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Defined by Dictum: The Geography of Revlon-Land in Cash and Mixed Consideration Transactions

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DEFINED BY DICTUM: THE GEOGRAPHY OF *REVLON*-LAND IN CASH AND MIXED CONSIDERATION TRANSACTIONS

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I. INTRODUCTION

ANYONE familiar with corporate law knows well how much of that law has been shaped by just one state: Delaware. Less obvious, however, is that so much of Delaware corporate law has been defined by the nonbinding dictum of that state's judges.[1] To illustrate this point, this Article considers the central role of dictum in the evolving doctrine first articulated by the Delaware Supreme Court in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[2] And in doing so, this Article refutes the thesis, recently advanced by Professor Stephen Bainbridge, that a judicial concern for di-

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1. *See generally* Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35 (2014). Although this Article uses "dictum" generally to refer to judicial statements that have no effect on the outcome of a particular case, some scholars and courts distinguish between two categories of dictum: (i) "judicial dictum," which is a court's opinion on a question that was briefed and argued by counsel but that is unnecessary to the court's ultimate decision; and (ii) "obiter dictum," which is a court's opinion on a question that was not briefed and argued by counsel and, therefore, was given without full consideration. *See, e.g.*, David Coale & Wendy Couture, *Loud Rules*, 34 PEPP. L. REV. 715, 727–28 (2007); Note, *Dictum Revisited*, 4 STAN. L. REV. 513, 513–14 (1952). This distinction does not appear to be recognized in Delaware law, and this Article refers to both categories as simply "dictum."

2. 506 A.2d 173 (Del. 1986).

rector conflicts of interests, *and nothing more*, motivates the *Revlon* doctrine.[3]

The *Revlon* doctrine famously dictates that in certain transactions involving the "sale or change in control" of a corporation,[4] the corporation's board of directors has a duty to "get[ ] the best price for the stockholders."[5] What constitutes a "sale or change in control" is thus a crucial legal question. Because when a board of directors enters *Revlon*-land, as it is colloquially called,[6] the board loses the presumption of the deferential business judgment rule[7] and becomes subject to enhanced judicial scrutiny under an objective standard of reasonableness.[8]

In *The Geography of* Revlon-*Land*,[9] Bainbridge attempts to crisply delineate the boundaries and contours of *Revlon*-land based on a conflict-of-interests theory of the doctrine. On this theory, *Revlon* is merely the logical extension of the Delaware Supreme Court's earlier corporate takeover

3. *See* Stephen M. Bainbridge, *The Geography of* Revlon-*Land*, 81 FORDHAM L. REV. 3277, 3281 (2013).

4. This articulation of when *Revlon* applies was developed in subsequent case law interpreting the doctrine. *See, e.g.*, Arnold v. Soc'y for Savs. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43, 47 (Del. 1994)).

5. *Revlon*, 506 A.2d at 182.

6. It should be noted that the Delaware Supreme Court has in the past expressed disapproval of such colloquial references to "*Revlon*-land" and "*Revlon* duties." *See Arnold*, 650 A.2d at 1289 n.40. Although the Delaware Supreme Court has itself made reference to "*Revlon* duties." *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003).

7. The Delaware Supreme Court has summarized the business judgment rule as the:

> [P]resumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company. Absent an abuse of discretion, that judgment will be respected by the courts.

Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

8. Although the doctrine arising from *Revlon* is sometimes referred to as "*Revlon* duties," the so-called "duty, announced in *Revlon*, is not an independent duty, but rather a restatement of directors' [foundational] duties of loyalty and care." Koehler v. Netspend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (Glasscock, V.C.). "Rather than changing the duties directors owe to stockholders, *Revlon* changes the level of [judicial] scrutiny" applied to board decisions. *Id.* at *11. When in *Revlon*-land, directors of a corporation "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders." *QVC*, 637 A.2d at 43. As then-Vice Chancellor Strine has explained it:

> 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. . . . [T]his reasonableness review is more searching than rationality review . . . . Although the directors have a choice of means, they do not comply with their *Revlon* duties unless they undertake reasonable steps to get the best deal.

In re Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007).

9. *See generally* Bainbridge, *supra* note 3.

jurisprudence, in which it introduced an intermediate standard of judicial review to police the potential self-interest that may drive the decisions of a target board of directors.[10] Employing this conflict-of-interests understanding of *Revlon*, Bainbridge decries a string of Delaware Chancery Court decisions applying the *Revlon* doctrine to transactions in which a target corporation is sold for cash or a mix of cash and the stock of a publicly traded, diffusely held acquirer that is without a controlling shareholder.[11] These chancery court decisions, Bainbridge argues, wrongly focus on the nature of the consideration paid in the transaction, rather than the potential conflicts of interests that may be present between the target's board of directors and its shareholders. These decisions have thus muddled the boundaries of *Revlon*-land. They are inconsistent with the conflict-of-interests rationale underlying the doctrine as well as subsequent Delaware Supreme Court precedent applying it.

In constructing his critique, however, Bainbridge overstates the chancery court precedent with which he takes issue as well as the supreme court precedent upon which he bases his conflict-of-interests thesis. In reality, the boundaries of *Revlon*-land are murky.[12] Left uncertain by Delaware Supreme Court precedent, the scope of the *Revlon* doctrine has been purposefully, but cautiously, defined by the Delaware Chancery Court through the use of dictum. By employing dictum, the chancery court has provided useful guidance on a doctrine that is otherwise ill-defined by the supreme court's jurisprudence; and it has done so strategically—in situations where the court's statements do not unfairly affect the parties to the dispute before it. For this, the chancery court should be commended.

The remainder of this Article proceeds in three parts. Part II describes the lay of *Revlon*-land under the conflict-of-interests theory that Bainbridge espouses. Part III then explains the considerable ambiguity in the Delaware Supreme Court's post-*Revlon* precedents and the limited support they provide to Bainbridge's conflict-of-interests thesis. In the absence of definitive guidance, this part argues, it is unsurprising that the Delaware Chancery Court has resorted to nonbinding dictum to provide some clarity for lawyers and business planners as to the precise boundaries of *Revlon*-land. Finally, Part IV briefly concludes.

II. THE GEOGRAPHY OF *REVLON*-LAND UNDER A CONFLICT-OF-INTERESTS THEORY

To understand Bainbridge's conflict-of-interests theory of *Revlon*, one must begin with an earlier and equally famous Delaware Supreme Court decision: *Unocal Corp. v. Mesa Petroleum Co.*[13] When properly understood, according to Bainbridge, *Revlon*, like *Unocal* before it, is simply a doctrine

10. *See infra* Part II.A.
11. *See infra* Part II.B.
12. *See infra* Part III.
13. 493 A.2d 946 (Del. 1985).

intended to police the self-interest that may motivate certain board decisions. As such, Bainbridge argues, the boundaries of *Revlon*-land are defined by the potential for problematic conflicts of interests, and not by the nature of consideration that shareholders are to receive in a sale transaction as the Delaware Chancery Court has erroneously concluded.

A. *The Conflict-of-Interests Theory of* Revlon

In 1985, the Delaware Supreme Court famously revolutionized the law of corporate takeovers by introducing an intermediate standard of judicial review—more intrusive than the deferential business judgment rule usually accorded to board decisions,[14] but less exacting than the entire fairness review applied to self-dealing transactions.[15] In *Unocal*, the supreme court recognized that in the context of hostile takeovers, there exists an "omnipresent specter" that a target board of directors may be motivated by self-interest rather than what is best for the corporation and its shareholders.[16] Accordingly, the court applied an "enhanced" level of judicial scrutiny to target board actions taken in response to a hostile takeover bid.[17]

In Bainbridge's view, the enhanced review articulated under *Unocal* sensibly balances the irreconcilable tension between accountability and authority in corporate law.[18] On one hand, unfettered director discretion to manage the business free from shareholder oversight or judicial intervention is necessary for the efficient operation of a large firm like the modern corporation.[19] On the other hand, the broad authority that corporate law affords boards of directors creates the potential for director self-dealing at the expense of the corporation and its shareholders. Thus,

14. *See supra* note 7 and accompanying text.

15. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.").

16. *See Unocal*, 493 A.2d at 954.

17. *See id.* at 954–55. Under the *Unocal* standard, the target board must carry its own initial two part burden:

> First, a *reasonableness test*, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and second, a *proportionality test*, which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed.

Unitrin, Inc. v. Am. Gen. Corp. 651 A.2d 1361, 1373 (Del. 1995) (citing *Unocal*, 493 A.2d at 955). Under the second prong of the *Unocal* test, the court engages "in a substantive review of the board's defensive actions" asking whether the board's actions "fell 'within a range of reasonable responses to the threat' posed." Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 92–93 (Del. Ch. 2011) (Chandler, C.) (quoting *Unitrin*, 651 A.2d at 1367).

18. *See* Bainbridge, *supra* note 3, at 3313–14.

19. *See id.* at 3283–85. For a more fulsome account of Bainbridge's director primacy theory of corporate law, see generally Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003).

in circumstances implicating a conflict of interests, the risk of legal sanction—that is, judicial intervention to ensure board accountability to the shareholders—is a necessary check on board authority to deter self-dealing among directors.[20] Applying this framework to corporate takeovers, *Unocal* recognized that the directors of a target corporation *may* be motivated by a selfish interest in preserving their own office.[21] Accordingly, the Delaware Supreme Court forged a middle ground between authority and accountability in the takeover context by requiring that directors' defensive actions be reasonable—proportionate to the threat that a hostile bid poses.[22]

For Bainbridge, then, *Revlon* represents the logical evolution of the intermediate *Unocal* standard, a "mere variant of *Unocal*"[23] designed to address potential self-interest in a slightly different situation: a negotiated sale of a corporation pursuant to which the target board has agreed to "lock-ups" or other deal protections—that is, contract terms used to protect the board's preferred transaction and deter (or preclude) an unwanted bidder.[24] In a negotiated transaction, the mere fact that the target board has favored a particular acquirer over other would-be bidders suggests at least the potential that the target directors acted in their own self-interest rather than that of the corporation and its shareholders. To police any potential conflict in this context, the *Revlon* doctrine requires the directors to "act[ ] reasonably to seek the transaction offering the best value reasonably available to the stockholders."[25] Thus, like the *Unocal* standard before it, the *Revlon* doctrine seeks to "ferret out board actions motivated by conflicted interests by contrasting the [board's] decision[s] to some objective standard."[26]

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20. *See* Bainbridge, *supra* note 3, at 3290–93.

21. *See Unocal*, 493 A.2d at 194.

22. *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) ("Avoiding a crude bifurcation of the world into two starkly divergent categories—business judgment rule review reflecting a policy of maximal deference to disinterested board decisionmaking and entire fairness review reflecting a policy of extreme skepticism toward self-dealing decisions—-the Delaware Supreme Court's *Unocal* and *Revlon* decisions adopted a middle ground."); *see also supra* notes 14–17 and accompanying text.

23. *See* Bainbridge, *supra* note 3, at 3314.

24. *See id.* at 3327.

25. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994). As the *QVC* court further elaborated,

> The key features of an enhanced scrutiny test [under *Revlon*] are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

Id. at 45.

