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THE DISTINCTIVE FIDUCIARY DUTIES THAT STOCKHOLDER CONTROLLERS OWE

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Introduction

Delaware law treats a stockholder who controls a corporation as a fiduciary. Delaware law also posits that a stockholder controller owes the same duties as a director. Motivated by concern that the resulting duties are onerous, Delaware decisions regularly express reluctance about determining that a stockholder exercises sufficient control to warrant fiduciary status. During an approximately twelve-year period from 2006 through 2018, Delaware decisions tightened the test for establishing stockholder control, ostensibly to avoid imposing those onerous duties. But on closer examination, the equivalency assertion underlying that trend is incorrect. Setting aside whether or not a director's duties are onerous, a stockholder controller does not owe the same duties as a director.

Unlike a director, a stockholder controller need not believe in subjective good faith that it is acting in the best interests of the corporation and its stockholders as a whole. A stockholder controller's fiduciary duties manifest only as an obligation not to harm the corporation or the minority stockholders through intentional, knowing, or grossly negligent action. Nor does a stockholder controller have a prescriptive obligation to take action to protect the corporation or its stockholders from harm. For a stockholder controller, the duty of loyalty is only a proscriptive obligation of non-harm. The resulting non-harming version of loyalty applies both when the stockholder controller transacts with the corporation and when the stockholder controller exercises its stockholder-level rights.

When negotiating an interested transaction, the stockholder acts both as a counterparty and as a fiduciary. Because the stockholder controller acts in part as a counterparty, the

stockholder controller need not believe subjectively that the transaction is in the best interests of the corporation or its minority stockholders, nor must the stockholder exercise due care on their behalf. The directors on the other side of the transaction owe those duties. But unless the stockholder controller disables itself fully at both the board and stockholder levels, then the stockholder controller continues to act in a limited fiduciary role, and a court will evaluate an interested transaction involving a stockholder controller using the entire fairness test. But despite its impressive sounding moniker, entire fairness only requires non-harm. The unitary entire fairness test has two dimensions: a substantive dimension known as fair price, and a procedural dimension known as fair dealing. The substantive dimension demands that the corporation or the minority stockholders receive at least the substantial equivalent value of what they had before, which is a measure of non-harm. The procedural dimension operates in service of the fair price dimension by looking for evidence of arm's length bargaining. Where evidence of arm's length bargaining is present, the result is more likely to be a fair exchange equivalent to what a third party would pay, meaning that the corporation or its minority stockholders are not being harmed relative to what they could obtain from the market.

Extant Delaware precedent conflicts over whether a stockholder controller owes fiduciary duties when exercising stockholder-level rights. Some cases assert that a stockholder controller never owes duties when exercising stockholder-level rights. Others assert that a controller always owes director-equivalent obligations, even when exercising stockholder-level rights.

A detailed examination of Delaware precedent supports a middle position. The cases first reveal that a stockholder controller can opt not to exercise any of its stockholder-level rights without triggering fiduciary review. By extension, cases permit a controller to use its stockholder-level powers to defend the status quo and its control position free of fiduciary constraint.

The cases also reveal that when a stockholder controller exercises its stockholder-level rights affirmatively and unilaterally, the stockholder controller owes both a duty of care and a duty of loyalty. The duty of care requires that the stockholder controller not harm the corporation or the minority

stockholders through grossly negligent action. The duty of loyalty manifests as an obligation not to harm the corporation or its minority stockholders knowingly or intentionally. Here again, the stockholder controller need not believe in subjective good faith that it is acting in the best interests of the corporation and all of its stockholders, nor does the stockholder controller have an affirmative obligation to exercise its stockholder powers in the best interests of the corporation and its stockholders as a whole.

It is thus incorrect to say that a stockholder controller does not owe fiduciary duties when exercising stockholder-level rights. It is also incorrect to assert that the stockholder controller's duties are the same as a director's. Delaware cases should stop making those claims and instead elaborate on the fiduciary framework based on the duty of non-harm.

Building on that insight, Delaware cases should hold that a stockholder controller owes a similar duty of non-harm when exercising other rights, such as statutory or contractual rights. Under this regime, a stockholder controller could exercise other statutory or contractual rights to defend the status quo or to protect its control position, but it could not use its rights to harm the corporation or its minority stockholders intentionally, knowingly, or through grossly negligent action.[1]

Finally, these insights provide a foundation for reconsidering a trend from approximately 2006 through 2018 that witnessed intermittent tightening of the test for controller status. To the extent that trend had a policy justification, it rested on the ostensibly onerous duties that controller status imposes. Because stockholder controllers owe more limited duties, that justification carries less weight. Instead, Delaware courts can employ a more predictable presumption that infers controller status at stock ownership levels of 20-25%.

1. Other aspects of a controlling stockholder's duties are less clear. A stockholder controller does not appear to owe a duty of oversight, which is a duty that directors and officers owe. A stockholder controller does owe a duty of disclosure that seems to parallel the director's duty, meaning that the controller must disclose all material information when requesting stockholder action and, if the controller chooses to speak, must speak honestly and completely. That duty fits with the obligation of non-harm, because stockholders are harmed if forced to make decisions without material information or based on misleading information. In the interest of brevity, this article does not discuss those duties.

I.
The Equivalency Claim and Its Implications

American law treats a stockholder that possesses the power to control a corporation as a fiduciary. That has been true since the late nineteenth and early twentieth centuries, when both federal courts and state courts reached that conclusion.[2] In Delaware, Chancellor Josiah O. Wolcott, a judicial luminary who put the Court of Chancery on the map in the early twentieth century, held similarly in *Allied Chemicals & Dye Corporation v.*

2. S. Pac. Co. v. Bogert, 250 U.S. 483, 487–88 (1919) ("The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority."); Wheeler v. Abilene Nat. Bank Bldg. Co., 159 F. 391, 394 (8th Cir. 1908) ("This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."); Ervin v. Or. Ry. & Nav. Co., 27 F. 625, 631 (C.C.S.D.N.Y. 1886) ("When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and cestui que trust."); *accord* Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R. Co., 417 U.S. 703, 716 n.13 (1974) (viewing the fiduciary duty of stockholder controllers as "settled law"); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) ("The stockholder controller owes the corporation a fiduciary obligation—one designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders" (internal quotation marks omitted); Pepper v. Litton, 308 U.S. 295, 306 (1939) ("A director is a fiduciary. So is a dominant or stockholder controller or group of stockholders." (citations omitted)); Jones v. H.F. Ahmanson & Co., 460 P.2d 464, 471-72 (Cal. 1969) ("[M]ajority shareholders, either singly or acting in concert to accomplish a joint purpose, have a fiduciary responsibility to the minority and to the corporation to use their ability to control the corporation in a fair, just, and equitable manner. Majority shareholders may not use their power to control corporate activities to benefit themselves alone or in a manner detrimental to the minority. Any use to which they put the corporation or their power to control the corporation must benefit all shareholders proportionately and must not conflict with the proper conduct of the corporation's business.").

Steel & Tube Company of America.[3] Since then, Delaware decisions have consistently recognized that principle.[4]

Fiduciary status based on control arises when a person can exercise a majority of a corporation's outstanding voting power. In one of the first articles to address the implications of corporate control, Adolf Berle labeled that "outright or absolute control."[5] Today, we might call it majority control, mathematical control, or hard control.

Fiduciary status based on control can also arise when a person has sufficient power, whatever the source, to exercise control over a corporation's business and affairs, even without wielding a majority of the voting power.[6] Berle called this

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3. Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 491 (Del. Ch. 1923) (Wolcott, Jos., C.) (stating that it was "clear" that the relationship between a majority stockholder and the minority is "of a fiduciary character.")

4. *E.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113 (Del. 1994) (imposing fiduciary duties on a stockholder who "owns a majority interest in or *exercises control* over the business affairs of the corporation") (internal quotation marks omitted); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989) (imposing fiduciary duties on a majority stockholder or a minority stockholder who exercises "actual control of corporate conduct"); Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."); Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109–10 (Del. 1952) ("Plaintiffs invoke the settled rule of law that Hilton as majority stockholder of Mayflower and the Hilton directors as its nominees occupy, in relation to the minority, a fiduciary position in dealing with Mayflower's property.").

5. Adolf A. Berle, Jr., *"Control" In Corporate Law*, 58 Colum. L. Rev. 1212, 1213 (1958).

6. "It is the fact of control of the common property held and exercised, not the particular means by which or manner in which the control is exercised, that creates the fiduciary obligation." *S. Pac. Co.*, 250 U.S. at 492. A controller thus need not be a stockholder. *See In re* Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674 (Del. Ch. May 6, 2021). Lender liability cases provide further evidence for this proposition. *See, e.g.*, Joanna M. Shepherd *et. al., What Else Matters for Corporate Governance?: The Case of Bank Monitoring*, 88 B.U. L. Rev. 991, 1002 (2008) ("The detailed reporting obligations and contract constraints imposed by the loan agreement, as well as the bank's ability to control the borrower's cash, enable the bank literally to control the firm."); Douglas G. Baird & Robert K. Rasmussen, *Private Debt and the Missing Lever of Corporate Governance*, 154 U. Pa. L. Rev. 1209, 1243-45 (2006) (explaining role of private debt as a "lever of corporate control"); *id.* at 1231-32 (describing features of loan agreements that afford lenders influence and control). In a variant of controller liability, courts have held lenders liable when they have exercised influence over a company that goes "beyond the domain of the usual money lender" and, while doing so, acted negligently or in bad faith. *E.g.,* NVent, LLC v. Hortonworks, Inc., 2017 WL 449585, at *9

"working control,"[7] which is a term we still use. Debate currently exists, however, over when a non-majority stockholder obtains sufficient power to be treated as a fiduciary,[8] what counts as

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(Del. Super. Feb. 1, 2017) (internal quotation marks omitted) (quoting Connor v. Great W. Sav. & Loan Ass'n, 44 P.2d 609, 616 (Cal. 1968)). *See generally* Daniel R. Fischel, *The Economics of Lender Liability*, 99 YALE L.J. 131 (1989) (analyzing lender liability as remedy for lender misbehavior); Margaret Hambrecht Douglas-Hamilton, *Creditor Liabilities Resulting from Improper Interference with a Management of a Financially Troubled Debtor*, 31 BUS. LAW. 343 (1975) (cataloging cases of lender liability). Other cases expressly impose fiduciary duties on a creditor who "exercise unreasonable or excessive control over its borrower." *E.g.*, Limor v. Buerger (*In re* Del-Met Corp.), 322 B.R. 781, 809–11 (Bankr. M.D. Tenn. 2005) (discussing controller creditor duties under Delaware, New York, and Tennessee law); *see* Jeffrey Jon Haas, *Insights into Lending Liability: An Argument for Treating Controlling Creditors as Controlling Shareholders*, 135 U. PA. L. REV. 1321, 1345–59 (1987). Courts also have recognized found a fiduciary relationship to exist in other contractual settings involving significant power disparities. *E.g.,* Calvin Klein Trademark Trust v. Wachner, 123 F. Supp. 2d 731 34 (S.D.N.Y. 2000) ("[S]pecial factors [may] create fiduciary relationships between contracting commercial parties, such as, for example, when one party's superior position or superior access to confidential information is so great as to require the other party to repose trust and confidence in the first party."); Peoples Bank & Trust Co. v. Cermack, 658 So.2d 1352, 1359 (Miss. 1995) ("A fiduciary relationship may arise in a legal, moral, domestic, or personal context, where there appears on the one side an overmastering influence or, on the other, weakness, dependence or trust, justifiably reposed." (internal quotation marks omitted)).

7. Berle, *supra* note 5, at 1213.

8. *See* notes 143 & 144, *infra* and accompanying text. A 2014 decision looked at ten precedents and failed to find "any sort of linear, sliding scale approach whereby a larger share percentage makes it substantially more likely that the court will find the stockholder was a stockholder controller." *In re* Crimson Expl., Inc. S'holders Litig., 2014 WL 5449419, at *10. If anything, that description undersold the lack of consistency. Prior decisions had citing decisions that treated ownership stakes of 21.5%, 27.7%, 33.5%, 33.7%, 39.5%, 44%, and 46% as insufficient to support an inference of control, while other treating ownership stakes of 17.5%, 35%, 40.3%, 43.3%, and 49% as sufficient to support an inference of control. *Id.* A more detailed examination of those decisions is beyond the scope of this article, but for present purposes, it suffices to say that whether a stockholder with less than a majority of the voting power can exercise control turns on multiple factors, not just voting power. A stockholder could be deemed to be a controller at lower levels of voting power if the stockholder also possesses other sources of power, such as board representation, blocking rights, or high-status roles (like founder, chairman, or CEO). Those factors complicate any effort to find an obvious, linear relationship. All else equal, however, there should be a positive correlation between stockholder voting power and control simply because of the mathematics surrounding the exercise of voting rights and the need for the party opposing a large block holder to poll and increasingly higher supermajority rates. *See* Voigt v. Metcalf, 2020 WL 614999, at *18–19 (Del. Ch. Feb. 10, 2020) (discussing voting implications of increasing blocks of voting power).

cognizable sources of power for that purpose,[9] and the test to

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9. For example, disagreement exists over whether contractual blocking rights are relevant to a finding of control. One line of decisions generally discounts contractual rights as irrelevant, although without meaningful analysis. That line of decisions can be traced to the *Superior Vision* case, which technically considered whether a stockholder could be subjected to fiduciary duties when exercising a specific blocking right. *See* Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., 2006 WL 2521426, at *2 (Del. Ch. Aug. 25, 2006) (rejecting the idea that "specific and fairly negotiated contractual right" could be subject to fiduciary limitation that would limit the counterparty's ability to "just consider its interests."). Later decisions have built on *Superior Vision* to assert more broadly that contractual rights should not be part of the control calculus. *See In re* KKR Fin. Hldgs. LLC S'holder Litig., 101 A.3d 980, 994 (Del. Ch. 2014) (relying on *Superior Vision* and holding "[a]t bottom, plaintiffs ask the Court to impose fiduciary obligations on a relatively nominal stockholder, not because of any coercive power that stockholder could wield over the board's ability to independently decide whether or not to approve the merger, but because of pre-existing contractual obligations with that stockholder that constrain the business or strategic options available to the corporation. Plaintiffs have cited no legal authority for that novel proposition, and I decline to create such a rule."), *aff'd sub nom.* Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304 (Del. 2015); Thermopylae Cap. Partners, L.P. v. Simbol, Inc., 2016 WL 368170, at *13 (Del. Ch. Jan. 29, 2016) ("Under Delaware law, however, contractual rights held by a non-majority stockholder do not equate to control, even where the contractual rights allegedly are exercised by the minority stockholder to further its own goals." (citing *Superior Vision*)); *see also* Calesa Assocs., L.P. v. Am. Cap., Ltd., 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016) (agreeing with argument that "exercise of contractual rights, alone are not sufficient to demonstrate control" but holding on other grounds that the plaintiffs had plead sufficient facts establishing that majority of board was under actual control and influence of alleged controller) (citing *Superior Vision*); *cf. In re* Sirius XM S'holder Litig., 2013 WL 5411268, at *8–9 (Del. Ch. Sept. 27, 2013) (discussing *Superior Vision* and holding that "[t]here are many situations when corporations enter into contractual arrangements that have important implications for corporate control in conceivable future situations; for example, debt instruments commonly give creditors rights that, if used, may result in their assuming control. The use of such rights to obtain control in the situations specifically contemplated by those contracts does not constitute a fiduciary breach.") (footnote omitted). These cases do not acknowledge, much less account for, the lender liability cases that have imposed fiduciary duties and liability based on purely contractual rights found in loan agreements. *See* note 7, *supra.*

By contrast, other cases explain that contractual rights are pertinent to a control determination. *See, e.g.*, *Voigt*, 2020 WL 614999, at *20 (explaining that contractual blocking rights weighed "in favor of an inference that CD&R exercised control over the Company generally by giving CD&R power over the Company beyond what the holder of a mathematical majority of the voting power ordinarily would possess"); *In re* Loral Space & Commc'ns Inc., 2008 WL 4293781, at *21 (Del. Ch. Sept. 19, 2008) (weighing large stockholder's "blocking power" when making post-trial finding of control); Williamson v. Cox Commc'ns, Inc., 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (noting that "veto power is significant for analysis of the control issue" because it

use for assessing fiduciary status.[10] This article therefore will not consider the concept of working control.

