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THE *REVLON* DIVERGENCE: EVOLUTION OF JUDICIAL REVIEW OF MERGER LITIGATION

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ABSTRACT

For over thirty years, stockholder lawsuits challenging mergers predominantly have been governed by the principles formulated in the seminal Revlon *decision issued by the Delaware Supreme Court in 1986, which held that boards of directors engaging in a change-in-control transaction have a fiduciary obligation to seek the highest value reasonably available. A series of recent decisions by the Delaware courts, however, caused three significant alterations to judicial review of merger litigation. This Article is a detailed analysis of the cumulative effects of those changes, which are dramatic. Whereas previously the same level of scrutiny applied to all lawsuits challenging mergers approved by independent boards, the contemporary doctrine has diverged into a weak form of review that applies to most cases and a strong version of* Revlon *that affects, in an outcome-determinative way, a small number of cases. The "classic" version of* Revlon *exists now only as a residual category capturing misfit cases that do not satisfy the requirements of the new regime. This doctrinal shift empowers stockholders while placing conflicted fiduciaries and corporate advisors in the plaintiffs' crosshairs.*

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I. INTRODUCTION

THE trend long has been that a significant merger would be announced and then a multitude of lawsuits would follow.[1] The percentage of lawsuits

[1] *See* Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 599 (2017) ("[A]t least until recently, almost every deal valued at over $100 million was subjected to litigation.") (summarizing empirical data); *see also* RAVI SINHA, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING ACQUISITIONS OF PUBLIC COMPANIES: REVIEW OF 2015 AND 1H 2016 M&A LITIGATION 1 (2016) (showing that most mergers valued over

challenging public-company deals has declined slightly in recent years,[2] partly due to some of the trends explored in this Article,[3] and partly due to an ongoing crackdown by the courts on strike-suit settlements.[4] Even with that decline, however, approximately two-thirds of mergers still are challenged in stockholder litigation.[5]

This high rate of litigation should not be surprising. A merger represents a pivotal moment in the life cycle of a corporation and for a company's stockholders: following consummation, the corporation may cease to exist, its stockholders may lose their ownership stake, or both.[6] Besides casting a vote at the stockholder meeting, a lawsuit challenging the merger represents the last chance for a stockholder to contest what she views as an unfair deal. Regardless of the motivation, the near-ubiquity of deal litigation and the massive stakes involved[7] make the rules governing merger litigation particularly important.

$100 million have been challenged in court every year since 2008, with over a 90% challenge rate in many years).

2 SINHA, *supra* note 1, at 1 (finding that plaintiffs filed suits challenging 84% of mergers in 2015, but only 64% in the first half of 2016). These numbers likely understate the rate of merger litigation in 2016, as there has been a significant uptick in merger challenges in federal courts. *See* STEFAN BOETTRICH & SVETLANA STARYKH, NERA ECONOMIC CONSULTING, RECENT TRENDS IN SECURITIES CLASS ACTION LITIGATION: 2017 FULL-YEAR REVIEW 4, 4–5 (2018) (showing a massive increase in merger-objection lawsuits filed in federal courts in 2016 and 2017).

3 The development discussed in Section III *infra* makes it more difficult to enjoin a merger before it closes. The cases discussed in Section IV *infra* add a substantial hurdle for plaintiffs to clear in order to survive a motion to dismiss in a post-closing damages action.

4 The Delaware Court of Chancery recently clamped down on disclosure-only settlements. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 898–99 (Del. Ch. 2016) (holding that Delaware law will require supplemental disclosures to be more material before courts will approve class-action settlements of merger-related claims). The effect of *Trulia* and subsequent cases is to eliminate one of the incentives for plaintiffs to file a lawsuit challenging a merger, i.e., the possibility of a quick settlement and the payment of attorneys' fees. *See* SINHA, *supra* note 1, at 1 (citing *Trulia* as a reason for the decline in merger lawsuits between 2015 and 2016).

5 SINHA, *supra* note 1, at 1; *see also* BOETTRICH & STARYKH, *supra* note 2, at 4–5.

6 *See* Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1993) ("There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up.").

7 *See generally* Joel E. Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 624–26 (2017) (collecting examples of sizeable outcomes in Delaware stockholder actions, including the affirmance of a $1.26 billion judgment in 2012 and the approval of a $275 million settlement in 2015).

Delaware leads the country in the development of corporate law.[8] For merger litigation, the standard of review is crucial. Indeed, "the outcome of a transactional case most often will depend on what review standard is applied."[9] These standards are important because they "reflect significant value judgments about the social utility of permitting greater or lesser insulation of director conduct from judicial scrutiny."[10] It commonly is said that there are three standards of review that a court may invoke when reviewing a challenge to directors' and officers' actions.[11] The most lenient standard of review is the business judgment rule,[12] and the most stringent is entire fairness.[13] In between is enhanced scrutiny, which, in the merger context, is known as *Revlon* review.[14]

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8 *See, e.g.*, Hamermesh & Wachter, *supra* note 1, at 601–07 (describing various procedural and substantive factors that have contributed to Delaware's ability to rapidly and efficiently resolve stockholder litigation); *see also* Lucian A. Bebchuk & Assaf Hamdani, *Vigorous Race or Leisurely Walk: Reconsidering the Competition Over Corporate Charters*, 112 YALE L.J. 553, 553–54, 576–80 (2002) (analyzing empirical data showing Delaware's overwhelming dominance as the preferred state of incorporation); Eric A. Chiappinelli, *How Delaware's Corporate Law Monopoly Was Nearly Destroyed*, 65 DEPAUL L. REV. 1, 1 (2015) ("Delaware's position as the nation's leader in corporate law is well established. Equally well established, although perhaps less well known except among corporate law scholars, is that Delaware's leadership is the result of its Court of Chancery being the center for stockholder litigation against corporate fiduciaries." (footnotes omitted)).

9 Jack B. Jacobs, *Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective*, 5 HARV. BUS. L. REV. 141, 155 (2015); *see also In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 547 (Del. Ch. 2003) ("[Delaware] law has so entangled the standard of review determination with the ultimate decision on the merits that the two inquiries are inseparable.").

10 William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1296 (2001).

11 *See, e.g.*, Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011) ("Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness.").

12 *See, e.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 43 (Del. Ch. 2013) ("Delaware's default standard of review is the business judgment rule. The rule presumes that 'in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'" (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

13 *See, e.g.*, *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 34 (Del. Ch. 2014) ("Entire fairness is Delaware's most onerous standard of review. . . . When entire fairness applies, the defendants bear the burden of proving 'to the court's satisfaction that the transaction was the product of both fair dealing *and* fair price.'" (quoting Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1163 (Del. 1995))).

14 *See, e.g.*, Chen v. Howard-Anderson, 87 A.3d 648, 682 (Del. Ch. 2014) ("*Revlon* is a standard of review in which 'the reviewing court has leeway to examine the reasonableness of the board's actions under a standard that is more stringent than business judgment review and yet less severe than the entire fairness standard.'" (quoting *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010))).

Enhanced scrutiny applies, among other situations,[15] when a company's board of directors decides to sell the company.[16] This Article focuses on *Revlon* review, the doctrine usually governing fiduciary duties during mergers,[17] and the recent changes to that standard of review, including when it applies.

Three separate lines of cases independently have worked changes to judicial review of merger litigation.[18] The following Sections explore those developments.

Section II explains the *Revlon* doctrine. Although the early cases created some uncertainty as to what duties, precisely, *Revlon* imposed on a company's board, the decisions over time clarified that directors in fact have substantial leeway in fulfilling *Revlon*'s mandate to seek out the highest value reasonably available after the board decides to sell the company. These decisions established that *Revlon* ultimately is a form of reasonableness review.

Section III describes the Delaware Supreme Court's tightening of the preliminary-injunction standard in merger-challenge cases and the resulting limited availability of pre-closing relief for stockholders. The current standard generally prevents deals from being delayed or cancelled due to poor sales processes, but it does allow an injunction to be issued when disclosures are inadequate. Thus, all but the most egregious instances of flawed sales efforts will go to the stockholders for a vote to approve or disapprove of a deal.

Section IV explores the evolution of the *Corwin* doctrine. Based on this line of cases, an uncoerced, fully-informed vote by a majority of disinterested stockholders shifts the standard of review to the business judgment rule, effectively insulating a merger from attack in the courts. As a result, even when a company's directors breach their fiduciary duties, there is no viable lawsuit if

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15 *See* Pell v. Kill, 135 A.3d 764, 785–86 (Del. Ch. 2016) (analyzing when enhanced scrutiny applies).

16 *See infra* Section II.B.

17 Delaware law should govern any lawsuit asserting breaches of fiduciary duties against directors of Delaware corporations, regardless of in which state the lawsuit is brought. *See, e.g.*, NAF Holdings., LLC v. Li & Fung (Trading) Ltd., 772 F.3d 740, 743, 753 n.2 (2d Cir. 2014) (applying Delaware law under the internal affairs doctrine); Frankston v. Aura Sys., Inc., 161 F.3d 12, No. 97-56119, 1998 WL 613839, at *1, *3 n.1 (9th Cir. Aug. 19, 1998); *see also* Guhan Subramanian, *The Drivers of Market Efficiency in* Revlon *Transactions*, 28 J. CORP. L. 691, 704 (2003) (suggesting that "most states outside of Delaware follow *Revlon*" and identifying only seven that do not).

18 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015) (foreclosing post-closing damage claims in many instances); C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049 (Del. 2014) (limiting the availability of pre-closing injunctive relief); *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54 (Del. Ch. 2014) (applying *Revlon*-Plus review), *aff'd sub nom.* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

fully-informed and uncoerced stockholders approve the deal. This premium placed by the courts on full disclosure to the stockholders should cause companies to vigorously disclose all material details surrounding a merger.

Section V analyzes a countervailing and under-discussed development in the case law that subjects deals with undisclosed conflicts of interest to a standard of review less rigorous than entire fairness but more stringent than enhanced scrutiny. This Article calls that form of review "*Revlon*-Plus" review. Its exact contours remain undeveloped, but the cases applying this standard show that it often is outcome determinative, i.e., actions that otherwise would pass muster under *Revlon* will fail under *Revlon*-Plus. Stockholder plaintiffs accordingly have an incentive to focus aggressively on potentially conflicted fiduciaries and their advisors.

Finally, Section VI synthesizes the effects of these three trends. First, fewer deals will be delayed or cancelled by the courts; instead, most will be sent to stockholders for approval. Second, in seeking stockholder approval, corporate fiduciaries should ensure full disclosure of all material facts. Third, boards that heed this advice should be rewarded in any post-closing litigation with an easy win at the motion-to-dismiss stage. Conversely, boards that fail to disclose their conflicts of interest, or their advisors' conflicts, risk significant damage exposure in subsequent litigation.

II. ENHANCED SCRUTINY UNDER *REVLON*

The 1980s witnessed an explosion in merger activity and, in particular, hostile takeovers financed by junk bonds.[19] A number of takeover-related lawsuits made their way through the courts, and the middle part of the decade witnessed the issuance of many of the most seminal decisions in the history of corporate law.[20] One of those cases was *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[21]

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[19] *See* Steven M. Davidoff, *The SEC and the Failure of Federal Takeover Regulation*, 34 FLA. ST. U. L. REV. 211, 224 (2007) (describing historical merger activity).

[20] *E.g.*, Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (upholding use of the poison pill); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (applying enhanced scrutiny to the use of defensive measures by boards of directors to prevent takeovers); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (holding directors monetarily liable for breach of fiduciary duties in approving a merger), *overruled in part by* Gantler v. Stephens, 965 A.2d 695, 713 n.54 (Del. 2009).

[21] 506 A.2d 173 (Del. 1986).

A. The *Revlon* Decision

Revlon involved the takeover of the cosmetics company Revlon, Inc. by Pantry Pride, Inc., and the great efforts of Revlon's management to sell the company instead to Forstmann Little & Co. ("Forstmann"). The contest included several of the large personalities involved in the 1980's takeover scene. Pantry Pride nominally was a small grocery store chain, but more importantly functioned as the takeover outfit of known corporate raider Ronald Perelman; Forstmann Little was the investment firm of Theodore Forstmann, a man who vehemently opposed the junk-bond financing schemes popularized by Michael Milken and his employer Drexel Burnham Lambert, which was backing Perelman's bid to acquire Revlon.[22] Indeed, the decision of Revlon's board and management to seek a friendly bidder in the form of Forstmann was predicated, at least in part, on Revlon's CEO's "strong personal antipathy to Mr. Perelman."[23]

The story of Revlon's acquisition began in the summer of 1985. After Perelman's initial discussions of a friendly takeover with Revlon's CEO, Michel Bergerac, failed, Pantry Pride launched a hostile tender offer for all of Revlon's common shares at $47.50 a share.[24] Revlon's banker recently had advised the board of directors that the company could be sold as a whole for somewhere in the mid $50 per share range or sold off in pieces with a return to stockholders of $60 to $70 per share.[25] Compared to either valuation, Perelman's offer significantly undervalued the company. In response to the threat posed by Perelman's takeover attempt, the board adopted a poison pill and advised the company's stockholders to reject the offer.[26]

Further seeking to counter Perelman, the board began a stock buyback program for nearly one-third of the company's outstanding shares, offering to

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22 *See generally* BRYAN BURROUGH & JOHN HELYAR, BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO 86, 240–41 (1st ed. 2009) (describing the Revlon acquisition). "Revlon was the first hostile takeover of a major public company by a junk-bond-backed buyer, and it opened the gates for a string of similar battles . . ." *Id.* at 239.

23 *Revlon*, 506 A.2d at 176.

24 *Id.* at 177.

25 *Id.* at 176–77.

26 *Id.* at 177. A poison pill is a device that dilutes a hostile acquiror's ownership interest by granting all of the company's stockholders other than the acquiror a right to buy shares of stock at highly discounted values upon the occurrence of an event, such as a newcomer, i.e., the bidder, acquiring more than ten percent of a company's stock. *See generally* Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348–49, 1354 (Del. 1985) (explaining mechanics of the poison pill).

exchange each share of common stock for a subordinated note worth $47.50 in principal plus 11.75% interest due in 1995 (the "Notes") and one-tenth of a share of preferred stock valued at $100. The offer was massively over-subscribed: stockholders tendered nearly 87% of the company's outstanding shares.[27] The Notes formed an important part of the *Revlon* story: although they initially traded at face value, their value would decline if noteholders believed that they would not be repaid in full, such as if the company took actions that increased the likelihood of a bankruptcy.[28]

Throughout September, Pantry Pride repeatedly increased its bid.[29] Meanwhile, Revlon's board was negotiating a friendly acquisition with Forstmann, eventually striking an agreement whereby Forstmann would acquire the company for $56 per share.[30] The proposed merger included a waiver of certain covenants in the Notes that were beneficial to the noteholders. The announcement of the merger caused the market value of the Notes to drop sharply, and the board faced "threats of litigation by these creditors."[31] Pantry Pride responded with an increased bid of $56.25 per share and vowed to "engage in fractional bidding and top any Forstmann offer by a slightly higher one."[32] Notwithstanding the promise of an ultimately higher offer than whatever Forstmann bid, Revlon's board committed to a transaction with Forstmann at $57.25 per share, including a contractual commitment—known as a "lock up"—to sell Forstmann a key Revlon asset at a massive discount if another bidder acquired control of the company.[33] As part of its takeover offer, Forstmann promised to shore up the value of the Notes in the market.[34] Pantry Pride responded by first raising its offer to $58 per share, contingent on the waiver of the special provisions offered to Forstmann, and second by filing suit in Delaware challenging the actions of Revlon's board.[35]

The litigation in Delaware involved allegations that Revlon's directors breached their fiduciary duties. Directors of Delaware corporations owe the corporation and its stockholders two fiduciary duties: the duty of care and the

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27 *Revlon*, 506 A.2d at 177.

28 *See, e.g.*, 11 U.S.C. § 726 (2016) (establishing the priority system for repayment in bankruptcy and the rule that similar-tiered claims be repaid pro rata if there are insufficient assets to repay the claims in full).

29 *Revlon*, 506 A.2d at 177.

30 *Id.* at 178.

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.* at 178–79.

35 *Id.* at 179.

duty of loyalty.[36] The duty of care requires directors to inform themselves of all reasonably available material information and consider such information while acting.[37] The duty of loyalty demands that the directors act in good faith and also in the best interests of both the corporation and its equity holders.[38]

The Court of Chancery granted a preliminary injunction to Pantry Pride after it concluded that Revlon's directors "breached their duty of loyalty by making concessions to Forstmann, out of concern for their liability to the noteholders, rather than maximizing the sale price of the company for the stockholders' benefit."[39] The appeal that followed established *Revlon* review.

The Delaware Supreme Court began by examining the various defensive measures—such as the poison pill and the self-tender—that Revlon's board adopted in response to Perelman's bid. The court recently had addressed those sorts of protective maneuvers in *Unocal Corp. v. Mesa Petroleum Co.*,[40] where it established a higher level of scrutiny for such defensive measures.[41] The court imposed increased scrutiny because of a recognition that "when a board implements anti-takeover measures there arises 'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the

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[36] *E.g.*, Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("It is basic to our law that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation. In discharging this function, the directors owe fiduciary duties of care and loyalty to the corporation and its shareholders." (citation omitted)).

[37] *See, e.g.*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 367–68 (Del. 1993) (collecting cases); *id.* at 368 ("[A] trial court will not find a board to have breached its duty of care unless the directors individually and the board collectively have failed to inform themselves fully and in a deliberate manner before voting as a board upon a transaction as significant as a proposed merger or sale of the company.").

[38] *See, e.g.*, Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[T]he fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith."); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 67 (Del. 2006) (cataloging types of bad faith behavior); *Cede & Co.*, 634 A.2d at 361.

