

PROTECTING PUBLIC SHAREHOLDERS: THE CASE OF GOOGLE’S RECAPITALIZATION

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The recent mid-stream recapitalization of Google introducing a class of non-voting shares raises certain questions about controlling shareholder opportunism and the adequacy of our current system in protecting the rights of public shareholders. This Note argues that the settlement of the class action suit on behalf of Google’s public shareholders did not do enough to address the harm they suffered, and examines options for how the law in Delaware may be adapted to provide adequate protection for public shareholders.

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I. INTRODUCTION

On October 28, 2013, then-Chancellor Leo Strine approved a settlement in the shareholder class action over Google’s creation of non-voting Class C shares.¹ Lawyers for the plaintiffs were awarded \$8.5 million in attorney’s fees plus \$791,652.06 in litigation expenses,² and shareholders received this bill in return for the strengthening of certain transfer restrictions of Class C shares by the founders and a “true-up” agreement by Google.³ The settlement most likely failed to truly address the equities of the recapitalization, which amounted to an extension of the founders’ control and a corresponding loss of future voting power by the public shareholders—a loss that could easily figure in the billions. However, it is likely that Chancellor Strine felt constrained in his approval of the settlement by existing precedents in Delaware law, most notably the case of *Williams v. Geier*.

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¹ Settlement Hearing and Rulings of the Court, *In re Google Inc. Class C S’holder Litig.*, No. 7469-CS, 2013 WL 6735045 (Del. Ch. Oct. 28, 2013).

² Order and Final Judgment, *In re Google Inc. Class C S’holder Litig.*, No. 7469-CS, 2013 WL 5949928 at *5 (Del. Ch. Nov. 6, 2013).

³ Google Inc., Current Report (Form 8-K), Ex. 99.1 Stipulation of Compromise and Settlement, (Oct. 30, 2013).

The results of *In re Google Inc.* demonstrate the limits of Delaware corporate law in policing the abusive behavior of controlling shareholders via the principle of fiduciary duty. After examining this specific instance of controlling shareholder opportunism, this Note analyzes more generally the possibilities for overruling or distinguishing *Geier*—including the notion that certain types of transactions could be prevented via the implied covenant of good faith and fair dealing instead. This notion builds on the fact that the law sees the corporate charter as a contract between shareholders.

Finding a way to deal equitably with situations such as that of Google is an issue of growing importance. The use of dual-class capital structures has become increasingly popular as large technology companies have gone public, including in the cases of Facebook, LinkedIn, Yelp, Groupon, and Zynga.⁴ Both NASDAQ and the NYSE allow dual-class companies to list, and although they prohibit dual-class recapitalizations, this does not extend to non-voting shares.⁵ It may further be a matter that falls on the courts to address, since exchanges may be engaged in a “race to the bottom” due to competitive pressures,⁶ and the Securities & Exchange Commission (SEC) has been unable to meaningfully advance regulation in this area.

For instance, in the 1980s, dual-class company listings were hotly debated.⁷ Responding to competition from the more liberal rules of NASDAQ, the NYSE attempted to reverse its longstanding policy against the listing of dual-class companies.⁸ The SEC responded by proposing Rule 19c-4 to prevent dual-class recapitalizations—a rule subsequently thrown out by the Court of Appeals for the District of Columbia.⁹ It now appears that the issue may again become the subject of debate. On August 13, 2012, CalPERS, one of the largest institutional investors in the United States, publicly announced

⁴ See, e.g., Stephen I. Glover & Aarthi S. Thamodaran, *Debating the Pros and Cons of Dual Class Capital Structures*, INSIGHTS: CORP. & SEC. L. ADVISOR, Mar. 2013, at 1.

⁵ NYSE, LISTED COMPANY MANUAL §313.00 Voting Rights, (2015) (noting that the rule technically provides that a company cannot create a new class of securities that votes at a higher rate than an existing class does).

⁶ See, e.g., Jeffery N. Gordon, *Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 70 (1988).

⁷ See Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687 (1986); George W. Dent, Jr., *Dual Class Capitalization: A Reply to Professor Seligman*, 54 GEO. WASH. L. REV. 725 (1986); Stephen M. Bainbridge, *The Short Life and Resurrection of SEC Rule 19C-4*, 69 WASH. U. L. REV. 565 (1991); Daniel R. Fischel, *Organized Exchanges and the Regulation of Dual Class Common Stock*, 54 U. CHI. L. REV. 119 (1987); Gordon, *supra* note 6; Robert Muth, *One Share, One Vote: The SEC's Duty to Protect Investors and Ensure Fair Administration Among the Securities Exchanges*, 44 WASH. & LEE L. REV. 985 (1987); Timothy K. O'Neil, *Rule 19C-4: The SEC Goes Too Far in Adopting a One Share, One Vote Rule*, 83 NW. U. L. REV. 1057 (1989).

⁸ See, e.g., Seligman, *supra* note 7, at 688.

⁹ See *Bus. Roundtable v. SEC.*, 905 F.2d 406, 407 (D.C. Cir. 1990) (noting that Rule 19c-4 barred “national securities exchanges and national securities associations, together known as self-regulatory organizations (SROs), from listing stock of a corporation that takes any corporate action ‘with the effect of nullifying, restricting or disparately reducing the per share voting rights of [existing common stockholders]’”).

that it was considering a boycott of dual-class IPOs.¹⁰ On March 27, 2014, the Council of Institutional Investors, a corporate governance advocacy group comprised of “pension funds, other employee benefit funds, endowments and foundations with combined assets that exceed \$3 trillion,”¹¹ asked NASDAQ and the NYSE to adopt one-share, one-vote principles.¹² It is against this backdrop that this Note turns to the case of Google.

