CORPORATE GOVERNANCE CASE FOR BOARD GENDER DIVERSITY: EVIDENCE FROM DELAWARE CASES

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I. INTRODUCTION

Gender diversity on company boards is becoming an increasingly important issue. The theoretical basis for the desirability of gender diversity regulations can be understood under three categories: to exploit "social benefits" of addressing inequality; to exploit "business benefits" including increased profits and stock prices; and to exploit "corporate governance benefits" or more effective board functioning.[1] The third category, "corporate governance" benefits, is often subsumed within the business benefits umbrella and not regarded as a separate category or basis for bringing gender diversity on company boards.[2] Since corporate governance is the main task of the board of directors, the corporate governance case for board gender diversity needs to be developed further.[3] It is the aim of this article to examine whether there is a corporate governance case for board gender diversity.

To do this, the article first draws on literature to explain the corporate governance case, and next tests the corporate governance

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[1] *See Business Benefits*, BUS. CASE ANALYSIS, https://www.business-case-analysis.com/business-benefit.html (last visited Sept. 7, 2018); *Business Studies*, BBC, http://www.bbc.co.uk/schools/gcsebitesize/business/environment/businessandtheenvironment1.shtml (last visited Sept. 7, 2018); *Corporate Governance*, MGMT. STUDY GUIDE, https://www.managementstudyguide.com/corporate-governance.htm (last visited Sept. 7, 2018).

[2] *See* Claude Francoeur et al., *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83, 84 (2008); *Corporate Governance*, *supra* note 1.

[3] The OECD Principles of Corporate Governance, published in 2004, states briefly that the role of the board is to provide strategic guidance to the company, to be an effective monitor of the management and to be accountable to the company and its shareholders. *See* ORG. FOR ECON. CO-OPERATION & DEV., OECD PRINCIPLES OF CORPORATE GOVERNANCE 24 (2004).

case in the context of Delaware company boards through a qualitative content analysis of relevant judgements.[4] Based on the findings of the study, the article argues that gender diverse boards might be able to address certain impediments, but also makes other recommendations to complement board gender diversity efforts—to enable the board to perform its monitoring duties effectively. Thus, the article studies the relevance of the prior studies about the corporate governance benefits of board gender diversity in practical settings. Also, this is the first study to employ qualitative content analysis of judicial decisions to answer the question of whether there is a corporate governance case for board gender diversity.

The article is divided into six parts. After providing a brief introduction in this Part I, Part II reviews literature relevant for the corporate governance case for board gender diversity. Part III then describes the methodology used in the study presented in Part IV. Part IV sets out an empirical study attempting to find evidence for the corporate governance case. Part V summarizes the main findings of the empirical study and comments on their broad policy implications.

II. EXTRACTING THE CORPORATE GOVERNANCE CASE FROM THE BUSINESS CASE

Regulators across the world have emphasized the business benefits rather than the equality benefits—and less often the corporate governance benefits—so as to appeal to businesses.[5] While this might be strategic, it is also true that the business benefits arguments base their claims on empirical evidence that is not always consistent.[6] The inconsistency in such studies might be attributable to differences in data sets.[7] However, these studies still do not explain how gender diversity might enhance the functioning of boards. In other words, causation is not explained.

To explain causation, the corporate governance arguments are the most significant since they directly relate to the board's role in the

[4] In a prior article, I examine the corporate governance case for board gender diversity in the context of Australian boards. *See* Akshaya Kamalnath, *Are Gender Diverse Boards Better for Corporate Governance? Evidence from Australian Judicial Decisions*, 2015 AJCL LEXIS (2015).

[5] *See* Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795 (2005).

[6] *See id.* at 799–801.

[7] *See id.* at 802–03.

corporation.[8] Since the board is responsible for governance of the company, any reforms to board composition should be based on the effect of such reforms on corporate governance. Since the board consists of a group of directors, the dynamics of the group becomes important. Scholars have explained how diverse boards can perform better than homogeneous boards, using theories of groupthink and explaining how a "critical mass" of minority or women directors would ensure that the full benefits of diversity are reaped.[9] There is also some interesting empirical work that has gone beyond merely checking for the effect of board diversity on firm performance.[10] Analyzing these studies along with the theoretical and qualitative literature gives us a comprehensive insight into how board diversity might improve board effectiveness.

A. Improved Decision-Making, Groupthink and Critical Mass

In general, commentators take the view that diverse boards make better decisions because diverse board members bring diverse views.[11] Studies show that educational diversity in problem solving groups improves performance and that teams with occupational diversity solve problems faster and more effectively.[12] It has been found that in team exercises, individuals prepare better for an exercise with a gender diverse group, a wider range of data inputs are likely to be debated, and the diverse group, in the end, is more likely to generate the correct answer to the problem.[13]

This is consistent with the views of Norwegian directors, interviewed in a qualitative study by Aaron A. Dhir.[14] He

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[8] *See id.* at 835–36.

[9] *See id.* at 831–32, 837.

[10] *See, e.g.*, Ioanna Boulouta, *Hidden Connections: The Link Between Gender Diversity and Corporate Social Performance*, 113 J. BUS. ETHICS 185, 186 (2013) (analyzing the effect of board diversity on corporate social responsibility).

[11] *See* Elena Bajic, *Why Companies Need to Build More Diverse Boards*, FORBES (Aug. 11, 2015, 8:00 AM), http://www.forbes.com/sites/elenabajic/2015/08/11/why-companies-need-to-build-more-diverse boards/#3f19a28817ef.

[12] *See* Sigal G. Barsade et al., *To Your Heart's Content: A Model of Affective Diversity in Top Management Teams*, 45 ADMIN. SCI. Q. 802, 809 (2000); Frances J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 ACAD. MGMT. REV. 402, 403–04 (1996); Patricia Pitcher & Anne D. Smith, *Top Management Team Heterogeneity: Personality, Power, and Proxies*, 12 ORG. SCI. 1, 3–4 (2000).

[13] *See* Katherine W. Phillips et al., *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 336, 337, 346 (2009).

[14] *See* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 11 (Cambridge Univ. Press 2015).

emphasized that gender diverse boards brought diverse views and perspectives which provided a broader basis for decision-making.[15] Quantitative studies also suggest that an increase in the number of female directors is associated with an amplified discussion of "tough issues."[16] One explanation for this is since female directors must overcome many systemic barriers to attain board positions, they tend to be highly motivated and prepared for meetings.[17] Another explanation is that female directors typically come from outside groups and networks that most directors belong to, which makes them "outsiders," therefore giving them a different perspective.[18] In support of these explanations, a study shows that women do not shy away from the "tough issues" in the boardroom because of what is called liminality.[19] In particular, "[l]iminal [persons] are those in transition between out-group and in-group status."[20] According to this study, since women directors have had to overcome barriers to reach board positions, they are better equipped to address difficult issues as compared to male directors, who are bound by loyalty "norms."[21] The authors of this study, however, also opine that once women directors transition into in-group, they would also be reluctant to raise difficult issues.[22] Thus, insofar as liminality is responsible for women directors' effect of improved board discussion, this would be a temporary advantage.

The flip side of women directors being able to discuss tough issues is that it makes boards less cooperative.[23] Studies have also found that homogenous boards are more cooperative and experience fewer emotional conflicts.[24] However, under the monitoring model of the

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[15] *See id.*

[16] *See* Nancy McInerney-Lacombe et al., *Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 123, 123 (Susan Vinnicombe et al. eds., 2008).

[17] *See id.* at 126–27.

[18] *See* Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 171, 173 (Ronald J. Burke & Mary C. Mattis eds., 2000).

[19] *See* McInerney-Lacombe et al., *supra* note 16, at 135.

[20] *Id.*

[21] *See id.*

[22] *See id.* at 137.

[23] *See* Laura Liswood, *Women Directors Change How Boards Work*, HARV. BUS. REV. (Feb. 17, 2015) https://hbr.org/2015/02/women-directors-change-how-boards-work.

[24] *See* Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, *in* PSYCHOLOGY OF INTERGROUP RELATIONS 7, 8 (Stephen Worchel & William G. Austin eds., 2d ed. 1986); *cf.* Katherine Y. Williams & Charles A. O'Reilly, *Demography and Diversity in Organizations: A Review of 40 Years of Research*, 20 RES. ORGANIZATIONAL BEHAV. 77, 88 (1998) ("Diversity is proposed to result in increased conflict, factionalism, and communication

board, cooperation might not be as important as the ability to be able to question and assess management decisions.[25] A strand of literature draws from theories of groupthink to argue that diverse boards would be better monitors of management.[26] Groupthink, in essence, is a "concurrence-seeking tendency" often seen in members of cohesive groups, and this tendency "fosters overoptimism, lack of vigilance," and an irrational belief in the group's morality.[27] Groupthink results in defective decision-making by the group, even when individual members of the group are both qualified and conscientious.[28] Drawing from this, Erica Beecher-Monas has argued that diversity could make boards psychologically independent of the CEO because diversity in the group will make groupthink less likely.[29]

However, for diverse candidates to be able to contribute and make a difference to the board, it has been argued that such diverse candidates should have a "critical mass," in other words, the minimum number required to ensure that the woman/minority director does not experience the effects of tokenism.[30] A study by Sumru Erkut, Vicki W. Kramer, and Alison M. Konrad has found that a minimum number of three women directors are required to constitute the critical mass.[31] Only when this critical mass is reached can these women directors contribute normally, without having to face the effects of tokenism.[32] A study which interviewed several women directors from Fortune 1000 companies, who were the sole woman directors of their boards, said they "felt visible as lone women."[33] One interviewee said, "[i]f you are alone, the spotlight is on you."[34] The same study quotes a male CEO as saying that when there are three women on the board, no one woman is considered to

difficulties.").

[25] *See* Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OR. L. REV. 373, 375 (2007).

[26] *See id.* at 394; Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1306 (2003).

[27] *See* IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES 12 (2d ed. rev. 1983).

[28] *See id.* at 9, 11.

[29] *See* Beecher-Monas, *supra* note 25, at 376.

[30] *See* Sumru Erkut et al., *Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 222, 224–25, 231 (Susan Vinnicombe et al. eds., 2008).

[31] *See* Alison M. Konrad et al., *Critical Mass: The Impact of Three or More Women on Corporate Boards*, 37 ORGANIZATIONAL DYNAMICS 145, 146 (2008).

[32] *See* Erkut et al., *supra* note 30, at 227.

[33] *See* Konrad et al., *supra* note 31, at 145, 150.

[34] *Id.* at 150.

represent an entire gender.[35] He went on to say—about the three women directors on the board of his company—that "[t]he three women don't always agree with each other, and that is healthy for the men to see. They are independent."[36] However, a contrary conclusion was drawn in another study conducted by Lissa Lamkin Broome, John M. Conley, and Kimberly D. Krawiec, where the authors identify a theme of interviewees saying they were comfortable being the first and only woman or minority directors on the board.[37] The critical mass theory was further tested in the Norwegian context in 2011 by Mariateresa Torchia, Andrea Calabrò, and Morten Huse, who conducted a study by analyzing the effect of boards with one, two, or at least three women directors on organizational innovation.[38] They found that once the number of women directors increased "from a few tokens (one woman, two women) to a consistent minority ('at least three women'), they are able to effectively influence the level of organizational innovation."[39]

Putting these various studies and arguments together, what emerges is that diverse boards are likely to result in enhanced decision making because diverse people would be likely to bring diverse views about the issues being considered. Further, gender diverse boards are likely to be better monitors, because diversity might help counter the incidence of groupthink and because of women directors' current status as outsiders. Overall, by improving board decision making and monitoring, board diversity can help boards function more effectively.

B. Effect of Board Gender Diversity on Corporate Governance – Empirical Work

Various aspects of the theoretical arguments reviewed in the previous section on board effectiveness, have been tested empirically by different studies.[40] The first wave of empirical literature on board

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[35] *See id.* at 154.

[36] *Id.*

[37] Lissa Lamkin Broome et al., *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1060 (2011).

[38] *See* Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 299 (2011).

[39] *Id.* at 311.

[40] *See* Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 292 (2009); Øyvind Bøhren & R. Øystein Strøm, *Governance and Politics: Regulating Independence and Diversity in the Board Room*, 37 J. BUS. FIN. & ACCT. 1281, 1282 (2010); Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOVERNANCE AN INT'L REV. 102, 102 (2003); Nancy M.

gender diversity focused on the link between women directors and firm profits.[41] However, the results of these studies are far from unequivocal, with some showing a positive correlation, others showing a negative correlation and still others showing no correlation.[42] Of course, one reason for the conflicting findings might be that these studies all use data from different countries and time periods.[43] More importantly, since most of the studies did not show causation these conflicting results could not be explained.[44]

Only a handful of studies have focused on board activities and aspects relevant to specific board functions to study how board gender diversity might be making a difference.[45] This section will critically analyze these studies and the implications for the corporate governance case.

1. Risk Appetite

The recent financial crisis called into question some of the risky decisions taken by company management and then approved by boards of these companies.[46] There was even a quip about the financial crisis turning out very differently if Lehman Brothers was "Lehman Sisters" instead.[47] Christine Lagarde, managing director of

Carter & Harvey M. Wagner, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004-2008)*, CATALYST 2 (2011), http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008.

[41] *See* Adams & Ferreira, *supra* note 40, at 293; Bøhren & Strøm, *supra* note 40, at 1282; Erhardt et al., *supra* note 40, at 102; Carter & Wagner, *supra* note 40, at 2.

[42] There are examples of studies that support the business case. *See, e.g.*, Erhardt et al., *supra* note 40, at 109; Carter & Wagner, *supra* note 40, at 1. There are examples of studies that do not support the business case. *See, e.g.*, Adams & Ferreira, *supra* note 40, at 308; Bøhren & Strøm, *supra* note 40, at 1305.

[43] *See, e.g.*, Adams & Ferreira, *supra* note 40, at 293; Bøhren & Strøm, *supra* note 40, at 1282; Erhardt et al., *supra* note 40, at 105; Carter & Wagner, *supra* note 40, at 2.

[44] *See* Adams & Ferreira, *supra* note 40, at 308; Erhardt et al., *supra* note 40, at 109; Carter & Wagner, *supra* note 40, at 2.

[45] *See* David A.H. Brown et al., *Women on Boards: Not Just the Right Thing . . . But the "Bright" Thing*, CONFERENCE BD. OF CAN. at i (2002), https://utsc.utoronto.ca/~phanira/Web ResearchMethods/women-bod&fp-conference%20board.pdf; Adams & Ferreira, *supra* note 40, at 292; Renée B. Adams & Vanitha Ragunathan, Lehman Sisters 5 (Aug. 2015) (unpublished manuscript), http://ssrn.com/abstract=2380036; Melsa Ararat et al., Impact of Board Diversity on Boards' Monitoring Intensity and Firm Performance: Evidence from the Istanbul Stock Exchange 4 (Apr. 2010) (unpublished manuscript), http://ssrn.com/abstract=1572283.

[46] *See, e.g.*, Nick Wilson & Ali Altanlar, Director Characteristics, Gender Balance and Insolvency Risk: An Empirical Study 3 (Sept. 22, 2009) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414224 ("The world wide concerns surrounding excessive risk-taking and governance issues, in the wake of the recent economic crisis, has focused attention on further reform to create balance and diversity on decision-making bodies in the public and private sector.").

[47] *See* Christine Lagarde, *Largarde: What If It Had Been Lehman Sisters?*, N.Y. TIMES (May

the International Monetary Fund (IMF), recalls the context of her quip in the following quote:

> In response to a journalist who asked me a few months ago about women's strength in times of crisis, I smiled and said that if Lehman Brothers had been "Lehman Sisters," today's economic crisis clearly would look quite different. It was a quip, of course, but one that reveals a bit about how I view things.[48]

However, even prior to Lagarde, Neelie Kroes, European Union Commissioner for Competition, had said "[m]y clear line is that if Lehman Brothers had been 'Lehman Sisters,' would the crisis have happened like it did? No."[49] Kroes explains that women directors are more risk-averse and think about the long-term more than their male counter-parts.[50] This comment is often cited in the context of arguments claiming that women have a lower risk appetite than men.[51] In an interesting study conducted on traders in London, it was found that there was an increase in the testosterone levels of these traders with increased profits, thus pointing towards higher risk appetites of men as compared to women.[52] Other studies test the risk-appetite of men and women in the context of corporate decision-making.[53] Maurice Levi, Kai Li, and Feng Zhang studied decision-making in the context of mergers and acquisitions (using data for S&P 1500 firms during 1997–2009) and found that women are less inclined to pursue risky deals and tend to demand a lower bid premium.[54]

However, while this might be the case with male traders and managers, what about a board of directors? A study by Renée Adams

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11, 2010), https://dealbook.nytimes.com/2010/05/11/lagarde-what-if-it-had-been-lehman-s isters/?_r=0.

[48] *Id*.

[49] Adams & Ragunathan, *supra* note 45, at 3.

[50] *See* Neelie Kroes, European Comm'r for Competition, Europe – Good for Women and Good for Ireland, Remarks at "Women for Europe" Event 3 (July 16, 2009) (transcript available in the European Commission Press Release Database).

[51] *See id.*

[52] JOHN COATES, THE HOUR BETWEEN DOG AND WOLF: HOW RISK TAKING TRANSFORMS US, BODY AND MIND 28 (2012); Gary Minda, *Lessons from the Financial Meltdown: Global Feminism, Critical Race Theory, and the Struggle for Substantive Justice*, 18 AM. U.J. GENDER SOC. POL'Y & L. 649, 669–70 (2010).

[53] *See* Maurice Levi et al., Men are from Mars, Women are from Venus: Gender and Mergers and Acquisitions 2 (Nov. 2011) (unpublished manuscript), https://www.aeaweb.org /aea/2012 conference/program/retrieve.php?pdfid=191.

[54] *See id.* at 20.

and Vanitha Ragunathan tests what it terms as the "'Lehman Sisters' hypothesis."[55] Particularly with respect to banks, the study finds that more women will not lead to less risk in banking companies.[56] Adams and Ragunathan explain that their results are different from that of the studies conducted on men and women in the general population because women directors are different from the typical women in risk aversion studies.[57] Since the path to directorships for women are fraught with barriers, women who are extremely risk-averse would not have chosen the career paths that led them to board positions.[58] Consistent with the results of the Adams and Ragunathan study, Renée Adams and Patricia Funk (in their study of directors and CEOs in Swedish firms in 2005) find that women directors "are also slightly more risk loving than their male colleagues."[59] However, Nick Wilson and Ali Altanlar (in their study of directors and owners in private companies in the U.K.) find that having female directors on the board reduces the likelihood of insolvency, and that companies with female directors appear to take on less debt and have better cash-flow.[60]

The contrary results with respect to the effect of women directors on risk-appetite shows that no firm conclusion can be drawn in this regard.[61] Besides, it is obvious that the risk-appetite of managers is more relevant when analyzing the overall effect of the company's decisions. The board, especially non-executive directors, might be involved in overseeing risk management policies, but it is executives' appetite for risk that is relevant.[62]

2. Monitoring

Since the board's main role in the company is monitoring management decisions, any effect that board composition (in this case gender diversity) has on firm performance can be explained by

[55] Adams & Ragunathan, *supra* note 45, at 4.

[56] *See id.* at 24.

[57] *See id.* at 3.

[58] *See* Renee Adams, *Risky Business: Why We Shouldn't Stereotype Female Board Directors*, THE CONVERSATION (Dec. 2, 2014, 2:23 PM), https://theconversation.com/risky-business-why-we-shouldnt-stereotype-female-board-directors-32685.

[59] *See* Renée B. Adams & Patricia Funk, *Beyond the Glass Ceiling: Does Gender Matter?*, 58 MGMT. SCI. 219, 220 (2012).

[60] *See* Wilson & Atlantar, *supra* note 46, at 4, 16, 46.

[61] *Compare* Adams & Funk, *supra* note 59, at 220 (finding women are more risk loving), *with* Wilson & Altanlar, *supra* note 46, at 42 (finding women are more risk-aware).

[62] *See* Martin Lipton, *Risk Management and the Board of Directors*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (July 28, 2015), https://corpgov.law.harvard.edu/2015/07/28/risk-management-and-the-board-of-directors-3/.

its effect on the board's monitoring effectiveness.[63] This sub-section reviews empirical studies that help us understand how board gender diversity might affect board functions, especially monitoring, and how this might impact firm performance.

In a 2008 study, Adams and Ferreira, analyzing data from U.S. firms, made the link between women directors and monitoring and, in turn, the effect of women directors on firm performance.[64] They found that although the correlation between gender diversity on boards and "firm value or operating performance appears to be positive . . . this correlation disappears once . . . omitted variables and reverse causality" have been taken into account.[65] This means that firms would perform worse when there are more women directors on the board.[66] It was found that this could be explained by the effect of gender diverse boards on monitoring.[67] Since the authors find aspects of firm monitoring to have improved when boards are gender diverse, they conclude that too much monitoring would decrease shareholder value.[68] This was reaffirmed by Corinne Post and Kris Byron's study, which found that strong shareholder protections incentivized boards to harness their skills into monitoring.[69] In the U.S. context, where the law stipulates strong shareholder protections, gender diverse boards resulted in improved monitoring.[70] Investigating this finding further, Adams and Ferreira found that gender diversity had beneficial effects only in companies where additional monitoring is required—i.e. in companies with weak shareholder rights, where additional monitoring could enhance shareholder value.[71] However, in companies where shareholder rights are strong, additional monitoring could have detrimental effects.[72] The data used in their study consisted of U.S. firms.[73]

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[63] *See* Mike Boland & Don Hofstrand, *The Role of the Board of Directors*, IOWA STATE U. EXTENSION & OUTREACH, (Sept. 2009), https://www.extension.iastate.edu/agdm/wholefarm/html/c5-71.html ("Recruiting, supervising, retaining, evaluating and compensating the CEO or general manager are probably the most important functions of the board of directors.").

[64] *See* Adams & Ferreira, *supra* note 40, at 292.

[65] *Id.* at 292.

[66] *See id.*

[67] *See id.* at 292, 307.

[68] *See id.* at 292, 306.

[69] *See* Corinne Post & Kris Byron, *Women on Boards and Firm Financial Performance: A Meta-Analysis*, 58(5) ACAD. OF MGMT. J. 1546 (2015) (manuscript at 31), https://www.researchgate.net/publication/268146570_Women_on_boards_and_firm_financial_performance_A_meta-analysis.

[70] *See id.*

[71] *See* Adams & Ferreira, *supra* note 40, at 292, 307.

[72] *See id.* at 292.

[73] *See id.* at 293.

Building on these findings, Melsa Ararat, Mine Aksu, and Ayse Tansel Cetin, study the effect of board diversity in companies listed on the Istanbul Stock Exchange, noting that they have chosen a context where shareholder rights are weak.[74] However, their paper studies not just gender diversity, but also diversity in terms of age, education, background (local or foreign) and level of independence (beholden to controlling shareholder or independent) on the board.[75] Overall they find that diverse boards are better monitors, and also enhance firm performance.[76] Since shareholder rights in Turkey are weak due to controlling shareholder domination, Ararat, Aksu and Cetin's findings are consistent with that of the study by Adams and Ferreira to the extent that diversity on the board improved monitoring.[77]

David A.H. Brown, Denise L. Brown, and Vanessa Anastasopoulos found that "the main governance practices that are affected by the presence of women are those associated with more active and independent boards of directors."[78] They argue that outer diversity is a proxy for inner diversity (i.e. diversity of views which leads to a constructive debate) and find that "boards with more women surpass all-male boards in their attention to audit and risk oversight and control."[79]

These results are consistent with Erica Beecher-Monas' argument (based on groupthink theory) that board diversity might help make boards more (psychologically) independent.[80] This is further analyzed by the findings of Dhir's qualitative study in Norway.[81] Most of his interviewees opined that women on boards ask more questions, thereby showing that the governance practices associated with independent directors seem to be strengthened by board gender diversity.[82] Linked to this, Adams and Ferreira find that women are more likely to be appointed to monitoring related committees than men, and that women are tougher monitors of the CEO than men.[83] Overall, what emerges from these studies is that women directors strengthen board monitoring by being more active in processes that

[74] *See* Arart et al., *supra* note 45, at 5.
[75] *See id.* at 6–7.
[76] *See id.* at 21.
[77] *See id.* at 5, 21; Adams & Ferreira, *supra* note 40, at 292.
[78] Brown et al., *supra* note 45, at ii.
[79] *See id.* at 5.
[80] *See* Beecher-Monas, *supra* note 25, at 392, 396.
[81] *See* DHIR, *supra* note 14, at 125.
[82] *See* DHIR, *supra* note 14, at 124, 125.
[83] *See* Adams & Ferreira, *supra* note 40, at 301, 304.

are associated with board independence.[84]

Another significant aspect to note from both the study by Ararat, Aksu, and Cetin, and the study by Brown, Brown, and Anastasopoulos, is that what is crucial to strengthen board monitoring is inner diversity—i.e. diversity of views and thinking.[85] However, since measuring inner diversity of potential board candidates is difficult, outer diversity can be used as a proxy.[86] Further, these benefits to monitoring are a result of board diversity in general, which could be a result of age, education and background, whether the director is local or foreign, or race and gender.[87] Despite this, the focus has almost exclusively stayed on gender diversity, perhaps because of advocacy in this regard, and also because of states' parallel interest in addressing gender equality concerns.[88]

C. Effect on Board Processes

This section examines the effect of gender diversity on the different aspect of board processes and functions. This will help further explain how gender diverse boards might be better monitors. The study by Adams and Ferreira examined the effect of board gender diversity on different functions of governance.[89] Other studies have also studied the effect of board gender diversity on specific governance functions of the board,[90] and this sub-section will synthesize the findings of these studies for each board function/ process for a complete understanding.

