# SOCIAL MISSION IMPOSSIBLE: WHY FIDUCIARY-LIKE OBLIGATIONS MUST PROTECT WHOLLY OWNED BENEFIT CORPORATIONS

## INTRODUCTION

In 2023, corporate social activism is all the rage. Surveyed investors and consumers both profusely indicate a preference for businesses to prioritize social pursuits alongside profits,[1] and companies are responding. Be it abortion rights, racial inequality, or support for the LGBTQ+ community, modern corporations regularly take action on society's pressing issues.[2] Denim giant Levi Strauss, for instance, is lauded for its internal effort to improve the working conditions of supply chain employees and its leadership in organizing peers behind voter turnout initiatives.[3]

Some go even further. Ingrained in the DNA of companies like Patagonia—which recently pledged to dedicate, in perpetuity, the entirety of its roughly $100 million yearly profits to fight climate change—is a devotion to social objectives that equals or predominates the focus on wealth generation.[4] Ben & Jerry's was once of similar ilk. This starlet poster child for corporate social activism garnered fame, in part, for being one of the first companies to openly tout a "double bottom line"—pursuit of profits and a social mission.[5] Yet, nearly two decades ago, Ben & Jerry's surprised onlookers by agreeing to an acquisition and sought to continue its core commitment to social ideology as a wholly owned subsidiary of a profit-oriented parent company.[6] The merger was perplexing given its legal implications—a parent bound by corporate form to pursue profits and endowed with legal authority over its subsidiary would have grave temptation to disregard the latter's social endeavors. On the other hand, the

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1. Tim Stobierski, *15 Eye-Opening Corporate Social Responsibility Statistics*, HARV. BUS. SCH. ONLINE (June 15, 2021), https://online.hbs.edu/blog/post/corporate-social-responsibility-statistics [https://perma.cc/6V78-NV9S].

2. Kate Birch, *9 Companies Taking a Stance on Political or Social Issues*, BUS. CHIEF (Aug. 26, 2022), https://businesschief.com/leadership-and-strategy/9-companies-taking-a-stance-on-political-or-social-issues [https://perma.cc/CP66-6FBU].

3. Andrew Edgecliffe-Johnson, *Levi Strauss Bets Moral Mission Can Survive Public Markets*, FIN. TIMES (Mar. 30, 2020), https://www.ft.com/content/a68876f6-66ca-11ea-800d-da70cff6e4d3 [https://perma.cc/6NFQ-HU54].

4. *See* David Gelles, *Billionaire No More: Patagonia Founder Gives Away the Company*, N.Y. TIMES (Sept. 21, 2022), https://www.nytimes.com/2022/09/14/climate/patagonia-climate-philanthropy-chouinard.html [https://perma.cc/9D3U-6K7M].

5. Antony Page & Robert A. Katz, *Freezing Out Ben & Jerry: Corporate Law and the Sale of a Social Enterprise Icon*, 35 VT. L. REV. 211, 219 (2010).

6. *See infra* Part I.

backing of an equally dedicated parent company would allow a mission-driven subsidiary to soar even higher, perhaps helping to explain why this parent-subsidiary arrangement has become more common in recent years.[7] But, what happens when parent and subsidiary no longer see eye to eye?

This was precisely the question facing Ben & Jerry's in the summer of 2022 when its parent suddenly turned on the company's social policy agenda, and it is one that the current legal system does not answer satisfactorily. Although shareholder profit maximization has been the mantra around which modern corporate law has developed, a discrete socially conscious company has somewhat effective avenues to blend social mission pursuit and profit seeking.[8] It might make non-pecuniary decisions under the justification that they will generate wealth in the long run or, alternatively, reorganize as a benefit corporation legislatively designed to seek social policy ends.[9] The imperfections of these methods become glaring, however, when relied on by a purpose-oriented subsidiary that can be mistreated by its sole shareholder parent to the detriment of eager investors and the social mission they hoped to support.[10] As a result, the expectations of investors interested in both profits and activism are disappointed, society is deprived of its foremost social pioneers, and companies are forced into a banal existence where expression is policed. Ben & Jerry's knows this all too well.

There is a disconnect: corporate law contemplates social ends that are demanded by investors and consumers, but the two-tiered governance structure that more effectively fulfills the mission also fatally exposes it to the risk of an unchecked parent corporation driven by different motivations than its subsidiary.[11] This Note proposes a solution for corporations committed to activism wherein the parent-subsidiary design is saved, and so is the social mission.[12] Part I details the history of Ben & Jerry's as an illustrative reference point for the plight of socially conscious corporations. Part II reviews the objectives of corporate and contract law, the methods by which non-pecuniary objectives may properly be pursued under both doctrines, and the flaws of these methods in empowering substantive corporate social impacts. Finally, Part III proposes a drafting solution—a two-tiered governance structure involving a benefit corporation subsidiary

7. *See* Matthew Quandt, Note, *Loosening Shareholder Primacy's Grip on Environmental, Social, Governance ("ESG") Factors: Benefit Corporations Offer Increased Latitude in Decision-Making for ESG-Motivated Directors*, 4 BUS. & FIN. L. REV. 97, 100 (2021).

8. *See* discussion *infra* Section II.A.

9. *See* discussion *infra* Sections II.A.1, II.A.3.

10. *See* discussion *infra* Sections II.A.2, II.A.4.

11. *See* discussion *infra* Section II.A.

12. This Note centers primarily around Delaware corporate law as most American public companies choose to organize thereunder. Leo E. Strine, Jr., *Making it Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 243 (2014).

with an independent board of directors, all implemented via merger agreement—coupled with new recognition, as a matter of law, of a parent company's fiduciary duty to facilitate the social mission of its purpose-driven subsidiary.

## I. BEN & JERRY'S HOMEMADE: INCEPTION, MERGER, AND CONFLICT

With an origin story worthy of screentime, Ben & Jerry's Homemade came into being in 1977 on the shoulders of two men passionate about ice cream but completely lacking in business experience.[13] The short version recounts how lifelong friends Ben Cohen and Jerry Greenfield enrolled in a $5 ice cream-making course offered by Pennsylvania State University with the simple goal of running a business to make ends meet.[14] Through trial and error the two established their first scoop shop in an abandoned Burlington, Vermont gas station, and officially incorporated later that year.[15]

Their business plan was far from grandiose.[16] The pair hoped that Ben & Jerry's would be a self-sustaining source of modest income which demanded little effort and allowed for the freedom to have fun.[17] Yet, despite sales growth and franchise expansion, Greenfield was primed to leave the enterprise after years of breaking even, and Cohen struggled with the decision to sell a business that necessarily "exploits the community, . . . the employees, [and] . . . the environment."[18] It was the advice of a confidant that helped Cohen realize that Ben & Jerry's might instead be a vehicle for social good, and, suddenly, this small band of scoop shops took on greater meaning.[19]

Now moving with conviction, Ben & Jerry's acted decisively to promote its founders' progressive worldviews and took care to avoid business decisions which might jeopardize the mission.[20] The company's 1984 stock issuance exclusively to Vermont residents is illustrative, as it functioned to both allow less wealthy community members to "invest on the ground floor" at an affordable price[21] and bypass a concern of the founders that the alternative—venture capital funding—would "pose[] a greater threat to their

13. BEN COHEN & JERRY GREENFIELD, BEN & JERRY'S DOUBLE-DIP: HOW TO RUN A VALUES-LED BUSINESS AND MAKE MONEY, TOO 15–18 (1998).
14. *Id.* at 15–16.
15. *Id.* at 17–18.
16. *Id.* at 15.
17. Page & Katz, *supra* note 5, at 216.
18. COHEN & GREENFIELD, *supra* note 13, at 21–23.
19. Antony Page & Robert A. Katz, *The Truth About Ben & Jerry's*, STAN. SOC. INNOVATION REV., Fall 2012, at 39, 40.
20. *See* COHEN & GREENFIELD, *supra* note 13, at 23; Page & Katz, *supra* note 5, at 218–23.
21. COHEN & GREENFIELD, *supra* note 13, at 96.

continued control over the company."[22] Accordingly, in the aftermath of this offering Cohen and Greenfield retained 50 and 10 percent of Ben & Jerry's stock, respectively.[23]

Using this jealously guarded control, the pair made non-pecuniary objectives a priority.[24] Initially believing that "the best thing [they] could do for society was to give [money] away," Cohen and Greenfield established the Ben & Jerry's Foundation, which annually donated 7.5% of the ice cream company's pretax profits.[25] This soon evolved into more direct activism including: opposition to artificial bovine growth hormones;[26] refusal to invest in issues involving gambling, alcohol, tobacco, weapons production, nuclear power, or environmental hazards;[27] and emphasis on the use of local ingredients and those produced by suppliers employing low-income and formerly homeless individuals.[28] For standing up and speaking out, Ben & Jerry's soon became regarded as a "social enterprise icon."[29]

Yet, as social involvement by Ben & Jerry's trended up, the company's financial well-being withered.[30] Its stock price—which had soared to $33.75 in 1993—shrunk by nearly half come 1999, and the company was plagued by lackluster sales growth and return on capital.[31] Whether this decline was attributable to Ben & Jerry's social activism remains unclear.[32] Nonetheless, competitors sensed weakness and launched takeover campaigns against the giant.[33] Because the company's charter allowed for a board vote eliminating special voting rights held by Cohen and Greenfield, Ben & Jerry's directors were free to consider outside bids to the embarrassment of its founders' attempts to retain control.[34] Management thus heard and rejected numerous offers—impelled, perhaps, by multiple derivative lawsuits filed by shareholders seeking to "maximizing [the] price"—and the struggle reached

22. Page & Katz, *supra* note 5, at 218; *see also* COHEN & GREENFIELD, *supra* note 13, at 96.

23. *Vermont's Ice Cream Upstart*, N.Y. TIMES, Mar. 29, 1985, at D1, https://www.nytimes.com/1985/03/29/business/vermont-s-ice-cream-upstart.html [https://perma.cc/9TRX-4685].

24. *See* Page & Katz, *supra* note 5, at 218–23.

25. COHEN & GREENFIELD, *supra* note 13, at 101–03. This degree of charity dwarfs the 3% figure touted by the underwriter of the subsequent national public offering of Ben & Jerry's stock as "something big" by Wall Street standards. *Id.* at 101.

26. Page & Katz, *supra* note 5, at 220–21.

27. COHEN & GREENFIELD, *supra* note 13, at 104; *see also* Jeremy Caplan, *Ben and Jerry*, TIME (July 31, 2006), https://content.time.com/time/nation/article/0,8599,1220641,00.html [https://perma.cc/WPE8-VWPV].

28. Page & Katz, *supra* note 5, at 221; Page & Katz, *supra* note 19, at 40.

29. Page & Katz, *supra* note 19, at 39.

30. *See* Page & Katz, *supra* note 5, at 224.

31. *Id.*

32. *Id.* at 224–25. On one hand, the company understood that social mission pursuit might yield adverse financial effects. *Id.* at 225. Yet, part of its allure was how the company "catered to the consumers' social and ethical sensibilities," thus linking its profits to social advocacy. *Id.* at 224.

33. *Id.* at 225.

34. Jim Steiker & Michael Golden, *Hot Fudge Partners: Insiders Tell How Social Investors Tried to (but Couldn't) Buy Ben & Jerry's*, BUS. ETHICS, May/June 2000, at 7, 7.

its climax in early 2000.[35] When the dust settled, international business conglomerate Unilever supplanted Cohen and Greenfield as the sole company owner.[36] All at once, Ben & Jerry's was at risk of being muzzled.

Notwithstanding the founders' apprehension about selling the company,[37] there remained optimism for the future.[38] Although Ben & Jerry's would become a close corporation wholly owned by Conopco, Inc., itself a wholly owned subsidiary of Unilever,[39] its acquirer expressed enthusiasm about and commitment to the company's social agenda.[40] Further, Ben & Jerry's recognized that merging with Unilever would afford it greater resources to sustain more acute social involvement.[41] Most importantly, however, Unilever doubled down on its position by drafting a merger agreement ("Merger Agreement") aimed at cementing the social vision of Ben & Jerry's in the new corporate structure despite Unilever's controlling shareholder status.[42]

Heralded by Unilever's then Chief Executive Officer of North America as the "most unique deal" he had ever handled,[43] the Merger Agreement sought to buck the usual inability of a wholly owned subsidiary to stand up against its parent company—the entity legally empowered to direct all corporate behavior.[44] With broad verbiage, the Agreement vested chief authority over decisions implicating social ideology in the Ben & Jerry's

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35. *Id.*; *see also* Ben & Jerry's Homemade, Inc., Definitive Proxy Statement (Form DEF 14A), at 8–13, 38 (July 5, 2000) [hereinafter Proxy Statement 2000].