[39] *Revlon*, 506 A.2d at 179.

[40] 493 A.2d 946 (Del. 1985).

[41] In *Unocal*, the court addressed a company's self-tender in response to a two-tiered tender offer by a hostile acquiror that the company's board deemed coercive. The court upheld the company's actions, but established a new standard of review for defensive actions. Boards of directors adopting defensive measures "must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed," a burden that can be satisfied by showing that the directors acted in good faith and conducted a reasonable investigation. *Id.* at 955. Any defensive measure also "must be reasonable in relation to the threat posed." *Id.*

corporation and its shareholders.'"[42] The *Revlon* court's analysis of the board's adoption of the poison pill and the company's exchange offer for its own shares broke no new doctrinal ground, and the court approved of both actions as reasonable defensive measures enacted in response to inadequate offers.[43]

Revlon's judicial innovation came from its analysis of the lock up. Because the board itself had negotiated a merger with Forstmann, it had become "apparent to all that the break-up of the company was inevitable."[44] In these circumstances, the

> duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit . . . The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.[45]

Thus, in selling the company, the directors were charged with, it seemed, an auctioneering duty.

Like *Unocal* before it, the decision reiterated that boards rightfully could deploy defensive measures in response to a takeover attempt, but emphasized that there comes a time when the directors violate their fiduciary duties by continuing to employ said defensive measures. That time, according to *Revlon*, is when the break-up or dissolution of the company is "inevitable."[46] *Revlon* also established that, in the context of a sale of the company, directors owe fiduciary duties precisely to one constituency: the company's stockholders. A corporation's other stakeholders—its employees, their families, debtholders, creditors, suppliers, customers, and so forth—cannot be the directors' focus in a sale. *Revlon* made clear that in normal times the "board may have regard for various constituencies in discharging its responsibilities, provided there are

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[42] *Revlon*, 506 A.2d at 180 (quoting *Unocal*, 493 A.2d at 954).

[43] As the court noted in its analysis, the implementation of these measures was a chief cause of Pantry Pride raising its bids "from a low of $42 to an eventual high of $58," much to the stockholders' benefit. *Id.* at 181.

[44] *Id.* at 182.

[45] *Id.*

[46] *Id.* at 182, 184. As the court put it: "The original threat posed by Pantry Pride—the break-up of the company—had become a reality which even the directors embraced. Selective dealing to fend off a hostile but determined bidder was no longer a proper objective." *Id.* at 182.

rationally related benefits accruing to the stockholders."[47] In a change-of-control transaction, however, valuing those constituencies' interests violates the directors' fiduciary duties, at least when according benefits to those constituencies is done at the expense of the company's stockholders. The Revlon board breached its fiduciary duties by agreeing to the merger with Forstmann, because that agreement impermissibly favored the company's noteholders over the stockholders.[48] In short, "concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."[49]

B. Evolution of the *Revlon* Doctrine

Revlon established that corporate fiduciaries take on a uniquely-focused obligation when selling the company. That obligation required the directors to get the "best price" for the stockholders. But, key questions remained unanswered. First and foremost, when, exactly, are *Revlon* duties triggered? Besides the cash-out, all-shares merger in which a company's stockholders are eliminated and paid a set amount, near-endless varieties of corporate transactions exist. On the value side, a merger could be for cash, shares, notes, other property, or some combination of the foregoing. On the structural side, there are true mergers of equals, spin-offs, divestitures, sales of assets, and every other combination between selling the entire company and selling only the tiniest piece of it. In addition, the various structural and value aspects can be combined. Imagine, for example, the sale of a division comprising two-thirds of a company's revenues to a buyer in exchange for a price paid in a two-to-one mix of cash and stock. Next, when *Revlon* does apply, what does it mean to get "the best price for the stockholders"? Even two all-cash offers may not be comparable when one proposal is less likely to be consummated because of, for example, antitrust concerns. Then there are the fact-specific questions of deal process, negotiating tactics, side agreements with management or major stockholders, deal-protection provisions in merger agreements, and so on. These innumerable questions and their permutations preoccupied the courts for decades after *Revlon*.[50]

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[47] *Id.* at 182.

[48] *Id.*

[49] *Id.*

[50] *See, e.g.*, Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167, 175 (2014) ("Yet, more so than any of the other towering decisions from [the 1980s],

These issues have been, and continue to be, the focus of substantial commentary.[51] They are not, however, the focus here. For purposes of this Article, it suffices to provide, instead, an abbreviated history of *Revlon*'s development.

Perhaps most significantly, the Delaware Supreme Court rapidly backed away from *Revlon*'s auctioneering language.[52] Three years after *Revlon*, the Court held that "*Revlon* does not demand that every change in the control of a Delaware corporation be preceded by a heated bidding contest."[53] Instead, the cases began emphasizing that "in a sale of corporate control the responsibility of the directors is to get the highest value reasonably attainable for the shareholders."[54] By 1993, it was clear that, notwithstanding the actual language in the *Revlon* opinion, *Revlon*, in fact, is a test of reasonableness as directors "have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders."[55] The reasonableness formulation afforded significant discretion to directors to consider a variety of factors in determining which transaction constituted the "best value."[56]

Consistent with this discretion, the courts eschewed any required deal process, instead holding that "Delaware law recognizes that there is 'no single blueprint' that directors must follow."[57] And, the case law emphasized that "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

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significant uncertainty still surrounds the so-called *Revlon* doctrine. This uncertainty stems, in part, from a failure to more clearly identify and justify the key underlying rationales for the *Revlon* doctrine, and from ongoing imprecision as to the precise 'contours' of the doctrine." (footnotes omitted)).

51 *See, e.g.*, Laura Bower Braunsberg, *Asking the Right Question: The Mixed-Consideration Denominator Problem*, 40 DEL. J. CORP. L. 989, 1001–06 (2016) (describing how the Delaware courts have yet to resolve when *Revlon* applies in deals involving both cash and stock consideration); Johnson & Ricca, *supra* note 50, at 180–205 (discussing at length the situations in which *Revlon* may be implicated, including situations where no deal is consummated); *see also* Stephen M. Bainbridge, *The Geography of* Revlon*-Land*, 81 FORDHAM L. REV. 3277, 3297–3320 (2013) (surveying the case law on what forms of consideration trigger *Revlon*); Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485, 1518–27 (2013) (describing uncertainty in the case law regarding the events that trigger *Revlon* and the lack of clarity on the relevance of the type of consideration).

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

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

54 Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989).

55 Paramount Commc'ns Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994).

56 *See id.* at 44 (listing factors boards could consider).

57 *Id.* (quoting *Barkan*, 567 A.2d at 1286).

choice."[58] This reformulation downwardly defined what a plain reading of the *Revlon* decision seemed to require. After all, tasking directors with becoming "auctioneers charged with getting the best price for the stockholders"[59] dictates a duty with significantly less wiggle room than merely demanding that a board's actions fall "within a range of reasonableness."[60]

In terms of when *Revlon* applied, the Delaware Supreme Court took the opposite approach and arguably went beyond what a narrow reading of the *Revlon* case required.[61] Instead, the court held that enhanced scrutiny applies:

> in *at least* the following three scenarios: (1) when a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control.[62]

The court also set forth the policy justification underlying the choice of these triggers:

> Each event represents a fundamental (and perhaps irrevocable) change in the nature of the corporate enterprise from a practical standpoint. It is the significance of **each** of these events that justifies: (a) focusing on the directors' obligation to seek the best value reasonably available to the stockholders; and (b) requiring a close scrutiny of board action which could be contrary to the stockholders' interests.[63]

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[58] *Id.* at 45.

[59] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[60] *QVC*, 637 A.2d at 45.

[61] *Revlon* focused on a break-up of the company. *Revlon*, 506 A.2d at 182.

[62] Arnold v. Soc'y for Sav. Bancorp., 650 A.2d 1270, 1290 (Del. 1994) (emphasis added) (internal citations omitted); *see also* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 851–52 (Del. 2015) (setting forth the same triggers).

[63] *QVC*, 637 A.2d at 47–48.

Recent decisions highlight the special considerations present in final-period transactions as the justification for *Revlon*'s enhanced scrutiny.[64]

The courts today apply *Revlon*'s core requirements in the same form as described above. Conveniently, one day before the Delaware Supreme Court issued its decision in *Corwin* and clarified the effects of stockholder votes on post-closing merger litigation,[65] the Court of Chancery issued a decision in a post-closing challenge to a merger governed by *Revlon*.[66] The decision in *Zale I* provides a good example of how the courts understood the "black letter" aspects of *Revlon*.

The *Zale I* court first noted that "[s]o-called *Revlon* duties are only specific applications of directors' traditional fiduciary duties of care and loyalty in the context of control transactions."[67] The court then set forth the standard governing the question of whether the directors in that case breached their fiduciary duties:

> [A]t bottom *Revlon* is a test of reasonableness; directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there. In that regard, the questions before [the Court] are: (1) whether the decision making process employed by the Director Defendants, including the information on which they based their decisions, was adequate; and (2) whether the Director Defendants' actions were reasonable in light of the circumstances then existing. . . . Even though there is an objective reasonableness evaluation, however, *Revlon* is not a license for law-trained courts to second-guess reasonable, but debatable, tactical choices that directors have made in good faith.[68]

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64 *See, e.g.*, Huff Energy Fund, L.P. v. Gershen, No. 11116-VCS, 2016 WL 5462958, at *13–14 (Del. Ch. Sept. 29, 2016) (explaining that *Revlon* applies in "final stage" transactions because of the inherent conflicts present in such situations); J. Travis Laster, Revlon *Is a Standard of Review: Why It's True and What It Means*, 19 FORDHAM J. CORP. & FIN. L. 5, 15–18 (2013) (identifying the conflicts present in final-period transactions as the driving policy behind the *Revlon* decisions and collecting authorities).

65 *See infra* Section IV.A.

66 *In re* Zale Corp. S'holders Litig., No. 9388-VCP, 2015 WL 5853693 (Del. Ch. Oct. 1, 2015) [hereinafter Zale I], *modified*, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015) [hereinafter Zale II], *aff'd sub nom.* Singh v. Attenborough, 137 A.3d 151 (Del. 2016).

67 Zale I, *supra* note 66, at *11.

68 *Id.* (citations omitted).

As even this brief history of *Revlon*'s evolution over thirty years shows, the obligations initially imposed by the Delaware Supreme Court in the mid-1980s have been rolled back significantly. Far from auctioneers, today's directors are tasked with nothing more than an obligation to act reasonably when selling the company. Perhaps unsurprisingly, several commentators have argued that *Revlon* has become increasingly defanged over time.[69] In the next two Sections, this Article turns to two lines of cases that further diminish the doctrine's impact. Then, this Article addresses a countercurrent in the law, which imposes an amped-up version of *Revlon* in select circumstances.

III. THE *C & J ENERGY* DECISION: CABINING INJUNCTIONS

The Delaware Supreme Court recently noted that "*Unocal* and *Revlon* are primarily designed to give stockholders and the Court of Chancery the tool of injunctive relief to address important M & A decisions in real time, before closing."[70] In late November 2014, the Court of Chancery granted such an injunction after determining that a company's board likely breached its duty of care when, in the course of pursuing an acquisition of another company, it ended up executing a transaction which resulted in its stockholders owning a minority of the resulting enterprise, thus effectively selling itself.[71] The Delaware Supreme Court, however, reversed that decision and held that the Court of Chancery "misappl[ied] *Revlon*."[72]

One of the many odd aspects of the *C & J Energy* litigation is that the narrative of the process that occurred reads quite differently in the two court decisions. The Court of Chancery's decision portrays a company that set out to acquire another entity and ended up selling itself instead. The Delaware Supreme Court's opinion, on the other hand, described a strategic transaction

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69 *See, e.g.*, Johnson & Ricca, *supra* note 50, at 173 ("Consequently, in the M&A setting, the *Revlon* doctrine currently has legal 'bite' only in preliminary injunction (but not damages) actions, and even here its diminished role as a pre-closing, nonmonetary remedies doctrine is limited to 'done deals.'"); *see also* Wells M. Engledow, *Structuring Corporate Board Action to Meet the Ever-Decreasing Scope of* Revlon *Duties*, 63 ALB. L. REV. 505, 534 (1999) ("[I]t is clear that the cases in *Revlon*'s wake have consistently been moving toward even greater deference to corporate boards.").

70 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015).

71 Transcript of Ruling of the Court, Preliminary Injunction Hearing, at 9–10, 13, City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. C & J Energy Servs., Inc., No. 9980-VCN, 2014 WL 7328818 (Del. Ch. Nov. 24, 2014) [hereinafter C & J Chancery Decision].

72 C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1071 (Del. 2014).

with contractual protections for the seller and a price supported by a passive market check.

A. The Unusual C & J "Sale": Chancery's View

A stockholder of C & J Energy Services, Inc., a Delaware corporation, sued the company's directors challenging a merger. The plaintiff sought a preliminary injunction to halt a stockholder vote on the proposed deal until such time as C & J's board had explored alternative sale transactions.[73] Pursuant to the terms of the proposed merger, C & J would merge with Nabors Red Lion Limited ("Red Lion"), a subsidiary of Nabors Industries Limited ("Nabors"). Each share of C & J stock would be converted into one share of Red Lion. Once consummated, C & J's stockholders would own 47% of the combined entity, which would be run by C & J's management, and four C & J board members, constituting a majority of the combined board, would have guaranteed five-year terms.[74] Nabors was registered in Bermuda, and the new entity would be registered there as well.[75]

Joshua Comstock was C & J's founder, Chairman, and CEO. C & J provided oilfield services. Anthony Petrello was the CEO and Chairman of Nabors, a company more than four times larger than C & J in terms of market capitalization. Nabors also provided oilfield services, and one of its divisions, Nabors CPS, had been a possible acquisition target of C & J.[76] Before the merger, "C&J was a successful growing company and had been looking to grow through strategic acquisitions."[77] The possibility for the deal emerged when Stephen Trauber, an investment banker, pitched the idea of merging C & J and Nabors to Comstock and Petrello.[78]

The brief Court of Chancery decision highlighted only those facts of apparent importance to the court. Comstock and Petrello agreed early on that Red Lion would own a majority of the combined entity in order to effect what commonly is known as a corporate inversion,[79] thus allowing C & J "to achieve

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[73] C & J Chancery Decision, *supra* note 71, at 3.
[74] *Id.* at 3–4.
[75] *Id.* at 5, 10.
[76] *C & J Energy*, 107 A.3d at 1056–57.
[77] C & J Chancery Decision, *supra* note 71, at 4.
[78] *C & J Energy*, 107 A.3d at 1056–57.
[79] *See generally* Gregory Day, *Irrational Investors and the Corporate Inversion Puzzle*, 69 SMU L. REV. 453, 461–65 (2016) (describing inversions).

significant tax savings."[80] Also clear from an early stage was that Comstock and his management team would manage the controlled entity.[81] The C & J board "deferred" to Comstock to negotiate the transaction.[82] C & J contended in litigation that the true value of Nabors CPS was what Comstock and his team intended to do with the division. On its own, Nabors CPS missed its projections and performed worse as negotiations progressed. Petrello demanded a higher valuation for Nabors CPS, notwithstanding the division's poor performance, and he "made clear to C&J's management that they would receive very generous employment packages as a result of the merger."[83]

Comstock agreed to the new valuation. As the division continued to decline in performance, its projections were modified to use a different EBITDA[84] measure to support the deal valuation. C & J also turned to Trauber's firm for merger financing. Apparently realizing that also providing financing would make its investment bank conflicted, C & J engaged a second financial advisor.[85] Nabors CPS continued to return poor results. An auditing firm that C & J engaged to conduct financial diligence concluded that Nabors CPS's "results continued a downward trend in profitability which was a concern for deal value."[86] Comstock also questioned the credibility of Nabors's accounting. He nevertheless employed optimistic values and increased the EBITDA multiple "to get to a number that would support the transaction."[87] The C & J board approved the merger on June 24, 2014. One of the directors testified at his deposition "that 'we weren't going out there—we weren't interested, as far as a board . . . in selling our business.' The board had a 'specific plan in mind' and there was apparently no interest to 'try to strike up other deals.'"[88] The director also testified that the board never considered selling C & J to another company. Moreover, the investment bank engaged as C & J's sell-side banker considered itself more on the buy side and viewed the merger as a joint-venture deal.[89]

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80 C & J Chancery Decision, *supra* note 71, at 5.
81 *Id.*
82 *Id.*
83 *Id.* at 6.
84 "EBITDA" refers to earnings before interest, tax, depreciation, and amortization.
85 C & J Chancery Decision, *supra* note 71, at 6–7.
86 *Id.* at 7.
87 *Id.*
88 Letter Supplement of C & J Chancery Decision*, supra* note 71, at 2 (Del. Ch. Nov. 25, 2014) [hereinafter C & J Letter] (quoting Deposition of C. James Stewart, III, Oct. 31, 2014, at 24).
89 *Id.*

The Court of Chancery enjoined the stockholder vote, concluding that the plaintiff had shown a likelihood of success on its *Revlon* claim.[90] C & J's board, in the court's view, acted like a buyer, not a seller. It never sought out other buyers. It was not even "clear that the board approached this transaction as a sale."[91] The C & J board "took no steps to sell or shop the company otherwise."[92] The court expressly denied that it was "suggesting any specific steps that the board needed to take, but the fundamental underpinning—and lacking here—is a recognition of the sales process that this transaction involved."[93] Although admitting that it was "a very close call," the court concluded that there likely was a breach of the duty of care, but no breach of the duty of loyalty, and that an injunction should issue because the stockholders otherwise would have no remedy: because of the company's exculpatory provision, no money damages would be available post-closing for a duty of care violation, and so pre-closing relief was the only possible remedy for the alleged wrongs.[94] Balanced against this problem was the court's skepticism that another buyer would emerge when, notwithstanding "the relatively modest deal protection measures," one had not come forward in the four months since the deal had been announced.[95]

The concern that the directors could not discharge their obligations under *Revlon* when they did not recognize that they were selling the company animated the court's decision. In the court's words: "If the board members were not focused on the selling process, it is not clear why they would have discharged those aspects of the duty of care commonly associated with a board's decision to sell the enterprise."[96] The court ordered C & J to shop itself on the market for thirty days.[97]

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90 C & J Chancery Decision, *supra* note 71, at 12–13, 15.
91 *Id.* at 9.
92 *Id.* at 10.
93 *Id.* at 13.
94 *Id.*
95 *Id.* at 14.
96 C & J Letter, *supra* note 88, at 2.
97 C & J Chancery Decision, *supra* note 71, at 15.