II. THE FACTS OF GOOGLE'S RECAPITALIZATION

Before the issuance of the disputed Class C shares, which began trading on April 3, 2014,¹³ Google had a dual-class capital structure whereby Class A shareholders held one vote per share and Class B shareholders held ten votes per share, with both classes of shareholders having equal entitlement to economic interests.¹⁴ Class B shares were held overwhelmingly by Google's founders in order to retain control of the company: around the time of the litigation, Larry Page and Sergey Brin had combined voting power of 56.1% with over 49 million Class B shares (and a negligible amount of Class A shares),¹⁵ which represented only about a 15% economic interest in the company.¹⁶

Under Google's corporate charter, Class B shares automatically convert into Class A shares upon transfer, with minor exceptions, resulting in shareholders losing their additional votes.¹⁷ Accordingly, as Page and Brin sold their shares for liquidity, and as Google issued more Class A shares to fund acquisitions and employee compensation, the relative voting power of the Class A shareholders would have increased until the company ultimately

¹⁰ Global Governance Program Update, CalPERS (Aug. 13, 2012) at 7, available at <http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/invest/201208/item07b-00.pdf> (declaring that CalPERS was developing an IPO governance strategic plan, which might include “removing dual class, classified, or plurality voting structures”).

¹¹ *About Us*, THE COUNCIL OF INSTITUTIONAL INVESTORS, http://www.cii.org/about_us (last visited Nov. 28, 2014).

¹² See Letter from The Council of Institutional Investors to NYSE (Mar. 27, 2014), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_27_14_CII_letter_to_NYSE_one_share_one_vote.pdf; Letter from The Council of Institutional Investors to NASDAQ (Mar. 27, 2014), available at http://www.cii.org/files/issues_and_advocacy/correspondence/2014/03_27_14_CII_letter_to_nasdaq_one_share_one_vote.pdf.

¹³ See, e.g., Google Inc., Quarterly Report (Form 10-Q), (Apr. 24, 2014).

¹⁴ Google Inc., Annual Report (Form 10-K), Third Amended and Restated Certificate of Incorporation art. 4 §2(a)(ii)-(iii), (b) (Ex. 3.01) (Feb. 11, 2012).

¹⁵ Plaintiffs' Opening Pre-Trial Brief at 7–8, *In re Google Inc. Class C S'holder Litig.*, No. 7469-CS, 2013 WL 2728583 (Del. Ch. June 10, 2013); see also Google Inc., Definitive Proxy Statement (Form DEF 14A), (Apr. 24, 2013) (showing a total of approximately 24.9 and 24.4 million Class B shares outstanding for Larry Page and Sergey Brin, respectively, on April 8, 2013).

¹⁶ Settlement Hearing, *supra* note 1; see also Definitive Proxy Statement, *supra* note 15, at 13 (showing a total of approximately 271 million Class A shares and 61 million Class B shares outstanding as of April 8, 2013).

¹⁷ See Third Amended and Restated Certificate of Incorporation, *supra* note 14, at §2(f)(iii) (providing that Class B shares would automatically convert to Class A shares upon a “Transfer” as defined).

became controlled by the public shareholders. By contrast, Class C shareholders participate equally in the economic interests but without voting power. This means that Google can issue Class C shares in acquisitions and for employee compensation without diluting the founders' control. Furthermore, because Class C shares were introduced into the market via a pro rata dividend to Class A and B shareholders,¹⁸ the founders could afterwards sell the Class C shares they received without losing voting power.

As the Delaware Court of Chancery noted, the midstream recapitalization was most likely "proposed by these founders in order to lengthen the period of time over which they could exercise voting control of [the] company."¹⁹ Rather than disputing this underlying purpose, defendants, including Google and certain directors, argued instead that it was a positive development for the company:

[T]he dual-class structure [helped] the Company 'follow the long-term, innovative approach' by preserving the Founders' voting control and thus insulating management against short-term performance pressures Google needed to find a means to safeguard the functioning of the dual-class structure, which had provided the Company with such significant value.²⁰

However, unless one subscribes to this thesis, the creation of Class C shares had no upside for public shareholders, only potential downsides. On June 21, 2012, an overwhelming 85.3% of Class A shareholders voted against the proposal at the annual shareholders' meeting, demonstrating that the recapitalization would have failed a majority-of-the-minority vote (although of course the vote passed given the founders' support).²¹

Prior to the vote, and in recognition of potential conflicts, Google set up a special committee of independent directors to negotiate with the founders. The committee negotiated certain protections for the Class A shareholders, including: (1) a Transfer Restriction Agreement (TRA), which contained a Stapling Agreement that forced the founders to sell an equal number of Class B shares when selling Class C shares, and (2) an Equal Treatment Amendment (ETA) to be included in Google's charter, requiring all classes of stock to receive the same amount of consideration in a change of control event.²² Pursuant to these terms, the special committee unanimously recom-

¹⁸ *Information on Our New Class of Shares*, GOOGLE INC., <https://investor.google.com/financial/class-c.html> (last visited Nov. 23, 2014).

¹⁹ Settlement Hearing, *supra* note 1.

²⁰ Opening Pretrial Brief of Google Inc. and Independent Director Defendants at 14, 16, *In re Google Inc. Class C S'holder Litig.*, No. 7469-CS, 2013 WL 2728591 (Del. Ch. June 10, 2013).

²¹ See Google Inc., Current Report (Form 8-K), (June 21, 2012).

²² Plaintiffs' Opening Pre-Trial Brief, *supra* note 15, at 4, 6; Opening Pretrial Brief of Google Inc. and Independent Director Defendants, *supra* note 20, at 4.

mended the recapitalization, and Google's board of directors unanimously decided on April 11, 2012, to recommend it to the shareholders.²³

Regardless, it was clear that the creation of Class C shares, as originally conceived, was flawed in many respects from the perspective of Class A shareholders. First, the ETA may have been more of a theoretical benefit rather than a real benefit, given that Google's huge market capitalization and the founders' intent to retain control make a takeover or tender offer unlikely.²⁴ Second, the TRA not only would have fallen away if the founder's voting power dropped below thirty-four percent, but it was also subject to a waiver or amendment by a majority vote of the independent directors.²⁵ Lastly, there was a very real risk that the Class C shares could trade at a significant discount to Class A shares. If so, the use of Class C shares for acquisitions and employee compensation could have severely diluted the economic interests of Class A shareholders—a dilution that depended on the size of the discount, since otherwise Google would have used Class A shares for these same purposes.²⁶

The ultimate settlement, as approved by Chancellor Strine, addressed some of these worries. First, the TRA was amended such that it could be waived or modified only if (1) recommended by a committee of independent directors, (2) approved unanimously by the board, and (3) made public with a delay of thirty days to allow a judicial challenge, at which point Google and its board would be forced to accept an entire fairness standard of review.²⁷ Second, if an acquisition required Google to issue more than ten million Class C shares, then its independent directors would have to separately consider the effects of such a transaction on its Class A shareholders.²⁸ Finally, Google agreed to a "true-up" arrangement under which it would pay Class C shareholders an amount based on the discount of their shares relative to Class A shares,²⁹ in order to ensure that Class C shares would not trade at a significant discount.

