**Washington and Lee Law Review Online**

Volume 71 | Issue 2 Article 6

10-2014

# Nearing 30, Is *Revlon* Showing Its Age?

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*Abstract*

*Nearly thirty years ago, in* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court famously dictated that in certain transactions involving a "sale or change in control," the fiduciary obligation of a corporation's board of directors is simply to "get[] the best price for the stockholders." Applying a novel remedial perspective to this iconic doctrine, in The Dwindling of* Revlon*, Professor Lyman Johnson and Robert Ricca argue that* Revlon *is today of diminishing significance. In the three decades since, the coauthors observe, corporate law has evolved around* Revlon*, dramatically limiting the remedial clout of the doctrine. In this Essay, I show how two recent Delaware Chancery Court decisions*—Chen v. Howard-Andersen *and* In re Rural Metro*—underscore the expansive reach of* Revlon *and, therefore, the limits of Johnson and Ricca's thesis. Instead, I suggest the dwindling of* Revlon*, if it is indeed dwindling, may be best observed from what is happening outside the pressed edges of corporate law, where other competing bodies of business law have emerged rejecting* Revlon*'s fiduciary mandate.*

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* Assistant Professor, University of Oregon School of Law. The author thanks Jacqueline Quarre, Meryl Hulteng, Thomas Marshall, and Tyler Hall for their productive research assistance on various facets of this Essay. The author is also grateful to Lyman Johnson for his frank critiques of a previous draft of this work. This Essay was made possible in part by the generous support of the John L. Luvaas Faculty Fellowship Fund. The author takes responsibility for all errors.

## *I. Introduction*

In 1986, the Delaware Supreme Court decided *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[1] In *Revlon*, the court famously dictated that in certain transactions involving the "sale or change in control" of a corporation,[2] the fiduciary obligation of the corporation's board of directors is simply to "get[] the best price for the stockholders."[3]

In the years since *Revlon* was decided, the ruling has been a continual source of interest among scholars and practitioners, with subsequent judicial decisions interpreting the *Revlon* doctrine occasionally fanning the flames of fascination.[4] Nearing

1. 506 A.2d 173 (Del. 1986). The case was orally decided November 1, 1985. The written opinion followed on March 13, 1986.

2. Although "sale or change of control" transactions are the most common types of transaction that trigger *Revlon* scrutiny, *Revlon* in fact also applies to two other categories of end-stage "break-up" transactions. *See* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) (delineating four specific transactional circumstances that trigger *Revlon* scrutiny).

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

4. *See generally* Stephen M. Bainbridge, Unocal *at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006); Christopher M. Bruner, *Good Faith in* Revlon-*Land*, 55 N.Y.L. SCH. L. REV. 581 (2010); Ronald Gilson & Reiner Kraakman, *What Triggers* Revlon?, 25 WAKE FOREST L. REV. 37 (1990);

its thirtieth birthday, however, *Revlon* has been subject to a crescendo of intensified attention. Professor Bainbridge has sought to more clearly define the types of transactions triggering the doctrine, arguing that the Delaware Chancery Court has misconstrued the supreme court's *Revlon* jurisprudence.[5] I have countered Professor Bainbridge's characterization of the high court's precedents, defending the chancery court's deft use of dictum to provide valuable guidance on the ill-defined boundaries of the doctrine.[6] Meanwhile, Professor Gevurtz has advocated for eliminating *Revlon*, arguing the doctrine lacks a sound policy basis.[7] In the opposite direction, Delaware Vice Chancellor Travis Laster has argued for the expansion of *Revlon*.[8] Beyond "sale or change in control" transactions,[9] the vice chancellor would have *Revlon* apply to all negotiated acquisitions.[10]

Into this lively discussion step Professor Lyman Johnson and Robert Ricca with *The Dwindling of* Revlon,[11] which takes a refreshingly new perspective on the doctrine. Focusing on remedies, the coauthors argue that corporate law has evolved around *Revlon*, dramatically diminishing the doctrine's importance.[12] Monetary damages require a plaintiff to meet an

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Marcel Kahan, Paramount *or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. CORP. L. 583 (1994); Morgan White-Smith, Comment, *Revisiting* Revlon*: Should Judicial Scrutiny of Mergers Depend on the Method of Payment?*, 79 U. CHI. L. REV. 1117 (2012); Richard Giovannelli, Note, *Revisiting* Revlon*: The Rumors of its Demise Have Been Greatly Exaggerated*, 37 WM. & MARY L. REV. 1513 (1996); Case Note, *Delaware Court of Chancery Imposes* Revlon *Duties on Board of Directors in Mixed Cash-Stock Strategic Merger*, 125 HARV. L. REV. 1256 (2012).

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

6. *See generally* Mohsen Manesh, *Defined by Dictum: The Geography of* Revlon-*Land in Cash and Mixed Consideration Transactions*, 59 VILL. L. REV. 1 (2014).

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

8. *See* J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 18 (2013).

9. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

10. *See* Laster, *supra* note 8, at 53–54.

11. Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167 (2013).

12. *See, e.g.*, *id*. at 195 (describing *Revlon* as a doctrine of "diminished

impossibly difficult liability standard, and equitable relief, in the form of a pre-transaction injunction, is in practice seldom granted. Thus, as a remedial matter, the pair concludes *Revlon* is today an "insipid" doctrine.[13] Questions about *Revlon*'s dictate and boundaries may subsist, "but the stakes are far smaller than many scholars, judges, and lawyers may fully appreciate."[14]

In this Essay, I show how recent Delaware Chancery Court decisions, published since *The Dwindling of* Revlon was written, underscore the expansive reach of *Revlon* and, therefore, the limits of Johnson and Ricca's thesis. Instead, I humbly suggest the dwindling of *Revlon*, if it is indeed dwindling, may be best observed from what is happening outside of corporate law than what is happening within it.

The balance of this Essay proceeds in three parts. In Part II, I outline the framework of Johnson and Ricca's analysis and the limits to their claim of *Revlon*'s dwindling significance. I do so by highlighting the liability implications of *Revlon* for boards of directors and corporate officers, as well as for expert advisors that may aid and abet directors and officers in a *Revlon* violation. Then in Part III, I suggest that the pragmatic remedial perspective that Johnson and Ricca bring to the *Revlon* literature, while helpful for appreciating the doctrine's evolution in the broader corporate law context, may be in fact the wrong perspective to take for evaluating *Revlon*'s contemporary relevance in corporate law and practice. Instead, I suggest that *Revlon*'s salience should be measured by its ex ante impact—what Johnson and Ricca recognize to be *Revlon*'s "prophylactic effect" on board decisions.[15] Taken from this perspective, *Revlon*'s core dictate seems vital rather than dwindling—so thoroughly accepted into corporate culture and practice that the doctrine seldom needs judicial enforcement. Nonetheless, I observe that, as an enforceable legal obligation, *Revlon* may be dwindling from another perspective—taken from outside of corporate law, where competing bodies of business law have emerged rejecting *Revlon*'s shareholder-focused fiduciary mandate. Finally, in Part IV, I

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relevance . . . in today's M&A law").

13. *Id.* at 222.

14. *Id.* at 173–74.

15. *Id.* at 216.

conclude briefly and commend the coauthors for their valuable contribution to the *Revlon* literature.

## *II. The Reach of* Revlon *and the Limits of Exculpation*

Johnson and Ricca's central thesis—"that there is little remedial clout" left to *Revlon* and, therefore, "[w]e should . . . stop regarding [it] as a robust doctrine"[16]—is built primarily upon two post-*Revlon* developments. First, on July 1, 1986, Delaware enacted § 102(b)(7) of the Delaware General Corporation Law (DGCL), enabling corporations to eliminate the liability of their directors for breaches of the fiduciary duty of care.[17] Since the statutory change, virtually every corporation has adopted an exculpation provision in its corporate charter.[18] Given the ubiquity of exculpation provisions, fiduciary breaches of the *Revlon* doctrine require a plaintiff-shareholder seeking monetary damages to show the defendant-directors acted in bad faith in breach of their unexculpable duty of loyalty.[19] Yet, under the Delaware Supreme Court's 2009 *Lyondell Chemical Co. v. Ryan*[20]

16. *Id*. at 224.

17. *See* DEL.CODE ANN. tit. 8, § 102(b)(7) (2013); E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 BUS. LAW. 399, 402 (1987) ("In essence, the new legislation permits a corporation, by a provision in its certificate of incorporation, to protect its directors from monetary liability for duty of care violations, i.e., liability for gross negligence.").

18. *See* J. Robert Brown, Jr. & Sandeep Gopalan, *Opting Only In: Contractarians, Waiver of Liability Provision, and the Race to the Bottom*, 42 IND. L. REV. 285, 285 (2009) (finding that all but one corporation in the Fortune 100 have provisions eliminating liability for breaches of the fiduciary duty of care); Laster, *supra* note 8, at 52 (describing "corporations without exculpatory provisions in their charters" as "rare").

19. In theory, a plaintiff-shareholder could also seek monetary damages against directors for breach of the fiduciary duty of loyalty where the directors faced a conflict of interests and approved a self-dealing transaction. But the presence of conflicted interests would alter the standard of judicial review from the enhanced scrutiny of *Revlon* to the more exacting scrutiny of entire fairness, making the conflict-of-interests scenario inapposite for *Revlon* analysis. *See In re* Rural Metro Corp. Stockholders Litig., 88 A.3d 54, 82 (Del. Ch. 2014) (Laster, V.C.) (explaining that enhanced scrutiny under *Revlon* applies in circumstances where there "are subtle structural and situational conflicts that do not rise to a level sufficient to trigger entire fairness review").

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

decision, bad faith requires "an extreme set of facts."[21] To establish bad faith, a plaintiff must show the defendant-directors were "intentionally disregarding their duties"—that "they knowingly and completely failed to undertake their responsibilities" to get the best price for the shareholders[22]—which, the coauthors observe, is a "tough damages standard."[23]

With post-transaction monetary damages all but unobtainable, *Revlon* leaves only pre-transaction injunctions as an available remedy for plaintiff-shareholders. But, here, Johnson and Ricca observe a second significant post-*Revlon* development: In recent years, "Delaware courts . . . have been extremely reluctant to grant injunctive relief even when directors likely have breached their *Revlon* duties,"[24] preferring instead to allow shareholders to vote on the challenged transaction.[25]

Added together, the coauthors conclude, DGCL § 102(b)(7), *Lyondell Chemical*, and the chancery court's reluctance to grant preliminary injunctions has meant that "as an ex post remedies matter, *Revlon* has dramatically faded in usefulness."[26] Remedially impotent, today the doctrine survives as a mere aspirational standard, not as an enforceable legal duty.[27]

While Johnson and Ricca's account of post-*Revlon* developments provides a pragmatic perspective from which to appreciate *Revlon* in the broader corporate law landscape, recent case law also reveals important limitations to the coauthors' larger thesis. This case law, decided since *The Dwindling of*

21. *Id.* at 243.

22. *Id.* at 243–44.

23. Johnson & Ricca, *supra* note 11, at 216.

24. *Id.* at 212.

