DESIRABLE RESISTANCE: *KAHN V. M&F WORLDWIDE* AND THE FIGHT FOR THE BUSINESS JUDGMENT RULE IN GOING-PRIVATE MERGERS

Daniel Wilson

INTRODUCTION

In Delaware, minority shareholders are a vulnerable category deserving special protections. That is for good reason: minority shareholders, by definition, are part-owners of companies whose affairs are subject to the influence of controlling shareholders. In these companies, the controlling shareholder has preponderant power because it holds most of the stock. Such power is difficult to check. Hence, Delaware courts have been—and remain—wary of actions taken by controlling shareholders.[1]

1. *See, e.g.*, Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (warning that the "specter of impropriety can never be completely eradicated" in going-private mergers, and

While this wariness has been consistent, the law surrounding controlling-shareholder actions has not. And in the context of parent-subsidiary mergers—or "going-private mergers"—the case law has been a battlefield rife with uncertainty for all parties involved. However, on March 14, 2014, the Delaware Supreme Court extended an olive branch to those feuding. The olive branch, in actuality, was the opinion provided in *Kahn v. M&F Worldwide Corporation*.[2] In *M&F Worldwide* ("*MFW II*"), the supreme court embraced Chancellor Strine's controversial chancery court decision *In re MFW Shareholders Litigation* ("*MFW I*"), which held that if a going-private merger is approved by both a special committee of independent directors and a majority of the minority shareholders, the business judgment rule ("BJR") will be the standard of review governing the transaction, rather than entire fairness.[3]

Background is required in order to appreciate the magnitude of this event. When a controlling shareholder executes a going-private merger by acquiring the remaining stock in the company it controls, the process is ripe for abuse. That is because the controlling shareholder sits on both sides of the transaction. It sits on one side of the transaction, since it is the party proposing the merger. The controlling shareholder sits on the other side of the transaction, since it has elected the majority of the target company's board, which must vote in favor of the merger for it to go through. Because the board is under the controlling shareholder's thumb, the controlling shareholder, in effect, is the party that is both proposing and approving the merger.

Accordingly, unless strict procedures are followed, going-private mergers constitute what Delaware and other courts term "self-dealing."[4] Self-dealing poses a risk for minority shareholders because there is a realistic likelihood that the controlling shareholder will be primarily focused on its own interests while carrying out the transaction. The classic scenario of abuse is when the controlling shareholder, "by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that

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additional judicial scrutiny is thus warranted); Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 509 (2002) (describing how "this strain of thought [embodied in *Tremont*] was premised on the notion that when an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power").

2. 88 A.3d 635 (Del. 2014).

3. 67 A.3d 496, 524-36 (Del. Ch. 2013).

4. *See, e.g.*, Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971) (explaining that self-dealing occurs when a parent sits on both sides of a transaction with its subsidiary).

the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary."[5]

Because of the potential for abuse in going-private mergers, Delaware courts have, as a matter of course, employed entire fairness as the standard of review, pointing at *Kahn v. Lynch* as the doctrinal justification.[6] In *Lynch*,[7] the Delaware Supreme Court held that if a going-private merger is negotiated and recommended by a special, independent committee formed from members of the subsidiary's board, the merger is subject to the entire fairness standard.[8] Entire fairness is invasive because it entails scrutinizing all aspects of the transaction—both procedural and substantive—without deference to the controlling shareholder.[9] Moreover, *Lynch* suggested that even if the merger was also approved by a majority of the minority shareholders, the standard of review would remain the same.[10] The court thus led controlling shareholders to believe that they could not evade the entire fairness standard for judicial review of going-private mergers. Spawning from this belief has been the dominance of a transaction structure in which the going-private merger is negotiated and recommended by a special committee—something *Lynch* ruled was enough to shift the burden onto the plaintiffs to show that the merger was not entirely fair.[11] However, the controlling shareholder demands nothing more, since it likely faces entire fairness regardless of the procedures it follows.[12]

However, in 2013 Chancellor Strine issued his opinion in *MFW I*, which forcefully challenged the status quo. *MFW I* held that if a going-private merger is conditioned from the outset on approval by both a special, independent committee, fully empowered to reject the deal, *and* the majority of the minority shareholders, the ultra-lax business judgment rule will apply.[13] Since the opinion came from the chancery court, it represented an insurrection against *Lynch*'s hegemony. When forced to determine the fate of the insurrection, the Delaware Supreme Court gave its approval and blessed Chancellor Strine's bold decision.[14]

5. *Id.*

6. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110 (Del. 1994).

7. Since there are many cases with "Kahn" as the first-named party, "*Lynch*" is how this case is conventionally referred to in the case law and otherwise.

8. *Id.* at 1117.

9. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

10. *Id.*

11. *Lynch*, 638 A.2d at 1117.

12. *Id.*

13. *In re* MFW S'holders Litig., 67 A.3d 496, 500 (Del. Ch. 2013).

14. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014) (holding that the business judgment rule is the standard of review that governs going-private mergers between the controlling stockholder and its corporate subsidiary when the merger is conditioned on both the approval of an independent, adequately-empowered special

In this comment, I endorse the Delaware Supreme Court's choice to uphold *MFW I* and demonstrate that it is part of a broader, desirable trend of pushback against *Lynch*—pushback principally arising from the chancery court. I first highlight the differences between the BJR and entire fairness standards of review. Second, I summarize the chancery court's opinion in *MFW I*. Third, I summarize the Delaware Supreme Court's opinion in *MFW II*. Fourth, I argue that *MFW I* and *MFW II* are best understood as a culmination of a larger movement in the case law, which reflected that *Lynch*, as commonly interpreted in the going-private merger context, was untenable.

In the fifth section, I identify the reasons why it was proper, as a matter of law and policy, for the Delaware Supreme Court to uphold Chancellor Strine's decision. Specifically, I contend that upholding *MFW I* was necessary to reconcile the tension between the standard practice of applying the BJR to going-private tender offers and entire fairness to going-private mergers, despite the practical similarities between the two transactions. Furthermore, because of *MFW II*, there will now be an incentive for controlling shareholders to structure going-private mergers in a manner ideal for protecting minority shareholders. Finally, *MFW II* will initiate a positive change in the realm of securities litigation by deterring frivolous lawsuits. In sum, these reasons serve as a strong defense of the recent Delaware Supreme Court opinion.

I. THE BUSINESS JUDGMENT RULE OR ENTIRE FAIRNESS: WHY DOES IT MATTER?

The crux of *MFW I* and *MFW II* was the selection of the BJR over entire fairness as the appropriate level of scrutiny for going-private mergers. In order to understand the implications of this choice, it is important to discern the differences between the two principles. Indeed, given the stark differences between the BJR and entire fairness, "[i]t is often of critical importance whether a particular decision is one to which the business judgment rule applies or the entire fairness rule applies."[15] The BJR is the most relaxed standard of review that a court can apply to a corporate action. It is essentially a standard of corporate liability by which a court reviews the actions of the members of a board of directors, who are bound by a "triad" of fiduciary duties: care, good faith, and loyalty.[16] The

committee that fulfills its duty of care, and the informed, uncoerced vote of a majority of minority stockholders).

15. Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993).

16. Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 361 (Del. 1993). The duty of good faith is technically a subset of the duty of loyalty. *See, e.g.*, Stone v. Ritter, 911 A.2d 362,

BJR is predicated on the idea that boards of directors, unlike courts, possess expertise in their areas of business, and the courts should afford them wide latitude in making decisions.[17] Accordingly, the BJR is a presumption that, in making a business decision, the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interest of the company.[18] Moreover, the court presumes that the decision did not constitute fraud, illegality, ultra vires conduct, or waste.[19]

To rebut the presumption, a shareholder "assumes the burden of providing evidence that directors, in reaching their challenged decision, breached . . . their fiduciary duty [of] good faith, loyalty, or due care."[20] To do so is very difficult; not even a showing of gross negligence is sufficient.[21] Instead, a plaintiff must prove that a director or officer knowingly shirked his or her duties by, for example, "intentionally act[ing] with a purpose other than that of advancing the best interests of the corporation . . . act[ing] with the intent to violate applicable positive law, or . . . fail[ing] to act in the face of a known duty to act, demonstrating a conscious disregard for his duties."[22] Put simply, the court will not disturb a director or officer's decision "if they can be attributed to *any rational business purpose*."[23] If a plaintiff fails to meet this burden, the BJR attaches to protect corporate officers.[24] Given that the BJR bars meaningful judicial review of a corporation's decisions and that it will attach absent extraordinary circumstances, the main effect of the BJR is to insulate corporations from liability.[25]

By contrast, entire fairness is the most exacting standard of judicial review in Delaware. As its name suggests, in applying entire fairness, the

370 (Del. 2006) (noting that "the fiduciary duty of loyalty is not limited to cases involving a financial or other cognizable fiduciary conflict of interest. It also encompasses cases where the fiduciary fails to act in good faith.").

17. *See, e.g.*, Aronson v. Lewis, 473 A.2d 804, 811 (Del. 1984) (remarking that the BJR reflects the "cardinal precept . . . that directors, rather than shareholders, manage the business and affairs of the corporation").

18. *Id.* at 812.

19. *Id.*

20. *Cede & Co.*, 634 A.2d at 361.

21. *See, e.g.*, *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66-68 (Del. 2006) (emphasizing how a showing of gross negligence is inadequate for rebutting the BJR).

22. *Id.* at 67 (internal quotations and citation omitted).

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

24. *Cede & Co.*, 634 A.2d at 361.

25. *See, e.g.*, Joy v. North, 692 F.2d 880, 885 (2d Cir. 1982) (remarking that "liability is rarely imposed upon corporate directors or officers simply for bad judgment and this reluctance to impose liability for unsuccessful business decisions has been doctrinally labelled [sic] the business judgment rule").

court must determine whether the challenged decision was entirely fair for the shareholders.[26] To do so, there must be an "examination of all aspects of the transaction,"[27] with an eye to both procedural fairness and substantive fairness.[28] Procedural fairness "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."[29] Substantive 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 . . . value of a company's stock."[30] Under entire fairness, the burden is initially on the defendant.[31] However, if the defendant demonstrates that a well-functioning special committee of independent directors or a fully informed and uncoerced majority of the shareholders approved the transaction, the burden shifts to the plaintiff to show that the transaction was not entirely fair.[32]

II. MFW I

In *MFW I*, the Delaware Chancery Court confronted a question of first impression: what standard of review should apply to a going-private merger conditioned from the outset by the controlling stockholder "on . . . *both* a properly empowered, independent committee and an informed, uncoerced majority-of-the minority vote . . . ."[33] The choice was between the highly deferential BJR, which, absent extraordinary circumstances, would prevent the court from second guessing the actions of the controlling shareholder, and the plaintiff-friendly entire fairness standard.[34] The controlling shareholder was MacAndrews & Forbes ("MacAndrews"), a holding company incorporated in Delaware.[35] After purchasing the rest of the shares in MFW, its subsidiary, MacAndrews and members of MFW's board were sued by a collection of former MFW shareholders, who had

26. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).
27. Kahn v. Lynch Commc'n Sys., Inc., 669 A.2d 79, 84 (Del. 1995).
28. *Weinberger*, 457 A.2d at 711.
29. *Id.*
30. *Id.*
31. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1117 (Del. 1994). .
32. *Id.*
33. 67 A.3d 496, 500 (Del. Ch. 2013) (emphasis in original).
34. *Id.* at 523 n.131 (citing *Tremont*, 694 A.2d at 428).
35. *Id.* at 499.

been squeezed out by the deal.[36] The plaintiffs sought post-closing damages for breach of fiduciary duty.[37]

Before the merger at issue, MacAndrews owned 43.4% of MFW.[38] MacAndrews itself was owned entirely by Ron Perelman.[39] In May 2011, MacAndrews began exploring the possibility of taking MFW private.[40] MacAndrews hired an investment bank for advice on the issue, and the bank valued MFW's shares at ten to thirty-two dollars a share.[41] At the time, MFW was trading on the New York Stock Exchange in the twenty to twenty-four dollar range.[42] By June 10, 2011, MFW's shares closed at $16.96.[43] The following business day, MacAndrews sent a proposal to the MFW board to buy the remaining shares for $24 in cash.[44]

Critically, the proposal stipulated that MFW "will not move forward with the transaction unless it is approved by . . . a special committee [of independent MFW directors]. . . . [T]he transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares of the Company not owned by [MacAndrews]."[45] The special committee was expected to objectively assess the merits of the deal for the minority shareholders and make a recommendation to them as to whether they should vote for or against it.[46] MacAndrews emphasized that, whatever the recommendation of the committee, MacAndrews would maintain a positive relationship with MFW and remain a long-term stockholder.[47]

In view of the proposal, the MFW board formed a special committee of independent directors and empowered it to: (1) investigate and evaluate MacAndrew's proposal, (2) negotiate with MacAndrews over the terms of the transaction, subject to the understanding that the MFW board would need to approve any final agreement, and (3) make recommendations to the board and provide conclusions about whether the transaction is fair and in the best interest of the minority shareholders.[48] The board agreed that it would not approve the transaction without a prior favorable recommendation of the special committee.[49] It also permitted the

36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at 506.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* (emphasis in original omitted).
46. *Id.*
47. *Id.*
48. *Id.* at 507.
49. *Id.*

committee to hire its own legal and financial advisers to assist in the undertaking.[50]

So empowered, the committee went to work immediately, interviewing several potential financial advisers, before settling on Evercore Partners.[51] With its financial adviser, the committee requested and received the most up-to-date financial data from MFW.[52] Armed with the data, Evercore used sound accounting methods to generate a multitude of valuations of MFW in order to analyze the fairness of MacAndrews' offer.[53] After determining that MFW had been lowballed by MacAndrews, the special committee rejected the $24/share offer and counter-offered with $30/share.[54] MacAndrews rejected the counteroffer, but, after some debate, made a "best and final" offer to MFW for $25/share.[55] At the committee's eighth and final meeting, Evercore declared that the price was fair.[56] Based on this, the committee unanimously accepted the offer, and recommended it to the board.[57] After the three board members affiliated with MacAndrews recused themselves, the eight other members also voted unanimously to accept MacAndrews' offer.[58] Given the committee's conduct, the court ruled that "[t]he record is clear that the special committee met frequently and was presented with a rich body of financial information relevant to whether and at what price a going private transaction was advisable . . . ."[59] Thus, "there is no triable issue of fact as to [the special committee's] satisfaction of its duty of care."[60] Moreover, the composition of the committee was such that there was no uncertainty as to whether the committee was truly independent from MacAndrews.[61]

Shortly after MFW's board accepted MacAndrews' offer, the stockholders were provided a proxy statement containing the history of the merger, including a summary of the negotiations between the special committee and MacAndrews, five separate ranges for the value of MFW's stock that Evercore had produced using different financial analyses, and a recommendation that they vote in favor of the transaction.[62] When the votes were counted on December 21, 2011, 65% of the shareholders other

50. *Id.*
51. *Id.* at 514.
52. *Id.* at 514-15.
53. *Id.* at 515.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 515-16.
59. *Id.* at 516.
60. *Id.*
61. *Id.* at 517-18.
62. *Id.* at 516.

