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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

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NATURE AND STAGE OF PROCEEDINGS

The Court's May 30, 2023 Order directed supplemental briefing on "whether the Court of Chancery judgment should be affirmed because the Transactions were approved by either of (a) the Separation Committee or (b) a majority of the minority stockholder vote."[1]

After years of lobbying, Delaware corporations succeeded in undermining entire fairness through the *MFW* exception, which established six elements for avoiding entire fairness review in controller transactions.[2] In *Tesla*, entire fairness was further diluted as the Court redefined the *MFW* factors as merely "best practices" and held that entire fairness only requires that numerous process flaws are offset by some redeeming features and some evidence of fair price even if the primary fair price finding is erroneous.[3] Entire fairness suffered yet another blow when the Court of Chancery in this case and others determined that committees with some members who are not independent and disinterested can nevertheless be considered "independent" committees.[4]

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[1] D.I. 58 ("Order") ¶4.

[2] *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 639, 645 (Del. 2014).

[3] *In re Tesla Motors, Inc. S'holder Litig.*, 2023 WL 3854008, at *1, 22-33, 44-47 (Del. June 6, 2023).

[4] *In re Match Grp. Inc. Derivative Litig.*, 2022 WL 3970159, at *16 & nn.140-42 (Del. Ch. Sept. 1, 2022).

The IAC Defendants now ask this Court to administer the *coup de grace* by rendering entire fairness inapplicable to all controller transactions except freeze-out mergers. Entire fairness would not apply to such transactions if either half of the approval portions of *MFW*'s first factor is partly satisfied: approval by a special committee or a majority of the minority stockholders. *MFW*'s "dual protection" would be cut to less than half.[5] The requirement of *MFW*'s first factor that the controller condition the transaction on both approvals *ab initio* would be eliminated.[6] The other five *MFW* factors would be ignored. Combined with the other recent limitations, eliminating entire fairness review in all controller transactions but freeze-out mergers will reinforce the view that "Delaware courts are set on a track towards retiring entire fairness review."[7]

The IAC Defendants' untimely argument must be rejected. This Court has already repeatedly recognized that *MFW* applies to all controller transactions.[8] Moreover, applying the business judgment rule to all controller transactions that are

[5] *MFW*, 88 A.3d at 645-46.

[6] *Id.* at 639, 645; *Flood v. Synutra Int'l Inc.*, 195 A.3d 754, 763-64 (Del. 2018).

[7] A. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 DEL. J. CORP. L. 1, 56 (2020).

[8] *Se. Pa. Transp. Auth. v. Volgenau*, 91 A.3d 562 (Del. 2014) (Table) ("*SEPTA*"); *Olenik v. Lodzinski*, 2018 WL 3493092 (Del. Ch. July 20, 2018), *aff'd in part*, *rev'd in part*, 208 A.3d 704 (Del. 2019); *Tesla*, 2023 WL 3854008, at *24-27.

not freeze-out mergers is inconsistent with 85 years of Delaware corporate law and is bad policy.

ARGUMENT

I. THE COURT SHOULD NOT DECIDE AN ISSUE NOT PRESENTED BELOW AND RAISED TO ADVANCE THE AGENDA OF NONPARTIES

A. An Advisory Opinion Will Not Provide Justice

The Court's Order acknowledges that the IAC Defendants' argument that meeting the *MFW* criteria for avoiding entire fairness is only required in a freeze-out merger was not raised below.[9] Indeed, the court below stated:

> The parties do not dispute that entire fairness is the presumptive standard of review.[10]

The Order indicates the Court will nevertheless consider the IAC Defendants' tardy argument "to provide certainty to boards and their advisors" and "to the Court of Chancery."[11] Thus, the purpose is not to determine an issue fairly raised in this case but to provide an advisory opinion to other boards and other advisors in structuring other transactions and to the Court of Chancery in resolving other cases involving other transactions. The "interests of justice" the Order identifies are the interests of corporations, directors and lawyers who are not part of this case.

Deciding this case based on supplemental appellate briefing on an issue concededly not raised below is unjust to Plaintiffs. Had Plaintiffs known that some

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[9] Order ¶¶2-3.

[10] *Match*, 2022 WL 3970159, at *15 & n.133 (citing B279-80, B298-99, B310, B318, B320, B332-34).

[11] Order ¶3.

new and different standard would govern their claims, they could have pressed for additional documents under 8 *Del. C.* § 220 to meet the more stringent standard. Had the IAC Defendants' raised the argument below, Plaintiffs would have had the opportunity under Court of Chancery Rule 15(aaa) to amend their Complaint in response. Plaintiffs also could have framed their arguments below and on appeal differently. Dismissing this action based on a new standard created on appeal that is inconsistent with precedent is changing the rules in the middle of the game and would be unfair to Plaintiffs.

B. This Appeal Should Not Be Used to Advance the Agenda of Nonparties

This Court and the Court of Chancery issued opinions applying *MFW* in non-freeze-out transactions long before the IAC Defendants filed their opening dismissal brief below.[12] The IAC Defendants' argument that this Court has not ruled, but should rule, that *MFW* only applies to freeze-out mergers is lifted, lock-stock-and-

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[12] *SEPTA*, *supra*; *Olenik*, *supra*; *In re Ezcorp Inc. Consulting Agreement Derivative Litig.*, 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016), *appeal refused*, *MS Pawn Corp. v. Treppel*, 133 A.3d 560 (Del. 2016) (Table) and *Roberts v. Treppel*, 133 A.3d 560 (Del. 2016) (Table); *In re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *1-2, 14-17 (Del. Ch. Aug. 18, 2017); *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, at *9-13 (Del. Ch. Dec. 11, 2017); *Ark. Teacher Ret. Sys v. Alon USA Energy, Inc.*, 2019 WL 2714331, at *18-20 (Del. Ch. June 28, 2019); *Garfield v. BlackRock Mortg. Ventures, LLC*, 2019 WL 7168004, at *7 & n.46 (Del. Ch. Dec. 20, 2019); *Salladay v. Lev*, 2020 WL 954032, at *8-12 (Del. Ch. Feb. 27, 2020); *Berteau v. Glazek*, 2021 WL 2711678, at *13-15 (Del. Ch. June 30, 2021); *Larkin v. Shah*, 2016 WL 4485447, at *9 (Del. Ch. Aug. 25, 2016).

barrel, from a law review article by a professor and two former Delaware jurists who now work for corporate defense firms, including a firm representing the IAC Defendants.[13] The article repeats arguments advanced in an article written 22 years earlier by the same two jurists and former Chancellor Allen with the assistance of the same professor.[14] *HJS* was first published at the University of Pennsylvania Carey Law School[15] on October 29, 2021, two months before the IAC Defendants filed their opening dismissal brief on December 17, 2021. Before that brief was filed, *HJS* was widely discussed in corporate defense circles, including in a posting by the authors.[16] Yet—without explanation—the IAC Defendants never raised *HJS*

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[13] L. Hamermesh, J. Jacobs & L. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 332-345 (2022) ("*HJS*") (cited by Supplemental Opening Brief of the IAC Defendants ("SOB") at 9-10, 21, 25 & nn.17-18, 29 & n.23, 31 & n.26, 37).

[14] *See* W. Allen, J. Jacobs & L. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 n.a1, 1306-09 (2001) ("*Function*") (cited in *HJS* at 321-325 & nn.1-5, 7-8, 10-13, 327-334 & nn.22-23, 29, 36-37, 43, 47-48, 50, 52, 336, 341-42, 344, 361-62 & nn.171, 174, 371).

[15] Faculty Scholarship at Penn Carey Law 2742, https://scholarship.law.upenn.edu/faculty_scholarship/2724.

