NOTE

HIDDEN VALUE INJURY

*Eitan Arom**

Rule 10b-5 and the securities-fraud action provide a private enforcement tool only where litigants can show a defendant's misrepresentation impacted the price of a security. But investors increasingly demand disclosure about how a corporation interacts with stakeholder groups such as employees, consumers, and communities. Because these "sustainability disclosures" are aimed at long-term value, misrepresentations will only incidentally impact immediate stock returns, so investors are left without legal recourse. Borrowing from Delaware antitakeover law, this Note argues that investors suffer a "hidden value" injury when corporations materially misrepresent sustainability information. Delaware recognizes and protects idiosyncratic value expectations by allowing corporate boards to stand between a willing buyer and tendering shareholders merely because the board believes the price is too low. Extending this model to shareholders shows how investors can hold legitimate value expectations not reflected in the stock price. Investors who believe based on sustainability disclosures that the market undervalues a company's stock are harmed when those disclosures turn out to be false. The hidden value model also shows, however, that this harm is inherently difficult for courts to value. Therefore, this Note argues for a private-ordering solution to allocate the cost of sustainability misrepresentations. In particular, it proposes that corporations issue conditional stock options that vest only when a corporation can be shown to have materially misrepresented their sustainability performance. This mechanism can guarantee the truthfulness of sustainability disclosure without creating undue liability for corporations. By pointing to a private-ordering solution, this Note hopes to elucidate the crucial but unquantifiable nature of the hidden value injury that results from sustainability misrepresentations.

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INTRODUCTION

Over the last twenty-five years, U.S. securities-fraud class actions have generated more than $100 billion in settlements—that is, $100 billion in incentives for corporations to tell the truth.[1] But those incentives are trained almost exclusively on finances, cash flows, and earnings estimates, rather than how a corporation interacts with the environment, employees, customers, and suppliers[2]—what this Note broadly calls "sustainability information." Because this information goes to the long-term value of a corporation but not necessarily its short-term value, investors may find it material even where it fails to move markets. But the securities-fraud action measures damages by stock-price impact, meaning investors lack the ability to vindicate their long-term value expectations based on sustainability information.[3] Where investors harbor long-term value expectations that the

1. Key Statistics, Stan. L. Sch. Sec. Class Action Clearinghouse, http://securities.stanford.edu/stats.html [https://perma.cc/8NTG-KCSU] (last visited Oct. 24, 2020).

2. Virginia Harper Ho, "Enlightened Shareholder Value": Corporate Governance Beyond the Shareholder–Stakeholder Divide, 36 J. Corp. L. 59, 91 (2010) (noting that mandatory sustainability disclosures are spotty and voluntary disclosures are selective and, on the whole, inadequate); see also infra Part II (noting how plaintiffs have struggled to hang liability on sustainability disclosures).

3. See infra section II.B.

market does not share, courts are systematically unable to protect their interests in truthful disclosure.[4]

Rule 10b-5 makes corporations liable for material misrepresentations, with materiality defined broadly based on significance to investors.[5] But the securities-fraud doctrine that has grown up around it bars class action lawyers and activist investors from applying the Rule to sustainability disclosures.[6] Nonetheless, the growing interest in what is sometimes called Environmental, Social, and Governance (ESG) demonstrates the need for accountable disclosure.[7] While misrepresentations about sustainability cause legally cognizable harm to investors,[8] securities-fraud doctrine cannot provide a solution to the extent those misrepresentations fail to impact stock price.[9] A contract solution is therefore needed to police misrepresentations in sustainability disclosures.[10]

This Note borrows the concept of "hidden value" from Delaware takeover jurisprudence to better define stockholders' interest in truthful sustainability disclosure. Delaware law allows boards to block hostile takeovers merely by saying the price is too low, implying that boards are able to see value that the stock market misses.[11] Professors Bernard Black and Reinier Kraakman describe this quantity as "hidden value": hidden in the sense that boards can perceive it while the market cannot.[12] While this "hidden value model" previously has been applied to corporate boards,[13] it can also describe investors. Just as board directors can perceive and protect above-market value, investors can form legitimate value expectations

4. See Caitlin M. Ajax & Diane Strauss, Corporate Sustainability Disclosures in American Case Law: Purposeful or Mere "Puffery"?, 45 Ecology L.Q. 703, 718–23 (2018) (analyzing the thin case law on the subject of Rule 10b-5 litigation over sustainability and concluding that the path to liability is likely narrow). But see Rick E. Hansen, Climate Change Disclosure by SEC Registrants: Revisiting the SEC's 2010 Interpretive Release, 6 Brook. J. Corp. Fin. & Com. L. 487, 541–42 (2012) (noting that while fraud liability for failure to disclose climate change effects is unlikely, the *threat* of securities litigation over sustainability information may deter misleading statements).

5. Basic Inc. v. Levinson, 485 U.S. 224, 232 (1988) (adopting the materiality standard from *TSC Industries* for Rule 10b-5 suits); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976) ("An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important . . . ."); 17 C.F.R. § 240.10b-5 (2020).

6. See infra section II.B.

7. See infra section I.A.2.

8. See infra section I.B.

9. See infra section II.B.

10. See infra Part III.

11. See Paul L. Regan, What's Left of *Unocal*, 26 Del. J. Corp. L. 947, 973 (2001) (arguing that Delaware case law allows boards to "protect shareholders from mistakenly failing to understand the value of management's existing business plan" and accepting a tender offer at a too-low price).

12. See generally Bernard Black & Reinier Kraakman, Delaware's Takeover Law: The Uncertain Search for Hidden Value, 96 Nw. U. L. Rev. 521 (2002) (laying out the "hidden value model").

13. Id.

that exceed the value reflected in the market price. Investors who study and believe a board's sustainability disclosures may conclude, based on those disclosures, that the stock is underpriced.[14] And when those disclosures turn out to be false, the investor suffers a cognizable injury. That injury—which this Note terms *hidden value injury*—represents an interest that Delaware courts protect but securities-fraud doctrine ignores.

This analogy also demonstrates why securities fraud *fundamentally cannot* account for long-term value expectations outside stock price. Hidden value is hidden for a reason: It is not easily communicated either to markets or the courts.[15] While Delaware courts protect a board's perceptions of hidden value, they are more reluctant to put a price tag on them.[16] Generalist judges in the federal courts should be even more hesitant to guess at this obscure quantity.

Because courts would be hard pressed to determine hidden value after the fact, investors should protect their reliance interest on sustainability disclosure by defining them ex ante by contract.[17] This Note suggests that conditional warrants can guarantee the truthfulness of sustainability disclosure where securities doctrine fails. Warrants are board-issue contracts that allow their holders to purchase stock from the board at a particular time and price.[18] Boards and investors can use these options to record the value expectations of both parties. Using conditional warrants to price sustainability information, corporations and investors can more efficiently allocate the cost of untruthful disclosure.

This Note proceeds in three Parts. Part I describes the state of sustainability disclosure and uses an analogy to hidden value to demonstrate why investors may find it material even where it fails to impact stock price. Corporations disclose information about nonfinancial performance even when under no obligation to do so. But the fact that investors cannot rely

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14. This insight is bolstered by the rise of socially responsible investing. These investors rely on corporate disclosures to restrict their investments to companies they identify as socially responsible. See The Rise of Responsible Investment, KPMG, https://home.kpmg/xx/en/home/insights/2019/03/the-rise-of-responsible-investment-fs.html [https://perma.cc/B6J9-5TPW] (last visited Oct. 24, 2020) ("The rise in ESG considerations on the part of businesses and investors is happening in tandem with a heightened regulatory environment that has also increased ESG requirements and accounting standards demanding transparency around disclosures in financial statements.").

15. See Black & Kraakman, supra note 12, at 522–23.

16. See, e.g., Del. Code tit. 8, § 262(g) (2020) (limiting the right of shareholders to ask the courts to appraise the value of their shares in merger proceedings).

17. See Charles J. Goetz & Robert E. Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev. 554, 568–72 (1977) (analyzing how contracting parties in the analogous context of liquidated damages can use ex ante contracting to try to protect idiosyncratic value).

18. 6A Fletcher Cyclopedia of the Law of Corporations § 2641, Westlaw (database updated Sept. 2020) ("Warrants constitute an agreement between the corporation and the warrant holder that the corporation will sell to the warrant holder a specified number of shares at a set price.").

on the truthfulness of disclosures produces an information asymmetry reflected in the diffuse and unaccountable nature of sustainability reporting. The analogy to Delaware takeover law shows that while sustainability information can give rise to legitimate and legally cognizable interests, the failure of an enforcement regime leaves disclosure irregular, unreliable, and diffuse.

Part II shows how even a securities-fraud action that pleads a material sustainability claim runs up against a de facto price-impact requirement. The hidden value model justifies this requirement, even though requiring price impact screens out a legitimate investor interest in truthful sustainability disclosure. Hidden value necessarily eludes the markets' attempts to incorporate it into the stock price. While these elusive long-term value expectations go against the orthodoxy of efficient capital markets, they help describe why sustainability disclosure escapes enforcement in the courts.

To that end, Part III suggests three alternative solutions. First, investors can research a company's sustainability claims by themselves before making investment decisions. This alternative—the status quo—imposes high search costs on investors, despite the fact that corporations have easier access to relevant information. Second, corporations could guarantee investors' long-term returns by issuing put options at the price investors expect the security to reach.[19] These guarantees, however, would impose undue liability by asking corporations to insure their stock price movements. Finally, corporations can guarantee long-term returns *conditioned on the truthfulness of their sustainability disclosure*. Thus, an issuer would be liable only if it knowingly misrepresented its sustainability performance. This Note argues that these conditional warrants would enforce investor interests in sustainability better than securities-fraud doctrine is able to.

I. DEFINING DISCLOSURE

Ninety-three percent of the world's largest corporations voluntarily disclose sustainability information.[20] One can extrapolate that investors want these disclosures, and corporations feel compelled to provide them. Because liability rarely attaches to sustainability disclosures, however, they are irregular and unreliable.[21] Corporations are free to disclose good sustainability information without the bad, producing a misleading picture

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19. A put option is a right to sell stock at a set future date and price. 5B Arnold S. Jacobs, Disclosure and Remedies Under the Securities Law § 9:84, Westlaw (database updated Sept. 2020) [hereinafter Jacobs, Disclosure and Remedies].

20. KPMG, The Road Ahead: The KPMG Survey of Corporate Responsibility Reporting 2017, at 9 (2017), https://assets.kpmg/content/dam/kpmg/xx/pdf/2017/10/kpmg-survey-of-corporate-responsibility-reporting-2017.pdf [https://perma.cc/9G5S-3BE5].

21. Jill E. Fisch, Making Sustainability Disclosure Sustainable, 107 Geo. L.J. 923, 947–50 (2019); see also infra Part II.

of their operations.[22] To the extent that it exists, sustainability disclosure is of relatively low quality to investors.[23]

This Part describes the state of sustainability reporting and demonstrates how investors can be harmed by misrepresentations even when they do not impact the stock price. Typically, securities-fraud plaintiffs must show either that a misrepresentation caused an artificial rise in the stock price or that a subsequent "corrective disclosure" correcting the misrepresentation caused the price to fall.[24] But when a misrepresentation deals with long-term value, it is likely to escape the stock price.[25] Sustainability disclosures are not unique in this respect—financial disclosures may fail to impact the stock price—but they are uniquely susceptible because they typically address long-term value.[26] The Delaware "hidden value" model helps define the harm investors suffer when corporations misrepresent long-term value information.[27]

Section I.A evaluates the present state of sustainability disclosure and asks why corporations choose to disclose, including the quantifiable benefit they reap from disclosure. Section I.B draws an analogy to Delaware corporate law to put a finer point on the harm investors suffer when issuers misrepresent sustainability information. Finally, section I.C shows how the doctrine's failure to address this harm results in the proliferation of information asymmetries between issuers and investors.

A. *The State of Sustainability Reporting*

Sustainability disclosures relay material information to investors that goes to long-term value even though it may not be reflected in short-term returns. The idea that these disclosures are material even without impacting the stock price defies an orthodox understanding of the efficient capital markets hypothesis (ECMH)—the theory that stock prices quickly and accurately incorporate all available information—but nevertheless explains why corporations inform their investors about environmental and governance performance.[28] Institutional investors with the incentive and resources to research portfolio companies increasingly demand social responsibility from the companies they invest in—and the disclosures that go along with it—even where stock price may not be implicated.[29] Moreover, the markets appear to reward favorable sustainability

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22. See Fisch, supra note 21, at 947.

23. Id. at 947–48.

24. Jay B. Kasner & Mollie M. Kornreich, Section 10(b) Litigation: The Current Landscape, Bus. L. Today, Oct. 2014, at 1, 3.

25. See infra section I.A.4.

26. See infra section I.A.4.

27. See infra section I.B.

28. For a review of the ECMH in the securities-fraud context, see Michael A. Kitson, Note, Controversial Orthodoxy: The Efficient Capital Markets Hypothesis and Loss Causation, 18 Fordham J. Corp. & Fin. L. 191, 193–94 (2012).