B. Stockholders Have a Remedy Through the Vote: The Supreme Court's Reversal

The Delaware Supreme Court reversed, declaring that the Chancery's decision "rested on an erroneous understanding of what *Revlon* requires,"[98] and that blue-penciling the merger agreement to require a go-shop period was "not an appropriate exercise of equitable authority."[99] That stern rebuke seems surprising in light of the fact that the process described by the Court of Chancery was chock full of questionable aspects: a board, advised by a potentially conflicted advisor, set out to acquire a target and ended up selling itself to the target instead in a process where the target's declining performance forced the CEO—who was insisting on lucrative employment agreements for himself and his management team—to skew the target's forecasts and multiples to support the deal valuation. That fact pattern does not seem far removed from what the Delaware courts have described as "the paradigmatic context for a good *Revlon* claim, which is when a supine board under the sway of an overweening CEO bent on a certain direction, tilts the sale process for reasons inimical to the stockholders' desire for the best price."[100] The Supreme Court's opinion represented the first of two big moves that significantly ratcheted down *Revlon*'s significance.[101]

The factual narrative in the Supreme Court's opinion paints a more nuanced view of the C & J board's actions during the sale process. The reader learns that Comstock wanted to hire C & J's usual investment banker, because it knew C & J's business the best, but instead hired another bank because Petrello wanted to hire C & J's regular investment banker to represent Nabors instead.[102] Comstock perceived during the process that Trauber, his banker, was feeding information to Petrello, and Comstock accordingly ended up negotiating with his own banker.[103] The board approved the initial valuation for Nabors after considering the potential $200 million in tax savings from structuring the transaction as an inversion.[104] Legal counsel also presented to

98 C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014).

99 *Id.* at 1054.

100 *In re* Toys "R" Us, Inc. S'holder Litig., 877 A.2d 975, 1002 (Del. Ch. 2005).

101 Section IV *infra* discusses the second major change.

102 *C & J Energy*, 107 A.3d at 1056.

103 *Id.* at 1056–57. *See also id.* at 1057 ("Comstock's perception of needing to 'negotiate' with his own financial advisor gives color to the plaintiffs' allegation that the deal process fell short of the ideal.").

104 *Id.* at 1057–58.

the board on its fiduciary obligations under *Revlon*.[105] Comstock unilaterally approved the first increase in the valuation of Nabors—after its disappointing quarterly results and after *increasing* the EBITDA multiplier—without board authorization. The Supreme Court, however, went on to find "a colorable basis" in the record "to believe that Comstock was playing the negotiation game skillfully," notwithstanding price increases following poor performance by Nabors.[106] Emphasizing the majority-independent composition of the board, the Supreme Court found that the directors "remained engaged in the process" and observed that Comstock "continually shared the details of the valuation changes and negotiations with the C & J board."[107] As a result, the court concluded that "the board was informed about the transaction they would eventually vote to approve, especially the final terms of the deal."[108]

In reviewing the terms of the merger, the Supreme Court placed significant emphasis on the unique protections for the C & J stockholders. C & J directors would control the board of the combined entity for five years. In the event of a sale of the company, all stockholders would share in the benefits pro rata. Nabors was prohibited from selling control unless the buyer made a bid for the entire company.[109] The merger agreement also contained a "fiduciary out" provision and a low termination fee.[110] Finally, both financial advisors provided fairness opinions.[111] As for the management contracts with the new entity, the Supreme Court described them as "generous" and noted that Comstock's severance agreement, if the board terminated him without cause, amounted to $173 million.[112]

Turning to the *Revlon* analysis, the Supreme Court acknowledged that the sale process "sometimes fell short of ideal," but held that it could not "conclude that the plaintiffs have proven that the majority-independent C & J board acted unreasonably in negotiating a logical strategic transaction, with undisputed business and tax advantages, simply because that transaction had change of control implications."[113] *Revlon* requires that a board act reasonably, not perfectly. *Revlon* also "does not require a board to set aside its own view of

105 *Id.*
106 *Id.* at 1059.
107 *Id.* at 1060.
108 *Id.* at 1061.
109 *Id.* at 1062–63.
110 *Id.* at 1063.
111 *Id.*
112 *Id.* at 1064.
113 *Id.* at 1066.

what is best for the corporation's stockholders and run an auction whenever the board approves a change of control transaction."[114]

C & J Energy's key clarification was not that a board had no obligation to run an auction. That long had been the law.[115] After *C & J Energy*, companies knew for certain what some likely already suspected: *Revlon* does not even require contacting other potential buyers before signing up a deal. The deal struck by the board will be upheld under *Revlon* "so long as the transaction is subject to an effective market check under circumstances in which any bidder interested in paying more has a reasonable opportunity to do so."[116] That "market check does not have to involve an active solicitation, so long as interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to eschew the original transaction and accept the higher-value deal."[117] In short, a board satisfies its obligations under *Revlon* in situations where, like *C & J Energy*, any deal protections, such as deal termination fees, do not deter topping bidders in any material way, and the merger includes a fiduciary-out provision for the board so that it can accept a higher bid if anyone makes one. A "viable passive market check" fulfills a board's *Revlon* obligations.[118]

Under this regime, a stockholder's remedy is not a lawsuit seeking to stop the deal. Foreshadowing the *Corwin* decision the next year, the Supreme Court pointed stockholders to the ballot box: "The ability of the stockholders themselves to freely accept or reject the board's preferred course of action is also of great importance in this context."[119]

The Supreme Court also clarified the standard for injunctions. The Court of Chancery nominally entered a preliminary injunction, but it actually ordered a mandatory injunction. The distinction between the two concerns the relief ordered. A preliminary injunction preserves the status quo, such as by holding up a deal for a set period of time until additional hearings can be held or corrective disclosures disseminated. A mandatory injunction, by contrast,

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114 *Id.* at 1067.
115 *See supra* notes 52–53 and accompanying text.
116 *C & J Energy*, 107 A.3d at 1067.
117 *Id.* at 1067–68.
118 *Id.* at 1053; *see also id.* at 1070 ("[T]here were no material barriers that would have prevented a rival bidder from making a superior offer.").
119 *Id.* at 1068.

requires a party to take affirmative action, such as engaging in a go-shop like the one Chancery ordered.[120]

As for the more commonly sought remedy of the preliminary injunction, the Supreme Court strongly discouraged granting injunctions in the absence of a competing bidder:

> In a situation like this one, where no rival bidder has emerged to complain that it was not given a fair opportunity to bid, and where there is no reason to believe that stockholders are not adequately informed or will be coerced into accepting the transaction if they do not find it favorable, the Court of Chancery should be reluctant to take the decision out of their hands.[121]

The stockholders' remedy is at the stockholder meeting, not in court: "[T]he stockholders can reject the deal for themselves if they do not find its terms to be value-maximizing."[122]

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[120] *See id.* at 1071–72. The procedural distinctions between the two types of injunctions are beyond the scope of this Article. In short, a preliminary injunction can be granted on a preliminary record, but a mandatory injunction requires that the court make findings of fact after a hearing or on the basis of a stipulated record. *Id.* at 1071. The Supreme Court also addressed the practice of "blue penciling," i.e., rewriting the terms of a contract. *Id.* at 1072; *see also* Griffin Toronjo Pivateau, *Putting the Blue Pencil Down: An Argument for Specificity in Noncompete Agreements*, 86 NEB. L. REV. 672, 681–688 (2008) (describing the blue pencil doctrine). According to the Court, it is not appropriate to blue pencil a merger agreement by, for example, striking a no-shop provision, like the Court of Chancery did, absent an independent basis for relief against the third party holding the contract right. In the court's words, "a judicial decision holding a party to its contractual obligations while stripping it of bargained-for benefits should only be undertaken on the basis that the party ordered to perform was fairly required to do so, because it had, for example, aided and abetted a breach of fiduciary duty." *C & J Energy*, 107 A.3d at 1072. The universe of wrongs pursuant to which an acquiror can be stripped of its contract rights has not been defined beyond aiding and abetting breaches of fiduciary duty by the directors of the target's board. This category likely is extremely narrow. Aiding and abetting claims, for example, though asserted against acquirors from time to time, virtually never succeed. *See, e.g.*, *In re* Comverge, Inc., No. 7368-VCP, 2014 WL 6686570, at *19 (Del. Ch. Nov. 25, 2014) ("The most typical example of such failed aiding and abetting claims is when a third-party acquirer is accused of aiding and abetting fiduciary breaches by the target board.").

[121] *C & J Energy*, 107 A.3d at 1072–73 (footnotes omitted).

[122] *Id.* at 1073.

C. The Diminished Availability of Pre-Closing Relief

The Delaware Supreme Court's description of the *Revlon* decision foreshadowed its holding. *Revlon*, according to the court, "made clear that when a board engages in a change of control transaction, it must not take actions *inconsistent* with achieving the highest immediate value reasonably attainable."[123] The negative characterization of *Revlon* makes a striking contrast with the language of the original *Revlon* decision, which clearly imposed an affirmative obligation on boards of directors to *seek* the highest value reasonably obtainable, not just to not obstruct such a process.[124] According to the court in *C & J*, however, "[i]t is too often forgotten that *Revlon*, and later cases like *QVC*, primarily involved board resistance to a competing bid after the board had agreed to a change of control, which threatened to impede the emergence of another higher-priced deal."[125]

After *C & J Energy*, the availability of injunctive relief is diminished significantly for transactions approved by majority-independent boards of directors. The major stock exchanges require listed companies, i.e., public companies, to have majority-independent boards in order to list their shares, making *C & J Energy*'s scope quite broad.[126] The Delaware Supreme Court's decision highlighted three scenarios where an injunction would be appropriate: (1) where plaintiffs have shown a reasonable likelihood of success on their claims for breach of fiduciary duty *and* there is a "rival bidder" attempting to buy the company;[127] (2) where there are disclosure violations and the

123 *Id.* at 1067 (emphasis added).

124 *See supra* note 45 and accompanying text. Notably, this negative formulation of *Revlon* is consistent with the court's holding that an injunction generally should not be granted in the absence of a competing bidder. *C & J Energy*, 107 A.3d at 1072–73.

125 *C & J Energy*, 107 A.3d at 1053 (footnotes omitted); *see also id.* at 1070.

126 *E.g.*, Nasdaq, Inc., Rule 5605(b)(1) (2009) ("A majority of the board of directors must be comprised of Independent Directors . . . ."); NYSE Listed Company Manual § 303A.01 ("Listed companies must have a majority of independent directors.").

127 *C & J Energy*, 107 A.3d at 1073. The Court's decision is unclear as to whether the rival bidder must be the plaintiff in the action or whether a stockholder plaintiff can prevail in seeking an injunction if there is a competing bidder but the bidder stays on the sidelines during the litigation. *See id.* ("where no rival bidder has emerged to complain that it was not given a fair opportunity to bid"). Previous decisions suggest that the failure of a competing bidder to join the litigation will weigh against granting an injunction. *See In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 595 (Del. Ch. 2010) (noting that the rival bidder "has failed to join the lawsuit, and is content to joust publicly with [the current buyer] about whether its proposal is superior").

stockholders are not adequately informed; and (3) where the stockholders "will be coerced into accepting the transaction if they do not find it favorable."[128]

Category two left the law largely as it was before *C & J Energy*: showing that the directors breached their disclosure obligations will merit a short injunction until corrective disclosures are disseminated to and absorbed by the stockholders.[129] Category three remains undeveloped.[130] Category one is of the most interest. It enshrines into law the concept that injunctions should not issue in the absence of a competing bidder. The Court of Chancery previously held that, "[w]hen there is no competing proposal, this Court rarely will enjoin a premium transaction pending trial."[131] There were, however, instances where the court granted such injunctions.[132] After *C & J Energy*, it seems doubtful that the Court of Chancery today would grant injunctions in those circumstances.

C & J Energy described only three categories of situations in which a preliminary injunction would be appropriate.[133] In its articulation of *Revlon* duties, the decision arguably also substantively shrunk the range of conduct that even qualifies as a wrong.[134] Since its issuance, the *C & J Energy* decision widely has been interpreted as cabining the availability of injunctions and further narrowing the scope of *Revlon*.[135]

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128 *C & J Energy*, 107 A.3d at 1073.

129 *See* Vento v. Curry, No. 2017-0157-AGB, 2017 WL 1076725, at *4 (Del. Ch. Mar. 22, 2017) (granting preliminary injunction and ordering stockholder meeting could be held no sooner than five days after the corrective disclosures).

130 It is unclear if the "coercive" category maps onto *Corwin*'s topography of coercion. *See infra* Section IV.B.4.

131 *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 839 (Del. Ch. 2011).

132 *See id.* at 839–43 (granting preliminary injunction in the absence of a rival bidder).

133 *C & J Energy*, 107 A.3d at 1073.

134 *See supra* notes 123–25 and accompanying text.

135 *See* Gail Weinstein et al., *How Delaware Has Radically Changed M&A Law in Recent Years*, M & A LAW., Nov.–Dec. 2018, at 4, 4 (explaining that *C & J Energy* "reflects the erosion of the concept of 'heightened scrutiny,' and sets a lower bar, for sale of the company transactions subject to the *Revlon* duty to seek to obtain the best price reasonably available"); *see also* Bradley R. Aronstam & S. Michael Sirkin, *C & J Energy Services and the Continued Erosion of* Revlon, M & A LAW., Mar. 2015, at 1, 1 ("*C & J* reduced the minimum threshold of actions necessary to satisfy *Revlon* in most cases to what *Omnicare* already requires—an effective fiduciary out. Indeed, *C & J* effectively holds that a majority independent board free of conflict can forego both a pre- and post-signing market check so long as potential interested suitors are not precluded from making a superior bid before closing."); Robert J. Leclerc et al., *Practical Considerations for Single-Bidder Processes in Public M&A*, INSIGHTS: CORP. & SEC. ADVISOR, June 2017, at 11, 15 (observing that "the Delaware Supreme Court suggested that Delaware courts ought not be enjoining transactions (other than disclosure-related injunctions) in the absence of a topping bid" and noting that *C & J Energy* and *Corwin* "have

One subsequent Court of Chancery decision denied a motion to expedite litigation, reasoning that there was no point because *C & J Energy* foreclosed any possibility of injunctive relief.[136] The court described the new approach as one in which "stockholders are able to make these types of decisions with information about whether or not to take the deal."[137] "[A]bsent truly extraordinary circumstances," injunctions premised on merger "process claims and the substantive terms of the deal" will not be granted.[138] As the court explained in another decision, "we are in a post-*C&J* world, and really a post-*Trulia* world, in which some of the old approaches and practices and expectations need to be modified and warrant modification."[139]

To summarize, preliminary injunctions now will be granted only in those situations where a plaintiff shows a reasonable probability of success on the merits of her claim for breach of fiduciary duty under *Revlon*—a narrow realm of actionable conduct—*and* the case falls into one of the three *C & J Energy* categories.[140] As of the time *C & J Energy* was decided, stockholders retained the ability to pursue post-closing damages claims under *Revlon*. Indeed, *C & J Energy* emphasized the availability of such damages when it reversed the Chancery Court's injunction.[141] Not long after the *C & J Energy* decision, however, the Delaware Supreme Court eliminated the availability of post-closing damages in a broad swath of cases.

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led many to question the continued relevance of *Revlon*"); Peter J. Walsh, Jr. & Andrew H. Sauder, *Delaware Insider: Softening the* Revlon *Reasonableness Standard*, BUS. L. TODAY, Jan. 2015, at 1, 3 ("And, even a 'passive' market check may now suffice.").

136 Transcript of Oral Argument on Plaintiff's Motion for Expedited Proceedings and Rulings of the Court at 18–19, Chester Cty. Ret. Sys. v. Collins, No. 12072-VCL (Del. Ch. Mar. 14, 2016) [hereinafter Chester Transcript].

137 *Id.* at 19.

138 *Id.* at 20; *see also In re* Rouse Props., Inc., Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015, at *1 (Del. Ch. Mar. 9, 2018) (noting that the Court previously "declined to grant the motion to expedite because Plaintiffs failed to identify any prospect of a superior proposal or any basis to infer that the stockholder vote on the Merger would be uninformed or coerced").

139 Transcript at 17, City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Grp., Inc., No. 12481-VCL (Del. Ch. June 29, 2016).

140 The language in *C & J Energy* conceivably leaves some wiggle room for injunctions in light of other extraordinary circumstances not falling neatly into these categories. *See* C & J Energy Servs., Inc. v. City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1073 (Del. 2014) (holding that "the Court of Chancery should be reluctant" to grant injunctions where a case does not fall into one of the three categories). The Court of Chancery's subsequent comments interpreting *C & J Energy* also suggest that injunctions still should be available when there are "truly extraordinary circumstances." Chester Transcript, *supra* note 136, at 20.

