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The Golden Ratio of Corporate Deal-Making

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2015 and 2016 mark the 30th anniversaries of the Delaware Supreme Court's landmark decisions in Unocal *and* Revlon, *respectively. Those cases and their progeny called for enhanced scrutiny standards to be applied in change of control transactions as well as to deal protection devices—contractual provisions which deter third parties from overbidding between signing and closing. Since those decisions, the courts have struggled with the application of these enhanced scrutiny standards. This Article uses auction theory principles and the related concept of information costs to correlate deal protection devices to the pre-signing sale process in change of control transactions. More specifically, this Article argues that the more extensive the pre-signing sale process, the more information that both the selling company, or target, and buyer have gathered. Specifically, the target board (who has a duty to maximize stockholder value in change of control transactions) achieves greater certainty regarding maximum value from engaging in a more extensive pre-signing sale process. Similarly, the buyer has greater certainty regarding the target's value. At the same time, information costs incurred on both sides is higher—as the parties expend more to learn about the value of the company, there is a lower likelihood that a third party will overbid. In this case, the courts should be more tolerant of more restrictive deal protection devices because of this information certainty.*

Conversely, when the target has engaged in only a single bidder negotiation, information costs are lower as is certainty that maximum shareholder value has been achieved. In that case, because of this lack of certainty regarding the achievable maximum value of the target, the courts should be less tolerant of restrictive deal protection devices. In other words there should be a direct proportional relationship between the information gathering process (i.e., the pre-signing sale process) and the resulting deal protection devices. This proportion—the Golden Ratio of Corporate Deal-Making—is supported by auction theory principles as well as Delaware Court of Chancery rhetoric. Despite, however, rhetoric that more extensive sale processes should lead to more restrictive deal protection devices, the Court of Chancery has not differentiated deal protection devices contained in single bidder transactions from those in deals resulting from a more extensive pre-signing sale process. The Golden Ratio of Corporate Deal-Making seeks to provide a template from which the courts can engage in a more nuanced analysis. If applied, in reviewing deal protection devices, the courts would be making distinctions based off of the pre-signing sale process rather than what they deem standard terms.

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I. INTRODUCTION

Measure what is measurable, and make measurable what is not so.
–Galileo Galilei (1564–1642)[1]

For centuries, mathematicians like Galileo, architects, builders, biologists, musicians, and artists, among others, have examined and applied the Golden Ratio in their work.[2] The Golden Ratio is a mathematical proportion said to "describe a harmonious relationship between different parts."[3] Mergers and acquisitions (M&A) transactions involving sales of corporate control can also be boiled down to a Golden Ratio-like equation. More specifically, the contract terms used in a sale of control should bear a harmonious relationship to the process leading up to the sale. Balancing contract terms with the sale process helps to make measurable what is not generally easy to measure.

Striking this balance is a question of information flow. The flow of information drives price but information itself is not free. The selling company—commonly known as a target company, or target—incurs costs, both tangible and intangible, in finding a buyer, including running a sale process, in valuing the company, and in negotiating the definitive acquisition agreement.[4] At the same time, bidders incur costs of their own by participating in the sale process, engaging in due diligence on the target, and ultimately negotiating an agreement. Because of the information costs incurred on both sides of a transaction, both the target company and bidders must determine how much in the way of information costs they are willing to incur before the resulting deal is no longer worth their while. This Article concentrates on the target's information costs, including how the target gathers information and how the target's information gathering should impact the ultimate deal terms.

In the bedrock case of *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[5] the Delaware Supreme Court held that, in a sale of corporate control, the target's board of directors has a duty to maximize stockholder value.[6] The courts also have held that various sale methods may be used in satisfying this obligation.[7] One available sale method is a full-

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1. Hermann Weyl, *Mathematics and the Laws of Nature*, *in* THE ARMCHAIR SCIENCE READER 301 (Isabel S. Gordon & Sophie Sorkin eds., 1959).

2. *See* MARIO LIVIO, THE GOLDEN RATIO: THE STORY OF PHI, THE WORLD'S MOST ASTONISHING NUMBER 6 (2002) (describing different individuals who have studied the Golden Ratio). The Golden Ratio is also known as phi, the Golden Number, the Golden Section, and the Divine Proportion. *Id.* at 2–3, 6.

3. *Id.* at 3. In mathematical terms, the Golden Ratio is defined as, "a special number found by dividing a line into two parts so that the longer part divided by the smaller part is also equal to the whole length divided by the longer part." Elaine J. Hom, *What is the Golden Ratio?*, LIVESCIENCE (June 24, 2013, 7:02 PM), http://www.livescience.com/37704-phi-golden-ratio.html. This number is irrational and is often rounded off to 1.618. *Id.*

4. For a more detailed discussion of these information costs, see Section III.A.

5. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986).

6. *Id.*

7. *See, e.g.*, Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) (explaining that auctions do not need to precede every change of control transaction).

blown auction[8] process; however, that would typically be the most costly option.[9] Due to the competitive nature of the auction it would likely provide the target with the most security that the price being paid correlates to maximum stockholder value.[10] Another sale method is single bidder negotiations. This method is typically cheaper than a full-blown auction process but, in many cases, it provides the target with less security that the price being paid maximizes stockholder value.[11] Between these two alternatives lies the market canvass. During a market canvass, the target will contact a select group of potential buyers to gauge their interest in the target.[12] For many targets, the market canvass provides a good middle ground, which allows the target to minimize its information costs while at the same time providing the target with a sense of the value it can ultimately obtain.

In evaluating the target's fiduciary duties, one must not lose sight of the potential buyer's perspective. Potential buyers may not be eager to incur the costs necessary to participate in a competitive auction process when there is a chance they may not win the auction. Moreover, the ultimate auction winner will typically seek security that the deal is not going to be disrupted by a third party. This security comes in the form of deal protection devices—contractual provisions in negotiated M&A agreements intended to deter third party bidders between the signing and closing of a transaction. A continuing issue for M&A practitioners is how restrictive these deal protection devices can be. The Delaware Supreme Court has held that deal protection devices are subject to the enhanced security standard first announced in *Unocal Corp. v. Mesa Petroleum Co.*[13] and that such provisions cannot make a transaction a "fait accompli."[14]

This Article contends that the relationship between the deal protection devices and sale process is derived from information flow and information costs. In a nutshell, the more extensive the pre-signing sale process, the more information costs the respective parties are made to bear. Consequently, a more accurate assessment of the target's value is achieved. When this is the case, the deal protection devices can be more restrictive. Conversely, single bidder negotiations can become a gamble in that each party has less information and subsequently lowered costs. On the downside, these information cost savings may not "pin the tail on the donkey" regarding the maximization of shareholder value. Accordingly, the deal protection devices should be less restrictive so as not to overly dissuade third parties from bidding. In other words, the sale process and the deal protection devices should bear a proportional relationship. This proportion is what I dub the "Golden Ratio of Corporate

8. As used in this Article, the term "auction" refers to a structured competitive bidding process. For a detailed description of an auction process, see Christina M. Sautter, *Auction Theory and Standstills: Dealing with Friends and Foes in a Sale of Corporate Control*, 64 CASE WESTERN RES. L. REV. 521, 539–44 (2013) [hereinafter Sautter, *Auction Theory*].

9. *See generally* Audra L. Boone & J. Harrold Mulherin, *Is There One Best Way to Sell a Company? Auctions Versus Negotiations and Controlled Sales*, 21 J. APPLIED CORP. FIN. 28 (2009) [hereinafter Boone & Mulherin, *Auctions Versus Negotiations*] (explaining why auctions are accompanied by high information costs).

10. *See infra* Section III.A (discussing the economic incentives of auction theory).

11. *Id.*

12. For a more detailed discussion of market canvasses, see Sautter, *Auction Theory*, *supra* note 8, at 544–45 and Christina M. Sautter, *Shopping During Extended Store Hours: From No Shops to Go-Shops—The Development, Effectiveness, and Implications of Go-Shop Provisions in Change of Control Transactions*, 73 BROOK. L. REV. 525, 540–41 (2008) [hereinafter Sautter, *Shopping During Extended Store Hours*].

13. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

14. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930–31 (Del. 2003).

Deal-Making."

The Golden Ratio of Corporate Deal-Making is consistent with auction theory principles that tend to favor competition as a way of extracting the most value for the target.[15] Moreover, the Delaware courts themselves have implicitly recognized this ratio as the ideal.[16] Despite this implicit recognition, however, the courts, in many cases, have failed to abide by the ratio by authorizing the same level of deal protection devices in a single bidder transaction as have occurred in a transaction resulting from a full auction.[17] This is problematic, as it has led to the erosion of the *Unocal* enhanced scrutiny standard for deal protection devices.[18]

A few caveats regarding the scope of this Article are in order at this point. First, this Article assumes the applicability of *Revlon* and does not address the ongoing debate regarding which transactions trigger *Revlon*'s value maximization requirement.[19] Second, this Article assumes the application of the *Unocal* standard of review to deal protection devices and does not address the propriety of applying the *Unocal* enhanced standard to such devices.[20] Finally, and perhaps most importantly, this Article does not advocate that a competitive auction process must (or should) precede every sale of control or that a certain set number of bidders must be invited to participate in any given sale process. This Article does, however, advocate that a more extensive sale process is the easiest way for a target board to gather information regarding value maximization. The extensiveness of the pre-signing sale process is context specific and will vary depending on a number of factors such as the unique characteristics of the company and the industry in which the company operates.

This Article proceeds in three parts. Part II describes the ideal M&A sale process as defined in the Delaware Supreme Court's landmark decisions of *Unocal* and *Revlon*. Part III describes why an extensive pre-signing sale process is a target's best means of gathering information. In particular, this Part details the role of auction theory and information costs in establishing the ideal M&A sale process. Part IV describes the Delaware Court of Chancery's current practice regarding deal protection devices using two cases as an

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15. For a description of auction theory principles, see *infra* Section III.A.

16. *Infra* Part III.B.

17. *Infra* Part IV.

18. For more information on the erosion of the enhanced scrutiny standard, see generally Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. L. 681 (2013).

19. A number of commentators have recently addressed when *Revlon* is and should be triggered and even whether the *Revlon* doctrine should be abolished. *See generally* Stephen M. Bainbridge, *The Geography of* Revlon-*Land*, 81 FORDHAM L. REV. 3277 (2013) (arguing that in determining the applicability of *Revlon*, the Delaware courts should eschew the consideration-based approach in favor of a conflicts of interests-based approach which focuses on ultimate control of the surviving entity); Franklin A. Gevurtz, *Removing* Revlon, 70 WASH. & LEE L. REV. 1485 (2013) (arguing for the abolishment of the *Revlon* doctrine); Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167 (2014) (arguing that the *Revlon* doctrine has been limited by subsequent corporate law developments and that *Revlon's* focus on short-term value maximization should be rejected); Mohsen Monash, *Defined by Dictum: The Geography of* Revlon-*Land in Cash and Mixed Consideration Transactions*, 59 VILL. L. REV. 1 (2014) (describing the Delaware Court of Chancery's use of dictum to describe the parameters of *Revlon*-land).

20. For an extensive discussion and analysis regarding the suitability of applying the *Unocal* enhanced standard to deal protection devices, see generally Jay B. Kesten, *Adjudicating Corporate Auctions*, 32 YALE J. ON REG. 45 (2015) (arguing that the *Unocal* enhanced scrutiny standard should not be applied to deal protection devices).

illustration. Part V describes the Golden Ratio of Corporate Deal-making and the implications of the Ratio. Dealmakers would have a measurable standard according to which they could negotiate deal protection devices and plaintiffs challenging M&A transactions would have a measurable standard against which they could contest the validity of these devices.

II. THE IDEAL M&A SALE PROCESS

In 1985 and 1986, the Delaware Supreme Court issued two landmark decisions, *Unocal* and *Revlon*, in the context of hostile takeovers, which the courts have since applied to negotiated transactions. Together these cases set the foundation for the ideal M&A sale process as well as the proper standard of review for deal protection devices. Moreover, these cases provide examples of the subjective factors often at play in any given transaction. As both cases reveal, board members may have conflicts of interest that become evident in a sale of corporate control. Because of this possibility, the Supreme Court attempted to craft standards, which help to root out these inherent conflicts and to restore trust in the board's actions.

A. Unocal*: Announcing a Standard of Review for Defensive Measures*

In *Unocal*, the Delaware Supreme Court established an enhanced-scrutiny standard applicable to board action taken in response to hostile takeover activity.[21] The underlying purpose of this standard is to provide an objective determination that—through the gathering of adequate information—the board has overcome the inherent conflict of interest it faces when addressing a threat to the corporation's existence.[22]

The *Unocal* enhanced-scrutiny test requires a two-step analysis of a board's decision to employ takeover defenses or deal protection devices.[23] First, the board must prove that it had "reasonable grounds for believing that a danger to corporate policy and effectiveness existed."[24] To satisfy this first step, the board must show a good faith and reasonable investigation, which is materially enhanced by the approval of a board comprised of a majority of outside independent directors.[25] Under the second step of the *Unocal* enhanced-scrutiny standard, the defensive devices utilized must be reasonable in relation to the threat posed.[26] In this step, the court first determines whether the defensive measures are "preclusive" or "coercive."[27] If the court is satisfied that the defensive measures are neither coercive nor preclusive, the court then examines the "range of reasonableness" of the board's decision.[28]

Although the Delaware Supreme Court developed the *Unocal* enhanced scrutiny standard in the hostile takeover context, the court later explicitly extended the standard to

21. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).
22. *Id.* at 954–55.
23. *Id.* at 955.
24. *Id.*
25. *Id.*
26. *Unocal*, 493 A.2d at 955.
27. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 932 (Del. 2003).
28. *Id.* at 935 (quoting Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995)).

deal protection devices in *Omnicare, Inc. v. NCS Healthcare, Inc.*[29] The court analogized deal protection devices to defensive measures taken in the hostile takeover context.[30] Due to this extension of the enhanced-scrutiny standard to deal protection devices, the facts of *Unocal* itself are instructive as to the proper ratio of sale process (i.e., information gathering) to deal protection devices.

