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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

AMICUS CURIAE BRIEF OF ACADEMICS IN SUPPORT OF APPELLANTS

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STATEMENT OF IDENTITY OF *AMICI CURIAE* AND INTEREST IN THE CASE

Amici curiae, who are identified in the Appendix to this brief, are professors and academic fellows who research and teach corporate law, corporate finance, securities law, mergers and acquisitions, and the economic analysis of law. *Amici* have authored numerous academic works concerning these subjects, and are regularly cited as authorities in them. Although *amici* have no financial interest in the outcome of the instant issue, they share a common aspiration for Delaware corporate law to develop in a fashion that comports with sound economic principles and well-founded public policy.

SUMMARY OF ARGUMENT

A direct implication of corporate controllers' outsized governance power is the unique agency cost dangers they pose for their fellow stockholders. Accordingly,[1] Delaware law subjects controller-conflicted transactions to the stringent entire fairness standard, even when controllers obtain a single form of procedural cleansing (albeit subject to a burden shift). Delaware's longstanding deployment of entire fairness review in these situations is consistent with sound economic reasoning, and it has resulted in material corporate value creation—deterring controller overreaching with credible investor recoveries for abuse, including a $2 billion judgment in *Southern Peru* affirmed by this Court on appeal.

To dismantle these traditional rules now—as the IAC Defendants propose—would radically depart from theory- and evidence-backed doctrine without meaningfully demonstrated offsetting benefits. Most critically, if controllers anticipate receiving exacting judicial review *only* in squeeze-outs and not in other types of conflicted transactions, Delaware law will practically invite tunneling through strategic transactional framing and manipulation. The IAC Defendants' proposal reflects both a misunderstanding of established law and unsound policy.

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[1] Leo Strine, *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005) ("Delaware is more suspicious when the fiduciary who is interested is a controlling stockholder.").

ARGUMENT

A. Courts Should Closely Scrutinize All Controller Conflicts

a. Controllers Represent a Unique Agency Cost Danger

As academics and jurists have long understood, a key goal (if not *the* key goal) of corporate law is to minimize and manage agency costs arising from the separation of economic ownership and legal control.[2] In widely-held corporations, corporate law aspires to constrain the ability of managers—*i.e.*, directors and officers—to divert corporate value away from dispersed stockholders and towards themselves.

In corporations with a controlling stockholder, however, agency costs take on a different form. On the one hand, controlling stockholders possess both the economic incentive to oversee management and (by definition) the power to override managerial actions that betray the controller's interests. On the other, however, *controllers themselves* have an especially strong incentive and power[3] to impose agency costs by diverting value from minority stockholders.[4]

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[2] *See generally* ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (2d ed. 1967).

[3] IAC Defendants themselves recognize that controllers are fiduciaries because of their "control of corporate affairs." IAC Defendants' Supplemental Opening Br. ["IAC Br." hereinafter] n.18.

[4] Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 786 (2003); Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1650 (2006).

Standard corporate governance mechanisms designed for widely held corporations are ill equipped to confront controller agency costs. Stockholders of widely held corporations, for example, can make use of the ballot box to oust incompetent or unfaithful boards.[5] In contrast, the stockholder voting franchise cannot credibly constrain controller agency costs because controllers dominate director selection by definition.[6]

Similarly, the board of a controlled corporation has limited practical power to rein in a controller, who can single-handedly replace directors who paddle against the controller's agenda.[7] These power dynamics apply even to nominally "independent" committees in controlled corporations:[8] the $2 billion verdict in

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[5] Thus, it is improper to compare majority-of-the-minority votes to *Corwin* stockholder votes. *Cf.* IAC Br. 9.

[6] Even majority-of-minority votes can suffer from a variety of well-known pathologies. For example, due to controllers' dominance of voting agendas, they can effectively place take-it-or-leave-it ultimatums before minority stockholders that unfairly allocate the lion's share of benefits to themselves. *See In re Dell Techs. Inc. Class V S'holders Litig.*, 2020 WL 3096748, at *27 (Del. Ch. June 11, 2020) ("the court must have confidence that the vote reflects an endorsement of the merits of the transaction, not just a preference for a marginally better alternative over an already bad situation.").

[7] *See In re EZCORP Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *41-42 (Del. Ch. Jan. 25, 2016).

