THE GEOGRAPHY OF MFW-LAND

ITAI FIEGENBAUM*

ABSTRACT

In a highly celebrated decision, the Delaware Supreme Court concluded that positive approval by both a special board committee of disinterested directors and an informed and uncoerced majority of minority stockholders justifies de-escalation of the standard of review for going private mergers with a controlling stockholder. Prior to the MFW decision, Delaware case law declined to provide a ratification avenue that results in a deferential standard of review for these types of transactions.

While helpful, the decision lacks any reference to the multitude of other factual situations that compel heightened judicial review. Thus, business planners are left pondering whether MFW created a ratification procedure that encompasses all manner of controlling stockholder transactions. Into this void, a Court of Chancery decision recently opined that the MFW framework applies to all controlling stockholder transactions

This article argues that the intuitive application of the MFW framework to all controlling stockholder transactions is misguided. Neither the text of the Supreme Court's decision nor its context justifies an expansive reading of MFW's holding. A critical look at the policy arguments espoused by the Supreme Court exposes their limitations when applied to other types of transactions. The unavoidable conclusion is that the borders of "MFW-Land" are much narrower than they appear.

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*Zvi Meitar Center for Advanced Legal Studies, Faculty of Law, Tel Aviv University.
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I. INTRODUCTION

Judicial standards of review for board actions and inactions are a foundational element of Delaware corporate law.[1] Market forces are

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[1]Robert B. Thompson, *Mapping Judicial Review: Sinclair v. Levin*, in THE ICONIC CASES IN CORPORATE LAW 79 (Jonathan R. Macey, ed.) (2008) ("The intensity of judicial review of corporate decisions is the central issue of corporate law"); *In re* Molycorp, Inc. S'holder Derivative Litig., Consolidated C.A. No. 7282-VCN, 2015 WL 3454925, at *7 (Del. Ch. May 27, 2015) ("Distinguishing among standards of review is an important (and

believed to correct egregious episodes of simple mismanagement more swiftly and mercilessly than the courts. Accordingly, a stockholder complaint against decisions undertaken by the board of directors will be met with the default deferential business judgment rule standard of review.[2] This standard's hallmark is a heavy presumption that the board acted in the corporation's best interests. Application of the business judgment rule usually results in a swift dismissal of the complaint.

Factual situations that cast suspicion on the board's ability to champion stockholder interests result in an upgrade of the standard of review. Arrival of an outside bidder that seeks to wrest control from incumbent management is an example of such a scenario. Lingering doubts regarding the actual motivation behind the board's response towards an unwanted suitor undermines the presumption of fidelity and justifies adoption of an intermediate 'enhanced scrutiny' level of review. Once enhanced scrutiny applies, the onus shifts to the board to prove that the defensive measures were reasonable to the recognized threat.

Transactions between the corporation and its controlling stockholder provide another example of a suspect situation. Ownership of a control block of shares connotes a heavy influence over board composition and by implication corporate policy. An inherent suspicion that board approval was induced by the desire to stay on the controller's good graces justify evocation of an even more stringent standard of review. Under the 'entire fairness standard,' it is up to the board to prove that the challenged transaction materialized after an impeccable negotiating process that successfully safeguarded minority stockholder interests.

Court deference to independent, disinterested, and sufficiently informed decisionmakers is an additional feature of Delaware law.[3] Under certain conditions, proper employment of a qualified decisionmaker results in a de-escalation of the standard of review.[4] Recent case law and scholarly endeavors have elucidated the

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frequently a dispositive) exercise."); Emerald Partners v. Berlin, 787 A.2d 85, 89 (Del. 2001) (citations omitted), *rev'd*, *In re* Cornerstone Therapeutics, 115 A.3d 1173 (Del. 2015) (This is because "[t]he applicable standard of judicial review often controls the outcome of the litigation on the merits.").

[2] Carsanaro v. Bloodhound Technologies, Inc., 65 A.3d 618, 637 (Del. Ch. 2013) ("The business judgment rule serves as Delaware's default standard of review and applies to the overwhelming majority of decisions that boards make").

[3] J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1456-57 (2013). In accordance with the terminology employed by Vice Chancellor Laster, this article adopts the phrase "qualified decisionmaker" as shorthand for the list of necessary attributes.

[4] *Id.* at 1444 ("A court applying Delaware law moves among the standards depending on the degree to which a qualified decision maker exists").

consequence of qualified decisionmaker approval in certain situations.[5] While helpful, these clarifications have done little to redress the scarcity of settled authority explaining the effect of qualified decisionmaker(s) approval in problematic scenarios involving the corporation and its controlling stockholder.[6]

This article fills that void. Specifically, it questions whether a ratification procedure for controlling stockholder transactions has already been established. At first glance, the answer appears obvious to faithful followers of Delaware law.

In a highly celebrated decision, the Delaware Supreme Court concluded that a going private merger with a controlling stockholder will be granted deferential business judgment rule review, so long as it was duly approved by two well-functioning and duly-empowered procedural safeguards:[7] (i) a special board committee composed of disinterested directors; and (ii) an informed and uncoerced majority of minority stockholders.[8] Prior to this decision, Delaware case law declined to provide a ratification avenue that results in business judgment rule review for going private mergers.[9]

Contrary to the "classic" ratification doctrine, which merely calls for either independent director or minority stockholder approval,[10]

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[5] *See* Section III.III.D.

[6] Laster, *supra* note 3, at p. 1444 ("Delaware decisions explain how the standard of review escalates from the business judgment rule to entire fairness and back again . . . . But Delaware cases address to a far lesser degree how the standard of review can diminish from enhanced scrutiny to the business judgment rule"). This article will prove that the lack of clarity exists in the controlling stockholder context as well.

[7] Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014). To be precise, the Supreme Court affirmed the analysis and framework established by the Court of Chancery; *see also* In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013).

[8] *Kahn*, 88 A.3d at 654.

[9] *See* Section V.B.

[10] Conceptually, the term "stockholder ratification" has been used to describe slightly different sets of circumstances. "Classic" ratification depicts situations where stockholders are asked to approve board action that would be legally valid even without stockholder approval. While presumptively valid, the hint of self-interest necessitates a more stringent judicial examination of the transaction. Stockholder ratification acts as a proxy for the inherent fairness of the transaction and justifies a downgrade in the intensity of the judicial scrutiny. Examples of this type of ratification include director compensation or a board stock option plan. Ratification has also been used to describe the effect of an informed stockholder vote that was statutorily required for the transaction to have legal existence. Examples of the "organic" ratification alternative include mergers and amendments to a corporation's certificate of incorporation. *See In re* Wheelabrator Tech. S'holders Lit., 663 A.2d 1194, 1201-02 fn. 4 (Del. Ch. 1995). Recent case law and a scholarly article authored by Vice Chancellor Laster have clarified language in prior Supreme Court opinions that arguably question the effect of stockholder ratification on organic corporate acts. *See In re* KKR Financial Holdings LLC, 101 A.3d 980, 1001-1003 (Del. Ch. 2014), *aff'd*, Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 309 (Del. 2015); Laster, *supra* note 3, at p. 1481-91. Since no statutory authority in

adherence to the *MFW* guidelines is conditioned upon the aggregate endorsement of two separate qualified decisionmakers. In essence, the *MFW* decision creates an "enhanced" ratification mechanism for going private mergers.

Going private transactions differ from going concern transactions in that successful completion wipes out the minority float. This distinction accelerates stockholders' divergent incentives and raises the possibility for minority stockholder abuse. All stockholders gain in value that accrues to a publicly traded corporation. An unscrupulous controller might structure the transaction in a manner that captures all unlocked value for later private consumption.[11] Additionally, going private transactions allow controlling stockholders to shed the restrictions of the public market, thereby evading future retribution by minority stockholders.[12] Accordingly, policy considerations call for superior protection of minority stockholders participating in a going private transaction.

Since *MFW* establishes a procedure for achieving less intrusive judicial review for going private transactions, it stands to reason that this procedure should apply to all transactions involving a controlling stockholder. Indeed, without addressing the distinction between going private and going concern transactions in this context, a recent Court of Chancery decision has explicitly opined that the *MFW* framework applies to all controlling stockholder transactions.[13]

This article shows that the borders of "MFW-Land" are not as clear-cut as they appear. The Supreme Court decision does not create a universally-applicable safe harbor procedure for all manner of controlling stockholder transactions. Two main arguments form the basis of this contention.

The dual tenets of doctrinal clarity and cohesion underpin the first argument. A careful reading of the *MFW* decision fails to detect any mention of competing precedent or a general proclamation regarding its applicability to other types of controlling stockholder transactions. *MFW* is clearly situated on a path of doctrinal evolution of judicial inspection

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Delaware requires stockholder approval for related party transactions with a controlling stockholder, this article's focus remains on the "classic" form of stockholder and director ratification.

[11] Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 804 (2003).

[12] Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1941-1947 (2002) (discussing the last period problem).

[13] *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245, at *28 (Del. Ch. Jan. 25, 2016), reconsideration granted in part, (Del. Ch. Feb. 23, 2016), and *appeal refused sub nom.* MS Pawn Corp. v. Treppel, 133 A.3d 560 (Del. 2016), and *appeal refused sub nom.* Roberts v. Treppel, 133 A.3d 560 (Del. 2016).

of going private transactions with controlling stockholders. Canons of judicial interpretation counsel against an indirect reversal or modification of established precedent.

Additionally, the theoretical justifications for the *MFW* decision hold significantly less weight in the going concern context. *MFW*'s doctrinal shift is grounded on the twin pillars representing the competency of independent directors and non-affiliated stockholders. Whatever the validity of these mechanisms in the freeze out context, the legal and financial scholarship does not validate an extension to going concern transactions. Serious flaws hamper the ability of independent directors and non-affiliated stockholders to pass meaningful judgment on going concern transactions. In the final tally, *MFW* does not produce an all-encompassing framework for all controlling stockholder transactions.

The rest of the Article is structured as follows. Since this article deals specifically with related party transaction with controlling stockholders, Section II defines the pertinent terms and expands on the policy issues that these types of transactions engender. Section III describes the Delaware judiciary's use of shifting standards of review to police potentially harmful transactions. Sections IV and V will shift the focus to the *MFW* decision and concentrate on both the text and the doctrinal context of the Supreme Court's decision. Section VI takes a closer look at the underlying policy rationales espoused by the Delaware Supreme Court. Critically, this part will reveal the incompatibility of these justifications in the going concern context. Section VII concludes that an unfiltered application of the *MFW* guidelines to other types of controlling stockholder transactions is by no means a compulsory outcome.

II. CONTROLLING STOCKHOLDERS AND RELATED PARTY TRANSACTIONS

A. *Controlling Stockholders Defined*

Delaware law recognizes two sets of circumstance that implicate the existence of a controlling stockholder. Ownership of at least 50% of the voting rights provides evidence of control.[14] Alternatively, domination over the board's decision-making process can transform a substantial stockholder owning less than a majority of the voting rights

[14] Weinstein Enterprises, Inc. v. Orloff, 870 A.2d 499, 507 (Del. 2005) ("In the context of imposing fiduciary responsibilities, it is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of the corporation's voting power") (footnotes omitted).

into a controlling stockholder[15] with regards to a challenged board action.[16]

The second option requires further clarification. The Delaware General Corporate Law's (DGCL) broad grant of authority to the board of directors is predicated on the grounds of efficiency.[17] Empowering a select group of motivated individuals[18] to manage the business and affairs of the corporation facilitates decisionmaking.[19] The next chapter details the courts' well thought-out use of standards of review to police board actions. The default standard of review includes a heavy presumption against judicial intrusion in the challenged business decision. While not outcome-definitive, the existence of a controlling stockholder is more likely to invoke a more exacting standard of review. However, a higher standard comes at a price. Overcoming procedural and transactional hurdles requires meticulous and costly planning. While this might deter blatant over-reaching, higher transaction costs and the risk of being forced to run a judicial gauntlet could just as easily dissuade the corporation from advancing value-enhancing transactions. An overly-cavalier attitude when contemplating the status of a large stockholder is ultimately detrimental to stockholders' interests.[20]

These overarching rationales are ingrained in the "actual domination" test endorsed by the Delaware courts. Ownership of a large bundle of stock carries with it legitimate rights, such as the ability to effectively veto transactions that require approval by the general

[15] Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 70 (Del. 1989) ("For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporate conduct").

