BENEFIT CORPORATIONS: THE END OF SHAREHOLDER PRIMACY IN THE TAKEOVER CONTEXT?

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I. INTRODUCTION

Benefit corporations are a newer form of business organization in which a corporation is legally bound to consider all stakeholders, not just shareholders, in its decision making.[1] Seemingly, this concept appears to be at odds with the shareholder primacy model, which states that a corporation's sole goal is to maximize wealth for its shareholders.[2] In this Note, I will explore the background on shareholder primacy and benefit corporations. Specifically, I will review the different approaches courts have taken with regard to (1) enforcing the shareholder primacy view in the takeover context and with change of control transactions, and (2) how the new benefit corporation form of organization may impact the duties directors have when evaluating buy-out offers. Finally, I will address the scenario when the shareholder primacy and benefit corporation models

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[1] *See infra* note 43 and accompanying text.

[2] *See* Lynn A. Stout, *New Thinking on Shareholder Primacy*, 2 ACCOUNT. ECON. LAW 1, 2 (2012).

appear to come in conflict with one another. Specifically, in the mergers and acquisitions arena where a benefit corporation is being acquired by a traditional corporation, as is illustrated by the acquisition of ice cream maker and famously sustainability conscious Ben & Jerry's, although not a benefit corporation at the time, by Unilever, a large traditional corporate conglomerate.[3] The accountability standards for directors to consider all stakeholders in the management of a benefit corporation has not been tested in the courts to date. I will explore the possible scenarios in which it could be tested and offer insight on how the courts may interpret and apply its meaning.

A. *Background on the concept of shareholder primacy*

The doctrine of shareholder primacy traces its origins to the early twentieth century as it became necessary to define the purpose of the relatively new form of business organization at that time, the public corporation. Famously, in *Dodge v. Ford Motor Co.* it was noted that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[4] It has been noted that this sentence constitutes the "famous statement of the shareholder primacy norm[.]"[5] This viewpoint has also been referred to by scholars and judges as the "property" model.[6] The thought goes that the corporation is a form of property with the stockholders who own its shares being regarded as its owners.[7]

Another well-established viewpoint in American business sees the corporation as an institution of society, with larger responsibilities than simply profit maximization and a return of wealth to its stockholders.[8] This theory evolved in the latter half of the twentieth century as corporations developed from small closely-held entities to large publicly traded behemoths whose shareholder base is "comprised largely of transient equity holders with no long-term stake in the fate of any particular corporation."[9] In this case, the directors owe a duty to the business itself and are "entitled to think about the well-being of various interests vital to the corporations *long-term* success as an economic

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[3]*See infra* Part E.

[4]Dodge v. Ford Motor, 170 N.W. 668, 684 (Mich. 1919).

[5]D. Gordon Smith, *The Shareholder Primacy Norm,* 23 J. CORP. L. 277, 319 (1998).

[6]Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There,* 75 S. CAL. L. REV. 1169, 1170 (2002).

[7]*Id.* at 1171.

[8]*Id.*

[9]*Id.*

entity."[10] This has been referred to as the "entity" model.[11] We will also refer to this as the "stakeholder approach" because the "various interests" referred to by former Delaware Supreme Court Chief Justice Leo Strine are commonly referred to as stakeholders.[12]

The property versus entity theories was famously discussed in the Great Debate.[13] Adolph Berle and Professor E. Merrick Dodd, in the pages of the Harvard Law Review in 1932, brought forth the two competing versions of the purpose of a public corporation.[14] Berle believed in the shareholder primacy or property viewpoint, while Dodd believed that a corporation's purpose should be to evaluate all stakeholders—the entity model.[15] This debate generally ebbed and flowed over the next several decades as "the two sides in the controversy seemed evenly matched[.]"[16] Lynn Stout, a noted scholar on shareholder primacy, even went on to note that the Dodd entity view may even have enjoyed a slight advantage during this time.[17]

This all seemed to change with the rise of the Chicago School of economic thinking, which emphatically tipped the scales back to the shareholder primacy view and property model.[18] This was articulated in Nobel-prize winner Milton Friedman's *New York Times* article stating that the only "social responsibility of business is to increase its profits."[19] Stout notes that the Chicago School view was backed up academically by Michael Jensen and William Meckling who, in their influential paper on the theory of the firm, opined that shareholders act as principles in a corporation and hire directors and managers to act as their agents and thus "corporate managers' only job was to maximize the wealth of the shareholders . . . by every means possible short of violating the law."[20] Stout goes on to conclude that by the 1990s this shareholder primacy view

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[10]Strine, *supra* note 6, at 1171.

