CONTROLLING-SHAREHOLDER RELATED-PARTY TRANSACTIONS UNDER DELAWARE LAW - A PRIMER AND PRACTICAL GUIDE

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INTRODUCTION & SUMMARY

Under Delaware law, controlling shareholders (much like directors and officers) owe fiduciary duties to the companies they control and their minority shareholders. Historically, therefore, controlling shareholders' transactions with their own companies have been subject to heightened "entire fairness" scrutiny, and not deferential "business judgment" rule review. Recently, Delaware courts have acknowledged the prevalence of "entire fairness" hold-up lawsuits, especially in the merger context, and the Delaware Supreme Court adopted in the *MFW Shareholders Litigation* an important exception: controlling-shareholder mergers are entitled to deferential "business judgment" review as long as the merger was conditioned from the outset on independent-director negotiation and approval, followed by approval of a majority of shareholders unaffiliated with the controlling shareholder. This dual-approval requirement was deemed to offset the controlling shareholder's control power and replicate a third-party transaction, obviating the need for intrusive judicial review.

Delaware's legal framework poses interesting challenges, unique complexities, and emerging strategic corporate-governance choices for companies addressing controlling-shareholder transactions. The following five practical pointers can be gleaned from Delaware case law:

- Shareholders holding more than 50% of the vote are generally considered *de jure* controlling shareholders and, thus, should assume that all their transactions with the company will be evaluated under the entire-fairness standard.

- Shareholders holding a significant block amounting to less than 50% of the vote should consider whether they have sufficient influence over the board that they may be deemed *de facto* controlling shareholders, likewise subjecting their transactions with the company to entire-fairness review.

- Controlling shareholders should include as a condition of any proposed related-party transaction that the company obtain approval by an

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independent-director committee. While that procedure will not avoid entire-fairness review, it will significantly enhance the chances of prevailing in litigation, provided that the committee was fully independent and informed, and its process was untainted.

- Controlling shareholders and directors of their companies should make sure that independent-director committees reviewing and negotiating transactions with controlling shareholders: (i) are advised by their own legal and financial advisers who either have no connection or business relationship with the controlling shareholder or have disclosed all such connections and relationships to the committee; (ii) have access to all current financials and projections; (iii) are fully empowered to investigate the transaction and negotiate (including where appropriate testing the market), and are authorized to decline the proposed transaction in their own discretion; (iv) conduct all deliberations in private, without interference by or participation from the controlling shareholder or any company personnel who may be deemed beholden to the controlling shareholder; and (v) make a record that can be publicly disclosed of all their meetings and negotiations.

- Controlling shareholders should consider the circumstances under which to include dual-approval—approval by independent directors and independent shareholders—as a condition of the transaction. Dual approval provides important safeguards in the merger context (where shareholder solicitation is a sunk cost in any event), and its costs and benefits should also be weighed in other contexts involving significant related-party transactions.

We discuss below the key Delaware cases supporting these considerations. Section I provides the history of entire-fairness review for controlling-shareholder transactions and the standards that Delaware courts traditionally have applied. Section II discusses the Delaware Supreme Court's decision in *MFW* to forego entire-fairness review in the merger context where dual approval is obtained, and the aftermath of that decision. And Section III discusses possible expansion of the dual-approval process in controlling-shareholder transactions outside the merger context.

I. HISTORY OF ENTIRE-FAIRNESS REVIEW FOR CONTROLLING-SHAREHOLDER TRANSACTIONS

Controlling shareholders—shareholders who "own a majority interest in or exercise control over the business affairs of the corporation"—are company fiduciaries,[1] because they, much like officers and directors, stand in a "trustee-like" position over

[1] *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1344 (Del. 1987) (controlling shareholders are company fiduciaries).

others' assets.[2] Courts may consider "controlling" three categories of shareholders: (i) those who own an outright majority (more than 50%) of the company's vote,[3] (ii) *de facto* dominant shareholders who control the company even though they have less than 50% of the vote,[4] and (iii) a group of otherwise unaffiliated shareholders may be considered a controlling-shareholder fiduciary if those shareholders establish a group by signing a contract, voting trust, or other agreement that gives them controlling voting power.[5]

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2 *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939).

