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IN THE SUPREME COURT OF THE STATE OF DELAWARE

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

CORRECTED *AMICUS CURIAE* BRIEF OF PROFESSOR CHARLES M. ELSON IN SUPPORT OF APPELLANTS

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STATEMENT OF IDENTITY OF AMICUS CURIAE AND INTEREST IN THE CASE

Amicus, Professor Charles M. Elson, is a leading corporate governance expert who has a wealth of both academic and practical experience, which gives him a unique perspective on the critical question for which the Court has sought supplemental briefing.

Professor Elson is the retired Edgar S. Woolard, Jr. Chair in Corporate Governance and the founding Director of the John L. Weinberg Center for Corporate Governance at the University of Delaware. Professor Elson has served as a director of many public corporations, including, among others, Enhabit, Inc., Encompass Health Corporation, Bob Evans Farms, Inc., HealthSouth Corporation, and AutoZone, Inc. Professor Elson served as vice chairman of the American Bar Association's Committee on Corporate Governance and as a member of the National Association of Corporate Directors' Best Practices Council on Coping with Fraud and Other Illegal Activity. He serves as the Executive Editor at Large for Directors and Boards magazine.

SUMMARY OF ARGUMENT

The IAC Defendants say "recent Chancery decisions unreviewed by this Court" have departed from what they describe as "the traditional rule that in most transactions with a controlling stockholder, use of any of the three traditional cleansing devices ... would invoke the business judgment rule."[1]

This, the IAC Defendants say, is "*MFW* creep."[2] Their supplemental brief repeats the phrase thirteen times.[3] Making the same assertion over and over again does not make it an accurate description of the development of Delaware law.

The IAC Defendants' core premise is backwards. Historically, the baseline standard for review of conflicted-controller transactions has been entire fairness. As an incentive to encourage controllers to provide important protections, *MFW* created an *exception* to that rule if two cleansing devices were imposed from the beginning: an independent committee and a majority-of-the-minority vote. By applying entire-fairness review to conflicted-controller transactions where only one cleansing device is used, the Court of Chancery is faithfully applying black-letter Delaware doctrine

[1] IAC Defs' Ans. Br. at 2, 5.

[2] *Id.* at 1-2.

[3] IAC Defs' Supp. Op. Br. at 4, 7, 8, 23, 25 n.18, 28, 32, 36.

established by an unbroken line of decisions from this Court, reaching back to *Kahn v. Tremont*.[4]

It is the IAC Defendants who seek a radical change in Delaware's treatment of conflicted-controller transactions. And it is the IAC Defendants who ask the Court to erase decades' worth of well-established corporate law with strong policy roots. If accepted, the new rule they advocate would topple foundational precedents, upset investors' settled expectations, and harm the Delaware franchise.

[4] *Kahn v. Tremont* ("*Tremont II*"), 694 A.2d 422, 428 (Del. 1997).

ARGUMENT

I. *MFW* Creep Is A Myth

It is well-established Delaware law that a single cleansing device is not enough to earn business-judgment review of a conflicted-controller transaction. As early as *Getty Oil*, this Court concluded that stockholder approval of an all-stock merger with a conflicted controller could shift the burden but the standard remained entire fairness.[5] In *Kahn v. Lynch*, this Court held 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" and that "approval of the transaction by an independent committee of directors or an informed majority of minority shareholders" would merely "shift[] the burden of proof on the issue of fairness … to the challenging shareholder-plaintiff."[6]

Two years later, in *Tremont I*, Chancellor Allen confronted the purchase by Tremont Corporation of shares of NL Industries, an entity owned by Tremont's controller, Valhi.[7] That conflicted-controller transaction was not a squeeze-out merger and was approved by a special committee. Arguing for business-judgment review, the "[d]efendants [sought] to limit *Lynch* to cases in which mergers give rise

[5] *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985).