When considering the fiduciary duties of a majority controller, Delaware cases often assert a controller owes the same fiduciary duties as a director. Chancellor Wolcott said so in the *Allied Chemicals* decision from 1923.[11] Writing seventy years

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enabled the holders of the veto rights "to shut down the effective operation of the At Home board of directors by vetoing board actions"); *cf.* W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 2024 WL 747180, *9–10 (Del. Ch. Feb. 23, 2024) (describing stockholder agreement that included eighteen pre-approval requirements that were "so all-encompassing as to render the Board an advisory body. [the founder,] not the Company, is running the show."). A rights-holder can use veto rights to cut off alternatives and channel a corporation into a particular course of action. Conceptually, there is not a significant difference between directing behavior by ordering a particular action and directing behavior by cutting off alternative sources of action. *E.g.*, Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, 2018 WL 3326693, at *35 (Del. Ch. July 6, 2018) ("By creating a situation in which the Company had no other alternatives and no more money, Georgetown forced the Company to accept its deal. Because Georgetown exercised actual control over the Company for purposes of the Series G Financing, Georgetown became a fiduciary for purposes of evaluating that transaction."), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019). Still other decisions have considered the significance of a right, such as the ability to cut off a company's access to cash, because "[w]hen cash is like oxygen, self-interested steps to choke off the air supply provide a strong indicator of control." *Id.* at *29; *accord Voigt*, 2020 WL 614999, at *19; *see* Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd., 2020 WL 881544, at *27 (Del. Ch. Feb. 24, 2020) ("The Complaint well-pleads that the Blocking Rights allowed DXS and PacNet to block all of SMP's efforts to finance any of its ongoing operations—with either debt or equity. That, in turn, prompted the Noble Loan default, the Fourth Amendment and the subsequent acquisition of the Noble Loan by Waterloo. . . . [A]s pled, the Blocking Rights gave DXS and PacNet the unilateral power to shut SMP down—full stop." (footnotes omitted). Still other decisions have attempted to distinguish between types of contractual rights based on whether they resemble board-level rights or stockholder-level rights. *See Thermopylae Cap. Partner's*, 2016 WL 368170, at *14 (examining whether contractual right is one under which the holder "operates the decision-making machinery of the corporation," thereby becoming a classic fiduciary who controls the property of others, as opposed to "an individual who owns a contractual right, and who exploits that right—even in a way that forces a reaction by the corporation.").

10. *See* notes 143 & 144, *infra*, and accompanying text.

11. *Allied Chem.*, 120 A. at 491 ("The same considerations of fundamental justice which impose a fiduciary character upon the relationship of the directors to the stockholders will also impose, in a proper case, a like character upon the relationship which the majority of the stockholders bear to the minority. When, in the conduct of the corporate business, a majority of the voting power in the corporation join hands in imposing its policy upon all, it is beyond all reason and contrary, it seems to me, to the plainest dictates of

later, Chancellor William T. Allen said the same thing in *Harris v. Carter*.[12] Consistent with that statement of law, other Delaware cases describe stockholder controllers as owing the duties of loyalty and care, which are the same duties that directors owe.[13]

Putting those principles together makes a finding of control seem significant and hence something that should be difficult to establish. One illustrative Delaware decision frames the implications in precisely those terms: "[A] finding that a stockholder is a controller has dramatic consequences—she

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what is just and right, to take any view other than that they are to be regarded as having placed upon themselves the same sort of fiduciary character which the law impresses upon the directors in their relation to all the stockholders. Ordinarily the directors speak for and determine the policy of the corporation. When the majority of stockholders do this, they are, for the moment, the corporation."); *accord. S. Pac. Co.*, 250 U.S. at 487–88 ("The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority as much so as the corporation itself or its officers and directors."); *see* Berle, *supra* note 5 at 1222 ("[T]he law has long recognized and imposed certain liabilities on the holders of control if they use their influence over directors to cause specific corporate action. Briefly stated, the risk is that where holders of control, without assuming the title of directors, move into the directors' room or the managerial offices and specifically direct corporate action, they are held to the same standards of conduct which apply to directors.").

12. Harris v. Carter, 582 A.2d 222 (Del Ch. 1990) ("[W]hen a shareholder presumes to exercise control over a corporation, to direct its actions, that shareholder assumes a fiduciary duty of the same kind as that owed by a director to the corporation.").

13. *See, e.g.*, Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 406 (Del. 1988) (referring to the stockholder controller's "general fiduciary duties of loyalty and care"); *In re* MultiPlan Corp. S'holders Litig., 268 A.3d 784, 799 (Del. Ch. 2022) ("There is no dispute that Churchill's directors, officers, and controlling stockholder owed fiduciary duties of care and loyalty to stockholders."); Bocock v. INNOVATE Corp., 2022 WL 15800273, at *19 (Del. Ch. Oct. 28, 2022) ("As controlling stockholders of DTV America at the time of the transaction, the Innovate Entities owed DTV America fiduciary duties of loyalty and care."); Gilbert v. Perlman, 2020 WL 2062285, at *6 (Del. Ch. Apr. 29, 2020) ("Where in fact [a stockholder] exerts such control, a controlling stockholder is bound by Delaware's common law fiduciary duties of loyalty and care."); Cinerama, Inc. v. Technicolor, Inc., 1991 WL 111134, at *19–20 (Del. Ch. June 24, 1991) ("[W]hen a shareholder, who achieves power through the ownership of stock, exercises that power by directing the actions of the corporation, he assumes the duties of care and loyalty of a director of the corporation."), *rev'd in part on other grounds sub nom.* Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993). *But see* Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma That Should Be Abandoned*, 2015 U. Ill. L. Rev. 479 (2015) (surveying authorities which suggest that a stockholder controller owes a duty of care and arguing for the rejection of the duty).

is no longer able to act in self-interest, but must act in the corporate interest only, and entire fairness applies to transactions with the controller."[14] That decision then posits that stockholder controllers, like other fiduciaries, "are prohibited from considering their self-interest in making corporate decisions [and] must exercise their business judgment on behalf of the entity and its stockholders, free from the taint of personal interest."[15] Those assertions do not reflect an isolated or idiosyncratic assessment of the law. They illustrate a commonly held perception of a stockholder controller's duties. They also fairly summarize the duties that should apply if a stockholder controller were to owe the same duties as a director.

Rather than treating fiduciary equivalency as a postulate, it should be treated as a hypothesis. That hypothesis can be tested by examining how cases address specific situations. The results of that examination disconfirm the hypothesis.

II.
The Duties Directors Owe

Testing the hypothesis of fiduciary equivalency requires a baseline measured by the duties that directors owe. Delaware law subjects a director to two fiduciary duties: the duty of care and the duty of loyalty.

Before discussing those duties, it is necessary to acknowledge the distinction in entity law between the standard of conduct and the standard of review.[16] The standard of conduct frames the duty that the fiduciary is supposed to fulfill, such as "act in the best interests of the beneficiary" or "exercise reasonable care." Instead, a court measures a director's compliance with the standard of conduct using one of three standards of

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14. Sciabacucchi v. Liberty Broadband Corp., 2017 WL 2352152, at *16 (Del. Ch. May 31, 2017).

15. *Id.*

16. Chen v. Howard-Anderson, 87 A.3d 648, 666 (Del. Ch. 2014); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 35–36 (Del. Ch. 2013) (*Trados II*). *See generally* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and its Progeny as a Standard of Review Problem*, 96 Nw. U. L. Rev. 449, 451–52 (2002); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of the Standards of Review in Delaware Corporation Law*, 56 Bus. Law. 1287, 1295–99 (2001); Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 Fordham L. Rev. 437, 461–67 (1993).

review: a default standard of review that is highly deferential and known as the business judgment rule; an intermediate standard of review known as enhanced scrutiny; and an onerous standard of review known as the entire fairness test.[17]

The standard of review introduces a range of permissible actions centered around the standard of conduct. A court only holds the fiduciary in breach if the conduct falls outside that range.[18] With the business judgment rule, the range is expansively broad. With the entire fairness test, it is relatively narrow. With enhanced scrutiny, it falls in between. In each manifestation, the standard of review is more forgiving than the standard of conduct.[19]

In effect, the standard of review introduces a margin for error, and a finding of breach only results if the director's degree of deviation from the standard of conduct exceeds the margin for error. Incorporating a margin for error acknowledges that directors must always exercise some degree of fact-specific judgment about what action to take, and there will always be a level of epistemic uncertainty when a court reviews their actions.[20]

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17. *See In re* Columbia Pipeline Grp., Merger Litig., 299 A.3d 393 (Del. Ch. 2023); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457–59 (Del. Ch. 2011).

18. *See* Eisenberg, *supra* note 16 at 467-68 ("Because lawyers tend to focus on the operational questions of liability and validity, it is easy to overlook the point that standards of review, which govern liability and validity, are not themselves standards of conduct. A director or officer who engages in self-interested conduct without having dealt fairly has acted wrongly, even though he is protected against liability by the relevant standard of review. A director or officer who makes an unreasonable decision has acted wrongly, even though he is protected against liability under the business-judgment rule. If directors or officers who violate the standards of reasonableness and fairness sometimes escape liability because of a less demanding standard of review, it is not because they have acted properly, but because utilizing standards of review that were fully congruent with the relevant standards of conduct would impose greater costs than the costs of letting some persons who violated their standards of conduct escape liability. Such an officer or director may therefore be held *accountable,* even if not *liable,* for failure to meet the relevant standard of conduct.").

19. *Chen*, 87 A.3d at 667.

20. *See* Allen et al., *supra* note 16 at 451–52 ("(1) directors must often make decisions in an environment of imperfect (that is, limited or incomplete) information; (2) the risk of liability under the applicable standard of conduct for assuming a given corporate role may dwarf the incentives for assuming the role; (3) if the risk of liability is disproportionate to the directors' incentives for service, directors may avoid making economically valuable decisions that might subject them to litigation risk; (4) courts are ill-equipped to determine after the fact whether a particular business decision was

This article focuses on the standard of conduct, which both establishes the baseline obligation and provides the orientation for the court's range-based review. It touches only indirectly on the standards of review through which a court would analyze compliance with the standard of conduct.

A. *The Duty of Care*

Directors of a Delaware corporation owe a duty of care.[21] The standard of conduct for the duty of care requires that a director consider all information reasonably available before making a decision. "Directors have a duty to inform themselves, prior to making a business decision, of all material information reasonably available to them. Having become so informed, they must *then* act with requisite care in the discharge of their duties."[22]

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reasonable in the circumstances confronting the corporation; and (5) institutional and prudential considerations sometimes counsel judicial deference to the corporate decision maker."); Eisenberg, *supra* note 16, at 437–38 ("Perhaps standards of conduct and standards of review in corporate law would always be identical in a world in which information was perfect, the risk of liability for assuming a given corporate role was always commensurate with the incentives for assuming the role, and institutional considerations never required deference to a corporate organ. In the real world, however, these conditions seldom hold, and the standards of review in corporate law pervasively diverge from the standards of conduct.").

21. *E.g.*, Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006); *accord* Mills Acq. Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) ("[D]irectors owe fiduciary duties of care and loyalty to the corporation and its shareholders."); Polk v. Good, 507 A.2d 531, 536 (Del.1986) ("In performing their duties the directors owe fundamental fiduciary duties of loyalty and care to the corporation and its shareholders."); *In re* Orchard Enters., Inc. S'holder Litig., 88 A.3d 1, 32 (Del. Ch. 2014) ("Directors of a Delaware corporation owe two fiduciary duties—care and loyalty.").

22. *Technicolor, Inc.*, 634 A.2d at 367 (quoting Aronson v. Lewis, 473 A.2d 805 (Del. 1984)). Properly characterizing *Aronson*'s subsequent history is a chore. In Brehm v. Eisner, 746 A.2d 244, 253–54 (Del. 2000), the Delaware Supreme Court overruled seven precedents, including *Aronson* to the extent that they reviewed a Rule 23.1 decision by the Court of Chancery under an abuse of discretion standard or otherwise suggested deferential appellate review. *Id.* at 253 n.13 (overruling in part on this issue Scattered Corp. v. Chi. Stock Exch., 701 A.2d 70, 72–73 (Del. 1997); Grimes v. Donald, 673 A.2d 1207, 1217 n.15 (Del. 1996); Heineman v. Datapoint Corp., 611 A.2d 950, 952 (Del. 1992); Levine v. Smith, 591 A.2d 194, 207 (Del. 1991); Grobow v. Perot, 539 A.2d 180, 186 (Del. 1988); Pogostin v. Rice, 480 A.2d 619, 624–25 (Del. 1984); and *Aronson*, 473 A.2d at 814. The *Brehm* Court held that going forward, appellate review of a Rule 23.1 determination would be *de novo* and plenary. *Brehm*, 746 A.2d at 254. The seven partially overruled precedents oth-

In the context of a transaction or sale process, directors "must be particularly vigilant."[23] One of the Delaware Supreme Court's clearest teachings is that "directors cannot be passive instrumentalities during merger proceedings."[24] The duty of care therefore requires that directors maintain "an active and direct role in the context of the sale of the company from beginning to end,"[25] including by "identifying and responding to actual and potential conflicts of interests."[26] "[D]irectors can breach their duty of care by failing to obtain information that they should have obtained, even when the information was withheld by others."[27]

Although the standard of conduct of the duty of care is framed in terms of reasonableness, the standard necessary to find a breach of duty varies depending on the standard of review that applies.[28] When the business judgment rule applies, the level of carelessness is gross negligence.[29] When enhanced scrutiny applies, the level of carelessness is action that falls outside a range of reasonableness.[30] When entire fairness applies, the level of carelessness is action resulting in a decision-making process that fails to satisfy the fair dealing dimension of the unitary entire fairness test.[31] Ultimately, however, before

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erwise remain good law. More recently, the Delaware Supreme Court overruled *Aronson* and *Rales*, to the extent that they set out alternative tests for demand futility. United Food & Com. Workers Union & Participating Food Indus. Empls. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021). The high court adopted a single, unified test for demand futility. *Id.*

23. *Columbia Pipeline.*, 299 A.3d at 468.

24. *Cede*, 634 A.2d at 368.

25. *Id.*

26. RBC Cap. Mkts., LLC v. Jervis, 129 A.3d 816 (Del. 2015).

27. *In re* Rural Metro Corp., 88 A.3d 54, 93–96 (Del. Ch. 2014).

28. *See Columbia Pipeline*, 299 A.3d at 468–69.

29. *Id.*

30. *E.g.*, Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 36 (Del. 1993). (rejecting a sale process that "was not reasonable as to process or result"); *id.* at 45 (identifying as a key feature of enhanced scrutiny "the adequacy of the decision-making process employed by the directors, including the information on which the directors based their decision"); *id.* (noting that the directors bore "the burden of proving that they were reasonably informed"); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 949, 955, 958 (Del. 1985) (requiring a "reasonable investigation").

31. *E.g.*, Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1244 (Del. 2012) (affirming trial court's finding that "the process by which the Merger was negotiated and approved was not fair" and produced an unfair price); *In re* Walt Disney Co. Deriv. Litig., 906 A.2d 27, 52 (Del. 2006) (*Disney II*) (explaining

imposing personal liability for the duty of care, Delaware law always requires a showing of gross negligence.[32] Not only that, but gross negligence in the corporate context has a special meaning under Delaware law that is akin to recklessness.[33] For

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that the business judgment rule can be rebutted by establishing that "the directors breached their fiduciary duty of care" and that "[i]f that is shown, the burden then shifts to the director defendants to demonstrate that the challenged act or transaction was entirely fair to the corporation and its shareholders"); Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (explaining that the fair dealing dimension of the entire fairness test includes "how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors . . . were obtained").