26. Bainbridge, *supra* note 3, at 3313; *see also* Koehler v. Netspend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013)

Bainbridge argues, however, that the potential conflict of interests in a negotiated transaction is not always problematic for shareholders of a target corporation.[27] Where the acquirer is a diffusely held, publicly traded corporation, diversified investors are as likely to own shares of the acquiring company as they are to own shares of the target.[28] In such cases, a diversified investor would be indifferent to the form of the consideration paid for the target shares (whether it is cash or stock in the acquirer)[29] and, more importantly, the allocation of transactional gains as between the shareholders of the acquirer and target.[30]

The risk of a conflicted motive among target directors is more acute, however, when the preferred acquirer is privately held or, alternatively, publicly held but controlled by a single individual or affiliated group rather than a "fluid aggregation of unaffiliated stockholders."[31] In such cases, even a fully diversified investor is precluded from standing on both sides of the transaction—to benefit from the transactional gains as both an owner of the target and acquirer.[32] Accordingly, in such cases even a fully diversified investor would prefer a legal rule requiring that as much of the

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(Glasscock, V.C.) ("*Revlon*'s enhanced scrutiny is a 'middle ground' between deference to the board under the business judgment rule and skepticism toward the board under entire fairness review. Under this middle-ground review, the directors have the burden of proving that they were fully informed and acted reasonably." (footnote omitted) (citing *QVC*, 637 A.2d at 45; *In re* Dollar Thrifty, 14 A.3d at 596)).

27. *See* Bainbridge, *supra* note 3, at 3304–07. *But see* Bernard Black & Reiner Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 Nw. U. L. REV. 521, 533 (2002) (observing that Delaware case law prioritizes "*the interests of undiversified investors [over] those of diversified investors*"); Franklin Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1551 (2013) ("Accepting this sort of portfolio based approach to determining shareholder interest would radically rewrite corporate law in ways reaching far beyond *Revlon*.").

28. *See* Bainbridge, *supra* note 3, at 3310.

29. *See id.* at 3334–35 ("As long as the acquirer is publicly held, shareholders who get cash could simply turn around and buy stock in the postacquisition company. They would then participate in any post-transaction gains, including any future takeover premium."). This argument—that target shareholders would be indifferent between consideration in the form of cash versus acquirer stock, because each can be easily converted into the other—assumes zero transaction costs, when in fact a shareholder would incur at least some marginal transaction cost to purchase or sell acquirer shares.

30. *See id.* at 3310–11 ("Because increasing the target's share of the gains by increasing the premium the acquirer pays to obtain control necessarily reduces the acquirer's share, the diversified investor will view such a shift as simply robbing Peter to pay Paul.").

31. *See id.* (making this assertion). The quoted language derives from *Paramount Commc'ns, Inc. v. QVC Network, Inc.*, in which the Delaware Supreme Court held that *Revlon* applies when a transaction would transfer corporate control from a "fluid aggregation of unaffiliated stockholders" to a "single person or . . . cohesive group acting together." *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43 (Del. 1994).

32. *See* Bainbridge, *supra* note 3, at 3310.

transactional gains as possible be allocated to the target corporation.[33] Unfortunately, Bainbridge observes, it is in these very situations—where the acquirer is privately held or controlled by an individual or affiliated group—that the potential for a conflict of interests is most problematic for investors.[34] The acquirer's ability to reap a disproportionate share of the gains from the transaction give it a "high incentive to . . . offer side payments" and other deal sweeteners to the target directors and managers in order to gain their favor and cooperation.[35]

Thus, according to Bainbridge's conflict-of-interests theory, the outer boundaries and inner contours of *Revlon*-land have been shaped by the Delaware Supreme Court to address the potentially problematic conflict-of-interests that may arise in a negotiated transaction where the acquirer is privately held or otherwise controlled by a single individual or affiliated group.[36] It is in these situations, he argues, that *Revlon* has been applied by the high court in its subsequent case law. Most notably, the supreme court applied *Revlon* in *Paramount Communications Inc. v. QVC Network, Inc.*[37] (*QVC*), a case involving the stock-for-stock merger of two publicly held media companies, Paramount and Viacom.[38] Unlike its earlier decision in *Paramount Communications Inc. v. Time Inc.*[39] (*Time-Warner*), where the court ruled that *Revlon* was inapplicable to a seemingly similar stock-for-stock merger between Time and Warner Communications,[40] the supreme court in *QVC* ruled that the Paramount-Viacom transaction triggered *Revlon* duties for the Paramount board of directors to get the best value reasonably available for its shareholders because the surviving post-merger business would be controlled by one individual, Viacom's pre-transaction controlling shareholder.[41] Implicit in the high court's distinction between the *Time-Warner* and *QVC* cases, Bainbridge sees the supreme court's concern for potential conflicted interests in transactions involving a privately held or controlled acquirer, like the Paramount-Viacom merger.[42]

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33. *See id.* at 3311.

34. *See id.*

35. *See id.* If *Revlon* is aimed at policing the conflicts of interests created by these kinds of side dealings, it is not clear why the doctrine would exist at all given the traditional fiduciary duty of loyalty would already address such concerns. *See* Gevurtz, *supra* note 27, at 1564 ("The simple answer . . . is to recognize the conflict-of-interest such side deals can create and invoke the higher scrutiny required of conflict-of-interests transactions.").

36. Bainbridge, *supra* note 3, at 3311–20.

37. 637 A.2d 34 (Del. 1994).

38. *Id.*

39. 571 A.2d 1140 (Del. 1990).

40. *Id.* at 1142.

41. *See QVC*, 637 A.2d at 42–46.

42. *See* Bainbridge, *supra* note 3, at 3312.

B. *The Chancery Court's Misapplication of* Revlon

According to the conflict-of-interests theory of *Revlon* espoused by Bainbridge, motives matter.[43] Whether a target board is adopting takeover defenses or agreeing to sell the corporation in a negotiated transaction, it is the potential that the target directors may be acting in their self-interest that justifies the intrusion on board authority under the heightened judicial scrutiny of *Unocal* and *Revlon*.[44] In the absence of a potentially problematic conflict of interests, judicial or shareholder intervention into board authority to sell the company in a negotiated transaction would upset the careful balance between authority and accountability that corporate law has constructed.[45]

Applying this theory, Bainbridge proceeds to decry a set of three chancery court decisions.[46] Starting with *In re Lukens Inc.*[47] and culminating with *In re Smurfit-Stone Container Corp.*,[48] the lower court considered whether *Revlon* applies to a merger transaction in which the target shareholders were to receive a mix of cash and stock in a publicly traded, diffusely held acquirer:

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43. *See id.* at 3302–05.

44. *See id.* at 3313.

45. *See id.* at 3290 ("The efficient separation of ownership and control that makes the modern corporation possible thus is inconsistent with routine shareholder—or judicial—review of board decisions.").

46. *See id.* at 3323–29. Bainbridge also criticizes a fourth unpublished chancery court decision—a transcript ruling—*Steinhardt v. Howard-Anderson*. *See* Transcript of Ruling of the Court on Plaintiffs' Motion for a Preliminary Injunction, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL); *see also* Bainbridge, *supra* note 3, at 3329–31. The problem that troubles Bainbridge in *Steinhardt*, however, is different than the three other chancery court decisions discussed herein. Namely, unlike *Lukens*, *NYMEX*, and *Smurfit-Stone*, all of which suggest that *Revlon* applies based on the nature of the consideration that target shareholders are to receive, in the *Steinhardt* transcript ruling, Vice Chancellor Laster opined that *Revlon* applies because of the minority percentage ownership the target shareholders would have in the combined post-merger entity, a widely held, publicly traded company. *See* Bainbridge, *supra* note 3, at 3330. The author agrees with Bainbridge that *Steinhardt* is a legally novel approach to applying *Revlon*, although it is arguably consistent with the underlying rationale of the doctrine. *See* Black & Kraakman, *supra* note 27, at 543–45 (explaining that "whale-minnow" stock-for-stock merger should trigger *Revlon* under "hidden value" understanding of doctrine).

47. 757 A.2d 720 (Del. Ch. 1999).

48. No. 6164-VCP, 2011 WL 2028076 (Del. Ch. May 20, 2011).

FIGURE 1: CHANCERY COURT DECISIONS APPLYING *REVLON* TO MIXED CONSIDERATION TRANSACTIONS

YEAR DECIDED	CASE	CONSIDERATION PAID TO TARGET SHAREHOLDERS	
1999	*IN RE* LUKENS INC.[49]	62% CASH	38% STOCK
2009	*IN RE* NYMEX[50]	44% CASH	56% STOCK
2011	*IN RE* SMURFIT-STONE CONTAINER CORP.[51]	50% CASH	50% STOCK

Focusing on the substantial cash portion of the total merger consideration to be paid to shareholders of the target, the chancery court first stated in dictum in *Lukens* and then "expressly held" in *Smurfit-Stone*, according to Bainbridge,[52] that *Revlon* applies to such mixed consideration transactions where cash is a substantial component.

In one sense, these mixed consideration cases merely reflect conventional wisdom—that an all-cash transaction categorically triggers *Revlon* duties.[53] Recall, under the Delaware Supreme Court's well-settled formulation, *Revlon* applies whenever a board embarks on a transaction that will result in a "sale *or* change of control" of the corporation.[54] Unlike a strategic stock-for-stock merger, where the shareholders of both companies will continue as owners of the combined business,[55] in an all-cash, cash-for-

49. 757 A.2d 720 (Del. Ch. 1999) (Lamb, V.C.).

50. 2009 WL 3206051 (Del. Ch. Sept. 30, 2009) (Noble, V.C.).

51. 2011 WL 2028076 (Del. Ch. May 20, 2011) (Parsons, V.C.).

52. *See* Bainbridge, *supra* note 3, at 3328 ("Unlike *Lukens* and *NYMEX* . . . in *Smurfit* Vice Chancellor Parsons *expressly held* that *Revlon* applied even though 'control of Rock-Tenn after closing will remain in a large, fluid, changing, and changeable market' and the 'Smurfit-Stone stockholders will retain the right to obtain a control premium in the future.'" (emphasis added)).

53. *See* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock–for–Stock Merger Agreements*, 56 BUS. LAW. 919, 927 n.25 (2001) ("In its simplest formulation, *Revlon* requires directors who wish to sell the company for cash to take affirmative steps to obtain the highest sale price reasonably attainable."); *see also* Black & Kraakman, *supra* note 27, at 539–40 ("The most common port of entry into *Revlon*land is a cash sale . . . . Cash sales . . . are an easy case for limiting the target board's discretion . . . ."); Brian J.M. Quinn, *Triggering* Revlon *Duties*, M&A L. PROF BLOG (Oct. 14, 2009), http://lawprofessors.typepad.com/mergers/2009/10/triggering-revlon-duties.html ("We know that an all cash transaction will constitute a change of control and thus require directors attempt [sic] to get the highest price reasonably available for the benefit of target shareholders.").

54. *See* Arnold v. Soc'y for Savs. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (emphasis added) (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43, 47 (Del. 1994)).

55. *See, e.g.*, *QVC*, 637 A.2d at 46–47 (reasoning that *Revlon* was inapplicable in *Time-Warner* to proposed Time-Warner merger because "neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market" (quoting Paramount Commc'ns, Inc. v. Time Inc., Civil Action Nos. 10866, 10670, 10935, 1989 WL 79880, 15 DEL. J. CORP. L. 700, 705, 739 (Del. Ch. July 17, 1989) (Allen, C.))); *In re* Delta & Pine Land Co.

stock merger, the target shareholders will be cashed out—effectively forced to sell their shares to the acquirer. "[T]here is no tomorrow" for the target shareholders.[56] For them at least, *this is a "sale"* of the corporation.[57] Because an all-cash transaction represents the last chance for the target shareholders to maximize the value of their investment, *Revlon* dictates that in such situations directors get the best price reasonably available for their shares.[58]

This "last chance" reasoning has been used to explain not only the conventional wisdom that *Revlon* categorically applies to any all-cash "sale" transaction. It has also been invoked by the Delaware courts to justify *Revlon*'s applicability to "change of control" transactions—even one structured as a stock-for-stock merger.[59] Although the target shareholders may continue as minority owners of the combined business following a change of control transaction, the controlling shareholder can, at any time, unilaterally cash out the target shareholders in a future cash-for-stock merger.[60]

S'holders Litig., No. Civ. A. 17707, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000) (Chandler, C.) (holding that strategic stock-for-stock merger does not trigger *Revlon* where there would be no transfer of control upon consummation of transaction).

