Kahn v. M&F Worldwide Corporation: A Small but Significant Step Forward in the War Against Frivolous Shareholder Lawsuits

Bernard S. Sharfman*

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I. INTRODUCTION

From time-to-time, a controlling shareholder will want to eliminate the minority shareholders by buying them out in a transaction called a freeze-out merger.[1] However,

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1. A freeze-out merger involves a controlling shareholder forcing the buyout of the minority shareholders for cash or the controller's stock. Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 9 (2005). The freeze-out merger is not to be confused with a tender offer freeze-out where the controlling shareholder initiates a tender

under Delaware corporate law, a freeze-out merger creates such a strong presumption of taint[2] that, for the last 30 years, the Delaware courts have required the decision to be reviewed under its highest level of scrutiny: entire fairness, i.e., fair dealing and fair price.[3] According to the Delaware Supreme Court, "[w]here a transaction involving self-dealing by a controlling stockholder is challenged, the applicable standard of judicial review is 'entire fairness,' with the defendants having the burden of persuasion."[4]

Empirical evidence suggests that the entire fairness standard of review does provide the required benefits for minority shareholders in freeze-out mergers. Bates, Lemmon and Linck conclude that "[m]inority claimants in freeze-out offers receive an allocation of deal surplus at the bid announcement that exceeds their pro rata claim on the firm," suggesting "that minority claimants and their agents exercise significant bargaining power during freeze-out proposals."[5] Unfortunately, the application of the entire fairness standard of review in freeze-out mergers has also created unintended negative consequences. Because entire fairness makes it almost impossible for defendants to get the case dismissed prior to trial,[6] the standard has made it extremely tempting for plaintiffs' attorneys, in order to earn attorney's fees, to reflexively file a class action lawsuit in a freeze-out merger without regard to the claim's merits.[7] For example, in *Kahn v. M&F Worldwide Corp.*—the Delaware Supreme Court case that is the focus of this article—the initial lawsuit challenging the freeze-out merger was filed one day after the controlling shareholder announced its proposal to buy out the minority shareholders and several months prior to a board-approved transaction.[8] As will be subsequently discussed, the process of freeze-out merger litigation then proceeds in a very predictable manner, with the final result being a settlement that allegedly benefits no one except the plaintiffs' attorneys. [9]

To help remedy this overabundance of frivolous lawsuits, the Delaware Supreme Court in *Kahn* provided the defendants the protections of the business judgment rule as long as the freeze-out transaction utilized the court's dual protection merger structure, i.e.,

offer to buy out the minority shareholders. *Id.* at 17. In a tender offer freeze-out, if the tender offer yields the controlling shareholder an ownership share of at least 90% of the voting stock, then the controlling shareholder would execute a short-form merger to eliminate the remaining shareholders without requiring a shareholder vote. *Id.* at 17–18. From the perspective of actually being able to execute this two-step transaction, there is no guarantee that the tender offer will yield the controlling shareholder 90% of the voting stock. Robert T. Miller, Kahn v. M&F Worldwide, THE CONGLOMERATE BLOG (Apr. 23, 2014), http://www.theconglomerate.org/2014/04/kahn-v-mf-worldwide.html.

2. For example, in regard to shareholder voting on freeze-out mergers, the law "is premised on the empirical assumption that stockholder votes on mergers with controlling stockholders invariably involve a form of inherent coercion . . . ." *In re* JCC Holding Co., Inc., 843 A.2d 713, 716 (Del. Ch. 2003).

3. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983). The applicable statutory law is DEL. CODE ANN. tit. 8, § 251 (2014).

4. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014).

5. Thomas W. Bates et al., *Shareholder Wealth Effects and Bid Negotiation in Freeze-out Deals: Are Minority Shareholders Left Out in the Cold?*, 81 J. FIN. ECON. 681, 681 (2006).

6. *Kahn*, 88 A.3d at 646 (citing Am. Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012)).

7. Subramanian, *supra* note 1, at 45 (citing Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1820 & n.84, 1833–34 (2004)).

8. The M&F Defendants Reply Brief in Support of their Motion for Summary Judgment at 11, Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014) (No. 6566-CS), 2010 WL 5464426.

9. Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797, 1820 (2004).

the use of a special independent committee in negotiating the transaction on behalf of the minority shareholders and the approval of the transaction by an informed majority of minority shareholders.[10] By moving the standard of review to the business judgment rule, defendants now have the ability to seek dismissal of the suit prior to trial, thereby reducing, at least in theory, the pressure on defendants to seek a settlement automatically even if the suit is without merit.

Unfortunately, the result is mostly aspirational because while the standard of review eventually shifts to the much more lenient business judgment rule, it does little to relieve the burden on defendants to show that the freeze-out merger ultimately meets the objective of an entire fairness standard of review: "fair price."[11] Each of the six requirements that the board and the controlling shareholder must meet may be subject to discovery.[12] The judicial review in total still requires a level of scrutiny, in terms of both process and discovery, that must be considered the functional equivalent of entire fairness. This does not mean, however, that *Kahn* is without significance. As subsequently discussed, *Kahn* may lay the foundation for a greater judicial attack on frivolous lawsuits in the context of freeze-out mergers if new approaches are allowed to enhance *Kahn*'s dual-protection merger structure.

This Commentary proceeds as follows. Part II describes Delaware law as it applies to freeze-out mergers prior to *Kahn*. Part III explains how *Kahn* has changed the law. Part IV describes how the *Kahn* court went about applying the new law to the facts of *Kahn*. Part V explains the rationale for the *Kahn* opinion: the deterrence of frivolous lawsuits. Part VI provides a recommendation on how the dual protection merger structure of *Kahn* can be modified to shift the balance of power between plaintiffs' attorneys and defendants, such that the threat of heightened judicial scrutiny and discovery is reduced without sacrificing the economic interests of minority shareholders.

II. THE LAW OF FREEZE-OUT MERGERS PRIOR TO *MFW* AND *KAHN*

Prior to the Chancery Court decision in *In re MFW S'holders Litigation*[13] (*MFW*), which *Kahn* essentially affirmed, the exclusive standard of review for freeze-out mergers was entire fairness.[14] Such a standard of review "is applied in the controller merger context as a substitute for the dual statutory protections of disinterested board and stockholder approval, because both protections are potentially undermined by the influence of the

10. *Kahn*, 88 A.3d at 645. Subramanian was the first to propose the use of this dual-protection merger structure as a way for defendants to receive the benefits of the business judgment rule. Subramanian, *supra* note 1, at 55 ("When a freezeout process provides both of these procedural safeguards, a court should apply business judgment review . . . .").

11. *Kahn*, 88 A.3d at 645.

12. *Id.* at 645 n.14.

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

14. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

controller."[15] Like the *Unocal* test[16] or the *Revlon* duty,[17] the application of entire fairness is an exception to corporate law's default standard of review, the business judgment rule.[18] Entire fairness results if the presumption of the business judgment rule "is rebutted," i.e., when a court determines that a board decision is tainted with interest, a lack of independence, or a lack of due care (gross negligence; process due care only[19]) and an exculpation clause does not apply,[20] or when certain types of board decisions are *presumed* to lack fairness, such as when a controlling shareholder is dealing with the corporation.[21]

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15. *Kahn*, 88 A.3d at 644.

16. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985). The *Unocal* test is a two-pronged test that the Delaware courts use to review defensive measures taken by a board of directors to repel attempts by an outside investor or group of investors to gain control of the corporation. *Id.* The *Unocal* test is considered an intermediate standard of review typically referred to as "enhanced scrutiny." Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 457 (Del. Ch. 2011). As a standard of review, it is situated between the business judgment rule and entire fairness. *Id.*

17. The *Revlon* duty "requires a board, when it undertakes a sale of the company, to set its singular focus on seeking and attaining the highest value *reasonably* available to the stockholders." Ryan v. Lyondell Chem. Co., C.A. No. 3176-VCN, 2008 WL 2923427, at *2 (Del. Ch. July 29, 2008) (emphasis added) (citing Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986), *rev'd on other grounds*, 970 A.2d 235 (Del. 2009)). Under this form of enhanced scrutiny, the burden is on directors to demonstrate that they had this singular focus, and then the court will closely scrutinize the process by which the board settled on a price. *See* Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 45 (Del. 1994) (discussing the enhanced judicial scrutiny of the relevant board actions).

