

FREEZING OUT BEN & JERRY: CORPORATE LAW AND THE SALE OF A SOCIAL ENTERPRISE ICON

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INTRODUCTION

*The perfect duo. Ice cream and chunks. Business and social change. Ben and Jerry.*¹

*Nobody wants to end up like Ben and Jerry's, where soon after a multinational acquired it, key facets of its social mission were cut from the company.*²

Ben & Jerry's Homemade, Inc. was once the darling of proponents of social enterprise and social entrepreneurship.³ It was a for-profit corporation that seemingly did not put profits first. Rather, it pursued, in the parlance, a “double bottom” line, seeking to advance progressive social goals, while still yielding an acceptable financial return for investors. It advanced its social mission in many ways, such as by committing 7.5% of its profits to a charitable foundation; conducting in-store voter registration; and buying ingredients from suppliers who employed disadvantaged populations.⁴ Ben & Jerry's founders, Ben Cohen and Jerry Greenfield, held out their double bottom line approach (they called it the “double-dip”) as a model for others who wished to “Lead With [their] Values and Make Money, Too.”⁵

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1. BEN COHEN & JERRY GREENFIELD, BEN & JERRY'S DOUBLE DIP: LEAD WITH YOUR VALUES AND MAKE MONEY, TOO 13 (1997).

2. Kevin Jones, *Selling vs. Selling Out*, STAN. SOC. INNOVATION REV. OP. BLOG (Feb 27, 2009, 11:00 AM), http://www.ssireview.org/opinion/entry/selling_vs_selling_out/.

3. See April Dembosky, *Protecting Companies that Mix Profitability, Values*, NPR MORNING EDITION (Mar. 9, 2010), available at www.npr.org/templates/story/story.php?storyId=124468487 (stating that the sale of Ben & Jerry's “helped set the stage for today's young, idealistic companies”).

4. *Id.* at 60–63, 101, 110.

5. COHEN & GREENFIELD, *supra* note 1.

The adulation dropped off significantly in 2000, when Ben & Jerry's was acquired by Unilever, a multi-national conglomerate.⁶ News of this sale reportedly "sent shudders and shivers through the socially responsible business community."⁷ It contributed to doubts about the long-term viability of for-profit firms that pursue a double bottom line, sometimes known as "for-profit social enterprises" or "hybrid enterprises."⁸ So it is that "virtually every mission-driven entrepreneur knows the sad ending to the tale of Ben & Jerry's: the *forced sale* of one of the country's premier socially responsible businesses to a giant multinational clearly focused on the financial bottom line."⁹

Who lost Ben & Jerry's?¹⁰ How did this happen, and who or what was responsible? Moving forward, what if anything should be done to protect the missions of other socially-oriented for-profit enterprises?

Even now, a decade after the sale, Ben & Jerry's serves as a "case study" for the perils of maintaining a social mission in the publicly-traded corporate form.¹¹ For some commentators, Ben & Jerry's denouement demonstrates that the publicly-traded corporate form is inherently and unavoidably biased towards profit-maximization.¹² Corporate law, part of a

6. See generally, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/history/> (documenting the history of Ben & Jerry's social activism); Jon Entine, *Ethical Brands – Turn On, Tune In, Sell Out*, ETHICAL CORPORATIONS, Oct. 2008, at 3.

7. JEFFREY HOLLENDER & STEPHEN FENICHELL, WHAT MATTERS MOST: HOW A SMALL GROUP OF PIONEERS IS TEACHING SOCIAL RESPONSIBILITY TO BIG BUSINESS, AND WHY BIG BUSINESS IS LISTENING 211 (2005).

8. For the purposes of this article we use the terms "for-profit social enterprise" or "hybrid enterprises" to refer to businesses that have at least some private owner-investors (i.e. they are thus not organized as nonprofit corporations, nor do they qualify as 501(c)(3) tax-exempt organizations), and that are expressly committed to creating both social value and financial value for their private investors.

9. JILL BAMBURGH, GETTING TO SCALE: GROWING YOUR BUSINESS WITHOUT SELLING OUT 57 (2006) (emphasis added).

10. In 1949, following the victory of the Chinese Communists over the anti-communist Chinese Nationalists, members of the media and Congress—including Senator Joseph McCarthy—demanded to know "who lost China?" See Lloyd E. Eastman, *Who Lost China? Chiang Kai-Shek Testifies*, 88 THE CHINA Q. 658 (Dec. 1981).

11. A standard version of the narrative:

Among social entrepreneurs, Unilever's purchase of Ben & Jerry's still serves as a cautionary tale of how easily corporate fiat can undermine social responsibility. "The board was legally required to sell to the highest bidder," says Jonathan Storper, an attorney Neither Ben Cohen nor Jerry Greenfield wanted to sell the company, but because it was public, they had no choice. Both cofounders have since expressed concerns that the company has shifted away from its original mission of social responsibility.

Jenna Lawrence, *Making the B List*, STAN. SOC. INNOVATION REV., Summer 2009, at 65, 66.

12. See Daniel J. H. Greenwood, *Discussing Corporate Misbehavior: The Conflicting Norms of Market, Agency, Profit and Loyalty*, 70 BROOK. L. REV. 1213, 1235 (2004) ("While courts generally do not require anything resembling a strong version of short-term profit-maximization, the market structure

corporation's "immoral contract" with society,¹³ is a trap for unwary social entrepreneurs, capable of overwhelming the most sincere efforts of corporations to combine financial goals with a social mission.¹⁴ According to one prominent commentator on social enterprise, Ben & Jerry's board "'decided,' at the point of a gun, to sell B&J to the highest bidder," such that Ben Cohen's "enlightened leadership was outmatched by the structural forces arrayed against him."¹⁵

This Article makes several claims. We reject the assertion that corporate law compelled the sale—or sellout—of Ben & Jerry's to Unilever. Admittedly, the publicly-traded corporate form inclines towards profit-maximization. Even so, socially-oriented founders can take steps to resist takeovers by others, including—if not especially—those who might want to water down the pro-social mission. Indeed, Ben & Jerry's (as well as the State of Vermont) took various measures to do precisely that in the years *before* Unilever made its approach.¹⁶

When Unilever presented its offer to Ben & Jerry's board, it had two options: accept the offer or vigorously attempt to thwart it—most notably by testing the anti-takeover defenses and other liability shields already in place. Accepting the offer would greatly enrich Ben & Jerry's shareholders but increase the risk of diluting the company's social mission. The second option—testing the anti-takeover measures and other potential sources of protection—might have preserved the company's independence, but also would have increased the founders' and other board members' exposure to liability. This risk of exposure, we contend, was vanishingly small; the board in general and Cohen and Greenfield in particular apparently overestimated it.

We also distinguish between two major challenges to the long-term survival of for-profit social enterprises: the first is the well-known threat of unwanted takeovers by outsiders; the second is the potential diminution of the founder's commitment to pursuing a double bottom line over time. What steps can the founder take to protect the for-profit social enterprise

in which publically traded corporations operate, and the ethos of our business and law schools, often do press managers in that direction.”).

13. The quote is attributed to Ben & Jerry's board member Terry Mollner. See Marjorie Kelly, *The New Frontier for Ethical Leadership*, in BUSINESS ETHICS: NEW CHALLENGES FOR BUSINESS SCHOOLS AND CORPORATE LEADERS 160, 163 (Robert A. Peterson & O.C. Ferrell eds., 2005).

14. Ben & Jerry's was not the only socially responsible business with iconic status to be acquired by a multinational. Others include The Body Shop, Cascadian Farms, Green and Black's, Stonyfield Farm, and Tom's of Maine, respectively acquired by L'Oreal, General Mills, Cadbury Schweppes, Kellogg's, Danone, Coca-Cola, and Colgate. Entine, *supra* note 6, at 1–4.

15. MARJORIE KELLY, THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY 147 (2001).

16. See *infra* Part II-C–II-E.

she created from her own changing preferences? Could more effective pre-commitment strategies be developed and made widely available to prospective founders of for-profit social enterprises? If so, then there may be an opportunity for organizational forms that make such enterprises more durable.

We argue that although there is nothing inherently wrong with a well-thought out corporate form for hybrid enterprises, it may be difficult to think through all contingencies. This is the failure that resulted in the sale of Ben & Jerry's, rather than the mandate of corporate law.

Lastly, we note that some of Ben & Jerry's distinctive social characteristics are relatively hearty and have persisted even after the firm's acquisition. The firm identified a neglected market niche for pro-social commercial activity.¹⁷ It helped create more pro-social standards for industry practice. These practices have endured and will likely endure, even if the initial practitioner does not. Their persistence means that a formerly-independent social enterprise can leave an enduring legacy of social value. Moreover, there are social gains as a result of acquisition, insofar as the social enterprise can do its good on a larger scale, and to the extent that the acquiring entity adopts its innovative social technologies.¹⁸

The Article proceeds as follows. Part I provides a short history of Ben & Jerry's from beginning to end as an independent company, focusing on what was perceived to make the company different. Part II discusses Ben & Jerry's acquisition by Unilever and considers the claim that this sale was compelled by corporate law. This claim, we argue, rests on doubtful legal and factual analyses. If this claim is in fact correct, it is only because Ben & Jerry's directors made readily avoidable mistakes, both at the time of the sale and fifteen years earlier. Part III looks at the consequences of the sale and draws conclusions for present day entrepreneurs. By agreeing to be

17. See *Ben & Jerry's Homemade, Inc.*, REFERENCE FOR BUSINESS: ENCYCLOPEDIA OF BUSINESS, 2ND ED., <http://www.referenceforbusiness.com/businesses/A-F/Ben-Jerry-s-Homemade-Inc.html> (last visited Sept. 5, 2010) ("Cohen and Greenfield started a revolution in the food business when they decided to give a percentage of company profits to charitable organizations, usually associated with social causes and the environment.").

18. Jack Neff, *It's Not Easy Being P.C.: Funding Anti-Globalization Protestors Is One Price Unilever Pays For Ben & Jerry's*, FOOD PROCESSING, Feb. 1, 2002, at 18 (explaining that after acquisition by Unilever, "[s]ocial mission campaigns now come with social objectives and metrics in addition to marketing goals," and detailing Ben & Jerry's campaign to reduce "tonnage of greenhouse gas emissions by collecting pledges from consumers and businesses to reduce their output by specific amounts"). See also Hays, *supra* note 18, at C1 (quoting Rosanne Haggerty, Director of Common Ground Community, which operates a Ben & Jerry's retail outlet in Manhattan, as saying, "I wish the company could have stayed independent . . . But I'm cheered that they have created a mechanism to not just preserve the values that have made Ben & Jerry's special, but to expand them. In a strange way, this could be a validation of all those quirky values").

acquired by Unilever, Ben & Jerry's may have advanced its social mission more effectively than it could have done on its own. Finally, in Part IV we identify some lessons that today's social entrepreneurs can draw from Ben & Jerry's experience.

I. THE PERFECT DUO

Ben & Jerry's Homemade, Inc. produced gourmet ice cream with creative names ("Cherry Garcia" was an early classic) and awesome flavors,¹⁹ all wrapped in unbleached paperboard and progressive causes like world peace (a.k.a. "Whirled Peace").²⁰ Until its acquisition in 2000 by Unilever, the world's biggest ice cream maker, it was a relatively small company that had achieved "iconic status as [a] socially progressive brand[]." ²¹

A. Humble Beginnings

The story of Ben & Jerry's beginnings is legendary, almost mythical. Cohen and Greenfield, old school chums and former hippies, were casting around for an inexpensive business.²² Greenfield had failed to get into medical school, and Cohen had failed to graduate from several universities.²³ They had in mind "a way . . . to work together without having to work for someone else,"²⁴ and "something that would be 'fun.'"²⁵ Initially, they had considered selling bagels, but the cost of a proper oven was out of reach.²⁶ Ice cream was something of an afterthought, prompted it seems by the availability from Pennsylvania State University of a \$5 correspondence course on how to make ice cream.²⁷

19. See, e.g., BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/flavors/ourflavors/#> (Sept. 24, 2010) (listing their current 47 flavors, including old favorites like Chunky Monkey, banana ice cream with fudge chunks and walnuts).

20. See *Ben & Jerry's Launches Whirled Peace*, CONE, <http://www.coneinc.com/ben-and-jerrys-launches-imagine-whirled-peace> (last visited Sept. 5, 2010) (explaining Ben & Jerry's promotion of its "whirled peace" flavored ice cream commemorated John Lennon and Yoko Ono's famous "Bed-in for Peace" demonstration and how Ben & Jerry's donated \$20,000 to the Student Peace Alliance and the Peace Camp Initiative).

21. James E. Austin & Herman B. Leonard, *Can the Virtuous Mouse and the Wealthy Elephant Live Happily Ever After?*, 51 CAL. MGMT. REV. 77, 77 (2008).

22. COHEN & GREENFIELD, *supra* note 1, at 15–16.

23. *Id.* at 14.

24. *Id.* at 15.

25. *Ben Cohen & Jerry Greenfield: Caring Capitalists*, ENTREPRENEUR (Oct. 10, 2008), <http://www.entrepreneur.com/article/197626> [hereinafter *Caring Capitalists*].

26. COHEN & GREENFIELD, *supra* note 1, at 15–16.

27. Penn State no longer offers this course. Its College of Agricultural Sciences currently offers a

They incorporated Ben & Jerry's Homemade in 1977 and began serving gourmet ice cream (known as "super-premium" in the industry) from a renovated gas station in May of 1978.²⁸ They had \$12,000 in start-up capital—\$6,000 in savings, \$2,000 borrowed from a family member, and a \$4,000 loan guaranteed by the Small Business Administration (SBA).²⁹ In 1980 they secured another SBA loan to manufacture ice cream in pint containers for retailers.³⁰

Their initial goals were modest. Both wanted to avoid becoming employees, particularly as Cohen had not proved to be a good one.³¹ They also had naïve notions that in due course "[t]he business would run itself."³² As people who had grown up in the sixties they were also looking for something more, reflected in the company's motto that "[i]f it's not fun, why do it?"³³ As Greenfield put it, his early goal was simply to "spread joy" in the community.³⁴ They also shared the modest dream of earning \$20,000 a year.³⁵

Success came quickly. In 1981, they franchised their first store, which was followed soon after by a *Time* magazine cover story that led with "[w]hat you must understand at the outset is that Ben & Jerry's, in Burlington, Vt., makes the best ice cream in the world."³⁶ In 1983, their first franchise outside of Vermont opened in Portland, Maine.³⁷

seven day "Ice Cream Short Course" every January ("the slowest time for the ice cream industry") that teaches "the ins and outs of ice cream manufacturing" and where "knowledgeable instructors take you from 'Cow to Cone.'" See *Ice Cream Short Course*, PENNSYLVANIA STATE UNIVERSITY, <http://foodscience.psu.edu/workshops/ice-cream-short-course> (last visited Sept. 15, 2010) ("Penn State's Ice Cream Short Course is the oldest, best-known, and largest educational program dealing with the science and technology of ice cream. It also is believed to be the first continuing education course in the United States.").