[16] L. Hamermesh, J. Jacobs & L. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Nov. 12, 2021), https://corpgov.law.harvard.edu/2021/11/12/optimizing-the-worlds-leading-corporate-law-a-20-year-retrospective-and-look-ahead/; S. Bainbridge, *Hamermesh, Jacobs, and Strine on "Optimizing the World's Leading Corporate Law": Part 1 Controlling Stockholders—Plus Lipton* (Dec. 6, 2021) https://www.professorbainbridge.com/professorbainbridgecom/2021/12/hamermes

or the arguments espoused therein (many of which were made 20 years earlier in *Function*) until they filed their answering brief in this Court on December 19, 2022.

The IAC Defendants' positions reflect what the professor and former jurists prefer Delaware law to be, rather than what it is.[17] Indeed, the two articles largely consist of arguments that seminal corporate cases from this Court and numerous recent cases are all wrong.[18] The *HJS* article is essentially a scorecard for the proposals in *Function* and a corporate defense lawyers' wish list for further eviscerating stockholders' ability to challenge corporate misconduct. It recycles proposals from *Function* that Delaware courts have declined to adopt,[19] while repeatedly attacking "plaintiffs' lawyers."[20] *HJS* advocates creating numerous and perhaps insurmountable obstacles for stockholders to plead a claim, while further restricting their ability to gather enough information to meet the increasingly onerous standards for doing so.[21]

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[17] SOB 16 n.12.

[18] *Function* at 1292, 1299-1311 (discussing the "imperfection" of "key Delaware decisions"); *HJS* at 336 (questioning all cases applying *MFW* outside freeze-out mergers or holding that a less than majority shareholder was a controller or a non-ratable benefit constitutes a conflict transaction).

[19] *HJS* at 324-25, 332-50.

[20] *Id.* at 322, 326, 334, 338 n.80, 344, 368, 378.

[21] *Id.* at 326, 376-79 (advocating limiting § 220 books and records production to sanitized lawyer-drafted documents such as minutes).

Twenty-two years ago, *Function* advocated that the business judgment rule should apply when a controller transaction is approved by independent directors or a majority of the minority vote.[22] Delaware courts declined to adopt that proposal, including in *MFW*. Blowing the dust off the proposal in a new article does not make this previously rejected suggestion any better.

Function argued that if using a special committee accomplished the same burden shifting as a majority of the minority stockholder vote it would disincentivize the corporation to hold such a vote.[23] *HJS*, written largely by the same authors, now proposes that special committee approval alone should achieve the same business judgment rule protection as having both special committee and majority of the minority stockholder approval. The theory they previously touted in *Function* suggests that their current "special committee approval is enough" proposal would create a disincentive to have a majority of the minority vote. If using just one of the two cleansing mechanisms would yield the same result as using both, why would you use both? The premise of *MFW* was that "the common law equitable rule that best protects minority stockholders is one that encourages controlling stockholders to accord the minority both procedural protections."[24] Under the IAC Defendants'

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[22] *Function* at 1307-08.

[23] *Id*. at 1307.

[24] *MFW*, 88 A.3d at 643.

"one protection is enough" theory,[25] if there is approval by a so-called independent committee, the self-interested controller could control the stockholder vote on transactions involving certificate amendments, recapitalizations, reclassifications, sales of substantially all assets or other transactions requiring stockholder approval. Indeed, *HJS* and the IAC Defendants apparently would give directors business judgment rule protection based on special committee approval, even if a majority of the minority vote disapproved the controller transaction.

This appeal of an active case should not be a forum for the belated advancement of pet proposals to change Delaware law. For this Court "to actually reach out and grab the issue in a case where it was not properly presented" is "a very big deal."[26] It has been suggested that the Court is responding to two Delaware corporations reincorporating to Nevada, which has a more permissive standard of review for conflict transactions.[27] Nearly 50 years ago, Delaware was accused of leading a "race to the bottom" which had been "tolerated and indeed fostered by

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[25] SOB 17.

[26] A. Lipton, *Cabining MFW*, BUSINESS LAW PROF BLOG (June 9, 2023), https://lawprofessors.typepad.com/business_law/2023/06/cabining-mfw.html

[27] *Id.*

corporate counsel."[28] Delaware should not now join states who are swimming rapidly downward toward a Mariana Trench of corporate law.

[28] W. Cary, *Federalism and Corporate Law: Reflections on Delaware*, 83 YALE L.J. 663, 705 (1974).

II. THE APPLICABILITY OF *MFW* BEYOND FREEZE-OUTS HAS BEEN DECIDED

A. The IAC Defendants' Arguments Are Based on False Premises

This Court granted supplemental briefing based on the IAC Defendants' representations that (a) "[t]he issue of *MFW* creep was raised *sua sponte* by the Court of Chancery below," (b) "Chancery decisions unreviewed by this Court" have expanded *MFW*, (c) "this Court has not had a chance to speak to whether" *MFW* applies outside the freeze-out context and (d) guidance from this Court is necessary because "transactional planners" are uncertain about the applicability of *MFW*.[29] These premises are wrong.

First, the court below did not raise "*MFW* creep," *sua sponte* or otherwise. It held that "the Separation met the elements of *MFW*, and is subject to business judgment protections."[30]

Second, this Court has reviewed decisions applying entire fairness outside the controller freeze-out context and has spoken three times indicating that *MFW*'s dual protections apply to transactions that are not controller freeze-outs.

Third, because Delaware law on the application of *MFW* is clear, the purported "uncertainty" of unidentified "transactional planners" is a fiction.

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[29] D.I. 26 (IAC Defendants' Corrected Answering Brief 1-2 & n.3, 5-6, 9-10, 15-19 & nn.10, 12-13 (relying on *HJS* at 332-345)).

[30] *Match*, 2022 WL 3970159, at *15. Footnote 139 says nothing about "*MFW* creep." It says *MFW* applies outside freeze-out mergers.

B. This Court Has Held That *MFW* Applies Outside the Freeze-Out Merger Context

The IAC Defendants' supplemental brief cites 64 cases borrowed from *HJS* but fails to mention three decisions by this Court demonstrating that *MFW* applies outside the freeze-out context.

1. *SEPTA v. Volgenau*[31]

In *SEPTA*, the Court of Chancery held that the dual-protection exception to entire fairness articulated in the May 29, 2013 *MFW* Chancery opinion[32] applied to a third-party merger where the controller was alleged to have inappropriately influenced the sale process. On appeal, the parties' briefs discussed the *MFW* Chancery opinion, which was also on appeal.[33] On February 5, 2014, this Court recognized during the *SEPTA* appeal argument, that the *MFW* standard would apply if *MFW* was affirmed[34] and stayed the *SEPTA* appeal pending the *MFW* decision.[35] This Court's *en banc MFW* opinion (including Justices Holland, Berger and Ridgely, who participated in *SEPTA*) was issued on March 14, 2014. On March 18, 2014, the Court directed the parties in *SEPTA* to submit supplemental briefs addressing its

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[31] 2013 WL 4009193, at *10-11 (Del. Ch. Aug. 5, 2013).

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

[33] *E.g.*, *SEPTA*, 2013 WL 8022381, at *3, 24, 27, 29 (Del. Oct. 14, 2013) (Brief); 2013 WL 6408440, at *2, 29-30 (Del. Nov. 21, 2013) (Brief).

[34] *SEPTA*, No. 461,2013 (Del. Feb. 5, 2014) (Transcript) at 6-7, 13-14.

[35] *SEPTA*, No. 461,2013 (Del. Feb. 5, 2014) (Letter).

MFW opinion, which the parties did.[36] Two months after *MFW*, the Supreme Court on May 13, 2014 affirmed the *SEPTA* Chancery opinion by *en banc* order.[37] If the third-party merger in *SEPTA* was not subject to the new *MFW* standard, the Court would not have stayed the *SEPTA* appeal, asked for supplemental briefing on *MFW* and affirmed the decision below by *en banc* order shortly after the *MFW* opinion.

