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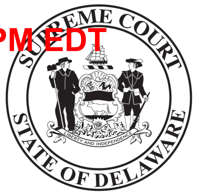

IN THE SUPREME COURT OF THE STATE OF DELAWARE

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 REPLY BRIEF OF THE IAC DEFENDANTS

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September 29, 2023

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TABLE OF ABBREVIATIONS

Abbreviation/Citation[*]	**Reference**
Order	May 30, 2023 Order Directing the Parties to Submit Supplemental Briefing (D.I. 58)
OB or "Opening Brief"	Supplemental Opening Brief of the IAC Defendants (D.I. 59)
AB or "Answering Brief"	Appellants' Supplemental Answering Brief (D.I. 63)
Elson	Corrected *Amicus Curiae* Brief of Professor Charles M. Elson in Support of Appellants (D.I. 83)
Alpha	Corrected Brief of *Amicus Curiae* Alpha Venture Capital Management, LLC in Support of Appellants (D.I. 84)
Academics	*Amicus Curiae* Brief of Academics in Support of Appellants (D.I. 79)

[*] All other capitalized terms are used consistently with the Opening Brief.

PRELIMINARY STATEMENT

The Court directed supplemental briefing 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?

Order 3. The Court found that "resolving the issue" would "provide certainty to the Court of Chancery which has continued to address *MFW* outside the context of controlling stockholder freeze out transactions." *Id*. at 2-3.

The Separation was the opposite of a squeeze-out, as plaintiffs concede. AB 45. Under the sound Delaware tradition that has governed conflict transactions outside the controller squeeze-out context, either the Separation Committee's approval or the majority-of-the-minority stockholder vote alone was sufficient to lower the standard of review from entire fairness to business judgment.[1]

[1] The Match Defendants join the arguments made herein.

ARGUMENT

A. The Tradition

The Opening Brief demonstrated: *First*, the entire fairness standard presumptively governs all self-dealing conflict transactions. OB 9. *Second*, the standard of review of a conflict transaction has traditionally shifted from entire fairness to business judgment if one of the three cleansing mechanisms was used with integrity. *Id.* at 9-14. *Third*, this approach has been applied to conflict transactions *with controllers* in many contexts (executive compensation, inter-company agreements, reorganizations, charter amendments). *Id.* at 11-14. *Fourth*, the concept of inherent coercion applied in *Kahn* v. *Lynch*[2] was a context-specific effort by the Delaware judiciary to deal with the vexing area of controller squeeze-outs. *Id.* at 14-17. *Fifth*, the cases solving the problems caused by *Lynch*'s embrace of inherent coercion, including *MFW*,[3] understood *Lynch* as context-specific for controller squeeze-outs, and cabined that concept because it conflicted with Delaware's traditional respect for independent director and stockholder decision-making—including in controlled companies. *Id.* at 17-23, 32-37.

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

[3] *Kahn* v. *M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014); *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013).

Finally, the *MFW* solution was not intended to displace the traditional rule's application to controller transactions not involving squeeze-out mergers. *Id.*

Plaintiffs do not address this measured argument. Instead, they argue that the entire fairness doctrine pre-dates cash-out mergers and "applies" to all controller conflict transactions. AB 20-25. Well, yes. As the Opening Brief explained:

> 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.

OB 9.

Plaintiffs and amici suggest that the traditional rule—under which approval by an independent board majority, an independent special committee, or a majority of the minority stockholders are accepted, effective ways to shift the standard of review from entire fairness to business judgment—has no grounding in Delaware precedent. AB 18-19; Elson 4-11; Academics 12-15. They are mistaken and fail to grapple with the Opening Brief's explanation for why this traditional rule has and should govern all controller conflict transactions outside the unique squeeze-out context.

1. The Origin and Context of Inherent Coercion: *Citron* to *Lynch* to *MFW*

The best way to begin to address plaintiffs' and amici's misconceptions about Delaware's traditional approach is to consider the decision that originated the inherent coercion concept as an attempt to rationalize the different treatment certain decisions had given to squeeze-out mergers: *Citron* v. *E.I. Du Pont de Nemours & Co*., which addressed a squeeze-out merger in which DuPont bought out the minority stockholders of its controlled subsidiary. 584 A.2d 490, 492 (Del. Ch. 1990).

Two decisions were relevant to then-Vice Chancellor Jacobs's analysis. In *In re Trans World Airlines, Inc. Shareholders Litigation*, Chancellor Allen had held that a going-private merger with a controller would receive business judgment review if approved by an independent special committee. 1988 WL 111271, at *1, *7-8 (Del. Ch. Oct. 21, 1988). But this Court previously had suggested in *Rosenblatt* v. *Getty Oil Co*. that the use of a traditional cleansing device in a controller squeeze-out merger would only shift the burden of persuasion on fairness to the plaintiff. 493 A.2d 929, 937 (Del. 1985).[4]

[4] *Rosenblatt* did not present the question whether the traditional cleansing mechanisms would invoke business judgment review. 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, 1403-05 (1993). Chancery found for defendants because the transaction was fair. 1983 WL 8936, at *13 (Del. Ch. Sept. 19, 1983). The court did not decide whether the majority-of-the-minority vote should obviate fairness review, calling the issue "a bit of a quandary" under "the current status of the law." *Id.* This Court

In *Citron*, although preferring the *TWA* approach, the Vice Chancellor felt bound by *Rosenblatt*'s language.[5] To rationalize the discordance between *Rosenblatt* and case law on other controller conflicts, the court articulated why a controller who wanted to squeeze out the minority in a parent-subsidiary merger posed special and unique dangers. That articulation refutes the entire thrust of plaintiffs' and amici's contentions.

Vice Chancellor Jacobs recognized that the traditional approach to conflict transactions built on the structure of Section 144:

> In reviewing the statutory and case law on this subject, a useful starting point is 8 *Del. C.* § 144….
>
> Section 144 was most recently construed in *Marciano* v. *Nakash*, 535 A.2d 400, 403-05 (Del. 1987)…. The Supreme Court, applying § 144, held that because neither shareholder ratification nor disinterested director approval could be obtained…, the "intrinsic fairness" review standard would govern. However, the Court noted that: "[A]pproval 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…."

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affirmed on fairness alone, and its statements about the standard of review do not suggest that it was a matter of adversary contention. 493 A.2d at 945-46.

[5] Then-Vice Chancellor Jacobs co-authored *Function Over Form*, stating: "The court in *Citron* reached a different result [than *TWA*], not because it viewed the merits of that issue differently, but solely because it had concluded that *Rosenblatt* was binding supreme court authority mandating that different result." William T. Allen et al., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287, 1306 n.75 (2001).

