical legislation, it is important to realize that what happens in Delaware does not just stay in Delaware. More than one million business entities, from (A)mazon.com, Inc., the giant e-commerce retailer, to (Z)ale Corporation, the jeweler in your local mall, make Delaware their legal home.[10] This includes more than 50% of all publicly-traded companies in the United States and 64% of the Fortune 500.[11] Understanding

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[8] This article draws no distinction between a sale of control and a change of control for doctrinal purposes.

[9] While this article argues for broadening of the discretion granted the board of directors in a sale or change of control, it does seek to overlook or downplay the importance of the board's duty to its shareholders.

[10] STATE OF DELAWARE - DIVISION OF CORPORATIONS, http://corp.delaware.gov/ (last visited July 14, 2013).

[11] Amazon.com, Inc. and Zale Corporation are both incorporated in Delaware and headquartered, respectively, in Seattle, Washington and Irving, Texas. This list further includes smaller

this, it is no surprise that most states look to Delaware law when interpreting their own local corporate law. As such, the impact of Delaware legislation broadening the infamous shareholder-friendly Revlon duties to include stakeholder-centric considerations is far reaching.[12] While the new legislation does not explicitly speak to or alter the fiduciary obligations of directors to non-benefit corporations, it does point to an emerging trend.[13]

The current framework for fiduciary duties as set out in *Revlon* was birthed in 1986, in an era when Sun Tzu's *The Art of War* served as a capitalist manifesto and the mantra on Wall Street was "Greed is Good."[14] But Greed is Good gave us a generation of mercenary CEOs eager to euthanize the golden goose to harvest the short-term egg. Such near-sighted decision-making led to the downfall of such high-fliers as Enron, WorldCom, and Global Crossing, and created corporate recklessness so systemic that a broader financial crisis was inevitable.

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corporations like Plum Organics and New Leaf Paper, two of the first seventeen Delaware BCorps, headquartered respectively in New York and California. THE CORPORATE SOCIAL RESPONSIBILITY NEWSIRE, http://www.csrwire.com/blog/posts/958-as-delaware-registers-its-first-benefit-corporations-a-conversation-with-the-early-adopters?utm_medium=Twitter&utm_campaign=CSR+and+sustainability+news (last visited Aug 2, 2013).

[12] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[13] *See e.g.*, PRINCIPLES FOR RESPONSIBLE INVESTMENT WEBSITE, http://www.unpri.org/about-pri/the-six-principles/ (last visited Aug. 1, 2013); THE CORPORATE SOCIAL RESPONSIBILITY NEWSIRE, http://www.csrwire.com/categories/23-Corporate-Social-Responsibility/press_releases (last visited Aug. 1, 2013).

[14] A paraphrase of the original quotation: "Greed, for lack of a better word, is good." The full quote reads: "Greed is right. Greed works. Greed clarifies, cuts through, and captures, the essence of the evolutionary spirit. Greed, in all of its forms; greed for life, for money, for love, knowledge, has marked the upward surge of mankind and greed, you mark my words, will not only save Teldar Paper, but that other malfunctioning corporation called the U.S.A." WALL STREET (20th Century Fox 1987).

But even in this era of greed, hubris, and desire for power, some companies survived and even thrived. And who were these companies? Names like: Costco, Whole Foods, and Southwest Airlines—companies that cultivated goodwill,[15] adopted sustainable business practices, and focused on creating win-win relationships with all of their stakeholders over the long-term rather than make tradeoffs to maximize short-term gain. [16] As a result, these companies have been consistently rewarded with higher long-term profits.[17] In effect, the Delaware benefit corporation

[15] Goodwill is a business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. BLACK'S LAW DICTIONARY (7th ed. 1999).

[16] Sustainability is defined as "[m]eeting the needs of the present generation without compromising the ability of future generations to meet their own needs." WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 16 (Oxford University Press 1987).

[17] In *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose*, an analysis of twenty eight companies known for their sense of purpose and stakeholder awareness revealed that these businesses outperformed both the S&P 500 and *Good to Great* companies (identified by Jim Collins in his best-selling business book). JOHN MACKEY & RAJ SISODIA, *Conscious Capitalism: Liberating the Heroic Spirit of Business* 283 (2013) (displaying *Firms of Endearment* analysis extended from 1996-2011).

Investment performance of *Firms of Endearment* companies versus S&P 500 and *Good to Great* companies, 1996 to 2011

	Fifteen-year		Ten-year		Five-year		Three-year	
Return	Cumulative	Annualized	Cumulative	Annualized	Cumulative	Annualized	Cumulative	Annualized
FoE[a]	1,646.1%	21.0%	254.4%	13.5%	56.4%	9.4%	77.4%	21.1%
GtG[b]	177.5%	7.0%	14.0%	1.3%	–35.6%	–8.4%	–23.2%	–8.4%
S&P 500[c]	157.0%	6.5%	30.7%	2.7%	15.6%	2.9%	10.3%	3.3%

Note: company returns are total returns with dividends reinvested and compounded.
a. Companies from *Firms of Endearment*, updated by authors.
b. Companies from *Good to Great*.
c. Standard & Poor's index of five hundred U.S. companies.

legislation is an attempt to align the law with what the leaders of these successful enterprises already know to be true: that long-term profit is a reflection of the value an enterprise creates for its stakeholders. In effect, the new benefit corporation legislation marks a turning point for capitalism: short-term profits v. long-term profitability; the highest bid v. the best bidder; the primacy of the shareholder v. the balancing of the interests of all stakeholders.

A Hypothetical Test Case: Martin Hydraulic Pump Company

To illustrate the divergence between the traditional duties of directors compared to those as espoused under the new benefit corporation legislation, consider the application to Martin Hydraulic Pump Company ("Martin Pump"), a fictional enterprise that faces issues and restrictions that are all too common and real. The story of Martin Pump begins in the garage of Charles and Susan Martin. The two met in college, Charles a mechanical engineering student and Susan an accounting major. Following graduation, they married and moved to Ohio. Susan went to work for an accounting firm and Charles worked for a municipal water-treatment facility. In his spare time Charles tinkered with hydraulic pumps in the couple's garage.