1. Board Meetings

Board meetings are one of the most important aspects of board functioning.[91] The board can question the CEO and management based on the information provided prior to the meeting, discuss issues and finally make decisions.[92] Adams and Ferreira find that women directors are "roughly 30% less likely to have attendance problems" than their male counterparts.[93] In this study, they also

[84] *See, e.g.*, *id.* at 292.
[85] *See* Ararat et al., *supra* note 45, at 5; Brown et al., *supra* note 45, at 5.
[86] *See* Brown et al., *supra* note 45, at 5.
[87] *See* Ararat et al., *supra* note 45, at 6–7.
[88] *See* Adams & Ferreira, *supra* note 40, at 292.
[89] *See id.*
[90] *See, e.g.*, *id.* at 292.
[91] *See id.* at 295.
[92] *See id.* at 298.
[93] *Id.* at 296.

control for other factors, such as the number of directorships held, meeting fees, and other board level factors that might affect attendance at board meetings.[94]

While this could be explained by the notion of gender differences between the behavior of men and women, another explanation for this could also be that where women are viewed as tokens, they are under more pressure to perform.[95] Apart from this, the study also finds that the more gender diverse a board is, there is an overall increase in the attendance behavior of male directors as well.[96] Thus, a diverse board seems to result in enhanced performance of all members of the board in certain aspects of board process.

2. Board Committee Membership

Boards of large companies usually delegate most of their tasks to board committees.[97] Most companies' legislations allow for such delegation.[98] Since some committees, like the audit committee, influence decisions on different aspects related to monitoring,[99] it is useful to understand if women directors are more likely to be appointed to some committees than others. The Adams and Ferreira study finds that women are over-represented on monitoring related committees: the audit committee and the corporate governance committee.[100] Further, they find that "the proportion of women on committees . . . is higher than the proportion of women on boards . . . ."[101] However they find that women are under-represented on the compensation committee.[102]

The audit committee is typically entrusted with oversight related activities like financial reporting, risk management and internal control mechanisms.[103] Because of its importance to the board's monitoring function, most jurisdictions also require that the audit committee be composed of a majority of independent directors.[104] Thus, another way in which women directors contribute to enhancing the board's monitoring ability is by being actively involved in specific

[94] *See id.*
[95] *See id.* at 297.
[96] *See id.*
[97] *See id.* at 298.
[98] *See id.* at 299.
[99] *See id.* at 296.
[100] *See id.* at 300–01.
[101] *Id.* at 301.
[102] *See id.*
[103] *See id.* at 296, 298.
[104] *See, e.g.*, Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301(m)(3)(A), 116 Stat. 745.

board committees.[105]

This finding about the involvement of women directors in core corporate governance committees is also significant in light of another study which was conducted using data from large companies in the European Union.[106] This study found that the involvement of women directors in key board committees is one channel through which women directors affect firm performance.[107] Thus, this study also links women's involvement in key committees to firm performance.

3. CEO Compensation

The issue of CEO compensation attracted a lot of attention in the 1990s.[108] Excessive CEO pay structures resulted in public outrage across countries.[109] An important aspect of the monitoring function is to appoint the CEO, set his or her remuneration, oversee his or her performance, and, when required, terminate his or her employment.[110] Lucian Arye Bebchuk and Jesse M. Fried explained the issue of executive compensation by means of the "managerial power approach."[111] According to this, where the board is not independent in its decision-making—i.e. in the case of a captured board—executives might negotiate remuneration arrangements that are more favorable than those that would arise from "arm's length" bargaining processes.[112] As has been noted already, board gender diversity is expected to make boards more independent (or psychologically independent as Beecher-Monas says) of management.[113] It is therefore expected that gender diverse boards would not set unreasonably high compensation packages for the CEO and other

[105] *See* Adams & Ferreira, *supra* note 40, at 301.

[106] *See* Colin P. Green & Swarnodeep Homroy, Female Directors, Board Committees and Firm Performance 2 (Oct. 12, 2017) (unpublished manuscript), https://ssrn.com/abstract=2879462.

[107] *See id.* at 3.

[108] *See* Lucian Arye Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 71 (2003).

[109] *See, e.g.*, Zachary Davies Boren, *Excessive Executive Pay Threatens British Business, Say Business Leaders*, INDEP. (Mar. 2, 2015, 7:45 PM), http://www.independent.co.uk/news/business/news/excessive-executive-pay-threatens-british-business-say-business-leaders-10080832.html.

[110] *See* Connie R. Curran & Mary K. Totten, *Board Oversight of Executive Performance and Compensation*, NURSING ECON., Sept.–Oct. 2010, at 343, 345; Holly J. Gregory, *Planning for Leadership Succession and Unexpected CEO Transitions*, TRANSACTIONS & BUS. 28, 31 (2016).

[111] *See* Bebchuk & Fried, *supra* note 108, at 72.

[112] *See id.* at 75, 77.

[113] *See* Beecher-Monas, *supra* note 25, at 377.

executives.

The Adams and Ferreira study finds that the women directors have no effect on CEO compensation.[114] Since their study had also found that women tend not to be appointed to the compensation committee, they conclude that CEO compensation levels are not affected by the presence of women on the board.[115] A more recent study by compensation research firm Equilar "found that companies with greater gender diversity on their boards paid their [CEOs] about 15 percent more than [what] . . . companies with less diverse boards [paid]."[116] However, this research is based on a small sample of the 100 largest companies in the U.S., is based only on compensation data in the year of 2015, and does not explain causality.[117] Further, this study examines the association between women directors on the board and CEO compensation, but does not take into account whether there are women directors on the compensation committee.[118] As the study by Adams and Ferreira found, women tend not to have positions on the compensation committee, which might explain the results of the Equilar study.[119] In fact, a 2014 study by Martin Bugeja, Zoltan Matolcsy, and Helen Spiropoulos examined the association between gender diversity on the compensation committee and CEO pay, and, in fact, found a negative association after controlling for both CEO characteristics and firm characteristics.[120] Another finding in this study was that excess CEO compensation resulted in a lower return on assets "for firms with an all-male compensation committee."[121]

The contradictory results in the above studies might be explained by different data sets. Additionally, the low numbers of women directors in compensation committees might also be responsible for the lack of reliable conclusions in this regard.[122]

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[114] Adams & Ferreira, *supra* note 40, at 303.

[115] *Id.* at 304.

[116] *See* Gretchen Morgenson, *Where More Women Are on Boards, Executive Pay Is Higher*, N.Y. TIMES (May 27, 2016), http://www.nytimes.com/2016/05/29/business/where-more-women-are-on-boards-executive-pay-is-higher.html?_r=0.

[117] *See id.*

[118] *See id.*

[119] *See* Adams & Ferreira, *supra* note 40, at 292.

[120] *See* Martin Bugeja et al., *The Association Between Gender-Diverse Compensation Committees and CEO Compensation*, 139 J. BUS. ETHICS 375, 375, 377, 389 (2016).

[121] *See id.* at 387.

[122] *See* Adams & Ferreira, *supra* note 40, at 292.

4. CEO Turnover

The Adams and Ferreira study finds that gender "diverse boards are more likely to hold CEOs accountable for poor stock price performance."[123] Holding management, particularly the CEO, responsible for poor performance is within the monitoring framework of the board.[124] Interestingly, the authors note that evidence of the effect gender diverse boards have on CEO turnover is more pronounced than the effect of independent boards on CEO turnover, as measured by previous studies.[125] Thus, as far as holding CEOs accountable is concerned, gender diverse boards seem to be even more effective monitors than independent (but homogenous) boards.

5. Information Disclosures

Disclosure of relevant information about the company to the public is another way in which the board exercises its monitoring function.[126] For public companies in the U.S., a study found that gender diverse boards encourage more public disclosures.[127] Building on this, a recent study used data from Australian companies and found that companies with more women directors not only made more disclosures, but also made lengthier disclosures.[128] Overall, these studies suggest that women directors tend to be more cautious while making public disclosures.[129]

Thus, although an interesting case is being made out for gender diverse boards as better monitors, studies in this regard are few and far between.[130] Further, while each study uses different proxies to measure monitoring—like attendance at meetings, committee membership, CEO compensation, CEO turnover, and frequency of information disclosures[131]—none of them are able to test if the

[123] *Id.*

[124] *See id.*

[125] *See id.*

[126] *See* Irene Karamanou & Nikos Vafeas, *The Association Between Corporate Boards, Audit Committees, and Management Earnings Forecasts: An Empirical Analysis*, 43 J. ACCT. RES. 453, 453, 456, 481 (2005) (concluding that efficient boards enhance the monitoring function by improving the quality and the frequency of information disclosure to the shareholders).

[127] *See* Ferdinand A. Gul et al., *Does Board Gender Diversity Improve the Informativeness of Stock Prices?*, 51 J. ACCT. & ECON., 314, 315 (2011).

[128] *See* Ammad Ahmed et al., *Gender Diversity in Corporate Boards and Continuous Disclosure: Evidence from Australia*, 13 J. CONTEMP. ACCT. & ECON. 89, 90 (2017).

[129] *See, e.g.*, Gul et al., *supra* note 127, at 317.

[130] *See, e.g.*, Bugeja et al., *supra* note 120, at 376; Gul et al., *supra* note 127, at 337.

[131] *See* Adams & Ferreira, *supra* note 40, at 292; Bugeja et al., *supra* note 120, at 375; Gul et al., *supra* note 127, at 315; Karamanou & Vafeas, *supra* note 126, at 469.

company has been monitored well enough to avoid loss of value to shareholders.[132] The next sub-section looks at some studies that have attempted to do this by looking at the effect of board gender diversity and firm litigation.

D. Firm Litigation

Since the rise of the monitoring model for the board of directors in the 1990s, studies have sought to link board structure with monitoring.[133] Studies have found that boards with a majority of outsiders are likely to be better monitors.[134] CEO turnover and executive compensation were some of the proxies used to determine the board's effectiveness in terms of monitoring.[135] As the previous section has shown, some of the studies attempting to find the effect of board gender diversity on monitoring have used similar proxies.[136]

However, while the above discussion notes the effect of gender diversity on various individual aspects of board functioning, it is still not convincing enough to warrant legislative intervention. For instance, a board which shows poor attendance at meetings, generally, might be more active in times of crisis or in times when an important decision is to be made. Similarly, firing the CEO might not always be the most efficient fix to poor performance, and setting high incentives for the CEO might not always be indicative of a captured board.[137] Also, it can be argued that a board which makes more public disclosures does not necessarily imply that there was no material misrepresentation.[138] In other words, even if the various pieces of the monitoring puzzle are likely to be better effectuated by a diverse board, it does not imply that, overall, the interests of shareholders have been perfectly upheld.

A sure indicator of a monitoring failure is the incidence of shareholder litigation against a corporation.[139] Shareholders have the right to bring lawsuits against management of the company,

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[132] *See, e.g.*, Adams & Ferreira, *supra* note 40, at 304.

[133] *See* Jill E. Fisch, *Corporate Governance: Taking Boards Seriously*, 19 CARDOZO L. REV. 265, 276 (1997).

[134] *See* Hamid Mehran, *Executive Compensation Structure, Ownership, and Firm Performance*, 38 J. FIN. ECON. 163, 166 (1995); Michael S. Weisbach, *Outside Directors and CEO Turnover*, 20 J. FIN. ECON. 431, 431 (1988).

[135] *See* Mehran, *supra* note 134, at 164; Weisbach, *supra* note 134, at 433, 434

[136] *See* Adams & Ferreira, *supra* note 40, at 292.

[137] *See* Weisbach, *supra* note 134, at 449, 458–59.

[138] *See* Karamanou & Vafeas, *supra* note 126, at 455.

[139] *See* Mary Jane Lenard et al., *Female Business Leaders and the Incidence of Fraud Litigation*, 43 MANAGERIAL FIN. 59, 61, 62 (2017).

which functions as an external monitoring mechanism.[140] Further, litigation of any kind (even outside of shareholder actions against the corporation) often imposes huge monetary costs on the company.[141] This is evidenced by the fact that, in a 2008 study, the cost of litigation to the Fortune 500 was estimated to be equivalent to "one-third of the after-tax profit" and was noted to dwarf CEO compensation in comparison.[142] Thus, being subject to litigation can cause a reduction in shareholder value. It is therefore interesting to see if gender diverse boards might have an effect on firm litigation. This sub-section reviews the few studies that have tested this empirically.

Douglas Cumming, T. Y. Leung, and Oliver Rui, in their study based in China, find that having more women on boards mitigates securities fraud.[143] This study further finds that the reason for the mitigation of securities fraud is not merely the presence of women, but the diversity of the board.[144] In other words, a board with one-hundred percent women directors would not have the same effect of mitigating fraud.[145] Another study, published in 2017, found that companies with at least one female leader (which include both directors and executives under this category) are less likely to be involved in financial reporting fraud litigation.[146] In addition to this, they find that female executives are "more effective in mitigating fraud in male-dominated industries" as compared to female-dominated industries.[147] However, they find that "the presence of at least one woman on the audit committee mitigates fraud in companies in both types of industries."[148] Thus, with respect to the board of directors, this study seems to indicate that for women (or a lone woman director) to have the effect of mitigating financial reporting fraud they must be on the audit committee.[149] Presumably, the director would be directly involved in the financial reporting

[140] *See* Jun Wang et al., The Interaction Between Internal and External Corporate Governance Mechanisms: Evidence from Bank Loan Litigation in China 5 (Feb. 2008) (unpublished manuscript), http://www.ceauk.org.uk/2008-conference-papers/Jun-Wang-Charlier-Cai-BankloadCG-2008Feb28-1.pdf.

[141] *See* John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, METROPOLITAN CORP. COUNS., Feb. 2008, at 28, 28.

[142] *See id.*

[143] *See* Douglas Cumming et al., *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT. J. 1572, 1573 (2015).

[144] *See id.* at 1574.

[145] *See id.* at 1575.

[146] *See* Lenard et al., *supra* note 139, at 59–60.

[147] *See id.* at 60.

[148] *Id.*

[149] *See id.* at 72.

process.

Another study found that an increased representation of women in top management had the effect of reducing lawsuits overall, particularly "lawsuits related to product liability, environment, medical liability, labor and contracts."[150] This study uses data from S&P 1500 firms in the year 2005.[151] The hypothesis in this study is based on literature that finds women to be (i) risk-intolerant (ii) less over-confident, and (iii) more likely to comply with rules.[152] However, since the board has different responsibilities from that of management, we cannot assume that the findings of this study will be applicable to boards as well.

Building on these studies, this article makes the case that since the board is primarily in charge of governance,[153] it is more suitable to study shareholder litigation, rather than other lawsuits against the company, to see whether board gender diversity would improve firm monitoring, thus reducing agency costs.

III. METHODOLOGY

This article conducts a qualitative content analysis of judgments arising out of derivative actions (filed in Delaware) to explore the possible impediments faced by boards in performing their monitoring role. Observations from the content analysis are evaluated against the studies and arguments for board gender diversity to assess whether board gender diversity would potentially strengthen the board's monitoring capacity.

Thus, although the data being analyzed in this study is judicial decisions—it is not assessed doctrinally.[154] Instead, the text of the judicial decision will be mined for factual information about board functioning within the circumstances of each case: a qualitative

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[150] *See* Binay K. Adhikari et al., *Do Women Stay Out of Trouble? Evidence from Corporate Litigation* 5 (Working Paper, 2015), https://www.aeaweb.org/conference/2016/retrieve.php?pdfid=55.

[151] *See id.* at 7.

[152] *See id.* at 3–4.

[153] *See, e.g.*, Binay K. Adhikari et al., *Do Women Stay Out of Trouble? Evidence from Corporate Litigation* 12 (Working Paper, 2017), https://www.researchgate.net/profile/Binay_Adhikari2/publication/315367225_Do_Women_Stay_Out_of_Trouble_Evidence_from_Corporate_Litigation/links/5aa55ec245851543e6412de9/Do-Women-Stay-Out-of-Trouble-Evidence-from-Corporate-Litigation.pdf.

[154] Doctrinal methodology is not used here because the focus is not on the holding in each case, but rather on the facts which give us insights into the black box of board functioning. *See* Salim Ibrahim Ali et al., *Legal Research of Doctrinal and Non-Doctrinal*, 4 INT'L J. TREND IN RES. & DEV., 493, 493, 494 (2017).

content analysis will be conducted. Qualitative content analysis is a method that has gained prominence in recent times.[155] Philipp Mayring defines qualitative content analysis "as an approach of empirical, methodological controlled analysis of texts within their context of communication, following content analytical rules and step by step models, without rash quantification."[156] This approach is empirical inasmuch as it makes observations from the data set.[157] However, the context of the observations is important in this research method, as against quantitative content analysis which counts observations and draws conclusions accordingly.[158] The importance of the context in qualitative content analysis is also reiterated by Yan Zhang and Barbara M. Wildemuth when they explain that qualitative analysis "is mainly inductive, grounding the examination of topics and themes, as well as the inferences drawn from them, in the data."[159]

A. Benefits of the Methodology

The current board gender diversity discussions, whether at the academic, industry, or policy levels, make arguments and claims without being able to observe the functioning of boards in their natural habitat—i.e. during board meetings and other situations of company decision-making.[160] While there is a fair amount of qualitative research that has accessed and analyzed the views of directors in the form of interviews,[161] research related to the broad

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[155] *See* Yan Zhang & Barbara M. Wildemuth, *Qualitative Analysis of Content*, *in* APPLICATIONS OF SOCIAL RESEARCH METHODS TO QUESTIONS IN INFORMATION AND LIBRARY SCIENCE 318 (Barbara M. Wildemuth ed., 2d ed. 2017).

[156] Philipp Mayring, *Qualitative Content Analysis*, 1 FORUM: QUALITATIVE SOC. RES., Art. 20, (June 2000), available at http://www.qualitative-research.net/index.php/fqs/article/view/1089/2385. In the context of legal research, a seminal paper by Mark A. Hall and Ronald F. Wright talks about using judicial decisions for content analysis in order to make legal scholarship more consistent with social science research. *See* Mark A. Hall & Ronald F. Wright, *Systematic Content Analysis of Judicial Opinions*, 96 CALIF. L. REV. 63, 64–65 (2008).

[157] *See* Mayring, *supra* note 156.

[158] *See* DANIEL RIFFE ET AL., ANALYZING MEDIA MESSAGES: USING QUANTITATIVE CONTENT ANALYSIS IN RESEARCH 3 (3d ed. 2014); Mayring, *supra* note 156.

[159] Zhang & Wildemuth, *supra* note 155, at 319.

[160] *See* Lissa L. Broome et al., *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C.L. REV. 759, 807 (2011).

[161] *See, e.g.*, DHIR, *supra* note 14, at 101 (analyzing directors' views in Norway); Broome, *supra* note 160, at 768 (analyzing directors' views in the United States); Catherine Casey et al., *Gender Equality and Corporate Governance: Policy Strategies in Norway and New Zealand*, 18 GENDER, WORK & ORG. 613, 625 (2011) (analyzing directors' views in Norway and New Zealand); Aparna Banerji et al., *Standard Chartered Bank: Women on Corporate Boards in India 2010*, COMMUNITY BUS. 24 (2010), http://www.community business.org/images/cb/publications/2010/ WOB _India.pdf (analyzing directors' views in India).

functioning of boards is limited.[162] This is because, as Leblanc and Schwartz illustrate, researchers are not able to "attend board meetings and observe how . . . 'boards work.'"[163] Schwartz-Ziv, in her article entitled *Does the Gender of Directors Matter?* attempts to observe precisely this by looking at the minutes of board meetings in Israel where the minutes are very detailed.[164] However, it is not always possible for researchers to gain access to board minutes, and even in cases where access is gained, the minutes usually only record the final resolution without giving us an insight into the actual contribution of each director.[165]

This article addresses this gap by qualitatively analyzing the text of judicial decisions (which deal with issues of directors' duties) in order to assess the problems with regard to boards being able to effectively monitor management. The claims about gender diverse boards being better monitors are then assessed against this study.

B. Coding

This analysis was undertaken through a process of "coding" or code formation, which Creswell describes as "the heart of qualitative data analysis."[166] This process of coding involved aggregating information in the text being analyzed into small categories, seeking evidence for the code in the texts of each litigation, and then assigning a label to the code.[167] While some researchers count the number of times a code occurs in the data, this study does not do so because the aim here is not to find the frequency of a particular code, but to explore and understand how each issue, contained in a code, may or may not be relevant in the board's performance of its duties.[168]

In this study, a "prefigured" coding scheme was developed based on the literature review.[169] While using such a prefigured coding scheme, it is recommended that researchers be open to additional

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[162] *See* Richard Leblanc & Mark S. Schwartz, *The Black Box of Board Process: Gaining Access to a Difficult Subject*, 15 CORP. GOVERNANCE: AN INT'L REV. 843, 845 (2007).

[163] *Id.* at 849.

[164] *See* Miriam Schwartz-Ziv, *Does the Gender of Directors Matter?* 2–3 (Edmond J. Safra Research Lab., Working Paper No. 8, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2257867.

[165] *See id.* at 2.

[166] JOHN W. CRESWELL, QUALITATIVE INQUIRY AND RESEARCH DESIGN: CHOOSING AMONG FIVE APPROACHES 151 (2d ed. 2007).

[167] *See id.*

[168] Creswell notes that counting codes provides an indication of the frequency of occurrence, "something typically associated with quantitative research or systematic approaches to qualitative research." *Id.* at 152.

[169] *See id.*

codes that emerged during the process.[170] In the process of this study, three additional codes were added, namely that of "management fault," "qualifications of directors," and "women directors." While "management fault" was not initially included because it is not immediately relevant to the issue of gender diversity, it became apparent during the research process that much of the literature on board gender diversity might be more applicable to management than the board. The cases thus, also allow for other interesting insights about management that would be relevant to the board gender diversity discussion. All these insights have been dealt with under the code of "management fault." Further, "qualifications" was also included as a code based on observations that were made from some cases, which seemed relevant in light of the emphasis on C-Suite experience in the director nomination process. Finally, the code "women directors" was added to make observations about any apparent difference in the way women directors functioned, from the few cases wherein there was at least one woman director on the company's board.

> Thus, the eventual coding scheme that emerged is as follows:
> A. Attendance at board meetings
> B. Preparation for board meetings
> C. Board independence (Did they question the CEO before approving resolutions? Was there genuine discussion of merits a decision was made?)
> D. Decision making under crisis/pressure
> E. Management fault
> F. Qualifications
> G. Women directors

The discussion of analysis will be structured in accordance with these codes, where applicable.