25. *See, e.g.*, Koehler v. NetSpend Holdings Inc., No. 8373-VCG, 2013 WL 2181518, at *21–24 (Del. Ch. May 21, 2013) (Glasscock, V.C.); *In re* Delphi Fin. Grp. S'holder Litig., No. 7144–VCG, 2012 WL 729232, at *18–21 (Del. Ch. Mar. 6, 2012) (Glasscock, V.C.); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 447–52 (Del. Ch. 2012) (Strine, C.); Laster, *supra* note 8, at 48–49 (observing that Delaware courts defer to stockholders' decisions if stockholders are given adequate information to make a determination on the transaction).

26. Johnson & Ricca, *supra* note 11, at 215.

27. *Id.* at 174 (describing *Revlon* as a "possibly useful, but essentially nonenforceable, norm in the M&A setting"); *id.* at 217 (suggesting that rather than a "legally enforceable directive," *Revlon* exists today as a "customarily adhered to but ultimately nonenforceable norm or mere aspirational standard").

Revlon was written, illustrates in stark colors the continuing reach of *Revlon*. To understand why, it is useful to first outline the framework of the doctrine.

### *A. The Reach of* Revlon

Building upon a substantial edifice of scholarship[28] and precedent,[29] the Delaware Chancery Court—led by Vice Chancellor Laster[30]—has in recent years sought to formalize the *Revlon* doctrine. The court has done so by attempting to harmonize nearly three decades of jurisprudence interpreting and applying the Delaware Supreme Court's original 1986 decision. Emerging from these judicial efforts are two salient doctrinal facets.

#### *1. Enhanced Judicial Scrutiny and the Reasonableness Standard*

First, *Revlon* is an "enhanced" form of judicial scrutiny applied to board decisions,[31] rather than a distinctive fiduciary duty of corporate directors.[32] This enhanced scrutiny is an

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28. *See supra* notes 4–11 (citing past and recent *Revlon* literature).

29. *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009); Paramount Comm. Inc. v. QVC Network Inc., 637 A.2d 34, 43–48 (Del. 1994); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 595–96 (Del. Ch. 2010) (Strine, V.C.); *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 192 (Del. Ch. 2007) (Strine, V.C.); *In re* Toys 'R' Us, Inc. S'holder Litig., 877 A.2d 975, 999–1001 (Del. Ch. 2005) (Strine, V.C.).

30. *See* Laster, *supra* note 8; *see also* Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014) (Laster, V.C.); *In re* Rural Metro Corp., 88 A.3d 54 (Del. Ch. 2014) (Laster, V.C.); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011) (Laster, V.C.). It should be noted that Johnson and Ricca are clear in their disagreements with Vice Chancellor Laster's views on certain facets of the *Revlon* doctrine. *See, e.g.*, Johnson & Ricca, *supra* note 11, at 210 n.233. But to the extent the vice chancellor's views are articulated in opinions of the Delaware Chancery Court, they must be treated as binding legal precedent.

31. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 682–83 (Del. Ch. 2014) (Laster, V.C.) ("*Revlon* does not establish a specific set of conduct obligations . . . . Instead, *Revlon* is a standard of review . . . ."); Laster, *supra* note 8, at 6–7.

32. Although the doctrine arising from *Revlon* is sometimes referred to as "*Revlon* duties," the so-called "duty" announced in *Revlon* "is not an independent duty, but rather a restatement of directors' [foundational] duties of loyalty and

intermediate level of judicial review, more intrusive than the deferential business judgment rule that is usually accorded to board decisions made by independent, disinterested directors,[33] but less exacting than the entire fairness review applied to self-dealing transactions.[34]

Under this tripartite framework, the business judgment rule is a form of rational basis review that affords boards tremendous deference.[35] Applying a rationality standard, a court will sustain a challenged board decision as long as there is any rational explanation for how it advances the interests of the corporation.[36] At the other end of the spectrum, entire fairness is a form of strict scrutiny, in which a court gives no deference to a board's

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care." Koehler v. Netspend Holdings Inc., No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (Glasscock, V.C.). "Rather than changing the duties directors owe to stockholders, *Revlon* changes the level of [judicial] scrutiny" applied to board decisions. *Id.* at *11; *accord* Laster, *supra* note 8, at 25–33 (noting that *Revlon* does not create a special duty for boards of directors to follow).

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

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

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

34. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."); Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) ("[E]ntire fairness is the highest standard of review in corporate law.").

35. *See, e.g.*, *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) (noting that the "business judgment rule review reflect[s] a policy of maximal deference to disinterested board decisionmaking").

36. *See, e.g.*, Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1374 (Del. 1995) ("[T]he business judgment rule shields directors from personal liability if, upon review, the court concludes the directors' decision can be attributed to any rational business purpose."); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) ("A board of directors enjoys a presumption of sound business judgment, and its decisions will not be disturbed if they can be attributed to any rational business purpose."); *Dollar Thrifty*, 14 A.3d at 598 (Strine, V.C.) ("In [the business judgment rule] context, the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives.").

decision.[37] Under this form of *de novo* review, defendant-directors bear the burden of showing a challenged transaction was fair to the corporation, both in terms of process and substance.[38]

In between business judgment rule deference and exacting entire fairness lies the enhanced judicial scrutiny of *Revlon* (and its companion decision, *Unocal Corp. v. Mesa Petroleum Co.*),[39] which applies an objective, reasonableness standard to board decisions.[40] In the *Revlon* context, where a board has determined to pursue a transaction involving a "sale or change of control,"[41] the court examines the reasonableness of a board's actions in seeking the best value available to shareholders.[42] Actions or

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37. *See Dollar Thrifty*, 14 A.3d at 597 (Strine, V.C.) ("[E]ntire fairness review reflect[s] a policy of extreme skepticism toward self-dealing decisions . . . .").

38. *See Weinberger*, 457 A.2d at 711 ("The concept of fairness has two basic aspects: fair dealing and fair price.").

39. 493 A.2d 946 (Del. 1985). Under the *Unocal* standard, the target board must carry its own initial two part burden:

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

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

40. *See, e.g., Dollar Thrifty*, 14 A.3d at 597 (Strine, V.C.) ("[T]he Delaware Supreme Court's *Unocal* and *Revlon* decisions adopted a middle ground [in which] the reviewing court has leeway to examine the reasonableness of the board's actions under a standard that is more stringent than business judgment review and yet less severe than the entire fairness standard."); Koehler v. Netspend Holdings Inc., No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (Glasscock, V.C.) ("*Revlon's* enhanced scrutiny is a 'middle ground' between deference to the board under the business judgment rule and skepticism toward the board under entire fairness review. Under this middle-ground review, the directors have the burden of proving that they were fully informed and acted reasonably.").

41. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

42. *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994) (observing that in the *Revlon* context, directors of a corporation

decisions that fall outside of the range of reasonableness are, under *Revlon*, a breach of fiduciary duty owed to the corporation and its shareholders.[43]

Here, reasonableness has both a procedural and substantive component.[44] Procedurally, the court inquires into "the reasonableness of 'the decision making process employed by the directors, including the information on which the directors based their decision[s].'"[45] Importantly, "there is no single blueprint"[46] or "judicially prescribed checklist of sale activities"[47] that a board must follow in the *Revlon* context.[48] Rather, "directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there."[49]

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"have the obligation of acting *reasonably* to seek the transaction offering the best value reasonably available to the stockholders" (emphasis added)). As then-Vice Chancellor Strine has explained it:

> Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the *Revlon* standard contemplates a judicial examination of the reasonableness of the board's decision-making process . . . . [T]his reasonableness review is more searching than rationality review . . . . Although the directors have a choice of means, they do not comply with their *Revlon* duties unless they undertake reasonable steps to get the best deal.

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

43. *See In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 85 (Del. Ch. 2014) (Laster, V.C.) ("A failure to satisfy the enhanced scrutiny standard, like a failure to satisfy the entire fairness standard, establishes the existence of a breach of duty."); *id* at 89 ("The question [under enhanced *Revlon* scrutiny] is whether the Board's actions fell within a range of reasonableness. If not, then the directors breached their fiduciary duties."); *Paramount Commc'ns Inc.*, 637 A.2d at 45 (observing that, under *Revlon* enhanced scrutiny, courts "will determine if the directors' decision was, on balance, within a range of reasonableness").

44. *See* Robert T. Miller, *Journeys in* Revlon*-Land with a Conflicted Financial Advisor:* Del Monte *and* El Paso 5 (Univ. of Iowa Coll. of Law Legal Studies Research Paper Series, Paper No. 12-24, 2012), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2156488## (identifying the distinct procedural and substantive facets of *Revlon*'s reasonableness inquiry).

45. Chen v. Howard-Anderson, 87 A.3d 648, 673 (Del. Ch. 2014) (Laster, V.C.) (quoting *Paramount Commc'ns Inc.*, 637 A.2d at 45).

46. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989).

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

48. *See* Laster, *supra* note 8, at 20 (noting that directors do not need to perform specific judicially mandated actions to satisfy their duties under *Revlon*).

49. *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 595–96 (Del. Ch. 2010)

Substantively, the court scrutinizes "the reasonableness of the directors' action[s] in light of the circumstances then existing."[50] The key substantive question is "whether the directors made a reasonable decision, not a perfect decision. If a board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination."[51]

### *2. Liability Standard for Monetary Damages*

Even when a court finds that directors subject to enhanced *Revlon* scrutiny breached their fiduciary duty by undertaking an unreasonable sale process, if what the plaintiff seeks in a lawsuit is monetary damages, then the court must make a second inquiry. This second inquiry is a consequence of DGCL § 102(b)(7) and the ubiquitous exculpation provisions found in corporate charters adopted pursuant to the statute.[52] DGCL § 102(b)(7) enables corporations to eliminate director liability for breaches of the fiduciary duty of care, but not for breaches of the fiduciary duty of loyalty or its subsidiary obligation of good faith.[53]

Thus, when the court finds there has been a *Revlon* breach, the court must further determine the *reason for the unreasonableness* by the fiduciaries—whether it was an

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(Strine, V.C.); *see also In re* Pennaco Energy, Inc., 787 A.2d 691, 705 (Del. Ch. 2001) (Strine, V.C.) ([T]he court['s] . . . task is to examine whether the directors have undertaken reasonable efforts . . . and not to determine whether the directors have performed flawlessly.").

50. *Chen*, 87 A.3d at 673 (quoting Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994)).

51. Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994); *see also In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1000 (Del. Ch. 2005) (Strine, V.C.) ("[T]he enhanced judicial review *Revlon* requires is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith.").

52. *See supra* notes 17–18 and accompanying text.

