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Kristin A. Neubauer*

Benefit Corporations: Providing A New Shield for Corporations With Ideals Beyond Profits

Introduction

In 2011, Patagonia, Inc. became one of the first California-based companies to incorporate as a benefit corporation[1] in the state of California.[2] The founder of Patagonia, Yvon Chouinard, stated that being a benefit corporation "allows us to have a way that I think the values of my company can continue even after it is sold and its way down the line . . . ."[3] Patagonia's corporate purpose has always been rooted in an environmental focus–donating time, services and at least 1% of sales to environmental groups throughout the world.[4]

Also in 2011, Warby Parker, an eyeglass manufacturer, became a benefit corporation in New York.[5] The founders stated "being a b corp[.] tells the world [these are] our values, it also more specifically tells our shareholders that this is important for us and we are going to prioritize this."[6] The founders continued, "we

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1. A "benefit corporation" is defined under the Delaware General Corporation Statute as a "for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and operate in a responsible and sustainable manner." DEL. CODE ANN. tit. 8 § 362(a).

2. John Tozzi, *Patagonia Road Tests New Sustainability Legal Status*, BLOOMBERG (Jan. 4, 2012), http://www.bloomberg.com/news/2012-01-04/patagonia-road-tests-new-sustainability-legal-status.html.

3. Yvon Chouinard, *Patagonia Founder, Remarks on Importance of a Benefit Corporation*, YOUTUBE (Jan. 4, 2012), http://www.youtube.com/watch?v=gm7wM5A7xcA.

4. *See Becoming a Responsible Company*, PATAGONIA, http://www.patagonia.com/us/patagonia.go?assetid=2329 (last visited Dec. 17, 2015); *see also Patagonia, Inc.* BCORP., http://www.bcorporation.net/community/patagonia-inc (last visited Dec. 17, 2015).

5. *Warby Parker*, BCORP., http://www.bcorporation.net/community/warby-parker (last visited Dec. 17, 2015).

6. *Warby Parker-Why We're a B Corp*, YOUTUBE, (July 15, 2014) (quoting Neil Blumenthal), http://www.youtube.com/watch?v=a5zA70gnrZ0. Warby Parker's business purpose is to provide inexpensive, trendy glasses and lenses to their customers while at the same time providing glasses and eye exams to the

just want to catalyze the private sector to get more involved in solving these huge global issues, and we think that the b corp. movement is the best way to do that."[7]

The force behind the rise of the benefit corporate form is the not-for-profit corporation B Lab. B Lab lobbies for benefit corporation legislation across the globe and has been instrumental in its burgeoning popularity in the United States.[8] B Lab also certifies corporations as "B corporations" using a multi-step process.[9] First, corporations seeking certification must complete a "B Survey" that is prepared by B Lab staff and tailored to the corporation's industry.[10] Once the corporation completes the survey, the staff at B Lab rates the company, and generates a report called a "B Report."[11] If the company receives a rating over 80, out of a possible 200, it is eligible to become a "B corporation."[12] To complete the certification process, the company must then amend its articles of incorporation to include the certification as a "B corporation," sign a declaration of interdependence, and pay a licensing fee to B Lab.[13] To date, B Lab has certified over 1,000 companies across the United States and the globe as "B corporations."[14]

In 2010, Maryland became the first state to embrace this new corporate form and pass benefit corporation legislation.[15] As of 2015, thirty-one states have fully implemented some version of the model benefit corporation legislation created by B-Lab, and five other states have introduced legislation.[16]

The expansion of benefit corporation legislation across the United States and the proliferation of businesses incorporating as benefit corporations lead to new questions pertaining to how benefit corporations should be considered in corporate

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almost 1 billion people worldwide who lack access to glasses, and therefore cannot effectively work or learn. *See id.*

7. *See id.*

8. *See About B Lab*, BCorp., https://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps (last visited Dec. 17, 2015).

9. *See generally* Jenna Lawrence, *Making the B List*, Stan. Soc. Innovation Rev., Summer 2009, at 65, http://ssir.org/articles/entry/making_the_b_list.

10. *Id.* at 65. The surveys are designed to measure the corporation's social and environmental performance by assessing a company's governance, environmental impact, community outreach, and employee treatment. *Id.* B Lab created the surveys by combing through existing labor, environmental, and business certification programs to develop the "best standards and measures across industries" for determining certifying a business. *Id.*

11. *Id.* at 66.

12. *Id.*

13. *Id.* B Lab assesses the licensing fee based on a specific percentage of the b corporation's sales. *Id.* The fees help B Lab maintain their certification standards, conduct audits of b corporations, support policy efforts, and promote their cause. *Id.*

14. *See generally*, *B Corporation*, BCorp. http://www.bcorporation.net (last visited Dec. 17, 2015).

15. John Tozzi, *Maryland Passes 'Benefit Corp.' Law for Social Entrepreneurs*, Bloomberg Bus. (Apr. 13, 2010), http://www.businessweek.com/smallbiz/running_small_business/archives/2010/04/benefit_corp_bi.html.

16. A full list of state enactments and proposed legislation are located on B Lab's website. *See State by State Legislative Status*, Benefitcorp, http://benefitcorp.net/policymakers/state-by-state-status (last visited Oct. 26, 2015).

governance disputes. Part I explains the appeal of the benefit corporate form by focusing on the structures and deficiencies of corporate laws governing for profit corporations and the severe constraints that incorporating as a not-for-profit corporation can pose to companies interested in providing a public benefit.[17] Part II specifically analyzes the public benefit corporation statute passed in Delaware to examine how legislators in this preeminent corporate law jurisdiction created this new corporate form.[18] Finally, Part III argues that the new Delaware benefit corporation legislation permits companies dedicated to philanthropic endeavors to more effectively combat hostile corporate maneuvers by companies whose profit-maximizing motivations threaten these corporations whose business model requires them to provide public benefits.[19]

I. The Deficiencies of the For Profit and Not-For-Profit Corporate Forms

Delaware's robust corporate law historically had two types of corporations: for profit and not-for-profit.[20] The first part of this section focuses on for profit corporate law in Delaware, specifically summarizing the fiduciary duties of boards of directors and corporate shareholders, and then discussing the principle that for profit corporations should primarily pursue goals that maximize their profits.[21] The second part centers on federal not-for-profit corporate law as adopted in Delaware, to examine the non-distribution constraint requirement and to consider how that limitation can negatively impact the public benefit goals of a not-for-profit corporation.[22]

A. For-Profit Corporate Governance in Delaware

Delaware has an eminent and longstanding reputation in the field of corporate law[23] because Delaware's General Corporation Law[24] is one of the most advanced and flexible corporation statutes in the United States, and the Court of Chancery-Delaware's highly respected court of equity-has a large body of corporate case law that the Chancery's expert judges rely on in navigating the complex nuances of corporate law disputes.[25]

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17. *See infra* Part I.

