CORPORATE WASTE CROSSING THE RUBICON: THE CASE FOR EXECUTIVE COMPENSATION AWARD ENHANCED SCRUTINY APPLIED REVIEW

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Executive compensation has recently made headlines, with the Delaware Court of Chancery's decision rescinding Elon Musk's $55.8 billion pay package in Tornetta v. Musk. When filing suit challenging executive compensation, shareholders face several obstacles in their claims of breaches of fiduciary duty. The doctrine of waste was supposed to be a safety valve providing shareholders residual protections to police broad director discretion granted by the business judgment rule. However, the corporate waste doctrine has proven to be of limited utility for shareholders and failed to be the safety valve it was meant to be. It is time to provide shareholders with an alternative. This paper will discuss how a possible solution is for the Delaware courts to change to the presumptive standard of review for executive compensation packages. It will propose the Compensation Award Enhanced Scrutiny Applied Review ("CAESAR Doctrine"), which applies Delaware's intermediate enhanced scrutiny standard to executive compensation decisions. This paper will discuss how enhanced scrutiny standard of review applied in cases like Unocal and QVC can provide an appropriate framework to address the shortfalls of the corporate waste doctrine.

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INTRODUCTION

The trend over the past several decades has been the continuous rise in public company valuation in terms of market capitalization.[1] Accordingly, there

[1] *See* Randall S. Thomas & Kenneth J. Martin, *Litigating Challenges to Executive Pay: An Exercise in Futility?*, 79 WASH. U. L. Q. 569, 569 (2001); Jack Kelly, *The Meteoric Rise in CEO Compensation*, FORBES (Dec. 27, 2024), https://www.forbes.com/sites/jackkelly/2024/12/27/the-meteoric-rise-in-ceo-compensation-how-executive-pay-surged-over-1000-since-1978/ [https://perma.cc/P4CR-EBHJ].

has been a dramatic increase in executive pay levels at publicly held corporations.[2] "Corporate boards have awarded Chief Executive Officer (CEO) pay packages valued at hundreds of millions of dollars."[3] Excessive executive compensation has attracted attention in recent years due to high-profile lawsuits involving some of the world's largest corporations like Citigroup, Walt Disney, and Tesla.[4]

Companies originally introduced equity awards as a form of compensation, through shares and options, to align the executive's and company's incentives by allowing the executive to profit personally when the company's shares appreciate.[5] While executives experience real gains, the exercise of stock options and share award issuance causes a loss of value to the stockholders in the form of dilution.[6] In essence, stock option compensation involves a wealth transfer "from the firm to the executive employees at the expense of other stockholders."[7] Directors who approve these wealth transfers justify them as pay for performance.[8] Especially in cases where corporations suffer from the executive's actions, shareholders find it "unfair when executives are highly compensated while the stock price plummets."[9] Shareholders, especially institutional investors, find that large pay packages are often accompanied by little or no improvement in stock prices or other financial measures of success.[10] Shareholder lawsuits challenging excessive executive compensation have often involved a dramatic decline in the company's stock price.[11] However, *Tornetta v. Musk* was unique because it

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[2] *See* Thomas & Martin, *supra* note 1*,* at 569; Kelly, *supra* note 1.

[3] Thomas & Martin, *supra* note 1, at 569.

[4] *See, e.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 111 (Del. Ch. 2009); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 745 (Del. Ch. 2005); Tornetta v. Musk, 310 A.3d 430, 445 (Del. Ch. 2024) [hereinafter Tornetta II], *appeal docketed,* No. 534,2024 (Del. 2024).

[5] Robert R. Bliss, *Common Sense About Executive Stock Options*, FED. RESERVE BANK OF CHI.: CHI. FED. LETTER, NO.188 (Apr. 2003), https://www.chicagofed.org/publications/chicago-fed-letter/2003/april-188 [https://perma.cc/UWN9-HFZF].

[6] *See id.*

[7] *See id.*

[8] *See* Thomas & Martin, *supra* note 1, at 569.

[9] *See* Steven C. Caywood, *Wasting the Corporate Waste Doctrine: How the Doctrine Can Provide a Viable Solution in Controlling Excessive Executive Compensation*, 109 MICH. L. REV. 111, 113 (2010).

[10] *See* Thomas & Martin, *supra* note 1, at 569.

[11] *See, e.g.*, *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 113–14 (Del. Ch. 2009) (During the Great Financial Crisis, Citigroup's stock price dropped significantly, at one point trading below book value).

involved a challenge to the executive's compensation even though the company's stock price experienced a meteoric rise.[12]

When challenging executive compensation as excessive in court, shareholder plaintiffs allege breaches of the fiduciary duties of care and loyalty, as well as corporate waste. "A court determines whether directors have fulfilled their fiduciary duties by evaluating the challenged decision through the lens of the applicable standard of review."[13] But do shareholders have standing to challenge executive compensation? In general, shareholders cannot attack executive compensation decisions on duty of care and loyalty grounds.[14] The corporate waste doctrine—which was supposed to provide shareholders protection from extreme director discretion—has not provided shareholders the utility and safety it was supposed to.[15] Additionally, Delaware courts are reluctant to find corporate decisions wasteful because they believe courts are "ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard or, *ex post*, to judge appropriate degrees of business risk."[16] Corporate directors' decision to award an executive compensation package can also be tainted with structural and situational conflicts that may undermine the decisions of even independent and disinterested directors, especially if the executive is a "superstar CEO."[17] If the circumstances call for it, excessive compensation should be reviewed in hindsight because the effects of corporate decisions made by executives can only be scrutinized after the effects of stock price reactions have taken place.[18]

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[12] *See Tornetta II*, 310 A.3d 430, 447 (Del. Ch. 2024) (Musk's pay package was awarded because he met the milestones required by the compensation package); Ari Levy & Lora Kolodny, *Tesla's IPO was 15 years ago. The stock is up almost 300-fold since then*, CNBC (June 29, 2025).

[13] *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013).

[14] *See infra* Section II.D.

[15] *See infra* Section II.E.

[16] Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997); *see also In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 746 (Del. Ch. 2005) ("Because courts are ill equipped to engage in *post hoc* substantive review of business decisions, the business judgment rule 'operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.'") (quoting Cede & Co v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993)).

[17] *See* Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353, 1356–57 (2023).

[18] *Compare*, *for example*, *Tornetta II*, 310 A.3d at 445, *with In re Citigroup Inc.*, Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 111–12 (Del. Ch. 2009) (challenging an executive's compensation package after the fallout of the 2008–2009 Great Financial Crisis).

Because the corporate waste doctrine has failed to be an adequate safety valve against director discretion, this paper proposes that Delaware courts raise the presumptive standard of review for all executive compensation challenges.[19] Judicial review of compensation packages will help ensure that compensation decisions were made for the benefit of stockholders at fair terms rather than just enriching executives without any repercussions to their risky corporate decisions. Delaware Courts should set the presumptive standard of review at enhanced scrutiny, through what this paper is proposing be called the Compensation Award Enhanced Scrutiny Applied Review, or the *CAESAR Doctrine*.[20]

Section I of this paper begins with a discussion of an upset shareholder's options, then describes the factual background of the *Tornetta v. Musk* and *Brehm v. Eisner* decisions, and concludes with a brief summary of the current state of the corporate waste doctrine.[21] It will also introduce the concept of a "superstar CEO" and discuss how executive compensation can function as a defensive measure employed by a company.[22] Then, Section II examines different contexts and standards of review applied in excessive compensation litigation, hurdles faced by shareholder plaintiffs in litigation, issues with the corporate waste doctrine, and possible solutions to address the shortfalls of corporate waste.[23] It will conclude by proposing a change in the presumptive standard of review of executive compensation cases and examining each standards' merits.[24] Lastly, Section III proposes the *CAESAR Doctrine*, which seeks to set the presumptive standard of review at enhanced scrutiny for all executive compensation challenges.[25] Section III will aim to provide guidelines on how Delaware Courts can apply enhanced scrutiny in the executive compensation context and how the standard is an appropriate tool to address conflicts faced by boards of directors, especially in their

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[19] *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) ("[C]orporate directors have a fiduciary duty to act in the best interest of the corporation's stockholders."); *see also In re Citigroup Inc*., 964 A.2d at 111–12 (challenging the CEO's multi-million dollar compensation package whose failures as CEO were allegedly responsible, in part, for billions of dollars of losses at Citigroup).

[20] *See infra* Section III; this paper involved a survey of relevant executive compensation case law and academic literature. While it is possible that discussions proposed in this paper exist, no instances of enhanced scrutiny being proposed or applied in the executive compensation context have been found during the research process.

[21] *See infra* Section I.

[22] *See infra* Sections I.C, I.D.

[23] *See infra* Section II.

[24] *See infra* Sections II.G, II.H.

[25] *See infra* Section III.

dealings with a superstar CEO.[26] Although compensation challenges can be brought against public companies and closely held corporations, this paper will only discuss public company compensation litigation.[27]

I. BACKGROUND

This Section aims to set the groundwork for shareholders' options in challenging executive compensation packages. It first outlines shareholders' options in influencing executive compensation. Next, it will describe the facts of two seminal Delaware cases on executive compensation: *Brehm v. Eisner*, involving Walt Disney Co., and *Tornetta v. Musk*, involving Tesla Inc.[28] Later, this Section will briefly discuss how compensation terms like the golden parachute can act as a defensive measure from corporate takeovers. Lastly, this Section will briefly discuss the corporate waste doctrine to lay a foundation for a deeper discussion of corporate waste in Section II.[29]

A. Shareholders' Options in Influencing Excessive Executive Compensation

An upset shareholder has three basic ways to influence executive pay decisions: voting, selling, and suing.[30] Shareholders' ability to use their voting powers to reduce executive pay levels, for example, involves removing directors and proposing new ones through a proxy contest, which is costly.[31] "Shareholder proposals using Rule 14a-8 frequently attack executive compensation practices . . . [but] these proposals seldom gain more than ten percent of the votes cast at shareholder meetings."[32] "Shareholders frequently have the right to vote on management proposals for stock option plans."[33] Although level of shareholder opposition to compensation plans has increased, their votes do not appear to have

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[26] *See infra* Sections III.

[27] *See* Thomas & Martin, *supra* note 1, at 571 (a study was conducted where scholars analyzed a sample of cases challenging executive compensation levels at both publicly and closely held corporations).

[28] *See* Brehm v. Eisner, 746 A.2d 244, 249–53 (Del. 2000); Tornetta v. Musk, 310 A.3d 430, 445 (Del. Ch. 2024).

[29] *See infra* Section II.E.

[30] *See* Thomas & Martin, *supra* note 1, at 569–70 (citing Robert B. Thompson, *Shareholders as Grown-Ups: Voting, Selling, and Limits on the Board's Power to "Just Say No,"* 67 U. CIN. L. REV. 999 (1999)).

[31] *See id.* at 570.

[32] *See id.*

[33] *Id.*

slowed the rapid growth in stock option awards.[34] "Selling decisions can be effective if large numbers of shareholders dump a company's stock due to concerns about its pay practices, but this is only feasible for investors whose portfolios have sufficient flexibility."[35] This form of selling is likely impossible for institutional investors whose holdings are indexed or have other holding requirements.[36] Lastly, a shareholder could sue.[37] Shareholders will sue in the company's state of incorporation, making Delaware, the home to many publicly traded corporations, a hotbed for litigation.[38] Plaintiffs may bring either direct or derivative suits, claiming breaches of duty of care, breaches of duty of loyalty, and corporate waste when the appropriate facts support them.[39] "A court [then] determines whether [the] directors have fulfilled their fiduciary duties by evaluating the challenged decision through the lens of the applicable standard of review."[40]

B. *In re Walt Disney Co. Derivative Litigation*

Shareholders sued Walt Disney Company for its decision to hire and ultimately terminate Michael Ovitz after approximately a year's worth of employment.[41] Events lined up such that by mid-July 1995, Michael Eisner's efforts to hire Michael Ovitz were well underway.[42] Irwin Russell, the chairman of Disney's compensation committee, assumed the lead role in negotiating the financial terms of Ovitz's contract per Eisner's direction.[43] Russell eventually found out that Ovitz was making approximately $20 to $25 million a year from CAA, his talent agency, and owned 55% of the company.[44] The focal point of this case was the non-fault termination ("NFT") provision in Ovitz's employment agreement.[45] In the event Disney fired Ovitz for any reason other than gross negligence or malfeasance, Ovitz would be entitled to: a non-fault payment which

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[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *See id.* at 570–71.

[38] *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 249 (Del. 2000); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 697 (Del. Ch. 2005); *see also* Thomas & Martin, *supra* note 1, at 571.

[39] Thomas & Martin, *supra* note 1, at 571.

[40] *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013).

[41] *See In re Walt Disney Co.*, 907 A.2d at 697.