Recognizing a need for more efficient swimming pool pumps, Charles built an energy-efficient model the couple dubbed the "Model 1" that could be sold into the residential market. The Model 1 was an immediate success. Local pool supply companies ordered as many pumps as the Martins could supply. Not long after, Susan quit her job at the accounting firm where she was working and together they launched Martin Pump. Within three years, Martin Pump was the number one regional seller of swimming pool pumps. Successive models for the residential market followed with the Model 2 and Model 3 and then later the Model 10 for commercial applications. Over the years that followed, the Company constructed state-of-the-art manufacturing facilities in Ohio and Illinois as it built a reputation for manufacturing the highest-quality, most energy-efficient pumps in the industry. Between the two facilities the Company employs more than 250 people. When asked about their success, the Martins point towards their partnership with their vendors and the family-like environment that has been established with their employees who consistently nominate the company as one of the “Best Places to Work” in the annual Employee’s Choice Awards, sponsored by the local chamber of commerce

To secure the capital needed to grow the business, five years ago Martin Pump went public. Charles and Susan Martin retained 30% of the equity in the company while the remaining 70% is publicly traded. The company is currently headquartered in Ohio and incorporated in Delaware.

This past month, Martin Pump received two unsolicited offers to purchase the company. Potential purchasers Omni-Conglomerate Industries, Inc. (“Omni-Con”) and Competitive Pump Supply, Inc. (“Competitive Pump”) both offer to purchase a majority interest in the company in a cash-for-stock transaction resulting in a change of control. Both companies have offered to purchase 51% of the equity to achieve majority status, leaving behind a large base of minority shareholders including the Martins who intend to retain their 30% interest.

Omni-Con plans to discontinue manufacturing in Ohio and Illinois, sell off all company assets, including the Company’s name brand for commercial pumps which foreign manufacturers covet. Manufacturing of residential pumps will be relocated to India where low-cost generic pumps will be produced. In addition, Omni-Con plans to replace Susan Martin as CEO with an Omni-Con executive who has no experience in the pump industry but specializes in outsourcing. Martin Pump’s internal financial forecast project that Omni-Con’s actions will generate a value for shareholders of $105 per share but destroy substantially all goodwill aggregated by Martin

Pump over the past 20 years. Competitive Pump, on the other hand, is a distributor of pumps, and sees an opportunity to vertically integrate the chain of manufacturing and distribution. They have committed to re-investing in the company to further extend the product lines, and desire to maintain the continuity of Susan Martin as CEO because they value his passion and drive to grow the business. Internal reports forecast Competitive Pump's actions will generate a value of $110 per share by substantially increasing goodwill. Both present their maximum bids to the board. Omni-Con comes in at $100 per share and Competitive Pump comes in $1 lower at $99 per share. All other financial terms of the respective sales are equivalent.

A meeting of the board has been convened to evaluate the two offers. As a director of Martin Pump one might reasonably ask: what are our duties under current Delaware law, how does the new benefit corporation legislation affect these duties, and how do we square our duties during a sale or change of control with our duties as directors of an ongoing enterprise?

The remainder of the Article proceeds in three parts:

Part I presents the current of fiduciary duties and standards of review used by Delaware courts in the context of a corporate sale or change of control, and analyzes different interpretations and applications of the current Revlon rationales.

Part II introduces the new Delaware public benefit corporation legislation, and explains the effects of benefit corporation legislation on Revlon case law.

Part III provides an outline of a benefit corporation director's duties in the event of a sale or change of control as well as presents a proposal that similar duties should be applied to serve as a safe harbor for the directors of a traditional corporation.

I. <u>Current Delaware Law: Fiduciary Duty and the Standard of Review</u>

A. ***General Fiduciary Duties and the Business Judgment Rule***

Delaware General Corporation Law § 141(a) mandates that the business and affairs of a Delaware corporation shall be managed under the direction of its board of directors.[18] And it is well understood that a corporation's board of directors, in discharging this statutory mandate, has a fiduciary duty to *both* (a) act in the best interests of its shareholders and (b) protect the interests of the corporation.[19] This fiduciary duty primarily consists of the duty of loyalty[20] and the duty of care.[21] Aside from a breach of loyalty or care, the majority of business decisions are otherwise reviewed under the business judgment rule, a rebuttable presumption that presumes the directors of a corporation make business decisions on an informed basis, in good faith, and in the honest belief that the action taken is in the best interests of the company.[22]

Given the latitude extended to board members under business judgment rule, the court generally defers to a board's business decisions.[23] Where the court finds a rational business purpose for a decision, it is precluded from imposing itself unreasonably on the affairs of the corporation by invalidating the decision, examining the decision's reasonableness, or substituting

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[18] DEL. CODE ANN. tit 8, § 141(a) (2000).

[19] *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281, 1292 (Del. 1998); *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985).

[20] A director's duty of loyalty mandates that the best interest of the corporation and its shareholders take precedent over any conflicting interest possessed by the director. *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939).

[21] "In a merger or sale, a director's duty of care requires a director, before voting on a proposed plan of merger or sale, to inform himself and his fellow directors of all material information that is reasonably available to them." *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993).

[22] Acting on an informed basis in good faith satisfies the duty of care while acting in the best interest of the company satisfies the duty of loyalty. *See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

[23] *See MM Companies, Inc. v. Liquid Audio, Inc.*, 813 A.2d 1118, 1127 (Del. 2003).

its views for those of the board.[24] This judicial deference protects most director decisions in managing the business of a corporation, providing broad discretion.