[16] *In re* KKR Financial Holdings LLC, 101 A.3d 980, 991 (Del. Ch. 2014), *aff'd*, Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 309 (Del. 2015) ("To survive a motion to dismiss under this theory, plaintiffs must allege facts demonstrating actual control with regard to the particular transaction that is being challenged") (internal quotations omitted), *aff'd*, Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 308 (Del. 2015); Williamson v. Cox Commc'ns, Inc., 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006).

[17] 8 *Del. C.* § 141(a).

[18] *See* Stephen M. Bainbridge & M. Todd Henderson, *Boards-R-Us: Reconceptualizing Corporate Boards*, 66 STAN. L. REV. 1051 (2014) (for a provocative argument advocating that specialized management firms be allowed to take up the directorship mantle).

[19] Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 104-109 (2004) (applying Kenneth Arrow's authority vs. accountability framework as a normative justification for the board's large grant of authority).

[20] In addition to measurable expenditures, such as legal and financial counsel, a comprehensive tally must include immeasurable costs as well. Examples of immeasurable costs include management resources spent on the lawsuit that would otherwise be devoted to corporate needs as well as the chilling affect that subsequent litigation poses for the consummation of value-enhancing transactions.

stockholder assembly.[21] However, ownership of even a large block of stock does not impinge on the board's mandate to manage the company.[22] Bullying the board to plot a course of action is an illegitimate abuse of power. The test's fact-intensive inquiry is designed to reveal instances where board discretion was usurped by a non-majority stockholder.[23] Absent evidence of this type of abuse, efficiency gains realized by deference to board authority advocate against classifying every large stockholder a controller.[24]

B. *Related Party Transactions with Controlling Stockholders*

Different terms have been used to describe the same basic state of affairs.[25] The distinguishing attribute of a controlling stockholder related party transaction is a divergence of interests between the controller and the rest of the stockholder base. Most often, the divergence of interests

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[21] Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994) ("No part of their duty as controlling shareholders requires them to sell their interest").

[22] Weinstein Enterprises, Inc. v. Orloff, 870 A.2d 499, 508-09 (Del. 2005)

> For publicly held corporations, the Delaware General Corporation Law contemplates a separation of control and ownership. The board of directors has the legal responsibility to manage the business of the corporation for the benefit of its stockholders. This Court has consistently held that the fact the directors of a corporation are elected by the majority stockholder does not relieve those directors of their fiduciary duties to the corporation and its minority stockholders.

[23] Superior Vision Services, Inc. v. ReliaStar Life Insurance Co., 2006 WL 2521426, at *4 (Del. Ch. Aug. 18, 2006) ("[T]he focus of the inquiry has been on the *de facto* power of a significant (but less than majority) shareholder, which, when coupled with other factors, gives that shareholder the ability to dominate the corporate decision-making process. The concern is that the significant shareholder will use its power to obtain (or compel) favorable actions by the board to the ultimate detriment of other shareholders").

[24] *In re* Crimson Exploration Inc. Stockholder Litigation, 2014 WL 5449419 at *29-30 (Del. Ch. Oct. 24, 2014) ("These [surveyed] cases show that a large blockholder will not be considered a controlling stockholder unless they actually control the board's decisions about the challenged transaction . . . . Absent a significant showing such as was made in these prior cases, the courts have been reluctant to apply the label of controlling stockholder - potentially triggering fiduciary duties - to large, but minority, blockholders"); *see also* Bainbridge, *supra* note 19, at 109 ("Given the significant virtues of [board] discretion, however, one should not lightly interfere with management or the board's decision-making authority in the name of accountability. Preservation of managerial discretion should always be the null hypothesis").

[25] *See, e.g.*, Simon Johnson, et al., *Tunneling*, 90 AM. ECON. REV. 22, 22 (2000) (tunneling); Simeon Djankov et al., *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430, 430 (2008) (self-dealing); Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 904 (2011) (interested transactions); Lewis H. Lazarus & Brett M. McCartney, *Standards of Review in Conflict Transactions on Motions to Dismiss: Lessons Learned in the Past Decade*, 36 DEL. J. CORP. L. 967, 972 (2011) (conflict transactions).

stems from the controlling stockholder's ability to extract private pecuniary benefits not available to the broad stockholder base.

Myriad methods exist though which unscrupulous controllers can extract a disproportionate level of corporate value. A particularly useful dichotomy distinguishes between asset tunneling, cash flow tunneling, and equity tunneling.[26]

Asset tunneling involves the transfer of productive corporate assets between the corporation and its controlling stockholder.[27] Since the corporation's value derives from assets under control, unfair asset pricing directly harms the value of minority shares. In a related party scenario, minority stockholders should be wary that the corporation would overpay to buy assets from the controller or accept low-ball offers to sell assets.

Cash flow tunneling differs from asset tunneling in that the corporation's long-term productive assets remain unharmed.[28] Obviously, employees and agents should be expected to be compensated for their endeavors on behalf of the corporation. However, owing to the uneven playing field, cash flow tunneling with controlling stockholders diverts what would otherwise be operating cash flow from the firm to the coffers of the controller or affiliated entities.[29]

By contrast, equity tunneling does not directly affect a corporation's operations. However, equity tunneling allows the controller to increase her ownership share of the corporation's assets, at the expense of minority stockholders.[30] Freeze out transactions and dilutive equity issuances are examples of possible equity tunneling.

This chapter's purpose is to introduce the terms and concepts necessary for the forthcoming analysis. Delaware law recognizes two distinct tests used to unveil the presence of a controlling stockholder: (i) ownership of at least a majority of shares; or (ii) actual domination of the board that resulted in a specific course of action, albeit with ownership of less than a majority of shares.

Without more, the existence of a controlling stockholder reveals little about the predicament that minority stockholders find themselves in. Lawmakers and the courts are expected to craft solutions that balance two competing principles. On one hand, the solution should provide effective protection and redress for minority stockholders that find

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[26] Vladimir Atanasov et al., *Law and Tunneling*, 37 J. CORP. L. 1, 1 (2011) (establishing this taxonomy).

[27] *Id.* at 7.

[28] *Id.* at 6.

[29] *See* LUCIAN A. BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2009) (excess executive compensation is the emblematic example of cash flow tunneling).

[30] ATANASOV, et al., *supra* note 26, at 8-9.

themselves faced with a potentially dire situation; on the other hand, the solution should minimize unnecessary transaction costs that ultimately harm minority stockholders. The next Section will focus on Delaware's resourceful use of shifting standards of review to achieve these dual goals.

III. STANDARDS OF REVIEW UNDER DELAWARE LAW

Delaware law has long endeavored to enhance the protection afforded to minority stockholders. Judicial standards of review serve as a crucial component of this effort. Technically, a standard of review is a "test that a court should apply when it reviews an actor's conduct whether to impose liability or grant injunctive relief."[31] This modest definition understates the significance that the choice of standard entails.

Standards of review in Delaware corporate law differ amongst themselves in the vigor of judicial scrutiny applied to the challenged board action. Put differently, the selected standard determines the relative deference granted to the corporate defendants.[32] Sound policy justifications dictate the types of factual patterns that call for greater or lesser judicial interference.[33] Heightened judicial oversight is warranted in situations that question the board's devotion to stockholders' interests. Precise application of the appropriate standard allows the courts to strike a delicate balance between board authority and board accountability.

The most frequently used standard of review involves a relatively lax judicial inquiry over the challenged transaction.[34] As long as no discernible divergence of interests with the stockholders exists and the board was reasonably diligent in fulfilling its role, the standard will normally hold.[35] Suspect motivations support an upgrade in the applied

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[31] Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993).

[32] William T. Allen, Jack B. Jacobs & Leo E. Strine Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 867 (2001).

[33] *Id.* at 869.

[34] Laster, *supra* note 3, at 1445 ("At the bottom of the pyramid [of standards of review] is the business judgment rule, which gives the pyramid a capaciously broad foundation").

[35] Two residual doctrines serve as safety valves that allow the court to intervene in apparently non-conflicted situations. The waste standard permits a court to set aside a transfer of assets where the consideration is "so inadequate in value that no person of ordinary, sound business judgment would deem it worth what the corporation has paid." Saxe v. Brady, 184 A.2d 602, 610 (Del. 1962). The duty to act in good faith is violated when, for instance, a "fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation, where the fiduciary acts with the intent to violate applicable positive law, or where the fiduciary intentionally fails to act in the face of a known duty to act, demonstrating a

standard of review and consequent intensity of judicial evaluation. Importantly, employment of self-cleansing mechanisms in the form of qualified decisionmakers allow for a relaxation in the intensity of judicial review.

The following sections will more fully describe the three main standards of review under Delaware law[36] as well as the settled law regarding corporate self-immunizing procedures.

A. *The Business Judgment Rule*

The business judgment rule (BJR) is the default standard of review utilized by Delaware courts to adjudicate a stockholder claim against the board of directors.[37] The rule's animating principal is a judicial attitude of deference towards real-world decisions carried out by unconflicted directors.[38] Absent well-plead allegations necessary to rebut the rule's

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conscious disregard for his duties." *In re* Walt Disney Co. Derivative Litigation, 906 A.2d 27, 67 (Del. 2006) (citations omitted). Both of these exceptions are extremely difficult for a plaintiff to meet. *See In re* Lear Corp. S'holder Lit., 967 A.2d 640, 657 (Del. Ch. 2008) (describing the waste standard as a "rigorous test designed to smoke out shady, bad faith deals"); Lyondell Chem. Co. v. Ryan, 970 A.2d 235, 243 (Del. 2009) ("[T]here is a vast difference between an inadequate or flawed effort to carry out fiduciary duties and a conscious disregard for those duties").

[36] Emerald Partners v. Berlin, 787 A.2d 85, 89 (Del. 2001) ("When shareholders challenge actions by a board of directors, generally one of three standards of judicial review is applied: the traditional business judgment rule, an intermediate standard of enhanced judicial scrutiny, or the entire fairness analysis"). For slightly differing categorizations of the other standards of review in Delaware, *compare* Julian Velasco, *How Many Fiduciary Duties are There in Corporate Law*, 83 S. CAL. L. REV. 1231, 1237-1256 (2009), *with* Mary Siegel, *The Illusion of Enhanced Review of Board Actions*, 15 U. PA. J. BUS. L. 599, 602-616 (2012).

[37] Citron v. Fairchild Camera & Instrument, 569 A.2d 53, 64 (Del. 1989) ("The presumption initially attaches to a director-approved transaction within a board's conferred or apparent authority in the absence of any evidence of fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment" (internal quotations omitted); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011) ("The business judgment rule is the default standard of review").