56. *See* Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1055 (Del. Ch. 1997) (Allen, C.); *see also* TW Servs., Inc. v. SWT Acquisition Corp., Civ. A. Nos. 10427, 10298, 1989 WL 20290, 14 DEL. J. CORP. L. 1169, 1184 (Del. Ch. Mar. 2, 1989) (Allen, C.) ("In the setting of a sale of a company for cash, the board's duty to shareholders is inconsistent with acts not designed to maximize present share value, acts which in other circumstances might be . . . justified by reference to the long run interest of shareholders. In such a setting, for the present shareholders, there is no long run.").

57. *See* McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (reasoning that *Revlon* is implicated by proposed all-cash, all-shares transaction, because "the decision constitutes a final-stage transaction").

58. *See Time-Warner*, 1989 WL 79880, 15 DEL. J. CORP. L. at 751 (Allen, C.) ("*Revlon* was not a radical departure from existing Delaware, or other, 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) . . . ."); *see also* Strine, *supra* note 53, at 927 n.25 ("The *Revlon* principle grows out of the traditional principle that fiduciaries must sell trust assets for their highest value.").

59. *See Equity-Linked Investors*, 705 A.2d at 1055 ("The holding of *Paramount* . . . was that where the stock to be received in the merger was the stock of a corporation under the control of a single individual or a control group, then the transaction should be treated for '*Revlon* duty' purposes as a cash merger would be treated: there is no tomorrow for the shareholders . . . ."); *see also* Transcript of Ruling of the Court on Plaintiffs' Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) ("[T]he change of control test is ultimately a derivative test. . . . [W]hen enhanced scrutiny applies [under *Revlon*] is when you have a final stage transaction."), *available at* http://www.alston.com/files/docs/Occam_Ruling.pdf.

60. *See* QVC Network, Inc. v. Paramount Commc'ns, Inc., 635 A.2d 1245, 1266–67 (Del. Ch. 1993) (Jacobs, V.C.) ("[S]hareholders' continuing equity interest is far from secure, because once the Viacom transaction is complete Mr. Redstone will have absolute control of the merged entity and will have the power to use his control at any time to eliminate the shareholders' interest by a 'cash out'

Regardless of the combined business's future prospects, the target shareholders can no longer be assured of their continuing equity ownership.[61] Accordingly, *Revlon* applies because a change of control represents the target shareholders' last opportunity to maximize the value of their investment.[62]

The chancery court in its *Lukens* and *Smurfit-Stone* decisions simply extended this "last chance" reasoning to mergers involving mixed consideration. In a mixed consideration transaction, by definition, the target shareholders will receive some shares of the acquirer and, therefore, continue as owners of the combined business after the merger. But, where cash is a substantial percentage of the merger consideration, the target shareholders will also be cashed out of a significant portion of their ownership interest. The transaction thus represents the last chance for them to maximize the value of that portion of their investment. Accordingly, for the same reasons conventional wisdom holds that *Revlon* applies to all-cash and change of control transactions, *Lukens* and *Smurfit-Stone* concluded that *Revlon* should also apply to mixed consideration transactions in which cash represents a significant portion of the total merger consideration.[63]

Yet, under Bainbridge's conflict-of-interests theory, this extension of *Revlon*—to apply to cash-heavy mixed consideration transactions—misapprehends the doctrine. Indeed, even the *conventional wisdom* upon which it is based—that *the type of consideration* received should matter at all for *Revlon* purposes—runs counter to the conflict-of-interests thesis. Recall, under a conflict-of-interests theory of *Revlon*, the doctrine aims to check board authority only where a problematic conflict of interests potentially

merger.") *aff'd* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1994) ("[S]tockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger.").

61. *See QVC*, 635 A.2d at 1267 (observing that Paramount shareholders "have no assurance that they will receive the long-run benefits claimed to justify the [Paramount] board's decision to prefer Viacom over QVC") *aff'd QVC*, 637 A.2d at 43 ("Following [the merger], there will be a controlling stockholder who will have the voting power to . . . cash-out the public stockholders . . . . Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.").

62. *See QVC*, 635 A.2d at 1267 (reasoning that *Revlon* applies because "[t]his is *the only* opportunity that Paramount's shareholders will ever have to receive the highest available premium-conferring transaction" (emphasis added)) *aff'd QVC*, 637 A.2d at 45 (reasoning that *Revlon* applies because "an asset belonging to public stockholders (a control premium) is being sold and *may never be available again*" (emphasis added)).

63. *See In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (Lamb, V.C.) ("For a substantial majority of the then-current shareholders, 'there is no long run.'"); *see also In re* Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *14 (Del. Ch. May 20, 2011) (Parsons, V.C.) ("[T]he concern here is that there is no 'tomorrow' for approximately 50% of each stockholder's investment in Smurfit–Stone.").

arises between the directors and shareholders of a target corporation.[64] The type of consideration received by the target shareholder—whether it is cash, stock in the acquirer, or some mix of the two—is simply irrelevant to the conflict-of-interests question.[65] What matters is the identity of the acquirer and whether it creates the potential for conflicted interests on the part of the target directors. Thus, a "sale" should not trigger *Revlon* simply because a target corporation is to be sold in an all-cash (or even mostly cash) transaction. Properly understood, a "sale" should trigger *Revlon only if* the transaction will also result in a "change of control" of the target from a "fluid aggregation of unaffiliated stockholders"[66] (i.e., the market) to the hands of a private entity or individual owner.[67] As noted above,[68] it is in these transactions—involving a "change of control" from public investors into the hands of a private entity or individual owner—that the potential conflict of interests among the board is most problematic for the shareholders of a target corporation. A "sale or change of control" does not occur for *Revlon* purposes where a target corporation is sold for cash to a publicly traded, diffusely held acquirer with no controlling shareholder.[69] Because, in such cases, control remains vested in a "fluid aggregation of unaffiliated stockholders" both before and after the transaction. To trigger *Revlon*, according to the conflict-of-interests thesis, there must be a "change of control," by sale or otherwise, raising the specter of conflicted board interest. Absent a "change of control," the courts should instead defer to the target board's unconflicted business judgment, as they would in any other transactional context.

By losing sight of this central principle, Bainbridge argues, the chancery court has become "lost in *Revlon*-land."[70] The lower court has mistakenly asserted that the doctrine applies to all "sales," focusing on the consideration paid rather than the potential conflict of interests created by a sale transaction. "The borders of *Revlon*-land thus have suffered a significant distortion," he laments wistfully.[71]

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64. *See* Bainbridge, *supra* note 3, at 3310–11, 3333–35.

65. *See id.* at 3332–35.

66. *See QVC*, 637 A.2d at 46 (distinguishing Time-Warner merger from Paramount-Viacom merger on grounds that in former transaction *Revlon* was inapplicable because "Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger"); *see also* Paramount Commc'ns, Inc. v. Time Inc., C.A. Nos. 10866, 10670, 10935, 1989 WL 79880, 15 DEL. J. CORP. L. 700, 739 (Del. Ch. July 17, 1989) (Allen, C.) (reasoning that *Revlon* is inapplicable to Time-Warner merger because "[c]ontrol of both [companies] remained in a large, fluid, changeable and changing market").

67. *See* Bainbridge, *supra* note 3, at 3331–33.

68. *See supra* notes 31–35 and accompanying text.

69. *See* Bainbridge, *supra* note 3, at 3332.

70. *Id.* at 3281.

71. *Id.* at 3329.

III. DICTUM IN THE WAKE OF AMBIGUOUS PRECEDENT

The problem with Bainbridge's critique of the Delaware Chancery Court in its application of *Revlon* is twofold. First, in constructing his conflict-of-interests thesis, Bainbridge overstates the relevant chancery court precedent when he characterizes the analysis in *Smurfit-Stone* regarding *Revlon* as a "holding" binding future decisions. The *Revlon* analysis in *Smurfit-Stone* with respect to mixed consideration transactions, like the decisions that came before it (and that have more recently come since[72]), is actually nonbinding dictum. But it is dictum built upon an edifice of precedent applying *Revlon* to all-cash transactions categorically, regardless of the identity of the acquirer.[73]

Second, Bainbridge overstates the support found in Delaware Supreme Court precedent for his theory that *Revlon* turns on the potentially problematic conflicts of interests, rather than the nature of the consideration received by the shareholders of the target corporation. In reality, the Delaware Supreme Court precedent, like the rationale for the *Revlon* doctrine itself, is at best ambiguous.[74]

Indeed, it is the absence of definitive guidance from supreme court precedent—embracing a conflict-of-interests theory or any other definitive explanation of the *Revlon* doctrine—that has moved the Delaware Chancery Court to embark on a seemingly deliberate path of defining, ever cautiously, the boundaries of *Revlon*-land with respect to mixed consideration transactions through the use of dictum. Some may disagree with the boundaries the lower court has drawn in its dictum. But by doing so, the chancery court has provided useful guidance, enhancing the predictability and certainty of corporate law on this key, yet illusive doctrine.[75]

A. *The Dictum of the Chancery Court*

Setting aside for the moment the merits of Bainbridge's conflict-of-interests theory of the *Revlon* doctrine, it is important to note at the outset that the chancery court has never actually held, as Bainbridge claims, that a mixed consideration merger triggers *Revlon* duties. Although the lower court has stated this principle on multiple occasions, each time it has been nonbinding dictum, unnecessary to the court's ultimate decision.

Recall that the chancery court's application of *Revlon* to mixed consideration transactions is built upon the conventional wisdom that any all-cash sale *is* a "sale or change of control" for *Revlon* purposes.[76] Bainbridge concedes that there is recurring language in the lower court's precedent

72. *See infra* notes 188–95 and accompanying text (describing dictum in *In re Synthes*).

73. *See infra* Part III.A.

74. *See infra* Part III.B.

75. *See infra* Part III.C.

76. *See supra* Part II.B

affirming this conventional wisdom.[77] For example, he notes, in *In re Topps Company*,[78] then-Vice Chancellor Strine articulated the "familiar" *Revlon* test as follows: "When directors propose to *sell a company for cash* or engage in a change of control transaction, they must take reasonable measures to ensure that the stockholders receive the highest value reasonably attainable."[79] Likewise, in *TW Services, Inc.*,[80] the esteemed Chancellor Allen summarized the *Revlon* doctrine to mean that "[i]n the setting of a *sale of a company for cash*, the board's duty to shareholders is . . . to maximize present share value" rather than pursue some long-term corporate interests, because "[i]n such a setting, for the present shareholders, there is no long run."[81]

Yet, as Bainbridge observes in dismissing the import of these decisions, both *Topps* and *TW Services* involved an all-cash sale to a *privately* held acquirer, raising a potential conflict of interests for the target board of directors.[82] And so, the otherwise unqualified judicial statements of law in these two decisions, *when read in context*, provide scant guidance—let alone binding precedent—on whether *Revlon* categorically applies to any *all*-cash sale, and, in particular, a cash sale of a target to a publicly traded, diffusely held acquirer, which the conflict-of-interests thesis would hold is outside *Revlon*-land.[83]

But *Topps* and *TW Services* are not the only two chancery court decisions to suggest that *Revlon* categorically applies to any all-cash transaction. One need not delve deeply into Delaware case law to find a number of opinions reaffirming the principle that any all-cash transaction *is* a "sale or change of control" triggering *Revlon* duties.[84] Moreover, one could read-

77. *See* Bainbridge, *supra* note 3, at 3328 (discussing chancery court's opinions in *Topps* and *TW Services*).

78. 926 A.2d 58 (Del. Ch. 2007).