53. DEL. CODE ANN. tit. 8, § 102(b)(7) (2013); *see* Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (stating that the duty of corporate directors to act in good faith "is a subsidiary element . . . of the fundamental duty of loyalty" (internal quotation marks omitted)).

exculpable breach of care or an unexculpable breach of loyalty.[54] If the board made unreasonable decisions as result of negligence or even gross negligence, then the directors are likely exculpated, despite a breach of the fiduciary duty of care.[55] If, however, the board made unreasonable decisions as a result of conflicted interests or bad faith, then the directors may face personal liability.[56]

Notably, this second inquiry under *Revlon* is only necessary if a plaintiff is seeking monetary damages from the corporation's board of directors. DGCL § 102(b)(7) has no application when a plaintiff is seeking an equitable remedy, such as an injunction, rather than monetary damages.[57] Unlike damages, a showing that a board's actions in pursuing a *Revlon* transaction were unreasonable—*for any reason*—permits the court to grant an injunction.[58]

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54. *See, e.g.*, *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 85 (Del. Ch. 2014) (Laster, V.C.) ("[T]he existence of a breach of duty . . . 'has only a crude and potentially misleading relationship to the liability of any particular fiduciary' . . . [because an] 'exculpatory charter provision would require an examination [of each director's] state of mind, in order to determine whether they breached their duty of loyalty.'" (citation omitted)). As Vice Chancellor Laster has explained, "[Exculpation] does not equate to an implicit finding that the directors did not breach their duties. Directors whose actions fail to pass muster under the applicable standard of review have breached their fiduciary duties, even though they are not liable for damages when exculpation applies." *Id.* at 86 (citation omitted).

55. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 685–86 (Del. Ch. 2014) (Laster, V.C.) (granting summary judgment in favor of certain outside directors in a claim for damages because the alleged breach of *Revlon* implicated a breach of the directors' exculpated fiduciary duty of care and not unexculpated duty of loyalty or good faith).

56. *See, e.g.*, *id.* at 686–87 (denying summary judgment in favor of an inside director in a claim for damages because the alleged breach of *Revlon* implicated a breach of the inside director's unexculpated duty of loyalty or good faith).

57. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2013) (allowing a charter "provision eliminating . . . personal liability . . . for *monetary damages*" (emphasis added)); Veasey et al., *supra* note 17, at 403 (explaining that exculpation under DGCL § 102(b)(7) does not affect the availability of injunctions or recessions); Gevurtz, *supra* note 7, at 1544 ("[W]aivers of [monetary damages under DGCL § 102(b)(7)] do not apply to actions pursuing an injunction.").

58. *See, e.g.*, *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 836, 844 (Del. Ch. 2011) (granting an injunction on the court's preliminary finding that the board had conducted an unreasonable sale process without further

### *B. The Limits of Exculpation*

Having now traced the doctrinal outlines of *Revlon* and the implications of DGCL § 102(b)(7), we can explore the limits of Johnson and Ricca's thesis of a dwindling doctrine. These limits track the limits of exculpation under DGCL § 102(b)(7). Specifically, exculpation does not protect bad faith directors, corporate officers, or corporate advisors such as investment banks or law firms. Moreover, as recent case law palpably demonstrates, these limits are consequential, not merely academic.

#### *1. Directors with Improper Motives*

As described above, even when a board conducts an unreasonable sale process, DGCL § 102(b)(7) shields directors from personal liability for any carelessness or even gross negligence despite the breach of fiduciary duty under *Revlon*.[59] But directors are not protected from personal liability for an unreasonable sale process that is the result of their bad faith[60]—a breach of the unexculpable fiduciary duty of loyalty.[61] Johnson and Ricca, of course, recognize this good faith limitation to exculpation.[62] Indeed, the pair crisply details the doctrinal evolution of the good faith concept under Delaware law,[63] from

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judicial inquiry into whether the unreasonable process arose from a breach of fiduciary care or loyalty); *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 199, 210 (Del. Ch. 2007) (same). Of course, to obtain a preliminary injunction before a transaction closes, a plaintiff also "must demonstrate: (1) a reasonable probability of success on the merits; (2) that they will suffer irreparable harm if an injunction does not issue; and (3) that the balance of the equities favors the issuance of an injunction." *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 435 (Del. Ch. 2012).

59. *See supra* Part II.A.2.

60. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2013).

61. *See* Stone *ex rel*. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) (explaining that "the fiduciary duty violated by [bad faith] conduct is the duty of loyalty").

62. *See* Johnson & Ricca, *supra* note 11, at 207–11 (discussing the evolution of the good faith doctrine under Delaware law).

63. *See id*.

the *Disney* litigation,[64] to *Stone v. Ritter*,[65] and ultimately to *Lyondell Chemical*. But the coauthors focus upon only the latter decision's import on the *Revlon* doctrine.

Specifically, the coauthors interpret *Lyondell Chemical* to impose a demanding liability standard for bad faith in the *Revlon* context[66]—one in which defendant-directors will not be personally liable unless they "utterly failed to attempt to obtain the best sale price," thus "intentionally disregarding their duties."[67] But the chancery court's recent *Chen v. Howard-Andersen*[68] decision reveals the problem with such an expansive interpretation of *Lyondell Chemical*. What *Chen* makes clear is that plaintiffs may show bad faith in other circumstances, much less stringent than *Lyondell Chemical*'s "utterly failed to attempt" standard that Johnson and Ricca emphasize in support of their dwindling thesis.

*Chen* involved the acquisition of Occam Networks by Calix, both at the time publicly traded Delaware corporations, pursuant to a transaction in which Occam shareholders received consideration comprised of 49.6% cash and 50.4% stock in Calix.[69] Alleging, among other things, a bad faith breach of *Revlon* during the process leading up to the transaction, the plaintiffs, former shareholders of Occam, sought monetary damages against the defendants, former directors, and officers of Occam.[70] In response, the defendants invoked Johnson and Ricca's interpretation of

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64. *In re* Walt Disney Co. Derivative Litig, 825 A.2d 275 (Del. Ch. 2003); *In re* Walt Disney Co. Derivative Litig, 907 A.2d 693 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006).

65. 911 A.2d 362 (Del. 2006).

66. *See* Johnson & Ricca, *supra* note 11, at 209 ("[T]he *Lyondell* opinion imposed a demanding liability standard for challenging director conduct in the *Revlon* setting.").

67. *See id.* ("[D]irectors would be liable in the M&A setting, the [*Lyondell*] court observed, *only 'if* they knowingly and completely failed to undertake their responsibilities.' The appropriate judicial inquiry should thus be whether 'directors utterly failed to attempt to obtain the best sale price.'" (emphasis added) (quoting Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243–44 (Del. 2009))).

68. 87 A.3d 648 (Del. Ch. 2014) (Laster, V.C.).

69. *Id.* at 667. Whether a transaction in which target shareholders receive a mix of cash and stock in a publicly traded acquirer would trigger *Revlon* scrutiny is itself a topic of debate. *See* Manesh, *supra* note 6, at 8–28 (discussing the issue).

70. *Chen*, 87 A.3d at 666–67.

*Lyondell Chemical*—that the plaintiffs' *Revlon* claim must fail because, despite any flaws in the sale process, the plaintiffs cannot show that the Occam board "utterly failed to attempt to obtain the best sale price."[71]

Vice Chancellor Laster squarely rejected this broad construction of *Lyondell Chemical*.[72] The Delaware Supreme Court's earlier *In re Walt Disney Co. Derivative Litigation*[73] decision, the vice chancellor reminded, outlined a number of nonexclusive circumstances that may be characterized as bad faith.[74] *Lyondell Chemical*'s "utterly failed" articulation addressed only one such circumstance: that involving an "intentional dereliction of duty, a conscious disregard for one's responsibilities" as a fiduciary.[75] The *Disney* court, however, also noted other bad faith circumstances, including "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation"[76]—a facet of good faith also recognized by the subsequent *Stone* decision.[77] To be sure, Johnson and Ricca identify this other facet of fiduciary good faith in their recounting of *Disney* and *Stone*.[78] But the coauthors do not link it to the *Revlon* setting, focusing instead only upon *Lyondell Chemical*'s "utterly failed" scenario.[79]

But the upshot of *Chen* is that the circumstances under which a plaintiff can show bad faith and, thus, seek monetary damages, are broader than *Lyondell Chemical*'s "utterly failed" scenario.[80] Aside from showing that defendants consciously

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71. *See id*. at 680 (quoting Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 244 (Del. 2009)).

72. *See id*. at 680–84 (discussing *Lyondell Chemical*).

73. 906 A.2d 27 (Del. 2006).

74. *See* Chen v. Howard-Anderson, 87 A.3d 648, 683 (Del. Ch. 2014).

75. *See id.* (quoting Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 240 (Del. 2009)).

76. *Disney*, 906 A.2d at 67.

77. *See* Stone *ex rel*. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369 (Del. 2006).

78. *See* Johnson & Ricca, *supra* note 11, at 208 ("[G]ood faith, according to [Chancellor] Chandler [in *Disney*], requires 'honest of purpose [and acting] in the best interests . . . of the corporation.").

79. *See id*. at 216 ("[T]he *Lyondell* opinion imposed a demanding liability standard for challenging director conduct in the *Revlon* setting.").

80. *See, e.g.*, SULLIVAN & CROMWELL LLP, *CHEN V. HOWARD-ANDERSON*:

disregarded their fiduciary duty to get the best price, plaintiffs may also establish bad faith by showing that defendants acted unreasonably due to an improper motive—"a purpose other than that of advancing the best interests of the corporation."[81]

Unlike the "utterly failed" standard, the scope of this "improper motive" standard for bad faith is quite broad. Of course, a fiduciary may be improperly motivated by personal financial interests that come at the expense of the corporation.[82] But improper motives may also arise from beyond simple financial considerations. "[A] range of human motivations can inspire fiduciaries . . . to be less than faithful to their contextual duty to pursue the best value for the company's stockholders."[83] "Greed is not the only human emotion that can pull one from the path of propriety; so might hatred, lust, envy, revenge, . . . shame or pride. Indeed any human emotion may cause a director to place his own interests, preferences or appetites before the welfare of the corporation."[84]

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DELAWARE COURT OF CHANCERY LIMITS SCOPE OF *LYONDELL CHEM. CO. V. RYAN* FOR BAD FAITH CLAIMS, (Apr. 23, 2014), http://www.sullcrom.com/siteFiles/Publications/SC_Publication_Chen_v_HowardAnderson.pdf ("[*Chen*'s] expanded standard [for bad faith] raises the specter of more situations in which directors and officers will be found to have personal liability for their decisions in a change of control situation.").

81. Chen v. Howard Anderson, 87 A.3d 648, 684 (Del. Ch. 2014); *accord*, *Disney*, 906 A.2d at 67; Koehler v. NetSpend Holdings Inc., No. 8373–VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (Glasscock, V.C.) ("*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.").

82. *See, e.g.*, *Chen*, 87 A.3d at 686–87 (denying defendant-officers' motion for summary judgment upon factual record suggesting the officers showed "favoritism towards Calix consistent with their personal financial interests"); *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 188, 197 (Del. Ch. 2007) (enjoining a transaction in which the target's officers were permitted to drive the sale process despite the officers' personal financial interests in favoring private equity bidders over strategic acquirers).

83. *Chen*, 87 A.3d at 684 (quoting *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 (Del. Ch. 2012) (Strine, C.)).

84. *Id*. (quoting *In re* RJR Nabisco, Inc. S'holders Litig., No. 10389, 1989 WL 7036, at *15 (Del. Ch. Jan. 31, 1989); *cf*. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 30 (Del. Ch. 2010) (Chandler, C.) (observing in the context of *Unocal* enhanced scrutiny that "[h]uman judgment can be clouded by subtle influences like the prestige and perquisites of board membership, personal relationships with management, or animosity towards a bidder").

