

SOMETHING'S GOT TO GIVE: THE BUSINESS
ROUNDTABLE STATEMENT AND THE OPPORTUNITY TO
CHANGE THE STATUS QUO OF SHAREHOLDER WEALTH
MAXIMIZATION

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In recent years, corporate leaders have increasingly described measures they will take to address the concerns of their stakeholders: members of the corporations' community that do not actually own stock in the company and are therefore not a part of the shareholder class. Perhaps the most prominent example of this trend is the Business Roundtable's August 2019 Statement on the Purpose of a Corporation, which pledged that the influential corporations comprising the Roundtable will begin focusing on providing value to stakeholders in addition to the routine operation and governance of their companies.

As commendable as this generosity towards stakeholders may sound, it is hard to ignore the tension it appears to create with Delaware's longstanding shareholder wealth maximization rule. The shareholder wealth maximization rule provides that a corporation's directors must make all of their governance decisions with the objective of increasing the wealth of the corporation's shareholders. If a corporation's directors make decisions aimed towards creating stakeholder value, are they not violating this shareholder wealth maximization rule? This Comment analyzes the state of corporate purpose law in Delaware to ascertain where the stated initiatives of the Business Roundtable fit in relation to the shareholder wealth maximization rule and the business judgment rule.

This Comment argues that, as corporate purpose law is currently treated in Delaware, the Business Roundtable corporations have an opportunity to implement stakeholder initiatives under the protection of the business judgment rule, which requires that courts not interfere with a corporation's good-faith business decisions. This Comment also recognizes, however, that stakeholder focus to the degree suggested by the Business Roundtable Statement is completely unprecedented, which could prompt newfound enforcement of the shareholder wealth maximization rule. Which of these two outcomes will prevail remains to be seen.

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INTRODUCTION

Perhaps the most foundational doctrine in corporate law is the law of corporate purpose. This is because corporate purpose law attempts to answer the most fundamental question about corporations: for what purpose are corporations formed and operated?¹ Delaware is the state in which the majority of Fortune 500 companies are incorporated² and is the leading jurisdiction on corporate law.³ Through case law, Delaware courts have asserted that corporate directors, when making decisions in their capacity as directors, have a duty to maximize the wealth of the corporation’s shareholders.⁴ This doctrine is either known as shareholder primacy

1. See David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKLEY BUS. L.J. 181, 183–84 (2013) (discussing “the fundamental question of what boards of directors are supposed to do with the corporations they command”).

2. DEL. DIV. OF CORPS., 2020 ANNUAL REPORT STATISTICS (2020), <https://corp.delaware.gov/stats/>.

3. See Yosifon, *supra* note 1, at 184 (“Delaware dominates the corporate law landscape in the United States.”).

4. See, e.g., *eBay Domestic Holdings Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (discussing the fiduciary duty to which a corporation’s directors are

or the shareholder wealth maximization rule.⁵ While this rule might seem very straightforward, the role it plays in Delaware law becomes a little more complicated upon closer inspection. For instance, Delaware courts have been extremely reluctant to enforce the duty of shareholder wealth maximization against any slate of directors.⁶ This has led some to call the rule unenforceable.⁷ Further, this reluctance, in turn, catalyzes a surprising amount of debate from legal scholars about the degree to which Delaware case law actually creates a duty to maximize shareholder wealth altogether.⁸

What seems to not be contested, however, is that over the last four decades the Delaware Court of Chancery has gradually increased the frequency of mentioning, and thereby endorsing, the doctrine of shareholder primacy in its cases.⁹ This trend holds especially true immediately following the most significant shareholder wealth maximization case this century: *eBay Domestic Holdings, Inc. v. Newmark*.¹⁰ Over the last decade, the court's apparent high level of enthusiasm for shareholder wealth maximization comes at a time in which the public's attitude towards corporations seems to have moved steadily in the opposite direction, reflecting a desire for corporations to move away from the shareholder primacy model towards a more stakeholder-friendly approach.¹¹ Perhaps the culmination of these sentiments came with the arrival of the Business Roundtable's "Statement on the Purpose of a Corporation" (the "Statement") in August 2019.¹² The Statement, contrary to the Business

bound, which "include[s] acting to promote the value of a corporation for the benefit of its stockholders").

5. See Bernard S. Sharfman, *Shareholder Wealth Maximization and its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 391 (2014) (stating that shareholder wealth maximization "encourages a firm's board of directors to implement all major decisions such as compensation policy, new investments, dividend policy, strategic direction, and corporate strategy with only the interests of shareholders in mind").

6. See *id.* at 398.

7. See Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 2010 (2018).

8. See *infra* Subpart II.A.

9. See Rhee, *supra* note 7, at 1991.

10. 16 A.3d 1 (Del. Ch. 2010).

11. See Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 149–50 (2012) (describing public anger at the court's pro-shareholder primacy decision in *eBay*); Doug Sundheim & Kate Starr, *Making Stakeholder Capitalism a Reality*, HARV. BUS. REV. (Jan. 22, 2020), <https://hbr.org/2020/01/making-stakeholder-capitalism-a-reality> (identifying the financial crisis, climate change, and rising inequality as factors that have contributed to the increase in the stakeholder movement).

12. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (August 19, 2019) (signatures last updated July 2021) [hereinafter *Statement*], <https://opportunity.businessroundtable.org/ourcommitment/>.

Roundtable's previously promulgated Principles of Corporate Governance, advocated for a more stakeholder-friendly system of governance.¹³

This Comment focuses on corporate purpose law as it has been historically handled by Delaware courts and the ensuing implications of the Statement for the immediate future. Part I discusses the decades of case law concerning shareholder primacy as it has been shaped by the Delaware Supreme Court and the Delaware Court of Chancery. Part II then discusses the academic debates surrounding the nebulous state of corporate purpose law, and more specifically, whether or not directors actually have a duty to maximize shareholder wealth. Part III then explores the implications of the current state of the law on the Statement.

Part IV posits that an opportunity exists for the Business Roundtable corporations and, by extension, any corporation incorporated in Delaware to change the prevailing culture of corporate purpose law in Delaware. Part V continues by analyzing the two possible responses of the Delaware courts to a widespread increase in stakeholder-minded corporate initiatives and explains why one response is more likely than the other. This Comment concludes by asserting that, assuming the Business Roundtable corporations follow through on their commitment to bring value to stakeholders, either an unprecedented amount of stakeholder attention will arise, or, alternatively, the Delaware courts will be forced to begin enforcing the shareholder primacy rule to an unparalleled degree. In other words, something's got to give.¹⁴

I. SHAREHOLDER PRIMACY IN DELAWARE

A. *Delaware Shareholder Primacy Case Law pre-eBay*

For such an incredibly important area of corporate law, the Delaware case law surrounding the doctrine of corporate purpose is surprisingly murky. This is not to imply that Delaware law's ostensible requirement is unknown: a corporation's directors must make their governance decisions for the ultimate benefit of that

13. *Id.* (stating that each issuance since 1997 advocated shareholder primacy).