29. See infra section I.A.2.

performance with lower risk, easier access to capital, and better long-term performance.[30]

While financial disclosures deal with matters like earnings and asset value that are relatively easy to factor into predictions of future value, sustainability information goes to facts about a corporation that often are far removed from present or near-term earnings and therefore do not have immediate stock-price impact.[31] So why should investors demand information about sustainability or push their portfolio companies to adopt sustainable goals? The most obvious answer is that investors rely on sustainability disclosures as a metric of long-term performance that may or may not be reflected in the stock price.[32] An investor that relies on the truthfulness of this information may value a stock differently from the market.[33] This Note suggests that the discrepancy between stock price and investor expectations is analogous to the hidden value that Delaware law protects in allowing boards to fend off hostile takeover bids.

1. *Defining Sustainability Disclosure.* — What this Note calls "sustainability" takes on a number of different names and forms—such as ESG and corporate social responsibility (CSR)—but coheres around the principle that "attention to corporate stakeholders, including the environment, employees, and local communities, is . . . critical to generating long-term shareholder wealth."[34] It necessarily encompasses a broad set of interests: As Martin Lipton observed, "[S]ustainability has become a major, mainstream governance topic that encompasses a wide range of issues, such as climate change and other environmental risks, systemic financial stability, labor standards, and consumer and product safety."[35]

Likewise, what is material to long-term shareholder value varies from industry to industry. The Sustainability Accounting Standards Board (SASB) breaks down materiality according to market sector.[36] For example, extractive industries are encouraged to consider wastewater management, while technology and communications companies must consider data security and consumer privacy.[37]

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30. See infra section I.A.3.

31. Hans B. Christensen, Luzi Hail & Christian Leuz, Adoption of CSR and Sustainability Reporting Standards: Economic Analysis and Review 6 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26169, 2019), https://www.nber.org/papers/w26169.pdf [https://perma.cc/N7KH-WCES] [hereinafter Christensen et al., Adoption of CSR].

32. Cf. id. at 13 ("[Corporate social responsibility] is often viewed as a 'strategic' activity that foregoes short-term profits in return for long-term benefits to the firm . . . .").

33. See infra section II.B (outlining how investors may form idiosyncratic value expectations based on sustainability information).

34. See Ho, supra note 2, at 60.

35. Martin Lipton, Spotlight on Boards 2018, Harv. L. Sch. F. on Corp. Governance (May 31, 2018), https://corpgov.law.harvard.edu/2018/05/31/spotlight-on-boards-2018 [https://perma.cc/KY38-GWGU].

36. SASB Materiality Map, Sustainability Acct. Standards Bd., https://materiality.sasb.org [https://perma.cc/GV9M-KURE] (last visited Oct. 24, 2020).

37. Id.

While financial disclosures take the form of annual reports to shareholders and periodic SEC filings,[38] sustainability reporting comes more or less at the discretion of corporations.[39] It includes self-laudatory press releases as well as glossy corporate reports.[40] Whereas SEC filings tend to be close-set lines of black-and-white text,[41] corporate sustainability reports tend to be colorful, decorated with pictures and graphics.[42] Very often, they are introduced by a letter from the CEO or a top sustainability officer touting the company's commitment to its stakeholders, social impacts, and the environment.[43] The reports tend to include the companies' sustainability priorities and their strategies for living up to those priorities.[44] They also aggregate data about sustainability performance, such as charitable donations made, energy consumed, and percentage of supply ethically sourced.[45]

Amazon's most recent disclosures provide an illuminating contrast. The working conditions in the shipping giant's warehouses have recently become headline fodder;[46] it acknowledges its labor issues in its 2019 SEC filings. Under risk factors, the company cites "works councils and labor unions" and discloses wage-and-hour suits against it in no fewer than five federal district courts, including a class action.[47] It concludes tepidly, "We

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38. See generally, e.g., Amazon.com, Inc., Annual Report (Form 10-K) (Jan. 31, 2019), https://www.sec.gov/Archives/edgar/data/1018724/000101872419000004/amzn-20181231x10k.htm [https://perma.cc/B9MW-2BCL] [hereinafter Amazon 10-K] (summarizing Amazon's financial condition and projections for the fiscal year ending December 31, 2018).

39. See Fisch, supra note 21, at 926–27 ("[M]ost existing sustainability reporting is voluntary, which means that individual issuers choose which information to disclose.").

40. See, e.g., In re Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597, 615 (S.D. W. Va. 2012) (finding a mine company liable for statements it made about safety in press releases, SEC filings, and analyst conference calls).

41. See generally, e.g., Amazon 10-K, supra note 38 (representing Amazon's mandatory SEC filings for 2018).

42. See generally, e.g., Walmart, 2019 Environmental, Social & Governance Report (2019), https://corporate.walmart.com/media-library/document/2019-environmental-social-governance-report/_proxyDocument?id=0000016a-9485-d766-abfb-fd8d84300000 [https://perma.cc/U62P-TLQT] [hereinafter Walmart ESG Report] (detailing Walmart's ESG goals and practices for 2019).

43. See, e.g., Boeing, The Future Is Built Here: 2019 Global Responsibility Report 1–3 (2019), http://www.boeing.com/resources/boeingdotcom/principles/environment/pdf/2019_environment_report.pdf [https://perma.cc/FZX4-Q3ZK].

44. See, e.g., Sysco, Delivering a Better Tomorrow: Corporate Social Responsibility Report 19 (2018), https://csr2018report.sysco.com/Sysco_2018_CSR.pdf [https://perma.cc/Z86S-VYFK].

45. See, e.g., Walmart ESG Report, supra note 42, at 79–89.

46. See, e.g., Isobel Asher Hamilton & Áine Cain, Amazon Warehouse Employees Speak Out About the 'Brutal' Reality of Working During the Holidays, when 60-Hour Weeks Are Mandatory and Ambulance Calls Are Common, Bus. Insider (Feb. 19, 2019), https://www.businessinsider.com/amazon-employees-describe-peak-2019-2 [https://perma.cc/DW2T-2BUT].

47. Amazon 10-K, supra note 38, at 7–8.

consider our employee relations to be good."[48] But looking at its 2019 sustainability report, one would learn that Amazon is "committed to supporting people—customers, employees, and communities" and "[c]reating a culture of safety," with worker perks like affinity groups and public transportation stipends.[49]

Sustainability reporting differs from financial disclosure in form as well as content. Whereas SEC filings are densely packed with carefully regulated disclosures aimed at financial details,[50] corporations post their sustainability reports as glossy PDFs under headings such as "Sustainability Report" or "Environmental, Social, and Governance Report."[51] But while corporations tend to aggregate sustainability information in special-purpose webpages and reports, it can also be found in corporate presentations, conference calls, proxy materials, SEC filings, news reports, and press releases—anywhere management speaks about the corporation's performance and practices.[52] Just as financial information is not limited to financial reports, sustainability information represents a type of disclosure rather than any particular forum.[53]

Attempts to standardize sustainability reporting have met with limited success. Corporate sustainability reports sometimes make reference to reporting standards set by independent organizations such as the Global Reporting Initiative (GRI).[54] But because neither the SEC nor stock exchange rules regulate the content of sustainability reporting—or require sustainability reporting at all—no set of standards has gained sway over the market.[55] Unlike accounting, for instance, where the Generally Accepted Accounting Principles are widely used, no single standard or set of

48. Id. at 4.

49. Amazon, Sustainability: Thinking Big 17, 46, 49–50 (2019), https://d39w7f4ix9f5s9.cloudfront.net/da/7d/b32c89ea479a9d76fb5ec31ed62c/amazon-susty-2019-2.pdf [https://perma.cc/B4KK-HXLS].

50. See generally Amazon 10-K, supra note 38 (representing Amazon's SEC filing for the fiscal year ending December 31, 2018).

51. Walmart's website is typical in this respect. See Global Responsibility, Walmart, https://corporate.walmart.com/global-responsibility [https://perma.cc/RG8V-UP4K] (last visited Oct. 24, 2020).

52. See, e.g., In re Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597, 615 (S.D. W. Va. 2012) (assigning liability to a mine company based on statements it made in conference calls, communications with the press, and SEC filings).

53. See Fisch, supra note 21, at 931–32.

54. See, e.g., Johnson & Johnson, GRI Content Index (2019), https://healthforhumanityreport.jnj.com/_document/gri-content-index?id=00000172-a920-d872-a776-bb7208910000 [https://perma.cc/27ES-3GT9] (breaking down Johnson & Johnson's 2019 sustainability report according to GRI standards).

55. See Fisch, supra note 21, at 926–27.

standards reigns, meaning sustainability reporting tends to be inconsistent and difficult to compare across companies or industries.[56]

2. *Investors Demand Sustainability Reporting*. — The increasing demand for sustainability reporting reflects the rise of large institutional investors that have the resources and incentive to research and evaluate corporations before investing.[57] In the last quarter of the twentieth century, institutional investors—including state, local, and private pensions—grew from 30% ownership of the securities traded on the New York Stock Exchange (NYSE) to more than half, accounting for more than two-thirds of all trades.[58] By 2017, institutional investors owned an estimated 80% of the S&P 500.[59] Unlike retail investors who previously dominated the market, institutional investors have the means to deeply research investments before buying, and they hold large stakes that can make monitoring and enforcement worthwhile.[60]

Increasingly, institutional investors are demanding that corporations maximize long-term sustainability as well as short-term profits.[61] For example, of nearly $50 trillion in professionally managed assets in the United States in 2017, about a quarter were invested in funds that explicitly adopt socially responsible investing (SRI) principles, up from about $2 trillion in

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56. Jill M. D'Aquila, The Current State of Sustainability Reporting: A Work in Progress, CPA J. (July 2018), https://www.cpajournal.com/2018/07/30/the-current-state-of-sustainability-reporting [https://perma.cc/TRR9-YV27].

57. Cf. Ho, supra note 2, at 84–86 (using portfolio theory to explain why institutional investors account for firm-specific risk).

58. Douglas M. Branson, Corporate Governance "Reform" and the New Corporate Social Responsibility, 62 U. Pitt. L. Rev. 605, 630 (2001).

59. Charles McGrath, 80% of Equity Market Cap Held by Institutions, Pensions & Invs. (Apr. 25, 2017), https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions (on file with the *Columbia Law Review*).

60. Compare Donald C. Langevoort, The SEC, Retail Investors, and the Institutionalization of the Securities Markets, 95 Va. L. Rev. 1025, 1025–26 (2009) (detailing the SEC's historical focus on "the plight of average investors, ones who lack investing experience and sophistication"), with Edward Rock & Marcel Kahan, Index Funds and Corporate Governance: Let Shareholders Be Shareholders 13–14 (N.Y.U. Sch. of L., L. & Econ. Working Paper No. 18-39, 2019), https://ecgi.global/sites/default/files/working_papers/documents/finalkahanrock.pdf [https://perma.cc/CSJ2-LJF5] (arguing that asset managers of a certain size have an incentive to use votes to increase corporate value), and Chester S. Spatt, Proxy Advisory Firms, Governance, Failure, and Regulation, Harv. L. Sch. F. on Corp. Governance (June 25, 2019), https://corpgov.law.harvard.edu/2019/06/25/proxy-advisory-firms-governance-failure-and-regulation [https://perma.cc/UP3L-EJ8R] (noting that institutional investors enjoy "economies of scale" in gathering information and making decisions about corporate affairs).

61. Laura Starks, Parth Venkat & Qifei Zhu, Corporate ESG Profiles and Investor Horizons 1–3, 6–7 (Oct. 9, 2017), https://ssrn.com/abstract=3049943 (on file with the *Columbia Law Review*) (unpublished manuscript) (addressing the increasing preference among institutional investors for ESG investing and concluding that this preference is due to those investors' increasing focus on long-term value).

2000.[62] The top issues addressed by the institutions that manage these funds included climate change, board and governance issues, and the risks of associating with repressive or corrupt regimes.[63] But even outside the context of specialized SRI funds, institutional investors have stepped up public demands for a long-term value approach. For instance, in a 2018 letter to corporate managers, the chairman of BlackRock, the world's largest asset manager,[64] touted "a new model for corporate governance" emphasizing long-term shareholder value.[65] The letter urged companies to "publicly articulate your company's strategic framework for long-term value creation," warning that BlackRock "can choose to sell the securities of a company if we are doubtful about its strategic direction or long-term growth."[66]

Corporations, in turn, have pledged themselves to a "new corporate purpose" that addresses stakeholders—for instance, employees, suppliers, and community groups—as well as stockholders. The most public example was the August 2019 *Statement on the Purpose of a Corporation* from Business Roundtable, a nonprofit whose membership includes the CEOs of major U.S. companies.[67] Signed by the CEOs of 222 corporations—including Walmart, Amazon, Apple, and Exxon—the statement purported to put stakeholders on equal footing with shareholders in the corporate hierarchy: "While each of our individual companies serves its own corporate purpose, we share a fundamental commitment to all of our stakeholders."[68] The statement committed its signatories to "[d]elivering value to our customers," "[i]nvesting in our employees," "[d]ealing fairly and ethically with our suppliers," "[s]upporting the communities in which we work," and, last but not least, "[g]enerating long-term value for shareholders."[69] Many in the business community saw the statement as no less than a revolutionary manifesto.[70]

62. See US SIF Found., Report on US Sustainable, Responsible and Impact Investing Trends: 2018 Trends Report Highlights 1 (2018), https://www.ussif.org//Files/Trends/Trends_onepageroverview_2018.pdf [https://perma.cc/Y7G3-9L3Q].

