I. INTRODUCTION

A NYONE familiar with corporate law knows well how much of that law has been shaped by just one state: Delaware. Less obvious, however, is that so much of Delaware corporate law has been defined by the nonbinding dictum of that state’s judges.1 To illustrate this point, this Article considers the central role of dictum in the evolving doctrine first articulated by the Delaware Supreme Court in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.2 And in doing so, this Article refutes the thesis, recently advanced by Professor Stephen Bainbridge, that a judicial concern for di-

1. See generally Mohsen Manesh, Damning Dictum: The Default Duty Debate in Delaware, 39 J. CORP. L. 35 (2014). Although this Article uses “dictum” generally to refer to judicial statements that have no effect on the outcome of a particular case, some scholars and courts distinguish between two categories of dictum: (i) “judicial dictum,” which is a court’s opinion on a question that was briefed and argued by counsel but that is unnecessary to the court’s ultimate decision; and (ii) “obiter dictum,” which is a court’s opinion on a question that was not briefed and argued by counsel and, therefore, was given without full consideration. See, e.g., David Coale & Wendy Couture, Loud Rules, 34 PEPP. L. REV. 715, 727–28 (2007); Note, Dictum Revisited, 4 STAN. L. REV. 513, 513–14 (1952). This distinction does not appear to be recognized in Delaware law, and this Article refers to both categories as simply “dictum.”

2. 506 A.2d 173 (Del. 1986).
rector conflicts of interests, and nothing more, motivates the Revlon doctrine.3

The Revlon doctrine famously dictates that in certain transactions involving the “sale or change in control” of a corporation,4 the corporation’s board of directors has a duty to “get[ ] the best price for the stockholders.”5 What constitutes a “sale or change in control” is thus a crucial legal question. Because when a board of directors enters Revlon-land, as it is colloquially called,6 the board loses the presumption of the deferential business judgment rule7 and becomes subject to enhanced judicial scrutiny under an objective standard of reasonableness.8

In The Geography of Revlon-Land,9 Bainbridge attempts to crisply delineate the boundaries and contours of Revlon-land based on a conflict-of-interests theory of the doctrine. On this theory, Revlon is merely the logical extension of the Delaware Supreme Court’s earlier corporate takeover


4. This articulation of when Revlon applies was developed in subsequent case law interpreting the doctrine. See, e.g., Arnold v. Soc’y for Savs. Bancorp, Inc., 650 A.2d 1270, 1290 (Del. 1994) (quoting Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43, 47 (Del. 1994)).

5. Revlon, 506 A.2d at 182.

6. It should be noted that the Delaware Supreme Court has in the past expressed disapproval of such colloquial references to “Revlon-land” and “Revlon duties.” See Arnold, 650 A.2d at 1289 n.40. Although the Delaware Supreme Court has itself made reference to “Revlon duties.” See Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003).

7. The Delaware Supreme Court has summarized the business judgment rule as the:

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

8. Although the doctrine arising from Revlon is sometimes referred to as “Revlon duties,” the so-called “duty, announced in Revlon, is not an independent duty, but rather a restatement of directors’ [foundational] duties of loyalty and care.” Koehler v. Netspend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. May 21, 2013) (Glasscock, V.C.). “Rather than changing the duties directors owe to stockholders, Revlon changes the level of [judicial] scrutiny” applied to board decisions. Id. at *11. When in Revlon-land, directors of a corporation “have the obligation of acting reasonably to seek the transaction offering the best value reasonably available to the stockholders.” QVC, 637 A.2d at 43. As then-Vice Chancellor Strine has explained it:

Unlike the bare rationality standard applicable to garden-variety decisions subject to the business judgment rule, the Revlon standard contemplates a judicial examination of the reasonableness of the board’s decision-making process. . . . [T]his reasonableness review is more searching than rationality review . . . . Although the directors have a choice of means, they do not comply with their Revlon duties unless they undertake reasonable steps to get the best deal.

In re Netsmart Techs., Inc. S’holders Litig., 924 A.2d 171, 192 (Del. Ch. 2007).

9. See generally Bainbridge, supra note 3.
jurisprudence, in which it introduced an intermediate standard of judicial review to police the potential self-interest that may drive the decisions of a target board of directors.\footnote{10. See infra Part II.A.} Employing this conflict-of-interests understanding of\textit{ Revlon}, Bainbridge decries a string of Delaware Chancery Court decisions applying the\textit{ Revlon} doctrine to transactions in which a target corporation is sold for cash or a mix of cash and the stock of a publicly traded, diffusely held acquirer that is without a controlling shareholder.\footnote{11. See infra Part II.B.} These chancery court decisions, Bainbridge argues, wrongly focus on the nature of the consideration paid in the transaction, rather than the potential conflicts of interests that may be present between the target’s board of directors and its shareholders. These decisions have thus muddled the boundaries of\textit{ Revlon}-land. They are inconsistent with the conflict-of-interests rationale underlying the doctrine as well as subsequent Delaware Supreme Court precedent applying it.

In constructing his critique, however, Bainbridge overstates the chancery court precedent with which he takes issue as well as the supreme court precedent upon which he bases his conflict-of-interests thesis. In reality, the boundaries of\textit{ Revlon}-land are murky.\footnote{12. See infra Part III.} Left uncertain by Delaware Supreme Court precedent, the scope of the\textit{ Revlon} doctrine has been purposefully, but cautiously, defined by the Delaware Chancery Court through the use of dictum. By employing dictum, the chancery court has provided useful guidance on a doctrine that is otherwise ill-defined by the supreme court’s jurisprudence; and it has done so strategically—in situations where the court’s statements do not unfairly affect the parties to the dispute before it. For this, the chancery court should be commended.

The remainder of this Article proceeds in three parts. Part II describes the lay of\textit{ Revlon}-land under the conflict-of-interests theory that Bainbridge espouses. Part III then explains the considerable ambiguity in the Delaware Supreme Court’s post-\textit{Revlon} precedents and the limited support they provide to Bainbridge’s conflict-of-interests thesis. In the absence of definitive guidance, this part argues, it is unsurprising that the Delaware Chancery Court has resorted to nonbinding dictum to provide some clarity for lawyers and business planners as to the precise boundaries of\textit{ Revlon}-land. Finally, Part IV briefly concludes.

II. The Geography of\textit{ Revlon}-Land Under a Conflict-of-Interests Theory

To understand Bainbridge’s conflict-of-interests theory of\textit{ Revlon}, one must begin with an earlier and equally famous Delaware Supreme Court decision:\textit{ Unocal Corp. v. Mesa Petroleum Co.}\footnote{13. 493 A.2d 946 (Del. 1985).} When properly understood, according to Bainbridge,\textit{ Revlon}, like\textit{ Unocal} before it, is simply a doctrine
intended to police the self-interest that may motivate certain board decisions. As such, Bainbridge argues, the boundaries of Revlon-land are defined by the potential for problematic conflicts of interests, and not by the nature of consideration that shareholders are to receive in a sale transaction as the Delaware Chancery Court has erroneously concluded.

A. The Conflict-of-Interests Theory of Revlon

In 1985, the Delaware Supreme Court famously revolutionized the law of corporate takeovers by introducing an intermediate standard of judicial review—more intrusive than the deferential business judgment rule usually accorded to board decisions, but less exacting than the entire fairness review applied to self-dealing transactions. In Unocal, the supreme court recognized that in the context of hostile takeovers, there exists an “omnipresent specter” that a target board of directors may be motivated by self-interest rather than what is best for the corporation and its shareholders. Accordingly, the court applied an “enhanced” level of judicial scrutiny to target board actions taken in response to a hostile takeover bid.

In Bainbridge’s view, the enhanced review articulated under Unocal sensibly balances the irreconcilable tension between accountability and authority in corporate law. On one hand, unfettered director discretion to manage the business free from shareholder oversight or judicial intervention is necessary for the efficient operation of a large firm like the modern corporation. On the other hand, the broad authority that corporate law affords boards of directors creates the potential for director self-dealing at the expense of the corporation and its shareholders. Thus,

14. See supra note 7 and accompanying text.
15. See Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) (“The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”).
16. See Unocal, 493 A.2d at 954.
17. See id. at 954–55. Under the Unocal standard, the target board must carry its own initial two part burden: First, a reasonableness test, which is satisfied by a demonstration that the board of directors had reasonable grounds for believing that a danger to corporate policy and effectiveness existed, and second, a proportionality test, which is satisfied by a demonstration that the board of directors’ defensive response was reasonable in relation to the threat posed. Unitrin, Inc. v. Am. Gen. Corp. 651 A.2d 1361, 1373 (Del. 1995) (citing Unocal, 493 A.2d at 955). Under the second prong of the Unocal test, the court engages “in a substantive review of the board’s defensive actions” asking whether the board’s actions “fell within a range of reasonable responses to the threat posed.” Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 92–93 (Del. Ch. 2011) (Chandler, C.) (quoting Unitrin, 651 A.2d at 1367).
18. See Bainbridge, supra note 3, at 3313–14.
19. See id. at 3283–85. For a more fulsome account of Bainbridge’s director primacy theory of corporate law, see generally Stephen M. Bainbridge, Director Primacy: The Means and Ends of Corporate Governance, 97 NW. U. L. REV. 547 (2003).
in circumstances implicating a conflict of interests, the risk of legal sanction—that is, judicial intervention to ensure board accountability to the shareholders—is a necessary check on board authority to deter self-dealing among directors. Applying this framework to corporate takeovers, *Unocal* recognized that the directors of a target corporation may be motivated by a selfish interest in preserving their own office. Accordingly, the Delaware Supreme Court forged a middle ground between authority and accountability in the takeover context by requiring that directors’ defensive actions be reasonable—proportionate to the threat that a hostile bid poses.

For Bainbridge, then, *Revlon* represents the logical evolution of the intermediate *Unocal* standard, a “mere variant of *Unocal*” designed to address potential self-interest in a slightly different situation: a negotiated sale of a corporation pursuant to which the target board has agreed to “lock-ups” or other deal protections—that is, contract terms used to protect the board’s preferred transaction and deter (or preclude) an unwanted bidder. In a negotiated transaction, the mere fact that the target board has favored a particular acquirer over other would-be bidders suggests at least the potential that the target directors acted in their own self-interest rather than that of the corporation and its shareholders. To police any potential conflict in this context, the *Revlon* doctrine requires the directors to “act reasonably to seek the transaction offering the best value reasonably available to the stockholders.”

21. See *Unocal*, 493 A.2d at 194.
22. See *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) (“Avoiding a crude bifurcation of the world into two starkly divergent categories—business judgment rule review reflecting a policy of maximal deference to disinterested board decisionmaking and entire fairness review reflecting a policy of extreme skepticism toward self-dealing decisions—the Delaware Supreme Court’s *Unocal* and *Revlon* decisions adopted a middle ground.”); see also *supra* notes 14–17 and accompanying text.
24. See *id.*, at 3327.
25. Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994). As the QVC court further elaborated,

The key features of an enhanced scrutiny test [under *Revlon*] are: (a) a judicial determination regarding the adequacy of the decisionmaking process employed by the directors, including the information on which the directors based their decision; and (b) a judicial examination of the reasonableness of the directors’ action in light of the circumstances then existing. The directors have the burden of proving that they were adequately informed and acted reasonably.