36. *See* Proxy Statement 2000, *supra* note 35, at 12–13. Although operating under a dual-headed legal structure at the time of its takeover, Unilever's heads have since merged into a single holding company—Unilever PLC. *See* Unilever Cap. Corp., Prospectus Supplement (Form 424B5), at S-8 (Aug. 9, 2021). This holding company established an American presence under a wholly owned subsidiary, Unilever United States, which operates primarily through another wholly owned subsidiary, Conopco, Inc. *Id.* at S-10. As such, the three entities should all be regarded as one and the same for the purposes of this Note.

37. *See* Page & Katz, *supra* note 19, at 39–40.

38. *See* Constance L. Hays, *Ben & Jerry's to Unilever, with Attitude*, N.Y. TIMES (Apr. 13, 2000), https://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html [https://perma.cc/6KD8-3NBP].

39. *See* Proxy Statement 2000, *supra* note 35, at 1, 30; Unilever Cap. Corp., *supra* note 36, at S-10.

40. *See* Steiker & Golden, *supra* note 34.

41. *See* COHEN & GREENFIELD, *supra* note 13, at 94. The charitable capacity of the Ben & Jerry's Foundation, for instance, would be significantly greater were it fed by ten percent of a $100 million dollar company, rather than a similar company grossing only $3 million in profits. *See id.*

42. Exhibit A to Verified Complaint, Ben & Jerry's Homemade, Inc. v. Conopco, Inc., No. 22-cv-05681 (S.D.N.Y. dismissed Dec. 19, 2022), ECF No. 1-1 [hereinafter Exhibit A].

43. BRAD EDMONDSON, ICE CREAM SOCIAL: THE STRUGGLE FOR THE SOUL OF BEN & JERRY'S 172 (2014).

44. Because the parent company of a wholly owned subsidiary necessarily holds the entirety of the latter's equity, it can typically direct the composition of the subsidiary's board of directors, thus controlling the subsidiary's behavior. *See* DEL. CODE ANN. tit. 8, §§ 211(b), 212(a), 216(3) (2023) (explaining that stockholders, entitled to vote by virtue of equity ownership, are the sole class responsible for the election of corporate directors).

board of directors ("Independent Board"), thus denying Unilever the final say on this subject matter.[45] Specifically, the Independent Board was vested with "primary responsibility for preserving and enhancing the objectives of the historical social mission of the Company" and was likewise named "custodian[] of the Ben & Jerry's-brand image."[46] Unilever, meanwhile, reserved authority over the financial and operational aspects of Ben & Jerry's, but vowed not to prevent the company from exercising its Agreement-granted privileges.[47] The "Social Mission Priorities" of Ben & Jerry's, explicitly set forth in an addendum, included both its current areas of social involvement—development of environmentally friendly packaging, opposition to bovine growth hormones, and partnership with nonprofits, among others—as well as future endeavors to be accomplished post-merger.[48] Through a separately executed shareholders agreement between Unilever and Ben & Jerry's, the parent company again promised its subsidiary freedom in social activism, albeit using the same broad prose as the Merger Agreement.[49] Thus, irrespective of Unilever's ability to coerce the Independent Board's decision-making through the use of corporate democracy,[50] the Independent Board was designed to remain steadfast in pursuing its social mission. Such an unprecedented delegation of control from parent to subsidiary, especially considering the Merger Agreement's nebulous language, created at least some uncertainty in terms of its legal enforceability.[51] Ultimately, then, the merger rested on "Ben and Jerry [having become] convinced that Unilever would honor its word."[52]

In the years since, the Independent Board has effectively continued the company's pursuit of social change in its new corporate form despite concerns that selling out to Unilever would cripple the mission.[53] In 2014, for instance, Ben & Jerry's accomplished its goal of eliminating the use of ingredients containing genetically modified organisms.[54] Refusing to shy

45. *See* Exhibit A, *supra* note 42, § 6.14(e)–(f).

46. *Id.*

47. *Id.* § 6.14(i)–(j).

48. *Id.* sched. 6.14.

49. Exhibit B to Verified Complaint, Ben & Jerry's Homemade, Inc. v. Conopco, Inc., No. 22-cv-05681 (S.D.N.Y. dismissed Dec. 19, 2022), ECF No. 1-2.

50. As the sole shareholder of Ben & Jerry's, Unilever would maintain total authority over the composition of its board of directors. *See* Exhibit A, *supra* note 42, § 6.14(a). Accordingly, Unilever might threaten to remove nonconforming directors, effectively mandating compliance with its interests.

51. At the time, there was real doubt about whether Ben & Jerry's might legitimately avail itself of a novel Vermont law allowing the company to consider prosocial factors in choosing its acquirer, much less subjugate that acquirer to the social whims of a company it would otherwise control outright under the law. *See* EDMONDSON, *supra* note 43, at 175.

52. *Id.* at 159.

53. *See* Steiker & Golden, *supra* note 34 ("[T]he old axiom 'the operation was a success but the patient died' may well apply.").

54. Amended Complaint at 21, *Ben & Jerry's Homemade, Inc.*, No. 22-cv-05681, ECF No. 58.

away from controversy, soon thereafter Ben & Jerry's announced unabashed support for the Black Lives Matter movement and ice cream sanctions against Australia for its government's opposition to same-sex marriage.[55] Notably, the Independent Board also prevailed against Unilever when the two clashed over the closure of a Ben & Jerry's manufacturing plant in Vermont upon which the local community relied.[56] Thus, the pair maintained a mostly frictionless relationship, evading conflict by declining to challenge the power allocation set forth in the Merger Agreement.[57]

Unfortunately, the collegiality between Ben & Jerry's and Unilever has recently melted away. Asserting the Independent Board's Merger Agreement autonomy, Ben & Jerry's filed suit against Unilever seeking to unwind Unilever's alleged sale of certain trademarks and brand rights to the Israeli distributor for Ben & Jerry's in July of 2022.[58] This action finds its roots in July of 2021, when the Board spoke up and announced that the social ideology of Ben & Jerry's would not allow for ice cream sales in Palestinian territory deemed occupied by the United Nations[59]—namely, the West Bank of the Jordan River, including the eastern sector of Jerusalem ("Occupied Territory").[60] Having investigated human rights violations committed therein by Israel, the Board voted unanimously to begin abating business in the Occupied Territory.[61]

Although the Israeli-Palestinian dynamic in the West Bank is expansive and beyond the scope of this Note, its history and recent developments bear on the outspoken disapproval of Israel's government by Ben & Jerry's.[62] Briefly, mass immigration of the Jewish population to the Palestinian region began at the United Nations's urging following the Second World War.[63] Yet conflict manifested from the outset—perhaps, as one author argues, because the Jewish immigrants in Palestine were "simultaneously[]

55. *Id.* at 21–23.

56. *Id.* at 21. Avoiding confrontation, Unilever reassured its subsidiary that it would comply with the Board's position. *Id.*

57. *See id.* at 20–23.

58. *Id.* at 1, 41–42.

59. Complaint for Violations of the Federal Securities Laws at 6, 18, City of St. Clair Shores Police & Fire Ret. Sys. v. Unilever PLC, No. 22-cv-05011 (S.D.N.Y. Aug. 29, 2023), ECF No. 1 [hereinafter St. Clair Shores Complaint]; *Ben & Jerry's Will End Sales of Our Ice Cream in the Occupied Palestinian Territory*, BEN & JERRY'S, https://www.benjerry.com/about-us/media-center/opt-statement [https://perma.cc/F2A5-L53J].

60. *Humanitarian Response Plan: OPT*, U.N. OFF. FOR COORDINATION HUMANITARIAN AFFS. (Jan. 25, 2023), https://www.ochaopt.org/content/humanitarian-response-plan-2023 [https://perma.cc/TU4W-5D32].

61. Amended Complaint, *supra* note 54, at 25–27.

62. This discussion of Israeli-Palestinian affairs was drafted prior to the tragic events of October 2023 and in no way comments on or evaluates the present geopolitical situation. The sole purpose of this shallow probe is to contextualize the dispute between Ben & Jerry's and Unilever.

63. GERSHON SHAFIR, A HALF CENTURY OF OCCUPATION: ISRAEL, PALESTINE, AND THE WORLD'S MOST INTRACTABLE CONFLICT 93–94 (2017).

refugees *and* settlers."[64] Fueled by mistrust and fear of losing sovereignty, territorial wars between Israel and its Arabic neighbors thus ensued through the heart of the twentieth century.[65] When the fighting ceased, Israel maintained dominance over the area formerly held by Palestine.[66]

Nonetheless, perpetual civil strife simmers in the Occupied Territory. Israel is accused of governing the Palestinian populace with an iron fist, engaging dissidents with violence, and treating civilians discriminatorily.[67] Because many experts consider it Israel's ongoing prerogative to promote its own settlement of the Occupied Territory by repressing Palestinians, few expect the current state of affairs to subside quickly.[68] Israel's behavior has thus drawn the ire of many activist organizations,[69] now including Ben & Jerry's.

The ice cream maker's regional presence began in the 1980s when businessman Ari Zinger sought to capitalize on the Israeli market.[70] After reaching a licensing agreement, Zinger became the Ben & Jerry's distributor in the area encompassing Israel and the Occupied Territory.[71] Accordingly, the company through which Zinger operates, American Quality Products, Ltd. (AQP), leased a production factory, opened scoop shops, and began creating a brand following.[72] The underlying licensing pact ultimately

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64. *Id.* at 93.

65. *Id.* at 95–96, 1–3.

66. *Id.* at 2 ("[W]ith the seizure of the Gaza Strip from Egypt and the West Bank and East Jerusalem from Jordan, the 1967 War had now brought all of what was Mandatory Palestine under Israeli rule . . . ."). Mandatory Palestine, for reference, roughly mirrored the territory today controlled by Israel and derives its name from the British Mandate for Palestine. Noah Rayman, *Mandatory Palestine: What It Was and Why It Matters*, TIME (Sept. 29, 2014, 12:45 PM), https://time.com/3445003/mandatory-palestine/ [https://perma.cc/2ML9-TFCN].

67. *See Israel and Occupied Palestinian Territories*, AMNESTY INT'L, https://www.amnesty.org/en/location/middle-east-and-north-africa/israel-and-occupied-palestinian-territories/report-israel-and-occupied-palestinian-territories/ [https://perma.cc/W299-H5YF] (accusing Israel of unlawful attacks on Palestinian children and civilians); SHAFIR, *supra* note 63, at 16–18 (contrasting the non-automatic citizenship for Palestinian residents of the Occupied Territory from the automatic citizenship granted to Jewish residents).

68. *Occupation, Discrimination Driving Israel-Palestine Conflict, Recurring Violence*, UN NEWS (June 7, 2022), https://news.un.org/en/story/2022/06/1119912 [https://perma.cc/7CUA-3W5S] (describing the conflict as asymmetrically instigated by Israel in order to create "a repressive environment for Palestinians and a favourable environment for Israeli settlers").

69. For example, Amnesty International, a global human rights organization, accuses Israel of inhumane treatment of local Palestinians and considers its governance—involving alleged forced evictions, detention, and torture—violative of international law. *Israel and Occupied Palestinian Territories*, *supra* note 67.

70. Carl Hoffman, *The Scoop on Ben & Jerry's in Israel*, JERUSALEM POST (Dec. 29, 2018, 2:32 AM), https://www.jpost.com/Magazine/Cookies-n-cream-and-tikkun-olam-575562 [https://perma.cc/PWM4-T8PY].

71. Verified Complaint for Injunctive Relief, Declaratory Relief and Damages at 7, Zinger v. Ben & Jerry's Homemade, Inc., No. 22-cv-01154 (D.N.J. dismissed July 1, 2022), ECF No. 1.

72. *Id.* at 6–7; Eliana Schreiber & Daphna Krause, *Watch: A Look Inside Ben & Jerry's Israeli Factory*, JERUSALEM POST (July 12, 2018, 12:11 PM), https://www.jpost.com/israel-news/a-look-inside-ben-and-jerrys-israeli-factory-562287 [https://perma.cc/5XTK-B2QK].

survived the merger between Ben & Jerry's and Unilever, remaining operational until the Independent Board sought to cease regional activities.