18. *See infra* Part II.

19. *See infra* Part III.

20. Not-for-profit corporations are governed by the Title 26 § 501(c) of the United States Code, but incorporate as a not-for-profit corporation with the Secretary of State in Delaware. *See* 26 U.S.C. § 501 (2012).

21. *See infra* Part II.A.

22. *See infra* Part II.B.

23. *See generally* Lewis S. Black, Jr., Del. Dep't. of State, Div. of Corps., Why Corporations Choose Delaware 1 (2007), http://corp.delaware.gov/whycorporations_web.pdf.

24. Del. Code Ann. tit. 8.

25. Black, *supra* note 23, at 1.

1. The Board of Directors Fiduciary Duties to the Corporation and Shareholders

The Delaware General Corporation Law governs the actions of all corporations incorporated in Delaware.[26] Section 141(a) of title 8[27] states that "every corporation organized under this chapter shall be managed by or under the direction of a board of directors."[28] The statute does not further clarify what exactly is required of the board of directors in performing their duties, but cases interpreting Delaware law elucidate what directors on a corporate board are required to do.

The Delaware Supreme Court case *Guth v. Loft, Inc.*,[29] is the first in a line of cases that explains in greater detail how directors on a corporate board are expected to act.[30] In *Guth*, the Court found that directors "stand in fiduciary relation to the corporation and its stockholders."[31] The Court went on to explain that this fiduciary relationship demands,

> *of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation committed to his charge, but also to refrain from doing anything that would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it, or enable it to make in the reasonable and lawful exercise of its powers.*[32]

Finally, the court noted that, as a general rule, directors are expected to act in the "utmost good faith in the relation to the corporation which [they] represent[]."[33] *Guth*, therefore, set forth the general rule that directors of a corporation owe a fiduciary duty to both the corporation and its shareholders, and as such should both protect and refrain from injuring the interests of the corporation.[34]

2. Shareholder Primacy and Profit Maximization

While scholars continue to debate over what exactly a director's fiduciary duty to the corporation and its shareholders include,[35] Delaware case law clearly finds that a

26. *See* DEL. CODE ANN. tit. 8.
27. *Id.* § 141(a).
28. *Id.*
29. 5 A.2d 503 (Del. 1939).
30. *See infra* notes 36–43 and accompanying text.
31. *Guth*, 5 A.2d at 510.
32. *Id.*
33. *Id.*
34. *See id.*
35. *See generally* A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. Rev. 1365 (1932); *see also* David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 213 (2013) (agreeing with Berle that "the better interpretation of this phrase [the corporation and its shareholders] is to view it as expressing a unified, coherent set of obligations . . . . The directors' attention is to be devoted to doing things

director's primary fiduciary duty is profit-maximization for the benefit of its shareholders.[36] In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[37] the Delaware Supreme Court stated that, "obtaining the highest price for the benefit of the stockholders should have been the central theme guiding director action."[38] The Court then cited to *Unocal Corp. v. Mesa Petroleum Co.*[39] when it found that "a board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to stockholders. [] However, such concern for non-stockholder interests is inappropriate. . .[when] the object [is] no longer to protect or maintain the corporate enterprise but to sell to the highest bidder."[40] *Revlon* makes clear that a director must primarily consider the shareholders' interests, in order to maximize the profits from the corporation, when the enterprise is about to be dissolved.[41] If the corporation is not dissolved, however, a director is permitted to consider other constituencies' interests, as long as they relate to the shareholders' interests.[42]

As is evident in the above summary of specific aspects of Delaware corporate governance law, corporate directors play a key role in managing the corporate entity. The directors retain a lot of latitude under the business judgment rule to make decisions for the corporation without fear of having every detail of their

aimed at increasing the value of the corporation (a distinct legal entity) for the shareholders."). *But see* E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932); Kellie A. Alces, *Revisiting Berle and Rethinking the Corporate Structure*, 33 Seattle U. L. Rev. 787, 797 (2010) ("If we return to our basic understandings about corporations, it should be apparent that long-term wealth maximization is the proper corporate objective. Corporations are, first and foremost, businesses designed to produce and market products and increase those products' value and relevance to society over time. In order to be successful or even to be a worthwhile investment vehicle, a business must have long-term prospects for viability and potential for growth.").

36. *See, e.g.*, Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [] does not for that reason constitute a breach of duty."); *see also* Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 242 (Del. 2009) ("The duty to seek the best available price applies only when a company embarks on a transaction-on its own initiative or in response to an unsolicited offer-that will result in a change of control."); Paramount Comm., Inc. v. QVC Network, Inc., 637 A.2d 34, 48 (Del. 1993) (clarifying that directors' have an obligation to seek the best value reasonably available to the stockholders when there is a change of control in the corporation).

37. 506 A.2d 173 (Del. 1986).

38. *Id.* at 182.

39. 493 A.2d 946 (Del. 1985).

40. *Revlon*, 506 A.2d at 182 (internal citation omitted).

41. *See id. But see Paramount Comm.*, 637 A.2d at 48 (explaining that directors' have a profit maximization duty not only when the corporation is being dissolved, but also when there is a change of control in the corporation).