32. *RBC*, 129 A.3d at 857 ("When disinterested directors themselves face liability, the law, for policy reasons, requires that they be deemed to have acted with gross negligence in order to sustain a monetary judgment against them.").

33. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 689 (Del. Ch. 2023) ("In the corporate context, gross negligence has its own special meaning that is akin to recklessness."); *In* re Lear Corp. S'holder Litig., 967 A.2d 640, 652 n.45 (Del. Ch. 2008) ("[T]he definition [of gross negligence in corporate law] is so strict that it imports the concept of recklessness into the gross negligence standard...."); Albert v. Alex. Brown Mgmt. Servs., Inc., 2005 WL 2130607, at *4 (Del. Ch. Aug. 26, 2005) ("Gross negligence has a stringent meaning under Delaware corporate (and partnership) law, one which involves a devil-may-care attitude or indifference to duty amounting to recklessness." (cleaned up)); Tomczak v. Morton Thiokol, Inc., 1990 WL 42607, at *12 (Del. Ch. Apr. 5, 1990) ("In the corporate context, gross negligence means reckless indifference to or a deliberate disregard of the whole body of stockholders or actions which are without the bounds of reason." (cleaned up)).

In civil cases not involving business entities, the Delaware Supreme Court has defined gross negligence as "a higher level of negligence representing 'an extreme departure from the ordinary standard of care.'" Browne v. Robb, 583 A.2d 949, 953 (Del. 1990) (quoting W. Prosser, Handbook of the Law of Torts 150 (2d ed. 1955)). This test "is the functional equivalent" of the test for "[c]riminal negligence." Jardel Co., Inc. v. Hughes, 523 A.2d 518, 530 (Del. 1987). By statute, Delaware law defines "criminal negligence" as follows:

A person acts with criminal negligence with respect to an element of an offense when the person fails to perceive a risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. Del. Code Ann. tit. 11, § 231(a). The same statute provides that a person acts recklessly when "the person is aware of and consciously disregards a substantial and unjustifiable risk that the element exists or will result from the conduct." *Id.* § 231(e). As with criminal negligence, the risk "must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." *Id.; see id.* § 231(a). Under this framework, gross negligence "signifies more than ordinary inadvertence or inattention," but it is "nevertheless a degree of negligence, while recklessness connotes a different type of conduct akin to the

purposes of determining the enforceable standard that could result in liability for a director, the standard is gross negligence as recklessness.

B. *The Duty of Loyalty*

For a director, acting loyally means seeking to maximize the value of the corporation for the benefit of its stockholders in the aggregate.[34] The director's duty of loyalty incorporates an obligation to act in good faith, which the Delaware Supreme Court has described as a prerequisite for loyal action.[35] Acting in good faith means acting with the subjective belief that the decision serves the best interests of the corporation and its stockholders.[36] A director acts in bad faith—and therefore disloyally—by acting "with a purpose other than that of advancing the best interests of the corporation."[37] A director certainly

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intentional infliction of harm." *Jardel*, 523 A.2d at 530. The comparison shows the protectiveness of Delaware's corporate law standard: To hold a director liable for gross negligence requires conduct more serious than what is necessary to secure a conviction for criminal negligence.

34. *Rural Metro*, 88 A.3d at 81 ("More concretely, the fiduciary relationship between the Board and Rural's stockholders required that the directors act prudently, loyally, and in good faith to maximize Rural's value over the long-term for the benefit of its stockholders."); *see also* Gantler v. Stephens, 965 A.2d 695, 706 (Del.2009) (holding that "enhancing the corporation's long term share value" is a "distinctively corporate concern[ ]"); TW Servs., Inc. v. SWT Acq. Corp., 1989 WL 20290, at *7 (Del. Ch. Mar. 2, 1989) (Allen, C.) (describing as "non-controversial" the proposition that "the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run" and explaining that "[t]hus, broadly, directors may be said to owe a duty to shareholders as a class to manage the corporation within the law, with due care and in a way intended to maximize the long run interests of shareholders"); Andrew A. Schwartz, *The Perpetual Corporation*, 80 Geo. Wash. L. Rev. 764, 777–83 (2012) (arguing that the corporate attribute of perpetual existence calls for a fiduciary mandate of long-term value maximization for the stockholders' benefit); William T. Allen, *Ambiguity in Corporation Law*, 22 Del. J. Corp. L. 894, 896–97 (1997) ("[I]t can be seen that the proper orientation of corporation law is the protection of long-term value of capital committed indefinitely to the firm.").

35. *See Stone*, 911 A.2d at 370 (quoting Guttman v. Huang, 823 A.2d 492, 506 n. 34 (Del. Ch. 2003)).

36. *Columbia Pipeline*, 299 A.3d at 455 ("Acting loyally requires acting in good faith, and acting in good faith requires that the fiduciary subjectively believe that the course of action is in the best interests of the corporation and its stockholders.") (citing United Food & Com. Workers Union v. Zuckerberg, 250 A.3d 862, 895 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021)).

37. *Disney II*, 906 A.2d at 67; *accord Stone*, 911 A.2d at 369.

acts in bad faith if the director has an "actual intent to do harm" to the corporation or its stockholders. [38] A director also acts in bad faith by engaging in an "intentional dereliction of duty," such as a "conscious disregard for one's responsibilities."[39] But those extreme levels of intent are not required. Any human emotion can cause a director to act in bad faith, including greed, hatred, lust, envy, revenge, shame or pride.[40]

III.
Can There Be Other Fiduciary Formulations?

To reiterate, Delaware decisions often posit the fiduciary equivalence of director and stockholder controller duties. One possible reason for fiduciary equivalency might be if director-level duties were universal. In such a world, if someone is a fiduciary, then they owe the same duties as a director, but not because of anything special about director duties. They owe those duties because every fiduciary owes them.

For the duty of care, the possibility of other standards is easily perceived, and Delaware cases discuss how Delaware's corporate law version of gross negligence as recklessness compares to other possibilities.[41] To reiterate, for a standard common law tort claim, the test is simple negligence measured by what a reasonable person would have done under the circumstances. A moderately higher standard is a version of gross negligence that still functions as a form of negligence, but which requires a gross departure from what a reasonable person would have done. Delaware's corporate version is still more onerous and requires conduct akin to recklessness.

For the duty of loyalty, Delaware cases do not acknowledge alternatives, but it turns out that variants exist. Scholars have explored a spectrum of increasingly meaningful loyalty obligations.

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38. *Disney II*, 906 A.2d 27, 66 (Del. 2006); *accord* Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 240 (Del. 2009).

39. *Disney II*, 906 A.2d at 66; *accord Lyondell Chem. Co.*, 970 A.2d at 240.

40. *In re* McDonald's Corp. S'holder Deriv. Litig., 291 A.3d 652, 688 (Del. Ch. 2023); *In re* RJR Nabisco Inc. S'holders Litig., 1989 WL 7036, at *12 (Del. Ch. Jan. 30, 1989), at *15; *see Guttman*, 823 A.2d at 506 n.34.

41. *See* notes 29-34, *supra.*

A. *A Spectrum of Loyalties*

Where the spectrum of loyalties begins is a contested issue. Some commentators put the loyalty floor at an obligation not to engage in self-dealing. Under this version, beyond that minimal requirement, the fiduciary need not specifically consider the beneficiary's interests at all.[42] Technically, under this version, a fiduciary cannot receive compensation from the beneficiary, but that limitation has generally been tempered to allow for fair compensation. Outside of permitted compensation, however, the fiduciary cannot engage in any other types of transactions with the beneficiary. The only other-regarding component of this formulation is the command to avoid transactions with the beneficiary.

Other commentators insist that the minimum level of loyalty must contain some outward-regarding dimension.[43] From that standpoint, the minimum level of loyalty requires that the fiduciary not betray the beneficiary.[44] In this setting, betrayal is

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42. *See* Andrew S. Gold, *The Loyalties of Fiduciary Law, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 176, 178 (Andrew S. Gold & Paul B. Miller, eds. 2014) [hereinafter Fiduciary Loyalties] (describing this version). Prominent commentators have taken this position. *E.g.*, Irit Semet, *Fiduciary Loyalty as Kantian Virtue, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 125, 126 (Andrew S. Gold & Paul B. Miller, eds. 2014) (Andrew S. Gold & Paul B. Miller, eds. 2014) [hereinafter Kantian Virtue]; Paul B. Miller, *A Theory of Fiduciary Liability*, 6 MCGILL L.J. 235, 257 (2011); Larry Ribstein, *Fencing Fiduciary Duties*, 91 B.U. L. REV. 899, 909 (2011).

43. Gold, *Fiduciary Loyalties*, *supra* note 42 at 176 ("Indeed, it is commonly thought that if a purported fiduciary does not owe a duty of loyalty to a beneficiary, then the relationship is not actually a fiduciary relationship. In this sense, duties of loyalty are an essential feature of fiduciary law."); *accord* James Edelman, *The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties, in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 21, 22 (Andrew S. Gold & Paul B. Miller, eds. 2014) ("An 'obligation' to be 'loyal' invites the question: loyal to what end? . . . In law as in life, loyalty cannot be understood without knowing the performance in relation to which loyalty is required."); *See* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 296 (2006) (arguing that "the law applicable to fiduciary duty can best be understood as responsive to circumstances that justify the expectation that an actor's conduct will be loyal to the interests of another"); Arthur Laby, *The Fiduciary Obligation as the Adoption of Ends*, 56 BUFF. L. REV. 99, 129 (2008) (explaining that fiduciary loyalty "entails a commitment by the fiduciary to adopt the principal's objectives, goals or ends as a fiduciary's own and to promote those ends"); *id.* at 134 ("[T]he fiduciary's role identification with eh principal requires him to re-orient his moral view-point away from pursuing the overall best state of affairs to furthering agent-oriented objectives.").

44. Gold, *Fiduciary Loyalties*, *supra* note 42, at 179; Lyman Johnson, *After Enron: Remembering Loyalty Discourse in Corporate Law*, 28 DEL. J. CORP. L. 27, 37-38 (2003).

defined as intentionally harming the beneficiary. Self-dealing can cause the beneficiary harm, so the non-betrayal concept incorporates harmful self-dealing. Unlike the no-self-dealing version, the non-betrayal formulation permits self-dealing that is beneficial, or at least not harmful to the beneficiary. That includes compensation but also could allow other transactions. The non-harming version goes beyond self-dealing by preventing the fiduciary from engaging in acts that a non-fiduciary could pursue, such as competing with the beneficiary.

The next level of loyalty requires that the fiduciary follow the course of action that the fiduciary subjectively believes is in the best interest of the beneficiary.[45] A fiduciary who acts with a different mental state has acted disloyally. Recognizing that humans can have multiple reasons for acting, this level of loyalty has two versions.[46] The more onerous version is deliberative exclusivity, which requires that only the beneficiary's interest be considered.[47] The less onerous version is deliberative priority, which requires that the beneficiary's interest be the dominant consideration, although other factors may come into play.[48]

An even higher level of loyalty moves beyond subjective intent to consider objective results. Loyalty in this sense involves being held accountable for outcomes. If the baseline standard is non-harm, then the fiduciary is liable for harm. If the baseline standard is to pursue the best interests of the beneficiary, then the fiduciary is liable if the best outcome is not achieved.

At its maximum, loyalty contemplates self-sacrifice. A loyal supporter contributes to a cause without obligation. A loyal

45. Gold, *Fiduciary Loyalties*, *supra* note 42, at 179; Semet, *Kantian Virtue*, *supra* note 42, at 127.

46. *See* J. E. Penner, *Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 159, 166 (Andrew S. Gold & Paul B. Miller, eds. 2014) (discussing deliberative priority and deliberative exclusivity).

47. *Id.* English law best reflects this concept by interpreting the duty of loyalty to prohibit the fiduciary from acting when any potential conflict of interest exists. *Id.* at 159. Penner starts from the no-betrayal view but expands that view to include the avoidance of conflicts. *Id.* He also identifies an obligation to provide disclosure about conflicts and contemplates liability for a fiduciary who fails to disclose a conflict and thereby causes the beneficiary to suffer harm. *Id.* at 159–60. The latter is a subset of the former. Liability turns on the existence of the conflict. Disclosure and approval by the beneficiary may negate the conflict. Liability exists in the absence of disclosure because of a non-negated conflict, not because of the absence of disclosure.

48. *Id.*; *see Columbia Pipeline*, 299 A.3d at 403.

employee remains so despite better opportunities elsewhere. A loyal soldier sacrifices his life for his country.

The duty of loyalty also has another axis. In each manifestation, the duty can be either proscriptive or prescriptive. A prospective duty applies when a fiduciary chooses to act, but does not force a fiduciary to act.[49] A prescriptive duty demands affirmative action and forces a fiduciary to act. The resulting distinction is intuitive, because human brains generally attribute greater agency to action than to inaction.[50] But the distinction is ultimately unstable, because inaction often has significant and obvious consequences, and conscious inaction is just as much of a decision as conscious action.[51] Any effort to

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49. *See* Lionel D. Smith, *Can We Be Obliged to be Selfless?*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 141, 145 (Andrew S. Gold & Paul B. Miller, eds. 2014) (describing Australian view that fiduciary duties are only proscriptive).

50. *See, e.g.*, David Gray, *"You Know You've Gotta Help Me Out . . ."* 126 PENN. ST. L. REV. 337, 351–65 (2022) (identifying and rejecting reasons for distinction between acts and omissions); George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975, 1013 (1999) (applying intuition to the Trolley Problem and analogizing to common law distinction between misfeasance and nonfeasance). This intuition may stem from lived experiences which suggest that inaction is less likely to be intentional. *Cf.* Richard S. Kay, *Causing Death for Compassionate Reasons in American Law*, 54 AM. J. COMP. L. 693, 712 (2006) (explaining that the persistence of a distinction between action and inaction "may reflect some idea that inaction often can be explained by inadvertence or mistake, while positive actions are, more generally, intentional" and that when the categories each involve intentional decisions, "the differential legal treatment of misfeasance and nonfeasance seems contrived").

51. *See Aronson* 473 A.2d at 813 ("[A] conscious decision to refrain from acting may nonetheless be a valid exercise of business judgment and enjoy the protections of the rule.") (subsequent history omitted); Quadrant Structured Prods. Co. v. Vertin, 102 A.3d 155, 183 (Del. Ch. 2014) ("The Complaint alleges that the Board had the ability to defer interest payments on the Junior Notes, that the Junior Notes would not receive anything in an orderly liquidation, that [Defendant] owned all of the Junior Notes, and that the Board decided not to defer paying interest on the Junior Notes to benefit [Defendant]. A conscious decision not to take action is just as much of a decision as a decision to act."); *In re* China Agritech, Inc. S'holder Deriv. Litig., 2013 WL 2181514, at *23 (Del. Ch. May 21, 2013) ("The Special Committee decided not to take any action with respect to the Audit Committee's termination of two successive outside auditors and the allegations made by Ernst & Young. The conscious decision not to take action was itself a decision."); Krieger v. Wesco Fin. Corp., 30 A.3d 54, 58 (Del. Ch. 2011) ("Wesco stockholders had a choice: they could make an election and select a form of consideration, or they could choose not to make an election and accept the default cash consideration."); Hubbard v. Hollywood Park Realty Enters., Inc., 1991 WL 3151, at *10 (Del. Ch. Jan. 14, 1991) ("From a semantic and

insulate conscious inaction from fiduciary review will founder on these realities. Thus, even a thin version of fiduciary loyalty—non-betrayal—can be framed as requiring that a fiduciary not sit passively if the fiduciary knows that inaction will cause the beneficiary to suffer harm.