Upon Ben & Jerry's announcing its withdrawal, Unilever appeared to stand with its subsidiary by expressly recognizing the right of the Independent Board to implement its social mission.[73] So when AQP brought suit against the pair to enjoin non-renewal of its license, parent and subsidiary presented unified opposition.[74] Months later, however, Unilever reversed course, exercising its business operations authority under the Merger Agreement to sell Ben & Jerry's Israeli business interests to AQP.[75] Although Unilever would no longer profit from regional sales, the completed AQP deal allowed Zinger to continue selling Ben & Jerry's product—alternatively branded—contrary to the desire of the Independent Board.[76]

Externally, this decision was met with mixed reviews. On one hand, it alleviated the concerns of profit-oriented shareholders like Fundsmith founder Terry Smith who scolded Unilever for "excessive focus on issues unrelated to its core business."[77] Moreover, the Independent Board's stance had caused Unilever to run afoul of certain state laws barring investments in companies that boycott Israel.[78] Indeed, the state pension funds of Arizona, New Jersey, New York, and Illinois began divesting themselves of holdings in Unilever upon the Board's announcement,[79] resulting in class litigation by Unilever's remaining shareholders for violations of federal

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73. *Unilever Statement on Ben & Jerry's Decision*, UNILEVER (July 19, 2021), https://www.unilever.com/news/press-and-media/press-releases/2021/unilever-statement-on-ben-and-jerrys-decision/ [https://perma.cc/F2EV-KNRU].

74. *See* Defendants' Memorandum of Law in Opposition to Plaintiff's Motion for a Preliminary Injunction at 41, *Zinger*, No. 22-cv-01154, ECF No. 39.

75. *Unilever Reaches New Business Arrangement for Ben & Jerry's in Israel*, UNILEVER (June 29, 2022), https://www.unilever.com/news/press-and-media/press-releases/2022/unilever-reaches-new-business-arrangement-for-ben-jerrys-in-israel/ [https://perma.cc/XAL5-RAM4].

76. Sarah Butler, *Ben & Jerry's Criticises Deal That Will Resume Sales in Occupied Territories*, GUARDIAN (June 30, 2022, 8:18 AM), https://www.theguardian.com/world/2022/jun/30/ben-jerrys-criticises-deal-that-will-resume-sales-in-occupied-territories [https://perma.cc/2KBE-EXWJ]. In the eyes of the Independent Board, only a complete withdrawal of Ben & Jerry's product in the Occupied Territory would convey the Board's condemnation of perceived human rights violations by the Israeli government. *See* Amended Complaint, *supra* note 54, at 23–28.

77. Alisa Odenheimer, *Unilever Sells Ben & Jerry's Israel After West Bank Dispute*, FIN. POST (June 30, 2022), https://financialpost.com/news/retail-marketing/unilever-sells-ben-jerrys-israel-after-west-bank-dispute [https://perma.cc/CL69-UUA5].

78. *See, e.g.*, N.J. STAT. ANN. § 52:18A-89.13 (2022); ARIZ. REV. STAT. ANN. § 35-393.02 (2022).

79. Nick Kostov, *New York State to Sell Unilever Shares After Ben & Jerry's Israel Decision*, WALL ST. J. (Oct. 29, 2021, 11:12 AM), https://www.wsj.com/articles/new-york-state-to-sell-unilever-shares-after-ben-jerrys-israel-decision-11635520354 [https://perma.cc/X4HU-44EV]; Ross Kerber, *Illinois Bars State Pensions from Owning Unilever Over Israel*, REUTERS (Dec. 23, 2021, 2:21 PM), https://www.reuters.com/markets/europe/illinois-bars-state-pensions-owning-unilever-over-israel-2021-12-23/ [https://perma.cc/W4T2-EC3G].

securities laws.[80] By allowing Zinger to continue regional business, the AQP deal helped Unilever avoid state sanctions and limit further divestiture, thus pleasing its profit-minded investors.[81] Yet, shareholders less focused on the bottom line decried Unilever for acquiescing.[82] KLP, Norway's largest pension fund and holder of significant investments in Unilever, accused the conglomerate of prioritizing money over the "principled stance" taken by Ben & Jerry's "against the Israeli government's illegal and brutal occupation."[83] Decades of outspoken activism by Ben & Jerry's have thus ignited greater concern for non-pecuniary corporate efforts by a subset of investors who now look down on Unilever's cold treatment of its socially conscious subsidiary.

Now coming full circle, the Ben & Jerry's Independent Board expressly denounced Unilever for encroaching on its Merger Agreement authority and empowered a special committee to pursue relief through litigation.[84] Yet success proved elusive. Unconvinced that Ben & Jerry's faced imminent harm, and perhaps questioning that it could ever prevail given the corporate structure, the reviewing court swiftly denied Ben & Jerry's its requested preliminary injunction.[85] Penultimately, the Board answered by reasserting its contract claims for breach of the Merger Agreement by Unilever's execution of the AQP deal.[86] In the end, however, this crusade went quietly into the night. Through tight lips, Unilever issued a one sentence press release in December of 2022 announcing that litigation against its subsidiary had resolved.[87]

## II. LEGAL PROTECTIONS FOR SOCIALLY CONSCIOUS CORPORATIONS

In the aftermath of this saga, spectators are left to wonder about the degree of legal protections afforded to socially driven corporations. Corporate law has long maintained reluctance to substitute its traditional

80. *See* St. Clair Shores Complaint, *supra* note 59.

81. *See* Odenheimer, *supra* note 77; *Unilever PLC ADR*, MARKETWATCH, https://www.marketwatch.com/investing/stock/ul [https://perma.cc/3RZB-FLC5] (showing a two percent increase in Unilever's stock price—from a low of $45.29 on June 28 to a high of $46.42 on July 8—in the days following Unilever's June 29 sale of Israeli Ben & Jerry's business to Zinger).

82. Butler, *supra* note 76.

83. *Id.*

84. Exhibit J to Verified Complaint, Ben & Jerry's Homemade, Inc. v. Conopco, Inc., No. 22-cv-05681 (S.D.N.Y. dismissed Dec. 19, 2022), ECF No. 1-10.

85. *Ben & Jerry's Homemade, Inc.*, No. 22-cv-05681, 2022 WL 4239941, at *1 (S.D.N.Y. Aug. 22, 2022) (order denying preliminary injunction). Noting the exceptional nature of injunctive relief, the Court began and promptly ended its inquiry by determining that any harm incurred by Ben & Jerry's would be "too speculative" to warrant redress. *Id.* at *1–2.

86. Amended Complaint, *supra* note 54, at 34–39.

87. *Unilever Statement on Ben & Jerry's – December 2022*, UNILEVER (Dec. 15, 2022), https://www.unilever.com/news/press-and-media/press-releases/2022/unilever-statement-on-ben-jerrys-december-2022/ [https://perma.cc/WFT5-6UBQ].

measuring stick for corporate accountability—profit maximization—with one more considerate of outside interests.[88] Pecuniary gain has thus become the near exclusive metric by which protection of the vulnerable principal and fulfillment of its expectations are judged under corporate law's traditional formulation.[89] Although mechanisms have been established to permit injection of social ideology into corporate operations, those weakly purporting to fit within the classic doctrine deny covetous activists the intrinsic pleasure of ideologically aligned stock ownership and full-throated cause championing,[90] thus precluding the corporation from real reputational benefits. The benefit corporation, a recent invention designed to foster social mission pursuit, theoretically remedies these issues yet fails to accommodate the resource needs of emerging corporations.[91] Even more troubling, this form lacks sufficient enforcement structures[92] and can be effectively neutralized by shrewd corporate planners[93] allowing for the expectations of internal and external constituencies to be contravened.

Such inadequate protection of corporate social activism has thus forced creative thinking by growth-seeking, socially minded companies. The Ben

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88. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders."); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147–48 (2012) (explaining that the deferential business judgment rule necessarily requires "that the fiduciary be motivated by a desire to increase the value of the corporation for the benefit of the stockholders"). The principle first articulated in *Dodge* that the touchstone for proper exercise of corporate power is profit maximization has come to be known as "shareholder primacy." *See Dodge*, 170 N.W. at 681, 684; Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189 (2002).

89. *See* A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932); Stout, *supra* note 88, at 1200 ("[The] need to measure and monitor agent performance provides the foundation for the best of the standard arguments for shareholder primacy.").

90. *See* Quandt, *supra* note 7, at 117–19; Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 776–77 (2015) (explicating that corporate decisions intended to benefit external constituencies, even if acceptable under the pretense of promoting shareholder primacy, are legally foreclosed once a "fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself").

91. Emilie Aguirre, *Beyond Profit*, 54 U.C. DAVIS L. REV. 2077, 2095–98 (2021); Michael B. Dorff, James Hicks & Steven Davidoff Solomon, *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 117 (2021) (arguing that investors have shown willingness to buy into corporations with non-pecuniary objectives, but that broad support from venture capitalists will lag until the legal landscape has further developed).

92. The benefit corporation form requires a corporate board to consider social policy objectives in decision-making but does not compel it to pursue this end. Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 96–97 (2017); Aguirre, *supra* note 91, at 2103–04.

93. When a benefit corporation operates as a wholly owned subsidiary of a for-profit parent, the latter is unlikely to bring derivative litigation to enforce the subsidiary's social mission as it would necessarily allege its own mismanagement of the subsidiary. Quandt, *supra* note 7, at 110. Enforcement might be achieved via *double* derivative litigation filed by shareholders of the parent to enforce the parent's claim against the subsidiary, yet strict standing requirements and the business judgment rule make this option problematic. FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE 98–99 (2017).

& Jerry's solution was a wholly original governance structure to be cemented in place by contract law.[94] Even had its case against Unilever reached the merits, however, contractual protections alone likely would have failed to safeguard the social agenda Ben & Jerry's wished to pursue. The static text of a contract is conducive neither to a growing company nor to its necessarily evolving social mission,[95] and risks becoming an albatross which does more harm than good. Further, protection under contract law would seem less appealing given the comparatively high litigation costs of enforcing the agreed strictures.[96]

Nonetheless, the core idea is workable. A subsidiary's command over its social mission can survive and utilize a two-tiered governance system should it organize as a benefit corporation and should corporate law consider it the recipient of fiduciary duties in order to benefit the entire enterprise. Such a duty of the parent company to facilitate certain of its subsidiary's social objectives—though reversing the typical flow of fiduciary obligation—accommodates the goals of corporate and contract law and empowers mission-driven companies as the soaring popularity of social enterprise becomes impossible to ignore.[97] Further, the youth of the benefit corporation form presents a fortuitous opportunity for present improvements that avoid a mire of existing legal precedent.[98]

### *A. Corporate Social Activism Under Corporate Law*

#### *1. The Traditional Formulation of Corporate Law: Shareholder Primacy*

Broadly speaking, corporate law aims to protect, through the imposition of fiduciary duties, principals who stand in a position of vulnerability from harm caused by their agents.[99] In this principal-agent relationship, corporate

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94. *See supra* text accompanying notes 44–49.

95. Aguirre, *supra* note 91, at 2137.

96. While corporate law promotes pleading stage dismissal, thus curtailing costs, *see* Strine, *supra* note 88, at 147 (explaining that courts are reluctant to overturn the business decisions of a behaved fiduciary, among which lies the choice not to pursue derivative litigation against corporate decision makers), contract law has no such equivalent.

97. Aguirre, *supra* note 91, at 2087–88; Stobierski, *supra* note 1.

98. State legislation enabling benefit corporations first appeared in 2010, with Delaware following suit in 2013. Dorff, *supra* note 92, at 79–80, 82–83. In the short time since, Delaware courts have yet to interpret the legislative requirements for the proper exercise of fiduciary duty, Quandt, *supra* note 7, at 110, much less the applicability of this duty in different contexts.

99. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 588 n.199 (2003) (explaining that shareholders are "vulnerable to both uncertainty and opportunism," thus necessitating special protections from their fiduciaries); Strine, *supra* note 12, at 241 ("In the end, American corporate law makes corporate managers accountable to only one constituency—stockholders . . . .").

law considers directors trustees for the property of investors.[100] This supplies the necessary guarantee to rational investors that capital supplied to the corporate enterprise in exchange for stock will not be squandered away.[101] Trust-like obligations therefore ensure that the expectations of the investor are fulfilled.

Nonetheless, these expectations may vary considerably[102] and the low transaction costs of modern exchange markets allow for investors with differing interests to convey and acquire stock rapidly. The resulting difficulty in accommodating investor expectations is further complicated by the principle that powers conceded by each investor to the corporation must be "used only on behalf of all," thus necessitating a common corporate objective.[103] Debate raged, famously exemplified by the exchange between law professors Adolph A. Berle and E. Merrick Dodd, over the proper ends of corporate activity.[104] While the former insisted that only pursuit of profit could adequately moor corporate directors to their shareholders, the latter countered that society expects corporate efforts to be directed toward broader interests.[105] Courts, however, quickly latched onto Berle's theory that pecuniary return on investment is the purpose to which corporate directors must be held legally accountable in order to protect the common interests of the vulnerable investor.[106] As such, profitability—otherwise

100. *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049–50, 1074 (1931) (explaining that the law must, and does, view the actions of corporate management through an equitable lens because "corporation law [is] in substance a branch of the law of trusts").

