Volume 59
Issue 6 *Tolle Lege*

Article 7

9-1-2014

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MAJORITY-OF-THE-MINORITY VOTING AND FAIRNESS IN FREEZE-OUT MERGERS

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It has been thirty years since the Delaware Supreme Court issued its landmark decision in *Weinberger v. UOP, Inc.*,[1] effectively permitting public companies to go private *at will* as long as certain basic protections are afforded to the minority stockholders who are cashed out in the process.[2] Before *Weinberger*, the law recognized at least a vestige of a vested right for stockholders to retain ownership of the stocks in which they chose to invest in that a controlling stockholder was required to show a business purpose for ousting minority stockholders.[3] Admittedly, the business purpose test was easily satisfied in practice because it sufficed that the controlling stockholder perceived minority shares to be a good investment—even though based on a market price that might well be depressed by the presence of a controlling stockholder who could have his way with the company.[4] Nevertheless, the

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1. 457 A.2d 701 (Del. 1983).

2. *See generally id.* The phrase "going private" refers to a merger by which a controlling stockholder eliminates minority stockholders by merging the controlled corporation with another (shell) corporation wholly owned by the controlling stockholder—which corporation is usually formed solely for the purpose of the merger—and by which merger the stockholders of the original corporation are paid in cash. Such a merger may also be called a *cash-out* merger or a *mop-up* or *back-end* merger when it follows a tender offer or other acquisition of control shares. Needless to say, such a merger depends on the possibility of using cash as consideration. *See generally* Matteson v. Ziebarth, 242 P.2d 1025 (Wash. 1952) (using redeemable preferred stock as merger consideration). For a brief history of cash mergers, see Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 8–30 (2005).

3. *See* Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) (requiring business purpose). Once upon a time, mergers could be approved only by unanimous vote. Thus, appraisal may be seen as the quid pro quo for majority voting. *See generally* Elliott J. Weiss, *The Law of Take Out Mergers: A Historical Perspective*, 56 N.Y.U. L. REV. 624 (1981). The idea that stockholders have a vested right to retain a given stock is consistent with the traditional notion of a stockholder who does his homework and picks a few good stocks to hold for the long term. But it is hardly consistent with the interests of well-diversified stockholders who invest in the market as a whole and who hold their shares through institutions—such as mutual funds and pension plans—which hold about three-quarters of all public equity. But the implications of stockholder diversification were not that well understood in 1977 when *Singer* was decided.

4. *See* Richard A. Booth, *The New Law of Freeze-Out Mergers*, 49 MO. L. REV. 517 (1984) [hereinafter Booth, *New Law of Freeze-Out Mergers*]; *see also* Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (illustrating possible business purpose for freeze-out mergers where three percent minority challenged dividend policies); Richard A. Booth, *The Business Purpose Doctrine and the Limits of Equal Treatment in Corporation Law*, 38 SW. L.J. 853 (1984) [hereinafter Booth, *Business Purpose Doctrine and Limits of Equal Treatment*] (summarizing business purpose test).

business purpose test effectively permitted objecting stockholders to challenge any merger without fear of dismissal for failure to state a cause of action.[5]

It is difficult to overstate the problems inherent in going private mergers. On the one hand, a controlling stockholder would not propose any such deal unless the minority stock is thought to be worth more than the price proposed to be paid—which price almost always includes a premium over the market price. But how can a fiduciary profit *legally* in a deal with those whom the fiduciary is supposed to serve? And given the efficiency of the stock market, is it really believable that a controlling stockholder perceives more value in minority shares than is reflected by market price? It seems more likely that the controlling stockholder has inside information.[6] Moreover, the gap in value must be quite significant if the buyer—who is presumably poorly undiversified—thinks the company is worth more than do diversified portfolio

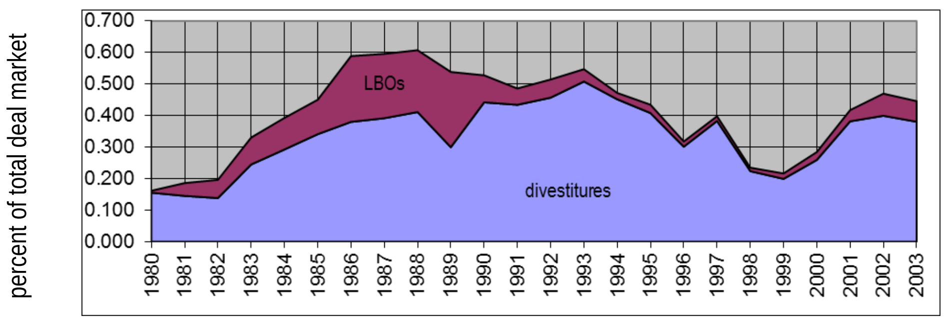
5. The business purpose test was new to Delaware merger law. Arguably, its adoption in *Singer* was prompted by *Santa Fe Industries, Inc. v. Green*, wherein the U.S. Supreme Court ruled that there was no cause of action under SEC Rule 10b-5 in absence of deception involving a material fact. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462, 473–74 (1977). In *Santa Fe,* the plaintiffs argued that the short-form merger at issue was fraudulent because the parent corporation had failed to disclose that there was no business purpose for the transaction (among other things). *See id.* at 468. The Supreme Court reasoned that because there was no business purpose requirement under Delaware law, the lack thereof could not be material. *Singer* was decided shortly thereafter. Some commentators saw this move as prompted by a worry that the lack of a federal remedy might be cited by Congress as justification for federalizing corporation law. *See generally* Richard A. Booth, *Five Decades of Corporation Law: From Conglomeration to Equity Compensation*, 53 VILL. L. REV. 459 (2008).

6. *See* Victor Brudney, *A Note on "Going Private"*, 61 VA. L. REV. 1019 (1975); *see also* Victor Brudney & Marvin A. Chirelstein, *Fair Shares in Corporate Mergers and Takeovers*, 88 HARV. L. REV. 297, 321 (1974) (advocating proportional gain sharing in parent-subsidiary mergers). On the other hand, one might question why a controlling stockholder should be deemed to become a fiduciary simply because of gaining control. Indeed, the law imposes no such duty where the controlling stockholder makes a tender offer for minority stock because the deal is viewed as one between stockholders. The rationale for imposing a fiduciary duty in the context of a freeze-out merger appears to be that the controlling stockholder acts through the board of directors (BOD). The rest of the world largely avoids these problems by requiring that in any change of control transaction, minority stockholders be offered the same premium as is paid to the seller of control (in amount though not necessarily form). This rule is yet another example of the precautionary principle—here prompted by the danger that the new controlling stockholder may plan to loot the company. In contrast, U.S. law generally permits the sale of control at a premium without requiring the buyer to offer to buy one-hundred percent of the shares on the theory that looting can be addressed when it happens and that it is more important to facilitate the maximum number of deals. *See generally* Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts,* 87 YALE L.J. 1354 (1978); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions,* 91 YALE L.J. 698 (1982); Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785 (2003). On the surface, SEC going private rules (first adopted in 1979) seemed to be focused on worries about inside information. *See* 17 C.F.R. § 240.13e-3 (2013). The SEC seemed also to be of the view that a company once public should remain public. But why should going *public* be a one-way street? It may be that some companies really should not be public because they have little need for public capital. *See, e.g.,* Kaufmann v. Lawrence, 386 F.Supp. 12 (S.D.N.Y. 1974). And, if the decision to go public is irreversible, many companies that need public capital may decline to go public in the first place. Thus, an outright ban on going private would not likely be favored by investors even though some investors may object to particular deals.

investors who effectively determine market prices.