C. The Data Set

Delaware cases have been chosen for the data set for two reasons. First, Delaware courts have developed expertise in corporate law because of the number of corporations that are drawn to Delaware's

[170] *See id.*

flexible Corporations legislation.[171] More than half of Fortune 500 companies are incorporated in Delaware.[172] This expertise developed by Delaware courts over the years has given them a reputation of "quality adjudication" in corporate law cases.[173] Second, Delaware decisions include detailed factual analyses, helpful as it sheds light on aspects of board-functioning in critical situations.[174]

The cases studied here have not been selected randomly. Amongst the results obtained from a general search for Delaware Chancery Court cases dealing with "directors' duties," some results were excluded where the company in question was not a public company, the case was dismissed on procedural grounds or where the case simply did not have enough factual material to analyze. Most of the literature on board gender diversity has come in the aftermath of the financial crisis when the public was exposed to the egregious misconduct and irresponsible risk-taking on the part of some companies.[175] In selecting a random sample of cases in the U.S., the data set in this research has included a number of cases where the board was in fact not held liable.[176] These cases give us an opportunity to see boards, whether or not gender diverse, performing their duties as required by the law.

IV. CASE ANALYSIS

This section will first detail the relevant aspects of each case in the data set and assess the observations and insights from each case, relevant to gender diversity and the board's monitoring role.

A. In re Del Monte Foods Co. Shareholders Litigation[177]

This case deals with a proposed leveraged buy-out.[178] The alleged breach of duty on the part of the board of directors concerns the sale

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[171] *See* LEWIS S. BLACK JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007).

[172] *See id.*

[173] *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1925–26 (1998).

[174] *See id.* at 1915.

[175] *See* Joseph A. McCahery & Erik. P.M. Vermeulen, *Understanding the Board of Directors After the Financial Crisis*, (European Corp. Governance Inst., Working Paper No. 229, 2013), https://corpgov.law.harvard.edu/2013/11/21/understanding-the-board-of-directors-after-the-financial-crisis/.

[176] *See generally In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 577, 619 (Del. Ch. 2010) (holding that the board of directors were not liable and subsequently denied the plaintiff's motion for preliminary injunction).

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

[178] *See id.* at 817.

process and the financial advisor for the sale process.[179] Although this case involves allegations and discussion against the financial advisor as well, only the breaches of the directors are relevant for the purposes of this discussion.[180]

1. Board Composition

As of November 2010, the board of directors of Del Monte Foods consisted Mr. Richard G. Wolford (also the CEO), Mr. Terrence D. Martin, Mr. Samuel H. Armacost, Ms. Sharon L. McCollam, Ms. Mary R. (Nina) Henderson, Mr. Timothy G. Bruer, Mr. David R. Williams, Mr. Joe L. Morgan and Mr. Victor L. Lund (non-executive chairman of the board).[181] Thus the board consisted of nine directors, two of whom were women. All nine directors were named as defendants in this case.[182]

2. Case Brief

On November 24th, 2010, Del Monte entered into a merger agreement with Blue Acquisition Group, which is owned by three private equity firms.[183] The lead firm amongst these private equity firms is Kohlberg, Kravis, Roberts & Co. ("KKR"), thus, the judgment refers to these firms, collectively, as KKR.[184] The merger agreement contemplated the leveraged buy-out of Del Monte.[185] It provided that, if stockholders approved the deal, "each share of Del Monte common stock w[ould] be converted into the right to receive $19 in cash . . . [which] represent[ed] a premium of approximately 40% over the average closing price of Del Monte's common stock for the three-month period end[ing] on November 8, 2010."[186] On February 15, 2011, Del Monte shareholders were to vote on the merger.[187]

However, the plaintiffs in this case sought a preliminary injunction to postpone the vote on the grounds that the defendant board members breached their fiduciary duties.[188] The board members'

[179] *See id.*
[180] *See id.*
[181] *See* DEL MONTE FOODS CO., Definitive Proxy Statements (Form 14A) 8–11 (Aug. 16, 2010), http://phx.corporate-ir.net/phoenix.zhtml?c=86259&p=irol-reportsannual_pf.
[182] *Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 817.
[183] *See id.*
[184] *See id.*
[185] *See id.*
[186] *Id.*
[187] *See id.*
[188] *See id.*

alleged breach of their fiduciary duties rested upon two assertions.[189] First, the directors breached their fiduciary duty "by failing to act reasonably to pursue the best transaction reasonably available" and second, "by disseminating false and misleading information and omitting material facts" in the proxy statement for the shareholder vote.[190] The defendants attempted to rectify the latter "through an extensive proxy supplement released during the afternoon of February 4, 2011 (the 'Proxy Supplement')."[191] The plaintiffs made the argument that limited injunctive relief would restore the shareholders' "opportunity to receive a topping bid free of fiduciary misconduct."[192] The Court granted a twenty day injunction.[193]

The discovery process in this case revealed that Barclays Capital, Del Monte's financial advisor, "secretly . . . manipulated the sale process to engineer a transaction that would permit Barclays to obtain lucrative buy-side financing fees."[194] Further, "Barclays protected its own interests by withholding information from the Board."[195] The Court found that "[b]y failing to provide the serious oversight that would have checked Barclays' misconduct, the directors breached their fiduciary duties."[196] However, the Court stressed that based "[o]n this preliminary record, it appeare[d] that the board sought, in good faith, to fulfill its fiduciary duties, but failed because it was misled by Barclays."[197] The protection of §141(e), which covers reliance on experts, would make it unlikely that money damages would be awarded.[198] However, "[f]or purposes of equitable relief, the board [was held] responsible."[199]

3. Crucial Facts of the Case Based on Which the Court Stated What Was Expected from the Board

Since this was a hearing for the purposes of granting an injunction, a definitive determination of breach of fiduciary duty was not made.[200] Rather, a determination was made only for the purposes of

189 *See id.*
190 *Id.*
191 *Id.*
192 *Id.* at 818.
193 *See id.* at 818–19.
194 *Id.* at 817.
195 *Id.*
196 *Id.* at 818.
197 *Id.*
198 *See id.*
199 *See id.*
200 *See id.* at 818, 836.

granting injunctive relief.[201] The Court stated at the outset that, "[t]o hold that the Del Monte directors breached their fiduciary duties for purposes of granting injunctive relief does not suggest, much less pre-ordain, that the directors face a meaningful threat of monetary liability."[202] Even for the purposes of granting the injunction, however, the Court does state what was expected from the board, at the minimum, in a situation like this one.[203]

To arrive at a conclusion about breach of fiduciary duties, the Court analyzed some crucial facts. In late 2009, Del Monte's stable business made it a prime candidate for a leveraged buy-out (LBO).[204] Barclays had pitched the acquisition of Del Monte to KKR, one of its clients, in late 2009, and then again in 2010.[205] KKR expressed interest and "planned to partner with Centerview" for the acquisition.[206] Barclays had similarly pitched the Del Monte acquisition "to other private equity firms, including Apollo Management."[207] Based on this, "Apollo sent Del Monte a written expression of interest in an acquisition at $14 to $15 per share."[208] Subsequent to "receiving the letter, Del Monte reached out to Barclays" to act as the financial advisor.[209] Barclays accepted, but did not mention its role in stirring up an LBO for Del Monte.[210] Barclays then recommended a strategic, non-public process, and "identified . . . five LBO shops that would be invited to submit expressions of interest: KKR, Apollo, The Carlyle Group, CVC Partners, and the Blackstone Group," and the board adopted this recommendation.[211]

Despite the private process, word leaked and Vestar and Campbell's Soup contacted Barclays to be included in the process.[212] Blackstone dropped out, leaving six participants.[213] Confidentiality agreements were executed with all the potential bidders before they were provided with confidential, non-public information.[214] They were asked to submit expressions of interest, which all except

[201] *See id.* at 836 (citing Mills Acquisition Co. v. MacMillian, Inc., 559 A.2d 1261, 1284 n.32 (Del. 1989)).
[202] *Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 818.
[203] *See id.* at 835.
[204] *See id.* at 819.
[205] *See id.* at 820.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *See id.*
[211] *Id.* at 820–21.
[212] *See id.* at 821.
[213] *See id.*
[214] *See id.* at 821–22.

Campbell's Soup did.[215] Vestar made the highest bid but it had asked to be paired with another investor.[216] Amongst the others, all except KKR asked permission to approach banks for financing.[217] For Barclays, KKR was strategically the best option since it had worked with KKR in a dual role before.[218] However, the board ultimately decided in the board meeting dated March 18, 2010, that Barclays had pushed "too far, too fast," and "that it was not in the stockholders' best interests to proceed further with the [sale] process" as the company's stand-alone growth was strong.[219] It therefore asked Barclays to "shut [the] process down" and inform the buyers that the company was not for sale.[220] Despite this, in September 2010, Barclays opened talks with Vestar and KKR.[221] A month later KKR met with the CEO of Del Monte and "delivered a written indication of interest from KKR and Centerview to acquire Del Monte for $17.50 in cash."[222] This was nominally higher than its previous offer, but given market developments since then, it was actually a step back.[223] Further, Vestar's involvement was not mentioned to Del Monte at this stage.[224]

When the board met on October 13 and October 25, 2010, to discuss KKR's expression of interest, it "decided to adopt a single-bidder strategy of negotiating only with KKR" and also to "'re-engage' Barclays as its financial advisor."[225] Barclays accepted, but did not reveal that they had been negotiating with KKR and Vestar.[226] During negotiations, "Barclays was the principal point of contact for KKR."[227] In addition, "[o]n October 27, 2010, the Board asked Barclays to tell KKR that the $17.50 per share offer was insufficient, but that the company was prepared to give KKR access to due diligence to allow them to submit a higher offer."[228] However, news of the possible LBO leaked out, and KKR raised the offer to $18.50 per share with a request for exclusivity.[229] Although the board did

[215] *See id.* at 822.
[216] *See id.*
[217] *See id.*
[218] *See id.*
[219] *Id.*
[220] *Id.*
[221] *See id.* at 823.
[222] *Id.*
[223] *See id.*
[224] *See id.* at 823–24.
[225] *Id.* at 824.
[226] *See id.* at 824.
[227] *Id.* at 825.
[228] *Id.*
[229] *Id.*

not grant formal exclusivity and did not accept the offer price, they asked KKR to open discussions with lenders and start the process.[230]

i. KKR's Request to Add Vestar Approved by the Board

On November 8, 2010, KKR made a formal request to Barclays to allow Vestar in the deal.[231] The Court notes that the board did not consider the effects of "permitting KKR to team up with the firm who previously submitted the high bid and who could readily have teamed with Carlyle, Apollo, CVC, or another large buyout shop."[232] Neither did the board "consider rejecting KKR's request, enforcing the confidentiality agreement, and inviting Vestar to participate with a different sponsor to generate competition."[233] Further, "[t]he Board did not seek to trade permission for Vestar to pair with KKR for a price increase or other concession."[234] Even though the board was unaware of Barclays' negotiation with Vestar,[235] an effective board would have considered the above aspects. In fact, the Court noted, based on the testimony of Martin, one of the directors, that there was no "meaningful Board consideration or informed decisionmaking with respect to the Vestar pairing."[236] Further, "[t]here [were] no minutes that suggest hard thinking about how acceding to KKR's request might affect Del Monte."[237] Based on this, the Court held that "[i]t was not reasonable for the Board to accede to KKR's request and give up its best prospect for price competition without making any effort to obtain a benefit for Del Monte and its stockholders."[238]

ii. Barclays' Request to Provide Buy-Side Financing Approved by the Board

Next, when Barclays asked Del Monte management for permission to provide buy-side financing to KKR, they agreed.[239] The Court noted that despite the fact that at this time, the offer price had not been agreed upon, Barclays' request was not used to negotiate a

230 *See id.*
231 *See id.*
232 *Id.*
233 *Id.*
234 *Id.*
235 *See id.*
236 *Id.* at 834.
237 *Id.*
238 *Id.*
239 *See id.* at 826.

higher price.[240] Also, other banks would have been ready to finance the deal.[241] In agreeing to let Barclays to provide buy-side finance, the board incurred an additional cost, since it had to obtain a fairness opinion from another financial adviser due to Barclays' conflict of interest.[242] As such, "Del Monte hired Perella Weinberg Partners LP to fulfill this role," whose fee was three million, and this was not contingent on closing the deal.[243] Del Monte therefore ended up incurring additional expenses to help Barclays profit.[244] On the other hand, "[i]f the Board had refused Barclays' request, then Del Monte could have had a non-conflicted (or at least not directly conflicted) negotiator bargain with KKR."[245] The Court ultimately opined that "[w]ithout some justification reasonably related to advancing stockholder interests, it was unreasonable for the Board to permit Barclays to take on a direct conflict when still negotiating price."[246]

iii. Board's Decision to Let Barclays Run the Go-Shop

The Court also notes that despite being aware of the financial conflict that Barclays had (due to it providing buy-side financing), the board allowed Barclays to run the go-shop.[247] Terrence Martin even "testified that it 'never occurred to us that [Barclays] wouldn't do a good job.'"[248] The board could have hired other advisors instead, especially Perella Weinberg, who had rendered the second fairness opinion.[249]

Finally, the Court noted that "Delaware law requires that a board take an 'active and direct role in the sale process.'"[250] Further, citing a Delaware Supreme Court decision, the Court stated that a finding that the board relied on the advice of management's financial advisor "'share[d] the same defects' as the board's reliance on conflicted management."[251] Applying this to the instant case, the Court held that "the taint of self-interest" here, came from Barclays being a

[240] *See id.*
[241] *See id.*
[242] *See id.*
[243] *Id.*
[244] *See id.*
[245] *Id.* at 835.
[246] *Id.*
[247] *See id.* at 828.
[248] *Id.* (alternations in original).
[249] *See id.*
[250] *Id.* at 835 (citing Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 66 (Del. 1989)).
[251] *Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 836 (alteration in original) (citing Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1284 n.33 (Del. 1989).).

conflicted financial advisor.[252] The Court concluded that the "plaintiffs [had] established a reasonable likelihood of success on the merits of their claim that the director defendants failed to act reasonably in connection with the sale process."[253]

4. Summary

From the above discussion, what emerges is that even if the financial advisor, hired for the deal, acted selfishly, as was the case here, effective board oversight would have ensured that the interests of the shareholders were protected.[254] In providing oversight as required by law, the board was expected to be involved in the deal process and weigh the costs and benefits of each decision.[255] For instance, allowing Vestar to be paired with KKR would come at the cost of eliminating price competition. The board should have negotiated some benefit in exchange for agreeing to the pairing up. Not only did the board not do this, there was no "hard thinking" on this matter.[256] Thus the board is expected to consider each aspect of the sale process and not just rely on the financial advisor. Again, allowing Barclays to also act as the buy-side bank would result in a conflict for Barclays, thus requiring the board to pay another bank for a fairness opinion.[257] The board agreed to this without considering the cost to the stockholders.[258] Finally, letting Barclays run the go-shop process despite Barclays' conflict of interest also shows a lack of board consideration of the issue.[259] One director's testimony "that it 'never occurred to [them] that [Barclays] wouldn't do a good job,'" makes it glaringly obvious that the board failed to adequately consider and discuss the matter.[260]

5. Insights from This Case on the Board Gender Diversity Issue

i. Board Independence and Women Directors

The board in this case already had two female members of the board of directors—Ms. Sharon L. McCollam and Ms. Mary R. (Nina)

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[252] *Del Monte Foods Co. S'holders Litig.,* 25 A.3d at 836.
[253] *Id.*
[254] *See id.* (citing *Mills Acquisition Co.*, 559 A.2d at 1284 n.33).
[255] *Del Monte Foods Co. S'holders Litig.,* 25 A.3d at 836.
[256] *Id.* at 834.
[257] *See id.* at 826.
[258] *See id.*
[259] *See id.* at 828.
[260] *See id.*

Henderson—both previously holding executive level positions.[261] It is worthwhile to note that Professor Dhir's interviews in Norway suggests that women directors ask more questions during board meetings, thereby ensuring that issues are given more consideration.[262] Adams and Ferreira also have concluded that gender diverse boards tend to be better monitors.[263]

Yet, here, issues in the sale process failed to be considered by the board despite the presence of two women directors on the board.[264] This leads us to consider whether the fact that the directors appointed in Norway after the board gender diversity legislation was introduced came with experience different from the typical board director (C-Suite experience) which in turn lead to fresh consideration of issues.

B. Air Products & Chemicals, Inc. v. Airgas, Inc.[265]

1. Board of Directors and Board Composition

The individual defendants in this case were Peter McCausland, Paula A. Sneed, David M. Stout, Ellen C. Wolf, Lee M. Thomas, W. Thatcher Brown, James W. Hovey, Richard C. Ill, and John C. van Roden.[266] Peter McCausland, the founder and CEO of Airgas, was also a member of the board of directors.[267] Every board member, with the exception of McCausland, were independent outside directors.[268] However, the 2010 annual meeting, "three Airgas directors (McCausland, Brown, and Ill) lost their seats on the board when three Air Products nominees were elected."[269] Following this, "[o]n September 23, 2010, Airgas expanded the size of its board to ten members and reappointed McCausland to fill the new seat."[270] From a gender diversity perspective, out of ten directors, two were women.[271]

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261 DEL MONTE FOODS CO., *supra* note 181, at 10.

262 *See* DHIR, *supra* note 14, at 35.

263 *See e.g.*, Adams & Ferreira, *supra* note 40, at 301 ("If women also participate actively at board and monitoring committee meetings, they could increase the monitoring intensity of the board.").

264 *See Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 828, 835, 836.

265 Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011).

266 *See id.* at 60–61.

267 *See id.* at 60–61.

268 *See id.* at 61.

269 *Id.*

270 *Id.*

271 *See id.* at 60–61.

2. Background and Facts

The facts of this case involve the "takeover battle between Air Products & Chemicals Inc. ('Air Products') and Airgas, Inc. ('Airgas')."[272] On or around October 2009, John McGlade, CEO of Air Products, approached McCausland with respect to a potential acquisition or combination.[273] When these "private advances were rebuffed, Air Products went hostile in February 2010, launching a public tender offer for all outstanding Airgas shares."[274] This case was heard a year since the first tender offer was announced, and the offer price stood at $70 per share ("[a]fter several price bumps and extensions") at the time of the hearing, which Air Products said was its "best and final offer."[275] Accordingly, "[t]he Airgas board unanimously rejected that offer as being 'clearly inadequate,'" and was of "the view that Airgas was worth at least $78 per share in a sale transaction."[276] In response, Air Products and stockholders of Airgas filed the current action asking the Court "to order Airgas to redeem its poison pill and other defenses . . . and to allow Airgas's stockholders to decide for themselves whether they want to tender into Air Products' . . . 'best and final' offer."[277] The Court ultimately concluded that the Airgas board had not breached its fiduciary duties and acted in good faith.[278] The Court held that directors had met their burden to "articulate a sufficient threat that justifies the continued maintenance of [the] poison pill."[279]

Thus, this case deals with the question of whether a board, "when faced with a structurally non-coercive, . . . tender offer, . . . [can] keep a poison pill in place so as to prevent the stockholders from making their own decision about whether they want to tender their shares" even when the "stockholders are fully informed as to the target board's views on the inadequacy of the offer."[280] Chancellor Chandler answers this at the end of the judgment, stating that this case endorses "Delaware's long-understood respect for reasonably exercised managerial discretion, so long as boards are found to be acting in good faith and in accordance with their fiduciary duties

[272] *Id.* at 55.
[273] *See id.*
[274] *Id.*
[275] *Id.*
[276] *Id.* at 55–56.
[277] *Id.* at 56.
[278] *See id.*
[279] *Id.* at 57.
[280] *Id.* at 54.

(after rigorous judicial fact-finding and enhanced scrutiny of their defensive actions)."[281] He goes on to add that the "Airgas board serves as a quintessential example" of this.[282] In other words, the actions of the Airgas board were actions taken in good faith and in accordance with their fiduciary duties.[283]

3. Analysis – Did the Board Fulfil Its Duties?

i. Facts Detailing the Functioning of the Airgas Board

The first time the board of directors of Airgas discussed (and subsequently rejected) Air Products' offer (which was $60 per share), was in November 2009.[284] In its review, the board relied on management's analysis of the future stock price that had been prepared "to show the value of Airgas in a change-of-control transaction."[285] Thereafter, "the board unanimously concluded that Airgas was 'not interested in [the] transaction,'" as the offer was far below fair value and thus "beginning negotiations at that price would send the wrong message."[286] Subsequently, "McCausland called McGlade to inform him of the board's decision."[287] McGlade, however, requested a "formal response."[288]

Airgas then held a special telephonic meeting (which lasted an hour), where Graff (Airgas' senior vice president) "presented a detailed financial analysis of the offer" and McCausland said that "the management team recommended that the board reject the offer."[289] In the ensuing discussion, one of the directors (Brown) said "that 'nothing had changed since [their previous discussion, and] that the proposal should be rejected,'" following which the board unanimously rejected the offer.[290]

On December 17, 2009, Air Products raised its "offer to an implied value of $62 per share in a cash-and-stock transaction."[291] Shortly thereafter, "[t]he Airgas board held a two-part meeting to consider

281 *Id.* at 129.
282 *Id.*
283 *See id.*
284 *See id.* at 64–65.
285 *Id.* at 64.
286 *Id.* at 65.
287 *Id.*
288 *Id.*
289 *Id.* at 65–66.
290 *See id.* at 66.
291 *Id.*

this revised proposal."[292] The first part of this meeting (December 21, 2009) was a thirty-five minute telephone call where Graff "discussed the financial aspects of the $62 offer . . . and explained that with a 50/50 cash-stock split, Air Products could bid well into the $70s."[293] On or about January 4, 2010, "Graff presented financial analyses of the December 17 proposal based on discussions he . . . had with Airgas's investment bankers."[294] Again, "the board unanimously agreed with management's" rejection of the offer.[295]

ii. Board's Recommendation and Defenses Against Air Products' Public Offer

"On February 4, 2010, Air Products sent a public letter to the Airgas board announcing its intention to proceed with a fully-financed, all-cash offer to acquire all outstanding shares of Airgas for $60 per share."[296] The board met in Philadelphia on February 8 and 9, 2010 to discuss the matter.[297] At this meeting, "[t]he board's financial advisors . . . made presentations . . . regarding Air Products' proposal" and also reviewed the financial projections of the Airgas management.[298] "At the meeting, the board unanimously agreed that the $60 [offer] was too low, and that it 'significantly, undervalued Airgas and its future prospects.'"[299] "Air Products launched its tender offer" on February 11, 2010 as per the terms of the letter, for all outstanding stock of Airgas.[300] Thus the tender offer was "$60 per share, all-cash, structurally non-coercive, non-discriminatory, and backed by secured financing."[301]

> The tender offer is conditioned, among other things, upon the following:
> 1) a majority of the total outstanding shares tendering into the offer;
> 2) the Airgas board redeeming its Rights Plan or the

[292] *Id.*
[293] *Id.* at 66–67.
[294] *Id.* at 67.
[295] *Id.*
[296] *Id.* at 68.
[297] *See id.*
[298] *Id.* at 69.
[299] *Id.*
[300] *Id.*
[301] *Id.*

> rights otherwise having been deemed inapplicable to the offer;
> 3) the Airgas board approving the deal under DGCL § 203 or DGCL § 203 otherwise having been deemed inapplicable to the offer;
> 4) the Airgas board approving the deal under Article VI of Airgas's charter or Article VI otherwise being inapplicable to the offer;
> 5) certain regulatory approvals having been met; and
> 6) the Airgas board not taking certain action (i.e., entering into a third-party agreement or transaction) that would have the effect of impairing Air Products' ability to acquire Airgas.[302]

Along with this, "Air Products also announced its intention to run a proxy contest to nominate" its own directors for election into the new board.[303]

The Airgas board held the next meeting on February 20, 2010 to discuss the tender offer.[304] Financial advisors of Airgas reviewed their analysis of the offer with the board "and concluded that the offer 'was inadequate from a financial point of view.'"[305] Accordingly, "Airgas recommended [in its proxy statement] that its [stockholders] not tender into Air Products' offer because it 'grossly undervalue[ed] Airgas.'"[306]

"On March 13, 2010, Air Products nominated . . . three independent directors for election at the Airgas 2010 annual meeting."[307] Air Products nominated John P. Clancy, Robert L. Lumpkins and Ted B. Miller, Jr.[308] Air Products particularly promoted its nominees as being independent directors who would act in the best interests of stockholders.[309] To emphasize this, Air products made the following statements about the "three nominees:

> [1. They] 'are independent and do not have any prior relationship with Airgas or its founder, ...'

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302 *Id.* at 69–70.
303 *Id.* at 70.
304 *See id.*
305 *Id.*
306 *Id.*
307 *Id.* at 71.
308 *See Id.*
309 *See id.* at 72.

