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IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN RE MATCH GROUP, INC. DERIVATIVE LITIGATION	Case No. 368, 2022 Court Below: Court of Chancery of the State of Delaware CONSOLIDATED C.A. No. 2020-0505-MTZ

SUPPLEMENTAL OPENING BRIEF OF THE IAC DEFENDANTS

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NATURE OF PROCEEDINGS

The Court directed the IAC Defendants to submit supplemental briefs on one issue:

> [W]hether the Court of Chancery judgment should be affirmed because the Transactions were approved by either of (a) the Separation Committee or (b) a majority of the minority stockholder vote?[1]

The answer is yes. Time-tested traditional principles of Delaware corporate law, as applied by this Court and the Court of Chancery in iconic decisions, recognize that any one of three cleansing mechanisms—approval by (i) a board with an independent director majority; *or* (ii) a special committee of independent directors; *or* (iii) a majority of unaffiliated stockholders—suffices to invoke the business judgment standard of review in a conflict transaction. These traditional cleansing mechanisms are drawn from 8 *Del. C.* § 144, authorizing any of these mechanisms to validate a conflict transaction, including one with a controlling stockholder.

For generations, Delaware courts and corporations have relied upon these principles to address situations posing conflicts of interest not just generally, but for those involving controlling stockholders. These principles have governed situations like charter amendments, executive compensation, intercompany agreements, split-

[1] D.I. 58 at 3. The Match Defendants join the arguments made herein.

offs and reorganizations, and mergers that do not involve a squeeze-out of the minority by the controller. Consistent with these principles, settled law like *Aronson* v. *Lewis*[2] has long trusted independent directors to perform the sensitive task of reviewing demands to sue controlling stockholders, an entrustment deepened by this Court's *Zuckerberg*[3] decision.

For many years, a doctrinal anomaly existed in the special situation when a controlling stockholder sought to buy out the minority in a merger. Because a final, cash-out, self-dealing transaction of that kind necessarily severs any shared interests between the controller and the minority, Delaware courts sought to be especially protective. But that was also because Delaware law had held that a controller could make a going-private tender offer without any negotiation on behalf of the minority by the independent directors and avoid equitable judicial review. Against this backdrop, this Court issued dictum in *Kahn* v. *Lynch Commc'n Sys., Inc.*[4] embracing a theory that controllers in that context have such inherently coercive power—most importantly, the ability to bypass the special committee and present a tender offer posing collective action problems for the minority—that the entire fairness standard

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[2] 473 A.2d 805 (Del. 1984).

[3] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund* v. *Zuckerberg*, 262 A.3d 1034 (Del. 2021).

[4] 638 A.2d 1110 (Del. 1994).

must govern any controller squeeze-out merger, even if approved by a special committee of independent directors and an informed majority of the minority stockholders.

Lynch led to three problems. The first was that it encouraged frivolous litigation because there was no way to win a dismissal motion. The second was that it provided no incentive to use both procedural protections. This case flows out of the third problem, which was that the dictum in *Lynch* created some understandable confusion about whether the "inherent coercion" concept governed only squeeze-outs, or whether it swept in any case of an arguable conflict involving a controlling stockholder. In *MFW*,[5] this Court addressed these problems in a balanced, responsible way by providing a context-specific solution to the context-specific problem of controller squeeze-outs. In doing so, *MFW* built upon a series of Chancery decisions, and recognized that the concept of inherent coercion was not tenable, was not supported by empirical market evidence, and was discordant with traditional teachings of this Court and with the Delaware General Corporation Law.

Instead of recognizing that the better-reasoned authority had confined the untraditional *Lynch* approach to the squeeze-out context and that *MFW* reflected a gracious (but clear) cabining of the inherent coercion concept even in that space,

[5] *Kahn* v. *M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014), *overruled on other grounds by Flood* v. *Synutra Int'l, Inc.*, 195 A.3d 754 (Del. 2018).

certain Chancery decisions have now embraced inherent coercion as a meta-principle of Delaware corporate law. Doing so requires the implicit overruling of precedent and the judicial creation of a legislative-like rule that the DGCL could have, but does not, embrace: applying one set of rules to conflict transactions generally, and another judicial code to conflict transactions of any kind with a controlling stockholder. Through what has been called "*MFW* creep," corporations must use the full suite of *MFW* procedures to obtain business judgment rule protection in contexts where that is neither efficient nor necessary, and where it creates tensions with the DGCL, this Court's precedent, and the rules of the major stock exchanges.

It is a foundational strength of Delaware law that its courts provide reliable guideposts for transactional planners. The traditional rule allowing for the use of any of the three cleansing mechanisms to address all conflict transactions, including those with a controlling stockholder, is one of those guideposts. Another is the business judgment rule, the essence of which involves judicial respect for business decisions made by impartial decision-makers like independent directors or the disinterested stockholders whose interests are at stake. *Lynch* departed from that entrustment in a specific, highly sensitive area. *MFW* responsibly adjusted that precedent in that discrete context, and distanced this Court from the concept of

inherent coercion, allowing transactional planners a route to business judgment rule protection in controller squeeze-outs.

MFW was never intended to disable controlled companies from relying on the traditional approach to conflict transactions in contexts other than squeeze-outs. *MFW*—like the predecessor Chancery opinions in *In re Pure Resources, Inc. Shareholders Litigation*[6] and *In re Cox Communications Inc. Shareholders Litigation*[7]—represented an important step back towards the traditional approach to reviewing conflict transactions, which later decisions like *Zuckerberg* continue to embrace.

This Court should affirm the ability of corporate planners to rely on generations of sound precedent. Doing so is not only efficient but fair. Delaware sets high standards for evaluating the independence of directors. Delaware polices stockholder votes to ensure they are uncoerced and informed. Independent directors and minority stockholders have proven themselves to be assertive and more than capable of saying no to unfair transactions. Given these realities, adherence to the long-standing principles that have served to regulate controller conflicts is warranted, because there is no sound basis to depart from prior precedent and

[6] 808 A.2d 421 (Del. Ch. 2002).

[7] 879 A.2d 604 (Del. Ch. 2005).

because the General Assembly can create a separate legislative category addressing controller conflict transactions if it wishes to do so.

Here, the public stockholders of Old Match[8] went from owning less of a company controlled by IAC to owning more of a non-controlled company, New Match. That transaction—approved by the Separation Committee and overwhelmingly approved by the stockholders unaffiliated with IAC—is the opposite of a squeeze-out, and does not give rise to the unique, context-specific concerns underlying the doctrine governing controller squeeze-outs. Under traditional Delaware doctrine, either the Separation Committee's approval *or* the majority-of-the-minority stockholder vote invoked the business judgment rule. That is especially so when, as here, a majority of informed unaffiliated stockholders has decided that a transaction is good for them—the decision that Delaware courts have been rightly most reluctant to second-guess.

[8] Capitalized terms are used consistently with the IAC Defendants' Answering Brief, D.I. 33 ("IAB").

ARGUMENT

To explain why the Court's question should be answered yes, this brief proceeds as follows:

Argument A demonstrates that well-reasoned cases dating back generations have invoked the business judgment rule whenever any one of the three traditional cleansing mechanisms has been properly employed in conflict transactions with controlling stockholders outside the context of squeeze-outs. That is the settled Delaware tradition.