On the other hand, most minority stockholders are likely to welcome the opportunity to sell out at a premium over the market price—especially because no one else is likely to make a bid for a controlled company and because studies subsequent to *Weinberger* indicate that prices paid in such mergers are as good as those paid in arms-length mergers (possibly because of the revamping of appraisal rights by *Weinberger* itself).[7]

In any event, it appears that *Weinberger* unlocked new sources of stockholder value and arguably helped to fuel the bull market in stocks that has persisted pretty much ever since—with a couple of notable interruptions.[8] As shown in the chart below, divestitures and leveraged buyouts (LBOs) combined grew in the years following *Weinberger* from about twenty percent of total deals to more than sixty percent in 1988. And LBOs grew from virtually nonexistent to about twenty percent of the total deal market in the years 1986 through 1989.[9]



To be specific, *Weinberger* held that appraisal should be the exclusive

7. *See* Guhan Subramanian, *Post*-Siliconix *Freeze-Outs: Theory, Evidence & Policy* 43 tbl.1 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 472, 2004) [hereinafter Subramanian, *Post*-Siliconix *Freeze-Outs*], *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=530284 (finding that premiums in freeze-outs during period from 2001 to 2003 averaged about forty-five percent). Interestingly, premiums in third party deals average less than thirty percent. *See* Stephen Gardner, *Companies Are Paying up for Deals*, CNN MONEY (July 31, 2012), http://finance.fortune.cnn.com/2012/07/31/companies-are-paying-up-for-deals/. On the other hand, it is not clear that one can compare premiums paid in freeze-outs with premiums paid in arms-length deals—apples to apples—because the premium paid in a freeze-out starts from a market price that may be depressed because of the shadow of control.

8. The general increase in stock prices since 1980 may also be attributable to increasing investor diversification and even demographics. Thus, some scholars have suggested that the level of returns experienced during the period are unlikely to be repeated and that investor expectations should be adjusted accordingly. *See generally* RICHARD A. BOOTH, VALUATION, GROWTH, AND INVESTOR EXPECTATIONS (forthcoming) (collecting sources). And the issue has found its way into recent appraisal proceedings. *See, e.g.*, *In re* Appraisal of the Orchard Enters., Inc., C.A. No. 5713-CS, 2012 WL 2923305 (Del. Ch. July 18, 2012); Gearreald v. Just Care, Inc., C.A. No. 5233-VCP, 2012 WL 1569818 (Del. Ch. Apr. 30, 2012); Global GT LP v. Golden Telecom, Inc., 993 A.2d 497 (Del. Ch. 2010).

9. For further explanation and underlying data, see Richard A. Booth, *Executive Compensation, Corporate Governance, and the Partner-Manager*, 2005 U. ILL. L. REV. 269 (2005).

remedy available to minority stockholders in a merger involving a controlling stockholder as long as the merger is entirely fair. *Weinberger* further held that entire fairness requires both fair dealing and fair price and provides substantial guidance as to what constitutes both. Simply stated, fair dealing is about replicating the conditions that obtain where there is no conflict—as with an arms-length merger between two independent corporations (or any other sort of entity for that matter).[10] As for fair price, *Weinberger* held that courts should take into account any and all evidence as to value generally considered acceptable in the financial community—including discounted cash flow and premiums paid in comparable transactions. But fair price is arguably irrelevant because it may be addressed in an appraisal proceeding anyway. Thus, the only thing that really matters is fair dealing.[11]

Although *Weinberger* did not say so (in so many words), arms-length mergers are presumed to be fair in that the business judgment rule applies. (Thus, appraisal is the exclusive remedy, which the court did say.) But the *Weinberger* court must have meant to say so because the problem with the business purpose test was precisely that it gave rise to a cause of action that could not be dismissed for failure to state a claim or on summary judgment.[12]

While the *Weinberger* court said that appraisal is the exclusive remedy, it also said that a merger may not be challenged for fairness—as long as it is fair. Thus, the courts have continued to scrutinize such mergers for fairness. But

10. Although the courts tend to view fiduciary duty as a uniform set of principles that apply across various forms of organization and relationships, it may be useful to distinguish between cases in which the issue is one of generally applicable fiduciary duties as opposed to those peculiar to corporation law. *See, e.g.*, United States v. Byrum, 408 U.S. 125 (1972). Moreover, it is not entirely clear that the business judgment rule means the same thing in a derivative action as it does in a direct action. Presumably, the BOD is entitled to more slack in connection with a business decision than in connection with a decision relating to the personal or contractual rights of stockholders. *Compare* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988), *with* Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971).

11. *Weinberger* also addresses remedies, holding that a breach of fiduciary duty in the course of negotiations for a freeze-out merger may justify rescissory damages even if discovered in the course of an appraisal proceeding. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

12. Moreover, *business purpose* is a term of art that refers to a recognized exception to the business judgment rule. Specifically, the business judgment rule applies only to business judgments. If the decision in question is one that is motivated by personal considerations, the business judgment rule does not apply for the simple reason that the decision is not a business decision. The business purpose test tends to arise where the issue is an all-or-nothing—yes or no—question that is resistant to fairness analysis. *See, e.g.*, CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008) (reimbursement of insurgent proxy expenses); Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (decision to pay dividends); Cheff v. Mathes, 199 A.2d 548 (Del. 1964) (greenmail); Berwald v. Mission Dev. Co., 185 A.2d 480 (Del. 1962) (decision to withhold dividends); Rosenfeld v. Fairchild Engine and Airplane Corp., 128 N.E.2d 291 (N.Y. 1955) (decision to pay dividends); Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919) (decision to withhold dividends, but no business purpose found); *see also* Booth, *Business Purpose Doctrine and Limits of Equal Treatment*, *supra* note 4. The concept of business purpose also arises often in tax law with the twist that the IRS often argues that there is no business purpose inherent in paying dividends or otherwise facilitating distributions to stockholders irrespective of the issue of equal treatment in corporation law. *See, e.g.*, Mountain State Steel Foundries, Inc. v. Comm'r, 284 F.2d 737 (4th Cir. 1960).

why? Because the business judgment rule applies to an unconflicted arms-length merger—at least in the absence of coercion—*Weinberger* would seem to imply that the business judgment rule should apply to conflicted mergers where similar conditions obtain—namely where the terms of the merger are negotiated by a truly independent committee and are ratified by a vote of the independent stockholders.