²³ Opening Pretrial Brief of Google Inc. and Independent Director Defendants, *supra* note 20, at 23.

²⁴ Plaintiffs' Opening Pre-Trial Brief, *supra* note 15, at 28, 51.

²⁵ *Id.* at 4.

²⁶ For example, if Class A shares trade at \$500 and Class C shares trade at \$400, Google would have to use 1.25 times more Class C shares for the same acquisition or employee compensation arrangement. Since these Class C shares have equal economic interest to the Class A shares, such a transaction would dilute the economic interests of Class A shares relative to if Class A shares had been used instead.

²⁷ Google Inc., Current Report (Form 8-K), Transfer Restriction Agreement §11(c) (Ex. 4.01, 4.02, 4.03) (Mar. 25, 2014); Stipulation of Compromise and Settlement, *supra* note 3, §3.1(b).

²⁸ Stipulation of Compromise and Settlement, *supra* note 3, §3.1(c).

²⁹ Under the true-up, Google will pay out annual consideration to owners of Class C shares, determined as a percentage of the discount at which their stock trades relative to voting Class A shares. The amount paid to Class C shareholders is as follows:

III. THE HARM: WHAT ARE VOTING RIGHTS WORTH?

Did the settlement truly address the equities of the case? To address such a question, it is necessary to understand precisely what the Class A shareholders lost. The clearest harm was that the economic interests of public shareholders would be diluted by the use of Class C shares for acquisitions and employee compensation to the extent that such shares traded at a discount to their Class A counterparts. The true-up agreement may have prevented such an outcome. However, as Chancellor Strine described, the true-up provisions were “cost mitigation factors . . . absent the creation of the C [shares], you wouldn’t need anything like this.”³⁰ Not only does the true-up equally benefit the founders, who could thereby sell their Class C shares at a higher price, but also the true-up was designed specifically for the purpose of mitigating these potentially dilutive consequences of the recapitalization.

On the other hand, the fundamental loss to the public shareholders should be determined by examining what Google’s controlling shareholders received at the public shareholders’ expense: voting power. By extending the period of control of Google’s founders, the creation of Class C shares delays Google’s eventual conversion into a publicly controlled company. The TRA attempts to address this issue by forcing Google’s founders to sell their super-voting shares along with their non-voting shares, preventing them from obtaining desired liquidity without a corresponding decrease in their voting power. However, the TRA is a far-from-perfect restriction.

First, the TRA falls away if the founders’ total voting power drops below 34%.³¹ Although Google’s financial advisors determined that below this level the founders would not have control of the company,³² in reality the question of control is much more ambiguous. In *In re Crimson Exploration, Inc.*, Vice Chancellor Donald Parsons surveyed past Delaware decisions on whether a significant blockholder with less than 50% voting power was a controlling shareholder.³³ Not only has control been found at levels as low as

% of Discount	% of Discount Paid in Consideration
Less than 1%	0%
Between 1% and 2%	20%
Between 2% and 3%	40%
Between 3% and 4%	60%
Between 4% and 5%	80%
At 5%	100%
More than 5%	Payment capped at 5%

The discount is measured by the volume-weighted average for that year. The payment can be made in cash, Class A shares, or ironically, more Class C shares. Stipulation of Compromise and Settlement, *supra* note 3, §3.1(a).

³⁰ Settlement Hearing, *supra* note 1.

³¹ Transfer Restriction Agreement, *supra* note 27, §10(b).

³² Settlement Hearing, *supra* note 1.

³³ See *In re Crimson Exploration Inc. S’holder Litig.*, 2014 WL 5449419, at *10 (Del. Ch. Oct. 24, 2014).

35% voting power,³⁴ but the focal question is whether large blockholders “actually control the board’s decisions about the challenged transaction.”³⁵ Arguably, given Page and Brin’s status as founders, their close relationship with other significant shareholders such as CEO Eric Schmidt, and the lack of other significant blockholders, they may be able to exert *de facto* control while benefiting from the liquidity of Class C shares at voting power even below 34%.

Additionally, once the founders’ voting power falls below 34%, the TRA terminates and does not return even if the founders then purchase additional voting shares to rebuild their voting power. Even though counsel for the plaintiffs (paradoxically, not defendants) argued that the founders “wouldn’t do it to game the system,”³⁶ it would be naïve to ignore such a possibility. Page and Brin could sell their Class B shares until their combined voting power fell below 34%, at which point they could freely sell their Class C shares and rebuild some of their voting power by purchasing Class A shares—a significant loophole.

Finally, the TRA does nothing to address the fact that without the recapitalization, the founders faced dilution from the issuance of Class A shares in acquisitions and employee compensation arrangements. This was likely the most important source of dilution since the founders had other avenues for liquidity—namely, they were permitted to pledge their Class B shares “pursuant to a bona fide loan or indebtedness transaction.”³⁷ Although the settlement included a provision for consideration by independent directors of Class A shareholder interests in an acquisition where more than ten million Class C shares are issued,³⁸ such an acquisition would have to cross a threshold of over five billion dollars at recent stock prices.³⁹ Even then, it could easily be avoided by mixing in cash consideration. Thus, it would appear that the element most directly contributing to the loss of future voting power by the public shareholders—the fact that the creation of the Class C shares allowed Google to acquire companies and compensate employees without diluting the founders’ control—went largely unaddressed by the settlement.

What, if anything, was the magnitude of this harm? Intuitively, there must be some value to voting rights. For instance, Delaware law allows con-

³⁴ See *In re Cysive, Inc. S’holders Litig.*, 836 A.2d 531, 535 (Del. Ch. 2003). Note that the blockholder also held options granting another 0.5% to 1%, and could have cobbled together additional votes from close managerial subordinates and family subordinates such that his actual voting power could have been around 40%.

³⁵ *In re Crimson*, 2014 WL at *12.

