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Talent for Sale: The Need for Enhanced Scrutiny in Judicial Evaluation of Acqui-Hires

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Large technology corporations are purchasing smaller companies at an increasing rate with one goal in mind—engineers. This practice has recently been given its own name—acqui-hiring. The buying corporation purchases the target, poaches its employees, jettisons its projects, and generally kills the company. Who is injured in this process? Those who were legally supposed to be afforded the highest degree of protection at the target companies—the shareholder investors.

This Note examines the practice of acqui-hiring and suggests that courts should analyze these transactions under heightened scrutiny. When addressing a target board's decision to enter into an acqui-hire, courts can find guidance in Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., *an acquisition case that arose during a climate of similar corporate concerns.*

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INTRODUCTION

An "acqui-hire" occurs when a company purchases a start-up in order to obtain desired talent, usually its founders and certain employees, and thereafter often kills the corporation or at least jettisons its products.[1] Acqui-hiring is currently well known to those working in the technology sectors of business development, law, and investment in

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1. Miguel Helft, *For Buyers of Web Start-Ups, Quest to Corral Young Talent*, N.Y. TIMES, May 18, 2011, at A1; Nate C. Hindman, *The Top 15 Tech 'Acqui-Hires'*, HUFFPOST TECH (May 27, 2011, 10:29 AM), http://www.huffingtonpost.com/2011/05/29/acqui-hires_n_867865.html.

Silicon Valley. However, recognition of the practice elsewhere is increasing, evidenced by the fact that it was even alluded to in HBO's hit series *Silicon Valley*.[2] This widespread awareness of acqui-hiring is bound to continue, as leading technology corporations are purchasing smaller start-up companies that operate in the same or similar fields at an increasing rate.[3] While this might sound reminiscent of common corporate practices, the interesting twist in these transactions is that the buyer ("buying company" or "buying corporation") is not interested in the projects or assets of the company being acqui-hired ("target company" or "target corporation").[4] Instead, the buyer is compelled by the desire to hire some or all of the target company's engineers ("target employees" or "moving employees").[5] These transactions have grown to be so common that they have earned their own name—"acqui-hires."[6]

While documentation of this emerging practice has largely been confined to technology columns and blogs, a small number of legal authors have attempted to identify the possible motivation of the buyers in these transactions.[7] In contrast, the purpose of this Note is to explore the actions of the leaders at the target companies and recommend a heightened level of judicial scrutiny when reviewing them. Enhanced judicial scrutiny is necessary because directors of corporations have fiduciary duties to their shareholders, and these duties may be compromised in acqui-hire transactions due to a number of concerns, including self-dealing and misplaced fiduciary duties. While acqui-hiring is a novel practice, the legal community can find guidance in past judicial directives that demanded increased protection for shareholders during a climate of similar corporate concerns.

Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.[8] was a groundbreaking case regarding specified duties of corporate directors and it created what are known today as "*Revlon* duties."[9] According to *Revlon*, a corporation's "board of directors has a duty to maximize shareholder value in the event that either the company is for sale or the break-up of the company becomes inevitable."[10] If a board decides to sell

2. *Silicon Valley: Bad Money* (HBO television broadcast Apr. 26, 2015).

3. John F. Coyle & Gregg D. Polsky, *Acqui-Hiring*, 63 Duke L.J. 281, 283 (2013).

4. *Id.*

5. *Id.*

6. *Id.* at 284. "Some commentators refer to this phenomenon as an 'acqhire' or a 'talent acquisition.'" *Id.* at 284, n.4.

7. *See* Coyle & Polsky, *supra* note 3, at 283, 292, 315, 318 (explaining acqui-hiring as an attempt to remain on friendly terms with venture capitalists); Andres Sawicki, *Buying Teams*, 38 Seattle U. L. Rev. 651, 651 (2015) (arguing that patent law is a motivation of "the choice to pursue an acqui-hire because it enables the buyer to obtain assets useful in team production").

8. 506 A.2d 173 (Del. 1986).

9. Janet E. Kerr, *Delaware Goes Shopping for a "New" Interpretation of the Revlon Standard: The Effect of the QVC Decision on Strategic Mergers*, 58 Alb. L. Rev. 609, 620 (1995).

10. *Id.* at 626.

a company and there is a question as to whether the board is fulfilling its *Revlon* duties, the actions of the directors "are no longer protected by the business judgment rule[11] and are subject to [] enhanced scrutiny . . . . The [*Revlon*] court stated that the board must be active, not passive. It must stimulate competitive bidding and not lay barriers to the process."[12] In other words, once it is inevitable that a company will be sold or dissolved, the board members are required to actively pursue the highest sale price in the interest of increasing shareholder profits. As judges encounter more and more acqui-hire cases, *Revlon* can provide them with a standard under which to evaluate the decisions of the boards at the companies being acqui-hired ("target boards").

The actions of target boards in acqui-hire transactions are beginning to be scrutinized by adversely affected individuals associated with the target corporations. California courts are now presented with cases focusing on acqui-hires, namely, *Graphicly, Inc. v. Blurb, Inc.*[13] and *Opperman v. Path, Inc.*[14] In *Graphicly*, a shareholder of the target company filed suit against the Graphicly board members and the purchasing corporation, Blurb, Inc.[15] The complaint alleged that "the Board of Graphicly tacitly agreed to give away the company's only assets to Blurb with no consideration paid to the shareholders of Graphicly then let the company shut down."[16] The claim centered on the assertion that the board breached its fiduciary duties by strategically transferring members of the Graphicly creative team and "not taking action to protect [] confidentiality and proprietary information from being accessed by [] Blurb."[17] The Plaintiff claimed such a breach of fiduciary duties caused the company to suffer damages in excess of five million dollars.[18]

In comparison, the complaint in *Opperman* was not filed by a shareholder, but was brought on behalf of past tort victims of a target

11. This rule reflects a judicial policy of deferring to the business judgment of corporate directors when they make corporate decisions: "courts will not second-guess a business decision, so long as corporate management exercised a minimum level of care in arriving at the decision." 3A Jennifer L. Berger et al., Fletcher Cyclopedia of the Law of Private Corporations § 1036 (2015). See Part I.B.I for a more detailed discussion of the business judgment rule.

12. Kerr, *supra* note 9, at 626–27.

13. Response to Defendants' Motion for Realignment of Graphicly, Inc. to a Defendant, Graphicly, Inc. v. Blurb, Inc. at 3, No. 5:14-cv-04630-NC, 2014 WL 6711931 (N.D. Cal. Sept. 8, 2014) [hereinafter Response to Defendants' Motion for Realignment].

14. 87 F. Supp. 3d 1018 (N.D. Cal. 2014).

15. Response to Defendants' Motion for Realignment, *supra* note 13, at 3.

16. *Id.* at 1.

17. Jury Demanded, Graphicly, Inc. v. Blurb, Inc. at 2, No. 5:14-cv-04630-NC, 2014 WL 5337027 (N.D. Cal. Aug. 13, 2014).

18. *Id.* at 3.

corporation on claims of successor liability and fraudulent transfer.[19] The *Opperman* complaint declared that "[t]he acqui-hire is just the latest incarnation of the age-old (and mostly discredited) strategy of buying assets while claiming not to buy liabilities in a corporate acquisition."[20] The plaintiffs implored the court to make the first judicial ruling expressly regulating acqui-hires.[21] The existence of *Graphicly* and *Opperman* suggest that California courts will continue to encounter acqui-hire cases and should be prepared to address the legal issues acqui-hires present including fiduciary duty conflicts, fraudulent transfers, and successor liability issues.

In order to address the concerns that acqui-hires pose, this Note proposes that (1) once the board of a target company becomes seriously involved in an acqui-hire, their fiduciary duties should shift to the requirements called for in *Revlon* duties, and (2) these transactions should be viewed as inherently suspect and therefore scrutinized under a higher standard than the business judgment rule, and perhaps even be analyzed under an entire fairness standard if self-dealing can be clearly identified. To establish the foundation for this proposal, Part I provides background information on acqui-hiring and *Revlon* duties. Part II then discusses emerging acqui-hire court cases, identifies what is taken from shareholders in these transactions, investigates the misplaced fiduciary duty to employees in these deals, and explains how the requirements that trigger *Revlon* duties are present in these transactions. This Note concludes by suggesting what the duties of target boards in acqui-hire transactions should be, along with the standard under which judges should review their actions.

19. Plaintiffs' Opposition to Facebook, Inc.'s and Gowalla Inc.'s Motion to Dismiss Pursuant to Fed.R.Civ.P 12(b)(6) at 1–2, *In re* Apple IDevice Address Book Litig., No. 3:13-cv-00453-JST, 2013 U.S. Dist. Ct. Pleadings LEXIS 9482 (N.D. Cal. Dec. 2, 2013) [hereinafter Plaintiffs' Opposition to Facebook, Inc.]. "Successor liability is an exception to the general rule that, when one corporate or other juridical person sells assets to another entity, the assets are transferred free and clear of all but valid liens and security interests." George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9, 11 (2007). "When successor liability is imposed, a creditor or plaintiff with a claim against the seller may assert that claim against and collect payment from the purchaser." *Id.* In the context of acquisition structures, "[t]he purchaser can leave behind certain liabilities in an asset sale, whereas in a stock sale the assets remain encumbered by all known and unknown liabilities." Brian Stuart Duba & Frost Brown Todd LLC, *Asset v. Stock Sales and Backdoor Liability Assumption in Asset Sales*, 33 E. MIN. L. FOUND. § 17.05 (2012). *Black's Law Dictionary* defines "fraudulent conveyance" as a "transfer of property for little or no consideration, made for the purpose of hindering or delaying a creditor by putting the property beyond the creditor's reach." *Fraudulent Conveyance*, BLACK'S LAW DICTIONARY 17(c) (10th ed. 2014).