28. Ben & Jerry's Homemade, Inc., Annual Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) 3 (filed Mar. 22, 2000), at 3 [hereinafter Annual Report 2000].

29. COHEN & GREENFIELD, *supra* note 1, at 91–92.

30. Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations: A Critical Assessment*, 50 WASH. & LEE L. REV. 1625, 1638 (1993).

31. COHEN & GREENFIELD, *supra* note 1, at 14 (describing Mr. Cohen as "unredeemably unemployable").

32. *Id.* at 18.

33. Murray Raphael, *What's the Scoop on Ben & Jerry?*, ALL BUSINESS (Aug. 1, 1994), <http://allbusiness.com/marketing/direct-marketing/454093-1.html>.

34. FRED LAGER, BEN & JERRY'S: THE INSIDE SCOOP: HOW TWO REAL GUYS BUILT A BUSINESS WITH A SOCIAL CONSCIENCE AND A SENSE OF HUMOR (1994). For the promotional material advertising the first free cone day in 1979, Cohen wrote "Business has a responsibility to give back to the community from which it draws its support." COHEN & GREENFIELD, *supra* note 1, at 20.

35. COHEN & GREENFIELD, *supra* note 1, at 15.

36. Janice C. Simpson et al., *Ice Cream: They All Scream For It*, TIME, Aug. 10, 1981, available at <http://www.time.com/time/magazine/article/0,9171,954909,00.html>. The article went on to contradict itself with several other ice cream stores also selling the world's (or even universe's) best ice

B. From Early Success to Social Enterprise

Ben & Jerry's transformation into a social enterprise icon began in 1982.³⁸ By then, Cohen and Greenfield realized that the business would not run itself. Instead of having fun by making and scooping ice cream, Cohen recalls, they were "hiring and firing, dealing with lawyers and accountants and correspondence, and trying to do the books."³⁹ They were preparing to sell the business—until Cohen had a light bulb moment. In explaining his disenchantment to an acquaintance, "an eccentric restaurateur,"⁴⁰ Cohen said that Ben & Jerry's is "just a business that, like all others, exploits its workers and the community."⁴¹ The acquaintance responded, "You don't have to run your business that way. . . . If there's something you don't like about the business, change it."⁴² According to Fred Lager, a former President of Ben & Jerry's, "[t]he conversation marked the beginning of Ben's efforts to run what he termed a socially conscious business."⁴³ Prior to then, says Cohen, the idea of changing the way business works "hadn't occurred to [them]."⁴⁴ Later, Cohen described it as "an experiment to see if it was possible to use the tools of business to repair society."⁴⁵ That September, he apprised the company's staff for the first time that he intended "to create a business that gave something back to the community,"⁴⁶ and Ben & Jerry's was on the way to becoming one of America's first and most successful prototypes for for-profit social enterprises.⁴⁷

Cohen's realization that he did not have to run a conventional business also served to take Ben & Jerry's off the auction block. In March 1982, Cohen and Greenfield had listed their company with Country Business Services, a broker of small businesses.⁴⁸ After the brokers had found a

cream. *Id.*

37. See *Ben & Jerry's Homemade, Inc.*, *supra* note 17 ("1983: The first out-of-state franchise scoop shop opens in Portland, Maine.").

38. COHEN & GREENFIELD, *supra* note 1, at 24.

39. Ben Cohen, *On Becoming an Ecopreneur*, in *THE GREEN FESTIVAL READER: FRESH IDEAS FROM AGENTS OF CHANGE 51* (Kevin Danaher & Alisa Gravitz eds., 2008).

40. *Id.*

41. LAGER, *supra* note 34, at 57.

42. *Id.*

43. *Id.*

44. Cohen, *supra* note 39, at 51.

45. *Id.*

46. LAGER, *supra* note 34, at 62.

47. See *Caring Capitalists*, *supra* note 25. This article, however, dates the transformation towards a socially conscious business to 1984 rather than 1982.

48. LAGER, *supra* note 34, at 54.

buyer, Cohen refused to go through with the deal.⁴⁹ In the subsequent breach of contract suit, not only did Ben & Jerry's lose, but the jury awarded the broker punitive damages, which is extremely unusual in a contract action.⁵⁰ Cohen dryly observed that the jury "found us really, really guilty."⁵¹

Cohen and Greenfields' social values influenced how they chose to expand the company. When the company next wanted to raise money, they were careful. In 1984, the company did a stock offering, available only to Vermont residents, to raise money for a new plant.⁵² They chose the public offering instead of seeking venture capital, which their investment bankers advised, because they feared that venture financing posed a greater threat to their continued control over the company.⁵³

By that time, moreover, they wanted the company to devote *more* resources to addressing social issues and believed that greater financial success would increase the money available for corporate philanthropy.⁵⁴ As they put it:

[W]e believed that business was a machine for making money. Therefore we thought the best way to make Ben & Jerry's a force for progressive social change was to grow bigger so we could make more profits and give more money away. We'd decided to give away 10 percent of our profits every year. Ten percent of the profits of a \$100 million company could do a lot more good than 10 percent of the \$3 or \$4 million we were currently doing.⁵⁵

49. *Id.* at 56.

50. *Id.* at 73. Restatement (Second) of Contracts states that "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1979). Typically, the breach must constitute an "independent and willful tort accompanied by fraud, malice, wantonness or oppression." *See, e.g., McIntosh v. Magna Systems, Inc.*, 539 F. Supp. 1185, 1190 (N.D. Ill. 1982) (explaining what is needed for recovery of punitive damages in a breach of contract claim in Illinois).

51. LAGER, *supra* note 34, at 76.

52. *Id.* at 90. They were unable to obtain a bank loan for the expansion. By keeping the offering Vermont-only they were able to avoid certain federal securities requirements, including the need for detailed historical financial statements that they had not prepared. *Id.* at 93.

53. Victor Fleischer, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1607-08 (2006); LAGER, *supra* note 34, at 90 ("The biggest drawback of soliciting venture capital was the potential for losing control of the business. As a precondition of their investment, most venture capitalists have input into how the business is managed, and they're apt to take over if things start going poorly.")

54. Their "philanthropy" to this point arguably consisted of not much more than the free ice-cream they would occasionally give away. *See, e.g., BEN & JERRY'S HOMEMADE ICE CREAM*, *supra* note 6 (marking each anniversary with a free cone day).

55. *See* COHEN & GREENFIELD, *supra* note 1, at 94. Years later but while still independent, Cohen looking at the changes to the company would sometimes complain that "[g]rowing is dying." *See*

They also thought they could create a bond between their customers and the company by allowing those from the community, who had been loyal to them from the beginning, a chance to invest in the company (or as they put it, “to spread the wealth”).⁵⁶ Unlike most road shows consisting of dry financial information and projections, they gave away free pints of ice cream along with their prospectus.⁵⁷ The offering itself raised \$750,000, with nearly 1% of Vermont households becoming shareholders.⁵⁸

A year later, they did a national public offering and listed Ben & Jerry’s on NASDAQ, in order to both get capital to further expand their production facilities and create more liquidity for their existing shareholders.⁵⁹ They also started selling the product outside New England and established a plant and their headquarters in Waterbury, Vermont.⁶⁰ This plant has since gone on to become one of Vermont’s most visited tourist attractions.⁶¹ The company was sufficiently successful for the founders to formalize the company’s charitable donation policy. They established the Ben & Jerry’s Foundation, endowed it with 50,000 of Cohen’s shares worth about \$850,000, and committed to funding it with 7.5% of the company’s pre-tax profits.⁶²

As Ben & Jerry’s became more successful, they began to develop an approach “dedicated to a sustainable corporate concept of linked prosperity.”⁶³ Unlike most other companies believed to pursue only profits—i.e. a financial bottom line—Ben & Jerry’s pursued a “double bottom line.”⁶⁴ It measured its own success by asking: “How much have we

Caring Capitalists, *supra* note 25.

56. LAGER, *supra* note 34, at 90–91.

57. Fleischer, *supra* note 53, at 1611.

58. See COHEN & GREENFIELD, *supra* note 1, at 98 (1997) (“Nearly one in every hundred Vermont families—about eighteen hundred households—bought stock.”).

59. See *id.* at 100–01.

60. See BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/history/> (click on 1985 icon at bottom of screen) (last visited Sept. 6, 2010).

61. BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/sear/1999-ceres/page3.cfm> (last visited Sept. 6, 2010).

62. See COHEN & GREENFIELD, *supra* note 1, at 101. The figure apparently was lowered from 10% to 7.5% at the insistence of their financial advisors. *Id.* The Foundation’s employee-led grant making committee essentially funded projects that fit their particular agenda. Many of these causes relate to environmental issues but also included causes like fair trade or community focused projects on homelessness. See Solomon, *supra* note 30, at 1652–53.

63. BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/activism/mission-statement> (last visited Aug. 30, 2010).

64. Ben & Jerry’s is one of the earliest U.S. companies to refer to the double bottom line. Its popular meaning is “a business term used in *socially responsible* enterprise and investment. While all businesses have a conventional *bottom line* to measure their fiscal performance—financial profit or loss—enterprises which seek a *second bottom line* look to measure their performance in terms of positive social impact.” *Double Bottom Line*, WIKIPEDIA, http://en.wikipedia.org/wiki/Double_bottom_line (last visited Oct. 19, 2010) (emphasis

improved the quality of life in the community? And how much profit is left over at the end of each month. If we haven't contributed to both those objectives, we have failed."⁶⁵ By 1988, they were ready to issue a three-part mission statement based on social, product, and economic facets.⁶⁶ The goal was to achieve this while "holding a deep respect for individuals inside and outside the Company and for the communities of which they are a part."⁶⁷ Ben & Jerry's also joined various organizations that promoted business responsibility, including the Social Venture Network, Business for Social Responsibility, and Vermont Businesses for Social Responsibility.⁶⁸ By 1992, *Worth Magazine* could write of the company, "[it] has done some marvelous things."⁶⁹

Ben & Jerry's business decisions frequently reinforced the company's social mission and, at least by its own report, improved the company's financial condition.⁷⁰ From the beginning, their packaging emphasized their commitment to Vermont ("Vermont's Finest"). They supported the Vermont economy by buying their milk and cream from local family farms.⁷¹ As organic milk became available, they traded organic milk produced in New York for organic milk produced in Vermont.⁷²

Many of these business decisions have focused on an environmental mission:⁷³ feeding waste to pigs (1987); speaking out against bovine growth hormone and using only milk that was free of artificial growth hormone

added).

65. Ben Cohen, *On Becoming an Ecopreneur*, NEW AMERICA MEDIA, http://namonline.com/news/view_article.html?article_id=c8a239dde5e243d8a8b8ef1852da2574 (last updated Sept. 8, 2008).

66. Annual Report 2000, *supra* note 28, at 1. Ben & Jerry's mission statement included "a 'product mission,' 'to make, distribute and sell the finest quality all natural ice cream'; an 'economic mission,' 'to operate the Company on a sound financial basis . . . increasing value for our shareholders and creating career opportunities and financial rewards for our employees'; and a 'social mission,' 'to operate the Company in a way that actively recognizes the central role that business plays in the structure of society by initiating innovative ways to improve the quality of life of a broad community: local, national and international.'" *Id.* (alteration in original).

67. *Id.*

68. *Id.*

69. Allan Sloan, *The Selling of the Simple Life*, WORTH MAG., Feb.-Mar. 1992, at 80.

70. In Ben & Jerry's final annual report, the company reported that it "believes that implementation of its social mission, which is integrated into the Company's business, has been beneficial to the Company's overall financial performance." Annual Report 2000, *supra* note 28, at 22. The report also cautioned that there may be limits: "it is possible that at some future date the amount of the Company's energies and resources devoted to its social mission could have some material adverse financial effect." *Id.*

71. See Ben & Jerry's Homemade, Inc., Solicitation Recommendation Statement (Schedule 14D-9), at 15 (April 18, 2000) [hereinafter Solicitation Recommendation Statement] (stressing Ben & Jerry's commitment to synthetic hormone-free Vermont dairy products). Ironically, much of their early production came from New Hampshire farms. COHEN & GREENFIELD, *supra* note 1, at 57.

72. See Solicitation Recommendation Statement, *supra* note 71.

73. See generally Solomon, *supra* note 30, at 1653-54.

(1989),⁷⁴ successfully litigating for the right to label its products “rBGH free” in Illinois (1997),⁷⁵ developing “Eco-pint” containers that use unbleached paperboard because of concerns about chlorine and water pollution (1998),⁷⁶ using more Fair-Trade certified and organic ingredients; and reducing company’s output of waste.⁷⁷

Other business decisions emphasized the company’s commitment to people and the community. For its “Chocolate Fudge Brownie” ice cream, Ben & Jerry’s purchased brownies from Greyston Bakery, an entity whose “mission is to provide employment and support services to former homeless, low-income and disenfranchised people and their families,” and which applies profits to housing programs, child care, and so forth.⁷⁸ “It’s no stretch to say,” according to Ben & Jerry’s (perhaps stretching the matter a bit), “that when you eat our Chocolate Fudge Brownie ice cream, you’re striking a blow for economic and social justice.”⁷⁹ The company also paid a premium to Vermont’s dairy farmers despite a volatile dairy market and the withdrawal of government dairy subsidies.⁸⁰ Another strategy was to create special flavors to help benefit charities or suppliers—most notably “Rainforest Crunch,” which used Brazil nuts grown in rainforests by indigenous people.⁸¹ They also substituted a cookie for the Oreos they

74. BEN & JERRY’S HOMEMADE ICE CREAM, *supra* note 6 (click on 1989). Others shared Ben & Jerry’s opposition to milk produced with the use of artificial growth hormones. See Shandra Martinez, *Consumers Drive Change to Hormone-Free Milk*, THE GRAND RAPIDS PRESS, Feb. 15, 2008, at C1, available at 2008 WLNR 3157127 (discussing additional suppliers who switched to hormone-free milk in response to consumer demand).

75. See *Chunky Monkey Puts You in the Know*, VEGETARIAN TIMES, Nov. 1997, http://findarticles.com/p/articles/mi_m0820/is_n243/ai_19986666/.

76. *Ben & Jerry’s Announces Environmentally-Friendly Packaging Innovation; Company Offers to Share ‘ECO-Pint’ Information*, PR NEWSWIRE, Feb. 18, 1999 (reporting that the company was eagerly sharing its “hot new packaging idea” with other companies as part of its social mission).