42. *See Paramount Comm.*, 637 A.2d at 45–46 (citing *Unocal*, 493 A.2d at 955); *see also*, Yosifon, *supra* note 35, at 192 (arguing that a board may attend to the interests of non-shareholders when the board believes that doing so will ultimately serve the shareholders, and only when those interests of the non-shareholders are rationally related to the shareholders' interests).

actions litigated and questioned by a court.[43] However, directors are constrained by the duties they owe to their shareholders, and while there is academic debate as to whether the shareholders are truly the primary beneficiaries of corporate decision-making,[44] in the Delaware court's eyes, shareholder interests must always be considered when a Board of Directors makes its decisions.[45] As we will see in Part III of this paper, the primacy of shareholder interests can have serious adverse consequences for companies who have shareholders with differing interests that directly conflict with each other. [46]

Fortunately a for-profit corporation is not the only form that a company can incorporate under. Not-for-profit corporations provide an important, albeit limited, alternative to the for-profit corporate form.

B. Not-For-Profit Corporations

Not-for-profit corporations are an important corporate form because they receive tax-exempt status under the federal tax code and their central purpose is to promote public benefits.[47] Section 501(c) of title 26[48] in the United States Code governs the not-for-profit corporate form by listing the types of endeavors that can receive tax exemption and proscribes certain activities by these entities.[49] The most consequential proscription the legislation prevents is what is known as the nondistribution constraint.[50] The nondistribution constraint effectively bars an organization from distributing any net earnings they may earn to individuals who exercise control over the organization.[51] This constraint, however, does not prevent a not-for-profit from providing reasonable compensation to a person for the labor or capital that they provide to the organization; it merely prevents an individual

43. The business judgment rule is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in honest belief that the action taken was in the best interests of the company; [a]bsent an abuse of discretion, that judgment will be respected by the courts." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

44. *See supra* note 35.

45. *See supra* notes 29–43 and accompanying text.

46. *See infra* Part III.

47. *See* 26 U.S.C. § 501(c) (2012).

48. *Id.*

49. *See id.* § 501(c)(3) ("Corporations . . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation. . .and which does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office.").

50. *Id.* ([N]o part of the net earnings of which inures to the benefit of any private shareholder or individual . . . ."); *see generally* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 Yale L.J. 835 (1980).

51. Hansmann, *supra* note 50, at 838. Hannsman clarifies that "net earnings" means the earnings in excess of the amount needed to pay for services rendered to the organization, including salaries. *See id.*

from receiving portions of profits that the organization may make.[52] Furthermore, not-for-profits are not barred from earning a profit, only the distribution of those profits to individuals in the organization is prohibited.[53] Any profits that are received must be devoted entirely to further financing the services that the organization was formed to provide.[54] The nondistribution constraint is an important tool to reinforce the charitable legitimacy of these organizations because it reinforces their devotion to promoting the public benefit rather than private gain. The nondistribution constraint, however, is a problematic limitation for individuals interested in creating corporations that have a public benefit focus but also seek to allow profits to revert back to individuals who work in the corporation.

Thus, the for profit corporate form is limited because the board of directors owe a significant fiduciary duty to the corporation and its shareholders by way of maximizing profits; alternatively, the not-for-profit corporate form is problematic because of the severe limitation of the nondistribution constraint, which prevents inurement of profit back to individuals who work in the corporation.[55] These deficiencies in the two main corporate forms led to the creation of benefit corporation legislation that Delaware passed in 2013.[56]

II. The Delaware Public Benefit Corporation Statute

Subchapter 15 of Chapter 1 in Title 8[57] governs the formation and obligations of public benefit corporations in Delaware. One of the key advantages that subchapter 15 provides is the integration of the benefit corporate form into existing corporate law. Under section 361 the language states "if a corporation elects to become a public benefit corporation. . .it shall be subject to all provisions of the chapter except to the extent the subchapter imposes additional or different requirements."[58] This requires benefit corporations to comport substantively with existing corporate law, except where the existing law that does not adequately acknowledge the new role that benefit corporations seek to play.[59]

52. *See id.*

53. *Id.*

54. *Id.*

55. *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 Regent U. L. Rev. 269, 280 (2013) ("There seems to be no good reason to have only an organizational bi-culture in which, on the one hand, no profit may inure to private persons in a nonprofit corporation and, on the other hand, the singular purpose in a for-profit corporation must be to zealously maximize profits. On a spectrum where those two institutional objectives occupy polar ends, there lies an intermediate range of possible business purposes that combine some level of return to 'private' investors with the simultaneous pursuit of more 'public' or 'social' benefits.").

56. *Governor Markell Signs Public Benefit Corporation Legislation*, Del.gov (July 17, 2013), http://news.delaware.gov/2013/07/17/governor-markell-signs-public-benefit-corporation-legislation.

57. Del. Code Ann. tit. § 361 *et al.*

58. *Id.* § 361.

59. *See id.*

A. The Benefit Corporate Form

Public benefit corporations have specific requirements that they must fulfill to obtain the recognition of the public benefit corporate form. Section 362 defines a public benefit corporation as a "for-profit corporation organized under and subject to the requirements of this chapter that is intended to produce a public benefit or public benefits and operate in a responsible and sustainable manner."[60] Importantly, the statute clarifies that a public benefit corporation shall be managed by "balancing the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit(s) identified in its certificate of incorporation."[61] This language is a key departure from traditional Delaware corporate law because the statute explicitly requires that directors consider all three interests when making decisions on behalf of the corporation, rather than merely the profit maximizing aims of stockholders.[62]

Public benefit corporations also have several requirements they must satisfy to incorporate. In their certificate of incorporation, the public benefit corporation must: 1) identify within its statement of business or purpose (pursuant to §102(a)(3) of title 8) one or more specific public benefits that will be promoted by the corporation; and 2) state within its heading that it is a public benefit corporation.[63] Furthermore, the provision requires that the public benefit corporation either include in its name the words "public benefit corporation" in their corporate name, or provide notice to any person who intends to purchase stock in the corporation of its benefit corporation status.[64] The statute defines a "public benefit" as a benefit that has a positive effect on one or more categories of persons, entities, communities, or interests other than stockholders in their capacities as stockholders.[65] Finally, incorporation as a benefit corporation requires 90% approval by the outstanding shares of each class of stock of the corporation to amend its certificate.[66]

B. The Board of Directors Fiduciary Duties to the Benefit Corporation

The subchapter also describes the duties that directors will have under this new corporate form. Section 365(a) reiterates the mandate that directors manage and

60. *Id.* § 362(a).

