A Corporate Governance Solution to the Inefficiencies of Entire Fairness

By Robert B. Greco[*]

In In re Match Group, Inc. Derivative Litigation, *the Delaware Supreme Court confirmed that non-ratable transactions between corporations and their controlling stockholders are subject to review under the onerous entire fairness standard unless the transaction is approved by both a fully empowered committee of independent directors and a fully informed and uncoerced vote of the disinterested stockholders. Despite the important role entire fairness review serves in policing potential conflict-of-interest transactions, it is not without cost to corporations and stockholders. In most cases, entire fairness claims cannot be dismissed on the pleadings, presenting plaintiffs with inherent settlement value and inviting litigation without regard to the merits of a claim. Delaware law's existing safeguards against opportunistic derivative litigation—namely, Delaware's* MFW *framework, demand futility requirement, and recognition of special litigation committees—curb inefficient entire fairness challenges to some degree, but offer imperfect solutions that do not fully address the problems facing many corporations under the modern entire fairness paradigm.*

This article offers an alternative solution founded in specific statutory authority under the DGCL, longstanding foundational Delaware corporate law principles, and an overlooked aspect of the seminal case Marchand v. Barnhill*: a provision in a corporation's certificate of incorporation empowering an independent board committee (or subset of independent directors) with the sole and exclusive power and authority over derivative litigation demands and related matters. Where this provision is adopted, Delaware law and public policy support assessing demand futility based solely on the independence and disinterestedness of the directors so empowered to review derivative litigation demands. This, in turn, generally concentrates control of derivative litigation in independent directors, who Delaware law deems best suited to manage corporate litigation rights, thereby promoting more efficient management of derivative claims and reducing the costs of opportunistic derivative litigation currently faced by many corporations.*

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INTRODUCTION

In recent years, there has been a marked increase in the risk of derivative litigation faced by many public companies and their directors, officers, and controlling stockholders.[1] This is especially true for the controlling stockholders of public Delaware corporations, which may face considerable derivative litigation risk for related-party transactions with the corporations they control.[2] This trend has coincided with a series of Delaware decisions, culminating in *In re Match Group, Inc. Derivative Litigation*, confirming the application of the onerous entire fairness standard to many transactions between corporations and their controlling stockholders.[3]

Entire fairness review serves an important role in policing potential conflict-of-interest transactions.[4] But it is not without cost to corporations and stockholders. Stockholders' derivative prosecution of entire fairness litigation presents many of the same agency problems as other types of representative litigation. This includes, for example, a compensation structure that may incentivize the pursuit of derivative claims without regard to the costs they impose on the corporate beneficiaries of the claims. In addition, claims implicating the entire fairness standard are generally difficult to dismiss on the pleadings. In many cases, this affords entire fairness claims inherent settlement value untethered to the merits of the claims. For corporations with significant blockholders, the potential application of entire fairness to related-party transactions may present the risk of opportunistic derivative litigation, where the expected upside of the litigation does not justify the monetary expenditures, distractions, and other costs it will impose on the corporation. This risk has saddled corporations with additional litigation costs and increased D&O insurance premiums, as well as other direct and indirect costs.[5]

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1. *See* Kim McLaughlin & Ann Kim, AIG, *North America Financial Lines: Public Company D&O Liability Claims*, AIG CLAIMS INTELLIGENCE SERIES (Feb. 7, 2024), https://www.aig.com/content/dam/aig/america-canada/us/documents/claims/aig-public-d-and-o-claims-report_3324p.pdf; John Skakun, *Five Essential D&O Insurance Questions*, DIRS. & BDS. (Sept. 5, 2023), https://www.directorsandboards.com/board-issues/director-liability/five-essential-do-insurance-questions/.

2. Randall S. Thomas, Robert B. Thompson & Harwell Wells, *Delaware's Shifting Judicial Role in Business Governance*, 77 BUS. LAW. 971 (2022) (observing a rise in derivative litigation based on an empirical analysis of the number and types of claims brought in cases filed in Delaware in 2018 as compared to the results of prior studies of cases filed in Delaware in 1999 and 2000).

3. 315 A.3d 446, 451 (Del. 2024); *see also In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245, at *11, *16 (Del. Ch. Jan. 25, 2016).

4. *Match*, 315 A.3d at 460–61.

5. *See, e.g.*, *In re* AbbVie Inc. S'holder Derivative Litig., C.A. No. 9983-VCG, 2015 WL 4464505, at *6 (Del. Ch. July 21, 2015) ("This Court has long recognized that derivative litigation is burdensome to companies, by way of the direct costs of the litigation, including advancement and indemnification obligations, as well as indirect costs, such as distraction to management and the board, and possible detriment to employee morale."); *see also In re* Primedia, Inc. S'holders Litig., 67 A.3d 455, 471–72 (Del. Ch. 2013) (acknowledging that "the costs and benefits" of derivative claims are "measured not only in dollars incurred or recovered but also by factors such as the distraction of litigation for management, its consequences for employee and executive morale, whether there would be adverse reactions from customers, suppliers, and capital providers, and the effectiveness of any internal corrective measures or sanctions"); *In re* Baker Hughes, a GE Co., Derivative Litig., C.A. No. 2019-0201, 2023 WL 2967780, at *29 n.363 (Del. Ch. Apr. 17, 2023) (upholding the

Existing safeguards—such as Delaware's "*MFW* framework,"[6] demand futility requirement embodied in Court of Chancery Rule 23.1, and recognition of special litigation committees—curb opportunistic entire fairness challenges to some degree. These safeguards, however, offer imperfect solutions that fail to fully address the inefficiencies facing many corporations under the modern entire fairness paradigm.

This article offers an alternative corporate governance solution founded in specific statutory authority provided under Delaware's General Corporation Law (the "DGCL"), longstanding foundational principles of Delaware corporate law, and an overlooked aspect of the seminal duty of oversight case *Marchand v. Barnhill*.[7] This alternative, referred to as a "Derivative Authority Provision," is a provision in a corporation's certificate of incorporation vesting an independent committee of its board (or subset of its independent directors) with sole and exclusive power and authority over derivative litigation demands and related matters.

A Derivative Authority Provision disables controllers and executive directors from board-level derivative litigation decisions and concentrates authority over these decisions in independent directors. As the Delaware Supreme Court recently reiterated in *Match*, Delaware law has long deemed these independent directors as "generally in the best position" to manage derivative litigation.[8] This, in turn, affects demand futility. In addition to its analysis of the duty of oversight, *Marchand* addressed the novel question of demand futility for a corporation with disparate voting power among its directors. In this context, *Marchand* assessed demand futility based on the voting power of the directors (rather than the number of directors) capable of impartially considering a demand. Under *Marchand* and consistent with longstanding Delaware public policy favoring independent director management of derivative litigation, a Derivative Authority Provision would result in demand futility turning solely on the independence and disinterestedness of the directors empowered by the provision. This has the effect of promoting more efficient oversight and management of derivative claims, thereby reducing the costs and burdens of derivative litigation currently faced by many Delaware corporations. Importantly, a Derivative Authority Provision furthers these objectives without compromising worthwhile derivative claims, which evidence has shown independent directors will remain incentivized to pursue.

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dismissal of derivative claims based on an assessment of the potential costs to the corporation of continuing with the prosecution of the claims, including "indemnification and advancement costs, diversion of company resources, and negative publicity"), *aff'd*, 312 A.3d 1154 (Del. 2024) (TABLE); Sam Vardy & Carey Lynn, *Guest Post: The Risks of Shareholder Derivative Suits and D&O Coverage*, D&O Diary (Oct. 2, 2023), https://www.dandodiary.com/2023/10/articles/shareholders-derivative-litigation/guest-post-the-risks-of-shareholder-derivative-suits-and-do-coverage/ (reviewing the "many more ways in which costs can be spent on derivative claims" beyond director defense and settlement costs, including those incurred in assessing demands, investigating claims, participating in litigation as a nominal defendant, paying fee awards and other legal costs of stockholders that may be awarded, and responding to Section 220 demands).

6. *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014), *overruled on other grounds by* Flood v. Synutra Int'l, Inc., 195 A.3d 754 (Del. 2018).

7. 212 A.3d 805 (Del. 2019).

8. 315 A.3d at 469.

I. The Modern Entire Fairness Framework

A. The Road to *Match*

Under Delaware law, courts assess whether a challenged action was taken in accordance with directors' fiduciary duties by reviewing it under one of three standards of review—the business judgment rule, enhanced scrutiny, or entire fairness.[9] Delaware's renowned business judgment rule presumes that the directors "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."[10] When applicable, a court will not substitute its judgment for that of the board—but will instead sustain the board's decision—if the decision "can be attributed to any rational business purpose."[11] The business judgment rule has historically protected many board decisions from after-the-fact stockholder litigation and continues to do so today.

The 1980s takeover boom saw the introduction of intermediate standards of review in cases such as *Unocal*,[12] *Revlon*,[13] and *Blasius*.[14] Today, these are considered forms of enhanced scrutiny, under which courts assess "the reasonableness of the end that the directors chose to pursue, the path that they took to get there, and the fit between the means and the end."[15] After change of control transactions and certain other matters were found to lack the protections of the business judgment rule and instead implicate enhanced scrutiny, these actions became the subject of a wave of litigation, a considerable portion of which was driven by attorneys incentivized to seek a quick settlement and fee award rather than the merits of the underlying transaction.[16] Merit-detached

9. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011).

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

11. Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971).

12. 493 A.2d 946.

13. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

14. Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988). The Delaware Supreme Court recently confirmed the modern reframing of *Blasius* as a form of enhanced scrutiny in *Coster v. UIP Cos.*, 300 A.3d 656 (Del. 2023).

15. Palkon v. Maffei, 311 A.3d 255, 268–70 (Del. Ch. 2024) (quoting Obeid v. Hogan, C.A. No. 11900-VCL, 2016 WL 3356851, at *13 (Del. Ch. June 10, 2016)).

16. *See, e.g.*, Robert M. Daines & Olga Koumrian, *Recent Developments in Shareholder Litigation Involving Mergers*, Cornerstone Research 1 (Mar. 2012 update) (observing that "almost every acquisition" of a public company valued over $100 million announced in 2010 or 2011 "elicited multiple lawsuits, which were filed shortly after the deal's announcement and often settled before the deal's closing," and "[o]nly a small fraction of these lawsuits resulted in payments to shareholders; the majority settled for additional disclosures or, less frequently, changes in merger terms, such as deal protection provisions"); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 Vand. L. Rev. 1797, 1838–41 (2004) (reviewing the significant number of claims challenging third-party acquisitions and observing that such claims rarely produced a monetary settlement or other recovery for stockholders); *In re* Trulia, Inc. S'holder Litig., 129 A.3d 884, 891–92 (Del. Ch. 2016) (discussing the attorney-driven M&A litigation that "far too often . . . serves no useful purpose for stockholders" and "serves only to generate fees for certain lawyers who are regular players in the enterprise of routinely filing hastily drafted complaints on behalf of stockholders on the heels of the public announcement of a deal and settling quickly on terms that yield no monetary compensation to the stockholders they represent"); Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 77 Bus. Law. 321, 338 n.80 (2022) (observing the "wave" of "non-meritorious cases

litigation in this area grew before reaching a critical mass in the mid-2010s, when landmark decisions in *Corwin v. KKR Financial Holdings LLC*[17] and *In re Trulia, Inc. Stockholder Litigation*[18] began to facilitate more equitable outcomes and curb many lawyer-driven M&A suits.

Entire fairness, the most onerous standard of review, has long been applied by the Delaware courts to review certain conflict of interest transactions warranting greater judicial oversight.[19] In its 1983 opinion in *Weinberger v. UOP, Inc.*, the Delaware Supreme Court defined the framework of entire fairness review in applying it to review a challenged controller buyout.[20] The Supreme Court explained in *Weinberger*:

> 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 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.[21]

Where entire fairness applies, the burden of establishing fairness is initially placed on the fiduciary defendants.[22] *Weinberger* recognized, however, that the burden of proof in entire fairness review may be shifted "to the plaintiff to show that the transaction was unfair to the minority" "[w]here corporate action has been approved by an informed vote of a majority of the minority shareholders."[23]

In the decades that followed, Delaware cases did not always reach a uniform conclusion as to entire fairness's application to controller transactions.[24] In the seminal 1994 decision in *Kahn v. Lynch Communication Systems, Inc.*, the Delaware Supreme Court resolved some of the "differing views" espoused in these cases regarding the application of entire fairness review to controller buyouts and the effect of a special committee and/or minority stockholder approval in this context.[25] *Kahn v. Lynch* confirmed that controller buyouts are reviewed under entire fairness.[26] The decision further confirmed that a buyout's negotiation and approval by an independent special committee, or approval by an

involv[ing] third-party deals"); *see generally* Browning Jeffries, *The Plaintiffs' Lawyer's Transaction Tax: The New Cost of Doing Business in Public Company Deals*, 11 Berkeley Bus. L.J. 55 (2014).

17. 125 A.3d 304 (Del. 2015).
18. 129 A.3d 884.
19. *See, e.g.*, Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952).
20. 457 A.2d 701 (Del. 1983).
21. *Id.* at 711 (citations omitted).
22. *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 700 (Del. 2023).
23. 457 A.2d at 703.
24. *See generally In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016).
25. 638 A.2d 1110 (Del. 1994).
26. *Id.*

informed vote of minority stockholders, shifts the burden of proof applicable in entire fairness review, but does not alter the standard of review.[27]

Over time, *Kahn v. Lynch* led to a flood of litigation challenging controller buyouts immediately after their announcement, a substantial portion of which sought a settlement and award of attorneys' fees without regard to the transaction's fairness.[28] Controller buyouts remain frequent targets of stockholder litigation, although the prevalence of these claims and associated costs have been limited, to at least some extent, by the Delaware Supreme Court's adoption of the *MFW* framework in 2014. The *MFW* framework—which involves conditioning a transaction at the outset on, and subsequently receiving, the approval of both an independent and fully empowered special committee and a fully informed and uncoerced majority of disinterested stockholders—was adopted to provide a path for business judgment review of controller buyouts otherwise subject to entire fairness review.[29]

The Delaware Supreme Court addressed the scope of entire fairness review again, this time outside of the controller buyout context, in its 1997 decision *Kahn v. Tremont Corp*.[30] *Tremont* involved a related-party transaction between a corporation and a blockholder owning 44.4 percent of its outstanding stock. In the transaction, the blockholder sold to the corporation shares of a third entity under common control with the blockholder. Consistent with at least one other post-*Weinberger* Supreme Court ruling,[31] the Delaware Supreme Court confirmed the Court of Chancery's extension of the entire fairness review to this type of self-interested controller transaction outside the controller buyout context. As the Delaware Supreme Court explained, "[o]rdinarily, in a challenged transaction involving self-dealing by a controlling shareholder, the substantive legal standard is that of entire fairness, with the burden of persuasion resting upon the defendants."[32] While the Delaware Supreme Court ultimately concluded in *Tremont* that a special committee "did not operate in an independent

27. *Id.*

28. *See* Weiss & White, *supra* note 16, at 1833–35, 1857 n.183 (observing the prevalence of this practice in lawsuits challenging controller buyouts between 1999 and 2001 and noting that the rule adopted in *Kahn v. Lynch* "appears to have had the effect of encouraging plaintiffs' attorneys to settle cases challenging squeeze outs, largely without regard to whether the merger terms agreed to by a[] [special committee] are entirely fair"); *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 605–06 (Del. Ch. 2005); Hamermesh et al., *supra* note 16, at 338 n.80.

29. Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014).

30. 694 A.2d 422 (Del. 1997).

31. Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 404–07 (Del. 1988) (applying the entire fairness standard to uphold findings that Howard Hughes and an affiliated entity breached their duties of loyalty as Trans World Airlines, Inc.'s controlling stockholders "by deliberately interfering with TWA's commercial success to benefit themselves" in preventing TWA from timely ordering the aircraft it needed to stay competitive and "refus[ing] to allow TWA to purchase its own aircraft [because the controllers] prefer[ed] instead to buy the planes and sell or lease them to TWA at a profit").

32. *Tremont*, 694 A.2d at 428; *id.* ("Regardless of where the burden lies, when 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 as opposed to the more deferential business judgment standard.").

or informed manner" and reversed the burden shift afforded by the trial court on the basis of the committee's involvement, the Supreme Court explained that "[e]ntire 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."[33]

In the years between *Tremont* and *Match*, several Delaware Supreme Court opinions applied the entire fairness standard to non-buyout transactions with conflicted controlling stockholders, referencing the effect of an independent committee or disinterested stockholder approval as a burden shift within this standard of review.[34] But in these cases, the applicable standard of review was not necessarily litigated by the parties or directly raised before the Delaware Supreme Court.[35] This led to continued suggestions, in some Court of Chancery cases, that controller transactions outside of the buyout context received the protections of the business judgment rule if negotiated and approved by an independent board or committee.[36]

In *EZCORP*, the Court of Chancery conducted a thorough analysis of this conflicting precedent to hold "that the weight of authority calls for" a broad application of the entire fairness framework extending to "any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit."[37] The Court explained in *EZCORP* the rationale for extending the entire fairness framework to controller transactions outside of the buyout context based on the "threat of implicit coercion" faced by directors of controlled companies.[38] Moreover, *EZCORP* suggested that such transactions may only receive the protections of the business judgment rule through use of the *MFW* framework.[39] This approach was widely accepted by the Court of Chancery in numerous other cases,[40] with this broad view of entire fairness review under *Kahn v. Lynch* applied to an array of different corporate transactions.[41]

33. *Id.* at 424, 428.

34. *See, e.g.*, Emerald Partners v. Berlin, 726 A.2d 1215, 1222–23 (Del. 1999); Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1242 (Del. 2012) (quoting *Cox*, 879 A.2d at 617); *Levco Alt. Fund Ltd. v. Reader's Digest Ass'n*, 803 A.2d 428 (Del. 2002) (TABLE).

35. *Cf. In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 465–66 (Del. 2024) (rejecting defendants' counterarguments "to what is a straight-forward reading of *Tremont II*, *Emerald Partners*, *Levco*, and *Ams. Mining*," including their argument that "the parties in those cases assumed that both procedural devices were needed to invoke the business judgment standard of review").

36. *See, e.g.*, *In re* MFW S'holders Litig., 67 A.3d 496. 526–27 (Del. Ch. 2013), *aff'd on other grounds sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); Orman v. Cullman, 794 A.2d 5, 21 n.36 (Del. Ch. 2002); Friedman v. Dolan, C.A. No. 9425-VCN, 2015 WL 4040806, at *5 (Del. Ch. June 30, 2015), *abrogated by Match*, 315 A.3d 446; *In re* Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563, 587–88 (Del. Ch. 2007), *abrogated by Match*, 315 A.3d 446.

37. 2016 WL 301245, at *11, *16.

38. *Id.* at *20.

39. *See id.* at *11, *23.

40. *See, e.g.*, Voigt v. Metcalf, C.A. No. 2018-0828-JTL, 2020 WL 614999, at *10 (Del. Ch. Feb. 10, 2020); Tornetta v. Musk, 250 A.3d 793 (Del. Ch. 2019); *see also* Hamermesh et al., *supra* note 16, at 337.

41. *See, e.g.*, *EZCORP*, 2016 WL 301245 (following *Kahn v. Lynch* in finding a consulting agreement subject to entire fairness review); *Musk*, 250 A.3d 793 (applying this framework to subject Elon

Still, this view was not shared by all, including former members of the Delaware Supreme Court and at least one esteemed Delaware law scholar who disagreed with this broad application of entire fairness review.[42] *Match* finally put an end to this debate, adopting *EZCORP*'s interpretation of Delaware entire fairness jurisprudence at it relates to "self-dealing [transactions] when a controlling stockholder stands on both sides of a transaction and receives a non-ratable benefit."[43] As the Supreme Court confirmed in *Match*, these transactions can only implicate a lesser standard of review if "the defendants can satisfy *all* of *MFW*'s requirements to change the standard of review to business judgment."[44]

B. The Inefficiencies of Entire Fairness Review

Where a challenged transaction implicates entire fairness review, the defendants initially bear the burden of proving that the transaction was "entirely fair."[45] Because of the factual nature of this inquiry, the application of entire fairness review, in and of itself, "typically precludes dismissal of a complaint" on a motion to dismiss.[46] Many claims challenging controller transactions are therefore capable of proceeding to trial in the absence of a settlement.[47] These types of

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Musk's compensation award to review under the entire fairness standard at the pleading stage); IRA Tr. FBO Bobbie Ahmed v. Crane, C.A. No. 12742-CB, 2017 WL 7053964 (Del. Ch. Dec. 11, 2017) (applying this framework to a recapitalization for which a challenge was ultimately dismissed under *MFW*); City Pension Fund for Firefighters & Police Officers in City of Miami v. Trade Desk, Inc., C.A. No. 2021-0560-PAF, 2022 WL 3009959 (Del. Ch. July 29, 2022) (applying structure in a challenge to a charter amendment extending a corporation's dual-class structure that was nevertheless dismissed under *MFW*); *In re* Carvana Co. S'holders Litig., C.A. No. 2020-0415-KSJM, 2022 WL 2352457, at *17–18 (Del. Ch. June 30, 2022) (finding it reasonably conceivable that a direct offering was subject to review under the entire fairness standard); Palkon v. Maffei, 311 A.3d 255, 277–84 (Del. Ch. 2024) (finding the entire fairness standard applicable under this framework to a Delaware corporation's proposed conversion to a Nevada corporation).

