View on our website.

GIBSON DUNN

**Mergers & Acquisitions |
Securities Regulation & Corporate Governance
Update**

July 31, 2026

Delaware Court of Chancery Holds That Statutory Safe Harbor Protects PBC Directors and *Revlon*'s Stockholder-Value-Maximization Mandate Does Not Apply to PBCs

Once a niche corporate form, the Delaware public benefit corporation (PBC) has become an increasingly significant feature of the corporate landscape, having been adopted by a number of prominent companies, including highly valued private issuers and established public companies. Until two days ago, however, the PBC statute had generated almost no case law on what PBC directors owe their stockholders in a sale of control. That has now changed.

On July 29, 2026, the Delaware Court of Chancery issued its opinion in *Drakes Landing Associates, L.P. v. Tilden Park Capital Management, L.P.*, C.A. No. 2025-0898-NAC (Del. Ch. July 29, 2026), addressing for the first time whether and how *Revlon* applies to a Delaware PBC in a change-of-control transaction.

Vice Chancellor Cook held that all claims against the PBC directors must be dismissed under the statutory safe harbor provision and that ***Revlon*'s exclusive stockholder-value-maximization standard of conduct does not apply to PBC directors.** That is so, the Court reasoned, because Delaware General Corporation Law (DGCL) Section 365(a) requires them to balance stockholders' pecuniary interests, the interests of those materially affected by the corporation's conduct, and the corporation's public benefit set forth in its charter—a duty that displaces any single-minded focus on stockholder wealth maximization. The Court left open whether enhanced scrutiny could nevertheless apply as a standard of review in a modified form that the opinion called "PBC enhanced scrutiny."

The Court did not decide that issue because it dismissed the complaint with prejudice under the safe harbor of DGCL Section 365(b), concluding that the plaintiffs had not pled facts supporting a reasonable inference that the statutory requirements were unsatisfied.

The decision gives the PBC statute's director-protective provisions their most extensive judicial treatment to date. In the aiding-and-abetting context, the Court treated Section 365(b) as a particularly powerful protection: because Section 365(b) deems a director's fiduciary duties satisfied rather than barring relief against a particular defendant, no predicate breach remained for a third party to have abetted. Neither Section 144 (the DGCL's safe harbors for conflicted transactions) nor Section 102(b)(7) (which permits charter provisions exculpating directors and officers from monetary damages) uses comparable language negating the underlying fiduciary breach.

What Is a Public Benefit Corporation, and Why Does This Decision Matter?

A Delaware PBC is a **for-profit** corporation formed under Subchapter XV of the DGCL (Sections 361–368) that is "intended to produce a public benefit or public benefits and to operate in a responsible and sustainable manner." Delaware authorized the form in 2013 and liberalized it in 2020 by eliminating the statutory requirement that a conversion from a PBC to a conventional corporation or vice versa must be approved by a supermajority of the stockholders and the special appraisal right previously afforded to stockholders of a conventional corporation converting into a PBC.

Three features distinguish a PBC from a conventional Delaware corporation:[1]

- **A charter-specified public benefit.** The certificate of incorporation must identify one or more specific public benefits the corporation will promote.
- **A statutory balancing mandate.** Under Section 365(a), the board must manage the corporation "in a manner that balances the pecuniary interests of the stockholders, the best interests of those materially affected by the corporation's conduct, and the specific public benefit or public benefits identified in its certificate of incorporation." This differs from the conventional Delaware framework, under which directors may consider the interests of other constituencies insofar as doing so advances the pecuniary interests of the corporation's stockholders.
- **PBC-specific fiduciary and litigation protections.** Section 365(b) provides a safe harbor: as to a decision implicating the balancing requirement, a director "will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation" if the decision is (i) informed, (ii) disinterested, and (iii) "not such that no person of ordinary, sound judgment would approve." Section 365(c) provides that, absent a conflict of interest, a failure to satisfy the balancing requirement does not constitute bad faith or a loyalty breach for purposes of Sections 102(b)(7) and 145 unless the charter provides otherwise. Section 367 imposes a 2%-of-shares (or, for listed companies, the lesser of

2% or $2 million in market value) ownership threshold on suits to enforce the balancing requirement.

The form remains relatively uncommon among U.S.-listed companies, although it is no longer a curiosity. Its adoption by a number of prominent companies commanding very high valuations has increased the structure's practical and commercial significance.

Before *Drakes Landing*, Subchapter XV had generated little case law. Practitioners and clients advising PBC boards — particularly on M&A, control transactions, and rescue financings — had largely been required to reason from statutory text and academic commentary. *Drakes Landing* provides the first substantial judicial guidance on two important questions: what standard of conduct applies when a PBC is sold, and what a plaintiff must plead to avoid Section 365(b).

