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A WOLF IN SHEEP'S CLOTHING: *UNOCAL* AND THE DEFENSIVE MECHANISM HIDDEN IN CORPORATE BENEFIT PURPOSE

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I. INTRODUCTION

MILTON Friedman infamously declared corporate social responsibility programs to be "hypocritical window-dressing,"[1] ignorant of the reality that "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game . . . ."[2] Indeed, the Chief Justice of the Delaware Supreme Court, Leo E. Strine Jr., has plainly endorsed profit maximization as the primary foundational principle of modern corporate purpose.[3] Positions similar to those of Friedman and Strine have historically been commonplace in the corporate community,[4] although such perspectives have been challenged in recent years by the benefit corporation movement and the codification of the for-profit, mission-driven entity in state corporation statutes.[5]

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1. *See* Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970 [hereinafter Friedman, *Social Responsibility*], *available at* http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html [https://perma.cc/X6EM-6FCK?type=image] (referencing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (40th anniversary ed. 2002) (1962)).

2. Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 171 (2012) [hereinafter Strine, *Our Continuing Struggle*] (alteration in original) (quoting Friedman, *Social Responsibility*, *supra* note 1) (internal quotation marks omitted).

3. *See generally id.*

4. *See generally* Paramount Commc'ns Inc. v. QVC Network, Inc. (*In re* Paramount Commc'ns Inc. S'holders' Litig.), 637 A.2d 34 (Del. 1994); Paramount Commc'ns, Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140 (Del. 1989); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010); *see also* William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) ("In the [property] conception, the corporation is seen as the private property of its stockholder-owners . . . and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners. . . . This model might almost as easily be called a contract model, because in its most radical form, the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract.").

5. *See* CAL. CORP. CODE §§ 14620–14623 (West 2012); DEL. CODE ANN. tit. 8, §§ 361–368 (2013); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01 (West 2012); N.Y.

Benefit corporations are social enterprises guided by responsibility initiatives through which the organization strives to achieve varying degrees and forms of "material positive impact on society and the environment."[6] The primary proponent of the benefit corporation movement has been B Lab, a nonprofit organization formed in 2006.[7] Since its inception, B Lab has facilitated the passing of over twenty-seven laws, calling for the incorporation of entities required to produce social and environmental benefits, in addition to financial profits.[8] With purpose, accountability, and transparency as guiding principles, benefit corporations have been conducting business since 2010, when Maryland and Vermont became the first states to embrace the for-profit, mission-driven entity effort.[9] Most significantly, in July 2013, Delaware enacted Sections 361–368 of the Delaware General Corporation Law (DGCL), providing for the incorporation of socially and environmentally conscious public benefit corporations.[10]

Several years prior to the enactment of Sections 361–368, in 1985, when Justice Moore of the Delaware Supreme Court penned the decision in *Unocal Corp. v. Mesa Petroleum Co.*,[11] corporate social responsibility programs were evolving and beginning to carve significant niches within the business landscape.[12] Yet, understanding of the corporate model was predominantly centered on the so-called property conception of the corporation, most notably promulgated by Chancellor William T. Allen several years later.[13] Under this framework, "the corporation is seen as the private property of its stockholder-owners. The corporation's purpose is to advance the purposes of these owners (predominantly to increase their wealth) . . . ."[14] Accordingly, in contrast to the mission-based purposes of

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BUS. CORP. LAW §§ 1707(a)(1)(G)–1709 (McKinney 2012); VT. STAT. ANN. tit. 11A, §§ 21.03–.14 (2012).

6. *See* Steven Munch, Note & Comment, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL'Y 170, 186 (2012) (internal quotation marks omitted); *see also, e.g.*, MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c); VT. STAT. ANN. tit. 11A, § 21.03(a)(4).

7. *See Our History*, B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/our-history [http://perma.cc/GD5Z-CKKT] (last updated Dec. 31, 2013); *see also* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 348 (2014) [hereinafter Murray, *Social Enterprise Innovation*] (citing B Lab, *Legislation*, B CORP., http://www.bcorporation.net/what-are-b-corps/legislation).

8. *See State by State Status of Legislation*, BENEFIT CORP., http://benefitcorp.net/policymakers/state-by-state-status [http://perma.cc/LV6T-RK7L] (last visited Nov. 18, 2015).

9. *See* MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-01–08; VT. STAT. ANN. tit. 11A, §§ 21.03–.14.

10. *See* DEL. CODE ANN. tit. 8, §§ 361–368.

11. 493 A.2d 946 (Del. 1985).

12. *See* Archie B. Carroll, *Corporate Social Responsibility: Evolution of a Definitional Construct*, 38 BUS. & SOC'Y 268, 284–88 (1999).

13. *See* Allen, *supra* note 4, at 264.

14. *Id.* at 264–65.

benefit corporations, the results in cases that are members of the *Unocal* family have been a product of the widely held belief that directors are primarily tasked with both guarding and maximizing shareholder financial value.[15]

The benefit corporation space broadens the scope of what is considered to be in the purview of shareholder value, however.[16] Almost uniformly, in addition to the financial well-being of the stockholders, benefit corporation statutes affirmatively *require* directors to consider the impact a corporate action might have on employees, customers, communities, and the environment, among other things.[17] In pertinent part, Section 365(a) of the Delaware General Corporation law provides the following:

> The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.[18]

Much akin to benefit corporation statutes of other states, in excess of Section 365(a)'s balancing test, the rather barren and ambiguous Delaware public benefit corporation statutory provisions provide little guidance for directors at such organizations with respect to their fiduciary duties. In view of this lack of specificity and clarity, the question remains as to the precise manner in which the board of directors at a Delaware public benefit corporation are required to balance the foregoing interests and, consequently, how the notable cases of *Unocal* and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[19] will operate in the for-profit social enterprise context, if at all.[20]

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15. For a discussion of the shareholder wealth maximization norm and its relationship to the holding in *Unocal*, see generally Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389 (2014).

16. *See generally* William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012).

17. *See* DEL. CODE ANN. tit. 8, § 365(a) (2013); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (2010); VT. STAT. ANN. tit. 11A, § 21.09(a)(3) (2010). *But see* Munch, *supra* note 6, at 184 n.119 (discussing permissive nature of state constituency statutes, which *permit*, but do not *require*, that directors consider non-shareholder interests in directing or managing affairs of the company).

18. tit. 8, § 365(a).

19. 506 A.2d 173 (Del. 1986).

20. *See generally* tit. 8, § 366; Frederick H. Alexander et al., *M&A Under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV. 255 (2014); Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235 (2014) [hereinafter Strine, *Making It Easier*]; Sean W. Brownridge, Article, *Canning Plum Organics: The Avant-Garde Campbell Soup Company Acquisition and Delaware Public Benefit Corporations Wandering* Revlon*-Land*, 39 DEL. J. CORP. L. 703 (2015).

Within the realm of legal scholarship, much ink has been spilled over the *Unocal* saga and the doctrine it yields,[21] although the reverberations of the decision are necessary to understanding the modern challenges presented to both the Delaware judiciary and legislature in their efforts to integrate public benefit corporations into the nation's foremost corporate law framework. In particular, the *Unocal* doctrine, in conjunction with Sections 361–368 of the Delaware General Corporation Law, pose a diverse array of difficulties for directors at public benefit corporations, where their company is subject to hostile overtures similar to those faced by the defending boards at Unocal and Airgas.[22] In the guise of benefit purpose, however, directors at public benefit corporations have a defense mechanism built into their corporate charter that directors at traditional, profit-maximizing companies do not. The balancing test articulated in Section 365(a) affirmatively requires that directors at Delaware benefit corporations manage the business and affairs of the company in a manner that balances not only the financial interests of the stockholders, but the best interests of those materially effected by the corporation's conduct and the specific public benefits identified in the company's certificate of incorporation, as well.[23]

In satisfying their fiduciary duties and acting within *Unocal*'s enhanced scrutiny, the question, then, is whether public benefit corporation directors are free to adopt a diversity of takeover defense mechanisms, layering them on top of their statutorily granted authority to reject a hostile offer on the grounds that it is not in the best interests of the company's public benefit purpose or purposes.[24] To the extent that directors at public benefit corporations adopt defensive measures, do such measures, in certain contexts, breach the thresholds of preclusivity and coerciveness when combined with the corporation's latitude to adhere to its mission? This Article seeks to answer these questions, among others.

Part II is a brief discussion of *Unocal*, its requirements, and its legacy. Part III investigates how corporate benefit purpose works independent from, and in tandem with, defensive instruments to effectively defend benefit corporations from hostile acquirers, while touching on whether the mixture of benefit purpose and defensive measures implicates questions of

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21. For a discussion of *Unocal*, see generally Stephen M. Bainbridge, Unocal *at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006); Ronald J. Gilson, Unocal *Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001); Marcel Kahan, Paramount *or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. CORP. L. 583 (1994).

22. *See generally* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Air Prods. & Chems., Inc. v. Airgas, Inc. (*In re* Airgas Inc. S'holder Litig.), 16 A.3d 48 (Del. Ch. 2011).

23. *See* tit. 8, §§ 361–368.

24. *See* Alexander et al., *supra* note 20, at 272 (posing question of whether "directors of a [public benefit corporation are] free to adopt deal protection measures of any deterrent effect they choose, as long as they can plausibly assert that they did so in an effort to balance pecuniary and public purposes?").

preclusivity and coerciveness. Using *eBay Domestic Holdings, Inc. v. Newmark*,[25] *Air Products & Chemicals, Inc. v. Airgas, Inc.*,[26] and the history of conscientious Delaware jurisprudence as guideposts, Part IV sets forth a framework for the judiciary to apply the *Unocal* test to public benefit corporations. Part V concludes that the defensive measure analysis propagated by *Unocal* and the fiduciary obligations of directors at Delaware public benefit corporations together provide mission-driven entities with an uncertain, complex, and socially consequential defensive palette, with externalities advantaging shareholders, stakeholders, and directors alike, but which, as they currently exist in relationship to one another, require clarification. That is to say, public benefit purpose, while socially and environmentally valuable, can function as a wolf in sheep's clothing for directors defending against the overtures of a hostile acquirer.

II. A BRIEF SURVEY OF THE *UNOCAL* LEGACY

In *Unocal v. Mesa Petroleum*, T. Boone Pickens and Mesa Petroleum Company made a two-tier, front-end-loaded tender offer for "approximately 37% [ ] of Unocal's outstanding stock at a price of $54 per share."[27] On the back-end, if the bidder successfully closed the tender offer, it planned to squeeze out the non-tendering Unocal shareholders via an issuance of "highly subordinated 'junk bonds' " of a successor corporation in exchange for target stock.[28] Unocal's disinterested board rejected Mesa's advances, in view of what they considered to be a "grossly inadequate" price and unattractive use of debt securities.[29]

Furthermore, in response to the hostile approach on the company, the Unocal board resolved to pursue a self-tender offer "to provide the stockholders with a fairly priced alternative to the Mesa proposal" in the event that Pickens reached his desired 51% ownership threshold.[30] In completing the self-tender, however, Unocal planned to exclude Pickens and Mesa from the terms of the offer, effectively preventing the corporate raider from closing on the coercive two-tier tender offer.[31] Mesa filed for an injunction in the Delaware Court of Chancery in response to the board's exclusionary strategy.[32] On appeal, the Delaware Supreme Court concluded that the target board could engage in defensive measures to

25. 16 A.3d 1 (Del. Ch. 2010).