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

[7] *Kahn v. Tremont Corp.* ("*Tremont I*"), 1996 WL 145452 (Del. Ch.), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

to the claim of unfairness[.]"[8] Chancellor Allen wisely rejected the argument, noting that defendants could "offer no plausible rationale for a distinction between mergers and other corporate transactions and in principle I can perceive none. Thus, I conclude that … the operation of such a committee can only shift to plaintiff the burden of proving that the transaction was unfair."[9]

Reviewing that decision, in *Tremont II*, this Court reversed Chancellor Allen's conclusion that the transaction was fair but adopted the same burden-shifting rule: "[W]hen a controlling shareholder stands on both sides of the transaction the conduct of the parties will be viewed under the more exacting standard of entire fairness … Entire fairness remains applicable even when an independent committee is utilized because the underlying factors which raise the specter of impropriety can never be completely eradicated and still require careful judicial scrutiny."[10] *That* is the traditional rule. It is a rule that provides the correct balance of protections for minority investors who cannot otherwise protect themselves at the voting polls. And it is a rule that this Court has consistently followed.

In *Emerald Partners v. Berlin*, the Court evaluated a transaction in which a

[8] *Id.* at *7.

[9] *Id.*

[10] 694 A.2d at 428.

controlled company bought thirteen small companies owned by its controller.[11] This was not a squeeze-out merger and the transaction was approved by an independent committee.[12] In reversing the Court of Chancery's grant of summary judgment to defendants, this Court recognized that "approval of the transaction by an independent committee of directors … may supply the necessary basis for shifting the burden" but entire fairness still applies.[13]

In *Reader's Digest*, plaintiffs sought an injunction, not of a squeeze-out merger but of a recapitalization in which a controlled company would repurchase its controller's Class B shares at a premium.[14] The recapitalization was approved by a special committee, yet this Court held that "the initial burden of establishing entire fairness rests upon the party who stands on both sides of the transaction" and the independent committee's approval would result merely in a burden shift.[15] This Court reversed the Court of Chancery's judgment denying a preliminary injunction and remanded with instructions to enter an injunction.[16]

In *Americas Mining*, the Court evaluated not a squeeze-out merger but a

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[11] 726 A.2d 1215, 1218 (Del. 1999).

[12] *Id.* at 1223.

[13] *Id.* at 1222–23.

[14] *Levco Alternative Fund Ltd. v. Reader's Digest Ass'n, Inc.*, 803 A.2d 428, *1 (Del. 2002).

[15] *Id.* at *2.

[16] *Id.* at *3.

controlled company's acquisition of its controller's interest in a Mexican mining company in a transaction approved by a special committee.[17] Affirming the Court of Chancery's judgment for plaintiffs, this Court recognized that "Delaware has long adhered to the principle that the controlling shareholders have the burden of proving an interested transaction was entirely fair" and that the "use of procedural devices that foster fair pricing, such as special committees and minority stockholder approval conditions" could, at most, shift the burden.[18]

Since *MFW*, the Court of Chancery and this Court have continued to apply the traditional rule of entire-fairness review to non-squeeze-out transactions where those dual protections were not present.

Most recently, in *Olenik v. Lodzinski*, the plaintiffs challenged a controlled company's acquisition of another company owned by the controller.[19] This was not a squeeze-out merger, and the transaction was approved by both a special committee and a majority of minority stockholders.[20] This Court reversed the Court of Chancery's dismissal, holding that the controller was not entitled to business judgment rule dismissal because the *MFW* conditions were not imposed until after

[17] *Americas Mining Corp. v. Theriault*, 51 A.3d 1213, 1218 (Del. 2012)

[18] *Id.* at 1242.

[19] 208 A.3d 704, 707 (Del. 2019).

[20] *Id.* at 706-07.

substantive economic negotiations were underway.[21]

The Court of Chancery decisions applying entire fairness to non-squeeze-out transactions are simply following the principles laid out by this Court in an unbroken string of decisions stretching back almost three decades. None of this is novel. There is no "*MFW* creep."

That phrase—which has never appeared in any written decision by a Delaware court—emerged from a 2022 article written by former Chief Justice Strine, former Justice Jacobs, and Professor Hamermesh.[22] But even that article had to "acknowledge the many cases stating that any conflicted self-dealing transaction with a controlling stockholder is subject initially to the entire fairness standard."[23]

Not long ago, Professor Hamermesh acknowledged that entire fairness would "also apply to other transactions," beyond a squeeze-out, in which a "controlling shareholder obtains a benefit at the expense of the corporation or its other shareholders. In such cases, it seems unlikely, or even unthinkable, that a challenge to such a transaction would be dismissed at the pleading stage; even where an ostensibly independent committee of directors approves the transaction, uncertainty about the independence of the directors ordinarily will prevent dismissal at the

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[21] *Id.* at 707.

