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The Dwindling of Revlon

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Table of Contents

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I. Introduction

In 2012, stockholders challenged a remarkable 96% of M&A transactions with a value greater than $500 million and 93% of deals with a value greater than $100 million,[1] a stunning upsurge since 2005.[2] The vast majority of these lawsuits settle, largely with disclosure-only accords,[3] but where monetary benefits are involved the average payment has increased in the last few years.[4] A mainstay argument by plaintiffs is that the selling company's board of directors failed to maximize the sale price[5]—in other words, the board breached its so-called *Revlon* duty. The "Revlon" in *Revlon* duty, of course, refers to *Revlon, Inc. v.*

1. ROBERT M. DAINES & OLGA KOUMRIAN, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2013), http://www.cornerstone.com/files/upload/Cornerstone_Research_Shareholder_Litigation_Involving_M_and_A_Feb_2013.pdf. Note that this study only surveyed M&A transactions involving publicly held target companies. *Id.* Transactions involving privately held target companies tend to face fewer challenges since those transactions are generally not publicly disclosed and the target companies generally have more closely held stockholder bases. *Id.*

2. Professors Matthew Cain and Steven Davidoff report that in 2005, approximately 39% of transactions with a value greater than $100 million were challenged. MATTHEW D. CAIN & STEVEN DAVIDOFF, A GREAT GAME: THE DYNAMIC OF STATE COMPETITION AND LITIGATION 3 (2013), *available at* http://ssrn.com/abstract=1984758 (last visited Dec. 20, 2013) (on file with the Washington and Lee Law Review). In a preliminary January, 2014 update of their study that includes data for calendar year 2013, Professors Cain and Davidoff found that in 2013 97.5% of deals valued at $100 million or more attracted litigation. MATTHEW D. CAIN & STEVEN M. DAVIDOFF, TAKEOVER LITIGATION IN 2013 1–2 (2014), *available at* http://ssrn.com/abstract=2377001 (last visited Feb. 3, 2014) (on file with the Washington and Lee Law Review).

3. *See* DAINES & KOUMRIAN, *supra* note 1, at 6 (stating that 81% of all settlements required additional disclosures only). This too is a reversal from a few years earlier when most Delaware settlements involved a monetary payment. *Id.* For a listing of disclosure-only settlements approved by the Delaware Chancery Court in the first quarter of 2013, see Morris James LLP, *Corporate and Fiduciary Litigation Group*, THIS MONTH IN DEL., at ii (Apr. 2013) (on file with the Washington and Lee Law Review).

4. Veronica E. Rendon et al., *Recent Trends in M&A and Corporate Fiduciary Litigation*, LAW 360, at 1 n.8 (last updated May 20, 2013), http://www.law360.com/articles/442043/print?section=classaction (last visited Nov. 6, 2013) (on file with the Washington and Lee Law Review).

5. *See* DAINES & KOUMRIAN, *supra* note 1, at Highlights ("Plaintiff attorneys typically allege that the target's board of directors violated its fiduciary duties by conducting a flawed sales process that failed to maximize shareholder value.").

MacAndrews & Forbes Holdings, Inc.,[6] a landmark 1986 ruling by the Supreme Court of Delaware.[7] *Revlon* was one of a handful of takeover-fueled decisions during the 1980s that fundamentally redrew the map governing director duties in the M&A setting.[8] Given the high volume of M&A activity in the United States,[9] and the frequency of court challenges to that activity,[10] *Revlon* has become an assumed and accepted part of the legal landscape for both the practicing M&A bar and the judiciary.

Yet, in 2014, Delaware's contemporary *Revlon* jurisprudence has come under fierce scholarly attack. Professor Stephen Bainbridge has severely criticized several chancery court decisions for misapplying the supreme court's core teachings on *Revlon*,[11] a critique Professor Mohsen Manesh counters is itself misconceived.[12] Professor Frank Gevurtz has leveled a more fundamental broadside against *Revlon,* contending it lacks any defensible policy rationale, and advocating its outright abandonment.[13] Vice-Chancellor Travis Laster, by way of

6. 506 A.2d 173 (Del. 1986).

7. *See id.* at 176 (reviewing the validity of "defensive measures in the face of an active bidding contest for corporate control," and affirming the Delaware Court of Chancery's holding that directors must seek to obtain the best available price for shareholders).

8. Other key decisions during the 1981–1990 decade include Aronson v. Lewis, 473 A.2d 805 (Del. 1984); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1989); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989).

9. *See* David A. Westenberg et al., *United States: 2013 M&A Report*, MONDAQ (May 20, 2013), http://www.mondaq.com/unitedstates/x/240092/M+A+Private%20equity/2013+MA+Report (last visited Nov. 9, 2013) (revealing an increase in M&A activity in the United States despite a decline in global deal volume in recent years) (on file with the Washington and Lee Law Review).

10. *Supra* note 1 and accompanying text.

11. *See* Stephen M. Bainbridge, *The Geography of* Revlon-*Land*, 81 FORDHAM L. REV. 3277, 3333–35 (2013) (asserting that the chancery court has misread the triggering events for the *Revlon* duty).

12. *See* Mohsen Manesh, *Defined by Dictum: The Geography of* Revlon-*Land*, 59 VILL. L. REV. (forthcoming 2014) (manuscript at 2), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2308704 (last visited Dec. 20, 2013) (arguing to refute the thesis of Professor Stephen Bainbridge) (on file with the Washington and Lee Law Review).

13. *See generally* Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1545 (2013).

contrast, recently argued for extending *Revlon's* enhanced scrutiny standard to *all* negotiated transactions, thereby substantially broadening the reach of the doctrine.[14]

We have an altogether different perspective than the bar, judiciary, and other scholars. We argue that, given its intersection with another important arc of recent Delaware decisional law, *Revlon* today is, ex post, essentially a constrained remedies doctrine, applicable only pre-closing for possibly granting nonmonetary sanctions.[15] We arrive at our novel thesis concerning *Revlon* as the natural conclusion of examining the following questions: Does *Revlon* apply only if a sales transaction is entered,[16] or does it also govern sales efforts by boards that utterly fail even to produce a transaction? If an attempted sale failed due to a flawed process, might the directors nonetheless have breached their *Revlon* duty because of how poorly they conducted the selling effort? Maybe, in other words, the reach of *Revlon* is actually far broader than many appreciate. Probing these neglected issues through a remedies perspective offers a useful, if ironic, lens on where exactly, as it turns out, the overblown *Revlon* doctrine stands today.

This Article takes up these important but overlooked questions for several reasons. First, there is broad language in Delaware decisional law suggesting a *Revlon* duty to maximize shareholder value in the no-deal context, but as of yet there is no clear-cut holding on this basic issue.[17] After all, many sales efforts fail. What legal significance does that hold if failure stems from deficient director conduct? Second, resolution of the no-deal issue is vital for directors, and lawyers counseling them, because directors recurrently confront difficult decisions in managing strategically critical sales transactions. For example, can the

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14. J. Travis Laster, Revlon *Is A Standard of Review: Why It's True And What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 33 (2013).

15. *Infra* Part IV.

16. We leave to one side, because it is not the focus of this article, the ongoing uncertainty as to what subset of all sales transactions ("done deals") trigger *Revlon*. *See generally* Bainbridge, *supra* note 11; Manesh, *supra* note 12; Laster, *supra* note 14. We ask, rather, whether certain attempted but failed ("no-deal") change of control or break-up transactions also trigger *Revlon* in a way that has remedial significance, and examine what that tells us about the larger state of the *Revlon* doctrine today.

17. *Infra* Part III.

board properly halt a sales process in an effort to avoid a suboptimal transaction likely to expose directors to stricter *Revlon* review if, at the same time, doing so imperils (or enhances) the future of the company? Should the director focus in this setting still narrowly be the *Revlon*-mandated immediate shareholder value purpose or should it expand to include the overall financial well-being of the company itself? If, by contrast, directors continue the sales effort, but do so poorly—such that no transaction results—can their own faulty performance serve, oddly, to spare them *Revlon* review, simply because they did no deal? Third, the lack of clear judicial guidance as to director exposure in "no-deal" cases creates uncertainty in settlement negotiations after a failed sales process results in a dramatic drop in stock price or even corporate insolvency.[18] This question is particularly important in bankruptcy proceedings where trustees frequently pursue fiduciary duty claims against directors to collect directors and officers (D&O) liability insurance proceeds, a key asset[19]—perhaps the only significant asset—in that setting.

Finally, and most importantly, this legal issue and the strategic and behavioral issues associated with it—in both the deal-making and litigation contexts—helps to illuminate how contemporary *Revlon* review fits into Delaware's evolving

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18. For example, Clearwire Corp., which recently announced and completed a merger with Sprint Nextel Corp., had earlier announced that it could not survive alone. Liz Hoffman, *Quinn Predicts Dangers in Clearwire-Sprint Trial*, LAW 360 1–2 (last updated May 10, 2013), http://www.law360.com/articles/439583/print?section=securities (last visited Nov. 6, 2013) (on file with the Washington and Lee Law Review). BlackBerry also likely faces a hard road remaining independent, and announced in August 2013 that it was for sale. Will Connors & Sharon Terlep, *BlackBerry Posts For-Sale Sign*, WALL ST. J., Aug. 13, 2013, at B1. After months of talks with potential buyers, and with the one formal offer for the company falling through, the company announced that it had abandoned the sales process and instead would issue $1 billion of convertible notes to investors led by BlackBerry's largest shareholder, Fairfax Financial Holdings, which was also the entity that had made the offer for the company. Euan Rocha & Allison Martell, *BlackBerry Calls Off Sale, Spurring Doubts and Stock Plunge*, REUTERS (Nov. 4, 2013, 4:45 PM), http://www.reuters.com/article/2013/11/04/us-blackberry-offer-idUSBRE9A30GI20131104 (last visited Jan. 8, 2014) (on file with the Washington and Lee Law Review).

19. We know of no empirical study gathering all of the federal bankruptcy cases where the trustee (or similar official) pursues fiduciary duty claims against directors and officers of insolvent companies. Professor Johnson, however, has served as an expert witness in several such cases, and we believe there have been a large number of such lawsuits in recent years.

fiduciary jurisprudence. For example, because the same director liability standard of *Lyondell Chemical Co. v. Ryan*[20] applies both inside and outside of the *Revlon* context,[21] there no longer is a different liability standard in the *Revlon* sale context as opposed to any other context; there is, rather, simply a vast array of different factual settings for considering monetary sanctions against directors, only one of which is the corporate sale setting. Whether directors do or do not consummate a transaction in the M&A context, they must not consciously disregard their fiduciary duty and thereby breach the duty of loyalty;[22] *Revlon* has no distinctive bearing on that issue. Thus, oft-recited statements in *Paramount Communications Inc. v. QVC Network, Inc.*[23] and other high-profile *Revlon* progeny regarding enhanced substantive scrutiny by courts,[24] and statements regarding placing an initial burden of proof on directors,[25] appear to be outmoded doctrinal vestiges in the personal liability context. The overly exalted place of *Revlon* in the law governing M&A deals endures, we believe, because it is regarded in narrow, silo-like doctrinal isolation, even though it can only be understood as one part of a larger legal landscape that has changed quite dramatically since 1986.

Nonetheless, any effort to harmonize *Revlon* review with Delaware's overarching fiduciary duty doctrine through this single damages standard for directors, whether in or out of the *Revlon* mode, only partially succeeds. There still remains a distinctive, if sharply reduced, thrust to *Revlon* in the M&A

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20. 970 A.2d 235 (Del. 2009).

21. *See id.* at 243–44 (explaining that director liability for violating the duty of loyalty requires a conscious disregard of duty, whether inside or outside of the *Revlon* context).

22. *See infra* Part IV (discussing the evolving standard of loyalty in Delaware).

23. 637 A.2d 34 (Del. 1994).

24. *See id.* at 36 ("[T]he sale of control in this case . . . implicates enhanced judicial scrutiny of the conduct of the Paramount Board."); *see also* Koehler v. NetSpend Holdings Inc., No. CIV.A. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (applying *QVC*'s enhanced scrutiny under *Revlon*).

25. *See QVC*, 637 A.2d at 45 ("The directors have the burden of proving that they were adequately informed and acted reasonably."); *Koehler*, 2013 WL 2181518, at *11 ("The directors have the burden of proving that they were fully informed and acted reasonably.").

context. This is because plaintiffs also frequently seek to enjoin proposed transactions before they close.[26] Of course, in a failed sales effort, there is no deal to enjoin. Consequently, in the M&A setting, the *Revlon* doctrine currently has legal "bite" only in preliminary injunction (but not damages) actions, and even here its diminished role as a pre-closing, nonmonetary remedies doctrine is limited to "done deals." Moreover, in the "done deal" context, Delaware courts recently have been extremely reluctant to grant injunctive relief even where directors likely have breached their *Revlon* duties.[27] The Court of Chancery, as noted in Part IV below, has granted only one such injunction since 2008.[28] Still, although remedial relief in done deals subject to *Revlon* has declined, there is at least some remote chance for pre-closing relief, unlike the no-deal context, where poor-performing directors face no such sanction. Although it makes no ex ante conceptual or policy sense for directors—once they set out to sell a company—to be held to a higher review standard if they succeed than if they fail to enter a transaction, that is, ex post and in practice, precisely today's likely outcome.

By understanding *Revlon* as a remedies doctrine, the larger boundary puzzle of what falls inside and outside the vaunted *Revlon* doctrine—and why it matters—still remains, but the stakes are far smaller than many scholars, judges, and lawyers

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26. Along with additional disclosure, a preliminary injunction is a common remedy sought by plaintiffs challenging M&A transactions pre-closing. *See* DAINES & KOUMRIAN, *supra* note 1, at 11 (noting that plaintiffs challenging mergers frequently ask the court to enjoin a shareholder vote); Rendon, *supra* note 4, at 4–5 (discussing suits to enjoin shareholder votes). We also note a trend in shareholder lawsuits evolving from "seeking to block deals that have already been announced and agreed upon to attempting to preemptively enjoin proposed transactions before a binding agreement has been reached." Michael Glasser, *M&A Shareholder Lawsuits Continue to be Popular, But Merits Uncertain*, BUSINESS LAW CURRENTS (Aug. 8, 2013), http://currents.westlaw business.com/Article.aspx?id=c38cf5c7-473c-411e-bf84-5de859d85f9f&cid=&src= &sp= (last visited Nov. 9, 2013) (citing the multiple lawsuits recently filed against Dole Food Company, Inc. upon the announcement of a proposal to acquire the company, but before an agreement had even been negotiated, which occurred on August 12, 2013) (on file with the Washington and Lee Law Review); *see also infra* notes 235, 241 and accompanying text.

27. *See* Glasser, *supra* note 26 ("Even when judges have found that a merger process was 'tainted by disloyalty,' they have refused to enjoin the acquisition and allowed it to proceed to a shareholder vote.").

28. *See infra* note 238 (describing the only time an injunction was granted).

may fully appreciate: only pre-closing relief is up for grabs anyway. Our paper thus uses the "no transaction" issue more generally to explore and critique *Revlon's* continuing, if more modest, status as a possibly useful, but essentially nonenforceable, norm in the M&A setting. Given its limited ex post legal role today, *Revlon*'s enduring value may be simply to provide an ex ante benchmark for directors conducting corporate sales; assuming, critically, that continued adherence to *Revlon*'s key (and disputable) normative goal of immediate value maximization[29] remains desirable in 2014.

The organization of this Article is as follows: Part II traces the course of the *Revlon* doctrine and sets out what today is the doctrinal essence of the *Revlon* duty. Part III is an extended consideration of whether and why *Revlon*, as a matter of sound doctrine and policy, should apply to a sales effort that fails to produce a transaction, thereby potentially broadening and invigorating the sweep of *Revlon*. Part IV explains why, however, *Revlon* today has dwindled, not broadened, in utility. Ex post it is a cabined, pre-closing remedies doctrine that, nonetheless, may continue to play an important ex ante role in articulating a higher-than-ordinary standard for prospectively guiding director conduct in the high-stakes M&A setting. In light of our remedies analysis, this Part then revisits and questions whether *Revlon*'s iconic focus on immediate value-maximization should be retained. Part V is a brief conclusion.