26. 16 A.3d 48 (Del. Ch. 2011).

27. *See Unocal Corp.*, 493 A.2d at 949.

28. *See id.* at 949; *id.* at 957 ("Thus, the board's decision to offer what it determined to be the fair value of the corporation to the 49% of its shareholders, who would otherwise be forced to accept highly subordinated 'junk bonds', [sic] is reasonable and consistent with the directors' duty to ensure that the minority stockholders receive equal value for their shares.").

29. *See id.* at 950.

30. *Id.*

31. *See id.* at 951.

32. *See id.* at 949.

protect Unocal and its shareholders from what the directors perceived to be the hostile bidder's grossly inadequate and coercive offer.[33]

The takeaway from *Unocal*, however, is not the result in the case, particularly in view of the Securities and Exchange Commission's subsequent adoption of the All Holders Rule.[34] Rather, the consequence is the well-known *Unocal* test that the court engaged in. In applying the *Unocal* standard of review to director actions, a court will engage in a two-part reasonableness and proportionality inquiry: first, the defensive measure taken must be on reasonable grounds to believe that there is a threat posed to corporate policy and effectiveness;[35] and, second, as part of a "bifurcated analysis,"[36] the reviewing court will search whether the defensive measure taken was "preclusive" or "coercive"[37] and, if not, the court will determine if it is within a permitted "range of reasonableness."[38]

In deciding *Unocal*, the Delaware Supreme Court

> created a new standard [of review] . . . to monitor decisions by target directors to enact defensive tactics when faced with a hostile takeover.
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> . . . .
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> Unlike the business judgment rule, which places the initial burden of proof on plaintiffs, this newly-created test requires the target board to bear the burden of [proof] . . . .[39]

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33. *See id.* The Delaware Supreme Court provided:

> Under the circumstances the board had both the power and duty to oppose a bid it perceived to be harmful to the corporate enterprise. On this record we are satisfied that the device Unocal adopted is reasonable in relation to the threat posed, and that the board acted in the proper exercise of sound business judgment. We will not substitute our views for those of the board if the latter's decision can be "attributed to any rational business purpose."

Id. (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

34. *See* 17 C.F.R. § 240.14d-10 (2015). The All Holders Rule requires that a bidder, in a tender offer, make the offer available to "all security holders of the class of securities subject to the tender offer" and that "[t]he consideration paid to any security holder for securities tendered in the tender offer is the highest consideration paid to any other security holder for securities tendered in the tender offer." *Id.* § 240.14d-10(a)(1)–(2).

35. *See Unocal*, 493 A.2d at 955.

36. Marcel Kahan & Edward Rock, *How to Prevent Hard Cases from Making Bad Law:* Bear Stearns*, Delaware, and the Strategic Use of Comity*, 58 EMORY L.J. 713, 724 (2009).

37. *See id.* (quoting Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1387 (Del. 1995)). For a discussion of how "preclusive" and "coercive" are defined under Delaware takeover jurisprudence, see *infra* notes 58–104 and accompanying text.

38. *See id.* (quoting *In re Unitrin,*, 651 A.2d at 1387) (internal quotation marks omitted); *see also Unocal*, 493 A.2d at 955.

39. Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 609 (2013). In order to satisfy the business judgment rule in Delaware, disinterested directors must make a decision on "an informed basis, in good faith and [with] the honest belief that the action taken [i]s in the best interests of

What results, therefore, is "'judicial examination at the threshold' of the board's process as well as its decision, thereby providing both a subjective and an objective review of the defensive tactic."[40] Nonetheless, "*Unocal* [only] subjects a decision to reject an offer [for the target company] to an enhanced review of the process by which this decision is arrived at, but not to an independent review of the substantive merits of the decision."[41] This intermediate standard of review is "situated between the business judgment rule and entire fairness," such that directors receive the protections of the business judgment rule only after meeting the enhanced scrutiny of the *Unocal* test.[42]

In *Paramount Communications, Inc. v. Time Inc.*,[43] the Delaware Supreme Court noted that the threats posed by hostile offers triggering the first prong of the *Unocal* test can be categorized into three molds.[44] The *Time* case itself is representative of opportunity loss, the first type of threat, "[where] a hostile offer might deprive target shareholders of the opportunity to select a superior alternative offered by target management [or, we would add, offered by another bidder]."[45] "Structural coercion," such as was present in *Unocal*, where there is a "risk that disparate treatment of non-tendering shareholders might distort shareholders' tender decisions," is the second category of threat sparking enhanced analysis.[46] Finally, "substantive coercion"—coursing through the offer at issue in *Air Products & Chemicals, Inc. v. Airgas*—is the final threat recognized by the Delaware Supreme Court in *Time* as sufficiently satisfying the first prong of the *Unocal* test.[47] "Substantive coercion [is] the risk that shareholders will mistakenly accept an under[-]priced offer because they disbelieve management's representations of intrinsic value."[48]

Similarly, three scenarios typically trigger a Delaware court's utilization of the *Unocal* test: (1) a bidder appears and the target board is uninterested in participating in a business combination and employs defensive measures to fend off the unwanted suitor;[49] (2) a corporation implements

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the" corporation. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

40. Siegel, *supra* note 39, at 610 (quoting *Unocal*, 493 A.2d at 954).

41. Kahan, *supra* note 21, at 588.

42. Sharfman, *supra* note 15, at 414 (citing Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011)).

43. 571 A.2d 1140 (Del. 1989).

44. *See id.* at 1153 n.17.

45. *Id.* (alterations in original).

46. *Id. See generally* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

47. *See Paramount Commc'ns, Inc.*, 571 A.2d at 1153 n.17. *See generally* Air Prods. & Chems., Inc. v. Airgas, Inc. (*In re* Airgas Inc. S'holder Litig.), 16 A.3d 48 (Del. Ch. 2011).

48. *Paramount Commc'ns, Inc.*, 571 A.2d at 1153 n.17 (internal quotation marks omitted).

49. *See generally Unocal*, 493 A.2d 946.

a defensive measure prior to the arrival of a hostile acquirer and maintains the thwarting mechanism in the face of the bidder;[50] and (3) a corporation has a transaction in place, only to be interrupted by a third-party bidder, and the target's board employs deal-protection mechanisms to preserve the deal in place prior to the arrival of the unwanted interloper.[51]

In applying the *Unocal* standard to board-level decisions, the Delaware courts are "deferential" to corporate leadership on the back end.[52] To the extent that subject directors can show that they satisfied the two-pronged *Unocal* enhanced scrutiny analysis,[53] they will receive the benefit of the business judgment rule, which requires only that the defendant directorship "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,"[54] particularly where such actions and decisions are plainly related to "any rational business purpose."[55] Consequently, in view of the broad range of available rational business purposes, defendants are often afforded business judgment review, such that they are infrequently held liable for breaching their fiduciary duties.[56] "In other words, the [business judgment] rule creates a presumption of deference to the board's authority as the corpora-

50. *See generally Airgas*, 16 A.3d 48.

51. *See generally Paramount Commc'ns, Inc.*, 571 A.2d 1140.

52. *See* Kahan, *supra* note 21, at 586.

53. *See* Siegel, *supra* note 39, at 608–10.

54. *Unocal*, 493 A.2d at 954 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)) (internal quotation marks omitted).

55. *Id.* (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)) (internal quotation marks omitted).

56. *See* Bainbridge, *supra* note 21, at 860 n.391 (disagreeing with Stephen Fraidin & Jon D. Hanson, *Toward Unlocking Lockups*, 103 YALE L.J. 1739 (1994)). Fraidin and Hanson state:

> Delaware courts appear to intervene dramatically in board-room decision making when a board decides to sell a firm to a specific bidder at a substantial premium, but show near-complete restraint when a board decides (1) to reject any and all offers regardless of the premium being offered, (2) to authorize a "merger of equals" transaction in which their company merges with another and the shareholders receive no premium for their stock (and perhaps even receive less than market value for their stock), or (3) to purchase another firm at substantial premium (and perhaps overpaying). The "inherent" conflicts of interest which Delaware courts claim to find so troubling in the takeover context would appear to be most severe in the last three settings and . . . virtually non-existent in the first. If judicial restraint is appropriate in the last three settings, in which a board is rejecting or paying a substantial shareholder premium, it is surely appropriate in the first setting, in which a board of directors is accepting a substantial shareholder premium.

Fraidin & Hanson, *supra*, at 1832–33 (footnotes omitted). Bainbridge, instead, argues "Delaware courts do not routinely defer to board decision making in the first numbered setting [above]." Brainbridge, *supra* note 21, at 860 n.391. While the presumption of deference typically shields director decisions, "Delaware courts carefully examine the board's decision-making process to determine whether the board acted from proper or improper motives." *Id.*

tion's central and final decision maker,"[57] casting a protective shadow over defendant directorships.

III. PUBLIC BENEFIT PURPOSE AS A DEFENSIVE MEASURE AND THE UNDERLYING DRACONIAN QUESTION

When Bart Houlahan joined AND 1, a basketball apparel and shoe company, in the company's infancy, the colorful brand's "[r]evenues were just $4 million."[58] In the process of scaling the business to $250 million, AND 1 benefited from meaningfully high employee retention rates, in part because the company boasted a basketball court in the office, yoga classes, a mother's room, and above-market wages.[59] AND 1's commitment to the well-being of its employees crossed borders, reaching to its production facilities in China, where the company competed with global corporations such as Nike and Reebok.[60] In 2005, AND 1 was sold to American Sporting Goods, which promptly "stripped" the shoe brand of its "commitments to employees, to the environment and to the community," eliciting Houlahan's desire to found B Lab, an organization that, among other things, helps companies to "scale, raise capital, have a liquidity event and still hold onto a mission."[61]

One year following the adoption of Sections 361–368 of the Delaware General Corporation Law, 184 companies converted or opted into the public benefit corporation entity model, which reflects Houlahan's view of social enterprise.[62] Unsurprisingly, given the age of the statutory provisions permitting them, most public benefit corporations are currently small-capitalization companies with brief operating histories and few third-party shareholders, if any.[63] However, the robust support for public benefit corporations carries with it a youthful exuberance, effectively making mission-driven entities attractive targets for larger companies that may be

57. Bainbridge, *supra* note 21, at 787.

58. *B Lab's Bart Houlahan: Building More Socially Responsible Corporations*, KNOWLEDGE@WHARTON (Nov. 7, 2012), http://knowledge.wharton.upenn.edu/article/b-labs-bart-houlahan-building-more-socially-responsible-corporations/ [https://perma.cc/67CX-BH2E?type=image]; *see also Board of Directors*, B CORP., http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/board-of-directors [http://perma.cc/MU57-D3Z7] (last visited Nov. 19, 2015).

59. *See B Lab's Bart Houlahan: Building More Socially Responsible Corporations*, *supra* note 58.

60. *See id.*

61. *See id.* (internal quotation marks omitted).

62. *Search*, BENEFIT CORP INFO. CTR., http://benefitcorp.net/find-a-benefit-corp/search [http://perma.cc/B8RW-3T9Q] (last visited Nov. 19, 2015).