[22] Lawrence A. Hamermesh et. al., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 337 (2022).

[23] *Id.* at 341.

pleading stage."[24] Professor Hamermesh made clear that he did not "urge that the pleading stage triage system ... expand to reach such cases" because "these cases are likely to have substantial merit and are thus unlikely to present the merger tax problem of extracting settlements or imposing other costs in litigation lacking merit."[25]

Similarly, while still sitting on the bench, both former jurists recognized—long before *MFW*—that the use of a single cleansing device could not (and should not) eliminate entire-fairness review of a non-squeeze-out conflicted-controller transaction. In *Wheelabrator*, then-Vice-Chancellor Jacobs concluded, correctly, that in "transactions between the corporation and its controlling stockholder," even where there was approval by minority stockholders, "the standard of review remains entire fairness, but the burden … shifts to the plaintiff."[26] Vice Chancellor Jacobs recognized that "[t]hat burden-shifting effect … has also been held applicable … in a case involving a transaction other than a merger."[27]

In *Pure Resources*, then-Vice-Chancellor Strine acknowledged that "later

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[24] Lawrence A. Hamermesh & Michael L. Wachter, *The Importance of Being Dismissive: The Efficiency Role of Pleading Stage Evaluation of Shareholder Litigation*, 42 J. CORP. L. 597, 648–49 (2017).

[25] *Id.*

[26] *In re Wheelabrator Techs., Inc. S'holders Litig.*, 663 A.2d 1194, 1203 (Del. Ch. 1995).

[27] *Id.*

cases … [had] extended the [burden-shifting] rule in *Lynch* to a broader array of transactions involving controlling shareholders" beyond squeeze-out mergers.[28] Years later, then-Chancellor Strine was the author of the Court of Chancery decision affirmed in *Americas Mining*. That case was not a squeeze-out merger and Chancellor Strine stated, correctly, that approval by a special committee or minority stockholders would merely shift the burden.[29] In light of the post-trial ruling in that case, one can infer that Chancellor Strine also believed that denying business-judgment review to that transaction reflected the correct policy.

At bottom, if there has been "*MFW* creep," it has been moving in the opposite direction of what the IAC Defendants suggest. *MFW* was originally adopted to provide controlling stockholders an incentive to provide extra protections to minority investors in the already-highly-regulated squeeze-out context.[30] As written, *MFW* gave controllers no expectation or entitlement of obtaining business judgment review when effecting conflicted transactions not subject to the same market and regulatory forces as a squeeze-out. Nevertheless, this Court and the Court of

[28] *In re Pure Res., Inc., Shareholders Litig.*, 808 A.2d 421, 437 & n.22 (Del. Ch. 2002) (citing this Court's decisions in *Emerald Partners*, 787 A.2d at 93 n.52 and *Tremont II*, 694 A.2d at 428).

[29] *In re Southern Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 788 (Del. Ch. 2011), *aff'd sub nom. Americas Mining Corp. v. Theriault*, 51 A.3d 1213.

[30] *Kahn v. M & F Worldwide Corp.* ("*MFW*"), 88 A.3d 635, 643 (Del. 2014).

Chancery extended *MFW* cleansing to other transactions.[31] Footnote 139 of the Court of Chancery's opinion in this case suggests that when it referenced "*MFW* creep" at oral argument, the trial court was referring to the extension of the *cleansing* effect of *MFW*:

> The Separation, a reverse spinoff collapsing a dual class capital structure and restoring some voting control to the minority, is in many ways the opposite of the freeze-out merger that inspired *MFW*. ... **Hallandale** does not dispute that *MFW* measures can **restore** the Separation to business judgment review. Nor does it appear it could under our jurisprudence as it has developed[.][32]

[31] *See, e.g.*, *IRA Tr. FBO Bobbie Ahmed v. Crane*, 2017 WL 7053964, *9-12 (Del. Ch.) (discussing whether the *cleansing* effect of *compliance* with *MFW* should extend beyond the squeeze-out context).