20. Plaintiffs' Opposition to Facebook, Inc., *supra* note 19, at 2.

21. *Id.* at 4.

I. Background

In order to provide context for the proposals in this Note, this Part will present background information on acqui-hiring and the relevant material related to *Revlon* duties. First, it describes what an acqui-hire is, gives a short background on company financing, and reviews acqui-hire concerns that have already been posed. Next, Part I explains the three levels of judicial review applied to director decisions, provides an overview of the historical climate at the time of *Revlon*, presents pre-*Revlon* cases and *Revlon* itself, and lastly provides justifications for the duties created in *Revlon*.

A. Acqui-Hiring

1. *What Is an "Acqui-Hire"?*

Typical corporate acquisitions are driven by the desire to obtain a company's assets, whether they are tangible, such as property or equipment, or intangible, such as intellectual property or reputation.[22] However, acqui-hiring has a different focus altogether—engineers.[23] This practice is drawing the attention of the business community as the occurrence rate of acqui-hire deals continues to increase. In fact,

> [r]ecent examples of talent-driven transactions include Twitter's acquisitions of Summify in January 2012 and Posterous in March 2012,[24] Google's acquisitions of Milk in March 2012 and RestEngine in May 2012,[25] Zynga's acquisitions of area/code in January 2011 and Buzz Monkey in June 2012,[26] Groupon's acquisition of ditto.me in April 2012,[27] LinkedIn's acquisition of IndexTank in October 2011,[28] and Facebook's acquisitions of Lightbox and Glancee, both in May 2012.[29]

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22. Coyle & Polsky, *supra* note 3, at 293.

23. *Id.* at 283.

24. Marita Makinen et al., *Acqui-Hires for Growth: Planning for Success*, 28 Venture Cap. Rev. 31, 31 (2012) (first citing Mike Issac, *Twitter Acquires Social-Aggregation Startup Summify*, WIRED (Jan. 19, 2012, 2:23 PM), http://www.wired.com/2012/01/twitter-summify-acquisition/; then citing Laurie Segall, *Why Twitter Bought Tumblr's Biggest Rival, Posterous*, CNNMoney (Mar. 14, 2012, 3:06 PM), http://money.cnn.com/2012/03/14/technology/posterous_twitter/).

25. *Id.* at 31 (first citing Alexia Tsotsis, *Winning a Bidding War with Facebook, Google Picks up the Milk Product Team*, TechCrunch (Mar. 15, 2012), http://techcrunch.com/2012/03/15/winning-a-bidding-war-with-facebook-google-picks-up-the-entire-milk-team/; then citing Josh Constine, *Twitter Buys Personalized Email Marketer RestEngine to Deliver Best Tweet Digests*, TechCrunch (May 10, 2012), http://techcrunch.com/2012/05/10/twitter-acquires-restengine/).

26. *Id.* at 32 (first citing Dean Takahashi, *Zynga Dials Area/Code Game Studio for an Acquisition*, VentureBeat (Jan. 21, 2011, 11:00 AM), http://venturebeat.com/2011/01/21/zynga-dials-areacode-game-studio-for-an-acquisition/; then citing Kim-Mai Cutler, *Zynga Adds 50 People Through Talent Acquisition of Video Game Marker Buzz Monkey*, TechCrunch (June 4, 2012), http://techcrunch.com/2012/06/04/zynga-acquires-buzz-monkey/).

27. *Id.* at 32 (citing Colleen Taylor, *Groupon Acquires Social Recommendation App Ditto.me*, TechCrunch (Apr. 16, 2012), http://techcrunch.com/2012/04/16/groupon-acquires-ditto-me-the-social-recommendation-and-planning-app/).

Even Mark Zuckerberg, CEO of the world's leading social network company, has come to embrace the value of acqui-hiring and has said, "Facebook has not once bought a company for the company itself. We buy companies to get excellent people."[30] Indeed, the "acqui-hire" label might be somewhat new, but it is easy to see that the substantive aspect of these transactions has been very common in recent years.

Acqui-hire transactions can be structured in several different ways.[31] In the acqui-hire's most basic form, it is structured as a payment of cash in exchange for the target company's agreement "not to sue the buyer for hiring its employees" and "the startup thereafter liquidates."[32] Generally, large acqui-hire deals are structured as asset sales; however, the only "assets acquired by the purchaser are whatever intellectual property rights that the startup owns; other assets—such as property, plant, and equipment—are left behind. The consideration paid by the buyer and any residual assets are then distributed to shareholders in the liquidation of the startup."[33] In even larger acqui-hire transactions, the deal can be structured as a merger or stock purchase resulting in the target company generally receiving stock in the buying corporation as part of the consideration.[34] In conclusion, the way that these transactions are structured affects what exactly the target company investors are left with when the deal closes.

These transactions have not gone unnoticed, and scholarship discussing acqui-hires thus far has analyzed the motivation of the buying corporations. That is, the question presented has been: why do buyers not save themselves the trouble of the acquisition and simply pursue the engineers individually or "poach" the engineering team in its entirety?[35] This question is even more poignant given that acqui-hiring was born in California, a state that provides for easy employee mobility and disfavors

28. *Id.* at 32 (citing Colleen Taylor, *LinkedIn Acquires Search Engine Startup IndexTank*, GIGAOM (Oct. 11, 2011, 2:41 PM), https://gigaom.com/2011/10/11/linkedin-acquires-search-engine-startup-indextank/).

29. *Id.* at 32 (first citing Josh Constine, *Facebook Hires Team from Android Photosharing App Dev Lightbox to Quiet Mobile Fears*, TECHCRUNCH (May 15, 2012), http://techcrunch.com/2012/05/15/facebook-lightbox/; then citing Mike Isaac, *Ramping up Mobile Discovery, Facebook Acquires Glancee*, ALLTHINGSD (May 4, 2012, 6:40 PM), http://allthingsd.com/20120504/ramping-up-mobile-discovery-facebook-acqhires-glancee/).

30. *Id.* at 31 (quoting Nathaniel Cahners Hindman, *Mark Zuckerberg: 'We Buy Companies to Get Excellent People'*, HUFFINGTON POST (Oct. 19, 2010, 11:18 AM), http://www.huffingtonpost.com/2010/10/19/mark-zuckerberg-we-buy-co_n_767338.html).

31. Coyle & Polsky, *supra* note 3, at 296.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 282; *see also* John Sullivan, *Acqui-Hiring: A Powerful Recruiting Strategy That You've Never Heard Of*, ERE.NET (Dec. 10, 2012), http://www.ere.net/2012/12/10/acqui-hiring-a-powerful-recruiting-strategy-that-youve-never-heard-of/.

covenants not to compete.[36] Considering that "poaching" employees in the Golden State arguably involves little fear of litigation, John F. Coyle and Gregg D. Polsky, in their article titled *Acqui-Hiring*, proposed that the buyers' motivation stems from social norms in the Silicon Valley.[37] They suggested that the buyer is incentivized by a desire to remain on friendly terms with venture capital funds.[38] Other theories of buyer motivation include a greater chance at retaining the team following the transaction, or the buyer having a specific project in mind for an engineering team that has already proven itself.[39] Aside from the exact motivation of the purchasing corporation, it is important to understand the financial structures of small companies because those in different financial positions at target corporations will have distinct incentives in a dissolution.

2. *Company Financing*

In order to finance a start-up, entrepreneurs generally sell equity in their company to outside investors who usually take the form of either venture capitals or wealthy individuals known as "angel investors."[40] In exchange for their investment, the venture capitals commonly receive preferred stock, which generally comes with certain managing rights and a liquidation preference.[41] Angel investors are ordinarily given convertible promissory notes, though it is becoming increasingly common for these notes to be entitled to an acquisition premium if the company is acquired before any successive equity financing.[42] In comparison, founders, employees, and other smaller investors generally receive common stock or the option to purchase such common stock.[43] Based on these facts, it can be suggested that venture capitals and angel investors have a lowered risk of financial harm in an acqui-hire and the following dissolution of assets because they have a liquidation preference and acquisition premium, respectively. Nevertheless, even with their enhanced financial positions, these investors still do not receive a full return on their investment in

36. Coyle & Polsky, *supra* note 3, at 282.

37. *Id.*

38. *Id.* at 308–09. A venture capital fund is "[a]n investment fund that manages money from investors seeking private equity stakes in startup and small- and medium-size enterprises with strong growth potential. These investments are generally characterized as high-risk/high-return opportunities." *Venture Capital Funds*, INVESTOPEDIA, http://www.investopedia.com/terms/v/vcfund.asp#ixzz3mhoP26Q9 (last visited Apr. 10, 2016).

39. Makinen et al., *supra* note 24, at 32–33.

40. Coyle & Polsky, *supra* note 3, at 287–88. "Angel investors are wealthy individuals who personally finance the same high-risk, high-growth start-ups as venture capitalists but at an earlier stage." Darian M. Ibrahim, *The (Not so) Puzzling Behavior of Angel Investors*, 61 VAND. L. REV. 1405, 1406 (2008).

41. Coyle & Polsky, *supra* note 3, at 289.

42. *Id.* at 289–90.

43. *Id.* at 289.

acqui-hires because founder "entrepreneurs try to figure out . . . 'the lowest amount [that must be paid] to investors so that [they] don't squawk.'"[44] Moreover, smaller investors and undesired employees with common stock are at an even greater risk because they are the last to receive payment, if any even remains. Thus, this financial structure enhances the apprehensions of investors and shareholders at target corporations because of the decrease on investment overall and the increased chance that smaller shareholders will either not get payment or will get only a nominal amount.

