The Supreme Court of Delaware clarified the applicable standard of review for board actions regarding stockholder votes in contested director elections, approving the Chancery Courts unification of the review standard established under *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), which tested a board's proportional reaction to a threat, with the compelling justification review in *Blasius Industries, Inc. v. Atlas Corp.*, 564 A.2d 651 (Del. 1988) and the inequitable self-perpetuation review in *Schnell v. Chris Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971); thus, the unified standard required the board to prove that (1) the board perceived a threat to corporate policy or effectiveness from a real, not pretextual, threat with the boards motivations being proper and not selfish or disloyal and (2) the response to threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder's franchise. *Coster v. UIP Companies, Inc.*, 300 A.3d 656 (Del. 2023).

William Gass

In *Coster v. UIP Companies, Inc.*,[1] the Delaware Supreme Court considered two arguments on appeal: (1) that the Court of Chancery misinterpreted *Schnell*[2] by restricting its review for inequitable conduct to where directors did not act on a good faith basis and (2) that the court erred in finding "that the board had a compelling justification for the stock issuance."[3] The Supreme Court held that the court did not err in its

[1] Coster v. UIP Companies, Inc., 300 A.3d 656 (Del. 2023).
[2] Schnell v. Chris Craft Industries, Inc., 285 A.2d 437 (Del. 1971).
[3] *Coster,* 300 A.3d at 659.

interpretation of *Schnell* and its factual findings were not clearly wrong.[4] However after considering the current standards, the Delaware Supreme Court clarified on appeal that the *Unocal*[5] review, after incorporating the *Schnell* and *Blasius*[6] reviews, was the proper review of the board's action that interfere with shareholder's franchise in a contested board election.[7]

I. FACTUAL BACKGROUND

UIP Companies, Inc. ("UIP") was founded in 2007 by Wout Coster ("Wout"), Cornelius Bruggen, and Steven Schwat as a real estate services company.[8] UIP operated through subsidiaries that provided services to investment properties in Washington, D.C., and many properties were held in special purpose entities that were jointly owned by UIP and third parties.[9]

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4 *Id.*
5 Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985).
6 Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651 (Del. 1988).
7 *Coster,* 300 A.3d at 672.
8 *Coster*, 300 A.3d at 659.
9 *Id.* at 659–60.

In 2011, Bruggen tendered his shares back to UIP, at no cost, leaving Wout and Schwat as co-owners.[10] In 2013, Wout told executive Peter Bonnell and Schwat that he had leukemia.[11] Negotiations for the sale of Wout's shares began, and those shares were contemplated to be used as compensation to incentivize Bonnell and another executive, Heath Wilkinson, to stay at UIP. Wout passed away on April 8, 2015, prior to the completion of negotiations, so the shares went to his widow, Marion Coster ("Coster").[12]

Schwat and Bonnell continued discussing buyout options with Coster, and as her financial situation devolved, she began to consider a lump sum payment or some steady stream of income for her shares.[13] Coster sought an independent valuation of UIP after doubts immerged about the

[10] *Id.* at 660.
[11] *Id.*
[12] *Id.*
[13] *Id.*

negotiating parties' truthfulness regarding the profitability of the company.[14] In August 2017, Coster demanded to inspect the books and records of UIP after providing UIP with a valuation of $7.3 million.[15] In October 2017, Coster again demanded to see the books, and in April 4, 2018, Coster called for a UIP stockholder meeting to elect new board members to replace two empty board positions on a five member board.[16]

The stockholder meeting was held on May 22, 2018.[17] Coster raised motions to change the compensation and size of the board, but the board, instead, reduced the number of board members to three.[18] On June 4, 2018, another stockholder meeting was held and Schwat and Coster opposed each other's motions, so Schwat, Bonnell, and Steven Cox, UIP's Chief Financial

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[14] *Id.* at 660–61.
[15] *Coster*, 300 A.3d at 661.
[16] *Id.*
[17] *Id.*
[18] *Id.*

Officer, remained the UIP directors.[19] Coster then sought the appointment of a custodian to be a tie-breaker in director elections.[20]