*Id.* at 45.
Bainbridge argues, however, that the potential conflict of interests in a negotiated transaction is not always problematic for shareholders of a target corporation.27 Where the acquirer is a diffusely held, publicly traded corporation, diversified investors are as likely to own shares of the acquiring company as they are to own shares of the target.28 In such cases, a diversified investor would be indifferent to the form of the consideration paid for the target shares (whether it is cash or stock in the acquirer)29 and, more importantly, the allocation of transactional gains as between the shareholders of the acquirer and target.30

The risk of a conflicted motive among target directors is more acute, however, when the preferred acquirer is privately held or, alternatively, publicly held but controlled by a single individual or affiliated group rather than a “fluid aggregation of unaffiliated stockholders.”31 In such cases, even a fully diversified investor is precluded from standing on both sides of the transaction—to benefit from the transactional gains as both an owner of the target and acquirer.32 Accordingly, in such cases even a fully diversified investor would prefer a legal rule requiring that as much of the

(Glasscock, V.C.) (“Revlon’s enhanced scrutiny is a ‘middle ground’ between deference to the board under the business judgment rule and skepticism toward the board under entire fairness review. Under this middle-ground review, the directors have the burden of proving that they were fully informed and acted reasonably.” (footnote omitted) (citing QVC, 637 A.2d at 45; In re Dollar Thrifty, 14 A.3d at 596)).


28. See Bainbridge, supra note 3, at 3310.

29. See id. at 3334–35 (“As long as the acquirer is publicly held, shareholders who get cash could simply turn around and buy stock in the postacquisition company. They would then participate in any post-transaction gains, including any future takeover premium.”). This argument—that target shareholders would be indifferent between consideration in the form of cash versus acquirer stock, because each can be easily converted into the other—assumes zero transaction costs, when in fact a shareholder would incur at least some marginal transaction cost to purchase or sell acquirer shares.

30. See id. at 3310–11 (“Because increasing the target’s share of the gains by increasing the premium the acquirer pays to obtain control necessarily reduces the acquirer’s share, the diversified investor will view such a shift as simply robbing Peter to pay Paul.”).

31. See id. (making this assertion). The quoted language derives from Paramount Commc’ns, Inc. v. QVC Network, Inc., in which the Delaware Supreme Court held that Revlon applies when a transaction would transfer corporate control from a “fluid aggregation of unaffiliated stockholders” to a “single person or . . . cohesive group acting together.” See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42–43 (Del. 1994).

32. See Bainbridge, supra note 3, at 3310.
transactional gains as possible be allocated to the target corporation.\textsuperscript{33} Unfortunately, Bainbridge observes, it is in these very situations—where the acquirer is privately held or controlled by an individual or affiliated group—that the potential for a conflict of interests is most problematic for investors.\textsuperscript{34} The acquirer’s ability to reap a disproportionate share of the gains from the transaction give it a “high incentive to . . . offer side payments” and other deal sweeteners to the target directors and managers in order to gain their favor and cooperation.\textsuperscript{35}

Thus, according to Bainbridge’s conflict-of-interests theory, the outer boundaries and inner contours of Revlon-land have been shaped by the Delaware Supreme Court to address the potentially problematic conflict-of-interests that may arise in a negotiated transaction where the acquirer is privately held or otherwise controlled by a single individual or affiliated group.\textsuperscript{36} It is in these situations, he argues, that Revlon has been applied by the high court in its subsequent case law. Most notably, the supreme court applied Revlon in Paramount Communications Inc. v. QVC Network, Inc.\textsuperscript{37} (QVC), a case involving the stock-for-stock merger of two publicly held media companies, Paramount and Viacom.\textsuperscript{38} Unlike its earlier decision in Paramount Communications Inc. v. Time Inc.\textsuperscript{39} (Time-Warner), where the court ruled that Revlon was inapplicable to a seemingly similar stock-for-stock merger between Time and Warner Communications,\textsuperscript{40} the supreme court in QVC ruled that the Paramount-Viacom transaction triggered Revlon duties for the Paramount board of directors to get the best value reasonably available for its shareholders because the surviving post-merger business would be controlled by one individual, Viacom’s pre-transaction controlling shareholder.\textsuperscript{41} Implicit in the high court’s distinction between the Time-Warner and QVC cases, Bainbridge sees the supreme court’s concern for potential conflicted interests in transactions involving a privately held or controlled acquirer, like the Paramount-Viacom merger.\textsuperscript{42}

\textsuperscript{33} See id. at 3311.
\textsuperscript{34} See id.
\textsuperscript{35} See id. If Revlon is aimed at policing the conflicts of interests created by these kinds of side dealings, it is not clear why the doctrine would exist at all given the traditional fiduciary duty of loyalty would already address such concerns. See Gevurtz, supra note 27, at 1564 (“The simple answer . . . is to recognize the conflict-of-interest such side deals can create and invoke the higher scrutiny required of conflict-of-interests transactions.”).
\textsuperscript{36} Bainbridge, supra note 3, at 3311–20.
\textsuperscript{37} 637 A.2d 34 (Del. 1994).
\textsuperscript{38} Id.
\textsuperscript{39} 571 A.2d 1140 (Del. 1990).
\textsuperscript{40} Id. at 1142.
\textsuperscript{41} See QVC, 637 A.2d at 42–46.
\textsuperscript{42} See Bainbridge, supra note 3, at 3312.
B. The Chancery Court’s Misapplication of Revlon

According to the conflict-of-interests theory of Revlon espoused by Bainbridge, motives matter. Whether a target board is adopting takeover defenses or agreeing to sell the corporation in a negotiated transaction, it is the potential that the target directors may be acting in their self-interest that justifies the intrusion on board authority under the heightened judicial scrutiny of Unocal and Revlon. In the absence of a potentially problematic conflict of interests, judicial or shareholder intervention into board authority to sell the company in a negotiated transaction would upset the careful balance between authority and accountability that corporate law has constructed.

Applying this theory, Bainbridge proceeds to decry a set of three chancery court decisions. Starting with In re Lukens Inc. and culminating with In re Smurfit-Stone Container Corp., the lower court considered whether Revlon applies to a merger transaction in which the target shareholders were to receive a mix of cash and stock in a publicly traded, diffusely held acquirer:

43. See id. at 3302–05.
44. See id. at 3313.
45. See id. at 3290 (“The efficient separation of ownership and control that makes the modern corporation possible thus is inconsistent with routine shareholder—or judicial—review of board decisions.”).
46. See id. at 3325–29. Bainbridge also criticizes a fourth unpublished chancery court decision—a transcript ruling—Steinhardt v. Howard-Anderson. See Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL); see also Bainbridge, supra note 3, at 3329–31. The problem that troubles Bainbridge in Steinhardt, however, is different than the three other chancery court decisions discussed herein. Namely, unlike Lukens, NYMEX, and Smurfit-Stone, all of which suggest that Revlon applies based on the nature of the consideration that target shareholders are to receive, in the Steinhardt transcript ruling, Vice Chancellor Laster opined that Revlon applies because of the minority percentage ownership the target shareholders would have in the combined post-merger entity, a widely held, publicly traded company. See Bainbridge, supra note 3, at 3330. The author agrees with Bainbridge that Steinhardt is a legally novel approach to applying Revlon, although it is arguably consistent with the underlying rationale of the doctrine. See Black & Kraakman, supra note 27, at 545–45 (explaining that “whale-minnow” stock-for-stock merger should trigger Revlon under “hidden value” understanding of doctrine).
47. 757 A.2d 720 (Del. Ch. 1999).
FIGURE 1: CHANCERY COURT DECISIONS APPLYING REVLOn TO MIXED CONSIDERATION TRANSACTIONS

<table>
<thead>
<tr>
<th>YEAR DECIDED</th>
<th>CASE</th>
<th>CONSIDERATION PAID TO TARGET SHAREHOLDERS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1999</td>
<td>In re Lukens Inc.⁴⁹</td>
<td>62% Cash 38% Stock</td>
</tr>
<tr>
<td>2009</td>
<td>In re NYMEX⁵⁰</td>
<td>44% Cash 56% Stock</td>
</tr>
<tr>
<td>2011</td>
<td>In re Smurfit-Stone Container Corp.⁵¹</td>
<td>50% Cash 50% Stock</td>
</tr>
</tbody>
</table>

Focusing on the substantial cash portion of the total merger consideration to be paid to shareholders of the target, the chancery court first stated in dictum in *Lukens* and then “expressly held” in *Smurfit-Stone*, according to Bainbridge,⁵² that *Revlon* applies to such mixed consideration transactions where cash is a substantial component.

In one sense, these mixed consideration cases merely reflect conventional wisdom—that an all-cash transaction categorically triggers *Revlon* duties.⁵³ Recall, under the Delaware Supreme Court’s well-settled formulation, *Revlon* applies whenever a board embarks on a transaction that will result in a “sale or change of control” of the corporation.⁵⁴ Unlike a strategic stock-for-stock merger, where the shareholders of both companies will continue as owners of the combined business,⁵⁵ in an all-cash, cash-for-

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⁵². See Bainbridge, supra note 3, at 3328 (“Unlike *Lukens* and *NYMEX* . . . in *Smurfit* Vice Chancellor Parsons expressly held that *Revlon* applied even though ‘control of Rock-Tenn after closing will remain in a large, fluid, changing, and changeable market’ and the ‘Smurfit-Stone stockholders will retain the right to obtain a control premium in the future.’” (emphasis added)).
⁵³. See Leo E. Strine, Jr., Categorical Confusion: Deal Protection Measures in Stock–for–Stock Merger Agreements, 56 BUS. LAW. 919, 927 n.25 (2001) (“In its simplest formulation, *Revlon* requires directors who wish to sell the company for cash to take affirmative steps to obtain the highest sale price reasonably attainable.”); see also Black & Kraakman, supra note 27, at 539–40 (“The most common port of entry into *Revlon*land is a cash sale . . . . Cash sales . . . are an easy case for limiting the target board’s discretion . . . .”); Brian J.M. Quinn, Triggering Revlon Duties, M&A L. PROF BLOG (Oct. 14, 2009), http://lawprofessors.typepad.com/mergers/2009/10/triggering-revlon-duties.html (“We know that an all cash transaction will constitute a change of control and thus require directors attempt [sic] to get the highest price reasonably available for the benefit of target shareholders.”).
⁵⁵. See, e.g., QVC, 637 A.2d at 46–47 (reasoning that *Revlon* was inapplicable in Time-Warner to proposed Time-Warner merger because “neither corporation could be said to be acquiring the other. Control of both remained in a large, fluid, changeable and changing market” (quoting Paramount Commc’ns, Inc. v. Time Inc., Civil Action Nos. 10866, 10670, 10935, 1989 WL 79880, 15 DEL. J. CORP. L. 700, 705, 739 (Del. Ch. July 17, 1989) (Allen, C.)));
In re Delta & Pine Land Co.
stock merger, the target shareholders will be cashed out—effectively forced to sell their shares to the acquirer. “[T]here is no tomorrow” for the target shareholders.56 For them at least, this is a “sale” of the corporation.57 Because an all-cash transaction represents the last chance for the target shareholders to maximize the value of their investment, Revlon dictates that in such situations directors get the best price reasonably available for their shares.58

This “last chance” reasoning has been used to explain not only the conventional wisdom that Revlon categorically applies to any all-cash “sale” transaction. It has also been invoked by the Delaware courts to justify Revlon’s applicability to “change of control” transactions—even one structured as a stock-for-stock merger.59 Although the target shareholders may continue as minority owners of the combined business following a change of control transaction, the controlling shareholder can, at any time, unilaterally cash out the target shareholders in a future cash-for-stock merger.60


56. See Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1055 (Del. Ch. 1997) (Allen, C.); see also TW Servs., Inc. v. SWT Acquisition Corp., Civ. A. Nos. 10427, 10298, 1989 WL 20290, 14 DEL. J. CORP. L. 1169, 1184 (Del. Ch. Mar. 2, 1989) (Allen, C.) (“In the setting of a sale of a company for cash, the board’s duty to shareholders is inconsistent with acts not designed to maximize present share value, acts which in other circumstances might be . . . justified by reference to the long run interest of shareholders. In such a setting, for the present shareholders, there is no long run.”).