Argument B shows that *Lynch* and *MFW* both addressed the context-specific problem of controller squeeze-outs, with *MFW* carefully rethinking *Lynch* and solving the problems created by *Lynch*'s "inherent coercion" justification—a concept at odds with empirical market evidence and important settled principles of Delaware law.[9] To address the special controller squeeze-out concerns while redressing the perverse incentives created by *Lynch*, *MFW* adopted a specific solution applicable to controller squeeze-outs, and cabined, not expanded, the inherent coercion concept.

Arguments C and D address "*MFW* creep" and demonstrate that the recent Chancery opinions elevating the now-abandoned inherent coercion concept into a

[9] The terminology "inherent coercion" was first used to describe the *Lynch* reasoning in *Pure Resources*, 808 A.2d at 433.

meta-principle cannot be squared with Delaware's traditional deference to impartial decision-making and thus the business judgment rule. These decisions ignore that *MFW* had retired that concept, and also conflict with this Court's teachings in *Williams* v. *Geier*,[10] *Aronson*, and *Zuckerberg*. In bifurcating the review of conflict transactions and expanding an approach not intended for anything other than a squeeze-out, *MFW* creep embraces rigid, legislative-like regulation of controlled companies that the General Assembly could enact but has not. In extending the inherent coercion concept, *MFW* creep reduces the flexibility of corporations and turns its back on Delaware's traditional respect for business judgments made by impartial decision-makers.

Argument E closes by noting that this case illustrates why *MFW* was focused solely on squeeze-outs. The transaction here was the opposite of a squeeze-out: the controlling stockholder relinquished voting control and a greater share of the company to the public stockholders. An informed supermajority of the unaffiliated stockholders approved the Separation, and there is no rational basis for a court to second-guess their decision.

[10] 671 A.2d 1368 (Del. 1996).

A. The Tradition

The "core rationale" of the business judgment rule "is that judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed, disinterested stockholders)." *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 313-14 (Del. 2015). When transactions are approved by impartial decision-makers, "the business judgment rule standard of review … best facilitates wealth creation through the corporate form." *Id.* at 314.

Entire fairness review, of course, presumptively governs interested transactions. But bedrock principles of Delaware law recognize that any one of three cleansing mechanisms—approval by (i) a board with an independent director majority; *or* (ii) a special committee of independent directors; *or* (iii) a majority of unaffiliated stockholders—suffices to invoke the business judgment standard of review in conflict transactions, including those involving controlling stockholders. *See* Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 333 (2022). These traditional protections are drawn from Section 144 of the DGCL, which authorizes any one of them to validate *any* interested transaction, including with a controlling stockholder. With judicial tailoring that ensures that they operate in a

fairness-assuring way, the effective use of any of the traditional cleansing mechanisms not only satisfies Section 144 but invokes the business judgment rule in equity. *See Cox*, 879 A.2d at 614-15; Hamermesh, *supra* p. 9, at 339-41; John F. Johnston et al., *The Effect of Disinterested Director Approval of Conflict Transactions Under the ALI Corporate Governance Project—A Practitioner's Perspective*, 48 BUS. LAW. 1393, 1401-05 (1993); Charles Hansen et al., *The Role of Disinterested Directors in "Conflict" Transactions: The ALI Corporate Governance Project and Existing Law*, 45 BUS. LAW. 2083, 2086-87, 2099-2103 (1990). The relationship of the equity cases to Section 144 is undeniable because the three protective provisions, as judicially adapted, were understood as ways to guarantee impartial decision-making and obviate judicial second-guessing of business decisions. *See Marciano* v. *Nakash*, 535 A.2d 400, 404, 405 n.3 (Del. 1987) ("approval by fully-informed disinterested directors under section 144(a)(1), or disinterested stockholders under section 144(a)(2), permits invocation of the business judgment rule"); *Oberly* v. *Kirby*, 592 A.2d 445, 467 (Del. 1991) (analogizing to charitable corporations; "Under 8 *Del. C.* § 144, a[n interested] transaction will be sheltered from shareholder challenge if approved by either a committee of independent directors, the shareholders, or the courts."); *cf. Kahn* v. *Roberts*, 1995 WL 745056, at *5 (Del. Ch. Dec. 6, 1995) (citing § 144(a); "The

business judgment rule will shelter a transaction from shareholder challenge if a panel of independent directors approves it.").

Iconic Delaware corporate law decisions demonstrate that this traditional approach has long governed controller transactions outside the context of squeeze-outs. An important example is Chief Justice Veasey's unanimous decision in *Williams* v. *Geier*. Issued two years after *Lynch* (in 1996), it held that a charter amendment implementing tenure voting in a controlled company that would tighten the controlling family's grip on voting control was subject to the business judgment rule standard of review because it was approved by an independent board majority. 671 A.2d at 1370-71, 1385. Importantly, the plaintiffs there argued that independent director approval was not enough, and that a majority-of-the-minority vote was required if entire fairness review was to be avoided. *Id.* at 1381. This Court explicitly rejected that argument. *Id.* at 1382. In its ruling, the Court rejected an argument based on "perceived coercion," and instead adhered to the traditional principles that use of any of the traditional protective procedures would invoke the business judgment rule in a controller conflict transaction, outside the discrete context of a squeeze-out. *Id.* at 1382-84.

A legion of precedent establishes that the traditional principles have been employed by Delaware courts in cases involving controller conflicts. *Puma* v. *Marriott* held that the business judgment rule governed Marriott's purchase of six

companies principally owned by the controller because a majority independent board had approved the acquisitions. 283 A.2d 693, 695 (Del. Ch. 1971). Underscoring the Delaware tradition, the court did not reach the defense that the majority-of-the-minority vote invoked the business judgment rule because the independent directors' approval alone sufficed to do so. *Id.* at 696.[11]

Puma was consistent with this Court's decision the previous year in *Getty Oil Co*. v. *Skelly Oil Co.*, holding that the business judgment rule governed a dispute involving the apportionment of oil import quotas between the controller and its subsidiary because the allocation was not set by the controller. 267 A.2d 883, 887 (Del. 1970). Other decisions of this Court and the Court of Chancery are to like effect: *Harman* v. *Masoneilan Int'l, Inc.*, 442 A.2d 487, 491-92 (Del. 1982) (entire fairness governed stock-for-stock merger with controlling stockholder only because the stockholder vote was not fully informed); *Johnston* v. *Greene*, 121 A.2d 919, 925 (Del. 1956) (court cannot disturb the decision of an independent board of a controlled company to forego a corporate opportunity); *Lewis* v. *Hat Corp. of Am.*, 150 A.2d 750, 752 n.3, 753-54 (Del. Ch. 1959) (business judgment rule governed asset purchase from controller because "[i]t is clearly established in Delaware that

[11] *See* Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 492 n.109 (1992) (criticizing ALI's approach which, contrary to *Puma* v. *Marriott*, "does not provide for disinterested director approval of [a controller] transaction").

stockholder ratification of corporate action which is not per se void renders such action immune from minority stockholder attack").

In 1992, then-Vice Chancellor Berger addressed a services agreement between a controller and the controlled company. Because an independent board majority approved the agreement, the business judgment rule applied. *Canal Cap. Corp*. v. *French*, 1992 WL 159008, at *5-6 (Del. Ch. July 2, 1992); *see also Schreiber* v. *Pennzoil Co*., 419 A.2d 952, 957-58, 961 (Del. Ch. 1980) (dismissing challenge to management contract with controlling stockholders approved by disinterested stockholders).