14. It is important to note at the outset that this Comment does not take a position on whether or not shareholder primacy, or a more stakeholder-friendly model of governance, is more desirable for society overall. For arguments on why shareholder primacy is the better overall system, see Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 143–47 (2020); Bernard S. Sharfman, *The Importance of the Business Judgment Rule*, 14 N.Y.U. J.L. & BUS. 27, 57–60 (2017). For purposes of this Comment, it's enough to note that corporations and the general public are intensely advocating for a stakeholder-friendly model, so my analysis goes from there.

corporation's shareholders.¹⁵ But in practice the doctrine appears to be more complicated, and an overview of the Delaware courts' past treatment of corporate purpose law is necessary to provide clarity on what the law presently requires.

Such an overview would be incomplete without mention of the most famous corporate purpose case, *Dodge v. Ford Motor Co.*¹⁶ Since *Dodge* is instructive on the concept of shareholder wealth maximization, it is useful to view it as a benchmark for the doctrine. The controversy in *Dodge* arose when Henry Ford was sued by two of his company's shareholders, John and Horace Dodge.¹⁷ John and Horace alleged that Mr. Ford withheld dividends for the purpose of reinvesting the money into the corporation.¹⁸ Mr. Ford's stated purpose for reinvesting the money was "to spread the benefits of this industrial system to the greatest possible number, to help [people] build up their lives and their homes."¹⁹ The public would enjoy the specific benefit of a reduction in automobile prices.²⁰ The court found this "humanitarian" explanation lacking and delivered the famous holding that "[a] business corporation is organized and carried on primarily for the profit of the shareholders. The powers of directors are to be employed for that end."²¹ Notably, while denouncing Mr. Ford's stated plan, the court conceded that it should not "interfere" with the plan because the members of the court were not "business experts," and such a plan could conceivably result in increased shareholder profit in the long run.²² Essentially, this was the court's articulation of the business judgment rule, which requires that courts should not second-guess good faith business decisions made by a corporation's board.²³ As will be explained later in this Comment, the shareholder primacy rule and the business judgment rule are tightly intertwined in Delaware law.

Despite being the most famous shareholder primacy case, *Dodge's* influence on Delaware corporate law is perhaps overstated. For one, *Dodge* is a Michigan Supreme Court case.²⁴ Additionally,

15. See Strine, *supra* note 11, at 149–55.

16. 170 N.W. 668 (Mich. 1919).

17. *Id.* at 671.

18. See *id.* at 671.

19. *Id.*

20. See *id.* at 683.

21. *Id.* at 684

22. See *id.*

23. See *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984). While the holding of the *Aronson v. Lewis* case was overruled, for this Comment, the case is cited solely for its analysis of the business judgment rule with respect to corporate directors. *Id.* at 816 (*overruled by Brehm v. Eisner*, 746 A.2d 244 (2000)); Sharfman, *supra* note 5, at 407 (stating that the *Dodge* holding represented an embrace of the business judgment rule).

24. See Rhee, *supra* note 7, at 1957–58.

Delaware courts have only cited *Dodge* three times.²⁵ It was not until the 1980s that Delaware courts began discussing shareholder primacy, approximately sixty-five years after *Dodge*.²⁶ At that time, Delaware developed its own set of shareholder primacy cases, which laid the foundation for the later *eBay* holding.

While there were a few prior cases that discussed shareholder primacy,²⁷ for the purposes of the Delaware Court of Chancery's eventual *eBay* holding, the first notable case is the Delaware Supreme Court's decision in *Unocal Corp. v. Mesa Petroleum Co.*²⁸ The issue in *Unocal* involved a board's decision to implement defensive measures while fighting a corporate takeover. *Unocal* established an enhanced judicial scrutiny test for situations involving an "omnipresent specter," which is the strong sense that directors are working for their own interests and not that of the shareholders.²⁹ In such situations, a director's defensive response must be reasonable and proportional to the perceived threat.³⁰ Further, while the court in *Unocal* affirmed that directors should act in "the best interests of the corporation's stockholders," the court also included "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)" as a factor the board may consider when analyzing the potential threat posed by a takeover.³¹

A year later in 1986, the Delaware Supreme Court decided another important shareholder primacy case: *Revlon Inc. v. MacAndrews & Forbes Holdings, Inc.*³² The facts in *Revlon* concerned a bidding auction for a corporation, during which the corporation's board adopted certain defensive measures to prevent an imminent purchase.³³ The board defended its actions on the basis that it was protecting its creditors and cited the "constituencies" language in *Unocal* for support.³⁴ The court applied the *Unocal* test and ruled in favor of the would-be acquirers, modifying the court's previous language in *Unocal* to clarify that, while boards could consider their constituencies' needs, they can only do so "provided there are rationally related benefits accruing to the stockholders."³⁵ The court asserted that the board's attempt to satisfy its noteholders by

25. *Id.* at 1959.

26. *See id.* at 1987–88.

27. *See id.* (identifying Delaware's first discussion of shareholder primacy to have taken place in 1985).

28. 493 A.2d 946 (Del. 1985).

29. *Id.* at 954.

30. *See id.* at 955.

31. *Id.*

32. 506 A.2d 173 (Del. 1986).

33. *See id.* at 176–77.

34. *Id.* at 182.

35. *Id.*

prematurely ending an auction cannot conceivably result in a larger shareholder gain.³⁶ That this “bidding war” situation calls for enforcement of the shareholder wealth maximization rule makes intuitive sense because, in the face of an imminent sale, the best way to maximize shareholder wealth in the long-run is to sell for the highest price. As a result, these *Revlon* situations have historically come before the Delaware courts more frequently than any other shareholder primacy factual scenario,³⁷ cementing the *Revlon* scenario as a category unto itself.

B. eBay v. Newmark

In the decades following those two foundational decisions, the shareholder primacy rule was not enforced outside of *Revlon* situations but was rather reinforced by the Delaware courts through case law rhetoric.³⁸ This pattern changed in 2010 when the Delaware Court of Chancery decided the seminal case, *eBay Domestic Holdings, Inc. v. Newmark*.³⁹ Jim Buckmaster and Craig Newmark (“Jim and Craig”), the founders, majority shareholders, and two of the three directors of Craigslist, Inc.,⁴⁰ began feuding with minority shareholder, eBay, over various differences relating to Craigslist’s future as a business.⁴¹ Eventually, Jim and Craig took several defensive actions to hinder eBay’s ability to purchase more shares and to appoint a director on the board.⁴²

The Delaware Court of Chancery, applying the *Unocal* test, invalidated one of these measures—the shareholder rights plan—on the premise that it was not implemented in a good faith attempt to increase shareholder wealth.⁴³ Jim and Craig’s main argument for implementing the shareholder rights plan was that they were trying to protect Craigslist’s corporate culture.⁴⁴ The court, however, found this argument unpersuasive because Jim and Craig provided no evidence that their corporate culture, which was heavily inspired by a sense of altruism and philanthropy, “translate[d] into increased profitability for stockholders.”⁴⁵ This was a momentous holding. It was easy enough for directors to understand and comply with cases that involved *Revlon* situations, but *eBay* represented uncharted territory in which a directors’ action outside of a bidding context could

36. *See id.* at 184–85.