18. *In re* Trados Inc. S'holder Litig., 73 A.3d 17 (Del. Ch. Aug. 16, 2013). There are many formulations for the business judgment rule, but in the eyes of this author, the following formulation captures not just the protections provided for board decisions but also the borders that limit the extent of those protections: "The business judgment rule, as a general matter, protects directors from liability for their decisions so long as there exists 'a business decision, disinterestedness and independence, due care, good faith and no abuse of discretion and a challenged decision does not constitute fraud, illegality, ultra vires conduct or waste.' There is a presumption that directors have acted in accordance with each of these elements, and this presumption cannot be overcome unless the complaint pleads specific facts demonstrating otherwise." Robotti & Co., LLC v. Liddell, 2010 Del. Ch. LEXIS 4, 46–47 (2010) (citing STEPHEN A. RADIN ET AL., THE BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES FOR CORPORATE DIRECTORS 110 (6th ed. 2009)). Therefore, in the general case, i.e., outside the extreme parameters of ultra vires, abuse of discretion, waste, and a lack of a rational business purpose, the court will only deny a motion to dismiss when the plaintiff has alleged with particularity a breach in the board's duties of loyalty or care (process only; gross negligence standard of review). Most importantly, if the preconditions of the business judgment rule are met, the defendants escape a substantive review of the decision.

19. Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). *See also* Brehm v. Eisner, 746 A.2d 244, 262–64 (Del. 2000) (explaining that the business judgment rule requires only "process due care," not "substantive due care."). Stephen Bainbridge argues that procedural due care is a prerequisite for receiving the protections of the business judgment rule. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 92 (2004). *See also* Karen Winn, *Due Care as a Prerequisite for Protection Under the Business Judgment Rule*. Smith v. Van Gorkom*, 488 A.2d 858 (Del.)*, 64 WASH. U. L. REV. 655 (1986).

20. In the specific instance where the business judgment rule has been overcome based solely on an alleged breach of a duty of care (process only), where director liability is at issue, and an exculpation clause has been utilized by defendants as an affirmative defense, then the entire fairness standard of review would not apply. Emerald Partners v. Berlin, 787 A.2d 85, 92 (Del. 2001).

21. However, "an entire fairness analysis can never be avoided in any challenged transaction that requires an application of the entire fairness standard of judicial review ab initio at trial." *Emerald Partners*, 787 A.2d at 93. *See also In re* Orchard Enterprises, Inc. Stockholder Litig., 88 A.3d 1, 38 (Del. Ch. 2014) ("It is premature in this case to make a determination regarding exculpation under Section 102(b)(7) without first determining whether the transaction was entirely fair, determining whether liability exists and on what basis, considering the evidence as a whole, and evaluating the involvement of each of the individual directors." (citing Emerald Partners v. Berlin, 787 A.2d 85, 94 (Del. 2001))).

The key difference between the two standards of review is that entire fairness requires a review of the result for "substantive fairness," with the burden of proof being on the defendants,[22] while the business judgment rule does not incorporate any type of substantive review and the burden of proof is on the plaintiffs.[23]

A. Entire Fairness

When the entire fairness standard applies,

> the board must present evidence of the cumulative manner by which it discharged *all* of its fiduciary duties. An entire fairness analysis then requires the [court] 'to consider carefully how the board of directors discharged all of its fiduciary duties with regard to each aspect of the non-bifurcated components of entire fairness: fair dealing and fair price.'[24]

Moreover, "[n]ot even an honest belief that the transaction was entirely fair will be sufficient to establish entire fairness. Rather, the transaction itself must be objectively fair, independent of the board's beliefs."[25] However, "[a] determination that a transaction must be subjected to an entire fairness analysis is not an implication of liability."[26] Further determinations must also be made that the transaction was not entirely fair, an identification of whether the directors' duty of care or loyalty or both were breached, and the absence of affirmative defenses such as an exculpation clause that protects directors from liability for breaches in their duty of care.[27]

1. Fair Dealing

Fair dealing "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."[28] In addition, "[p]art of fair dealing is the obvious duty of candor . . . . Moreover, one possessing superior knowledge may not mislead any stockholder by use of corporate information to which the latter is not privy."[29]