After *Lynch* was decided (in 1994), the Court of Chancery continued to apply the traditional approach in the non-squeeze-out context, just as this Court did in *Williams* v. *Geier*. Two decisions by Chancellor Chandler are illustrative. In *Orman* v. *Cullman*, the Chancellor held that the business judgment rule governed a merger in which a controlled company was sold to a third party, but in which the controller received guarantees that it would remain in control in exchange for certain deal protections because "a fully informed majority of the minority public shareholders" had approved the transaction. 2004 WL 2348395, at *4 n.49, *5, *7-8 (Del. Ch. Oct. 20, 2004). And in a case attacking the fairness of a consulting agreement with members of the controlling family of Tyson Foods, Chancellor Chandler invoked the business judgment rule because the agreement had been approved by an

independent board majority. *In re Tyson Foods, Inc. Consol. S'holder Litig*., 919 A.2d 563, 587-88 (Del. Ch. 2007). Other Chancery decisions are in accord: *Teamsters Union 25 Health Servs. & Ins. Plan* v. *Baiera*, 119 A.3d 44, 65 n.119 (Del. Ch. 2015) (business judgment rule governed services agreement with controller approved by an independent committee); *Friedman* v. *Dolan*, 2015 WL 4040806, at *7-8 (Del. Ch. June 30, 2015) (business judgment rule governed compensation arrangements with a controlling family approved by an independent committee).

Underscoring their traditional deference to impartial decision-making, after *Lynch*, Delaware courts also continued to apply the *Aronson* test to assess demand excusal in cases involving controller conflict transactions. That test presumes that independent directors can make the more difficult decision of causing a company to bring suit against a fellow fiduciary, including a controlling stockholder. Indeed, that deference to independent directors was extended by this Court's 2021 decision in *Zuckerberg*. *See* Argument D, *infra*.

B. *Lynch* and *MFW*: Exception for Squeeze-Outs

1. *Lynch* (1994): Unique Fear of Bypass

In 1994, *Lynch* decided that controller squeeze-out mergers present unique circumstances such that minority stockholders need special protection beyond the traditional rules governing conflict transactions. The Court's concern was that, in a

squeeze-out, the independent directors and minority stockholders might cave to the controller because the controller could bypass the merger process altogether by making a tender offer directly to stockholders at a lower price. 638 A.2d at 1120. Even though tender offers are intrinsically more coercive and less protective of stockholders than mergers, existing law had suggested that a controller could proceed with a squeeze-out structured as a tender offer and not be subject to any equitable review. *See Lynch* v. *Vickers Energy Corp.*, 351 A.2d 570, 575-77 (Del. Ch. 1976), *rev'd on other grounds*, 383 A.2d 278 (Del. 1977); *In re Ocean Drilling & Expl. Co. S'holders Litig.*, 1991 WL 70028, at *5 (Del. Ch. Apr. 30, 1991).

Exploiting this doctrinal divide, the controller in *Lynch* threatened to bypass the special committee and make a tender offer if the committee did not agree to the controller's price. 638 A.2d at 1120. "It was this threat of bypass that was of principal concern in *Lynch* and cast doubt on the special committee's ability to operate effectively." *In re MFW S'holders Litig.*, 67 A.3d 496, 503 (Del. Ch. 2013), *aff'd*, 88 A.3d 635. The bypass threat deprived the committee of the "power to say no." *Lynch*, 638 A.2d at 1119-20. One committee member "voted in favor of the merger because he felt there was no alternative," and another believed that a hostile bid would be at a lower price and "that *under the circumstances*, [the controller's price] was fair and should be accepted." *Id.* at 1118-19. Embracing an idea advanced in a Chancery decision, the Court suggested that when a controller wants

the rest of the shares and can bypass the special committee with a tender offer, both the independent directors and the stockholders are subject to a form of inherent coercion disabling them from acting to ensure fairness. *Id.* at 1116-17 (citing *Citron* v. *E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990)).[12] *Lynch* concluded that because bypass was credibly threatened, the independent directors could not protect the minority. *Id.* at 1120.

Although *Lynch* did not involve a majority-of-the-minority vote, the Court suggested that minority stockholders would be too afraid to vote against a squeeze-out merger proposed by a controlling stockholder. 638 A.2d at 1116-17. As the Court of Chancery pointed out in *MFW*, "that rationale was one advanced in the context of a deal structure where the minority was expressly faced with a situation where a controller informed the special committee that it would put a lower priced offer directly to the stockholders in the intrinsically more coercive form of a tender offer." 67 A.3d at 532.[13]

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[12] Notably, the Vice Chancellor who decided *Citron* preferred another rule but felt obliged by language in *Rosenblatt* v. *Getty Oil Co.*, 493 A.2d 929 (Del. 1985), to depart from Chancellor Allen's decision in *In re Trans World Airlines, Inc. S'holders Litig.*, 1988 WL 111271 (Del. Ch. Oct. 21, 1988), discussed on p. 29, *infra*. *See* William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1306-09 & 1306 n.75 (2001).

[13] *See Cox*, 879 A.2d at 617 ("[I]t is perhaps fairest and more sensible to read *Lynch* as being premised on a sincere concern that mergers with controlling stockholders involve an extraordinary potential for the exploitation by powerful insiders of their

Accordingly, because of the unique risk of bypass in squeeze-outs, *Lynch* stated that, regardless of the cleansing devices used, "the exclusive standard of judicial review in examining the propriety of an *interested cash-out merger transaction* by a controlling or dominating shareholder is entire fairness." 638 A.2d at 1117 (emphasis added); *In re Tesla Motors, Inc. S'holder Litig*., 2023 WL 3854008, at *24 & n.170 (Del. June 6, 2023) (*Lynch* "clarified the effect of certain procedural cleansing mechanisms in the context of controller squeeze-outs"). By doing so, *Lynch* suggested that even use of two cleansing devices—approval by *both* a special committee of independent directors and a majority of the minority stockholders—would yield the same result as just one, namely, only a shift in the burden of proof under the entire fairness standard. *Id.* at 1116-17. That suggestion was made even though both devices were not employed in the case.

2. *MFW* (2014): Abandoning the Inherent Coercion Concept and Rethinking *Lynch*

Lynch led to a number of problems that this Court solved two decades later in *MFW*. *MFW* was so long in coming because the dictum in *Lynch* made it difficult

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informational advantages and their voting clout. Facing the proverbial 800 pound gorilla who wants the rest of the bananas all for himself, chimpanzees like independent directors and disinterested stockholders could not be expected to make sure that the gorilla paid a fair price. Therefore, the residual protection of an unavoidable review of the financial fairness … was thought to be a necessary final protection.").

for controllers to proceed as there was no apparent way to obtain a dismissal by use of any array of procedural protections. This inspired some controllers to take advantage of the case law allowing them to pursue a squeeze-out by tender offer instead, thereby escaping the non-dismissible litigation a controller faced if it took the more stockholder-protective merger path. *E.g.*, *In re Siliconix Inc. S'holders Litig.*, 2001 WL 716787, at *16 & n.82 (Del. Ch. June 19, 2001).