42. *See generally* Hamermesh et al., *supra* note 16.

43. 315 A.3d at 463.

44. *Id.* at 471.

45. Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1239 (Del. 2012).

46. Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2018 WL 3599997, at *15 (Del. Ch. July 26, 2018); *accord* Berteau v. Glazek, C.A. No. 2020-0873-PAF, 2021 WL 2711678, at *15 (Del. Ch. June 30, 2021); Salladay v. Lev, C.A. No. 2019-0048-SG, 2020 WL 954032, at *1 (Del. Ch. Feb. 27, 2020).

47. *See* Orman v. Cullman, 794 A.2d 5, 21 n.36 (Del. Ch. 2002) ("[A] determination that entire fairness is the appropriate standard of review is often of critical importance. That conclusion normally will preclude dismissal of a complaint on a Rule 12(b)(6) motion to dismiss. Once the business judgment rule presumption is rebutted, the burden of proof shifts to the defendant, who must either establish the entire fairness of the transaction or show that the burden of disproving its entire fairness must be shifted to the plaintiff. A determination of whether the defendant has met that burden will normally be impossible by examining only the documents the Court is free to consider on a motion to dismiss—the complaint and any documents it incorporates by reference. Besides foreclosing dismissal under Rule 12(b)(6), the requirement of an entire fairness review may also preclude the entry of a final judgment even after discovery on a motion for summary judgment, but only if there remains at that point unresolved questions of material fact on either of the two prongs of the entire fairness test. The more difficult of these two prongs to establish on a paper record, however, is the 'fair price' prong. Although not inevitable in every case, in those cases in which entire fairness is the initial standard, the likely end result is that a determination of that issue will require a full trial." (internal quotation marks, emphasis, and citations omitted)).

claims may take several years to defend up through trial at significant cost.[48] The Court of Chancery recently estimated the costs of defending an entire fairness case through trial "conservatively at figures between $10 million and $30 million depending on the number of defendants and firms involved, the hourly rates of the defense lawyers, and the cost of the experts."[49]

But for many entire fairness claims, the expected recovery does not justify anywhere near this level of cost.[50] Corporations often begin to incur these costs quite rapidly, even before derivative litigation is filed. In recent years, these costs have been amplified by the growing scope of books and records that the Delaware courts have ordered corporations to produce pursuant to Section 220 of the DGCL. This has led to stockholders frequently seeking the production of emails, text messages, and other electronic messages as part of Section 220 demands.[51] Before any complaint is filed, negotiating narrowed scopes for overbroad Section 220 demands, and producing documents in response to them, can alone cost millions.[52] By contrast, plaintiffs are often

48. *See, e.g.*, *In re* Nine Sys. Corp. S'holders Litig., C.A. No. 3940-VCN, 2014 WL 4383127 (Del. Ch. Sept. 4, 2014), *aff'd sub nom.* Fuchs v. Wren Holdings, LLC, 129 A.3d 882 (Del. 2015) (TABLE) (affirming a post-trial decision finding a challenged transaction to be fair, with the post-trial decision issued more than six years after the transaction and the Delaware Supreme Court affirming this decision more than seven years after the transaction); *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. 2013) (holding, in a decision issued more than five years after plaintiff filed its initial complaint challenging a merger, that a board's allocation of no consideration to common stockholders in the merger was entirely fair); *see also In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 709 (Del. 2023) (observing that the burdens associated with being "subjected to entire fairness review" are "an expensive, risky, and 'heavy lift' in the litigation arena" (quoting *Trados*, 73 A.3d at 78)).

49. *In re* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 724 (Del. Ch. 2023).

50. *See* Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. Rev. 1, 6–11 (2015) (observing that "[s]ubstantial monetary recovery is uncommon" for derivative claims); Jessica Erickson, *Corporate Governance in the Courtroom: An Empirical Analysis*, 51 Wm. & Mary L. Rev. 1749, 1802–03 (2010) (conducting an empirical analysis of 101 "classic derivative suits," of which only two produced a "meaningful financial benefit" and only one "involved a cash payment to the plaintiff corporation"); *see also Dell*, 300 A.3d at 709 ("[S]cholarly research establishes that only exceptional entire fairness cases result in meaningful damages awards." (quoting Basho Techs. Holdco B, LLC v. Geo. Basho Invs., LLC, C.A. No. 11802-VCL, 2018 WL 3326693, at *35 (Del. Ch. July 6, 2018), *aff'd sub nom*. Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019)); Reza Dibadj, *Networks of Fairness Review in Corporate Law*, 45 San Diego L. Rev. 1, 15–22 (2008) (conducting an empirical analysis of cases in the Delaware courts and finding that "in a majority of cases discussing . . . entire fairness th[is] fairness standard[] ended up not helping plaintiffs").

51. *See* John Mark Zeberkiewicz & Robert B. Greco, *Drafting Minutes and Preparing Disclosures in the Post-*Corwin *Era*, INSIGHTS, Mar. 2019, at 15, 16–17.

52. Priya Cherian Huskins, *Section 220 Books and Record Requests: Are You Ready?*, Woodruff-Sawyer & Co. (Dec. 6, 2017), https://woodruffsawyer.com/insights/section-220-books-record-requests; *see also* McLaughlin & Kim, *supra* note 1 (finding, based on an empirical analysis of "AIG claims data on D&O liability losses from 10,500 matters noticed on policies issued from 2016 through 2020 to North American D&O insureds": "Instances of paid loss from [books and records] demands alone are also emerging. The average [books and records] loss without a[] [securities class action] or derivative action was $1.3 million, and the maximum reached $10 million."); Hamermesh et al., *supra* note 16, at 374 ("Companies facing the potential costs of searching for and producing documents, before a complaint has survived a motion to dismiss, find it economically more rational to pay attorneys' fees to cause a meritless issue to go away rather than expend millions of dollars responding to the § 220 demand or action.").

able to prepare complaints challenging controller transactions capable of withstanding a motion to dismiss at relatively little cost.[53]

Upon the filing of derivative litigation, corporations continue to bear an outsized portion of the litigation's costs. At this stage, corporations may face significant additional costs, including the advancement of legal fees and expenses incurred by defendant directors and officers. Advancement costs can be significant from the start of litigation, particularly if various defendants represented by different counsel intend to file separate motions to dismiss. In comparison, motions to dismiss may also be less costly for stockholder-plaintiffs, as they are often capable of opposing them with a single brief. After the dismissal stage, and given the fact-intensive nature of entire fairness review, corporations and their directors and officers receive and must respond to expansive discovery requests. In comparison, stockholder-plaintiffs face relatively limited discovery burdens in derivative actions, as they are unlikely to themselves have significant documents to collect, review, and produce.

The uneven allocation of these burdens is ripe for exploitation, given the agency problems inherent in stockholder prosecution of derivative litigation. While stockholder management of derivative claims solves one agency problem when a board lacks independent decision-makers capable of impartially assessing the claims, it poses the risk of others recognized in a "mountain of academic literature" examining the incentive structures of representative litigation.[54] Unlike a board or committee focused on the corporation's bottom line, entrepreneurial counsel bringing derivative litigation face compensation structures that generally incentivize the pursuit of claims without regard to their costs on the corporation on whose behalf the claims are brought.[55] Even if this misalignment

53. *See In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 622 (Del. Ch. 2005) ("plaintiffs' lawyers know that the *Lynch* standard gives them the ability, on bare satisfaction of notice pleading standards and Rule 11, to defeat a motion to dismiss addressed to any complaint challenging an actual merger agreement with a special committee" implicating entire fairness); La. Mun. Police Emps.' Ret. Sys. v. Pyott, 46 A.3d 313, 346 (Del. Ch. 2012) ("Filing a derivative claim is relatively cheap."), *rev'd*, 74 A.3d 612 (Del. 2013).

54. *In re* Revlon, Inc. S'holders Litig., 990 A.2d 940, 959 n.6 (Del. Ch. 2010); *accord* Jessica Erickson, *The Lost Lessons of Shareholder Derivative Suits*, 77 Wash. & Lee L. Rev. 1131, 1139–40 (2020) ("This situation [presented by the misaligned interests of representative plaintiffs in derivative litigation] creates obvious and oft-discussed agency costs. Without significant control by their clients, plaintiffs' attorneys can make decisions that benefit themselves at the expense of these clients, acting more like principals than legal agents or fiduciaries. These attorneys can, for example, make trade-offs in settlement negotiations that leave more money in their own pockets. They can also choose to abandon positive-value claims and put their resources into other cases that offer higher possible payouts."); *see generally* John C. Coffee, Jr., *Understanding the Plaintiffs' Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1 (1991).

55. *See generally* Collins J. Seitz, Jr. & S. Michael Sirkin, *The Demand Review Committee: How It Works, and How It Could Work Better*, 73 Bus. Law. 305, 314 (2018) (explaining, that although "the interests of a stockholder plaintiff and those of a disinterested, independent board majority should merge," and "in the ideal world of stockholder litigation, a stockholder should be confident of a good outcome for the corporation when she entrusts independent directors with a valuable corporate asset by making a demand, even at the cost of conceding demand futility," "in practice, much of stockholder litigation is lawyer-driven [a]nd in many cases, from the perspective of a plaintiff's

of interests does not knowingly affect the prosecution of derivative litigation, together with hindsight bias, confirmation bias, and other biases and agency problems, it may present a considerable risk of suboptimal decision-making.[56] Suboptimal decisions can include the commencement of opportunistic derivative litigation, including suits asserting derivative claims with little or marginal value.[57]

lawyer seeking control of a lucrative fee opportunity, making a demand is less appealing than taking a shot at pleading demand futility").

56. *See generally* Coffee, *supra* note 54; Macey & Miller, *supra* note 54; *see also In re Revlon*, 990 A.2d at 959 (noting the "problems of opportunism, over-deterrence, over-enforcement, and agency costs" faced by "[t]raditional plaintiffs' law firms who bring class and derivative lawsuits on behalf of stockholders without meaningful economic stakes [and] can best be viewed as entrepreneurial litigators"); Erickson, *supra* note 54, at 1139–40; Julian J.Z. Polaris, *Backstop Ambiguity: A Proposal for Balancing Specificity and Ambiguity in Financial Regulation*, 33 Yale L. & Pol'y Rev. 231, 261 (2014) ("Findings from behavioral psychology show that rational and well-intentioned people can fall prey to the pernicious effects of chronic underestimation . . . and overestimation of [matters], especially when those self-serving biases are reinforced by internal feedback loops."); Griffith, *supra* note 50, at 7 (discussing the "litigation agency costs" that arise where "the attorney conducts (and concludes) [stockholder] litigation in ways that may depart from plaintiff interests" based on, among other things, plaintiffs' attorneys' "contingency fee arrangements"); Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 Rev. Litig. 25, 45 (2002) (noting the "agency problems" correlated "with the asymmetry of information between the principal and the agent"); *cf.* Clem v. Skinner, C.A. No. 2021-0240-LWW, 2024 WL 668523, at *1 (Del. Ch. Feb. 19, 2024) (explaining that "[o]ver the past several years, *Caremark* suits have proliferated in Delaware," but only "few [were] deemed viable" and "[m]any" were "[f]ueled by hindsight bias" and "f[e]ll outside the narrow confines of the *Caremark* doctrine"); Agranoff v. Miller, 791 A.2d 880, 892 (Del. Ch. 2001) (noting that, for an expert proffered by plaintiffs prosecuting corporate litigation, "[t]he possibility of hindsight bias and other cognitive distortions seems untenably high"); *In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245, at *5 (Del. Ch. Jan. 25, 2016) (discussing "commitment bias and confirmation bias" and the prospect of these biases affecting decision-making (albeit at the board level) on derivative litigation in certain cases).

57. *Cf., e.g.*, Transcript of Settlement Conference and Rulings of the Court at 64–70, Wang v. Biomarin Pharm. Inc., C.A. No. 2023-0058-NAC (Del. Ch. July 23, 2024) (rejecting a proposed settlement of "tag-along" derivative litigation, which was filed after a federal securities action survived a motion to dismiss and was resolved with "real money paid," where counsel "did a little bit of a 220 inspection" but "[n]o litigation happened" and "[n]o one really looked under the hood in any meaningful way in terms of discovery," and there were apparent barriers to proceeding with the litigation under Rule 23.1, and, in questioning the terms of the proposed settlement that would have involved broad releases, the establishment of a management disclosure committee, and a requested attorneys' fee award of $1.25 million, characterizing the benefit of the proposed settlement as "basically ephemeral" and stating: "I personally have real questions about whether it is a positive social good, in sort of considering corporate governance, the corporate governance world as society, whether it's really a good thing for this sort of—and this is why I asked you about whether it could be referred to as tag-along litigation; whether that sort of litigation is really adding value and is something that I in any way want to incentivize; or whether that sort of litigation, frankly, gives rise to precisely or very similar concerns as those discussed in *Trulia* and other cases. . . . And my conclusion is that I don't want to incentivize this sort of outcome. I don't want to incentivize the filing of these sorts of cases unless folks are actually going to push and get a real benefit. . . . And frankly, I have zero interest in approving this settlement and incentivizing further cases like this with yet more therapeutic benefits that I see as ephemeral, and a very substantial payout to plaintiff's counsel, which then continues on the vicious cycle and incentivizes more of these types of claims."); *see also* Mark Lebovitch & Jeroen van Kwawegen, *Of Babies and Bathwater: Deterring Frivolous Stockholder Suits Without Closing the Courthouse Doors to Legitimate Claims*, 40 Del. J. Corp. L. 491, 533 (2016) ("[W]e would be remiss to ignore that some stockholder litigation confers such minimal benefits that its costs should be an institutional concern."). While plaintiffs' attorneys bringing derivative claims do so as representative of a stockholder with a pecuniary interest in the corporation, stockholders commencing derivative litigation often have limited ownership stakes insufficient to fully off-

This is especially true for derivative challenges to controlling stockholder transactions, as even those with little to no merit can, and often do, have millions in settlement value.[58] This, in turn, has made transactions between public corporations and their controlling holders the focus of many in the plaintiffs' bar. For many public corporations, it is now the default expectation that a transaction

set the incentives faced by enterprising plaintiffs' attorneys. *See* Griffith, *supra* note 50, at 10 ("Studies of current patterns in derivative litigation reveal that derivative suits frequently are filed in federal court, often by repeat play law firms on behalf of shareholders with insignificant ownership stakes."); *cf. In re* Fox Corp. Derivative Litig., 307 A.3d 979, 994 (Del. Ch. 2023) ("For a stockholder, an important dimension of the relationship is the size of the stake. Too small a stake 'may reduce a stockholder's incentive to monitor counsel, leading to greater agency costs.'" (quoting Ryan v. Mindbody, Inc., C.A. No. 2019-0061-KSJM, 2019 WL 4805820, at *2 (Del. Ch. Oct. 1, 2019))); *cf.* Transcript of Telephonic Rulings of the Court on Cross-Motions for Summary Judgment at 47–50, Elec. Workers Pension Fund, Loc. 103, I.B.E.W. v. Fox Corp., C.A. No. 2022-1007-JTL (Del. Ch. Mar. 29, 2023) (musing that, in light of the limitation on claims applicable for public benefit corporations under Section 367 of the DGCL, "it's difficult to say that" a charter provision requiring stockholders of a public corporation to own shares representing either 2 percent of the corporation's outstanding shares or a market value of at least $2 million in order to sue for breach of fiduciary duty is "contrary to Delaware public policy"), *aff'd on other grounds sub nom. In re* Fox Corp./Snap Inc. Section 242 Litig., 312 A.3d 636 (Del. 2024). Recent history has also shown that stockholder representatives prosecuting derivative claims may, and from time to time do, prioritize individual interests over those of the corporation that owns the claims. *See, e.g.*, OptimisCorp v. Atkins, C.A. No. 2020-0183-MTZ, 2023 WL 3745306, at *2 (Del. Ch. June 1, 2023) (holding that stockholders who prosecuted and obtained a derivative arbitration award "breached their duty of care by divesting the company of its authority to manage the award and by failing to perform their obligations as company agents" and breached their duty of loyalty "[b]y withholding the award with designs of distributing it to themselves, their friends, and their family").

58. *See* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 709 (Del. Ch. 2023) ("The cost to defend an entire fairness case through trial can be high. I would guess conservatively at figures between $10 million and $30 million depending on the number of defendants and firms involved, the hourly rates of the defense lawyers, and the cost of the experts. Settlements at or below that level may present defendants (or their insurers) with an attractive way to mitigate risk. As the dollar value of the settlement gets higher, it becomes more difficult to rationalize the payment as money that would have been spent anyway. It is also notable that six of the fourteen settlements land in the vicinity of $45 million, which could be a sweet spot that takes into account the defense costs that the settlement saves plus something for the elimination of risk." (footnote omitted)); *In re* Baker Hughes, a GE Co., Derivative Litig., C.A. No. 2019-0201, 2023 WL 2967780, at *29 n.363 (Del. Ch. Apr. 17, 2023) ("Parties often settle entire fairness cases after the pleadings stage if defense costs exceed a settlement payment."); *In re* CNX Gas Corp. S'holders Litig., C.A. No. 5377-VCL, 2010 WL 2705147, at *2 (Del. Ch. July 5, 2010) ("The entire fairness standard likewise changes the parties' settlement leverage."); *Cox*, 879 A.2d 604 (explaining the inherent settlement value of entire fairness claims that generally cannot be dismissed on the pleadings arising from the discovery and litigation costs defendants avoid by settling the claims); *see also* Transcript of Settlement Conference and Rulings of the Court at 68–70, Wang v. Biomarin Pharm. Inc., C.A. No. 2023-0058-NAC (discussing how the dynamics of derivative litigation and directors' and officers' insurance may incentivize parties to reach settlements involving significant fee awards to plaintiffs' counsel even where the litigation is unlikely to withstand a motion to dismiss, explaining: "there's always uncertainty in this sort of litigation, right. In any litigation. There's always a chance . . . that I might deny a motion to dismiss. And so, okay, now we spent however much briefing up the motion. And then on top of that, now there's a real threat of damages. And so then you bring the D&O insurers in and they're thinking about that. And suddenly, having the certainty of getting out of this for 1.25 million, from the D&O insurer's perspective, maybe starts to sound pretty good, rather than taking the chances of rolling the dice with a motion to dismiss. And so from that perspective—and, again, there's a lot of incentives and dynamics at play here. It's all very complicated. But from the perspective of this one single case and from those folks who are considering that analysis in that one case, maybe that's something that a rational actor agrees to . . . which then continues on the vicious cycle and incentivizes more of these types of claims.").

between the corporation and its controlling stockholder will be challenged as a breach of fiduciary duty irrespective of its terms.[59]

With the prevalence of entire fairness challenges and the escalating costs to defend those challenges, corporations and controllers now regularly face what some have characterized as an entire fairness "tax" attributable to the litigation costs and risks often associated with related-party transactions.[60] In addition to litigation costs, the regularity of related-party transaction challenges imposes an array of indirect costs on public corporations. This trend, for example, has likely contributed to the extraordinary rise in directors' and officers' insurance costs in recent years.[61] And the tax of entire fairness likely dissuades some interested parties from pursuing mutually beneficial transactions that would otherwise generate positive value for corporations and all of their stockholders.[62] Even where the potential costs of entire fairness review do not dissuade a controller, they may result in the controller requiring a greater return in exchange for bearing them—a prospective cost of entire fairness review that comes at the expense of the same minority stockholders the standard is intended to protect.

Where claims proceed to trial, the stringent entire fairness standard designed for end-stage transactions may be an imperfect standard of review for other types of

59. *Cf. In re* Viacom Inc. S'holders Litig., C.A. No. 2019-0948-JRS, 2020 WL 7711128, at *2 n.11 (Del. Ch. Dec. 29, 2020) (observing, in an opinion denying a motion to dismiss certain claims brought by a class of former Viacom Inc. stockholders challenging Viacom's merger with CBS as allegedly unfair to Viacom's stockholders: "In an interesting twist, a putative class of CBS stockholders have brought a separate lawsuit in this Court in which they allege that CBS fiduciaries . . . breached their fiduciary duties by causing CBS to merge with Viacom on terms unfair to CBS.").