Under 8 Del. C. § 226(a)(1), Coster asked the Court of Chancery for a custodian ("Custodian Action") with broad oversight powers, but the request for a custodian would later be deemed to be too broad and "posed new risks to the company."[21] The Court of Chancery found the custodian's power would have allowed the special purposes entities to terminate their contracts with UIP.[22] The board instead decided to issue equity to Bonnell, and UIP sold a one-third interest to him for $41,289.23 ("Stock Sale"),

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[19] *Id.*
[20] *Id.*
[21] *Coster*, 300 A.3d at 661 (quoting Coster v. UIP Companies, Inc. ("Coster II"), No. CV 2018-0440-KSJM, 2022 WL 1299127 (Del. Ch. May 2, 2022), aff'd, 300 A.3d 656 (Del. 2023)).
[22] *Id.* (citing *Coster II*, 2022 WL 1299127, at *4).

diluting Coster's control from one-half to one-third control.[23] Coster filed suit seeking to cancel the Stock Sale.[24]

In the original suit, "the Chancery Court upheld the Stock Sale under the entire fairness standard of review."[25] The court determined no further review was required as the fairness standard was the highest standard of review.[26] The court dismissed the action and did not consider appointing the custodian.[27] Coster appealed.

A. FIRST APPEAL

On appeal, the Supreme Court of Delaware did not consider the fairness doctrine, but instead, the high court instructed the Chancery Court

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[23] *Coster*, 300 A.3d at 662. This was a much smaller amount than what Wout was negotiating in 2014 which amounted to $2,125,000 for half of the UIP shares. *Id.* at 660. The deal did not finalize because "Wout did not feel comfortable with the terms…." *Id.*
[24] *Coster*, 300 A.3d at 662.
[25] *Id.* (citing Coster v. UIP Companies, Inc. (Coster I), No. CV 2018-0440-KSJM, 2020 WL 429906, *12 (Del. Ch. Jan. 28, 2020), rev'd, 255 A.3d 952 (Del. 2021)). The entire fairness standard requires fairness in dealings and price. *Coster I*, 2020 WL 429906, *17. Fair dealing considers structure, timing, approvals, and disclosures of the deal. *Id.*
[26] *Coster*, 300 A.3d at 662. (citing *Coster I*, 2020 WL 429906, *14).
[27] *Id.*

to review the stock sale in light of the *Blasius* and *Schell* standards.[28] Looking to *Schnell*, the court emphasized that "inequitable action does not become permissible simply because it is legally possible."[29] The Supreme Court then explained that if the Stock Sale was approved for inequitable reasons, the sale should be cancelled, and if the board acted in good faith to harm Coster's franchise, the board must "demonstrat[e] a 'compelling justification' for such action."[30] The court supported a conclusion under *Schnell*[31] that the board acted in bad faith after considering facts that included entrenchment of the board, intent to remove stockholder franchise, and the timing of the sale after

[28] *Id.* The high court directed the court to consider "*Schnell* and *Blasius* when the board interferes with director elections." *Id.*
[29] *Id.* (quoting *Schnell*, 285 A.2d at 439).
[30] *Id.* (quoting *Blasius Indus., Inc.,* 564 A.2d at 661–62). A *Blasius* review considers if the board "may validly act for the principal purpose of preventing the shareholders from electing a majority of new directors." *Blasius Indus., Inc.*, 564 A.2d at 658. However, the board may do so if they can demonstrate a "compelling justification for such an action." *Id.* at 661.
[31] A review under *Schnell* considers if "management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office[] and…for the purpose of obstructing the legitimate efforts of dissident stockholders in the exercise of their rights to undertake a proxy contest against management." *Schnell*, 285 A.2d at 439.

failed negotiations.[32] Due to the Chancery Court's contrary finding, the lower court was charged to review the findings while considering both *Schnell* and *Blasius* review.[33]