The problem is that *Weinberger* does not purport to require any particular procedures designed to ensure fair dealing. And, it has been interpreted not to do so quite consistently in the meantime.[13] In other words, the conventional wisdom is that there are many ways to achieve fair dealing. One way is to set up a truly independent special negotiating committee (SNC)—although it is not necessarily required for the committee to retain its own lawyers or investment bankers.[14] Another way may be for the merger to be conditioned on a fully informed majority-of-the-minority (MOM) vote without the involvement of an SNC—although few if any deals are so structured. In any event, *Weinberger* appears to contemplate many different ways to achieve fair dealing.[15]

Incredibly, it appears that the Delaware Supreme Court has never squarely addressed the question whether the business judgment rule would apply to a conflicted merger negotiated by a truly independent committee *and* ratified by a MOM vote—possibly because no one thought it would result in business judgment rule protection to do so.[16] Until now.

In a case of apparent first impression, *In re MFW Shareholders Litigation*,[17] the Delaware Chancery Court ruled that the business judgment rule should apply to a freeze-out merger if it is negotiated by an independent SNC with the power to walk away from any deal—where the controlling stockholder has promised that it will not preempt the SNC by making a tender offer directly to the minority stockholders—and if the deal must be approved by a MOM vote. In essence, the court ruled that because this procedure is equivalent to an arms-length merger, review should be governed by the same standards.[18]

Some might argue that conflicted mergers should always be reviewed for

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13. *See generally In re* MFW S'holders Litig., 67 A.3d 496 (Del. Ch. 2013); *see also* Subramanian, *Post*-Siliconix *Freeze-Outs*, *supra* note 7 (finding that ninety-four percent of freeze-outs involve SNCs, but only about a third involve MOM votes).

14. *See generally* Gilson & Gordon, *supra* note 6.

15. *Weinberger* seems to have happened onto this formula almost by accident in focusing on two features of the subject deal that fell short—the negotiations by the special committee and the disclosures in connection with the MOM vote.

16. *See MFW*, 67 A.3d at 500 n.3.

17. 67 A.3d 496 (Del. Ch. 2013).

18. The *MFW* court offers a grab-bag of additional reasons why a deal so structured should be protected by the business judgment rule, including the fact that a cash-out by tender offer and short-form merger is not subject to fairness review (despite the coercion inherent therein) and that there is no apparent financial benefit from routine fairness review (in absence of reason to believe or suspect overreaching by majority stockholder). Indeed, as the court notes, routine fairness review may entail a net loss for minority stockholders. These and other reasons cited by the court are discussed in more detail below. Again, protection under the business judgment rule may also connote that the court should focus on the interests of the corporation rather than those of the minority stockholders.

fairness—for much the same reason that prompted the Delaware Supreme Court to adopt the business purpose test in the first place.[19] But it is a bit of an overstatement to say that the business judgment rule precludes review or (the equivalent) that appraisal is the exclusive remedy. A merger may always be challenged on grounds that the business judgment rule should *not* apply. The minority can always sue if the controlling stockholder overreaches.[20] Even under the business judgment rule, a stockholder may challenge a merger based on the (positive) argument that it was motivated by personal considerations rather than a business purpose.[21]

Again, almost all conflicted mergers involve independent SNCs. Otherwise there is really nothing for the stockholders to ratify. In the absence of an independent SNC, the controlling stockholder would almost certainly bear the burden of proving fairness.[22] Thus, it is the effect of veto power—the power to walk away from any deal—and the MOM vote that is the real issue. But what is really added by these devices? What difference do they make if the SNC really does its job as intended? There are several answers.

First, an independent (well-advised) SNC with veto power plus a MOM vote is equivalent to an arms-length third-party merger, the terms of which will be protected by the business judgment rule in the absence of coercive or preclusive tactics.[23] What more could one require? If the process is good enough for mergers between independent entities, it should be good enough for any merger. On the other hand, who says merger law is good enough, anyway? Indeed, the now-discredited business purpose test was adopted in an arms-length cash-out merger following immediately on the heels of a tender offer that garnered more than eighty-four percent of target shares and where the bidder stated in advance that the merger would be at the same price as the tender offer.[24] Moreover, one might argue that SNCs can never be truly independent. But, one could say the same thing about the target board of directors (BOD) in any merger. Indeed, in the absence of conflict, the temptation is to approve a

19. *Cf.* MODEL BUS. CORP. ACT § 13.02 (2013) (providing for appraisal remedy in cash-out even though appraisal is not available for publicly-traded companies where subject corporation is twenty percent or more controlled by surviving corporation).

20. *See MFW*, 67 A.3d at 535 n.183.

21. A cynic might argue that *MFW* is just another example of a trial court seeking to establish a bright line rule designed to make life a little easier. *See, e.g.*, Amgen, Inc. v. Conn. Ret. Plans & Trust Funds, 133 S. Ct. 495 (2012); Matrixx Initiatives, Inc. v. Siracusano, 131 S. Ct. 1309 (2011); TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438 (1976). *See generally* Richard A. Booth, *The Two Faces of Materiality*, 38 DEL. J. CORP. L. 517 (2013) (discussing bright line market test for materiality); *see also* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 323–25 (3d ed. 2009) (noting difference in approach of trial courts and appellate courts as to matters of valuation); *cf.* Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 122 n.480 (Del. Ch. 2011); William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 56 BUS. LAW. 1287 (2001) (arguing for application of business judgment rule where merger is negotiated by fully-empowered SNC and ratified by MOM vote).

22. *See, e.g.*, Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985).

23. *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914 (Del. 2003).