In *Unocal*, Mesa Petroleum, led by the notorious "greenmailer," T. Boone Pickens, made a hostile tender offer for Unocal.[31] Mesa's offer was a "textbook example of a coercive tender offer."[32] The proposed tender offer would use cash to acquire enough shares to give Mesa a controlling interest in Unocal.[33] After acquiring a controlling interest, the tender offer called for a merger that would give junk bonds to the remaining Unocal shareholders in exchange for their stock.[34]

In response, the Unocal board convened multiple times to discuss the Mesa tender offer and possible defensive measures.[35] Goldman Sachs advised the board that the Mesa tender offer was "wholly inadequate."[36] Fearing that Unocal shareholders who did not find Mesa's price attractive might nevertheless accept the offer for fear of being left in the minority group and receiving only junk bonds, the board ultimately decided to oppose the offer, and to implement defensive devices.[37] The board opted in favor of a self-tender by Unocal for its own stock, but excluded Mesa so as not to inadvertently finance Mesa's takeover of the company.[38] The self-tender would cause Unocal to incur over $6 billion of additional debt, which would make the company considerably less desirable to Mesa or any other bidders.[39]

The Delaware Supreme Court upheld the self-tender offer as valid under the new enhanced-scrutiny standard.[40] The Unocal board had reasonable grounds to believe a threat to corporate policy existed because the Mesa offer was "a grossly inadequate two-tier coercive tender offer coupled with the threat of greenmail."[41] The court gave significant credit to the fact that Unocal's board was composed of a majority of outside independent directors who acted in good faith and made a reasonable investigation.[42] Thus, the court easily determined that the first step of the enhanced-scrutiny standard had been satisfied.[43]

The Unocal board also satisfied the second step of the enhanced-scrutiny standard

29. *See id.* at 930–32 (holding that deal protection devices appearing in non-change of control transactions are subject to enhanced scrutiny).

30. *Id.* at 932.

31. *Unocal*, 493 A.2d at 956. "The term 'greenmail' refers to the practice of buying out a takeover bidder's stock at a premium that is not available to other shareholders in order to prevent the takeover." *Id.* at 956 n.13.

32. Gevurtz, *supra* note 19, at 1498.

33. *Unocal*, 493 A.2d at 950.

34. *Id.* at 949–50.

35. *Id.* at 950–53.

36. *Id.* at 950. Mesa's tender offer would give stockholders $54 per share, while Goldman Sachs determined that Unocal's shares were valued "in excess of $60" per share. *Id.*

37. *Unocal*, 493 A.2d at 950; Gevurtz, *supra* note 19, at 1498.

38. *Unocal*, 493 A.2d at 951.

39. *Id.* at 950.

40. *Id.* at 956–57.

41. *Id.* at 956.

42. *Id.* at 955.

43. *Unocal*, 493 A.2d at 955.

when it adopted the self-tender offer that excluded Mesa.[44] The board's stated objective was to defeat the Mesa offer, or if the Mesa offer succeeded, to provide the back-end of Unocal's stockholders with greater value for their shares than would be provided by Mesa's offer.[45] These efforts would have been defeated if Mesa were able to benefit from the exchange offer.[46] Thus, the Unocal board's decision to implement a selective exchange offer was reasonable in relation to the threat posed by Mesa's bid.[47]

Thirty years after the Delaware Supreme Court rendered *Unocal*, it continues to play a crucial role in M&A transactions. As previously mentioned, the court explicitly extended the enhanced scrutiny standard to deal protections appearing in negotiated transactions. As such, practitioners negotiate deal protection devices with the *Unocal* enhanced scrutiny standard as a backdrop. In addition to the *Unocal* enhanced scrutiny standard, practitioners also negotiate many M&A transactions in light of another thirty-year-old decision, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[48]

B. Revlon *and the Maximization of Value in a Sale of Control*

Shortly after the Delaware Supreme Court issued its decision in *Unocal*, it issued its seminal decision in *Revlon*.[49] In that case, the Delaware Supreme Court addressed the standard for assessing the conduct of a board of directors in selling a company. The court held once the breakup of a corporate entity becomes inevitable, the sole duty of the board of directors becomes the "maximization of the company's value at a sale for the stockholders' benefit."[50] The facts of *Revlon* are illustrative in calibrating the appropriate ratio of deal protection devices to the sale process.

Revlon involved a hostile transaction during which Pantry Pride, Inc. and leveraged buyout specialist, Forstmann Little & Co., submitted competing offers.[51] Initially, Pantry Pride attempted to acquire Revlon through negotiations.[52] After Revlon rejected the offers, Pantry Pride informed Revlon of its plans to acquire Revlon for $42–43 per share, or commence a hostile tender offer at $45 per share.[53] Faced with a "grossly inadequate" price for the company, the Revlon board implemented defensive measures.[54] The Revlon board authorized a poison pill and for the company to repurchase ten million shares of the company's common stock in exchange for promissory notes and preferred stock.[55]

Pantry Pride then increased its offer to $50 and then later to $53 per share.[56]

44. *Id.* at 956–57.

45. *Id.* at 956.

46. *Id.*

47. *Id.*

48. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986).

49. The Delaware Supreme Court issued its written decision in *Unocal* on June 10, 1985. *Unocal*, 493 A.2d at 946. The Delaware Supreme Court issued its oral decision in *Revlon* on November 1, 1985, but did not publish its written decision in the case until March 13, 1986. *Revlon*, 506 A.2d at 173.

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

51. *Id.* at 175.

52. *Id.* at 176.

53. *Id.*

54. *Id.* at 176–77.

55. *Revlon*, 506 A.2d at 177. The notes contained covenants that limited Revlon's operational flexibility unless the independent members of the board approved certain business decisions. *Id.*

56. *Id.*

Importantly, however, Pantry Pride's offer was contingent on the waiver of certain covenants in the notes that shareholders had purchased.[57] Revlon's board responded by authorizing management to negotiate a merger or leveraged buyout with alternate parties.[58] Revlon's negotiations with alternate buyers culminated in an agreement with Forstmann for $56 per share.[59] The deal with Forstmann included a number of deal protection devices including a crown jewel lock-up, termination fee, and a no-shop provision.[60] Most importantly, Forstmann was willing to issue new debt to Revlon noteholders in order to support the par value of the notes, which had been trading well below par value.[61] Meanwhile, Pantry Pride again raised its bid to $56.26 per share, and indicated that it would engage in fractional bidding and top any Forstmann offer.[62] Forstmann then raised its bid to $57.25, which the Delaware Supreme Court described as "very little actual improvement" over Pantry Pride's offer.[63] Revlon's board agreed to the Forstmann deal, motivated in part because of the board's fear of personal liability from litigation threatened by the noteholders.[64]

The Delaware Supreme Court struck down the crown jewel lock-up and the no-shop provision as a breach of the Revlon board's fiduciary duties.[65] The court found the lock-up had a "destructive effect on the auction process."[66] Rather than using the lock-up to enhance the ongoing bidding process between Pantry Pride and Forstmann, Revlon's board used the lock-up as a way of favoring one bidder in order to protect the board members from personal liability.[67] The court stated the no-shop provision was "impermissible under the *Unocal* standards when a board's primary duty becomes that of an auctioneer responsible for selling the company to the highest bidder."[68] Pantry Pride and Forstmann had made relatively similar offers, neither of which posed a threat to shareholder interests.[69] Rather than using the no-shop agreement to obtain an advantage for shareholders, the board had agreed to negotiate with Forstmann in order to favor its own interests.[70] By agreeing to negotiate only with Forstmann, the Revlon board effectively ended rather than intensified the bidding contest.[71]

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57. *Id.* at 178.
58. *Id.*
59. *Revlon*, 506 A.2d at 176–77.
60. *Id.* at 178.
61. *Id.* at 178–79.
62. *Id.* at 178.
63. *Id.* at 184.
64. *Revlon*, 506 A.2d at 178–79, 183–84. The note contained a typical covenant, which, inter alia, prevented Revlon from selling the company unless the independent board members approved. *Id.* at 177. The note covenants "stymied" Pantry Pride's takeover attempts. *Id.* However, the board waived the note covenant with respect to the Forstmann transaction. *Id.* at 178. When the waiver was announced, the notes' trading price dropped below par, causing the noteholders to become angry and to threaten litigation. *Id.* In negotiating the transaction with Forstmann, Revlon made the noteholders a priority and Forstmann agreed to support the par value of the notes if Revlon entered into an agreement with Forstmann. *Revlon*, 506 A.2d at 178.
65. *Id.* at 184.
66. *Id.* at 183.
67. *Id.* at 184.
68. *Id.*
69. *Revlon*, 506 A.2d at 184.
70. *Id.*
71. *Id.*

Although *Revlon* involved a hostile takeover, the courts very quickly extended *Revlon* to negotiated transactions.[72] Hence, in a negotiated sale of control, the target board has an obligation to ensure the maximization of stockholder value. Although the "auctioneering" language in *Revlon* seemingly required that an auction precede any sale of control, the Delaware courts backed away from the "auctioneering" term not long after *Revlon*.[73] The courts hurriedly pointed out that not every sale of corporate control must be preceded by an auction. For example, four years after *Revlon*, in *Barkan v. Amsted Industries, Inc.*, the Delaware Supreme Court specified that *Revlon* did not necessitate that a sale of control "be preceded by a heated bidding contest."[74] Moreover, the *Barkan* court famously stated that "no single blueprint" exists for how a target board ensures the maximization of stockholder value.[75]

III. THE EXTENSIVE PRE-SIGNING SALE PROCESS AND WHY IT MATTERS

Despite the Delaware courts' repeated pronouncement that there is "no single blueprint" for how a board satisfies its *Revlon* duties, the extensiveness of the pre-signing sale process is important as it serves as a method for information gathering. Information and the costs of obtaining information are driving economic incentives in M&A transactions. This Part describes the importance of information costs in designing a sale process using auction theory. It then provides examples of Delaware Court of Chancery decisions recognizing the importance of the pre-signing sale process both as an information gathering mechanism and a basis for more restrictive deal protection devices.

A. Economic Incentives—Information Costs and Auction Theory

Auction theory is an applied branch of economics and game theory used to analyze and design optimal sale processes.[76] In an auction setting, sellers (or targets) and buyers have conflicting goals.[77] On the one hand, sellers (or targets) are "seek[ing] the highest possible sale price" while on the other hand, buyers are looking for "the lowest purchase price."[78] Financial economists have used auction theory to design sale processes in an attempt to balance these diverse interests.

One popular research area for financial economists is the issue of whether auctions or single bidder negotiations better optimize a target's sale price.[79] Two seemingly opposing

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72. Clark W. Furlow, *Reflections on the* Revlon *Doctrine*, 11 U. PA. J. BUS. L. 519, 549 (2009).

73. *Revlon*, 506 A.2d at 182, 184. The Delaware Supreme Court had specifically stated that "[t]he directors' role changed from defenders of the corporate bastion to *auctioneers* charged with getting the best price for the stockholders at a sale of the company" and that "a board's primary duty becomes that of an *auctioneer* responsible for selling the company to the highest bidder." *Id.* (emphasis added). For a detailed description of the movement away from the auctioneering language and the seeming obligation to conduct a pre-signing market auction, see Sautter, *Shopping During Extended Store Hours*, *supra* note 12, at 542–53.

74. Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989).

75. *Id.*

76. John Min, *Applied Mechanism Design: Solving for the Optimal Collusive Mechanism at First-Price Auctions* 4 (2010), https://econ.duke.edu/uploads/assets/dje/2010/Final%202010%20PDFS/Min_DJE.pdf.

77. *Id.*

78. *Id.*

79. *See, e.g.*, Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 28 (comparing the benefits of single bidder negotiations with auctions).

camps have developed on this issue. Professors Audra Boone, J. Harold Mulherin, Jeremy Bulow, and Paul Klemperer best exemplify members of these two camps. Boone and Mulherin have taken the position that full-blown auctions may not always maximize value while Bulow and Klemperer have taken the opposite view.[80] But, the division is not as clear-cut as it may first appear. In fact, each side inherently relies upon information costs and the role these costs play in any sale process.

The target's information costs take various forms, both tangible and intangible. For example, tangible costs include items such as the assembly and dissemination of due diligence materials and the hiring of legal and financial advisors.[81] Costs will vary from deal-to-deal and will depend on the size and type of the company, but those costs will likely increase the more extensive the pre-signing sale process is. Along those lines, if the target were to conduct a full-blown auction, financial and legal advisors would play a more significant role in structuring the auction, inviting bidders, overseeing the bidding process, and reviewing bids. With the expanded role of advisors, costs will increase. Like tangible costs, a target's intangible costs can take various forms. Targets must consider the types of information that potential buyers would want and need to make an accurate assessment of the target's value and the potential effect of releasing such information. As Professor Robert G. Hansen has explained, a potential issue (and possible cost) is that "the information relevant to an accurate valuation may also be valuable to potential buyers in their role as competitors, suppliers, or customers of the selling company."[82] Moreover, the more potential buyers that the target contacts to field interest in participating in the process, the greater the possibility that the sale process may be leaked. In addition, targets sometimes shy away from more extensive sale processes, such as full-blown auctions, for fear of losing employees, customers, or suppliers.[83] In addition, the possibility that the auction will fail and that the target might then be considered "damaged goods" is another possible intangible cost to be weighed.[84]

Like a target, bidders' participation in any given sale process is not without costs, both tangible and intangible. Like a target, bidders typically hire legal and financial advisors to assist them in the due diligence process and in making offers.[85] Another consideration for bidders is that the more participants in any given sale process, the higher the likelihood that a bidder may not come out "on top." Bidders and targets, alike, must consider this intangible cost in weighing a sale process.

Boone and Mulherin recognize that "conventional wisdom and common sense suggest that all sellers should implement a wide-ranging auction."[86] Their research, however, has found that there is not a "measurable difference" in value obtained when comparing an auction (including a pre-signing market canvass) and a single bidder negotiation.[87] Boone

80. *Id.* at 32.

81. *See id.* (discussing "explicit, out-of-pocket expenses borne by selling companies, such as bankers' and lawyers' fees").