141 *C & J Energy*, 107 A.3d at 1073 ("We are mindful that an after-the-fact monetary damages case is an imperfect tool . . . .").

IV. THE *CORWIN* CASES: LETTING STOCKHOLDERS CHOOSE

C & J Energy can be seen as a moderate rebalancing of policy considerations that narrowed *Revlon* in a manner consistent with where the doctrine already was heading.[142] Viewed in hindsight, one can see in the opinion's emphasis on stockholder voting hints of a larger change to come. The judiciary wasted no time in getting there. Less than a year after *C & J Energy*, the Delaware Supreme Court issued its decision in *Corwin v. KKR Financial Holdings LLC*,[143] which dramatically and immediately reworked judicial review of mergers.

A. Faith in the Franchise: *Corwin* Defers to the Will of the Stockholders

Unlike *C & J Energy*, which came about through real-time review of an unusual merger, the change wrought by *Corwin* seemingly began with a law review article authored by Vice Chancellor Laster analyzing language about the effect of stockholder votes in a set of Delaware decisions spanning twenty years.[144] The proper approach, the Vice Chancellor argued, was that "in a situation where enhanced scrutiny applies, stockholder approval by a disinterested, uncoerced, and fully informed stockholder majority should restore the business judgment rule."[145]

Defense counsel quickly seized on the idea and advanced it in court. The Court of Chancery agreed with the argument and adopted the concept as an alternative holding in a case dismissing a stockholder complaint.[146] The court held that the "effect of a fully-informed stockholder vote of a transaction with a non-controlling stockholder is that the business judgment rule applies and insulates the transaction from all attacks other than on the grounds of waste, even if a majority of the board approving the transaction was not disinterested or independent."[147]

The Delaware Supreme Court—apparently interested in reaching the issue of the effect of a stockholder vote—affirmed on those grounds in addition to

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142 *See supra* notes 69 & 135 and accompanying text.

143 125 A.3d 304 (Del. 2015).

144 *See* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443 (2014).

145 *Id.* at 1444.

146 *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 998–1003 (Del. Ch. 2014), *aff'd sub nom.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

147 *Id.* at 1001.

the Chancery Court's other more limited holding.[148] "For sound policy reasons," the Supreme Court held, "Delaware corporate law has long been reluctant to second-guess the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests."[149] Thus, "when a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies."[150]

In justifying its holding, the Delaware Supreme Court explained that *Revlon* and *Unocal* "were not tools designed with post-closing money damages claims in mind,"[151] and that the "long-standing policy of our law has been to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction for themselves."[152] Both the relative competence of the courts and the fact that the stockholders have skin in the game when voting on a proposed merger weighed heavily on the analysis: "[J]udges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)."[153]

The business judgment rule that applies after a stockholder vote is not the normal business judgment rule that applies when the court reviews a non-change-in-control decision by directors, which is rationality review.[154] Instead, as the Delaware Supreme Court clarified a few months after *Corwin*, following a vote, the standard of review is waste.[155] Stating a waste claim is virtually

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148 *Corwin*, 125 A.3d at 305–08.

149 *Id.* at 306.

150 *Id.* at 309.

151 *Id.* at 312.

152 *Id.* at 313.

153 *Id.* at 313–14.

154 *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000) ("Irrationality is the outer limit of the business judgment rule." (footnote omitted)); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010) (observing that, where the business judgment rule applies, "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives").

155 Singh v. Attenborough, 137 A.3d 151, 151–52 (Del. 2016). According to the court, applying the rationality standard instead of waste "would give no standard-of-review-shifting effect to the vote," because "[a]bsent a stockholder vote and absent an exculpatory charter provision, the damages liability standard for an independent director or other disinterested fiduciary for breach of the duty of care is gross negligence, even if the transaction was a change-of-control transaction." *Id.* at 151. That reasoning is fascinating in context, as the

impossible.[156] The Supreme Court expressly recognized that fact, noting that "dismissal is typically the result" of claims challenging stockholder-approved mergers.[157] "That is because the vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would be unlikely to approve a transaction that is wasteful."[158] Henceforth, most post-closing challenges to mergers approved by independent boards would be dead on arrival and dismissed on the pleadings.

B. Developing the Doctrine: A Working Structure with Many Unresolved Issues

Since the Delaware Supreme Court issued *Corwin*, numerous written decisions have addressed the effect of stockholder approval.[159] From this body

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Court of Chancery decision under review originally concluded that it was reasonably conceivable under *Revlon* reasonableness review that the board breached its duty of care, Zale I, *supra* note 66, at *18–20, but then on reargument (*Corwin* was issued the next day), the Court of Chancery concluded that it was *not* reasonably conceivable that the board breached its duty of care, i.e., acted grossly negligently, under the business judgment rule, Zale II, *supra* note 66, at *4–5. Because, as the Delaware Supreme Court recognized in *Corwin*, "with the prevalence of exculpatory charter provisions, due care liability is rarely even available," 125 A.3d at 312, the question of whether a stockholder vote reduces the standard of review to waste or gross negligence may seem unimportant. For non-officer directors, the distinction likely makes little difference. But, the answer is significant to corporate advisors, who can be held liable for aiding and abetting breaches of the duty of care, even if the directors are exculpated from liability for those claims. *See* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 874 (Del. 2015). By holding that waste is the appropriate standard of review, the Delaware Supreme Court "effectively foreclosed aiding and abetting claims against board advisors" when *Corwin* applies. Myron T. Steele & Christopher N. Kelly, *Delaware Insider:* Singh v. Attenborough*: Delaware Supreme Court Slams Door Shut on Aiding and Abetting Claims Against Board Advisors*, BUS. L. TODAY, Aug. 2016, at 1, 1.

[156] Stating a waste claim requires "proving an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 748–49 (Del. Ch. 2005) (citations omitted), *aff'd sub nom.* Brehm v. Eisner (*In re* Walt Disney Co. Derivative Litig.), 906 A.2d 27 (Del. 2006). Successful waste claims are rare, to put it lightly. *See, e.g.*, Seinfeld v. Slager, NO. 6462-VCG, 2012 WL 2501105, at *6 (Del. Ch. June 29, 2012) ("A plaintiff, as here, alleging waste arising from the decision of an independent board concerning employee compensation has set himself a Herculean, and perhaps Sisyphean, task.").

[157] *Singh*, 137 A.3d at 152.

[158] *Id.* (footnotes omitted).

[159] *In re* Hansen Med., Inc. S'holders Litig., No. 12316-VCMR, 2018 WL 3025525 (Del. Ch. June 18, 2018); *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018); *In re* Rouse Props., Inc. Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018); Trial Order, *In re* PLX Tech. Inc. S'holders Litig., No.

of cases, the general structure of *Corwin*'s workings has been established,[160] and it is clear that *Corwin* puts an end to most post-closing merger claims that the Courts previously would have reviewed under *Revlon*.[161]

Following the *Attenborough* decision's holding that a stockholder vote lowers the standard of review to waste, the courts now speak of the business judgment rule applying "irrebuttably."[162] In terms of pleading practice for a

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9880-VCL (Del. Ch. Feb. 6, 2018); Lavin v. West Corp., No. 2017-0547-JRS, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017); van der Fluit v. Yates, No. 12553-VMCR, 2017 WL 5953514 (Del. Ch. Nov. 30, 2017); Morrison v. Berry, 12808-VCG, 2017 WL 4317252 (Del. Ch. Sept. 28, 2017), *rev'd*, No. 445, 2017, 2018 WL 3339992 (Del. July 9, 2018); Appel v. Berkman, No. 12844-VCMR, 2017 WL 6016571 (Del. Ch. July 13, 2017), *rev'd*, 180 A.3d 1055 (Del. 2018); Sciabacucchi v. Liberty Broadband Corp., No. 11418-VCG, 2017 WL 2352152 (Del. Ch. May 31, 2017); *In re* Cyan, Inc. S'holders Litig., No. 11027-CB, 2017 WL 1956955 (Del. Ch. May 11, 2017); *In re* Massey Energy Co. Derivative & Class Action Litig., 160 A.3d 484 (Del. Ch. 2017); *In re* Paramount Gold & Silver Corp. S'holders Litig., No. 10499-CB, 2017 WL 1372659 (Del. Ch. Apr. 13, 2017); *In re* Saba Software, Inc. S'holder Litig., No. 10697-VCS, 2017 WL 1201108 (Del. Ch. Mar. 31, 2017); Order Granting Motion to Dismiss, *In re* Columbia Pipeline Grp., Inc. S'holder Litig., No. 12152-VCL (Del. Ch. Mar. 7, 2017); *In re* Merge Healthcare Inc. S'holders Litig., No. 11388-VCG, 2017 WL 395981 (Del. Ch. Jan. 30, 2017); *In re* Solera Holdings, Inc. S'holder Litig., No. 11524-CB, 2017 WL 57839 (Del. Ch. Jan. 5, 2017); Trial Order, Chester Cty. Ret. Sys. v. Collins, No. 12072-VCL, 2016 WL 7117924 (Del. Ch. Dec. 6, 2016), *aff'd*, 165 A.3d 286 (Del. 2017) (Table); Trial Order, *In re* Comverge, Inc. S'holders Litig., No. 7368-VCMR, 2016 WL 3523624 (Del. Ch. Oct. 31, 2016); *In re* OM Grp., Inc. S'holders Litig., No. 11216-VCS, 2016 WL 5929951 (Del. Ch. Oct. 12, 2016); Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447 (Del. Ch. Aug. 25, 2016); City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Comstock, No. 9980-CB, 2016 WL 4464156 (Del. Ch. Aug. 24, 2016), *aff'd*, 158 A.3d 885 (Del. 2017) (Table); *In re* Volcano Corp. S'holder Litig., 143 A.3d 727 (Del. Ch. 2016), *aff'd*, 156 A.3d 697 (Del. 2017) (Table); Espinoza v. Zuckerberg, 124 A.3d 47 (Del. Ch. 2015).

[160] For example, *Corwin* applies to standard mergers, which stockholders approve at a meeting, and those approved through tender offers under DEL. CODE ANN. tit. 8, § 251(h) (2011), which stockholders "vote" in favor of by tendering their shares. *See Volcano*, 143 A.3d at 747.

[161] Excluding *PLX*, *Espinoza*, *Comverge*, *Massey*, and *Lavin*, which did not deal with *Corwin* on a motion to dismiss a stockholder merger challenge, it seems so far that only seven complaints that generated written decisions by a Delaware court have survived an argument that *Corwin* barred all claims. *Sciabacucchi* concluded that the vote was coerced. 2017 WL 2352152, at *24. *Saba* held that the stockholder vote was not fully informed and was coerced. 2017 WL 1201108, at *8, *14. *van der Fluit* found that the vote was not fully informed, but went on to dismiss the claims anyway for failing to state a claim under *Revlon*. 2017 WL 5953514, at *1. *Appel* initially was dismissed by Chancery, but the Supreme Court reversed on grounds that the vote was not fully informed, 180 A.3d at 1057–58, which also occurred in *Berry*, 2018 WL 3339992. *Tesla* found that there was a controlling stockholder, 2018 WL 1560293, at *19, and *Hansen* similarly found that the plaintiff adequately alleged the existence of a control group, 2018 WL 3025525, at *4 nn.62–64.

[162] *Volcano*, 143 A.3d at 741.

Corwin defense, the cases recognized the tension between a defendant bearing the burden of proof that a stockholder vote was fully informed and "putting a litigant in the proverbially impossible position of proving a negative."[163] The courts thus adopted a burden-shifting scheme pursuant to which plaintiffs "challenging the decision to approve a transaction must first identify a deficiency in the operative disclosure document, at which point the burden would fall to defendants to establish that the alleged deficiency fails as a matter of law in order to secure the cleansing effect of the vote."[164]

The most interesting aspects of the doctrine relate to the situations in which *Corwin* potentially does not apply, i.e., the body of cases continuing to receive *Revlon* review. The elements of a *Corwin* defense are: (1) the inapplicability of entire fairness, and a majority vote of the (2) fully-informed, (3) disinterested, (4) uncoerced stockholders.[165] A stockholder-ratification defense fails if any of these four prongs fails to hold, and *Corwin* will not apply. For whatever reason—be it the fact that many of the then-pending cases to which *Corwin* was applied instantly became clearly meritless under the new regime, but perhaps were not when filed, or simply because the right cases for more interesting arguments have not arisen—challenges to *Corwin* defenses so far overwhelmingly have focused on the "fully informed" aspect.

1. The Inapplicability of Entire Fairness

Corwin held that a stockholder ratification defense would be available only for a "transaction not subject to entire fairness."[166] Entire fairness applies when, among other instances, plaintiffs show that a majority of the board is interested in or lacks independence with respect to a transaction.[167] The Court of Chancery, however, has concluded that a stockholder-ratification defense is available when a majority of the board is interested.[168] Although that outcome seemingly conflicts with *Corwin*, the case law unanimously construes *Corwin*'s holding with respect to entire fairness in a more limited manner than the text of *Corwin* suggests.

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163 *Solera*, 2017 WL 57839, at *8.

164 *Id.*

165 "[W]hen a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies." Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309 (Del. 2015).

166 *Id.* at 309.

167 *E.g.*, Orman v. Cullman, 794 A.2d 5, 21 (Del. Ch. 2002).

168 *See* Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447, at *11 (Del. Ch. Aug. 25, 2016).

The Court of Chancery in *Larkin v. Shah* addressed this very issue. The plaintiffs advanced the strict, literal interpretation of the Supreme Court's statement. Chancery rejected that reading, focusing on language and authorities cited in other portions of *Corwin*, the trial court decision, and the policies underlying stockholder ratification.[169] Instead, stockholder ratification is unavailable in those cases involving a transaction with a conflicted controller, a far more limited subset of entire-fairness cases.[170]

Conflicted controller transactions are "those in which the controller stands on both sides of the deal (for example, when a parent acquires its subsidiary), as well as those in which the controller stands on only one side of the deal but 'competes with the common stockholders for consideration.'"[171] Subsequent cases have followed *Shah*'s lead,[172] so the scope of attack on this prong is limited: *Corwin* will not apply to those cases involving a conflicted controller transaction. A well-developed body of law on controller transactions exists already, and addressing *Corwin*'s "entire fairness" prong requires little more than applying it to these new cases.[173]

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169 *Id.* at *10–13.

170 *Id.* at *13.

171 *Id.* at *8 (quoting *In re* Crimson Expl. Inc. S'holder Litig., No. 8541-VCP, 2014 WL 5449419, at *9 (Del. Ch. Oct. 24, 2014)) (footnotes omitted).

172 *See In re* Rouse Props., Inc. Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015, at *11 (Del. Ch. Mar. 9, 2018) (applying *Shah*); van der Fluit v. Yates, No. 12553-VMCR, 2017 WL 5953514, at *5 (Del. Ch. Nov. 30, 2017) (agreeing with *Shah*); *In re* Merge Healthcare Inc. S'holders Litig., No. 11388-VCG, 2017 WL 395981, at *6–7 (Del. Ch. Jan. 30, 2017) (following *Shah* and concluding that *Corwin*'s "entire fairness" limitation was not triggered because the controller extracted no personal benefits and had interests aligned with the common stockholders); *In re* Solera Holdings, Inc. S'holder Litig., No. 11524-CB, 2017 WL 57839, at *6 n.28 (Del. Ch. Jan. 5, 2017) (adopting *Shah*'s read on *Corwin*'s "entire fairness" limit). Quite recently, two cases found *Corwin* inapplicable because of the existence of a controller or control group that engaged in a conflicted transaction. *See In re* Hansen Med., Inc. S'holders Litig., No. 12316-VCMR, 2018 WL 3025525, at *4 nn.62–64 (Del. Ch. June 18, 2018) (finding *Corwin* inapplicable because plaintiff adequately alleged a control group); *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2018 WL 1560293, at *19 (Del. Ch. Mar. 28, 2018) (concluding that *Corwin* did not apply because plaintiff adequately alleged that a large stockholder was a controller and engaged in a conflicted transaction).

173 A discussion of controlling-stockholder transactions is beyond the scope of this Article, but the issue is well-developed in the case law. *See, e.g.*, *Crimson Exploration*, 2014 WL 5449419, at *10–14 (cataloging at length those decisions in which a stockholder is considered a controller and those controller cases in which entire fairness applies). One-sided conflicted controller transactions come in a variety of forms. Those cases where a controller "competes with the common stockholders for consideration," *id.* at *12, include at least three broad varieties: (1) "disparate consideration" cases where the controller receives more money, *id.* at *12–13; (2) "continuing stake" cases where the controller gets to continue on in the new business, but the minority stockholders are cashed out, *id.* at *13; and (3) "unique

2. A Fully-Informed Vote

Corwin will not apply if the stockholder vote was not fully informed. Because directors long have been subject to a duty of disclosure, also known as a duty of candor, Delaware boasts a very deep body of law addressing disclosure obligations and materiality.[174] The standard applied by the courts to disclosure claims accordingly is well established:

> Evaluating [w]hether shareholders are fully-informed as to a particular transaction depends on whether those stockholders were apprised of all material information related to that transaction. An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding [whether to approve the challenged transaction]. Stated another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable stockholder as having significantly altered the "total mix" of information made available.[175]

Whether the stockholders are fully informed is a case-specific determination made in light of the facts of the case and the specific disclosures at issue, making it difficult to draw any macro-level observations about the "fully informed" inquiry. Only a small number of complaints so far under *Corwin* adequately pled that the stockholder vote was not fully informed.[176] Every other case to address the issue under *Corwin* has found the alleged

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benefit" cases where the controller receives a "special benefit not shared with the other stockholders," "even if the controller nominally receives the same consideration as all other stockholders," *id. See also Rouse*, 2018 WL 1226015, at *11–20 (addressing, in the *Corwin* context, whether a defendant was a controller).

