CANNING PLUM ORGANICS: THE AVANT-GARDE CAMPBELL SOUP COMPANY ACQUISITION AND DELAWARE PUBLIC BENEFIT CORPORATIONS WANDERING *REVLON*-LAND

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ABSTRACT

In July 2013 the Governor of Delaware signed into law Sections 361-368 of the Delaware General Corporation Law, providing for the incorporation of mission-driven public benefit corporations. Section 365(a) requires that a board of directors manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation. However, the Delaware Supreme Court's 1986 holding in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., *specifies that at a sale of the company a board must maximize the sale price of the enterprise for the benefit of the shareholders while continuing to perform its fiduciary duties. When a public benefit corporation enters* Revlon-*land, the statutory language provides no guidance to managers, directors, stockholders, and the Delaware courts on how the foregoing interests are intended to be balanced against one another. The language in the newly adopted Delaware public benefit corporation statute, the holding in* Revlon, *and* Revlon*'s progeny have therefore left several key questions unanswered when read together. The fundamental question being: what are the duties of directors at public benefit corporations when selling the company? In performing Section 365(a)'s statutorily-imposed balancing act, may directors make an end-run around the maximization of the company's value for the benefit of the shareholders at a sale of the company in favor of adopting a position, or accepting a bid, more hospitable to the company's promoted public benefits?*

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This Article seeks to answer these questions, among others, while simultaneously suggesting a more suitable framework that should apply with respect to public benefit corporations in Revlon-*land.*

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I. INTRODUCTION

In the early 1960s, Andy Warhol immortalized the red and white cans of Campbell's Soup. The pop artist's unique perspective on an iconic product transformed lasting perceptions of American culture. Almost half a century later, the New Jersey-based global food brand

became a trailblazer in the effort to re-color traditional notions of the corporation[1] by acquiring Plum Organics, a baby food company committed to maximizing not only profit, but also public value through social and environmental responsibility initiatives.[2] Perhaps best known for its environmentally friendly lightweight soft-sided baby food pouch, Plum is socially committed to producing "nutritious organic baby food. . . . [and] to nourishing little ones with the very best food from the very first bite, and extends that mission to children in need across America."[3]

Campbell acquired Plum from Catamount Ventures, a venture capital firm that invests in companies committed to corporate social responsibility.[4] At the time of the acquisition, which was completed in June 2013, Plum was a well-established benefit corporation based in California,[5] a corporate form expressly committed to the pursuit of social and environmental goods, not just profits.[6] Campbell structured the acquisition in a way that allowed Plum to operate as a "standalone business" under the continued guidance of Neil Grimmer, Plum's

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[1]The conception of the traditional corporation has been historically dominated by two different models—the "property" model and the "entity" model. *See* C. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264-65 (1992):

> In the [property] conception, the corporation is seen as the private property of its stockholder-owners. The corporation's purpose is to advance the purposes of these owners (predominantly to increase their wealth), and the function of directors, as agents of the owners, is faithfully to advance the financial interests of the owners . . . . This model might almost as easily be called a contract model, because in its most radical form, the corporation tends to disappear, transformed from a substantial institution into just a relatively stable corner of the market in which autonomous property owners freely contract.
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> The [entity] conception sees the corporation not as the private property of stockholders, but as a social institution . . . . [T]he corporation is not strictly private; it is tinged with a public purpose. . . . Thus, corporate purpose can be seen as including the advancement of the general welfare. The board of directors' duties extend beyond assuring investors a fair return, to include a duty of loyalty, in some sense, to all those interested in or affected by the corporation.

[2]*Plum Organics*, B CORP. (July 21, 2014), *archived at* http://perma.cc/5CUR-Y73L.

[3]*Id.*

[4]*See Catamount Ventures Enters Into an Agreement to Sell Plum Organics to Campbell Soup Company*, YAHOO! FIN. (May 23, 2013, 5:15 PM), *archived at* http://perma.cc/LH82-7JMK.

[5]*See* Ariel Schwartz, *Inside Plum Organics, The First Benefit Corporation Owned By A Public Company*, FAST CO. (Jan. 22, 2014), *archived at* http://perma.cc/WTK3-HGHJ.

[6]*See* CAL. CORP. CODE. § 14600 *et seq.* (2012).

president and co-founder, while simultaneously sustaining its "mission-driven culture."[7] In August 2013, with Campbell's blessing, Plum converted to a Delaware public benefit corporation after Governor Markell signed into law Sections 361-368 of the Delaware General Corporation Law.[8] The corporate conversion made the baby food company the first Delaware public benefit company owned by a public company.[9]

Public benefit corporations, such as Plum Organics, are, of course, novel ideas within the realm of Delaware corporate law. In some instances, this novelty clashes with the well-settled decisions of Delaware business courts, most notably that of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, a 1986 decision issued by the Supreme Court of Delaware.[10] In its most basic formulation, *Revlon* holds that "when a target board of directors enters *Revlon*-land, the board's role changes from that of 'defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.'"[11] Less colloquially, *Revlon*-land is the space in which the duty of a target corporation's board shifts from corporate preservation to maximization of the company's value for the benefit of the shareholders.[12]

However, the use of the word "duty" is perhaps a misnomer, in that "*Revlon* does not establish special duties or impose particular conduct obligations on directors. Rather, it is a standard of review under which the extent of judicial deference to be given to board decisions narrows from rationality to range-of-reasonableness."[13] Thus, insofar as

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[7]*Campbell Completes Acquisition of Plum Organics*, CAMPBELL SOUP CO. (June 13, 2013), *archived at* http://perma.cc/B2VS-L6RT.

[8]*Governor Markell Registers Delaware's First Public Benefit Corporations*, DELAWARE.GOV (Aug. 1, 2013), *archived at* http://perma.cc/37L9-4K5K.

[9]*See* Schwartz, *supra* note 5.

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

[11]Stephen M. Bainbridge, *The Geography of* Revlon-*Land*, 81 FORDHAM L. REV. 3277, 3280 (2013) (quoting *Revlon*, 506 A.2d at 182).

[12]*See Revlon*, 506 A.2d at 182 (Del. 1986).

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

> There are many business and financial considerations implicated in investing and selecting the best value reasonably available. The board of directors is the corporate decisionmaking body best equipped to make these judgments. Accordingly, a court applying enhanced judicial scrutiny should be deciding 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

this Article references "*Revlon* duties," in addition to the duties of directors to "act in accordance with their fundamental duties of care and loyalty,"[14] it is also referring to "the duty to act reasonably, [which] requires that a reasonable course of action be taken under the circumstances."[15] Although, once *Revlon* has been triggered, "the board must perform its fiduciary duties in the service of a specific objective: maximizing the sale price of the enterprise."[16] As noted by former Justice Carolyn Berger, writing for the Supreme Court of Delaware in *Lyondell Chemical Co. v. Ryan*, "[t]here is only one *Revlon* duty—to '[get] the best price for the stockholders at a sale of the company.'"[17]

Revlon and its progeny have yielded three scenarios in which a company and its board of directors can enter *Revlon*-land: first, "when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company;"[18] second, "where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company;"[19] and third, where, in the context of a sale of control, such control passes from the fluid aggregation of unaffiliated stockholders to a controller.[20] Once *Revlon* is

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> subsequent events may have cast doubt on the board's determination. Thus, courts will not substitute their business judgment for that of the directors, but will determine if the directors' decision was, on balance, within a range of reasonableness.

See also V.C. J. Travis Laster, Revlon *is a Standard of Review: Why It's True And What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 6 (2013)

[14]*Paramount Commc'ns, Inc.*, 637 A.2d at 43 (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (1989)); *see also* Laster, *supra* note 13, at 6-7.

[15]Laster, *supra* note 13, at 20.

[16]Malpiede v. Townson, 780 A.2d 1075, 1083 (Del. 2001).

[17]Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242 (quoting *Revlon*, 506 A.2d at 182). Justice Berger reasoned:

> No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control. As we noted in *Barkan v. Amsted Industries, Inc.*, "there is no single blueprint that a board must follow to fulfill its duties." That said, our courts have highlighted both the positive and negative aspects of various boards' conduct under Revlon. The trial court [in *Lyondell Chemical*] drew several principles from those cases: directors must "engage actively in the sale process," and they must confirm that they have obtained the best available price either by conducting an auction, by conducting a market check, or by demonstrating "an impeccable knowledge of the market."

Id. at 242-43 (internal citations omitted).

[18]Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989) (citing Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1988)).

[19]*Id.*

[20]*See Paramount Commc'ns Inc.*, 637 A.2d at 34, 36 (Del. 1994).

triggered, "[t]he reviewing court looks at whether the board acted reasonably 'by undertaking a logically sound process to get the best deal that is realistically attainable.'"[21] Despite what may otherwise be popular perception, *Revlon* does not create affirmative "duties" to conduct an auction or follow a set of judicially prescribed procedures,[22] retain the right to terminate should a better deal come along,[23] nor get the best price.[24] In short, what changes once *Revlon* is triggered "is not the standard of conduct but the standard of review."[25]

The debate surrounding the application of *Revlon* to traditional corporations has gained momentum in recent years,[26] but this Article does not seek to interject in that space. Rather, this Article seeks to grapple with the issues presented by the conflict of responsibilities that necessarily arises when a Delaware public benefit corporation and its board of directors find themselves wandering *Revlon*-land. That is to say, as part of the new legislation signed into law by Governor Markell

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[21]Laster, *supra* note 13, at 21 (citing *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. 2007)).

[22]*See* Barkan v. Amstead Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("*Revlon* does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest."); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 595-96, 600 (Del. 2010) ("*Revlon* is often mistakenly referred to as creating a duty to auction. . . ."); *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007) ("The mere fact that a board did not, for example, do a canvass of all possible acquirers before signing up an acquisition agreement does not mean that it necessarily acted unreasonably."); *see also* Laster, *supra* note 13 at 21-22.

[23]*See* WaveDivision Holdings, LLC v. Millennium Digital Media Sys., L.L.C., 2010 WL 3706624, at *17 (Del. Ch.) ("Delaware entities are free to enter into binding contracts without a fiduciary out so long as there was no breach of fiduciary duty involved when entering into the contract in the first place."); *see also* Laster, *supra* note 13, at 23-25.

[24]*See In re Netsmart Techs. S'holders Litig.*, 924 A.2d at 192:

> What is important and different about the *Revlon* standard is the intensity of judicial review that is applied to the directors' conduct. 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. Although linguistically not obvious, this reasonableness review is more searching than rationality review, and there is less tolerance for slack by directors.

See also Laster, *supra* note 13, at 25-26.

[25]Laster, *supra* note 13, at 26.

[26]*See* Bainbridge, *supra* note 11, at 3280-82; Mohsen Manesh, *Defined by Dictum: The Geography of* Revlon-*Land in Cash and Mixed Consideration Transactions*, 59 VILL. L. REV. 1, 1-2 (2014); Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1487 (2013); *see also* Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167, 169-70 (2014) (summarizing the contemporary academic debate of *Revlon* jurisprudence).

in July 2013, public benefit corporations must "[i]dentify within its statement of business or purpose . . . [one] or more specific public benefits to be promoted by the corporation."[27] Moreover, Delaware public benefit corporation directors are required to "manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[28]

Advocates of benefit corporation entity form believe "[c]urrent corporate law makes it difficult for businesses to take employee, community and environmental interests into consideration when making decisions," on account of the widely-held principle that boards of directors are, in the first instance, charged with maximizing shareholder value.[29] Some critics of the mission-driven entity movement, however, claim that advocacy groups behind the benefit corporation fundamentally ignore the reality in which "there is no legal restriction on directors' ability to consider the interests of other stakeholders,"[30] particularly in light of the implications of Chancellor William B. Chandler III's discussion of the promotion of non-shareholder considerations in *eBay Domestic Holdings, Inc. v. Newmark*.[31] Additionally, the majority of states have enacted "constituency statutes" that enable directors to make such considerations.[32]

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[27]DEL. CODE ANN. tit. 8, § 362(a)(1) (2013).

[28]DEL. CODE ANN. tit. 8, § 365(a) (2013).

[29]Mark A. Underberg, *Benefit Corporation vs. "Regular" Corporations: A Harmful Dichotomy*, HAR. L. SCH. F. CORP. GOV. & FIN. REG. (May 12, 2012), *archived at* http://perma.cc/SF9K-GQRA.

[30]*Id.*

[31]16 A.3d 1, 33 (Del. Ch. 2010) ("Promoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders."); *see also* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 178-79 (2008):

> Corporations can ignore shareholder wealth maximization in order to: (1) comply with the law; (2) make charitable contributions; and (3) devote a 'reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.' In other words, the only exceptions permitted to the shareholder wealth maximization norm are those necessary to ensure that corporations be given sufficient latitude to act like responsible community members by complying with the law and supporting charities and other worthy causes.