79. *Id.* at 64 (emphasis added).

80. C.A. Nos. 10427, 10298, 1989 WL 20290, 14 DEL. J. CORP. L. 1169 (Del. Ch. Mar. 2, 1989).

81. *Id.* at 1184 (emphasis added).

82. *See* Bainbridge, *supra* note 3, at 3324, 3328.

83. *Cf. id.* at 3328 ("[L]ike *TW Services*, *Topps* does not stand for the proposition that a cash transaction by a publicly held acquirer triggers *Revlon*.").

84. *See* Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (Glasscock, V.C.) ("Here, the NetSpend Board has agreed to sell the Company in an all-cash [transaction]. If the transaction closes, [the publicly-traded acquirer] will own 100% of NetSpend. This is a change-in-control transaction, and *Revlon* duties apply."); *see also In re* Delphi Fin. Grp. S'holders Litig., C.A. No. 7144-VCG, 2012 WL 729232, at *13 (Del. Ch. Mar. 6, 2012) (Glasscock, V.C.) ("Once the Director Defendants decided to sell the Company for cash, they assumed a duty under the *Revlon* doctrine to undertake reasonable efforts to obtain the highest price reasonably available in the sale of the Company."); Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4292024, at *4 (Del. Ch. Nov. 30, 2007) (Parsons, V.C.) ("Under *Revlon*, when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available."); *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 115 (Del. Ch.

ily cite decisions actually applying this conventional wisdom to transactions involving a publicly traded, diffusely held acquirer.[85] For example, in *In re Pennaco Energy, Inc.*,[86] then-Vice Chancellor Strine applied *Revlon* to the all-cash sale of a target to Marathon Oil, then a wholly owned subsidiary of the publicly traded, diffusely held USX Corporation.[87] Likewise, in *In re Cogent, Inc.*,[88] Vice Chancellor Parsons applied *Revlon* to the all-cash sale of a target to the global conglomerate 3M Company.[89] Together, these precedents go far to suggest the conventional wisdom is conventional for a reason. That an all-cash sale per se triggers *Revlon*—irrespective of the acquirer's identity—is practically unquestioned by myriad chancery court decisions.

Bainbridge, however, never acknowledges this fact in constructing his conflict-of-interests thesis. Despite the substantial body of precedent applying *Revlon* to all-cash transactions, he instead attacks the conventional wisdom by focusing his attention on the chancery court's more recent extension of *Revlon* to mixed consideration transactions. Bainbridge argues

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2007) (Strine, V.C.) ("*Revlon* and its progeny stand for the proposition that when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available."); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 812 (Del. Ch. 2007) (Strine, V.C.) ("Here, for example, the Inter–Tel board is recommending a cash-out merger and had the duty under *Revlon* to act reasonably in pursuit of the highest value reasonably attainable."); *In re* Delta & Pine Land Co. S'holders Litig., No. Civ.A. 17707, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000) (Chandler, C.) ("The Delta-Monsanto merger did not involve a cash sale of the company, an event that would have placed the transaction in a *Revlon* factual context. The merger also did not involve a change of control, another event triggering *Revlon*."); Chaffin v. GNI Grp., Inc., No. Civ.A. 16211-NC, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999) (Jacobs, V.C.) ("In a cash-out merger that amounts to a sale of the company, the duty of the acquired company's board is to obtain the best value reasonably available for the stockholders."); Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1058 (Allen, C.) (Del. Ch. 1997) ("[T]he single aim of maximizing the present value of the firm's equity. . . . [I]s very clear when, for example, one bidder, offers an all cash deal and another offers all cash as well, but less money.").

85. In addition to the decisions noted below, more recently, in *Koehler*, Vice Chancellor Glasscock applied *Revlon* to the all-cash sale of NetSpend to publicly traded, diffusely held Total System Services pursuant to a negotiated tender offer. *See Koehler*, 2013 WL 2181518, at *24 (denying motion for preliminary injunction).

86. 787 A.2d 691 (Del. Ch. 2001) (denying motion for preliminary injunction).

87. *See id.* at 703 (denying motion for preliminary injunction); *see also* SEC. EXCH. COMM'N, *Schedule 14A Information: USX Corporation* 19–20 (Mar. 12, 2001), http://www.sec.gov/Archives/edgar/data/101778/000091205701503227/a2040659zdef14a.txt (confirming that USX did not have controlling shareholder around time of acquisition).

88. *See* 7 A.3d 487 (Del. Ch. 2010) (denying motion for preliminary injunction).

89. *See id.* at 497, 517 (denying motion for preliminary injunction); *see also* SEC. EXCH. COMM'N, *Schedule 14A Information: 3M Inc.* 31–32 (Mar. 23, 2011), http://www.sec.gov/Archives/edgar/data/66740/000104746911002539/a2202430zdef14a.htm (confirming that 3M did not have controlling shareholder around time of acquisition).

the chancery court began to stray from *Revlon*-land's purportedly singular concern for director self-interest in 1999 with its decision in *Lukens*.[90] In *Lukens*,[91] and again in a subsequent case, *NYMEX*,[92] the chancery court suggested that a merger transaction in which the target shareholders receive all cash or mostly cash would trigger *Revlon* duties even though the acquirer was a publicly traded, diffusely held company with no controlling shareholder. But, as Bainbridge notes, the statements concerning *Revlon* in these two decisions were mere dicta, unnecessary for the court's ultimate ruling.[93] In both decisions, the court ruled that *even if Revlon were triggered*, the corporate charter at issue exculpated the defendant-directors of any liability for damages sought by the plaintiff-shareholders.[94] Resolution of the *Revlon* question was therefore irrelevant to the dispute. As dicta, neither decision created legally binding precedent.

According to Bainbridge, however, the dicta of *Lukens* and *NYMEX* became binding precedent in 2011 with the chancery court's *Smurfit-Stone*

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90. *But see supra* notes 82–89 (citing cases reaffirming conventional wisdom that *Revlon* applies to any all-cash transaction and identifying cases applying that conventional wisdom to all-cash transactions involving publicly traded acquirer without controlling shareholder).

91. In *Lukens*, Vice Chancellor Lamb stated:

> The defendants argue that because over 30% of the merger consideration was shares of [the acquirer's] common stock, a widely held company without any controlling shareholder, *Revlon* and *QVC* do not apply. I disagree. Whether 62% or 100% of the consideration was to be in cash, the directors were obliged to take reasonable steps to ensure that the shareholders received the best price available because, in any event, for a substantial majority of the then-current shareholders, "there is no long run."

In re Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) *aff'd sub nom.* Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (unpublished table decision).

92. Citing *Lukens*, Vice Chancellor Noble in *NYMEX* observed that:

> [I]n a transaction where cash is the exclusive consideration paid to the acquired corporation's shareholders, a fundamental change of corporate control occurs—thereby triggering *Revlon*—because control of the corporation does not continue in a large, fluid market. In transactions, such as the present one, that involve merger consideration that is a mix of cash and stock—the stock portion being stock of an acquirer whose shares are held in a large, fluid market—"[t]he [Delaware] Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering *Revlon*."

In re NYMEX S'holders Litig., C.A. Nos. 3621-VCN, 3835-VCN, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009).

93. *See* Bainbridge, *supra* note 3, at 3323 n.275, 3326.

94. *See Lukens*, 757 A.2d at 732 n.25 (holding that, even "assuming that *Revlon* is implicated, the Complaint must still be dismissed" because allegations pled amounted only to breach of duty of care, which was exculpated under target corporation's certificate of incorporation); *NYMEX*, 2009 WL 3206051, at *5 (observing that court "need not decide whether *Revlon* scrutiny applies to the present transaction," because, "even if *Revlon* applied to this case, application of the exculpatory clause [in the target corporation's charter] would lead to dismissal" of plaintiff's duty of care claims).

decision.[95] In that case, Bainbridge asserts, Vice Chancellor Parsons relied on those two earlier opinions "*to hold—for the first time*—that all- or partial-cash transactions trigger *Revlon*."[96]

It is true that in *Smurfit-Stone*, the vice chancellor opined that, as a general matter, "*Revlon* will govern a board's decision to sell a corporation where stockholders will receive cash for their shares"[97]—although, as noted above, this simply reiterates a long-established principle in chancery court jurisprudence.[98]

And it is true that with respect to the challenged transaction before him, which involved mixed consideration, the vice chancellor stated after some deliberation: "I conclude that Plaintiffs are likely to succeed on their argument that the approximately 50% cash and 50% stock consideration here triggers *Revlon*."[99] And it is likewise true that others, like Bainbridge, have characterized this facet of the *Smurfit-Stone* decision as its holding.[100]

But the analysis regarding *Revlon*'s applicability in *Smurfit-Stone* is "through and through" dictum.[101] To start with, the opinion addressed a shareholder-plaintiff's motion for preliminary injunction.[102] Accordingly, the vice chancellor was not asked to definitively determine whether *Revlon* applied to the challenged transaction.[103] Rather, the question before him was simply whether the shareholder-plaintiff's *Revlon* claim had "a reasonable probability of success on the merits."[104] "[A] finding of reasonable

95. *See* Bainbridge, *supra* note 3, at 3327.

96. *Id.* (emphasis added).

97. *In re* Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011).

98. *See supra* note 84.

99. *Smurfit-Stone*, 2011 WL 2028076, at *16.

100. *See, e.g.*, *Corporate Law—Mergers and Acquisitions—Delaware Court of Chancery Imposes* Revlon *Duties on Board of Directors in Mixed Cash-Stock Strategic Merger*—In Re *Smurfit-Stone Container Corp. S'holder Litigation*, 125 HARV. L. REV. 1256, 1258 (2012); Paul D. Brown & K. Tyler O'Connell, *Key 2011 Corporate Law Decisions Include Notable Stockholder Victories in Delaware Courts*, BUS. L. TODAY (Jan. 23 2012), *available at* http://apps.americanbar.org/buslaw/blt/content/2012/01/article-2-brown-oconnell.shtml; Morgan White-Smith, Comment, *Revisiting* Revlon*: Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177, 1195 n.95 (2012).

101. *See* William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 590 (2012).

102. *See Smurfit-Stone*, 2011 WL 2028076, at *1.

103. *See In re* MFW S'holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (Strine, C.) ("[T]he [Delaware] Supreme Court treats as dictum language on an issue if the record before the court was 'not sufficient to permit the question to be passed on.' If an issue is not presented to a court with the benefit of full argument and record, any statement on that issue by that court is not a holding with binding force." (footnote omitted)).

104. *Smurfit-Stone*, 2011 WL 2028076, at *10.

probability of success at the preliminary injunction stage is not a final judgment of the court on the merits"[105] or binding on future decisions.[106]

More importantly, however, at the outset of his opinion, Vice Chancellor Parsons also noted that the applicability of *Revlon* was unnecessary to the ultimate ruling on the motion before him. "[E]ven if I assume without deciding that the *Revlon* standard applies, the result would be the same" as it would under the default standard, the business judgment rule.[107] Because under either standard of review, the vice chancellor held, the plaintiffs had not shown that they were reasonably likely to succeed on the merits of their claim that the defendant-directors had breached their fiduciary duties in approving the challenged mixed consideration transaction.[108]

As was recently observed in a much discussed decision,[109] Delaware courts "follow[ ] the traditional definition of 'dictum,'" defining it as "judicial statements on issues that 'would have no effect on the outcome of [the] case.' . . . Thus, broad judicial statements, *when taken out of context*, do not constitute binding holdings."[110] Under this definition, the analysis

105. Thomas & Agnes Carvel Found. v. Carvel, Civil Action No. 3185-VCP, 2008 WL 4482703, at *5 (Del. Ch. Sept. 30, 2008) (Parsons, V.C.); *see also In re* Trans World Airlines, Inc. S'holders Litig., Civ. A. No. 9844, 1988 WL 111271, 14 DEL. J. CORP. L. 870, 876 (Del. Ch. Oct. 21, 1998) (Allen, C.) ("Such a motion [for preliminary injunction], of course, presents no occasion to resolve finally the factual and legal issues raised by the pleadings. Rather, the court is required to make a preliminary assessment of the probability that plaintiffs will be able, at trial, to establish the wrongs alleged.").