57. See McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (reasoning that Revlon is implicated by proposed all-cash, all-shares transaction, because “the decision constitutes a final-stage transaction”).

58. See Time-Warner, 1989 WL 79880, 15 DEL. J. CORP. L. at 751 (Allen, C.) (“Revlon was not a radical departure from existing Delaware, or other, law (i.e., it has ‘always’ been the case that when a trustee or other fiduciary sells an asset for cash, his duty is to seek the single goal of getting the best available price) . . . .”); see also Strine, supra note 53, at 927 n.25 (“The Revlon principle grows out of the traditional principle that fiduciaries must sell trust assets for their highest value.”).

59. See Equity-Linked Investors, 705 A.2d at 1055 (“The holding of Paramount . . . was that where the stock to be received in the merger was the stock of a corporation under the control of a single individual or a control group, then the transaction should be treated for ‘Revlon duty’ purposes as a cash merger would be treated: there is no tomorrow for the shareholders . . . .”); see also Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) (“[T]he change of control test is ultimately a derivative test. . . . [W]hen enhanced scrutiny applies [under Revlon] is when you have a final stage transaction.”), available at http://www.alston.com/files/docs/Occam_Ruling.pdf.

60. See QVC Network, Inc. v. Paramount Commc’ns, Inc., 635 A.2d 1245, 1266–67 (Del. Ch. 1993) (Jacobs, V.C.) (“[S]hareholders’ continuing equity interest is far from secure, because once the Viacom transaction is complete Mr. Redstone will have absolute control of the merged entity and will have the power to use his control at any time to eliminate the shareholders’ interest by a ‘cash out’
Regardless of the combined business's future prospects, the target shareholders can no longer be assured of their continuing equity ownership. Accordingly, Revlon applies because a change of control represents the target shareholders' last opportunity to maximize the value of their investment.

The chancery court in its Lukens and Smurfit-Stone decisions simply extended this “last chance” reasoning to mergers involving mixed consideration. In a mixed consideration transaction, by definition, the target shareholders will receive some shares of the acquirer and, therefore, continue as owners of the combined business after the merger. But, where cash is a substantial percentage of the merger consideration, the target shareholders will also be cashed out of a significant portion of their ownership interest. The transaction thus represents the last chance for them to maximize the value of that portion of their investment. Accordingly, for the same reasons conventional wisdom holds that Revlon applies to all-cash and change of control transactions, Lukens and Smurfit-Stone concluded that Revlon should also apply to mixed consideration transactions in which cash represents a significant portion of the total merger consideration.

Yet, under Bainbridge’s conflict-of-interests theory, this extension of Revlon—to apply to cash-heavy mixed consideration transactions—misperceives the doctrine. Indeed, even the conventional wisdom upon which it is based—that the type of consideration received should matter at all for Revlon purposes—runs counter to the conflict-of-interests thesis. Recall, under a conflict-of-interests theory of Revlon, the doctrine aims to check board authority only where a problematic conflict of interests potentially

merger.”) aff’d Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 42 (Del. 1994) (“[S]tockholder votes are likely to become mere formalities where there is a majority stockholder. For example, minority stockholders can be deprived of a continuing equity interest in their corporation by means of a cash-out merger.”).

61. See QVC, 635 A.2d at 1267 (observing that Paramount shareholders “have no assurance that they will receive the long-run benefits claimed to justify the [Paramount] board’s decision to prefer Viacom over QVC”) aff’d QVC, 637 A.2d at 43 (“Following the merger, there will be a controlling stockholder who will have the voting power to . . . cash-out the public stockholders . . . . Irrespective of the present Paramount Board’s vision of a long-term strategic alliance with Viacom, the proposed sale of control would provide the new controlling stockholder with the power to alter that vision.”).

62. See QVC, 635 A.2d at 1267 (reasoning that Revlon applies because “[t]his is the only opportunity that Paramount’s shareholders will ever have to receive the highest available premium-conferring transaction” (emphasis added)) aff’d QVC, 657 A.2d at 45 (reasoning that Revlon applies because “an asset belonging to public stockholders (a control premium) is being sold and may never be available again” (emphasis added)).

63. See In re Lukens Inc. S’holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999) (Lamb, V.C.) (“For a substantial majority of the then-current shareholders, ‘there is no long run.’”); see also In re Smurfit-Stone Container Corp. S’holder Litig., C.A. No. 6164-VCP, 2011 WL 2028076, at *14 (Del. Ch. May 20, 2011) (Parsons, V.C.) (“[T]he concern here is that there is no ‘tomorrow’ for approximately 50% of each stockholder’s investment in Smurfit–Stone.”).
arises between the directors and shareholders of a target corporation.\textsuperscript{64} The type of consideration received by the target shareholder—whether it is cash, stock in the acquirer, or some mix of the two—is simply irrelevant to the conflict-of-interests question.\textsuperscript{65} What matters is the identity of the acquirer and whether it creates the potential for conflicted interests on the part of the target directors. Thus, a “sale” should not trigger \textit{Revlon} simply because a target corporation is to be sold in an all-cash (or even mostly cash) transaction. Properly understood, a “sale” should trigger \textit{Revlon} only if the transaction will also result in a “change of control” of the target from a “fluid aggregation of unaffiliated stockholders”\textsuperscript{66} (i.e., the market) to the hands of a private entity or individual owner.\textsuperscript{67} As noted above,\textsuperscript{68} it is in these transactions—involving a “change of control” from public investors into the hands of a private entity or individual owner—that the potential conflict of interests among the board is most problematic for the shareholders of a target corporation. A “sale or change of control” does not occur for \textit{Revlon} purposes where a target corporation is sold for cash to a publicly traded, diffusely held acquirer with no controlling shareholder.\textsuperscript{69} Because, in such cases, control remains vested in a “fluid aggregation of unaffiliated stockholders” both before and after the transaction. To trigger \textit{Revlon}, according to the conflict-of-interests thesis, there must be a “change of control,” by sale or otherwise, raising the specter of conflicted board interest. Absent a “change of control,” the courts should instead defer to the target board’s unconflicted business judgment, as they would in any other transactional context.

By losing sight of this central principle, Bainbridge argues, the chancery court has become “lost in \textit{Revlon}-land.”\textsuperscript{70} The lower court has mistakenly asserted that the doctrine applies to all “sales,” focusing on the consideration paid rather than the potential conflict of interests created by a sale transaction. “The borders of \textit{Revlon}-land thus have suffered a significant distortion,” he laments wistfully.\textsuperscript{71}

\textsuperscript{64} See Bainbridge, supra note 3, at 3310–11, 3333–35.
\textsuperscript{65} See id. at 3332–35.
\textsuperscript{66} See QVC, 637 A.2d at 46 (distinguishing Time-Warner merger from Paramount-Viacom merger on grounds that in former transaction \textit{Revlon} was inapplicable because “Time would be owned by a fluid aggregation of unaffiliated stockholders both before and after the merger”); \textit{see also} Paramount Commun’ns, Inc. v. Time Inc., C.A. Nos. 10866, 10670, 10935, 1989 WL 79880, 15 Del. J. Corp. L. 700, 739 (Del. Ch. July 17, 1989) (Allen, C.) (reasoning that \textit{Revlon} is inapplicable to Time-Warner merger because “[c]ontrol of both [companies] remained in a large, fluid, changeable and changing market”).
\textsuperscript{67} See Bainbridge, supra note 3, at 3331–33.
\textsuperscript{68} See supra notes 31–35 and accompanying text.
\textsuperscript{69} See Bainbridge, supra note 3, at 3332.
\textsuperscript{70} Id. at 3281.
\textsuperscript{71} Id. at 3329.
III. DICTUM IN THE WAKE OF AMBIGUOUS PRECEDENT

The problem with Bainbridge’s critique of the Delaware Chancery Court in its application of Revlon is twofold. First, in constructing his conflict-of-interests thesis, Bainbridge overstates the relevant chancery court precedent when he characterizes the analysis in Smurfit-Stone regarding Revlon as a “holding” binding future decisions. The Revlon analysis in Smurfit-Stone with respect to mixed consideration transactions, like the decisions that came before it (and that have more recently come since72), is actually nonbinding dictum. But it is dictum built upon an edifice of precedent applying Revlon to all-cash transactions categorically, regardless of the identity of the acquirer.73

Second, Bainbridge overstates the support found in Delaware Supreme Court precedent for his theory that Revlon turns on the potentially problematic conflicts of interests, rather than the nature of the consideration received by the shareholders of the target corporation. In reality, the Delaware Supreme Court precedent, like the rationale for the Revlon doctrine itself, is at best ambiguous.74

Indeed, it is the absence of definitive guidance from supreme court precedent—embracing a conflict-of-interests theory or any other definitive explanation of the Revlon doctrine—that has moved the Delaware Chancery Court to embark on a seemingly deliberate path of defining, ever cautiously, the boundaries of Revlon-land with respect to mixed consideration transactions through the use of dictum. Some may disagree with the boundaries the lower court has drawn in its dictum. But by doing so, the chancery court has provided useful guidance, enhancing the predictability and certainty of corporate law on this key, yet illusive doctrine.75

A. The Dictum of the Chancery Court

Setting aside for the moment the merits of Bainbridge’s conflict-of-interests theory of the Revlon doctrine, it is important to note at the outset that the chancery court has never actually held, as Bainbridge claims, that a mixed consideration merger triggers Revlon duties. Although the lower court has stated this principle on multiple occasions, each time it has been nonbinding dictum, unnecessary to the court’s ultimate decision.

Recall that the chancery court’s application of Revlon to mixed consideration transactions is built upon the conventional wisdom that any all-cash sale is a “sale or change of control” for Revlon purposes.76 Bainbridge concedes that there is recurring language in the lower court’s precedent

72. See infra notes 188–95 and accompanying text (describing dictum in In re Synthes).
73. See infra Part III.A.
74. See infra Part III.B.
75. See infra Part III.C.
76. See supra Part II.B
affirming this conventional wisdom. For example, he notes, in In re Topps Company, then-Vice Chancellor Strine articulated the “familiar” Revlon test as follows: “When directors propose to sell a company for cash or engage in a change of control transaction, they must take reasonable measures to ensure that the stockholders receive the highest value reasonably attainable.” Likewise, in TW Services, Inc., the esteemed Chancellor Allen summarized the Revlon doctrine to mean that “[i]n the setting of a sale of a company for cash, the board’s duty to shareholders is . . . to maximize present share value” rather than pursue some long-term corporate interests, because “[i]n such a setting, for the present shareholders, there is no long run.”