> [2. They] 'will consider without any bias [the Air Products] offer.'
> [3.They] 'will be willing to be outspoken in the boardroom about their views on these issues;'
> [4. They] 'are highly qualified to serve as directors on the Airgas Board.'"[310]

Along with this, Air Products also sought approval from Airgas stockholders to amend the bylaws.[311] The Airgas board then amended its bylaws to delay the annual meeting to give itself more time to firstly, give the stockholders more information, and secondly, to "demonstrate performance of the company."[312] "The annual meeting was [ultimately] scheduled for September 15, 2010."[313] Both Airgas and Air Products made several filings and press releases during the months leading up to the annual meeting to make their respective cases to the Airgas stockholders.[314]

On July 8, 2010, Air Products increased its offer to $63.50 and left the remaining material terms the same.[315] Air Products also sent Airgas a letter expressing Air Products' willingness to negotiate.[316] "The Airgas board held two special telephonic meetings to consider [this]."[317] During the first call on July 15, 2010, "McLaughlin updated the board on Airgas's performance . . . and the financial advisors provided updated financial analyses."[318] On the second call (July 20, 2010), the two financial advisors of Airgas gave "their respective opinions that the offer of $63.50 was also 'inadequate . . . from a financial point of view."[319] Based on this, "McCausland sent a public letter to McGlade rejecting . . . [the] offer and invitation to meet because . . . '[it was] not a sensible starting point for any discussions or negotiations.'"[320] In its SEC filing, Airgas set out many of the reasons why its stockholders should reject the offer.[321] Airgas stated that the offer "grossly undervalued" Airgas and attached the

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310 *Id.*
311 *See id.*
312 *Id.* at 73.
313 *Id.*
314 *See id.* at 72.
315 *See id.* at 73.
316 *See id.*
317 *Id.* at 74.
318 *Id.*
319 *Id.*
320 *Id.*
321 *See id.*

financial advisors' inadequacy opinions to the filing.[322]

Subsequently, both Airgas and Air Products filed their proxy materials before the September annual meeting.[323] Airgas urged stockholders to vote against the three nominees of Air Products and also to vote against the bylaw amendments sought by Air Products.[324]

"On September 6, 2010, Air Products further increased its offer to $65.50" without changing the other terms of the offer.[325] Also, "Air Products threatened to walk if the Airgas stockholders did not elect the three Air Products Nominees . . . [and did not] vote in favor of Air Products' proposed bylaw amendments."[326] "The next day, the Airgas board met to consider . . . [the] revised offer."[327] After it received updated analysis from management and external bankers, it unanimously rejected the offer again "saying that it was 'not an appropriate value or a sensible starting point for negotiations.'"[328] McCausland, Thomas and Brown also held meetings with twenty-five to thirty stockholders, consisting of arbitrageurs, hedge funds and institutional investors.[329] The stockholders wanted Airgas to negotiate with Air Products, but McCausland expressed the view that an offer of at least $70 would be a reasonable starting point to negotiate.[330] Nevertheless, despite Air Products' financial advisors engaging Airgas' financial advisors, subsequent to receiving notice of McCausland's statement no revised offer came.[331] Instead, counsel for Air Products sought assurance from Airgas bankers that Airgas would agree to the deal at $70 per share if that was offered.[332] Airgas bankers, however, could not give that assurance.[333]

At the September 15 annual meeting, the Air Products nominees were voted in, and the Air Products amendments to the bylaws were also approved by a majority of Airgas's stockholders.[334] Following this, the board size was increased to ten, McCausland was voted back on the board, and John van Roden was unanimously appointed the

322 *See id.*
323 *See id.* at 75.
324 *See id.*
325 *Id.* at 76.
326 *Id.*
327 *Id.*
328 *Id.*
329 *See id.*
330 *See id.*
331 *See id.* at 77.
332 *See id.*
333 *See id.*
334 *See id.*

chairman.[335] In relation to this vote, it was concluded at the trial, held in October 2010, that the stockholders had had all of the information they needed to evaluate the $65.50 offer at the time of the September annual meeting.[336]

On October 26, 2010, Airgas sent a letter to Air Products reiterating that the Airgas board (including the newly appointed directors) were of the view that the $65.50 offer was grossly inadequate.[337] The letter also showed a willingness to negotiate if Air Products gave reason to believe that it would make an offer consistent with Airgas' board's own valuation of its stock, which was "meaningfully in excess of $70 per share."[338] In a subsequent letter, the Airgas board stated "that it believ[ed] that the value of Airgas in a sale [was] at least $78 per share."[339] Even though Air Products did not view $78 per share as a "realistic valuation," it accepted the invitation to meet because it believed that a meeting was "in the best interest[s] of both companies."[340] On November 4, 2010, the principles of both companies met accordingly, but had differences of opinions regarding valuations of Airgas.[341] After the meeting, they "issued a disclosure stating that 'no further meetings [were] planned.'"[342] Based on evidence presented, the Court held, with regard to this meeting, that it was a legitimate attempt by both parties to reach in good faith, some sort of agreement, although eventually unsuccessful.[343]

In the meantime, Air Products continued to consider its strategic options while the newly elected directors (the Air Products nominees) acquainted themselves with information about Airgas.[344] At the orientation session for the new directors, information was presented to them and the new directors, in return, challenged management and existing board members about the economic assumptions underlying the valuation of the company.[345] Clancy, one of the new directors, stated in his testimony, that he was "very impressed" at the end of this process.[346] The new directors also raised "the

[335] *See id.* at 61, 77.
[336] *See id.* at 79.
[337] *See id.* at 80.
[338] *Id.*
[339] *See id.* at 80–81.
[340] *Id.* at 81.
[341] *See id.*
[342] *Id.*
[343] *See id.*
[344] *See id.* at 82.
[345] *See id.* at 83.
[346] *Id.*

possibility of forming a special negotiating committee, . . . obtaining independent legal counsel and getting a third independent financial advisor to take a fresh look at the valuation and five-year plan."[347] After the November 2010 board meeting, Airgas sent a letter to McGlade stating that the board had unanimously agreed that the offer was inadequate.[348] However, the new directors later sought to clarify their views, stating that the $78 per share valuation had been only agreed to in context of the discussion.[349] They again requested independent financial advisors to take a fresh look, which the Airgas board complied with.[350] On December 10, the independent directors telephonically met and decided to appoint Credit Suisse as the independent financial advisor.[351] In any case, they later came to "fully support the view that Airgas is worth *at least* $78 per share in a sale transaction."[352]

On December 9, 2010, Air Products raised its offer price to $70 per share and termed it its "'best and final' offer."[353] With respect to this, the Court held that even if this was not Air Products' final offer, having publicly announced that it was, there cannot be any further judicial requests for relief if there is such an offer.[354] The Airgas board met on December 21, 2010, to discuss this "'best and final' offer."[355] Here, again, management presented an updated five-year plan.[356] The financial advisors of Airgas presented their analysis and opinion that Air Products' $70 offer was financially inadequate.[357] Credit Suisse, the newly retained, independent financial advisor, then presented its analysis and also "concluded that the $70 offer was inadequate from a financial point of view."[358] After considering all this, the Airgas board unanimously rejected the offer.[359] During the board discussion, John Clancey, one of the newly appointed directors, said to the rest of the board that "the offer was not adequate, and that even 'an increase to an amount which was well below a $78 per share

[347] *Id.*
[348] *See id.* at 81.
[349] *See id.* at 84.
[350] *See id.* at 83, 84.
[351] *See id.* at 85.
[352] *Id.* (emphasis in original).
[353] *Id.* at 86.
[354] *See id.* at 87.
[355] *Id.* at 88.
[356] *See id.*
[357] *See id.*
[358] *Id.* at 88–89.
[359] *See id.* at 89.

price was not going to 'move the needle.'"[360] He told the rest of the board that they had to "protect the pill."[361] Clancey later testified in court that "[p]rotecting the pill was important [because] if there was no pill, it [was] possible . . . that 51percent of the [stockholders would] tender" and the others would not have much choice.[362] One day after the meeting, Airgas made an amendment to its filing, announcing the rejection of Air Products' $70 offer because it was inadequate.[363]

4. Insights from This Case on the Board Gender Diversity Issue

The Airgas board had two female directors in what was a nine-member board, and then was expanded to be a ten-member board.[364]

i. Attendance at Board Meetings

One of the significant aspects of board functioning that this case brings out, is the fact that the board of directors held meetings whether physically or telephonically, as many times as necessary to discuss the issue.[365] Since this was a takeover battle, it is obvious that the board would be actively involved, as compared to other situations.[366] The gender diversity literature claims that diverse boards have more meetings and that they are better attended than in the case of other boards.[367] Neither the number of board meetings nor the attendance at these meetings seem to be a problem in this case, since all the decisions were taken unanimously.[368]

ii. Independence from Management

Next, the board diversity literature stresses that women directors tend to ask more questions and express diverse viewpoints.[369] In this case, this does not seem to be the case. Rather, the focus was on the

[360] *Id.*
[361] *Id.*
[362] *Id.*
[363] *See id.* at 90.
[364] *See id.* at 60–61.
[365] *See, e.g.*, *id.* at 60–61, 63, 64, 65, 66, 70, 74, 76 (demonstrating the several meetings held by the board of directors).
[366] *See id.* at 95 ("[B]oard approval and recommendation is required before stockholders have the opportunity to vote on or even consider a merger proposal, while traditionally the board has been given no statutory authority role in responding to a public tender offer.").
[367] *See* Adams & Ferreira, *supra* note 40, at 297–98.
[368] *See, e.g.*, *Air Prods. & Chems., Inc.*, 16 A.3d at 55, 61, 65, 66, 67, 68, 69, 80, 81, 84, 85, 89, 90 (demonstrating the decisions that were taken by a unanimous vote).
[369] *See* Broome et al., *supra* note 37, at 1055.

new directors (nominated by Air Products), all of whom were male, who challenged the existing board about the valuation of the company.[370] In its analysis, the Court seems to have stressed on the fact that the nominees of Air Products formed the opinion, along with the other members of the board, that the price was inadequate.[371] Thus, even though all the directors, apart from McCausland, were independent directors, the fact that Air Products had nominated the new directors seems to make them, in a sense, more important than the rest.[372] Air Products even promoted the independence of the three nominees stating that they "are independent and do not have any prior relationship with Airgas or its founder" and that they "will be willing to be outspoken in the boardroom about their views on these issues."[373]

This perhaps lends support to Yaron Nili's argument that independent directors might be beholden to the CEOs who appointed them, and that reducing the tenure of independent directors might be one way to remedy this.[374] Also, this is consistent with Beecher-Monas' argument that independent directors are not truly independent in terms of their thinking.[375] In this case, it is apparent that this 'outsider' status of the new independent directors may also be exercised by newly appointed male directors who are not friends of management.

C. Yucaipa American Alliance Fund II, L.P. v. Riggio[376]

1. Board of Directors and Composition

The company in question in this case is Barnes & Noble, Inc, a public company whose shares traded on the NYSE.[377] Leonard Riggio, was the founder of the company and also the chairman of the board of directors.[378] Until recently (March 2010), his brother, Stephen Riggio, served as the CEO and was a member of the board

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[370] *See Air Prods. & Chems., Inc.*, 16 A.3d at 83.

[371] *See id.* at 123 ("Air Products *got what it wanted*. Its three nominees got elected to the Airgas board and then questioned the directors about their assumptions. . . . [I]n the end, they *joined in the board's view* that Air Products' offer was inadequate.") (emphasis in original).

[372] *See id.* at 60, 123.

[373] *Id.* at 72.

[374] *See* Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L.J. 97, 118, 124 (2016).

[375] *See* Beecher-Monas, *supra* note 25, at 412.

[376] Yucaipa Am. Alliance Fund II, L.P. v. Riggio, 1 A.3d 310 (Del. Ch. 2010).

[377] *See id.* at 314.

[378] *See id.*

of directors at the time of this hearing.[379] Besides the Riggios, the board consisted of Lawrence Zilavy, Michael Del Giudice, George Campbell, William Dillard, Patricia Higgins, Irene Miller and Margaret Monaco.[380] Thus from a gender diversity perspective, two out of nine directors were women on the Barnes & Noble board.

2. Case Brief

This case involves investor Ronald Burkle's efforts to acquire Barnes & Noble through Burkle's funds (collectively referred to as "Yucaipa").[381] It began when Burkle called Riggio indicating his interest to invest in Barnes & Noble.[382] However, because of prior history (joint investment under Burkle's leadership which went sour) between the two, Riggio tried to persuade Burkle not to invest.[383] Burkle not only invested, but also suggested several ideas for Barnes & Noble to pursue, which Riggio did not pursue.[384] However when "[Burkle] learned in August 2009 that Barnes & Noble was to acquire a college bookstore chain that had been wholly-owned by Riggio," Burkle complained about how the company was governed and started increasing his stake in Barnes & Noble to nearly 18%.[385] In response to Yucaipa rapidly increasing its stake in Barnes & Noble, the board of directors adopted a poison pill.[386] "Yucaipa then brought this action against the Barnes & Noble directors, claiming that the adoption of the pill, and the board's refusal to amend the pill per Burkle's specific suggestions, was a breach of the directors' fiduciary duties."[387] Vice Chancellor Strine, held that there was no breach of fiduciary duties in this regard.[388]

3. Analysis: Did the Board Fulfill Its Duties?

i. Independence of the Barnes & Noble Board

In examining Yucaipa's claims, the first issue the Court dealt with was the independence of the board, and held that the board

379 *See id.*
380 *See id.* at 314, 315.
381 *See id.* at 312.
382 *See id.*
383 *See id.*
384 *See id.*
385 *See id.*
386 *See id.*
387 *Id.* at 313.
388 *See id.*

comprised of a bare majority of independent directors and that it continues to have a feel of a board in a controlled company even after going public.[389] It based this conclusion on the following. First, Stephen was Riggio's brother, and hence, not an independent director.[390] Second, working as Riggio's personal financial advisor and working for Riggio at the Barnes & Noble college bookstore, of which, at the time, was owned by Riggio, Zilavy was not an independent director.[391] Third, and more controversially, Del Giudice, who was determined to be an independent director under the NYSE rules, by the board, had business and political ties with Riggio.[392] However, the Court in this case declined to make a conclusion on Del Giudice's independence based on the limited record before it.[393] Fourth, about Irene Miller, Yucaipa claims that she is beholden to Riggio since she is a former Barnes & Noble executive, her independence is compromised.[394] However, the Court notes that, since ten years has passed since she held the appointment, it satisfies NYSE's cooling-off period, and it again declined, without more evidence, to make a finding of non-independence.[395]

ii. College Bookstore Deal

Although Barnes & Noble had not adopted any of Burkle's suggestions, trouble began brewing in August 2009 when "Barnes & Noble announced that it had entered into an agreement to purchase all of the stock in Barnes & Noble College Booksellers."[396] Since the college bookstore was owned by Riggio and his wife, it was an interested transaction.[397] Burkle wrote a private letter to Riggio expressing his objection to the deal.[398] Despite this, objections from other stockholders, and poor market reaction, Barnes & Noble went ahead with the transaction.[399] On a side note, litigation regarding the fairness of the transaction was ongoing in court during the hearing of this case.[400]

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389 *See id.* at 315.
390 *See id.* at 314.
391 *See id.*
392 *See id.* at 314, 315.
393 *See id.* at 315.
394 *See id.*
395 *See id.*
396 *Id.* at 317.
397 *See id.* at 317–18.
398 *See id.* at 318.
399 *See id.*
400 *See id.*

iii. November 17, 2009 Board Meeting

Yucaipa significantly increased its position in Barnes & Noble following the closing of the college bookstore deal.[401] Its disclosures to the SEC in this regard indicated that it had increased its stake to 17.8% within a span of four days.[402] These disclosures "criticized Barnes & Noble's management and corporate governance policies, [and] reserved Yucaipa's right to pursue a wide range of options" implying that one of such options could be the purchase of the company.[403] "Yucaipa also made two notifications pursuant to the Hart-Scott-Rodino Act indicating that it intended to purchase Barnes & Noble stock with a value in between $130.3 and $651.7 million," the higher end of which "would have given Yucaipa control over a majority of Barnes & Noble stock."[404]

In response to the first SEC disclosure filed by Yucaipa, "Barnes & Noble's then-General Counsel, Jennifer Daniels, immediately reached out to Scott Barshay, a corporate partner at Cravath, Swaine & Moore LLP," who suggested a poison pill as an appropriate response to Yucaipa.[405] After analyzing the language of the disclosures by Yucaipa, the attorneys at Cravath started drafting a rights plan.[406] On "November 17, 2009, Daniels called a board meeting to discuss how to respond to Yucaipa's rapid acquisition of shares."[407] With regard to this meeting, the Court makes two points about process.[408]

The first point is about independence.[409] The Court notes that from the start, no effort was made to get an independent counsel and investment advisors, or to constitute a special committee of independent directors.[410] Instead, they contacted Cravath as legal advisor, along with Brian Cave (another law firm) and Morgan Stanley as investment advisors, all of whom had worked with Riggio before.[411] Further, there is no evidence of minutes being recorded and shared with the board regarding Riggio's meeting with the

401 *See id.*
402 *See id.*
403 *Id.*
404 *Id.* at 319.
405 *Id.*
406 *See id.* at 320.
407 *See id.* at 321.
408 *See id.* at 321–22.
409 *See id.*
410 *See id.* at 321.
411 *See id.*

representatives of Morgan Stanley.[412] However, the Court concedes that "Yucaipa's rapid purchases and indication of a willingness to buy up to half of Barnes & Noble's shares undoubtedly put extreme time pressure on the response."[413]

The second point is about board papers.[414] Prior to the "meeting, the board received two packets of materials."[415] The first packet which was sent to directors on the morning of the meeting and "included: a copy of the draft Rights Plan; a memo from Cravath to the board explaining the draft Rights Plan; a two-page slide deck from Cravath summarizing the highlights of the draft Rights Plan; and, draft board resolutions adopting the Rights Plan."[416] "The second packet, sent shortly before the meeting convened at 3:00 p.m., included: a revised set of board resolutions; a presentation from Morgan Stanley; and a draft press release."[417]

At the board meeting, Riggio recounted his partnership with Burkle and told the board that it "can't predict what [Burkle] will do;" that "if [Burkle] keeps going, he'll create a private co[mpany];" that "[Burkle]'s dangerous with other people's money;" and that Riggio "does not want to talk to [Burkle]."[418] Thus, the court notes that "Riggio's description of Burkle was hostile."[419] "Riggio [also] said that there was no question that Burkle would increase his shareholding to over 20%, and that Burkle would go after board seats in the next election."[420] However, the board was also presented with a more measured assessment from Barshay (of Cravath).[421] About Burkle, he "noted that Burkle's standard technique was to get on a board through friendly means, and then to 'quietly influence from the wings' once he was on."[422] "Barshay then educated the board about their fiduciary duties when considering the implementation of takeover defenses . . . [and the need to] balance between their duty to protect shareholders from a person acquiring control without paying a premium with their duty to adopt defensive measures that are reasonable in relation to the threat posed, and not coercive."[423]

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412 *See id.*
413 *Id.* at 322.
414 *See id.*
415 *Id.*
416 *Id.*
417 *Id.*
418 *Id.* (alterations in original).
419 *Id.*
420 *Id.*
421 *See id.*
422 *Id.*
423 *Id.* at 322–23.

Interestingly, after the draft rights plan was suggested, Riggio suggested, in the guise of "play[ing] devil's advocate . . . that he should be allowed to acquire up to a 45% stake because 'at 33% we are at risk.'"[424] To this, "Barshay noted that under the Rights Plan [they would adopt], Burkle would have to win two successive proxy contests in order to gain control of the board because" of the staggered board in place.[425] Also, "[t]he Morgan Stanley representative [dismissed this] sa[ying] that adopting the Rights Plan looked better in the 'public eye' than an 'arms race' . . . between Riggio and Yucaipa."[426] The Court notes that this discussion was important firstly, because of the push back against Riggio, and secondly, because while discussing the possibility of Yucaipa running a proxy contest, the board seems to have accepted the fact that Yucaipa may win that contest.[427] Further, the court notes that the discussion "demonstrated a recognition that the board could not adopt a Rights Plan that would foreclose an effective proxy challenge from Yucaipa because to do so would be preclusive."[428]

In addition to this, from the notes of the meeting, the Court also infers that the board was already concerned about the possibility of Yucaipa joining with another shareholder and forming a control group.[429] Another point noted by the board is that Cravath steered most of the discussion at the meeting.[430] Ultimately, the board unanimously adopted the Rights Plan in this meeting.[431]

December 23, 2009, Burkle wrote to Riggio, criticizing the Rights Plan and stating that the recent actions of the company were not in the best interests of the shareholders.[432] At the January 6, 2010 board meeting, Riggio notified the board of Burkle's letter and stated that it "was evidence that Burkle was 'not going to go away.'"[433] "[D]irector Miller [then] asked whether the board was 'ready for this onslaught.'"[434] Based on Miller's comment, the Court noted that "the board viewed a proxy contest as a real possibility, and one in which Yucaipa might prevail."[435]

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424 *Id.* at 323.
425 *Id.*
426 *Id.*
427 *See id.*
428 *Id.*
429 *See id.*
430 *See id.*
431 *See id.*
432 *See id.* at 324.
433 *Id.*
434 *Id.*
435 *Id.*

iv. February 16, 2010 Board Meeting

Next, "Burkle wrote . . . to the full board demanding an exception to the Rights Plan to allow Yucaipa to buy up to a 37% stake in Barnes & Noble."[436] In addition to this, the letter "states that the Riggio 'insiders' stake in Barnes & Noble, combined with the 20% cap in the Rights Plan, had a 'coercive effect on the Company's other shareholders and [gave] the Riggio family a preclusive advantage in any proxy contest'" and that it "made [Burkle's own] ability to win a proxy context 'mathematically impossible or realistically unattainable.'"[437] The Court points out that the wording was a clear citation of the Unitrin[438] decision even if it was unattributed.[439]

At the February 16 meeting, the board considered Burkle's letter.[440] In doing so, the board also noted that Aletheia Research and Management Inc., which had previously been a passive investor, "increased its stake in Barnes & Noble from 6.37% to 17.44%."[441] In its Schedule 13D disclosure, Aletheia stated that it "had 'no plans or proposals' that would result in an 'extraordinary corporate transaction' involving Barnes & Noble, but also expressly noted that [it] however reserve[ed] the right, at a later date, to effect one or more of such changes or transactions."[442] In light of this, the board considered whether the Rights Plan was indeed proportional to the threat faced by the company, and whether it should amend the Rights Plan as Burkle demanded.[443] Burkle's letter had also required the board to consider whether it was "reasonable to put a pill in place with a 20% trigger when the Riggios owned 28.91% of the shares, and the other directors and officers [owned] 3.26%, for a total of 32.17%."[444] On this question, the board concluded that combining "Riggio's holding at the current level did not pose a threat."[445] The Court noted that although this conclusion was not unreasonable, the process of considering the issue was questionable.[446] Since this was a question about Riggio, the discussion should have been held by

436 *Id.* at 325.
437 *Id.* at 325–26.
438 Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995).
439 *See Riggio*, 1 A.3d at 325–26.
440 *See id.* at 326.
441 *Id.* at 324.
442 *Id.*
443 *See id.* at 326.
444 *Id.*
445 *Id.* at 327.
446 *See id.*

independent directors of the board.[447]

Next, the board discussed "whether Yucaipa remained a threat."[448] "Barshay recapped the reasons that the board had adopted the Rights Plan," discussed the parallel increase in Yucaipa's and Aletheia's stake in Barnes & Noble and that the board could not stop somebody from running a proxy contest.[449] "After reviewing the board's fiduciary duties, Barshay advised that Yucaipa and Aletheia posed a threat to the company, and that the 20% threshold was a reasonable, non-preclusive response to that threat."[450] After this discussion, "[t]he board unanimously voted to reject Yucaipa's request to raise the Rights Plan's threshold to 37%."[451]

Next, Burkle's proposed amendment to the rights plan was later considered by the board.[452] "Under Burkle's reading [of the Rights Plan], the Riggios were allowed to acquire up to 50% of Barnes & Noble's stock before triggering the Rights Plan."[453] "Although Barshay did not agree with [this] reading, he recommended that the board adopt an amendment . . . to foreclose any" such reading.[454] Barshay went through the draft amendment, which had been circulated to the directors before the meeting, with the help of a four-page slide deck.[455] The board adopted the amendment and accordingly responded to Burkle's letter, indicating its decisions on the various issues raised.[456]

v. Meeting with Independent Directors

Burkle responded by "critici[sing] the board for protecting the Riggio family's interests . . . and asked for a meeting with Barnes & Noble's independent directors."[457] Accordingly, Del Giudice and Higgins met with Burkle where Burkle recounted his strategic ideas for Barnes & Noble and suggested that three or four independent directors (whom Burkle was to suggest) be added to the Barnes & Noble board.[458] Further, when pressed on Yucaipa's intentions,

447 *See id.*
448 *Id.*
449 *Id.*
450 *Id.*
451 *Id.*
452 *See id.*
453 *Id.*
454 *Id.*
455 *See id.*
456 *See id.*
457 *Id.*
458 *See id.* at 328.