[32]*See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 733 (2005) (arguing that directors have implicit and explicit discretion to forgo profits in the name of public interests, although not criticizing the creation of B-Corporation

When read together, the language in the newly adopted Delaware public benefit corporation provisions, the holding in *Revlon*, and *Revlon*'s progeny have left several key questions unanswered.[33] The fundamental question being: what are the duties of directors at public benefit corporations when selling the company? In performing the statutorily-imposed balancing act, may the directors make an end run around the maximization of the company's value for the benefit of the shareholders at a sale of the company in favor of adopting a position, or accepting a bid, more hospitable to the company's promoted public benefits?

The novelty of the foregoing issue and the lack of specificity in the statutory amendments have yielded a reality in which the kinds of actions and decisions that will satisfy the standard of reasonableness, adjudging directors managing a public benefit corporation in *Revlon*-land, are unclear. This Article seeks to answer the foregoing questions, among others, while simultaneously suggesting a more suitable framework that *should* apply with respect to public benefit corporations in *Revlon*-land.[34] Part II of this Article will discuss the birth of the benefit corporation, starting with the theories of E. Merrick Dodd and concluding with B Lab's movement to increase corporate dedication to mission-driven initiatives.[35] Further, Part II procedurally and substantively compares the legislation passed in Delaware with the benefit corporation Model Legislation and the legislation of other states that have similar statutory provisions, including Maryland, Vermont, California, and New York.[36] This portion of the paper will additionally investigate the reasons why companies like Campbell would be interested in acquiring a socially-minded entity like Plum Organics.[37]

Part III briefly expands on the law's current state as it concerns the applicability of *Revlon*, touching on the holdings in *Paramount Communications, Inc. v. Time, Inc.*, *Paramount Communications, Inc. v. QVC Network, Inc.*, and *eBay Domestic Holdings, Inc. v. Newmark*.[38] This section also elaborates on the inherent tensions that exist between the mandate of Delaware public benefit corporations and the shareholder

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statutes).

[33] *See* Daniel Fisher, *Delaware 'Public Benefit Corporation' Lets Directors Serve Three Masters Instead of One*, FORBES (July 16, 2013), *archived at* http://perma.cc/7JZ6-M5NQ ("'It's very clear you can turn down more cash to protect this mission,' [attorney William] Clark said. 'We haven't had a hostile run at a benefits corporation yet, so it's anybody's guess when we'll see the first lawsuit.'").

[34] *See infra* Part III.

[35] *See infra* Part II.A-C.

[36] *See infra* Part II.D.

[37] *See infra* Part II.A.

[38] *See infra* Part III.A.

wealth maximization creed as commemorated by *Revlon*.[39] From there, Part III will set forth this author's view of how the law should apply to public benefit corporations, so as to answer the questions left behind by the language in the public benefit corporation statute, *Revlon*, and *Revlon's* progeny.[40] Part IV is a brief conclusion. Ultimately, this Article proposes that the law, as it currently exists, is unsuitable for the public benefit corporation, and suggests that the powers that be in Delaware produce a legal regime that enables directors of such entities adrift in *Revlon*-land to give the greatest weight to maximizing shareholder financial *and* non-financial interests when performing Section 365(a)'s balancing act.[41]

II. THE BIRTH OF THE BENEFIT CORPORATION, ITS AFFIRMATION, AND REGRESSION

A. *Birth and Infancy in Maryland and Vermont*

Corporate social responsibility has long been a perplexing issue for lawmakers, legal theorists, and corporate managers alike, and the birth of the benefit corporation in 2010[42]—when Maryland and Vermont became the first states to enact statutory provisions providing for entities that promote employee, community, and environmental interests, in addition to maximizing shareholder value—is largely an outgrowth of a debate started in the early portion of the 20th century by Professor E. Merrick Dodd.[43] Professor Dodd advanced the notion that a corporation could operate "as an economic institution which has a social service as well as a profit-making function."[44] Professor Dodd's theories were

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[39]*See infra* Part III.A.

[40]*See infra* Part III.B.

[41]*See infra* Part IV.

[42]Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y. 170, 184 (2012).

[43]*See* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932):

> If, therefore, the managers of modern businesses were also its owners, the development of a public opinion to the effect that business has responsibilities to its employees and its customers would, quite apart from any legal compulsion, tend to affect the conduct of the better type of business man. . . . Business might then become a profession of public service, not primarily because the law had made it such but because a public shared in by business men themselves had brought about a professional attitude.

[44]*Id.* at 1148; *see also* Alicia E. Plerhoples, *Can an Old Dog Learn New Tricks?*

themselves handed-down from the issues presented in *Dodge v. Ford Motor Co.*, where in 1919, the Michigan Supreme Court struck down Henry Ford's altruistic—albeit unbelievable and inauthentic—public platform as it related to the construction of the River Rouge Complex.[45] Mr. Ford suggested that his beloved Ford Motor Company was founded to do "as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally to make money."[46] In reaching the decision to reject Henry Ford's charlatan view of corporate purpose, the court in *Ford Motor Co.* noted, "[I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefitting others. . . ."[47]

The actual import of *Dodge* with respect to shareholder wealth maximization can be—and has been—meaningfully debated,[48] but the case explicitly provides that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[49] Almost a century later, however, the weight of the Michigan Supreme Court's discussion of value maximization with respect to contemporary corporate law is in jeopardy, as firms such as B Lab have taken up the benefit corporation cause.[50] Indeed, perhaps the most influential stimulus for the passing of statutory provisions creating benefit corporations has been, to date, B Lab, a nonprofit organization "dedicated to using the power of

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Applying Traditional Corporate Law Principles to New Social Enterprise Legislation, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 222 (2012) ("For many social enterprises, how the business operates is just as important as what the business produces.").

[45] *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684-685 (Mich. 1919).

[46] DAVID L. LEWIS, THE PUBLIC IMAGE OF HENRY FORD: AN AMERICAN FOLK HERO AND HIS COMPANY 100 (Wayne State University Press 1976).

[47] *Ford Motor Co.*, 170 N.W. at 507.

[48] *See, e.g.*, Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 COLUM. L. REV. 497, 522 (1992):

> The antitrust perspective potentially transforms our view of the case. . . . The practical effect of the courts' decisions was to provide funds for the Dodges to invest in and expand their competing automobile company. Indeed, by preventing Ford from hindering the expansion of the Dodge brothers, probably the most skilled and dangerous competitors that [Ford Motor Company] faced, the case may perhaps better be read as subordinating pure shareholder interests to competitive concerns than as an undiluted expression of the shareholder primacy view.

[49] *Ford Motor Co.*, 170 N.W. at 684.

[50] *See* Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis With Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1007 (2013) ("Society has reevaluated the corporate governance yardstick. The benefit corporation is an invitation to seekers of an evolved interpretation.").

business to solve social and environmental problems."[51] Broader forces have also been at work, as "companies fundamentally rely on tacit acceptance by the communities that are affected by their operations, even when there is no formalized relationship of rights and responsibilities."[52] Companies, like Campbell, have adopted the position that their short-term and long-term business outlooks are inextricably tied to their impact on employees, communities, and the environment, in an age where some investors have developed a sensitivity to the direct and indirect effects their investments have on society as a whole, making firms such as Plum Organics attractive targets.[53]

New Jersey, California, and New York followed the path laid out by Maryland and Vermont in 2010, culminating with, unquestionably, the most significant affirmation of the benefit corporation when, in 2013, the Delaware legislature enacted Section 361 *et seq.* of the Delaware General Corporation Law.[54] As precursors to Delaware public benefit corporations, mission-driven entities in Maryland and Vermont are required to make a "material positive impact on society and the environment" as part of their duty to strive for a "general public benefit."[55] Furthermore, in an effort to regulate the benefits actually provided to society by such corporations, some corporate statutes "require the corporation to issue an 'annual benefit report,' to outline its specific beneficial goals and detail its recent progress towards them. In this report, the benefit corporation must include a review of its social and environmental performance prepared 'in accordance with a third party

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[51] *Powered by B Lab*, BENEFIT CORP. INFO. CENTER (July 24, 2014), *archived at* http://perma.cc/7K8M-369P.

[52] Allison Christians, *How Starbucks Lost Its Social License – and Paid £20 Million to Get It Back*, 71 TAX NOTES INT'L 637, 638 (2013); *see also* Plerhoples, *supra* note 44, at 234-35 ("The social enterprise's earnings affect its stock price and entice a buyer, either hostile or friendly, in an attempt to achieve greater earnings and higher stock prices for the company.").

[53] *See* Plerhoples, *supra* note 44, at 235:

> [F]inancial success of a social enterprise may be because of—and not in spite of—its social and environmental mission, since many consumers prefer socially responsible and environmentally sustainable products and services. Indeed, it seems more likely that a social enterprise will be targeted by bidders because the target has access to a new and growing market of socially responsible business; profit-maximizing businesses will want to expand into that market by acquiring an established participant rather than starting their own brands. Such an acquisition leads to an immediate immersion in the market, marked by the legitimacy of the target social enterprise.

[54] DEL. CODE ANN. tit. 8, § 361 *et seq.* (2013).

[55] *See* MD. CODE ANN., CORPS. & ASSN'NS § 5-6C-01 (2010); VT. STAT. ANN. tit. 11A, §21.03 (2010); *see also* Munch, *supra* note 42, at 186.

standard.'"[56] The buck does not stop there, however, as directors who have failed to lead their benefit corporations to a position of positive social impact "may be subject to suit" derivatively.[57]

B. *Affirmation and Regression In Delaware*

For B Lab and comparable proponents of the benefit corporation, the most significant recognition of the mission-driven entity as a viable vehicle for social and environmental impact was its recognition by Delaware, a state that is home to the most influential body of corporate law in the nation and the legal home of many of the country's most notable corporations.[58] In that sense, codification in Delaware corporate law was a moment of validation and maturation for the benefit corporation movement.[59] It was, however, simultaneously a substantial regressive incident in the life of the benefit corporation.[60]

Section 365(a) provides the following language, without more:

> The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation.[61]

Not long after signing this language into law, Governor Markell took the public position that the new Delaware corporate entity could successfully achieve public benefits "while maintaining the high standards that are the hallmark of Delaware corporate law."[62] Indeed, the Governor posited, "Delaware public benefit corporations will function like and enjoy all the same benefits as traditional Delaware corporations and they will have

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[56]Munch, *supra* note 42, at 186 ("In this report, the benefit corporation must include a review of its social and environmental performance prepared 'in accordance with a third party standard.'").

[57]*Id.* at 186-87.

[58]*See* Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. J. L. 247, 248-49 (2014).

[59]*Id.*

[60]*See infra* notes 64-66 and accompanying text.

[61]DEL. CODE ANN. tit. 8, § 365 (2013).

[62]Jack Markell, *A New Kind of Corporation to Harness the Power of Private Enterprise for Public Benefit*, HUFFINGTON POST (2013), *archived at* http://perma.cc/S2R-XUEM.

three unique features that make them potential game changers. These three features concern corporate purpose, accountability, and transparency."[63] The notion that Delaware public benefit corporations will operate in a manner similar to traditional corporations is both a problematic and sentimental ideal due to Section 365's ambiguous language and the uncertainty related to a benefit corporation director's duties under *Revlon*.[64]

In pertinent part, Section 365 falls short with respect to corporate purpose and the statute's so-called balancing of interests housed in the entity's certificate of incorporation, and Governor Markell's comments reflect such inadequacy.[65] According to Governor Markell, "The overarching language helps ensure that a public benefit corporation serves the best long term interests of society while it creates value for its stockholders."[66] The complication, though, is the very fact that the statutory provisions are more overarching than specific.[67] Consequently, when a public benefit corporation enters *Revlon*-land, the statutory language provides no guidance to managers, directors, stockholders, or the Delaware courts on how the foregoing interests should be balanced against one another.[68] Thus, an apparent inconsistency arises between the expectation that directors will maximize the sale price of the company to the benefit of shareholder value and the cutting-edge supposition that directors will advance the public benefit corporation's general and specific public benefits—ultimately diminishing the utility of the "accountability" and "flexibility" that the new corporate form is meant to facilitate.[69] The only discernable limitation with respect to the balancing test is derived from the July 17, 2013 summary of the newly adopted version of Subchapter XV. In pertinent part, it provides: "Section 365(b) deems directors of public benefit corporations to have satisfied their fiduciary duties to balance the tripartite purposes if the director's decision is informed and disinterested and not such that no person of ordinary sound judgment would approve."[70]

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[63] *Id.*

[64] *See* Plerhoples, *supra* note 58, at 249 ("The public benefit corporation and other corporate forms with similar grounding . . . are untested, and characterized by ambiguity and uncertainty.").