106. *See* Siegman v. Columbia Pictures Entm't, Inc., Civ. A. No. 11152, 1993 WL 10969, at *5 (Del. Ch. Jan. 15, 1993) ("A finding of reasonable probability at the preliminary injunction stage, of course, is not a binding finding of the Court.").

107. *Smurfit-Stone*, 2011 WL 2028076, at *11.

108. *Id.* ("I conclude that Plaintiffs have not shown a reasonable probability of success on their claim that the Board breached its fiduciary duties by approving the [proposed] merger.").

109. Chancellor Strine's decision in *In re MFW Shareholders Litigation* has garnered substantial attention for its holding with respect to controlling shareholder cash-out mergers. *See In re* MFW S'holders Litig., C.A. No. 6566-CS, 2013 WL 2436341 (Del. Ch. May 29, 2013); *see also* Lawrence Hamermesh, MFW*: One for the Casebooks*, INST. OF DEL. CORP. & BUS. L. BLOG (Mar. 6, 2013), http://blogs.law.widener.edu/delcorp/2013/06/03/mfw-one-for-the-casebooks/; Francis Pileggi, *Chancery Applies Business Judgment Rule to Freezeout by Majority Shareholder*, DEL. CORP. & COMM. LITIG. BLOG (May 31, 2013), http://www.delawarelitigation.com/2013/05/articles/chancery-court-updates/strine-op/; Brian J.M. Quinn, *Strine Revisits* Kahn v. Lynch *and the Unified Standard*, M&A L. PROF BLOG (May 30, 2013), http://lawprofessors.typepad.com/mergers/2013/05/in-an-opinion-just-handed-down-in-mfw-shareholders-litigationchancellor-strine-explains-why-the-supreme-courts-kahn-v-lynch-j.html.

110. *See In re* MFW S'holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (emphasis added) (quoting Brown v. United Water Del., Inc., 3 A.3d 272, 276–77 (Del. 2010)) (describing as dictum statements that "would have no effect on the outcome of the case"); *id.* (citing Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010)) (noting that chancery court ruling was "unnecessary . . . to decide [the] issue," and therefore "obiter dictum and without precedential effect"); *see*

in *Smurfit-Stone* of whether *Revlon* applied to the challenged mixed consideration transaction is mere dictum. Because it was "unnecessary to the resolution of the case before [him],"[111] the vice chancellor's answer to that question does not bind future cases.[112]

B. *The Ambiguity of Supreme Court Precedents*

Legal niceties aside, one might ask what does it matter whether the *Revlon* analysis in *Smurfit-Stone* was a holding or mere dictum? After all, irrespective of the distinction, *Lukens*, *NYMEX*, *Smurfit-Stone*, and other precedents make clear that at least some—and perhaps all—members of the chancery court believe (wrongly, in Bainbridge's view) that any all-cash or cash-heavy mixed consideration transaction triggers *Revlon* duties regardless of the acquirer's identity. Moreover, even nonbinding dictum may provide persuasive authority for future decisions.[113] But recognizing the chancery court analysis in *Smurfit-Stone* and its predecessors as mere dicta sheds light on a second problem with Bainbridge's conflict-of-interests account of the *Revlon* doctrine: it lacks support in relevant Delaware Supreme Court precedent.

To begin with, the *Revlon* decision itself—the very genesis of the doctrine—seemed less focused on the "omnipresent specter" of director self-interest[114] and more focused on a different kind of conflict of interests: namely, the fact that the target board in that case had placed *other stakeholders*' interests above the interests of the shareholders.[115] Thus, the sem-

also Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 66–67 (1996) (defining holding of opinion as "the result [and] also those portions of the opinion necessary to that result," and contrasting it with nonbinding dictum); BLACK'S LAW DICTIONARY 519 (9th ed. 2009) (illustrating dictum as "passages [that] are not essential to the deciding of the very case" (quoting WILLIAM M. LILE ET AL., BRIEF MAKING AND THE USE OF LAW BOOKS 307 (3d ed. 1914))).

111. *In re MFW*, 67 A.3d at 502; compare *id.* ("Like the U.S. Supreme Court, our Supreme Court treats as dictum statements in opinions that are unnecessary to the resolution of the case before the court."), *with Smurfit-Stone*, 2011 WL 2028076, at *11 ("[E]ven if I assume without deciding that the *Revlon* standard applies, the result would be the same.").

112. *See In re MFW*, 67 A.3d at 521 ("In Delaware, such dictum is 'without precedential effect.'" (quoting Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010))).

113. *See id.* at 523; *cf. In re* Plains Exploration & Prod. Co. Stockholder Litig., C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013) (noting that defendant-directors do not dispute that *Revlon* applies to merger involving even 50/50 mix of cash and acquirer stock and citing to *Smurfit-Stone*).

114. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

115. As Professor Franklin Gevurtz has observed, "*Revlon* is really about whether directors must maximize shareholder value, as opposed to protecting stakeholder interests . . . . [T]he question was whether Revlon's directors could sacrifice the highest price for the shareholders in order to protect certain Revlon creditors." Gevurtz, *supra* note 27, at 1546; *see also* Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 914 (1990) ("Unmistakably, in *Revlon* the Delaware Supreme Court sought to contain the potentially mutinous *Unocal* dicta [regarding the welfare of non-shareholder

inal case seems to be more about shareholder primacy over other stakeholders than about selfish directors. If director self-interest was germane to the *Revlon* decision, it was only indirectly implicated.[116]

Revlon itself notwithstanding, one could plausibly find support for a conflict-of-interests theory of *Revlon* by contrasting two post-*Revlon* cases: *Time-Warner* and its seemingly inseparable companion, the *QVC* decision.[117] As noted above,[118] both cases involved stock-for-stock mergers, but the Delaware Supreme Court held that *Revlon* applied only in the latter decision, because the Paramount-Viacom merger contemplated a transfer of control over Paramount to Viacom's controlling shareholder.

Certainly, the differing results of these two well-known cases could be interpreted to be consistent with a conflict-of-interests interpretation of the *Revlon* doctrine.[119] Importantly, however, the *QVC* court never explicitly cited the potential self-interest of the Paramount directors as a factor for applying *Revlon* to the Paramount-Viacom merger.[120] The supreme court did, however, expressly articulate a number of other factors to justify *Revlon* scrutiny, including: (i) the diminution in the voting power of the Paramount shareholders in the combined post-merger business;[121] (ii) the fundamental and irrevocable change in the corporate enterprise that

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stakeholders] and to resurrect the primacy of the shareholder-welfare strand of corporate law . . . ."). This reading of *Revlon* finds ample support in the text of the opinion. *See e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("The directors . . . made support of the Notes an integral part of the company's dealings with Forstmann, even though their primary responsibility at this stage was to the equity owners."); *id.* ("The Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders."); *id.* ("[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."); *id.* at 184 ("The [board's] principal object, contrary to the board's duty of care, appears to have been protection of the noteholders over the shareholders' interests.").

116. Even though the *Revlon* court's concern focused primarily on the fact that the target board had sacrificed the shareholders' interest in obtaining the highest price in order to protect certain of the target's creditors, the court at one point also noted that "[t]he principal benefit" of favoring the creditors over the shareholders "went to the directors, who avoided [the possibility of] personal liability" stemming from litigation that the creditors had threatened. *Id.* at 184.

117. *See* Bainbridge, *supra* note 3, at 3299–13.

118. *See supra* notes 37–40 and accompanying text.

119. *See supra* notes 23–42 and accompanying text.

120. Bainbridge all but concedes this point, yet argues that "properly understood" the *QVC* court's reference to other factors justifying *Revlon* duties "presumably reflect the possibility that conflicted interests" improperly motivated the Paramount board of directors. *See* Bainbridge, *supra* note 3, at 3299–313.

121. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994) ("In the event the Paramount-Viacom transaction is consummated, the public stockholders will . . . [hold] a minority equity voting position in the surviving corporation. [T]here will be a controlling stockholder who will have the voting power to . . . alter materially the nature of the corporation and the public stockholders' interests.").

would result from a transfer of control to Viacom's controlling shareholder;[122] (iii) the fact that the transaction represented the Paramount shareholders' last chance to maximize the value of their ownership interest;[123] as well as (iv) the Paramount board's interference with shareholder franchise when it agreed to deal protection devices to "lock up" the board's preferred transaction.[124] Curiously, the risk of director self-interest did not make the list.

Nevertheless, one could also plausibly find support for a conflict-of-interests theory of the *Revlon* doctrine in two post-*QVC* Delaware Supreme Court decisions: *In re Santa Fe Pacific Corp.*[125] and *Lyondell Chemical Corp. v. Ryan.*[126] And it is true that these cases can be read to be "consistent" with a conflict-of-interests thesis.[127] But neither expressly embraces a conflict-of-interests understanding of the *Revlon* doctrine; and each can be read to be "consistent" with the principle articulated in *Lukens*, *NYMEX*, and *Smurfit-Stone* that *Revlon* applies to all all-cash and cash-heavy mixed consideration transactions.

For example, in *Santa Fe*, the supreme court ruled that *Revlon* was inapplicable to a transaction in which the target shareholders were to receive a 33–67 mix of cash and acquirer stock for their shares in the target corporation.[128] The court's only explanation for this conclusion was that there were no facts suggesting that there would be a controlling shareholder of the publicly traded, combined business following the transaction.[129] Seizing on the court's terse reasoning, Bainbridge argues that "[t]he *clear implication* [of *Santa Fe*] is that the form of consideration was

122. *See id.* at 47–48 ("There are few events that have a more significant impact on the stockholders than a sale of control . . . . [It] represents a fundamental (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of [this event] that justifies [*Revlon* scrutiny].").

123. *See id.* at 45 (reasoning that *Revlon* scrutiny applies because "an asset belonging to public stockholders (a control premium) is being sold and *may never be available again*" (emphasis added)).

124. *See id.* at 42 ("Because of the overriding importance of voting rights, [Delaware courts] have consistently acted to protect stockholders from unwarranted interference with such rights.").

125. 669 A.2d 59 (Del. 1995).

126. 970 A.2d 235 (Del. 2009).

127. *See* Bainbridge, *supra* note 3, at 3320 ("Although motive *did not figure explicitly* in that analysis, the Delaware Supreme Court's *Lyondell* decision in fact is fully consistent with the argument in the preceding part that motive is what matters." (emphasis added)); *cf. id.* at 3331 ("The clear *implication* [of *Santa Fe*] is that the form of consideration was not the relevant issue." (emphasis added)).

128. *See Santa Fe*, 669 A.2d at 64–65, 71.

129. *See id.* at 71 ("Conspicuously absent from the complaint is a description of the stock ownership structure of Burlington. Absent this factual averment, plaintiffs have failed to allege that control of Burlington and Santa Fe after the merger would not remain 'in a large, fluid, changeable and changing market.'" (citation omitted)).

not the relevant issue."[130] But this reads too much into the high court's cryptic opinion. After all, *Santa Fe* concerned a *stock-heavy* mixed consideration transaction.[131] Thus, the challenged transaction more closely resembled a strategic stock-for-stock merger between two widely held corporations, an area where *Revlon* clearly does not govern.[132] The *Santa Fe* court was never asked to consider whether *Revlon* would apply to an *all-cash* merger or even a *cash-heavy* mixed consideration transaction.[133] So, it is unclear what (if anything) *Santa Fe* portends on that question.[134]

Likewise, in *Lyondell Chemical*, the supreme court accepted that *Revlon* applied to an all-cash, cash-for-stock merger, where the acquirer was a privately held business controlled by a single individual.[135] Yet, the court said nothing about whether *Revlon* would apply to the challenged transaction *in the absence of the transfer of control to a privately held acquirer*.[136] Indeed, much like the chancery court decisions in *Topps* and *TW Services*,

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130. Bainbridge, *supra* note 3, at 3331 (emphasis added).