3. *Current Concerns Regarding Acqui-Hiring*

In order to provide background on the current apprehensions surrounding acqui-hires, this Subpart explores concerns that have previously been presented in the existing literature. First, it sets forth discoveries of general injustice to acqui-hire target shareholders that have been identified by those researching the field. To expand on this issue, the discussion shows that the expected return on investment to stockholders can be drastically reduced, especially if the consideration for the transaction is cash or stock in a public company with slower growth.[45] Furthermore, greater concern arises because expenses of acqui-hires often reduce cash considerations, making these transactions even less appealing to investors.[46] Finally, this Subpart addresses other concerns that have been identified, including: the way in which the consideration will be divided at the target corporation; the general unease regarding the premature death of an emerging company; and the reality that the deal considerations might include a great amount of illiquid stock for inappropriate employee incentive and tax reasons.[47]

A major issue in acqui-hire negotiations centers on how the buyer's collective purchase price will be allocated between the target company's moving employees and its outside investors.[48] An acqui-hire is usually structured as an asset sale, or occasionally as a stock purchase or merger with stock in the buyer included as part of the consideration.[49] Either way it is structured, the buyer offers this consideration in a single aggregate amount.[50] Both the consideration for the deal, which eventually goes to outside investors and shareholders, and the compensation pool, which goes to the desired founders and employees for future work, are offered

44. *Id.* at 317.
45. Makinen et al., *supra* note 24, at 33.
46. *Id.* at 35.
47. *Id.* at 33, 35.
48. Coyle & Polsky, *supra* note 3, at 287.
49. *Id.* at 296.
50. *Id.* at 299.

together.[51] The compensation pool does not make its way into the hands of outside investors or employee shareholders whom the buyer does not desire to retain as future employees.[52] Accordingly, these outside investors and employees would prefer a greater amount to be divided to the deal *consideration* pot, while the moving employees and the buyer want a greater amount to go toward the *compensation* pot.[53] Disputes about division of these funds present a chief place of disagreement for shareholders and the negotiating insiders. Therefore, it would be ideal to alternatively offer these two sets of payment separately in the interest of protecting investors.

Another frustration with these transactions is that they oftentimes result in the premature death of companies that might have grown to be great successes if given the time and opportunity to do so. In regard to this concern, it is important to point out that acqui-hiring could occur as an alternative to liquidation, or simply an alternative to continuing business.[54] For example, an acqui-hire that would be an alternative to liquidation can take place when the target company is unable to successfully bring a product to the market before it runs out of funding and is unable to access additional money.[55] In this situation, the choice is generally between acquiescing to the acqui-hire or succumbing to complete liquidation.[56] However, some acqui-hires occur *in place of* accepting additional available funding, and this happens when the leaders at the target corporation decide that the acqui-hire offer is more appealing than continuing as a company.[57] This second scenario implicates fiduciary duties to stockholders because the target company still has a chance of survival and possible growth, which suggests that it could have eventually provided larger returns to its investors.[58]

The structure of acqui-hire transactions can also create taxation concerns for shareholders. Acqui-hires are generally structured as asset purchases.[59] As an alternative, shareholders would prefer to configure the deals as stock sales or mergers so they would be taxed as stock sales

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51. *Id.* at 297–98.

52. *Id.*

53. *Id.* at 299. The purchasing corporations want more money to be allocated to desired employees so that the employees will be comfortable with the transition and will be more likely to remain in their new positions long-term. *Id.*

54. *Id.* at 295.

55. *Id.*

56. *Id.*

57. *Id.*

58. For more information to provide support and context for this proposition see *infra* Part II.B.

59. Jeff Seul, *A 360° View of Current Emerging Company M&A Practice Trends*, *in* MERGERS AND ACQUISITIONS LAW 2014 TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR 33, 43 (Aspatore 2013). An asset acquisition occurs when a corporation purchases all or substantially all of another company's assets, which can include its property and its goodwill, for either money or other property. DEL. CODE ANN. tit. 8, § 271 (West 2010).

instead of asset sales.[60] This would be more favorable for the shareholders "because the deal consideration they receive would be taxed as capital gains (i.e., at a lower rate)."[61] Unfortunately for shareholders, they are not typically successful in this pursuit because the target engineers, who are the focus of the deal, would be financially harmed. [62] To illustrate, if the acqui-hire was not structured as an asset purchase, then all of the consideration received by a target engineer "via signing bonuses or participation in a buyer's equity-compensation plan" would be taxed as compensation income.[63] That compensation income would be subject to a high combined federal and state rate, and therefore would not be financially desirable for the employee.[64] Alternatively, due to the current popular structure of the acqui-hire, the portion of the consideration that goes to the engineer from the deal consideration is characterized as payment for her stock in the startup.[65] This payment is labeled as capital gains and "by shifting part of the buyer's purchase price to the deal-consideration pool, the engineer cuts her tax rate approximately in half on the amounts that come back to her as payment for her equity interest in the startup."[66] Due to this common method of structuring acqui-hire transactions, tax apprehensions are simply one of the many concerns that have already been raised by those who study these deals. While the above presented concerns surrounding acqui-hires are legitimate, an approach to address those concerns and regulate acqui-hires generally can be found within the requirements of fiduciary duties and accepted case law, such as *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[67]

B. *Revlon* Duties

In order to identify the relevant legal concepts, this Subpart will first characterize the three levels of judicial review used to evaluate the decisions of directors. Next, it will describe the corporate climate at the time when *Revlon* and similar cases were decided, as well as present the relevant cases leading up to *Revlon* and the *Revlon* case itself. Lastly, this Subpart will briefly outline justifications for the creation of *Revlon* duties.

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60. Seul, *supra* note 59, at 40. Stock sales occur when the target's shares are sold to the buyer in exchange for cash, securities, or a combination of both. Mergers occur when the target merges into the buyer and the stock of the target is exchanged for cash or securities. Stephen I. Glover, Business Separation Transactions: Spin Offs, Subsidiary IPOs and Tracking Stock § 12A.04[2] 12A-8 (2006).

61. Seul, *supra* note 59, at 40.

62. *See id.*

63. Coyle & Polsky, *supra* note 3, at 329.

64. *Id.*

65. *Id.*

66. *Id.*

67. 506 A.2d 173 (Del. 1986).

1. The Three Levels of Judicial Review of Directors' Decisions

When evaluating board decisions, judges apply three levels of review: (1) the business judgment rule, (2) the reasonableness standard called for under both *Unocal Corp. v. Mesa Petroleum Co.*[68] and *Revlon*, and (3) the entire fairness standard.[69] The default and most deferential standard is the business judgment rule, which has essentially become a rubberstamp by judges in the evaluation of board decisionmaking.[70] The business judgment rule "provides a rebuttable presumption 'that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.' Thus, at bottom, the business judgment rule reflects little more than process inquiry."[71]

The second level, the reasonableness standard, is triggered by certain facts and involves an investigation by the court into the reasonableness of the decisions of directors.[72] For instance, the *Unocal* court, in considering the reasonableness of defensive tactics put in place by the board, considered whether the board was independent, highly informed, and acted in good faith.[73] Going even further, the *Revlon* court demanded, in "change of control" transactions, a more generalized reasonableness, which included stricter language than *Unocal* and added a focus on attaining the best value for shareholders.[74] The *Revlon* reasonableness "standard requires virtually absolute independence of the board, careful attention to the type and scope of information to be considered by the board, good faith negotiation, and a focus on what constitutes the best value for the shareholders."[75]

The third level, the entire fairness standard, is triggered "where a majority of the directors approving the transaction [are] interested or where a majority stockholder stands on both sides of the transaction."[76] Board members could be considered to be on both sides of the transaction if they "'expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.'"[77] Under entire

68. 493 A.2d 946, 955 (Del. 1985).
69. Wells M. Engledow, *Structuring Corporate Board Action to Meet the Ever-Decreasing Scope of* Revlon *Duties*, 63 ALB. L. REV. 505, 507 (1999).
70. *Id.*
71. *Id.* at 507–08 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).
72. Engledow, *supra* note 69, at 508.
73. *Id.* (citing *Unocal*, 493 A.2d at 955).
74. Engledow, *supra* note 69, at 508 (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986)).
75. Engledow, *supra* note 69, at 508.
76. *Id.* (internal citations omitted).
77. *Id.* at 508–09 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)).

fairness standard review, the board has the burden of showing, by both fair dealing and fair price, that the transaction was fair to shareholders.[78]

2. *Corporate Climate at Time of* Revlon *and Similar Cases*

The corporate environment at the time of *Revlon* and its predecessors draws comparisons to the similar short-term profitability concerns in acqui-hire transactions. The 1980s were a transformative period for corporations and corporate law due to struggles for corporate control, new types of financial acquirers, and a change in the political climate.[79] In the early 1980s, battles for corporate control began as an effort to capitalize on depressed stock prices, but this quickly transformed into a takeover frenzy.[80] Corporations started to develop new radical defensive tactics in order to fend off both actual and perceived hostile bidders.[81] Thus, the period produced an increase in hostile acquisitions leading to a need for more rigorous corporate defensive strategies.

As the form of the conventional American investor shifted, increased anxieties began to surface that boards were becoming more concerned with short-term gains rather than the longevity of their companies.[82] In the 1980s, interest rates began falling due to stock prices being undervalued, and many of the largest companies in America had little debt and a surplus of cash.[83] A chief development that grew out of this situation was the changing nature of the investor.[84] Based on the goals of the new prominent type of investor, the corporate focus changed from an objective of long-term gains to that of short-run returns.[85] Consequently, this created an environment where, "[f]or the first time, corporations were compelled to maximize short-term profitability at the expense of long-term goals."[86] Acquirers were not concerned with the corporations they were acquiring or those corporations' shareholders;

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78. Engledow, *supra* note 69, at 509.

