

## Defending Patagonia: Mergers & Acquisitions with Benefit Corporations

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*Yvon Chouinard, founder of Patagonia, stated that “benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership.” This article uses Patagonia, one of the most visible benefit corporations, in the article’s examination of Chouinard’s claim and in the article’s exploration of issues surrounding benefit corporations in the mergers and acquisitions context.*

*Of special interest are the seminal Delaware cases of Unocal and Revlon, and how, if at all, the tests created by those cases should be applied to benefit corporations. This article concludes that the Unocal test could be used to evaluate takeover defenses erected by benefit corporations, but argues that the test should be modified to more clearly allow directors to protect the mission of their benefit corporation, even if the mission “openly eschews shareholder wealth maximization.” A more difficult issue arises when the break-up or sale of a benefit corporation becomes inevitable and the benefit corporation, incorporated in a state that follows Delaware law, enters “Revlon-mode.” To provide a practical corporate governance framework, this article concludes that Revlon should remain relevant for benefit corporations that are incorporated in states following Delaware law, but proposes statutory amendments requiring a partial-asset lock and an annual charitable giving floor to ensure public benefit.*

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## I. INTRODUCTION

“Benefit corporation legislation creates the legal framework to enable mission-driven companies like Patagonia to stay mission-driven through succession, capital raises, and even changes in ownership, by institutionalizing the values, culture, processes, and high standards put in place by founding entrepreneurs.”<sup>1</sup>

—Yvon Chouinard, Founder of Patagonia

In early January 2012, Patagonia became one of the first California benefit corporations.<sup>2</sup> Patagonia also became one of the largest corporations, and perhaps the most well-known corporation in the United States, to convert to a benefit corporation. This article explores the above-quoted claim of Patagonia’s founder, Yvon Chouinard. Will the benefit corporation statutes enable companies like Patagonia to preserve their mission in the face of hostile takeover threats? To what extent should the benefit corporation statutes protect against such threats?

While Patagonia is a privately-held California benefit corporation, this article explores possibilities that include envisioning Patagonia as a publicly-traded corporation and Patagonia as a Delaware benefit corporation (or a benefit corporation in a state that closely follows Delaware law, because Delaware does not yet have a benefit corporation statute).<sup>3</sup> No stretch of the imagination is needed to envision a future Patagonia as a publicly traded company and some version of a benefit corporation statute being enacted in Delaware.

Part II of this article provides a brief background on Patagonia and on the benefit corporation statutes. Part III examines how a court following *Unocal*<sup>4</sup> and its progeny might analyze takeover defenses

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1. *Patagonia Registers as First California Benefit Corporation*, CSR WIRE (Jan., 30, 2012), [http://www.csrwire.com/press\\_releases/33565-Patagonia-Registers-as-First-California-Benefit-Corporation](http://www.csrwire.com/press_releases/33565-Patagonia-Registers-as-First-California-Benefit-Corporation).

2. *Id.*

3. Yvon Chouinard currently controls Patagonia’s stock. Seth Stevenson, *Patagonia’s Founder Is America’s Most Unlikely Business Guru*, WSJ (Apr. 26, 2012), <http://online.wsj.com/article/SB10001424052702303513404577352221465986612.html>. A few days before the final edits on this article were due, statutory amendments to the Delaware General Corporation Law allowing the creation of “public benefit corporations” were proposed. Haskell Murray, *Delaware Public Benefit Corporation Legislation*, SOCENTLAW (March 20, 2013), <http://socentlaw.com/2013/03/delaware-public-benefit-corporation-legislation>.

4. *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946 (Del. 1985).

erected by benefit corporations, taking special interest in the Delaware Court of Chancery's 2010 case of *eBay v. Newmark*.<sup>5</sup> Part IV ventures into *Revlon*-land and argues that *Revlon* should remain relevant in the benefit corporation context.<sup>6</sup> Part V examines and evaluates preexisting potential ways a company like Patagonia could protect its mission. Part VI discusses solutions offered by the existing benefit corporation statutes, suggests modifications to those statutes, and builds on the author's previous work on benefit corporation governance by focusing on the mergers and acquisitions context.<sup>7</sup> Finally, the article concludes that an appropriately modified benefit corporation statute could reduce "mission-drift," also known as "mission creep," but would not and should not create an absolute lock on the corporation's original mission.<sup>8</sup>

## II. PATAGONIA AND BENEFIT CORPORATIONS

### A. PATAGONIA: THE FLAGSHIP BENEFIT CORPORATION

Rock climber, surfer, and environmentalist Yvon Chouinard founded the outdoor clothing company Patagonia, Inc. in 1973.<sup>9</sup> Patagonia recently recorded over \$500 million dollars in annual sales,<sup>10</sup> has been dubbed "the coolest company on the planet,"<sup>11</sup> and aspires to "use business to inspire and implement solutions to the environmental crisis."<sup>12</sup> In his most recent book, *The Responsible*

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5. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

6. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

7. See generally J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1 (2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2085000](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2085000) (discussing benefit corporation governance, but only briefly mentioning the mergers and acquisitions context).

8. Professor Jenkins defines "mission creep" as "an organizational phenomenon in which entities inadvertently, over time, stray from their fundamental mission by engaging in activities or behaviors less closely related to the core charitable purpose." Garry W. Jenkins, *Who's Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 805 n.212 (2011).

9. YVON CHOUINARD, *LET MY PEOPLE GO SURFING: THE EDUCATION OF A RELUCTANT BUSINESSMAN* 38-44 (2006).

10. Patagonia, *The World's 50 Most Innovative Companies*, FAST COMPANY, <http://www.fastcompany.com/most-innovative-companies/2012/patagonia> (last visited Jan. 30, 2013).

11. Susan Casey, *Patagonia: Blueprint for Green Business*, FORTUNE, Apr. 2, 2007, at 62, available at [http://money.cnn.com/magazines/fortune/fortune\\_archive/2007/04/02/8403423/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2007/04/02/8403423/index.htm).

12. YVON CHOUINARD & VINCENT STANLEY, *THE RESPONSIBLE COMPANY* (back cover) (2012).

*Company*, Chouinard acknowledges that Patagonia is not perfect, but states that the company seriously seeks to benefit society and the environment.<sup>13</sup> Patagonia's numerous social and environmental initiatives include providing health care to part-time workers, providing flexible working schedules, enforcing a code of conduct on all primary suppliers, using primarily environmentally preferred materials, and donating one percent of sales to environmental NGOs.<sup>14</sup>

On November 9, 2012, Chouinard turned 74 years old.<sup>15</sup> Like all of us, he will die. It is reasonable to assume, especially given the opening quote, that he would like his life's work to continue after he is gone. It is also reasonable to assume that he would want Patagonia to continue to operate in an environmentally friendly manner and support environmental causes after he is gone. While completely preventing "mission-drift" may be neither possible nor necessarily desirable, benefit corporation law could help ensure that a mission shift is reasonably difficult and that at least a portion of the assets are devoted to the intended corporate mission.<sup>16</sup> The benefit corporation statutes may provide additional valuable protection for risk-averse managers and could serve as a valuable warning device to possible acquirers.<sup>17</sup> While this article suggests that the current benefit corporation statutes are far from perfect, there is reason to believe benefit corporation statutes, coupled with statutory amendments suggested in this article, could be useful in defending the missions of companies like Patagonia.<sup>18</sup>

## B. BRIEF HISTORY OF BENEFIT CORPORATIONS

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13. *Id.* at 5.

14. *B Corp Community: Patagonia Inc.*, B LAB CERTIFIED B CORPORATION, <http://bcorporation.net/community/directory/patagonia> (last visited Jan. 30, 2013).

15. *America's Best Leaders 2009*, U.S. NEWS & WORLD REPORT <http://www.usnews.com/listings/best-leaders/4-yvon-chouinard> (last visited Jan. 30, 2013).

16. *See infra* Parts V and VI.

17. Profit-focused acquirers could, however, see benefit corporations as attractive targets because of the social goodwill the benefit corporation has created. Alicia Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 *TRANSACTIONS: TENN. J. BUS. L.* 221, 235 (2012). In addition, some profit-focused acquirers could see benefit corporations as poorly managed and envision opportunities to cut the social and environmental programs, increase profits, and subsequently sell for a quick profit. Parts III, IV, and V discuss the legal hurdles that a profit-focused acquirer would have to clear under the current law and additional amendments to the benefit corporation statutes that should be considered.

18. *See infra* Parts V and VI.

In 2007, B Lab, a nonprofit organization, began certifying companies as “Certified B Corporations.”<sup>19</sup> Eventually, B Lab also started lobbying states to pass benefit corporation statutes, and in 2010 Maryland became the first state to pass such a statute.<sup>20</sup> Since then, 11 other states have passed similar benefit corporation statutes.<sup>21</sup> A number of the states have passed the legislation unanimously,<sup>22</sup> but a few states have rejected or stalled the bills.<sup>23</sup> As of the date of publication of this article, there is no known litigation involving benefit corporation governance. Currently, there are approximately 700 Certified B Corporations and approximately 200 entities formed as benefit corporations.<sup>24</sup>

According to their proponents, the benefit corporation statutes combat the shareholder wealth maximization norm that they claim is mandated by traditional corporate law.<sup>25</sup> In practice, except in a small handful of cases—*Dodge v. Ford*,<sup>26</sup> *Revlon*,<sup>27</sup> and *eBay v. Newmark*<sup>28</sup>—courts very rarely enforce shareholder wealth maximization.<sup>29</sup> Among

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19. Murray, *supra* note 7 (discussing the differences between Certified B Corporations and benefit corporations).