3 *See Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507 (Del. 2005) ("[I]t is well established in the corporate jurisprudence of Delaware that control exists when a stockholder owns, directly or indirectly, more than half of a corporation's voting power."); *but see ACP Master, Ltd., et al. v. Clearwire Corp*., C.A. No. 9042-VCL, 2017 WL 3421142, at *16 (Del. Ch. Aug. 8, 2017) (because no fiduciary-duty breach found, court declined to consider majority shareholder's argument that it was not controlling fiduciary given provisions in equity holders' agreement that prevented it from exercising effective control).

4 *See In re Western Nat'l Corp. S'holders Litig.*, C.A. No. 15927-CC, 2000 WL 710192, at *20 (Del. Ch. May 22, 2000) (holding that "significant stockholder that does not, as a general matter, exercise actual control over the investee's business and affairs or over the investee's board of directors but does, in fact, exercise actual control over the board of directors during the course of a particular transaction, can assume fiduciary duties for purposes of that transaction"). *Compare Kahn v. Lynch Commc'ns Sys., Inc.*, 638 A.2d 1110, 1114–15 (Del. 1994) (43.3% shareholder deemed controlling where it attempted to force independent directors to defer to its proposals by reminding them about its significant stockholdings and, thus, presumably, its ability to retaliate against board and minority shareholders); *In re Zhongpin Inc. S'holders Litig.*, C.A. No . 7393-VCN, 2014 WL 6735457, at *7–*9 (Del. Ch. Nov. 26, 2014) (17.3% shareholder considered controlling at pleading stage where he was alleged to be company's largest shareholder, its founder, chairman, and CEO, and to exercise meaningful influence over director elections, merger transactions, and bylaw amendments), *rev'd on other grounds*, *In re Cornerstone Therapeutics Inc. S'holders Litig*., 115 A.3d 1173 (Del. 2015); *with In re Sanchez Energy Derivative Litig.*, C.A. No. 9132-VCG, 2014 WL 6673895, at *7–*10 (Del. Ch. Nov. 25, 2014) (21.5% shareholder group not controlling even though it included chairman and his CEO son, because they did not exercise greater control over company than typical CEO and no specific allegations that group controlled board's actions in connection with challenged transaction), *rev'd on other grounds*, *Delaware County Employees Ret. Fund v. Sanchez*, 124 A.3d 1017 (Del. 2015); *In re KKR Fin. Holdings LLC S'holders Litig.*, 101 A.3d 980, 993–94 (Del. Ch. 2014) (1% shareholder not controlling, even though its affiliate controlled company's day-to-day management, because it did not have right to appoint directors, and did not dictate specific action to board or interfere with directors' decisions about challenged transaction), *aff'd sub nom. Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015); *In re Morton's Rest. Group, Inc. S'holders Litig.*, 74 A.3d 656, 664–65 (Del. Ch. 2013) (27.7% stockholder who had two employees on board not deemed controlling); *Superior Vision Services, Inc. v. ReliaStar Life Ins. Co.*, C.A. No. 1668-N, 2006 WL 2521426 at *4–*5 (Del. Ch. August 25, 2006) (44% stockholder not controlling over the company's payment of dividends even though it had effective contractual right to veto dividend payments).

5 *Dubroff v. Wren Holdings,* C.A. Nos. 3940-VCN, 6017-VCN, 2011 WL 5137175, at *7 (Del. Ch. Oct. 28, 2011) (allegations that several shareholders "acted as a single group" that "planned and caused" company to engage in transactions that enriched group at expense of minority shareholders deemed sufficient to plead controlling-shareholder group); *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 25–27 (Del. Ch. 2010) (finding two co-signers of voting trust controlling fiduciaries because their combined votes sufficient to elect board of directors); *Williamson v. Cox*, C.A. No. 1663-VCN, 2006 WL 1586375, at *3–*6 (Del. Ch. June 5, 2006) (where three otherwise-unrelated cable companies owned large stakes in IT company, allegations that they voted purely in their own interests and not in

If the controlling shareholder engages in a conflicted transaction with the company, that "related-party" transaction may be subject to "entire fairness" scrutiny.[6] The goal of "entire fairness" is, much like the name implies, to ensure that the transaction is fair to all shareholders and the company. Although there is no single recipe for an "entirely fair" controlling-shareholder transaction, the following are helpful guidelines:

(i) controlled boards should establish a special committee of independent directors to negotiate the related-party transaction with the controlling shareholder,[7]

(ii) the independent directors should hire their own independent legal and financial advisors,[8]

(iii) any ties between the advisors and the controlling shareholder should be disclosed to the Board,[9]

(iv) independent directors and their advisors should have access to current financials and projections,[10]

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interests of IT company they partially owned were sufficient at motion-to-dismiss stage to plead controlling-shareholder group).