24. *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977).

deal that is *good enough* and to stick to a decision once made, declining to revisit the matter even in the face of new information.[25] Or, to cave in to bullying.[26] In contrast, conflict provides a reason for SNCs to be scrupulous, as well as a powerful negotiating point. One could argue that SNCs may be *more* zealous in doing their duty than a supposedly independent BOD. SNC members know they will be sued on any deal they approve. Thus, like Caesar's wife, the SNC must be above suspicion.[27]

Second (and closely related), the MOM vote further assures that the SNC will do its job. The SNC must negotiate harder because its proposal will be put up to a vote. If the vote fails, the SNC will be embarrassed in the process and will need to return to the negotiating table—assuming the controlling stockholder remains interested. Still, the vote arguably absolves the committee of some of its responsibility. If they get it wrong, the stockholders can vote it down. But that also frees the SNC to exercise its judgment in good faith. And because the SNC must eventually finish the deal, why not get it right the first time? Thus, if the SNC knows that a MOM vote will follow, presumably it will seek to set a price that will satisfy at least half of the minority—but not a price so high that the controlling stockholder will walk away from the deal.[28]

This suggests a slightly different role for the SNC. The conventional view is that the SNC operates as a surrogate individual seller.[29] The vote serves merely to ratify the deal made by the SNC, or at most, operates as a kind of market check to confirm that the price to be paid is within the so-called range of fairness.[30] This view is largely agnostic as to price or premium. Indeed, the efficient market suggests that any (substantial) premium should be enough—at least in an arms-length merger.[31] But the presence of a controlling stockholder—precluding any deal with an outside buyer—likely depresses the

25. *Cf.* FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER: FROM PREHUMAN TIMES TO THE FRENCH REVOLUTION 245–317 (2011); *see also Omnicare*, 818 A.2d at 918 (BOD agreed not to consider competing merger proposals and controlling stockholders agreed to vote in favor of proposed merger even though merger at higher price might be and was proposed).

26. *See, e.g.*, *Van Gorkom*, 488 A.2d at 874.

27. *See* Subramanian, *supra* note 2, at 17.

28. The *MFW* court emphasizes this point—perhaps to excess—noting that in addition to a native sense of duty directors who serve on SNCs are subject to numerous forces that induce them to bargain hard for the minority. *See In re* MFW S'holders Litig., 67 A.3d 496, 528 n.157 (Del. Ch. 2013). But the argument proves a bit too much in that it suggests that the MOM vote is really unnecessary. In contrast, the argument here is that the vote measures something more than whether the minority approves of the SNC effort. Incidentally, the court's argument that directors are motivated to do their duty because they expect to serve on other BODs and will thus be held accountable for their shortcomings (because of stockholder access to ever more complete data as to performance from proxy advisors and other sources) suggests—contrary to conventional wisdom—that stockholders should favor directors who sit on multiple BODs.

29. *See generally* Alan Schwartz, *The Sole Owner Standard Reviewed*, 17 J. LEGAL STUD. 231 (1988).

30. *Cf. Van Gorkom*, 488 A.2d at 874 (noting directors argued that it might be violation of their fiduciary duty to reject deal offering substantial premium).

31. *See generally* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

market price from which negotiations begin. So it may be that the primary function of the SNC is to negotiate a price that overcomes this discount from the shadow of control.[32] Thus, the assumption seems to be that there is some determinable price to which the minority would agree if only they could act as one.

Quite to the contrary, most courts and commentators agree that there is a *range* of fair prices to which parties might agree in an arms-length deal.[33] Moreover, there is every reason to think that individual stockholders hold differing opinions as to the value of a given company and its stock—that minority stockholders will set different *reservation prices* at which they would be willing to sell. If so, the purpose of the stockholder vote is not merely to *ratify* the deal, but rather to *verify* that the deal is good enough to satisfy at least half of the minority. In other words, the MOM vote assures that the price is at least high enough to satisfy the median minority stockholder.

Assuming (as seems reasonable) that minority stockholder opinions as to price form a continuum ranging from the market price—which naturally reflects the views of the least optimistic current stockholder—to the price acceptable to the most optimistic stockholder with the highest reservation price, the MOM vote assures that (at worst) half of the minority will be undercompensated and half will be overcompensated. Moreover, and more important, the total aggregate premium paid by the controlling stockholder will be equal to what would have been paid in a hypothetical stair-step auction—a discriminatory auction in which each target stockholder is paid her individual reservation price.[34]

The chart below illustrates the point. The horizontal (X) axis measures the premium offered in the merger—ranging here from zero (market price) to fifty percent over market price. The vertical (Y) axis represents the percentage of minority stockholders who would vote in favor of the deal at a given premium. Thus, the diagonal line is essentially a demand (or supply) curve representing

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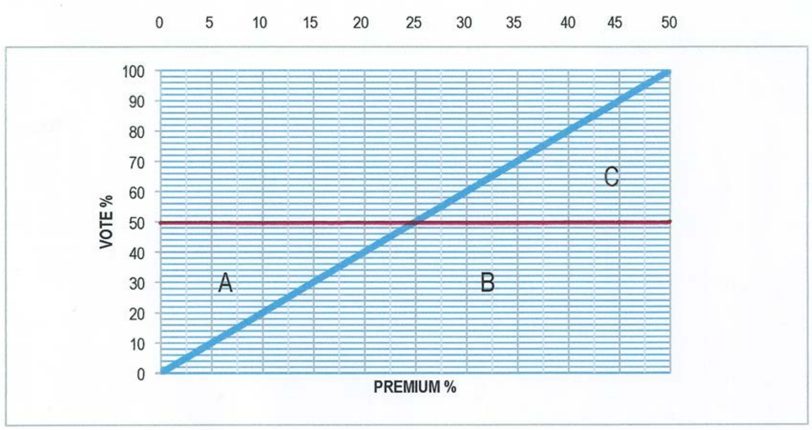
32. On the other hand, the shadow of control may also work *against* a controlling stockholder in that it effectively triggers fairness review. Because the transaction will almost certainly be reviewed for fairness, the controlling stockholder is precluded from bargaining as hard as a third party might. At the extreme, the controlling stockholder may also be held liable for rescissory damages. Aside from the shadow of control, it is arguable that the market price of a stock is inherently low, possibly reflecting a liquidity discount (as seems to be assumed in connection with appraisal proceedings). As discussed further below, there may also be a structural explanation for merger premiums and thus why the market price appears to be inherently low.

33. *See, e.g.*, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22 (2008); MODEL BUS. CORP. ACT § 13.01 cmt. 2 (2013) (defining fair value). To be sure, this may reflect variations in the sharing of gains rather than differences as to fairness of price.

34. A discriminatory or stair-step auction is not the same thing as a "Dutch auction," wherein the price for all is set at the highest or lowest price that will clear the market. Rather, a discriminatory auction is one in which stockholders may be paid differing prices as in the practice of price discrimination (as prohibited under the antitrust laws). Admittedly, neither merger law nor tender offer law permits such a result even though it is implicit in how the market works. But that does not detract from the central argument here that the aggregate premium in such an auction should be the definitive measure of fair price.

stockholder opinions as to the premium required to approve the deal.