B. ***Enhanced Scrutiny Brought on by the Sale Context***

There are, however, limited circumstances under which the court applies the heightened standard of enhanced scrutiny, preempting the business judgment rule.[25] Enhanced scrutiny typically applies in the context a corporate sale under the theory that during a sale there is an "omnipresent specter" that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.[26] This Specter Theory was first advanced in *Unocal Corp. v. Mesa Petroleum Co.*[27] In *Unocal*, the court ruled that the application of enhanced scrutiny is appropriate where a board institutes defensive measures against a hostile takeover because takeover attempts raise an opportunity for director self-dealing.[28] Once the attempt occurs, the actions of the directors must be examined under enhanced scrutiny.[29]

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[24] *In re Smurfit-Stone Container Corp. S'holder Litig.*, No. 6164–VCP, 2011 WL 2028076 at *14 (Del. Ch. May 20, 2011).

[25] Enhanced scrutiny requires judicial examination at the threshold before the protections of the business judgment rule may be conferred. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

[26] *Id.*

[27] *Id.*

[28] Essentially, the specter is omnipresent because the danger of director self-dealing exists, but it does not become a cognizable threat until a takeover attempt occurs.

[29] *Id.*

To dispel the specter and return to the protection of the business judgment rule, the directors are required to show good faith, reasonable investigation, and must analyze the nature of the takeover and its effect on the corporation in order to ensure balance.[30]

> A further aspect is the element of balance. If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, *the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)*, the risk of nonconsummation, and the quality of securities being offered in the exchange.[31]

The balancing element in *Unocal* provides a common law framework for addressing non-shareholder interests. This language clearly acknowledges that a director has the discretion to consider the interests of primary stakeholders in anti-takeover decisions,[32] which makes it the functional equivalent of a constituency statute.[33]

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[30] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986).

[31] *Unocal Corp.*, 493 A.2d at 955 (emphasis added).

[32] Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1110 (2000) (acknowledging that *Unocal* permitted consideration of non-shareholder constituencies in a takeover situation).

[33] Constituency statutes, also known as stakeholder statutes, permit a board of directors to consider an enumerated list of constituent (i.e., primary stakeholder) interests as well as shareholder interests when making business decisions. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 588-89 (1992) (demonstrating that Revlon duties without constituency statutes allow for sub-optimal outcomes in takeover scenarios, possibly resulting in a net economic loss as well as damage to primary stakeholders).

Thirty-three states currently have some version of a constituency statute. *See* ARIZ. REV. STAT. ANN. § 10-2702 (2004); CONN. GEN. STAT. § 33-756(D) (2007); FLA. STAT. § 607.0830(3) (2008); GA. CODE ANN. § 14-2-202(B)(5) (2003); HAW. REV. STAT. § 414-221(A)-

Unfortunately, in the absence of legislative guidance at the time, subsequent case law failed to advance *Unocal's* positive step towards stakeholder rights. Under the business judgment rule a board can consider stakeholder interests because there is no *per se* duty to maximize shareholder value in the short-term; rather, discretion is granted to directors to make decisions to best serve the company's and shareholders' best interests without regard to a fixed investment horizon.[34] And even under enhanced scrutiny, *Unocal's* balancing prong makes room for considering additional primary stakeholders.[35] But with *Revlon*, the Court takes an abrupt turn away from stakeholder considerations, stepping back towards shareholder primacy.[36]

C. *Revlon Rationales—the Control Premium and No Tomorrow Theories*

(B) (2008); IDAHO CODE ANN. § 30-1602 (2010); 805 ILL. COMP. STAT. 5/8.85 (2004); IND. CODE § 23-1-35-1(D) (1999); IOWA CODE § 490.1108A (1999); KY. REV. STAT. ANN. § 271B.12-210(4) (LexisNexis 2006); LA. REV. STAT. ANN. § 12:92(G) (1994); ME. REV. STAT. ANN. tit. 13-C, §832 (2005); MD. CODE ANN., CORPS. & ASS'NS § 2-104(B)(9) (West 2008); MASS. GEN. LAWS ANN. ch. 156B, § 65 (2006); MINN. STAT. § 302A.251(5) (2008); MISS. CODE ANN. § 79-4-8.30 (2001); MO. REV. STAT. § 351.347(1) (2000); NEB. REV. STAT. § 21-2432(2) (2007); NEV. REV. STAT. ANN. § 78.138(4) (West 2007); N.J. STAT. ANN. § 14A:6-1(2) (West 2003); N.M. STAT. ANN. § 53-11-35(D) (West 2003); N.Y. BUS. CORP. LAW § 717(B) (McKinney 2003); N.D. CENT. CODE § 10-19.1-50(6) (2005); OHIO REV. CODE ANN. § 1701.59(E) (LexisNexis 2004); OR. REV. STAT. § 60.357 (2007); 15 PA. CONS. STAT. § 1715(A)(1) (West 1995); R.I. GEN. LAWS § 7-5.2-8 (1999); S.D. CODIFIED LAWS § 47-33-4 (2002); TENN. CODE ANN. § 48-103-204 (West 2008); VT. STAT. ANN. tit. 11A, § 8.30 (2008); VA. CODE ANN. § 13.1-727.1 (2006); WIS. STAT. § 180.0827 (2006); WYO. STAT. ANN. § 17-16-830(E) (2007).

[34] *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

[35] *Supra* note 29 and emphasized text.

[36] "all powers granted to a corporation or to the management of a corporation, or to any group within the corporation . . . [are] at all times exercisable only for the ratable benefit of all the shareholders as their interest appears." ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harvest Books, 1968) (1932) (Stating the theory of shareholder primacy). *See generally Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986).