Thus, while transactional circumstances implicating *Lyondell Chemical*'s "utterly failed" scenario may be rare in practice (and even hard to imagine in theory), directors may quite frequently be faced with improper motives, financial and nonfinancial, especially in the context of a "sale or change of control" transaction.[85] To take one example, consider the *Revlon* case—the very genesis of the namesake doctrine. In *Revlon*, the high court expressed concern that "*Revlon*'s CEO, Michel Bergerac, rebuffed Pantry Pride's acquisition overtures in part because of the '*strong personal antipathy*' felt by Bergerac towards Pantry Pride's CEO, Ron Perelman, who was an upstart from Philly and not someone whom the Supreme Court believed Bergerac wanted running his storied company."[86]

Recognizing the link between improper motives and the fiduciary duty of good faith, *Chen* thus significantly broadens the good faith limitation to director exculpation under DGCL § 102(b)(7).[87] Directors may be personally liable for monetary damages in a wide range of circumstances not covered by the *Lyondell Chemical* decision. The importance of this fact cannot be understated.[88] Just ask the two *Chen* defendants who lost summary judgment and now face the specter of untold personal liability in a trial on the merits.[89] Incidentally, those two defendants were officers, not just directors, of Occam—which segues into a second limitation of Johnson and Ricca's dwindling thesis.

### *2. Corporate Officers*

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85. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

86. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439 n.24 (Del. Ch. 2012) (Strine, C.) (quoting Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986)); *see In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1000 (Del. Ch. 2005) (Strine, V.C.) ("*Revlon* itself . . . involved a sell-side CEO whose disdain for a particular bidder seemed to taint his and his board's ability to impartially seek the best value for their stockholders . . . .").

87. *See supra* Part II.A.2.

88. Note also that a finding of bad faith on the part of a director or officer limits the availability of indemnification or, as a practical matter, D&O insurance. *See* DEL. CODE ANN. tit. 8, § 145 (2013).

89. *See* Chen v. Howard-Anderson, 87 A.3d 648, 685–86 (Del. Ch. 2014).

Leaving aside the import of *Revlon* for corporate directors, the doctrine has not dwindled at all for another set of fiduciaries: corporate officers. Few have written more on the fiduciary duties and potential personal liability of officers under corporate law than Professor Johnson.[90] Indeed, Johnson and Ricca have together coauthored two separate articles on the subject.[91] In *The Dwindling of* Revlon, however, the pair devotes only one sentence to officers.[92]

The executive officers of a corporation often play central roles in the exploration, negotiation, and execution of a merger or acquisition.[93] For example, in *Chen*, Occam's chief executive officer (CEO) was a key liaison between Occam's board and various potential merger partners.[94] Occam's chief financial officer (CFO) was likewise "intimately involved in the [sale] process."[95] In fact, by her own account, "she was the person 'running the deal' for Occam."[96]

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90. *See generally* Lyman Johnson & Dennis Garvis, *Are Corporate Officers Advised About Fiduciary Duties?*, 64 BUS. LAW. 1105 (2009); Lyman Johnson, *Having the Fiduciary Duty Talk: Model Advice for Corporate Officers (and Other Senior Agents)*, 63 BUS. LAW. 147 (2007); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597 (2005); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439 (2005).

91. *See generally* Lyman Johnson & Robert Ricca, *Reality Check on Officer Liability*, 67 BUS. LAW. 75 (2011); Lyman P.Q. Johnson & Robert V. Ricca, *(Not) Advising Corporate Officers About Fiduciary Duties*, 42 WAKE FOREST L. REV. 663 (2007).

92. *See* Johnson & Ricca, *supra* note 11, at 206 ("Thus, while corporate officers remain personally liable for duty of care breaches, directors generally face only injunctive and other equitable remedies for such breaches.").

93. *See, e.g.*, *In re* Lear Corp. S'holder Litig., 926 A.2d 94, 97–106 (Del. Ch. 2007) (involving a transaction in which the target CEO was permitted to negotiate the terms of the merger with little supervision from the special committee of independent directors); *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 188, 197 (Del. Ch. 2007) (enjoining a transaction in which the targets executive officers were permitted to drive the sale process); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 176, 176 (Del. 1995) (describing the role of Revlon's CEO in blocking an unwanted acquisition offer by Pantry Pride).

94. *See Chen*, 87 A.3d at 654–60.

95. *Id.* at 654.

96. *Id.*

As a legal matter, corporate officers generally owe the same fiduciary duties owed by directors.[97] Applied to the mergers and acquisitions context, this means that to the extent a corporate officer "play[s] a role" in an unreasonable sale process, that officer may be personally liable under *Revlon* for breach of fiduciary duty.[98] But unlike directors, the liability of officers cannot be exculpated under DGCL § 102(b)(7).[99] The statute covers only directors.[100] For corporate officers, *Revlon* retains its full remedial potency.[101]

The absence of exculpation means that corporate officers may face personal liability under *Revlon* in a range of circumstances where a director may be otherwise protected. As noted above, an exculpated director will face personal liability only when she acts in bad faith by conducting an unreasonable sale process driven by improper personal motivations.[102] By contrast, an unexculpated officer may face personal liability any time she participates in an unreasonable sale process, regardless of whether the officer was improperly motivated or just careless.[103] Without exculpation,

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97. *See* Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) (holding that "officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors").

98. *See* Chen v. Howard-Anderson, 87 A.3d 648, 686–87 (Del. Ch. 2014) (finding that an officer who "played a role in the sale process" may be subject to personal liability for fiduciary breach).

99. *See Gantler*, 965 A.2d at 709 n.37 ("Although legislatively possible, there currently is no statutory provision authorizing comparable exculpation of corporate officers."); Veasey et al., *supra* note 17, at 403

> Section 102(b)(7) authorizes . . . [the] elimination of monetary liability only for directors' actions as directors. It does not limit the liability of a director for actions taken in a capacity other than a director, such as that of an officer or a majority stockholder. Nor does it apply to officers, employees, or agents.

100. *See* DEL. CODE ANN. tit. 8, § 102(b)(7) (2013) (allowing a charter "provision eliminating . . . personal liability *of a director*" (emphasis added)).

101. To be sure, even though a corporation may not eliminate the liability of corporate officers for breaches of the fiduciary duty of care, corporations may still indemnify and insure officer liability under circumstances authorized by statute. *See* DEL. CODE ANN. tit. 8, § 145 (2013).

102. *See supra* Part II.B.1.

103. As Vice Chancellor Laster has explained,

> "[Where an] exculpatory provision does not apply, the fiduciary

*any* breach of *Revlon*'s reasonableness dictate—whether it is a breach of fiduciary care, loyalty, or good faith—can create personal liability for a corporate officer.[104]

With respect to the fiduciary duty of care, the potential for officer liability in connection with an unreasonable sale process is exacerbated by the fact that under Delaware law it is uncertain what standard of judicial review applies to the fiduciary duty of care for corporate officers.[105] In previous scholarship, Professor Johnson has argued that, with respect to corporate officers, a breach of the fiduciary duty of care should be established by a showing of *ordinary negligence*.[106] Professor Lawrence Hamermesh and Gilchrist Sparks have countered that the same liability standard that applies to directors—*gross negligence*[107]—ought to apply to officers as well.[108] In *Chen*, Vice Chancellor Laster noted but expressly deferred on this question.[109] Yet, the objective reasonableness standard applied by enhanced scrutiny strongly suggests that, at least in the *Revlon* context, an officer may breach her fiduciary duty of care (and therefore become subject to personal liability) through ordinary negligence[110]—a far

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> analysis . . . stops with the application of the standard of review. From a doctrinal standpoint, [a court] need not proceed further and attempt to categorize the directors' conduct under the headings of loyalty or care, nor need it assess the individual directors' subjective motivations."

*In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 89 (Del. Ch. 2014).

104. *See id.* at 85 (Laster, V.C.) ("A failure to satisfy the enhanced scrutiny standard, like a failure to satisfy the entire fairness test, establishes the existence of a breach of duty."); *id.* at 89 ("The question . . . is whether the Board's actions fell within a range of reasonableness. If not, then the directors breached their fiduciary duties . . . .").

105. *See* Chen v. Howard-Anderson, 87 A.3d 648, 666 n.2 (Del. Ch. 2014) ("A lively debate exists regarding the degree to which decisions by officers should be examined using the same standard of review developed for directors.").

106. *See generally* Johnson, *Corporate Officers and the Business Judgment Rule*, *supra* note 90.

107. *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) ("[T]he standard of care applicable to a director's duty of care . . . is . . . gross negligence.").

108. *See* Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson*, 60 BUS. LAW. 865 (2005).

109. *See Chen*, 87 A.3d at 666 n.2.

less protective standard than the gross negligence threshold more commonly associated with the fiduciary duty of care.[111]

Putting aside the questions (and concerns) raised by an officer's fiduciary duty of care, the fiduciary duty of good faith, as interpreted by *Chen*,[112] represents an even more significant liability risk for officers in *Revlon* cases. The liability risk stems from the distinct position of officers, as compared to directors, within a corporation, and improper personal considerations that can arise as a result of that position in the context of a sale or change of control transaction. "[T]he potential sale of a corporation has enormous implications for corporate managers."[113] Unlike part-time directors, officers are full-time employees of the corporation. As such, officers may derive significant financial compensation, perquisites, and professional prestige from their executive position, all of which could be jeopardized if the corporation is sold to the wrong buyer.[114] Yet, these personal and financial considerations are precisely the type of improper motivations that courts seek to police under

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110. *See supra* note 43 and accompanying text (explaining that, under *Revlon* enhanced scrutiny, any unreasonableness during a sale process establishes a breach of fiduciary duty).

111. *See* Johnson & Ricca, *supra* note 11, at 206 (observing that the liability standard for directors for a breach of fiduciary duty of care under Delaware law is "gross negligence, which has been construed as essentially a recklessness standard").

112. *See supra* notes 72–81 and accompanying text (discussing the *Chen* decision).

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

114. *See* Laster, *supra* note 8, at 12 ("Executives may have 'an incentive to favor a particular bidder (or type of bidder),' especially if 'some bidders might desire to retain existing management or to provide them with future incentives while others might not.'" (quoting *In re* Netsmart Techs., Inc. S'holder Litig., 924 A.2d 171, 188, 194 (Del. Ch. 2007))); Paramount Commc'ns Inc. v. Time Inc., 15 DEL. J. CORP. L. 700, 715 (1989) (Allen, C.)