37. *See Rhee, supra* note 7, at 1986.

38. *See id.* at 1990–91.

39. 16 A.3d 1 (Del. Ch. 2010).

40. *See id.* at 6–9.

41. *See id.* at 9–11, 14–16.

42. *See id.* at 6.

43. *See id.* at 34.

44. *See id.* at 32.

45. *Id.* at 33.

be invalidated because the action lacks a visible connection to maximizing shareholder wealth.⁴⁶

In the years following *eBay*, Delaware courts have continued to rhetorically reinforce shareholder primacy, even if never going so far as to rule against a director for failing to take an action that maximizes shareholder wealth.⁴⁷ Instead, Delaware courts have largely used the shareholder primacy language from *eBay* to discuss, but not enforce, shareholder primacy or to reach holdings in other points of law.⁴⁸ In fact, the years directly following *eBay* seemed to represent something of a high mark in the frequency of the Delaware Court of Chancery's general discussions about shareholder primacy.⁴⁹ These discussions frequently cite the same straightforward quote from *eBay*: “[D]irectors must seek to promote the value of the corporation for the benefit of its stockholders.”⁵⁰

C. *The Arrival of the Business Roundtable Statement*

The proshareholder primacy holding in *eBay*, and the subsequent constant endorsements by the Delaware Court of Chancery, apparently did not depress the public's desire to see corporations become more stakeholder friendly. Nine years after *eBay*, the Business Roundtable released its Statement, advocating for a system of governance that puts more emphasis on stakeholder needs.⁵¹ The Business Roundtable, founded in 1972, is a large and influential association of CEOs working for some of the most powerful companies in America, such as Alphabet Inc., Amazon, and Apple.⁵² The Business Roundtable periodically issues its “Principles of Corporate Governance,” which express the Business Roundtable's current

46. See David B. Guenther, *The Strange Case of the Missing Doctrine and the “Odd Exercise” of eBay: Why Exactly Must Corporations Maximize Profits to Shareholders?*, 12 VA. L. & BUS. REV. 427, 484 (2018) (outlining the various newfound troubles directors would run into while attempting to comply with *eBay* and engaging in basic business transactions).

47. See Rhee, *supra* note 7, at 1959–60 (identifying *eBay*, along with *Dodge*, as two of the only examples in case law of a court enforcing a duty to maximize shareholder wealth).

48. See cases cited *infra* notes 136, 137, and 139.

49. See Rhee, *supra* note 7, at 1986–87.

50. See, e.g., *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013); *Klaassen v. Allegro Dev. Corp.*, C.A. No. 8626-VCL, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013); *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 35 n.21 (Del. Ch. 2014).

51. See *Statement*, *supra* note 12.

52. *About Us*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us> (last visited Nov. 6, 2021); *Members*, BUS. ROUNDTABLE, <https://www.businessroundtable.org/about-us/members> (last visited Nov. 6, 2021) (listing the leading CEOs who are currently members of the Business Roundtable).

position on the corporation's role in society.⁵³ The Statement differed substantially from its previous statements, which all largely supported the contention that "corporations exist principally to serve their shareholders."⁵⁴ The Statement disclaims this previous viewpoint, stating that "this language on corporate purpose does not accurately describe the ways in which we and our fellow CEOs endeavor every day to create value for our stakeholders, whose long-term interests are inseparable."⁵⁵ The Statement goes on to list a number of stakeholders to which the Business Roundtable corporations "share a fundamental commitment," including customers, employees, suppliers, communities, and shareholders.⁵⁶

D. The Delaware Court of Chancery's Treatment of Shareholder Primacy Post-Statement

Since the Statement, the Delaware Court of Chancery has been relatively quiet on the issue of corporate purpose and shareholder primacy, at least in its use of *eBay*. This is important because a significant percentage of the corporations whose CEOs signed the Statement are incorporated in Delaware and are thus beholden to Delaware law.⁵⁷ Since August 2019, Delaware courts have only cited *eBay* once—in *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*⁵⁸ in October 2019—in support of the contention that Delaware law requires shareholder wealth maximization.⁵⁹ The facts in *Bandera* dealt with a partnership, and the court draws a distinction between the fiduciary duties that a director in a corporation must adhere to and the fiduciary duties that exist in a limited partnership.⁶⁰ In the process, the court cites the classic *eBay* assertion that "directors must seek to promote the value of the corporation for the benefit of its stockholders."⁶¹

53. See *Statement*, *supra* note 12.

54. *Id.*

55. *Id.*

56. See *id.*

57. See *Bebchuk & Tallarita*, *supra* note 14, at 137 (explaining that seventy percent of the Business Roundtable companies that signed the statement are incorporated in Delaware).

58. C.A. No. 2018-0372-JTL, 2019 WL 4927053 (Del. Ch. Oct. 7, 2019).

59. As of November 2021 this is no longer true. The Delaware Court of Chancery cited *eBay* again to support this contention in May 2021. See *In re Pattern Energy Grp. Inc. S'holders Litig.*, C.A. No. 2020-0357-MTZ, 2021 WL 1812674, at *47 n.620 (Del. Ch. May 6, 2021).

60. See *Bandera*, 2019 WL 4927053, at *14.

61. *Id.*

II. THE DEBATE SURROUNDING THE DOCTRINE

A. *The Argument That There Is No Duty to Enhance Shareholder Wealth*

Revlon makes it very clear that directors have a duty to maximize shareholder value while engaged in a bidding war for the sale of the company.⁶² Whether and to what extent directors must consider stakeholders when making decisions outside of those situations on a day-to-day basis, however, is much less clear. *eBay* has provided little clarity on the issue. In fact, in the years following the *eBay* decision, whether or not a duty exists to maximize shareholder value has inspired intense debate amongst legal scholars.⁶³

Stakeholder-minded scholars have posited that Delaware law actually permits directors to consider stakeholder interests while making decisions and that there is no actual duty to maximize shareholder value.⁶⁴ The basis for this opinion sometimes arises out of the Delaware Supreme Court's language in *Unocal*, where the court seems to concede that directors can, in fact, consider constituencies other than shareholders when analyzing the threat level an imminent takeover poses.⁶⁵ Corporate law scholars have labeled the duty to maximize shareholder wealth a "myth"⁶⁶ that is only held in place by external incentive mechanisms reinforced by corporations, academia, and even the media.⁶⁷ Directors not only comply with the rule because everyone else does but also because of market incentives that reward doing so.⁶⁸ The Delaware courts' strong endorsement of shareholder primacy also contributes greatly to the prevailing "norm" of shareholder wealth maximization by increasing social pressure to comply.⁶⁹

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

63. See LYNN STOUT, *THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC* 21 (2012).

64. See *id.*

65. See *id.* at 23 (citing *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985)).

66. Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 951 (2020).

67. See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 17–19 (2012) ("The perception may stem from the pronouncements of courts in *Dodge* and *eBay*, from various academic articles, from education in business and law schools, and from the popular media.").

68. See *id.*

69. See Rhee, *supra* note 7, at 2007 ("The rule of law and the legal system writ large, not social norm, have resulted in today's strongly shareholder-centric economic orientation in corporate governance.").