77. See *Progress on Our Commitments*, UNILEVER.COM, http://www.unilever.com/images/sd_Progress_on_our_commitments.tcm13-216546.pdf (last visited Sept. 6, 2010).

78. *Our Flavors profile of Chocolate Fudge Brownie Ice Cream*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/activism/inside-the-pint/greyston/> (last visited Oct. 20, 2010). See also GREYSTON FOUNDATION, http://www.greyston.org/index.php?who_we_are (last visited Sept. 05, 2010) (stating that when hiring people, the bakery does not “hire people to make brownies,” but rather, “make[s] brownies in order to hire people” and that those hired “are considered to be ‘hard to employ’”).

79. *Inside the Pint—Greyston Bakery*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benjerry.com/activism/inside-the-pint/greyston/> (last visited Sept. 2, 2010).

80. Elizabeth Kolbert, *An “Inspirational” Ice Cream Factory*, N.Y. TIMES, Sept. 11, 1991, at A16. In a perhaps less savory development, Ben & Jerry’s arguably played to xenophobic fears by portraying *Häagen-Dazs* as a foreign intruder that did not reflect the local, community-based values of Ben and Jerry’s. See Calvin Trillin, *Competitors*, NEW YORKER, July 8, 1985, at 31 (citing Ben & Jerry’s questioning “WHAT’S THE DOUGHBOY AFRAID OF?”). In truth, *Häagen-Dazs* was created in New York, albeit by a Polish immigrant. *Id.*

81. This is not to claim that all of their initiatives had the desired effect. For example, a large percentage of the Brazil nuts used in Rainforest Crunch were bought from conventional suppliers, and

originally used in order to stop doing business with RJ Reynolds Nabisco, a company that sold cigarettes.⁸²

Ben & Jerry's also followed several unusual and creative business practices, claiming in a securities filing that it "embraces a philosophy that manifests itself in these attributes: being real and 'down to earth,' being humorous and having fun, being non-traditional and alternative and, at times, being activists around progressive values."⁸³ For example, when the Grateful Dead's lawyers challenged the Cherry Garcia flavor, the company negotiated a licensing agreement where the royalties went to charity.⁸⁴ When they needed a new CEO, they ran a national campaign, "Yo! I'm Your CEO!" inviting anyone to apply.⁸⁵ They also registered voters and solicited members for the Children's Defense Fund in their scoop shops.⁸⁶ Moreover, they rarely used traditional methods of advertising, since in the early years conventional media was too expensive for them. Rather, their support for social and environmental causes invariably generated attention from the press, garnered public interest, and made them cult heroes for various demographics.⁸⁷ They also used their ice cream cartons to advertise and explain the various social causes they supported, such as their vehement opposition to bovine growth hormones, and support of rainforest preservation or One Percent for Peace.⁸⁸ Some consumers may have thought

the increase in demand and subsequent overproduction apparently resulted in the indigenous rain forest farmers being forced to sell their lands to developers. Marianne Jennings & Jon Entine, *Business with a Soul: Reexamination of What Counts in Business Ethics*, 20 *HAMLIN J. PUB. L. & POL'Y* 1, 43-45 (1998) (concluding that the "Ben & Jerry's program actually exacerbated the very problem it was purported to address").

82. Ben Cohen, *My Life With Oreos*, HUFFINGTON POST, Apr. 13, 2010, <http://www.huffingtonpost.com/ben-cohen-ben-andjerrys/my-life-with-oreos/>.

83. Annual Report 2000, *supra* note 28 at 1.

84. Tim Golden, *It Is Money Battles Like These that Make the Dead Truly Grateful*, N.Y. TIMES, Feb. 2, 1997, available at <http://www.nytimes.com/1997/02/02/weekinreview/it-is-money-battles-like-these-that-make-the-dead-truly-grateful/html>.

85. They ended up selecting a candidate, Robert Holland, who was identified by the executive search firm. See, e.g., Jerry Ackerman, *Holland Resigns At Ben & Jerry's Urges Marketing Specialist Should Be Next To Take Helm*, BOSTON GLOBE, Sept. 28, 1996, at F1. Holland resigned 18 months later, apparently never having been at ease "with the founders' clowning and campaigning." *Raspberry Rebels*, THE ECONOMIST, Sept. 6, 1997, at 61. Holland was replaced with Perry Odak—a choice that was questioned because of Odak's role as chief operating officer at the company that made Winchester rifles. *Id.*

86. See, e.g., Stuart Elliott, *When Products Are Tied to Causes*, N.Y. TIMES, Apr. 18, 1992, § 1, at 33, available at <http://www.nytimes.com/1992/04/18/business/when-products-are-tied-to-causes.html>.

87. Hanna Rosin, *The Evil Empire: The Scoop on Ben and Jerry's Crunchy Capitalism*, THE NEW REPUBLIC, Sept. 11, 1995, at 22.

88. One Percent for Peace was an organization founded by Ben Cohen that supported rerouting one percent of the U.S. defense budget towards peaceful activities. See COHEN & GREENFIELD, *supra* note 1, at 203-04.

that buying Ben & Jerry's ice cream directly contributed to worthy causes and was akin to a charitable donation.⁸⁹

Ben & Jerry's was also committed to paying its employees a living wage and generous benefits,⁹⁰ including being one of the first companies to offer health care benefits to employees' same sex partners.⁹¹ They followed a compressed payroll policy—i.e. the company's highest-paid person could earn no more than five times the lowest paid person.⁹² The figure was first increased to seven times, and then abandoned in 1994 in order to attract more qualified senior executives.⁹³ Yet, trade-offs among social missions were unavoidable, and some employees complained that the company skimmed on their wages and working conditions in order to finance its charitable contributions to third parties.⁹⁴

Throughout these years and into the early 1990s, sales grew impressively each year.⁹⁵ During this same period, they also did well in their market niche, and by 1997 they had garnered 39% of the American market for super-premium ice cream, compared with 43% for Häagen-Dazs.⁹⁶

89. Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investing*, 57 BUS. LAW. 681, 689 (2002) (explaining that socially responsible investing is “investment, not charity”).

90. *Livable Wage*, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/activism/peace-and-justice/livable-wage/> (last visited Sept. 5, 2010). Benefits included profit sharing, health club memberships, day care, and tuition assistance. See *Caring Capitalists*, *supra* note 25 (listing the employee benefits in addition to ice cream). These policies did not, however, prevent a successful union organization effort in a department of one plant. Annual Report 2000, *supra* note 28, at 10. The employment policies have survived the takeover, such that the average wage in Vermont was \$13.25 per hour in 2008, at a time when the prevailing state minimum wage was \$7.68. See *SEAR Report, 2008*, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerrycompany.com/company/sear/2008/sear08-9.0.cfm> (last visited Sept. 7, 2010). Regarding benefits, according to Vault, Ben & Jerry's offers “[d]ependant care benefits, Domestic partner benefits, Paternity and Maternity leave, Adoption aid, Health club memberships, and Three free pints of ice cream per day.” *Ben & Jerry's Homemade Inc.*, VAULT, http://www.vault.com/companies/company_main.jsp?co_page=2&product_id=649&ch_id=301&v=2&tabnum=2 (last visited Sept. 2, 2010).

91. James P. Baker, *Equal Benefits for Equal Work? The Law of Domestic Partner Benefits*, 14 LABOR LAWYER 23, 51 (1998)

92. COHEN & GREENFIELD, *supra* note 1, at 184.

93. Maria Shau, *Ben & Jerry's Grows Up*, BOSTON GLOBE, July 3, 1994, at 65, available at 1994 WLNR 2030405. See generally, Linda Barris, *The Overcompensation Problem: A Collective Approach to Controlling Executive Pay*, 68 IND. L. J. 59 (Winter, 1992). The seven-to-one ratio was a bit misleading, as the figures compared were only base salaries and did not include stock options. Indeed, by 1999 total executive compensation had increased to near sixteen-to-one. WILLIAM B. WERTHER & DAVID CHANDLER, STRATEGIC CORPORATE SOCIAL RESPONSIBILITY: STAKEHOLDERS IN A GLOBAL ENVIRONMENT 140 (2006).

94. See COHEN & GREENFIELD, *supra* note 1, at 177 (quoting an employee who thought “they could do more for their employees before they look outside”).

95. LAGER, *supra* note 34, at 224–25. Ben & Jerry's lost money for the first time in 1994, prompting the search for a new CEO. *Raspberry Rebels*, *supra* note 85.

96. *Id.*

Ben & Jerry's identified untapped demand for ice cream that catered to the consumers' social and ethical sensibilities and was able to earn profits by selling it.⁹⁷ By 1999, Ben & Jerry's ranked first in a Harris poll on the public's perceptions of the "social responsibility" of U.S. businesses.⁹⁸ Ben & Jerry's social mission was not just "a drag on its commercial aspirations: after all, some of its customers shell out the extra cash for Rainforest Crunch precisely because it is chock full of righteously harvested nuts from tribal cooperatives in the Amazon."⁹⁹ From a social perspective it was doing good, but from a financial perspective, was it doing well?

C. Successful Social Enterprise to Stockmarket Stagnation

A hybrid business pursues a double bottom line—profits and people. Although Ben & Jerry's social initiatives continued and arguably thrived throughout the 1990s,¹⁰⁰ their previously stellar financial performance suffered.¹⁰¹ In 1992, initial investors in Ben & Jerry's owned stock worth fifteen times what they had paid.¹⁰² The shares hit \$33.75 in 1993.¹⁰³ By 1999, the stock was languishing at \$17, and, in the words of a Prudential Securities Analyst, "[t]he stock had done nothing for the past 10 years."¹⁰⁴ The stock performance resulted from the company's financial performance, and the company had suffered its first financial loss in 1994.¹⁰⁵ Financial performance resulted from what was, by the mid-1990s, relatively slow sales growth.¹⁰⁶ Likewise, the company's return on capital was relatively

97. See Austin & Leonard, *supra* note 21, at 83 (characterizing the founders as "pioneers in creating products that did not exist in the marketplace, but were perceived by the entrepreneurs to be socially valuable").

98. Annual Report 2000, *supra* note 28, at 6.

99. *Raspberry Rebels*, *supra* note 85. See, e.g., Sankar Sen et al., *Withholding Consumption: A Social Dilemma Perspective on Consumer Boycotts*, 28 J. CONSUMER RES. 399, 400 (2001) (demonstrating that some consumers will pay more for products produced by a more virtuous company).

100. Hanna Rosin, *supra* note 87, at 22.

101. *Id.*

102. Sloan, *supra* note 69, at 80.

103. Mary Ellen Kuhn, *Ben & Jerry's suffers some growing pains*, FOOD PROCESSING, Sept. 1, 1994, available at <http://www.allbusiness.com/manufacturing/food-manufacturing/474789-1.html>.

104. *Buyout Sweet Enough for Ben & Jerry's Founders; Ability to Pursue Social Causes Key Factor in Deal*, THE PANTAGRAPH, May 12, 2000, at 4, available at 2000 WLNR 4343876 [hereinafter *Buyout Sweet Enough*] (quoting Jeff Kanter, who added, "Something had to be done" to give Ben & Jerry's shareholders a better return on their investment"). See also Richard McCaffrey, *In the Hunt for Ben & Jerry's*, THE MOTLEY FOOL, Dec. 2, 1999, <http://www.fool.com/news/1999/quicknews991202.htm> (stating that the company's return on equity was "lousy by any measure" and arguing that it "has to find ways to create value").

105. *Raspberry Rebels*, *supra* note 85. The company still donated more than a quarter of a million dollars to charity that year. COHEN & GREENFIELD, *supra* note 1, at 276.

106. *Raspberry Rebels*, *supra* note 85.

low—about 5% in 1996.¹⁰⁷ Growth prospects appeared weak, as Americans paid more attention to health concerns over fatty foods like ice cream.¹⁰⁸ As the Economist wrote in 1997, Ben & Jerry's had “slushy results.”¹⁰⁹ The Motley Fool, a website that sought to represent Main Street, griped that the company's stock had “underperformed the market's historical average during the greatest bull run in the stock market history. That's unacceptable any way you slice it.”¹¹⁰ Naturally, some investors believed that the company should relax its commitment to social values and focus on delivering more profit. The Motley Fool argued that the policy of donating 7.5% of profits to charity had “lost its luster when the company failed to deliver reasonable results to its long-term investors.”¹¹¹ The Economist chided that “[e]ven caring shareholders would rather that Ben & Jerry's gave its profits to charity than becoming a charity itself.”¹¹²

Although the company itself acknowledged the potential for conflict—“it is possible that at some future date the amount of the Company's energies and resources devoted to its social mission could have some material adverse financial effect”—as late as 1999, it did not believe that date had come.¹¹³ Regardless, however, of the real or perceived financial impact of Ben & Jerry's social programs, investors could see that the stock was not performing well.

D. The End of Independence

Ben and Jerry's mediocre stock gains had attracted buyout interest and offers since at least 1998, when Dreyer's, a competing ice cream manufacturer, had offered to buy the company.¹¹⁴ In early 2000, Cohen responded to takeover rumors by leading a group of social investors in an

107. *Id.*

108. *Id.* Ben & Jerry's responded by unveiling frozen yogurt with “butterfat content between one and five percent [as] opposed to the 17 percent butterfat levels in the regular ice cream.” *Ben & Jerry's Homemade, Inc. – Company History*, FUNDING UNIVERSE, <http://www.fundinguniverse.com/company-histories/Ben-amp-Jerrys-Homemade-Inc-Company-History.html> (last visited Sept. 2, 2010). By 1992, Ben & Jerry's yogurt sales “were accounting for 15 to 18 percent of the company's revenues” and ultimately made the company “the leader in the super premium yogurt market.” *Id.*

109. *Raspberry Rebels*, *supra* note 85 (“You might think that such slushy results [e.g., modest growth of sales; net loss one year; submarket return on equity] are less worrying for Ben & Jerry's than they would be for other, more conventional companies. . . . Surely if any firm could breeze along enjoying a moderately profitable but socially responsible existence it would be this one?”).

110. Rob Walker, *The Scoop on Ben & Jerry's Sellout*, SLATE, April 12, 2000, available at <http://www.slate.com/id/1005081> (quoting Motley Fool).

111. *Id.*

112. *Raspberry Rebels*, *supra* note 85, at 62.