Yet, as Bainbridge observes in dismissing the import of these decisions, both Topps and TW Services involved an all-cash sale to a privately held acquirer, raising a potential conflict of interests for the target board of directors. And so, the otherwise unqualified judicial statements of law in these two decisions, when read in context, provide scant guidance—let alone binding precedent—on whether Revlon categorically applies to any all-cash sale, and, in particular, a cash sale of a target to a publicly traded, diffusely held acquirer, which the conflict-of-interests thesis would hold is outside Revlon-land.

But Topps and TW Services are not the only two chancery court decisions to suggest that Revlon categorically applies to any all-cash transaction. One need not delve deeply into Delaware case law to find a number of opinions reaffirming the principle that any all-cash transaction is a “sale or change of control” triggering Revlon duties. Moreover, one could read-

77. See Bainbridge, supra note 3, at 3328 (discussing chancery court’s opinions in Topps and TW Services).
78. 926 A.2d 58 (Del. Ch. 2007).
79. Id. at 64 (emphasis added).
81. Id. at 1184 (emphasis added).
82. See Bainbridge, supra note 3, at 3324, 3328.
83. Cf. id. at 3328 (“[L]ike TW Services, Topps does not stand for the proposition that a cash transaction by a publicly held acquirer triggers Revlon.”).
84. See Koehler v. Netspend Holdings Inc., C.A. No. 8373-VCG, 2013 WL 2181518, at *11 (Del. Ch. May 21, 2013) (Glasscock, V.C.) (“Here, the NetSpend Board has agreed to sell the Company in an all-cash transaction. If the transaction closes, [the publicly-traded acquirer] will own 100% of NetSpend. This is a change-in-control transaction, and Revlon duties apply.”); see also In re Delphi Fin. Grp. S’holders Litig., C.A. No. 7144-VCG, 2012 WL 729232, at *13 (Del. Ch. Mar. 6, 2012) (Glasscock, V.C.) (“Once the Director Defendants decided to sell the Company for cash, they assumed a duty under the Revlon doctrine to undertake reasonable efforts to obtain the highest price reasonably available in the sale of the Company.”); Globis Partners, L.P. v. Plumtree Software, Inc., C.A. No. 1577-VCP, 2007 WL 4299024, at *4 (Del. Ch. Nov. 30, 2007) (Parsons, V.C.) (“Under Revlon, when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available.”); In re Lear Corp. S’holder Litig., 926 A.2d 94, 115 (Del. Ch.
ily cite decisions actually applying this conventional wisdom to transactions involving a publicly traded, diffusely held acquirer.\(^{85}\) For example, in *In re Pennaco Energy, Inc.*,\(^ {86}\) then-Vice Chancellor Strine applied *Revlon* to the all-cash sale of a target to Marathon Oil, then a wholly owned subsidiary of the publicly traded, diffusely held USX Corporation.\(^ {87}\) Likewise, in *In re Cogent, Inc.*,\(^ {88}\) Vice Chancellor Parsons applied *Revlon* to the all-cash sale of a target to the global conglomerate 3M Company.\(^ {89}\) Together, these precedents go far to suggest the conventional wisdom is conventional for a reason. That an all-cash sale per se triggers *Revlon*—irrespective of the acquirer’s identity—is practically unquestioned by myriad chancery court decisions.

Bainbridge, however, never acknowledges this fact in constructing his conflict-of-interests thesis. Despite the substantial body of precedent applying *Revlon* to all-cash transactions, he instead attacks the conventional wisdom by focusing his attention on the chancery court’s more recent extension of *Revlon* to mixed consideration transactions. Bainbridge argues

2007) (Strine, V.C.) (“*Revlon* and its progeny stand for the proposition that when a board has decided to sell the company for cash or engage in a change of control transaction, it must act reasonably in order to secure the highest price reasonably available.”); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 812 (Del. Ch. 2007) (Strine, V.C.) (“Here, for example, the Inter–Tel board is recommending a cash-out merger and had the duty under *Revlon* to act reasonably in pursuit of the highest value reasonably attainable.”); *In re Delta & Pine Land Co. Shareholders Litig.*, No. Civ.A. 17707, 2000 WL 875421, at *8 (Del. Ch. June 21, 2000) (Chandler, C.) (“The Delta-Monsanto merger did not involve a cash sale of the company, an event that would have placed the transaction in a *Revlon* factual context. The merger also did not involve a change of control, another event triggering *Revlon*.”); Chaffin v. GNI Grp., Inc., No. Civ.A. 16211-NJ, 1999 WL 721569, at *5 (Del. Ch. Sept. 3, 1999) (Jacobs, V.C.) (“In a cash-out merger that amounts to a sale of the company, the duty of the acquired company’s board is to obtain the best value reasonably available for the stockholders.”); Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1058 (Allen, C.) (Del. Ch. 1997) (“[T]he single aim of maximizing the present value of the firm’s equity. . . . [I]t is very clear when, for example, one bidder, offers an all cash deal and another offers all cash as well, but less money.”).

85. In addition to the decisions noted below, more recently, in *Koehler*, Vice Chancellor Glasscock applied *Revlon* to the all-cash sale of NetSpend to publicly traded, diffusely held Total System Services pursuant to a negotiated tender offer. *See Koehler*, 2013 WL 2181518, at *24 (denying motion for preliminary injunction).

86. 787 A.2d 691 (Del. Ch. 2001) (denying motion for preliminary injunction).

87. *See id.* at 703 (denying motion for preliminary injunction); *see also Sec. Exch. Comm’n, Schedule 14A Information: USX Corporation 19–20 (Mar. 12, 2001), http://www.sec.gov/Archives/edgar/data/101778/000091205701503227/a20406 59zdef14a.txt (confirming that USX did not have controlling shareholder around time of acquisition).

88. *See 7 A.3d 487 (Del. Ch. 2010) (denying motion for preliminary injunction).*

89. *See id.* at 497, 517 (denying motion for preliminary injunction); *see also Sec. Exch. Comm’n, Schedule 14A Information: 3M Inc. 31–32 (Mar. 23, 2011), http://www.sec.gov/Archives/edgar/data/66740/000104746911002539/a220243 0zdef14a.htm (confirming that 3M did not have controlling shareholder around time of acquisition).
the chancery court began to stray from Revlon-land’s purportedly singular concern for director self-interest in 1999 with its decision in Lukens.90 In Lukens,91 and again in a subsequent case, NYMEX,92 the chancery court suggested that a merger transaction in which the target shareholders receive all cash or mostly cash would trigger Revlon duties even though the acquirer was a publicly traded, diffusely held company with no controlling shareholder. But, as Bainbridge notes, the statements concerning Revlon in these two decisions were mere dicta, unnecessary for the court’s ultimate ruling.93 In both decisions, the court ruled that even if Revlon were triggered, the corporate charter at issue exculpated the defendant-directors of any liability for damages sought by the plaintiff-shareholders.94 Resolution of the Revlon question was therefore irrelevant to the dispute. As dicta, neither decision created legally binding precedent.

According to Bainbridge, however, the dicta of Lukens and NYMEX became binding precedent in 2011 with the chancery court’s Smurfit-Stone

90. But see supra notes 82–89 (citing cases reaffirming conventional wisdom that Revlon applies to any all-cash transaction and identifying cases applying that conventional wisdom to all-cash transactions involving publicly traded acquirer without controlling shareholder).

91. In Lukens, Vice Chancellor Lamb stated:
The defendants argue that because over 30% of the merger consideration was shares of [the acquirer’s] common stock, a widely held company without any controlling shareholder, Revlon and QVC do not apply. I disagree. Whether 62% or 100% of the consideration was to be in cash, the directors were obliged to take reasonable steps to ensure that the shareholders received the best price available because, in any event, for a substantial majority of the then-current shareholders, "there is no long run."

92. Citing Lukens, Vice Chancellor Noble in NYMEX observed that:
[In a transaction where cash is the exclusive consideration paid to the acquired corporation’s shareholders, a fundamental change of corporate control occurs—thereby triggering Revlon—because control of the corporation does not continue in a large, fluid market. In transactions, such as the present one, that involve merger consideration that is a mix of cash and stock—the stock portion being stock of an acquirer whose shares are held in a large, fluid market—"[t]he [Delaware] Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering Revlon."

93. See Bainbridge, supra note 3, at 3325 n.275, 3326.

94. See Lukens, 757 A.2d at 732 n.25 (holding that, even "assuming that Revlon is implicated, the Complaint must still be dismissed" because allegations pled amounted only to breach of duty of care, which was exculpated under target corporation’s certificate of incorporation); NYMEX, 2009 WL 3206051, at *5 (observing that court “need not decide whether Revlon scrutiny applies to the present transaction,” because, “even if Revlon applied to this case, application of the exculpatory clause [in the target corporation’s charter] would lead to dismissal” of plaintiff’s duty of care claims).
In that case, Bainbridge asserts, Vice Chancellor Parsons relied on those two earlier opinions “to hold—for the first time—that all- or partial-cash transactions trigger Revlon.”

It is true that in Smurfit-Stone, the vice chancellor opined that, as a general matter, “Revlon will govern a board’s decision to sell a corporation where stockholders will receive cash for their shares”—although, as noted above, this simply reiterates a long-established principle in chancery court jurisprudence.

And it is true that with respect to the challenged transaction before him, which involved mixed consideration, the vice chancellor stated after some deliberation: “I conclude that Plaintiffs are likely to succeed on their argument that the approximately 50% cash and 50% stock consideration here triggers Revlon.” And it is likewise true that others, like Bainbridge, have characterized this facet of the Smurfit-Stone decision as its holding.

But the analysis regarding Revlon’s applicability in Smurfit-Stone is “through and through” dictum. To start with, the opinion addressed a shareholder-plaintiff’s motion for preliminary injunction. Accordingly, the vice chancellor was not asked to definitively determine whether Revlon applied to the challenged transaction. Rather, the question before him was simply whether the shareholder-plaintiff’s Revlon claim had “a reasonable probability of success on the merits.” “[A] finding of reasonable

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95. See Bainbridge, supra note 3, at 3327.
96. Id. (emphasis added).
98. See supra note 84.
103. See In re MFW S’holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (Strine, C.) (“[T]he [Delaware] Supreme Court treats as dictum language on an issue if the record before the court was ‘not sufficient to permit the question to be passed on.’ If an issue is not presented to a court with the benefit of full argument and record, any statement on that issue by that court is not a holding with binding force.” (footnote omitted)).
probability of success at the preliminary injunction stage is not a final judgment of the court on the merits or binding on future decisions.

More importantly, however, at the outset of his opinion, Vice Chancellor Parsons also noted that the applicability of Revlon was unnecessary to the ultimate ruling on the motion before him. "[E]ven if I assume without deciding that the Revlon standard applies, the result would be the same" as it would under the default standard, the business judgment rule. Because under either standard of review, the vice chancellor held, the plaintiffs had not shown that they were reasonably likely to succeed on the merits of their claim that the defendant-directors had breached their fiduciary duties in approving the challenged mixed consideration transaction.