> There may be at work here a force more subtle than a desire to maintain a title or office in order to assure continued salary or prerequisites. Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm.

intermediate *Revlon* scrutiny.[115] As Chief Justice Strine explained as a then-vice chancellor,

> The heightened scrutiny that applies in the *Revlon* (and *Unocal*) contexts are, in large measure, rooted in a concern that the board [or other corporate fiduciaries, like officers,] might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders. Most traditionally, there is the danger that top corporate managers will resist a sale that *might cost them their managerial posts*, or prefer a sale to one industry rival rather than another for reasons having more to do with *personal ego* than with what is best for stockholders . . . .
>
> In a situation where heightened scrutiny applies, the predicate question of what the [corporate fiduciaries'] true motivation was comes into play. The court must take a nuanced and realistic look at the possibility that *personal interests short of pure self-dealing* have influenced the [fiduciaries] to block a bid or to steer a deal to one bidder rather than another.[116]

Indeed, Chief Justice Strine has described the "paradigmatic context for a good *Revlon* claim" as one where "a supine board *under the sway of an overweening CEO* bent on a certain direction[] tilts the sale process for reasons inimical to the stockholders' desire for the best price."[117]

*Chen* brings these points to bear in concrete fashion. In *Chen*, the chancery court granted summary judgment dismissing the *Revlon* claims made against Occam's outside directors on the basis of the exculpatory provision found in the charter of the corporation.[118] Although the court found that Occam had conducted an unreasonable sale process, there was no evidence that the outside directors were improperly motivated.[119] At most,

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115. *See supra* notes 82–86 and accompanying text (describing various improper motives that may implicate bad faith under *Revlon*).

116. *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 597–98 (Del. Ch. 2010) (Strine, V.C.) (emphasis added) (internal citations omitted).

117. *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1002 (Del. Ch. 2005) (Strine, V.C.) (emphasis added).

118. *See* Chen v. Howard-Anderson, 87 A.3d 648, 675–77 (Del. Ch. 2014) (Laster, V.C.).

119. *See id.* at 685–86.

the outside directors acted in breach of their fiduciary duty of care, the liability for which was exculpated.[120]

Nevertheless, the court allowed the plaintiff's *Revlon* claims to proceed to trial against Occam's CEO and CFO, the former of which also sat on the company's board as an inside director.[121] Acting in their capacities as officers, the court noted that Occam's "[e]xculpatory [p]rovision does not protect them."[122] Both officers, the court found, may have been improperly motivated by personal financial interests at the expense of pursuing maximum value for the shareholders.[123] To support this conclusion, the court cited facts suggesting that during the sale process involving multiple potential acquirers, the CEO and CFO took actions favoring a bidder that had confirmed at the outset it would support certain change-of-control employee benefits payable to the pair.[124]

While the *Chen* officers now face the prospect of personal liability because personal financial interests may have tainted their good faith decision-making, it is important to remember that *Revlon*'s reach extends beyond conflicting financial interests. Like directors, any "personal interests short of pure self-dealing" may taint an officer's good faith,[125] exposing them to *Revlon* liability. Recall, for example, the *Revlon* case and the "strong personal antipathy" felt by the Revlon CEO toward his counterpart at Pantry Pride.[126] Together, *Revlon* and *Chen* thus

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120. *See id.* at 685 (ruling that the outside directors "have demonstrated that they exclusively breached their duty of care, and the Exculpatory Provision bars any monetary damages award for such a breach").

121. *See id.* at 686–87.

122. *Id*. at 686.

123. *See id*. at 687.

124. *See id.*; *see also* SULLIVAN & CROMWELL LLP, *supra* note 80, at 2 ("[*Chen*] concludes that fairly routine change-in-control benefits available to an officer defendant were sufficient to raise triable issues of fact with respect to his proper motives.").

125. *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010); *see also supra* notes 80–84 and accompanying text (describing various improper motives that may implicate bad faith under *Revlon*).

126. *See supra* note 86 and accompanying text; *see also In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 188, 197 (Del. Ch. 2007) (enjoining a transaction in which the target's special committee permitted the target's CEO and other executive officers to drive the sale process despite the officers' personal interest in continuing in their management positions and receiving future incentive compensation).

illustrate that in "sale or change of control" transactions, officers stand in a fundamentally different position than directors in regards to both motivations and exculpation. Given the very real liability risks for corporate officers, *Revlon* thus remains a critical legal obligation.

### *3. Financial Advisors (and Other Aiders and Abettors)*

Like corporate officers, Johnson and Ricca's thesis is cold comfort for other corporate participants left uncovered by the protective exculpatory shield of DGCL § 102(b)(7).[127] Investment banks, for example, may not owe fiduciary duties directly to a corporate client, but these outside advisors may nevertheless be liable for monetary damages when they aid and abet the breach of a fiduciary duty by the directors or officers of a client corporation.[128] Moreover, such liability may arise even when the fiduciaries themselves are exculpated from monetary liability for the underlying breach of duty.[129] Johnson and Ricca scarcely consider the potential for secondary liability that corporate advisors may face for aiding and abetting a *Revlon* breach.[130] The risk is real, however, especially for investment banks, given the many roles such institutions often play in corporate transactions.[131]

127. *See In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 86 (Del. Ch. 2014) (Laster, V.C.) ("The literal language of Section 102(b)(7) only covers directors; it does not extend to aiders and abettors.").

128. Under Delaware law, a claim for aiding and abetting breaches of fiduciary duty has four elements: "(i) the existence of a fiduciary relationship, (ii) a breach of the fiduciary's duty, (iii) knowing participation in the breach by the non-fiduciary defendants, and (iv) damages proximately caused by the breach." *Id.* at 80.

129. *See id.* at 85–88 (ruling that the exculpation of a breach of fiduciary duty by a director is irrelevant to liability for aiding and abetting in that breach).

130. *See* Johnson & Ricca, *supra* note 11, at 212 (noting the "conflicted financial advisor" involved in *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011)).

131. *See* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors* 15–32 (Univ. Pa. Law Sch. Inst. for Law & Econ. Working Paper No. 14-23, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446576 (describing the many roles played by investment bankers in corporate mergers and acquisitions and the conflicts created thereby).

Indeed, Delaware courts have long voiced concerns in the *Revlon* context about the conflicting interests of investment banks advising corporations in mergers and acquisitions. As early as 2005, then-Vice Chancellor Strine decried Credit Suisse First Boston, in dictum, for needlessly compromising its position as sell-side financial advisor to a target corporation by seeking to provide buy-side "staple" financing to the acquirer of the target.[132] Typical of Delaware jurisprudence, this dictum would resurface with more force in subsequent decisions.[133] In this instance, it would come to bite in *In re Rural Metro Corp. Shareholders Litigation*.[134]

In *Rural Metro*, after a trial on the merits, Vice Chancellor Laster held the investment bank RBC Capital Markets liable for aiding and abetting the board of Rural/Metro in breaching *Revlon* during a largely botched, and therefore unreasonable, sale process.[135] The Rural/Metro board had hired RBC as financial advisor to explore strategic alternatives for the corporation.[136] Throughout its engagement as financial advisor, the court found, RBC took seemingly every opportunity to surreptitiously manipulate the Rural/Metro board to advance its own interests.[137] At the outset, RBC had coaxed the Rural/Metro board into an immediate sale in the hopes of exploiting the timing of the sale to provide acquisition financing in a separate, simultaneous transaction involving Rural/Metro's chief competitor.[138] Later in the sale process, aiming to generate more fees by providing buy-side "staple" financing to Rural/Metro's likely acquirer, RBC sought to curry favor with the bidder by sharing inside information about the Rural/Metro board's private

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132. *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1005–06 (Del. Ch. 2005) (Strine, V.C.).

133. *See* Mohsen Manesh, *Damning Dictum: The Default Duty Debate in Delaware*, 39 J. CORP. L. 35, 53–60 (2014) (describing the important roles of dictum in Delaware law).

134. 88 A.3d 54 (Del. Ch. 2014) (Laster, V.C.).

135. *See id.* at 63, 80–96.

136. *Id*. at 66–70.

137. *See id*. at 101 ("RBC's self-interested manipulations caused the Rural process to unfold differently than it otherwise would have . . . . [B]ut for RBC's actions, a fully-informed Board would have had numerous opportunities to achieve a superior result.")

138. *Id.* at 66–68.

deliberations.[139] Finally, on the day before the Rural/Metro board was set to vote, in an effort to sell Rural/Metro's directors on the transaction, RBC manipulated its valuation analysis to make the final price offered appear more attractive.[140] Finding that the Rural/Metro board's sale process was unreasonable under *Revlon*, the chancery court had little trouble assigning liability to RBC for aiding and abetting the board in their bungled efforts.[141]

The egregious facts in *Rural Metro* might tempt one to think such scenarios are uncommon. But, as Johnson and Ricca note in passing,[142] *Rural Metro* is not the first instance of a self-interested investment bank deceptively meddling and, thus, sullying a client corporation's *Revlon* sale process. As the chancery court has observed is a slightly different context, "the reality [is] that American business history is littered with examples of managers who exploited the opportunity to work both sides of a deal."[143] In 2011, the chancery court temporarily enjoined the sale of Del Monte Foods to a consortium of private equity buyers based on facts suggesting that the Del Monte board's financial advisor, Barclays, had "secretly and selfishly manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees."[144] And the next year, in a lawsuit brought to enjoin Kinder Morgan's acquisition of El Paso Corporation, the chancery court sharply rebuked Goldman Sachs for similar self-interested mischief while it acted as financial advisor to the El Paso board of directors.[145]

Admittedly, in neither of these high-profile cases did the court ultimately block the transaction or award damages, despite

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139. *Id.* at 76.

140. *Id.* at 76–78.

141. *See id.* at 103.

142. *Supra* note 130.

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

144. *See In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 817 (Del. Ch. 2011) (Laster, V.C.).

145. *See In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012) (Strine, C.) (criticizing Goldman for "claim[ing] to step out of the [El Paso sale] process while failing to do so completely and while playing a key role in distorting the economic incentives of the bank that came in to ensure that Goldman's conflict did not taint the [El Paso] Board's deliberations").

finding a reasonable probability that the plaintiff-shareholders could show at trial a breach of *Revlon* by the board of directors.[146] (Although, it should be noted that in both instances, the defendants settled the lawsuits with the plaintiffs for substantial sums.[147]) Still, what these and other cases demonstrate is that the investment banks that advise corporations in mergers and acquisitions are rife with their own conflicts of interests.[148] To this picture, *Rural Metro* adds the stark detail that, while the courts may be chary to enjoin a transaction[149] and directors are

146. *See Del Monte*, 25 A.3d at 844–45 (granting a temporary twenty-day injunction to allow time for any competing bids); *El Paso*, 41 A.3d at 434 (denying preliminary injunction).