Citron, 584 A.2d at 500-01. The Vice Chancellor then explained the general rule for conflict transactions other than squeeze-out mergers:

> *Except in the case of parent-subsidiary mergers*, our courts have applied the same analysis, and reached similar results, in interested transaction cases that were not decided under § 144. *Puma* v. *Marriott*, 283 A.2d 693 (Del. Ch. 1971) (applying business judgment standard of review where disinterested directors approved the purchase of six corporations owned by the Marriott family group, including inside directors, according to terms that the inside directors did not dictate)…. *The same result has been reached* in cases involving mergers with acquirors who were fiduciaries but *did not own a controlling stock interest in the corporation*….

Id. at 501 (emphases added).

After thus recognizing that the traditional approach governed controller conflicts outside of the "parent-subsidiary merger" context, the Vice Chancellor concluded that *Rosenblatt* required a different approach to controller squeeze-outs:

> The question posed here is whether the business judgment form of review will also govern a *parent-subsidiary merger* that is either negotiated on behalf of the subsidiary by a committee of disinterested, independent directors, or is ratified by the informed vote of disinterested minority shareholders, or both. Although it did not decide that issue, *Weinberger* v. *UOP, Inc.*, 457 A.2d 701 (Del. 1983), contains language from which that result (the application of the business judgment standard) might be inferred. However, subsequent case law confirms that that inference is erroneous.
>
> In *Rosenblatt* … a special committee of the subsidiary's independent directors negotiated (quite adversarily) a merger with the corporate parent. The merger was later

> ratified by the subsidiary's minority stockholders…. *Rosenblatt* … held that minority stockholder ratification "shifts the burden of proving the unfairness of the merger entirely to the plaintiffs…."
>
> *Rosenblatt* indicates that minority stockholder ratification of a *parent-subsidiary merger*, will not cause the transaction to be evaluated under the business judgment review standard that normally applies to challenged stock options or *the other above described corporate transactions.* Rather, in a *parent-subsidiary merger context*, shareholder ratification operates only to shift the burden of persuasion, not to change the substantive standard of review (entire fairness). Nor does the fact that the merger was negotiated by a committee of independent, disinterested directors alter the review standard.

Id. at 501-02 (emphases added).

Seeking to explain *Rosenblatt*'s deviation from the traditional approach, Vice Chancellor Jacobs grounded his reasoning in the unique pressure stockholders and independent directors would be under when a controller wanted exclusive ownership of a controlled corporation—i.e., the inherent coercion concept:

> [S]hareholder ratification and disinterested director intervention have a different procedural effect where the transaction is a *parent-subsidiary merger*, than in cases where the transaction is with a fiduciary that does not control the corporation. Although the Delaware cases do not articulate a distinction in those terms, a plausible basis exists for it. *Parent subsidiary mergers*, unlike stock options, are proposed by a party that controls, and will continue to control, the corporation, whether or not the minority stockholders vote to approve or reject the transaction. *The controlling stockholder relationship has the inherent potential to influence, however subtly, the vote of minority stockholders in a manner that is not*

> *likely to occur in a transaction with a noncontrolling party.*
>
> *Even where no coercion is intended*, shareholders voting *on a parent subsidiary merger* might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder. *For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation*. At the very least, the potential for that perception, and its possible impact upon a shareholder vote, could never be fully eliminated. Consequently, *in a merger between the corporation and its controlling stockholder*—even one negotiated by disinterested, independent directors—no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation. Given that uncertainty, *a court might well conclude* that even minority shareholders who have ratified a *parent-subsidiary merger* need procedural protections beyond those afforded by full disclosure of all material facts. One way to provide such protections would be to adhere to the more stringent entire fairness standard of judicial review.

Id. at 502 (emphases added).

In *Lynch*, this Court block quoted *Citron*'s reasoning, and emphasized that it was addressing the standard for controller squeeze-out mergers in holding that independent director approval (possibly even coupled with minority stockholder approval) did not warrant shifting to business judgment review. 638 A.2d at 1115-18 (referring to controller "cash-out mergers" and "parent-subsidiary mergers"). *Lynch* stressed the unique threat of bypass in that context due to the ability of the

controller to make a tender offer, thereby bypassing the board of directors. *Id*. at 1120; OB 14-17.

Plaintiffs and amici never confront the unique bypass problem that animated *Lynch.* They also slight the reality that the cases leading to the context-specific solution in *MFW*, and *MFW* itself, understood *Lynch*'s inherent coercion-based exception to the traditional doctrine to be a special one for controller squeeze-outs. *See In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421 (Del. Ch. 2002); *In re Cox Commc'ns Inc. S'holders Litig.*, 879 A.2d 604 (Del. Ch. 2005); OB 17-23.[6] This Court recently recited this history in similar fashion, focusing on controller squeeze-outs. *In re Tesla Motors, Inc. S'holder Litig.*, 298 A.3d 667, 706-07 & nn.170, 174 (Del. 2023) (discussing *Rosenblatt*, *Lynch*, *Pure*, *Cox*, and *MFW* as developed "in the context of controller squeeze-outs"); *id.* at 707 (observing that "*MFW* answered a doctrinal question the corporate bar long had: did 'the business judgment standard apply *to controller freeze-out mergers* where the controller's proposal is conditioned on both Special Committee approval and a favorable majority-of-the-minority vote?'" (emphasis added)).

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[6] Plaintiffs mistakenly claim that *Pure* conceived of inherent coercion and that it was not the reason for *Lynch*'s context-specific deviation from the traditional approach. AB 29-30 & n.97. *Pure* named the concept *Lynch* embraced from *Citron* while accurately describing it. 808 A.2d at 435-36 & nn.16, 18.

Plaintiffs' and amici's position is further undermined by *Flood* v. *Synutra*, where this Court again underscored the context-specific deviation from the tradition for controller squeeze-out mergers. 195 A.3d 754, 762-64 (Del. 2018) (referring to "mergers with controlling stockholders," "controller … buyout[s]," and "going private proposal[s]," and explaining that the ab initio requirement solves the tender offer bypass problem); *id.* at 768 (Valihura, J., dissenting) (*MFW*'s rule is one for "controller squeeze-out transactions," i.e., "controller buyout transactions").