B. REMAND

On remand, the Court of Chancery found that the UIP board, under *Schnell*, "had not acted for inequitable purposes" and had a "compelling justification for the Stock Sale under *Blasius*."[34] Under the *Schnell* claim, the court held that the UIP board had motivations for approving the sale and that the "board's decision did not totally lack a good faith basis."[35] Under the *Blasius* review, the court used a reasonableness and proportionality test, borrowing from *Unocal*,[36] and determined that the directors had to review the

[32] *Coster,* 300 A.3d at 663.
[33] *Id.* at 662 (citing Coster v. UIP Companies, Inc., 255 A.3d 952, 964 (Del. 2021)).
[34] *Id.* at 663. "Inequitable purpose" refers to the board perpetuating itself in office or obstructing stockholder franchise. *Schnell*, 285 A.2d at 439.
[35] *Coster,* 300 A.3d at 663 (quoting *Coster II,* 2022 WL 1299127 at *10).
[36] *Unocal* review requires that, "[i]n the face of…conflict[,] directors must show that they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed

board's actions under a "compelling justification" standard.[37] The court pulled a compelling justification standard from *Mercier v. Inter-Tel (Delaware), Inc.*[38] that states: "[T]he directors must show that their actions were reasonable in relation to their legitimate objective, and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way."[39] The court found that Coster's Custodian Action justified UIP's board's response because the appointment threatened UIP, and the sale of stock accomplished the goals of stopping the custodian appointment, "implementing the succession plan Wout favored," and rewarding Bonnell.[40] Coster timely appealed.[41]

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because of another person's stock ownership." *Unocal Corp.*, 493 A.2d at 955. Further, the defensive measure used "must be reasonable in relation to the threat posed." *Id.*

[37] *Coster,* 300 A.3d at 663.

[38] 929 A.2d 786, 810–11 (Del. Ch. 2007).

[39] *Coster,* 300 A.3d at 663 (citing *Coster II*, 2022 WL 1299127, at *11).

[40] *Id.* (quoting *Coster II*, 2022 WL 1299127, at *13).

[41] *Coster,* 300 A.3d at 663.

II. ISSUE

In *Coster v. UIP Companies, Inc.*, the Delaware Supreme Court considered two arguments on appeal (1) "that the Court of Chancery erred when it limited its *Schnell* review to board action totally lacking a good faith basis"[42] and (2) that the court erred in finding "that the board had a compelling justification for the stock issuance."[43]

III. HISTORY AND DEVELOPMENT

Ultimately, the Court determined that the "*Schnell* and *Blasius* review could be folded into *Unocal* review to accomplish the same ends—enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control."[44] The Court reached this

[42] *Id.* at 664.
[43] *Id.* at 659.
[44] *Id.* at 672.

conclusion by rehashing the application of *Blasius* and *Schnell* and considered the interactions between the standards and *Unocal*.[45]

A. SCHNELL

In *Schnell*, the board accelerated the annual meeting date and moved it to a remote location in anticipation of a difficult proxy fight regarding the removal of board members.[46] The board only claimed that their actions did not violate the Delaware General Corporate Law.[47] The Chancery Court accepted the board's arguments, but on appeal, the Supreme Court found the obstruction efforts, though legal, to be inequitable.[48] The Court frowned upon the board's "attempt[] to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office" and

[45] *Id.* at 672–73.
[46] *Coster*, 300 A.3d at 664 (citing *Schnell*, 285 A.2d at 439).
[47] *Id.*
[48] *Id.* (citing *Schnell*, 285 A.2d at 439).

obstructing the stockholder's exercise of their franchise.[49] Justice Herrmann reasoned that "inequitable action does not become permissible simply because it is legally possible."[50] The court ordered the reinstatement of the original meeting date.[51]

B. BLASIUS

In *Blasius*, the Court tested *Schnell* and found that it "was not the end of the road for judicial review of good faith board actions that interfered with director elections."[52] *Blasius* involved an incumbent board that was facing a loss of majority voting power as only seven of the fifteen authorized board positions were occupied, and the majority shareholder vote could allow for the election of eight new board members.[53] The board, by adding two seats

