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PRESERVING SOCIAL MISSION IN CORPORATE DEMERGERS: THE BEN & JERRY'S-UNILEVER SPLIT

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In March 2024, Unilever announced its intention to accelerate its Growth Action Plan (GAP) by separating its ice cream division into a standalone business. This strategic decision immediately cast a spotlight on the future of Ben & Jerry's, a brand synonymous with social purpose, and marked the impending conclusion of a partnership that spanned over two decades and was fraught with challenges and controversies. From the outset, the 2000 merger agreement was unique, establishing an "Independent Board" predominantly composed of Ben

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& Jerry's appointees with exclusive authority to preserve the subsidiary's brand and social mission. This imminent separation, on track for completion by the end of 2025, raises heightened concerns about whether Ben & Jerry's well-loved brand, intricately linked to its social mission, will survive this transaction.

This note is profoundly driven by a desire to document the unique and often contentious nature of the Ben & Jerry's-Unilever partnership. It critically evaluates the pivotal decisions made by Ben & Jerry's managers and directors, particularly concerning the unique merger agreement, aiming to provide crucial lessons for other companies genuinely committed to integrating social purpose into their core business. To this end, the analysis examines the Ben & Jerry's-Unilever partnership through the lens of corporate governance theories, including Corrigan's Corporate Governance Trilemma and Petrucci & Subramanian's framework of Stakeholder Amnesia. Drawing on comparative case studies of Craigslist and OpenAI, this note evaluates the effectiveness and durability of various governance mechanisms designed to safeguard social purpose throughout a company's lifecycle, illuminating their relative efficacy under changing corporate ownership.

The findings reveal a nuanced hierarchy of governance mechanisms, highlighting that formal allocations of control—such as the Independent Board's composition in the Ben & Jerry's Partnership—proved surprisingly resilient in preserving social mission, far more effectively than functional contractual commitments. Conversely, widely held structures employing mechanisms like capped returns models, general veto rights, or mission statements in the Articles of Incorporation offered limited practical protection against market imperatives and unaligned corporate owners. This analysis underscores the critical role of external partners in complicating dual objectives and the profound, often irreversible, impact of relinquishing ownership and control. Ultimately, the Ben & Jerry's narrative serves as a cautionary tale and a call to action for pro-social founders, emphasizing the urgent need for sophisticated, integrated corporate governance models that genuinely embed social purpose to ensure its long-term resilience against commercial pressures.

INTRODUCTION

In March 2024, Unilever announced its intention to accelerate its Growth Action Plan (GAP) by separating its Ice Cream division into a standalone business.[1] This decision drew immediate attention to the future of one of the leading brands in Unilever's ice cream portfolio: Ben & Jerry's. The separation (or "demerger") marks the end of a partnership that lasted over twenty years and was fraught with challenges and controversies. In 2000, Ben & Jerry's board approved a unique merger agreement with Unilever,[2] which established an "Independent Board" composed predominantly of Ben & Jerry's appointees with a rotating structure, in which an outgoing board member is tasked with appointing their successor. The terms of this agreement grant the Independent Board exclusive authority to preserve the wholly owned subsidiary's brand and social mission,[3] which later formed the basis for two separate lawsuits filed by Ben & Jerry's against its parent company for failing to uphold the agreement.

Scholars have closely followed the evolution of the Ben & Jerry's-Unilever partnership (the "Partnership") and its impact on Ben & Jerry's operational character, encapsulated by its three-part mission: 1) to create the highest quality product possible (Product Mission); 2) to deliver reasonable returns

1. *Unilever to Accelerate Growth Action Plan Through Separation of Ice Cream and Launch of Productivity Programme*, UNILEVER (Mar. 19, 2024), https://www.unilever.com/news/press-and-media/press-releases/2024/unilever-to-accelerate-growth-action-plan-through-separation-of-ice-cream-and-launch-of-productivity-programme/.

2. Constance L. Hays, *Ben & Jerry's to Unilever, with Attitude*, N.Y. TIMES (Apr. 13, 2000), https://www.nytimes.com/2000/04/13/business/ben-jerry-s-to-unilever-with-attitude.html.

3. Ben & Jerry's Homemade Inc., Proxy Statement (Section 14A) (Apr. 18, 2000).

for shareholders (Financial Mission); and 3) to contribute to the community (Social Mission).[4] The imminent separation, on track for completion by the end of 2025,[5] marks a new chapter in this story, raising heightened concerns about whether Ben & Jerry's well-loved brand, intricately linked to its social mission, will survive this transaction. The demerger offers a new lens to evaluate methods of corporate governance design, proposed by scholars for founders with pro-social preferences, to advance stakeholder interests throughout a company's lifetime.[6,7] This note aims to contribute to the literature by highlighting how the prospect of changes in corporate ownership or external partnerships reinforces important lessons on how market-based corporate governance in pro-social corporations leads inexorably to mission drift. The Ben & Jerry's case also illuminates the relative effectiveness or ineffectiveness of corporate governance mechanisms designed to protect a corporation's social mission under changing corporate ownership. Drawing on comparable examples of corporate governance design in pro-social corporations, namely Craigslist and OpenAI, the note seeks to illuminate whether alternative choices might have provided better long-term protection to Ben & Jerry's brand and its distinguished commitment to social purpose.

With an understanding of the story of Ben and Jerry's, the mechanics of demerger transactions, and the impact of traditional market-based corporate governance on pro-social businesses, it becomes clear that Ben & Jerry's decision to sell itself to Unilever in 2000 was a pivotal moment that sealed its fate. Ben & Jerry's could have certainly negotiated for mechanisms in the acquisition to better protect their social mission

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4. Julie Bayle-Cordier et al., *Leadership, Social Responsibility, and Projected Identity: The Ben & Jerry's Story*, ACAD. OF MGMT. PROC. 1 app.1 (2012).

5. Dominic Chopping, *Unilever Picks Amsterdam Over London for Ice Cream Unit's Primary Listing*, WALL ST. J. (Feb. 13, 2025, 7:58 AM), https://www.wsj.com/business/unilever-to-list-ice-cream-business-in-amsterdam-london-and-new-york-ad4be963.

6. This note draws from the literature by using the terms "social" and "pro-social" capaciously, and without judgment, to mean any nonfinancial objective, including a social, environmental, political, or other objectives. Patrick M. Corrigan, *The Corporate Governance Trilemma*, at n.2 (Apr. 1, 2024) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729606.

7. In some contexts, "social mission" may refer to this aspect of Ben & Jerry's articulated three-part mission statement. Bayle-Cordier et al., *supra* note 4, at app. 1.

from Unilever's corporate influence. Nevertheless, this story should reinforce to founders of pro-social corporations the importance of retaining control over governance rights to continue producing public goods. The case also reinforces how the right of shareholders to sell and vote their ownership interests is the workhorse institution that ultimately shapes the direction of a corporation's character, with fiduciary duties providing limited guidance, leverage, or support to pro-social founders in the absence of ownership and control.

This note uses the terms "social" and "corporate social responsibility" ("CSR") interchangeably to reference the stakeholder capitalism view, as contrasted with the shareholder primacy view, in the context of the longstanding debate of the purpose of the corporation[8]. While there is no universally accepted definition of a "social enterprise"[9,10], this note uses the term to refer to those organizations that embody the stakeholder capitalism view and seek to use corporate vehicles to blend purpose and profit.[11] These organizations primarily aim to deliver social value to the beneficiaries of their mission while generating revenue from commercial activities to support and scale their operations.[12] This revenue aspect is crucial for distinguishing hybrid companies from other entities that have historically dominated the social sector, such as non-profits and cooperatives that depend on donations, grants, and public sector funding.[13] A demerger, also known as a spin-off or carve-out, involves separating a company's business activities into distinct entities that are usually owned by the same shareholders.[14]

8. Caley Petrucci & Guhan Subramanian, *Stakeholder Amnesia in M&A Deals*, 50 J. CORP. L. 88 (July 31, 2024).

9. Chris Cornforth, *Understanding and Combating Mission Drift in Social Enterprises*, 10 SOC. ENTER. J. 1, 5 (2014); *see, e.g.*, Jacques Defourny & Marthe Nyssens, *At the Crossroads of Market, Public Policies and Civil Society*, SOCIAL ENTERPRISE 3, 4 (Marthe Nyssens ed., 2006); *see also* Dennis R. Young, *The State of Theory and Research on Social Enterprises, in* SOCIAL ENTERPRISES: AN ORGANIZATIONAL PERSPECTIVE 19, 19 (Benny Gidron & Yeheshkel Hasonfeld eds., 2012).

10. In this note, the terms "social enterprise," "hybrid organization," and "hybrid company" will be used interchangeably.

11. *See generally* Alnoor Ebrahim et al., *The Governance of Social Enterprises: Mission Drift and Accountability Challenges in Hybrid Organizations*, 34 RSCH. IN ORGANIZATIONAL BEHAV. 81 (2014).

12. *Id.* at 82.

13. *Id.* at 82–83.

14. *Demergers*, WESTLAW UK PRAC. L. https://1.next.westlaw.com/Document/I3351a65ae8da11e398db8b09b4f043e0/View/

"Demerger" is the term most used under UK company law, while the term "spin-off" is its counterpart in the U.S.[15] "SpinCo" and "NewCo" are also used interchangeably to refer to the entity created from the demerger transaction.

The discussion will begin by providing context about Ben & Jerry's social mission and the terms of its partnership with Unilever, as well as the challenges the merger partners faced. It will then turn to the legal and statutory principles that will shape the upcoming separation, providing an indication of Ben & Jerry's future following the upcoming transaction, as well as the potential for shareholders to obtain recourse if Unilever structures the transaction in a manner that undermines the company's social mission. Further, relevant scholarly literature on methods of corporate governance design for pro-social corporations will provide a framework to draw important insights from the Ben & Jerry's case. The methods proposed by scholars will be evaluated in turn for their relative effectiveness and resilience under changing corporate ownership. The note will conclude by outlining core principles for founders and managers on designing pro-social corporations to sustain the production of public benefits, even as ownership structures evolve.

I.
Ben & Jerry's: From Founding to Acquisition

A. *The CSR Pioneer*

To further complicate the existing definitional challenges surrounding social enterprises, Ben & Jerry's arguably occupies a unique position as a pro-social corporation that blends the pursuit of purpose and profit more consistently and successfully than most. Unlike multinational firms that have adopted CSR practices in response to consumer trends, Ben & Jerry's is part of a pioneering group of social enterprises that were committed to utilizing business as a vehicle for social good from their inception.[16] Former CEO Jostein Solheim emphasized that the company's social mission is not merely an aspect of its

FullText.html?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (last visited June 15, 2025).

15. The use of UK company law terminology is appropriate in this context because Unilever, the parent company and original buyer, is incorporated under UK law.

16. Bayle-Cordier et al., *supra* note 4, at 10.

organizational identity, but is instead "integral to how we do business."[17] Gravalese writes that "unlike most corporations that cherry-pick causes for PR moments, Ben & Jerry's has institutionalized activism into its business model."[18]

The origin story of Ben & Jerry's is certainly "worthy of screentime."[19] Founders Ben Cohen and Jerry Greenfield enrolled in an ice cream-making course at Penn State for a mere $5 in tuition.[20] They opened their first store in 1977, situated in an abandoned gas station in Burlington, Vermont.[21] Both lacked any prior business experience, and the founders have been described by scholars as "two underachievers with counterculture values".[22,23] Nonetheless, many regard them as marketing geniuses, possessing an instinct for creating a compelling brand image characterized by "simple, down-home wholesomeness".[24] Cohen and Greenfield capitalized on a rising trend for super-premium ice cream, a market segment that was predominantly occupied by Häagen-Dazs at the time of the company's founding.[25]

Feeling threatened by the emergence of a new competitor, Häagen-Dazs attempted to obstruct the distribution of Ben & Jerry's product through its parent company, Pillsbury.[26] This action provoked Ben & Jerry's first marketing campaign:

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17. *How Ben & Jerry's Got Bought Out Without Selling Out*, Knowledge at Wharton (Jan. 15, 2016), https://knowledge.wharton.upenn.edu/article/ben-jerrys-got-bought-without-selling/.

18. Stephanie Gravalese, *Ben & Jerry's CEO Ousted—Employees Walk Out In Protest Against Unilever,* Forbes (Mar. 20, 2025), https://www.forbes.com/sites/stephaniegravalese/2025/03/20/ben–jerrys-ceo-fired-what-it-means-for-activist-food-culture/.

19. Nick Pirsos, *Social Mission Impossible: Why Fiduciary-Like Obligations Must Protect Wholly Owned Benefit Corporations*, 101 Wash. U. L. Rev. 991, 993 (2024).

20. *Id.*

21. *Id.*

22. Antony Page & Robert A. Katz, *The Truth About Ben and Jerry's,* 10 Stan. Soc. Innovation Rev. 38, 39 (2012).

23. Ben Cohen was a college dropout with a background in pottery making. *See* Rosanna Greenstreet, *How We Met: Ben Cohen and Jerry Greenfield*, Independent (May 27, 1995), https://www.the-independent.com/arts-entertainment/how-we-met-ben-cohen-and-jerry-greenfield-1621559.html.

24. Merrill Fabry, *Ben & Jerry's is Turning 40. Here's How They Captured a Trend That Changed American Ice Cream*, Time (May 4, 2018), https://time.com/5252406/ben-jerry-ice-cream-40/.

25. *Id.*

26. Gabriëlle de Sain, *Ben & Jerry's: Two Friends Make the World a Better Place,* Offorte (Jan. 7, 2025), https://www.offorte.com/en/blog/inspiration/ben-jerrys.

"What's the doughboy afraid of?"[27] This initiative effectively cast them as underdog insurgents, unafraid to confront more powerful corporate entities.[28] The campaign attracted media attention and garnered public sympathy, ultimately enhancing brand awareness and facilitating their entry into the broader U.S. market.[29] This early episode illustrates that the company's socio-political orientation was a key driver of its initial corporate success.