63. Id. at 2.

64. CodeGreen, BlackRock, https://codegreensolutions.com/project/blackrock [https://perma.cc/R3FN-RPXG] (last visited Oct. 24, 2020).

65. Larry Fink, Larry Fink's 2018 Letter to CEOs: A Sense of Purpose, BlackRock, https://www.blackrock.com/corporate/investor-relations/2018-larry-fink-ceo-letter [https://perma.cc/U55M-AYWD] (last visited Oct. 24, 2020).

66. Id.

67. Our Commitment: Statement on the Purpose of a Corporation, Bus. Roundtable, https://opportunity.businessroundtable.org/ourcommitment [https://perma.cc/9TFW-3QUR] [hereinafter Business Roundtable, Letter] (last visited Oct. 24, 2020).

68. Id.

69. Id.

70. See, e.g., Camille Nicita, Are Companies Rising to the Occasion? Why 181 CEOs Signed a Revolutionary Corporate Governance Pact, Forbes (Oct. 17, 2019), https://www.forbes.com/sites/forbesagencycouncil/2019/10/17/are-companies-rising-to-the-occasion-

To be sure, shareholders are still in the driver's seat of the American corporation. They alone possess the power to hire and fire directors, and they hold the residual equity in the corporations they invest in.[71] But when shareholders themselves demand that customers, suppliers, employees, and the environment be taken into account, it makes sense for corporations to update the way they think and speak about the corporate purpose. In turn, that new purpose demands a different set of public disclosures.

3. *Empirical Data on Sustainability Disclosure.* — In 2015, a sustainable asset manager partnered with Oxford researchers to compile the results of 200 academic papers on corporate sustainability.[72] Large majorities of the studies linked sustainability performance with a lower cost of capital and stock-price performance.[73] Emerging empirical data suggests investors may have good financial reason to invest in firms with strong sustainability performance and to demand the disclosures they need to make those investments.[74]

Professors Pierre Chollet and Blaise Sandwidi, for instance, posit a "virtuous circle," where robust sustainability performance and disclosure lessen litigation risk, increase stockholder confidence, and reduce financial risk.[75] These effects give firms the discretion to invest further in sustainability efforts.[76] In turn, these investments lead to better sustainability performance, which feeds back into less financial risk.[77] An empirical study of nearly 4,000 firms linked sustainable practices with reduced financial risk, supporting the "virtuous circle" hypothesis.[78]

Capital markets appear to recognize sustainability disclosures, rewarding robust disclosure practices with easier access to capital. One study found that companies with better CSR performance faced lower

why-181-ceos-signed-a-revolutionary-corporate-governance-pact [https://perma.cc/P34R-S6JQ].

71. See, e.g., Del. Code tit. 8, § 141(k) (2020) (setting out the rights of stockholders).

72. Gordon L. Clark, Andreas Feiner & Michael Viehs, From the Stockholder to the Stakeholder: How Sustainability Can Drive Financial Outperformance 6, 8–10 (2015), https://ssrn.com/abstract=2508281 (on file with the *Columbia Law Review*).

73. Id. at 8–9.

74. These data are not uncontroversial. See, e.g., Luc Renneboog, Jenke Ter Horst & Chendi Zhang, Socially Responsible Investments: Institutional Aspects, Performance, and Investor Behavior, 32 J. Banking & Fin. 1723, 1739 (2008) (arguing that SRI investors seek sustainability in spite of *suboptimal* performance); Christophe Revelli & Jean-Laurent Viviani, Financial Performance of Socially Responsible Investing (SRI): What Have We Learned? A Meta-Analysis, 24 Bus. Ethics: Eur. Rev. 158, 171 (2014) (concluding that "globally, there is no real cost or benefit to investing in SRI").

75. Pierre Chollet & Blaise W. Sandwidi, CSR Engagement and Financial Risk: A Virtuous Circle? International Evidence, 38 Glob. Fin. J. 65, 66–67 (2018).

76. Id.

77. Id.

78. Id. at 78.

capital constraints.[79] The authors reasoned that "the increased data availability and quality reduces the informational asymmetry between the firm and investors."[80] In other words, investors buy more readily into companies with better sustainability disclosures because they know more about their likely future performance.

Perhaps most importantly for investors, companies with better sustainability performance outperform other firms financially.[81] Researchers found that sustainability measures are positively related with financial performance *but only* when those measures were material according to the SASB.[82] Indeed, the best-performing companies were those that performed well on material measures of sustainability but poorly on immaterial measures, suggesting that well-directed investment in sustainability is the winningest strategy for firms.[83]

Beyond validating the benefits of sustainability performance, research suggests the market absorbs sustainability information, for whatever reason. A Harvard Business School study rated more than 1,200 U.S. corporations based on the quality of their sustainability disclosures and compared those ratings with stock price informativeness—the degree to which stock prices reflect firm-specific information.[84] The positive relationship between material sustainability disclosure and stock-price informativeness suggests that "SASB-identified sustainability information provides investors with useful firm-specific information aiding in the price discovery process."[85]

Whether motivated by lower risk, easier access to capital, or abnormal stock performance, the markets seem to respond to sustainability disclosures. This evidence gives empirical weight to the claim that sustainability disclosures can be material. While this Note presents only a small fraction of the studies on sustainability and firm performance,[86] this research

79. Beiting Cheng, Ioannis Ioannou & George Serafeim, Corporate Social Responsibility and Access to Finance, 35 Strategic Mgmt. J. 1, 16–17 (2014).

80. Id. at 2.

81. Mozaffar Khan, George Serafeim & Aaron Yoon, Corporate Sustainability: First Evidence on Materiality 16–17 (Harvard Bus. Sch., Working Paper No. 15-073, 2015), https://dash.harvard.edu/bitstream/handle/1/14369106/15-073.pdf?sequence=1 [https://perma.cc/EW5U-ANFV].

82. See id. at 3–4.

83. See id.

84. Jody Grewal, Clarissa Hauptmann & George Serafeim, Material Sustainability Information and Stock Price Informativeness, J. Bus. Ethics, Feb. 2020, at 1, 2–3.

85. Id. at 3.

86. For a comprehensive review of the academic literature on sustainability disclosure, see generally Hans B. Christensen, Luzi Hail & Christian Leuz, Economic Analysis of Widespread Adoption of CSR and Sustainability Reporting Standards: Structured Overview of CSR Literature (Nov. 2018), http://ssrn.com/abstract=3313793 (on file with the *Columbia Law Review*) (unpublished manuscript) (compiling nearly 400 publications on sustainability disclosure as an appendix to Christensen et al., Adoption of CSR, supra note 31).

points to legitimate reasons investors may have for monitoring the long-term sustainability of their portfolio companies and potential investments.

4. *Sustainability Reporting and Short-Term Prices.* — The environmental and social goals and metrics set out in sustainability disclosures entail putting stakeholder interests ahead of short-term maximization, embodying a longer time horizon than the next trading day.[87] Unlike the information contained in financial reports, this data can be difficult to price.[88] By definition, long-term value information goes to long-term returns.[89] In short, sustainability information is less likely than financial information to move markets in the short term.

A recent example serves to illustrate the point. On January 16, 2020, Microsoft made a dramatic announcement that it intended to be carbon negative within ten years.[90] By the company's own account, this effort would require an "aggressive program" that entailed "not just a bold goal but a detailed plan," which it proceeded to describe at some length.[91] By all accounts, the announcement was a big deal in the ESG community.[92] Major outlets ran with the story,[93] and over the next few months, other major tech giants like Facebook and Apple followed suit with pledges of their own.[94] Yet the stock market barely took notice. The day before the announcement, Microsoft stock closed at $163.18.[95] By the end of trading on January 16, it was up $2.99, to $166.17, about a 1.8% increase.[96] A week

87. See Christensen et al., Adoption of CSR, supra note 31, at 6.

88. See id. at 13.

89. See id. at 6 ("[S]ustainability . . . emphasizes the long-term horizon.").

90. See Brad Smith, Microsoft Will Be Carbon Negative by 2030, Microsoft (Jan. 16, 2020), https://blogs.microsoft.com/blog/2020/01/16/microsoft-will-be-carbon-negative-by-2030 [https://perma.cc/BB83-785Z].

91. See id.

92. See David Roberts, Microsoft's Astonishing Climate Change Goals, Explained, Vox (July 30, 2020), https://www.vox.com/energy-and-environment/2020/7/30/21336777/microsoft-climate-change-goals-negative-emissions-technologies (on file with the *Columbia Law Review*).

93. See, e.g., Diana Bass, Microsoft to Invest $1 Billion in Carbon Capture with Pledge to Go Carbon-Negative by 2030, L.A. Times (Jan. 16, 2020), https://www.latimes.com/business/technology/story/2020-01-16/microsoft-to-invest-1-billion-in-carbon-capture-technology (on file with the *Columbia Law Review*); Jay Greene, Microsoft Pledges to Remove More Carbon than It Produces by 2030, Wash. Post (Jan. 16, 2020), https://www.washingtonpost.com/technology/2020/01/16/microsoft-climate-change-pledge (on file with the *Columbia Law Review*); Matt O'Brien, Microsoft: 'Carbon-Negative' by 2030 Even for Supply Chain, AP News (Jan. 16, 2020), https://apnews.com/article/17f056941a078fccede72b12236f6d6f [https://perma.cc/YBS4-YF7P].

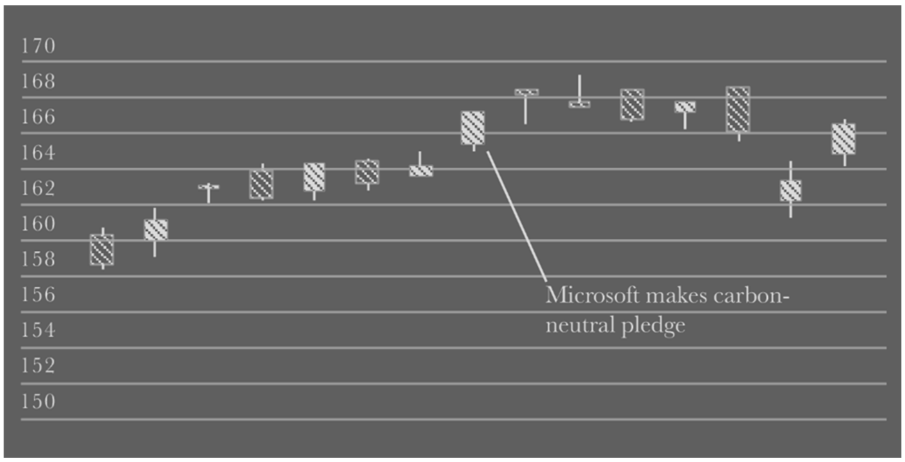
94. Somini Sengupta & Veronica Penney, Big Tech Has a Big Climate Problem. Now, It's Being Forced to Clean Up., N.Y. Times (July 21, 2020), https://www.nytimes.com/2020/07/21/climate/apple-emissions-pledge.html (on file with the *Columbia Law Review*).

95. Microsoft Corporation (MSFT), Yahoo! Fin., https://finance.yahoo.com/quote/MSFT/history?p=MSFT [https://perma.cc/7SB8-TU8A] [hereinafter Data from Yahoo! Finance] (last visited Oct. 24, 2020).

96. Id.

later, by January 27, Microsoft was again trading in the $163 range.[97] In all, it seems that the market reacted to Microsoft's "astonishing climate change goals"[98] with a yawn. If stock price reliably accounted for sustainability information, one would expect an announcement like this one to have a greater impact.

FIGURE 1: MICROSOFT STOCK PRICE, JANUARY 7–27, 2020[99]



This is not to say that sustainability disclosures *cannot* produce short-term stock-price impact. To the contrary, a study of short-term returns following the release of corporate sustainability reports showed that these reports can move markets when they "contain new, value-relevant information."[100] But the study also found that over the long term, sustainability reporting increases the extent to which sustainability performance tracks with financial performance, suggesting some long-term effect of sustainability reporting beyond the short-term price impact.[101] In general, though, the empirical literature is mixed. One study found that markets react negatively to both good and bad CSR news, though they react more strongly to bad news.[102] A study of eleven socially responsible mutual funds found that while they failed to outperform the NYSE Composite Index

97. Id.

98. Roberts, supra note 92.

99. Data from Yahoo! Finance, supra note 95. Spread between high and low, and opening and closing price for Microsoft seven days before and after the carbon-negative announcement. Relative to normal stock price movements, the announcement seems to have had little effect.