79. Andrew G. T. Moore, II, *The 1980s—Did We Save the Stockholders While the Corporation Burned?*, 70 WASH. U. L.Q. 277, 278 (1992) ("The Reagan Administration believed that free markets worked best, and that government should interfere in business and finance as little as possible. Laissez-faire was the call of the day.").

80. *Id.* at 277 ("With millions to be made in breakups and exorbitant fees, acquirors [sic] and their financial advisors, who cared little or nothing for the corporation itself, plotted new forms of attack that made virtually any company a takeover candidate.").

81. *Id.* at 277–78.

82. *See id.* at 278–79.

83. *Id.* at 278.

84. *Id.* ("More than fifty percent of the outstanding shares of Fortune 500 companies were held by institutional investors with professional portfolio managers. Arbitrageurs amassed huge positions in potential targets—hoping to put companies 'in play.' Many such efforts were intentionally manipulative and illegal.").

85. *Id.* at 278–79.

86. *Id.*

instead their focus was on their own financial profits.[87] Given each of the contributing circumstances of the time period, it was left to Delaware courts to regulate corporate takeovers, which they did, most notably in *Revlon* and its surrounding cases.[88]

3. *Pre-*Revlon *Cases*

The path to the creation of *Revlon* duties was built on concepts from corporate cases decided during the several preceding years. The Delaware Supreme Court's 1985 decision in *Smith v. Van Gorkom*[89] was the first in this line of historical cases. The *Van Gorkom* court held that board members breach fiduciary duties to stockholders when they obligate themselves to a sale of the company under hasty and uninformed conditions.[90] Delaware Supreme Court Justice Andrew G. T. Moore II, who joined the majority opinion, later wrote, "*Van Gorkom* was much more a case about process in the takeover environment than anything else."[91] He explained, "the protection of the business judgment rule is not a birthright of directors but, rather, is given in return for care, loyalty, and unyielding good faith to the corporation."[92] Thus, the *Van Gorkom* case demonstrated the willingness of judges to question board decisions when they were not made carefully and in consideration of the corporation itself and its shareholders.

The court was able to build upon its decision in *Van Gorkom* when it resolved *Unocal Corp. v. Mesa Petroleum Co.*[93] In *Unocal*, the Delaware Supreme Court analyzed, for the first time, a corporation that presented its own self-tender to defend against a hostile takeover offer.[94] A self-tender is an "offer made by an issuer . . . for any class of the issuer's own securities."[95] Self-tenders generally occur in response to a hostile tender offer and are organized as a repurchase program in order to provide shareholders an alternative purchaser and entice them to

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87. *Id.* at 279 (noting that, due to the changing investor, along with the economic and political climate of the time, the "1980s marked a period of massive wealth shifting, but little wealth creation.").

88. *Id.* at 280. For those unfamiliar with the corporate legal field, "Delaware corporate law has been transformed into something akin to a national law of corporations as other states follow its lead . . . [T]here can be no dispute that Delaware is winning the race." Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1099–1100 (1999); *see also* Makinen et al., *supra* note 24, at 34 ("[D]irectors of California corporations would be served well by understanding Delaware case law, which is based on the same basic duties of care and loyalty as clearly apply to California corporations.").

89. 488 A.2d 858 (Del. 1985).

90. Moore, *supra* note 79, at 281.

91. *Id.*

92. *Id.*

93. 493 A.2d 946 (Del. 1985).

94. Moore, *supra* note 79, at 283.

95. MEREDITH M. BROWN ET AL., TAKEOVERS: A STRATEGIC GUIDE TO MERGERS AND ACQUISITIONS xxxi (3d ed. 2011).

decline the hostile offer.[96] In evaluating Unocal's defensive strategy, the court laid out two conditions that must be met before boards in similar situations would receive the protection of the business judgment rule.[97] The court explained that "[f]irst, directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed. This burden is satisfied by showing good faith and reasonable investigation. Second, the defensive measures must be reasonable in relation to the threat posed."[98] Thus, boards can use drastic measures when they believe an outsider's attempted purchase threatens the corporation, but the measures need to be informed, in good faith, and reasonable. The court also explained that when taking these types of measures, the board could consider the interests of "shareholders . . . and perhaps even the community generally."[99] Additional permitted considerations are "inadequacy of the price, nature and timing of the offer, questions of illegality, risk of nonconsummation, quality of securities being offered, and the bidder's identity and background."[100] In conclusion, this case, along with *Van Gorkom*, exemplified the Delaware Supreme Court's move away from a presumption of business judgment rule protection toward demanding a higher standard of board members in sale situations.

4. Revlon *Duties Creation and Clarification*

Building upon the court's development toward a less deferential review of corporate decisions, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*[101] created the "*Revlon* duties" that are well-known today in corporate law.[102] In 1985, the CEO of Pantry Pride, Ronald O. Perelman, started to discuss an acquisition of Revlon by Pantry Pride with a representative from Revlon, Michel C. Bergerac, who had strong personal dislike for Perelman.[103] In response to Perelman's interest, the

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96. Edward Brodsky & M. Patricia Adamski, Law of Corporate Officers and Directors: Rights, Duties and Liabilities § 6:9 (2015).

97. Moore, *supra* note 79, at 283.

98. *Id.*

99. *Id.*

100. *Id.*

101. 506 A.2d 173 (Del. 1986).

102. Ivanhoe Partners v. Newmont Mining Corp., 533 A.2d 585, 603 (Del. Ch. 1987), *aff'd*, 535 A.2d 1334 (Del. 1987).

103. *Revlon*, 506 A.2d at 176. The board of Pantry Pride authorized Perelman to acquire Revlon, either by negotiating for $42–$43 per share or by making a hostile tender offer at $45 per share. *Id.* at 176. Revlon was advised by one of its investment bankers that $45 per share was a "grossly inadequate price for the company." *Id.* at 176–77. Pantry Pride then made a cash tender offer at $47.50 per share and the Revlon board began to explore defensive measures. *Id.* at 177. The directors at Revlon created a Rights Plan, which was considered to be a "poison pill" in corporate takeover language. *Id.* at 180 (citing Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985)). A "poison pill" has been described as a scheme where shareholders get the right to be bought out by the corporation at a substantial

Revlon board authorized the company's management to negotiate with other parties also interested in acquiring Revlon.[104] While Revlon searched for other acquirers, Pantry Pride continued to raise its initial cash bid offer of $45 per share, until it reached a final proposition of $58 per share.[105] The Revlon board eventually decided that it wanted Forstmann Little & Co., an acquirer it apparently had more friendly feelings toward than Pantry Pride or Perelman, to acquire Revlon.[106] The board bolstered Forstmann's bargaining power by giving Forstmann access to Revlon financial data that Pantry Pride was not aware of, placing the two parties on unequal negotiation grounds.[107] Following negotiations, Forstmann made an offer less than Pantry Pride's, at $57.25 per share, and also required the Revlon board to put into place several defensive measures.[108] The Revlon board complied with Forstmann's request and accordingly put into place numerous defensive strategies to insulate the company from Pantry Pride and other potential acquirers.[109] Thereafter, Pantry Pride sought injunctive relief barring Revlon's defensive strategies and requested a temporary restraining order on Revlon's assets to halt any attempted transfer to Forstmann.[110] In evaluating Pantry Pride's claims, the court considered the appropriateness of the Revlon board's actions, most importantly, in the implementation of the defensive measures.[111]

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premium price. *Id.* Revlon launched its own offer for up to ten million shares and its stockholders tendered eighty-seven percent of outstanding shares. *Id.* at 177, 181–82.

104. *Id.* at 176–77.

105. *Id.* at 179–80.

106. *Id.* at 175, 176, 178.

107. *Id.* at 178.

108. *Id.* at 175, 178. These defensive measures included a lock-up option (an option for Forstmann to purchase certain assets), a no-shop provision (a promise by Revlon to deal only with Forstmann), and Revlon agreeing to a $25 million cancellation fee to go to Forstmann if their agreement was terminated. *Id.*

109. *Id.* at 178–79. The *Revlon* court explained that, in implementing antitakeover measures, the concern arises that a "board may be acting primarily in its own interests, rather than those of the corporation and its shareholders." *Id.* at 180 (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)). Due to this potential conflict of interest, the directors of a board using defensive tactics has the burden of showing that they had a reasonable belief that the corporation was in danger and this burden can by satisfied by a showing of good faith and reasonable investigation. *Id.* (citing *Unocal*, 493 A.2d at 955). The directors also have to show "that the responsive action taken [was] reasonable in relation to the threat posed." *Id.* (quoting *Unocal*, 493 A.2d at 955).

110. *Id.* at 179.