There are several prominent examples of a lack of fair dealing under the entire fairness standard of review. In *Weinberger*, two officers of the controlling shareholder, who were

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22. Solomon v. Armstrong, 747 A.2d 1098, 1112 (Del. Ch. 1999). In these scenarios, "the board's decision is reviewed through the lens of entire fairness, pursuant to which the directors lose the presumption of good business judgment, and where the Court more closely focuses on the details of the transaction and decision-making process in an effort to assess the fairness of the transaction's substantive terms." *Id.*; *see also In re* MFW S'holders Litig., 67 A.3d 496, 504 (Del. Ch. 2013) (stating that "a controller who employed only one of the procedural protections would continue to get burden-shifting credit within the entire fairness rubric, but could not escape an ultimate judicial inquiry into substantive fairness").

23. *See, e.g.*, Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) (stating that "directors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available").

24. *Emerald Partners*, 787 A.2d at 97.

25. Gesoff v. IIC Indus., Inc., 902 A.2d 1130, 1145 (Del. Ch. 2006).

26. *Emerald Partners*, 787 A.2d at 93.

27. *Id.* at 96–97.

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

29. *Id.*

also directors of the target company's board, created a valuation memo.[30] For the memo, the officers used confidential information they obtained from the target company that was unfairly used by the controlling shareholder in its dealings with the target company's board of directors.[31] Moreover, the controlling shareholder structured the transaction to pressure the target board to make a decision quickly with minimal negotiations.[32] Finally, no one informed the shareholders on how the transaction was negotiated, or that the fairness opinion was put together in a rush.[33]

In *Kahn v. Lynch*, because of the high pressure tactics of the controlling shareholder, the independent committee of directors was not able to exercise real bargaining power in an arms-length transaction, resulting in the independent committee agreeing to a price that was below fair value.[34] In *Kahn v. Tremont Corp.*, the Special Committee created to negotiate on behalf of minority shareholders was tainted with a lack of independence in terms of both committee composition and the selection of both legal and financial advisors.[35] Finally, in *Rabkin v. Philip A. Hunt Chemical Corporation*,[36] an acquirer purchased majority control of a company on condition that it would to pay $25 per share to buy out the minority shareholders if the purchase occurred within one year after gaining majority control.[37] The controlling shareholder waited out the one year time period and was able to negotiate the purchase of the minority shares for $20 per share.[38] In reversing the Chancery Court's grant of a motion to dismiss for failure to state a claim, the Delaware Supreme Court held that waiting until after the one year period ran out might constitute unfair dealing even though the controlling shareholder had no legal obligation to commence a freeze-out merger within that time period.[39] In sum, all aspects of the deal process are subject to judicial scrutiny including: how well the committee members were informed, how well the terms of the agreement actually result in fair dealing, whether or not the dealings could be viewed as being at arm's-length and not a victim of coercion from the controlling shareholder, and how vigorously the committee negotiated the transaction.

2. Fair Price

Fair price "relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock."[40] As stated by former Chancellor Allen when explaining the meaning of fair price:

> A fair price does not mean the highest price financeable or the highest price that fiduciary could afford to pay. At least in the non-self-dealing context, it means a price that is one that a reasonable seller, under all of the circumstances, would regard as within a range of fair value; one that such a seller could reasonably

30. *Id.* at 712.
31. *Id.*
32. *Id.*
33. *Weinberger*, 457 A.2d at 712.
34. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1117–18 (Del. 1994).
35. Kahn v. Tremont Corp., 694 A.2d 422, 429 (Del. 1997).
36. Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985).
37. *Id.* at 1101.
38. *Id.* at 1102.
39. *Id.* at 1106.
40. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

accept.[41]

Moreover, "the 'fair price' aspect of the unitary entire fairness standard is widely regarded as requiring a valuation analysis equivalent to the 'fair value' inquiry in an appraisal."[42] In general, this requirement can be met with a fairness opinion.[43]