101. Bainbridge, *supra* note 99, at 582 (reasoning that investors would be unlikely to invest if the law allowed directors free rein in reallocating wealth to corporate outsiders); Stout, *supra* note 88, at 1200–01 (describing the "economic evils" that stem from a lack of managerial accountability).

102. Dorff et al., *supra* note 91, at 122, 139 (distinguishing between for-profit investors who expect maximum return on investment and prosocial investors focused on the social outcome in and of itself). The investor who finds intrinsic pleasure in being involved with a company whose brand image she admires, for instance, would therefore expect the commendable traits underlying this business to persist.

103. Berle, *supra* note 100, at 1073; *see also* Strine, *supra* note 88, at 150 (echoing the view of Berle that "when corporate fiduciaries [are] allowed to consider all interests without legally binding constraints, they [are] freed of accountability to any").

104. Berle, *supra* note 100, at 1049 (posing that managerial power is exercisable "only for the ratable benefit of all the shareholders"); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (arguing that corporations "ha[ve] a social service as well as a profit-making function"); Berle, *supra* note 89, at 1367–68 (countering that diluting legally permissible ends would destroy accountability).

105. *See* Berle, *supra* note 89, at 1367–68; Dodd, *supra* note 104, at 1148–49.

106. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) (proscribing a corporation's plan to reinvest earnings into the company to benefit employees as contrary to the principle of shareholder profit maximization); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (forbidding consideration of non-shareholders during a hostile takeover because regard for shareholder pecuniary interests fully displaces outside concerns).

called "shareholder primacy"—has been the lodestar around which corporate law has evolved.[107]

In light of this guiding principle, Delaware courts employ different standards of review to determine whether corporate power has been exercised in accordance with fiduciary obligations.[108] The board-lenient business judgment rule, for instance, is a standard which presumes the validity of corporate actions unless it can be shown that the board of directors violated its duty of loyalty, care, or good faith.[109] When this presumption is rebutted, the board prevails by demonstrating that it fulfilled its duties, but did so specifically in a manner that prioritized shareholder profit.[110] Nonetheless, adherence to shareholder primacy can, at times, be flexible. Except during change-of-control transactions, the board may pursue non-monetary goals under the rationale that its actions will benefit shareholders in the long run.[111] Because business judgement deference stems from the mandate of the Delaware Code that corporate affairs be managed by the board of directors,[112] this standard will not scrutinize a decision that can adequately be tied to shareholder primacy.[113] Accordingly,

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107. Bainbridge, *supra* note 99, at 563. Some authors distinguish shareholder primacy from wealth maximization. *Id.* at 574. For the purposes of this Note, both terms will be used interchangeably as Delaware courts have mandated that decisions made on the behalf of a for-profit corporation's shareholders must promote pecuniary gain. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

108. *See eBay*, 16 A.3d at 28 (holding that defendant directors' implementation of a staggered board, rights plan, and dilutive share issuance each warranted scrutiny under a different standard of review).

109. In short, when exercising judgment corporate management must have been disinterested, *see* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (noting that the business judgment rule would not apply where a self-interested parent company caused its subsidiary to harm itself for the benefit of the parent), and informed, *see In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 64–65 (Del. 2006) (clarifying that gross negligence prevents court deference under the business judgment rule absent an exculpatory charter provision), and have avoided both bad faith acts and intentional derelictions of duty, *see id.* at 66–67; Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

110. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 40–41 (Del. Ch. 2013) ("[T]he standard of conduct for directors requires that they . . . maximize the value of the corporation for the benefit of its [shareholders], . . . not for the benefit of its contractual claimants.").

111. *Compare* Shlensky v. Wrigley, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (holding that directors did not breach any fiduciary duty for declining to invest in stadium lights that might upset neighbors as a strong community relationship would ultimately increase profitability), *and* Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 955–56 (Del. 1985) (permitting regard for non-shareholder constituencies when weighing the need to adopt defensive measures to protect against a takeover bid), *with eBay*, 16 A.3d at 33–35 (holding that directors' implementation of a rights plan to protect a corporate culture of providing low-cost services to consumers was impermissible for failure to "translate[] into increased profitability for [its] stockholders"), *and Revlon*, 506 A.2d at 182 (rejecting consideration of corporate outsiders during change of control transactions, as ensuing efforts would necessarily lack "rationally related benefits accruing to the stockholders").

112. DEL. CODE ANN. tit. 8, § 141(a) (2023).

113. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule is an acknowledgment of the managerial prerogatives of Delaware directors under Section 141(a). . . . Absent an abuse of discretion, that judgment will be respected by the courts.").

a corporate board that wishes to engage in prosocial activity that is not strictly profit maximizing can attempt to survive shareholder derivative litigation by justifying its decisions as wealth generating over time.[114]

### 2. *Shareholder Primacy Undermines Social Objectives*

As applied to widely held for-profit corporations that seek to engage in social activism, the shareholder primacy formulation of corporate law is fundamentally inconsistent with social mission fulfillment. When the interest of the corporate enterprise is defined exclusively as pecuniary gain, actions taken pursuant to social policy objectives expose the board of directors to liability for breach of fiduciary duty.[115] Rational directors could never therefore pursue social ideology through corporate machinery for fear of legal action without reasonable certainty that the charges would go unenforced. Yet, the simplicity of measuring financial performance quashes any belief that the board could sneak one past its shareholders.[116] A diminishing, or even languishing, stock price resulting from diversion of resources toward social goals is information readily available to profit-minded stockholders who need only satisfy standing requirements to bring derivative action against the board.[117] In light of the Delaware judiciary's repeated admonition that fiduciary obligations must be exercised "to promote the value of the corporation," directors cannot rest assured that derivative claims will dissipate,[118] and are thus deterred from promoting social objectives.

This paradigm is squarely demonstrated in *eBay Domestic Holdings, Inc. v. Newmark*.[119] There, defendant directors founded and operated the online listing behemoth craigslist upon the conviction that this company should serve the community.[120] Believing it to be the "heart of craigslist's business," defendants sought low prices for their consumers and refused to

114. *See Wrigley*, 237 N.E.2d at 780. This, of course, assumes that aggrieved shareholders can demonstrate that a demand for the corporation to sue its board was futile, having fallen on the deaf ears of directors who may decline to sue as an exercise of business judgment. *See* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1048–49 (Del. 2021); DEL. CH. CT. R. 23.1(a).

115. *See eBay*, 16 A.3d at 32–35 (finding that directors' objective to bind future fiduciaries to a corporate culture that benefitted customers to the detriment of shareholders was impermissibly contrary to the principle of profit maximization and therefore constituted improper fiduciary behavior).

116. Stout, *supra* note 88, at 1200. Because this information is efficiently captured in a corporation's stock price, it is difficult to delude shareholders into believing that activism-promoting actions which detract from profits indeed comport with shareholder primacy. *Id.*

117. *Id.*; *see also supra* note 114.

118. *eBay*, 16 A.3d at 34.

119. *See id.*

120. *Id.* at 8.

monetize their platform in lockstep with competitors.[121] When eBay, a minority shareholder, began competing with craigslist and refused to divest itself of its position in the company, defendants sought to neutralize the threat with measures designed to prevent eBay from acquiring board control.[122] In response, eBay sued derivatively on behalf of craigslist alleging breach of fiduciary duty for defendants' implementation of new defensive structures that eroded the company's value.[123] Rejecting defendants' pleas that the community-prioritizing culture of craigslist was a recognizable interest under corporate law, the court held impermissible certain of defendants' measures.[124] While the court "admire[d] [defendants'] desire to be of service to communities," it sternly found no place for social activism where a dissenting shareholder was denied profits.[125]

Proponents of shareholder primacy nonetheless stress the flexibility afforded by the court system's business judgment deference and insist that this, effectively, allows for covert social activism.[126] Such assertions, however, overlook a key component of advocacy: the reputational advantage of unconcealed expression. Now more than ever, consumers, employees, and investors are drawn toward companies that fight for a purpose.[127] Unashamed pursuit of social ideology thus cultivates a corporate identity that modern society seeks to reward.[128] To capitalize on this market, many companies disingenuously imitate social activism via superficial efforts.[129] When these companies fail to "put their money where their mouth

121. *Id.*
122. *Id.* at 18–21.
123. *Id.* at 26.
124. *Id.* at 33–34.
125. *Id.* at 34.
126. *See* Strine, *supra* note 88, at 147 n.34.
127. Aguirre, *supra* note 91, at 2087. Consumers, for instance, indicate that they are willing to pay more for brands that promote social and environmental policies, and both prosocial and for-profit investors have strong reasons to favor purpose-driven companies as a means of realizing each group's respective objectives. Dorff et al., *supra* note 91, at 124, 130, 139.
128. Dorff et al., *supra* note 91, at 130. Patagonia, the acclaimed outdoor apparel maker, is one such company that has benefitted from its social policy dedication. *Id.* Having long devoted itself to environmentally friendly practices and exorbitant donations, the brand ballooned into a $3 billion dollar entity. Gelles, *supra* note 4; James Giller, *Patagonia's Growth Strategy: A Masterclass in Value-Based Marketing*, NOGOOD (Sept. 30, 2022), https://nogood.io/2022/09/30/patagonia-marketing/#main [https://perma.cc/R5ZZ-NF45]. As with any business decision, to take a stance is risky and does not perfectly correlate with positive results. *See* Philip Blankinsop, *AB InBev Sticks to Forecast as China Offsets Bud Light Backlash*, REUTERS (Aug. 3, 2023, 7:51 AM), https://www.reuters.com/business/retail-consumer/ab-inbev-maintains-2023-profit-forecast-after-q2-beat-2023-08-03/ [https://perma.cc/DKJ4-CKCV]. Shareholder primacy, however, completely deprives a company of the autonomy to make such a choice and reap potentially great rewards.
129. Dorff et al., *supra* note 91, at 133–36 (explaining how some corporations "purpose wash" by feigning commitment to activism in order to swindle the goodwill of outside constituencies); Gemma

is," so to speak, the façade drops and those deceived seek retribution. In the case of Ben & Jerry's, even the perception that merging with Unilever indicated a lack of dedication to its social mission yielded grassroots backlash against the company, demonstrating society's unfavorable view of imposters.[130] Whether effectuated through legal avenues or informal boycotting, the result is the same—business suffers.

In light of the above-described threat of liability, shareholder primacy effectively forecloses devotion of corporate resources for outspoken activism and allows only for the secret advocacy so proudly suggested by defenders of this theory.[131] Yet, corporate acts claimed to promote a social purpose and immediately disclaimed upon the threat of derivative litigation are exactly the sort of disingenuous faking that society finds worthy of punishment.[132] Nor is this a speculative concern—Unilever itself faced a near-identical situation. Previously regarded as a pioneer in corporate social responsibility,[133] when Unilever executed the AQP deal to avoid derivative litigation it was publicly shamed for balking on its stance against human rights violations in the Occupied Territory.[134] Additionally, if a court considers furtively prosocial corporate acts to be too attenuated from profit maximization, then the board is subject to liability for having breached its fiduciary duties.[135] Given the legal risks and inability to enjoy social capital benefits, shareholder primacy's method of social advocacy is hardly a viable solution.

Furthermore, the rigid focus of shareholder primacy on profit maximization makes it inevitable that the expectations of shareholders not

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Elgar, *The Dos and Don'ts of Pride Campaigns*, LIBERTY (June 27, 2022), https://www.libertymarketing.co.uk/blog/the-dos-and-donts-of-pride-campaigns/ [https://perma.cc/V3F9-GR95] (describing the paradoxical Pride Month behavior of certain companies—superficial branding and social media posts coupled with political support for politicians with contrary views—and the unenthusiastic response of observers).

130. *See* Page & Katz, *supra* note 5, at 226–27. Skeptical of a disingenuous commitment to activism, Ben & Jerry's franchisees and customers led rallies opposing the Merger Agreement and boycotts of the brand. *Id.*

131. Strine, *supra* note 90, at 776–77 ("[I]f a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty.").

132. *See supra* notes 129–30 and accompanying text.

133. Eli Amdur, *Unilever: A Global Pioneer Again ... A Tradition of Corporate Social Responsibility*, FORBES (Jan. 15, 2021, 1:13 PM), https://www.forbes.com/sites/eliamdur/2021/01/15/unilever-a-global-pioneer--again-a-tradition-of-corporate-social-responsibility/?sh=15bf85937d18 [https://perma.cc/Q8CB-LZE6].

134. *See supra* text accompanying notes 75, 79–80, 82–83; Jospeh Krauss, *Sale Puts Ben & Jerry's Ice Cream Back in West Bank, Kind of*, ASSOCIATED PRESS (June 29, 2022, 4:24 PM), https://apnews.com/article/politics-jerusalem-israel-boycotts-0b63fd81c879ae1680aa2f913db4ed11 [https://perma.cc/5UPD-SGAX].

135. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) (finding defendant directors' implementation of a rights plan to be too attenuated from the goal of indefinitely perpetuating corporate culture, even assuming this is a profit-maximizing objective).

exclusively fixated on pecuniary gain will be disappointed. As Professor Dodd explained nearly a century ago, society has come to expect something more than mere profit-making from business enterprises.[136] It is a safe assumption, then, that many investors carry multi-faceted interests when deciding between investment opportunities. Beyond monetary return, one's motive may be contribution to an enterprise consistent with one's individual values.[137] Yet, the shareholder primacy conception of corporate law is built to maximize the former without regard to the latter.[138] Unavoidably, investors with nuanced interests will not be fully satisfied by the product this theory exalts.

The weaknesses of corporate law as traditionally formulated in protecting socially conscious companies are not alleviated, and indeed worsen, when a parent-subsidiary relationship—like that of Ben & Jerry's and Unilever—enters the picture. Nothing about a parent-subsidiary structure cures the reputational damage of inconsistent social mission pursuit or the disregard for investors' non-pecuniary interests resultant from this theory.[139] As for the former, one need only consider the now-resurfacing accusation that Ben & Jerry's is a sellout for having abruptly halted its social campaign in the Occupied Territory.[140] The latter, meanwhile, persists necessarily as profit maximization remains the sole permissible corporate purpose.[141]

Quite oppositely, this governance system only worsens the ability of the subsidiary board to pursue social efforts beyond the watchful eye of its principal. Because a corporate parent is the sole shareholder of its socially involved subsidiary, any non-compliance with shareholder primacy can be

136. Dodd, *supra* note 104, at 1148.

137. *See* Dorff et al., *supra* note 91, at 139.

138. *See supra* notes 106–07 and accompanying text.

139. Whether instigated by parent or subsidiary, social activism is commonly attributed to the entity that interacts directly with society, and reputational damage attaches accordingly. For instance, when Gatorade ran advertisements sporting a plus-sized actress, criticism was directed at the brand itself and not PepsiCo or Quaker Oats, its parent companies. *See* PepsiCo, Inc., Annual Report (Form 10-K), at 30 (Feb. 8, 2023) (describing the parent-subsidiary relationship between Gatorade, PepsiCo, and Quaker Oats); Lucy Partington, *The Backlash to Gatorade Featuring a Plus-Size Yoga Instructor in Their New Advert Proves Fatphobia Is Still Very Much Alive and Well*, GLAMOUR (Jan. 5, 2023), https://www.glamourmagazine.co.uk/article/jessamyn-stanley-gatorade-advert-fatphobia [https://perma.cc/KF3T-FSBG].

140. *See supra* note 53 and accompanying text; Page & Katz, *supra* note 5, at 226–27 (recounting the original backlash faced by Ben & Jerry's upon mere speculation that its parent would disregard the company's social mission); Cassie Werber, *Corporate Purpose Took a Step Backward This Week*, QUARTZ (Aug. 24, 2022), https://qz.com/ben-and-jerrys-israel-palestinian-territories-unilever-1849450069 [https://perma.cc/A9F9-8SP8].

141. *See supra* notes 109–10, 115 and accompanying text.

corrected with perfection by means of corporate democracy.[142] Should a subsidiary board even attempt activism in defiance of its profit-minded parent, the latter can threaten immediate removal of directors who will not acquiesce via written consent.[143] In the unlikely event that the subsidiary board has insulated itself with charter provisions for board staggering and for cause removal,[144] the parent's threat is only delayed until each directorship is up for re-election.[145] Given that rebellious directors will inevitably be replaced, many will instead capitulate and sacrifice activism for wealth maximization.

### 3. *Benefit Corporations Modify the Traditional Formulation*

The benefit corporation form significantly tilts the scales in favor of mission-oriented companies. In response to the Delaware judiciary's hard stance in *eBay* that for-profit incorporation demands shareholder primacy,[146] states began enacting benefit corporation statutes to enable a new corporate form that facilitates direct social activism.[147] To achieve this, the statutes recalibrate the application of fiduciary duties to fit a newly defined interest of corporate principals in social objectives. Under the Delaware variant, for instance, a public benefit corporation (PBC) is a for-profit corporation, but one that is "intended to produce a public benefit . . . and to operate in a responsible and sustainable manner."[148] Critically, the PBC must enumerate in its charter specific public benefits which it will be bound to promote.[149] To this end, directors properly exercise their fiduciary

142. By contrast, the board of a discrete socially conscious company might evade removal or replacement via election despite shareholder dissatisfaction as each dissident shareholder only has voting power commensurate to her holdings, which may fall short of the requisite threshold. DEL. CODE ANN. tit. 8, §§ 141(k), 212(a), 216(3) (2023) (describing the allocation of one vote per share and the voting requirements necessary to remove an incumbent director and elect a challenger). The fundamental problems with vote coordination emerge in full force when multiple shareholders, rather than one, aim to replace their representatives.

143. *Id.* §§ 141(k), 228(a).

144. *Id.* § 141(d), (k)(1).

145. *Id.* § 211(b). These provisions are unlikely in the first instance because the parent of a wholly owned subsidiary necessarily controls the entirety of the voting bloc and could unilaterally bar or amend out of existence such charter provisions.

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

147. Christopher D. Hampson, *Bankruptcy & The Benefit Corporation*, 96 AM. BANKR. L.J. 93, 110–11 (2022); Dorff, *supra* note 92, at 87 (explaining that the two purposes of Delaware's PBC statute were to "allow corporations to institutionalize a social purpose" and "fill market demand for a form of business organization that permits this").

148. DEL. CODE ANN. tit. 8, § 362(a) (2023).

149. *Id.* § 362(a)(1). The statute further defines a public benefit as "a positive effect (or reduction of negative effects) on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature." *Id.* § 362(b).

duties by balancing traditional shareholder pecuniary interests against the best interests of those materially affected by the corporation and the public benefits identified in the charter.[150] As written, these duties do not flow to external constituencies who maintain interest in the identified benefit,[151] nor can they be enforced by internal constituencies owning less than a threshold amount of the corporation's outstanding shares.[152] That said, PBCs otherwise remain subject to the Delaware corporate code, allowing for typical enforcement mechanisms like derivative action when standing hurdles are cleared.[153]

By defining the interest of the principal to include pursuit of identified benefits and regard for impacts on corporate outsiders, Delaware's PBC statute supplants profit maximization with a new touchstone to measure fulfillment of corporate law's goals.[154] In many respects, the framework is unchanged. To ensure that shareholders who stand in a position of vulnerability are not undermined by management's abuse of agency, enforceable fiduciary duties hold the latter accountable to the former. A broader conception of shareholder interests, however, drastically alters the core of the framework while maintaining its accountability mechanism.[155] Just as the threat of derivative action binds a for-profit corporation's board to act in accordance with shareholder primacy, so too does this threat drive PBC directors to uphold the social interests enumerated in the charter and precipitating in external constituencies.[156] Notwithstanding the widened scope of permissible conduct under the PBC form, the common expectations of shareholders remain the priority.[157] By knowingly purchasing stock in a corporation that, by statute, must announce its dedication to social goals,[158] investors express assent and effectively indicate an expectation that the PBC's social mission be promoted.[159] In

150. *Id.* § 365(a).

151. *Id.* § 365(b).

152. *Id.* § 367 (explaining that enforcement litigation requires that the filing party own either 2% of the corporation's outstanding shares, or, if the corporation is listed on a national securities exchange, the lesser of 2% of its shares and shares with a market value of at least $2 million).

153. *Id.* § 361; Dorff, *supra* note 92, at 100–01 ("Since the PBC statute does not exclude traditional derivative actions, they would seem to be permitted."); ALEXANDER, *supra* note 93, at 96 ("[T]he statute does specifically allow a shareholder to bring a derivative action on behalf of the corporation itself for a failure to balance.").

154. *See* Strine, *supra* note 12, at 242–43.

155. *See id.* at 243–44 (explaining that the PBC conception of fiduciary obligation fits within the traditional framework while expanding the scope of permissible corporate ends to which directors may be held accountable).

156. *See* DEL. CODE ANN. tit. 8, § 365(a) (2023).

157. Strine, *supra* note 12, at 245.

158. DEL. CODE ANN. tit. 8, § 362(a)(1)–(2) (2023).

159. *See* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1446 (1989); Hampson, *supra* note 147, at 119; Boilermakers Loc. 154 Ret. Fund v. Chevron

sum, PBC management remains tethered to the corporate objective approved by assenting investors whose expectations are the superior interest.

At the same time, PBCs sidestep the nasty consequences of corporate social activism under shareholder primacy. While this form mirrors for-profit incorporation in prioritizing shareholder expectations, it uniquely accommodates varying interests to the benefit of investors not solely fixated on profit. Unlike for-profit corporations, PBCs are designed to permit directors to take actions which satiate investors' non-pecuniary interests,[160] thus facilitating the intrinsic pleasure derived from involvement in an organization more ideologically aligned with the individual.[161] Moreover, the PBC form allows for mission-driven corporations to pursue social ideology without fear of legal liability.[162] Because corporate action in furtherance of social ends is baked into the touchstone for proper exercise of a PBC director's fiduciary duty, the sort of outspoken activism forbidden under shareholder primacy is perfectly within bounds.[163] As such, PBCs can more fully enjoy the reputational advantages of overt social mission pursuit.

#### 4. *Weaknesses of the Benefit Corporation*

There is nevertheless real criticism that public benefit enforcement is practically weak, and the efficacy of the PBC form is likewise undermined by uncertainty about its capacity to aid corporate growth. Delaware's PBC statute primarily encourages promotion of social goals by safeguarding directors who make decisions on the basis of non-pecuniary factors from liability for breach of fiduciary duty.[164] The hope is that directors will act *sua sponte* to carry out the PBC's social ideals and fulfill its charter priorities.[165] Yet, nothing expressly compels directors to uphold this social agenda, and they are shielded from enforcement litigation by simply making

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Corp., 73 A.3d 934, 939–40 (Del. Ch. 2013) (explaining that those who invest knowing that a corporate charter permits certain board actions assent to exercises of power consistent with the charter).

160. *See* Dorff, *supra* note 92, at 87, 96.

161. Sarah Li Cain, *Socially Responsible Investing Can Help You Make a Positive Impact: Here's What You Need to Know*, CNBC SELECT (Aug. 1, 2021), https://www.cnbc.com/select/socially-responsible-investing-what-you-should-know/ [https://perma.cc/PG6X-LDKK].

162. Dorff, *supra* note 92, at 96–98 (explaining that directors are exculpated from liability for consideration of non-pecuniary interests so long as fiduciary obligations are properly exercised).

163. *See id.*

164. DEL. CODE ANN. tit. 8, § 365(a)–(c) (2023).

165. Dorff, *supra* note 92, at 98 ("Directors threatened with liability for failing to take other corporate constituencies into account seem more likely to take care to do so.").

an effort to balance profits and public benefit.[166] Thus, a PBC board might decline the free pass to pursue activism and instead revert to profit seeking.

At this stage, PBC shareholders might turn to the court with enforcement litigation as a failsafe mechanism to ensure board accountability. Unfortunately, this response is twice flawed. First, the standard of conduct required of directors to survive judicial review is easily satisfied. The Delaware PBC statute specifically informs that fiduciary liability is avoided when board decisions are "both informed and disinterested and not such that no person of ordinary, sound judgment would approve."[167] Directors, then, must only provide evidence that the decision-making process involved some consideration of the competing interests and that the resulting decision would be condoned by a sound individual.[168] Because PBCs remain subject to the Delaware corporate code at large, directors can further exculpate grossly negligent balancing by adopting a personal liability waiver.[169] The resulting standard of conduct for board members, consistent with the Delaware judiciary's traditional business judgment deference, is quite lenient and creates a risk that directors—perhaps at the urging of a socially apathetic for-profit parent—might run roughshod over the PBC's social mission after a superficial balancing of interests.[170]

Second, and anteceding the courtroom outcome, are standing requirements. The above analysis assumes in the first instance that shareholders are able to satisfy these preconditions to derivative litigation. Yet, Delaware's jurisprudence and PBC statute require weighty showings for a derivative action to survive standing challenges.[171] Not only must a plaintiff possess sufficient holdings in the PBC to clear the statutory threshold,[172] but she must also allege particularized improprieties by a majority of the PBC board so as to satisfy Delaware's demand futility prerequisite.[173] These hurdles are significant in isolation, but grow even

166. DEL. CODE ANN. tit. 8, § 365(a) (2023) (requiring only that the "board of directors shall manage or direct . . . the public benefit corporation in a manner that balances" social and pecuniary objectives); Dorff, *supra* note 92, at 98.