63. *See generally id. See also* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 247, 259 (2014) (finding that "74% of public benefit corporations are most likely new corporations"); Alexander et al., *supra* note 20, at 279 (acknowledging that, currently, many public benefit corporations "remain closely held by a cohesive group of like-minded stockholders with similar preferences regarding the balance between pecuniary gain and the corporation's stated public purpose").

seeking to diversify their business platforms and that are keen to capitalize on a target public benefit corporation's "access to a new and growing market of socially responsible business."[64] Indeed, "profit-maximizing businesses will want to expand into [the social enterprise] market by acquiring an established participant rather than starting their own brands."[65]

While traditional corporations may desire to engage in a Pac-Man business strategy in approaching mission-driven entities,[66] public benefit purpose effectively functions as a daunting takeover defense engrained in the genetic makeup of a Delaware-based social enterprise, particularly when coupled with traditional defensive mechanisms.[67] Pursuant to Section 362(a)(1), a public benefit corporation is required to "[i]dentify within its statement of business or purpose . . . [one] or more specific public benefits to be promoted by the corporation . . . ."[68] Accordingly, as discussed in Part I, public benefit corporation directors are required to "manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[69] Delaware public benefit corporation directors, consequently, are statutorily mandated to consider the public benefit or the public benefits articulated in the social enterprise's certificate of incorporation when confronted with an offer for the company, even when such a bid is hostile. In that light, directors at public benefit corporations are presumably free to defend against hostile offers by deploying benefit purpose as a justification for rejection without fearing liability under *Unocal*. As a result, however, how directors go about defending their company from a hostile bid is critical to the preservation of a public benefit corporation's mission-driven purpose.[70]

Not only do directors of public benefit corporations have the latitude to manage and direct the affairs of the company in a manner that considers the public benefits identified in the company's certificate of incorpora-

64. Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 235 (2012) (observing that acquisitions of benefit corporations by traditional profit-maximizing corporation "leads to an immediate immersion in the [social enterprise] market, marked by the legitimacy of the target social enterprise").

65. *Id.*

66. *See* Martin Lipton & Andrew R. Brownstein, *Takeover Responses and Directors' Responsibilities–An Update*, 40 BUS. LAW. 1403, 1419 (1985) (providing "Pac-Man counter tender offers became an accepted offensive and defensive strategy during 1982"); *see also* Steven Davidoff Solomon, *Men's Wearhouse Dusts Off the Pac-Man Defense*, N.Y. TIMES, Nov. 26, 2013, http://dealbook.nytimes.com/2013/11/26/mens-wearhouse-dusts-off-the-pac-man-defense/ [http://perma.cc/26F5-27ZM].

67. *See* DEL. CODE ANN. tit. 8, § 362(a) (1) (2015).

68. *Id.*

69. tit. 8, § 365(a).

70. *See* Alexander et al., *supra* note 20, at 272.

tion, they are also presumably free to utilize traditional defensive mechanisms permitted under the Delaware law.[71] The aforementioned benefit purpose shield and traditional defensive measures, in tandem, provide a public benefit corporation with formidable armor, which may be deployed upon demonstrating "'*reasonable* grounds for believing that a danger to corporate policy and effectiveness existed.' This burden is met by reasonable investigation and a showing of good faith."[72] The question, though, is whether the ability to "say no" to an offer for mission-based purposes, in combination with the authority to employ additional defensive measures, rises to the level of preclusive or coercive in certain contexts, as most notably discussed in *Versata Enterprises, Inc. v. Selectica, Inc.*[73] There, the Delaware Supreme Court reiterated that a coercive response to an unwanted bid "is one that is aimed at 'cramming down' on its shareholders a management-sponsored alternative."[74] Moreover, the court noted that "[a] defensive measure is preclusive where it makes a bidder's ability to wage a successful proxy contest and gain control either 'mathematically impossible' or 'realistically unattainable.'"[75] That is to say, "a response is 'preclusive' if it . . . precludes a bidder from seeking control by fundamentally restricting proxy contests or otherwise."[76] Justices and chancellors evaluating preclusion "must assess the likelihood of dissident success given the existence of the various defenses. Thus far, the courts have relied on ad hoc discussions of individual target companies' situations and piecemeal evidence of success in other contests in making their determinations."[77]

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71. *See generally* tit. 8, §§ 361–368.

72. Sharfman, *supra* note 15, at 413–14 (footnote omitted) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985)).

> Reasonable investigation requires a showing that the board was adequately informed under the gross negligence standard of review that was established in *Smith v. Van Gorkom.* The finding of good faith requires a showing that the directors acted in response to a perceived threat to the corporation and not out of self-interest. A defensive measure fails the good faith prong if it was implemented "for an inequitable purpose." Consistent with corporate law's traditional approach, evidence of good faith and reasonable investigation is "materially enhanced . . . by the approval of a board comprised of a majority of outside independent directors." Under the second prong, the board must demonstrate that the measure was "*reasonable* in relation to the threat posed."

Id. (alteration in original) (footnotes omitted) (quoting *Unocal*, 493 A.2d at 955).

73. 5 A.3d 586 (Del. 2010).

74. *Id.* at 601 (quoting Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1387 (Del. 1995)) (internal quotation marks omitted); *see also* Kahan & Rock, *supra* note 36, at 724 (noting that "a response is 'coercive' if it is aimed at forcing on stockholders a management-sponsored alternative to a hostile offer").

75. *Versata Enters. Inc.*, 5 A.3d at 601 (quoting Carmody v. Toll Bros. Inc., 723 A.2d 1180, 1195 (Del. Ch. 1998)) (internal quotation marks omitted).

76. Kahan & Rock, *supra* note 36, at 724 (citing *Unitrin*, 651 A.2d at 1387).

77. Paul H. Edelman & Randall S. Thomas, Selectica *Resets the Trigger on the Poison Pill: Where Should the Delaware Courts Go Next?*, 87 IND. L.J. 1087, 1111 (2012).

Without chasing the rabbit down the hole that is the Delaware Supreme Court majority opinion in *Omnicare, Inc. v. NCS Healthcare, Inc.*,[78] a decision that stands on uncertain ground[79] and, when decided, was labeled as having "the life expectancy of a fruit fly[,]"[80] the holding nonetheless "properly separated the elements of coercion and preclusion from the question of overarching reasonableness."[81] That is to say, "[t]he issues of coercion and preclusion are separate from and logically prior to an assessment of reasonableness,"[82] in that the question of whether a defensive board action was within the applicable range of reasonableness may only properly be asked once defendant directors have shown that the measures taken were not "draconian."[83] Delaware courts, in evaluating the reasonableness of a decision, "should be deciding whether the directors made *a reasonable* decision, not *a perfect* decision. . . . Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness."[84] Accordingly, the "range of reasonableness" standard is a "relatively permissive" one,[85] such that the reasonableness inquiry is fact-specific and therefore conducive to being molded to fit the mission-based objectives of public benefit corporations, recognizing simultaneously that

78. 818 A.2d 914 (Del. 2003).

79. *See* Sean J. Griffith, *The Costs and Benefits of Precommitment: An Appraisal of* Omnicare v. NCS Healthcare, 29 J. CORP. L. 569, 623 (2004); Wayne O. Hanewicz, *Director Primacy,* Omnicare, *and the Function of Corporate Law,* 71 TENN. L. REV. 511, 556–58 (2004); Kahan & Rock, *supra* note 36, at 730; J. Travis Laster, Omnicare*'s Silver Lining,* 38 J. CORP. L. 795, 795 n.2 (2013) (citing Andrew D. Arons, *In Defense of Defensive Devices: How Delaware Discouraged Preventative Measures in* Omnicare v. NCS Healthcare, 3 DEPAUL BUS. & COM. L.J. 105, 120–21 (2004)); E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992–2004? A Retrospective on Some Key Developments,* 153 U. PA. L. REV. 1399, 1461 (2005); Eleonora Gerasimchuk, Article, *Stretching the Limits of Deal Protection Devices: From* Omnicare *to* Wachovia, 15 FORDHAM J. CORP. & FIN. L. 685, 704 (2010); Thanos Panagopoulos, Article, *Thinking Inside the Box: Analyzing Judicial Scrutiny of Deal Protection Devices in Delaware,* 3 BERKELEY BUS. L.J. 437, 466–68 (2006); Daniel Vinish, Comment, *The Demise of Clarity in Corporate Takeover Jurisprudence: The* Omnicare v. NCS Healthcare *Anomaly,* 21 ST. JOHN'S J. LEGAL COMMENT. 311, 312 (2006).

80. Laster, *supra* note 79, at 796 n.3 (internal quotation marks omitted) ("Then-Justice, now Chief Justice Steele was quoted as saying during a discussion of the case at a continuing legal education event that '[w]hile I don't suggest that you rip the *Omnicare* pages out of your notebook. . . . I do suggest that there's the possibility, one could argue, that the decision has the life expectancy of a fruit fly.'" (alterations in original)).

81. *Id.* at 796.

82. *Id.* at 812.

83. *See* Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1383 (Del. 1995).

84. *Id.* at 1385–86 (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45–46 (Del. 1994)).

85. Kahan & Rock, *supra* note 36, at 724 (internal quotation marks omitted).

cognizable threats at social enterprises may diverge from those faced by their traditional, for-profit counterparts.[86]

With respect to public benefit corporations, the Delaware courts are likely to be compelled to continue to rely on "ad hoc discussions"[87] tailored to the social and environmental objectives of mission-driven entities and the measures taken in defense of those objectives. The decision to stick to its mission in the face of an attractive offer certainly presents the possibility of directors forcing a management-sponsored alternative on shareholders, who may favor a bidder's substitute roadmap for the production of social value or, despite their investment in a social enterprise, may be seeking increased wealth. Comparably, given the paucity of hostile transactions in the social enterprise realm, it is currently unclear whether successful proxy contests and changes of control are realistically attainable when defending public benefit corporation boards adopt traditional defensive measures to supplement their ability to "say no" using benefit purpose as a justification.

The mixture formed by adopted defensive measures and the ability to "say no" for mission-based reasons presumably makes obtaining control challenging and, at times, difficult to realistically achieve, in light of the undefined liberty granted by the balancing requirements of Section 365(a). In the *Unocal* context, concerns of preclusivity and coerciveness at public benefit corporations arise where a bidder submits an offer for the company and the target board adopts defensive measures to deter the unwanted suitor[88] and where a public benefit corporation maintains defensive measures it adopted prior to the arrival of a bidder.[89] In both scenarios, bidders seeking to acquire target public benefit corporations are faced with significant challenges that require financial, social, and environmental resources to overcome, so as to satisfy impact investor interests and social enterprise leadership's corresponding accountability to those concerns.[90]

As to the third scenario typically triggering the *Unocal* standard of review, where a corporation implements deal protection mechanisms to preserve an agreed-upon transaction from the threat of an unwanted interloper,[91] it is well-settled in Delaware law that independent and disinterested selling boards are "not absolutely required to treat all bidders

86. *See* Alexander et al., *supra* note 20, at 272 (stating that "what might not constitute a cognizable threat to a traditional, for-profit corporation might well constitute such a threat to a [public benefit corporation]").

87. Edelman & Thomas, *supra* note 77, at 1111.

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

89. *See generally* Air Prods. & Chems., Inc. v. Airgas, Inc. (*In re* Airgas Inc. S'holder Litig.), 16 A.3d 48 (Del. Ch. 2011).

90. *See* Strine, *Making It Easier*, *supra* note 20, at 248 (citing DEL. CODE ANN. tit. 8, § 362(a) (2013)).

91. *See generally* Paramount Commc'ns, Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140 (Del. 1989).

equally."[92] Therefore, boards are generally free to provide some acquirers with advantages not otherwise available to others in the same contemplated transaction.[93] In attempting to navigate the omnipresent specter of entrenchment, defendant directors at public benefit corporations will be especially challenged in attempting to justify their defensive actions in favor of one transaction at the expense of another, where the measure taken does not "reflect a good faith effort to secure a better price for shareholders" on its face,[94] but instead is taken in furtherance of the company's benefit purposes.