II. The Essence of Revlon

Given the imperatives of the rampant hostile takeover movement of the 1980s,[30] during that decade the Delaware Supreme Court dramatically reconfigured the fiduciary duty

29. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986) ("[T]he directors allowed considerations other than the maximization of shareholder profit to affect their judgment, and followed a course that ended the auction . . . to the ultimate detriment of its shareholders."). "No such defensive measure can be sustained when it represents a breach of the directors' fundamental duty of care." *Id.*

30. *See* Lyman Johnson & David Millon, *Misreading the Williams Act*, 87 MICH. L. REV. 1862, 1862–64 (1989) (discussing the increase in hostile takeover activity).

standards applicable to corporate directors. Landmark decisions in the 1984–1986 period included *Aronson v. Lewis*,[31] *Unocal Corp. v. Mesa Petroleum Co.*,[32] *Moran v. Household International, Inc.*,[33] and *Revlon*.[34] Hundreds of cases have cited *Revlon* in the twenty-eight years of its existence,[35] and it has spawned extensive commentary.[36] Yet, more so than any of the other towering decisions from that era, significant uncertainty still surrounds the so-called *Revlon* doctrine.[37] This uncertainty stems, in part, from a failure to more clearly identify and justify the key underlying rationales for the *Revlon* doctrine,[38] and from ongoing imprecision as to the precise "contours" of the doctrine.[39] To put the latter issue another way, lingering doubt remains as to

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31. *See* Aronson v. Lewis, 473 A.2d 805, 807 (Del. 1984) (reviewing whether "a stockholder's demand upon a board of directors, to redress an alleged wrong to the corporation, [was] excused as futile prior to the filing of a derivative suit").

32. *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985) (reviewing "the validity of a corporation's self-tender for its own shares which excludes from participation a stockholder making a hostile tender offer for the company's stock").

33. *See* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348 (Del. 1985) (reviewing a Preferred Share Purchase Rights Plan—i.e., a "poison pill"—in the context of preparing for a corporate takeover).

34. *See Revlon*, 506 A.2d at 175–76 (reviewing director duties in a battle for corporate control).

35. As of October 30, 2013, Westlaw's KeyCite listed 437 cases that are "Citing References" to *Revlon*.

36. For a collection of many of these commentaries, see generally Bainbridge, *supra* note 11; Manesh, *supra* note 12; Gevurtz, *supra* note 13; Laster, *supra* note 14.

37. *See supra* notes 11–14 and accompanying text (providing four law review articles that address the *Revlon* doctrine's uncertainty).

38. *See* Gevurtz, *supra* note 13, at 1545

> Normally, courts can look to a doctrine's underlying rationale to help resolve the issues regarding the doctrine's scope . . . . With *Revlon*, however, the failure of the Delaware courts to resolve such issues satisfactorily is symptomatic of the fact that there really is no sensible underlying rationale for the doctrine.

39. *See* Bainbridge, *supra* note 11, at 3314–15 ("Although the court continued to identify a limited class of cases in which *Revlon* was the controlling precedent, it also continued to confirm *QVC*'s holding that *Revlon* is properly understood as a mere variant of *Unocal* rather than as a separate doctrine."); Manesh, *supra* note 12, at 5 ("In reality, the boundaries of *Revlon*-land are murky.").

what, exactly, "triggers" the ostensibly more demanding *Revlon* standard?

Professor Stephen Bainbridge, for example, recently leveled a stinging critique of certain chancery court decisions on just this latter basis, contending they badly misread supreme court precedent.[40] This seems to be an important question in mixed consideration deals and it is one that has plagued Delaware law—and commentary on it—for some time.[41] We take up a very different and far more fundamental *Revlon* "trigger" question, however, one that, to our knowledge, has received no sustained attention from courts or commentators: does *Revlon* require a transaction?

To frame our examination of that novel issue and to use it as a way to critically assess *Revlon's* true status today, this Part summarizes the history and core features of the *Revlon* doctrine. Our treatment here is necessarily brief because full coverage is not the chief aim of this Article and because other extensive discussions of this subject already exist.[42] Our summary in this Part follows standard practice and examines *Revlon* as the discrete "standalone" doctrine it is widely but wrongly considered to be, and thus it serves to contextualize and set up our larger argument on the unexamined questions we explore in Parts III and IV.

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40. Bainbridge, *supra* note 11, at 3323–31. We note that Professor Mohsen Manesh has written that the Bainbridge critique misses the mark. Manesh, *supra* note 12, at 4 ("In constructing his critique, however, Bainbridge overstates the chancery court precedent with which he takes issue as well as the supreme court precedent upon which he bases his conflict-of-interests thesis. In reality, the boundaries of *Revlon*-land are murky."); *see also* Morgan White-Smith, *Revisiting* Revlon*: Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1177, 1194–95 (2012) (approving of recent Chancery Court decisions that reconceptualize the factors triggering *Revlon*).

41. As will be seen, our argument will end up demonstrating that the stakes in the *Revlon* mixed consideration debate are actually quite small.

42. *See supra* notes 11–14; *see generally* White-Smith, *supra* note 40, at 1178 (discussing the criteria for triggering *Revlon* in mixed-consideration transactions).

A. Revlon

Revlon was decided during the 1980s "wave of corporate takeovers."[43] So-called corporate "raiders" routinely took spurned acquisition proposals directly to target company stockholders by launching tender offers that enabled them to bypass unfriendly boards of directors.[44] Many in the business and legal communities saw hostile takeovers as a positive development, "not only enhanc[ing] shareholder wealth in the short run" but also making corporations more efficient.[45] Therefore, a board of directors that interfered with this process through the use of defensive measures, or by favoring non-shareholder interests in the sale of a company, was looked upon, in the eyes of many, with great suspicion.[46] The Delaware Supreme Court was faced with just such a situation in the *Revlon* case, and the court took advantage of the opportunity to craft a novel standard for assessing the conduct of a board of directors in selling a company.

In *Revlon,* the Delaware Supreme Court held, with little normative justification, that once the break-up of a corporate entity becomes inevitable, the sole duty of the board of directors becomes "maximization of the company's value at a sale for the stockholders' benefit."[47] The break-up of Revlon became inevitable during the battle for control of the company between Pantry Pride, Inc. (an entity ultimately controlled by Ronald O.

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

44. *See* Bainbridge, *supra* note 11, at 3285–86 ("In a merger, two corporations combine to form a single entity. In an asset sale, the selling corporation transfers all or substantially all of its assets to the buyer. In both transactions, approval by the target board of directors is an essential precondition." (citations omitted)). Other things being equal, approval of the board of directors is not required when a bidder acquires shares of a target corporation through a tender offer. *Id.* at 3286.

45. *See* Johnson & Millon, *supra* note 30, at 1864 (citing commentary). The threat of an unsolicited takeover through a tender offer was seen by many as reducing traditional corporate law agency costs deriving from the imbalance of power between the agents—management—and the putative principal—stockholders—forcing management to run their businesses more efficiently or risk being seen as undervalued in the marketplace, thus becoming a target for corporate raiders. *Id.*

46. *See id.* at 1910–12 (describing the pro-takeover outlook).

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

Perelman) and leveraged buyout specialist Forstmann Little & Co.[48] Faced with the threat of an unwanted hostile takeover by Pantry Pride, the Revlon board implemented several defensive measures, including a poison pill and the repurchase of ten million shares of the company's common stock in exchange for promissory notes and preferred stock.[49] The board also approved the initiation of a search for a "white knight," which culminated in an agreement to be acquired by Forstmann.[50] The agreement with Forstmann included several protective provisions, including a no-shop clause, a termination fee, and a lock-up option granting Forstmann the right to purchase two divisions of Revlon for significantly less than market value in the event that another potential acquirer purchased 40% or more of Revlon's shares.[51]

While the Delaware Supreme Court upheld the Revlon board's initial defensive measures, including the poison pill, under a *Unocal* analysis,[52] the supreme court went in a different direction in analyzing the board's approval of the protective provisions in the Forstmann agreement.[53] The Delaware Supreme Court found that after successive legitimate offers for the

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48. *Id.* at 175, 182.

49. *Id.* at 177. Revlon repurchased all ten million shares in the offering, exchanging for each share of common stock tendered, one Senior Subordinated Note of $47.50 principal (the same price per share as the most recent Pantry Pride offer for Revlon) at 11.75% interest, due in ten years, and one-tenth of a share of $9.00 Cumulative Convertible Exchangeable Preferred Stock valued at $100 per share. *Id.*

50. *Id.* at 177–78.

51. *Id.* at 178.

52. *See id.* at 180–81 (describing the *Unocal* precedent and its application to the case). A "*Unocal* analysis" is applied when a board adopts defensive measures due to the high potential of a conflict of interest between the board and stockholders. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–57 (Del. 1985). The initial burden of proof is placed on the target board of directors to prove "they had reasonable grounds for believing there was a danger to corporate policy and effectiveness, a burden satisfied by a showing of good faith and reasonable investigation." Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d. 173, 180 (Del. 1986) (citing *Unocal*, 493 A.2d at 955). In addition, the board must show that any defenses implemented are "reasonable in relation to the threat posed." *Id.* at 180 (citing *Unocal,* 493 A.2d at 955).

53. *See Revlon*, 506 A.2d at 182 ("The duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at sale . . . . The whole question of defensive measures became moot.").

company by Pantry Pride and the Revlon board's subsequent search for a white knight, "it became apparent to all that the break-up of the company was inevitable."[54] At that point, the "directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[55] This dramatic and narrowed shift of the directors' objective in a corporate break-up context is the central teaching of *Revlon*. Never before had shareholder primacy been so forcefully and singularly expressed by a Delaware court.[56]

Once this duty to obtain the best price for stockholders was triggered, the Revlon board's only permissible metric, the court emphasized, was "the maximization of shareholder profit."[57] Yet, in approving the protective provisions in the Forstmann agreement, particularly the lock-up option,[58] the board had clearly considered other interests.[59] The final purchase price negotiated with Forstmann represented "very little actual improvement" over the most recent offer by Pantry Pride.[60] But Forstmann had agreed to assume all of Revlon's obligations under the notes and to support the par value of the notes in the market.[61] In addition to being in the interests of the noteholders, this support was thought to be in the interests of Revlon's directors personally because, following a significant decline in the

54. *Id.* at 177–78, 182. Pantry Pride's initial hostile move was initiated on August 23, 1986, and despite the defensive measures taken by the Revlon board, Pantry Pride continued to increase its offers for the company, with a bid of $53 per share two days before the Revlon board approved a merger with Forstmann at $56 per share. *Id.* at 177–78.

55. *Id.* at 182.

56. *See* Lyman Johnson, *The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law*, 68 TEX. L. REV. 865, 913–17 (1990) (analyzing *Revlon* as the first case where the Delaware Supreme Court expressed shareholder primacy).

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

58. *Id.* at 182, 185.

59. *See id.* at 182, 184–85 (discussing the board's consideration of noteholders' interests).

60. *Id.* at 184. While the final price negotiated with Forstmann of $57.25 per share was "objectively higher than Pantry Pride's $56.25 bid, the margin of superiority is less when the Forstmann price is adjusted for the time value of money." *Id.*

61. *Id.* at 178–79, 182.

market value of the notes, the noteholders were threatening litigation.[62] In approving the "auction-ending lock-up agreement" with Forstmann, the Revlon directors had breached their primary duties of care and loyalty by allowing "considerations other than the maximization of shareholder profit to affect their judgment . . . to the ultimate detriment of [the] shareholders."[63]

B. Revlon*'s Progeny*

In the almost three decades since the Delaware Supreme Court's decision in the *Revlon* case, the Delaware courts have revisited the decision time and time again.[64] The cases primarily address persistent questions as to when exactly the *Revlon* mode is triggered and, once triggered, how the board must conduct the sales process to obtain the best price for the stockholders.[65] These lingering questions are considered to be so critical because the *Revlon* doctrine articulates such a sharp focus on immediate share value maximization once a company is in the *Revlon* mode.

1. When is Revlon *Mode Triggered?*

Two Delaware Supreme Court decisions involving Paramount Communications, Inc. provide important guidance on when a board has entered *Revlon* mode. In *Paramount Communications, Inc. v. Time Inc.*,[66] the supreme court stated that there are at least two scenarios that may implicate "*Revlon* duties," (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" and (2) "where, in response to a bidder's offer, a target abandons its long-term

62. *Id.* at 179, 182, 184.

63. *Id.* at 182, 185.

64. *See supra* note 35 and accompanying text (noting how many cases have cited to *Revlon*).

65. *See supra* notes 11–13, 37–40 and accompanying text (noting the courts' attempts to resolve these issues left open by *Revlon*).

66. 571 A.2d 1140 (Del. 1990).

strategy and seeks an alternative transaction involving the breakup of the company."[67]

In the *Time* case, the supreme court declined to apply *Revlon* because the stock for stock merger negotiations had not "made the dissolution or break-up of the corporate entity inevitable."[68] As part of its long-term strategy of expanding into the entertainment industry, the Time board had negotiated a strategic merger with Warner Communications, Inc.[69] Although Time's stockholders would become minority holders in the combined entity, Time would retain control over the board of directors and the position of chief executive officer.[70] After announcement of the merger with Warner, Paramount stepped in with an unwelcome attempt to acquire Time.[71] The Time board

67. *Id.* at 1150. Note that the supreme court identified a third scenario for triggering *Revlon* in *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42–43, 47 (Del. 1993); *see also* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) (noting that a *Revlon* duty attaches in three scenarios, and including the situation in *QVC* as the third scenario). The third scenario is "when approval of a transaction results in a 'sale or change of control.'" *Arnold,* 650 A.2d at 1290 (quoting *QVC,* 637 A.2d at 42–43, 47). There is no "'sale or change in control' when '[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.'" *Id.* (quoting *QVC,* 637 A.2d at 47) (emphasis omitted).

68. *Time*, 571 A.2d at 1150.

69. *See id.* at 1144–45 (discussing the business rationale behind Time's merger). The merger represented a crucial step in this strategic plan. *Id.* at 1144. The Time board believed that Warner was the superior partner for such a transaction because of Warner's "much desired production capability and an established international marketing chain." *Id.* at 1148.

70. *See id.* at 1144–46 (noting that a majority of Time's board believed that a merger of Time and Warner was only feasible if Time controlled the resulting board, even though Warner shareholders would control 62% of the new entity). Time's board insisted that Time control the board of directors of the combined entity in order to preserve the company's strong reputation and "a management committed to Time's journalistic integrity." *Id.* at 1144. Time's outside directors were concerned with maintaining the "Time Culture," which they perceived as being recognized "as an institution built upon a foundation of journalistic integrity." *Id.* at 1143 n.4.

71. *Id.* at 1147–48. Shortly after the Warner merger was announced, Paramount made an unsolicited all-cash offer to purchase all of Time's shares for $175 per share, which it eventually increased to $200 per share. *Id.* at 1147–49. The offers represented premiums of almost $50 and $75 per share respectively based on Time's $126 per share trading price the day prior to the first Paramount offer. *Id.* Paramount also stated that its offers were "fully-negotiable." *Id.* at 1147 (internal quotations omitted).

rejected Paramount's overtures as inadequate, concluding that the Warner merger "offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its 'culture.'"[72] Time's board considered the merger with Warner to be a continuation of its existing business, and, other than the rejected Paramount overtures, there was nothing to indicate that a break-up or dissolution of Time as a continuing and intact company was imminent.[73]

In an unanticipated twist following its *Time* decision, in *Paramount Communications Inc. v. QVC Network Inc.,*[74] the Delaware Supreme Court applied the share price maximization goal of *Revlon* to the Paramount board's negotiation of a stock for stock merger with Viacom, Inc., an entity controlled by Sumner Redstone.[75] Paramount and Viacom entered into a merger agreement that contained several defensive measures, including a no-shop clause, a termination fee, and most significantly, a stock option agreement giving Viacom the right to acquire approximately 19.9% of Paramount's stock in the event any of the triggers for the termination fee occurred.[76] Despite these defenses, QVC launched a competing offer,[77] and after stalled

72. *Id.* at 1149; *see also id.* at 1148–49 (discussing the rationale behind Time's rejection of Paramount's previous offer of $175 per share). Time also adopted several defensive measures and restructured its deal with Warner, including adding a cash component that would require Time to assume $7 to $10 billion worth of debt, "thus eliminating one of the principal transaction-related benefits of the original merger agreement." *Id.* at 1148. Time's motive for adding the cash component appears to have been driven, at least in part, by the fact that it would reduce the number of Time shares to be issued in the merger, resulting in Time's stockholders no longer having the right to vote on the transaction under New York Stock Exchange Rules. *Id.* Time's board cited a concern that the stockholders, mostly institutional investors, "would not comprehend the long-term benefits of the Warner merger" and would jump at the immediate cash premium represented by Paramount's all-cash offer. *Id.* at 1148.