6 *In Re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, C.A. No. 11202-VCS, 2017 WL 3568089, at *11 (Del. Ch. Aug. 18, 2017) (noting two typical conflicted- transaction scenarios in controlling-stockholder context, triggering entire-fairness review: (i) controller stands on both sides of transaction, such as when parent acquires its subsidiary; and (ii) controller does not stand on both sides of transaction but exploits its position of leverage on sell-side to extract different consideration or derive some unique benefit not shared with the common stockholders).

7 *Sealy Mattress Co. v. Sealy, Inc.*, 532 A.2d 1324, 1337 (Del. Ch. 1987) (finding parent-subsidiary merger unfair, in part because controlled board left negotiations in hands of non-independent directors).

8 *Compare Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985) (presence of independent, knowledgeable advisors hired by merging parties was strong indicator of fairness) *with Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1150–51 (Del. Ch. 2006) (parent-subsidiary merger not "entirely fair" where special committee's efforts "crippled" by receiving legal and financial advice that was not independent); *see also In re Western Nat'l Corp.*, 2000 WL 710192, at *21–*22 (finding advisor independent despite minor role for controlling shareholder in past deal).

9 *See RBC Cap. Markets v. Jervis*, 129 A.3d 816, 862–63, 865 (Del. 2015) (upholding finding that financial advisor aided and abetted target board's breach of duty of care, where advisor "exploit[ed] its own conflicted interests" and lowered its fairness values while attempting to obtain business from potential buyer and capture buy-side financing work); *In re Inergy L.P. Unitholder Litig.*, C.A. No. 5816-VCP, 2010 WL 4273197, at *14–*15 (Del. Ch. Oct. 29, 2010) (permitting special committee to weigh advisors' potential conflicts against committee's confidence in advisor and its "stellar" work).

10 *Compare Kahn v. M&F Worldwide Corp.*, 88 A.3d 635, 651 (Del. 2014) (hereinafter, *Kahn v. MFW*) (finding special committee exercised due care in part because it requested updated financial projections from management) *with In re Emerging Commc'ns, Inc. S'holders Litig.*, C.A. No. 16415, 2004 WL 1305745, at *7, *12–*13, *35 (Del. Ch. June 4, 2004) (holding controlling shareholder's going-private transaction unfair, in large part because independent directors did not have access to company's newest projections, while controlling shareholder did); *but see ACP Master. v. Clearwire*,

(v) independent directors should have the powers necessary to carry out their duties, including the power to negotiate better terms—not just the narrow power to evaluate the controlling shareholder's proposed transaction[11]—and the "critical" power to say "no" to the controlling shareholder,[12]

(vi) independent directors should preserve their independence by not sharing confidences with the controlling shareholder or allowing the controlling shareholder to participate in negotiations or deliberations,[13] and

(vii) the company should fully disclose the negotiation process—not just to fulfill their disclosure obligations, but also to provide a strong record for a motion to dismiss.[14]

Delaware courts also acknowledge the business reality that a "fair" controlling-shareholder deal is only an approximation of an arm's-length transaction; it cannot be an exact replica. One important difference is that a majority shareholder cannot be compelled to sell his shares to another bidder.[15] Independent directors considering a

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2017 WL 3421142, at *16, *23 (controlling shareholder not required to disclose internal financial projections or other private information revealing how it values company and ultimate price it would pay).

11 *Ams. Mining Corp. v. Theriault*, 51 A.3d 1213, 1245-47 (Del. 2012).

12 *Kahn v. Lynch*, 638 A.2d at 1110, 1119 (Del. 1994) ("The power to say no is a significant power. It is the duty of directors serving on an independent committee to approve only a transaction that is in the best interests of the public shareholders, to say no to any transaction that is not fair to those shareholders and is not the best transaction available. It is not sufficient for such directors to achieve the best price that a fiduciary will pay if that price is not a fair price.") (quoting *In re First Boston, Inc. S'holders Litig*., C.A. No. 10338, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990)).