[32] *In re Match Grp., Inc. Derivative Litig.*, 2022 WL 3970159, *15 n.139 (Del. Ch.) (emphasis added) (citing *Crane*, 2017 WL 7053964, *11).

II. The IAC Defendants' Proposal Would Enable Abuses And Create Serious Anomalies In Delaware Law

The traditional rule of *Tremont II* was the correct one from a policy perspective when adopted in 1997 and it remains correct today. As *Lynch* recognized, controllers are different. The inherent threat of controller retaliation means that even where a transaction is negotiated by an independent committee, "no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation."[33] "In colloquial terms, the [*Lynch*] Court," correctly, "saw the controlling stockholder as the 800–pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support)."[34]

MFW requires dual protections because they are in "important ways complements and not substitutes."[35] Even in a non-controlled company, boards are rarely comprised of directors whose "own financial futures depend importantly on getting the best price[.]"[36] The problem is worse in a controlled company where

[33] *Lynch*, 638 A.2d at 1116 (cleaned up).

[34] *Pure Resources*, 808 A.2d at 436.

[35] *In re Cox Commc'ns, Inc. Shareholders Litig.*, 879 A.2d 604, 619 (Del. Ch. 2005).

[36] *Id.*

directors are handicapped by "informational asymmetries," there is "the possibility that the outside directors might be more independent in appearance than in substance," and directors "might lack the savvy to effectively counter the controller)[.]"[37] Thus, *MFW* was designed to give controllers an incentive to provide *both* protections.[38]

Delaware law is not and should not be "blind to the practical realities of serving as a director of a corporation with a controlling stockholder."[39] "[T]he controller has retributive capacities that lead our courts to question whether independent directors ... can freely exercise their judgment in approving transactions sponsored by the controller."[40] Moreover, "controlling shareholders can and do form repeat relationships with the nominally independent directors who serve on their boards, and the prospect of [future] patronage can compromise those directors' ability to prevent controlling shareholder opportunism."[41] Thus, Delaware recognizes "that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation

[37] *Id*

[38] *In re MFW Shareholders Litig.*, 67 A.3d 496, 500–01 (Del. Ch. 2013).

[39] *In re BGC Partners, Inc.*, 2019 WL 4745121, *7 (Del. Ch.).

[40] *In re Tesla Motors, Inc. S'holder Litig.*, 2020 WL 553902, *6 (Del. Ch.).

[41] Da Lin, *Beyond Beholden*, 44 J. CORP. L. 515, 557 (2019).

and its public stockholders[.]"[42] That is why "when a controlling stockholder is on the other side of the deal from the corporation, our law has required that the transaction be reviewed for substantive fairness even if the transaction was negotiated by independent directors or approved by the minority stockholders."[43]

As an object lesson on the limits of what even the most courageous independent directors can accomplish, consider the case of CBS, a public company controlled by National Amusements, Inc. ("NAI") and NAI's ultimate human controller, Shari Redstone. In 2018, Redstone sought to merge CBS with another NAI-controlled company, Viacom.[44] An independent committee of CBS directors rejected the proposal, then took the extraordinary step of suing Redstone and seeking a temporary restraining order preventing her from removing them from the Board while they effectuated a stock dividend diluting NAI below majority voting control.[45] After a brief flurry of expedited litigation and the Court of Chancery denying the independent directors' requested injunctive relief,[46] the action settled; seven CBS directors resigned and were replaced by six new directors "hand-picked

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[42] Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005).

[43] *Id.*

[44] *CBS Corp. v. Nat'l Amusements, Inc.*, 2018 WL 2263385 (Del. Ch.).

[45] *Id.*

[46] *Id.*

by Ms. Redstone."[47] Redstone promptly forced through the Viacom/CBS merger, which was announced in August 2019.[48]

Given the demonstrable futility of resisting a determined controller, the realities of "human nature," and its "ever-present inclination to rationalize,"[49] it is easy for independent directors to slip into a controlled mindset. Even truly independent directors can convince themselves that is better to go along with a controller's desires and make the best of a bad situation rather than expose the corporation to retribution from the controller or allow themselves to be replaced by even-more pliable directors.[50]

Market developments in the years since *Tremont II* have only strengthened the need for the rule it adopts. As *amicus* has noted elsewhere,[51] the dramatic rise of

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[47] *In re CBS Corp. Stockholder Class Action & Derivative Litig.*, 2021 WL 268779, *2 (Del. Ch.).