In two cases leading up to *MFW*, the Court of Chancery distanced Delaware law from the untenable inherent coercion concept even within the squeeze-out context, and took measured action to bring the treatment of squeeze-outs into greater conformity with the traditional approach. *Pure* highlighted the problems created by *Lynch*'s embrace of inherent coercion and the counterintuitively more favorable treatment of squeeze-outs procured by the less stockholder-protective method of a tender offer as compared to a merger approved by an independent committee or a majority-of-the-minority vote. 808 A.2d at 441-43. *Pure* refused to apply inherent coercion to going-private tender offers so long as they were structured to give the stockholders the same ability to make a non-coerced judgment whether to tender as they did in a merger vote, and suggested that the *Lynch* approach should be reformed. *Id.* at 444-46.

Cox further undermined the inherent coercion concept, documenting the evidence that independent directors and stockholders could protect against controller

overreach as well as the wave of meritless litigation *Lynch* had fueled. 879 A.2d at 624-48. *Cox* also noted that *Lynch* left no incentive for controllers to use a combination of protections beneficial to minority stockholders—a special committee empowered to say no *and* a majority-of-the-minority vote—because that gained them no greater protection than the modest burden shift that only matters if a case was in equipoise (sometimes called "entire fairness lite"). *Id.* at 606-07. *Cox* presaged the *MFW* solution, and created a disincentive to bypass the board via a tender offer, by suggesting that going-private tender offers by a controller should be tested by equity on the same basis as a going-private merger. *Id.* at 606, 623-24.

The transaction structure in *MFW* allowed the *Lynch* dictum to be tested. In that case, the Court of Chancery held, and this Court agreed, that the dictum in *Lynch* was just that, because "*Lynch* did not involve a merger conditioned by the controlling stockholder on both procedural protections." *MFW*, 88 A.3d at 642. Embracing the Court of Chancery's approach, this Court held that the business judgment rule applied because the controlling stockholders had used both procedural protections. *Id.* at 644, 654.

The *MFW* holding in both courts was carefully confined to controller squeeze-outs. *Id.* at 645 ("To summarize our holding, *in controller buyouts*, the business judgment standard of review will be applied *if* …." (first emphasis added)); *id.* at 644 ("We hold that business judgment is the standard of review that should

govern *mergers between a controlling stockholder and its corporate subsidiary*, where …." (emphasis added)); 67 A.3d at 502 ("when a controlling stockholder merger has ….").[14]

In providing needed clarity to the squeeze-out space, *MFW* distanced Delaware law from inherent coercion. *MFW* rejected the notion that independent directors and stockholders could not exercise impartial judgment where the proposal came from a controlling stockholder, finding that concept inconsistent with empirical market experience, established principles of Delaware law, and the larger accountability structures constraining controller power. 88 A.3d at 643 ("As the Court of Chancery correctly observed: 'Although it is possible that there are independent directors who have little regard for their duties or for being perceived by their company's stockholders (and the larger network of institutional investors) as being effective at protecting public stockholders, the court thinks they are likely to be exceptional, and certainly our Supreme Court's jurisprudence does not embrace such a skeptical view.'"); *id.* at 643-44 ("[A]s the Court of Chancery summarized … 'a majority-of-the-minority condition gives minority investors a free and voluntary

[14] *See Tornetta* v. *Musk*, 250 A.3d 793, 811 (Del. Ch. 2019) ("nothing in *MFW* or its progeny would suggest the Supreme Court intended to extend the holding to other transactions involving controlling stockholders"); Itai Fiegenbaum, *The Geography of MFW-Land*, 41 DEL. J. CORP. L. 763, 802 (2017) ("the text, the context, and the underlying policy justifications enumerated in [*MFW*]" show "*MFW*'s holding is limited to the context of going private transactions").

opportunity to decide what is fair for themselves.'"); 67 A.3d at 503 (fear of controller ameliorated by "the potent tools entrusted to our courts to protect stockholders against violations of the duty of loyalty," and "market realities" that "[s]tockholders, especially institutional investors who dominate market holdings, regularly vote against management on many issues, and do not hesitate to sue, or to speak up"); *id.* at 526-35 (collecting authority establishing fundamental policy of deference to independent directors and unaffiliated stockholders, including in controlled companies). *MFW* "essentially rejected the inherent coercion theory and restored traditional principles for determining the standard of judicial review applicable to conflict transactions." Hamermesh, *supra* p. 9, at 336.

The bespoke *MFW* framework addresses the squeeze-out bypass problem that led to the rule in *Lynch* because, under *MFW*, "the controlling stockholder knows that it cannot bypass the special committee's ability to say no." 88 A.3d at 644; 67 A.3d at 503 (solution addresses the "threat of bypass that was of principal concern in *Lynch*"). *MFW* also led practitioners to understand that if a controller proceeded with a squeeze-out tender offer, it would face fairness review unless it used protective procedures equivalent to those required by *MFW* for mergers.[15]

[15] Guhan Subramanian, *Freezeouts in Delaware and Around the World*, 24 U. PA. J. BUS. L. 803, 804 n.5 (2022) ("Today, with the so-called 'unified approach' to freezeouts (and therefore no advantage to a tender offer freezeout), 90+% of

Put simply, *MFW* was a measured, specific solution to a specific problem—controller squeeze-outs—where the dangers of overreaching had been thought to be particularly grave.

As with *MFW*, *Cox*, and *Pure*, many other decisions correctly viewed *Lynch*'s inherent coercion concept as an anomalous rule for controller squeeze-outs and declined to extend it, leaving the traditional principles of Delaware law to apply to all other controller conflict transactions—as they always had. *E.g.*, *Solomon* v. *Armstrong*, 747 A.2d 1098, 1123 (Del. Ch. 1999) (treating a split-off like "a minority freeze-out … could too easily deprive the board of business judgment protection"), *aff'd*, 746 A.2d 277 (Del. 2000); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *10 (Del. Ch. May 4, 2005) (split-off was not "akin to a minority freeze-out" and therefore "shareholder ratification will have the effect of maintaining the business judgment rule's presumptions"), *aff'd*, 897 A.2d 162, 172 (Del. 2006) (holding that Chancery "properly took judicial notice of the shareholder votes" and "properly applied well-settled principles of Delaware law"); *Orman* v. *Cullman*, 794 A.2d 5, 20 n.36, 23 n.40 (Del. Ch. 2002) (outside of "a squeeze out merger or a merger between two companies under the control of a controlling shareholder," entire fairness is "not applied" unless "a majority of a board that

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freezeouts are executed via merger, and the doctrinal disconnect is largely just a historical artifact.").

approved the transaction in dispute was interested and/or lacked independence"); *cf. Lonergan* v. *EPE Holdings, LLC*, 5 A.3d 1008, 1023 (Del. Ch. 2010) (stating that "[t]he doctrine of inherent coercion has not been extended to limited partnerships" and citing authority for the proposition that it "would seem unwise to expand this doctrinal anomaly into the limited partnership setting").

C. *MFW* Creep: The Resurrection of Inherent Coercion

In a surprising turn, several Chancery decisions have nevertheless taken the view that the concept of inherent coercion should not only be brought back to life but extended to require the use of the full suite of context-specific *MFW* protections in all controller conflict transactions. This "*MFW* creep" improperly transforms *MFW*—a sensible, bespoke solution to the problematic reasoning undergirding the inherent coercion concept—into a meta-principle of Delaware law clashing directly with generations of prior precedent as well as this Court's recent decision in *Zuckerberg*.