13 *See Black v. Hollinger Int'l*, 872 A.2d 559, 562 (Del. 2005) (criticizing controlling shareholder for using "confidential, non-public information of the Company for his own purposes without permission," and upholding injunctive and monetary damages against him); *Emerald Partners v. Berlin*, 726 A.2d 1215, 1220–21 & n.5 (Del. 1999) (chastising independent directors for not excluding interested directors from what should have been confidential meetings and deliberations).

14 *See In re Tyson Foods, Inc.*, 919 A.2d 563, 594–96 (Del. Ch. 2007) (granting motion to dismiss certain claims concerning review of related-party transactions based in part on publicly-filed disclosures of independent-director approvals) ; *see also In Re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *3 ("in the face of outright contradictions between the Complaint and the Proxy, I have considered the Proxy for its truth, even at this [motion to dismiss] procedural stage, because it is integral to Plaintiffs' claims").

15 *In re John Q. Hammons Hotels Inc. S'holder Litig.*, C.A. No. 758-CC, 2009 WL 3165613, at *14 (Del. Ch. Oct. 2, 2009) ("[T]here is no requirement that [a controlling shareholder] sell his shares. Nor is there a requirement that [a controlling shareholder] sell his shares to any particular buyer or for any particular consideration, should he decide in the first instance to sell them."); *Thorpe by Castleman v. CERBCO, Inc.*, 676 A.2d 436, 444 (Del. 1996) (controlling shareholder has statutory right to block sale of "all or substantially all" company assets to third party, with no liability to minority shareholders).

controlling shareholder's buy-out offer therefore do not need to go through the "futile" exercise of seeking out alternative buyers.[16]

Controlling shareholders bear the burden of proving entire fairness.[17] But the controlling shareholder can shift the burden of proof to plaintiffs on the ultimate fairness issue by demonstrating that the conflict transaction was approved by a "well functioning committee of independent directors,"[18] with "no compulsion" to reach an agreement.[19] Unlike independent approval of related-party transactions that do not involve a controlling shareholder, however, the entire-fairness review, not the business-judgment rule, would still apply.[20] Delaware courts have described this burden-shifting benefit as "modest"[21] and having only a "slight" practical effect,[22] and difficult to obtain without a

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16 *See McMullin v. Beran*, 765 A.2d 910, 920 (Del. 2000) (board "could not effectively seek an alternative" to majority shareholder's proposed sale, and therefore "had no fiduciary responsibility to engage in [that] futile exercise").

17 *See, e.g., Ryan v. Tad's Enterprises, Inc.*, 709 A.2d 682, 689 (Del. Ch. 1996), *aff'd*, 693 A.2d 1082 (Del. 1997) ("Because the Merger transaction is concededly one in which the [controlling shareholders] stood on both sides, the defendants have the burden of demonstrating that the Merger was entirely fair.").

18 *Kahn v. Tremont Corp.*, 694 A.2d 422, 428 (Del. 1997).

19 *Kahn v. Lynch*, 638 A.2d at 1121; *see Emerald Partners v. Berlin*, 726 A.2d 1215, 1222-23 (Del. 1999) (for defendants to obtain benefit of burden shift, special committee must exert "real bargaining power").

20 *Compare In re Resorts Int'l S'holders Litig. Appeals*, 570 A.2d 259, 266–67 (Del. 1990) (holding that business-judgment rule applies to management-led buyout approved by "independent and disinterested special committee" where there was no controlling shareholder); and *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 307–08 (Del. 2015) (upholding Chancery Court's determination that private-equity investment manager did not have control power and thus entire-fairness review of merger not warranted) *with Kahn v. Lynch*, 638 A.2d at 1116 ("Entire fairness remains the proper focus of judicial analysis in examining an interested merger, irrespective of whether the burden of proof remains upon or is shifted away from the controlling or dominating shareholder, because the unchanging nature of the underlying "interested" transaction requires careful scrutiny."); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d 531, 548 (Del. Ch. 2003) ("The rationale for this [entire-fairness] rule is that the potential power of the controlling stockholder to act in ways that are detrimental to independent directors and unaffiliated stockholders is supposedly so formidable that the law's prohibition of retributive action and unfair self-dealing is insufficient to render either independent director or independent stockholder approval a reliable guarantee of fairness."). *See also* 8 Del. Code § 144(a) (conflicted-director or -officer transactions will not be struck down solely because of conflict if (i) approved by informed and independent directors, (ii) approved by informed and independent shareholders, or (iii) entirely fair).