While the review for entire fairness is not bifurcated, the Delaware Supreme Court has stated that "in a non-fraudulent transaction we recognize that price may be the preponderant consideration outweighing other features of the merger."[44] Moreover, even if fair dealing were absent, that finding would not necessarily be outcome determinative.[45] For example, in *In re Trados Inc. Shareholder Litigation*, the requirements of entire fairness were met based on a fair sale price, even though the board of directors were interested, lacked independence, and the sale process was unfair.[46] Vice Chancellor Laster's holding was based on how the Delaware Supreme Court has characterized the "test of fairness": '"whether the minority stockholder shall receive the substantial equivalent in value of what he had before.'" [47] In *Trados*, the stock was worth nothing prior to the merger and the shareholders received exactly what the stock was worth, nothing.[48] As a result, the directors did not breach a duty to their shareholders.[49]

3. Non-Bifurcated Components

Trados is still consistent with the non-bifurcated approach of the entire fairness standard of review. When a court reviews a transaction under the entire fairness standard, it must determine whether an unfair process infected the price provided to the shareholders.[50] For example, when the court finds that a Special Committee is limited in its ability to negotiate the transaction as an independent body, thereby not realizing in terms of price, "what truly independent parties would have achieved in an arm's length negotiation."[51] This occurred in *Kahn v. Tremont*, where the lack of independence of a Special Committee negotiating the purchase of a block of stock from a controlling shareholder created an atmosphere where "the directors were permitted to default on their obligation to remain fully informed."[52]

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41. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1143 (Del. 1994).

42. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 461 (Del. Ch. 2011).

43. *See* Seagraves v. Urstadt Prop. Co., Inc., No. 10307, 1996 WL 159626, at *5 (Del. Ch. Apr. 1, 1996) (stating fairness opinion provides strong evidence of a fair transaction). *See also* Kahn v. Lynch Commc'n Sys., Inc., No. 8748, 1995 WL 301403, at *2 (Del. Ch. Apr. 17, 1995) (according to the court, fairness opinions are "further evidence of the fairness of the price offered").

44. *Weinberger*, 457 A.2d at 711.

45. *Cinerama, Inc*., 663 A.2d 1134 (Del. Ch. 1994), *aff'd*., 663 A.2d 1156 (Del. 1995).

46. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 75–77 (Del. Ch. 2013).

47. *Id.* at 76 (quoting Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 114 (Del. 1952)); *accord* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940 (Del. 1985). According to Vice Chancellor Laster in *Reis v. Hazelett*, *Sterling* was "the seminal decision applying the entire fairness standard to a parent-subsidiary merger." Reis v. Hazelett, 28 A.3d at 462.

48. *Trados*, 73 A.3d at 75–76.

49. *Id.* at 78.

50. *Id.*

51. Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997). *See also In re* Southern Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 784–85 (Del. Ch. 2011) (finding that merger was unfair to corporation and minority shareholders where Specific Committee only attempted to rationalize overvalued merger).

52. *Tremont Corp.*, 694 A.2d at 430.

III. THE STANDARD OF REVIEW AFTER *KAHN*

Entire fairness is no longer the exclusive standard of review in a freeze-out merger. In *Kahn*, the Delaware Supreme Court provided the board of directors the protections of the business judgment rule in a freeze-out merger given certain requirements are met.[53] As a threshold matter, it was the presence of both an adequately empowered committee *and* the uncoerced, informed vote of a majority of the minority shareholders approving the merger that allowed the courts to consider providing the board with the protections of the business judgment rule. According to the Delaware Supreme Court in *Kahn*:

> This appeal presents a question of first impression: what should be the standard of review for a merger between a controlling stockholder and its subsidiary, where the merger is conditioned *ab initio* upon the approval of both an independent, adequately-empowered Special Committee that fulfills its duty of care, and the uncoerced, informed vote of a majority of the minority stockholders. The question has never been put directly to this Court.[54]

A. The New Law

But getting the benefit of the business judgment rule in a freeze-out merger comes at a high price. To make sure that an independent, adequately-empowered Special Committee was operational and meeting its duty of care, and that the shareholder vote was uncoerced and informed, the defendants must demonstrate that they have fulfilled the following six requirements:

> (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders;[55] (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say "no" definitively; (iv) the Special Committee meets its duty of care in negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[56]

Given these requirements are met, the entire fairness standard of review is no longer required.[57] From the perspective of the Delaware Supreme Court, meeting these requirements means that "the controller irrevocably and publicly disables itself from using