[8] *In re Orchard Enters., Inc. S'holder Litig.*, 88 A.3d 1, 36 (Del. Ch. 2014) ("when push comes to shove, directors who appear to be independent and disinterested will favor or defer to the interests and desires of the majority stockholder."); *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997).

Southern Peru was well-warranted despite the presence of an independent committee.[9]

Moreover, external market forces are not well equipped to incentivize controlled boards to act differently. In a 2022 *Business Lawyer* article (hereinafter *Optimizing*),[10] Professor Hamermesh, former Justice Jacobs, and former Chief Justice Strine posit the opposite, asserting that institutional investors, proxy advisors, SEC disclosures, the media, and similar market actors will effectively stiffen independent directors' spines.[11] Several key shortcomings make this argument unpersuasive to us:

- First, the evidence that *Optimizing* cites relates solely to publicly traded companies, while 99%+ of Delaware corporations are privately held,[12] operating in a starkly different regulatory and economic environment.
- Second, we are unaware of any persuasive evidence supporting the assertion in *Optimizing* that board elections in *widely held* corporations can somehow neutralize director pusillanimity in *controlled* corporations because independent directors in controlled corporations

[9] *In re Southern Peru Copper Corp. S'holder Derivative Litig.*, 52 A.3d 761, 763, 793 (Del. Ch. 2011) (despite independence of members, committee was not sufficiently "well functioning" that minority was actually protected).

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

[11] *Id.* at 341-42.

[12] Compustat indicates that about 2,400 U.S exchange-traded businesses are Delaware corporations, but Delaware has over 380,000 total corporations. *See* Delaware Division of Corporations, *2022 Annual Report* 3, https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2022-Annual-Report.pdf.

aspire one day to join public-company boards.[13] This unsupported assertion seems particularly suspect given the far smaller headcount of public corporations.

- Third, even its own cited sources suggest that *Optimizing* exaggerates the influence of these forces. For example, while *Optimizing* argues that proxy advisors can effectively unseat bad directors, the study on which the authors rely concludes the very opposite—that proxy advisors' influence is "substantially overstated."[14] Another article cited in *Optimizing* in support of directors' responsiveness to shareholders actually found that, even in public companies, most stockholder-approved proposals are never implemented by boards.[15]

- Finally, even if market forces can episodically motivate independent directors to push back on controllers, *Optimizing* cites no studies—and we know of none—suggesting that such market forces are a sufficient elixir for controller-borne agency costs *writ large*, much less that judicial scrutiny provides no meaningful complement.

Indeed, if market forces provided all needed discipline, there would be little need for corporate law; and the unspoken implication of the IAC Defendants' proposal is precisely that. But in our view, the guardrails of corporate law matter—and Delaware jurisprudence matters—because all markets are built on the foundation of credible rules. No rules, no market.[16]

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[13] *Id.* at n.95.

[14] Stephen Choi et al., *The Power of Proxy Advisors: Myth or Reality*, 59 EMORY L.J. 869, 906 (2010) (cited by *Optimizing*, *supra* note 3, at n.97).

[15] Yonca Ertimur et al., *Board of Directors' Responsiveness to Shareholders: Evidence from Shareholder Proposals*, 16 J. CORP. FIN. 53, 57 (2010) (cited by *Optimizing*, *supra* note 3, at n.98).

[16] *See* Allison Herren Lee, *Going Dark: The Growth of Private Markets and the Impact on Investors and the Economy* (Oct. 12, 2021), https://www.sec.gov/news/speech/lee-sec-speaks-2021-10-12.

The viability of the corporate form as a vehicle for value creation turns critically on credible legal protections tailored to rein in controller agency costs. Delaware law has long relied upon entire fairness review (except in the case of *MFW*'s notably exacting dual-mechanism cleansing[17]) to protect minority stockholders. Delaware's entire fairness regime has worked well. Exceptionally well, in fact: American controllers who sell their stake to successor controllers garner price premia over minority stockholders in the low single digits, as compared with 30%+ average premia garnered by similar controller sales in some other developed economies, suggesting that controllers (and would-be control purchasers) understand that American corporate law limits their ability to wrongfully divert value from minority investors.[18]

Moreover, minority protections—including entire fairness review—enhance value for not only minority stockholders, but also for controllers themselves.[19] The reason is simple: strong legal regimes represent a credible bond, committing controllers to a value-enhancing standard of conduct (such as treating minority

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[17] *In re MFW S'holders Litig.*, 67 A.3d 496, 525 (Del. Ch. 2013).

