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Reclaiming "Value" in the True Purpose of the Corporation

As corporate boards have increasingly embraced broad stakeholder governance and sustainable value creation in confronting today's urgent environmental and social challenges, some critics have sown confusion by claiming that stakeholder governance stands at odds with a duty to promote shareholder value. Remarkably, some now even argue that those directors who view their fiduciary duty as owed to the corporation — to grow its value over the long-term using their business judgment, based on regular engagement with shareholders — run afoul of Delaware law's purportedly exclusive solicitude for shareholder value, triggering loss of the business judgment rule's protection. Delaware law says nothing of the sort, and directors must not let such warnings deter their full commitment to sustainable long-term growth, innovation, and corporate social responsibility.

For these critics of stakeholder governance, pitting shareholders against other stakeholders offers the misleading allure of an existential conflict, one that requires directors to choose between value for one versus the other. But Delaware law nowhere demands that choice — and opponents of stakeholder governance know it. Indeed, even strict Friedmanist "shareholder primacy" advocates acknowledge, as they must, that directors are fully authorized to use their business judgment to consider the variety of stakeholder interests essential to promoting sustainable success and growth in long-term corporate value. Since the 1985 decisions in the *Unocal* and *Household* cases, and in an unbroken string of holdings since then, the Delaware Supreme Court has been clear that, outside the cabined sale-of-control setting, the board of directors can and should take the interests of all relevant stakeholders into account in assessing and pursuing the corporation's long-term value. What's more, as we have recently emphasized, Delaware's directors have an obligation under the *Caremark* doctrine to implement and monitor appropriate systems for identifying material risks, and then to address them once identified. Not a single Delaware case has ever distinguished these seminal rulings to withhold the business judgment rule's protections where disinterested directors used their judgment to address material risks to the corporation and to grow corporate value over the long term pursuant to a strategy determined by engagement with its major shareholders.

To be clear, there is no way to manage a company to achieve sustainable, long-term growth in corporate value without taking into account all stakeholders and ESG (environmental, social and governance) principles. That is more true today than ever before — as we recently noted, the well-being of employees and other stakeholders, and the ability to engage in sustainable ways of doing business, are a basic building block of the corporation's long-term value. As Professor Colin Mayer has observed, "Forty years ago, 80% of the market value of U.S. corporations was attributable to tangible assets —

plant, machinery, and buildings — as against intangibles — licenses, patents, and research and development. Today, intangibles account for 85% of the market value of U.S. corporations." Further, as we have stated, a board and management team that is myopically focused on share price, without also taking a broader, more holistic view of the corporation and its longer-term strategy, sustainability, and risk profile, is doing a disservice not only to employees, customers, communities, and other impacted stakeholders, but also to shareholders and the corporation as a whole. At bottom, the interests of the shareholders as a class *in the long run* are the same as those of the corporation *in the long run* — and those interests depend upon stakeholder governance for the responsible corporate stewardship that is essential to long-term value, the true purpose of the corporation.

For these reasons, promoting shareholder value must not be misrepresented to be the exclusive province of shareholder primacy advocates. Nor should directors be misled by Friedman adherents' most recent claim of stakeholder governance "demoting shareholders' interests," an archaic construction of the corporation whose keystone is the sole objective "to Maximize Shareholder Value." In the real world of everyday business, there is no difference between stakeholder governance and what some now tout as a modified version of shareholder primacy that must engage and account for the interests of other stakeholders — the only practical difference arises for the takeover raiders and activist hedge funds who are determined to constantly maximize and extract *short-term* value from the corporation, to the exclusion of other shareholders' interests in the long-term value of the corporation.

That lays bare the corporation's real existential governance choice: on the one hand, the type of shareholder primacy model demanded by activists and raiders to cut off directors' reasoned judgment to pursue anything but *short-term maximization* of shareholder value; and on the other hand, a governance model that permits boards to embrace ESG principles and sustainable investment strategies, with the support of investors and asset managers, to promote *long-term* corporate value. In this fundamental debate, we continue to believe that *It's Time to Adopt The New Paradigm*, which conceives of corporate governance as a partnership among corporations, shareholders, and other stakeholders to resist short-termism and to embrace ESG principles and corporate social responsibility in order to create sustainable, long-term value.

There should be no doubt that the law in Delaware and every other U.S. jurisdiction empowers well-advised boards to follow The New Paradigm for responsible corporate stewardship through partnership between boards and investors to vindicate long-term value as the true purpose of the corporation.

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