111. *Id.* at 175–76. The court analyzed the separate defensive measures that the Revlon board implemented. The first defensive tool that the court examined was the "poison pill" Rights Plan. *Id.* at 180. When Revlon initially implemented the Rights Plan, the Pantry Pride hostile takeover bid was at $45 per share, which was a price that the Revlon board was advised as being grossly inadequate, making the implementation of the poison pill reasonable and in good faith. *Id.* at 180–81. Nevertheless, the continued use of the Rights Plan became moot when, for the favor of Forstmann, the board passed a resolution redeeming the Rights in regard to any cash proposal of $57.25 or more. *Id.* at 181. All of the involved offers eventually equaled or surpassed that amount so the Rights were no longer an obstruction in the contest for acquisition. *Id.* The court then analyzed the Revlon board's

In the *Revlon* holding, the court emphasized a higher standard in the realm of board member fiduciary duties during an acquisition or sale.[112] The court explained that the Revlon directors undertook considerations not related to the maximization of shareholder profit, and that such measures could not "be sustained when [they] represent[] a breach of the directors' fundamental duty of care."[113] Therefore, the court concluded that the board's actions were not entitled to business judgment rule deference.[114] Instead, the court held the Revlon board to a higher standard, explaining that when the board members first recognized that the company was for sale, their duties changed from ensuring the "preservation of Revlon as a corporate entity *to [maximizing] the company's value at a sale for the stockholders' benefit*."[115] Therefore, "[*t*]*he directors' role changed* from defenders of the corporate bastion *to auctioneers charged with getting the best price for the stockholders at a sale of the company*."[116] Thus, the court emphasized that boards are required to keep shareholders' best interests as their primary focus and that less deference would be afforded if there appeared to be deviation from that practice.

Several years later, building upon *Revlon*, *Paramount Communications, Inc. v. Time, Inc.*[117] addressed a portion of the *Revlon* framework that *Revlon* left unclear: when is a company "for sale?"[118] In *Paramount*, a planned merger between Time and Warner was set to take place.[119] When Paramount learned of the intended merger, Paramount announced an impeding offer for Time at $175 per share, which Time rejected.[120] Paramount then raised its all cash offer to $200 per share, which Time, again, rejected.[121] The Time board genuinely believed that the merger with Warner was going to be better for the Time company in

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own exchange offer for ten million of its own shares, which may have been reasonable when Pantry Pride's offer was at $47.50 a share; however, when Pantry Pride increased its offer to "$53, it became apparent to all that the break-up of the company was inevitable." *Id.* at 182. The court further noted that "Forstmann had already been drawn into the contest on a preferred basis, so the result of the lock-up was not to foster bidding, but to destroy it" and that "the [no-shop] agreement . . . ended rather than intensified the board's involvement in the bidding contest." *Id.* at 183–84.

112. *See id.* at 185.

113. *Id.* (citing Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985)). The court explained that Revlon's defensive tactics worked to the benefit of the shareholders in the beginning; however, considering the totality of the defensive moves throughout the life span of the takeover period, the court found that the directors considered inappropriate factors. *Id.*

114. *Revlon*, 506 A.2d at 185.

115. *Id.* at 182 (emphasis added).

116. *Id.* (emphasis added).

117. 571 A.2d 1140 (Del. 1989).

118. Moore, *supra* note 79, at 285–86.

119. *Id.* at 286.

120. *Id.*

121. *Id.*

the long run.[122] Consequently, out of fear that Time shareholders would be blindly attracted to Paramount's high cash offer, the Time board changed the structure of their planned merger with Warner.[123] Time and Warner restructured the merger from a stock swap to a cash offer, thereby eliminating the need for a vote from the shareholders and allowing Time to continue with its original plan.[124] In response, both Paramount and shareholders of Time filed suits, which were eventually consolidated, to halt the planned merger with Warner.[125] The court had to evaluate whether to allow Time and Warner to proceed with their restructured merger.[126]

The *Paramount* court held that there are two circumstances that constitute a sale and require the board to act as an auctioneer.[127] These situations arise, "[(1)] when the corporation initiates the bidding process, seeking to sell itself or to effect a reorganization involving a change in control or a clear breakup of the company; and [(2)] when, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative."[128] The court drew attention to the fact that Time's board was able to document a long-term strategy before implementing defense mechanisms.[129] The opinion stated that the "legitimacy of a long-range plan is important when determining whether a board reasonably views and reacts to an acquiror [sic] as a threat."[130] The holding in *Paramount* could be read to imply that courts will afford boards a degree of deference when they are in disagreement with their shareholders, if the boards could show a legitimate long-term plan that they were implementing to protect the company.

In summary, combining *Revlon* together with *Paramount* suggests that courts will require that boards pursue the best price for their shareholders in acquisitions, unless it appears that the board is implementing a long-term strategy to protect the company. This proposition relates to acqui-hires because target boards are not "auctioning" off their companies to get the best price, nor are they implementing long-term strategies to legitimately protect their companies and shareholders. The enhanced duties created in *Revlon* and *Paramount* are essential in change of control situations because the circumstances of such situations pose an extremely high risk to shareholders.

122. *See Paramount*, 571 A.2d at 1144–45, 1149.

123. *See* Moore, *supra* note 79, at 286.

124. *Id.*

125. *Paramount*, 571 A.2d at 1141–42.

126. *Id.* at 1142.

127. Moore, *supra* note 79, at 286.

128. *Id.* at 286–87. The court also noted that the possibility that a shareholder would tender in ignorance of another strategic benefit could be considered a perceived threat. *Id.* at 287.

129. *Id.*

130. *Id.*

5. *Justifications for* Revlon *Duties*

In situations involving corporate break ups, courts have agreed that the actions taken by boards are subject to enhanced scrutiny.[131] This heightened scrutiny is necessary due to the possible reduction of current shareholders' voting power and the fact that a control premium, which is an asset that belongs to stockholders, is being sold.[132] Moreover, the courts have clarified that the duty "announced in *Revlon*, is not an independent duty, but rather a restatement of directors' duties of loyalty and care."[133] It has been shown that "[d]irectors need not follow a particular path to maximize stockholder value, but the directors' path must be a reasonable exercise toward accomplishing that end."[134] In the context of acqui-hiring, these justifications are applicable because the target investors are not being guaranteed a process to maximize value, and they lose voting power and control when the company is acquired and dissolved.

To conclude, this Part presented the relevant information on acqui-hires and analyzed the heightened scrutiny applied to board acquisition decisions when shareholder interest is in question. Acqui-hire transactions are only increasing in frequency and becoming more recognizable by the technology and legal communities. They are generally structured in a form more favorable to target employees than shareholders, and many times result in the premature death of an emerging company. In the past, Delaware courts have encountered situations where boards have made questionable decisions regarding their duties to shareholders in acquisition circumstances. At that time, the courts stepped up and demanded protection for shareholders in those types of situations. In extending the combined rationale of *Revlon* and *Paramount* to the acqui-hire context, it can be argued that acqui-hire target investors are losing power and control at a price that could easily be less than what they deserve.

II. An Examination of the Issues Posed by Acqui-Hires and an Offered Solution

It is certain that "the use of acqui-hires to obtain talent continues;"[135] however, investors, such as the founder of 500 Startups venture fund, Dave McClure, have given warning about the practice.[136] McClure explained that these types of talent acquisitions are "not what

131. Paramount Commc'ns v. Qvc Network, 637 A.2d 34, 45 (Del. 1994).

132. *Id.*

133. Koehler v. NetSpend Holdings Inc., No. 8373-VCG, 2013 WL 2181518, at *10 (Del. Ch. 2013) (citing *In re* Answers Corp. S'holders Litig., No. 6170-VCN, 2012 WL 1253072, at *6 (Del. Ch. 2012)).

134. *Id.*

135. Joseph W. Bartlett et al., Advanced Private Equity Term Sheets and Series A Documents § 7.16 (2014).

136. Helft, *supra* note 1.

we are aiming for as investors . . . . We are trying to build large, lasting businesses."[137] Another well-known activist investor from Starboard Value has also critiqued the practice, insisting in a 2014 open letter to the CEO of Yahoo, that Yahoo "stop [its] pricey and 'aggressive acquisition strategy' dead in its tracks."[138] The frank letter stated that "[t]he $1.3 billion spent on acquisitions has clearly not delivered value to shareholders," and that "the acquired companies were, and still are, losing a considerable amount of money."[139] Nevertheless, warnings from investors such as these have still not "stopped some of tech's biggest names for which buying season never seems to wane. Yahoo and Facebook snapped up at least 6 different small fish in 2014 alone, which [was] dwarfed by the 29 swallowed whole by Google."[140] Considering that the concerns investors have presented are going unacknowledged by large corporations, courts will likely have to make a determination regarding this practice soon.

A. Lawsuits Involving Acqui-Hires Are Beginning to Emerge

As acqui-hiring is somewhat of a novel practice, the court system has not seen many cases; however, those who have commented on acqui-hiring have warned that lawsuits involving the practice could be on their way.[141] One commentator has stated that there are causes of action available to shareholders, including fraud and breach of fiduciary duties.[142] These particular causes of action are "centered around the notion that there's a lot of money going to some shareholders (founders/employees) but not others (investors)."[143] Expanding upon that concept in another article, that author warns that "some of these deals could theoretically be a violation of various corporate and securities laws that require shareholders of a given class to be treated equally in an acquisition."[144] In line with these legal predictions, California has already started to encounter complaints bearing the word "acqui-hire."[145]

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137. *Id.* (internal quotation marks omitted).

138. Jackson Burke, *Have Job, Will Buy Your Firm: Tech's 'Acqui-Hire' Trend*, CNBC (Nov. 9, 2014, 12:00 PM), http://www.cnbc.com/id/102164860.

139. *Id.* (internal quotation marks omitted).

140. *Id.*

141. Michael Arrington, *Some Investors May Request Protection from Acqui-Hires*, UNCRUNCHED (Apr. 24, 2012), http://uncrunched.com/2012/04/24/some-investors-may-request-protection-from-acqui-hires/ [hereinafter Arrington, *Some Investors May Request Protection from Acqui-Hires*]; Michael Arrington, *Facebook to Pay $10 Million Cash for Hot Potato, Says Source*, TECHCRUNCH (July 28, 2010), http://techcrunch.com/2010/07/28/facebook-to-pay-10-million-cash-for-hot-potato-says-source/ [hereinafter Arrington, *Facebook to Pay $10 Million Cash for Hot Potato*].