In holding that *MFW* applied to a third-party cash/stock election merger where the eponymous controller was a seller, *Martha Stewart* rejected the controller's argument that the business judgment rule, not *MFW*, applied in a "one-sided controller, disparate consideration scenario."[38] The Court of Chancery observed that the affirmance in *SEPTA* removed any doubt that *MFW*'s requirements applied to controller transactions besides freeze-out mergers.[39]

2. *Olenik v. Lodzinski*

Olenik applied *MFW*'s six-part test to a business combination where a controller contributed assets and received 61.1% of the combined entity.[40] This Court ruled that the Court of Chancery misapplied *MFW* because plaintiff had pled

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[36] *SEPTA*, No. 461,2013 (Del. Mar. 18, 2014) (Letter); (Del. Mar. 31, 2014) (Brief); 2014 WL 1673155 (Del. Apr. 14, 2014) (Brief); (Del. Apr. 22, 2014) (Brief).

[37] *SEPTA*, 91 A.3d 562.

[38] 2017 WL 3568089, at *1-2, 16-19.

[39] *Id.* at *16.

[40] 2018 WL 3493092, at *1-3, 12, 14-24.

facts supporting a reasonable inference that substantive negotiations began before the *MFW* conditions were put in place.[41] *Olenik* recognized that "the *MFW* protections" applied "in a controller-led transaction," holding that plaintiff stated an entire fairness claim because the transaction did not satisfy *MFW*.[42]

The panel in *Olenik* consisted of two current justices and former Chief Justice Strine, who is Of Counsel at a firm representing the IAC Defendants. The IAC Defendants' briefs do not mention *Olenik* (or *SEPTA*) or identify the former Chief Justice as a co-author of the article underpinning their *MFW* creep argument. The *HJS* article does not mention *Olenik* in its discussion of *MFW*, but cites the case in a different portion of the article,[43] demonstrating the authors were aware of the case when they said only the Court of Chancery has applied *MFW* outside the freeze-out merger context and *MFW*'s application beyond freeze-outs is "the important question the Supreme Court of Delaware has yet to answer post-*MFW*."[44]

The reported opinion in *Olenik* is hardly a secret. A leading Delaware corporate law treatise states:

> Delaware courts have concluded that the *MFW* framework applies not only to squeeze-out mergers but also to other controlling stockholder transactions. For instance, in

[41] 208 A.3d at 707, 716, 718.

[42] *Id.* at 707, 715-18.

[43] *HJS* at 367 n.212.

[44] *Id.* at 337-41.

> *Olenik v. Lodzinski*, the Delaware Supreme Court reversed the Court of Chancery's dismissal of a challenge to an all-stock business combination involving a controlling stockholder due to the failure to comply *with MFW*'s "*ab initio*" requirement. The Court noted that "[a]lthough [the challenged transaction] is not a transaction between the controlling stockholder and controlled company, the same principles apply whether the controller is directly or indirectly exerting its influence over the transaction."[45]

Other Delaware corporate law treatises cite *Olenik* and other non-freeze-out cases as applying *MFW*'s roadmap.[46] *Olenik* has been cited in cases applying the *MFW* exception outside the freeze-out context.[47] That *Olenik* applied *MFW* in a non-

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[45] 1 R. SAUNDERS, J. VOSS & C. GARDNER, FOLK ON THE DELAWARE GENERAL CORPORATION LAW §141.02 [G][2][c] & nn.1222-23 (2014-2022) (citing *Olenik*, *Crane*, *Martha Stewart*, *Lankin*, *Ezcorp* and *SEPTA*).

[46] 1 R. F. BALOTTI & J. FINKELSTEIN, DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS §9.58 & n.1060 (4th ed. 2020-2021); 1 DREXLER, L. BLACK & A.G. SPARKS III, DELAWARE CORPORATION LAW AND PRACTICE §15.12[7] & nn.69, 71 (2022) (citing *Olenik, Alon* and *Martha Stewart*).

[47] *Alon*, 2019 WL 2714331, at *19-20 (following *Olenik*'s "guidance"); *Salladay*, 2020 WL 954032, at *11 ("[a]pplying [*Olenik*'s] guidance"); *Glazek*, 2021 WL 2711678, at *15; *Garfield*, 2019 WL 7168004, at *7 & n.46.

freeze-out context has been recognized in articles[48] and as part of a symposium honoring former Chief Justice Strine.[49]

3. *In re Tesla Motors, Inc. Stockholder Litigation*

Tesla was a derivative suit challenging Tesla's stock-for-stock acquisition of SolarCity, not a freeze-out.[50] The transaction was subject to a majority of the minority vote, but Tesla did not utilize an independent committee. The Court of Chancery explained:

> Elon, as controller, cannot invoke *MFW* to achieve business judgment review because the Tesla Board elected not to form an independent special committee, a predicate to the operation of *MFW*'s ratchet from entire fairness down to the business judgment rule.[51]

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[48] R. Reder, *Delaware Supreme Court Explores Application of MFW's 'Ab-Initio' Requirement in Controlling Stockholder-Related Litigation*, 72 VAND. L. REV. *En Banc* 237, 238, 240-47 (2019); M&A Jurisprudence Subcommittee, Mergers & Acquisitions Committee, ABA Business Law Section, *Annual Survey of Judicial Developments Pertaining to Mergers and Acquisitions*, 75 BUS. LAW. 1869, 1892-95 (2020); F. Gevurtz, *The Shareholder Approval Conundrum*, 60 B.C.L. REV. 1831, 1873-74 & n.235 (2019).

[49] G. Subramanian, *Freezeouts in Delaware and Around the World*, 24 U. PA. J. BUS. L. 803, 815 & n.40 (2022).

[50] *In re Tesla Motors, Inc., S'holder Litig.*, 2022 WL 1237185, at *1 (Del. Ch. Apr. 27, 2022), *aff'd*, 2023 WL 3854008 (Del. 2023).

[51] *Id*. at *28.

The court criticized Musk and Tesla's board for failing to follow the "guidance" establishing the "presumptive path" and "right way" to move from entire fairness to business judgment.[52]

On appeal, this Court addressed concerns that Musk's exoneration "will disincentivize any board from utilizing the procedural protections this Court endorsed in [*MFW*]."[53] After discussing the development of *MFW*'s requirement that both protections must be adopted,[54] this Court concluded:

> Here, the price of not utilizing a special committee was being subjected to entire fairness review . . .[55]

The Court held that *MFW* established "a 'best practices' pathway that, if followed, allow[ed] for conflicted transactions, such as the Acquisition, to avoid entire fairness review."[56] Thus, *Tesla* reconfirmed that use of both *MFW* procedural protections, not one or the other, is necessary to avoid entire fairness review in a controller transaction that is not a freeze-out.

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[52] *Id.* at *33 & n.397.

[53] *Tesla*, 2023 WL 3854008, at *1, 24-28.

[54] *Id.* at *24-26.

[55] *Id.* at *27.

[56] *Id.*

4. This Court and The Court of Chancery Have Gotten It Right

In three decisions issued by this Court, eleven Delaware justices, including the authors of the *MFW* opinions (Chief Justice Strine and Justice Holland), recognized that *MFW* applies to all controller transactions,[57] not just controller freeze-outs. In the over nine years since *MFW*, the current Chancellor, almost every current Vice Chancellor, former Chancellor Bouchard and former Vice Chancellor Slights issued nearly a dozen opinions applying *MFW* outside the freeze-out context. The IAC Defendants now ask this Court to rule that 20 or more Delaware judges (plus three Delaware corporate law treatises and several articles) all got it wrong repeatedly for nearly a decade. Given the interpretation of *MFW* in numerous cases, treatises and articles, the purported rationale that "guidance" is necessary for "transactional planners" is fabrication. This Court should reaffirm *SEPTA*, *Olenik* and *Tesla*.

[57] Consistent with *Weinberger v. UOP, Inc.*, 457 A.2d 701, 703 (Del. 1983), a plaintiff must plead a basis for invoking entire fairness (i.e., the controller standing on both sides or receiving a non-ratable benefit).