20. *Maryland First State in Union to Pass Benefit Corporation Legislation*, CSR WIRE (Apr. 14, 2012), [http://www.csrwire.com/press\\_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation](http://www.csrwire.com/press_releases/29332-Maryland-First-State-in-Union-to-Pass-Benefit-Corporation-Legislation).

21. *Benefit Corp. State by State Legislation*, CERTIFIED BENEFIT CORP INFORMATION, <http://www.benefitcorp.net/state-by-state-legislative-status> (last visited Jan. 30, 2013).

22. *See PA Leads B Corporations Push, But Will It Become Official?*, KEYSTONE EDGE (May 3, 2012), <http://www.keystoneedge.com/features/bcorporations0503.aspx> (noting the nine unanimous floor votes for benefit corporations as of May 2012).

23. To date, at least Michigan, North Carolina, and Colorado have provided some resistance to passing the model benefit corporation legislation.

24. CERTIFIED B CORPORATION, <http://www.bcorporation.net>. The number of benefit corporations is difficult to determine with accuracy, as many secretaries of states do not separate benefit corporations from traditional corporations, but the estimate of 200 benefit corporations is made based on the author’s efforts calling secretaries of states, and consultation with B Lab personnel. An incomplete list of benefit corporations can be found at the following website: <http://www.benefitcorp.net/find-a-benefit-corp/search>. *See also* Eric Talley, *Corporate Form and Social Entrepreneurship: A Status Report from California (and Beyond)* 7 (UC Berkeley Pub. L. Research, Working Paper No. 2144567, Sept. 10, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144567](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144567) (reporting that 60 benefit corporations had been formed in California by mid-August 2012. Professor Talley also mentions that this number of benefit corporations is massively dwarfed by the roughly 60,000 new incorporations occurred overall during the same period of time in California.”).

25. *See* Murray, *supra* note 7 (detailing the debate over the shareholder wealth maximization norm).

26. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

27. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

28. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

29. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 288 (1998) (noting

the exceptions, however, the takeover cases play a prominent role.<sup>30</sup>

### III. TAKEOVER DEFENSES, *UNOCAL*, AND *EBAY*

#### A. TWO-PRONGED *UNOCAL* TEST

A seminal case in the takeover defense area is the Delaware Supreme Court case of *Unocal Corp. v. Mesa Petroleum Co.*<sup>31</sup> In analyzing the use of a self-tender offer as a takeover defense, *Unocal* applied what “has been called an ‘intermediate’ or ‘enhanced business judgment’ standard of review, but is perhaps best described as a ‘conditional business judgment rule.’”<sup>32</sup> The *Unocal* court stated, “[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders, there is an enhanced duty which calls for judicial examination before the protections of the business judgment rule may be conferred.”<sup>33</sup> Under the first prong of the two-pronged *Unocal* test, the directors of the company enacting the takeover defense bear the burden of showing a “danger to corporate policy or effectiveness.”<sup>34</sup> Under the second prong, the directors must also prove that the takeover defense was “reasonable in relation to the threat posed.”<sup>35</sup> If the directors satisfy both prongs of the *Unocal* test then the business judgment rule applies. But if the directors fail to carry their burden on either prong then the intrinsic fairness test applies.<sup>36</sup> While the two-

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that “[a]lthough it is possible for shareholders to prevail on claims that the board of directors violated the shareholder primacy norm, such cases are extremely rare”).

30. See *infra* Part III.

31. 493 A.2d 946 (Del. 1985); see generally Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769 (2006) [hereinafter Bainbridge I]; Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001).

32. STEPHEN M. BAINBRIDGE, *MERGERS AND ACQUISITIONS* 254 (3d ed. 2012) [hereinafter BAINBRIDGE (M&A)].

33. *Unocal*, 493 A.2d at 954.

34. *Id.* at 955. Directors may carry their burden under the first prong by “showing good faith and reasonable investigation.” *Id.* The director’s proof is “materially enhanced” if the board is “comprised of a majority of outside directors.” *Id.*

35. *Id.* at 955–56. Under the second prong, which is an element of balance, the court will analyze the “nature of the takeover bid and its effect on the corporate enterprise.” *Id.* at 955. The court listed the following as potential concerns: “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on ‘constituencies’ other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.” *Id.*

36. *Id.* at 9585; R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *DELAWARE LAW OF CORPORATIONS AND*

prong test is merely the first part of the inquiry to determine which standard applies, the answer to the initial inquiry is usually outcome determinative.<sup>37</sup> Ten years after *Unocal*, the *Unitrin* court added that “if the board of directors’ defensive response is not draconian (preclusive or coercive) and is within a ‘range of reasonableness,’ a court must not substitute its judgment for the board’s.”<sup>38</sup>

Academic commentators have noted that, while the *Unocal* test may be called an “enhanced” or “intermediate” standard of review, the test is seldom used to hold directors accountable.<sup>39</sup> *Unocal* expressly allows consideration of “constituencies other than shareholders” and stated that “perhaps” the community in general could even be considered.<sup>40</sup>

Of the 12 states that have passed benefit corporation statutes, one has cited *Unocal* approvingly, three have expressly rejected *Unocal*, and eight have not yet cited *Unocal* either positively or negatively in cases involving their state’s law.<sup>41</sup> The states that have rejected or not yet addressed *Unocal* appear to mostly use the business judgment rule in takeover defense situations, giving directors even more protection than *Unocal*’s conditional business judgment rule.<sup>42</sup>

## B. EBAY AND TRADITIONAL FOR-PROFIT CORPORATIONS

The *eBay v. Newmark*<sup>43</sup> case arose out of disagreements between eBay and the two founders of Craigslist (Craig Newmark and James Buckmaster).<sup>44</sup> As of August 10, 2004 Craigslist had three shareholders: Newmark owned 42.6 percent, Buckmaster owned 29 percent, and eBay owned 28.4 percent.<sup>45</sup> eBay expressed interest in taking over Craigslist, allegedly misused Craigslist’s confidential

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BUSINESS ORGANIZATIONS § 4.20 (3d. ed. 1997 & Supp. 2012).

37. BAINBRIDGE (M&A), *supra* note 32, at 257.

38. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 (Del. 1995).

39. *See, e.g.*, Bainbridge I, *supra* note 31, at 772 (citing academics who have criticized *Unocal* as a “toothless standard”). In contrast, *Unocal* has also been called “the most innovative and promising in [Delaware’s] recent corporation law.” *City Capital Assocs. Ltd. P’ship v. Interco Inc.*, 551 A.2d 787, 796 (Del. Ch. 1989).

40. *Unocal*, 493 A.2d at 955.

41. *See infra* Appendix A.

42. *Id.*

43. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1 (Del. Ch. 2010).

44. *Id.* at 6; *see generally* David A. Wishnick, *Corporate Purposes in a Free Enterprise System: A Comment on eBay v. Newmark*, Comment, 121 YALE L.J. 2405 (2012).

45. *eBay*, 16 A.3d at 11.

information to launch a competing website, and disagreed with the founders on numerous operational issues.<sup>46</sup> Not interested in selling craigslist and wishing to “gracefully unwind the relationship” with eBay, the founders of Craigslist took three primary actions that led to the litigation: “(1) implementation of a staggered board through amendments to the craigslist charter and bylaws (the “Staggered Board Amendments”); (2) approval of a stockholder rights plan (the “Rights Plan”); and (3) an offer to issue one new share of craigslist stock in exchange for every five shares on which a craigslist stockholder granted a right of first refusal in favor of craigslist (the “ROFR/Dilutive Issuance”).”<sup>47</sup> The Chancellor applied the *Unocal* standard to the Rights Plan and rescinded the entire plan.<sup>48</sup>

The *eBay v. Newmark* case has been used aggressively by proponents of the benefit corporation statutes. For example, B Lab co-founder Jay Coen Gilbert stated, according to *eBay*, “the only game in town, if you are a U.S. corporation, is to maximize shareholder value. That makes it awfully hard to care about what you’re doing with your employees or what you’re doing with your community or what you are doing with the environment when that is the law of the land and if you don’t do that you can get sued.”<sup>49</sup> Furthermore, the Benefit Corporation White Paper, authored by a number of attorneys who are promoting the form, states that “[i]n *eBay Domestic Holdings, Inc. v. Newmark*, the Delaware Court of Chancery recently reaffirmed its position that corporate directors are obligated pursuant to their fiduciary duties to maximize shareholder value.”<sup>50</sup> A fair reading of Delaware law, however, shows much more deference to directorial

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46. *Id.* at 15–20.

47. *eBay*, 16 A.3d at 19–21.

48. *Id.* at 28–35. The *eBay v. Newmark* case, which amounted to a rare loss for directors, could have breathed a bit of life into what has been called a dead or dying *Unocal* case. Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261, 286–94 (2001) (describing *Unocal* as a “dead letter” and stating that directors virtually always win under the *Unocal* standard.) However, the *eBay* court mentioned that this appeared to be the first case of an extremely closely held corporation utilizing a Rights Plan and noted that the craigslist stockholders were not “dispersed, disempowered, or vulnerable stockholders” that Rights Plans were usually used to protect. *eBay*, 15 A.3d at 30–31. As such, *eBay*’s impact may be limited.