Burkle did not clarify.[459]

vi. Filing of Lawsuit and Amendment of Rights Plan

The instant case arose subsequent to Yucaipa filing suit, on May 5, 2010, "alleging that the board breached its fiduciary duties by adopting the Rights Plan and declining to amend it to Yucaipa's satisfaction. After Yucaipa filed suit, the board approved a second amendment to the Rights Plan" to ensure that it is in accordance with Rights Plans that were previously upheld by the Delaware Supreme Court.[460]

4. Decision

Based on Delaware precedent, the Court determined that the Unocal standard of review was appropriate in this case, stating that it is settled law that the standard of review to be employed to address whether a poison pill is being exercised consistently with a board's fiduciary duties is the Unocal[461] standard.[462] Based on Unitrin, it is explained that to establish the second step of this test, "directors must 'show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way.'"[463] Thus, even a "non-preclusive, non-coercive defensive measure [is] nonetheless unreasonable in light of the threat faced by the corporation."[464] This is relevant here because Yucaipa argued that the Rights Plan was substantively unreasonable in its effect even though it conceded that the board was faced with a legitimate threat and that the Rights Plan was not preclusive.[465] In this regard, the Court held that although the board process was not the best (since Riggio was part of the discussion), it is convinced "that the independent board members and lead director Del Giudice acted in good faith and for reasons unrelated to the perpetuation of Riggio as the largest stockholder."[466] In so concluding, the Court noted that "[t]he board was also appropriately informed, and its outside legal

[459] *See id.*
[460] *Id.*
[461] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
[462] *Riggio*, 1 A.3d at 335.
[463] *Id.* at 336–37 (quoting Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786, 810–11 (Del. Ch. 2007).
[464] *Riggio*, 1 A.3d at 337.
[465] *See id.* at 344–45.
[466] *Id.* at 346.

advisors consistently kept the board focused on their duty to avoid precluding the ability of Yucaipa or other holders from mounting an effective proxy contest."[467] In addition to this, the Court noted that the board acted to "constrain[] Riggio . . . from addressing the threat . . . by making market purchases to secure voting control."[468] Further, based on the evidence, the Court held that the Rights Plan was a reasonable response since it did not unreasonably inhibit the ability of Yucaipa to run an effective proxy contest.[469] The Court then explained, "to win [in a proxy contest], Yucaipa would have to garner a strong supermajority of the remaining vote to get a majority."[470] While this was difficult, it could be pulled off by Yucaipa since it could get nearly half of the required votes from Aletheia.[471] With respect to Yucaipa's argument that the Rights Plan was ambiguous, the Court held that the argument had no merit.[472]

Next, the Court analyzed whether there was a legitimate threat posed, and concluded that "the board had a reasonable basis for concluding that Burkle was potentially planning to acquire a controlling stake in Barnes & Noble, or from a governing bloc with another large stockholder like Aletheia."[473] Amongst other things, the Court based this conclusion on the fact that Burkle had been proposing alternative business strategies, published a Schedule 13D in November 2009 publicly criticizing the policies of the board, and on the fact that Yucaipa and Altheia, wielding effective voting control, could propose options, such as LBOs, in which they remained in control.[474]

5. Insights from This Case About Gender Diversity

The board has three woman directors in this company in a nine-member board.[475]

i. Preparation for Board Meetings

In this case, because of the time pressure the board was under, the

[467] *Id.*
[468] *Id.*
[469] *See id.* at 359.
[470] *Id.* at 354.
[471] *See id.*
[472] *See id.* at 338.
[473] *Id.* at 348.
[474] *See id.*
[475] *See id.* at 314, 315.

board packets were not made available well in advance.[476] One packet was sent to directors on the morning of the meeting, which included explanations and summaries of the draft Rights Plan, as well as the draft board resolution to adopt the Plan.[477] In addition, "[t]he second packet, sent shortly before the meeting [which was held] at 3:00 p.m., included a revised set of board resolutions, a presentation from Morgan Stanley and a draft press release."[478] Thus, the directors did not have much time to prepare, as would be the case in urgent situations like this one.[479] In any case, the legal advisor, Barshay (from Cravath), went over the Rights Plan and later made amendments to it, with the help of a slide deck, for the directors.[480] Again, in the February board meeting, Barshay went over the rights plan that had already been adopted before discussing the proposed amendment to it.[481] Thus, even if the directors had not prepared, in terms of reading the rights plan that had already been adopted, the outside legal advisors made sure that the board was aware of the relevant issues.[482]

While considering their response to Burkle, "Miller asked whether the board was 'ready for the onslaught,'" and the Court concluded, based on this statement, that "the board viewed a proxy contest as a real possibility, and one in which Yucaipa might prevail."[483] Thus, the board is sufficiently aware of the issues facing the company. Further, when Riggio suggested that he buy Barnes & Noble stock from the market to counter the threat that Burkle was posing, "Barshay noted that, under the Rights Plan [they would adopt], Burkle would have to win two success[ful] proxy contests in order to gain control of the board because" of the staggered board in place.[484] With respect to this, the Court notes that the discussion demonstrated a recognition of the fact that the board could not adopt a rights plan that would foreclose an effective proxy challenge from Yucaipa because to do so would be preclusive.[485] Thus, the board seemed to have had a well-informed discussion despite having very little time to prepare. Therefore, the pertinence of the studies stating

476 *See id.* at 322.
477 *See id.*
478 *Id.*
479 *See id.*
480 *See id.* at 322, 323.
481 *See id.* at 326.
482 *See id.*
483 *Id.* at 324.
484 *Id.* at 323.
485 *See id.*

that diverse boards are better prepared, is in question.

ii. Board Independence from Management

Ultimately the Court is "convinced that the board acted loyally, in the sense of trying to advance the best interests of the company and its public stockholders, and not those of Riggio."[486] The Court arrives at this conclusion based on the fact that the board was well-informed, and that its outside legal advisors kept them focused on their duty of ensuring that the Rights Plan is not preclusive.[487] Thus in fulfilling its duties, the quality of outside advice relied on by the board is at times more important than board members themselves having diverse perspectives.

D. In re American International Group, Inc.[488]

1. Board of Directors

This case involved the executive directors of the company AIG which had received a $170 billion bail-out package from the government in 2008.[489] The first was Mr. Maurice R. Greenberg, who was the chairman and CEO of the company.[490] The second director defendant was Mr. Howard I. Smith, who, apart from being a director, was also the chief financial officer of the company.[491] The third director defendant was Mr. Edward E. Matthews "who served on [the] board for almost thirty years and was Vice Chairman of Investments and Financial Services."[492] The fourth director defendant was Mr. Thomas R. Tizzio "who was a director and Senior Vice Chairman of General Insurance, and [was] a member of AIG's reinsurance security committee."[493]

Since the focus of this judgement was the conduct of executive directors, and not the conduct of the board as a whole,[494] it will not be relevant to look into the composition of the board. Instead, it is

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[486] *Id.* at 346.
[487] *See id.*
[488] Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763 (Del. Ch. 2009).
[489] *See id.* at 774; Edmund L. Andrews & Peter Baker, *A.I.G. Planning Huge Bonuses After $170 Billion Bailout*, N.Y. TIMES (Mar. 14, 2009) https://www.nytimes.com/2009/03/15/business/15AIG.html.
[490] *See Greenberg*, 965 A.2d at 774, 776.
[491] *See id.*
[492] *Id.*
[493] *Id.*
[494] *See id.*

relevant to note that all four of the executive directors in question are male.[495]

2. Case Brief

At issue here is a motion to dismiss, filed by defendants in response to a derivative action initially filed by stockholders of AIG, against the four director defendants, the company's auditor, PWC, and a group of defendants who were officers and employees of the company.[496] The motion to dismiss by the officers, employees and PWC was successful on procedural grounds.[497] However, the director defendants' motion to dismiss was not successful.[498] For the purpose of this study, however, it is only relevant to consider the facts and issues relating to the director defendants.

The derivative action was filed by stockholders "to recover funds to make [AIG] whole for harm it suffered when it was revealed that the corporation's financial statements were materially misleading and overstated the value of the corporation by billions of dollars."[499] Stockholder plaintiffs first brought this case in 2004 and with fewer allegations than at the time of this decision.[500] AIG's board had responded by appointing a special litigation committee (SLC) to investigate the claims.[501] The SLC took eighteen months to investigate during which the litigation was stayed.[502] "[T]he SLC chose . . . to pursue claims against Greenberg and Smith on its own, seek the dismissal of certain other defendants, and take no position on the claims against the remaining defendants."[503] As a result AIG joined the case as a plaintiff with respect to two counts and "asserts breach of fiduciary duty and indemnification claims against Greenberg and Smith."[504] In the same complaint, stockholder plaintiffs brought derivative claims against Matthews and Tizzio.[505]

495 *See id.*
496 *See id.* at 780.
497 *See id.* at 779.
498 *See id.* 777–78.
499 *Id.* at 774.
500 *See id.* at 775.
501 *See id.*
502 *See id.*
503 *Id.*
504 *Id.* at 776.
505 *See id.*

i. Allegations Against Director Defendants

The stockholder plaintiffs alleged that the false financial statements were a result of intentional misconduct on the part of AIG's top managers.[506] With respect to Greenberg, the plaintiffs alleged that "AIG embarked on widespread illegal misconduct at the direction and under the control of . . . its board of directors and [CEO]."[507] Further, Greenberg, along with the other director defendants, it is alleged, deceived investors.[508] A fraudulent reinsurance transaction ($500 million) which was an elaborate artificial transaction staged another company, Gen Re Corporation, "to make AIG's balance sheet look better."[509] In addition to this, it was alleged that, AIG insiders "caused the corporation to engage in schemes to avoid taxes[,] . . . [and] conspire[ed] with other companies to rig markets."[510] Further, plaintiffs alleged that the directors defendants even sold their "'expertise' in balance sheet manipulation" by selling "insurance policies that did not involve the actual transfer of insurable risk to other companies with the improper purpose of helping those companies report better financial results."[511] Also, AIG "created special purpose entities for other companies without observing the required accounting rules for the similarly improper purpose of helping those companies hide impaired assets that they did not want on their balance sheets."[512] When "all of these schemes were uncovered[,] . . . "[AIG] was forced to restate years of financial statements, eventually reducing stockholder equity by $3.5 billion."[513] Besides, litigation and regulatory proceedings, some of which were still on-going at the time of this case, had already cost the company over $1.6 billion in fines.[514]

ii. Legal Analysis and Decision

It was decided here that except for a small part, the claims against the director defendants would stand.[515] The small part wherein the motion to dismiss was granted was in relation to the breach of duty

506 *See id.* at 774.
507 *Id.*
508 *See id.* at 774–75.
509 *Id.* at 775.
510 *Id.*
511 *Id.*
512 *Id.*
513 *Id.*
514 *See id.*
515 *See id.* at 776.

of care claim against Tizzio, a former director, despite being protected by an exculpatory provision (as provided for by § 102(b)(5)) in the certificate of incorporation of AIG.[516] With respect to the rest of the claims, using the plaintiff-friendly lens Rule 12(b)(5), the court held that the complaint was well-pled, contrary to what the defendants argued.[517] In providing the reasoning for its decision, the court dealt with each of the claims. Below is a discussion of fiduciary duty claims.

First, the stockholder plaintiffs claimed that Matthews and Tizzio violated their fiduciary duties.[518] "Matthews and Tizzio[ ] s[ought] to have the claims against them dismissed for failure to state a claim."[519] In holding in favour of the plaintiffs, the court noted that since it was a motion to dismiss, "it [was] enough to explain why the Complaint pleads facts supporting a fair inference that both Matthews and Tizzio: (1) knew of and helped Greenberg implement a diverse array of fraudulent schemes; and (2) knew that AIG's internal controls were inadequate."[520] Matthews and Tizzio were positioned at the top of the AIG hierarchy and were within Greenberg's inner circle.[521] This gave rise to an inference that they were aware of Greenberg's schemes and illegal activities.[522]

Second, the plaintiffs made "a breach of loyalty claim against Matthews and Tizzio for knowingly tolerating inadequate internal controls and knowingly failing to monitor their subordinates' compliance with legal duties."[523] The court held in favor of the plaintiffs, stating that it was impossible for the director defendants to not "know that AIG's internal controls were inadequate and too easily bypassed," since the defendants were themselves involved in and had knowledge of much of the wrong-doing.[524] In this regard, Vice Chancellor Strine says that, "[a]lthough [he] fully recognize[d] the difficulty of pleading a breach of the duty of loyalty based on a failure to monitor, even under a Rule 12(b)(6) standard, the Stockholder Plaintiffs ha[d] done so here."[525] Further, he notes that prior cases have held that "directors can be liable where they 'consciously failed to monitor or oversee [the company's internal

[516] *See id.*
[517] *See id.*
[518] *See id.* at 794.
[519] *Id.*
[520] *Id.* at 795–96.
[521] *See id.* at 796.
[522] *See id.*
[523] *Id.* at 798–99.
[524] *Id.* at 799.
[525] *Id.*

controls] thus disabling themselves from being informed of risks or problems requiring their attention.'"[526] Thus, satisfaction of this requirement required scienter.[527] However, the court notes that the fiduciary counts against Matthews and Tizzio stand since they were "conscious of the fact that they were not doing their jobs."[528]

There was also a separate breach of fiduciary claim against Matthews and Tizzio premised on insider trading.[529] Such a claim, the court notes, "arises where '1) the corporate fiduciary possessed material, nonpublic company information; and 2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information.'"[530] At the time Matthews and Tizzio made their sales, "AIG was allegedly permeated by the frauds described [in this case], all of which, if known, would have made AIG a much less attractive investment."[531]

3. Insights About Gender Diversity

AIG being one of the main companies that went bust at the peak of the financial crisis, it is pertinent to note the oft cited quote, "[w]ould the world be in this financial mess if it had been Lehman Sisters?"[532] This sub-section explores the question in this case.

i. Management Fault

Since this case deals with the conduct of executive directors, rather than that of the entire board of directors,[533] it offers insights into the excesses that executive directors might be able to commit. Here, Greenberg, holding both CEO and board chairman positions, gave him more power.[534] The three "Inner Circle" directors, Smith, Matthews and Tizzio, were male directors.[535] Underscoring the egregious nature of their conduct, Vice Chancellor Strine noted at one

[526] *Id.* (alteration in original) (*quoting* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006)).
[527] *See Am. Int'l Group, Inc.*, 965 A.2d at 799.
[528] *Id.*
[529] *See id.* at 800.
[530] *Id.* (quoting In re Oracle Corp., 867 A.2d 904, 934 (Del. Ch. 2004)).
[531] *Am. Int'l Group, Inc.*, 965 A.2d at 800.
[532] Katrin Bennhold, *Where Would We Be if Women Ran Wall Street?*, N.Y. TIMES (Feb. 1, 2009), https://www.nytimes.com/2009/02/01/business/worldbusiness/01iht-gender.3-420354.html.
[533] *See Am. Int'l Group, Inc.*, 965 A.2d at 780.
[534] *See id.* at 780.
[535] *See id.* at 774.

point that the complaint fairly supported the assertion that AIG's inner circle led a "criminal organization."[536] He went on to say that "[t]he diversity, pervasiveness, and materiality of the alleged financial wrongdoing at AIG is extraordinary."[537]

While most gender diversity literature focuses on non-executive directors,[538] this case shows the importance of executive directors' conduct. With executive directors and the CEO, who is also the board chairman, themselves perpetrating illegal activity, whether or not the rest of the board is gender diverse is not likely to be very significant.[539] Particularly with respect to top management, a study which finds that women "stay out of trouble" i.e. avoid litigation, looks at litigation against companies that have women in top management positions.[540] It finds a negative relation between gender diversity in top management and the number of lawsuits faced by the company.[541] Since this study particularly focuses on gender diversity in top management, one can infer that women executives are less likely to be involved in illegal schemes which might increase profits in the short term, but not in the long-run, as is obvious in the case of AIG.[542]

Clearly, Greenberg and the inner circle directors were focused on increasing the value of AIG stock in the short term.[543] However, the fact that each of these men owned significant amount of the company's stock might have incentivized them to engage in such short-termism.[544] Would women with similar incentives have acted

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[536] *See id.* at 799.

[537] *Id.*

[538] *See, e.g.*, Ioanna Boulouta, *Hidden Connections: The Link Between Board Gender Diversity and Corporate Social Performance*, 113 J. BUS. ETHICS 185, 185 (2013) (studying the effect of women on boards of directors generally, not as executive directors); Kevin Campbell & Antonio Minguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435, 435 (2008) (focusing on board composition generally); Claude Francoeur et al., *Gender Diversity in Corporate Governance and Top Management and Financial Performance*, 81 J. BUS. ETHICS 83 (2008) ("focusing on whether and how the participation of women in the firm's governance and their presence among its senior management might enhance corporate performance.").

[539] *See* Justin Esarey & Gina Chirillo, *"Fairer Sex" or Purity Myth? Corruption, Gender, and Institutional Context*, 9 POL. & GENDER 361, 365 (2013) ("[W]omen will resist corruption in places where it is already culturally and institutionally stigmatized but will be no different than men where such practices are simply a normal part of doing business or are even expected.").

[540] *See* Binay K. Adhikari, et al., Do Women Stay Out of Trouble? Evidence from Corporate Litigation and Policies 1, 40 (May 2018) (unpublished manuscript).

[541] *See id.*

[542] *See id.* at 38.

[543] *See Am. Int'l Group, Inc.*, 965 A.2d at 801, 827.

[544] *See id.* at 801.

similarly? The authors of a recent study find that they are less likely to do so than male executives.[545] More specifically, they found that female executives reduce the association between firm level incentives for unethical behavior and a firm's unethical behavior.[546] Also, studies show that women tend to be more risk averse than men, and this might perhaps prevent women directors with similar incentives to engage in these illegal schemes.[547] In addition to this, risk taking is also increased when groups making decisions are suffering from groupthink.[548] In other words, the fact that all members of the group agree will make the group more confident about their decision and to perceive it as less risky than it actually is.[549] The fact that Greenberg and his inner circle were all male executives who had worked together at AIG for a long time[550] might have resulted in groupthink and hence decisions to engage in illegal conduct. Also, relevant here is a study by Guidice et al., which studied "bluffing as a form of competitive engagement" and found that "[m]en indicated more willingness to mislead their company than women."[551]

This case therefore throws light on the fact that some of the studies being used in support of board gender diversity might in fact be more relevant to executive directors than to non-executive directors.

E. In re Dollar Thrifty Shareholder Litigation[552]

1. Board Composition and Characteristics

The corporation's "board consist[ed] of six members, five of whom [were] independent.[553] Scott Thompson, the CEO, is the only non-

[545] *See* Allison Leigh Evans et al., Does Breaking the Glass Ceiling Raise the Ethical Floor? The Conditional Effects of Executive and Board Gender on Corporate Ethics 21 (2016) (unpublished manuscript), https://belkcollegeofbusiness.uncc.edu/gmarti44/wp-content/uploads/sites/1138/2016/08/Yang-Paper.pdf.

[546] *See id.*

[547] James P. Byrnes et al., *Gender Differences in Risk Taking: A Meta-Analysis*, 125 PSYCHOL. BULL. 367, 377 (1999); Paola Sapienza et al., *Gender Differences in Financial Risk Aversion and Career Choices Are Affected by Testosterone*, 106 PROC. NAT'L ACAD. SCI. U.S. 15268, 15268 (2009).

[548] Marleen A. O'Connor, *The Enron Board: The Perils of Groupthink*, 71 U. CIN. L. REV. 1233, 1270 (2003).

[549] *See id.*

[550] *See* Am. Int'l Grp., Inc. v. Greenberg, 965 A.2d 763, 774, 781, 782 (Del. Ch. 2009).

[551] *See* Rebecca M. Guidice et al., *Competitive Bluffing: An Examination of a Common Practice and Its Relationship with Performance*, 87 J. BUS. ETHICS 535, 535, 545 (2009).