60. Patrick O'Neal, "Unnecessary Peril": *MFW* Creep, the *MFW* Tax, and the Future of Entire Fairness Review in Conflicted Controller Transactions 19 (May 15, 2023) (unpublished manuscript available at https://ssrn.com/abstract=4522546) (quoting the remarks of Vice Chancellor Glasscock from University of California-Berkeley School of Law, *The "State" of Delaware–2022 Fall Forum on Corporate Governance*, YouTube (Dec. 29, 2022), https://www.youtube.com/watch?v=41FqrjpGjLI); *see also* Zohar Goshen & Assaf Hamdani, *Corporate Control, Dual Class, and the Limits of Judicial Review*, 120 Colum. L. Rev. 941, 976 (2020) ("Under the entire fairness standard, even controllers with extremely valuable idiosyncratic visions would be subject to costly litigation."); *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 709 (Del. 2023) (characterizing the burdens of being "subjected to entire fairness review" as "an expensive, risky, and 'heavy lift' in the litigation arena" (quoting *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 78 (Del. Ch. 2013))).

61. *See* McLaughlin & Kim, *supra* note 1 ("Standalone derivative actions [without accompanying securities class action litigation] are driving up D&O exposure."); *see also* Hamermesh et al., *supra* note 16, at 344 (forecasting "increased D&O insurance costs" from the entire fairness framework upheld in *Match*).

62. *See* Salladay v. Lev, C.A. No. 2019-0048-SG, 2020 WL 954032, at *1 (Del. Ch. Feb. 27, 2020) ("It is likewise true, however, that value to the entity or its stockholders can inhere in a conflicted transaction, and that allowing conflicted boards to replicate the value-enhancing structure of an arms-length transaction and thereby re-invoke the business judgment rule allows value-maximizing transactions to go forward where they might otherwise be eschewed in light of the onerous entire fairness standard."); Goshen & Hamdani, *supra* note 60, at 976 ("Under the entire fairness standard, even controllers with extremely valuable idiosyncratic visions would be subject to costly litigation. The deterrence effect on the controllers with valuable idiosyncratic visions might be particularly acute given the likelihood that courts will tend to underestimate the value of their idiosyncratic vision." (footnote omitted)); *see also* Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 Cal. L. Rev. 393 (2003).

corporate transactions.[63] For example, while the standard's "fair price" prong sensibly applies to controller buyouts, it may be an imprecise tool for reviewing certain charter amendments[64] and other matters that do not, at their core, involve an exchange of tangible economic value.[65] Similarly, the entire fairness standard's "fair process" component, which has been found to require "adversarial negotiations" between a board and controller,[66] is well suited for reviewing the end-stage, zero-sum negotiation over value in controller buyouts. But as the Delaware courts have recognized in other contexts, the path to value maximization is not always amenable to such a one-size-fits-all approach.[67] A "substantial body of contract law scholarship" recognizes that an overly adversarial negotiating posture may erode goodwill and be suboptimal in negotiations among "repeat players" with ongoing relationships, including negotiations between corporations and their executives.[68] While this has

63. *See* Hamermesh et al., *supra* note 16, at 342 n.99 ("Appraising a company sold in a conflicted merger with no market test is difficult enough; judicial pricing of compensation packages is unmoored in standards that would make any exercise of discretion reviewable in any coherent and consistent way."); Goshen & Hamdani, *supra* note 60, at 966 ("[T]his Article contends that financial economists cannot devise a workable methodology for valuing allocations of control rights.").

64. *See, e.g.*, Hamermesh et al., *supra* note 16, at 343 n.105 (noting the issues with "subjecting [a charter] amendment to some unworkable form of 'fairness review'").

65. *See* Goshen & Hamdani, *supra* note 60, at 966 ("Financial economics does not provide a methodology for valuing different allocations of control rights over a corporation. We are aware of no method—least of all one commonly accepted within the financial community—for determining the objective value of granting control over corporation A to individual B (as opposed to individual C). The lack of acceptable methods for valuing different allocations of control rights is not a matter of sheer coincidence. Rather, this Article contends that financial economists cannot devise a workable methodology for valuing allocations of control rights." (footnote omitted)); *but see* Palkon v. Maffei, 311 A.3d 255, 277–84 (Del. Ch. 2024) (discussing the application of the entire fairness standard to a Delaware corporation's proposed conversion to a Nevada corporation); Transcript of Oral Argument and Rulings of the Court on Plaintiff's Motion for an Award of Attorneys' Fees and Expenses at 53–54, W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., C.A. No. 2023-0309-JTL (Del. Ch. July 18, 2024) (rejecting an argument that the benefits resulting from the invalidation of a stockholders agreement's consent rights are "unpriceable," stating: "Lawyers are extremely capable people. When they want to price a control benefit, such as for a low vote/high vote recapitalization or a merger that does the same thing, . . . it's quite easy for them to do it. Bankers will price the control based on precedents at somewhere between 1 and 5 percent of market value. Scholars have consistently reached the same conclusion. . . . I think the plaintiff is completely right to use 1 percent to 5 percent of market value as the range for control.").

66. *See, e.g.*, Tornetta v. Musk, 310 A.3d 430, 513 (Del. Ch. 2024).

67. *Cf.* Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) ("there is no single blueprint that a board must follow to fulfill its duties [under *Revlon*].").

68. Franklin G. Snyder, *More Pieces of the CEO Compensation Puzzle*, 28 Del. J. Corp. L. 129, 149–51 (2003) (positing that viewing "the board's role in the compensation process [a]s essentially adversarial—to represent the interests of the shareholders in getting the best possible deal with the CEO, in much the same way a car buyer tries to negotiate the best possible deal with the salesman[,] . . . ignores the substantial body of contract law scholarship that suggests that individuals engaged in mutually beneficial contractual relationships over time do not—and ordinarily should not—behave in the way the arm's-length model postulates," explaining that "[p]arties to relational contracts realize that the relationship itself has value over and above the terms of any particular deal, and understand that backing out of the relationship will be both costly and disruptive," and that "[e]mployment relationships" constitute "classic cases of long-term relational contracts" where "[t]he terms set at the beginning, even in a formally signed agreement, are merely a jumping-off point for a relationship where the parties are engaged continuously in rewriting the contract as circumstances change and the relationship develops"); *see also* Carrie Menkel-Meadow,

been rejected as a basis for deviating from the type of adversarial negotiations that are traditionally looked for under entire fairness review, in doing so, "[t]he court [has] recognize[d] that negotiations over CEO compensation give rise to strange dynamics because the parties need to work collaboratively after the negotiations have ceased," which "is true in many negotiations and in virtually every salary negotiation."[69] In certain circumstances, engaging in hard-nosed negotiations to meet the scrutiny of entire fairness could risk straining critical relationships and other future adverse consequences, even if this approach yields superior results in the short term.[70] In any event, situations implicating more dynamic interests than the "zero-sum game"[71] and distributive negotiations of controller buy-outs may be particularly susceptible to diverging views on a transaction's "fairness."[72]

The burdens of entire fairness review have been exacerbated by the increasing frequency with which non-majority stockholders have been found, after trial or for purposes of the pleading stage, to constitute a controller or control group.[73] "Under Delaware law, it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder."[74] Recently, Delaware cases have largely trended in a different direction, and in one instance, a less than 22 percent stockholder (albeit one with the influence of Elon Musk) has now been found, after trial, to constitute a controlling stockholder.[75] Outside of the context of judicial rulings, one member of the Court of Chancery has personally expressed support for applying a presumption of control to 20

Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754, 793 (1984) (observing that "[w]hen negotiators adopt zero-sum conceptions of the problems or transactions they seek to resolve or plan, they unnecessarily limit themselves in a number of ways," which can include, among other things, "focusing on maximizing immediate, individual gain" in a manner that "may fail to appreciate the long-term consequences of a particular solution").

69. *Musk*, 310 A.3d at 520 n.733.

70. *See* Menkel-Meadow, *supra* note 68, at 793; Snyder, *supra* note 68, at 149–51.

71. Hamermesh et al., *supra* note 16, at 337 n.74.

72. *See* Goshen & Hamdani, *supra* note 60, at 975 (discussing situations in which the absence of "valuation models to guide courts" could render the results of "entire fairness . . . quite speculative . . . and the outcome of judicial review . . . unpredictable"); Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 Del. J. Corp. L. 27, 72 (1999) (explaining that "a fairness review has significant costs in terms of time and predictability").

73. *See* Hamermesh et al., *supra* note 16, at 344–48 (reviewing recent decisions "expanding the definition of a 'controlling stockholder,'" including those deemed by the article's authors to take relatively "adventuresome" positions on what constitutes a control group); *see generally* Nicholas D. Mozal, Justin T. Hymes & Faith C. Flugence, *Delaware's "Control Group" Jurisprudence: A Survey of Recent Decisions*, 18 Del. L. Rev. 25 (2023).

74. Hamermesh et al., *supra* note 16, at 345.

75. 310 A.3d at 497–520. In at least one other post-trial decision (again involving relatively unique circumstances), the Court of Chancery found two brothers owning less than 15 percent of a corporation's outstanding stock to constitute controlling stockholders. FrontFour Cap. Grp. LLC v. Taube, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at *21–24 (Del. Ch. Mar. 11, 2019); *but see* Sciannella v. AstraZeneca UK Ltd., C.A. No. 2023-0125-PAF, 2024 WL 3327765, at *16–26 (Del. Ch. July 8, 2024) (granting a motion to dismiss claims against a stockholder who held 26.7 percent of a corporation's outstanding stock and provided contractual support services that the corporation was alleged to have "substantially depended on . . . to support its business operations," finding that it was not reasonably conceivable that the stockholder exercised either general control over the corporation or transaction-specific control over the corporation or its board in connection with the challenged transaction).

percent stockholders.[76] Other cases illustrate that questions may arise as to when multiple stockholders constitute a control group.[77] Recent controlling stockholder and control group jurisprudence has considerably expanded the universe of public companies and potential controlling holders that could, at least at the pleading stage, be subject to the burdens and costs of entire fairness review. Even if a relatively small blockholder would not ultimately be found to constitute a controller, at this stage, real costs can arise from mere allegations of control given the entire fairness standard's uneven leverage that often encourages settlement before significant defense costs are incurred.

II. The Limitations of Delaware's Existing Safeguards

Corporations and fiduciaries facing entire fairness claims are not entirely devoid of safeguards, particularly with respect to derivative entire fairness challenges outside of the controller buyout context. These safeguards, however, offer imperfect solutions that do not fully address the problems presented by the modern entire fairness paradigm.

A. The *MFW* Framework

The *MFW* framework was adopted to provide a path for controlling stockholders to avoid the burdens and costs of entire fairness review and the opportunistic controller buyout challenges that emerged following *Kahn v. Lynch*.[78] While *MFW* also supplies a path for avoiding entire fairness review of other transactions implicating unique interests of controllers, the *MFW* framework has shown that it is often not a practical solution and, at times, may not even be feasible.[79]

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76. J. Travis Laster, *Wondering About "Control"? The General Assembly Already Defined It*, LinkedIn (Feb. 4, 2024), https://www.linkedin.com/pulse/wondering-control-general-assembly-already-defined-travis-laster-4czme (posting in his personal capacity).

77. *See generally* Mozal et al., *supra* note 73.

78. *See In re* MFW S'holders Litig., 67 A.3d 496, 526–27 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014); Swomley v. Schlecht, C.A. No. 9355-VCL, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014), *aff'd*, 128 A.3d 992 (Del. 2015) (TABLE).

79. *See, e.g.*, Greg Varallo, Andrew Blumberg & James Janison, *"Optimizing" and* Match: *Bad Policy Threatens to Drive Bad Law*, Harv. L. Sch. F. on Corp. Governance (Nov. 13, 2023), https://corpgov.law.harvard.edu/2023/11/13/optimizing-and-match-bad-policy-threatens-to-drive-bad-law/ ("We again agree with the premise" "that there are conflicted controller transactions that cannot reasonably be subjected both to approval by an independent committee and a majority of the minority stockholder vote."); Delman v. GigAcquisitions3, LLC, 288 A.3d 692, 721 n.201 (Del. Ch. 2023) ("The dual protections outlined in *Kahn v. M&F Worldwide Corp*. would also be an ill fit for a de-SPAC transaction. The *MFW* process was designed to protect minority stockholders from the retribution of a controlling stockholder engaged in a self-dealing transaction—specifically, a squeeze-out. Those fears are not realized in a SPAC merger; public stockholders can simply redeem their shares." (internal citations omitted)); *see also In* re Pilgrim's Pride Corp. Derivative Litig., C.A. No. 2018-0058-JTL, 2019 WL 1224556, at *9 (Del. Ch. Mar. 15, 2019) ("Bebchuk and Hamdani observe that while the *MFW* framework works well for major transactions like squeeze-out mergers, its significant requirements undermine its utility for other types of interested transactions involving a controller." (citing Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. Pa. L. Rev. 1271 (2017))); *cf. In re* Match Grp., Inc. Derivative Litig., C.A. No. 2020-0505-MTZ, 2022 WL 3970159, at *15 n.139 (Del. Ch. Sept. 1, 2022) ("I pause to note that the Separation, a reverse spinoff collapsing a dual class capital structure

For many public companies, especially those with smaller market capitalizations, it may be almost impossible to obtain a majority-of-the-minority vote regardless of a transaction's merits. Following the emergence of retail trading platforms, many public companies are owned by a growing concentration of retail holders prone to "rational apathy" with a "traditionally . . . poor record of attending and voting at meetings."[80] This trend has coincided with several brokerage firms' adoption of policies of declining to exercise discretionary authority over shares held in "street name,"[81] as well as changes that have "significantly narrowed" "the ability of brokers to exercise discretionary voting . . . in recent years."[82] These developments have created such a problem that "many public corporations have encountered significant difficulty in securing various stockholder votes and, in particular, a vote necessary to effect a reverse stock split to help a corporation maintain the minimum share price amount necessary to be listed on a national securities exchange," that is "often attributable not to the merits of the proposal," as "few stockholders, it would seem, would support a de-listing that would assuredly diminish the liquidity of the stock."[83] This problem has even been recognized by the Delaware General Assembly. In 2023, the General Assembly adopted amendments to Section 242 of the DGCL that addressed this problem by reducing the default stockholder vote required to authorize charter amendments changing the authorized number of shares of a class of stock or reclassifying a class of stock to effect a reverse stock split in specified circumstances.[84] Public companies experiencing this phenomenon frequently have no way of escaping entire fairness review of non-ratable controller transactions. These are, unfortunately, the same public companies most likely to lack the funds required to defend an entire fairness lawsuit (and advance the defense costs of its director and officer defendants) through trial.

and restoring some voting control to the minority, is in many ways the opposite of the freeze-out merger that inspired *MFW*."), *aff'd in part, rev'd in part*, 315 A.3d 446 (Del. 2024). For example, in *Frederick Hsu Living Trust v. ODN Holding Corp.*, the interests of a controller seeking the redemption of its preferred stock were found to invoke entire fairness review of the corporation's alleged abandonment of its growth strategy "in favor of selling off whole business lines and hoarding cash in order to provide the maximum amount [the controller] could extract non-ratably from the Company by exercising its redemption right." C.A. No. 12108-VCL, 2017 WL 1437308, at *15 (Del. Ch. Apr. 14, 2017). While the Court of Chancery explained in *ODN* that "the twin procedural protections of both an independent committee and a majority-of-the-minority vote would be required to restore the business judgment rule" in this context, this presents questions as to how the *MFW* framework would apply to a general shift in corporate strategy carried out through a series of separate transactions—what specifically would need to receive independent committee and disinterested stockholder approval in order to obtain the protections of *MFW*? *Id.* at *34.

80. *In re* AMC Ent. Holdings, Inc. S'holder Litig., 299 A.3d 501, 510 (Del. Ch. 2023); *see generally* Kobi Kastiel & Yaron Nili, *In Search of the "Absent" Shareholders: A New Solution to Retail Investors' Apathy*, 41 Del. J. Corp. L. 55, 60–61 (2016); *see also* Dell Techs. Inc. Class V S'holders Litig., 300 A.3d 679, 686 (Del. Ch. 2023) (noting the role "[e]ntrepreneurial plaintiff's counsel," serve "by pursuing litigation" because "stockholders are rationally apathetic").

81. *See 2023 Proposed Amendments to the General Corporation Law of the State of Delaware*, Richards, Layton & Finger, P.A. (May 1, 2023), https://www.rlf.com/2023-proposed-amendments-to-the-general-corporation-law-of-the-state-of-delaware/.

82. Kastiel & Nili, *supra* note 80, at 71.

83. *2023 Proposed Amendments to the General Corporation Law of the State of Delaware*, *supra* note 81.

84. S.B. 114, 152d Gen. Assemb., 84 Del. Laws ch. 98 (2023); *see 2023 Proposed Amendments to the General Corporation Law of the State of Delaware*, *supra* note 81.

Even where a company's stockholder base leaves open the possibility of obtaining a majority-of-the-minority vote, the imposition of this condition can add considerable deal risk and uncertainty.[85] As has been widely recognized, an agreement to follow the *MFW* framework may present considerable leverage to those with a relatively small stake, which could invite resistance from activists and arbitrageurs buying into a target's stock in an attempt to extract hold-up value.[86] For transactions not otherwise requiring a stockholder vote, seeking majority-of-the-minority approval adds timing delays and costs associated with soliciting minority stockholder approval, including proxy solicitation costs and, where a special meeting is needed, the costs of holding an additional stockholder meeting.[87]

The timing delays associated with seeking a majority-of-the-minority vote may be especially problematic in the types of dire financial situations in which transactions with controllers, such as controller-led rescue financings, are most valuable. Committing to the *MFW* framework also comes at the cost of some degree of flexibility.[88] The flexibility lost by committing to the *MFW* framework may again be most critical in desperate times when a transaction is needed to ensure corporate survival and rational apathy among stockholders may be highest.[89] And even if the receipt of a majority-of-the-minority vote is feasible in these circumstances, controllers attempting to preserve value for all

85. *See In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 709 (Del. 2023) ("[W]e also recognize that there may be reasons why a board decides not to employ [*MFW*'s prophylactic] devices, including transaction execution risk.").

86. *See* Guhan Subramanian, *Freezeouts in Delaware and Around the World*, 24 U. PA. J. BUS. L. 803, 808–10 (2022); Gail Weinstein & Steven Epstein, *Another Road Leading to Business Judgment Review—*Martha Stewart Living Omnimedia, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 10, 2017), https://corpgov.law.harvard.edu/2017/09/10/another-road-leading-to-business-judgment-review-martha-stewart-living-omnimedia/; *Delaware Court Applies Business Judgment Rule to Going-Private Merger with Controlling Stockholder*, DAVIS POLK (May 31, 2013), https://www.davispolk.com/insights/client-update/delaware-court-applies-business-judgment-rule-going-private-merger ("Read the full update" to access); *see generally In re* AmTrust Fin. Servs., Inc. S'holder Litig., C.A. No. 2018-0396-AGB, 2020 WL 914563 (Del. Ch. Feb. 26, 2020) (discussing how opposition to a proposed $13.50 per share controller buyout led by Carl Icahn, whose funds held approximately 9.3 percent of the company's outstanding stock, initially resulted in the company having insufficient votes to satisfy a majority-of-the-minority condition and led to Icahn negotiating an increased buyout price of $14.75 per share).

87. *See* Hamermesh et al., *supra* note 16, at 337 n.74, 343–44 (arguing against the extension of broad entire fairness review under *Kahn v. Lynch* to matters that do not require a statutory vote, such as compensation decisions).

88. *See In re Tesla*, 298 A.3d at 709 (recognizing that the "reasons why a board decides not to employ [*MFW*'s prophylactic] devices" may include a desire "to maintain some flexibility in the process").

89. Consider a situation where a controlling stockholder commits to the *MFW* framework for potential rescue financing needed for a corporation to continue as a going concern. Even if there is a critical need for financing and no other options are available, disinterested stockholder approval of a favorable controller-led financing may be exceedingly difficult to obtain. Not only does this dire financial situation present considerable risk of rationale apathy among stockholders, it raises the prospect of disinterested stockholders using their voting power as leverage against the controlling stockholder with the most at stake. *Cf.* Stream TV Networks, Inc. v. SeeCubic, Inc., 250 A.3d 1016, 1042–43 (Del. Ch. 2020) (discussing the risk of stockholders of an insolvent corporation rejecting a transfer of assets to a secured creditor under Section 271 of the DGCL "if only to create bargaining leverage against the creditor"), *rev'd in part*, 279 A.3d 323 (Del. 2022). If an apathetic or hard-bargaining disinterested stockholder base fails to approve a controller-led financing and no fi-

could still face arguments that "situational coercive factors" render *MFW* unavailable.[90]

Other practical difficulties may arise from *MFW*'s "*ab initio*" requirement. Unlike the negotiation of controller buyouts, which often begin upon an initial overture made by a controlling stockholder, negotiations over other transactions may have a more organic beginning. Transactions emerging from day-to-day discourse in the ordinary course of business may be prone to some high-level discussion of potential financial terms between business principals not well versed in *MFW*'s requirements before lawyers become involved.[91] At the outset of a process to consider a potential transaction with a controlling stockholder, the existence of even minimal prior discussions can call into question *MFW*'s application and undermine the primary incentive of following its framework.

Uncertainty can also arise at the beginning of a process with respect to which stockholders constitute part of the minority for purposes of obtaining *MFW*'s majority-of-the-minority approval. This question has arisen with greater frequency in recent years, as past commercial or investment relationships have been found to render a stockholder part of a control group or otherwise undermine a director's or stockholder's independence.[92] And most often, it arises with respect to the

nancing alternatives emerge, adherence to the *MFW* framework could jeopardize the corporation's continued viability.