³⁶ Settlement Hearing, *supra* note 1.

³⁷ Third Amended and Restated Certificate of Incorporation, *supra* note 14, at §2(f)(i)(4)(c).

³⁸ Stipulation of Compromise and Settlement, *supra* note 3, §3.1(c).

³⁹ At the current Class C share closing price of \$537.50. YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=GOOG&a=10&b=21&c=2014&d=10&e=22&f=2014&g=d> (last visited Nov. 23, 2014).

trolling shareholders to receive a “control premium” in a sale of their shares.⁴⁰ However, a survey of control premiums would be inadequate for assessing the harm to Google’s public shareholders. This is because a distinction should be made between “inside” value to controlling shareholders who can extract private benefits, and “outside” value to public shareholders, to whom voting rights are valuable only in those instances where they carry a deciding vote.⁴¹ What Class A shareholders lost could be more properly characterized as a loss in future outside value, since they were not a single controlling block.

Rather than examining control premiums, measuring the premium at which super-voting shares trade is an alternative approach that captures this outside value. For instance, a study of various U.S. publicly traded companies from 1940 to 1978 found that where a company had voting and non-voting stock, or voting and super-voting stock, the class of shares with greater voting power traded at a premium—a market indication of the value of voting rights.⁴² Under this approach, GOOGL, the Class A shares, have traded at an average premium of \$9.23 or 1.65% above GOOG, the Class C shares, since their introduction on April 3, 2014.⁴³ In terms of market capitalization, that premium represents a value of about \$2.6 billion.⁴⁴

This \$2.6 billion figure gives the reader a sense of the value of voting rights—shareholders are collectively willing to pay \$2.6 billion more to own Class A shares with votes than to own Class C shares with no votes, despite the fact that their votes may be largely meaningless due to the presence of controlling shareholders. This behavior is especially striking given the arbitrage opportunity involved in owning Class C shares: if the value of a share were summarized strictly as the present value of its future income stream, Class C shares should be worth *more* than Class A shares. Class C shares receive not only an equal amount of dividends, but they also receive an additional income stream due to the true-up agreement. Since Class C shares

⁴⁰ See, e.g., Abraham v. Emerson Radio Corp., 901 A.2d 751, 761–62 (Del. Ch. 2006) (stating that “control premium envy is not a cognizable claim for a minority stockholder under Delaware law”). In examining acquisitions of dual class companies, Professors DeAngelo and DeAngelo found that in acquisitions with an explicit per share premium for super-voting shares, that premium ranged between 83% and 200%. Harry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. FIN. ECON. 33, 57, 60 (1985).

⁴¹ See, e.g., Shmuel Hauser & Beni Lauterbach, *The Value of Voting Rights to Majority Shareholders: Evidence From Dual-Class Stock Unifications*, 17 REV. FIN. STUD. 1167, 1168 (2004).

⁴² See Ronald C. Lease et al., *The Market Value of Control in Publicly Traded Corporations*, 11 J. FIN. ECON. 439, 466 (1983).

⁴³ YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=GOOG&a=10&b=21&c=2014&d=10&e=22&f=2014&g=d> and <http://finance.yahoo.com/q/hp?s=GOOGL&a=03&b=4&c=2014&d=10&e=25&f=2014&g=d> (last visited Nov. 26, 2014) (based on data from April 4, 2014 to November 25, 2014—the differential was calculated for each day based on closing price, then averaged across all days to arrive at the 1.63% figure).

⁴⁴ Google Inc., Quarterly Report (Form 10-Q), (Oct. 23, 2014) (using 284,816,184 shares outstanding as of October 16, 2014).

traded at a discount of over 1% in 2014, their holders can expect approximately \$530 million more than Class A shareholders in dividends for that year.⁴⁵

These calculations highlight the fact that voting power *does* have a meaningful economic value. In fact, it appears that shareholders are willing to pay \$2.6 billion more for voting rights despite the fact that Class C shares are worth more in pure financial terms, and despite the fact that such votes may be largely useless given the presence of controlling shareholders. However, a measurement of trading premiums cannot directly measure the value transferred from the Class A shares to the founders' Class B shares because the Class B shares do not trade—and cannot trade, since they convert to Class A shares upon transfer.

One potential solution to this problem would be to try to predict the price at which the parties would have transferred the voting rights if they had been forced to negotiate. In a study of 84 dual-stock firms listed on the Tel Aviv Stock Exchange that underwent a share unification to a one-share, one-vote capital structure—economically equivalent to “sales of voting rights by majority shareholders to the rest of the shareholders”—Professors Hauser and Lauterbach found that the average value of 1% of the voting power was 0.09% of the firm's equity value.⁴⁶ Hauser and Lauterbach further isolated for 46 unifications involving some compensation, because firms could unify without compensation for a variety of reasons.⁴⁷ In this subset, the average value of 1% of the voting power was 0.17% of the firm's equity value.⁴⁸ Since this number represents an intra-firm negotiated price for voting rights, it could be a useful guide to thinking about Google's recapitalization: how much would Google's founders have had to pay for extending their period of control, had they been forced to negotiate with public shareholders? Google's market capitalization when it first announced the creation of Class C shares on April 12, 2012, was \$169 billion,⁴⁹ which means that 0.17% would amount to about \$288 million for each 1% of voting power.

Unfortunately, although these figures again hint at the magnitude of the loss that public shareholders suffered, it would be difficult to apply these

⁴⁵ See *supra* notes 29, 43 & 44 (twenty percent of the volume-weighted average discount of approximately \$2.65 billion as of November 25, 2014, as provided for in the true-up provisions).

⁴⁶ Hauser & Lauterbach, *supra* note 41, at 1171, 1173.

⁴⁷ *Id.* at 1174 (stating that “true transactions of voting power for additional equity took place only in unifications with compensation”).