174 A Westlaw search for "duty of disclosure" or "duty of candor" returns more than 475 Delaware cases, including over 260 since 2000. *See generally In re* Transkaryotic Therapies, Inc., 954 A.2d 346, 356–63 (Del. Ch. 2008) (providing a historical overview of the evolution of the duty of disclosure and its relation to the fiduciary duties of care and loyalty).

175 *In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 748 (Del. Ch. 2016) (alterations in original) (footnotes omitted) (citations omitted), *aff'd*, 156 A.3d 697 (Del. 2017) (Table).

176 Morrison v. Berry, No. 445, 2017, 2018 WL 3339992 (Del. July 9, 2018); Appel v. Berkman, 180 A.3d 1055, 1057–58 (Del. 2018); *van der Fluit*, 2017 WL 5953514, at *7–8; *In re* Saba Software, Inc. S'holder Litig., No. 10697-VCS, 2017 WL 1201108, at *8–13 (Del. Ch. Mar. 31, 2017).

disclosure deficiencies meritless and concluded that the vote was fully informed.[177]

The most notable consequence of the "fully informed" prong is the perverse incentive structure it creates. Assume a vote that otherwise satisfies *Corwin*: a majority of disinterested stockholders approve a merger in an uncoerced vote. The only question is whether the vote was fully informed. A plaintiffs' attorney reviews the available information and concludes that (1) the deal process likely fell short of what *Revlon* requires, and (2) there is a reasonable likelihood that a key material fact was not disclosed.[178] Assume also that the *Revlon* claims would be valid and would yield either a judgment or some monetary settlement to the stockholders, with a significant accompanying payday to counsel. If the attorney brings suit seeking to enjoin the deal on grounds of the deficient disclosures, the defendants can issue supplemental disclosures and moot the claim.[179] The stockholders now (presumably) are better informed and approve the transaction, fully aware of the less-than-

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[177] *See supra* note 161. Of the few complaints to overcome a *Corwin* defense, only *van der Fluit*, *Appel*, and *Berry* resolved the question solely on grounds of the vote not being fully informed. *Saba* also concluded that the vote was coerced. 2017 WL 1201108, at *14–16. *Hansen* found that the plaintiffs pled disclosure claims, 2018 WL 3025525, at *10, but rejected *Corwin*'s applicability on the grounds that the complaint adequately alleged a control group, *id.* at *4 n.64. Neither *Tesla* nor *Sciabacucchi* reached the issue of whether the vote was fully informed.

[178] The materiality standard surely is not a black-and-white inquiry in a large number of instances. The court must decide whether "'there is a substantial likelihood that a reasonable shareholder would consider it important in deciding' whether to approve the challenged transaction." *van der Fluit*, 2017 WL 5953514, at *7 (quoting Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985)). Reasonable minds obviously could disagree on whether a "reasonable shareholder" considers a given fact "important" when voting on a specific transaction, a determination that is made significantly more difficult when considering a disclosure in the abstract, as directors and officers must when initially preparing the company's proxy statement. *See In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 893–99 (Del. Ch. 2016) (describing the difficulty of determining materiality in the non-adversarial context). The litigation in *Berry* provides a good case study of the potential uncertainty surrounding the materiality inquiry. The Court of Chancery dismissed a stockholder complaint, finding all of *Corwin*'s requirements satisfied, including that the vote was fully informed. 12808-VCG, 2017 WL 4317252 (Del. Ch. Sept. 28, 2017). The Delaware Supreme Court reversed and held that the complaint adequately alleged that the company's proxy statement contained no fewer than four different material omissions or misleading disclosures. No. 445, 2017, 2018 WL 3339992, at *10–13 (Del. July 9, 2018).

[179] *See, e.g.*, Louisiana Mun. Police Emps.' Ret. Sys. v. Black, No. 9410-VCN, 2016 WL 790898, at *7 (Del. Ch. Feb. 19, 2016) (awarding plaintiffs' counsel a mootness fee after litigation was filed and defendants responded by agreeing to modify certain deal-protection measures and issue supplemental disclosures, which the court described as "material, even if not much more than material").

optimal deal process. In the post-closing litigation challenging the deal process, the plaintiffs' *Revlon* claims will be barred by the defendants' *Corwin* defense. Plaintiffs' counsel receives a mootness fee for raising the disclosure issue,[180] but earns less (per our assumption) than she would have from litigating the *Revlon* claim to conclusion. What is a rational attorney to do? The answer is to not raise the disclosure claim until after the vote, thus defeating the *Corwin* defense because the vote was not fully informed. In the process, counsel allows the stockholders, i.e., the people that the attorney purports to represent, to suffer what the Delaware courts repeatedly have described as the "irreparable harm" of voting on a deal without adequate information.[181]

This situation creates an obvious agency problem between stockholders and the attorneys that represent them.[182] By failing to raise a disclosure claim pre-closing in order to preserve it post-closing to fight *Corwin*, attorneys in search of a bigger payout are "preserving" a *Revlon* claim that otherwise may not exist but for their litigation strategy. Indeed, the Delaware courts consider an uninformed vote to be "irreparable harm" precisely "because stockholders may vote 'yes' on a transaction they otherwise would have voted 'no' on if they had access to full or nonmisleading disclosures."[183] Stockholders are intelligent enough to protect their own interests, and informed stockholders "can easily protect themselves at the ballot box by simply voting no."[184] That is the whole point of *Corwin*. The point was not to create a situation where stockholders are *less* informed when voting. An incentive structure that encourages the plaintiffs' bar *not* to bring otherwise viable disclosure claims does not serve stockholders' interests.

These are not hypothetical concerns: the existing body of *Corwin* cases suggests that the problem highlighted above—deliberately avoiding pre-closing

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180 *See id.*

181 *See, e.g.*, Vento v. Curry, No. 2017-0157-AGB, 2017 WL 1076725, at *4 (Del. Ch. Mar. 22, 2017) ("This Court has held on numerous occasions that 'the threat of an uninformed stockholder vote constitutes irreparable harm.'" (quoting ODS Techs. L.P. v. Marshall, 832 A.2d 1254, 1262 (Del. Ch. 2003))).

182 *See, e.g.*, Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465, 480 (2015) ("The drivers of merger litigation are shareholder plaintiffs' attorneys' firms. . . . Attorneys act in their self-interest to file opportunistic complaints in pursuit of settlement and payment of attorneys' fees."); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 685 (1986) (describing "a serious principal-agent problem that gives the plaintiff's attorney, not the client, the real discretion as to whether to commence suit").

183 *In re* MONY Grp. Inc. S'holder Litig., 852 A.2d 9, 18 (Del. Ch. 2004).

184 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015).

resolution of disclosure claims in order to fight a post-closing *Corwin* defense—has become standard practice. Multiple actions have included pre-closing placeholder complaints challenging a merger, which plaintiffs often fail to prosecute, followed by post-closing amended complaints asserting disclosure claims in addition to substantive fiduciary duty claims.[185]

The Court of Chancery, attuned to this issue, repeatedly has described pre-closing as "the preferred time to address [disclosure] claims in order to afford remedial relief appropriate for genuine informational deficiencies."[186] But,

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185 *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2018 WL 1560293, at *11 (Del. Ch. Mar. 28, 2018) ("Once selected, lead counsel informed the Court that Plaintiffs were foregoing expedition and would not seek to enjoin the transaction, including on disclosure grounds, presumably to reserve their disclosure claims as bases to resist an anticipated *Corwin* ratification defense."); *In re* Rouse Props., Inc. Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015, at *1 n.3 (Del. Ch. Mar. 9, 2018) ("The post-closing Complaint alleges for the first time that the disclosures relating to the Merger were materially inadequate in a manner that caused the stockholder vote approving the Merger to be uninformed. These allegations appear more to anticipate an affirmative ratification defense than to support an affirmative breach of fiduciary duty claim."); *In re* Cyan, Inc. S'holders Litig., No. 11027-CB, 2017 WL 1956955, at *12 (Del. Ch. May 11, 2017) (describing how plaintiffs failed to seek a pre-closing injunction despite identifying numerous supposed disclosure problems and then filed an amended post-closing complaint listing "something in the neighborhood of twenty disclosure deficiencies, all but one of which plaintiffs had identified before the Merger"); *In re* Paramount Gold & Silver Corp. S'holders Litig., No. 10499-CB, 2017 WL 1372659, at *4 (Del. Ch. Apr. 13, 2017) (recounting that the plaintiffs received pre-closing discovery, they "took no action after receiving this discovery to enjoin the proposed transaction," and then post-close they filed a third amended complaint that "added back allegations challenging certain disclosures"); *In re* Merge Healthcare Inc. S'holder Litig., No. 11388-VCG, 2017 WL 395981, at *4–5 (Del. Ch. Jan. 30, 2017); *In re* Solera Holdings, Inc. S'holder Litig., No. 11524-CB, 2017 WL 57839, at *5 (Del. Ch. Jan. 5, 2017).

186 *Solera*, 2017 WL 57839, at *8 (describing how plaintiffs can take advantage of "the relatively low pleading standard of 'colorability' to obtain discovery in aid of disclosure claims before a stockholder vote"); *see also Merge Healthcare*, 2017 WL 395981, at *10 ("[T]he preferred way of proceeding is for plaintiffs to bring these claims pre-closing to ensure that stockholders can exercise their right to a fully informed vote. Damages arising from disclosure deficiencies can be remedied post-close, but the stockholders' right to a fully informed vote cannot." (footnotes omitted)).

unless the court's preference affects the materiality inquiry,[187] plaintiffs still will be incentivized to pocket their disclosure claims until post-closing.[188]

The solution to this problem is to bar post-closing disclosure claims that could have been brought before a merger or tender offer closed, but were not.[189] The Delaware courts already have a tool capable of producing this change in the form of the doctrine of laches.[190] "To prevail on a laches defense, a defendant must prove that: (1) the plaintiff had knowledge of his claim; (2) he delayed unreasonably in bringing that claim; and (3) the defendant suffered resulting prejudice."[191] Laches can be applied in a case-by-case manner. Where the plaintiffs' disclosure claims were apparent pre-closing, i.e., they could be deduced from a reasonable investigation and publicly-available information, and the plaintiff failed to bring them pre-close, but reasonably could have done so, laches would be appropriate.[192] The harm to the defendants is at least threefold: (1) unaware of the disclosure issue before the closing, the defendants were rendered unable to correct it and better inform the stockholders to whom they are fiduciaries; (2) increased litigation costs from the need to fight a post-

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187 Some language in the cases suggests that the courts tend to view skeptically post-closing disclosure claims that could have been brought pre-closing. *See, e.g.*, *Cyan*, 2017 WL 1956955, at *12 ("[P]laintiffs tellingly did not believe the deficiencies were serious enough to warrant seeking an injunction to prevent an allegedly uninformed stockholder vote."). Whether that skepticism affects the courts' decisions in the form of a thumb on the scale against a finding of materiality is unknown.

188 In fact, the Court of Chancery so far has held that the preference for pre-closing disclosure claims will not prevent plaintiffs from advancing them post-closing. *In re* Saba Software, Inc. S'holder Litig., No. 10697-VCS, 2017 WL 1201108, at *8 n.36 (Del. Ch. Mar. 31, 2017) ("Failing to pursue that remedy, however, does not deprive the Plaintiff of a right to press disclosure claims post-closing."); *see also Rouse*, 2018 WL 1226015, at *21–24 (addressing post-closing disclosure claims on the merits); van der Fluit v. Yates, No. 12553-VMCR, 2017 WL 5953514, at *4–5, *8 (Del. Ch. Nov. 30, 2017) (concluding that stockholder vote was not fully informed and therefore *Corwin* did not apply in complaint asserting post-closing disclosure claims).

189 Defendants in *Merge Healthcare* requested that the court employ such an approach, but the court declined "[i]n light of the evolving nature of our jurisprudence" on *Corwin*. 2017 WL 395981, at *10. More recently, defendants in *Rouse* raised similar laches and waiver arguments, but the Court declined to address the merits of those arguments. 2018 WL 1226015, at *22 n.186. This Article argues that *Corwin*, and the resulting incentive structure encouraging post-closing litigation of disclosure claims, has become sufficiently well-established that it now is appropriate to apply such a rule.

190 *See generally* TrustCo Bank v. Mathews, No. 8374-VCP, 2015 WL 295373, at *5 (Del. Ch. 2015) (describing the equitable doctrine of laches).

191 *Id.* (citations omitted).

192 A case-by-case application of laches, as opposed to a rule barring post-closing disclosure claims, would allow the court discretion to deal with the situations that may arise in which it would be inequitable to apply the bar on post-closing claims in a particular instance.

closing motion to dismiss that could have been resolved in the form of supplemental disclosures and, perhaps, minor litigation about the amount of mootness fees; and (3) uncertainty over the standard of review deliberately created by the plaintiff's actions. This approach would correct the current structure, which skews the incentives of plaintiffs' attorneys, and would lead to stockholders receiving better information before the vote.

3. The Disinterested Stockholders

For a *Corwin* defense to succeed, the fully informed, uncoerced vote must be of a majority of the disinterested stockholders. None of the existing *Corwin* cases addresses this issue.[193] In the case of public companies with widely-dispersed stockholder bases, the question may not even be relevant in a large number of cases. Outside of that setting, the analysis rapidly becomes murky. Indeed, one commentary notes that "ascertaining which stockholders are 'disinterested' for purposes of obtaining a cleansing vote can be problematic, if not downright impracticable, in the private company context."[194]

The analysis might begin with a look back at *Corwin* and the policy basis for deferring to stockholder votes. According to the court, the underlying rationale of the ratification doctrine is "to avoid the uncertainties and costs of judicial second-guessing when the disinterested stockholders have had the free and informed chance *to decide on the economic merits of a transaction for themselves*."[195] In another portion of the decision, the court again highlighted the importance of the fact that stockholders have "an actual economic stake in the outcome" and so, according to the court, applying the business judgment rule "best facilitates wealth creation through the corporate form."[196] *Corwin* thus suggests that an "interested" stockholder would be one voting in favor of a transaction for reasons other than the economic merits of the transaction itself.[197]

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193 An expansive body of case law addresses director interestedness in the context of a transaction, as that is one way for plaintiffs to rebut the business judgment rule. *See supra* note 167 and accompanying text. Presumably, the shares voted by an interested director would not be disinterested for purposes of a *Corwin* analysis, but no decision has confirmed this fact.

194 Steven E. Bochner & Amy L. Simmerman, *The Venture Capital Board Member's Survival Guide: Handling Conflicts Effectively While Wearing Two Hats*, 41 DEL. J. CORP. L. 1, 21 (2016).

195 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015) (emphasis added).

196 *Id.* at 314; *see also In re* Volcano Corp. S'holder Litig., 143 A.3d 727, 743–44 (Del. Ch. 2016) (highlighting *Corwin*'s economic policy bases), *aff'd*, 156 A.3d 697 (Del. 2017) (Table).

197 This interpretation would harmonize the "disinterested" prong with the existing case law on the "coercion" prong. *See infra* Section IV.B.4.

Two cases from other contexts also support this reading. When analyzing a majority-of-the-minority ("MOM") vote, the court in *In re CNX Gas Corp. Shareholders Litigation*[198] concluded that the MOM vote was structured improperly because a major stockholder held nearly equal interests in the acquiror and the target and had entered into an agreement to tender its shares in support of the deal. These hedged ownership interests left the stockholder "indifferent to the allocation of value" between the target and the acquiror.[199] The court focused on this "direct economic conflict,"[200] because "[e]conomic incentives matter, particularly for the effectiveness of a legitimizing mechanism like . . . a stockholder vote."[201]

An earlier decision also focused on economic incentives, noting that the existence of put agreements, which may have allowed those stockholders party to the agreements to put their stock to the acquiror at a higher price than was being offered in the transaction, "can create materially different incentives for the holders than if they were simply holders of [the target's] common stock."[202] Elsewhere, the court noted that the MOM vote was flawed because the definition of "minority" included "those stockholders who are affiliated with [the buyer] as directors and officers. It also includes the management of [the target], whose incentives are skewed by their employment, their severance agreements, and their Put Agreements."[203]

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198 4 A.3d 397 (Del. Ch. 2010).

199 *Id.* at 416.

200 *Id.* at 417.

201 *Id.* at 416. The plaintiffs in the *Tesla* litigation raised an argument along these lines when they contended that a number of large stockholders should have been considered "interested" because they held shares in both the buyer and the seller, but the court found it unnecessary to resolve the issue. *In re* Tesla Motors, Inc. S'holder Litig., No. 12711-VCS, 2018 WL 1560293, at *10 n.183 (Del. Ch. Mar. 28, 2018).

202 *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 426 (Del. Ch. 2002).

203 *Id.* at 446. It is unclear from the *Pure Resources* decision whether employment and severance agreements alone, without some other distorting factor, such as hedged investments or side arrangements, are enough to oust one from the category of "disinterested" stockholders. Employment and severance arguably raise different concerns. *Corwin*'s focus on stockholders approving a deal because of its inherent economic merit suggests that continued employment could distort the considerations of an executive when voting on the merger. Severance, on the other hand, may not be problematic, at least when tied to stock. In that situation, the executive has an incentive to maximize the deal price and the severance payments effectively make her a larger stockholder, not a stockholder with a different incentive structure. *See In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656, 662 (Del. Ch. 2013) ("Delaware law presumes that large shareholders have strong incentives to maximize the value of their shares in a change of control transaction.").

These cases suggest a few classes of stockholders that could be considered "interested": (1) those with material economic stakes in the acquiror; (2) those with side agreements resulting in them receiving a different price for their shares than the other stockholders; and, possibly, (3) members of management that would continue being employed with the acquiror.