[65] DEL. CODE ANN. tit. 8, § 365 (2013).

[66] Markell, *supra* note 62.

[67] *See* Plerhoples, *supra* note 58, at 251-57 (discussing potential flaws in Delaware's public benefit corporation law).

[68] *See id.* at 257.

[69] *See id.* at 248-49.

[70] S. 47, 147th Gen. Assemb., Reg. Sess. (Del. 2013).

C. *Enforcing Section 365(a) in Delaware—A Procedural Comparison*

As part of its advocacy, B Lab distributed the Model Benefit Corporation Legislation, which included a procedural framework for enforcing not only the duties of fiduciaries at benefit corporations, but the pursuit and creation of the general public benefit or specific public benefit purpose housed in the entity's certificate of incorporation, as well.[71] More specifically, the Model Legislation provides for a so-called "Benefit Enforcement Proceeding" defined as: "Any claim or action or proceeding for: (1) failure of a benefit corporation to pursue or create general public benefit or a specific public benefit purpose set forth in its articles; or (2) violation of any obligation, duty, or standard of conduct under this [*chapter*]."[72] The Model Legislation limits standing to bring a Benefit Enforcement Proceeding to the benefit corporation itself, or derivatively by:

> (i) a person or group of persons that owned beneficially or of record at least 2% of the total number of shares of a class or series outstanding at the time of the act or omission complained of;
> (ii) a director;
> (iii) a person or group of persons that owned beneficially or of record 5% or more of the outstanding equity interests in an entity of which the benefit corporation is a subsidiary at the time of the act or omission complained of; or
> (iv) other persons specified in the articles of incorporation or bylaws of the benefit corporation.[73]

Delaware's Section 367 approaches enforcement in a simpler manner. Instead of providing for an alternative enforcement procedure, such as a Benefit Enforcement Proceeding, Section 367 limits actions against public benefit corporation directors for a violation of their duties under Section 365(a) to derivate suits.[74] The statutory provision, without more, provides:

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[71] *See* MODEL BENEFIT CORP. LEGIS. § 102, (Bill Clark, Proposed Draft 2014), *archived at* http://perma.cc/AN7N-MU4D.

[72] *See id.*

[73] *Id.* § 305(c).

[74] *See* DEL. CODE ANN. tit. 8, § 367 (2013).

> Stockholders of a public benefit corporation owning individually or collectively, as of the date of instituting such derivate suit, at least 2% of the corporation's outstanding shares or, in the case of a corporation with shares listed on a national securities exchange, the lesser of such percentage or shares of at least $2,000,000 in market value, may maintain a derivative lawsuit to enforce the requirements set forth in § 365(a) of this title.[75]

Unlike the Model Legislation and other states who have enacted benefit corporation statutes, shareholders of a Delaware public benefit corporation are the only stakeholders legally capable of bringing a suit to enforce the requirements of Section 365(a).[76] Furthermore, the statutory language seemingly does not modify the nature of a typical derivative suit, suggesting that the requirements for maintaining such an action at a public benefit corporation are no different than they are for maintaining one at a traditional Delaware corporation.[77]

While neither the Model Legislation nor the Delaware General Corporation Law provisions provide for directorial monetary liability for the failure to pursue the general or specific public benefit, both "clearly allow director liability for failure to balance stockholders' and stakeholders' interests."[78] Indeed, Section 365(b) explicitly states that the

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[75] *Id.*

[76] *Compare* HAW. REV. STAT. ANN. § 420D-10 (2014) (providing shareholders *and* directors with the right to bring a derivative claim), *and* 15 PA. CONS. STAT. ANN. § 3325(b) (2013) (mirroring the language set forth in the Model Legislation), *and* VT. STAT. ANN. tit. 11, § 21.13(b) (2014), *with* DEL. CODE ANN. tit. 8, § 367 (2013), *and* S. 47, 147th Gen. Assemb., Reg. Sess. (Del. 2013) ("Section 367 authorizes stockholders of public benefit corporations to sue derivatively to enforce the directors' duties under § 365 . . . ."). *See also* Plerhoples, *supra* note 58, at 257 ("[O]nly stockholders, and not stakeholders, have standing to bring a derivative claim, making directors more accountable to stockholders than stakeholders.").

[77] A derivative suit is one that is instituted on behalf of the corporation by a shareholder in an effort to enforce a cause of action against a third party, including officers or directors. *See* DEL. CH. CT. R. 23.1. A shareholder must hold that position at the time the action is brought and must maintain his or her position as a shareholder throughout the action's life, in order to sustain a derivative suit. *Id.* Moreover, before a derivative action can be brought to the Delaware courts, the aggrieved shareholder must make a demand upon the board, identify the cause of action, and request that they rectify it. *Id.* The demand requirement is excused only when placing such a demand with the board would be futile. *See* Aronson v. Lewis, 473 A.2d 805, 808 (Del. 1984) ("In our view demand can only be excused where facts are alleged with particularity which create a reasonable doubt that the directors' action was entitled to the protections of the business judgment rule."), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[78] *See* Plerhoples, *supra* note 58, at 257.

business judgment rule will apply to the decision-making processes of Delaware public benefit corporation directors, such that a director's fiduciary duties to stockholders and the corporation will be deemed satisfied only when a "decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve."[79] Section 365(c) also enables public benefit corporations to include a Section 102(b)(7) exculpatory provision in its certificate of incorporation.[80]

D. *A Substantive Comparison with Maryland, Vermont, New York, and Model Legislation*

The legislation enacted in Maryland and Vermont, the first states to statutorily provide for benefit corporations, and the legislation in New York—debatably the second most significant state in the realm of corporate law—serve as interesting foundational points when compared to the new sections of the Delaware General Corporation Law.[81] For instance, Maryland requires that a benefit corporation director consider how his or her decisions will impact: (1) the benefit corporation's stockholders; (2) the benefit corporation's employees, workforce, subsidiaries, and suppliers; (3) the beneficiaries of the benefit corporation's general or specific public benefit purposes; (4) the community and societal considerations, including where the benefit corporation's offices, facilities, subsidiaries, and suppliers are located; and (5) the environment.[82]

The Vermont Business Corporations statute is largely identical to Maryland with respect to the duties of directors at public benefit corporations.[83] Not insignificantly, however, Vermont permits directors to consider how their decisions in managing the company may impact "the long-term and short-term interests of the benefit corporation,

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[79]DEL. CODE ANN. tit. 8, § 365(b) (2013).

[80]*Id.*, § 365(c) (2013) ("The certificate of incorporation of a public benefit corporation may include a provision that any disinterested failure to satisfy this section shall not . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty.").

[81]*See* CAL. CORP. CODE. § 14620 (2012) (concerning the duties of public benefit corporation directors, this California statute is substantively reflective of the Maryland and Vermont statutes); MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (2010) (stating duties of benefit corporation directors); VT. STAT. ANN. tit. 11A, §21.09 (2010) (stating the duties of directors of benefit corporations).

[82]MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (2010).

[83]*Compare* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (2010), *with* VT. STAT. ANN. tit. 11A, §21.09 (2010).

including the possibility that those interests may be best served by the continued independence of the benefit corporation."[84] This language is a nod to *Revlon*, while also being an indirect rejection of the expectation that directors must direct the corporation with the purpose of maximizing shareholder value.[85]

New York's Business Corporation Law Section 1707(a)(1)(G) tracks the language of the Vermont statute, as well.[86] Whether insignificant or not, there is a notable difference among Maryland, Vermont, California, and New York. New York lists first for directorial consideration "the ability for the benefit corporation to accomplish its general and any specific public benefit purpose," while the Vermont, Maryland, and California provisions list first the interests of stockholders.[87]

In addition to providing a procedural framework for legislators adopting benefit corporation legislation, B Lab distributed Model Benefit Corporation Legislation with the purpose of affording legislators a workable structure for meeting the "needs of business leaders and investors" at mission-driven companies.[88] The Model Legislation provides the following with respect to standards for director conduct and the interests that benefit corporation directors *must consider* when making a decision:

> (i) the shareholders of the benefit corporation;
> (ii) the employees and work force of the benefit corporation, its subsidiaries, and its suppliers;
> (iii) the interests of customers as beneficiaries of the general public benefit or specific public benefit purposes of the benefit corporation;

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[84]VT. STAT. ANN. tit. 11A, §21.09(a)(1)(F) (2010).

[85]*See* Plerhoples, *supra* note 44, at 238-39 n.92. Hypothetically, then, if the directors of a Vermont benefit corporation find themselves in *Revlon*-land and reasonably conclude that the long-term or short-term interests of the company are best served by passing on a monetarily more valuable offer in favor of selling the target to a bidder more apt to preserve the company's mission-driven initiatives, they presumably would not be in violation of their fiduciary duties.

[86]NY BUS. CORP. LAW. § 1707(a)(1)(G) (McKinney 2012).

[87]*Compare* NY BUS. CORP. L. § 1707(a)(1)(A) (2012), *with* CAL. CORP. CODE § 2700(c) (Deering 2012), *and* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-07 (2010), *and* VT. STAT. ANN. tit. 11A, § 21.09(a)(1)(A) (2010).

[88]*Model Legislation*, BENEFIT CORP. INFO. CENTER., *archived at* http://perma.cc/RE2P-W2H3.

> (iv) community and societal factors, including those of each community in which offices or facilities of the benefit corporation, its subsidiaries, or its suppliers are located;
> (v) the local and global environment;
> (vi) the short-term and long-term interests of the benefit corporation, including benefits that may accrue to the benefit corporation from its long-term plans and the possibility that these interests may be best served by the continued independence of the benefit corporation; and
> (vii) the ability of the benefit corporation to accomplish its general public benefit purpose and any specific public benefit purpose . . . ."[89]

Uniformly, Maryland, Vermont, California, and New York give no guidance as to what factor is to be given priority over any other, although the statutes do provide that certain interests may be given greater weight in the balancing if the benefit corporation so provides for such priority in its articles of incorporation.[90] In fact, the abovementioned states note that no priority need be given to any of the interests.[91]

The Comment to Model Legislation Section 301 advances the issue in ways that the state statutes do not, however.[92] The Comment provides, "By requiring the consideration of interests of constituencies other than the shareholders, the section rejects the holdings in *Dodge v. Ford* . . . and *eBay Domestic Holdings, Inc. v. Newmark* . . . that directors must maximize the financial value of a corporation."[93] The Comment proceeds by claiming that subsection (a) of Section 301 "makes it mandatory for the directors of a benefit corporation to consider the interests and factors that they would otherwise simply be permitted to consider in their discretion under the typical constituency statute,"[94] which generally permits directors to consider interests akin to those listed

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[89] MODEL BENEFIT CORP. LEGIS. § 301(a).

[90] *See, e.g.*, VT. STAT. ANN. tit. 11A, §21.09(a)(3) (2010) (stating that a benefit corporation is not required to provide priority to any particular group unless the benefit corporation has provided as such in its articles of incorporation).

[91] *See* NY BUS. CORP. L. § 1707(a)(3) (McKinney 2012); MD. CODE ANN., CORPS. & ASSN'NS § 5-6C-07 (2010); VT. STAT. ANN. tit. 11A, § 21.09(a)(3) (2010); CAL. CORP. CODE § 2700(c) (Deering 2012).

[92] *See* MODEL BENEFIT CORP. LEGIS. § 301(a) cmt.

[93] MODEL BENEFIT CORP. LEGIS. § 301(a) cmt.; *see also* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (holding that corporate culture is not a legally defensible interest if it is not intrinsically related to shareholder value).