The Delaware courts, applying the *Unocal* standard of review to public benefit corporations, will be faced with the difficult task of deciphering deal protection mechanisms adopted by management to defend against a threat posed to the company's social mission by an interloping acquirer that is perhaps offering a financially more attractive deal, but that has an eye towards undermining the target's public benefit commitment, either wholly or in part. The Delaware judiciary's unwillingness to insert itself into the rational business decisions of directors will likely be magnified when considering how such decisions relate to a social enterprise's public benefit objectives.[95] Certainly, in order to fairly evaluate whether a deal protection mechanism is preclusive, coercive, and within a range of reasonableness, the analytical process for the judiciary will likely be required to evolve to more aptly reflect the novel purposes of public benefit corporations.[96]

92. *In re* Novell, Inc. S'holder Litig., No. 6032–VCN, 2013 WL 322560, at *9 (Del. Ch. Jan. 3, 2013) (citing *In re* Fort Howard Corp. S'holder Litig., No. 9991, 1988 WL 83147, at *14 (Del. Ch. Aug. 8, 1988)); *see also In re* Novell, Inc. S'holder Litig., No. 6032–VCN, 2014 WL 6686785, at *9 (Del. Ch. Nov. 25, 2014).

93. *See In re Novell,* 2013 WL 322560, at *9; *In re Novell,* 2014 WL 6686785, at *9.

94. *See* Ronald J. Gilson, *Lipton and Rowe's Apologia for Delaware: A Short Reply*, 27 DEL. J. CORP. L. 37, 40–41 (2002) ("Target management's efforts to block a takeover may reflect a good faith effort to secure a better price for shareholders, or it may reflect entrenchment—a preference of target management to maintain the status quo."); Griffith, *supra* note 79, at 582 n.70 ("discussing cases where the directors have no direct pecuniary interest in the transaction but have an entrenchment interest, i.e., an interest in protecting their existing control of the corporation and noting that the corporation law has always been concerned . . . with whether directors have acted to advance their personal self-interest by entrenching themselves in office" (alteration in original) (quoting William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law,* 26 DEL. J. CORP. L. 859, 862–63 (2001)) (internal quotation marks omitted)).

95. *See* Alexander et al., *supra* note 20, at 273.

96. Dealmakers have adapted to perceived missteps by the Delaware judiciary with respect to the import of *Omnicare* on deal protection mechanisms. *See* E. Norman Veasey, *Ten Years After* Omnicare: *The Evolving Market for Deal Protection Devices,* 38 J. CORP. L. 891, 901–02 (2013) (concluding "[i]n short, there are reasons to question the enduring jurisprudence of *Omnicare.* But of greater importance is the fact there are many variations of deal protections and ways to obviate *Omnicare.* Dealmakers are fashioning these measures every day. In practice, therefore, *Omni-*

Hostile bidders faced with the reality that directors at public benefit corporations can reasonably reject an offer for the company on the grounds that it would lead to mission-drift, depriving shareholders of social value, face a meaningful, yet outwardly surmountable obstacle in acquiring such entities. As mentioned above, "in the setting of a traditional, for-profit corporation, courts will uphold a non-preclusive deal protection measure if it is demonstrated to be within a 'range of reasonableness.' The standard is fairly deferential, but one could well ask if it would be even looser in the case of a [public benefit corporation]."[97]

The interplay between the perceived "looser" standard—the ability to "say no" in an effort to stick to mission—and the threat of adopting or maintaining defensive measures makes obtaining control of an unreceptive public benefit corporation an exacting undertaking. Accordingly, a Delaware court reviewing the propriety of a public benefit corporation's decisions to both reject an offer on the grounds that it would result in mission-drift and maintain or adopt defensive measures to thwart the same offer would struggle to do so, as "[t]he weight to be given to other constituencies would seem to be a matter entrusted to the judgment of the directors . . . and would be difficult for courts to second guess."[98]

From a cynic's perspective, the latitude afforded to directors at public benefit corporations with respect to their ability to direct and manage the affairs of the company in a manner that considers the enterprise's stated public benefit purposes,[99] particularly when considering their authority to adopt defensive measures, suggests that management may be able to deprive shareholders of a market opportunity under the guise of adhering to mission while, seemingly acting within a permissible range of reasonableness. Given the difficulty courts may have evaluating the business purposes of decisions in furtherance of social mission,[100] public benefit corporation directors are in a prime position to "green-wash[ ]" their decisions to further their self-interest and impose greater acquisition hurdles on acquirers that may be offering valuable social, environmental, and financial returns to investors.[101] Indeed, Delaware courts have long "recognized that directors are often confronted with an 'inherent conflict of interest' during contests for corporate control '[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'"[102]

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care may have set forth some doctrinal landmarks, but it should not present too many obstacles for dealmakers.").

97. Alexander et al., *supra* note 20, at 273 (footnotes omitted).

98. Strine, *Our Continuing Struggle, supra* note 2, at 150 n.45.

99. *See generally* DEL. CODE ANN. tit. 8, § 365(a) (2015).

100. *See* Strine, *Our Continuing Struggle, supra* note 2, at 150 n.45.

101. *See* Strine, *Making It Easier, supra* note 20, at 249.

102. Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1373 (Del. 1995) (alteration in original) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)) (internal quotation marks omitted).

The foundational question, ultimately, is

> whether the deferential standard of [S]ection 365(b), which provides that directors are deemed to have satisfied their "fiduciary duties to stockholders and the corporation" as long as their decisions were "both informed and disinterested and not such that no person of ordinary, sound judgment would approve" applies "to a decision implicating the balance requirement" among stockholders and public beneficiaries.[103]

That is to say, query whether directors will comfortably survive the threshold judicial examination of the subjective and objective review of the process used to adopt a defense mechanism[104] and enjoy the protections of the business judgment rule when deploying benefit purpose as a justification for a respective determination to turn away an unwanted acquirer.

A. *The Stockholders' Role in the Strained Relationship Between Delaware Public Benefit Corporations and M&A*

Delaware's public benefit corporation statute was codified in July 2013, with its most consequential provision being the balancing requirement in Section 365(a).[105] Outside of maintaining differentiated fiduciary mandates for directors, public benefit corporations are required to "produce a public benefit or public benefits and to operate in a responsible and sustainable manner."[106] The importance of a public benefit corporation's mission, within the merger and acquisition context, is reflected by the language in Section 363(c), which provides:

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103. Alexander et al., *supra* note 20, at 272 (citing tit. 8, § 365(b)). Section 365(b) provides:

> A director of a public benefit corporation shall not, by virtue of the public benefit provisions or § 362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct and, with respect to a decision implicating the balance requirement in subsection (a) of this section, will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.

tit. 8, § 365(b).

104. *See* Siegel, *supra* note 39, at 609.

105. *See* tit. 8, § 365(a). Section 365(a) requires:

> The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.

Id.

106. *Id.* § 362(a).

> [A] corporation that *is* a public benefit corporation may not, without the approval of 2/3 of the outstanding stock of each class of the stock of the corporation entitled to vote thereon: . . . (2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the public benefit or public benefits . . . .[107]

In effect, approval of a business combination with the potential to abandon a public benefit corporation's mission requires supermajority approval of the outstanding shares of each class of the stock of the public benefit corporation. Needless to say, social impact shareholders, with interests extending beyond financial remuneration, likely will not be quick to accept consideration from an offeror keen to abandon the social and environmental responsibility initiatives that invited their initial investments, as discussed *infra.*[108]

Shareholders of public benefit corporations are not the only ownership group whose approval is required in a transaction involving a mission-driven entity and a traditional, profit-maximizing corporation. Pursuant to Section 363(a):

> [A] corporation that is *not* a public benefit corporation, may not, without the approval of 2/3 of the outstanding stock of the corporation entitled to vote thereon: . . . (2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign public benefit corporation or similar entity.[109]

Reflective of Delaware's continuous commitment to the shareholder wealth maximization norm, Section 363(a)'s two-thirds approval requirement ensures that shareholders of a traditional wealth-maximizing corporation engaged in a business combination with a public benefit corporation only receive equity interests in an enterprise that is oriented towards producing social and environmental returns, even at the expense

107. *Id.* § 363(c) (emphasis added).

108. *See* Plerhoples, *supra* note 64, at 254 ("[T]he preferences of impact or social investors differ from those of traditional profit-maximizing investors . . . .").

109. tit. 8, § 363(a) (emphasis added). Section 363(a) continues: "The restrictions of this section shall not apply prior to the time that the corporation has received payment for any of its capital stock, or in the case of a nonstock corporation, prior to the time that it has members." *Id.*

of profit maximization, when essentially all of the shareholder population has consented.

The statutory protection provided by the supermajority provisions in Section 363 is not unique to the Delaware General Corporation Law, however. "Most benefit corporation statutes require an affirmative vote of at least two-thirds of the shareholders to adopt or terminate benefit corporation status."[110] Of course, when a public benefit corporation engages in a merger or acquisition with a traditional profit-maximizing corporation, there is potential on both sides of the transaction, depending on its structure, for the abandonment or adoption of a public benefit mission. In either scenario, there is a threat to the foundational principles of each of the Delaware entities: in the case of a public benefit corporation, the termination of benefit purpose; or, where a traditional corporation stands to have its shares converted into or exchanged for public benefit corporation shares, the desertion of the shareholder wealth maximization norm.

The two-thirds approval threshold in Section 363(a) is an endorsement of the potential operational and financial divide between public benefit corporations and traditional business corporations. Moreover, the Delaware statutory amendments reinforce the sanctity of the shareholder wealth-maximization creed by reaffirming that appraisal rights are available to stockholders of a corporation that is not a public benefit corporation "immediately prior to the effective time of . . . [a] merger or consolidation that would result in the conversion of the corporation's stock into or exchange of the corporation's stock for the right to receive shares or other equity interests in" a public benefit corporation or similar entity, provided that such holder has neither voted in favor of or consented to such merger or consolidation.[111] To be sure, shareholders of traditional corporations will be quick to exercise their appraisal rights in a transaction involving a public benefit corporation, if "the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders."[112]

The consequence of the significantly high approval requirements that accompany Section 363 is that mergers and acquisitions involving Delaware public benefit corporations are conceivably difficult to consum-

110. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 494, 508 (2013) [hereinafter Murray, *Defending Patagonia*] (citing MODEL BENEFIT CORP. LEGISLATION §§ 102(a), 201(a)); J. HASKELL MURRAY, BENEFIT CORPORATIONS: STATE STATUTE COMPARISON CHART (Dec. 6, 2012), updated version *sub nom.* CORPORATE FORMS OF SOCIAL ENTERPRISE, COMPARING THE STATE STATUTES (Jan. 15, 2015), *available at* https://www.law.umich.edu/clinical/internationaltransactionclinic/Documents/May%2011%20Conference%20Docs/Corporate%20Forms%20of%20Social%20Enterprise.pdf. [https://perma.cc/HWC7-PXG8?type=source])

111. *See* tit. 8, § 363(b).

112. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 284 (2013) (quoting Strine, *Our Continuing Struggle*, *supra* note 2, at 155) (internal quotation marks omitted).

mate,[113] regardless of whether the social enterprise assumes the role of target or acquirer. Supermajority approval of a sale or business combination "provide[s] another hurdle" for public benefit corporations that wish to "leave their mission behind" in connection with a transaction.[114] However, the threshold requirements not only create additional impediments for public benefit corporations seeking to be acquired by a traditional corporation, but also pose additional challenges for management of Delaware-based socially responsible businesses seeking to acquire a profit-maximizing entity.[115]

In the infancy of the statutory amendments, when many of the public benefit corporations conducting business "remain closely held by a cohesive group of like-minded stockholders with similar preferences regarding the balance between pecuniary gain and the corporation's stated public purpose," the challenge posed by Section 363's respective approval thresholds is perhaps less unnerving.[116] However, once the shareholder population in public benefit corporations becomes more widely-held, diverse, and complicated, as it inevitably will, obtaining the supermajority approval of social impact investors evolves into a task not-so-easily fulfilled.[117]

B. *Poison Puts: The Perceived Availability of Toxic Debt at Public Benefit Corporations*

Currently, a substantial portion of public benefit corporations are new companies with limited operating histories and few shareholders, as mentioned above.[118] Capitalization challenges at new companies are not uncommon, and management often seeks recourse in the debt capital

113. *See* Alexander et al., *supra* note 20, at 279 ("If and when the ranks of [public benefit corporations] become populated with more widely-held firms with disaggregated stockholders [ ] courts [will] likely [ ] address the . . . challenges [facing] merger and acquisition transactions involving [public benefit corporations].").

114. Murray, *Defending Patagonia*, *supra* note 110, at 512.

115. *See id.*

116. Alexander et al., *supra* note 20, at 279.

117. *See* Unitrin, Inc. v. Am. Gen. Corp. (*In re* Unitrin, Inc. S'holders Litig.), 651 A.2d 1361, 1381 (Del. 1995) (citing Berlin v. Emerald Partners, 552 A.2d 482 (Del. 1989)); *see also* Strine, *Making It Easier*, *supra* note 20, at 247. Chief Justice Strine notes:

> These voting requirements could be outcome-determinative in real world situations. Attaining a vote of two-thirds of the outstanding shares is likely to prove difficult, even in a vote on a merger or acquisition. Given the velocity of trading, an increasing number of shares are simply not voted by stockholders because so many trades are made after the record date. Because of that reality and the need to obtain two-thirds of all shares that could be voted, leverage will be granted to any base of socially responsible investment funds, individual investors, and manager- and employee-stockholders committed to protecting the public benefits the corporation was established to serve.

Id. (footnotes omitted).

118. *See generally* Strine, *Making It Easier*, *supra* note 20.

markets. "To date, the vast majority of social enterprises have been closely-held, and only a few have attracted outside capital, which is often needed to scale business operations."[119] The ability to borrow money is not only useful in the scaling process, but it is also a meaningful shield against hostile takeovers, particularly in the "poison put" context. A company utilizing a poison put will "enter into a loan agreement" and borrow capital from a lender.[120] In colloquial terms, the loan agreement "specif[ies] that if there is a change of control at the [borrower], the debt must be bought back."[121] The defensive aspect of such a provision

> is that the debt is often required to be bought back at a premium, or the company will be in a market where refinancing it is hard. In an extreme situation, the company may not be able to refinance its debt or have the cash to buy back the debt, leaving it effectively bankrupt.[122]

The consequence of these accelerated, premium buy-back event risk covenants, therefore, is that target companies with poison put provisions in their loan agreements are "more expensive to take over, or in some circumstances, impossible to be bought out because of the costs of the poison put."[123]

The Delaware courts have questioned the permissibility of event risk covenants requiring the accelerated payment of debt at a premium.[124] The Court of Chancery, in *Kallick v. Sandridge Energy*,[125] noted its hope that directors—aware of the "toll" that poison puts can take on the shareholder franchise—would "only accede" to such a provision in their loan agreements after "hard negotiation and only for clear economic advan-

119. Murray, *Social Enterprise Innovation*, *supra* note 7, at 367 (citing Joan MacLeod Heminway, *To Be or Not to Be (A Security): Funding For-Profit Social Enterprises*, 25 REGENT U. L. REV. 299, 308–09 (2013)).

120. Steven Davidoff Solomon, *A Defense Against Hostile Takeovers Develops a Downside*, N.Y. TIMES, Nov. 25, 2014, http://dealbook.nytimes.com/2014/11/25/a-defense-against-hostile-takeovers-develops-a-downside/?_[https://perma.cc/F27P-W792?type=image].

121. *Id.*

122. *Id.*

123. *Id.*; *see also* Douglas O. Cook & John C. Easterwood, *Poison Put Bonds: An Analysis of Their Economic Role*, 49 J. FIN. 1905, 1906 (1994).

124. *See* Solomon, *supra* note 120 (citing Pontiac Gen. Emps. Ret. Sys. v. Ballantine, No. 9789–VCL, 2014 WL 6388645 (Del. Ch. Oct. 14, 2014); Kallick v. Sandridge Energy, Inc., 68 A.3d 242 (Del. Ch. 2013); San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc., 983 A.2d 304 (Del. Ch.), *aff'd*, 981 A.2d 1173 (Del. 2009)). In *Sandridge Energy*, the poison put—referenced therein as a "Proxy Put"—in the indentures at issue compelled the incumbent board to warn that Sandridge Energy "*may not have sufficient liquidity to fund the purchase price for such senior notes as required under the Indentures . . . [and] [a] mandatory refinancing of this magnitude would present an extreme, risky and unnecessary financial burden . . . .*" *See Sandridge Energy*, 68 A.3d at 250 (third alteration in original) (internal quotation marks omitted).

125. 68 A.3d 242 (Del. Ch. 2013).

tage."[126] Then-Vice Chancellor Lamb, in *San Antonio Fire & Police Pension Fund v. Amylin Pharmaceuticals*,[127] suggested that the Delaware courts "would want, at a minimum, to see evidence that the board believed in good faith that, in accepting [a poison put], it was obtaining in return extraordinarily valuable economic benefits for the corporation that would not otherwise be available to it."[128]

Outside of the courtroom, poison put provisions have been referred to as an "unregulable defense," in view of the fact that "[m]anagers can utilize these defenses to deter acquisitions or proxy contests, 'embedding' [them] within a host of seemingly ordinary, and otherwise legitimate, pre-bid business transactions."[129] The decision to accept a poison put provision in a loan agreement is arguably "unregulable" because of the "unfettered managerial freedom to adopt such defenses because they are contractual rather than subject to shareholder vote, and because their purposes may be difficult to pinpoint as purely entrenching and therefore nefarious."[130] However, the policy justification behind such provisions—that lenders should benefit from the comfort provided by being familiar with the borrower on the other side of a loan agreement[131]—has preserved both the viability and prevalence[132] of the controversial covenants.

In the Delaware public benefit corporation form's infancy, debt may, ultimately, function as the most effective source of financing for these new entities, given the likely difficulty posed by obtaining "patient capital" that is willing to "pursu[e] a nonfinancial purpose as well as some long-term profit . . . ."[133] The fear, of course, is that management will manipulate event risk covenants, such that the "omnipresent specter" of entrenchment and decisions motivated by self-interest will overshadow the policy justification promoting the use of such provisions.[134] Nonetheless, management may seek to capture the lending opportunities provided by social

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126. *Id.* at 248 (citing *Amylin Pharms., Inc.*, 983 A.2d at 315).

127. 983 A.2d 304 (Del. Ch. 2009).

128. *Id.* at 315.

129. DAVID WHISSEL, PROXY MOSAIC, PERILOUS POISON PUTS: EMBEDDED ANTI-TAKEOVER DEFENSES AND SHAREHOLDER RIGHTS 4 (2014) (second alteration in original) (quoting Jennifer Arlen & Eric Talley, *Unregulable Defenses and the Perils of Shareholder Choice*, 152 U. PA. L. REV. 577, 600 (2003)) (internal quotation marks omitted), *available at* https://www.proxymosaic.com/wp-content/uploads/2014/12/Proxy-Puts-White-Paper.pdf [https://perma.cc/QSA2-J857].

130. *Id.* (citing Arlen & Talley, *supra* note 129, at 600).

131. *See* Solomon, *supra* note 120.

132. *See id.* ("S&P Capital IQ reports there are now more than 4,500 debt instruments outstanding with poison put features.").

133. Munch, *supra* note 6, at 173 (citing Thomas Kelley, *Law and Choice of Entity on the Social Enterprise Frontier*, 84 TUL. L. REV. 337, 354–55 (2009)).

134. For a discussion of the "omnipresent specter of entrenchment," see generally J. Travis Laster, *Exorcizing the Omnipresent Specter: The Impact of Substantial Equity Ownership by Outside Directors on* Unocal *Analysis*, 55 BUS. LAW. 109 (1999).

impact creditors who seek to do well by doing good.[135] Managers at mission-driven entities may also be impelled to accept less-favorable terms in loan agreements, at least at the outset, given the novel nature of the Delaware benefit corporation and the associated uncertainty that comes with lending to companies with limited operating histories. Social-impact investors, to date, have been the primary source for the influx of outside capital into the for-profit social enterprise space. Meanwhile, common financing may be more difficult for public benefit corporations to obtain, as "the mix of social and profit purposes may raise eyebrows" for "diligent investors or lenders who closely examine the business plan of a social entrepreneur."[136] Indeed, "corporations pursuing social goals may have limited access to other non-equity sources of capital like bonds and loans. Due to their more limited, less certain profitability, such corporations may be subject to higher interest rates from lenders."[137]

This is all to say that lenders, when negotiating loan agreements with public benefit corporations, may desire to include an event risk covenant—which would accelerate debt payments at a premium in the event that there was a change of control at the social enterprise—given the inherent risks of financing public benefit corporations with debt.[138] Management at public benefit corporations may, in turn, see this as an opportunity to bolster its takeover defense arsenal and willingly accept less-favorable provisions that have the effect of making the company more difficult to acquire on a financial basis, despite being housed in ordinary business transactions.

From a corporate governance perspective, managers at public benefit corporations seemingly have a plausible and reasonable foundation for accepting a provision that may have an "eviscerating effect on the [shareholder] franchise,"[139] given the company's commitment to its social and environmental initiatives and the prospective financing challenges that attend the potential for diluted profitability as a result of those missions.[140] Therefore, to the extent that the availability of capital for public benefit corporations is in limited supply due to their undeveloped operating histo-

135. *See generally Fact Sheet: The Utah High Quality Preschool Program, America's First Social Impact Bond Targeting Early Childhood Education*, GOLDMAN SACHS, *available at* http://www.goldmansachs.com/what-we-do/investing-and-lending/impact-investing/case-studies/sib-slc-fact-sheet.pdf [http://perma.cc/9Y2S-PDC3].

136. Heminway, *supra* note 119, at 318 n.82 (quoting Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 618 (2011)).

137. Munch, *supra* note 6, at 174 (footnote omitted) (citing Matthew F. Doeringer, Note, *Fostering Social Enterprise: A Historical and International Analysis*, 20 DUKE J. COMP. & INT'L L. 291, 303 (2010)).

138. *See* Doeringer, *supra* note 137.

139. WHISSEL, *supra* note 129, at 6 (alteration in original) (quoting San Antonio Fire & Police Pension Fund v. Amylin Pharms., Inc., 983 A.2d 304, 315 (Del. Ch. 2009)) (internal quotation marks omitted).

