HIGHWAY TO THE REVLON ZONE: "MERGING" UNOCAL AND REVLON INTO A UNIFIED ENHANCED SCRUTINY FRAMEWORK

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CONTENTS

HIGHWAY TO THE REVLON ZONE: "MERGING" UNOCAL AND REVLON INTO A UNIFIED ENHANCED SCRUTINY FRAMEWORK

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Abstract

Two interchangeable yet fundamentally unique doctrines have emerged in Delaware since the 1980s to deal with hostile takeovers and change-of-control transactions in Mergers and Acquisitions law. The first is the Unocal framework, designed to apply enhanced scrutiny to defensive measures taken by a board of directors when dealing with hostile takeovers. The second is the so-called Revlon duties, originally designed to compel boards to receive the best price for the sale of the corporation when the entity is put up for auction.

The problem with these two doctrines is that they both purport to solve the same problem while trying to apply to different hypothetical scenarios. Traditionally, when a board enacts a poison pill to avoid a hostile corporate raider, shareholders may be concerned that the board is not taking the pill for the good of the company, but is acting in self-interest in the fear that a new owner may fire the lot of them. Similarly, when a board engages in a series of transactions aimed at selling the company to a preferred bidder, there is a concern that in doing so, the directors had a conflict of interest.

In this way, Unocal and Revlon both confront the same judicial concern: can a court be certain that a board's actions were in furtherance of their fiduciary duties to the corporation? The Delaware Supreme Court, in creating a separate line of cases, expanded the Revlon Zone towards a standard of reasonableness in piecemeal fashion and constrained its application in a world of complex transactions, most of which are not simply all-cash.

This paper proposes harmonizing this conflict by merging Revlon into the existent Unocal framework to create one uniform enhanced scrutiny framework. The standard of review should flow logically under Unocal – regardless of whether a firm enacts a poison pill to stop a bidder due to the fear of losing board seats, or hunts a buyer because of personal preferences and locks up the transaction to the detriment of a higher share price.

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Forcing a board to explain a complex transaction under the best price rule implies a trustee-style fiduciary duty to a world where layered financial instruments could sometimes yield a better long-term deal for the shareholders while – on paper – be something below the highest share offer. Delaware courts have attempted to cabin Revlon's application for years. It is time to formally merge the language to apply a standard of reasonableness and proportionality onto boards that have entered the Revlon Zone.

INTRODUCTION

The concept of merging and acquiring extends beyond companies; legal doctrines can be similarly transformed. The Delaware Supreme Court can harmonize years of difficult lawyering and judicial confusion and create a uniform enhanced scrutiny analysis by acquiring the *Revlon Zone*[1] doctrine and making it a wholly owned subsidiary within the *Unocal*[2] framework. The *Revlon*[3] line of cases has struggled with consistency in its application. This is primarily because it is difficult to determine when a company has entered the *Revlon Zone*.[4] Another component of this issue is the challenge of how to address *Revlon* without bringing up *Unocal's*[5] central theme of reasonableness. As fiduciaries, if directors engage in a hot pursuit of a sale of the company, it is vital to determine whether they satisfied their fiduciary duties and received the best value possible.[6] If a board sells

[1] It should be noted that Delaware courts are not uniform on the wording used to describe when a board's actions force the *Revlon* duties upon it. *See* In re Smurfit-Stone Container Corp. S'holder Litig., 2011 WL 2028076, at *19 (Del. Ch. May 20, 2011, revised May 24, 2011) ("[D]irectors are thrust into *Revlon* mode . . . ."); McMillan v. Intercargo Corp., 768 A.2d 492, 502 (Del. Ch. 2000) ("[R]egardless of whether the board was in *Revlon*-land."); Paramount Commc'ns Inc v. Time, Inc., 1989 WL 79880, at *20 (Del. Ch. July 14, 1989)("[I]t has elected to enter the Revlon zone.").

[2] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).

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

[4] *See* Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) ("The directors of a corporation have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders, 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. In the latter situation, there is no sale or change in control when [c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.") (internal citations, quotations omitted); *but see* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 314 (Del. 2015) ("In circumstances, therefore, where the stockholders have had the voluntary choice to accept or reject a transaction, the business judgment rule standard of review is the presumptively correct one and best facilitates wealth creation through the corporate form.") (holding that a fully informed and uncoerced stockholder vote negated the need to apply *Revlon*).

[5] *See, e.g.*, Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995). *See generally Unocal*, 493 A.2d at 946-48.