82. Robert G. Hansen, *Auctions of Companies*, 39 ECON. INQUIRY 30, 33 (2001).

83. Sautter, *Shopping During Extended Store Hours*, *supra* note 12, at 540.

84. *Id.*

85. *See* Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 33 (discussing bidders' costs in "preparing their offers").

86. *Id.* at 28.

87. Audra L. Boone & J. Harold Mulherin, *How are Firms Sold?*, 62 J. FIN. 847, 865 (2007) [hereinafter Boone & Mulherin, *How are Firms Sold?*].

and Mulherin attribute this to "information costs between sellers and buyers [which] can severely limit the apparent benefits of an auction" and that when a seller institutes "constraints on the number and kinds of bidders and otherwise 'manage[s]' the selling process to reduce information costs," sellers can achieve greater value.[88]

Boone and Mulherin explain that in some cases the possible information costs incurred on both sides may cause sellers to limit the sale process, which in turn, may "induce more aggressive bidding by those allowed to participate in the process."[89] The theory behind this argument is a balancing of the bidders' "search and evaluation costs" and the bidders' likelihood of winning the auction, which may be due in large part to the numbers of bidders in the process.[90] Boone and Mulherin further state that:

> when bidding companies are confident that their own offers will not be trumped by that of "uninformed" and perhaps overly aggressive bidders, they are likely to offer to pay higher prices—prices that more than offset the higher fees paid the bankers and lawyers who help manage the selling process. And to the extent this is so, for a given seller there may be an 'optimal' number of potential bidders, neither too many nor too few.[91]

Although Boone and Mulherin's research may question whether a full-blown auction is always the best route to maximizing stockholder value, their research and the foregoing quote, in particular, suggest that single bidder negotiations may not be the favored route either. Moreover, Boone and Mulherin's research demonstrates that a balance must be struck in engaging the "right" number and type of bidders in the pre-signing sale process and also utilizing certain deal protection devices to provide assurances.[92] In striking this balance, bidding companies can be confident that "their own offers will not be trumped by that of 'uninformed' and perhaps overly aggressive bidders."[93]

The goal in any sale process is for bidders to bid their reservation prices. Boone and Mulherin argue that bidders are incentivized to bid their reservation prices when targets "invite[] more aggressive bidders to the next round of bidding and, in controlled sales, . . . limit[] the number of and kinds of bidders."[94] Professors Nihat Aktas, Eric de Bodt, and Richard Roll argue that "[i]t is the pressure of potential rivals that matters."[95] Along the lines of limiting the kinds of bidders and possibility of potential aggressive bidders existing, Boone and Mulherin recognize that "some bidders may have significant synergies" which will provide those bidders with an informational advantage regarding the target's value.[96] If these types of bidders are part of the sale process, other bidders may be deterred from participating.[97] Moreover, Boone and Mulherin found that simply the "presence of large bidders" deters other bidders.[98] In addition, they found that there was a

88. Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 28.
89. *Id.* at 32.
90. *Id.* at 33.
91. *Id.*
92. *Id.* at 28, 33.
93. Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 33.
94. *Id.* at 34.
95. Nihat Aktas et al., *Negotiations Under the Threat of an Auction*, 98 J. FIN. ECON. 241, 242 (2010).
96. Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 34.
97. *Id.*
98. *Id.*

indirect correlation relating to the average bidder size and the number of bidders in the process—the larger the bidders, the fewer the bidders.[99] Presumably the reason for this is that smaller bidders are not able to successfully compete—or *believe* they are unable to successfully compete—with larger bidders.

As previously mentioned, a significant concern in any sale process is information flow and the costs involved in gathering information—the target's provision of information to potential buyers and the target board's information with respect to the value of the target and potential bidders' interest in the target. From a bidder's perspective, a bidder might be more inclined to bid higher—to bid its reservation price—when the target has provided the bidder with proprietary information.[100] The bidder will bid higher because it will be more confident in the value of the target.[101] At the same time, the possibility exists that bidders could evaluate the proprietary information negatively which could have a negative effect on the ultimate bids. Moreover, targets are oftentimes concerned with losing a competitive edge by providing proprietary information to bidders.[102]

It is specifically this issue of information, or the lack thereof, which Professors Bulow and Klemperer argue causes a more extensive sale process to be preferable for targets. They argue "contrary to our usual instinct that auctions are profitable because they are efficient, *it is precisely the inefficiency of the auction—that entry into it is relatively ill-informed and therefore leads to a more random outcome—that makes it more profitable for the seller*."[103] Also, from a practical standpoint, they point out that it is more effective to invite bidders to the table as opposed to threatening to turn down an offer with no other bidders present.[104] Bulow and Klemperer go on to explain that it is particularly beneficial for a target to structure a sale process as an auction when it "has only limited information about valuations, entry costs, or the number of bidders."[105] Like Professors Aktas, de Bodt, and Roll, Bulow and Klemperer also focus on the power of competition.[106] Bulow and Klemperer make clear that *actual* competition is more favorable than *potential* competition.[107]

So how does one reconcile these two seemingly opposing camps represented on the one side by Boone and Mulherin and on the other by Bulow and Klemperer? First, one must point out that, although Boone and Mulherin's research found that the values received were not significantly different between the more extensive pre-signing sale process and the single bidder negotiations, their research also found that a significant number of targets choose to go the more extensive route.[108] More specifically, "[i]n a study of [400]

99. *Id.*

100. *See id.* (stating that "[r]evealing proprietary information can reduce uncertainty for some buyers, which increases the price they are willing to pay").

101. Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 34.

102. *See* Hansen, *supra* note 82, at 32 ("Throughout the auction process, potential buyers may ask for information that the selling company will view as too confidential to reveal.").

103. Jeremy Bulow & Paul Klemperer, *Why Do Sellers (Usually) Prefer Auctions?*, 99 AM. ECON. REV. 1544, 1546 (2009) (emphasis added).

104. *See id.* at 1567 (noting that this efficiency is for the seller and not society).

105. *Id.* at 1568.

106. *Compare* Nihat Aktas et al., *supra* note 95, at 242, *with* Bulow & Klemperer, *supra* note 103, at 1568.

107. *Id.*

108. Boone & Mulherin, *How are Firms Sold?*, *supra* note 87, at 865, 869 (explaining that according to their research there is not a "measurable difference" between the value received in auctions versus in single bidder

transactions during the 1990s," Boone and Mulherin found that half of the targets were sold in a process involving multiple bidders.[109] The multiple bidder sale process is a popular way for a target board to become informed of the value of the target and of bidder interest.

Moreover, at the heart of the matter, both camps stress the value of having competitors, which will incentivize bidders to reveal their reservation prices.[110] This possibility is clearly visible in surveys of dealmakers and in statements made by them. In a 2006 poll, 80% of private equity firms stated that on the sell-side they would prefer to use an auction while 90% of the same private equity firms stated they would prefer to avoid an auction on the buy-side.[111] This sentiment is reflected by the late Bruce Wasserstein, a well-known investment banker and businessperson, who said: "A wide-ranging auction generally maximizes value, particularly since the 'best buyer' on paper is not always the party who eventually pays the highest price. . . . [S]ophisticated bidders will do their best to circumvent the auction format."[112]

Wasserstein is not the only well-known businessperson to publicly state that bidders avoid auctions. Warren Buffett is famous for repeatedly stating in each Berkshire Hathaway Annual Report: "*[w]e don't participate in auctions.*"[113] This is precisely because the price of the target company is unknown and Buffett does not want to get into a bidding war for a company that has not set its own price.[114] Moreover, Buffett has stated, "I don't fool a lot around with negotiations. If they name a price that makes sense to me, I buy it. If they don't, I was happy the day before, so I will be happy the day after without owning it."[115] If the Oracle of Omaha avoids auctions on the buy-side, auction theorists must be right about their theory of competition in the sale of companies.

For dealmakers, another consideration playing an equally, if not more important role as auction theory in the M&A sale process is Delaware jurisprudence. But auction theory and Delaware jurisprudence are often "at odds."[116] As the next Parts describe, the Delaware courts' preaching is that they have seemingly adopted the position of many auction theorists that more extensive sale processes better maximize value and that deal protection devices can aid in extracting maximum value. However, the Delaware courts' practices are inconsistent with their preaching.[117]

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negotiations but in their study more than half of the targets chose a more extensive sale process).

109. *Id.* at 869.

110. *See* Boone & Mulherin, *Auctions Versus Negotiations*, *supra* note 9, at 34 (discussing inviting aggressive competitors to the second round of an auction); Bulow & Klemperer, *supra* note 103, at 1568 (discussing the power of actual competition).

111. Bulow & Klemperer, *supra* note 103, at 1544.

112. BRUCE WASSERSTEIN, BIG DEAL: 2000 AND BEYOND 746–49 (WARNER BOOKS 2000).

113. BERKSHIRE HATHAWAY, INC., 2013 ANNUAL REPORT (OMAHA, NEB.) 2, 25 (2014).

114. *Id.* Buffett and Berkshire Hathaway encourages principals of businesses interested in selling to contact them but cautions that they are looking for six specific criteria, including "[a]n offering price." *Id.* Buffett explains, "we don't want to waste our time or that of the seller by talking, even preliminarily, when price is unknown." *Id.*

115. *Warren Buffett Quotes*, THE BUFFETT, http://www.thebuffett.com/quotes/Investing-Approach.html#.VNbRzVpP2D0 (last visited Mar. 24, 2016).

116. Kesten, *supra* note 20, at 47.

117. *Infra* Section III.B & Part IV.

B. The Delaware Courts' Rhetoric

Although the courts have clearly and repeatedly held that "no single blueprint" exists for satisfying a board's *Revlon* duties, and as already described, the courts have upheld a variety of sale processes, the courts also have repeatedly indicated that a more extensive pre-signing sale process is preferable for information gathering. Moreover, the courts have indicated that more restrictive deal protection devices may withstand enhanced scrutiny if a more extensive sale process is utilized or if the device is being used to draw bidders into the bidding process. This Section provides some examples of the courts' rhetoric regarding the validity of more deal protection devices in light of an extensive sale process.

1. Favoring a More Extensive Sale Process for Information Gathering

Since the Delaware Supreme Court's decision in *Revlon*, both the Supreme Court and the Delaware Court of Chancery have indicated that a more extensive sale process is favored over single bidder negotiations as a means of gathering information. Even the Delaware Supreme Court in *Barkan*, which announced the "no single blueprint" standard, indicated that if a board "is considering a single offer and has no reliable grounds upon which to judge its adequacy, this concern for fairness demands a canvas of the market to determine if higher bids may be elicited."[118] As previously mentioned, although the *Barkan* court focused on the board's "body of reliable evidence" against which the board would judge the fairness of a single offer and proceed without an "active survey of the market," the court noted that "the circumstances in which [a] passive approach" would suffice are limited.[119] Importantly, the court reiterated that "[a] decent respect for reality forces one to admit that . . . [sic] advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvas of the relevant market can provide."[120]

The *Barkan* rhetoric echoes a Court of Chancery decision decided six months earlier. In *In re Holly Farms Corp. Shareholders Litigation*,[121] the Court of Chancery stated "[t]he value of the shares of a corporation is best determined by the marketplace. . . ."[122] This statement implies that simply engaging in negotiations with one party is not optimal for information gathering regarding value maximization. Moreover, more recently in 2011, in *In re Openlane, Inc. Shareholders Litigation*,[123] the Court of Chancery stated that "if a board fails to employ any traditional value maximization tool, such as an auction, a broad market check, or a go-shop provision, that board must possess an impeccable knowledge of the company's business before the Court to determine that it acted reasonably."[124] Even more recently, in 2013, in *In re BioClinica, Inc. Shareholder Litigation*, the Court of Chancery indicated that auctions "ensur[e] the stockholders receive[] the highest price available to them."[125]

118. Barkan v. Amsted Indus., Inc., 567 A.2d. 1279, 1287 (Del. 1989).
119. *Id.*
120. *Id.* (citations omitted).
121. *In re* Holly Farms Corp. S'holder Litig., 564 A.2d 342 (Del. Ch. 1989).
122. *Id.* at 350.
123. *In re* Openlane, Inc. S'holder Litig., No. 6849-VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).
124. *Id.* at *5.
125. *In re* BioClinica, Inc. S'holders Litig., No. 8272VCG, 2013 WL 673736, at *2 (Del. Ch. Feb. 25, 2013).

Similarly, in 2007, then-Vice Chancellor, now Chief Justice, Strine in *In re Netsmart, Inc. Shareholders Litigation* implied that smaller companies, particularly micro-cap companies, may have an obligation to engage in a more extensive pre-signing sale process rather than to just rely upon a passive post-signing market check.[126] Strine stated, "to test the market for strategic buyers in a reliable fashion, one would expect a material effort at salesmanship to occur. To conclude that sales efforts are always unnecessary or meaningless would be almost un-American, given the sales-oriented nature of our culture."[127] The Delaware courts' rhetoric does not stop with the sale process but also extends to the restrictiveness of deal protection devices. As with the sale process, through rhetoric, the Delaware courts seem to side with auction theorists who have argued that more restrictive deal protection devices can be used to enhance the sale process and the ultimate value received.

2. The Possible Restrictiveness of Deal Protection Devices

Deal protection devices are not considered on an individual basis, nor do the courts consider them in a vacuum. The courts have continually examined deal protection devices as part of the total package of deal protection and in light of the totality of the circumstances, including the board's sale process. That being said, this Section summarizes examples where the Delaware courts' rhetoric has indicated that a more restrictive individual deal protection provision or total deal protection package may be valid following a thorough sale process.

In *Renaissance Communications Corp. v. NBC, Inc.*,[128] Vice Chancellor William Allen summarized this viewpoint by stating:

> I think it is different if the board negotiates highly particular protections in order to get the highest price in the auction, because if the fiduciary duty always overrides an auction, you have just made auctions less valuable, because people obviously won't have the incentive to issue the best price. So it is self-defeating for the fiduciary law to say in all events a higher and later price gives rise to a fiduciary obligation to breach the contract.[129]

In reviewing a no-talk provision limiting a target board's ability to negotiate with and provide information to a third party, then-Vice Chancellor Strine stated, in *Ace Ltd. v. Capital Re Corp.*,[130] that "one would think that there would be limited circumstances in which a board could prudently place itself in the position of not being able to entertain and

126. *In re* Netsmart Technologies, Inc. S'holders Litig., 924 A.2d 171, 177 (Del. Ch. 2007). In particular, then-Vice Chancellor Strine stated:

> Likewise, the board's rote assumption (encouraged by its advisors) that an implicit, post-signing market check would stimulate a hostile bid by a strategic buyer for Netsmart—a micro-cap company—in the same manner it has worked to attract topping bids in large-cap strategic deals appears, for reasons I detail, to have little basis in an actual consideration of the M&A market dynamics relevant to the situation Netsmart faced.