Cohen and Greenfield initially envisioned the business as a self-sustaining source of modest income.[30] However, as the venture grew, Cohen expressed disappointment that Ben & Jerry's had become "just a business, like all others, [that] exploits its workers and the community".[31] Following the advice of a friend, Cohen changed his perspective, viewing the business as "an experiment to see if it was possible to use the tools of business to repair society."[32] By 1988, the company adopted its renowned three-part mission statement.[33] Its executives aimed to develop internal success metrics based on a "two-part bottom line," stating that "our success is measured not only by how much money is left over at the end of the year, [but also by] how much of a contribution we made to our various communities."[34] By "our communities," they referred to their employees, the local community, the national community, and the global community.[35]

The various ways in which Ben & Jerry's has embodied its three-part mission are abundant and span the company's entire history. Beyond the extensive list of campaigns and products aimed at addressing a wide range of causes—from the more neutral, such as rain forest conservation, to the highly controversial, like the Israel-Palestine Conflict—a few business and legal decisions particularly stand out. In 1984, company leaders utilized a little-known clause that enabled them to

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27. *Id.*
28. *Id.*
29. *Id.*
30. Pirsos, *supra* note 19, at 993.
31. Page & Katz, *supra* note 22, at 40.
32. *Id.*
33. Bayle-Cordier et al., *supra* note 4.
34. *An Interview with Ben Cohen of Ben & Jerry's Ice Cream,* STUDIO POTTER, June 1990, at 77–79.
35. *Id.* at 79.

initiate a Vermont-only public stock offering.[36] By resisting venture capital financing to maintain control over the company, the company raised funds for a new manufacturing facility by allowing stock purchases exclusively by Vermont residents. This initiative was intended to provide "less wealthy community members [the opportunity] to invest on the ground floor at an affordable price," while founders Cohen and Greenfield retained 50% and 10% of the company's stock, respectively.[37] They subsequently established the Ben & Jerry's Foundation, which donates 7.5% of the company's pretax profits annually, aiming to benefit society by "giv[ing] money away."[38]

Bayle-Cordier and her colleagues have attempted to categorize Ben & Jerry's exceptional alignment with its social mission through methods of organizational identity theory. They assert that Ben & Jerry's meets the rigorous standards associated with a more stringent definition of a socially responsible organization, particularly by displaying two critical elements: responsible leadership and authenticity.[39] Responsible leaders must be "ethically-and-socially motivated and not solely engaged in CSR for instrumental and/or financial reasons."[40] Authenticity is a characteristic embodied by "a response to internal desires to behave with integrity, not to societal pressures to conform to certain standards."[41]

B. *The Acquisition*

As Ben & Jerry's leadership escalated its use of the company to pursue non-pecuniary objectives throughout the 1990s, the company's financial performance began to wane.[42] Between 1993 and 1999, the stock price halved, in part due to a reported slowdown in sales growth.[43] While the company's social contributions gained momentum during this time, the relationship

36. Marianne Kotch & Paul Carnahan, *Ben & Jerry's Homemade, Inc. Vermont Stock Offering Records & Annual Reports, 1983–1997*, VT. HIST. SOC'Y (Mar. 2018), https://vermonthistory.org/documents/findaid/BenJerrysVermontStockOffering.pdf.
37. Pirsos, *supra* note 19, at 993–994.
38. *Id.*
39. Bayle-Cordier et al., *supra* note 4, at 5.
40. *Id.*
41. *Id.*
42. Page & Katz, *supra* note 22, at 40.
43. Pirsos, *supra* note 19, at 994.

between these two trends remain unclear.[44] The decline in stock price attracted the attention of prospective buyers eager to leverage the growth potential inherent in the brand that the founders had built over its nearly twenty-year history.[45]

In 2000, Unilever presented an acquisition offer at $43.60 per share, preceded by offers from Dreyer's Grand Ice Cream and a $38 a share proposal to take the company private, led by Cohen and a consortium of investors.[46] On April 11, 2000, the Ben & Jerry's board announced its approval of Unilever's offer for the company to become a wholly owned subsidiary of the international conglomerate.[47] The announcement of the sale sent "shudders and shivers through the socially responsible business community,"[48] with commentators indicating that this event "continues to haunt social entrepreneurs,"[49] representing a kind of Groundhog Day in the community. It has also prompted many theorists to emphasize the importance of financial viability and sustainability as essential components for founders to maintain control over their organizations' commitment to social responsibility. In this context, they assert that "financial success is essential to staying in control."[50]

The board of Ben & Jerry's had compelling reasons to believe that the terms of its merger with Unilever, and its post-acquisition future, were *different* from those with other potential partners. By this point, Unilever had begun committing to adopting sustainable business practices[51] and signaled a sense of cultural compatibility, including a willingness to engage with the unique character of Ben & Jerry's business operations.[52] During the announcement of the merger, one co-chairman of Unilever remarked that early negotiations revealed a shared "similar vision" and emphasized that "Unilever prides itself on the way it does business worldwide."[53] Additionally, a representative from

44. *Id.*
45. *Id.*
46. Page & Katz, *supra* note 22, at 40.
47. *Id.*
48. *Id.* at 39.
49. *Id.*
50. *Id.* at 42.
51. UNILEVER, UNILEVER'S APPROACH TO CORPORATE SOCIAL RESPONSIBILITY: SOCIAL REVIEW 2000, https://www.unilever.com/files/origin/b7c407227f4eb0b869ff1b6b50f81d5c50ccdecd.pdf/2000-social-review-of-1999-data.pdf.
52. *See, e.g.*, Pirsos, *supra* note 19, at 995; Hays, *supra* note 2.
53. Hays, *supra* note 2.

Ben & Jerry's expressed that they were "very, very impressed" by the other co-chairman, who "talked for three hours about all the sustainable-agriculture programs they have" during the merger discussions.[54]

Scholarly research underscores the importance of cultural compatibility in determining the success of potential business combinations.[55] On the upside, cultural alignment generates greater synergies, better long-run operating performance, and fewer write-offs of goodwill.[56] On the downside, disparities in social missions and corporate cultures can fuel poor financial performance and lead to merger failures.[57] Lack of cultural compatibility has contributed to many high-profile merger failures to date, such as the AOL-Time Warner merger and the Amazon-Whole Foods merger.[58] A significant majority—approximately 95%—of executives consider cultural fit as essential for successful integration.[59]

While the founders of Ben & Jerry's may have exhibited optimism regarding their cultural alignment with Unilever, it is important to note that Unilever's approach to sustainability did not fully reflect the depth of Ben & Jerry's commitment to its social mission at the time of the acquisition. The board of Ben & Jerry's was firm in its requirement that any prospective acquirer must explicitly acknowledge its pre-existing social mission and establish an independent board of directors to oversee this aspect of the business.[60] Unilever's willingness to implement a governance framework through social covenants was a

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54. *Id.*

55. Tyler J. LeBlanc, *The Lost Ark of a Social Covenant: Progressing M&A Social Covenants from Moral Commitments to Binding Agreements*, 84 La. L. Rev. 747, 764 (2024).

56. *See* Fredrick L. Bereskin et al., *The Effect of Cultural Similarity on Mergers and Acquisitions: Evidence from Corporate Social Responsibility*, Harv. L. Sch. F. on Corp. Governance (July 23, 2017), https://corpgov.law.harvard.edu/2017/07/23/the-effect-of-cultural-similarity-on-mergers-and-acquisitions-evidence-from-corporate-social-responsibility/ (concluding that firms with similar CSR policies are more likely to decide to merge, complete deals more quickly, experience greater merger synergies and improved long-run performance, and experience fewer changes in CSR policy after the deal is closed, and "when firms with similar pre-deal CSR practices merge, they experience fewer post-merger integration issues overall").

57. LeBlanc, *supra* note 55 at 764.

58. *Id.*

59. *Id.* at 765.

60. *Id.* at 768.

key factor in convincing Ben & Jerry's of their cultural compatibility.[61] LeBlanc supports this notion, asserting "it was these social covenants that distinguished Unilever from other potential purchasers."[62] This represented a sincere misjudgment on the part of Ben & Jerry's, who overemphasized the extent to which these aspects of the merger agreement amounted to genuine cultural alignment.

Post-acquisition, then-CEO of Ben & Jerry's, Jostein Solheim, described Unilever as "visionary" for recognizing that any shift away from the company's commitment to social justice would undermine the value of the acquisition.[63,64] Moreover, he noted that the perceived worth of Ben & Jerry's commitment to social responsibility was a motivating factor behind the unusual concessions made by the acquirer regarding the governance of the surviving corporation.[65] It remains uncertain whether Unilever believed that the proposed governance structure would yield better financial outcomes for its new subsidiary, or if it merely recognized the perceived value of Ben & Jerry's socially responsible brand and acquiesced to its unique demands. Notably, in either scenario, it is clear that, Unilever placed some amount of value on Ben & Jerry's identity as a social enterprise at that time.[66]

C. *The Terms of the Acquisition*

The total legal implications of the definitive merger agreement, which designated Ben & Jerry's Homemade, Inc., a Vermont corporation, as the "Surviving Corporation," were complex from the beginning.[67] The result was that the parent

61. *Id.* at 782.
62. *Id.*
63. *How Ben & Jerry's Got Bought Out Without Selling Out*, *supra* note 17.
64. Solheim was a former Unilever executive. *Id.*
65. *Id.*
66. Immediately following the acquisition, Richard Goldstein, president of Unilever Foods North America, praised Ben & Jerry's Homemade's commitment to human rights in a press release: "Much of the success of Ben & Jerry's brand is based on its connections to basic human values, and it is our hope and expectation that Ben & Jerry's continues to engage in these critical, global economic and social missions." Russ Banham, *Unilever's Ben & Jerry's Fiasco: Board Lessons*, CORP. BD. MEMBER, https://boardmember.com/unilevers-ben-jerrys-fiasco-board-lessons/?mc_cid=67b157d8d8&mc_eid=-4c5ad3a611 (last visited May 31, 2025).
67. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 8.

company was bound by corporate form to pursue profits and endowed with legal authority over its subsidiary, except for decisions related to a nebulously defined category of organizational priorities linked to the Ben & Jerry's social ideology.[68] The authority to make decisions regarding these priorities was vested in a board of directors ("Independent Board"), denying Unilever the final say on these matters under the terms of the agreement.[69]

The Independent Board was given "primary responsibility for preserving and enhancing the objectives of the historical social mission of the Company" and was identified as the "custodians of the Ben & Jerry's brand image."[70] The Social Mission Priorities, which detailed the current areas of social involvement and future initiatives to be undertaken post-merger, were outlined in an addendum.[71] Conversely, the parent company was endowed with "primary responsibility for the financial and operational aspects of the Surviving Corporation".[72]

Structurally, Ben & Jerry's was granted the authority to appoint nine of the eleven seats on the Independent Board, with a revolving mechanism under which any departing member would designate their successor.[73] Moreover, the agreement stipulated that a majority of directors in each class would annually designate their successors to serve one-year terms on the Independent Board.[74] The merger agreement contractually compelled Conopco, as the sole shareholder, to nominate and elect these designated successors, thereby limiting its ability to interfere with the board's composition.[75] Notably, the agreement did not include provisions for modifying this governance structure or adapting the parent-subsidiary relationship in response to future organizational or cultural changes.

68. Pirsos, *supra* note 19, at 991–96.
69. *Id.*
70. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 29–30.
71. Pirsos, *supra* note 19, at 996.
72. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 29–30.
73. *See* Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 29 (stating that the Surviving Corporation Board shall consist of "seven directors from among the current members of the Board of Directors and persons nominated by such continuing directors").
74. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 28 (stating that "a majority of directors then in office in each Class shall designate the candidates for election to the Company Board in such Class each year").
75. *Id.* ("Canopco shall cause the election of such candidates and the CEO to the Company Board,").

The agreement states, "the Surviving Corporation Board shall have primary responsibility with respect to the enhancement of the Social Mission Priorities (as defined below) of the Company, *as they may evolve*."[76] Another section of the agreement stipulates: "The Surviving Corporation Board will have primary responsibility for preserving and enhancing the objectives of the historical social mission of the Company *as they may evolve from time to time consistent therewith*."[77] These clauses acknowledge the dynamic nature of corporations and social purpose but fail to provide guidelines for the merger partners to resolve potential conflicts. Aside from board appointments, the agreement stipulates that the U.S.-based Unilever holding company (Conopco) will make decisions with respect to the appointment, compensation and removal of the CEO "after a good faith consultation with, and the participation in discussions of, an advisory committee of the Company Board (the "Appointment Committee"), consisting of two appointees designated by the Ben & Jerry's Independent Board members.[78]

The Articles of Incorporation of the Surviving Corporation as included in an exhibit of the merger agreement retained Ben & Jerry's state of incorporation as Vermont.[79] Section 8.01 of the Vermont Business Corporations Statute requires that "all corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed under the direction of, its board of directors",[80] thereby endowing the Independent Board with legal authority over the Ben & Jerry's corporation. Vermont has a permissive "constituency statute", which theoretically permits directors to pursue non-pecuniary objectives by expanding the list of stakeholders the board is accountable to beyond the company and its stockholders.[81] The constituency statute of Vermont, included in § 8.30(3) of the Vermont Business Corporations Statute, articulates that a director, in discharging their duties, may "consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the State, region and nation, community and societal

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76. *Id.* at 30 (emphasis added).
77. *Id.* at 31 (emphasis added).
78. *Id.* at 29 (emphasis added).
79. *Id.* at 40 (emphasis added).
80. 11 Vt. Stat. § 8.01 (2024).
81. Brett McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WILLIAM MITCHELL L. REV. 1227, 1228 (2004).

considerations, including those of any community in which any offices or facilities of the corporation are located, and any other factors [they] reasonably consider appropriate in determining what [they] reasonably believe to be in the best interests of the corporation, and in the long-term and short-term interests of the corporation and its stockholders".[82] The Independent Board is therefore permitted to discharge its duties under this statute's broader conception of the corporation's stakeholders.

Building on background rules that purport to permit stakeholder-centric director decision-making under Vermont's constituency statute, Article III of the Articles of Incorporation seeks to internally codify Ben & Jerry's corporate purpose through a comprehensive "Mission Statement":

> "We have a progressive, nonpartisan, social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our business activities. Our focus is on children and families, and the environment."[83]

The mission statement proceeds with six stated intentions:

> "The gap between the rich and the poor is wide. We strive to create economic opportunities for those who have been denied them."

> "Capitalism and the wealth it produces does not create opportunity for everyone equally. We practice caring capitalism by integrating concern for the disadvantaged in our day-to-day business activities, and by advancing new models of economic justice that can become sustainable and replicable . . . ."

> "Manufacturing by definition creates waste. We strive to minimize our negative impact on the environment."

> "The growing of food sometimes uses toxic chemicals. We support socially and environmentally sustainable methods of food production and family farming."

> "The U.S. continues to spend significantly more on its military each year than the combined spending on: child health, welfare, education, nutrition, housing, job training and

82. 11 Vt. Stat. § 8.30(3) (2024).

83. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 40 (emphasis added).

environment. We seek and support nonviolent ways to achieve peace and justice."

"We strive to manifest a deep respect for human beings inside and outside our Corporation and for the communities in which they live."[84]

It is important to observe that none of these statements constitute enforceable commitments, but rather articulate detailed aspirational intentions regarding the corporation's socio-political purpose. Their open-ended, indeterminate nature would likely prevent a shareholder from bringing an enforcement action on the grounds that the board of directors failed to uphold them. While one could argue that embedding social commitments in a corporation's articles may offer directors a "shield" against claims that they failed to maximize shareholder value, recent case law casts doubt on that proposition. The capacious language of the opinion in *eBay v. Newmark*[85] suggests that shareholder primacy may be such a foundational principle of corporate law that it cannot be waived through private ordering—much like the duty of loyalty.[86,87] Ultimately, the degree of legal protection and strategic latitude that these provisions afford Ben & Jerry's Independent Board remains a subject of ongoing debate.

Alongside these structural elements, the parties agreed to several social covenants intended to encapsulate Unilever's commitment to maintaining Ben & Jerry's organizational identity after the acquisition. Among these covenants were commitments that the merger partners would "work together in good faith to develop a set of social metrics to measure the social performance of the Surviving Corporation," and that "the

84. *Id.*

85. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (2010).

86. Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075, 1084 (2017).

87. The uncertain legal status of corporate efforts to prioritize non-pecuniary goals—particularly the risk that directors may be found in breach of fiduciary duties for failing to maximize shareholder value—has been a major justification for the creation of the public benefit corporation (PBC) form. Unlike traditional corporations, PBCs are statutorily authorized to pursue a public benefit alongside profit, and their directors are explicitly empowered to balance the interests of shareholders with broader stakeholder considerations. *See, e.g.*, Del. Code Ann. tit. 8, § 365 (2023) (allowing directors to consider effects on stakeholders and specific public benefits).