It has also been asserted that the duty to maximize shareholder wealth is unenforceable, so even if it is “law,” it is essentially rendered moot, at least in its capacity as a legal duty.⁷⁰ The relatively unenforceable nature of the shareholder wealth maximization rule can be credited to the existence of the business judgment rule.⁷¹ The business judgment rule allows directors to almost always defend their actions as being in the best interests of the long-term value of the corporation—and, in turn, the shareholders—even if the connection is not always visible to the court.⁷² The arguments for why there is no shareholder wealth maximization duty vary in their particular characterizations, but the overarching assertion is that shareholder wealth maximization is not a duty that directors need to adhere to either because nonadherence is what the law permits⁷³ or because the law cannot enforce it.⁷⁴

B. The Counterpoint: A Duty to Maximize Shareholder Wealth Does Exist

At the same time, there are also prominent opponents of the contention that shareholder wealth maximization is not a duty.⁷⁵ Former Chancellor of the Delaware Court of Chancery and Chief Justice of the Delaware Supreme Court, Leo Strine, Jr., has stated decisively that directors do have a duty to maximize shareholder wealth; this duty arises from the directors’ duty of loyalty and can be satisfied through a good faith, long-term effort to maximize shareholder profits.⁷⁶ Importantly, former Chief Justice Strine makes clear that this duty is not one to maximize shareholder wealth in the short term.⁷⁷ He goes on to assert, however, that various incentives inherently exist in a for-profit corporation that make it fundamentally misguided to rely on a corporation to meaningfully invest in its stakeholders.⁷⁸ Some of these incentives include general human psychology that favors the short term, pressure from shareholders, and the corporate structure itself.⁷⁹

70. *See id.* at 2004 (“Shareholder primacy is not a legal duty, but is instead a legal obligation.”).

71. *See id.* at 1961.

72. *See Macey, supra* note 66, at 950 (“[T]he business judgment rule is the key to understanding why the notion of shareholder wealth maximization is a norm and not an enforceable legal principle.”).

73. *See Stout, supra* note 63, at 21 (stating that it is not the law).

74. *See Rhee, supra* note 7, at 1961 (asserting that it cannot be enforced).

75. *See, e.g., Yosifon, supra* note 3, at 200.

76. *See Strine, supra* note 11, at 155.

77. *See id.*

78. *See id.* at 145–46.

79. *See id.* at 138, 150–51, 153. *See also* David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 529 (2011) (identifying short-term perspectives, earnings pressure from institutional investors, management compensation structures, and social norms as non-

Former Chief Justice Strine's contention that directors do in fact have a duty to maximize shareholder wealth in the long term finds significant support from the Delaware legal community, and such support is evident in Delaware's case law.⁸⁰ Further, the argument that *Unocal* permits corporations to consider stakeholder constituencies for their own sake can be refuted by viewing *Revlon* as making a clarifying correction.⁸¹ *Revlon* explains that *Unocal*'s perceived permission to consider stakeholders is only acceptable so long as these decisions bring "rationally related benefits accruing to the stockholders."⁸²

III. THE SHAREHOLDER PRIMACY RULE AS IT STANDS

While the Statement qualifies as something of a turning point in both corporate culture and discourse regarding corporate purpose law, it remains unclear whether the governing strategy advocated by the Business Roundtable CEOs would even comply with Delaware law. As such, it is important to analyze the current state of shareholder primacy law to understand the opportunities available to the Business Roundtable CEOs and, therefore, any corporate board that may choose to implement a corporate strategy focusing on stakeholders. As explained in Part II, whether Delaware law requires directors to adhere to a duty to maximize shareholder wealth is a heavily debated topic. This discourse reveals something of a nebulous center held together by a balance between the shareholder wealth maximization rule and the business judgment rule. This Part recognizes the essential correctness on both sides of that debate and attempts to reach a conclusion regarding the current legal landscape facing the Business Roundtable corporations or any corporation that desires to work towards stakeholder value.

This Comment disputes characterizing the shareholder wealth maximization rule as a complete myth or pure norm.⁸³ But, this Comment recognizes the reality that the rule is effectively unenforceable so long as directors frame their strategy to reflect a

judicial factors contributing to the dominant culture of shareholder wealth maximization).

80. See Sharfman, *supra* note 14, at 64–66; Yosifon, *supra* note 1, at 195 (“[W]hen you hear Delaware jurists speak, they make no bones about the fact that Delaware law requires corporate directors to pursue the interests of shareholders, and allows them to do nothing else.”).

81. See Yosifon, *supra* note 1, at 199.

82. See *id.* (quoting *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 176 (Del. 1986)).

83. See Lynn Stout, *The Shareholder Value Myth*, CORNELL L. FAC. PUBL'NS (April 19, 2013) <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2311&context=facpub>; Sharfman *supra* note 5, at 393–94.

commitment to long-term shareholder interests.⁸⁴ As a result, this Comment argues that the corporations represented in the Business Roundtable have an opportunity to take advantage of the nebulous state of existing law to govern in the way they see socially responsible; otherwise, their corporate actions will prompt Delaware courts to begin enforcing the shareholder primacy rule to a newfound degree. But, this Comment argues that in either scenario, the status quo balance of the shareholder primacy rule and the business judgment rule will be tested, and therefore the prevailing culture of shareholder primacy will change. This is so long as the corporations in the Business Roundtable actually start governing in the way that is reflected in their Statement.

While the current lack of enforcement history for the shareholder wealth maximization rule provides compelling support for the assertion that no duty actually exists, the *eBay* decision seems to be a thorn in the side of proponents of such an argument. *eBay*, as it stands, is evidence that the shareholder wealth maximization rule is demonstrably not a myth. Rather, *eBay* articulates that a duty to make decisions for the purpose of maximizing shareholder value *does* exist for directors, even outside of imminent auction scenarios.⁸⁵ After all, try telling Jim and Craig that the duty to make decisions for the purpose of maximizing shareholder value is an unenforceable “myth” that they can totally disregard. Jim and Craig already tried to disregard it once, and it did not go over well.

Commentators have argued that the situation in *eBay* is something of a special outlier or even a mistake, dismissing the existence of a duty to maximize shareholder wealth because of the unique circumstances that led to applying the *Unocal* test.⁸⁶ But such arguments do little in light of the fact that, in the decade following *eBay*, the Delaware Court of Chancery has repeatedly and vehemently reaffirmed the shareholder wealth maximization rule in other decisions while citing *eBay* as support.⁸⁷ If *eBay* is in fact

84. See Rhee, *supra* note 7, at 1961–62 (listing a number of claims against directors that have failed despite the appearance of favoring stakeholders over shareholders at least in the short-term).

85. See *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (“Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders.”).

86. See Rhee, *supra* note 7, at 1963 (asserting that, because *eBay*’s holding resulted from a *Unocal* review, it did not establish an independent duty); Guenther, *supra* note 46, at 473–74 (arguing that the *Unocal* rule was misapplied because the shareholder wealth maximization rule only makes sense to protect shareholder’s expectations and that Jim and Craig’s expectations, as shareholders, were not harmed by their actions as directors).