Other categories of potentially interested stockholders readily can be imagined. An increasingly active area of litigation involves companies backed by venture capital ("VC") funds. Where those VC funds own significant amounts of preferred stock with special liquidation rights, their evaluation of the merits of a merger can diverge significantly from that of the common stockholders, who may receive far less, if anything, from the merger.[204] Absent an alignment of interests between the preferred stock and the common stock, VC funds conceivably could be interested—and their votes accordingly not counted—in the *Corwin* analysis.

A second category of likely "interested" stockholders include those subject to agreements with drag-along rights requiring them to vote in favor of a transaction.[205] Those stockholders probably would not be disinterested under *Corwin*: they are voting in favor of the merger because of a preexisting contractual requirement, not because of the merits of the transaction.

One noteworthy area where *Corwin*'s underlying policy rationales do not mesh well with the current corporate landscape is in the case of dual-class stock. Dual-class firms are those with two (or more) classes of common stock, one with high (or all) voting rights and one with low (or no) voting rights.[206] Facebook, for example, has a dual-class voting structure pursuant to which Mark Zuckerberg retains voting control over the company despite owning a

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[204] *See, e.g.*, Frederick Hsu Living Tr. v. ODN Holding Corp., No. 12108-VCL, 2017 WL 1437308, at *27–30 (Del. Ch. Apr. 14, 2017); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 46–54 (Del. Ch. 2013).

[205] The enforceability of such a provision has not been resolved in Delaware yet, but it has been raised in several cases. *In re* Good Tech. Corp. S'holder Litig., No. 11580-VCL, 2017 WL 2537347, at *4 (Del. Ch. May 12, 2017); Halpin v. Riverstone Nat'l, Inc., No. 9796-VCG, 2015 WL 854724, at *1 (Del. Ch. Feb. 26, 2015).

[206] Such structures frequently are deployed by technology companies that have been taken public by their founder(s). *See generally* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 590 (2016) ("In the dual-class structure, the entrepreneur holds shares with superior voting rights, while investors' shares have voting rights that are inferior or nonexistent. . . . By owning a majority of the voting rights, the entrepreneur retains full control over business decisions and can block any hostile-takeover bids.") (footnotes omitted).

minority of its shares: Facebook's "Class B common stock has ten votes per share and its Class A common stock has one vote per share."[207]

The above analysis suggests that a stockholder is "interested," under *Corwin*, when factors other than the economic merits of the transaction cause her to vote in favor of the transaction. In the case of high-vote shares, the standard 1:1 payoff of votes to proportional benefit is not present. A high-vote stockholder will have disproportionate impact on the vote, but will not necessarily receive an equivalent percentage of the benefits of the transaction.[208] For example, if all 100 of a firm's shares are sold, and a high-vote stockholder owns 10 shares equaling 30% of the vote, she still will receive only 10% of the sale proceeds. The remaining stockholders owning 90% of the shares will receive 90% of the proceeds, but control only 70% of the vote.[209] The link between a stockholder's economic evaluation of a transaction and their vote is skewed. Whatever idiosyncratic reasons led the stockholder to acquire high-vote shares in the first place conceivably could affect her view of whether to approve a transaction.[210]

In the case of no-vote common stock, all of the concerns about the disconnect between voting rights and cash-flow rights discussed above are exacerbated to the most extreme degree. If the voting class predominantly was controlled by a single person or entity, any transaction likely would be a controller transaction.[211] If the control of the voting class itself was divided,[212] then presumably the *Corwin* analysis would ignore the non-voting class entirely,

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[207] Espinoza v. Zuckerberg, 124 A.3d 47, 50 (Del. Ch. 2015).

[208] *See* Goshen & Hamdani, *supra* note 206, at 592 ("In the dispersed-ownership and the dual-class structures, those with de facto control do not necessarily hold a majority of cash-flow rights. Thus, these structures expose investors to management agency costs.") (footnotes omitted).

[209] In many, if not most, situations with a dual-class stockholder structure, the high-vote holder likely will be a controller, and the "entire fairness" prong of *Corwin* may be implicated. *See supra* Section IV.B.1.

[210] *See* Goshen & Hamdani, *supra* note 206, at 576 (arguing that "control matters for an entrepreneur because it allows her to ensure that the firm will pursue *her* idiosyncratic vision even against the investors' objections."). That said, there are many instances where a high-vote stockholder's interests may be perfectly aligned with the common stockholders. *Corwin*, after all, is not limited to mergers. Stockholders, for example, may be asked to approve a financing that makes everyone in the firm better off.

[211] *See supra* notes 171–73 and accompanying text (addressing one-sided controller transactions).

[212] Why anyone deliberately would create such a structure—rather than just have a single divided class of stock—is a mystery, but it conceivably could arise incidentally over time if a dual-class firm was held within a family and shares of the voting class ended up in the hands of subsequent generations that disagreed about how the firm should be operated.

as those stockholders are not entitled to vote on the transaction, and the question would be whether a majority of the disinterested voting stockholders approved the transaction in a fully-informed, un-coerced vote.[213]

In short, the "disinterested" prong of *Corwin* has received scant attention in the cases thus far, but there is an abundance of possible scenarios in which the issue might be in play. Beyond the examples above, arguments about which stockholders are not "disinterested"—because their vote was driven by some factor other than the transaction's "economic merits"[214]—are limited only by the creativity of the plaintiffs' bar.

4. An Uncoerced Vote

Corwin requires that the fully-informed vote of a disinterested majority of stockholders be uncoerced. Two cases so far have held that stockholder votes were coerced.

The first case to agree with a coercion argument, *In re Saba Software, Inc. Stockholder Litigation*,[215] contains a curious fact pattern unlikely to be repeated. Saba's board fell out of compliance with respect to its public financial statements and was required to issue restatements following a multi-year fraudulent earnings overstatement scheme. The board failed to restate its financial statements or get back into compliance with its filings with the SEC. After a significant period of noncompliance, the SEC took the drastic step of deregistering the company's stock. Just before that event, the board announced a merger. The stockholders then were left with the choice of accepting a merger at a price well below historic trading values or continuing to hold deregistered stock. They approved the merger.

First, the court concluded that the vote was not fully informed.[216] Then, in what arguably was dicta, the court went on to find that the vote also was coerced. The court concluded that placing the stockholders in the situation of

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213 The Court of Chancery has held that *Corwin* can be invoked only when statutory formalities are followed. *See* Espinoza v. Zuckerberg, 124 A.3d 47, 61–66 (Del. Ch. 2015). The Delaware General Corporation Law limits the class of stockholders whose votes are considered to those "entitled to vote." *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(c) (2011) ("If a majority of the outstanding stock of the corporation *entitled to vote thereon* . . . .") (emphasis added); *id.* § 228(a) ("[A]ny action . . . having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all *shares entitled to vote* thereon were present and voted . . . .") (emphasis added).

214 Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 313 (Del. 2015) (emphasis added).

215 No. 10697-VCS, 2017 WL 1201108 (Del. Ch. Mar. 31, 2017).

216 *Id.* at *11–13.

choosing between holding deregistered stock and approving a merger was no choice at all and effectively "left them with no practical alternative but to vote in favor of the Merger."[217] The stockholder vote was tainted by "inequitable coercion" because the directors "may have wrongfully induced the [company's] stockholders to vote in favor of the Merger for reasons other than the economic merits of the transaction."[218] Again, the court's focus is on the underlying economic merits of the transaction. The focus of the coercion inquiry, according to the court, is "whether the stockholders have been permitted to exercise their franchise free of undue external pressure created by the fiduciary that distracts them from the merits of the decision under consideration."[219]

The Court of Chancery next addressed the issue of coercion in *Sciabacucchi v. Liberty Broadband Corp.*[220] There, the court found that a stockholder vote on a merger did not have a cleansing effect because the board tied the vote on the merger to an allegedly unnecessary and self-dealing insider equity issuance. The court held that no cleansing occurs "where the vote is *structurally* coercive," which the court defined "as where the directors have created a situation where a vote may be said to be in avoidance of a detriment created by the structure of the transaction the fiduciaries have created, rather than a free choice to accept or reject the proposition voted on."[221] "[A] structurally-coerced vote is simply a vote structured so that considerations extraneous to the transaction likely influenced the stockholder-voters."[222]

These decisions make clear that a coerced vote is one in which the stockholders conceivably vote for a merger for reasons other than the underlying merits of the merger.[223] In this regard, the analysis lines up neatly

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217 *Id.* at *15.
218 *Id.* at *16.
219 *Id.* at *15.
220 No. 11418-VCG, 2017 WL 2352152 (Del. Ch. May 31, 2017).
221 *Id.* at *2.
222 *Id.* at *20.
223 One recent decision suggested that there are three types of coercion: (1) "inherent coercion" in the case of conflicted controllers; (2) "structural coercion" in those instances where "the Board structures the vote in a manner that requires stockholders to base their decision on factors extraneous to the economic merits of the transaction at issue"; and (3) "situational coercion," which is "when the board, by its conduct, creates a situation where 'stockholders are being asked to tender shares in ignorance or mistaken belief as to the value of the shares.'" *In re* Rouse Props., Inc. Fiduciary Litig., No. 12194-VCS, 2018 WL 1226015, at *21 (Del. Ch. Mar. 9, 2018) (*quoting* Next Level Commc'ns, Inc. v. Motorola, Inc., 834 A.2d 828, 851 n.90 (Del. Ch. 2003) (citations omitted)). "Inherent coercion" arguably is not a *Corwin* "coercion" category, because *Corwin* does not apply at all where there is a conflicted

with the foregoing discussion of disinterestedness. One obvious implication of this standard is that bundling stockholder approvals—e.g., a merger and a separate transaction, such as an insider financing—dramatically increases the risk of a possible coercion finding by a court, because the vote "offers no assurance that the stockholders have made a determination that *the transaction at issue* is beneficial."[224]

An area that remains to be explored is the meaning of the court's "avoidance of a detriment" language.[225] Elsewhere in *Sciabacucchi*, the court explained that, "[i]f a transaction is negotiated and structured in a particular way, and presented to the stockholders such that they may ratify it, or reject it and retain the status quo, such a vote is not structurally coercive."[226] Suppose, however, that the deal process itself altered the status quo such that the status quo of rejecting the deal is a situation significantly different than what was the status quo before the transaction process started.[227] The applicability of *Corwin* in such a situation is unclear and arguably would depend upon whether the change in the status quo was caused by market factors or was a situation "the fiduciaries have created."[228]

5. The Scope of Cleansing Under Corwin

One final issue involves *Corwin*'s scope, i.e., which claims are cleansed. Few cases address this issue in any meaningful way. *In re Massey Energy Co. Derivative and Class Action Litigation*[229] touched on the question in passing. The issue in

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controller, and thus the fully informed, disinterested, and coercion prongs need not be addressed. *See supra* Section IV.B.1. Both "structural" and "situational" coercion key the inquiry to the stockholders' approval of the merger on its actual economic merits. No *Corwin* case thus far has found a vote to have been coercive on grounds of situational coercion. *See, e.g.*, *Rouse*, 2018 WL 1226015, at *21 (rejecting argument). The boundaries of "situational coercion" also are unclear, as that form of coercion involves the board having "done or failed to do something . . . that prevents stockholders from understanding the true merits or value of the transaction they are being asked to approve," but is different from structural coercion *and* different from a disclosure violation. *Id.* at *21 n.180.

224 *Sciabacucchi*, 2017 WL 2352152, at *15.

225 *Id.* at *2.

226 *Id.* at *21.

227 One variant of this situation would be if a company, such as a cash-burning technology company, pursues a dual-track process of entertaining merger offers while also preparing to launch an IPO, its primary goal. If the IPO fails, for whatever reason, the company is left low on cash and needing to enter into a merger for financial reasons. The stockholders could reject the deal, but they would be left with a bankrupt company.

228 *Sciabacucchi*, 2017 WL 2352152, at *2.

229 160 A.3d 484 (Del. Ch. 2017).

that case was whether a merger extinguished standing to pursue derivative claims that arose earlier. The derivative claims stemmed from the fatal April 2010 explosion at one of the company's coal mines. Derivative lawsuits relating to the disaster were filed almost immediately. After the disaster, the company began a sale process that eventually led to a merger on January 27, 2011. The court concluded that the plaintiffs lost standing to pursue the derivative claims, and that the acquiror now owned those claims.

At the very end of the decision, the court emphatically rejected the argument that *Corwin* in any way affected the analysis, calling the defendants' reliance on it "mystifying."[230] The court pointed out that the policy underlying *Corwin* is "to avoid judicial second-guessing when the disinterested stockholders have had the free and informed chance to decide on the economic merits of a transaction themselves."[231] That policy was not implicated because the complaint was not challenging the merger; it was challenging the board's oversight of the company's operations and its CEO in the time leading up to the mining disaster.

As examples of the issues that *Corwin* does cleanse, the court listed allegations like: the "directors played favorites with any bidder, erected improper defensive measures, or otherwise failed to maximize value for the Company's stockholders once a decision was made to consider strategic alternatives."[232] The court explained that *Corwin* "was never intended to serve as a massive eraser, exonerating corporate fiduciaries for any and all of their actions or inactions *preceding their decision to undertake a transaction* for which stockholder approval is obtained."[233] In conclusion, the court explained:

> [I]n order to invoke the cleansing effect of a stockholder vote under *Corwin*, there logically must be a far more proximate relationship than exists here between the transaction or issue for which stockholder approval is sought and the nature of the claims to be "cleansed" as a result of a fully-informed vote.[234]

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230 *Id.* at 507.
231 *Id.* (internal quotation marks omitted).
232 *Id.*
233 *Id.* (emphasis added). The court added that the "stockholders were *not* asked in any direct or straightforward way to approve releasing defendants from any liability they may have to the Company for the years of alleged mismanagement that preceded the sale process." *Id.*
234 *Id.* at 508.

Corwin thus covers sale-process claims, but not misconduct by fiduciaries preceding a sale. Presumably, *Corwin* also would not cover independent misconduct completely unrelated to the sale that occurred during the sale process. The trickiest scenario might be a true dual-track process,[235] where the company is pursuing an IPO and a possible merger at the same time and allegedly commits breaches of fiduciary duty with respect to the IPO track. The court has not addressed that situation.[236]

6. *Effects of the* Corwin *Regime*

Corwin is now the threshold test for deal litigation. Although many aspects remain unresolved, some of which, as the preceding Sections suggest, may show that *Corwin*'s applicability is not quite as broad as currently thought,[237] there is no disputing that it is a doctrine of enormous significance.[238] Since its announcement, stockholder complaints only rarely have been able to overcome its applicability.[239]

Corwin should incentivize deal architects to structure deals in ways designed to take maximum advantage of the doctrine. In practice, that primarily means favoring increased disclosure to stockholders in proxy statements and ahead of votes. *Corwin* also encourages "clean" votes on transactions, i.e., no bundling of multiple transactions. On the stockholder-plaintiff side of the equation, *Corwin* should discourage complaints that are meritless under the new regime, thus reducing overall deal litigation.[240] Those complaints that are filed will

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235 *See supra* note 227.

236 The existing *Corwin* cases do strongly suggest that *Corwin*'s cleansing scope is quite broad with respect to claims relating to a sale process. *See, e.g.*, Order Granting Motion to Dismiss at ¶¶ 7, 12, *In re* Columbia Pipeline Grp., Inc. S'holder Litig., No. 12152-VCL (Del. Ch. Mar. 7, 2017) (cleansing spinoff transaction preceding merger); *In re* OM Grp., Inc. S'holders Litig., No. 11216-VCS, 2016 WL 5929951, at *1–2 (Del. Ch. Oct. 12, 2016) (cleansing claims relating to sale, including decision to sell entire company instead of selling the company in pieces, which allegedly was done to avoid a proxy contest).

237 *See, e.g.*, *supra* Section IV.B.3 (discussing the under-litigated "disinterested" prong).

238 *See* Friedlander, *supra* note 7, at 644 ("*Corwin* gives defendants a strong hand when seeking dismissal of a challenge to a transaction otherwise subject to enhanced scrutiny under *Revlon*.").

239 *See supra* note 161 and accompanying text.

240 The early evidence suggests that Delaware's courts have seen a dramatic decrease in merger-objection litigation following *Corwin* and *Trulia*. *See* Cain et al., *The Shifting Tides of Merger Litigation*, 71 VAND. L. REV. 603, 608 (2018) ("[P]laintiffs appear, in the short term at least, to be trying to avoid the effects of the changes in Delaware law by filing their cases elsewhere.").

focus on attacking one of the prongs outlined above. Most complaints so far have focused on the "fully informed" prong, likely because that element could be attacked for any given deal.[241]

The existing evidence suggests that *Corwin* has encouraged a shift to post-closing litigation.[242] That trend likely will continue in light of recent rulings permitting stockholder plaintiffs to seek books and records, a limited form of discovery,[243] in pursuit of a post-closing stockholder complaint challenging a merger.[244] The Court of Chancery has encouraged stockholders to take this route and first to seek books and records in order "to gather information" and prepare more hearty complaints in advance of a possible *Corwin* defense.[245] Absent such advanced diligence, even the Court of Chancery has observed that "it would be naïve to believe, in most instances, that the stockholder plaintiff will not face significant challenges to meet her pleading burden in anticipation of a *Corwin* defense if all she has in hand to prepare her complaint are the public filings of the company . . . ."[246]

V. *REVLON*-PLUS: RATCHETING UP REVIEW FOR CONFLICTS

Both *C & J Energy* and *Corwin* have made life more difficult for the plaintiffs' bar.[247] For a small subset of cases, however, the Delaware courts have applied an enhanced version of *Revlon* and reviewed the defendants' actions with an exacting scrutiny shy of entire fairness but more stringent than standard *Revlon* review.[248] This Article calls that form of scrutiny "*Revlon*-Plus review."