Surviving Corporation will seek to have the rate of increase of such social metrics exceed the rate of increase of sales", among other stipulations.[88] Conopco also agreed to provide a $5 million disbursement to the Ben & Jerry's Foundation, in addition to causing the Surviving Corporation to continue the company's practice of making charitable contributions by donating $1.1 million per year for a minimum of ten years to be allocated by the Independent Board among the Ben & Jerry's Foundation and local community initiatives.[89]

D. *Partnership Breakdown and Litigation*

The parent-subsidiary relationship between Ben & Jerry's and Unilever thrived for over twenty years, characterized by significant collegiality and compromise. During this time, the Independent Board continued Ben and Jerry's commitment to social change, despite concerns that the sale would undermine its social mission, launching various campaigns addressing both longstanding and new issues that were important to the company's management.[90]

In 2008, the CEO of Ben & Jerry's, who was appointed by Unilever, proposed closing a manufacturing facility in Vermont that was crucial to the local economy.[91] The Independent Board determined that this closure would be inconsistent with the company's social mission, and Unilever respected their judgment, shelving plans to shut down the Waterbury plant.[92] With this conflict behind them, Ben & Jerry's social mission campaigns continued to flourish. For example, in 2017, the company announced it would no longer offer two scoops of the same ice cream flavor in Australia, in response to its national refusal to legalize same-sex marriage.[93]

These accomplishments led many to believe that the governance structure established in the merger agreement was a

88. Rauterberg & Talley, supra note 86, at 30 (emphasis added).
89. *Id.*
90. *See* Pirsos, *supra* note 19, at 996–97; LeBlanc, *supra* note 55, at 770.
91. Amended Complaint at 21, Ben & Jerry's Homemade, Inc. v. Conopco, Inc., No. 22-cv-05681 (S.D.N.Y. 2022), ECF No. 58.
92. *Id.*
93. Lisa Kocay, *Ben & Jerry's Bans Same-Flavored Scoops in Australia in Support of Marriage Equality*, FORBES (May 29, 2017, 2:31 PM), https://www.forbes.com/sites/lisakocay/2017/05/29/ben-jerrys-bans-same-flavored-ice-cream-scoops-support-marriage-equality/.

success. Publications from that period praised the structure, emphasizing the remarkable coexistence of two competing institutional logics.[94] Within the Ben & Jerry's sphere, based in the company's headquarters in Burlington, Vermont, "social mission actions [could] be ethically driven because there [was] a cocoon whereby these very social mission actions have been acknowledged as vital to the identity of the Ben & Jerry's brand."[95] In turn, the 'ethical sphere' constituted by social mission missionary employees feeds the power of the brand at a more global level."[96] Commentators noted: "many people expected the mission wouldn't survive… [t]o a remarkable degree, they were mistaken."[97]

This lengthy honeymoon period began to deteriorate in 2019 when a special committee representing Ben & Jerry's initiated a fact-finding mission to explore the human rights implications of selling products in the West Bank.[98] The Independent Board unanimously decided that selling products in that region would be inconsistent with the essential elements of the brand's integrity.[99] After Unilever initially affirmed that it had "always recognized the right of the brand and its independent Board to take decisions about its social missions," the parent company reversed its stance in June 2022, informing the chair of the Independent Board that it intended to enable product sales in the West Bank through a third-party distributor.[100] Unilever exercised its authority over its subsidiary by selling Ben & Jerry's Israeli business interests to a third party.[101]

This move revealed several critical issues: the unenforceability of the merger agreements' social covenants, the governance structure's failure to clearly delineate managerial authority, and the artificial separation between social mission, brand identity, and business operations. Subsequently, the Independent Board held a special meeting and, in a vote of 5-2, approved pursuing

94. *See, e.g.*, *How Ben & Jerry's Got Bought Out Without Selling Out*, *supra* note 17.
95. Roland Calori, Leadership, *Social Responsibility & Organizational Identity: The Case of the Acquisition of Ben & Jerry's by Unilever* 17 (unpublished manuscript).
96. *Id.*
97. *How Ben & Jerry's Got Bought Out Without Selling Out, supra* note 17.
98. Amended Complaint, *supra* note 91, at 23.
99. *Id.* at 3, 25.
100. *Id.* at 3.
101. *Id.* at 3, 15.

litigation against its parent company, a highly unusual occurrence.[102]

Following the Independent Board's announcement, the state pension funds of Arizona, New Jersey, New York, and Illinois began divesting their holdings in Unilever.[103] Unilever's decision therefore successfully limited further divestment and helped shield the parent company from potential state sanctions for violating laws that prohibit investments in companies that boycott Israel.[104] Ultimately, the United States District Court for the Southern District of New York denied Ben & Jerry's request for a preliminary injunction, stating the company had failed to demonstrate imminent harm and questioned the company's likelihood of prevailing against its sole owner and Parent.[105] The dispute was resolved through a confidential settlement agreement.[106]

However, the conflict resurfaced in November 2024 when Ben & Jerry's filed new claims, alleging that Unilever breached the obligations outlined in the settlement agreement.[107] The complaint asserts that Section 2(b) of the settlement agreement requires that Unilever "respect and acknowledge the [. . .] Independent Board's primary responsibility over Ben & Jerry's Social Mission and Essential Brand Integrity" and "work in good faith with the Independent Board to ensure that both are protected and furthered."[108] Additionally, the complaint notes that the settlement agreement included a commitment from Unilever to provide a total of $5 million in payments to Ben

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102. *Id.* at 29.

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

104. Pirsos, *supra* note 19, at 999–1000.

105. *Id.* at 1000; Ben & Jerry's Homemade, Inc. v. Conopco, Inc., No. 22-cv-05681, 2022 WL 4239941, at *1–2 (S.D.N.Y. Aug. 22, 2022) (order denying preliminary injunction). Noting the exceptional nature of injunctive relief, the Court began and promptly ended its inquiry by determining that any harm incurred by Ben & Jerry's would be "too speculative" to warrant redress. *Id.* at *1–2.

106. Complaint at 4, Ben & Jerry's Homemade, Inc. v. Unilever PLC, No. 24-cv-08641-PKC (S.D.N.Y. 2024).

107. *Id.* at 3–8.

108. *Id.* at 4.

& Jerry's for disbursement to human rights and humanitarian organizations, along with a $2 million payment to an organization that supports Palestinian farmers.[109]

The complaint alleges that in response to Ben & Jerry's plans to issue statements calling for a ceasefire in the Israel-Palestine conflict, Unilever threatened to dismantle the Independent Board and sue its members individually.[110] Other allegations include various incidents where Unilever suppressed the Independent Board's attempts to issue statements in connection with the conflict.[111] Overall, it appears that the commitments under the settlement agreement share similar issues with those of the original merger agreement and the social covenants it contained: they are loosely defined contractual obligations that fail to address the fundamental governance challenges that underpin the conflict between the two entities.

E. *Leadership Challenges*

In March 2025, Ben & Jerry's submitted an amendment to its second complaint as part of the ongoing dispute in the Southern District of New York.[112] The company alleged that Unilever removed and replaced Ben & Jerry's CEO, David Stever, in violation of the terms of the merger agreement that required consultation with the advisory committee.[113] Stever was a homegrown Ben & Jerry's employee, having started with the company in 1988 as a tour guide at its Vermont factory.[114] The amendment alleges that Unilever ousted Stever because of his commitment to Ben & Jerry's social mission and his cooperation with the

109. *Id.* at 8, 11.
110. *Id.* at 5.
111. *Id.* at 4.
112. Jonathan Stempel & Jessica DiNapoli, *Ben & Jerry's Says Unilever Ousting Ice Cream Maker's CEO over Social Activism*, REUTERS (Mar. 19, 2025), https://www.reuters.com/business/retail-consumer/ben-jerrys-says-parent-unilever-decided-oust-ice-cream-makers-ceo-2025-03-18/.
113. Dee-Ann Durbin, *Ben & Jerry's Alleges Parent Company Unilever Removed its CEO Over Social Activism*, NBC NEWS CHANNEL 8 (Mar. 19, 2025), https://www.wfla.com/news/ben-jerrys-alleges-parent-company-unilever-removed-its-ceo-over-social-activism/.
114. *Who is David Stever? Was Ben & Jerry's CEO Fired for Criticizing Donald Trump or Is There More to the Story?*, ECON. TIMES (Mar. 20, 2025), https://economictimes.indiatimes.com/magazines/panache/who-is-david-stever-was-ben-jerrys-ceo-fired-for-criticizing-donald-trump-or-is-there-more-to-the-story/articleshow/119258838.cms?from=mdr.

Independent Board, rather than concerns about his job performance.[115] According to Ben & Jerry's, the decision was the culmination of repeated threats by Unilever toward personnel, including Stever, for failing to align with efforts to suppress the company's social mission.[116] Unilever responded that it had made multiple attempts to engage with the Independent Board regarding the CEO's standing and expressed disappointment that "the confidentiality of an employee career conversation has been made public."[117] The company also sought dismissal of Ben & Jerry's earlier complaint, asserting that while it supports the brand's social advocacy, the mission has shifted toward "one-sided, highly controversial, and polarizing topics that put Unilever, B&J's, and their employees at risk."[118]

II.
Ben & Jerry's Future: The Demerger

This section examines the legal and structural framework surrounding Unilever's anticipated demerger of Ben & Jerry's, with a focus on the implications for the company's social mission. It begins by outlining the known details of the proposed transaction, then analyzes the statutory and equitable requirements governing demergers within multinational conglomerates under UK company law, drawing on a comparative analysis of Delaware law's approach to similar transactions. Particular attention is given to the fiduciary duties of Unilever's directors as they consider how to structure the demerger and whether those duties incentivize preserving Ben & Jerry's social mission under new ownership. While acknowledging the complexity and unpredictability of Unilever's final structural decision, the section distills the core features of various demerger mechanisms to assess their likely impact on the brand's future. It also considers the likelihood that shareholders will obtain recourse if the transaction substantially compromises Ben & Jerry's social mission. Rather than speculating on specific outcomes, this

115. Dean Seal, *Ben & Jerry's Says CEO Ousted by Unilever over Brand's Social Activism,* Wall St. J. (Mar. 20, 2025), https://www.wsj.com/business/ben-jerrys-says-ceo-ousted-by-unilever-over-brands-social-activism-655b82ac?-mod=hp_lead_pos5.
116. Stempel & DiNapoli, *supra* note 112.
117. Seal, *supra* note 115.
118. Stempel & DiNapoli, *supra* note 112.

section clarifies the legal constraints and incentives shaping the directors' decision-making and outlines the range of plausible trajectories the demerger may follow.

A. *Demerger Announcement and Plan*

In March 2024, Unilever announced its intention to spin off its ice cream businesses, which coincided with the arrival of activist investor Nelson Peltz[119]. The board expressed the view that the company should focus on "superior brands with strong positions in highly attractive categories that have complementary operating models."[120] Historically, the company's profit margin on ice cream is less than half of that in other categories, such as personal care products.[121]

Unilever stated that a demerger creating a newly listed company for its ice cream businesses is the most likely route for separation, although other options would be considered.[122] Reports later emerged suggesting that Unilever had contacted private equity firms to gauge their interest.[123] A November 2024 report by *the Financial Times* indicated that any plans to offload the ice cream business to an investor had been abandoned.[124] According to the *Financial Times*, the "size and complexity of a potential deal was a major obstacle", along with Ben & Jerry's recent stance on the Israel-Palestine conflict.[125] In October 2024, Unilever's CFO reaffirmed that the separation of its ice cream businesses was "on track" for a split by the end of 2025: "We are progressing with the legal entity set up, the stand-alone operating model and the carve-out of financials."[126] In mid-February 2025,

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119. Aimee Picchi, *Unilever Bought Ben & Jerry's 24 Years ago. Now It's Exiting the Ice Cream Business,* CBS News (Mar. 19, 2024), https://www.cbsnews.com/news/unilever-ben-jerrys-spinning-off-ice-cream/.

120. *Unilever to Accelerate Growth Action Plan, supra* note 1.

121. Picchi, *supra* note 119.

122. *Id.*

123. Swetha Gopinath & Dinesh Nair, *Unilever Said to Start Sale Talks for £15 Billion Ice Cream Unit,* Bloomberg, (July 19, 2024), https://www.bloomberg.com/news/articles/2024-07-19/unilever-said-to-start-sale-talks-for-15-billion-ice-cream-unit?embedded-checkout=true.

124. Ivan Levingston et al., *Unilever Shelves Planned Sale of Its Ice Cream Business to Private Equity,* Fin. Times (Nov. 21, 2024), https://www.ft.com/content/ceb989be-f7ef-4b52-8aab-b70f34e9db2a.

125. *Id.*

126. Simon Harvey, *Unilever Silent Amid Talk Private-Equity Sale of Ice Cream Off Table,* Just Food (Nov. 21, 2024), https://www.just-food.com/news/unilever-tight-lipped-on-talk-ice-cream-sale-to-private-equity-abandoned/?cf-view.

Unilever confirmed its plan to spin off Ben & Jerry's alongside the rest of its ice cream business as a stand-alone company, with its primary listing set to be in Amsterdam, with secondary listings in London and New York.[127,128,129] Unilever also announced that Jean-Francois van Boxmeer had been appointed chair designate for the separated ice cream business.[130] Ironically, these announcements were released alongside increased sales growth of the ice cream division in 2024, recovering partially from the sluggish financial performance the division had exhibited prior, partially attributed to the success of Ben & Jerry's new oat-based ice creams product line.[131]

Cohen believes that Unilever's decision was partly motivated by a difference in values between the two entities and the resulting culture clash.[132] The founders assert that the turmoil has been worthwhile, citing internal sales data that shows the brand has experienced stronger sales growth than its parent company's broader ice cream business in three of the past five years.[133] Cohen and Greenfield were supportive of the brand being acquired by a "values-aligned owner," while cautioning that a new financial acquirer would undermine the brand's strengths: "They don't realize the intangibles that are behind the numbers."[134]

B. *Demerger Transactions Under UK Company Law*

In 2020, Unilever Group unified its dual-parent structure, culminating in Unilever PLC, incorporated under the laws of

127. Dominic Chopping, *Unilever Picks Amsterdam Over London for Ice Cream Unit's Primary Listing,* WALL ST. J. (Feb. 13, 2025), https://www.wsj.com/business/unilever-to-list-ice-cream-business-in-amsterdam-london-and-new-york-ad4be963.

128. Yadarisa Shabong & Richa Naidu, *Ben & Jerry's Maker Unilever Picks Amsterdam for Ice Cream Spin Off,* REUTERS (Feb. 13, 2025), https://www.reuters.com/business/retail-consumer/unilever-list-ice-cream-business-amsterdam-london-new-york-2025-02-13/.

129. Reporters stated that Unilever had made commitments to the Dutch government back in 2020 that it would choose the Netherlands if it ever planned to spin off its food and refreshment business. *Id.*

130. *Id.*

131. Shabong & Naidu, *supra* note 128.

132. Saabira Chaudhuri, *Go Woke, Go Broke? Not a Chance, Say Ben and Jerry,* WALL ST. J. (June 26, 2024), https://www.wsj.com/business/ben-jerry-ice-cream-unilever-social-mission-58d18fc1.

133. *Id.*

134. *Id.*

England and Wales, as the sole parent company of the Unilever Group.[135] Subsequently, in 2022, Unilever implemented a new operating model, reorganizing the conglomerate into five product-focused business groups, including the Ice Cream division.[136] Therefore, the separation of the entire Ice Cream business unit will be executed according to the principles of UK Company Law.

There is no designated statutory procedure for effectuating demergers under UK company law.[137] However, UK corporate entities typically utilize the general statutory procedures established in the Companies Act 2006 to facilitate such transactions.[138] A variety of complex structures can be employed to effectuate the demerger, with the selection of a particular structure primarily driven by tax implications, the availability of distributable reserves (given that demergers constitute distributions) and the requirement to engage with third parties, such as courts or liquidators.[139] Given that several of Unilever's ice cream businesses are neither incorporated nor managed or controlled in the UK, the Parent will be precluded from utilizing "statutory demerger" structures that provide access to various tax benefits.[140] The simplest approach to effect a demerger involves the declaration and issuance of a dividend in specie by the parent company, where the shares of the subsidiary to be demerged are distributed to its shareholders.[141,142]

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135. *The Governance of Unilever*, Unilever, (Jan. 1, 2025), https://www.unilever.com/files/a05bff1b-5b19-4c89-bf85-c085706e74f4/governance-of-unilever-2023.pdf.

136. *Unilever Business Group Restatements*, Unilever, (Sept. 20, 2022), https://www.unilever.com/files/7b3b1c9e-78ae-48e6-bb97-000c9855e01a/unilever-business-group-restatements.pdf.

137. *Demergers*, *supra* note 14 ("no specific statutory demerger procedure").

138. *Id.*

139. *European M&A and Corporate Governance Hot Topics*, Sullivan & Cromwell LLP 5–6 (Mar. 2023), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/European_M_A_Corporate_Governance_March_2023.pdf.