73. *Id.* at 1149.

74. 637 A.2d 34 (Del. 1993).

75. *See id.* at 38–39, 44 (summarizing the proposed merger and finding *Revlon* mandates that a board must maximize company value in a sale of control transaction). Redstone controlled approximately 85.2% of Viacom's voting Class A stock and approximately 69.2% of Viacom's nonvoting Class B stock. *Id.* at 38.

76. *Id.* at 39.

77. *Id.* QVC sent a letter to Paramount proposing a merger in which QVC would acquire Paramount for approximately $80 per share, consisting of 0.893 shares of QVC common stock and $30 in cash. *Id.*

negotiations with Paramount's board, QVC went directly to Paramount's stockholders with a cash tender offer for 51% of Paramount's shares to be followed by a stock-for-stock second step merger.[78] Although now armed with the leverage of a competing bid, the Paramount board failed to use its new position to negotiate a truly improved deal with Viacom.[79] QVC's rival offer represented a higher price per share than Viacom's offer, yet the Paramount board rejected the QVC offer as "excessively conditional."[80]

In applying *Revlon* scrutiny to the Paramount board's conduct in negotiating the merger, the supreme court emphasized that, prior to the proposed combination with Viacom, Paramount's stock was "not vested in a single person, entity, or group, but vested in the fluid aggregation of unaffiliated stockholders."[81] Following the merger with Viacom, however, Paramount's stockholders would suffer "significant diminution" of their voting power, becoming minority stockholders in an entity controlled by Summer Redstone.[82] Thus, the court reasoned, the Paramount–Viacom merger represented the last opportunity for Paramount's stockholders to collectively negotiate a control premium for their shares.[83] This post-deal outcome differed from that in the *Time* case, where Time's shareholders would still have the opportunity to obtain a premium in a subsequent sale of the combined company.[84] Still, such a true merger of equals as seen

78. *Id.* at 40. The tender offer was all-cash at $80 per share. *Id.* On the same day as the announcement of the tender offer, QVC brought suit seeking to enjoin the defensive measures protecting the Paramount-Viacom merger. *Id.*

79. *See id.* at 40–41 (noting that the renegotiated merger agreement was "essentially the same as" the original agreement). While Viacom did raise its offer, it did not meet QVC's final offers, and the defensive measures remained in the amended merger agreements. *Id.*

80. *Id.* at 41. The latest Viacom bid was $85 per share in cash, which the Paramount board approved and recommended to shareholders, yet QVC's last bid was $90 per share, consisting of cash and QVC stock. *Id.*

81. *Id.* at 43.

82. *Id.* at 42–43.

83. *See id.* at 43 (positing that "Paramount stockholders [were] entitled to receive, and should receive, a control premium" for the loss of control the deal would cause). Of course, no stockholder alone is legally or practically able to obtain such a premium.

84. *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1151 (Del. 1990) (rejecting plaintiff's contention that the adoption of structural safety

in *Time* is vastly different than many Silicon Valley deals today, where a large buyer (itself lacking a controlling shareholder) uses its stock to buy a start-up company. Although, in theory, the start-up's shareholders could obtain a premium on a subsequent sale of the larger entity, realistically the time for a measurable, company-specific premium is upon sale to the initial acquirer. Yet, based on the *Time* decision, *Revlon* has no application to these deals.[85] Of course, if there is a controlling shareholder in the buyer itself—as with Facebook and Google, for example—then, just as in *QVC*, *Revlon*'s short-term value maximization directive would apply.[86] Such are the ongoing boundary issues raised by the *Revlon* doctrine.

The subsequent supreme court decisions in *Arnold v. Society for Savings Bancorp, Inc.*[87] and *In re Santa Fe Pacific Corp. Shareholder Litigation*,[88] provide further guidance for determining when a board's actions rise to the level of "seeking to sell control"[89] or otherwise taking actions that will make "the dissolution or break-up of the corporate entity inevitable."[90] In *Arnold*, the supreme court held that a seller's board is not "seeking to sell itself" unless it "initiate[s] an active bidding process."[91] Less than a year later, in *Santa Fe*, the supreme court clarified that in addition to the initiation of such an active bidding process, *Revlon* mode is not triggered unless the board also "seek[s] to sell control of the company or take other actions which would result in a break-up of the company."[92]

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devices "prevented shareholders from obtaining a control premium in the immediate future and thus violated *Revlon*").

85. *See supra* notes 68–73 and accompanying text (describing the holding and factual circumstances relied upon in the *Time* decision, including the absence of a controlling shareholder and timing issues).

86. *See supra* notes 81–83 and accompanying text (explaining why the supreme court relied upon the controlling shareholder status of Sumner Redstone to apply *Revlon* scrutiny to the merger).

87. 650 A.2d 1270 (Del. 1994).

88. 669 A.2d 59 (Del. 1995).

89. *Id.* at 71.

90. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del. 1990).

91. *Arnold*, 650 A.2d at 1290 (quoting *Time*, 571 A.2d at 1150).

92. *In re Santa Fe*, 669 A.2d at 71.

The transaction in *Santa Fe* involved an all-stock merger of publicly held corporations (Santa Fe Pacific Corporation and Burlington Northern Inc.), neither of which had controlling stockholders.[93] While the Santa Fe–Burlington merger was being negotiated, Union Pacific Corporation made an unsolicited proposal to acquire Santa Fe, first attempting to negotiate a deal with the Santa Fe board, and then taking its proposal directly to the Santa Fe stockholders.[94] While the Santa Fe board encouraged Union Pacific to increase its offers and used the revised offers as leverage to renegotiate the terms of Santa Fe's merger with Burlington,[95] the supreme court found that the Santa Fe board had remained "firmly committed to a stock-for-stock merger."[96] Thus, while the Santa Fe board may have "initiated an active bidding process," it did not seek to sell control of the company or otherwise take actions to break up the company, and so the Santa Fe board had not triggered its *Revlon* duties.[97]

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93. *See id.* at 64, 71 (describing the terms of the merger agreement and the supreme court's rejection of the plaintiff's contention that post-merger control would not remain in a "large," "fluid," and "changing" market). The acquirer, Burlington, would contribute 0.4 shares of its common stock for each share of Santa Fe stock. *Id.*

94. *Id.* at 63. After the Santa Fe board rejected two offers from the third party bidder, Union Pacific, citing its fear that a merger with Union Pacific would not pass regulatory muster, and after a renegotiation of the Santa Fe–Burlington merger at a higher price, Union Pacific went directly to the Santa Fe shareholders with a hostile offer. *Id.* The Santa Fe board responded by recommending that the Santa Fe stockholders not tender their shares, by taking certain defensive measures—including the adoption of a poison pill—and by renegotiating the deal with Burlington. *Id.* at 64–65.

95. *Id.* at 64.

96. *Id.* at 71.

97. *See id.* at 70–71 (explaining that the duty under *Revlon* "to seek the best value reasonably available" was not implicated because plaintiffs did not allege the board sought to transfer control of the company). The supreme court also considered whether *Revlon* might have been triggered due to the approval of a transaction resulting in a "sale or change of control." *Id.* at 71 (citations and internal quotation marks omitted). However, the plaintiffs made no allegations that Burlington had a controlling stockholder. *See id.* (noting that the complaint lacked "a description of the stock ownership structure of Burlington"). And so the supreme court was forced to assume that control of Burlington and Santa Fe after the merger would "remain 'in a large, fluid, changeable and changing market.'" *Id.* (citing Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1993))).

One aspect of the Santa Fe–Burlington merger has led to Delaware courts[98] and legal commentators[99] repeatedly mischaracterizing the *Santa Fe* decision as holding that *Revlon* mode is not triggered when a board negotiates a merger with a mixed consideration that consists of 67% stock and 33% cash. While as a practical matter this mix of stock and cash is generally how the economics of the Santa Fe–Burlington merger played out,[100] the court treats the Santa Fe–Burlington deal as a

98. *See In re* Synthes S'holder Litig., 50 A.3d 1022, 1048 (Del. Ch. 2012) ("In the case of [*Santa Fe*], the [Delaware] Supreme Court held that a merger transaction involving . . . consideration of 33% cash and 67% stock did not trigger *Revlon* review when there was no basis to infer that the stock portion of that consideration was stock in a controlled company." (citing *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995))); *see also In re* Smurfit–Stone Container Corp. S'holder Litig., C.A. No. 6164–VCP, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011) (noting that in *Santa Fe* the supreme court did not apply *Revlon* to a transaction "in which Burlington would acquire up to 33% of Santa Fe common shares through a tender offer (*i.e.*, cash)"); *In re* NYMEX S'holder Litig., C.A. Nos. 3621–VCN, 3835–VCN, 2009 WL 3206051, at *5 (Del. Ch. Sept. 30, 2009) ("In [*Santa Fe*], the [Delaware] Supreme Court held that a merger transaction involving consideration of 33% cash and 67% stock did not trigger *Revlon*." (citing *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 70–71 (Del. 1995))); *In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (noting that *Santa Fe*, involving consideration of only 33% cash, did not control the current case in which "over 60% of the consideration is cash").

99. *See* Manesh, *supra* note 12, at 31 ("[I]n *Santa Fe*, the supreme court ruled that *Revlon* was inapplicable to a transaction in which the target shareholders were to receive a 33–67 mix of cash and acquirer stock for their shares in the target corporation." (citing *In re* Santa Fe Pac. Corp. S'holders Litig., 669 A.2d 59, 71 (Del. 1995))); Gevurtz*, supra* note 13, at 1527 ("In *Santa Fe*, the court held that *Revlon* did not apply to a merger with a company lacking a controlling shareholder when 33% of the shareholders received cash in the transaction and the rest received stock." (citing *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 64–65, 71 (Del. 1995))).

100. Following the hostile tender offer by Union Pacific, Santa Fe and Burlington negotiated a second amended merger agreement. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 64–65 (Del. 1995). "The [Santa Fe] [b]oard also announced a joint tender offer for up to 33% of Santa Fe's common shares at a cash price of $20 per share. Burlington would also purchase up to 13% and Santa Fe would purchase up to 20% of its own stock." *Id.*; *see also* Burlington N. Inc., Tender Offer Statement, Amendment No. 7 (Schedule 14D-1/A) (Dec. 23, 1994) [hereinafter Press Release, Burlington N. Inc.], *available at* http://www.sec.gov/Archives/edgar/data/351979/0000950103-95-000065.txt (announcing expiration of the joint tender offer, which was oversubscribed, resulting in Burlington and Santa Fe purchasing the full 63 million shares or 33% of Santa Fe's outstanding stock as of the date the tender offer was announced). After Union Pacific increased its tender offer price to $18.50 per

standard stock-for-stock merger throughout its opinion.[101] With the cash tender offer not conditioned on the closing of the merger, and indeed with the tender offer closing more than seven months after the merger itself closed,[102] the supreme court appears to

share, Santa Fe and Burlington again revised the terms of their merger, including to allow Santa Fe to repurchase up to 10 million of its shares following the joint tender offer by Santa Fe and Burlington, *In re Santa Fe*, 669 A.2d at 65, and to amend Santa Fe's poison pill to enable another bidder, Allegheny Corporation, to purchase up to 14.9% of Santa Fe's shares. *See id.* ("Burlington and Santa Fe also announced that the Santa Fe Rights Plan had been amended to allow Allegheny Corporation to purchase up to 14.9% of Santa Fe shares without triggering the Rights . . . ."). However, note that stockholders that tendered their shares in the February 1995 joint tender offer were able to sell a pro rata portion of their shares for cash, while stockholders that failed to tender would receive 100% stock in the merger. *See id.* at 64 (explaining that first there would be "a joint tender offer for *up to* 33% of Santa Fe's common shares" and that subsequently there would be "a merger of Santa Fe and Burlington at an exchange ratio of 0.4 shares of Burlington stock for *each* Santa Fe share" (emphases added)). Burlington and Santa Fe purchased 33% of the total outstanding shares in the joint tender offer, but only stockholders that tendered their shares participated in the joint tender offer. *Id.*

101. *See id.* at 71 ("[T]he complaint portrays the Board as firmly committed to a stock-for-stock merger with Burlington."); *see also id.* at 64–65 (referring to the value of the "merger consideration" as an indicated value of $20.60 per share based on the "exchange ratio of 0.4 shares of Burlington stock for each Santa Fe share," thus not considering the $20.00 per share paid by Santa Fe and Burlington in the joint tender offer); *id.* at 71–72 (reviewing the joint tender offer as a defensive measure using a *Unocal* analysis).

102. Although the joint tender offer by Santa Fe and Burlington was agreed to as part of the merger agreement for the transaction, closing of the joint tender offer and consummation of the merger were separate events. *See* Burlington N., Inc. and Santa Fe Pac. Corp., Joint Proxy Statement/Prospectus (Form 424B3) 1 (Jan. 13, 1995), *available at* http://www.sec.gov/Archives/edgar/data/351979/0000950130-95-000083.txt ("The merger is contingent upon, among other things, approval by the [ICC]. The merger would be consummated shortly after ICC approval is obtained and the other conditions to the merger are satisfied or waived. The tender offers are not conditioned on ICC approval of the merger."). While Interstate Commerce Commission (ICC) regulatory approval was a condition to the closing of the merger, it was not a condition to the closing of the joint tender offer. *Id.* The joint tender offer closed in February 1995, Press Release, Burlington N. Inc., *supra* note 100, but ICC approval was not obtained until July 20, 1995, *In re Santa Fe,* 669 A.2d at 65, and the merger was not consummated until September 22, 1995. *See* Burlington N., Inc., Current Report (Form 8-K) (Oct. 10, 1995), *available at* http://www.sec.gov/Archives/edgar/data/934612/0000950130-95-002033.txt ("On September 22, 1995, Burlington Northern Inc. ('BNI') and Santa Fe Pacific Corporation ('SFP') consummated a business combination (the 'Merger') . . . .").

have treated the cash tender offer as a defensive measure under *Unocal* rather than as an element of the merger consideration.[103]

Considering the continuing lack of guidance from the supreme court on whether the form of consideration plays a factor in triggering *Revlon* mode,[104] it is no surprise that courts and commentators have extended the *Santa Fe* decision beyond its actual holding.[105] In addition to uncertainty as to how the form of consideration influences whether *Revlon* mode is triggered, uncertainty remains as to whether there are entry points for triggering *Revlon* mode outside of the three traditional scenarios enunciated in *Arnold*.[106] In a recent opinion, for example,

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103. *In re Santa Fe*, 669 A.2d at 71–72 (finding that the plaintiffs properly pled a *Unocal* claim).

104. *See* Manesh, *supra* note 12, at 31–32 (contending that the supreme court has not clearly defined the role of consideration in triggering *Revlon*).

105. In the absence of direction from the Delaware Supreme Court, the Delaware Chancery Court has used dicta to fashion its guidance on how the form of merger consideration can affect the triggering *Revlon* mode. *See* Manesh, *supra* note 12, at 4 ("Left uncertain by Delaware Supreme Court precedent, the scope of the *Revlon* doctrine has been purposefully, but cautiously, defined by the Delaware Chancery Court through the use of dictum."). The chancery court has consistently stated that *Revlon* is triggered when a corporation is sold for cash. *Id*. at 14 n.52 (citing cases in which the chancery court discusses a board's obligations to shareholders during an all-cash merger). The chancery court has also consistently held that absent a controlling stockholder issue, *Revlon* is generally not triggered when a corporation is acquired in a stock-for-stock merger. *See, e.g.*, Krim v. ProNet, Inc., 744 A.2d 523, 527 (Del. Ch. 1999) (noting that the duty "to maximize shareholder value" is not implicated in "stock-for-stock strategic mergers of publicly traded companies"). Less clear is the court's stance on mixed consideration transactions; however the court has indicated that *Revlon* mode is triggered when cash makes up a majority or even 50% of the mixed consideration. *See In re* Lukens Inc. S'holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (stating that at least a 60% cash consideration would trigger *Revlon*); *In re* Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *13–14 (Del. Ch. May 20, 2011) ("[T]he concern here is that there is no "tomorrow" for approximately 50% of each stockholder's investment in Smurfit–Stone."). Finally, the chancery court has generally not found *Revlon* mode to be triggered where stock makes up a majority of the mixed consideration. *See In re* Synthes S'holder Litig., 50 A.3d 1022, 1047–48 (Del. Ch. 2012) (contending that *Revlon* is not triggered here because the merger involves "mixed consideration of 65% . . . stock and 35% cash," which "does not qualify as a change of control under [the Delaware] Supreme Court's precedent").