140. *See* Munch, *supra* note 6, at 174.

ries, capacity for limited profitability, and obligation to public purpose, accepting less-favorable event risk covenants in loan agreements may be necessary sacrifices in obtaining financing that affords the company "extraordinarily valuable economic benefits . . . that would not otherwise be available to it."[141]

C. *Classifying Public Benefit Corporation Boards*

Classified boards are an effective[142] and controversial method of preventing hostile takeovers.[143] Proponents of the classified board suggest that its "primary effect" is "stability," particularly when the company is confronted by an unwanted suitor, as a result of the fact that a staggered board requires a hostile bidder to "successfully gain election of its director nominees" at multiple annual meetings of the target.[144] Similarly, leadership in favor of installing or maintaining a staggered board at their company often rely on the notion that such structures do "not preclude unsolicited acquisition proposals but, by eliminating the threat of imminent removal, puts the incumbent [b]oard in a position to act to maximize value to all shareholders."[145] To this end, "academics have defended the staggered board as a means to ensure director primacy, itself a social good. Director primacy in its purist form posits that directors should have decision-making authority over shareholders."[146]

On the other side of the coin, those who oppose classified boards suggest that the "stability" offered by such structures is functionally "entrenchment," disincentivizing underperforming directors to the detriment of shareholders.[147] Lucian Bebchuk, most notably, has been at the fore-

141. WHISSEL, *supra* note 129, at 6 (quoting *Amylin Pharms., Inc.*, 983 A.2d at 315) (internal quotation marks omitted).

142. For a discussion of how a classified board operates, see generally Richard H. Koppes, Lyle G. Ganske & Charles T. Haag, *Corporate Governance Out of Focus: The Debate over Classified Boards*, 54 BUS. LAW. 1023 (1999).

143. *See generally* Lucian Bebchuk, Scott Hirst & June Rhee, *Towards the Declassification of S&P 500 Boards*, 3 HARV. BUS. L. REV. 157 (2013) [hereinafter Bebchuk et al., *Declassification*] (arguing against use of classified boards); Koppes et al., *supra* note 142 (arguing in favor of classified boards).

144. Koppes et al., *supra* note 142, at 1027.

145. Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 899 n.37, 901 (2002) [hereinafter Bebchuk et al., *Staggered Boards*] (quoting Bausch & Lomb Proxy Statement, Shareholder Proposal No. 2 (Dec. 28, 1996)) (internal quotation marks omitted); *id.* ("[T]he threat of imminent removal, puts the incumbent [b]oard in a position to act to maximize value to all shareholders." (quoting Bausch & Lomb Proxy Statement, Shareholder Proposal No. 2 (Mar. 19, 1998)).

146. Stephen M. Davidoff, *A Case Study:* Air Products v. Airgas *and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502, 511 (footnote omitted) (citing Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 807–09 (2002)).

147. Koppes et al., *supra* note 142, at 1027 (internal quotation marks omitted); *id.* at 1027 n. 14 ("Whether one perceives the classified board structure to

front of the movement to declassify boards, citing to his belief that "significant shareholder support for declassification proposals is consistent with empirical studies reporting that classified boards are associated with lower firm value and inferior outcomes for shareholders."[148] Shareholder support for declassification has admittedly rendered staggered boards an endangered species, with classification provisions rapidly declining in utilization over the past two decades such that their reproduction in the socially responsible business context is potentially implausible.[149]

The newly adopted provisions of the Delaware General Corporation Law, Sections 361–368, calling for the incorporation of public benefit corporations, do not impose requirements differing from those applicable to traditional, for-profit entities under the statute with respect to board structures. Section 141(d) of the DGCL provides the authority, in part, for staggering a corporation's board.[150] The Section also permits classification of a corporation's board via a shareholder bylaw,[151] effectively diluting its anti-takeover import, as a result of the ease with which the board may be declassified. The court in *Airgas, Inc. v. Air Products and Chemicals, Inc.* noted that:

> To implement a staggered board, as permitted by DGCL Section 141, corporations typically have used two forms of language. Many corporations provide in their charters that each class of directors serves until the "annual meeting of stockholders to be held in the third year following the year of their election." . . .

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have a positive or negative effect on shareholder wealth depends upon whether one believes that classified boards promote stability or entrenchment." (quoting Jason D. Montgomery, *Classified Boards*, CORP. GOVERNANCE SERVS., IRRC, Mar. 3, 1998, at 2) (internal quotation marks omitted)).

148. Bebchuk et al, *Declassification*, *supra* note 143, at 164; *see also* Bebchuk et al., *Staggered Boards*, *supra* note 145, at 900 (discussing growing opposition to staggered boards).

149. *See* Bebchuk et al., *Declassification*, *supra* note 143, at 165–66 ("According to data from FactSet Research Systems, there were 303 S&P 500 companies with classified boards at the beginning of 1999, and that number declined to 126 at the beginning of 2012. That is, during this twelve-year period, the fraction of S&P 500 companies with classified boards declined by about 60%." (footnote omitted)).

150. *See* DEL. CODE ANN. tit. 8, § 141(d) (2014).

151. *See id.* Section 141(d) provides:

> The directors of any corporation organized under this chapter may, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes; the term of office of those of the first class to expire at the first annual meeting held after such classification becomes effective; of the second class 1 year thereafter; of the third class 2 years thereafter; and at each annual election held after such classification becomes effective, directors shall be chosen for a full term, as the case may be, to succeed those whose terms expire.

Id.

> On the other hand, some corporations . . . provide in their charters that each class serves for a "term of three years."[152]

However, where the staggered board is integrated in the company's charter pursuant to Section 242, declassification of a staggered board requires both shareholder approval and board recommendation, solidifying it as the more difficult provision for a hostile acquirer to overcome.[153]

The consequence of classified boards at Delaware public benefit corporations is three-fold. First, as at a traditional corporation, "[a] classified board would *delay—but not prevent—a hostile acquirer from obtaining control of the board*, since a determined acquirer could wage a proxy contest and obtain control of two thirds of the target board over a two year period, as opposed to seizing control in a single election."[154] Second, it forces a hostile acquirer to confront the target company's commitment to public benefit in multiple election years, compounding the defensive impact of the directors' mandate to balance the public benefit purposes of the corporation. That is to say, because a hostile bidder is required to win multiple elections in order to gain control of a staggered board, on more than one occasion it must convince social impact shareholders, with interests extrinsic to wealth maximization, that the bidder's vision for the company will bring increased social, environmental, and financial value. This multiyear endeavor is complicated by Section 366(b)'s requirement that the board "no less than biennially" promulgate for the stockholders' review "a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct."[155]

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152. 8 A.3d 1182, 1188 (Del. 2010) (citing Essential Enters. v. Automatic Steel Prods., Inc., 159 A.2d 288 (Del. Ch. 1960)).

153. *See* tit. 8, § 242; *see also* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1088 (2002).

> [A]dvocates would have the courts require the board to redeem the poison pill once the proponents of a tender offer have won any election focused on the offer, even if the election only replaces a minority of the board. The problem with this approach is that it puts a court in the position of overriding a board majority, when the presence in the certificate of the classified board structure itself represents a statutorily authorized expression that stockholders may be forbidden from changing the company's strategy in a single election.

Id. (footnote omitted).

154. *Airgas, Inc.*, 8 A.3d at 1191 n.18 (quoting Versata Enters., Inc. v. Selectica, Inc. 5 A.3d 586, 604 (Del. 2010)) (internal quotation marks omitted).

155. tit. 8, § 366(b). In substance, Section 366(b) provides:

> A public benefit corporation shall no less than biennially provide its stockholders with a statement as to the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and of the best interests of those materially affected by the corporation's conduct. The statement shall include:
>
> (1) The objectives the board of directors has established to promote such public benefit or public benefits and interests;

Among other things, the Section 366 statement must set forth "[t]he objectives the board of directors has established to promote such public benefit or public benefits and interests."[156] Third, a classified board affords incumbent board members negotiating leverage in the boardroom and at the acquisition table in attempting to safeguard the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in the company's certificate of incorporation.[157]

D. *Socially Responsible White Knights and the Corresponding* Revlon *Uncertainty*

As Delaware public benefit corporations establish themselves as a sustainable form of enterprise, they will likely become more attractive targets than they already are, especially for companies seeking to immediately immerse themselves in the mission-driven entity market and piggyback off of the cemented "legitimacy of [a] target social enterprise."[158] The allure of public benefit corporations will likely grow should the suggestion "that the financial success of a social enterprise [is] [ ] because of—and not in spite of—its social and environmental mission" prove to be economic actuality.[159] To the extent that bidders seek "access to a new and growing market of socially responsible business" and public benefit corporations

> (2) The standards the board of directors has adopted to measure the corporation's progress in promoting such public benefit or public benefits and interests;
> (3) Objective factual information based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit or public benefits and interests; and
> (4) An assessment of the corporation's success in meeting the objectives and promoting such public benefit or public benefits and interests.

Id. Additionally, Section 366(c) provides:

> The certificate of incorporation or bylaws of a public benefit corporation may require that the corporation:
> (1) Provide the statement described in subsection (b) of this section more frequently than biennially;
> (2) Make the statement described in subsection (b) of this section available to the public; and/or
> (3) Use a third-party standard in connection with and/or attain a periodic third-party certification addressing the corporation's promotion of the public benefit or public benefits identified in the certificate of incorporation and/or the best interests of those materially affected by the corporation's conduct.

Id.

156. *Id.* § 366(b)(1).

157. *See* Allen et al., *supra* note 153, at 1095 n.85.

158. Plerhoples, *supra* note 64, at 235 (observing that acquisition of benefit corporation by traditional profit-maximizing corporation "leads to an immediate immersion in the [social enterprise] market, marked by the legitimacy of the target social enterprise").

159. *Id.* at 235.

become attractive targets, acquisition trends suggest that "[o]nce a merger is announced, other companies within the industry are likely to make their own offers in order to remain competitive."[160]

If a target public benefit corporation is subject to an unwanted offer, finding friendlier acquisition companions seeking entry into the for-profit social enterprise space likely will not be a far-fetched defensive strategy, in view of the emerging nature of the socially responsible business market and the desire for companies to remain competitive.[161] Consequently, employing a "white knight" defensive strategy at a public benefit corporation will, in all likelihood, become a viable and attractive defensive measure when faced with an offer from a hostile bidder.

White knight acquirers are bidders "seen as friendlier by the management of a target company than the unsolicited outside bidder."[162] The perception of one acquirer being friendlier than another stems in part from the notion that the white knight, while interested in acquiring the target company, may not be interested in controlling it, which enables target management to maintain the path set by its vision for the business of the company. That is, for public benefit corporations, a white knight may not only be an acquirer uninterested in control, but one willing to support and continue the target's chosen path for its public benefit purposes.

The challenge posed to public benefit corporations that choose to pursue a white knight defensive strategy, however, is the Delaware Supreme Court's holding in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[163] The duties of directors at public benefit corporations when selling the company are ambiguous, in view of Section 365(a)'s uncertain balancing requirement and overarching language.[164] To the extent that directors at a public benefit corporation sought a white knight to acquire the company instead of a hostile bidder, such action would fall firmly within

160. *See id.* at 235–36 ("As markets become dominated by fewer and fewer companies, these companies that fail to grow not only may wind up less competitive on a global scale and unprepared to deal with changing technologies or develop new ones, but also may find their strategic options limited if they miss the opportunity to gain a significant market share by merging with a preferred partner."); *see also* Dennis J. Block, *Public Company M&A: Directors' Fiduciary Duties and Recent Developments in Corporate Control Transactions*, *in* CONTESTS FOR CORPORATE CONTROL 2009: CURRENT OFFENSIVE & DEFENSIVE STRATEGIES IN M&A TRANSACTIONS 9, 20 (2009).