140. *Statutory Demergers: Tax*, Westlaw UK Prac. L., https://uk.practicallaw.thomsonreuters.com/7-372-3983?originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&ppcid=341a00c040fe4cfdbc9dc337ab7e4394&comp=pluk. To qualify as a "statutory demerger" and gain access to relevant tax benefits by meeting the criteria for "exempt distributions" under UK Company Law, all relevant entities must be UK residents at the time of the distribution. *Id.*

141. *Id.*

142. *See Dividend in Specie,* Westlaw UK Prac. L., https://uk.practicallaw.thomsonreuters.com/Glossary/UKPracticalLaw/

UK parent companies also have the option of pursuing a three-cornered demerger (or indirect demerger), which is a variation on the direct dividend route.[143] In this process, the parent company declares a dividend in specie, transferring either the shares in the subsidiary or the business to be demerged to a newly incorporated company (NewCo) or another third party.[144] In exchange, the recipient of the transfer will issue shares directly to the parent's existing shareholders.[145] This requires a demerger agreement between Parent (acting as the seller) and NewCo (acting as the purchaser) to facilitate the transfer of the shares or business assets.[146] Demerger agreements typically include cross-indemnities allocating liabilities of the retained and demerged businesses to the respective entities, alongside "wrong pockets" provisions that facilitate the transfer of assets to the appropriate entities if such assets were not included in the initial share distributions.[147] This type of transaction offers structural flexibility, allowing the creation of a new company whose share capital can be customized to meet the commercial needs of the involved parties.[148] Parent declares a dividend to its shareholders for no consideration, transferring the subsidiary to NewCo at book value, and in return, NewCo issues new shares pro rata to Parent's shareholders.[149]

Unilever may also consider utilizing more complex structures to execute the transaction, such as a capital reduction demerger or a liquidation demerger. A capital reduction demerger involves transferring shares of SpinCo to Parent shareholders (or transferring assets to SpinCo), in exchange for the issuance of SpinCo shares to Parent shareholders through a reduction of capital instead of a dividend.[150] This complex transaction typically requires the establishment of a new holding

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I3f4a43c8e8db11e398db8b09b4f043e0?transitionType=Default&contextData=%28sc.Default%29#:~:text=Also%20known%20as%20a%20dividend,in%20assets%20other%20than%20cash (a dividend in specie refers to a dividend which is satisfied in assets other than cash).

143. *See Three-cornered Demergers: Tax,* WESTLAW UK PRAC. L., https://uk.practicallaw.thomsonreuters.com/4-366-8006?transitionType=Default&contextData=%28sc.Default%29.

144. *Id.*

145. *Id.*

146. *Id.*

147. SULLIVAN & CROMWELL LLP, *supra* note 139, at 5.

148. *Id.*

149. *Id.*

150. *Id.* at 6.

company above Parent, which would issue two classes of shares to Parent's shareholders.[151] It also necessitates a shareholder vote where at least 75% of the shares by value and a majority of shareholders voting must approve it, along with sanction by the court.[152] This structure bypasses the requirement for Parent to possess sufficient distributable reserves, which is required for dividends in kind of SpinCo.[153]

Liquidation demergers also involve creating a new holding company that transfers its assets during liquidation to two new holding companies (which will receive SpinCo and the retained business respectively).[154] After this transfer, both new holding companies will issue shares to Parent's original shareholders.[155] This demerger structure requires approval from the new holding company's shareholders by special resolution and presents unique issues related to liquidations, including the involvement of a third-party liquidator.[156]

Regarding shareholder approval, if the parent company is listed on the Official List (which applies in the case of Unilever), the class tests under the listing rules may necessitate specific shareholder approval for the demerger.[157] This requirement will, in turn, influence the form and content of the public documents needed for the demerger.[158] Moreover, the NewCo listing will require compliance with the regulatory standards of the Netherlands.[159]

In summary, Unilever's choice of transaction structure will most significantly affect Ben & Jerry's in the following ways: the form of distribution of Ben & Jerry's assets and ownership interests to NewCo; the necessity and scope of Ben & Jerry's involvement in demerger agreement negotiations; and the stockholder approval requirements for transaction approval.[160]

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151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Demergers, supra* note 14 at Shareholder Consent; *The Official List*, FIN. CONDUCT AUTH., https://marketsecurities.fca.org.uk/officiallist.
158. *Demergers, supra* note 14.
159. *Id.*
160. If the threshold required to approve the transaction is high (seventy-five percent, for example), it is more likely that shareholders representing Ben & Jerry's social mission may be able to mount a voting coalition to resist the transaction.

C. *Statutory Requirements for Lawful Distributions Under UK Law*

As a preliminary matter, demerger transactions entail distributions, which are defined in Section 829 of the Companies Act 2006 and are governed by Part 23 of that act.[161] A company intending to make a distribution must meet two fundamental requirements: it must have "profits available for that purpose" (distributable profits or distributable reserves),[162] and the distribution must be justified by reference to "relevant accounts."[163] If these conditions are not met, the accounts in question cannot be relied upon, and any distribution purportedly justified by reference to them would be in violation of Part 23. Directors who authorize their company to pay an unlawful dividend may be held liable to compensate the full amount of the unlawful dividends they facilitated.[164] Unilever's directors and legal advisors will be sure to remain compliant with these statutory requirements, which should be relatively straightforward to achieve.

D. *Fiduciary Duties of Directors Under UK Law*

Chapter 2 of Part 10 of the Companies Act 2006 introduced, for the first time, the statutory general duties of directors of companies incorporated under the laws of England and Wales.[165] Directors must act in a manner they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.[166] In this context, "member" is used interchangeably with "shareholder" or "holder" of a share.[167] In fulfilling this duty, the statute prescribes that

161. Companies Act 2006, c.46, § 829 (UK).
162. Companies Act 2006, c. 46, § 830 (UK).
163. Companies Act 2006, c. 46, § 836 (UK).
164. Tonstate Group Ltd. v. Rosling King LLP, [2024] EWHC (Ch) 2005 [97] (Eng.) (citing Bairstow v. Queens Moat Houses plc, [2001] EWCA (Civ) 712).
165. *See Directors' Duties: General Duties Under the Companies Act 2006*, WESTLAW UK PRAC. L., https://uk.practicallaw.thomsonreuters.com/7-376-4884?comp=pluk&transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=34636938edd2406c91449574ddb50ddf&skipAnonymous=true (last visited June 14, 2025) (stating relationship between the general duties and the pre-CA 2006 law).
166. Companies Act 2006, c.46, §172(1) (UK).
167. *So What Does a "Shareholder", "Member" and "Holder" of Shares Really Mean?*, MAYER BROWN CAP. MKTS. LEGAL UPDATE, (Feb. 2013), https://

directors must "have regard" to certain factors, enumerated in a non-exhaustive list,[168] including: (a) the likely consequences of any decision in the long term; (b) the likely interests of the company's employees; (c) the need to foster the company's business relationships with suppliers, customers, and others; (d) the impact of the company's operations on the community and the environment; (e) the desirability of the company maintaining a reputation for high standards of business conduct; and (f) the need to act fairly as between members of the company.[169] Finally, this section states: "to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, the prior section has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes."[170] The Companies Act of 2006 therefore entails a more expansive definition of stakeholders than the traditional shareholder primacy view under Delaware law,[171] and bears close similarities with Vermont's constituency statute. Importantly, the language of the Companies Act *requires* directors to consider the broader enumerated factors,[172] representing a stronger form of stakeholderism than the permissive nature of Vermont's statute.

Commentators note that the "success" of the company as it pertains to this legislation typically refers to its long-term financial performance, allowing some flexibility on how that success may be achieved.[173] For a non-pecuniary risk to be relevant to a director's decision-making, it is sufficient for the director to believe that the risk is material and that the company should

www.mayerbrown.com/-/media/files/perspectives-events/publications/2013/02/so-what-does-a-shareholder-member-and-holder-of-sh/files/130205-capital-markets/fileattachment/130205-capital-markets.pdf.

168. Companies Act 2006, *supra* note 161, at ¶ 326 (making clear that the list of factors to be considered is "non-exhaustive," enabling non-pecuniary factors to form a legitimate basis for directors' decisions under the law).

169. Companies Act 2006, *supra* note 161.

170. *Id.*

171. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

172. The statute states that a "director *must* act in the way . . . most likely to promote the success of the company for the benefit of its members . . . and in doing so have regard" to the list of enumerated factors. Companies Act 2006, *supra* note 132 (emphasis added).

173. *The Duty of UK Company Directors to Consider Relevant ESG Factors,* Debevoise & Plimpton 4–5 (Sept. 2019), https://www.unpri.org/download?ac=9525.

strive to mitigate it.[174] However, observers note that enforcing this duty is challenging in practice for several reasons: the difficulty of proving bad faith or a subjective belief that an action would not promote the company's success; the fact that the duty is owed to the company rather than its members; and substantial barriers—both substantive and procedural—to bringing a derivative claim under the Act, especially in cases where the majority shareholders are willing to ratify a purported breach.[175,176] Still, it remains legally and theoretically possible to file a claim for breach of duty if there is evidence that insufficient consideration was given to a non-pecuniary factor, and this oversight resulted in a poor decision that caused damage to the company. Nevertheless, successful claims have mostly arisen in instances of "extreme" or "total" failures. The likelihood of proving breach is low when directors follow basic procedural steps, such as consulting affected parties or seeking expert advice.[177]

Sections 171–77 of the Companies Act 2006 set out other "general duties" that directors must adhere to.[178] These include: the duty to act within powers; the duty to exercise independent judgment; the duty to exercise reasonable care, skill, and diligence; the duty to avoid conflicts of interest; the duty not to accept benefits from third parties; and the duty to declare interest in the proposed transaction or arrangement.[179] While these statutory duties replaced pre-existing common law rules, other aspects of prior case law that are not specifically addressed in Chapter 2 of Part 10 remain in effect.[180] These aspects include the understanding, supported by "ample authority spanning well over a century," that "although company directors are not strictly speaking trustees, they are in a closely analogous position because of the fiduciary duties which they owe to the

174. *Id.* at 5.
175. *Id.* at 8.
176. For a discussion of the capacity for shareholder ratification to cleanse director breaches under UK Company Law, *see infra* Section II.G.
177. DAVID KERSHAW, THE FOUNDATIONS OF ANGLO-AMERICAN CORPORATE FIDUCIARY LAW 280–81 (Cambridge Univ. Press 2018) (stating that these cases tell us that where directors follow basic procedural steps, such as contacting parties affected by a decision or seeking expert advice, the probability of breach is low).
178. *Directors' Duties: General Duties Under the Companies Act 2006, supra* note 165.
179. *Id.*
180. *See* Companies Act 2006, *supra* note 161, at §§ 170(3), 170(4).

company."[181] Specifically, directors are regarded as trustees of the company's assets that come into their hands or come under their control.[182] These features of UK company law resemble the bedrock "twice-tested" principle of Delaware law, which dictates that corporate decisions must be evaluated: "first, by the technical rules having to do with the existence and proper exercise of the power; second by the equitable rules somewhat analogous to those which apply in favor of a cestui que trust to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary."[183] The UK company law version of the "twice-tested" principle as it applies to director duties is memorialized under § 170(3) of the Companies Act: "[t]he general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles."[184]

E. *Fiduciary Duties of Directors in Corporate Groups under UK Law*

Under UK company law, directors owe fiduciary duties to the company itself rather than to any group of companies it may be a part of.[185] This principle arises from the notion that directors are considered agents of the company, which is recognized as having a distinct legal personality separate from its shareholders.[186,187] The same holds true even if the company

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181. Bairstow v. Queens Moat Houses PLC [2001] EWCA (Civ) 712, [50].

182. In re Lands Allotment Co. [1894] 1 EWHC (Ch) 616*;* Re Duckwari PLC [1999] EWHC (Ch) 253.

183. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 Harv. L. Rev. 1049, 1049 (1931); *see also* Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("[I]nequitable action does not become permissible simply because it is legally possible.").

184. Companies Act 2006, *supra* note 161, at § 170(3).

185. Percival v. Wright [1902] 2 EWHC (Ch) 401 (codified in section 170(1) of the Companies Act 2006 (UK)).

186. Peskin v. Anderson [2000] EWCA (Civ) 326, [33]–[34].

187. *Intra-group Reorganizations: Overview*, Westlaw UK Prac. L., https://ca.practicallaw.thomsonreuters.com/1-201-3340?transitionType=Default&contextData=(sc.Default)&firstPage=true&OWSessionId=2c2184ec007349f88ab2d&OWSessionId=bf835771803d47fe8757888a1143b0c9&skipAnonymous=true (Directors' duties and group interests) (last accessed June 15, 2025).

is part of a corporate group.[188,189] It is a fundamental principle that each company in a group of companies must be treated as a separate legal entity,[190] and therefore directors of a holding company do not owe duties to a subsidiary.[191] Furthermore, under UK company law, the directors of one group company are not entitled to sacrifice the interests of that company for those of another group company.[192] On the other hand, the law does not require that the directors of a group of companies ignore the interests of the wider group.[193] In addition, if the intended measure is likely to promote the success of the company for the benefit of its members as a whole, it is not a breach of duty for the director to take into account the benefit of a group as a whole.[194] None of these considerations override the general principle that a director must act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, including present and future shareholders.[195]

F. *Fiduciary Duties of Directors in Corporate Groups under Delaware Law*

Fiduciary duties in company groups under UK law are broadly comparable to those under Delaware law. In *Anadarko Petroleum Corp. v. Panhandle Eastern Corp*,[196] a wholly owned subsidiary's shareholders sued the parent company's directors

188. *Id.*

189. While Delaware corporate law similarly recognizes the distinction between a company and its shareholders, it upholds the alternative conclusion that directors owe fiduciary duties primarily to shareholders and their interests. *See generally* Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

190. *See* Saloman v. Saloman & Co Ltd [1897] AC 22.

191. *Corporate Reorganisations: Undervalue Transactions*, WESTLAW UK PRAC. L., https://uk.practicallaw.thomsonreuters.com/w-027-4757?transitionType=Default&contextData=(sc.Default)&firstPage=true (last accessed June 15, 2025); *see also* Lindgren v. L&P Estates Co [1968] EWHC (Ch) 572.

192. Extrasure Travel Inss. Ltd. v. Scattergood [2003] 1 BCLC 598.

193. *See* Companies Act 2006, *supra* note 161 (citing The Bell Group Ltd v Westpac Banking Corporation [2008] WASC 239).

194. *See* Nicholson v Permakraft (NZ) Ltd [1985] 1 NZLR 242; *see also* Commissioner of Taxpayer Audit and Assessment v Cigarette Co of Jamaica Ltd [2012] UKPC 9.

195. Companies Act 2006, *supra* note 161.

196. Gideon Parchomovsky & Asaf Eckstein, *Corporate Empires: Past, Present, and Future*, 109 IOWA L. REV. 1157, 1187 (2024).

following a spin-off of the subsidiary, arguing that they breached their fiduciary duties by modifying the agreements at the request of the parent company prior to the distribution. The Supreme Court of Delaware affirmed the Chancery Court's decision that Anadarko's former directors owed a fiduciary duty only to the parent corporation, clarifying that "the directors of the subsidiary are obligated only to manage the affairs of the subsidiary in the best interests of the parent and its shareholders."[197] The court further clarified that the parent and the directors of a wholly owned subsidiary do not owe fiduciary duties to the prospective stockholders of the subsidiary once the parent declares its intention to spin off the subsidiary.[198]

In a subsequent Chancery Court decision, then-Vice Chancellor Strine reinforced the principle that "[w]holly-owned subsidiary corporations are expected to operate for the benefit of their parent corporations; that is why they are created."[199] This ruling was made despite the evidence showing that a publicly traded holding company and its directors compelled its wholly owned subsidiaries to take on high levels of debt to support a parent's business strategy.[200] The Chancellor stated, "Delaware law does not embrace the concept that a director of a wholly-owned subsidiary owes a duty to second-guess the business judgment of its parent corporation . . . . That is even so if [the board] took actions that made [the subsidiary] less valuable as an entity."[201] Furthermore, the Chancellor clarified that the parent company owes no duties to a wholly owned subsidiary.[202] To that end, Delaware law "completely disregards the independent corporate entity of wholly owned subsidiaries."[203] Other observers have noted that "under Delaware law . . . the board of directors of a wholly-owned subsidiary has an obligation to oversee the subsidiary's operations in the best interests of the parent company and the parent company's shareholders."[204]

197. Anadarko Petroleum Corp. v. Panhandle E. Corp., 545 A.2d 1171, 1174 (Del. 1988).
198. *Id.* at 1172.
199. Trenwick Am. Litig. Tr. v. Ernst & Young L.L.P., 906 A.2d 168, 173 (Del. Ch. 2006), *aff'd*, 931 A.2d 438 (Del. 2007).
200. *Id.* at 172.
201. *Id.* at 201.
202. *Id.* at 173.
203. Parchomovsky & Eckstein, *supra* note 196, at 1188.
204. Letter from John A. Hayes, Corp. Governance Comm. Chair, Bus. Roundtable, to Robert deV. Frierson, Sec'y, Bd. of Governors of the Fed. Rsrv. Sys. (Feb. 2, 2015) (on file with the Federal Reserve).