B. *Locating Directors on the Spectrum of Loyalties*

When located within this spectrum, the director's duty of loyalty manifests as an intermediate version that uses the concept of good faith to require an explicit, other-regarding mindset. The director's duty does not turn on objective outcomes nor does it require self-sacrifice or altruism.

To reiterate, for a director to act in good faith under Delaware law means acting with the subjective belief that the decision serves the best interests of the corporation and its stockholders. For a director to act in bad faith means acting with an actual intent to do harm to the corporation or its stockholders or by engaging in an intentional dereliction of duty, such as a conscious disregard for one's responsibilities.[52]

These characterizations capture two different levels of the duty of loyalty. The examples of bad faith capture the non-betrayal version. The concept of good faith goes beyond non-betrayal version to require the affirmative subjective pursuit of the other's best interests, such that a director can be disloyal by acting "with a purpose other than that of advancing the best interests of the corporation."[53] Affirmative betrayal is

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even legal viewpoint, 'inaction' and 'action' may be substantive equivalents, different only in form."); Jean-Paul Sartre, Existentialism Is a Humanism 44 (Carol Macomber trans., Yale Univ. Press 2007) ("[W]hat is impossible is not to choose. I can always choose, but I must also realize that, if I decide not to choose, that still constitutes a choice.").

52. *See* Part II.B, *supra*.

53. *Disney II*, 906 A.2d at 67; *accord Stone*, 911 A.2d at 369 ("A failure to act in good faith may be shown, for instance, where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation . . . ."); *see* Gagliardi v. Trifoods Int'l Inc., 683 A.2d 1049, 1051 n.2 (Del. Ch. 1996) (Allen, C.) (defining a "bad faith" transaction as one "that is authorized for some purpose *other than* a genuine attempt to advance corporate welfare or is *known to constitute* a violation of applicable positive law"); *RJR Nabisco*, 1989 WL 7036 at *15 (Allen, C.) (explaining that the business judgment rule would not protect "a fiduciary who could be shown to have caused a transaction to be effectuated (even one in which he had no financial interest) for a reason unrelated to a pursuit of the corporation's best interests").

not required. The reason why the director lacked the necessary other-regarding mindset also does not matter.[54] The absence of the necessary mental state can result from any human emotion that causes the director "to place his own interests, preferences, or appetites before the welfare of the corporation," including greed, hatred, lust, envy, revenge, shame or pride.[55]

Under Delaware law, the duty of loyalty does not require deliberative exclusivity, only deliberative priority. A director can have other motivations for acting, as long as the principal or predominant motivation is to serve the best interests of the corporation and its stockholders.[56] A director thus can believe that paying herself compensation is in the best interests of the company and would act in good faith by approving the compensation arrangement, even though she necessarily has a personal interest in the compensation.

For directors, the duty of loyalty is clearly prescriptive. In *Unocal*, the Delaware Supreme Court held that "in the broad context of corporate governance, including issues of fundamental corporate change, a board of directors is not a passive instrumentality."[57] The board instead has a "fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source."[58]

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54. *In re* Walt Disney Co. Deriv. Litig., 907 A.2d 693, 754 (Del. Ch. 2005) (*Disney I*) ("It makes no difference the reason why the director intentionally fails to pursue the best interests of the corporation."), *aff'd*, 906 A.2d 27 (Del. 2006); *see* Nagy v. Bistricer, 770 A.2d 43, 48 n.2 (Del. Ch. 2000) ("[R]egardless of his motive, a director who consciously disregards his duties to the corporation and its stockholders may suffer a personal judgment for monetary damages for any harm he causes," even if for a reason "other than personal pecuniary interest.").

55. *RJR Nabisco*, 1989 WL 7036 at *15; *see Guttman*, 823 A.2d at 506 n.34 ("The reason for the disloyalty (the faithlessness) is irrelevant, the underlying motive (be it venal, familial, collegial, or nihilistic) for conscious action not in the corporation's best interest does not make it faithful, as opposed to faithless.").

56. *See* Coster v. UIP Companies, Inc., 300 A.3d 656, 675 (Del. 2023) (affirming judgment for fiduciary defendants who had mixed motives where their predominant motive was to protect the corporation and advance its best interests).

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

58. *Id. accord* Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (explaining that because directors have taken on a role that calls for representing "the financial interests of others," they have "an affirmative duty to protect those interests. . . .") (subsequent history omitted).

The director's duty of loyalty stops short of the highest level and does not require altruism or self-sacrifice. A director is not obligated to provide capital to a struggling corporation. And a director can freely resign, even if the director believes that remaining would be in the corporation's best interests.[59]

IV.
A Stockholder Controller's Duties

Having established a baseline by identifying the fiduciary duties of a director, the next step is to examine the fiduciary duties of a stockholder controller. If the assertion of fiduciary equivalency is accurate, then the duties should be identical. That turns out to be true for the duty of care, but not for the duty of loyalty.

A. *The Stockholder Controller's Duty of Care*

Under the general rule that stockholder controllers owe the same duties as directors, a stockholder controller should owe a duty of care. As noted previously, Delaware decisions have often spoken of stockholder controllers owing duties of both loyalty and care.[60]

Three cases have questioned the extent to which a stockholder controller could owe a duty of care. In *Harris v. Carter*, the plaintiff alleged that a stockholder controller had breached its duty of care by selling its control block without investigating whether the buyer posed a threat to the corporation.[61] Chancellor Allen held that the plaintiff had stated a viable claim, but took pains to ground the care-based obligation on the general duty that anyone in society owes to every other person, and he expressly analogized the controller's alleged misconduct to a negligent driver who injures her passenger in a collision.[62] Chancellor Allen had elsewhere expressed the view that a stockholder controller could take action as a stockholder without any overlay of fiduciary duties whatsoever,[63] so that move may

59. *See* Frantz Mfg. Co. v. EAC Indus., 501 A.2d 401, 408 (Del. 1985) ("Directors are also free to resign.").
60. *See* note 13, *supra* (collecting cases).
61. *Harris*, 582 A.2d at 232.
62. *Id.* at 235.
63. *E.g.*, Thorpe v. CERBCO, Inc., 1995 WL 478954 (Del. Ch. Aug. 9, 1995) (*Thorpe I*), (asserting that "[w]here [stockholder controllers] exercise

have been an effort to maintain coherence with the no-duties position. Ironically, shifting away from the fiduciary framework subjects the controller to liability for negligence, rather than the higher recklessness standard that governs the fiduciary version of the claim.

Later decisions also questioned whether a stockholder controller could owe a duty of care when selling its control block, at least when a corporation has a charter provision that exculpates directors for beaches of the duty of care.[64] One decision asserted more generally that a stockholder controller cannot be

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no power over the corporation to facilitate their own sale, (putting aside questions of inside information under federal securities law) they are privileged to sell their shares for what they can get, even while the corporation itself is selling its stock."), *aff'd in part, rev'd in pertinent part sub nom.* Thorpe by Castleman v. CERBCO, Inc., 676 A.2d 436 (Del. 1996); Freedman v. Rest. Assocs. Indus., Inc., 1990 WL 135923, at *6 (Del. Ch. Sept. 19, 1990) ("Thus, a shareholder, even a majority shareholder, has discretion as to when to sell his stock and to whom, and I find no basis for holding the management group liable to plaintiffs for exercising that discretion qua shareholder."); *see also* Abraham v. Emerson Radio Corp., 901 A.2d 751, 759 (Del. Ch. 2006) (asking "by what logic does the judiciary extend liability to a controller exercising its ordinarily unfettered right to sell its shares?").

English decisions demonstrate how difficult it is to maintain the formalistic position. Because the right to vote is an attribute of the stockholder's shares, English decisions nominally describe that right as one that even a majority stockholder can exercise in a non-fiduciary capacity. *See* Zipora Cohen, *Fiduciary Duties of Controlling Shareholders: A Comparative View*, 12 U. PA. J. INT'L BUS. L. 379, 381 (1991); *see id.* at 379 ("English law denies the imposition of a fiduciary duty on controlling shareholders."). Yet despite this baseline assertion, English decisions place limits on the ability of a majority stockholder to exercise its voting rights. One applies to amendments to the articles of association, where "the majority may alter the company's constitution only when this power is exercised in good faith for the benefit of the company." *Id.* Another involves the concept "fraud on the minority," which generally means the majority expropriating either the property of the company or the property of the minority. *Id.* at 382. A stockholder controller would commit a fraud on the minority that equity would not allow if it used its majority voting power to ratify an interested transaction between the company and the stockholder's representative on the board, or if it used its majority voting power to approve an amendment to the articles of association that would impose a redemption call right on the shares. *Id.*

64. *See Emerson Radio Corp.*, 901 A.2d at 759 (expressing doubt about whether "our common law of corporations should recognize a duty of care-based claim against a stockholder controller for failing to (in a court's judgment) examine the bona fides of a buyer, at least when the corporate charter contains an exculpatory provision authorized by 8 Del. C. § 102(b)(7)."). *See also* Firefighters' Pension Sys. of City of Kan. City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 284 (Del. Ch. 2021) (disagreeing with *Shandler* on the implications of Section 102(b)(7) for controllers).

held liable for a breach of the duty of care if the corporation's charter contains an exculpatory provision.[65] But that decision supported that proposition by citing a non-Delaware decision that relied on principles of agency law, including the proposition that "[o]rdinarily, a principal cannot be sued for acts of an agent for which the agent cannot be sued."[66] Delaware law generally does not deploy agency principles when analyzing the fiduciary relationship between directors and stockholders.[67] Regardless, introducing the concept of exculpation presumes the existence of an underlying duty of care that warrants exculpation. Consistent with cases acknowledging that stockholder controllers owe duties of both loyalty and care, a more recent decision holds that a stockholder controller owes a duty of care when exercising stockholder-level rights.[68]

The better reading of the cases imposes on stockholder controllers a duty not to harm the company or its minority stockholders through grossly negligent action, with gross negligence

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65. Shandler v. DLJ Merch. Banking, Inc., 2010 WL 2929654, at *16 (Del. Ch. July 26, 2010).

66. Off. Comm. of Unsecured Credit. of Color Tile, Inc. v. Investcorp S.A., 137 F. Supp. 2d 502, 515 (S.D.N.Y. 2001), *cited in Shandler*, 2010 WL 2929654, at *16 n.140.

67. *See, e.g.*, Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 509 (Del. 2005); *Skye Mineral*, 2020 WL 881544 at *24; Abercrombie v. Davies, 123 A.2d 893, 898–99 (Del. Ch. 1956). There are isolated cases that loosely refer to stockholders as principals and directors as their agents, but these descriptions appear more metaphorical than doctrinal. *See, e.g.,* Calma v. Templeton, 114 A.3d 563, 579 (Del. Ch. 2015) ("In the corporate law context, stockholders (as principal) can, by majority vote, retrospectively and, at times, prospectively, act to validate and affirm the acts of the directors (as agents)." (footnote omitted)); Desimone v. Barrows, 924 A.2d 908, 917 (Del. Ch. 2007) (asserting that requiring directors to specify the precise amount and form of their compensation when seeking stockholder ratification "ensure[s] integrity" in the underlying principal-agent relationship between stockholders and directors); UniSuper Ltd. v. News Corp., 2005 WL 3529317, at *8 (Del. Ch. Dec. 20, 2005) (analogizing directors to agents and stockholders to principals). Given that Section 141(a) of the Delaware General Corporation Law confers statutory authority on the board of directors to manage the business and affairs of the corporation, "[c]learly, directors are not mere agents." Julian Velasco, *Fiduciary Duties and Fiduciary Outs*, 21 Geo. Mason L. Rev. 157, 164 (2013); *see* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 Nw. U. L. Rev. 547, 605 (2003) (reviewing authorities and concluding that "the board of directors is not a mere agent of the shareholders"); Deborah A. DeMott, *The Mechanisms of Control*, 13 Conn. J. Int'l L. 233, 253 (1999) ("Even when the parent owns all the stock in the subsidiary, its directors are not agents of the parent.").

68. *In re* Sears Hometown & Outlet Stores, Inc. S'holder Litig., 2024 WL 262322 (Del. Ch. Jan. 24, 2024) (*Sears*).

having the stringent connotation of recklessness that Delaware corporate law imposes. That duty of care parallels the directors' duty. At least as to the duty of care, the assertion of fiduciary equivalence holds.

B. *The Stockholder Controller's Duty of Loyalty*

Case law shows that unlike the duty of care, the duty of loyalty operates differently for directors and stockholder controllers. The duty of loyalty governs the behavior stockholder controllers in two different settings. One is where the stockholder controller exercises corporate power as part of an interested transaction. The other is when the stockholder controller unilaterally exercises stockholder-level rights. Those rights fall into three general categories: governance rights, such as the right to vote; economic rights, such as the right to sell or receive dividends; and litigation rights, such as the right to sue.[69]

1. *Interested Transactions with a Stockholder Controller*

Interested transactions provide the most familiar setting that implicates the fiduciary duties of a stockholder controller. Envision a proposed squeeze-out merger in which the subsidiary board has an independent majority. In this setting, the controller has not taken over the boardroom. To make the hypothetical even cleaner, assume that any directors who are affiliated with the controller absent themselves from any discussions about the transaction and recuse themselves from the vote. In this setting, the stockholder controller has only two roles. One is as the corporation's contractual counterparty under the merger agreement. The other is as the provider of stockholder-level approval for the merger.

In this setting, the directors owe the full range of fiduciary duties. They must exercise due care.[70] They must act in good faith by believing subjectively that the merger serves the best interests of the corporation and its stockholders.[71] And they must act loyally by not allowing the interests of the stockholder

69. New Enter. Assocs. 14 L.P. v. Rich (NEA), 295 A.3d 520, 570 (Del. Ch. 2023).
70. *Supra*, Sec. III.A.
71. S*upra*, Sec. III.B.

controller to shape the terms of the transaction and by not extracting unfair benefits for themselves.[72]

The director's duty in this setting is not merely to seek a fair price. Rather, their duty is to seek the highest possible price through "the energetic, informed, and aggressive negotiation that one would reasonably expect from an arm's length adversary."[73] The directors cannot merely assess whether a transaction is fair; they must "approve only a transaction that is in the best interests of the public shareholders, [and] to say no to any transaction that is not fair to those shareholders and is not the best transaction available."[74]

The stockholder controller's loyalty obligation is different. The stockholder controller has no obligation as a contractual counterparty to believe that the transaction is in the best interests of the company or to pursue that end. As the potential acquirer, the stockholder controller can bargain in its own self-interest.

But because the stockholder controller also delivers the necessary vote, the stockholder controller is not freed of all fiduciary obligation. The stockholder controller cannot use its voting power to approve terms that are unfair, meaning terms that harm the corporation or the minority stockholders.[75] Chancellor Wolcott first articulated that principle in the seminal *Allied Chemical* decision. The case involved a sale of substantially all of the corporation's assets,[76] which was the principal transactional structure of the day.[77] The Chancellor explained that

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72. *In re* Trans World Airlines, Inc. S'holders Litig., 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988) (Allen, C.).

73. *See id.*

74. *In re* First Boston, Inc. S'holders Litig., 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) (Allen, C.)

75. *Id.*

76. *Allied Chem.*, 120 A. at 488.