100. Shuili Du, Kun Yu, C.B. Bhattacharya & Sankar Sen, The Business Case for Sustainability Reporting: Evidence from Stock Market Reactions, 36 J. Pub. Pol'y & Mktg. 313, 325 (2017) (emphasis omitted).

101. Id. at 327.

102. See Philipp Krüger, Corporate Goodness and Shareholder Wealth, 115 J. Fin. Econ. 304, 305 (2015).

over three- and five-year spans, they beat the market over a ten-year time horizon.[103]

In any case, it does not seem like a stretch to say that some investors value sustainability performance while others do not.[104] Long-term investors invest based on long-term prospects and react positively to CSR investments, while short-term investors react negatively or not at all.[105] Perhaps due to the heterogeneous nature of investor interests,[106] some sustainability information is immediately priced by the markets while other disclosures are not. One analysis suggests that some sustainability investments provide net positive value by mitigating foreseeable risks (and thus impact short-term stock prices) while other CSR investments put long-term interests in front of short-term ones (and thus have no impact, or even a negative impact on short-term prices).[107] In sum, while both sustainability and financial disclosures may create short-term price impact, sustainability disclosures less reliably move markets because of their long-term valence.

5. *The Failure of Sustainability Reporting.* — In spite of the apparent benefits to companies that disclose, sustainability disclosure exists in a regulatory Wild West that undercuts its reliability.[108] Whereas the contents, timing, and veracity of financial disclosures are governed by robust SEC regulations, such as the reporting requirements in Regulation S-K,[109] the lack of regulation or enforcement around sustainability disclosures means companies can provide boilerplate disclosures or even mislead.[110] Even where companies want to disclose material information about sustainability performance, the lack of accountability means stockholders have no good reason to believe them.[111]

To begin with, sustainability reports are prepared by specialized personnel rather than reporting professionals working under a corporation's CFO, meaning sustainability reports and financial disclosures may provide

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103. See Todd Shank, Daryl Manullang & Ron Hill, "Doing Well While Doing Good" Revisited: A Study of Socially Responsible Firms' Short-Term Versus Long-Term Performance, 30 Managerial Fin. 33, 36, 44 (2005).

104. See Starks et al., supra note 61, at 2 ("[D]ifferences exist between long-term and short-term investors in their preferences toward high ESG firms.").

105. Id.

106. Id.

107. See Christensen et al., Adoption of CSR, supra note 31, at 33.

108. See Fisch, supra note 21, at 947 ("Because disclosure is voluntary . . . issuers overwhelmingly disclose only information about the areas in which their business practices are highly sustainable. In many cases, issuers simply omit the issues on which their practices fall short and reporting metrics that would flag shortcomings." (footnotes omitted)).

109. See 17 C.F.R. §§ 229.10–229.915 (2020) (laying out the contents and mechanics of mandatory financial disclosures).

110. Fisch, supra note 21, at 947–48.

111. Cf. id. (noting that "sustainability disclosures are fragmented, of inconsistent quality, and often unreliable").

conflicting pictures of corporate performance.[112] The job of spearheading sustainability efforts and reporting on those efforts often falls to a Chief Sustainability Officer or a similarly titled executive.[113] Thus, the bifurcation between financial and sustainability disclosures entails not just separate reports but separate *reporting staff*.

Professionals and scholars have decried this failure. One speaker at an SASB conference suggested, "[I]t's not that investors are not interested [in sustainability disclosures]—it's that they're already getting information through alternative channels that lack the safeguard of financial reporting."[114] Conference participants pointed to the "silos" separating financial and nonfinancial disclosure: "If the CFO or lawyers realized some of the information that is going through the Chief Sustainability Officer [or] COO or Chief Marketing Officer," said one, "then there might be more of a sense that . . . they're putting out public information, using terms like 'material' or 'absolutely imperative' or 'billions of dollars,' and making commitments on changing operations that are not finding their way into the securities filing."[115]

While sustainability disclosures no doubt have important implications for financial performance, the bifurcation of financial and sustainability reporting creates a confusing picture of corporate operations. A contrast between financial and sustainability disclosure reflects these information silos. As shown in Figures 2 and 3—depictions of Walmart's 2019 SEC Form 10-K and its Environmental, Social, and Governance Report, respectively[116]—the SEC filing is heavy on words like "financial," "assets," and "tax," while the sustainability report emphasizes "suppliers," "emissions," and "associates."[117]

112. Kathleen Miller & George Serafeim, Chief Sustainability Officers: Who Are They and What Do They Do? 3 (Harvard Bus. Sch., Working Paper No. 15-011, 2014), https://dash.harvard.edu/bitstream/handle/1/13350441/15-011.pdf [https://perma.cc/QG5C-7D4V].

113. Id.

114. Sustainability Accounting Standards Board, Legal Roundtable on Emerging Issues Related to Sustainability Disclosure 7 (2017), https://www.sasb.org/wp-content/uploads/2019/08/LegalRoundtable-Paper-11132017.pdf [https://perma.cc/PU9A-B5AU].

115. Id. (internal quotation marks omitted).

116. These word clouds were generated using a free online tool. Word Cloud Generator, Jason Davies, https://www.jasondavies.com/wordcloud [https://perma.cc/VAH3-VLUR] (last visited Oct. 24, 2020).

117. Walmart Inc., Annual Report (Form 10-K) (Mar. 28, 2019), https://www.sec.gov/Archives/edgar/data/104169/000010416919000016/wmtform10-kx1312019.htm [https://perma.cc/9HYX-KLNQ]; Walmart ESG Report, supra note 42.

FIGURE 2: WALMART—2019 FORM 10-K

FIGURE 3: WALMART—2019 ESG REPORT

To be sure, it comes as no surprise that 10-K forms and sustainability reports cover different subject matter. But it is worth wondering why, if investors expect that sustainability contributes to firm performance, sustainability reports do not more often include predictions about the financial impact of sustainable practices. On the other hand, why do financial reports not more often include sustainability practices and performance?

These problems have left corporate sustainability disclosures open to claims of greenwashing, or selectively publishing sustainability information for reputational gain.[118] For instance, consumers are more likely to believe that companies engage in CSR efforts in order to enhance their

118. See, e.g., Cadesby B. Cooper, Note, Rule 10B-5 at the Intersection of Greenwash and Green Investment: The Problem of Economic Loss, 42 B.C. Env't Affs. L. Rev. 405, 406 (2015) (defining "greenwash" as "communications [that] disclose false or misleading claims about environmental performance" and claiming that "[c]ompanies have an incentive to greenwash to improve returns on investments and to gain positive goodwill").

reputation than out of any genuine altruism.[119] Thus, even where corporations genuinely care about sustainability, they risk being disbelieved, crippling their ability to signal virtue to shareholders.[120] Without a mechanism to enforce truthfulness in sustainability disclosure, the problems of information silos, selective disclosure, and greenwashing will likely persist.

B. *A Hidden Value Approach to Sustainability Disclosure*

While securities doctrine assumes that the stock price captures all pertinent information about the future value of a security,[121] Delaware takeover law recognizes that certain market actors have durable, legitimate expectations about a corporation's value not reflected in the stock price.[122] Delaware protects a *board's* expectations about this unpriced value, but the assumptions underpinning its jurisprudence apply with equal force to an investor that shares the board's expectations or even claims to know better. Thus, Delaware courts can be said to recognize a legitimate investor expectation that securities doctrine rejects.

Along with its progeny, *Unocal Corp. v. Mesa Petroleum Corp.*, Delaware's seminal takeover defense case, allows corporate boards to stand between tendering shareholders and a willing buyer solely because the board thinks the price is inadequate.[123] In *Unitrin, Inc. v. American General Corp.*, the Delaware Supreme Court held that boards can justify blocking a tender offer merely by citing "substantive coercion"—an assertion that, in the board's judgment, the tendering shareholders will sell at too low a price.[124] These cases thus recognize and protect value expectations not reflected in market prices.[125] Despite skepticism among scholars and jurists

119. Aflac & Fleishman Hillard, National Survey on Corporate Social Responsibility 36 (2016), https://www.aflac.com/docs/about-aflac/csr-survey-assets/2016-csr-survey-deck.pdf [https://perma.cc/5MXS-NCF9].

120. Id.

121. See Kitson, supra note 28, at 193–96.

122. Under the Delaware model, the board's role includes protecting shareholders from inadequate offers by recognizing long-term value the shareholders miss. This role is justified by the idea that only the board can properly value the corporation's stock, meaning only the board can prevent shareholders from selling at too low a price and being locked out of all future synergies or growth opportunities. See Black & Kraakman, supra note 12, at 527 ("The board knows best how to discern hidden value both in the target's stand-alone value and in its synergies with the acquirer . . . . The board's insight into hidden value justifies its discretion to accept or reject deals.").

123. 493 A.2d 946, 949 (Del. 1985). A tender offer is a public offer by a third party to buy all or some portion of the stock in a corporation. Jacobs, Disclosure and Remedies, supra note 19, § 17:1. Tender offers are the primary vehicle of the hostile takeover as they do not require board approval, since they represent a voluntary sale by shareholders. See Ronald J. Colombo, Law of Corporate Officers and Directors: Rights, Duties and Liabilities § 6:1, Westlaw (database updated Oct. 2020). Thus, by allowing boards to block tender offers, *Unocal* allowed boards to stand between willing buyers and willing sellers.

124. 651 A.2d 1361, 1384–85 (Del. 1995).

125. Black & Kraakman, supra note 12, at 522–23.

as to whether boards can see value that shareholders simply miss,[126] Delaware courts protect these value expectations even though they do not attempt to put a price tag on them.[127] Indeed, Delaware courts are much more reluctant to actually appraise the underlying value of corporations.[128] While they will reluctantly undertake appraisal proceedings in the merger context to determine the value of an investor's holdings, no single method applies to make this calculation.[129] Hence, Delaware courts recognize value expectations in excess of stock price even though they hedge on their ability to evaluate these expectations by allowing a variety of valuation methods.

A leading interpretation of Delaware's takeover jurisprudence explains it using a "hidden value model," the idea that boards can perceive corporate value that is not only unknown but unknowable to shareholders.[130] While expressing reservations about the extent to which hidden value actually exists, Black and Kraakman outline a set of necessary assumptions underlying the model and suggest that it underpins takeover jurisprudence.[131] In particular, they suggest that for hidden value to exist, boards must possess comprehensive information that cannot credibly be communicated to shareholders, representing a relatively large and durable difference between the stock price and a corporation's true value.[132] Boards must be trustworthy: not overly susceptible to agency costs and kept in check by a credible investment banker's opinion.[133] Finally, hidden value must escape capture in the takeover market, or else boards could simply auction off the company for its true value.[134]

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126. Jack B. Jacobs, Fifty Years of Corporate Law Evolution: A Delaware Judge's Retrospective, 5 Harv. Bus. L. Rev. 141, 165–66 (2015) (calling into question the doctrine of substantive coercion). Black and Kraakman themselves express doubt about the empirical truth of the hidden value model. See Black & Kraakman, supra note 12, at 552 ("Any one board's claim of hidden value might be right, but the evidence shows that most such claims are wrong.").

127. See Black & Kraakman, supra note 12, at 523 ("The hidden value model merits analysis not because it is right—we don't think it is—but because it is the only paradigm that makes sense of the broad outlines of the Delaware case law.").

128. See supra note 16 and accompanying text.

129. Weinberger v. UOP, Inc., 457 A.2d. 701, 713 (Del. 1983) (holding that appraisal may be carried out by "any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court").

130. See Black & Kraakman, supra note 12, at 522–23 ("[H]idden value must be not only unknown to shareholders and acquirers, but *unknowable* . . . .").

131. See supra notes 125–127 and accompanying text.

132. See Black & Kraakman, supra note 12, at 528–32 (outlining the assumptions underlying the hidden value model).

133. Id.

134. Id. Corporate law scholars see the market for corporate control as a check on corporate management: Raiders will seek out corporations that are not performing up to their potential, take them over, and either sell or improve them to capture this unrealized market value. See Zohar Goshen, The Efficiency of Controlling Corporate Self-Dealing, 91

Without assigning any more empirical weight to the hidden value model than Black and Kraakman, a short logical step can extend the model from boards to certain institutional shareholders. Instead of assuming hidden value cannot be communicated to *any* shareholders, this Note adopts an expanded assumption: that hidden value can be communicated to *some but not all* shareholders. Thus, an investor who takes the time and effort to study a corporation's underlying worth—for instance, an SRI fund—might perceive hidden value even where traditional investors would not. With this modest adjustment, Black and Kraakman's model demonstrates how shareholders can hold value expectations that the market does not recognize. While the hidden value remains hidden to the market, a small number of shareholders, after careful study of a corporation's long-term value, can come to share the board's perspective.[135]

This Note uses the hidden value model to show how misrepresentations about sustainability information cause real injury to investors that cannot be captured by the securities-fraud class action. Investors look to sustainability performance as a proxy for long-term returns,[136] and may be injured when that performance is misrepresented—*regardless of short-term stock movements.* Hence, the Delaware example shows how takeover jurisprudence can give meaning to sustainability information that securities law rejects. The following Part demonstrates that even though sustainability misrepresentations can be material, investors cannot get relief because of the Supreme Court's price-impact requirement. These plaintiffs therefore have a right with no remedy. The hidden value model deals with this contradiction by showing how investors can suffer injuries that are not only unproven but unprovable. In this way, it helps explain why securities-fraud doctrine necessarily fails to incentivize truthful sustainability disclosure and why a private-ordering solution must instead be sought.