[11]*Id.*

[12]*Id.* at 1171-72.

[13]As characterized in William T. Allen, et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1067 (2002). *See also* Stout, *supra* note 2 at 2 (discussing the Great Debate and its role in shareholder primacy theory).

[14]*See generally* Adolph A. Berle, *Corporate Powers as Powers in Trust,* 45 HARV. L. REV. 1365 (1932); E. Merrick Dodd, *For Whom are Our Corporate Managers Trustees?* 45 HARV. L. REV. 1145 (1932).

[15]*See* Stout, *supra* note 2, at 2.

[16]*Id.*

[17]*Id.*

[18]*Id.* at 2-3.

[19]Stout, *supra* note 2, at 2.

[20]*Id.* at 3. *See also* Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189 (2002) (discussing the residual claimant's argument with regard to shareholder primacy).

became the "only intellectually respectable theory of corporate purpose[.]"[21]

What is interesting is that both schools of thought generally believe that the other side is served by their approach. The property or shareholder focused model believes that a market oriented wealth maximization approach will, in the end, benefit all stakeholders by giving directors an easy metric to follow, and making them less susceptible to pursuing their own agendas.[22] In the long term, the profit maximization approach will lead to strong and efficient capital markets – thus creating more employment opportunities, higher salaries, and better working conditions in the overall economy.[23] In short, while in the micro perspective of an individual deal, the property model may result in a group of employees being furloughed or a certain industry being marginalized; in the macro perspective, it would be good for the overall economy as new opportunities would arise. This may be a bitter pill to swallow for some, and our recent history offers no good examples of this thought having any success.[24] On the other hand, the entity model believes the inverse – that by the corporation focusing on the long-term creation of wealth, rather than short-term shareholder profits, it will generate long-term wealth for their shareholders.[25] The thought is that a long-term minded investor, be it an employee, creditor or community, wishes to make a firm specific investment in a corporation and if they believe that the potential value created by their investment can, at any time, be subverted when a majority of stockholders decides to sell the firm, he may in turn reduce that investment.[26] This would consequently negate wealth generation.[27]

While the scholarly debate over shareholders versus all stakeholders is certainly relevant, it undoubtedly begs the question, what view did the courts adopt? The answer is complicated and is, as with most legal questions, generally best stated as – it depends. The court in *Dodge v. Ford*, while articulating the concept of shareholder primacy, concurrently discussed what we now refer to as the business judgment rule.[28] This is

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[21]Stout, *supra* note 2, at 3.

[22]Strine, *supra* note 6, at 1173-74. *See* Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001).

[23]Roe, *supra* note 22, at 2065.

[24]Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 139-45 (2012) (discussing the economic crisis in 2008 and how a motivation for short term profits nearly brought down the economy).

[25]Strine, *supra* note 6, at 1173.

[26]*Id.*

[27]*Id.* at 1173-74.

[28]*See* Dodge v. Ford Motor, 170 N.W. 668, 681-82 (Mich. 1919). *See also* E-Bay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (explaining application of

the concept that the directors of a corporation are the managers and experts of that said business – thus the courts should allow them broad discretion in determining what to consider within the business interests of the corporation.[29] The court would intervene only when directors breached the duty of care by failing to avoid wasting corporate assets and making irrational decisions.[30]

Stout notes that while courts in their dicta employ language consistent with a shareholder primacy view, they have generally opted for the stakeholder approach.[31] Corporate law, both in Delaware and in general, "allows directors to redirect wealth from shareholders to other stakeholders."[32] By using language consistent with a shareholder primacy viewpoint, the courts have been able to "blur distinctions between contradictory ideas in order to decide cases while avoiding broad issues of public policy."[33] Progressive legal scholars, such as Stout, take a broad reading of the business judgment rule and thus allow directors significant discretion with decisions so long as there is some nexus to an increase in shareholder value. In court, identifying this nexus is arguably of utmost importance, as former Chief Justice Strine noted that "[u]ltimately, any for-profit corporation that sells shares to others has to be accountable to its stockholders for delivering a financial return."[34] Strine goes on to note that Henry Ford was ultimately doomed by his admission that his shareholders should be happy with a smaller dividend since he was able to lower prices and increase wages, which would benefit the community as a whole.[35] It seems that if Ford had only said that his actions were intended to increase shareholder value long-term, then his decisions would have been perfectly justified as a legitimate business judgment.

