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THE BUSINESS JUDGMENT RULE AND ANTI-TAKEOVER DEFENSIVE TACTICS: IVANHOE PARTNERS v. NEWMONT MINING CORP.

Recent history has seen a tremendous increase in hostile corporate takeovers, many of which give rise to complex litigation. The Williams Act\(^2\) (the “Act”) was enacted to regulate tender offers,\(^3\) which have become the principal means of consummating


\(^3\) See 13A B. Fox & E. Fox, supra note 2, § 27.01, at 27-5 (“[a] tender offer is an offer to shareholders of a corporation to purchase stock of that corporation”). The tender offer, “[a]n organized attempt to acquire a substantial percentage of the outstanding stock of a [target] corporation by making an attractive offer to its shareholders[,] is frequently the
hostile takeovers. The Act is designed to give "target" companies time to mobilize defensive plans and respond to such tender offers. Consequently, hostile tender offers have often been met with

most effective method available to the would-be acquirer for achieving the desired [takeover]." Id. Once the tender offer is announced, a shareholder of the target company may either keep his shares, sell them in the securities market, or tender them to the tender offeror. See Panter, 646 F.2d at 283. If a substantial number of shareholders exchange their shares for the consideration provided by the tender offeror, the takeover will be successful. See Sommer, supra note 1, at 251.


(1) active and widespread solicitation of public shareholders for the shares of an issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock.


Tender offers have often been recognized as advantageous to shareholders even if their corporation never actually becomes a target. See Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer, 94 HARV. L. Rev. 1161, 1173-74 (1981). "The process of monitoring by outsiders poses a continuous threat of takeover if performance lags. Managers will attempt to reduce agency costs in order to reduce the chance of takeover, and the process of reducing agency costs leads to higher prices for shares." Id. at 1174; see also Harrington, If It Ain't Broke, Don't Fix It: The Legal Propriety of Defenses Against Hostile Takeover Bids, 34 SYRACUSE L. Rev. 977, 981-83 (1983) (hostile takeover attempts foster market efficiency and shareholder autonomy). But see 13A B. Fox & E. Fox, supra note 2, § 27.06[1][b], at 27-166 (discussing possible detriments of takeover bid to corporation).

* See Easterbrook & Fischel, supra note 3, at 1162. Prior to the passage of the Williams Act, shareholders were forced to decide quickly whether or not to sell their shares to corporate raiders since "offerors could limit the time an offer would be available, require that tenders be irrevocable, or specify that if the offer should be oversubscribed the first shares to be tendered would be the first purchased." Id. at 1162-63 & n.6. The Act was framed so as "to insure that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information regarding the qualifications and intentions of the offering party." Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 58 (1975). However, the draftsmen of the Act took care "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid." S. Rep. No. 550, 90th Cong., 1st Sess. (1967).
powerful anti-takeover strategies. The decision by corporate directors to utilize such defensive tactics in response to a takeover attempt is generally protected by the business judgment rule. Under the business judgment rule, actions by a board of directors are presumed to be in good faith, and will not be disturbed by the courts absent a clear abuse of discretion. Traditionally, the standard by

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6 See Prentice, Target Board Abuse of Defensive Tactics: Can Federal Law be Mobilized to Overcome the Business Judgment Rule?, 8 J. Corp. L. 337, 339-43 (1983). Defensive tactics are the strategic maneuvers used by target companies to evade a takeover “or at least to succumb on more favorable terms.” Id. at 339. Among these defenses are: “golden parachutes,” “poison pills,” “pac-man,” and “lock-up” defenses. See id. at 341-42.

A “golden parachute” is a contract designed to provide bonuses or long-term salary guarantees to executives of the target in the event that corporate control changes hands and executives are terminated. See id. at 341 (overview of golden parachute as anti-takeover defense). See generally Note, Golden Parachutes: Executive Employment Contracts, 40 Wash. & Lee L. Rev. 1117, 1119-20 (1983) (“golden parachutes provide executives with lucrative severance packages”).

“Poison pills” generally allow all target shareholders to sell common shares at a prescribed premium or to purchase common stock at a set discount when any single entity acquires a certain percentage of the company, thereby making the target less attractive. See 13A B. Fox & E. Fox, supra note 2, § 27.07[2][e], at 27-221. See generally Helman & Junewicz, A Fresh Look at Poison Pills, 42 Bus. Law. 771, 772-74 (1987) (discussing history of poison pill plans).