[42] *Id.* at 702.

[43] *Id.* at 702.

[44] *Id.*

[45] *Id.* at 703–04.

consisted of his remaining salary; $7.5 million a year for any unaccrued bonuses; the immediate vesting of his first tranche options; and a $10 million cash out payment for the second tranche options.[46]

As negotiations progressed, Russell authored a case study commenting on what he believed was an extraordinary level of executive compensation.[47] Russell recognized Ovitz's success but cautioned that the proposed compensation under his agreement could raise strong criticism because the salary was at the top level for any corporate officer, significantly above the CEO's salary, and the number of stock options was far beyond the standards applied within Disney and Corporate America.[48] Disney decided to hire Graef Crystal, an executive compensation consultant particularly well-known within the industry for lambasting the extravagant compensation paid to America's top executives.[49] During the hiring process, Disney's compensation committee was provided a term sheet with the key terms of Ovitz's employment agreement, and directors with relevant information from the negotiations and compensation consultant gave the committee a presentation.[50]

Eventually, Ovitz was hired at Disney, and the company's stock price rose 4.4%, adding more than $1 billion to the company's market capitalization.[51] However, it was quickly discovered that Ovitz did not fit in with the Disney culture, and he failed to adapt.[52] Ovitz's relationship with Eisner and with other Disney executives and directors continued to deteriorate through September 1996.[53] Disney eventually officially terminated Ovitz without cause, and he received a lucrative severance package.[54]

Chancellor Chandler ultimately decided the decisions to hire Ovitz and the compensation committee's approval of his pay package were entitled to the business judgment rule because the decisions were neither grossly negligent nor made in bad faith.[55] He also concluded Disney did not commit waste in terminating Ovitz and paying the NFT, because Ovitz could not be terminated for cause and the Board credibly testified that the Company would be better off without Ovitz,

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46 *Id.* at 704.

47 *Id.*

48 *Id.*

49 *Id.* at 704–05.

50 *Id.* at 705, 708–09.

51 *Id.* at 708–10.

52 *Id.* at 713–14.

53 *Id.* at 724.

54 *Id.* at 736–37.

55 *Id.* at 760.

which meant the exchange did not constitute such a "one sided" nature that the waste standard required.[56] Chancellor Chandler wrote that courts are ill equipped to engage in *post hoc* substantive review of business decisions, and the business judgment rule "operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation."[57] He emphasized that when a plaintiff fails to rebut the presumption of the business judgment rule through gross negligence or bad faith, she is not entitled to any remedy, be it legal or equitable, unless the transaction constitutes waste.[58]

The Court contrasted Disney's board member's actions with the Board in *Van Gorkom*.[59] Unlike the board in *Van Gorkom*, while the Disney board did not follow best practices, the compensation committee was well-informed.[60] The board of directors did not act in bad faith and were at most ordinarily negligent, which is insufficient to constitute a violation of the duty of care.[61] Chancellor Chandler emphasized that Delaware law does not —indeed, the common law cannot—hold fiduciaries liable for a failure to comply with the aspirational ideal of best practices.[62] But, he hoped that his opinion would serve as a guide for future officers and directors.[63]

C. Tornetta v. Musk

In *Tornetta v. Musk*, the Delaware Court of Chancery rescinded Elon Musk's pay package, which had a maximum value of $55.8 billion and a grant date fair value of $2.6 billion.[64] At the motion to dismiss stage of litigation, Vice Chancellor Slights denied Tesla's motion to dismiss but dismissed the plaintiff's waste claim.[65]

1. Superstar CEO

In her post-trial opinion of *Tornetta v. Musk*, Chancellor McCormick

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[56] *Id.* at 759.
[57] *Id.* at 746.
[58] *Id.* at 747.
[59] *Id.* at 769.
[60] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 57 (Del. 2006).
[61] *In re Walt Disney Co.*, 907 A.2d at 760.
[62] *Id.* at 697.
[63] *Id.* at 698.
[64] *See* Tornetta v. Musk, 310 A.3d 430, 445 (Del. Ch. 2024).
[65] *See* Tornetta v. Musk, 250 A.3d 793, 812–14 (Del. Ch. 2019) [hereinafter *Tornetta I*].

described Elon Musk as a paradigmatic "superstar CEO" who was very powerful within Tesla.[66] One group of scholars defines superstar CEOs as individuals who directors, investors, and markets believe have charismatic power, unique vision, or other extraordinary qualities that set them apart from ordinary CEOs and make a unique contribution to a company's value.[67] CEOs might act strategically to make themselves uniquely valuable to a specific company by making firm-specific investments or investing in assets that have a higher value under the CEO than under a different manager.[68] Superstar CEOs are often, but not always, owners of a significant equity stake.[69] Many are also founders.[70]

2. *Applying the Entire Fairness Standard because Elon Musk Was a Controller*

Chancellor McCormick emphasized that CEO superstardom is relevant to controller status because the belief in the CEO's singular importance shifts the balance of power between management, the board, and the stockholders.[71] According to her, this shift in the balance of power can undermine Director independence.[72] She clarified that a CEO's value to a company alone does not make the CEO a controlling stockholder.[73] In the case of Elon Musk, the facts aligned leading to her conclusion that Musk was a controlling stockholder.[74]

When it came to a superstar CEO's compensation, the Chancellor wrote that it is imperative for a company to employ robust protections for minority stockholders.[75] Having found that Musk was a conflicted controlling shareholder, Chancellor McCormick applied the entire fairness standard of review, which requires a showing of fair process and price.[76] Due to disclosure deficiencies, Tesla failed to show that the stockholder vote was fully informed, and thus, it bore the burden of proving that the pay package approval met the entire fairness standard of review.[77]

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[66] *See Tornetta II*, 310 A.3d at 446 (citing Hamdani and Kastiel, *supra* note 17).
[67] Hamdani & Kastiel, *supra* note 17, at 1366–67.
[68] *Id.* at 1367–68.
[69] *Id.* at 1375.
[70] *Id.* at 1376.
[71] *See Tornetta II*, 310 A.3d at 507.
[72] *Id.*
[73] *Id.* at 508 n.632.
[74] *Id.* at 497–513.
[75] *Id.* at 507–08.
[76] *Id.* at 446, 497–513.
[77] *See id.* at 446, 526.

In her entire fairness analysis, the Chancellor concluded that the process leading to the approval of Musk's compensation was deeply flawed because of Musk's extensive ties to the persons tasked with negotiating on Tesla's behalf.[78] These ties included Musk's connections with members of the compensation committee, including personal relationships involving Musk's previous divorce representation and a vacation with a committee member.[79] Given these conflicts, there was no evidence that suggested an adversarial negotiation between Tesla's Board and Musk concerning any terms.[80] Furthermore, Tesla's compensation committee did not consider alternative award sizes, nor did they conduct a traditional benchmarking analysis.[81] Although Tesla attempted to argue that a comparable analysis would be futile because no CEO was willing to condition his compensation on such audacious milestones, Chancellor McCormick rejected this reasoning.[82] She wrote that Musk's job was the same as every other public CEO and a benchmarking study would have shown the committee what other companies paid their executives.[83] Chancellor McCormick criticized Tesla and Musk for comparing his public company compensation plan with that of a private-equity company because Tesla is not a privately held portfolio company.[84] Chancellor McCormick ultimately held that Tesla failed to show fair process and price, and that rescission was the appropriate remedy for shareholder plaintiffs.[85]

D. Compensation as a Defensive Measure against Takeovers

In the corporate takeover context, golden parachutes generally are understood to be termination agreements providing substantial bonuses and other benefits for managers and certain directors upon a change in company control.[86] Golden parachutes can either modify an existing employment contract or be signed as a separate agreement during the executive's employment at the company.[87]

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[78] *Id.* at 446.
[79] *Id.*
[80] *Id.* at 446, 513.
[81] *See id.* at 446, 511, 517.
[82] *See id.* at 518–19.
[83] *See id.* at 519.
[84] *See id.* at 542.
[85] *See id.* at 513, 534, 544.
[86] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 178 n.5 (Del. 1986).
[87] Peter L. Coffey, *Golden Parachutes: A Perk that Boards Should Scrutinize Carefully*, 67 MARQ. L. REV. 293, 295 (1984).

These agreements are offered to senior executives and key technical employees.[88] The terms of golden parachutes vary, but continuation of benefits for a period of time is found in virtually all such agreements.[89] Many parachutes open when the company experiences a change of control and the executives are terminated after the transaction closes.[90]

Golden parachutes can increase the target firm's price to a hostile bidder, since the target would need to pay the parachute amount when it does not retain the executives post-closing.[91] The increase in acquisition cost can thus be seen as a defensive measure by discouraging or deterring hostile bids for the company.[92] The amount paid to executives is often a fraction of the acquisition price, but it amounts to significant compensation for the executive. This could incentivize executives to take hostile bids seriously and could also create conflicts of interest because the executive receives a benefit that is not shared with the stockholders. For example, in *Revlon v. MacAndrews & Forbes Holdings, Inc.*, the proposed leverage buyout terms included existing management purchasing shares in the new company through the exercise of their golden parachutes, while the other stockholders were cashed out.[93]

E. The Current State of Corporate Waste

Corporate waste is a rare, unconscionable case where directors irrationally squander or give away corporate assets.[94] Corporate waste is very rarely found in Delaware case law because the applicable tests impose such an onerous burden upon plaintiffs.[95] Furthermore, Delaware courts generally defer to the directors when it comes to executive compensation decisions.[96]

The doctrine of corporate waste is theoretically supposed to be a safety valve, providing residual protection for stockholders that polices the outer boundaries of the broad field of discretion the business judgment rule affords

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[88] *Id.* at 296.

[89] *Id.* at 297.

[90] *Id.*

[91] CLAIRE A. HILL, BRIAN JM QUINN & STEVEN DAVIDOFF SOLOMON, MERGERS AND ACQUISITIONS: LAW, THEORY, AND PRACTICE 477 (3rd ed. 2023).

[92] *Id.*; *see also* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 957 (Del. 1985).

[93] Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 178 (Del. 1986).

[94] *See In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 748–49 (Del. Ch. 2005).

[95] *Id.*

[96] *See infra* Section II.E.

directors.[97] In *Brehm v. Eisner*, Chief Justice Veasey wrote that there is an "outer limit" to a director's discretion to make decisions on executive compensation, at which point the compensation is so disproportionately large, making it unconscionable and constituting waste.[98] Due to waste's stringent requirements, judicial deference to board decisions, and limited case law in which courts find waste, no case has explored this outer limit.[99] Because Delaware courts hold that there is no single template for how a corporation should be governed, courts have treated precedent as a means to determine legal standards rather than a benchmark for what specific dollar amount constitutes excessive compensation.[100] Accordingly, dismissal of the waste claim in *Tornetta v. Musk* is unsurprising.

II. ANALYSIS

Excessive compensation litigation can be broken into three categories of cases that utilize different standards of review: 1) compensation challenges involving a conflicted-controlling stockholder, 2) stockholder challenges to directors setting their own compensation, and 3) compensation challenges alleging breaches of fiduciary duties and corporate waste with neither a controlling stockholder nor director self-compensation.[101] This Section will first discuss the requirements and rationales for applying the respective standards of review in each of the litigation categories.[102] Second, this Section will discuss shareholder plaintiffs' challenges in litigating executive compensation.[103] An emphasis will be

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[97] *See* Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1275 (2017); Sample v. Morgan, 914 A.2d 647, 669 (Del. Ch. 2007) (citing *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006)).

[98] *See* Brehm v. Eisner, 746 A.2d 244, 262 n.56 (Del. 2000) (citing Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962)).

[99] *See In re* 3COM Corp. S'holder Litig., No. C.A. 16721, 1999 WL 1009210, at *5 (Del. Ch. 1999) (citing Steiner v. Meyerson, Civ. A. No. 13139, 1995 Del. Ch. LEXIS 95, at *19 (Del. Ch. 1995)) (holding that "there is, of course, no single template for how corporations should be governed and no single compensation scheme for corporate directors").

[100] *See id*; Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 895–902 (Del. Ch. 1999).

[101] *Compare*, *for example*, *Tornetta II*, 310 A.3d 430, 446 (Del. Ch. 2024) (applying entire fairness review to a conflicted-controller transaction), *with* Stein v. Blankfein, C.A. No. 2017-0354-SG, 2019 WL 2323790, at *5 (Del. Ch. 2019) (applying entire fairness review to director self-compensation), *and In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 760 (Del. Ch. 2005) (applying business judgment rule to plaintiffs' failure to show gross negligence).

[102] *See infra* Sections II.A, II.B, II.C.