61. *Id.*

62. *See* Katz v. Oak Indus., Inc., 508 A.2d 873, 879 (Del. Ch. 1986) (holding that the directors owe a duty to maximize the long-run interests of the corporation's stockholders, sometimes at the expense of other constituencies).

63. Del. Code. Ann. tit. 8 § 362(a).

64. *See id.* § 362(c). The subsection allows the corporation to alternatively use the abbreviation "P.B.C" or the designation "PBC." *Id.*

65. *Id.* § 362(c).

66. *Id.* § 363(a)(1).

direct the business and affairs of the public benefit corporation by balancing "the pecuniary interests of the stockholders, the best interests of those materially affected by the corporations' conduct, and the specific public benefit[s] identified in its certificate of incorporation."[67] This reiteration that directors must consider these additional interests reinforces the departure this requirement takes from the traditional corporate law principle of profit maximization for the benefit of shareholders.[68] Subsection b clarifies that in considering these different interests, a director has satisfied his or her duty if his or her decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.[69] This clarification of a director's obligation is important because it allows directors significant flexibility to weigh each interest based on the specific issue they are tasked with deciding.

C. The Duty to Promote a Public Benefit

Public benefit corporations must also provide stockholders with a statement explaining how the corporation has promoted the public benefit(s) identified in their certificate. This statement must be provided biennially and include the following: 1) The objectives the board has established to promote the public benefit(s) of the corporation; 2) the standards the board has adopted to measure the corporation's progress in promoting such public benefit(s); 3) objective, factual information on based on those standards regarding the corporation's success in meeting the objectives for promoting such public benefit(s); and 4) an assessment of the corporation's success in meeting the objectives and promoting such public benefit(s).[70] This statement keeps the shareholders apprised of precisely how the Board is satisfying the public benefit goals of the corporation.[71]

67. *Id.* § 365(a).

68. *See id. Cf. supra* notes 29–42 and accompanying text (articulating the profit maximization duties directors owe to their shareholders).

69. *Id.* § 365(b). Under subsection b, a director does not owe any duty to a person based on any interest that such person has in the public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct. *Id.*

70. *Id.* § 366(b). Section 366 (c) provides that a corporation's certificate can require the corporation to: 1) provide the statement in (b) more frequently than biennially; 2) make the statement described in (b) available to the public; and or 3) use a third-party standard that addresses the corporation's promotion of the public benefit identified in the certificate and or the best interests of those materially affected by the corporation's conduct. *Id.* § 366(b).

71. *But see* Jessica Chu, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. Cal. Inter. L.J 155, 186 (2013) (finding that the benefit corporate forms gives shareholders unprecedented power to bring enforcement proceedings against their board of directors for failing to pursue or create the public benefit purpose, or failing to consider the interests of various stockholders).

III. A New Shield Against Hostile Maneuvers by Profit-Driven Invaders

Benefit corporations are a significant new corporate form that could have a consequential impact on corporate governance disputes. By first examining two famous examples of hostile maneuvers taken by profit-driven corporations to acquire publicly minded corporations, it becomes clear that under traditional corporate governance law corporations who gain success while maintaining a public benefit focus have little defense against these profit-driven invaders.[72] However, with the advent of the new benefit corporate form these public benefit corporations will have additional protections against hostile maneuvers, allowing these corporations to focus their activities on providing public benefits rather than defending against these hostile actors.[73]

A. Philanthropic For Profit Corporations Have Little Chance Against Profit-Driven Invaders

Hostile maneuvers by one corporation to acquire another corporation are not an uncommon practice in the corporate world.[74] In certain scenarios, however, those acquisitions are at the expense of the acquired company's original corporate mission. Unilever's acquisition of Ben & Jerry's and the legal dispute between the founders of Craigslist and their minority shareholder, eBay, suggest that for profit corporations founded for a public purpose have little protection against hostile maneuvers by profit-driven corporations who seek to acquire them under traditional corporate law.

1. The Unilever Acquisition: International Conglomerate versus Communal Roots

Ben Cohen and Jerry Greenfield founded the famous ice cream company Ben & Jerry's in 1978. By 1982, the two founders clarified their goals for the company with the mission of "creat[ing] a business that gave something back to the community."[75] The company went public two years later, and with the influx of capital formalized their company's charitable donation policy by establishing the Ben & Jerry's Foundation.[76] The foundation was endowed with 50,000 of Cohen's shares (worth

72. *See infra* Part III.A.

73. *See infra* Part III.B.

74. In the first six months of 2014, twenty-five unsolicited, hostile merger and acquisition offers were made for a combined value of $290 billion dollars; this amounted to about nineteen percent of the value of all merger and acquisition activity in 2014 according to data from Deologic. Arash Massoudi & Ed Hammond, *Hostile takeovers rise to 14-Year High in M&A as Confidence Grows*, FINAN. TIMES (June 8, 2014), http://www.ft.com/cms/s/0/a8a8f608-eee5-11e3-8e82-00144feabdc0.html#axzz3rvofrOe1.

75. *See* Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 45 VT. L. REV. 211, 217 (2010)(quoting founder Ben Cohen in a speech Cohen gave to the staff).

76. *Id.* at 219.

about $850,000) and a commitment of 7.5% of the company's yearly pre-tax profits.[77]

From that promising beginning Ben & Jerry's greatly expanded its charitable efforts over the next thirty years. Not only did the company continue to invest 7.5% of their profits into their charitable foundation, but the company also became conscious of the environmental and social impact their company had on society.[78] This consciousness led Ben & Jerry's to reduce its impact by feeding the waste from the ice-cream making process to pigs, speaking out against bovine growth hormones, using milk that was free from artificial growth hormones, and developing "Eco-pint" containers that used unbleached paperboard because of concerns about chlorine and water pollution.[79] To measure its success, the founders would ask "[h[ow much have we improved the quality of life in the community?"[80] and "how much profit is left over at the end of each month?"[81] If, each month, the company had not contributed to both objectives, then the founders considered that month a failure.[82]

Ben & Jerry's became a rubric for what a public benefit for-profit corporation looked like, and both the local and national community not only took notice but also overwhelmingly embraced the company. By 1998, Ben & Jerry's stock gains led to an attractive buyout offer from Dreyer, a competing ice cream manufacturer, and later Unilever, an international conglomerate.[83] Despite the founders reluctance to sell the company, eventually in 2000 the founders declared the sale of Ben & Jerry's to Unilever.[84]

While Unilever kept Ben & Jerry's operations substantively separate from the rest of the conglomerate and continues to support the charitable mission of the company,[85] this case exemplifies the flaws that traditional corporate law has in

77. *Id.*

78. *See id.* at 220–22.