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53. The genesis for applying the business judgment rule in freeze-out mergers began with then Vice Chancellor Strine's dicta in *Cox*. According to Vice Chancellor Strine: "I observe that Delaware law would improve the protections it offers to minority stockholders and the integrity of the representative litigation process by reforming and extending Lynch in modest but important ways. The reform would be to invoke the business judgment rule standard of review when a going private merger with a controlling stockholder was effected using a process that mirrored both elements of an arms-length merger: 1) approval by disinterested directors; and 2) approval by disinterested stockholders. The two elements are complementary and not substitutes." *In re* Cox Commc'ns., Inc. S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005).

54. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014).

55. These procedural safeguards must be implemented at the outset, before negotiations begin. According to the court, "We hold that business judgment is the standard of review that should govern mergers between a controlling stockholder and its corporate subsidiary, where the merger is conditioned *ab initio* [from the beginning] upon both the approval of an independent, adequately-empowered Special Committee." *Id.* at 645.

56. *Id.* The addition of the words "in negotiating a fair price" distinguishes this holding from what is found in *MFW*. *See In re* MFW S'holders Litig., 67 A.3d 496, 535 (Del. Ch. 2013).

57. *Id.* at 644.

its control to dictate the outcome of the negotiations and the shareholder vote," allowing the transaction to acquire the "shareholder-protective characteristics of third-party, arm's-length mergers, which are reviewed under the business judgment standard."[58] Most importantly, the "dual protection merger structure" achieves the *objective* of an entire fairness standard of review, "fair price."[59]

IV. A ROADMAP FOR MEETING ENTIRE FAIRNESS IN A FREEZE-OUT MERGER

If the dual merger protection structure has the same "fair price" objective as an entire fairness standard of review, then it would not be surprising that the six new requirements simply provide a roadmap for meeting the demands of entire fairness in a freeze-out merger. This argument can be made when one reviews how the *Kahn* Court applied the six new requirements to the facts.

A. Applying the Facts

This Subsection goes through each of the requirements, discussed previously, that the defendants must demonstrate they have fulfilled, and applies the facts of *Kahn* accordingly.

1. The Controller Conditions the Procession of the Transaction on the Approval of Both a Special Committee and a Majority of the Minority Stockholders[60]

Indeed, this was the case. On June 13, 2011, MacAndrews & Forbes, a company that owned 43.4% of M&F Worldwide Corporation's (Worldwide) common stock,[61] sent a letter proposal to the Worldwide board offering to buy out the minority shareholders for $24 per share in cash.[62] The stock had closed at $16.96 on the prior trading day.[63] The proposal was conditioned on the approval of the board of directors and a Special Committee of independent directors.[64] In addition, the proposal was conditioned on the approval of a majority of the shares of Worldwide not owned by MacAndrews & Forbes. MacAndrews & Forbes also made clear in its proposal that it did not intend to use its position as a controlling shareholder to negotiate unfairly with the Special Committee. It provided that if the Special Committee turned down the proposal or the shareholders did not approve the merger, the company and its minority shareholders would not be punished for doing so.[65]

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58. *Id.*
59. *Kahn*, 88 A.3d at 644–45.
60. *Id.* at 645.
61. *Id.* While not discussed in either *MFW* or *Kahn*, it must be presumed that MacAndrews & Forbes had "effective control" of MFW. According to the court in *Lynch Communications*, "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation." *Kahn v. Lynch Commc'ns. Sys, Inc.*, 638 A.2d 1110, 1113 (Del. 1994) (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)).
62. *Kahn*, 88 A.3d at 640.
63. *Id.*
64. *Id.* at 640–41.
65. *Id.* at 639.