142. *See* Arrington, *Some Investors May Request Protection from Acqui-Hires*, *supra* note 141.

143. *Id.*

144. Arrington, *Facebook to Pay $10 Million Cash for Hot Potato*, *supra* note 141.

145. Response to Defendants' Motion for Realignment, *supra* note 13, at 3; Plaintiffs' Opposition to Facebook, Inc., *supra* note 19, at 1.

One example of an acqui-hire shareholder derivative suit is *Graphicly, Inc. v. Blurb, Inc.*, wherein the shareholder plaintiff brought suit against the board members of Graphicly, a target company in an acqui-hire.[146] The shareholder alleged that the Graphicly board breached its fiduciary duties by terminating and transferring employees, along with failing to protect confidential company information.[147] The complaint stated that Graphicly and Blurb entered into a nondisclosure agreement after Blurb expressed interest in an acqui-hire of Graphicly.[148] Thereafter, "Blurb, Inc. had full and complete access to all of Graphicly, Inc.'s proprietary and confidential information as well as unfettered access to top management who were allegedly essential to the value and continued success of Graphicly, Inc."[149] After the sale to Blurb was complete, the plaintiff claimed that the board terminated all Graphicly employees and, thereafter, members of Graphicly's creative team were immediately hired by Blurb.[150] This resulted in Blurb owning all proprietary and confidential information that the creative team possessed, which was gained from their employment at Graphicly.[151] "At the same time, the six co-founders and creative team of Graphicly [who moved over to Blurb] were encouraging Graphicly's customers and prospects to migrate to Blurb."[152] In the end, the shareholders received only $2.5 million, which was not a penny more than Blurb offered initially, before it examined Graphicly's confidential information or negotiations began.[153]

The complaint explained that a derivative suit was necessary because "Graphicly ha[d] no employees, no leadership, and ha[d] been stripped of its only real assets. It [was] not capable of taking any action on its own behalf."[154] The acqui-hire transaction transferred all of Graphicly's key talent and intellectual property to Blurb. The plaintiff asserted that the employees who were allowed to move to Blurb received all of the benefit in the acqui-hire, while shareholders were left with only the amount of money that made up Blurb's initial offer.[155] While *Graphicly* is still in the pleadings stage, the case presents a viable

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146. Jury Demanded, *supra* note 17; Response to Defendants' Motion for Realignment, *supra* note 13, at 3. A shareholder derivative suit is a lawsuit brought by a shareholder on behalf of the corporation itself. Mary Elizabeth Matthews, *The Shareholder Derivative Suit in Arkansas*, 52 ARK. L. REV. 353, 353 (1999).

147. Jury Demanded, *supra* note 17, at 2.

148. *Id.*; Response to Defendants' Motion for Realignment, *supra* note 13, at 3.

149. Jury Demanded, *supra* note 17, at 2.

150. *Id.*

151. *Id.*

152. Response to Defendants' Motion for Realignment, *supra* note 13, at 2.

153. *Id.* at 3.

154. *Id.*

155. *Id.*

opportunity for the court to evaluate acqui-hire transactions and the impact they have on target companies and target shareholders.[156]

Another example of an acqui-hire case is *Opperman v. Path, Inc.*, which involved claims brought, not by shareholders, but by past tort victims of the target corporation.[157] The plaintiffs claimed that the acqui-hire transaction in their case was a fraudulent transfer and imposed successor liability on the purchaser, Facebook, for past misconduct by the target corporation, Gowalla.[158] The *Opperman* plaintiffs pled for the court to take the opportunity to make a judicial determination regarding the practice of acqui-hires.[159]

The complaint asserted that the acqui-hire caused Gowalla's financial disarray and that by stripping Gowalla of its only real assets, the transaction rendered Gowalla insolvent.[160] As a result of the *Opperman* acqui-hire, Gowalla's two main assets—its principle employees, including its founder, and its technology—were transferred to Facebook.[161] The plaintiffs claimed that Facebook and Gowalla knowingly failed to reserve adequate assets or finances to pay Gowalla creditors, such as the plaintiffs, and instead structured the deal to route the consideration, including stock in Facebook, to the employee managers of Gowalla.[162] Specifically, the complaint requested that the court find acqui-hires to be de facto acquisitions, which would require the purchasing corporations to take on the liabilities of the target companies, or to alternatively label acqui-hires as bona fide personnel licensing agreements.[163] In accordance with that proposition, the plaintiffs alleged that the acqui-hire constituted a fraudulent transfer, imposing successor liability on Facebook.[164]

Unfortunately for the Gowalla claimants, the Northern District of California dismissed the claims.[165] The court stated there was no fraudulent transfer because the plaintiffs did not make a showing that they could not subject Gowalla's intellectual property, which Gowalla theoretically retained, to the payment of debts in the future.[166] Also, the

156. The parties mediated this dispute on March 11, 2015 before retired Judge David A. Garcia of Judicial Arbitration and Mediation Services, Inc. ("JAMS"). The parties reached a settlement and Plaintiffs filed a Motion for Preliminary Approval of Proposed Settlement on May 13, 2015. The motion was scheduled for hearing on July 23, 2015. Joint Case Management Conference Statement, Graphicly, Inc. v. Blurb, Inc., No. C-14-04630-EJD, 2015 WL 6452139 (N.D. Cal. July 16, 2015).

157. Opperman v. Path, Inc., 87 F. Supp. 3d 1018, 1064 (N.D. Cal. 2014).

158. Plaintiffs' Opposition to Facebook, Inc., *supra* note 19, at 1–2. For definitions of "successor liability" and "fraudulent transfer," see *supra* note 19.

159. Plaintiffs' Opposition to Facebook, Inc., *supra* note 19, at 4.

160. *Id.* at 10.

161. *Id.* at 7.

162. *Id.*

163. *Id.* at 4.

164. *Id.* at 2.

165. Opperman v. Path, Inc., 87 F. Supp. 3d 1018, 1067 (N.D. Cal. 2014).

166. *Id.* at 1066.

judge believed that the plaintiffs' allegations based on successor liability were deficient because the plaintiffs did not allege that Facebook "acquired" Gowalla.[167] In support of this assessment the judge explained that "the [Consolidated Amended Class Action Complaint] expressly allege[d] the opposite: that Facebook acquired employees and intellectual property rights, but not Gowalla itself."[168] Indeed, the *Opperman* case is slightly convoluted, but it does reveal that plaintiffs need to be cautious when phrasing their allegations while courts familiarize themselves with the practice of acqui-hiring.

In conclusion, commentators have identified that causes of action related to acqui-hires may be available, and *Graphicly* and *Opperman* are two such examples. Acqui-hires raise many legal concerns including fraud, breach of fiduciary duties, fraudulent transfer, and successor liability. This is a new practice that courts might be unfamiliar with, and guidance is needed in order to protect those that are adversely affected in these transactions. In untangling this corporate legal web, the best starting point is to address the duties of the target boards and identify what obligations the boards have. When attempting to distinguish what obligations should be imposed, it is best to begin first with analyzing exactly how shareholders are being harmed in these transactions.

B. What Do Acqui-Hires Take from Shareholders?

Concerns for shareholders at acqui-hire target corporations include a division between employees and shareholders based on the purchase price and a diminished life on their investment. As mentioned earlier in this Note, buyers in these transactions offer the deal consideration, including the consideration pot and the compensation pot, in a single aggregate amount.[169] While outside investors and employees would prefer a greater amount to be allocated to the *consideration* pot, moving employees and the buyer want a greater amount to go toward the *compensation* pot.[170] This creates a rift between employees and shareholders and, in fact, many of those who participate in acqui-hires admit to an amount of collusion between buyers and moving employees.[171] Therefore, these transactions can be dangerous for target shareholders, who might receive extremely nominal or no consideration

167. *Id.*

168. *Id.*

169. Coyle & Polsky, *supra* note 3, at 297–99. Both the consideration pot, which eventually goes to outside investors and shareholders, and the compensation pot, which goes to the desired founders and employees for future work, are offered together. *Id.* at 297–98; *see supra* Part I.A.3.

170. Coyle & Polsky, *supra* note 3, at 299. The buyer wants more to go to the compensation pool because that pool provides incentives to move to the target employees, which is what the buyer cares about. *See id.*

171. *Id.*

in the deal.[172] Moreover, acqui-hires cut the life of an investment short and diminish expected return if the consideration includes stock in a slower-growth public company.[173] In addition to the significant concerns about the amount of payments shareholders receive at the closing of these transactions, there are also arguments that other rights of shareholders are being violated.

An acqui-hire could constitute a conversion of a corporate opportunity, as the target company's likely greatest opportunity at success rests with the engineering team to be acquired. The corporate opportunity doctrine explains that "[c]orporate officers and directors are not permitted to use their position of trust and confidence to further their private interests."[174] To illustrate, at the time of investing, shareholders are under the impression that they have first "dibs" to the engineering innovations that the team creates. This makes the engineering team itself a huge part of what the shareholders believe they were securing with their initial investment. However, after an acqui-hire, the "opportunity" for these investors to benefit from the team's potential is transferred to the moving managing employees and the purchaser. Therefore, not only is the seizing of employees a main focus that shareholders need to consider, but also the resulting loss of any possible profits from current and future projects.