Id.

127. *Id.* at 197.

128. Renaissance Commc'ns Corp. v. NBC, Inc., No. 14446, 1995 WL 1798510 (Del. Ch.. Aug. 1, 1995).

129. *Id.* at *15.

130. Ace Ltd. v. Capital Re Corp., 747 A.2d 95, 107 (Del. Ch. 1999).

consider a superior proposal to a transaction dependent on a stockholder vote."[131] He then continued, "[o]ne legitimate circumstance may be where a board has actively canvassed the market, negotiated with various bidders in a competitive environment, and believes that the necessity to close a transaction requires that the sales contest end."[132]

One area in which the Delaware courts have indicated that a thorough pre-signing sale process may result in more restrictive deal protection devices is crown jewel lock-ups. In *Revlon*, the Delaware Supreme Court implied that crown jewel lock-ups may be upheld if the role of the lock-up was to draw a bidder into the bidding process and "foster bidding."[133] A couple years later, in *Mills Acquisition Co. v. Macmillan, Inc.*,[134] the court reiterated that a valid use for crown jewel lock-ups is to attract bidders.[135] Like these references regarding crown jewel lock-ups, some Delaware judges have made similar references regarding standstill agreements and a board's promise not to waive a standstill. For example, in reviewing a board's promise not to waive a standstill, then-Vice Chancellor Strine strongly alluded that such a restrictive deal protection device may follow an extensive pre-signing sale process:

> Contemplate, for example, a final round auction involving three credible, but now tired bidders, who emerged from a broad market canvass. One can easily imagine how a board striving in good faith to extract the last dollar they could for their stockholders might promise the three remaining bidders that the top bidder at 8:00 p.m. on the next Friday will get very strong deal protections including a promise from the target not to waive the Standstill as to the losers.[136]

Strine reiterated this sentiment in *In re Ancestry.com Shareholder Litigation*[137] while reviewing a "Don't Ask, Don't Waive" (DADW) Standstill. A DADW Standstill includes not only a promise by the target company not to waive a standstill agreement but also a promise by a bidder not to request a waiver of its covenant not to make an offer for the target. Strine stated that DADW Standstills could be used for "value-maximizing purposes."[138] But he cautioned:

> the value-maximizing purpose has to be to allow the seller as a well-motivated seller to use it as a gavel, to impress upon the people that it has brought into the process the fact that the process is meaningful; that if you're creating an auction,

131. *Id.*

132. *Id.* at 107 n.36. Strine made clear, however, that "where a board has not explored the marketplace with confidence and is negotiating a deal that requires stockholder approval and would result in a change in stockholder ownership interests, a board's decision to preclude itself—and therefore the stockholders—from entertaining other offers is less justifiable." *Id.* Strine has also recognized, however, that how the board goes about conducting a pre-signing sale process—whether it be through a public auction or more targeted market canvas—is not an issue that the Delaware courts typically entertain. *See* McMillan v. Intercargo Corp., No. 16963, 2000 WL 516265, at *8 (Del. Ch. Apr. 20, 2000) ("Whether it is wiser for a disinterested board to take a public approach to selling a company versus a more discreet approach relying upon targeted marketing by an investment bank is the sort of business strategy question Delaware courts ordinarily do not answer.").

133. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 183 (Del. 1986).

134. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261 (Del. 1989).

135. *Id.* at 1286.

136. *In re* Topps Co. S'holders Litig., 926 A.2d 58, 91 n.28 (Del. Ch. 2007).

137. *In re* Ancestry.com S'holder Litig., No. 7988-CS (Del. Ch. Dec. 17, 2012).

138. *Id.* at 23.

> there is really an end to the auction for those who participate. And therefore, you should bid your fullest because if you win, you have the confidence of knowing you actually won that auction at least against the other people in the process.[139]

Moreover, in evaluating the deal protection devices weighed against the sale process conducted in *Netsmart*, Strine recognized that, "[t]he mere fact that a technique was used in different market circumstances by another board and approved by the court does not mean that it is reasonable in other circumstances that involve very different market dynamics."[140] The foregoing are just a couple examples of indications the Delaware courts have made in favor of more restrictive deal protection devices following more extensive sale processes. Despite the Delaware courts' repeated acknowledgement that a more thorough pre-signing sale process could, and maybe should, lead to more restrictive deal protection devices, the courts tend to treat deals involving no pre-signing sale process or a limited sale process the same as deals involving a more extensive pre-signing sale process.

IV. CURRENT COURT PRACTICE AND WHY IT IS NOT WORKING

As both the Delaware courts and auction theorists have alluded to, one of the most significant information gathering methods for target companies is via the pre-signing sale process. But, despite this recognition, in practice the Delaware courts do not appear to differentiate transactions involving extensive sale processes from those with much less extensive sale processes or the particular deal protection devices appearing in those transactions.

Appendices A and B further elaborate upon this. The chart in Appendix A includes all Delaware Court of Chancery and Delaware Supreme Court cases decided between April 4, 2003 (the date of *Omnicare*) and December 31, 2014 published on Westlaw in which the courts addressed the reasonability of deal protection devices. To find these cases, I did a search using "deal protection" and "*Revlon*" to initially narrow down the cases within that period. I then excluded cases if: (1) the case did not pertain to a challenge to deal protection devices per se;[141] (2) the case involved the authorization of a settlement or challenges to a settlement;[142] (3) the case involved a hostile takeover;[143] or 4) the case involved a motion to expedite and did not address deal protection devices.[144] The 28 cases

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139. *Id.*

140. *In re* Netsmart Techs., Inc. S'holders Litig., 924 A.2d 171, 197 (Del. Ch. 2007).

141. *See, e.g.*, C & J Energy Servs, Inc. v. City of Miami Gen. Emps.' and Sanitation Emps.' Ret. Tr., 107 A.3d 1049, 1067 (Del. 2014) (holding the Chancery Court's decision rested on an erroneous understanding of *Revlon* and not addressing the deal protection devices); *In re* El Paso Corp. S'holder Litig., 41 A.3d 432, 434 (Del. Ch. 2012) (focusing review on the target's "debatable negotiating and tactical choices" and not addressing the deal protection devices); Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786 (Del. Ch. 2007) (addressing the rescheduling of a stockholder vote). In *In re Morton's Rest. Grp., Inc. S'holders Litig.*, the plaintiffs had initially alleged that the deal protection devices were unreasonable but the court said the plaintiffs had waived that argument by "not pressing the argument in their brief." *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656, 675 n.108 (Del. Ch. 2013).

142. *See, e.g.*, *In re* Celera Corp. S'holder Litig., No. 6304-VCP, 2012 WL 1020471, at *1 (Del. Ch. Mar. 23, 2012), *aff'd in part, rev'd in part*, 59 A.3d 418, 437 (Del. 2012); *In re* Compellent Tech., Inc. S'holder Litig., No. 6084-VCL, 2011 WL 6382523, at *1 (Del. Ch. Dec. 9, 2011).

143. *See generally* Air Prods. and Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011) (addressing reasonableness of a target's defensive measures in the context of a hostile takeover).

144. Ehlen v. Conceptus, Inc., No. 8560-VCG, 2013 WL 2285577, at *1 (Del. Ch. May 24, 2013); Gaines

set forth on the chart remained. Appendix A includes a brief summary of the pre-signing sale process, namely whether the process was an auction, a market canvass, single bidder negotiations, or some variation of those three. Appendix B includes more detail regarding the sale process, including special knowledge of the board of directors.

A quick perusal of Appendix A shows that very similar deal protection devices are found to be reasonable both in transactions involving more extensive sale processes and in transactions with a limited sale process. In reviewing deal protection devices in transactions arising from a more limited sale process, the courts oftentimes rely on cases involving a more extensive sale process and uphold certain deal protection devices simply because they are "market terms."[145] In *Lock-Up Creep*, Professor Steven Davidoff Solomon and I alluded to this very issue and argued the end result of such action is that the "Chancery Court has abandoned enhanced scrutiny analysis in favor of a reasonableness analysis."[146] The following Section includes an in-depth analysis of two such examples.

A. *In re* Plains Exploration & Production Co. Shareholder Litigation

In a 2013 decision, *In re Plains Exploration & Production Co. Shareholder Litigation*, the Delaware Chancery Court addressed the fiduciary duties of a company's board of directors in a sale of control transaction within the context of a single-bidder negotiation strategy.[147] Plaintiff shareholders in *Plains* sought to enjoin the consummation of a cash-stock merger wherein defendant Freeport-McMoRan Copper & Gold Inc. (Freeport)[148] would acquire defendant Plains Exploration & Production Co. (Plains).[149] After entering into a confidentiality agreement with Freeport, the Plains board never looked into the benefits of alternative transactions, nor did it solicit or search for potential buyers other than Freeport itself.[150] In other words Plains' board engaged in a single-bidder strategy from the beginning, never making contact with other prospective acquirers. As a result of the merger, the CEO of Plains, James Flores, would become Vice Chairman and CEO of the combined companies' oil and gas operations.[151]

As the negotiations began to become more serious, Plains engaged its financial

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v. Narachi, No. 6784-VCN, 2011 WL 4862978, at *1 (Del. Ch. Sept. 30, 2011); Police & Fire Ret. Sys. of Detroit v. Bernal, No. 4663-CC, 2009 WL 1873144, at *1 (Del. Ch. June 26, 2009).

145. Davidoff & Sautter, *supra* note 18, at 708.

146. *Id.*

147. *In re* Plains Expl. & Prod. Co. S'holders Litig., No. 8090-VCN, 2013 WL 1909124, at *1–2 (Del. Ch. May 9, 2013). Of note is that a number of derivative suits brought by Freeport stockholders also derived from this transaction. In April 2015, the Delaware Chancery Court approved a $153.75 million settlement of the consolidated derivative suits. *In re* Freeport-McMoRan Copper & Gold Inc. Derivative Litig., Stipulation and Agreement of Settlement, Compromise and Release, No. 8145-VCN, 2015 WL 1565918, at *1–2 (Del. Ch. Apr. 7, 2015).

148. Originally, the leaders of Plains, Freeport, and McMoRan discussed a merger amongst the three individual companies. *Plains*, 2013 WL 1909124, at *1. Freeport and McMoRan merged prior to the acquisition of Plains, and for simplicity this Article will address the latter transaction without regards to the first. *Id.*

149. *Id.* Although the shareholders originally were to receive a $50 per share value for their stock, the decline in value of Freeport's stock following the announcement of the merger transaction resulted in a lower predicted value for the plaintiffs. *Id.*

150. *Id.* at *2.

151. *Plains*, 2013 WL 1909124, at *1. The court dismissed the plaintiff's claims that Flores was not fit to negotiate on behalf of Plains given this arrangement by pointing to the large percentage of ownership in Plains that Flores held, which the court found aligned his interests with the shareholders. *Id.* at *5.

advisor, Barclays, to prepare a preliminary financial analysis of the transaction and the amount at which Plains should attempt to sell its company in its entirety.[152] Barclays responded that a price near $50 per share would suffice, and the Plains board was eventually able to negotiate up from Freeport's initial $47 offer to that amount.[153] Although Barclays suggested using a collar to protect Plains' shareholders from any negative fluctuation in Freeport's stock, the board did not pursue a provision to protect its shareholders from market change despite the fact that it sought a stock-heavy deal.[154] Plaintiffs contended that Flores' negotiations were "tepid at best."[155]

Plaintiffs contended that the Plains board breached its *Revlon* duties by failing to shop the company either before or after entering into a deal with Freeport.[156] Plaintiffs argued despite this feeble attempt to garner the maximum shareholder value for the company, the Plains board agreed to "preclusive" deal protection provisions.[157] The Chancery Court judge acknowledged that "[o]ne consequence of a single-buyer negotiation strategy is that it requires a board to rely more extensively on its own knowledge and the knowledge of its financial advisor in determining whether the proposed transaction is priced fairly. Arguably, neither option provides a robust determination of market value."[158] Nonetheless, the Delaware Chancery Court held the Plains board acted reasonably in engaging in a single-bidder negotiation and thereafter agreeing to what the judge characterized as the "mild deal protection devices" stipulated within the merger agreement.[159] The court found Plains' board was justified in not pursuing alternative acquirers because it was focused on either consummating a deal with Freeport or remaining a stand-alone company, either option being an "attractive" end.[160] In light of the directors' expertise, the court opined, a single-bidder strategy was sufficient to satisfy the board's *Revlon* duties if the deal protection devices were not onerous and would not thereby "unduly impede a competing bid."[161]

The importance of *Plains* comes in the court's treatment of the deal protection devices based on the pre-signing sale process (or the lack thereof). In regards to the deal protection devices—specifically, a no-shop provision with fiduciary out, a three percent termination fee, and matching rights—the court ruled that together they were not onerous.[162] "Collectively," it declared, "these deal protection devices would not have prevented either a serious bidder from putting forth a higher bid or the [b]oard from entertaining and accepting a bona fide superior proposal."[163] Importantly, in reaching its conclusion the court relied on case law wherein the Delaware courts had upheld similar provisions. But in