[6] *See Revlon*, 506 A.2d at 182; *see also* Paramount Commc'ns Inc. v. Time, Inc., 1989 WL 79880, at *25 (Del. Ch. July 14, 1989); Leo E. Strine, Jr., *Categorical Confusion:*

a company in a live auction to anyone other than the highest bidder, the question of breach of fiduciary duty emerges.[7] The same conflict of interest question arises when a board employs a poison pill to ward off a hostile takeover.[8] Enhanced scrutiny applies in both instances to confront "'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'"[9]

In either hypothetical, something dramatic has taken place. What was once a normal corporate entity was either sold off or a change-of-control had taken place; or a potential suitor with deep pockets was thwarted in its bid to legitimately take over the company. Although many cases apply *Revlon* duties when companies tread into the *Revlon Zone*, opinions surrounding *Revlon's* application seem to indicate that a *Unocal* analysis is either a necessary predicate or an alternative test.[10] While it is easy to claim *Unocal* and *Revlon* are separate doctrines, it is just as easy to mix them in application: when companies enter the *Revlon Zone*, conflict of interest concerns are raised – the same concerns that spurred the *Unocal* opinion. Even the Delaware Supreme Court has clearly held that in the *Revlon* context:

> Within the auction process, any action taken by the board must be reasonably related to the threat posed or reasonable in relation to the advantage sought. Thus, a *Unocal* analysis may be appropriate when a corporation is in a *Revlon* situation and *Revlon* duties may be triggered by a defensive action taken in response to a hostile offer. Since *Revlon,* we have stated that differing treatment of various bidders is not actionable when such action reasonably relates to achieving the best price available for the stockholders.[11]

Deal Protection Measures in Stock-for-Stock Merger Agreements, 56 BUS. LAW. 919, 942 (2001).

[7] *Paramount*, 1989 WL 79880, at *25.

[8] *See Unitrin*, 651 A.2d at 1379.

[9] *Id.* at 1373 (quoting *Unocal*, 493 A.2d at 954).

[10] *See* Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d 1140, 1150–51 (Del. 1989)

> Thus, in *Revlon,* when the board responded to Pantry Pride's offer by contemplating a "bust-up" sale of assets in a leveraged acquisition, we imposed upon the board a duty to maximize immediate shareholder value and an obligation to auction the company fairly. If, however, the board's reaction to a hostile tender offer is found to constitute only a defensive response and not an abandonment of the corporation's continued existence, *Revlon* duties are not triggered, though *Unocal* duties attach.

[11] *Id.* at 1151 n.14 (internal citations omitted).

If the board thwarts a corporate raider, determining the best price is irrelevant to the analysis because the company was never for sale. However, when a company forces a bid to go through, picks an alternative bidder, or otherwise locks the company into a transaction that will ultimately change who controls the corporation, not only should that transaction be viewed under *Revlon*, but those actions—so cataclysmic that the company no longer belongs to the same shareholders post-transaction—should be properly viewed under the reasonableness and proportionality lens of *Unocal* for a more equitable outcome.

Simply stating that a board must achieve the "best price"[12] imposes a fiduciary duty upon corporate directors that is normally reserved for trustees who are selling trust assets for cash.[13] Most corporate transactions are so mired in complex financial instruments moving from the buyer to the seller that a more nuanced approach to this issue should allow for a fairer judicial analysis. This is especially true in preliminary injunction motions, where a Delaware court must act quickly to put the brakes on the deal from taking place. The *Unocal* standard would almost always be satisfied when it is clear the company must be sold and the board achieves the highest price available to shareholders. This would bring the procedural posture back to business judgment.[14]

I. SUMMARY

This paper will first discuss the three levels of judicial scrutiny that courts use to analyze breaches of the fiduciary duty of loyalty. Next, it will address the *Revlon Zone* and analyze when a company triggers its famous *Revlon* duties. Finally, this paper will explain how to re-word the enhanced scrutiny framework to allow all "contests for corporate control"[15] to fit under the reasonableness and proportionality language of *Unocal* and address the concerns raised in *Revlon* by incorporating "best value" as a factor into the proportionality of the board's actions in selling the company. This paper primarily argues that expanding the scope of judicial review from the original "best price"[16] language to the "reasonable and proportional" language of *Unocal* will give courts more deference in analyzing

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

[13] Paramount Commc'ns Inc. v. Time, Inc., 1989 WL 79880, at *25 (Del. Ch. July 14, 1989); *see also* Strine, *supra* note 6, at 942.

[14] *See Unocal*, 493 A.2d at 957–58.

[15] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).

[16] *Revlon*, 506 A.2d at 182.

complex transactions while simultaneously allowing more opportunities for a board to explain the rationale behind difficult choices made under the gun.