131. *See supra* note 128 and accompanying text.

132. *See, e.g.*, Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1142 (Del. 1989).

133. As Vice Chancellor Lamb observed in *Lukens*,

> I do not agree . . . that *Santa Fe*, in which shareholders tendered 33% of their shares for cash and exchanged the remainder for common stock, controls a situation in which over 60% of the consideration is cash. The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering *Revlon*. I take for granted, however, that a cash offer for 95% of a company's shares, for example, even if the other 5% will be exchanged for the shares of a widely held corporation, will constitute a change of corporate control. Until instructed otherwise, I believe that purchasing more than 60% achieves the same result.

In re Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999). *But see* Bainbridge, *supra* note 3, at 3325 (asserting that "Vice Chancellor Lamb [in *Lukens*] ducked *Santa Fe* by dismissing it out of hand").

134. *See* Gevurtz, *supra* note 27, at 1527 ("What, if anything, [*Santa Fe*] tells us about an entirely (or even predominately) cash-out deal . . . is in the eye of the beholder."); Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH & LEE L. REV. (forthcoming 2014) (manuscript at 22) (observing that with respect to question of whether form of consideration matters for *Revlon* purposes "courts and commentators have extended the *Santa Fe* decision beyond its actual holding").

135. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009).

136. Indeed, the only new guidance that *Lyondell Chemical* provided on the question of what triggers *Revlon* was that "[t]he 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." *Id.* at 242. Applying this test, the court concluded that "[t]he time for action under *Revlon* did not begin until . . . the directors began negotiating *the sale* of Lyondell," leaving it uncertain whether any all-cash "sale" or specifically a "sale" to a privately held acquirer (like the one involved under the specific facts of the case) would trigger the enhanced judicial scrutiny. *Id.* (emphasis added); *see also* Gevurtz, *supra* note 27, at 1526–27 ("[W]as this a change in control because cashing out all the existing Lyondell shareholders removed their role in the corporation? Or was it a change in control because the buyer was a privately held company . . . ? The Delaware Supreme Court never actually says.").

which Bainbridge dismisses on the grounds that each case involved a sale to a privately held acquirer,[137] *Lyondell Chemical* seems inapposite to the question of whether *Revlon* would apply in an all-cash or cash-heavy sale to a publicly traded, diffusely held acquirer.

Thus, the problem the case law presents for Bainbridge's conflict-of-interests thesis can be visually depicted as follows (with the applicable Delaware Supreme Court precedent indicated in bold text):

FIGURE 2: MATRIX OF CASES DEFINING *REVLON*-LAND

		Acquirer Identity	
		Publicly Traded and **Diffusely Held**	**Privately Held** or **Controlled**
Consideration Paid to Target Shareholders	**All Stock** (or Mostly Stock)	***Time-Warner*** ***Santa Fe*** BJR (1)	***QVC*** *Revlon-land* (2)
	All Cash (or Cash-Heavy Mix)	*Lukens* *NYMEX* *Smurfit-Stone* *Pennaco* *Cogent* (4)	*TW Services* *Topps* ***Lyondell Chemical*** (3)

In short, Bainbridge's conflict-of-interests thesis asserts that *Revlon* is generally inapplicable to transactions that fall into box 4 of the above matrix. But the thesis relies on support from cases in boxes 1, 2, and 3 which are factually distinct from the box 4 situation—namely, an all-cash or cash-heavy sale transaction involving a publicly traded, diffusely held acquirer with no controlling shareholder. While *Revlon*-land certainly covers box 2 and box 3 transactions under supreme court precedent, the high court's decisions simply leave box 4 unexplored.

To further complicate matters, the ambiguity of supreme court precedent is actually worse than the above matrix suggests. While Bainbridge criticizes *Lukens* and its chancery court progeny in box 4 as inconsistent with his conflict-of-interests understanding of Delaware Supreme Court precedent,[138] he neglects to mention that *Lukens* was summarily affirmed by the high court "on the basis of and for the reasons assigned by the

137. *See supra* note 82.

138. *See* Bainbridge, *supra* note 3, at 3331–33.

Court of Chancery in its *well-reasoned* opinion."[139] Of course, because the *Revlon* analysis in *Lukens* was nonbinding dictum, and not a holding,[140] it is hard to know whether the Delaware Supreme Court intended its rather terse endorsement to cover the chancery court's dictum or just its holding.

Likewise, a conflict-of-interests theory cannot account for *McMullin v. Beran*,[141] a case in which a controlling shareholder sought the sale of its partially owned subsidiary in an all-cash, all-shares transaction to an unrelated third-party acquirer.[142] There, the Delaware Supreme Court specifically held that although the challenged transaction did not involve a "change of control" of the target for *Revlon* purposes, the transaction nonetheless "implicated the [target] directors' ultimate fiduciary duty that was described in *Revlon* and its progeny—to focus on whether the shareholder value has been maximized."[143] Thus, *McMullin* seems to run expressly counter to Bainbridge's conflict-of-interests thesis, which after all asserts that a cash "sale" alone does not trigger *Revlon* unless the transaction will also result in a "change of control" of the target from a "fluid aggregation of unaffiliated stockholders" to the hands of a private entity or individual owner.[144] Instead, *McMullin* seems to confirm the conventional wisdom that an all-cash transaction per se is a "sale or change of control" categorically triggering *Revlon* scrutiny.[145]

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139. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (emphasis added) (unpublished table decision) (affirming *In re Lukens Inc.* after considering oral arguments and briefs by litigants).

140. *See supra* notes 93–95 and accompanying text.

141. 765 A.2d 910 (Del. 2000). Bainbridge's only mention of *McMullin* is in a footnote, citing the case for an unrelated point. *See* Bainbridge, *supra* note 3, at 3319 n.251.

142. *See McMullin*, 765 A.2d at 915–16.

143. *Id.* at 920. Although the target's controlling and minority shareholders would receive identical cash consideration in the transaction, the Delaware Supreme Court reasoned that because "the decision constitutes a final-stage transaction . . . . [T]he time frame for the board's analysis is immediate value maximization for all shareholders." *Id.* at 918.

144. *See supra* note 66.

145. To be fair, *McMullin* may be distinguished from the usual *Revlon* case, because it involves a controlling shareholder. Thus, although the court expressly stated that *Revlon* was implicated, what the court seems to articulate in *McMullin* is really a modified *Revlon* standard:

> When the entire sale to a third-party is proposed, negotiated and timed by a majority shareholder, . . . the board cannot realistically *seek* any alternative because the majority shareholder has the right to vote its shares in favor of [its proposed] transaction . . . . Nevertheless, in such situations, the directors are obliged to make an informed and deliberate judgment, in good faith, about whether the sale to a third party that is being proposed by the majority shareholder will result in a maximization of value for the minority shareholders.

McMullin, 765 A.2d at 919. But even so, this modified *Revlon* version was applied to an all-cash sale on the grounds that it was a "final-stage transaction," even though the court posited it did not involve a "change of control."

But perhaps most problematic for a conflict-of-interests theory of *Revlon* is that it fails to explain other facets of the *Revlon* doctrine. There are, after all, three distinct checkpoints for entering *Revlon*-land.[146] To quote the Delaware Supreme Court's definitive statement on the matter, *Revlon* applies in at least the following three scenarios:

> (1) [W]hen a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the 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.[147]

While Bainbridge sensibly focuses on the third checkpoint, as it is the one that is most often crossed and, therefore, litigated, he says nothing about how his conflicts-of-interests theory explains the first or second

146. *See* Arnold v. Soc'y for Savs. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) (citations omitted).

147. *Id.* Bainbridge points to the sentence immediately following this excerpted text, in which the Delaware Supreme Court added: "In the latter situation, there is no 'sale or change in control' when '[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.'" *Id.* at 1290 (citation omitted). Bainbridge argues this qualification to the third *Revlon* checkpoint makes clear that an all-cash or mixed consideration acquisition by a publicly held corporation with no controlling shareholder is not a "sale or change of control." *See* Bainbridge, *supra* note 3, at 3332. But the awkwardly edited language of this qualification originated from Chancellor Allen's description of the stock-for-stock Time-Warner merger. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1994). And considering Chancellor Allen's repeated assertions in other decisions that an all-cash, cash-for-stock merger triggers *Revlon*, it seems unlikely he intended the above language to exclude such transactions from *Revlon*'s enhanced scrutiny. *See supra* note 84 (citing decision of Chancellor Allen among others). The awkwardness of the language becomes clear when one tries to apply it to an all-cash deal. Following an all-cash transaction, it seems inaccurate to say control of "*both companies*" remains in the market where the target's shareholders are eliminated and the target becomes a *controlled* subsidiary of the acquirer. And even if the supreme court's qualification—that "sole or change in control" does not occur where "control of both companies remains in a large, fluid, changeable and changing market"—supports Bainbridge's position, an all cash sale may nonetheless fall under *Revlon*'s first trigger. Arguably, even if the target corporation engages in negotiations contemplating an all-cash sale, the target has begun "an active bidding process seeking to sell itself," even if those negotiations involve just one bidder.

checkpoints of *Revlon*-land.[148] If *Revlon* is, in fact, all about policing director self-interest, why does the doctrine cover these other two situations?[149]

Arguably, this is not a problem with Bainbridge's conflict-of-interests theory. It is a problem intrinsic in the doctrine it seeks to explain. Ever elusive, there seems to be no one single policy or principle that animates *Revlon* and its progeny.[150] The Delaware Supreme Court has never provided a grand unifying theory explaining why *Revlon* duties exist[151] or what those duties specifically require of directors.[152] And it has never explained why only certain categories of transactions trigger this heightened form of judicial scrutiny.[153] To be sure, the conflict-of-interests concern is part of the *Revlon* story. But fiduciary self-dealing concerns do not tell the whole tale of *Revlon*.

As the Delaware Supreme Court has explained, "*Revlon* [duties] . . . do not admit of easy categorization as duties of care or loyalty."[154] Instead, *Revlon* implicates *both* of these fiduciary duties.[155] It is not just about potential conflicts of interests between boards and shareholders. It is also about ensuring that directors act in an "informed and deliberate man-

148. By contrast, in the above-quoted excerpt from *Arnold*, the Delaware Supreme Court gave some guidance as to the theory undergirding the three checkpoints of *Revlon*-land, by citing the work of Professor Marcel Kahan. *See Arnold*, 650 A.2d at 1290 (citing Marcel Kahan, Paramount *or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. CORP. L. 583 (1994)). Under Kahan's theory, *Revlon* is a doctrine that imposes substantive judicial scrutiny as a substitute for shareholder voting in situations where board decisions are irreversible by the shareholders through the election of new directors. *Id.* at 589–602.

149. Moreover, if the concern is simply director self-interest, why does the Delaware Supreme Court not simply say so, instead of explicitly reserving for itself the room to apply *Revlon* to "scenarios" other than the three it has "at least" articulated? *See Arnold*, 650 A.2d at 1289–90.

150. *See* Gevurtz, *supra* note 27, at 1528, 1545 ("Not only has it been uncertain what triggers *Revlon*, it is also been uncertain what *Revlon* actually does. . . . [T]he failure of the Delaware courts to resolve [issues as to *Revlon*'s scope and impact] is symptomatic of the fact that there really is no sensible underlying rational for the doctrine.").