III. THE "TRADITION" IS THAT ENTIRE FAIRNESS AND BURDEN SHIFTING APPLY UNIFORMLY TO ALL CONFLICT TRANSACTIONS

The IAC Defendants claim that "The Tradition" under Delaware law is that "any one of three cleansing mechanisms—approval by (i) a board with an independent board majority; *or* (ii) a special committee of independent directors; *or* (iii) a majority of unaffiliated stockholders—suffices to invoke the business judgment standard of review in a conflict transaction."[58] To the contrary, the Delaware corporate law tradition for the last 85 years is that conflict transactions are subject to entire fairness review. Indeed, the IAC Defendants concede:

> Entire fairness review, of course, presumptively governs interested transactions.[59]

The IAC Defendants assert that entire fairness is only applicable "in the special situation when a controlling stockholder sought to buy out the minority in a merger."[60] Entire fairness, however, originated and developed before Delaware permitted cash-out mergers.

The IAC Defendants also claim the three cleansing methods "are drawn from 8 *Del. C.* § 144, authorizing any of these mechanisms to validate a conflict

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[58] SOB 1, 2, 9.

[59] *Id*. 9.

[60] *Id*. 2.

transaction, including one with a controlling stockholder."[61] Section 144's plain language, limited purpose and three methods of evading voidability disprove that thesis.

A. Entire Fairness Pre-Dates Cash-Out Mergers

The IAC Defendants claim that "[f]or generations" Delaware courts have applied the business judgment rule to conflict transactions involving controlling stockholders, "like charter amendments, executive compensation, intercompany agreements, split-offs and reorganizations and mergers that do not involve a squeeze-out of the minority by the controller."[62] To the contrary, for generations, Delaware courts have applied the entire fairness test to such transactions.

Delaware adopted the entire fairness standard at least thirty years before the DGCL was amended in 1967 to permit cash-out mergers. In 1938, this Court held that a corporation's directors, by having the corporation pay management fees to another company of which they were directors and officers, "assumed the burden of showing the entire fairness of the transaction."[63] For decades thereafter, the entire fairness standard was applied to various non-merger transactions.[64] In *Sterling v.*

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[61] *Id.*

[62] *Id*. 1-2.

[63] *Keenan v. Eshleman*, 2 A.2d 904, 908 (Del. 1938).

[64] *E.g.*, *Kennedy v. Emerald Coal & Coke Co.*, 42 A.2d 398, 402 (Del. 1944) (contracts between corporations having common directors and related refinancing

Mayflower Hotel Corporation and subsequent cases, the entire fairness standard was applied to stock-for-stock mergers.[65]

B. The Entire Fairness Test Is Extended to Cash-Out Mergers

Singer v. Magnavox[66] established that entire fairness extended to freeze-outs:

> In such case the Court will scrutinize the circumstances for compliance with the *Sterling* rule of "entire fairness" and, if it finds a violation thereof, will grant such relief as equity may require.[67]

Contrary to the IAC Defendants' misinterpretation,[68] *Harman v. Masoneilan International, Inc.*, held that, under *Sterling* and *Singer*, entire fairness applied even though a majority of the subsidiary's minority stockholders approved the merger.[69]

Weinberger,[70] citing *Sterling*, held that entire fairness governed transactions where a controller stands on both sides and that an informed majority of the minority

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plan); *Shrage v. Bridgeport Oil Co.*, 68 A.2d 317, 319 (Del. Ch. 1949) (asset purchase).

[65] 93 A.2d 107, 109-10 (Del. 1952); *David J. Greene & Co. v. Dunhill Int'l., Inc.*, 249 A.2d 427, 430-31 (Del. Ch. 1968).

[66] 380 A.2d 969, 976-80 (Del. 1977).

[67] *Id.* at 980.

[68] SOB 12.

[69] 442 A.2d 487, 492-96 (Del. 1982). *Harman*'s focus was that equity had jurisdiction over post-merger fairness claims seeking damages for breach of fiduciary duty.

[70] 457 A.2d at 703-04, 710-11, 714-15.

vote would only shift the fairness burden to plaintiff.[71] *Rosenblatt*[72] reconfirmed these holdings. Neither *Weinberger* nor *Rosenblatt* involved a threat by the controlling stockholder to pursue a tender offer for the minority shares.[73]

Kahn v. Lynch[74] did not hold "that controller squeeze-out mergers present unique circumstances such that minority stockholders need special protection beyond the traditional rules governing conflict transactions."[75] Instead, it followed the "well-established" Delaware law of *Weinberger* and *Rosenblatt* that the controller bears the entire fairness burden but the burden can shift to plaintiff, observing:

> The same policy rationale which requires judicial review of interested cash-out mergers exclusively for entire fairness also mandates careful judicial scrutiny of a special committee's real bargaining power before shifting the burden of proof on the issue of entire fairness.[76]

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[71] For its burden shifting holding, *Weinberger* cited *Michelson v. Duncan*, 407 A.2d 211, 224 (Del. 1979), which cited earlier interested director option cases recognizing a stockholder vote could shift the fairness burden. *E.g.*, *Gottlieb v. Heyden Chemical Corp.*, 91 A.2d 57, 58 (Del. 1952).

[72] 493 A.2d at 937.

[73] A tender offer with full disclosure is not "intrinsically more coercive and less protective of stockholders than mergers." SOB 15. It allows each stockholder to decide whether to sell shares, while a merger and other transactions can be imposed on them.

[74] 638 A.2d 1110, 1115-17 (Del. 1994).

[75] SOB 14.

[76] *Lynch*, 638 A.2d at 1117.

Lynch's concern with respect to controller transactions was not solely based on the "unique fear of bypass" because the controller threatened a tender offer.[77] Rather, entire fairness applied "because the unchanging nature of the underlying 'interested' transaction requires careful scrutiny."[78] The "policy rationale" adopted in *Lynch* included:

> 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.[79]

The subtle influence is present "[e]ven where no coercion is intended," so:

> 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.[80]

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[77] SOB 14-17.

[78] *Lynch*, 638 A.2d at 1116.

[79] *Id.* (quoting *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990)). Subtle and not-so-subtle influences on directors and stockholders are usually not apparent from formal board materials or public disclosures.

[80] *Id.* The detailed policy rationale in *Citron* is not found in *Rosenblatt*, which belies the argument at SOB 16 n.12 and *Function* at 1306 n.75, that *Citron*, written by a co-author of *Function* and *HJS*, was merely following *Rosenblatt*.

C. Entire Fairness Continues to Apply to Controller Transactions That Are Not Freeze-Outs

Entire fairness continued to govern non-cash-out controller transactions.[81] *Kahn v. Tremont Corporation*, where an independent committee approved the company's purchase of stock of a corporation under common control, rejected an argument that *Kahn v. Lynch* should be limited to merger cases, stating defendants "offer no plausible rationale for a distinction between mergers and other corporate transactions and in principle I can perceive none."[82] Thus, *Function*'s lead author could find no reason why the standards for application of entire fairness should be different for controller transactions that were not mergers.[83] This Court confirmed in *Tremont* that entire fairness applied to the stock purchase and generally to

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[81] *Trans World Airlines, Inc. v. Summa Corp.*, 374 A.2d 5, 9-10 (Del. Ch. 1977) (aircraft purchases and leases).

[82] 1996 WL 145452, at *7-8 (Del. Ch. Mar. 21, 1996), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997). Chancellor Allen's jurisprudence reflects controllers' influence on independent directors. SOB 29-30. After relying on a special committee to deny plaintiff's preliminary injunction motion, the Chancellor denied defendants' motions to dismiss upon finding the controller "'hemmed in'" that committee. *Freedman v. Rest. Assocs. Indus., Inc*., 1987 WL 14323, at *7 (Del. Ch. Oct. 16, 1987) (cited by SOB 30) and 1990 WL 135923, at *7-8 (Del. Ch. Sept. 19, 1990).