[48] *Id.* at *14.

[49] *Merritt v. Colonial Foods, Inc.*, 505 A.2d 757, 765 (Del. Ch. 1986).

[50] *Southern Peru*, 52 A.3d at 798 ("[I]f no other opportunities are available because we are a controlled company, shouldn't we make the best of this chance?"); *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1114 (Del. 1994) ("an Alcatel director, told the board members, '[y]ou must listen to us. We are 43 percent owner. You have to do what we tell you.'").

[51] Charles Elson and Craig Ferrere, *SNAP Judgment: Unequal Voting and the Business Judgment Rule*, at 11 (January 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3315548.

dual-class companies[52] has increased the threat of controller tunnelling through non-squeeze-out transactions. "As control rights diverge from equity ownership, the controller has heightened incentives to engage in related-party transactions and cause the corporation to make other forms of non-pro rata transfers. … The economic incentive to tunnel varies inversely with the controller's equity stake."[53] Dual-class structures, which allow a controller to exercise majority voting control with a minority economic interest, "generate significant governance risks because they feature a unique absence of incentive alignment. These controllers own a small fraction of the company's equity capital and thus bear only a small (and sometimes extremely small) share of the losses that their actions may inflict on the company's value. Yet they exercise effective control over decisionmaking and can capture the full private benefits of that control."[54]

So the IAC Defendants have it precisely backwards when they argue that a squeeze-out merger "present[s] unique circumstances such that minority stockholders need special protection[.]"[55] If anything, squeeze-out mergers offer

[52] David T. White, *Delaware's Role in Handling the Rise of Dual-, Multi-, and Zero-Class Voting Structures*, 45 DEL. J. CORP. L. 141, 143–44 (2020).

[53] *In re EZCORP Inc. Consulting Agreement Deriv. Litig.*, 2016 WL 301245, *2 (Del. Ch.).

[54] Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1466 (2019).

[55] IAC Defs' Ans. Br. at 11.

more protections for minority stockholders: "most notably appraisal rights, Rule 13e–3 disclosure requirements, heightened press coverage, and the possibility—however rare—of an alternative transaction."[56] In a squeeze-out merger, minority stockholders face the 800–pound gorilla under the glare of stadium lights with the SEC playing referee. Why should Delaware law give less protection to minority stockholders when the self-interested gorilla tries to rob them in the dimly lit back alley of a conflicted, non-squeeze-out transaction with none of those safeguards in place?

Indeed, if the IAC Defendants' rule was adopted, then a predatory controller—knowing that a future squeeze-out would require the use of dual protections to avoid entire fairness—could respond by first misappropriating corporate value through conflicted, non-squeeze-out transactions not requiring the same protections. By the time the controller effected the squeeze-out, the company would have been stripped of value at the expense of the minority and the cost of the squeeze-out would be lower, regardless of the standard of review applied to the end-stage transaction.

The IAC Defendants' proposed rule would also create serious inconsistencies with Delaware's enhanced-scrutiny doctrine. Consider an arm's-length cash sale of a widely held public company with an independent board that delegates negotiations

[56] *EZCORP*, 2016 WL 301245, *23 n.13.

to a fully empowered independent committee. Notwithstanding the board's independence and the use of the committee, Delaware law will still require enhanced-scrutiny review if there is a single material omission in the disclosures made to stockholders.[57] As then-Vice-Chancellor Strine explained in *Dollar Thrifty*, Delaware applies enhanced scrutiny in this context because of "a concern that the board might harbor personal motivations in the sale context that differ from what is best for the corporation and its stockholders."[58]

These potential conflicts are surely even more significant in any conflicted-controller transaction. Yet under the IAC Defendants' proposed rule, approval by an independent committee would, alone, be enough to ensure business-judgment review. The IAC Defendants' self-interested proposal—to impose more scrutiny on an independent board that fails to disclose a single material fact than a conflicted controller that provides *no* disclosure or stockholder vote at all—is without principle or logical support.