167. DEL. CODE ANN. tit. 8, § 365(b) (2023).

168. *Cf.* ALEXANDER, *supra* note 93, at 96 (explaining that shareholders must allege that the board failed to pursue one of the interests outlined in Delaware's PBC statute or that its decision would not have been reached by a rational person in order to prevail in an enforcement action).

169. DEL. CODE ANN. tit. 8, § 102(b)(7) (2023); *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66–67 (Del. 2006) ("[Section 102(b)(7)] exculpates directors . . . for conduct amounting to gross negligence . . . ."); Dorff et al., *supra* note 91, at 135.

170. *See* Aguirre, *supra* note 91, at 2104.

171. *See supra* note 114; United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1047–49 (Del. 2021).

172. *See supra* note 152 and accompanying text.

173. *See Zuckerberg*, 262 A.3d at 1048, 1059; *see also supra* note 114. A plaintiff's grounds to allege directorial indiscretion are further limited should the board adopt a personal liability waiver. *Zuckerberg*, 262 A.3d at 1050.

larger when the PBC is a wholly owned subsidiary. Shareholders of the parent corporation may attempt derivative litigation against the board of a wholly owned subsidiary PBC in a so-called "double derivative" action.[174] Even so, this taxing course involves the shareholder first making a demand or alleging demand futility with regard to the parent corporation, and repeating the process with regard to the subsidiary in order to enforce the subsidiary's claim against its own directors.[175] Thus, in a two-tiered governance structure, accountability through enforcement action requires a plaintiff to twice prevail against the business judgment rule by demonstrating sterilizing influences that prevented both corporate boards from properly deciding whether to enforce the subsidiary's claim.[176] Only then might the plaintiff proceed to the merits and fight the above-described uphill battle in proving that the subsidiary's board failed to properly balance interests in disregard of its fiduciary duties.[177] In light of such obstacles, double derivative enforcement litigation to hold accountable directors of a wholly owned PBC is rightly deemed an impracticable solution.[178]

Additionally, current avenues for PBC growth endanger the company's social ideology and rest on shaky ground. As Cohen and Greenfield recognized in contemplating the merger between Ben & Jerry's and Unilever, social involvement hinges significantly on the amount of resources that can be devoted to activism.[179] Simply put, it is critical for a PBC to expand in order to maximize its social impact.[180] A number of problems arise, however, when growth is achieved by merging into a larger entity.[181] The abovementioned watering down of shareholders' enforcement mechanism is but one example.[182] Should the parent corporation de-

174. ALEXANDER, *supra* note 93, at 98; *see also* Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993).

175. *See* Lambrecht v. O'Neal, 3 A.3d 277, 282 (Del. 2010) ("[A] double derivative suit is one brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled."); *Rales*, 634 A.2d at 934 (explaining that even after a plaintiff has demonstrated the inability of the parent's board to exercise impartial judgment in responding to a demand, she must again satisfy the standing test in order "to establish that demand on the **subsidiary's** board is futile").

176. ALEXANDER, *supra* note 93, at 98–99, 99 n.46 ("[A derivative plaintiff] would need to show that the parent directors violated the lenient business judgment rule in deciding whether to pursue a claim that the subsidiary directors had violated the lenient business judgment rule.").

177. *See supra* notes 167–70 and accompanying text.

178. ALEXANDER, *supra* note 93, at 99; Strine, *supra* note 12, at 253 (explaining that a wholly owned PBC's lack of direct shareholders makes it "difficult for even very committed socially responsible investors to monitor these companies' fulfillment of their commitments"); *see also* Quandt, *supra* note 7, at 110.

179. *See supra* note 41 and accompanying text.

180. Aguirre, *supra* note 91, at 2095 ("Companies with social purpose objectives aim to maximize social impact alongside economic impact, just as traditional businesses aim to maximize profit. To do so, many of these companies attempt to scale up . . . .").

181. *Id.* at 2095–97.

182. *See supra* notes 174–78 and accompanying text.

emphasize social mission pursuit—as was Unilever's decision[183]—or take shelter under a permissive standard of conduct to effectively abandon the PBC's platform, shareholders are left with little recourse.[184] Even worse, the parent corporation might compel its subsidiary to convert altogether to a for-profit corporation or take a host of other actions adverse to its own social objectives.[185]

Seemingly, then, growth as a lone standing entity would better suit a PBC's social goals. While empirical data shows that this alternative is conducive to venture capital investment, the funding raised pales in comparison to that of similarly situated for-profit corporations.[186] Resultantly, PBCs face a disadvantage in surviving regular market competition. Further, current levels of investment into discrete PBCs rest on the perception of for-profit investors that the benefits of this corporate form—the significant social capital advantages mentioned earlier, for instance[187]—outweigh its risks.[188] Nonetheless, the legal uncertainties surrounding the degree of protection afforded to corporate boards and the effectiveness of measures to hold rogue directors accountable amount to substantial threats that undermine the attractiveness of PBC investment.[189] Given the current state of the law, volatility in the PBC investment market should come as little surprise.[190] It is thus unclear whether the current PBC form can consistently support the growth necessary for full-fledged social activism.

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183. *See supra* text accompanying notes 75–76.

184. *See supra* notes 167–70 and accompanying text; *see also* Strine, *supra* note 12, at 253 (questioning the feasibility of a PBC's post-merger commitment to social goals when shareholders must monitor PBC performance by proxy).

185. Reversion to for-profit form can be accomplished by a simple charter amendment removing any PBC provisions. DEL. CODE ANN. tit. 8, §§ 242, 362(a) (2023). Because the parent of a wholly owned subsidiary controls the entire voting bloc, it has unobstructed discretion to compel this and other adverse actions. *See* Aguirre, *supra* note 91, at 2106–10.

186. Dorff et al., *supra* note 91, at 151 ("[O]ur results show that PBC investment exists, and is not insignificant in dollar amounts . . . [but] these investments come in smaller amounts than for traditional corporations and LLCs . . . .").

187. *See supra* notes 127–28, 160–61 and accompanying text.

188. Dorff et al., *supra* note 91, at 124, 152–53 (explaining that for-profit investors might find PBC investment promising in the modern market, but that "[venture capitalists] desire certainty about legal risk" which is lacking given the primitive state of corporate law regarding PBCs).

189. *Id.* at 152–53. While Delaware's PBC statute indicates that directors are indeed bound to pursue activism as balanced against profits and that, having done so, the board is shielded from liability, *see* DEL. CODE ANN. tit. 8, §§ 362, 365 (2023), uncertainty remains as these precise issues have not yet been litigated in Delaware courts, Quandt, *supra* note 7, at 110.

190. *See* Dorff et al., *supra* note 91, at 152, 157. While some expect for-profit investors to continue backing PBCs, the data is insufficient to compel the conclusion that this form's current popularity will persist. *Id.* at 157.

### *B. Corporate Social Activism Under Contract Law*

Even given the shortcomings of PBCs, the social purpose driving Ben & Jerry's allows for easy speculation that Cohen and Greenfield would have reincorporated under this form had it existed decades ago.[191] Compelled by necessity to work as a for-profit corporation, however, Ben & Jerry's creatively attempted to guarantee protections for activism through contract law.[192] The company might have tried privately contracting with its stakeholders—employees, for instance—to ensure their veneration in spite of shareholder primacy. While this method does enable a discrete corporation to pursue non-pecuniary interests, such provisions fall to the wayside as the company grows[193] and are therefore antithetical to a critical component of corporate social activism.[194] Perhaps sensing the ineffectiveness of this course, Ben & Jerry's instead invented a wholly original application of contract law: empowering and embedding an autonomous board of directors within the traditional parent-subsidiary structure via merger agreement.[195] Yet, contractual safeguards fail to evolve alongside the social ideology they seek to uphold and, even worse, require costly litigation to enforce. Accordingly, a socially conscious subsidiary is prone to have its expectations disappointed should it rely exclusively on contract law.

#### *1. Contract Law as Applied to Merger Agreements*

Both corporate charters[196] and merger agreements[197] are contracts outlining a set of promises supported by legal remedies if breached.[198]

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191. *See* Strine, *supra* note 12, at 253 (indicating that, after its sale to Unilever, Ben & Jerry's continued to operate under a charter "requiring it to pursue public benefits" just as a PBC would); Hampson, *supra* note 147, at 126 (explaining that while not formally incorporating as a benefit corporation, Ben & Jerry's designed its merger with Unilever to allow it to behave as one). Because all that is required for conversion to a PBC is a charter amendment, DEL. CODE ANN. tit. 8, § 362(a) (2023), and the founders long maintained a majority of the voting stock, *see supra* text accompanying notes 22–23, this method would have been a painless way to avoid selling out.

192. *See supra* text accompanying notes 44–49.

193. Aguirre, *supra* note 91, at 2114 (highlighting that new managers and directors can easily alter contract terms so as to undermine the intent of the original contracting parties). Whether such contracts are feasible in the first instance—given the threat of liability faced by those who determine whether to enter said agreements—depends upon the corporation's ability to justify them as wealth maximizing. *See supra* note 110 and accompanying text.

194. *See supra* notes 179–80 and accompanying text.

195. *See supra* text accompanying notes 44–49.

196. *See* Stream TV Networks, Inc. v. SeeCubic, Inc., 279 A.3d 323, 339 (Del. 2022).

197. *See* All. Data Sys. Corp. v. Blackstone Cap. Partners V L.P., 963 A.2d 746, 759–60 (Del. Ch. 2009).

198. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981). Indeed, the so-called "contractarian" view of corporations goes further, asserting that the entire enterprise is a nexus of explicit and implicit contracts from which legal obligations stem. Bainbridge, *supra* note 99, at 547–48, 552–53.

Understood as such, it is unsurprising that commentators have contemplated creative uses of charter amendments to protect non-pecuniary objectives.[199] Yet, the focus of contract law is narrow, being geared primarily toward upholding the expectations of the contracting parties.[200] Understandably, discerning party intent can be problematic, thus necessitating a bifurcated approach to contract interpretation.[201] Where the language used in a contract is unambiguous, the promises establishing the legal obligations of the parties are construed according to their plain-language meaning.[202] By contrast, when the terms of a contract are susceptible to varying interpretations, a court must look beyond the plain language to ascertain the underlying intent.[203] Further, in pursuing the intent of the parties, a court is tasked with giving effect to each contract provision and molding an interpretation that is consistent with all terms.[204] In short, although courts maintain some flexibility to breathe life into the prose such that it better encapsulates the intent of the parties,[205] the canon of interpretation that a court must effectuate and make consistent all provisions serves to anchor the adjudicator to the text actually present.[206] Thus, the contractual protections available to any activist corporation turn on the precise language of its charter or merger agreement.

### 2. *Contract Law Offers Only a Partial Solution*

Preserving a company's social mission via novel contractual structures which broadly delegate authority to different parties in the parent-subsidiary dynamic invites ambiguity and undermines the subsidiary's ability to pursue activism. The Ben & Jerry's Merger Agreement yields this very dilemma

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199. *See* Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause*, 99 TEX. L. REV. 1423, 1450–51 (2021) (explaining that using purpose clauses housed in corporate charters can "encod[e] social aims into the DNA of the company").

200. 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 1993); *see also Stream TV*, 279 A.3d at 339.

201. *See* Allied Cap. Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1030 (Del. Ch. 2006) (describing contrasting judicial methods of contract interpretation depending on the presence of "plain and unambiguous" language).

202. *Id.* Finding clarity in the language present, the court in *Allied Capital* emphatically refused to "twist and torture the unambiguous terms . . . to give [one party] a right for which it did not bargain." *Id.* at 1031–32.

203. Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997). Accordingly, when the wording of a merger agreement supports distinct interpretations, a court must consult extrinsic evidence notwithstanding an integration clause. *Id.* at 1232–33 & n.10. Importantly, the inquiry into ambiguity hinges not on the perceived constructions of the parties, but rather the conclusion drawn by a reasonable person in the position of the parties. Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins., 616 A.2d 1192, 1196 (Del. 1992).

204. E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985); RESTATEMENT (SECOND) OF CONTRACTS § 202(5) (AM. L. INST. 1981).

205. *See Eagle Indus.*, 702 A.2d at 1232.