90. *See In re* Saba Software, Inc. S'holder Litig., C.A. No. 10697-VCS, 2017 WL 1201108, at *16 (Del. Ch. Mar. 31, 2017) (finding *Corwin* inapplicable to a merger because a corporation's de-listing from NASDAQ "forced stockholders to choose between a no-premium sale or holding potentially worthless stock"); *see generally In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748, at *20–35 (Del. Ch. June 11, 2020) (discussing the issue of coercion and the impediment it may serve in receiving the business judgment protection offered by the *MFW* framework).

91. *See* Flood v. Synutra Int'l, Inc., 195 A.3d 754, 760–68 (Del. 2018) (holding that *MFW*'s *ab initio* requirement requires that a transaction be conditioned on the *MFW* framework "before the start of substantive economic negotiations"); Olenik v. Lodzinski, 208 A.3d 704 (Del. 2019).

92. *See, e.g.*, Transcript of Telephonic Rulings of the Court on Defendants' Motions to Dismiss at 31, MH Haberkorn 2006 Tr. v. Empire Resorts, Inc., C.A. No. 2020-0619-KSJM (Del. Ch. July 23, 2021) (suggesting that commercial relationships could prevent a third-party stockholder from being included as part of the minority for *MFW* purposes and finding it "reasonably conceivable that bet365 was not disinterested and was not an unaffiliated minority stockholder [of Empire Resorts, Inc.] for the purposes of th[e] *MFW* condition" because of its joint venture sports betting operations with Empire); *compare In re* MFW S'holders Litig., 67 A.3d 496. 513–14 (Del. Ch. 2013)(finding that a committee member was independent from a corporation's controlling stockholder, Ronald Perelman, despite allegations that (i) the committee member knew Perelman "since at least 1988, when Perelman invested in failed thrifts," (ii) the committee member served as President and Chief Operating Officer of the investment vehicles through which they invested in these thrifts, and (iii) the committee member and Perelman "both made a 'significant' amount of money in turning around the thrifts, which they sold to Citigroup for $5 billion in 2002"; the Court explained that the profit the committee member "realized from coinvesting with Perelman nine years before the transaction at issue in this case d[id] not call into question his independence" and instead "tend[ed] to strengthen the argument that [he wa]s independent" and that his current relationship with Perelman would likely be economically inconsequential to him," noting that "there [wa]s no evidence that [the committee member] and Perelman had any economic relationship in the nine years before this merger that was material to [the committee member], given his existing wealth"), *aff'd sub nom*. Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014), *with In re* Hansen Med., Inc. S'holders Litig., C.A. No. 12316-VCMR, 2018 WL 3025525, at *5–9 (Del. Ch. June 18, 2018) (finding it reasonably conceivable, for purposes of a motion to dismiss, that two stockholders with a long history of coordinating investment strategies re-

disinterestedness of relatively large blockholders whose inclusion as part of the minority may determine the feasibility of obtaining a majority-of-the-minority vote.[93] Where ambiguity regarding the composition of a corporation's minority stockholder base is present, those considering the merits of following the *MFW* framework must consider the risk this presents. That is, the risk of potentially being left defending an entire fairness claim despite intending to adhere to the *MFW* framework if a court later finds it reasonably conceivable, at the pleading stage and based on the plaintiff-friendly inferences arising from the plaintiff's own complaint, that the majority-of-the-minority vote should have been calculated differently.[94]

Further uncertainty as to the benefits of seeking to follow the *MFW* framework can arise from the disclosures in proxy statements or other solicitation materials seeking majority-of-the-minority approval. Frequently, these disclosures are the primary target of stockholder-plaintiffs attempting to overcome *MFW* to challenge a transaction under entire fairness review.[95] Importantly, "[o]ne disclosure violation is enough to defeat" the effectiveness of a disinterested stockholder vote and prevent the invocation of the business judgment rule through the *MFW* framework.[96] Materiality is "a 'context-specific inquiry,'"[97] and questions regarding the materiality of a particular disclosure can, and frequently do, give rise to the type of "close call" on which the views of even seasoned corporate law jurists can diverge.[98] Reasonable views may therefore differ as to whether

garding various companies constituted a control group), *and* Tornetta v. Musk, 310 A.3d 430, 455–60 (Del. Ch. 2024) (finding several directors who amassed considerable wealth from Musk-affiliated companies to lack independence from Musk); *see also* Ark. Tchr. Ret. Sys. v. Alon USA Energy, Inc., C.A. No. 2017-0453-KSJM, 2019 WL 2714331, at *20 n.140 (Del. Ch. June 28, 2019) (declining to rule on the question, but noting plaintiff "dispute[d] that the stockholder vote prevailed by a majority of the truly unaffiliated stockholders").

93. *See supra* note 80.

94. *Cf.* Mozal et al., *supra* note 73, at 47 ("Uncertainty about whether one is part of a control group decreases the likelihood of utilizing *MFW* because the stockholders may be unwilling to in essence concede they are part of such a group by stating they will abide by *MFW*. . . . Why would one make such a concession if he or she did not think they were part of a control group? One final point: the decisions discussed in this article all involved pleading-stage motions. One outstanding issue that has yet to play out post-*Corwin* is what it takes parties to succeed at trial in showing there was or was not a control group, after the court had determined on the pleadings that the existence of one was reasonably conceivable.").

95. *Cf. In re* Rouse Props., Inc. Fiduciary Litig., C.A. No. 12194-VCS, 2018 WL 1226015, at *1 (Del. Ch. Mar. 9, 2018) (explaining the "pattern" of post-closing challenges contesting the adequacy of disclosures that have emerged in the "post-*Corwin*, post–*MFW* world"); Zeberkiewicz & Greco, *supra* note 51; John Mark Zeberkiewicz & Robert B. Greco, *Amendments to the DGCL Permit Officer Exculpation*, INSIGHTS, Oct. 2022, at 3, 4.

96. Teamsters Loc. 677 Health Servs. & Ins. Plan v. Martell, C.A. No. 2021-1075-NAC, 2023 WL 1370852, at *10 (Del. Ch. Jan. 31, 2023).

97. City Pension Fund for Firefighters & Police Officers in City of Miami v. Trade Desk, Inc., C.A. No. 2021-0560-PAF, 2022 WL 3009959, at *16 (Del. Ch. July 29, 2022) (quoting *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748, at *39 (Del. Ch. June 11, 2020)).

98. City of Dearborn Police & Fire Revised Ret. Sys. (Chapter 23) v. Brookfield Asset Mgmt. Inc., 314 A.3d 1108, 1113 (Del. 2024) (reversing the Court of Chancery's dismissal of claims challenging a controller buyout under *MFW* upon concluding "that the minority stockholders were not adequately informed of certain alleged conflicts of interest between the special committee's advisors and the counterparty to the Merger," but in reaching a different conclusion than the Court of Chancery, agreeing with the Court of Chancery's observation that the disclosure question in the case "was a

specific negotiating events or relationships truly alter the "total mix" of information available to stockholders voting on a transaction, and disclosure deficiencies can arise even in the absence of any misconduct or bad faith.[99] Even the prospect of diverging views may alone be problematic, as "[i]ssues of materiality are often fact-intensive,"[100] and *MFW*'s principal benefit of pleading-stage dismissal may be lost if a complaint, "when fairly read," simply "supports a *rational inference* that material facts were not disclosed or that the disclosed information was otherwise materially misleading."[101] While controllers facing potential entire fairness claims generally bear most of the risk of disclosure deficiencies, by recusing themselves from the company's side of the transaction, controllers often lack principal responsibility for the company's solicitation materials and disclosures. Regardless of the cause of any disclosure deficiencies, or the sound policy reasons that prevent *MFW*'s application where a stockholder vote is not fully informed, transactional planners considering the *MFW* framework must weigh the risk that disclosure issues could ultimately prevent the invocation of the business judgment rule.

Taken together, these types of considerations often lead parties to conclude that the benefits of following the *MFW* framework, as adjusted to reflect the various risks that could undermine its invocation of the business judgment rule, do not justify the costs and risks of conditioning a transaction on this framework, particularly in the case of transactions not otherwise requiring a stockholder vote and/or corporations with apathetic minority stockholder bases.[102]

B. Demand Futility, as Reframed and Confirmed in *Zuckerberg*

The controller buyouts traditionally reviewed under the entire fairness standard generally give rise to direct claims from target stockholders cashed out in the transaction.[103] But many other types of controller transactions implicating entire fairness review are quintessential derivative claims.[104] This includes

close call"); *see, e.g.*, Morrison v. Berry, C.A. No. 12808-VCG, 2017 WL 4317252 (Del. Ch. Sept. 28, 2017) (dismissing a challenge to a merger under *Corwin* upon finding no material omissions in the solicitation statement relating to a merger, and explaining that only one of the alleged disclosure deficiencies even "comes close to materiality"), *rev'd*, 191 A.3d 268 (Del. 2018) (reversing the dismissal of the same claims under *Corwin* on the basis of four separate disclosure deficiencies in the same solicitation statement).

99. *See, e.g.*, Morrison v. Berry, C.A. No. 12808-VCG, 2019 WL 7369431, at *25 (Del. Ch. Dec. 31, 2019) ("Our Supreme Court held that as offered, the 14D-9 'presents a distorted narrative.' For reasons already explained, I do not find that the omissions support an inference of a subsequent concealment of misconduct or a bad faith intent to harm the Company.").

100. Palkon v. Maffei, C.A. No. 2023-0449-JTL, 2024 WL 1211688, at *9 (Del. Ch. Mar. 23, 2024).

101. *Morrison*, 191 A.3d at 282 (emphasis added).

102. *See In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 709 (Del. 2023) ("recogniz[ing] that there may be reasons why a board decides not to employ [the *MFW* framework], including transaction execution risk.").

103. *See* Parnes v. Bally Ent. Corp., 722 A.2d 1243, 1245 (Del. 1999).

104. *See generally* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004).

financing transactions with controlling stockholders, as reinforced in a 2021 Delaware Supreme Court decision overturning prior cases that permitted direct challenges to dilutive controller financings.[105] Today, challenges to financings, compensation awards, and other commercial arrangements and related-party transactions in the course of business are, in most cases, derivative in nature.[106]

Longstanding Delaware law recognizes that the management of derivative claims is principally vested in a corporation's board of directors through the board's general management authority under Section 141(a) of the DGCL.[107] "Because directors are empowered to manage, or direct the management of, the business and affairs of the corporation" under Section 141(a), "the right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so or where demand is excused because the directors are incapable of making an impartial decision regarding such litigation."[108] "The demand requirement," implemented through Court of Chancery Rule 23.1, "is a substantive requirement that '[e]nsure[s] that a stockholder exhausts his intracorporate remedies, provide[s] a safeguard against strike suits, and assure[s] that the stockholder affords the corporation the opportunity to address an alleged wrong without litigation and to control any litigation which does occur.'"[109]

The Delaware courts traditionally assessed demand futility based on two tests: the *Aronson* test and the *Rales* test. Under this historical framework, "[t]he *Aronson* test applie[d] where the complaint challenge[d] a decision made by the same board that would consider a litigation demand."[110] Under the *Aronson* test, demand was futile where "the particularized facts alleged" gave rise to "a reasonable doubt . . . that: (1) the directors are disinterested and independent and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment."[111]

"The *Rales* test applie[d] in all other circumstances."[112] When applicable, the *Rales* test found demand futile if a complaint's "particularized factual allegations . . . create[d] a reasonable doubt that" the board of directors, as comprised at the time of the filing of the complaint, "could have properly exercised its independent and disinterested business judgment in responding to a demand."[113]

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105. Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251 (Del. 2021) (overturning *Gentile v. Rosette*, 906 A.2d 91 (Del. 2006), and its progeny, which previously deemed certain controller dilution claims as dual-natured claims that could be brought directly or derivatively).

106. *See generally Tooley*, 845 A.2d 1031.

107. *See, e.g.*, Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981); Aronson v. Lewis, 473 A.2d 805 (Del. 1984); *see also* DEL. CODE ANN. tit. 8, § 141(a) (2024).

108. Rales v. Blasband, 634 A.2d 927, 932 (Del. 1993).

109. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1047–48 (Del. 2021) (alterations in original) (internal quotation marks omitted) (quoting Lenois v. Lawal, C.A. No. 11963–VCMR, 2017 WL 5289611, at *9 (Del. Ch. Nov. 7, 2017)); *accord* Spiegel v. Buntrock, 571 A.2d 767, 773 (Del. 1990).

110. *Zuckerberg*, 262 A.3d at 1048.

111. *Aronson*, 473 A.2d at 814.

112. *Zuckerberg*, 262 A.3d at 1048; *see Rales*, 634 A.2d at 933–34.

113. *Rales*, 634 A.2d at 934.

In 2021, the Delaware Supreme Court reframed the *Aronson* and *Rales* tests in *United Food & Commercial Workers Union & Participating Food Industry Employers Tri-State Pension Fund v. Zuckerberg*, supplanting them with a "universal test for assessing whether demand should be excused as futile."[114] Under this universal test, demand is futile if a complaint's particularized allegations raise a reasonable doubt, with respect to at least half of the directors who would consider a demand, as to their ability to consider the demand with "impartial business judgment" based on whether each director (or someone from whom the director lacks independence) "faces a substantial likelihood of liability on any of the claims that would be the subject of the litigation demand" or "received a material personal benefit" from the alleged misconduct that would be the subject of the claims.[115] The universal test addresses the "same question" at the core of the *Aronson* and *Rales* tests—"whether the board can exercise its business judgment on the corporat[ion]'s behalf in considering demand."[116] As such, *Zuckerberg*'s universal test reframed the historical demand futility analysis in "an orderly fashion" to characterize more accurately the modern application of the *Aronson* and *Rales* tests by the Delaware courts.[117] The "refined test [did] not change the result of demand-futility analysis."[118]

Perhaps most notably, part of the Delaware Supreme Court's rationale for reframing *Aronson* and *Rales* through *Zuckerberg*'s universal test was to account for and confirm the holdings of a series of Court of Chancery decisions addressing demand futility for controller transactions implicating entire fairness review. Under the *Aronson* test as originally articulated in 1984, its second prong purported to render demand futile where a reasonable doubt was raised as to whether "the challenged transaction was otherwise the product of a valid exercise of business judgment."[119] Interpreting this literally, some litigants argued "that demand would be excused as a matter of law whenever a transaction between a corporation and its putative controlling stockholder implicates the entire fairness standard,"[120] "even if the business judgment rule is rebutted for a reason unrelated to the conduct or interests of a majority of the directors on the demand board."[121]

114. 262 A.3d at 1058.

115. *Id.* at 1059.

116. *Id.* at 1058 (alteration in original) (internal quotation marks omitted).

117. *Id.*

118. *Id.*

119. Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984).

120. Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 65 (Del. Ch. 2015); *see, e.g.*, United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1055 (Del. 2021) (rejecting the "argu[ment] that because the entire fairness standard of review applies *ab initio* to a conflicted-controller transaction, demand is automatically excused under *Aronson*'s second prong" (footnote omitted)); *In re* BGC Partners, Inc. Derivative Litig., C.A. No. 2018-0722-AGB, 2019 WL 4745121, at *7 (Del. Ch. Sept. 30, 2019) ("Focusing on the second prong of *Aronson*, Plaintiffs argue that demand is excused as a matter of law simply because the Transaction is subject to entire fairness review since [a] controlling stockholder stood on both sides." (internal quotation marks omitted)).

121. *Zuckerberg*, 262 A.3d at 1055.

But, as the Supreme Court explained in *Zuckerberg*, "[t]he Court of Chancery's case law developed in a different direction, . . . concluding that demand is not futile under the second prong of *Aronson* simply because entire fairness applies *ab initio* to a controlling stockholder transaction."[122] Notwithstanding the phrasing of the second prong of *Aronson*, the Court of Chancery explained that this literal interpretation cannot be reconciled with *Aronson*'s holding:

> [I]n the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.[123]

As a result, in *Teamsters Union 25 Health Services & Insurance Plan v. Baiera*, the Court of Chancery interpreted *Aronson*'s second prong more narrowly by looking to this principal holding of *Aronson*, as well as the inherent authority over litigation conferred on "directors by 8 *Del. C.* § 141(a)"—which was cited in *Aronson* and is embodied in the requirements of Court of Chancery Rule 23.1 that must be satisfied for a stockholder to "infringe[] upon the board's managerial authority" and commence derivative litigation.[124] Based on the foregoing and other guidance from the Delaware Supreme Court,[125] the Court of Chancery held in *Baiera* that "regardless of" whether *Aronson* or *Rales* applied, "the demand futility analysis focuses on whether there is a reason to doubt the impartially of the directors, who hold the authority under 8 *Del. C.* § 141(a) to decide 'whether to initiate, or refrain from entering, litigation.'"[126] The *Baiera* Court explained that, "[u]nder these authorities, neither the presence of a controlling stockholder nor allegations of self-dealing by a controlling stockholder change the director-based focus of the demand futility inquiry" or "remove . . . derivative claims . . . from the purview of the Demand Board to decide for themselves under 8 *Del. C.* § 141(a) whether to exercise the Company's right to bring such a claim."[127]

Subsequent Court of Chancery decisions reached the same conclusion.[128] In *Zuckerberg*, the Delaware Supreme Court explained that this was one of the key developments following *Aronson* "both appropriate and necessary" to address through the new universal test for demand futility.[129] In doing so, the Supreme

122. *Id.*; *see, e.g.*, *Baiera*, 119 A.3d at 65–68; *BGC*, 2019 WL 4745121, at *7–9.
123. *Baiera*, 119 A.3d at 66 (quoting *Aronson*, 473 A.2d at 815).
124. *Id.* (quoting Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981)).
125. *See, e.g.*, Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1054 (Del. 2004) ("A stockholder's control of a corporation does not excuse presuit demand on the board without particularized allegations of relationships between the directors and the controlling stockholder demonstrating that the directors are beholden to the stockholder.").
126. *Baiera*, 119 A.3d at 67 (quoting *Zapata*, 430 A.2d at 782).
127. *Id.* at 67–68.
128. *See, e.g.*, *BGC*, 2019 WL 4745121, at *7.
129. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1058 (Del. 2021).

Court adopted the reasoning articulated in *Baiera* and expressly rejected the notion that demand is automatically futile where "the entire fairness standard of review applies *ab initio* to a conflicted-controller transaction" based, in large part, on the board's managerial authority under Section 141(a).[130] The Delaware Supreme Court explained:

> [Plaintiff]'s argument presumes that a stockholder has a general right to control corporate claims. Not so. The directors are tasked with managing the affairs of the corporation, including whether to file action on behalf of the corporation. A stockholder can only displace the directors if the stockholder alleges with particularity that "the directors are under an influence which sterilizes their discretion" such that "they cannot be considered proper persons to conduct litigation on behalf of the corporation." As such, enforcing the demand requirement where a stockholder has only alleged exculpated conduct does not "undermine shareholder rights;" instead, it recognizes the delegation of powers outlined in the DGCL.
>
> Finally, [plaintiff]'s argument collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction. It is entirely possible that an independent and disinterested board, exercising its impartial business judgment, could decide that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed. Yet, [plaintiff] asks the Court to deprive directors and officers of the power to make such a decision, at least where the derivative action would challenge a conflicted-controller transaction. This rule may have its benefits, but it runs counter to the "cardinal precept" of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights.[131]

The principal authority over derivative claims vested in boards under Section 141(a) of the DGCL, and embodied in the requirements of demand futility and Court of Chancery Rule 23.1, does limit, to some degree, inefficient derivative litigation incapable of supporting the costs and burdens of its continued prosecution. But corporations with controllers prone to entire fairness challenges may tend to have board compositions more susceptible to a finding of demand futility. Indeed, many controlled companies take advantage of the "controlled company exemption" offered by the New York Stock Exchange and NASDAQ, which relieves them of the requirement of having an independent board majority.[132]

130. *Id*. at 1055.

131. *Id*. at 1055–56 (quoting Aronson v. Lewis, 473 A.2d 805, 811, 814 (Del. 1984)); *accord In re* Match Grp. Inc. Derivative Litig., 315 A.3d 446, 469 (Del. 2024) ("In *Zuckerberg*, we held that layering entire fairness review over our demand review precedent 'collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction.' An 'independent and disinterested board' can decide 'that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed.' To divest the board of authority over a derivative litigation, however, even when it involves a controlling stockholder, 'runs counter to the "cardinal precept" of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights.'" (quoting *Zuckerberg*, 262 A.3d at 1056)).

132. NYSE Listed Company Manual, § 303A.00 (2023); Nasdaq Listing Rule 5615(c).

Corporations with an independent board majority for stock exchange purposes are also not immune to a finding of demand futility. Unlike stock exchange independence requirements based on specified independence criteria, "Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry."[133] Delaware's fluid standard of director independence—capable of turning on innumerable types of different relationships—may create situations in which a director whose independence was not previously believed to be in question may be compromised for purposes of demand futility.[134] Indeed, in recent years, numerous directors deemed independent for exchange purposes have been found by the Delaware courts to lack independence and disinterestedness for purposes of demand futility.[135] If a bare majority of a board is nominally independent for stock exchange purposes, the independence and disinterestedness of only one director needs to be impugned to render demand futile.