II. DELAWARE M&A STANDARDS OF REVIEW

A. The Gravity of Loyalty

Since directors are the corporation's fiduciaries, they are subject to fiduciary duties in the execution of their actions to the corporate entity.[17] Fiduciary duties are broken into two broad categories: the duty of care[18] and the duty of loyalty.[19] The duty of loyalty is most litigated because derivative and direct suits can more easily show that a director's decision was for their own benefit as opposed to the benefit of the corporation. This may be easier to allege as opposed to a director that had his or her hands off the wheel in a breach of the duty of care, as in *Smith v. Van Gorkom*.[20] Additionally, many corporations now acknowledge "fiduciary-out" clauses to shield directors from liability from breaches of the duty of care to avoid another *Van Gorkom* case. Conversely, no contractual provision can remove a director's liability for a breach of loyalty.[21]

B. Determining the Proper Standard of Review

There are three standards of review to analyze board decisions: business judgment,[22] enhanced scrutiny,[23] and entire fairness.[24] Generally speaking, board decisions are reviewed under the business judgment rule, where courts will defer to the board's action if it can be attributed "to any rational business purpose."[25] Under this standard of review, a plaintiff must allege that the directors failed to satisfy their burden and show that there was essentially no possible business explanation for the decision – an extremely high burden to pass.[26] The entire

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[17] *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239–40 (Del. 2009); *Unocal*, 493 A.2d at 955.

[18] Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[19] *Lyondell*, 970 A.2d at 243–44.

[20] *Van Gorkom*, 488 A.2d at 893.

[21] WILLIAM SJOSTROM, MERGERS AND ACQUISITIONS LAW 441–43 (2nd ed. 2022)

[22] *See, e.g.*, In re Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 708 (Del. 2023).

[23] *See, e.g.*, Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995).

[24] *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

[25] Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

[26] *Id.*

fairness standard works in the opposite way, where defendant-directors have a high burden of proof. Here, once it has been proven to the factfinder that there was a violation of the fiduciary duty of loyalty, the burden of proof is on the director-defendants to show that, even though a breach of the fiduciary duty of loyalty took place, it was still entirely fair to the corporation.[27] This is normally satisfied if the defendants can show fair dealing, fair price, and overall fairness.[28] Therefore, once a case is placed into one of the two camps, it can be outcome-determinative.[29]

The third standard of review, enhanced scrutiny, acts like a bouncer. To determine what standard the case should be decided under, enhanced scrutiny first reviews the case through a lens stricter than business judgment but more lenient than entire fairness. Enhanced scrutiny puts the onus on the defendant to satisfy their burden of persuasion.[30] If the defendant can satisfy enhanced scrutiny, business judgment applies.[31] If the defendant fails, they must prove entire fairness.[32] The catch with enhanced scrutiny is the burden initially lies with the defendant board to show that they deserve business judgment.[33]

C. Enhanced Scrutiny

i. Unocal and Unitrin

In the 1980s, corporate raiding was at its zenith in popular culture.[34] When boards developed the concept of a shareholder rights plan, colloquially known as a poison pill,[35] a hostile bidder's raid went from entertaining to near impossible. If the hostile bidder pushed through the percentage outlined in the rights plan, the poison pill would be triggered, and all shareholders *but* the hostile bidder were allowed to receive either new shares or some other benefit that diluted the stake owned by the hostile bidder.[36] This situation would almost always make pushing

[27] In re Tesla Motors, Inc. S'holder Litig., 298 A.3d at 712.

[28] *Weinberger*, 457 A.2d at 711.

[29] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1371 (Del. 1995).

[30] *Id.*

[31] *Id.*

[32] *Id.* at 1373.

[33] *Id.*

[34] *See, e.g.*, WALL STREET (Twentieth Century Fox 1987) ("Greed, for lack of a better word, is good. Greed is right. Greed works. Greed clarifies, cuts through, and captures the essence of the evolutionary spirit.").

[35] *Unitrin*, 651 A.2d at 1369 n.6.

[36] *Id.*

through the poison pill threshold a self-defeating gesture. Therefore, to close the deal, bidders would have to enter into a proxy fight or force a board-approved transaction.[37] If a hostile bidder could win a proxy fight and implement enough board members of their own, the hostile-friendly new board members could simply vote to remove the shareholder rights plan and pave the way for the hostile bidder to add as many shares as possible to their balance sheets.

Meanwhile, Delaware courts determined how to evaluate the legality of shareholder rights plans under established corporate law.[38] The Delaware Supreme Court held that such plans were generally permissible,[39] but was wary about the motivations that surrounded their implementation.[40] These defensive measures raised the eyebrows of the judiciary "because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders . . . ."[41] Implementing a poison pill to block a hostile bidder may not further the best interests of the company, but it might benefit directors who are concerned about their job security. Frequently, the first order of new ownership is to "clean house" and bring in "new blood."[42] The court was concerned that directors could be looking out for themselves instead of the corporation, so they outlined an enhanced scrutiny framework to analyze defensive measures and ensure directors were acting as loyal fiduciaries in *Unocal v. Mesa Petroleum Corp*.[43] Later, this test was more clearly transcribed in *Unitrin, Inc. v. American General Corp*:[44]

> This Court has recognized that directors are often confronted with an inherent conflict of interest during contests for corporate control because of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders. Consequently, in such situations, before the board is accorded the protection of the business judgment rule, and that rule's concomitant placement of the

[37] *See generally id.* at 1377–79.

[38] *See generally* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985).

[39] *Id.* at 957.

[40] *Id.* at 954.

[41] *Id.*

[42] *See generally Unitrin*, 651 A.2d at 1390.