49. Jay Coen Gilbert, *TedX xPhilly – Jay Coen Gilbert – On Better Business*, YOUTUBE, at 9:40–10:02 (Dec. 1, 2010), <http://www.youtube.com/watch?v=mGnz-w9p5FU>.

50. William H. Clark & Larry Vranka, *The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form that Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public* 11 (Benefits Corp. White Paper, 2012), available at [http://www.benefitcorp.net/storage/The\\_Need\\_and\\_Rationale\\_for\\_Benefit\\_Corporations\\_-\\_April\\_2012.pdf](http://www.benefitcorp.net/storage/The_Need_and_Rationale_for_Benefit_Corporations_-_April_2012.pdf).

decisionmaking than either of these statements suggest, but Chancellor Leo Strine added fuel to the fire with his 2012 Wake Forest Law Review article titled *Our Continuing Struggle With The Idea That For-Profit Corporations Seek Profit*.<sup>51</sup> In that article, Chancellor Strine argued “that the corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders,” but he also clarified that he did “not mean to imply that the corporate law requires directors to maximize *short-term* profits for stockholders.”<sup>52</sup>

While the outcome in *eBay v. Newmark* may be rare, its impact could be quite significant. For example, while the 1919 *Dodge v. Ford* case, which overrode Henry Ford’s decision not to pay special dividends in a purported attempt to benefit society with the funds, was admittedly “atavistic,” it has impacted corporate law practice for almost an entire century by pushing risk-averse business people toward more emphasis on shareholder wealth.<sup>53</sup> Norms and practices that spring from cases like *Dodge v. Ford* can reach much further than the actual holding of the case or any precedential power the case may possess.<sup>54</sup> The *eBay* case has the potential for a large impact similar to *Dodge v. Ford*, especially in the takeover defense arena, even if some academics feel that *eBay* was wrongly decided or should be limited to minority oppression fact patterns.<sup>55</sup> While the *Unocal* standard is generally toothless, the *eBay* case will likely work itself into corporate lore and could push risk adverse social entrepreneurs, especially those using the Delaware for-profit corporate form, in the direction of shareholder wealth maximization.

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51. Leo E. Strine, Jr. *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135 (2012). One can read Chancellor Strine’s article as arguing for an extension of *eBay* beyond the takeover defense area.

52. Leo E. Strine, Jr., *supra* note 51, at 155 (emphasis added).

53. William T. Allen & Leo E. Strine, Jr., *When the Existing Economic Order Deserves a Champion: The Enduring Relevance of Martin Lipton’s Vision of the Corporate Law*, 60 BUS. LAW. 1383, 1385 n.7 (2005).

54. See generally Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 WM. & MARY L. REV. 519 (2012). While *eBay* is a lower court decision, it comes from the highly influential Delaware Court of Chancery. *Dodge v. Ford*, on the other hand, was a case from Michigan, a state that has comparatively little influence on the course of corporate law.

55. See, e.g., Lyman Johnson, *Beyond the Inevitable and Inadequate Regulation of Bankers: A Comment on Painter*, 8 U. ST. THOMAS L.J. 29, 37 n.29 (2010) (noting problems with the *eBay* decision); see also e-mail from Professor Lynn Stout (March 25, 2013 12:31 EST) (confirming her view that *eBay* is merely an oppression case). Cf. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 323 (1998) (noting that the shareholder primacy norm “first appeared in cases involving closely held corporations, which today would be treated under the doctrine of minority oppression”).

The benefit corporation legislation alleviates fears of the *eBay* situation repeating itself by explicitly stating that the purpose of a benefit corporation is not shareholder wealth maximization but rather a “general public benefit.”<sup>56</sup> The *Unocal* test could still be used in evaluating a benefit corporation’s takeover defense, but the threats and the reasonableness of the response would be evaluated in light of the purpose of the benefit corporation. The stated purpose of the benefit corporation would also prevent courts from concluding, as Chancellor Chandler did in *eBay*, that “[p]romoting, protecting, or pursuing nonstockholder considerations must lead at some point to value for stockholders.”<sup>57</sup>

Takeover defenses erected by directors of a benefit corporation to protect the entity from those focusing on short-term profits, and from rulings like those in *eBay v. Newmark*, should be allowed, but the takeover defenses should still have to be reasonably related to the mission of the entity. The current benefit corporation statutes do not require managers to prioritize among the stakeholders, but this author has suggested that the statutes should at least require benefit corporations to choose their top priority to guide courts, directors, and investors.<sup>58</sup> Once the top priority is chosen, the courts could more easily use the *Unocal* test to determine whether the takeover defense was a reasonable protection of the entity’s mission and its priorities. Benefit corporation directors would be able to protect the company’s mission, without fear of ruling like the one in *eBay v. Newmark*, but the clear statement of the entity’s top priority would allow courts to effectively use the *Unocal* test to attack unreasonable takeover defenses that were erected only to entrench the directors and not to protect the entity’s mission.<sup>59</sup>

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56. See Model Benefit Corp. Legislation §§ 102(a), 201(a) (defining “general public benefit” as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”), available at [http://www.benefitcorp.net/storage/Model\\_Legislation.pdf](http://www.benefitcorp.net/storage/Model_Legislation.pdf) (making the creation of “general public benefit”, defined as “[a] material positive impact on society and the environment, taken as a whole, assessed against a third-party standard, from the business and operations of a benefit corporation.”). Most of the state benefit corporation statutes closely follow the model legislation. See J. Haskell Murray, *Benefit Corporations: State Statute Comparison Chart* (Dec. 6, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1988556](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1988556).

57. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d at 1, 33 (Del. Ch. 2010).

58. Murray, *supra* note 7 (proposing that benefit corporation statutes require benefit corporations to state the stakeholder of primary importance in the corporation’s governing documents).

59. The “general public benefit purpose” required in the benefit corporation statutes would likely allow directors of benefit corporations to erect draconian takeover defenses and hide

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behind the vague, unprioritized language to completely entrench themselves. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985) (stating that the “omnipresent specter” of self-interest and the directors’ natural desire to entrench themselves in their positions leads to the need for an enhanced duty and additional judicial scrutiny).

IV. EXPLORING *REVLON*-LANDA. *REVLON* BACKGROUND

*Revlon* is one of the most cited and most controversial cases in corporate law.<sup>60</sup> In that case, Revlon faced a hostile takeover bid from Ronald Pearlman's Pantry Pride, Inc. ("Pantry Pride") and used defensive measures to favor its "white knight" Forstmann Little & Co. and its affiliates (collectively, "Forstmann").<sup>61</sup> The court found that Revlon ended the auction, involving Pearlman and Forstmann, prematurely by granting Forstmann an option to buy certain valuable Revlon assets at a discount (the "lock-up option"), a no-shop provision, and a \$25 million cancellation fee.<sup>62</sup> The Delaware Supreme Court upheld the Delaware Court of Chancery's decision to enjoin the defensive measures.<sup>63</sup>

Revlon claimed that one of the reasons it accepted Forstmann's offer was because his offer was better for constituencies other than stockholders, including noteholders.<sup>64</sup> The court rejected that argument, stating "while concern for various corporate constituencies is proper when addressing a takeover threat, that principle is limited by the requirement that there be some rationally related benefit accruing to the stockholders."<sup>65</sup> The court further explained "[a] board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders. However, such concern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder."<sup>66</sup>

Under *Revlon*, when:

it became apparent to all that the break-up of the company was inevitable . . . . The duty of the board had thus changed from the preservation of Revlon as a corporate entity to *the maximization of*

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60. BALOTTI & FINKELSTEIN, *supra* note 36, § 4.20.

61. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 175-76 (Del. 1986).

62. *Revlon*, 506 A.2d at 175-76.

63. *Id.* at 185.

64. *Id.* at 179. The court explained that the noteholders' interests were protected by contract. *Id.* 182-83.

65. *Id.* at 176.

66. *Id.* at 182 (citation omitted).

*the company's value at a sale for the stockholders' benefit. This significantly altered the board's responsibilities under the Unocal standards. It no longer faced threats to corporate policy and effectiveness, or to the stockholders' interests, from a grossly inadequate bid. The whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company.*<sup>67</sup>

As evidenced by these quotes, once a company enters *Revlon*-land, it must intensify focus on shareholder wealth.

## B. *TIME* AND *QVC*

This section will address two major cases following *Revlon: Paramount Communications Inc. v. Time Inc.* ("*Time*")<sup>68</sup> and *Paramount Communications Inc. v. QVC Network Inc.* ("*QVC*").<sup>69</sup> Like *Revlon*, these opinions are by no means recent, but they all still hold prominent places in the mergers and acquisitions case law.<sup>70</sup>

*Time* is a case that many may think supports social entrepreneurs. In *Time*, the court found that *Revlon* was not triggered when the corporation was merely "in play" or "up for sale."<sup>71</sup> Rather, *Revlon* is triggered in at least two situations: when (1) "a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company" or (2) "in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company."<sup>72</sup> Though *Revlon* did not apply in *Time*, *Unocal* did.<sup>73</sup> Applying the *Unocal* test, the *Time* court reaffirmed director primacy and deferred to *Time*'s board of directors' decision to take an offer

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67. *Id.* (emphasis added).