106. *See infra* Part III (suggesting that the three *Arnold* scenarios are not the exclusive bases for invoking *Revlon*). The supreme court found one such a scenario in *McMullin v. Beran*, in which the court held that *Revlon* mode was triggered in a transaction *not* involving a "change of control." 765 A.2d 910, 919–

Chancellor Strine questioned why the plaintiffs in the case had not argued that *Revlon* applies when the defendant directors set out to sell control of the company but ultimately approve a sale not involving a change of control.[107] And, surprisingly, the Delaware courts have not settled, and M&A litigators have not raised, the rather basic question we take up in Part III—that is, whether *Revlon* applies when a board sets out to sell control of a company but no transaction of any kind results.

2. Once Revlon *Mode Is Triggered, How Must the Board Conduct the Sales Process?*

While not changing the basic duties of care and loyalty owed by directors as they seek immediate value maximization for stockholders,[108] *Revlon* mode does purportedly trigger enhanced

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20 (Del. 2000). *McMullin* involved a deal where the company's 80.1% controlling stockholder negotiated the sale of the company in an all shares, cash tender offer, followed by a cash-out merger. *Id.* at 915–16. Given that the minority holders were going from a company with a controlling shareholder to a company without a controlling shareholder, for purposes of a *Revlon* analysis, there was no change of control, yet the court held that *Revlon* mode was triggered when the board approved an "all shares" tender offer that was to be followed by a second-step cash-out merger because such a decision constituted "a final-stage transaction for all shareholders." *Id.* at 918 (citing Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994)). A few years after *McMullin* was decided, the appellants in Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003), seized on the *McMullin* holding that *Revlon* may be triggered without a change of control. *Id.* at 929 (noting that appellants argued that "once NCS decided to initiate a bidding process seeking to maximize short-term stockholder value, it cannot avoid enhanced judicial scrutiny under *Revlon* simply because the bidder it selected [Genesis] happens to have proposed a merger transaction that does not involve a change of control" (alteration in original) (internal quotations omitted)). The supreme court sidestepped the argument by deciding the case on other grounds. *See infra* note 181 and accompanying text (explaining that the court found the standard of review was not outcome determinative and declined to apply the heightened *Revlon* standard on appeal).

107. *In re* Synthes S'holder Litig., 50 A.3d 1022, 1048 n.117 (Del. Ch. 2012). We discuss Chancellor Strine's musings on this issue *infra* Part III.

108. Barkan v. Amsted Indus., 567 A.2d 1279, 1286 (Del. 1989) ("[T]he basic teaching of these precedents is simply that directors must act in accordance with their fundamental duties of care and loyalty." (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954–55 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986))).

judicial scrutiny of director conduct in fulfilling those duties.[109] If a plaintiff has shown that the board treated one or more bidders on unequal terms,[110] then the enhanced scrutiny test of *Revlon* includes two key features: "(a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[111] Significantly, moreover, unlike ordinary business judgment rule review, the burden of proof is on directors to show that their actions in conducting the sales process were reasonably related to maximizing stockholder value and were based upon adequate information.[112] Heightened judicial review for reasonableness, coupled with an initial burden of proof being placed on directors, appears, at least when viewed within the narrow confines of *Revlon* doctrine alone, to give robust legal force to *Revlon*'s value-maximizing mandate.

While there is "no single blueprint" that directors of Delaware corporations must follow in conducting a sales process under *Revlon* mode,[113] the Delaware courts have found that "certain fact patterns demand certain responses."[114] Where several bidders are competing for corporate control, the board

109. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993) (explaining that because the case involved a sale of control, "[b]oard action in the circumstances presented here is subject to enhanced scrutiny").

110. *See id.* ("The *Macmillan* decision articulates a specific two-part test for analyzing board action where competing bidders are not treated equally . . . ." (citing Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1288 (Del. 1989))).

111. *Id.*

112. *See id.* ("The directors have the burden of proving that they were adequately informed and acted reasonably."); *see also* Koehler v. NetSpend Holdings, Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (describing enhanced *Revlon* scrutiny (citing *In re* Plains Exploration & Prod. Co. Stockholder Litig., C.A. No. 8090-VCN, 2013 WL 1909124, at *4 (Del. Ch. May 9, 2013))).

113. *See Barkan*, 567 A.2d at 1286–87 (finding that "the advice of . . . investment bankers, when coupled with the special circumstances surrounding the negotiation and consummation of the [management-led buyout], supported a finding that Amsted's directors had acted in good faith to arrange the best possible transaction for shareholders").

114. *Id.* at 1286.

must conduct a fair auction process,[115] acting in a neutral and evenhanded manner to encourage the highest price.[116] Where the board is considering a single offer *and* has no reliable grounds upon which to judge its adequacy, the board must canvas the market for competing bids.[117] It has also become a given that the selling company directors will obtain a fairness opinion from an investment bank to provide comfort that they have obtained a fair price.[118] A board that fails to follow these processes, as by dealing with a single bidder, must show that it possessed "impeccable knowledge of the company's business for the Court to determine that it acted reasonably."[119]

Notwithstanding supposed enhanced judicial scrutiny and an initial director burden of proof under stand-alone *Revlon* doctrine,

115. *Id.* at 1286 (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–85 (Del. 1986)).

116. *Id.* at 1286–87.

117. *Id.* at 1287 (citing *In re* Fort Howard Corp. S'holders Litig., Civ. A. No. 9991, 1988 WL 83147 (Del. Ch. Aug. 8, 1988)). Such a market check can take place either before a merger or acquisition agreement is entered into or afterwards if the agreement contains a "go-shop" provision. *See, e.g.*, *In re* Pennaco Energy, Inc., 787 A.2d 691, 707 (Del. Ch. 2001) (finding that "[a]though the board negotiated with a single bidder, it bargained hard and made sure that the transaction was subject to a post-agreement market check unobstructed by onerous deal protection measures that would impede a topping bid"). *But see infra* note 119 (discussing a recent case, like others, where neither a pre- nor a post-signing market check were done yet the deal was not enjoined).

118. *See, e.g.*, *In re* Openlane, Inc., C.A. No. 6849-VCN, 2011 WL 4599662, at *5–6 (Del. Ch. Sept. 30, 2011) (considering a fairness opinion as one factor indicative of the board securing the "best value reasonably attainable"). Fairness opinions are particularly important in the absence of a broad market-check. *Id.* at *7. While fairness opinions are expensive, even small companies generally obtain them unless the company is "managed by a board with an impeccable knowledge of the company's business." *Id.* at *5. The court may also consider the company's size in determining what is reasonable and appropriate. *Id.* at *7.

119. *Id.* at *5 (citing Barkan v. Amsted Indus., Inc. 567 A.2d 1279, 1287 (Del. 1989)). Recently, the chancery court refused to enjoin a sale that involved neither a pre-agreement market check nor a post-agreement "go shop" provision, because the independent directors had extensive industry experience and made an informed decision. *In re* Plains Exploration & Prod. Co., Stockholder Litig,, C.A. No. 8090-VCN, 2013 WL 1909124, at *6 (Del. Ch. May 9, 2013). Shortly after that decision, the chancery court again expressly endorsed the permissibility of single-bidder sales processes, under conditions of adequate director informedness. Koehler v. NetSpend Holdings, Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *15 (Del. Ch. May 21, 2013).

obtaining remedial relief because a board allegedly acted unreasonably in constructing a sales process to maximize stockholder value may be much more of a hurdle than typically imagined. In *Lyondell Chemical Co. v. Ryan,*[120] the supreme court upheld a board's process where the merger was "negotiated and finalized in less than one week,"[121] the directors failed to press the buyer for a better price, no market check was conducted, and significant deal protections were in the merger agreement.[122] While acknowledging that such failures could arguably raise an issue in evaluating director conduct under a duty of care claim, the Delaware Supreme Court cited the fact that Lyondell's charter contained an exculpatory provision pursuant to Delaware General Corporation Law section 102(b)(7),[123] which barred claims for monetary damages against the directors for duty of care breaches.[124] Obtaining monetary liability from directors for breaches of the supposedly heightened *Revlon* duties therefore requires a duty of loyalty breach, by showing, for example, that a majority of the board of directors had a conflict of interest or otherwise acted in bad faith during the sales process.[125] Yet *Revlon* scrutiny as such is not necessary for such a showing.[126] Thus, it begins to emerge that heightened judicial scrutiny and the director burden of proof under *Revlon* may remain relevant

120. 970 A.2d 235 (Del. 2009).

121. *Id.* at 241.

122. *Id.* at 238–39.

123. DEL. CODE. ANN. tit. 8, § 102(b)(7) (2013).

124. *Lyondell Chemical Co.*, 970 A.2d at 239. The significance of the *Lyondell* case on *Revlon* jurisprudence is explored further in Part IV, *infra*.

125. *See, e.g.*, Malpiede v. Townson, 780 A.2d 1075, 1083–85 (Del. 2001) (analyzing whether a conflicted board member during the sale of a company constituted a breach of the duty of loyalty).

126. *See In re* Novell, Inc. S'holder Litig., C.A. No. 6032-VCN, 2013 WL 322560, at *6–18 (Del. Ch. Jan. 3, 2013) (denying, with almost no analysis of the plaintiffs' *Revlon* claim, the defendant directors' motion to dismiss where the plaintiffs stated a reasonably conceivable bad faith claim based on the board's "unexplained, extremely favorable treatment" of the successful bidder during the acquisition process). The plaintiff in the one case did not make a *Revlon* claim in a suit alleging the directors breached their duty of loyalty in approving a sale of the company. *In re* Trados Inc. S'holder Litig., Civil Action No. 1512-CC, 2009 WL 2225958, at *6–7 (Del. Ch. July 24, 2009). Instead, the case went to trial under an entire fairness standard, due to a conflicted board of directors, and at trial the defendants proved that the merger was entirely fair. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 55–79 (Del. Ch. 2013).

only in the preliminary injunction setting, where the court is asked to enjoin a proposed deal due to a flawed sales process, and even here, as noted above, injunctions are extraordinarily hard to come by. We elaborate on this in Parts III and IV as we situate the overly insular *Revlon* doctrine in the larger, much-evolved body of Delaware's modern fiduciary duty jurisprudence.

C. A Summary of Revlon*'s Essence*

The supreme court's pioneering decision in *Revlon* doctrinally articulated a sharpened and narrowed corporate objective for boards of directors. Once the break-up of a Delaware corporation becomes inevitable, *Revlon* mode is triggered,[127] and the board's objective shifts from operating the business for success over the long run to maximizing stockholder value in the short-term.[128] The subsequent decisions in the *Time* and *QVC* cases provided important guidance on when the *Revlon* duty to maximize shareholder value in the short-term is and is not triggered. In *Time*, the supreme court clarified that absent the imminent dissolution or break-up of the corporate entity, *Revlon* does not apply and courts will defer to good faith and disinterested business decisions of boards of directors, such as the decision to enter into a stock-for-stock strategic merger.[129]

While the *Time* case appeared to narrow the application of *Revlon* and thus reassert the broad power of the board of directors to focus on the long run, stockholders regained immediate value-maximization ground with the supreme court's decision in *QVC*. In *QVC*, the supreme court applied enhanced scrutiny to determine whether a board's sales process was properly conducted to maximize short-term stockholder value

127. *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150–51 (Del. 1989) ("[I]n *Revlon*, when the board responded to Pantry Pride's offer by contemplating a 'bust-up' sale of assets in a leveraged acquisition, we imposed upon the board a duty to maximize immediate shareholder value and an obligation to auction the company fairly.").

128. *See id.* at 1150 n.13 ("'[T]he duty of the board [has] changed from the preservation of . . . [the] corporate entity to the maximization of the company's value at a sale for the stockholder's benefit . . . .' (quoting Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986))).

129. *Id.* at 1150–51.

where a stock-for-stock merger resulted in target company stockholders no longer holding shares in a company owned "in a large, fluid, changeable and changing market," but instead holding shares in an entity controlled by a single stockholder.[130] Thus, the court observed, the board needed to obtain the best immediate price for stockholders because the transaction represented the last opportunity for those stockholders to earn a control premium for their shares.[131]

Once *Revlon* mode is triggered, the burden of proof shifts from the plaintiffs to the directors, requiring the directors to show that they were "adequately informed and acted reasonably."[132] This heightened scrutiny of a board's actions represents "a 'middle ground' between deference to the board under the business judgment rule and skepticism toward the board under entire fairness review."[133] The board must show that, in light of available information, its sales process is reasonably related to maximizing stockholder profit.[134] Notwithstanding these seemingly onerous intra-doctrinal demands, we must ask whether, in light of broader legal developments, directors are likely to bear such burdens in reality, either in damages actions,[135] or even in preliminary injunction lawsuits where the initial burden of proof is placed on the plaintiff.[136] To fully

130. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1993).

131. *Id.* at 43.

132. *Id.* at 45.

133. Koehler v. Netspend Holdings, Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013).

134. *See id.* at *11 ("Reasonableness requires that the board be informed and that it construct a sales process to maximize value in light of that information."). The *Koehler* court stated, "Revlon requires the Court to look to the directors' true intentions to determine if the directors have been motivated by the appropriate desires: i.e., to achieve the highest price reasonably available to the stockholders." *Id.*

135. *See infra* Part IV.A.1.

136. *Koehler*, 2013 WL 2181518, at *11 n.164. To show a likelihood of success on a preliminary injunction motion in a *Revlon* claim, "the Plaintiffs bear the burden of establishing a reasonable probability that at trial the Director Defendants would be unable to show that they acted reasonably." *In re* Plains Exploration & Prod. Co., C.A. No. 8090-VCN, 2013 WL 1909124, at *4 (Del. Ch. May 9, 2013). We think, after *Lyondell*, that the plaintiffs' showing should be phrased as a reasonable probability that plaintiffs will be able to show that one or more defendants breached their duty of loyalty. The plaintiff must

appreciate the remarkable dwindling of *Revlon*, once we step outside the cramped confines of the *Revlon* doctrine itself, we first explore, in Part III, how fidelity to its core teachings should, as a theoretical matter, actually *broaden* its reach into the no-deal context.

III. Revlon *in the No-Deal Context*

Having delineated the *Revlon* doctrine in isolation and as it has evolved (and still is evolving) over time,[137] we now turn to our central concern. Specifically, we seek to understand what enduring significance *Revlon* has for corporate law jurisprudence. To do this, we must examine *Revlon* from different and varied vantage points. In this Part, we explore whether the no-deal context holds promise for broadening and re-invigorating *Revlon*.[138] Ironically, it appears that the no-deal prism serves only to magnify the diminished relevance of *Revlon* in today's M&A law.

The most complete statement of which scenarios trigger the well-known *Revlon* duty of "acting reasonably to seek the transaction offering the best value reasonably available" appears in a 1994 Delaware Supreme Court decision.[139] The court stated that such a duty arises

> in at least the following three scenarios: (1) "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company," *Paramount Communications, Inc. v. Time Inc.*, Del. Supr., 571 A.2d 1140, 1150 (1990) . . . ; (2) "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction

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also show irreparable harm absent an injunction and that the balance of hardships favors the plaintiff's claims. *Koehler*, 2013 WL 2181518, at *9.

137. *See supra* Part II (summarizing *Revlon*'s "essence" and its progeny).

138. *See supra* note 17 and accompanying text (introducing the no-deal context and the surrounding queries).

139. Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994); *see also In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 70–71 (Del. 1995) (noting that the plaintiffs "failed to state a claim that the Board had a duty to 'seek the transaction offering the best value reasonably available to the stockholders'" (citing Paramount Commc'ns, Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994))).