The “pac-man” defense is a tender offer, made by the target company, for the stock of the original offeror. See Moran v. Household Int’l, Inc., 500 A.2d 1346, 1350 n.6 (Del. 1985); DeMott, Pac-Man Tender Offers, in Tender Offers 123, 123-41 (M. Steinberg ed. 1985).

In a “lock-up,” the target corporation gives a favored prospective bidder—the “white knight”—an option to buy shares of the target corporation, thereby allowing him to have a distinct advantage over other bidders. See Note, Lock-Up Options: Toward a State Law Standard, 56 Harv. L. Rev. 1088, 1098 (1983) [hereinafter Note, Lock-Up Options].

In addition, target companies have often entered into standstill agreements with third parties. See, e.g., Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1338 (Del. 1987). “The standstill agreement is, in essence, a corporate peace treaty designed to inject a degree of stability, certainty, and cooperation into the relationship between the issuer and a major investor.” Bartlett & Andrews, supra note 1, at 144. Standstill agreements enhance the third party’s ability to “sweep [the] street” through a “rapid acquisition of securities on the open market during and shortly after the pendency of a tender offer for the same class of securities.” See Ivanhoe, 535 A.2d at 1337 n.3.

6 See infra notes 29-32 and accompanying text.

7 See 13A B. Fox & E. Fox, supra note 2, § 27.06[4], at 27-187. The business judgment rule is best described as a presumption that directors’ decisions are informed, made in good faith, and motivated by the corporation’s best interests. Id.; see Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). The rule is designed to protect management against liability for reasonable actions which ultimately prove to be faulty. See Johnson v. Trueblood, 629 F.2d 287, 294 (3d Cir. 1980) (directors not penalized if judgment reasonable at time made), cert. denied, 450 U.S. 999 (1981); S. Lorne, Acquisitions and Mergers: Negotiated and Contested Transactions § 4.05[3][a], at 4-101 (1985). It has been noted that:

Courts are willing to defer to directors because it is the board’s duty to manage the affairs of the corporation and because court’s often consider themselves ill-equipped to second-guess business decisions. The presumption of sound business
which a board's discretionary acts are evaluated is one of corporate reasonableness. 8 Recently, in Ivanhoe Partners v. Newmont Min-

judgment allows the directors to prevail whenever they can articulate a rational, unselfish business purpose for their actions.


The good faith requirement has often been construed to mean that the business judgment rule affords protection only to disinterested directors. Aronson, 473 A.2d at 812; see also Note, Unocal Corp. v. Mesa Petroleum Co.: A New Era of Fiduciary Duty, 38 BAYLOR L. REV. 687, 698-700 (1986) [hereinafter Note, A New Era] (board's defensive tactics invalid where sole purpose to perpetuate control); Note, Discrimination Against Shareholders in Opposing a Hostile Takeover, 59 S. CAL. L. REV. 1319, 1321 (1986) [hereinafter Note, Discrimination] (business judgment rule will not be applied "where a board's self interest predominates"). "[D]irectors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing . . . ." Aronson, 473 A.2d at 812. When a board's self-interest predominates, courts will not apply the business judgment rule and all aspects of the transaction must be deemed objectively fair to the shareholders. See AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 115 (Del. Ch. 1986). The burden of proof then shifts to the director to prove that the transaction was fair and reasonable. See Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). However, the parameters of this fiduciary duty are so ambiguous that it is often invoked by both plaintiffs and defendants. Note, Panter v. Marshall Field & Co.: Unbridled Discretion of Management to Resist Hostile Tender Offers, 33 MERCER L. REV. 647, 649 (1982) [hereinafter Note, Unbridled Discretion]. "Shareholders sue . . . and claim that the duty is breached when an offer is thwarted which would have resulted in their economic enrichment. Management counters that the duty makes it incumbent upon the directors to resist offers that they determine to be detrimental . . . ." Id. at 650. Generally, the business judgment rule only marginally inhibits board action since "[i]n practical application, there are only rudiments of limits placed on the discretion of management to pursue whatever courses of action directors deem necessary." Id.

See Norlin Corp. v. Rooney Pace, Inc., 744 F.2d 255, 264 (2d Cir. 1984). The members of a corporation's board of directors have a duty of care and a duty of loyalty to both the corporation and its shareholders. See id.; Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 633 (D. Md. 1982); S. Lonze, supra note 7, § 4.05[3][a], at 4-101, 4-102. The power of the board to act is tempered by this fundamental duty and obligation to protect the corporate enterprise, including the stockholders, from any reasonably perceived harm. See Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1983); Cheff v. Mathes, 199 A.2d 548, 556 (Del. 1964). Accordingly, the business judgment rule guides the courts in the determination of whether directors have adhered to their fiduciary duty. See Note, Unbridled Discretion, supra note 7, at 650.