21 *Ams. Mining Corp. v. Theriault*, 51 A.3d at 1242 ("to encourage the use of procedural devices that foster fair pricing, such as special committees and minority stockholder approval conditions, this Court has provided transactional proponents with what has been described as a 'modest procedural benefit—the shifting of the burden of persuasion on the ultimate issue of entire fairness to the plaintiffs—if the transaction proponents proved, in a factually intensive way, that the procedural devices had, in fact, operated with integrity'") *quoting In re Cox Commc'ns, Inc. S'holders Litig.*, 879 A.2d 604, 617 (Del.Ch. 2005).

22 *In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 548 ("The practical effect of the *Lynch* doctrine's burden shift is slight. One reason why this is so is that shifting the burden of persuasion under a

full trial on the transaction's overall procedural and substantive fairness.[23] But where the controlling shareholder is able to demonstrate that the special committee process was sufficiently independent and "robust" to shift the burden, that same showing correlates with court approval.[24]

II. DEFERENTIAL REVIEW OF DUAL-APPROVED CONTROLLING-SHAREHOLDER MERGERS

Controlling shareholders have two main methods of obtaining the company's remaining shares: (i) a traditional long-form merger transaction negotiated with the controlled board that recommends the merger to its shareholders, who then vote on the merger; or (ii) a tender offer made directly to the minority shareholders, followed by a statutory short-form merger to cash out any remaining minority shareholders once the controlling shareholder owns at least 90% of the shares.[25] Before the Delaware Supreme Court's 2014 *MFW* decision, Delaware courts reviewed the first category (mergers) under the entire-fairness test,[26] and the second category (tender offers) under the deferential business-judgment standard.[27]

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preponderance standard is not a major move, if one assumes, as I do, that the outcome of very few cases hinges on what happens if . . . the evidence is in equipoise.").

[23] *In re S. Peru Copper Corp. S'holder Deriv. Litig.*, 52 A.3d 761, 791, 793 (Del. Ch. 2011) (Strine, C.) (*Tremont* implies that there is no way to decide whether the defendant is entitled to a burden shift without taking into consideration the substantive decisions of the special committee, a fact-intensive exercise that overlaps with the examination of fairness itself"; "[s]ubsuming within the burden shift analysis questions of whether the special committee was substantively effective in its negotiations with the controlling shareholder—questions fraught with factual complexity—will, absent unique circumstances, guarantee that the burden shift will rarely be determinable on the basis of the pre-trial record alone"); *In re Cysive, Inc. S'holders Litig.*, 836 A.2d at 549 (noting inefficiencies in trying to obtain pretrial burden-shift ruling); *see, e.g.*, *ACP Master et al. v. Clearwire*, 2017 WL 3421142, at *17 (because record did not permit pretrial determination that defendants were entitled to burden shifting, burden of proving entire fairness remained with controlling shareholder throughout trial).

[24] *See, e.g.*, *Kahn v. Lynch Commc'ns Sys., Inc.*, 669 A.2d 79, 85–88 (Del. 1995) (relying on same facts that justified burden-shifting—strong, independent board and fair price—court found proposed transaction fair); *Gesoff v. IIC Industries, Inc.*, 902 A.2d 1130, 1145 (Del. Ch. 2006) ("What can shift the burden of entire fairness can also establish fair dealing.").

[25] 8 Del. Code § 253 allows owners of at least 90% of a company's stock to perform a merger with no board or shareholder approval. The controlling shareholder assigns the payment amount, and minority shareholders may either receive it or seek appraisal rights under 8 Del. Code § 262. *Glassman v. Unocal Exploration Corporation* confirmed that section 253 mergers are not subject to entire-fairness review because the Delaware Legislature's authorization of this simple short-form merger for 90% owners would be undermined by a "fair" process requirement. 777 A.2d 242, 247–48 (Del. 2001).

[26] *In re Siliconix Inc. S'holders Litig.*, C.A. No. 18700, 2001 WL 716787, at *8 (Del. Ch. June 21, 2001).