> involving the break-up of the company," *id.*; or (3) when approval of a transaction results in a "sale or change of control," *QVC,* 637 A.2d at 42-43, 47. In the latter situation, there is no "sale or change in control" when "'[c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.'" *Id.* at 47 (citation and emphasis omitted).[140]

There are several striking features of this fertile paragraph. First, the three identified scenarios are described as non-exclusive.[141] The court states, after all, that the *Revlon* duty arises in "at least" the three scenarios.[142] Second, the three specified scenarios are described in the disjunctive, as in "(1) . . . *or* (2) . . . *or* (3)."[143] Third, although scenario three keys off of the "approval of a transaction," the first two scenarios do not.[144] Rather, scenario one is triggered upon a company's initiation of "an active bidding process seeking to sell itself or to effect."[145] The clear focus is on the "process" and the "seeking" of a sale or to "effect" a break-up.[146] Similarly, scenario two is triggered short of actually approving a deal, as it begins when the company "abandons its long-term strategy" and "seeks an alternative transaction."[147] Put another way, scenarios one and two seek to regulate attempts toward an action, while scenario three keys off of a completed act.

The clear alternative phrasing of scenarios one and two—not centered, as is the third scenario, on the "approval of a transaction"[148]—prompts our question: why is it widely pre-supposed that *Revlon* requires a transaction? It is evident that Delaware's courts consider the *Revlon* standard to be applicable long before a deal is actually approved by directors. For example, in the *QVC* decision, the Delaware Supreme Court noted that *Revlon* duties were implicated in that case due to the fact that the

140. *Arnold*, 650 A.2d at 1290.
141. *See id.* ("[I]n at least the following three scenarios . . . .").
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*

Paramount board, albeit unintentionally, had brought itself "within the first general scenario" because it had "'initiate[d] an active bidding process seeking to sell itself.'"[149] The *QVC* decision quotes the 1990 Delaware Supreme Court decision in *Time*, in which the Delaware Supreme Court stated that, of the several circumstances that may implicate *Revlon* duties, the "first, and clearer one, is when a corporation *initiates an active bidding process seeking to sell itself* or to effect a business reorganization involving a clear break-up of the company."[150]

There are many such references in Delaware decisional law. For example, in *Lyondell Chemical Co. v. Ryan*, the supreme court stated that the time for action under *Revlon* was when the directors "began negotiating the sale of Lyondell."[151] And in 2012, the chancery court noted that "[o]nce a board has decided to undertake a sales process it is required to seek the highest value reasonably available for the shareholders."[152] Yet it might be objected that every reported case has, in fact, involved an actual transaction and, therefore, *Revlon* mode—as elaborated in *Arnold*[153]—implicitly presupposes a transaction. Consequently, the reasoning would run, the three *Arnold* scenarios simply describe *which* particular types of M&A transactions are covered (for example, a break-up of the company or a sale of corporate control) and *when*, within these transactions, the heightened *Revlon* duty begins (for example, upon initiating an "active bidding process").[154]

We reject that response as faulty and lacking in support. First, the *Arnold* language itself refutes that interpretation. As noted,[155] the (nonexclusive) three scenarios key off of markedly

149. Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1994).

150. *Id.* (quoting Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150 (Del 1989)) (quotations omitted).

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

152. *In re* Answers Corp. S'holder Litig., No. 6170–VCN, 2012 WL 1253072, at *6 (Del. Ch. Apr. 11, 2012).

153. *Supra* notes 139–47 and accompanying text.

154. *See* Arnold v. Soc'y for Sav. Bancorp, Inc. 650 A.2d 1270, 1290 (Del. 1994) (delineating the three *Arnold* scenarios for when a *Revlon* duty is triggered).

155. *Supra* notes 139–47 and accompanying text.

different actions. Second, the supreme court has described the *Revlon* duty itself as a duty "to seek the transaction . . . [best for stockholders]."[156] The clear emphasis is on the selling process. To be sure, in *Santa Fe*, the court observed that under the first scenario—initiating an active bidding process—directors must be seeking to sell control or break-up the company.[157] But, assuming that form of deal is being sought, the court clearly regarded the first "initiating" scenario as a distinct "method of invoking the duty" in relation to the third "approval" scenario.[158] Third, given the emphasis on the sales process, it makes no policy sense to have different standards for directors—once they undoubtedly are within one of the first two *Arnold* scenarios[159]—be based on whether they did or did not succeed in pulling off a transaction. If that were the case, directors who consummate a transaction—whether by means of an admirable or abject effort—must face heightened scrutiny,[160] while directors who fail to cut a deal—possibly through their own abysmal performance—would face a more deferential, business judgment rule standard of review.[161]

Finally, consistent with our analysis, while there are no clear holdings on the issue, there is considerable indication that the "no-deal" setting should and will trigger heightened *Revlon* scrutiny. In August 2012, Chancellor Strine authored suggestive

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156. *Arnold*, 650 A.2d at 1290 (quoting Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994)).

157. *See In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995) (stating that the *Revlon* duty arises "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" (quoting *Arnold*, 650 A.2d at 1290 (internal quotations and citation omitted))).

158. *Id.*

159. *Supra* notes 139–40 and accompanying text.

160. *See* Koehler v. Netspend Holdings, Inc., No. 8373–VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (recognizing that "*Revlon* changes the level of scrutiny" to enhanced scrutiny for "change-of-control transactions"); Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994) (stating that enhanced scrutiny applies to directors in order "to ensure that the directors have acted reasonably").

161. *See, e.g.*, Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1152 (Del. 1989) ("[T]he refusal to entertain an offer may comport with a valid exercise of a board's business judgment"); TW Servs. Inc. v. SWT Acquisition Corp., Nos. 10427, 10298, 1989 WL 20290, at *11 (Del. Ch. Mar. 2, 1989) (same).

language touching on *Revlon* in a no-deal context.[162] Rejecting the plaintiffs *Revlon* claim in the case before him because selling company shareholders received a mix of 65% stock and 35% cash from the buyer, and moved from owning stock in a company with a controlling shareholder to one without,[163] the Chancellor, in dictum, reflected on a *Revlon*-related argument not raised by plaintiff.[164] Strine thought it "can be viewed as odd that a board should be relieved of its duties under *Revlon* in a situation when it has made the strategic decision to sell the company but selects as the highest bid a stock deal that is not technically a change of control."[165] In other words, if a board sets out to sell control but ultimately approves a sale *not* involving a change of control, Strine wondered why *Revlon* duties should not apply. By analogy, we ask the closely related question of whether a board initiating an active process seeking to sell control that ultimately fails to approve any sale at all—and so, obviously, likewise fails to effectuate a sale of control—should similarly have its conduct reviewed under *Revlon*. In this way, if the value-maximizing objective of *Revlon*, along with its enhanced scrutiny and burden shift, truly are salutary requirements, they would apply to all covered sales processes, whether or not successful.

Strine allows as having "logical force" an argument that questions whether a selling company board, having once triggered a *Revlon* duty, can deactivate that duty by doing a non-control deal.[166] We ask, relatedly, whether, once tripped, the heightened *Revlon* duty can be exited by electing not to (or simply failing to) do any deal. Strine goes on to observe that a plaintiff pressing such an unresolved *Revlon* issue would have to address two supreme court decisions.[167] These decisions are the

162. *See In re* Synthes S'holder Litig., 50 A.3d 1022, 1024 (Del. Ch. 2012) (considering the role of *Revlon* when a board makes a decision to sell but ultimately selects a deal that is not a change of control).

163. *Id.* at 1047–48.

164. *See id.* at 1048 n.117 (stating that the plaintiffs could have argued that "the Board's initial consideration of a range of strategic options . . . compels a different result" under *Revlon*).

165. *Id.*

166. *Id.*

167. *See id.* ("In any event, the plaintiffs do not press this point, and if they did, they would have to address, which they did not, [two] Supreme Court[]

Arnold case, noted above, and *Omnicare, Inc. v. NCS Healthcare, Inc.*[168]

We do not see the *Arnold* and *Omnicare* decisions as giving pause on this unsettled *Revlon* issue, as Chancellor Strine hinted without elaboration.[169] First, as to *Arnold*, that case, of course, is the one that first set forth the three nonexclusive scenarios for triggering *Revlon*.[170] *Arnold* did not simplistically involve, however, as the Chancellor states, a case where *Revlon* did not apply to "a board [that] was looking to sell for the highest value."[171] Rather, although the supreme court in *Arnold* acknowledged that the company was "seeking to sell itself,"[172] it went on to hold *Revlon* inapplicable because the board did not ever "initiate[ ] an active bidding process."[173] Moreover, there was no sale of control in *Arnold*.[174] Thus, neither the first *Revlon*-duty scenario nor the third *Revlon*-duty scenario under *Arnold* was involved.[175] In short, *Revlon* was never triggered.

Second, as to *Omnicare*, in that case the chancery court held that the third *Arnold* scenario had not been triggered because the approved deal was a stock-for-stock merger involving no change of control.[176] As to the first *Arnold* scenario, the chancery court acknowledged that it too, as a conceptual matter, separately

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decision[s] . . . .").

168. *Id. See generally* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270 (Del. 1994); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

169. *See In re* Synthes S'holder Litig., 50 A.3d 1022, 1048 n.117 (suggesting that *Revlon* may not apply where the board "selects as the highest bid a stock deal that is technically not a change of control").

170. *Arnold*, 650 A.2d at 1289–90.

171. *In re Synthes*, 50 A.3d at 1048 n.117.

172. *Arnold*, 650 A.2d at 1289.

173. *Id.* at 1290 (quotation and citation omitted).

174. *Id.* at 1289.

175. *See id.* at 1290 (stating that the first *Revlon*-duty scenario was not implicated because "to fall within that category, the target must have 'initiate[d] an active bidding process,'" and the third *Revlon*-duty scenario was not implicated because the merger did not involve a change in control (quoting Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989))).

176. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 929 (Del. 2003) (describing the chancery court's conclusion that "because the stock-for-stock merger . . . did not result in a change of control, the . . . directors' duties under *Revlon* were not triggered").

triggered *Revlon* duties.[177] But the court held that the selling company, as in *Arnold*, did not initiate an active bidding process and, moreover, after entering an exclusivity agreement with the favored buyer, "abandoned" its efforts to sell the company.[178] The court then examined the selling company board's conduct under both ordinary business judgment rule review and the more exacting *Revlon* standard, holding that both standards had been met.[179]

On appeal, the plaintiffs challenged the lower court's findings that an active bidding process had not been initiated and that the sales process had been abandoned.[180] Thus, the applicability of *Revlon* where a value-maximizing, enhanced scrutiny scenario is triggered but then exited was squarely raised. The supreme court sidestepped resolution of this issue, however, by concluding that the standard of review was not outcome determinative on the facts before it and, therefore, the court went on to simply assume arguendo that the ordinary business judgment rule standard would be applied.[181]

Taken together, *Arnold* and *Omnicare* simply do not resolve the situations posed by either Chancellor Strine or us—that is, whether the heightened duties and director burdens associated with *Revlon*, having once been triggered, can be deactivated either by doing a sale not involving a change of control or by not doing any sale at all. Today, these intriguing, novel, and important questions concerning the scope of *Revlon* remain unanswered under Delaware law.

Further bolstering our position on the "no-deal" issue is the supreme court's decision in *Lyondell Chemical Co. v. Ryan*, where the court underscored that the *Revlon* duty was activated once a selling company board "had decided to sell" or "when a company embarks on a transaction" or "began negotiating the sale of [the company]."[182] And *Revlon* itself held that the duty to maximize

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177. *See id.* (recognizing that *Revlon* is triggered after an active bidding process is initiated).

178. *See id.* (describing the Delaware Court of Chancery's conclusion that *Revlon* was not triggered).

179. *Id.*

180. *Id.*

181. *Id.*

182. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 241–42 (Del. 2009). The

the sales price began when the directors acknowledged that a break-up was "inevitable."[183] Chancery court cases are in accord in holding that undertaking a sales process triggers *Revlon*.[184] Thus, it is clearly recognized that the *Revlon* duty arises—as it must to accomplish its intended value-maximization purpose—well before a particular transaction is agreed.

This is not to say—and this is not our position—that simply "deciding" or "embarking" on a sales process of any kind is sufficient to trigger *Revlon*. As *Arnold* itself teaches, it is not enough to seek to sell; there must be the initiation of "an active bidding process seeking to sell itself."[185] In addition, as clarified by the supreme court in *Santa Fe*, this strand of *Revlon* "requires that the Board also seek to sell control of the company or take other actions which would result in a break-up of the company."[186] Thus, where a board sets out to conduct an "active bidding process seeking to sell itself" in a *non-change* of control transaction, *Revlon* generally will not be triggered.[187] This, of

court stated that the trial court was mistaken when it imposed *Revlon* duties on the directors "before they either had decided to sell, or before the sale had become inevitable." *Id.* at 241. The court then stated that the *Revlon* duty "applies only when a company embarks on a transaction . . . that will result in a change of control." *Id.* at 242. Finally, the court stated that "[t]he time for action under *Revlon* did not begin until . . . the directors began negotiating the sale of Lyondell." *Id.*

183. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182–84 (Del. 1986) (stating that the board's duty changed from preserving the company to "getting the best price for the stockholders at a sale of the company" once the company's break-up became inevitable).

184. *See, e.g.*, *In re* Answers Corp. S'holder Litig., C.A. No. 6170–VCN, 2012 WL 1253072, at *6 (Del. Ch. Apr. 11, 2012) ("Once a board has decided to undertake a sales process it is required to seek the highest value reasonably available for the shareholders regardless of where that value comes from."); *see also In re* Lear Corp. S'holder Litig., 926 A.2d 94, 115 (Del. Ch. 2007) (stating that *Revlon* applies when a board decides to sell the company); *In re* Delphi Fin. Grp. S'holder Litig, C.A. No. 7144-VCG, 2012 WL 729232, at *13 (Del. Ch. Mar. 6, 2012) (stating that the directors "assumed a duty under the *Revlon* doctrine" when they decided to sell the company for cash).

185. Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994).

186. *In re* Santa Fe Pac. Corp. S'holder Litig., 669 A.2d 59, 71 (Del. 1995).

187. This, of course, was the situation in the well-known *Time* case. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1142, 1151 (Del. 1989) ("[W]e decline to extend *Revlon*'s application to corporate transactions simply because they might be construed as putting a corporation either 'in play' or 'up for sale.'"). One exception to this is where a company is sold that had a

course, comports with the teachings of the *Time* case that if control is not sold in a transaction, then the third *Arnold* scenario is not triggered.[188] Likewise then, under the first *Arnold* scenario, *Revlon* is triggered by the initiation of an active bidding process seeking to sell a company, but only if a sale of control or break-up transaction is pursued.[189]

Conversely, if a sale of control or break-up transaction is sought through the initiation of an active selling process, it does not follow—and this is our position—that *Revlon* requires the eventual approval of a change of control transaction (i.e., a "done deal"). Were that the case, the first *Arnold* scenario would be a surplusage because the third scenario adequately covers that situation.[190]

Thus, to give meaning to all three *Revlon* scenarios articulated in *Arnold,* the *Revlon* duty should not be construed as requiring an actual sale of control or break-up transaction, only its determined seeking. This, we believe, is the argument that Chancellor Strine briefly characterized as having "logical force."[191] To hold otherwise would mean that a corporate board of directors, having avowedly undertaken a sales process seeking to sell the entire company or control of it—or enter a break-up transaction—bears no responsibility if it conducted the process so poorly that no transaction results, to the harm of the company itself and its shareholders. That would be an unwarranted and conceptually bizarre outcome.

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controlling shareholder before the sale. This is not a "change of control," but a *Revlon*-like duty nonetheless is implicated. McMullin v. Beran, 765 A.2d 910, 919–20 (Del. 2000); *see also supra* note 106 (discussing *McMullin*).

188. *See Arnold*, 650 A.2d at 1290 (providing that the third scenario that triggers *Revlon* is "when approval of a transaction results in a 'sale or change of control'"). Thus, if control is not sold in a transaction, this scenario will not be implicated. *Id.*

189. *Santa Fe* so ruled. *See In re Santa Fe*, 669 A.2d at 71 (stating that the *Revlon* duty arises "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" (quoting *Time*, 571 A.2d at 1150)).

190. *See supra* notes 139–40 (providing the first *Arnold* scenario that triggers *Revlon*).

191. *See In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1048 n.117 (Del. Ch. 2012) (stating that the assertion, "that the Board's initial consideration of a range of strategic options . . . compels a different result," has more "logical force" than the plaintiff's argument).