[49] *Id.* (quoting *Schnell*, 285 A.2d at 439).
[50] *Id.* (quoting *Schnell*, 285 A.2d at 439).
[51] *Id.*
[52] *Id.* (citing *Blasius Indus., Inc*, 564 A.2d at 658).
[53] *Id.*

and filling the seats with members that were "friendly to management," stopped a single vote from changing the power of the board and instead required two votes to control the board.[54] Two main points led to the court's decision here to find that the board acted in good faith: (1) stockholders were enticed with cash now and a debenture redemption later by Blasius and (2) the board had a plan they believe was better for the stockholders than the riskier plan by Blasius.[55]

To evaluate the claims by Blasius that the board had selfish motivations, the Chancellor used *Schnell* and reasoned that the court would have nullified the plan if the board incidentally stopped the consent solicitation or stopped it under a false pretext.[56] The Chancellor found that

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[54] *Id.*

[55] *Coster*, 300 A.3d at 664–65.

[56] *Id. at 665* (citing *Blasius Indus., Inc.,* 564 A.2d at 655, 658). The main thrust of the evaluation is determining the "principal[] motivate[ion]" of the board's actions. *See id.*

the board had acted in good faith, because the board feared that Blasius's plan would harm the company and its shareholders.[57] The court determined that acting in good faith does not justify interference with shareholder franchise.[58] Instead, a board would have to demonstrate a compelling justification for acting with the primary purpose to stop stockholders from exercising their voting right.[59]

After *Blasius*, the courts continued to use *Schnell* to "police board action that, although technically legal, was motivated for selfish reasons to interfere with corporate elections and stockholder voting."[60] Of note, "[a]lmost all of the post-*Schnell* decisions involved situations where boards of

[57] *Id.* (citing *Blasius Indus., Inc.,* 564 A.2d at 658).
[58] *Id.* at 666 (citing *Blasius Indus., Inc.,* 564 A.2d at 663) ("While that premise is no doubt true for any number of matters, it is irrelevant (except insofar as the shareholders wish to be guided by the board's recommendation) [that the board knows better than the shareholders what is in the corporation's best interest] when the question is who should comprise the board of directors.")
[59] *Id.* at 666.
[60] *Id.*

directors deliberately employed various legal strategies either to frustrate or completely disenfranchise a shareholder vote."[61] The Supreme Court agreed with the Chancellor's decision to narrowly use *Schnell* in instances where the board acted for selfish reasons.[62]

C. *Blasius* into *Unocal*

The Court of Chancery reviewed the use of *Blasius* and how it is effectively folded into *Unocal* in the case law.[63]

In *Stroud v. Grace*, the court concluded a board's defensive measure that purposefully disenfranchises stockholders implicates *Blasius*'s "compelling justification" review and would be "strongly suspect" under *Unocal*.[64] The court in *Unocal* developed a test to determine if a board's

[61] *Id.* at 666–67 (quoting Stroud v. Grace, 606 A.2d 75, 91 (Del. 1992)). Typically, the *Blasius* standard is articulated as being used to review instances where the actions of the board contain the "sole or primary purpose of thwarting a shareholder vote." *Blasius Indus., Inc.*, 564 A.2d at 662. In such cases, the "board bears the heavy burden of demonstrating a compelling justification for such action." *Id.* at 661.
[62] *Coster*, 300 A.3d at 667.
[63] *Id.*
[64] *Id.* at 668 (citing *Stroud*, 606 A.2d at 92 n.3).

antitakeover measure is nullified, and that test required the board to "show (i) that 'they had reasonable grounds for believing that a danger to corporate policy and effectiveness existed,' and (ii) that the response was 'reasonable in relation to the threat posed.'"[65] However under the test, a defensive response is not reasonable if it is "coercive or preclusive…or falls outside a range of reasonable responses."[66] Ultimately, the court noted *Blasius* and *Unocal* could be invoked to review the board's decision in both a proxy fight and a tender offer.[67] Therefore, the review standards were not mutually exclusive.[68]

The courts then progressed to consider a combination of the standards. The court in *Chesapeake Corporation v. Shore*[69] suggested combining