II. A HIDDEN VALUE APPROACH TO SUSTAINABILITY MISREPRESENTATIONS

The Supreme Court's decision in *Halliburton II* firmly shut the door on long-term value as a basis for injury in securities fraud: Defendants can defeat class certification by showing that there is no provable connection between the alleged misrepresentations and movement in the stock

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Calif. L. Rev. 393, 421 (2003). The hidden value model suggests that corporate boards can detect value that the takeover market cannot. Black & Kraakman, supra note 12, at 528–32.

135. This may be the case notwithstanding the fact that a market will act efficiently even if only a small portion of the market is properly informed. See Lynn A. Stout, The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation, 87 Mich. L. Rev. 613, 619–20 & n.27 (1988). This Note assumes that a small number of investors could believe a corporation to be underpriced, but either be unable to convince the market of their position right away, or otherwise choose not to for the time being.

136. See supra section I.A.2.

price.[137] *Halliburton II* affirmed a doctrinal status quo that insists on stock-price impact as a measure of damages, effectively putting private enforcement out of reach for investors looking to vindicate their interest in truthful sustainability disclosure.[138]

Securities-fraud doctrine rejects liability for any disclosure that fails to impact short-term stock price, meaning disclosures impacting only long-term value are functionally invisible to the securities-fraud action.[139] Consequently, even where investors allege a material misrepresentation as to sustainability disclosure so as to survive a motion to dismiss, they cannot obtain relief unless they can show stock-price impact.[140] Because sustainability disclosures may elude capture by the stock price, sustainable investors are often left without any legal enforcement tools, and a breakdown in the exchange of such information persists.[141] This Part shows how even where investors point to material misrepresentations about sustainability disclosure, these misrepresentations are without a remedy to the extent that they fail to allege price impact.

Section II.A outlines the narrow set of circumstances under which courts find sustainability disclosure to be material. Section II.B shows how these claims nonetheless run up against a de facto price-impact requirement. Section II.C uses the hidden value model to demonstrate how investors are left with a right but no remedy and how the nature of this investor interest eludes the ability of the courts to craft a remedy. This understanding suggests investors' demand for truthful sustainability disclosure is not only without a remedy but also irremediable without a private-ordering solution.

A. *A Narrow Path to Liability*

Suits over sustainability disclosures risk dismissal based on the argument that they fail to allege a material misrepresentation. Because sustainability disclosures are often cloaked in corporate boosterism, they are easily dismissed as puffery, hyperbole, or "management-speak."[142] This

137. Halliburton Co. v. Erica P. John Fund (*Halliburton II*), 573 U.S. 258, 268–69 (2014). Because securities-fraud actions rarely go to trial, benchmarks such as class certification, which impact the settlement value, take on outsized importance. Geoffrey Rapp, Rewiring the DNA of Securities Fraud Litigation: *Amgen*'s Missed Opportunity, 44 Loy. U. Chi. L.J. 1475, 1478–79 (2013) ("[B]ecause securities litigation is so high risk for defendants, these cases . . . will almost always settle (and usually in a fairly predictable monetary range). As a result, securities litigation rarely reaches the 'merits' stage, and the law evolves extremely slowly . . . ." (footnote omitted)).

138. See infra section II.B.

139. See infra section II.B.

140. See infra section II.B.

141. See supra section I.A.4.

142. See, e.g., In re Level 3 Commc'ns, Inc. Sec. Litig., 667 F.3d 1331, 1340 (10th Cir. 2012) (characterizing alleged misrepresentations as "vague (if not meaningless) management-speak upon which no reasonable investor would base a trading decision").

section first examines the doctrines and arguments courts use to reject sustainability disclosure suits, and then describes the conditions under which such a suit can nonetheless proceed.

1. *The Puffery Problem.* — The recent disposition of the securities lawsuit that followed a catastrophic dam collapse in Brazil illustrates the reasoning courts use to throw out suits where the alleged misrepresentations are insufficiently material. Shareholders in Vale, the world's largest iron ore producer, brought suit after a dam the company used to dispose of wastewater collapsed, unleashing millions of tons of mining waste that killed nineteen people and left 600 homeless.[143] The shareholders sued based on conference calls, press releases, and public filings that played up Vale's dedication to health, safety, and the environment; touted its commitment to risk mitigation; and repeatedly claimed to cut costs without compromising capital expenditures.[144] The Southern District of New York dismissed Vale's communications before the disaster as the basis of liability for three reasons: They were too general, too aspirational, and otherwise forward-looking and framed by hedging language.

The court first turned to Vale's statements about cost reduction, which it concluded were too general to give rise to liability. Plaintiffs alleged that once Vale spoke about its cost-cutting measures, it was under a duty to reveal that it was cutting costs by compromising on mine safety.[145] Acknowledging that "once a company speaks on an issue or topic, there is a duty to tell the whole truth," the court nonetheless found that asking Vale to implicate itself in safety violations would be going a step too far.[146] Thus, stating in an SEC filing that Vale was "minimizing operating costs and expenses" did not also require it to disclose its lax investment in safety.[147] The court concluded that a "reasonable investor" would not have been misled about safety violations "from the headline statements about cost reductions."[148]

Next, the court turned to statements about Vale's commitment to health, safety, and the environment, including a conference presentation by Vale's CEO where he espoused the company's "genuine care for the safety and well-being" of employees and communities, as well as Vale's 2013 Sustainability Report, in which it claimed the company "adopt[ed] best practices in social and environmental management."[149] These statements, the court found, were comprised of "general, airy statement[s]

143. In re Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 WL 1102666, at *1 (S.D.N.Y. Mar. 23, 2017).

144. Id. at *7.

145. Id. at *21.

146. Id. at *20–21 (quoting Meyer v. Jinkosolar Holdings Co., 761 F.3d 245, 250 (2d Cir. 2014)) (citing In re Citigroup, Inc. Sec. Litig. 330 F. Supp. 2d 367, 377 (S.D.N.Y. 2004)).

147. Id. at *12, *20–21.

148. Id. at *21.

149. Id. at *8.

of commitment routinely found to constitute non-actionable puffery."[150] Significantly, the court distinguished Vale's statements from those found to be materially misleading in litigation over the Deepwater Horizon oil rig explosion.[151] In that case, the defendant Transocean claimed to be unaware of any "'past or present facts, conditions or circumstances' that were 'reasonably likely to give rise under any Environmental Law' to costs and liabilities."[152] The *In re Vale* court found that Transocean's statements "conveyed a statement of measurable fact" and "differed in kind from the broad non-specific statements regarding Vale's commitment to safety generally."[153]

In re Ford presents another example of a court dismissing sustainability disclosures as "corporate puffery."[154] Plaintiffs alleged that Ford's failure to adequately test its Explorer model had resulted in more than fifty lawsuits alleging injury or death due to tire separation failure.[155] The plaintiffs claimed, among other things, that Ford had misled its investors by making "many misleading statements regarding its commitment to quality, safety, and corporate citizenship" in its annual report, including "Ford is a worldwide leader in automotive safety" and "want[s] to be [a] clear leader[] in corporate citizenship."[156] The court made quick work of these statements, finding that "[c]ourts everywhere 'have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers.'"[157] It tied its dismissal back to the Supreme Court's materiality doctrine, holding, "Such statements are either mere corporate puffery or hyperbole that a reasonable investor would not view as significantly changing the general gist of available information, and thus, are not material, even if they were misleading."[158]

Turning back to *In re Vale*, the court lastly pointed to predictive or forward-looking language as a basis for dismissing sustainability complaints. The defendants cited the "bespeaks caution" doctrine to

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150. Id. at *22.

151. Bricklayers & Masons Loc. Union No. 5 Ohio Pension Fund v. Transocean Ltd., 866 F. Supp. 2d 223, 241 (S.D.N.Y. 2012).

152. Id. (quoting Second Amended Class Action Complaint at 53, *Transocean*, 866 F. Supp. 2d 223 (No. 10-cv-7498), 2012 WL 3017701).

153. *In re Vale*, 2017 WL 1102666, at *22.

154. In re Ford Motor Co. Sec. Litig., Class Action, 381 F.3d 563, 570 (6th Cir. 2004).

155. Id. at 568–69.

156. Id. at 570 (alteration in original) (internal quotation marks omitted) (quoting Consolidated Complaint for Violations of the Securities Exchange Act of 1934 at 2–3, *In re Ford Motor Co.*, 381 F.3d 563 (No. 00-74233), 2001 WL 36162728).

157. Id. at 570–71 (quoting Shaw v. Digit. Equip. Corp., 82 F.3d 1194, 1217 (1st Cir. 1996)).

158. Id. at 570. For comparison, the Court in *TSC Industries, Inc. v. Northway, Inc.* found a statement or omission is material if it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." 426 U.S. 438, 449 (1976).

shield the statements from court scrutiny.[159] The bespeaks caution doctrine protects "forward-looking statement[s] accompanied by sufficient cautionary language" from liability.[160] Accepting defendants' contention that *some* of the allegedly misleading statements fell under the doctrine, the court scrubbed any forward-looking statements from the complaint while retaining any "representations of present or historical facts."[161] Thus, statements like "[w]e mitigate operational risk with new controls and improvement of existing ones" and "[o]perations are planned and conducted so as to cause the lease [sic] possible environmental impact" survived the defendants' motion to dismiss.[162]

In re Vale and *In re Ford* sum up common reasons that courts reject liability based on corporate disclosures about sustainability: They are too general, too aspirational, and too forward-looking to be actionable. While exempting a large portion of sustainability disclosures, these criteria begin to narrow down a set of disclosures that *are* material. Statements that "convey measurable facts" can survive motions to dismiss and potentially become the basis for class certification.[163] The following section attempts to define the narrow category of statements that may give rise to liability.

2. *Toward a Material Sustainability Complaint.* — While dismissal seems to be the norm for complaints based on nonfinancial disclosure, *In re Massey* presents an important distinction in determining when sustainability information might give rise to liability. If *In re Vale* and *In re Ford* provide what can be termed the traditional approach—dismissing sustainability information as immaterial puffery—*In re Massey* demonstrates the narrow path that plaintiffs can walk to establish liability based on nonfinancial disclosures.[164]

In January 2006, a fire killed two miners in a Massey-run coal mine in West Virginia.[165] The company sought to rehabilitate its image by portraying itself as a paragon of mine safety.[166] Its CEO touted the company as the safest in the industry, press releases claimed "safety first" was "not just a slogan," and its 2009 CSR Report claimed "no coal company can succeed . . . without a total commitment to safety."[167] Then, in April 2010, an explosion at another Massey-run West Virginia mine killed twenty-nine miners, "one of the deadliest United States coal mining accidents in forty

159. In re Vale S.A. Sec. Litig., No. 1:15-cv-9539-GHW, 2017 WL 1102666, at *23 (S.D.N.Y. Mar. 23, 2017).

160. Id. (internal quotation marks omitted) (quoting Iowa Pub. Emps. Ret. Sys. v. MF Glob. Ltd., 620 F.3d 137, 141 (2d Cir. 2010)).

161. Id. at *24.

162. Id. at *24–25.

163. See supra note 153 and accompanying text.

164. In re Massey Energy Co. Sec. Litig., 883 F. Supp. 2d 597 (S.D. W. Va. 2012).

165. Id. at 603.

166. Id. at 604.

167. Id. at 604–05 (internal quotation marks omitted).

years."[168] Subsequent investigations suggested not only that Massey put profits before safety, but also that it had the nation's highest fatality rate and far exceeded the national average in regulatory citations.[169]

The court first addressed Massey's understatement of its nonfatal days lost (NFDL) rate, a measure of workdays lost to nonfatal employee injuries. The court found Massey itself had played up its NFDL rate in SEC filings, statements to the press, and conferences.[170] Given Massey's "desire to have the market find the rate relevant," the court found it to be material.[171] The decision thus espoused the principle that where a company touts a specific nonfinancial statistic as particularly relevant, it can become the basis for liability. More broadly, it can be read to say that where a defendant has "indicated their desire to have the market find" sustainability information relevant, it can open itself to liability.[172]

Next, the court turned to Massey's repeated affirmations that it was committed to mine safety as its top priority. The defendant characterized these as "immaterial puffery."[173] The court found the statements material for at least three reasons: (1) "[T]he truth or falsity" of the statements could be positively determined; (2) the disclosures were "not stated in a context of future prediction," but described "past achievements and current goals"; and (3) Massey "closely aligned their statements of commitment to safety to their productivity and success as a company, thereby lending [them] credence."[174]

These cases point to an emerging set of principles for determining when sustainability disclosures are material. First, headline statements that fail to describe specific facts *do not* give rise to liability. Second, facts or metrics that a company itself touts are likely to be adjudged material. Third, statements that describe historical or present realities are more likely than statements about future performance to be material. Finally, statements are more likely to be found material when companies closely align them with financial performance.