147. In the *El Paso* case, Kinder Morgan settled the lawsuit with the plaintiffs by agreeing to pay $110 million. In addition, Goldman Sachs agreed to forego $20 million that El Paso had promised to pay the investment firm in connection with the transaction. *See* Jef Feeley, *Kinder Morgan to Pay $110 Million to Settle El Paso Suit*, BLOOMBERG (Sept. 8, 2012, 12:01 AM), http://www.bloomberg.com/news/2012-09-07/kinder-morgan-to-pay-110-million-to-settle-el-paso-suits.html (last visited Oct. 3, 2014) (on file with the Washington and Lee Law Review). In the *Del Monte* case, Del Monte and Barclays settled with the plaintiffs, paying them $89.4 million. *See* Gina Chon & Anupreeta Das, *Settlement Chills Use of M&A Tactic*, WALL ST. J. (Oct. 7, 2011), http://online.wsj.com/news/articles/SB10001424052970203388804576614924170701478 (last visited Oct. 3, 2014) (on file with the Washington and Lee Law Review). Significant settlements were also obtained in the two other cases that Johnson and Ricca cite, in which the chancery court found the plaintiffs' *Revlon* claim stood a reasonable likelihood of success on the merits but nonetheless denied a preliminary injunction to block the challenged transaction. *See* Johnson & Ricca, *supra* note 11, at 226–27. In the *Delphi Financial Group* case, the defendants agreed to pay the plaintiff-shareholders $49 million. *See* Phil Medford & Jef Feeley, *Delphi Financial Settles Investor Suit Over Tokio Deal*, BLOOMBERG (Apr. 9, 2012, 2:16 PM) http://www.bloomberg.com/news/2012-04-09/delphi-financial-settles-investor-suit-over-tokio-deal.html (last visited Oct. 3, 2014) (on file with the Washington and Lee Law Review). In the *Koehler v. Netspend Holdings* case, the defendants agreed to modify various deal protection provisions in the merger agreement before the shareholder vote and, further, pay the plaintiffs' attorneys $2.2 million for their fees. *See* Koehler v. Netspend Holdings, Inc., No. 8373–VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013). Such multi-million dollar sums go far to answer a question Johnson and Ricca raise: "Why [do plaintiffs' attorneys] press cases where money damages and the granting of injunctive relief are so unlikely?" Johnson & Ricca, *supra* note 11, at 217.

148. *See* Bratton & Wachter, *supra* note 131, at 15–32 (describing the many roles played by investment bankers in corporate mergers and acquisitions and the conflicts created thereby).

149. *See supra* notes 24–25 and accompanying text.

mostly protected by exculpation,[150] the investment banks that knowingly advise or assist corporate boards in an unreasonable sales process may face harsh monetary sanctions for aiding and abetting a *Revlon* violation.

The result in *Rural Metro* thus belies the claim that *Revlon* is a receding doctrine. Although damages are yet to be determined, RBC may be liable for as much as $250 million,[151] for a transaction in which the investment bank received only $5.1 million for its efforts.[152] But the impact of *Rural Metro* is, of course, more far-reaching than that. The gross disproportion between the fees an investment bank may obtain for its services in a given transaction versus the potential liability it may face for aiding and abetting a fiduciary breach suggests that investment banks, and indeed all corporate advisors, will after *Rural Metro* more scrupulously monitor the sale process and the involvement of the corporate fiduciaries in order to avoid the potential for secondary liability.[153] In this regard, by enlisting corporate advisors to ensure fiduciary compliance, *Rural Metro* reinforces the *Revlon* doctrine.[154]

### *III. The Dwindling of* Revlon*?*

Despite the limits to exculpation described above, let us be clear: the reach of *Revlon* as an enforceable legal obligation should not be exaggerated. After all, in so-called *Revlon*-land,

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150. *See supra* Part II.A.2.

151. *See* Steven Davidoff Solomon, *Ruling Highlights Unequal Treatment in Penalizing Corporate Wrongdoers*, N.Y. TIMES (Mar. 18, 2014, 6:45 PM), http://dealbook.nytimes.com/2014/03/18/ruling-highlights-unequal-treatment-in-penalizing-corporate-wrongdoers/?_php=true&_type=blogs&_r=0 (last visited Oct. 3, 2014) (estimating damages as much as $250 million) (on file with the Washington and Lee Law Review); Feeley, *supra* note 147 ("[T]he full damage award . . . could top $240 million with interest.").

152. *In re* Rural Metro Corp., 88 A.3d 54, 69 (Del. Ch. 2014).

153. *See id.* at 88–89 (describing the rationale behind and financial incentives created by "gatekeeper" liability).

154. *See id.* at 89 ("[T]he prospect of aiding and abetting liability for investment banks . . . creates a powerful financial reason for the banks to . . . advise boards in a manner that helps ensure that the directors carry out their fiduciary duties when exploring strategic alternatives and conducting a sale process . . . .").

courts require fiduciaries to make only "reasonable, not perfect" decisions.[155] Judges will not meticulously "second-guess [the] reasonable, but debatable, tactical choices that directors have made."[156] And even when a corporation conducts an unreasonable sale process, its directors at least will be likely exculpated for any carelessness or even gross negligence in the absence of bad faith.[157] Moreover, personal liability for bad faith requires a court to find that the directors were "intentionally disregarding their duties"[158] or, alternatively, acting on an "improper motive,"[159] which in either case is a difficult evidentiary burden.

Thus, as Johnson and Ricca observe, in practice, courts almost never grant injunctions or award monetary damages in connection with a *Revlon* violation. Although cases like *Chen* and *Rural Metro* demonstrate starkly the limits of the coauthors' thesis, these cases are not the typical *Revlon* cases. They are the exception. Indeed, the focus on non-director defendants in both *Chen* and *Rural Metro* may itself reflect the difficulty for plaintiff-shareholders to enforce *Revlon* against exculpated boards of directors. As a result, Johnson and Ricca are correct to conclude that from a remedial perspective, *Revlon* is of little pragmatic consequence.[160]

But this too may overstate *Revlon*'s insignificance. The remedial perspective is likely the wrong perspective from which to judge *Revlon*'s continuing vigor. Instead, if one wants to truly see the dwindling of *Revlon* as an enforceable legal obligation, one must step outside of corporate law to appreciate the shrinking realm of the doctrine.

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155. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009); *accord* Paramount Commc'ns. Inc. v. QVC, Inc., 637 A.2d 34, 45 (1994) (describing the judicial inquiry under *Revlon* as asking "whether the directors made a reasonable decision, not a perfect decision").

156. *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975 (2005) (Strine, V.C.).

157. *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 685 (Del. Ch. 2014) (ruling that the outside directors "have demonstrated that they exclusively breached their duty of care, and the Exculpatory Provision bars any monetary damages award for such a breach").

158. *Lyondell Chem.*, 970 A.2d at 243.

159. *Chen*, 87 A.3d at 685.

160. *See* Johnson & Ricca, *supra* note 11, at 222 ("[W]e conclude . . . that there is little remedial clout to the *Revlon* doctrine in any setting.").

### *A. Dwindling or Pervasive?*

To be sure, Johnson and Ricca's chief contribution to the *Revlon* literature is the novel remedial perspective the pair brings to the doctrine.[161] But the fact that courts seldom grant injunctions or monetary damages in connection with a *Revlon* claim does not necessarily lead to the conclusion that it is an "insipid" corporate law doctrine.[162] In fact, rather than reveal the erosion of the doctrine, the lack of judicial enforcement may show the opposite: that *Revlon*, as a normative concern, is enduring and pervasive.

To be specific, it may be the case that boards have fundamentally internalized *Revlon*'s core dictate—that directors' sole fiduciary obligation is "to get[] the best price for the stockholders."[163] In an era of shareholder empowerment[164] and intense investor activism,[165] for better or worse, directors nowadays worship at the altar of shareholder value maximization.[166] Indeed, that altar is today so sacred that when

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161. *See supra* notes 11–14 and accompanying text.

162. *See* Johnson & Ricca, *supra* note 11, at 222.

163. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 176, 182 (Del. 1995).

164. *See, e.g.*, Shareholder Approval of Executive Compensation and Golden Parachute Compensation, Exchange Act Release No. 33-9178, 76 Fed. Reg. 6010, 6013 (Feb. 2, 2011) (codified at 17 C.F.R. pts. 229, 240, 249) (granting shareholders a nonbinding vote on certain executive compensation matters); Facilitating Shareholder Director Nominations, Exchange Act Release Nos. 33-9136, 34-62764, 75 Fed. Reg. 56,668 (Sept. 16, 2010) (codified at 17 C.F.R. pts. 200, 232, 240 & 249) (granting shareholders proxy access). *But see* Bus. Roundtable v. SEC, 647 F.3d 1144, 1156 (D.C. Cir. 2011) (invalidating portions of the 2010 shareholder proxy access rules).

165. *See, e.g.*, SIMPSON THACHER & BARTLETT LLP, SHAREHOLDER ACTIVISM IN M&A TRANSACTIONS (2014), http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1694.pdf (highlighting the recent role of shareholder activism in corporate mergers and acquisitions); Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1274–81 (2008) (charting the evolving role of shareholder activism during the Twentieth Century); Brian R. Cheffins & John Armour, *The Past, Present, and Future of Shareholder Activism by Hedge Funds*, 37 J. CORP. L. 51, 75–82 (2011) (charting the rise of hedge fund shareholder activism starting with the 1980s through the present).

166. *See, e.g.*, LYNN STOUT, THE SHAREHOLDER VALUE MYTH 15–23 (2012) (tracing the rise of shareholder value ideology); William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PENN. L. REV.

the CEO of Apple recently suggested—in non-*Revlon* circumstances[167]—that the goal of the company was not to maximize the shareholders' returns at the expense environmental considerations,[168] the offhanded remarks roused a lively controversy[169] and serious academic discussion over whether the CEO had breached his fiduciary duties to Apple's shareholders.[170]

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653, 653 (2010) (arguing that "shareholder empowerment delivers management a simple and emphatic marching order: manage to maximize the market price of the stock"); Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1510–35 (2007) (charting "the shift toward shareholder value as the ultimate corporate objective" from 1950–2005); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001) ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

167. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

168. At the 2014 annual shareholder meeting of Apple, its CEO, Tim Cook, responded to a shareholder question regarding Apple's efforts to battle climate change, by saying:

> We do things because they are right and just and that is who we are. That's who we are as a company. . . . [W]hen I think about human rights, I don't think about an ROI [return on investment]. When I think about making our products accessible for the people that can't see or to help a kid with autism, I don't think about a bloody ROI, and by the same token, I don't think about helping our environment from an ROI point of view. . . . If you only want me to make things, make decisions that have a clear ROI, then you should get out of the stock.

Chris Taylor, *Tim Cook to Climate Skeptic Group: Get Out of Apple Stock*, MASHABLE (Feb. 28, 2014), http://mashable.com/2014/02/28/apple-ceo-tim-cook-climate-change/#:eyJzIjoidCIsImkiOiJfcjU4dDJ4bXA3emdwbHpjaSJ9 (last visited Oct. 3, 2014) (on file with the Washington and Lee Law Review).

169. *See Press Release*, NAT'L CENTER FOR PUB. POL'Y RES. (Feb. 28, 2014), http://www.nationalcenter.org/PR-Apple_Tim_Cook_Climate_022814.html (last visited Oct. 3, 2014) (criticizing the CEO's comments as essentially telling Apple's investors to "Drop Dead") (on file with the Washington and Lee Law Review).

170. *Compare* Haskell Murray, *Fiduciary Duties: Hobby Lobby, Conestoga Wood and Apple*, BUS. L. PROF BLOG (Mar. 7, 2014), http://lawprofessors.typepad.com/business_law/2014/03/fiduciary-duties-hobby-lobby-conestoga-wood-and-apple.html (last visited Oct. 3, 2014) (suggesting the comments implicated a potential breach of fiduciary duty) (on file with the Washington and Lee Law Review), *with* Stephen Bainbridge, *Can Tim Cook Ignore ROI When Deciding How to Design an iPhone?*, PROFESSORBAINBRIDGE.COM (Mar. 7, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/03/can-tim-

Rather than dwindle, it seems that *Revlon*'s shareholder-focused fiduciary mandate has seeped beyond its specific transactional boundaries and found its way into every corporate decision.[171] In thirty years, it has evolved from a narrow legal doctrine to an unquestioned norm that frames virtually all boardroom discussions.[172] If this theory is correct, then it should be no surprise that courts seldom enjoin transactions or award damages for breach of *Revlon* duties, despite the uptick in volume of shareholder litigation. Courts may simply be finding few cases in which boards did not act in good faith to maximize the wealth of their shareholders.