[94] *See* MODEL BENEFIT CORP. LEGIS. § 301(a) cmt.

as part of the benefit corporation statutes.[95] In short, the most significant import of the Model Legislation is that it dares to go where the state statutes do not: it clearly rejects the mandate that directors, in the first instance, must manage the corporation with the purpose of maximizing shareholder value at a sale of the company.[96]

III. MODERNIZING THE *REVLON* SPECTRUM: DISCOVERING A MORE SUITABLE REGIME FOR PUBLIC BENEFIT CORPORATIONS

A. *Factors to Consider in Determining How Revlon Should Apply to Public Benefit Corporations*

In view of the blurred, if not movable, borders of *Revlon*-land,[97] the question becomes: what standard should apply to directors of a

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[95] *See id.*

[96] *See id.*

[97] *See* Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1488 (2013) ("The boundaries of the area covered by *Revlon* have shifted over the course of cases in unpredictable and paradoxical ways . . . ."). Furthermore, Professor Stephen Bainbridge, using a conflicts-of-interest-based approach, has been one of the primary proponents of the notion that the *Revlon* doctrine is becoming increasingly ambiguous, and that it needs to be refocused within the three entryways. *See* Bainbridge, *supra* note 11, at 3281, 3320-21 (2013). In *The Geography of* Revlon-*land*, Professor Bainbridge claims that recent decisions of the Chancery Court have "redrawn" the borders of *Revlon*-land, specifically with respect to the *QVC* gateway, where there is a sale or change of control of the target. *Id.* at 3320-21. Professor Bainbridge suggests that the *QVC* gateway has resulted in confusion as to whether a publicly-held acquirer without a controlling stockholder, utilizing cash to acquire a target, triggers *Revlon*. *See id.* at 3334. Professor Bainbridge reaches the conclusion that "so long as acquisitions of publicly held corporations are conducted by other publicly held corporations, diversified shareholders will be indifferent as to the allocations of gains between the parties. In turn, those shareholders will also be indifferent as to the form of consideration." *Id.* at 3335. In other words, where ownership in the post-transaction target is dispersed in a fluid market, *Revlon* is inapplicable; but, where the post-transaction target has a controlling stockholder, *Revlon* is applicable—and ultimately the concern for courts should not be the form of consideration, but whether a "change of control" has occurred "by sale or otherwise." *Id.* at 3338.

However, Professor Mohsen Manesh has criticized Professor Bainbridge's analysis as being an oversimplification of *Revlon* and its progeny, suggesting that the:

> *Revlon* doctrine has been purposefully, but cautiously, defined by the Delaware Chancery Court through the use of dictum. By employing dictum, the chancery court has provided useful guidance on a doctrine that is otherwise ill-defined by the supreme court's jurisprudence; and it has done so strategically—in situations where the court's statements do not unfairly affect the parties to the dispute before it.

Manesh, *supra* note 26, at 3. Regardless of whether the reader is cut from the cloth that the *Revlon* doctrine is superficially unclear and misapplied by the Delaware courts, as Professor Bainbridge is, or is of the idea that *Revlon* is intentionally "murky," with room for

public benefit corporation engaged in a sale of the company? This Article has already established that the relationship between the shareholder wealth maximization norm and the *Revlon* standard of review is unbefitting of the various social missions guarded by directors at Delaware public benefit corporations, who, in discharging their fiduciary duties, must balance "the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefit[s] identified in [the company's] certificate of incorporation."[98] *Revlon* is incongruous with these duties to the extent that it requires, in the first instance, the maximization of shareholder value at a sale of the company, if the actions of directors are to fall within the range-of-reasonableness in a given circumstance.[99]

Revlon-land is an area of the law that a Delaware public benefit corporation director wishes to avoid, as it currently exists.[100] The uncertainty of *Revlon*'s applicability to mission-driven organizations may produce a result whereby a director "may feel obligated to recommend an acquisition by an entity that intends to scale back or even abandon the social or environmental mission of the social enterprise,"[101] at the expense of another organization offering less monetary value but more

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maneuvering and interpretation, as Professor Manesh is, the common denominator between the positions is that *Revlon* is, in one way or another, equivocal. *Id.* at 3.

Former Delaware Supreme Court Justice Jack B. Jacobs brings another interesting and compelling query as to the current position of the *Revlon* doctrine in modern corporate law. *See* Jack B. Jacobs, Delaware Supreme Court Justice, *Does the New Corporate Shareholder Profile Call for a New Corporate Law Paradigm?*, Lecture at The Eugene P. and Delia S. Murphy Conference on Corporate Law (May 8, 2012) (transcript available at 18 FORDHAM J. CORP. & FIN. L. 19, 20-28 (2012)). Justice Jacobs questions whether "the degree of shareholder protection afforded in *Revlon*-type cases is still appropriate," given that "[o]ur capital markets are now 'deretailized.'" *Id.* at 20, 28. That is to say, as the Justice writes, "[t]oday, the shareholder base of U.S. public companies consists of highly-sophisticated institutions that have the resources and power—both economic and legal—to act collectively and influence governance." *Id.* at 20. Justice Jacobs qualifies this point by stating:

> There may be other forms of *Revlon*-type transactions where the need for shareholder protection is less compelling. Time does not permit me to explore or elaborate that thought here, except to say that the relevant inquiry would be whether, given the new shareholder profile reality, the shareholders as a group are able and motivated to protect themselves without court intervention. In cases where the answer is yes, the courts will be challenged, doctrinally speaking, either to formulate an exception to *Revlon* in those cases or to articulate a new governing theoretical concept.

Id. at 29.

[98] DEL. CODE ANN. tit. 8, § 365(a) (2013).

[99] *See* Plerhoples, *supra* note 44, at 244.

[100] *See id.*

[101] *Id.* at 239.

public benefit value. The murky nature of *Revlon*-land is such that, in considering how the doctrine should apply to public benefit corporations, we should be mindful of the ultimate fact that:

> [A]lthough directors have a duty to consider each of their various stakeholder groups, they are only legally accountable to one: shareholders . . . . [Moreover], shareholders and directors [in some jurisdictions] are the only individuals that can file a claim against leadership for mismanagement of the benefit corporation's public mission and other interests."[102]

Simultaneously, however, the law must apply such that the purpose of the public benefit corporation is not tossed by the wayside at the sight of the first bidder.[103] In other words, the powers that be in Delaware must avoid a legal regime in which directors are so uniquely focused on shareholder wealth maximization that they fail to balance the social and environmental goals of the company, thereby "selling out" or engaging in so-called "mission drift."[104] In proposing new borders for *Revlon*-land, this Article approaches the statutory balancing test, the obligations of directors, and the incentives of managers contemplating six different frameworks—shareholder interests, contract theory and corporate purpose, the business judgment rule, constituency statutes, the nonprofit corporation fiduciary duty model, and executive compensation. These frameworks will help to develop both a more suitable legal structure and a more adaptable corporate response to that structure.[105]

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[102]Munch, *supra* note 42, at 189.

[103]*See id.*

[104]*See* Plerhoples, *supra* note 44, at 258; *see also* Elhauge, *supra* note 32, at 784:

> An increasing number of investors now put their money in funds committed to avoid investments in corporations that create environmental harms, make tobacco, alcohol, or weapons, or engage in some other activity that conflicts with various conceptions of public interest . . . . Likewise, investors increasingly are government pension funds, unions, and university endowments, which in part often have nonfinancial agendas. For such shareholders, their welfare reflects a combination of their financial returns and their social or moral satisfaction with corporate activities.

[105]*See* Plerhoples, *supra* note 44, at 258.

1. Shareholder Interests

The creation of the Delaware public benefit corporation does not necessitate the demise of the shareholder primacy model. Being the only group legally capable of instituting an action against a corporation or its directors,[106] Delaware shareholders should, in fact, be the principal stakeholder considered when a director engages in a decision-making process that would otherwise thrust a traditional corporation into *Revlon*-land. Presumably, however, "the preferences of impact or social investors differ from those of traditional profit-maximizing investors," given that they are putting capital into a company that implicitly declares that it is committed to "doing well while doing good," such that it is unmistakably oriented towards the generation of social goods, even at the expense of financial profit maximization.[107] Just as donors to charitable trusts and organizations expect their funds to be utilized to advance a specified charitable purpose,[108] informed benefit corporation investors likely expect their investments to support the company's mission-based initiatives. Alternative shareholder preferences and interests are still shareholder preferences and interests, and financial investment in public benefit corporations is an affirmation of investor fidelity to those concerns.[109] Those interests, more importantly, are memorialized in the public benefit company's certificate of incorporation, which sets forth the specific public benefit or public benefits that will be promoted by the corporation.[110]

With the above in mind, a Delaware public benefit corporation director should have the flexibility to consider shareholder interests extrinsic to the company's financial performance.[111] The furtherance of non-financial shareholder concerns fits neatly into the shareholder primacy model,[112] which suggests, in its simplest form, "shareholders own the corporation and directors and officers are mere fiduciaries of the shareholders' interests."[113] Ultimately, though, the crux of *Revlon* is that

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[106] *See* DEL. CODE ANN. tit. 8, § 327 (2013).

[107] *See* Plerhoples, *supra* note 44, at 254-55.

[108] *See* Jeremy Benjamin, *Reinvigorating Nonprofit Directors' Duty of Obedience*, 30 CARDOZO L. REV. 1677, 1678 (2009).

[109] *See id.* at 1678-79.

[110] *See* DEL. CODE ANN. tit. 8, § 362(a)(1) (2013).

[111] *See* Plerhoples, *supra* note 44, at 254-55.

[112] *See id.* at 227 (explaining that the shareholder primacy model requires directors to prioritize shareholder interests).

[113] Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L. J. 999,

"any management action benefiting stakeholders must produce ancillary shareholder benefits;"[114] and, in the context of impact investors, management actions advancing a corporation's social missions conceivably deliver shareholder benefits despite not being financial in nature.[115]

2. Contract Theory and Corporate Purpose

In the eyes of some commentators, corporate charters are contracts between directors and shareholders, which clearly delineate the goals and purposes of the corporation.[116] Under Section 362(a)(1), Delaware public benefit corporations are required to identify the specific public benefit or public benefits that will be promoted by the corporation.[117] Arguably, then, "[w]hen shareholders purchase stock in a corporation, they assent to, and are bound by, the terms of the corporation's charter."[118] It follows that shareholders who invest in Delaware public benefit corporations "are put on notice" as to the specific public benefit or public benefits that the company seeks to promote, making it "fundamentally different than a traditional profit-maximizing" organization.[119] The outgrowth of this view is twofold: first, benefit corporations likely attract social investors concerned with more than wealth maximization;[120] and second, "shareholders might not be able to bring suit against [benefit] corporation directors for considering non-shareholder interests" once the company enters *Revlon*-land.[121]

Professor Alicia E. Plerhoples suggests that shareholders who invest capital in benefit corporations tacitly accept a corporate charter

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1002 (2013).

[114]Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 982 (1992); *see also Revlon*, 506 A.2d at 182 (Del. 1986).

[115]Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Fiduciary Directors' Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 454 (2002) (discussing the court's willingness to consider social values as opposed to solely financial value in the benefit corporation context).

[116]*See* EDWARD P. WELCH ET AL., 1 FOLK ON THE DELAWARE GENERAL CORPORATION LAW 811-16 (6th ed. 2014); Steven J. Haymore, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311, 1335 (2011).

[117]DEL. CODE ANN. tit. 8, § 362(a)(1) (2013).

[118]Haymore, *supra* note 116, at 1335.

[119]Plerhoples, *supra* note 44, at 254-55.

[120]*See id.*

[121]Haymore, *supra* note 116, at 1335 (explaining the view that at the time of purchase, shareholders implicitly assent to and are bound by the corporate charter and therefore assented to this as part of consideration).

that functions as a "modified contract."[122] With respect to the *Revlon* doctrine, shareholder investment in mission-driven companies with a stated purpose of pursuing social good indicates that investors have opted-in to a corporate framework that is not beholden to the wealth maximization norm, and those shareholders should be aware of the reality that public benefit corporation directors, in *Revlon*-land, may reasonably choose a bid that is monetarily less valuable than a bid that fails to pursue the company's social mission.[123] This is all to say, while on notice of the unorthodox corporate purpose, benefit corporation shareholders may willingly invest in a corporate form that is fundamentally divergent from the traditional profit-centric corporation, vote their shares in favor of converting to such a corporation, or divest their shares when conversion has occurred despite their vote against it.[124] The volitional nature of the initial investment or the sustained investment reinforces the notion that shareholders have assented to a contract that enables directors to consider interests external to shareholder wealth maximization[125] at a sale of the company.[126]

Perhaps the most effective way to implement a public benefit corporation's public benefit, while also protecting the interests of other constituencies, is to explicitly "define[] each participant's rights, benefits, duties, and obligations in the corporate endeavor."[127] Advanced by

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[122]*See* Plerhoples, *supra* note 44, at 254-55.

[123]*See id.*

[124]*See id.*

[125]*See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) ("When director decisions are reviewed under the business judgment rule, [courts] will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value."); *see also Revlon*, 506 A.2d at 183 ("Although such considerations [of non-stockholder corporate constituencies and interests] may be permissible, there are fundamental limitations upon that prerogative. A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

[126]*See* Elhauge, *supra* note 32, at 787:

> If shareholders buy into corporations knowing that they are run by mangers and controlling shareholders who can temper profit-maximization, then shareholders will have bought in at lower stock prices that reflect that fact and can claim no tax or injury when the tempering occurs . . . . But it seems clear that while shareholders expect profits and do not regard stock investments as tantamount to charitable contributions, they also do not expect unabashed profit-seeking untempered by any sense of social responsibility.

[127]Jonathan R. Macey, *Fiduciary Duties As Residual Claims: Obligations To Nonshareholder Constituencies From a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266, 1267 (1999).