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the business judgment rule as, "[w]hen director decisions are reviewed under the business judgment rule, this Court will not question rational judgments about how promoting non-stockholder interests—be it through making a charitable contribution, paying employees higher salaries and benefits, or more general norms like promoting a particular corporate culture—ultimately promote stockholder value. Under the *Unocal* standard, however, the directors must act within the range of reasonableness.").

[29]Strine, *supra* note 24, at 147.

[30]Michael B. Dorff, *Why Public Benefit Corporations*, 42 DEL. J. CORP. L. 77, 97 (2017).

[31]Lynn A. Stout, *Bad and Not-so-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1203 (2002).

[32]*Id.*

[33]*Id.*

[34]Strine, *supra* note 24, at 146.

[35]*Id.*

B. *Shareholder primacy in the takeover context*

It is important to note that courts generally took a narrower view within the takeover context.[36] This is evident in the *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* case.[37] The Delaware Supreme Court in *Revlon* held that where directors of a public company, in having decided to sell the firm to a company which sought to turn it into a private company, the board was dutifully bound to get the best possible price for its shares.[38] This is the embodiment of shareholder primacy. The impact of *Revlon*, however, does seem to be very limited.[39] Subsequent Delaware cases have narrowed this holding to situations of cash out mergers and have not applied it when the board decides not to sell or prefers a stock-to-stock transaction.[40] Thus, *Revlon* can seemingly meld with the general notion that directors may consider all stakeholders as the duties imposed on directors by *Revlon* do not apply to all decisions, only those that involve a cash-out merger.[41]

C. *The Benefit Corporation*

The form of corporate organization known as a benefit corporation is now recognized by thirty-seven states, including Delaware.[42] In short, benefit corporations make legal the duty for directors to consider all stakeholders, not just shareholders, in their management of a corporation.[43] Benefit corporations are not to be confused with non-profits, as benefit corporations are still explicitly for-profit entities.[44] While state law may vary with the specific organizational requirements of benefit corporations, many have mirrored their statutes on a model legislation, created by B Lab,

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[36]Strine, *supra* note 6, at 1175.

[37]Revlon, Inc. v. McAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that once a board had decided a sale of the company is appropriate, "[t]he directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders").

[38]Stout, *supra* note 31, at 1203-04.

[39]*Id.* at 1204.

[40]*Id.*

[41]*Id.*

[42]Jay Cohen Gilbert, Andrew Kassoy, & Bart Houlahan, *Transforming Capitalism for the 21st Century: It's Time to Upend Shareholder Primacy,* B LAB (Aug. 29, 2019), https://bthechange.com/transforming-capitalism-for-the-21st-century-its-time-to-upend-shareholder-primacy-35163561cfa9

[43]B LAB, *What is a Benefit Corp.?* https://benefitcorp.net (last visited Nov. 17, 2019).

[44]Mark J. Loewenstein, *Benefit Corporations: A Challenge in Corporate Governance,* 68 BUS. LAW. 1007, 1010 (2013).

a promoter and driving force of the benefit corporation movement.[45] For purposes of this paper, the discussion of benefit corporations will generally be within the parameters of the model legislation; however, it will note the variations to the model legislation that Delaware has chosen to adopt.

The model legislation and the benefit corporation movement were created by a group called B Lab. In 2006, B Lab began a certification process where existing companies (i.e., LLCs, S-Corporations, C-Corporations) could complete a multi-step certification process it had developed and become a "Certified B Corporation" indicating to the public and potential investors that the company believes in sustainability.[46] While often confused, Certified B Corporations and benefit corporations are distinct. Certified B Corporations have completed a third-party sustainability assessment, known as a B Impact Assessment, administered by B Lab.[47] The certification fee is calculated based on revenues and goes towards certification costs and other overhead from B Lab, which operates as a non-profit.[48] The motives for achieving Certified B Corporation status varies amongst the companies seeking it. These motives could range from anything such as the legitimate and firmly held belief in social entrepreneurship of its founder, to that of a marketing ploy, as if your business operated in the sustainability sphere it could certainly be attractive to potential customers that you have been independently certified as operating sustainably.[49] While B Lab had initial success with this certification process, there really was nothing binding the corporation legally from considering all stakeholders;[50] therefore, shareholder interests would still be paramount in driving decisions, especially the tough ones.