Indeed, the full *MFW* suite does not fit in any coherent way in contexts outside transactions for which it was designed—to address the tender offer bypass problem unique to squeeze-outs. Unlike squeeze-outs, in cases like the present spin-off, or (for example) involving executive compensation or services agreements, a controller *cannot* impose its will in a way that bypasses the board and fiduciary review, as board approval is always required.[7] If nothing else, *MFW*'s ab initio

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[7]

> [*MFW*] addressed concerns unique to the controller going-private context: the requirement that the controller concede that the special committee of independent directors could say no responded directly to the concern that the controller could bypass that committee decision by presenting a tender offer directly to the minority stockholders.
>
> The *MFW* solution was never designed to apply to all transactions between controlling stockholders and companies. *MFW* repeatedly emphasized that it was addressing only the context of going-private mergers: it defined the question presented as "what should be the

requirement makes no sense in compensation and other conflict transactions. This further illustrates the reality that *MFW* was a sensible bespoke context-specific solution, and not the problem-creating, tradition-undermining blunderbuss that plaintiffs and amici make of it.

Put simply, the opinions leading to and including *MFW* tempered the rigid rule of *Lynch*, appropriately cabined the inherent coercion concept, and understood that it was conceived in *Citron* to explain a context-specific exception to the traditional approach to conflict transactions (per *Rosenblatt*) and was embraced in *Lynch* as only that. Inherent coercion has never been a meta-principle of Delaware law. OB 17-23, 32-37.[8]

> correct standard of review for mergers between a controlling stockholder and its subsidiary," and recited that "[o]utside the controlling stockholder merger context, it has long been the law that even when a transaction is an interested one but not requiring a stockholder vote, Delaware law has invoked the protections of the business judgment rule when the transaction was approved by disinterested directors acting with due care." Thus, the idea that *MFW* meant, without saying so, to define the treatment of all transactions with controlling stockholders is at odds with *MFW*'s own text.

Lawrence A. Hamermesh et al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 339 (2022).

[8] Plaintiffs are mistaken that Chancellor Allen embraced inherent coercion in *Kahn* v. *Tremont*. AB 24. Chancellor Allen actually said that "as an original matter one could, indeed I did, express the view, that if the evidence of the integrity of the special committee was substantial enough, that process should result in the

2. Plaintiffs' (and Amici's) Inability to Address Authority Applying the Traditional Approach

The Opening Brief cited numerous cases demonstrating that the traditional approach has long governed controller conflicts. OB 9-14. Plaintiffs' attempt to distinguish those cases (AB 20-22, 35-37 nn.123-26) fails:[9]

First, plaintiffs argue that cases where it was clear that the court *would have* applied business judgment review *if* one of the traditional cleansing mechanisms *had been used correctly* are inconsistent with the traditional approach. AB 21, 36 & n.126. Not so. Those precedents show the traditional approach's integrity because Delaware courts rigorously evaluate whether approval was by informed independent directors or by informed uncoerced stockholders. *Harman* v. *Masonelian Int'l Inc.*, 442 A.2d 487, 492 (Del. 1982) ("[D]efendants' reliance on the minority shareholders' approval of the merger does not warrant dismissal—*given plaintiff's allegation that the public shareholders' approving vote was 'coerced' through a materially false and misleading proxy statement*." (emphasis added)); *Schreiber* v. *Pennzoil Co.*, 419 A.2d 952, 957, 961 (Del. Ch. 1980) (majority-of-the-minority vote

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invocation of business judgment type judicial review." 1996 WL 145452, at *7 (Del. Ch. Mar. 21, 1996). He concluded, as a trial judge, that *Lynch* ruled out the approach he favored. *Id.* Chancellor Allen co-authored *Function Over Form*, explaining why the inherent coercion concept was erroneous and why the traditional approach should govern even squeeze-outs. Allen, *supra* n.5, at 1306-07.

[9] Amici do not even try.

"constituted approval" and invoked business judgment protection because "fully informed"); *see* Argument B, *infra*.[10]

Second, plaintiffs mistakenly argue other cases "did not involve a controller." AB 36 n.123. *Puma* v. *Marriott*—a leading case often cited in support of the traditional approach[11]—involved Marriott's purchase of six companies principally owned by members of the Marriott family, who controlled 46% of Marriott's voting

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[10] Plaintiffs' argument that stockholders cannot vote in a mature, self-interested manner and that courts should second-guess stockholder judgments about their own investments (AB 41) is at odds with the DGCL, *e.g.*, 8 *Del. C.* §§ 144(a)(2), 242(b)(1), 251(c), and sound Delaware jurisprudence, *e.g.*, *Williams* v. *Geier*, 671 A.2d 1368, 1381 (Del. 1996) ("[T]he stockholders control their own destiny through informed voting. This is the highest and best form of corporate democracy."); *R.S.M. Inc.* v. *All. Cap. Mgmt. Holdings L.P.*, 790 A.2d 478, 498 (Del. Ch. 2001) ("[I]t seems a misallocation of judicial resources to have courts reassess the fairness of transactions that minority [stockholders] could have blocked themselves."); *Corwin* v. *KKR Fin. Holdings LLC*, 125 A.3d 304, 309 n.19 (Del. 2015) (collecting cases demonstrating the long-standing tradition of judicial deference to disinterested stockholder votes). Contrary to plaintiffs' suggestion (AB 45), *Corwin*'s statement that Delaware courts are reluctant to second-guess "the judgment of a disinterested stockholder majority that determines that a transaction with a party other than a controlling stockholder is in their best interests," 125 A.2d at 306, is not an embrace of *MFW* creep; the "other than" reference simply avoided any implication that "*Corwin* cleansing" overrode *MFW*'s requirements in the controller squeeze-out context.

[11] *E.g.*, *Aronson* v. *Lewis*, 473 A.2d 805, 812 (Del. 1984); *MFW*, 67 A.3d at 526-27 & n.149; *Citron*, 584 A.2d at 501; *Pure*, 808 A.2d at 435 n.16; *Cox*, 879 A.2d at 615 & n.18. The ABA's *Guidelines for the Unaffiliated Director of the Controlled Corporation* rely on *Puma* for the rule that "the courts will generally defer" to decisions made by informed independent directors of controlled corporations as to transactions with the controller. 44 BUS. LAW. 211, 215-16 (1988).

power and occupied four of nine board seats. 283 A.2d at 694-95. The court applied business judgment *solely* because the transaction was the "result of the exercise of independent business judgment of the outside, independent directors," not on the implausible notion that Marriott's founding family was not a controller. *Id.* at 696. The Court was explicit: "Having so decided it is unnecessary to consider defendants' contention that ratification of the transaction by Marriott's stockholders effectively barred this action." *Id.*

Plaintiffs also inaccurately claim that *Tyson Foods* was not a controller case. The complaint attacked the fairness of a consulting agreement for Don Tyson—the former Chairman and CEO, who controlled over 80% of Tyson's voting power. 919 A.2d 563, 572, 575 (Del. Ch. 2007). Addressing a direct conflict transaction involving a majority stockholder, the court applied the traditional rule and held that majority independent board approval invoked business judgment protection. *Id.* at 587-88.