These principles broadly track with the type of information that is likely to give rise to hidden value. Plainly, not every piece of sustainability information will be so material as to justify an investor's belief in unpriced value.[175] Vague statements that communicate only an attitude of general

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168. Id. at 605.

169. Id. at 605–06.

170. Id. at 615.

171. Id. at 615–17.

172. Id.

173. Id. at 617–18.

174. Id.

175. Cf. Khan et al., supra note 81, at 3–4 (showing that only material sustainability measures were related to financial outperformance).

positivity are unlikely to suggest hidden value.[176] The factors that make a statement material are therefore likely to make it the basis of hidden value expectations. This analysis demonstrates that where shareholders allege a material misrepresentation about sustainability information, their harm can often be described by the hidden value model. The following section shows how the securities-fraud action nonetheless screens out these claims to the extent they fail to impact stock prices.

B. *The De Facto Price-Impact Requirement*

While financial and nonfinancial misrepresentations may each fail to produce price impact, nonfinancial disclosures are more likely to elude the stock price than earnings and asset data.[177] This disparity arises both from the nature of sustainability information and the particular way in which corporations disclose it.[178] This section outlines the price-impact requirement as it appears in the Supreme Court's securities jurisprudence and shows how it is more likely to screen out sustainability information that financial disclosures.

Notably, the price-impact requirement would screen out financial disclosures that fail to impact price as well as nonfinancial disclosures. Savvy firms can take advantage of the lack of periodic disclosure requirements by bundling good and bad information to further negate price impact.[179] But these problems are particularly pronounced in the context of sustainability information because, by definition, it goes to long-term rather than short-term value and therefore is likely to escape the twists and turns of the stock market.[180] This section lays out the contours of securities doctrine's price-impact requirement and how it excludes sustainability disclosures in particular.

1. *Sustainability Disclosures May Lack Contemporaneous Price Impact.* — Some disclosures simply do not cause price impact at the time that they are made, a problem that is compounded when the disclosure deals with stakeholder groups whose impact on the stock price is not immediately clear.[181] Professors Allen Ferrell and Andrew Roper give the example of a company that illegally backdates options to increase executive compensations but tells shareholders that its executive compensation practices are legitimate.[182] Soon after, it comes to light that the company was illicitly

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176. Cf., e.g., In re Level 3 Commc'ns, Inc. Sec. Litig., 667 F.3d 1331, 1340 (10th Cir. 2012) (claiming that no reasonable investor would make purchase or sale decisions based on a company touting its own customer experience).

177. See supra section I.A.4.

178. See supra sections I.A.4–.5.

179. James C. Spindler, Why Shareholders Want Their CEOs to Lie More After *Dura Pharmaceuticals*, 95 Geo. L.J. 653, 657 (2007).

180. See supra section I.A.4.

181. See supra section I.A.4.

182. See Allen Ferrell & Andrew Roper, Price Impact, Materiality, and *Halliburton II*, 93 Wash. U. L. Rev. 553, 567 (2015). Backdating involves issuing a stock option as a form of

backdating options, but because shareholders are happy with the company's performance, this disclosure does not create a price impact. Later, however, the SEC investigates the company for backdating and the visionary leader is forced to resign, causing the stock to tumble.[183] Because the backdating did not create price impact, either when it was committed or disclosed, a claim based on fraudulent disclosure would likely fail on the basis of loss causation.[184] Nonetheless, the information was evidently material to investors and caused economic loss.

A version of the time-lag problem is on display in the ongoing litigation surrounding *Ramirez v. Exxon Mobil Corp.*[185] In *Ramirez*, Exxon shareholders filed suit alleging that in its 2014 "Energy and Climate" report, the oil giant falsely claimed it was factoring into its production costs a $60 to $80 per ton "proxy cost" related to the regulatory risk associated with climate change.[186] Later on, when this misstatement was corrected, the plaintiffs alleged it contributed to a downward revision in oil reserves that are economically feasible to extract.[187] Ruling on a motion to dismiss, the Northern District of Texas found that the plaintiffs pled a material misrepresentation.[188] In opposing class certification, however, Exxon pointed out that the revelations about its climate-accounting practices did not produce a statistically significant price impact at the time they came out. Only later, when the company "de-booked" oil reserves did the stock price fall.[189] While the plaintiffs sought to link the fraudulent proxy costs with the subsequent de-booking and earnings miss, Exxon argued that the plaintiffs "identif[y] no analyst report that mentioned a causal link between ExxonMobil's use of proxy costs and [greenhouse gas] costs" and the subsequent downgrade in extractable reserves.[190] The court has not yet

executive compensation and writing in a past date when the stock was particularly low. As shareholder rights plans often require options to be issued with an exercise price equal to or greater than the present market price, backdating the options allows corporations to give executives options with built-in—and illicit—value. For an explanation of backdating, and why courts frown upon it, see Ryan v. Gifford, 918 A.2d 341, 345, 357–58, 360–61 (Del. Ch. 2007); see also In re Tyson Foods Consol. S'holder Litig., 919 A.2d 563, 592 & n.74 (Del. Ch. 2007).

183. Ferrell & Roper, supra note 182, at 575–76.

184. 4 Thomas Lee Hazen, Treatise on the Law of Securities Regulation § 12:91, Westlaw (database updated May 2020) (stating that for a court to find loss causation, "there must be a price movement in the shares that corresponds to the timing of the misstatement").

185. 334 F. Supp. 3d 832 (N.D. Tex. 2018).

186. Id. at 840.

187. Consolidated Complaint for Violations of the Federal Securities Laws at 61 & n.26, *Ramirez*, 334 F. Supp. 3d 832 (No. 3:16-cv-03111-K), 2017 WL 3188487.

188. *Ramirez*, 334 F. Supp. 3d at 859.

189. Defendants' Memorandum of Law in Opposition to Lead Plaintiff's Motion for Class Certification at 23–24, *Ramirez*, 334 F. Supp. 3d 832 (No. 3:16-cv-03111-K) [hereinafter Defendants' Memorandum]. De-booking refers to the practice of striking reserves from a corporation's proven oil reserves. *Ramirez*, 334 F. Supp. 3d at 840.

190. Defendants' Memorandum, supra note 189, at 24–25.

ruled on class certification. But Exxon's argument is the functional equivalent of Ferrell and Roper's backdating example: Disclosure of sustainability information today might not create price impact until tomorrow or next year, if at all.

2. *Dribs, Drabs, and Bundles: The Timing Dilemma.* — Disclosures may come out in dribs and drabs, with information leaking out until it is eventually fully disclosed and acknowledged.[191] This type of graduated disclosure may defeat a showing of price impact by increasing the amount of time between the misrepresentation and the eventual stock price drop and thus preventing a plaintiff from showing loss causation.[192] If "other intervening causes" may have generated the economic loss, then "a plaintiff would not be able to prove loss causation to that extent."[193] Where otherwise actionable disclosures are separated by time and circumstance, it becomes difficult to tie them together. As Professor Donald Langevoort points out, "[O]nce the inquiry extends to a potentially lengthy period of time between the original lie and the corrective disclosure, it is likely that there will be many intervening or supervening events . . . making it hard—if not impossible—to disentangle all the effects with any econometric rigor."[194]

Again, *Ramirez* provides a helpful example.[195] The plaintiffs pointed to at least six corrective disclosures, three of which were directly related to Exxon's climate change policies.[196] Staggered over a period of a year and a half, the disclosures produced respective stock drops of 2.98%, 4.31%, 2.58%, 2.46%, 1.8%, and 2.26%.[197] Cumulatively, these represent a considerable loss in share price. Individually, however, they were open to the defendants' attack that most of the individual stock price drops were statistically insignificant.[198]

Critics of the Court's securities law doctrine point out that the loss-causation requirement is subject to manipulation by firms that can time disclosures so as to blunt their stock-price impact. Under the present regime, firms can strategically time corrective disclosures to coincide with the announcement of unexpected good news; that way, the good news will

191. Donald C. Langevoort, Judgment Day for Fraud-on-the-Market: Reflections on *Amgen* and the Second Coming of *Halliburton*, 57 Ariz. L. Rev. 37, 45 (2015) [hereinafter Langevoort, Judgment Day].

192. Erica P. Johns Fund, Inc. v. Halliburton Co. (*Halliburton I*), 563 U.S. 804, 812–13 (2011).

193. Id. at 813.

194. Langevoort, Judgment Day, supra note 191, at 45.

195. Ramirez v. Exxon Mobil Corp., 334 F. Supp. 3d 832, 858 (N.D. Tex. 2018).

196. Id. In particular, the plaintiffs pointed to a report by the *Guardian* that the New York Attorney General was investigating the company's climate change disclosures, a *Los Angeles Times* article reporting that the California Attorney General was doing the same, and an op-ed in the *Washington Post* by Senators Elizabeth Warren and Sheldon Whitehouse discussing the investigations. Id.

197. Id.

198. See Defendants' Memorandum, supra note 189, at 12.

serve to counteract the corrective disclosure, resulting in no price impact.[199] Suppose, then, that a chemical company experiences a plant meltdown that pollutes a nearby waterway, but the disaster goes unreported by the press. Rather than immediately disclose the event, the company might wait until it has a piece of good news—say, a breakthrough in the development of a lucrative new compound—and publicize both the meltdown and the discovery on the same day. Whatever negative stock-price impact the meltdown might have had will be cancelled out by the good news of the discovery, and the company will be immune from liability.

These criticisms can apply to financial as well as nonfinancial disclosures: Information about financial performance can leak out over time or be bundled with good news to cancel out its impact. But unlike sustainability information, financial data is subject to periodic disclosure requirements: SEC regulations require that corporations lay out their risk factors on an annual or semiannual basis.[200] A company can hold onto a piece of bad financial news for only so long before being required to release it to the public in an SEC filing. And whereas companies must report data like income and cash flow,[201] they face no categorical reporting requirements for metrics like carbon emissions, supplier ethics, or employee relations.[202] Unlike financial data, companies can choose to hold on to material sustainability information until a convenient moment, or until it leaks—if it ever does.

C. *The Hidden Value Conundrum*

The preceding sections demonstrate that while misrepresentations as to sustainability information can be material, they are nonetheless more susceptible than financial misrepresentations to failing the price-impact requirement. Thus, while investors might base their purchase or sale decisions based on sustainability information, they cannot vindicate their interest in truthful disclosure except to the extent that the market shares their expectations. To put this injury into the language of Delaware takeover law, investors who believe based on sustainability disclosures that a corporation is underpriced by the market—that the market undervalues its stock—suffer a *hidden value injury* when those disclosures turn out to be false.

To put a finer point on the idea of hidden value injury, suppose that Acme stock trades for $100. Acme broadcasts that it is the market leader in corporate sustainability, and for that reason, it is not subject to the same long-term regulatory risk as its competitors. After careful study of Acme's sustainability disclosures, asset manager WhiteRock comes to believe that

199. See supra note 179 and accompanying text.

200. 17 C.F.R. § 229.105 (2020).

201. Id. § 210.3-02.

202. See supra note 39 and accompanying text.

because of its exceptional sustainability performance, Acme's stock price does not reflect its long-term value.[203] Based on this information, WhiteRock believes the stock is worth $105, rather than $100, and buys one million shares. Acme's sustainability information turns out to be false. The stock price does not budge. Nevertheless, WhiteRock has suffered a hidden value injury of $5 million ($5 times one million shares). This injury goes beyond a moral harm and instead represents a cognizable legal and business interest—even though it could never be vindicated in court.[204] The hidden value model therefore explains why securities litigation ignores—and will continue to ignore—investor expectations about long-term value.

There is good reason to suggest that the hidden value model applies to sustainability disclosures. To begin with, the hidden value model assumes the interests of two types of investors: long term and short term.[205] Black and Kraakman recognized that long-term investors are harmed when they sell at the market price, while the short-term investors are not.[206] This Note suggests a corollary: that those long-term investors are harmed when they *choose not to sell* because they recognize hidden value that turns out to be fraudulent.

But further, empirical research bears out that, at least some of the time, long- and short-term investors split over how they value sustainability disclosures.[207] Whereas short-term investors react only to sustainability disclosures that impact the net present value of a stock, for instance by reducing litigation risk, they will disregard or even discount disclosures that suggest a company is trading away short-term returns for long-term ones.[208] By contrast, long-term investors may value investments in sustainability even if these investments negatively impact short-term stock returns.[209] Applying the hidden value model to these investors requires

203. See supra section I.A.4 (noting that material sustainability information often does not impact short-term prices).

204. See Cooper, supra note 118, at 408 (suggesting that investors suffer a moral harm when they are misled as to sustainability information).