And even if a corporation truly has an independent board majority, a plaintiff may be able to raise reasonable questions as to the independence of one or more directors and survive a Rule 23.1 motion, thereby generating considerable settlement leverage. Demand futility is typically assessed under Rule 23.1 on a motion to dismiss.[136] When Rule 23.1 is invoked at this stage, plaintiffs' demand futility arguments are bolstered by a heightened, yet still plaintiff-friendly, pleading standard.[137] While a complaint must allege "particularized factual statements that are essential to the claim" to satisfy Rule 23.1's heightened pleading standard,[138] this "does not entitle a court to discredit or weigh the persuasiveness of well-pled allegations" in the complaint.[139] Rather, the particularized allegations that a plaintiff may plead and utilize to establish demand futility may still include "cherry-picked"[140] or mischaracterized factual allegations, even if they later prove inaccurate

133. Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 61 (Del. Ch. 2015).

134. *See, e.g.*, *In re* Oracle Corp. Derivative Litig., C.A. No. 2019-0303-JTL, 2022 WL 3136601, at *8 (Del. Ch. May 20, 2022) ("At least one Delaware case, *In re Dell Technologies Inc. Class V Stockholders Litigation*, has extended [Delaware's] test [regarding director independence] to reach cases where the director in question has a compromising relationship with a 'close advisor or other associate' of the interested party, as opposed to the interested party itself.").

135. *See, e.g.*, Sandys v. Pincus, 152 A.3d 124 (Del. 2016); Del. Cnty. Emps.' Ret. Fund v. Sanchez, 124 A.3d 1017 (Del. 2015); *In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016).

136. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 699 (Del. Ch. 2023).

137. *See* Grabski *ex rel.* Coinbase Glob., Inc. v. Andreessen, C.A. No. 2023-0464-KSJM, 2024 WL 390890, at *6–7 (Del. Ch. Feb. 1, 2024) (explaining that while "Rule 23.1 requires that a derivative complaint plead facts with particularity," "[a]t the pleadings stage," the court still accepts well-pled facts as true and "draw[s] all inferences from the particularized facts in Plaintiffs' favor" to assess whether "it is reasonably conceivable that the Director[s have interests] that would compromise their impartiality in considering demand").

138. Brehm v. Eisner, 746 A.2d 244, 254 (Del. 2000).

139. United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 250 A.3d 862, 877 (Del. Ch. 2020), *aff'd*, 262 A.3d 1034 (Del. 2021).

140. *See, e.g.*, Abbott v. N. Shores Bd. of Governors, Inc., C.A. No. 2019-0194-JRS, 2020 WL 1490880, at *3 n.32 (Del. Ch. Mar. 27, 2020) (ORDER), *aff'd*, 248 A.3d 104 (Del. 2021) (TABLE); Teamsters Loc. 677 Health Servs. & Ins. Plan v. Martell, C.A. No. 2021-1075-NAC,

or untrue.[141] Indeed, when demand futility is decided on a motion to dismiss, plaintiffs benefit from these and any other particularized factual allegations set forth in their complaint, which "are accepted as true on such a motion."[142] Plaintiffs' establishment of demand futility is further aided at this stage by "all reasonable factual inferences that logically flow" from the complaint's particularized factual allegations, which are all drawn in favor of the plaintiff.[143] While there are also circumstances in which demand futility may be assessed on summary judgment, the Court of Chancery recently stated that "[d]emand futility generally should be evaluated on the pleadings, without the benefit of discovery," and in any event "should be analyzed early in the case and not addressed (or readdressed) at later phases."[144] As the Court of Chancery explained, "defendants generally should expect one bite at the demand-futility apple," which may leave them bound to a conclusion on demand futility based on plaintiff-friendly pleading-stage inferences.[145]

C. The Special Litigation Committee

The managerial authority of boards under Section 141 of the DGCL is further embodied in longstanding Delaware law, dating back to the Delaware Supreme Court's 1981 opinion in *Zapata Corp. v. Maldonado*, recognizing the ability of boards to form special litigation committees (or "SLCs") for the purpose of investigating and, as appropriate, prosecuting and/or seeking to stay, dismiss, or settle derivative claims previously filed by stockholders.[146] In *Zapata*, the Supreme Court explained that this board authority arises from "the fount of directorial powers" provided under Section 141 of the DGCL.[147] As the Supreme Court explained, "Rule 23.1, by excusing demand in certain instances, does not strip the board of its corporate power"; "the board entity remains empowered under [Section] 141(a) to make decisions regarding corporate litigation."[148] Demand futility, therefore, addresses a

2023 WL 1370852, at *80 (Del. Ch. Jan. 31, 2023) (quoting Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, C.A. No. 2019-0816-SG, 2020 WL 5028065, at *2 (Del. Ch. Aug. 24, 2020)).

141. *See Zuckerberg*, 250 A.3d at 877 ("Rule 23.1 requires that a plaintiff allege specific facts, but 'he need not plead evidence.'" (quoting Aronson v. Lewis, 473 A.2d 805, 816 (Del. 1984))).

142. *Id.* (quoting Rales v. Blasband, 634 A.2d 927, 931 (Del. 1993)).

143. *Id.* (quoting *Brehm*, 746 A.2d at 255).

144. *In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 699 (Del. Ch. 2023).

145. *Id.* at 700; *see also* Tornetta v. Musk, 310 A.3d 430, 496 n.541 (Del. Ch. 2024) ("Demand futility is a gating issue that must be raised (and, in this jurist's view, should only be raised) at the pleading stage."). In this case, the Court of Chancery nevertheless acknowledged that "[i]f the defendants believe that the allegations supporting demand futility are incorrect, then they can file a Rule 23.1 motion to preserve the defense" and "move promptly for summary judgment on the issue of demand futility so that they can introduce evidence by affidavit showing that demand was not futile." *McDonald's*, 291 A.3d at 700. The Court of Chancery explained that "a plaintiff would be entitled to some limited discovery under [Court of Chancery] Rule 56(f)," but "full merits discovery would not be warranted." *Id.* The Court of Chancery also acknowledged that if defendants unsuccessfully moved to dismiss in "a situation in which a complaint presents a close call on the issue of demand futility, . . . then the court would have discretion to entertain a motion for summary judgment on the demand futility issue." *Id.* But the Court of Chancery explained that the defendants would still not have "a right to a redo" in this circumstance. *Id.*

146. *See* Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

147. *Id.* at 782.

148. *Id.* at 786.

"problem . . . of member disqualification, not the absence of power in the board."[149] Holding that a conflicted board is still empowered under Section 141 of the DGCL to "legally delegate its authority to a committee of . . . disinterested directors," *Zapata* recognized the power of boards to create SLCs that "can properly act for the corporation to move to dismiss derivative litigation that is believed to be detrimental to the corporation's best interest."[150]

At the same time, *Zapata* acknowledged "the realities of a situation" in which "directors are passing judgment on fellow directors in the same corporation . . . who designated them to serve."[151] *Zapata* therefore declined to extend the protections of the business judgment rule to an independent committee's decision to terminate previously filed derivative litigation, articulating instead a two-part test intended to serve as "a balancing point where bona fide stockholder power to bring corporate causes of action cannot be unfairly trampled on by the board of directors, but the corporation can rid itself of detrimental litigation."[152]

"The first prong of the *Zapata* standard analyzes the independence and good faith of the committee members, the quality of its investigation and the reasonableness of its conclusions."[153] The SLC bears "the burden of proving independence, good faith and a reasonable investigation."[154] An SLC may need to undertake considerable investigatory efforts to satisfy this burden, which may require the SLC to "investigate all theories of recovery asserted in the plaintiffs' complaint" by "explor[ing] all relevant facts and sources of information that bear on the central allegations in the complaint."[155] It has been noted that, for even "the less serious allegations in plaintiffs' complaint," a "total failure to explore" them "may cast doubt on the reasonableness and good faith of an SLC's investigation" if exploring them, "at least in summary fashion, would have helped the SLC gain a full understanding of the more serious allegations in plaintiffs' complaint."[156] In addition, the SLC's investigation "must be supported by a thorough written record" speaking to the SLC's investigation, findings, and recommendation.[157]

If the SLC satisfies this burden, "[p]roceeding to the second step of the *Zapata* analysis is wholly within the discretion of the court."[158] Under *Zapata*'s second step, the court can "determine[], in its own business judgment, whether the suit should be dismissed," thereby "preserv[ing] the court's role as the ultimate decider of whether litigation should be dismissed."[159] The Delaware Supreme

149. *Id.*
150. *Id.*
151. *Id.* at 787.
152. *Id.*
153. Kahn v. Kolberg Kravis Roberts & Co., 23 A.3d 831, 836 (Del. 2011).
154. *Zapata*, 430 A.2d at 788.
155. London v. Tyrrell, C.A. No. 3321-CC, 2010 WL 877528, at *17 (Del. Ch. Mar. 11, 2010).
156. *Id.*
157. Kaplan v. Wyatt, 484 A.2d 501, 506 (Del. Ch. Nov. 5, 1984), *aff'd*, 499 A.2d 1184 (Del. 1985).
158. *Kaplan*, 499 A.2d at 1192.
159. Diep v. Trimaran Pollo Partners, L.L.C., 280 A.3d 133, 158 (Del. 2022).

Court has explained that under *Zapata*'s second step, "[t]he court should exercise its discretion . . . and refuse to dismiss a derivative suit when 'corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation's interest.'"[160] In this regard, the court is directed to give "'special consideration to matters of law and public policy in addition to the corporation's best interests.'"[161]

The availability of SLCs under Delaware law provides a "final arrow in [the] quiver" for a "conflicted board"[162] and serves "as a last chance for a corporation to control a derivative claim in circumstances when a majority of its directors cannot impartially consider a demand."[163] In comparison to plaintiffs' law firms facing incentives to pursue derivative claims without regard to corporate costs and other inherent biases,[164] an SLC charged with the investigation of a derivative claim is generally better positioned to weigh "the costs, burdens, and distractions of pursuing the litigation" against the "potential recovery"[165] and, when appropriate, recommend the dismissal of litigation whose continued pursuit is deemed to be contrary to "the long-run best interest of the corporation."[166] In conducting this assessment, independent directors serving on SLCs often possess confidential information and have a better understanding of the corporation, its business, and its best path forward, even after plaintiffs are equipped with Section 220 productions.[167] Indeed, the Delaware Supreme Court recently reiterated in *Match* that independent directors are generally better positioned than stockholder-plaintiffs to assess the merits of derivative claims and the advisability of their prosecution.[168]

160. *Id.* (quoting *Zapata*, 430 A.3d at 789).

161. *Id.* (quoting *Zapata*, 430 A.3d at 789).

162. *Id.* at 151.

163. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 939–40 (Del. Ch. 2003).

164. *See supra* notes 54–55.

165. *In re* Primedia, Inc. S'holders Litig., 67 A.3d 455, 469 (Del. Ch. 2013).

166. *In re* Baker Hughes, a GE Co., Derivative Litig., C.A. No. 2019-0201, 2023 WL 2967780, at *29 (Del. Ch. Apr. 17, 2023) (quoting Carlton Invs. v. TLC Beatrice Int'l Holdings, Inc., C.A. No. 13950, 1997 WL 305829, at *11 (Del. Ch. May 30, 1997)). As the Delaware courts have acknowledged, this does not necessarily require "that an SLC conduct an expected-value calculation." *Id.*

167. *Cf. In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 441 (Del. Ch. 2002) ("Delaware law has seen directors as well-positioned to understand the value of the target company, to compensate for the disaggregated nature of stockholders by acting as a negotiating and auctioning proxy for them, and as a bulwark against structural coercion. Relatedly, dispersed stockholders have been viewed as poorly positioned to protect and, yes, sometimes, even to think for themselves."); *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748, at *18 (Del. Ch. June 11, 2020) (explaining that in the *MFW* context, "[a]bsent special rights or arrangements, a minority stockholder is unlikely to match the [independent] committee's ability to access the non-public information necessary to serve as an effective bargaining agent"); *In re* HomeFed Corp. S'holder Litig., C.A. No. 2019-0592-AGB, 2020 WL 3960335, at *11 (Del. Ch. July 13, 2020) (noting the "unique[] qualifi[cations]" of a "special committee" arising from, among other things, its "'superior access to internal sources of information'").

168. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 469 (Del. 2024) ("[I]ndependent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights," "even when it involves a controlling stock-

Accordingly, SLCs are a tool through which Delaware corporations may employ their optimally positioned independent directors to assess derivative claims and limit the costs and burdens of those with little to no value, including inefficient derivative claims that may otherwise proceed to trial under the modern entire fairness paradigm. But the availability of SLCs does not fully address this issue. Given the burdens of the *Zapata* test, SLC investigations frequently involve comprehensive inquiries requiring extraordinary time commitments from independent directors and outside counsel.[169] SLC investigations often require the devotion of significant corporate resources, including, but not limited to, the legal fees arising from the hundreds, if not thousands, of billable hours incurred by outside counsel to complete the investigation.[170]

But corporations' ability to form SLCs to investigate and, where appropriate, seek dismissal of derivative claims does not necessarily alter incentives for commencing attorney-driven derivative challenges. In most cases, complaints bringing opportunistic challenges to controller transactions may be drafted in short order without a significant time commitment on the part of stockholder-plaintiffs.[171] Following a relatively limited undertaking, these challenges can have settlement value due to the inherent difficulty of dismissing them on the pleadings and the costs of dismissing them through the SLC process. In addition, the Delaware courts have held that, after an SLC is formed and assumes the management of derivative claims, the corporate benefit doctrine may still support a fee award to the plaintiffs' attorneys who initially brought the claims, depending on the outcome.[172] In fact, the Court of Chancery has previously been skeptical of arguments seeking to dramatically reduce fee awards sought by plaintiffs' attorneys who filed derivative litigation that was later investigated and settled by an SLC.[173] The prospect of an SLC may, in some cases, offer plaintiffs' attorneys a path to a fee award with a considerably reduced workload.

holder." (quoting United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1056 (Del. 2021))).

169. *See, e.g.*, *In* re Carvana Co. S'holders Litig., C.A. No. 2020-0415-KSJ, 2024 WL 1300199, at *1 (Del. Ch. Mar. 27, 2024); *Baker Hughes*, 2023 WL 2967780, at *17; *Carlton*, 1997 WL 305829, at *8; *Oracle*, 824 A.2d at 925; Teamsters Loc. 443 Health Servs. & Ins. Plan v. Chou, C.A. No. 2019-0186-SG, 2023 WL 7986729, at *25 (Del. Ch. Nov. 17, 2023); *Kaplan*, 484 A.2d at 511.

170. *See, e.g.*, *Baker Hughes*, 2023 WL 2967780, at *29 ("The SLC and its advisors spent more than 6,300 hours on the investigation."); *Carlton*, 1997 WL 305829, at *8 ("[T]he SLC's counsel spent over 4,000 hours reviewing the facts and then presenting the information to the SLC."); *Kaplan*, 484 A.2d at 511 ("[T]he Committee says the hours [incurred by its outside counsel] are 5,000 in number.").

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

172. *See, e.g.*, Transcript of Settlement Hearing and Rulings of the Court at 57–58, Alpha Venture Cap. Partners LP v. Pourhassan, C.A. No. 2020-0307-PAF (Del. Ch. June 4, 2021); Transcript of Settlement Hearing at 42–43, *In* re infoUSA, Inc. S'holders Litig., C.A. No. 1956-CC (Del. Ch. Nov. 7, 2008).

173. *See, e.g.*, *cases cited at supra* note 172; Transcript of Settlement Hearing at 39, 42, *In re* Clear Channel Outdoor Holdings, Inc. Derivative Litig., Consol. C.A. No. 7315-CS (Del. Ch. Sept. 9, 2013).

III. The Derivative Authority Provision

Although Delaware law offers several protections that tend to limit the inefficiencies, costs, and burdens of the modern entire fairness paradigm, they do not fully address the problem. Fortunately, the Derivative Authority Provision offers a potential corporate governance solution.

A. Marchand

The Delaware Supreme Court's opinion in *Marchand* represented a landmark ruling on the duty of oversight.[174] *Marchand* confirmed directors' fiduciary obligation to "make a good faith effort to put in place a reasonable system of monitoring and reporting" on "mission critical" compliance risks.[175] It has also led to "an uptick in *Caremark* claims" and caused many corporations to "increase[] their focus on risk assessment and compliance."[176]

In addition to reviewing important principles of the duty of oversight, *Marchand* addressed the novel issue of demand futility for a corporation deviating from the "one director-one vote" default under Delaware law. Although not entirely overlooked,[177] *Marchand*'s assessment of demand futility on the basis of director voting power in this context has received relatively little coverage.

In the wake of its listeria outbreak that led to the *Caremark* claims asserted in *Marchand*, Blue Bell Creameries USA, Inc. ("Blue Bell") "faced a liquidity crisis."[178] To address its liquidity needs, Blue Bell secured an investment from the investment fund Moo Partners. "Moo Partners provided Blue Bell with a $125 million credit facility and purchased a $100 million warrant to acquire 42% of Blue Bell at $50,000 per share."[179] As part of the investment, "Blue Bell also amended its

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174. *See* City of Detroit Police & Fire Ret. Sys. *ex rel*. NiSource, Inc. v. Hamrock, C.A. No. 2021-0370-KSJM, 2022 WL 2387653, at *14 n.111 (Del. Ch. June 30, 2022) ("Some interpret *Marchand* as ushering in a new 'stricter *Caremark* era.'" (quoting Roy Shapira, *A New* Caremark *Era: Causes and Consequences*, 98 Wash. U. L. Rev. 1857, 1864, 1892–94 (2021))).

175. Marchand v. Barnhill, 212 A.3d 805 (Del. 2019).

176. Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have a Purpose?*, 99 Tex. L. Rev. 1309, 1327 (2021); *accord* Constr. Indus. Laborers Pension Fund v. Bingle, C.A. No. 2021-0940-SG, 2022 WL 4102492, at *1 (Del. Ch. Sept. 6, 2022) ("Derivative claims against corporate directors for failure to oversee operations—so-called *Caremark* claims, once relative rarities—have in recent years bloomed like dandelions after a warm spring rain, largely following the Delaware Supreme Court's opinion in *Marchand v. Barnhill*."), *aff'd*, 297 A.3d 1083 (Del. 2023) (TABLE).

177. *See, e.g.*, John Mark Zeberkiewicz & Robert B. Greco, Marchand v. Barnhill*: Addressing and Monitoring Corporate Risk*, INSIGHTS, July 2019, at 11, 14–15 (observing that since "the Court of Chancery and the Supreme Court looked to whether the directors holding a majority in voting power of Blue Bell's board were disinterested," *Marchand* "indicates that, where the certificate of incorporation vests one or more directors with more or less than one vote pursuant to Section 141(d) of the DGCL, the demand-futility analysis examines the voting power of the independent directors rather than the number of independent directors," and further explaining: "This may have added significance as more public Delaware corporations adopt complex governance or control structures. In the event that control over a corporation is to be exercised at the board level by a director with extraordinary voting power, it may be advisable to include a carve-out reverting to one vote per director for board decisions relating to derivative demands in order to decrease the likelihood that such disproportionate voting power could render demand futile.").

178. *Marchand*, 212 A.3d at 815.

179. *Id.*

certificate of incorporation to grant Moo the right to appoint one member of Blue Bell's board who would be entitled to one-third of the board's voting power."[180] After Moo Partners made the investment, its designee was appointed to the Blue Bell board. Upon his appointment, Moo Partners' designee served as one of Blue Bell's eleven directors—entitling him, under Blue Bell's certificate of incorporation, to five of the fifteen total votes entitled to be cast by the entire Blue Bell board.