[103] *See infra* Section II.D.

put on the limited utility of the corporate waste doctrine for shareholder plaintiffs.[104] Then, this Section will discuss the need for alternative legal avenues for shareholders to challenge excessive executive compensation and the merits of possible solutions.[105] Finally, this Section concludes with a discussion of the inapplicability of the entire fairness standard and the merits of enhanced scrutiny standards of review.[106]

A. Conflicted-Controlling Stockholder—the Entire Fairness Standard

Delaware Courts review Compensation challenges involving a conflicted-controlling stockholder under the most exacting level of review: the entire fairness standard.[107] "As the Delaware Supreme Court recently reaffirmed in *Match*, entire fairness is the presumptive standard of review for conflicted-controller transactions."[108] Delaware courts impose this heightened standard of review because controlling-stockholders present multiple risks to minority stockholders.[109] First, minority stockholders face "coercion" risk because a controlling stockholder might retaliate if it does not get its way.[110] Second, there is also the "bypass" risk, where a controlling stockholder may bypass the board to unilaterally achieve its goals.[111] Third, there is also a tunneling risk that the controller will use its ability to direct corporate action to extract corporate value through related-party transactions.[112] By taking control, the controlling stockholder essentially assumes fiduciary duty obligations that a board of directors generally owes.[113]

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[104] *See infra* Section II.E.

[105] *See infra* Sections II.F, II.G, II.H.

[106] *See infra* Section II.H.

[107] *See, e.g.*, *Tornetta II*, 310 A.3d 430, 446 (Del. Ch. 2024).

[108] Tornetta v. Musk, 326 A.3d 1203, 1232 (Del. Ch. 2024) [hereinafter *Tornetta III*] (citing *In re* Match Grp. Derivative Litig., 315 A.3d 446, 451 (Del. 2024)).

[109] *Id.* at 1231–32.

[110] *Id.* at 1231–32.

[111] *Id.* at 1232.

[112] *Id.*

[113] *See Tornetta II*, 310 A.3d 430, 497–98 (Del. Ch. 2024) ("Delaware law imposes fiduciary duties on those who control a corporation. Why? Because fiduciary duties exist in part to minimize agency cost caused by the divide between economic ownership and legal control. Delaware law vests control over a corporation in a board of directors and imposes attendant fiduciary obligations on the board as a consequence. When a controller displaces or neutralizes a board's power to direct corporate action, then the controller assumes fiduciary obligations.").

The heightened entire fairness standard of review requires a holistic analysis that takes into consideration process and price.[114] The controlling stockholder has the burden to prove entire fairness but can shift the burden of proof to the plaintiff by properly employing a special committee or an unaffiliated stockholder vote.[115] However, if a controlling stockholder wants to secure the benefit of business judgment review, it must follow *MFW*'s requirements.[116] Unlike the pleading standard for corporate waste, under this standard, plaintiffs have a lower pleading burden when alleging lack of entire fairness and must point to "some facts" implying lack of entire fairness.[117]

B. Director Compensation—More Discretion Equals Higher Standard of Review

Section 141(h) of the Delaware General Corporate Law gives a corporation's board of directors the power to fix director compensation.[118] Directors' exercise of authority under Section 141 means that the actions are not *ultra vires*, but it says nothing about whether those actions are consistent with fiduciary duties.[119] When a director's decision on director compensation is

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[114] *Id.* at 446; Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) ("The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock.").

[115] *In re* Match Grp. Derivative Litig., 315 A.3d 446, 451 (Del. 2024).

[116] *Id.* (citing Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014)); *see also* Kahn v. M&F Worldwide, 88 A.3d 635, 645 (Del. 2014) ("To summarize our holding, in controller buyouts, the business judgment standard of review will be applied *if and only if*: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.").

[117] Stein v. Blankfein, C.A. No. 2017-0354-SG, 2019 WL 2323790 at *8 (Del. Ch. 2019).

[118] DEL CODE ANN. tit. 8, § 141(h) (West 2025).

[119] *Stein*, 2019 WL 2323790, at *5.

challenged, Section 141 is the beginning, not the end, of the inquiry.[120]

There are generally two different kinds of equity incentive plans boards of directors can use to compensate themselves: 1) a plan under which the award terms are fixed and directors lack discretion , and 2) a plan under which directors can award equity from a pool at a later time in amounts and terms they decide.[121] Director self-compensation involves the quintessence of director self-interest.[122] Whether or not director self-compensation is subject to entire fairness review depends on directors' future discretion regarding their compensation package.[123] If the discretionary plan does not contain meaningful limits, the challenged award is subject to entire fairness review because self-compensation is a self-interested decision that is inherently disloyal.[124] In other words, the directors must show their self-interested decision was entirely fair towards the corporation.[125]

In *In re Investors Bancorp, Inc. Stockholder Litigation*, the Delaware Supreme Court clarified the standard of review for director self-compensation, shifting the standard of review to business judgment only where stockholders approve a compensation plan that does not involve future director discretion in setting the amount of self-payment.[126] If the business judgment rule applies, then courts will infer bad faith and a breach of duty only when a decision lacks any rationally conceivable basis, the lowest threshold of proof.[127]

The Delaware Supreme Court in *Investors Bancorp* also clarified when a ratification defense for director compensation decisions was available.[128] When the directors submit their specific compensation decisions for approval by fully informed, uncoerced, and disinterested stockholders, ratification is properly asserted as a defense in support of a motion to dismiss.[129] Chief Justice Seitz further wrote that the same applied for self-executing plans that make awards over time based on a fixed criteria, with specific amounts and terms approved by the stockholders.[130] But when stockholders approve an equity compensation plan that gives directors discretion to grant themselves awards within general parameters,

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[120] *Id.*
[121] *See In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1211 (Del. 2017).
[122] *Stein*, 2019 WL 2323790, at *1.
[123] *Id.* (citing *In re Invs. Bancorp, Inc.*, 177 A.3d 1208).
[124] *Stein*, 2019 WL 2323790, at *5.
[125] *See In re Invs. Bancorp, Inc.*, 177 A.3d at 1223.
[126] *Stein*, 2019 WL 2323790 at *1 (citing *In re Invs. Bancorp, Inc.*, 177 A.3d at 1211).
[127] *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 43 (Del. Ch. 2013).
[128] *See In re Invs. Bancorp, Inc.*, 177 A.3d at 1211.
[129] *See id.*
[130] *See id.*

then the ratification defense is unavailable to dismiss the suit, and the directors are required to prove the entire fairness of the awards to the corporation.[131]

C. Compensation Cases that do not Involve a Controller or Director Self-Compensation

This category of compensation challenges involves executive compensation without situations involving conflicted-controller transactions or director self-dealing.[132] Under Section 122(5) of the Delaware General Corporate Law, corporations have the power to appoint officers and agents as the business of the corporation requires and to pay them suitable compensation.[133]

These cases often allege breaches of fiduciary duty and corporate waste, and they begin with the presumption of the business judgment rule that the plaintiff can rebut by either showing gross negligence or bad faith.[134] Courts are ill equipped to engage in *post hoc* substantive review of business decisions, and the business judgment rule precludes a court from imposing itself unreasonably on the business and affairs of the corporation.[135] If a plaintiff successfully rebuts the presumption, the burden shifts to the defendant to show by a preponderance of the evidence that the challenged compensation package was entirely fair to the corporation.[136] If a plaintiff fails to rebut the business judgment presumption, then the plaintiff must show corporate waste to prevail.[137]

D. Procedural and Substantive Hurdles Faced by Stockholders

Stockholder plaintiffs who challenge executive compensation packages often bring both direct and derivative claims.[138] Plaintiffs bringing these lawsuits

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[131] *See id.*

[132] *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 761 (Del. Ch. 2005) (analyzing this compensation challenge under the business judgment rule presumption).

[133] DEL. CODE ANN. tit. 8 § 122(5) (West 2025).

[134] *See In re Walt Disney Co*., 907 A.2d at 697, 756.

[135] *Id.* at 746.

[136] *Id.* at 756–57.

[137] *See id.* at 747.

[138] *See, e.g.*, *Tornetta II*, 310 A.3d 430, 494 (Del. Ch. 2024) ("Plaintiff Richard Tornetta ("Plaintiff"), a Tesla stockholder, filed his complaint on June 5, 2018. His original complaint asserted four counts: Count I for breach of fiduciary duty against Musk in his capacity as then-controlling stockholder; Count II for breach of fiduciary duty against

face both procedural and substantive hurdles.[139]

A plaintiff bringing a derivative suit is subject to procedural safeguards because they are bringing a suit on behalf of the corporation.[140] "The most important of these safeguards is the demand requirement."[141] Stockholders must make a demand on the board of directors to take action correcting the wrongdoing, or allege that demand would be futile.[142] If the shareholder makes a demand on the board to pursue the action, then in most cases, this demand effectively shifts control over the lawsuit to the board.[143] "Typically, a board will move to dismiss derivative litigation if a demand is made," and if the board appears to have been independent and conducted a reasonable investigation of the plaintiff's allegation, the court will grant the motion to dismiss.[144] Although courts acknowledge the benefits to the demand requirement, the demand requirement can be an extremely difficult hurdle for stockholder plaintiffs because they must make a demand without the benefit of discovery.[145] Therefore, most shareholder plaintiffs in

Musk, Kimbal, Gracias, Jurvetson, Ehrenpreis, Buss, Denholm, Murdoch, and Johnson Rice as directors (together, "Defendants"); Count III for unjust enrichment against Musk; and Count IV for waste. Counts I and II were asserted as both direct and derivative claims. Counts III and IV were asserted as derivative claims.").

[139] *See* Thomas & Martin, *supra* note 1, at 573.

[140] *See id.* at 576; *see also Tornetta III*, 326 A.3d 1203, 1225–26 (Del. Ch. 2024) ("Stockholders pursuing derivative claims are already subject to a gauntlet of procedural barriers erected to protect Delaware's board-centric model. Among other hurdles, they face: the demand requirement; the contemporaneous ownership requirement; the continuous ownership requirement; adequacy standards; the threat of being *Walmarted*; and the risk of being derailed by a special litigation committee.") (internal footnotes omitted).

[141] *See* Thomas & Martin, *supra* note 1, at 576.

[142] *See id.* (citing JAMES D. COX ET AL., CORPORATIONS § 15.1-22 (2001)).

[143] *See id.* at 576.

[144] *See id.* at 576–77.

[145] *See id.* (citing Brehm v. Eisner, 746 A.2d 244, 255 (Del. 2000)) ("The Delaware Supreme Court has stated that the demand requirement has several benefits. First, it requires exhaustion of all intracorporate remedies, thereby possibly avoiding litigation altogether. Second, it gives the corporation an opportunity to pursue claims that its board of directors believe are meritorious, and to seek dismissal of the others. Finally, in situations where demand is excused because it is futile, or is wrongfully refused by the board of directors, the plaintiff shareholder is free to pursue its action in the manner it believes best."); *but see Brehm*, 746 A.2d at 266 (encouraging the use of "tools at hand" like Section 220 of the Delaware General Corporation Law).

derivative actions will allege that demand on the board is futile.[146]

Stockholders also face substantive hurdles when challenging compensation packages. Plaintiffs often allege breaches of fiduciary duties (*i.e.* the duties of care and loyalty) and corporate waste.[147] The duty of care requires corporate directors to operate with a level of "care which ordinarily careful and prudent men would use in similar circumstances," and to "consider all material information reasonably available" in making business decisions.[148] Therefore, deficiencies in the directors' processes are actionable only if the directors' actions are grossly negligent.[149] However, plaintiffs face a challenge in showing gross negligence in duty of care claims because case law has created a set of best practices boards of directors could follow to satisfy their duty of care, just as other cases, like *Smith v. Van Gorkom*, created practices for corporate boards in the mergers and acquisitions context.[150] In *Van Gorkom*, the Trans Union board had no documentation before it considered a merger.[151] The board was completely

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[146] *See* Thomas & Martin, *supra* note 1, at 577; Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984) (requiring the plaintiff to plead particularized facts that create a reasonable doubt that the majority of the board is independent or the challenged payments are not protected by the business judgment rule).

[147] *See, e.g.*, *Tornetta II*, 310 A.3d 430, 494 (Del. Ch. 2024) ("Plaintiff Richard Tornetta ("Plaintiff"), a Tesla stockholder, filed his complaint on June 5, 2018. His original complaint asserted four counts: Count I for breach of fiduciary duty against Musk in his capacity as then-controlling stockholder; Count II for breach of fiduciary duty against Musk, Kimbal, Gracias, Jurvetson, Ehrenpreis, Buss, Denholm, Murdoch, and Johnson Rice as directors (together, "Defendants"); Count III for unjust enrichment against Musk; and Count IV for waste. Counts I and II were asserted as both direct and derivative claims. Counts III and IV were asserted as derivative claims.").

[148] *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749 (Del. Ch. 2005) (citing Graham v. Allis-Chalmers Mfg., 188 A.2d 125, 180 (Del. 1963)); *Brehm*, 746 A.2d at 259.