There is some evidence to corroborate this theory. Johnson and Ricca note—in support of their claim that *Revlon* offers little remedial clout—that from 2008 through December 2013, the Delaware Chancery Court granted an injunction in only one of fifteen reported decisions.[173] But a closer look at those fourteen decisions in which the court did not grant an injunction reveals the reason in the vast majority of cases—eleven of fourteen—was because the plaintiffs had not established a reasonable likelihood of success on the merits of their claim.[174] Put differently, based on a preliminary record, in all but four of the fifteen cases that the coauthors cite the court determined the defendant-directors *had been faithful to their* Revlon *duty* to maximize the value paid to

cook-ignore-roi-when-deciding-how-to-design-an-iphone.html (last visited Oct. 3, 2014) (arguing that the position espoused by Apple's CEO is protected by the business judgment rule) (on file with the Washington and Lee Law Review).

171. *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) (Chandler, C.) (ruling outside of the *Revlon* context that "Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties"); *see also* Johnson & Ricca, *supra* note 11, at 219 (arguing that "the immediate share price maximization norm may not be so easily cabined within the sale of company context"). In other scholarship, Professor Johnson has cogently critiqued this seepage of shareholder value maximization into broader corporate law. *See* Lyman Johnson, *The Unsettledness in Delaware Corporate Law: Business Judgment Rule*, *Corporate Purpose*, 38 DEL. J. CORP. L. 405, 432–50 (2013).

172. Indeed, beyond a mere norm, Professor David Yosifon has argued that the obligation to maximize shareholder wealth is unambiguously corporate *law*. *See generally* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L. J. 181 (2014).

173. *See* Johnson & Ricca, supra note 11, at 212, 226–27.

174. *See infra* Appendix.

their shareholders.[175] Although telling, this finding says nothing, of course, of the countless *Revlon* claims dismissed as meritless by the Delaware Chancery Court in bench rulings without a written opinion.[176]

Thus, the bulk of *Revlon*'s importance appears to be what Johnson and Ricca recognize as its "prophylactic effect" on board decisions.[177] If so, then *Revlon*'s significance as a corporate law doctrine should be measured not by the remedies courts grant ex post but by the doctrine's impact ex ante on corporate culture and boardroom discussions.[178] For directors, legal liability is likely an afterthought; they instead are preoccupied with "the maximization of shareholder profit."[179] Thus, courts seldom enforce *Revlon*, not because it is a "nonenforceable norm or mere aspirational standard,"[180] but because the norm of shareholder value maximization is today so deeply enmeshed into corporate boardrooms that it seldom needs judicial enforcement.

Of course, even if *Revlon* enjoys pervasive salience in corporate culture and practice, future developments in corporate law may yet dwindle its continuing endurance as an enforceable legal doctrine. For example, Vice Chancellor Laster has recently

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175. To be sure, the fact that plaintiffs in eleven of these fourteen reported cases were unable to show a reasonable likelihood of success could be interpreted to support Johnson and Ricca's claim that *Revlon* is today a largely unenforceable legal doctrine. But the more recent cases, like *Chen* and *Rural Metro*, belie this reasoning. Moreover, as noted above, even in those cases where the chancery court found the plaintiffs' *Revlon* claim stood a reasonable likelihood of success on the merits but nonetheless denied a preliminary injunction to block the challenged transaction, significant settlements followed. *See supra* note 147. Such settlements indicate that the *Revlon* claims made in those cases bore some real risk of monetary liability and were settled solely for nuisance value.

176. *See* Edward M. McNally, *The Court of Chancery Speaks by Transcript*, MORRIS JAMES (Sept. 12, 2012), http://www.morrisjames.com/newsroom-articles-12.html (last visited Oct. 3, 2014) (discussing the proliferations of transcript opinions reflecting the bench rulings of the Delaware Chancery Court) (on file with the Washington and Lee Law Review).

177. Johnson & Ricca, supra note 11, at 216.

178. *See id*. at 215–16 (noting that "an *ex ante* frame of reference . . . sheds light on [*Revlon*'s] enduring, if more modest, value in today's M&A practice and law").

179. Revlon, Inc. v. MacAndrews and Forbes Holdings, Inc., 506 A.2d 176, 185 (Del. 1995).

180. Johnson & Ricca, supra note 11, at 217.

floated in dictum the idea that an informed shareholder vote would reduce the judicial scrutiny in a *Revlon* transaction from objective reasonableness to business judgment rule deference.[181] Such a move would arguably be consistent with recent doctrinal developments in the corporate law governing controlling shareholder cash-out mergers[182] and would limit the reach of *Revlon*'s enhanced scrutiny. Moreover, following the *Rural Metro* decision, there has been speculation that the Delaware legislature might amend DGCL § 102(b)(7), broadening its protective shield to cover corporate actors other than directors.[183] Exculpating officers like directors, for instance, would eliminate any lingering possibility of personal liability for breaches of the fiduciary duty of care in the *Revlon* context,[184] although it would presumably do nothing to protect improperly motivated fiduciaries acting in bad faith from monetary damages;[185] nor would it prevent courts from granting injunctions, rather than monetary damages, to block deals struck in connection with a *Revlon* violation.[186] But even if these or other subsequent

181. *See* Chen v. Howard-Anderson, 87 A.3d 648, 669 (Del. Ch. 2014) (Laster, V.C.) ("[W]hat could affect the standard of review of a sale process challenge (at least in my view) would be a fully informed, non-coerced stockholder vote."); *In re* Rural Metro Corp., 88 A.3d 54, 84 n.10 (Del. Ch. 2014) ("[T]his case does not provide any opportunity to consider whether a fully informed stockholder vote would lower the standard of review from enhanced scrutiny to the business judgment rule.").

182. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (holding that where a controlling shareholder cash out merger is, among other things, approved by an "uncoerced, informed vote of a majority of the minority stockholders" the reviewing court will apply business judgment rule deference rather than entire fairness).

183. *See* C. Steven Bradford, *Will Delaware Plug the 102(b)(7) Hole?*, BUS. L. PROF BLOG (Mar. 7, 2014), http://lawprofessors.typepad.com/business_law/2014/04/will-delaware-plug-the-102b7-hole.html (last visited Oct. 3, 2014) (discussing the options the Delaware legislature has to address the liability non-director corporate actors face under the current version of DGCL § 102(b)(7)) (on file with the Washington and Lee Law Review).

184. *See supra* notes 100–104 and accompanying text (explaining that exculpation protects directors, but not officers, from personal liability for breaches of the fiduciary duty of care).

185. *See supra* Part II.B.1 (explaining that exculpation under DGCL 102(b)(7) does not apply to situations where directors act in bad faith).

186. *See supra* note 57 and accompanying text (explaining that exculpation under DGCL 102(b)(7) applies only to monetary damages and does not limit the

developments do effectively limit the impact of *Revlon* as an enforceable legal directive, the corporate ethos articulated by *Revlon*—the sacred altar of shareholder value—will subsist in corporate practice.

*B. The Rise of Alternative Entities and Benefit Corporations*

If *Revlon* is dwindling, as suggested above, it is not from within the confines of corporate law and practice. If it is dwindling, it is from outside the pressed edges of corporate law, where other bodies of business law have emerged rejecting *Revlon* as a fiduciary mandate.

For example, in recent years the use and popularity of LLCs and other unincorporated alternative entity forms has proliferated,[187] especially in Delaware.[188] Yet, under Delaware alternative entity law, the fiduciary duties of business managers are optional; they are merely default duties that can be modified or wholly eliminated by the terms of an entity's governing agreement.[189] As I have shown in previous scholarship,

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ability of plaintiffs to seek equitable remedies such as an injunction).

187. *See* Rodney D. Chrisman, *LLCs Are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LLPs Formed in the United States Between 2004–2007 and How LLCs Were Taxed for Tax Years 2002–2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 468–78 (2010) (reporting empirical data confirming the ascent of the LLC as the dominant business form in the United States).

188. *See* Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 201–02 (2011) ("During the five-year period ending in 2009, the number of new Delaware LLCs outpaced corporations anywhere from 256% to 313%. To put these numbers in perspective, consider that in 2007 alone, an average of 430 LLCs were formed on each weekday in Delaware."); Peter J. Walsh, Jr & Dominick T. Gattuso, *Delaware LLCs: The Wave of the Future and Advising Your Clients About What to Expect*, A.B.A. BUS. L. TODAY, Sept.–Oct. 2009, at 11 ("In less than two decades, Delaware limited liability companies (LLC) have gone from nouveau 'alternative' entity to the 'go-to' entity.").

189. *See* DEL CODE ANN. tit. 6, § 17-1101(d) (2013) (governing limited partnerships); *id.* § 18-1101(c) (governing LLCs); *see also* Mohsen Manesh, *Contractual Freedom under Delaware Alternative Entity Law: Evidence from Publically Traded LPs and LLCs*, 37 J. CORP. L. 555, 560–62 (2012) (describing the default status of fiduciary duties under Delaware alternative entity law); Manesh, *supra* note 188, at 225–26 (describing the contractual nature of LLCs under Delaware law).

businesses adopting the alternative entity form are able to easily mimic the corporate form and even successfully access the capital of public markets.[190] Yet, the standard practice among publicly traded alternative entity businesses is to eliminate the fiduciary duties of managers, replacing them with less onerous contractual obligations.[191] By rejecting the fiduciary framework of corporate law, publicly traded alternative entities have also rejected *Revlon*'s legal mandate.[192] But it is not because these firms have also rejected *Revlon*'s normative tenet. Rather, investors in these unincorporated businesses, it seems, have willingly traded the judicially enforced obligation of shareholder wealth maximization in favor of market-driven constraints on their managers in order to maximize the returns of their investments.[193]

At the other end of the spectrum, the rise of benefit corporation statutes signals yet another breach in *Revlon*'s hegemony over business practice. Today, approximately twenty-six states have adopted some form of benefit corporation

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190. *See generally* Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465 (2009) (describing the multi-million dollar initial public offerings of two Delaware limited partnerships and a Delaware LLC).

191. *See* Manesh, *supra* note 189, at 574–75 (reporting empirical evidence showing that 88% of publicly traded alternative entity firms fully eliminate or exculpate the fiduciary duties of their managers).

192. Although Delaware LLCs and limited partnership may in the terms of their governing agreements eliminate their managers' fiduciary duties, such firms cannot eliminate the implied contractual covenant of good faith and fair dealing. *See* DEL CODE ANN. tit. 6, § 17-1101(d) (2013) (governing limited partnerships); *id.* § 18-1101(c) (governing LLCs). Still, the Delaware Chancery Court has made clear that "the implied covenant cannot be invoked to override the express provisions of a contract" to impose a *Revlon*-like duty. *See* Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1016–21 (Del. Ch. 2010) (holding that the implied covenant cannot impose an obligation to pursue an "adequate and fair sale process" that is "[r]eminscent of *Revlon*" where the governing agreement expressly permits a sale by an alternative "special approval" process).