<u>Background: MPower's Rescue Financing</u>

MPower Financing, PBC is a Delaware PBC whose stated mission is to expand international students' access to U.S. postsecondary education, which it pursues by lending to them. In early 2025, it faced a liquidity squeeze: its debt covenants required a minimum cash balance of $17 million by January 31, and an earlier effort to raise equity had failed.

Two of MPower's lenders — Tilden Park Capital Management, L.P. and another fund (the Funds) — offered to fill the gap. The Funds were existing lenders and significant stockholders: together they held approximately $109 million of MPower's debt and 25.5% of its common stock, and Tilden Park had two designees on the board. On January 30, one day before the covenant deadline, they proposed $20 million of new financing plus an option to convert approximately $109 million of their debt into equity at $2.04 per share; the final term sheet later increased the conversion price to $2.25 per share (MPower's July 2021 financing round had been priced at $15.50 per share). Full conversion would take them from roughly 25% to approximately 85% of MPower's equity.

The board approved the term sheet on a non-exclusive basis on January 31, with the Tilden Park designees recusing, and in February formed a three-member special committee of concededly disinterested and independent directors. The committee retained its own counsel and financial advisor, directed the advisor to find alternatives that raised comparable capital with materially less dilution, and ran a market process with a data room and a mid-March bid deadline. A separate group of existing stockholders proposed alternative financing, though the opinion noted that the complaint omitted material details about that proposal.

In mid-March, two stockholder groups holding more than 50% of MPower's stock objected in writing and demanded a stockholder vote; company counsel and the CEO had likewise recommended one. No vote was held. The committee approved the transaction on March 28, and the company signed an exchange agreement providing a $28.125 million secured note alongside a governance agreement giving the Funds seven board seats between them and consent rights over stock issuances, new debt, mergers, charter amendments, and management changes.

Stockholders holding roughly 30% of MPower sued in August 2025, asserting breach of fiduciary duty against the special committee and aiding and abetting against the Funds.

<u>The Court's Analysis</u>

1. *Revlon* as a Standard of Conduct Versus a Standard of Review

The Court began with the distinction Delaware law draws between a **standard of conduct** (what directors are expected to do) and a **standard of review** (how a court evaluates whether their conduct met that standard). It observed that Delaware decisions are "less than clear" on which of the two *Revlon* supplies, noting the tension between Delaware Supreme Court statements that *Revlon* creates no new duty and repeated references to a singular *Revlon* "duty" to obtain the best value reasonably available.

Read as a standard of conduct, the Court held that *Revlon*'s exclusive stockholder-value-maximization mandate cannot apply to a PBC because it would conflict with Section 365(a)'s balancing requirement. Instructing PBC directors that they "must focus on" maximizing sale value as their "primary objective" would be irreconcilable with the statutory command that they consider and balance other interests against stockholder pecuniary interests. Even the plaintiffs conceded that some "modified" version of *Revlon* would be required. The Court's reasoning tracks former Chief Justice Strine's view, cited in the opinion, that a consequential feature of the PBC statute is that it takes *Revlon*'s exclusive value-maximization objective off the table.

Read as a standard of review, however, aspects of *Revlon*'s enhanced-scrutiny rationale may remain relevant in the PBC context. The "enormous implications" of a change-of-control transaction — and the range of human motivations it can activate — do not disappear because a corporation has a chartered public benefit. The Court suggested that a PBC-specific inquiry might ask whether the directors' balancing of the Section 365(a) interests fell outside the range of reasonableness, but expressly declined to decide whether that standard applies. It noted in a footnote that it would "almost certainly" have found the pleading inadequate under that standard in any event.

2. Section 365(b)'s Safe Harbor

As noted above, Section 365(b) provides that as to a decision implicating the balancing requirement, a director "will be deemed to satisfy such director's fiduciary duties to stockholders and the corporation" if the decision is (i) informed, (ii) disinterested, and (iii) "not such that no person of ordinary, sound judgment would approve." The Court held that the burden was on the plaintiffs to plead facts supporting a reasonable inference that the statutory requirements were **not** satisfied.

Disinterestedness. The plaintiffs conceded at oral argument that all three committee members were disinterested and independent.