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

[553] *Id.* at 578.

independent director.[554] Out of the non-executive directors, "John C. Pope, Edward C. Lumley and Thomas P. Capo (who had served as Chairman since 2003) have been on the Board since 1997, the year the company went public."[555] In addition, "Maryann N. Keller and Richard W. Neu joined the Board in 2000 and 2004 respectively."[556] Thus, as of the date of this decision (2010), each of the non-executive directors had served on the board for at least six years.[557] Apart from the period of service, the court also notes that all the directors were experienced in the automotive industry, and thus had relevant industry experience for an automotive company.[558]

From a gender diversity point of view, there was one woman director in the six-member board. In terms of the diversity discourse, the lone woman director would be labelled as a token.[559]

2. Case Brief

In this case, "plaintiffs s[ought] a preliminary injunction [to prevent the company from] consummation of a merger under a merger agreement with Hertz Global Holdings, Inc."[560] They allege that the board "fail[ed] to conduct a pre-signing auction" and entered into a "Merger Agreement that yielded only a modest premium over the closing price of [the company's] stock on the last trading day before the Merger Agreement was signed."[561] The court denied the motion.[562]

3. Facts

i. Anti-Trust Issues

At the time of this decision, Dollar Thrifty was the fourth largest rental car company in the U.S.[563] There were anti-trust issues to be considered as well since at the time the board was considering sale of

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[554] *See id.*
[555] *Id.*
[556] *Id.*
[557] *See id.*
[558] *See id.*
[559] *See id.*; Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 299 (2011) (referring to two or fewer women as tokens on a board).
[560] *In re Dollar Thrifty*, 14 A.3d at 575.
[561] *Id.*
[562] *See id.* at 619.
[563] *See id.* at 578.

the company (2009), four companies, namely: Enterprise Holdings, Inc., Avis, Hertz, and Dollar Thrifty, together accounted for over 90% of the industry's total revenue.[564] While "[b]oth Dollar Thrifty and Avis's Budget brand focus[ed] on value-conscious, leisure travelers[,] Hertz, . . . focus[ed] mainly on weekday business travelers and only recently entered the leisure market."[565]

ii. Past Merger Talks

Dollar Thrifty had been having unsuccessful merger discussions with both Hertz and Avis since 2007.[566] In 2007, Dollar Thrifty had entered into a confidentiality agreement with Hertz, but the merger eventually did not go through.[567] Similarly, merger talks with Avis broke down when Avis refused to pay a termination fee payable if anti-trust approval was not obtained.[568] In 2008, when Dollar Thrifty's stock was trading between $10-$15, it again, unsuccessfully invited both Hertz and Avis for merger discussions.[569]

iii. Dollar Thrifty's Turnaround

The CEO, Thompson, initially joined the company as the CFO at a time when its share price had tumbled from $50 to $13 within a year.[570] By the time Thompson was appointed as CEO, the company was in a dire situation with its stock price below $1 per share and on the verge of defaulting on its debts.[571] However, the company recovered under Thompson's leadership and based on Thompson's submissions, the court highlights three factors that contributed to this turnaround.[572]

"First, Thompson renegotiated the purchase agreement that Dollar Thrifty had with Chrysler . . . [which] required Dollar Thrifty to purchase over 100,000 cars per year from Chrysler, [thus] ensur[ing] that 75% of all the cars Dollar Thrifty purchased every year came from Chrysler."[573] This "hampered Dollar Thrifty's efforts to

564 *See id.*
565 *Id.* at 579.
566 *See id.*
567 *See id.*
568 *See id.* at 575.
569 *See id.* at 579.
570 *See id.* at 580.
571 *See id.*
572 *See id.*
573 *Id.*

negotiate with other car manufacturers."[574] In 2009, "Thompson took advantage of Chrysler's own economic difficulties" to eliminate this requirement.[575]

The second factor was a change in the way the company purchased cars.[576] Thompson changed the existing low-risk system to one where the company "would be exposed to the downside risk of the used-car market, but also would be in a position to take advantage if the market improved."[577] The court notes that "Dollar Thrifty's fleet of cars went from being about 60% 'risky' to about 95%. This move proved profitable."[578]

Further, "Thompson embarked on a series of cost-cutting and productivity enhancing endeavors as soon as he was appointed CEO. Thompson slashed Dollar Thrifty's workforce across all levels."[579] Knowing that lay-offs would lower morale, he slashed the workforce in "one fell swoop" rather than gradually.[580] Then, to keep morale of the remaining officers high, he changed the dress code to casual and also got the board to set aside a chunk of the company's stock that could be given to company's executives and officers to ensure that he got "their hearts, their minds and all their efforts."[581]

iv. Merger Agreement with Hertz

In the end of 2009, Hertz again contacted Thompson about a merger and despite failed talks in the past, the two companies entered into a confidentiality agreement.[582] Eventually "Hertz made a formal expression of interest to [buy] Dollar Thrifty at a price of $30 per share" in a half cash, half stock transaction.[583] Eight days after the offer was made, the board met to consider the offer on December 30, 2009.[584] At this meeting, Thompson cautioned that one of the main issues would be the certainty of closing, amongst other things, because of possible anti-trust issues.[585] The board was then advised by an anti-trust counsel from Cleary Gottlieb and based on the board

574 *Id.*
575 *Id.*
576 *See id.*
577 *Id.*
578 *Id.*
579 *Id.*
580 *See id.* at 580–81.
581 *Id.* at 581.
582 *See id.*
583 *Id.* at 584.
584 *See id.*
585 *See id.*

minutes, the court notes that the board asked questions of the counsel.[586] Another lawyer from Cleary Gottlieb then advised the board about its fiduciary duties including its Revlon duties (applicable when the company is up for sale).[587] Next, the bankers from JP Morgan and Goldman Sachs joined the meeting to advise the board about the economics of the transaction including the premium represented by the offer.[588]

The court also specifically noted that "the Board considered at the meeting whether to contact Avis and decided against it."[589] In making this decision, the board discussed that Hertz, having a smaller luxury business, would pose less of an anti-trust risk than Avis.[590] They also discussed "that Avis would have trouble financing the deal because of its bank covenants and the state of the financial markets and [the board wanted,] 'at the outset, . . . certainty of [the] transaction clos[ing,] as one of the critical criteria."[591] This is understandable as Dollar Thrifty already had had a lot of unsuccessful merger discussions in the past.[592] After the meeting, Dollar Thrifty responded to Hertz rejecting the offer, but stated that it was open to an offer in the mid-thirties per share and also stated its preference for an all cash offer.[593] Apart from this, Thompson also conveyed Dollar Thrifty's need for certainty of the transaction closing by "stat[ing] that Dollar Thrifty 'will require as a condition to proceeding with further discussions, confirmation that Hertz will bear the burden of any and all conditions imposed by any regulatory agency . . . .'"[594] This was followed by meetings between the financial advisors of the two companies and between the senior management of both companies.[595]

On January 25, 2010, Hertz made a revised offer of $35 per share to be paid 60% in cash and 40% in stock.[596] They also "responded to Dollar Thrifty's antitrust concerns by offering that it was 'prepared to use [its] reasonable best efforts to obtain regulatory clearance . . . including, if necessary, divesting assets. . . .'"[597] The board met on

[586] *See id.*
[587] *See id.*
[588] *See id.*
[589] *Id.*
[590] *See id.*
[591] *Id.*
[592] *See id.* at 576, 581.
[593] *See id.* at 584.
[594] *Id.*
[595] *See id.* at 585.
[596] *See id.*
[597] *See id.* (alteration in original).

January 27 to consider the revised offer.[598] The bankers gave a positive assessment about the economics of the offer.[599] In turn, Dollar Thrifty's board inquired whether to contact Avis, taking into consideration Avis's ability, in comparison to Hertz's, to close the deal.[600] "The [b]oard, for instance, discussed that because of Avis's financial condition, the consideration in an offer from Avis would need to be largely in Avis stock which would trigger provisions of the New York Stock Exchange Rules and require an Avis shareholder vote and that there was somewhat greater antitrust risk in an Avis deal."[601] Following this discussion, "the Board [decided] not to accept [the] offer but authorized Thompson to execute a 45-day exclusivity agreement with Hertz and requested that management update the Board at least every two weeks on the progress of talks."[602] The exclusivity agreement was then entered into on February 3, 2010, and senior management of the two companies met on February 10 and 11 to work out the specifics of the deal.[603]

Following this, Thompson emailed the board on February 12 with the update "that Hertz appeared serious about getting a deal done but that there was 'no news on the anti trust [sic] front.'"[604] Also, on February 12, the Dollar Thrifty lawyers sent a draft merger agreement to Hertz's lawyers who then sent back revisions which Thomson was not happy with.[605] Amongst other things, it did not have a reverse termination fee payable by Hertz but on the contrary had a termination fee payable by Dollar Thrifty if it signed another deal within a year.[606] The board met on March 5 and the advisors outlined the problems with the proposed agreement.[607] Based on this, the board decided that the data room (for due diligence) be closed and instructed Thompson to "re-emphasize the minimum risk allocation requirements of [Dollar Thrifty]" to Hertz.[608]

To address some of the concerns communicated by Dollar Thrifty, on March 12, Hertz sent another draft of the merger agreement with an attached memorandum outlining Hertz' obligations with respect

598 *See id.*
599 *See id.*
600 *See id.*
601 *Id.*
602 *Id.*
603 *See id.*
604 *Id.*
605 *See id.* at 585–86.
606 *See id.* at 586.
607 *See id.*
608 *Id.* (alteration in original).

to the anti-trust issues.[609] "The next day, Thompson [updated] the Board [via email,] relaying that a new draft merger agreement had been received [stating] that the 'way over the top' parts had been taken out" of the agreement.[610] However, despite management noting that the agreement was "worth discussing," Thompson expressed concern that the agreement was nevertheless unacceptable.[611] "Additionally, Thompson told the Board that [the] data room would remain closed until the March 24 board meeting."[612] In the meantime, the lawyers of both companies continued to work on revisions to the agreement and Thompson updated the board saying that the discussions were "'moving forward' but that price was going to be a 'big issue.'"[613]

By the time the board met next, on March 24 and 25, the exclusivity agreement with Hertz had expired and there was a revised, and more viable, agreement to consider.[614] During the board meeting, Cleary Gottlieb again outlined the board's fiduciary duties and specifically addressed the "manner in which [the risk of] non-consummation of a transaction should be considered as part of any Revlon analysis."[615] Next, the financial advisors reviewed the economics of the transaction.[616] After this, "[t]he Board also again considered the [idea] of making an overture to Avis [since the company] was no longer constrained by the exclusivity agreement" with Hertz.[617] In fact, in his testimony, Capo, one of the directors, said, "as we moved through the process we were always asking the question, 'Is there anybody else out there?'"[618]With regard to this, Thompson expressed his concern about whether "creat[ing] an auction instead of dealing with Hertz alone posed real risks that no deal would get done with either potential buyer."[619] In this regard, both financial advisors expressed doubts about Avis being able to arrange the requisite finances "for a cash bid given the state of the credit markets and Avis's current leverage profile."[620] Cleary, Gottlieb further added, Avis would need its shareholders to approve the deal if it used more

609 *See id.*
610 *Id.*
611 *Id.*
612 *Id.*
613 *Id.*
614 *See id.* at 586–87.
615 *Id.* at 587 (alteration in original).
616 *See id.*
617 *Id.*
618 *Id.* at 587 n.93.
619 *Id.* at 587.
620 *Id.*

equity-based consideration.[621] These discussions were oral and not from an official presentation.[622] This discussion then sparked a conversation about what sort of deal protections would be necessary if the board did in fact approach Avis.[623] Despite this discussion, the board considered whether a deal with Hertz would "chill a topping bid from Avis."[624] One of the directors, Pope, thus asked the lawyers to address this issue.[625] Another director, "Capo, [was of the opinion that] the best strategy was to 'get a fair deal with Hertz' but 'at all times leav[e] ourselves, within the contract, the ability to evaluate any superior offer that may come in.'"[626]

Next, "the Board's independent directors met alone for almost an hour . . . discuss[ing] the need to be on the lookout for any risk that management might be 'starting to favor one thing versus another, or management falling in love with the transaction or one of those things.'"[627] In this regard, Pope testified that "[t]he independent directors made a point of talking without management at every board meeting."[628] At the end of this meeting, the board decided to continue negotiations with Hertz and also decided not to reach out to Avis.[629] In order to extend the due diligence period and allow negotiations with Hertz to resume, the board permitted Thompson to reopen the data room.[630]

However, negotiations with Hertz broke down after Dollar Thrifty pushed for a consideration of $45.[631] Hertz sent a letter stating that they were still interested but that the price was too high.[632] Thompson's response was to email the advisors and board of directors expressing his opinion "that the [best] response was 'no response hard dark and just drive on.'"[633] He also asked the advisors to stand down and called for a quick board meeting.[634] The last line of his email stated that "[w]e will close a deal with next [Hertz] CEO or [Avis]."[635] The court particularly notes this last sentence to infer that

621 *See id.*
622 *See id.* at 587 n.95.
623 *See id.* at 587.
624 *Id.*
625 *See id.*
626 *Id.* (alteration in original).
627 *Id.* at 587–88.
628 *Id.* at 587 n.99.
629 *See id.* at 588.
630 *See id.*
631 *See id.*
632 *See id.*
633 *Id.*
634 *See id.*
635 *Id.* (alteration in original).

even at this point, Thompson "was [prepared] to continue as an independent company and negotiate [with either Hertz and Avis to close a deal] somewhere down the road."[636] This is contrary to the plaintiff's claim that the deal was rigged from the start.[637] The board meeting however did not happen as the two CEOs met to again negotiate the price.[638] Thompson asked for anything over $40 and the Hertz CEO was only prepared to offer $38, causing negotiations to again break down.[639]

At this point, Avis reached out to Thompson through JP Morgan but there seems to be confusion about whether the enquiry was about the company or Thompson personally.[640] The JP Morgan representatives seemed to perceive that this was about Thompson rather than the company, since the Avis CEO, Nelson, seemed to be asking about Thompson's career history.[641] Ultimately, when they agreed to meet for dinner, it was not clear to Thompson whether the meeting was to discuss a possible merger or a possible job offer for himself.[642] He assumed the latter after questioning the JP Morgan Representatives.[643]

Ultimately, on April 21, 2010, Hertz made a new offer which included a consideration of $40 per share, with an 80% cash, 20% stock consideration mix; termination and reverse termination fee at 3.5% each; and an antitrust divestiture threshold set at $100 million.[644] However, this offer was conditioned on the merger agreement being entered into before Hertz could announce its quarterly results on April 26.[645] The board met on April 22 to discuss how to proceed.[646] At this meeting, after the financial advisors presented on the economics of the offer, the board considered the question whether Hertz would really walk away if they did not sign by April 26 and concluded, based on the advisors' opinion, that it would and "that the deal was still worth doing."[647] Further, the financial advisors advised the board that an offer exceeding $40 per

636 *Id.* at 588–89.
637 *See id.* at 588.
638 *See id.* at 589.
639 *See id.*
640 *See id.* at 589.
641 *See id.* at 589–90.
642 *See id.* at 590–91.
643 *See id.* at 591.
644 *See id.*
645 *See id.*
646 *See id.*
647 *Id.* at 591–92.

share was unlikely.[648] Based on this, the board decided that the time was right to go ahead with the merger.[649] Taking advantage of Hertz' eagerness to close before April 26, Thompson "negotiate[d] the price to $41 per share and to secure an additional $75 million in antitrust divestiture commitments from Hertz."[650]

In the final board meeting before signing, held on April 25, the board considered the final agreement.[651] At this meeting "the Board again received [advice] as to its fiduciary duties from Cleary Gottlieb . . . [and also] received presentations from its financial advisors" about the fairness of the price for shareholders.[652] In addition to this the board also received advice about anti-trust risk and Hertz's commitments in this regard; and about not precluding Avis "from making an offer because of the agreement with Hertz."[653] The agreement was then signed on April 25, 2010.[654]

Apart from the terms already mentioned, "the Merger Agreement contain[ed] a 'no-shop' provision, [which] prevent[ed] Dollar Thrifty from affirmatively soliciting higher bids."[655] The merger agreement however also contained a fiduciary out which allowed the board "to share confidential information with another bidder if the bidder has made a proposal that the Board determines is reasonably likely to lead to a superior offer than Hertz's."[656] Also, if another bidder made a superior offer, then Hertz was given a chance to match that offer, such that failing to do so permitted Dollar Thrifty to take the superior offer.[657]

v. Offer from Avis

After signing the merger agreement, Thompson cancelled the dinner with Nelson which was only three days away because of the no-shop provision and also because he felt it would be inappropriate to discuss a possible job offer (which is what he thought the meeting was about) immediately after signing a merger agreement with Hertz.[658] However, on May 3, Nelson wrote to both Thompson and

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[648] *See id.* at 592.
[649] *See id.*
[650] *Id.*
[651] *See id.*
[652] *Id.*
[653] *Id.*
[654] *See id.*
[655] *Id.* at 593.
[656] *Id.*
[657] *See id.*
[658] *See id.*

Capo expressing surprise regarding the merger agreement; "and announcing Avis's intention to make a 'substantially higher offer to acquire Dollar Thrifty.'"[659] Nelson's letter also stated that he was confused about the transaction since he had expressed interest in Dollar Thrifty earlier.[660] However, as discussed earlier, the court found no evidence to show that Nelson had made his intentions clear earlier.[661]

On the other hand, since Nelson's letter clearly indicated interest, the board convened telephonically to discuss the same.[662] In the meeting Cleary Gottlieb "discussed the requirements for a 'superior proposal' under the Merger Agreement with Hertz, whether Avis would be capable of making such a proposal, and the board's *Revlon* duties in this context."[663] The board unanimously concluded that Avis was capable of making a superior offer and instructed Cleary Gottlieb to draw up a notice informing Hertz about the offer.[664] It was also decided that Avis would be allowed to start due diligence after signing a confidentiality agreement.[665] Avis finally made an offer to acquire Dollar Thrifty on July 28, 2010, at a price of $46.50 per share.[666] However, in order to go through with this offer, Avis was required to get consent from its lenders.[667] Also, "[the] offer contained[] a commitment to divest assets generating up to $325 million in revenue to obtain antitrust approval."[668] However, the agreement did not contain any financing contingency, termination fee, reverse termination fee, or matching rights.[669] Based on this, Thompson sent Nelson a formal letter on August 3, stating "that the board could not [consider] Avis's offer 'superior' to Hertz's but gave Avis a guide to how to cure the deficiency."[670] In order to be considered superior, Thompson pointed out that the deal had to be "'reasonably expected to be consummated on a timely basis,'" and the board was unable to establish this because there was no reverse termination fee and because of the anti-trust concerns.[671]

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659 *Id.*
660 *See id.*
661 *See id.*
662 *See id.* at 594.
663 *Id.*
664 *See id.*
665 *See id.*
666 *See id.*
667 *See id.*
668 *Id.*
669 *See id.*
670 *Id.*
671 *Id.*

3. Legal Analysis

The class action complaint that was being decided in this case, was filed on May 5, 2010, i.e. after Avis' letter reacting to the merger but much before Avis' July 28 bid.[672] "The allegations in the complaint, therefore, focus on the conduct of the Board in negotiating the transaction with Hertz;" and not on the board's refusal of Avis' proposal.[673] More specifically, the plaintiffs allege that the board "fail[ed] to take affirmative steps to draw Avis into a bidding contest with Hertz *before* signing up [the] definitive merger agreement with Hertz" and by doing so, they breached their Revlon duties.[674] In support of this, "the plaintiffs [first] contend that the Board should not have been so easily cowed by the fear that Hertz would walk away from sale discussions" because Dollar Thrifty was one of the last roll-up opportunities in the rental car business and because its stock had risen in the recent past.[675]

In conducting its legal analysis, the court explained that under the Revlon standard of review, it had to assure itself that the board acted reasonably and this involved consideration of two steps: (i) whether the board acted for proper ends and (ii) "whether its means were themselves a reasonable way of advancing those ends."[676] With regard to first step, the court concluded that the evidence did not show any basis to infer that the board did not serve the interests of the shareholders.[677] It notes that at various stages, the board and its advisors considered involving Avis but concluded, each time, "that the risks of doing so outweighed the possible benefits."[678]

Regarding the second step, which requires the court to determine if the board diligently attended to its duties, the court again finds in favor of the board.[679] In coming to this conclusion, the court observes the close involvement of the board in all decisions about handling negotiations with Hertz and about "whether to try to bring Avis into the process."[680] The court also observes, with approval, that the "testimony of the independent directors reflects their deep involvement [in the process] and their substantial experience in

672 *See id.*
673 *Id.* at 594–95.
674 *Id.* at 596 (emphasis in original).
675 *Id.*
676 *Id.* at 599–600.
677 *See id.* at 600, 602.
678 *Id.* at 602.
679 *See id.*
680 *Id.*

finance and business, . . . knowledge of the company, the industry, and the benefits and risks [of] different approaches."[681]

Addressing specific questions, the court first looked at "the Board's decision not to stimulate an immediate auction" of the company when negotiations with Hertz began.[682] It notes that in answering this question, the board makes citations to its actual deliberative process where they considered the risks of inviting Avis to the process.[683] The range of things considered by the board in this regard includes Dollar Thrifty's past experience with both potential buyers, the risk of Hertz walking away, the financial capabilities of Avis, anti-trust issues in which would come up with Avis, and possibility of upsetting employee morale in case of a public sales process.[684]

Next, the court addressed the plaintiff's contention that the board had another chance to invite Avis into the process before finalizing the deal with Hertz, by attending the scheduled dinner meeting with Nelson (CEO of Avis).[685] Based on the evidence, however, the court notes that it was unclear that the dinner might have been about a potential merger.[686] Here, the court's observation that Thompson kept the board, Capo, the Chairman, informed throughout the negotiation process, was significant.[687] Thus, the board and financial advisors were aware of Nelson's scheduled dinner with Thompson, yet it did not change the board's mind since Nelson had not clarified that he wanted to meet regarding a possible merger.[688] Because of the vague invitation by Avis, Avis' financial situation, and the possibility that the dinner was about a possible job offer for Thompson, Thompson's decision not to meet with Nelson was reasonable, according to the court.[689]

The final question the court addressed was the board's decision to enter into the merger agreement with Hertz and the terms of the agreement.[690] Plaintiffs contended that the board's decision to enter into the merger agreement with Hertz was unreasonable because at the time, Dollar Thrifty's stock price was on the rise.[691] Further, they

681 *Id.*
682 *Id.* at 602–03.
683 *See id.* at 603.
684 *See id.*
685 *See id.* at 605.
686 *See id.*
687 *See id.* at 606.
688 *See id.*
689 *See id.* at 607.
690 *See id.* at 608.
691 *See id.*

contended that the deal protection provisions were so onerous that they prevented an effective post-signing market check.[692] The court notes that it must determine whether the board's actions were reasonable and not whether it could have pursued another course.[693] The court held that the board acted reasonably in entering into the merger agreement based on factors including prior negotiations in which Hertz had walked away; and extensive negotiations about price on the part of Dollar Thrifty including the final time when it got Hertz to raise the price to $41 in exchange for signing the agreement before Hertz quarterly results were announced.[694] Significantly, in making this determination, the court observed that the board was well informed about the company's prospects and had considered its fundamental value rather than merely be guided by the current market price.[695] With respect to the deal protection provisions, the court notes that a termination fee is preclusive insofar as it prevents topping bids; but the fact that Avis made a topping bid is evidence of the fact that it was not preclusive.[696] Significantly, the board had considered whether the deal protection provisions would deter a serious topping bidder from emerging, and the court makes note of this.[697]

The plaintiffs prayed for a motion for preliminary injunction.[698] Based on its legal analysis, the court did not grant the injunction because it determined that the plaintiffs had not demonstrated a likelihood of success on merits; and because the risks of an injunction in this case would outweigh the benefits to shareholders.[699]

4. Insights About Gender Diversity

The Dollar Thrifty board just has one women director, out of six directors.[700] However, the court has approvingly noted the functioning of the board at many instances in this judgement.[701]

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692 *See id.*
693 *See id.*
694 *See id.* at 608–09, 610.
695 *See id.* at 611, 612.
696 *See id.* at 613, 614, 615.
697 *See id.* at 614.
698 *See id.* at 575.
699 *See id.* at 616–17, 618, 619.
700 *See id.* at 578.
701 *See id.* at 577, 578, 611, 617; *id.* at 576 ("[T]he record reveals that the Dollar Thrifty Board, and its CEO Scott Thompson, has managed Dollar Thrifty successfully through a financial crisis that saw the company on the brink of insolvency and improved its performance to the point where the company was profitable and receiving plaudits from the stock market."); *id.* at 605 ("[T]he Board engaged in a reasoned consideration of the relevant factors and selected

i. Management Fault (or Absence of Fault)

The focus on the role of the CEO in this case also allows some interesting insights about executive directors. Here, in discussing the turn-around of the company, the court focuses on the CEO's role rather than on that of the board.[702] The board's approval was required for certain issues like issuing stock to employees, but largely, Thompson made decisions about overhauling the business of the company.[703] This is significant because the gender diversity research has largely tended to focus on non-executive directors and their effect on firm performance and ignored executive directors.[704]

The next issue relevant to note is that Thompson was a male CEO. Literature suggests that women CEOs tend to face a "glass cliff," inasmuch as they are usually appointed as CEOs only when the company is in crisis and a change of perspective is required.[705] Here, Thompson was appointed from within the company when the Dollar Thrifty was in dire straits.[706] However, his actions to overhaul the company did reflect a fresh perspective. He renegotiated a purchase agreement that the company had been a party to since a long time, thus displaying a "fresh perspective".[707] Next, he changed the way in which the company purchased cars to a riskier system which proved to be profitable.[708] Thus, while a lot of the gender diversity research stresses that women are less likely to take risks, and risk is seen as a bad thing in the post-crisis era,[709] a lot of business decisions do

a reasonable course of action.").

[702] *See id.* at 580 ("Under Thompson's leadership, Dollar Thrifty has performed a skillful economic u-turn.").

[703] *See id.* ("Thompson renegotiated the purchase agreement that Dollar Thrifty had with Chrysler[,] . . . changed the way that Dollar Thrifty purchased cars. . . [and] embarked on a series of cost-cutting and productivity enhancing endeavors as soon as he was appointed CEO."); *see also id.* at 581 ("Thompson got the Board to set aside a large piece of the company's equity—approximately 10%—to be used for stock options that the company could give to the officers and executives.").

[704] *See generally* Adams & Ferreira, *supra* note 42, at 291 (focusing on female directors generally); Gul et al., *supra* note 127, at 314 (focusing on gender diverse boards as a whole).

[705] *See* Karen Higginbottom, *Women More Likely Than Men to Lead in Times of Crisis*, FORBES (July 21, 2016) https://www.forbes.com/sites/karenhigginbottom/2016/07/21/women-more-likely-than-men-to-lead-in-times-of-crisis/#36a12ee6d8e. *See also* Alison Cook & Christy Glass, *Above the Glass Ceiling: When are Women and Racial/Ethnic Minorities Promoted to CEO?*, 35 STRATEGIC MGMT. J. 1080, 1081 (2014) ("Glass cliff theory predicts that occupational minorities are more likely to be promoted to leadership positions in organizations that are struggling, in crisis, or at risk to fail . . . .").

[706] *See Dollar Thrifty*, 14 A.3d at 580.