Delaware law clearly outlines the fiduciary duties of directors during a spin-off transaction. The board of ParentCo must fulfill its duties of care and loyalty to ParentCo and its stockholders when deciding to distribute SpinCo's stock to its stockholders.[205] The ParentCo board needs to ensure that this distribution qualifies as a permissible dividend.[206] Since they do not owe duties to SpinCo or its future stockholders, they are free to focus solely on the interests of ParentCo's shareholders when determining the terms of the spin-off and separation agreements.[207] However, if they set SpinCo up for commercial failure, this could result in a breach of fiduciary duty claim by ParentCo shareholders, who are receiving SpinCo shares as a distribution.[208] Like UK company directors, directors of Delaware corporations can also be held personally liable for improperly declaring a dividend based on insufficient "surplus" available for payment.[209] Furthermore, actual current value, rather than book value, is advised to be used as the relevant metric in evaluating whether distributions are lawful ex-ante.[210]

G. *The Ratification (Duomatic) Principle and Demergers*

An important feature of the UK law of equity is the ratification principle, which dictates that breaches of fiduciary duty can be authorized in advance through shareholder ratification following full and frank disclosure of material facts.[211,212] The principle underpinning this rule is as follows: when shareholders authorize an act performed by directors, that act is treated as if it were an act of the company itself, based on the principles of agency law.[213] This eliminates the possibility of the company

205. Cathy A. Birkeland et al., *Spin-offs Unraveled*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 31, 2019), https://corpgov.law.harvard.edu/2019/10/31/spin-offs-unraveled/.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Intra-group Reorganizations, supra* note 187.
212. If the members, with full knowledge of the relevant facts, consent or acquiesce in a director's conduct that would otherwise be a breach of their duties under section 175 of the Companies Act, that conduct will not be in breach of the section. *See* Sharma v. Sharma [2013] EWCA (Civ) 1287.
213. BTI 2014 LLC v. Sequana S.A. [2022] 3 UKSC 25 [23].

bringing a derivative claim against the directors for breach of their duties to the company.[214,215] Further rulings support this principle, stating that when the actions of a company's directors have been requested or approved by shareholders, those actions are regarded as actions of the company, and "the company cannot contend that the directors have acted in breach of fiduciary duty."[216] There is an exception to this rule if the transaction approved by the shareholders could jeopardize the company's solvency or result in a loss to its creditors.[217] To that end, the ratification (or Duomatic) principle cannot apply to unlawful distributions: "The corporators cannot do informally what they have no power to do formally."[218] In other words, the ratification principle cannot apply to "acts or transactions which are ultra vires the company."[219]

H. *Potential Claims Against Unilever Directors for Social Mission Erosion*

The principles of UK law discussed herein are important for considering the legal obligations of Unilever's board in effectuating the demerger in compliance with its obligations to a broader set of stakeholders under the Companies Act. Under the ratification principle, a fully informed shareholder vote approving the demerger would obstruct any potential derivative claims that a director breached his duty in failing to consider material non-pecuniary factors in undermining Ben & Jerry's capacity to pursue its social mission under new ownership.

There are three creative arguments that current Unilever shareholders or future shareholders of NewCo could bring against directors in the event they fail to structure the resulting entity in a manner that preserves Ben & Jerry's social mission under UK company law. First, shareholders could leverage the expansive definition of fiduciary duty under Section 172 of the Companies Act (2006) to levy a multitude of arguments against Unilever's directors. The list of factors that directors may consider as outlined by the statute gives rise to several potential

214. *Id.*
215. Companies Act 2006, *supra* note 161, Explanatory Notes 486.
216. Madoff Sec. Int'l Ltd. v. Raven, [2013] EWHC (Comm) 3147 [95].
217. *Id.* at [272].
218. *Id.* at [269].
219. Manolete Partners PLC v. Rutter [2022] EWHC (Ch) 2552 [91.2].

claims, including undermining the divested entity's: long-term financial performance, purpose beyond its members, impact on the community and environment, and interests of its employees. Moreover, shareholders could leverage the continued authority of longstanding common law principles, which analogize directors to "trustees" over the company's assets. The social mission and responsible business practices are one of Ben & Jerry's most significant intangible assets, which the Unilever directors are entrusted to preserve under these principles. Given the challenges of bringing fiduciary duty claims for failure to consider non-pecuniary objectives, shareholders might also consider bringing a claim of constructive fraudulent conveyance on the grounds that the shareholders received less than reasonably equivalent value for the asset.

Mounting these claims successfully poses two primary, interrelated challenges. First, despite the broad conception of stakeholders to whom company directors owe duties under the Companies Act, UK law is clear that directors of a parent company do not owe duties to other entities within a corporate group in which they belong, including their subsidiaries. To that end, the Companies Act only permits directors of a parent company to consider the interests of broader stakeholder interests to the extent they are fulfilling their duties to the corporate entity itself. Thus, any claim of harm to the corporation resulting from director action must be made in terms of the parent company, rather than that of the subsidiary. This insight leads naturally to the second primary challenge: it is impossible to measure the extent to Ben & Jerry's social mission contributes to the commercial success of the company and its brand. Even if Unilever effectuates the transaction in a way that completely undermines the capacity for Ben & Jerry's board to uphold its social mission, any standard breach of fiduciary duty claim would face the extraordinary challenge of *proving* that the erosion of the company's social mission directly caused a future decline in sales or performance. Ben & Jerry's has the best chance of preserving its social mission under new ownership if, in structuring the transaction today, Unilever's directors personally believe that failing to protect the company's social mission and essential character might generate a significant decline in its performance. Overall, given the challenges associated with these claims, it is unlikely that litigation risk alone provides meaningful incentives for the Unilever board to prioritize Ben

& Jerry's capacity to uphold its social mission under the ownership of its new parent-holding company.

I. *Preserving Social Mission Post-Demerger*

Under both UK and Delaware law, parent companies retain broad discretion in structuring demergers or spinoffs of wholly owned subsidiaries. Nothing in the original merger agreement between Unilever and Ben & Jerry's anticipates a future in which the two entities are no longer corporate partners; nor does it grant Ben & Jerry's Independent Board any authority to participate in demerger negotiations.[220] Even if such provisions existed, their enforcement would ultimately rely on the cooperation of Unilever, as Ben & Jerry's sole shareholder. While UK company law requires directors to consider a wider range of stakeholders, including non-shareholder interests, the legal hurdles to mounting a successful claim based on the erosion of Ben & Jerry's social mission are high. This leaves little formal incentive for Unilever's directors to structure the transaction in a way that prioritizes its preservation.

Nevertheless, the demerger highlights the continuing force of the original contractual arrangements between Conopco (Unilever's operating subsidiary) and Ben & Jerry's. As long as Conopco remains the sole shareholder, it is bound by provisions that preserve the composition of Ben & Jerry's Independent Board. These include requirements to nominate and elect board members approved by a majority of each board class, where Ben & Jerry's appointees hold nine of a fixed number of eleven seats. Jeff Furman, former treasurer and long-time board member of Ben & Jerry's who helped approve the original 2000 deal, reinforced this interpretation, stating: "Any buyer, or a new stand-alone entity spun off to Unilever's shareholders, would also need to abide by the unusual acquisition agreement . . . . [The] agreement stands even in the event of a sale."[221] Ben & Jerry's, for its part, has also reaffirmed its "commitment to its three-part mission . . . regardless

220. *See generally*, Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3.

221. Saabira Chauduri, *Why Ben & Jerry's Will Keep Its Progressive Politics After Unilever Divorce,* Wall Street J. (Mar. 20, 2025), https://www.wsj.com/business/why-ben-jerrys-will-keep-its-progressive-politics-after-unilever-divorce-dce24d5f?mod=article_inline.

of any new ownership structure."[222] As long as Conopco holds full ownership, the Independent Board structure remains enforceable—anchored not in operational covenants, but in a formal allocation of ownership control.

One caveat threatens this framework: the original merger agreement does not appear to include a clause explicitly binding future owners to uphold the Independent Board structure. The assignment clause, for example, does not specify that contractual obligations, such as nominating Ben & Jerry's board designees, would transfer automatically to a successor or assignee.[223] As such, in the event that Unilever sells or transfers its shares to a third party, a new clause would need to be added to the sale agreement to obligate the buyer to uphold these terms. That outcome, however, appears unlikely. It is difficult to imagine Unilever imposing a governance structure on a new owner that it found burdensome itself. To borrow a phrase, it likely "wouldn't wish it on its worst enemy." Moreover, Unilever is acutely aware that its strained relationship with the Independent Board has drawn negative publicity, an added disincentive for replicating that arrangement in a NewCo context.[224] Given this history, it seems improbable that Unilever would hold a future buyer to the same structural commitments.

The fate of the Independent Board remains uncertain. But given the nature of demergers and Unilever's total ownership of Ben & Jerry's, one conclusion is clear: Unilever will determine the structure that emerges. In theory, the company's articles of incorporation may survive the demerger intact, but their ability to safeguard Ben & Jerry's social mission under new ownership will likely be as limited as it was under Unilever. Still, a few glimmers of hope remain. The first lies in the remarkable resilience of the voting restrictions embedded in the contractual arrangements between Ben & Jerry's and its sole shareholder, Conopco. As long as Conopco retains 100% ownership of Ben & Jerry's shares, it is contractually obligated to elect nine of the eleven board members nominated by Ben & Jerry's. The second is commercial self-interest: the extent to which Ben & Jerry's retains control over

222. *Id.*
223. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 37–38.
224. *See, e.g.,* Lawrence Hamermesh, Jack Jacobs, and Leo Strine, *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 324 (2022).

its social mission may depend on whether Unilever views that mission as integral to the brand's financial success.[225] Aside from the threat of litigation, Unilever has strong internal incentives to position its Ice Cream portfolio for long-term commercial success. If its directors consider the social mission fundamental to the brand's strength, they may structure the transaction to preserve the Independent Board's authority over mission-related matters in the post-demerger framework.

1. *A Different Future: Taking Back the Brand*

In February 2025, Bloomberg reported that Cohen and Greenfield had entered preliminary discussions to buy back their brand from Unilever.[226] Their report alleged that Ben & Jerry's aimed to partner with "socially minded investors" to facilitate the acquisition.[227] Unilever swiftly responded, affirming that the demerger remained on track: "Ben & Jerry's is an important part of the ice cream business, and it's not for sale."[228]

It may be overly idealistic to believe there is an investor with both the financial capacity and the cultural-political alignment necessary to support such a transaction.[229] Potential investors are also likely deterred by Ben & Jerry's history of litigation against its own parent company, actions that could be perceived as "biting the hand that feeds them". Unilever's firm response underscores the long-term significance of Ben & Jerry's decision to sell itself to a corporate conglomerate twenty-five years ago. In doing so, the founders made a final and irreversible choice to relinquish operational and managerial control over

225 The stronger form of stakeholderism contained within the Companies Act as it pertains to director duties is playing little to no role in protecting Ben & Jerry's social mission in this context, further reinforcing the idea that fiduciary duties and equitable review provides little support for managers of pro-social corporations.

226. Liana Baker & Dasha Afanasieva, *Ben & Jerry's Founders Discuss Buying Back Ice Cream Brand,* BLOOMBERG (Feb. 27, 2025), https://www.bloomberg.com/news/articles/2025-02-26/ben-jerry-s-founders-discuss-buying-back-brand-from-unilever.

227. Bernadette Giacomazzo, *Ben & Jerry's Founders Want to Buy Back Brand From Unilever,* RETAILWIRE (Feb. 28, 2025), https://retailwire.com/ben-jerrys-unilever-buyback/.

228. Bruce Cumley, *Why Ben & Jerry's Co-Founders Want to Buy Their Company Back from Unilever*, INC. (Feb. 28, 2025), https://www.inc.com/bruce-crumley/why-ben-jerrys-co-founders-want-to-buy-their-company-back-from-unilever/91154192.

229. *Id.*

the brand's future, even if elements of formal control were preserved through the merger agreement.

III.
A Theoretical Foundation for Social Mission Integration in Corporate Governance

This section of the note explores scholarly literature concerning the susceptibility of social enterprises to mission drift with growth, while illustrating theoretical approaches to preserving broader stakeholder interests through corporate governance design amidst changing ownership structures. This body of literature provides the theoretical foundation for analyzing the Ben & Jerry's case study, particularly in the context of its upcoming demerger and the potential threat it poses to the company's social mission.

A. *Mission Drift and Organizational Growth*

The Ben & Jerry's case study should be considered in light of the phenomenon of mission drift. Mission drift, defined by scholars as "a process of organizational change, where an organization diverges from its main purpose or mission,"[230] poses a particular risk to social enterprises as they attempt to integrate competing institutional logics.[231] While not exclusive to social enterprises, this risk is heightened due to their reliance on commercially generated revenue for financial sustainability and the severe consequences of mission drift, which threatens their core purpose of delivering social value to beneficiaries.[232]

Organizational growth further intensifies the risk of mission drift, as scaling up complicates the delicate balancing act inherent in dual-purpose organizations.[233] Van and Vredenburg caution against the mismanaged pursuit of growth and scale within hybrid organizations.[234] They note that rapid expansion

230. Cornforth, *supra* note 9, at 4.
231. *Id.* at 3.
232. Ebrahim et al., *supra* note 11, at 82.
233. *See generally* M. Paola Ometto et al., *From Balancing Missions to Mission Drift: The Role of the Institutional Context, Spaces, and Compartmentalization in the Scaling of Social Enterprises,* 58 Bus. & Soc'y 1003 (2019).
234. Abdi R. J. Rabi, *How Social Enterprises Manage Mission Drift* 38 (2016) https://www.diva-potal.org/smash/get/diva2:1076297/FULLTEXT01.pdf. (Master's Thesis, Orebo University School of Business) (citing Connie Van

can undermine a firm's mission, as foundational values and approaches may become compromised by new, financially motivated objectives.[235] The risks also escalate during financing events essential for new developmental stages. For instance, the agreements that govern minority investments and private capital commitments invite new restrictions, stipulating terms that can limit the recipients' financial or governance decisions. Similarly, public securities offerings impose stricter governance standards and expose organizations to potential securities-related liabilities.

More broadly, mission drift can stem from an organization's reliance on a dominant funding source.[236] Conversely, an excessive focus on social objectives can undermine financial viability, leading to commercial challenges. However, the relationship between growth and mission drift warrants further examination; rather than directly causing mission drift, increased scale may instead highlight existing contradictions between hybrid organizations' dual purposes, making the symptoms of their conflicting objectives more observable. Growth can thus serve as a lens revealing underlying tensions within organizations striving to concurrently achieve diverse missions that necessitate varying strategies, metrics, and decision-making frameworks.

Scholars and theorists seek to understand mission drift to better protect social enterprises from its potentially harmful effects. Yet, this phenomenon is intricately linked to the organizational challenges inherent in social enterprises.[237] Identifying or quantifying mission drift is difficult due to the complexities of defining social enterprises themselves.[238] Therefore, determining whether an organization is experiencing mission drift can be problematic. A more constructive approach may be to conceptualize social enterprises as dynamic entities navigating a continuum between traditional nonprofit organizations and conventional for-profit businesses.[239]

Der Byl & Harrie Vredenburg, *The Challenge of Mission Drift Through Growth in the Hybrid Organisation*, 18 INT'L J. ENV. TECH. & MGMT. 309, 326 (2015)).