[149] *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749 (Del. Ch. 2005) (citing Graham v. Allis-Chalmers Mfg., 188 A.2d 125, 180 (Del. 1963)); *Brehm*, 746 A.2d at 259.

[150] *Compare, for example*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (the Trans Union Board of Directors had no documentation, relied on misleading and uninformed presentation from officers, not retaining investment bankers for a fairness opinion), *and Tornetta II*, 310 A.3d at 517 ("The Grant process lacked a traditional benchmarking analysis, which compares a proposed compensation plan at comparable firms."), *and In re Walt Disney Co*., 907 A.2d at 699–745 (presenting the compensation committee with a term sheet of key terms of the compensation package, obtaining a compensation consultant), *with In re* Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1224 (Del. 2017) (comparing compensation packages to those of similarly sized companies).

[151] *See Van Gorkom*, 488 A.2d at 874.

reliant on misleading and uninformed presentation by officers, and it did not obtain a fairness opinion from financial professionals.[152] Unlike in *Van Gorkom*, the compensation committee of Disney was provided with a term sheet of the key terms of Ovitz's employment agreement, and directors who had personal knowledge of the relevant information, including information from negotiations and the compensation consultant, made a presentation to the board.[153] *Tornetta v. Musk* has a veneer of *Van Gorkom*, considering Musk had extensive ties with persons tasked with negotiating with Tesla on his behalf and there was no meaningful negotiation over key terms of the compensation plan.[154] Additionally, the committee avoided using objective benchmarking data comparing similarly situated companies and justified Musk's compensation by comparing Tesla to private equity companies despite the fact that Tesla is a public company.[155] Delaware General Corporation Law Section 102(b)(7) also complicates matters for stockholder plaintiffs because the statute allows a certificate of incorporation to exculpate director and officers from liability for monetary damages stemming from breaches of the duty of care.[156]

The duty of loyalty requires directors to act in the best interests of the corporation and to refrain from conduct that might injure the company and its shareholders.[157] In publicly held corporations, most executive compensation agreements are negotiated between managers and the board's compensation

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[152] *See id.* at 868–78 (stating that although the Court held that fairness opinions by investment bankers are not required as a matter of law, it has become standard practice for boards to obtain one in the mergers and acquisitions context).

[153] *In re Walt Disney Co*., 907 A.2d at 769.

[154] *See Tornetta II*, 310 A.3d at 446–47.

[155] *See id.* at 447–48.

[156] DEL. CODE tit. 8, § 102(b)(7) (West 2025) ("The certificate of incorporation may also contain… a provision eliminating or limiting the personal liability of a director or officer to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director or officer, provided that such provision shall not eliminate or limit the ability of: (i) a director or officer for any breach of the director's or officer's duty of loyalty to the corporation or its stockholders; (ii) a director or officer for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) a director under § 174 of this title; (iv) a director or officer for any transaction from which the director or officer derived an improper personal benefit; or (v) an officer in any action by or in the right of the corporation."). § 102(b)(7) still permits liability for injunctive relief, but that may be of little help to stockholders since injunctive relief is designed to prevent future harms rather than to remedy past actions.

[157] Thomas & Martin, *supra* note 1, at 584.

committee.[158] Generally, the committee's decision cannot be attacked on duty of loyalty grounds.[159] Public companies are required by the Securities and Exchange Commission ("SEC") and stock exchange rules to have compensation committees comprised of independent members of a company's board of directors.[160] The SEC and exchange rules preserve the independence of directors involved in compensation decisions and remove potential conflicts of interest.[161] The independent director compensation committee effectively creates an "unsurpassable barrier in the plaintiff's quest to challenge executive compensation" and tilts the scale in favor of the corporate board defendants.[162]

E. The Waste Problem: The Limited Utility of the Corporate Waste Doctrine for Plaintiffs

Stockholder plaintiffs must successfully show corporate waste to prevail in litigation if they do not rebut the business judgment presumption.[163] The doctrine of waste is consistently applied across different cases, and courts in these cases aim to provide guidance for plaintiffs and corporate boards when litigating waste claims.[164] Unfortunately for shareholder plaintiffs, the corporate waste

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[158] *Id.*

[159] *See id.*

[160] *See* 17 C.F.R. § 240.10C–1(b)(1); NYSE Rule § 303A.05(a); Nasdaq Rule 4350(c)(3)(A).

[161] *Compare Tornetta II*, 310 A.3d 430, 446–47 (Del. Ch. 2024) (non-independent board members failing to negotiate Musk's compensation package at arm's length), *with In re Walt Disney Co.*, 907 A.2d at 702 (Disney's compensation committee negotiating Ovitz's pay package at arm's length through Ovitz's attorney).

[162] JAMES D. COX & THOMAS LEE HAZEN, 2 TREATISE ON THE LAW OF CORPORATIONS § 11.5 (4th ed.) [hereinafter COX & HAZEN, CORPORATIONS]; *see also* Thomas & Martin, *supra* note 1, at 578, 584.

[163] *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005) ("When a plaintiff fails to rebut the presumption of the business judgment rule, she is not entitled to any remedy, be it legal or equitable, unless the transaction constitutes waste.").

[164] *Compare, for example*, Knight on behalf of Nominal Defendant Universal Health Servs., Inc. v. Miller, No. CV 2021-0581-SG, 2022 WL 1233370, at *6 (Del. Ch. 2022) ("To withstand a motion to dismiss, it must be reasonably conceivable from the pleadings that the directors authorized an exchange that was 'so one sided that no business person of ordinary, sound judgment' could conclude that the corporation received sufficient consideration."), *and* Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *1 (Del. Ch. 1995) ("Corporate waste occurs when a corporation is caused to effect a

doctrine has evolved to be of limited utility and does not do much to protect stockholders' interests for several reasons.[165]

The doctrine of waste is supposed to be a safety valve, providing residual protection for stockholders that polices the outer boundaries of the broad field of discretion courts afford directors under the business judgment rule.[166] A successful showing of corporate waste "requires more than a demonstration that the transaction was costly to the company, badly conceived, or inefficient and improvidently entered."[167] The corporation must have irrationally squandered corporate assets or essentially made a gift to the recipient of corporate assets, a gift that returned nothing in terms of incentives or goodwill.[168] Alternatively, corporate waste "requires a showing that the fiduciaries knowingly entered a transaction of virtually no value to the corporation."[169]

At the pleading stage, waste requires mirroring the standard for waste and "must allege facts showing that no person of ordinary sound business judgment could view the benefits received in the transaction as a fair exchange for the consideration paid by the corporation."[170] Like in derivative lawsuits, a high pleading burden is a challenge for stockholder plaintiffs because they must survive a motion to dismiss prior to discovery.[171] The pleading burden on a plaintiff

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transaction on terms that no person of ordinary, sound business judgment could conclude represent a fair exchange. . . . Thus, for liability to exist the defendants must have approved a transaction exchanging something of value for consideration so inadequate that 'no person of ordinary, sound business judgment would deem it worth what the corporation has paid.'"), *with* Knight ("Put differently, the corporation must have essentially made a 'gift' to the recipient of corporate assets, a gift that returned nothing in terms of incentives or goodwill.").

165 *See, e.g.*, Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) ("If, however, there is *any substantial* consideration received by the corporation, and if there is a *good faith judgment* that in the circumstances the transaction is worthwhile, there should be no finding of waste, even if the fact finder would conclude *ex post* that the transaction was unreasonably risky.").

166 *See* Wells, *supra* note 97, at 1275 n.213; Sample v. Morgan, 914 A.2d 647, 669 (Del. Ch. 2007) (citing *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 74 (Del. 2006)).

167 *Knight*, 2022 WL 1233370 at *6.

168 *See Id.*; *In re Walt Disney Co.*, 907 A.2d at 748–49, 759.

169 *Knight*, 2022 WL 1233370 at *6.

170 *See* Tornetta v. Musk, 250 A.3d 793, 814 (Del. Ch. 2019).

171 *See Id.* at 814 ("[t]he pleading burden on a plaintiff attacking a corporate transaction as wasteful is necessarily higher than that of a plaintiff challenging a transaction as

alleging waste is necessarily higher than that of a plaintiff challenging a transaction as unfair, especially when the transaction was approved by a majority of disinterested stockholders.[172] As a result, a significant number of waste claims are dismissed at the pleadings stage.[173] Plaintiffs must recognize that the very high hurdle that a stockholder must overcome to succeed in a corporate waste claim is a protection that the corporate form offers.[174]

When the business judgment rule is invoked because of a stockholder vote, dismissal is typically the result because fully informed, uncoerced, independent stockholders have approved the transaction and made the decision that it is a fair exchange and thus not wasteful.[175] Vice Chancellor Strine found it difficult to conceptualize how a plaintiff could ultimately prove waste or a gift claim in cases with fully informed, disinterested stockholder votes.[176] In this context, he favored dismissal and saw limited utility in allowing litigation to proceed, especially considering investors have access to an abundance of information about a corporate transaction from sources other than boards of directors.[177] He deemed it presumptuous and paternalistic to assume that the court knows better in a particular instance than a fully informed corporate electorate with real money riding on the corporation's performance.[178]

Judicial review remains limited. Courts generally defer to director decisions because compensation committees are served by independent directors

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'unfair.'" (quoting Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 892 (Del. Ch. 1999))); Thomas & Martin, *supra* note 1, at 576–77. *But see Brehm v. Eisner*, 746 A.2d 244, 266 (Del. 2000) (encouraging the use of "tools at hand" like Section 220 of the Delaware General Corporation Law).

[172] *See Tornetta I*, 250 A.3d at 814.

[173] *See* Thomas & Martin, *supra* note 1, at 583 ("Plaintiffs succeed overall about forty percent of the time [waste] claims are brought . . . splitting the sample between public corporation and close corporations, we see higher success rates for close corporations (forty-nine percent) than in public companies (thirty-two percent). These differences are statistically significant."). This article was published in 2001. The trend is likely not much different considering the standard for corporate waste has stayed consistent.

[174] Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995).

[175] *See* Singh v. Attenborough, 137 A.3d 151, 152 n.4 (Del. 2016) (citing *Huizenga*, 751 A.2d at 901).

[176] *Huizenga*, 751 A.2d at 901.

[177] *Id*.

[178] *Id*.

and the executive does not participate in fixing compensation.[179] Delaware judges have also written that courts are "ill-fitted to attempt to weigh the 'adequacy' of consideration under the waste standard or, *ex post*, to judge appropriate degrees of business risk."[180] Valuing a future benefit to the corporation from options grants is challenging since there is no objective metric to gauge *ex ante* incentive effects of owning options by officers or directors.[181] Accordingly, Delaware courts have held that there should be no finding of corporate waste if a corporation receives any substantial consideration, and if there is a good faith judgment that the transaction was worthwhile, even if a fact finder concludes an *ex post* transaction was unreasonably risky.[182] Delaware courts are also very cognizant of the burden litigation puts on corporations, and they understand the need to balance incentives for corporations and boards of directors so they can properly function.[183] Vice Chancellor Strine noted that the costs to corporations of litigating waste claims were not trifling and that the law should not give dissenters the right to command the corporate treasury over the contrary will of a majority of the disinterested stockholders.[184] The Delaware Courts' general deference to a board of directors' decision reflect their awareness of Delaware's board-centric model and encourages corporate boards towards an "optimal rational acceptance of risk."[185]

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[179] *See* DEL. CODE ANN. tit. 8, § 122(5); COX & HAZEN, *supra* note 158, § 11.5 ("In an attack on allegedly exorbitant compensation, the scope of review depends on whether the recipient officers or directors have participated in fixing the compensation. Where the person compensated does not fix the compensation and the amount is set by directors without any adverse interest or influence that would prevent the exercise of a fair judgment, judicial review is very limited.").

[180] Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997); *see also In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005) ("Because courts are ill equipped to engage in *post hoc* substantive review of business decisions, the business judgment rule 'operates to preclude a court from imposing itself unreasonably on the business and affairs of a corporation.'").

[181] *Vogelstein*, 699 A.2d at 337 n.17 ("The benefits that Mattel contemplates receiving from the grant of options, according to its Proxy Statement, is to "attract, retain and reward . . . directors" and "to strengthen the mutuality of interests between [the option-recipients] and the . . . stockholders."); *see, e.g.*, Tornetta v. Musk, 310 A.3d 430, 542–43 (Del. Ch. 2024) (analyzing different arguments for valuing the options grant, considering Musk's existing incentives and his already significant equity holding).

[182] *Vogelstein*, 699 A.2d at 336.

[183] *See e.g.*, *Huizenga*, 751 A.2d at 901.