⁴⁸ See *id.*

⁴⁹ See YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=GOOGL&a=03&b=12&c=2012&d=03&e=12&f=2012&g=d> (last visited Nov. 26, 2014) (providing the closing price as of April 12, 2012); Google Inc., Quarterly Report (Form 10-Q), (Apr. 25, 2012) (providing the number of shares outstanding). The calculation uses the closing price of \$651.01, and 259,960,162 shares outstanding. Note that Yahoo! Finance was used instead of Google Finance, because Google automatically adjusts the prices for stock splits and reverse stock splits, meaning that the figure it provides is not the actual price at which shares traded on a given day. This is relevant because the issuance of Class C shares had the effect of a stock split.

figures to Google because the extension of the founders' control is indeterminate in both quantity and duration. Since Google's recapitalization prevented a future transfer of control, a proper valuation would require discounting the future value of voting rights to their present value; however, the magnitude and timing of the dilution that *would* have occurred is not observable. Furthermore, the extent to which the experience of Tel Aviv Stock Exchange companies could be extrapolated in this manner may be limited given differences in socioeconomic and legal contexts.

For these reasons, a final simple yet powerful approach to evaluating the harm to Google's public shareholders would be to evaluate how they themselves valued the future voting rights they lost. The table below shows that in the week following the announcement of the recapitalization on April 12, 2012, Google's Class A shares had declined in value by 7.9%. By comparison, the NASDAQ Composite, which tracks the vast majority of securities on NASDAQ (where Google is listed) declined by 1.6% in the same period. Conversely, in the week following the announcement that the settlement had been approved by the Delaware Court of Chancery on October 28, 2013, Google's Class A Shares had increased in price by 1.1%. By comparison, the NASDAQ Composite remained steady in that week.

TABLE 1. SUMMARY OF GOOGLE STOCK MOVEMENTS⁵⁰

Date	Google		NASDAQ Composite
	Price	Market Cap	Price
April 12, 2012	\$651.01	\$169.2 bn	\$3,055.55
Week Later	\$599.30	\$155.8 bn	\$3,007.56
% Change	-7.9%		-1.6%
Beta-Adjusted	\$608.79	\$158.3 bn	-
Beta-Adjusted Loss		\$10.9 bn	-

⁵⁰ YAHOO! FINANCE, <http://finance.yahoo.com/q/hp?s=GOOGL&a=03&b=12&c=2007&d=03&e=12&f=2012&g=d>, <http://finance.yahoo.com/q/hp?s=%5EIXIC&a=03&b=12&c=2007&d=03&e=12&f=2012&g=d>, <http://finance.yahoo.com/q/hp?s=GOOGL&a=09&b=28&c=2008&d=09&e=28&f=2013&g=d>, and <http://finance.yahoo.com/q/hp?s=%5EIXIC&a=09&b=28&c=2008&d=09&e=28&f=2013&g=d> (last accessed Nov. 26, 2014). All prices reflect closing prices for the day. Market capitalization was calculated using 259,960,162 shares outstanding and 276,721,703 shares outstanding, respectively. See Google Inc., Quarterly Report (Form 10-Q), (Apr. 25, 2012); Google Inc., Quarterly Report (Form 10-Q), (Oct. 24, 2013). Note that a one-week time frame was selected to allow the market adequate time to adjust to the news.

TABLE 1 (CONT'D)

October 28, 2013	\$1,015.02	\$280.9 bn	\$3,940.13
Week Later	\$1,027.14	\$283.9 bn	\$3,936.59
% Change	1.1%		-0.1%
Beta-Adjusted	\$1,026.90	\$284.2 bn	-
Beta-Adjusted Gain	\$3.3 bn		-

After eliminating market-based swings by using an estimate of Google's beta,⁵¹ we can see that the market priced the original loss at \$10.9 billion. By contrast, the settlement returned only \$3.3 billion of value—after all, counsel for the defendants described it as a “therapeutic settlement.”⁵² Consequently, the overall loss for Class A shareholders amounted to \$7.7 billion—not an insignificant sum.

This analysis illustrates that the settlement in Google's recapitalization may not have adequately addressed the equities of the case. Although the market reaction to the settlement suggests that it did create value, by one estimate Google's public shareholders nevertheless lost \$7.7 billion due to the recapitalization. Even under other approaches, it is evident from the above discussion that the figure would almost certainly number in the billions. The sheer magnitude of what is at stake should give courts pause as they examine situations like that of Google.

IV. CONSIDERATIONS OF EFFICIENCY

Chancellor Strine may have recognized this need for pause in the settlement hearing for Google's recapitalization. Although he demonstrated some acceptance of the defendants' view that prolonging the founders' control would be beneficial to the company, he nonetheless recognized that such logic would necessarily have its limits: “you could imagine situations where a founder or a controlling family, where the idea that it would be laughable that it would be beneficial to others to give more of an opportunity for them to retain voting control”⁵³

This view, moreover, is consistent with academic literature examining situations where economic and voting interests diverge—where control rights exceed cash flow rights. Empirical studies have generally found that such circumstances lead to decreased firm value, particularly with respect to

⁵¹ See YAHOO! FINANCE, *supra* note 50. For the beta-adjusted figures, the author calculated the five-year beta for each respective date versus the NASDAQ Composite (covariance of the two returns over the variance of the NASDAQ Composite returns over the five years prior to the date), yielding a beta of 0.93 for April 12, 2012, and 0.87 for October 28, 2013, with a beta-adjusted drop of -6.5% and a beta-adjusted gain of 1.2%, respectively.

⁵² Settlement Hearing, *supra* note 1.

⁵³ *Id.*

dual-class structures.⁵⁴ Even if prolonging founders' control may have been beneficial to Google—a fact with which its public shareholders seem to disagree—such a proposition, as an empirical matter, is unlikely to hold for most companies.

Such empirical findings are also buttressed by efficiency concerns. As Professor Jeffrey Gordon has argued, a firm may be able to obtain a lower cost of capital from public shareholders if it can credibly commit to refraining from future abuses. However, “[t]he problem for both the firm and the prospective public shareholder is how to provide assurances that the firm will not undergo a welfare-reducing dual-class recapitalization at some future time.”⁵⁵

Where the controlling shareholder cannot credibly commit to refraining from expropriating value, including opportunistically changing the company's capital structure, the market may discount all companies where a controlling shareholder is present or might emerge. This is inefficient because a controlling shareholder might rationally want to commit to refraining from future abuses to lower his cost of capital. Or, in terms of information asymmetries, there may be two types of controlling shareholders: “bad” ones who would engage in soft abuses and “good” ones who would not. But, absent a credible mechanism to signal this characteristic to the market, public shareholders cannot differentiate the good controlling shareholders from the bad controlling shareholders. In this case, good controlling shareholders are forced to accept a higher cost of capital—in effect, the bad controlling shareholders create a market for lemons.