[43] *Unocal*, 493 A.2d at 955–57.

[44] *Unitrin*, 651 A.2d at 1361.

> burden to rebut its presumption on the plaintiff, the board must carry its own initial two-part burden:
>
> > First, a *reasonableness test*, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and
> >
> > Second, a *proportionality test*, which is satisfied by a demonstration that the board of directors' defensive response was reasonable in relation to the threat posed.[45]

Courts use this language when reviewing a board's decision to confront hostile bidders with defensive measures. However, as written in *Unitrin,* the language of *Unocal* was never broad enough to deal with "contests for corporate control"[46] when the *board* pursued a sale of the company.[47] This lack of accommodation led the Delaware Supreme Court to re-structure the test in *Revlon v. MacAndrews*[48] to deal with the "omnipresent specter,"[49] in a situation where a board locks up the company into a sale with a preferred bidder instead of getting its shareholders the most money in the marketplace for the company.[50]

ii. The Revlon Zone

The *Revlon* case is famous for its application of enhanced scrutiny to the board of directors of Revlon, Inc. in a sale of the Revlon corporation in an open market auction with the owner of Pantry Pride, Ron Perelman.[51] Revlon locked up the sale of their company to a "white-knight,"[52] Forstmann Little & Co., even

[45] *Id.* at 1373 (quoting *Unocal*, 493 A.2d at 955).

[46] *Id.*

[47] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) (noting that the board failed its *Unocal* duties but did not directly answer whether the conduct was unreasonable or disproportionate – instead claiming broadly that "the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions.").

[48] *Id.*

[49] *Id.* at 181.

[50] *See id.* at 183–85.

[51] *Id.*

[52] *Id.* at 184.

though by all metrics Perelman's offers exceeded any other bidder's.[53] This was done in part because the CEO and chairman of the board of Revlon's board, Michel Bergerac, would not deal fairly with Perelman, leading the court to conclude that "[a]ll subsequent Pantry Pride overtures were rebuffed, perhaps in part based on Mr. Bergerac's strong personal antipathy to Mr. Perelman."[54]

The Delaware Supreme Court began with a discussion of the *Unocal* standard over the poison pill enacted by the Revlon board. The court opined 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 corporation and its shareholders…'"[55] However, when "it became apparent to all that the break-up of the company was inevitable,"[56] the Court found that "the duty of the board . . . 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."[57] Famously, the court wrote that "[t]he 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."[58]

The Court separated the analysis from *Unocal* in part because under *Unocal*, directors could consider constituencies other than stockholders in making a decision.[59] Under these circumstances, when an active auction was in progress, it was "inappropriate"[60] to consider any interests other than the best price for the shareholders.[61] Since the Revlon board was instead concerned about making a deal with Forstmann Little & Co. (even though Perelman was the highest bidder) they had breached their duty of loyalty.[62]

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[53] *Id.* at 177–80.

[54] *Id.* at 176.

[55] *Id.* at 180 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

[56] *Id.* at 182.

[57] *Id.*

[58] *Id.*

[59] *Id*. *See also Unocal*, 493 A.2d at 955.

[60] *Revlon*, 506 A.2d at 182.

[61] *Id.*

[62] *Id.* at 184 ("Favoritism for a white knight to the total exclusion of a hostile bidder might be justifiable when the latter's offer adversely affects shareholder interest, but when bidders make relatively similar offers, or dissolution of the company becomes inevitable, the directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions.").

The *Revlon* decision was unclear about whether it was a breach of the duty of loyalty or a duty of care led to the decision.[63] While the case expresses concerns that the directors breached their duty of loyalty in neglecting Perelman,[64] the opinion mixes the duty of care in its final paragraph, stating with respect to the lock-ups that granted Forstmann Little & Co. the company, "[n]o such defensive measure can be sustained when it represents a breach of the directors' fundamental duty of care."[65] Looking back on the opinion, its author, Justice Moore, stated in a panel interview that the opinion properly should have focused on the duty of loyalty and not have focused on any discussion on a breach of the duty of care.[66] Interestingly, although several decades later, this case has splintered into something distinct from *Unocal*, the opinion is rife with evidence that under the facts, the board's failure to find the best price was somehow a failure of the *Unocal* standard.[67]

These inconsistencies have sparked debate in three areas: where *Revlon* fits within *Unocal*; whether *Unocal* applies to one type of corporate scenario, and *Revlon* to another; or whether, as this paper argues, *Revlon's* concerns can be merged into the *Unocal* test to solve for all "contests for corporate control."[68]

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[63] University of Pennsylvania Carey School of Law, *The Foundations of Delaware Corporate Law: Revlon v. MacAndrews & Forbes Holdings, Inc.*, YouTube, (Feb. 17, 2020), https://www.youtube.com/watch?v=dFbn4fxivrU&t=1281s. Justice Andrew Moore (author of *Revlon* opinion speaking reflectively on its holding) (commentary beginning at 1:05:00) ("I think we should have just stayed with the duty of loyalty without injecting issues of care because that's what it really came down to. Bergerac set the tone. He violated the duty of loyalty immediately by saying he was not going to deal with someone he didn't personally like. And you can't do that when you decide to sell the company.").