[184] *Id.*

[185] *See* DEL. CODE ANN. tit. 8, § 141(a) ("The business and affairs of every corporation

Additionally, the waste doctrine may not only be an inconvenient doctrine, but it might only be describing nonexistent transactions.[186] The waste theory represents a "*theoretical* exception" to corporate contracts that is very rarely encountered in the world of real transactions.[187] Chancellor Allen even referred to waste as "Nessie," highlighting the unlikelihood of disinterested businesspeople entering into deals that meet the standard of waste.[188] Delaware also recognizes as axiomatic, even on the pleadings, that stockholders would be unlikely to approve a wasteful transaction.[189] In *Brehm v. Eisner*, Chief Justice Veasey drew upon Chancellor Seitz's opinion in *Saxe v. Brady* which stated that there is an "outer limit" to director discretion to make decisions on executive compensation, at which point the compensation is so disproportionately large as to be unconscionable and constitute waste.[190] However, Delaware Courts view that there is no single template for how a corporation should be governed, and therefore, they treat judicial opinions as a method to determine legal standards for corporate waste rather than decide a benchmark for what specific dollar amount constitutes excessive compensation.[191] Accordingly, no such outer limit exists to this day. The theoretical existence of an outer limit to compensation that automatically would constitute waste is logically incompatible with judicial skepticism of waste claims

organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation."); Tornetta v. Musk, 326 A.3d 1203, 1225–26 (Del. Ch. 2024); *Vogelstein*, 699 A.2d at 336 ("Any other rule would deter corporate boards from the optimal rational acceptance of risk.").

[186] Wells, *supra* note 97, at 1272.

[187] Steiner v. Meyerson, No. Civ. A. 13139, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) (emphasis added).

[188] *Id*.

[189] *See Tornetta I*, 250 A.3d at 814 (citing Singh v. Attenborough, 137 A.3d 151, 152 (Del. 2016)).

[190] *See* Brehm v. Eisner, 746 A.2d 244, 262 n.56 (Del. 2000) (citing Saxe v. Brady, 184 A.2d 602, 610 (Del. Ch. 1962)).

[191] *See In re* 3COM Corp., No. C.A. 16721, 1999 WL 1009210, at *5 (Del. Ch. Oct. 25, 1999) (citing Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999 (Del. Ch. 1995)) ("There is, of course, no single template for how corporations should be governed and no single compensation scheme for corporate directors"); Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 897(Del. Ch. 1999).

and deference to board decisions.[192]

Although several recent cases have analyzed waste claims separately from those of breach of fiduciary duties, the utility of the corporate waste doctrine is further questioned because of a recent trend treating corporate waste as an aspect of the fiduciary duty of good faith.[193] A successful waste claim is "a close kin to a claim of bad faith," and plaintiffs will need to show that directors approved a decision that cannot be attributed to "any rational business purpose."[194] That is also one articulation of the requirement to rebut the business judgment presumption. A court will uphold a board's decision if the plaintiff fails to show "fraud, bad faith, or self-dealing," unless it cannot be "attributed to any rational business purpose.[195] Because of the high hurdle to establish waste, the rational business purpose standard effectively places a higher burden on shareholder plaintiffs compared to the burden imposed on corporate boards.[196] This trend has been criticized by at least one scholar, who argues that the present-day test for waste is objective, while the test of good faith is clearly subjective because it looks at the decision-maker's state of mind.[197] Although the doctrine of corporate waste has objective standards

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[192] *Compare Brehm*, 746 A.2d at 262 n.56 (citing *Saxe*, 184 A.2d at 610), *and* COX & HAZEN, CORPORATIONS § 11.5 (4th ed.) ("In an attack on allegedly exorbitant compensation, the scope of review depends on whether the recipient officers or directors have participated in fixing the compensation. Where the person compensated does not fix the compensation and the amount is set by directors without any adverse interest or influence that would prevent the exercise of a fair judgment, judicial review is very limited."), *with* Singh v. Attenborough, 137 A.3d 151, 152 (Del. 2016) ("[T]he vestigial waste exception has long had little real-world relevance, because it has been understood that stockholders would unlikely to approve a transaction that is wasteful").

[193] Wells, *supra* note 97, at 1279; *see also In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 749 (Del. Ch. 2005), *aff'd*, 906 A.2d 27 (Del. 2006) (citing White v. Panic, 783 A.2d 543, 553–55 (Del. 2001)) ("The Delaware Supreme Court has implicitly held that committing waste is an act of bad faith."); *see also*, *e.g.*, *In re Walt Disney Co.*, 906 A.2d at 73–75; *In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 137 (Del. Ch. 2009) (analyzing fiduciary duty claims and waste claims separately).

[194] *See* Knight on behalf of Nominal Def. Universal Health Servs., Inc. v. Miller, No. CV 2021-0581-SG, 2022 WL 1233370, at *6(Del. Ch. Apr. 27, 2022).

[195] *In re Walt Disney Co.*, 907 A.2d at 747 (citing Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971)) ("[The business judgment] presumption applies when there is no evidence of 'fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment' on the part of the directors. In the absence of this evidence, the board's decision will be upheld unless it cannot be 'attributed to any rational business purpose.'").

[196] *In re Walt Disney Co.*, 906 A.2d at 74–75.

[197] Wells, *supra* note 97, at 1282–83.

for courts to employ, judicial analysis of waste in practice has been a subjective balancing test, with courts looking to the decision-maker's state of mind, the circumstances surrounding their decision, and their motives.[198] If waste claims merge with fiduciary duty claims, then dissenting stockholders may not have a claim regarding excessive compensation at all.[199] The waste doctrine may already be effectively useless in cases where there has been proper stockholder approval.[200] Some scholars doubt the merits of waste claims and believe that they, like duty of loyalty and care claims, are simply filler claims that plaintiffs toss into a complaint challenging executive compensation largely to help the plaintiff gain discovery.[201] However, one study suggests that plaintiffs do succeed with waste claims, even in the absence of other successful allegations.[202] Even if waste claims are not filler claims, the combination of high hurdles to establish waste, the rational business purpose standard putting a higher burdens on shareholder plaintiffs, and judicial deference ultimately tilt the judicial scale in executive compensation litigation cases in favor of corporate boards rather than shareholders.

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[198] *See, e.g.*, *In re Walt Disney Co.*, 907 A.2d at 759 (examining independent board members' negotiations, the President's market knowledge, Ovitz's past compensation, and the study conducted by a compensation consultant); *see also* Thomas & Martin, *supra* note 1, at 585 (citing RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 122 (4th ed. 1999) (general comments about § 122(5))) ("[C]ourts look at the following factors: evidence of the compensation received by similarly situated executives, the ability of the executive, whether the Internal Revenue Service has allowed the corporation to deduct the amount of salary alleged to be unreasonable, whether the salary bears a reasonable relation to the success of the corporation, the salary history of the executive, the relation of increases in salary to increases in the value of services rendered, and the relation of the challenged salary to other salaries paid by the employer.").

[199] Wells, *supra* note 97, at 1289.

[200] *Id*. at 1290.

[201] Thomas & Martin, *supra* note 1, 583–84.

[202] *Id*. ("In our data set, we see a somewhat different picture emerge. Looking first at the first top row of Table 6, we see that seventy-one percent of the time when waste succeeds, at least one other claim succeeds as well. By contrast, in row two of Table 6, we find that waste, either alleged with other claims or simply by itself, is the only successful claim in sixteen out of eighty-nine instances. When we break down the figures further, we find that plaintiffs succeed on waste claims alone in fifteen percent of Delaware cases and twenty percent of non-Delaware cases. Both of these figures are statistically significantly different from zero at the one percent level of significance. This shows that plaintiffs do succeed with waste claims even in the absence of other successful allegations.") (the trend seen in this data set is likely to have remained consistent considering the standard for waste has remained consistent).

F. Retiring Corporate Waste and Exploring Alternative Safety Valves

The corporate waste doctrine has come to be of little utility for stockholder plaintiffs. Claims of corporate waste place high burdens on plaintiffs such that plaintiffs very rarely satisfy the standard.[203] Courts have also expressed skepticism of a compensation package that appears excessive because that view has the benefit of hindsight.[204] However, if the circumstances call for it, excessive compensation should be reviewed with the benefit of hindsight. The effects of corporate decisions executives make can only be scrutinized after the effects have taken place, especially given the company's stock price is reactive to officer and corporate board decisions.[205] Regardless of whether the company's stock price rises or falls due to corporate decisions, stockholders ultimately pay the price of equity compensation plans, either through dilution or the stock price dropping precipitously.[206]

Tornetta v. Musk would have been a great opportunity for Delaware Courts to explore the outer limits of corporate waste, but Chancellor McCormick was unable to do so because the trial court dismissed the waste claim at the motion to dismiss stage of litigation.[207] If courts are unable to explore whether the largest compensation package ever awarded to an executive constituted corporate waste, how will shareholders and legal practitioners know how much is wasteful? In reality, corporate waste has failed to be the safety valve for stockholders it was meant to be.[208] Vice Chancellor Strine agreed, questioning the continued utility of the corporate waste equitable safety valve.[209]

Because waste has failed to serve its safeguarding purpose, courts should

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[203] *See Tornetta I*, 250 A.3d at 814; Steiner v. Meyerson, No. CIV. A. 13139, 1995 WL 441999, at *1 (Del. Ch. July 19, 1995).

[204] *See* Knight on behalf of Nominal Def. Universal Health Servs., Inc. v. Miller, No. CV 2021-0581-SG, 2022 WL 1233370, at *6 (Del. Ch. Apr. 27, 2022).

[205] *Compare*, *for example.*, *Tornetta II*, 310 A.3d at 445 (challenging the CEO's compensation plan after the CEO did not invest the amount of time expected), *with In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106, 106 (Del. Ch. 2009) (challenging an executive's compensation package after the fallout of the 2008/2009 Great Financial Crisis).

[206] *See* Bliss, *supra* note 5, at 3.

[207] *See Tornetta I*, 250 A.3d at 813–14.

[208] *See* Wells, *supra* note 97, at 1275; Sample v. Morgan, 914 A.2d 647, 669 (Del. Ch. 2007) (citing *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 74 (Del. 2006)).

[209] Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 895 (Del. Ch. 1999) (citing R.F. BALOTTI & J.A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATION 4-234 § 4.35 (3rd ed. 1997)).

create alternative "equitable safety valves" that allow the judiciary to scrutinize and second-guess executive compensation decisions that do not facially violate fiduciary duties, but that may, in practice, do just that .[210] Such judicial review should be more readily accessible so that executive compensation packages can be reviewed to ensure they were made for the benefit of stockholders at fair terms, rather than enriching executives without any repercussions to their risky corporate decisions.[211]

G. *Possible Solution 1: Amending the Delaware General Corporate Law*

One possible solution to this problem is to amend the Delaware General Corporate Law to require a disinterested shareholder vote for all executive compensation decisions. It is already common practice for shareholders to vote on executive compensation and stock option awards.[212] In fact, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") requires public companies to hold periodic say-on-pay advisory votes, including votes on the frequency of say-on-pay advisory votes every six years and a vote for golden parachute arrangements.[213] With Dodd-Frank in place, however, a Delaware General Corporate Law amendment that requires corporations to hold a vote on executive compensation would be redundant. Furthermore, this kind of statutory amendment would tilt the scale further in favor of corporate directors who will use the shareholder votes to bolster their ratification defense, if the factual context avails the defense to directors.[214] The aim here is to assist shareholders with executive compensation challenges, so this solution would be ineffective in achieving that goal.

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[210] Wells, *supra* note 97, at 1243 (citing *Huizenga*, 751 A.2d at 895 (describing corporate waste and the continued utility of an "equitable safety valve")).

[211] *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) ("[C]orporate directors have a fiduciary duty to act in the best interest of the corporation's stockholders."); *see also In re Citigroup Inc.*, 964 A.2d at 106 (challenging the CEO's multi-million dollar compensation package when the CEO's failures were allegedly responsible, in part, for billions of dollars of losses at Citigroup).

[212] *See, e.g.*, Thomas & Martin, *supra* note 1, at 570 (citing Randall S. Thomas & Kenneth J. Martin, *The Determinants of Shareholder Voting on Stock Option Plans*, 35 WAKE FOREST L. REV. 31, 35 (2000)).

[213] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 12 U.S.C. 5301, § 951 (2010).

[214] *See, e.g.*, In re Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1211 (Del. 2017).

H. Possible Solution 2: Changing the Standard of Review

Another possibility is for Delaware courts to consider raising the presumptive standard of review for executive compensation challenges. Raising the standard of review would mean more judicial involvement, which should push boards of directors to be more cautious in their decision to award an executive's compensation package and increase the likelihood that the compensation package is made under fair terms.