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[65] *Id.* at 667–68 (quoting *Unocal Corp.*, 493 A.2d at 955).
[66] *Coster*, 300 A.3d at 668 (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1367 (Del. 1995)).
[67] *Coster*, 300 A.3d at 668 (citing *Stroud* for the purpose of showing the review standards are not mutually exclusive).
[68] *Id.* (citing *Stroud*, 606 A.2d at 92 n.3).
[69] 771 A.2d 293, 323 (Del. Ch. 2000).

the two standards.[70] The court recommended using the *Unocal* standard but would focus on either on bad faith shareholder disenfranchisement or good faith actions that resulted in a preclusive or coercive effect.[71] In *MM Companies v. Liquid Audio, Inc.*,[72] the Supreme Court applied *Blasius* and *Unocal* reviews to the actions, requiring the compelling justification test of *Blasius* be applied first and then applying the *Unocal* reasonableness and proportionality tests.[73] This was a formal step of incorporation, but the "compelling justification" standard of *Blasius* turned out to be difficult to apply and resulted in lopsided results once the standard was applied.[74]

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70 *Coster*, 300 A.3d at 668.

71 *Id.* (citing *Chesapeake Corp.*, 771 A.2d at 323) ("If *Unocal* is applied by the court with a gimlet eye out for inequitably motivated electoral manipulations or for subjectively well-intentioned board action that has preclusive or coercive effects, the need for an additional standard of review is substantially lessened.").

72 813 A.2d 1118, 1129 (Del. 2003).

73 *Coster*, 300 A.3d at 668–69 (citing *Liquid Audio, Inc.,* 813 A.2d at 1132). The standard may be combined if there is a purposeful interference with stockholder franchise. *Id.* (citing *Liquid Audio, Inc.,* 813 A.2d at 1132) ("To invoke the *Blasius* compelling justification standard of review within an application of the *Unocal* standard of review, the defensive actions of the board only need to be taken for the primary purpose of interfering with or impeding the effectiveness of the stockholder vote in a contested election for directors.").

74 *Id.* at 669.

In *Mercier v. Inter-Tel (Delaware), Inc.*,[75] the Chancery Court used the *Unocal* "reasonableness" review after independent directors rescheduled a stockholder special meeting about a proposed merger and moved the record date.[76] The Court of Chancery applied the *Unocal* review with "greater sensitivity to the interests at stake," instead of first considering the compelling justification.[77] The court modified the *Unocal* review and required the board to:

> (1)…identify "a legitimate corporate objective" supporting its decision to move the special stockholders' meeting date and to change the record date; (2) "…show that their motivations were proper and not selfish;" and (3)…demonstrate that, even if not disloyal, "their actions were reasonable in relation to their legitimate objective and did not preclude the stockholders from exercising their right to vote or coerce them into voting a particular way.[78]

[75] 929 A.2d 786 (Del. Ch. 2007).
[76] *Coster*, 300 A.3d at 669–70.
[77] *Id.* at 670 (citing *Mercier*, 929 A.2d at 810).
[78] *Id.* (quoting *Mercier*, 929 A.2d at 810).

The court included a requirement that the action be reasonable in relation to the outcome [79] and decided the board's actions met this standard, refusing to stop the rescheduling.[80]

In *Pell v. Kill,*[81] the Court of Chancery "continued to apply a modified *Unocal* review."[82] The court considered whether the "reasonable in relation to a legitimate objective[] and whether the board's action was preclusive or coercive."[83] However, the court narrowed the connection between the action and the outcome by "require[ing] the board to have a compelling justification

79 *Id.* (citing *Mercier*, 929 A.2d at 811). The intent of the relationship between the action and the outcome is mirrored in the Court of Chancery's response to the first remand. *Coster*, 300 A.3d at 663 (citing *Coster II*, 2022 WL 1299127, at *11).
80 *Coster*, 300 A.3d at 670.
81 135 A.3d 764 (Del. Ch. 2016).
82 *Coster*, 300 A.3d at 670.
83 *Id.* (citing *Pell*, 135 A.3d at 787).