77. *See, e.g.,* Stream TV Networks, Inc. v. SeeCubic, Inc., 250 A.3d 1016, 1033 (Del. Ch. 2020) ("The current dominance of the merger as the transactional vehicle for selling a corporation has caused the earlier predominance of the sale of assets to fade from memory."). In the Nineteenth Century "a merger almost always meant the melding of two different businesses into one, akin to the formation of a partnership among individual proprietorships. All of the stockholders in all of the constituent corporations had to approve the combination, and each automatically became a stockholder of the surviving corporation." 2 David A. Drexler et al., Delaware Corporation Law and Practice, § 35.03, at 35-4.(2018 & Supp. 2020). "The concept of a 'merger' thus meant a direct, stock-for-stock merger between two entities, and it required unanimous stockholder approval to effectuate." *Stream TV*, 250 A.3d at 1033.

while the Delaware General Corporation Law gave a majority stockholder the power to approve the transaction, the existence of the statute "supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny."[78] Instead, a court of equity would act "if it should appear that the power is used in such a way that it violates any of those fundamental principles which [are] the special province of equity to assert and protect."[79]

For the stockholder controller, that equated to a more limited duty of loyalty.[80] As Chancellor Wolcott explained, the duty of loyalty did not require that the stockholder controller act "in the best interests of the corporation" when deciding whether or not to vote in favor of the transaction.[81] It required instead that the stockholder controller only approve a sale "upon terms and conditions that are fair to the corporation."[82] At the time, that obligation applied not only when the buyer was an affiliate of the stockholder controller, but also in a third party sale, when the controller still had an obligation to obtain "a fair and adequate price."[83] Today, the obligation only applies in interested transactions, which includes nominally third-party transaction

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The merger remained a "cumbersome, seldom-used mechanism," in the first half of the twentieth century, when *Allied Chemical* was decided. The merger's dominance as the prevailing form of transaction after amendments to the DGCL in 1941 and 1967 significantly loosened the requirements for executing a merger. 43 Del. Laws ch. 132, § 12 (1941); 56 Del. Laws ch. 50 (1967); *see* 1 R. Franklin Balotti & Jesse A. Finkelstein, The Delaware Law of Corporations & Business Organizations § 9.11 (3d ed. 1998 & 2011 Supp.); *see also* Del. Code Ann. tit. 8, § 251. Before Delaware's General Assembly liberalized Delaware's merger statues, the preferred transaction structure involved the target corporation selling all of its assets to the acquirer, then dissolving and distributing the consideration to its stockholders. *See generally* 2 David A. Drexler et al., Delaware Corporation Law and Practice §§ 37.04 at 37-8 to -9; Henry Winthrop Ballantine, Ballantine on Corporations §§ 279–80 (1946); George S. Hills, *Consolidation of Corporations by Sale of Assets and Distribution of Shares*, 19 Cal. L. Rev. 349 (1931).

78. *Allied Chem.*, 120 A. at 491.

79. *Id.*

80. *Id.* at 490–91.

81. *Id.* at 490 ("As I read the statute, therefore, the bald question of whether the entire assets should be sold is to be determined by the stockholders entirely aside from the question of whether it would be to the best interests of the corporation to sell them.").

82. *Id.* ("The price to be paid, the manner of payment, the terms of credit, if any, and such like questions, must all meet the test of the corporation's best interest.").

83. *Id.*

in which the stockholder controller receives a unique benefit, such as differential consideration, or uniquely avoids a detriment.[84]

Delaware decisions subsequently extended these principles to squeeze-out mergers.[85] The stockholder controller in that setting can vote its shares to approve the merger, but the controller's duty of loyalty still requires fair terms.

In an interested transaction, therefore, the scope of the controller's duty of loyalty becomes equivalent to the substance of the entire fairness test. Although that test has been described as Delaware's "most onerous standard of review,"[86] it technically does not require anything more than non-harm. Yes, the standard imposes a unitary test that requires a court to consider all aspects of fairness, but all the standard ultimately requires is that stockholders receive at least "the substantial equivalent in value of what [they] had before."[87] That is the essence of non-harm.

The entire fairness test is a unitary standard with two dimensions: a substantive dimension, colloquially referred to as a fair price, and a procedural dimension, colloquially referred to as fair dealing.[88] The Delaware courts have held that in a transaction untainted by fraud, coercion, or other serious instances

84. *E.g.*, Harcum v. Lovoi, 2022 WL 29695, at *13 (Del. Ch. Jan. 3, 2022); *In re* Crimson Expl., Inc. S'holders Litig., 2014 WL 5449419, at *12–14 (Del. Ch. Oct. 24, 2014).

85. Tanzer v. Int'l Gen. Indus., Inc., 379 A.2d 1121, 1124 (Del. 1977) ("IGI, as a stockholder of Kliklok, had a right to look to its own corporate concerns in determining how to conduct the latter's affairs, including a decision to cause it to merge. The formal way in which that interest was exercised was in voting its shares generally, and on the merger proposal, specifically. In short, in so doing, IGI is entitled to the benefit of the Ringling rule. And that includes a decision to cause the Kliklok merger (subject, of course, to the duty it owes other stockholders)."), *overruled on other grounds by* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (rejecting the business purpose test that *Tanzer* also applied).

86. *Coster*, 300 A.3d at 662.

87. *Sterling*, 93 A.2d at 114; *accord* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940 (Del. 1985) ("[T]he correct test of fairness is 'that upon a merger the minority stockholder shall receive the substantial equivalent in value of what he had before.' " (quoting *Sterling*, 93 A.2d at 114)); *see* Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. Corp. L. 119, 139 (2005) (arguing for a remedial standard that "provides the minority shareholders with the value of what was taken from them. . . . ").

88. *Weinberger*, 457 A.2d at 711 ("[T]he test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.").

of unfair dealing, the substantive dimension will be "the preponderant consideration."[89] The test for fair price is "a price that is within a range that reasonable men and women with access to relevant information might accept."[90] That means the value that either the corporation or the minority stockholders could obtain from a third party in an arm's length transaction. As long as that standard is met, the beneficiary has not been harmed relative to what the market would pay, and the resulting price is fair.

The procedural dimension of fair process operates in service of the substantive fair price assessment. Steps taken to replicate arm's length bargaining provide strong evidence of a fair process and hence supports a finding of overall fairness.[91] That is because arm's length bargaining supports an inference that the negotiations resulted in a market price, meaning that the corporation and its minority stockholders were not harmed relative to what they could have obtained from a third party.

There is a further complication that requires additional analysis: Under Delaware law, a fiduciary is not only liable for harm caused, but also can be forced to disgorge any benefit received.[92] Disgorgement, however, is another way of achieving non-harm. If a fiduciary wrongfully takes an asset, there are two remedial paths to restore the beneficiary to the equivalent of its unharmed, *ex ante* position. One is compensatory damages, the other is rescission.

The standard remedy of compensatory damages values the harm at the time of the taking, thereby eliminating any harm as measured at that point in time. The court then brings the amount necessary to achieve non-harm current to the time of judgment by awarding interest.

The equitable remedy of rescission is another means of achieving non-harm, but it achieves that goal by undoing the transaction that caused harm. That step eliminates all harm by restoring the plaintiff to the *status quo ante*. Rescission is

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89. *Id.*

90. Kahn v. Tremont Corp., 1996 WL 145452, at *1 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

91. *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 701 (Del. 2023); *accord Cinerama*, 663 A.2d at 1172; *Weinberger*, 457 A.2d at 711.

92. *E.g.*, Kahn v. Kolberg Kravis Roberts & Co., L.P., 23 A.3d 831, 838 (Del. 2011); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); Pike v. Commodore Motel Corp., 1986 WL 13007, at *3 (Del. Ch. Nov. 14, 1986) *aff'd*, 529 A.2d 772 (1987).

often impractical, and under those circumstances, the court can award rescissory damages to provide the monetary equivalent of rescission. A rescissory damages award values what the fiduciaries gained as of the time of judgment, then subtracts the value of what the beneficiaries received, also measured at the time of judgment. By awarding the difference as rescissory damages, the court puts the beneficiary in the same financial position as if the transaction had been rescinded, thereby eliminating any harm.

Disgorgement is a form of rescissory damages. The underlying goal is to eliminate the consequences of the fiduciary breach, which in a disgorgement setting involved the fiduciary's receipt of an improper benefit. But for the fiduciary breach, that benefit could have inured to the benefit of the beneficiary. Compared to what the beneficiary's legitimate expectations, the beneficiary was harmed. Forcing the fiduciary to disgorge the benefit avoids the harm the beneficiary suffered relative to the position it could have been in had the fiduciary acted loyally.

All of the potential remedies for a fiduciary breach thus seek to achieve non-harm from the standpoint of the beneficiary. Rescissory damages and disgorgement both achieve that goal by forcing the fiduciary to disgorge any benefit that the fiduciary may have received, that is not a new or different remedial component. It is a different way of approaching the goal of eliminating all possibility of harm.

Interestingly, current Delaware law prioritizes awards of compensatory damages, rather than rescission rescissory damages. In 1983, just two years after holding that rescissory damages could be awarded for a cash-out merger that was infected with disclosure violations,[93] the Delaware Supreme Court retreated and emphasized that rescissory damages should not be the "exclusive" remedy, instead prioritizing a fair value measure equivalent to appraisal.[94] By doing so, the Delaware Supreme Court pointed courts and litigants towards a compensatory measure that is arguably less effective at fully achieving the goal of non-harm. Since *Weinberger*, very few decisions have awarded

93. Lynch v. Vickers Energy Corp., 429 A.2d 497 (Del. 1981), *overruled by Weinberger*, 457 A.2d 701.
94. *Weinberger*, 457 A.2d 701.

rescissory damages.[95] Even fewer have ordered disgorgement.[96] Both are often cited as possible remedies, but the court ultimately grants a compensatory award.[97]

Delaware thus operates a fiduciary regime for interested transactions based on non-harm. Even in an interested transaction, a stockholder controller's duties are limited to that version of the duty of loyalty. A stockholder controller need not act in the best interests of the corporation or its minority stockholders.

2. *Unilateral Actions by a Controller*

Most lawsuits that challenge a stockholder controller's actions involve an interested transaction. But stockholder controllers can take some actions unilaterally. Most notably, a stockholder controller can vote its shares, sell its block, or sue the directors. Because every stockholder has similar rights, some decisions assert that their exercise is never subject to fiduciary review and treated the formalistic answer as the end of

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95. *E.g.*, Deane v. Maginn, 2022 WL 16557974, at *1 (Del. Ch. Nov. 1, 2022), *appeal dismissed*, 291 A.3d 651 (Del. 2023) ("After trial, I find that Maginn breached his duty of loyalty when he usurped from New Media II-B the opportunity to obtain the new warrants. I award rescissory damages to remedy that harm."); Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, 2018 WL 3326693 (Del. Ch. July 6, 2018) ("The plaintiffs seek a rescissory damages . . . . In my view, a damages award of this nature is warranted on the facts of this case. . . ."), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019); Strassburger v. Earley, 752 A.2d 557, 579–82 (Del. Ch. 2000) (awarding rescissory damages against three directors for breach of duty of loyalty in connection with share repurchases).

96. *E.g.*, Valeant Pharm. Int'l v. Jerney, 921 A.2d 732, 752–53 (Del. Ch. 2007) ("Because Jerney has failed to show that the transaction was entirely fair, it is clear that he has no right to retain any of the $3 million bonus he received. As between Jerney and the company, that payment must be rescinded, requiring Jerney to disgorge the full amount.").

97. *E.g.*, *Sears*, 2024 WL 262322, at *50–51 (considering an award of rescissory damages but granting a compensatory remedy); Bamford v. Penfold, L.P., 2022 WL 2278867, at *51–52 (Del. Ch. June 24, 2022) (considering an award of disgorgement but granting a compensatory remedy); *In re* Dole Food Co., Inc. S'holder Litig., 2015 WL 5052214, at *44–46 (Del. Ch. Aug. 27, 2015) (considering an award of rescissory damages but granting a compensatory remedy); *Reis*, 28 A.3d at 466–68, 479 (considering an award of rescissory damages but granting a compensatory remedy); *In re* Sunbelt Beverage Corp. S'holder Litig., 2010 WL 26539 (Del. Ch. Jan. 5, 2010) (considering an award of rescissory damages but granting a compensatory remedy).

the story.[98] Other decisions, however, disconfirm that approach, at least for the right to sell and the right to vote. Cases have not yet explored the extent to which fiduciary limitations apply to the right to sue.

a. The Right to Vote

The right to vote is where Delaware decisions have been most explicit about a stockholder controller's duties. Exercising that right, a stockholder controller approve or reject any issue that requires the affirmative vote a majority of the outstanding shares, such as a mergers,[99] sales of all or substantially all assets, [100] charter amendments,[101] or dissolution.[102] A stockholder controller also can use its voting power to amend, alter, or repeal bylaws.[103] Finally, a stockholder controller can use its voting power to elect or remove directors.[104]

The Delaware Supreme Court's decision in *Bershad v. Curtiss-Wright* provides the canonical authority on the right to vote. The relevant passage states:

> Stockholders in Delaware corporations have a right to control and vote their shares in their own interest. *They are limited only by any fiduciary duty owed to other stockholders.* It is not objectionable that their motives may be for

98. *See* note 64, *supra*. As discussed previously, English law shows how difficult it is to maintain the formalistic position. *See* note 63, *supra*. *see id.* at 379 ("English law denies the imposition of a fiduciary duty on controlling shareholders."). Yet despite this baseline assertion, English decisions place limits on the ability of a majority stockholder to exercise its voting rights. One applies to amendments to the articles of association, where "the majority may alter the company's constitution only when this power is exercised in good faith for the benefit of the company." *Id.* Another involves the concept "fraud on the minority," which generally means the majority expropriating either the property of the company or the property of the minority. *Id.* at 382. A stockholder controller would commit a fraud on the minority that equity would not allow if it used its majority voting power to ratify an interested transaction between the company and the stockholder's representative on the board, or if it used its majority voting power to approve an amendment to the articles of association that would impose a redemption call right on the shares. *Id.*

99. Del. Code Ann. tit. 8, § 251.

100. *Id.* § 271.

101. *Id.* § 242.

102. *Id.* § 275.

103. *Id.* § 109.

104. *Id.* §§ 141 & 211.

> personal profit, or determined by whim or caprice, *so long as they violate no duty owed other shareholders.*[105]

Most corporate lawyers are familiar with the non-italicized text, particularly the reference to whim or caprice. The italicized text, however, often gets ignored.

The *Bershad* court's reference to fiduciary limitations on the right to vote did not come out of thin air. In 1977, after surveying the history of Delaware law on stockholder controller voting, the Delaware Supreme Court used quite similar language, stating similar: "[F]or more than fifty years our Courts have held, consistent with the general law on the subject, that a stockholder in a Delaware corporation has a right to vote his shares in his own interest, including the expectation of personal profit, limited, of course, by any duty he owes to other stockholders."[106] Four decades earlier, Chancellor Wolcott explained that "stockholders have the right to exercise wide liberality of judgment in the matter of voting and may admit personal profit or even whims and caprice into the motives which determine their choice, so long as no advantage is obtained at the expense of their fellow stockholders."[107]

Cases implementing these principles fall into the three general areas where stockholders have a right to vote: votes on transactions, votes on bylaws, and votes for directors.

i. Voting on Transactions

Delaware cases have provided the most insight into voting on transactions. The *Bershad* decision stated flatly that the controller in that case "had no duty to sell [the controller company] to anyone."[108] Building on that statement, Court of

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105. *Bershad*, 535 A.2d at 845.

106. *Tanzer*, 379 A.2d at 1124, *overruled on other grounds by Weinberger*, 457 A.2d 701.

107. Heil v. Standard Gas & Elec. Co., 151 A. 303, 304 (Del. Ch. 1930); *accord* Stroud v. Grace, 606 A.2d 75, 83–84 (Del. 1992) ("The fact that controlling shareholders voted in favor of the transaction is irrelevant as long as they did not breach their fiduciary duties to the minority holders."); Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441, 447 (Del. 1947) ("Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders.").

108. *Bershad*, 535 A.2d at 847 ("Curtiss-Wright, of course, had no duty to sell Dorr-Oliver to anyone.").