In Norlin, the court stated that the duty requires care that a "reasonably prudent person in a similar position would use under similar circumstances." See Norlin, 744 F.2d at 264. See generally Steinberg, The American Law Institute's Draft Restatement on Corporate Governance: The Business Judgment Rule, Related Principles, and Some General Observations, 37 U. MIAMI L. REV. 295, 301-06 (1983) (rational basis is component of business judgment rule according to ALI). The courts have struggled to determine standards which would preclude invocation of the business judgment rule when bad faith entrenchment tactics are strongly suspected. See, e.g., Johnson, 629 F.2d at 293 (presumption of business judgment rule remains unless sole or primary motive is to retain control). The Panter court summarized the business judgment rule and its effect on directors: "In the absence of fraud, bad faith, gross overreaching or abuse of discretion, courts will not interfere with the exer-
the Supreme Court of Delaware found it reasonable, under the business judgment rule, for a target company to enter into a standstill agreement\(^9\) and increase its dividends in order to facilitate a “street sweep” of its stock by a preferred buyer.\(^{11}\)

In *Ivanhoe*, Ivanhoe Partners and Ivanhoe Acquisition Corporation (“Ivanhoe”) commenced a hostile takeover of Newmont Mining Corporation (“Newmont”).\(^{12}\) It did so by making a tender offer for forty-two percent of Newmont’s shares at ninety-five dollars per share, a bid it later increased to one hundred five dollars per share.\(^{13}\) After investigation, Newmont determined that these

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9. *Panter v. Marshall Field & Co.*, 486 F. Supp. 1168, 1194 (N.D. Ill. 1980), aff’d, 646 F.2d 271 (7th Cir. 1981); see also *Whittaker Corp. v. Edgar*, 535 F. Supp. 933, 950 (N.D. Ill. 1982) (absent bad faith or gross abuse of discretion, business judgment of directors not to be interfered with by courts). *See generally* *Note, supra* note 1, at 322 (duty of loyalty requires directors of corporation to avoid self-dealing). However, courts will generally not hold management liable for good faith errors in judgment. *See* 13A B. Fox & E. Fox, *supra* note 2, § 27.06[4], at 27-187. The determinative question thus becomes “management’s state of mind at the time of the [challenged] transaction.” *Johnson*, 629 F.2d at 294; *see also* *Cheff*, 199 A.2d at 555 (directors not to be penalized for mistake when judgment appeared reasonable at time of decision).


11. *Ivanhoe*, 535 A.2d at 1338-39. A takeover attempt is said to be “hostile” when tender or exchange offers are made directly to shareholders without management approval or negotiation. *See* 1 M. Lipton & E. Steinberger, *Takeovers and Freezes* § 1.01[1], at 1-4 (1984).

12. *Ivanhoe*, 535 A.2d at 1339. These offers were made after Ivanhoe’s proposal to acquire all of Newmont’s outstanding stock proved futile. *Id.* at 1339. Moreover, Ivanhoe had already acquired 9.95% of Newmont stock, intending to release Consolidated Gold Fields PLC (“Gold Fields”), which owned a twenty-six percent interest in Newmont from a previous standstill agreement, in the hopes that Gold Fields would ally itself with Ivanhoe. *Id.* at 1338. However, Gold Fields failed to respond as Ivanhoe expected and consequently the tender offer was made. *Id.* at 1339.
offers were inadequate.\textsuperscript{14} Newmont then declared a large dividend in order to expedite a street sweep by Consolidated Gold Fields PLC (“Gold Fields”), its largest shareholder.\textsuperscript{16} Additionally, in an effort to maintain its independence, Newmont signed a standstill agreement with Gold Fields allowing Gold Fields to purchase only up to 49.9% of Newmont stock.\textsuperscript{18} Soon thereafter, facilitated by the dividend, Gold Fields “swept the street,”\textsuperscript{17} purchasing approximately 15.8 million Newmont shares at ninety-eight dollars per share.\textsuperscript{18} The Court of Chancery of Delaware granted Ivanhoe’s request for a temporary restraining order prohibiting any future trading by Gold Fields in Newmont stock.\textsuperscript{19} The court later denied the motion for a preliminary injunction because Gold Fields and Newmont had agreed to amend their standstill agreement in the interim.\textsuperscript{20} On appeal, the Delaware Supreme Court affirmed, concluding that the directors were protected by the business judgment rule since no fiduciary duty was breached.\textsuperscript{21}

Writing for the court, Justice Moore indicated that Newmont’s board could have properly determined that the Ivanhoe tender offer threatened corporate policy and effectiveness.\textsuperscript{22} The court reasoned that the street sweep, in conjunction with the large dividend and the standstill agreements, was a reasonable response to the Ivanhoe threat\textsuperscript{23} since it was “an essential part of Newmont’s defensive plan, which enabled Newmont to maintain its independent status for the benefit of its other stockholders.”\textsuperscript{24} Therefore, the

\textsuperscript{14} Id.