[83] The SOB admits Chancellor Allen believed entire fairness "could not be confined to just one context" and "was hard to limit [] to a particular transactional context." SOB 28, 29 n.23. Like the articles on which it primarily relies, the SOB cannot explain away *Citron* and the *Tremont* Chancery opinion. *Id*. 16 & n.12, 29 & n.23, 30; *Function* at 1306 & nn.74, 76; *HJS* at 337 n.74. Post-judicial claims that "the opinion did not really mean what it said" and "the Supreme Court made me do it," written while employed at defense firms, are hardly convincing. SOB 29-30 & n.23.

transactions with a controlling stockholder and that use of an independent committee could only shift the burden of proof "in a transaction such as the one considered in this appeal."[84] Thus, *Tremont* refused to limit *Kahn v. Lynch* to merger cases and held that use of an independent committee would only shift the fairness burden and not trigger the business judgment standard.[85] These principles continued to be applied in transactions that were not freeze-outs.[86]

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[84] *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997). In an effort to undermine *Tremont*, the IAC Defendants cite Chancellor Allen's earlier *TWA* decision, but that was issued six years before *Kahn v. Lynch* and nine years before *Tremont*. SOB 29; *In re Trans World Airlines, Inc. S'holders Litig.*, 1988 WL 111271 (Del. Ch. Oct. 21, 1988) ("*TWA*"), *abrogated by Lynch*, 638 A.2d 1110. Further, on a preliminary injunction motion, *TWA* held that defendants had the burden to establish entire fairness and plaintiffs made a showing sufficient to prevent burden shifting through special committee approval or minority stockholder approval. 1988 WL 111271, at *8-9. The passage the SOB pulls out of context to claim that either approval is sufficient to mandate business judgment review is a strained interpretation of ambiguous *dictum* inconsistent with *Tremont*. Speculation 35 years later in *HJS* cannot convert *TWA*'s imprecise *dictum* into controlling Delaware law. *Lynch*, *Tremont*, *MFW* and *Olenik* are binding precedents; *TWA* is not. SOB 29-30.

[85] *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 552 (Del. Ch. 2000); *cf. Canal Capital Corp. v. French*, 1992 WL 159008, at *5-6 (Del. Ch. July 9, 1992) (decided before *Tremont*, finding a majority of the board disinterested and independent).

[86] *See* Arg. §III.E, *infra*; *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442 (Del. Ch. 2011) (reverse stock split); *S. Muoio & Co. LLC v. Hallmark Ent. Invs. Co.*, 2011 WL 863007 (Del. Ch. Mar. 9, 2011) (recapitalization), *aff'd*, 35 A.3d 419 (Table) (Del. 2011). The SOB acknowledges this Court has applied entire fairness to non-squeeze-out transactions subject to one cleansing mechanism. SOB 30-31 n.26.

D. Entire Fairness and the *MFW* Exception Apply to All Controller Transactions

Contrary to the revisionist history presented in *HJS* and the SOB, entire fairness was not a test created for review of freeze-out mergers which then crept into other controller transactions. Entire fairness was applied to controller transactions before cash-out mergers were even authorized and then extended to freeze-outs as a new form of controller transaction. The SOB does not cite *Weinberger* because that case disproves the theory that application of entire fairness and limiting the effect of a majority of the minority vote or independent committee approval to burden shifting was based on concern that "the controller could bypass the merger process altogether by making a tender offer directly to" the minority.[87] Similarly, this Court's opinion in *Rosenblatt* is only fleetingly mentioned in a single footnote.[88]

The effect of an independent committee or a majority of the minority vote (burden shifting, not business judgment) was the same for freeze-out mergers as previously established for other interested transactions.[89] It did not derive from "the unique risk of bypass in squeeze-outs."[90] Applying *MFW* to all controller

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[87] *Id*. 14-15.

[88] *Id*. 16 n.12.

[89] *E.g.*, *Michelson*, 407 A.2d at 224; *Gottlieb*, 91 A.2d at 58.

[90] SOB 17.

transactions is consistent with longstanding Delaware law applying entire fairness the same way, regardless of whether the challenged transaction is a freeze-out.

E. *Ezcorp* Applied the Substantial Weight of Authority

In *Ezcorp*, the Court of Chancery reviewed decades of Delaware law, finding "the weight of authority calls for applying the entire fairness framework more broadly" to non-squeeze-out transactions.[91] The court found three outlier cases (*Dolan*, *Tyson* and *Canal*) unpersuasive because they did not consider, or were not relied on by, most precedent.[92] The court applied entire fairness to the challenged advisory services agreements, and denied defendants' motions to dismiss for failure to comply with *MFW*.[93]

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[91] 2016 WL 301245, at *11-16 (citing, *e.g.*, *Tremont*, *supra*; *Rubin*, *supra*). The cases *Ezcorp* cites recognize a cleansing mechanism only shifts the burden of proof. *See id.* (citing *Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, Inc.*, 803 A.2d 428, at *2 (Del. 2002) (Table); *Ams. Mining Corp. v. Theriault*, 51 A.3d 1231, 1239-40 (Del. 2012) ("*Southern Peru*"); *In re Loral Space & Commc'ns Inc.*, 2008 WL 4293781, at *21 (Del. Ch. Sept. 19, 2008); *In re New Valley Corp.*, 2001 WL 50212, at *7 (Del. Ch. Jan. 11, 2001); *Strassburger v. Earley*, 752 A.2d 557, 570 (Del. Ch. 2000); *In re Dairy Mart Convenience Stores, Inc.*, 1999 WL 350473, at *20 (Del. Ch. May 24, 1999)).

[92] *Id.* at *16. These cases involved poorly pleaded complaints failing to invoke entire fairness. *See id.* at *17 (citing *Friedman v. Dolan*, 2015 WL 4040806, at *6 (Del. Ch. June 30, 2015); *In re Tyson Foods, Inc.*, 919 A.2d 563, 570 (Del. Ch. 2007); *Canal*, 1992 WL 159008, at *5-6).

[93] *Ezcorp*, 2016 WL 301245, at *1, 31.

The trial court declined defendants' application to certify an interlocutory appeal, emphasizing this Court would send an important message by rejecting the appeal:

> [T]here's an awful lot of law out there that supports the outcome that I reached in that ruling. But the Delaware Supreme Court may want to change the law, or it may want to clarify the law, or it may want to say *MFW* signaled a different direction in the law. And if it does, then hearing the interlocutory appeal would serve considerations of justice . . . I think that this question largely turns on to what degree our law should move in a direction different than the cases that are collected in my EZCORP decision.[94]

In rejecting the interlocutory appeal and holding that the trial court decided *Ezcorp* correctly, Justice Holland, the author of *MFW*, on behalf of a panel including Chief Justice Strine and Justice Valihura, wrote:

> [T]he Court of Chancery noted that, while there was an arguable conflict in previous Court of Chancery decisions regarding the application of the entire fairness standard under analogous circumstances, the substantial weight of authority supported the application of the entire fairness standard in this case.[95]

Thus, this Court expressly agreed that Delaware precedent supports the application of entire fairness to non-squeeze-outs and approved such an application of *MFW* in

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[94] *Ezcorp*, No. 9962-VCL (Del. Ch. Feb. 22, 2016) (Transcript) at 96-98.

[95] *Treppel*, 133 A.3d at 560.

Ezcorp.[96] The SOB does not reference the Chancery and Supreme Court orders in *Ezcorp* denying the interlocutory appeals. Neither did *HJS*.

F. Inherent Coercion Remains Where *MFW*'s Six Factors Are Not Established

Eight years after *Kahn v. Lynch*, the Court of Chancery coined the term "inherent coercion" to characterize this Court's rationale for determining entire fairness should continue to apply to a controller transaction even when procedural protections were used.[97] The court used an inaccurate analogy to describe *Kahn v. Lynch*'s reasoning:

> In colloquial terms, the Supreme Court saw the controlling stockholder as the 800-pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support).
>
> The Court also expressed concern that minority stockholders would fear retribution from the gorilla if they defeated the merger and he did not get his way.[98]

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[96] *Ezcorp* did not follow *Geier*, *Oberly*, *Getty Oil*, *Johnston*, *Aronson*, *Puma*, *Lewis*, *Cox*, *Schreiber* or *Orman* because, as discussed herein, these cases were not relevant or binding. *Ezcorp* aligns with *Harman*. *Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera*, 119 A.3d 44, 60 n.119 (Del. Ch. 2015), is against the weight of authority and irrelevant, like *Tyson*, *Dolan,* and *Canal*. *Contra* SOB 26-28.