[18] *See, e.g.*, Alexander Dyck & Luigi Zingales, *Private Benefits of Control: An International Comparison*, 59 J. FIN. 537 (2004); Tatiana Nenova, *The value of corporate voting rights and control: A cross-country analysis*, 68 J. FIN. ECON. 325 (2003).

[19] *See EZCORP*, 2016 WL 301245, at *21 n.11 (citing sources); *see also* Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997).

investors fairly). Without such meaningful legal protections, controllers would rationally tunnel what investment they could attract, and minority investors would rationally eschew investing in controlled companies altogether.

By enabling controllers to commit to treating minority investors fairly, then, enhanced legal protections (such as entire fairness review) increase welfare for all: minority investors have confidence their investments will not be plundered, and controllers garner more investment capital from minority investors.[20]

[20] *See* John C. Coates IV, *"Fair Value" As an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251, 1325–27 (1999).

b. Controller Agency Costs Transcend the Pantheon of Corporate Actions

Agency costs are a general phenomenon. Accordingly, we are aware of no economic theory predicting that agency costs will manifest only in one type of transaction. To the contrary, controller value diversion can manifest in any setting where controllers can extract non-ratable benefits through exercise (or threatened exercise) of their outsized governance power. Controllers can coerce boards and minority stockholders to approve unfair asset purchases,[21] consulting agreements,[22] debt issuances, and more. Given the transcendent agency-cost dangers posed by controllers, sound economic principles suggest that governance rules should manifest similar breadth, deterring non-ratable benefit extraction by controllers across all financially material settings.

It therefore makes little economic sense to claim (as IAC Defendants and *Optimizing* do) that the threat of controller coercion somehow stops at the door of squeeze-out mergers. In *Kahn v. Lynch,* this Court evaluated whether the use of an independent committee or a majority-of-the-minority stockholder vote would affect the standard of review in a controller-led squeeze-out. In concluding that an independent committee or majority-of-the-minority approval would shift only the

[21] *Southern Peru*, 52 A.3d at 794.

[22] *EZCORP*, 2016 WL 301245, at *1.

burden of proving entire fairness,[23] this Court found that the inherent coercive power held by controllers required the "exclusive application of the entire fairness standard" for minority stockholders to receive adequate protection.[24]

The tender-offer strategy used by the defendant in *Lynch* is but one of a panoply of methods by which controllers can divert value. Controllers can present ultimatums to stockholders, effectuate self-interested non-squeeze-out transactions, jettison inquisitive board members, distort the flow of information, and more to push through the transactions they propose. In short, there is no principled basis in economics, finance, or coherent legal policy for imagining that controller coercion is dangerous only in the context of a tender-offer squeeze-out.

Not only does economic theory support a uniform application of heightened scrutiny across all material controller-conflicted transactions, but it similarly counsels against artificial scope exceptions (*i.e.*, a lower standard for non-squeeze-outs). Such exceptions invite a type of transactional gaming that has become all too familiar and well-documented in settings where courts analogously have erected factitious transactional boundaries.[25]

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[23] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1117 (Del.1994).

[24] *Id.* at 1116.

[25] *See, e.g.*, Guhan Subramanian, *Post-Siliconix Freeze-Outs: Theory and Evidence*, 36 J. LEGAL STUD. 1 (2007); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2 (2005); Sneha Pandya & Eric Talley, *Debt Textualism and Creditor-on-Creditor*

As applied here, were the full gamut of *MFW* protections required only in squeeze-outs to achieve business judgment review, it would entice controllers to smuggle in squeeze-outs under alternative packaging. A controller might, for example divide a *de facto* squeeze-out into a series of time-separated asset sales, each insufficiently substantial to qualify as a squeeze-out but in the aggregate accomplishing an identical outcome.[26] Or, a controller could cause the corporation to purchase a series of assets from the controller at inflated prices,[27] subsequently writing down those assets to fair market value and squeezing out the minority at the resulting discounted (but now nominally fair) value. Or, a controller might conjure a "Potemkin" startup to acquire the corporation through a highly dilutive stock-for-stock acquisition, effectuating an economic value transfer virtually identical to a squeeze-out[28] whilst evading the judicial scrutiny that a direct squeeze-out would

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Violence: A Modest Plea to Keep the Faith, 171 U. PENN. L. REV. (forthcoming, 2023).