68. 1989 WL 79880 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

69. 637 A.2d 34 (Del. 1994). Professor Bainbridge provides a detailed map of *Revlon*-land and its progeny. See generally Stephen M. Bainbridge, *The Geography of Revlon-Land*, 81 FORDHAM L. REV. — (forthcoming 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2115769](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2115769) [hereinafter Bainbridge II].

70. Bainbridge II, *supra* note 69, at 24.

71. *Paramount Commc'ns, Inc. v. Time, Inc.*, 571 A.2d 1140, 1151 (Del. 1989).

72. *Id.* at 1150. The court left open the possibility that other actions, outside of the two listed, might trigger *Revlon*. *Id.* The *QVC* court reiterated the disjunctive nature of this quote and the fact that the *Time* court intentionally included the phrase "without excluding other possibilities" when discussing the instances where *Revlon* applied. *QVC*, 637 A.2d at 46–48.

73. *Paramount Commc'ns, Inc.*, 571 A.2d at 1150–51.

from Warner Communication, Inc. that was much lower, on its face, than a competing offer from Paramount.<sup>74</sup> The Time board claimed it rejected Paramount's offer because it was "inadequate" and because "the Warner transaction offered a greater long-term value for the stockholders and, unlike Paramount's offer, did not pose a threat to Time's survival and its 'culture.'"<sup>75</sup> In *eBay*, however, Chancellor Chandler clarified that *Time*<sup>76</sup> "did not hold that corporate culture, standing alone, is worthy of protection as an end in itself."<sup>77</sup>

Approximately five years later, in *QVC*, Paramount found itself on the other side of the argument, and tried to use much of the same reasoning that had beaten them in *Time*.<sup>78</sup> Paramount favored Viacom over QVC and agreed to a number of significant deal-protection measures.<sup>79</sup> The court reiterated director primacy, but stated that enhanced scrutiny was appropriate in the *QVC* case because: "(1) the approval of a transaction resulting in a sale of control, and (2) the adoption of defensive measures in response to a threat to corporate control."<sup>80</sup> The Delaware Supreme Court focused on impact of the change of control in *QVC* to distinguish it from *Time*.<sup>81</sup> The court noted that:

[o]nce control has shifted, the current Paramount stockholders will have no leverage in the future to demand another control premium. As a result, the Paramount stockholders are entitled to receive, and should receive, a control premium and/or protective devices of significant value. There being no such protective provisions in the Viacom-Paramount transaction, the Paramount directors had an obligation to take the maximum advantage of the current

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74. *Id.* at 1148-53.

75. *Id.* at 1149.

76. 1989 WL 79880 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1990).

77. *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33 (Del. Ch. 2010). The court stated that the possibility of eBay departing from craigslist's "public-service mission in favor of increased monetization of craigslist" upon the death of the Craigslist founders was not a valid reason for adopting the Rights Plan. *Id.* at 32.

78. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 46 (Del. 1994).

79. *Id.* at 37-41.

80. *Id.* at 42; *see generally* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547 (2003) [hereinafter Bainbridge III].

81. *QVC*, 637 A.2d at 42-43. "Following such consummation, there will be a controlling stockholder who will have the voting power to: (a) elect directors; (b) cause a break-up of the corporation; (c) merge it with another company; (d) cash-out the public stockholders; (e) amend the certificate of incorporation; (f) sell all or substantially all of the corporate assets; or (g) otherwise alter materially the nature of the corporation and the public stockholders' interests. Irrespective of the present Paramount Board's vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision." *Id.* at 43.

opportunity to realize for the stockholders the best value reasonably available.<sup>82</sup>

The court reiterated that “[i]n the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders—and they must exercise their fiduciary duties to further that end.”<sup>83</sup> While the *QVC* court stated “there is ‘no single blueprint’ directors must follow” in the sale process, the court did mention that directors must be diligent and act in good faith.<sup>84</sup> After noting the complexity of the board’s task, the court reminded the reader that “a court applying enhanced judicial scrutiny should be deciding whether the directors made a *reasonable decision*, not a *perfect decision*.”<sup>85</sup>

The *QVC* court distinguished *Time* by stating, “[i]n [*Time*], the Chancellor held that there was no change of control in the original stock-for-stock merger between Time and Warner because Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger.”<sup>86</sup> While *Time* might have given Patagonia some hope, *Revlon*, *QVC*, and *eBay* show that directors of traditional Delaware corporations still need to focus on shareholder value.

## V. PRE-EXISTING SOLUTIONS FOR DEFENDING PATAGONIA

How could Yvon Chouinard defend Patagonia’s environmental mission in the face of holdings in *Unocal*, *Revlon*, and *eBay*, which place the focus on shareholder value? There are a number of viable solutions, including those discussed in this Part below, that pre-date the benefit corporation.

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82. *Id.* at 43.

83. *Id.* at 44.

84. *Id.* at 43–44, 48. In a sale of control, directors can focus on things other than cash offered in the deal, such as “fairness and feasibility; the proposed or actual financing for the offer, and the consequences of that financing; questions of illegality; . . . the risk of non-consum[m]ation; . . . the bidder’s identity, prior background and other business venture experiences; and the bidder’s business plans for the corporation and their effects on stockholder interests.” *Id.* at 44.

85. *QVC*, 637 A.2d at 45 (emphasis in original). When enhanced scrutiny applies “[t]he directors have the burden of proving that they were adequately informed and acted reasonably. *Id.*

86. *Id.* at 46.

## A. CHARTER PROVISIONS

Opponents of the benefit corporation statutes argue that the statutes are unnecessary because corporations can already be organized to serve social and environmental purposes. For example, the Delaware General Corporation Law states that the certificate of incorporation may set forth

[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders, or the governing body, members, or any class or group of members of a nonstock corporation; if such provisions are not contrary to the laws of this State.<sup>87</sup>

Whether a social and environmental purpose clause would violate the law of Delaware may be open to debate, though the better argument seems to be that such a clause would be allowed, at least if included in the initial charter.<sup>88</sup> Oregon's corporate law makes the ability to adopt such a purpose clause more explicit, stating that the articles of incorporation may include "[a] provision authorizing or directing the corporation to conduct the business of the corporation in a manner that is environmentally and socially responsible."<sup>89</sup> This Oregon provision implies, but does not expressly state, that environmentally and socially responsible management can be detrimental to shareholder wealth.<sup>90</sup>

The benefit corporation solution could be better for the social entrepreneur than the charter provision solution for three primary reasons. First, in six of the twelve states that have passed benefit corporation legislation, charter provisions of traditional corporations can be changed by an affirmative vote of a mere majority of shareholders.<sup>91</sup> In contrast, the benefit corporation statutes generally require approval by two-thirds of shareholders to adopt or terminate benefit corporation status, which gives social entrepreneurs more confidence that the mission of their company would not be easily

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87. DEL. CODE ANN. tit. 8, § 102(b)(1) (2012).

88. See generally Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976). If the initial charter contained terms explaining the social or environmental focus of the corporation, investors would be put on notice and would have difficulty explaining their objection at a later date.

89. OR. REV. STAT. § 60.047(2)(e) (2010).

90. *Id.*

91. See *infra* Appendix B.

discarded.<sup>92</sup> Second, as discussed below, the benefit corporation moniker is a more visible signal to the market than a provision in the charter that many investors may never read.<sup>93</sup> Third, the California benefit corporation statute provides for dissenters' rights if a corporation changes to or from a benefit corporation.<sup>94</sup> The traditional corporate law in California, however, does not provide for dissenters' rights for amending the corporate charter, so the purpose clause solution would be less effective at maintaining the corporate purpose than the benefit corporation statute.

The current benefit corporation statutes are not perfect, however. The dissenters' rights and super majority vote are only required if the corporation decides to adopt or terminate benefit corporation status.<sup>95</sup> The dissenters' rights and super majority vote are *not* expressly triggered by the statute if a benefit corporation changes its specific public benefit purpose or how it chooses to prioritize among stakeholders, giving the company freedom to stray significantly from its original purpose.<sup>96</sup> The dissenters' rights and super majority vote will better protect the mission of the benefit corporation if these protection measures are coupled with the statutory amendment suggested in a previous article by this author: requiring each benefit corporation to choose a specific public benefit or specific stakeholder group as its top priority.<sup>97</sup> If the identification of the benefit corporation's top priority is required, the benefit corporation statute

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92. See Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56 (summarizing the provisions of the various benefit corporation statutes); see also Appendix B.

93. See *infra* Part VI.A (describing benefit corporation signaling).

94. CAL. CORP. CODE §§ 14603–14604 (West 2012). In *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, the author argued for the expansion of dissenters' rights to other states with benefit corporation statutes as a change in corporate purpose can be just as fundamental a change as a merger. Murray, *supra* note 7. Benefit corporation proponents argue that dissenters' rights are not included in the model benefit corporation legislation because changing corporate form is not a liquidation event. Clark & Vranka, *supra* note 50, at 26–27. If, however, the change is a good one, the corporation should be able to find capital to replace the dissenters.

95. Model Benefit Corp. Legislation §§ 104–105.

96. See generally Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56. The general corporate code of the given state applies to benefit corporations, except where the benefit corporation statute conflicts with the general corporate code. Model Benefit Corp. Legislation § 101(c). Given that some general corporate codes require approval by a super majority of shareholders to amend the corporation's articles, benefit corporations in those states will be required to do so.