Subsequent to *Unocal*, the court ruled in *Revlon* that under a special set of circumstances enhanced scrutiny applied to a refined set of director fiduciary duties.[37] Duties where shifted away from the best interests of the corporation and its shareholders to the narrow primary objective of maximizing shareholder value in the short-term.[38] Over time this objective has been refined into an obligation of a board to seek and recommend the transaction offering the highest value reasonably available to the stockholders.[39] The test for evaluating the reasonableness of the bidder's offer focuses principally on the ability of the bidder to consummate a transaction.[40] In all, these considerations must be made in light of the ultimate goal: maximizing shareholder value.[41] So what set of circumstances invoke *Revlon*?

The Supreme Court of Delaware has listed at least three situations that lead a company into Revlon territory, and they are: (1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the

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[37] *Id.*

[38] *Id.*

[39] *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44-45 (Del. 1994).

[40] "In assessing the bid and the bidder's responsibility, a board may consider, among various proper factors, the adequacy and terms of the offer; its fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; the impact of both the bid and the potential acquisition on other constituencies, provided that it bears some reasonable relationship to general shareholder interests; the risk of nonconsumation; the basic stockholder interests at stake; 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." *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1282 nt. 29 (1989).

[41] "While the assessment of these factors may be complex, *45 the board's goal is straightforward: Having informed themselves of all material information reasonably available, the directors must decide which alternative is most likely to offer the best value reasonably available to the stockholders." *QVC Network Inc.*, 637 A.2d at 44-45.

company; (2) where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a "sale or change of control."[42] *Revlon* follows *Unocal* in applying the enhanced scrutiny standard. It is applied at any point where it is necessary to require directors to show that their motivations were proper and their actions reasonable in relation to their legitimate objective.[43] But *Revlon* takes the next step in judicial intervention by refocusing the director's fiduciary duties, making their legitimate objective short-term maximization of shareholder value.[44] The Court has since provided two rationales to support its application of Revlon duties:[45] the Control Premium Theory[46] and the No Tomorrow Theory.[47]

(1) *The Control Premium Theory*

The Control Premium Theory states that the purchase of majority status should come at a higher cost than the face value of the shares acquired because it is necessary to pay the minority

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[42] These three situations are extensions of the original idea in *Revlon* that the inevitable sale of a corporation is fundamentally different from defensive anti-takeover measures. *Arnold v. Society for Sav. Bancorp, Inc.*, 650 A.2d 1270, 1290 (Del. 1994).

[43] S*ee Reis v Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch. 2011).

[44] Revlon duties are not independent duties, but rather a restatement of the duties of care and loyalty. *In re Answers Corp. S'holders Litig.*, No. 6170–VCN, 2012 WL 1253072, at *6 (Del. Ch. Apr. 11, 2012).

[45] Morgan White-Smith, Comment, *Revisiting Revlon: Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177 (Analyzing Revlon rationales in a mixed cash and stock transaction).

[46] *See QVC Network Inc.*, 637 A.2d at 44.

[47] *See In re Smurfit-Stone Container Corp. S'holder Litig.*, No. 6164–VCP, 2011 WL 2028076 at *14 (Del. Ch. May 20, 2011).

a premium for selling its voting and control interests. [48] Following a sale of control, voting power shifts, and the new majority shareholder may unilaterally make material alterations to the nature of the corporation at the expense of the minority.[49] The sale of control leaves minority shareholders completely disenfranchised.[50] To safeguard the minority shareholders, the court applies Revlon duties.

When a change of control occurs, the control premium comes into play.[51] For example, in a cash-for-stock transaction, where the result is a clear change of control, *Revlon* applies.[52] Whereas in a stock-for-stock transaction, where the result is a large aggregation of unaffiliated stockholders, and not a majority interest, Revlon duties are not triggered because the remaining shareholders retain a voting interest and control has not shifted.[53] A caveat exists, however, when sufficient minority safeguards are in place. [54] Transactional minority safeguards have the same

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[48] "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 value of a control block of shares, but also compensates the minority stockholders for their resulting loss of voting power." *QVC Network Inc.*, 637 A.2d at 44.

[49] Material alterations include but are not limited to electing directors, forcing a break-up of the corporation, merging with another company, cashing-out the public stock holders, amending the certificate of incorporation, and consolidating or selling any and all of the corporate assets. DEL. CODE ANN. tit 8, §§211, 242, 251-258, 263, 271, 275. *See also QVC Network Inc.*, 637 A.2d at 42.

[50] Following a change of control, the residual minority stockholders have no leverage to regain another control premium. *Id.*

[51] *QVC Network Inc.*, 637 A.2d at 44.

[52] *Id.* at 46.

[53] *Id.*

[54] Examples of typical protective measures or minority safeguards are supermajority voting provisions, majority of the minority requirements, etc.

practical effect as if there were no change of control: the minority interests at play are not suddenly left without a vote in the face of a new majority interest.[55] As such, sufficient minority safeguards also make Revlon duties unnecessary.

The issue with this approach is that the theory compensates shareholders by converting their voting interests into maximized profits, but this does not solve the problem for all shareholders because not all shareholders are the same. Many shareholders invest for reasons other than just the bottom line: many investors take a socially responsible approach by endorsing companies that share their values or do not invest in industries that they find to be inherently negative.[56] These investors value a company, in part, based upon the perceived goodwill associated with the company's products or services.[57] A control premium can benefit minority shareholders, but it can just as easily undermine complex shareholder interests by oversimplifying them. The control premium retreats from the stakeholder balance in *Unocal*, and moreover requires a board to overlook one of its two general fiduciary duties, the duty to protect

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[55] "[T]he Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. *There being no such protective provisions* in the Viacom-Paramount transaction, 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." *QVC Network Inc.*, 637 A.2d at 44 (Referencing the absence of devices protecting minority stockholders.) (Emphasis added).

[56] *See generally* Susan N. Gary, *Is it Prudent to be Responsible? The Legal Rules for Charities that Engage in Socially Responsible Investing and Mission Investing*, 6 NW J. L. & SOC. POL'Y 106 (2011)(Analyzing socially responsible investing and mission investing, both of which consider non-financial criteria in addition to financial gain when making investing decisions).