The origin of *MFW* creep can be traced to the 2016 decision in *In re Ezcorp Inc. Consulting Agreement Derivative Litigation*, 2016 WL 301245 (Del. Ch. Jan. 25, 2016). Other recent Chancery decisions mandating the full-*MFW* framework to invoke the business judgment rule outside of controller squeeze-out transactions have relied on *Ezcorp*: *IRA Tr. FBO Bobbie Ahmed* v. *Crane*, 2017 WL 7053964, at *10-11 (Del. Ch. Dec. 11, 2017) (reclassification alleged to uniquely

benefit controller); *Tornetta*, 250 A.3d at 800 & n.20, 807-08 & n.96 (controller compensation); *Berteau* v. *Glazek*, 2021 WL 2711678, at *12-15 (Del. Ch. June 30, 2021) (forward triangular merger of subsidiary allegedly involving controller non-ratable benefits); *Knight* v. *Miller*, 2022 WL 1233370, at *10 (Del. Ch. Apr. 27, 2022) (controller compensation).[16]

Ezcorp involved a challenge to advisory services agreements between Ezcorp and an affiliate of Ezcorp's controlling stockholder by which the controller allegedly extracted a "non-ratable return." 2016 WL 301245, at *1. The agreements were approved by the company's independent audit committee but not subject to a majority-of-the-minority vote. *Id.* at *4. The court did not find that the committee members lacked independence. *Id.* at *4-5. In a fulsome opinion, the court purported to address on a clean slate the applicable standard of review for "a transaction involving self-dealing by a controlling shareholder." *Id.* at *11. (citation omitted). In doing so, it suggested that this Court had not had occasion to decide this question, and that it was an open one after *MFW*. *Id.* at *16 ("If the

[16] *In re Oracle Corp. Derivative Litig.*, 2023 WL 3408772, at *2 (Del. Ch. May 12, 2023) (citing *Ezcorp*; "The coercive nature of the conflicted controller applies most compellingly in … a squeeze-out merger. The instant case involves an acquisition *by*, not a sale *of*, Oracle. Nonetheless, decisions of this Court hold that the inherent coercion rationale applies in such transactions with a conflicted controller, compelling entire fairness review."); *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *2 (Del. Ch. Aug. 18, 2017) (not citing *Ezcorp*; controller "side deals" in third-party sale of corporation).

Delaware Supreme Court were to limit the entire fairness framework to squeeze-out mergers, as one of these decisions suggests, then I of course would adhere to that ruling. At present, however, it appears to me that the weight of authority calls for applying the entire fairness framework more broadly.").[17]

Ezcorp then went on to pronounce that unless a controlling stockholder used the full suite of *MFW* protections in any conflict transaction, the standard of review was entire fairness, not business judgment. *Id.* at *11. The court held that the concept of inherent coercion required this approach and should not be confined to the squeeze-out context. *Id.* at *11-12, *15, *20. The court stated that this holding should apply to all conflict transactions with controllers, regardless of whether they involved direct self-dealing, non-ratable benefits, compensation, intercompany agreements, or transactional form. *Id.* at *3, *11-15.[18]

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[17] As commentators have noted, many decisions state that "any conflicted self-dealing transaction with a controlling stockholder is subject initially to the entire fairness standard." Hamermesh, *supra* p. 9, at 341. *Ezcorp* cited many decisions to that effect. But that does not address the question posed in this case by this Court: whether the use of one cleansing mechanism is sufficient to invoke the protection of the business judgment rule for a transaction initially subject to entire fairness review.

[18] As commentators have noted, the sweep of *Ezcorp* encourages further creep unsettling other settled doctrine. Hamermesh, *supra* p. 9, at 344-50. Cases involving *MFW* creep have morphed from focusing on direct self-dealing to extending entire fairness review whenever it is alleged that a controller or other fiduciary got something somewhat different than the public stockholders. *Ezcorp*, 2016 WL 301245, at *11; *In re Tilray, Inc. Reorganization Litig.*, 2021 WL 2199123, at *13-14 (Del. Ch. June 1, 2021). Relatedly, *MFW* creep has encouraged watering down the definition of a controlling stockholder. Hamermesh, *supra* p. 9, at 344-48.

In the course of doing so, however, the decision failed to confront insurmountable barriers to the new rule of law it was proposing in place of the traditional approach. *Ezcorp* ignored a good deal of binding precedent. Cases decided before *Ezcorp* were essentially relegated to the scrapheap of history. These include the important decisions discussed in Argument A, *supra*, from this Court (*Williams* v. *Geier*, *Marciano*, *Oberly*, *Getty Oil*, *Harman*, *Johnston*, *Aronson*) and the Court of Chancery (*Puma*, *Lewis*, *Canal*, *Cox, Schreiber*, *Orman*, *Tyson*, *Baiera*, and *Dolan*).

In this case, it inspired the legally unsupportable claim that Old Match had *two* controlling stockholders: IAC, a multibillion-dollar public company that in fact was Match's controlling stockholder, and another who was not a stockholder, director, or officer of Match at all (Barry Diller) but supposedly fit the new *Ezcorp*-invented category of "ultimate human controller." 2016 WL 301245, at *9; *Teuza—A Fairchild Tech. Venture Ltd.* v. *Lindon*, 2023 WL 3118180, at *6 (Del. Ch. Apr. 27, 2023); *see* IAB 43-47. *See also Tesla*, 2023 WL 3854008, at *19 n.117 ("[E]xpanding the definition of a 'controller' expands the universe of persons who could be liable to stockholders under fiduciary principles, and it potentially excludes persons from '*Corwin* cleansing' and subjects them to the rigorous entire fairness standard of review.").

Likewise, *Ezcorp* ignores that the whole reason for impressing fiduciary duties on a controlling stockholder that is not a director or officer is to hold the controller accountable as if it were a director or officer because of its control of corporate affairs—not to subject the controller to different or especially stringent rules. *See Allied Chem. & Dye Corp.* v. *Steel & Tube Co. of Am.*, 120 A. 486, 491 (Del. Ch. 1923) (controllers are subject to fiduciary duties so they are "regarded as owing a duty to the minority such as is owed by directors to all").

Ezcorp also gave no weight to post-*Lynch* precedent that did not adopt the inherent coercion concept that *MFW* and other cases had found unconvincing. *Ezcorp* deemed those opinions "unpersuasive" precisely because they did not give credence to that anomalous doctrine. 2016 WL 301245, at *24. By telling omission, *Ezcorp* failed to grapple with this Court's decision in *Williams* v. *Geier.* That decision cannot be squared with inherent coercion as it gave deference to a majority independent board that blessed a charter amendment that would have the practical effect of shifting more voting power to the controlling family. 671 A.2d at 1385. *Ezcorp* also ignored the decisions making clear that *Lynch*'s inherent coercion concept was confined to squeeze-outs. 2016 WL 301245, at *24 & n.14 (relegating *Pure* and *Cox* to a footnote referencing the "considerable tension" between the rule *Ezcorp* propagated and existing Delaware precedents); *see* Argument B.2, *supra.*

In like vein, *Ezcorp* cited, but gave no weight to the decisions of then-Vice Chancellor Berger in *Canal*,[19] Chancellor Chandler in *Tyson*,[20] and Vice Chancellor

[19] *Ezcorp* criticized *Canal* as "not appear[ing] to have considered the possibility that entire fairness might apply because the case involved a transaction with a controlling stockholder." 2016 WL 301245, at *24. *Ezcorp* does not explain the basis for its view that the then-Vice Chancellor had misunderstood the case she decided.