[64] *See Revlon*, 506 A.2d at 184.

[65] *Id.* at 185 (citing Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985)).

[66] University of Pennsylvania Carey School of Law, *The Foundations of Delaware Corporate Law: Revlon v. MacAndrews & Forbes Holdings, Inc.*, YouTube, (Feb. 17, 2020), https://www.youtube.com/watch?v=dFbn4fxivrU&t=1281s. Justice Andrew Moore (author of Revlon opinion speaking reflectively on its holding) (commentary beginning at 1:05:00).

[67] *See Revlon*, 506 A.2d at 184 ("[T]he directors cannot fulfill their enhanced *Unocal* duties by playing favorites with the contending factions."); *id.* ("The no-shop provision, like the lock-up option, while not *per se* illegal, is impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder."); *id.* ("[T]he action cannot withstand the enhanced scrutiny which *Unocal* requires of director conduct.").

[68] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

III. ENTERING INTO THE *REVLON ZONE*

According to the Delaware Supreme Court, there are at least three scenarios when a company enters the *Revlon Zone*:

> The directors of a corporation have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders, 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. In the latter situation, there is no sale or change in control when [c]ontrol of both [companies] remain[s] in a large, fluid, changeable and changing market.[69]

Generally speaking, these conditions trigger a duty to achieve the best price for the shareholders in the inevitable sale of the company.[70] Analyzing whether a company's actions have attached *Revlon* duties is fact-specific and considers the market conditions, whether the board initiated the transaction, and whether the company's market led to a situation where the board had no other choice but to sell.[71]

That *Revlon* applies to unique scenarios does not necessarily mean it requires its own analysis or framework to address enhanced scrutiny. The fact that *Revlon's* language altered the already foundational framework in *Unocal* leads to much confusion when one reviews a transaction. Depending on how a case is framed, it is easy to call a *Revlon* case a *Unocal* case, and vice versa.

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[69] Arnold v. Soc'y for Sav. Bancorp, Inc., 650 A.2d 1270, 1289–90 (Del. 1994) (citations, quotations omitted).

[70] *See, e.g.*, Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 1994).

[71] *Arnold*, 650 A.2d at 1289–90.

IV. PLACING REVLON DUTIES WITHIN A UNOCAL ANALYSIS FOR SPECIAL CASES

A. Revlon Primarily Acts to Prevent Disloyal Defensive Actions

Revlon and *Unocal* both do the same thing. Both cases focused on the reasonableness and proportionality of a board's action under unique circumstances. In *Revlon*, a major question was whether it was reasonable to allow Forstmann Little & Co.'s bid to go through and ignore the higher bidder to the detriment of the shareholders.[72] Part of the court's reasoning with respect to the board's action was its attention to certain noteholders instead of to the shareholders.[73] The court then shifted its focus to *Revlon* duties. However, in *Revlon*, the court did not dismiss *Unocal* as irrelevant: it claimed that the Revlon board actually failed *Unocal* by not achieving the highest price, but did not address how *Revlon* duties fit within the *Unocal* test that outlines how enhanced scrutiny should work.[74]

But the question remains – why was the *Unocal* language not enough to bring these directors to justice? Was it really that – like in the other *Revlon* cases – *Unocal* did not exactly apply to the unique facts at issue, or was it something lacking in the *Unocal* language itself? The very act of preferring one bidder to the detriment of another is defensive in nature.[75] If a board of directors is in a live auction and picks their preferred bidder for any other reason than the best value to the shareholders, they should not be subject to only *Revlon,* or only *Unocal*, but both as one.

[72] *Revlon*, 506 A.2d at 180–82.

[73] *Id.* at 182–83.

[74] *Id.* at 184.

[75] *See generally* Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("This Court has found that certain fact patterns demand certain responses from the directors. Notably, in *Revlon* we held that when several suitors are actively bidding for control of a corporation, the directors may not use defensive tactics that destroy the auction process.").

B. The Current State of Revlon

Courts have bent over backwards in recent years to cabin *Revlon's* application.[76] Courts initially expanded the duty from achieving the "best price"[77] to a more broad definition of "best available price."[78] More recently, Courts have lessened the burden even further, arguing that "[i]nstead of questioning whether disinterested, independent directors did everything that they (arguably) should have done to obtain the best sale price, the inquiry should have been whether those directors utterly failed to *attempt* to obtain the best sale price."[79] The Delaware Supreme Court seems to be moving this way. However, it needs to expand its scope of inquiry but also give boards some deference in complex and turbulent financial situations that end in a sale. Limiting a court's inquiry into the "best price"[80] has the unfortunate consequence of arresting its acknowledgement of other market factors that go into a board's rational business judgment. What if a preferred bidder came to the table and offered a lower share price than a non-preferred bidder, but included stock options with the potential to waterfall to greater value later? What if the preferred bidder was only marginally lower than the highest bidder, but had a greater track record of financial responsibility and was more likely to come through with the money in the back end on the closing date? What if, as is a growing area of corporate governance, a B-Corporation decides to go with a lower bidder because the highest bidder contravenes its moral mission statement? Would the boards of these companies – assuming they are in the *Revlon Zone* – face a claim that they breached their duties as fiduciaries?