87. See, e.g., *In re Rural/Metro Corp. S’holders Litig.*, 102 A.3d 205, 253 (Del. Ch. 2014); *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A.

something of an outlier or a regret for the court, the court has not demonstrated an effort to distinguish or change *eBay's* rule. A duty does not cease to exist because it is highly difficult to enforce and easy to sidestep, and *eBay* seems to be enough to prove this.⁸⁸

The key is, of course, that the duty to maximize shareholder wealth can almost always be satisfied by asserting that the challenged action was in the pursuit of long-term shareholder value, even if that value is not immediately obvious.⁸⁹ Addressing stakeholder concerns in the short-term can increase the long-term value of a company.⁹⁰ This possibility, along with the protection of the business judgment rule, makes any real enforcement of the shareholder wealth maximization rule extremely rare. Nevertheless, as *eBay* is testament, it is not completely unenforceable.

eBay has been called the *Dodge* of the twenty-first century.⁹¹ Similarities between the two cases have been identified in order to uncover when courts deem that a particular board action violates the duty of shareholder wealth maximization.⁹² Jim and Craig, like Henry Ford before them, made the mistake of clearly taking a corporate action not for the benefit of the corporation's shareholders but for a separate purpose altogether.⁹³ The court found that Jim and Craig's stated defense of protecting Craigslist's "corporate culture" failed because Craigslist's practice of offering free services was not a culture but rather "purely philanthropic."⁹⁴ Jim and Craig did not make an argument refuting this characterization.⁹⁵ As for their counterpart in 1919, while the court stopped short of interfering,⁹⁶ Henry Ford was found to have violated the shareholder wealth maximization rule largely because of his own admitted indifference to shareholder profit.⁹⁷

In sum, the current state of corporate purpose law in Delaware is one best characterized as a balance between the shareholder primacy

No. 2018-0372-JTL, 2019 WL 4927053, at *14 (Del. Ch. Oct. 7, 2019); *see also* Sharfman, *supra* note 14, at 64–66 (identifying three additional post-*eBay* cases that strongly advocate a duty to maximize shareholder wealth).

88. *See* Yosifon, *supra* note 1, at 224 (drawing distinction between rare enforcement and nonexistent enforcement).

89. *See* Rhee, *supra* note 7, at 1962.

90. *See* Millon, *supra* note 79, at 532 (identifying Johnson & Johnson's anti-smoking program as one example of an expensive stakeholder initiative that turned out to be in the company's best long-term financial interest).

91. Yosifon, *supra* note 1, at 193.

92. *See* Strine, *supra* note 11, at 148.

93. *See id.*, at 148–49.

94. *See eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 33–34 (Del. Ch. 2010).

95. *See* Strine, *supra* note 11, at 149.

96. *See Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

97. *See id.*

rule and the business judgment rule.⁹⁸ While directors can be found to have violated the duty in the most egregious instances of neglecting shareholder value, such as explicitly admitting to taking an action for a nonshareholder purpose like in *eBay* or *Dodge*, they almost always will be afforded protection by the business judgment rule.⁹⁹ This does not mean, however, that directors currently take advantage of this freedom to focus on stakeholder needs. Directors very much abide by the rule that all actions must be taken for the benefit of shareholders.¹⁰⁰ This compliance is the result of external forces, such as judicial endorsement and social pressure,¹⁰¹ and internal incentives, such as compensation structures.¹⁰² All such influences make it unlikely that directors will venture away from governing in a manner that is not attuned to shareholder wealth maximization. In this way, corporations effectively police themselves and end up complying with the shareholder wealth maximization rule without needing any actual enforcement from the courts. But, just because corporations can conceivably sidestep the shareholder wealth maximization rule does not mean courts will always be so deferential when they do. Corporations, to a large degree, comply with the shareholder wealth maximization rule on their own;¹⁰³ to what extent courts will tolerate genuine, substantial governance deviation to a more stakeholder-oriented approach remains an open question.

IV. THE BUSINESS ROUNDTABLE'S OPPORTUNITY AND DELAWARE COURTS' OPTIONS TO RESPOND

A. *The Opportunity Available to the Business Roundtable*

The corporations represented in the Business Roundtable are in a unique position to answer this open question: to what degree can a

98. See Macey, *supra* note 66, at 950–51.

99. See Yosifon, *supra* note 1, at 223.

100. See Macey, *supra* note 66, at 953 (showing a survey of directors in various countries and revealing a strong obedience to shareholder wealth maximization principles on the part of American directors, as compared to directors in other countries); Bebchuk & Tallarita, *supra* note 14, at 156–57 (presenting a chart of the ten largest transactions in which a private equity firm acquired a public company incorporated in a state with a constituency statute and finding that practically none of the transactions provided for any stakeholder value).

101. See Rhee, *supra* note 7, at 2007 (describing that directors have internalized shareholder wealth maximization largely due to consistent reinforcement, as opposed to enforcement, by courts); Millon, *supra* note 79, at 528 (describing how corporate directors pursue short-term profits to reflect in quarterly earnings instead of forgoing such increases to pursue a long-term strategy that could incorporate stakeholder interests).

102. See Bebchuk & Tallarita, *supra* note 14, at 140–46 (analyzing incentive structures of directors and CEOs and concluding that both are incentivized towards shareholder primacy).

103. See Macey, *supra* note 66, at 951–53.

corporation devote attention to stakeholder needs? Any significant attempt to answer this question will disrupt the balance of the shareholder wealth maximization rule and the business judgment rule. Thus, assuming these corporations implement their stakeholder plans, their actions will trigger one of two results. The first result is that Delaware courts will be compelled to begin enforcing the shareholder wealth maximization rule, bringing greater specificity to Delaware's corporate purpose law in the process.¹⁰⁴ The second result is that Delaware courts will continue their highly deferential approach, and the Business Roundtable corporations' actions towards stakeholders will be a large step in the direction towards encouraging all corporations to begin exercising the freedom accorded to them by the business judgment rule in order to shift societal focus towards stakeholders.¹⁰⁵

As stated above in Subpart I.C, the Statement explicitly advocates for corporations to adopt a strategy that commits to bringing value to various corporate stakeholders.¹⁰⁶ In doing so, the Statement "supersedes" its previous statements that advocated for a strict shareholder wealth maximization approach.¹⁰⁷ Delaware corporate law grants wide protection to directors to pursue corporate strategies so long as doing so results in "rationally related benefits accruing to the stockholders."¹⁰⁸ Thus, whether or not the Business Roundtable corporation's stated governance objectives comply with Delaware law will depend largely on the degree to which they can stay within those lines.

eBay and *Revlon* serve as the known outer boundaries for which the Delaware courts will not tolerate certain stakeholder-minded initiatives at the expense of shareholder value.¹⁰⁹ While *Revlon* auction scenarios are easy enough for corporations to recognize and comply with, *eBay* proves to be a more challenging precedent to apply when it comes to identifying the fine line that directors cannot cross when making corporate governance decisions. The wording of the Statement seems to evince an understanding of this need to tie stakeholder initiatives to long-term shareholder value.¹¹⁰ The second

104. See, e.g., *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010) (holding that "a corporate policy that specifically, clearly, and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders" was not valid).