152. *Id.* at *2.
153. *Id.*
154. The board originally countered with $55 per share with two-thirds of the consideration in stock. *Id.*
155. *Plains*, 2013 WL 1909124, at *2 (internal quotations omitted).
156. *Id.* at *3.
157. *Id.*
158. *See id.* at *6 (citing Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1287 (Del. 1989)) (stating that "advice [of an investment banker] is frequently a pale substitute for the dependable information that a canvas of the relevant market can provide") (internal quotation marks omitted).
159. *Id.* at *4–6.
160. *Plains*, 2013 WL 1909124, at *6.
161. *Id.*
162. *Id.*
163. *Id.*

those cases on which the court relied, the board of directors had *not* engaged in a single-bidder strategy but instead had shopped the company prior to executing a merger agreement.[164] For example, the court cited to *In re Toys "R" Us, Inc. Shareholders Litigation* for the proposition that matching rights would not deter "a fervent bidder intent on paying a materially higher price for the Company."[165] In that case, however, the board of directors engaged in an extensive market check, signing confidentiality agreements with 29 bidders before agreeing to a deal with the bidder willing to pay the highest price.[166]

Additionally, the court also cited *In re 3Com Shareholders Litigation* for the proposition that a three percent termination fee was reasonable.[167] The published decision is unclear as to whether the 3Com board conducted an extensive pre-transaction market check or merely negotiated with one bidder throughout the process.[168] 3Com's Proxy Statement, however, makes clear that 3Com pursued negotiations with a single bidder.[169] But 3Com's sale process is irrelevant because the cases upon which the *3Com* court relied in concluding that a four percent termination fee and its other deal protection devices were reasonable also all involved facts and circumstances wherein the relevant boards of directors engaged in market canvasses or other multiple-bidder strategies.[170] First, the *3Com* court also looked to *Toys "R" Us* to justify the reasonableness of its deal protection devices; as previously noted, the facts in that case are inapposite to those in *Plains* as the board in *Toys "R" Us* engaged in an extensive market check prior to negotiating with the final bidder.[171] The *3Com* court next cited to *State of Wisconsin Investment Board v. Bartlett* for the proposition that deal protection devices are reasonable "absent director interest or other breaches of fiduciary duty."[172] In that case, however, the target engaged an investment banker to solicit offers and "aggressively sought out suitors" who might benefit from an acquisition prior to entering into an agreement.[173]

In support of the notion that no-shop provisions are standard, the *3Com* court cited to *In re IXC Communications, Inc. Shareholders Litigation*, another case in which the defendant board of directors engaged in a public market canvas prior to entering into a transaction.[174] As for the termination fee, the court in *3Com* found authority in *Golden Cycle LLC v. Allan*.[175] Impressively, in *Golden Cycle* the board of directors engaged in a

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164. *Id.*

165. *Plains*, 2013 WL 1909124, at *6 (quoting *In re* Toys "R" Us, Inc. S'holders Litig., 877 A.2d 975, 1019 (Del. Ch. 2005)) (internal quotations omitted).

166. *Toys "R" Us*, 877 A.2d at 987.

167. *Plains*, 2013 WL 1909124, at *6 (citing *In re* 3Com S'holders Litig., No. 5067-CC, 2009 WL 5173804, at *7 (Del. Ch. Dec. 18, 2009)).

168. *See generally 3Com S'holders Litig.*, 2009 WL 5173804.

169. 3Com Corp., Definitive Proxy Statement (Form 14A), at 18 (Dec. 25, 2009).

170. *3Com S'holders Litig.*, 2009 WL 5173804, at *7.

171. *Id.* at *7 n.37 (quoting *In re* Toys "R" Us, Inc. S'holders Litig., 877 A.2d at 1017) ("[N]either a termination fee nor a matching right is *per se* invalid. Each is a common contractual feature that, when assented to by a board fulfilling its fundamental duties of loyalty and care for the proper purpose of securing a high value bid for the stockholders, has legal legitimacy.").

172. *Id.* (citing State of Wis. Inv. Bd. v. Bartlett, No. 17727, 2000 WL 238026, at *9 (Del. Ch. Feb. 24, 2000)).

173. *Bartlett*, 2000 WL 238026, at *5.

174. *3Com S'holders Litig.*, 2009 WL 5173804, at *7 n.37 (citing *In re* IXC Commc'n Inc. S'holders Litig., No. 17334, 1999 WL 1009174, at *2, 6 (Del. Ch. Oct. 27, 1999)).

175. *Id.* (citing Golden Cycle LLC v. Allan, No. 16301, 1998 WL 892631, at *17 (Del. Ch. Dec.10, 1998)).

seven-month search for an acquirer, engaging 79 companies before entering into a merger agreement with the final bidder.[176] Finally, the last case to which the *3Com* court looked in support of its conclusion that the deal protection devices at issue there were reasonable was *In re J.P. Stevens & Co. Inc., Shareholders Litigation*.[177] The *Plains* court's indirect reliance on *J.P. Stevens* again overlooked a stark contrast in facts, as the board in *J.P. Stevens* had engaged in a full auction prior to the contested agreement.[178]

Ultimately, the *Plains* court relied on several decisions, either directly or indirectly, to support its conclusion that these deal protection devices are standard, common, and reasonable. Remarkably, however, the cases upon which it relied address negotiations that are strikingly dissimilar to the single-bidder strategy at hand in *Plains*. This is of particular importance as it reflects an inconsistency between the purported importance of information gathering alluded to by the courts and what the courts are willing to uphold in practice. Under the Golden Ratio theory, the greater the information costs incurred, the more restrictive the deal protection devices should be. The target companies in *Toys "R" Us*, *IXC*, *Golden Cycle*, and *J.P. Stevens* likely all incurred greater information costs by engaging in much more significant pre-signing sale processes. Their "reward," however, was ultimately the same as that in *Plains*. As Professor Davidoff Solomon and I argued in *Lock-Up Creep*, the overall result is a weakening of the enhanced scrutiny standard as applied to deal protection devices.[179]

B. *In re* Pennaco Energy, Inc.

Like the court in *Plains*, the Delaware Court of Chancery considered the balance between a board's selling/information gathering efforts and deal protection devices in *In re Pennaco Energy, Inc.*[180] Just like the *Plains* court, the *Pennaco* court erred in its evaluation of the deal protection devices. In *Pennaco*, Pennaco shareholders sought to enjoin the anticipated tender offer by Marathon Oil (Marathon) for all of the shares of Pennaco Energy, Inc. for $19 per share.[181] The shareholder plaintiffs argued that Pennaco's board of directors' method for selling the company was flawed because it did not actively shop the company and relied solely on a post-market check.[182] Although the Pennaco board willingly provided information to potential bidders prior to its negotiations with Marathon, the company did not actively pursue any other bidders, did not obtain a financial advisor to discuss strategic alternatives, and included a no-shop provision and termination fee of three percent.[183] Notably, the time between the disclosure of the intended transaction, December 22, 2000, and the beginning of the tender offer period, January 8, 2001, was

176. *Allan*, 1998 WL 892631, at *17 n.16.

177. *3Com S'holders Litig.*, 2009 WL 5173804, at *7 n.37 (citing *In re* J.P. Stevens & Co., Inc., S'holders Litig., 542 A.2d 770, 783 (Del. Ch. 1988) for the proposition that deal protection devices are "reasonably conventional").

178. *Id.* (citing *In re* J.P. Stevens & Co., Inc. S'holders Litig., 542 A.2d at 773–76 (Del. Ch. 1988)).

179. Davidoff & Sautter, *supra* note 18.

180. *In re* Pennaco Energy, Inc., 787 A.2d 691 (Del. Ch. 2001).

181. *Id.* at 692.

182. *Id.*

183. *Id.* at 704. The board did entertain sales pitches by two financial advisors wherein it received insight into the advantages and disadvantages of a single-bidder strategy, but it did not hire Lehman Brothers until after it was seeking a fairness opinion for Marathon's final offer. *Id.*

brief.[184]

Then-Vice Chancellor Strine refused to enjoin the tender offer, holding that the board's actions were reasonable.[185] Despite the fact that the board only negotiated with a single bidder, he reasoned, "it bargained hard and made sure that the transaction was subject to a post-agreement market check unobstructed by onerous deal protection measures that would impede a topping bid."[186] Strine emphasized that the standard a board of directors is held to by the court should not be perfection but instead reasonableness, stating that the board of directors is "best equipped" to make judgments as to the complex business considerations involved in a sale of corporate control.[187] He acknowledged that "one would not commend the Pennaco board's actions as a business school model of value maximization" but nonetheless found that the strategy was not unreasonable.[188]

The court's decision focused on the experience of the board and the "bullish" nature with which the company communicated with interested parties.[189] Strine also pointed out that Pennaco had previously conducted an extensive search for a joint venture partner in 1998, bringing attention to itself before 20 to 30 companies.[190] Strine was not bothered by the board's failure to hire a financial adviser regarding strategic alternatives, and was content with the fact that the board heard sales pitches from two financial advisers before agreeing to the acquisition by Marathon.[191] Strine refused to find fault in the fact that despite both companies' advice that Pennaco should obtain an updated reserve report to maximize its value, the board ignored this advice.[192] To find this kind of conduct unreasonable "would involve second-guessing of the kind *QVC* proscribes."[193]

Importantly, Strine did note that the actions of the board would likely have been unreasonable had it locked up the transaction from post-agreement competition with onerous deal protection devices.[194] His analysis as to this redeeming feature of the deal was as follows:

> But it appears that the Pennaco board was careful to balance its single buyer negotiation strategy by ensuring that an effective post-agreement market check would occur. The merger agreement's provisions leave Marathon exposed to competition from rival bidders, with only the modest and reasonable advantages of a [three percent] termination fee and matching rights. The plaintiffs' attack on the termination fee's level is make-weight and at odds with precedent upholding the validity of fees at this level.[195]

The precedent to which Strine refers is three cases arguably inapposite to the facts in *Pennaco*. He cited *McMillan v. Intercargo Corp.* (Intercargo II) and *Matador Capital*

184. *Pennaco Energy, Inc.*, 787 A.2d at 703.
185. *Id.* at 693.
186. *Id.*
187. *Id.* at 705.
188. *Id.*
189. *Pennaco Energy, Inc.*, 787 A.2d at 705–06.
190. *Id.* at 705.
191. *Id.* at 706.
192. *Id.*
193. *Id.*
194. *Pennaco Energy, Inc.*, 787 A.2d at 707.
195. *Id.*

Management Corp. v. BRC Holdings, Inc. for the proposition that a three percent termination fee would not deter a rival bidder, but in those cases the board conducted a market canvas prior to executing the agreement.[196] Similarly, he cited another case, *Goodwin v. Live Entertainment, Inc.*, for the same proposition, but in *Goodwin* the board had distributed a confidential information memorandum to over 50 prospective lenders seeking a recapitalization partner, many of whom executed confidentiality agreements and conducted due diligence.[197] As a result of this search, one company came forward with an acquisition proposal, which was consummated within that year.[198] In *Pennaco*, by contrast, the only party to execute a confidentiality agreement and conduct due diligence was Marathon itself.[199] Strine also cited *Matador* for the proposition that the fact that no other bidders appear after the execution of the agreement evidences that the board obtained the best price reasonably available.[200]

In the end, like the *Plains* court, the *Pennaco* court relied on cases where more extensive searches were conducted in advance of the agreement for the proposition that the deal protection devices the Pennaco board agreed to were not "onerous." Strine was ultimately impressed by the board's expertise alone, despite the arguable bias of certain board members in favor of getting the deal done.[201] But as the previous Section describes, the courts have repeatedly recognized that a board's special knowledge is not a substitute for actual pre-signing sale process as a means of information gathering. The next Part describes the role that special knowledge should play in the Golden Ratio of Corporate Deal-Making.

V. THE GOLDEN RATIO OF CORPORATE DEAL-MAKING

A. *What is the Golden Ratio of Corporate Deal-Making?*

The Golden Ratio of Corporate Deal-Making grows out of auction theory and information costs incurred in determining the target's value. Under this theory, as the parties incur more information costs, they essentially "buy" the right to more restrictive deal protection devices. To the contrary, the lesser the information costs incurred by the parties, the less restrictive the deal protection devices would be. Information gathering and distribution occurs most significantly during the pre-signing sale process. Consequently, as this Section will describe in more detail, the strength of the deal protection devices should bear a direct relationship to the extensiveness of the pre-signing sale process.[202]

196. *Id.* at 707 n.27; McMillan v. Intercargo Corp., 768 A.2d 492 (Del. Ch. 2000); Matador Capital Mgmt. Corp. v. BRC Holdings, Inc., 729 A.2d 280 (Del. Ch. 1998).

197. Goodwin v. Live Entm't, Inc., No. 15765, 1999 WL 64265, *2–3 (Del. Ch. Jan. 25, 1999).

198. *Id.*

199. *Pennaco Energy, Inc.*, 787 A.2d at 697–98.

200. *Id.* at 707.

201. Strine also rejected the plaintiff's argument that the board members were biased. *Id.* at 708. As an example of the support for the plaintiff's allegations, several of the board members altered their employment contracts to substantially increase their severance packages only months prior to negotiating with Marathon. *Id.*

202. In many ways, the Golden Ratio Theory is a culmination of my scholarship to date, which contends that certain deal protection devices may be more restrictive in the context of a more extensive pre-signing sale process. In *Auction Theory and Standstills: Dealing with Friends and Foes in a Sale of Corporate Control* and *Promises Made to be Broken? Standstill Agreements in Change of Control Transactions*, I examined the use of standstill agreements in public company M&A transactions. Sautter, *Auction Theory*, *supra* note 8; Christina M. Sautter,

As previously described, a fundamental issue for auction theorists is information flow between the target and potential bidders. The target's provision of information to potential buyers is not without costs. As auction theorists debate, target boards must weigh these information costs in deciding what type of sale process to engage in which will best satisfy their *Revlon* duties. More precisely, boards must decide which process provides them with sufficient information to determine that maximum shareholder value has been obtained. Auction theorists agree that competition results in more significant gains for target shareholders. Accordingly, a significant consideration for boards is the number of bidders participating in the sale process. Generally, as competition increases, targets can be more certain that maximum stockholder value has been achieved. Conversely, as competition decreases, so does certainty. Because of this lack of certainty, target boards must have some way to avail themselves of information. This is where the less restrictive deal protection devices under the Golden Ratio theory should come into play.