[707] *See id.*

[708] *See id.*

[709] *See* Sapienza et al., *supra* note 547, at 15268.; Barry B. Burr, *New Risk Management Tools for a Post-Financial Crisis Era*, PENSIONS & INVESTMENTS (May 13, 2013),

involve some risk and, in this case, the risk-taking, helped turn-around the company.[710]

Next, Thompson slashed Dollar Thrifty's workforce across all levels, but still ensured that employee morale was not affected by issuing stock options to officers and also by changing the dress code to casual.[711] Thus, it is apparent that he was conscious of keeping employee morale high. This is significant because studies have suggested that one of the benefits of women directors is that they would be more concerned about the interests of employees.[712] However, executive directors of any gender have to be mindful of employee interests in order to ensure that the company performs optimally.[713]

ii. Board Independence of Management

When Hertz contacted Dollar Thrifty about a possible merger in 2009, before rejecting the offer, the board considered a range of issues.[714] After being advised by Thompson that the main issues were the certainty of closing and anti-trust issues, the board asked further questions of the counsel.[715] While the board was advised about its Revlon duties by legal counsel and about valuation by financial advisors, the board also considered other issues such as whether Avis was to be contacted and whether it might be able to secure financing.[716] Thus from the very start, board discussions have been thorough with all possibilities being considered, before making decisions. Capo's testimony about the board asking whether there might be another potential buyer out there, throughout the process, shows that the board was always open to this possibility.[717] At one point, they even considered the consequences of creating an auction, but both financial advisors expressed doubts about Avis's ability to arrange finance for a cash bid.[718] The court notes, based on testimony

http://www.pionline.com/article/20130513/PRINT/305139969/new-risk-management-tools-for-a-post-financial-crisis-era.

[710] *See Dollar Thrifty*, 14 A.3d at 580.

[711] *See id.* at 580–81.

[712] *See* Thomas Kaspereit et al., *Board Gender Diversity and Dimensions of Corporate Social Responsibility*, 6 J. MGMT. & SUSTAINABILITY 50, 51, 62 (2016); Siri Tejesen et al., *Women Directors on Corporate Boards a Review and Research Agenda*, 17 CORP. GOVERNANCE: AN INT'L R. 320, 329 (2009).

[713] *See* Konrad et al., *supra* note 31, at 157.

[714] *See Dollar Thrifty*, 14 A.3d at 584.

[715] *See id.*

[716] *See id.*

[717] *See id.* at 587 n.93.

[718] *See id.* at 587.

before it, that this discussion was spontaneous and not from a presentation, and this tells us that the board was discussing the issue actively and not just going through the motions of hearing out the management and external advisors' presentations.[719]

Further, the Dollar Thrifty board asked Thompson to update the board, which he did, at least every two weeks, after authorizing him to sign an exclusivity agreement with Hertz.[720] Thus, despite Thompson being what might be termed a powerful CEO, after turning around the company, the board is able to actively oversee negotiations during the merger process.[721] Even at the final stage, i.e. during the March 24 and 25 board meetings, the board was alive to any possible management interests that might not align with shareholders.[722] Therefore, the independent directors met separately for an hour, discussing "the need to be on the lookout for any risk that management might be 'starting to favor one thing versus another, or management falling in love with the transaction or one of those things.'"[723] Further, the board had kept itself well-informed throughout the process and the court states, with approval, that the testimony of the independent directors showed their deep involvement in the process and also reflected their substantial experience in finance and business, knowledge of the company, the industry, and the benefits and risks of the different approaches.[724] It is significant to note that independent directors, irrespective of gender, might be able exercise their independent judgement if they meet separately, i.e. without management, as and when required.[725]

What is also significant here is the importance given by the board to ensure that the company did not take on the risky end of a merger transaction in terms of termination fee.[726] Literature suggests that gender diverse boards are less over-confident and hence, less likely to take risky decisions.[727] In this case, the board is very conscious of the risks involved despite having only one woman member on the board.

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[719] *See id.* at n.95.
[720] *See id.* at 585.
[721] *See id.* at 602.
[722] *See id.* at 587.
[723] *Id.* at 587–88.
[724] *See id.* at 602.
[725] *See* Wells M. Engledow, *Structuring Corporate Board Action to Meet the Ever-Decreasing Scope of Revlon Duties*, 63 ALB. L. REV. 505, 530 (1999).
[726] *See Dollar Thrifty*, 14 A.3d at 578.
[727] *See, e.g.*, Maurice Levi et al., *Director Gender and Mergers and Acquisition*, 28 J. CORP. FIN. 185, 186 (2014).

iii. Qualifications

It is also interesting that the court refers to the independent directors' experience in finance and business while noting that their testimony reflected their knowledge of the company and industry and their ability to assess the risks and benefits of different courses of action.[728] While the law does not specify any formal qualifications for directors, the gender diversity literature has advocated that women directors bring different qualifications and experience to the board room, and that this would be beneficial to the company.[729] This does not seem to be consistent with the court's view.

F. In re Massey Energy Company[730]

1. Board of Directors

This case was decided in 2011 and the board, as of 2010, consisted of Robert H. Foglesong, Bobby R. Inman, James B. Crawford, Robert B. Holland III, Stanley C. Suboleski, Linda J. Welty, Richard M. Gabrys, Dan R. Moore and Baxter F. Phillips.[731] However, trouble had been brewing in the company from much before 2010 with the company being investigated by the Mining Safety and Health Administration (MSHA) for violating federal safety regulations; and the FBI investigated a fire at one of the company's mines.[732] It is relevant, therefore, to look at the board composition a little earlier. As of 2008 the board consisted of nine directors.[733] The table below reflects the changes effected to the 2008 board by 2010.

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[728] *See Dollar Thrifty*, 14 A.3d at 602.

[729] *See, e.g.*, Daehyun Kim & Laura T. Starks, *Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?*,106 AM. ECON. REV.: PAPERS & PROCEEDINGS 267, 269, 270 (2016). They find that the least reported skills on the board are research and development, human resources, risk management, sustainability, and political/government. *Id.* at 269. The study further finds that four of these five areas of expertise are more likely to be found in female directors than in male directors. *Id.*

[730] *See In re* Massey Energy Co. Derivative & Class Action Litig., C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83 (Del. Ch. May 31, 2011).

[731] *See id.*; MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K) 1–4 (Apr. 19, 2011), http://www.getfilings.com/sec-filings/110419/MASSEY-ENERGY-CO_10-K.A.

[732] *See Massey*, 2011 Del. Ch. LEXIS 83, at *18.

[733] *See* MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), at II-13 (August 5, 2008), https://www.sec.gov/Archives/edgar/data/37748/000119312508166495/ds3asr.htm filings/37748/0000037748-09-000005.htm#fullReport?utm_source=last 10k&utm_medium=PDF&utm_campaign=share&utm_term=3774.

Sl. No.	2008	2010
1.	Don L. Blankenship (CEO)[734]	Baxter F. Phillips (CEO since December 2010)[735]
2.	James B. Crawford[736]	James B. Crawford[737]
3.	Robert H. Foglesong[738]	Robert H. Foglesong[739]
4.	Richard M. Gabrys[740]	Richard M. Gabrys[741]
5.	E. Gordon Gee[742]	Dan R. Moore[743]
6.	Bobby R. Inman[744]	Bobby R. Inman[745]
7.	Lady Judge (Female director)[746]	Linda J. Welty (Female director)[747]
8.	Baxter F. Phillips (executive director)[748]	Robert B. Holland III[749]
9.	Stanley C. Suboleski[750]	Stanley C. Suboleski[751]

Thus, in 2008, there were two executive directors and seven independent directors in the nine-member board. In 2010, after Blankenship's resignation, the board consisted of eight independent directors and one executive director, who was the newly appointed CEO.[752] From a gender diversity perspective, the board consisted of one female director in a nine-member board both in 2008 and in 2010.

Bobby R. Inman was the lead independent director and is seen to have taken an active role in the company over the years, as is apparent from this decision.[753] Vice Chancellor Strine particularly mentions in the course of the judgment that "Inman had a distinguished career in the United States Navy and the CIA that

[734] *See id.*
[735] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 4, 63.
[736] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[737] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[738] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[739] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[740] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[741] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[742] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[743] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[744] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[745] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[746] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[747] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[748] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[749] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[750] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733 at II-13.
[751] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731 at 63.
[752] *See id.*
[753] *See In re* Massey Energy Co. Derivative & Class Action Litig., C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *37–38 (Del. Ch. May 31, 2011).

imbued him with a belief system about how organizations should deal with crises."[754]

2. Case Brief

In this case, stockholders of Massey Energy Co. have sought a preliminary injunction to enjoin the proposed merger with Alpha because the board of Massey did not negotiate to transfer pending derivative claims "into a litigation trust for the exclusive benefit of Massey stockholders."[755] These derivative claims refer to a pending derivative action against the Massey board.[756] The court held that sufficient grounds had not been established for a preliminary injunction to be granted.[757] In deciding this case, the court also comments on the merits of the derivative claims, based on the facts on record.[758] This is significant with respect to the current discussion on board functioning and board gender diversity.

3. Relevant Facts

i. Derivative Claims

A description of the facts that led to the filing of the derivative action is useful to understand the derivative claims. The facts largely involve CEO, Blankenship's disregard for federal safety regulations.[759] Blankenship was the CEO of Massey from a period of ten years (November 2000 to December 2010) and was a "high profile and dominant CEO" who "was Massey's public face and . . . regularly sought (or was found by) the public spotlight."[760] "[A] key subordinate described . . . Blankenship's [leadership as an] 'autocratic' management style."[761]

Blankenship had "an adversarial relationship with the United Mine Workers of America" and according to Vice Chancellor Strine, this "anti-union position also colored his approach to safety at [the company's] coal mines."[762] Blankenship believed "that governmental safety regulators were overly nit-picking when [they] inspect[ed] non-

[754] *Id.* at *34.
[755] *Id.* at *5.
[756] *See id.* at *5–6.
[757] *See id.* at *8, *12.
[758] *See id.* at *10–11.
[759] *See id.* at *15–16.
[760] *Id.* at *14–15.
[761] *Id.* at *15.
[762] *Id.*

union mines like Massey's" which has de-unionized in 1984.[763] Blankenship had been very public about his views and had even issued an internal memorandum which asked employees to ignore any instructions from supervisors or anyone else about anything, apart from running coal.[764] Despite a clarification being issued to the effect that the memorandum was not advocating profits over safety,[765] the court notes that it was rational for managers and employees to believe that the priority of profits over safety was not to be questioned.[766] The court even cites the case of a former employee who was fired for reporting unaddressed mine safety violations to the MHSA.[767] Further, Massey had plead guilty in 2008 to criminal charges in relation to mine safety violations that had caused a fire and death.[768] Additionally, the company had paid a huge settlement in relation to a suit brought by the Environment Protection Agency in 2008.[769] A prior derivative action had also been settled in 2008 as a result of which the board had set up a committee (Safety and Environmental Committee) that was required to give quarterly reports and safety updates to the board with respect to "compliance with all applicable mine safety laws and regulations."[770]

Although this was not the issue being decided in this case, Vice Chancellor Strine notes that the board "did not direct any of its motion at him [Blankenship] or other members of Massey's top management, opting instead to leave Blankenship at the helm."[771] On the contrary, the lead independent director, Inman, agreed with "Blankenship's assessment of the MSHA as being pro-union and acutely focused on Massey's non-union mines."[772] As Vice Chancellor Strine notes, "when a company has strong opinions about knowing better than the regulators, it is optimal to match that with a record of worker safety and environmental protection that is substantively spotless."[773] But this was not the case at Massey.

The derivative lawsuit being currently discussed by the court was in relation to a "2010 . . . explosion at [Massey's] Upper Big Branch

763 *Id.*
764 *See id.* at *15–16.
765 *See id.* at *17.
766 *See id.*
767 *See id.*
768 *See id.* at *18.
769 *See id.* at *18–19.
770 *Id.* at *19.
771 *Id.* at *20.
772 *Id.* at *22.
773 *Id.* at *17.

mine claim[ing] the lives of 29 miners[;] America's deadliest mining accident in forty years."[774] An investigative report commissioned with respect to this, the McAteer Report, concluded that the explosion was "prevent[able]" and "was caused by the failure of at least three 'basic safety systems identified and codified to protect the lives of miners.'"[775] In addition to this, the report concluded that it was "'common knowledge' to those who regularly worked in the mine" that there were "'chronic' ventilation problems" at the particular mine.[776] The report cites an instance of a foreman telling his supervisor about malfunctions with the ventilation system but he was told, "not to worry about it."[777] Further, the report found inadequate rock dusting practices at Massey.[778]

Since the derivative action is directed against Massey's board and top management, it is significant that the McAteer Report concluded that Massey's senior management, particularly Blankenship, was the source of the Upper Big Branch Mine's failure to meet mandated safety standards.[779] Calling it a cautionary tale of "hubris," the report states that Massey "operated its mines in a . . . reckless manner, and [that the] 29 coal miners paid with their lives for the corporate risk-taking."[780] The derivative action was filed in the weeks following the explosion (August 16, 2010) and alleged that the "directors and officers of Massey breached their fiduciary duties during the period from May 21, 2008 to [2010] by . . . disregarding mining safety regulations and . . . failing to adequately address poor safety conditions."[781]

> In response to the[se] derivative [claims] . . . the Board created an "[a]dvisory [c]ommittee" [consisting] of two . . . independent directors appointed the same day, Linda J. Welty and Robert B. Holland III, charged with making recommendations to the full Board regarding . . . whether Massey should pursue the Derivative Claims and . . . whether Massey should undertake any changes in "management, operations, practice and/or polices."[782]

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[774] *Id.* at *22–23.
[775] *Id.* at *23.
[776] *Id.* at *24.
[777] *Id.*
[778] *See id.* at *25.
[779] *Id.* at *26–27.
[780] *Id.* at *27–28.
[781] *Id.* at *28–29, *33.
[782] *Id.* at *32–33.

The committee retained Weil, Gotshal and Manges LLP as outside counsel and commenced work.[783]

ii. Merger Negotiations with Alpha Under Blankenship

After the explosion at Upper Big Branch, Massey's stock price had dropped drastically and Alpha Natural Resources, Inc. approached Massey with a possible combination proposal.[784] The two companies had talked about a similar proposal in 2006, but talks had ceased.[785] Vice Chancellor Strine noted in this regard that he "sens[ed] from the record that Blankenship had no desire to do a deal with Alpha or anyone else that resulted in him not being CEO of the resulting entity."[786] Even in responding to the 2010 proposal, Blankenship's response "was not warm," and he made clear to the Alpha board chairman (Quillen) "that a combination was not in the Massey stockholders' best interests [because of the] depressed stock price" and because he "believed the valuation metrics used by Wall Street did not . . . take into account Massey's extensive coal reserves."[787] However, he said he would convey the proposal to the board.[788]

Blankenship advised Inman and Dan R. Moore about Quillen's proposal, after which the board met on May 3, 2010, to discuss the proposal.[789] The board agreed with Blankenship's assessment that the combination was not in the best interests of the stockholders.[790] Despite this, "Alpha sent . . . a non-binding proposal on August 11, 2010 to acquire all of Massey's outstanding stock in an all stock merger that would have offered . . . a 20% premium" to stockholders.[791] The board considered this proposal at its next meeting "at which . . . Massey's outside legal and financial advisors were present."[792] Again, "[t]he [b]oard concluded that the Alpha proposal offered inadequate value and Blankenship informed Alpha [about the decision]" but also indicated that Massey was interested in considering other proposals "on more favorable terms and upon a

783 *See id.* at *33.
784 *See id.* at *29.
785 *See id.* at *30.
786 *Id.*
787 *Id.* at *31.
788 *See id.*
789 *See id.*
790 *See id.*
791 *Id.*
792 *Id.* at *32.

consideration of 'other factors.'"[793] When Alpha's CEO asked "what those 'other factors' might be, Blankenship responded that '[it] . . . convey[ed] the principle that any proposed combination of our two companies would be evaluated as a total package, and nothing more.'"[794]

Alpha then made another non-binding proposal with a higher offer price, representing a 26% premium.[795] Although discussion continued between the two companies, the Massey board "eventually concluded that [the] offer provided insufficient value."[796] Again, the court does not mention the grounds on which the board decided this,[797] probably because the record did not reflect this.

iii. Post-Disaster Management of the Company – Board Takes Over

After the disaster, the court notes that even those directors who had shared Blankenship's views about the MSHA going after non-union companies like Massey, realized that the company's reputation had to be salvaged and "regain the confidence of the market and . . . regulators."[798] The court also specifically noted that Inman's prior background in the Navy and CIA influenced his thinking that it would be counter-productive to change leadership in the wake of a crisis.[799] Thus, Inman "publicly expressed his continued support for Blankenship after the Upper Big Branch disaster" and Blankenship continued to be the "public face of Massey in responding" to the post-disaster scrutiny from both the media and government.[800]

However, seeing that Blankenship was defiant and refused to take responsibility, Inman and some other independent directors formed the view that it was "time for Blankenship to move on."[801] According to Inman, Blankenship had expressed the view that it was in the best interests of the stockholders for Massey to remain independent.[802] He was also of the opinion that Massey's stock was worth $90-100 a share, which was well beyond Massey's highest ever trading price.[803] Further, Blankenship had been of the view that he, "rather than the

793 *Id.*
794 *Id.*
795 *See id.* at *33.
796 *Id.*
797 *See id.*
798 *Id.* at *33–34.
799 *See id.* at 34.
800 *Id.*
801 *See id.* at *34–35.
802 *See id.* at 35.
803 *See id.*

[b]oard, should lead any consideration of an alternative."[804] However, "[g]iven Massey's tarnished reputation, Inman and the rest of the [b]oard were not convinced that remaining independent was the best course" of action.[805] In addition to this, Inman who "had had . . . discussions with Blankenship about [his] retirement as early as two years before the [disaster], but had ended . . . conversations" about this "so as not 'to signal any lack of confidence in him,'" resumed discussions about this with other independent directors.[806] Inman noted that there had been a growing consensus amongst the board that it was time for Blankenship to step down since Blankenship, by this time, "had 'been demonized by the media.'"[807]

It was at this point that "Inman and the rest of the [b]oard . . . believed that they, and not Blankenship, should assume the central role in considering and negotiating [any] strategic transaction with" potential bidders.[808] Thus, in order to put the word out that the company was considering strategic options, Inman held back-channel conversations with Alpha representatives, that despite what Blankenship was saying, the board would like to consider a strategic option with Alpha.[809] Inman also "called an executive session of the independent directors," which was the majority of the board, resolved to set up a committee to consider strategic options.[810] The strategic options review committee consisted of independent directors Inman and Gabrys, and executive director, Phillips.[811] The court notes in this regard that the committee excluded Blankenship, but instead included Phillips, his subordinate.[812] The "committee retained Perella Weinberg Partners LP as its financial advisor."[813]

Further, an article published in the Wall Street Journal made it public that Massey was looking for strategic options, which caused Massey's stock price to increase considerably "and created an incentive for rivals like Alpha to emerge and pay a higher price."[814]

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804 *Id.*
805 *Id.* at *35–36.
806 *Id.* at *36 n.71.
807 *Id.* at *36.
808 *Id.*
809 *Id.* at *36–37.
810 *Id.* at *37–38.
811 *See id.* at *38.
812 *See id.*
813 *Id.*
814 *Id.* at *38–39.

iv. Advisory Committee's Preliminary Report

The Advisory Committee met the independent directors prior to the board meeting on November 20, 2010, where it gave its preliminary observations to the independent directors.[815] The committee observed that Massey's safety standards "across all mines at Massey [were] suboptimal, and further indicated its own concerns about Blankenship's continued employment as CEO given his demonization by the media and elected officials as a result of his defiant public profile."[816] The Advisory Committee however "was not yet in the position to make recommendations about the pending Derivative Claims and their merit."[817]

v. Blankenship Is Asked to Resign

Based on the Advisory Committee's preliminary report, "Inman express[ed] the independent directors' 'unanimous view' to Blankenship that he ought to 'stop his public assaults on [the] MSHA.'"[818] According to Inman, the message caused Blankenship "to become 'exceedingly distressed.'"[819]

At the "[b]oard meeting on November 21, Blankenship presented his 5-year strategic stand-alone plan for Massey."[820] He "also expressed his continued dissatisfaction with what he perceived were 'constraints' on his ability to 'run the company as he wanted' and to continue his public fight with the MSHA."[821] Inman then "told Blankenship he should consider retiring if he was not comfortable with the situation."[822] Blankenship acceded, and the board agreed on a severance agreement that would permit Blankenship to receive a severance of approximately $12 million "which Blankenship signed."[823] On December 3, Blankenship left both his position as CEO and board Director, and Phillips was appointed as the new CEO.[824]

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[815] *See id.* at *39.
[816] *Id.*
[817] *Id.* at *40.
[818] *Id.* at *39–40 (alteration in original).
[819] *Id.* at *40.
[820] *Id.*
[821] *Id.* at *40–41.
[822] *Id.* at *41.
[823] *Id.* at *41.
[824] *See id.*

vi. Sale Process

Based on the report of the strategic alternatives committee, Perella Weinberg was asked "to solicit bids from Alpha, as well as three other potential strategic acquirors" and the Massey board issued a press release to that effect.[825] Although four different companies expressed interest, by January 3, 2011, Alpha and Arch were the only two remaining bidders.[826] On January 14, the board met to compare the two offers.[827] After a presentation by Perella, it "determined that the synergies that could be achieved through a combination with Alpha exceeded" that of a combination with Arch.[828] The board also considered again if "Massey's stand-alone prospects . . . were more favorable than the third-party offers" and were advised by Perella that both offers exceeded the price of $68 per share which was "the 'upper reach of what [Massey] could achieve' as a stand-alone entity."[829]

Further, it appears that the new CEO, Phillips, was of the "view that Massey's stock price could reach somewhere between $71 and $97 per share *by 2013*" but Perella was of the view that Phillips' view "was overly optimistic" especially since market perception of Massey was bound to be colored by the recent disaster.[830] In addition to this, the board also considered the fact that Massey had "rarely ever reached or exceeded its own projections" in the past.[831] Ultimately, "the [b]oard concluded that a strategic transaction was the better route" and asked "Arch and Alpha to submit their best and final" offers.[832]

Despite Arch dropping out of the running when it lowered its offer, the board was able to negotiate a further increase in Alpha's bid (25% premium) and unanimously approved the merger agreement at its January 27 board meeting.[833]

vii. Consideration of Derivative Claims in the Merger Process

During the entire sale process, the board did consider the issue of

[825] *Id.*
[826] *See id.* at *41, *42–43.
[827] *See id.* at *43.
[828] *Id.*
[829] *Id.* (alteration in original).
[830] *Id.* at *43–44 (emphasis in original).
[831] *Id.* at *44–45.
[832] *Id.* at *45.
[833] *See id.* at *45–46.

the Derivative Claims and its effect on the merger.[834] "[O]n December 20, 2010, the board met for a special meeting at which its outside legal counsel, Cravath, was present."[835] Cravath advised the board that it should assume that the derivative claims would survive a merger like the one that was being considered with Alpha and Arch.[836] Further, Cravath advised that survival of derivative claims should not affect the board's decision, one way or another, in deciding about the potential merger.[837] The court notes here that this advice was obviously meant to ensure that the board was not conflicted in its decision since all the board members, except Holland and Welty, were also defendants in the derivative action.[838] While this is good advice, the court notes that Cravath was also the board's counsel for the derivative action and so it would have been better to have received advice from a more independent source.[839]

The court also noted that the depositions showed that not all the directors were clear about whether the claims would survive the merger.[840] However, the court says that this did not show improper motive on the part of the board.[841]

4. Decision

The plaintiffs do not contend that the sale process followed by the board was flawed.[842] Instead, the main contention was that the defendants breached their fiduciary duties by entering into the merger agreement with Alpha that did not secure full value for the derivative claims.[843] With regard to this, the board found that although the board should have received advice about the matter from a source other than Cravath, its decision to enter into the merger agreement was not influenced in any material way.[844] Ultimately, the court found that the motion for a preliminary injunction would not succeed.[845] However, the analysis it undertakes in coming to this conclusion is not relevant to the current discussion.

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[834] *See id.* at *53.
[835] *Id.*
[836] *Id.* at *53.
[837] *See id.*
[838] *See id.* at *54.
[839] *See id.* at *54–56.
[840] *See id.* at *54–55.
[841] *See id.* at *55–56.
[842] *See id.* at *46.
[843] *See id.* at *62.
[844] *See id.* at *56.
[845] *See id.* at *136.