than MacAndrews—i.e., 65% of the minority shareholders—voted to accept the offer.[63] In reviewing the vote, the court concluded that there was no triable issue of fact regarding whether the vote was fully informed and uncoerced—a point that the plaintiffs did not dispute.[64]

In light of the special committee's independence, the legitimacy of the minority shareholders' vote, and the requirement that both conditions were necessary for the transaction, the court then considered what standard of review was appropriate. Although the plaintiffs admitted that the Delaware Supreme Court had not directly answered this query, they nevertheless contended that its precedent demanded entire fairness.[65] The plaintiffs cited the language in the ever-influential *Lynch* that commanded that a "controlling or dominating shareholder standing on both sides of a transaction, as in a parent-subsidiary context, bears the burden of proving its entire fairness."[66] The plaintiffs argued that this language was not only by itself sufficient to control the outcome of *MFW I*, but also the underlying principle had been affirmed in three subsequent supreme court cases,[67] including *Kahn v. Tremont Corp.*,[68] *Emerald Partners v. Berlin*,[69] and *Americas Mining Corp. v. Theriault* (*AMC*).[70]

Chancellor Strine denied that these four cases individually or collectively controlled *MFW I*. Although the language from *Lynch* ostensibly mandated entire fairness, the court observed that the going-private merger in *Lynch* was distinguishable because it was conditioned only on the approval of the special committee, *not* on the approval of the minority shareholders as well.[71] Moreover, the special committee in *Lynch*, unlike MFW's, was not capable of rejecting the transaction, since the controlling shareholder threatened to bypass the committee and make a tender offer to the minority shareholders at a lower price if the committee said no.[72] Thus, *Lynch* was distinguishable from *MFW I*'s facts.[73] The same could be said for *Tremont* and *Emerald Partners*, since the going-private transactions in those cases also were not conditioned on the approval of the minority stockholders, but rather only on the special

63. *Id.*
64. *Id.* at 517.
65. *Id.* at 520.
66. *Id.* (quoting Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994)).
67. *Id.*
68. 694 A.2d 422 (Del. 1997).
69. 726 A.2d 1215 (Del. 1999).
70. 51 A.3d 1213 (Del. 2012).
71. *MFW*, 67 A.3d at 522.
72. *Id.* (citing *Lynch*, 638 A.2d at 1118).
73. *Id.*

committee's approval.[74] Finally, while it is true that *AMC* broadly proclaimed that "[w]hen a transaction involving self-dealing by a controlling shareholder is challenged, the applicable standard of judicial review is entire fairness,"[75] the chancery court noted that the defendants had explicitly eschewed any argument that any standard of review other than entire fairness applied.[76] Because the issue was not brought up in the chancery court,[77] the Delaware Supreme Court in *AMC* did not need to consider the question presented in *MFW I*. Since no Delaware Supreme Court precedent controlled, the *MFW I* court concluded that it had a free hand in choosing the outcome of the case.[78]

With its free hand, the court pulled away from the general tradition of entire fairness in going-private mergers and decided that the BJR should apply.[79] The court referenced the broad preference of the Delaware judiciary, which is not expert in business affairs, to defer to experienced directors and knowledgeable shareholders, whose money is at stake.[80] This deference takes the form of the BJR, which is common to transactions that are not going-private mergers.[81] Second, the dual protections for minority shareholders instituted by MacAndrews—approval by a special committee and vote by the majority of the minority shareholders—create an ideal model for going-private mergers, since each uniquely shields minority shareholders against abuse by the controlling shareholder.[82] However, controlling shareholders would have no incentive to take both measures if their transactions were subject to entire fairness—the standard of review that would apply had they taken only one measure.[83] Therefore, the BJR can be extended as a carrot to controlling shareholders so that, despite the added costs, they will structure going-private mergers in a way highly beneficial to minority shareholders.[84] Third, and relatedly, the usual wariness of self-interested transactions that has led Delaware courts in

74. *Id.* at 523 (citing *Tremont*, 694 A.2d at 429-30); The M&F Defendants' Reply Brief in Support of Their Motion for Summary Judgment at 9, *MFW*, 67 A.3d 496 (Del. 2013) (No. 6566-CS).

75. *AMC*, 51 A.3d at 1213.

76. *MFW*, 67 A.3d at 523-24 (citing *In re* Southern Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 766 (Del. Ch. 2011), *aff'd sub nom.* Americas Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012)).

77. *Id.* at 524.

78. *Id.*

79. *Id.* at 527-28.

80. *Id.* at 526.

81. *Id.* at 527.

82. *Id.* at 527-28.

83. *Id.*

84. *Id.* at 528-29.

other contexts to routinely apply entire fairness has no place here.[85] While abuse by controlling shareholders is indeed a palpable risk when robust safeguards do not exist, the presence of a strong special committee and majority of minority voting largely eliminates the chances of such abuse.[86] Thus, the court ruled that the merger between MFW and MacAndrews should be viewed through the lens of the BJR.[87]

Since the BJR all but guarantees that a transaction under scrutiny will get the court's seal of approval, Chancellor Strine preemptively stressed that the decision was not a broad fiat to corporations to freeze out minority shareholders without meaningful judicial oversight by simply asking for approval by a special committee and the majority of the minority.[88] Instead, to enjoy the laxity of the BJR: (1) the controlling shareholder must condition *from the outset* the procession of the deal on these two measures; (2) the special committee must be independent; (3) the committee must be empowered to freely select its own advisors and to say no definitively; (4) the committee must meet its duty of care; (5) the vote of the minority must be informed; and (6) there must be no coercion of the minority.[89] Only then will the BJR apply.

Turning to the merits of the plaintiffs' case, Chancellor Strine applied the BJR and awarded summary judgment for the defendants on all claims.[90] The plaintiffs appealed the decision and the Delaware Supreme Court heard their appeal in *MFW II*.

III. MFW II

In *MFW II*, the Delaware Supreme Court upheld Chancellor Strine's opinion at the chancery court. It affirmed that the BJR is the standard of review that should govern mergers between a controlling shareholder and its subsidiary, "where the merger is conditioned *ab initio* upon both approval by an independent, adequately-empowered Special Committee that fulfills its duty of care; and the uncoerced, informed vote of a majority of the minority stockholders."[91] The court rested its decision on four considerations. First, the court noted that "entire fairness is the highest standard of review in corporate law," and is appropriate when a controlling shareholder has potentially undermined the protections afforded by a

85. *Id.*
86. *Id.* at 528-29, 532-33, 535.
87. *Id.* at 536.
88. *Id.* at 533-36.
89. *Id.* at 535.
90. *Id.* at 536.
91. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 644 (Del. 2014).

disinterested board and shareholder approval.[92] Yet, that "undermining influence does not exist in every controlled merger setting," and "[t]he simultaneous deployment of the procedural protections employed [by the defendant] here create[s] a countervailing, offsetting influence of equal—if not greater—force."[93] That is, when the controller "irrevocably and publicly disables itself from using its control to dictate the outcome of the negotiations and shareholder vote," the going-private merger acquires the characteristics of a third-party, arm's-length merger, which is reviewed under the BJR.[94]

Second, the court agreed with Chancellor Strine that the merger structure encouraged by *MFW I* "optimally protects" the minority shareholders in a going-private merger.[95] Third, the use of the BJR as the standard of review in a going-private merger conditioned on approval by both a special committee and the majority-of-the-minority shareholders "is consistent with the central tradition of Delaware law, which defers to the informed decisions of impartial directors, especially when those decisions have been approved by the disinterested stockholders on full information and without coercion."[96] The final consideration that led the court to uphold *MFW I* was that these dual protections would assure a fair price for the minority shareholders. Under entire fairness review, obtaining the right price for minority shareholders is the "preponderant" concern, and the risk of them not getting the right price in a self-dealing scenario is the major justification for the heightened standard of review.[97] However, since the dual-protections in play in the instant case would also ensure an acceptable price for minority shareholders, there is no point of imposing entire fairness when they are present.[98]