193. *Cf.* Manesh, *supra* note 189, at 597 ("[E]ven in the absence of meaningful contractual constraints, . . . other market-based mechanisms [may] efficiently guard against publicly traded alternative entity agency costs."). *See generally* LARRY RIBSTEIN, THE RISE OF THE UNCORPORATION 193–222 (2010); Suren Gomtsian, *The Governance of Publicly Traded Limited Liability Companies* 26 (TILEC Discussion Paper No. 2014-008) (Feb. 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2391621 (discussing the role of market constraints on the governance of LLCs).

legislation (or some variant thereof),[194] including most notably Delaware, which adopted its statute in 2013.[195] While these statutes vary somewhat across jurisdictions, all share a common core: the rejection of *Revlon*'s basic precept that a business is run solely to advance the financial interests of shareholders.[196]

The proliferation of these statutes can be explained by the misperception that traditional corporations and their directors have a legal duty to ruthlessly maximize the wealth of their shareholders under all circumstances.[197] Ironically, this misperception stems, in part, from the pervasive reach of *Revlon* and its seepage into every facet of corporate decision-making. In reality, beyond *Revlon*'s narrow scope—covering only "sale or change in control" transactions[198]—the business judgment rule

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194. *See* J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (May 1, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556 (providing a chart of all fifty states corporate forms of social enterprise). Despite the proliferation of these statutes, it is admittedly a separate question how many businesses will actually opt in to these alternative corporate forms.

195. *See* DEL CODE ANN. tit. 8, §§ 361–68. *See generally* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. (forthcoming 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2437001 (discussing Delaware's divergence from the Model Benefit Corporation Legislation); Alicia Plerhoples, *Delaware Public Benefit Corporations 90 Days Out*: *Who's Opting In?*, 14 U.C. DAVIS BUS. L. J. (forthcoming 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2377267 (discussing the impact of Delaware's newly adopted statute that allows entities to incorporate as public benefit corporations).

196. *See, e.g.*, DEL. CODE ANN. tit. 8, § 362 ("[A] public benefit corporation shall be managed in a manner that balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit or public benefits identified in its certificate of incorporation.").

197. *See, e.g.*, WILLIAM H. CLARK, JR. ET AL., THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS AND ULTIMATELY THE PUBLIC 14 (2012), www.benefitcorp.net/storage/documents/Benecit_Corporation_White_Paper_1_18_2013.pdf ("In the day-to-day context where the business judgment rule applies, a judge may not find it to be appropriate to consider and advance non-shareholder interests for their own sake (i.e., as part of the company's mission) and not as a way of maximizing long-term shareholder financial value . . . .").

198. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

affords corporate directors ample discretion to make decisions that serve the interests of non-shareholder stakeholders.[199] If directors myopically focus on the interests of shareholders, then it is not because corporate law requires it, but because shareholders demand it.[200]

Putting aside the dubious need for benefit corporation legislation, however, the proliferation of these statues and, more generally, the rise of the larger social enterprise movement[201] represent yet another rejection of *Revlon*'s dictate, both as a legal mandate and as a normative tenet. Investors in these social enterprises, it seems, have willingly traded the judicially enforced obligation of shareholder wealth maximization in favor of an unenforceable aspiration to do well financially by doing good in business.

Johnson and Ricca wonder whether the rise of benefit corporations may cause the Delaware courts to revisit the *Revlon* mandate.[202] But consider the possibility that social enterprise legislation may do the opposite. The very existence of an alternative legal regime rejecting the primacy of shareholders may serve as a counterpoint for corporate law, ossifying the already pervasive norm within traditional, for-profit corporations that boards must mercilessly pursue shareholder wealth maximization under all circumstances. If so, then benefit corporations may, ironically, bolster *Revlon*'s status within

199. *See* STOUT, supra note 166, at 24–31; *cf*. Yosifon, *supra* note 172, at (conceding that although corporate law dictates shareholder primacy, the business judgment rule gives directors "near total discretion" and, therefore, "it is nearly impossible to enforce the shareholder primacy norm"); *accord* Bainbridge, *supra* note 170 ("[C]urrent law allows boards of directors substantial discretion to consider the impact of their decisions on interests other than shareholder wealth maximization.").

200. *Cf*. Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance*, 68 BUS. LAW. 1007, 1038 (2013) ("The problem that [benefit corporation statutes are] seeking to address . . . may not [be] a problem of law, but one of business strategy . . . . [T]he answer to creating more socially responsible corporations may lie in the classrooms of business schools and not in the halls of state legislatures.").

201. *See generally* Antony Page & Robert A. Katz, *Is Social Enterprise the New Corporate Social Responsibility?*, 34 SEATTLE U. L. REV. 1351 (2011); Robert A. Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59 (2010).

202. *See* Johnson & Ricca, *supra* note 11, at 223–24.

corporate law and practice, even while rejecting the doctrine's central dictate.

## *IV. Conclusion*

Nearing thirty years in age, *Revlon* endures today as an enforceable legal obligation. Indeed, recent chancery court decisions demonstrate *Revlon*'s extensive grasp, reaching corporate directors, officers, and even corporate advisors—all to ensure that in a "sale or change in control" transaction,[203] shareholders "get[] the best price" reasonably available for their investment.[204] Given the doctrine's continuing vigor, it is unsurprising then that questions about *Revlon*'s purpose and triggers, its contours and boundaries, continue to garner close academic and practitioner interest.[205]

Taking a remedial perspective on the doctrine, Johnson and Ricca are able to coherently harmonize *Revlon*'s evolution with subsequent developments in corporate law more broadly. And in the process, the coauthors have liberated *Revlon* from the "narrow, silo-like doctrinal isolation"[206] that it is too often accorded. For these significant scholarly contributions the pair should be commended.

But what the coauthors perceive to be the dwindling of *Revlon* as an enforceable legal directive may actually reflect the hegemony of the doctrine's unitary shareholder focus in corporate culture and boardroom discussions. If *Revlon* is dwindling, it is happening from outside of corporate law, where competing bodies of law have emerged, rejecting or dispensing of the doctrine's fiduciary mandate. Viewed from this broader perspective, the dwindling of *Revlon* may simply be a part of a larger narrative: the dwindling of the corporate form as the only way to do business.[207]

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203. *See supra* note 2 (describing the transactional circumstances triggering *Revlon* scrutiny).

204. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 176, 182 (Del. 1995).

205. *See supra* notes 4–10 and accompanying text.

206. *See* Johnson & Ricca, *supra* note 11, at 172.

207. *Cf.* Manesh, *supra* note 190 (describing the competitive threat that LLC

and limited partnership law represents to the continuing vitality of the corporate form).

*Appendix*

| Case Name | Single Bidder? | Injunction Granted on *Revlon* Claim? | Reason *Revlon* Claim Failed? |
| --- | --- | --- | --- |
| 1. *David P. Simonetti Rollover IRA v. Margolis* | Multiple | Denied | Failed to show probability of success on merits[208] |
| 2. *Maric Capital Master Fund, Ltd. v. Plato Learning, Inc.* | Unclear | Denied | Failed to show probability of success on merits[209] |
| 3. *In re Dollar Thrifty Shareholder Litigation* | Multiple | Denied | Failed to show probability of success on merits[210] |
| 4. *In re Cogent, Inc. Shareholder Litigation* | Multiple | Denied | Failed to show probability of success on merits[211] |
| 5. *In re Del Monte Foods Co. Shareholder Litigation* | Single | Granted | |
| 6. *In re Atheros Communications, Inc.* | Multiple | Denied | Failed to show probability of success on merits[212] |

208. David P. Simonetti Rollover IRA v. Margolis, C.A. No. 3694–VCN, 2008 WL 5048692, at *5 (Del. Ch. Jun. 27, 2008).

209. Maric Capital Master Fund, Ltd. v. Plato Learning, Inc., 11 A.3d 1175, 1176 (Del. Ch. 2010).

210. *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 616–17 (Del. Ch. 2010).

211. *In re* Cogent, Inc. S'holder Litig., 7 A.3d 487, 502 (Del. Ch. 2010).

212. *In re* Atheros Commc'ns, Inc., No. 6124–VCN, 2011 WL 864928, at *8 (Del. Ch. Mar. 4, 2011).

| Case Name | Single Bidder? | Injunction Granted on *Revlon* Claim? | Reason *Revlon* Claim Failed? |
|---|---|---|---|
| 7. *In re Answers Corp. Shareholders Litigation* | Single | Denied | Failed to show probability of success on merits[213] |
| 8. *In re Orchid Cellmark Inc. Shareholder Litigation* | Single | Denied | Failed to show probability of success on merits[214] |
| 9. *In re Smurfit-Stone Container Corporation Shareholder Litigation* | Single | Denied | Failed to show probability of success on merits[215] |
| 10. *In re OPENLANE, Inc.* | Single | Denied | Failed to show probability of success on merits[216] |
| 11. *In re El Paso Corp. Shareholder Litigation* | Single | Denied | Probability of success; Balance of equities did not favor injunction[217] |

213. *In re* Answers Corp. S'holders Litig., No. 6170–VCN, 2011 WL 1366780, at *5 (Del. Ch. Apr. 11, 2011).

214. *In re* Orchid Cellmark Inc. S'holder Litig., No. 6373–VCN, 2011 WL 1938253, at *8 (Del. Ch. May 12, 2011).

215. *In re* Smurfit-Stone Container Corp. S'holder Litig., No. 6164–VCP, 2011 WL 2028076, at *19 (Del. Ch. May 20, 2011).

216. *In re* OPENLANE, Inc., No. 6849–VCN, 2011 WL 4599662, at *10 (Del. Ch. Sept. 30, 2011).

217. *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 447, 451–52 (Del. Ch. 2012).

| Case Name | Single Bidder? | Injunction Granted on *Revlon* Claim? | Reason *Revlon* Claim Failed? |
|---|---|---|---|
| 12. *In re Micromet, Inc. Shareholder Litigation* | Single | Denied | Failed to show probability of success on merits[218] |
| 13. *In re Delphi Financial Group Shareholder Litigation* | Single | Denied | Probability of success; Balance of equities did not favor injunction[219] |
| 14. *In re Plains Exploration & Production Co. Stockholder Litigation* | Single | Denied | Failed to show probability of success on merits[220] |
| 15. *Koehler v. NetSpend Holdings Inc.* | Single | Denied | Probability of success; Balance of equities did not favor injunction[221] |

218. *In re* Micromet, Inc. S'holder Litig., No. 7197–VCP, 2012 WL 681785, at *10, *13 (Del. Ch. Feb. 29, 2012).

219. *In re* Delphi Fin. Grp. S'holder Litig., No. 7144–VCG, 2012 WL 729232, at *17, *20–21 (Del. Ch. Mar. 6, 2012).

220. *In re* Plains Exploration & Prod. Co. Stockholder Litig., No. 8090–VCN, 2013 WL 1909124, at *7 (Del. Ch. May 9, 2013).

221. Koehler v. NetSpend Holdings Inc., No. 8373–VCG, 2013 WL 2181518, at *24 (Del. Ch. May 21, 2013).