The IAC Defendants say "[c]ontrolling stockholders routinely engage in business with the companies they control; many of those transactions are subject to board or committee approval. It is not sensible to subject all such transactions to

[57] *Morrison v. Berry*, 191 A.3d 268, 275 (Del. 2018); *Appel v. Berkman*, 180 A.3d 1055, 1064 (Del. 2018); *RBC Capital Markets, LLC v. Jervis*, 129 A.3d 816, 852 (Del. 2015).

[58] *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 597 (Del. Ch. 2010).

judicial second-guessing if they are not put through an *MFW*-like process."[59] Yet they identify just one specific category of conflicted-controller transactions where they say it would be inappropriate to impose entire-fairness review absent *MFW* compliance: executive compensation.[60] This exposes the fundamental weakness of their position. The "say on pay" requirements of Dodd-Frank mean that publicly traded corporations are already required to seek stockholder input on executive compensation, on an advisory basis, at least once every three years.[61] If controllers wish to avoid review of their own compensation for fairness, it seems reasonable to ask that they negotiate their compensation with an independent special committee and make the vote a binding one with a minority veto. They can also pay themselves fairly.

In short, the IAC Defendants are prescribing a radical and dangerous remedy for what is, at most, a small problem. If the Court of Chancery detects abuses under existing entire-fairness doctrine,[62] it has ample tools to address such problems under existing law. Squeeze-outs are necessarily direct claims, brought as class actions subject to Rule 8 pleading standards. But, after *Brookfield*, claims challenging non-

[59] IAC Defs' Ans. Br. at 13.

[60] *Id.* at 13-14, 18.

[61] 15 U.S.C. § 78n-1(a).

[62] The IAC Defendants attack the current system with rhetoric but not objective evidence.

squeeze-out conflicted-controller transactions are almost always derivative, subject to heightened pleading standards and the demand-futility requirement. [63] That means defendants and the Court of Chancery can (and regularly do) screen out weak claims involving non-squeeze-out conflicted-controller transactions through a robust use of Rule 23.1 and special litigation committees. Moreover, in both class and derivative actions, the Court can adjust fee awards to deter nuisance settlements and still "encourage *wholesome* levels of litigation."[64]

The rule put forth by the IAC Defendants is not needed from a judicial management perspective, or to "help" the Court of Chancery manage its cases. The IAC Defendants seek a rule that is a gift to controllers at the expense of minorities, plain and simple. The IAC Defendants would have Delaware take a giant leap in the direction of the overly permissive legal regime of Nevada (which has effectively abandoned entire fairness review)[65]—the classic "race to the bottom." That is not the right path for Delaware. Delaware should protect all investors, not simply controlling ones as Defendants' rule would enable.

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[63] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021).

[64] *Anderson v. Magellan Health, Inc.*, 2023 WL 4364524, *16 (Del. Ch.) (emphasis original).

[65] *Guzman v. Johnson*, 483 P.3d 531, 534 (Nev. 2021).

III. *Stare Decisis* Cautions Against The Radical Change The IAC Defendants Seek

The rule that the IAC Defendants are proposing would require this Court to overturn *Tremont II*, *Emerald Partners*, *Reader's Digest*, *Americas Mining*, *Olenik*, and the entire body of Delaware law relying on those cases. If. as the IAC Defendants seem to suggest, their rule is meant to apply to all stock-for-stock mergers with a controller, [66] then it would also overturn *Getty Oil*.[67] The Court should reject the IAC Defendants' invitation to unravel a critical thread that runs through the last quarter-century or more of Delaware law. Accepting that invitation would breach "the cardinal rule of public policy—particularly applicable to corporate law and corporate finance—'If it ain't broke, don't fix it.'"[68]

In that cautionary vein, the Court may consider the guidance of former Chief Justice Veasey who has written, wisely:

> Courts ... are not activists. To quote one of my fellow Chief Justices[:]
>
> > The fact is that courts sit like clams in the water; they wait for whatever is brought to them by the tides ... We do not issue advisory opinions, and we only rule on matters that are brought before us in which there is a real case or controversy.