\textsuperscript{16} Id. at 1339-40. The dividend was to be financed by Newmont’s sale of its non-gold assets and it “became the linchpin for negotiating the new standstill agreement.” Id. Moreover, it would make Newmont a less attractive target by reducing its liquidity. Id.

\textsuperscript{18} Id. at 1340. The agreement did, however, limit Gold Fields’ representation on Newmont’s board to forty percent of the total directors. Id.

\textsuperscript{17} Id.

\textsuperscript{19} Id.


\textsuperscript{21} See Ivanhoe, 535 A.2d at 1345-46.

\textsuperscript{22} See id. at 1342. Ivanhoe was controlled by T. Boone Pickens, Jr., who was celebrated for his involvement in attempts to acquire and break up other companies. Id. Gold Fields also posed a realistic threat. Id.

\textsuperscript{23} Id. at 1343-44.

\textsuperscript{24} Id. at 1344. The court was not persuaded that the street sweep had any coercive effect. Id. The increased dividend allocated the non-gold assets to the Newmont shareholders, and this became the catalyst needed to facilitate Gold Fields’ street sweep. Id. at 1343. The restrictions in the standstill agreement guaranteed the continued independence of
court concluded that the Newmont directors acted reasonably and their actions were shielded by the business judgment rule.\textsuperscript{25}

The \textit{Ivanhoe} court relied upon the standards enunciated in \textit{Unocal Corp. v. Mesa Petroleum Co.},\textsuperscript{26} in finding that the actions of the Newmont board of directors were reasonable.\textsuperscript{27} It is submitted, however, that the court erred in its application of those principles. The defensive measures taken by Newmont went far beyond those necessary to combat the threats posed by Ivanhoe and Gold Fields. This Comment will analyze the reasonableness doctrine and will assert that the Newmont board did not act reasonably under the circumstances. It is suggested that the sole motivation behind the Newmont board’s acts was self-interest, in breach of its fiduciary duties to its shareholders. This Comment will also analogize the tactics employed by the Newmont board to those used by the board of directors in the landmark case of \textit{Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.}\textsuperscript{28} and conclude that, contrary to the \textit{Ivanhoe} court’s findings, the Newmont board did indeed act in breach of its fiduciary duties.

\textbf{The \textit{Unocal} Standard}

The business judgment rule, in some form, is applied almost universally in matters of corporate decision making.\textsuperscript{29} In \textit{Unocal}

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\textsuperscript{25} \textit{Ivanhoe}, 535 A.2d at 1345. Ivanhoe was found to be the sole bidder for Newmont and, consequently, the board had no obligation to obtain the highest price for the benefit of its shareholders. \textit{Id.}

\textsuperscript{26} 493 A.2d 946 (Del. 1985).

\textsuperscript{27} \textit{Ivanhoe}, 535 A.2d at 1337.

\textsuperscript{28} 506 A.2d 173 (Del. 1986).

Corp. v. Mesa Petroleum Co., a new standard was established, compelling management to overcome an initial burden before the business judgment rule would be applied. This preliminary burden, adopted in most jurisdictions, requires management to show reasonable grounds for having believed that corporate policy and effectiveness were in danger. Newmont's management perceived such a threat from T. Boone Pickens, Jr., who controlled Ivanhoe. However, Gold Fields also posed a tangible threat to Newmont, as evidenced by the strong possibility that it could acquire control of Newmont at any time, either alone or in alliance with Ivanhoe.

Under Unocal, management also must show that the defensive measure taken was a reasonable response to the threat posed.

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30 See Unocal, 493 A.2d at 954-55. In holding that the directors had the burden of proving good faith, the court stated: “A corporation does not have unbridled discretion to defeat any perceived threat by any Draconian means available.” Id. at 955; cf. Hanson Trust PLC, 781 F.2d at 273 (under New York law, even in takeover context, initial burden rests with plaintiff).