1. Entire Fairness Review for all Executive Compensation Challenges

One possibility is to impose an entire fairness review on compensation challenges that do not involve a conflicted controlling stockholder transaction or director self-compensation.[215] Conflicted controller transactions are already subject to entire fairness review.[216] Likewise, director self-compensation cases also start with the entire fairness standard of review, but directors can shift the standard to business judgment rule if the stockholder approved compensation plan does not involve future discretion.[217] If a plaintiff can rebut the business judgment rule by either gross negligence or bad faith, the corporation has to show that the transaction was entirely fair. This involves a showing of fair dealing and fair price.[218] A key benefit of this approach is standardizing the standards of review for all three categories of compensation cases, which would increase clarity to stockholder plaintiffs and defendant boards of directors.[219]

Corporate boards can already reference industry-standard best practices

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[215] *See, e.g.*, *Tornetta II*, 310 A.3d at 445; Stein v. Blankfein, No. 2017-0354-SG, 2019 WL 2323790, at *5 (Del. Ch. May 31, 2019).

[216] *See, e.g.*, *Tornetta II*, 310 A.3d at 430.

[217] *Stein*, 2019 WL 2323790, at *5.

[218] *In re Walt Disney Co.*, 907 A.2d at 747 ("[The business judgment rule presumption] can be rebutted by a showing that the board violated one of its fiduciary duties in connection with the challenged transaction. In that event, the burden shifts to the director defendants to demonstrate that the challenged transaction was 'entirely fair' to the corporation and its stockholders.'"); *Tornetta II*, 310 A.3d at 446 ("[T]he concept of fairness calls for a holistic analysis that takes into consideration two basic issues: process and price.").

[219] *See, e.g.*, *Tornetta II*, 310 A.3d at 430 (applying entire fairness review); *Stein*, 2019 WL 2323790, at *5 (starting with entire fairness standard of review and shifting the standard only if the stockholders approve a compensation plan that does not involve future discretion); *In re Walt Disney Co.*, 907 A.2d at 779 (applying the presumption of business judgment rule).

Delaware case law has developed. As such, directors should not have any more difficulty in proving fair dealing.[220] Imposing entire fairness on corporate boards will incentivize directors to adhere to best practices to establish a good decision-making process. This is because fair process can impact a showing of a fair price, and conversely unfair process can impact price.[221] Regarding fair price, the Delaware Supreme Court in *Weinberger* wrote that a showing of fair price relates to the economic and financial considerations of the proposed transaction. Therefore, it requires analyzing various factors, including: assets, market value, earnings, future prospects, and any other element that affects the intrinsic or inherent value of a company's stock.[222] Other Delaware precedent and scholarly articles have further suggested what else corporate boards can rely upon to support their showing of fair price.[223]

However, raising standards of review to the entire fairness standard for executive challenges that do not involve director self-compensation or conflicted controller transactions would be contrary to existing Delaware case law. In this context, the application of the entire fairness standard is not suitable because the primary rationale behind imposing the highest standard of review in conflicted controller transactions and director self-compensation—that someone in self-dealing will "receive a personal financial benefit from a transaction that is not

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[220] *See, e.g.*, *In re Walt Disney Co.*, 907 A.2d at 769 (presenting the compensation committee with a term sheet of key terms of the compensation package and obtaining a compensation consultant).

[221] *See Tornetta II*, 310 A.3d at 527.

[222] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (citing Andrew G. T. Moore, *The "Interested" Director or Officer Transaction*, 4 DEL. J. CORP. L. 674, 676 (1979)); *Tornetta II*, 310 A.3d at 527; *see* Charles M. Nathan & K. L. Shapiro, *Legal Standard of Fairness of Merger Terms Under Delaware Law*, 2 DEL. J. CORP. L. 44, 46–47 (1977); *see also* Tri-Continental Corp. v. Battye, 74 A.2d 71, 72 (Del. 1950).

[223] *See* In re Invs. Bancorp, Inc. S'holder Litig., 177 A.3d 1208, 1224 (Del. 2017) (comparing compensation packages to those of similarly sized companies); Thomas & Martin, *supra* note 1, at 585 (citing RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 122 (4th ed. 1999) (general comments about § 122(5)) ("[C]ourts look at the following factors: evidence of the compensation received by similarly situated executives, the ability of the executive, whether the Internal Revenue Service has allowed the corporation to deduct the amount of salary alleged to be unreasonable, whether the salary bears a reasonable relation to the success of the corporation, the salary history of the executive, the relation of increases in salary to increases in the value of services rendered, and the relation of the challenged salary to other salaries paid by the employer.").

equally shared by the stockholders,"—is absent.[224]

2. Enhanced Scrutiny Review as the Presumptive Standard of Review

Alternatively, Delaware courts could apply the intermediate enhanced scrutiny standard of review to compensation challenges.

The Delaware Supreme Court in *Unocal* recognized the potential conflicts of interest boards of directors face in the hostile takeover context. One of these conflicts is the possibility that the boards and incumbent management will put their own interest above that of the corporation and stockholders.[225] To address this subtle conflict, the Delaware Supreme Court created an enhanced scrutiny review, after declining to apply either the business judgment rule or the entire fairness test to actions directors took to resist a hostile takeover.[226] One year later, the Delaware Supreme Court held in *Revlon* that the new intermediate enhanced scrutiny standard would apply to the sale of a corporation for cash.[227] The enhanced scrutiny standard of review requires the board to identify the proper corporate objectives served by their actions and justify their actions as reasonable.[228]

Enhanced scrutiny is mandated by: (a) the threatened diminution of the current stockholders' voting power, (b) the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again, and c) the traditional concern of Delaware courts for actions which impair or

[224] *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 45 (Del. Ch. 2013); *see Tornetta II*, 310 A.3d at 497–98 ("Delaware law imposes fiduciary duties on those who control a corporation. Why? Because fiduciary duties exist in part to minimize agency cost caused by the divide between economic ownership and legal control. Delaware law vests control over a corporation in a board of directors and imposes attendant fiduciary obligations on the board as a consequence. When a controller displaces or neutralizes a board's power to direct corporate action, then the controller assumes fiduciary obligations."); *see Stein*, 2019 WL 2323790 at *5.

[225] *See In re* Rural Metro Corp., 88 A.3d 54, 82 (Del. Ch. 2014) (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

[226] *See In re Trados Inc.*, 73 A.3d at 43–44 (citing *Unocal*, 493 A.2d at 954); *see also* Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1387–88 (Del. 1995) ("if a defensive measure is not draconian because it is not either coercive or preclusive, the *Unocal* proportionality test requires the focus of enhanced judicial scrutiny to shift to 'the range of reasonableness.'").

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

[228] *See* Coster v. UIP Cos., 300 A.3d 656, 671 (Del. 2023) (citing Strategic Inv. Opportunities LLC v. Lee Enters., No. CV 2021-1089-LWW, 2022 WL 453607, at *14 (Del. Ch. Feb. 14, 2022)).

impede stockholder voting rights.[229] Enhanced scrutiny has also been applied in situations where the corporate boards' actions encroached on stockholders' right to vote.[230] Although it is often the case the enhanced scrutiny standard is applied in the mergers and acquisitions context, Vice Chancellor Laster elaborated on other contexts in which enhanced scrutiny review would apply, writing that:

> Delaware courts deploy enhanced scrutiny in specific, recurring situations marked by two features. First, there is an identifiable decision-making context where the realities of the situation "can subtly undermine the decisions of even independent and disinterested directors." "Inherent in these situations are subtle structural and situational conflicts that do not rise to a level sufficient to trigger entire fairness review, but also do not comfortably permit expansive judicial deference [under the business judgment rule.]" Second, the decision under review involves the fiduciary intruding into a space where stockholders possess rights of their own. The fiduciary's exercise of corporate power therefore raises questions about the allocation of authority within the entity and, from a theoretical perspective, implicates the principal-agent problem.[231]

In other words, under enhanced scrutiny, fiduciaries must show that their motivations were proper and unselfish.[232] This inquiry is the subjective component of enhanced scrutiny, where the Court's task is to "look to the directors' true intentions to determine if the directors have been motivated by the appropriate desires," namely, to "achieve the highest value reasonably available for the shareholders."[233] Under this standard, the court must take a nuanced and realistic look at the possibility that personal interests short of pure self-dealing have

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

[230] *See In re* Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 458–59 (Del. Ch. 2023) (citing *Coster*, 300 A.3d at 662–72 (Del. 2023)) (explaining that Blasius test was another form of enhanced scrutiny and applies where directors' actions deprive or coerce the stockholder vote).

[231] *See, e.g.*, *Revlon*, 506 A.2d at 173; *QVC*, 637 A.2d at 45; *see also In re Columbia Pipeline Grp.*, 299 A.3d at 456 (citing *In re Trados Inc.*, 73 A.3d at 43).

[232] *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 43 (Del. Ch. 2013).

[233] *See In re* Comverge, Inc. S'holders Litig., No. CV 7368-VCP, 2014 WL 6686570, at *9 (Del. Ch. Nov. 25, 2014) (citing Koehler v. NetSpend Holdings, No. CV 8373–VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013)); *QVC*, 637 A.2d at 46 (citing Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1288 (Del. 1988)).

influenced the board.[234] Trial courts assess the mental states of fiduciaries who act for more than one purpose, but this is often a difficult task.[235] Because people rarely act for only one purpose, especially in a group setting, corporate board members' motivations may vary.[236] Courts resolve this difficult inquiry by assessing the facts and circumstances, judging credibility assessments, and weighing evidence to determine fiduciaries' motivations.[237]

There are two prongs of an enhanced scrutiny test.[238] The first prong is essentially a duty of care inquiry, where courts examine whether the directors' decision-making process was adequate.[239] Courts also consider the information on which the directors based their decision.[240] In the second prong, courts examine whether the directors' actions were reasonable in light of the circumstances then existing.[241] In measuring the adequacy of the decision-making process, courts consider whether the fiduciaries acted for the proper purpose of seeking the best transaction reasonably available.[242] Then, courts ask whether the fiduciaries followed a process that fell within a range of reasonableness.[243] The reasonableness standard permits a reviewing court to address inequitable action even when directors subjectively believed that they were acting properly.[244] What typically drives a finding of unreasonableness is evidence of self-interest, undue favoritism or disdain towards a particular bidder, or a similar non-stockholder-motivated influence that calls into question integrity of the process.[245] If the fiduciary selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the decision.[246] The two prong test is the "objective

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[234] *See In re* Dollar Thrifty S'holders Litig., 14 A.3d 573, 598 (Del. Ch. 2010).

[235] *See In re Columbia Pipeline Grp.*, 299 A.3d at 455–56 (citing *Coster*, 2022 WL 1299127, at *10).

[236] *See id.*

[237] *See id.*

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

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *See In re Columbia Pipeline Grp.*, 299 A.3d at 459–60 (citing *Paramount Commc'ns*, 637 A.2d at 45).

[243] *See id.*

[244] *In re* Rural Metro Corp., 88 A.3d 54, 84 (Del. Ch. 2014) (citing *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 830–31 (Del. Ch. 2011)).

[245] *Id.*

[246] *See In re Columbia Pipeline Grp.*, 299 A.3d at 459–60 (citing *Paramount Commc'ns*, 637 A.2d at 45).

dimension" of enhanced scrutiny, which requires the Court to "look closely to ensure that the Board was diligently attending to its duties."[247]

The defendant fiduciaries bear the burden of proving that they "act[ed] reasonably to seek the transaction offering the best value reasonably available to the stockholders."[248] As fiduciaries, corporate boards of directors are afforded judicial deference for reasonable decisions; if a board satisfies their burden, a court will not "second-guess" their decision and will apply the business judgment rule.[249]

Revlon enhanced scrutiny exists within a larger context of management constraints, such as independent boards and active shareholders, each of which has shifted over time.[250] At least one scholar has argued that *Revlon* arose as a tool to keep management accountable when other constraints have made them less so.[251] In that sense, *Revlon* can be viewed as a substitute for other constraints, whether legal, structural, or market-based.[252] Enhanced scrutiny, therefore, could act as a substitute for ineffective "safety valves" like the corporate waste doctrine.[253]

Corporate directors and the defense bar, however, would likely oppose an enhanced scrutiny standard because courts have generally granted the business judgment rule for executive compensation decisions. Moreover, courts have often only applied enhanced scrutiny in the mergers and acquisitions context. But enhanced scrutiny is supposed to be applicable in a variety of contexts, as Vice Chancellor Laster wrote in *Columbia Pipeline*.[254] As discussed in this paper, shareholders have limited avenues to challenge executive compensation. When shareholders have lacked a voice in corporate decisions, Delaware courts have stepped in, like in *Unocal*, as a check on management and director discretion when

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[247] *See* In re Comverge, Inc. S'holders Litig., No. 7368-VCP, 2014 WL 6686570, at *10 (Del. Ch. Nov. 25, 2014) (citing *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 602 (Del. Ch. 2010)).

[248] *In re Rural Metro Corp.*, 88 A.3d at 83 (citing *Paramount Commc'ns*, 637 A.2d at 43).