[27] *Solomon v. Pathe Commc'ns Corp.*, 672 A.2d 35, 39–40 (Del. 1996); *In re Cox Radio, Inc. S'holders Litig.*, C.A. No. 4461-VCP, 2010 WL 1806616, at *11 (Del. Ch. May 6, 2010); *In re Pure Res., Inc. S'holders Litig.*, 808 A.2d 421, 433, 438 n.26 (Del. Ch. 2002); *Siliconix*, 2001 WL 716787, at *6

The Delaware Supreme Court in *MFW* adopted a new review standard for controlling-shareholder mergers: business-judgment, not entire-fairness, review would be available upon dual approval (by both the company's independent directors and a majority of the company's minority shareholders).[28] The Court has not yet ruled on or changed the tender-offer standard.[29] The Court adopted this new standard for four reasons: First, the strict entire-fairness review standard should not be necessary if the controlling shareholder abdicates control by irrevocably requiring director and shareholder approval. Second, encouraging dual-approval mergers by affording them business-judgment review should "optimally protect[] the minority stockholders in controller buyouts." Third, business-judgment review of dual-approved mergers is consistent with Delaware's "central" tradition of deferring to informed and independent business decisions. Fourth, both entire-fairness review and the dual-protection merger structure have the same purpose: facilitating a fair price to the minority.[30]

The *MFW* Court listed the following six prerequisites for dual-approved controlling-shareholder mergers to receive business-judgment review:

(i) "the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders";

(ii) "the Special Committee is independent";

(iii) "the Special Committee is empowered to freely select its own advisors and to say no definitively";

(iv) "the Special Committee meets its duty of care in negotiating a fair price";

(v) "the vote of the minority is informed"; and

("unless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate the entire fairness of this proposed tender transaction").

28 *Kahn v. MFW*, 88 A.3d at 644. Last year, the New York Court of Appeals adopted the *MFW* approach for controlling-stockholder mergers. *See In re Kenneth Cole Prods., Inc., S'holder Litig.*, 27 N.Y.3d 268, 274–78 (N.Y. 2016).

29 *See Siliconix*, 2001 WL 716787, at *6 ("unless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate the entire fairness of this proposed tender transaction"). In 2010, the Delaware Supreme Court heard a controlling-shareholder tender-offer case and acknowledged at oral argument that the applicable standard of review may be up in the air. Oral Argument at 7:12–7:40, *In re Cox Radio, Inc. S'holders Litig.*, No. 331,2010 (Del. Nov. 17, 2010), *available at* http://courts.delaware.gov/supreme/OralArgs/2010-11-17_338,_2010_Dixon_et_al_v_Leon.wav.MP3. The Delaware Supreme Court opinion did not decide the standard. *In re Cox Radio, Inc. S'holders Litig.*, 9 A.3d 475 (Table), No. 331,2010, 2010 WL 4721568, at *1 (Del. Nov. 22, 2010).

30 *Kahn v. MFW*, 88 A.3d at 644-45.

(vi) “there is no coercion of the minority.”[31]

Swomley v. Schlecht was the first successful application of a post-*MFW* dual-approved controlling-shareholder merger.[32] There, the Court of Chancery granted a motion to dismiss a complaint that focused on alleged price deficiencies (implicating the fourth *MFW* prerequisite). The court disagreed with the shareholder plaintiffs that *MFW* established a new or separate “fair price” requirement, explaining that to survive a motion to dismiss, any price-negotiation failures must rise to the level of “gross negligence” and “recklessness,” which was the existing “duty of care” standard before *MFW*.[33] The court went on to discuss areas in which the special committee in *Swomley* could have valued assets differently, or negotiated harder, but found none of those price choices “grossly negligent.”[34] The Delaware Supreme Court affirmed *en banc* “for the reasons stated in [the Court of Chancery’s] August 27, 2014 bench ruling.”[35]

Less than a year after *Swomley*, the Chancery Court in *Books-A-Million* again relied on *MFW* in dismissing a complaint that alleged a controlling shareholder’s fiduciary-duty breach in purchasing the remaining shares in a going-private transaction.[36] The court focused on plaintiffs’ argument that the special-committee members were not independent (*i.e.*, the transaction did not satisfy the second *MFW* prerequisite) because they had acted in bad faith by agreeing to a deal at $3.25 (a 95% premium over the average closing price for the prior 90 trading days), when another bidder had offered $4.21 (even though the controlling shareholder refused to sell)).[37] The court explained that “the difficult route of pleading subjective bad faith is [a] theoretically viable means of attacking the *M&F Worldwide* framework,” but held that plaintiffs did not meet their pleading burden because the committee had (i) explored third-party offers to test whether the controlling shareholder would stick to its buyer-only stance when given an opportunity to sell (it did); and (ii) used third-party offers to assess whether the controlling shareholder’s $3.25 bid was so low as to warrant rejecting it outright (it was not).[38] The court concluded that “[r]ather than supporting an inference of bad faith, the Committee’s actions support an inference of good faith.”[39] The Delaware Supreme Court

31 *Id*. at 645.