[97] *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 436 (Del. Ch. 2002). The IAC Defendants import *Pure*'s inherent coercion concept into opinions written well before *Pure*. SOB 27-29.

[98] *Pure*, 808 A.2d at 436 (footnotes omitted). *In re Cox Commc'ns, Inc. S'holder Litig.*, 879 A.2d 604, 617 (Del. Ch. 2005), repeated the gorilla analogy, which fails

"Inherent coercion" and the gorilla analogy were substituted for *Kahn v. Lynch*'s more nuanced concern for the subtle influence a controller has over even independent directors and minority stockholders. *Pure* did not "distance[] Delaware law from the untenable inherent coercion concept."[99] It made the concept up. *MFW* did not "distance[] Delaware law from inherent coercion."[100] It never used the term. The authority for the supposed distancing is, unsurprisingly, *HJS*.[101] Moreover, lack of coercion is one of *MFW*'s six factors.[102]

Tesla refutes the thesis that *MFW* eliminated inherent coercion from Delaware's legal landscape. This Court recognized: "[t]his concept of inherent coercion was a focus of the trial court's overall fair dealing fact finding."[103] This Court affirmed:

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to capture the full range of human behavior and inaccurately describes gorillas, who are capable of subtle influence. D. Fossey, *Gorilla Communication*, DIAN FOSSEY GORILLA FUND (May 22, 2020), https://gorillafund.org/uncategorized/gorilla-communication; E. Genty, et al., *Gestural Communication of the Gorilla (Gorilla Gorilla): Repertoire, Intentionality and Possible Origins*, NATIONAL LIBRARY OF MEDICINE (Feb. 1, 2009), https://ncbi.nlm.nih.gov/pmc/articles/PMC2757608/.

[99] SOB 18. The SOB references "inherent coercion" 47 times.

[100] *Id*. 20.

[101] *Id.* 21.

[102] *MFW*, 88 A.3d at 645.

[103] *Tesla*, 2023 WL 3854008, at *22; *see id*. at *22 n.154 ("[t]he concept of 'inherent coercion' has often percolated in controlling stockholder transactions.").

> The Court's overarching determination that Musk did not exploit any inherent coercion was adequately supported by numerous factual findings . . . .[104]

Thus, inherent coercion still applies in controller transactions where all of *MFW*'s six factors are not established. While *Tesla* held post-trial that inherent coercion was not exploited, that is far different than holding, as the IAC Defendants assert, that inherent coercion must be disregarded on a motion to dismiss.

G. Defendants Advocated for *MFW* Creep

Given *Tremont*, *MFW*, *Septa*, *Olenik*, and the Chancery cases applying *MFW* to non-freeze-outs, the SOB's criticism of so-called "*MFW* creep" and, specifically, *Ezcorp* is "surprising."[105] *Ezcorp* benefitted defendants by confirming *MFW* applies to non-squeeze-outs, permitting defendants a path to early pleading-stage dismissal. After *MFW*, defendants structured non-squeeze-outs to comply with *MFW* and urged Delaware courts to dismiss challenges under *MFW*.[106] Transactional planners and defense lawyers have taken full advantage of "*MFW* creep."

MFW was decided on summary judgment after "extensive discovery" providing plaintiff an opportunity to test director independence and other issues.[107]

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[104] *Id.* at *23.

[105] SOB 23.

[106] A881, A915; *IRA*, 2016 WL 7636008, at §II.A (Del. Ch. Dec. 29, 2016) (Brief) (cited by SOB 23); *Martha Stewart*, 2017 WL 3568089, at *2 (cited by SOB 24 n.16).

[107] *MFW*, 88 A.3d at 638-39.

The real "*MFW* creep" is to apply *MFW* at the motion to dismiss stage where stockholders have had no opportunity for discovery that may show *MFW* factors have not been satisfied.

H. Section 144 Does Not Affect Equitable Claims

Section 144 does not, as the IAC Defendants contend, provide that any of the three "cleansing mechanisms" is sufficient to "validate a conflict transaction, including one with a controlling stockholder,"[108] and invokes the business judgment rule for equitable claims.

The IAC Defendants' argument is inconsistent with Section 144's language and purpose. Section 144 merely provides that interested director transactions shall not be "void or voidable solely" because the interested director is present at or participates in the board or committee meeting authorizing the transaction or "solely" because her vote is counted if one of its three criteria are met.[109] Its only purpose was to remove by statute the specter under the common law that interested transactions were voidable if challenged; it was not intended to immunize directors from responsibility to the corporation or its stockholders for interested

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[108] SOB 1, 9-10, 31.

[109] Section 144 has not been amended substantively since 1969. I. FOLK §144.13.

transactions.[110] Contemporaneous commentary by those involved in drafting the statute confirm its limited purpose and scope.[111]

This Court and the Court of Chancery have rejected the IAC Defendants' overbroad misinterpretation of Section 144 for five decades. In *Fliegler v. Lawrence*, this Court held that Section 144 does not confer "broad immunity," but "merely removes an 'interested director' cloud" and prevents "invalidation of an agreement 'solely' because such a director or officer is involved."[112] Compliance with Section 144 neither removes the transaction from judicial scrutiny[113] nor triggers application of the business judgment rule.[114] Rather, an interested transaction is "twice-tested," first for compliance with Section 144 and then for fairness in equity.[115]

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[110] DREXLER §15.05[2].

[111] ERNEST L. FOLK, III, THE DELAWARE GENERAL CORPORATION LAW: A COMMENTARY AND ANALYSIS 82 (1972); S. Arsht & W. Stapleton, *Delaware's New General Corporation Law: Substantive Changes*, 23 BUS. LAW. 75, 81-82 (1967). *See also* B. Rohrbacher, et al., *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719 (2008) ("Under its plain language, Section 144 plays no part in validating transactions or in ensuring the business judgment rule's application.").

[112] 361 A.2d 218, 222 (Del. 1976).

[113] *Id.*; *Lewis v. Vogelstein*, 699 A.2d 327, 335 n.12 (Del. Ch. 1997); *Zimmerman v. Crothall*, 2012 WL 707238, at *18 & nn.99-100 (Del. Ch. Mar. 5, 2012).

[114] *Cumming v. Edens*, 2018 WL 992877, at *20-22 & n.223 (Del. Ch. Feb. 20, 2018); *Off v. Ross*, 2008 WL 5053448, at *11 n.43 (Del. Ch. Nov. 26, 2008).

[115] *In re Investors Bancorp, Inc. S'holder Litig.*, 177 A.3d 1208, 1222 (Del. 2017); *CCSB Fin. Corp. v. Totta*, 2023 WL 4628822, at *9 (Del. July 19, 2023).

The IAC Defendants' purported "cleansing methods" are not equivalent to Section 144(a)'s provisions. Approval by a board with an independent majority does not require "the affirmative votes of a majority of the disinterested directors" specified by Section 144(a)(1). A seven-member board with three interested directors could approve a conflict transaction with the vote of only one disinterested director. Similarly, since the IAC Defendants claim a "committee of independent directors" can include directors who are not independent, approval by a committee where only three of five members are independent might include the vote of only one independent member, not a majority of independent directors as Section 144(a)(2) requires. Moreover, Section 144 applies to "disinterested" directors, while the director cleansing method of the IAC Defendants is based on "independent" directors. The board and committee and stockholder cleansing methods the IAC Defendants propose do not include the disclosure/knowledge of material facts and good faith requirements of Section 144(a)(1) and (2). Section 144(a)(3) requires both board, committee or stockholder approval and that the transaction is fair at the time of approval. That is inconsistent with the IAC Defendants' theory that any one of board, committee or stockholder approval eliminates any fairness requirement.