[249] *See Paramount Commc'ns*, 637 A.2d at 45.

[250] Matthew D. Cain, Sean J. Griffith, Robert J. Jackson, Jr., & Steven Davidoff Solomon, *Does* Revlon *Matter? An Empirical and Theoretical Study*, 108 CAL. L. REV. 1683, 1722 (2020).

[251] *Id.* (citing Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1937 (2003)).

[252] *Id.*

[253] *See supra* Section II.E.

[254] *See* In re Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023) (citing In re Trados Inc., S'holder Litig., 73 A.3d 17, 43 (Del. Ch. 2013)).

they may put their own interests above that of shareholders.[255] This paper is arguing for similar action from Delaware Courts.

3. Sidestepping Corwin Cleansing

In *Corwin v. KKR Financial Holdings LLC*, the Delaware Supreme Court seemingly limited the reach of *Revlon* and enhanced scrutiny review, writing that if a merger that is not subject to the entire fairness standard of review (*i.e.* a non-controlling stockholder transaction) has been approved by a *fully informed* and *uncoerced majority* of disinterested stockholders, the business judgment rule is the appropriate standard of review for a post-closing damages action.[256] *Corwin* also echoes the corporate waste doctrine and Vice Chancellor Strine's view that a fully informed, uncoerced, independent stockholder vote typically results in a court's application of the business judgment rule.[257] Because *Corwin* requires a fully informed vote, adequate disclosure is key in obtaining *Corwin* cleansing.[258] One reading of *Corwin* suggests that approval of an executive compensation package by an uncoerced vote of fully informed and disinterested stockholders forecloses any judicial review post-closing.[259] This would have been a significant barrier for shareholders seeking to litigate compensation decisions retrospectively, especially when the effects of executive decisions on a company can only be judged after the effects have taken place, as the stock price is reactive. Fortunately for shareholder plaintiffs, the Delaware Chancery Court declined to extend *Corwin* for *Unocal* claims for injunctive relief.[260] Quoting *Corwin*, Vice Chancellor Zurn wrote that *Corwin* promised not to interfere with *Unocal* or to "expose stockholders to unfair action by directors without protection."[261] For executive compensation challenges,

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[255] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949 (Del. 1985); Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 179 (Del. 1986); *In re* Rural Metro Corp., 88 A.3d 54, 82 (Del. Ch. 2014) (citing *Unocal*, 493 A.2d at 954); *In re Trados Inc.*, 73 A.3d at 43–44 (citing *Unocal*, 493 A.2d at 954).

[256] Corwin v. KKR Fin. Holdings, 125 A.3d 304, 305–06 (Del. 2015) (emphasis added).

[257] *See* Singh v. Attenborough, 137 A.3d 151, 152, n.4 (Del. 2016) (citing Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 901 (Del. Ch. 1999) (quoting Michelson v. Duncan, 407 A.2d 211, 224 (Del. 1979)).

[258] *Corwin*, 125 A.3d at 305–06.

[259] *See id.* at 308.

[260] In re Edgio, Inc. S'holders Litig., No. 2022-0624-MTZ, 2023 WL 3167648 at *14 (Del. Ch. May 1, 2023).

[261] *Id.* at *15 (quoting *Corwin*, 125 A.3d at 312).

it is common for plaintiffs to ask the court to rescind a compensation plan.[262] Plaintiffs seeking rescission, a form of injunctive relief, are thus likely able to sidestep *Corwin* in litigating executive compensation challenges.

III. RECOMMENDATIONS

For several reasons, the corporate waste doctrine has failed to be the safety valve for stockholders to challenge board decisions to which courts generally grant business judgment rule deference.[263] It is time for both plaintiffs and courts to retire the corporate waste doctrine. Especially if the corporation employs a superstar CEO, shareholders and directors themselves might defer to that executive, tolerating self-dealing, problematic governance, and other practices that would normally be met with resistance.[264] Therefore, courts should create a new avenue for plaintiffs to utilize in challenging executive compensation.

A. Proposing the Compensation Award Enhanced Scrutiny Applied Review

Delaware courts should raise the presumptive standard of review on all executive compensation challenges. Although imposing the entire fairness standard across all executive compensation challenges would standardize judicial review for these cases, it would also be an improper application of existing case law because the rationales behind imposing the most onerous standard of review are absent.[265] Therefore, Delaware courts should set the presumptive standard of review at enhanced scrutiny through what this paper is proposing to be called the Compensation Award Enhanced Scrutiny Applied Review (the "*CAESAR Doctrine*").[266]

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[262] *See, e.g.*, *Tornetta II*, 310 A.3d 430, 448 (Del. Ch. 2024).

[263] *See* Yoon, *supra* Section II.F.

[264] Hamdani & Kastiel, *supra* note 17, at 1356.

[265] *See Tornetta II*, 310 A.3d at 497–98 ("Delaware law imposes fiduciary duties on those who control a corporation. Why? Because fiduciary duties exist in part to minimize agency cost caused by the divide between economic ownership and legal control. Delaware law vests control over a corporation in a board of directors and imposes attendant fiduciary obligations on the board as a consequence. When a controller displaces or neutralizes a board's power to direct corporate action, then the controller assumes fiduciary obligations."); Stein v. Blankfein, No. 2017-0354-SG, 2019 WL 2323790, at *5 (Del. Ch. May 31, 2019); In re Trados Inc. S'holder Litig., 73 A.3d 17, 44–45 (Del. Ch. 2013).

[266] *See* Joshua A. Kreinberg, *Reaching Beyond Performance Compensation in Attempts to Own the Corporate Executive*, 45 DUKE L.J. 138, 147 (1995) (performance pay traces back to Julius Caesar, when he awarded his soldiers a percentage of the spoils from

The *CAESAR Doctrine* proposes to impose the two-prong enhanced scrutiny review on executive compensation packages.[267] Various situational and contextual factors can influence corporate board negotiations of executive compensation packages, and these factors could subtly undermine the decision-making process of directors, the presence of which is sufficient to trigger enhanced scrutiny review.[268] The board of directors would bear the burden of proving that they "act[ed] reasonably to seek the transaction offering the best value reasonably available to the stockholders."[269] Although the corporate waste doctrine is of little utility, Delaware jurisprudence and scholarly articles about corporate waste can be of immense use in establishing a standard of conduct for corporate boards to follow in deciding executive compensation.[270]

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successful Roman military endeavors). The concept of a Caesar is also complementary to the idea of a "superstar CEO." *See* Hamdani & Kastiel, *supra* note 17.

[267] *See In re* Rural Metro Corp., 88 A.3d 54, 82 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)).

[268] *See In re* Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023).

[269] *In re Rural Metro Corp*., 88 A.3d at 83 (quoting Paramount Commc'n Inc. v. QVC Network Inc., 637 A.2d 34, 43 (Del. 1994)).

[270] *See* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 451–452 (2002). *Compare*, *for example*, Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (the Trans Union Board of Directors had no documentation, relied on misleading and uninformed presentation from officers, not retaining investment bankers for a fairness opinion), *Tornetta II*, 310 A.3d at 517 ("The Grant process lacked a traditional benchmarking analysis, which compares a proposed compensation plan at comparable firms."), *and* In re Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005) (presenting the compensation committee with a term sheet of key terms of the compensation package, obtaining a compensation consultant), *with In re* Invs. Bancorp, S'holder Litig., 177 A.3d 1208, 1224 (comparing compensation packages to those of similarly sized companies). *See also* Thomas & Martin, *supra* note 1, at 585 (citing RODMAN WARD, JR., EDWARD P. WELCH, ANDREW J. TUREZYN, FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 122 (4th ed. 1999) (general comments about § 122(5))) ("[C]ourts look at the following factors: evidence of the compensation received by similarly situated executives, the ability of the executive, whether the Internal Revenue Service has allowed the corporation to deduct the amount of salary alleged to be unreasonable, whether the salary bears a reasonable relation to the success of the corporation, the salary history of the executive, the relation of increases in salary to increases in the value of services rendered, and the relation of the challenged salary to other salaries paid by the employer.").

B. Triggering the CAESAR Doctrine

Superstar CEOs blur the line between visionary leadership and unchecked power.[271] The superstar CEO's unique contribution to a company's value accords significant power over boards of directors.[272] Even directors who are faithful agents of shareholders might struggle to fulfill their oversight duties when the CEO is believed to have star qualities.[273]

Board members' decision to award larger than appropriate compensation packages may be motivated by their desire to maintain a personal or social relationship with the executive.[274] CEOs often sit on corporate boards, and directors may be motivated to award a higher compensation package to reduce future friction between management and directors, hoping to prolong their lucrative part-time role serving on the board of directors.[275] As equity compensation vests, dilution threatens and impacts existing shareholders' votes, resulting in a "diminution of the current stockholders' voting power" that triggers enhanced scrutiny review under *QVC*.[276] Although not necessarily rising to the level of "depriving" or "coercing" a stockholder vote, dilution due to executive equity awards impacts the power of an individual stockholder's vote that "involves the fiduciary intruding into a space where stockholders possess rights of their own" and "raises questions about the allocation of authority within the [corporation]."[277]

For new CEO hires, a company's decision to negotiate with a particular candidate, and thus preclude discussions with other candidates, can be analogized to the use of deal protection measures, which are analyzed under the enhanced scrutiny standard like in *QVC*.[278] Inadequate compensation can lead to executives, such as existing CEOs and superstar CEOs, threatening to leave the corporation,

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[271] Dominic P. Keilty, *Starstruck: The Superstar CEO Concept in Delaware Corporate Jurisprudence*, 33 U. Mia. Bus. L. Rev. 263, 263 (2025).

[272] Hamdani & Kastiel, *supra* note 17, at 1356.

[273] *Id.* at 1378–79.

[274] *See, e.g.*, *Tornetta II*, 310 A.3d 430, 446 (Del. Ch. 2024) (board members had extensive ties to Elon Musk, for example personal relationships, vacations together, and serving as Musk's divorce attorney); *In re Walt Disney Co.*, 907 A.2d at 699 (Eisner and Ovitz had enjoyed a social and professional relationship that spanned 25 years).

[275] *See* Hamdani & Kastiel, *supra* note 17, at 1379.

[276] *See* Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45 (Del. 1994); Bliss, *supra* note 5.

[277] *See In re* Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023).

[278] *See Paramount Commc'ns*, 637 A.2d at 49 ("Defensive measures, coupled with the sale of control and subsequent disparate treatment of competing bidders, implicated the judicial scrutiny of *Unocal*, *Revlon*, *Macmillan*, and their progeny.").

which can be seen as a threat to the corporation triggering *Unocal* review.[279] Terminating the CEO would be harmful to a company, and alienating the CEO might have a similar effect.[280] Furthermore, a sufficient executive compensation package could become an obstacle in a transaction to sell a company and preclude a future change of control transaction.[281] The compensation package would effectively function as a defensive measure, to which a court's application of enhanced scrutiny review from *Unocal* and *Unitrin* would be appropriate.[282]

Golden parachutes for executives and directors, like the one used by management in their proposed leveraged buyout in *Revlon*, can involve situations where the management's and directors' financial interests conflict with the shareholders' interests.[283] Directors' independence may also be undermined, and other conflicts of interest may exist. Lucrative severance packages can act as defensive measures, creating an appropriate setting to apply enhanced scrutiny review under *Unocal* and *Unitrin*.[284] The applicable standard of review for golden parachutes will ultimately depend on when a board awarded the golden parachute. If these lucrative termination provisions were approved at the outset of the executive compensation award, then enhanced scrutiny, as proposed in this paper, would likely be appropriate. However, if existing executives and directors reward these terms to themselves after their initial employment agreement, then the court could find that conflicts exist that justify the court's imposition of the higher entire fairness standard.

These are some of the potential reasons that could create "subtle structural and situational conflicts" that can "undermine the decisions of even independent and disinterested directors."[285] Directors' decision to award executive compensation effectively "intrud[e] into a space where stockholders possess rights of their own" by diluting shareholders and their votes, thereby triggering enhanced

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[279] *See* Hamdani & Kastiel, *supra* note 17, at 1379; Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).

[280] *Tornetta II*, 310 A.3d 430, 507 (Del. Ch. 2024).

[281] *See Paramount Commc'ns*, 637 A.2d at 46 (citing Barkan, 567 A.2d at 1286).

[282] *See* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361,1387–88 (Del. 1995); *Paramount Commc'ns*, 647 A.2d at 45–46.

[283] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 178 (Del. 1986); Peter L. Coffey, *Golden Parachutes: A Perk That Boards Should Scrutinize Carefully*, 67 MARQ. L. REV. 293, 295–99 (1984); *see also supra* Section I.D.

[284] *See* Yoon, *supra* Section I.D; *see also Unocal*, 493 A.2d at 953–57; *Unitrin*, 651 A.2d at 1372.