As was recently observed in a much discussed decision, Delaware courts "follow[ ] the traditional definition of 'dictum,'" defining it as "judicial statements on issues that 'would have no effect on the outcome of [the] case.' . . . Thus, broad judicial statements, when taken out of context, do not constitute binding holdings." Under this definition, the analysis

105. Thomas & Agnes Carvel Found. v. Carvel, Civil Action No. 3185-VCP, 2008 WL 4482703, at *25 (Del. Ch. Sept. 30, 2008) (Parsons, V.C.); see also In re Trans World Airlines, Inc. S'holders Litig., Civ. A. No. 9844, 1988 WL 111271, 14 Del. J. Corp. L. 870, 876 (Del. Ch. Oct. 21, 1998) (Allen, C.) ("Such a motion [for preliminary injunction], of course, presents no occasion to resolve finally the factual and legal issues raised by the pleadings. Rather, the court is required to make a preliminary assessment of the probability that plaintiffs will be able, at trial, to establish the wrongs alleged.").


108. Id. ("I conclude that Plaintiffs have not shown a reasonable probability of success on their claim that the Board breached its fiduciary duties by approving the [proposed] merger.").


110. See In re MFW S'holders Litig., 67 A.3d 496, 521 (Del. Ch. 2013) (emphasis added) (quoting Brown v. United Water Del., Inc., 3 A.3d 272, 276–77 (Del. 2010)) (describing as dictum statements that "would have no effect on the outcome of the case"); id. (citing Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010)) (noting that chancery court ruling was "unnecessary . . . to decide [the] issue," and therefore "obiter dictum and without precedential effect"); see
in Smurfit-Stone of whether Revlon applied to the challenged mixed consideration transaction is mere dictum. Because it was “unnecessary to the resolution of the case before [him],”\textsuperscript{111} the vice chancellor’s answer to that question does not bind future cases.\textsuperscript{112}

B. The Ambiguity of Supreme Court Precedents

Legal niceties aside, one might ask what does it matter whether the Revlon analysis in Smurfit-Stone was a holding or mere dictum? After all, irrespective of the distinction, Lukens, NYMEX, Smurfit-Stone, and other precedents make clear that at least some—and perhaps all—members of the chancery court believe (wrongly, in Bainbridge’s view) that any all-cash or cash-heavy mixed consideration transaction triggers Revlon duties regardless of the acquirer’s identity. Moreover, even nonbinding dictum may provide persuasive authority for future decisions.\textsuperscript{113} But recognizing the chancery court analysis in Smurfit-Stone and its predecessors as mere dicta sheds light on a second problem with Bainbridge’s conflict-of-interests account of the Revlon doctrine: it lacks support in relevant Delaware Supreme Court precedent.

To begin with, the Revlon decision itself—the very genesis of the doctrine—seemed less focused on the “omnipresent specter” of director self-interest\textsuperscript{114} and more focused on a different kind of conflict of interests: namely, the fact that the target board in that case had placed other stakeholders’ interests above the interests of the shareholders.\textsuperscript{115} Thus, the sem-

\textsuperscript{111} In re MFW, 67 A.3d at 502; compare id. ("Like the U.S. Supreme Court, our Supreme Court treats as dictum statements in opinions that are unnecessary to the resolution of the case before the court.") with Smurfit-Stone, 2011 WL 2028076, at *11 ("[E]ven if I assume without deciding that the Revlon standard applies, the result would be the same.").

\textsuperscript{112} See In re MFW, 67 A.3d at 521 ("In Delaware, such dictum is 'without precedential effect.'" (quoting Crown EM&K Partners, LLC v. Kurz, 992 A.2d 377, 398 (Del. 2010))).


\textsuperscript{114} See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

\textsuperscript{115} As Professor Franklin Gevurtz has observed, “Revlon is really about whether directors must maximize shareholder value, as opposed to protecting stakeholder interests . . . . [T]he question was whether Revlon’s directors could sacrifice the highest price for the shareholders in order to protect certain Revlon creditors.” Gevurtz, supra note 27, at 1546; see also Lyman Johnson, The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law, 68 Tex. L. Rev. 865, 914 (1990) (“Unmistakably, in Revlon the Delaware Supreme Court sought to contain the potentially mutinous Unocal dicta [regarding the welfare of non-shareholder
inal case seems to be more about shareholder primacy over other stakeholders than about selfish directors. If director self-interest was germane to the *Revlon* decision, it was only indirectly implicated. 116

*Revlon* itself notwithstanding, one could plausibly find support for a conflict-of-interests theory of *Revlon* by contrasting two post-*Revlon* cases: *Time-Warner* and its seemingly inseparable companion, the *QVC* decision. 117 As noted above, 118 both cases involved stock-for-stock mergers, but the Delaware Supreme Court held that *Revlon* applied only in the latter decision, because the Paramount-Viacom merger contemplated a transfer of control over Paramount to Viacom’s controlling shareholder.

Certainly, the differing results of these two well-known cases could be interpreted to be consistent with a conflict-of-interests interpretation of the *Revlon* doctrine. 119 Importantly, however, the *QVC* court never explicitly cited the potential self-interest of the Paramount directors as a factor for applying *Revlon* to the Paramount-Viacom merger. 120 The supreme court did, however, expressly articulate a number of other factors to justify *Revlon* scrutiny, including: (i) the diminution in the voting power of the Paramount shareholders in the combined post-merger business; 121 (ii) the fundamental and irrevocable change in the corporate enterprise that stakeholders] and to resurrect the primacy of the shareholder-welfare strand of corporate law . . . . ”). This reading of *Revlon* finds ample support in the text of the opinion. See e.g., *Revlon*, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (“The directors . . . made support of the Notes an integral part of the company’s dealings with Forstmann, even though their primary responsibility at this stage was to the equity owners.”); id. (“The Revlon board could not make the requisite showing of good faith by preferring the noteholders and ignoring its duty of loyalty to the shareholders.”); id. (“[C]oncern for non-stockholder interests is inappropriate when an auction among active bidders is in progress, and the object no longer is to protect or maintain the corporate enterprise but to sell it to the highest bidder.”); id. at 184 (“The [board’s] principal object, contrary to the board’s duty of care, appears to have been protection of the noteholders over the shareholders’ interests.”).

116. Even though the *Revlon* court’s concern focused primarily on the fact that the target board had sacrificed the shareholders’ interest in obtaining the highest price in order to protect certain of the target’s creditors, the court at one point also noted that “[t]he principal benefit” of favoring the creditors over the shareholders “went to the directors, who avoided [the possibility of] personal liability” stemming from litigation that the creditors had threatened. Id. at 184.

117. See Bainbridge, supra note 3, at 3299–13.

118. See supra notes 37–40 and accompanying text.

119. See supra notes 23–42 and accompanying text.

120. Bainbridge all but concedes this point, yet argues that “properly understood” the *QVC* court’s reference to other factors justifying *Revlon* duties “presumably reflect the possibility that conflicted interests” improperly motivated the Paramount board of directors. See Bainbridge, supra note 3, at 3299–313.

121. See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994) (“In the event the Paramount-Viacom transaction is consummated, the public stockholders will . . . [hold] a minority equity voting position in the surviving corporation. [T]here will be a controlling stockholder who will have the voting power to . . . alter materially the nature of the corporation and the public stockholders’ interests.”).
would result from a transfer of control to Viacom’s controlling share-
holder;¹²² (iii) the fact that the transaction represented the Paramount
shareholders’ last chance to maximize the value of their ownership inter-
est;¹²³ as well as (iv) the Paramount board’s interference with shareholder
franchise when it agreed to deal protection devices to “lock up” the
board’s preferred transaction.¹²⁴ Curiously, the risk of director self-inter-
est did not make the list.

Nevertheless, one could also plausibly find support for a conflict-of-
interests theory of the Revlon doctrine in two post-QVC Delaware Supreme
Court decisions: In re Santa Fe Pacific Corp.¹²⁵ and Lyondell Chemical Corp. v. Ryan.¹²⁶ And it is true that these cases can be read to be “consistent” with
a conflict-of-interests thesis.¹²⁷ But neither expressly embraces a conflict-
of-interests understanding of the Revlon doctrine; and each can be read to
be “consistent” with the principle articulated in Lukens, NYMEX, and
Smurfit-Stone that Revlon applies to all all-cash and cash-heavy mixed consid-
eration transactions.

For example, in Santa Fe, the supreme court ruled that Revlon was
inapplicable to a transaction in which the target shareholders were to re-
ceive a 33–67 mix of cash and acquirer stock for their shares in the target
corporation.¹²⁸ The court’s only explanation for this conclusion was that
there were no facts suggesting that there would be a controlling share-
holder of the publicly traded, combined business following the transac-
tion.¹²⁹ Seizing on the court’s terse reasoning, Bainbridge argues that
“[t]he clear implication [of Santa Fe] is that the form of consideration was

¹²². See id. at 47–48 (“There are few events that have a more significant im-
 pact on the stockholders than a sale of control . . . . [It] represents a fundamental
 (and perhaps irrevocable) change in the nature of the corporate enterprise from a
 practical standpoint. It is the significance of [this event] that justifies [Revlon
 scrutiny].”).

¹²³. See id. at 45 (reasoning that Revlon scrutiny applies because “an asset be-
 longing to public stockholders (a control premium) is being sold and may never be
 available again” (emphasis added)).

¹²⁴. See id. at 42 (“Because of the overriding importance of voting rights,
 [Delaware courts] have consistently acted to protect stockholders from unwar-
ranted interference with such rights.”).

¹²⁵. 669 A.2d 59 (Del. 1995).

¹²⁶. 970 A.2d 235 (Del. 2009).

¹²⁷. See Bainbridge, supra note 3, at 3320 (“Although motive did not figure
 explicitly in that analysis, the Delaware Supreme Court’s Lyondell decision in fact is
 fully consistent with the argument in the preceding part that motive is what mat-
ters.” (emphasis added)); cf. id. at 3331 (“The clear implication [of Santa Fe] is that
 the form of consideration was not the relevant issue.” (emphasis added)).

¹²⁸. See Santa Fe, 669 A.2d at 64–65, 71.

¹²⁹. See id. at 71 (“Conspicuously absent from the complaint is a description of
 the stock ownership structure of Burlington. Absent this factual averment,
 plaintiffs have failed to allege that control of Burlington and Santa Fe after the
 merger would not remain ‘in a large, fluid, changeable and changing market.’”
 (citation omitted)).
not the relevant issue.” 130 But this reads too much into the high court’s
cryptic opinion. After all, Santa Fe concerned a stock-heavy mixed consider-
ation transaction. 131 Thus, the challenged transaction more closely re-
sembled a strategic stock-for-stock merger between two widely held
corporations, an area where Revlon clearly does not govern. 132 The Santa Fe
court was never asked to consider whether Revlon would apply to an all-
cash merger or even a cash-heavy mixed consideration transaction. 133 So, it
is unclear what (if anything) Santa Fe portends on that question. 134

Likewise, in Lyondell Chemical, the supreme court accepted that Revlon
applied to an all-cash, cash-for-stock merger, where the acquirer was a pri-
vately held business controlled by a single individual. 135 Yet, the court
said nothing about whether Revlon would apply to the challenged transac-
tion in the absence of the transfer of control to a privately held acquirer. 136

Indeed, much like the chancery court decisions in Topps and TW Services,

130. Bainbridge, supra note 3, at 3331 (emphasis added).
131. See supra note 128 and accompanying text.
132. See, e.g., Paramount Commc’ns, Inc. v. Time Inc., 571 A.2d 1140, 1142
(Del. 1989).
133. As Vice Chancellor Lamb observed in Lukens,
I do not agree . . . that Santa Fe, in which shareholders tendered 33% of
their shares for cash and exchanged the remainder for common stock,
controls a situation in which over 60% of the consideration is cash. The
Supreme Court has not set out a black line rule explaining what percent-
age of the consideration can be cash without triggering Revlon. I take for
granted, however, that a cash offer for 95% of a company’s shares, for
example, even if the other 5% will be exchanged for the shares of a
widely held corporation, will constitute a change of corporate control.
Until instructed otherwise, I believe that purchasing more than 60%
achieves the same result.