[38] D. GORDON SMITH, THE MODERN BUSINESS JUDGMENT RULE, http://papers.ssrn.com/abstract=2620536 (last visited Jun 19, 2015), at *6 ("[T]he crucial feature of the business judgment rule . . . is not a presumption that the directors have acted well, but rather a commitment not to question the substance of director action when there is no proof that the directors have acted badly"). While one prominent scholar characterizes the business judgment rule as an abstention doctrine, litigation realities lead to court oversight over the process adopted by the directors at the outset of the litigation; cf. SMITH, at *7, with Bainbridge, *supra* note 19, ; E. Norman Veasey & Christine T. Di Guglielmo, *What Happened in Delaware Corporate Law and Governance from 1992-2004? A Retrospective on Some Key Developments*, 153 U. PA. L. REV. 1399, 1421 (2005) ("[T]he focus of the business judgment rule remains on the process that directors use in reaching their decisions").

initial presumption, the substantial merits of the business decision are essentially immune from judicial second-guessing.[39]

Perhaps the most famous formulation[40] of the business judgment rule depicts it as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[41]

The respect afforded to well thought-out business decisions is grounded in more than judicial humility. Adoption of the rule facilitates stockholder value maximization. Rational and diversified stockholders would prefer that their elected directors advance investment projects with the highest risk adjusted rate of return.[42] The rule's *de-facto* prohibition against second-guessing failed business decisions empowers directors to overcome understandable risk-aversion and the fear of being sued.[43] Competitive markets police simple mismanagement ruthlessly and efficiently.[44] Insulation from stockholder intervention in a regular business setting has the added value of preserving board authority.[45]

The business judgment rule is the starting off point in a judicial inquiry of a challenged board action. Judicial respect towards outcomes produced by rational business procedures usually results in a loss for the plaintiff.[46] The next sub-Sections will depict less defendant-friendly standards of review.

B. *Enhanced Scrutiny*

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[39] *Citron*, 569 A.2d at 64 ("The burden falls upon the proponent of a claim to rebut the presumption by introducing evidence either of director self-interest, if not self-dealing, or that the directors either lacked good faith or failed to exercise due care"). In order to rebut the business judgment rule's presumption of care, a plaintiff must plead and later prove gross negligence; *see* Brehm v. Eisner, 746 A.2d 244, 264 (Del. 2000).

[40] SIEGEL, *supra* note 36, at 602 ("Perhaps the most often quoted description of the business judgment rule is found in *Aronson v. Lewis*") and SMITH, *supra* note 38, at *5 ("Over the years, the presumption [of good faith] expanded and contracted in various ways before achieving its modern form in *Aronson v. Lewis*").

[41] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

[42] Gagliardi v. TriFoods Int'l., Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

[43] Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L. J. 1155, 1160 (1990) (detailing how 42 states reacted to a perceived insurance crisis by amending their corporation statutes to reduce directors' liability exposure).

[44] Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 458 (Del. Ch. 2011).

[45] STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 268 (2002).

[46] Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) ("It is sometimes thought that the decision whether to apply the business judgment rule or the entire fairness test can be outcome-determinative").

The educated belief that non-conflicted directors are innately motivated to maximize stockholder value heavily influences the business judgment rule's deferential attitude. Creeping suspicions about the board's true motivations therefore chip away at the rule's basic assumption and invite heightened judicial involvement. Delaware courts carry out this involvement through the medium of more exacting standards of review.

"Enhanced scrutiny is Delaware's intermediate standard of review."[47] The standard applies in factual situations that call into question a director's ability to impartially advance stockholders' best interests.[48] Two main transactional archetypes lead to application of this standard.[49]

Board defensive responses in the face of a hostile takeover attempt epitomize the first factual pattern that warrants application of enhanced scrutiny. A successful hostile takeover results in removal of incumbent board members. The "omnipresent specter" surrounding the board's self-serving motivation justifies subjecting the selected reaction to a more stringent judicial examination.[50]

In this context, enhanced scrutiny consists of a two-part analysis conducted by the courts. The first part of the test requires corporate defendants to prove reasonable grounds for believing that a danger to corporate policy existed.[51] After proving that, the directors must then prove that their response was reasonable relative to the threat posed.[52]

The second main fact-pattern that engenders enhanced scrutiny is colloquially referenced by the seminal case that introduced the analysis.[53] In what would become a cornerstone of Delaware jurisprudence, the Supreme Court held that the broad deference usually afforded to the

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[47] *Reis*, 28 A.3d at 457.

[48] *Id.* ("Enhanced scrutiny applies when the realities of the decision-making context can subtly undermine the decisions of even independent and disinterested directors").

[49] Enhanced scrutiny is also applied to adjudicate board postponement of a stockholder meeting that does not deal with director elections. *See* Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 786 (Del. Ch. 2007) (applying enhanced scrutiny instead of the more demanding *Blasius* standard to a board decision to postpone a stockholder vote on an impending merger so as to provide more information and not jeopardize what the board believes to be an irrevocable loss of a pending offer).

[50] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

[51] *Id.* at [955].

[52] *Id.* Significant refinement of the *Unocal* doctrine occurred in Unitrin, Inc. v. American General Corp., 651 A.2d 1361, 1387-1390 (Del. 1995) (a reasonable response by the board must be neither coercive nor preclusive, and should not impinge on the stockholder's ability to vote directors out of office).

[53] *See generally* Lyman Johnson & Robert Ricca, *The Dwindling of Revlon*, 71 WASH. & LEE L. REV. 167 (2014); Stephen M. Bainbridge, *The Geography of Revlon-Land*, 81 FORDHAM L. REV. 3277 (2012) (which obviously inspired this article's title).

board of directors no longer applies in the face of an impending sale or break-up of the corporation. When finding itself in this situation, the board's *raison d'etre* transforms to "maximization of the company's value at a sale for the stockholders' benefit."[54] While subsequent cases have attempted to clarify what a "sale or break-up" of the corporation entails,[55] recent scholarship still grapples with this seemingly unsettled issue.[56]

Since even a self-initiated sale of the corporation results in broad personnel changes amongst the corporate hierarchy, enhanced judicial scrutiny attempts to weed out subtle manipulation of the sales process. In a *Revlon* setting, the burden shifts to the board to prove that they have taken reasonable steps to ensure stockholders receive the best price possible for their shares. Although the term "auctioneer" was originally used to describe the board's new function,[57] subsequent decisions clarified that there is no single blueprint for the board to follow.[58]

In sum, the policy justifications that counsel against judicial interference hold considerably less sway when directors are faced with the tangible prospect of relinquishing their post. *Unocal* and *Revlon* situations place the onus on the board to prove the reasonableness of their actions. While not an extremely difficult test to pass,[59] the enhanced scrutiny standard of review allows a certain degree of judicial oversight in inherently problematic settings. The next sub-Section will detail the most extracting standard of review in a transactional setting.

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[54] Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).

[55] Most famously, Paramount Communications v. QVC Network, 637 A.2d 34, 47-48 (Del. 1994) (for the purpose of the Revlon test, a "sale" occurs when the consummation of a transaction introduces a new controlling stockholder to an entity that previously had none).

[56] *Compare* Bainbridge, *supra* note 53 (arguing that the *Revlon* standard of review is motivated by a conflicts of interest), *with* Mohsen Manesh, *Defined by Dictum: The Geography of Revlon-Land in Cash and Mixed Consideration Transactions*, 59 VILL. L. REV. 1 (2014) (refuting Bainbridge's claim). *See also* J. Travis Laster, *Revlon Is a Standard of Review: Why It's True and What It Means*, 19 FORD. J. CORP. FIN. L. 5 (2013) (Vice Chancellor Laster professes his scholarly view that the *Revlon* standard should apply in all final-period transactions, regardless of choice of consideration).

[57] *Revlon*, 506 A.2d at 184.

[58] Johnson & Ricca, *supra* note 53, at 189-193 (summarizing subsequent holdings detailing the board's proper conduct in the sales process).

[59] Mercier v. Inter-Tel (Del.), Inc., 929 A.2d 810 (Del. Ch. 2007) ("I recognize . . . that some of the prior *Unocal* case law gave reason to fear that that standard, and the related *Revlon* standard, were being denuded into simply another name for business judgment rule review"); *see* SIEGEL, *supra* note 36, at 621, 629 (providing data that defendants are able to pass *Unocal* and *Revlon* scrutiny almost 80% of the time the standards are evoked).

C. *Entire Fairness*

Doubts regarding the corporate decisionmaker's ability to advance stockholder interests give rise to more severe judicial review. The differential default standard transforms into enhanced scrutiny when the challenged board action implicates the director's continued incumbency. Full-fledged economic conflicts of interest between the corporation and members of the corporate hierarchy necessitate a further upgrade in the intensity of judicial oversight.

Immediate realization of profit in a related party transaction usually more than offsets the prospect of market discipline.[60] Delaware law accordingly requires that these transactions pass through the filter of entire fairness review.

A preliminary taxonomy of related party transactions distinguishes between director self-dealing and controlling stockholder self-dealing. As long as the director's conflict is sufficiently disclosed and approved by an otherwise independent and disinterested board, even a direct transaction with a corporate director will enjoy the presumptions afforded by the business judgment rule.[61] In order to rebut the business judgment rule's application regarding director self-dealing, a stockholder has to plead facts demonstrating that a *majority* of the board either had a financial interest in the transaction or was otherwise dominated by a materially interested director.[62]

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[60] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 103 (1996) ("Duty-of-loyalty problems often involve spectacular, one-shot appropriations, of the "take the money and run" sort, in which subsequent penalties through markets are inadequate"); *see also* Hill & McDonnell, *supra* note 25, at 908-909 ("[T]he law has long treated self-dealing with suspicion. The reasons for that suspicion are obvious: If the leading decisionmakers, or those with strong influence over such decisionmakers, can gain personally by making a decision that hurts the corporation, they may make decisions that benefit them at the corporation's expense").

[61] Telxon Corp. v. Meyerson, 802 A.2d 257, 264 (Del. 2002) ("Where only one director has an interest in a transaction, however, a plaintiff seeking to rebut the presumption of the business judgment rule under the duty of loyalty must show that the interested director controls or dominates the board as a whole") (internal quotations omitted).

[62] The pleading requirement stems from Court of Chancery Rule 23.1, which requires a stockholder plaintiff prosecuting a derivative action to "allege with peculiarity" reasons for not making a demand on the board of directs. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) ("[I]f such director interest is present, and the transaction is not approved by a majority consisting of the disinterested directors, then the business judgment rule has no application whatever in determining demand futility"); *see also* Laster, *supra* note 3, at 1455 ("To change the standard of review from the business judgment rule to entire fairness, a plaintiff must show that there were not enough independent, disinterested, and sufficiently informed individuals who acted in good faith when making the challenged decision to constitute a board majority").

In this context, the Delaware Supreme Court has identified independence to exist in situations where "a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences."[63] Overcoming the presumption of director independence relies on "pleading facts that support a reasonable inference that the director is beholden to a controlling person or so under their influence that their discretion would be sterilized."[64]

The Aronson court additionally articulated what would be recognized as the canonical definition for director self-interest.[65] In order to be considered disinterested, a director "can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally."[66] Subsequent cases have clarified that director self-interest is not limited to direct personal dealings with a corporation, and further manifests in situations where the director has a stake in or serves as an executive at the corporation's counterparty.[67] The pecuniary benefit justifies a heightened standard of review, regardless of whether or not the benefit was in fact material for the director.[68]

Even more nuances alter the applied standard of review for transactions with a controlling stockholder. Regardless of whether or not the transaction consummates with the elimination of minority stockholders, entire fairness applies in all conflicted transactions with a controlling stockholder.[69] A direct transaction between the controller

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[63] Aronson, 43 A.2d at 816.

[64] *In re* KKR Financial Holdings LLC Sharholder Litig., 101 A.3d 980, 995 (Del. Ch. 2014) (internal quotations omitted). For examples of a paralyzing interest, see Harbor Finance Partners v. Huizenga, 751 A.2d 879, 889 (Del. Ch. 1999) (familial relationship casts doubt on a director's ability to impartially consider a board demand); New Jersey Carpenters Pension Fund v. Infogroup, Inc., C.A. No. 5334-VCN (Del. Ch. Oct. 6, 2011) (ostensibly independent directors were actually under the control of a dominant and bullying blockholder and member of the board).