Plaintiffs' attempt to slough off other cases as involving non-controlled corporations is also meritless. *Lewis* v. *Hat Corp. of Am.*, 150 A.2d 750, 751, 753 (Del. Ch. 1959) (challenge to corporation's purchase of properties from 42.7% stockholder with "sufficient voting stock [of corporation] to cause to be elected to its board a majority of [stockholder's] nominees or designees"; sole rationale for business judgment review was the informed majority-of-the-minority vote);

Johnston v. *Greene*, 121 A.2d 919, 925 (Del. 1956) (challenge to "a transaction between the dominating director and his corporation").[12]

Third, plaintiffs slight Chancellor Chandler's decisions distinguishing split-offs from squeeze-outs. AB 36-37 n.123. *Solomon* v. *Armstrong* applied business judgment review to a corporation's split-off of a subsidiary that was approved by the holders of tracking stock of the affected subsidiary—who were thus in a position economically equivalent to minority stockholders. 747 A.2d 1098, 1120-23 (Del. Ch. 1999), *aff'd*, 746 A.2d 277 (Del. 2000) (Table). The Chancellor observed that the split-off was unlike "a classic freeze-out [where] the minority shareholders have no choice" because "the transaction at issue … was conditioned on separate class voting for approval." *Id.* at 1120-21. *Solomon* noted that conceptualizing a split-off as "akin to a minority freeze-out" "could too easily deprive the board of business judgment protection in a situation where the business judgment rule's presumptions seem appropriate." *Id.* at 1123; *see also In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *10 (Del. Ch. May 4, 2005) (stockholder ratification of split-off maintained business judgment protection), *aff'd*, 897 A.2d

[12] *Kahn* v. *Roberts*, 1995 WL 745056 (Del. Ch. Dec. 6, 1995) was not cited as a controller conflict case. AB 36 n.123. It was cited on the relationship of equity doctrine to Section 144. OB 10-11.

162 (Del. 2006); *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 616 (Del. Ch. 1999) (same).

Fourth, plaintiffs are incorrect in arguing that *Getty Oil Co.* v. *Skelly Oil Co.* and *Orman* v. *Cullman* should be ignored because the controller did not unilaterally "fix" the transaction terms. AB 37 & n.125. That *is* the traditional rule—only where the transaction is approved by impartial decision-makers does business judgment review apply. The phrasing in *Getty Oil* of terms "not set by the parent but by a third party" (267 A.2d 883, 887 (Del. 1970)) distinguishes situations where the controller abides by terms set by or agreed with others from those where the controller unilaterally pushes through a self-dealing transaction on its own terms. So too in *Orman*, 794 A.2d 5, 22 (Del. Ch. 2022) (terms negotiated with third party).

Finally, plaintiffs' argument that *Williams* v. *Geier* is not a controller conflict because the transaction was on putatively pro rata terms, AB 37 & n.124, ignores that the challenged charter amendment entrenched the control of the majority stockholder family by cementing its voting control. 671 A.2d at 1378. Indeed, the opinion acknowledged the controller was "reap[ing] a benefit." *Id*. at 1381-82. The Court nonetheless rejected the idea that the independent board majority could not act independently of the controller—that is, it rejected inherent coercion—and held that informed majority independent board approval alone invoked business judgment review, and rejected plaintiffs' claim that a majority-of-the-minority vote

was required. *Id*. at 1381-84.[13]

Plaintiffs do not attempt to distinguish the well-reasoned applications of the traditional rule in *Canal Capital Corp*. v. *French*, 1992 WL 159008, at *5-6 (Del. Ch. July 2, 1992), *Teamsters Union 25 Health Services & Insurance Plan* v. *Baiera*, 119 A.3d 44, 65 n.119 (Del. Ch. 2015),[14] or *Friedman* v. *Dolan*, 2015 WL 4040806, at *7-8 (Del. Ch. June 30, 2015). Following *Ezcorp*'s lead,[15] plaintiffs just assert that they wrongly failed to understand inherent coercion as a meta-principle of Delaware law, or "involved poorly pleaded complaints failing to invoke entire fairness." AB 25 n.85, 27 n.92, 29 n.96.[16]

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[13] *See In re Google Inc.*, 2013 WL 6735045 (Del. Ch. Oct. 28, 2013) (Settlement Tr.) (*Williams* v. *Geier* "weigh[s] heavily in favor of" business judgment review of recapitalization plan approved by independent directors that allowed co-founders to retain voting control).

[14] *Zuckerberg* quoted *Baiera* on the ability of a controlled company's board to impartially assess demand as to controller conflict transactions. *United Food & Com. Workers Union* v. *Zuckerberg*, 262 A.3d 1034, 1055 & n.153 (Del. 2021).

[15] 2016 WL 301245, at *16-24 (Del. Ch. Jan. 25, 2016).

[16] Most of the decisions cited by plaintiffs and amici did not address what cleansing mechanism would invoke business judgment review because they involved transactions not deploying any cleansing mechanism (*Keenan* v. *Eshleman*, 2 A.2d 904, 908 (Del. 1938); *Shrage* v. *Bridgeport Oil Co*., 68 A.2d 317, 319 (Del. Ch. 1949); *Kennedy* v. *Emerald Coal & Coke Co*., 42 A.2d 398, 415 (Del. 1944)); or cleansing mechanisms not used with integrity (*Garfield* v. *BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *8-11 (Del. Ch. Dec. 20, 2019); *Ark. Tchr. Ret. Sys.* v. *Alon USA Energy, Inc.*, 2019 WL 2714331, at *3 (Del. Ch. June 28, 2019); *Salladay* v. *Lev*, 2020 WL 954032, at *1 (Del. Ch. Feb. 27, 2020)); or cases where the standard of review was not disputed (*S. Muoio & Co.* v. *Hallmark*

3. Plaintiffs' Alternative Universe

Rather than acknowledging the body of well-reasoned precedent applying the traditional rule in controller conflict cases, plaintiffs assert that pre-*MFW*, no controller conflict could ever avoid fairness review regardless of the cleansing devices utilized. Plaintiffs argue that *MFW* creep per *Ezcorp* "benefitted defendants," not just in the squeeze-out context, but in all controller cases. AB 31. Plaintiffs thus take the position that before *MFW*, there was no way to structure a non-squeeze-out controller conflict transaction—e.g., executive compensation to a CEO-controller or an inter-company agreement between a parent and a controlled subsidiary—to invoke business judgment review. In plaintiffs' view, pre-*MFW*, the very most that could be achieved through approval by an independent committee

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Ent. Invs. Co., 2011 WL 863007, at *2 (Del. Ch. Mar. 9, 2011), *aff'd*, 35 A.3d 419 (Del. 2011) (Table)).