Thus, on these grounds, the Delaware Supreme Court upheld the legal standard propounded in *MFW I*, holding that a going-private merger conditioned from the outset on approval by both an independent, fully empowered special committee and an uncoerced, informed majority-of-the-minority will be subject to the BJR rather than entire fairness.[99] Applying this standard to the facts of the case at hand, the Delaware Supreme Court found in favor of the defendant, MacAndrews.[100] It determined that MacAndrews indeed conditioned its offer upon dual procedural

92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 644-45.
98. *Id.* at 645.
99. *Id.* at 644.
100. *Id.* at 646-47.

protections.[101] Also, the special committee used by MacAndrews was truly independent and effective.[102] Finally, the vote of the majority of the minority was uncoerced and fully informed.[103] Therefore, with the case being reviewed through the lens of the BJR, MacAndrews was entitled to summary judgment.[104]

IV. THE EROSION OF *LYNCH*: HOW *MFW I* AND *MFW II* FIT INTO THE CASE LAW

Despite first appearances, the *MFW* opinions are not an aberration. Although Chancellor Strine and the Delaware Supreme Court broke from the tradition of entire fairness in controlling-shareholder transactions, *MFW I* and *II* are best understood as a broader undercurrent against the old model of judicial review underpinned by *Lynch*. While the influence of *Lynch* is still heavy, the footprint that it left in the case law had begun to wear away before *MFW I*, particularly within the chancery court.[105] Long before *MFW* was decided in May 2013, two major and oft-cited opinions, *In re Siliconix Shareholders Litigation*[106] and *Glassman v. Unocal Exploration Company*,[107] were issued. These cases and their progeny, as well as *In re Cox Communications, Inc. Shareholders Litigation*,[108] provided a vital foundation for *MFW I* and *MFW II*. Thus, rather than being a monumental, but *sui generis*, event, *MFW I and MFW II* are a culmination of a wider movement.

A. The Lynch Footprint

Since being decided in 1995, *Lynch* has cast a shadow across all transactions involving controlling shareholders. *Lynch*'s main contribution to the canon of Delaware case law was clarifying, for a time, what standard of review applies to a going-private merger that is negotiated by a special committee of independent members of the subsidiary's board. The court in *Lynch* adopted the position that the presence and activity of the special committee only shifts the burden of proof to the plaintiff within the entire

101. *Id.* at 654.
102. *Id.* at 647-53
103. *Id.* at 653-54.
104. *Id.* at 654
105. Aside from *Unocal*, the cases discussed in this section have not been reviewed by the Delaware Supreme Court.
106. *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001).
107. Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).
108. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604 (Del. Ch. 2005).

fairness analysis and does not afford the defendant the protections of the BJR.[109] Moreover, the court employed broad language, implying that even if a majority of the minority shareholders approved the deal negotiated by the committee, entire fairness would still be the standard of review. It articulated that "[a] controlling . . . shareholder standing on both sides of a transaction . . . bears the burden of proving its entire fairness," and "[e]ntire fairness remains the proper focus of judicial analysis in examining an interested merger . . . because the unchanging nature of the underlying 'interested' transaction requires careful scrutiny."[110] These two statements in conjunction with the court's declaration that "an approval of the transaction by an independent committee . . . or an informed majority of minority shareholders [only] shifts the burden of proof" appeared to foreclose the BJR even when both measures are taken—a holding contrary to *MFW I* and *II*, and, as later discussed, *Cox Communications*.[111]

Lynch was hardly the first case to entrench entire fairness as the mainstay in going-private mergers. Entire fairness had been a protection for minority shareholders since 1952, when the Delaware Supreme Court held in *Sterling v. Mayflower Hotel Corporation*[112] and *Gotlieb v. Heyden Chemical Corporation*[113] that interested transactions with controlling shareholders can be reassessed by the courts if they believe the price to be unfair. While there was some debate in the case law before *Lynch* about the absoluteness of this rule[114]— a debate that *Lynch* essentially quashed—many opinions were steadfast in their commitment to entire fairness. For example, in *Rosenblatt v. Getty Oil Company*, the court affirmed that "[t]he requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."[115] Thus, *Lynch*, along with other case law supporting it, has been extremely influential precedent. But, recently pushback has been developing.

109. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1117 (Del. 1994).

110. *Id.* at 1115-16.

111. This, of course, hinges on whether the use of "or" in this statement was intentional. Given the rest of *Lynch* and the fact that the there was no majority of minority condition in *Lynch* (and thus this statement was not relating to the facts at hand), it is difficult to say. However, "and" may well have been intended.

112. Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109 (1952).

113. Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 58 (1952).

114. *See, e.g.*, *In re* Trans World Airlines, Inc. S'holders Litig., No. CIV. A. 9844, 1988 WL 111271 (Del. Ch. Oct. 21, 1988) (holding that if there is a special committee, the BJR applies rather than entire fairness).

115. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) (quoting *Weinberger*, 457 A.2d at 710).

B. The Siliconix Line of Cases

In *Siliconix*, the defendant, Vishay Intertechnology ("Vishay"), sought to purchase through a tender offer the 19.6% of its subsidiary, Siliconix, that it did not already own.[116] The consideration for the purchase was to be in stock.[117] Before the deal could be either accepted or rejected by the minority shareholders, an individual who held shares in Siliconix sued, seeking a preliminary injunction.[118] He alleged that the Siliconix board failed to properly analyze the tender offer and make an informed recommendation to the minority shareholders about whether or not to accept the offer.[119] The plaintiff also claimed that the board was responsible for Vishay offering too low of a price, since it did not adequately reveal the basis for Vishay's valuations of Siliconix.[120] Because of these failures, the plaintiff contended that Vishay breached its fiduciary duty to the minority shareholders and that the breach should be reviewed under entire fairness.[121] The plaintiff asserted that the transaction would fail entire fairness scrutiny since it was procedurally and substantively unfair under the *Weinberger* standard.[122] Accordingly, the court should impose the requested preliminary injunction against the transaction.[123]

The court, however, rebuffed the plaintiff's argument that entire fairness applies to tender offers and opted instead to apply the BJR.[124] In doing so, the court acknowledged that "[i]t may seem strange that the scrutiny given to tender offer transactions is less than the scrutiny that may be given to . . . a merger transaction."[125] After all, once a parent obtains at least 90% of its subsidiary's shares through a tender offer, it will almost invariably carry out a short-form merger to acquire the remaining 10%. Thus, for those minority shareholders who do not tender, they may well "end up in the same position as if . . . [they] had tendered or if the transaction had been structured as a merger"[126]—that is, they will lose their shares in the subsidiary, possibly against their will.

116. *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787, at *1 (Del. Ch. June 19, 2001).

117. *Id.*

118. *Id.* at *6.

119. *Id.*

120. *Id.* at *12-13.

121. *Id.* at *6.

122. *Id. See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (highlighting that entire fairness has two components: procedural fairness—"fair dealing"—and substantive fairness—"fair price").

123. *In re Siliconix*, 2001 WL 716787, at *6

124. *Id.*

125. *Id.* at *7.