113. Annual Report 2000, *supra* note 28, at 22.

114. Shau, *supra* note 93.

attempted leveraged buyout of the company at \$38 a share, about double what the stock had been trading for a few months earlier.¹¹⁵ The group, Hot Fudge Partners, included Cohen and Meadowbrook Lane Capital, an “investment bank [that] serves businesses that value social responsibility.”¹¹⁶ Although it was reported that the board accepted this offer,¹¹⁷ this seems doubtful.¹¹⁸ Dreyer then offered a \$38 per share all stock deal, which in turn prompted international conglomerate Unilever to bid \$43.60.¹¹⁹ On April 11, 2000, the Ben & Jerry’s board announced that it had accepted Unilever’s offer and signed the merger agreement.¹²⁰ The last remaining step was a shareholders’ vote, after which Ben & Jerry’s became a wholly-owned subsidiary of Unilever.¹²¹ Ben & Jerry’s had remained independent for just a little more than twenty years.

The announcement generated considerable criticism,¹²² notwithstanding Unilever’s claim that it was “in an ideal position to bring the Ben & Jerry’s brand, values and socially responsible message to consumers worldwide.”¹²³ Scoop shop franchisees were generally opposed, taking such action as organizing rallies against the sale.¹²⁴ Many consumers

115. Jim Steiker & Michael Golden, *Hot Fudge Partners: Insiders Tell How Social Investors Tried to (but Couldn't) Buy Ben & Jerry's*, BUSINESS ETHICS, May-June 2000, at 7.

116. See MEADOWBROOK LANE, <http://www.meadowbrooklane.com> (last visited Nov. 7, 2010). Meadowbrook Lane included investors like Anita Roddick, founder of the Body Shop, another prominent for-profit social enterprise that was bought by a multinational. Constance L. Hays, *Investment Group Makes Bid for Ben & Jerry's*, N.Y. TIMES, Feb. 10, 2000, at C1.

117. Constance L. Hays, *Ben & Jerry's is Reportedly Going Private*, N.Y. TIMES, Mar. 29, 2000, at C1, available at <http://www.nytimes.com/2006/03/29/business/the-market-place-ben-jerry-s-is-reportedly-going-private.html> [hereinafter Hays, *Going Private*] (reporting that a shareholder stated that the board had approved the transaction to go private).

118. Ben & Jerry’s securities filings do not disclose acceptance of Hot Fudge Partner’s offer.

119. Dan Gallagher, *Dreyer's Loses Ben & Jerry's Bid to Unilever*, EAST BAY BUSINESS TIMES, Apr. 14, 2000.

120. See *Unilever Completes Ben & Jerry's Homemade Tender Offer*, UNILEVER (May 16, 2000), <http://www.unilever.com/mediacentre/pressreleases/2000/jerry2.aspx>.

121. *Id.*

122. See, e.g., WERTHER & CHANDLER, *supra* note 93, at 140 (noting that “Ben & Jerry’s cult status was tarnished somewhat . . . when they sold out to the corporate giant Unilever”). Business Ethics removed the company from its list of Best Corporate Citizens. *Id.*

123. Press Release, Ben & Jerry Homemade, Inc., *Ben & Jerry's & Unilever to Join Forces*, (Apr. 12, 2000), available at <http://www.benjerry.com/company/media-center/press/join-forces.html> (quoting the President of Unilever’s North American division). See also David Gram, *Ben & Jerry's Caves Into Pressure, Sells To Unilever; English Company Buys Ice Cream Maker For \$ 326 Million*, ST. LOUIS POST-DISPATCH, Apr. 13, 2000, at C1 (quoting Richard Goldstein, President of Unilever Foods North America); Jack Neff, *It's Not Easy Being P.C.: Funding Anti-Globalization Protesters is One Price Unilever Pays For Ben & Jerry's*, FOOD PROCESSING, Feb. 1, 2002, at 18 (quoting Walt Freese, Unilever’s first appointee as chief marketing officer, stating that he found that Unilever really was committed to maintaining the company’s social mission, unlike other companies where he had worked).

124. *Ben & Jerry's Sale Opposed*, CBS MARKETWATCH (Jan. 17, 2000), <http://www.marketwatch.com/story/ben-jerrys-sale-opposed>.

were skeptical that Ben & Jerry's would remain a corporate force for good,¹²⁵ and some led an effort "to educate Unilever about the importance of keeping the Ben & Jerry's social mission alive and creative," which included a boycott and an email campaign.¹²⁶

Unilever's acquisition of Ben & Jerry's included several unusual provisions, touted by some as "unique and ground-breaking."¹²⁷ Unilever chose to keep much of Ben & Jerry's operations separate.¹²⁸ More importantly, they committed to creating a board of directors composed primarily of the existing board's nominees.¹²⁹ This board was intended to help manage the brand and provide leadership for the social mission.¹³⁰ Initial members included Cohen, Greenfield, and Terry Mollner (described as "a pillar of socially responsible investing").¹³¹ The board had the right to sue Unilever if Unilever failed to meet the terms of the merger agreement and to require Unilever to cover the litigation expenses.¹³² Yves Couette,

125. *A Reputation is Tough to Maintain; Survey Results for Socially Responsible Companies*, WORK & FAMILY NEWSBRIEF, Mar. 1, 2001. See also 'Caring Capitalism: Not For Sale;' Bay Area Ben & Jerry's Franchisees and Their Customers Join National Effort to Prevent Sale of the Company, BUSINESS WIRE, Jan. 20, 2000; Michelle Holcenberg, *Multiflavor, not Multinational: Protesting the Corporate Takeover of Ben & Jerry's*, ALTERNET (April 26, 2000), <http://www.alternet.org/story/505/>; Walter Shapiro, *Ice Cream Sellout and Street Protests*, USA TODAY, Mar. 14, 2000 (predicting that Ben & Jerry's "is now destined to become just another globe-girdling commodity, no more authentic in its corporate parentage than its Bronx born competitor with a phony Scandinavian name, Häagen-Dazs").

126. SAVE BEN & JERRY'S, <http://web.archive.org/web/20010116184500/http://savebenjerry.com/> (last visited Sept. 05, 2010).

127. *Ben & Jerry's and Unilever to Join Forces in Ice Cream Deal that Maintains Social Efforts*, FOOD & DRINK WEEKLY, No. 15, Apr. 17, 2000, at 1.

128. Patrick J. Kiger, *Corporate Crunch*, WORKFORCE MGMT, Apr. 1, 2005, at 32.

129. Solicitation Recommendation Statement, *supra* note 71.

130. *Id.* at 5-6 ("[T]he Surviving Corporation Board shall have primary responsibility with respect to the enhancement of the Social Mission Priorities . . . of the Company, as they may evolve, and the preservation of the essential integrity of the Ben & Jerry's brand-name."). Unilever, however, would "have primary responsibility in the area of financial and operational aspects of [Ben & Jerry's] and in all areas not allocated" to the board. *Id.* at 6.

Established in perpetuity, the external board would conduct business in much the same way as a company's board of directors—meeting at regularly appointed times throughout the year and helping shape company policy with respect to managing the brand. It formulated a corporate values statement to serve as principles for managing the brand. This external board has a legal contract that lives in perpetuity and the board can take legal action if the company's board of directors does not uphold the contract. Unlike a more conventional board, however, it does not report to any group outside of itself, such as shareholders or other Unilever management, and new members are appointed by the board itself (characteristics shared, intriguingly, by most nonprofit boards).

Austin & Leonard, *supra* note 21, at 94.

131. Constance L. Hays, *Long Shots, on the Court and Off*, N.Y. TIMES, July 2, 2000, at 2, available at <http://www.nytimes.com/2000/07/02/business/private-sector-long-shots-on-the-court-and-off.html?scp=238&sq=%22ben+%26+Jerry%27s%22&st=nyt> [hereinafter Hays, *Long Shots*].

132. This kind of provision is necessary to enforce the terms of the merger agreement, as

the first CEO of Ben & Jerry's appointed by Unilever, believed that this external board was "an amazing statement of humility and cooperation" that helped show that Unilever was buying "the integrity of the brand."¹³³

Unilever also agreed to continue to pay the greater of \$1.1 million or 7.5% of pretax profits to charity, maintain in Vermont its "corporate presence and substantial operations" for "at least five years,"¹³⁴ maintain the existing method of production and not lay-off a material number of workers for at least two years.¹³⁵ In addition, Unilever promised to contribute \$5 million to assist minority-owned and undercapitalized businesses, \$5 million to employees to be paid within six months, and \$5 million to the Ben & Jerry's Foundation.¹³⁶ Cohen also agreed to work with Unilever on "social audits," such as its treatment of the environment.¹³⁷ Unilever's co-chairman claimed his company "discovered early in its negotiations that it and Ben & Jerry's had a similar vision."¹³⁸

The transaction dramatically increased the value of Ben & Jerry's shares, including those owned by the founders. Cohen's shares at the time of the sale were worth nearly \$40 million and Greenfield's were worth nearly \$10 million.¹³⁹ Additionally, both men remained on the company's board for \$200,000 each per year.¹⁴⁰

Notwithstanding these favorable provisions, Ben & Jerry's board was reportedly reluctant to sell.¹⁴¹ As Jim Barrett, a stock analyst, put it at the time, "Ben & Jerry's had a legal responsibility to consider the takeover bids - when offers are made well above a company's stock price, executives and directors must examine them or risk a lawsuit. That responsibility is what forced a sale."¹⁴² Another person with knowledge of the bidding observed,

following the consummation of the merger, other parties either lack standing (the shareholders) or have ceased to exist (the target company).

133. Austin & Leonard, *supra* note 21, at 94.

134. Solicitation Recommendation Statement, *supra* note 71, at 6.

135. *Id.*

136. *Id.* at 4.

137. Hays, *Long Shots*, *supra* note 131, at 32.

138. Hays, *supra* note 18, at C1.

139. David Gram, *Ben & Jerry's Founder Feeling Out in Cold; Questions Social Activism Since Buyout*, RECORD (Bergen County, N.J.), Dec. 1, 2000, at B3.

140. Solicitation Recommendation Statement, *supra* note 71, at B-10.

141. *Buyout Sweet Enough*, *supra* note 104.

142. *Id.* (reporting that "distribution concerns and a series of takeover bids forced the pair finally to accept the unthinkable, selling their company"). See also Entine, *supra* note 6, at 3 ("But in 2000, when Unilever offered three times its floundering stock price, Ben & Jerry's founders . . . had little choice but to heed their fiduciary duty to their shareholders and sell."); Holcenberg, *supra* note 125 ("[S]ince Ben & Jerry's is in fact a public company, it's in a tricky situation. Its legal responsibility is not to make a delicious dessert, protect the planet or improve the world, but to make its shareholders the most moolah."); Lawrence, *supra* note 11.

“The board felt they had no choice but to let all three groups put their best offers on the table We think it’s horrible that a company has no choice but to sell to the highest bidder or get sued.”¹⁴³ Indeed, three class action lawsuits alleging that the directors were breaching their fiduciary duties to shareholders by failing to maximize shareholder value were filed while the deal was being negotiated.¹⁴⁴ Greenfield later stated:

We did not want to sell the business; it was a very difficult time. But we were a public company, and the board of directors’ primary responsibility is the interest of the shareholders. So that is what the decision came down to. It was extremely difficult, heart-wrenching. It was a horrible experience for me and I can probably say it was horrible for Ben too. . . . It is not as if we sold it feeling great about the situation and ended up regretting it - we didn’t feel great about it from the start and throughout. It was nothing about Unilever; we didn’t want to get bought by anybody.¹⁴⁵

Cohen made the same claim: corporate law “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.”¹⁴⁶ The relationship with Unilever, Cohen says, was a “forced marriage.”¹⁴⁷

143. Hays, *supra* note 18 (quoting Terri Mollner, a principal of Meadowbrook). See also Holcenberg, *supra* note 125 (“The directors of the company could actually be sued if they decide to put the interests of their employees, family farmers and local communities above the interests of Wall Street.”); Dembosky, *supra* note 3 (“Lawyers told the board members that shareholders could sue if they turned Unilever’s offer down.”).

144. Solicitation Recommendation Statement, *supra* note 71, at 12. Vincent F. Garrity, Jr. & Mark A. Morton, *Would the CSX Conrail Express have Derailed in Delaware? A Comparative Analysis of Lock-Up Provisions Under Delaware and Pennsylvania Law*, 51 U. MIAMI L. REV. 677, 686 (1997) (discussing shareholder litigation which found that solely maximizing shareholder value was “myopic”). Of course other shareholders and consumers fought against the takeover, such as Save Ben & Jerry’s with the slogan “Multi-flavors NOT multinationals.” ARCHIVE, <http://archive.org> (follow “Take Me Back” hyperlink; then search <http://www.savebenjerry.com>”; then select “Mar. 3, 2000” hyperlink) (“This site provides you the opportunity to get your message out to the Ben & Jerry’s shareholders and help them to find a truth higher than profit taking.”) (last visited Sept. 1, 2010). A group also listed Ben & Jerry’s on eBay. See *Controlling Ownership of Ben & Jerry’s*, INTERNET ARCHIVE, http://web.archive.org/web/20010116192500/savebenjerry.com/e-bay_listing.htm (last visited Apr. 15, 2010) (“[H]urry, Ben Cohen and Jerry Greenfield can’t hold out much longer or they might get sued by their shareholders for trying to protect the environment and the community with their company instead of making a quick buck.”).

145. Hannah Pool, *Question Time with Hannah Pool*, THE GUARDIAN, Jul. 31, 2008, available at <http://www.guardian.co.uk/business/2008/jul/31/5>.

146. Dembosky, *supra* note 3 (quoting Cohen). See also Dave Gram, *Ben and Jerry Back Bill to Let Firms Pursue Social Mission*, ASSOCIATED PRESS, April 12, 2010; Courtney Rubin, *Ben & Jerry’s Fair Trade Fanfare Belies Struggle With Corporate Parent, INC.*, Feb. 22, 2010, available at

II. CORPORATE LAW'S ROLE IN THE SALE OF BEN & JERRY'S: THE CONVENTIONAL WISDOM AND THE REALITY

A. Corporate Law as Scapegoat

Ben & Jerry's is a leading example¹⁴⁸ of an alleged problem with the publicly traded corporate form. As discussed above, Cohen and Greenfield claimed that they did not really want to sell Ben & Jerry's to a multinational corporation, but that they were compelled to do so by the dictates of corporate law—in other words, “corporate law made them do it.”¹⁴⁹ A number of commentators also endorse this view. As Jill Bamburgh puts it, “[i]n the case of Ben & Jerry's, the founders were forced out by a decision of the public shareholders to sell to Unilever.”¹⁵⁰ Somewhat more accurately, commentators charged that corporate law and the fiduciary duties of directors required its sale to the highest bidder.¹⁵¹

Progressives assert that mainstream corporate law, at least with respect to publicly held corporations,¹⁵² almost inevitably erodes a corporation's social mission, or inexorably thwarts the ability of well-intentioned corporations to advance social goals in the long run.¹⁵³ Their claim is that a

<http://www.inc.com/news/articles/2010/02/ben-and-jerrys-goes-fully-fairtrade.html> (stating that “Cohen and Greenfield said . . . they couldn't stop Unilever from buying the company because its shares were already publicly traded”).