235. *Id.*

236. Cornforth, *supra* note 9, at 4.

237. *Id.*

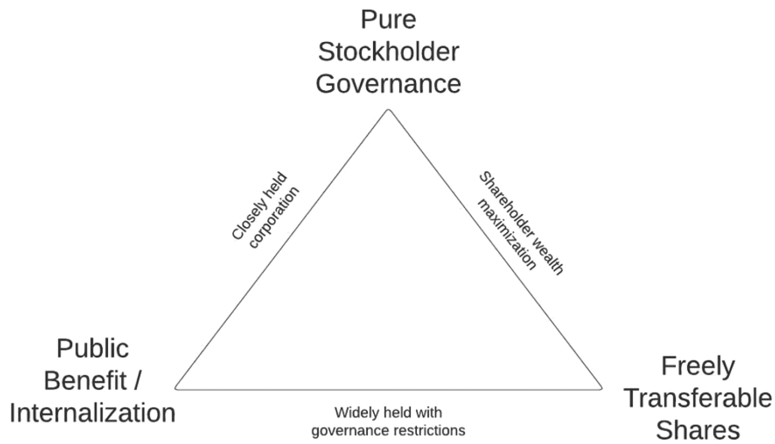
238. *Id.*

239. *Id.* at 4–5.

B. *Ben & Jerry's and the Corporate Governance Trilemma*

In *The Corporate Governance Trilemma*, Patrick Corrigan presents a compelling framework explaining why pro-social corporations adhering to traditional market-based corporate governance models inevitably experience mission drift.[240] He argues that mission drift stems not from company growth, but from the impossibility of simultaneously achieving all three of the following corporate governance features: liquid share trading of ownership interests, low-cost removal of directors by stockholders, and a credible commitment to producing costly social goods.[241] According to his theory, any pro-social corporation that attempts to pursue all three of these objectives simultaneously will run the risk of profit-motivated outsiders taking control of the company and abandoning the costly production of social goods.[242] To avert mission drift, founders with social preferences must abandon traditional corporate governance wisdom and instead adopt one of two institutional solutions: either operate as a closely held corporation or as a widely held corporation with restrictions on transfers of governance rights.[243] Consequently, founders aiming to consistently produce costly social goods through the corporate form must implement institutional designs that entail real financial costs, whether in the form of increased agency costs or illiquidity costs.[244] Corrigan's theory fundamentally asserts that fiduciary duties are insufficient to resolve conflicts over corporate purpose; instead, shareholder ownership and voting rights are the "workhorse institutions" that ultimately dictate outcomes in such disputes.[245] He also generally posits that widely held public companies, even if they restrict transfers of governance rights, are less likely to sustain the production of a costly public benefit compared to closely held corporations.[246]

240. Corrigan, *supra* note 6, at 6.
241. *Id.* at 1.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 9–10.
246. *Id.* at 10.



Corrigan's analytical framework effectively illuminates several facets of Ben & Jerry's dilemma. The company's demonstrated mission drift can be traced to two pivotal events: first, its decision to adopt a dispersed ownership structure, which significantly spurred the second, its sale to Unilever. Corrigan's theory suggests that the company's choice to conduct an initial public offering (and thus pursue a dispersed ownership structure) necessarily required the implementation of non-tradeable governance rights to remain situated on one side of the trilemma and sustain the production of corporate public benefits. These non-tradeable rights, he argues, can be created through mechanisms such as granting veto rights to public benefit trustees.[247] The Independent Board can be understood as performing this function for Ben & Jerry's. Corrigan's framework therefore prompts the following clarifying question: did the Independent Board, established by the merger agreement with Unilever, constitute a sufficiently robust "governance restriction" (as Corrigan envisions) to shield Ben & Jerry's from the corporate governance trilemma that inevitably generates mission drift?

While Corrigan's analysis highlights the crucial role the Independent Board would play in providing Ben & Jerry's with an opportunity to preserve its pro-social character (even under corporate ownership), the ultimate insufficiency of this mechanism exposes a key insight that Corrigan misses.

247. *Id.* at 36.

Corrigan correctly identifies the allocation of shareholder ownership and voting rights as the "workhorse institutions" of corporate governance, in contrast to fiduciary duties supported by equitable review. However, he fails to extend this logic to demonstrate the *relative effectiveness* of various alternative mechanisms designed to restrict the tradability of governance rights. Corrigan's analysis abruptly concludes that granting veto rights to public benefit trustees is a sufficient mechanism to restrict the transfer of governance rights. The Ben & Jerry's case, particularly the evolution of its partnership with even a seemingly "values-aligned" owner (at least initially), provides a crucial perspective that qualifies Corrigan's helpful framework. Ultimately, in that case, governance restrictions designed for functional purposes, such as pro-social management and public-benefit-orientated operational decisions, did not stand the test of time. In practically every instance, Unilever leveraged its corporate power to sidestep such commitments, including Ben & Jerry's ultimate say over its brand image and social mission and even its ability to hire (and fire) key executives. The most notable example is Unilever's decision to sell the Ben & Jerry's trademark to a third-party distributor in the West Bank, despite the Independent Board's refusal to continue selling products in the region. Somewhat remarkably, however, Unilever has continued to uphold its formal commitment to the independence and composition of the Independent Board, consistently nominating and electing Ben & Jerry's designees, even though this entity has repeatedly filed lawsuits against its parent. These analytical extensions of Corrigan's analysis explain the unique character of Ben & Jerry's experience of mission drift, which manifests less as an internal shift in management values and more as a diminished capacity to integrate its social mission into daily operations, policies, and strategic decision-making.

Corrigan's analysis further explains why Unilever's acquisition decisively shaped Ben & Jerry's trajectory. He emphasizes the critical importance of ab initio implementation of corporate governance mechanisms to safeguard a corporation's pro-social attributes.[248] This initial implementation allows the corporation's social purposes to be incorporated into investment decisions, thereby mitigating investor surprise when the corporation prioritizes a corporate public benefit over profit

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248. *Id.* at 7.

maximization.[249] This rationale underscores that establishing corporate governance mechanisms to protect a corporation's social character is crucial for shaping investor expectations before any ownership interest changes hands. Consequently, when Ben & Jerry sold to Unilever, it permanently relinquished both the ability to implement governance designs that adequately protect its social mission and the capacity to dictate investor expectations regarding future share purchases. This feature of Corrigan's analysis illustrates the decisive moment represented by Ben & Jerry's sale to Unilever, and explains why the governance restrictions, in any event, were implemented far too late to be truly effective.

C. *Stakeholderism in dealmaking and dealbreaking*

In *Stakeholder Amnesia in M&A Deals*,[250] Petrucci and Subramanian present a framework for analyzing transformational transactions like mergers and acquisitions within the context of mission drift pressures. They put forth two key claims: descriptively, pro-social corporations systematically experience "stakeholder amnesia" during company sales; normatively, boards possess the legal and practical capacity to integrate stakeholder interests into these transactions.[251] The authors examine potential barriers to stakeholder integration in M&A deals, including fiduciary duties, negotiation leverage, and contractual feasibility, concluding that none of these barriers adequately justify stakeholder amnesia among sell-side boards.[252]

To illustrate their arguments, they offer a paradigmatic scenario where a board receives an offer that, despite exceeding the company's perceived long-term value, compromises the interests of other constituencies the company serves through its social mission.[253] They assert that a staggered board and a poison pill empower the board to "just say no" in this context, and that the *Time* precedent allows the board to consider the buyer's identity when employing this strategy.[254] Using Elon Musk's

249. *Id.* at n.16.
250. Petrucci & Subramanian, *supra* note 8.
251. *Id.* at 1–2.
252. *Id.* at 2.
253. *Id.* at 47.
254. *Id.* at 51.

acquisition of Twitter as a case study, they characterize the failure to protect the former management's carefully crafted content moderation policies post-transaction as a "major missed opportunity."[255] They advocate instead for a scenario where the Twitter board would have demanded irrevocable delegation of content moderation policies to an independent, self-perpetuating panel of experts.[256] Specifically, they suggest embedding these policies into Twitter's articles of incorporation, alongside a specific grant to users of a right of action to enforce them.[257] The authors directly reference Ben & Jerry's mission statement, included in the articles of incorporation of the Surviving Corporation under the merger agreement, as a key precedent for this approach.[258] While acknowledging criticisms that acquirers demand absolute control over acquired subsidiaries, they argue the benefits of such a structure for Twitter and society outweigh the risks.[259] Nevertheless, they concede that a significant doctrinal question remains regarding whether the Twitter board could and should have pursued these safeguards, and that the timing of this request would have been crucial.[260]

The authors also cite Murdoch's acquisition of the *Times of London*, where he legally pledged to protect editorial freedom by avoiding interference with reporting, and empowered a board of external directors to manage editor hiring and firing.[261] However, as observed with the Ben & Jerry's-Unilever partnership, commentators note that "Murdoch was often able to sidestep these restrictions", appointing editors despite resistance from Times of London's Independent Board.[262] Considering these observations and the Ben & Jerry's narrative, it is questionable whether the authors' proposal would, in practice, enable an independent committee to enforce and maintain aspects of prior governance under new ownership.

255. *Id.* at 55.
256. *Id.*
257. *Id.* at n.250.
258. *Id.* at n.251.
259. *Id.* at 57.
260. *Id.* at 57–60.
261. *Id.* at 56.
262. Jim Waterson, *Ban on Rupert Murdoch's Interference in Times and Sunday Times Ended,* GUARDIAN (Feb. 10, 2022), https://www.theguardian.com/media/2022/feb/10/ban-on-rupert-murdochs-interference-in-times-and-sunday-times-ended.

Nevertheless, Petrucci and Subramanian's framework remains analytically valuable for illuminating the challenge of preserving social mission in corporate separations. The barriers to considering stakeholder interests in company sales apply similarly to demergers. Thus, their analysis offers a useful starting point to consider the structural and legal impediments that parent and subsidiary boards face in attempting to integrate stakeholder considerations during demerger transactions. First, doctrinal support for incorporating such interests under a fiduciary duty analysis in the demerger context is even more limited than in company sales. Second, subsidiary boards typically lack meaningful negotiating leverage against their corporate parent during a separation. Third, contractual provisions rarely enable creative governance solutions, as demergers generally take the form of IPOs or distributions, precluding enforceable contractual commitments. Moreover, even creative protections embedded in the original merger agreement may lose legal force following a demerger.[263] These insights deepen our understanding of the risks inherent in relinquishing corporate control, further supporting Corrigan's argument that founders with social preferences should exercise extreme caution when transitioning from a closely held to a dispersed ownership structure.

D. *Ben & Jerry's: A Challenge to Stakeholder Amnesia Claims*

The evolution of the Ben & Jerry's partnership poses a serious challenge to the insights offered in Petrucci and Subramanian's *Stakeholder Amnesia*. Unlike Corrigan's framework, Petrucci and Subramanian's analysis is premised on the notion that fiduciary obligations, enforced through a court's equitable review, sufficiently protect pro-social corporations' capacity to pursue social missions. However, the Ben & Jerry's case strongly challenges this premise and their theory more broadly. While the authors characterize the acquisition terms as a paradigmatic success, subsequent events under Unilever's

263. Using the Ben & Jerry's case as an example, consider a scenario in which Unilever compels Conopco to sell or assign its ownership interest in the Ben & Jerry's subsidiary to a new parent entity, thereby terminating Conopco's contractual obligation to preserve the composition of the Independent Board.

ownership profoundly contradict this characterization. Indeed, throughout the partnership, Unilever demonstrated its capacity to bypass the Independent Board regarding nearly every contractual commitment in the original merger agreement concerning Ben & Jerry's operational management, with the singular exception of the Independent Board's formal composition and the underlying allocation of voting rights control. The reality of the upcoming demerger further undermines their assessment, given both the limited protection afforded by the merger provisions to Ben & Jerry's post-partnership future, and the restricted capacity of Unilever's fiduciary obligations to uphold Ben & Jerry's social mission during the separation.

Moreover, the authors' characterization of Ben & Jerry's as a paradigmatic example of a sell-side board that resisted the pressures of stakeholder amnesia during a company sale is descriptively questionable. Petrucci and Subramanian specifically cite Ben & Jerry's merger with Unilever as an illustrative case where a sell-side board effectively utilized its negotiating leverage to establish appropriate contractual and institutional safeguards, preserving the founders' original concept of stakeholder governance. Regardless of this depiction's accuracy, Ben & Jerry's, at least superficially, appears to be an exception to their descriptive claim regarding sell-side boards' susceptibility to stakeholder amnesia. Supporting this positive depiction during the merger, Bayle-Cordier et al. employ organizational theory, contending that Ben & Jerry's socially driven identity was maintained in a "cocoon" by the parallel board and Vermont-based company managers, despite Unilever's control over financial and operational matters.[264] They further argue that the company's post-acquisition emphasis on social mission stemmed from Unilever's interest in leveraging the acquired intangible asset: a socially responsible organizational identity.[265]

On the other hand, Page and Katz offer a more critical portrayal, highlighting the misconception that Ben & Jerry's was legally obligated to sell itself to Unilever due to shareholder obligations.[266] A 2000 stock analyst claimed that "Ben & Jerry's had a legal responsibility to consider the takeover bids…that

264. Bayle-Cordier, *supra* note 4, at 29.

265. *Id.* at 31 ("B&J's social mission . . . was a valuable resource and had to be preserved by Unilever.").

266. Page & Katz, *supra* note 22, at 42.

responsibility is what forced a sale."[267] Cohen echoed these conclusions in a 2010 NPR radio segment, stating that "the laws required the board of directors of Ben & Jerry's to take an offer, to sell the company despite the fact that they did not want to sell the company."[268] Greenfield similarly stated, "We were a public company, and the board of directors' primary responsibility is in the interest of the shareholders . . . . it was nothing about Unilever; we didn't want to get bought by anybody."[269] While the founders can be forgiven for an inaccurate legal analysis, even a 2009 issue of the *Stanford Social Innovation Review* touted this misconception of governing case law: "The board [of Ben & Jerry's] was legally required to sell to the highest bidder . . . because [the company] was public they had no choice."[270]

To clarify this misconception, Page and Katz emphasize Vermont's constituency statute, amongst other doctrinal and structural protections, which Ben & Jerry's board could have leveraged to resist the sale.[271] Their discussion critically examines both the fiduciary duty to accept or facilitate a sale and the board's obligation as shareholders regarding transaction approval. Importantly, at the time, the directors had not made an irrevocable commitment to a sale, allowing them the discretion to freely reject an offer after reasonable diligence as to its adequacy.[272]

While this fiduciary analysis aligns with Petrucci and Subramanian's characterization of fiduciary protections for sell-side boards of pro-social corporations resisting takeovers, it also questions whether Ben & Jerry's truly represents an anomaly to their theory of stakeholder amnesia, and even its broader authenticity as a social enterprise. Cynics question the purported significance of a "public company's obligation to sell," suggesting it masked the founders' true motivation: the $50 million cash payout from the acquisition.[273] Furthermore, attention has been drawn to operational challenges that the acquisition would alleviate, including product distribution, and fear of litigation the founders might personally face (despite an indemnity provision

267. *Id.* at 39.
268. *Id.*
269. *Id.*
270. *Id.* at 39–40.
271. *Id.* at 41.
272. *Id.* at 41–42.
273. *Id.* at 42.

in Ben & Jerry's charter).[274] Nevertheless, it is crucial to examine the company's integrity as a social enterprise, particularly given its decision to engage in a transaction that significantly altered managerial discretion over using the organization as a platform for social good. At the time of the merger, co-founder Ben Cohen remarked, "[W]hile I would have preferred for Ben & Jerry's to remain independent, I'm excited about this next chapter."[275] Consequently, Page and Katz's contribution is essential in qualifying the praise and optimism characterizing Petrucci and Subramanian's portrayal of Ben & Jerry's behavior as a sell-side board prioritizing broader stakeholder interests. Rather than serving as an illustrative counterexample, the Ben & Jerry's board may have succumbed to the very stakeholder amnesia that the authors criticize. These insights are essential for comprehending the alternative motivations that may have driven the Ben & Jerry's board to take its decisive step towards Unilever's ownership, a decision from which the integrity of its brand and social mission may be irretrievably compromised. More generally, these observations illuminate the shortcomings of Petrucci and Subramanian's proposal, which relies on Ben & Jerry's as a primary positive example of a sell-side board that resisted stakeholder amnesia, by highlighting evidence that suggests the contrary.