Before the Supreme Court issued its landmark decision in *Marchand*, the Court of Chancery dismissed the same oversight claims under Rule 23.1.[181] In assessing demand futility, the Court of Chancery observed that, under Blue Bell's certificate of incorporation and pursuant to Section 141(d) of the DGCL, Moo Partners' designee was "entitled to exercise five of the fifteen votes and each of the other directors is entitled to exercise one vote."[182] "Accordingly, for demand excusal purposes," the Court of Chancery explained that "a majority of the Board consists of a collection of [Blue Bell] directors holding a majority of the Board's voting power (*i.e.*, at least eight votes)."[183] That is, "[the Moo Partners designee] and any three other [Blue Bell] directors constitute a majority of the Board, as do any eight [Blue Bell] directors other than [the Moo designee]."[184] Finding that the complaint failed to raise a reasonable doubt as to the independence of "directors control[ling] eight of the Board's fifteen votes," the Court of Chancery dismissed the claims under Rule 23.1.[185]

On appeal, the Delaware Supreme Court articulated its monumental guidance on the duty of oversight and reversed the Court of Chancery's finding that demand was not futile. With respect to demand futility, the Supreme Court disagreed with the Court of Chancery's conclusion that the complaint failed to raise a reasonable doubt as to the independence of a director who formerly served as Blue Bell's CFO. Notably, this director was alleged to have "worked at Blue Bell for decades and owe[d] his entire career" to the father of Blue Bell's current CEO, a defendant in the case.[186] As the Supreme Court explained, these and other allegations regarding the director's relationship with the CEO's family were "suggestive of the type of very close personal [or professional] relationship that, like family ties, one would expect to heavily influence a human's ability to exercise impartial judgment."[187] Despite reaching a different conclusion as to this director's independence and finding demand futile on that basis, the Supreme Court's demand futility analysis did not call into question the Court of Chancery's assessment of demand futility in this context based on director voting power, instead of the per capita demand futility analysis traditionally employed under the default "one director-one vote" regime of most corporations. Instead, the Supreme Court reiterated the Court of Chancery's voting power-based assessment of demand futility and

180. *Id.*
181. Marchand v. Barnhill, C.A. No. 2017-0586-JRS, 2018 WL 4657159 (Del. Ch. Sept. 27, 2018), *rev'd*, 212 A.3d 805 (Del. 2019).
182. *Id.* at *13.
183. *Id.*
184. *Id.* at *13 n.147.
185. *Id.* at *16.
186. *Marchand*, 212 A.3d at 808.
187. *Id.* (quoting Sandys v. Pincus, 152 A.3d 124, 130 (Del. 2016)).

approached demand futility on the same basis, stating: "To survive the Rule 23.1 motion to dismiss, the complaint needed to allege particularized facts raising a reasonable doubt that directors holding eight of the fifteen votes could have impartially considered a demand."[188] Although the Delaware Supreme Court's opinion was not as detailed as the Court of Chancery's on this issue, the Supreme Court explained that it elected not to "belabor[] the details of the Court of Chancery's *thorough analysis*" on this issue, which the Supreme Court acknowledged was "somewhat complicated due to the unusual structure of Blue Bell's board."[189]

B. The Legal Basis for Derivative Authority Provisions

Despite the novelty of the question, *Marchand*'s analysis of demand futility based on director voting power is unsurprising and consistent with the DGCL. In fact, it is what the DGCL mandates. Under Section 141(d) of the DGCL, "the certificate of incorporation may confer upon 1 or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors."[190] Where a charter provision vests directors with disparate voting power, unless the provision otherwise provides, it extends to all board decisions, including matters falling under the board's general authority under Section 141(a).[191] And as discussed, board authority over "decisions whether to initiate, or refrain from entering, litigation[] [is derived] from 8 *Del. C.* § 141(a)," which serves as the basis for Delaware's longstanding demand futility requirement and recognition of SLC authority.[192] Accordingly, the DGCL requires that the outcome of any board vote on a derivative demand be determined based on any differential voting powers directors may have under the certificate of incorporation.[193]

188. *Id.* at 816. The Delaware Supreme Court expressed further support for determining demand futility on the basis of director voting power, explaining: "We first address the plaintiff's claim that the Court of Chancery erred by holding that the complaint did not allege particularized facts that raise a reasonable doubt as to whether directors holding a majority of the board's votes could impartially consider demand as to the management claims. The Court of Chancery concluded that four directors representing eight votes were independent and that seven directors representing seven votes were not independent. On appeal, the plaintiff challenges the Court of Chancery's conclusion as to only Rankin and one other director, Paul Ehlert. Holding that the Court of Chancery erred as to either director would be dispositive." *Id.* at 818

189. *Id.* at 816 (emphasis added).

190. Del Code. Ann. tit. 8, § 141(d) (2024).

191. *See id.* ("Any . . . provision conferring greater or lesser voting power shall apply to voting in any committee, unless otherwise provided in the certificate of incorporation or bylaws. If the certificate of incorporation provides that 1 or more directors shall have more or less than 1 vote per director on any matter, every reference in [the DGCL] to a majority or other proportion of the directors shall refer to a majority or other proportion of the votes of the directors.").

192. Tornetta v. Musk, 250 A.3d 793, 876 (Del. Ch. 2019) (quoting Zapata Corp. v. Maldonado, 430 A.2d 779, 782 (Del. 1981)); *accord* Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 68 (Del. Ch. 2015) (recognizing the right and power of a "Demand Board to decide for themselves under 8 *Del. C.* § 141(a) whether to exercise the Company's right to bring such a claim").

193. *See* Del Code. Ann. tit. 8, § 141(d) (2024).

Section 141(d) further contemplates that a certificate of incorporation may vest directors with differential voting power on only specified matters.[194] Section 141(d), therefore, supplies statutory authority for a Derivative Authority Provision in a corporation's certificate of incorporation vesting a subset of independent directors—for example, the directors serving from time to time on the corporation's audit committee[195]—with the sole and exclusive voting power on board decisions regarding derivative litigation demands and related matters.

Alternatively, a certificate of incorporation could include a Derivative Authority Provision establishing a committee of the board—for example, a corporation's standing audit committee or conflicts committee—with the full and exclusive power and authority in respect of derivative litigation demands and related matters. Sections 141(a) and 141(c) of the DGCL broadly empower boards to control derivative litigation and establish committees for the purpose of investigating, considering, managing, and addressing derivative claims, litigation, and demands.[196] Section 141(a) further provides that any of "the powers and duties

194. *Id.* (stating that "the certificate of incorporation [may] provide[] that 1 or more directors shall have more or less than 1 vote per director *on any matter*" (emphasis added)).

195. This falls squarely within the DGCL's authorization of certificate of incorporation provisions made "dependent upon facts ascertainable outside" the certificate of incorporation, even if this authority may be more cabined than some have traditionally believed. Del Code. Ann. tit. 8, § 102 (d) (2024); *compare* Colon v. Bumble, Inc., 305 A.3d 352 (Del. Ch. 2023) (upholding charter provisions varying voting power among certain stockholders based on which holders are party to a stockholders agreement from time to time, explaining that the identity of the parties to the agreement at any given time fell "within the authority" vested under analogous provisions of the DGCL to make charter provisions "dependent on facts ascertainable outside of the certificate of incorporation"), *with* Seavitt v. N-able, Inc., C.A. No. 2023-0326-JTL, 2024 WL 3534476 (Del. Ch. July 25, 2024) (ruling that charter provisions expressly made "subject to" a stockholders agreement failed to incorporate by reference the substantive provisions of the agreement under Section 102(d) of the DGCL).

196. Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984) ("The thrust of *Zapata* is that in either the demand-refused or the demand-excused case, the board still retains its Section 141(a) managerial authority to make decisions regarding corporate litigation. Moreover, the board may delegate its managerial authority to a committee of independent disinterested directors. Thus, even in a demand-excused case, a board has the power to appoint a committee of one or more independent disinterested directors to determine whether the derivative action should be pursued or dismissal sought." (citing Del. Code Ann. tit. 8, § 141(c))); *In re* Oracle Corp. Deriv. Litig., C.A. No. 2017-0337-SG, 2019 WL 6522297, at *15 (Del. Ch. Dec. 4, 2019) ("The authority of a corporate board to litigate claims on behalf of a corporation is derived from Section 141(a) of the DGCL. Even in circumstances such as this Action—where the requirement to make a litigation demand is excused under Chancery Court Rule 23.1—'the board entity remains empowered under [Section] 141(a) to make decisions regarding corporate litigation.' This authority is delegable to a special litigation committee pursuant to Section 141(c) of the DGCL." (quoting *Zapata*, 430 A.2d at 786)); *cf.* W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 821 (Del. Ch. 2024) (finding that "[d]etermining the composition of committees falls within the Board's authority" under Sections 141(a) and 141(c)); Hollinger Int'l, Inc. v. Black, 844 A.2d 1022, 1078–80 (Del. Ch. 2004) (holding that Section 141(c)(2) of the DGCL did not prohibit a stockholder-adopted bylaw amendment eliminating a board committee previously established by resolution of the board), *aff'd*, 872 A.2d 559 (Del. 2005); *see also* Wagner v. BRP Grp., Inc., 316 A.3d 826, 843 (Del. Ch. 2024) (giving effect to a bylaw that established an independent board committee and, subject to certain exceptions, vested such committee with "the full power and authority of the Board to make, solely for purposes of [a Consent Agreement], any determination contemplated by [specified provisions] thereof, and with respect to amending, waiving or enforcing any term of the [Consent Agreement], and to take any action and engage any such advisors or counsel as it deems necessary in connection therewith," and

conferred or imposed upon the board of directors by [the DGCL] shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation."[197] Accordingly, Section 141(a) generally authorizes provisions in a certificate of incorporation establishing a committee of the board and vesting in the committee, on an exclusive or non-exclusive basis, some or all of the power and authority otherwise vested in the board over derivative litigation. Where this type of Derivative Authority Provision is implemented, *Marchand* and the longstanding Delaware authorities discussed herein recognizing decisions made by independent committees in respect of derivative claims support an assessment of demand futility based solely on the independence and disinterestedness of the members of the committee charged with assessing derivative litigation demands.[198]

Under any such construct, a Derivative Authority Provision is permitted by express authority provided under the DGCL.[199] As such, a Derivative Authority

finding the independent committee thereby empowered "with the full power and authority of the Board for purposes of any Committee Waiver" granted under the Consent Agreement).

197. Del Code Ann. tit. 8, § 141(a) (2024) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation. If any such provision is made in the certificate of incorporation, the powers and duties conferred or imposed upon the board of directors by this chapter shall be exercised or performed to such extent and by such person or persons as shall be provided in the certificate of incorporation.").

198. *Cf.* J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 Wm. Mitchell L. Rev. 1443, 1456 (2014) ("If the board delegates its full power to address an issue to a committee, then the judicial search for a qualified decision maker shifts from the board to the committee. The same principles that govern the inquiry at the board level apply at the committee level, and the court will determine whether there were sufficient directors who voted in favor of the decision to make up a disinterested, independent, and informed majority of the committee.").

199. This article focuses solely on a charter-based Derivative Authority Provision, which is supported by the clear statutory and common law authorities discussed herein. As its title may suggest, this article is not intended to call into question the validity of analogous corporate governance solutions, such as delegations of similar authority to independent committees by other means, or suggest that any such delegation should not affect the assessment of demand futility. Despite the legal power of a board, as a technical matter under the DGCL, to later revoke or amend committee delegations established by board resolution, various aspects of Delaware law (including Delaware's *MFW* framework and respect for SLCs discussed herein) still give full effect to such delegations. Delaware's respect for independent committees so established is supported, from a policy perspective, by the effect this has in encouraging conflicted boards to make use of independent committees, which are favored under Delaware law. To the extent there is any risk attendant to a board's authority to revoke or amend an independent committee's delegation, it generally should not serve as a basis for giving lesser effect to committees established by board resolution, absent some evidence of the board exercising or threatening to exercise this authority. In much the same way as Delaware law respects the ability of independent directors to manage derivative litigation even where they are susceptible to being removed by a controller stockholder, Delaware law respects decisions made by independent committees established by interested boards, and Delaware law and its flexible assessments of demand futility and director independence are suited to address any exploitative conduct when and as it arises. *See, e.g.*, *In re* WeWork Litig., 250 A.3d 976 (Del. Ch. 2020) (applying heightened scrutiny akin to *Zapata*, in denying a motion for leave to voluntarily dismiss litigation initially commenced on behalf of The We Company (or "WeWork") by a special committee of its board of directors, after the WeWork board responded to the litigation by forming a new committee to assess the litigation and determine the special committee's ongoing authority with respect to it, and the new committee revoked the special committee's authority, determined that the litigation should be dismissed, and directed the filing of the motion for leave to voluntarily dismiss the litigation); Park Emps.' & Ret. Board Emps.' Annuity & Benefit Fund of Chi. v. Smith, C.A. No. 11000-VCG, 2016 WL 3223395, at *10 (Del. Ch. May 31, 2016) (finding demand

Provision does not contravene Section 102(b)(1)'s limitation on charter provisions "contrary to the laws" of the State of Delaware.[200] As the Delaware Supreme Court has explained, "Section 102(b)(1)'s scope is broadly enabling" and "bars only charter provisions that would 'achieve a result forbidden by settled rules of public policy.'"[201] Far from contravening Delaware public policy, a Derivative Authority Provision conforms with Delaware's "important" public policy favoring delegations of derivative litigation authority to independent directors over stockholder representatives, as embodied in Section 141(a) of the DGCL and Delaware's demand futility requirement, Rule 23.1, and recognition of SLC authority.[202] In effect, a Derivative Authority Provision would create a

futility, for a complaint filed four days before the publicly announced election of three new potentially independent directors, determined based on the board's composition after the election of the new directors and, in rejecting plaintiff's argument that "venturing away from a bright-line rule" based on the date of a complaint's filing "would lead to "a slippery slope of a standard susceptible to manipulation," explaining that this argument rang "hollow" because "[o]nly where a manipulation of board composition is employed to discourage meritorious derivative litigation is the matter problematic" and the Court had "every confidence that this Court can sniff out and preempt improper manipulation of board composition in this context"), *aff'd,* 175 A.3d 621 (Del. 2017) (TABLE); Schoon v. Smith, 953 A.2d 196, 204–10 (Del. 2008) ("The judicial creation of equitable standing for a stockholder to bring a derivative action demonstrates that equitable doctrine can be judicially extended to address new circumstances" to the extent necessary "to prevent a complete failure of justice," as "equity 'has an expansive power, to meet new exigencies'" (quoting 1 STORY'S EQUITY JURISPRUDENCE 45 (Isaac F. Redfield, ed. 9th ed. 1866))); *see also In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245, at *40–42 (Del. Ch. Jan. 25, 2016) ("giving pleading-stage effect to a controller's actual threats and retributive behavior," which involved his prior removal of directors and reappointment of a director to fill one of the resulting vacancies, and finding it reasonably conceivable that the director was not independent for purposes of deciding demand futility on a motion to dismiss); *In re* Viacom Inc. S'holders Litig., C.A. No. 2019-0948-JRS, 2020 WL 7711128, at *22 (Del. Ch. Dec. 29, 2020) ("[T]hreats of removal, even in circumstances where the directorship is not demonstrably material, cannot be ignored in the independence analysis.").

200. DEL. CODE ANN. tit. 8, § 102(b)(1) (2024).

201. Salzberg v. Sciabacucchi, 227 A.3d 102, 115 (Del. 2020) (quoting Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 118 (Del. 1952)).

202. *See In re* Oracle Corp. Deriv. Litig., C.A. No. 2017-0337-SG, 2019 WL 6522297, at *15 (Del. Ch. Dec. 4, 2019) ("The deference of Delaware law to the decisions of a special litigation committee 'is among the many important policy choices that our state has made regarding the circumstances when it is appropriate to divest the board of directors of a Delaware corporation of a portion of its statutory authority to manage the corporation's affairs, *i.e.*, its right to control litigation brought on behalf of the corporation.'" (quoting *In re* Oracle Corp. Derivative Litig., 808 A.2d 1206, 1212 (Del. Ch. 2002))); United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1055–56 (Del. 2021) ("[Plaintiff] asks the Court to deprive directors and officers of the power to make such a decision, at least where the derivative action would challenge a conflicted-controller transaction. This rule may have its benefits, but it runs counter to the 'cardinal precept' of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights." (quoting Aronson v. Lewis, 473 A.2d 805, 811, 814 (Del. 1984))); Transcript of Settlement Conference and Rulings of the Court at 55, City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley, C.A. No. 2020-0650-KSJM (Del. Ch. June 21, 2022) ("[W]e always favor litigants working with special litigation committees to resolve claims efficiently."); *see also* Wenske v. Blue Bell Creameries, Inc., 214 A.3d 958, 963 (Del. Ch. 2019) ("[T]he proper use of the special litigation committee device is to be encouraged."); *cf.* Transcript of Telephonic Rulings of the Court on Cross-Motions for Summary Judgment at 47–50, Elec. Workers Pension Fund, Loc. 103, I.B.E.W. v. Fox Corp., C.A. No. 2022-1007-JTL (Del. Ch. Mar. 29, 2023) (proposing a hypothetical charter provision prohibiting stockholders from bringing derivative and other breach of fiduciary

standing demand review committee, another important concept recognized under Delaware law and supported by the same public policy.[203] In *Match* and *Zuckerberg*, the Delaware Supreme Court confirmed that this public policy endures notwithstanding the broad applicability of the entire fairness standard, even when derivative litigation implicates the interests of controlling stockholders, to "elevate a board's control of derivative litigation above the inherently coercive dynamic of conflicted controller transactions."[204] As the Delaware Supreme Court explained in *Match*, it remains a "'cardinal precept' of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights," "even when it involves a controlling stockholder."[205]

For the same reasons, Delaware public policy supports *Marchand*'s voting power-based approach to demand futility. As the Delaware Supreme Court explained nearly 100 years ago, "[t]he right of a stockholder to file [a derivative action] to litigate corporate rights is . . . solely for the purpose of preventing injustice, where it is apparent that material corporate rights would not otherwise be protected."[206] Thus, as the Delaware Supreme Court reaffirmed in *Zuckerberg*, the demand futility requirement looks to whether the directors vested with derivative authority under Section 141(a) "'cannot be considered proper persons to conduct litigation on behalf of the corporation.'"[207] This "requirement is not excused lightly because derivative litigation upsets the balance of power that the DGCL."[208] Where only specified directors are vested with authority over derivative litigation demands, it follows that only the directors so empowered should be considered for purposes of demand futility. Under longstanding Delaware law affording stockholders derivative standing "solely to prevent an otherwise complete failure of justice"[209] in cases where "corporate [litigation] rights would not otherwise be protected,"[210] there would only be a basis for vesting stockholders with derivative standing if the directors with authority over derivative litigation demands could not impartially consider a demand and protect those litigation rights. Because both Delaware law and Delaware public policy favor placing control of these litigation rights in the hands of independent

duty claims unless they own 2 percent of the corporation's outstanding shares (or, in the case of a public company, the lesser of 2 percent of the corporation's outstanding shares and shares with a market value of at least $2 million) and observing that "it's difficult to say that it's contrary to Delaware public policy"), *aff'd on other grounds sub nom. In re* Fox Corp./Snap Inc. Section 242 Litig., 312 A.3d 636 (Del. 2024).

203. *See generally* Seitz & Sirkin, *supra* note 55.

204. Varallo et al., *supra* note 79.

205. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 469 (Del. 2024) (quoting *Zuckerberg*, 262 A.3d at 1056).

206. Sohland v. Baker, 141 A. 277, 282 (Del. 1927).

207. *Zuckerberg*, 262 A.3d at 1048 (quoting Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984)).

208. *Id.* at 1049.

209. Schoon v. Smith, 953 A.2d 196, 202 (Del. 2008) (quoting 4 POMEROY'S EQUITY JURISPRUDENCE § 1095, at 278 (5th ed. 1941)).

210. *Sohland*, 141 A. at 282.

directors, neither supports deviating from this approach in the name of easing the burdens to establish demand futility.[211]

C. The Equities Supporting Derivative Authority Provisions

As contemplated herein, a Derivative Authority Provision would focus demand futility on the subset of directors it empowers with authority over derivative litigation demands. In effect, this would exclude indisputably interested directors—such as executive directors and controller-affiliated directors—from the denominator used to assess demand futility. Rather than needing to establish demand futility based on the proportion of independent and disinterested directors comprising an entire board (which would include such interested directors), stockholders of a corporation with a Derivative Authority Provision in its certificate of incorporation would be required to impugn the independence or disinterestedness of half of the applicable committee or independent directors vested with authority over derivative claims.[212] If a Derivative Authority Provision vests this authority in truly independent directors, it may make demand futility a more difficult hurdle for stockholder-plaintiffs seeking to commence opportunistic derivative litigation. This, in turn, would help preserve independent and disinterested directors' control over derivative claims, limiting the costs and burdens of inefficient derivative litigation and fostering more efficient outcomes for corporations and their stockholders.

Although a Derivative Authority Provision furthers this interest of stockholders generally, the broad scope of modern entire fairness review, viewed in isolation, may lend some facial appeal to arguments for extending this onerous standard of review to a controlled corporation's adoption of a Derivative Authority Provision. In one recent case, *Palkon v. Maffei*, the Court of Chancery found the entire fairness standard applicable to a Delaware corporation's proposed conversion to a Nevada corporation based on the alleged "fewer litigation rights to stockholders" and "greater litigation protections to fiduciaries" that would result under Nevada law.[213] In finding that the alleged differences in litigation rights

211. *Cf.* Park Emps.' & Ret. Board Emps.' Annuity & Benefit Fund of Chi. v. Smith, C.A. No. 11000-VCG, 2016 WL 3223395, at *9 (Del. Ch. May 31, 2016) (finding it appropriate to assess demand futility based on a board's composition upon the election of new directors four days after the plaintiff's complaint was filed in light of the corporation's prior disclosures publicly announcing the upcoming election of these new potentially independent directors, and explaining that Delaware law "generally evaluates demand futility [by] disregarding a superseded board that lacks the power to act . . . in favor of the board that would actually be tasked with determining whether or not the corporation will pursue the litigation").