126. *Id.*

Nevertheless, the court found that, despite *Lynch* and the convention of entire fairness for controlling shareholder transactions, entire fairness was inappropriate because of "two simple concepts."[127] First, although minority shareholders who do not tender may lose their shares through a likely short-form merger anyway, they at least hang onto their shares in the meantime.[128] Second, tender offers, unlike merger proposals, are made directly to the minority shareholders, rather than the target's board.[129] Thus, there is no self-dealing in the form of a controller reaching an agreement with the board it controls.[130] Since self-dealing is one consideration that militates in favor of entire fairness in going-private mergers, its absence in the tender-offer context renders entire fairness less appropriate.[131] Another consideration—"fair price"—is also irrelevant in the tender-offer context because minority shareholders are free to accept or decline the tender offer according to their individual assessment of its propriety.[132] In short, the court concluded that "as long as the tender offer is pursued properly, the free choice of the minority shareholders to reject the tender offer provides sufficient protection."[133] Thus, *Siliconix* held, for the first time ever in Delaware, that entire fairness did not apply to tender offers. This decision bifurcated the path controlling shareholders must take to go private. Before *Siliconix*, a controlling shareholder was, pursuant to *Lynch*, confined to a merger subject to entire fairness. However, after *Siliconix*, a controlling shareholder could pursue an alternative: a tender offer subject to the BJR. At once, this limited the reach of *Lynch*.

The contours of *Siliconix* were clarified in *In re Pure Resources, Inc., Shareholders Litigation*.[134] Again in the context of a going-private tender offer, the court considered what standard of review applied.[135] The court held that the mere fact that the controlling shareholder elected to take the *Siliconix* path did not liberate it from meaningful judicial review.[136] In the court's mind, the concerns expressed in *Lynch* about abuse by controlling shareholders could only be given "proper effect"—that is, remedied—if certain safeguards exist.[137] Three safeguards are required for entire fairness

127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at *6. *See also* Solomon v. Pathe Commc'ns Corp., 672 A.2d 35 (Del. 1996) (finding that the "fair price" requirement of entire fairness does not apply to non-controlling shareholder tender offers).
133. *Id.*
134. 808 A.2d 421 (Del. Ch. 2002).
135. *Id.* at 424, 433
136. *Id.* at 444-46.
137. *Id.* at 445.

to apply: (1) the tender offer must be bound by a non-waivable majority of the minority tender condition; (2) the controlling shareholder must promise to consummate a prompt short-form merger at the same price if it gets more than 90% of the shares; and (3) the controller must not make any "retributive threats."[138] These safeguards provide "equitable reinforcement" to the potential for coercion and unfairness posed by controlling-shareholder transactions.[139]

The court in *In re CNX Gas Corp. Shareholders Litigation* further reinforced the shift away from entire fairness.[140] There, the court added another requirement to the three mandated by *Pure Resources*: if a controlling shareholder seeks entire fairness for its going-private tender offer, the tender offer must also be negotiated and recommended by a special committee of independent directors.[141] Importantly, the subsidiary's board needs to confer onto the special committee authority comparable to what it would have in a third-party transaction, where there is no controlling shareholder. This includes the authority to seek different transactions and to adopt a rights plan "to provide the subsidiary with time to respond, negotiate, and develop alternatives" to the tender offer.[142] Such authority is vital to protecting the minority shareholders.[143]

C. Cox Communications

Whereas *Siliconix*, *Pure Resources*, and *CNX Gas* addressed the standard of review for tender offers by controlling shareholders, *Cox Communications*[144] moved the debate squarely to going-private mergers. In the case, the Cox Family ("the Family") controlled 74% of Cox Communications.[145] By summer 2004, the Family decided it would seek the remaining shares that it did not own and take Cox private again.[146] After a meeting with the Cox board in which the Family previewed its ambitions, the Family made it clear that it would require a special committee of independent directors to respond to and negotiate its impending proposal.[147] The Family did not make any threats about what

138. *Id.*
139. *Id.*
140. 4 A.3d 397 (Del. Ch. 2010).
141. *Id.* at 413.
142. *Id.* at 415.
143. *Id.*
144. 879 A.2d 604 (Del Ch. 2005).
145. *Id.* at 607.
146. *Id.*
147. *Id.*

would happen if the special committee rejected the deal.[148] On the same day that the proposal was announced, August 2, 2004, the minority shareholders sued Cox and the Family, alleging breaches of fiduciary duty.[149] The allegations centered on the notions that the Family had undervalued Cox and was trying to enrich itself, and that Cox's board was merely acquiescing to the Family's suspect wishes.[150] Amidst the litigation, Cox's board formed the special committee as demanded by the Family's proposal.[151] After lengthy negotiations, the Family reached an agreement for $34.75/share, up from the initial offer of $32/share.[152] The agreement was conditioned on approval by a majority of the minority shareholders and a settlement of all outstanding lawsuits.[153] While there were no objections by any party to the settlement, several minority shareholders challenged the plaintiffs' request for attorneys' fees, which amounted to millions of dollars, and, as part of the settlement, the Family agreed not to oppose.[154]

While the court's opinion on the attorneys' fees, authored by Chancellor Strine, is irrelevant here, it is noteworthy how the court, in dicta, used this issue as a platform for inveighing against the system of judicial review for going-private mergers. The court's remarks were prompted by its perception that *Lynch* generates undue litigation costs for defendants—plaintiffs' attorneys' fees being one such example.[155] The court acknowledged that *Lynch* created a "useful incentive" for controlling shareholders to use a special committee to negotiate going-private mergers, since use of the committee shifts the burden within entire fairness to the plaintiffs.[156] Yet the court lamented how *Lynch* simultaneously dis-incentivized the use of a majority of the minority voting condition, because fulfilling such a condition would not yield any benefits to the controlling shareholder.[157] After all, entire fairness would still apply.[158] As the court described, "[f]rom a controller's standpoint, accepting this condition from the inception of the negotiating process added an element of transactional

148. *Id.*
149. *Id.* at 608.
150. *Id*.
151. *Id.* at 609.
152. *Id.* at 612.
153. *Id.*
154. *Id.* at 612-13.
155. *Id.* at 614-15.
156. *Id.* at 618.
157. *Id.*
158. Although *Lynch* did not expressly state this, that has been the conventional understanding and, of course, it would be risky and expensive for a controller to hold itself out as a "test balloon" to see if it holds true. Hence, the special committee-only model for going-private mergers became entrenched.

risk without much liability-insulating compensation in exchange."[159] *Lynch* thus generated a world in which special committees alone are used in going-private mergers.[160] This is not ideal for minority shareholders, since they are less protected than they might otherwise be.

Furthermore, it is not ideal for defendants—the next point that the court drives home. Because entire fairness, by its very nature, demands a highly invasive judicial inquiry into the fairness of the price the controlling shareholder offered the minority shareholders, upon being sued, the controlling shareholder cannot even get the most unmeritorious cases dismissed.[161] A plaintiff, simply by claiming that the price was unfair, can survive a motion to dismiss, "because financial fairness is a debatable issue and the plaintiff has at least a colorable position."[162] Accordingly, it is rational for controlling shareholders to simply settle, since it would likely be cheaper than covering the costs of bringing the case up to summary judgment—costs that include the waste of executives' time.[163]

The solution, in Chancellor Strine's estimation, was exactly what he had a chance to rule on in *MFW I*: when a merger with a controlling shareholder is (1) negotiated and approved by a special committee of independent directors and (2) conditioned on an affirmative vote of a majority of the minority stockholders, the court should apply the BJR.[164] Although in *Cox Communications* this prescription was contained only within dicta, it exerted deep influence on the practical answer to standard of review question. Beyond, of course, *MFW I*, the court in *CNX Gas* explicitly stated that it had applied Chancellor Strine's recommendation in *Cox Communications* to arrive at its conclusion that a tender offer will be subject to the BJR if, among other things, it is conditioned on the existence of a special, independent committee and approval by a majority of the minority shareholders.[165] It did so despite the obvious fact that *Cox Communications* did not speak to the same set of facts—*CNX Gas* tackled a tender offer—and, regardless, one chancery court opinion is not binding upon another.