Professor Jonathan Macey, the nexus-of-contracts approach, as it relates to non-shareholder constituencies, suggests "one should view the corporation as a 'complex set of explicit and implicit contracts,' and corporate law as enabling 'the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy.'"[128] Insofar as this may be true, public benefit corporation directors "can contract away fiduciary duties to shareholders," given that such duties are "simply another default rule that shareholders and non-shareholder constituencies can customize as they please."[129]

Within the nexus-of-contracts framework, the subordination of shareholder claims to non-shareholder constituency claims can be achieved by explicitly defining each participant's rights in the relative corporate charter. Nonetheless, public benefit corporation directors can continue to effectively operate within the shareholder wealth maximization norm if, say, the mission-driven entity wrote a provision into its charter plainly identifying not only the rights of each participant group, but the public benefit constraint on the organization, as well.[130] By explicitly defining the public benefit restriction in the corporate charter, fiduciaries can be held accountable using the shareholder wealth maximization norm or, even, the *Revlon* standard of review, and both shareholders and non-shareholder constituencies may directly benefit, despite their limited contractual rights.[131]

3. Business Judgment Rule

The business judgment rule, traditionally applied, holds directors harmless for the consequences of their business decisions, if such decisions are made on an informed basis and with the good faith belief that the action taken was in the corporation's best interests.[132] Accordingly, "[c]ourts have consistently applied the business judgment rule so long as a particular board decision has some rational benefit

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[128] *Id.* at 1266 (citing Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989)).

[129] *Id.* at 1274-75.

[130] Comments of Edward B. Rock, (Mar. 28, 2014) (on file with author).

[131] Comments of Edward B. Rock, (Mar. 28, 2014) (on file with author). *But see* Plerhoples, *supra* note 58, at 7 n.18 ("[M]any of the filed charters . . . simply restate the general statutory definition of a public benefit rather than narrowly define the public benefit.).

[132] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

extending to the shareholders."[133] To the extent that social impact shareholders have interests outside of wealth maximization, a public benefit corporation director making a business decision based on the company's social mission potentially falls within the grasp of the business judgment rule.[134]

Despite such alternative shareholder interests, case law discussing the business judgment rule "falls short of unambiguously authorizing the pursuit of non-shareholder interests other than instrumentally for the benefit of shareholders."[135] Where a discernable distinction with respect to the fiduciary duties of directors considering "other" interests does exist, however, is in the case law stemming from Chancellor William T. Allen's "zone of insolvency" theory, first articulated in *Credit Lyonnais Bank Nederland, N.V. v. Pathe Communications Corp.*[136] Notoriously, footnote 55 of the *Credit Lyonnais Bank* opinion created confusion in the Delaware courts, yielding three interpretations of directorial duties when a corporation approaches, but does not yet reach, insolvency:

> First, some [courts] treat *Credit Lyonnais* as a sword giving creditors the ability to sue. Second, some find that a breach of duty will occur only under a narrowly defined set of circumstances, such as self-dealing fraudulent conveyance, or improper preference of one creditor over the others. Third, some hold that *Credit Lyonnais* is a shield for

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[133]Note, Anthony Bisconti, *The Double Bottom Line: Can Constituency Statutes Protect Socially Responsible Corporations Stuck in* Revlon *land?*, 42 LOY. L.A. L. REV 765, 776 (2009).

[134]*See* Bainbridge, *supra* note 114, at 978-79.

[135]Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 557-58 (2006).

[136]*See* Credit Lyonnais Bank Nederland, N.V. v. Pathe Comm. Corp., 17 DEL. J. CORP. L. 1099, 1155 (1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."); *see also* Production Res. Grp., L.L.C. v. NCT Grp., 863 A.2d 772, 788 (Del. Ch. 2004):

> The obligation of directors in that context of high risk and uncertainty, said Chancellor Allen, was not "merely [to be] the agent of the residue risk bearers" but rather to remember their fiduciary duties to "the corporate enterprise" itself, in the sense that the directors have an obligation "to the community of interest that sustained the corporation . . . ." and to preserve and, if prudently possible, to maximize the corporation's value to best satisfy the legitimate claims of all its constituents, and not simply to pursue the course of action that stockholders might favor as best for them.

> directors, who cannot be held liable for considering the interests of other constituencies in the zone of insolvency.[137]

This uncertainty was put to rest in *North American Catholic Education Programming Foundation, Inc. v. Gheewalla*, where the Supreme Court of Delaware held:

> When a solvent corporation is navigating in the zone of insolvency, the focus for Delaware directors does not change: directors must continue to discharge their fiduciary duties to the corporation and its shareholders by exercising their business judgment in the best interests of the corporation for the benefit of its shareholder owners.[138]

The difference between the sword and shield approaches to director liability with respect to the consideration of stakeholder interests relates to the issues presented in this Article.[139] A sword, of course, gives shareholders the right to sue a board of directors for a business decision considering "other" interests that may or may not have been a breach of their fiduciary duties.[140] Conversely, a shield, which protects director discretion in the consideration of non-shareholder interests, is an effective mechanism for reinforcing the notion that directors *may* consider such interests.[141] Indeed, a shield in this context is a powerful tool for advancing and protecting those other interests, whatever they may be, while simultaneously relieving the directorship of the fears of liability and injunction.[142]

In the Delaware public benefit corporation setting, identifying interests of other constituencies with a rational benefit extending to

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[137]Cory Dean Kandestin, *The Duty to Creditors in Near-Insolvent Firms: Eliminating the "Near-Insolvency" Distinction*, 60 VAND. L. REV. 1235, 1250 (2007) (footnotes omitted).

[138]N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007).

[139]*See infra* notes 146-49 and accompanying text.

[140]*See* Maldonado v. Flynn, 413 A.2d 1251, 1255 (Del. Ch. 1980) (discussing shareholders' ability to bring a derivative action when they are dissatisfied with a board's decision), *rev'd on other grounds*, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

[141]*Cf.* Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: the Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 610 (1984) ("[The business judgment rule] has traditionally operated as a shield to protect directors from liability for their decisions"); *see also infra* notes 150-54 and accompanying text.

[142]*See infra* notes 154-63 and accompanying text.

shareholders, so as to provide directors with a shield, is seemingly not all that difficult, given the direct connection between the interests of social impact investors and the stated public benefit purpose of the mission-driven corporation.[143] The business judgment rule, therefore, should be available to directors who adhere to "good" process when choosing a bidder committed to maintaining the company's social mission over another bidder with a superior monetary offer, provided the decision is rationally related to the corporation's specified public benefit.[144] This is particularly true in light of the fact that the rule's applicability is not predicated on the substance of a decision, and that Delaware's statutory amendments encompassing public benefit corporations empower directors to pursue public value.[145]

Traditionally, of course, if the actions of directors face legal challenge once the *Revlon* standard of review is triggered, the decision to sell the company is not analyzed with the protection of the business judgment rule, but rather under an enhanced scrutiny standard that "requires independent, disinterested directors to prove: (1) that their decision-making process was performed with adequate care; and (2) that their decision was reasonable under the circumstances."[146] Even with enhanced scrutiny applied, good process and a reasonable connection to impact investor interests should shield a director's decision in the wake of a change of control transaction.[147] Certainly, as discussed *infra*, constituency statutes seek to provide directors with business judgment rule protection for decisions of this ilk.[148]

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[143] *See* Elhauge, *supra* note 32, at 787.

[144] *See* Jay Coen Gilbert, Bart Houlahan & Andrew Kassoy, *Ben & Jerry Were Right*, 11 STAN. SOC. INNOVATION REV. 1, 5 (2013).

[145] *See* DEL. CODE ANN. tit. 8, § 361 *et seq.* (2013).

[146] Clark W. Furlow, *Reflections on the* Revlon *Doctrine*, 11 U. PA. J. BUS. L. 519, 521 (2009).

[147] *See id.* at 531-53 ("If the board's decision is one of several reasonable alternatives, it should be approved by the court even if the judge thinks a different course of action would have been better.").

[148] *See infra* notes 155-64 and accompanying text. This Article does not advocate diminishing the enhanced scrutiny framework, but rather suggests that the business judgment rule can provide guidance in defining a legal regime that better suits Delaware public benefit corporations in *Revlon*-land.

4. The Constituency Statute Model

The precursor to benefit corporation legislation was the constituency statute.[149] These statutes authorize directors to take into account the impact a corporate action might have on employees, suppliers, customers, communities, the environment, and, of course, shareholders, among other things.[150] Notably, however, state constituency statutes, for the most part, do not *require* directors to consider non-shareholder interests, but rather *permit* them to do so.[151] Although permissive, constituency statutes are aimed at the heart of the *Revlon* doctrine—unabashedly so in certain instances[152]—as they were initially instituted in the takeover defense context to "give the target company's board the discretion to favor a deal that is better for the company's employees, the community and the local economy over a deal with a higher purchase price but more detrimental effects to the community."[153]

Perhaps the most aggressive stance against the *Revlon* doctrine is found in Indiana's constituency statute.[154] In substance, Section 23-1-35-1(f) of the Indiana Code provides:

> Certain judicial decisions in Delaware and other jurisdictions, which might otherwise be looked to for guidance in interpreting Indiana corporate law, including decisions relating to potential change of control transactions that impose a different or higher degree of scrutiny on actions taken by directors in response to a proposed acquisition of control of the corporation, are inconsistent

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[149] *See* Bainbridge, *supra* note 114, at 973 (noting that nonshareholder constituency statutes arose during a national debate over corporations and their impact on nonshareholder interests during the 1980s).

[150] *E.g.*, IND. CODE § 23-1-35-1(d) (2010) ("A director may, in considering the best interests of a corporation, consider the effects of any action on shareholders, employees, suppliers, and customers of the corporation, and communities in which offices or other facilities of the corporation are located, and any other factors the director considers pertinent."); *see also* Bainbridge, *supra* note 114, at 994 ("[These statutes] permit directors to select a plan that is second-best from the shareholders' perspective, but which alleviates the decision's impact on the firm's nonshareholder constituencies.").

[151] *See* Munch, *supra* note 42, at 181.

[152] *See* IND. CODE ANN. § 23-1-35-1(f).

[153] William H. Clark, Jr. & Larry Vranka, *Benefit Corporation White Paper: The Need and Rationale for the Benefit Corporation* 8 (2013), *archived at* http://perma.cc/7QQ5-J3QJ.

[154] *See* IND. CODE ANN. § 23-1-35-1(f).

> with the proper application of the business judgment rule under this article. Therefore, the general assembly intends:
> (1) to reaffirm that this section allows directors the full discretion to weigh the factors enumerated in subsection (d) as they deem appropriate; and
> (2) to protect both directors and the validity of corporate action taken by them in the good faith exercise of their business judgment after reasonable investigation.[155]

This explicit rejection of *Revlon* is akin to the Model Legislation Comment distributed by B Lab in their effort to promote the passage of benefit corporation legislation.[156] It effectively functions as carte blanche for directors who adhere to good process, affording them the protection of the business judgment rule in change of control transactions that result in the sale of the company to a bidder that is more apt to sustain the non-financial interests of the company.[157]

Despite unequivocal repudiations of *Revlon*, such as the one in Indiana's constituency statute, courts have been "reluctant to interpret constituency statutes as supplanting the shareholder-centric policies enunciated by *Revlon*. Instead, constituency statutes currently function only to the extent that they do not conflict with shareholder primacy."[158] In that sense, constituency statutes suffer from the same policy-based shortcoming as the newly enacted Delaware public benefit corporation legislation: directors are statutorily *permitted* to consider non-shareholder interests, but the statutory language is ambiguous as to "exactly how, when and to what extent [directors] can consider those interests."[159] Thus, in determining how *Revlon* should apply to public benefit corporations, the Delaware legislature should "clearly enunciate

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[155] IND. CODE ANN. § 23-1-35-1(f); *accord* Bainbridge, *supra* note 115, at 994.

[156] MODEL BENEFIT CORP. LEGIS. § 302 cmt.

[157] *See* Douglas M. Branson, *The Rule That Isn't a Rule: The Business Judgment Rule*, 36 VAL. U. L. REV. 631, 653 (2002):

> Ergo, no *Unocal*, no *Revlon*, no enhanced scrutiny, no proportionality add-on, and no duty to conduct an auction exist in Indiana. Under the provision enacted in Indiana, if directors adopt a wrong-headed, scorched earth defense of some sort—on incomplete news that someone may be acquiring a larger holding of the corporation's shares—those directors, their ignorance, and their over-reaction will be protected from judicial scrutiny by the Indiana version of the business judgment rule.

[158] Bisconti, *supra* note 133, at 784.