[65] *In re* Crimson Exploration Inc. Stockholder Litigation, 2014 WL 5449419 at *51 (Del. Ch. Oct. 24, 2014) ("*Aronson v. Lewis* set forth the now-standard definitions for the terms "interested" and "independent") (footnote omitted).

[66] *Aronson*, 43 A.2d at 812 (citations omitted).

[67] Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1169 (Del. 1995) (subsequent history omitted) (citing 8 Del. § 144(a)). *See also* Rales v. Blasband, 634 A.2d 927, 936 (Del. 1993) ("Directorial interest also exists where a corporate decision will have a materially detrimental impact on the director, but not on the corporation and the stockholders").

[68] Cambridge Retirement System v. Bosnjak, C.A. No. 9178-CB, 2014 WL 2930869, at *5 (Del. Ch. June 26, 2014).

[69] Kahn v. Lynch Communication Systems, 638 A.2d 1110, 1115 (Del. 1994) ("A controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness"). *See In re* EZcorp

and the corporation is the essence of a conflicted transaction.[70] Under certain conditions, going-private transaction with a *bona fide* third party can also lead to application of entire fairness review.

Although Delaware law imposes minimal restrictions on the controller's ability to sell her shares at a premium,[71] receipt of unequal consideration in a going-private transaction will invite entire fairness review. Unequal consideration can manifest in either a tangible or non-tangible form. Higher prices for the same class of shares or a continuing equity stake in the surviving entity are examples of a tangible unequal consideration.[72] Unavoidable competition between the controller and the rest of the stockholder base for their portion of the deal consideration necessitates heightened court involvement.

Extinguishment of a derivative claim or immediate realization of much-needed liquidity are examples of a non-tangible unique benefit.[73] Although receipt of pro-rata treatment should usually assuage minority stockholders' fears of misappropriation,[74] the controller's acceptance of a unique benefit might detract from the price ultimately offered for all shares.

The definitive formulation of the entire fairness test has remained virtually the same for three decades:

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and

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Consulting Agreement, fn. 13 supra, at *11-*24 (thorough analysis of the authorities concludes that the entire fairness standard applies to all controlling shareholder self-dealing transactions).

[70] In addition, some case law requires that in order to qualify as self-dealing, the plaintiff stockholder must prove that the transaction allows the controlling stockholder to extract from the corporation a benefit to the exclusion of, and detriment to, the minority stockholders of the corporation. *See* Sinclair Oil Corporation v. Levien, 280 A.2d 717, 720 (Del. 1971).

[71] Abraham v. Emerson Radio Corp., 901 A.2d 751, 753 (Del. Ch. 2006) ("Under Delaware law, a controller remains free to sell its stock for a premium not shared with other stockholders except in very narrow circumstances."); *see generally* In re Delphi Fin. Gp. S'holder Litig., 2012 WL 729323 (Del. Ch. Mar. 6, 2012) (examples of these very narrow circumstances exist when the controller has entered into a contractual commitment not to receive a premium or she knows that the buyer is a looter or was aware of circumstances that would alert a reasonably prudent person to a risk that the buyer was dishonest in a material aspect); Harris v. Carter, 582 A.2d 222, 235 (Del.1990).

[72] *In re* Crimson Exploration Inc. Stockholder Litigation, 2014 WL 5449419 at *31-33 (Del. Ch. Oct. 24, 2014) (analyzing and generating a rule from *In* re Tel-Communications, Inc. S'holder Litig., 2005 WL 3642727 (Del. Ch. Jan. 10, 2006), *In re* Delphi Fin. Gp. S'holder Litig., 2012 WL 729232 (Del. Ch. Mar. 6, 2012), *In re* John Q. Hammons Hotels Inc. S'holder Litig., 2009 WL 3165613 (Del. Ch. Oct. 2, 2009), and *In re* LNR Prop. Corp. S'holder Litig., 896 A.2d 169 (Del. Ch. 2005)).

[73] *See In re* Primedia, Inc. S'holder Litig., 67 A.3d 455, 486 (Del. Ch. 2013); *In re* Synthes, Inc. S'holder Litigation, 50 A.3d 1022, 1034-36 (Del. Ch. 2012).

[74] *Synthes*, 50 A.3d at 1039-1040.

how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.[75]

Special attention is called to the relationship between a motion to dismiss and the standard of review.[76] A successful motion results in the immediate dismissal of the stockholder complaint. A failed motion adds discovery and trial costs to the already substantial transaction bill.[77] Importantly, application of the entire fairness standard proves a near-insurmountable obstacle for a defendant's motion to dismiss.[78]

The chosen standard's influence on the litigation dynamic guarantees that it remains one of the most heavily debated aspects in corporate litigation.[79] Onerous standards of review invite some of the more unscrupulous and entrepreneurial members of the plaintiffs' bar to file hastily crafted complaints in an effort to secure settlements that offer no discernible advantage to the remaining stockholders.[80] The next sub-Section will detail how careful implementation of corporate self-cleansing mechanisms allows for a downgrade in the severity of the standard of review.

D. *Downgrading the Standard of Review*

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[75] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (internal citations omitted).

[76] Del. Ch. Ct. R. 12(b)(6) (Importantly, Rule 12(b)(6) allows defendants to file a motion to dismiss for "failure to state a claim upon which relief can be granted.").

[77] *See generally* Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, SSRN (August 21, 2015), http://tinyurl.com/mev27qp.

[78] *In re* Cornerstone Therapeutics, 115 A.3d 1173, 1180-81 (Del. 2015) ("No doubt, the invocation of the entire fairness standard has a powerful pro-plaintiff effect against interested parties. When that standard is invoked at the pleading stage, the plaintiffs will be able to survive a motion to dismiss by interested parties regardless of the presence of an exculpatory charter provision because their conflicts of interest support a pleading-stage inference of disloyalty") (footnotes omitted); *see also* Hamilton P'rs, L.P. v. Highland Capital Mgmt., L.P., 2014 WL 1813340, at *12 (Del. Ch. May 7, 2014) ("The possibility that the entire fairness standard of review may apply tends to preclude the court from granting a motion to dismiss under Rule 12(b)(6) unless . . . [the] challenged transaction was entirely fair based solely on the allegations of the complaint and the documents integral to it").

[79] Lewis H. Lazarus, *Standards of Review in Conflict Transactions: An Examination of Decisions Rendered on Motions to Dismiss*, 26 DEL. J. CORP. L. 911, 926 (2001).

[80] Johnson & Ricca, *supra* note 53, at [168].

Higher standards of review all but ascertain that a stockholder complaint survives a motion to dismiss. T he credible threat of a prolonged and costly trial is arguably at the root of what some considered a non-meritorious litigation epidemic.[81] Conditioning the transaction on the approval of qualified decisionmakers offers transactional planners a way to downgrade the standard of review and thus recover from a tactical litigation disadvantage.[82] The collective wisdom of qualified decisionmakers is considered a suitable substitute for court oversight.

A clarifying note on terminology is warranted at the outset. Although frequently used, "ratification" is not the most precise legal term to describe the self-cleansing mechanism. In agency law, ratification consists of "the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority."[83] Most stockholder challenges against corporate acts focus on potential breaches of fiduciary duties, not a lack of actual authority. The self-cleansing mechanisms are not intended to confer actual authority upon the corporate actors, but rather to de-escalate the standard of review.[84]

Two equally competent corporate organs form the core of the Delaware self-cleansing framework:[85] a committee comprised of

[81] Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 165 (2015) (finding that stockholder litigation following announcement of a merger skyrocketed from 39.3% of transaction in 2005 to over 92% of transactions in 2011). Cornerstone Research, Shareholder Litigation Involving Acquisitions of Public Companies, https://www.cornerstone.com/Shareholder-Litigation-Involving-Acquisitions-2014-Review.pdf (Last visited Mar. 7, 2017) (supporting the finding that plaintiff attorneys filed lawsuits in 93% of all mergers and acquisition deals announced in 2014 and valued at over $100 million. For Delaware-incorporated firms, plaintiffs filed lawsuits either exclusively in Delaware or in conjunction with litigation in other courts on 88% of the deals).

[82] Scott V. Simpson & Katherine Brody, *The Evolving Role of Special Committees in M&A Transactions: Seeking Business Judgment Rule Protection in the Context of Controlling Shareholder Transactions and Other Corporate Transactions Involving Conflicts of Interest*, 69 BUS. LAW. 1117, 1120 (2014) ("[T]he ability to structure a board's process in connection with its consideration of a transaction such that its decisions will benefit from the protection of the business judgment rule provides significant practical comfort that its decisions will not be overturned by a court").

[83] RESTATEMENT (THIRD) OF AGENCY §4.01 (2006).

[84] Smith, *supra* note 38, at *3

> The modern business judgment rule is applied not only in cases [without procedural infirmities, but] in cases where procedural infirmities at the board level have been mitigated by a special committee, stockholder approval, or . . . partial substantive review of the board action by the court. In these new contexts, a court must satisfy itself that a board decision is worthy of respect, not because the decision was substantively correct, but because the effect of the procedural infirmities was sufficiently muted

[85] Amitai Aviram, *Officers' Fiduciary Duties and the Nature of Corporate Organs*, 2013 U. ILL. L. REV. 763, 768 (2013) (The corporation, as an artificial entity, requires actors to

independent and disinterested directors and a stockholder vote.[86] When the interested party holds a large percentage of the corporation's stock, deference to the stockholder vote will only be afforded if a majority of the minority approve the transaction.[87]

Reliance on independent director committees is a natural extension to the respect Delaware law affords the board of directors. Absent a disabling conflict for a majority of the board, the courts are reluctant to intrude into the realm of business judgment. Deference to the wisdom of the board is no longer justifiable when a majority of the board is conflicted. Importantly, the DGCL permits the board to cede a portion of its authority to a board committee.[88] The logic behind the refusal to impinge on the authority of a non-conflicted board equally applies to a non-conflicted and duly authorized board committee.[89]

By itself, this legislative interpretation would have a hard time justifying the deference afforded to a committee of qualified directors. Even legally independent and disinterested directors cannot erase a joint history of mutual service. Unchecked camaraderie can potentially undermine the committee's ability to carry out its role. Court-mandated guidelines designed to weed out lingering biases or structural dependencies are an important component of this self-cleansing avenue. In order to receive full credit for their efforts, committees are expected to adhere to well-settled judicial proclamations regarding their composition, mandate, level of activity, hiring of advisors, and compensation.[90] Insulation from even the hint of undue influence substantially reinforces

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act on its behalf. A corporate organ is one such actor. An organ, such as the board of directors or a stockholder general assembly, acts on the corporation's behalf but is not subject to its control); *see also* Arnold v. Soc'y for Sav. Bancorp, Inc., 678 A.2d 533, 539-540 (Del. 1996) ("Directors, in the ordinary course of their service as directors, do not act as agents of the corporation . . . An agent acts under the control of the principal. The board of directors of a corporation is charged with the ultimate responsibility to manage or direct the management of the business and affairs of the corporation. A board of directors, in fulfilling its fiduciary duty, controls the corporation, not *vice versa*") (citations omitted).

[86]Blake Rohrbacher et. al., *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 33 DEL. J. CORP. L. 719, 719-720 (2008) (The resemblance between the two organs comprising the Delaware ratification process and Section 144 of the DGCL is easily discernable. An apparent resemblance does not mean that Section 144 governs the ratification procedure. Section 144 was enacted in order to counteract the old common law principle that voided related party transactions and provide transaction planners a road map to avoid such a fate); *see In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 615 (Del. Ch. 2005) (Determination 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.").

[87]Fliegler v. Lawrence, 361 A.2d 218, 221 (Del. 1976).