151. *See* Kahan, *supra* note 148, at 585 (noting Delaware Supreme Court's "failure to articulate a unified theory [of *Revlon* and its other takeover jurisprudence] in a single case").

152. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) ("There is only one *Revlon* duty—to '[get] the best price for the stockholders at a sale of the company.' No court can tell directors exactly how to accomplish that goal . . . .").

153. *Cf.* Gevurtz, *supra* note 27, at 1545–70 (explaining that common rationales for *Revlon* do not match category of transactions covered by doctrine).

154. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 67 (Del. 1995).

155. *See* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1345–46 (Del. 1987); *see also* Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (Glasscock, V.C.) ("This duty, announced in *Revlon*, is not an independent duty, but rather a restatement of directors' duties of loyalty and care."); *In re* Novell, Inc. S'holder Litig., C.A. No. 6032-VCN, 2013 WL 322560, at *7 (Del. Ch. Jan. 3, 2013) (Noble, V.C.) ("So-called *Revlon* duties are only a specific application of directors' traditional fiduciary duties of care and loyalty in the context of control transactions.").

ner"[156] with respect to significant and irreversible end-of-the-line transactions.[157] Moreover, beyond fiduciary considerations, the doctrine "rests on 'the overriding importance of [shareholder] voting rights,'"[158] a facet of board accountability under corporate law that Bainbridge too readily dismisses.[159]

The reality, thus, appears to be an untidy one: *Revlon* is animated by a mishmash of policy concerns that go well beyond the simple potential for conflicts of interests.[160] These concerns span the fiduciary duties of care and loyalty and even the fundamental structure of corporate law—that boards (and not courts) manage the business affairs of the corporation

156. *Ivanhoe Partners*, 535 A.2d at 1345 ("[*Revlon*] involves duties of loyalty and care. . . . [T]he duty of care requires a director, when making a business decision, to proceed with a 'critical eye' by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board." (citation omitted)); *see also* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993) (noting that in executing *Revlon* duties "this Court has stressed the importance of the board being adequately informed in negotiating a sale of control"); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1287 (Del. 1989) (observing that "[t]he need for adequate information is central to the enlightened evaluation of a transaction that a board must make" to fulfill its fiduciary duty under *Revlon*); WILLIAM J. CARNEY, MERGERS & ACQUISITIONS: THE ESSENTIALS 169 (2009) ("*Revlon* duties are a subset of the more general duty to make an informed decision in order to obtain the protection of the business judgment rule . . . .").

157. *See QVC*, 637 A.2d at 45 ("[*Revlon*] scrutiny is mandated by[, among other factors,] the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again . . . ."); *id.* at 47–48 ("There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental (and perhaps irrevocable) change . . . . It is the significance of each of these events that justifies [*Revlon* scrutiny]."); *see also* McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (holding that *Revlon* applies to target board's consideration of all-cash, all-shares acquisition because "the decision constitutes a final-stage transaction"); *see also* Transcript of Ruling of the Court on Plaintiffs' Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) ("[T]he change of control test is ultimately a derivative test. . . . [W]hen enhanced scrutiny applies [under *Revlon*] is when you have a final stage transaction."); *see also* Kahan, *supra* note 148, at 592–601 (arguing that *Revlon* is triggered by fundamental corporate transactions that are irreversible by shareholder through election of new directors).

158. *Santa Fe*, 669 A.2d at 68 (quoting *QVC*, 637 A.2d at 42); *see also QVC*, 637 A.2d at 45 ("[*Revlon*] scrutiny is mandated by[, among other factors,] the threatened diminution of the current stockholders' voting power . . . [and] the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights."); *see also* Kahan, *supra* note 148, at 592–601 (arguing that *Revlon* is triggered by fundamental corporate transactions that are irreversible by shareholder through election of new directors).

159. *See* Bainbridge, *supra* note 3, at 3283.

160. *Cf.* Gevurtz, *supra* note 27, at 1488, 1509 (noting that potential for problematic director self-interest is generally less acute in transactional contexts implicating *Revlon* than it is in context of self-entrenching defensive measures scrutinized under *Unocal*).

subject to the shareholders' right to elect the directors.[161] *Revlon* addresses not only the "omnipresent specter" of director self-interest;[162] it addresses the potential for "slothful indifference"[163] by sometimes "torpid, if not supine"[164] fiduciaries vested with control over the assets of shareholders.[165] Thus, as a doctrinal matter, *Revlon* is as much the evolutionary descendant of *Unocal* as it is of *Unocal*'s more infamous sibling, *Smith v. Van Gorkom*.[166] In sum, director motives matter, but *Revlon* cannot be neatly defined solely by the concern for potential conflicts of interests.

C. *Dictum's Guidance in a Vacuum of Binding Precedent*

Given the myriad policy concerns that animate *Revlon*, it is unsurprising that the geography of *Revlon*-land is unclearly defined in Delaware Supreme Court precedent.[167] And given this uncertainty, it is further

161. *See* Kahan, *supra* note 148, at 606; *cf.* Black & Kraakman, *supra* note 27, at 538–43 (observing that under applicable case law *Revlon* seems to be triggered only in transactional contexts where there is reason to second-guess target board's business judgment as to value of target corporation).

162. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)); *see also In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) ("The heightened scrutiny that applies in the *Revlon* (and *Unocal*) contexts are, in large measure, rooted in a concern that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders."); Barkan v. Amsted Indus. Inc., 567 A.2d 1279, 1286 (Del. 1989) ("*Revlon* is 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 by demanding that directors act with scrupulous concern for fairness to shareholders.").

163. Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 241 (Del. 2009).

164. Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1988) (finding that defendant-directors failed in their *Revlon* duty by being "torpid, if not supine, in [their] efforts to establish a truly independent auction," free of manipulation by interested directors).

165. *See In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 731(Del. Ch. 1999) ("A corporate board's failure to obtain the best value for its stockholders may be the result of illicit motivation (bad faith), personal interest divergent from shareholder interest (disloyalty) *or* a lack of due care." (emphasis added)) *aff'd sub nom.* Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (unpublished table decision).

166. *In re Dollar Thrifty*, 14 A.3d at 602 (Strine, V.C.) ("*Van Gorkom* . . . was really a *Revlon* case."); *see also* Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) (Allen, C.) ("I count *Smith v. Van Gorkom* . . . not as a 'negligence' or due care case involving no loyalty issues, but as an early . . . '*Revlon*' or 'change in control' case."); Black & Kraakman, *supra* note 27, at 522 ("*Van 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."); Kahan, *supra* note 148, at 593 ("*Revlon* could be seen more like a 'sale of the company' case such as *Van Gorkom*.")

167. *See* Gevurtz, *supra* note 27, at 1488; *see also In re Lukens*, 757 A.2d at 732 n.25 (Lamb, V.C.) ("The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering *Revlon*."); *In re* Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011) (Parsons, V.C.) ("The Supreme Court has

unsurprising that the Delaware Chancery Court has taken on the difficult, but crucial, project of defining the outer boundaries and inner contours of *Revlon*-land through dictum.

In a contemporaneous article,[168] I explore the Delaware courts' penchant for the strategic use of dictum.[169] This established judicial practice, I explain, serves valuable guidance, regulatory, and responsiveness functions, which have been vital to Delaware's success in attracting corporate and alternative entity charters.[170] The chancery court decisions involving mixed consideration mergers—*Lukens* and *Smurfit-Stone* in particular—exemplify the court's strategic use of dictum as well as the guidance function served by the practice.

As reflected in the figure below, mixed consideration mergers have in recent years represented nearly a quarter of all strategic acquisitions involving public corporations:[171]

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not yet clarified the precise bounds of when *Revlon* applies in the situation where merger consideration consists of an equal or almost equal split of cash and stock."); Bainbridge, *supra* note 3, at 3320 (observing that, under applicable Delaware precedent, *Revlon* is triggered whenever "the target corporation . . . initiate[s] 'an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company,' with it being unclear whether the reference to a 'breakup' modifies both halves of this checkpoint or only the latter").

168. *See* Manesh, *supra* note 1.

169. *See id.* at Part III.B.1.

170. *See id.* at Part III.B.2.

171. Data for this table comes from the American Bar Association Section of Business Law's annual Deal Points Study, which looks at publicly available acquisition agreements for acquisitions of U.S. publicly traded targets by publicly traded and other strategic acquirers for transactions where the transaction value was at least $100 million. *See* ABA, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (2012), http://apps.americanbar.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL560000&url=/buslaw/committees/CL560000/materials/matrends/2012_public_study.pdf; ABA, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (2011), http://apps.americanbar.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL560000&url=/buslaw/committees/CL560000/materials/matrends/2011_public_study.pdf; ABA, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (2010), http://apps.americanbar.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL560000&url=/buslaw/committees/CL560000/materials/matrends/2010public_study.pdf; ABA, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (2009), http://apps.americanbar.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL560000&url=/buslaw/committees/CL560000/materials/matrends/2009public_study.pdf; ABA, *Strategic Buyer/Public Target Mergers & Acquisitions Deal Points Study* (2008), http://apps.americanbar.org/buslaw/committees/CL560000/materials/matrends/2008public_study.pdf.

FIGURE 3: MERGERS INVOLVING A PUBLICLY TRADED TARGET AND A PUBLICLY TRADED OR OTHER STRATEGIC ACQUIRER

		Consideration Paid to Target Shareholders		
Year	*n*	All Cash	All Stock	Mixed
2005–2006	212	49%	20%	31%
2007	152	74%	10%	16%
2008	103	66%	15%	19%
2009	75	51%	24%	25%
2010	126	63%	14%	23%
2011	101	61%	15%	24%
Weighted Average		60%	16%	24%

Yet, surprisingly only one Delaware Supreme Court opinion, *Santa Fe*, has addressed the applicability of *Revlon* to such transactions.[172] And the meaning of that decision is, as noted above, at best indeterminate.[173] In the absence of a definitive answer or predictable framework in supreme court precedent regarding the applicability of *Revlon* to transactions involving mixed consideration,[174] the chancery court in its *Lukens*, *NYMEX*, and *Smurfit-Stone* decisions has cautiously, but purposefully, used dictum to fill a gap left by the supreme court's *Revlon* jurisprudence.[175]

Such dicta provide crucial guidance for attorneys and business planners on how to structure transactions to comply with applicable fiduciary obligations.[176] While dictum is not binding on the courts in future decisions, it affords important insight on how a court would rule if the matter was squarely presented to it.[177] Moreover, by using dictum to clarify uncertain law, the chancery court is able to provide this guidance without unfairly applying a newly announced principle retroactively on the parties who brought the litigation.[178] As attorney William Savitt has recently

172. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 64–65, 71 (Del. 1995) (ruling that *Revlon* is inapplicable to merger in which target shareholders received 33–67 mix of cash and acquirer stock for their shares in target corporation). The original Paramount-Viacom merger at issue in *QVC* was also a mixed consideration transaction, although the cash amount was relatively small and, in any case, the presence of a controlling shareholder made the case unlike the transaction in *Santa Fe*, which involved a diffusely held, publicly traded acquirer. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 39 (Del. 1994).

173. *See supra* notes 128–34 and accompanying text.

174. *See* Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1055 (Allen, C.) (Del. Ch. 1997) (noting that in wake of supreme court's *QVC* decision, "[h]ow th[e] 'change in control' trigger [for *Revlon*] works in instances of mixed cash and stock or other paper awaits future cases").

175. *See* Manesh, *supra* note 1, at Part III.B.2.

176. *See id.*

177. *See In re* MFW S'holders Litig., C.A. No. 6566-CS, 2013 WL 2436341, at *19 (Del. Ch. May 29, 2013) (Strine, C) (noting persuasive authority of dictum).