To be clear, the chart depicts an *example* in which a premium of fifty percent over the market price would be enough to induce the highest valuing stockholder to vote in favor of the deal. In other words, one-hundred percent of the stockholders would vote for the deal if a premium of fifty percent over market price were offered.[35] Other companies (and deals) might require more or less of a premium. In other words, the demand (or supply) curve may be steeper or flatter than shown here.[36]



The area under the diagonal line (Area B plus Area C) is equal to the aggregate premium that would be paid to all of the stockholders if they could be paid their individually demanded prices. In other words, this area is equal to the number of shares that would be tendered at a given premium multiplied by the premium in a tender offer free of any coercion in which the price paid could be raised in increments until all stockholders have tendered—in a tender offer in which price discrimination is permitted.[37]

In the real world, the same price must be paid to all stockholders. Thus, some are overcompensated and some are undercompensated. But aggregate overcompensation (Area A) is equal to aggregate undercompensation (Area C). Thus, the aggregate premium paid is at least equal to the premium that would be

35. Needless to say, MOM voting avoids the problem of holdouts and no-shows by forcing all minority stockholders to take the price approved by the majority. Indeed, cram-down is a subtle advantage as compared even to an un-coerced tender offer in that there is no need for any subsequent mop-up merger. On the other hand, MOM voting also enhances the power of holdouts, who may be able to recruit fellow minority stockholders to their cause. In other words, and as discussed further below, the need to garner a majority vote enhances the power of holdouts because their votes still count in a MOM vote—in contrast to, say, a short-form merger.

36. It seems likely that riskier (higher beta) companies will have steeper demand curves because risk is defined by the dispersion of possible outcomes and investors are thus likely to hold more widely differing opinions. *See* BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 273 (Norton 1995) (arguing that risk is best correlated with differing analyst opinions).

37. Again, in the real world, stair-step offers are not possible because tender offer law requires that the same price be paid to all—as does merger law.

paid in a perfectly fair stair-step tender offer in which every target stockholder gets his individually demanded price. This price is fair *by definition*. Indeed, it may be more than fair because the price paid must satisfy at least a majority and will almost always garner a somewhat higher percentage of votes in practice.[38]

The problem (if it is a problem) is the *distribution* of the premium—not the amount. But distribution is not really a problem. Diversified stockholders do not (or should not) care if they get too little or too much in an individual deal. The only thing that matters is that the average price be fair over time and that the law assures that outcome.[39]

Moreover, the vote maximizes the *number* of deals that get done because it permits deals to get done without the payment of an excessive premium. Thus, diversified stockholders should favor MOM voting because it assures a fair price without creating a drag on the number of deals. As Dr. Pangloss would say, it is the best of all possible worlds.[40]

If the foregoing analysis of MOM voting is correct, it is arguable that the vote is more important than the efforts of the SNC. Further, it is arguable that the role of the SNC is as much to estimate the price that will be acceptable to a majority of the minority and to assure a fully informed vote as it is to find the price. In other words, the vote is the thing.[41] Yet almost all freeze-outs involve negotiation by SNCs, while only about one-third require a MOM vote. And, many of these MOM votes appear to be throw-in votes announced during the course of negotiations to induce the SNC to accept a somewhat lower price than they might be inclined to seek.[42]

One possible objection to the foregoing analysis is that it does not accurately describe how the market works. It could be argued that stockholders do not in fact hold differing reservation prices for individual stocks—that rational investors would not (or should not) act on the belief that a stock is mispriced—and that even those who claim to do so really do not do so. Rather, in an efficient market, prices somehow jump from one level to another—as in quantum physics—in response to company-specific information. More specifically, it could be argued that because most investors invest in portfolios, they see various stocks as virtually perfect substitutes for each other, with the

38. In other words, if the price proposed is somewhat higher than what is necessary to satisfy the median stockholder, Area A will be larger than Area C and more stockholders will be overcompensated than are undercompensated. Thus, with a MOM vote, fair price is the minimum that may be paid. This suggests that it might make sense to use some sort of Dutch auction to conduct the vote so as to guard against overcompensation of stockholders and a consequent reduction in the number of deals. *Cf.* 17 C.F.R. § 240.13e-4 (2013) (relating to repurchase tender offers and use of variable pricing).

39. It may go without saying, but this rationale applies in connection with most uses of stockholder voting and it explains why the required majority should be a majority of shares eligible to vote. *See, e.g.*, Bove v. Cmty. Hotel Corp., 249 A.2d 89 (1969).

40. *Cf.* VOLTAIRE, CANDIDE, OU L'OPTIMISME (Norton 1966) (Robert M. Adams, ed. and trans.) (1759).

41. *Cf.* WILLIAM SHAKESPEARE, HAMLET act 2, sc. 2.

42. *See In re* MFW S'holders Litig., 67 A.3d 496, 528 n.157 (Del. Ch. 2013); *see also* Subramanian, *supra* note 2, at 16 (finding that ninety-four percent of freeze-outs involve SNCs, but only about one-third involve MOM votes).

result that there is no true demand curve for any individual stock.[43]

There are several responses. First, irrational or not, there are many investors devoted to the holy grail of beating the market—even though the evidence suggests that it is impossible to do so consistently. Entire segments of the market—such as the hedge fund industry—appear to be founded on the idea. My own research indicates that about fifteen percent of trading is attributable to hedge funds.[44] Indeed, some such effort is crucial to keeping the market efficient.[45] Still, there is some truth in both sides of this argument. While there is no reason to think that it is possible to beat the market consistently, there is also no reason to think that hedge funds and other activist investors cannot generate superior returns doing what they do. The obvious difference is that passive investors take their companies as they find them without any (or much) hope of influencing business policy. So, even though it is irrational for an individual investor to act on any belief that market price is wrong, it is not necessarily irrational for an activist investor to do so if the investor is in a position to do something about it.

Second, almost all goods exhibit downward sloping demand in the sense that decreased supply leads to higher prices (and vice versa). The outlier is the idea that investor demand for a given stock is somehow different from consumer demand for any other good. Moreover, numerous market phenomena show that stockholder opinions can, and do, differ enough for stockholders to act on them.[46] In any event, the simpler explanation—what I call the

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43. *See* FRANK PARTNOY, INFECTIOUS GREED: HOW DECEIT AND RISK CORRUPTED THE FINANCIAL MARKETS 208 (2009). It is tempting to dismiss this argument by pointing out that the Efficient Capital Market Hypothesis (ECMH) has been largely discredited by events since 2000. For a thorough critique of market efficiency in the context of the fraud on the market theory under federal securities law, see Halliburton Co. v. Erica P. John Fund, Inc., 131 S. Ct. 2179 (2011), *cert. granted*, 134 S. Ct. 636 (Nov. 15, 2013). But, despite bubbles and other forms of irrational exuberance, it is no more likely today that an investor can beat the market consistently than it was twenty years ago. The notion that the ECMH is dead confuses informational efficiency with fundamental efficiency. Moreover, the argument is not aimed exclusively at the ECMH. Rather, it is aimed at the mechanism by which the market arrives at the price for a stock and the idea that minority investors may disagree in all good faith as to the correct price for a stock such that MOM voting matters for the reasons set forth above.