97. Murray, *supra* note 7. The general public benefit purpose could still be statutorily required, but also requiring a prioritized specific public benefit purpose would provide additional guidance for directors

could then require both a super majority vote and dissenters' rights upon a change of that priority. These amendments would give the benefit corporation statute more teeth, help lessen investors' fear about mission-drift, provide directors with more guidance, and help elevate the benefit corporation solution over the charter amendment solution.

## B. VOTING CONTROL

Individuals in a number of companies, such as Facebook,<sup>98</sup> Google,<sup>99</sup> and the *New York Times*,<sup>100</sup> have retained substantial control by entering into voting agreements or voting trusts, or by creating and holding high-vote stock. This voting control may allow these individuals to pursue social and environmental causes. More germane to this article, voting control may allow these individuals to ward off hostile takeovers that threaten to end the social and environmental mission of their companies. While shareholders may generally vote in their own self-interest, dominant shareholders may have to worry about oppression lawsuits.<sup>101</sup> *Dodge v. Ford* has been characterized as an oppression lawsuit, and in *Dodge* the minority shareholders were at least partially successful.<sup>102</sup> Also, at some point the voting control will

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98. James Surowiecki, *Unequal Shares*, NEW YORKER, May 28, 2012, available at [http://www.newyorker.com/talk/financial/2012/05/28/120528ta\\_talk\\_surowiecki](http://www.newyorker.com/talk/financial/2012/05/28/120528ta_talk_surowiecki) (noting that Facebook Chief Executive Officer and co-founder, Mark Zuckerberg, owns 18 percent of the company, but controls 57 percent of the shares).

99. See Steven M. Davidoff, *New Share Class Gives Google Founders Tighter Control*, N.Y. TIMES (Apr. 13, 2012), <http://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/> (stating that Google founders Sergey Brin and Larry Page will control Google's super-voting class B common shares); see also Certificate of Incorporation of Google Inc. (last visited Jan. 30, 2013), Art. IV, § 2(a)(ii), available at <http://investor.google.com/pdf/google-fourth-amended-and-restated-certificate-of-incorporation.pdf> (showing class B stock has 10 votes for every one vote of class A stock).

100. Joe Nocera, *How Punch Protected the Times*, N.Y. TIMES (Oct. 1, 2012), [http://www.nytimes.com/2012/10/02/opinion/nocera-how-punch-protected-the-times.html?\\_r=0](http://www.nytimes.com/2012/10/02/opinion/nocera-how-punch-protected-the-times.html?_r=0) (stating that the "Class B shares, held largely in a family trust, still gave the Sulzbergers the power to elect around 70 percent of the board.").

101. See generally F. Hodge O'Neal, *Oppression of Minority Shareholders: Protecting Minority Rights*, 35 CLEV. ST. L. REV. 121 (1986-1987).

102. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 323 (1998) (discussing cases including *Dodge v. Ford*, Professor Smith concludes that "[c]onflicts among shareholders have long been analyzed under the doctrine of minority oppression rather than the shareholder primacy norm. Despite the link between the modern doctrine of minority oppression and the shareholder primacy norm, the shareholder primacy norm is broader than necessary to

pass to a younger generation who may have a different vision for the company, and who may wreck the legacy of the corporation's founders.

The current benefit corporation statutes partially address this inadequacy of the voting control method in preserving the company's mission. The benefit corporation statutes require benefit corporations to pursue a "general public benefit purpose," but the statutes do not require prioritization of any specific constituent.<sup>103</sup> If a primary constituent is not required, a younger generation could shift the corporation's focus (from the environment to employees, for example) without much fear of legally imposed consequences. In a previous article, this author addressed this issue by suggesting the statute require the appointment of a primary constituent while still requiring the consideration of the "general public benefit."<sup>104</sup> While an oppression lawsuit might still be possible in the benefit corporation context, having the priorities and mission of the benefit corporation clearly stated would make a successful oppression lawsuit, when the directors were following that stated mission, much less likely. Some may argue that corporations should not be strangled by a founder's dead hand, but the benefit corporation statutes do not completely restrain future generations.<sup>105</sup> The statutes, instead, allow termination of benefit corporation status upon a super majority shareholder vote. If the benefit corporation statutes were amended as suggested in this article, the statutes would also allow a change of the benefit corporation's primary constituent or specific mission upon a super majority shareholder vote.<sup>106</sup>

### C. AVAILABLE DEFENSIVE MEASURES

Various defensive measures could be utilized to defend Patagonia from an unwanted takeover, even if it were not a benefit corporation. One of the most powerful defensive measures is the combination of the poison pill and the classified board.<sup>107</sup> Recently, in *Air Products and*

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resolve problems of minority oppression in closely held corporations.").

103. See Model Benefit Corp. Legislation §§ 102(a), 201(a).

104. Murray, *supra* note 7.

105. See Carmody v. Toll Bros., 723 A.2d 1180, 1191 (Del. Ch. 1998) (invalidating a dead-hand poison pill).

106. Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56 (showing that most benefit corporation statutes require a two-thirds shareholder vote to adopt or terminate benefit corporation status).

107. See generally Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful*

*Chemicals, Inc. v. AirGas, Inc.*,<sup>108</sup> the Delaware Court of Chancery held this combination to be valid under the facts of that case.<sup>109</sup> The decision did not appear to be an easy one, however, and the court said that the *AirGas* case should not be read to allow the board to “just say never” to takeovers.<sup>110</sup> The court examined scholarship and case law on the issue before ultimately recognizing Delaware law’s “long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties (after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions).”<sup>111</sup>

In *Freezing Out Ben & Jerry: Corporate Law and the Sale of A Social Enterprise Icon*, Professors Antony Page and Robert Katz explain the various defensive measures Ben & Jerry could have used to protect itself from a hostile takeover, including a poison pill coupled with a staggered board.<sup>112</sup>

Various takeover defenses, including and especially the poison pill coupled with the staggered board, may provide significant protection to a traditional corporation that is pursuing social and environmental ends. However, there is increasing pressure from institutional investors to declassify boards and redeem poison pills.<sup>113</sup> The benefit corporation solves that problem by signaling that it is interested in a different type of investor—an investor focused on multiple bottom lines. The benefit corporation investor will be less likely to pressure for the removal of these takeover defenses because she has been attracted to the benefit corporation, at least in part, because of its mission. How many of these socially motivated investors exist and

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*Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002).

108. *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48 (Del. Ch. 2011); see generally Steven M. Davidoff, *A Case Study: Air Products v. Airgas and the Value of Strategic Judicial Decision-Making*, 2012 COLUM. BUS. L. REV. 502 (2012).

109. *Air Prods. & Chems., Inc.*, 16 A.3d at 129.

110. *Id.*; see generally Jeffrey N. Gordon, “Just Say Never?” *Poison Pills, Deadhand Pills, and Shareholder-Adopted Bylaws: An Essay for Warren Buffett*, 19 CARDOZO L. REV. 511 (1997).

111. *Air Prods. & Chems., Inc.*, 16 A.3d at 129.

112. Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of A Social Enterprise Icon*, 35 VT. L. REV. 211, 233–34 (2010).

113. Lucian Bebchuk & Scott Hirst, *Thirty-Six Precatory Declassification Proposals Going to a Vote at Annual Meetings*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION, available at <http://blogs.law.harvard.edu/corpgov/2012/04/10/thirty-six-precatory-declassification-proposals-going-to-a-vote-at-annual-meetings>; John H. Matheson, *Corporate Governance at the Millennium: The Decline of the Poison Pill Antitakeover Defense*, 22 HAMLINE L. REV. 703, 736 (1999) (noting that “shareholder proposals seeking to redeem or require a shareholder vote on rights plans [also known as “poison pills”] have been a favorite area for institutional investors.”).

how much they are willing to invest in these social enterprise forms, like benefit corporations, remains to be seen.<sup>114</sup>

#### D. CONSTITUENCY STATUTES

Approximately 30 states have some form of constituency statute.<sup>115</sup> Constituency statutes, however, do not seem to have been very effective in combating the shareholder wealth maximization norm.<sup>116</sup> Perhaps this lack of effectiveness stems from the fact that the typical constituency statute is permissive and does not give non-shareholder stakeholders standing to sue.<sup>117</sup> While constituency statutes undoubtedly provide some protection for directors seeking to further the social or environmental mission of the corporation, the constituency statutes do not seem to motivate the average director to move beyond the shareholder wealth maximization norm. Of the 12 states that have passed benefit corporation statutes, nine states already had some form of constituency statute.<sup>118</sup>

The benefit corporation statute does more than the typical constituency statute. First, the benefit corporation statute is mandatory, not permissive.<sup>119</sup> Second, the benefit corporation statute expressly provides the option to give standing to non-shareholder stakeholders.<sup>120</sup> While few, if any, benefit corporations may take advantage of non-shareholder standing option, the shareholders in a benefit corporation should do a better job enforcing the mission than shareholders in a traditional corporation because the benefit corporation shareholders bought shares after being put on notice that the entity was a benefit corporation with a mission other than just maximizing shareholder value.

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114. If these socially motivated investors do exist in significant numbers, the next question is whether they will remain socially motivated throughout the life of the company.

115. William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 35-36 (2009).

116. Jonathan D. Springer, *Corporate Law Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 108 (1999) (arguing that constituency statutes have not lived up to the hopes of their proponents).

117. Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L.J. 1085, 1121 (2000) (arguing that "stakeholders need to be given standing to sue; otherwise, constituency statutes lack the power necessary to guarantee consideration of nonshareholder interests").

118. See *infra* Appendix A.

119. Model Benefit Corp. Legislation § 301(a).

120. Model Benefit Corp. Legislation § 305(a).

## VI. BENEFIT CORPORATION SOLUTIONS

The solutions discussed above may be sufficient in most cases to defend Patagonia, but the solutions have their mentioned flaws and limitations. Benefit corporation statutes provide the improvements discussed below, and could be made even more beneficial by adopting the statutory amendments suggested in this Part.

### A. FOLLOWING THE FLAG: SIGNALING SOCIAL FOCUS

“There is an instinct in the human race which delights in the flying of flags—a sentiment which appears to be inborn, causing men to become enthusiastic about a significant emblem raised in the air, whether as the insignia of descent, or as a symbol of race, or of nationality; something which, being held aloft before the sight of other men, declares, at a glance, the side to which the bearer belongs, and serves as a rallying point for those who think with him.”<sup>121</sup>

In early warfare, warriors rallied around and were led by flags.<sup>122</sup> Flags guided, united, and signified a common cause.<sup>123</sup> The benefit corporation label could serve as a metaphorical flag, a signaling device, for those interested in societal and environmental good. As the benefit corporation form becomes more widely recognized, and if it becomes recognized as more than mere greenwashing, likeminded directors and investors may flock to the form.<sup>124</sup> In an era of rampant greenwashing, having the form grounded in state statute is an advantage, even though the current statutes themselves are far from perfect. Attracting directors and investors who believe in the corporation’s mission may serve as a powerful defense against hostile corporate raiders who desire to focus more strictly on short-term profits.

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121. BARLOW CUMBERLAND, *THE HISTORY OF THE UNION JACK AND FLAGS OF THE EMPIRE* 13 (3d ed. 1909).

122. WILLIAM FOSTER-HARRIS, *THE LOOK OF THE OLD WEST: A FULLY ILLUSTRATED GUIDE* 91 (2007).

123. CUMBERLAND, *supra* note 121, at 13; 2 *GROUND WAR: AN INTERNATIONAL ENCYCLOPEDIA* 380 (Stanley Sandler ed., 2002).

124. While discussion of game theory, signaling, and focal points is beyond the scope of this article, future articles may explore benefit corporations’ place in those areas. *See, e.g.*, HOWELL E. JACKSON, ET. AL., *ANALYTICAL METHODS FOR LAWYERS*, 33–34, 44–47 (2d. ed. 2011).

The current benefit corporation statutes, however, do not provide a clear rallying point and currently appear unworkable in the mergers and acquisition context. The current benefit corporation statutes require the corporation to pursue a general public benefit purpose.<sup>125</sup> In pursuing that purpose, most state benefit corporation statutes require directors to consider at least seven different stakeholder groups, but do not require prioritization among those groups.<sup>126</sup> Under the current statutes, shareholders aligned with any one of those shareholder groups could bring a benefit enforcement proceeding to enjoin a merger.<sup>127</sup> Under the current statutes, directors are provided no clear direction and no helpful guidelines for how to choose among offers to purchase the benefit corporation.

Amending benefit corporation statutes to require the identification of at least the company's top priority (its primary specific public benefit) would lead to a better-defined mission and cut against confusion among the corporate stakeholders.<sup>128</sup> Requiring choice of at least a top priority would make it possible to create a sensible framework for directorial decisionmaking in the mergers and acquisitions context—providing guidance to directors, aligning investor expectations, and containing the appropriate amount of potential liability. The next section explains how, with a few amendments to the statutes, benefit corporations can navigate in the mergers and acquisitions context.

#### B. MISSION STICKINESS: REDUCING MISSION-DRIFT

“[Y]ou will come to the Sirens who enchant all who come near them . . . stop your men's ears with wax that none of them may hear; but if you like you can listen yourself, for you get the men to bind you as you stand upright on a cross-piece halfway up the mast.”<sup>129</sup>

Mission-drift, or mission creep, is a frequently discussed topic in social enterprise circles.<sup>130</sup> Organizations often drift from their

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125. Model Benefit Corp. Legislation § 201(a).

126. Model Benefit Corp. Legislation § 301(a).

127. Model Benefit Corp. Legislation §§ 301(a), 305.

128. Murray, *supra* note 7.

129. HOMER, THE ODYSSEY, BOOK XII, 148 (Samuel Butler trans., 1944).

130. See, e.g., Alicia Plerhoples, *Can an Old Dog Learn New Tricks? Applying Traditional Corporate Law Principles to New Social Enterprise Legislation*, 13 TRANSACTIONS: TENN. J. BUS. L. 221, 257–59 (2012) (discussing the problem of mission-drift or “sell-out” in the flexible purpose

intended purpose much the same way individuals drift from their personal goals. The drafters of the benefit corporation statutes might be able to learn from the Yale economics, management, and law professors who created a website, stickK.com, where individuals can “sign contracts obliging them to achieve their personal goals” (Commitment Contracts).<sup>131</sup> StickK.com is “based on two well-known principles of behavioral economics: (1) People don’t always do what they claim they want to do, and (2) incentives get people to do things.”<sup>132</sup> StickK.com allows individuals to *pre-commit* to actions they want to do, but that may be difficult to accomplish day-to-day.<sup>133</sup> Similarly, benefit corporation statutes attempt to allow managers and investors to pre-commit to a positive mission, which may be difficult to achieve once the Sirens’ call of short-term profit is heard. Benefit corporation statutes attempt to reduce mission-drift and create some “mission stickiness.”<sup>134</sup> This mission stickiness is currently created in two ways: the super majority vote and the benefit enforcement proceeding.<sup>135</sup> Mission stickiness could be improved, however, by amending current benefit corporation statutes and giving the statutes some teeth by requiring a floor for corporate charitable giving and a partial asset lock. With these two amendments, governments could be more confident that the benefit corporations are actually doing at least some good, and then the governments could be more at ease if and when they provide incentives to benefit corporations.

### 1. *Super Majority Vote and Dissenters’ Rights*

Most benefit corporation statutes require an affirmative vote of at least two-thirds of the shareholders to adopt or terminate benefit corporation status.<sup>136</sup> This super majority vote creates a higher hurdle

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corporation context); Garry W. Jenkins, *Who’s Afraid of Philanthrocapitalism?*, 61 CASE W. RES. L. REV. 753, 805–807 (2011); (recognizing “philanthrocapitalism” as a cause of mission-drift); Christine Hurt, *Family Christian Bookstores -- Private Equity, Mission Drift and the Religious Corporation*, THE CONGLOMERATE, (Nov. 16, 2012), <http://www.theconglomerate.org/2012/11/family-christian-bookstores-private-equity-mission-drift-and-the-religious-corporation.html>.

131. STICKK, <http://www.stickk.com/about.php> (last visited Jan. 30, 2013).

132. *Id.*

133. *Id.*

134. “Mission stickiness” is a term created for this article. A statute that creates mission stickiness will reduce the amount and/or probability of mission-drift by the entities subject to the statute.

135. See *infra* Part VI.B.1–2.

136. Model Benefit Corp. Legislation §§ 104–105; Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56.

in those states that do not already require super majority voting for merger approval.<sup>137</sup> The super majority vote hurdle is not impossible, however, and a determined acquirer could potentially convince two-thirds of the shareholders to agree to the termination of the target's benefit corporation status. For the shareholders who vote against the adoption or termination of the benefit corporation statute, California's statute explicitly provides dissenters' rights to shareholders who will receive "fair value" for their shares.<sup>138</sup> The traditional corporate statutes of many states, including Delaware, already provide for dissenters' (or "appraisal") rights under certain circumstances in the mergers and acquisitions context, so the provision of dissenters' rights is certainly not unprecedented.<sup>139</sup>

## 2. *Benefit Enforcement Proceeding*

The benefit enforcement proceeding created by the benefit corporation statutes provides a way for a shareholder to potentially prevent a transaction that strays from the benefit corporation's mission.<sup>140</sup> The benefit enforcement proceeding does not provide a right to monetary damages, but does provide grounds for a possible injunction.<sup>141</sup> Problematically, the statute does not provide any guidance on the relative weighting among stakeholders, which means that any shareholder with affinity to any of the many listed stakeholder groups would potentially be able to enjoin a transaction. Also, the benefit corporation statutes allow, but do not automatically provide, standing for non-shareholder stakeholders.<sup>142</sup> While most companies will probably not rush to give others standing to sue them, some benefit corporations may wish to give standing to one or more key stakeholder groups. Such a grant may be evidence of the company's long-term commitment to their mission. This author is not, however,

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137. Appendix B (showing that the traditional corporation statutes in half of the states where a benefit corporation statute has passed require approval by a majority of shareholders, while half of the states require approval by at least two-thirds of shareholders).

138. Oddly, Massachusetts' benefit corporation statute gives appraisal rights to dissenting shareholders when a traditional corporation becomes a benefit corporation, but does not expressly provide appraisal rights when a benefit corporation becomes a traditional corporation. MASS. GEN. LAWS ANN. ch. 156E, §§ 5, 8 (West 2012).