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241 Moreover, many transactions simply are not coercive, as the Delaware courts have defined the term, nor may many deals by public companies provide fertile ground for attacks on grounds of disinterestedness, given the widely dispersed stockholder bases of those companies.

242 *See supra* notes 185–88 and accompanying text.

243 Delaware law allows stockholders to demand that a company provide them access to corporate records in certain limited situations. DEL. CODE ANN. tit. 8, § 220 (2011).

244 *See* Lavin v. West Corp., No. 2017-0547-JRS, 2017 WL 6728702, at *1–2 (Del. Ch. Dec. 29, 2017).

245 *Id.* at *9.

246 *Id.*

247 *See* Friedlander, *supra* note 7, at 642–46 (discussing the negative effects of *C & J*, *Trulia*, and *Corwin* on stockholder plaintiffs' ability to pursue merger-related claims).

248 *See In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 81–82 (Del. Ch. 2014), *aff'd*, RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 439–40 (Del. Ch. 2012); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 830 (Del. Ch. 2011).

Academic commentary on the important decisions discussed in this Section is limited, and what does exist focuses almost exclusively on the aiding-and-abetting claims asserted against the investment banks in each of these cases or, more broadly, on the conflicted relationship between companies and investment banks.[249] Perhaps because of the prominence of the discussions of aiding and abetting, the higher form of scrutiny applied in these cases, as described below, has been overlooked.[250]

A. The Early Decisions

Revlon-Plus review truly emerged with the issuance of the *Rural Metro* decision and its $75 million damages award,[251] but the content of *Revlon*-Plus review was derived from two earlier cases. The first case was *Del Monte*, in which the court enjoined a deal for a short period in light of the conflicted sale process. Del Monte began exploring strategic alternatives and engaged Barclays as its investment bank to guide the process. Barclays, from the outset, intended to supply buy-side financing, a fact that was not revealed to Del Monte's board of directors, and steered the process toward private equity firms in order to increase the likelihood of supplying that financing.[252] Late in the process, Barclays struck a deal with the high bidder, a private equity fund, to supply a

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[249] *See, e.g.*, William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 8 (2014) ("Conflicts of interest have become wrought into banker-client relationships; as a result, the structure of the advisory sector makes them hard to avoid and clients, expecting them, make allowances. Advisor banks emerge in practice as arm's-length counterparties constrained less by rules of law than by a market for reputation."); Eric S. Klinger-Wilensky & Nathan P. Emeritz, *Financial Advisor Engagement Letters: Post-*Rural/Metro *Thoughts and Observations*, 71 BUS. LAW. 53, 58 (2016) (proposing that "a financial advisor engagement letter is an appropriate tool to vet potential conflicts of a financial advisor"); Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 TEX. L. REV. 1079 (2016) (arguing that investment banks are fiduciaries of their clients and evaluating various methods of reducing banker misconduct).

[250] One article draws a different conclusion than the one presented here. Johnson and Ricca, in a follow-up piece to their article arguing that *Revlon* lacks force in the absence of serious misconduct, *see supra* note 50, contend that: "*Rural Metro* is a cautionary tale for egregiously conflicted financial advisers, but, from a remedies perspective, it is a distinct outlier. These [aiding-and-abetting] types of claims may arise in *Revlon* settings—where they typically fail—but they are not uniquely *Revlon* duty claims, and they do not "'limit'" our thesis." Lyman Johnson & Robert Ricca, *The Still-Dwindled* Revlon, 71 WASH. & LEE L. REV. ONLINE 150, 153 (2014). Johnson and Ricca's focus on *Rural Metro* and *Del Monte* as outlier aiding-and-abetting decisions, however, overlooks the possibility that these cases comprise a separate strand of decisions applying a standard of review more stringent than normal *Revlon*.

[251] *See infra* Section V.B.

[252] 25 A.3d at 820–21.

third of its financing, *and then* asked permission from Del Monte's board to supply the financing.[253] "At the time Barclays asked for and obtained Del Monte's permission to provide buy-side financing, *Del Monte and [the bidder] had not yet agreed on price*."[254] The merger agreement included a go-shop provision, and the board allowed Barclays to run that process as well, despite its obvious conflict of interest: the fees from the buy-side financing were worth as much as its fees from advising Del Monte. Thus, "Barclays would earn substantially more for executing the LBO with [the initial bidder] than it would for any other strategic alternative. If another bidder emerged that did not need financing or who chose not to use Barclays, then Barclays would lose its buy-side financing fees."[255]

The preliminary record suggested that the likelihood of a damages judgment against the directors was "vanishingly small,"[256] because the evidence at that stage indicated no more than a breach of the duty of care by the directors, liability for which was exculpated.[257] But, Barclays as the investment banker still could be held liable for aiding and abetting such a breach.[258] As discussed already, *Revlon* requires that the directors make reasonable decisions.[259] The court in *Del Monte* observed at the outset that the company's board "predominantly made decisions that ordinarily would be regarded as falling within the range of reasonableness for purposes of enhanced scrutiny," i.e., they normally would satisfy *Revlon*.[260] The court, however, still enjoined the transaction.

Understanding that outcome requires acknowledging that the court applied a standard of scrutiny more stringent than what *Revlon*, in an ordinary case, requires. The court emphasized the central role investment banks play in transactions, observing that the Court of Chancery not only requires full disclosure of "investment banker compensation and potential conflicts," but also "has examined banker conflicts closely to determine whether they tainted the directors' process."[261] In finding that Barclays's actions had tainted the process, the court repeatedly focused on the bank's undisclosed conflict in

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253 *Id.* at 825–26.
254 *Id.* at 826.
255 *Id.* at 828.
256 *Id.* at 818.
257 *See supra* note 155 and accompanying text.
258 *Del Monte*, 25 A.3d at 818.
259 *See supra* notes 57–58 and accompanying text.
260 *Del Monte*, 25 A.3d at 817.
261 *Id.* at 832.

seeking to provide buy-side financing and how that conflict led to the process unfolding differently than it might have without a conflicted bank.[262] In failing to disclose its conflict, the bank committed a fraud on the board.[263]

The *El Paso* litigation came next.[264] *El Paso* involved a twist on *Del Monte*: the financial advisor was conflicted because it owned a $4 billion stake in Kinder Morgan, the acquiror, *and* El Paso's CEO was conflicted because he intended to buy a division of El Paso that the acquiror planned to spin off after the acquisition. "In other words, when El Paso's CEO was supposed to be getting the maximum price from Kinder Morgan, he actually had an interest in not doing that."[265] The financial advisor's conflict was known, but, according to the court, "inadequate efforts to cabin its role were made."[266] The CEO's conflict, however, was not known to El Paso's board.[267]

Similar to *Del Monte*, the court observed that the "record is filled with debatable negotiating and tactical choices made by El Paso fiduciaries and advisors. *Absent a conflict of interest*, these debatable choices could be seen as the sort of reasonable, if arguable, ones that must be made in a world of uncertainty."[268] Put differently, but for the undisclosed conflicts, *Revlon* would have been satisfied. In light of the conflicts, however, "these choices now must be viewed more skeptically."[269] Again, the court was applying a more stringent version of *Revlon* than would be applied in a normal case.

In analyzing *Revlon*'s requirements, the Court of Chancery elaborated on the importance of conflicts: "[W]hen there is a reason to conclude that debatable tactical decisions were motivated not by a principled evaluation of the risks and benefits to the company's stockholders, but by a fiduciary's consideration of his own financial or other personal self-interests, then the core animating principle of *Revlon* is implicated."[270] Just like in *Del Monte*, the court focused repeatedly on the undisclosed conflicts of interest in the deal.[271] Undisclosed conflicts differ from disclosed conflicts because directors dealing

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262 *Id.* at 833–35.
263 *Id.* at 836.
264 *In re* El Paso Corp. S'holder Litig., 41 A.3d 432 (Del. Ch. 2012).
265 *Id.* at 434. El Paso's CEO was both a buyer and a seller of the assets, and the more Kinder Morgan paid for El Paso, the higher amount it presumably would demand for the to-be-spun-off division. *Id.* at 443–45.
266 *Id.* at 434.
267 *Id.*
268 *Id.* (emphasis added).
269 *Id.*
270 *Id.* at 439.
271 *Id.* at 441–48.

with disclosed conflicts are aware that a potentially conflicted actor may harbor incentives that diverge from the company's interests. The focus in those situations is on the board's management of the conflicts.[272] Where conflicts are undisclosed, the board cannot manage them effectively, and the process can be tainted without intentional wrongdoing by the board.[273] Those undisclosed conflicts will lead to additional scrutiny from the courts. As the court in *El Paso* noted, "[w]hen anyone conceals his self-interest . . . it is far harder to credit that person's assertion that that self-interest did not influence his actions. That is particularly true when a court is reviewing the actions of businessmen and investment bankers" because they "are masters of economic incentives, and keenly aware of them at all times."[274]

B. The *Rural Metro* Decision

The *Rural Metro* litigation[275] involved all of the objectionable behavior by the investment bank in *Del Monte* and then some. Rural, an ambulance transport company, considered various strategic alternatives, including attempting to acquire a company called AMR, its leading competitor, which was a subsidiary of a company called EMS. After being rebuffed in its initial offers to buy AMR, Rural heard that EMS itself might be for sale.[276] Rural hired RBC to advise it on any possible transaction. Unbeknownst to Rural, RBC "planned to use its engagement as Rural's advisor to capture financing work from the bidders for EMS."[277] RBC understood its role as to sell Rural, even though Rural's board had not authorized a sale process, only a consideration of alternatives. The CEO nevertheless allowed RBC to put the company in play.[278] RBC designed the sale process in a way that prioritized

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[272] *See id.* at 440–41 (finding inadequate efforts to cabin the investment banker in light of its conflicts).

[273] A board may act negligently in failing to investigate the conflicts in the first place, but that is different from the intentional wrongdoing necessary to support a breach of the duty of loyalty. *See In re* Del Monte Foods Co. S'holder Litig., 25 A.3d 813, 818 (Del. Ch. 2011).

[274] *El Paso*, 41 A.3d at 445.

[275] The *Rural Metro* litigation involved a liability opinion and a separate damages opinion. *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54 (Del. Ch. 2014) (finding liability) [hereinafter Rural Metro I]; *In re* Rural/Metro Corp. S'holders Litig., 102 A.3d 205 (Del. Ch. 2014) (awarding damages) [hereinafter Rural Metro II]. Both decisions were affirmed on appeal. RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015) (affirming Rural Metro I and Rural Metro II).

[276] Rural Metro I, *supra* note 275, at 64–67.

[277] *Id.* at 68.

[278] *Id.* at 69.

EMS bidders "so they would include RBC in their financing trees."[279] The conflict of interest was substantial: "The maximum financing fees of $55 million were more than ten times the [Rural] advisory fee, giving RBC a powerful reason to take steps to promote itself as a financing source at the expense of its advisory role."[280]

The sale process ran into foreseeable problems. Rural's board failed to oversee the process effectively, deferring to the CEO at every step. RBC, which ostensibly had designed a sale process to dovetail with EMS's sale and capture any attendant synergies from the buyer of that company, refused to give the winning bidder for EMS more time to submit a bid. In the end, only one company bid for Rural.[281] RBC failed to include any substantive valuation analyses for Rural's board and instead capitalized on internal boardroom dynamics favoring a near-term sale. RBC then turned its attention to attempting to provide buy-side financing for the buyer,[282] which was not disclosed to the board.[283] The buyer's bid, however, was not compelling in light of RBC's initial valuation analyses. Over one weekend, RBC's fairness opinion team systematically reduced the various valuation metrics to make the bid seem more convincing.[284] The board approved the sale and litigation followed.[285]

In explaining the standard of review, the Court of Chancery described the reasonableness standard required by *Revlon* and its progeny.[286] When turning to the decisions under review, however, the court cited *Del Monte* and *El Paso* and made clear that extra scrutiny applies "[w]here undisclosed conflicts of interest exist."[287] In light of those undisclosed conflicts, decisions will be "viewed more skeptically."[288]

This skeptical application of *Revlon* is what this Article calls *Revlon*-Plus review. *Revlon*-Plus review is a higher standard of review than normal enhanced

[279] *Id.*
[280] *Id.* at 70.
[281] *Id.* at 70–75.
[282] As should be evident from *Del Monte* and *Rural Metro*, a sell-side investment advisor intent on providing buy-side financing creates an obvious conflict of interest. *See* Bratton & Wachter, *supra* note 249, at 25 (describing the various conflicts created by banks providing staple financing to bidders).
[283] Rural Metro I, *supra* note 275, at 74, 76–77.
[284] *Id.* at 77–78
[285] *Id.* at 79.
[286] *Id.* at 82–85.
[287] *Id.* at 91.
[288] *Id.* (quoting *El Paso*, 41 A.3d at 434).

scrutiny á la *Revlon*. The court in *Rural Metro* clearly held that application of *Revlon*-Plus review can be outcome determinative: "Absent conflicts of interest, this decision [relating to the sale process] would be one of the many debatable choices that fiduciaries and their advisors must make when exploring strategic alternatives in an uncertain world, *and it would fall within the range of reasonableness*" under *Revlon*, but, when "[v]iewed skeptically," under *Revlon*-Plus, "the decision . . . fell outside the range of reasonableness."[289]

The court found RBC liable for aiding and abetting breaches of fiduciary duty by Rural's board of directors.[290] In a separate decision on damages, the court ordered RBC to pay $75,798,550.33, plus interest.[291]

On appeal, the Delaware Supreme Court explicitly considered the application of additional scrutiny in the case of undisclosed conflicts of interest, and it approved of the practice:

> We agree with the trial court's suggestion that the reasonableness of initiating a sale process to run in tandem with the EMS auction, absent conflicts of interest, "would be one of the many debatable choices that fiduciaries and their advisors must make . . . and it would fall within the range of reasonableness." But where undisclosed conflicts of interest exist, such decisions must be viewed more skeptically.[292]

C. The Effects of *Revlon*-Plus Review

The *Del Monte*, *El Paso*, and *Rural Metro* triad of cases shows that the courts will apply *Revlon*-Plus review when there are conflicts of interest not disclosed to the board of directors, and application of *Revlon*-Plus review can have an outcome-determinative effect on the litigation. Beyond those two facts, not much is known about the doctrine. Very few subsequent decisions have applied *Revlon*-Plus review or considered its implications. One oral ruling in

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289 *Id.* at 91 (emphasis added). The decision in *Rural Metro I* also shows that the application of *Revlon*-Plus review is not an automatic death knell for defendants. In examining a separate decision relating to the sale process, the court held that "[e]ven viewed skeptically," i.e., under *Revlon*-Plus, that "decision fell within the range of reasonableness." *Id.* at 93.

290 *Id.* at 110.

291 Rural Metro II, *supra* note 275, at 213–14.

292 RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 854–55 (Del. 2015) (quoting Rural Metro I, *supra* note 275, at 90).

PLX appears to have applied the doctrine to a motion to dismiss.[293] That decision, however, raises as many questions about *Revlon*-Plus as it answers, showing why further development is needed on this issue, and *PLX*'s status as a transcript ruling makes its ultimate precedential effect questionable in any event.[294]

As best as can be gathered from the transcript, *PLX* involved a litany of potential conflicts, including by the company's CEO, by a director that also served as a fiduciary of an activist investor, and by PLX's investment bank.[295] The most likely acquiror for PLX was a company called Avago, which ultimately ended up being the purchaser. PLX's investment bank had earned a significant amount of fees from Avago in recent years, was advising Avago on another acquisition in the same industry space as PLX, and the advisor's lead banker on the other transaction also worked on PLX's sale.[296]

The court stressed the central role that conflicts of interest play under *Revlon*, highlighting that "Delaware cases recognize that the harmful influence of conflicts in the boardroom is not limited to the CEO. It includes other directors, senior officers, and the company's advisors."[297] Like in *Rural Metro*, the court in *PLX* explained that, in light of such conflicts, "even decisions that might otherwise be thought to fall within the range of reasonableness become subject to question where there is a taint."[298]

Unlike in *Del Monte* and *Rural Metro*, however, the investment bank actually disclosed its work on the Avago deal and its fees, though the advisor seems not to have disclosed the dual role of its lead banker.[299] The bank made those disclosures to the PLX board on June 19, four days before the deal was announced, i.e., well after Avago became the winning bidder and the bulk of the sale process had concluded.[300]

As a result of the disclosures, it is unclear if *PLX* actually applied *Revlon*-Plus, as formulated in *Del Monte* and *Rural Metro*, or whether the court applied

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293 Transcript, *In re* PLX Tech. Inc., S'holders Litig., No. 9880-VCL (Del. Ch. Sept. 3, 2015) [hereinafter PLX Transcript].

294 *See* Frechter v. Zier, No. 12038-VCG, 2017 WL 345142, at *4 n.27 (Del. Ch. Jan. 24, 2017) (referencing a transcript ruling as "instructive," but stating that the court did "not mean to imply that bench decisions are part of the case-law of this Court, or encourage citation thereto").

295 PLX Transcript, *supra* note 293, at 25–32.

296 *Id.* at 19–20.

297 *Id.* at 24.

298 *Id.* at 25.

299 *Id.* at 19–20.