44. *See generally* Richard A. Booth, *The Buzzard Was Their Friend—Hedge Funds and the Problem of Overvalued Equity*, 10 U. PA. J. BUS. & EMP. L. 879 (2008).

45. Recent studies indicate that in the United States, stock-picking has declined from about sixty percent of trading volume in the 1960s to about twenty-four percent in the early 2000s. And, it is predicted that stock-picking will eventually stabilize at about eleven percent as the minimum necessary to maintain market efficiency. *See id*. at 893 n.47.

46. For example, it is sometimes necessary in a tender offer or merger to increase the offered price in order to attract additional tenders or votes. *See* Subramanian, *Post*-Siliconix *Freeze-Outs*, *supra* note 7, at 43 tbl.1 (indicating that premiums in freeze-outs are increased by average of about fourteen percent, based on data from 2001 to 2003). Indeed, federal law incorporates rules governing bid increases in tender offers. Similar dynamics likely explain why stock price typically rises following an initial public offering. Moreover, public companies often repurchase their own shares (either on the open market or by repurchase tender offer) in order to support or increase market price. At the individual level, stockholders often place limit orders to buy or sell a stock at a price away from the prevailing market price. And the very fact that stockholders who object to the terms of a merger often seek appraisal—

Downward Sloping Demand Hypothesis (DSDH)—is that stocks are like other commodities.[47] So, the burden is on those who would argue that the stock market is different from other markets.[48]

Third, the Efficient Capital Market Hypothesis (ECMH) proves too much in the context of a freeze-out where market price is *known* to be wrong. To be specific, market price is ordinarily determined by the interaction of buyers and sellers. It is the point of equilibrium between those who would buy at a slightly lower price and those who would sell at a slightly higher price. It stands to reason that where a company is the subject of a proposed freeze-out merger of the minority, the equilibrium price will rise to reflect the differing views of *existing* stockholders as to whether the price proposed is correct. In other words, the relevant population of investors changes from existing *and* potential investors to existing investors only. Ordinarily, market price reflects as-is investment value. But in the context of a pending merger, market price reflects a collective prediction as to the ultimate merger price adjusted for the risk of failure and the time value of money.[49]

Fourth, even though it is irrational for a diversified stockholder not to be a price-taker under normal circumstances, it is quite rational for a diversified stockholder to think like a hedge fund manager in the context of a takeover. Quite aside from DSDH, minority stockholders know that a controlling stockholder must expect some sort of gain from the proposed deal. Otherwise,

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despite the expense and time involved—clearly demonstrates that investors may differ in all good faith about the value of a given stock. *See* Richard A. Booth, *Discounts and Other Mysteries of Corporate Finance*, 79 CALIF. L. REV. 1053 (1991); Richard A. Booth, *The Efficient Market, Portfolio Theory, and the Downward Sloping Demand Hypothesis*, 68 N.Y.U. L. REV. 1187 (1993); *see also* Mills v. Elec. Auto-Lite Co., 396 U.S. 375 (1970) (addressing question of how many votes would likely have been changed as result of failure to disclose material facts); Lynn A. Stout, *The Mechanisms of Market Inefficiency: An Introduction to the New Finance*, 28 J. CORP. L. 635 (2003) (discussing heterogeneous investor expectations).

47. DSDH might better be called the "upward sloping supply hypothesis" in the context of mergers and acquisitions because the focus tends to be more on the willingness of stockholders to sell.

48. Another possible objection is that the demand curve (so-called) for a given stock may not be a straight line but rather may be curved or kinked somehow such that Area A and Area C may not be equal even at the median. This seems unlikely in that arbitrage should result in a straight line. Moreover, the demand curve could be shaped more like a stair-step than a straight line, but that does not affect the fundamental logic that a fair price is one that satisfies the median stockholder. *See* Booth, *New Law of Freeze-Out Mergers*, *supra* note 4.

49. The distinction is akin to market pricing of a convertible security where conversion value exceeds investment value. Incidentally, this suggests that appraisal may be of little value because appraisal seeks to determine as-is investment value. On the other hand, *Weinberger* itself held that an appraisal court may consider premiums in comparable transactions.

In addition, voting may be different from trading. As discussed further below, there is little risk in voting against a deal. But there is significant risk in declining to tender. The bigger worry is that stockholders may not take the vote seriously. They may routinely vote against deals in the hope of getting a higher price, or they may fail to vote altogether on the theory that their votes do not matter much. As discussed further below, these worries are likely to wither away if the courts fully endorse MOM voting. If the vote matters, stockholders will care.

the deal would not have been proposed. So when a company is in play, it is no longer just another stock in a portfolio.[50] To be sure, the market continues to work while a merger is negotiated. But price depends on additional factors such as the premium offered, the possibility that it may be increased, and the likelihood that the merger will ultimately happen. Indeed, market price may even increase above the price offered. So there is no reason for a diversified investor to sell out. Rather, there is every reason to trust the vote.[51]

Most investors are institutions that often follow the recommendations of advisors (such as Institutional Shareholder Services (ISS) and Glass Lewis) in deciding whether to sell and how to vote. But the very fact that there are numerous such advisors who compete with each other tends to prove the point that stockholders may have differing opinions. Moreover, where a stockholder chooses to sell rather than vote, the buyer is likely to be a hedge fund that will have its own opinion as to price. In other words, the DSDH argument is not necessarily based on the notion that the opinions of thousands of stockholders will be distributed in some normal way. Rather, it is also consistent with the idea that a relative few large stockholders will in fact trade or vote based on research and analysis.[52]

If the foregoing analysis is correct, it tends also to explain why it is important for a merger both to be negotiated by an SNC and to be approved by a MOM vote. Specifically, to the extent that the premium comes from gain sharing (rather than DSDH), the SNC may be able to extract more of it from the controlling stockholder.[53] To leave the matter to a take-it-or-leave-it vote not preceded by negotiations does not allow for any of the give-and-take inherent in a bilateral negotiation. Presumably, the controlling stockholder will always propose the minimum amount necessary to garner a majority vote. And if the vote fails, a tender offer may ensue—the possibility of which may cloud the vote in the first place—as discussed further below.[54] To state what is perhaps

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50. While it is quite true that most stocks move together most of the time, it is also quite true that the price of an individual stock may move contrary to market prices if new company-specific information comes to light. The logic of diversification does not extend to the twenty-dollar bill on the sidewalk. *See* MALKIEL, *supra* note 36, at 457. Indeed, corporation and securities law is founded on the notion that stock price generally reflects performance and that information matters. It is difficult to see how the law could be otherwise.