[88]8 *Del. C.* § 141(c).

[89]Laster, *supra* note 3, at 1456.

[90]Simpson & Brody, *supra* note 82, at 1135-40.

the committee's resolve to impartially review the merits of the proposed transaction.

An independent stockholder vote is the second independent element of Delaware's self-cleansing mechanism.[91] Subjecting key events in the corporation's life to stockholder approval is supported by several complimentary justifications. Even in the cradle of director primacy, the stockholder vote remains the "ideological underpinning upon which the legitimacy of directorial powers rests."[92] Under this view, the voting mechanism aggregates the preferences of the stockholder constituency and thus legitimizes the chosen course of action.[93]

A slightly different rationalization focuses on the accountability aspect of the stockholder vote. Conflicts of interest are an unavoidable consequence of publicly traded corporations. Subjecting a contentious course of action to stockholder approval serves to align the interests of the corporate directors with those of the entire stockholder base. The stockholder vote thus functions as a means to reduce the likelihood of a self-serving error by the original corporate actors.[94]

Implicit in both of these views is the fact that rational stockholders vote for their own interests.[95] Manipulation of the process invalidates the cleansing effect of the stockholder vote.[96] Courts therefore police the voting mechanism in order to prevent substantive coercion and ensure that stockholders are given enough information from which to arrive at an informed decision.

The self-cleansing mechanisms do not have a uniform effect on the entire fairness standard of review. A threshold question is whether the

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[91] Previous case law can be read to create an analytical distinction between "classic" stockholder ratification and instances where a stockholder vote was a necessary step in authorizing the transaction, such as a statutory merger or amendment to the certificate of incorporation. The Supreme Court recently disavowed this distinction. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 309-11 (Del. 2015).

[92] Blasius Industries, Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988).

[93] LISA M. FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 29 (2011).

[94] Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 132-133 (2009).

[95] Laster, *supra* note 3, at 1457 ("[S]tockholders [are] collectively well-positioned to decide whether to endorse what the board did, and that for purposes of determining how easy it should be for a stockholder plaintiff to challenge the action taken by the board (i.e., to determine the standard of review), a court should take into account and defer to an uncoerced endorsement from fully informed, disinterested stockholders").

[96] *Corwin*, 125 A.3d at 312 (stating "the doctrine applies only to fully informed, uncoerced stockholder votes, and if troubling facts regarding director behavior were not disclosed that would have been material to a voting stockholder, then the business judgment rule is not invoked").

entire fairness standard stems from a majority-conflicted board or rather from a related party transaction with a controlling stockholder.

The result of a competent approval by *either* a qualified director committee or a qualified stockholder vote when no controlling stockholder is involved is relatively straightforward. Valid approval by either one of the corporate organs reaffirms the presumptions of the business judgment rule to the transaction.[97] Once the business judgment rule applies, judicial review is limited to issues of gift or waste with the burden of proof upon the plaintiffs.[98]

Introduction of a controlling stockholder adds some uncertainty to the analysis. Until fairly recently, it was seemingly well-settled that a self-dealing transaction with a controlling stockholder would without fail evoke the entire fairness standard of review.[99] The controlling stockholder's superior bargaining position and ability to extract revenge should the corporate agents refuse to bow down to her demand justified continuous court oversight.[100] The Delaware Supreme Court clarified that at most, defendants can receive a shift in the burden of proof properly employing one of the self-cleansing mechanisms.[101]

Critically, the above holding was rendered in connection with a going-private merger with a controlling stockholder. The degree of overlap between the line of holdings governing going-private mergers and those applicable to controlling stockholder going concern

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[97] *See, e.g.*, Valeant Pharms. Int'l. v. Jerney, 921 A.2d 732, 745-746 (Del. Ch. 2007) (Approval by a well-functioning independent director compensation committee reaffirms the presumptions of the business judgment rule to the interested transaction); Calma v. Templeton, 114 A.3d 563, 587 (Del. Ch. 2015) (Approval by a fully-informed stockholder vote of a transaction with a non-controlling stockholder reaffirms the presumptions of the business judgment rule).

[98] Singh v. Attenborough, 137 A.3d 151, 151-52 (Del. 2016).

[99] Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 900 (Del. Ch. 1999) (stating "it appears that a corporation with a majority or controlling majority stockholder may, under current Delaware law, never escape the exacting entire fairness standard . . ."); *see also* Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1116 (Del. 1994). This determination would not change even if the majority of the board was independent from the controlling shareholder. *See* Emerald Partners v. Berlin, 787 A.2d 85, 96-97 (Del. 2001).

[100] *Kahn*, 638 A.2d at 1116-17 (quoting Citron v. E.I. de DuPont Nemours Co., 584 A.2d 490, 502 (Del. Ch. 1990).

[101] *Kahn*, 638 A.2d at 1117. The practical consequence of the burden shift is subject to debate. For Chief Justice Strine's view (as Vice Chancellor); *see In re* Cysive, Inc. S'holder Litig., 836 A.2d 531, 548 (Del. Ch. 2003)

> The practical effect of the *Lynch* doctrine's burden shift is slight. One reason why this is so is that shifting the burden of persuasion under a preponderance standard is not a major move, if one assumes, as I do, that the outcome of very few cases hinges on what happens if in the evidence is in equipoise

transactions is unclear.[102] Since both strands arrived at the same result of heightened judicial scrutiny, this uncertainty had little practical consequence and did not engender a torrent of judicial or scholarly commentary.[103]

All this changed once the Delaware courts accepted the notion that conditioning a going private merger with a controlling stockholder on the effective employment of *both* self-cleansing mechanisms will subject the transaction to business judgment rule review. Suddenly, the question of *MFW*'s applicability to all controlling stockholder related party transactions has gained practical import. Subsequent sections will provide an in-depth look at the policy considerations that animated the shift in long-standing precedent and ponder their suitability in the going concern context. A more thorough review of the *MFW* decision will usher in this analysis.

IV. THE MFW DECISION

MacAndrews & Forbes' decision to purchase the remaining 57% of the equity not already owned in M&F Worldwide (MFW) set in motion a series of events that would fundamentally change Delaware law.[104] Prior to the controller's overture, MFW was a publicly-traded Delaware-incorporated holding company operating in four main business segments.[105]

Following completion of internal projections, MacAndrews & Forbes sent MFW official notice of its intent to acquire all un-owned outstanding shares for the price of $24 in cash. The initial offer reflected a premium of just over $7 per share on the then-current trading price.[106]

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[102] *See* Hill & McDonnell, *supra* note 25, at 923-24 ("[I]t is somewhat unclear whether the *Weinberger* entire fairness framework applies only to freezeout acquisitions, or whether it applies to all transactions in which a shareholder has a controlling interest . . . . The applicability of *Weinberger* outside of the freezeout context is an open and important question."); Steven M. Haas, Note, *Toward a Controlling Shareholder Safe Harbor*, 90 Va. L. Rev. 2245, 2254 (2004) ("Because *Weinberger* stopped short of articulating a complete framework for controlling shareholder transactions, subsequent courts were left to guess as to the legal consequences of independent approval").

[103] *See* Haas, *supra* note 102, at 2254; Hill & McDonnell, *supra* note 25. Both articles call for unavoidable entire fairness review for going private transactions with a controlling stockholder while advocating a ratification framework for going concern transactions. Since the *MFW* decision created a ratification framework for going private transactions, the question addressed in this article remains outside the scope of the analysis performed in those two articles.

[104] MacAndrews and Forbes is entirely owned by Ronald Perelman, whose previous exploits have cemented his legacy in Delaware corporate law lore. *See, e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

[105] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 640 (Del. 2015).

[106] *Id.*

Importantly, the proposal was conditioned up front on the positive recommendation of a special committee of independent directors and the approval of a majority of the minority stockholders.[107] MacAndrews & Forbes further clarified its unwillingness to participate in any transaction other than the proposed merger.[108] The controller's overture encouraged MFW's not-yet-constructed special committee to appoint independent financial and legal advisors.[109]

MFW's board met the following day to confer on this unexpected turn of events. After recusal of all directors affiliated with MacAndrews & Forbes and retention of independent counsel, the remaining board members resolved to form a special committee of independent board members.[110] The framing of the resolution demonstrates the independent counsel's knowledge and expertise in this area of Delaware law.

The board resolution delineated the breadth of the committee's powers and authority. For instance, the special committee was empowered to investigate the proposal in any manner it sees fit, evaluate its terms, and negotiate any element with the controlling stockholder.[111] The board resolution made clear the committee's prerogative to pass on either a positive or negative recommendation to the full board.[112] The resolution cemented the committee's negotiating power by mandating a positive recommendation as a condition precedent to board approval.[113] An express directive to retain independent legal and financial advisors further solidified the committee's observance of the multitude of judicial guidelines aimed at ensuring the committee's fidelity and effectiveness.[114]

Once constructed, MFW's independent committee carried out its task in a commendable manner. Exclusion of MacAndrews & Forbes' affiliates from the committee's internal evaluations helped safeguard its integrity and ability to imitate a third-party bargaining agent.[115] Updated financial projections for each of MFW's core business segments assisted the committee in gauging MFW's intrinsic value.[116] While MacAndrews & Forbes' proposal emphasized its refusal to take part in any transactional alternative, the committee nonetheless instructed its

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[107] *Id.*
[108] *Id.* at 640-41.
[109] *Id.* at 641.
[110] *Kahn*, 88 A.3d 641.
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *See Kahn*, 88 A.3d 641; SIMPSON & BRODY, supra note 82 at 1135-40 (thorough depiction of the state of the art of special committee composition and conduct).
[115] *Kahn* , 88 A.3d at 651.
[116] *Id.*

financial advisors to explore other options that might unlock additional value for minority stockholders.[117] Satisfied in the lack of a fundamentally superior transactional substitute, the special committee entered into direct negotiations with MacAndrews & Forbes.

Despite starting with an ambitious $30 per share counteroffer, the ensuing give and take yielded a modest $1 increase from MacAndrews & Forbes initial proposal.[118] Even so, the committee's independent financial advisor opined that $25 per MFW share was fair based on generally accepted valuation methods. At its eighth and final meeting, the special committee unanimously agreed to recommend the merger at a price of $25 per share.[119] The committee cited the deteriorating financial performance of several of MFW's business segments as well as the ongoing turmoil in the financial markets as a basis for this recommendation. The full board, absent MacAndrews & Forbes' affiliates, subsequently accepted the committee's recommendation and submitted the merger to a determinative stockholder vote.[120]

Approval by a duly-empowered and well-functioning independent committee was just one component prescribed in MacAndrews & Forbes' original proposal. Although there is no statutory obligation to do so,[121] the controlling stockholder willingly conditioned consummation of the merger on the approval of a majority of minority stockholders.

The plaintiff's allegations of impropriety in the stockholder vote were found unpersuasive by both the Court of Chancery and the Supreme Court. The proxy statement accurately disclosed, among other things, the $30 counteroffer that the independent committee made to the controlling stockholder's original overture.[122] The proxy statement further divulged the financial advisor's valuation range and fairness opinion. After being made aware of these facts, over 65% of MFW's unaffiliated stockholders voted in favor of the merger.[123]

Satisfied in the integrity of both procedural measures, the Supreme Court affirmed the Court of Chancery's application of the business judgment rule as the appropriate standard of review.[124] Importantly, a

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[117] *Id.* at 652.

[118] *Id.*

[119] *Id.* at 652-53.

[120] *Kahn*, 88 A.3d at 653.

[121] 8 *Del. C.* § 251(c) (requiring approval of "a majority of the outstanding stock of the corporation entitled to vote thereon" for effectuation of a merger).

[122] *Kahn*, 88 A.3d at 653.

[123] *Id.* at 653-54.