206. *Shell Oil*, 498 A.2d at 1113.

and demonstrates how the abovementioned principles might just as well hurt a subsidiary in a power struggle against its parent. When delineating the rights and obligations of the parties, the Merger Agreement mandates predominant authority for the Independent Board over the social goals and brand image of the company.[207] At the same time, however, the Agreement appoints Conopco—synonymous in this context with Unilever[208]—as the final arbiter of spending determinations[209] and grants it power over the office of the CEO.[210] Because social projects necessarily weigh on financing and the CEO administers all company affairs, these inconsistent provisions create reasonably apparent ambiguity as to intent as a whole.[211] The Merger Agreement yet compounds the contradiction by subjecting Conopco's broad and unilaterally exercised power to the social policy decisions of the Independent Board.[212] In essence, both parties have a hand on the social maneuvers of Ben & Jerry's. Thus, under standard canons of contract interpretation, neither Conopco's total jurisdiction over operations and finances nor the Independent Board's paramount authority over social policy can subjugate the other.[213] A court, then, must rule based on its own line-drawing.[214]

The necessary result of such a balancing is that Ben & Jerry's will lack full control over its social activism. Unless a court chooses to disregard completely the language granting Conopco blanket primacy over operations and finances, the best the Independent Board might hope for is split decision-making privileges in the context of its social mission. Nonetheless, it is an ever-present concern of the judiciary not to arbitrarily grant "a right for which [the party] did not bargain,"[215] especially when that party is sophisticated.[216] Considering the Merger Agreement right of Conopco to

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207. *See supra* text accompanying note 46.

208. *See supra* note 36.

209. Exhibit A, *supra* note 42, § 6.14(d). Appendages to the Merger Agreement provide that Conopco's delegated powers include setting the budget, determining capital expenditures, and approving transactions such as asset sales, among others. *Id.*

210. *Id.* § 6.14(c). This is significant because the CEO possesses much of the power not directly wielded by Conopco. *Id.* Conopco, as the sole shareholder of Ben & Jerry's, can unilaterally appoint and direct this position, thus rounding out its domination of finances and operations within Ben & Jerry's. *See id.* § 6.14(j).

211. Eagle Indus., Inc. v. DeVilbiss Health Care, Inc., 702 A.2d 1228, 1232 (Del. 1997) ("When the provisions in controversy are fairly susceptible of different interpretations or may have two or more different meanings, there is ambiguity."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 202(2) cmt. d (AM. L. INST. 1981).

212. Exhibit A, *supra* note 42, § 6.14(d).

213. *See* E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113 (Del. 1985) ("[T]he meaning which arises from a particular portion of an agreement cannot control the meaning of the entire agreement where such inference runs counter to the agreement's overall scheme or plan.").

214. *Id.* at 1113–14; *see supra* text accompanying notes 205–06.

215. Allied Cap. Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1032 (Del. Ch. 2006).

216. All. Data Sys. Corp. v. Blackstone Cap. Partners V L.P., 963 A.2d 746, 764 (Del. Ch. 2009).

decide unilaterally on a CEO and annual business plan,[217] a court-issued veto power bestowed upon the Independent Board seems improbable. More likely, a court would infer from a wholistic reading of the Agreement that the influence of Ben & Jerry's over asset sales, even in the context of social policy, was intended to be limited. Tellingly, the sort of action in furtherance of the Independent Board's social policy agenda contemplated by the Merger Agreement is charitable contribution.[218] Moreover, the Social Mission Priorities annexed to the Agreement enumerate actions which the Independent Board is permitted to compel.[219] Yet, these areas of authority are easily distinguishable from asset sales, thus allowing a court to draw the safe inference that the scope of authority wielded by the Independent Board does not extend so far as to encompass major financial transactions.[220] Under either scenario, Ben & Jerry's would certainly maintain less influence over its social mission than it expected in selling to Unilever.[221]

Moreover, the company will have incurred significant injury en route to a disappointing resolution. Obvious is the time and resource drain brought on by months of litigation.[222] Perhaps more impactful, however, would be the implications of this lawsuit on the ability of Ben & Jerry's to pursue its social agenda in the future. An adverse judgment could hamstring the efficacy of the Independent Board either by shrinking its sphere of influence as prescribed under the principle of *ejusdem generis*[223] or by encouraging Unilever to continually attempt to chisel away at the Board's autonomy by instigating new iterations of legal action. Because the same Merger Agreement would lie at the center of each subsequent lawsuit, an unfavorable construction might haunt Ben & Jerry's in perpetuity.[224] Absent

217. Exhibit A, *supra* note 42, § 6.14(c)–(d).

218. *Id.* § 6.14(h).

219. *Id.* sched. 6.14; *see supra* text accompanying note 48.

220. This reasoning bears similarity to "[t]he well-established rule of [contract] construction, *ejusdem generis*." Aspen Advisors LLC v. United Artists Theatre Co., 861 A.2d 1251, 1265 (Del. 2004). Under this canon, general language following a specifically described list of items is construed as encompassing only items of the same kind as those expressly enumerated. *See id.* In this instance, the Independent Board's open-ended authority to implement its social agenda can be considered general language restricted by the enumerated social missions appended to the Agreement.

221. Exhibit A, *supra* note 42, § 6.14(e)–(f); Yuki Noguchi, *Premium Dreams Still on Ice*, WASH. POST (Apr. 20, 2000), https://www.washingtonpost.com/archive/local/2000/04/20/notes/f07ec1d9-fa57-4bd6-a9f8-ad0973f964bf/ [https://perma.cc/SG7V-LDG4].

222. *See generally* Kathleen Engelmann & Bradford Cornell, *Measuring the Cost of Corporate Litigation: Five Case Studies*, 17 J. LEGAL STUD. 377 (1988) (explaining the costs, beyond legal fees, that corporate litigation yields). Unlike contract litigation, corporate litigation better fosters dismissal at the pleading stage—where costs have not fully accrued—through the business judgment rule. *See* Strine, *supra* note 88, at 147 ("Under [this] rule, the judiciary does not second-guess the decision of a well-motivated, non-conflicted fiduciary."). Only strong claims proceed to the merits; thus, the likelihood of high legal costs that do not produce results declines.

223. *See supra* note 220 and accompanying text.

224. Indeed, a narrow construction of contractual social commitments would bind a corporation to obsolete objectives and effectively moot its mission. Aguirre, *supra* note 91, at 2132.

clairvoyance, it is impossible to perfectly draft an agreement to clearly address every conceivable eventuality.[225] So when a dispute arises, the parties must either accept the drawbacks of static language or put themselves at the mercy of a court.[226] Because flexibility and consistency are vital to effective corporate social activism, the inadequacies of contract law protections are glaring.

## III. REIMAGINING FIDUCIARY DUTIES FOR WHOLLY OWNED BENEFIT CORPORATIONS

A wholly owned subsidiary can expect little help in implementing its social ideology from independent corporate and contract law protections as they currently stand. In tandem, however, these safeguards are more impactful. As the Ben & Jerry's case illustrates, contract law can be used to preserve autonomy for a subsidiary corporation post-merger.[227] Yet, for this autonomy to be useful, socially driven decisions of a subsidiary company must be able to survive enforcement litigation by profit-minded challengers.[228] Re-organizing the subsidiary as a benefit corporation is helpful to this end by providing a legal foothold to choose activism over profits without offending traditional formulations of corporate law.[229] Still, neither of these partial fixes compels the result sought by a socially conscious subsidiary: the freedom to fight for its values. In other words, the above steps are necessary but insufficient preconditions for this desired end.

The missing piece is a fiduciary-like obligation owed by the parent to its wholly owned subsidiary to facilitate the latter's social mission as characterized in the charter and inherent in the foundation of a benefit corporation. Although inverting the typical flow of fiduciary responsibility, such a duty to facilitate should be recognized as a matter of law in these narrowly described circumstances as it is consistent with the goals of corporate and contract law and remedies the practical deficiencies of current solutions. Accordingly, a wholly owned benefit corporation which contracts for decision-making independence in social activism from its controller should be protected by a unique fiduciary duty under corporate law.

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225. Amirsaleh v. Bd. of Trade of City of New York, Inc., No. 2822-CC, 2008 WL 4182998, at *1 (Del. Ch. Sept. 11, 2008) ("No contract, regardless of how tightly or precisely drafted it may be, can wholly account for every possible contingency.").

226. *See id.* A third option is to deliberately leave terms undecided and grant one party authority to later make a determination, subject to judicial review under an implied covenant of good faith. *Id.* Yet, nebulous standards guide judicial interpretation of implied covenants, *see id.* at *7–8; thus, the result achieved under this method is akin to that reached by supplying ambiguous terms.

227. *See supra* text accompanying notes 44–49. Despite its flaws in safeguarding the social mission of Ben & Jerry's, the Merger Agreement has effectively kept the Independent Board distinct.

228. *See* discussion *supra* Section II.A.2.

229. *See* discussion *supra* Section II.A.3.

### *A. This Proposal Upholds the Goals of Corporate and Contract Law*

#### *1. Corporate Law*

As articulated earlier, the chief concern of corporate law is the protection of vulnerable principals from harm caused by their fiduciaries.[230] The duties owed by such a fiduciary aim to promote the common expectation of corporate shareholders and keep the agent accountable to this end so that investors continue to place trust in the market, which flourishes in turn.[231] By recognizing the duty of a corporate parent to facilitate the efforts of its wholly owned subsidiary in pursuing public benefits identified in the subsidiary charter—thus, reversing the typical flow of fiduciary obligation—investor expectations and agent accountability are better achieved, so to satisfy corporate law's major objective.

In safeguarding this common expectation and ensuring accountability, the concept that fiduciary duty might restrain a dominant force from stampeding over a weaker one is very familiar to corporate law. It is reflected in the principal-agent context whenever doubt arises that board action pursues the proper ends.[232] This concept likewise appears, with particular force, at the principal level when controlling shareholders enter the picture. Under these circumstances, there is a grave incentive for a controlling bloc to shortchange shareholders in the minority who are powerless to object via internal measures like shareholder voting.[233] Corporate law thus prescribes searching and flexible judicial scrutiny of fiduciary behavior in order to protect the meek.[234]

So too has this idea appeared in other contexts. The notion that those with overwhelming control over an enterprise in which there is a community of interest should not abuse this power for personal gain has historically been held to prevent a controlling shareholder from jettisoning assets to the detriment of creditors,[235] a managing joint venturer from appropriating opportunities to the detriment of his partner,[236] and a physically present bondholder from triggering seizure and sale of corporate assets to the detriment of the physically distant bondholder class.[237] In all of these instances, those in command were considered quasi-trustees responsible for

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230. *See supra* notes 99–101 and accompanying text.

231. *See supra* notes 99–101 and accompanying text.

232. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 29–30 (Del. Ch. 2010) (contemplating how corporate directors may deploy a rights plan to the detriment of shareholders).

233. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

234. *See, e.g.*, *id.* at 723; Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486 (Del. Ch. 1923).

235. N.Y. Credit Men's Adjustment Bureau, Inc. v. Weiss, 110 N.E.2d 397, 399–400 (N.Y. 1953).

236. Meinhard v. Salmon, 164 N.E. 545, 547–48 (N.Y. 1928).

237. Jackson v. Ludeling, 88 U.S. (21 Wall.) 616, 623–24 (1874).

the wellbeing of the enterprise at large.[238] The popular corporate law lexicon that fiduciary duties protect the "interests of *the corporation* and its shareholders" captures this very sentiment[239] and harmonizes with the legal system's departure from the early common law view that those who trust in others should not turn to the judiciary for help.[240]

What distinguishes this Note's proposal from the above-described extensions of fiduciary duty is the direction of obligation. Whereas fiduciary duties typically flow upstream—from agent to principal—this proposal recommends that they flow downstream from for-profit parent to wholly owned benefit corporation subsidiary. This helps to avoid undermining shareholders of the parent—the ultimate principal—who expect the benefit corporation subsidiary to function effectively having bought into this enterprise.[241] Without a fiduciary obligation the parent could, consistent with its objective of profit maximization, stand idly or even urge its subsidiary as it shirks consideration of its charter-identified public benefits.[242] Yet, a duty to facilitate due regard for the subsidiary's social aims ensures that parent shareholders who invested with this expectation are prioritized, thus comporting with this objective of corporate law.

On the accountability front, unburdening corporate management from fiduciary responsibility has long been accused of providing directors a license to "take other people's money, use it as [they] wish, and ignore the best interests of [the shareholders]."[243] An agent unconstrained by fiduciary obligation, the argument goes, is no longer accountable to the principal, thus defeating the major purpose of corporate law.[244] Although poignant in the context of a discrete, widely held corporation, this concern holds less water in light of structural constraints upon the hypothetical subsidiary in the present proposal. In particular, a fiduciary duty which strictly facilitates a subsidiary benefit corporation's charter-described social goals would narrowly constrain the managerial freedom derived from this duty to the realm of public benefits.[245] Thus, the only license given to the subsidiary is

238. *See, e.g.*, *Weiss*, 110 N.E.2d at 400 ("Quasi trustees must be held to accountability for the performance of obligations thrust upon them by circumstances.").