Informed. The Court observed that Section 365(b) uses "informed" without definition — in pointed contrast to Section 144(a)(1), which both specifies the information that must be disclosed to or known by the deciding directors *and* supplies the applicable standard (good faith and without gross negligence). The Court flagged, but did not resolve, whether the business judgment rule or enhanced scrutiny governs the "informed" inquiry in a change-of-control setting, because the plaintiffs failed under both:

- Under the business judgment rule, the plaintiffs would have to plead gross negligence — which they affirmatively conceded they could not.
- Under enhanced scrutiny, the plaintiffs would have to plead that the committee's efforts to inform itself fell outside the range of reasonableness. Here the Court suggested that because PBC directors must inform themselves as to all three Section 365(a) interests, a plaintiff must plead facts showing an unreasonable failure to become informed as to all three. The complaint attacked only the thoroughness of the market canvass — a pecuniary-interest allegation — and said nothing about the committee's information as to materially affected constituencies or the chartered public benefit.

The Court rejected the plaintiffs' argument, raised for the first time in their answering brief, that no balancing had occurred. That contention was both an impermissible attempt to amend the pleading through briefing and entirely conclusory. The Court also twice noted that the plaintiffs could have sought books and records under Section 220 before filing but chose not to.

Ordinary, sound judgment. The third prong — whether the decision was such that no person of ordinary, sound judgment would approve it — sounds in waste, an "extreme and rarely satisfied" standard requiring that the company receive literally nothing for what it gave. MPower received urgently needed financing. The plaintiffs did not attempt to plead waste and did not respond to the defendants' waste arguments.

3. Alternative Grounds and the Section 365(c) Question

Although it did not need to reach them, the Court indicated it would "almost certainly" have dismissed under both DGCL Section 144(a)(1) and MPower's Section 102(b)(7) exculpation provision, each of which turned on bad faith that the plaintiffs failed to plead.

In a notable footnote, the Court flagged Section 365(c) — a provision the defendants had not raised. As discussed above, Section 365(c) provides that, absent a conflict of interest, a failure to satisfy Section 365(a)'s balancing requirement cannot constitute bad faith or a breach of the duty of loyalty for exculpation and indemnification purposes, unless the charter provides otherwise. The provision was potentially significant here because the plaintiffs' only remaining path to non-exculpated liability was bad faith, and their bad faith theory was precisely that the Special Committee failed to balance — the very failure Section 365(c) addresses.

The Court observed that the statute does not specify whose conflict counts. If the "absence of a conflict of interest" language refers to the decision-makers, the concededly disinterested Special Committee had no conflict, and Section 365(c) would appear to foreclose the plaintiffs' theory outright. Even if the provision instead looks to the entire board, the Court noted that it was not clear that the complaint alleged a board-level conflict: the only directors who might be viewed as conflicted were Tilden Park's two designees, and the Court reiterated settled law that board designation by a transaction counterparty does not, standing alone, create a conflict or defeat independence. Because the defendants had not invoked Section 365(c), the Court declined to address it further.

4. Aiding and Abetting — and Why Section 365(b) Is Different

With no predicate breach adequately pled, the aiding-and-abetting claim against the Funds failed. The Court then drew a distinction that deal counterparties should note in this context: Section 365(b) provides that a qualifying director "will be deemed to satisfy" the director's fiduciary duties. That language negates the predicate breach rather than merely protecting the director from particular relief or liability like Section 144 or Section 102(b)(7). Section 365(b) therefore can extinguish secondary aiding-and-abetting liability predicated on the protected director decision in circumstances where Section 144 or Section 102(b)(7) may not. It does not necessarily eliminate an independent claim against a counterparty or controller based on that party's own conduct.

Key Takeaways

1. **PBC status materially changes the deal-side fiduciary analysis in a sale of control.** A PBC board asked to approve a change-of-control transaction is not subject to *Revlon*'s exclusive stockholder-value-maximization mandate. That is a meaningful planning point for mission-driven companies weighing conversion, for boards fielding competing bids with different stakeholder profiles, and for bidders whose proposals compete on dimensions other than price.

2. **It is not, however, a free pass.** The Court held only that *Revlon*'s exclusive stockholder-value-maximization standard of conduct does not apply. It left open whether enhanced scrutiny — reframed as PBC enhanced scrutiny testing the reasonableness of the board's balancing — applies to the same transactions that would trigger *Revlon* at a conventional corporation. Section 365(b) may nevertheless dispose of a challenge even if PBC enhanced scrutiny otherwise applies. The Court also left open, however, whether enhanced scrutiny governs the safe harbor's own "informed" requirement.

3. **Create a contemporaneous record addressing all three statutory interests.** *Drakes Landing* did not hold that minutes or resolutions must separately document each component of Section 365(a), or that silence in the formal record defeats Section 365(b). As a planning matter, however, a board or special committee should create a record showing that it informed itself about, considered, and balanced stockholders' pecuniary interests, the interests of materially affected constituencies, and the public benefit set forth in the charter. That record should strengthen the board's ability to invoke Section 365(b), particularly if plaintiffs first obtain books and records under Section 220, as the opinion encourages future plaintiffs to do. The quality of the deliberation — not merely formal references to each interest — will remain critical.