[124] *Id.* at 654; *id.* at 645 n.14. Interestingly, contrary to the Court of Chancery decision, the Supreme Court found that the plaintiff's amended complaint would have survived a motion to dismiss under this standard. The Supreme Court gave weight to particularized allegations insinuating that the controller engaged in pre-overture stock price suppression.

recent Court of Chancery decision embraces the notion that the *MFW* guidelines apply unfiltered to all transactions with a controlling stockholder.[125] The next Sections will explain why this is an inaccurate and ultimately misguided understanding of MFW's breadth.

V. QUESTIONING MFW'S REACH

The next two Sections represent the bulk of the argument against an expansive reading of *MFW*'s holding. The decision itself makes clear that it directly applies to going private mergers with controlling stockholders. This distinction is significant. The *MFW* decision is located on a continuum representing a decades-long evolution in the judicial scrutiny of going private transactions. While some points on this spectrum no doubt intersect with the holdings applicable to other types of controlling stockholder self-dealing transactions, Delaware has yet to declare a perfect overlap in the regulation of these diverse transactional structures.

A. *Distilling MFW's Precedent – The Text*

Determining *MFW*'s breadth starts off with the express language found in the Supreme Court's decision. Canons of jurisprudential interpretation differentiate between the textual components that together comprise a Supreme Court decision. Only the holding serves as binding precedent for determining later cases involving similar facts or issues.[126] By contrast, judicial statements that have no effect on the outcome of the case are not accorded precedential power.[127]

Had the Supreme Court expressly ruled on the viability of the enhanced ratification guidelines for all controlling stockholder transactions, the Court of Chancery would undoubtedly be required to follow it.[128] In order for a judicial statement to have binding force, the issue must be presented and fully argued before the Court.[129] Incidental references are not part of the binding precedent set by the court. This distinction has no bearing here, as the Supreme Court decision does not even contain an incidental reference to going concern transactions.

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[125] *In re Ezcorp Inc., 2016 WL 301245, at *11 n.6 (Del. Ch. Jan. 25, 2016).*

[126] *In re MFW S'holders Litigation*, 67 A.3d 496, 521 (Del. Ch. 2013).

[127] *Id.*

[128] *Id.* at 502 ("[T]he court has to satisfy itself that our Supreme Court has not already answered the question. If our Supreme Court has done so, this court is bound by that answer, which may only be altered by the Supreme Court itself or by legislative action").

[129] *Id.* at 521 ("If an issue is not presented to a court with the benefit of full argument and record, any statement on that issue by that court is not a holding with binding force.").

A careful reading of the Supreme Court decision reveals that the holding's binding force is limited to controlling stockholder mergers and possibly other forms of going private transactions. From the start, the decision notes that it deals with controlling stockholder mergers.[130] When proclaiming its holding, the Supreme Court once again employs the same vernacular.[131] In summing up its holding, the Supreme Court notes its application to "controller buyouts."[132]

A textual examination of the Supreme Court decision negates the view that *MFW*'s holding applies to going concern transactions. If the Supreme Court would have meant for the guidelines to apply in an unfiltered manner to the full array of controlling stockholder transactions, it would have said so.[133] It would be ludicrous to assert that the Delaware Supreme Court is unaware of or indifferent to the menu of transactional structures afforded by law.[134] The precise and repetitive use of specific transactional terms-of-art clarifies the Supreme Court's intent: *MFW* was intended as binding authority for going private mergers with a controlling stockholder.

Admittedly, the term "controller buyouts" used by the Supreme Court when summarizing its holding encompasses a larger assortment of transactions than simple mergers. The next sub-Section's contextual analysis of the *MFW* decision will illuminate the Supreme Court's choice of vernacular. By definition, however, going concern transactions are excluded from the Supreme Court's expansion.

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[130] *Kahn*, 88 A.3d at 642 ("This appeal presents a question of first impression: what should be the standard of review for a *merger* between a controlling stockholder and its subsidiary . . .") (emphasis added).

[131] *Id.* at 644 ("We hold that business judgment is the standard of review that should govern *mergers* between a controlling stockholder and its corporate subsidiary") (emphasis added).

[132] *Id.* at 645 ("To summarize our holding, in controller buyouts, the business judgment standard of review will be applied . . .").

[133] *See* In re KKR Financial Holdings LLC, 101 A.3d 980, 1002 (Del. 2014) ("Had the Supreme Court intended to [overrule extensive precedent], I believe the Court would have expressly stated such an intention"), *aff'd* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).

[134] This is especially true for a jurisdiction that steadfastly supports a textual reading of the protections afforded by statute to functionally equivalent transactional methods. *See* Orzeck v. Englehart, 195 A.2d 375, 377 (Del. 1963) ("While the argument may have a surface plausibility, it nevertheless is contrary to the uniform interpretation given the Delaware Corporation Law over the years to the effect the action taken in accordance with different sections of that law are acts of independent legal significance even though the end result may be the same under different sections. The mere fact that the result of actions taken under one section may be the same as the result of action taken under another section does not require that the legality of the result must be tested by the requirements of the second section.").

B. *Distilling MFW's Precedent – The Context*

This sub-Section advances the argument that counsels for a narrow reading of *MFW*'s precedential value. *MFW* stands at the pinnacle of a series of decisions that attempt to regulate freeze out transactions with controlling stockholders. For several years now, Delaware jurists have endeavored to unify the disparate strands of authority that apply to different forms of going private transactions. The evolutionary context of the *MFW* decision reinforces the argument against its general application to all controlling stockholder transactions.

Several synonyms have been used to depict final period transactions, including "freeze outs," "cash out" mergers, controlled mergers, and "going private" transactions.[135] While the name varies, the result is similar—a successful final period transaction culminates in the wiping out of the public float. Minority stockholders do not leave empty handed, usually having exchanged their shares for cash.[136]

Two main transactional templates exist through which to accomplish this task.[137] A merger is a legal event effectuated between two corporations pursuant to which one "absorbs" the other, which ceases to exist as a matter of law.[138] Since this act fundamentally alters the stockholder's investment, mergers call for both board and stockholder approval. Dissenting stockholders of the target corporation are forced to bow to the will of the majority and relinquish their shares.

Conversely, an acquirer can structure a going private transaction by means of a tender offer.[139] A tender offer differs from the statutory merger in that it is not a corporate-level event. The acquirer in a tender offer attempts to purchase the shares directly from the target stockholders and effectively operate the target company as a subsidiary. One of the benefits of structuring the transaction in this manner is the avoidance of corporate law formalities necessary to effectuate a merger.[140] Thus, an

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[135] Vikramaditya Khanna, *The Growth of the Fiduciary Duty Class Action for Freeze Out Mergers: Weinberger v. UOP, Inc.* in THE ICONIC CASES IN CORPORATE LAW 194 (Jonathan R. Macey ed. 2008).

[136] The transaction consideration can also consist of shares in a surviving entity. In this situation, while the transaction is no longer a "cash out" it is still a "freeze out" for the minority, since they are forced to relinquish shares in the original company.

[137] Other techniques include the de facto merger doctrine and the sale of all assets. *See* PETER V. LETSOU, CASES AND MATERIALS ON CORPORATE MERGERS AND ACQUISITIONS 136-162 (2006).

[138] 8 *Del. C.* § 251.

[139] WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 467-68 (4th ed., 2012).

[140] LETSOU, *supra* note 137. This is not to say that tender offers are unregulated. On the contrary, they are heavily regulated by the federal securities law; *id.* at 168-369.

acquirer wary about receiving approval by the target's board can bypass these requirements by means of a tender offer.

The standard of review used to adjudicate a complaining stockolder's claim against a freeze out transaction plays a significant role in their regulation.[141] Delaware law allows controllers to cash out minority stockholders, subject to certain legal and regulatory conditions aimed at ensuring stockholder's information rights and ability to block the transaction. Since the current state of the law is commonly traced to *Weinberger v. UOP*,[142] the depiction of the judicial evolution will start from there.

In addition to serving as a starting point for modern freeze out adjudication, *Weinberger* serves as a "how not to" manual for controlling stockholders wishing to orchestrate the removal of minority stockholders.[143] The Supreme Court made clear that a party standing on both sides of the transaction bears the burden of satisfying an entire fairness standard of review.[144]

Weinberger rightfully earned iconic status for its attempt to achieve transactional fairness in a related party context. However, some pertinent issues were left unaddressed. Specifically, the court did not opine on whether a controller can employ devices that would allow for a downgrade of the standard of review. The Supreme Court clarified this issue in *Kahn v. Lynch*.[145]

The *Lynch* decision reiterated the holding that a dominating stockholder standing on both sides of the merger bears the burden of proving the transaction's entire fairness.[146] The court added a new doctrinal wrinkle by decreeing that approval of the going private transaction by *either* an independent committee of directors or an informed vote by a majority of minority stockholder shifts the burden of proof from the controlling stockholder to the plaintiff challenging the transaction.[147] Even so, the *Lynch* court emphasized that even should

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[141] *See supra* note 1 and accompanying text.

[142] *Weinberger*, 457 A.2d 701 (Del. 1983).

[143] Signal, UOP's controlling stockholder with 50.5% of UOP's shares, appointed several of its officers to serve on UOP's board. When Signal began contemplating the purchase of the rest of UOP's shares, two of the Signal-affiliated UOP directors furnished Signal with a 'feasibility study' peppered with privy information obtained by virtue of their position at UOP. *Id.* at 708-09.

[144] *Id.* at 710 ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts").

[145] 638 A.2d 110, 115-17 (Del. 1994).

[146] *Id.* at 1117 ("Once again, this Court holds that the exclusive standard of judicial review in examining the propriety of an interested cash-out merger transaction by a controlling or dominating shareholder is entire fairness").

[147] *Id.*

this happen, "an entire fairness analysis if the only proper standard of judicial review."[148]

Lynch solidified the hegemony of entire fairness review for going private mergers for the next two decades. However, recall that there is more than one way for a controller to carry out a going private transaction. *In re Siliconix*[149] addressed the applicability of *Lynch*'s holding to tender offer freeze-outs.[150]

The background facts should by now seem familiar: a majority stockholder wishes to purchase the remaining shares of a publicly-held subsidiary. Instead of a merger, the controlling stockholder proposes a tender offer for the remaining public float, publicly announcing that she would 'contemplate' the effectuation of a short-form merger should the tender offer bring her past the 90% threshold.

Weinberger and *Lynch* make clear that a mere existence of a controlling stockholder in a going-private merger necessitates entire fairness review. Rather than extending this rationale to tender offers, the *Siliconix* court concluded that controlling stockholders are under no duty to prove the entire fairness of their offer.[151]

The court acknowledged that this result "may seem strange" from the vantage point of minority stockholders.[152] After all, freeze out mergers and tender offers arrive at the same practical result. The *Siliconix* court rationalized the divergent standards of review on account of the role played by the corporate machinery in each transactional setting. A merger is a corporate action, while a tender offer is not.[153] A stockholder in the tender offer setting must directly decide whether to tender his shares. A merger, by contrast, cannot go through without board approval of the merger agreement. The Delaware General Corporation Law therefore imposes a positive fiduciary duty in the merger context, while no similar mandate is imposed for a tender offer.

While disavowing entire fairness review, the court emphasized that target stockholders in a tender offer are not completely at the mercy of the controlling stockholder. Coercive acts or disclosure violations will invite court intervention to ensure a stockholder's free choice.[154] This

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[148] *Id.*

[149] *In re* Siliconix Inc. S'holder Litig., 27 DEL. J. CORP. L. 1011, 1021-24 (Del. Ch. June 19, 2001).

[150] The tender offer freeze out is accomplished by a subsequent short form merger in order to eliminate the entire minority float; *see* 8 *Del. C.* § 253.

[151] *In re Siliconix*, at 1021.