105. See, e.g., *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986) (holding that "a board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders").

106. See *Statement*, *supra* note 12.

107. See *id.*

108. *Revlon*, 506 A.2d at 182.

109. See *Yosifon*, *supra* note 1, at 224.

110. See *Statement*, *supra* note 12.

paragraph of the Statement mentions “inclusive long-term growth,” and then in later paragraphs states “we and our fellow CEOs endeavor every day to create value for all our stakeholders, whose long-term interests are inseparable.”¹¹¹ Later phrases include “inclusive prosperity,” “long-term value,” “economic growth,” and a final promise to “generate[] long-term value for shareholders.”¹¹² Language such as this, which signals a commitment to delivering long-term value, provides evidence that the Business Roundtable corporations do not treat the duty of shareholder wealth maximization as a myth but rather treat *eBay* as a cautionary tale of how enforcement can occur when a corporation’s governance decisions become too “purely philanthropic.”¹¹³

Although the Business Roundtable has an opportunity to change how shareholder primacy is treated in Delaware, it apparently has not yet made an effort to affect change.¹¹⁴ Crucially, for the Statement to have any impact at all, whether through changing the culture around shareholder wealth maximization by encouraging directors to pursue stakeholder interests or through forcing Delaware courts to begin enforcing the shareholder wealth maximization rule consistently, such change relies on corporations actually taking action to implement stakeholder-oriented strategies. If the Business Roundtable corporations decline to implement any meaningful change in this regard, neither of the two aforementioned scenarios will occur, and the status quo balance in which corporations are given wide but underutilized leeway will remain.

Since the release of its call-to-arms Statement, the Business Roundtable has been accused of “greenwashing” by prominent academics.¹¹⁵ Early evidence appears to support such accusations. Since August 2019, none of the companies represented in the Statement have amended their corporate governance guidelines to reflect the prostakeholder approach championed in the Statement.¹¹⁶ In fact, most of their corporate guidelines still retain an explicit avowal of a shareholder primacy model of governance.¹¹⁷ For

111. *Id.*

112. *Id.*

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

114. See Aneesh Raghunandan & Shiva Rajgopal, *Do the Socially Responsible Walk the Talk?* 2 (Apr. 1, 2021), <https://ssrn.com/abstract=3609056>.

115. See Stephen M. Bainbridge, *More Evidence That The Business Roundtable's Statement Oil Corporate Purpose Was Mere Greenwashing*, PROFESSORBAINBRIDGE.COM (Mar. 18, 2021), <https://www.professorbainbridge.com/professorbainbridgecom/2021/03/more-evidence-that-the-business-roundtables-statement-oil-corporate-purpose-was-mere-greenwashing.html>.

116. See Bebchuk & Tallarita, *supra* note 14, at 134–37 (examining the governance guidelines of the twenty companies whose CEOs sit on Business Roundtable’s board and concluding that none have been changed to reflect stakeholder concerns since the release of the Statement).

117. *See id.*

example, Jamie Dimon, the Chairman of the Business Roundtable and CEO of JPMorgan Chase, is featured prominently on the Statement's press release,¹¹⁸ but his company's governance guidelines still explicitly promote shareholder primacy.¹¹⁹ In February 2021, JPMorgan Chase's board declined to convert to a public benefit corporation, perhaps adding further evidence that nothing has significantly changed in the companies' governance attitudes since the release of the Statement.¹²⁰

This raises the concern that if even the most prominent advocates for stakeholder-minded governance have little to show for their original enthusiasm just a year and a half following the Statement's issuance, perhaps, as former Chief Justice Strine postulated, corporations simply cannot be expected to self-govern in a way that is not strictly tailored towards shareholder wealth maximization.¹²¹ But, it is worth acknowledging the immense amount of power available to these companies¹²² and the positive incentives they potentially have to genuinely invest in stakeholders. For instance, clearly incentives are aligned enough to compel companies to release such a statement in the first place. With such a high level of public dissatisfaction with corporations,¹²³ "greenwashing" may be harder for companies to keep getting away with. Further, armed with the knowledge that stakeholder initiatives can result in a long-term value increase¹²⁴ and equipped with sufficient capital to pursue these initiatives in innovative ways, it does not seem unlikely that some of these corporations will take advantage of the opportunity available to them and begin earnestly attempting to deliver more value to stakeholders.

B. *The Response of the Courts: The Two Options Available*

As laid out above in Subpart IV.A, because of the lack of shareholder wealth maximization enforcement, the Business Roundtable has an opportunity to break away from the prevailing social norm of shareholder primacy and simultaneously change the

118. *Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>.

119. See Bebchuk & Tallarita, *supra* note 14, at 135.

120. Ross Kerber, *JP Morgan's Board Rejects Switch to Stakeholder-Focused Entity*, NASDAQ (Feb. 9, 2021), <https://www.nasdaq.com/articles/focus-jp-morgans-board-rejects-switch-to-stakeholder-focused-entity-2021-02-09-0>.

121. See Strine, *supra* note 11 at 145–46.

122. See Bebchuk & Tallarita, *supra* note 14, at 126 ("The CEOs who signed the statement head companies with an aggregate market capitalization exceeding \$13 trillion.").

123. See Strine, *supra* note 11, at 135.

124. See Rhee, *supra* note 7, at 1962.

state of Delaware's corporate purpose law. But the direction in which this change eventually goes—to a stakeholder-friendly approach or to a more heavily enforced shareholder wealth maximization rule—hinges on the reaction of the Delaware courts. Obviously, these corporations are not above the law, and any degree to which the courts find that corporations are violating the shareholder wealth maximization rule could bring any potential stakeholder initiatives to a swift end.

Delaware courts are certainly aware of the dynamic at play between the shareholder wealth maximization rule and the business judgment rule.¹²⁵ In part, this dynamic exists because the Delaware legal system allows it to occur.¹²⁶ Further, to this point, there has not been any real reason for the courts to disrupt this balance. Corporations comply with the shareholder wealth maximization rule on their own,¹²⁷ and the courts' interference with the independence and creativity of corporate directors could ironically have chilling effects on future value.¹²⁸ This further underscores the importance of the business judgment rule.¹²⁹ But if massively influential companies, such as the Business Roundtable corporations, decide to implement widespread stakeholder-focused strategies, it will end this dynamic and force the courts' hand in answering the question that has remained unanswered since *eBay*: to what degree can corporations attend to stakeholder needs while acting with the supposed long-term interests of the shareholders in mind?

The courts can answer this question in one of two ways: (1) they can continue to decide cases in the fashion they already do by deferring heavily to the business judgment rule, or (2) they can begin enforcing the shareholder wealth maximization rule. While both options would veer away from the status quo operation of shareholder primacy law, the magnitude of change presented by the first option relies on the initiative of corporations to genuinely commit to delivering value to stakeholders. In effect, the question posed by the

125. *Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996) (“The [business judgment rule] protects shareholder investment interests against the uneconomic consequences that the presence of such second-guessing risk would have on director action and shareholder wealth in a number of ways.” (emphasis omitted)).