for its action."[84] Upon review, the court found the board's actions to be preclusive.[85]

As the final case considered, *Strategic Investment Opportunities LLC v. Lee Enterprises,*[86] the board had rejected a slate of board members for not adhering to the contractual requirements, so the board action was reviewed to ensure that the rejections were equitable.[87] The court required the defendants to "identify the proper corporate objectives served by their actions" and "justify their actions as reasonable in relation to those objectives."[88] Disregarding the specificity of using *Unocal* or *Blasius*, the court focused on equity and only noted the investigation would use 'special

[84] *Id.* at 671 (citing *Pell*, 135 A.3d at 787–88) ("[The move to a compelling standard] is also a reminder that in the context of voting rights, there is one justification that the directors cannot use to justify their actions: they cannot argue that without their intervention, the stockholders would vote erroneously out of ignorance or mistaken belief about what course of action is in their own interests.")
[85] *Id.* (citing *Pell*, 135 A.3d at 769, 790).
[86] No. CV 2021-1089-LWW, 2022 WL 453607 (Del. Ch. Feb. 14, 2022).
[87] *Id.* (citing *Strategic Inv.*, 2022 WL 453607 at *14).
[88] *Id.* (quoting *Strategic Inv.,* 2022 WL 453607 at *16) (stressing good faith under Blasius but justifying an action with a reasonable response akin to *Unocal*).

sensitivity' where director's actions may impact stockholder voting.[89] The court determined that the board had not acted inequitably, because the board had a legitimate interest that their action pursued in good faith.[90]

IV. REASONING AND HOLDING

The Supreme Court held that the court did not err in its interpretation of *Schnell* and its factual findings were not clearly wrong.[91] *Schnell* remains valid to review board actions that disenfranchise shareholders, but the court noted *Schnell*'s limited application to where board's actions were selfishly motivated.[92] As *Schnell* was limited, the court turned to *Blasius* and *Unocal.* The Supreme Court agreed with the Court of Chancery's interpretation that the courts have folded *Schnell* and *Blasius* into *Unocal* to

[89] *Id.* (quoting *Strategic Inv.,* 2022 WL 453607 at *15).
[90] *Coster*, 300 A.3d at 672 (citing *Strategic Inv.,* 2022 WL 453607 at *17–18) (finding that the action of consistent enforcement of bylaws was a reasonable in relation to the goal of protecting the power of the bylaws).
[91] *Coster*, 300 A.3d at 659.
[92] *Id.* at 667. Schnell is used to stop the actions where the management is attempting to perpetuate itself in office, so if the justification for the action is not such, then other standards of review may be applied. *See Schnell*, 285 A.2d at 439.

"enhanced judicial scrutiny of board action that interferes with a corporate election or a stockholder's voting rights in contests for control."[93]

A. NEW STANDARD

The Supreme Court put forward a revised review standard for when a stockholder challenges board action that interferes with the exercise of shareholder voting in a contest for corporate control.[94] The court first should review the threat to see if it implicates "an important corporate interest or to the achievement of a significant corporate benefit."[95] Additionally, "[t]he threat must be real and not pretextual, and the board's motivations must be proper and not selfish or disloyal."[96] Second, the court should consider if

[93] *Coster*, 300 A.3d at 672.
[94] *Id.* The Supreme Court articulated the elements of a unified standard which required the board to prove that (1) the board perceived a threat to corporate policy or effectiveness from a real, not pretextual, threat with the boards motivations being proper and not selfish or disloyal and (2) the response to threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder's franchise. *Id.* at 672–73. The court noted the review is "situationally specific." *Id.* at 672.
[95] *Coster*, 300 A.3d at 672 (quoting Phillips v. Insituform of N. Am., Inc., No. CIV.A. 9173, 1987 WL 16285, at *7 (Del. Ch. Aug. 27, 1987).
[96] *Coster*, 300 A.3d at 672. The threat cannot arise from the board's fear of the shareholders decision-making. *Id.* ("[T]he threat cannot be justified on the grounds that the board knows what is in the best interests of the stockholders.").