[152] *Id.*

[153] *Id.* at 1022-23.

[154] *Id.* at 1021.

qualification will prove instrumental in the evolution of judicial review of tender offers.

Following *Siliconix*, two divergent authorities simultaneously existed for economically similar transactions. On one hand, *Lynch* made clear that a going private merger with a controlling stockholder will necessitate entire fairness review. On the other hand, *Siliconix* endorsed a seemingly lax role for the judiciary when the tender offer method was employed. In several well-known opinions, the Court of Chancery strived to provide consistent and effective protective measures to frozen out stockholders, regardless of the transactional form chosen by the controller.

In re Pure Resources, Inc. Shareholders Litigation remains perhaps the most famous of the decisions to address the relatively lax protection afforded minority stockholders in a tender offer.[155] Then-Vice Chancellor Strine noted that the divergent treatment of economically similar transactions creates a possible incoherence in the law.[156] Indeed, the retributive capabilities of the controlling stockholder in a tender offer are substantially equivalent to those in the freeze out merger setting.[157] If anything, minority stockholders facing a tender offer are worse off than those contemplating a freeze out merger. In a merger, all stockholders are treated the same; dissenting stockholders are given identical consideration in lieu of their shares. Thus, a stockholder rejecting the merger is aware that should the merger pass despite his vote, he would receive the same consideration as those voting in favor.[158]

A tender offer, by contrast, does not include a mandatory share purchase mechanism. If other stockholders elect to sell, the dissenting stockholder has no right to force the offeror to purchase his shares after conclusion of the tender offer. Prior to *Pure Resources*, a tender offeror was under no obligation to treat all stockholders uniformly. A stockholder contemplating rejection of the tender offer is thus painfully aware that other stockholders can elect to sell, leaving her in the unenviable position as part of an even smaller minority float in fear of the controller's wrath.[159]

While the *Pure Resources* court could have opted for the easier route of extending entire fairness review to tender offers, the court increased stockholder protection by fleshing out the nebulous "coercion" exception that was left vague in *Siliconix*. Thus, a tender offer would be

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155 808 A.2d 421, 424-25 (Del. Ch. 2002).

156 *Id.* at 435.

157 *Id.* at 441.

158 *Id.* at 441-42.

159 *Id.*

deemed non-coercive if the following conditions were all met: (i) the offer is subject to a non-waivable majority of minority stockholder tender condition; (ii) a commitment by the controlling stockholder to consummate a swift short-form merger at an identical price should she pass the 90% ownership threshold; (iii) the absence of retributive threats by the controller.[160]

Then-Vice Chancellor Strine authored the next important chapter in the evolution of the treatment of freeze out transactions.[161] From a purely procedural standpoint, *Cox Communications* deals with a post-merger settlement offer. *Cox Communications* is noteworthy for its introduction of a coherent framework through which to reconcile Delaware's disparate treatment of the two main freeze-out mechanisms.

While noting that *Lynch* creates a strong incentive for special committees of independent directors, the structure falls short of recreating an accurate depiction of an arm's-length transaction. Specifically, because the controller will most likely own enough shares to make the accompanying merger vote a foregone conclusion, minority stockholder are effectively silenced. Although a controller can voluntarily subject the merger to a further majority of the minority provision, *Lynch* made sure that no added benefit will accrue from doing so. On the contrary, a rational controller would shy away from the additional transactional risk.[162]

In order to incentivize the controller to replicate an arm's length transaction, Vice Chancellor Strine contemplates affording business judgment rule review for going private mergers that effectively employ dual protective measures: (1) approval of the transaction by an independent director committee; and (2) conditioning the merger on the approval of a majority of minority stockholders.[163]

Importantly, the proposed amendment to the *Lynch* line of holdings would create a universal transactional structure, since stockholders facing tender offers and going private mergers will now be afforded identical protection.[164]

Cox Communication's unified standard for reviewing all controlling stockholder freeze-outs was explicitly adopted and modestly refined by later Court of Chancery decisions.[165] Nevertheless, without

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[160] *Id.* at 445.

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

[162] *Id.* at 618.

[163] *Id.* at 643-44.

[164] *Id.* at 646.

[165] *See In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010); *In re* John Q Hammons Hotels Inc. S'holders Litig., 2009 WL 3165613, at *11-12 (Del. Ch. Oct. 2, 2009); *In re* MFW S'holders Litig., 67 A.3d 496, 525 (Del. Ch. 2013).

clear recognition by the Supreme Court, the unified standard's precedential validity remained in doubt.[166] MacAndrews & Forbes decision to take M&F Worldwide private provided the Delaware Supreme Court with the opportunity to generate binding precedent and remove any remaining uncertainty on this issue.

Because minority stockholders face the danger of expropriation in both going private and going concern transactions, it is clear that certain common principles apply. For instance, the Supreme Court has made it clear that self-dealing by the controlling stockholder will be policed via the entire fairness standard of review, regardless of the transactional form.[167] The key decisions refer to the *Weinberger-Lynch* line of cases as authority for this holding.

However, unfiltered application of holdings rendered in the going private context to going concern transactions is not without controversy. Several Court of Chancery decisions authored by now-Chief Justice Strine have expressed doubt whether the holdings generated by the *Lynch* line of cases apply outside the freeze out context.[168] Since *MFW* clearly descends from *Lynch*, this reasoning undercuts the dual approval mechanism's validity for going concern transactions.

This sub-Section situates *MFW* on a path of sequential decisions that culminates in a cohesive judicial approach to all going private transactions.[169] While this path might have not yet reached its final

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[166] *In re* Cox Radio, Inc. S'holders Litig., 2010 WL 1806616, at *20-23 (Del. Ch. May 6, 2010) (Vice Chancellor Parsons declining to apply the *Cox Communication*'s "unified approach" in the context of a fee determination for plaintiff's lawyers after litigation of a freeze out tender offer); *see also* Suneela Jain, Ethan Klingsberg & Neil Whoriskey, *Examining Data Points in Minority Buy-Outs: A Practitioner's Report*, 36 DEL. J. CORP. L. 939, 949 (2011) ("The goals of the Court of Chancery [in creating a unified approach] are straightforward, and its method of achieving them is arguably more coherent than the bifurcated approach that, until the Delaware Supreme Court rules otherwise, remains law").

[167] Americas Mining Corp. v. Theriault, 51 A.3d 1213, 1239 (Del. 2012) ("When a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness, with the defendants having the burden of persuasion").

[168] Teachers' Ret. Sys. of La. v. Aidinoff, 900 A.2d 654, 669 n.19 (Del. Ch. 2006) ("There is more complexity about [informed approval of a conflict transaction] now than there was, say, 45 years ago, mostly because of a line of decisions that focus on conflicted mergers with controlling stockholders . . . The precise extent to which that line of cases applies outside that context is an ongoing subject of debate"); *R.S.M. Inc. v. Alliance Capital Mgmt. Holdings L.P.*, 790 A.2d 478, 498 n. 28 (Del. Ch. 2001) ("A specialized rule [of shareholder ratification] applies in the case of a squeeze-out merger proposed by a controlling stockholder, see *Kahn v. Lynch Communication Systems, Inc.*, [638 A.2d 1110 (Del. 1994)]. The Reorganization at issue in this case is not comparable to such a transaction; moreover, it would seem unwise to expand this doctrinal anomaly into the limited partnership setting.").

[169] *See* Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908, 1909-12 (1998) (identifying Delaware's strategic use of

destination,[170] the analysis reinforces the conclusion that *MFW*'s precedential value is limited to controlling stockholder freeze-outs.

While some aspects of the regulation of going private transactions no doubt intersect with those of going concern decisions, extension of the ratification mechanism requires a more thorough discussion of the underlying policy concerns.[171] The next Section will re-examine the policy considerations espoused by the Supreme Court and ponder their applicability for going concern transactions with a controlling stockholder.

VI. ENHANCED RATIFICATION AND THE QUESTION OF PRICE FOR GOING CONCERN TRANSACTIONS WITH CONTROLLING STOCKHOLDERS

Regardless of the chosen transactional structure, related party transactions with controlling stockholders raise similar concerns for minority stockholders. The divergence of interests between the controller and the broad stockholder base might disincentivize the corporation's bargaining agents from securing the best deal possible from the viewpoint of minority stockholders.[172]

Traditionally, Delaware courts police this divergence of interests by means of the entire fairness standard of review. Judicial proclamations singled out the 'fair price' component as the more significant aspect of entire fairness review.[173] *MFW*'s holding is

indeterminate and slowly-evolving corporate law doctrines and arguing that it plays a factor in the state's success in the race for incorporations).

[170] The *MFW* decision's failure to specifically reference other modes of controlling share freeze-outs that garner entire fairness review, such as a reverse stock split, might lead to future litigation on this issue. *See* Strougo v. Hollander, 111 A.3d 590, 595 (Del. Ch. 2015) (using presumptive entire fairness standard of review for a reverse stock-split bylaw amendment that effectively froze out minority stockholders).

[171] *Cf.* Leo E. Strine Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 510 (2002) ("In the *Tremont* and *Emerald Partners* cases, the *Lynch* doctrine was *arguably* extended from the unique context of a going private transaction to address any transaction involving a controlling stockholder, on the one side, and another controlled corporation, on the other. This arguable extension occurred without discussion of whether a transaction potentially less important to a majority stockholder (such as the sale of a modest-sized asset) should be subject to the same rules as a squeeze-out merger").

[172] *See id.* at 504 ("I will start with an obvious concern. Dominator is a majority shareholder. Nagging at the judge will be a concern that . . . even the independent directors will be subtly influenced by the fact that Dominator has the voting power to unseat them the next time around"); Hill & McDonnell, *supra* note 25, at 924.

[173] Kahn v. M&F Worldwide Corp., 88 A.3d 635, 645 (Del. 2014) ("[T]his Court has consistently held that, although entire fairness review comprises the dual components of fair dealing and fair price, in a non-fraudulent transaction 'price may be the preponderant consideration outweighing other features of the merger'").

grounded in the efficacy of the positive endorsement by two qualified decisionmakers. The dual approval mechanism is believed to produce comparable benefits to intrusive judicial review in guaranteeing the best price possible for minority stockholders. The remainder of this Section ponders the validity of the Supreme Court's reasoning in the context of going concern transactions with controlling stockholders.

A. *Independent Board Committees and the Question of Price*

Delaware's longstanding support of independent director committees as a procedural safeguard rests on the notion that formal independence leads to optimal results for minority stockholders. To be sure, some empirical evidence has confirmed the relationship between properly empowered independent committees and stockholder value in the context of freeze out transactions. However, these findings go against the bulk of the research questioning the value added by independent directors in general and do not easily extrapolate to going concern transactions.

The post-*Siliconix* schism in Delaware takeover law generated a host of scholarly articles that attempted to explain, justify, or reconcile the disparate judicial treatment.[174] Arguably the most influential of these articles was an empirical work authored by Professor Guhan Subramanian.[175] Professor Subramanian's database included all controlling stockholder going private transactions undertaken in Delaware in the four years following the *Siliconix* decision. Professor Subramanian found that target stockholders on the receiving end of a merger enjoyed higher cumulative abnormal returns (CARs) than stockholders for corporations that were about to be taken private via a tender offer.[176] Since independent committees are a frequent feature for

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[174] *See, e.g.*, Ely R. Levy, *Freeze-out Transactions the Pure Way: Reconciling Judicial Asymmetry Between Tender Offers and Negotiated Mergers*, 106 W. VA. L. REV. 305 (2003-2004); Kimble Charles Cannon, *Augmenting the Duties of Directors to Protect Minority Shareholders in the Context of Going-Private Transactions: The Case for Obligating Directors to Express a Valuation Opinion in Unilateral Tender Offers After Siliconix, Aquila, and Pure Resources*, 2003 COLUM. BUS. L. REV. 191 (2003); Brian M. Resnick, *Recent Delaware Decisions May Prove to be "Entirely Unfair" to Minority Shareholders in Parent Merger with Partially Owned Subsidiary*, 2003 COLUM. BUS. L. REV. 253 (2003); Adam C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 BERKELEY BUS. L.J. 83 (2004).