2. The Special Committee Is Independent[66]

A critical element in any entire fairness review, especially in determining whether or not there is fair dealing, is making sure that an independent committee is truly independent. Per the proposal's requirements, Worldwide formed a Special Committee of allegedly independent directors to negotiate on behalf of the minority shareholders.[67] After an extensive discussion of the independence of the committee members, the Delaware Supreme Court affirmed the Chancery Court's finding that the committee was independent.[68] This affirmation was made despite one director sharing a "longstanding and lucrative business partnership" with the controlling shareholder of MacAndrews & Forbes, Ronald Perelman.[69] This relationship, however, had ended nine years earlier, thereby excluding it as a triable issue of fact in regard to his being impartial in his negotiation of the merger.[70]

Also, a second director had some relatively recent sporadic business relationships with Scientific Games—a public company that is 38% owned by MacAndrews & Forbes—that had yielded the director's law firm $200,000 in fees.[71] The Delaware Supreme Court found these fees to be immaterial to the director and therefore de minimis.[72] In addition, this director, a prominent tenured professor at the Georgetown University Law Center, had a relationship with an executive officer of MacAndrews & Forbes since the executive was on the Georgetown Board of Visitors and had offered this professor a seat on the board of MacAndrews & Forbes subsequent to the Worldwide board approving the merger.[73] The Court found that this relationship did not disturb the director's independence.

Finally, a third director had worked with Ronald Perelman while employed at Citibank during the 1990s but had no business relationship with Perelman between 1996 and 2007, the year she became a Worldwide board member.[74] Also, between 2007 and 2008, the director performed advisory work for a company partially owned by MacAndrews & Forbes.[75] The company paid the advisory firm $100,000, an amount deemed to be immaterial to the advisory firm and the director. [76]

In affirming the Chancery Court's determination of independence, the Delaware Supreme Court explicitly noted that "the Court of Chancery applied well-established Delaware legal principles."[77] To explain why these relationships did not disturb the independence of the committee members, the court provided the following summary of what it is looking for, especially in terms of materiality, in its independence review:

> To show that a director is not independent, a plaintiff must demonstrate that the director is beholden to the controlling party or so under [the controller's]

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66. *Id.* at 645.
67. *Kahn*, 88 A.3d at 643.
68. *Id.* at 643.
69. *Id.* at 647.
70. *Id.* at 654 n.40.
71. *Id.* at 647. While not clear in the fact pattern provided by the *Kahn* opinion, Professor Dinh was kind enough to clarify the actual relationship between his firm, Bancroft, PLLC, and MacAndrew & Forbes.
72. *Kahn*, 88 A.3d at 647.
73. *Id.*
74. *Id.* at 648.
75. *Id.*
76. *Id.* at 648.
77. *Kahn*, 88 A.3d at 648.

> influence that [the director's] discretion would be sterilized. Bare allegations that directors are friendly with, travel in the same social circles as, or have past business relationships with the proponent of a transaction or the person they are investigating are not enough to rebut the presumption of independence.
>
> A plaintiff seeking to show that a director was not independent must satisfy a *materiality standard*. The court must conclude that the director in question had ties to the person whose proposal or actions he or she is evaluating that are sufficiently substantial that he or she could not objectively discharge his or her fiduciary duties. Consistent with that predicate materiality requirement, the existence of some financial ties between the interested party and the director, without more, is not disqualifying. The inquiry must be whether, applying a subjective standard, those ties were material, in the sense that the alleged ties could have affected the impartiality of the individual director.[78]

In addition, the court affirmed that the determination of director independence can be made at summary judgment without having to wait for trial.[79]

3. The Special Committee is Empowered to Freely Select Its Own Advisors and to Say "No" Definitively[80]

The court found that the Special Committee was empowered to hire its own legal counsel and financial advisor.[81] The qualifications of these advisors were not contested.[82] In addition, it was undisputed that the Special Committee was empowered to evaluate the offer and negotiate its terms with the controlling shareholder.[83] This negotiating power was accompanied by the clear authority to say no to the controlling shareholder without fear that the controlling shareholder would retaliate by making a tender offer directly to the minority shareholders.[84]

At this point we know that the committee is independent. It has the authority and power to negotiate on behalf of minority shareholders to achieve a fair result. What we still need to discover is how well informed the committee was in regard to fair price and how well it performed its negotiations on behalf of the minority shareholders to achieve such a price. This, as described below, requires a *substantive* review of the result and is the key to an entire fairness standard of review.

4. The Special Committee Meets Its Duty of Care in Negotiating a Fair Price[85]

The court first noted that McAndrews & Forbes, including dual employees, were screened off from the Special Committee during the negotiations, helping to ensure the "process replicated arm's-length negotiations with a third party." [86] It was also noted that

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78. *Id.* at 649. Of course, it is beyond the scope of this Commentary to opine on the Delaware Supreme Court's approach to independence or how well it applied its law of independence to the facts.