[20] *Ezcorp* criticized *Tyson* for its reliance on this Court's opinion in *Brehm* v. *Eisner*, 764 A.2d 244, 263 (Del. 2000), and for its failure to "grapple with the possibility that entire fairness might apply." 2016 WL 301245, at *18.

Noble in *Dolan*,[21] finding that each had somehow failed to appreciate that the concept of inherent coercion rendered the traditional approach to controller conflict transactions improper. *Ezcorp* gave more respectful treatment to this Court's *Aronson* decision, but ultimately determined not to follow it—finding it to have been an improvident departure from the general concept of inherent coercion, and incompatible with the *MFW* creep that *Ezcorp* created.[22]

In a true oddment, *Ezcorp* justified its embrace of inherent coercion by invoking one of the most respected critics of that approach: Chancellor Allen. Using a comment by the Chancellor in a pre-*MFW* decision that simply expressed the view that if inherent coercion were a valid concept, then it was one that could not be confined to just one context—a comment that must be understood as

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[21] *Ezcorp* criticized *Dolan*'s holding that "our law … respects the judgment of independent directors" on annual compensation, by citing academic literature to the effect that controllers have "informational advantages" over directors, "particularly" as to compensation matters. 2016 WL 301245, at *19 & n.9.

[22] *Ezcorp* recognized that: "Ultimately, the choice between *Aronson* and other precedents is something only the Delaware Supreme Court can resolve." 2016 WL 301245, at *30. *Ezcorp* characterized *Aronson* as marking a "sea change in Delaware law" and a "depart[ure] from longstanding precedent." *Id.* at *25. *Ezcorp* acknowledged that the "public policy judgment" made in *Aronson* in favor of deference to independent directors in controlled companies was "undoubtedly the type of public policy judgment that the Delaware Supreme Court was and is empowered to make"—but it offered no rationale for how limiting *Aronson* to the demand-excusal context can be squared with *Aronson*'s "public policy judgment." *Id.* at *27.

frustrated acceptance of a form of reasoning he himself found implausible—*Ezcorp* suggested that inherent coercion was a meta-principle justifying a new blanket approach to conflict transactions with controllers that would unsettle generations of Delaware precedent.[23] *Ezcorp*'s reliance on Chancellor Allen's comments in *Tremont I* was misplaced. Chancellor Allen decided *Trans World Airlines*, in which he held that if a going-private merger proposed by a controlling stockholder was approved by a special committee of independent directors, then the business judgment rule applied, not the entire fairness standard. 1988 WL 111271, at *7.[24] *Lynch* adopted a contrary approach based on an inherent coercion concept

[23] In *Tremont I*, Chancellor Allen stated that "[d]efendants seek to limit *Lynch* to cases in which mergers give rise to the claim of unfairness, but offer no plausible rationale for a distinction between mergers and other corporate transactions and in principle I can perceive none." *Kahn* v. *Tremont Corp.*, 1996 WL 145452, at *7 (Del. Ch. Mar. 21, 1996), *rev'd*, 694 A.2d 422 (Del. 1997). That statement is best viewed "simply as rueful acceptance that if the Delaware Supreme Court intended to base Delaware law on the idea that a controller had overweening retributive power and influence that *per se* disabled independent directors and minority stockholders from exercising free will [under the now-abandoned *Lynch* regime], then it was hard to limit that reasoning to a particular transactional context." Hamermesh, *supra* p. 9, at 337 n.74. As the authors there also demonstrate, there are in fact powerful reasons for treating squeeze-outs differently. *Id.* ("Those transactions involve a zero-sum game, which is not true of many other related party transactions. The controller can achieve the same result by a tender offer, arguably avoiding board control and entire fairness review, which is not possible in other contexts. And, mergers require a statutory vote, which is also not the case with many other transactions, including those involving compensation.").

[24] Chancellor Allen stated that ratification by disinterested shareholders would have the same effect. 1988 WL 111271, at *7.

that Chancellor Allen did not embrace, and that was at odds with his entire body of jurisprudence giving deference to decisions of well-motivated independent directors. *E.g.*, *Freedman* v. *Rest. Assocs. Indus., Inc*., 1987 WL 14323, at *7 (Del. Ch. Oct. 16, 1987) ("Heavy reliance is placed upon the acts of specially constituted committees of disinterested directors when Delaware courts are asked to review the propriety of corporate transactions that involve elements or claims of self-dealing."). Indeed, *after Tremont I*, Chancellor Allen co-authored an influential article arguing that the traditional approach should apply *even* to squeeze-outs. There, the Chancellor argued for providing "full cleansing effect" to a controller squeeze-out conditioned on approval by a majority of the minority stockholders *or* approval by independent directors. *See* Allen, *supra* n.12, at 1307, 1309. Not only that, he explained why real-world market evidence exposed inherent coercion as an untenable concept and demonstrated that the traditional approach's deference to decisions made by independent directors and disinterested stockholders is wise policy. *Id.* at 1306-08.[25]

[25] In *Tremont II*, this Court was not presented with the question of how to avoid entire fairness review of a non-squeeze-out controller transaction, as the plaintiff raised only "two contentions" on appeal: the "burden of proof allocation" and the findings regarding the fairness of the transaction. *Kahn* v. *Tremont Corp.*, 694 A.2d 422, 424 (Del. 1997). The same is true regarding the other Supreme Court decisions relied upon in *Ezcorp*. *See Ams. Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1239 (Del. 2012) ("In the Court of Chancery and on appeal, both the Plaintiff and the Defendants agree that entire fairness is the appropriate standard of judicial review for the Merger."); *Emerald Partners* v. *Berlin*, 726 A.2d 1215, 1223 n.11 (Del. 1999)

In employing inherent coercion to override traditional Delaware corporate law, *Ezcorp* ignored other important institutional factors. *Ezcorp* ignored the reality that Section 144 does not embrace the dichotomy central to inherent coercion. If the General Assembly viewed controller conflict transactions as being afflicted by inherent coercion, it could have enacted a subsection of 144 requiring *both* approval by disinterested directors *and* by disinterested stockholders to validate transactions between controlled companies and their controlling stockholders. But Section 144 does not treat controller conflicts as a separate category.

Likewise, *Ezcorp* ignored that other regulators have not embraced the inherent coercion approach. One of the historic reasons for the mandate for independent audit committees was to approve related party transactions in controlled companies.[26] By this requirement, the exchanges sought to protect minority stockholders,

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(recognizing that Chancery "did not address the issue of the existence of a well functioning independent committee as it relates to an entire fairness review"). *Cf. Tesla*, 2023 WL 3854008, at *19 ("On appeal, the parties do not dispute that entire fairness controls. In keeping with our practice of addressing only issues fairly presented, we, too, view the Acquisition through the lens of entire fairness.").

[26] Hamermesh, *supra* p. 9, at 339-40; William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW 2055, 2057-58 (1990); *see also* NYSE R. 314 ("A company's audit committee or another independent body of the board of directors, shall conduct a reasonable prior review and oversight of all related party transactions for potential conflicts of interest and will prohibit such a transaction if it determines it to be inconsistent with the interests of the company and its shareholders."); Nasdaq R. 5630 (similar).

consistent with the traditional approach. *Ezcorp* also ignored the reality that the DGCL does not require stockholder votes on many transactions with controllers, including compensation decisions. Federal law has now mandated advisory say-on-pay votes, including at controlled companies, but these are nonbinding.[27] And the major stock exchanges exempt controlled companies from the mandate to have a compensation committee comprised entirely of independent directors.[28] But in the face of all that, *Ezcorp* adopted a legislative-like code essentially requiring controlled companies to have independent compensation committees and majority-of-the-minority votes on executive compensation or face non-dismissible suits alleging unfairness and asking Delaware courts to second-guess decisions in the context where they have been most reluctant to do so.