It has been suggested that when an acqui-hire buyer not only poaches the team, but also takes the team's projects, it eliminates the target company's ability to sell those projects as an asset to another entity.[175] It could be the case that "the acquiring corporation recognizes that value of the project but, nonetheless, prefers to bury the project to eliminate threats to its business model."[176] This is an issue for target investors because if the engineering team has proven itself well enough to get acqui-hired, then "surely, there often would be a party willing to pay some amount for these projects."[177] The inability of the target companies to sell projects raises yet another concern that shareholders of target corporations are not being given an opportunity to get the greatest

172. Makinen et al., *supra* note 24, at 33.

173. *Id.*

174. DeLarme R. Landes, *Economic Efficiency and the Corporate Opportunity Doctrine: In Defense of a Contextual Disclosure Rule*, 74 TEMP. L. REV. 837, 844 (2001) (quoting Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)). The doctrine is a "mechanism for allocating property rights between a corporation and those who manage it" so that managers of a corporation can not personally take business opportunities that they become aware of, due to their position, from the corporation without following specific disclosure protocols. *Id*. at 843 (quoting Eric Talley, *Turning Servile Opportunities to Gold: A Strategic Analysis of the Corporate Opportunities Doctrine*, 108 YALE L.J. 277, 279 (1998)).

175. Gregg D. Polsky & Brant J. Hellwig, *Examining the Tax Advantage of Founders' Stock*, 97 IOWA L. REV. 1085, 1097 (2012).

176. *Id.* at 1098 n.48.

177. *Id.* at 1098.

return on their investment, even if there does have to be a dissolution of the company. In addition to the issues of consideration division and loss of corporate opportunities and assets, there is also a concern that target corporations are protecting employees rather than shareholders, in conflict with their traditional fiduciary duties.

C. Do Acqui-Hires Reflect a Fiduciary Duty to Employees or Are Employees Actually Harmed Too?

Acqui-hires present a multifaceted situation for moving employees, encompassing a range of positive and negative aspects. For example, on one hand, the target employees stand to make a great amount of money in these deals. On the other hand, they may be required to stay at the buying company for an extended period of time to realize that money, and they will likely lose the ability to continue work on their current projects. Nevertheless, however employees perceive these deals, shareholder experience is supposed to be the focus at the target corporation.

In acqui-hire transactions, it appears that the moving employees might be the ones at the target company who are getting the large payouts, while the investors are left with nominal amounts. Even though American corporate law requires fiduciary duties to shareholders, not to employees, many of the benefits that acqui-hire participants put forth seem to speak to the advantages that the target *employees* experience, with little discussion of effects on the target *shareholders*. To illustrate, Vaughan Smith, Facebook's Director of Corporate Development and a participant in the twenty or so talent acquisitions that the company has participated in over the past four years, has made the assessment that "[e]ngineers are worth half a million to one million."[178] The employees who are acquired in these transactions get a highly rich salary and often even more stock options.[179] Dave McClure, an investor previously mentioned, has said that these sales for "a few million will not make or break [the] funds" of target investors, but "it could amount to a tidy sum for an engineer just out of college."[180] Paul Graham, another well-known investor and a partner at Y Combinator, a firm that has invested in hundreds of start-ups, has asked, "[w]ho are we to tell a young entrepreneur that they can't have their first million?"[181] These remarks suggest that commentators have taken notice that, if anyone is getting rich in these transactions, it is not investors, but the moving employees.

While it is true that moving employees may stand to make the greatest initial profit, the acqui-hire process still presents issues that

178. Helft, *supra* note 1.
179. *Id.*
180. *Id.*
181. *Id.* (internal quotation marks omitted).

many target engineers will face when they are acquired. In fact, even though "[n]either the acquired nor the acquirers like to talk numbers. . . . the acquisitions are generally in stock, and *employees typically must wait a year or more* before they can sell their shares."[182] In regard to this, one of the largest acqui-hire purchasers, Facebook, contends that structuring the transactions this way is beneficial as a buyer because they "need[] creative entrepreneurs who can also help keep Facebook's start-up culture alive."[183] Moreover, when a buyer takes ownership of the past projects, even if it has no interest in furthering them, the buyer reduces the risk that the acquired team would continue developing the projects on the side, because any success in such projects would go to the buyer.[184] Therefore, taking ownership of the projects is a way to reduce the risk of employee disloyalty, as well as stifle possible competition by successful engineers.[185] In addition, along the lines of employee concerns, but unrelated to the concerns of *moving* employees, an even more disheartening fact is that employees that are not desired and do not join the buying company are generally laid off following the transaction.[186] In conclusion, the sum value of these concerns is that acqui-hired engineers can be encouraged to work at slower growth public companies for a minimum amount of time based on stock structure. Furthermore, the opportunity of innovation for them personally and society as a whole is robbed in an effort to reduce competition in the field. Whilst acqui-hires present troublesome circumstances for investors and employees alike, an answer to these concerns can be found in *Revlon* duties.

D. Structures of Acqui-Hires Comply with the Requirements to Trigger *Revlon*

The structure of acqui-hire transactions falls squarely within the required elements laid out in *Revlon:*

> [C]ircumstances requiring enhanced judicial scrutiny give rise to what are known as *Revlon* duties, such as [(1)] when the board enters into a merger transaction that will cause a change in corporate control, [(2)] initiates an active bidding process seeking to sell the corporation, or [(3)] makes a break up of the corporate entity inevitable.[187]

182. *Id.* (emphasis added).
183. *Id.*
184. Polsky & Hellwig, *supra* note 176, at 1097.
185. *Id.*
186. Darshan Shankar, *What Is a Typical Deal Structure of an Acquihire?*, Quora (Dec. 10, 2012), https://www.quora.com/What-is-a-typical-deal-structure-of-an-acquihire.
187. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 928 (Del. 2003) (citing Paramount Commc'ns v. Qvc Network, 637 A.2d 34, 47 (Del. 1994), and Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986)).

Acqui-hires can arguably satisfy the second circumstance, "initiating an active bidding process seeking to sell,"[188] because these deals are generally framed as asset sales, and therefore, the target boards do find themselves in an active sale process. Comparatively, even if stock is included in the deal consideration, the result is the buying company having a controlling share in the target, at least until they formally dissolve it, therefore qualifying as a "merger transaction that will cause a change in corporate control."[189] In addition, as acqui-hires become increasingly common in the small Silicon Valley, it can be argued that when target board members seriously consider an acqui-hire offer, they should be aware that dissolution of the company is "inevitable," satisfying the third circumstance. Each of these occurrences, especially considered collectively, show that acqui-hire transactions meet the circumstances requiring enhanced judicial scrutiny and the application of *Revlon*.

The argument could be made that these "break ups" are not inevitable because acqui-hire buyers could keep the company alive in a theoretical sense, but the requirements for *Revlon* duties, nevertheless, would still be present. For example, the buyer could argue that dissolution of the target is not "inevitable" simply because the buyer could still theoretically pursue the target company's past projects. However, in order for *Revlon* duties to take effect, *Revlon* does not require that a dissolution or break up necessarily be "inevitable," per se.[190] The court in *Revlon* did state that one of the circumstances that requires heightened scrutiny is an inevitable dissolution.[191] It does not, however, follow that such is a necessity before directors are subject to enhanced scrutiny and are required to retrieve the best value available to stockholders.[192] In fact, *Revlon* stated, "'when bidders make relatively similar offers, or dissolution of the company becomes inevitable,' the directors need to fulfill their enhanced *Unocal* duties."[193] Furthermore, in interpreting *Revlon*, the Delaware Supreme Court has reiterated that this enhanced scrutiny and need to obtain the best value for shareholders is present when "there is a pending sale of control, regardless of whether [. . .] there is to be a break-up of the corporation."[194] Two events that

188. *Id.*
189. *Id.*
190. *Paramount*, 637 A.2d at 46.
191. *Id.*
192. *Id.*
193. *Id.* (quoting *Revlon*, 506 A.2d at 184) (internal quotation marks omitted).
194. *Id.* at 46; *see also* Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1288 (Del. 1989) (stating that directors have a responsibility to attain the highest value reasonably attainable for shareholders when there is a sale of corporate control); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) (asserting that *Revlon* governs every case in which even a fundamental change of corporate control occurs or is contemplated).

have the greatest impact on stockholders are both the sale of control or a corporate break up, and therefore, each of these events alone creates the requirement that directors be charged with attaining the best value for shareholders, and each is subject to heightened judicial scrutiny.[195] Both a sale of control and a break up implicate a corporation in a significant, fundamental, and likely irreversible way; accordingly, *Revlon* duties are ignited in both instances.[196] Therefore, even if an acqui-hire buyer could argue that dissolution of the target corporation is not "inevitable," the sale of control itself could ignite heightened scrutiny of the target board's decisions.

Moreover, even if the acqui-hire process is not viewed as a dissolution that satisfies the requirements for igniting *Revlon*, and instead is seen as controlling investors or managers exercising their right to sell, the practice still calls for a higher level of review. Acqui-hires by nature involve a great amount of self-dealing, as many of those who may be engaged in the negotiation process on the seller's side will likely be future employees of the buying side. In fact, one attorney author has warned that insulation of board members in acqui-hires is important because "assuming [the target company's stock] is held by a small cohort, most if not all of the directors will be 'interested' in the transaction."[197] Furthermore, the business judgment rule should not offer protection in these circumstances because that rule itself calls for its use only when there is no conflict of interest present.[198] Based on the business judgment rule's own requirements, along with the general need to provide protection for shareholders, courts should analyze these transactions under a reasonableness or an entire fairness standard. Moreover, even if the target's biggest controlling institutional investors approve of the deal, the general rule that controlling investors can sell their control at a premium price has exceptions, including bad faith and conversion of a corporate opportunity.[199] For the reasons stated above, it can easily be a concern that these deals will be completed in bad faith on the part of the target company and/or its controlling investors. Looking further, not only do the structures of these transactions comply with requirements for higher judicial review, but the surrounding corporate climate calls for heightened scrutiny as well.