147. David Teather, *Sold Up but Not Sold Out, Ben and Jerry Are Still the Poster Boys for Fair Trade*, THE OBSERVER, April 4, 2010, available at <http://www.guardian.co.uk/business/2010/apr/04/ben-jerrys-fairtrade-ethical-business>.

148. See, e.g., Dembosky, *supra* note 3. However, Ben & Jerry's is one of many examples. See Entine, *supra* note 6.

149. See *supra* pp. 16–21.

150. BAMBURGH, *supra* note 9, at 1. The Bamburgh statement is a gross oversimplification. Ben & Jerry's shareholders only had a chance to vote on the merger because the board of directors had already approved (and recommended) the transaction.

151. Robert R. Keatinge, *LLCs and Nonprofit Organizations – For-profits, Nonprofits, and Hybrids*, 42 SUFFOLK U. L. REV. 553, 579 at n.120 (“When the founders attempted to maintain control in order to continue some of the corporation's charitable undertakings, they were subject to shareholder suits and ultimately had to allow the corporation to be acquired by Unilever.”). See also Hannah Clark, *A New Kind of Company: B Corporations Worry About Stakeholders, Not Just Shareholders*, INC. MAGAZINE, July 2007, at 23 (stating that corporate law requires publicly-traded companies, including Ben & Jerry's, to maximize shareholder returns by selling out to the highest bidder); Dembosky, *supra* note 3 (observing that shareholders can sue a board of directors if they think the board is “sacrificing profits for some other non-profit-making reason”).

152. Closely held corporations do not pose the same risks as publicly held corporations, as there are far fewer shareholders who might object to the pursuit of a social mission. As a practical matter, shareholders typically manage the business. Separation of ownership and control is much less likely because the owners and managers of the enterprise are likely to be same.

153. See, e.g., Marjorie Kelly, *The Legacy Problem: Why Social Mission Gets Squeezed out of*

corporation must be run to maximize shareholder wealth, without regard for other stakeholders except to the degree that such regard will in fact financially benefit shareholders.¹⁵⁴ Put differently, the “special attributes” of businesses that pursue both financial and social missions are “likely to be fragile and easy to disrupt or destroy” with a publicly-owned business.¹⁵⁵

Did corporate law in fact require Ben & Jerry’s board of directors to sell the company to Unilever?¹⁵⁶ The answer is almost certainly not, but to understand why requires a basic understanding of how publicly-traded companies are acquired and an in-depth look at Ben & Jerry’s corporate structure. As a preliminary matter, there are two principle ways to buy a publicly-traded company. The first is a tender offer, which is merely an offer to purchase shares from the existing holders. If the acquirer obtains shares holding more than 50% of the voting rights, the acquirer will be able to elect its own board of directors and exercise control. The second, the Ben & Jerry’s transaction, is a merger. Both the board of directors and the shareholders *must* approve a merger.¹⁵⁷ The issue then is whether in the first instance a board must allow a tender offer to reach the shareholders and in the second instance whether a board must approve a merger. Corporate law is very flexible and permits many actions that can prevent a sale of the company under either method without the existing board’s approval.

B. Shareholder Wealth Maximization: Rhetoric and Practice

The claim that a board must maximize shareholder value has a legitimate source. In the 1919 case of *Dodge v. Ford Motor Co.*, the court famously explained that the directors’ powers must be employed “primarily

Firms When They’re Sold, and What to Do About It, BUSINESS ETHICS (2003), available at <http://www.esopbuilders.com/articles/the-legacy-problem.pdf> (arguing that going public results in a loss of mission). This criticism, and problems with the nonprofit form, have led to new forms and calls for new forms. The law may create an exceedingly “rigid line—dividing for-profit vs. nonprofit,” thereby causing problems for the hybrid organization. Susan H. Mac Cormac, *The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial and Social Missions*, <http://www.corporation2020.org/pdfs/SummitPaperSeries.pdf> (last visited Aug. 30, 2010).

154. Keatinge, *supra* note 151, at 578–79 (“[T]here are circumstances in which a business organization wishes to do good while doing well, *viz.* to operate in the area between the purely pecuniary and the entirely eleemosynary. . . . To the extent the managers of such an organization [organized as a for-profit] wish to conduct a business in a way as to promote a non-economic objective, they may find themselves confronted with demands from the owners that profit be maximized.”).

155. Austin & Leonard, *supra* note 21, at 79.

156. Ben & Jerry’s also had distribution issues regarding its ice cream—notably its distributors were two big competitors, Dreyer’s and Häagen-Dazs. Hays, *Going Private*, *supra* note 117.

157. Corporate law provides that shareholders have a vote, *inter alia*, on mergers or substantial corporate changes, like the sale of most assets. *See, e.g.*, VT. STAT. ANN. tit 11A, § 11.01 (1997) (stating that shareholders may be required to approve the merger plan).

for the profit of the stockholders” and that directors may not change that goal or “devote [profits] to other purposes.”¹⁵⁸

The rhetoric of shareholder wealth maximization, however, has produced almost no legal results.¹⁵⁹ Although it is fair to claim that there is a norm, and possibly even a legal requirement, of shareholder wealth maximization (i.e. that directors must make decisions in order to maximize corporate profitability),¹⁶⁰ commentators on both the right and left recognize that shareholder wealth maximization is effectively unenforceable by courts.¹⁶¹ Under the business judgment rule, courts will almost invariably defer to the directors’ judgment.¹⁶² As long as a course of action may lead to some potential benefit to shareholders, even in the far distant future, the directors’ decisions will survive judicial review.¹⁶³ Ben & Jerry’s could thus always claim that its social activities helped it achieve its financial goals.¹⁶⁴ A decision to enter or not enter into a merger agreement, for example, without more, would be judged under this standard.¹⁶⁵

Occasionally, however, there may be more. An important exception to the unenforceability of shareholder wealth maximization may apply in the context of the sale of the company:¹⁶⁶ *Revlon* duties. A board may have

158. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

159. Other courts have acknowledged additional goals. *See, e.g.*, *A.P. Smith Mfg. Co. v. Barlow*, 98 S.2d 581, 586 (N.J. 1953) (observing that “modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate”).

160. *See, e.g.*, Antony Page, *Has Corporate Law Failed? Addressing Proposals for Reform*, 107 MICH. L. REV. 979, 987–93 (2009) (evaluating arguments regarding shareholder wealth maximization).

161. *See, e.g.*, FRANKLIN A. GEVURTZ, *CORPORATION LAW* 313 (2000) (“[A] rule which requires directors to act purely as profit maximizers is unenforceable.”). Product markets are also thought to constrain mission-oriented operational decisions. Companies that do not produce a competitive product go out of business. Ben & Jerry’s, however, was either operating to maximize profitability as they claimed, or alternatively had identified a niche where consumers were willing to subsidize the social mission. *See supra* note 70.

162. *See, e.g.*, Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (concluding that the business judgment rule is properly understood as a doctrine of judicial abstention, focusing on boards’ decision-making process rather than the substantive outcome).

163. *Id.*

164. *See supra* note 70.

165. *See, e.g.*, *Cede v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993) (stating that director self-interest must be shown on both sides of the transaction to rebut the presumption that the directors’ judgment is valid); *Smith v. Van Gorkom*, 488 A.2d 858, 872–73 (Del. 1985) (stating that under the business judgment rule, there “is a presumption that in making a business decision, the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company”) (quoting *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984)).

166. Companies that would otherwise choose to make decisions that do not maximize shareholder wealth may face constraints from the market for corporate control, i.e. they may be bought by others. *See, e.g.*, Ian B. Lee, *Corporate Law, Profit Maximization, and the “Responsible” Shareholder*, 10 STANFORD J. LAW. BUS. & FINANCE 31, 36–37 (stating that the market is “a mechanism which ensures that

“*Revlon* duties,” an obligation to maximize shareholders’ immediate return, when the company’s break-up is inevitable or its shareholders are getting cashed-out or selling control.¹⁶⁷ Despite acknowledging that “concern for various corporate constituencies is proper,” the *Revlon* court noted that any concern for non-shareholders must have some “rationally related benefits accruing to the stockholders.”¹⁶⁸ In a situation where the shareholders will have no further economic stake in the enterprise, such as a cash-out merger, concern for other constituencies *could not* be rationally related to a shareholder benefit. People who believed that corporate law required the sale likely relied on *Revlon* duties, but as discussed in detail in Section III-D, *Revlon* duties need not have applied and, even if they did, may not have required the sale.

C. Ben & Jerry’s Defenses

If a company’s board refuses to negotiate a sale, the party seeking to acquire it may make a tender offer directly to shareholders. If the offer is sufficiently generous, enough shareholders may sell to the acquirer to give it control.¹⁶⁹ Target boards are, however, permitted under corporate law to take actions—defensive measures—that reduce the likelihood of a tender offer’s success.¹⁷⁰ Whether these actions are good or bad for shareholders from a financial perspective is hotly debated,¹⁷¹ but their legality is unquestioned.¹⁷²

Ben & Jerry’s, perhaps because it had been put up for sale early in its existence,¹⁷³ was fully aware of the potential risk of a take-over.¹⁷⁴ To

management’s conduct is at least somewhat responsive to shareholders’ wishes”). As explained below, however, controlling shareholders cannot be compelled to sell even when faced with a wealth maximizing option. See discussion, *infra* Part II.

167. See *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). See also *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) (stating that one justification for imposing *Revlon* duties is to limit managers from self-interested transactions).

168. *Revlon*, 506 A.2d at 176, 182.

169. As explained in Part III-E, it is unlikely that this would have worked against Ben & Jerry’s.

170. See, e.g., *Unocal v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985) (allowing corporate defenses); *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361 (Del. 1995) (same).

171. See John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers, and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 GEO L. J. 1729, 1741 (2007).

172. *Id.*

173. See COHEN & GREENFIELD, *supra* note 1, at 22–23 (explaining that Cohen and Greenfield decided to put Ben & Jerry’s up for sale in 1982).

174. As Ben & Jerry’s last annual report as an independent company stated, “Ben & Jerry’s has, through the years, taken actions intended to strengthen the Company’s ability to remain an independent Vermont-based company focused on carrying out its three-part corporate mission.” Annual Report 2000, *supra* note 28, at 2.

prevent a forced sale, the company had implemented several defensive measures.¹⁷⁵ In August 1998, Ben & Jerry's introduced a shareholder-rights plan, also known as a "poison pill."¹⁷⁶ In simple terms, a poison pill would make any hostile takeover staggeringly more expensive by diluting the acquirer's holdings.¹⁷⁷ A poison pill, however, can be redeemed if a majority of the directors so vote in order to permit friendly acquisitions.¹⁷⁸

One possibility for an acquirer faced with a board that refuses to redeem its pill is to launch a proxy contest, with the goal of electing directors more favorable to the acquisition, who might then redeem the pill.¹⁷⁹ In 1997, however, Ben & Jerry's had also introduced a staggered board, meaning that only a third of the board would be elected each year.¹⁸⁰ An acquirer would have to win elections in two successive years rather than just one in order to gain control. As explained in Part III-E, given the founders' super-voting stock, a successful proxy contest would be extremely unlikely. As a 2002 empirical study showed, "staggered boards make it extremely difficult for a hostile bidder to gain control over the incumbents' objections,"¹⁸¹ even without super-voting stock.

A second possibility for an acquirer is to go to court asserting that the board's fiduciary duties to the shareholders require that the pill be redeemed. Would corporate law compel the board of directors to redeem the poison pill, thereby allowing an offer to go forward, even if directors personally did not want to sell? A decision not to redeem a pill would, as a defensive measure, typically be judged under a stricter standard than the business judgment rule: enhanced scrutiny, also known as the *Unocal* standard of review.¹⁸² Under *Unocal* review, a court determines whether a

175. Corporate defenses can also be thought of as "mission maintenance mechanisms." These mechanisms can blunt the impact of the market and restrict the ability of an acquiring company to eliminate the constraints on the ability of the managers to pursue profits over non-pecuniary goals. *See, e.g., Lee, supra* note 166, at 37.

176. *See* Ben & Jerry's Homemade, Inc., Form 8-A12B (Class A) (Aug. 13, 1998), <http://www.secinfo.com/dsVsd.71B7.htm>; Ben & Jerry's Homemade, Inc., Form 8-A12G (Class B) (Aug. 13, 1998), <http://www.secinfo.com/dsVsd.71b6.htm>.

177. *See generally*, Lucian Ayre Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002) (discussing the implementation and varying effectiveness of a poison pill in corporate takeovers).

178. *Id.*

179. *Id.* at 899.

180. *See* Ben & Jerry's Homemade, Inc., 1998 10-K Ex.-3.(I), Articles of Amendment (Mar. 27, 1998). The amendment also provided for a two-thirds shareholder majority vote in order to repeal the amendment. *Id.*

181. Bebchuk, *supra* note 177, at 890.

182. *Unocal v. Mesa Petroleum*, 493 A.2d 946, 954 (Del. 1985). *See also* *Moran v. Household Intern., Inc.*, 500 A.2d 1346, 1354 (Del. 1985) (stating that a board's decision not to redeem a pill would be judged under *Unocal*).

defensive measure (failing to redeem a pill) is reasonable in relation to the threat posed (almost any change in company policy).¹⁸³ In practice there are very few cases where courts have overturned a board's decision.¹⁸⁴ Courts typically determine reasonableness by deciding if a board's actions are preclusive or coercive,¹⁸⁵ and Ben & Jerry's pill was neither.¹⁸⁶

D. Avoiding Revlon Duties

Courts have enforced *Revlon* duties, under which the board is required to take actions reasonably likely to maximize shareholder value.¹⁸⁷ *Revlon* duties, however, are quite limited, as directors can usually avoid them.¹⁸⁸ *Revlon* duties attach, or are triggered, when

[A] corporation initiates an active bidding process seeking to sell itself or to effect a business reorganization involving a clear break-up of the company. However, *Revlon* duties may also be triggered where, in response to a bidder's offer, a target abandons its long-term strategy and seeks an alternative transaction involving the breakup of the company.¹⁸⁹

This permits directors to just say no. Even where the company actually is for sale, as long as the consideration for shareholders includes stock in the

183. *Unocal*, 493 A.2d at 955.

184. See, e.g., Stephen M. Bainbridge, *Unocal at 20: Director Primacy in Corporate Takeovers*, 31 DEL. J. CORP. L. 769, 772 (2006) (noting academics and others describing *Unocal* as “a failure,” a “toothless standard,” “fairly inconsequential,” “a toothless tiger,” as giving directors “a fairly forgiving, if not entirely free, pass,” and “a dead letter”) (citations omitted).

185. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388 (Del. 1995). The court explained, “[t]he *ratio decidendi* for the ‘range of reasonableness’ standard is a need of the board of directors for latitude in discharging its fiduciary duties to the corporation and its shareholders when defending against perceived threats. The concomitant requirement is for judicial restraint. Consequently, if the board of directors’ defensive response is not draconian (preclusive or coercive) and is within a ‘range of reasonableness,’ a court must not substitute its judgment for the board’s.” *Id.*

186. Vermont’s other constituency statute, discussed *infra* at notes 193–96 and accompanying text, might also have permitted Ben & Jerry’s board to retain its pill.

187. See, e.g., *Mills Acquisition Co. v. MacMillian Inc.*, 559 A.2d 1261, 1285 (Del. 1989).

188. See, e.g., *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150–51 (Del. Jul. 24, 1989, revised Mar. 9, 1990); *Paramount Commc’ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 47 (Del. 1994) (stating that a stock-for-stock merger does not implicate *Revlon* duties if control “remain[s] in a large, fluid, changeable and changing market”) (quoting *Paramount Commc’ns Inc. v. Time Inc.*, No. 10866, 1989 Fed. Sec. L. Rep. (CCH) ¶ 94, 514 (Del. Ch. Jul. 14, 1989)). Even a de facto change of control may not trigger *Revlon* duties in the event that there are sufficient protections for the minority shareholders. See, e.g., *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1338 (Del. 1987) (refusing to apply *Revlon* duties where a standstill agreement capped the shareholder’s holdings at 49.9% and limited its board representation to 40%).

189. *QVC Network Inc.*, 637 A.2d at 47 (quoting *Time*, 571 A.2d at 1150) (emphasis removed).

new enterprise (and will not result in a controlling shareholder), the directors may consider non-shareholder constituencies.¹⁹⁰ For example, negotiating a no-termination clause for employees could have a rational benefit for shareholders as a result of increased employee loyalty and effort for the new enterprise.

Although Ben & Jerry's was considering offers, none of the *Revlon* triggers applied. Neither the break-up nor the sale of the company was inevitable.¹⁹¹ Even if the board had *Revlon* duties, many states had passed other constituency statutes which gutted *Revlon* by either allowing or requiring directors to consider the interests of non-shareholder stakeholders, regardless of the benefit to shareholders.¹⁹² Vermont was no exception. In 1998, the Vermont legislature had passed just such an other-constituency statute.¹⁹³ This statute expressly allows a board to consider social issues, such as the interests of employees and suppliers, when evaluating acquisition offers, rather than only focusing on shareholder wealth maximization.¹⁹⁴ It was in fact nicknamed "the Ben & Jerry's law," because the company—showing great foresight—pushed for the law after rebuffing the 1998 offer from Dreyer's.¹⁹⁵

Notwithstanding the plain language of the law, the board may have been afraid to accept a lower offer (that of socially-oriented Hot Fudge Partners) because the Vermont law was untested in the courts—the board

190. *Time*, 571 A.2d at 1153.

191. Even if Ben & Jerry's had accepted the Hot Fudge Partners' offer, it is still unlikely that *Revlon* duties would attach, as it is not clear that the public shareholders were selling control. See *Mendel v. Carroll*, 651 A.2d 297 (Del. Ch. 1994) (holding that *Revlon* duties were not triggered when a board approved a merger with its controlling shareholders because there was no sale of corporate control). This is merely to say that the board could still turn down a higher second offer, not that it would be able to accept the lower controller's offer.

192. See, e.g., Garrity & Morton, *supra* note 144, at 697 (noting that a board may satisfy its fiduciary duty to shareholders even as it accepts a lower offer that provides more protection to workers). Perhaps not surprisingly, many commentators have charged that these statutes have merely served to protect incumbent boards and managers. See, e.g., Brett McDonnell, *Corporate Constituency Statutes and Employee Governance*, 30 WM. MITCHELL L. REV. 1228, 1228 (2004).

193. VT. STAT. ANN. tit 11A, § 8.30 (2009).

194. *Id.* § 8.30(a)(3) (stating that the director may "consider the interests of the corporation's employees, suppliers, creditors and customers, the economy of the state, region and nation, community and societal considerations . . . and any other factors the director in his or her discretion reasonably considers appropriate in determining what he or she reasonably believes to be in the best interests of the corporation . . . and including the possibility that these interests may be best served by the continued independence of the corporation"). In an interesting omission, the board of directors, in approving the sale of Ben & Jerry's, determined only that the sale was in the best interest of the shareholders. Solicitation Recommendation Statement, *supra* note 71. By contrast, in their annual report, the company claimed that its defenses were not only in the best interests of the company, but also "its stockholders, employees, suppliers, customers and the Vermont community." Annual Report 2000, *supra* note 28, at 2.

195. *Who's Buying Ben & Jerry's?*, ICE CREAM REP., Dec. 20, 1999, available at 1999 WLNR 8325403.

believed that a lawsuit might follow and go all the way to the Vermont Supreme Court where they might eventually lose.¹⁹⁶ The issue was apparently the magnitude of the social discount. The board felt that if bids were close, they could accept the lower bid, but the difference between \$38 per share and \$43.60 was too high.¹⁹⁷ If the law needed a case to test its limits; Ben & Jerry's declined to be that case.

E. Ben & Jerry's Capital Structure

Even if a court would require the poison pill to be redeemed to allow a tender offer to go forward, or the board's *Revlon* duties were such that—given the value presented by Unilever's offer—Vermont's other constituency statute would not protect the board, it is still unlikely that corporate law would require a sale. Corporate law permits parties to preserve control regardless of their equity positions. As one Delaware case stated:

Our corporation law provides great flexibility to shareholders in creating the capital structure of their firm. Differing classes of stock with differing voting rights are permissible under our law; restriction on transfers are possible, and charter provisions requiring the filling of certain directorates by a class of stock are, if otherwise properly adopted, valid.¹⁹⁸

Ben & Jerry's had established an intricate capital structure comprised of both Class A and Class B common stock.¹⁹⁹ Class A stock was publicly traded and had one vote per share.²⁰⁰ Class B stock was not publicly traded

196. Jim Steiker & Michael Golden, *Hot Fudge Partners: Insiders Tell How Social Investors Tried to (but Couldn't) Buy Ben & Jerry's*, BUSINESS ETHICS, May-June 2000, at 7. See also KELLY, *supra* note 15, at 147 (2001) (“[T]he board might have been protected in selling to them [Cohen and a group of social investors] at a lower price had it used Vermont's stakeholder statute. But [they] feared lawsuits and declined to test that law.”).

197. Kelly, *supra* note 153, at 5 (stating that lawyers advised Hot Fudge Partners that they would lose if the law were litigated). See also *id.* (quoting investor Terry Mollner, who stated that “the legal tradition remains that ‘shareholders are entitled to an unlimited upside’”—meaning that Unilever's bid would ultimately prevail). While Mollner is correct regarding the legal tradition, he perhaps underestimates the discretion given to directors, even in takeover contexts. See, e.g., *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1149–51 (Del. Jul. 24, 1989, revised Mar. 9, 1990) (stating that Time was allowed to restructure their own transaction with Warner, thereby depriving shareholders of a vote on the transaction, and more importantly, depriving shareholders of the opportunity to accept a very generous offer from Paramount).

198. *Lacos Land Co. v. Arden Group Inc.*, 517 A.2d 271, 275 (Del. Ch. 1986) (citations omitted).

199. See generally, Annual Report 2000, *supra* note 28.

200. *Id.* at 11.

but had ten votes per share.²⁰¹ Class B stock was nontransferable, unless it was first converted into Class A stock.²⁰² By 2000, founders Cohen, Greenfield, and Jeff Furman (a director of both Ben & Jerry's and the Ben & Jerry's Foundation) had 47% of the votes for board elections, which as a practical matter meant they elected the board members and could thus control Ben & Jerry's policies.²⁰³ It also meant that a tender offer without the support of Cohen, Greenfield, and Furman could not succeed in obtaining control, and a merger would be unlikely to be approved.²⁰⁴

In addition, Ben & Jerry's had issued preferred stock that held special voting rights with regard to various business combinations, including most mergers and tender offers.²⁰⁵ The Ben & Jerry's Foundation was the sole holder of this preferred stock, which meant that a takeover of Ben & Jerry's would require the Foundation's agreement.²⁰⁶ Two of the three members of the Ben & Jerry's Foundation board were none other than Cohen and Jeff Furman.²⁰⁷ Not only that, but the Foundation itself was takeover-proof, as it was a nonprofit organization whose board selected its own successors.²⁰⁸ This structure, reportedly invented by Cohen and Greenfield,²⁰⁹ was described as "one of the most clever anti-takeover devices ever: a charitable foundation that doubles as a corporate 'shark repellent.'"²¹⁰ Again, a tender offer or merger would fail without the support of the Foundation.

It does not suffice to say that Cohen, Greenfield, Furman, or the Foundation would have fiduciary obligation to vote their shares in favor of a merger or tender their shares in an offer. Although persons have fiduciary duties to the shareholders, perhaps even *Revlon* duties, when acting as directors, persons acting as shareholders have few obligations to other shareholders. Parties acting as shareholders of public corporations, unlike

201. *Id.*

202. *Id.* at 12.

203. *Id.* at 22. See also *Who's Buying Ben & Jerry's?*, *supra* note 195 (stating that the co-founders and Furman owned enough stock to prevent the takeover). At the time that the corporation was sold to Unilever, Cohen and Greenfield owned respectively 6.7% and 2.1% of the Class A stock and 61.5% and 11.3% of the Class B stock. Annual Report 2000, *supra* note 28. Jeff Furman, a director of both Ben & Jerry's and the Foundation, owned a further 3.8% of the Class B stock. *Id.*

204. In order to prevail in a merger vote, the acquirer would need the support of more than 94% of the unaffiliated shares. Voter turnout alone could make that difficult.

205. Annual Report 2000, *supra* note 28, at 11.

206. Michael J. Schill, *Ben & Jerry's Homemade* (2000) (unpublished manuscript) (SSRN Electronic Library), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909725.

207. *Id.* at 12.

208. Sloan, *supra* note 69. See also Robert Katz & Antony Page, *The Role of Social Enterprise*, 35 VT. L. REV. 59 (2010) (discussing how a nonprofit organization is immune to takeovers).

209. Sloan, *supra* note 69.

210. *Id.* at 80. Greenfield argued that giving the Foundation a veto power was "only fair," because in the event of a takeover the Foundation would lose its 7.5% of the company's profit. *Id.*

when they act as directors,²¹¹ are permitted to enjoy the benefits of selfish ownership of those shares, which includes choosing whether or not to accept a superior offer. Thus, even if Greenfield, Cohen, and Furman had a fiduciary obligation to vote in favor of the Unilever merger as directors, this did not mean they had to vote in favor of the transaction as shareholders,²¹² or that the Foundation had to vote in favor as a shareholder.²¹³ Greenfield, Cohen, and Furman (and the Foundation)—*acting as shareholders*—could exercise selfish ownership, in the sense that even though they might be willing to participate in a sale of the company to themselves for \$38 they could also be unwilling to sell to a third party for a greater amount.²¹⁴

If we assume that a company's board *knows* that the controlling shareholders will not support a transaction—a majority shareholder of whose votes are required before a corporation can merge—corporate law would not require the board to agree to such a transaction, even when the transaction offered superior value to shareholders than could be achieved independently.²¹⁵ After all, what would be the point of accepting a merger offer that would inevitably be defeated by shareholders?

There is one complication to the above analysis. The company states that the corporate charter allowed the company's board to redeem the preferred stock on a "specified vote" and convert the Class B common stock.²¹⁶ It is difficult to understand why a company would both create a capital structure granting certain securities voting preferences and vest power in the board to eliminate those preferences. It is also uncertain how a

211. See *Lacos Land Co. v. Arden Group Inc.*, 517 A.2d 271, 276 (stating that the defendant's threat to use his power as director "to block transactions that may be in the best interests of the Company" was different from simply using his "power *qua* shareholder"). Acting as a director, the defendant was bound by his fiduciary duties to other shareholders. *Id.* In contrast, in Delaware the shareholder acting as shareholder generally does not owe fiduciary duties (or "special, judicially-created rules") to protect other shareholders. *Nixon v. Blackwell*, 626 A.2d 1366, 1379 (Del. 1993). Hewlett Packard's high profile takeover of Compaq serves as another example. Walter B. Hewlett voted in favor of the transaction as a director of Hewlett Packard, but launched a proxy contest against the transaction as a shareholder. Steve Lohr, *Hewlett Heir Issues Letter Denouncing Planned Deal*, N.Y. TIMES, Dec. 14, 2001, at C4.

212. *Zahn v. Transamerica Corp.*, 162 F.2d 36, 45 (3d Cir. 1947) ("We must also re-emphasize . . . that there is a radical difference when a stockholder is voting strictly as a stockholder and when voting as a director . . .") (citations omitted).

213. Cohen and Furman would have fiduciary duties to the Foundation when acting as directors of the Foundation. There is, however, no duty to maximize profits when acting as the director of a foundation.

214. Of course other shareholders also had the right to vote against the merger if they preferred an independent Ben & Jerry's. Although nobody compelled the other shareholders to support a merger, presumably cash and a merger was preferable to independence.

215. See VT. STAT. ANN. tit. 11A, § 11.01(a), 11.03(b)(1)(2009) (requiring both the board and shareholders to approve a merger independently).

216. Annual Report 2000, *supra* note 28, at 58 (stating that the corporate charter allowed company directors to eliminate special voting rights).

court would treat a board's decision to either eliminate—or fail to eliminate—those preferences. The board would, after all, have full fiduciary duties to all common stock holders, and not just the Class A stockholders.²¹⁷ If the redemption and conversion were required, it would conflict with the company's public disclosure acknowledging that its capital structure would make it “difficult for a third party to acquire control” if the transaction were not supported by the three principal Class B stockholders or the Foundation.²¹⁸ In truth, the transaction would need only be supported by Ben & Jerry's board.

In short, if it is assumed that: (1) the board unintentionally triggered *Revlon* duties; (2) Vermont's other constituency statute would be ineffective; and (3) that the board would have a fiduciary obligation to eliminate the super-voting stock and preferred stock, then the board would indeed be compelled to accept Unilever's offer if they thought it would maximize shareholder value. If all of these assumptions hold, then it could be said that *after Revlon* duties attached, corporate law required the sale, albeit not before. Alternatively, if any of those assumptions failed (or if the redemption and conversion provisions had not been included), corporate law would not require the sale.