In re Lukens Inc. S’holders Litig., 757 A.2d 720, 732 n.25 (Del. Ch. 1999).  But see
Bainbridge, supra note 3, at 3325 (asserting that “Vice Chancellor Lamb [in Luk-
ens] ducked Santa Fe by dismissing it out of hand”).
134. See Gevurtz, supra note 27, at 1527 (“What, if anything, [Santa Fe] tells us
about an entirely (or even predominately) cash-out deal . . . is in the eye of the
beholder.”). Lyman Johnson & Robert Riha, The Dwindling of Revlon, 71 WASH &
LEE L. REV. (forthcoming 2014) (manuscript at 22) (observing that with respect to
question of whether form of consideration matters for Revlon purposes “courts and
commentators have extended the Santa Fe decision beyond its actual holding”).
136. Indeed, the only new guidance that Lyondell Chemical provided on the
question of what triggers Revlon was that “[t]he duty to seek the best available price
applies only when a company embarks on a transaction—on its own initiative or in
response to an unsolicited offer—that will result in a change of control.” Id. at
242. Applying this test, the court concluded that “[t]he time for action under Revlon
did not begin until . . . the directors began negotiating the sale of Lyondell,”
leaving it uncertain whether any all-cash “sale” or specifically a “sale” to a
privately held acquirer (like the one involved under the specific facts of the case) would
trigger the enhanced judicial scrutiny. Id. (emphasis added); see also Gevurtz, supra
note 27, at 1526–27 (“[W]as this a change in control because cashing out all the
existing Lyondell shareholders removed their role in the corporation? Or was it a
change in control because the buyer was a privately held company . . . ? The
Delaware Supreme Court never actually says.”).
which Bainbridge dismisses on the grounds that each case involved a sale to a privately held acquirer.\footnote{137 See supra note 82.} *Lyondell Chemical* seems inapposite to the question of whether *Revlon* would apply in an all-cash or cash-heavy sale to a publicly traded, diffusely held acquirer.

Thus, the problem the case law presents for Bainbridge’s conflict-of-interests thesis can be visually depicted as follows (with the applicable Delaware Supreme Court precedent indicated in bold text):

**Figure 2: Matrix of Cases defining Revlon-Land**

<table>
<thead>
<tr>
<th>Consideration Paid to Target Shareholders</th>
<th>Acquirer Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Publicly Traded and Diffusely Held</td>
<td>Privately Held or Controlled</td>
</tr>
<tr>
<td>All Stock (or Mostly Stock)</td>
<td><em>Time-Warner</em></td>
</tr>
<tr>
<td></td>
<td><em>Santa Fe</em></td>
</tr>
<tr>
<td></td>
<td><em>BJR</em></td>
</tr>
<tr>
<td>All Cash (or Cash-Heavy Mix)</td>
<td><em>QVC</em></td>
</tr>
<tr>
<td></td>
<td><em>Revlon-land</em></td>
</tr>
<tr>
<td></td>
<td><em>Lukens</em></td>
</tr>
<tr>
<td></td>
<td><em>NYMEX</em></td>
</tr>
<tr>
<td></td>
<td><em>Smurfit-Stone</em></td>
</tr>
<tr>
<td></td>
<td><em>Pennaco</em></td>
</tr>
<tr>
<td></td>
<td><em>Cogent</em></td>
</tr>
<tr>
<td></td>
<td><em>TW Services</em></td>
</tr>
<tr>
<td></td>
<td><em>Topps</em></td>
</tr>
<tr>
<td></td>
<td>*Lyondell Chemical</td>
</tr>
</tbody>
</table>

In short, Bainbridge’s conflict-of-interests thesis asserts that *Revlon* is generally inapplicable to transactions that fall into box 4 of the above matrix. But the thesis relies on support from cases in boxes 1, 2, and 3 which are factually distinct from the box 4 situation—namely, an all-cash or cash-heavy sale transaction involving a publicly traded, diffusely held acquirer with no controlling shareholder. While *Revlon-land* certainly covers box 2 and box 3 transactions under supreme court precedent, the high court’s decisions simply leave box 4 unexplored.

To further complicate matters, the ambiguity of supreme court precedent is actually worse than the above matrix suggests. While Bainbridge criticizes *Lukens* and its chancery court progeny in box 4 as inconsistent with his conflict-of-interests understanding of Delaware Supreme Court precedent,\footnote{138 See Bainbridge, supra note 3, at 3331–33.} he neglects to mention that *Lukens* was summarily affirmed by the high court “on the basis of and for the reasons assigned by the
Court of Chancery in its *well-reasoned* opinion.\textsuperscript{139} Of course, because the *Revlon* analysis in *Lukens* was nonbinding dictum, and not a holding,\textsuperscript{140} it is hard to know whether the Delaware Supreme Court intended its rather terse endorsement to cover the chancery court’s dictum or just its holding.

Likewise, a conflict-of-interests theory cannot account for *McMullin v. Beran*,\textsuperscript{141} a case in which a controlling shareholder sought the sale of its partially owned subsidiary in an all-cash, all-shares transaction to an unrelated third-party acquirer.\textsuperscript{142} There, the Delaware Supreme Court specifically held that although the challenged transaction did not involve a "change of control" of the target for *Revlon* purposes, the transaction nonetheless "implicated the [target] directors’ ultimate fiduciary duty that was described in *Revlon* and its progeny—to focus on whether the shareholder value has been maximized."\textsuperscript{143} Thus, *McMullin* seems to run expressly counter to Bainbridge’s conflict-of-interests thesis, which after all asserts that a cash “sale” alone does not trigger *Revlon* unless the transaction will also result in a “change of control” of the target from a “fluid aggregation of unaffiliated stockholders” to the hands of a private entity or individual owner.\textsuperscript{144} Instead, *McMullin* seems to confirm the conventional wisdom that an all-cash transaction per se is a "sale or change of control" categorically triggering *Revlon* scrutiny.\textsuperscript{145}


\textsuperscript{140} See supra notes 93–95 and accompanying text.

\textsuperscript{141} 765 A.2d 910 (Del. 2000). Bainbridge’s only mention of *McMullin* is in a footnote, citing the case for an unrelated point. See Bainbridge, *supra* note 3, at 3319 n.251.

\textsuperscript{142} See *McMullin*, 765 A.2d at 915–16.

\textsuperscript{143} *Id.* at 920. Although the target’s controlling and minority shareholders would receive identical cash consideration in the transaction, the Delaware Supreme Court reasoned that because “the decision constitutes a final-stage transaction . . . . [T]he time frame for the board’s analysis is immediate value maximization for all shareholders.” *Id.* at 918.

\textsuperscript{144} See supra note 66.

\textsuperscript{145} To be fair, *McMullin* may be distinguished from the usual *Revlon* case, because it involves a controlling shareholder. Thus, although the court expressly stated that *Revlon* was implicated, what the court seems to articulate in *McMullin* is really a modified *Revlon* standard:

When the entire sale to a third-party is proposed, negotiated and timed by a majority shareholder, . . . the board cannot realistically seek any alternative because the majority shareholder has the right to vote its shares in favor of [its proposed] transaction . . . . Nevertheless, in such situations, the directors are obliged to make an informed and deliberate judgment, in good faith, about whether the sale to a third party that is being proposed by the majority shareholder will result in a maximization of value for the minority shareholders. *McMullin*, 765 A.2d at 919. But even so, this modified *Revlon* version was applied to an all-cash sale on the grounds that it was a “final-stage transaction,” even though the court posited it did not involve a “change of control.”
But perhaps most problematic for a conflict-of-interests theory of Revlon is that it fails to explain other facets of the Revlon doctrine. There are, after all, three distinct checkpoints for entering Revlon-land. To quote the Delaware Supreme Court’s definitive statement on the matter, Revlon applies in at least the following three scenarios:

(1) When a corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company; (2) where, in response to a bidder’s offer, a target abandons its long-term strategy and seeks an alternative transaction involving the break-up of the company; or (3) when approval of a transaction results in a sale or change of control.

While Bainbridge sensibly focuses on the third checkpoint, as it is the one that is most often crossed and, therefore, litigated, he says nothing about how his conflicts-of-interests theory explains the first or second


147. Id. Bainbridge points to the sentence immediately following this excerpted text, in which the Delaware Supreme Court added: “In the latter situation, there is no ‘sale or change in control’ when ‘[c]ontrol of both [companies] remains[s] in a large, fluid, changeable and changing market.’” Id. at 1290 (citation omitted). Bainbridge argues this qualification to the third Revlon checkpoint makes clear that an all-cash or mixed consideration acquisition by a publicly held corporation with no controlling shareholder is not a “sale or change of control.” See Bainbridge, supra note 3, at 3332. But the awkwardly edited language of this qualification originated from Chancellor Allen’s description of the stock-for-stock Time-Warner merger. See Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 47 (Del. 1994). And considering Chancellor Allen’s repeated assertions in other decisions that an all-cash, cash-for-stock merger triggers Revlon, it seems unlikely he intended the above language to exclude such transactions from Revlon’s enhanced scrutiny. See supra note 84 (citing decision of Chancellor Allen among others). The awkwardness of the language becomes clear when one tries to apply it to an all-cash deal. Following an all-cash transaction, it seems inaccurate to say control of “both companies” remains in the market where the target’s shareholders are eliminated and the target becomes a controlled subsidiary of the acquirer. And even if the supreme court’s qualification—that “sole or change in control” does not occur where “control of both companies remains in a large, fluid, changeable and changing market”—supports Bainbridge’s position, an all cash sale may nonetheless fall under Revlon’s first trigger. Arguably, even if the target corporation engages in negotiations contemplating an all-cash sale, the target has begun “an active bidding process seeking to sell itself,” even if those negotiations involve just one bidder.
checkpoints of Revlon-land. If Revlon is, in fact, all about policing director self-interest, why does the doctrine cover these other two situations?

Arguably, this is not a problem with Bainbridge’s conflict-of-interests theory. It is a problem intrinsic in the doctrine it seeks to explain. Ever elusive, there seems to be no one single policy or principle that animates Revlon and its progeny. The Delaware Supreme Court has never provided a grand unifying theory explaining why Revlon duties exist or what those duties specifically require of directors. And it has never explained why only certain categories of transactions trigger this heightened form of judicial scrutiny. To be sure, the conflict-of-interests concern is part of the Revlon story. But fiduciary self-dealing concerns do not tell the whole tale of Revlon.