239. Unocal Corp. v. Mesa Petrol. Co., 493 A.2d 946, 954 (Del. 1985) (emphasis added).

240. *See* David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1012–14 (2011) ("The fools who trusted their neighbors . . . had to look outside the common law—or wait a few centuries for the law to develop a new remedy . . . .").

241. *See supra* notes 158–59 and accompanying text.

242. *See generally* Glassman v. Unocal Expl. Corp., 777 A.2d 242, 243, 247–48 (Del. 2001) (explaining that a parent company may exploit its 96% owned subsidiary by summarily eliminating its minority shareholders in order to increase its own profits).

243. Strine, *supra* note 88, at 150.

244. Bainbridge, *supra* note 99, at 582–83.

245. *See* Strine, *supra* note 90, at 767 (praising the theory of Professor Berle that corporate law should actively regulate and channel extensions of corporate power, and reproaching the unrestrained delegation to corporate directors promoted by Professor Dodd).

such that it may act consistent with the expectation of the ultimate shareholder in the first instance—pursuit of activism as balanced against profits. Moreover, the necessary consequence of a parent-subsidiary design is that the former, which still owes a traditional fiduciary responsibility to its shareholders, would retain control over the latter. As a result, the parent can provide oversight and curtail actions taken beyond the scope of the subsidiary's license for public benefits.[246] In short, the narrow scope of subsidiary power and availability of parental oversight serve to focus the subsidiary such that it conforms with corporate law's goal of accountability to the ultimate principal.

### 2. *Contract Law*

Contract law seeks to pursue a simpler target: upholding the expectations of the contracting parties.[247] When these are explicit, this task is easily accomplished. It is only when the intent of the parties is obscure that courts may rely on canons of interpretation that risk a result contrary to what the parties originally had in mind.[248] Indeed, substantial judicial interpretation creates room for doubt that the parties' actual intent was ultimately effectuated.[249] As such, a corporate charter or merger agreement that is unambiguous on its face avoids this concern and better enables the purpose of contract law to be satisfied.

Notably, and in contrast to the Ben & Jerry's case, the relevant contract of the present proposal does very little work. While the Ben & Jerry's Merger Agreement aims to both preserve its autonomy post-merger *and* endow its Independent Board with legal protections for the company social mission,[250] the present proposal envisions a merger agreement that accomplishes only the former. Specifically, the proposed merger agreement would include language demonstrating an intent that the subsidiary board remain independent from parental influence in its formation and, as a result, in its determinations.[251] The only other drafting necessary, assuming the subsidiary has not done so pre-merger, would be to amend the subsidiary

246. *See supra* notes 142–45 and accompanying text (describing oversight via removal of non-compliant board members).

247. WILLISTON & LORD, *supra* note 200.

248. Allied Cap. Corp. v. GC-Sun Holdings, L.P., 910 A.2d 1020, 1030 (Del. Ch. 2006).

249. An appellate finding that a contract interpreted one way at trial should be construed entirely another, *see* E.I. du Pont de Nemours & Co. v. Shell Oil Co., 498 A.2d 1108, 1113–14 (Del. 1985), surely calls into doubt whether the construction matches what was originally intended.

250. *See supra* text accompanying notes 44–49.

251. *See* Exhibit A, *supra* note 42, § 6.14(a). The Ben & Jerry's Merger Agreement, for example, directed that a majority of the post-merger Independent Board would consist of former Ben & Jerry's directors, and that only the Board would have authority over new candidate nominations. *Id.* In effect, the Board would be able to continually restock itself with prosocial directors and ward off Unilever's selections, so as to maintain control over decision-making not expressly committed to the CEO.

charter to incorporate it as a benefit corporation.[252] With this corporate form, the resulting independent board will draw social mission protections not from contract law—the merger agreement provides for none in the first instance—but rather from a parental duty to facilitate governed by corporate law.

In this scenario, should litigation regarding the hypothetical subsidiary's independence arise, a reviewing court need not decide line by line which permissions for social activism the company maintains post-merger. Instead, the court is able to focus on a narrow issue: did the parties intend for the subsidiary's board to remain separate from the parent post-merger? Of course, the result turns on the language present and judicial interpretation.[253] Yet the simplicity of this inquiry is conducive to drafting that clearly articulates the parties' intent.[254] Thus, the aim of contract law—that this intent be executed—is more easily fulfilled in the present proposal where no weight is placed on contractual social mission protections.

### *B. This Proposal Avoids the Practical Defects of Current Solutions*

As explained above, contract law falls flat in protecting the social mission of a purpose-driven company for two practical reasons. First, contracts are static and require continuous amendment to remain relevant to a company's social platform.[255] This becomes problematic when new management with a divergent ideology displaces the old—a likely result of company growth.[256] Commitments thus risk becoming obsolete or diluted by differently focused directors and controllers. Second, court enforcement of contract protections is likelier to yield higher costs without any greater likelihood of success.[257] Worse, contracts construed unfavorably add to a body of negative precedent that undermines the future efforts of a mission-driven corporation.[258]

Fortunately, these concerns are sidestepped altogether under the present proposal. Once more, this proposal relies not on contract but corporate law to protect the subsidiary as it balances pecuniary and non-pecuniary

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252. Indeed, Delaware's merger statute contemplates charter amendments during the process of a merger, DEL. CODE ANN. tit. 8, § 251(f) (2023), and incorporation as a PBC requires only a standard amendment which identifies the subsidiary as a PBC and enumerates the public benefits to be pursued, *id.* § 362(a)(1)–(2).

253. *See* Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins., 616 A.2d 1192, 1195–96 (Del. 1992).

254. *Id.* at 1198.

255. Aguirre, *supra* note 91, at 2137.

256. *Id.* at 2113–14.

257. *See supra* note 222 and accompanying text.

258. *See supra* notes 223–24 and accompanying text.

considerations. Fiduciary duties act as gap fillers[259] and prescribe dynamic remedies on the basis of what is equitable in light of the fiduciary relationship rather than the static text of a contract.[260] As such, enforcement actions geared to uphold the spirit of this relationship maintain the flexibility that is lacking in breach of contract litigation focused on the letter of the text.[261] Further, because the merger agreement is not the source of social mission protection there is little risk that an adverse construction will later hamstring the subsidiary. Lastly, judicial reliance is likely to be less costly on average for enforcement proceedings under corporate law where intense standing hurdles filter out weak claims.[262] Thus, the accumulating costs of fruitless efforts by the subsidiary are better avoided when the source of legal protection is fiduciary obligation.

Meanwhile, there are several practical shortcomings of current corporate law vehicles for a wholly owned subsidiary's social mission pursuit, but a few can be dispelled from the outset under the present proposal. Incorporation as a for-profit company triggers shareholder primacy as the touchstone for proper exercise of fiduciary duty. As discussed, this creates a lingering risk of liability for ideologically driven decisions thus diminishing the ability of rational directors to make them.[263] The effect is that the corporation is deprived of reputational benefits that proceed from outspoken activism and unable to satisfy investors motived by non-pecuniary interests.[264] Yet, because these drawbacks are mooted under benefit corporation form where non-monetary considerations are indeed mandated,[265] the present proposal evades such faults.

This proposal confronts head-on, however, the deficiencies of benefit corporations otherwise unsupported by parental fiduciary obligation. The first critique of benefit corporations is that the form is detrimental to growth, thus marginalizing social impact and endangering competitiveness in the open market.[266] The above analysis discounted growth through merger almost entirely because a subsidiary without the protection of a parental duty to facilitate is unable to withstand strongarming by its parent.[267] To place trust in an outright controller would fatally jeopardize social mission

259. Bainbridge, *supra* note 99, at 586.

260. *See* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

261. *See* Aguirre, *supra* note 91, at 2137. In other words, a court is at greater liberty to approve pursuit of the social objectives enumerated in a subsidiary's charter—as well as objectives lying in the penumbras of those enumerated—when the body of law applied focuses on veneration of investor expectations and agent accountability, not on discerning the past intent of contracting parties.

262. *See* discussion *supra* Section II.A.4.

263. *See supra* text accompanying notes 115–18.

264. *See* discussion *supra* Section II.A.2.

265. *See* DEL. CODE ANN. tit. 8, § 365(a) (2023).

266. *See* discussion *supra* Section II.A.4.

267. *See* discussion *supra* Section II.A.4. Indeed, this is exactly what happened to Ben & Jerry's.

fulfillment. This problem largely disappears, however, when said controller is obligated to facilitate its subsidiary's underlying social objectives. This responsibility both restrains the parent from undermining its subsidiary and, as will be shown in the ensuing analysis, alleviates the enforcement difficulties plaguing wholly owned benefit corporations. Aided by a duty to facilitate, submitting to a two-tiered governance structure and to a total controller thus poses far less risk to a subsidiary's pursuit of activism. Accordingly, growth by acquisition becomes a viable option.

The crippling problem with benefit corporations under the current law is an inability to enforce social mission pursuit as imagined in the corporate charter.[268] Such a public benefit purpose might go unenforced in two ways: the for-profit parent might preclude its subsidiary from carrying out its non-pecuniary prerogatives while hiding behind the business judgment rule, or the subsidiary board might shirk its obligation to consider public benefits under the laxity of its balancing duty. In the former case, the public benefit purpose might be enforced derivatively by the parent shareholders. This class will likely find little success on the merits, however, given the parent's obligation to make profit-maximizing decisions and the ease with which it can justify non-consideration of corporate outsiders as profitable.[269] The latter violation might see derivative enforcement from either of its principals—the for-profit parent or its shareholders. Nonetheless, a for-profit parent would have little incentive to prosecute its subsidiary for focusing on wealth generation in disregard of social considerations. Parent shareholders, meanwhile, must satisfy the heightened standing mandates of double derivative litigation to sue in the first place. Even after getting this foot in the door, a vastly board-deferential balancing standard likely stymies the parent shareholder efforts.[270] As such, there is practically little remedy when either parent or subsidiary decides to ignore the latter's public benefit purpose.

The present proposal completely forecloses the first scenario. A corporate controller obligated to safeguard the interests of another is not at liberty to undermine those interests for the sake of its own profitability.[271] Accordingly, a for-profit parent responsible for facilitating its subsidiary's public benefit purpose could not, consistent with this duty, disable the latter from effectuating its social policy determinations. Just as a for-profit corporation exploited by a controller shareholder cannot subvert minority

268. *See supra* text accompanying notes 166–78.
269. *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33–35 (Del. Ch. 2010).
270. *See supra* text accompanying notes 167–70.
271. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720, 723 (Del. 1971).

shareholders to whom it owes a duty in order to serve the controller,[272] so too would it be prevented from flouting a similarly situated subsidiary.

The second instance of enforcement issues—where the subsidiary disregards its public benefit purpose—is likewise remedied by this proposal. When fiduciary duties impose active responsibilities, a director violates her duty for failure to act.[273] As such, parent directors obligated to facilitate a subsidiary's public benefit purpose are duty-bound to respond in the face of neglect.[274] While there are many ways to properly discharge this duty, perhaps the simplest is for the parent to use its voting power as the sole shareholder to replace subsidiary board members non-compliant with the benefit corporation requirement to consider stakeholders.[275] This both increases the pool of subsidiary directors who will take public benefit balancing seriously, and pressures dissenters into conformity. Moreover, should the parent ignore its duty to facilitate, its own shareholders can bring standard derivative litigation—avoiding the heightened burdens of double derivative litigation—to enforce this obligation. The present proposal thus cuts off avenues for a parent to idly watch its subsidiary disregard its benefit corporation responsibilities.

## CONCLUSION

Corporate and contract law both seem to welcome social mission pursuit, but neither adequately facilitates this end when it is sought by a wholly owned subsidiary. A for-profit subsidiary's current options for activism—shelter under a board-permissive business judgement rule, and reorganization as a benefit corporation—are fatally flawed when an unchecked parent company can compel subversive profit-driven decisions. These unsatisfying alternatives come at a time when corporate social responsibility is in demand, and a two-tiered governance structure can be primed to answer the call. Organizing the subsidiary as a benefit corporation with an independent board of directors lays the groundwork for a workable solution by providing the subsidiary a license to choose activism. These efforts can only take flight, however, if a doctrine-consistent expansion of fiduciary obligation prevents parental strongarming for the benefit of the parent shareholders and corporate enterprise at large. By tweaking the Ben

272. *See id.*; Weinberger v. UOP, Inc., 457 A.2d 701, 710–11 (Del. 1983).

273. Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (directors must have informed themselves of the material information reasonably available prior to making a business decision in order to satisfy the duty of care).

274. *See id.*

275. *See supra* notes 142–45 and accompanying text (describing the overwhelming ability of a parent corporation to alter the board composition of its wholly owned subsidiary).

& Jerry's idea and modifying our notion of fiduciary responsibility in this narrow context, we might just save the next social enterprise icon.

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