Furthermore, although public shareholders may try to discount for the possibility of an expropriation by a controlling shareholder, it may be impossible to predict the probability and magnitude of these costs with any meaningful degree of accuracy. First, abuses such as a transfer of voting power may be especially difficult to value *ex ante*. Second, since controlling shareholders can develop creative methods of appropriating value, the market may find itself faced with possibilities it could not have anticipated. After all, the significant loss in value of Class A shares after Google's announcement of its recapitalization shows that the market had not been adequately discounting for this possibility, potentially due to “the novelty of the legal

⁵⁴ See, e.g., Stijn Claessens et al., *Disentangling the Incentive and Entrenchment Effects of Large Shareholdings*, 57 J. FIN. 2741, 2741 (2002) (finding firm value falls when the control rights of the largest shareholder exceed its cash flow rights in a sample of 1301 public companies in eight East Asian countries); Paul A. Gompers et al., *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUDIES 1051, 1084 (2010) (finding that firm value decreases with insider voting rights but increases with insider cash flow rights in a sample of U.S. dual-class companies filing with the SEC from 1995 to 2002); Ronald W. Masulis et al., *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1699 (2004) (finding firm value is decreasing with excess insider control rights using a sample of U.S. public dual-class companies from 1994 to 2002).

⁵⁵ Gordon, *supra* note 6, at 61.

dynamic” presented.⁵⁶ This presents added inefficiencies, not only because good firms that are willing to commit to refraining from future abuses are being penalized, but also because the amount of the penalty may be drastically different from what it should be.

In addressing these concerns, private party solutions—notably, building a provision into the charter so that certain provisions cannot be amended or introduced without a substantial supermajority—face practical challenges. Among other things, Professor Gordon points to the fact that the firm could simply avoid such a requirement later via restructuring, such as through a merger. However, a company may not want to provide further for supermajority approval of such transactions since these transactions may be necessary for other legitimate corporate purposes, where holdout power might be undesirable.⁵⁷ On the other hand, if the supermajority threshold were set low or forgone altogether in order to avoid the holdout problem, the protection could end up being inadequate.⁵⁸ In addition, individual contracts such as shareholder agreements may be used to solve this dilemma for private corporations but cannot be used for widely dispersed shareholders in public companies.

Given these considerations, the most efficient outcome may be for regulators to intervene to police soft abuses by controlling shareholders in public corporations. With the exception of the SEC or the NYSE and NASDAQ amending their rules to prevent such behaviors—not a certain outcome given the SEC’s experience with the failed Rule 19c-4, and given the exchanges’ competition for listings—this need will have to be met by the courts.

V. THE LAW ON SOFT ABUSES

Unfortunately, it is not clear that Delaware corporate law has a mechanism for addressing such soft abuses by controlling shareholders, where a transaction purports to treat all shareholders proportionately but is nevertheless structured to confer private benefits to the controlling shareholders. As a general matter, Delaware law provides two standards of review for corporate decision-making: the business judgment rule, which grants wide judicial deference to the directors of a corporation,⁵⁹ and the entire fairness standard, which entails extensive oversight of different elements of the decision being challenged.⁶⁰ The wide disparity between the two standards means that much

⁵⁶ Settlement Hearing, *supra* note 1.

⁵⁷ See Gordon, *supra* note 6, at 63.

⁵⁸ *Id.*

⁵⁹ See, e.g., *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (declaring that “where business judgment presumptions are applicable, the board’s decision will be upheld unless it cannot be ‘attributed to any rational business purpose’”) (citing *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971)).

⁶⁰ See, e.g., *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (enumerating the two prongs of fair dealing and fair price and declaring that fair dealing “embraces questions of

of the battle between plaintiffs and defendants takes place on the question of which standard should apply.

Where a controlling shareholder is involved in an interested transaction, such a conflict would normally dictate that the entire fairness standard be applied,⁶¹ although approval by a committee of independent directors or an informed majority-of-the-minority vote could shift the burden of proof.⁶² While Delaware very recently put to rest the question of whether business judgment could be available if *both* protections were adopted,⁶³ this question was not presented by Google's recapitalization since there was no majority-of-the-minority vote.

However, Delaware has generally interpreted conflicted shareholder transactions in an economically strict sense. For instance, in the seminal case of *Sinclair Oil Corp. v. Levien*, self-dealing was defined as where "the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary."⁶⁴ Such a conflict was not found even though the parent divvied out substantial amounts of cash from the subsidiary for its own needs, possibly causing the subsidiary to collapse, since "a proportionate share of this money was received by the minority shareholders."⁶⁵ Applying a similar analysis to Google's recapitalization, entire fairness review was unlikely to be available since the Class C shares would have been distributed as dividends pro rata to all the shareholders.

This is the conclusion borne out by *Williams v. Geier*, a Delaware Supreme Court precedent bearing most directly on the case. In *Geier*, the Geier family, a controlling block of the corporation Milacron, had pushed through a recapitalization proposal for "tenure voting," whereby shareholders would receive ten votes per share, but such super-voting shares would revert to

when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained," and that fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock").

⁶¹ See, e.g., *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del. 1994) (stating that "the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness").

⁶² *Id.* (stating that "an approval of the transaction by an independent committee of directors or an informed majority of minority shareholders shifts the burden of proof on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff").

⁶³ *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014) (providing that where there is both special committee approval and majority-of-the-minority vote, business judgment rule may be granted if: "(i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority").

⁶⁴ *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971).

⁶⁵ *Id.* at 721.

one-vote shares upon transfer until held for three years by the new owner.⁶⁶ Even though the effect of the transaction would be to shift more voting power to the Geier family, the court refused to impose entire fairness review because the record contained: “no non-pro rata or disproportionate benefit which accrued to the Family Group on the face of the Recapitalization, although the dynamics of how the Plan would work in practice had the effect of strengthening the Family Group’s control.”⁶⁷

This situation is incredibly similar to Google’s recapitalization, where a dividend of non-voting shares would have the practical effect of extending the founders’ control but was nevertheless pro rata. Moreover, the Court in *Geier* found that no heightened review was appropriate under either the *Blasius* or the *Unocal* standards because the recapitalization neither had the purpose of impeding a shareholder vote nor was a unilateral board action to adopt a defensive measure (given that there was a shareholder vote on the recapitalization).⁶⁸ This further weakened the plaintiffs’ posture since the application of either *Blasius* or *Unocal* would have imposed an intermediate standard higher than pure business judgment review, giving plaintiffs a stronger case.