159. *Id.*
160. *Id.* at 619.
161. *Id.* at 620.
162. *Id.*
163. *Id.*
164. *Id.* at 606.
165. *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010).

D. Unocal

Unocal also chipped away the edifice constructed by *Lynch* in the merger context. In *Unocal*, the court considered what standard of review applied to a "short-form" merger.[166] Short-form mergers, which are governed by Section 253 of the Delaware Corporate Law, permit a controlling shareholder that owns at least 90% of the shares of a subsidiary to merge the subsidiary into itself through a simple administrative process, thereby removing the minority shareholders.[167] The plaintiffs, who were minority shareholders in UXC—Unocal's 96%-owned subsidiary—challenged the short-form merger between Unocal and UXC, arguing that Unocal and its directors on UXC's board did not engage in fair dealing.[168] Mindful of *Lynch*'s warnings about abuse by controlling shareholders in interested transactions, the court was confronted with the choice of either limiting the breadth of *Lynch* or possibly defeating the legislature's purpose in creating the short-form merger: providing controlling shareholders with an expedited process for squeezing out minority shareholders.[169] Whatever the ostensible sweep of *Lynch*, the court ruled that entire fairness did not apply.[170] Accordingly, controlling shareholders in short-form mergers would be freed from complying with the procedural demands of entire fairness, such as setting up a negotiating committee and hiring independent financial and legal experts—procedures that help protect minority shareholders.

V. DESIRABLE RESISTANCE: WHY *MFW I* AND *II* GOT IT RIGHT

The previous section described how *MFW I* and *II*, despite first appearances, were not a one-off challenge to *Lynch*, but rather the most graphic illustration of broader resistance to *Lynch*'s influence. Now, I will shift from the positive to the normative. The Delaware Supreme Court properly upheld *MFW I* for three reasons. First, it bridges the deep divide between the treatment of going-private tender offers and going-private mergers. Second, it incentivizes a going-private merger structure that is optimal for minority shareholders. Third, it will inevitably initiate a positive change in the realm of securities litigation by reducing frivolous

166. Glassman v. Unocal Exploration Corp., 777 A.2d 242, 247 (Del. 2001).

167. *See* Del. Code Ann. tit. 8, § 253 (2010) (stating, "by executing, acknowledging and filing . . . a certificate of such ownership and merger setting forth a copy of the resolution of its board of directors to so merge and the date of the adoption").

168. *Unocal*, 777 A.2d at 244.

169. *Id.* at 247-48.

170. *Id.*

lawsuits. Therefore, the Delaware Supreme Court correctly upheld Chancellor Strine's opinion.

A. Doctrinal Coherence

The first reason that *MFW* should be upheld is to reconcile the doctrinal tension between *Lynch*, on the one hand, and the *Siliconix* line of cases, on the other. As discussed, there are dramatic differences between entire fairness and the BJR.[171] Yet there are not dramatic differences between a going-private merger and a going-private tender offer followed by a short-form merger—in fact, they are practically similar.[172] Thus, the tension becomes: why are comparable transactions reviewed under radically different standards? The court itself in *Pure Resources*, which built on *Siliconix*, was "troubled by [this] imbalance in Delaware law . . . ."[173] In *In re Cysive, Inc. Shareholders Litigation*, the court called the imbalance downright "strange."[174] Delaware's application of entire fairness to mergers and the BJR to tender offers is disconcerting from the uncontroversial standpoint that the law should make sense and not be arbitrary. However, the concern is not purely academic; if *Lynch* was motivated by worries that controlling shareholders may exercise their power to the detriment of minority shareholders, and the *Siliconix* line of cases, while departing from *Lynch*, also expressed that same fear, then one would hope that minority shareholders would be amply protected by the courts whatever method of going private was chosen.

Although *CNX Gas* made significant headway in protecting minority shareholders in the tender offer context by holding that the BJR would only apply if: (1) the tender offer is negotiated and recommended by a special committee of independent directors; (2) the tender offer is conditioned on majority of the minority approval; (3) the controlling shareholder consummates a prompt short-form merger at the same price if it gets more than 90% of the shares; and (4) the controller does not make any retributive

171. *See supra* Section I (discussing the differences between the BJR and entire fairness standards of review).

172. *See, e.g.*, *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787, at *7 (Del. Ch. June 19, 2001) (noting how the "[minority] shareholders may reject the tender, but, if the tender is successful and the short-form merger accomplished, the shareholder . . . will end up in the same position as if he or she had tendered *or if the transaction had been structured as a merger* . . . .") (emphasis added); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 824 n.160 (2003) (flagging the "thinness of the distinction between the transactional forms . . . .").

173. *In re* Pure Res., Inc. S'holders Litig., 808 A.2d 421, 443 (Del. Ch. 2002).

174. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 547 (Del. Ch. 2003).

threats,[175] there remained a disconnect with the judiciary's treatment of mergers. If the transaction being negotiated and recommended by a special, independent committee and approved by the majority of the minority was sufficient to insulate the minority shareholders from the controller's abuse in the tender offer context, why would these procedures not do the same for minority shareholders in a going-private merger?

The answer is that they should. Thus, *MFW II*, in declaring that a going-private merger negotiated and accepted by a special committee and approved by a majority of the minority is subject to the BJR, bridges the doctrinal divide between *Lynch* and the *Siliconix* line of cases. Unifying the two sides is the principle that, when these measures are taken, regardless of what form the transaction takes, the controlling shareholder and the controlled board have replicated an "arm's-length" bargain and thus the transaction is not conflicted and does not constitute self-dealing. Accordingly, the BJR should apply, just as it applies in situations in which the takeover is being attempted by a third party.[176]

Relatedly, *MFW II* provided the Delaware Supreme Court with an opportunity to whole-heartedly join the movement against *Lynch* and quell the uncertainty at the chancery court about what the supreme court might do with the chancery court's decisions in this area. With the exception of *Unocal*, the supreme court had not spoken on the derogation of *Lynch*'s authority begot by the *Siliconix* line of cases, among others. With the doctrinal incoherence having simmered for years, the court, by upholding *MFW I*, put its seal of approval on Chancellor Strine's solution. Had the Delaware Supreme Court overruled *MFW I* and blessed the differing treatment of going-private tender offers and going-private mergers, then Delaware would be left with a distinction in the law that is unjustified. Therefore, *MFW I* was properly upheld.

B. Protecting Minority Shareholders

The second reason that it was beneficial for the Delaware Supreme Court to endorse *MFW I* is that it creates an incentive to structure mergers in a manner optimally protective of minority shareholders. Based on the standard reading of *Lynch*, with its expansive statements about the propriety of entire fairness for self-dealing transactions, controlling shareholders believed that entire fairness would apply regardless of what measures they took in going-private mergers. Moreover, based on this

175. *In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 413 (Del. Ch. 2010).