[57] "[T]he socially responsible investment movement, which now represents a sizable portion of market activity, demonstrates that moral considerations outweigh the profit motive for some shareholders." Andrea M. Matwyshyn, *Imagine the Intangible*, 34 Del. J. Corp. L. 965, 985 (2009) (proposing long run profit maximization through asset sensitive governance of intangible assets, i.e., managing corporate goodwill).

the corporation as a whole. As a result, the theory risks impairing the corporation's goodwill and injuring minority shareholders.

(2) *The No Tomorrow Theory*

Under the No Tomorrow Theory, where a transaction constitutes the end of "all or a substantial part of the stockholder's investment," the stockholder is entitled to a short-term maximization of profits because its future investment horizon has been shrunk to the present.[58] Effectively, the theory is that there is no tomorrow for target shareholders because following the sale of control, they will be forever shut out from the corporations future profits.[59] This rationale, first announced in *Smurfit-Stone*, is similar to the Control Premium Theory, which focuses on the loss of a future control interest. Under the No Tomorrow Theory, the focus is on the end of a future profit interest.

Dealing only with shareholders,[60] it is clear that for a complete sale of a company, in a cash-for-stock transaction, there is little room to argue against Revlon duties; maximizing value protects shareholder interests because shareholders have no future interest in the corporation. But as the transaction's cash component of consideration decreases and the stock component increases, the stockholder interests that face a no tomorrow reality become fewer and fewer, and

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[58] *Id.*

[59] *In re Smurfit-Stone Container Corp. S'holder Litig.*, No. 6164–VCP, 2011 WL 2028076 at *14 (Del. Ch. May 20, 2011).

[60] The Control Premium Theory, being derived from *Revlon*, is capable of addressing stockholders only, and does not apply to other primary stakeholders as they have no direct control over the corporation. The No Tomorrow Theory, like the Control Premium Theory, is also derived from *Revlon*, and as such, addresses only stockholders. But, unlike the Control Premium Theory, which excludes primary stakeholders because they have no direct control over the corporation, the No Tomorrow Test is capable of addressing primary stakeholder future interests.

the application of Revlon duties becomes less and less.[61] The uncertain distinctions between ratios of cash and stock boils down to the principle that Revlon duties should not apply where shareholders retain a financial future interest.

There are two issues with applying *Revlon* by looking at future interests. First, this approach places the Court in the position to decide the intrinsic value of a mixed-consideration merger and the impact it will have on stockholder future interests. [62] A board is better suited to make this decision.[63] And second, the No Tomorrow Theory does not address a corporation's other primary stakeholders; rather, it follows the persistent myth claiming that the ultimate purpose of business is always to maximize profits for the investors, visualizing capitalism as a zero-sum game[64] and not a positive-sum game where all other players can profit.[65] "How can the board fulfill its fiduciary obligation to act in the best interests of the stockholders, when it also is obligated to consider the conflicting interests of a variety of other groups?"[66] To answer this, it is

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[61] While there is no clear tipping point as to when Revlon applies, the Delaware Supreme Court held that a transaction in which 33% of the consideration was offered in cash was not sufficient. *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 71 (Del. 1995).

[62] *See generally* Case Comment, *Corporate Law—Mergers and Acquisitions—Delaware Court of Chancery Imposes Revlon Duties on Board of Directors in Mixed Cash-Stock Strategic Merger*, 125 HARV. L. REV. 1256 (2012).

[63] *Id.*

[64] The idea of zero-sum thinking is that if one player wins, another must lose (i.e., for shareholders to gain, other stakeholders must lose).

[65] Positive-sum thinking is the idea that "it is in each stake-holder's interest for management to take risks that can lead to increasing the size of the pie for everyone[,]" and that one player may gain at no expense or cost to another. R. Edward Freeman, Andrew C. Wicks, Bidhan Parmar, Stakeholder Theory and "The Corporate Objective Revisited," 15 No. 3 Org. Science 364, 366 (2004).

[66] Lawrence E. Mitchell, *supra* note 31, at 588.

essential to understand that, economically, consideration of a single stakeholder under the Revlon model can create a net negative economic result.[67] And to understand that consideration of multiple stakeholders generates value for shareholders.[68] The scope of the No Tomorrow Theory is currently limited to consider the future interests of target shareholders; however, following the theory's key underlying principle, it might naturally be extended to include all shareholders with a future interest.

II. Public Benefit Corporation Legislation

Delaware recently passed new public benefit corporation legislation.[69] A public benefit corporation is a for-profit corporation organized with the purpose of "produc[ing] a "public benefit"[70] and operating in a "responsible and *sustainable* manner."[71] A benefit corporation is managed in a manner that simultaneously balances stockholder profit interests, the best interests of those materially affected by the corporation's conduct (primary stakeholders), and the public benefit identified in the corporation's certificate of incorporation.[72] For example, the board of a benefit corporation could not arbitrarily cut jobs to increase the company's short-term profits

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[67] *Id.* (providing an example where following Revlon duties to ensure a board refrain from self-dealing resulted in a net loss of $40 million: a $20 million gain for stockholders at the cost of $60 million to noteholders).

[68] *Supra* note 15.

[69] *Supra* note 1.

[70] Delaware defines a public benefit as a positive effect (or reduction of negative effects) on one or more categories of persons, entities, communities, or interests (other than stockholders in their capacities as stockholders). DEL. CODE ANN. tit 8, § 362(b) (Supp. 2013) *available at* http://legis.delaware.gov/LIS/lis147.nsf/vwLegislation/SB+47/$file/legis.html?open.

[71] § 362(a) (emphasis added).