[159] Clark & Vranka, *supra* note 153, at 10.

the public policy preferences"[160] behind the benefit corporation legislation, such that director actions at companies, like Plum Organics, may be analyzed outside of the traditional *Revlon* framework. Until such clarification occurs, "risk-averse directors" at mission-driven organizations will continue to prioritize the *Revlon*-induced belief that directors must maximize shareholder value at the sale of the company in order for their actions to be deemed reasonable, even if that means selecting a bid that is meaningfully inferior with respect to its specific public benefit purpose.[161]

5. The Nonprofit Corporation Model, The *Cy Pres* Doctrine and Trusts, and the Duty of Obedience

The nonprofit organization and charitable trust fiduciary models are compelling points of reference in attempting to reconfigure the bounds of *Revlon*-land to better accommodate the obligations and desires of Delaware public benefit corporation directors.[162] In addition to the traditional duties of care and loyalty, nonprofit directors are subject to a third fiduciary duty, the duty of obedience.[163] Fundamentally, "the duty of obedience requires that a director act with fidelity, within the bounds of the law generally, to the organization's 'mission,' as expressed in its charter and by-laws."[164] Nonprofit directors are, therefore, primarily concerned with the ability of the nonprofit to achieve its "mission," and secondarily concerned with the financial health of the organization.[165] Using the duty of obedience as a compass, benefit corporation directors' obligations, at the company's sale, may be more clearly defined; the significance of the entity's mission can function as a guiding light once

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[160] Bisconti, *supra* note 133, at 786.

[161] *See* Plerhoples, *supra* note 44, at 239.

[162] *See generally* Harvey J. Goldschmid, *The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems, and Proposed Reforms*, 23 J. CORP. L. 631, 641-49 (1998) (explaining nonprofit directors' duties of care and loyalty).

[163] *See* Foye v. New York Univ., 269 A.2d 63, 71 (1970) (referencing the duty of obedience); *see also* WEIL, GOTSHAL & MANGES LLP, THE GUIDE TO NOT-FOR-PROFIT GOVERNANCE 2-14 to 2-15 (2012), *archived at* http://perma.cc/ULM2-FPGY (explaining that the duty of obedience, which is not explicitly required by statute, requires directors to stay true to the corporation's stated purpose and comply with all applicable laws).

[164] Goldschmid, *supra* note 162, at 641 (quoting DANIEL J. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 21 (1988)).

[165] *Id.*

the company is in play and both the pecuniary interests of the stockholders and the company's public benefit purposes are at issue.[166]

In New York, for example, the duty of obedience requires a nonprofit organization to verify with a court that "the consideration and the terms of the sale, lease, exchange, or other disposition of the assets of the corporation are fair and reasonable to the corporation, *and that the purposes of the corporation*, or the interests of its members will be promoted thereby."[167] Accordingly, at a sale of a nonprofit corporation, "a court will consider whether the sale will enable the organization's charitable mission to continue."[168] Therefore, the decision-making process for public benefit corporation directors—in a change of control transaction—is arguably more akin to the complexities of selling a nonprofit corporation than a for-profit corporation,[169] for which the *Revlon* doctrine was originally intended.[170]

Delaware public benefit corporation directors must manage the company in a way that "balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the [specific] public benefit or public benefits identified in its certificate of incorporation,"[171] just as a nonprofit director, at a sale of

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[166] *Cf.* WEIL, GOTSHAL & MANGES LLP, *supra* note 163, at 2-14 (noting a similar requirement that nonprofit corporations in New York show that such a transaction will serve the company's purpose).

[167] *Id.* (emphasis in original) (quoting N.Y. NOT-FOR-PROFIT CORP. LAW § 511(a)(6) (McKinney 2014)); *see also* Goldschmid, *supra* note 162, at 641:

> It would be entirely in accordance with their duty of care and business judgment responsibilities, for example, for the directors of a nonprofit hospital to accept a low bid from one of several suitors because the chosen bidder would provide a far higher level of public benefit or service to the community.

[168] WEIL, GOTSHAL & MANGES LLP, *supra* note 163, at 16-1; *see also* Agudist Council of Greater New York v. Imperial Sales Co., 551 N.Y.S.2d 955, 957 (N.Y. App. Div. 1990) ("The petitioner's certificate of incorporation expressly states that one of its corporate purposes is to conduct activities for senior citizens.").

[169] *See* Goldschmid, *supra* note 162, at 641:

> [T]he obligation of nonprofit directors and officers with respect to the corporation's mission creates a more difficult and complex decision-making process for them than for their for-profit peers. For-profit directors and officers are principally concerned about long-term profit maximization. While nonprofit directors and officers keep economic matters in mind, they are principally concerned about the effective performance of the nonprofit's [sic] mission.

[170] *But see* Colin T. Moran, *Why* Revlon *Applies to Nonprofit Corporations*, 53 BUS. LAW. 373, 378 (1998) ("Absent express statutory provisions to the contrary, the law presumes that a nonprofit board engaged in a change-of-control transaction faces the same standards of care as a for-profit board." (citing Oberly v. Kirby, 592 A.2d 445, 446 (Del. 1991)).

[171] *See* DEL. CODE ANN. tit. 8, § 362(a) (2014).

the company, must be wary of financial matters while being similarly focused on the organization's mission.[172] In other words, at a sale of the company, public benefit corporation directors—who have taken actions which satisfy the reasonableness standard under *Revlon* as it relates to the maximization of the enterprise's value—should not be capable of diluting a mission-driven entity's corporate purpose "simply [to] take advantage of a market opportunity."[173] In that sense, using the duty of obedience at a sale of a public benefit corporation is perhaps a better metric for evaluating the decision-making processes and actions of directors. Nonprofit corporation cases considering the sale of such an entity have "focus[ed] on the duty of obedience . . . [and have] reinforced the primacy of stewardship and mission in nonprofit governance," providing a doctrinal foundation that, to a certain extent, more successfully accommodates the demands placed upon public benefit corporation directors and more carefully considers the corporate purposes of Delaware public benefit corporations than the framework that currently exists.[174]

Similarly, with respect to trusts, fiduciary duties obligate trustees to manage the trust in conformity with the standards set forth by the trust's creator;[175] and a trustee's duty of loyalty is "'a duty to the beneficiary to administer the trust solely in the interest of the beneficiary.'"[176] More broadly, "[a] trust relationship is a 'fiduciary' relationship and the duties that arise out of it are 'fiduciary' duties."[177] However, the doctrine of *cy pres* enables courts to modify the charitable purpose of a trust where the original purpose has become "obsolete as a result of changed conditions not taken into account by the original settlor or donor."[178] Where *cy pres* is available, a court may "modify the terms of the trust, departing from the original purpose only so much as is

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[172]*See* Goldschmid, *supra* note 162, at 641 (expounding upon the different demands of nonprofit directors compared to those of their for-profit counterparts in terms of the need to adhere to the organization's mission).

[173]*See* Benjamin, *supra* note 108, at 1689 (reiterating that nonprofit directors have a distinct duty of obedience).

[174]*Cf. id.*

[175]*See* Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 653 (2002).

[176]*Id.* (quoting RESTATEMENT (FIRST) OF TRUSTS § 169 (1935)).

[177]*Id.*

[178]Alex M. Johnson Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation*, 74 IOWA L. REV. 545, 561 (1989) (reviewing the purpose of the *cy pres* doctrine).

necessary to avoid its frustration or, to look at it the other way, staying as close to that purpose as possible."[179]

The Delaware Court of Chancery has identified the policy justification behind the *cy pres* doctrine as one "to permit the best available realization of the donor's fundamental intention where unforeseen change threatens to cause the trust to fail in its fundamental purpose."[180] From a purely theoretical standpoint, the *cy pres* precedent functions as a foundation for Delaware courts to recognize the preservation and protection of social missions at organizations appreciably concerned with the production of public value.[181] Deviating from the traditional boundaries of *Revlon* in favor of a regime that is more amenable to preserving a corporation's public benefit purpose is potentially less challenging with the *cy pres* doctrine in the purview, given that Delaware courts have, in different circumstances, put themselves in a position to exercise their authority with an eye towards maintaining a public good.[182]

At bottom, nonprofit directors and charitable trustees fear—and rightly so—the discontinuation of donations as a byproduct of mission-drift, on the assumption that donors will be deterred from giving, should their funds be allocated for a purpose other than advancing the organization's charitable purpose.[183] It stands to reason, then, that impact investors will redirect their investments from a public benefit corporation if the company fails to pursue its specific public benefit purpose or purposes, either because the investors will be dissatisfied with mission-drift or because they might perceive the return on investment as being higher at a company that more vigorously promotes its social mission or

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[179] Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1118 (1993).

[180] *In re* Estate of du Pont, 663 A.2d 470, 478 (1994) (citing First Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 121 A.2d 296, 299 (Del. Ch. 1956)).

[181] *See* Note, *Charitable Foundations and the Argument for Efficiency: Balancing Donor Intent with Practicable Solutions Through Expanded Use of* Cy Pres, 34 SUFFOLK U. L. REV. 173, 181 (2000) ("Because private philanthropy plays a vital role in serving the needs of society, there must exist a legal principle that aims to preserve charitable trusts, which otherwise might fail . . . .").

[182] *See* Brian M. McCall, *The Corporation as Imperfect Society*, 36 DEL. J. CORP. L. 509, 552-56 (2011) (emphasizing that, although corporations primarily focus on profitability, they must not forget that they are to serve the public good as well).

[183] Of course, where a nonprofit or charitable trust has sufficient capital, they likely do not have to engage in fundraising. Consequently, directors at such organizations need not fear the discontinuation of donations, perhaps empowering them to engage in a certain degree of mission-drift. *See* Benjamin, *supra* note 108, at 1679 ("Individual instances of mission drift, if publicized, may compromise charities' capacity to perform . . . and negatively impact the entire sector.").

simply returns greater financial profits.[184] In other words, no impact investor would put money into a benefit corporation that fails to provide public benefits when that money can be reallocated to a traditional profit-maximizing corporation that effectively achieves the same degree of desired public benefit with a greater financial return to the investor.[185]

Functionally, the duty of obedience acts as an insurance policy against mission-drift at nonprofits by protecting "donors' expectations by ensuring that their donations go toward a charity's mission" and, thus, the success and life of the company.[186] It may be possible to replicate the duty of obedience, with variations, at Delaware public benefit corporations, in order to ensure the pursuit of social good in the face of the *Revlon* doctrine.[187] Indeed, mapping trustee fiduciary models onto corporate law is not all that farfetched, in view of the fact that modern corporate law "emerged out of trust and agency law."[188] Such a duty would likely benefit investors seeking return on investment in the form of public benefit, as well as the community and environment impacted by the company's operations; not to mention the interests of the corporation itself, insofar as we believe that the entity relies on its directors' fidelity to its mission-driven initiatives and the "tacit acceptance" of the communities in which it functions.[189]

6. Executive Compensation

At traditional corporations, executive compensation schemes are used to militate against the agency problem present in managers' decision-making, given that such managers have the "power and

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[184] *See* Plerhoples, *supra* note 44, at 262 ("[T]his author predicts that social investors will not invest in a corporate form that does not protect against the possibility of mission-drift or sell-out.").

[185] *See id.*

[186] *See* Benjamin, *supra* note 108, at 1679.

[187] *See* Melanie DiPietro, *Duty of Obedience: A Medieval Explanation for Modern Nonprofit Governance Accountability*, 46 DUQ. L. REV. 99, 104 (2007):

> Without being grounded in an articulated duty of obedience, the duty of care and the duty of loyalty will not be able to sustain the utility, credibility, and accountability requirements of the charitable sector. This is especially true if, as this author believes, the public is to enjoy community benefits from charitable corporations that are distinguishable from those of for-profit organizations.

[188] *See* Rock & Wachter, *supra* note 175, at 671.

[189] *See* Christians, *supra* note 52, at 638 (maintaining that corporations have a strong interest in abiding by "community standards" in addition to the legal requirements in order to be accepted by the community).

discretion" to "benefit their private interests" at the expense of those of the shareholders."[190] Executive compensation packages effectively "provide managers with efficient incentives to maximize shareholder value."[191] Standard executive compensation programs are typically linked to shareholder wealth, without reference to stakeholder well-being.[192] Yet, it is entirely possible, if not probable, that managerial decisions may harm the interests of stakeholders.[193] Non-financial stakeholder interests at Delaware public benefit corporations are a paradigmatic breeding ground for misaligned managerial incentives absent a suitable legal framework.[194] In fact, if we are to believe that managerial incentives are incongruous with those of shareholders, they are even more so with those of stakeholders, as a byproduct of the fact that "there is no basis for expecting management control to translate into effective protection of stakeholders" whose interests perhaps reside in a non-financial arena.[195]

Nonetheless, if grown from its current form and function, executive compensation can align the interests of managers and public beneficiaries of a social enterprise with the ultimate objective of creating a regime that encourages management to lead the company in a manner that reasonably "balances the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the [specific] public benefit or public benefits identified in its certificate of incorporation."[196] "Compensation-related incentives can be created through a plan that promises greater benefits to managers who perform in a [] manner"[197] that promotes the specific public benefit or public benefits

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[190]Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem* 1, (Nat'l Bureau of Econ. Research, Working Paper No. 9813, 2003), *archived at* http://perma.cc/88A7-TX96.