[26] *See, e.g.*, *Altieri v. Alexy*, 2023 WL 3580852, at *1-5 (Del. Ch. May 22, 2023) (sale of 38% of the corporation's assets does not constitute a "sale of assets" under DGCL § 271).

[27] *Southern Peru*, 52 A.3d at 794.

[28] For a numerical example, see *In re El Paso Pipeline Partners, L.P. Derivative Litig.*, 132 A.3d 67, 109–10 (Del. Ch. 2015), *rev'd on other grounds sub nom. El Paso Pipeline GP Co., L.L.C. v. Brinckerhoff*, 152 A.3d 1248 (Del. 2016). *See also Grace Bros., Ltd. v. Uniholding Corp.*, 2000 WL 982401, at *11 (Del. Ch. July 12, 2000) (Strine, V.C.) (denying motion to dismiss in which defendants were alleged to have "gain[ed] the benefits of a squeeze-out" via a stock-for-stock transaction);

attract.[29] This is a but a modest inventory of the transactional parlor tricks that an artificial squeeze-out boundary can (and will) invite.

Strategic manipulations such as those outlined above are not mere exercises in transactional dodgeball, moreover: they impose real social costs (including fees for high-priced transactional advisers and *ex ante* risk premia for minority investors and controllers) that exacerbate further the ultimate inefficiency of inadequately checked controller agency costs.

And therein lies the rub: if squeeze-outs represent a setting where meaningful judicial scrutiny is essential (a position that even IAC Defendants and *Optimizing* concede[30]), it makes little sense for such scrutiny to wilt in the face of economically equivalent transactions structured strategically to game categorical boundaries.

Brinckerhoff v. Texas E. Prod. Pipeline Co., LLC, 986 A.2d 370, 393 (Del. Ch. 2010) (squeeze-outs may be effected with consideration in cash or stock).

[29] Although not crystal-clear, IAC Defendants and *Optimizing* appear to propose that stock-for-stock mergers qualify for single-mechanism cleansing. IAC Br. 12; *Optimizing*, *supra* note 3, at 337 n.74. That said, even if IAC Defendants believe that some stock-for-stock mergers involving an allegedly too-low merger price might constitute squeeze-outs not subject to single-mechanism cleansing, a controller could readily re-engineer an "underpayment" squeeze-out as an "overpayment" transaction in which the nominal buyer and seller switch positions (a transaction paradigm that IAC Defendants clearly propose to be subject to single-mechanism cleansing) with identical economic effect as explained in *El Paso*, 132 A.3d at 109–10.

[30] IAC Br. at 22, 29 n.23; *Optimizing*, *supra* note 3, at 337 n.74.

B. Current Delaware Law—Entire Fairness with Burden Shifting—Reflects the Need for Minority Investor Protections in Controlled Companies

a. Entire Fairness Review Provides Valuable Legal Protections

Recognizing the inherent dangers of controller-conflicted transactions, Delaware law has long imposed entire fairness as the standard of review in such cases. In opinions such as *EZCORP*[31] and *Berteau v. Glazek*,[32] the Court of Chancery has explained how the decisive weight of Delaware law imposes the entire fairness standard upon *all* controller-conflicted transactions, even in the presence of a single cleansing device.[33]

To be sure, entire fairness review is not perfect. Compared with business judgment review, entire fairness may entail higher litigation costs. Moreover, determining fair price and fair dealing is not always an exact science (though neither is self-dealing itself). But Delaware courts impose entire fairness upon controller-

[31] 2016 WL 301245, at *11-24.

[32] 2021 WL 2711678, at *13–15 (Del. Ch. June 30, 2021).

[33] In other writings, each of the *Optimizing* authors have expressed their understanding that, even outside of squeeze-outs, traditional Delaware law requires entire fairness in controller conflicts when a single cleansing device is used: Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 648–49 (2017); *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 900-01 (Del. Ch. 1999) (Strine, V.C.); *In re Pure Res., Inc., S'holders Litig.*, 808 A.2d 421, 437 (Del. Ch. 2002) (Strine, V.C.); *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1203 (Del. Ch. 1995) (Jacobs, V.C.).

conflicted transactions for good reason: because the Court of Chancery (and this court upon appellate review) is a neutral arbiter that cannot be pressured, entire fairness is a critical protection that conventional cleansing devices cannot replicate where a controller looms. As such, to the extent that heightened judicial review imposes costs, it also produces tangible benefits.