[72] § 365(a).

without giving some consideration to the effected primary stakeholders (i.e., the employees and the community) as well as whether the decision would affect the company's public benefit. And to ensure the proper balance of all interests, benefit corporations operate with heightened standards of transparency and accountability.[73]

New benefit corporation legislation raises some important legal questions. The first question is whether Revlon duties apply to newly established benefit corporations. Seemingly, benefit corporation legislation completely shields benefit corporation directors from *Revlon*. And if this is true, the second question raised is whether application of *Revlon* to general corporations is altered by new legislative guidance.

For almost a century, capitalism and corporate responsibility centered on creation of profit for shareholders: profit for profit's sake;[74] however, "[t]he high-tech, globalized capitalism of the 21st century is very different from the postwar version of capitalism that performed so magnificently for the middle classes of the western world."[75] Fiduciary duties shaped around maximizing profit have partly been eroded by the wake of the judicial standards like the business judgment rule, but in *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Chancery Court went so far as to say, "[d]irectors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at

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[73] A benefit corporation is required to report on their overall social and environmental performance, giving stockholders important information that, particularly when reported against a third party standard, can mitigate risk and reduce transaction costs. Gov. Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST, July 22, 2013, *available at* http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html. *See e.g.,* §366(b).

[74] *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

[75] Chrystia Freeland, *Capitalism, but With a Little Heart*, N.Y. TIMES, July 17, 2013, *available at* http://www.nytimes.com/2013/07/19/us/19iht-letter19.html?_r=3&.

least not consistently with the directors' fiduciary duties under Delaware law."[76] Benefit corporations and the states that have passed benefit corporation legislation recognize the progressive trend moving away from historic shareholder-centric values towards a more stakeholder-centric approach with the focus of bringing capitalism from the past into the future.[77] More specifically, endorsement of benefit corporations by Delaware, in the words of Delaware Governor Jack Markell, is the creation of "a powerful, no cost, market-based solution to the systemic problem of short termism and an innovative approach to using market forces to solve our most challenging problems;"[78] a solution that will affect the entire framework of corporate law.

A. *Key Sections of the Delaware Legislation*

Benefit corporation legislation provides the legal framework for corporations to step outside of the restrictions found in shareholder-centric cases like *Dodge*, *Revlon*, and *eBay*.[79] Boards now have the statutory authority to consider other stakeholder interests in addition to maximization of shareholder value. This expansion of fiduciary duties is at the heart of what it means to be a benefit corporation. A quick overview of the key sections:

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[76] In his opinion, Chancellor Chandler agrees with the attempt by Craigslist to provide a service to communities, but iterates that the current law does not. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010).

[77] As of July 17, 2013, Delaware is one of nineteen states to pass B-Corp legislation: Arizona, Arkansas, California, Colorado, Delaware, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, New Jersey, New York, Nevada, Oregon, Pennsylvania, Rhode Island, South Carolina, Vermont, Virginia. Legislation has also passed in Washington D.C. CERTIFIED B CORPORATION WEBSITE, http://www.bcorporation.net/what-are-b-corps/legislation (last visited July 25, 2013).

[78] Governor Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST, July 22, 2013, *available at* http://www.huffingtonpost.com/gov-jack-markell/public-benefit-corporation_b_3635752.html.

[79] Clark & Vranka, *supra* note 3.

The first key section in the Delaware legislation is § 365 Duties of directors. This section outlines what interests directors must consider in their business decisions, and the standard by which their decisions will be reviewed. Delaware consolidates the list of benefit corporation stakeholder interests[80] to three overarching categories: stockholder pecuniary interest,[81] best interests of those materially affected by the corporation's conduct (primary stakeholders), and the public benefit identified in the certificate of incorporation.[82] And Delaware adopts the business judgment rule as the standard of review by codifying language from Delaware case law.[83]

The second key section in the Delaware legislation is § 363 Certain amendments and mergers; votes required; appraisal rights. This section creates a strong barrier for companies

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[80] Under the Model Legislation, benefit corporation directors shall consider the effects of any action or inaction upon: (i) the shareholders of the benefit corporation, (ii) the employees and workforce of the benefit corporation, its subsidiaries and its suppliers, (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation, (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries and its suppliers are located, (v) the local and global environment, (vi) the short-term and long-term interests of the benefit corporation, including any benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation and (vii) the ability of the benefit corporation to accomplish its general benefit purpose and any specific public benefit purpose. § 301(a)

[81] It should be noted that in both the Model and Delaware legislation, shareholders are among the stakeholders whose interests the directors are required to consider; in fact, they are first on both lists, and are the only stakeholder entitled to bring a legal action against the corporation or its directors. *See* § 366(b); Clark & Vranka, *supra* note 3, appx. A, § 301(a)(1)(i).

[82] § 362(a).

[83] "deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve" § 365(b); *c.f. Grobow v. Perot*, 539 A.2d 180 (Del. 1988) (holding that a waste determination rebutting the business judgment rule depends on whether what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth the which the corporation has paid).

wanting to reincorporate as a benefit corporation and creates merger protections requiring super-majority votes when the outcome of a merger is a change in benefit corporation status for either company. While this barrier is restrictive in nature, it also provides a protective function. It protects benefit corporation status. This provision makes benefit corporation status less accessible to corporations that might simply want to don it because it increases board discretion by insulating its decisions from litigation or increases company value by enhancing perceived goodwill.

The third key section in the Delaware legislation is § 368. This section states that benefit corporation legislation "shall not affect a statute or rule of law that is applicable to a corporation that is not a public benefit corporation."[84] This expressly limits the impact of the legislation, but does not discount the legislative intent associated with passing the legislation.