The Golden Ratio should be considered on a continuum. More precisely, the more significant the pre-signing sale process is, the more tolerant courts should be of stronger or more restrictive deal protection devices.[203] Conversely, the less extensive the pre-signing sale process the less tolerant courts should be of restrictive deal protection devices. When considering the extensiveness of the pre-signing sale process, the main inquiry should be the number of potential buyers invited to participate in the process. For example, if a target only negotiates with a single bidder the deal protection devices in the resulting transaction should be much less restrictive than deal protection devices included in an agreement entered into with the winner of a full-blown auction. However, there is not a magic number of bidders that must be involved in any given sale process. Instead, this inquiry is and should be context specific, considering the individual characteristics of the target company and the industry in which the target operates.

Similarly, considering the extensiveness of the pre-signing sale process does not mean that there is not room for the board's special knowledge about the company and the industry in which the company operates. As demonstrated in *Pennaco* as well as many of the transactions described in Appendices A and B, the Delaware courts consider the board's special knowledge in evaluating the sale process. This special knowledge can come from

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Promises Made to be Broken? Standstill Agreements in Change of Control Transactions, 37 DEL. J. CORP. L. 929 (2013). In those articles, I argued that more restrictive standstills, including DADW standstills, could be used following an extensive pre-signing sale process. *See* Sautter, *Auction Theory*, *supra* note 8, at 568 (providing a framework for the use of DADW standstills); Sautter, *Promises Made to be Broken?*, at 983–84 (arguing that, in considering the validity of standstills, the Delaware courts are likely to focus on the amount of pre-signing "shopping" in which the target has engaged). Similarly, in *Rethinking Contractual Limits on Fiduciary Duties*, I examined merger agreement recommendation fiduciary out provisions. Christina M. Sautter, *Rethinking Contractual Limits on Fiduciary Duties*, 38 FLA. ST. U. L. REV. 55 (2010). There I argued that an informed board who "has fully shopped the target company . . . should have the right to limit its change of recommendation to certain defined circumstances." *Id.* at 98. Finally and most recently, in *Fleecing the Family Jewels*, I argue that practitioners should not necessarily shy away from crown jewel lock-up options as they have done in the past. Christina M. Sautter, *Fleecing the Family Jewels*, 90 TUL. L. REV. 545 (2016). Instead, consistent with jurisprudence like *Revlon*, dealmakers can legitimately use lock-ups in the context of a more extensive sale process as a way of enticing bidders to enter the sale process, to bid more during the process, and to reward a winning bidder for their information costs. *Id.* at 587-88.

203. This argument is also consistent with recent scholarship. Professor Jay Kesten argued, quite persuasively, in *Adjudicating Corporate Auctions*, that more restrictive deal protection devices, like DADW standstills, should be allowed in auctions. Kesten, *supra* note 20, at 259–64.

various sources and vary depending upon the particular target's circumstances but can include recent previous unsuccessful sale processes, valuations by financial advisors, industry conditions, and the target's particular financial condition. Under the Golden Ratio, the board's knowledge would continue to play a significant role in the level of deal protection devices the parties could agree to and that the courts should be tolerant of. The continuum of the Golden Ratio could be boiled down and reduced simply to the following three "equations" describing the pre-signing sale process and the level of deal protection that the courts should tolerate under *Unocal*:

Full blown auction + special knowledge = strongest, most restrictive deal protection devices

Market Canvass + special knowledge = intermediate deal protection devices

Single bidder + special knowledge = weakest, least restrictive deal protection devices

Another way to think of the interplay between the pre-signing sale process (including the board's special knowledge) and the deal protection devices is to consider the relationship of trust between the board and shareholders. More specifically, the pre-signing sale process and the board's special knowledge provide a proxy for the shareholders' trust of the board. Possible conflicts of interest are inherent in a board's actions and can become particularly problematic in the context of a sale of control. Although the possibility of conflicts are never erased, the more extensive the pre-signing sale process, the more likely the board is not acting out of its own self-interests. It follows that if the board agrees to more extensive deal protection devices, it is doing so not to favor one bidder over another for selfish reasons but rather because it is using the deal protection devices as a way of stimulating the bidding process and/or rewarding the ultimate buyer. On the flip side, if a target has only engaged in negotiations with a single bidder, shareholders may look with more suspicion upon the board's actions, particularly if the board agrees to more restrictive deal protection devices.

Although under the Golden Ratio, the strongest, most restrictive deal protection devices would follow a full-blown auction, this Article is not contending that a full-blown auction precede every change of control transaction. To the contrary there may be situations where a full-blown auction is not prudent or even possible. For example, only a small number of potential buyers may be willing and able to buy a multibillion-dollar company.[204] In these instances when measuring the extensiveness of the sale process the focus should be on contacting and engaging the viable acquisition partners that *do* exist.

This Article is not advocating for certain "set" deal protection devices to be used depending upon the sale process. Instead, this Article advocates that dealmakers make those particular calls. An illustration may be helpful. The chart located at Appendix A

204. *See* Boone & Mulherin, *How Are Firms Sold?*, *supra* note 87, at 870 (stating that appropriate sale process in which to engage is dependent on the corporation's size and the industry in which it operates).

shows that termination fees of between 3–4% of equity value are common, if not standard, *no matter* if an auction process was held or if the target simply negotiated with one bidder prior to entering into a definitive acquisition agreement. Take for example, the Bioclinica transaction, which involved an auction process including 21 bidders over an eight-month period and culminated in a transaction with a 3.6% termination fee. This transaction is the quintessential auction process but includes a termination fee very close to that contained in single bidder transactions, like Smurfit-Stone described in Appendix A. The Smurfit-Stone transaction was a result of single bidder negotiations and included a 3.4% termination fee. Under the Golden Ratio, the Bioclinica termination fee could be higher and other deal protection devices could be more restrictive, while the Smurfit-Stone termination fee should be lower and the other deal protection devices less restrictive. To be clear, however, even after a full-blown auction like that in Bioclinica, the deal protection devices package should not be so restrictive as to completely lock-up a transaction.[205]

B. Implications of the Golden Ratio

The Golden Ratio is not only consistent with the Delaware Supreme Court's decisions in both *Revlon* and *Unocal*, but also returns the courts to the enhanced scrutiny standard from which they have strayed.[206] The theory seeks a more thorough analysis of the sale process, considering all elements of the process in determining the impact of the deal protection devices on the transaction. In considering the sale process, the courts must weigh the type of process, the number of bidders involved in the process, the target's unique characteristics, the target's competitors, and the industry in which the target operates. In addition, unlike in *Plains* and *Pennaco*, for example, in upholding deal protection devices the courts should consider precedent with similar factual backgrounds.

When following this theory, the result would be a more thorough analysis of the sale process and of the deal protection devices. Although the theory strives for a detailed factual analysis by the courts, it also provides practitioners with a basic formula to follow in negotiating future deals. It would give practitioners greater latitude to negotiate much more restrictive deal protection devices as the pre-signing sale process becomes more extensive. In other words, the Golden Ratio will help to make more measurable a relationship that has previously not been conducive to measurement.

VI. CONCLUSION

The Golden Ratio of Corporate Deal-Making uses auction theory and information costs incurred during the sale process to make measureable the relationship between pre-signing sale process and deal protection devices. Specifically, the Golden Ratio is a proportion measuring the restrictiveness of deal protection devices against the pre-signing sale process conducted by the target board. Under this theory, the more extensive the pre-signing sale process, the more information that both the selling company, or target, and buyer have gathered. In particular, the target board (who has a duty to maximize

205. *See* Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 930–31 (Del. 2003) (holding that transactions must include effective fiduciary out provisions).

206. *See* Davidoff & Sautter, *supra* note 18, at 701–08 (describing how the Delaware courts have not been applying an enhanced scrutiny standard to deal protection devices).

stockholder value in change of control transactions) achieves greater certainty regarding maximum value from engaging in a more extensive pre-signing sale process. Similarly, the buyer has greater certainty regarding the target's value. At the same time, information costs incurred on both sides are higher—as the parties expend more to learn about the value of the company, there is lower likelihood that a third party will overbid. In this case, the deal protection devices can be more restrictive because of this information certainty. Conversely, when the target has engaged in only a single bidder negotiation, information costs are lower, as is certainty that maximum shareholder value has been achieved. In that case, because of this lack of certainty regarding the achievable maximum value of the target, deal protection devices should be less restrictive. In other words, the Golden Ratio of Corporate Deal-Making provides for a direct proportional relationship between the information gathering process and the resulting deal protection devices. The ultimate implication of this theory is a return to the application of an enhanced scrutiny standard to deal protection devices.

APPENDIX A: DELAWARE SUPREME COURT AND COURT OF CHANCERY RULINGS ON DEAL PROTECTION DEVICES FROM APRIL 4, 2003 TO DECEMBER 31, 2014[207]

1.	Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003)	Auction process between two interested parties, preceded by a market canvass in which over 50 potential acquirers were contacted over the course of two years.	Shareholder voting agreement with two directors who together controlled majority voting power of the target, without a fiduciary out; force-the-vote provision; no-shop provision with a fiduciary out; termination fees of $11 million, which represented approximately 3.24% of the deal value.	Motion for summary judgment granted in favor of defendants.
2.	*In re* MONY Group Inc., S'holder Litig., 852 A.2d 9 (Del. Ch. 2004).	Single bidder transaction with no market canvass.	Termination fee representing 3.3% of equity value and 2.4% of transaction value.	Preliminary injunction motion by plaintiffs granted to correct disclosure.
3.	*In re* Toys 'R' Us, Inc. S'holder Litig., 877 A.2d 975 (Del. Ch. 2005).	Auction sale process, which included a public announcement that the company was exploring strategic alternatives.	Three business days matching rights; termination fee representing 3.75% of equity value or 3.25% of enterprise value; up to $30 million expense reimbursement after a naked no vote.	Preliminary injunction motion by plaintiffs denied.

207. This chart is based on a chart appearing in *Lock-Up Creep*. *See* Davidoff & Sautter, *supra* note 18, at 725–31. That chart focused on Delaware holdings regarding deal protection devices in cases following *Omnicare*. *See id.* It did not include details regarding the sale process. *See id.*

4.	*In re* Topps Co. S'holders Litig., 926 A.2d 58 (Del. Ch. 2007).	Single bidder sale process was chosen in favor of an auction because the buyer stated that the bid would be withdrawn if the target commenced an auction.	40-day go shop; four business days matching rights;[208] termination fee and expense reimbursement of 3% of transaction value during go-shop and 4.6% of transaction value after go-shop.	Preliminary injunction motion by plaintiffs granted to correct disclosure and release third party from standstill.
5.	La. Mun. Police Emps. Ret. Sys. v. Crawford, 918 A.2d 1172 (Del. Ch. 2007).	Single buyer negotiations for a merger of equals transaction without a market canvass.	Five business days matching rights; termination fee of more than 3% of deal value; force-the-vote provision; no-shop provision with a fiduciary out; information rights.	Preliminary injunction motion by plaintiffs granted to correct disclosure.
6.	*In re* Lear Corp. S'holder Litig., 926 A.2d 94 (Del. Ch. 2007).	Single bidder transaction with a pre-signing market canvass and go-shop.	45-day go-shop; if the acquirer did not exercise its matching right it was obligated to vote its block of shares in favor of superior offer; matching rights: 10 days but if the superior proposal was in excess of $37 per share, the acquirer had a single chance to match, but if superior proposal was not in excess	Preliminary injunction motion by plaintiffs granted to correct disclosure.

208. TOPPS Company, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(b)(ii) (Mar. 6, 2007), http://www.sec.gov/Archives/edgar/data/812076/000095013607001390/0000950136-07-001390.txt.

			of $37, the acquirer had three days to match successive bids; termination fee and expense reimbursement of 2.79% equity or 1.9% of enterprise value during go-shop and 3.52% of equity value or 2.4% enterprise value after go-shop.	
7.	Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009).	Single bidder transaction without a market canvass.	Termination fee representing approximately 3% of equity value[209] and 2% of enterprise value; three business days[210] matching rights; no-shop provision with fiduciary out	Reversed Court of Chancery's denial of defendant's motion for summary judgment.
8.	*In re* 3Com S'holders Litig., No. 5067-CC, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009).	Single bidder transaction without a market canvass.	Termination fee and expense reimbursement fee representing over 4% of equity value; five business days[211] matching rights; no-shop provision	Motion to expedite discovery denied.
9.	*In re* Dollar Thrifty S'holder Litig., 14 A.3d 573 (Del. Ch. 2010).	Single bidder transaction without a market canvass.	Termination fee representing 3.5% of deal value (or 3.9% of deal value when taking into	Preliminary injunction motion by plaintiffs denied.

209. Ryan v. Lyondell Chemical Co., No. 3176–VCN, 2008 WL 2923427, at *8 (Del. Ch. July 29, 2008).

210. Lyondell Chemical Co., Current Report (Form 8-K, Exhibit 2.1), § 4.2(b)(ii) (July 17, 2007), http://www.sec.gov/Archives/edgar/data/842635/000084263507000007/lyoexhibit2-1.htm.

211. 3Com Corp., Current Report (Form 8-K, Exhibit 2.1), §5.3(a)(i)(C) (Nov. 12, 2009), http://www.sec.gov/Archives/edgar/data/738076/000095012309061809/b78042exv2w1.htm.

			account expense reimbursement); two business days matching rights.	
10.	*In re* Cogent, Inc. S'holder Litig., 7 A.3d 487 (Del. Ch. 2010).	Auction process involving five companies.	Termination fee representing 3% of equity value or 6.58% of enterprise value; five business days matching rights; top-up provision allowing "3M to purchase up to approximately 139 million shares, consisting of all of Cogent's treasury stock and authorized but unissued stock, at the tender offer price of $10.50 per share. 3M, at its discretion could pay for any stock purchased under this provision either in cash or with a promissory note due in one year."	Preliminary injunction motion by plaintiffs denied.