205. Black & Kraakman, supra note 12, at 532.

206. Id.

207. See supra notes 104–107 and accompanying text.

208. See Christensen et al., Adoption of CSR, supra note 31, at 33. Net present value refers to the present calculation of future income and is "the tool of choice for most financial analysts." Amy Gallo, A Refresher on Net Present Value, Harv. Bus. Rev. (Nov. 19, 2014), https://hbr.org/2014/11/a-refresher-on-net-present-value (on file with the *Columbia Law Review*).

209. One can easily imagine this type of investment. For instance, a company may choose to forgo exploitative labor practices even though they are profitable in the short term because these practices could invite bad press, enforcement actions, or an inability to attract a skilled workforce in the long term. Such an investment would likely negatively impact short-term returns while (potentially) boosting long-term performance. Cf. Christensen et al., Adoption of CSR, supra note 31, at 33 ("[E]ven if CSR activities were negative [net present value] projects, it could make sense for firms to pursue them, for

only the assumption that they are few enough that their expectations do not move the market. Under these conditions, these investors can be said to possess hidden value expectations based on sustainability information. In turn, they are harmed when the information proves false.

Understanding shareholders' long-term value expectations as a reflection of hidden value demonstrates why these expectations cannot be proven in court. As presented by Black and Kraakman, the hidden value model assumes that even where a board can communicate the basis for its value predictions, it cannot make shareholders believe or agree.[210] The model thus assumes that mere information transfer will not suffice to communicate hidden value. Instead, market actors with the same access to information may still come to different conclusions about value.[211] Therefore, even with ample opportunity to present its reasoning and the underlying facts in court, there is no reason to believe that a litigation party could convince a judge or jury that hidden value existed.

Indeed, Delaware defers to boards' discretion as to hidden value precisely *because* that value is unknowable. Where hidden value cannot exist, for instance because a sale of control eliminates the possibility of any long-term value expectations for minority shareholders, no deference is merited, and the court will apply a more exacting *Revlon* standard.[212] Likewise, where the board's failure to inform itself about a corporation's value belies any assertion of hidden value, a gross negligence standard applies.[213] Thus, hidden value is subject to deference only where it at least

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instance, when (some) shareholders put a non-monetary value on CSR or have specific CSR preferences.").

210. Black & Kraakman, supra note 12, at 522–23 (claiming that "hidden value cannot credibly be disclosed by the board"). This assumption is definitional to the notion of hidden value: If it could be communicated, it would not stay hidden for long, and moreover, boards would have no need to protect it. Id. Black and Kraakman give several reasons for the incommunicability of hidden value information: "This can be because the information is soft and cannot be effectively conveyed, it will not be believed, or the hidden value will be diminished by premature disclosure." Id. at 529–30.

211. Id. at 532 (suggesting that long- and short-term investors have different interests and value expectations).

212. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (establishing a strict standard of review for cash sales and corporate dissolutions requiring that directors maximize the sale price). Where a company's breakup is inevitable or where it is sold for cash, no hidden value can exist because the corporation's existence—at least as far as the shareholder is concerned—is at an end. See Black & Kraakman, supra note 12, at 539–40 (explaining how the hidden value model underlies the *Revlon* decision). Because there is no long-term time horizon over which hidden value can be revealed and incorporated into the stock price, no hidden value can exist. Id.

213. Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985) (applying a gross negligence standard to the question of whether a board was properly informed in approving a merger agreement). Where the board fails to do the legwork of evaluating the corporation, it cannot lay claim to the intrinsic ability to assess the corporation's true value that gives rise to legitimate and protected expectations of hidden value. See Black & Kraakman, supra note 12, at 526 (discussing *Van Gorkom* in the context of the hidden value model).

might exist—that is, where the board can legitimately claim to foresee long-term value the market ignores.

Hidden value is all the more difficult to capture in securities proceedings because the court's primary reason for deferring to such value—the board's discretion and expertise—is absent in these proceedings. In the takeover context, the board will likely argue for the existence of hidden value to justify blocking a tender offer, while the plaintiff will argue no such value exists.[214] While no securities case has evidently gone to trial on a hidden value theory, the roles would presumably reverse: With the company potentially on the hook to a plaintiff-shareholder, the board would have every incentive to argue *against* hidden value.[215] Thus, the plaintiff would assert that sustainability misstatements gave rise to mistaken perceptions of hidden value, while the board would argue that such hidden value never existed.

The hidden value model helps explain not only how investors are harmed by sustainability misrepresentations, but also why courts cannot consistently recognize and compensate those harms. If investors are truly without a remedy for a cognizable legal harm, it stands to reason that only private ordering can—and should—protect their interests. A private solution would yield the moral benefit of preventing investors from being materially misled while also helping bridge information asymmetries by allocating the cost of misrepresentations to those most able to prevent them. The following Part argues that a contractual solution is needed to police sustainability misrepresentations and suggests what one such solution might look like.

III. YOU LIE, YOU BUY: A PRIVATE-ORDERING SOLUTION

Companies can credibly communicate sustainability information—and by extension hidden value—if they can pledge to absorb the cost of

214. For instance, in Paramount Communications, Inc. v. Time Inc., 571 A.2d 1140, 1147–49 (Del. 1989), Time argued that Paramount's tender offer of $200 for its stock—which had been trading at $126—was inadequate because a merger with Warner would preserve Time's culture and yield greater long-term value.

215. An analogous claim can be drawn to a suit brought by shareholders alleging that a corporate board took a course of action because of the improper influence of a controlling owner that failed to maximize corporate value. For instance, in *Cookies Food Products v. Lakes Warehouse*, shareholders argued that the Cookies board squandered corporate funds in its dealings with its controlling owner, Duane "Speed" Herrig. 430 N.W.2d 447, 448 (Iowa 1988). The Iowa Supreme Court disagreed, agreeing with the board and the court below that the plaintiff's claims that the company would have been worth more absent the alleged self-dealing were "all conjecture and speculation." Id. at 456 (internal quotation marks omitted) (quoting the lower court's opinion). In the theoretical case of a hidden value suit by jilted shareholders, the plaintiffs would face a similar uphill battle as the *Cookies* plaintiffs: They would have to convince the court that the company was worth more than the board said it was.

untruthfulness.[216] If corporations can convince would-be investors about optimistic sustainability metrics, they can attract investment more easily and at more favorable prices.[217] Just as contracting partners can use liquidated damages to bind themselves where injury in breach would otherwise be hard to measure,[218] this Note suggests shareholders and corporations can contract around the hidden value conundrum by specifying in advance what the hidden value is worth to them.

This Note proposes that corporations use conditional warrants to give stockholders the right to sell shares back to the company at their expected rate of return *if and only if* they can prove the corporation misled them about material sustainability information.[219] "Warrants" are options a corporation may issue to investors for its own stock, to either buy or sell on a later date at a specified price.[220] Statutory law gives corporations the power to issue such warrants and to condition them on certain factual events.[221] These instruments allow for transacting partners to provide one another with security in making deals. For instance, a corporation hoping to be acquired can issue warrants to the would-be acquirer to purchase a large block of stock at a low price if a competing buyer gains a certain percentage of the selling corporation's stock.[222]

Conditioning warrants on truthful disclosure would allow corporations to guarantee the truthfulness of their sustainability disclosures

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216. In both contracts and torts, the principle of the cheapest cost avoider suggests that liability should generally rest with the party best able to avoid an accident or mistake. See Catherine M. Sharkey, In Search of the Cheapest Cost Avoider: Another View of the Economic Loss Rule, 85 U. Cin. L. Rev. 1017, 1039–40 (2018). Corporations are presumably better able to police their own lies than any outside party, making them the cheapest cost avoider of any untruthfulness.

217. See generally Cheng et al., supra note 79 (showing empirically that companies that disclose sustainability information have cheaper access to capital).

218. The Uniform Commercial Code, for example, provides that "[d]amages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy." U.C.C. § 2-718 (Am. L. Inst. & Unif. L. Comm'n 2017). Because, as this Note demonstrates, obtaining a remedy is not feasible for hidden value injuries, liquidated damages are appropriate. See supra section I.B.

219. This concept incorporates the idea, found in contract law, that contracting parties are responsible to one another for untruthfulness only where they took affirmative steps to mislead. See Davidson v. Rogers, 431 So. 2d 483, 485 (Miss. 1983) ("In order to recover damages for fraudulent concealment, appellant must demonstrate appellee took some action, affirmative in nature, which was designed or intended to prevent and which did prevent, the discovery of the facts giving rise to the fraud claim.").

220. See supra note 18 and accompanying text.

221. See, e.g., Del. Code tit. 8, § 157 (2020) (empowering corporations, via the board, to issue options and set conditions under which they vest).

222. See, e.g., Is JPMorgan Getting Too Clever?, N.Y. Times: Dealbook (Mar. 24, 2008), https://dealbook.nytimes.com/2008/03/24/is-jpmorgan-getting-too-clever (on file with the *Columbia Law Review*) (describing an option grant to JPMorgan to buy 39.5% of Bear Sterns even before a proposed merger was approved by shareholders).

without becoming the guarantor of their future returns.[223] Investors who believe based on sustainability information that a corporation's stock price is too low—that the stock contains hidden value—can gain protection from being misled.[224] If sustainability disclosures were misrepresented, and the hidden value is proven to be fictive, the corporation can be forced to pay up by honoring the option.[225]

Section III.A examines three possible contract solutions to the hidden value problem. First, it examines the steps investors must currently take to verify sustainability information and demonstrates how the status quo multiplies search costs. Next, it looks to an extreme solution—a strict liability regime for hidden value represented by nonconditional warrants—and argues that this proposal would represent an inefficient windfall for investors. Finally, it offers conditional warrants as a middle ground, eliminating search costs without unduly exposing corporations to exogenous market movements. Further, conditional warrants solve the hidden value conundrum by allowing corporations to credibly communicate hidden value to shareholders. Thus, they allow corporations to extract better investment prices. Finally, section III.B examines the limits of this contracting tool and predicts how it can contribute to an eventual public-ordering solution.

A. *Private Allocation of Sustainability Risks*

Where investors have no credible reason to believe a company's sustainability disclosures, the most obvious alternative is to verify the disclosures by inspecting the company's operations. But this alternative would be costly for investors. Where corporations maintain internal systems to collect data about their operations, having investors independently

223. Just as negligence liability for mistakes by corporate managers would discourage beneficial risk-taking, making corporations liable for their stock price would encourage them to set modest growth trajectories that minimize the risk of loss. Cf. Lawrence A. Hamermesh & A. Gilchrist Sparks III, Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson, 60 Bus. Law. 865, 873 (2005) ("[A] negligence standard for officer liability will almost certainly discourage officers from choosing and implementing relatively risky but valuable corporate decisions.").

224. See infra section III.A.1.

225. Assume, for instance, that Shareholder S bought 100 shares from Corporation C for $1 each. At the same time, C issued a conditional warrant to S stating that C would buy back S's shares in five years for $1.50 each but *only if* it misstated its sustainability information. Even though the $1.50 figure was an optimistic projection, S believed it to be accurate based on what S knew about C's sustainability performance. Those disclosures soon proved to be misleading. After five years, S can exercise the option, meaning C must pay it $1.50 per share for its holding. S thus receives the benefit of the bargain it struck. Of course, if C refuses to honor the option, S can go to court, prove that it had been misled, and ask the court to uphold the contract with C.

seek out and verify information about a corporation represents an expensive duplication of efforts.[226]

If securities law aims to reduce verification costs by assigning liability for untruthfulness to the cheapest cost avoider, duplicative investor inspections would represent a policy failure.[227] Clearly, corporations are best placed to collect and certify information about their operations.[228] And yet, without legal recourse to enforce truthful sustainability disclosure, investors cannot rely on sustainability disclosure to provide them with reliable information about portfolio companies or potential investments.[229] Investor inspection therefore represents a costly solution to the information asymmetries generated by the lack of shareholder enforcement.

On the other end of the enforceability spectrum, corporations could certify investors' expected returns based on sustainability information.[230] Suppose, then, that a corporation's stock trades at $10. Based on a study of the corporation's sustainability disclosures, an investor believes its stock price will rise to $12 in two years. The investor is willing to buy at some price between $10 and $12—say, $11—but only provided it can be protected against the risk that the sustainability disclosures misrepresented material facts. The corporation could issue an option for the shareholder to sell it the stock in two years at the investor's expected price of $12.

This agreement would mean that if the investor's value perceptions are overly optimistic based on untruthful disclosure, the corporation, and not the investor, would bear the cost. But it would also saddle the corporation with liability for any exogenous market effect.[231] Categorical option

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226. Roger J. Dennis, Mandatory Disclosure Theory and Management Projections: A Law and Economics Perspective, 46 Md. L. Rev 1197, 1217 & n.119 (1987) (claiming that mandatory disclosure "reduces wasteful search costs for the whole investor community").