Others do not support plaintiffs' anti-tradition narrative because they involved squeeze-outs (*Sterling* v. *Mayflower Hotel Corp.*, 93 A.2d 107, 109-10 (Del. 1952); *Singer* v. *Magnavox Co.*, 380 A.2d 969 (Del. 1977), *overruled by Weinberger*, 457 A.2d 701; *Alon*, 2019 WL 2714331, at *18); or the "functional equivalent of a cash-out merger." *Reis* v. *Hazelett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) (reverse split freezing out minority without any procedural protections). *David J. Greene & Co.* v. *Dunhill Int'l, Inc.* is an oddment involving a controller buy-out, holding, contrary to *Lynch*, that a majority-of-the-minority vote did not even shift the burden on fairness to plaintiffs. 249 A.2d 427, 432 (Del. Ch. 1968).

and/or a majority-of-the-minority vote was a burden shift that only matters if the evidence was in equipoise.[17]

That is an implausible assertion. But it is essential to plaintiffs' (and amici's) position. Can it seriously be thought that it was a categorical rule of law before *MFW* that any controller conflict transaction, no matter how mundane or regular, had to be set aside by a court unless shown to be entirely fair at trial even if the transaction was approved by a well-functioning special committee of indisputably independent and disinterested directors or a fully informed and uncoerced majority-of-the-minority stockholder vote?

Plaintiffs' assertion cannot be reconciled with the realities of representative litigation, as demonstrated by the wave of litigation resulting from *Lynch* and the (pre-*Trulia*) wave of disclosure-only challenges to third-party mergers.[18] If, contrary to the traditional approach—as illustrated by *Tyson Foods*, 919 A.2d at 587-88—plaintiffs' and amici's view of Delaware law had been the reality, then Delaware courts would have been swamped with cases challenging executive compensation decisions because even approval by an independent compensation committee would

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[17] *See Dermatology Assocs. of San Antonio* v. *Oliver St. Dermatology Mgmt. LLC*, 2020 WL 4581674, at *19 n.214 (Del. Ch. Aug. 10, 2022).

[18] *Cox*, 879 A.2d at 622-23; *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884, 891-92 (Del. Ch. 2016).

not have sufficed to invoke business judgment review. That didn't happen because plaintiffs and amici are wrong about the law as long understood—not because the entire plaintiffs' bar was asleep at the switch.

Plaintiffs and amici also fail to acknowledge that the General Assembly and other regulators like Congress, the SEC, and stock exchanges have long refused to impose on controlled companies the rigid approach advocated. Federal say-on-pay votes are non-binding and not mandated by the DGCL; exchanges do not mandate independent compensation committees at controlled companies; and audit committees have long had the role of approving related-party transactions. OB 31-32. Plaintiffs' and amici's approach would have this Court by judicial fiat mandate use of the full *MFW* suite in contexts where that could be the legislative, regulatory rule but has never been. They slight the costs and novelty of this expansion by arguing that if controlled companies wish to avoid constant stockholder litigation, they should routinely hold annual binding say-on-pay votes on top of independent compensation committee approval and, correspondingly, for all inter-company arrangements. Elson 19; Alpha 13. In doing so, they transform the context-specific exception governing squeeze-outs into a judicially written, prescriptive code addressing all controller transactions.

4. DGCL § 144

The Opening Brief did not argue that mere compliance with DGCL § 144 results in equitable cleansing. AB 32-34. Rather, the point is that the traditional approach's deference to *either* uncoerced, informed impartial director *or* stockholder decision-making to invoke business judgment protection for conflict transactions is *drawn* from Section 144. OB 9. As *Citron* recognized, Section 144 is a "useful starting point" in determining the standard of review in conflict transactions. 584 A.2d at 500-01.

The Academics cite *Cox* in an incomplete fashion (Academics 16), ignoring *Cox*'s observation that the traditional approach of deferring to an impartial decision made by *either* independent directors *or* disinterested stockholders tracks Section 144, but with judicial enhancements to ensure that the required approval was informed, uncoerced, and impartial.[19] *Cox* (and other authority) was cited in the Opening Brief to just this measured effect: "With judicial tailoring that ensures that they operate in a fairness-assuring way, the effective use of any of the traditional

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[19] "By those methods [i.e., judicial enhancements], respect for the business judgment of the board can be maintained with integrity, because the law has taken into account the conflict and required that the business judgment be either proposed by the disinterested directors or ratified by the stockholders it affects." 879 A.2d at 614; *cf.* Ernest L. Folk, III, *The Delaware General Corporation Law: A Commentary and Analysis* 67 (1972) (compliance with proposed Section 144 "should provide substantial protection if not insulation" from challenges to "affiliated (interested director) transaction[s]").

cleansing mechanisms not only satisfies Section 144 but invokes the business judgment rule in equity." OB 9-10.

That judicial tailoring—e.g., requiring informed, independent directors to make the decision—coheres with *Aronson* and *Zuckerberg* and demonstrates that only genuinely impartial decision-making invokes business judgment review. It also reflects that Delaware courts have long trusted uncoerced, informed independent directors and minority stockholders to be capable of acting as an effective check on controllers. The proponents of Section 144 believed that its protections were, contrary to the Academics' arguments, of particular help to stockholders in controlled corporations. *See* Folk, *supra* n.19, at 67 (Section 144 procedures "are absolutely essential to the close corporation, many of whose transactions necessarily involve conflicting interests" and "parent-subsidiary transactions similarly benefit form [sic] such a statute").

If plaintiffs and amici are right about inherent coercion being a sound meta-principle of Delaware corporate law, then it makes no sense that Section 144 allows *either* disinterested director *or* stockholder approval to validate controller transactions, rather than providing that such approvals are *both* required. Had the General Assembly wished to bifurcate conflict transactions into two categories—one for directors and officers, and another for controllers—it could have easily done so. Its decision not to, and its use of an "or" rather than an "and" approach to the

critical issue of validation, corroborates the traditional approach to both legal and equitable cleansing.