VI.
Enduring Corporate Governance Design for Pro-Social Corporations under Corporate Ownership and Beyond

This section critically evaluates various instruments of corporate governance design for pro-social corporations, drawing upon scholarly literature and the stress-tested experiences of three key case studies: Craigslist, OpenAI, and Ben & Jerry's. Building on Corrigan's foundational insight that closely held corporations offer greater social mission protection than widely held ones, this analysis aims to establish a more detailed, illustrative, and instructional hierarchy of effective and durable governance restrictions. This theoretical attempt is motivated by a crucial takeaway illustrated by the Ben & Jerry's-Unilever partnership: formal restrictions that retained control rights endured far beyond functional attempts to preserve Ben & Jerry's social mission.

274. *Id.*
275. Hays, *supra* note 2.

The evaluation will proceed by examining four mechanisms of corporate governance design for pro-social corporations: first, closely held corporations with transfer restrictions (illustrated by the case of Craigslist); second, widely held corporations with a capped returns model (illustrated by the case of OpenAI); third, widely held corporations with a public benefit trustee mechanism (illustrated by the case of Ben & Jerry's); and fourth, widely held corporations with restrictions on control rights (illustrated by the case of Ben & Jerry's). It will then assess the relative effectiveness of negotiated mechanisms to protect social missions during M&A transactions: first, leveraging contractual protections to shape post-deal governance under a corporate owner (illustrated by the case of Ben & Jerry's); and second, memorializing irrevocable social mission policies into the Articles of Incorporation (as proposed by *Stakeholder Amnesia*).

Beyond constructing this refined hierarchy, this section will elaborate on the often-excluded role of corporate partners, a critical factor not fully addressed in Corrigan's analysis. Each case study vividly illustrates how external (and, in OpenAI's situation, internal) partners complicate the management protocols of pro-social corporations under various designs. This also provides a valuable opportunity to assess whether any of Corrigan's proposals might have afforded greater protections for Ben & Jerry's, or any pro-social corporation, under public company ownership — a scenario Corrigan's analysis does not explicitly consider. The section will conclude with crucial takeaways for similarly situated pro-social entities, providing guidance for navigating the complex task of bridging for-profit aims with the pursuit of broader public benefits through their corporate operations.

A. *Methods of Corporate Governance Design for Pro-Social Corporations*

1. *The Closely Held Model: Craigslist*

Corrigan initially proposes that if corporate planners aim to sustain a corporate public benefit while minimizing managerial agency costs, they should organize as close corporation with restrictions on share transfers.[276] Under this structure, founders

276. Corrigan, *supra* note 6, at 36–37.

with idiosyncratic nonfinancial preferences can retain autonomy in managing their company.[277] To preserve this autonomy, transfer restrictions can be incorporated into stock instruments, granting the corporation veto rights over share transfers.[278] Alternatively, stockholder agreements can impose similar transfer restrictions.[279] The restrictions should be structured to exclude stockholders who will not contribute to the corporate public benefit.[280] However, these restrictions necessarily impose illiquidity costs, reducing stock value and increasing corporate funding costs.[281]

The governance of Craigslist, as detailed in *eBay v. Newmark*, exemplifies this proposal, highlighting its advantages and risks for pro-social corporations.[282] Craigslist displayed distinct operational characteristics from traditional for-profit corporations, exhibiting an extremely unique business strategy that did not prioritize revenues or resemble other online technology platforms.[283] Craigslist was closely held by its ideologically aligned founder and CEO, along with a third, more-profit-oriented, minority investor.[284] This party began seeking a buyer for his ownership stake after management refused his requests to properly monetize Craigslist.[285] The ultimate buyer of this minority stake, eBay, operates as a traditional for-profit corporation, focused on maximizing revenues and market share.[286] Craigslist negotiated a restrictive stockholder agreement to define the terms of eBay's minority investment.[287] Corrigan's analysis accurately predicts the inherent flaws of the original corporate governance design; specifically, the transfer restrictions failed to effectively exclude stockholders, such as eBay, who did not intend to contribute to Craigslist's public benefit. The *eBay v. Newmark* opinion characterizes their partnership as "oil and water", noting that "it is curious these two companies

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *eBay,* 16 A.3d at 1.
283. *Id.* at 8–9.
284. *Id.* at 12.
285. *Id.* at 12–13.
286. *Id.* at 10.
287. *Id.* at 14-23.

ever formed a business relationship,"[288] and that their "relationship was marred by inconsistent expectations from the beginning."[289] The court ultimately invalidated two of the three measures Craigslist implemented in an attempt to reclaim eBay's ownership stake and preserve Craigslist's unique, and arguably social, character.[290] The Craigslist founders articulation of the *Unocal* "threat" posed by eBay's investment stake is illustrative: it would "fundamentally alter craigslist's values, culture and business model, including departing from craigslist's public service mission in favor of monetization of craigslist."[291]

The case marks a significant development in Delaware law concerning corporate action to pursue broader stakeholder interests. The court restricted the use of "cultural protection" as justification for considering non-pecuniary factors under *Time*, characterizing this aspect of the doctrine as mere "dicta"[292] and articulating the following rule: "promoting, protecting, or pursuing non-stockholder considerations must lead at some point to value for stockholders."[293] Furthermore, they conducted a fact-specific inquiry into the integrity of Craigslist's purported social mission: "[g]iving away services to attract business is a sales tactic . . . not a corporate culture."[294] Moreover, the court determined that its business strategy was "not something unique to craigslist" but rather reflected "American capitalist culture."[295]

While these rulings do not govern UK-incorporated Unilever, they nonetheless illuminate crucial challenges in pursuing stakeholderism under the scrutiny of equitable review. First, demonstrating to a court that a company bound by corporate form genuinely employs its social mission to advance the interests of non-shareholder beneficiaries is exceedingly difficult. Compared to Craigslist, Ben & Jerry's may find it easier to persuade a court of the integrity and singularity of its commitment to its social mission. However, even then, the financial contribution of its social mission remains immeasurable. Consequently, equitable review cannot compensate for corporate governance design's failure to protect a company's social mission. Second,

288. *Id.* at 4.
289. *Id.* at 31.
290. *Id.* at 4.
291. *Id.* at 82.
292. *Id.* at 87.
293. *Id.* at 85.
294. *Id.* at 86.
295. *Id.* at 86–87.

Corrigan's claim that *ab initio* implementation of these features is crucial for the long-term success of any governance mechanism is clearly applicable here. Had Craigslist implemented more effective mechanisms ex-ante to safeguard share transfers to a profit-motivated investor, this situation could have been avoided.

Craigslist provides a valuable counterfactual for evaluating Ben & Jerry's initial decision to conduct a public offering. While Corrigan's theory clarifies that producing corporate public benefits with widely held shares is possible, he asserts that a closely held model offers stronger protection against mission drift. Although direct comparison is challenging given the distinct natures of the two companies, Craigslist's corporate governance design, despite its imperfections, underscores the implications of early ownership structure choices for pro-social firms. Representing the "closely held with transfer restrictions" model within the proposed hierarchy, the Craigslist case further illuminates the risk of ideological misalignment and subsequent shareholder conflicts, even when transfer restrictions are in place. This risk, introduced by the presence of external corporate partners like eBay, mirrors the challenges Ben & Jerry's later encountered with Unilever, albeit in a distinct context. Ultimately, despite the holdings of *eBay v. Newmark,* the case of Craigslist provides general support for Corrigan's claim that a closely held model provides relatively better protection for social mission than a widely held model, even alongside the pressures imposed by external corporate partners.

2. *The Widely Held Model: Creating Non-Tradeable Governance Rights*

Corrigan proposes a second alternative for pro-social corporations seeking to maintain a corporate public benefit while also having a liquid trading market for voting stock. This alternative necessitates creating non-tradeable governance rights tied to their chosen public benefit.[296] The main drawback of this approach is the potential for agency costs, as control rights could be used to divert value from stockholders, resulting in high financing costs.[297] These concerns are consistent with traditional corporate governance scholars, whose primary focus

296. Corrigan, *supra* note 6, at 37.
297. *Id.* at 38.

is minimizing managerial agency costs.[298] Corrigan outlines several mechanisms to minimize managerial discretion within the governance of a pro-social corporation, thereby mitigating agency costs.[299]

a. The Capped Returns Mechanism: Open AI

The first mechanism Corrigan explores in this context involves partial distribution restrictions, implemented through either capping returns to investors or specifying an annual amount of net income for donation to a beneficiary, as defined in the certificate of incorporation.[300] OpenAI's former structure exemplifies the capped returns model, advising investors that "it would be wise to view any investment... in the spirit of a donation."[301] The unique nature of OpenAI's corporate structure is well-documented and offers a compelling comparison to the Ben & Jerry's-Unilever partnership.[302] Notably, OpenAI's structure stemmed from internal decisions, thereby foregoing the need to navigate the conflicting visions, values, and objectives typically introduced by an external partner. Nevertheless, its hybrid structure, integrating entities with both shareholder-centric and broader stakeholder interests, established a delicate and complex dichotomy between generating returns and producing costly public benefits. Despite its non-profit arm holding ultimate control,[303] OpenAI's ability to genuinely prioritize non-pecuniary goals was challenged by Sam Altman's removal and subsequent reinstatement.[304] The non-profit board demonstrably yielded to market pressure, particularly from Microsoft, its key corporate partner and minority investor, when deciding to reinstate the CEO.[305] Furthermore, the

298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. *Our Structure*, OPEN AI, https://openai.Com/our-structure/.
303. Ellen P. Aprill, Rose Chan Loui & Jill R. Horwitz, *The Untold Nonprofit Story of OpenAI*, CLS BLUE SKY BLOG (Mar. 5, 2024), https://clsbluesky.law.columbia.edu/2024/03/05/the-untold-nonprofit-story-of-openai/.
304. David Fahrenthold, Cade Metz & Mike Isaac, *How OpenAI Hopes to Sever Its Nonprofit Roots*, N.Y. TIMES (Dec. 17, 2024), https://www.nytimes.com/2024/12/17/technology/openai-nonprofit-control.html.
305. Ari Levy et. al, *OpenAI Brings Sam Altman Back as CEO Less Than a Week After He Was Fired by Board*, CNBC (Nov. 22, 2023), https://www.cnbc.com/2023/11/22/openai-brings-sam-altman-back-as-ceo-days-after-ouster.

capped returns model began to impede OpenAI's ability to develop powerful, capital-intensive AI systems and technology by constraining capital commitments from investors,[306] and, according to management, limited the ability for OpenAI to compete with the unforeseen emergence of other "great AGI companies."[307]

On this basis, in May, 2025, OpenAI's leadership opted to abandon its capped-profit structure and instead converted its for-profit arm to a public benefit corporation (PBC). OpenAI management justified this new structure by acknowledging that "PBCs have become the standard for-profit structure for other AGI labs… as well as many purpose driven companies".[308] They further argued that the conversion would afford greater resources to the controlling nonprofit (as a large shareholder in the PBC), and therefore greater operational flexibility to "support programs so AI can benefit many different communities, consistent with [its social] mission".[309] However, despite these stated advantages, scholars caution that the PBC lacks an enforcement mechanism or prescribed procedure for directors to balance these dual objectives.[310] Regarding its applicability to the Ben & Jerry's case, given the absence of judicial precedent concerning director balancing duties in benefit corporations means that it remains unclear whether conversion could have aided the company in upholding its social mission under Unilever's ownership.[311] Nevertheless, OpenAI appears to have stress-tested Corrigan's proposed partial distribution restriction mechanism with limited success for entities pursuing capital-intensive, high-stakes corporate public benefits. OpenAI's experience reveals that even with a non-profit arm at the top of the corporate chain, market pressures from corporate

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html#:~:text=Sam%20Altman%20will%20return%20as,less%20than%20a%20week%20ago.

306. Aditya Soni et. al, *OpenAI outlines new for-profit structure in bid to stay ahead in costly AI race*, REUTERS (Jan. 2, 2025), https://www.reuters.com/technology/artificial-intelligence/openai-lays-out-plan-shift-new-for-profit-structure-2024-12-27/.

307. *Evolving Our Structure,* OpenAI, https://openai.com/index/evolving-our-structure/ (last visited May 27, 2025).

308. *Id.*

309. *Id.*

310. Soni, *supra* note 306.

311. Jill E. Fisch, *Purpose Proposals* (ECGI Working Paper Series in Law, Working Paper No. 638, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4079135.

partners and investors can significantly influence decisions, potentially compromising the prioritization of non-pecuniary goals, a challenge similarly faced by Ben & Jerry's under Unilever's influence.

b. The Public Benefit Trustee Mechanism: The Ben & Jerry's-Unilever Partnership

The second mechanism Corrigan proposes for widely held pro-social corporations is the public benefit trustee mechanism, which grants trustees veto power over "fundamental corporate transactions affecting the firm's capital structure or control rights and over material contracts affecting the corporation's purpose."[312] This structure's intended advantage, compared to a controlling stockholder arrangement, is its delegation of major strategic decisions and daily corporate management to professional managers, who remain constrained by the trustees' veto power regarding specified matters related to the corporate public benefit.[313]

The Independent Board can be interpreted as fulfilling the role of public benefit trustees for Ben & Jerry's. Nonetheless, Corrigan's proposal elucidates shortcomings of the merger agreement, specifically in how it delineated governance rights within the partnership. He suggests that public benefit trustees, like the Independent Board, should possess veto rights in a limited range of circumstances, rather than over every decision potentially impacting the company's social mission. In essence, Corrigan's proposal implies that granting "exclusive authority" to the Independent Board over decisions concerning the "brand" and "social mission" decisions was excessively broad and inadequately defined.[314]

However, even a narrower, more concrete delegation of governance rights within the merger agreement would likely not have salvaged the complex partnership, thereby illustrating a missing component of Corrigan's proposal: the role of corporate power. The dispute over product sales in the West Bank, and Unilever's eventual sale of the Ben & Jerry's trademark to a third-party distributor in the region, critically illustrates that veto rights are consequential only if the rights holder also possesses

312. Corrigan, *supra* note 6, at 38–39.
313. *Id.*
314. Ben & Jerry's Homemade Inc., Proxy Statement, *supra* note 3, at 29–30.

the authority to enforce them. Although more precise language in the merger agreement might have offered clarity, it likely would not have shielded the Independent Board from Unilever's corporate power to circumvent the agreement's terms and exercise its ownership rights over the subsidiary to execute its own plan. Consequently, for Corrigan's theory to be robust, public benefit trustees must also be individuals vested with appropriate legal and operational authority to ensure their veto is effective. The Ben & Jerry's case thus demonstrates that the public benefit trustee model is unlikely to function effectively in safeguarding the social mission of a subsidiary that is wholly owned by an unaligned corporate parent, especially when the veto rights reside with members of the subsidiary's board.

Just as longstanding principles of corporate governance underpin Corrigan's framework, these same traditional principles help explain why the public benefit trustee mechanism is unlikely to function effectively or endure over time in most scenarios. Grossman and Hart's seminal theory of incomplete contracts, specifically their insight that economic actors cannot anticipate all possible contingencies, applies as much to the public benefit trustee mechanism as it does to the theory of the firm more broadly.[315] Ben & Jerry's and Unilever could not have possibly anticipated their dispute over product sales in the West Bank when they were negotiating the merger agreement almost twenty years prior. The surprisingly long period of constructive coexistence was thus more a product of luck than of the strength or wisdom of the governance arrangement they originally brokered. Since not all uses of an asset, including a wholly owned subsidiary, can be specified in advance, this insight calls for the same solution applicable in the broader setting of the firm: the allocation of control rights.[316]

c. The Restricting Control Rights Mechanism: The Ben & Jerry's-Unilever Partnership

Third, Corrigan proposes a change in control mechanism, which he describes as the "bluntest way to create nontradeable governance rights" by delegating corporate policy

315. Philippe Aghion & Richard Holden, *Incomplete Contracts and the Theory of the Firm: What Have We Learned over the Past 25 Years?*, 25 J. ECON. PERSP. 181, 182–83 (2011).