Chancery decisions have asserted that a stockholder controller can vote against a transaction without any fiduciary overlay.[109] Summarizing *Bershad* and its progeny, a 2015 decision by the Delaware Supreme Court referred to a "long-standing rule that a controller does not have to entertain offers."[110]

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109. *See In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1041 (Del. Ch. 2012) (explaining that a controller could vote against competing transaction because "controllers have a right to vote their shares in their own interest."); Emerson Radio Corp. v. Int'l Jensen Inc., 1996 WL 483086, at *17 (Del. Ch. Aug. 20, 1996) ("But even if Shaw and Blair Fund were Jensen's 'controlling' stockholder, they violate no fiduciary duty by opposing Emerson's proposal or by supporting Recoton's, because even a majority stockholder is entitled to vote its shares as it chooses, including to further its own financial interest."); Frank v. Elgamal, 2014 WL 957550, at *21 (Del. Ch. Mar. 10, 2014) ("Because a stockholder controller has no duty to sell its stock, it has the obvious ability to reject any transaction it does not like."); *In re* John Q. Hammons Hotels Inc. S'holder Litig., 2009 WL 3165613, at *12 (Del. Ch. Oct. 2, 2009) (noting that a stockholder controller "could effectively veto any transaction").

110. Buttonwood Tree Value Partners, LP v. Sullivan, 126 A.3d 643, 2015 WL 6437218, at *1 (Del. 2015). In addition to relying on Chancery decisions, the *Buttonwood* decision cited *Malpiede v. Townson*, 780 A.2d 1075, 1099 (Del. 2001), which it describes as "agreeing with the Court of Chancery's conclusion that the majority stockholder had the 'right[ ] to vote down any transaction it did not favor.'" *Buttonwood*, 2015 WL 6437218, at *1 n.5. The *Malpiede* court did not express agreement with that statement of law, but rather with the Court of Chancery's dismissal of a tortious interference claim. The Delaware Supreme Court reached the same result on different grounds. The justices may well have agreed with the Court of Chancery's statement of the law, but that is not evident form the passage that the *Buttonwood* decision references. The *Buttonwood* decision also cites *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996), where the Delaware Supreme Court observed that "Because the alternative transaction would have been covered by [DGCL] § 271, the Eriksons had the statutory right as [controlling] shareholders to veto this transaction."). Acknowledging that a stockholder controller has a statutory right does not address whether the stockholder controller owes fiduciary duties when exercising the right. In *Thorpe*, the Delaware Supreme Court rejected the argument that a controller could exercise its statutory right free of any fiduciary duty, stating: "The shareholder vote provided by § 271 does not supersede the duty of loyalty owed by control persons, just as the statutory power to merge does not allow oppressive conduct in the effectuation of a merger. Rather, this statutorily conferred power must be exercised within the constraints of the duty of loyalty. In practice, the reconciliation of these two precepts of corporate law means that the duty of a controlling shareholder/director will vary according to the role being played by that person and the stage of the transaction at which the power is employed." *Thorpe*, 676 A.2d at 442. Later in the decision, the Delaware Supreme Court agreed that on the facts of the case, the controlling stockholders could block the transaction. *Id.* at 443.

Earlier Delaware case law was not so clear on this point. In *Epstein v. Celotex Corp.*, Chancellor Marvel contemplated that a majority stockholder's "higher duty to the public stockholders" might require it to vote in favor of

If the controller votes in favor of the transaction, however, then the controller has a loyalty-based obligation not to harm the minority or the corporation intentionally or knowingly. That obligation recalls Chancellor Wolcott's observation that a stockholder controller can vote freely "so long as no advantage is obtained at the expense of their fellow stockholders."[111] It also recalls his decision in *Allied Chemical*, where he held that a stockholder controller owed fiduciary duties when exercising its power to approve a sale of all a corporation's assets such that "if it should appear that the power is used in such a way that it violates any of those fundamental principles which it is the special province of equity to assert and protect."[112]

ii. Voting on Bylaw Amendments

A stockholder controller can also use its voting power to adopt, amend, or repeal bylaws. As with voting on transactions, Delaware law in this area suggests that a stockholder controller operates under a duty of loyalty that permits the stockholder controller to protect its control position (analogous to a vote against a transaction) but prevents a stockholder controller from knowingly or internationally harming the corporation or its minority stockholders. Both of the leading cases involve a controller's adoption of a bylaw that required board unanimity to take action. In each case, the unanimity requirement had the effect of locking up the board and preventing the board from taking action against the controller.

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a sale of assets, but concluded that the controller "had lived up to such duty" by acting fairly. Epstein v. Celotex Corp., 238 A.2d 843, 847 (Del. Ch. 1968).

111. *Heil*, 151 A. at 304; *accord Stroud*, 606 A.2d at 83-84 ("The fact that controlling shareholders voted in favor of the transaction is irrelevant as long as they did not breach their fiduciary duties to the minority holders."); Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441, 447 (Del. 1947) ("Generally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders."). The *Stroud* decision thus explicitly calls out a controller's fiduciary duties when voting. The *Ringling Brothers* decision speaks of not violating a duty owed to other stockholders, which logically encompasses a fiduciary duty. If the *Ringling Brothers* only anticipated a potential contractual duty, the justices logically would have referred to a contractual duty. They instead referred in open ended fashion to "a duty."

112. *Allied Chem.*, 120 A. at 491.

The first decision was the Delaware Supreme Court's opinion in *Frantz Manufacturing*.[113] The controller implemented the bylaw amendment to prevent the incumbent board from diluting the controller's stake, which the incumbent directors believed was in the best interests of the corporation. In a clipped and enigmatic ruling, the justices described the bylaw amendment as "a permissible part of [the stockholder's] attempt to avoid its disenfranchisement as a majority shareholder" and concluded that the amendment was "not inequitable under the circumstances."[114] The decision suggests that the justices thought it was legitimate for the controlling stockholder to protect its majority stake against dilution and maintain the status quo. On the latter issue, the Delaware Supreme Court appeared to view the stockholder controller as having acted legitimately to protect its majority stake from dilution.

In *Hollinger v. Black*, by contrast, the Delaware Court of Chancery invalided a similar unanimity bylaw using an analysis that suggested a violation of the non-harming principle.[115] The stockholder controller had committed in writing to support a sale process overseen by the controlled company's board. The stockholder controller subsequently sought to implement a different transaction that was in his own best interest. To prevent the board from blocking his efforts, the stockholder controller adopted an unanimity bylaw. The court found that the amendments sought to "disable[] the [company] board from protecting the company from his wrongful acts."[116] The court concluded that the amendments "were clearly adopted for an inequitable purpose and have an inequitable effect" because they interfered with the board's ability to maximize value under the strategic process that [the stockholder controller] had agreed to support.[117] Put differently, the bylaw amendments injured the company by interfering with the board's rights under the sale process agreement.[118] The sale process agreement had defined the status quo, and the controller breached its duties by intentionally using its stockholder power to change

113. *Frantz Mfg.*, 501 A.2d 401.
114. *Id.*, at 407, 409.
115. Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1030 (Del. Ch. 2004), *aff'd*, 872 A.2d 559 (Del. 2005).
116. *Id.* at 1029–30.
117. *Id.* at 1080.
118. *Id.* at 1082.

it, knowingly harming the company in the process. In an abbreviated decision, the Delaware Supreme Court affirmed.[119]

Read together, *Frantz* and *Hollinger* suggest a standard of conduct under which a stockholder controller owes a duty of loyalty when amending, altering, or repealing bylaws, but that duty does not require that the stockholder controller act subjectively in the best interests of the entity. If the stockholder controller takes action to defend itself and preserve the status quo, as in *Frantz*, then the stockholder controller has acted permissibly, just as a stockholder can vote against a proposed transaction. But if the stockholder controller takes action affirmatively and intentionally harms the corporation, as in *Hollinger*, then the stockholder controller has breached its duty of loyalty.

iii. Voting on Directors

A controller's greatest power is the right to elect or remove directors. To explain the influence that comes from being able to determine who serves on the board, Chief Justice Leo Strine has colorfully invoked the political philosophy of Eddie Cochran in *Summertime Blues*: "I called my Congressman and he said quote, I'd love to help you, son, but you're too young to vote."[120] The *Summertime Blues* principle means that when push comes to shove, directors will help the constituency that has the power to remove or replace them. In a controlled company, that constituency is the stockholder controller.

Unfortunately, Delaware law provides minimal guidance about whether a stockholder controller owes fiduciary duties when electing, removing, or replacing directors. Some things are clear. For example, a stockholder controller is free to elect individuals with conflicts, including individuals who are loyal to the controlling stockholder, and a stockholder controller is not accountable under agency doctrines like *respondeat superior* for any actions that its appointees take merely because the

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119. Black v. Hollinger Int'l Inc., 872 A.2d 559 (Del. 2005).

120. Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1186-87, 1187 n. 35 (2002) (citing Eddie Cochran, *Summertime Blues* (Liberty Records 1958) ("I'm gonna take two weeks, gonna have a fine vacation/I'm gonna take my problem to the United Nations/Well I called my congressman and he said, quote/'I'd love to help you, son, but you're too young to vote.'")).

stockholder controller elected the director.[121] Delaware decisions have also considered situations in which the members of a board of directors have been prepared to take action adverse to the interests of a controlling stockholder, such as by issuing a block of shares to dilute the controlling stockholder's interest, and held that a controller can respond legitimately to those efforts by removing directors.[122] Not only that, but Delaware decisions have asserted that the directors have a duty to inform the stockholder controller representatives about their plans so that the stockholder controller can take action to defend itself, even when the controller takes action contrary to what an independent board of directors has determined in its business judgment to be in the best interests of the company.[123]

At the same time, it is hard to believe that Delaware law would turn a blind eye to a scenario in which a controller acted knowingly or recklessly to elect directors who looted the company. There does not appear to be any principled distinction

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121. *See In re* PLX Tech. Inc. S'holders Litig., 2018 WL 2018535, at *50 (Del. Ch. Oct. 16, 2018) ("Delaware law does not recognize any basis to attribute the actions of an independent director to the control of the stockholder that nominated or appointed him, simply by virtue of the fact of the nomination or appointment."); Khanna v. McMinn, 2006 WL 1388744, at *28 (Del. Ch. May 9, 2006) (declining to impute liability to stockholder who appointed director under doctrine of *respondeat superior* "); Emerson Radio Corp. v. Int'l Jensen Inc., 1996 WL 483086, at *20 n.18 (Del. Ch. Aug. 20, 1996) (declining to impose fiduciary status on fund where one of three general partners who controlled the fund also served as a corporate director). That does not mean that a stockholder controller could not be held liable under *respondeat superior* if other factors were present, such as a true agency relationship between the controller and the director, independent of the controller's election of the director to the board.

122. *E.g.*, CBS Corp. v. Nat'l Amusements, Inc., 2018 WL 2263385, at *6 (Del. Ch. May 17, 2018) (holding that controller had the right to go first by protecting itself before board of directors could act against the controller).

123. *E.g.*, Adlerstein v. Wertheimer, 2002 WL 205684, at *11 (Del. Ch. Jan. 25, 2002) (holding that failure to inform chairman, CEO, and stockholder controller in advance of plan to dilute his block with the issuance of preferred stock constituted "trickery or deceit" that equity would not countenance); *see also* OptimisCorp v. Waite, 137 A.3d 970, 2016 WL 258871, at *2 (Del. 2016) (characterizing the term "super-director" as tendentious when used to describe the assertion in *Adlerstein* that a director who was not entitled to advance notice of meeting topics under the charter or bylaws in his capacity as a director nor as a stockholder was nevertheless entitled to advance notice because the individual was both a director and a controlling stockholder; expressing the contrary concern that "cliques of the board may confer and sandbag a fellow director" and that the law should not "encourage board factions to develop Pearl Harbor-like plans" that would enable directors affiliated with large blockholders to be "blindsided").

between (i) a claim against a stockholder controller for amending the bylaws in bad faith to harm the corporation and (ii) electing directors to do the same thing. Any duty that a stockholder controller owes when voting for directors would thus seem to be of the minimal, non-harming variety.

iv. The Composite Picture for the Right to Vote

Taken together, the authorities on voting indicate that when a stockholder controller acts to preserve the status quo, the stockholder controller is not subject to any fiduciary duty, including a duty of loyalty. If, however, a stockholder controller acts to change the status quo, then the stockholder controller owes a duty of loyalty. That duty only demands that the stockholder controller not harm the corporation or its minority stockholders knowingly or intentionally. It is thus fundamentally different than the standard that governs a director, which requires that the director believe in good faith that the transaction is in the best interest of the corporation and then act on that belief.

b. The Right to Sell

A stockholder controller's rights at the stockholder-level also include the right to sell. The cases in this area point to principles for the duty of loyalty that parallel the principles that govern the right to vote.

The *Bershad* decision again provides the starting point. There, the Delaware Supreme Court stated, "[c]learly, a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."[124] As with the *Bershad* decision's comment on voting, that statement is ambiguous. On the one hand, the use of the phrase "no duty" indicates that a stockholder controller could decide not to sell free of any fiduciary constraint. On the other hand, the statement that a duty to sell would not exist "merely because the sale would profit the minority" leaves open the possibility that a stockholder controller might have a duty to sell under other circumstances.

As with votes against transactions, subsequent Delaware decisions have interpreted *Bershad* as standing for the proposition that a stockholder controller has an absolute right to

124. *Bershad*, 535 A.2d at 845.

refuse to sell.[125] At this point in the evolution of Delaware law, the decision not to sell is thus one that a controller does not make in a fiduciary capacity and to which fiduciary duties do not apply. It is not a fiduciary act.

The situation is different when a stockholder controller decides to sell its block. The common law originally permitted a stockholder controller to sell freely to anyone and at any price, without any duty to the corporation or the minority stockholders.[126] During the first half of the twentieth century, however, courts held that directors could breach their fiduciary duties by transferring their shares to a buyer for an above-market price, adding representatives of the buyer to the board, then resigning from their positions as directors.[127] Several cases involved buyers who proceeded to loot the corporation, and those cases held that the directors breached their duties by facilitating a takeover by the looter.[128] Having held that directors acted disloyally in that setting, courts found it easy to expand the paradigm to a stockholder controller. The doctrine thus emerged that a stockholder controller owed fiduciary duties when selling its shares and that those duties could be breached if a controller sold its shares to a looter, either knowingly or as a result of gross negligence.

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125. *Buttonwood*, 2015 WL 6437218, at *1 ("As a controlling stockholder of Central Steel, the trust was entitled to refuse to sell its 62.1% stake in Central Steel and control of Central Steel could therefore not pass without its consent."); Peter Schoenfeld Asset Mgmt. LLC v. Shaw, 2003 WL 21649926, at *1 (Del. Ch. July 10, 2003) ("Hughes, as a controlling stockholder, had no duty to sell its PanAmSat shares."), *aff'd*, 840 A.2d 642 (Del. 2003); Cincinnati Bell Cellular Sys. Co. v. Ameritech Mobile Phone Serv. of Cincinnati, Inc., 1996 WL 506906, at *12 (Del. Ch. Sept. 3, 1996) ("A majority stockholder in a Delaware corporation owes no duty to sell its holdings in the corporation just because the sale would profit the minority."); Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994) ("No part of [the Carroll family's] fiduciary duty as controlling shareholders requires them to sell their interest."); Freedman v. Rest. Assocs. Indus., Inc., 1990 WL 135923, at *6 (Del. Ch. Sept. 19, 1990) ("Thus, a shareholder, even a majority shareholder, has discretion as to when to sell his stock and to whom, and I find no basis for holding the management group liable to plaintiffs for exercising that discretion qua shareholder.").

126. Cohen, *supra* note 63 at 407.

127. *E.g.*, Insuranceshares v. N. Fiscal Corp., 35 F. Supp. 22, 24–25 (E.D. Pa. 1940); Bacchus v. Finkelstein, 23 F.2d 357, 359 (D. Minn. 1927); Forbes v. McDonald, 54 Cal. 98, 100 (1880); Gerdes v. Reynolds, 28 N.Y.S.2d 622, 631–33 (Sup Ct. 1941); Porter v. Healy, 91 A. 428, 431 (Pa. 1914).