The IAC Defendants support their Section 144 argument primarily by citing *HJS* and two articles from thirty or more years ago that actually recognize that Section 144 only modifies the common law voidability rule and does not determine

the burden of proof or standard of review for equitable challenges to interested transactions.[116] The cases the IAC Defendants cite do not support their argument. *Cox*[117] acknowledged that Section 144 only provides ways to evade *per se* voidability and mere compliance with Section 144 does not answer the somewhat different question of whether an interested transaction raises an equitable claim for breach of fiduciary duty. *Marciano v. Nakash*[118] reiterated *Fliegler*'s analysis that Section 144 only removes a voidability cloud created "solely" by director interest, acknowledging that *Fliegler* "refused to view Section 144 as either completely preemptive of the common law duty of director fidelity or as constituting a grant of broad immunity." *Marciano* endorsed the twice-tested approach:

> In *Fliegler* this Court applied a two-tiered analysis: application of section 144 coupled with an intrinsic fairness test.[119]

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[116] C. Hansen, et al., *The Role of Disinterested Directors in "Conflict" Transactions: The ALI Corporate Governance Project and Existing Law*, 45 BUS. LAW 2083, 2093 (1990) ("*DD*"); J. Johnston & F. Alexander, *The Effect of Disinterested Stockholders Approval of Conflict Transactions Under the ALI Corporate Governance Project—A Practitioner's Perspective*, 48 BUS. LAW. 1393, 1402 n.39 (1993) ("*St.*").

[117] 879 A.2d at 614-15.

[118] 535 A.2d 400, 404 (Del. 1987).

[119] *Id.*

The *dicta* in a footnote in *Marciano* and *dicta* in *Oberly v. Kirby*[120] are among the "murky" statements that tend to obscure the clear "difference between the off-confused Section 144(a) safe harbors" and the common law the Delaware courts apply to determine the standard of review for interested transactions.[121]

I. The Other Cases the IAC Defendants Cite Do Not Involve Controlling Stockholder Transactions Implicating Entire Fairness

The "legion" of cases the IAC Defendants cite do not demonstrate a "traditional approach" of applying business judgment to controller transactions.[122] These cases (i) did not involve a controller and/or plead a basis for invoking entire fairness against an alleged controller;[123] (ii) did not provide a controller with a non-

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[120] 592 A.2d 445, 466 (Del. 1991). *Oberly* acknowledged Section 144 was inapplicable to the nonstock foundation. *Id.* at 467.

[121] *Cumming*, 2018 WL 992877, at *20-21. Because of its unusual facts and seemingly contradictory statements, *Marciano* has no precedential value. 1 DREXLER §15.05[2].

[122] SOB 10-14, 22. The IAC Defendants recycle the same few cases *HJS* and earlier articles cite (*Marciano*, *Oberly* and *Puma*) to argue for business judgment review. *HJS* at 340 n.89; *St.* at 1402 n.39; *DD* at 2092-93 & nn.32, 38.

[123] *Puma v. Marriott*, 283 A.2d 693, 695-96 (Del. Ch. 1971) (46% ownership, interested directors a board minority, no showing of control); *Lewis v. Hat Corp. of Am.*, 150 A.2d 750, 752 (Del. Ch. 1959) (42.7% ownership, interested directors a board minority and did not participate in negotiations or approval); *Tyson*, 919 A.2d at 586-88 (consulting contract for former Senior Chairman approved by majority independent board); *Johnston v. Greene*, 121 A.2d 919, 920, 923 (Del. 1956) (applied corporate opportunity doctrine to a director); *Kahn v. Roberts*, 1995 WL 745056, at *1, 7 (Del. Ch. Dec. 6, 1995) (stock not repurchased from a controller). Because holders of GM tracking stock were GM stockholders, GM was not a controller and "both the form and substance" of spin offs were "radically different from a parent-subsidiary freeze-out merger or any other transaction with a

ratable benefit;[124] (iii) did not involve the controller fixing the terms;[125] or (iv) applied entire fairness.[126] In contrast, as *Ezcorp* shows, cases applying entire fairness in non-freeze-out contexts are "legion."

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controll[er]." *Solomon v. Armstrong*, 747 A.2d 1098, 1120-23 (Del. Ch. 1999), *aff'd* 746 A.2d 277 (Del. 2000); *In re Gen. Motors (Hughes) S'holder Litig.*, 2005 WL 1089021, at *10 & nn.94-99 (Del. Ch. May 4, 2005) (following *Solomon*), *aff'd*, 897 A.2d 162 (Del. 2006).

[124] *Williams v. Geier*, 671 A.2d 1368, 1370, 1378 (Del. 1996) (tenured voting certificate amendment "applied to every stockholder," so "no non-pro rata or disproportionate benefit" to majority holder).

[125] *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887-88 (Del. 1970) (terms set by federal government, not controller); *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (controller "did not stand on both sides of the challenged merger" initiated by third party and negotiated by independent directors).

[126] *Schreiber v. Bryan*, 396 A.2d 512, 519 (Del. Ch. 1978) and *Schreiber v. Pennzoil Co.*, 419 A.2d 952, 957, 959, 961 (Del. Ch. 1980) (entire fairness applied, stockholder vote shifted fairness burden that plaintiff did not meet).

IV. *MFW* DOES NOT SUPPORT *HJS*'S ONE IS ENOUGH PROPOSAL

A. *MFW* Reconfirmed Entire Fairness Applies in All Controller Transactions

MFW reconfirmed, "[w]here a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is 'entire fairness,' with the defendants having the burden of persuasion . . . ."[127] It also reconfirmed *Kahn v. Lynch*'s burden shifting standard.[128] This Court did not limit these statements of long-standing Delaware law to squeeze-out mergers. Indeed, the Court cited *Tremont* in support.[129]

MFW stated that "the vital distinction" between the *MFW* merger and the transactions in *Southern Peru* and *Tremont* was that the controller did not agree to a majority of the minority vote, not that those cases did not involve a squeeze-out merger.[130] In explaining the new dual protection standard, *MFW* repeatedly cited *Southern Peru* and *Tremont*.[131] *MFW* indicated its dual protection exception would apply in controller transactions other than buy-outs, not that such transactions would be subject to the business judgment rule if only one protection was used.

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[127] 88 A.3d at 642. Internal citations are omitted unless stated otherwise.

[128] *Id*.

[129] *Id.* at 642 n.5.

[130] *Id*. at 642.

[131] *Id.* at 645 n.13, 646 & nn.16-20, 650 n.35.

The IAC Defendants and *HJS* focus more heavily on the Chancery opinions in *Pure*, *Cox* and *MFW* than on this Court's opinions in *MFW*, *Tremont* and *Olenik*.[132] However, as the Chancery *MFW* opinion acknowledged, "the ultimate authority regarding the Supreme Court's prior decisions . . . is the Supreme Court itself."[133]

B. All of *MFW*'s Protections Are Necessary and Do Not Fully Replicate Arms-Length Transactions

MFW's six factor test is an exception to the general rule that entire fairness applies to controller transactions. This Court held that approval by both an independent committee and a majority of the minority, in the manner and with the conditions *MFW* prescribes, comes sufficiently close to replicating the arms-length approval of a third-party transaction to permit invocation of the business judgment rule.[134] This Court concluded that a transaction subject to both conditions differs fundamentally from a transaction having only one of those protections.[135] *MFW* recognized that the controller's influence potentially undermines both board and

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[132] SOB 5, 15, 16 n.13, 18-22; *HJS* at 325 & n.15, 334-35 & nn.53, 56, 60-63, 336-37 nn.72-73, 338 n.80, 339 & nn.83-84, 340 n.89, 342-43 nn.96, 102-03.

[133] *MFW*, 67 A.3d at 524.

[134] *MFW*, 88 A.3d at 645-46.