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[45]B LAB, *Benefit Corporation Model Legislation*, https://benefitcorp.net/attorneys/model-legislation

[46]B LAB, *About B Corps,* https://bcorporation.net/about-b-corps (last visited Aug. 2, 2020).

[47]*Id.*

[48]B LAB, *Certification,* https://bcorporation.net/certification (last visited Aug. 2, 2020).

[49]Michele Giddins, *The Rise of B Corps Highlights the Emergence of a New Way of Doing Business,* FORBES.COM (Aug. 3, 2018), https://www.forbes.com/sites/michelegiddens/2018/08/03/rise-of-b-corps-highlights-the-emergence-of-a-new-way-of-doing-business/#74e653202ed2 ("In short, people increasingly want to work for, buy from and invest in companies that have mission and impact at their heart of their model.").

[50]Jay Cohen Gilbert, Andrew Kassoy, Bart Houlahan, *Transforming Capitalism for the 21st Century: It's Time to Upend Shareholder Primacy,* B LAB (Aug. 29, 2019), https://bthechange.com/transforming-capitalism-for-the-21st-century-its-time-to-upend-shareholder-primacy-35163561cfa9

("Then we realized that we needed to go further to address the doctrine of shareholder primacy by passing benefit corporation legislation in 37 U.S. jurisdictions, including Delaware, that allows corporations to make themselves legally accountable to create value for their stakeholders.").

This led to B Lab lobbying state legislatures in 2008 to pass its model legislation.[51]

While possible to be a benefit corporation and not a Certified B Corporation, it is no longer possible to maintain Certified B Corporation status and not be organized as a benefit corporation. As part of its certification requirement, B Lab requires a Certified B Corporation to organize, or reorganize, as a benefit corporation.[52] The Certified B Corporation status adds the tantalizing marketing tool that many benefit corporations utilize to grow their businesses.[53] In its model legislation, B Lab proposes making the benefit corporation adhere to a third-party standard to ensure it is meeting its newly created obligations and is fully transparent by creating an annual report laying out its efforts.[54] While utilizing the services of a third-party to create this report is not required by the model legislation, B Lab is one of the firms that would be well positioned to provide this service through its Certified B Corporation process.[55] Given this, one cannot help but question B Lab's motivation, is it truly to be a "force for good"[56] or is it to legislate itself into a thriving business? Generally speaking, lawmakers often question this as well, as the third-party verification requirement is the most often changed section of the model legislation when states choose to enact a benefit corporation statute.[57]

D. *Delaware Benefit Corporation Statute*

The Delaware statute recognizing the benefit corporation form of corporate organization refers to a benefit corporation as a public benefit corporation ("PBC").[58] A distinct attraction for a benefit corporation organizing under Delaware law would be that the *Revlon* standard of being required to maximize shareholder value in a buyout scenario may not apply as the PBC statute can be interpreted as empowering directors with the "legal authority to reject buy-out offers that would harm their social

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[51]Dorff, *supra* note 30, at 82.

[52]Lowenstein, *supra* note 44, at 1013.

[53]*See id. See* CIRCLEUP, *How (And Why) to Become a B Corporation,* (Apr. 20, 2017), https://circleup.com/blog/2017/04/20/how-and-why-to-become-a-b-corporation/

[54]B LAB, *Benefit Corporation Model Legislation*, https://benefitcorp.net/attorneys/model-legislation. *See* Loewenstein, *supra* note 44, at 1016.

[55]B LAB, *What is a Benefit Corp.?,* https://benefitcorp.net (last visited Aug. 2, 2020).

[56]B LAB, *The B Corp Declaration of Independence*, https://bcorporation.net/about-b-corps (last visited Aug. 2, 2020).

[57]Lowenstein, *supra* note 44, at 1015-16.

[58]Dorff, *supra* note 30, at 86. *See also* DEL. CODE ANN. tit. 8, § 362 (West 2015) (Delaware public benefit corporation statute).

mission or non-shareholder constituencies by requiring them to balance these interests with those of shareholders."[59] Now that we have looked at the background of the benefit corporation, its intended purpose, and its perceived benefits, we will turn to what duties it actually imposes. For this discussion we will focus primarily on the Delaware legislation rather than the model legislation.