[191]*Id.*

[192]*See* Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 911 (2005).

[193]*See id.* at 911.

[194]*See id.* at 911-12 (providing ways that managerial incentives become misaligned).

[195]*Id.*

[196]DEL. CODE ANN. tit. 8, § 362(a) (2013). *But see* Mark S. Blodgett et al., *Evolving Corporate Governance Standards for Healthcare Nonprofits: Is Board of Director Compensation a Breach of Fiduciary Duty?*, 7 BROOK. J. CORP. FIN. & COM. L. 443, 462-63 (opining that within nonprofit boards, executive compensation may undermine the fiduciary duties of care, loyalty, and obedience).

[197]Marcel Kahan, *The Limited Significance of Norms for Corporate Governance*, 149 U. PENN. L. REV. 1869, 1879 (2001) (stating that the incentive compensation packages typically include bonus plans, stock option plans, and the potential to receive raises).

identified in a public benefit corporation's charter.[198] Due to the potential disconnect between the financial performance of a corporation and its public mission, a bonus plan granting managers additional payment if they "meet specified [public benefit] performance targets" can incentivize managers to strive toward these non-financial goals.[199] Indeed, it would be entirely possible to link stock option plans to public benefit performance targets by granting managers additional stock options, or similar financial products, in the event that such mission-driven objectives are satisfied; although, this may be conceivably more challenging because the achievement of public benefit goals does not necessarily mean an increase in the corporation's financial performance.[200]

To be sure, public benefit corporation managers who successfully meet or exceed the specific public benefit targets of the corporation could be given a raise in the next fiscal year, further incentivizing managerial commitment to the non-financial interests of public beneficiaries.[201] While seemingly more difficult to quantify and monitor than financial performance, the social achievements of a company can be observed using social accounting metrics.[202] Thus, executive compensation can be meaningfully aligned with the interests of public beneficiaries using social accounting data to measure the performance of the entity and its management.[203] For example, if the management of Plum Organics increased the number of children that received the firm's environmentally friendly lightweight soft-sided baby food pouch year over year, the management team could qualify for a bonus, additional stock options, or increased compensation. Of course, preserving managerial incentive plans tied to the firm's financial performance would be necessary to militate against any motivation to decrease profitability in favor of increasing public benefits with the goal of receiving bonus

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[198] *See* DEL. CODE ANN. tit. 8, § 362(a) (2013).

[199] *See* Kahan, *supra* note 197, at 1879.

[200] *See id.*

[201] *Cf. id.* (citing Tod Perry & Marc Zenner, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?*, 35 WAKE FOREST L. REV. 123, 138-39 (2000)).

[202] *See* Plerhoples, *supra* note 44, at 263 ("Social accounting measurements could be used in the same way that fairness opinions are used to assure that directors are well-informed about the firm's value; social accounting metrics can extend the firm's valuation to social and environmental value creation.").

[203] *See id.* (addressing the use of social accounting data to measure the functionality of the management within an organization).

compensation, although it is assumed that most managers try to do the right thing most of the time.

B. *A Suitable Regime within the Re-Drawn Borders of* Revlon-*land*

The Delaware legislature should clarify the balancing test in Section 365(a), so that directors can better discharge their duties and courts can better analyze the quality of the decision-making process and the reasonableness of the conclusion reached under the circumstances. As it currently stands, the statute provides directors with an excess amount of discretion once the company ventures into *Revlon*-land, and it does so to the detriment of directors, shareholders, non-financial stakeholders, and the judiciary alike.[204] The concern stemming from such volition has been voiced by Chief Justice Leo E. Strine, Jr. in a paper that otherwise questions the viability of the benefit corporation model, where he suggests that the ambiguity of the priority to be given to each interest enables "directors to justify their actions by reference to virtually everything, [yielding a result whereby] they will not be accountable to any constituency for anything."[205] Given the ubiquity of Section 102(b)(7) provisions, however, current corporate law does not necessarily view such latitude as an evil, provided there is no self-dealing in a given decision.[206] If we extend the implications of Chief Justice Strine's writing to reach Section 365(a), it reinforces the notion that the Delaware legislature should clearly delineate the priority to be given to each of the interests listed in the statutory provision.[207] If the legislature

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[204] *See* DEL. CODE ANN. tit. 8, § 365(a) (2013); *see also* Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 150 n.45 (2012) ("The weight to be given to other constituencies would seem to be a matter entrusted to the judgment of the directors . . . and would be difficult for courts to second guess.").

[205] *Id.*

[206] *See* DEL. CODE ANN. tit. 8, § 102(b) (7) (2011) ("[L]imiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of [the] fiduciary duty [of care] as a director . . . .").

[207] Section 365(a) identifies three interests to be balanced by a board of directors: "the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation." *Id.*, § 365(a) (2013); *see also* Strine, *supra* note 204, at 155:

> The public interest, in the end, depends on protection by the public's elected representatives in the form of law. The well-intentioned efforts of many entrepreneurs and company managers, who have a duty to their investors to deliver a profit, to be responsible employers and corporate

fails to amend the statute or otherwise clarify the balancing test, the Delaware business courts should take steps to clarify the standard applicable to directors at a public benefit corporation engaged in a change of control transaction that triggers *Revlon*.

A unified *Revlon* framework applying the doctrine similarly across corporate forms, as some authors have suggested, is a perilous approach stemming from a dangerous misevaluation of the import of *Revlon*, based on a fundamental disregard for baseline differences between the objectives of a public benefit corporation and a traditional profit maximizing corporation.[208] Thus, in re-drawing the borders of *Revlon*-land, sensitivity to the unorthodox purposes of the Delaware public benefit corporation is necessary. Once *Revlon* is triggered, the inquiry into corporate action and director decision-making at a public benefit company should be predominantly process-based, considering factors such as the degree to which the board was informed, the quality of the information upon which the board relied, and the effectiveness of any market check used to determine both its social and financial value,[209] among other things.[210] Substantively, "a court should consider such factors as the monetary difference between the two bids" and "the extent

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citizens is undoubtedly socially valuable. But it is no adequate substitute for a sound legally determined baseline.

[208] *See* Rugger Burke & Samuel P. Bragg, *Sustainability in the Boardroom: Reconsidering Fiduciary Duty under Revlon in the Wake of Public Benefit Corporation Legislation*, at 26-29 EXPRESSO (2013), *archived at* http://perma.cc/UZ2H-3NYU (suggesting a principally divergent *Revlon* regime that enables directors at both public benefit corporations and traditional for-profit corporations to consider post-closing non-shareholder interests).

[209] *See* Plerhoples, *supra* note 44, at 263.

[210] Under the duty of care, the board is generally required to do a variety of things to satisfy its fiduciary obligations. *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 600, 602, 613-14 (2010) (holding that the *effectiveness* of board discussions about the acquisition, the amount of stock held by the board members at the target company, and the coerciveness of any termination fee will be considered); Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936 (2003) (providing that any negotiated agreement need provide for an *effective* fiduciary out); Paramount Comme'ns Inc. v. Time Inc., 571 A.2d 1140, 1151-52 (Del. 1989) (preventing a board from saying "no" to an offer before satisfying informational requirements pursuant to the duties of care and loyalty); Barkan v. Amstead Indus., Inc., 567 A.2d 1279, 1287 (Del. 1989) (holding that a board needs to show that it had reliable evidence on which to judge the proposed transaction price); Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983) (forming an independent committee to negotiate the transaction is a meaningful step in ensuring that the board has satisfied its fiduciary obligations); Smith v. Van Gorkom, 488 A.2d 858, 876-77 (Del. 1985) (suggesting that a target board should employ an investment banker to aid in the negotiation process and should receive committee and outside counsel reports, if it wants to comply with Section 141(e) of Delaware's corporate law); *see also In re* Pennaco Energy, Inc. S'holders Litig., 787 A.2d 691, 706 (2001) (noting that the investment banker requirement in *Van Gorkom* is unnecessary when the board is informed, given its authority to manage the company).

of the commitment the favored bidder has made to nonshareholder constituents."[211] In effect, such considerations would enable directors to satisfy their duty to act reasonably once the *Revlon* standard of review is triggered, as well as their duties under Delaware's public benefit corporation statute.[212]

1. The Financial and Non-Financial Interests of the Stockholders

Section 365(a)'s balancing test lists first the pecuniary interests of the stockholders, perhaps suggesting that such interests should be the foremost concern for directors at public benefit corporations in *Revlon*-land.[213] Indeed, states such as Indiana have gone so far as to plainly wash their hands of the holding in *Revlon*, affirmatively granting directors the authority to weigh non-financial and financial interests in a manner they deem fit during a change of control transaction.[214] Accordingly, in such a transaction jolting the company into *Revlon*-land, directors at public benefit corporations should, in the first instance, prioritize shareholder interests, even if those interests are unrelated to wealth maximization.[215] As suggested above, shareholder interests in mission-driven companies presumably extend beyond wealth maximization and, thus, directors should be *encouraged* to weigh financial and social interests fairly, based on the notion that social impact investors who invest in public benefit corporations are seeking more than financial return.[216] Directors certainly

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[211] Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1020-21 (1992).

[212] DEL. CODE ANN. tit. 8, § 365(a) (2013); *see also* Bainbridge, *supra* note 211, at 1021 (discussing judicial review of factors, other than share price, evaluated by boards when considering an acquisition).

[213] DEL. CODE ANN. tit. 8, § 365(a) (2013) (emphasis added):

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

[214] *See supra* note 155 and accompanying text.

[215] *See* Munch, *supra* note 42, at 189:

> The [benefit corporation] does much to ensure that honest, socially conscious businesspeople are protected in their pursuit of both financial and social missions. In featuring an affirmative duty to do good, the [benefit corporation] goes further than any social enterprise vehicle seriously considered in the United States.

[216] *Id.* at 190.

could be *required* to ascribe greater weight to either the financial or social interests of stockholders vis-à-vis a provision in the entity's articles of incorporation.[217]

Weighting shareholder pecuniary and social interests most heavily is seemingly in tune with the intentions of B Lab[218] and the first movers, Vermont and Maryland.[219] More generally, the justification for shareholder primacy at traditional corporations—"the more amorphous the managers' mandate is, the more difficult it is to determine whether the managers are faithfully and diligently accomplishing their mandate"[220]—is equally true at public benefit corporations. From an efficiency standpoint, once *Revlon* triggered, "if managers are tasked with a clear mission" such as maximization of shareholder financial and non-financial value as opposed to being charged "with a more amorphous mission involving the balancing of competing interests," as currently exists in Section 365(a), director action will be more easily monitored to the benefit of all stakeholders.[221] Shareholder financial and non-financial interests are potentially in conflict with one another, of course, which necessitates a certain degree of directorial discretion within the framework.[222] Limited discretion is not necessarily an evil in the context of a change of control transaction at a mission-driven entity, however, particularly since at least one of the legislatures enacting benefit corporation statutes envisioned a degree of flexibility in the duty to maximize shareholder wealth while still holding directors accountable

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[217] *See, e.g.*, VT. STAT. ANN. tit. 11A, §21.09(a)(3) (2010):

> [S]hall not be required to give priority to the interests of any particular person or group referred to in subdivisions (1) or (2) of this subsection over the interests of any other person or group unless the benefit corporation has stated its intention to give priority to interests related to its specific public benefit purpose in its articles of incorporation.

[218] *See* BENEFIT CORP INFO. CENTER, *supra* note 52 ("[P]romoting legislation creating a new corporate form—the benefit corporation—that meets purpose, accountability, and transparency.")

[219] *See* MD. CODE ANN., CORPS. & ASS'NS § 5-6C-01(c) (2010) (defining "general public benefit" in the context of benefit corporations as "a material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits."); VT. STAT. ANN. tit. 11A, §21.03(a)(4) (2010) (using the same definition as Maryland).

[220] Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 537 (2006).

[221] *See id.*; *see also* Elhauge, *supra* note 32, at 736 ("A single goal like profit-maximization is easier to monitor.").