[285] *See In re* Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 456 (Del. Ch. 2023).

scrutiny review.[286] Directors could also "doubt their own judgment and hesitate to question the decisions", especially when dealing with a superstar CEO."[287] Courts will ultimately need to determine if directors acted for the proper purpose of negotiating the best compensation package reasonably available.[288]

C. The First Prong of Enhanced Scrutiny Review in the Executive Compensation Context

The first prong of an enhanced scrutiny test is essentially a duty of care inquiry, which requires a "judicial determination regarding the adequacy of the decision-making process."[289] Executive compensation cases—like *Tornetta* and *Brehm*—and breach of fiduciary duty of cases— like *Van Gorkom*, *Unocal*, and *Revlon*—can provide helpful guidelines on the best practices corporate boards can follow to fulfill their duty of care.[290] A non-exhaustive list of recommended conduct is included below:

> Negotiation through the executive's representative and the corporation's compensation committee,;[291] directors having documentation related to the executive employment agreement;[292] accurate and informed presentation by directors involved in the employment negotiation to the board;[293] retaining a financial expert

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[286] *See id.* at 456; *Paramount Commc'ns*, 637 A.2d at 45.

[287] *Tornetta II*, 310 A.3d 430, 507 (Del. Ch. 2024) (quoting Hamdani & Kastiel, *supra* note 17, at 1379).

[288] *See In re Columbia Pipeline Grp.*, 299 A.3d at 459–60 (citing *Paramount Commc'ns*, 637 A.2d at 45).

[289] *Paramount Commc'ns*, 637 A.2d at 45.

[290] *See, e.g.*, *Tornetta II*, 310 A.3d at 517 ("The Grant process lacked a traditional benchmarking analysis, which compares a proposed compensation plan at comparable firms."); *In re* Walt Disney Co. Derivative Litig., 907 A.2d 693, 747 (Del. Ch. 2005) (presenting the compensation committee with a term sheet of key terms of the compensation package, obtaining a compensation consultant); *In re* Invs. Bancorp, Inc. S'holder Litig. 177 A.3d 1208, 1224 (comparing compensation packages to those of similarly sized companies); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).

[291] *Cf. In re Walt Disney Co.*, 907 A.2d at 734 (Russell was the chair of compensation committee and director most heavily involved in negotiating with Ovitz's representatives).

[292] *Cf. Van Gorkom*, 488 A.2d at 858 (The Board of Directors had no documentation about the transaction).

[293] *Cf. id.* at 874 (The Trans Union board relied on misleading and uninformed presentation from officers).

to issue a fairness opinion;[294] benchmark analysis comparing a proposed compensation plan to those of comparable firms;[295] presenting the compensation committee with a term sheet which contains the key terms of the proposed compensation package;[296] the executive's historical pay;[297] retaining a compensation consultant;[298] adequacy of the compensation consultant's analysis and the frequency of his/her input to the compensation committee;[299] adequacy of the compensation committee meeting to discuss the proposed terms of the compensation package;[300] the process involved in calculating growth trajectory, internal growth plans, projection considered by the Board when setting milestones;[301] and recency of the internal projections.[302]

In the aggregate, corporate compensation committees should strive to follow a diligent process to create "a frame of reference with respect to what other companies are doing with respect to compensation."[303] Corporate boards need not

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294 *Cf. id.* at 877–78 (The Trans Union board did not hire investment bankers to issue a fairness opinion).

295 *Cf. Tornetta II*, 310 A.3d at 517 (The grant process lacked a traditional benchmarking analysis comparing a proposed compensation plan to those at comparable firms).

296 *See In re Walt Disney Co.*, 907 A.2d at 708) (the Compensation Committee reviewed and discussed the term sheet during a meeting).

297 *See id.* at 701 (Ovitz's agency brought in annual revenues of $150 million. Ovitz individually brought in about $20 million annually).

298 *See id.* at 704–05 (the board hired Crystal, a compensation consultant known in the industry lambasting extravagant compensation of America's top executives, to assist the compensation committee).

299 *See id.* at 705–06 (Crystal sent multiple faxes to Disney, each with revisions and new estimations to Russell).

300 *See id.* at 708 (Disney's Compensation Committee met for one hour to discuss the proposed terms of Ovitz's Employment Agreement).

301 *See Tornetta II*, 310 A.3d 430, 488 (Del. Ch. 2024) ("The Proxy disclosed that, when setting the milestones, the 'Board carefully considered a variety of factors, including Tesla's growth trajectory and internal growth plans and the historical performance of other high-growth and high-multiple companies in the technology space that have invested in new businesses and tangible assets.'").

302 *See* Kahn v. M&F Worldwide, 88 A.3d 635, 651 (Del. 2014) ("Evercore and the Special Committee asked MFW management to produce new projections that reflected management's most up-to-date, and presumably most accurate, thinking.").

303 *See Tornetta II*, 310 A.3d at 446, 517.

follow a bright line rule, but courts should consider the totality of the circumstances to determine whether directors obtained and acted with all material information reasonably available before finalizing granting the executive compensation package—including information necessary to compare and explore alternatives.[304]

D. The Second Prong of Enhanced Scrutiny Review in the Executive Compensation Context

The second prong involves a "judicial examination of the reasonableness of the directors' action in light of the circumstances then existing."[305] The court will determine whether the directors' actions were within the "range of reasonableness."[306] In deciding whether a corporate boards' compensation decision was reasonable, Delaware courts should examine the following factors:

> Evidence of the compensation received by similarly situated executives, the ability of the executive, whether the Internal Revenue Service has allowed the corporation to deduct the amount of salary alleged to be unreasonable, whether the salary bears a reasonable relation to the success of the corporation, the salary history of the executive, the relation of increases in salary to increases in the value of services rendered, and the relation of the challenged salary to other salaries paid by the employer.[307]

Additionally, courts should especially scrutinize the benchmarks tied to the executive compensation packages and be suspicious of compensation packages that are contingent on public company's market capitalization and adjusted earnings. With the rise in passive investing and the trend of overvaluing public companies,[308] pay packages tied to market capitalization alone could not reflect the true performance improvements attained by the executive. Courts should also be wary of compensation packages with benchmarks set to adjusted EBITDA, as

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[304] *See* Smith v. Van Gorkom, 488 A.2d 858, 897 (Del. 1985); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 48 (Del. 1994).

[305] *Paramount Commc'ns*, 637 A.2d at 45.

[306] *Id.*

[307] Thomas and Martin, *supra* note 1, at 585 (citing RODMAN WARD, JR. ET AL., FOLK ON THE DELAWARE GENERAL CORPORATION LAW § 122 (4th ed. 1999) (general comments about § 122(5))).

[308] *See, e.g.*, Hao Jiang, Dimitri Vayanos, & Lu Zheng, *Passive Investing and the Rise of Mega-Firms* (Jun. 1, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4851266 [https://perma.cc/4DNZ-DKYG].

adjustments to earnings and revenue can distort a corporation's true financial performance.[309] If board members use market capitalization and adjusted financial metrics, they should justify why it was reasonable for them to do so. This prong will likely require a comparative analysis between the minimum terms the executive would have agreed to in order to work for the corporation and the terms of the employment agreement that the executive eventually signed. The larger the difference between these two terms, the less reasonable the compensation package will likely be.

A hypothetical executive compensation package that is significantly large could become a major obstacle in a transaction selling a company, potentially precluding a future change of control transaction. The compensation package would functionally be a defensive measure, which would be subject to *Unocal* and *Unitrin* enhanced scrutiny review.[310] If an executive's compensation of a size that does not preclude a future change of control transaction and is not excessive or manipulative, the pay package would not be "preclusive" or "coercive" under *QVC*, and the focus of judicial scrutiny would shift to the range of reasonableness.[311] If the board of directors' defensive response, to award a large compensation package to an executive, is not draconian (neither preclusive nor coercive) and is within the range of reasonableness, a court must not substitute its judgment for the board's.[312]

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[309] David Dalgas, Klaus Ingemann, & Per la Cour, *Investors Beware—Earnings Forecasts Omit Stock Compensation*, ALLIANCEBERNSTEIN (Aug. 30, 2023), ("[S]ome companies and Wall Street analysts tend to omit these expenses from earnings by issuing 'adjusted earnings' that often distort a company's historical earnings, future potential and free-cash-flow metrics.") (EBITDA stands for Earnings Before Interest, Taxes, Depreciation, and Amortization. Adjusted EBITDA excludes interest, depreciation, amortization expense, and stock-based compensation), https://www.alliancebernstein.com/corporate/en/insights/investment-insights/investors-beware-earnings-forecasts-omit-stock-compensation.html#:~:text=Adjusted%20earnings%20forecasts%20tend%20to%20overshadow%20reported,historical%20earnings%2C%20future%20potential%20and%20free%2Dcash%2Dflow%20metrics [https://perma.cc/5K8Q-FRYX]; *cf. Tornetta II*, 310 A.3d 430, 445 (Del. Ch. 2024) ("For a tranche to vest, Tesla's *market capitalization* must increase by $50 billion and Tesla must achieve either an *adjusted* EBITDA target or a revenue target in four consecutive fiscal quarters.") (emphasis added).

[310] *See* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–56 (Del. 1985); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361,1387–88 (Del. 1995).

[311] *See Unitrin*, 651 A.2d at 1387–88 (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 45–46 (Del. 1994)).

[312] *See id.*

A court applying enhanced judicial scrutiny should decide whether directors made a reasonable decision, not a perfect decision.[313] If a corporate board of directors selects one of several reasonable alternatives, a court should not question this choice despite disagreeing with its prudence, and despite subsequent events that may have cast doubt on the board's determination.[314] Because the remedy sought by shareholder plaintiffs are often injunctive claims, plaintiffs can likely sidestep *Corwin* cleansing.[315] Courts should engage in some hindsight analysis, especially considering courts can only scrutinize the true effects of corporate decisions executives make after the effects have manifested, especially given a company's stock price is reactive.[316] Board members should exercise caution in the negotiation process, as a conflicted action can cause a court to deem their actions as being outside the range of reasonableness.[317] This inquiry will ultimately depend on how courts assess facts and circumstances, make credibility assessments, and weigh evidence.[318]

CONCLUSION

Corporate waste has evolved into an ineffective tool for shareholders challenging executive compensation. Although courts are reluctant to do so, excessive compensation should be reviewed with the benefit of hindsight. This paper proposes that Delaware courts set the presumptive standard of review for such decisions at enhanced scrutiny, through the *CAESAR Doctrine*.

This paper advocates a narrow increase in the standard of review for a specific category of executive compensation cases. It does not advocate for raising the standard of review for all corporate decisions. The business judgment rule would still protect officers and directors for corporate decisions if the circumstances warranted such a presumption. Applying enhanced scrutiny review to executive compensation packages may look like a novel and radical re-conception of existing case law, but it is a natural extension of existing corporate

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[313] *Paramount Commc'ns*, 637 A.2d at 45.

[314] *Id.*

[315] *See In re* Edgio, Inc. S'holders Litig., 2023 WL 3167648, at *15 (citing Corwin v. KKR Fin. Holdings, 125 A.3d 304, 312 (Del. 2015)).

[316] *Compare*, *for example*, *Tornetta II*, 310 A.3d 430, 445 (Del. Ch. 2024), *with In re* Citigroup Inc. S'holder Derivative Litig., 964 A.2d 106 (challenging an executive's compensation package after the fallout of the 2008/2009 Great Financial Crisis); *see also* Knight v. Miller, No. 2021-0581-SG, 2022 WL 1233370, at *6.

[317] *In re* Columbia Pipeline Grp. Merger Litig., 299 A.3d 393, 468 (Del. Ch. 2023).

[318] *See id.* at 459–60.

law principles and rationale, as *Columbia Pipeline* outlines.[319]

Litigation risk and judicial second-guessing could act as substantial disincentive for corporate boards to approve risky transactions, such as executive hiring decisions and executive compensation packages.[320] However, directors can proactively prepare to survive enhanced scrutiny review Delaware courts apply by following a set of best practices created through case law.[321] Boards of directors will have a strong incentive to comply with best practices to reduce the "Litigation Target Zone."[322] Today, Delaware courts and the corporate waste doctrine have effectively left no arrows in shareholders' quivers in their quest to challenge executive compensation. The *CAESAR Doctrine* seeks to empower shareholders to have a say in the compensation decision-making process.

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[319] *See id.* at 456.

[320] Steiner v. Meyerson, No. 13139, 1995 WL 441999, at *1 (Del. Ch. 1995).

[321] *See supra* Section III.C.

[322] *See* Leo E. Strine, Jr., *Documenting the Deal: How Quality Control and Candor Can Improve Boardroom Decision-Making and Reduce the Litigation Target Zone*, 70-3 The Business Lawyer 679 (Summer 2015).