31 See Note, supra note 29, at 110.

32 Unocal, 493 A.2d at 955. Directors meet that burden “by showing good faith and reasonable investigation.” Id. (quoting Cheff v. Mathes, 41 Del. Ch. 494, 506, 199 A.2d 548, 555 (1964)). This standard is “designed to ensure that a defensive measure to thwart or impede a takeover is indeed motivated by a good faith concern for the welfare of the corporation and its stockholders, which in all circumstances must be free of any fraud or other misconduct.” Id.; accord Revlon, 506 A.2d at 180; Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985); AC Acquisitions, 519 A.2d at 111-12.

33 Ivanhoe, 535 A.2d at 1342. Pickens “had been involved in several attempts to acquire and break-up other corporations, resulting in . . . severe restructuring of the target companies.” Id. In addition, defendants perceived the Ivanhoe actions as “classic elements of Mr. Pickens' typical modus operandi.” Id.

34 Id. Ivanhoe deliberately acquired 9.95% of Newmont shares to release Gold Fields from their previous standstill agreement. Id. The agreement prohibited Gold Fields from acquiring more than a 33 1/3% interest in Newmont unless a third party held 9.9% or more of the outstanding shares. Id. at 1338. Although Gold Fields did not immediately terminate the previous standstill, the threat remained that it would do so to gain control unilaterally or with Ivanhoe. Id. at 1342.

35 Unocal, 493 A.2d at 955. Directors are charged with employing defense measures reasonably related to the particular threat because of their fiduciary duty to the corporation and its stockholders. See Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939). This fiduciary duty requires the directors to “analyze the nature of the takeover bid and its effect on the corporate enterprise.” Unocal, 493 A.2d at 955. Factors to be considered by the directors when formulating a reasonable defense include the “inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees . . . ), the risk of nonconsummation, and the quality of securities being offered in the exchange.” Id.; see also Moran, 500 A.2d at 1357 (plan vesting common stockholders with right to purchase preferred stock at half value upon occurrence of tender offer held reasonable); AC Acquisitions v. Anderson, Clayton &
The *Ivanhoe* court applied this reasonableness standard to the actions taken by the Newmont board and found such actions to be reasonable. It is submitted, however, that although the street sweep in and of itself was not unreasonable, the standstill agreement and resulting “lock-up” exceeded the bounds of reasonableness. Integral components of the standstill agreement—the increased dividend and the street sweep—were replete with self-perpetuating consequences, casting serious doubt upon the assertion that such responses were reasonable defensive tactics.

As a practical matter, the standstill agreement assured the defeat of any hostile takeover because for ten years Gold Fields was bound to vote its 49.9 percent interest for the Newmont board’s director-nominees and was precluded from transferring their shares free of this restriction. Rather than representing a reasonable strategy designed merely to prevent the realization of an inadequate bid, it is suggested that the standstill agreement was a disproportionate response to the threat posed. Such entrenching of a Co., 519 A.2d 103, 113 (Del. Ch. 1986) (stock option held unreasonable where shareholders were precluded from accepting tender offer).

*Ivanhoe*, 535 A.2d at 1343. The court also found that because Newmont’s defensive actions were so “inextricably related” to one another, they could be considered to be a single response to the threat posed for purposes of determining the reasonableness of the board’s actions. *Id.*

*Id.* The street sweep was a Gold Fields defense to protect its own substantial interest in the company. *Id.* As a stockholder, Gold Fields was not barred from acting in its own interest. *See Unocal*, 493 A.2d at 858; Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 29 Del. Ch. 610, 622, 53 A.2d 441, 447 (1947). This rule for stockholders is in marked contrast to the rule governing directors’ activities, which requires that they be both disinterested and free from self-dealing. *See Revlon*, 506 A.2d at 176 (lock-ups and related agreements permitted if “untainted by director interest or other breaches of fiduciary duty”); *see also* Note, *Discrimination, supra* note 7, at 1327 (discussing fiduciary ramifications of board of directors’ self-tender offer in *Unocal*).

*Ivanhoe Partners*, 533 A.2d at 598; *see also* supra notes 15-16 and accompanying text (discussing terms of standstill agreement). However, one clause in the standstill agreement was free from self-perpetuating effects. *See Ivanhoe Partners*, 533 A.2d at 598. It entitled Gold Fields to elect a percentage of directors, equal to the percentage of voting stock it held, up to forty percent of the positions to be filled. *Id.; see also* Condec Corp. v. Lunkenheimer Co., 43 Del. Ch. 353, 363, 230 A.2d 769, 776-77 (1967) (directors shown to have perpetuated own control by diluting offeror’s ownership). *See generally* Bartlett & Andrews, *supra* note 1, at 143 (“[t]he marshalling of a substantial block of stock by a new investor may produce a bunker mentality in the issuer’s boardroom”).