[135] *Id.* at 643.

stockholder approval, making simultaneous deployment of both protections necessary to create a countervailing, offsetting influence.[136]

MFW's "dual protections," however, are not equivalent to arms-length approval of a third-party transaction. Unlike a third-party, the controller can block alternative transactions. *MFW*'s protections do not require that the controller forswear doing a future tender offer, making open market purchases or causing or preventing other corporate actions if its proposed transaction is vetoed by an independent committee or a majority of the minority.[137] Thus, even with *MFW*'s protections, the circumstances in a controlled corporation are not the same as in a corporation that is not controlled and has a board and stockholders free to authorize third-party transactions.

Each of *MFW*'s dual protections is imperfect. "Independent directors" may have connections to the controller and likely were voted into their directorships, a position bringing prestige and compensation, by the controller. Many "independent directors" may serve, or wish to serve, on multiple boards; opposing the controller of one corporation may have an effect on whether they are appointed or re-elected to other boards having a controller. Independent directors in a controlled corporation

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[136] *Id.* at 644.

[137] In light of *Kahn v. Lynch*, the controller would refrain from making an overt threat and rely on the known, unspoken possibility.

considering a controller transaction are not in the same position as an outside director of a non-controlled company considering a third-party transaction.

A favorable majority of the minority vote is not conclusive evidence that a controller transaction is fair. Stockholders' votes may be influenced by a wide variety of factors not tied to the transaction's merits. Some may want the short-term gain the transaction may represent, particularly investment funds eager to show profits for a quarter or year. Some may have purchased shares after announcement of the transaction that they want to close to secure an arbitrage profit. Some may also hold shares in the controller. Because the controller can prevent alternative transactions, some stockholders may conclude an unfair transaction is the best they will get. While proxy solicitations should not be materially misleading or incomplete, such solicitations generally are one-sided in the transaction's favor. Approval by most minority stockholders does not equate to an unqualified endorsement of the transaction's fairness.

Because neither of *MFW*'s dual protections exactly replicates a third-party deal, *MFW* requires both protections and several supporting requirements, in an effort to compensate for the shortcomings of each protection. Requiring only one protection, and eliminating or reducing the supporting requirements, will fail to provide the best protection for minority stockholders and create a disincentive for using both protections.

V. DEFENDANTS INCORRECTLY CONFLATE DEMAND FUTILITY AND ENTIRE FAIRNESS

Application of *MFW* to non-cash-out controller transactions does not contradict demand futility cases like *Aronson* and *Zuckerberg*.[138]

Defendants theorize that because directors can independently decide whether the corporation should sue a controlling stockholder, they cannot be inherently coerced in any negotiations with controlling stockholders. Thus, they conclude any independent director approval of such a transaction should render it subject to business judgment. This is the flip side of an identical argument the Court rejected in *Zuckerberg*. There, plaintiff argued demand was futile because the transaction was subject to entire fairness review. The Court rejected this argument, because it "collapse[d] the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction itself."[139] Similarly, in *Aronson*, the Court rejected an argument that demand was futile because the directors would have to sue themselves.[140]

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[138] SOB 32.

[139] *United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg*, 262 A.3d 1034, 1056 (Del. 2021). *See also id.* at 1059 (inquiries into whether directors can impartially consider a litigation demand and the strength of the claims based on the standard of review were "helpful to keep . . . separate").

[140] *Aronson v. Lewis*, 473 A.2d 805, 818 (Del. 1984).

The Court's rationale for this distinction comports with Delaware law. A derivative suit "encroaches on the managerial freedom of directors by seeking to deprive the board of control over a corporation's litigation asset."[141] This runs counter to Section 141(a)'s mandate that "directors, rather than shareholders, manage the business and affairs of the corporation."[142] Delaware enforces Section 141(a) through Rule 23.1, which imposes "stringent requirements of factual particularity" to ensure directors are not easily displaced from their statutory management role of controlling corporate assets.[143]

This does not mean, as the Court recognized in *Aronson*, there is no "structural bias common to corporate boards" and "unseen socialization processes cutting against independent discussion and decision-making in the boardroom."[144] Rather, it means the Court defers to statutory law when choosing between enforcing explicit statutory law that directors control a corporate asset, such as a claim, and letting stockholders automatically control the claim.

Defendants' conflation of demand futility and the standard of review is especially wrong as to individual stockholder claims; they are not corporate assets

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[141] *Zuckerberg*, 262 A.3d at 1047.

[142] *Id.*

[143] *Id.* at 1048.

[144] 473 A.2d at 815 n.8.

subject to director management. The "cardinal precept" of applying entire fairness to controller transactions challenged individually by minority stockholders is protecting minority stockholders. Just as demand futility protects directors from losing control over managing a corporation's assets, Delaware protects minority stockholders by requiring that controllers prove the transaction is entirely fair.

Defendants' conflation of these issues is also wrong in derivative actions because it would render the demand futility analysis a nullity for the same reasons that animated this Court's *Zuckerberg* decision. If the plaintiff had prevailed in *Zuckerberg*, invoking entire fairness would have excused demand, swallowing the Rule 23.1 analysis. Similarly, if committee approval or a stockholder vote could invoke business judgment, the Court would essentially skip the Rule 23.1 analysis in every controlling stockholder case. For example, a 10-member board with 8 controlled directors could have a 3-member-committee of 2 independent and 1 non-independent members; approval by the committee would subject the transaction to business judgment review. Other *MFW* protections would not apply. The committee need not have negotiated at all. Demand would be futile, but the case would be dismissed pre-discovery because an ineffective, partially independent committee approved the deal. This absurd result is inconsistent with Delaware law.

VI. THE SEPARATION WAS THE OPPOSITE OF A SQUEEZE OUT

IAC's attempt to differentiate the Separation from a freeze-out merger is irrelevant because both controller transactions are subject to entire fairness.[145] The Separation was a complicated, multi-step reverse spin-off transaction that included a merger—which IAC claims eliminated derivative standing. The court below ruled that the Complaint alleged IAC "extracted benefits by standing on both sides of the transaction, to the detriment of the minority stockholders."[146] Under Delaware law, that subjects the Separation to entire fairness review unless *MFW* is satisfied.

Defendants' argument is a rehash of their argument (rejected below) that the Separation was entirely fair. IAC's desire to litigate the merits of entire fairness claims pre-discovery is contrary to Delaware law, as Plaintiffs addressed.[147] Defendants ignore the benefits IAC extracted in the Separation.

Furthermore, a stockholder vote alone could not cleanse the Separation. The cleansing effect of a stockholder vote can only be implicated in "a transaction with a party other than a controlling stockholder."[148]

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[145] SOB 37.

[146] *Match*, 2022 WL 3970159, at *15 n.139.

[147] Appellants' Reply Brief at 28-33.

[148] *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 306 (Del. 2015).

IAC's other contentions are equally meritless.[149] Match minority stockholders did not gain "the power to influence corporate direction through the ballot."[150] IAC stockholders received a majority of New Match's voting power. IAC and Diller "maintained control of the New Match Board with entrenching governance provisions."[151]

Defendants rely on the Proxy for the truth of its assertions as to which institutions held shares and assume those institutions continued holding the same number of shares, voted them in favor of the Separation and were not influenced by IAC's control.[152] Defendants waived that argument by not making it below, and, regardless, are entitled to no such inferences on a motion to dismiss.

Defendants rely on SEC filings and articles regarding other companies, which supposedly reflect that, in a few instances, stockholders and special committees voted against proposals by controlled companies.[153] These documents have nothing to do with the issues before the Court. Defendants are not entitled to the inference that IAC could not influence the special committee or minority stockholders.

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[149] SOB nn.32-35.

[150] *Cf. id*. 38.

[151] A842-45 (¶¶167, 170-71).

[152] SOB 38.

[153] *Id*. 38-39.

CONCLUSION

MFW applies. Defendants failed to satisfy it. The dismissal should be reversed and the case remanded for prosecution.

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CERTIFICATE OF SERVICE

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