Delaware is clear that the PBC statute complements its existing General Corporation statute by adding to it or modifying it. Specifically, Delaware's public benefit corporations are "subject in all respects to the General Corporation Law, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply."[60] The main differences of a PBC from a traditional corporation, according to the Delaware statute, are expanded purpose, accountability, and transparency.[61] The Delaware statute expands the stated corporate purpose, requiring the corporation "to operate in a responsible and sustainable manner" AND "to produce a public benefit or benefits."[62] On accountability, directors of a PBC are charged with managing the affairs of the corporation "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation."[63] With regard to transparency, the corporation is required to report biennially to its shareholders on its progress to those public interests.[64] The accountability standard is by far the most specific and potentially inflexible aspect of the public benefit corporation form.[65] This accountability would presumably be, in addition to the fiduciary duties already imposed on directors, both statutorily enforced and recognized by the courts.[66] However, it is noted that this merely modifies the directors' duty of care by adding specificity as to what directors "must do to satisfy it and avoid liability."[67] Some

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[59]Dorff, *supra* note 30, at 93.

[60]David G. Yosifon, *Opting out of Shareholder Primacy: Is the Public Benefit Corporation Trivial,* 41 DEL. J. CORP. L. 461, 480 (2017) (quoting Delaware statute, internal quotations omitted). DEL. CODE ANN. tit. 8, § 361 (West 2015).

[61]Yosifson, *supra* note 60 at 480.

[62]DEL. CODE ANN. tit. 8, § 362 (West 2015). *See* B LAB, *How to become a DE Benefit Corporation*, https://benefitcorp.net/sites/default/files/HowtobecomeaDEBenefitCorp.pdf (last visited Aug. 2, 2020).

[63]DEL. CODE ANN. tit. 8, § 365(a) (West 2020).

[64]DEL. CODE ANN. tit. 8, § 366(b) (West 2013).

[65]*See* Yosifon, *supra* note 60, at 483-85.

[66]*See* Dorff, *supra* note 30, at 96. Dorff suggests that a reading of the Delaware PBC Statute may impose liability upon director decisions that are merely unreasonable, rather than irrational.

[67]*Id.* at 96-97.

scholars have noted that this additional accountability language may actually expose directors to additional liability.[68]

While unclear as to what, if any, additional exposure to liability the accountability language may add for directors, it seems that it may give directors additional justification for making decisions that may facially seem counter to a shareholder value scenario.[69] The legal duties imposed upon, and the legal protection given to directors of PBC's in their decision making abilities, remains a moving target that has not yet been tested in the courts. We will explore where, in the mergers and acquisitions context, the additional accountability imposed on directors may be tested.

E. *Benefit Corporations and Mergers and Acquisitions*

The case of Ben & Jerry's offers a real-life example of both the shareholder primacy and stakeholder approach guiding decisions. In 2000, Ben & Jerry's, a public company, agreed to be acquired by the Dutch corporate conglomerate Unilever.[70] Ben & Jerry's was famously known as a "quirky ice cream company that made social consciousness central to its strategy."[71] However, being publicly traded, Ben & Jerry's directors realized that they had a duty to its shareholders to give them maximum value.[72] In evaluating between the deal offered by Unilever and another that would have taken the company private, co-founder Ben Cohen opined "[w]hile I would have preferred for Ben & Jerry's to remain independent, I'm excited about this next chapter."[73] What Cohen was alluding to was an unsolicited offer from a competitor that essentially derailed the plan to take the company private and forced the board "to let all three groups put their best offers on the table[.]"[74] A principle adviser expressed the general sentiment among the board and the co-founders by stating, "[w]e think it's horrible that a company has no choice but to sell to the highest bidder or get sued."[75] A not so subtle acknowledgment to the *Revlon* precedent that a board must adhere to when evaluating potential acquisition offers. Ultimately, Ben & Jerry's was able to maintain its socially conscious mission as Unilever allowed it to be operated by its own board and

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[68] *Id.* at 97.

[69] *See* Yosifon, *supra* note 60, at 483.

[70] Constance L. Hays, *Ben & Jerry's to Unilever, With Attitude,* N.Y. TIMES, Apr. 13, 2000, at C1.

[71] *Id.*

[72] *See id.*

[73] *Id.*

[74] Hays, *supra* note 70.

[75] *Id.*

Unilever also agreed to commit 7.5 percent of Ben & Jerry's profits to a foundation.[76] Generally, giant corporations and socially conscious entrepreneurs would make strange bedfellows, however, this deal on its face seemed to please everyone. Ben & Jerry's, while still a wholly owned subsidiary of Unilever, is now organized as a benefit corporation, along with being a Certified B Corporation and the poster child for a socially conscious for-profit business. While the union between Unilever and Ben & Jerry's appears to be one made in heaven, it would be naïve to believe this to be the rule rather than the exception.