128. *E.g.*, *Insuranceshares,* 35 F.Supp. at 24–25; *Gerdes*, 28 N.Y.S.2d at 661–63; *see* David S. Ruder, *Duty of Loyalty—A Law Professor's Status Report*, 40 BUS. LAW. 1383, 1395–96 (1985) ("The corporate fiduciary is not entitled to act in an arm's-length manner when dealing with the corporation or its shareholders.").

During the middle of the twentieth century, some scholars built on those decisions to argue that a stockholder controller should be subject to an even more onerous fiduciary constraint when selling a control block. Writing with Gardiner Means in *The Modern Corporation and Private Property*, Berle argued that "the power going with 'control' is an asset which belongs only to the corporation; and that payment for that power, if it goes anywhere, must go to the treasury."[129] In 1955, the United States Court of Appeals of the Second Circuit adopted that approach in a split decision,[130] holding that the Chairman and President Newport Steel Corporation, who also controlled 33% of its voting power, breached his fiduciary duties by selling his shares at a premium. The majority held that the corporation was entitled to damages equal to the difference between the price the Chairman received and the value of shares "without the appurtenant control."[131]

The *Perlman* decision generated strong reactions, with some praising it[132] and others criticizing it.[133] Four years later, in 1961, the United States District Court for the District of Minnesota used the same logic to award damages for a sale of control, and its decision was affirmed.[134] But rather than establishing a new watermark for stockholder controller duties, later decisions retreated to the rule that a controller only would breach its duties by knowingly or negligently selling to a looter.[135] Even Berle, who had favored a shared premium concept,

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129. ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 244 (1933).

130. Perlman v. Feldman, 219 F.2d 173 (2d Cir. 1955).

131. *Id.* at 176.

132. *E.g.*, David Cowan Bayne, *The Sale of Control Premium: The Definition*, 53 MINN. L. REV. 285 (1969); Adolf A. Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L.Q. 628 (1965); William D. Andrews, *The Stockholders Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965); *see also*, Richard W. Jennings, *Trading in Corporate Control*, 44 CALIF. L. REV. 1 (1956); *see generally* Berle, *supra* note 5. David C. Bayne was a particularly prolific proponent of the shared-control rule and critic of control premiums for large blocks. Between 1963 and 2001, he published nineteen articles on the subject of corporate control, the impropriety of control premiums for large blocks, and the rationale for the shared control rule.

133. *E.g.*, Wilber G. Katz, *The Sale of Corporate Control*, 38 CHI. BAR RECORD 376 (1957); George B. Javoras, *Equal Opportunity in the Sale of Controlling Shares: A Reply to Professor Andrews*, 32 U. CHI. L. REV. 420 (1965); Alfred Hill, *The Sale of Controlling Shares*, 70 HARV. L. REV. 986 (1957).

134. Honigman v. Green Giant Co. 208 F. Supp. 754 (D. Minn. 1961), *aff'd*, 309 F.2d 667 (8th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963).

135. *E.g.*, Swinney v. Keebler Co., 480 F.2d 573, 578 (4th Cir. 1973).

abandoned that position and endorsed no-selling-to-a-looter doctrine.[136]

Delaware follows the no-selling-to-a-looter doctrine, but it has added some twists. As discussed previously, two decisions have sought to limit the extent to which the duty of care could apply in such a setting.[137] No decision has questioned whether a stockholder controller owed a duty of loyalty when selling a control block. One decision has stated "a controlling shareholder has the right to sell his control share without regard to the interests of any minority shareholder, so long as the transaction is undertaken in good faith."[138] The decision did not define what "good faith" meant, but it presumably means a version of the duty of loyalty that requires, at a minimum, a good faith belief that the buyer is not a looter. Another decision acknowledges that a stockholder plaintiff can state a claim against a controlling stockholder by pleading "facts that indicate that the controller knew there was a risk that the buyer was a looter or otherwise intended to extract illegal rents from the subsidiary, at the expense of the subsidiary's remaining stockholders."[139] That is the essence of a loyalty claim.

Taken together, the cases addressing the sale of a control block parallel the decisions regarding a stockholder controller's exercise of its voting power. They indicate that when a stockholder controller decides not to sell, the stockholder controller is not subject to any fiduciary duty. But when a stockholder controller decides to sell, the stockholder controller owes a duty of loyalty that require the stockholder controller not to harm the corporation or its stockholder by intentionally or knowingly selling to a looter. Those duties are fundamentally different than the duties that a director owes, which include a requirement that the director believe in good faith that the transaction is in the best interest of the corporation and its stockholders.

c. Suing

The last of the three principal rights of a stockholder is the power to sue. Because a controller controls the corporation,

136. Adolf A. Berle, *The Price of Power: Sale of Corporate Control*, 50 CORNELL L.Q. 628, 636 (1965).
137. *See Abraham*, 901 A.2d at 759; *Harris*, 582 A.2d at 232.
138. *In re* CompuCom Sys., Inc. S'holders Litig., 2005 WL 2481325, at *6 (Del. Ch. Sept. 29, 2005).
139. *Abraham*, 901 A.2d at 762.

the controller will generally not need to sue derivatively on the corporation's behalf. If the controller wants the corporation to pursue a claim, it can cause the corporation to pursue it. The controller also generally will not have any reason to sue the directors for breach of fiduciary duty, precisely because the directors usually do what the controller wants. In some situations, however, a controller may acquire a controlling position, such by acquiring a majority of the shares, and yet face resistance from directors who want to dilute the controller or otherwise defeat its control. In that setting, a controller may pursue litigation to assert its control or to remediate harm the controller suffered before it could assert its control. Those claims might invoke statutory rights that a stockholder can assert, such as by bringing an action under Section 225 of the DGCL to establish the validity of a corporate election or action taken by written consent. It could also involve an action for breach of fiduciary duty, either to stop incumbent directors from taking action or to recover for harm they caused the corporation to suffer. Or it could involve efforts to enforce other rights that the controller or the corporation possesses.

There do not appear as yet to have been any cases addressing whether a stockholder controller could breach its duty of loyalty by filing suit. By analogy to the scenarios involving a sale of stock or the adoption of a bylaw, a suit filed with the intent to harm the corporation presumably could breach the controller's duties of loyalty or care. That said, other remedies would also be available, such as Rule 11 sanctions, bad faith fee shifting, or a cause of action for malicious prosecution.

By analogy to the scenarios involving a sale of stock or the adoption of a bylaw, it seems clear is that a stockholder controller is not obligated to act in the best interest of the corporation and its stockholders when filing suit. A stockholder controller can assert its own rights against the corporation even if the litigation would redound to the corporation's detriment.

C. *No Duty of Self-Sacrifice*

Delaware authorities establish that like a board of directors, a stockholder controller's duty of loyalty does not require altruism or self-sacrifice.[140] At a minimum, that means that a

140. *See* Getty Oil Co. v. Skelly Oil Co., 267 A.2d 883, 888 (Del. 1970) ("[T]he duty [of a parent to its subsidiary] does not require self-sacrifice from

stockholder controller does not have any duty to support the controlled firm when it experiences financial difficulties.[141] It also means that a stockholder controller need not share its own business opportunities or assets with the controlled corporation.[142] And a stockholder controller need not accept less attractive consideration to subsidize a third-party transaction that would deliver more value to the minority stockholders.[143]

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the parent."); *iSynthes*, 50 A.3d at 1040 ("Delaware law does not, however, go further than that and impose on stockholder controllers a duty to engage in self-sacrifice for the benefit of minority shareholders."); Odyssey Partners, L.P. v. Fleming Cos., Inc., 735 A.2d 386, 411 (Del. Ch. 1999) (stockholder controller was under no fiduciary obligation to agree to a proposal that would have "required significant and disproportionate self-sacrifice"); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986) ("While the law requires that corporate fiduciaries observe high standards of fidelity and, when self-dealing is involved, places upon them the burden of demonstrating the intrinsic fairness of transactions they authorize, the law does not require more than fairness. Specifically, it does not, absent a showing of culpability, require that directors or controlling shareholders sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholders.").

141. Cohen, *supra* note 63, at 396 ("The fiduciary duty which the majority shareholders owe to the company and to the minority does not require them to extend financial aid to the company when it experiences financial difficulties. . . . A breach would not exist even where the controlling shareholders are aware that such a contribution is the only way to save the company from being wound up."). 12B William Meade Fletcher, Fletcher Cyc. Corp. § 5810, Westlaw (database updated Sept. 2023) ("[T]here is no duty on the part of majority shareholders to assist the corporation financially in its money difficulties and thereby shield it from financial destruction.").

142. In *Getty Oil Co. v. Skelly Oil Co.*, the Delaware Supreme Court held that Getty had no obligation to share an oil allotment it had received from a government regulator with its controlled subsidiary, stating that the parent's duty of loyalty "does not require self-sacrifice from the parent." 267 A.2d 883, 888 (Del. 1970). The Court of Chancery reached the same conclusion regarding a parent's tax asset. Meyerson v. El Paso Nat. Gas Co., 246 A.2d 789, 794 (Del. Ch. 1967).

143. *Synthes*, 50 A.3d at 1041 ("'Controlling shareholders, while not allowed to use their control over corporate property or processes to exploit the minority, are not required to act altruistically towards them.' [The controller] was thus entitled to oppose a deal that required him to subsidize a better deal for the minority stockholders by subjecting him to a different and worse form of consideration. To hold otherwise would turn on its head the basic tenet that controllers have a right to vote their shares in their own interest.") (alteration removed) (quoting Thorpe v. CERBCO, Inc., 1993 WL 443406, at *7 (Del. Ch. Oct. 29, 1993) (Allen, C.)); *see CompuCom Sys.*, 2005 WL 2481325, at *7 ("This claim, that the minority shareholders were entitled to more per share consideration than Safeguard, the controlling shareholder, is not supported by Delaware law.").

The no-self-sacrifice principle lies at the heart of the concept that a stockholder controller can take action to protect itself and maintain the status quo.[144] A stockholder controller need not allow itself to be diluted, even if doing so is in the best interests of the corporation and its stockholders as a whole.[145] A stockholder controller also need not allow a board to take action, such as by pursing an acquisition or selling the company, even if doing so is in the best interests of the corporation and its stockholders as a whole.[146]

D. *Prescriptive or Proscriptive?*

The cases involving both interested transactions and unilateral action finally show that a stockholder controller's duty of loyalty differs from a directors in that it is prescriptive, not proscriptive. The ability of a stockholder controller to refuse to sell its shares into a value-maximizing transaction or vote in favor of a value-maximizing transaction demonstrates that a stockholder controller does not have an affirmative obligation to act in the best interests of the corporation and its stockholders. Instead, a stockholder can refuse to act, even if non-action prevents an outcome that would benefit the corporation and its stockholders.

V.
The Myth of Fiduciary Equivalence Dispelled

Delaware authorities thus dispel the myth of fiduciary equivalency. Authorities addressing specific examples of stockholder controller behavior disconfirm the assertion that stockholder controllers owe the same duties as directors. The negation of fiduciary equivalency also negates principles that depend on that assertion.

One claim that this article identified at the outset asserts that a stockholder controller "is no longer able to act in self-interest, but must act in the corporate interest only, and entire fairness applies to transactions with the controller."[147] The first half of this statement is not true. A stockholder controller can

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144. *Sears*, 2024 WL 262322, at *27.
145. *Frantz Mfg.*, 501 A.2d at 407.
146. *Sears*, 2024 WL 262322, at *21.
147. *Liberty Broadband*, 2017 WL 2352152, at *16.

act self-interestedly when voting against a transaction or refusing to sell its block. A stockholder controller can also sell its block in lieu of a transaction that would share a premium ratably with the other stockholders. The second half of the statement, however, is true. Entire fairness applies to transactions with the controller, but even the entire fairness standard is another manifestation of the stockholder controller's obligation of non-harm.

Another claim derived from the concept of fiduciary equivalency asserts that stockholder controllers, like other fiduciaries, "are prohibited from considering their self-interest in making corporate decisions [and] must exercise their business judgment on behalf of the entity and its stockholders, free from the taint of personal interest."[148] That is also not true. A controller can consider its own self-interest. A controller can act affirmatively to protect the status quo and its own interests, even if an objective view of the best interests of the entity as a whole would suggest a different course of action.

Finally, as noted, a stockholder controller's duties also are not proscriptive. Those propositions make a stockholder controller's duty of loyalty different from a director's.

In two respects, however, the duties are equivalent. Just as directors must exercise due care, so too must a stockholder controller. And just as a director need not engage in self-sacrifice, a stockholder controller need not either.

A stockholder controller's duties thus overlap with a director's duties, but they are not the same. The assertion of fiduciary equivalency is not accurate.

VI.
Explaining the Divergence

Having established that a stockholder controller's duties diverge a director's, the question becomes why. One obvious reason is that directors and stockholder controllers have different relationships with the corporation.

A director *qua* director only possesses power by virtue of that office. All of the powers that the director has are entrusted to the director in a fiduciary capacity. It follows that the director only can exercise power in a fiduciary capacity. Everything a director does when exercising corporate power carries the fiduciary imprimatur.

148. *Id.*

The same is not true for a stockholder controller, which possesses stockholder-level rights by virtue of owning shares. By aggregating a sufficient level of stockholder rights, however, a stockholder obtains a level of control that warrants fiduciary status. Once that level is achieved, those stockholder powers gain a hybrid quality. They can no longer be exercised completely free of fiduciary constraint, but they also are not wholly fiduciary. They retain a degree of their original nature as private property rights, but the controller's influence is sufficiently great to have stretched the baseline allocation of power within the entity.

Before a stockholder aggregates sufficient power to constitute control, the corporation's stockholders can rely on the board of directors to act on their behalf. They can also rely on their ability to elect new directors to constrain director conduct. And they can rely on the requirement of stockholder approval for significant transactions to check the board's ability to effect fundamental changes in the corporate form.

After a stockholder aggregates sufficient power to constitute control, the minority stockholders can no longer rely on those protections. They can no longer be certain that the board of directors is acting act on their behalf, because the *Summertime Blues* principle comes into play: The stockholder controller's influence over election outcomes can cause the directors to give deliberative priority to the stockholder controller's interests. Minority stockholders can no longer rely on their ability to elect new directors to constrain director conduct, because the stockholder controller determines who serves as directors. And they can no longer rely on the requirement of stockholder approval for significant transactions as a means of preventing fundamental changes in the corporate form, because the stockholder controller can deliver the necessary vote.

The aggregation of sufficient power thus creates a need for some check on that power—hence the fiduciary overlay—while at the same time acknowledging the origins of the powers in traditional property rights. That combination explains why stockholder controller duties and director duties would diverge.

VII.
Normative Implications

The divergence between the fiduciary duties of directors and stockholder controllers has a number of implications. The most obvious is that judges should stop saying that stockholder

controllers owe the same fiduciary duties as directors. Academics should help extinguish that false dogma. Practitioners and commentators should lend a hand as well.

The existence of fiduciary divergence means that courts need to speak in terms of the duties that stockholder controllers owe in specific settings. When a stockholder controller acts affirmatively, those duties are generally minimal, manifesting as an obligation of non-harm. When a stockholder controller declines to exercise its powers, those duties are non-existent.

Relatedly, cases must distinguish between two types of controller action. One type involves scenarios where the stockholder controller deploys its own powers as a stockholder to obtain a result, such as by determining what to do with its control block, voting in favor of an interested transaction, adopting a bylaw, or negotiating for an interested transaction. Those types of actions are different than a controller who affirmatively enters the boardroom and deploys board-level corporate powers to achieve its ends. Such an example might involve a controller populating a board with its own representatives or own agents, such as parent corporation officers, then causing those officers to exercise board-level authority on the controller's behalf. Another example is *McMullin v. Beran*,[149] where a subsidiary corporation delegated upwards to its stockholder controller the task of conducting a sale process for the controlled corporation. The law can and should treat those situations differently. When a stockholder controller enters the boardroom or substitutes itself for the board of directors, the stockholder controller should owe the same duties that directors owe.