11.	*In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011).	Single bidder transaction, following a failed limited auction process amongst bidders selected by the company's financial advisor.	First match: three business days; subsequent matches: two business days; 45-day go-shop; if transacting with enumerated "Excluded Party," termination fee "representing 1.13% of total deal value and 1.5% of equity value" but if transacting with non-Excluded Party, termination fee "representing 2.26% of total deal value, and 3% of the total equity value."	Preliminary injunction motion by plaintiffs granted to delay stockholder vote 20 days in an attempt to obtain a third party overbid. The Vice Chancellor found that the board likely breached its fiduciary duties as it was misled by a conflicted financial advisor. The Vice Chancellor compared the delay "to a disclosure-based injunction" and prevented the enforcement of the deal protection devices during the delay.
12.	*In re* Atheros Commc'ns, Inc., No. 6124–VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011).	Single bidder transaction with a pre-signing market canvass.		Preliminary injunction motion by plaintiffs granted to correct disclosure.

			Five business days[212] matching rights; termination fee representing 3.3% of "total value of the Transaction."	
13.	*In re* Answers Corp. S'holders Litig., No. 6170–VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011).	Single bidder transaction with a market canvass.	Three business days[213] matching rights; termination fee and expense reimbursement of 4.4% of equity value; force-the-vote provision; two voting agreements locking up approximately 27% of the vote.	Preliminary injunction motion by plaintiffs denied.
14.	*In re* Orchid Cellmark, Inc. S'holders Litig., No. 6373–VCN, 2011 WL 1938253 (Del. Ch. May 12, 2011).	Auction process involving eight potential acquirers.	Four business days[214] matching rights; termination fee of "less than 3% of the deal price"; top-up provision; no-shop provision with fiduciary out; poison pill that applied to all other bidders except the board's favored buyer; standstill provision.	Preliminary injunction motion by plaintiffs denied.

212. Qualcomm, Inc., T Merger Sub, Inc., and Atheros Commc'n, Inc., Agreement and Plan of Merger (Form 8-K, Exhibit 2.1), § 4.02(b)(iii) (Jan. 5, 2011), http://www.sec.gov/Archives/edgar/data/1140486/000119312511001634/dex21.htm.

213. AFCU Holdings, LLC, A-Team Acquisitions Sub, Inc., and Answers Corp., Agreement and Plan of Merger (Form 8-K, Exhibit 2.1), § 6.3(d)(iii) (Feb. 7 2011), http://www.sec.gov/Archives/edgar/data/1283073/000114036111006460/ex2_1.htm.

214. Lab. Corp. of Am. Holdings, OCM Acquisition Corp, and Orchid Cellmark, Inc., Agreement and Plan of Merger (Form 8-K, Exhibit 2.1), § 5.2(c) (Apr. 6 2011), http://www.sec.gov/Archives/edgar/data/1107216/000119312511090300/dex21.htm.

15.	*In re* Smurfit-Stone Container Corp. S'holder Litig., No. 6164–VCP, 2011 WL 2028076 (Del. Ch. May 20, 2011), *revised* (Del. Ch. May 24, 2011).	Single bidder transaction with no market canvass.	Three calendar days matching rights; termination fee of approximately 3.4% of equity value.	Preliminary injunction motion by plaintiffs denied.
16.	*In re* Micromet, Inc. S'holders Litig., No. 7197–VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2010).	Single bidder transaction with market canvass.	Four business days matching rights; termination fee of 3.4% of equity value and 47% of enterprise value; top-up provision; poison pill.	Preliminary injunction motion by plaintiffs denied.
17.	*In re* OPENLANE, Inc. S'holders Litig., No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011).	Single bidder transaction with limited market canvass.	Termination fee if majority of OPENLANE shareholders did not consent to Agreement within 24 hours: 0%. Also, if the agreement was validly terminated: 0%.[215]	Preliminary injunction motion by plaintiffs denied.

215. OPENLANE, INC., Preliminary Proxy Statement (Sch. 14A), § 8.3 (Aug. 28, 2011), http://www.sec.gov/Archives/edgar/data/1438302/000114420411050194/v233512_prem14a.htm.

18.	*In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022 (Del. Ch. 2012).	Auction process involving 15 potential acquirers.	Force-the-vote provision; matching rights of five business days for a superior proposal and two business days for an amended superior proposal; termination fee representing "approximately 3.05% of the equity value of the [m]erger" or 2.9% of enterprise value; voting agreement locking up 37% of the stock which would be reduced to 33% of the stock upon a change in the board's merger recommendation.	Motion to dismiss by defendants granted.
19.	*In re* Novell, Inc. S'holder Litig., No. 6032-VCN, 2013 WL 322560 (Del. Ch. Jan. 3, 2013).	Auction process involving over 50 potential acquirers.	Five business days matching rights; termination fee of 2.7% of equity value; no-solicitation provision.	Motion to dismiss by defendants granted.
20.	*In re* BJ's Wholesale Club, Inc. S'holder Litig., No. 6623-VCN, 2013 WL 396202 (Del. Ch. Jan. 31, 2013).	Auction process involving private equity firms and strategic competitors.	"[T]ermination fee representing 3.1% of the deal value"; force-the-vote provision; matching rights of three calendar days for superior proposal and one calendar day for superior proposal revisions.[216]	Motion to dismiss by defendants granted.

216. Agreement and Plan of Merger by and among Plains Exploration & Production Company, Freeport-

21.	*In re* Plains Exploration & Production Co. S'holder Litig., No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013).	Single bidder transaction with no market check.	"[T]hree percent termination fee," matching rights of four business days and two business days for revised offers.[217]	Motion for a preliminary injunction denied.
22.	Koehler v. NetSpend Holdings Inc., Civil Action No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013).	Single bidder transaction, without a market check.	Termination fee "representing 3.9% of the deal value"; no-shop provision; matching rights of five business days and three business days for revised offers[218]; don't ask, don't waive standstills (which were withdrawn after oral argument in the case), and "voting agreements . . . lock[ing] up approximately 40% of the stock . . . [that] only terminate if the Board terminates the . . . Merger Agreement."	Motion for preliminary injunction denied.
23.	Miramar Firefighters Pension Fund v. AboveNet, Inc., No. 7376-VCN, 2013 WL	Single bidder sale process with market canvass.	Termination fee of $45 million, representing approximately 2%	Motion to dismiss by defendants granted.

McMoRan Copper & Gold Inc. and IMONC LLC (Form 8-K, Exhibit 2.1), § 6.1(b)(iii) (June 29, 2011), http://www.sec.gov/Archives/edgar/data/1037461/000119312511176822/dex21.htm.

217. Plains Expl. & Prod. Co., Current Report (Form 8-K, Exhibit 2.1), § 5.4(d) (Dec. 6, 2012), http://www.sec.gov/Archives/edgar/data/891456/000119312512493974/d449913dex21.htm.

218. NetSpend Holdings, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(d) (Feb. 19, 2013), http://www.sec.gov/Archives/edgar/data/1496623/000110465913011811/a13-5550_1ex2d1.htm.

	4033905 (Del. Ch. July 31, 2013).		of the deal's equity value; 30 day go-shop which could be extended 15 days; no solicitation clause which became operative after the go-shop period.	
24.	*In re* BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013).	Auction process involving 21 strategic and private equity buyers over an 8-month period.	Termination fee representing approximately 3.6% of equity value;[219] matching rights of four business days for superior offers which could be extended by two business days for superior offer revisions;[220] no-shop clause; adopted a poison pill that exempted the favored bidder; top-up option.	Motion to dismiss by defendants granted.
25.	Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014).	Auction process with seven potential acquirers.	No-shop clause with a fiduciary out; four-day matching rights; termination fee of $5.2 million representing 3% of the equity value.	Motion for summary judgments by defendants granted in part and denied in part.
26.	Dent v. Ramtron Int'l Corp., Civil Action No. 7950-VCP, 2014 WL 2931180 (Del. Ch. June 30, 2014).	Single bidder transaction with market canvass involving 25 potential acquirers.	Termination fee representing 4.5% of the deal's equity value; no-solicitation agreement with a	Motion to dismiss by defendants granted.

219. *In re* Bioclinica, Inc. S'holder Litig., BioClinica Defendants' Opposition to Plaintiffs' Motions for Expedited Proceedings, No. 8272-VCG, 2013 WL 663191 (Del. Ch. Feb. 20, 2013).

220. BioClinica, Inc., Current Report (Form 8-K, Exhibit 2.1), § 6.3(c)(iii) (Jan. 29, 2013), http://www.sec.gov/Archives/edgar/data/822418/000104746913000537/a2212643zex-2_1.htm.

			fiduciary out; change in recommendation provision; information rights; standstill provision; matching rights for three days.	
27.	*In re* Comverge, Inc., Civil Action No. CV 7368-VCP, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014).	Single bidder transaction with market canvass involving 25 potential acquirers for a minority position in the company.	Go-shop period which could be extended 10 days if the target company was negotiating a potentially superior proposal; termination fee of $1.206 million during the go-shop period, and $1.93 million after the go-shop period expired; expense reimbursement for up to $1.5 million; top-up option.	Motion to dismiss by defendants granted.

APPENDIX B: ADDITIONAL FACTS REGARDING THE SALE PROCESSES FOR THE CASES INCLUDED IN APPENDIX A

Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003):

Of the 50 companies contacted, only two expressed interest—Omnicare and Genesis. *Id.* at 920. Omnicare was interested in acquiring the target company via an asset sale in bankruptcy that offered little recovery for the target company's noteholders, and no recovery for the target's stockholders. *Id.* at 921. Genesis proposed a transaction that did not involve bankruptcy that would fully repay the target's noteholders and also provide some recovery for its stockholders. *Id.* at 922–23. Believing the Genesis offer to be superior, the board entered into an exclusivity agreement with Genesis for 30 days. *Id.* at 923. During the exclusivity period, Omnicare made a higher offer than what Genesis offered, but subject to Omnicare being satisfied after conducting due diligence. *Omnicare*, 818 A.2d at 924. The board used the Omnicare offer to extract a higher price, and eventually agreed to a merger with Genesis. *Id.* at 924–25.

Orman v. Cullman, No. 18039, 2004 WL 2348395 (Del. Ch. 2004):

The board formed a Special Committee to negotiate with the bidder, but did not authorize the Special Committee to solicit offers from third parties. *Id.* at *2. During the negotiations, the buyer required the target company's controlling shareholders to enter into a voting agreement. *Id.* In order to extract a higher offer, the shareholder agreed to a longer voting agreement. *Id.* at *3. The board received a fairness opinion indicating that $15.25 per share should be paid to the public shareholders—which was a significant premium above the market value. *Id.*

In re MONY Group Inc. S'holder Litig., 852 A.2d 9 (Del. Ch. 2004):

Over the course of nine months, the buyer made bids that declined in value because of change-in-control agreements (CICs) between the target company and its senior management. *Id.* at 15–18. After modifying the CICs, the target company was able to negotiate a higher price that represented a 7.4% market premium. *Id.* at 17. The merger agreement contained a window-shop provision and a fiduciary out. *Id.* at 18. After the agreement was publicly announced, one company indicated an interest in acquiring the target, but never submitted an offer. *Id.*

In re Toys 'R' Us, Inc. S'holder Litig., 877 A.2d 975 (Del. Ch. 2005):

Based on input from its financial advisors, the target company conducted a market canvass for selling off divisions of the company, rather than selling the company as a whole. *Id.* at 982–84. In the final round of bidding on one of those divisions, one of the bidders expressed an interest in buying the entire company. *Id.* at 987–90. The target company then solicited bids for the entire company. *Id.* at 990. Instead of soliciting bids from all bidders, the target company chose to solicit only those bidders that were in the final round of bidding for one of its divisions. *Id.* Of the bids that were submitted, the board chose a bid that was $1.50 higher than the next-highest bid. *Toys 'R' Us*, 877 A.2d at 994–95.

In re Topps Co. S'holders Litig., 926 A.2d 58 (Del. Ch. 2007):

After negotiating for a higher price, and a go-shop period, the target company entered into a definitive agreement at a price its financial advisor deemed fair. *Id.* at 65. During the go-shop period, the target's financial advisor contacted 107 potential bidders, five of which expressed interest. *Id.* Only one potential bidder pursued an acquisition. *Id.* at 71.

La. Mun. Police Emps. Ret. Sys. v. Crawford, 918 A.2d 1172 (Del. Ch. 2007).

After entering into a merger agreement with one company, a competing bidder emerged and made an unsolicited bid for the target company. *Id.* at 1182–83. The board determined that the offer did not constitute a superior proposal. *Id.* Nevertheless, the original buyer increased the offering price. *Id.* at 1183. After the original buyer increased the bid price, the competing bidder commenced an exchange offer. *Id.*

In re Lear Corp. S'holder Litig., 926 A.2d 94 (Del. Ch. 2007):

The target company formed a Special Committee to evaluate strategic alternatives, which received a bid from Carl Icahn. *Id.* at 99. The Committee rejected the initial offers, and tried to extract more value, but Icahn identified $36 per share as his highest and final offer. *Id.* at 103–04. Fearing that an auction process would lose the Icahn bid as well as disrupting the company's customer relationships, the Special Committee opted for an abbreviated pre-signing market canvass, and a go-shop provision. *Id.* at 104. During the pre-signing market canvass, which lasted only three days, the target solicited eight companies, but none submitted an offer. *Id.* Later, during the go-shop period, 41 potential buyers were contacted, but only 8 entered into confidentiality agreements. *Lear Corp.*, 926 A.2d at 106. None of those buyers submitted a bid. *Id.*

Lyondell Chem. Co. v. Ryan, 970 A.2d 235 (Del. 2009):

Over a four-month period the board obtained a price increase of nearly $20 per share over the original offer. *Id.* at 237–39. The board sought, but ultimately did not obtain, a go shop provision, but the board was successful in negotiating for a reduced termination fee. *Id.* at 238–39.

In re 3Com S'holders Litig., No. 5067-CC, 2009 WL 5173804 (Del. Ch. Dec. 18, 2009):

After terminating a prior merger agreement with an unrelated company, the target company continued to explore strategic alternatives. 3Com Corp., Definitive Proxy Statement (Form 14A), at 18 (Dec. 25, 2009). Recognizing a downturn in business and the target's industry, the target board opted to explore a "commercial relationship" with several companies, but only HP was willing to share confidential information. *Id.* at 18–19, 23. After learning about the target's business, HP made an indication of interest in acquiring the target rather than engaging in a commercial relationship. *Id.* at 19. After the board rejected HP's initial offer, news leaked that HP was interested in acquiring one of the target's competitors. *Id.* at 20–21. Although there were public rumors that the target company was in play, no other companies approached the target to discuss an acquisition. *Id.* at 23. The target board considered a market canvass, but because of the lack of interest from other companies as well as the fear of HP acquiring a competitor instead of the target, the target agreed to negotiate exclusively with HP. 3ComCorp., Definitive Proxy Statement at 23 (Dec. 25, 2009). The two companies continued negotiations and the target continued to reject proposals until arriving at $7.90 per share, which was nearly $3.00 higher than the initial indication of interest. *Id.* at 19, 25.