*Ivanhoe Partners*, 533 A.2d at 609. Gold Fields’ 49.9% interest in Newmont was “locked up” by the standstill agreement because it “bound Gold Fields to vote its shares for the Newmont Board’s director-nominees.” *Id.* at 608. In addition, it prevented Gold Fields from later transferring the shares free of those restrictions. *Id.*
board of directors can threaten the corporate structure. Moreover, the strategy pursued by the Newmont board divested the shareholders of their inherent power to make decisions concerning the tendering of shares.

It is also asserted that the directors failed to satisfy the good faith requirement of the business judgment rule in relation to the threatened takeover because they were not sufficiently independent or disinterested. Although a subsequent amendment to the standstill agreement significantly reduced its potential for entrenchment, in determining management's state of mind a proper

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40 See Note, supra note 7, at 1323 (“unimpeded takeover attempts should be encouraged in order to maintain the proper corporate structure”); see also Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 837 (1981) (“efficient operation” should be management’s key concern).

41 See Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 635 (D. Md. 1982) (stockholders entitled to exercise own judgment with regard to tendering of shares); Conoco Inc. v. Seagram Co., 517 F. Supp. 1299, 1303-04 (S.D.N.Y. 1981) (equity demands that stockholders not be denied opportunity to accept cash in tender offer despite interference with proposed merger); Harrington, supra note 3, at 983 (tender offers are invitations to stockholders, not directors). But see Enterra Corp. v. SGS Assocs., 600 F. Supp. 678, 686 (E.D. Pa. 1985) (board of directors empowered to accept or decline takeover bid). It has been suggested that with the recent onslaught of aggressive corporate acquisitions, removal of shareholder control over tender offers would drastically limit what has heretofore been an important ownership right. See Quinn & Martin, The SEC Advisory Committee on Tender Offers and its Aftermath—A New Chapter in Change of Control Regulation, in TENDER OFFERS 21-23 (M. Steinberg ed. 1985).

42 See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Good faith under the business judgment rule is measured by a subjective standard, taking into account the director’s “state of mind at the time of the transaction.” Johnson v. Trueblood, 629 F.2d 287, 294 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981). It is asserted that the Newmont directors could not have been acting in good faith in light of the aggressive nature of their defense, which went beyond that required to meet the threat posed to the company and was clearly motivated by their desire to perpetuate themselves in management. Consequently, the board should not have been afforded the protection of the business judgment rule. See Whittaker Corp. v. Edgar, 535 F. Supp. 933, 950 (N.D. Ill. 1982) (business judgment rule not invoked unless management has no personal interest in transaction); Aronson, 473 A.2d at 812 (protection of business judgment rule can only be claimed by disinterested directors); Note, A New Era, supra note 7, at 699 (courts invalidate defensive tactics if perpetuation of control was primary purpose); see also supra notes 6-8 and accompanying text (discussing business judgment rule). Although a showing of a motive to retain control is not sufficient to remove the presumption, where the defensive tactic “is itself calculated to alter the structure of the corporation . . . and results in a fundamental transfer of a power from one constituency (shareholders) to another (the directors) the business judgment rule will not foreclose inquiry into the directors’ action.” Moran v. Household Int’l, Inc., 490 A.2d 1059, 1076 (Del. Ch.), aff’d, 500 A.2d 1346 (Del. 1985).

43 See Ivanhoe Partners, 533 A.2d at 609. The original standstill agreement would have had the effect of keeping “the Gold Fields tiger in the cage” by binding it to vote for nominees of the Newmont board in director elections. Id. at 608. The amendment unleashed the “tiger” by permitting Gold Fields to elect forty percent of the board independently. Id.
analysis demands consideration of both the original transaction and the subsequent amendment. Since the corporate fiduciaries of Newmont were self-interested when they set the terms of the transaction and effectuated its consummation, all aspects of the agreement must be deemed fair to bring it within the protection of the business judgment rule.

It is suggested that in failing to consider price and other economic aspects of the proposed takeover threat, the Ivanhoe court's determination was not based on a proper view of the substantive fairness of the entire transaction. The reasonableness test posited by Unocal mandates judicial scrutiny of such matters and is intended to more clearly define the limits of justifiable board actions. By holding the self-interested acts of the Newmont board to be within the realm of reasonableness, it is asserted that the

at 609. In addition, Gold Fields was permitted to transfer shares to third parties subject only to secondary restrictions. Id.