Even if the assumptions do hold true and the law did require the sale, however, this result would not be the fault of corporate law failing to protect a left-liberal corporate icon, but a simple failure of execution on the part of the company, its founders, or perhaps its lawyers. Corporate law permitted granting a takeover veto to a charitable foundation through preferred stock and a disproportionate voting interest to long-term shareholders like the founders. Corporate law did not require granting the board discretion to eliminate the seemingly carefully crafted capital structure defense. The redemption and conversion provisions (and the board's error in triggering *Revlon*) would then have effectively gutted Ben & Jerry's many-layered defenses.

So why did those in control of Ben & Jerry's choose to sell? Cohen and Greenfield seem to have taken the necessary steps *ex ante* to give themselves the freedom to reject Unilever's offer. Legal commentators have suggested several motivations, including the company's litigation and

217. There are very few opinions which confront this situation. One case involving a company's right to convert a class of common stock, *Taylor v. Axton-Fisher Tobacco Co.*, 295 Ky. 226, 229–31 (1943), avoids the problem of conflicting fiduciary duties by recognizing that one class is in the nature of junior preferred stock. In addition, in there was a plausible rationale for the inclusion of the conversion mechanism as it had economic substance. *Id.* In contrast, voting rights are the only difference between the two classes of Ben & Jerry's common stock. See Annual Report 2000, *supra* note 28, at 10.

218. *Id.* at 59.

management issues,²¹⁹ and that Cohen and Greenfield were ready to focus exclusively on their charitable causes,²²⁰ or were comfortable with Unilever.²²¹

The best explanation, however, may be, as Cohen himself has stated, that the directors were afraid of the risk of personal liability.²²² Apparently there was a “genuine fear” on the board that rejecting the offer could result in board members’ personal bankruptcy.²²³ If the foregoing analysis is correct, any risk of personal liability would be very small, particularly for the outside directors.²²⁴ Moreover, the risk would have been even smaller, given that Ben & Jerry’s had a provision in its Articles that indemnified board members for nearly all breaches of their fiduciary duties.²²⁵

Who really lost Ben & Jerry’s? It was not corporate law that inexorably pushed the company to subordinate its social mission to the financial bottom line. Rather, Ben & Jerry’s board members preferred Unilever’s offer and no risk of personal liability to testing Ben & Jerry’s defenses, discovering whether the board was *obliged* to eliminate the supervoting

219. See Michele Simon, *Can Food Companies Be Trusted to Self-Regulate?*, 39 LOYOLA L.A. L. REV. 169 (2006) (pointing to Ben and Jerry’s litigation and management issues causing a desire to offload the company). A key operational issue was due to the ice cream’s distribution by two of its big competitors, Dreyer’s and Häagen-Dazs. See Hays, *Going Private*, *supra* note 117 (stating that Ben & Jerry’s “never solved some important issues, including how to get their product onto store shelves reliably”).

220. See, e.g., Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 94–95 (2004) (suggesting that Cohen and Greenfield were simply ready to focus more exclusively on their charitable causes).

221. Cohen may also have felt comfortable with Unilever due to the fact that they participated in some social causes such as funding hospitals and schools in developing countries. See Laura P. Hartman et al., *The Communication of Corporate Social Responsibility: United States and European Union Multinational Corporations*, 74 J. BUS. ETHICS 373, 379 (2007).

222. See, e.g., Dembosky, *supra* note 3.

223. According to a well-placed confidential source.

224. See Bernard Black et al., *Outside Director Liability*, 58 STAN L. REV. 1055, 1059 (2006) (finding that “out-of-pocket payments by outside directors are rare”).

²²⁵ Ben & Jerry’s indemnification provision reads:

No director of the Corporation shall be personally liable to the corporation or its stockholders for money damages for any action taken, solely as a director, based on a failure to discharge his or her own duties in accordance with Section 8.30 (entitled “general standards for directors”) of the Vermont Business Corporation Act, except for: (i) the amount of financial benefit received by a director to which the director is not entitled; (ii) an intentional or reckless infliction of harm on the Corporation or the shareholders; (iii) a violation . . . [for unlawful distributions]; or (iv) an intentional or reckless criminal act. The foregoing additional provisions shall not be construed in any way so as to impose or create any duty or liability.

Ben & Jerry’s Homemade, Inc., Amendment to Articles of Association, June 24, 1995, Quarterly Report, filed Aug. 7, 1995, available at <http://www.secinfo.com/dNEcf.aa.8.htm>.

Plaintiffs’ best argument would be to argue that failing to accept the offer and convert or redeem the supervoting and preferred stock would be an “intentional infliction of harm” on the shareholders.

stock and the preferred stock, and facing some non-zero risk of liability.²²⁶ Perhaps they simply overestimated the risk of liability. In any event, Cohen and Greenfield (and the other directors) voted in favor of the sale, notwithstanding the transaction's potential threat to the company's mission. As the next section discusses, however, the sale was not necessarily a bad thing.

III. HOW MUCH SELL-OUT RESULTED FROM BEN & JERRY'S SALE?

In the conflict of "capitalism vs. tie-die"²²⁷ which would prevail? Or as a New York Times reporter asked, "Did Ben & Jerry's sell out, or is the Ben & Jerry's culture invading the corporate world?"²²⁸ The critics' most dire predictions about Ben & Jerry's loss of social mission have not been borne out, but there was good reason for concern.

When the merger was announced, the Ben & Jerry's company issued a press release asserting (optimistically) that:

[S]hareholders will be rewarded for their investment; Ben & Jerry's employees will be protected; the current social mission of Ben & Jerry's will be encouraged and well-funded, which will lead to improved performance in this area; and an opportunity has been offered for Ben & Jerry's to contribute to Unilever's social practices worldwide.²²⁹

Cohen's outlook was more tentative and nuanced. Several months before the sale, he declared his "strong personal belief that the only way that the company can actualize its progressive values is to remain independent."²³⁰ After the sale, he described Ben & Jerry's as a former "smaller 'social values led' business[]" that was "in the process of becoming . . . an entity inside a larger business," and "trying to infuse those

226. It was also Ben & Jerry's board who, 15 years earlier, had left the loophole in the company's otherwise impervious corporate defenses, by allowing the board to eliminate the supervoting stock and the preferred stock.

227. *Who's Buying Ben & Jerry's?*, *supra* note 195 (asking "can Cohen and Greenfield, recognized leaders in the movement to create capitalism with a human face, approve a sale that, while great for the bottom line, might lead to the demise of the company's ground-breaking social agenda?") (emphasis omitted).

228. Hays, *supra* note 18 (responding to the question with "[a] scoop of each, perhaps").

229. Press Release, Ben & Jerry's Homemade, Inc., Ben & Jerry's & Unilever to Join Forces (Apr. 12, 2000), available at <http://www.benjerry.com/company/media-center/press/join-forces.html> [hereinafter Press Release].

230. Holcenberg, *supra* note 125 (quoting Cohen in an interview on New Hampshire Public Radio).

values in that larger business. We expect that it will be a long and winding road.”²³¹

Ben & Jerry’s, now a (self-described) “wholly-owned *autonomous* subsidiary of Unilever,”²³² has had mixed success in maintaining its values and infusing these into its parent company.²³³ The conventional view is that Ben & Jerry’s is a textbook illustration of the “legacy problem”: a socially-conscious corporation’s social mission being squeezed out when the founders leave, sell, or go public.²³⁴ Jill Bamburgh believes that “the sale of Ben & Jerry’s failed to address” the key issue of ensuring that the social mission of the company would survive the exit of the founders and early investors.²³⁵

Marjorie Kelly examined the results of the sale. She argues:

In the three years since 4-11 [2000], Ben & Jerry’s has seen its social mission begin to seep away—Unilever has laid off one in five B&J employees, stopped donating 7.5 percent of profits to the Ben & Jerry’s Foundation, and hired a CEO Cohen didn’t approve of. It’s been a wakeup call in socially responsible business circles, where preventing mission loss when a company changes hands has become the problem of the hour.²³⁶

Kelly also claims that key provisions in the merger agreement are unenforceable,²³⁷ and that some fundamental issues were never

231. Constance L. Hays, *Ben & Jerry’s Deal Takes on Slightly New Flavor*, N.Y. TIMES, May 2, 2009, at C1, available at <http://www.nytimes.com/2009/05/02/business/the-markets-market-place-ben-jerry-s-deal-takes-on-slightly-new-flavor.html> (quoting Ben Cohen).

232. *Profile of Ben & Jerry’s*, UNILEVER USA, <http://unileverusa.com/brands/foodbrands/benandjerrys/> (last visited Sept. 2, 2010) (emphasis added).

233. We leave out here those who have criticized not Ben & Jerry’s social mission, but their sale of calorie-rich desserts. See, e.g., DOUGLAS RUSHKOFF, GET BACK IN THE BOX: INNOVATION FROM INSIDE OUT 250 (2005) (answering in the negative the question “Does encouraging charitable giving, environmental responsibility, and fair labor standards compensate for the obesity encouraged by its products and marketing campaigns?”). We are also leaving out critiques of quality of the product, such as the company’s use of high-fructose corn syrup, at least to the degree that these changes appear unrelated to the company’s social mission. See, e.g., Entine, *supra* note 6.

234. Kelly, *supra* note 153; see also Susan H. Mac Cormac, *The Emergence of New Corporate Forms: The Need for Alternative Corporate Designs Integrating Financial and Social Missions*, <http://www.corporation2020.org/pdfs/SummitPaperSeries.pdf> (last visited Aug. 30, 2000) (“Many socially oriented for-profits find that their social mission is dependent on founders’ fervor, and when founders retire or sell, their social legacy is often lost as more traditional owners and managers take over.”).

235. BAMBURGH, *supra* note 9, at 73.

236. Kelly, *supra* note 153.

237. *Id.* (noting that the Ben & Jerry’s merger agreement included provisions that effectively cannot be verified, such as Unilever’s commitment regarding the sourcing of dairy goods). Joe Sibilia of

memorialized, such as Unilever's commitment to hire only CEOs for Ben & Jerry's who Cohen personally approved.²³⁸

Kevin Jones, an investment manager who specializes in social enterprises, agrees that key aspects of Ben & Jerry's social mission were lost after the acquisition.²³⁹ Although some visible aspects survived, such as the avoidance of dairy products made with bovine growth hormone,²⁴⁰ some less visible ones have fallen by the wayside. One example is the nonprofit partner ice cream shops.²⁴¹ The company did not demand franchise fees from these shops, which were partly staffed by "at-risk youth who learned from social workers and job supervisors how to have a bank account and to complete a high school equivalency exam."²⁴² Another example: Unilever has gone back on some of its promises such as an ice cream made from fair trade ingredients.²⁴³ Even Greenfield concluded in 2008 that he believed it was fair to call him and Cohen "sell outs."²⁴⁴

These criticisms may, however, be overstated. Other observers are far more positive about the social value created by the transaction. For example, James Austin and Herman Leonard, professors at Harvard Business School, specifically praise the external board for serving as "a warning buzzer . . . blocking or reversing operational decisions that might have led away from Ben & Jerry's core values."²⁴⁵ More generally, they claim that Ben & Jerry's, like some other businesses with a social mission, managed to create sustainable "special know-how" or "social technology" that "embeds social values into their missions, production processes, product characteristics, organizational cultures, and relationships with their employees, their suppliers, and their consumers."²⁴⁶ Some Ben & Jerry's employees believe that Unilever is interested in this social technology. Helen Jones states Unilever "has encouraged us to be a grain of sand in [Unilever's] eye and I believe it wants to learn from us too."²⁴⁷ In making

Meadowbrook Lane Capital stated that, "[p]rovisions in the Unilever contract are legally binding, but we have not been able to enforce them." *Id.*

238. *Id.*

239. Jones, *supra* note 2.

240. *Id.*

241. *Id.*

242. *Id.* Immediately before the takeover there were only eight such partnerships, as opposed to 164 conventional domestic franchises. Annual Report 2000, *supra* note 28, at 11.

243. Simon, *supra* note 219, at 234. Ben & Jerry's has now committed to use only Fair Trade Certified ingredients, where such ingredients exist, by the end of 2013. *See Ben & Jerry's Goes Globally Nuts for Fair Trade*, BUSINESS WIRE (Feb. 18, 2010, 12:00 AM), available at <http://www.businesswire.com/news/home/20100217007206/en/Ben-Jerry%E2%80%99s-Globally-Nuts-Fair-Trade>.

244. Pool, *supra* note 145.

245. Austin & Leonard, *supra* note 21, at 94.

246. *Id.* at 79.

247. *M&A Case Study - Ben & Jerry's: A Big Dollop of Investment*, BRAND STRATEGY, Apr. 5,

its acquisition, Unilever was in fact looking at the new market segment created by Ben & Jerry's and "betting on products with high social content becoming a salient component of the future marketplace" and thus was always likely to keep the salient pro-social aspects of the company.²⁴⁸

Ben & Jerry's continues to be involved in progressive initiatives like voter-registration drives (2004), protesting against drilling in the Arctic (2005), speaking out against global warming (2006), expanding the use of hydrofluorocarbon-free equipment,²⁴⁹ supporting same-sex marriage (2009),²⁵⁰ and increasing the use of Fair Trade Certified ingredients (2010).²⁵¹ The company has taken more steps to reduce its carbon footprint, minimize waste, and improve its overall efficiency.²⁵² It has continued to produce its annual "Social & Environmental Assessment Reports."²⁵³ The company's marketing continues to advance its social mission.²⁵⁴ Jon Entine goes even further, suggesting that but for Unilever, "Ben & Jerry's values would be mostly symbolic, talked about in the past tense."²⁵⁵

Put differently, Unilever presumably feels market pressure to preserve those qualities and activities that consumers support and are willing to subsidize. Accordingly, Unilever has kept Ben & Jerry's in a unique position within Unilever's corporate structure.²⁵⁶ Ben & Jerry's

2005, at 24, *available at* 2005 WLNR 5414311 [hereinafter *M&A Case Study*] (quoting Helen Jones). A former executive at Unilever's advertising agency goes even further. "Today, the Unilever brand doesn't fit well with the Ben & Jerry's experience. But the plan is that at some point in the future, the Unilever brand will be an actual asset to a brand like Ben & Jerry's . . ." *Id.* (quoting Ian Stephens).

248. Austin & Leonard, *supra* note 21, at 79. *See also M&A Case Study, supra* note 247 at 2. ("If you've heard the brand story behind Unilever recently, you'll have realized that its missions and values are not so dissimilar to Ben & Jerry's.") (quoting Ian Stephens).