The lesser nature of controller duties also supports the Court of Chancery's current, multi-factor approach to evaluating control. Historically, Delaware decisions supported a presumption of control when a stockholder could exercise 20-25% of the voting power.[150] Section 203 of the Delaware

149. 765 A.2d 910 (Del. 2000).

150. For a summary of earlier decisions, *see* Robbins & Co. v. A.C. Israel Enters., Inc., 1985 WL 149627 (Del. Ch. Oct. 2, 1985) (recognizing that "[t]his Court and others have recognized that substantial minority interests ranging from 20% to 40% often provide the holder with working control" and collecting authorities). For an example, *see* Rosenthal v. Burry Biscuit Corp., 60 A.2d 106, 107 (Del. Ch. 1948) (Seitz., V.C.) (treating 10% holder who was also CEO and director as controller). The Supreme Court of the United States helped shape understandings of control by holding that DuPont gained controlling influence over General Motors by acquiring a 23% stake, which later

General Corporation Law, which protects against tunneling and expropriation by substantial stockholders, likewise establish a presumption of control at 20%.[151] Although Section 203's definition of control technically applies only for purposes of that statutory section, the General Assembly enacted the statute to constrain the ability of a person who acquired a large stock position in a company (more than 15%) from engaging in transactions with the company.[152] Section 203 thus seeks to address the same types of tunneling and expropriation that the fiduciary law governing controllers seeks to address. In that context, Section 203 represents a policy determination by the General Assembly as to where those concerns kick in. Consistent with those ranges, stockholder rights plans initially used an ownership stake of 20%, before a consensus emerged at 15%.[153] The disclosure-oriented regimes that Rule 13D starts at 5%.[154]

During a period from 2006 to 2018, however, some Delaware Court of Chancery decisions sough to ratchet the

led to antitrust violations. *See* United States v. E.I. duPont de Nemours & Co. 353 U.S. 586 (1957).

151. Del. Code Ann. tit. 8, § 203(c)(4) ("A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary"). Two federal statutes use 25%. *See* Investment Company Act of 1940, 17 C.F.R. § 248.120(h) ("Control of a company means the power to exercise a controlling influence over the management or policies of a company whether through ownership of securities, by contract, or otherwise. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 percent of the voting securities of any company is presumed to control the company."); Bank Holding Company Act of 1956. 28 U.S.C. § 1841(a)(2)(A) ("Any company has control over a bank or over any company if—(A) the company directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company[.]").

152. Del. Code Ann. tit. 8, § 203(a).

153. Tornetta v. Musk, 2024 WL 343699, at *48 (Del. Ch. Jan. 30, 2024); Williams Cos. S'holder Litig., 2021 WL 754593, at *1 (Del. Ch. Feb. 26, 2021); Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. Rev. 915, 922 (2019).

154. Securities and Exchange Act of 1934, 17 CFR § 240.13d-1(a) ("Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i)(1) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within five business days after the date of the acquisition, file with the Commission, a statement containing the information required by Schedule 13D (§ 240.13d-101).").

threshold upward,[155] relying on the theory that "finding that a stockholder is a controller has dramatic consequences."[156] Some decisions pooh-poohed the influence of comparatively large blocks, describing a 33.5% stake as "not impressive,"[157] another 33.5% stake as "relatively low,"[158] a 33.3% stake that could be increased to 45% as similarly "not impressive,"[159] and a 33% stake as something that "means little."[160] The math says otherwise.[161] Having disconfirmed the assertion that a controller

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155. The main catalyst for the tightening seems to have been a decision that characterized a 33.5% stake, without explanation, as "relatively low." *In re* PNB Hldg. Co. S'holders Litig., 2006 WL 2403999, at *10 (Del. Ch. Aug. 18, 2006). During the tightening period, decisions echoed *PNB* by describing similar stakes as "not impressive." *In re* Rouse Props., Inc., 2018 WL 1226015, at *18 (Del. Ch. Mar. 9, 2018); *accord In re* GGP, Inc. S'holder Litig., 2021 WL 2102326, at *20 (Del. Ch. May 25, 2021), *aff'd in part, rev'd in part and remanded*, 282 A.3d 37 (Del. 2022). Another catalyst seems to be the erroneous assertion, made in 2013, that a prior finding of control at 35% had been "perhaps" the Court of Chancery's "most aggressive finding that a minority blockholder was a controlling stockholder." *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656, 664–66 (Del. Ch. 2013) (discussing *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 553 (Del. Ch. 2003)). That statement was incorrect in 2013, because the Court of Chancery had found control at lower levels. *See Crimson Expl.*, 2014 WL 5449419, at *10 (collecting precedents). Yet a series of decisions repeated the assertion as if it were accurate. *E.g.*, *GGP*, 2021 WL 2102326, at *23 n.244; *Rouse*, 2018 WL 1226015, at *19; *Liberty Broadband*, 2017 WL 2352152, at *18; Larkin v. Shah, 2016 WL 4485447, at *14 (Del. Ch. Aug. 25, 2016); *In re* Zhongpin Inc. S'holders Litig., 2014 WL 6735457, at *7 (Del. Ch. Nov. 26, 2014), *rev'd on other grounds sub nom. In re* Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173 (Del. 2015); *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 991 (Del. Ch. 2014), *aff'd sub nom.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015);; Veloric v. J.G. Wentworth, Inc., 2014 WL 4639217, at *10 n.44 (Del. Ch. Sept. 18, 2014). The assertion is plainly incorrect today. *See Tornetta*, 2024 WL 343699, at *45 n.556 (collecting cases involving determinations that minority stockholders were controllers, including eight at levels below 35%); *id.* at *47 (finding after trial that 22% stockholder controlled company for purposes of stock grant).

156. *Liberty Broadband*, 2017 WL 2352152, at *16.

157. *Rouse*, 2018 WL 1226015, at *18.

158. *PNB*, 2006 WL 2403999, at *10.

159. *GGP*, 2021 WL 2102326, at *20 (Del. Ch. May 25, 2021), *aff'd in part, rev'd in part and remanded*, 282 A.3d 37 (Del. 2022).

160. Zlotnick v. Newell Cos., 1984 WL 8242, at *2 (Del. Ch. July 30, 1984).

161. *See Voigt*, 2020 WL 614999, at *18–19. A presumption of control at 20% makes sense, because with a block of that size, the voting power math tilts heavily in favor of the blockholder. Assuming a typical 80% turnout at a stockholder meeting, the blockholder only needs another 35% of the unaffiliated shares to win. Anyone opposing the blockholder must capture 68% of the unaffiliated vote. *See id.* The Delaware Court of Chancery has described disinterested majorities of 60% and 66 2/3% as "more commonly associated with

finding is so momentous, the policy-based demand for a heightened level of ownership relaxes.

During the tightening trend, some Delaware decisions also advocated for a new test for control. Traditionally, Delaware decisions spoke in terms of determining whether control existed by evaluating the person's ability to exercise control over the corporation or its business.[162] That test contemplates a holistic examination of the levers that a controller can use to exercise control over the corporation and its business. In 2006,

sham elections in dictatorships than contested elections in genuine republics." Chesapeake Corp. v. Shore, 771 A.2d 293, 342 (Del. Ch. 2000). The record in *Air Products* showed that no insurgent had ever achieved a 67% vote and that polling votes at this level was not realistically attainable. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 117 (Del. Ch. 2011).

162. The test originally looked to whether the alleged controller could exercise control over *the corporation*, either generally or for purposes of a particular transaction. *E.g.*, Martin v. D.B. Martin Co., 88 A. 612, 614–15 (Del Ch. 1913) (Curtis, C.) ("It results, further, that the officers of corporation A, which holds all, or a controlling portion, of the shares of corporation B, have a fiduciary relation towards the latter, which must necessarily be friendly. And further, if by reason of such ownership, or control, there can be an injury done to corporation B by the officers of corporation A, which would also be detrimental to the stockholders of corporation A, a court of equity would, notwithstanding the existing of the separate corporate entities, give relief according to the real equities of the case at the suit of a stockholder of corporation A."). Beginning in the 1980s, the Delaware Supreme Court restated the test as an inquiry into whether the stockholder could exercise control "over the business affairs [sic] of the corporation." *Ivanhoe*, 535 A.2d at 1344; *see Weinstein Enters.*, 870 A.2d at 507 (basing working control on "the *actual exercise* of control over the corporation's conduct." (emphasis in original)); Emerald P'rs v. Berlin, 726 A.2d 1215, 1221 n.8 (Del. 1999) (noting that minority stockholdings with "some additional allegation of domination through actual control of corporate conduct" may give rise to controller status); *Citron.*, 569 A.2d at 70 (referring to either majority voting power or "actual control of corporation [sic] conduct"); *see Cysive*, 836 A.2d at 553 ("In view of that framework, the analysis of whether a stockholder controller exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes."). A majority of Court of Chancery decisions have used this test. *See* New Enter. Assocs. 14, L.P. v. Rich, 292 A.3d 112, 173 (Del. Ch. 2023); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 716 (Del. Ch. 2023); Crispo v. Musk, 2022 WL 6693660, at *12 (Del. Ch. Oct. 11, 2022); *In re* Vaxart, Inc. S'holder Litig., 2021 WL 5858696, at *15 (Del. Ch. Nov. 30, 2021); *In re* Pattern Energy Grp. Inc. S'holders Litig., 2021 WL 1812674, at *37 (Del. Ch. May 6, 2021); *Presidio, Inc.*, 251 A.3d at 258 (Del. Ch. 2021); *In re* WeWork Litig., 2020 WL 7343021, at *12 (Del. Ch. Dec. 14, 2020); *In re* USG Corp. S'holder Litig., 2020 WL 5126671, at *15 (Del. Ch. Aug. 31, 2020), *aff'd sub nom.* Anderson v. Leer, 265 A.3d 995 (Del. 2021); *Voigt*, 2020 WL 614999, at *11; *Basho Techs.*, 2018 WL 3326693, at *26.

however, a Delaware decisions reinterpreted that test to require a showing of *board-level* control, namely the actual ability to dictate outcomes in the board room.[163] The board-control concept lay dormant for nearly a decade, until the Delaware Supreme Court issued a pair of decisions that referenced the concept of board control.[164] That test is more onerous and would lead to fewer findings of control, which seems to be the point.[165]

Neither of the Delaware Supreme Court decisions held that board control was the exclusive test, nor did either overrule the host of precedents that looked for control over the business affairs of the corporation. Some Court of Chancery decisions have therefore treated board control as one means of establishing control, which it plainly is, but not the exclusive method.[166] Because a finding of control is not so momentous as has been feared, the policy underpinning for narrower tests falls away.

Yet another normative implication concerns whether a stockholder controller should owe duties when exercising statutory or contractual rights. The no-duty-to-sacrifice principle has historically been proffered as a basis for asserting that a stockholder controller can exercise contractual or statutory rights free of fiduciary constraint.[167] One case frames the general rule

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163. *Superior Vision*, 2006 WL 2521426, at *4 ("Delaware case law has focused on control of the board.").

164. *See* Olenik v. Lodzinski, 208 A.3d 704, 718 (Del. 2019); *Corwin*, 125 A.3d at 307.

165. *See* Lawrence A. Hammermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 334–48 (2022) (expressing concern about a supposedly expanding definition for control).

166. *See In re* Tesla Motors, Inc. S'holder Litig., 2020 WL 553902, at *4 (Del. Ch. Feb. 4, 2020) ("A minority blockholder can, as a matter of law, be a stockholder controller through 'a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock.'" (quoting *Corwin*, 125 A.3d at 307)); Klein v. Wasserman, 2019 WL 2296027, at *8 (Del. Ch. May 29, 2019) (citing "effective control of the board" under Olenik as one way to establish general control).

167. *See, e.g., Odyssey Partners*, 735 A.2d at 415. ("Chancellor Allen found that Fleming was not constrained by fiduciary duties when acting as a creditor in relation to the foreclosure sale. . . . In my view, this rationale applies with equal force both to the claim that Fleming was obligated to pay a fair price in the foreclosure sale and that it (or Lawson) was obliged to disclose to ABCO's directors its analyses of ABCO's value to it. Fleming was not acting in a fiduciary capacity when it bid at the foreclosure sale and, thus, its conduct thereat is not subject to a fiduciary duty analysis."); *Superior Vision*, 2006 WL 2521426, at *5 ("Here, ReliaStar is alleged to have taken advantage of its contractual

as follows: "[A] controller is free to exercise its bargained-for contractual rights without breaching its fiduciary duties, even when doing so might be to the detriment of the stockholders to whom the duties are owed."[168] But as shown by the prior discussion, the capacity distinction does not hold. Some decisions have made similar assertions about stockholder-level rights like the right to sell or vote, but this article had demonstrated that a limited fiduciary regime applies to those areas.[169]

Delaware law should extend the same fiduciary treatment to contractual and statutory rights. The rights to vote and sell are already statutory and contractual. They arise under the Delaware General Corporation Law[170] (a statute) and the corporate charter (which is treated as a contract).[171] The same principle of non-harm should apply to the exercise of other statutory and stockholder rights.

Under the non-harming standard, a court would analogize the exercise of a contract right to the exercise of a voting right. The controller could use its contract rights to maintain the status quo or to defend its interests, and a controller also would be able to exercise its rights as long as the other stockholders received the equivalent of what they had before. For example, when a corporation becomes insolvent, a stockholder controller could exercise its creditors' rights to foreclose on the corporation's assets without violating any non-harming obligation, not because no fiduciary obligation applied, but because the stockholders' interests had no realistic value such that they could suffer harm.[172] What a controller could not do is use the

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rights for its own purposes. Without more, that is not sufficient to allege that ReliaStar is a 'controlling shareholder' bound by fiduciary obligations.").

168. Gamco Asset Mgmt. Inc. v. iHeartMedia Inc., 2016 WL 6892802, at *12 (Del. Ch. Nov. 23, 2016), *aff'd*, 172 A.3d 884 (Del. 2017).

169. *See* Parts IV.A & B, *supra*.

170. *See* DEL. CODE ANN. tit. 8, §§ 159, 212.

171. *See Air Products*, 8 A.3d at 1188 ("Corporate charters and bylaws are contracts among a corporation's shareholders...."); STAAR Surgical Co. v. Waggoner, 588 A.2d 1130, 1136 (Del.1991) ("[A] corporate charter is both a contract between the State and the corporation, and the corporation and its shareholders."); Centaur Partners, IV v. Nat'l Intergroup, Inc., 582 A.2d 923, 928 (Del.1990) ("Corporate charters and by-laws are contracts among the shareholders of a corporation....").

172. Economics scholars will argue that even in this setting, the underwater common has option value, just as an out-of-the-money option has value. That could well be true. But a plaintiff would have to come forward and prove that the common stock had non-zero option value. In a case that was the most

blocking right to hold up a beneficial transaction for the corporation, simply because the controller want to extract a toll for itself. Nor could a controller use a series of blocking right to force a controlled corporation into a crisis that it would not otherwise face.

The resulting regime is what Chancellor Wolcott envisioned. In *Allied Chemicals*, he explained that the statutory source of a power "supplies no reason for clothing it with a superior sanctity, or vesting it with the attributes of tyranny" and admonished that a court of equity would act "if it should appear that the power is used in such a way that it violates any of those fundamental principles which it is the special province of equity to assert and protect."[173] That reasoning applies to contract and statutory rights as well.

Conclusion

A stockholder controller's duties are not the same as a director's. For stockholder controllers, Delaware law imposes a fiduciary framework grounded in non-harm. The stockholder controller's duty never incorporates the best-interests duty that a director must fulfill. Only the minimal non-harming duty applies, and when a controller acts to preserve the status quo or opts not to take action, then the controller does not act in a fiduciary capacity. Thus stockholder controllers owe distinctive and limited fiduciary duties. Courts should acknowledge that fact and take notice of its implications.

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logical candidate for that type of argument, the plaintiff failed to advance it, relying instead on a discounted cash flow analysis. *See Trados II*, 73 A.3d at 73.

173. *Allied Chem.*, 120 A. at 491.