79. *See id.* Ben & Jerry's also conducted voter registrations at their stores; bought ingredients from suppliers who employed disadvantaged populations; used more Fair-Trade certified organic ingredients in their ice cream; and reduced the company's output of waste. *Id.*

80. *Id.* at 219–20.

81. *Id.*

82. *Id.* at 220.

83. *Id.* at 225–26. In response to Dreyer's 1998 offer, in 2000 Cohen and a group of social investors attempted a leveraged buyout of the company at $38.00 a share. In response, Dreyer offered a $38.00 per share all stock deal. Unilever then entered the bidding war by offering $43.60 per share. *Id.* at 226.

84. *Id.* at 228. The founders considered re-organizing their intricate capital structure to change the voting make-up of the board, but the other board members did not want to take on the personal liability of testing Ben & Jerry's corporate defense by re-structuring especially in light of the fact that Unilever's bid included no risks of liability. *See id.* at 240–42. Unilever's offer was $5.20 over what Dreyer offered, and $26.20 over what the stock was worth on the market. *See id.*

85. Under Unilever's management, the new board of directors was primarily comprised of the old board members; and, in the merger agreement Unilever promised to contribute $5 million to assist minority-owned and under-capitalized business, $5 million to employees that had to be paid within six months of the agreement, and contribute $5 million to the Ben & Jerry's Foundation. *See id.* at 227–28.

protecting a socially conscious company that is deeply rooted in local and national community development from being overtaken by an international profit-driven company.

2. A Clash of Corporate Cultures: eBay versus Craigslist

The litigation that resulted from eBay and Craigslist's incompatible corporate cultures demonstrates how benefit corporation legislation will have significant impact on traditional corporate governance law and how courts will assess the defensive measures taken by benefit corporations facing hostile corporate maneuvers.[86]

a. Craiglist's Corporate Culture

Craig Newmark (Newmark) founded Craigslist to provide the online community with a quality online classifieds forum. While Craigslist is a for profit corporation, nearly all of the classified advertisements that are placed on the forum are placed there free of charge, and it does not sell advertising space on its website to third parties.[87] The management team, consisting mainly of Jim Buckmaster (Buckmaster) and Newmark, is committed to the community-service approach to doing business.[88] The company, therefore, has not tried to monetiz[e] the site,[89] but rather focused on providing a quality service that helps connect the communities for which it operates.[90] Other evidence of this community-focused mission is reflected in the fact that even after Craigslist became successful the company did not foray into ventures beyond classifieds.[91] Also, despite its vast popularity, the company remains small with only about thirty-four employees and a maximum of three stockholders.[92] While Craigslist enjoys enormous success and continually makes a profit, despite little effort taken by the management team, at its core Craigslist is focused on providing a community service, not optimizing profit streams.

b. Litigation between Craigslist and eBay

The dispute between Craigslist and eBay arose when Philip Knowlton ("Knowlton"), one of Craigslist's stockholders, sold his shares to eBay. Newmark

86. *See infra* notes 87–119 and accompanying text.

87. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 8 (Del. Ch. 2010). As of 2010, Craigslist's revenue stream consisted solely of fees for online job postings in certain cities and apartment listings in New York City. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *eBay Domestic Holdings, Inc.*, 16 A.3d at 8.

and Buckmaster were concerned (as the other two shareholders) about eBay becoming a minority shareholder in their company because the two companies had vastly different business models.[93] Despite these concerns, and after months of negotiations, eBay, Newmark, and Buckmaster agreed to make eBay the third stockholder.[94] EBay became the new minority shareholder in Craigslist in 2004, owning 28.4% of Craigslist's stock.[95] The parties then signed a stock purchase agreement (SPA) and a stockholders agreement (SA), and Buckmaster and Newmark executed a separate voting agreement.[96]

From the beginning of the relationship, eBay sought to expand its role within Craigslist with the long-term goal of making Craigslist an eBay subsidiary.[97] Pierre Omidyar, founder of eBay, viewed his role as a shareholder as "facilitating the relationship. . .between [C]raigslist and eBay, help[ing] [C]raigslist see the value of having eBay as a partner, and ultimately [getting] that relationship. . .closer and closer so that [eBay] would end up in an acquisition[.]"[98] Ultimately, eBay's goal was to acquire Craigslist as a subsidiary.[99] Newmark and Buckmaster, however, resisted all overtures that eBay made to maximize Craigslist's profits, and completely ignored eBay's advice in making changes to their business model.[100] EBay, meanwhile, continued to pursue separate endeavors in the classifieds sphere.[101]

By 2007, the underlying tensions between the two companies came to a head when eBay launched a classifieds site in the United States, invoking the SA competitive activity clause.[102] In response, Craigslist sent eBay notice invoking the competitive activity clause and gave eBay ninety days to cure the violation before

93. *See id.* at 9. EBay operates with an eye to maximizing revenues, profits, and market share. Their website charges commissions on each sale that occur in the forum and the court found that the company is constantly looking to acquire new subsidiaries to diversify and build their empire. The court also found that the central mission of eBay is to focus on monetization, and turning online products and services into revenue streams. *Id.*

94. *Id.* at 11.

95. *Id.* EBay ultimately agreed to pay $32 million for Knowlton's shares with Knowlton receiving $16 million, and Buckmaster and Newmark each receiving $8 million. *Id.*

96. *Id.* at 11. The SPA required creation of a new charter for Craigslist, which provided for a three-person board of directors to be elected under a cumulative voting regime (effectively allowing eBay to unilaterally elect one of the three members to the Craigslist board). *Id.* The SA set out the following provisions: 1) eBay's confidentiality obligations as a Craigslist stockholder; 2) eBay's right to consent to certain Company transactions; 3) numerous transfer restrictions on Craigslist shares owned by Newmark, Buckmaster, and eBay; 4) eBay's right to compete with Craigslist subject to certain consequences; and 5) the consequences that will ensue should eBay decide to compete with Craigslist. *Id.* at 11–12.