the "response to the threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder franchise."[97] For the second element, the response must be tailored[98] to the threat and cannot unduly influence the stockholder's vote.[99] However, the court noted that the review is case specific.[100]

B. JUSTIFICATION FOR ONLY *UNOCAL*

The court emphasized that the more sensitive *Unocal* review, that subsumed parts of *Blasius*, was a reasonable interpretation of the review standard for this case.[101] As seen in a similar dispute related to a custodial action in *Phillips v. Insituform of North America, Inc.*, the Chancery Court

[97] *Coster*, 300 A.3d at 672–73.
[98] *Id.* at 673 ("To guard against unwarranted interference with corporate elections or stockholder votes in contests for corporate control, a board that is properly motivated and has identified a legitimate threat must tailor its response to only what is necessary to counter the threat.").
[99] *Id.* ("The board's response to the threat cannot deprive the stockholders of a vote or coerce the stockholders to vote a particular way.").
[100] *Id.* at 672.
[101] *Id.* at 673.

considered if a dilutive stock issuance designed to stop a consent solicitation was valid.[102] There, the court invalidated the board's interference by restricting the voting of the issued shares and ordering the board to act in the interest of all stockholders.[103] To reach such a ruling, the court identified no threat to the corporation and no justification for depriving shareholders of voting rights in light of the threat generated by the shareholder's vote.[104]

C. APPLICATION

The Supreme Court then considered if the board acted for selfish reasons or in bad faith. The first decision by the court highlighted the facts that could have led to the conclusion that the board acted selfishly, but the Chancery Court supplemented the fact with more information that indicated

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[102] *Id.* (citing *Phillips*, 1987 WL 16285, at *1, *6). The actions of the board were intended to wrestle control over from Class B stock in receivership by issuing, at a discount, shares to the current chairman and CEO, to stop the removal of board members. *Phillips*, 1987 WL 16285, at *2, *4.
[103] *Id.* (citing *Phillips*, 1987 WL 16285, at *11–12).
[104] *Id.* at *673 (citing *Phillips*, 1987 WL 16285, at *8). The court blurred the lines between "justified" and "reasonable in relation to the threat posed." *Id.* (quoting *Phillips*, 1987 WL 16285, at *7).

that the plaintiff's request was broader and potentially more damaging than originally understood.[105] The Court of Chancery considered these fact and determined that, on balance, the UIP board was "properly motivated in responding to the threat"[106] and acted in good faith.[107]

UIP's board was also found to have "responded reasonably and proportionally to the threat posed when it approved the Stock Sale and mooted the Custodial Action."[108] The court determined that the Stock Sale may result in an "existential crisis,"[109] so the response could have been

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105 *Id.* at *674 (mentioning new facts that contribute to the understanding that Costa did not attempt to first negotiate, the relief sought through a custodian was not particularized to stop "stockholder deadlock," termination rights were implicated which threatened the company, and the sale proposed by the UIP board was not for self-enrichment and would protect the company from the shareholder and the custodial action).
106 *Coster*, 300 A.3d at 675.
107 *Id.* (considering the payment to retain an employee, the implementation of the Wout succession plan, and avoidance of breaching contracts). The court even found that the stock was issued to Bonnell at a fair price. *Id.* (citing *Coster II*, at *10).
108 *Id.*
109 While not directly addressed by the court, survival, or at least avoidance of catastrophe, can be understood to be an important corporate interest. *See Coster*, 300 A.3d at 672.

drastic.[110] The response was deemed to be "appropriately tailored," because it stopped the Custodial Action and simultaneously retained Bonnell.[111]

The Court determined that the response to the threat was not "preclusive or coercive."[112] The court considered that Coster could even be the swing vote, so this would be a more effective way of having control as Bonnell and Schwat were not bound to vote together.[113] The court noted that Coster's potential ability to "control…UIP negates the preclusive impact of the Stock Sale."[114] So, the actions by the board were approved under the sensitive *Unocal* review.[115]