178. *See* Manesh, *supra* note 1, at Part III.B.2.

noted, the strategic use of dictum is part of the "genius" of the chancery court's jurisprudence.[179]

Of course, despite such praise, there is naturally a danger in dictum, because it can sometimes be the product of unconsidered judgment.[180] Thus, courts have cautioned that "like the proverbial chickens of destiny, [dictum can] come home to roost sooner or later in a very uncomfortable way . . . [becoming] a great source of embarrassment in future cases."[181] But Delaware's judges are uniquely situated to avoid these pitfalls, given their expertise in business law matters and their intensive engagement with the corporate bar and scholars.[182] Indeed, the restrained manner in which the chancery court has used dictum to only incrementally refine the understanding of *Revlon*'s reach within the mixed consideration context shows just how mindful its judges are of dictum's potential danger to create bad doctrine as well as its power to influence future behavior.

One can see dictum's guidance function palpably in the actions of parties in subsequent litigation. For example, following *Smurfit-Stone*, in *In re Plains Exploration*,[183] the shareholder-plaintiffs familiarly claimed the director-defendants had breached their *Revlon* duties in negotiating a merger in which the shareholders would receive a 50–50 mix of cash and stock in the acquiring corporation.[184] Rather than contesting the applicability of *Revlon*, the director-defendants conceded the point in light of the *Smurfit-Stone* decision[185] and instead demonstrated that the process they had undertaken was, in fact, reasonable and in compliance with their *Revlon* duties.[186]

This interaction between dictum and practice, courts and directors, typifies Delaware's unique and dynamic lawmaking process.[187] And it has continued, most recently in *In re Synthes, Inc.*,[188] issued apparently after *The Geography of* Revlon-*Land* was first drafted. *Synthes* continues the gap-filling guidance function that *Lukens* and *Smurfit-Stone* started. But it mer-

179. *See* Savitt, *supra* note 101, at 587–91.

180. *See* Savitt, *supra* note 101, at 588 (summarizing this danger of dictum). One could raise other concerns about judicial rulemaking through dictum. *See* Steven J. Cleveland, *Process Innovation in the Production of Corporate Law*, 41 U. CAL. DAVIS L. REV. 1829, 1859–64 (2008).

181. Darr v. Burford, 339 U.S. 200, 214 n.38 (1950); Opinion of the Justices, 198 A.2d 687, 690 (Del. 1964).

182. *See* Manesh, *supra* note 1, at Part II.B.2.d.

183. C.A. No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013).

184. *See id.* at *1.

185. *See id.* at *4 n.32.

186. *See id.* at *4–7 (denying plaintiffs' motion for preliminary injunction).

187. *See* Lyman Johnson, *Dynamic, Virtuous Fiduciary Regulation*, *in* FESTSCHRIFT IN HONOR OF CHRISTIAN KIRCHNER (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2273869; *cf.* Savitt, *supra* note 101, at 591–97 (comparing Delaware judiciary to regulatory agency that develops and refines its substantive expertise through repeated interaction and engagement with specialized bar).

188. 50 A.3d 1022 (Del. Ch. 2012).

its particular attention because, although Bainbridge gives it only scant footnoted treatment, *Synthes* is yet another precedent in which he finds support for his conflict-of-interests thesis.[189] Bainbridge asserts that the "holding" in *Synthes* was that *Revlon* is inapplicable to a transaction in which the target shareholders would receive for their shares a 35–65 mix of cash and stock in a publicly traded, widely held acquirer.[190]

Even if that were the holding of *Synthes*, it would say nothing about the applicability of *Revlon* to an all-cash merger or cash-heavy mixed consideration transaction.[191] Referring back to the matrix above,[192] *Synthes* (much like *Santa Fe*) would be a box 1 case that sheds little light on box 4 transactions.[193]

But more importantly, like *Lukens* and *Smurfit-Stone* before it, the analysis in *Synthes* as to the applicability of *Revlon* to the challenged mixed consideration transaction is unambiguously dictum and not a holding that binds future cases. Reminiscent of Vice Chancellor Parsons's *Smurfit Stone* opinion,[194] Chancellor Strine at the outset of his analysis in *Synthes* was careful to mention that the question of whether *Revlon* applies is irrelevant to his decision on the motion before him: "[*E]ven if Revlon* applied, for the reasons discussed at length above, there are no pled facts from which I could infer that [the defendants breached their *Revlon* duties]. Thus, even if *Revlon* applied, the complaint fails to state a viable claim."[195]

Nevertheless, by indulging in dictum, *Synthes* adds incremental clarity to the question of when *Revlon* applies to mixed consideration transactions. Before *Synthes*, two Delaware decisions delineated the outer boundaries of *Revlon*-land for transactions involving mixed consideration. *Santa Fe* implied, but did not clearly hold, that *Revlon* is inapplicable to a merger in which the target shareholders would receive a 33–67 mix of cash and acquirer stock for their shares of the target corporation.[196] And *Smurfit-Stone*, building on *Lukens* before it, stated in dicta that a merger in which target shareholders receive an even 50–50 split of cash and acquirer stock

189. *See* Bainbridge, *supra* note 3, at 3323 n.273 ("Chancellor Strine's holding [in *Synthes*] is fully consistent with the understanding of *Revlon* and its progeny advanced herein.").

190. *Id.*

191. *Cf. supra* notes 128–34 and accompanying text (questioning relevance of *Santa Fe* to all-cash or cash-heavy transactions).

192. *See supra* Part III.B.

193. *See supra* notes 128–40 and accompanying text.

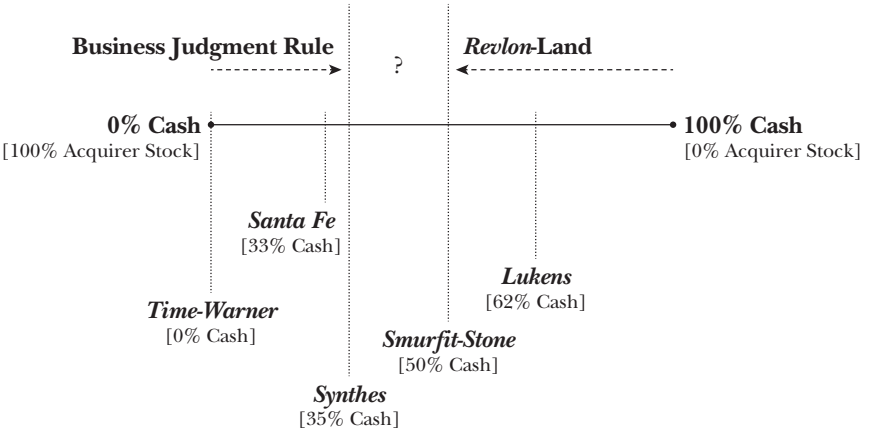
194. *See supra* notes 107–08 and accompanying text.

195. *In re* Synthes, Inc. S'holder Litig, 50 A.3d 1022, 1047 (Del. Ch. 2012). Notably, in coming to this conclusion, Chancellor Strine cited to *NYMEX*, an opinion whose articulation of the *Revlon* doctrine Bainbridge finds troublesome. *See id.* at 1047 n.115.

196. *See supra* notes 128–34 and accompanying text (noting court's cryptically terse reasoning in *Santa Fe*); *see also* Johnson & Ricca, *supra* note 134, at 22–23 (observing that *Santa Fe* does not provide guidance as to question of whether form of consideration matters for *Revlon* purposes).

would trigger *Revlon* duties.[197] Although neither decision can be said to be binding on the question, each provided useful guidance as to when *Revlon* may be triggered in the context of mixed consideration transactions. The dictum of *Synthes* now marginally refines the landscape. To borrow from Professor Brian Quinn,[198] after *Synthes*, the map of *Revlon*-land for mixed consideration transactions can be depicted as follows:

FIGURE 4: BOUNDARIES OF *REVLON*-LAND FOR MIXED CONSIDERATION TRANSACTIONS



IV. CONCLUSION

The boundaries of *Revlon*-land have never been clearly defined precisely because the principles animating the doctrine are multi-faceted and perhaps even confounded. While Bainbridge's conflict-of-interests explanation of *Revlon* should be lauded for rationalizing specific features of *Revlon*-land, it does not explain the whole breadth of the doctrine.[199] Recognizing this reality, the Delaware Chancery Court has through the strategic use of dictum sought to provide incremental clarity into the precise borders of this murky doctrinal province.

Certainly, one may disagree with the content and conclusions of such dictum. And certainly, the Delaware Supreme Court may in the future revisit *Revlon* and revise the doctrine to provide clarity on the questions left open by its existing precedents. Indeed, the seemingly arbitrary line-drawing required in cases involving mixed consideration—distinguishing, for example, between a transaction involving an even 50–50 split of cash

197. *See supra* notes 101–08 and accompanying text (noting dictum of *Smurfit-Stone*).

198. The diagram that follows updates the diagram that Professor Brian Quinn published on his blog. *See* Brian J.M. Quinn, *More on Revlon Triggers*, M&A L. PROF BLOG (May. 31, 2011), http://lawprofessors.typepad.com/mergers/2011/05/more-on-revlon-triggers.html.

199. *See supra* notes 146–66 and accompanying text.

and acquirer stock versus one involving a 35–65 mix—would suggest it is time for the high court to reconsider the *Revlon* doctrine.

The high court could choose to explicitly shrink the realm of *Revlon*-land to focus solely on potentially problematic conflicts of interests, as Bainbridge advocates. Or it could choose, consistent with the rationale of its previous decisions, to expand its doctrinal boundaries of *Revlon* to cover other categories of final-stage transactions.[200] Less likely yet, the supreme court may, as others have argued, scrap *Revlon* altogether.[201] Although that would be a dramatic doctrinal shift, it would be consistent with the steady judicial erosion of *Revlon*'s remedial potency in recent years.[202]

But in the meantime, in the wake of the Delaware Supreme Court's indeterminate *Revlon* precedents, the chancery court has through the use of dictum provided some stability and predictability as to the boundaries of *Revlon*-land, where the law is otherwise uncertain. For this, the chancery court should be commended.

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200. *See, e.g.*, Transcript of Ruling of the Court on Plaintiffs' Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) (applying *Revlon* to stock-for-stock merger based upon minority percentage ownership target shareholders would have in combined post-merger entity, widely held, publicly traded company); Morgan White-Smith, Note, *Revisiting* Revlon*: Should Judicial Scrutiny Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177, 1203–14 (2012) (embracing *Steinhardt* and arguing that *Revlon* should apply to all final-stage transactions); Black & Kraakman, *supra* note 27, at 543–45 (explaining that "whale-minnow" stock-for-stock merger should trigger *Revlon* based upon "hidden value" understanding of doctrine espoused in prior Delaware Supreme Court precedent).

201. *See, e.g.*, Gevurtz, *supra* note 27, at 1571; *see also* Johnson & Ricca, *supra* note 134, at 58.

202. *See generally* Johnson & Ricca, *supra* note 134. The Delaware Supreme Court's most recent significant decision applying the *Revlon* doctrine made clear that it is exceptionally difficult to obtain damages as a remedy on a *Revlon* claim. *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) (stating that where corporate charter includes exculpation provision eliminating director liability for breaches of fiduciary duty of care, "an extreme set of facts"—something more than "inadequate or flawed effort" on part of directors—is required to obtain damages on *Revlon* claim premised on breach of fiduciary duty of good faith). Likewise, more recent Delaware Chancery Court decisions have made clear that the equitable remedy of a preliminary injunction may be unavailable *even if* the court believes the directors breached their *Revlon* duties in approving a particular transaction. *See, e.g.*, Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *22 (Del. Ch. May 21, 2013) (Glasscock, V.C.); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 447 (Del. Ch. 2012) (Strine, C.).