Perhaps recognizing the potential for abuse, the Delaware Court of Chancery in *Geier* reserved some potential for review by declaring that the creation of tenure voting implicated heightened scrutiny under *Unocal*, although it approved the transaction as being reasonable in relation to the threat posed.⁶⁹ Arguably, Google’s recapitalization would have had a tougher case under *Unocal* than tenure voting, since the Delaware Court of found that: “[t]he reasonableness of the recapitalization plan as a defensive measure is established by the fact that the plan achieves Milacron’s goals without preventing any stockholder from . . . obtaining the super voting power.”⁷⁰ In that case, the ability of other shareholders to benefit equally from the tenure-voting regime informed the court’s decision—a fact absent in Google’s case given that control benefits are transferred solely to the founders. Unfortunately, as the Delaware Supreme Court rejected even the application of *Unocal*, it is difficult to imagine that Google’s recapitalization could have been prevented without overturning *Geier*.

⁶⁶ See *Williams v. Geier*, 671 A.2d 1368, 1370–71 (Del. 1996).

⁶⁷ *Id.* at 1378.

⁶⁸ *Id.* at 1376 (stating that “*Blasius* is appropriate only where the “primary purpose” of the board’s action [is] to interfere with or impede exercise of the shareholder franchise,” and the stockholders are not given a ‘full and fair opportunity to vote’”) (citing *Stroud v. Grace*, 606 A.2d 75, 92 (Del. 1992)); *id.* at 1377 (stating that “[a] *Unocal* analysis should be used only when a board unilaterally (*i.e.*, without stockholder approval) adopts defensive measures”).

⁶⁹ See *Williams v. Geier*, 1994 WL 514871, at *3 (Del. Ch. Sept. 9, 1994), *aff’d*, 671 A.2d 1368 (Del. 1996); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (stating that “[i]f a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed”).

⁷⁰ *Williams*, 1994 WL at *3.

The adverse controlling precedent set by *Geier* almost certainly impacted the settlement negotiations in the case of Google's Class C shares. Counsel for the defendants stated at the settlement hearing that, "we had very strong defenses to this case . . . [T]he business judgment rule would have applied under *Williams v. Geier*."⁷¹ Conversely, counsel for the plaintiffs admitted, "we ultimately decided that what we got was better off for the class and will do more to protect the [Class] A shareholders than if we had lost at trial, because if we had lost at trial, we'd have none of these protections."⁷² Thus, there can be little doubt that the settlement negotiations had proceeded under the shadow of *Williams v. Geier*, with defendants in a very strong position.

Ultimately, during the settlement hearing, Chancellor Strine emphasized *Geier* as one of the reasons for his approval, remarking that *Geier* is a case he "take[s] seriously," and that "the settlement should be approved."⁷³ This remark demonstrates that Chancellor Strine may also have felt constrained to accept the agreement due to Delaware precedents, since the parties were most likely correct that *Geier* would have limited the scope of judicial review.

VI. RETHINKING *WILLIAMS v. GEIER*

The settlement in Google's recapitalization therefore highlights the boundaries of the law of fiduciary duties in policing soft abuses by controlling shareholders—despite the potential for significant harm. In addressing such concerns, however, Delaware likely faces one of two alternatives: (1) overruling or distinguishing *Williams v. Geier*, or (2) finding a new legal principle which can be used in these situations.

With respect to the first, there are three standards of review available: entire fairness, "compelling justification" under *Blasius*,⁷⁴ or "reasonable in relation to the threat posed" under *Unocal*.⁷⁵ The case for entire fairness review is not weak, given that *Kahn v. M&F* laid out the onerous standards a controlling shareholder must meet in order to avoid entire fairness review and obtain the protection of the business judgement rule.⁷⁶ However, since entire fairness review is predicated on self-dealing, such as some exclusive benefit to the controlling shareholder, this would entail overruling or distinguishing the statement in *Geier* that there is no disproportionate effect in a

⁷¹ Settlement Hearing, *supra* note 1.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988) (stating that where a board action has "the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action").

⁷⁵ *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985).

⁷⁶ *See Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

recapitalization even though its practical effect is to consolidate voting power.

One potential source of authority for this understanding would be the line of cases analyzing “overpayment,” where a controlling shareholder causes the corporation to issue shares to him for less than fair value.⁷⁷ In *Gentile v. Rosette*, the Supreme Court of Delaware ruled that minority shareholders had suffered a direct harm from overpayment due to “an improper transfer—or expropriation—of economic value *and voting power* from the public shareholders to the majority or controlling stockholder.”⁷⁸ Although the court did not address the transfer of voting power independently from the transfer of economic value, this case nevertheless supports the notion that such a transfer of voting power is an actionable harm. If a transfer of voting power without adequate compensation is a disproportionate benefit, then situations like Google’s recapitalization are within the ambit of entire fairness review—the view taken by the dissenting Justices in *Geier*.⁷⁹

Furthermore, it may be possible to bring situations like Google’s under the “compelling justification” standard of *Blasius*. Although the court in *Geier* stated that the practical effect of the tenure-voting plan was to strengthen the Geier Family Group’s control,⁸⁰ it nevertheless declined to apply *Blasius* because it found that the directors were motivated by a good-faith desire to “promote long-term planning and values,” and that “[p]laintiffs had submitted no evidence to the contrary.”⁸¹ In Google’s recapitalization, plaintiffs had a stronger case that the creation of non-voting shares was motivated directly by the desire to prolong the founders’ control—their Pretrial Brief points to statements in the Proxy that the recapitalization will allow Google “to prolong the period of time during which our existing stockholders, particularly Larry and Sergey, maintain voting control over Google.”⁸² Given that the purpose of the recapitalization was to prolong the founders’ control, the court may have been able to apply a “compelling justification” standard under *Blasius*. But this solution leaves the possibility that it may be fairly easy for controlling shareholders and directors to characterize their actions as long-term planning while removing references to prolonging or consolidating control, circumventing review under *Blasius*.