5. Plaintiffs' Argument That This Court Has "Three Times" Embraced *MFW* Creep

Plaintiffs argue that this Court has already decided—"three times"—the question that it asked the parties to answer. AB 11-17. Not so.[20]

In two cases that plaintiffs insist moot the *MFW* creep issue, the parties assumed that entire fairness governed a non-squeeze-out controller conflict transaction unless both *MFW*'s protections were used. *Tesla*, 298 A.3d at 678-79; *Olenik* v. *Lodzinski*, 208 A.3d 704, 707 (Del. 2019). The parties did not challenge the governing standard—no one argued that one of the two *MFW* prongs sufficed to invoke business judgment. Indeed, *Tesla* was explicit that it was not addressing the review standard for that very reason:

> The trial court assumed, without finding, that the entire fairness standard applied.... *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.*

298 A.3d at 699 (emphasis added).

[20] Even *Ezcorp* acknowledged that *MFW* creep was an open issue in this Court. 2016 WL 301245, at *16.

In the third case, *Southeastern Pennsylvania Transportation Authority* v. *Volgenau*, Chancery applied business judgment review because the transaction was approved by an independent special committee and a fully informed majority-of-the-minority vote. 2013 WL 4009193, at *21 (Del. Ch. Aug. 5, 2013), *aff'd*, 91 A.3d 562 (Del. 2014) (Table). There was thus no occasion for Chancery or this Court to determine whether either special committee or minority stockholder approval alone would have invoked business judgment review.[21]

There is no doubt that the inherent coercion concept has created confusion and arguable inconsistencies in how the Delaware courts have addressed cases involving controller conflicts after *Lynch*. But the notion that this Court has implicitly embraced *MFW* creep—so that, for example, executive compensation to officers affiliated with controllers is now open season for entire fairness claims unless that compensation is subjected to both independent compensation committee approval and a binding majority-of-the-minority say-on-pay vote—has no foundation. It is implausible that the Court would decide an important question of Delaware law not raised by the parties in the indirect, implicit, unexplained manner suggested by

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[21] Plaintiffs strain so far as to cite colloquy during the *SEPTA* oral argument as embodying the Court's views on *MFW* creep. AB 12-13. The one-paragraph summary affirmance order does not mention *MFW*. 91 A.3d 562.

plaintiffs.[22] Nor is it likely that the Court ordered supplemental briefing on an issue it has (thrice) decided.[23]

6. *Aronson* and *Zuckerberg*

Ezcorp acknowledged that expanding *MFW* (and the inherent coercion concept) beyond the squeeze-out merger context is incompatible with *Aronson*.[24]

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[22] This Court did not address the *MFW* creep issue in any of the other cases cited by plaintiffs or amici. *Ams. Mining Corp.* v. *Theriault*, 51 A.3d 1213, 1239 (Del. 2012) (parties "agreed that entire fairness is the appropriate standard of judicial review for the Merger"); *Levco Alt. Fund Ltd.* v. *Reader's Digest Ass'n*, 803 A.2d 428 (Del. 2002) (Table) (finding that "the [special] committee's functioning … was flawed both from the standpoint of process and price" in a transaction without unaffiliated stockholder approval); *Emerald Partners* v. *Berlin*, 726 A.2d 1215, 1223 n.11 (Del. 1999) (Chancery "did not address the issue of the existence of a well-functioning independent committee as it relates to an entire fairness review"); *Kahn* v. *Tremont Corp.*, 694 A.2d 422, 424 (Del. 1997) ("two contentions" on appeal were evidentiary issues); *see* Hamermesh, *supra* n.7, at 341 ("[T]he Delaware Supreme Court has yet to answer [this question] post-*MFW*: outside of the going private context, what cleansing techniques will change that initial standard from entire fairness to business judgment review?").

[23] The Court's refusal of interlocutory appeal in *Ezcorp* was not a "holding" that *Ezcorp* was "correctly" decided, as plaintiffs claim (AB 28-29). *Taylor* v. *Pontell*, 3 A.3d 1099, at n.12 (Del. 2010) (Table) ("A discretionary refusal of an interlocutory appeal has no precedential effect nor does it serve to suggest any point of view on the substantive merits of any legal issue in the case.").

[24] *Ezcorp*, 2016 WL 301245, at *27, *30, acknowledged that *Aronson*'s deference to independent directors of controlled companies was "undoubtedly the type of public policy judgment that the Delaware Supreme Court was and is empowered to make," and concluded:

> Ultimately, the choice between *Aronson* and other precedents is something only the Delaware Supreme Court can resolve.

Zuckerberg not only rejected the inherent coercion concept in the demand futility context, it went beyond *Aronson* by eliminating *Aronson*'s second-prong safety valve, thereby deepening its confidence in the ability of independent directors to sue, let alone stand up to, controllers. *MFW* creep and *Aronson*/*Zuckerberg* cannot co-exist. OB 32-37.

Plaintiffs and amici ignore that this Court has acknowledged that it is much more difficult to decide to cause the corporation to sue the controller than to say no to a transaction the controller proposes. *Sandys* v. *Pincus*, 152 A.3d 124, 134 (Del. 2016); *Marchand* v. *Barnhill*, 212 A.3d 805, 819 & n.95 (Del. 2019); OB 35. If Delaware law embraces the ability of independent directors of controlled companies to discharge their duties faithfully when considering a stockholder demand, no principle of law, or human nature, supports the contradictory notion that independent directors' judgments in the less contentious transactional context should not be respected. Having *MFW* creep extend to all controller conflicts, as plaintiffs and amici advocate, would mean that Delaware law will simultaneously not trust independent directors to say no to an unfair transaction in the first instance and yet allow them broad discretion to make the more difficult decision whether to sue the controller (and themselves) if they say yes.[25]

[25] Under *Zapata Corp.* v. *Maldonado*, 430 A.2d 779, 788-89 (Del. 1981), independent directors can cause the dismissal even of claims that have successfully survived a Rule 23.1 motion—including claims challenging a controller

The Academics do not confront this critical issue or even seem to recognize it exists. Elson and Alpha go so far as to argue that the *MFW* suite should not be limited to squeeze-out mergers precisely because courts can address unwarranted suits via dismissals under Rule 23.1. Elson 20; Alpha 13. That argument exposes the incoherence of their position.

Plaintiffs argue that *MFW* creep is not at odds with *Aronson* and *Zuckerberg* because the demand futility question is just different than the transaction approval question. AB 42. But *Aronson* explicitly linked its reasoning to the business judgment rule and the traditional role of an independent board majority in the impartial decision-making that justifies business judgment protection. 473 A.2d at 812-13 ("demand futility [question] is inextricably bound to issues of business judgment and the standards of that doctrine's applicability"; business judgment rule "comes into play in several ways" including "addressing a demand" and "as a defense to the merits"). In reviewing the basic doctrine that the business judgment of directors "will be respected by the courts," *Aronson* cited *Puma* v. *Marriott*—to the very page holding that business judgment review governed the corporation's purchase of companies owned by the controller because of independent director

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transaction. *E.g.*, *Diep* v. *Trimaran Pollo Partners, LLC*, 280 A.3d 133, 137 (Del. 2022); *Kahn* v. *Kohlberg Kravis Roberts & Co.*, 23 A.3d 831, 835, 842 (Del. 2011); *In re Baker Hughes a GE Co., Derivative Litig.*, 2023 WL 2967780, at *1-2 (Del. Ch. Apr. 17, 2023).

approval. 473 A.2d at 812; 283 A.2d at 695.