195. *Paramount*, 637 A.2d at 47–48.

196. *Id.*

197. Danielle Naftulin, *So You're Being Acqui-Hired . . .* , COOLEY GO, https://www.cooleygo.com/acqui-hire-basics/ (last visited Apr. 10, 2016).

198. FDIC v. Castetter, 184 F.3d 1040, 1044 (9th Cir. 1999).

199. Zetlin v. Hanson Holdings, Inc., 48 N.Y.2d 684, 685 (1979).

E. The Surrounding Concerns That First Brought About *Revlon* Duties Are Present in the Acqui-Hire Structure

The environment surrounding acqui-hire transactions is reminiscent of the climate that brought about *Revlon* duties in the first instance. As mentioned in Part I.B, the decisions in *Revlon* and surrounding cases were influenced by the corporate climate of the 1980s.[200] The corporate focus of that time, similar to the focus in acqui-hires, was on short-run returns instead of long-term gains.[201] The acquirers then, similar to the acqui-hire purchasers now, were not concerned with the target corporations themselves or their shareholders.[202] Thirty years ago, the courts stepped in when directors and institutional investors began restructuring corporate transactions at the detriment to shareholders; now an intervention by the courts is needed again. Even if some might contend that *Revlon* does not apply to these deals, corporate judges are well known for their desire to implement good policy and they will likely be willing to stretch the *Revlon* policy where needed.

F. *Revlon* Duties Can Apply to Boards of Private Companies and the Duties Exist When There Is a Single Bidder

Those who disagree that acqui-hires ignite *Revlon* duties could argue that the common target corporations are not thought to be the type traditionally encompassed by *Revlon*. This could be either because the targets are generally private companies or because there is usually only a single bidder. These arguments, however, have been deflated by legal literature and recent Delaware cases.

The *Revlon* court's language raised doubt as to whether *Revlon* duties were a responsibility of directors for private companies,[203] which most of the targets in acqui-hires are. Yet, valid arguments have been raised for applying these duties to nonpublic companies. When the *Revlon* court made its decision, the opinion appeared to limit *Revlon* duties to only public corporate break ups by avoiding all change of control and prefatory language.[204] Nevertheless, if the holding "could be expanded under the prefatory language, then the sale of control of a private company could trigger Revlon."[205] This relates to acqui-hire deals because most of the targets are likely private corporations and the transactions result in a change of control in the buyer's favor. Moreover, authors of another piece that briefly explores *Revlon* duties in the

200. Moore, *supra* note 79, at 277–79.
201. *Id.* at 278–79.
202. *Id.* at 279.
203. Kerr, *supra* note 9, at 644 n.255.
204. *Id.*
205. *Id.*

context of acqui-hires, argue that boards of private companies, regardless of size, could possibly still be bound by the fiduciary duties created in *Revlon*.[206] The authors caution that California corporations should be mindful of Delaware corporate law because California applies the same basic duties of care and loyalty.[207] In the discussion of *Revlon*'s application to private companies, they cite the *In re Openlane, Inc.* decision, in which the court explained that "'[t]he fact that a company is small . . . does not modify core fiduciary duties. . . . In other words, small companies do not get a pass just for being small.'"[208] The article acknowledges that there is a potential for deference to a board when it is made up of founders and experienced professional investors, and also that there is a reduced risk of shareholder litigation in closely held companies.[209] Nevertheless, it warns that boards that are considering acqui-hire transactions still have an obligation to fulfill their duties of care during these deliberations.[210] The piece cautions that these private target boards "should carefully review potential alternative buyers, market and competitive factors, and company projections and financing prospects."[211] While the authors of that article caution that the application of *Revlon* to acqui-hires could eventually be a possibility, this Note proposes that, in consideration of each of the unsettling factors presented, courts *should* begin applying the *Revlon* standard now.

Acqui-hire transactions are generally structured with an initial single-bidder, but even in single bidder situations (as compared to cases such as *Revlon*, where competing bidders were present) boards are still required to satisfy their *Revlon* duties. The Delaware Court of Chancery, just two years ago, heard two cases that questioned whether two different boards satisfied their *Revlon* duties within sale-of-control transactions involving a single bidder.[212] In both cases, the court found that the board's initial decision to pursue a single-bidder process was reasonable.[213] However, in only one of the cases, *In re Plains Exploration & Production Co. Stockholder Litigation*, did the court conclude that the

206. Makinen et al., *supra* note 24, at 33–34 (citing Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc., 794 A.2d 1191 (Del. Ch. 2001)).

207. *Id.* at 34.

208. *Id.* (quoting *In re* Openlane, Inc. S'holders Litig., No. 6849-VCN, 2011 WL 4599662, at *7 (Del. Ch. Sept. 30, 2011).

209. Makinen et al., *supra* note 24, at 34.

210. *Id.*

211. *Id.*

212. Akin Gump Strauss Hauer & Feld LLP, Recent Delaware Court of Chancery Decisions Address Revlon Duties in Single-Bidder Sale-of-Control Transactions 1 (June 17, 2013).

213. *Id.* (citing *In re* Plains Exploration & Prod. Co. Stockholder Litig., No. 8090-VCN, 2013 WL 1909124 (Del. Ch. 2013), and Koehler v. NetSpend Holdings, Inc., No. 8373-VCG, 2013 WL 2181518 (Del. Ch. 2013)).

board members satisfied their fiduciary duties under *Revlon*.[214] In the second case, *Koehler v. NetSpend Holdings, Inc.*, the court found that the directors would likely fail to meet this burden.[215] In *Koehler*, the court found that the board had likely failed at carrying out its duties of remaining fully informed and acting reasonably throughout the process, as required by *Revlon*.[216] The court in *Koehler* noted that, "[w]hile a single-bidder sale process is not per se unreasonable, if a board elects to pursue a single-bidder process and forgo a presigning market check," that may be taken into account by a court.[217] The lack of a pre-signing market check along with the board's other actions, "taken as a whole, must result in a process that is reasonably designed to maximize the price to be received by the stockholders."[218] Moreover, in the single-bidder process, the target company's ability, or lack thereof, to "conduct a 'de facto,' postsigning [sic] market check may be significant," which is something that a "target's board should be aware of in negotiating both the deal protection measures and length of the preclosing [sic] period for the acquisition agreement."[219] Considering the recent emphasis on the likelihood of corporate judges to comply with *Revlon* policy in both private and single bidder situations, it seems that acqui-hire transactions have little legal argument to hide behind.

To summarize, this Part pointed to areas that call for concern in acqui-hire transactions and provided a solution within *Revlon* duties. California courts are beginning to see acqui-hire cases and will likely need to establish a standard under which to scrutinize those claims. Moreover, acqui-hire transactions take a great amount away from shareholders including reduced return on investment, possible conversion of a corporate opportunity, and the inability to sell past projects at a premium. Also, the way that employees are treated in acqui-hires raises concerns, ranging from misplaced fiduciary duties that should belong to the investors, to more negative experiences like an employee's inability to continue projects. Lastly, this Part verified that *Revlon* duties can apply to acqui-hires due to their structure, and that concerns such as self-dealing increase the need to encourage heightened judicial scrutiny in these transactions.

214. *Id.; In re* Plains Exploration & Prod. Co. Stockholder Litig., No. 8090-VCN, 2013 WL 1909124 (Del. Ch. 2013).

215. Akin Gump Strauss Hauer & Feld LLP, *supra* note 212, at 1; Koehler v. NetSpend Holdings, Inc., No. 8373-VCG, 2013 WL 2181518 (Del. Ch. 2013).

216. Akin Gump Strauss Hauer & Feld LLP, *supra* note 212, at 1 (citing *Koehler*, 2013 WL 2181518).

217. *Id.* at 6.

218. *Id.* at 1.

219. *Id.* at 6.

Conclusion

When a purchaser approaches a target corporation with an acqui-hire and the managing board members are seriously considering the offer, that board's actions should be strictly scrutinized following the *Revlon* standards. At that point, the target company's directors become auctioneers for the stockholders. Consequently, they should actively seek out other companies who might want to be the buyer in the acqui-hire or even purchase the target in a more traditional manner. The boards owe fiduciary duties to stockholders, preferred and common, not to employees, and the *Revlon* duties explicitly require protection for the shareholders. To go even further, the standard of review called for under *Revlon* is a reasonableness standard; however, considering the fact that acqui-hires by nature involve a great amount of self-dealing, as many of those who are engaged in the negotiation process on the seller's side will likely be future employees of the buying side, an even higher standard could be considered if needed. Additionally, bolstering this argument, the business judgment rule itself also calls for its use only when there is no conflict of interest present. To protect investors, courts should analyze these transactions under a reasonableness standard incorporating *Revlon* considerations and, even further, an entire fairness standard if self-dealing can be identified.

Though arguments may be made that the target boards do not fall under *Revlon*, either because the target companies are private or because the deals consist of a single bidder, there are still ways to enhance the judicial scrutiny of these transactions. The general rule governing the sale of controlling shares specifically says that controlling shareholders can sell their control at a premium price, but even this standard has exceptions including bad faith and conversion of a corporate opportunity. For the reasons stated above, it can easily be a concern that these deals will be completed in bad faith on the part of the target board. Target board members in acqui-hires should be scrutinized under a higher standard than is generally granted to board members. Acqui-hire transactions encompass the exact concerns that inspired courts to create the protection of *Revlon* duties in the first place, and acqui-hires provide the perfect opportunity for *Revlon*'s modern application.