32 Transcript of Oral Argument and Court’s Decision at 65–68, *Swomley v. Schlecht*, C.A. No. 9355-VCL (Del. Ch. Aug. 27, 2014), *aff’d*, *Swomley v. Schlecht*, 128 A.3d 992 (Table), No. 180,2015, 2015 WL 7302260, at *1 (Del. Nov. 19, 2015).

33 Transcript at 72–74, *Swomley*, C.A. No. 9355-VCL (Del. Ch. Aug. 27, 2014).

34 *Id*. at 73–74.

35 *Swomley v. Schlecht*, 128 A.3d 992 (Table), No. 180,2015, 2015 WL 7302260, at *1 (Del. Nov. 19, 2015).

36 *Books-A-Million, Inc. S’holders Litig.*, C.A. No. 11343-VCL, 2016 WL 5874974, at *1 (Del. Ch. Oct. 10, 2016), *aff’d*, No. 515, 2016, 2017 WL 2290066 (Del. May 22, 2017).

37 *Books-A-Million, Inc. S’holders Litig.*, 2016 WL 5874974 at *6, *25–*26, *34–*36.

38 *Id.* at *23, *32.

39 *Id.* at *32.

recently affirmed without comment.[40]

III. POTENTIAL FUTURE EXPANSION OF DUAL-APPROVAL PROCESS IN OTHER CONTROLLING-SHAREHOLDER TRANSACTION CONTEXTS

There is currently no Delaware Supreme Court precedent for extending the protections of the *MFW* dual-approval framework beyond controlling-shareholder mergers.[41] And there are unlikely to be many judicial opportunities to test any such potential extension. That is because outside the merger context (with its existing shareholder disclosure and voting requirements), companies will typically avoid the shareholder-voting process, given the expense, delay, and uncertainty it would entail.[42]

But extending dual-approval business-judgement review to non-merger controlling shareholder transactions would be consistent with the manner in which Delaware corporate-governance law has evolved. During the 1990s and 2000s, Delaware courts expanded the *Kahn v. Lynch* entire-fairness test from merger cases to other controlling-shareholder transactions, with Chancellor Allen stating that there is "no plausible rationale for a distinction between mergers and other corporate transactions."[43] Since then, the *Lynch* entire-fairness standard has been applied to controlling-shareholders' management-services agreements,[44] loans,[45] non-competition payments,[46] and third-party "brokering" payments.[47] It stands to reason, therefore, that Delaware courts would be receptive to extending the *MFW* recipe for *avoiding* entire-fairness review to non-merger control-shareholder transactions.

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40 *Books-A-Million, Inc. S'holders Litig.*, No. 515, 2016, 2017 WL 2290066 (Del. May 22, 2017).

41 *But see In Re Martha Stewart Living Omnimedia, Inc. S'holder Litig.*, 2017 WL 3568089, at *11-*12, *23 (Slights, V.C.) (dismissing allegations that a controlling shareholder received unfair employment and trademark side deals in a third-party buyout, where the buyer, acquired company, and controller complied with the *MFW* roadmap).

42 *See* 8 Del. C. § 251(c); SEC Schedule 14A.

43 *Kahn v. Tremont,* C.A. No. 12339, 1996 WL 145452, at *7 (Del. Ch. March 21, 1996) (applying entire-fairness standard to controlling shareholder's stock-sale transaction), *rev'd on other grounds*, 694 A.2d 422 (Del. 1997).

44 *T. Rowe Price Recovery Fund, L.P. v. Rubin*, 770 A.2d 536, 552-55 (Del. Ch. 2000) (applying entire-fairness standard and finding sufficient questions about transaction and approval process—including indications that controlled company's special committee was not sufficiently independent or fully informed—to enjoin management-services agreements).

45 *Marciano v. Nakash,* 535 A.2d 400, 403-05 (Del. 1987).

46 *Ryan v. Tad's Enterprises,* 709 A.2d at 689–90.

47 *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1177–83 (Del. Ch. 1999) (applying entire fairness and holding controlling shareholder liable for accepting undisclosed "brokering" fee in switching company's utilities), *aff'd*, 766 A.2d 437 (Del. 2000).