51. For a diversified investor, the risk involved in holding and voting, as opposed to selling, is minimized by virtue of being diversified. *See In re* MFW S'holders Litig., 67 A.3d 496, 533 n.174 (Del. Ch. 2013).

52. The foregoing arguments for MOM voting may also be seen as possible explanations for why mergers and acquisitions almost always involve the payment of a substantial premium. To be clear, the argument from DSDH is different from the gain sharing argument. And it is entirely possible that there is a little of both at work.

53. In addition, it is economically more efficient for a committee to negotiate on behalf of the collective minority—as if the minority were a single seller. In effect, the (substantial) costs of negotiating are born by all of the stockholders—including the controlling stockholder—whereas with a MOM vote alone, minority stockholders would bear the expense. Indeed, they might bear the expense several times over.

54. Note that this logic may extend generally to takeovers by tender offer and thus may justify target company defensive tactics.

obvious, the MOM vote also permits stockholders to express their varying preferences. In other words, the procedure endorsed in *MFW* assures that both forms of premium will be reflected.

Ironically, one major argument made against MOM voting is that when a deal is proposed, stock price rises to reflect (some of) the premium offered and many minority stockholders sell to lock in (most of) the gain and avoid the risk that the deal may fail. Concomitantly, arbitrageurs (such as hedge funds) buy up minority stock in the hope of realizing the slightly higher merger price when the deal is done. The conventional wisdom is that arbitrageurs have a strong interest in seeing the deal succeed, and thus, invariably will vote in favor of the deal in any MOM vote. Thus, if the arbitrageurs end up holding most of the minority stock—as they often do—the vote is meaningless because the arbitrageurs always vote for the deal. Or so goes the argument.

To the contrary, arbitrageurs may also buy because they think they can negotiate for a higher price by persuading other stockholders also to vote against the deal.[55] If the arbitrageurs know they can stop the deal, they may invest in convincing others to vote against it. In other words, the MOM vote is akin to a proxy contest: it gives higher valuing stockholders an opportunity to make their case to other stockholders. To be sure, there is a risk that the majority will back out of the deal if it is voted down. Presumably, the arbitrageurs understand this risk and can weigh it in deciding whether to proceed. But unless the matter is required to be put to a binding vote, there is no chance that the stockholders can improve on the price proposed by the SNC other than by persuading a court that the price is unfair.

Admittedly, there is a bit of a chicken-and-egg problem here. Before *MFW*, there was little incentive for holdouts to invest much in convincing their fellow minority stockholders to vote against a deal. So it is not completely clear that past practice is a reliable indication of the future. Presumably, if the vote matters more, stockholders will take it more seriously.[56]

In reaching its decision, the *MFW* court emphasized the coercion inherent in tender offers—and the anomaly that no fairness review applies. Specifically, tender offers are inherently coercive because stockholders know that if they fail to tender, they may be left with a much less valuable stub of shares. Moreover, stockholders have no way of knowing what other stockholders will do—or of being assured that they will hold out even if they say they will. In short, stockholders face added risks with tender offers. Other things equal, more risk means they will tender at a lower price. Although market price will provide some guidance as to what other stockholders are likely to do, it provides no

55. *See, e.g.*, Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, BYU L. REV. (forthcoming 2014) (discussing efforts by hedge fund Pershing Square to assume control of debtor in order to preserve value of equity).

56. The evolution away from the coercive tender offers that were common in the early 1980s to the routine use of any-or-all offers is instructive. Bidders gradually eschewed coercive offers as a result of target resistance, changes in the law, and competition from fellow bidders who perceived that any-or-all offers were more likely to succeed—albeit at presumably higher prices. The eventual result was that serious bidders open the bidding with serious offers.

assurance that they will follow through.[57]

In contrast, MOM voting permits stockholders to express their collective opinion—or dissatisfaction with the price offered—without the need to tender or risk being left with a stub. A stockholder may be disappointed if the merger is approved, but the stockholder will still get the merger price. Clearly, a stockholder vote is superior to a tender offer as a way of assessing stockholder opinion.

The foregoing analysis suggests a further reason why a tender offer (followed by a short-form merger) is inferior to the *MFW* approach. Simply stated, if tender offers introduce coercion or additional risk, stockholders will be inclined to tender at a somewhat lower price. In the graph above, the stockholder demand line will shift downward toward the X-axis. The area under the stockholder demand line will shrink and with it the aggregate premium paid.

On the other hand, the tender offer must garner enough shares to leave no more than ten percent outstanding in order for it to be followed up with a short-form merger. If the minority stake is, say, forty percent of outstanding shares, the price offered in the tender offer must be sufficient to satisfy three-quarters of the minority in addition to overcoming the drag from holdouts and no-shows. So even if the price offered is somewhat lower than what would need to be paid to satisfy the last stockholder to tender in a perfectly non-coercive offer, it may still be higher than the price paid in a negotiated merger.[58] Moreover, the danger of being left with a stub may be minimal because failure to promise or follow up with a short-form merger may subject the tender offer to fairness review.[59] Indeed, Delaware case law has evolved almost to the point that these terms are required in connection with a freeze-out by tender offer.[60] Thus,

57. One big question is whether the commitment of a controlling stockholder not to resort to a tender offer is truly enforceable. Or is it always possible that a controlling stockholder may resort to a tender offer if a deal cannot be negotiated? While no such promise is likely to be enforced indefinitely, the Delaware courts have held controlling stockholders to similar undertakings not to exercise their rights. *See* Hollinger Int'l, Inc. v. Black, 844 A.2d 1022 (Del. Ch. 2004) (sale of control enjoined where controlling stockholder had agreed in writing to assist company in divestiture of assets).

58. Thus, the decision by a controlling stockholder to proceed by negotiation or tender offer may depend to some extent on the size of the minority. If the minority is larger than twenty percent of outstanding shares, it may be cheaper to proceed by negotiated merger. Indeed, data indicate that the average controlling stake in tender offer deals is about seventy-three percent versus about sixty-three percent in merger deals. *See* Subramanian, *Post-*Siliconix *Freeze-Outs*, *supra* note 7, at 43 tbl.1 (citing data from 2001 to 2003).