4. **Section 365(b) can be particularly powerful in the aiding-and-abetting context.** Because it deems fiduciary duties satisfied, a qualifying decision can defeat the primary claim against directors and eliminate the predicate breach for a secondary claim against a counterparty. Sponsors, lenders, and acquirers negotiating with PBCs should factor this into their litigation-risk assessment and seek appropriate assurance that the target committee is following a robust process, while avoiding involvement that could compromise the committee's independence or support an allegation of knowing participation in a fiduciary breach.

5. **Conventional special committee process protections remain important.** The committee here was disinterested and independent, retained its own counsel and financial advisor, ran a market process with a data room and a bid deadline, and directed its banker to seek less dilutive alternatives. Those process protections materially strengthened the defense. The plaintiffs conceded that the committee was disinterested

and independent and that they had not pled gross negligence. Given MPower's exculpatory charter provision, their remaining damages theory required bad faith. Their contention that the committee had performed no balancing, however, was raised only in their answering brief, was unsupported by specific allegations, and was pursued without first seeking books and records under Section 220. Notably, no stockholder vote was held even though holders of more than 50% of the stock requested one and company counsel and the CEO recommended one. The absence of a vote did not prevent dismissal at the pleading stage.

6. **Do not over-read the decision.** This was a Rule 12(b)(6) ruling on a complaint filed without a preceding Section 220 investigation and containing significant concessions. The Court repeatedly emphasized what the plaintiffs had failed to plead rather than what the record showed. Several of the most favorable passages — on Section 144(a)(1), exculpation, and Section 365(c) — are express dicta. The decision is also a Court of Chancery ruling and may be subject to appellate review; its treatment of the relationship among *Revlon*, Section 365(a), and Section 365(b) should not yet be treated as the final word in Delaware. More fundamentally, Section 365(b) protects qualifying director decisions; it does not by its terms resolve independent claims arising from the duties of a controlling stockholder or control group. The opinion did not address whether or when the Funds qualified as a controlling stockholder or control group — particularly in light of the governance rights and potential conversion — or how amended Section 144's controller-transaction framework would apply. Those questions would require a separate analysis of the statutory controller definitions, the available safe harbors, and the statute's fairness provision. A differently pled complaint may therefore present a materially harder case.
7. **Significant questions remain for future cases.** *Drakes Landing* leaves open whether PBC enhanced scrutiny applies, what that review would require, what "informed" means under Section 365(b), and how Section 365(c) interacts with other fiduciary-duty protections. PBCs should also confirm whether their certificates of incorporation modify Section 365(c)'s default treatment of a failure to satisfy the balancing requirement for exculpation and indemnification purposes.

[1] See our August 2016 client alert, "A Corporate Paradigm Shift: Public Benefit Corporations," for historical background on the PBC framework as then in effect. The statute was subsequently amended in 2020, and aspects of that alert's discussion of change-of-control review have now been qualified by this decision.

The following Gibson Dunn lawyers participated in preparing this update: Stephen Glover and Harrison Korn.

Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, the authors, or any leader or member of the firm's Mergers & Acquisitions, Securities Regulation & Corporate Governance, or Securities Litigation practice groups:

Harrison A. Korn – Washington, D.C. (+1 202.887.3736, hkorn@gibsondunn.com)

Stephen I. Glover – Washington, D.C. (+1 202.955.8593, siglover@gibsondunn.com)

Mergers & Acquisitions:
Robert B. Little – Dallas (+1 214.698.3260, rlittle@gibsondunn.com)
Saee Muzumdar – New York (+1 212.351.3966, smuzumdar@gibsondunn.com)
George Sampas – New York (+1 212.351.6300, gsampas@gibsondunn.com)

Securities Regulation & Corporate Governance:
Elizabeth Ising – Washington, D.C. (+1 202.955.8287, eising@gibsondunn.com)
Thomas J. Kim – Washington, D.C. (+1 202.887.3550, tkim@gibsondunn.com)
Lori Zyskowski – New York (+1 212.351.2309, lzyskowski@gibsondunn.com)

Securities Litigation:
Monica K. Loseman – Denver (+1 303.298.5784, mloseman@gibsondunn.com)
Brian M. Lutz – San Francisco (+1 415.393.8379, blutz@gibsondunn.com)
Jason J. Mendro – Washington, D.C. (+1 202.887.3726, jmendro@gibsondunn.com)
Craig Varnen – Los Angeles (+1 213.229.7922, cvarnen@gibsondunn.com)