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110 *Id.* (citing *Coster II*, at *11–12). The court noted more aggressive options could have been pursued to resolve the crisis. *Id.* (citing *Coster II*, at *13).
111 *Id.* (citing *Coster II*, at *11–12).
112 *Coster*, 300 A.3d at 675.
113 *Id.*
114 *Id.*
115 The other arguments raised by Coster against the new fact findings were also dismissed since the factual findings were not "clearly wrong." *Id.* Of note, the court dismissed the argument that the Stock Sale was not needed after the court declined to appoint the custodian. *Id.* The court only mentioned that the sale fulfilled a prior commitment to Bonnell and then moved on since Bonnell was "essential." *Id.* (communicating that the loss of a key person was considered in the proportionality test). The wishes of the past

V. CONCLUSION

The Supreme Court held that the court did not err in its interpretation of *Schnell* and its factual findings were not clearly wrong.[116] The Court also affirmed use of a unified review that required the board to prove that (1) the board perceived a threat to corporate policy or effectiveness from a real, not pretextual, threat with the boards motivations being proper and not selfish or disloyal and (2) the response to threat was reasonable in relation to the threat posed and was not preclusive or coercive to the stockholder's franchise.[117]

The court's adoption of the sensitive *Unocal* review removes the need for shareholders to apply the *Blasius* review separately. Under *Unocal*, there must be a reasonable ground to justify the action of the board, and by

shareholder to sell shares to another person was included as "one [fact] in a constellation of other more compelling justifications for the Stock Sale." *Id.*

[116] *Coster*, 300 A.3d at 659.

[117] *Id.* at 672–73.

including the *Blasius* review, the courts may not claim that shareholders voting contrary to the board as the only justification, as that reason is not compelling. The justification is some other action outside of the voting against the board, like the "existential crisis."[118] If the threat is something other than contrary stockholder voting, the sensitive *Unocal* test still requires that the response to the threat not be "preclusive or coercive" regarding the impact to shareholder franchise.[119]

VI. APPLICATION

Practitioner should first consider the new sensitive *Unocal* review standard and no longer look to *Blasius* when the board acts to disenfranchise the shareholders in a contested director election. Practically, practitioners should then consider two main points when a board acts to interfere with

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[118] *Id.* at 675 (citing *Coster II*, at *11–12).
[119] *Id.* at 668 (citing *Chesapeake Corp.*, 771 A.2d at 323).

shareholder voting rights: (1) is there a clearly articulable and justifiable reason for the actions of the board outside of the franchise issue and (2) what is preclusive?

A. REASON

The court made sure to articulate that any review under the new test is case specific.[120] The court will review the facts to make an equitable determination after considering the potential harm that the board is avoiding. Practitioners defending the board's action should prepare for an uphill battle when the court weighs factors, because the court desired to weigh additional factors on top of the threat of an "existential crisis." Also, the responsibility of the board to keep the business in operation, does not seem to be enough motivation for the board's action to determine the actions were done in good

[120] *Coster*, 300 A.3d at 672.

faith.[121] The additional motivations, e.g., rewarding of employees, of UIP seemed to pivot the discussion of motivations away from purely economic considerations, like the default, which may not inherently indicate unselfish motives. Therefore, practitioners should highlight positive, good faith, examples of advancement of the company's interests to establish proper motivation.[122] Practitioners will have to wait to see how this new review standard is applied to see what facts the courts will favor.

B. PRECLUSIVE

Practitioners representing shareholders should look out for dilutive stock sales, because the court appeared to minimize its impact on shareholder franchise. The court argued Coster was still able to vote with other

[121] *See generally* Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009) (considering good faith pursuit of enhanced long term share value as a legitimate corporate concern).
[122] Practitioners should also note that the court did not place a heavy weight on the other options available, such as trying to narrow the scope of the custodian's authority.

shareholders.[123] Therefore, dilutive stock sales may not be deemed "preclusive," because shareholders will still have the possibility of forming a coalition with the other shareholder. Until further guidance is issued on what is "preclusive," practitioners should rely on other elements to negate board action under the *UIP v. Coster*'s new review standard.

[123] *Coster*, 300 A.3d at 675.