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[66] *See* IAC Defs' Supp. Op. Br. at 12.

[67] 493 A.2d at 937.

[68] Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1065 (2002).

> We do not reach out on our own to pluck the interesting issues of the day and make a ruling.[69]

The former Chief Justice's wisdom might weigh in favor of not deciding this question today and instead waiting until it is presented by a defendant who raised the argument below. This would give stockholder-plaintiffs a fair chance to develop a complete record (including by amending their complaint to add relevant allegations). It would give the Court of Chancery the opportunity to address the argument in the first instance. And it would give this Court the benefits of both a fully developed record and the Court of Chancery's analysis.

If this Court does address the IAC Defendants' position on the merits today, it should reject it outright. Delaware respects *stare decisis* and this Court will overrule its past precedents "only for urgent reasons and upon clear manifestation of error."[70] The factors favoring *stare decisis* are "at their acme" for precedents like these, which "parties are especially likely to rely on … when ordering their affairs."[71] When this Court reluctantly overruled *Gentile* in *Brookfield*, it identified a number of factors that favored a departure from *stare decisis*:

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[69] E. Norman Veasey, *The Defining Tension in Corporate Governance in America*, 52 BUS. LAW. 393, 399 (1997).

[70] *Seinfeld v. Verizon Commc'ns, Inc.*, 909 A.2d 117, 124 (Del. 2006) (cleaned up).

[71] *Kimble v. Marvel Entm't, LLC*, 576 U.S. 446, 447 (2015) (cleaned up).

- "The practical and analytical difficulties courts … encountered in applying [*Gentile*] reflect[ed] fundamental unworkability";[72]
- *Gentile* was fifteen years old and "not so old as to carry the weight of 'antiquity'";[73] and
- "Any reliance [was] further muted by *El Paso*, from which parties could rightly anticipate that *Gentile*'s continued viability was in doubt."[74]

None of those factors apply here. *Tremont II* and *Lynch* are twice as old as *Gentile* and far more fundamental to the structure of Delaware law. *Getty Oil* is older still. There has been no early warning that *Getty Oil*, *Lynch*, *Tremont*, *Emerald Partners*, *Reader's Digest*, *Americas Mining*, and *Olenik* were at risk of being overturned; to the contrary, the argument did not even surface until the IAC Defendants filed their answering brief on appeal.

Most importantly, the existing doctrine has not proved unworkable. For all the reasons set forth above, the IAC Defendants' arguments to upend the entire fairness doctrine as applied to non-squeeze-out conflicted-controller transactions are not even marginally compelling, let alone urgent or bespeaking clear error. As *amicus* has observed, "Delaware's preeminent role in corporate regulation has endured, despite numerous challenges, for decades [because] ... [i]nvestors, directors, and managers respect its even-handedness and predictable approach to regulation and

[72] *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1280 (Del. 2021).

[73] *Id.*

[74] *Id.*

the resolution of corporate controversy. This is the product of a highly advanced corporate code and a judiciary renowned for its neutrality and corporate specialization."[75]

Simply put, Delaware law is working. The Delaware franchise is strong, and the Delaware brand is more valuable than ever. Accepting the IAC Defendants' invitation would do far more harm to the franchise than any theoretical concerns about the Court of Chancery being unable to weed out nuisance claims, even if they are viewed under the entire fairness paradigm. Delaware's reputation is based on maximizing stockholder value and, to achieve that goal, it has carefully managed the balance between enabling transactional flexibility and ensuring investor protection. The IAC Defendants' proposed approach would undo that careful balance and send the law in precisely the wrong direction.

The Court should not try to fix what is not broken. Change and adaption are inevitable and desirable. But when change happens, it should be through gradual tweaks at the margins through the familiar, common-law approach that is at the core of Delaware's brand. This Court must not perform the radical and dangerous surgery that the IAC Defendants demand.

[75] Charles Elson, *Why Delaware Must Retain Its Corporate Dominance and Why It May Not* in Bainbridge, *et al.*, CAN DELAWARE BE DETHRONED 235 (2018).

CONCLUSION

Whether the Court reverses or affirms, it should decline the IAC Defendants' invitation to overturn *Tremont II* and the critical line of cases that follow.

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