161. *See* Block, *supra* note 160.

162. Melissa J. Rhodes, Note, *The White Knight Privilege in Litigated Takeovers: Leveling the Playing Field in Discovery*, 43 STAN. L. REV. 445, 445 n.1 (1991) ("A white knight is a 'friendly' company that will take over the target, theoretically on more favorable terms than those offered by the raider, while usually retaining current management." (quoting Mark L. Berman, *SEC Takeover Regulation Under the Williams Act*, Note, 62 N.Y.U. L. REV. 580, 598 n.130 (1987)) (internal quotation marks omitted)).

163. 506 A.2d 173 (Del. 1986).

164. *See* DEL. CODE ANN. tit. 8, § 365(a) (2013); Alexander et al., *supra* note 20, at 263; Strine, *Making It Easier*, *supra* note 20, at 246; Brownridge, *supra* note 20, at 715.

the grasp of the *Revlon* doctrine, as the heightened standard of review[165] is triggered "when a corporation initiates an active bidding process seeking to sell itself . . . ."[166] Consequently, while seeking a white knight when subjected to overtures from a hostile bidder might otherwise be a viable defensive measure, the directorships of public benefit corporations are inhibited by Section 365(a)'s lack of clarity, yielding a scenario whereby the mandate of directors with respect to the weight to be ascribed to the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or benefits[167] is unsettled.

E. *Public Benefit Corporation Poison Pills*

Prior to the arrival of Martin Lipton's shareholder rights plan on the takeover scene in the summer of 1982,[168] "target managers resorted to a variety of exotic sounding defensive tactics, ranging from 'shark repellants' to 'greenmail,' and from 'white knights' to the 'Pac-Man' defense."[169] The poison pill, however, reshaped the takeover landscape and provided managers with a defensive mechanism superior to these colorfully-named but less-effective measures:

> A pill could be adopted by any company at any time without shareholder approval; adoption of a pill did not entail significant transaction costs and did not, apart from its effect on takeovers, affect the conduct of the company's business; and, most importantly, a pill made a company takeover-proof unless redeemed by the target board.[170]

Opponents of the pill "paraded" academics and "experts" into the Delaware courts to challenge the propriety of the shareholder rights plan,[171]

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165. *See* J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 6 (2013).

166. Paramount Commc'ns, Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140, 1150 (Del. 1989) (citing Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988)).

167. *See* tit. 8, § 365(a).

168. Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1037 (2002).

169. Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871, 875 (2002) (footnotes omitted); *see also* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1985) (discussing "white knight[s]"); RONALD J. GILSON & BERNARD S. BLACK, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 771–72 (2d ed. 1995) (discussing "Pac-Man" defense); Ronald J. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 777 (1982) (defining "shark repellants"); Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 13 (1985) (defining "greenmail").

170. Kahan & Rock, *supra* note 169, at 875 (footnote omitted).

171. *See* Lipton, *supra* note 168, at 1047.

only to have their "strong academic arguments and political efforts . . . to dramatically repudiate pills and other structural defenses" rebuffed by the justices and chancellors.[172] Even though questions swirled around the permissibility of the rights plan, "[b]ecause any company could quickly create a poison pill and because a pill was so effective, the doctrinal and academic interest soon turned to the circumstances in which target managers could refuse to redeem the pill . . . ."[173] With the codification of the Delaware public benefit corporation, the circumstances affording directors the discretion to refuse to redeem a shareholder rights plan are once again in question.

Typically, poison pills permit directors to issue rights to existing shareholders of a target company at a discount. Those existing shareholders are then permitted to convert their rights into a larger number of shares, if the bidder, who would be excluded from the plan, acquired in excess of a certain threshold percentage of target shares.[174] That is to say, if an acquirer triggers a rights plan by breaching the instrument's specified ownership threshold, the hostile acquirer's position in the target company would be diluted upon target shareholders exercising their rights to purchase additional shares at a deflated price point, thereby increasing the unwanted suitor's costs associated with attempting to complete the acquisition.

As mentioned above, Sections 361–368 do not deprive public benefit corporations of the protections afforded to traditional, for-profit corporations.[175] The effect of rights plans at Delaware-based mission-driven entities is similarly devastating to acquirers subject to their operation. That is to say,

> [w]ithout shareholder approval, a board of directors could within hours of a hostile tender offer install a poison pill that would make completing the tender exorbitantly expensive. Although the bidder could, in theory, wage a proxy battle to take over the board and remove the pill, if the pill was combined with other defenses, such as a classified or staggered board, the result-

172. *Id.* at 1048 (citing John C. Coates IV, *Empirical Evidence on Structural Takeover Defense: Where Do We Stand?*, 54 U. MIAMI L. REV. 783, 797 (2000)).

173. Kahan & Rock, *supra* note 169, at 876 (citing Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?* 44 BUS. LAW. 247, 256–60 (1989)).

174. *See* Moran v. Household Int'l Inc., 500 A.2d 1346, 1354 (Del. 1985) (upholding permissibility of discriminatory poison pills, as result of fact when "Board of Directors is faced with a tender offer and a request to redeem the Rights, they will not be able to arbitrarily reject the offer. They will be held to the same fiduciary standards any other board of directors would be held to in originally approving the Rights Plan").

175. For a discussion of the relationship between Sections 361–368 and protections for public benefit corporations, see *supra* note 141 and accompanying text.

> ing delay in completing the deal would be fatal to the entire acquisition.[176]

Furthermore, over a longer time period, "[t]he pill works to prevent a creeping takeover whereby effective negative control over a corporation is acquired without the payment of a control premium."[177] Using a shareholder rights plan to combat the threat of a "creeping takeover" at a public benefit corporation would thus ensure that impact investors receive both adequate financial remuneration for their ownership of a social enterprise and assurance that a hostile acquirer will be unable to methodically degrade a company's social and environmental commitments by obtaining "negative control" via gradual expansion of its stock holdings.[178]

Despite its widespread use since its invention in the 1980s, the poison pill has long been subject to pressure from academics[179] and institutional investors.[180] Public benefit corporations, according to Professor J. Haskell Murray, are in a unique position to respond to those calling for the repeal of poison pills.[181]

> The benefit corporation solves [the institutional investor] problem by signaling that it is interested in a different type of investor—an investor focused on multiple bottom lines. The benefit corporation investor will be less likely to pressure for the removal of these takeover defenses because she has been attracted to the benefit corporation, at least in part, because of its mission.[182]

Similarly, because the mandate of directors at public benefit corporations is to manage or direct the affairs of the corporation in a manner that considers the company's mission, they may have social and environmental justifications available to them for a respective decision not to redeem a poison pill. Those justifications, moreover, may not simply be ignored in reaching a decision to redeem a pill without being confronted by litigation.[183] Nonetheless, given the individual missions of public benefit corporations, the circumstances under which directors may refuse to redeem a rights plan have broadened, and pills at public benefit corporations may be bolstered by the social enterprise's benefit purposes, furthering the im-

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176. Edelman & Thomas, *supra* note 77, at 1093 (footnote omitted).

177. Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 497 (2014).

178. *See id.*

179. *See, e.g.*, Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 977–81 (2002).

180. *See generally* Mark R. Wingerson & Christopher H. Dorn, *Institutional Investors in the U.S. and the Repeal of Poison Pills: A Practitioner's Perspective*, 1992 COLUM. BUS. L. REV. 223.

181. Murray, *Defending Patagonia*, *supra* note 110, at 504.

182. *Id.*

183. *See* Strine, *Making It Easier*, *supra* note 20, at 248.

pact of the defensive mechanism and complicating a hostile acquirer's ability to force the redemption of a pill.

IV. *AIRGAS* AND *EBAY* REDUX: APPLYING *UNOCAL* TO PUBLIC BENEFIT CORPORATIONS

A. *Doctrinal Likeness*

To date, hostile takeovers have not made their way to the social enterprise market.[184] However, as discussed in Part III above, the growing attractiveness of the public benefit corporation's business space likely means that interested and unwanted bidders are lurking on the horizon. "Takeovers, in the 'market for corporate control,' are often considered one way to discipline managers and keep them accountable. Some may argue that benefit corporation statutes destroy this path to accountability as well."[185] That is to say, the undefined flexibility of leadership at public benefit corporations faced with a hostile bid undermines managerial incentives to act in the best interests of the company, its public benefit purpose, its nonfinancial stakeholders, and its shareholders. The threshold questions of how and to what extent may directors adopt takeover defense mechanisms at these social enterprises are, in many ways, not dissimilar to the challenges posed to the Delaware judiciary in reaching its decision in *Airgas*.

In *Airgas*, the target company was subject to multiple rounds of hostile offers to acquire all of its outstanding stock, which the board of directors met with unflinching rejection. Prior to the initial offer from Air Products, Airgas had in place both a shareholder rights plan and a classified board.[186] The two mechanisms, in combination, provided Airgas with a potent defensive cocktail,[187] requiring the bidder "to initiate two successive proxy contests to elect a majority of Airgas directors" who would be

184. *See* Murray, *Social Enterprise Innovation*, *supra* note 7, at 366 n.119 ("There have yet to be any reported hostile takeovers in the benefit corporation context."); *see also* Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013), www.forbes.com/sites/danielfisher/2013/07/16/delaware-public-benefit-corporation-lets-directors-serve-three-masters-instead-of-one/ [http://perma.cc/FY2W-GQD9] (quoting Model's drafter, William Clark, stating that "[w]e haven't had a hostile run at a benefits corporation yet" (internal quotation marks omitted)).

185. J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 39 (2012) (footnote omitted); *see also* Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700 (1982); Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–19 (1965); Henry G. Manne, *The "Higher Criticism" of the Modern Corporation*, 62 COLUM. L. REV. 399, 411 (1962).

186. *See* Davidoff, *supra* note 146, at 508–09.

187. *See* Allen et al., *supra* note 153, at 1095 n.85 ("Recent scholarship suggests that an effective classified board is the most potent defensive weapon available (when combined with a poison pill) and can be used to make a hostile takeover fight quite unattractive for all but the most hearty of acquirors." (citation omitted)).

willing to redeem the pill.[188] Due to the staggered board and the target's annual meeting schedule, the redemption process could have taken up to two years.[189] Following arguments in the Delaware Supreme Court, Chancellor Chandler ruled in favor of Airgas, writing, perhaps unwillingly:

> I am thus bound by this clear precedent to proceed on the assumption that Airgas' defensive measures are not preclusive if they delay Air Products from obtaining control of the Airgas board (even if that delay is significant) so long as obtaining control at some point in the future is realistically attainable.[190]

The "realistically attainable" standard followed in Chancellor Chandler's *Airgas* decision is applicable to Delaware public benefit corporations and the mandate of directors at such entities to manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation. That is to say, ultimately, the issues litigated in *Airgas* are not far removed from the questions posed when directors at public benefit corporations layer defensive measures on top of their statutorily granted ability to promote and protect the company's social mission, in that the ability to "say no" for benefit purpose reasons in combination with defensive measures merely complicates a change of control, but apparently does not make such a change unrealistically attainable at some point in the future.[191] The defensive recipe instead requires that bidders in search of a change of control transaction present target companies with offers encompassing the objectives stated in a given public benefit corporation's certificate of incorporation.