And this Court was emphatic in *Zuckerberg* (a controlled company case) that it is a "'cardinal precept' of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights." 262 A.3d at 1056.

Plaintiffs posit that special deference is accorded directors in the demand context because a derivative lawsuit "encroaches on the managerial freedom of directors." AB 43. But deciding whether to approve executive compensation, a merger agreement, an inter-company agreement, or another transaction is a core managerial power entrusted to the board under Section 141(a), and there is no rational basis for giving directors less deference as to these business decisions—especially because they are more obviously core business judgments than a decision whether to assert a legal claim against a controller. In either case, the directors exercise their Section 141(a) power to manage the corporation. If inherent coercion is pervasive, then it would be at its zenith in the ultimate high-stakes context—deciding to sue a controller for a serious breach of a legal duty—rather than in the transactional arena. OB 35.[26]

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[26] Plaintiffs' argument that "structural bias" undermines independent decision-making in the boardroom (AB 43) is at odds with *Zuckerberg*, which eliminated the second prong of *Aronson*, and thus represents a bigger move than *Aronson* away

Finally, as amici acknowledge, most controller conflicts other than squeeze-outs (e.g., inter-company agreements, executive compensation) are subject to a derivative, not a direct suit. Elson 19-20; Alpha 13. Having *MFW* creep extend to all controller conflicts would mean that Delaware corporate law does not trust independent directors to impartially say no to controller transactions yet, at the same time, empowers them to block the courthouse door for claims challenging such transactions. The traditional approach of respecting impartial decisions by directors found to meet Delaware's high standards for independence avoids that incoherence.

B. Amici

Amici mount a challenge to the integrity and effectiveness of Delaware corporate law in a sweeping way that ignores the proven utility and success of Delaware's traditional approach to conflict transactions. They say that the traditional approach leaves everything to "market forces," leaving "little need for corporate law" (Academics 6), and that absent mandatory application of the *MFW* suite, Delaware law cannot protect minority stockholders from controller overreaching.

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from embracing inherent coercion as a sound principle. 262 A.3d at 1050-57. If structural bias is cognizable, it would surely be most operative when independent directors are asked to file a reputationally damaging complaint seeking recompense from the controller for harming the company.

Not so. It is the traditional legal rule, not the market, that demands that the interested party give power to informed, impartial independent directors or to informed, disinterested stockholders, or face entire fairness scrutiny. That rule empowers and incentivizes market players—like independent directors and disinterested stockholders—to protect minority stockholders efficiently and fairly.[27]

The best way to show this is by highlighting the rigor with which the Delaware courts apply the traditional rule and their refusal to invoke business judgment protection unless cleansing mechanisms are used in a high-integrity, confidence-assuring manner. In recent years, Delaware courts have repeatedly refused to apply business judgment protection where the approving directors were not informed or not independent, including in controller transactions.[28] Likewise, Delaware courts

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[27] Studies have found that an independent director's alleged misconduct at one company results in loss of board seats at other companies. Eliezer M. Fich et al., *Financial Fraud, Director Reputation, and Shareholder Wealth*, J. FIN. ECON. 306, 316-18 (2007); Suraj Srinivasan, *Consequences of Financial Reporting Failure for Outside Directors: Evidence from Accounting Restatements and Audit Committee Members*, 43 J. ACCT. RSCH. 291, 293-94 (2005).

[28] *City of Fort Myers Gen. Emps.' Pension Fund* v. *Haley*, 235 A.3d 702, 705, 723 (Del. 2020); *Delman* v. *GigAcquisitions3, LLC*, 288 A.3d 692, 720 (Del. Ch. 2023); *In re Carvana Co. S'holders Litig.*, 2022 WL 2352457, at *18 (Del. Ch. June 30, 2022); *Sciabacucchi* v. *Liberty Broadband Corp.*, 2022 WL 1301859, at *1, 29 (Del. Ch. May 2, 2022); *Cumming* v. *Edens*, 2018 WL 992877, at *23 (Del. Ch. Feb. 20, 2018); *In re AmTrust Fin. Servs., Inc. S'holder Litig.*, 2020 WL 914563, at *10 (Del. Ch. Feb. 26, 2020); *In re MultiPlan Corp. S'holders Litig.*, 268 A.3d 784, 814 (Del. Ch. 2022).

have refused to give cleansing effect where it was less than assured that the stockholders had all material information and were not subject to coercion.[29]

Contrary to amici's arguments, Delaware courts have been especially sensitive to the dynamics of private companies and smaller public companies. Numerous decisions involving private and small-cap companies, including controller conflict cases, have declined to apply business judgment review when the

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This track record validates the academic prediction that "uncertainty about the independence of the directors ordinarily will prevent dismissal at the pleading stage." Lawrence A. Hamermesh et al., *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 648 (2017). Contrary to amici's suggestion (Elson 9; Academics 13), that prediction acknowledges that a properly constituted and functioning committee of independent directors *can* effectively cleanse a controller conflict, and that the Delaware courts police independence closely.

[29] *Morrison* v. *Berry*, 191 A.3d 268, 285-88 (Del. 2018); *Appel* v. *Berkman*, 180 A.3d 1055, 1064 (Del. 2018); *GigAcquisitions3*, 288 A.3d at 721; *Goldstein* v. *Denner*, 2022 WL 1671006, at *23-28 (Del. Ch. May 26, 2022); *In re Baker Hughes Inc. Merger Litig.*, 2020 WL 6281427, at *14 (Del. Ch. Oct. 27, 2020); *In re Mindbody, Inc.*, 2020 WL 5870084, at *26 (Del. Ch. Oct. 2, 2020); *In re USG Corp. S'holder Litig.*, 2020 WL 5126671, at *18 (Del. Ch. Aug. 31, 2020); *Salladay*, 2020 WL 954032, at *12-13; *Chester Cnty. Emps.' Ret. Fund* v. *KCG Holdings., Inc.*, 2019 WL 2564093, at *10-11 (Del. Ch. June 21, 2019); *In re Xura, Inc. S'holder Litig.*, 2018 WL 6498677, at *12-13 (Del. Ch. Dec. 10, 2018); *In re Tangoe, Inc. S'holders Litig.*, 2018 WL 6074435, at *10 (Del. Ch. Nov. 20, 2018); *Van der Fluit* v. *Yates*, 2017 WL 5953514 , at *7-8 (Del. Ch. Nov. 30, 2017); *In re Comverge, Inc. S'holders Litig.*, C.A. No. 7368-VCMR, ¶ 9 (Del. Ch. Oct. 31, 2016) (Order); *In re Saba Software Inc. S'holder Litig.*, 2017 WL 1201108, at *13, 16 (Del. Ch. Mar. 31, 2017); *Ligos* v. *Isramco, Inc.*, 2021 WL 3870679, at *9 (Del. Ch. Aug. 31, 2021); *Sciabacucchi* v. *Liberty Broadband Corp.*, 2017 WL 2352152, at *24 (Del. Ch. May 31, 2017).