212. Although the Supreme Court held in *Match* that undermining the independence of even one member of an independent committee could prevent the invocation of the business judgment rule to a conflicted controller transaction through the *MFW* framework, *Aronson*'s framework for assessing demand futility reinforced in *Zuckerberg* and *Match* draws "the line at a majority of the [relevant decision-makers]" as a matter of policy, even if this "may be an arguably arbitrary dividing point" at times, and even in the case of a conflicted controlling stockholder. *Aronson*, 473 A.2d at 815 n.8.

213. Palkon v. Maffei, 311 A.3d 255, 261 (Del. Ch. 2024). The Delaware Supreme Court has accepted an interlocutory appeal of the Court of Chancery's motion to dismiss ruling in *Palkon*. Maffei v. Palkon, No. 125, 2024 (Del. Apr. 16, 2024) (ORDER).

implicated entire fairness review of the proposed conversion in *Palkon*, the Court of Chancery explained:

> As depicted, the conversion constitutes a self-interested transaction effectuated by a stockholder controller. The reduction in the unaffiliated stockholders' litigation rights inures to the benefit of the stockholder controller and the directors. That means the conversion confers a non-ratable benefit on the stockholder controller and the directors, triggering entire fairness. There are no protective devices that could lower the standard of review. Entire fairness governs.[214]

Considerable Delaware authority, however, supports the application of the business judgment rule to the adoption of a Derivative Authority Provision, even when considered in the context of entire fairness's broad reach under *Palkon* and other recent Delaware cases. The prospect of receiving the deference of business judgment review could make the adoption of a Derivative Authority Provision viable not just for corporations that are private or in the process of going public, but also for existing public corporations.[215]

As the Delaware Supreme Court reaffirmed in *Zuckerberg*, Delaware law has long held that stockholders have no general ongoing individual right to bring derivative litigation.[216] Because Rule 23.1 is substantive, "[t]he right to bring a derivative action does not come into existence until the plaintiff shareholder has made a demand on the corporation to institute such an action or until the shareholder has demonstrated that demand would be futile."[217] Prior to that time, stockholders'

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214. *Palkon*, 311 A.3d at 261.

215. For corporations with a dual class high-vote low-vote capital structure and directors elected by stockholders voting together as a single class, no separate class vote of the holders of the outstanding shares of low-vote stock would generally be mandated under Section 242(b)(2) of the DGCL to adopt a Derivative Authority Provision. *Cf. In re* Fox Corp./Snap Inc. Section 242 Litig., 312 A.3d 636, 646 (Del. 2024) ("The ability to sue directors or officers for duty of care violations is an attribute of the Companies' stock, but not a power, preference, or special right of the Class A common stock under Section 242(b)(2).").

216. 262 A.2d at 1055–56 ("[Plaintiff]'s argument presumes that a stockholder has a general right to control corporate claims. Not so. The directors are tasked with managing the affairs of the corporation, including whether to file action on behalf of the corporation. A stockholder can only displace the directors if the stockholder alleges with particularity that 'the directors are under an influence which sterilizes their discretion' such that 'they cannot be considered proper persons to conduct litigation on behalf of the corporation.' As such, enforcing the demand requirement where a stockholder has only alleged exculpated conduct does not 'undermine shareholder rights; instead, it recognizes the delegation of powers outlined in the DGCL.'" (quoting *Aronson*, 473 A.2d at 814)).

217. Kaplan v. Peat, Marwick, Mitchell & Co., 540 A.2d 726, 730 (Del. 1988); *accord* Lewis v. Daum, C.A. No. 6733, 1984 WL 8223, at *1 (Del. Ch. May 24, 1984) ("[I]t is clear that the right of a stockholder to bring a derivative action does not come into being until he has made a demand on the corporation to institute a suit and the demand has been refused or unless he has demonstrated through the allegations of his complaint that such a demand would have been futile."); Stepak v. Dean, 434 A.2d 388, 390 (Del. Ch. 1981); Maldonado v. Flynn, 413 A.2d 1251, 1262 (Del. Ch. 1980) ("The stockholder's individual right to bring the action does not ripen, however, until he has made a demand on the corporation which has been met with a refusal by the corporation to assert its cause of action or unless he can show a demand to be futile."), *rev'd on other grounds sub nom.* Zapata Corp. v. Maldonado, 430 A.2d 779, 784 (Del. 1981) ("[W]here demand is properly excused, the stockholder does possess the ability to initiate the action on his corporation's behalf."); *see generally In re* EZCORP Inc. Consulting Agreement Derivative Litig., 130 A.3d 934, 943–44 (Del. Ch. 2016), *rev'd on other grounds sub nom.* Cal. State Tchrs.' Ret. Sys. v. Alvarez, 179 A.3d 824 (Del. 2018).

only right in respect of derivative litigation is the right to bring "the equivalent of a suit by the shareholders to compel the corporation to sue"[218] if and in the event "the corporation will not sue because of the domination over it by the alleged wrongdoers."[219] Stockholders fully retain that right from and after the adoption of a Derivative Authority Provision. Accordingly, the adoption of a Derivative Authority Provision would not infringe on existing stockholder rights and is distinguishable from cases such as *Palkon*.[220] In contrast to *Palkon*, for example, in which the Court of Chancery discussed the importance of extending entire fairness review to a proposed corporate conversion to prevent stockholders' litigation rights from becoming "second-class rights,"[221] a Derivative Authority Provision merely confirms, consistent with Delaware law and important Delaware public policy, that any right of stockholders to commence derivative litigation *is already secondary* to that of the board or committee thereof principally vested with authority over

218. *Aronson*, 473 A.2d at 811; Cantor v. Sachs, 162 A. 73, 76 (Del. Ch. 1932); *EZCORP*, 130 A.3d at 945; *accord* Harff v. Kerkorian, 324 A.2d 215, 218 (Del. Ch. 1974) ("The nature of the derivative suit is two-fold: first, it is the equivalent of a suit by the stockholders to compel the corporation to sue."), *aff'd in part*, *rev'd in part on other grounds*, 347 A.2d 133 (Del. 1975).

219. *Cantor*, 162 A. at 76 (explaining that the "individual right" of stockholders in respect of derivative litigation is solely "a right in equity to compel the assertion of the corporation's rights to redress" "[i]nasmuch however as the corporation will not sue because of the domination over it by the alleged wrongdoers"); *see Alvarez*, 179 A.3d at 846 ("At the first stage of a derivative action (assertion of demand futility), the stockholder-derivative plaintiff is permitted to litigate only the board's capacity to control the corporation's claims. The corporation is always the sole owner of the claims. In other words, the suit is always about the corporation's right to seek redress for alleged harm to the corporation." (footnote omitted)).

220. *Compare* Palkon v. Maffei, 311 A.3d 255, 270–84 (Del. Ch. 2024) (referencing "the right to sue" as one of stockholders' "fundamental rights" and concluding that "[i]t seems readily apparent that under current Delaware law, a transaction that cuts back on either economic rights or governance rights would trigger entire fairness review," but in doing so, generally discussing direct claims and principles of "[c]orporate law giv[ing] *stockholders the right to recover* from their fiduciaries for certain types of wrongdoing" (*i.e.,* the right to recover for direct claims) and action taken affecting the viability of derivative claims already commenced or imminent (*i.e.,* derivative claims for which stockholders had, or would imminently have, the right to bring a derivative action) (emphasis added)), *with Alvarez*, 179 A.3d at 847 ("The named plaintiff, at [the demand futility stage of derivative litigation], only has standing to seek to bring an action by and in the right of the corporation and never has an individual cause of action.").

221. 311 A.3d at 282–84. For the same reasons described herein supporting business judgment review of the adoption of a Derivative Authority Provision, notwithstanding any benefits to a controlling stockholder that could be alleged to arise if a Derivative Authority Provision would tend to heighten the hurdle of demand futility for opportunistic derivative litigation, any analogous alleged interests of directors should not support the invocation of a more onerous standard of review. Even directors vested with a greater concentration of authority over derivative litigation matters through a Derivative Authority Provision will not personally benefit from it in any material respect; for any matters in which these directors may have a material interest, their heightened concentration of authority will enhance the likelihood of demand futility. *Cf.* Khanna v. McMinn, C.A. No. 20545, 2006 WL 1388744, at *21 (Del. Ch. May 9, 2006) (rejecting one faction's argument that a corporation "advanced its position in litigation by appointing [a new director] because it gave" its board "tainted" by a competing faction "one more vote in [its] camp," explaining that "[t]his argument begs the question . . . as the inquiry during demand futility analysis, in this context, is independence" and the newly appointed director "can only be viewed as a 'vote in the [defendant faction]' if he is not independent—and if he is not independent, then [the defendant faction] gain no benefit from his presence").

derivative claims and only arises when that body is incapable of impartially exercising this authority.[222]

Far from adversely intruding into existing stockholder rights, the Delaware courts and plaintiffs' bar have repeatedly recognized the substantial corporate benefits arising from enhanced concentrations of corporate authority in independent directors.[223] "After all, Delaware law presumes that independent directors enhance the value of the firm and benefit minority stockholders."[224] For this reason, the Delaware courts have repeatedly deemed independent director appointments and other settlement terms enhancing independent director influence as important governance measures. These measures have been deemed corporate benefits for corporations and their minority stockholders so valuable that they have, on numerous occasions, supported fee awards in the hundreds of thousands, and in some cases, millions of dollars.[225] In particular, this has included governance reforms that, like a Derivative Authority Provision, establish an independent committee or group of independent directors charged with reviewing and making decisions with respect to specified matters that could present

222. *See* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1056 (Del. 2021) (explaining that, in light of the authority vested in boards under Section 141 of the DGCL that can only be displaced by a stockholder in respect of derivative claims if the stockholder adequately alleges that the directors cannot impartially consider the claims, "enforcing the demand requirement where a stockholder has only alleged exculpated conduct does not 'undermine shareholder rights'; instead, it recognizes the delegation of powers outlined in the DGCL").

223. *See, e.g.*, *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667, 709 n.190 (Del. 2023) ("We have 'repeatedly held that any board process is materially enhanced when the decision is attributable to independent directors.'" (quoting Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1243–44 (Del. 2012))).

224. Simons v. Brookfield Asset Mgmt. Inc., C.A. No. 2020-0841-KSJM, 2022 WL 223464, at *7 n.43 (Del. Ch. Jan. 21, 2022).

225. *See, e.g.*, Transcript of Settlement Conference and Rulings of the Court at 51, 53, City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley, C.A. No. 2020-0650-KSJM (Del. Ch. June 21, 2022) (finding an appropriate fee award in the "ballpark" of "1 to $2 million for the appointment of independent directors"); Transcript of Settlement Hearing and Ruling of the Court at 41–42, *In re* Tile Shop Holdings, Inc. S'holder Derivative Litig., C.A. No. 10884-VCG (Del. Ch. Aug. 23, 2018) (ruling that "about a million dollars was a proper plaintiff firm recovery" for the appointment of an independent director and noting the "substantial benefit" the appointment provided to the corporation); Transcript of the Court's Ruling on Plaintiffs' Motion to Approve Settlement and for Award of Attorneys' Fees and Expenses at 57, *In re* Medley Cap. Corp. S'holders Litig., C.A. No. 2019-0100-KSJM (Del. Ch. Nov. 19, 2019) ("I think the appropriate fee award, based on the precedent I've been provided for the appointment of the two independent directors in this case, is $1 million."); Transcript of Co-Lead Plaintiffs' Motion to Approve Settlement, Award Fees, Expenses, and Incentive Fees, and the Court's Rulings at 46, *In re* Coty Inc., S'holder Litig., C.A. No. 2019-0336-LWW (Del. Ch. June 13, 2023) ("The addition of the independent directors is, itself, especially valuable, and there's prior precedent cited in the brief that indicates that that, itself, could support at least a $1 million fee."); *see* also *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1071 (Del. Ch. 2015) (granting a $72.5 million fee award and stating: "Lead Counsel obtained substantial non-monetary relief. The Settlement adds two independent directors and reduced Kotick and Kelly's voting power from 24.9% to 19.9%. Establishing an independent Board majority and reducing the stockholder-level control of insiders at a corporation with a market capitalization in excess of $15 billion is a valuable non-monetary benefit. Precedent suggests that an award of $5–10 million could be justified.").

a conflict of interest.[226] Indeed, in one recent derivative litigation, leading members of the Delaware plaintiffs' bar even championed the valuable corporate benefits that specifically arise from the establishment of an independent director base equipped "to deal with future conflict transactions, [and] to actually deal with the disposition of . . . litigation" in the future.[227]

As several recent Delaware cases make clear, a Derivative Authority Provision concentrating authority over derivative litigation demands in independent directors does not foreclose recovery for those claims that are meritorious and worth pursuing. Independent directors can and do authorize the prosecution of derivative claims against controllers and corporate insiders.[228] Coincidentally, one such example is *Marchand*,

226. *See, e.g.*, Transcript of Settlement Conference and Rulings of the Court at 42–54, City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley, C.A. No. 2020-0650-KSJM (Del. Ch. June 21, 2022) (finding that "two corporate governance measures"—which provided for the formation of a "related-party transaction committee" with "at least two independent directors who will review and approve related-party transactions" and the adoption of a "related-person transaction policy" setting forth "a clear definition of 'related-person' and 'related-party transaction,' as well as a process for the submission, review, and approval of the related-party transactions by independent directors"—were "meaningful" benefits "likely to improve the integrity of board processes for the benefit of the company," stating that "I think it's obvious that the value of fees connected to this particular benefit achieved is at least $400,000, and probably more"); Transcript of Settlement Hearing and Rulings of the Court at 19–20, 99–100, *In re* Google Inc. Class C S'holder Litig., C.A. No. 7469–CS (Del. Ch. Oct. 28, 2013) (granting a fee award of $8.5 million plus expenses in a settlement for which the Court of Chancery viewed "the primary gains" as "the strengthening of the TRA and in the corporate governance protections that kick in when the founders' percentage interest goes down," with the TRA changes "giv[ing] a lot of assurance to the public shareholders" by "requiring essentially every independent director of Google to approve a waiver of the TRA"); Transcript of Telephonic Settlement Hearing and Rulings of the Court, *In re* Opko Health, Inc. Derivative Action¸ C.A. No. 2018-0740-SG (Del. Ch. Nov. 2, 2020) (finding that a series of governance reforms agreed to as part of a settlement, including requirements that a corporation maintain a lead independent director, maintain an independent investment committee comprised of independent directors (including the lead independent director) and charged with reviewing certain minority investments, and obtain full audit committee approval of related-party transactions with a value below $250,000, were "substantial corporate governance improvements" and sufficiently "significant" to "support a rather substantial fee award on their own"); Transcript of Rulings of the Court on Proposed Settlement at 24–25, *In re* CytRx Corp. S'holder Derivative Litig. II, C.A. No. 11800-VCMR (Del. Ch. May 10, 2018) (finding a fee award supported by a bylaw amendment "ensuring independent directors approve" any consent provided by the corporation to the commencement of "breach of fiduciary duty claim[s]" in any foreign jurisdiction).

227. *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG, 2024 WL 472396, at *5 (Del. Ch. Feb. 7, 2024) (quoting Transcript of Oral Argument on Plaintiffs' Motion for Fees at 55, *In re* Oracle Corp. Deriv. Litig., C.A. No. 2017-0337-SG (Del. Ch. Nov. 17, 2023)).

228. *See, e.g.*, *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG, 2019 WL 6522297, at *1 (Del. Ch. Dec. 4, 2019) ("Ultimately, the special litigation committee found that it was in the corporate interest that the cause of action [against the corporation's purported controlling stockholder and certain other fiduciaries] be pursued, and determined that that asset would best be monetized on behalf of the corporation by allowing the original plaintiff to proceed, derivatively."); *In re* WeWork Litig., 250 A.3d 976, 986–87 (Del. Ch. 2020) (reviewing litigation filed on behalf of WeWork by a special committee of its board against WeWork's alleged controlling stockholders holding up to a combined 49.9 percent of the voting power of WeWork's outstanding voting securities); CBS Corp. v. Nat'l Amusements, Inc., C.A. No. 2018-0342-AGB, 2018 WL 2263385 (Del. Ch. May 17, 2018) (denying a motion for a temporary restraining order sought by CBS Corporation and five independent directors serving on CBS's special committee in connection with breach of fiduciary duty and other claims they initiated against National Amusements, Inc. and members of the Redstone family as alleged controlling stockholders of CBS).

in which an SLC formed by Blue Bell's board concluded, after a thorough assessment of Blue Bell's oversight claims, that it was in the best interests of Blue Bell and its stockholders to allow representatives of the stockholder-plaintiff who initially commenced the litigation to continue prosecuting the claims on Blue Bell's behalf.[229] And this evidence is not just anecdotal. A recent study of public SLC recommendations filed in the Delaware courts observed "a reasonably equal distribution" of recommendations in favor of dismissal and recommendations in favor of settling or litigating claims investigated by the SLC.[230] This observation conforms with prior acknowledgments of the Court of Chancery that "in this day and age, . . . the reality is that there is a high degree of scrutiny of independent directors" facing "network effects" that incentivize them to avoid action that could "draw adverse attention" and be seen to compromise their independence.[231] Rather than conferring a non-ratable benefit on a controlling stockholder or other fiduciaries, a Derivative Authority Provision would divest conflicted directors of voting power in respect of derivative claims and reallocate that power in the trusted hands of independent and disinterested directors Delaware law deems "in the best position to manage [those] legal rights," "even when it involves a controlling stockholder."[232]

Consistent with the foregoing, the Delaware courts have repeatedly held that even on a "cloudy day" after potential derivative claims have emerged against certain directors, a board's decision to delegate the investigation and management of the claims to an independent board committee is subject to the protections of the business judgment rule.[233] Enhanced "judicial review" under *Zapata* "is limited to those

229. Special Litigation Committee's Motion to Permit Plaintiff's Counsel to Proceed with Derivative Litigation, Marchand v. Barnhill, C.A. No. 2017-0586-NAC (Del. Ch. Mar. 29, 2024).

230. C.N.V. Krishnan, Steven Davidoff Solomon & Randall S. Thomas, *How Do Legal Standards Matter? An Empirical Study of Special Litigation Committees: Evidence of Management Bias and the Effect of Legal Standards*, 60 J. Corp. Fin. 1, 9 (2020); *see also* Minor Myers, *The Decisions of the Corporate Special Litigation Committees: An Empirical Investigation*, 84 Ind. L. J. 1309, 1320 (2009) (conducting an empirical analysis to find that "SLCs do not invariably move to dismiss derivative litigation" and in observed SLC decisions in which the corporation had not already sought relief against one or more defendants named in a derivative action, "SLC decisions to dismiss" represented just more than half of the observed recommendations).

231. Transcript of Settlement Hearing and Rulings of the Court at 99–100, *In re* Google Inc. Class C S'holder Litig., C.A. No. 7469–CS (Del. Ch. Oct. 28, 2013).

232. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 469 (Del. 2024) (quoting United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1056 (Del. 2021)).