As the Delaware Supreme Court has explained, “Revlon [duties] . . . do not admit of easy categorization as duties of care or loyalty.” Instead, Revlon implicates both of these fiduciary duties. It is not just about potential conflicts of interests between boards and shareholders. It is also about ensuring that directors act in an “informed and deliberate man-

148. By contrast, in the above-quoted excerpt from Arnold, the Delaware Supreme Court gave some guidance as to the theory underlying the three checkpoints of Revlon-land, by citing the work of Professor Marcel Kahan. See Arnold, 650 A.2d at 1290 (citing Marcel Kahan, Paramount or Paradox: The Delaware Supreme Court’s Takeover Jurisprudence, 19 J. Corp. L. 583 (1994)). Under Kahan’s theory, Revlon is a doctrine that imposes substantive judicial scrutiny as a substitute for shareholder voting in situations where board decisions are irreversible by the shareholders through the election of new directors. Id. at 589–602.

149. Moreover, if the concern is simply director self-interest, why does the Delaware Supreme Court not simply say so, instead of explicitly reserving for itself the room to apply Revlon to “scenarios” other than the three it has “at least” articulated? See Arnold, 650 A.2d at 1289–90.

150. See Gevurtz, supra note 27, at 1528, 1545 (“Not only has it been uncertain what triggers Revlon, it is also been uncertain what Revlon actually does. . . . [T]he failure of the Delaware courts to resolve [issues as to Revlon’s scope and impact] is symptomatic of the fact that there really is no sensible underlying rational for the doctrine.”).

151. See Kahan, supra note 148, at 585 (noting Delaware Supreme Court’s “failure to articulate a unified theory [of Revlon and its other takeover jurisprudence] in a single case”).

152. Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) (“There is only one Revlon duty—to ‘get’ the best price for the stockholders at a sale of the company. ‘No court can tell directors exactly how to accomplish that goal . . . .’ ”).


ner" with respect to significant and irreversible end-of-the-line transactions. Moreover, beyond fiduciary considerations, the doctrine “rests on ‘the overriding importance of [shareholder] voting rights,’” a facet of board accountability under corporate law that Bainbridge too readily dismisses.

The reality, thus, appears to be an untidy one: Revlon is animated by a mishmash of policy concerns that go well beyond the simple potential for conflicts of interests. These concerns span the fiduciary duties of care and loyalty and even the fundamental structure of corporate law—that boards (and not courts) manage the business affairs of the corporation.

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156. *Ivanhoe Partners*, 535 A.2d at 1345 (“[Revlon] involves duties of loyalty and care. . . . [T]he duty of care requires a director, when making a business decision, to proceed with a ‘critical eye’ by acting in an informed and deliberate manner respecting the corporate merits of an issue before the board.” (citation omitted)); *see also* Paramount Commc’ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 44 (Del. 1993) (noting that in executing Revlon duties “this Court has stressed the importance of the board being adequately informed in negotiating a sale of control”); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1287 (Del. 1989) (observing that “[t]he need for adequate information is central to the enlightened evaluation of a transaction that a board must make” to fulfill its fiduciary duty under Revlon); William J. Carney, *Mergers & Acquisitions: The Essentials* 169 (2009) (“Revlon duties are a subset of the more general duty to make an informed decision in order to obtain the protection of the business judgment rule . . . .”).

157. *See* QVC, 637 A.2d at 45 (“[Revlon] scrutiny is mandated by[], among other factors[,] the fact that an asset belonging to public stockholders (a control premium) is being sold and may never be available again . . . .”); *id.* at 47–48 (“There are few events that have a more significant impact on the stockholders than a sale of control or a corporate break-up. Each event represents a fundamental (and perhaps irrevocable) change . . . . It is the significance of each of these events that justifies [Revlon scrutiny].”); *see also* McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) (holding that Revlon applies to target board’s consideration of all-cash, all-shares acquisition because “the decision constitutes a final-stage transaction”); *see also* Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878VCL) (“[T]he change of control test is ultimately a derivative test . . . . [W]hen enhanced scrutiny applies [under Revlon] is when you have a final stage transaction.”); *see also* Kahn, supra note 148, at 592–601 (arguing that Revlon is triggered by fundamental corporate transactions that are irreversible by shareholder through election of new directors).

158. *Santa Fe*, 669 A.2d at 68 (quoting QVC, 637 A.2d at 42); *see also* QVC, 637 A.2d at 45 (“[Revlon] scrutiny is mandated by[], among other factors[,] the threatened diminution of the current stockholders’ voting power . . . [and] the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights.”); *see also* Kahn, supra note 148, at 592–601 (arguing that Revlon is triggered by fundamental corporate transactions that are irreversible by shareholder through election of new directors).

159. *See* Bainbridge, supra note 3, at 3283.

160. *Cf.* Gevirtz, supra note 27, at 1488, 1509 (noting that potential for problematic director self-interest is generally less acute in transactional contexts implicating Revlon than it is in context of self-entrenching defensive measures scrutinized under Unocal).
subject to the shareholders’ right to elect the directors.\textsuperscript{161} \textit{Revlon} addresses not only the “omnipresent specter” of director self-interest,\textsuperscript{162} it addresses the potential for “slothful indifference”\textsuperscript{163} by sometimes “torpid, if not supine”\textsuperscript{164} fiduciaries vested with control over the assets of shareholders.\textsuperscript{165} Thus, as a doctrinal matter, \textit{Revlon} is as much the evolutionary descendant of \textit{Unocal} as it is of \textit{Unocal}'s more infamous sibling, \textit{Smith v. Van Gorkom}.\textsuperscript{166} In sum, director motives matter, but \textit{Revlon} cannot be neatly defined solely by the concern for potential conflicts of interests.

C. Dictum's Guidance in a Vacuum of Binding Precedent

Given the myriad policy concerns that animate \textit{Revlon}, it is unsurprising that the geography of \textit{Revlon}-land is unclearly defined in Delaware Supreme Court precedent.\textsuperscript{167} And given this uncertainty, it is further

\begin{itemize}
  \item \textsuperscript{161} See Kahan, \textit{supra} note 148, at 606; cf. Black & Kraakman, \textit{supra} note 27, at 538–45 (observing that under applicable case law \textit{Revlon} seems to be triggered only in transactional contexts where there is reason to second-guess target board’s business judgment as to value of target corporation).
  \item \textsuperscript{162} See \textit{Revlon}, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)); see also \textit{In re Dollar Thrifty S'holder Litig.}, 14 A.3d 573, 597 (Del. Ch. 2010) (Strine, V.C.) (“The heightened scrutiny that applies in the \textit{Revlon} (and \textit{Unocal}) contexts are, in large measure, rooted in a concern that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders.”); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) (“\textit{Revlon} is merely one of an unbroken line of cases that seek to prevent the conflicts of interest that arise in the field of mergers and acquisitions by demanding that directors act with scrupulous concern for fairness to shareholders.”).
  \item \textsuperscript{163} Lyondell Chemical Co. v. Ryan, 970 A.2d 235, 241 (Del. 2009).
  \item \textsuperscript{164} Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1280 (Del. 1988) (finding that defendant-directors failed in their \textit{Revlon} duty by being “torpid, if not supine, in [their] efforts to establish a truly independent auction,” free of manipulation by interested directors).
  \item \textsuperscript{165} \textit{In re Lukens Inc. S'holders Litig.}, 757 A.2d 720, 731 (Del. Ch. 1999) (“A corporate board’s failure to obtain the best value for its stockholders may be the result of illicit motivation (bad faith), personal interest divergent from shareholder interest (disloyalty) or a lack of due care.” (emphasis added)) aff’d sub nom. Walker v. Lukens, Inc., 757 A.2d 1278 (Del. 2000) (unpublished table decision).
  \item \textsuperscript{166} \textit{In re Dollar Thrifty}, 14 A.3d at 602 (Strine, V.C.) (“\textit{Van Gorkom} . . . was really a \textit{Revlon} case.”); see also Gagliardi v. TriFoods Int’l, Inc., 683 A.2d 1049, 1051 n.4 (Del. Ch. 1996) (Allen, C.) (“I count \textit{Smith v. Van Gorkom} . . . not as a ‘negligence’ or due care case involving no loyalty issues, but as an early . . . ‘\textit{Revlon}’ or ‘change in control’ case.”); Black & Kraakman, \textit{supra} note 27, at 522 (“\textit{Van Gorkom} should be seen not as a business judgment rule case but as a takeover case that was the harbinger of the then newly emerging Delaware jurisprudence on friendly and hostile takeovers, which included the almost contemporaneous \textit{Unocal} and \textit{Revlon} decisions.”); Kahan, \textit{supra} note 148, at 593 (“\textit{Revlon} could be seen more like a ‘sale of the company’ case such as \textit{Van Gorkom}.”)
  \item \textsuperscript{167} See Gevurtz, \textit{supra} note 27, at 1488; see also \textit{In re Lukens}, 757 A.2d at 732 n.25 (Lamb, V.C.) (“The Supreme Court has not set out a black line rule explaining what percentage of the consideration can be cash without triggering \textit{Revlon}.”); \textit{In re Smurfit-Stone Container Corp. S'holder Litig.}, C.A. No. 6164-VC, 2011 WL 2028076, at *13 (Del. Ch. May 20, 2011) (Parsons, V.C.) (“The Supreme Court has
unsurprising that the Delaware Chancery Court has taken on the difficult, but crucial, project of defining the outer boundaries and inner contours of Revlon-land through dictum.

In a contemporaneous article, I explore the Delaware courts’ penchant for the strategic use of dictum. This established judicial practice, I explain, serves valuable guidance, regulatory, and responsiveness functions, which have been vital to Delaware’s success in attracting corporate and alternative entity charters. The chancery court decisions involving mixed consideration mergers—Lukens and Smurfit-Stone in particular—exemplify the court’s strategic use of dictum as well as the guidance function served by the practice.

As reflected in the figure below, mixed consideration mergers have in recent years represented nearly a quarter of all strategic acquisitions involving public corporations:

not yet clarified the precise bounds of when Revlon applies in the situation where merger consideration consists of an equal or almost equal split of cash and stock.”}; Bainbridge, supra note 3, at 3320 (observing that, under applicable Delaware precedent, Revlon is triggered whenever “the target corporation . . . initiate[s] ‘an active bidding process seeking to sell itself or to effect a business reorganization involving a clear breakup of the company,’ with it being unclear whether the reference to a ‘breakup’ modifies both halves of this checkpoint or only the latter”).

168. See Manesh, supra note 1.

169. See id. at Part III.B.1.

170. See id. at Part III.B.2.

FIGURE 3: Mergers Involving a Publicly Traded Target and a Publicly Traded or Other Strategic Acquirer

<table>
<thead>
<tr>
<th>Year</th>
<th>n</th>
<th>All Cash</th>
<th>All Stock</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005–2006</td>
<td>212</td>
<td>49%</td>
<td>20%</td>
<td>31%</td>
</tr>
<tr>
<td>2007</td>
<td>152</td>
<td>74%</td>
<td>10%</td>
<td>16%</td>
</tr>
<tr>
<td>2008</td>
<td>103</td>
<td>66%</td>
<td>15%</td>
<td>19%</td>
</tr>
<tr>
<td>2009</td>
<td>75</td>
<td>51%</td>
<td>24%</td>
<td>25%</td>
</tr>
<tr>
<td>2010</td>
<td>126</td>
<td>63%</td>
<td>14%</td>
<td>23%</td>
</tr>
<tr>
<td>2011</td>
<td>101</td>
<td>61%</td>
<td>15%</td>
<td>24%</td>
</tr>
<tr>
<td><strong>Weighted Average</strong></td>
<td></td>
<td>60%</td>
<td>16%</td>
<td>24%</td>
</tr>
</tbody>
</table>

Yet, surprisingly only one Delaware Supreme Court opinion, *Santa Fe*, has addressed the applicability of *Revlon* to such transactions. And the meaning of that decision is, as noted above, at best indeterminate. In the absence of a definitive answer or predictable framework in supreme court precedent regarding the applicability of *Revlon* to transactions involving mixed consideration, the chancery court in its *Lukens*, *NYMEX*, and *Smurfit-Stone* decisions has cautiously, but purposefully, used dictum to fill a gap left by the supreme court's *Revlon* jurisprudence.