4 See Johnson, 629 F.2d at 294; Cheff v. Mathes, 41 Del. Ch. 494, 506, 199 A.2d 548, 555 (1964) (directors not penalized for honest mistake in judgment where action appeared reasonable at time decision made); see also Karasik v. Pacific E. Corp., 21 Del. Ch. 81, 96, 180 A. 604, 611 (1935) (validity of settlement agreement in action against former directors for mismanagement to be viewed as of date of settlement, not trial date).

Although the Court of Chancery found the resulting lock-up to be unreasonable at the time of the transaction, the court also held that the amendment obviated the need for preliminary injunctive relief. Ivanhoe Partners, 533 A.2d at 609-10.

41 AC Acquisitions Corp. v. Anderson, Clayton & Co., 519 A.2d 103, 111 (Del. Ch. 1986); see Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983); Sterling v. Mayflower Hotel Corp., 33 Del. 293, 298, 93 A.2d 107, 110 (1952). Since self-interested directors lose the strong presumption of the business judgment rule, the burden is no longer on the party challenging management's decision. See Aronson, 473 A.2d at 812. Instead, once a prima facie case of self-interest is made, the burden shifts to the directors to demonstrate that the "transaction is fair and serves the best interests of the corporation and its shareholders." Norlin Corp. v. Rooney Pace, Inc., 744 F.2d 255, 264 (2d Cir. 1984) (New York law applied); see also Minstar Acquiring Corp. v. AMP Inc., 621 F. Supp. 1252, 1261 (S.D.N.Y. 1985) (actions by board of directors taken to entrench itself shifted burden of proof to directors). However, the business judgment rule is presumed applicable absent a showing "by a preponderance of the evidence that the directors' decisions were primarily based on perpetuating themselves in office, . . . lack of good faith, or being uninformed." Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958 (Del. 1985).

4 See Unocal, 493 A.2d at 954; Oesterle, The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court, 72 CORNELL L. REV. 117, 118 (1986); Note, Discrimination, supra note 7, at 1329 n.57 (author expresses confusion over reasonableness standard espoused by Unocal but suggests it requires subjective criteria). Although the courts must perform a case by case analysis, it is suggested that the Unocal test did, in fact, delineate a uniform standard. Because of the potential conflict of interest, courts must review the board's judgment carefully. It follows, therefore, that if a board's actions fail the Unocal test, they will surely fail the additional scrutiny of an intrinsic fairness test. See Oesterle, supra, at 118 n.7.
Ivanhoe court allowed shareholder interests to be subordinated to the interests of the corporate directors.

**Breach of Fiduciary Duty Required by Revlon**

The Ivanhoe court failed to follow judicial precedent requiring a shift of the board’s fiduciary duty from that of acting reasonably in fending off hostile bidders, to maximizing shareholder profit once a sale of the corporation became imminent. While the Ivanhoe court acknowledged that directors are not required to declare an open auction to sell the company when faced with a takeover bid, it failed to recognize that a sale was, in fact, inevitable and therefore, *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* properly applied. In *Revlon*, defensive board actions included lock-up provisions whereby a “white knight” was given the opportunity to purchase two choice Revlon divisions at 100 to 175 million dollars below market value in the event that another bidder obtained forty percent of Revlon’s shares. The court held that authorizing Revlon’s management to enter into negotiations such as these was tantamount to announcing the sale of the company and, therefore, further defensive acts by the board would no

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49 506 A.2d 173 (Del. 1986). It is suggested that a “sale” was inevitable once Gold Fields was released from the initial standstill agreement by Ivanhoe’s actions. It was at this time that Ivanhoe was actively pursuing a hostile takeover and Gold Fields was considering its own purchase of control in Newmont in the open market. *Ivanhoe*, 535 A.2d at 1339-40.

50 See supra note 5 (explaining “lock-ups” and other defensive tactics).

51 See 13A B. Fox & E. Fox, supra note 2, § 27.07[2], at 27-223. A white knight is a friendly party sought by the target company to obtain a sufficient portion of the target’s stock so as to block any takeover bid. *Id.*; see also *Lipton & Brownstein*, supra note 1, at 1421 (recent uses of “white knight” defensive arrangement by corporate enterprises).

52 *Revlon*, 506 A.2d at 178. The two Revlon divisions, Vision Care and National Health Laboratories, were to be purchased for $525 million. *Id.* In addition, Revlon was required to accept a no-shop provision and agreed not to have its management involved with the merger. *Id.*
longer be in good faith. While a preference for a white knight, to the total exclusion of a hostile bidder, may be justified if the hostile offer "adversely affects shareholder interests" and the offers are relatively similar, directors do not fulfill their fiduciary duty "by playing favorites with contending factions." Thus, when the lock-up forecloses further bidding, it operates to the shareholders' detriment and is impermissible.