126. *See* Sharfman, *supra* note 14, at 68 (“[P]rotecting the ability of Boards to make decisions without interference by shareholders and courts is the best way to ensure that SWM occurs.”).

127. *See* Yosifon, *supra* note 1, at 223.

128. *See* Aronson v. Lewis, 473 A.2d 805, 816 (1984) (*overruled by* Brehm v. Eisner, 746 A.2d 244 (2000)); Sharfman, *supra* note 5, at 406–07 (arguing that judicial deference to the business judgment rule preserves decision-making power in the entity that most effectively maximizes shareholder wealth: the board).

129. *See* Sharfman, *supra* note 5, at 406–07.

Statement forces the court to choose between the business judgment rule or the shareholder primacy rule.

The Delaware Court of Chancery contributes significantly to the overall social normality of the shareholder wealth maximization rule not by consistently enforcing the rule in the disputes brought before it but by *reinforcing* the rule through dicta in its opinions.¹³⁰ Further, in addition to rhetorically recognizing the existence of the doctrine, the court has also tied shareholder wealth maximization into the machinations of other legal doctrines, such as shareholder voting rights, inspection rights, derivative suits, and the legality of poison pill use.¹³¹ This situation suggests that the shareholder wealth maximization rule is not a doctrine that Delaware courts can easily pivot away from, at least explicitly.

In anticipating the reaction of the Delaware courts to increased stakeholder-focused corporate activity, and because the courts reinforce shareholder primacy through their rhetoric, it is potentially revealing to analyze such rhetoric following the Statement's issuance. Because the Delaware Court of Chancery only adjudicates private actions based on conflicts as they arise,¹³² and because the Business Roundtable corporations have hardly implemented their stakeholder-friendly policies,¹³³ it is perhaps not surprising that the court has yet to deliver an opinion directly on point. By analyzing the Delaware Court of Chancery's treatment of shareholder primacy both before and after the issuance of the Statement, however, one can appreciate the evolving attitude of the court towards stakeholder-focused actions.

By February 2021, eighteen months after the Statement, *Bandera* remained the sole case in which the Delaware Court of Chancery cited *eBay* to assert that directors are beholden to seek an increase in shareholder wealth when making decisions.¹³⁴ Going back to February 2018, in an identical span of time preceding the Statement, there was likewise only a single case supporting shareholder wealth maximization citing the strong language from *eBay*. The case, *In re PLX Technology Inc. Stockholders Litigation*,¹³⁵

130. See Rhee, *supra* note 7, at 1990–91.

131. See *id.* at 1993–99 (listing sixteen corporate law doctrines that are “explicitly justified” by the existence of a duty to maximize shareholder wealth).

132. See Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1604–07 (2005).

133. See *supra* Subpart IV.A.

134. *But see* *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A. No. 2018-0372-JTL, 2019 WL 4927053, at *14 (Del. Ch. Oct. 7, 2019). The *Pattern* decision, while certainly unambiguously endorsing shareholder primacy, was also a *Revlon* sale situation and thus is perhaps not indicative of how courts will treat non-sale situations moving forward. See *In re Pattern Energy Grp. Inc. S'holders Litig.*, C.A. No. 2020-0357-MTZ, 2021 WL 1812674, at *47 (Del. Ch. May 6, 2021) (showing that the *Pattern* court applied *Revlon* review).

135. C.A. No. 9880-VCL, 2018 WL 5018535 (Del. Ch. Oct. 16, 2018).

was decided in October 2018, almost exactly a year before *Bandera*.¹³⁶ Further, *Bandera* was decided only about a month and a half after the Statement was released.¹³⁷ Assuming *Bandera* was decided too closely in time to the Statement to infer anything about the Delaware Court of Chancery's reaction to the Statement, that leaves a considerable amount of time in which the court has not reinforced shareholder primacy using its most salient case.

In general, the Delaware courts' reliable use of *eBay* as a source to reinforce the doctrine of shareholder primacy seems to have peaked in the mid-2010s. For example, during the sixteen month period from November 2013 to February 2015, *eBay* was cited to support shareholder primacy in seven cases found on Westlaw.¹³⁸ An aggregate view of the Delaware Court of Chancery's use of *eBay* over the last decade is perhaps even more revealing. In the five years from 2011 to 2015, according to Westlaw and LEXIS, the Delaware Court of Chancery apparently used *eBay* to support some version of shareholder primacy eleven times.¹³⁹ A number of these cases utilized the same popular phrase from *eBay*: directors must seek "to promote the value of the corporation for the benefit of its stockholders."¹⁴⁰ In contrast, Delaware courts cited *eBay* to support the same general sentiment only three times in the subsequent five year period of 2016 through 2020.¹⁴¹ The last decade represents a

136. *Id.* at *1.

137. *See generally* *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A. No. 2018-0372-JTL, 2019 WL 4927053, at *1 (Del. Ch. Oct. 7, 2019) (noting that this case was decided in October 2019, which is about a month and a half after the Statement was released in August 2019).

138. *Klaassen v. Allegro Dev. Corp.*, C.A. No. 8626-VCL, 2013 WL 5967028, at *11 (Del. Ch. Nov. 7, 2013); *In re Orchard Enters., Inc.*, 88 A.3d 1, 34–35 n.21 (Del. Ch. 2014); *In re Rural Metro Corp. S'holders Litig.*, 88 A.3d 54, 80 n.3 (Del. Ch. 2014); *Allen v. El Paso Pipeline GP Co.*, 113 A.3d 167, 179 n.1 (Del. Ch. 2014); *In re Rural/Metro Corp. S'holders Litig.*, 102 A.3d 205, 253 n.27 (Del. Ch. 2014); *Quadrant Structured Prods. Co. v. Vertin*, 102 A.3d 155, 187 n.11 (Del. Ch. 2014); *Virtus Cap. L.P. v. Eastman Chem. Co.*, C.A. No. 9808-VCL, 2015 WL 580553, at *16 n.5 (Del. Ch. Feb. 11, 2015).

139. *See cases cited supra* note 138; *see also* *Goggin v. Vermillion, Inc.*, No. 6465-VCN, 2011 WL 2347704, at *5 n.33 (Del. Ch. June 3, 2011); *Feeley v. NHAOCG, L.L.C.*, 62 A.3d 649, 668 (Del. Ch. 2012); *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36 n.3 (Del. Ch. 2013); *OptimisCorp v. Waite*, C.A. No. 8773-VCP, 2015 WL 5147038, at *61 n.520 (Del. Ch. Aug. 26, 2015).

140. *E.g., Allen*, 113 A.3d at 179.

141. *Bandera Master Fund LP v. Boardwalk Pipeline Partners, LP*, C.A. No. 2018-0372-JTL, 2019 WL 4927053, at *14 n.7 (Del. Ch. Oct. 7, 2019); *In re PLX Tech. S'holders Litig.*, C.A. No. 9880-VCL, 2018 WL 5018535, at *20 n.410 (Del. Ch. Oct. 16, 2018); *Frederick Hsu Living Tr. v. ODN Holding Corp.*, C.A. No. 12108-VCL, 2017 WL 1437308, at *17 n.15 (Del. Ch. Apr. 14, 2017). Westlaw and LEXIS sometimes pick up cases that cite *eBay* to support certain fiduciary duty principles but not shareholder wealth maximization. These cases are not counted. *See, e.g., Gilbert v. Perlman*, C.A. No. 2018-0453-SG, 2020 WL 2062285,

steep drop-off in the apparent influence of the most vehemently proshareholder primacy case that the Delaware Court of Chancery has in its arsenal.