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[76] *See generally* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) ("Directors' decisions must be reasonable, not perfect. 'In the transactional context, [an] extreme set of facts [is] required to sustain a disloyalty claim premised on the notion that disinterested directors were intentionally disregarding their duties.'" (quoting In re Lear Corp. S'holder Litig., No. 2728-VCS, 2008 WL 4053221, at *11 (Del. Ch. Sept. 2, 2008)); Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 312 (Del. 2015) ("First, *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. They were not designed with post-closing money damages claims in mind . . . ."); *Corwin*, 125 A.3d at 312–13 ("Finally, when a transaction is not subject to the entire fairness standard, 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.").

[77] *Revlon*, 506 A.2d at 182.

[78] *See Lyondell*, 970 A.2d at 242.

[79] *Id.* at 244 (emphasis added).

[80] *Revlon*, 506 A.2d at 182.

Courts, therefore, already felt the need to expand the *Revlon* inquiry into something resembling a reasonableness test.[81] Of course, reasonableness was always at the center of *Unocal*. Ignoring these similarities to create a parallel line of cases attempting to solve the same problem adds confusion to an intentionally fluid area of law.[82] *Unocal* traditionally applies to defensive measures, but is that the end of its usefulness? Could a board satisfy *Revlon* but fail *Unocal*? It is certainly possible for a board to satisfy the original *Unocal* language but nonetheless fail *Revlon*.[83] Then again, the very facts that triggered the *Revlon* decision involved a board that attempted to pick between bidders, or otherwise shut higher bidders out.[84] If a board puts itself up for sale, it theoretically has not violated any duty. It may have discussions with potential suitors and may even prefer one suitor over another. However, consider the following scenario, which when looked at in two different ways, produces the same result but can apply different case law:

[81] In re Fam. Dollar Stores, Inc. S'holder Litig., No. 9985–CB, 2014 WL 7246436, at *12 (Del. Ch. Dec. 19, 2014)

> There is no single blueprint for directors to act to obtain the highest value reasonably attainable. No court can tell directors exactly how to accomplish that goal, because they will be facing a unique combination of circumstances, many of which will be outside their control. Under *Revlon,* directors are generally free to select the path to value maximization, so long as they choose a reasonable route to get there. The burden is on the defendant directors to show that, when they made the decision(s) at issue, they were adequately informed and acted reasonably (internal citations and quotations omitted);

Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("A stereotypical approach to the sale and acquisition of corporate control is not to be expected in the face of the evolving techniques and financing devices employed in today's corporate environment" (citing Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1286–88 (Del. 1988)); In re Smurfit-Stone Container Corp. S'holder Litig., No. 6164–VCP., 2011 WL 2028076, at *12 (Del. Ch. May 20, 2011), *as revised* (May 24, 2011) ("When a board leads its corporation into the so-called *Revlon* territory, its subsequent actions will be reviewed by this Court not under the deferential BJR standard, but rather under the heightened standard of reasonableness.").

[82] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985).

[83] *See Revlon*, 506 A.2d at 184–85.

[84] *Id.*

> *Scenario one*: a board places itself for sale, and places itself within the *Revlon Zone*. Two bidders attempt to gain control in a hostile way. Preferring one bidder over the other, the board decides to implement a poison pill to ward off the non-preferred bidder, and binds itself to the preferred suitor because the preferred suitor is allowed to push through and buy up as many shares as needed. This is a defensive measure to ward off a hostile bidder, and therefore *Unocal* would apply to the board's action. *Revlon* may also apply if the preferred bidder does not offer the best value.[85]
>
> *Scenario two*: a board places itself for sale, and places itself within the *Revlon Zone*. Two bidders attempt to gain control in a hostile way. Preferring one bidder over the other, the board contractually binds itself to the preferred bidder through lock-ups, no-shops, deal cancellation fees in gross excess in comparison to their market capitalization, etc. Since there is no tomorrow for the company, the board is subject to *Revlon* duties because it must act as an auctioneer, and therefore could be subject to damages under *Revlon*. But what of *Unocal*?

In either scenario, the same result has taken place, yet depending on how one looks at the metrics leading up to the end of the story, the legal analysis seems to change. Does it make sense that it is possible to have the same result analyzed through two different lines of cases?