The Delaware Supreme Court, moreover, has made it clear that even nontransactional behavior can be reviewed under the most demanding review standard of all—entire fairness.[192] Thus, directors who choose not to enter a possible transaction due to a conflict of interest can be made to prove that their conduct was fair.[193] Similarly then, directors who clearly initiate a sale process seeking to sell control or effectuate a break-up should, if they fail to discharge their duties properly with the result that no deal is done, be held to have breached their *Revlon* duty. The lack of a completed transaction should not per se be an impediment to such a claim.

We recognize that there will be, broadly, two different "no-deal" settings. One will involve a board that continues a sales process but ultimately fails to effectuate a transaction. The company may then continue to exist and operate or fail and enter bankruptcy. As a matter of doctrine and policy, if the *Revlon* doctrine is to continue to have vitality, it should apply to this situation.[194] The second setting involves a board, having entered *Revlon* mode, deciding to halt the sales process and exit *Revlon* mode. Here, fidelity to *Revlon's* teachings suggests that while such a decision should be possible, directors, if challenged, might be required to support their decision by meeting the same value-maximizing and enhanced scrutiny standards of *Revlon*. This would impose the same standard on a decision to exit *Revlon* as on a decision made while in that mode, an outcome we reject.

In sum, as to whether the no-deal setting triggers *Revlon*, we conclude that while various cases have touched on the question, we still lack authoritative guidance on this fundamental, doctrine-defining issue. From a policy standpoint, if *Revlon* is to have force, we discern no a priori rationale for reviewing director

192. *See* Gantler v. Stephens, 965 A.2d 695, 708 n.33 (Del. 2009) (applying the "entire fairness standard in a non-transaction context").

193. *See id.* (stating that directors are not immune from being compelled to demonstrate fairness simply because no sale transaction was approved).

194. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 48–49 (Del. 1993) (stating that when directors are in *Revlon* mode they must consider whether a particular sale transaction or "an alternative course of action" best maximizes value); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 44 (Del. Ch. 2013) (stating that the best value reasonably available "may be no transaction at all"); *see also* Laster, *supra* note 14, at 43 (stating that the best course for stockholders could well be no transaction at all).

behavior differently, once directors set out to sell the company, based on whether or not a transaction was approved by the board. What does this novel conclusion tell us about the larger state of the *Revlon* doctrine in 2014? Is the potential reach of the *Revlon* duty even broader than imagined? Are the potentially large numbers of no-deal sales efforts subject to the far stricter *Revlon* review than judges, lawyers (especially, plaintiffs' lawyers), and scholars have appreciated? While we have, in this Part, seemingly "opened up" and extended the scope of *Revlon*, the next Part goes on to use the no-deal context, a novel remedies perspective, and overarching fiduciary duty developments since *Revlon* to argue to the contrary: that *Revlon* in fact has dramatically dwindled in importance all across the board.

IV. Revlon *Today*

A. Revlon *Fades into Another, Later Doctrine*

1. Revlon *in Historical Perspective*

As with any long-established legal doctrine, appreciating *Revlon's* original historical milieu—and subsequent changes in it—can usefully inform contemporary understandings of the doctrine. *Revlon* was orally decided by the Delaware Supreme Court on October 31, 1985 and the court's written opinion was issued on March 13, 1986.[195] As of both dates, Delaware had yet to adopt the director exculpation statute, Section 102(b)(7).[196] That provision, permitting a corporation's certificate of incorporation to absolve directors of monetary liability for breaching the duty of care,[197] became effective on July 1, 1986.[198] Thus, at the time of the *Revlon* ruling and opinion, directors were

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

196. DEL. CODE ANN. tit. 8, § 102(b)(7) (2012) (providing that the certificate of incorporation may contain "[a] provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of [the] fiduciary duty [of care] as a director").

197. *Id.*

198. 65 Del. Laws, c. 289 (1986).

fully exposed to monetary liability for duty of care breaches.[199] That is significant because the *Revlon* value-maximization objective was predicated on both the duty of care and the duty of loyalty.[200] Therefore, as to available remedies for directors failing to maximize the sales price, *Revlon*, at the time, fully contemplated potentially far-reaching damages.

The liability exposure of directors for breaching their *Revlon* duty quickly diminished, however, as exculpation provisions spread like wildfire throughout corporate America.[201] Soon, and continuing today, director exposure to monetary liability for care breaches has become quite rare.[202] Moreover, the standard of care today is fairly lax, being gross negligence,[203] which has been construed as essentially a recklessness standard.[204] Thus, while corporate officers remain personally liable for duty of care breaches,[205] directors generally face only injunctive and other equitable remedies for such breaches. And as Vice-Chancellor

199. *Id.*

200. *Revlon*, 506 A.2d at 180.

201. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 751–52 (Del. Ch. 2005) (noting that the Delaware General Assembly created a provision, for inclusion in a corporation's certificate of incorporation, to exculpate directors from personal liability for breaches of duty of care, and a majority of Delaware corporations took advantage of this provision).

202. *See id.* at 750 ("Because duty of care violations are actionable only if the directors acted with gross negligence, and because in most instances money damages are unavailable to a plaintiff who could theoretically prove a duty of care violation, duty of care violations are rarely found.").

203. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (confirming that the applicable standard of care is that of gross negligence). The *Van Gorkom* case, a rare case imposing personal monetary liability on directors for breaching the duty of care, was decided just a few months before *Revlon*. *See id.* at 893 (finding "that the director defendants breached their fiduciary duty of care" and ordering an award of damages to be entered on remand based on the court's valuation of the plaintiff class's shares).

204. *See* McPadden v. Sidhu, 964 A.2d 1262, 1274 (Del. Ch. 2008) ("Delaware's current understanding of gross negligence is conduct that constitutes reckless indifference or actions that are without the bounds of reason.").

205. *See* Gantler v. Stephens, 965 A.2d 695, 709 n.37 (Del. 2009) (noting that "although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers"); *see generally* Lyman Johnson & Rob Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75, 85–86 (2011) (noting that corporate officers may not be exculpated from liability for breaching the duty of care).

Glassock recently noted in *Koehler v. Netspend Holdings Inc.*,[206] even a duty of care breach showing irreparable harm—due to the unavailability of damages because of exculpation—may not be sufficient to warrant the remedy of a preliminary injunction.[207] Of course, liability for breaching the duty of loyalty has remained throughout. But as noted below,[208] the liability standard for breaching the duty of loyalty has itself substantially evolved (and stiffened) in Delaware since *Revlon*.

2. Revlon *and the Altered Arc of the Loyalty Doctrine*

Quite apart from the ongoing developments within the insular ambit of the *Revlon* doctrine itself, as traced in Part II, the contours of Delaware's overarching loyalty doctrine have been dramatically redrawn in recent years. In 2003, then Chancellor William Chandler denied a motion to dismiss in the high-profile *Disney* litigation, ruling that the complaint, which alleged that directors had breached their duty of good faith, sufficiently pled a wrongful "we don't care about the risks" attitude.[209] After a thirty-seven day trial, in August 2005 Chandler wrote a lengthy opinion absolving the directors of liability and further elaborating on the meaning of a director's good faith obligation.[210] This issue was important because directors could not be exculpated from monetary liability if they failed to act in good faith.[211] Exactly how the concept of good faith meshed with the traditional fiduciary duties of care and loyalty, however, had not been made particularly clear in Delaware at the time.[212]

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206. No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013).

207. *See id.* at *20, *22 (finding that irreparable harm may have occurred but declining to issue an injunction because plaintiff did not sufficiently establish the magnitude of harm).

208. *Infra* Part IV.A.2.

209. *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275, 289 (Del. Ch. 2003).

210. *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 697 (Del. Ch. 2005).

211. DEL. CODE ANN. tit. 8, § 102(b)(7) (2012).

212. *See In re Walt Disney Co.*, 907 A.2d at 753 ("Decisions from the Delaware Supreme Court and the Court of Chancery are far from clear with respect to whether there is a separate fiduciary duty of good faith."); Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal Penumbra of*

Chandler acknowledged that providing "a definitive and categorical definition" of bad faith "would be difficult, if not impossible."[213] But good faith, according to Chandler, requires "honesty of purpose [and acting] in the best interests . . . of the corporation."[214] He also stated that "intentional dereliction of duty [or] a conscious disregard for one's responsibilities, is an appropriate (although not the only) standard for . . . good faith."[215]

In mid-2006, the Delaware Supreme Court affirmed Chandler's rulings and wrote approvingly of his statements on good faith.[216] Late the same year, in *Stone v. Ritter*,[217] the supreme court again described good faith in near-identical terms to those of Chancellor Chandler and, importantly, held that good faith was not a separate duty but was a component of the duty of loyalty.[218] Thus, given widespread exculpation of directors for duty of care breaches,[219] personal liability for a breach of fiduciary duty requires either classic self-dealing behavior or "intentional" or "conscious" wrongdoing by a director.[220] That is a demanding standard. But the full implications of this doctrinal development for the seemingly separate and distinctive *Revlon* duty were unknown for another three years.

In 2009, the supreme court decided *Lyondell Chemical Co. v. Ryan*.[221] The court reversed the Chancery Court's denial of

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Delaware Corporation Law, 4 VA. L. & BUS. REV. 333, 338–43 (2009) (discussing the duty of care and the duty of loyalty in Delaware and explaining the "duty of good faith").

213. *In re Walt Disney Co.*, 907 A.2d at 755.

214. *Id.*

215. *Id.*

216. *See In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 75 (Del. 2006) (affirming the Delaware Court of Chancery's judgment).

217. 911 A.2d 362 (Del. 2006).

218. *See id* at 369–70 ("The failure to act in good faith may result in liability because the requirement to act in good faith 'is a subsidiary element[,]' i.e., a condition 'of the fundamental duty of loyalty.'" (citation omitted)).

219. *See supra* note 196 and accompanying text (discussing Section 102(b)(7)).

220. *Stone*, 911 A.2d at 369–70.

221. 970 A.2d 235, 237 (Del. 2009). For a comment on how *Lyondell* relates to earlier decisions, see generally Christopher M. Bruner, *Good Faith in* Revlon-*Land*, 55 N.Y.L. SCH. L. REV. 581 (2010/2011).

defendants' motion for summary judgment and held that the selling company directors had acted properly under *Revlon*.[222] The court noted that there is only one *Revlon* duty—"to [get] the best price for the stockholders at a sale of the company."[223] And the court quoted from *Barkan v. Amsted Industries Inc.*[224] that "there is no single blueprint that a board must follow to fulfill its duties."[225] Turning to the all-important issue of director liability for money damages for breaching the *Revlon* duty, and noting that in a liability case "the analysis is very different,"[226] the court adopted the larger good faith concept of the *Disney* and *Stone* decisions. Liability thus depended on plaintiffs showing that directors in the *Revlon* setting—however triggered—were "intentionally disregarding their duties."[227]

But the court went further in explaining just how difficult it would be under that standard to find directors personally liable for their conduct in *Revlon* mode. The court stated that such a showing, in the transactional context, required an "extreme set of facts."[228] And directors would be liable in the M&A setting, the court observed, only "if they knowingly and completely failed to undertake their responsibilities."[229] The appropriate judicial inquiry should thus be whether "directors utterly failed to attempt to obtain the best sale price."[230]

Both the actual words and the clear "music" of the *Lyondell* opinion imposed a demanding liability standard for challenging director conduct in the *Revlon* setting. Thus, in the nearly quarter century from *Revlon* to *Lyondell*, the court—with a little

222. *Id.* at 244.

223. *Id.* at 242.

224. 567 A.2d 1279 (Del. 1989).

225. *Lyondell*, 970 A.2d at 242–43 (quoting *Barkan*, 567 A.2d at 1286).

226. *Id.* at 243.

227. *Id.*; *see* Malpiede v. Townson, 780 A.2d 1075, 1083–84 (Del. 2001) (stating that although *Revlon* "imposes enhanced judicial scrutiny on certain transactions," plaintiffs must "plead sufficient facts to support the underlying claims for a breach of fiduciary duties in conducting the sale" (citation omitted)).

228. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009).

229. *Id.* at 243–44.

230. *Id.* at 244; *see also supra* note 126 and accompanying text (discussing the *Novell* decision's use of a straightforward bad faith analysis in the corporate sale setting).

help from the General Assembly[231]—substantially redrew the director liability landscape on both the duty of care and duty of loyalty fronts, and then fitted the pre-existing *Revlon* doctrine into the larger arc of those fiduciary developments.

In light of *Lyondell*, continuing assertions about the *Revlon* duty imposing a higher "reasonableness" standard of scrutiny than ordinary business judgment rule review, and requiring that directors carry an initial burden of proof,[232] are, in the personal liability context, outworn and faulty doctrinal vestiges. Today, to hold directors personally liable for damages, all plaintiffs, in all types of cases, must allege deliberate wrongdoing to state a claim for breaching the good faith component of the duty of loyalty.[233]

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231. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2012) (permitting a corporation to include, in its certificate of incorporation, a provision eliminating or limiting the personal liability of a director of the corporation for a breach of the duty of care).

232. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1993) (stating that board action in such a circumstance "is subject to enhanced scrutiny"); Koehler v. Netspend Holdings, Inc., No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (noting that "[e]nhanced scrutiny under *Revlon* is a test of reasonableness, which is 'more searching than rationality review'" (citation omitted)); Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 180 (Del. 1986) (noting that, the initial burden of proof is placed on the target board of directors to prove "they had reasonable grounds for believing there was a danger to corporate policy and effectiveness, a burden satisfied by a showing of good faith and reasonable investigation" (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985))).

233. *Supra* notes 215–20 and accompanying text; *see also In re* BioClinica, Inc. S'holders Litig., Civil Action No. 8272-VCG, 2013 WL 5631233, at *5–6 (Del. Ch. Oct. 16, 2013) (finding that the only way for plaintiffs to pursue post-closing monetary damages claim was for directors to knowingly and completely fail to undertake their responsibilities). Thus, we respectfully disagree with Vice-Chancellor Laster's recent statement that *Revlon* is a standard of judicial review. *See* Laster, *supra* note 14, at 6 ("*Revlon* does not establish special duties or impose particular conduct obligations on directors. Rather, it is a standard of review under which the extent of judicial deference given to board decisions narrows from rationality to range-of-reasonableness."). In damages actions, the demanding *Lyondell* standard is the relevant review standard. We question too the utility of the supposed distinction between "standard of conduct" and "standard of review" that Laster seeks to build on. *See generally* Lyman Johnson, *Unsettledness In Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013) (arguing that Delaware courts should directly focus on fiduciary duties when analyzing director, officer, and shareholder wrongdoing). But even by Laster's own definition of standard of review, *Lyondell* sets the pertinent review standard in the damages setting. Laster, *supra* note 14, at 25 & n.96.

This is true whether the defendant directors were operating in an M&A setting or in some completely different setting. This deftly harmonizes, on the money damages issue, *Revlon* review with the larger, recent thrust of Delaware fiduciary duty doctrine. Moreover, this also means that, if *Revlon* applies even in a no-deal context, as we have argued above, directors now face the same reduced level of personal liability risk in both the done-deal and the no-deal contexts. This is because of the singular, all-embracing liability standard for directors that emerged only long after *Revlon* and its formative progeny first appeared. In turn, this development would seem to provide further support for (or at least remove an objection to) our view that the no-deal scenario coherently fits within the *Revlon* doctrine, and that *Revlon* itself has now been absorbed, on the damages issue, into a later, more comprehensive liability standard.

Compelling as is this effort to achieve a larger unity with respect to both the contours of the *Revlon* doctrine on the done-deal/no-deal issue, and the way in which *Revlon* fits into Delaware's modern fiduciary jurisprudence, it does not entirely achieve congruence. There remains a distinctive if narrow thrust to *Revlon* that differentiates the M&A setting from all others and that also sharply distinguishes the done-deal from the no-deal scenario even within the M&A milieu. This is developed below.

B. Revlon *as a Pre-closing Remedies Doctrine*

As noted earlier, virtually all sizeable M&A transactions are challenged in court, some several times.[234] Moreover, most of these cases are settled without monetary payments and typically are brought after a deal is struck but before it is finalized.[235] At

234. *See supra* note 1 and accompanying text (detailing the number of stockholder challenges to M&A transactions in 2012). The 2013 Dell buyout was the subject of over twenty lawsuits. *See* Phil Milford, *Icahn's Fast-Track Hearing on Dell Share Buyout Delayed*, BLOOMBERG (Aug. 12, 2013, 11:20 AM), http://www.bloomberg.com/news/2013-08-12/dell-investor-icahn-seeks-fast-track-status-for-lawsuit.html (last visited Nov. 2, 2013) ("Shareholders have sued Dell officials in federal court in Houston and at least 20 other Delaware suits seeking more money are pending.") (on file with the Washington and Lee Law Review).