139. DEL. CODE ANN. tit. 8, § 262 (2012); see generally Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119 (2005).

140. Model Benefit Corp. Legislation § 305; Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56.

141. *Id.*

142. *Id.*

in favor of the statute providing automatic standing to non-shareholder stakeholders. Given the variety among benefit corporations, it would be difficult to impossible to choose, via statute, the proper individuals or groups, other than shareholders, who should be given standing in every case.<sup>143</sup>

The defensive measures, discussed above, may be necessary to protect benefit corporations from bidders who would destroy the company's mission. Also, benefit corporation statutes may properly allow companies like craigslist to avoid shareholder value-centric outcomes like in the *eBay v. Newmark* case. However, once the corporation has willingly entered *Revlon*-land and decided to sell the benefit corporation, the measure needs to be financially based. If the measure were something else—say the environmental friendliness of the acquirer—the benefit corporation would end up giving itself away to maximize that non-financial, environmental return. If, however, the measure were financial, the benefit corporation would be sold to the buyer who valued the benefit corporation the most, and the shareholders could use the proceeds as they see fit, including investing in different socially or environmentally-focused companies. The distinction this paper makes between giving additional protections to the company's social mission when *Unocal* applies, but requiring a financial focus upon entering *Revlon*-land, is based on a belief in the wisdom of director primacy tempered by director guidance and a small dose of director accountability.<sup>144</sup>

### 3. Floor for Corporate Giving and Asset Lock

Benefit corporations have been trumpeted as an antidote to

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143. The benefit corporation employees are one group that might have a reasonable argument for being given standing, but it is more likely that employees would use that power to protect their own jobs and benefits rather than the mission of the benefit corporation.

144. DEL. GEN. CORP. LAW § 141(a) (stating that “[t]he business and affairs of every corporation organized under this chapter shall be managed by or under the direction of the board of directors”); see generally Bainbridge III, *supra* note 80. The current benefit corporation statutes provide no guidance and no real accountability. The benefit corporation directors are required to consider all stakeholders. By creating different formulae to compare the benefit of one stakeholder group to another, benefit directors could always made an argument that a sale, to almost any bidder, satisfied their duties. Under *Revlon*, courts could impose a bit of accountability on directors who do not seek the best financial deal. Other solutions are unworkable. Providing directors with no real guidance, by telling them to pursue the vague “general public benefit,” would simply result in most directors pursuing their own self-interest. Directing directors to maximize benefit to other stakeholders in a sale situation would ultimately result in no or minimal financial returns for shareholders.

greenwashing, but impact investors and governments may fear that the current statutes are toothless.<sup>145</sup> To combat the claim of toothlessness, and in exchange for the state-allowed privilege of calling their company a “benefit” corporation, the statutes could be amended to require a floor of corporate charitable giving by benefit corporations. Perhaps the giving floor could match that which Patagonia has voluntarily adopted: the greater of one percent of revenue or 10 percent of profits.

Additionally, benefit corporation statute drafters could consider a partial asset lock for benefit corporations. To prevent companies from raising capital for a benefit corporation by promoting themselves as a “good” company and then quickly selling to the highest bidder, the statutes could impose a lock on some percentage of the benefit corporation assets such that some percentage of the assets are guaranteed to be left behind even if the corporation is bought and has its benefit corporation status terminated. The statutes could require that some portion of the assets be given to a charity with a similar mission to the benefit corporation.<sup>146</sup>

One of the major benefits of the benefit corporation legislation could be the grouping of “good” companies for quick and easy identification by investors, consumers, and governments. Currently, there is little to nothing in the benefit corporation statutes that provides assurance of those companies’ “goodness.”<sup>147</sup> The cities of Philadelphia and San Francisco have already started giving preferential treatment to benefit corporations.<sup>148</sup> Those cities and their taxpayers

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145. Clark & Vranka, *supra* note 50, at 2-3 (stating that benefit corporations were created to help combat the problem of “greenwashing”).

146. The receiving organization should have both the same “top priority” as the benefit corporation that lost its status, and the receiving organization should be one that has a fair level of outside oversight, like a charity.

147. Benefit corporation proponents may point to the benefit enforcement proceedings, the third party standards, and the annual benefit reports as assurance. However, upon closer examination, none of these lead to confidence. The statutes do not give standing to bring benefit enforcement proceedings to non-shareholder constituencies and, in any event, monetary damages are not available. Some of the statutes try to describe the third party standard with words like “credible” and “comprehensive,” but none of the statutes provide assurance that the third party standards will be any good. No real oversight of the third party standard makers is provided. Finally, the statutory description of what the annual benefit reports must contain is thin, and most of the statutes have no enforcement mechanism to deal with benefit corporations who do not produce the reports. The author’s own research shows that a majority of the early benefit corporations that formed in Maryland, who should have produced benefit reports as of the writing of this article, have either not produced reports or have not produced reports that comply with the statute.

148. *City and County of San Francisco Municipal Code*, AM. LEGAL PUBL’G CORP.,

should be provided more assurances that the benefit corporations are actually a benefit to society before giving preferential treatment. If assurance is provided, through a statutorily required charitable giving floor and/or partial asset lock, then perhaps more governments would feel comfortable offering incentives for using the benefit corporation form.

### C. DEFENDING PATAGONIA IN PRACTICE

This Section explains how a modified benefit corporation statute could work in practice using Patagonia as an example. Remember that for this exercise we are assuming that Patagonia is a publicly traded benefit corporation. Before deciding to sell, Patagonia could use various takeover defenses to protect the company. If the state of incorporation followed the *Unocal* line of reasoning when evaluating takeover defenses, the threat to the benefit corporation's mission (in Patagonia's case protecting the environment) could be considered, even to the extreme detriment of shareholder wealth.<sup>149</sup>

If, however, the directors decide to sell or break up the benefit corporation, then the directors should be required to sell to the highest bidder, if the state follows *Revlon*.<sup>150</sup> In contrast to *Revlon*, the current benefit corporation statutes require the consideration of various stakeholder groups in each decision, including, presumably, when the sale or break up of the company is envisioned.<sup>151</sup> The consideration of these various stakeholder groups may be proper when trying to defend

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[http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco\\_ca](http://www.amlegal.com/nxt/gateway.dll?f=templates&fn=default.htm&vid=amlegal:sanfrancisco_ca) (last visited Jan. 30, 2013) (San Francisco provides preferences in government contracting to California benefit corporations); *City of Philadelphia: Tax Credits & Other Incentives*, CITY OF PHILADELPHIA BUSINESS SERVICES, [business.phila.gov/pages/taxcreditsotherincentives.aspx?stage=start&type=all%20business%20types&section=financing%20%26%20incentives&bspcontentlistitem=tax%20credits,%20grants%20%26%20other%20incentives](http://business.phila.gov/pages/taxcreditsotherincentives.aspx?stage=start&type=all%20business%20types&section=financing%20%26%20incentives&bspcontentlistitem=tax%20credits,%20grants%20%26%20other%20incentives) (last visited Jan. 30, 2013) (the city of Philadelphia is providing a \$4000 tax credit, for the years 2012 to 2017, to a maximum of 25 Certified B Corporations per year).

149. See *supra* Part III; under *eBay v. Newark*, defensive measures, erected by traditional Delaware corporations, that "openly eschew" shareholder wealth maximization are at risk of failing the first prong of *Unocal*. 16 A.3d 1, 34–35 (Del. Ch. 2010). Benefit corporations, however, exist to pursue a "general public benefit" and any stated "specific public benefit" of the entity.

150. See *supra* Part IV. But see Steven J. Haymore, Note, *Public(ly Oriented) Companies: B Corporations and the Delaware Stakeholder Provision Dilemma*, 64 VAND. L. REV. 1311 (2011) (arguing that *Revlon* should not apply in the benefit corporation context).

151. Model Benefit Corp. Legislation § 301(a); Murray, *Benefit Corporations: State Statute Comparison Chart*, *supra* note 56.

the benefit corporation. However, once the company is on the auction block, the directors need to know how to value bids. *Revlon* creates the best framework for valuing these bids, based on financial value.

Trying to value the bids based on the benefit corporation's mission is simply unworkable. For example, as mentioned above, requiring the benefit corporation to maximize benefit to the environment would result in the benefit corporation basically (or literally) giving the money away to an environmental organization that promised to do virtually every environmentally friendly thing possible.<sup>152</sup> On the other hand, requiring consideration of multiple constituencies destroys the possibility of any real accountability for directors.<sup>153</sup> When it has been decided that the company is going to be sold, maximizing the financial returns is the best directive. The bidder who values the company the most will receive it, and if the former shareholders of the benefit corporation wish to invest the money they received in another benefit corporation or give the money away, they may. The corporate giving floor and the partial asset lock, required in this article's proposed amendments to the current benefit corporation statutes, would ensure that the benefit corporation's mission was not completely abandoned. The approval of the sale by a super majority of the shareholders, already included in the current benefit corporation statutes, would provide another hurdle for companies, like Patagonia, to clear if they wanted to leave their mission behind in a sale.<sup>154</sup> In short, a modified benefit corporation statute would create additional mission stickiness, but not a complete mission lock.

## VII. CONCLUSION

In this symposium article, Patagonia has served as an example of a company that wishes to stick to its mission in the face of potential takeover threats. There are various defensive measures that Patagonia could employ to fend off hostile corporate raiders with inconsistent

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152. *See supra* Part VI.B.2.

153. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 38 (1991) ("A manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither."); Michael P. Dooley, *Two Models of Corporate Governance*, 47 *BUS. LAW* 461, 470 (1992) (recognizing that "[i]f the board is never made accountable for its decisions, it is liable to exercise its power irresponsibly vis-a-vis the shareholders.").

154. *See supra* Part VI.B.1.

visions for the company, even if Patagonia were not a benefit corporation. That said, the benefit corporation statutes come prepackaged with some useful provisions that increase mission stickiness, such as super majority voting, a predetermined corporate purpose, the benefit enforcement proceeding rights, and, in some states, dissenters' rights. This article has proposed amending the current benefit corporation statutes to require benefit corporations to select a primary non-shareholder stakeholder. The selection of this primary stakeholder would shine light on the mission of the benefit corporation for investors, could provide needed guidance for directors, and would aid courts in determining whether the defensive measures erected were reasonable in relation to the threats posed. The article has also proposed the consideration of a statutorily required charitable giving floor and a partial asset lock to ensure that the benefit corporations are not merely engaged in greenwashing or faux corporate social responsibility. Finally, the article has suggested that *Revlon* and its progeny could be relevant in the benefit corporation context, especially if a charitable giving floor and partial asset lock become statutorily required.

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## Appendix A

State	<i>Unocal</i>	<i>Revlon</i>	Constituency Statute
California	N/A	N/A	No
<b>Delaware</b>	<b>Yes</b> <sup>155</sup>	<b>Yes</b> <sup>156</sup>	<b>No</b>
Hawaii	N/A	N/A	Yes <sup>157</sup>
Illinois	N/A	N/A	Yes <sup>158</sup>
Louisiana	N/A	N/A	Yes <sup>159</sup>
Maryland	No <sup>160</sup>	Yes <sup>161</sup>	No
Massachusetts	No <sup>162</sup>	N/A	Yes <sup>163</sup>
New Jersey	N/A	N/A	Yes <sup>164</sup>
New York	Yes <sup>165</sup>	No <sup>166</sup>	Yes <sup>167</sup>
Pennsylvania	N/A	No <sup>168</sup>	Yes <sup>169</sup>
South Carolina	N/A	N/A	No
Vermont	N/A	N/A	Yes <sup>170</sup>
Virginia	No <sup>171</sup>	No <sup>172</sup>	Yes <sup>173</sup>

155. *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946 (Del. 1985).

156. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986).

157. HAW. REV. STAT. § 414-221(a), (b) (West 2011).

158. 805 ILL. COMP. STAT. ANN. 5/8.85 (West 2011).

159. LA. REV. STAT. ANN. § 12:92(G) (West 2011).

160. *Shenker v. Laureat Educ., Inc.*, 983 A.2d 408, 427 (Md. 2009).

161. *Id.* at 421-22 (2009).

162. *Seidman v. Central Bancorp, Inc.*, 16 Mass. L. Rptr. 383, 2003 WL 21528509 at \*9-\*10 (Mass. Super. Ct. 2003).

163. MASS. GEN. LAWS ANN. ch. 156B, § 65 (West 2011).

164. N.J. STAT. ANN. § 14A:6-1(2) (West 2011).

165. *Int'l Banknote Co., Inc. v. Muller*, 713 F.Supp. 612, 626-27 (S.D.N.Y. 1989).

166. *Minzer v. Keegan*, No. CV-97-4077(CPS), 1997 WL 34842191, at \*10 (E.D.N.Y. Sept. 22, 1997).

167. N.Y. BUS. CORP. LAW § 717(b) (McKinney 2011).

168. *Keyser v. Commonwealth Nat. Financial Corp.*, 675 F.Supp. 238, 265-66 (M.D.Pa. Jun 30, 1987).

169. 15 PA CONS. STAT. ANN. § 1715(a), (b) (West 2012); *see also* 15 PA CONS. STAT. ANN. § 515(a), (b) (West 2012).

170. VT. STAT. ANN. tit. 11A, § 8.30(a)(3) (West 2011).

171. *WLR Foods, Inc. v. Tysons, Inc.*, 869 F.Supp. 419, 421-22 (W.D. Va. 1994)

172. *Willard ex rel. Moneta Bldg. Supply, Inc. v. Moneta Bldg. Supply, Inc.*, 50 Va. Cir. 558, 6 (Va. Cir. Ct. 1998).

173. VA. CODE ANN. § 13.1-727.1 (West 2011).

## Appendix B

State	Shareholder Approval for Merger (traditional corporation)	Shareholder Approval for Adoption of Benefit Corporation Status	Shareholder Approval for Termination of Benefit Corporation Status
California	Majority <sup>174</sup>	Two-Thirds <sup>175</sup>	Two-Thirds <sup>176</sup>
<b>Delaware</b>	<b>Majority</b> <sup>177</sup>	<b>N/A</b>	<b>N/A</b>
Hawaii	Majority <sup>178</sup>	Two-Thirds <sup>179</sup>	Two-Thirds <sup>180</sup>
Illinois	Two-thirds <sup>181</sup>	Two-Thirds <sup>182</sup>	Two-Thirds <sup>183</sup>
Louisiana	Two-thirds <sup>184</sup>	Two-Thirds <sup>185</sup>	Two-Thirds <sup>186</sup>
Maryland	Two-thirds <sup>187</sup>	Two-Thirds <sup>188</sup>	Two-Thirds <sup>189</sup>
Massachusetts	Two-thirds <sup>190</sup>	Two-Thirds <sup>191</sup>	Two-Thirds <sup>192</sup>
New Jersey	Majority <sup>193</sup>	Two-Thirds <sup>194</sup>	Two-Thirds <sup>195</sup>
New York	Majority <sup>196</sup>	Three-Fourths <sup>197</sup>	Three-Fourths <sup>198</sup>
Pennsylvania	Majority <sup>199</sup>	Two-Thirds <sup>200</sup>	Two-Thirds <sup>201</sup>

174. CAL. CORP. CODE § 1201 (West 2012).

175. CAL. CORP. CODE § 14603 (West 2012).

176. CAL. CORP. CODE § 14604 (West 2012).

177. DEL. CODE ANN. TIT. 8, § 251 (West 2012).

178. HAW. REV. STAT. § 414-313 (West 2012).

179. HAW. REV. STAT. §§ 420D-3 (West 2011).

180. HAW. REV. STAT. §§ 420D-4 (West 2011).

181. ILL. COMP. STAT. ANN. 805 § 5/11.20 (West 2012).

182. ILL. COMP. STAT. 805 § 40/2.05 (West 2012).

183. ILL. COMP. STAT. 805 § 40/2.10 (West 2012).

184. LA. REV. STAT. ANN. § 12:112 (2012).

185. LA. REV. STAT. ANN. § 1804 (2012).

186. LA. REV. STAT. ANN. § 1805 (2012).

187. MD. CODE ANN., CORPS. & ASS'NS § 3-105 (West 2012).

188. MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-03 (West 2011).

189. MD. CODE ANN., CORPS. & ASS'NS §§ 5-6C-04 (West 2011).

190. MASS. GEN. LAWS ANN. ch. 156, § 46B (West 2012).

191. MASS. GEN. LAWS ANN. ch. 156E, §§ 5 (West 2012).

192. MASS. GEN. LAWS ANN. ch. 156E, § 6 (West 2012).

193. N.J. STAT. ANN. § 14A:10-3 (West 2012) (in the case of a corporation organized prior to January 1, 1969 it must be by the affirmative vote of two-thirds of the shareholders).

194. N.J. STAT. ANN. § 14A:18-3 (West 2011).

195. N.J. STAT. ANN. § 14A:18-4 (West 2011).

196. N.Y. BUS. CORP. LAW § 903 (McKinney 2012) (in the case of a corporation organized prior to existence of the current law it must be by the affirmative vote of two-thirds of the shareholders).

197. N.Y. BUS. CORP. LAW § 1704 (McKinney 2012).

198. N.Y. BUS. CORP. LAW § 1705 (McKinney 2012).

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South Carolina	Two-thirds <sup>202</sup>	Two-Thirds <sup>203</sup>	Two-Thirds <sup>204</sup>
Vermont	Majority <sup>205</sup>	Two-Thirds <sup>206</sup>	Two-Thirds <sup>207</sup>
Virginia	Two-thirds <sup>208</sup>	All Shareholders <sup>209</sup>	Two-Thirds <sup>210</sup>

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199. 15 PA. CONS. STAT. ANN. § 1924 (West 2012).

200. 15 PA. CONS. STAT. ANN. § 3304 (West 2012).

201. 15 PA. CONS. STAT. ANN. § 3305 (West 2012).

202. S.C. CODE ANN. § 33-11-103 (2012).

203. S.C. CODE ANN. § 33-38-210 (2012).

204. S.C. CODE ANN. § 33-38-220 (2012).

205. VT. STAT. ANN. tit. 11A, § 11.03 (West 2012).

206. VT. STAT. ANN. tit. 11A, §§ 21.05-06 (West 2011).

207. VT. STAT. ANN. tit. 11A, §§ 21.06-07 (West 2011).

208. VA. CODE ANN. § 13.1-718 (West 2012).

209. VA. CODE ANN. § 13.1-785 (West 2012).

210. VA. CODE ANN. § 13.1-786 (West 2012).