C. Merging the Rationale of Revlon into a Holistic Unocal Lens

Surely, the aim behind the *Revlon* duties is maximizing shareholder value when a deal is struck—something that indicates that there either wasn't a breach of any fiduciary duty, or alternatively that it doesn't matter because the shareholders were treated as well as possible based on the value received.[86] There is no need from a textual construction standpoint to separate the duty to achieve the highest value from *Unocal's* reasonable proportionality test. If no deal takes place but defensive measures were taken that raise a question of "omnipresent specter"[87] then under *Unocal* a court inquires into the reasonableness of the threat and the proportionality of the board's response.[88] Under proportionality, a court

[85] *See, e.g.*, *Revlon*, 506 A.2d at 182–83.

[86] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 239–41 (Del. 2009).

[87] *Unocal*, 493 A.2d at 954.

[88] Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1373 (Del. 1995).

should be looking to see whether the board's actions were draconian in the common law sense of the word—whether the board's actions were either preclusive or coercive towards the measures taken.[89] The same question should arise when a board carries out a transaction in the *Revlon Zone*. Delaware courts should determine whether the threat that prompted the sale or shift into the *Revlon Zone* was reasonable (using a similar "reasonable investigation"[90] and "good faith"[91] inquiry to that in *Unocal*,[92] and then finally review whether the price is proportional to the value of the company. Usually, a sale to the highest bidder in pure auction conditions with all other factors neutral would satisfy this test. Giving discretion in how *Unocal* can be used, applied, and reshaped is key to its very existence and continued relevance, as the Delaware Supreme Court explained in *Paramount*:

> The usefulness of Unocal as an analytical tool is precisely its flexibility in the face of a variety of fact scenarios. Unocal is not intended as an abstract standard; neither is it a structured and mechanistic procedure of appraisal. Thus, we have said that directors may consider, when evaluating the threat posed by a takeover bid, the inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on constituencies other than shareholders ... the risk of nonconsummation, and the quality of securities being offered in the exchange. The open-ended analysis mandated by Unocal is not intended to lead to a simple mathematical exercise: that is, of comparing the discounted value of Time–Warner's expected trading price at some future date with Paramount's offer and determining which is the higher. Indeed, in our view, precepts underlying the business judgment rule militate against a court's engaging in the process of attempting to appraise and evaluate the

[89] *Id.* at 1373–74.

[90] *Id.* at 1375.

[91] *Id.*

[92] *See, e.g.*, *id.* ("The first aspect of the *Unocal* burden, the reasonableness test, required the Unitrin board to demonstrate that, after a reasonable investigation, it determined in good faith, that American General's Offer presented a threat to Unitrin that warranted a defensive response.").

> relative merits of a long-term versus a short-term investment goal for shareholders.[93]

The issue with acknowledging a distinct *Revlon duty* is that it narrows the focus of the court's analysis. Recall the fundamental doctrine in analyzing board decisions is the business judgment rule.[94] Courts do not normally ask questions about why a board chose to do what it did—nor should it. However, with fiduciary duties come judicial scrutiny. There are times when actions are so significant to the control of the company that enhanced scrutiny is required.[95] Adopting a poison pill is one.[96] Selling the company is another.[97] The language derived from *Unocal* would likely refer to any of those actions as "contests for corporate control."[98] In a volatile market, selling the company to the highest bidder can satisfy *Revlon*.[99] What if in getting the "best price"[100] per share in a sale spurred by personal gain, the directors were thrown out of the plane with golden parachutes? Under that logic, the directors could satisfy their *Revlon* duties, yet since there was no "defensive measure" initiated like a poison pill, *Unocal* could be outside the court's analysis. Yet everyone would know that the directors likely were tempted to act not in the best interests of the company but to pad their own pockets – meaning enhanced scrutiny should apply.[101]

i. Prior Harmonization Attempts

Some Delaware cases have held that *Unocal* and *Revlon* "govern … every case in which a fundamental change of corporate control occurs or is

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[93] Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1153 (Del. 1989) (internal citations omitted).

[94] *Unitrin*, 651 A.2d at 1373.

[95] *See id.* at 1373–74.

[96] *Id.* at 1376.

[97] *See* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

[98] *Unitrin*, 651 A.2d at 1373 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

[99] *Revlon*, 506 A.2d at 182.

[100] *Id.*

[101] Even though these hypothetical facts may still satisfy entire fairness, there is a certain ethic to forcing the onus on the party that acted out of self-interest to prove their case instead of the non-breaching party.

contemplated."[102] However, it is difficult to square implicit language in *Revlon* that focuses on the actions a board can take to satisfy its duties while the door is still left open to a violation of *Unocal* if in getting the highest current price, the directors acted out of a self-interest. While it may not matter in the long run, since shareholders would be foolish to sue over receiving the highest price possible, it seems important to point out that if – in a board-initiated auction – two competing bids are identical, and the board picks one based off of self-interest, they may satisfy a *Revlon* analysis as originally construed, yet such actions should not pass enhanced scrutiny. It is also true that some cases in the *Revlon* line have attempted to alleviate the discrepancy between *Unocal* and *Revlon*. In *Paramount*, the Delaware Supreme Court held that a two-part test should be used to analyze deals where competing bidders are treated differently:

> [I]n the face of disparate treatment, the court must first examine whether the directors properly perceived that shareholder interests were enhanced. In any event the board's action must be *reasonable* in relation to the advantage sought to be achieved, or conversely, to the threat which a particular bid allegedly poses to stockholder interests.[103]

However, the *Paramount* excerpt above only applies if *disparate treatment* between bidders exists, something easy to spot. Something more difficult to spot is: (1) whether the board achieved the best result in the long-term for shareholders even if the price was not the highest on paper; and (2) whether a board treated all the bidders the same, yet still made a final decision out of a motive other than what is best for the company. If the court in *Revlon* had confined its holding to only all-cash-for-stock sales,[104] it may have prevented much of the ensuing expansion, re-wording, or confusion.

[102] Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 46 (Del. 1994) (quoting Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989)).

[103] *Id.* at 45 (quoting Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1989))

[104] *See Revlon*, 506 A.2d at 177–79.

ii. Acquiring Broader Language

The law here is murky and ever-changing, and that is by the Delaware Supreme Court's design.[105] By adopting the *Unocal* reasonable and proportional language to cases that enter the *Revlon Zone*, Delaware courts can look at factors that are broader than the best or highest price in determining if enhanced scrutiny was satisfied. If the sale process aligns with market conditions, and proportional value was received, then the board's actions should satisfy enhanced scrutiny and fall back under business judgment protection. Normally, a board will likely satisfy this burden if it shows that it received the best value, meaning the cases decided under *Revlon* so far would have held the same, consistent with other enhanced scrutiny cases.

The original impetus for applying the best price duty outlined in *Revlon* was the idea that "when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price."[106] The problem is, when a trustee sells a trust asset, it is almost always for cash and cash *alone*. If such a cash transaction existed without any other security, warrant, debenture, future right, property interest, or other financial instrument, the doctrine as it stood in *Revlon* makes sense to a corporate sale. However, not all corporate sales are all-cash transactions. Where more complex securities and contractual rights are implemented into the deal, it is only fair to have a Delaware Court evaluate the merits of a deal's complex financial instruments before declaring that a board of directors violated its fiduciary duty. Further, other niche areas of fiduciary duty threshold issues have been folded into *Unocal* in recent Delaware decisions, and re-tooling the language here would be consistent with that trend.[107]

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[105] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985) ("However, our corporate law is not static. It must grow and develop in response to, indeed in anticipation of, evolving concepts and needs."); *see generally* Paramount Commc'ns, Inc v. Time Inc., 571 A.2d 1140, 1153 (Del. 1989).

[106] Paramount Commc'ns Inc. v. Time Inc., 1989 WL 79880, at *25 (Del. Ch. July 14, 1989), *aff'd sub nom.* Literary Partners, L.P. v. Time Inc., 565 A.2d 280 (Del. 1989), and *aff'd*, 565 A.2d 280 (Del. 1989), and *aff'd sub nom.* In re Time Inc. S'holder Litig., 565 A.2d 281 (Del. 1989) (internal quotations omitted); *see also* Strine, *supra* note 6, at 942.

[107] *See, e.g.*, Coster v. UIP Cos., Inc., 300 A.3d 656, 672 (Del. 2023) ("Experience has shown that *Schnell* and *Blasius* review, as a matter of precedent and practice, have been and can be folded into *Unocal* review to accomplish the same ends – enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control.").

Merging the two doctrines would not eliminate the board's "auctioneer" duty to obtain the best value, but would allow a board to explain any long-term strategies it considered, such as taking a lower cash bid that would ultimately yield higher value in the long run because of other financial instruments laced in the deal. Alternatively, merging the two would give judges the ability to scrutinize a choice to sell to the highest bidder (among many identical or closely identical bidders) if the board picked that bidder for a reason other than the best interest of the shareholders. This is a scenario that should yield enhanced scrutiny but, until now, could slip through *Revlon* even though it would have been a disloyal act.

CONCLUSION

Merging the language of *Revlon* into a proper *Unocal* analysis would harmonize decades of M&A jurisprudence, and would ensure the two doctrines align to accomplish a determination of reasonableness.

This would allow courts to analyze a greater breadth of factors and would enable boards to demonstrate its consideration of other aspects of a deal beyond best price or best value on paper while still acting as corporate fiduciaries. A multitude of changing market, contractual, and financial conditions can drive a board to make choices that may look conflicted but are not. In adopting the language directly from *Unocal*, *Revlon* cases can have a more holistic lens in which to determine whether fiduciary duties were met. This would link the underlying concerns of *Unocal* and *Revlon*—breaches of loyalty by fiduciaries—together in a way that would allow: courts more discretion to analyze a board's action; boards the ability to explain the motives behind their actions; and Delaware M&A jurisprudence the ability to flesh out one framework of language to apply in future cases in a uniform way.