97. *See id.* at 10, 14.

98. *Id.* at 14 (quoting Omidyar).

99. *Id.*

100. *See id.* at 14–16.

101. *Id.* at 17. EBay launched the site Kijiji internationally in March 2005, which offered similar free classified services with a broad selection of categories. *Id.*

102. *Id.* at 18–19. The launch of Kijiji in the United States invoked the clause because it contained a job listings section. *Id.* at 19.

eBay would lose important shareholder rights.[103] A month after the notice was sent Buckmaster sent a letter to eBay seeking to "gracefully unwind the relationship" because Craigslist was no longer comfortable with eBay's shareholding and board seat.[104] The letter then explained that Craigslist did not share eBay's competitive business model, and Craigslist was concerned that eBay, as a shareholder, had access to Craiglist's private financials and other nonpublic information.[105]

Over the course of the next six months, Craigslist and its attorneys came up with a plan to effectively neutralize eBay's influence on Craigslist.[106] The plan consisted of the following: 1) implementation of a staggered board through amendments to the Craigslist charter and bylaws; 2) approval of a stockholder rights plan (SRP); 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.[107] EBay responded by filing suit against Craigslist in April 2008, alleging that the above plan was a breach of fiduciary duty by Buckmaster and Newmark in their capacities as directors and controlling stockholders.[108]

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103. *Id.* The SA stipulated that if eBay invoked the competitive activity clause and did not cure in 90 days, then eBay would lose: 1) its consent rights; 2) its preemptive rights over the issuance of new shares; and 3) its rights of first refusal over Buckmaster's and Newmark's shares; if eBay failed to cure, then their shares became freely transferable. *Id.*

104. *Id.*

105. *eBay Domestic Holdings, Inc.*, 16 A.3d at 19. Evidence presented at trial confirmed Buckmaster's suspicions that eBay used Craigslist's nonpublic business information to develop and expand their own classifieds website without the knowledge of either Buckmaster or Newmark; there was also evidence presented that eBay "scraped" data from Craigslist's website by using a third-part service to remotely extract data. *See id.* at 17–18.

106. *Id.* at 21.

107. *Id.* The first action created a staggered board that in effect prevented eBay from electing a board member to Craigslist for two years. The second action pays a dividend to stockholders of one right per share of stock; each right allows its holder to purchase two shares of craigslist stock at $0.00005/share if the rights are triggered (two triggers: 1) Buckmaster, Newmark, or eBay obtain 0.01% of additional stock; 2) anyone other than the above become an owner of 15% or more of Craigslist's outstanding shares); if the rights are triggered the Board has four options: a) the board can redeem the rights at $0.00001/right within 10 days, and the rights will not become exercisable; 2) the Board may amend the SRP within 10 days and make the SRP inapplicable to the transaction; 3) the Board may leave the choice whether to exercise the rights in the hands of the individual stockholders; or 4) within 10 days of the rights being triggered, the Board may unilaterally exchange the rights for shares of stock, at a rate of two shares of common stock/right. The third action gave Craigslist the right of first refusal over their shares in the event a third party wished to purchase the shares. This effectively forced eBay to decide whether to encumber their previously unencumbered stocks, but not dilute their stock percentage, or refuse and dilute their ownership in Craigslist. *See id.* at 22–25.

Buckmaster and Newmark approved the actions in the plan on January 1, 2008 through a unanimous written consent as Craigslist directors, and a written consent as majority stockholders to approve the actions. The actions were implemented on January 2 and eBay was informed of the changes on January 3rd. *Id.* at 22.

108. *Id.* at 25.

c. The Court of Chancery's Analysis of Craiglist's Corporate Culture

The importance of this case lies in how the court discussed the divergent corporate cultures of eBay and Craigslist in its analysis. As discussed above, Craigslist and eBay had dramatically different business models, and antithetical goals in what they hoped to achieve out of their relationship.[109] As the court noted, "the two companies are a study in contrasts, with different business strategies, different cultures, and different perspectives on what it means to run a successful business. It is curious that these two companies ever formed a business relationship."[110] This clash of cultures between the two companies became a theme of the court's analysis.[111]

Craigslist's main argument was that eBay threatened Craigslist and its corporate policies.[112] They argued that the 2008 plan was in response to their fears that eBay's acquisition of control "would fundamentally alter Craigslist's values, culture and business model, including departing from [Craigslist's] public-service mission in favor of increased monetization."[113] The court, however, completely dismissed Craigslist's culture argument. Chancellor Chandler found that Craigslist "failed to prove that Craigslist possesses a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value . . . ."[114] He went on to state:

> *As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire [Buckmaster's] and [Newmark's] desire to be of service to communities. The corporation form in which Craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment.*[115]

Chancellor Chandler concluded his argument regarding Craiglist's corporate culture by stating, "[h]aving chosen a for-profit corporate form, the Craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of the stockholders."[116] As Chandler's analysis clearly articulates, while a company's decision to embark on charitable endeavors is admirable under

109. *See supra* notes 87–108 and accompanying text.
110. *eBay Domestic Holdings, Inc.*, 16 A.3d at 7.
111. *See generally id.*
112. *Id.* at 32.
113. *Id.* at 32.
114. *Id.* at 33.
115. *Id.* at 34 (emphasis added).
116. *Id.*

traditional corporate law, if that charitable endeavor threatens the traditional fiduciary obligations of directors, then the charitable endeavor will not be sustained as a viable defense in Delaware courts.[117]

This case exemplifies why traditional for-profit corporate law is not sufficient to protect companies who seek to earn a profit but also want to promote public benefits in society. As Chandler noted in his opinion, traditional for profit corporations must consider profits first and everything else second.[118] With the passing of benefit corporation legislation in Delaware, however, the previously unpersuasive defense of a philanthropic culture in a for-profit corporation will gain new standing, and provide a more effective shield against hostile threats from profit-driven companies.[119]