Of course, a citation to *eBay* isn't required for a court to discuss and therefore reinforce shareholder primacy. A full empirical analysis of the courts' use of shareholder primacy language over the last decade is beyond the scope of this Comment. It seems unlikely, however, that the courts would undergo a meaningful analysis without reference to the seminal case. Again, *eBay* is the only non-*Revlon* instance where the Delaware courts actually enforced a duty to maximize shareholder wealth,¹⁴² so the courts' apparent softening of the *eBay* grip is itself notable.

C. The Delaware Courts' Likely Decision: Why They Would Choose to Continue Deferring to the Business Judgment Rule

By virtue of declining to meaningfully implement stakeholder initiatives, the Business Roundtable corporations have yet to put the Delaware courts in the uncomfortable position of having to choose between the shareholder wealth maximization rule and the business judgment rule. But, if the courts were to be put in that position, a clear weighing of the options suggests that the Delaware courts have probably already made their decision. It seems clear that of the two possible options available to the court, one response disrupts the status quo balance substantially less than the other. The current balance between the shareholder wealth maximization rule and the business judgment rule exists at the creation and mercy of the Delaware courts,¹⁴³ and there is a good reason why the business judgment rule is deferred to¹⁴⁴ over the shareholder wealth maximization rule. Consider what would occur if the courts decided to begin enforcing the shareholder wealth maximization rule whenever a director makes a decision that negatively affects the short-run wealth of shareholders. This would obliterate the business judgment rule, position the court as the arbiter for what constitutes a good business decision, and force directors to alter their behavior to appease the business sensibilities of the court.¹⁴⁵ This result could lead directors to make less wealth-maximizing decisions, not more.¹⁴⁶

at *6 n.89 (Del. Ch. Apr. 29, 2020) (citing *eBay* to support contention that "controlling stockholders are fiduciaries of their corporations' minority stockholders").

142. See Guenther, *supra* note 46, at 484.

143. See *Gagliardi v. TriFoods Int'l Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996).

144. See Rhee, *supra* note 7, at 1961–62 (showing examples of deference).

145. See Sharfman, *supra* note 5, at 400, 409 (noting that corporate law has decided that a system closer to absolute authority for the board is more desirable than one of absolute accountability when it comes to shareholder wealth maximization).

146. See *id.* at 409.

Such a disruptive option seems unlikely, especially since a more stable path is available.

The actions of the Business Roundtable corporations would bring the surprisingly harmonious tension between the two rules to a macroscale for the first time. This is where the inevitable status quo change will occur, because directors largely have been indoctrinated with facilitating decisions based on shareholder wealth maximization principles.¹⁴⁷ The point is that the law has not been enforced in a way that actually precludes attention to stakeholders, so long as there is a long-term strategy in mind that leads to an increase in shareholder wealth.¹⁴⁸ Further, evidence of the courts' decreasing reinforcement of *eBay* over the last half-decade¹⁴⁹ adds support that the courts' rhetoric, which is the most significant driving force behind directors' steady compliance with strict shareholder wealth maximization,¹⁵⁰ is softening in a way that will gel with an increased societal preference towards a more stakeholder-friendly approach. This, in turn, will result in corporations actually implementing such an approach on a wide scale.¹⁵¹

Of course, the courts' deferral to the business judgment rule will never be absolute. The Delaware courts have already provided something of an outer border with their decisions in *Revlon* and *eBay*. Following the language in *eBay*, directors will not be allowed to "openly eschew shareholder wealth maximization."¹⁵² Additionally, *Revlon* will naturally prevent stakeholder focus in an auction scenario.¹⁵³ The savvy drafting of the Statement reveals that directors are not unaware that such a border exists.¹⁵⁴

Ultimately, the courts want to retain a system as close as possible to what they have had for the last few decades: a duty of shareholder wealth maximization that is essentially illusory in that it remains mostly unenforced but ultimately leads to the benefits that the shareholder wealth maximization rule is supposed to cultivate in the first place.¹⁵⁵ It appears that the courts can get closest to maintaining this dynamic by deferring to the business judgment rule when

147. See Yosifon, *supra* note 1, at 223.

148. See Strine, *supra* note 11, at 155.

149. See *supra* Subpart IV.B.

150. See Murray, *supra* note 67, at 17–19.

151. See Rhee, *supra* note 7, at 2015–16 (posing a hypothetical scenario in which courts had not been strongly insisting on shareholder wealth maximization and concluding that “[s]ince law can legitimize or delegitimize social norms, there would not even have been a strong norm in the business community”).

152. *eBay Domestic Holdings Inc. v. Newmark*, 16 A.3d 1, 35 (Del. Ch. 2010).

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

154. See *supra* Subpart IV.A.

155. See Sharfman, *supra* note 14, at 57 (giving examples of such benefits).

analyzing director decisions, so long as the decision does not implicate the boundaries already established by *eBay* and *Revlon*.

Further, it remains an option for the court to add more color to the existing boundaries by rejecting stakeholder initiatives in specific situations in which shareholder wealth is deemed particularly vulnerable, as was identified in *Revlon* scenarios, for instance. One should remember that the Business Roundtable corporations are businesses, and they are likely not adopting this stakeholder-friendly position on a purely charitable basis. While these corporations' post-Statement actions have led to general accusations of greenwashing,¹⁵⁶ it remains true that corporations can theoretically focus more heavily on stakeholder needs, while also serving the ultimate goal of increasing shareholder wealth.¹⁵⁷ Businesses, by their very nature, are operated with the ultimate goal of profitability, which leads to increases in shareholder wealth. All things considered, if that is indeed the ultimate goal, that appears to be all the Delaware courts ask for.

CONCLUSION

While this Comment does not take a position on the comparative efficacies of a strict shareholder wealth maximization system or one that allows for greater flexibility to address stakeholder interests, it acknowledges that leading United States corporations have recently taken the stated initiative to proclaim that their corporate governance strategy is evolving from a shareholder wealth maximization approach to one that makes a more conscious effort to deliver value to stakeholders.¹⁵⁸ This Comment argues that the Business Roundtable corporations have an opportunity to take advantage of the flexible state of Delaware corporate purpose law to implement such an approach. As a result, this Comment poses a question to Delaware courts that can be answered in one of two ways: continue to defer to the business judgment rule, and therefore permit stakeholder initiatives on an unprecedented level, or enforce the shareholder wealth maximization rule to an unprecedented degree. Something's got to give, and this Comment concludes by stating that it is more likely that such stakeholder approaches would be permitted, so long as they are tied to long-term shareholder profit. All that remains is actually taking the initiative.

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156. See *supra* note 115 and accompanying text.

157. See *supra* notes 89–90 and accompanying text.

158. See *Statement, supra* note 12.

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