227. See Zohar Goshen & Gideon Parchomovsky, The Essential Role of Securities Regulation, 55 Duke L.J. 711, 719 (2006) ("[M]anagement is the cheapest cost avoider of the harm resulting from misstatements . . . .").

228. See id. at 741 ("[Placing] the burden of verifying the information on the information source . . . avoids duplicative expenditures by multiple information traders.").

229. See supra section I.B.

230. To begin with, the idea of a corporation guaranteeing its returns is an uncomfortable one, perhaps because, as Professor Benjamin Klein put it, "In the real world, as opposed to the standard economic model, complete, fully contingent, costlessly enforceable contracts do not exist." Benjamin Klein, Contracting Claims and Residual Claims: The Separation of Ownership and Control, 26 J.L. & Econ. 367, 367 (1983). More particularly, making a corporation responsible for its share price would make the share look more like a fixed claim to a creditor—like a bond—than a residual claim to the shareholder. See id. at 368–70 (describing the risk-sharing relationship among bondholders and residual claimants).

231. For example, assume that within six months of the agreement described above, the economy entered a recession and the stock price dropped as a result. The corporation would nonetheless be on the hook to buy the stock back at $12 per share. This type of liability is antithetical to securities fraud, where damages are based on the effect a misrepresentation had on the market. See United States v. Martoma, 48 F. Supp. 3d 555, 569

grants therefore represent an extremely costly tool for companies to credibly communicate sustainability information.[232] If an effective tool exists, it must go beyond the status quo but stop short of such a blunt instrument.

Conditional option grants based on material misrepresentations of sustainability information are just such a solution.[233] In contrast to nonconditional warrants, conditional warrants could be structured to vest when a corporation knowingly misrepresented material sustainability information.[234] Corporations may still be exposed to exogenous market movements if they only happened to make a material misrepresentation, and later on an unrelated market effect causes returns to deviate from their expected trajectory.[235] But this situation should be relatively easy for a corporation to avoid where it honestly believes in its sustainability disclosures.[236] Moreover, conditional warrants could be crafted to certify

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(S.D.N.Y. 2014) ("[I]n fraudulent misrepresentation cases, it makes sense to isolate the effect of the defendant's conduct on the market from other market forces, because the defendant's 'offense' directly relates to the effect that his misrepresentations had on the market.").

An interesting contrast exists to market manipulation, where a plaintiff can argue that the defendant is responsible for all damages because it had exclusive and complete control over the market. For instance, in *In re London Silver*, the plaintiffs argued that the defendant set the market price for silver, so "there is little room for any interfering price impact due to the actions of non-culpable entities or exogenous market forces." In re London Silver Fixing, Ltd., Antitrust Litig., 213 F. Supp. 3d 530, 555 (S.D.N.Y. 2016).

232. See supra note 223.

233. Professor Afra Afsharipour has suggested shareholder put options as a solution to a different but related problem: overpayment in corporate acquisitions. Afra Afsharipour, A Shareholders' Put Option: Counteracting the Acquirer Overpayment Problem, 96 Minn. L. Rev. 1018, 1025–26 (2012). Afsharipour proposed that the acquiring corporation could issue put options to its shareholders to sell their shares at the price before the acquisition announcement. Id. In this way, shareholders could be guaranteed at least not to *lose* money on the deal. Id.

234. Conditional options for a corporation's stock are not without precedent; they are commonly used to condition option grants to employees on their continued employment. For instance, in *Catalyst Health Solutions, Inc. v. Magill*, an employee attempted to enforce an option that became exercisable only after he had worked for Catalyst for a predetermined period. 995 A.2d 960, 961–62 (Md. 2010). The Maryland Supreme Court upheld the condition and found that the option had not vested. Id. at 974.

235. For instance, as in supra note 231, suppose the market entered a recession six months after a conditional warrant was issued. Suppose further that the company had misrepresented its sustainability information, so the option vested. The company would absorb the portion of the losses attributable to the recession even though they were unrelated to any hidden value injury suffered by the investor.

236. The securities-fraud scienter requirement demands a relatively high level of culpability—intent or reckless disregard for the truth—before assigning liability. See Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 (1976) (holding liability for a misrepresentation does not lie under Rule 10b-5 without scienter). The scienter requirement allows courts to ferret out and punish only culpable actors. Cf. Victor D. Quintanilla, (Mis)judging Intent: The Fundamental Attribution Error in Federal Securities Law, 7 N.Y.U. J.L. & Bus. 195, 245 (2010) (arguing that the Supreme Court's Rule 10b-5 scienter jurisprudence "requir[es]

sustainability disclosures only at the time they are issued. They could thus be tailored rather narrowly toward assuring the truthfulness of disclosures without opening corporations to outsized liability.

Suppose, then, that a corporation hopes to certify its sustainability disclosures in order to attract more favorable investment rates. Suppose the stock price is $10, but an investor believes based on the company's sustainability disclosures that the stock price should be $12 and that the stock market will recognize and correct this discrepancy over the next two years. While most investors would not pay a price per share of more than $10, this investor will accept a price of, say, $11 if it can be convinced the company has given it an accurate picture of its sustainability performance.

First, the corporation and investor would decide which misrepresentations would cause the option to vest. They could decide that any material misrepresentation triggers the option, relying on the legal definition in use for financial disclosures.[237] On the other hand, the corporation could certify a particular set of material disclosures. The parties could agree on any level of specificity. At their most specific, such agreements would include a rider laying out every fact and statistic the parties certify as material. Otherwise, they could incorporate by reference all facts laid out in a company's sustainability reports.[238]

Once the triggering terms are fixed, the parties would set the exercise price to match the investor's expected return—in this case, $12. This sum represents a share price that both the corporation and the investor expect the stock will reach provided the company has not misrepresented its sustainability information. If it turns out the corporation materially misrepresented its sustainability information, and the stock price fails to climb above $12 after two years, the investor could nonetheless make its expected return by exercising the option.[239] If the corporation did not misrepresent, the option would not vest.

The particular advantage of this mechanism is that it eliminates search costs without forcing the corporation to assume liability for exogenous risks. The investor has no need to painstakingly verify the corporation's sustainability performance because the corporation itself

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federal courts to compare and contrast culpable and non-culpable explanations for behavior").

237. Presumably, liability would then attach based on the principles section II.A lays out.

238. The concept of using a put option to protect a corporate claimant against the happening of a particular set of facts can be found in the creditor context, where bondholders sometimes craft "put" provisions that allow them to call in their debt if control of the corporation changes hands. Jonathan R. Macey & Geoffrey P. Miller, Corporate Stakeholders: A Contractual Perspective, 43 U. Toronto L.J. 401, 418 (1993).

239. While the idea of an investor contracting with a corporation for security on their purchase seems foreign, it fits within the concept of the investor–corporation relationship as an incomplete contract: By obtaining a guarantee of the corporation's truthfulness, an investor merely adds an explicit term to its implied contract with the corporation. See id. at 423.

will bear the cost of any untruthfulness.[240] The investor can instead include any information it relies on in the triggering conditions for the warrant. Meanwhile, the company is only liable if it knowingly misrepresented its sustainability performance—a condition entirely within its own control.[241] To the corporation, the conditional warrant represents a relatively costless way to extract a better investment price than would otherwise be available—in this example, $11 per share instead of $10.

These warrants would allow investors to vindicate their previously unprovable interest in truthful sustainability disclosure. Without private ordering, investors are unable to show courts how they are injured by material sustainability misrepresentations.[242] The conditional warrant allows companies to capitalize on hidden value by credibly communicating it to investors. A key assumption in Black and Kraakman's hidden value model is that hidden value cannot be credibly communicated to stockholders or prospective investors.[243] Similarly, it cannot be traded on or auctioned off on the takeover market.[244] By certifying the factual predicates for hidden value, however, companies would make their hidden value predictions more believable. This value might still escape the stock price if it is based on facts far upstream from earning potential, such as employee relationships and emission standards.[245] But this Note suggests that corporations can nonetheless communicate hidden value to investors, who conclude based on their research and analysis that, due to impressive sustainability performance, the corporation's future growth will be greater than the market predicts.

B. *Toward a Public-Ordering Solution*

While public ordering bears some obvious and significant benefits, private ordering presents a viable first step without requiring legislative action or a wholesale rewriting of the securities-fraud doctrine.[246] But conditional warrants would apply only in a narrow band of situations between willing contracting partners. To begin with, they can only apply where investors purchase authorized but unissued stock directly from the

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240. See supra text accompanying notes 226–227.

241. By conditioning the warrants on *knowing* misrepresentations of fact, the parties could draw on the Supreme Court's scienter jurisprudence so that the company would only be liable if it were found to be sufficiently culpable—that is, if it acted intentionally or with reckless disregard for truth. See supra note 236 and accompanying text.

242. See supra section I.B.

243. See Black & Kraakman, supra note 12, at 529–32.

244. Id. at 531–32.

245. See supra section I.A.4.

246. While it is possible courts might find a reason to disapprove of such warrants absent legislative approval, courts have "rejected the position that board action should be invalidated or enjoined simply because it involves a novel use of statutory authority." Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 953 (Del. Ch. 2013).

corporation.[247] Where investors acquire shares on the market, certain legal and financial barriers prevent them from contracting directly with the corporation. The law disfavors shareholders meddling in the day-to-day business of the corporation.[248] In this context, a conditional warrant issued to a shareholder who bought on the market would be voidable if other shareholders alleged waste: The corporation would have given away a potentially valuable option for no consideration.[249] One could also ask what reason a corporation would have for putting a warranty on stock purchased on the market.

Nonetheless, conditional warrants represent a starting point for corporations and investors to mutually define what sustainability information contributes to valid expectations of future growth. Eventually, the contracts thus generated could provide a battle-tested basis for public regulation. Admittedly, public ordering would save a great deal of contracting costs by guaranteeing the truthfulness of disclosure for all market participants without the need to negotiate put options.[250] But any public-ordering regime faces significant challenges in regulating around hidden value.[251] Allowing market participants to define and enumerate hidden value would eventually produce a body of contracts that regulators could rely on in determining how to set the parameters for hidden value liability.

CONCLUSION

Companies evidently want to be believed in their disclosures about sustainability information.[252] This Note provides a simple but powerful solution: Put your money where your mouth is.

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247. Corporate statutes, such as Del. Code tit. 8, § 157 (2020), empower corporations to issue options to purchase stock "from the corporation" but not from others. Thus, corporations could only issue options to purchase stock to the extent they are authorized to issue the stock themselves.

248. For instance, the SEC holds that companies can exclude shareholder proposals that deal with day-to-day business. See Thomas Kim, Andrea Reed & Claire Holland, New Guidance on Excluding Shareholder Proposals, Harv. L. Sch. F. on Corp. Governance (Nov. 4, 2019), https://corpgov.law.harvard.edu/2019/11/04/new-guidance-on-excluding-shareholder-proposals [https://perma.cc/7ZN4-WV7S].

249. See Lewis v. Vogelstein, 699 A.2d 327, 336 (Del. Ch. 1997) ("[W]aste entails an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." (citations omitted)).

250. Cf. Laura Nyantung Beny, Insider Trading Laws and Stock Markets Around the World: An Empirical Contribution to the Theoretical Law and Economics Debate, 32 J. Corp. L. 237, 254–55 (2007) (analyzing the costs of a contract solution in the parallel field of insider trading).

251. These problems boil down to the fact that, as mentioned, hidden value is not only unknown but unknowable. Black & Kraakman, supra note 12, at 522–23.

252. See supra notes 68–70 and accompanying text.

Moreover, it shows how private ordering can solve a problem public ordering is necessarily unable to solve on its own.[253] No amount of doctrinal recalibration can allow litigants to prove an unprovable harm.[254] The nature of hidden value is that even with careful explanation it cannot credibly be communicated to shareholders, let alone the courts. And because securities fraud restricts damages to that reflected in the stock price, any lost value not priced by the market is irremediable. Nonetheless, the hidden value model shows that stockholders suffer a cognizable harm when corporations misrepresent sustainability information. The conditional warrant mechanism suggested here provides the beginnings of a private-ordering solution and helps elucidate the doctrinal limitations that make it necessary.

While scholars question the empirical reality behind the hidden value model, they nonetheless concede it to be an accurate description of takeover jurisprudence.[255] The failure of securities doctrine to account for hidden value therefore represents a dissonance in the law governing the valuation of corporations and the rights of investors. Applying the hidden value model to securities-fraud doctrine helps explain why investors crave sustainability disclosures in the first place. Putting a finer point on these interests not only demonstrates the importance of sustainability information in today's capital markets, but also begins to show how investors and corporations can contract around this increasingly significant body of disclosure.

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253. See Jay M. Feinman, The Economic Loss Rule and Private Ordering, 48 Ariz. L. Rev. 813, 814 (2006) ("The logic of private ordering is, of course, the logic of contract law: individuals are the best judges of their own interests; individuals maximize those interests through contracts . . . .").

254. See supra section I.B.

255. See supra notes 125–127 and accompanying text.