B. Benefit Corporation Statutes Provide New Protections Against Profit-Driven Invaders

As *eBay Domestic Holdings, Inc.* made explicit above, Delaware courts will not recognize the defense that a corporation who has a philanthropic culture can disregard the profit maximization goals of one of its shareholders.[120] The new benefit corporate form, however, provides a novel corporate form that allows publicly minded for-profit corporations to more effectively protect their philanthropic goals. First, this new corporate form provides notice to potential investors that these benefit corporations are, at least in part, incorporated to serve a public benefit; thus, investors solely interested in turning a profit will likely not invest in these types of ventures.[121] Second, the new benefit corporate form will more clearly define a philanthropic "culture" that will allow the company to more effectively defend itself in corporate governance disputes against profit-driven entities that only seek to capitalize off the public benefit company's success.[122]

1. The Public Benefit Corporate Form Provides Notice to Potential Investors

As noted in Part II, Delaware legislators added the benefit corporate form to their General Corporation Law in 2013.[123] As part of the new legislation, corporations seeking to incorporate as benefit corporations are required to include in their certificate of incorporation one or more specific public benefits the corporation

117. *See supra* notes 115–16 and accompanying text.
118. *eBay Domestic Holdings, Inc.*, 16 A.3d at 34.
119. Del. Code. Ann. tit. 8 §361 *et al.*
120. *See supra*, Part III.A.2.
121. *See infra* Part III.B.1.
122. *See infra* Part III.B.2.
123. *See supra* Part II.

plans to pursue.[124] They also must include in the heading of their certificate of incorporation that they are a "benefit corporation."[125] Another key requirement mandated by the Delaware benefit corporation legislation is the voting requirement. Section 363(a) requires that in order to incorporate as a benefit corporation, 90% approval from the outstanding shares of each class of stock in the corporation.[126] By requiring such a high approval percentage from the stockholders it ensures that the corporation's investors are sufficiently united in deciding to make provisions for public benefit(s) a part of the company's business model.[127]

The new legislation is designed to provide notice to existing and potential investors with notice of the repercussions associated with entering into this type of corporate form.[128] By requiring these corporations to include notice of their status as a benefit corporation,[129] and requiring the stockholders to vote for the new corporate form,[130] the benefit corporation legislation seeks to provide both existing and potential investors with notice that the corporation is not solely interested in promoting profit-maximizing aims. This is not to say that public benefit corporations do not also endeavor to turn a profit, but rather that these new types of corporations will not sacrifice their goals of providing a public benefit in the name of profit-maximization.[131]

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124. *See* Del. Code Ann. tit. 8 § 362(a)(1).

125. *Id.* § 362(a)(2).

126. *Id.* § 363(a).

127. *See id.*

128. *See id.* § 362(c) (requiring a public benefit corporation either to include in their name the words "public benefit corporation" or to provide notice to any person who intends to purchase stock in the corporation that it is a public benefit corporation).

129. *See id.*

130. *See id.* § 363(a).

131. *See* Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 Regent U. L. Rev. 269, 288 (2013) (clarifying that a benefit corporation may also seek to enhance its profits and shareholder wealth, but that while a benefit corporation is required to provide a public benefit, they are not *required* to maximize profits) (emphasis added). If, however, a benefit corporation decides they no longer want to retain their charitable aims, and want to revert back to a traditional corporate model they are able to do so. *See* Del. Code. Ann. tit. 8 § 363(c):

> Notwithstanding any other provisions of this chapter, a corporation that is a public benefit corporation may not, without the approval of 2/3 of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or nonvoting:
>
> (1) Amend its certificate of incorporation to delete or amend a provision authorized by § 362(a)(1) or § 366(c) of this title; or
>
> (2) Merge or consolidate with or into another entity if, as a result of such merger or consolidation, the shares in such corporation would become, or be converted into or exchanged for the right to receive, shares or other equity interests in a domestic or foreign corporation that is not a public benefit corporation or similar entity and the certificate of incorporation (or similar governing instrument) of which does not contain the identical provisions identifying the

Furthermore, by providing this type of notice to such investors, benefit corporations are in a better position to attract the types of investors who share their interests in philanthropic endeavors. Potential investors who connect with the philanthropic goals of a benefit corporation will likely be enticed to invest in that type of venture, thus perpetuating the likelihood that the benefit corporation will remain dedicated to its philanthropic goals.[132] Additionally, since this corporate form explicitly includes philanthropy as a component of the board of directors' considerations,[133] potential investors who seek only maximization of profits are less likely to invest in these types of ventures because their corporate goals diverge.

The Unilever acquisition provides a prime example of how important this new benefit corporate form is to for profit philanthropic corporations. As noted in Part III.A.1 of this paper, Ben & Jerry's was acquired by Unilever in 2000 after a bidding war between Unilever and Dreyer.[134] Had Ben & Jerry's been incorporated as a benefit corporation at the time, they would have had more effective protections against the acquisition. Because benefit corporation legislation provides clear language that explicitly allows directors to consider interests other than those directly related to shareholders, Cohen and Greenfield would have better understood their obligations as directors.[135] Delaware's benefit corporation legislation allows boards of directors to have more flexibility in determining what is best for their corporation because they are no longer constrained solely by shareholder interests and the profit-maximization objective.[136] This frees the directors' decision-making to consider a much wider range of interests, depending on what the individual issue requires.

Finally, in the instance where a dispute does arise between a profit-focused investor and those dedicated to the philanthropic purpose and litigation ensues, the benefit corporate form provides more advanced protections during the litigation process than under traditional corporate law.

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public benefit or public benefits pursuant to § 362(a) of this title or imposing requirements pursuant to § 366(c) of this title.

132. According to the US SIF, a forum for sustainable and responsible investment, in the year 2014, socially responsible investors invested $4.85 trillion dollars utilizing a strategy known as the ESG Incorporation strategy. *See Fast Facts* USSIF, http://www.ussif.org/photogallery/info-graphics1.jpg. (last visited Dec. 7, 2015). The ESG Incorporation strategy requires investors to consider the environment, community, and other societal and corporate governance criteria in investment analysis and portfolio construction. The ESG Incorporation strategy also highlights community investing by explicitly seeking to finance projects or institutions that will serve poor and undeserved communities in the United States and overseas. *See SRI Basics*, USSIF, http://www.ussif.org/sribasics (last visited Dec. 7, 2015).