316. *Id.*

decision-making to a single individual or small group of trusted individuals.[317] This feature was implemented in the Partnership through the Independent Board's fixed composition and revolving structure, which retained Ben & Jerry's majority control throughout the Partnership. This mechanism successfully protected Ben & Jerry's social mission far more effectively than the veto rights granted to these board members. The protracted challenges and disagreements within the partnership strongly attest to the Independent Board's enduring socio-political culture, evidenced by its repeated lawsuits against Unilever to enforce the merger agreement. The Independent Board's ability to retain its socio-political culture and pursue litigation despite Unilever's corporate power highlights the strength of this mechanism, even under corporate ownership. Its durability is further illustrated by the fact that this formal allocation of control rights, as prescribed by the merger agreement, is also likely to endure following the demerger.[318] The Ben & Jerry's case therefore illuminates that, within a widely held ownership structure, this formal allocation of control rights, upheld via enforceable contractual commitments to use voting powers consistent with a subsidiary's commands, represents a highly effective method to preserve social mission against the influence of an unaligned corporate owner.

B. *Negotiated Mechanisms to Preserve Control under Corporate Ownership*

To empower sell-side boards to integrate stakeholder interests during an acquisition, Petrucci & Subramanian offer two primary mechanisms: contractual provisions to structure post-acquisition governance,[319] and amendments to the articles of incorporation granting a right of action as an enforcement mechanism.[320] Their central recommendation, as applied to their case study, is that the Twitter board should have emulated Ben & Jerry's approach by irrevocably delegating control over Twitter's content moderation policies to an independent,

317. Corrigan, *supra* note 6, at 39–40.

318. For a discussion of why the independent board will endure post-demerger, see *supra* Section II.I.1.

319. Petrucci & Subramanian, *supra* note 8, at 133.

320. *Id.* at n.250.

self-perpetuating panel of experts.[321] The Partnership's observed trajectory provides a valuable context for assessing the implications of the authors' proposal and its efficacy in safeguarding a pro-social corporation's social mission.

1. *Contractual Protections for Post-Deal Governance*

The governance structure established between the parent company and its subsidiary post-acquisition, as detailed in the merger agreement, introduced an original and distinct governance framework intended to be upheld contractually. However, the viability of this governance structure was inherently limited by the capacity to adapt to the evolving needs of growing companies, their changing social missions, and the delicate interdependencies within large conglomerates. Equitable review, designed for the diverse needs of corporate entities and their relationships in our modern industrialized society, fulfills a function that contract law alone cannot. These practical considerations highlight the limitations of static contractual language and the unique demands of principal-agent relationships that underpin sophisticated governance structures. While parties retain the freedom to contract within legal bounds, employing contractual mechanisms to supplant fundamental legal principles governing corporate relationships appears imprudent.

Scholars highlight the critical role of social covenants in securing the support of key target company constituencies and stakeholders during the merger approval process, especially considering shareholder voting requirements.[322, 323] However, parties may underestimate the importance of establishing robust enforcement mechanisms to ensure the long-term fulfillment of these commitments, given their prominence in the deal's short-term considerations.[324] When a target company is absorbed as a wholly-owned subsidiary, its former shareholders forfeit any means to

321. *Id.* at 136.

322. Social covenants are defined as promises regarding social issues that an acquiror will make to a target in the context of an acquisition, which may include general promises to preserve the target's social purpose or more defined details of governance designed to effectuate these social commitments. *See* LeBlanc, *supra* note 55, at 749–50.

323. *Id.* at 765–66.

324. *Id.*

effectively enforce these social covenants.[325, 326] Furthermore, the acquiring entity is bound only by its own post-acquisition commitments, resulting in a lack of substantial deterrence against covenant breaches.[327] Essentially, the purchaser-turned-parent company contracts with itself: "there is no person or entity with contractual power to hold [the buyer] accountable" for post-closing non-compliance.[328] Consequently, the obligation to uphold social covenants regarding a wholly-owned subsidiary's social mission depends on the acquirer's goodwill. In this situation, the merger's success relied on "Ben and Jerry's [having become] convinced that Unilever would honor its word."[329] Scholars advise caution against target companies overemphasizing the significance of social covenants in mitigating their concerns.[330]

The issues involved with generating enforceable agreements to protect the interests of a merger partner post-closing in a public company deal are not new. Traditionally, efforts in this area focus on providing recourse to the buyer for any deficiencies in the purchased entity or representations related to the features of that entity made by the seller.[331] Transition Services Agreements (TSAs) can serve as a starting point for considering how similar legal structures could be adapted to support social mission priorities.[332] However, TSAs only work because they are discrete, necessity-driven, and time-limited

325. *Id.* at 766–67.

326. *See* Daniel Wolf, *Social Covenants in Mergers: Legal Promises or Moral Commitments?*, HARVARD L. SCH. F. ON CORP. GOVERNANCE (Apr. 4, 2016), https://corpgov.law.harvard.edu/2016/04/04/social-covenants-in-mergers-legal-promises-or-moral-commitments/ ("[T]here is no person or entity with a contract right to hold the buyer accountable for failing to uphold these covenants after the deal closes . . . .").

327. LeBlanc, *supra* note 55, at 777.

328. *Id.* at 751.

329. Pirsos, *supra* note 19, at 996.

330. LeBlanc, *supra* note 55, at 777–78.

331. *See, e.g.*, Igor Kirman et al., *The Next Frontier for Representations and Warranties Insurance: Public M&A Deals?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 24, 2020), https://corpgov.law.harvard.edu/2020/10/24/the-next-frontier-for-representations-and-warranties-insurance-public-ma-deals/.

332. JANICE ROEHL-ANDERSON, M&A INFORMATION TECHNOLOGY BEST PRACTICES 14 (Wiley Finance Series, 2013) ("A TSA is a legal agreement, separate from the separation and purchase agreement, in which the buyer agrees to pay the seller for certain services to support the divested business for a defined period of time . . . . TSAs are most often used in carve-outs where the buyer lacks the necessary information technology capabilities or capacity to support the business on its own.").

agreements. These characteristics contrast sharply with the fraught nature of covenants that attempt to embody a governance structure that will formalize a company's social mission long-term.

Secondary problems arise from the lack of enforcement mechanisms for social covenants. For instance, buyers may be emboldened to propose an increasing number of detailed social covenants to attract targets while overselling their cultural compatibility.[333] As LeBlanc notes, "purchasers . . . should not be allowed to outdo other companies vying for the transaction simply because they are willing to promise more only to be bound to less."[334] Conversely, alternative solutions must be flexible enough to give the parent company enough financial and operational control to motivate them to close the deal while keeping transaction costs low.[335] Thus, buyers should still be shielded from the potential overextension of vague social covenants when these agreements are enforceable.

The demerger vividly highlights the significant limitations of contractual provisions in safeguarding an acquired subsidiary's social mission. The Ben & Jerry's subsidiary will continue to rely on their new corporate parent's goodwill to maintain these social covenants. The precedent of its relationship with Unilever does not paint a promising picture: nearly every other long-term contractual feature, encompassing CEO appointments and social mission authority, eventually succumbed to Unilever's capacity to influence its corporate strategy.

2. *Irrevocable Policies in Articles of Incorporation*

Petrucci & Subramanian further suggest incorporating certain irrevocable policies, such as content moderation policies, into the articles of incorporation and granting users a right of action to enforce them.[336] They reference the mission statement within Ben & Jerry's articles of the Surviving Corporation as a precedent for this approach.[337] These governance documents are notable as a feature of the Ben & Jerry's acquisition that will persist through the demerger transaction, regardless of Unilever's chosen structure. The prohibitive cost and difficulty of

333. LeBlanc, *supra* note 55, at 782.
334. *Id.*
335. *Id.* at 783.
336. Petrucci & Subramanian, *supra* note 8, at n.250.
337. *Id.* at n.251.

amending them render them non-tradeable and theoretically resistant to the risks of mission drift identified by Corrigan.[338] Moreover, such terms shield management from judicial intervention by establishing an enforceable duty to manage a corporation's business and affairs in accordance with them.[339] A court might even be inclined to enjoin corporate actions by Unilever that impair the board's ability to fulfill its obligations under the articles.

However, while the immutability of these terms offers a valuable mechanism for pro-social corporations seeking to safeguard their social mission, this characteristic may hinder a company's operational dynamism and adaptability. More critically, the Ben & Jerry's case demonstrates that the mission statements contained within its articles of incorporation ultimately did little to protect the company when Unilever leveraged its corporate power to effectuate its intended strategy. This reality is underpinned by the debatable extent to which a mission statement within a corporation's articles can support pursuing public benefits at the expense of shareholders.[340] Thus, despite its promise to endure changing ownership or the entry of external partners, this mechanism suffers from its ambiguous role in resolving the fundamental debate about the relationship between corporate form and purpose, limiting its practical effectiveness in safeguarding social mission against an unaligned corporate owner.

C. *Key Insights for Governance Design*

This section's evaluation of corporate governance design methods for pro-social corporations, illuminated by the Craigslist, OpenAI, and Ben & Jerry's case studies, reveals a nuanced hierarchy of effectiveness and durability against mission drift, particularly in the face of corporate ownership and external partners. While maintaining a costly public benefit inherently imposes costs on the corporation, these cases underscore that the ability to preserve a social mission hinge significantly on the nature (and specifically, the enforceability) of various governance mechanisms.

338. Corrigan, *supra* note 6, at 41.
339. *Id.*
340. *See supra* Section I.C.

Based on this analysis, the mechanisms can be broadly ranked by their demonstrated capacity to protect social mission over time. The highest protection, albeit with inherent trade-offs, is offered by closely held corporations with transfer restrictions, as exemplified by Craigslist. This model provides the strongest defense against mission drift by concentrating ownership and control. However, it imposes significant illiquidity costs and limits the corporation's ability to maximize its capacity for social good through broader expansion and external financing.

Moving to widely held structures, moderate protection is observed with restrictions on control rights, particularly as implemented in the Ben & Jerry's partnership. This formal allocation of control rights has demonstrated remarkable resilience, especially given its likely endurance beyond the upcoming demerger. In contrast, other mechanisms within widely held structures offered limited protection and proved prone to external pressures. The capped returns model, exemplified by OpenAI, while designed to balance profit and purpose, ultimately fell in the face of market pressures, despite the continued presence and oversight of its controlling nonprofit at the top of the entity structure. Similarly, memorializing irrevocable social mission policies into the articles of incorporation, despite theoretical immutability and resistance to mission drift, provided limited practical protection to Ben & Jerry's in instances of conflict with its corporate owner. Furthermore, the public benefit trustee mechanism, specifically concerning general veto rights, proved largely ineffective. The Ben & Jerry's case demonstrated that such rights are inconsequential unless the trustees are vested with explicit legal and operational authority to enforce them. Finally, contractual protections to shape post-deal governance (general social covenants) suffered from similar pitfalls, proving highly susceptible to mission drift. The endurance of these provisions crucially depends on the acquirer's goodwill, which often deteriorates in the face of conflict with its own strategic goals.

The hierarchy can ultimately be distilled to a single, key insight for pro-social founders seeking to design corporations to preserve their stated social missions. The two most effective mechanisms that emerge from the scholarship, supported by the case studies explored, were the closely held model with proper transfer restrictions and the allocation of control rights to a trusted group. These two methods share a defining feature:

their fundamental reliance on restricting transfers of control. This insight relates to a primary takeaway illustrated by Ben & Jerry's story: formal allocations of control within the merger agreement endured far more effectively than any functional attempt to shape the company's governance long-term.

Beyond this hierarchy, the case studies reveal consistent phenomena that pro-social founders should implement mechanisms to avoid. The introduction of external partners, often driven by profit motives, consistently represents a pivotal moment, introducing inconsistent ideologies that impede the incumbent management's capacity to pursue social missions alongside financial returns. This underscores the critical importance of cultivating robust internal agreement on how to balance dual objectives early in a company's lifecycle.

The decisions to relinquish ownership and control are often irreversible, making any delay in considering future conflicts a mistake. Founders should exercise extreme caution and avoid undue reliance on assurances of alignment from incoming partners, as predicting all potential conflicts regarding pro-social costs versus market pressures is exceedingly difficult. Crucially, these cases illuminate the fundamental driver behind founders accepting partners: financing. Thus, while Corrigan emphasizes the illiquidity costs associated with maintaining concentrated ownership, the cases demonstrate that maximizing a corporation's ability to generate valuable public benefits through concentrated ownership may also incur the opportunity costs of limited expansion. Founders should therefore adopt a healthy level of skepticism towards initial internal agreements to assume the costs of pursuing public benefits, underpinned by an awareness that rapid commercial success may challenge their commitment to prioritizing this aim in the long-run. These insights reinforce the enduring difficulty of designing governance structures that fully insulate social mission from paramount market imperatives.

Conclusion

This analysis has provided a comprehensive overview of the managerial, operational, and legal complexities surrounding Unilever's upcoming demerger of its Ice Cream division, with a central focus on the future of Ben & Jerry's social mission. The Ben & Jerry's case serves as a unique and compelling study within the landscape of pro-social corporations. Its unwavering dedication to integrating social purpose into its business model, demonstrating a level of integrity, consistency, and authenticity that surpasses that of many corporations, has been a key driver in shaping the power and global resonance of its brand image. However, a central challenge lies in the inherent difficulty of precisely quantifying the financial value of this social mission, complicating its protection within traditional corporate decision-making structures, which prioritize measurable financial returns.

The note has examined the Ben & Jerry's-Unilever partnership through the lens of corporate governance theories, including Corrigan's *Corporate Governance Trilemma* and Petrucci & Subramanian's *Stakeholder Amnesia in M&A Deals*, to understand the inherent tensions between a pro-social subsidiary's mission and a parent company's market-driven imperatives. The analysis of demerger transactions under UK company law further illuminated the legal and structural considerations that will shape Unilever's separation of its Ice Cream division and, consequently, the future governance and operational context for Ben & Jerry's.

A key finding is the revelation of a nuanced hierarchy of governance mechanisms based on their effectiveness and durability in safeguarding social mission against mission drift, especially under corporate ownership. The highest protection, albeit with inherent trade-offs, is demonstrated by closely held corporations with proper transfer restrictions. Within widely held structures, moderate protection is observed with formal restrictions on control rights, such as the Independent Board's composition in the Ben & Jerry's partnership, which proved surprisingly resilient due to enforceable contractual commitments regarding voting powers. In contrast, mechanisms offering limited protection include capped returns models and memorializing irrevocable policies in a company's articles of incorporation, both susceptible to market pressures and the ambiguous role of social purpose in corporate law. The public benefit trustee mechanism (relying on veto rights) also provided limited practical protection, as such rights proved inconsequential without explicit legal and operational enforcement authority. Finally, contractual protections to shape post-deal governance (social covenants) offered the least protection, being highly susceptible to mission drift due to their reliance on acquirer goodwill and lack of independent enforcement. This analysis underscores that formal allocations of control endured far more effectively than any functional attempt to shape the company's long-term governance.

The broader lesson for pro-social corporations and their stakeholders presents a multifaceted picture. Partnerships and acquisitions, while offering valuable avenues for growth (increased resources, expanded scale), inherently introduce mission drift that can erode an organization's social purpose. In all three cases explored, the socially-driven entities were compelled to navigate the manner in which partnerships complicated management's capacity to pursue dual objectives. This underscores the critical importance of cultivating robust internal agreement on balancing these objectives early in a company's lifecycle, including an exploration of whether to memorialize these agreements in the form of enforceable allocations of corporate control.

The Ben & Jerry's story serves as both a cautionary tale and a call to action for social enterprises moving forward. It underscores the urgent need for a more sophisticated and integrated approach to corporate governance, one that moves beyond a superficial balancing of profit and purpose and instead seeks to genuinely embed and protect social purpose as a core organizational value, ensuring its resilience even in the face of evolving corporate priorities and ownership structures.