249. Marc Gunther, *Ben & Jerry's Chills Ice Cream - and the Planet*, FORTUNE, Oct. 22, 2008, *available at* http://money.cnn.com/2008/10/22/technology/ben_jerrys.fortune/index.htm. In order to use the new freezers, Ben & Jerry's had to lobby the Environmental Protection Agency for permission. *Id.*

250. The company renamed its Chubby Hubby flavor Hubby Hubby to mark Vermont's passage of a same sex marriage law. *See Ben & Jerry's Renames Legendary Flavor to Celebrate Freedom to Marry*, BUSINESS WIRE (Sept. 1, 2009, 3:00 AM), <http://www.businesswire.com/news/home/20090901005358/en/Ben-Jerry's-Renames-Legendary-Flavor-Celebrate-Freedom>.

251. *Ben & Jerry's Goes Globally Nuts for Fair Trade*, BUSINESS WIRE (Feb. 18, 2010, 12:00 PM), <http://www.businesswire.com/news/home/20100218006252/en/Ben-Jerry's-Globally-Nuts-Fair-Trade>.

252. *See, e.g., Social & Environmental Assessment Report*, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/sear/2009/index.cfm> (last visited Sept. 24, 2010) (stating that the company purchases carbon offsets for all carbon created at the Vermont plant).

253. *Id.*

254. Entine, *supra* note 6. Entine also suggests that although the founders were good entrepreneurs, it was their "bungling and mismanagement" that led to the takeover. *Id.* at 3.

255. *Id.*

256. *M&A Case Study, supra* note 247 ("[Ben & Jerry's] occupies a unique position within [Unilever's] vast brand structure. It is part of the portfolio, yet the only brand exempt from carrying the new Unilever branding on its packaging. It has a separate location from other companies in the portfolio and is run as a distinct business unit.").

undoubtedly increased the number of ice cream consumers willing to pay a premium for ice cream made without bovine growth hormone, using dairy from family farms, made in ways that promote rainforest preservation, and that pays fair(er) wages to Third World suppliers of cocoa, vanilla, and coffee.²⁵⁷ Unilever has continued to operate within these parameters, even if it has discarded some of Ben & Jerry's pro-social activities. The Ben & Jerry's website suggests that not only is it still pursuing the same social mission on a local and national level, but that with Unilever's acquisition, the social mission can be carried out on a global scale.²⁵⁸ This echoes Cohen's claim during Ben & Jerry's early days that if the company were bigger, it could do more good.²⁵⁹ To the degree that these activities are part of Ben & Jerry's pre-takeover social mission, the acquisition has significantly enhanced that mission; Unilever helped Ben & Jerry's grow more quickly, as they now sell three times more ice cream.²⁶⁰

Overall, the takeover of Ben & Jerry's suggests which pro-social elements of a for-profit social enterprise are heartier and likely to persist after its acquisition. These include the social value that an enterprise "makes" rather than "buys." Those elements that are embedded in the enterprise's production process are more likely to persist, as opposed to, say, gifts made to existing charitable organizations.²⁶¹ One example is Ben & Jerry's innovation in controlling its waste output. In the late 1980s, the company fed ice cream waste to pigs rather than further contaminating the municipal water system.²⁶² Now, it sends ice-cream waste to a "Bio-

257. See BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/history/> (click on 1989 icon at bottom of screen) (last visited Sept. 1, 2010); BEN AND JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/activism/inside-the-pint/fair-trade/> (click on the corresponding icons for Mexico, Cote D'Ivoire, Uganda, and Dominican Republic) (last visited Sept. 1, 2010).

258. See, e.g., *Unilever's Acquisition of Ben & Jerry's*, BEN & JERRY'S CUSTOMER SUPPORT (Mar. 5, 2010, 06:56 AM), <http://benjerry.custhelp.com> (follow "Find Answers" hyperlink; then search for Answer ID "136") (concluding that Unilever's increased resources would allow Ben & Jerry's mission to expand globally).

259. BAMBURGH, *supra* note 9, at 2.

260. Presumably, at least for public relations purposes, this is what the two founders hoped for when they agreed to the sale. At the time they said "[n]either of us could have anticipated, twenty years ago, that a major multinational would some day sign on, enthusiastically, to pursue and expand the social mission that continues to be an essential part of Ben & Jerry's and a driving force behind our many successes. But today, Unilever has done just that." Press Release, *supra* note 229.

261. John Peloza & Derek N. Hassay, *Make Versus Buy Philanthropy: Managing Firm-Cause Relationships for Strategic and Social Benefit*, CIBC CENTRE FOR CORPORATE GOVERNANCE AND RISK MANAGEMENT, at 7 (Winter 2006), <http://business.sfu.ca/files/PDF/cibc-centre/ccgrm-hierarchy.pdf>.

262. COHEN & GREENFIELD, *supra* note 1, at 154. The pigs reportedly enjoyed all of the flavors except mint Oreos.

digester” which uses the “ice-creamy” waste to produce energy from methane.²⁶³ The remaining solid leftovers are used as bedding for cows.²⁶⁴

Another example is its opposition to genetic modification. When Unilever sought approval in England for a genetically-modified ingredient, a Ben & Jerry’s spokesperson declared, “We would not dream of including anything like that in our products. . . . The fact that we are not using this [genetically modified] ingredient shows that we are not following all of their decisions.”²⁶⁵ A third example is Unilever’s repeated commitment to production in Vermont.²⁶⁶ Ben & Jerry’s chief executive says keeping production in Vermont is important because of “the history and the authenticity of the culture and values.”²⁶⁷ Perhaps this is no surprise, as Ben & Jerry’s was said to have “redefined corporate philanthropy” in going beyond financial contribution to charity to its innovative product practices.²⁶⁸

Even after the takeover, Ben & Jerry’s styles itself and is perceived by many as a socially-responsible corporation.²⁶⁹ As evidence of its relevance, it continues to generate ideological opposition, among them “Star Spangled Ice Cream,” a conservative alternative to Ben & Jerry’s that donates 10% of its profits to pro-military organizations and sells flavors such as “Iraqi Road,” “Smaller Government,” and “Nutty Environmentalist.”²⁷⁰ In

263. *Environmental Waste*, BEN & JERRY’S HOMEMADE ICE CREAM, <http://www.benandjerrys.com/activism/environmental/waste/> (last visited Sept. 5, 2010).

264. *Id.*

265. Jonathan Owen, *Ben & Jerry’s Breaks Ranks With Unilever Over ‘Risky’ GM Ice Cream Additive*, THE INDEPENDENT, July 16, 2006, available at <http://www.independent.co.uk/environment/ben-and-jerrys-breaks-ranks-with-unilever-over-risky-gm-ice-cream-additive-408164.html>.

266. Dan McLean, *Ben & Jerry’s New CEO Promises to Keep it in Vermont*, USA TODAY, Mar. 24, 2010, available at http://www.usatoday.com/money/industries/food/2010-03-24-ben-and-jerrys-ceo-solheim_N.htm?csp=34&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+UsatodaycomMoney-TopStories+%28Money+-+Top+Stories%29.

267. *Id.*

268. *Caring Capitalists*, *supra* note 25.

269. See, e.g., Dan Mitchell, *Cuts, Cream, Claus and Coffee*, N.Y. TIMES, Dec. 10, 2005, at C1, available at <http://www.nytimes.com/2005/12/10/technology/10online.ready.html?scp=86&sq=%22ben+%26+Jerry%27s%22&st=nyt> (reporting that “Ben & Jerry’s . . . casts itself as a force for good by using organic ingredients, giving profits to social causes and treating its employees well”). See also *Gen Y’s Totally Trusted Brands*, THE OUTLAW, <http://www.outlawnewsletter.com/newsletters/the-brand-issue#section1> (last visited Apr. 25, 2010) (reporting that Ben & Jerry’s made the top fifteen list for Generation Y’s most trusted brands). Of course, one reason for this may be that many consumers do not realize that Ben & Jerry’s is owned by a multinational. See, e.g., Judy Rambert & Katie Anderson, *Stealth Branding and Authenticity: How Companies Can Keep it Real*, ICONOCULTURE, Feb. 2008, available at http://www.iconoculture.com/icopws/groups/public_website/documents/web_content/pws_002072.pdf (claiming that “most fans would be shocked to learn” that Ben & Jerry’s, an “authentic” brand, was actually owned by Unilever).

270. See STAR SPANGLED ICE CREAM, www.starspangledicecream.com (last visited Apr. 27, 2010).

addition, Ben & Jerry's was targeted by PETA (People for the Ethical Treatment of Animals) for its "Breast is Best" campaign.²⁷¹

Contrast this to the social value that Ben & Jerry's created by making corporate donations to charities.²⁷² These activities, which were tangential to the company's production process, were more readily discarded.²⁷³ This may be why Cohen is no longer involved with the company,²⁷⁴ and why Greenfield believes that Ben & Jerry's is just "a clone of its giant owner."²⁷⁵ Even a Ben & Jerry's spokesperson acknowledged the difficulty: "One of the biggest problems is that we are affected by Unilever's actions even though they are [sic] nothing to do with the way that we behave."²⁷⁶ This may be false if Unilever is now running Ben & Jerry's just like any other profit-maximizing firm. On the other hand, if Ben & Jerry's securities filings are correct, its social mission *always* contributed to its financial performance.²⁷⁷

Ben & Jerry's has continued to contribute to a social mission, albeit in different ways than it would have done had it stayed independent. The takeover, while perhaps worse than staying independent, has by no means been a disaster. Greenfield and Cohen now say that Unilever "generally has been good about pursuing a social mission, but could have been better."²⁷⁸ For those who support what Ben & Jerry's remains committed to, the takeover may in fact have been positive.

IV. THE WAY FORWARD?

The Ben & Jerry's experience, properly understood, offers several lessons for scholars and practitioners of for-profit social enterprise. These

271. PETA argues that Ben & Jerry's should switch to using human breast milk for its ice cream to prevent unnecessary cruelty to dairy cattle. *The Breast is Best! PETA Asks Ben & Jerry's to Dump Dairy and Go With Human Milk Instead*, PETA (Sept. 28, 2008), <http://www.peta.org/mc/newsitem.aspx?id=11993>.

272. See generally, *Social & Environmental Assessment Reports*, BEN & JERRY'S HOMEMADE ICE CREAM, <http://www.benjerry.com/company/sear/> (last visited Sept. 5, 2010) (reporting all donations to charities from 1999–2000).

273. In fairness, Unilever has continued to donate profits to the Ben & Jerry's Foundation. Since the merger, this amounted to \$1,135,000 in 2000, \$1,285,630 in 2001, \$1,200,000 in 2002, \$1,206,412 in 2003, \$1,289,000 in 2004, \$1,445,844 in 2005, \$1,587,917 in 2006, and \$1,699,684 in 2007, respectively. See generally, *Social & Environmental Assessment Report*, *supra* note 252.

274. Entine, *supra* note 6, at 3 ("Cohen has washed his hands of the company and moved on to other ventures.").

275. *Id.*

276. Owen, *supra* note 265.

277. See Annual Report 2000, *supra* note 28.

278. Dave Gram, *Ben and Jerry Back Bill to Let Firms Pursue Social Mission*, TIMES ARGUS (Montpelier, VT), Apr. 12, 2010.

lessons, however, should not be derived from the frequently retold story of the forced fall from grace of an iconic social enterprise.

Contrary to the oft-repeated assertions, corporate law did not dictate the sale of Ben & Jerry's to Unilever. The law of publicly-traded corporations is sufficiently flexible to enable the creation of a double bottom line enterprise that is largely immune from takeover, thereby preserving control in the founders' mission-friendly hands. Cohen and Greenfield took some permissible steps early on that either allowed, or with some simple tweaking, would have allowed them to fend off Unilever's offer. Granted, the corporate form itself may predispose some corporate managers to see shareholder wealth maximization as a suitable aim. Yet as Ben & Jerry's demonstrates, a for-profit corporation can espouse and foster a very different culture and set of norms.

It is one thing to protect a for-profit social enterprise from being taken over by unfriendly outsiders. It is a different and perhaps more difficult task to construct an organizational form strong enough to withstand changes over time in the founders' preference or values. Some proponents of new legal forms for hybrid ventures invoke the Ben & Jerry's experience to garner support for such forms.²⁷⁹ Such claims are flawed. There may be good reasons to create such forms, but preventing another Ben & Jerry's is not one of them.

Even so, the Ben & Jerry's experience invites other social entrepreneurs to consider whether and how to use organizational law to protect their enterprise's social mission not only from hostile acquirers, but also from their future preferences, which might be less idealistic and altruistic than their present selves.²⁸⁰ The traditional way to perpetuate an enterprise's mission-driven focus is to set it up as a nonprofit organization, which permanently dedicates the nonprofit's surplus to legally charitable purposes.²⁸¹ The asset lock imposed by nonprofit law (a.k.a. the "nondistribution constraint") prohibits the organization's controllers from distributing its surplus to themselves, except for reasonable compensation for goods and services rendered.²⁸² When a social entrepreneur organizes

279. See, e.g., Dembosky, *supra* note 3.

280. See generally, Richard H. Thaler & H. M. Shefrin, *An Economic Theory of Self-Control*, 89 J. POL. ECON. 392, 394 (1981) (proposing a model which explains why individuals change economic preferences over time by acknowledging "man as having two sets of preferences that are in conflict at a single point in time").

281. See generally, Diana Ransom, *Starting Up: Nonprofit Vs. For-Profit Social Ventures* (June 17, 2008), http://www.ssmallbiz.com/bestpractices/starting_up_up_Nonprofit_vs_For_Profit_Social_Ventures.html (stating that traditional nonprofits are more common).

282. See Robert Katz & Antony Page, *supra* note 208, at 67–68 (explaining nondistribution constraint).

her enterprise on a nonprofit basis, she thereby constrains her future self from appropriating its surplus for her personal benefit. Proponents of new legal forms of for-profit social enterprises thus pose a good question: can we devise forms that enable founders to more firmly commit themselves to pursuing a double bottom line in the long term?

Lastly, the Ben & Jerry's experience points to potential drawbacks to efforts to entrench a for-profit firm's social mission and suggests some larger lessons in social entrepreneurship. Even if a hybrid entity is taken over by a profit-maximizing company, the entity can leave an enduring legacy of social progress. From a broader, macro-economic perspective, Ben & Jerry's acquisition by Unilever may not be undesirable, and perhaps should even be celebrated. Ben & Jerry's effected important changes in the ice cream market: it identified and developed a neglected market niche for "socially conscious" ice cream, by demonstrating that substantial numbers of consumers place a high value on social and environmental practices. It thus helped bring about a new, more pro-social equilibrium in the ice cream market—one that generates greater social value and fewer negative externalities than the status quo. Unilever, by expanding the market that Ben & Jerry's pioneered, may have created more social value than Ben & Jerry's could have done alone.