Judgments of the Delaware courts provide clear evidence of the tangible value of traditional entire fairness rules. The controller in *Southern Peru*, for example, proposed a transaction in which Southern Peru would acquire a controller-affiliated company.[34] Although Southern Peru established an independent committee to evaluate the transaction *and* held a majority-of-the-minority vote,[35] then-Vice Chancellor Strine found that the independent committee had failed to effectively protect minority stockholders from a "manifestly unfair transaction."[36] Ultimately, the court "conservative[ly]" awarded over $2 billion in damages and interest, though "the record could [have] justif[ied] a much larger award."[37] Notably, the court expressly found that even if the majority-of-the-minority vote had sufficed under Delaware's standards for such votes, it would not have changed the court's

[34] *Southern Peru*, 52 A.3d at 765-69.

[35] *Id.* at 794-97.

[36] *Id.* at 765, 797-813.

[37] *Id.* at 765; *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012).

determination of liability and damages.[38] And although the $6.5 million settlement in *EZCORP* regarding self-dealing consulting agreements is less eye-popping than the *Southern Peru* judgment, it is yet another example where stockholders would have been without a remedy—and fiduciary misconduct been unchecked—under the defendant's proposed rule.

Even these documented financial recoveries for acts of past misconduct do not tally the full benefits of entire fairness scrutiny. They do not, for example, reflect the prospective benefit that enhanced scrutiny delivers by deterring future controller misconduct, which accordingly is never litigated. For such deterred misconduct, the specter of litigation costs simply disappears. And that, moreover, is how healthy legal systems (including Delaware's) should work. It is therefore misguided to assert (as IAC Defendants and *Optimizing* appear to) that continued judicial vigilance is unnecessary because observed instances of misconduct are rare.[39] In our view, deterred misconduct is a direct result of Delaware's effective judicial oversight, and increased misconduct would predictably result from dismantling such oversight.

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[38] *Southern Peru*, 52 A.3d at 797.

[39] IAC Br. at 38-39; *Optimizing*, *supra* note 3, at 342, 344 (claiming that the cleansing mechanisms are "high-integrity procedures").

b. Single-Mechanism Cleansing Under DGCL 144 is Sensibly Limited to the Director Context

Both IAC Defendants and *Optimizing* invoke DGCL Section 144 as a partial basis for allowing single-mechanism cleansing outside of squeeze-outs. Such reliance is misplaced. Even if Section 144 were thought to be compelling authority for controllers, it (correctly) does not single out squeeze-outs for differential treatment relative to other self-interested transactions.

Additionally, Section 144 concerns *director* conflicts, not controller conflicts. As detailed above, there are good reasons why, under traditional Delaware law, the individual procedural measures in Section 144 do not carry over seamlessly to controller transactions and instead, at most, shift the burden in proving entire fairness.

First, as former Chief Justice Strine noted, Section 144 was traditionally understood as "dealing solely with the problem of per se invalidity; that is, as addressing only the common law principle that interested transactions were entirely invalid . . . . The somewhat different question of when an interested transaction might give rise to a claim for breach of fiduciary duty . . . was left to the common law of corporations to answer. Mere compliance with § 144 did not necessarily suffice."[40] For example, Section 144(a) only requires approval by a majority of the disinterested

[40] *In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 614–15 (Del. Ch. 2005).

directors (who need not form a quorum), while the common law requires approval by a disinterested majority of the entire board, if such a majority exists.[41]

Second, that the common law subsequently permitted a permutation of Section 144's procedural mechanisms to vary how courts review director-conflicted transactions[42] is largely justified by the landscape confronting directors of *widely held* firms, who do not typically have coercive power over one another or over stockholders. Such directors cannot per se appoint and remove one another, so genuine independence is possible (if not likely) when a subset of directors review a conflicted transaction by another director. Likewise, such a director cannot unilaterally place a take-it-or-leave-it proposition in front of other directors because the board acting as a whole can make counteroffers or pursue another transaction entirely. Finally, even to the extent that disloyal directors might comprise a majority of the board, Section 144 allows an independent minority to say no until stockholders remove the disloyal majority.