In *eBay Domestic Holdings, Inc. v. Newmark*,[192] Chancellor Chandler considered whether craigslist, Inc.'s corporate culture was a defensible interest, justifying the adoption of a poison pill, when faced with acquisition overtures from eBay.[193] Following a *Unocal* analysis, the Chancellor asked two questions in considering the issue: "First, did Jim and Craig [the majority shareholders of craigslist] properly and reasonably perceive a threat to craigslist's corporate policy and effectiveness? Second, if they did, is the Rights Plan a proportional response to that threat?"[194] Jim and Craig argued that the threat to craigslist would "materialize" once they had both passed away and their shares in the company were distributed to their

188. Davidoff, *supra* note 146, at 509.

189. *See id.*

190. *Id.* at 532 (citing Air Prods. & Chems., Inc. v. Airgas, Inc. (*In re* Airgas Inc. S'holder Litig.), 16 A.3d 48, 115 (Del. Ch. 2011)).

191. *See id.*

192. 16 A.3d 1 (Del. Ch. 2010).

193. *See id.*

194. *Id.* at 31–32.

heirs.[195] "At that point, [Jim and Craig said], 'eBay's acquisition of control [via the anticipated acquisition of Jim or Craig's shares from some combination of their heirs] would fundamentally alter craigslist's values, culture and business model, including departing from [craigslist's] public-service mission in favor of increased monetization of craigslist.' "[196]

In reaching the decision to strike down the craigslist poison pill, Chancellor Chandler noted that Jim and Craig "failed to prove that craigslist possesse[d] a palpable, distinctive, and advantageous culture that sufficiently promote[d] stockholder value . . . ."[197] While holding the rights plan to be unlawful, the Chancellor acknowledged that the Delaware Supreme Court in *Time* "accepted defensive action by the directors of a Delaware corporation as a good faith effort to protect a specific corporate culture."[198] Considering the applicability of the holdings in *eBay* and *Time* to public benefit corporations, the fact-specific nature of the court's approval of the defensive measures at Time is likely more reflective of the issues presented to the Delaware judiciary in determining the propriety of similar protective actions taken at mission-driven entities when faced with a hostile offer, in that corporate leadership may seek to preserve the company's commitment to its individualized social mission. The public benefit corporation is, perhaps, the corporate form most reliant on its tailored public commitment to the promotion of social value in order to preserve and advance shareholder well-being and, thus, a prime space for the Delaware courts to allow for the consideration of interests extrinsic to shareholder financial welfare in defending against a hostile offer, as corporate social benefit identity and environmental responsibility are integral to both perceived and realized impact investor value.

To the extent that *Unocal* applies to Delaware public benefit corporations defending against a hostile takeover, the corporate law has built-in the authority for a board to "have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders," even in the traditional for-profit corporation context.[199] With respect to social enterprises and impact investors, management actions advancing a corporation's social missions conceivably deliver shareholder benefits despite not being financial in nature. Well-intentioned defensive measures adopted by corporate leadership in furtherance of the entity's social mission therefore presumably provide benefits accruing to impact investors.

Accordingly, the additional layer of protection provided by benefit purpose requires a bidder to approach with a well-developed, socially re-

195. *See id.* at 32.

196. *Id.* (second and third alterations in original).

197. *Id.* at 33.

198. *Id.* at 32 (citing Paramount Commc'ns, Inc. v. Time Inc. (*In re* Time Inc. S'holder Litig.), 571 A.2d 1140 (Del. 1990)).

199. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1985).

sponsible acquisition plan. A suitor is required not only to meet the non-financial desires of social impact investors to successfully acquire a public benefit corporation, but also to face the reality that "the board must consider these interests and cannot compromise them away without facing a lawsuit."[200] In short, bidders seeking to acquire Delaware-based, mission-driven entities need be prepared to cope with a public benefit corporation directorship's "leverage to extract desirable, enforceable protections for other constituencies as well as commitments to responsible, sustainable conduct from buyers, joint venture partners, and the like."[201] Thus, insofar as *Unocal* permits "boards [to] legitimately [ ] consider a host of other constituencies when defending against takeover attempts" in the traditional for-profit corporation scenario,[202] Section 365(a)'s statutory mandate should enable public benefit corporation directors to take actions necessary to guard their company's social and environmental commitment without fear of liability.

B. *The Practical Import of Conscientious Judicial Decision-Making*

The importance of Delaware's foremost position in the realm of corporation law is well-documented.[203] To that end, the state's "financial self-interest in legal excellence leads to a productive dynamic for the creation and maintenance of an efficient and fair corporation law," which is primarily dominated by the interests of managers and stockholders.[204] The policy foundations of the Delaware corporate law, according to Professor Lawrence Hamermesh, are:

> (1) an abiding conservatism, in the sense of a reluctance to make any change without clear evidence that significant benefits (primarily in the form of convenience or clarity) will result; (2) a related desire to protect commercial relationships and expecta-

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200. Strine, *Making It Easier*, *supra* note 20, at 248.

201. *Id.*

202. Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 447 ("The [*Unocal*] court specifically noted that one of the concerns that directors legitimately could consider was 'the impact on constituencies other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally). This decision marks one of the first times the Delaware court explicitly condoned the social entity model. Moreover, it reveals that as long as a board is not willing to sell its company, it can institute defens[ive] measures aimed at protecting groups other than shareholders." (footnotes omitted)).

203. *See generally* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749 (2006); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573 (2005); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673 (2005).

204. Strine, *supra* note 203, at 680.

> tions that have been built up in reference to preexisting legal rules; (3) a preference that the details of corporate law be shaped in a common law fashion, with courts as first responders to tensions within the corporate law, at least in areas that are not susceptible to simple statutory clarification; and (4) a preference for enhancement of private ordering opportunities, so long as the basic scheme of fiduciary duty principles and the allocation of authority among directors, officers, and stockholders remains essentially unchanged.[205]

The jurists that sit on the benches of the Delaware Supreme Court and the Court of Chancery are the bastions of the foregoing foundational principles, ensuring the quality and reasonableness of Delaware's corporate law, in addition to its primacy. "In Delaware, judge-made law, to the virtual exclusion of statutory law, governs fundamental issues" of the corporate realm,[206] with the state's highest court having "shown a certain degree of discomfort with, perhaps even hostility to, legislative intrusions into its domain."[207] Similarly, being fully aware of the judiciary's clout and experience, the Delaware legislature has been loath to insert itself into the corporate law decisions of the Supreme Court and Chancery Court, such that "overturning of judge-made corporate law is practically unheard of."[208]

With Delaware's commitment to its corporate law positioning and the significance of the state's judiciary in mind, Stephen M. Davidoff provocatively and compellingly argued in his piece, *A Case Study: Air Products v. Airgas and the Value of Strategic Judicial Decision-Making*, that the import of the various holdings in the Airgas saga may extend beyond precedent and instead reach to conscientious Delaware decision-making, benefitting the state's stronghold on corporate law by allowing the "courts to fine-tune jurisprudence not only to meet their needs, but for the wider corporate community. Strategic jurisprudence allows Delaware to look past endogenous decisional effects toward larger principles of law."[209] In other words, "judge-made Delaware law eschews hard rules in favor of flexible and highly fact-intensive standards. This results in an extraordinarily high degree of flexibility."[210] With such latitude available to them, the Delaware judiciary should adapt the *Unocal* standard to fit the unique features of the public benefit corporation, such that questions of preclusivity and coerciveness do not invade well-intentioned decisions to implement defensive measures necessary to guard a mission-driven entity's respective social and environmental objectives.

205. Hamermesh, *supra* note 203, at 1787.
206. Kahan & Rock, *supra* note 203, at 1591.
207. *Id.* at 1594.
208. *Id.* at 1595.
209. Davidoff, *supra* note 146, at 507.
210. Kahan & Rock, *supra* note 203, at 1598 (footnote omitted).

Nonetheless, Chief Justice Strine has rightly noted:

> [T]he first wave of entrepreneurs who drape themselves in the benefit corporation garb bear a special responsibility for the movement's ultimate fate. If their commitment to social responsibility is simply a green-washed cloak for a desire to squeeze out profits for themselves and stockholders by feigning but not actually having a sincere regard for other corporate constituencies, the benefit corporation movement will quickly lose credibility among socially responsible investors and policymakers.[211]

The other side of this observation, however, is that if Delaware wishes to incentivize mission-driven entrepreneurs to incorporate their businesses in the state, the legal regime underlying the presence of public benefit corporations must adjudge the furtherance of their social and environmental purposes and motivations without fundamentally compromising the viability of their business models. In other words, to the extent that *Unocal* leaves public benefit corporations susceptible to takeover by impeding a Delaware-based social enterprise's freedom to adopt a menu of defensive measures to supplement the ability to promote and protect its benefit purpose, mission-driven entities may very well migrate to the host of states that are in the market to loosen Delaware's clutch on corporate law and that may more effectively facilitate the preservation and protection of mission.

V. CONCLUSION

The opaqueness of Section 365(a)'s balancing test, the *Unocal* doctrine, and the managerial fidelity to social mission interact in a multitude of complex ways that will ultimately challenge directors, acquirers, and the judiciary to reshape Delaware takeover law. The requirement that leadership at public benefit corporations manage and direct the affairs of the company in a way that considers the specific public benefit or public benefits identified in its certificate of incorporation should not deprive directors of Delaware-based socially responsible businesses of the various defensive measures otherwise available to management at traditional for-profit corporations merely because social enterprise leadership has a novel avenue of justification for thwarting unwanted suitors in the form of social and environmental mission. Indeed, insofar as the Delaware legislature believes that public benefit corporations necessitate statutory provisions independent of traditional corporations, should the corporate form's uniqueness not also be acknowledged by permitting the adoption of defensive measures in the face of the diversity of new, exceptional, and cognizable threats that may diverge from the financial dangers customarily considered by *Unocal*? As the Delaware Supreme Court has previously provided, the justices and chancellors "will not substitute [their] views for those of

211. Strine, *Making It Easier*, *supra* note 20, at 249.

the board if the latter's decision can be 'attributed to any rational business purpose'" and, in the framework of public benefit corporations, social mission is presumably a rational business purpose defined in the company's charter.[212]

This Article does not seek to remove Delaware public benefit corporations from the auspices of the *Unocal* doctrine when directors adopt defensive tactics in response to being confronted by unwanted suitors. Rather, due to the interplay between the competing interests, motivations, and characteristics attending the social enterprise form, its aim is to suggest that the Delaware courts should carefully consider whether to expand the reasonableness and proportionality inquiry, such that the judiciary may embrace new variations of threats posed to corporate policy and effectiveness, in addition to new concoctions of defensive measures designed to ward off hostile bidders in protection of mission. Directors, however, have a strong defensive card to play in the form of benefit purpose, and the onus will be on management at public benefit corporations to appropriately justify defensive measures under the cloak of social and environmental commitment, so as to not undermine the viability of the Delaware social enterprise form by "green-wash[ing]" actions for self-interested or profit-extracting purposes.[213] Ultimately, when confronted with a *Unocal* question in the public benefit corporation context, the flexibility of Delaware's corporate law framework and the foundational principles underlying it put both the judiciary and public benefit corporation directorships in a meaningful position to redefine the reach and applicability of a seminal corporate law doctrine in a way that does justice to the alternative, beneficial objectives of mission-driven entities committed to doing well by doing good.

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212. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (quoting Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)).

213. Strine, *Making It Easier*, *supra* note 20, at 249.