59. On the other hand, some courts and commentators have expressed worry about retribution against minority stockholders who vote against a merger (presumably in connection with mergers that are voted down). *See In re* MFW S'holders Litig., 67 A.3d 496, 533 n.173 (Del. Ch. 2013).

60. Although the general rule is that a tender offer will not be reviewed for fairness in the absence of a failure to disclose material information or coercion, the Delaware courts have held that a tender offer will be treated as coercive unless it is conditioned on the tender of at least a majority of the minority shares—a MOM condition—and the controlling stockholder commits in advance to a back-end short-form merger if it achieves ninety-percent control (or if the controlling stockholder threatens some sort of retribution if the offer fails). *See In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421 (Del. Ch. 2002). While this formula appears

ironically, the *MFW* rule may conceivably lead to more deals at somewhat lower prices. But even if so, it is difficult to see how the result could be called unfair to minority stockholders.

In ruling that the *MFW* merger should be reviewed under the business judgment rule, the court emphasized the coercion inherent in the alternative tender offer plus short-form merger structure and the lack of any fairness review as to either step. But a problem with the law governing the alternative does not constitute a positive argument for why the *MFW* rule is better. Two wrongs do not make a right. Similarly, the court reasoned that there is no incentive to use the *MFW* model unless the controlling stockholder gains some sort of advantage such as an assurance of no fairness review (which the court noted has no real value for stockholders and indeed likely reduces aggregate deal value). Again, this is not really an argument in favor of negotiated mergers in the absence of positive reasons why MOM voting assures fairness. Moreover, there are other incentives. A negotiated merger captures one-hundred percent of minority shares in a single bound (as it were).

In addition, the court noted evidence suggesting that a MOM vote is often thrown in toward the end of negotiations—instead of more money—as a way to persuade the SNC to accept the offer on the table and leave it to the minority stockholders to decide if the deal is good enough.[61] But so what? If the stockholders vote for the deal and are fully informed in the process, the vote presumably reflects stockholder opinion accurately. Why should it matter if the requirement of a MOM vote is announced in advance?

The answer is that the vote matters in its own right because it assures minority stockholders that the SNC will have sought a price that will survive a MOM vote. Since the vote will fail if the proposed price is too low, there is every reason to think that the SNC will seek to determine what price will garner a majority vote and that the SNC will use its assessment of stockholder opinion as a negotiating tool *vis a vis* the controlling stockholder to get that price.[62] Thus, minority stockholders are assured of being paid the higher of a bilaterally

designed to assure that the price offered is high enough to satisfy the median minority stockholder, it leaves open the possibility—where the minority stake is greater than twenty percent—that even if the MOM condition is met, the tender offer may leave behind a stub. Thus, it fails to eliminate all of the coercion inherent in a tender offer. To do so would require that the offer be conditioned on gaining a ninety percent stake. It is understandable that the courts are reluctant to impose such a condition since it would give too much power to holdouts. Nevertheless, in practice about eighty-nine percent of all tender offer deals include a non-waivable ninety percent tender requirement and about ninety-six percent include a guarantee of a back-end short-form merger at the same price. *See* Subramanian, *Post*-Siliconix *Freeze-Outs*, *supra* note 7, at 43 tbl.1 (citing data from 2001 to 2003). Where the minority stake is significantly larger than twenty percent, the controlling stockholder is always free to proceed by negotiated merger. As noted above, mergers do in fact tend to involve somewhat smaller controlling stockholder interests (even though premiums in merger deals average about fifty-one percent versus about thirty-four percent in tender offer deals). Thus, there is a certain twisted logic to the bifurcated system that has evolved.

61. *Cf.* Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (noting that BOD was persuaded to agree to proposed deal since stockholders would vote on it anyway).

62. Presumably, the same methods are available and may be used for assessing investor opinion as are used in connection with proxy solicitations and public offerings.

negotiated price or a price determined by MOM vote reflecting the demands of scattered stockholders.

One lingering worry is that where a controlling stockholder may be willing to pay more than the minimum price that will clear a MOM vote, the SNC may not bargain hard to get the higher price. But it is difficult to see how the price set by a fully informed MOM vote can ever be said to be unfair. Presumably, any price so approved will be at least as high as the appraisal price and will also include some portion of any gain expected by the controlling stockholder. Although such gain cannot be awarded in appraisal, that does not mean that it will not influence the votes of minority stockholders.[63]

Incidentally, if the procedure endorsed in *MFW* is so superior to the alternatives, maybe it should be further encouraged by a presumption that the price so negotiated and approved constitutes fair value for appraisal purposes in the absence of positive evidence to the contrary.[64] Presumably, the price paid in a negotiated merger will almost always be somewhat higher than fair value since there is no reason to think that well diversified institutional investors—who collectively control the vote and know they can stop the deal and who can afford to walk away from a deal if the price is too low—would ever accept less than a fair price. Why would they settle for a valuation that incorporates a discount when appraisal law quite clearly prohibits any discount for lack of control (or anything else)? As noted in *MFW*, minority stockholders are arguably in a better negotiating position than a (captive) controlling stockholder.[65] There is no reason to think that they cannot protect themselves.

To sum up, the recent decision by the Delaware Court of Chancery in *In re MFW Shareholders Litigation* completes the work started thirty years ago in *Weinberger v. UOP, Inc.* by providing a roadmap by which minority stockholders may be cashed out at a fair—indeed attractive—price without the expense, delay, and risk inherent in more or less automatic judicial review. In short, the *MFW* court got the rule right even if it did not get the reason exactly right. One hopes that the Delaware Supreme Court sees fit to affirm.

63. In a sense, the MOM vote is akin to a final offer appraisal in that the price that garners a majority may be seen as the market's best estimate (at least) of the price that would be awarded in appraisal. As such, it is superior to the extant system of appraisal wherein the parties have every incentive to take extreme positions as to value. *See generally* Christian J. Henrich, *Game Theory and* Gonsalves*: A Recommendation for Reforming Stockholder Appraisal Actions*, 56 BUS. LAW. 697 (2001).

64. The trend outside Delaware has been to confine appraisal rights to cases involving clear conflict—such as going private mergers. *See* MODEL BUS. CORP. ACT §§ 13.01–.40 (2013). So any such presumption would be a significant departure from current practice—especially in Delaware where appraisal is available in all mergers except for stock-for-stock mergers between listed companies. On the other hand, I have argued elsewhere that if a freeze-out is approved by a MOM vote, the plaintiff in a subsequent appraisal proceeding should bear the cost of the proceeding unless the court finds that a higher price should have been paid. *See* Booth, *New Law of Freeze-Out Mergers*, *supra* note 4.

65. *See In re* MFW S'holders Litig., 67 A.3d 496, 532 n.172 (Del. Ch. 2013).