D. *MFW* Creep Contradicts *Aronson* and *Zuckerberg*

By making inherent coercion a meta-principle, *Ezcorp* also embraced reasoning in conflict with the deference this Court has afforded to independent directors of controlled companies in the most difficult of all contexts: when they

[27] 15 U.S.C. § 78n-1(a)(1)-(2), (c).

[28] NYSE R. 303A.00 (exempting controlled companies from Rule 303A.05 ("Compensation Committee")); Nasdaq R. 5615(c)(2) (exempting controlled companies from Rule 5605(d) ("Compensation Committee Requirements")).

have to decide whether to sue the controller. *Ezcorp* acknowledged that its reasoning was incompatible with this Court's decision in *Aronson*. 2016 WL 301245, at *30.[29]

In *Aronson*, an employment and retirement agreement and interest-free loans between Meyers Parking System, Inc. and Leo Fink, Meyers's former CEO and then-Chairman and 47% stockholder, were challenged on the grounds that they were unfair and were "approved only because Fink personally selected each director and officer of Meyers." 473 A.2d at 808-09 & 808 n.2. This Court held that demand was not excused because there was an independent board majority capable of impartially causing the company to bring suit against Fink, stating that "even proof of majority ownership of a company does not strip the directors of the presumptions of independence." *Id.* at 815, 818. Nor was it sufficient "to charge that a director was nominated by or elected at the behest of those controlling the outcome of a corporate election." *Id.* at 816.

Since *Aronson* was decided two generations ago, independent directors have been trusted to impartially make the difficult decision whether to sue the controller that elected them. *Sheldon* v. *Pinto Tech. Ventures, L.P.*, 220 A.3d 245, 253 & n.38

[29] *See also In re Barnes & Noble S'holder Derivative Litig.*, No. 4813-VCS, at 51:18-23 (Del. Ch. Oct. 21, 2010) (Transcript) ("the continued coexistence of [] *Aronson*" and *Lynch* can only be explained if *Lynch* is understood as a "squeeze out merger doctrine" given that their "psychological intuitions are so utterly at odds with each other").

(Del. 2019) (collecting cases); *Sandys* v. *Pincus*, 152 A.3d 124, 133 (Del. 2016) ("That a director sits on a controlled company board is not, and cannot of course, be determinative of director independence at the pleading stage, as that would make the question of independence tautological."); *Beam ex rel. Martha Stewart Living Omnimedia, Inc.* v. *Stewart*, 845 A.2d 1040, 1054 (Del. 2004) ("particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder" required for demand excusal).[30]

This Court has also recognized that it is more difficult to decide to have the company sue controllers for breach of fiduciary duty than to say no to controllers when they propose a transaction. Accepting a demand to sue requires finding that a controller likely acted in a manner harmful to the company and taking a step that

[30] *Accord McElrath* v. *Kalanick*, 224 A.3d 982, 995 (Del. 2020) ("Importantly, being nominated or elected by a director who controls the outcome is insufficient by itself to reasonably doubt a director's independence"); *In re Cornerstone Therapeutics Inc, S'holder Litig.*, 115 A.3d 1173, 1183 (Del. 2015) (declining to adopt "an invariable rule that any independent director who says yes to an interested transaction subject to entire fairness review must remain as a defendant until the end of the litigation" as not "prudent"); Steven M. Haas, *Toward a Controlling Shareholder Safe Harbor*, 90 VA. L. REV. 2245, 2283 (2004) ("[T]he abilities of independent directors are relied upon in many areas of corporate law, and there is no convincing justification for setting apart controlling shareholder transactions for disparate treatment."); Michael P. Dooley et al., *The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared*, 44 BUS. LAW. 503, 534-35 (1989).

would seriously damage the controller's reputation. *Sandys*, 152 A.3d at 134 ("Causing a lawsuit to be brought against another person is no small matter, and is the sort of thing that might plausibly endanger a relationship."); *Marchand* v. *Barnhill*, 212 A.3d 805, 819 & n.95 (Del. 2019) ("[T]he decision whether to sue someone is materially different and more important than the decision whether to part company with that person on a vote about corporate governance."). Thus, if inherent coercion were a sound principle of Delaware corporate law, it would apply with the most force in the most sensitive context—demand excusal. That it does not apply there underscores its far more targeted role as part of the judiciary's struggle to address the nettlesome area of controller squeeze-outs.

Zuckerberg makes that plain. *Zuckerberg* did not just reaffirm the trust *Aronson* placed in independent directors; it went even further in gutting the basic premise of inherent coercion. In affirming dismissal of a derivative claim seeking recompense for over $90 million Facebook spent on litigation over an abandoned reclassification benefiting its controller, the Court spoke clearly:

> [T]he theory that demand should be excused simply because an alleged controlling stockholder stood on both sides of the transaction is 'inconsistent with Delaware Supreme Court authority that focuses the test for demand futility exclusively on the ability of a corporation's board of directors to impartially consider a demand to institute litigation on behalf of the corporation—including litigation implicating the interests of a controlling stockholder.'

262 A.3d at 1055 (quoting *Baiera*, 2015 WL 4192107, at *1). Thus, the Court held that the same directors who approved the reclassification benefiting the controller could impartially decide whether to sue the controller for the reclassification. *Id.* at 1059-64. In doing so, the Court necessarily rejected the inherent coercion doctrine in the highly difficult demand futility context and confirmed its confidence in the ability of independent directors to stand up to controllers when necessary to protect minority stockholders and discharge their duties faithfully. *Zuckerberg* then went beyond *Aronson* by not only rejecting the concept of inherent coercion and deferring to independent director impartial decision-making but also eliminating *Aronson*'s second prong safety valve. *Id.* at 1040-41, 1058-59.

Zuckerberg cannot be squared with *Ezcorp*:

> If independent directors who the particularized facts suggest approved an unfair transaction by ineffectively failing to check the interested party's self-interest are presumed capable of impartially suing, then certainly independent directors advised by qualified advisors should be presumed capable of effectively negotiating for fair terms and their conduct should invoke the business judgment rule. If *Zuckerberg* signals the beginning of an alignment toward greater respect for the traditional protective measures and toward a confinement of *MFW* to its originally intended narrow function, then we view that development with more optimism. If, by contrast, *Zuckerberg*'s policy choice co-exists with *MFW* creep, then Delaware law will rest on contradictory assumptions about director conduct and will invite criticism for subjecting certain claims to tighter judicial review, while using a change in demand excusal law to render that review illusory in the important context of derivative

claims.

Hamermesh, *supra* p. 9, at 360-61 (citations omitted).