Finally, it may be possible to subject situations like Google’s recapitalization to heightened scrutiny under *Unocal*—the original choice of the Dela-

⁷⁷ See *Gentile v. Rosette*, 906 A.2d 91 (Del. 2006); *In re Tri-Star Pictures, Inc., Litig.*, 634 A.2d 319 (Del. 1993).

⁷⁸ See *Gentile*, 906 A.2d at 100 (emphasis added).

⁷⁹ *Williams v. Geier*, 671 A.2d 1368, 1386 (Del. 1996) (stating that “the Recapitalization Plan implicates the duty of loyalty and, therefore, must be subject to full judicial scrutiny . . . given the Plan’s conceded effect: to confer substantial benefits on the majority shareholders, the Geier Family Group, without conferring similar benefits upon the minority shareholders”).

⁸⁰ *Id.* at 1378.

⁸¹ *Id.* at 1376 (citation omitted).

⁸² Plaintiffs’ Opening Pre-Trial Brief, *supra* note 15.

ware Court of Chancery.⁸³ However, this is likely the most difficult option, because it would also entail changing the Delaware courts' position that *Unocal* applies only to unilateral action by the board, not actions where there has been shareholder approval.⁸⁴ In *Geier*, the Supreme Court of Delaware did not apply a *Unocal* analysis despite Milacron's directors specifically indicating in their proxy statement that one of the purposes of the recapitalization was to "discourage hostile takeovers."⁸⁵ Additionally, the heightened scrutiny under *Unocal* would force plaintiffs to demonstrate that there was some kind of takeover threat, which is especially difficult in situations where controlling shareholders can block a takeover—precisely the situation being addressed.⁸⁶ For instance, Google's founders have significant control—the company is also so large that takeover threats are unlikely to be credible.

Even barring one of these options for overruling or distinguishing *Geier*, it may be possible to adopt a novel theory of law applicable to situations like that of Google. One such option is the implied covenant of good faith and fair dealing. First, Delaware has already ruled that "[c]orporate charters and bylaws are contracts among a corporation's shareholders; therefore, . . . rules of contract interpretation apply."⁸⁷ Second, it has also ruled that the implied covenant of good faith and fair dealing "requires 'a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits' of the bargain,"⁸⁸ and that "the implied covenant attaches to every contract."⁸⁹ Consequently, it seems fairly uncontroversial that the implied covenant would apply to corporate charters.

Under the implied covenant of good faith and fair dealing, "parties are liable for breaching the covenant when their conduct frustrates the 'over-arching purpose' of the contract by taking advantage of their position to con-

⁸³ See *Williams v. Geier*, 1994 WL 514871, at *3 (Del. Ch. Sept. 9, 1994), *aff'd*, 671 A.2d 1368 (Del. 1996); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (stating that "[i]f a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed").

⁸⁴ See *Geier*, 671 A.2d at 1376 (stating that "*Blasius* is appropriate only where the 'primary purpose' of the board's action [is] to interfere with or impede exercise of the shareholder franchise,' and the stockholders are not given a 'full and fair opportunity to vote'") (citing *Stroud v. Grace*, 606 A.2d 75, 92 (Del. 1992)); *id.* at 1377 (stating that "[a] *Unocal* analysis should be used only when a board unilaterally (*i.e.*, without stockholder approval) adopts defensive measures").

⁸⁵ *Id.* at 1376.

⁸⁶ See, *e.g.*, *Stroud v. Grace*, 606 A.2d 75, 82 (Del. 1992) (stating that "[t]he amendments here could not have been adopted in response to some threat to corporate policy and effectiveness because management controls, and will control for the foreseeable [sic] future, well over 50% of the stock . . .") (citing *Stroud v. Grace*, No. 10719, 1990 WL 176803 (Del. Ch. Nov. 1, 1990)).

⁸⁷ *Airgas, Inc. v. Air Products & Chemicals, Inc.*, 8 A.3d 1182, 1188 (Del. 2010).

⁸⁸ *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 442 (Del. 2005) (citing *Wilgus v. Salt Pond Inv. Co.*, 498 A.2d 151, 159 (Del. Ch. 1985)).

⁸⁹ *Id.* (citing *Blish v. Thompson Automatic Arms Corp.*, 64 A.2d 581, 597 (Del. 1948)).

trol implementation of the agreement's terms."⁹⁰ This rule could be expanded to cover situations where a controlling shareholder pushes through a change in the governance structure of a company for his private benefit. Where an amendment to the charter is not conditioned upon a majority-of-the-minority vote, the controlling shareholder could be deemed to be taking advantage of his "position to control the implementation of an agreement"—here, via his controlling vote—and "frustrating the overarching purpose" of the charter by unilaterally altering the governance structure provided in the charter.

Extending the application of the implied covenant of good faith and fair dealing to the charter may present an attractive alternative to overturning or distinguishing *Geier*. Because the charter is a minimalist document generally providing select governance provisions, it is likely that a breach of the covenant could be limited to certain situations where the possibility of abuse by a controlling shareholder is significant. Furthermore, the corporate charter is generally amended infrequently, limiting the occasions for judicial challenge. Extending the implied covenant of good faith and fair dealing may be an option that merits further consideration.

Examining the options for curbing opportunism by controlling shareholders, including overturning *Williams v. Geier* or finding a new theory of law to address soft abuses, is a difficult task. Nevertheless, this Note demonstrates that the status quo under *Geier* condones the potential for significant harm to public shareholders and is likely to result in inefficient pricing for capital. Especially as dual-class structures proliferate among U.S. corporate titans, the economic impact of what is at stake may become more and more significant. Absent the unlikely outcome of regulatory intervention, this is a challenge left to the courts: to fashion an adequate judicial remedy for policing situations like that of Google, perhaps preventing a ten-figure loss for public shareholders in the future.

⁹⁰ *Id.* (citing *Breakaway Solutions, Inc. v. Morgan Stanley & Co. Inc.*, 2004 WL 1949300, at *12 (Del. Ch. Aug. 27, 2004)).