235. *See* DAINES & KOUMRIAN, *supra* note 1, at 6 (detailing statistics about the number of settlements that occur and how many settlements result in

this stage, plaintiffs seek initial relief other than damages. Consequently, the tougher monetary liability standard of *Lyondell* is not directly at play. In this preliminary injunction setting, therefore, *Revlon's* higher reasonableness standard of review seems to remain pertinent,[236] along with an initial director burden of proof,[237] unlike the case in the subsequent personal liability stage where these aspects are outmoded after *Lyondell*. This reveals that the stricter *Revlon* doctrine may continue to have robust legal force, but only in preliminary injunction (not damages) actions, suggesting its true current ex post role is as a limited remedies doctrine, narrowly applicable pre-closing to permit a grant of nonmonetary sanctions and to shape ensuing settlement negotiations. Even assigning *Revlon* this reduced role may be according it far too much credit, however.

In recent years, the chancery court consistently has refused to grant injunctive relief on *Revlon* claims in the pre-closing context. For the years beginning in 2008 through December 2013, of fifteen reported decisions by the chancery court involving a request for an injunction on a *Revlon* theory, only one such injunction was granted.[238] The injunction, moreover, involved a conflicted financial advisor, and it did not halt the transaction but only delayed a shareholder meeting for twenty days.[239] The

monetary benefit). This is not to say plaintiff shareholders cannot and will not seek to enjoin, prior to a deal, certain director and officer negotiating conduct thought likely to lead to a suboptimal and underpriced transaction. *Id.* at 11. This happened in mid-2013 with respect to a possible sale of Dole Food Company. *See* Glasser, *supra* note 26 (detailing the lawsuits filed against Dole Food Company, Inc.). Even before a definitive merger agreement was signed between seller Dole and buyer Robert Murdock, a 40% shareholder and CEO of Dole, shareholders sued to block any possible transaction, asserting that "the purchase price was inadequate" and that any deal "would be the product of a flawed merger process." *Id.* Such claims seem rather obviously not to present a justiciable controversy until a deal is signed, which happened only on August 12, 2013. *See* Saabira Chaudhuri & Julie Jargon, *CEO to Acquire Dole in Sweetened $1.2 Billion Deal*, WALL ST. J., Aug. 12, 2013, at B3 (discussing Dole Food Company, Inc.'s agreement to be acquired by David Murdock).

236. *See supra* note 24 (citing representative cases of *Revlon* review).

237. *See supra* note 25 (citing representative cases of *Revlon* review showing that directors have the initial burden of proof).

238. *See infra* Table A (collecting cases). The sole case in which the court granted an injunction was *In re Del Monte Foods Co. Shareholders Litigation*, 25 A.3d 813 (Del. Ch. 2011).

239. *In re Del Monte*, 25 A.3d at 844.

losing streak for plaintiffs continued in 2013.[240] For example, in May 2013, Vice Chancellor Glassock, citing similar rulings, refused to enjoin a transaction prior to a shareholder vote where plaintiffs demonstrated both a likelihood of success on the merits and irreparable harm, because there was no alternative transaction to consider.[241] Tellingly, consistent with standard preliminary injunction law, the plaintiff in these types of actions has the burden of proof, not the defendants.[242] Vice-Chancellor Glassock found plaintiffs had satisfied that burden and that the sales process was inadequate under *Revlon* but that, in balancing the equities, the existence of a significant premium, coupled with the lack of another bid, meant the shareholders should be permitted to vote on the deal.[243] Even when an injunction was occasionally granted in a "done deal" context prior to 2008, moreover, it sometimes was done for the limited purpose of only temporarily delaying the shareholder vote so that investors could be provided with additional information before voting.[244] Overall then, when seen as a limited, pre-closing remedies doctrine,

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240. *See, e.g.*, Koehler v. NetSpend Holdings, Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *24 (Del. Ch. May 21, 2013) (noting that despite making a showing of "likelihood of success on the merits of her *Revlon* claim," the "[p]laintiff . . . failed to carry her burden of persuasion that the balance of equities favors enjoining the deal"); *In re* Plains Exploration and Prod. Co. S'holder Litig., C.A. No. 8090-VCN, 2013 WL 1909124, at *11 (Del. Ch. May 9, 2013) ("The [p]laintiffs' efforts to enjoin the [m]erger must fail because they have not established a reasonable probability of success on the merits of either their *Revlon* claim or their duty of candor claims.").

241. *See Koehler*, 2013 WL 2181518, at *23–24 (citing cases where the chancery court refused to enjoin transactions under similar circumstances). "This Court has, in prior cases, refused to enjoin a premium transaction notwithstanding the fact that plaintiffs had demonstrated likely success on the merits of a claim for breach of fiduciary duty and the threat of irreparable harm." *Id*. (referring in part to *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 447 (Del. Ch. 2012), in which the court found that the plaintiff would likely prevail on the merits and that it faced irreparable harm, but declining to provide injunctive relief where no rival bid exists).

242. *Supra* note 136.

243. *See Koehler*, 2013 WL 2181518, at *23–24 (denying plaintiff's motion for a preliminary injunction because the "[p]laintiff . . . failed to carry her burden of persuasion that the balance of the equities favors enjoining the deal").

244. *See, e.g.*, *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 209–10 (Del. Ch. 2007) (granting the motion for preliminary injunction until the Netsmart board disclosed certain information).

Revlon may offer scant relief even in that setting, regardless of whether its strictures seem pretty clearly to have been violated.

Significantly, the "done-deal" setting is, in the pre-closing context, starkly different than the "no deal" scenario. In the latter, there is no deal to enjoin. Thus, even if the no-deal scenario is indeed sensibly regarded as still triggering *Revlon* duties—as we believe it is, for the doctrinal and policy reasons identified in Part III—it has no salience for remedies. As to damages, a plaintiff in a no-deal case, like any *Revlon* plaintiff—indeed, like *any* plaintiff—must overcome the formidable *Lyondell* standard.[245] As to injunctive relief, however, there being, by definition, no proposed transaction in the no-deal context, there simply is nothing to enjoin. Thus, faulty director behavior in the M&A setting that nonetheless produces a transaction is at least potentially immediately sanctionable—perhaps even halted, however unlikely that outcome—compliments of *Revlon*, while faulty director conduct in an M&A setting that does not produce a transaction is not. If director failure in the latter setting threatens to imperil the financial well-being of the company, there is little, from a fiduciary duty standpoint, that a shareholder (or other stakeholder) can do at that stage.

Moreover, it is unclear how *Revlon* bears on director behavior where, having entered the *Revlon* mode, directors seek to exit it because of an improved company outlook. If *Revlon* is triggered because directors did make a determined effort to sell corporate control or effectuate a break-up, *Revlon* teaches that maximizing immediate shareholder value is the only appropriate metric for evaluating director conduct.[246] But in deciding whether to continue a sales process or halt it, in light of brightening company prospects, may directors, once in *Revlon* mode, consider the well-being of the corporate enterprise itself (or long-term shareholder value) or must they stay riveted solely on short-term shareholder value?[247] Courts and M&A lawyers have given no answer to this question, or even asked it.

By approaching *Revlon* from this remedies perspective, we see two important points. First, the boundary puzzle of what

245. *See supra* notes 221–30 and accompanying text (analyzing *Lyondell*).

246. *Supra* note 57 and accompanying text.

247. *Supra* note 57 and accompanying text.

sensibly and doctrinally falls inside and outside the *Revlon* mode still remains. That is to say, the longstanding issue of what particular forms of done deals will and will not trigger *Revlon* persists.[248] And the even more basic boundary question of whether an attempted (but failed) sales effort similarly triggers *Revlon* review reveals a profound doctrinal shortcoming—i.e., directors who set out to sell a company may be assessed differently, and face different sanctions, based on whether they succeed or not. That is a puzzling and highly unsatisfying outcome, both as a matter of sound doctrine and good policy. It reveals, however, the general inability of courts to deal with corporate inaction, even within the confined context of an attempted but failed or abandoned transaction. Second, by adopting a remedies perspective on this issue we see that the stakes in the entire ongoing *Revlon* debate are, in fact, much smaller than imagined: ex post, only pre-closing relief is up for grabs anyway. The *Revlon* doctrine today may retain a certain cosmetic luster, but it lacks remedial clout. In light of *Revlon's* diminished significance, an appraisal of the doctrine's remaining value is in order.

C. The Remnants of Revlon

The *Revlon* doctrine has, since its inception, taken on a doctrinally insular life of its own.[249] The various intradoctrinal developments associated with the unfolding *Revlon* doctrine have, regrettably, obscured the larger story of its overall marginalization. Using a remedies vantage point, we see that *Revlon* carries no special significance for damages claims and is most germane to pre-closing relief in "done deals." Even there, almost invariably no remedy is granted. Thus, as an ex post remedies matter, *Revlon* has dramatically faded in usefulness. In light of that conclusion, we make several observations about *Revlon* and what the tale of its decline teaches us.

First, we have emphasized the ex post remedies perspective on *Revlon*. But there also is an ex ante frame of reference that

248. *See supra* notes 11–14, 37–40 and accompanying text (describing scholarly attacks on *Revlon* jurisprudence).

249. *See supra* Part II (tracing the development of *Revlon* doctrine).

sheds light on its enduring, if more modest, value in today's M&A practice and law. Presumably, when directors make a considered decision to sell a company as the best strategic option, they fully intend to succeed in that course of action. Success, of course, is not entirely within their control. But to the considerable extent that directors do influence events, their aim is to sell, assuming that, after running a good process, such a strategic alternative remains superior to any other.

Given the *Revlon* value-maximizing goal in that setting, one might argue that it is in equity investors' interests for directors to believe that their conduct will be closely scrutinized for reasonableness if a deal is struck, at least pre-closing if not in a later damages action. Gauging their conduct against such a higher than normal benchmark—because they are so advised by legal counsel—may, ex ante, result in better performance. It is behaviorally doubtful that directors who have carefully decided to sell would slack off for the reason that if they perform poorly enough no deal will be done at all, obviating any injunctive action. And performance that is too deficient might run afoul of even *Lyondell*'s tough damages standard. Thus, believing that, having decided to sell, their conduct will be more closely scrutinized than usual, and that they may shoulder a burden of proof, directors may perform best if they believe the done deal and no-deal outcomes will be reviewed under the same standard, even if remedies may differ. Perhaps this will lead to better effort throughout the sale process before it is known (or even knowable) whether or not a deal can be struck.

As one example of this prophylactic effect on sales practices, in 2013 numerous agreed deals included "go shop" provisions that permitted the selling company directors to actively seek higher bids post-signing.[250] These were included in acquisition agreements for Dell, Dole, and Steinway, for example.[251] In the

250. Michael Glasser, *M&A Terms: Go-Shops Remain Critical to Maximizing Shareholder Value in a Flat Market*, BUS. LAW CURRENTS (Oct. 2, 2013), https://currents.westlawbusiness.com/Article.aspx?id=76d18fab-7a50-4361-bbcd-a6c53c1c9b8e&cid=&src=&sp= (last visited Nov. 10, 2013) ("Go-shop provisions were imperative to ensure that the CEOs of Dell and Dole maximized shareholder value in light of the conflicts of interest present in the deals.") (on file with the Washington and Lee Law Review).

251. *Id.*

Dole deal, no rival bid emerged, while in the Dell and Steinway sales, alternative bids were generated.[252] The Dell agreement expressly linked the go-shop provision to the directors expressed goal of seeking "to ensure the best outcome for shareholders."[253] That, of course, is the gist of *Revlon*.

To be sure, such an ex ante outlook invites the question of whether, lacking meaningful correlative remedial relief, *Revlon* remains a legally enforceable directive at all rather than a customarily adhered to but ultimately nonenforceable norm or mere aspirational standard. But that discontinuity may exist more generally in the fiduciary duty area. The duty of loyalty, for example, generally and unremittingly demands that the best interests of the corporation and its stockholders should be the touchstone for director conduct.[254] Yet, to obtain remedial relief for breaching that duty, significant conflicts of interest or deliberate wrongdoing are required.[255] We do not ultimately believe the ex ante rationale is sufficient to preserve *Revlon* as a distinctive standard, but we allow that it has at least some force.

Second, although from a transactional lawyer's counseling perspective, *Revlon* may usefully guide advice-giving, the lack of an ex post remedial payoff for plaintiffs' lawyers seems to offer them no incentive to bring cases at all, much less to challenge virtually every transaction.[256] Why press cases where money damages and the granting of injunctive relief are so unlikely? Indeed, why are *more* rather than fewer challenges being leveled

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252. *Id.*

253. *Id.* In 2013, moreover, buyers are paying an average premium of 29%. Stephen Grocer, *Deals Are at a Premium*, WALL ST. J., Dec. 9, 2013, at C3 (on file with the Washington and Lee Law Review). This suggests, at a time of high company valuations, that selling company directors, generally, take seriously the goal of obtaining a good sales price.

254. *See* Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law,* 28 DEL. J. CORP. L. 27, 71 (2003) ("[D]irectors in the decision-making context can (and should) emphasize the affirmative dimension of loyalty, stressing the importance of identifying and then doing what is *best* for the enterprise . . . not simply . . . refrain[ing] from *disloyal* behavior." (emphasis added)).

255. *See supra* notes 209–20, 226–30 and accompanying text (explaining that the remedial relief to breaching the duty of loyalty generally requires director self-dealing or intentional disregard of duties).

256. *See* DAINES & KOUMRIAN, *supra* note 1, at Highlights ("Attorney fee awards in disclosure-only settlements have decreased since 2009.").

against deals in recent years, the very period over which the likelihood of a remedy has slackened?[257]

This is a puzzle. Possibly, the M&A litigation market is inefficient and the probability of failure has not been quantified, leading to an overproduction of lawsuits problem. More likely, *Revlon* cases retain pre-closing settlement value and obtaining modest, nonmonetary relief[258]—such as additional disclosure—may be sufficient to induce resolution and also warrant court-approved attorneys' fees in an overall settlement. This does relatively little for investors, of course, but it does benefit plaintiffs' lawyers. On the defense side, such fees are just a bothersome but necessary transaction cost to settle an action and move it to closing.[259] Defense lawyers may lack a reason to resist even if they fully appreciate the low likelihood of a remedial sanction under *Revlon*. Winning is costly, time-consuming, and introduces heightened risk of not closing. Thus, while plaintiffs' fees have gone down in settled cases in recent years,[260] only if, as was done recently,[261] courts more closely monitor the granting of attorneys' fees, will this ingrained practice subside.

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257. *See supra* notes 1–2 (indicating an upsurge in litigation since 2005).

258. *See supra* notes 3–4 and accompanying text (explaining how the vast majority of lawsuits settle with disclosure-only accords).

259. The average time between filing a lawsuit and approval of a settlement is a mere 42 days in these types of cases. DAINES & KOUMRIAN, *supra* note 1, at 5.

260. DAINES & KOUMRIAN, *supra* note 1, at 9.

261. For example, in a letter ruling in March 2013, Vice-Chancellor Glasscock was asked to approve a settlement in *In re PAETEC Holding Corp. Shareholder Litigation*, Civil Action No. 6761-VCG, 2013 WL 1110811 (Del. Ch. Mar. 19, 2013). *See* Andrew J. Noreuil, *Will Recent Decisions of the Delaware Chancery Court Finally Curb Excessive M&A Litigation?,* LEXOLOGY (Sept. 9, 2013), http://www.lexology.com/library/detail.aspx?g=b50ad233-b4c3-4521-bde9-c74219 072905 (last visited Oct. 30, 2013) (discussing several 2013 cases from Delaware Chancery Court) (on file with the Washington and Lee Law Review). In the proposed settlement, the court noted that, as is customary, the defendants agreed not to oppose a fee request by plaintiffs' counsel up to a specified amount. *Id.* Vice-Chancellor Glasscock rejected plaintiffs' argument that judicial scrutiny of unopposed fee requests was inappropriate. *Id.* Expressing concern about plaintiffs obtaining trivial benefits due to defendants' desires to obtain a release of claims, Glasscock found, with one exception, that the additional agreed disclosures did not warrant any attorneys' fees. *Id.* Chancellor Strine, in a March 2013 ruling that denied an unopposed motion to settle a shareholder action because it did not provide sufficient benefits to justify a release of claims, also declined to certify the class and denied the

Third, the chronicling of *Revlon's* unacknowledged decline is a cautionary tale about keeping a more dynamic, all-encompassing perspective on particularized fiduciary doctrines, in light of larger doctrinal shifts. Relatedly, Delaware courts frequently, if gradually, rework earlier precedents into the larger fabric of their developing fiduciary jurisprudence.[262] During the transition, a particular doctrine may appear to express more legal force than it carries in reality. The *Revlon* doctrine, when viewed in silo-like isolation, thus seems to retain unusually robust rhetorical force; but it actually has been drained of genuine remedial clout. This phenomenon may itself portend imminent change.