None of these features characterizes the controller context. Instead, the very nature of controller conflicts seriously dampens the utility of Section 144's cleansing mechanisms. Controllers can unilaterally remove directors, including independent

[41] *Cumming v. Edens*, 2018 WL 992877, at *21 (Del. Ch. Feb. 20, 2018).

[42] *Cf. id.* at *22 n.26 (expressing uncertainty as to whether compliance with Section 144 even shifts the burden of proof, much less the overall standard of review).

directors. Controllers can veto alternative transactions, regardless of the form of the transaction. And directors at a controlled corporation who disregard minority stockholder interests cannot be removed by that same minority. Thus, with the exception of *MFW*'s dual "belt and suspenders" protections, Delaware law sensibly confines the benefits to adopting Section 144's individual cleansing mechanisms to burden-shifting alone, not business judgment deference.

C. Several Other Considerations Weigh Against Jettisoning the Status Quo

a. Modifying the Existing Standard May Well Increase—Not Decrease—Total Transactional and Agency Costs

In support of its argument that business judgment review should be extended to controller transactions with a single cleansing mechanism, *Optimizing* claims that any other rule would result in "excessive transaction costs" and "contrived settlements."[43] We Respectfully disagree.

First, all litigation is costly. That observation, while self-evident, does not and cannot make the case for eliminating legal duties or courts altogether.[44] As noted, there are several countervailing benefits to litigation rooted in both compensation and deterrence. If, for example, the controller in S*outhern Peru* had remained unaccountable, as would be the case under IAC Defendants' proposal, how many more controllers would have been emboldened to engage in their own version of that transaction?

Second, the benefits of deterring controller misconduct are substantial. Over $3 trillion in publicly traded U.S. equity is owned by minority stockholders of

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[43] *Optimizing*, *supra* note 3, at 344.

[44] *Cf. Gottlieb v. Heyden Chem. Corp.*, 91 A.2d 57, 59 (Del. 1952) (stating, in director compensation case, that even in the face of stockholder approval, "Jurisprudence has as yet devised no method for suppressing baseless suits without also impeding just ones . . . . We conclude that we have no right to heed the strenuous protest that we are encouraging too many suits by minority stockholders.").

controlled corporations. Based on asset distribution data,[45] over $1 trillion of these minority shares are held for the direct benefit of Americans' pensions and retirement savings. Furthermore, economists have valued privately held U.S. corporations at $6.7 trillion,[46] of which no small portion is held by minority investors. Altogether, diminution of the value of those minority holdings by even a few tenths of 1% due to reduced legal protections would impose costs in the billions on the general public. Viewed in this sense, the thought of saving millions in litigation costs at the expense of billions of minority investor value is the epitome of being penny wise yet pound foolish.

Third, and contrary to *Optimizing*'s claims that reducing minority protections "will not generate systemic value for diversified stockholders," substantial quantitative evidence supports the opposite conclusion: poor legal protection for minority stockholders substantially impairs value.[47] Even within the United States, legal regimes (such as that of Nevada) that afford less protection to minority

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[45] Steven Rosenthal & Lydia Austin, *The Dwindling Taxable Share of U.S. Corporate Stock*, TAX NOTES 923, 928 (2016), https://www.taxpolicycenter.org/sites/default/files/alfresco/publication-pdfs/2000790-The-Dwindling-Taxable-Share-of-U.S.-Corporate-Stock.pdf.

[46] Cole Campbell & Jacob Robbins, *The value of private business in the United States* 15, https://richardcolecampbell.com/wp-content/uploads/2022/08/valuation_writeup.pdf.

[47] *See supra* notes 18-19.

investors are associated with lower firm value and lower returns to minority investors.[48]

Moreover, even on its own terms, *Optimizing*'s claim reproduced above contains an important qualifier—"diversified"—that excludes many of the minority stockholders (e.g., of privately held firms) who cannot diversify their risk and depend on Delaware law to protect them. Delaware law should protect not only diversified multibillionaires investing in public companies, but also smaller investors who hold minority stakes in privately held Delaware corporations.

Finally, and as mentioned above, a rule prescribing heightened review only for artificial transactional categories creates its own legal costs—including the expense of high-priced advisers to manipulate those same categories.[49] Simply because such costs do not manifest *in litigation* does not imply their absence. Even in the instant case, it is all too likely that the fees charged by IAC Defendants' and Match Group's financial and legal advisers eclipse those charged by their litigation

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[48] Michael Baruza and David Smith, *What Happens in Nevada? Self-Selecting into Lax Law*, 27 REV. FIN. STUDIES 3593 (2014).