defendants could not show that a transaction had been approved by informed, uncoerced, and genuinely impartial directors[30] or stockholders.[31] This protection comes on top of the important role that appraisal plays in policing conflicted mergers in small-cap and close corporations.[32]

Amici themselves prove that the rigorous enforcement of the traditional approach has teeth against controller overreach. Alpha, purporting to speak for

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[30] *New Enter. Assocs. 14, L.P.* v. *Rich*, 292 A.3d 112, 161 (Del. Ch. 2023); *Manti Holdings LLC* v. *Carlyle Grp. Inc.*, 2022 WL 1815759, at *8-11 (Del. Ch. June 3, 2022); *In re Emerging Commc'ns, Inc. S'holders Litig.*, 2004 WL 1305745, at *33-35 (Del. Ch. May 3, 2004); *In re Trados Inc. S'holder Litig.*, 2009 WL 2225958, at *9 (Del. Ch. July 24, 2009).

[31] *Emerging Commc'ns*, 2004 WL 1305745, at *36; *In re Netsmart Techs., Inc. S'holders Litig.*, 924 A.2d 171, 207-10 (Del. Ch. 2007); *Maric Cap. Master Fund, Ltd.* v. *Plato Learning, Inc.*, 11 A.3d 1175, 1176 (Del. Ch. 2010); *Rich*, 292 A.3d at 150-51, 155; *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *38 (Del. Ch. Oct. 16, 2018), *aff'd*, 211 A.3d 137 (Del. 2019); *Nagy* v. *Bistricer*, 770 A.2d 43, 60 (Del. Ch. 2000); *Turner* v. *Bernstein*, 776 A.2d 530, 542 (Del. Ch. 2000); *Huff Energy Fund, L.P.* v. *Gershen*, 2016 WL 5462958, at *16 (Del. Ch. Sept. 29, 2016); *Kerbawy* v. *McDonnell*, 2015 WL 4929198, at *13 (Del. Ch. Aug. 18, 2015); *Kurz* v. *Holbrook*, 989 A.2d 140, 160 (Del. Ch. 2010), *aff'd in part, rev'd in part on other grounds*, 992 A.2d 377 (Del. 2010).

[32] Substantial appraisal awards have been rendered in cases involving private company controller-led transactions where no procedural protections were used or those used were found to be deficient: *Lane* v. *Cancer Treatment Ctrs. of Am., Inc.*, 2004 WL 1752847 (Del. Ch. July 30, 2004) (417% above); *Emerging Commc'ns,* 2004 WL 1305745 (271% above); *In re ISN Software Corp. Appraisal Litig.*, 2016 WL 4275388 (Del. Ch. Aug. 11, 2016), *aff'd*, 173 A.3d 1047 (Del. 2017) (158% above); *In re Sunbelt Beverage Corp.*, 2010 WL 26539 (Del. Ch. Jan. 15, 2010) (149% above); *In re Orchard Enters., Inc.*, 2012 WL 2923305 (Del. Ch. July 18, 2012) (128% above; procedural protections discussed in 88 A.3d 1, 25 (Del. Ch. 2014)).

investors in microcap companies, relies on two cases—*neither of which involved a controller*—that demonstrate why the traditional approach protects minority stockholders. In both, the business judgment rule would have applied if any one of the three traditional cleansing mechanisms had been used with integrity.

In *Alpha* v. *Elam*, Alpha alleged that independent directors approved a compensation plan awarding officers nearly half of the company's equity for unfair consideration without having a single meeting or retaining a compensation consultant. Alpha 7-8 n.24. Given allegations that the independent director approval was uninformed, entire fairness would have applied under the traditional rule. And because there was no controller, it was the traditional rule's close scrutiny of whether independent directors acted with care that gave Alpha settlement leverage.

In *Alpha* v. *Pourhassan*, Alpha alleged that the independent directors engaged in self-dealing and acted in bad faith in approving unfair and dilutive equity awards. Alpha 7-8. The claim was that at a night-time meeting hastily arranged by the CEO and with apparent knowledge of non-public information that would positively affect the company's stock price, the directors granted themselves equity awards that depleted the stockholder-approved incentive plan. Compl. ¶ 117, C.A. No. 2020-0307-PAF (Del. Ch. Apr. 29, 2020). A few weeks later, they approved an even larger set of awards outside of the approved plan. *Id.* ¶¶ 119, 132. Again, based on these allegations, the traditional approach would have precluded business judgment

review. Alpha claims that in both these non-controller cases, it got an outcome that protected the minority stockholders. If that is so, it is because the traditional approach has rigor and refuses to give business judgment protection to a transaction that is not approved by uncoerced, informed, impartial independent directors or minority stockholders.

CONCLUSION

The traditional approach addressed controller conflict transactions for generations, promoted capital investment in Delaware corporations, and provided ample protection to minority stockholders. A judicially-created, legislative-like, rigid rule for all controller conflicts will impose far more cost than benefit. It will also incentivize plaintiffs to seek to expand the concept of non-ratable benefits and the attribution of controller status to more and more fiduciaries, and inspire waves of new litigation on, for example, executive compensation. OB 25-26 n.18. At the same time, embracing inherent coercion as a meta-principle would contradict the rules applicable to derivative suits, and require overruling decades of precedent. The traditional approach of trusting impartial decision-making by independent directors, and especially the disinterested stockholders themselves, avoids unprincipled inconsistency, works with integrity to best balance fairness and efficiency, and creates value for stockholders and society.

The Separation is the opposite of a squeeze-out, as plaintiffs acknowledge. Accordingly, either the Separation Committee's approval or the majority-of-the-minority stockholder vote alone should invoke business judgment review.

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