5. Insights About Board Gender Diversity

In this case, the class period begins in 2008 and ends in 2010.[846] The board, in 2008, had one female director (Lady Judge) out of nine members.[847] In 2010, there was only one female director (Linda J. Welty) in the nine-member board.[848]

i. Management (Appointments During Crisis)

Welty had been appointed on the board, along with Holland III, in 2010 as an independent director, and had also been appointed on the advisory committee charged with making recommendations to the full board regarding the derivative claim and also regarding whether any changes in management, operations or policies had to be made at Massey.[849] Holland was originally a lawyer who had experience in the banking and financial sectors, and had served on the boards of many companies.[850] Welty had a degree in chemical engineering and had a record "of redirecting and rejuvenating various business enterprises, initiating and leading change within large organizations," and had also served on the boards of many companies.[851]

Thus, it is clear that both Holland and Welty had been appointed in the wake of the Upper Big Branch mine disaster because of their extensive experience.[852] While there is literature claiming that women directors tend to be appointed at times of crisis where a fresh perspective is needed,[853] this case is not one such situation. Welty's experience in leading change in large organizations is most likely to have influenced her appointment, rather than her gender.

ii. Qualifications/Backgrounds

Much is made out of the fact that directors from diverse backgrounds enhance board decision-making.[854] The Tyson report in the U.K. suggests that boards should widen their search to non-

[846] *See id.* at *28–29, *32–33.
[847] MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13.
[848] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 63.
[849] *Massey*, 2011 Del. Ch. LEXIS 83, at *33.
[850] MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, at 2.
[851] *Id.* at 3.
[852] *See id.* at 2, 8.
[853] *See, e.g.*, Susanne Bruckmüller & Nyla R. Branscombe, *The Glass Cliff: When and Why Women are Selected as Leaders in Crisis Contexts*, 49 BRIT. J. SOC. PSYCHOL. 433, 449 (2010).
[854] *See* Kim & Starks, *supra* note 729, at 267.

commercial sectors in order to find female candidates for directorial positions.[855] The "Commonsense Principles of Corporate Governance," which does not have a particular focus on board gender diversity, also advocates that there should be diverse backgrounds and skill-sets on the board.[856]

In general, it is not obvious how non-executive directors' backgrounds would influence the performance of their duties one way or another. However, this case offers an insight into Inman's background in the Navy and the CIA influencing his actions as a director.[857] Inman is the lead independent director and seems to play a more active role than the board chair.[858] Vice Chancellor Strine has noted that Inman's background influenced his decision to support Blankenship after the crisis since he believed that it would be counter-productive to change leadership in the wake of a crisis.[859] Although the court does not express an opinion about the merits of such decision, Inman himself, along with the rest of the board, in the months following the crisis, seemed to have decided to get rid of Blankenship and eventually asked him to resign.[860] Thus, contrary to what the board gender diversity literature suggests, diverse backgrounds on the board might not always result in the most optimal decisions.[861]

iii. Management Fault (CEO's Impact on Firm Reputation)

A significant observation from this case is that the reputation of a company tends to be influenced by the CEO rather than the non-executive directors on the board. Usually CEO's tend to be the public face of a company and in this case, the Court notes that Blankenship particularly "sought (or was found by)" the media.[862] He was the CEO of Massey for a period 10 years which would ensure that the public image of Massey was tied to that of Blankenship.[863] Thus, the board

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[855] *See* LAURA D. TYSON, LONDON BUS. SCH., THE TYSON REPORT ON THE RECRUITMENT AND DEVELOPMENT OF NON-EXECUTIVE DIRECTORS 16 (2003).

[856] *See* COMMONSENSE CORPORATE GOVERNANCE PRINCIPLES 1, http://www.governanceprinciples.org/wp-content/uploads/2016/07/GovernancePrinciples_Prin ciples.pdf (last visited Sept. 21, 2018).

[857] *See Massey*, 2011 Del. Ch. LEXIS 83, at *34.

[858] *See id.*

[859] *See id.* at *34.

[860] *See id.* at *35, *40.

[861] *See e.g.*, Ronald J. Burke & Mary C. Mattis, *Women on Corporate Boards of Directors: Where Do We Go from Here?*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 3 (Susan Vinnicombe et al. eds., 2008).

[862] *See Massey*, 2011 Del. Ch. LEXIS 83, at *14–15.

[863] *See id.* at 14.

gender diversity literature that argues that women directors would enhance the reputation of a company[864] needs to be re-thought in light of the fact that CEOs tend to have the biggest impact on a company's reputation.

vi. Management Fault (CEO's Impact on Firm Culture)

Blankenship's lack of respect for the federal safety regulations seems to have impacted the entire management of the company with supervisors disregarding complaints about safety concerns at mines.[865] The McAteer report shows that the disaster at the Upper Big Branch mine could have been avoided if safety regulations had been complied with.[866] Further, management was not unaware of the safety concerns.[867] The report states that it was "common knowledge" to those who regularly worked in the mine that there were "chronic ventilation problems" at the particular mine.[868] The report even cites an instance of a foreman telling his supervisor about malfunctions with the ventilation system but he was told "not to worry about it."[869]

This attitude of the supervisors at the mines seems to have come straight from Blankenship.[870] The court mentions an internal memorandum issued by Blankenship telling employees to ignore instructions about "anything other than run coal (i.e.—build overcasts, do construction jobs, or whatever)."[871] When this memorandum became public, Blankenship's clarification that "he did not mean that profits came ahead of safety" did not seem to help.[872] The court also cites an instance where a former safety inspector was "allegedly fired in retaliation for his reporting to the MSHA of unaddressed safety violations at a Massey mine."[873] All of this shows that Blankenship was responsible for creating a culture at the company where employees were to disregard safety concerns.

This case shows that in a situation where the CEO is dominant like at Massey, it is the CEO's beliefs and practices, rather than that of the non-executive directors that set the firm's practices regarding employee welfare. It is also to be noted that the board did not

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864 *See* TYSON, *supra* note 855, at 7.
865 *See Massey*, 2011 Del. Ch. LEXIS 83 at *26–27.
866 *See id.* at *28.
867 *See id.* at *24.
868 *See id.*
869 *See id.*
870 *See id.* at *68–69.
871 *Id.* at *16.
872 *See id.* at *17.
873 *Id.*

intervene in this instance, especially since Inman initially seemed to echo Blankenship's views about the MSHA going after non-union companies like Massey.[874] The one woman director on the board at that time (Lady Judge), like the other non-executive directors, does not seem to have intervened in this regard despite the memorandum becoming public knowledge.[875] This could possibly be explained by the "critical mass" literature which suggests that the benefits of diversity will become available only when there is a "critical mass" of women in the group.[876] Alternatively it could mean that the female director, like the other directors, simply chose not to disagree with Inman.

v. Management Fault (Risk-Appetite)

The McAteer report ultimately calls the disaster a "cautionary tale of hubris" and holds "corporate risk-taking" responsible for the 29 miners losing their lives.[877] Hubris is defined as "a great or foolish amount of pride or confidence."[878] Thus in this context, the "corporate risk-taking" being referred to is Blankenship's disregard for federal safety regulations and his belief that he knew better about mine safety.[879] In this context, Vice Chancellor Strine states as follows:

> Of course, when a company has strong opinions about knowing better than the regulators, it is optimal to match that with a record of worker safety and environmental protection that is substantively spotless. But in the case of Massey, no such match existed, at least insofar as one credits actual judgments and other regulation-related losses suffered by the company under Blankenship's tenure as CEO.[880]

Thus, despite having fines and other sanctions imposed in regard to mine safety practices,[881] Blankenship continued to express his opinion that the company was unnecessarily targeted by the MSHA

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[874] *See id.* at *22.
[875] *See id.* at *20.
[876] *See e.g.*, Adhikari et al., *supra* note 150, at 5; Erkut et al., *supra* note 30, at 231.
[877] *Massey*, 2011 Del. Ch. LEXIS 83, at *27–28.
[878] *Hubris*, MERRIAM-WEBSTER.COM DICTIONARY, https://www.merriam-webster.com/dictionary/hubris (last visited Sept. 21, 2018).
[879] *Massey*, 2011 Del. Ch. LEXIS 83, at *15.
[880] *Id.* at *17–18.
[881] *See id.* at *18–20.

and overlooked the safety of miners.[882] This type of "corporate risk-taking" engendered by Blankenship's over-confidence, perhaps most closely reflects (in the company management context) the testosterone induced over-confidence that John Coates finds in his experiments on traders.[883] Research on "groupthink" suggests that when similar individuals make decisions together, their similar views tend to drive their combined decisions to reflect extreme positions.[884] This might also be relevant here since Inman initially seemed to support Blankenship's views and no other director on the board, as of 2008, seemed to put a stop to it.[885] Here, it is relevant to ask if more women directors on the board might have ensured that Blankenship's views were challenged. The study by Adhikari et al. finds that women executives tend to avoid litigation.[886] If this can be applied to boards, it is possible that a critical mass of women directors would have been in favor of complying with the existing federal safety regulations.

vi. Board Independence from Management

Blankenship has been described as "high profile," "dominant" and his leadership style has been described as "autocratic."[887] Thus, he does not seem to have taken the board's opinion on matters and the board didn't seem willing to rein him in.[888] Eventually, when Inman and the rest of the board disagreed with him about going ahead with merger talks with Alpha, they had to do so by having back-channel conversations with representatives of Alpha.[889] Further, when Blankenship was asked to "stop his public assaults on [the] MSHA," by the board, he did not take this well, and became "exceedingly distressed."[890]

Thus, this is a situation where the CEO has run the company autocratically and the board does not seem to have stopped him prior to the advisory committee's preliminary report. It is unclear whether more women directors on the board would have ensured that the

[882] *See id.* at *15–16.
[883] *See* COATES, *supra* note 52, at 27.
[884] *See, e.g.*, JANIS, *supra* note 27, at 13.
[885] *See Massey*, 2011 Del. Ch. LEXIS 83, at *19–22.
[886] *See* Adhikari et al., *Do Women Managers Keep Firms Out of Trouble? Evidence from Corporate Litigation and Policies* 18 (Working Paper, 2018), https://ssrn.com/abstract=2627 8 46.
[887] *See Massey*, 2011 Del. Ch. LEXIS 83, at *14–15.
[888] *See id.* at *20–21.
[889] *See id.* at *36–37.
[890] *Id.* at *40 (alteration in original).

board reined in Blankenship's "autocratic" leadership style. One of the points in the recent "Commonsense Corporate Governance Principles" published by leading executives, is that every board should have active and direct engagement with executives below the CEO level.[891] In a situation like that of Massey's, it is possible that the board might have been more aware of issues and alert to the dangers of Blankenship's directives if it received direct inputs from executives below the CEO level.

Another issue that is raised by the Massey board's initial silence and even support of Blankenship and his views, is that of independence of the "independent directors." Yaron Nili suggests capping the tenure of independent directors because over time, independent directors do not remain truly independent of the CEO's influence.[892] In this case, Holland and Welty, appointed in 2010, expressed concern about Blankenship's continued employment at Massey despite being "demonized" by the media and by MSHA officials.[893] This eventually led to Blankenship being asked to resign by the board.[894] In contrast, despite Inman having been in talks with Blankenship asking him to retire, since as early as two years before the disaster, nothing had come of it.[895]

This is also reflected in Blankenship's initial recommendation against a potential merger with Alpha.[896] The court comments that Blankenship did not seem happy with a scenario wherein he does not remain the CEO of the resulting entity.[897] In this respect, the board seems to have initially accepted Blankenship's assessment and as a result resolved in its meeting (May 3, 2010) that the offer was not in the best interests of the stockholders.[898] However, the board seemed to have acted more independently of the CEO once Phillips was appointed as the new CEO.[899] In the January 14, 2011 meeting, despite Phillips' projection of Massey's prospects being overly optimistic, the board decided that a strategic combination would be in the best interests of stockholders as compared to the company remaining independent.[900] In coming to this decision, the board

891 *See* COMMONSENSE PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 856, at 5.
892 *See* Nili, *supra* note 374, at 124, 157.
893 *See Massey*, 2011 Del. Ch. LEXIS 83, at *33, *39.
894 *See id.* at *40–41.
895 *See id.* at *36–37 n.71.
896 *See id.* at *31.
897 *See id.*
898 *See id.*
899 *See id.* at *43–46.
900 *See id.* at *45.

considered the financial advisor, Perella's advice, the blow to Massey's reputation after the disaster and the fact that Massey had rarely ever reached or exceeded its own projections in the past.[901] Thus, the Massey board (which had only undergone a slight change in composition with the inclusion of Welty and Holland) was able to act independently of the CEO once the CEO had changed.

V. DISCUSSION OF FINDINGS AND THEIR POLICY IMPLICATIONS

This Part discusses the findings and their policy implications.

A. Summary of Findings

At the outset, it is worth noting that companies in five out of the six cases had at least one woman director, and three of the cases had two women directors on the respective company boards.[902] While this is not critical mass, as suggested by Torchia, Calabro, and Huse (30% or three women directors),[903] boards with at least two women directors start to overcome problems of tokenism, if it exists in the relevant company environment.[904] Further, the extensive engagement with the facts in Delaware court decisions give us more insight into company processes including the management conduct and the interaction of the board with management. This has allowed for some observations regarding management that might be relevant to consider in the context of the corporate gender diversity debate. Another general observation about the data set is that the cases relate to mergers, takeover/LBO offers, or a major accident (and consequently, a public relations problem)[905]—all examples of

[901] *See id.* at 44–45.

[902] *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 61 (Del. Ch. 2011) (showing two women on the board of directors); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 578 (Del. Ch. 2010) (showing at least one woman on the board of directors); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 315 (Del. Ch. 2010) (showing two women on the board of directors); DEL MONTE FOODS CO., *supra* note 181, at 10 (showing two women on the board of directors); MASSEY ENERGY CO., REGISTRATION STATEMENT (FORM S-3), *supra* note 733, at II-13 (showing one woman on the board of directors in 2008); MASSEY ENERGY CO., ANNUAL REPORT (FORM 10-K), *supra* note 731, 1–4 (showing one woman on the board of directors in 2010).

[903] *See* Torchia et al., *supra* note 38, at 300.

[904] *See* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 281–282 (1977) (discussing tokenism and number-balancing strategies).

[905] *See Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 817 (relating to a merger); *Air Prods. & Chems., Inc.*, 16 A.3d at 55 (relating to a takeover); *Massey*, 2011 Del. Ch. LEXIS 82, at *12–13 (relating to a merger and a major accident); *Dollar Thrifty*, 14 A.3d at 575 (relating to a merger); *Yucaipa*, 1 A.3d at 320 (relating to a takeover); Am. Int'l Group, Inc. v. Greenberg, 965 A.2d 763, 774 (Del. Ch. 2009) (relating to false financial documents).

situations outside the day-to-day operations of the company; hence situations where the board's active involvement is expected.

The two women directors on the board for Del Monte Foods Co. had C-suite experience and to that extent, had similar backgrounds to those of the other directors.[906] The fact that the board in this case, failed to consider significant issues in the sale process[907] makes us question arguments that women directors bring diverse opinions to the board, which was one of the findings in Dhir's study in Norway as well.[908] Perhaps the diverse views of women directors are a result of liminality rather than of their gender. A portion of the women directors that Dhir interviewed were appointed after Norway's quota law came into effect.[909] In contrast, the women directors for Del Monte Foods Co. were elected in accordance with the board established selection process.[910]

With regard to attendance at board meetings, all cases show that this was not a problem. Directors likely attended all the meetings and since these cases deal with emergent or important situations that the company was being faced with. This was probably because all cases studied involved crucial or significant events when board meetings would involve important decisions. Thus, attendance at board meetings is not truly a proxy for board monitoring since non-attendance at routine board meetings might not impact monitoring as much. Similarly, the directors in most of the cases are well-prepared and even where lack of time does not allow for much preparation before the meetings, board members ensure they avail themselves of legal advice about the issues to be considered.[911] Again, this is probably because most of the situations studied here involve some form of crisis or emergency situation. Thus, the arguments for gender diversity on the basis of gender diverse boards being more prepared might not be as significant.

The observations regarding the factors that lead to effective board

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906 *See* DEL MONTE FOODS CO., *supra* note 181, at 10.

907 *See Del Monte Foods Co. S'holders Litig.*, 25 A.3d at 835.

908 *See* DHIR, *supra* note 14, at 101–102.

909 *See id.* at 123.

910 *See* DEL MONTE FOODS CO., *supra* note 181, at 7, 10.

911 *See* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 65–66 (Del. Ch. 2011) (meeting with legal team); *In re* Del Monte Foods Co. S'holders Litig., 25 A.3d 813, 827 (Del. Ch. 2011) (consulting outside counsel); *In re* Massey Energy Co. Derivative & Class Action Litig., C.A. No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *32 (Del. Ch. May 31, 2011) (consulting outside legal advisors); *In re* Dollar Thrifty S'holder Litig., 14 A.3d 573, 592 (Del. Ch. 2010) (utilizing legal advisors); Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 346 (Del. Ch. 2010) (consulting outside legal advisors); Am. Int'l Group, Inc. v. Greenberg, 962 A.2d 763, 775 (Del. Ch. 2009).

independence are interesting. In the *Airgas* case, the directors appointed by the company attempting to takeover Airgas, referred to as "outside independent directors," were relied upon to not be affected by management thinking.[912] Next, in the *Massey* case, the two newly appointed directors seem to question management decisions and suggest firing the CEO, much more than the directors who were already on the board.[913] This suggests that board independence of even "independent directors" as defined by law[914] might be compromised by a long association with the CEO on the board. In other words, limiting director tenure might be another way of improving board effectiveness.

With respect to the diversity of backgrounds that women bring is the possibility that decisions made on the basis of such diverse experience might not be well-suited to the large public company context. For instance, in the *Massey* case, Inman (the lead independent director) decided to retain the CEO because of reasoning that he based on his experience in the U.S. Navy.[915] However, the decision to retain the CEO at that stage might not have been the best decision in the public company context where the issue of the mine accident had become a matter of public interest.[916] It is to be also noted here that Inman's decision was not countered by the other directors.[917] In an ideal situation, other directors might be able to counter any decisions by members based on their diverse backgrounds, when such decisions are not suitable to the situation at hand.

In addition to providing insights relevant to the board diversity debate, the analysis has also provided insights about possible problems with management that must not be overlooked. In the *AIG* case, the CEO also held the position of board chair.[918] This was possibly one reason for the board's inability to monitor CEO excesses.[919] Further, the fact that the CEO and his "Inner Circle" functioned as a "criminal organization"[920] suggests that if gender

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912 *See Air Prods & Chems., Inc.*, 16 A.3d at 103–04.

913 *See Massey*, 2011 Del. Ch. LEXIS 83, at *20, *33, *39.

914 *See e.g.*, Chamber of Commerce of the United States v. SEC, 412 F.3d 133, 137 (D.C. Cir. 2005) (discussing that the Securities Exchange Commission defines "independent directors" as the opposite of "interested persons" as defined in 15 U.S.C. § 80a-2(a)(19)).

915 *See Massey*, 2011 Del. Ch. LEXIS 83, at *34.

916 *See id.* at *34–35.

917 *See id.* at *34.

918 *See* Am. Int'l Group, Inc. v. Greenberg, 965 A.2d 763, 780 (Del. Ch. 2009).

919 *See id.* at 781.

920 *See id.* at 799.

diversity has ethical benefits to offer, then management might benefit from it since it is in a position to control and (mis)manage many aspects of the company.[921] The study by Adhikari et. al. supports this suggestion since it concludes that companies with women in top executive positions are subject to fewer litigations.[922] Similarly, studies and arguments about the lower risk appetite of women might be more relevant in the management context. For instance, in the *Massey* case, the CEO was willing to risk non-compliance with regulations because he was of the opinion that he knew better.[923] Additionally, groupthink might also be a problem in the management context. Dominant CEOs, like the ones in *AIG* and *Massey*, are not questioned by other executives, and it becomes easy for them to conceal or misrepresent information to the board.[924] Thus, it might be necessary to rethink the exclusive focus of the diversity efforts on company boards and to complement this with similar efforts in the management context.

B. Policy Implications

The findings from the study summarized above have important policy implications. While prior literature has argued that women directors bring diversity of viewpoints and thought to board decision-making,[925] it is unclear whether this is a function of gender or liminality. Thus, other forms of diversity, in terms of age, educational background, race and nationality must be considered for the pursuit of diverse viewpoints.

What must also be considered is the willingness of board members to present and argue these different viewpoints, even if they exist. Groupthink theory suggests that where the board is suffering from groupthink, members tend to self-censor merely to ensure there is the appearance of a consensus.[926] The literature also argues that directors are usually appointed from the same networks as the CEO and hence there is a feeling of loyalty and friendship that might discourage dissent.[927] While gender diversity might counter this in

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[921] *See e.g.*, Kristin Johnson et al., *Diversifying to Mitigate Risk: Can Dodd-Frank Section 342 Help Stabilize the Financial Sector?*, 73 WASH & LEE L. REV. 1795, 1815–16 (2016).

[922] *See* Adhikari et al., *supra* note 150, at 40.

[923] *In re* Massey Energy Co. Derivative & Class Action Litig., No. 5430-VCS, 2011 Del. Ch. LEXIS 83, at *15 (Del. Ch. May 31, 2011).

[924] *See id.* at *14–15; *Greenberg*, 965 A.2d at 781.

[925] *See* Darren Rosenblum & Daria Roithmayr, *More Than A Woman: Insights into Corporate Governance After the French Sex Quota*, 48 IND. L. REV. 889, 905 (2015).

[926] *See* JANIS, *supra* note 27, at 257–58.

[927] *See* Kathleen M. Boozang, *Does An Independent Board Improve Nonprofit Corporate*

cases where women directors do not belong to similar circles and networks, this might not always be true about women directors who do belong to the same circles. After a few years, it might be possible that the women directors have been integrated into the elite networks and social circles. Further, after serving on the same board for a few years, directors, including women, might develop feelings of loyalty and friendship for the board members and also to the CEO. Nili has suggested limiting directors' tenure to ensure that there is constant refreshment of the board.[928] Thus, more research needs to be done to find possible ways to ensure that board members take the job of overseeing management more seriously than any feelings of friendship. Perhaps including a certain percentage of overseas directors where suitable, might be an additional solution since such directors most often are not physically present at board meetings.[929] Further, they would not belong to the same networks in terms of geography.

Next, the cases have underlined the importance of management, especially the CEO on the board's access to information and decision-making process. The theory of groupthink also refers to the possible detrimental effects of a powerful and dominating leader who discourages being challenged.[930] Further, since CEOs tend to affect organizational culture of a company,[931] it might be pertinent to ensure there are people with a high moral compass in positions like that of the CEO and CFO. Since research suggests that companies with more women in management tend to have less lawsuits filed against them, it might be pertinent to focus on addressing barriers to women directors being promoted within the company to reach executive positions.[932] For this, it important to understand the specific barriers in each sector and company. If this is merely related to women choosing to drop out of careers to be able to devote time to family obligations, it might be worth examining whether the current organizational culture promotes working styles that are more suitable to men. While this article did not set out to study women in management, it might be necessary to look at problems with

Governance?, 75 TENN. L. REV. 83, 130 (2007).

928 *See* Nili, *supra* note 374, at 101.

929 *See e.g.*, *In re* Fisker Auto. Holdings, Inc. S'holder Litig., 2018 U.S. Dist. LEXIS 141222, at *11 (D. Del. Aug. 21, 2018) (discussing that a member of the Board of Directors, a resident of Hong Kong, was not physically present in a meeting and instead participated telephonically).

930 *See* JANIS, *supra* note 27, at 246.

931 *See* Linda Klebe Trevino*: Out of Touch: The CEO's Role in Corporate Misbehavior*, 70 BROOK. L. REV. 1195, 1197 (2005).

932 Adhikari et al., *supra* note 150, at 40.

management alongside those of the board to ensure that agency problems within a company are optimally addressed.

VI. CONCLUSION

Ultimately, from the perspective of corporate governance, the board gender diversity policy discourse might be better served by focusing not only on gender but also other types of diversity. Additionally, it must expand its scope to that of management positions and the pipeline leading to these positions as well. The article has provided a nuanced understanding of how and when diversity (gender and other forms) might enhance corporate governance. It has shown that the corporate governance case for board gender diversity is limited, at best. However, other aspects like "outsider status" of directors might make boards more effective.