[175] Guhan Subramanian, *Post-Siliconix Freeze-Outs: Theory and Evidence*, 36 J. LEGAL STUD. 1 (2007). A draft of this paper, which was submitted as an affidavit on behalf of the plaintiffs by Professor Subramanian, was analyzed extensively by then-Vice Chancellor Strine in In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 625-30 (Del. Ch. 2005).

[176] Subramanian, *supra* note 175, at 14. This finding was replicated via slightly different methodology in Fernán Restrepo, *Do Different Standards of Judicial Review Affect*

both types of transactions, Professor Subrahamian attributes the higher stockholder gains to the committees' veto power in the merger setting.[177] The elimination of the CARs gap following Cox Communication's mandated empowerment of the independent committee in the context of a tender offer freeze-out reinforces this conclusion.[178]

While extremely informative, these findings do not support the proposition that independent director committees promote stockholder value in other types of related party transactions. The shortage in explanatory power is explained by the dissimilar roles that independent committees are expected to fulfil in the different transactional settings.

Proponents of the 'independent director movement' theorize that distance from the powers that run the corporation leads to increased objectivity. The argument further equates objectivity with more efficient fulfillment of their fiduciary duties. This account, however, ignores the fact that increased objectivity comes at a price. Independent directors often have no first-hand knowledge of the corporation or its business and must rely on second-hand accounts.[179]

Judicial guidelines attempt to alleviate this problem by requiring that independent committees be supplied with a wealth of available information. However, this solution overlooks the fact that "information" does not necessarily equate with the "firm-specific knowledge" necessary to fulfilling the independent committee's task in the going concern setting. While independence and objectivity might be beneficial to satisfying the board's monitoring functions, this is but one aspect of the board's role.[180]

Independent committees charged with examining a going concern related party transaction with a controlling stockholder fulfill more than one board function. While it is expected that they monitor the

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the Gains of Minority Shareholders in Freeze-Out Transactions? A Re-Examination of Siliconix, 3 HARV. BUS. L. REV. 321, 324 (2013).

[177] *Id.* at 6.

[178] Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach* (2013). Rock Center for Corporate Governance at Stanford University Working Paper No. 153, *available at* http://ssrn.com/abstract=2297707 (finding that the gap in stockholder CARs between the two transactional structures disappeared following *Cox Commc'ns*).

[179] Arnoud W. A. Boot & Jonathan R. Macey, Monitoring *Corporate Performance: The Role of Objectivity, Proximity and Adaptability in Corporate Governance*, 89 CORNELL. L. REV. 356, 358 (2003) (objectivity and proximity of monitors are two goals that cannot be achieved simultaneously); Jill Fisch, *Taking Boards Seriously*, 19 CARDOZO. L. REV. 265, 267 (19970-1998) ("director independence . . . come[s] at the expense of a decline in the board's management capacity").

[180] Lynne L. Dallas, *The Multiple Roles of Corporate Boards of Directors*, 40 SAN DIEGO L. REV. 781, 782-783 (2003) (characterizing the functions of the board as monitoring, relational and strategic).

transaction for potential abuses, many going-concern transactions are an integral part of long-term corporate strategy. A lack of firm-specific or industry-specific knowledge hampers the independent director's ability to observe and assess a corporation's strategic direction.[181] Instead of guaranteeing the best price for the minority, independent director committees might not be able to properly value the synergies that the related party transaction adds to the corporation.

In sum, *MFW*'s holding is influenced by the empirical literature that shows a causal link between the employment of empowered independent director committees and additional stockholder value. However, this data does not lend itself to going concern transactions. The next sub-Section will take a closer look at majority of the minority stockholder voting provision and contemplate whether *MFW*'s confidence in the stockholder vote is similarly misplaced.

B. *Majority of Minority Stockholder Approval and the Question of Price*

The stockholder vote is believed to distill the efficient result for the broad stockholder base.[182] However, several impediments stand in the way of achieving this goal. Ultimately, conditioning the course of action on stockholder approval cannot guarantee an efficient result. A majority of the minority condition does not change the basic calculus, and in fact has the potential to engender even more harm.

Monitoring a publicly-held corporation is a costly endeavor; forming an educated opinion about business intricacies requires the stockholder to collect and process a vast amount of information. Owing to the minute share ownership of most minority stockholders, chances are that most stockholders do not play a pivotal role in the vote. In addition, any benefits that a value-producing vote accrues to the corporation will be distributed among all stockholders. As a result, the expected benefits of an informed vote are microscopic and at the very best marginally related to the incurred costs. The above analysis leads to

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[181] Fisch, *supra* note 179, at 282-286; Nicola F. Sharpe, *Rethinking Board Function in the Wake of the 2008 Financial Crisis*, 5 J. BUS. & TECH. L. 99, 108-110 (2010).

[182] Crown Emak Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010) (quoting Kurz v. Holbrook, 989 A.2d 140, 178 (Del. Ch. 2010)) ("[W]hat legitimizes the stockholder vote as a decision-making mechanism is the premise that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization"); *see also* Miriam Bitton & Odelia Minnes, *Exploring the Standard of Review of Transactions with Controlling Shareholders After In re* MFW Shareholders Litigation *(Decided May 29th, 2013)*, J. BUS. ENTREPRENEURSHIP & L. 447, 457-464 (2014) (explaining how changing realities promote shareholder participation in the going private context).

a phenomenon labeled by the finance literature as 'rational apathy': a typical stockholder has no incentive to inform himself and participate in the vote, and therefore will not.[183]

Arguably, a majority of the minority condition works to dissipate the rational apathy associated with the stockholder vote. Exclusion of the controlling stockholder from the voting constituency increases the relative voting power attached to a minority stockholder's holdings; the possibility that a minority stockholder's vote will prove pivotal rises. Increased voting power provides a greater incentive to acquire adequate information on the voted-upon issues. In theory, the minority of the majority condition facilitates an informed and efficient vote by the stockholder constituency. Unfortunately, the realities of stockholder voting cast serious doubt on the realization of this objective.

Although minority stockholders subject to this condition ostensibly have a greater incentive to collect information on the issues on the ballot box, there is no guarantee that this incentive is enough to overcome rational apathy; the high costs associated with becoming informed and the division of potential benefits conspire to preclude minority stockholders from actually carrying out this endeavor. In all likelihood, minority stockholders that wish to make their vote count—but not enough to actually incur the costs necessary to become informed—will blindly vote in accordance with the recommendation of proxy advisory services.[184] The proxy advisors' use of "one size fits all" recommendations based upon purported corporate best practices are not supported by the literature.[185]

Increasing the power given to minority stockholders is a potentially misguided strategy for a different reason. Minority stockholders, even relatively substantial ones, are not all cut from the same cloth. In fact, minority stockholders are motivated by widely divergent interests.[186] In order for the error-correcting role of the stockholder vote to function correctly, stockholders must share a common goal. Raising the relative voting power of minority stockholders transforms formerly disenfranchised stockholders into

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[183] Stephen M. Bainbridge, *The Case for Limited Shareholder Voting Rights*, 53 UCLA L. REV. 601, 607 (2006).

[184] DAVID LARCKER & BRIAN TAYAN, CORPORATE GOVERNANCE MATTERS: A CLOSER LOOK AT ORGANIZATIONAL CHOICES AND THEIR CONSEQUENCES 403 (2012).

[185] Asaf Eckstein, *Great Expectations: The Peril of an Expectations Gap in Proxy Advisor Regulation*, 40 DEL. J. CORP. L. 77, 80 (2015).

[186] Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006) (depicting the divergent interests of minority stockholders along the following axis: investment horizon (short vs. long termism), risk preference (diversified vs. non-diversified), and degree of "social" considerations (union-affiliated stockholders vs. financial institutions).

potential swing-votes. Under these conditions, it is perfectly rational for a minority stockholder to utilize his new-found voting power to engage in 'rent-seeking' behavior; i.e. to condition his agreement on the promotion of private interests that have the potential to be detrimental to the rest of the stockholders.[187]

Another distinction between stockholder voting on freeze-out transactions and going-concern related party transactions needs to be made. In both scenarios, public stockholders generally suffer from information deficits regarding the intrinsic value of the corporation or the transaction at hand. Incentivizing stockholders to carry out an informed vote is an essential component of a well-operating voting regime. Stockholders in a going-private scenario have higher motivation to inform themselves about the value of the transaction as well as a much cheaper way to do so.

A successful undertaking of a going-private transaction results in the elimination of the public float. Stockholders are in fact voting on whether to cash in on the future revenue stream associated with their shares. A 'wrong' decision cannot be easily rectified; stockholders that successfully defeat a value-enhancing deal will be left owning something of worse value. Conversely, agreeing to sell means that the stockholder will not participate in future gains. The incentive to make an informed decision will never be higher. In addition, the capital market's ability to aggregate available information into a single stock price offers the stockholders a clear benchmark of the value of their shares.[188]

By contrast, stockholders asked to approve a going concern related party transaction have neither the incentive nor the informational shortcut that attach to a going-private transaction. Regardless of the final tally, their shares will still be in their possession. Continued share ownership allows them to enjoy future gains if the transaction is value-producing or punish the corporation if the transaction is value-reducing. Regardless, stockholders can defer passing judgment on the transaction to a later period. There is no unique incentive to accrue costs designed to inform themselves about the efficacy of the transaction. Not only is there no incentive, in contrast to a going-private decision the deliberating stockholders cannot readily rely on the market price of the shares. The evidence casts doubt on the market's ability to disentangle and accurately price discrete portions of the corporate enterprise.[189]

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[187] Bainbridge, *supra* note 183, at 634.

[188] *Id.*

[189] Sudha Krishnaswami & Venkat Subramanium, *Information Asymmetry, Valuation and the Corporate Spin-off Decision*, 53 J. FIN. ECON. 73, 73 (1999) (providing evidence that information asymmetries prevent the market from correctly pricing independent firm units and that the actual value is recognized following a spin-off).

VII. CONCLUSION

The goal of this article is to contemplate whether or not the *MFW* decision produces an all-encompassing ratification framework applicable to all related party transactions with a controlling stockholder. After reviewing the text, the context, and the underlying policy justifications enumerated in the Supreme Court's decision, this article concludes that *MFW*'s holding is limited to the context of going private transactions.

This conclusion breeds a host of new enquiries. Pertinently, it leaves unanswered the question of the proper ratification procedure for going concern transactions with controlling stockholders. In a further study I intend to inquire into a possible solution. Suffice it for now, the framework for evaluating these types of transactions must strike a careful balance in order to avoid both over- and under-deterrence of corporate transactions.

A critical distinction between going concern and going private related party transactions is the procedural avenue that a stockholder must follow. Under established Delaware law, going concern claims must be vindicated via a derivative suit, while going private claims are pursued via a class action lawsuit.[190] This distinction is significant.

Derivative lawsuits entail procedural hurdles such as the demand requirement and the corporation-defendant's ability to form a special litigation committee with the power to commandeer the plaintiff's lawsuit. These two procedural quirks are absent in the class action setting. As a result of this discrepancy, litigation against controlling stockholder going concern transactions did not experience the litigation explosion that going private transactions engendered. A comprehensive ratification framework for controlling stockholder going concern transactions must take this issue into account.

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[190] *See* Tooley v. Donaldson, Lufkin & Jenrette, 845 A.2d 1031 (Del. 2004).