[49] *See* Cara Lombardo, *On Wall Street, Lawyers Make More Than Bankers Now*, WALL ST. J. (June 22, 2023); LexisNexis CounselLink, 2022 *CounselLink Enterprise Legal Management Trends Report*, https://counsellink.com/2022/06/enterprise-legal-management-trends-report/ (stating that M&A had "the highest median partner rate of $878").

teams, holding aside the fees charged by advisers in other deals whose work is not subsequently litigated.

b. IAC Defendants Fail to Carry Their Burden of Justifying Radical Departures from Well-Settled and Well-Functioning Precedent

The position of IAC Defendants and *Optimizing* is not an innocuous restatement of existing Delaware jurisprudence.[50] Rather, it seeks to upend settled precedent (including judicial opinions previously penned by two of *Optimizing*'s authors[51]). As noted above, Delaware has not generally accorded business judgment review to single-mechanism cleansing of controller transactions.[52] Consequently, allowing a single cleansing mechanism to remove controller transactions from entire fairness review would constitute an significant change in law. Given that Delaware's existing rules have served stockholders well, anyone seeking to change the rules bears the burden of proving that a proposed modification represents a worthwhile improvement. As detailed above, IAC Defendants have not carried this burden.[53]

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[50] *See, e.g.*, IAC Br. at 37-41; *Optimizing*, supra note 3, at 338, 344.

[51] *Supra* note 33.

[52] *Supra* Section B.

[53] Even had IAC Defendants provided such evidence, it may be prudent for this Court to refer such evidentiary debates to the Court of Chancery for evaluation in the first instance.

c. The Delaware Courts Have Ample Tools to Deal With the Issues That IAC Defendants and Optimizing Fret Over

Finally, applying entire fairness does not impose an insurmountable burden on controllers. Controllers can—and do—prevail in entire fairness cases not only at trial,[54] but also at the pleading stage.[55]

If Delaware courts have concerns over frivolous or "deal-tax" litigation, they have more precise tools to address the problem than the sledgehammer of eliminating entire fairness with but a single cleansing mechanism save for an artificial transactional category. For instance, to the extent that *Optimizing* expresses concern over "contrived settlements" in representative litigation, the Court of Chancery is more than capable of ensuring that plaintiffs' attorneys cannot extract a merger tax by filing baseless suits simply by rejecting such settlements, as exemplified by *Trulia*.[56] Indeed, the Court of Chancery just recently toughened the standard for plaintiffs' attorneys to obtain mootness fees, further discouraging value-destroying suits.[57] By contrast, eviscerating entire fairness review as IAC

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[54] *In re Dell Techs. Inc. Class V S'holders Litig.*, 2023 WL 4864861, at *19 (Del. Ch. July 31, 2023) (listing decisions).

[55] *See, e.g.*, *Monroe Cnty. Employees' Ret. Sys. v. Carlson*, 2010 WL 2376890, at *1 (Del. Ch. June 7, 2010); *Ravenswood Inv. Co. v. Winmill*, 2011 WL 2176478, at *4 (Del. Ch. May 31, 2011); *Capella Hldgs., Inc. v. Anderson*, 2015 WL 4238080, at *5 (Del. Ch. July 8, 2015).

[56] *In re Trulia, Inc. S'holder Litig.*, 129 A.3d 884 (Del. Ch. 2016).

[57] *Anderson v. Magellan Health, Inc.*, 2023 WL 4364524, at *11 (Del. Ch. July 6, 2023).

Defendants and *Optimizing* propose simply to address strike suits would be to bomb a highway in order to eliminate a pothole.

CONCLUSION

Controlled corporations are different—not necessarily better or worse—than widely held corporations, because controllers present a distinct species of agency cost danger relative to fiduciaries of widely held firms. That distinction, in turn, implies that corporate law needs distinct tools to protect minority investors. Entire fairness with burden shifting embody the tools that Delaware courts have traditionally deployed with great success. Both objective evidence and sound economic reasoning strongly support preserving that time-honored approach. The IAC Defendants offer a (self-interested) solution in search of a problem.

Regardless of whether this Court affirms or reverses the Court of Chancery's *MFW* determination, it should not determine that a single cleansing mechanism suffices for business judgment review in controller-conflicted transactions.

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