B. *Application of Delaware Public Benefit Corporation Legislation to Revlon*

Delaware benefit corporation legislation disregards Revlon, resetting fiduciary duties and the standard of review. It protects benefit corporation boards by making stakeholder consideration mandatory.[85]

First, § 365(a) of the new statute states that "[t]he board of directors shall manage or direct the business and affairs" of the public benefit corporation in a manner that balances stockholder pecuniary interest, stakeholders, and the public benefit.[86] This reframes the foundational principles of what constitutes a board's fiduciary duties and completely shifts the view away from shareholder primacy. Further, this language parallels the language of §141(a)

[84] § 368.

[85] *See* § 365

[86] § 365(a)

granting the board of directors managerial status over the actions of a corporation, including the sale or change of control.[87] By doing this, the legislature directly indicates that the duty of a public benefit corporation board in balancing the concerns of all primary stakeholders applies when a typical corporation would begin its voyage into Revlon territory, overcoming the harsh requirement of considering only maximization of shareholder value.

Second, § 365(b) sets the standard of review for this balancing requirement, inclusive of a sale or change of control, as requiring only that the director's decision be both informed (duty of care) and disinterested (duty of loyalty) and not such that no person of *ordinary, sound judgment would approve*.[88] This is the business judgment rule. This means that even if § 365(a) does not supersede Revlon duties, director decisions will be given judicial deference. Section 365(a) simply expands what directors are required to consider when exercising their judgment, effectively entitling directors to make business decisions looking at the long-term value to shareholders as well other stakeholders so long as they act on an informed basis, in good faith, and in the honest belief that the action taken is in the best interests of the corporation.

C. *Application of Delaware Public Benefit Corporation Legislation to non-Benefit Corporations*

Although not explicitly applicable to non-benefit corporations, the benefit corporation statute provides legislative guidance for further judicial development of the general application of *Revlon* in an era when terms like "brand equity" point towards the increasing recognition that a company's value and, therefore, its sustainability as an ongoing enterprise, is inextricably tied

[87] § 365(a); *c.f.* § 141(a).

[88] *Supra* note 83 and accompanying text.

to the relationship it has cultivated with its customers, employees, suppliers, and community.[89] Not surprisingly, the correlation between a company's orientation towards its stakeholders and its stock price are highly correlated over time.[90] In contrast, companies that focus exclusively on short-term profits to the detriment of their key stakeholders increase the risk of impairing goodwill and eroding the long-term value of the company.[91] The best interests of an ongoing enterprise, and in turn its shareholders, therefore, hinge upon increasing not only the financial performance but also the corporations perceived goodwill. In adopting benefit corporation legislation, the Delaware legislature recognized these underlying assumptions and, in doing so, the legislature opened the door to change *Revlon*.

III. Proposal, Test, and Application

A. *Proposal*

Where a company receives two or more offers to sell its equity, the results of which are a sale or change of control, our proposal is twofold:

(1) for directors of a benefit corporation, the new statute supersedes Revlon. The clear path forward is to recommend the offer that, in its business judgment, provides the highest value for all of the primary stakeholders; and

(2) for directors of non-benefit corporations, the directors *may* take into account the post-transaction interests of the corporation's primary stakeholders in addition to the immediate pecuniary interests of the selling majority where there are non-selling shareholders retaining a

[89] *The World's Most Powerful Brands*, FORBES (August 30, 2013), http://www.forbes.com/powerful-brands/list/

[90] *Supra* note 15.

[91] Matwyshyn, *Supra* note 53 at 988.

substantial minority interest. Of course, if directors may, they also may not, which is an important distinction for investors and/or remaining shareholders who give weight to the creation of value for non-shareholder (e.g. worker, community, or environmental) interests.

Under either scenario, a board may assert the safe harbor of the business judgment rule in relation to its recommendation so long as it considers the decision in the context of (a) preserving the goodwill of the ongoing enterprise as well as (b) the company's other primary stakeholders.

A. *Test*

To determine whether our proposal applies in the context of a non-benefit corporation, we have designed an easy to follow test that asks three questions:

(1) Will there be one or more equity holders that in the aggregate hold a substantial minority interest that will not be selling their equity on the date of the transaction?[92]

(2) Will, according to the company's own financial forecast, the proposed offer substantially impair the company's economic goodwill following the date of the transaction? [93] and

(3) Will accepting the proposed offer materially harm two or more of the company's other primary stakeholders?[94]

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[92] To determine whether a minority interest is "substantial," we propose that the court consider certain non-exclusive factors: percentage of equity retained in aggregate, the percentage retained by single equity holders, and the value of the corporation at the time of transaction.

[93] This prong of this test would be determinable by an internal analysis of the corporation's goodwill asset value. The majority of corporations already undergo goodwill impairment tests to determine the true asset value and to forecast future goodwill values; therefore, it is no additional burden on the corporation to provide this information. We propose that directors make this evaluation and courts review their evaluation under the business judgment rule standard.

[94] We propose that the determination of what constitutes material harm should be left to the business judgment of directors and that courts review the determination under the corresponding standard.

This test attempts to provide an exception to the rule that conforms to the rationales for *Revlon*. Prong 1 simply protects the company from an instance where a shareholder with a single share or *de minimis* interest in the company attempts to hijack the sale process. Prong 2 shields the long-term economic value of an ongoing enterprise from short-sighted profiteering at the expense of the residual minority who would be forced to sell at a time when they may not have otherwise realized their investment objectives. This does not conflict with the No Tomorrow Theory, which is designed to only come into effect as shareholders relinquish their future investment interest. Rather, it comes into effect when the No Tomorrow Theory would not be applicable, and provides protection for the future investment interests of the residual minority that continued to hold stake in the corporation. Prong 3 permits directors to retain their traditional role outside of the sale process in which they have the duty to protect both the shareholders and the corporation inclusive of the discretion to consider the interests of all primary stakeholders. Exercising this discretion, directors are able to safeguard minority interests as required by the Control Premium Theory. If the answer to these three questions is "yes," then the board can assert the same safe harbor provisions of the business judgment rule in relation to their recommendation of a particular offer without violating or offending the Revlon doctrine.