300 *Id.* at 21.

normal *Revlon* and faulted PLX's board for poor management of conflicts, more along the lines of *El Paso*. The *PLX* decision criticized both the investment banker's dilatory disclosure and the board's failure to discover the conflict earlier and its poor management of it once it emerged.[301]

As *PLX* shows, the boundaries of *Revlon*-Plus remain undefined. Of particular importance is the relationship between disclosed and undisclosed conflicts. In the situation of a late disclosure of a conflict to the board, it is unclear which standard of review applies. Conceivably, a court could choose any of three options: (1) apply *Revlon*-Plus to the entire transaction; (2) apply normal *Revlon* to the entire transaction; or (3) review pre-disclosure conduct under *Revlon*-Plus, but post-disclosure conduct under *Revlon*. An ultra-late disclosure may merit application of the first option, whereas a relatively early disclosure could point in favor of the second option. Disclosures directly in the middle of a sale process would make the third route a possibility, but its application would be messy, and one might suspect that the Delaware courts may prefer to apply *Revlon*-Plus to the entire transaction to encourage early disclosure.[302]

Whatever the doctrine's precise contours, the key takeaway from the *Revlon*-Plus cases is that fiduciaries and advisors who do not timely reveal their potential conflicts of interest to the board will face intense scrutiny of their most debatable decisions during a sale process. *Rural Metro*'s massive damages judgment shows the stakes are significant. Although investment banks seem particularly prone to attack on grounds of failing to reveal conflicts of interest, *Revlon*-Plus review is not limited to banks behaving badly. *El Paso* showed that the CEO's conflict can be a trigger.[303] Moreover, the universe of advisors is not confined to investment banks. Law firms, for example, are capable of the

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301 *Id.* at 31, 34–41, 50.

302 *Cf. supra* note 272-74 and accompanying text.

303 *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434, 443-45 (Del. Ch. 2012). Notably, neither corporate officers nor advisors can claim the protection of an exculpatory provision, and thus both can be held monetarily liable for duty-of-care claims, the former directly and the latter through aiding and abetting. *See* RBC Capital Mkts., LLC v. Jervis, 129 A.3d 816, 873–75 (Del. 2015). As for directors, in addition to exculpatory provision, the statutory safe harbor for reliance on one's agents provides further protection. As one commentary noted, cases like *Del Monte* and *Rural Metro* imply that a board can violate *Revlon* despite the utmost good faith if misled by its agents, i.e., the company's advisors. *See* Bratton & Wachter, *supra* note 249, at 54–55 ("Utmost diligence makes deception less likely without importing an absolute guarantee. It would seem to follow that even a highly diligent, disinterested board can walk into a deal that violates *Revlon*."). The statutory safe harbor, however, protects directors acting in good faith from personal liability. *See id.* at 55, 55 n.302 (citing DEL. CODE ANN. tit. 8, § 141(e) (2011)).

same misbehavior, and they have been added as aiding-and-abetting defendants in at least three instances in recent litigation, each of which resulted in significant monetary settlements.[304]

D. *Revlon*-Plus Review After *Corwin* and *C & J Energy*

Some have argued that the net effect of *Corwin* and *C & J* is to eliminate cases like *Del Monte*, *El Paso*, and *Rural Metro*. Joel Friedlander, a successful plaintiffs' attorney, has observed that the restriction on preliminary injunctions has reduced the availability of pre-closing discovery that can be used to uncover conflicts of interest.[305] In those instances where an injunction still can be sought, "the defendants can make supplemental disclosures to not only moot the disclosure issue, but also to set up a *Corwin* defense."[306] Cases like *El Paso*, Friedlander argues, today would result not just in a denial of the preliminary injunction, but would lay the foundation for the granting of a motion to dismiss. He thus concludes that "[b]ringing a preliminary injunction motion is self-defeating in light of *Corwin*."[307] From this perspective, the interesting questions posed by *Revlon*-Plus review never will be answered, because *Corwin* and *C & J* effectively rendered the *Revlon*-Plus cases a closed universe consisting of *Del Monte*, *El Paso*, *Rural Metro*, and maybe *PLX*, with future cases nothing more than a null set.

In light of the still-developing case law surrounding *Corwin* and *C & J*, however, such pessimism is premature. The new regime certainly will eliminate many merger-objection claims, but there is no reason to think that the sort of misconduct seen in the *Revlon*-Plus cases will go unchecked.[308] For starters,

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304 Stipulation and Agreement of Compromise, Settlement and Release, Haverhill Ret. Sys. v. Kerley, No. 11149-VCL (Del. Ch. June 23, 2017) (settling claims for $10 million, including direct fiduciary duty and aiding-and-abetting claims against outside counsel); Stipulation and Agreement of Compromise and Settlement, City of Daytona Beach Police & Fire Pension Fund v. ExamWorks Grp., Inc., No. 12481-VCL (Del. Ch. May 5, 2017) (settling claims against outside counsel, including aiding-and-abetting claims, for $46.5 million); Stipulation and Agreement of Compromise and Settlement, Chen v. Howard-Anderson, No. 5878-VCL (Del. Ch. June 2, 2016) (settling claims for $35 million, including claims of aiding and abetting asserted against outside counsel).

305 Friedlander, *supra* note 7, at 643.

306 *Id.* at 644.

307 *Id.* at 648.

308 For example, although *C & J Energy* unquestionably limited the availability of injunctions, *see supra* Section III.C, it remains unclear what transactions count as "coercive" such that an injunction is appropriate under the third category in *C & J Energy*, *see supra* note 130, and what extraordinary circumstances will permit injunctive relief outside of *C & J Energy*'s

although Friedlander considers it a "pale substitute" for past practice,[309] Section 220 books-and-records inspection remains available.[310] And, post-*Corwin* cases have interpreted Section 220 to require the production of electronically-stored information ("ESI") in appropriate cases.[311] At least as important, the boundaries of *Corwin*'s various prongs have not been explored fully, as discussed at length in Section IV *supra*. Litigation so far largely has been confined to arguments about whether stockholder votes were fully informed. Disclosure claims, of course, can be dreamt up and asserted in every case, which is part of what drove Delaware's crackdown on frivolous merger litigation in the first place.[312] The more substantive elements of *Corwin* remain uncharted. *Corwin*'s "coercion" prong remains fairly untested, and the "disinterested" prong has been ignored almost entirely. The scope of *Corwin*'s cleansing likewise is not settled. Depending on how cases interpreting those issues are decided, *Corwin* may not have the breadth currently suspected, but no one will know until plaintiffs actually bring cases challenging those aspects of *Corwin*.

three categories, *see supra* note 140. And, the Court of Chancery after all is a court of equity; stockholders will not be deprived of relief where the circumstances demand a remedy. "Irreparable injury is, of course the *sine qua non* of injunctive relief. Thus it is always appropriate for a court of equity to ask what will occur if that extraordinary remedy is not issued." Household Int'l, Inc. v. Eljer Indus., Inc., No. 13631, 1994 WL 469169, at *3 (Del. Ch. Aug. 12, 1994). *See also* Gotham Partners v. Hallwood Realty Partners, 817 A.2d 160, 176 (Del. 2002) ("Where there is a breach of the duty of loyalty . . . the Court of Chancery's powers are complete to fashion any form of equitable and monetary relief as may be appropriate." (citations omitted)).

309 Friedlander, *supra* note 7, at 648.

310 *See* Appel v. Berkman, 180 A.3d 1055, 1058–59 (Del. 2018) (reversing dismissal of complaint because *Corwin*'s requirements were not satisfied and noting that the plaintiffs first pursued books and records under Section 220); Lavin v. West Corp., No. 2017-0547-JRS, 2017 WL 6728702 (Del. Ch. Dec. 29, 2017).

311 *See* Amalgamated Bank v. Yahoo! Inc., 132 A.3d 752, 792–93, 793 n.42 (Del. Ch. 2016) (finding production of ESI appropriate and collecting cases).

312 *See, e.g.*, Jill E. Fisch, Sean J. Griffith, & Steven Davidoff Solomon, *Confronting the Peppercorn Settlement in Merger Litigation: An Empirical Analysis and a Proposal for Reform*, 93 TEX. L. REV. 557, 566, 572, 585 (2015) (documenting that over 70% of merger-litigation lawsuits settle, usually in settlements that generate attorneys' fees and supplemental disclosures that the authors show have a statistically insignificant effect on subsequent stockholder votes).

VI. CONTEMPORARY MERGER LITIGATION: A NEW INCENTIVE STRUCTURE FOR LITIGANTS AND LITIGATORS

Judicial review of mergers has changed significantly in recent years. Previously, *Revlon* governed the vast bulk of change-in-control transactions executed by independent boards of directors. When a board approved a sale of the company, its legal advisors could say with confidence that the transaction would be reviewed under enhanced scrutiny with the directors' actions subject to reasonableness review. Now, however, the *Revlon* doctrine has diverged. There are three strands to contemporary judicial review of merger litigation. First, while the zone of conduct deemed sufficiently bad to violate *Revlon* had been shrinking for years,[313] in *C & J Energy* the Delaware Supreme Court narrowed the availability of pre-closing relief.[314] Second, the *Corwin* line of cases effectively eliminated liability where a majority of disinterested stockholders approve a transaction in an uncoerced, fully-informed vote, so *Revlon* no longer even matters in those situations.[315] Although *Corwin*'s true scope remains to be seen,[316] the existing universe of cases suggests that few complaints are capable of overcoming a *Corwin* defense.[317] Third, swimming against the current of decreased liability, the *Revlon*-Plus cases created a form of über-enhanced scrutiny—still shy of entire fairness but more stringent than traditional *Revlon* review—that the courts will apply when reviewing transactions tainted by undisclosed conflicts of interest.[318] How the third strand meshes with the first two remains to be seen.[319] Together, these three developments comprise the new regime of judicial review. Now, *Revlon* generally either applies with extra force or it does not apply at all.

Not much remains of "classic" *Revlon*. It applies to preliminary injunction proceedings, but in light of *C & J Energy*, the courts seem reluctant even to schedule injunction hearings when the plaintiffs' claims amount to no more than criticisms of poor sales processes.[320] *Revlon* presumably applies to post-closing claims,[321] but most *Revlon*-based claims now will fail at the motion-to-

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313 *See supra* notes 69, 135, & 142 and accompanying text.
314 *See supra* Section III.C.
315 *See supra* Section IV.A.
316 *See supra* Section IV.B (discussing open issues under *Corwin*).
317 *See supra* note 161 and accompanying text.
318 *See supra* Sections V.A–C.
319 *See supra* Section V.D.
320 *See supra* notes 136–39 and accompanying text.
321 Some defendants have argued that *Corwin* actually held that *Revlon* does not apply at all to post-closing claims. *See* van der Fluit v. Yates, No. 12553-VMCR, 2017 WL 5953514, at

dismiss stage because of *Corwin*.[322] In sum, classic *Revlon* in reality lives on only for those pre-closing claims satisfying *C & J Energy*'s categories and the small fraction of post-closing complaints that, for whatever reason, manage to survive a *Corwin* defense. The new "standard" deal litigation conceivably could be a books-and-records action attempting to unearth disclosure claims followed by a post-closing complaint.[323] The actual litigation relating to a merger now might take place years after closing. What effect that will have on litigation—whether from lost ESI or hazy memories—remains to be seen.

The new regime has important implications for would-be litigants and their faithful litigators. Those likely to be haled into court—directors, officers, and their advisors—can expect more deference on deal process. Fewer deals will be held up; closing certainty will increase. The new jurisprudence defers to stockholders' informed wishes, and vigorous disclosure should be the default when drafting proxy statements. Erring on the side of disclosure can be beneficial, as it often will allow an early win with a *Corwin* defense.

At the same time, the new regime places conflicted actors in the cross-hairs. No fewer than three aspects of the current doctrine conceivably address conflicts. Any material conflict not disclosed to stockholders will render a vote uninformed, thus leading to the loss of *Corwin*. A transaction structurally designed to advance an interest aside from the transaction itself, e.g., a coupled stockholder vote, might be deemed coercive, again leading to the loss of *Corwin*. Conflicts not disclosed to the board are the premise of the *Revlon*-Plus cases. A material, undisclosed conflict thus might result in a denial of any motion to dismiss *and* the application of *Revlon*-Plus review for the post-closing damages claim.

The new regime also changes how litigators will work through any merger challenges. Rather than attacking or defending a deal process, litigation instead frequently will focus on the stockholder vote. Disclosures, long a part of the old regime, continue to have a central role in this new system, but additional

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*11 n.159 (Del. Ch. Nov. 30, 2017) (noting that certain language in *Corwin* "might be read to suggest that *Revlon* does not apply at [the post-closing] stage of litigation"). The Court of Chancery so far has rejected that argument, observing that it would be inconsistent with a great number of Delaware cases applying *Revlon* to post-closing claims. *See* Order at 3–5, *In re* PLX Tech. Inc. S'holders Litig., No. 9880-VCL (Del. Ch. Feb. 6, 2018). Notably, the Delaware Supreme Court's decision in *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816 (Del. 2015), which affirmed the *Rural Metro* decisions, was issued nearly two months after *Corwin*. In addition, one recent Delaware Supreme Court decision appeared to obliquely reference this issue and disagree with the argument that *Revlon* does not apply post-closing. *See* Kahn v. Stern, No. 393, 2018 WL 1341719, at *1, *1 n.3 (Del. Mar. 15, 2018).

[322] *See supra* note 161 and accompanying text.

[323] *See supra* Section V.D.

areas for litigation will include the disinterestedness of major stockholders, whether transactions are coercively structured, and the scope of any cleansing under *Corwin*. The litigation focus on conflicts will increase as well. The combination of *Corwin*'s "fully informed" standard and the possibility of *Revlon*-Plus review creates a system that gives plaintiffs' attorneys a powerful incentive to unearth and attack potential conflicts of interest. Counsel advising boards on transactions would do well to increase focus at the outset on possible conflicts—whether by directors, officers, or corporate advisors, including counsel themselves—and continue to monitor conflicts aggressively throughout the sale process. Those conflicts that cannot be eliminated should be fully disclosed to stockholders in advance of the vote.

Another feature of the new regime is that, in all likelihood, litigation will move more slowly. Fewer injunctions and a shift to post-closing disputes should mean less expedited litigation. One unfortunate anomaly of this structure is that it can encourage plaintiffs' attorneys *not* to bring pre-closing disclosure litigation that could lead to additional disclosures and better-informed stockholders. That byproduct of *Corwin* is incompatible with *Corwin*'s underlying policy of encouraging and deferring to informed stockholders. The Delaware courts should eliminate that feature of *Corwin* by barring disclosure claims that could have been brought pre-closing.[324] Doing so easily can be harmonized with permitting post-closing Section 220 actions: if the limited discovery under Section 220 only confirms the validity of a disclosure claim that reasonably could have been brought pre-closing, then that claim should be barred; but if the discovery generates new, material information that should have been disclosed, and that information could not have been deduced from the public record or a reasonable pre-closing investigation, then that disclosure claim was not one that could have been brought pre-closing, and it should be permitted.

The long-term consequences of the *Revlon* divergence remain to be seen. Early evidence suggests a recent outflow of litigation from Delaware.[325] Forum-selection bylaws may force much of this litigation back to Delaware.[326] It is unclear how much of that outflow represents an attempt to avoid *Corwin* versus an attempt to avoid *Trulia* and continue bringing meritless disclosure litigation in the hopes of a settlement. Evidence at present points toward the latter. The primary shift in forum has been to federal courts, rather than other

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[324] *See supra* notes 189–92 and accompanying text.
[325] *See* Cain et al., *supra* note 240, at 6, 33.
[326] *See id.* at 18–19, 35–36.

states' courts, and the high number of mootness-fee settlements in federal courts "appear to indicate that plaintiffs' counsel may be extracting rents by seeking low cost payments to 'go away.'"[327] Indeed, the new regime of judicial review of merger litigation cannot be avoided merely by leaving Delaware, because the developments discussed in this Article represent substantive Delaware law and would be applied whenever Delaware law governs, which should be in virtually every instance of the merger of a Delaware corporation because of the internal affairs doctrine.[328]

Beyond the current forum shuffling, the *Revlon* divergence also may be contributing to an increase in appraisal claims.[329] The recent decisions of the Delaware Supreme Court indicating that the deal price should be given significant emphasis in determining fair value[330] may not halt all such shifts from fiduciary duty claims to appraisal claims; a shoddy deal process may not generate a viable *Revlon* claim after *Corwin*, but it also likely would not merit much weight in an appraisal action.[331]

As for other long-term effects of the new system, one only can speculate. Those cases that survive a *Corwin* defense may be those with a high likelihood of producing a substantial damages judgment, particularly if *Revlon*-Plus applies. That high damages exposure could cause those cases to settle at a disproportionate rate, ultimately leading to a decrease in post-trial opinions on fiduciary duties in the corporate merger context, which are an important subset of Delaware law, because, unlike rulings on motions to dismiss or summary judgment decisions, post-trial opinions are the only substantive rulings in which the court is not drawing inferences in favor of one party or another. Those opinions thus provide important guidance to actors as to what actions are or are not acceptable and how deals ought to be structured. But, much remains to be seen, there are many open issues, as discussed throughout this Article,

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327 *Id.* at 36.

328 Pursuant to the internal affairs doctrine, the law of the state of incorporation will govern most corporate disputes among stockholders, directors, and officers, such as claims asserting breach of fiduciary duty. *See, e.g.*, Heine v. Streamline Foods Inc., 805 F. Supp. 2d 383, 389 (N.D. Ohio 2011) ("The internal affairs doctrine provides that the law of the state of incorporation governs the internal affairs of a corporation. . . Internal affairs are those 'matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders.'" (quoting Edgar v. MITE Corp., 457 U.S. 624, 645 (1982)) (applying Delaware law).

329 *See* Cain et al., *supra* note 240, at 37–38.

330 *See generally* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1 (Del. 2017); DFC Glob. Corp. v. Muirfield Value Partners, 172 A.3d 346 (Del. 2017).

331 *Cf. Dell*, 177 A.3d at 21–23.

and the law on each of the three aspects of the new regime requires further development.