While the majority of benefit corporations are generally small, closely-held businesses, Ben & Jerry's provides an example of a company that grew itself by embracing a socially conscious strategy, arguably in a time not nearly as conducive to such a business model as today. Therefore, as these small, closely-held businesses choose to embrace benefit corporation organization and Certified B Corporation status to grow and thrive, it will be inevitable that traditional corporations will desire entrance to the sustainability arena via mergers and acquisitions. This is seemingly the true purpose of the benefit corporation, as with a legal duty to consider all stakeholders, the socially conscious entrepreneur or like-minded directors need not simply sell to the highest bidder, but may consider what buyer will provide the best fit to continue their mission. Interestingly, even though all seems well between Unilever and Ben & Jerry's now, if the Ben & Jerry's directors had this ability, they may not have been acquired by Unilever and instead gone private, as the founders would have preferred.[77] When reviewing the acquisition from Unilever's perspective, did they truly add value to their shareholders by purchasing a company who agreed to give a sizable portion of its profits away and who has now made a legal commitment to consider all stakeholders in its decision making?

This scenario, where a benefit corporation is acquired by or merged with a traditional corporation, is one area where the legal test of the benefit corporation may be fought. The traditional corporation's shareholders may bring an action, either legally or through a proxy fight, claiming that their value is being compromised by the directors purchasing a company who is organized in a way that allows it to not hold shareholder value first and foremost. An alternate scenario is where the shareholders of the benefit corporation bring an action arguing that selling the company to a traditional corporation compromises its social mission, which may have been their main reason for originally investing. These are the competing

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[76] *Id.*
[77] *See id.*

interests that directors will have to balance, both in managing everyday affairs and in making decisions in the context of a merger or acquisition.

Some have argued that the benefit corporation has no real purpose.[78] However, I think the major impact, whether it was intended or not, will be the additional flexibility afforded directors in a change of control transaction. The benefit corporation effectively allows directors to not have to abide by the *Revlon* rule requiring them to only consider maximum shareholder value in change of control transactions.[79] Thus, if the benefit corporation form existed in the time of the Ben & Jerry's/Unilever transaction, the Ben & Jerry's directors would have been able to reject the Unilever bid and opt to stay independent. That is not to say that the theoretical decision would not be challenged, just that the Delaware PBC statute may be interpreted to allow directors this latitude.[80]

In the case of traditional corporate shareholders challenging the acquisition of a benefit corporation as counter to maximizing value, the business judgment rule would most likely govern. Since there is no change of control with regard to the acquiror, the *Revlon* principles would not apply, therefore the decision to acquire the benefit corporation would be viewed through the business judgment lens, and if the directors can show that they had a good faith belief that the acquisition would make long term sense for shareholder value, they will be given the benefit of the doubt. Assuming no Henry Ford-like detrimental honesty, as long as some nexus exists that backs up the decision as a legitimate good investment, the directors would most likely prevail in any theoretical legal challenge.[81]

II. CONCLUSION

As noted, the emergence of benefit corporations as a form of business organization looks to limit the impact of shareholder primacy in all of the decision making within a corporation. It will be very interesting to observe the inevitable legal issues that will be adjudicated surrounding the benefit corporation accountability standards. Likely, most of these legal challenges will be in the mergers and acquisition context, just as the landmark shareholder primacy cases resulted from. The courts will be forced to deal with the *Revlon* precedent and decide if the benefit corporation accountability standards sufficiently protect directors from being compelled to maximize shareholder value first and foremost in

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[78] *See generally* Yosifon, *supra* note 60.
[79] *See* Dorff, *supra* note 30, at 93.
[80] *See id.*
[81] *See supra* note 28 and accompanying text.

change of control transactions. It seems this may be the ultimate impact of benefit corporations, the limitation and narrowing of the *Revlon* precedent and making official something that traditional corporations already admit they are cognizant of – the consideration of all stakeholders in their decision making.[82]

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[82]In August of 2019, a group of 181 CEOs signed a commitment to lead their companies for the benefit of all stakeholders. While this is a more informal commitment to pursue the same values that a benefit corporation legally commits itself to do, it is still important as it represents the changing view of the purpose of an American corporation. *See* Business Roundtable, *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans',* (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.