This test provides for great flexibility and is limited in application to the factually specific instances wherein goodwill would be impaired. These instances would be reviewed on a case-by-case basis anyway. An example satisfying the first prong would be where 51% of the corporation is acquired leaving a 49% minority shareholder interest. An example satisfying the second prong would be where inter-company forecasts indicate $100 share value today will be worth $120 within the next two years or where the company has been growing historically at a rate of 15% per year and the decision to reduce working capital or capital expenditure would reverse this growth. And an example satisfying the third prong would include a cash out resulting in two or more of the following: the inability of customers to secure a comparable substitute on commercially reasonable terms, the loss of all or substantially all employee jobs, insolvency of critical suppliers to the business, or irreparable harm to the local community following the cessation of operations by its largest employer, tax payer, and public benefactor.

This proposal is not intended to create any additional obligation on a board, but rather to provide a safe harbor for evaluating the offers of competing bidders in the context of a sale or change of control. In effect, the application of this test provides the board the opportunity to avoid the dilemma of whether to recommend a bid that will effectively destroy the value of an ongoing enterprise or to breach Revlon duties to protect the interests of the corporation and its stakeholders. It empowers directors to choose not just the highest offer, but the best offer—the offer that maximizes value for *both* the selling equity holders as well as the remaining stakeholders who will be both responsible for and beneficiaries of the company as an ongoing enterprise following the date of the transaction.

C. *Application to Martin Pump*

Reflecting back on the decision faced by the directors of Martin Pump, what are their different options and the outcomes they can expect? Under current Delaware law, the outcome is all but predestinated. Under *Revlon*, the board's evaluation is limited to maximizing present shareholder value without regard to future shareholder value or any other primary stakeholders.[95] The board must overlook the harm associated with the dissolution of the company and the

[95] "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 stockholder—and they must exercise their fiduciary duties to further that end." *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 44 (Del. 1994).

impairment of goodwill because control has been traded away and the target shareholders have no tomorrow for their investment. The board is forced to either to recommend Omni-Con without considering all of the material information or to recommend Competitive pump and face the threat of personal liability. The company Charles and Susan Martin spent decades building with the help of so many who believed in their vision, would be dismantled.

Now assume that Martin Pump, in furtherance of the Martins' original intention to create an enduring enterprise, recently reincorporated as a benefit corporation.[96] While current Delaware law does not speak to the matter directly, it is reasonable to conclude that the new Delaware benefit corporation legislation applies in sale or change of control scenarios, mandating that benefit corporation directors balance shareholder profit with the public interest and the interests of other primary stakeholders. Following this interpretation, Martin Pump's board of directors must evaluate both offers with consideration of not only maximization of short-term shareholder value, but also the future equitable value of each offer, the overall impact of each offer to the non-shareholder primary stakeholders, and the impact to the public benefit generated by the continued production of Martin Pump's products. The board would balance the consequences of accepting Omni-Con's $1 ($100 per share compared to $99 per share) premium over the offer of Competitive Pump, namely: (a) forecasted loss of $5 per share in future value for the remaining shareholders; (b) the loss of 250 full-time employees; (c) the likelihood of loss of vendors that supply critical components necessary for production; (d) the effect of offshore production on customer perception and, therefore, loyalty, and (e) the economic impact to the community in which the plants operate. As a benefit corporation, the board must take all of these

[96] This is no small task. Delaware requires ninety percent of outstanding shares to vote for amending the certificate of incorporation. DEL. CODE ANN. tit 8, § 363(a) (Supp. 2013).

factors into account, and the net positive impact of this decision is clear. More likely than not, the board of Martin Pump should recommend the offer from Competitive Pump.

Assume instead that Martin Pump does not decide to become a benefit corporation , and that Delaware courts apply the stated proposal. First, it is necessary to evaluate whether the proposed transaction meets the criteria to apply our proposal. In applying the scenario to the first prong, 49% would constitute a substantial minority interest that will not be selling their equity on the date of the transaction, including the Martins who retain 30% of the company's equity. In applying the second prong, it is apparent that Martin Pump residual shareholders will receive a superior economic benefit in the forecastable future from the Competitive Pump offer ($5 per share higher), and in addition, Omni-Con's plans to sell off valuable trademark assets, outsource, and terminate key management will likely impair the company's goodwill and the continuation of the company's historical growth. In considering the third prong, it is clear that Omni-Con's offer will severely impact the company's other primary stakeholders. As such, the court would apply the proposal creating an exception to *Revlon*. In effect, the directors, like those of a benefit corporation could assert safe harbor over its recommendation, should it recommend the offer from Competitive Pump.

Conclusion

For almost a century, the idea of shareholder primacy first articulated in *Dodge v. Ford Motor Co.* has gone largely unchallenged. Rather, the principle of profit maximization at all costs has passed from generation to generation without regard for the actual impact on future generations. The practical effect of such short-term profiteering is evident in the graveyard of corporations passed whose economic deaths were inevitable. But to quote Bob Dylan: "The times they are a-changin'."

The passage of the benefit corporation legislation provides a safe harbor for directors who seek to uphold their fiduciary obligations to both the shareholders as well as the corporation in all circumstances rather than forfeit them during the process of a sale. Moreover, it sets the stage for leaders of corporations dedicated to building enterprises of enduring value to realize their vision of creating prosperity, not only for the shareholders, but for all of the lives they touch. For what is a corporation without the support of its customers, employees, vendors and suppliers, and community?

Our proposal is not to abolish almost a century of refinement in case law articulating fiduciary duties, but envision the next steps in growing fiduciary duty into a more cogent economical, legal, and ethical form. Like the Delaware's benefit corporation statute, it is not about advancing an ideology, but a call to action for organizations that do not want to just survive, but thrive in this new era of sustainability.