[222] *See* Elhauge, *supra* note 32, at 737-38 (describing legal discretion of corporate managers to sacrifice profits in the public interest).

for decisions impacting a company's financial and social value.[223] The difficulty resides in assigning a value to the public benefits produced and created by the company, such that they can be fairly balanced against the financial value of the company.[224]

With that being said, it is possible to quantify the social value created by a public benefit corporation. As suggested by Professor Plerhoples, "[s]ocial accounting measurements could be used in the same way that fairness opinions are used to assure that directors are well-informed about the firm's value; social accounting metrics can extend the firm's valuation to social and environmental value creation."[225] Using this as a method of analyzing the necessary discretion in decision-making, courts could adequately evaluate whether a director's decision was reached using the requisite care and was reasonable under the circumstances, so as to reflect the enhanced scrutiny applied to director decisions once a company enters *Revlon*-land.[226] Ultimately, "managerial discretion to sacrifice profits does not mean that shareholders have no primacy over other stakeholders."[227] Rather, to the contrary, it would reinforce managerial commitment to both the creation of public value in line with impact shareholder interests and the mission of the public benefit corporation, which stockholders implicitly subscribe to through their investments in the company.

2. The Specific Public Benefit Purpose or Specific Public Benefit Purposes

Prioritizing shareholder interests, both financial and non-financial, serves four purposes: first, it is in line with the current *Revlon* framework, influencing directors to maximize the company's value at a sale for the shareholders' benefit;[228] second, it is both a recognition of the

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[223] *See Hearing on S.B. 201 Before the Assemb. Comm. on Judiciary*, 2011-12 Reg. Sess., at 1 (June 28, 2011), *archived at* http://perma.cc/SED7-P4BR:

> The bill would revise the fiduciary duty of the corporate directors of a [flexible purpose corporation] to include consideration of both shareholder profit and non-financial, special purpose-related interests, but the bill does not give shareholders any special right of action to enforce the special purpose.

[224] *See* Plerhoples, *supra* note 44, at 263 (noting that social accounting measures are subjective and not yet standardized).

[225] *Id.*

[226] *Id.* at 262 (describing the heightened scrutiny under *Revlon*).

[227] Elhauge, *supra* note 32, at 745.

[228] *See* Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 176 (Del. 1986) ("[W]hile concern for various corporate constituencies is proper when addressing a

fact that shareholders remain the only stakeholder group legally capable of bringing an action against the corporation and its directors, and the reality that "only capital has the right to vote";[229] third, the reduced agency costs stemming from the shareholder primacy model enable non-shareholder stakeholders to receive increased benefits;[230] and fourth, it advances the public benefit corporation's mission-driven initiatives.[231] In considering the bids of potential acquirers, directors should be able to ensure the continued health of their company's public benefit purpose, similar to directors at nonprofit organizations pursuing a social mission or the trustees of a charitable trust.[232] This is to say, then, that the specific public benefit purpose enumerated in the public benefit corporation's charter should be the second most heavily weighted factor in the statutory balancing test, because such a mission is reflective of both corporate and shareholder concerns.[233]

The specific public benefit purpose is partially—if not entirely—the impetus behind a public benefit corporation's creation.[234] Perhaps more importantly, though, the mission-driven initiatives of benefit corporations are what separate them from traditional corporations and necessitate a unique corporate form; otherwise, constituency statutes, like

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takeover threat, that principle is limited by the requirement that that there be some rationally related benefit accruing to the stockholders.").

[229] *See* Strine, *supra* note 204, at 151 n.47:

> The 'practical consequence' of an adherence to the so-called 'property model' of the corporation is that the board of directors will, when faced with a conflict among the corporation's stockholders and other corporate constituencies, almost always favor the stockholders' interests because 'in the intra-corporate republic, only capital has the right to vote!

[230] Elhauge, *supra* note 32, at 776-77:

> [T]he optimal level of agency costs requires some tradeoff between monitoring costs and the costs of permitting agent discretion even if one assumes shareholder profitability is the only goal. In the economic lingo, giving such discretion to managers lowers total agency costs because any residual loss of shareholder profits is offset by the savings in monitoring costs, which we might equally call the benefits of delegation.

[231] *See, e.g.*, Plerhoples, *supra* note 44, at 223 (describing social enterprises as retaining a profit motive, but using a social or environmental mission as the core of the business model).

[232] *See* Bainbridge, *supra* note 211, at 1014 (suggesting that where shareholder and stakeholder interests conflict in corporate takeovers, the target corporation's directors are in the best position to reconcile them).

[233] *Contra* DEL. CODE ANN. tit. 8, § 365(a) (2013) (emphasis added):

> The board of directors shall manage or direct the business and affairs of the public benefit corporation in a manner that balances [(1)] the pecuniary interests of the stockholders, [(2)] the best interests of those materially affected by the corporation's conduct, and [(3)] *the specific public benefit . . . identified in its certificate of incorporation.*

[234] Plerhoples, *supra* note 44, at 223.

the one in Indiana, would achieve an outcome acceptable to socially-minded traditional corporations and their stakeholders.[235] Indeed, just as the charitable objectives of nonprofit organizations and charitable trusts drive donations, the social value creation aspirations of public benefit corporations compel impact investors to put capital into the company.[236] In some ways, the financial life of the public benefit corporation is contingent on the company's ability to pursue and achieve its public benefit purpose.[237] Of course, because shareholders can institute a derivative suit to enforce the public benefit purpose,[238] the corporation's mission should be a paramount concern for public benefit corporation directors in *Revlon*-land, particularly if the potential acquirer is unlikely to uphold it.[239]

The secondary importance of the maintenance and advancement of the specific public benefit or public benefits identified in a public benefit corporation's certificate of incorporation is more extensive than the fundamental notion that the creation of public value is at the heart of a mission-driven entity's purpose.[240] The life of the public benefit corporation is inextricably linked to its ability to create public value.[241] In that sense, choosing a bidder that is more likely to pursue the mission of the company provides increased social and economic utility to stakeholders.[242] A bidder that can enhance or maintain the mission of the organization post-acquisition is more likely to provide shareholders, employees, and the community with not only social value, but financial value as well, simply because the target company will remain attractive to impact investors.[243] Stripping away or otherwise diminishing the specific public benefit purposes of a mission-driven organization jeopardizes the company's short-term and long-term interests by undermining the characteristics and qualities that attracted initial investment and by losing the potential to attract a future influx of outside capital.[244]

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[235] *Id.* at 221-25; *see also* IND. CODE ANN. 23-1-35-1 (2009).
[236] *See* Plerhoples, *supra* note 44, at 253-55.
[237] *See id.* at 235-36.
[238] DEL. CODE ANN. tit. 8, § 367 (2013).
[239] *Id.*, § 365(a) (2013).
[240] Plerhoples, *supra* note 44, at 223 & n.16.
[241] *See id.* at 235-36.
[242] *See id.*
[243] *See id.*
[244] *Contra* Plerhoples, *supra* note 44, at 235-36.

3. The Best Interests of those Materially Affected by the Corporation's Conduct

The least weighted factor in Section 365(a)'s balancing test should be the best interests of those materially affected by the corporation's conduct. This is not to suggest that these interests are unimportant when directors consider the quality of bids as part of a change of control transaction triggering *Revlon*.[245] Rather, this position recognizes that, despite the fact that directors are permitted to take into account non-shareholder interests in evaluating a bid under *Revlon*, "the equity market [remains the] primary accountability system for public firms."[246]

Moreover, these interests are potentially encompassed under the roof of a public benefit corporation's specific public benefit. One can argue that the best interests of those materially affected by the corporation's conduct are subconsciously, if not consciously, pursued by corporations in the normal course of business, regardless of whether the entity is a traditional profit-maximizing organization or a public benefit corporation.[247] "[C]orporations do act upon pressures to help or benefit some aspect of society, be it global, national, statewide, municipality, or even a smaller demographic or group."[248] Typically, that smaller demographic includes employees, customers, and the communities in which corporations operate.[249] Corporations not only rely on the "tacit acceptance"[250] of these non-shareholder constituencies, but they also view their advancement as being intertwined with the success of the corporation.[251] This is perhaps a dangerous assumption,[252] but presumably mission-driven organizations and companies looking to acquire socially-minded entities are sensitive to corporate social responsibility prerogatives outside of their specific public benefit purposes, such that companies like Campbell are committed to ensuring

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[245] *See* Alexandra Leavy, *Necessity is the Mother of Invention: A Renewed Call to Engage the SEC on Social Disclosure*, 2014 COLUM. BUS. L. REV. 463, 473-74 (2014).

[246] Strine, *supra* note 204, at 153.

[247] *See* Leavy, *supra* note 245, at 491-92.

[248] Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience,"* 42 VAL. U. L. REV. 1129, 1150 (2008).

[249] *See id.* at 1161-66 & n.235.

[250] Allison Christians, *How Starbucks Lost its Social License – and Paid £20 Million to Get it Back*, 71 TAX NOTES INT'L 637, 638 (Aug. 12, 2013).

[251] *See* Marks, *supra* note 248, at 1164-66 & n.235 (discussing the "altruistic" corporate policies of American Apparel, which pays a comparatively high wage in addition to other substantial benefits).

[252] *See id.* at 1166.

the sustained well-being of the interests of those materially affected by the corporation's conduct subsequent to the completion of a change of control transaction triggering *Revlon*.[253]

Indeed, the reasoning behind this organizational structure for the balancing test in Section 365(a) is, in part, a homage to the public benefit corporation itself.[254] The public benefit corporation is required to produce a specific public benefit under the Delaware statute, just as a traditional corporation is required to maximize shareholder wealth.[255] If we are to believe that traditional corporations are to be directed with a single corporate focus, so should public benefit corporations.[256] And, if a new corporate form is necessary to recognize alternative corporate purposes, the legislature and judiciary should adopt a governance model that respects the impetus behind the enactment of Sections 361-368.[257] To that end, in evaluating the decisions of directors at public benefit corporations in *Revlon*-land, the judiciary should hold sacred that unorthodox corporate purpose, such that—next to the shareholders—it is recognized as being at the heart of what necessitates the creation and continuation of Delaware's public benefit corporation form.[258] Thus, in assessing whether a director's decision-making process was performed with adequate care and whether their decision was reasonable under the circumstances, the Delaware courts should prioritize the pecuniary and non-pecuniary interests of the stockholders and the specific public benefits of the corporation over the best interests of those materially affected by the corporation's conduct, particularly in view of the likelihood that the best interests of those materially affected are protected by a benefit corporation's public benefit purposes.[259]

IV. CONCLUSION

This author is ultimately sensitive to the difficulties judges and legislators face in attempting to fit public benefit corporations into the *Revlon* framework. "The weight to be given to other constituencies would seem to be a matter entrusted to the judgment of the directors (albeit a calculus not so easily called a 'business judgment') and [is]

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[253] *See id.*
[254] *See* Leavy, *supra* note 245, at 486.
[255] *Id.*
[256] *See id.* at 485-86.
[257] *Id.* at 465-66, 486.
[258] *See* Leavy, *supra* note 245, at 485-86.
[259] *See id.*

difficult for courts to second guess."[260] Delaware jurists themselves have recognized the implicit difficulties in applying fiduciary models more generally, given "the almost infinite potential variation in the fact patterns calling for director decisions, the disparate time frames within which different boards may be required to act, and the divergent skills and information needed to make particular business decisions, [which] usually make it impossible for courts to articulate *ex ante* precise guidelines for appropriate fiduciary action in future cases."[261] As it stands currently, the *Revlon* doctrine as it relates to the shareholder wealth maximization norm is fundamentally in conflict with the duties of directors at public benefit corporations to "manage or direct the business and affairs of the public benefit corporation in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[262] Worse yet, the statutory regime governing director behavior at such corporations is ambiguous with respect to *Revlon*.[263]

The revised balancing test proposed in Part III is perhaps one of many resolutions to the lack of clarity plaguing the legal regime governing public benefit corporation director action once their company has traveled to *Revlon*-land.[264] What has been provided here is hopefully a foundation on which the powers that be in Delaware can build upon, so as to better accommodate the new corporate form that is the public benefit corporation. Companies that aim to do well while doing good, like Plum Organics, deserve the benefit of the necessary guidance to ensure that their directors can dutifully perform their fiduciary obligations, such that they can provide both their shareholders and the public at large with value. Whether or not the suggestions made in this Article are accepted, the Delaware legislature should clearly delineate how the interests in Section 365(a) are to be balanced, and the Delaware business courts should carefully evaluate how *Revlon* applies to public benefit corporation directors who find themselves in *Revlon*-land, so as to articulate a standard, one way or the other, that brings clarity to the matter.

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[260] Strine, *supra* note 204, at 150 n.45.

[261] William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1294 (2001).

[262] *See* DEL. CODE ANN. tit. 8, § 365(a) (2013).

[263] *See id.*

[264] *See supra* Part III.