176. *See, e.g.,* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (recognizing that "the business judgment rule, including the standards by which director conduct is judged, is applicable in the context of a [non-controlling shareholder] takeover").

same reading, if a going-private merger was negotiated and recommended by a special, independent committee and approved by the majority of the minority, the controlling shareholder would be in no better position than if the committee alone had endorsed the deal; either way, the controlling shareholder would face entire fairness and the burden would merely be shifted to the plaintiff.[177] Thus, as the court noted in *Cox Communications*, "[a]s a practical matter . . . the effect of *Lynch* in the real world . . . was to generate the use of special committees alone."[178]

However, minority shareholders would certainly benefit from the dual protections prescribed in *Cox Communications* and found to be sufficient to warrant the BJR in *MFW I*. The power of a special negotiating committee as a formidable roadblock to controlling shareholder abuse has long been appreciated, including, of course, by the Delaware Supreme Court. In *Weinberger*, for example, where the controlling shareholder did not use a special committee to negotiate the going-private merger, the court lamented that "the result here could have been entirely different if [the controller] had appointed an independent negotiating committee," since that would be equivalent to "conduct by a theoretical, wholly independent, board of directors . . . exerting its bargaining power against the other at arm's length . . . ."[179] Approval by the majority of the minority is also powerful, though not dispositive, in its own right. Combined with *MFW*'s requirement that the controlling shareholder cannot coerce the minority shareholders if it seeks the fruits of the BJR,[180] the vote provides an effective check on the special committee—a safeguard against the peril that the committee either erred in its judgment or was somehow suborned by the controller.

Furthermore, as the court expounded in *Cox Communications*, a going-private merger blessed both by the independent directors and the majority of the minority is vital, since [the two are] complementary and not substitutes. The first element is important because the directors have the capability to act as effective and active bargaining agents, which disaggregated shareholders do not. But, because bargaining agents are not

177. *See supra* Section IV.A (discussing the "*Lynch* Footprint"); *see also* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 17 (2005) (concluding that, "from a transactional lawyer's perspective, merger-freezeout doctrine after *Lynch* . . . represents the worst of all possible worlds: a fully empowered [special committee] and a feisty negotiation with the controller, to be followed nevertheless with entire fairness review by the court, even if minority shareholders have approved the deal").

178. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 619 (Del. Ch. 2005).

179. Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983).

180. *In re* MFW S'holder Litig., 67 A.3d 496, 536 (Del. Ch. 2013).

always effective or faithful, the second element is critical, because it gives the minority stockholders the opportunity to reject their agents' work.[181]

Even the *MFW* plaintiffs acknowledged that this transactional structure is the ideal one for minority stockholders.[182] Thus, the combination of safeguards, incentivized by *MFW I*, is a particularly potent force in protecting minority shareholders. Given that the combination would continue to not be used if the Delaware Supreme Court had overruled *MFW I* and held that the BJR always applies in going-private mergers, the Delaware Supreme Court made the correct decision—one that will inherently ward off abuse by controlling shareholders.

C. Changing the Landscape of Securities Litigation

The third reason that the outcome in *MFW II* is desirable is that it will positively transform the landscape of securities litigation. One effect of the standard interpretation of *Lynch*—that the standard of review should always be entire fairness for going-private mergers—was that it enabled frivolous lawsuits. The dilemma was that, when a plaintiff sued, alleging that a going-private merger was unfair, it was virtually impossible for the defendant to make the case go away at the pleading stage. This is because of the "factual intensiveness of the financial fairness determination," which "will generally preclude dismissal or [even] summary judgment in such cases."[183] Any allegation that the transaction is not fair will survive a motion to dismiss, since it raises a triable issue of fact, and under *Lynch*, there is no need to plead particularized facts demonstrating unfairness.

Summary judgment was also similarly hopeless for the defendant. As the court commented in *Cysive*, "the determination of whether the burden should shift under the *Lynch* doctrine is the kind of decision that can usually be made . . . at the earliest, on undisputed facts that have emerged from a discovery record."[184] At the summary judgment stage, where all inferences are drawn in favor of the non-moving party based on that record, it is highly improbable that the controlling shareholder would be able to convince that court, for example, that there is zero dispute whether the special committee had real bargaining power, whether the committee was unduly influenced by the controller, and whether the committee complied with its fiduciary duties of care and loyalty.[185]

Hence, every single case, however unmeritorious, has settlement

181. *Id.* at 606.
182. *Id.* at 527.
183. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 548 n.19 (Del. Ch. 2003).
184. *Id.* at 548.
185. *Id.*

value. That the terms of a going-private merger are irrelevant to whether litigation is brought is poignantly illustrated by the fact that plaintiffs, as a matter of course, sue long before the committee has agreed to or even received the controlling shareholder's proposed terms.[186] Thus, plaintiff firms reflexively file suit when the controller merely makes public its intention to propose a deal, using almost entirely boilerplate complaints, which they later have to amend to incorporate the actual details of the proposal. The reflexive nature of the exercise is further confirmed by the fact that, in 2012, multiple shareholder suits were brought to challenge 93% of M&A deals with a value over $100 million, and 96% of M&A deals with a value over $500 million.[187] While some of these suits undoubtedly have merit, it utterly strains credulity that unfairness is near universal to such transactions, especially when the defendants would know in advance that plaintiff firms would be watching their every move.

That the terms of a going-private merger do not matter is further verified by the fact that plaintiffs universally acquiesce to whatever price per share the special committee agrees to with the controlling shareholder.[188] They do so by accepting the price as part of the litigation settlement and signing a memorandum of understanding ("MOU") declaring that the price is fair.[189] To appreciate the farcical nature of this practice, the ritualistic process of challenging a going-private merger must be further highlighted. The process is as follows: a plaintiff sues when the controlling shareholders' intention to go private is announced; naturally, the controlling shareholder, when it initially offers a price for its subsidiary, does not offer the maximum that it would be willing to pay, since that would weaken its negotiating position; after negotiating with the special

186. *See, e.g.*, ROBERT M. DAINES & OLGA KOUMRIAN, CORNERSTONE RESEARCH, SHAREHOLDER LITIGATION INVOLVING MERGERS AND ACQUISITIONS 1 (2012), *available at* https://www.cornerstone.com/GetAttachment/9d8fd78f-7807-485a-a8fc-4ec4182dedd6/2012-Shareholder-Litigation-Involving-M-and-A.pdf (finding that in 2012, M&A shareholder suits were filed an average of fourteen days after the merger announcement and sometimes "within hours" of the merger announcement); *see also In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 620 (Del. Ch. 2005) (observing that, "Instead of suing once a controller actually signs up a merger agreement with a special committee of independent directors, plaintiffs sue as soon as there is a public announcement of the controller's intention to propose a merger"—something that is "typical.")

187. *Cox Commc'ns*, 879 A.2d at 620. This figure includes M&A deals in which there are not controlling shareholders. Since the presence of a controller makes it that much more likely that the deal would be challenged, these figures for going-private mergers would likely be even higher.

188. Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1817 (2004) (noting that shareholders typically "go[] through the motions").

189. *Id.* at 1818.

committee, the price that the controlling shareholder agrees to pay is always higher than its initial offer; because the price paid is higher than the price proposed, the plaintiffs' attorneys contend that their suit is responsible for the difference and thus their suit benefited the minority shareholders; the controlling shareholder and plaintiffs' attorneys, as part of the settlement, sign a MOU stating that the plaintiffs' attorneys deserve credit for the increase and that the price paid is indeed fair; and, finally, the court will award attorney's fees based on this "added value" that the plaintiffs' attorneys generated.[190]

The plaintiffs' attorneys have no incentive to further challenge the fairness of the price agreed to by the special committee, because they would have little or nothing to gain from doing so, and their costs—in the form of time and effort trying to convince the court that the price was unfair—are significant.[191] Thus, the plaintiffs do not care whether the price agreed to is fair. They only care that the price is higher than what was proposed after they filed suit, since that is what will form the foundation for their fees!