E. The Separation is the Opposite of a Squeeze-Out and Delaware's Traditional Approach Governs

The Separation at issue in this case "is in many ways the opposite of the freeze-out merger that inspired *MFW*." *In re Match Grp., Inc. Derivative Litig.*, 2022 WL 3970159, at *15 n.139 (Del. Ch. Sept. 1, 2022). Accordingly, the Separation is subject to the traditional rule that any one of the three cleansing mechanisms is sufficient to invoke the business judgment rule. To hold otherwise would be inconsistent with cases recognizing that treating split-offs and reorganizations like squeeze-outs under the rigid approach of *Lynch* was inefficient and improper.[31]

Before the Separation, the public stockholders owned less of a company, Old Match, with a controlling stockholder, IAC, which had firm voting control. *After the Separation, the public stockholders owned 2% more of a company, New Match, without a controlling stockholder (or anything close to one) and open to the market for corporate control*. Thus, the Separation transformed Match from a controlled company to one whose control now rests "in a large, fluid, changeable and changing market." *Paramount Commcn's, Inc.* v. *Time, Inc.*, 1989 WL 79880,

[31] *E.g.*, *Solomon*, 747 A.2d at 1123; *Gen. Motors*, 2005 WL 1089021, at *10.

at *23 (Del. Ch. July 14, 1989), *aff'd*, 571 A.2d 1140 (Del. 1989). The Match public stockholders gained "the power to influence corporate direction through the ballot" and were positioned to share ratably in any future control premium. *Paramount Commc'ns Inc*. v. *QVC Network Inc*., 637 A.2d 34, 43 (Del. 1994). The complaint ignores the enormous benefit flowing to the Old Match minority stockholders from Old IAC relinquishing its high-vote shares. This Court need not reach the other defects in the complaint because when the stockholders—those whose money is at stake—have freely decided that a non-squeeze-out transaction is in their best interests, Delaware courts do not second-guess that decision.

This case indeed exemplifies the soundness of the traditional approach. Given the sophisticated stockholder base of Old Match and the rich information available for the stockholders to evaluate the merits of the Separation, there is no rational basis for invoking entire fairness review.[32] Market developments since *Lynch* have made "it far easier, not harder, for stockholders to protect themselves." *MFW*, 67 A.3d at 530.[33] Investors have proven themselves more than comfortable

[32] Old Match's stockholder base included T. Rowe Price Associates, Inc. (15.6%), The Vanguard Group (8.9%), and BlackRock, Inc. (8.5%). A372.

[33] William W. Bratton, *Reconsidering the Evolutionary Erosion Account of Corporate Fiduciary Law*, 76 BUS. LAW. 1157, 1157 (2021) ("Disclosure rules make self-dealing transparent to shareholders, who have no reason to like self-dealing and who now stand ready and able to register their preferences regarding such matters in corporate boardrooms.").

in voting against proposals made by controlled companies and other insiders in many contexts, including transactional ones.[34] Independent directors have likewise proven their ability to stand up to controllers.[35]

For good reason, outside the squeeze-out context, Delaware courts have long deferred to informed, uncoerced stockholder votes in transactions involving controlling stockholders that arguably involve a conflict. *See* Argument A, *supra.* Because disinterested stockholders are the ultimate impartial decision-makers,

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[34] For recent examples of unaffiliated stockholders exercising their power to say no at controlled companies, *see, e.g.*, Clearway Energy, Inc., Current Report (Form 8-K) 2 (May 2, 2019) (stockholders rejected proposed defensive charter amendments); Pilgrim's Pride Corp., Current Report (Form 8-K) 3 (May 2, 2023) (same); Nat'l W. Life Grp., Inc., Current Report (Form 8-K) 2 (June 27, 2023) (stockholders voted against advisory vote on executive compensation at controlled company); SWK Holdings Corp., Current Report (Form 8-K) 1 (Aug. 15, 2022) (same); The Boston Beer Co., Current Report (Form 8-K) 2 (May 20, 2019) (same).

[35] *E.g.*, Eidos Therapeutics, Inc., Current Report (Form 8-K) 2 (Sept. 13, 2019) (special committee rejected controller's squeeze-out merger proposal); *Blue Bird Corporation Special Committee Finds American Securities LLC Proposal Inadequate*, BUSINESSWIRE, Sept. 1, 2016 (same); *Turquoise Hill Special Committee Finds Rio Tinto's Privatization Proposal Does Not Reflect Full & Fair Value of the Company*, BUSINESSWIRE, Aug. 15, 2022 (same); *Essar Energy committee asks minority shareholders to reject bid*, REUTERS, Apr. 25, 2014 (same); Pilgrim's Pride Corp., Annual Report (Form 10-K) 22 (Feb. 18, 2022) (controller withdrew squeeze-out proposal after failed negotiations with special committee); *Scientific Games Withdraws Offer to Acquire Remaining 19% Equity Interest in SciPlay*, PR NEWSWIRE, Dec. 22, 2021 (same); *see also* Guhan Subramanian, *Post*-Siliconix *Freeze-Outs: Theory, Evidence and Policy* 44 (John M. Olin Ctr. for L., Econ., and Bus., Discussion Paper No. 472, 2004) (identifying 17 squeeze-out proposals withdrawn by controllers between June 2001 and April 2005).

Chancellor Allen advocated—after *Lynch* and well before *MFW*—that even if the Delaware courts would not apply the traditional approach to reviewing squeeze-outs approved by independent directors, then the courts should at least give business judgment rule treatment when the disinterested stockholders had been allowed to freely make an informed decision whether to accept or reject a transaction. *See* Allen, *supra* n.12, at 1307-08. As *Williams* v. *Geier* put it, allowing "stockholders [to] control their own destiny through informed voting" represents "the highest and best form of corporate democracy." 671 A.2d at 1381. After all, "a majority-of-the-minority condition gives minority investors a free and voluntary opportunity to decide what is fair for themselves." *MFW*, 88 A.3d at 644.

Outside the squeeze-out context, the traditional approach should govern, full stop. As cases like *Zuckerberg* recognize, independent directors operate in a high-profile accountability structure and risk their reputations if they fail to discharge their important responsibilities faithfully. 262 A.3d at 1054; *see also Stewart*, 845 A.2d at 1052 & n.32. Delaware corporate law has wisely encouraged the use of independent directors to address the danger that conflicts of interest may harm the corporation and its stockholders—in contexts ranging from conflict transactions, to demand excusal under *Aronson* and now *Zuckerberg*, to anti-takeover measures. *E.g.*, *Unocal Corp.* v. *Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985). And the Delaware courts have proven their ability to protect independent directors who stand

up to controllers from retribution by any controller arrogant enough to make the attempt. *Black* v. *Hollinger Int'l Inc.*, 872 A.2d 559, 566-67 (Del. 2005); *MFW*, 67 A.3d at 532-33 & nn.172-73 (collecting cases).

Delaware's traditional approach provides an efficient framework for addressing the diverse range of transactions and other situations that involve potential conflicts of interest. That flexible framework allows for the proper use of any of the traditional cleansing mechanisms to invoke the business judgment rule in direct self-dealing cases, and the consideration of non-self-dealing conflicts in the context of heightened scrutiny under the intermediate standards of review.[36] That high-integrity framework uses fairness-assuring protections to encourage impartial decision-making and to avoid judicial-second guessing inconsistent with the sound basis for the business judgment rule.

[36] *See In re Columbia Pipeline Grp., Inc.*, 2021 WL 772562, at *3, *31-32 (Del. Ch. Mar. 1, 2021) (considering management severance package providing non-ratable benefits under *Revlon*).

CONCLUSION

This Court should underscore the reliability of these time-tested principles of Delaware corporate law by answering its important question yes, and affirming the dismissal below.

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