In re Dollar Thrifty S'holder Litig., 14 A.3d 573 (Del. Ch. 2010):

The transaction was with a buyer that the company had prior dealings. *Id.* at 579–81. After unsuccessful acquisition proposals in the years before, the target was approached with a new acquisition proposal. *Id.* at 581. The board considered the proposal, and negotiated for a higher price. *Id.* at 584–85. Believing that an alternative buyer would not be in the financial position to submit a bid, and also that an auction would cause the buyer to withdraw, the board agreed to a merger. *Id.* at 585–87. The buyer agreed to divest certain assets should there be anti-trust concerns, as well as a reverse termination fee if anti-trust approval could not be obtained. *Dollar Thrifty*, 14 A.3d at 585. After entering into the merger agreement, the alternative buyer jumped the transaction. *Id.* at 589–90. The offer would give the shareholders greater value, but did not have the same closing certainty—namely the second bidder did not agree to divest assets, nor did it agree to a reverse termination fee. *Id.* at 592. The target company's board determined that the overbid would not close on a timely basis, and declined to accept the proposal, and resumed the merger with the first buyer. *Id.*

In re Cogent, Inc. S'holder Litig., 7 A.3d 487 (Del. Ch. 2010):

The target company had explored strategic alternatives for two years, reaching out to 27 potential bidders, five of which entered into non-disclosure agreements. *Id.* at 493. After a lengthy process negotiating with each potential bidder, the board opted for an offer that presented the fewest closing contingencies. *Id.* at 495–96. The merger agreement called for the buyer to make a tender offer for all shares of the target's stock, followed by a short-form merger at the same price. *Id.*

In re Del Monte Foods Co. S'holders Litig., 25 A.3d 813 (Del. Ch. 2011):

Responding to an unsolicited offer, the target company engaged a financial advisor as part of a limited, private auction process. *Id.* at 819–21. The financial advisor solicited interest from private equity firms, in an effort to provide buy-side financing. *Id.* at 819–20. Six private equity firms emerged, each agreeing to a confidentiality provision, two year standstill provision, and a "no teaming provision" which ensured that the target company would control which companies would be allowed to work together on a joint bid. *Id.* at 820–22. However, based on the strength of its stand-alone prospects, the company decided to shut down the process. *Id.* at 822. Seven months later, the company's financial advisor surreptitiously encouraged private equity groups to partner together for a proposal. *Del Monte Foods Co.*, 25 A.3d at 823. The board then negotiated a higher price, but decided not to do a pre-signing market check because of the prior auction process. *Id.* at 824–25. The board agreed to allow the private equity firms to submit a joint bid, as well as to allow the financial advisor to do the buy-side financing. *Id.* at 826–27.

In re Atheros Commc'ns, Inc., No. 6124–VCN, 2011 WL 864928 (Del. Ch. Mar. 4, 2011):

After receiving an offer from a long-time business partner, the company considered the universe of potential acquirers. *Id.* at *1–4. The board determined that the initial bidder and three other companies would be able to pay the highest price. *Id.* at *4–5. The other companies displayed varying degrees of interest, but none immediately made offers. *Id.* at *3–4. After rejecting the initial offer, the board approved an exclusivity agreement with the initial buyer in exchange for a higher price. *Id.* at *4–5.

In re Answers Corp. S'holders Litig., No. 6170–VCN, 2011 WL 1366780 (Del. Ch. Apr. 11, 2011):

The target company rejected several offers from a single bidder in the range of $7.50–$8.25 per share and rejected demands for exclusivity. *Id.* at *1–2. The target company conducted a market check in which ten companies were solicited, three of which entered into confidentiality agreements, but none made an offer. *Id.* at *2. The board then sought another price increase from the bidder and obtained a fairness opinion that $10.50 per share was in the best interests of the shareholders. *Id.*

In re Orchid Cellmark, Inc. S'holders Litig., No. 6373–VCN, 2011 WL 1938253 (Del. Ch. May 12, 2011):

Over the course of two years, the target company rebuffed several offers from a single bidder and then conducted a market check. *Id.* at *1–3. Seven other potential bidders came forward, but none were interested in a transaction for all of the target's business. *Id.* at *5. Private equity firms appeared interested in acquiring a division of the target's business, but none made an offer. *Id.* The target then granted the previously unsuccessful bidder an exclusivity period, during which the target company agreed to a merger agreement at a price representing a 40% premium over the target's trading price. *Id.* at *1–4. The board negotiated through a special committee, and five of six board members were independent. *Orchid Cellmark*, 2011 WL 1938253, at *1–4.

In re Smurfit-Stone Container Corp. S'holder Litig., No. 6164–VCP, 2011 WL 2028076 (Del. Ch. May 20, 2011), *revised* (Del. Ch. May 24, 2011):

The target company had engaged in serious negotiations with a private equity firm. *Id.* at *3. Ultimately, however, the offer was turned down because the company believed the offer of $29 per share was inadequate. *Id.* at *5. Then, the target entered bankruptcy. *Id.* After emerging from bankruptcy, the target company entered into a merger agreement with a bidder. *Id.* at *5–7. The target did not reengage with the private equity firm because it believed that the private equity firm would not be able to match the prices offered by the new buyer. *Smurfit-Stone Container Corp.*, No. 6164–VCP, 2011 WL 2028076 at *8. The target's board approved the deal worth $35 per share, after having rejected two prior offers at lower prices. *Id.*

In re Micromet, Inc. S'holders Litig., No. 7197–VCP, 2012 WL 681785 (Del. Ch. Feb. 29, 2012):

Over several months, the target's board rejected several offers made by the Target's drug development partner. *Id.* at *1–2. The target authorized its financial advisor to reach out to seven strategic acquirers that had previously conducted due diligence in the partnering process. *Id.* at *4. Of the seven companies solicited, only three expressed interest. *Id.* After conducting due diligence sessions, none of the solicited companies were interested in acquiring Micromet. *Id.*

In re OPENLANE, Inc. S'holders Litig., No. 6849–VCN, 2011 WL 4599662 (Del. Ch. Sept. 30, 2011):

After a downturn in business, the target company retained a financial advisor to explore strategic alternatives. *Id.* at *1–2. The financial advisor identified eight potential strategic acquirers and 31 potential buyers. *Id.* at *2. Following discussions with three companies, the target granted an exclusivity period to KAR. *Id.* Following further negotiations and counteroffers, the board approved a merger with KAR, without seeking a fairness opinion from its financial advisor. *Id.* at *2–3.

In re Synthes, Inc. S'holder Litig., 50 A.3d 1022 (Del. Ch. 2012):

The target board decided to explore the sale of the company, engaged a financial advisor, and appointed an independent director to lead the sale process. *Id.* at 1024–27. Out of nine strategic buyers contacted by the board, three executed confidentiality agreements. *Id.* at 1026–27. Out of six private equity firms the board approached, four executed confidentiality agreements. *Id.* at 1027. The private equity firms were allowed to collaborate to be able to join together as a consortium for an all-cash offer. *Id.* at 1027. Eventually, the board was able to extract a price from the strategic bidder that represented a 26% market premium, which included a mixture of 65% stock (subject to a collar) and 35% cash. *Synthes, Inc.*, 50 A.3d at 1030.

In re Novell, Inc. S'holder Litig., No. 6032-VCN, 2013 WL 322560 (Del. Ch. Jan. 3, 2013):

In response to a Schedule 13D publicly announcing an acquisition plan of the target company, the target board initiated an auction process. *Id.* at *2. The board solicited over 50 potential acquirers. *Id.* Of those contacted, more than 30 entered into a non-disclosure agreement. *Id.* In the first round of bidding, nine bidders submitted preliminary proposals. *Id.* at *2–3. The board pursued further discussions with five of the potential buyers, and still solicited additional potential buyers. *Novell, Inc.*, 2013 WL 322560 at *2–3. After considering various proposals for two months, the target's board granted one bidder an exclusivity agreement, which it later renewed. *Id.* The board allowed a bidder to work with strategic partners, which lead to an offer of $5.25 per share, while another bidder that was not allowed to work with strategic partners submitted a bid for $5.75 per share. *Id.* at *3–4. Eventually, the board approved an acquisition and patent sale with the bidder offering $5.25 per share. *Id.* at *4.

In re BJ's Wholesale Club, Inc. S'holder Litig., No. 6623-VCN, 2013 WL 396202 (Del. Ch. Jan. 31, 2013):

After a potential buyer filed a 13D disclosing its interest in acquiring the target company, the target engaged a financial advisor and formed a special committee led by independent directors to evaluate potential alternatives. *Id.* at *2. Two other bidders emerged as interested in acquiring the target company, one a strategic competitor and one a private equity firm. *Id.* Both of these bidders were turned away by the Special Committee because Party A had no prior history of acquiring domestic companies, and Party B's offer required the target to acquire Party B's franchises. *Id.* at *2–3. Both of these offers were rejected in favor of a joint acquisition proposal by private equity firms at a price representing a 6.6% premium, but which was less than the other bidders' offers. *Id.* at *2–3.

In re Plains Explor. & Prod. Co. S'holder Litig., No. 8090-VCN, 2013 WL 1909124 (Del. Ch. May 9, 2013):

The target company bargained for a higher price representing a 39% market premium, which included a mixture of cash and stock. *Id.* at *2–3. A fairness opinion indicated that the price was fair. *Id.* at *3. The board did not negotiate a collar to account for price fluctuations in the buyer's stock. *Id.* at *2. Although one member of the board would have a role in the new company, the majority of the board was independent. *Id.* at *3.

Koehler v. NetSpend Holdings Inc., No. 8373-VCG, 2013 WL 2181518 (Del. Ch. May 21, 2013):

Prior to entering into the transaction, the target company had been approached by various private equity firms and strategic acquirers, but the target continually rejected these indications of interest. *Id.* at *2. Throughout these discussions, the target company required those interested companies to enter into confidentiality agreements containing standstill provisions and "don't ask, don't waive" provisions that prohibited them from making bids after the sale was announced. *Id.* at *3–4. Throughout the negotiation process, the target company portrayed itself as "not for sale" in an attempt to encourage the single bidder to raise the offering price. *Id.* at *3–4. The board sought a go-shop provision, but agreed to a no-shop provision in exchange for a higher offering price and a lower termination fee. *Id.* at *6–7.

Miramar Firefighters Pension Fund v. AboveNet, Inc., No. 7376-VCN, 2013 WL 4033905 (Del. Ch. July 31, 2013):

Believing the best course of action was to take the company private, the board began negotiating with a private equity group, which submitted an offer at $78.00 per share. *Id.* at *1–2. During the market canvass, the target company received a competing bid from a strategic acquirer at $80 per share. *Id.* at *2. Eventually, the target board reached a deal with the strategic acquirer at $84 per share. *Id.*

In re BioClinica, Inc. S'holder Litig., No. 8272-VCG, 2013 WL 5631233 (Del. Ch. Oct. 16, 2013):

The bidders signed Nondisclosure Agreements that included standstill agreements precluding most non-consensual offers, but allowed bidders to commence a tender offer. *Id.* at *2. When one bidder made its offer contingent on an exclusivity agreement, the board agreed to an exclusivity agreement because during the six-month process, only two credible bidders had emerged. *Id.* The process resulted in a price of $7.25 per share, which included a 25% premium over the stock price. *Id.* at *3. Although one member of the board would have a role in the new company, eight out of nine board directors were independent. *Id.* at *2.

Chen v. Howard-Anderson, 87 A.3d 648 (Del. Ch. 2014):

As negotiations with two of the potential buyers were nearing the end, the target company conducted a twenty-four-hour market check in which seven companies were contacted, five of which were interested but made no offers. *Id.* at 659. After the twenty-four-hour market check, the target company began to exceed business expectations. *Id.* at 661–63. Nevertheless, the target entered into an exclusivity agreement with a favored buyer, which later evolved into a definitive agreement without demanding a higher sale price. *Id.* at 661–62. During the negotiations process, the target company routinely favored one bidder over another by not sharing certain financial data, and not being receptive to that buyer's discussions. *Id.* at 660–64.

Dent v. Ramtron Int'l Corp., No. 7950-VCP, 2014 WL 2931180 (Del. Ch. June 30, 2014):

In response to an unsolicited offer from a buyer, the board formed an independent committee to consider alternatives and began a market canvass. *Id.* at *2. Of 24 potential purchasers contacted, seven entered into confidentiality agreements. *Id.* at *3. However, none of those other 24 potential purchasers made an offer. *Id.* Over the course of two years, the board rejected two offers as inadequate and negotiated an increase in the offer price from $2.88 to $3.10 per share. *Id.* at *2–3.

In re Comverge, Inc., No. CV 7368-VCP, 2014 WL 6686570 (Del. Ch. Nov. 25, 2014):

After conducting the market canvass over an eighteen-month period, the board negotiated with a buyer for a sale of the company. *Id.* at *2. The buyer was interested in acquiring the target company for a price in the range of $1.75 to $2.25 per share. *Id.* As these negotiations were ongoing, another buyer came forward with an indication of interest in the range of up to $4.00 to $6.00 per share but never made a formal offer. Meanwhile, the original potential buyer purchased rights in a note the target company owed. The buyer used the impending default on the note as leverage to continue negotiations that lead to a two-tier tender offer at $1.75 per share. *Id.* at *3–4. During the go-shop period, "several" potential buyers were contacted and executed confidentiality agreements. *Id.* at *7. Two bidders indicated interest in acquiring the company at prices ranging from $2.50 to $3.25 per share, but no firm proposals were made. *Comverge*, 2014 WL 6686570, at *7.