Such dicta provide crucial guidance for attorneys and business planners on how to structure transactions to comply with applicable fiduciary obligations. While dictum is not binding on the courts in future decisions, it affords important insight on how a court would rule if the matter was squarely presented to it. Moreover, by using dictum to clarify uncertain law, the chancery court is able to provide this guidance without unfairly applying a newly announced principle retroactively on the parties who brought the litigation. As attorney William Savitt has recently noted:

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172. *In re Santa Fe Pac. Corp. S’holder Litig.*, 669 A.2d 59, 64–65, 71 (Del. 1995) (ruling that *Revlon* is inapplicable to merger in which target shareholders received 33–67 mix of cash and acquirer stock for their shares in target corporation). The original Paramount-Viacom merger at issue in *QVC* was also a mixed consideration transaction, although the cash amount was relatively small and, in any case, the presence of a controlling shareholder made the case unlike the transaction in *Santa Fe*, which involved a diffusely held, publicly traded acquirer. *See Paramount Commc’ns, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 39 (Del. 1994).


175. *See Manesh, supra* note 1, at Part III.B.2.

176. *See id.*


noted, the strategic use of dictum is part of the “genius” of the chancery court’s jurisprudence.179

Of course, despite such praise, there is naturally a danger in dictum, because it can sometimes be the product of unconsidered judgment.180 Thus, courts have cautioned that “like the proverbial chickens of destiny, dictum can come home to roost sooner or later in a very uncomfortable way . . . [becoming] a great source of embarrassment in future cases.”181 But Delaware’s judges are uniquely situated to avoid these pitfalls, given their expertise in business law matters and their intensive engagement with the corporate bar and scholars.182 Indeed, the restrained manner in which the chancery court has used dictum to only incrementally refine the understanding of Revlon’s reach within the mixed consideration context shows just how mindful its judges are of dictum’s potential danger to create bad doctrine as well as its power to influence future behavior.

One can see dictum’s guidance function palpably in the actions of parties in subsequent litigation. For example, following Smurfit-Stone, in In re Plains Exploration,183 the shareholder-plaintiffs familiarly claimed the director-defendants had breached their Revlon duties in negotiating a merger in which the shareholders would receive a 50–50 mix of cash and stock in the acquiring corporation.184 Rather than contesting the applicability of Revlon, the director-defendants conceded the point in light of the Smurfit-Stone decision185 and instead demonstrated that the process they had undertaken was, in fact, reasonable and in compliance with their Revlon duties.186

This interaction between dictum and practice, courts and directors, typifies Delaware’s unique and dynamic lawmaking process.187 And it has continued, most recently in In re Synthes, Inc.,188 issued apparently after The Geography of Revlon-Land was first drafted. Synthes continues the gap-filling guidance function that Lukens and Smurfit-Stone started. But it mer-

180. See Savitt, supra note 101, at 588 (summarizing this danger of dictum).
182. See Manesh, supra note 1, at Part III.B.2.d.
184. See id. at *4.
185. See id. at *4 n.32.
186. See id. at *4–7 (denying plaintiffs’ motion for preliminary injunction).
188. 50 A.3d 1022 (Del. Ch. 2012).
its particular attention because, although Bainbridge gives it only scant footnoted treatment, Synthes is yet another precedent in which he finds support for his conflict-of-interests thesis.\footnote{189. See Bainbridge, supra note 5, at 3325 n.273 (“Chancellor Strine’s holding [in Synthes] is fully consistent with the understanding of Revlon and its progeny advanced herein.”).}

Bainbridge asserts that the “holding” in Synthes was that Revlon is inapplicable to a transaction in which the target shareholders would receive for their shares a 35–65 mix of cash and stock in a publicly traded, widely held acquirer.\footnote{190. Id.}

Even if that were the holding of Synthes, it would say nothing about the applicability of Revlon to an all-cash merger or cash-heavy mixed consideration transaction.\footnote{191. Cf. supra notes 128–34 and accompanying text (questioning relevance of Santa Fe to all-cash or cash-heavy transactions).}

Referring back to the matrix above, Synthes (much like Santa Fe) would be a box 1 case that sheds little light on box 4 transactions.\footnote{192. See supra Part III.B.}

But more importantly, like Lukens and Smurfit-Stone before it, the analysis in Synthes as to the applicability of Revlon to the challenged mixed consideration transaction is unambiguously dictum and not a holding that binds future cases. Reminiscent of Vice Chancellor Parsons’s Smurfit Stone opinion,\footnote{193. See supra notes 128–40 and accompanying text.}

Chancellor Strine at the outset of his analysis in Synthes was careful to mention that the question of whether Revlon applies is irrelevant to his decision on the motion before him: “[E]ven if Revlon applied, for the reasons discussed at length above, there are no pled facts from which I could infer that [the defendants breached their Revlon duties]. Thus, even if Revlon applied, the complaint fails to state a viable claim.”\footnote{194. See supra notes 107–08 and accompanying text.}

Nevertheless, by indulging in dictum, Synthes adds incremental clarity to the question of when Revlon applies to mixed consideration transactions. Before Synthes, two Delaware decisions delineated the outer boundaries of Revlon-land for transactions involving mixed consideration. Santa Fe implied, but did not clearly hold, that Revlon is inapplicable to a merger in which the target shareholders would receive a 33–67 mix of cash and acquirer stock for their shares of the target corporation.\footnote{195. In re Synthes, Inc. S’holder Litig, 50 A.3d 1022, 1047 (Del. Ch. 2012). Notably, in coming to this conclusion, Chancellor Strine cited to NYMEX, an opinion whose articulation of the Revlon doctrine Bainbridge finds troublesome. See id. at 1047 n.115.}

And Smurfit-Stone, building on Lukens before it, stated in dicta that a merger in which target shareholders receive an even 50–50 split of cash and acquirer stock

\footnote{196. See supra notes 128–34 and accompanying text (noting court’s cryptically terse reasoning in Santa Fe); see also Johnson & Ricca, supra note 134, at 22–23 (observing that Santa Fe does not provide guidance as to question of whether form of consideration matters for Revlon purposes).}
would trigger Revlon duties. Although neither decision can be said to be binding on the question, each provided useful guidance as to when Revlon may be triggered in the context of mixed consideration transactions. The dictum of Synthes now marginally refines the landscape. To borrow from Professor Brian Quinn, after Synthes, the map of Revlon-land for mixed consideration transactions can be depicted as follows:

**Figure 4: Boundaries of Revlon-Land for Mixed Consideration Transactions**

The boundaries of Revlon-land have never been clearly defined precisely because the principles animating the doctrine are multi-faceted and perhaps even confounded. While Bainbridge’s conflict-of-interests explanation of Revlon should be lauded for rationalizing specific features of Revlon-land, it does not explain the whole breadth of the doctrine. Recognizing this reality, the Delaware Chancery Court has through the strategic use of dictum sought to provide incremental clarity into the precise borders of this murky doctrinal province.

Certainly, one may disagree with the content and conclusions of such dictum. And certainly, the Delaware Supreme Court may in the future revisit Revlon and revise the doctrine to provide clarity on the questions left open by its existing precedents. Indeed, the seemingly arbitrary line-drawing required in cases involving mixed consideration—distinguishing, for example, between a transaction involving an even 50–50 split of cash

197. See supra notes 101–08 and accompanying text (noting dictum of Smurfit-Stone).

198. The diagram that follows updates the diagram that Professor Brian Quinn published on his blog. See Brian J.M. Quinn, More on Revlon Triggers, M&A L. PROF BLOG (May 31, 2011), http://lawprofessors.typepad.com/mergers/2011/05/more-on-revlon-triggers.html.

199. See supra notes 146–66 and accompanying text.
and acquirer stock versus one involving a 35–65 mix—would suggest it is time for the high court to reconsider the Revlon doctrine.

The high court could choose to explicitly shrink the realm of Revlon-land to focus solely on potentially problematic conflicts of interests, as Bainbridge advocates. Or it could choose, consistent with the rationale of its previous decisions, to expand its doctrinal boundaries of Revlon to cover other categories of final-stage transactions.\footnote{See, e.g., Transcript of Ruling of the Court on Plaintiffs’ Motion for a Preliminary Injunction at 4, Steinhardt v. Howard-Anderson, 2012 WL 29340 (Del. Ch. Jan. 24, 2011) (Laster, V.C.) (C.A. No. 5878-VCL) (applying Revlon to stock-for-stock merger based upon minority percentage ownership target shareholders would have in combined post-merger entity, widely held, publicly traded company); Morgan White-Smith, Note, Revisiting Revlon: Should Judicial Scrutiny Depend on the Method of Payment?, 79 U. Chi. L. Rev. 1177, 1203–14 (2012) (embracing Steinhardt and arguing that Revlon should apply to all final-stage transactions); Black & Kraakman, supra note 27, at 543–45 (explaining that “whale-minnow” stock-for-stock merger should trigger Revlon based upon “hidden value” understanding of doctrine espoused in prior Delaware Supreme Court precedent).} Less likely yet, the supreme court may, as others have argued, scrap Revlon altogether.\footnote{See, e.g., Gevurtz, supra note 27, at 1571; see also Johnson & Ricca, supra note 134, at 58.} Although that would be a dramatic doctrinal shift, it would be consistent with the steady judicial erosion of Revlon’s remedial potency in recent years.\footnote{See generally Johnson & Ricca, supra note 134. The Delaware Supreme Court’s most recent significant decision applying the Revlon doctrine made clear that it is exceptionally difficult to obtain damages as a remedy on a Revlon claim. See Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 242–43 (Del. 2009) (stating that where corporate charter includes exculpation provision eliminating director liability for breaches of fiduciary duty of care, “an extreme set of facts”—something more than “inadequate or flawed effort” on part of directors—is required to obtain damages on Revlon claim premised on breach of fiduciary duty of good faith). Likewise, more recent Delaware Chancery Court decisions have made clear that the equitable remedy of a preliminary injunction may be unavailable even if the court believes the directors breached their Revlon duties in approving a particular transaction. See, e.g., Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518, at *22 (Del. Ch. May 21, 2013) (Glasscock, V.C.); In re El Paso Corp. S’holder Litig., 41 A.3d 492, 447 (Del. Ch. 2012) (Strine, C.).}

But in the meantime, in the wake of the Delaware Supreme Court’s indeterminate Revlon precedents, the chancery court has through the use of dictum provided some stability and predictability as to the boundaries of Revlon-land, where the law is otherwise uncertain. For this, the chancery court should be commended.