It is asserted that Newmont's sale of its non-gold assets and its declaration of increased dividends are analogous to the lock-up options granted in Revlon in that the defensive plans in both cases were designed to make the target companies less attractive to the hostile bidders. Moreover, Newmont's schemes were designed to facilitate the street sweep and support Gold Fields' acquisition of the majority of shares. The Ivanhoe court consistently analyzed the transactions in terms of the Ivanhoe threat and the Gold Fields threat; however, the court too easily dismissed the fact that Gold Fields was now the largest controlling shareholder and would most likely determine the future of Newmont. Further-

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53 Id. at 182. In permitting negotiations with a third party for a buyout or merger, management recognized that the breakup of the company was certain. Id.

54 Revlon, 506 A.2d at 184; see also Hanson Trust PLC v. ML SCM Acquisition, 781 F.2d 264, 277 (2d Cir. 1986) ("lock-up" in favor of white knight invalidated since management knew or should have known it would foreclose further bidding). But see Treadway Cos. v. Care Corp., 638 F.2d 357, 383 (2d Cir. 1980) (favor shown to white knight upheld since it was precondition to desired business combination). Thus, the only case in which bidding should be terminated by a target board arises when the board is convinced that normal bidding is over and a higher bid can only be elicited through a lock-up option. See Oesterle, supra note 46, at 151; Note, Lock-Up Options, supra note 5, at 1076-82; cf. Applied Digital Data Sys. v. Milgo Elec. Corp., 425 F. Supp. 1163, 1165 (S.D.N.Y. 1977) (management decision to turn shareholder list over to friendly offeror and to withhold same from competing offeror held to offend congressional concern in adopting Williams Act that both offeror and management have equal opportunity to fairly present their case).

55 See Hanson Trust, 781 F.2d at 282-83; Edelman v. Fruehauf Corp., 798 F.2d 882, 887 (6th Cir. 1986); Revlon, 506 A.2d at 184; see also Hastings-Murtagh v. Texas Air Corp., 649 F. Supp. 479, 494 (S.D. Fla. 1986) (Delaware law allows "lock-up" if used to encourage bidder to submit offer rather than to preclude bidding); Thompson v. Enstar Corp., 509 A.2d 578, 583 (Del. Ch. 1984) ("lock-up" upheld where sole offer was contingent upon its adoption); Note, Lock-Up Options, supra note 5, at 1077 (stockholders suffer when "lock-up" ends bidding). But see Oesterle, supra note 46, at 151 ("[i]ronically, Revlon may be the rare case in which a lock-up is a rational gamble").

56 See Ivanhoe, 535 A.2d at 1344.

57 See id. at 1346; see also Franklin, 'Reasonable' Revisited—Effect of Newmont on Takeover Defenses Debated, N.Y.L.J., Dec. 17, 1987, at 5, col. 2.

58 See Franklin, supra note 57, at 6, col. 2. "It is clear Gold Fields controls and will determine the destiny of Newmont notwithstanding a standstill agreement which simply puts some independent directors' on the board." Id. (quoting Stephen Flood, senior partner
more, it is submitted that the court's reasoning ignored the fact that the Newmont board effectively acknowledged the inevitable sale of the company by encouraging Gold Fields, as white knight, to make an offer. Under *Revlon*, once it became apparent that Newmont was bound for sale to a white knight, the directors' duty changed to one of ensuring that the shareholders obtained the best possible return on their investments. Management, therefore, breached its duty as “auctioneer[,] charged with getting the best price for the stockholders,” and it is suggested that the court erred in not granting the consequent injunctive relief.

**CONCLUSION**

In holding the Newmont directors' defensive measures to be within the constraints placed on management by the *Unocal* decision, the Delaware Supreme Court has greatly expanded the business judgment rule and stretched the bounds of reasonableness far beyond what was initially contemplated. Consequently, future plaintiffs in similar actions will be faced with the inordinate task of proving management's actions “unreasonable.” Moreover, by departing from established precedent, the court has sanctioned heretofore improper board actions and, in so doing, has given the green light to more aggressive and unrestricted management tactics in dealing with future takeover attempts.

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69 See Edelman, 798 F.2d at 886; Hanson Trust PLC v. ML SCM Acquisition, 781 F.2d 264, 274 (2d Cir. 1986) (ending the bidding held to be breach of duty of due care); *Revlon*, 506 A.2d at 182 (held to be breach of duty of loyalty); *supra* note 47 and accompanying text (discussing director's role when sale imminent).