Finally, *Revlon's* central teaching on short-term value maximization may be ripe for rethinking. Chancellor Strine has referred to "*Revlon's* myopic focus on immediate value"[263] and asked why, subject to complying with the duty of loyalty, a board of directors should not be free to "choose the deal it believed was best on a long-term basis for stockholders."[264] Furthermore, the immediate share price maximization norm may not be so easily cabined within the sale of company context. It may seep into the larger corporate milieu, and lead directors to overly focus on short term rather than long-term considerations even when not in the sale setting.

Certainly, at the time *Revlon* was decided, and continuing thereafter,[265] Delaware courts have routinely stated that the proper corporate objective was to act in the best interests of the

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application for attorneys' fees. *In re* Transatl. Holdings Inc. S'holder Litig., C.A. No. 6574-CS, 2013 WL 1191738, at *1 (Del. Ch. Mar. 8, 2013).

262. *See, e.g.*, Tara L. Dunn, *The Developing Theory of Good Faith in Director Conduct: Are Delaware Courts Ready to Force Corporate Directors to Go Out-of-Pocket After* Disney IV*?*, 83 DENV. U. L. REV. 531, 562–63 (2005) (discussing how the Delaware Chancery Court approached the development of a corporate good faith doctrine); *see generally* Johnson, *supra* note 56 (describing how the common law method of judicial decisionmaking serves to signal future changes).

263. *In re* Synthes S'holder Litig., 50 A.3d 1022, 1048 n.117 (Del. Ch. 2012).

264. *Id.*

265. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (recognizing that a board is to act in the best interests of the corporation and its stockholders); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 37, 41 (Del. Ch. 2013) ("[T]he duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term . . . .").

corporation and its stockholders over the long term, not the short term. Whether the focus is short-term or long-term value, however, courts are institutionally competent only to examine whether, in pursuing the proper objective, directors fulfilled or breached their fiduciary duties.[266] Courts themselves cannot otherwise monitor or mandate achievement of any stated objective.[267] It remains just that, an articulated objective or goal for directors to pursue, to be assessed in light of alternative courses of action. A corporate objective is not, however, an enforceable and distinctive duty in its own right.[268]

To the extent *Revlon* is grounded on concerns about director conflicts,[269] traditional fiduciary duty doctrine is designed to address such concerns, upon the usual showings, as seen in *Lyondell*.[270] And while several Delaware decisions analogize the *Revlon* duty to a trustee's duty to get the best price when selling an asset,[271] the parallel is inapt. Even in a corporate break-up

266. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43–45 (Del. 1993) (stating that "[i]n the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end").

267. The litigation between eBay and Craigslist made this clear. Former Chancellor Chandler nullified certain of Craigslist's defensive measures, but he did not—and could not—alter its core business strategy of not charging for most of its classified ad space. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010). Although Vice-Chancellor Laster refers to *eBay*, he does not point out that the decision did not alter that company's approach to conducting its business in a non-maximizing of profits manner. Laster, *supra* note 14, at 27.

268. For this reason, we disagree with Laster that a corporate objective—whatever it might be—necessarily is the same as (or an aspect of) the directors' fiduciary duty of loyalty. *See* Laster, *supra* note 14, at 25–26 (arguing that the directors' objective of maximizing shareholder value is part of the duty of loyalty). Corporate goals or objectives are distinct from fiduciary duties.

269. *See, e.g.*, *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012) (recognizing that *Revlon* was animated by concerns that directors' "actions are not compromised by impermissible considerations, such as self-interest"); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (identifying *Revlon*'s "heightened scrutiny" as "rooted in a concern that the board might harbor personal motivations . . . that differ from what is best for the corporation and its stockholders"). Inasmuch as *Revlon* also was grounded on the director duty of care, the existence of director conflicts is not the sole policy rationale of that decision. *See* Manesh, *supra* note 12, at 2.

270. *See supra* notes 221–30 and accompanying text (discussing *Lyondell*).

271. *See* Forsythe v. ESC Fund Mgmt. Co. Inc., C.A. No. 1091-VCL, 2013 WL 458373, at *2 n.3 (Del. Ch. Feb. 6, 2013) ("Although the value-maximizing

transaction, it is not individual assets that are being sold; it is a business unit or division, having distinctive value as an intact business. And in a sale of stock deal, the corporation as an entity is likewise being sold intact, not as a parceling out of individual assets. As for directors being "trustees" for shareholders in the sale of their individually held stock, that simply is not the nature of the director-shareholder relationship. Moreover, Delaware has never articulated a "trustee-like" duty when corporate directors act to *purchase* another company, even though a large majority of acquisitions fail,[272] to the detriment of shareholders. Consequently, the usual metric of asking whether directors complied with their fiduciary duties in assessing which, of several possible strategic options, was best for the corporation as a business (whether as a whole or in units) and its shareholders remains feasible and appropriate.[273]

If a sharper focus on shareholder benefit is preferred to an emphasis on the interests of the company itself, the proper metric is the best available option for shareholders over the long term. If

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principle is typically associated with [*Revlon*], it is not unique to that context."); *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 999 (Del. Ch. 2005) (noting that the obligation to maximize stockholder value "is rooted in old trust principles"); Paramount Commc'ns Inc. v. Time, Inc., No. 10866**,** 1989 WL 79880, 15 DEL. J. CORP. L. 700, 741 (Del. Ch. July 14, 1989) ("*Revlon* was not a radical departure from existing Delaware, or other, law (i.e., it has 'always' been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price) . . . ."); Freedman v. Rest. Assocs. Indus., Inc., No. 9212, 1987 WL 14323, 13 DEL. J. CORP. L. 651, 661 (Del. Ch. Oct. 16, 1987) ("The bedrock principle that a board owes a duty to shareholders to act only in pursuit of their interests is the principle that explains *Revlon*."). Chancellor Allen went on to note in *Freedman v. Restaurant Associates Industries, Inc.*, that "[w]here the company is to be sold, it cannot be in conformity with that obligation to defeat a higher offer in favor of a lower one regardless of other considerations. So understood, *Revlon* is consistent with a very long line of cases." *Id.*; *see also* Leo E. Strine, Jr., *Categorical Confusion: Deal Protection Measures in Stock-for-Stock Merger Agreements*, 56 BUS. LAW. 919, 927 n.25 (2001) (stating that "[t]he *Revlon* principle grows out of the traditional principle that fiduciaries must sell trust assets for their highest value" (citing Wilmington Trust Co. v. Coulter, 200 A.2d 441, 448 (Del. 1964); Robinson v. Pittsburgh Oil Ref. Corp., 126 A. 46, 49 (Del. Ch. 1924))).

272. *See generally* PETER CLARK & ROGER MILLS, MASTERMINDING THE DEAL (2013).

273. *See supra* note 265 (observing that the standard by which directors are evaluated for duty of loyalty purposes is whether they are acting in the "best interests of the corporation and its stockholders").

directors believe a high premium sales price is superior to operating independently, they still presumably are and should be making that assessment based on what they consider to be the best way to derive value from the business for shareholders over the long run. In certain cases, that time horizon may mean procuring the best sales price now, but in many cases it means not selling. The long-term time horizon remains the same, however. Where there are two or more bids in the sale context—the facts in the *Revlon* and *QVC* cases—if a sale, rather than operating independently, sincerely is thought to be the best way to derive value, then obviously the better of the two bids is value maximizing, but only after the sale option is first determined to be the best value-maximizing option, compared to all others, over the long run. In this way, the overall director objective always is to achieve the best long-term value; when that goal is best achieved via a sale, the best sale price by definition achieves the greatest long-term value. If that is all that *Revlon* and its progeny mean, it is misleading to focus only on the value-maximization aspect of the sale itself, and neglect the fact that that very choice must itself, first, be determined to be the best way to maximize long term value.[274]

Delaware's substantial weakening of *Revlon*'s remedial impact, while, at the same time, rhetorically adhering to its stiffer standards, suggests a judicial willingness to harmonize *Revlon* not only with larger fiduciary doctrine, as we have argued, but perhaps to align it as well on the underlying corporate objective issue. The aim may be to eventually synchronize the corporate objective whether a company is or is not for sale, thus entirely obviating any per se concern as to whether a company is or is not in *Revlon* mode.[275] *Revlon* would then become irrelevant, not just insipid.

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274. For Vice-Chancellor Laster's recent and very helpful explanation of this line of analysis, see *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 37 (Del. Ch. 2013) (discussing the "perpetual existence" of Delaware corporations and the resulting implications for long-term value considerations). *See also* Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764, 777–83 (2012) (emphasizing the long history of precedent supporting a long-term value focus for corporate action).

275. This is the upshot of Vice-Chancellor Laster's recent argument as well. *See generally* Laster, *supra* note 14. However, he does so by extending *Revlon*

Two developments may hasten this reconsideration. First, a 2013 amendment to Delaware's merger statute will permit sales transactions to go forward without a shareholder vote, under certain conditions.[276] In those types of deals, Delaware judges will not be able at the injunction stage to sidestep likely *Revlon* breaches and rule that shareholders should be permitted to vote on the approved deal—there will be no such vote. The judges will then have to grapple with whether apparent violations of *Revlon*, coupled with director exculpation for duty of care breaches, will lead them to enjoin a board-approved deal. Provided that no other deal is on the scene, and that the directors did nothing wrong defensively under *Unocal* to preclude a rival bid,[277] it is hard to believe courts will not defer to a deal approved by an independent board.

Second, Delaware's new benefit corporation statute permits electing "benefit corporations" to expressly advance a blend of investor and other interests.[278] Directors must balance the interests of shareholders, the interests of those affected by the corporation's conduct, and an articulated public benefit.[279] Certainly, when those types of companies are sold, investor interests will not need to be paramount, and *Revlon* and its progeny likely will have no application to them. But the rise of benefit corporations may also prompt Delaware courts to reexamine the rightful claim of investor interests in regular business corporations, both in relation to the corporation's institutional interests as a business enterprise and with respect

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into all sale settings, whereas we do so by curtailing and abandoning *Revlon's* misguided emphasis on immediate value maximization.

276. Subject to certain conditions, Section 251(h) of the Delaware Corporation Law was amended, effective as of August 1, 2013, to permit a merger without a shareholder vote if, following a tender offer, the offeror owns at least the percentage of each class of target company stock required to approve a merger. Abbe Dienstag, et al., *DGCL § 251(h): Recent Change to Delaware Law Facilitates Two-Step Mergers*, LEXOLOGY (Sept. 13, 2013), http://www.lexology.com/library/detail.aspx?g=def937a9-ee43-40a9-9ab1-85869 3d70759 (last visited Oct. 30, 2013) (on file with the Washington and Lee Law Review); *see also* DEL. CODE ANN. tit. 8, § 251(h) (2012); 79 Del. Laws, c. 72, § 6 (2013) (inserting § 251(h) into Title 8 of the Delaware Code).

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

278. DEL. CODE ANN. tit. 8, § 362 (2012).

279. *Id.* § 365.

to whether boards should ever be directed by courts to manage companies to benefit shareholders over the short term rather than the long run. In other words, Delaware courts should speak to why *Revlon* demands, if it still does, a different corporate objective than the normal long-term focus. As we have emphasized, however, far more important than what courts say, is what, from a remedies perspective, they actually do.[280]

V. Conclusion

Over the past several years, we observe a paradox in M&A deal litigation. The number of challenges to done deal transactions has risen dramatically, but the number of successful *Revlon* claims—those procuring a judicial remedy—has plummeted. Evidently, there is either an information inefficiency in the lawsuit market about the dismal success rate, or plaintiffs (and their counsel) are imposing a transaction cost on moving deals from signing to closing that defendants seem willing to pay.[281] Only stricter judicial monitoring of attorneys' fees can alter that dynamic.

The larger untold story we have traced in this article is the dwindling of a cornerstone legal doctrine. Having set out to suggest, as a theory and policy matter, that *Revlon* might sensibly be extended into the no-deal context, we conclude, ironically, that there is little remedial clout to the *Revlon* doctrine in any setting. We should acknowledge this decline and stop regarding *Revlon* as a robust doctrine. This would address Chancellor Strine's recent complaint about the "now too common invocation of the iconic *Revlon* case."[282] Delaware courts should go further, however. They should, for the reasons stated, forthrightly reject *Revlon*'s faulty focus on short-term value

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280. *See supra* Part IV.B.

281. The "transaction cost" could include lower bids by buyers overall if they fear some, however modest, exposure to aiding and abetting liability and related defense costs. *See* Malpiede v. Towson, 780 A.2d 1075, 1095–96 (Del. 2001) (describing the elements of an aiding and abetting claim).

282. *In re* Morton's Rest. Grp. S'holder Litig., 74 A.3d 656, 676 (Del. Ch. 2013).

maximization.[283] Then the corporate objective in the sale setting—of whatever kind—would be the same as it is (and should be) outside the sale setting: to pursue the best option for achieving long-term value.

283. A recent academic study concluded that "our results are most consistent with the view that public firms' investment decisions are affected by managerial short-terminism." JOHN ASKER, ET AL., CORPORATE INVESTMENT AND STOCK MARKET LISTING: A PUZZLE? 27 (2013), *available at* http://ssrn.com/abstract=1603484 (last visited Jan. 8, 2014) (on file with the Washington and Lee Law Review). Possibly, *Revlon's* 1986 emphasis on immediate value maximization in certain sale settings has, regrettably, seeped into the larger corporate milieu.

TABLE A

Reported Delaware Preliminary Injunction Actions Scrutinized Under *Revlon*

January 1, 2008 through December 31, 2013

	Case	**Single bidder?**	**Injunction granted on *Revlon* claim?**
1.	David P. Simonetti Rollover IRA v. Margolis, C.A. No. 3694–VCN, 2008 WL 5048692 (Del. Ch. Jun. 27, 2008)	Multiple	Denied
2.	Maric Capital Master Fund, Ltd. v. Plato Learning, Inc., 11 A.3d 1175 (Del. Ch. May 13, 2010)	Unclear	Denied
3.	In re Dollar Thrifty S'holder Litig., 14 A.3d 573 (Del. Ch. Sep. 8, 2010)	Multiple	Denied
4.	In re Cogent, Inc. S'holder Litig., 7 A.3d 487 (Del. Ch. Oct. 5, 2010)	Multiple	Denied
5.	In re Del Monte Foods Co. S'holder Litig., 25 A.3d 813 (Del. Ch. Feb 14, 2011)	Single	Granted
6.	In re Atheros Commc'ns, Inc., C.A. No. 6124–VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011)	Multiple	Denied
7.	In re Answers Corp. S'holders Litig., C.A. No. 6170–VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011)	Single	Denied
8.	In re Orchid Cellmark Inc. S'holder Litig., C.A. No. 6373–VCN, 2011 WL 1938253 (Del. Ch. May 12, 2011)	Single	Denied
9.	In re Smurfit-Stone Container Corp. S'holder Litig., C.A. No. 6164–VCP, 2011 WL 2028076 (Del. Ch. May 20, 2011)	Single	Denied
10.	In re OPENLANE, Inc., C.A. No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sep. 30, 2011)	Single	Denied
11.	In re El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. Feb. 29, 2012)	Single	Denied
12.	In re Micromet, Inc. S'holders Litig., C.A. No. 7197–VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2012)	Single	Denied

	Case	Single bidder?	Injunction granted on *Revlon* claim?
13.	In re Delphi Fin. Grp. S'holder Litig., C.A. No. 7144–VCG, 2012 WL 729232 (Del. Ch. Mar 06, 2012)	Single	Denied
14.	In re Plains Exploration & Prod. Co. Stockholder Litig., C.A. No. 8090–VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013)	Single	Denied
15.	Koehler v. NetSpend Holdings Inc., C.A. No. 8373–VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013)	Single	Denied