233. *See, e.g.*, Spiegel v. Buntrock, 571 A.2d 767, 778 (Del. 1990) ("The same standard of judicial review [under the business judgment rule] is applicable when a board delegates authority to respond to a demand to a special litigation committee."); Mount Moriah Cemetery v. Moritz, C.A. No. 11431, 1991 WL 50149, at *3 (Del. Ch. Apr. 4, 1991) ("[W]hen a board refuses a demand, 'the only issues to be examined are the good faith and reasonableness of its investigation.' The same review, to determine whether there was a valid exercise of business judgment, is undertaken when a board delegates its authority to respond to a demand to a special committee." (quoting *Spiegel*, 571 A.2d at 777)), *aff'd*, 599 A.2d 413 (Del. 1991) (TABLE); Sutherland v. Sutherland, C.A. No. 2399-VCL, 2008 WL 3021024, at *1 n.1 (Del. Ch. Aug 5, 2008) ("Neither *Speigel v. Buntrock*, 571 A.2d 767 (Del. 1990), nor the other cases cited in Mr. Saunder's August 1, 2008 letter are to the contrary. Those cases affirm that a board may delegate investigative powers to a committee without either conceding demand futility or invoking the heightened scrutiny required by *Zapata v. Maldonado*, 430 A.2d 779 (Del. 1981), in the case of a board with a majority of interested members that appoints a committee consisting of one or more of its minority disinterested members to investigate and ex-

cases where demand upon the board of directors is excused and the board has decided to regain control of litigation through the use of an independent special litigation committee"; it does not extend to the initial decision by a board to delegate investigation and control of potential derivative claims to a committee.[234] Applying the business judgment rule in this context is consistent with Delaware law's recognition of the "important function" served by SLCs in "'promot[ing] confidence in the integrity of corporate decision making by vesting the company's power to respond to accusations of serious misconduct by high officials in an impartial group of independent directors.'"[235] It also conforms with Delaware's valued public policy of encouraging the use of SLCs for the same reasons.[236] Applying a standard of

ercise control over derivative litigation."); Grimes v. Donald, 673 A.2d 1207, 1216 n.13 (Del. 1996) ("This Court has held that in demand-excused cases the board of directors may sometimes reassert its authority over a derivative claim in certain instances through the device of the Special Litigation Committee ("SLC"). The use of a committee of the board formed to respond to a demand or to advise the board on its duty in responding to a demand is not the same as the SLC process contemplated by *Zapata*, however. It is important that these discrete and quite different processes not be confused." (internal citations omitted)); Aronson v. Lewis, 473 A.2d 805, 812–13 (Del. 1984) ("In our view the entire question of demand futility is inextricably bound to issues of business judgment . . . . The function of the business judgment rule is of paramount significance in the context of a derivative action. . . . [W]here demand on a board has been made and refused, we apply the business judgment rule in reviewing the board's refusal to act pursuant to a stockholder's demand. Unless the business judgment rule does not protect the refusal to sue, the shareholder lacks the legal managerial power to continue the derivative action, since that power is terminated by the refusal. We also concluded that where demand is excused a shareholder possesses the ability to initiate a derivative action, but the right to prosecute it may be terminated upon the exercise of applicable standards of business judgment. The thrust of *Zapata* is that in either the demand-refused or the demand-excused case, the board still retains its Section 141(a) managerial authority to make decisions regarding corporate litigation. Moreover, the board may delegate its managerial authority to a committee of independent disinterested directors. Thus, even in a demand-excused case, a board has the power to appoint a committee of one or more independent disinterested directors to determine whether the derivative action should be pursued or dismissal sought. Under *Zapata*, the Court of Chancery, *in passing on a committee's motion to dismiss a derivative action in a demand excused case*, must apply a two-step test." (emphasis added) (citations omitted)); *In re* Oracle Corp. Derivative Litig., Consol. C.A. No. 2017-0337-SG, 2020 WL 3867407, at *11 (Del. Ch. July 9, 2020) ("*Zapata*'s exception from business judgment rule review applies only within its context: 'demand-excused derivative cases in which the board sets up a[ ] [special litigation committee] that investigates whether a derivative suit should proceed *and recommends dismissal after its investigation*.'" (quoting London v. Tyrrell, C.A. No. 3321-CC, 2010 WL 877528, at *17 (Del. Ch. Mar. 11, 2010))); *cf.* Zapata Corp. v. Maldonado, 430 A.2d 779, 786–87 (Del. 1981) (explaining that "the interest taint of the board majority" is not a "bar to the delegation of the board's power to an independent committee composed of disinterested board members," and that where an SLC conducts an investigation and seeks dismissal of derivative claims, "[t]he issues become solely independence, good faith, and reasonable investigation" on the part of the SLC); City of Tamarac Firefighters' Pension Tr. Fund v. Corvi, C.A. No. 2017-0341-KSJM, 2019 WL 549938, at *9 (Del. Ch. Feb. 12, 2019) (dismissing challenge to a board's reliance on a committee and subcommittee to respond to the litigation demands where the complaint "fail[ed] to allege particularized facts to support conflicts *at the committee level*" (emphasis added)).

234. *Spiegel*, 571 A.2d at 778; Seminaris v. Landa, 662 A.2d 1350, 1352 (Del. Ch. 1995) ("In *Spiegel*, the Delaware Supreme Court confirmed a board of directors' right to delegate its control over derivative litigation to a committee of board members without automatically subjecting the committee to the enhanced scrutiny of the two tiered test established in *Zapata*.").

235. Wenske v. Blue Bell Creameries, Inc., 214 A.3d 958, 963 (Del. Ch. 2019) (quoting Biondi v. Scrushy, 820 A.2d 1148, 1156 (Del. Ch. 2003), *aff'd*, 847 A.2d 1121 (Del. 2004)).

236. *Id.* ("[T]he proper use of the special litigation committee device is to be encouraged."); *Oracle*, 2019 WL 6522297, at *15 ("The deference of Delaware law to the decisions of a special litigation committee 'is among the many important policy choices that our state has made regarding the

review more onerous than business judgment to the adoption of a Derivative Authority Provision concentrating authority in independent and disinterested directors, and away from directors who may lack independence, on a "clear day" is incompatible with this longstanding Delaware authority.[237]

While there is arguably "tension" between this conclusion and the broad entire fairness framework upheld in *EZCORP* and *Match*,[238] *EZCORP*, *Match*, and even

circumstances when it is appropriate to divest the board of directors of a Delaware corporation of a portion of its statutory authority to manage the corporation's affairs, *i.e.*, its right to control litigation brought on behalf of the corporation.'" (quoting *In re* Oracle Corp. Derivative Litig., 808 A.2d 1206, 1212 (Del. Ch. 2002))); Transcript of Settlement Conference and Rulings of the Court at 55, City of Miami Gen. Emps.' & Sanitation Emps.' Ret. Tr. v. Foley, C.A. No. 2020-0650-KSJM (Del. Ch. June 21, 2022) ("[W]e always favor litigants working with special litigation committees to resolve claims efficiently.").

237. *See* Varallo et al., *supra* note 79 (explaining that this authority stems from a "public policy concern [that] lies in business judgment principles" and has been "elevate[d]" by the Delaware Supreme Court "above the inherently coercive dynamic of conflicted controller transactions" generally supporting entire fairness review in other contexts).

238. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 469 (Del. 2024); *In re* EZCORP Inc. Consulting Agreement Derivative Litig., C.A. No. 9962-VCL, 2016 WL 301245, at *24, *29 (Del. Ch. Jan. 25, 2016). It is also noteworthy that in *Match*, the Delaware Supreme Court carefully limited its endorsement of broad entire fairness review to "suit[s] claiming that a controlling stockholder stood on both sides of a transaction with the controlled corporation and received a non-ratable benefit." 315 A.3d at 451; *see also* Maffei v. Palkon, No. 125, 2024 (Del. Apr. 16, 2024) (ORDER) (granting an interlocutory appeal, following *Match*, of the Court of Chancery's denial of a motion to dismiss challenges to the corporate conversion in *Palkon*, finding that the application for appeal met "the strict standards for certification" because, among other factors, "[c]ertainty regarding the standard of review applicable to a decision to reincorporate in another jurisdiction would be beneficial [and] the [appealed] Opinion involve[d] a question of law regarding reincorporation in another jurisdiction that was decided for the first time in this state," and thereby suggesting that the applicable standard of review was not definitively resolved by *Match*). In *Match*, the Supreme Court also endorsed its prior opinion in *Williams v. Geier*, 671 A.2d 1368 (Del. 1996), which applied business judgment review to a recapitalization involving a controlling stockholder group. *Match*, 315 A.3d at 466–67. In *Williams v. Geier*, the controllers "reap[ed] a benefit" from the transaction" because "'the dynamics of how the Plan would work in practice had the effect of strengthening the [controlling stockholders'] control.'" *Id.* (quoting *Williams*, 671 A.2d at 1378). But "the *Williams* majority [nevertheless] concluded that 'no non-pro rata [sic] or disproportionate benefit . . . accrued to the [controlling stockholders] on the face of the Recapitalization'" as "[t]he Recapitalization applied to every stockholder, whether a stockholder was a minority stockholder or part of the majority bloc." *Id.* (quoting *Williams*, 671 A.2d at 1370, 1378). Thus, as explained in *Match*, "[e]ntire fairness review did not apply" in *Williams v. Geier* "because the controlling stockholders received the same benefit as other stockholders." *Id.* at 467. This reasoning could supply another basis to conclude that the adoption of a Derivative Authority Provision—which, on its face, would only divest interested directors of voting power on matters relating to derivation litigation and would stand to benefit minority holders by concentrating this authority in independent directors—should not invoke entire fairness review. *But see* IRA Tr. FBO Bobbie Ahmed v. Crane, C.A. No. 12742-CB, 2017 WL 7053964, at *8–9 (Del. Ch. Dec. 11, 2017) (finding it reasonably conceivable that a reclassification provided a controller with a unique benefit in perpetuating its controlling stake and was "presumptively . . . subject to entire fairness review" even though the reclassification "and *Williams* both involve[d] a nominally pro rata distribution of new shares," explaining: "But here, unlike in *Williams*, the case is at the pleadings stage and no discovery has been taken. This distinction is significant because the Supreme Court in *Williams* did not stop its analysis once it found that the tenure voting recapitalization was pro rata. . . . Because the parties have not developed a factual record from which the motivations of defendants can be assessed, and because [] control over the Board is self-evident here, *Williams* is not dispositive and it would be premature for me to apply its reasoning at the pleadings stage."). For the reasons discussed herein, this interpretation of *Match* is not necessary to conclude that the default standard of review applicable to the adoption of a Derivative Authority Provision is the business judgment rule, and this

leading members of the plaintiffs' bar all acknowledge that board primacy over derivative claims falls within "a public policy carveout to the general [entire fairness] rule that has animated our law . . . since *Lynch*," and which the Delaware Supreme Court adopted in *Aronson* and recently reaffirmed in *Zuckerberg*.[239] As explained by the same attorneys who successfully argued before the Court of Chancery in *Palkon* for entire fairness review of a proposed corporate conversion based on the alleged non-ratable litigation protections the conversion would afford fiduciaries, "*Aronson* and *Zuckerberg* . . . elevate a board's control of derivative litigation above the inherently coercive dynamic of conflicted controller transactions" that support entire fairness review in other contexts.[240] As they have further explained, this is based on the Delaware Supreme Court's "public policy concern [that] lies in business judgment principles, which emphasize the 'freedom of directors' and their 'managerial prerogatives' consistent with Section 141(a) of the Delaware General Corporation Law" in this context, and is intended to "create salutary results, such as channeling 'intracorporate' disputes to the board and 'safeguard[ing] against strike suits.'"[241] A Derivative Authority Provision would further precisely

article instead offers the foregoing as an alternative basis to support this conclusion, as well as a potential means of reconciling some of the "tension" that may otherwise arguably exist between this conclusion and the modern entire fairness framework.

239. Varallo et al., *supra* note 79; *see also EZCORP*, 2016 WL 301245, at *24–30 (explaining that the inherent coercion rationale supporting the broad modern application of entire fairness review does not extend to the "demand futility context" because of "the Delaware Supreme Court's policy judgments about the demand futility context" adopted in *Aronson* for the purpose of bolstering "the board's authority over derivative actions" and "reinforc[ing] the bulwark of Rule 23.1 as a pleading-stage limitation on weak derivative claims"); *Match*, 315 A.3d at 469 ("In *Lynch* and *Tremont II*, we held that, because of the inherently coercive presence of a controlling stockholder and the perceived risk of retaliation, the use of an independent and properly functioning special committee did not replicate arm's length bargaining and change the entire fairness standard of review. But according to our demand review precedent in *Aronson*, which involved derivative claims against a controlling stockholder, inherent coercion alone did not excuse demand. The defendants argue that if inherent coercion does not disable an independent director's ability to decide whether the corporation should sue a controlling stockholder, then consistency requires that inherent coercion not be presumed in business transaction negotiations with controlling stockholders. Admittedly, there is a tension in our law in these contexts. But *Aronson* and our demand review precedent stand apart from the substantive standard of review in controlling stockholder transactions. The distinction is grounded in the board's statutory authority to control the business and affairs of the corporation, which encompasses the decision whether to pursue litigation. In *Zuckerberg*, we held that layering entire fairness review over our demand review precedent 'collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction.'" (quoting United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034, 1056 (Del. 2021))).

240. Varallo et al., *supra* note 79.

241. *Id.* (quoting Aronson v. Lewis, 473 A.2d 805, 811–12 (Del. 1984)). For this recognized exception to have meaning, it must extend to board-level decisions regarding the delegation and consideration of derivative demands and cannot be cabined solely to the assessment of director independence for purposes of Rule 23.1. Otherwise, *Aronson*'s public policy exception would prevent a finding of demand futility based on the independence of a controlled corporation's directors, only to then produce the illogical result of subjecting the board's assessment of a demand regarding the same claims to entire fairness review. *See Aronson*, 473 A.2d at 812 ("In our view the entire question of demand futility is inextricably bound to issues of business judgment and the standards of that doctrine's applicability."); *Zuckerberg*, 262 A.3d at 1056 ("[Plaintiff]'s argument collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction. It is entirely possible that an independent and disinterested board, exercising its impar-

the same objective, and far from contravening modern entire fairness jurisprudence, affording the protections of the business judgment rule to the adoption of a Derivative Authority Provision fits squarely within the public policy exception expressly recognized in *Match* and *EZCORP*.[242]

This is perhaps best illustrated by a relatively recent Court of Chancery decision, *Simons v. Brookfield Asset Management*, dismissing fiduciary challenges to the appointment of an independent director.[243] The challenges were brought by a stockholder-plaintiff who, months prior to the director's appointment, received hundreds of pages of documents upon making a Section 220 demand to investigate a stock repurchase with an alleged controller. The stockholder failed to commence litigation prior to the director's appointment and, upon filing suit the following month, challenged the appointment as a breach of fiduciary duty based on the impediment it served on the stockholder's ability to establish demand futility. In this regard, the stockholder argued "that because a majority of the Board was interested [in potential litigation relating to the repurchase] prior to [the independent director]'s appointment, it is reasonably conceivable that [the] appointment was for the purpose of countering a demand futility argument and thus motivated by self-interest."[244] In dismissing the fiduciary claim based on the appointment, the Court of Chancery first observed "the oddity of a minority stockholder arguing that directors should not create a supermajority independent board," explaining that "Delaware law presumes that independent directors enhance the value of the firm and benefit minority stockholders."[245] The Court of Chancery then found that the stockholder's allegations as to the timing and consequences of the appointment in relation to the stockholder's Section 220 demand and claims could not, on their own, support a claim for breach of fiduciary duty. In doing so, the Court of Chancery noted the absence of any case cited by the stockholder in which "this court, or any court, has found such an allegation sufficient to support a claim for breach of fiduciary duty."[246] In addition, the Court of Chancery discussed policy considerations that weigh in favor of promoting the use

tial business judgment, could decide that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed. Yet, [plaintiff] asks the Court to deprive directors and officers of the power to make such a decision, at least where the derivative action would challenge a conflicted-controller transaction. This rule may have its benefits, but it runs counter to the 'cardinal precept' of Delaware law that independent and disinterested directors are generally in the best position to manage a corporation's affairs, including whether the corporation should exercise its legal rights."); *Match*, 315 A.3d at 469 ("In *Zuckerberg*, we held that layering entire fairness review over our demand review precedent 'collapses the distinction between the board's capacity to consider a litigation demand and the propriety of the challenged transaction.' An 'independent and disinterested board' can decide 'that it is not in the corporation's best interest to spend the time and money to pursue a claim that is likely to succeed.'" (quoting *Zuckerberg*, 262 A.3d at 1056)).

242. *See supra* notes 239–41.

243. Simons v. Brookfield Asset Mgmt. Inc., C.A. No. 2020-0841-KSJM, 2022 WL 223464 (Del. Ch. Jan. 21, 2022).

244. *Id.* at *8.

245. *Id.* at *7 & n.43.

246. *Id.* at *9.

of independent directors and against imposing fiduciary liability for the appointment of an independent director whose qualifications are not in dispute.[247]

Also illustrative is the demand futility analysis conducted by the Court of Chancery to dismiss fiduciary challenges to the stock repurchase under Rule 23.1 in the same case. Because the challenged repurchase was approved by the corporation's audit committee, the Stockholder attempted to impugn the independence of a director who did not serve on the audit committee and was not otherwise involved in the audit committee's decision-making, by arguing that this director "faced a substantial likelihood of liability based on her participation in the [] Board decision to delegate authority to the Audit Committee."[248] The Court of Chancery rejected this as a basis for undermining the director's independence, noting that "the Audit Committee members were independent" from the alleged controller.[249] And, as the Court of Chancery explained, "Plaintiff cite[d] no authority for the proposition that a director faces a substantial likelihood of liability in a challenge to a decision that the director agreed should be relegated to a committee of disinterested and independent directors."[250]

Likewise, similar Delaware policy favoring the use of independent committees in other contexts weighs against the imposition of liability for independent committee delegations and lends further support to business judgment review of the adoption of a Derivative Authority Provision. Delaware's adoption of the *MFW* framework, for example, was intended to encourage the use of fully empowered independent committees and disinterested stockholder vote conditions in controller buyouts.[251] The *MFW* framework offers significant benefits for controlling stockholders in shielding transactions otherwise subject to entire fairness with the protections of the business judgment rule.[252] It could thus be argued that a controlling stockholder realizes a non-ratable benefit from a board's formation of a special committee with the intent of adhering to the *MFW* framework. It would nevertheless be antithetical to *MFW* to

247. *Id.* ("Plaintiff's approach would expose directors to potential liability, for some unstated period of time, for expanding or otherwise changing the Board composition to increase its independence from an interested party after receipt of a Section 220 demand. Section 220 demands are increasingly common, and Delaware law encourages stockholders to pursue books and records actions in certain circumstances. Changes in Board composition too are common occurrences, and changes in Board composition can often achieve salutary goals. Plaintiff's approach would place these two common occurrences, which Delaware law often encourages, in tension with one another." (citing, among other things, and as support for one of the "salutary goals" that may often be achieved by changes in Board composition, Theodore N. Mirvis & William Savitt, *The Dangers of Independent Directors*, 40 Del. J. Corp. L. 481, 481 (2016) (observing the increasing proportion of major public corporations with three or more independent directors, which rose from 34 percent in 1987 to 94 percent in 2014))).

248. *Id.* at *11 n.77.

249. *Id.*

250. *Id.*

251. Kahn v. M & F Worldwide Corp., 88 A.3d 635, 643 (Del. 2014) (affirming the adoption of the *MFW* framework based "upon the premise that the common law equitable rule that best protects minority investors is one that encourages controlling stockholders to accord the minority both procedural protections").

252. *See In re* MFW S'holders Litig., 67 A.3d 496, 502 (Del. Ch. 2013) (explaining that the *MFW* framework "will provide a strong incentive for controlling stockholders"), *aff'd sub nom. M & F Worldwide*, 88 A.3d 635.

subject the board decision forming the committee to a heightened standard of judicial review. Given Delaware's policy favoring and encouraging the use of independent committees, and in recognition of the interests of minority stockholders served by the use of independent committees,[253] the decision to form an independent committee to consider even a controller buyout, in and of itself, is subject to the protections of the business judgment rule.[254] Likewise, the protections of the business judgment rule should apply to the adoption of a Derivative Authority Provision concentrating board authority over derivative litigation demands that could otherwise present conflicts of interest in the future in independent and disinterested directors best suited to assess these claims and any associated diverging interests.

IV. Conclusion

A Derivative Authority Provision facilitates more efficient oversight and management of derivative claims based on foundational legal principles of Delaware corporate law and the DGCL. In doing so, it offers a solution to the risk of opportunistic derivative litigation and other inefficiencies faced by many corporations under Delaware law's broad application of entire fairness review. But even after a Derivative Authority Provision is adopted, plaintiffs' attorneys will remain incentivized, under the corporate benefit doctrine, to seek remedial action in respect of worthwhile derivative claims. And as recent history has shown, independent directors vested with authority over derivative litigation under a Derivative Authority Provision will remain incentivized to independently investigate and pursue those that are worthwhile. By facilitating more efficient management of derivative claims, a Derivative Authority Provision allows for a considerable reduction in the costs and burdens currently faced by many Delaware corporations in respect of derivative claims without compromising the upside of meritorious claims, promoting efficient outcomes and furthering value maximization for Delaware corporations and their stockholders.

253. *See M & F Worldwide*, 88 A.3d at 643 ("With regard to the Special Committee procedural protection, the Appellants' assertions regarding the MFW directors' inability to discharge their duties are not supported either by the record or by well-established principles of Delaware law. As the Court of Chancery correctly observed: 'Although it is possible that there are independent directors who have little regard for their duties or for being perceived by their company's stockholders (and the larger network of institutional investors) as being effective at protecting public stockholders, the court thinks they are likely to be exceptional, and certainly our Supreme Court's jurisprudence does not embrace such a skeptical view.'" (quoting *MFW*, 67 A.3d at 528)).

254. In fact, Delaware law recognizes that committees of independent directors offer unique value, that stockholder-representatives often cannot replicate, of such importance in the *MFW* context that having negotiations with a controller conducted directly by stockholder-representatives (rather than by an independent committee) will, in and of itself, render *MFW*'s protections inapplicable even when those negotiations lead to better terms for the minority. *In re* Dell Techs. Inc. Class V S'holders Litig., Consol. C.A. No. 2018-0816-JTL, 2020 WL 3096748, at *17–20 (Del. Ch. June 11, 2020); *see also* Transcript of Telephonic Settlement Hearing and Rulings of the Court at 20, 34, *In re* Palantir Techs. Inc. Class F Stock Litig., C.A. No. 2021-0275-SG (Del. Ch. Sept. 13, 2022) (noting that a commitment from a corporation's founders as part of a settlement "that any future squeeze-out had to comply with *MFW*" "is, alone, quite a significant 'get'").