133. *See* DEL. CODE. ANN. tit. 8 § 365(a).

134. *See supra* Part III. A.1.

135. *See* DEL CODE ANN. tit. 8 § 365(a) ("The board of directors shall manage or direct the business and affairs of the public benefit 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.").

136. *See id.*

2. The Public Benefit Corporate Form Creates a Viable "Philanthropic Corporate Culture" Defense in Corporate Governance Disputes

As Chancellor Chandler pointed out in his *eBay Domestic Holdings, Inc.* opinion, "[t]he corporation form in which Craigslist operates. . .is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment."[137] Chancellor Chandler made clear that, under traditional Delaware corporate law, a culture of philanthropy, while admirable, is not a viable defense for resisting shareholders' profit-maximizing ambitions.[138] With the advent of the new benefit corporate form in Delaware, however, this culture of philanthropy defense will provide more adequate protections for these benefit corporations against profit-driven entities.

Chancellor Chandler based his analysis on the finding that Craiglist did not "possess a palpable, distinctive, and advantageous culture that sufficiently promotes stockholder value . . . ."[139] However, earlier in his opinion, Chancellor Chandler explained all the ways that Craigslist as a company was philanthropically engaged.[140] Thus, under traditional corporate law, even if a company such as Craigslist is organized to provide a public benefit, they cannot use their philanthropic endeavors as a defense against their shareholder's profit maximization objectives.

The benefit corporate form will be significant in these types of disputes because companies who are philanthropically minded finally have laws that protect their interests. During litigation, these benefit corporations will be able to point out that their certificates of incorporation: 1) explicitly name them as a benefit corporation, and 2) clearly explain what type of public benefit(s) the corporation is going to provide. In addition, the Delaware benefit corporation legislation specifically allows boards of directors to consider interests other than those of their shareholders.[141] With these new laws, Delaware courts will be forced to consider the role of these benefit corporations through a new lens.

This legislation challenges the traditional conventions of for profit corporate law and will force courts to reconsider traditional corporate governance standards in a

137. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

138. *See id.*

139. *Id.* at 33.

140. *See supra* notes 87–92 and accompanying text.

141. *But see* Jessica Chu, *supra* note 71. Chu argues that benefit corporation statutes are unnecessary because corporation's founders already have wide latitude in incorporating unique business purposes into their business models. *Id.* at 170. She finds three key deficiencies with the benefit corporate form: (1) shareholders have unprecedented power in bringing shareholder suits against directors; (2) the annual report creates repetitive costs for the corporation because many corporations already publish and market their impact on the community; and (3) corporations can already act in socially conscious ways so there is little incentive to switch corporate forms. *Id.* at 186. Ultimately, Chu concludes that if states simply adopted constituency statutes corporate directors would explicitly be allowed to act in socially conscious ways without converting the corporation into a benefit corporation. *Id.* at 187.

way that more adequately contemplates the reality that not every corporation has the sole aim of maximizing profits for their shareholders.

CONCLUSION

The proliferation of benefit corporation statutes has been both swift and exciting. With such a rapid expansion of this new corporate form, however, questions arise on how to integrate this new corporate form into existent corporate law. In Delaware, the legislators simply provided that benefit corporation law should follow traditional corporate law to the extent that its provisions remain consistent with the other provisions of Title 8.[142] While this blanket integration on its face seems to solve the dilemma of fitting a new corporate form into the existing law, when broken down it becomes clear that serious issues remain regarding what requirements the boards of directors will have under this new form and how those duties will interplay with other corporate governance issues.

Critics of this new corporate form argue that the form is unnecessary because existent corporate law gives directors a fair amount of latitude in making decisions for the corporation.[143] However, as previously noted,[144] there is substantial Delaware case law that denies directors the ability to account for priorities other than those that they owe to shareholders.[145] Additionally, not only does Delaware law refute the interpretation that directors are able to consider other interests that do not in some way pertain to shareholders' interests, but the two case examples above further undermine the viability of that argument.[146] Thus, although critics argue this corporate form is superfluous,[147] it is clear that benefit corporation legislation has merit and is filling a void that exists in corporate law.

The significance of this legislation lies in the new protections it grants to corporations who seek to promote philanthropic endeavors, but under traditional corporate law face hostile takeovers as a result of their successes. Using the examples

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142. DEL. CODE ANN. tit. 8 § 361.

143. *See, e.g.*, J. William Callison, Symposium, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 105 (2012) (arguing that under the current restraints of corporate law "for most corporate decisions there are no legal restrictions on the directors' ability to take non-shareholder interests into account.").

144. *See supra* Part I.

145. *See, e.g.*, Guth v. Loft, 5 A.2d 503, 510 (Del. 1939)(finding that boards' of directors owe a fiduciary obligation to both the corporation and its stockholders, including "refrain[ing] from doing anything that would work injury to the corporation, or to deprive it of profit or advantage . . . ."); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del 1986) (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)) (acknowledging that a board may consider a variety of constituencies when making decisions, but these considerations must be rationally related to benefitting the stockholders. Furthermore, considering non-stockholder interests is inappropriate when the corporation is being sold.); Katz v. Oak Industries, Inc. 508 A.2d 873, 879 (Del. Ch. 1986) (arguing that it is the obligation of a board of directors to maximize the long-run interests of the stockholders).

146. *See supra* Part III.A.

147. *See supra* notes 71, 141, 143.

of Unilever's acquisition of Ben & Jerry's and Craigslist's stockholder dispute with eBay it is clear that traditional corporate law was incapable of protecting these philanthropic corporations against hostile maneuvers by profit-driven companies.[148] However, with the advent of benefit corporation legislation, companies who decide to incorporate under the new form have explicit protections because the board of directors is no longer constrained by shareholder primacy and profit-maximization standards.[149] Thus, the boards for these new benefit corporations will be able to more effectively consider whether relationships with profit-maximizing investors are good for the company.

The new benefit corporate form provides an important new shield for these philanthropically inclined companies by giving them specific weapons that will allow them to resist profit-driven investors who do not share the same corporate goals.

148. *See supra* Part II.

149. *See* DEL. CODE ANN. tit. 8 § 363(c).