Accordingly, as Elliot Weiss and Lawrence White bluntly put it, *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 negotiating committee] are entirely fair."[192] Indeed, as the court in *Cox Communications* noted, despite its challenge to the instant plaintiffs to do so, they were unable "to point to one instance in the precise context of a case of this kind (i.e. cases started by attacks on negotiable going-private proposals) of the plaintiffs' lawyers refusing to settle once a special committee has agreed on price with a controller."[193] They were unable, because "in every instance, the plaintiffs' lawyers have concluded that the price obtained by the special committee was sufficiently attractive, that the acceptance of a settlement at that price was warranted."[194] Thus, the pre-*MFW* litigation framework facilitated "an implicitly collusive settlement in which plaintiffs' attorneys, in exchange for defendants' virtual guaranty of a fee award, agree to sign off on merger terms that at least arguably are unfair and that they might otherwise be successful in challenging."[195]

190. *See, e.g.*, *id.* at 1815-19 (describing these aspects of the process of challenging going-private mergers); *Cox Commc'ns*, 879 A.2d at 621-22 (same).

191. Weiss & White, *supra* note 189, at 1819.

192. Weiss & White, *supra* note 188, at 1857 n.183.

193. *Cox Commc'ns*, 879 A.2d at 621.

194. *Id.*

195. Weiss & White, *supra* note 188, at 1818.

Similarly, plaintiffs' attorneys are not fighting for a fair deal for minority shareholders. They settle when it is profitable for them to do so—not when the minority shareholders obtain the price that they deserve under Delaware law. Sometimes these two things can converge, as is the case when the attorneys settle according to the price that the special committee agreed to *and* that price happens to be entirely fair. However, unless these two things *always* converge, the pre-*MFW* practice of invariably settling according to the agreed-to price represented a selling out of the minority shareholders' interests in favor of their lawyers. If the lawyers were concerned about the fairness of the transaction, one would expect to witness at least some situations in which the plaintiffs' attorneys reject the agreed-to price, refuse to settle, and continue their fight for a better deal. But these situations do not exist. Thus, the standard interpretation of *Lynch*, which was challenged by *MFW I*, was responsible for a litigation system in which suits were brought to attack nearly all going-private mergers involving controlling shareholders, but the beneficiaries are the lawyers rather than the minority shareholders.

By upholding *MFW I*, the Delaware Supreme Court helped correct these serious woes of shareholder litigation arising from going-private mergers. Pursuant to Chancellor Strine's opinion, the BJR will presumptively apply at the pleading stage if the controller conditions its going-private merger on approval by a fully empowered special committee and a majority of the minority shareholders. The plaintiffs will then have the burden of pleading facts sufficient to rebut the BJR.[196] Thus, to survive a motion to dismiss, a plaintiff will need to plead particularized facts indicating gross negligence or that *MFW I*'s procedural requirements were not met. The latter could be done by pleading particularized facts indicating that: the controlling shareholder did not condition from the outset the procession of the deal on approval by a special committee and the majority of the minority shareholders; the special committee was not independent; the committee was not adequately empowered to say no; the committee was not informed; or that the minority was coerced.[197] Since this is far more difficult for a plaintiff to do compared to his burden under entire fairness, *MFW II* creates a desirable filtering mechanism early in the litigation. Lawsuits will no longer have settlement value purely because there is no feasible way for the controlling shareholder to get them dismissed on the pleadings.

Emanating from this will be a reduction in the number of frivolous lawsuits. No longer can plaintiffs' attorneys file suit when a controlling

196. Gantler v. Stephens, 965 A.2d 695, 706 (Del. 2009).

197. *See In re* MFW S'holders. Litig., 67 A.3d 496, 535 (Del. Ch. 2013) (listing the necessary conditions for invoking the business judgment rule).

shareholder's bare intention to go private is announced. They will be forced to wait until the terms of the deal are revealed and then assess whether the terms are indeed unfair. To do otherwise would be to invite financial ruin, as they would be investing time and energy into far too many suits that would be dismissed and thus not generate returns of any sort. Similarly, plaintiffs' attorneys now need to care about if the going-private merger's terms are actually fair or not. They can no longer afford to bring suit independent of the merits of their claims and burden defendants who, in fact, did nothing wrong.

Moreover, because only non-frivolous lawsuits can survive a motion to dismiss under the BJR, the defendant controlling shareholder responsible for the challenged transaction will feel pressure to pay more to obtain the minority shareholders' stock. As discussed, the current practice is for plaintiffs' attorneys to file suit whenever there is a going-private merger proposed, wait until the special committee reaches an agreement about price with the controlling shareholder, and then reach a settlement with the controlling shareholder based on that price.[198] In exchange for settling, the plaintiffs' attorneys, without exception, declare that the price is fair and the controlling shareholder declares that the plaintiffs' attorneys are responsible for the difference between the lower price proposed initially and the higher agreed-upon price. If only meritorious suits—or suits that have a reasonable potential to be found meritorious—survived a motion to dismiss, the controlling shareholders would be compelled to offer more favorable terms. They could not rest assured, as they do now, that whatever terms they extract from the special committee are to be blessed by the plaintiffs' attorneys.

CONCLUSION

MFW I brought the brewing conflict between *Lynch* and the *Siliconix* line of cases to a climax. Now, the Delaware Supreme Court has ruled on the issue. The basic question was what standard of review applies when a going-private merger is (1) negotiated and recommended by a special, independent committee and (2) approved by the majority of the minority shareholders. Yet, bound up in the answer to the question was a variety of important issues, such as the doctrinal coherence of Delaware case law on going-private tender offers and mergers, the level of protection afforded to minority shareholders, and the fate of this arena of securities litigation. This comment has argued that the Delaware Supreme Court was shrewd in upholding Chancellor Strine's opinion in *MFW I*, since doing so was

198. *See supra* text accompanying note 190.

beneficial on all three of these fronts. First, upholding *MFW I* reconciled the long-brewing tension between the *Siliconix* line of cases, which supports the BJR in the context of tender offers, and the *Lynch* line of cases, which supports entire fairness in the context of going-private mergers. It did so by setting a bold new precedent at the highest level in Delaware: the BJR is the appropriate standard of review for both tender offers and going-private mergers, so long as they abide by certain procedural requirements to ward off coercion. This precedent ends the uncertainty that existed at the chancery court on these matters, and affirms the sound principle that practically similar transactions should not be treated radically differently under the law.

Second, by upholding *MFW I*, the Delaware Supreme Court incentivized controlling shareholders to structure their going-private mergers in a manner maximally protective of minority shareholders. If controllers conditioned their going-private mergers on approval by both a special, fully empowered, independent committee and the majority of the minority shareholders, controllers would benefit from the BJR—a standard of review that they cannot benefit from now. Therefore, controllers would want to take these measures, which each uniquely mitigate the risk of abuse. Finally, the *MFW II* decision will improve securities litigation. Since entire fairness had, since *Lynch*, been entrenched as the standard of review for going-private mergers, the reality was that virtually any lawsuit challenging such mergers could survive a motion to dismiss. Therefore, every single one of these lawsuits had settlement value to plaintiffs' attorneys, since they knew that the defendant controlling shareholders would rather pay to make the case go away than to fight them through the discovery stage and beyond. This led to the proliferation of frivolous lawsuits. However, if, as *MFW II* now commands, the BJR is the standard of review and presumptively applies at the pleadings stage, the mere allegation of unfairness does not suffice to defeat a motion to dismiss. Instead, plaintiffs need to plead with particularity facts that indicate that the defendants breached their fiduciary duties and that the transaction cannot be attributed to any legitimate business purpose. This filter ensures that only cases that are meritorious or likely to be meritorious would proceed to the discovery stage. Given these advantages to upholding *MFW I*, the Delaware Supreme Court was correct to do so.