79. *Id.*

80. *Id.* at 645.

81. *Id.* at 650.

82. *Kahn*, 88 A.3d at 650.

83. *Id.*

84. *Id.* at 650–51.

85. *Id.* at 645.

86. *Id.* at 651.

during the process of negotiating, the committee met eight times.[87] Most importantly, the court did an extensive review of how the committee became informed of the company's fair value.[88] The court noted that the committee and the financial advisor had access to Worldwide's business segments' old and new financial projections.[89] The financial advisor valued Worldwide using a variety of accepted methods.[90] The $24 per share initial offer that MacAndrews & Forbes made, fell within—though at the low end of—the range of fair values generated by all the valuation methods utilized by the financial advisor.[91] The committee also solicited the financial advisor's opinion on potential strategic alternatives that would require the controlling shareholder to sell its stake in the company.[92] The financial advisor concluded that such strategic alternatives, if possible, would not provide extra value to the minority shareholders.[93]

Yet, to become informed and achieve a fair price for the minority shareholders, there was one more step the committee needed to take—active negotiation with the controlling shareholder. The committee counter-offered at $30 per share, an admittedly aggressive price, and settled at $25 in the face of a continued decline in the company's financial performance, and fears that a slowing U.S. economy would negatively affect its future performance.[94]

In sum, the court was satisfied with the result on a *substantive* basis. The price fell within the fair value range based on multiple valuations. Then the negotiation process adequately bumped the price up in a relatively poor economic environment. This type of judicial review is no different than what would have been done under an entire fairness standard of review. As the court noted, for purposes of burden shifting, *the defendants had met their burden of proof under an entire fairness standard of review*.[95]

5. The Vote of the Minority Is Informed [96]*; and 6. There Is No Coercion of the Minority*[97]

To complete the deal and get the benefit of the business judgment rule, the informed, uncoerced vote of the minority is required. This was achieved by a proxy statement that provided all the information necessary for the minority shareholders to vote on the freeze-out merger, including the processes that the committee went through to negotiate the transaction.[98] The plaintiffs did not dispute that the vote was informed.[99] The merger was approved by more than 65% of the minority shareholders.[100] There was no evidence of coercion and plaintiffs did not dispute this.[101]

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87. *Kahn*, 88 A.3d at 651.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 652.
92. *Kahn*, 88 A.3d at 651.
93. *Id.*
94. *Id.* at 652.
95. *Id.* at 646.
96. *Id.* at 645.
97. *Kahn*, 88 A.3d at 645.
98. *Id.* at 653–54.
99. *Id.* at 654.
100. *Id.*
101. *Id.* at 653–54.

B. Interpreting the Six Requirements

If we divide the six requirements of *Kahn* into two groups, the first four belonging to one group and the last two belonging to another, then a comparison with an entire fairness standard of review becomes clear. Meeting the first four requirements allows plaintiffs to demonstrate that they have met their burden of proof for purposes of burden shifting under a traditional entire fairness review.[102] As stated by the *Kahn* court:

> [D]eciding whether an independent committee was effective in negotiating a price is a process so fact-intensive and inextricably intertwined with the merits of an entire fairness review (fair dealing and fair price) that a pretrial determination of burden shifting is often impossible. Here, however, the Defendants have successfully established a record of independent committee effectiveness and process that warranted a grant of summary judgment entitling them to a burden shift prior to trial.[103]

However, meeting the first four requirements does not create a safe harbor for defendants from continued judicial scrutiny.[104] Instead, the focus of judicial scrutiny switches from the independent committee to the shareholder vote and making sure the shareholders were informed and not the victims of coercion. If these two requirements can be met, then the review for the fairness of the substantive result has ended and the litigation may also be ended by the granting of summary judgment. This is the key distinction between a traditional entire fairness review and the six requirements of *Kahn*.

V. THE RATIONALE FOR THE SIX REQUIREMENTS OF *KAHN*

It is critical to note that meeting *Kahn*'s six requirements and thereby receiving the protections of the business judgment rule is no panacea for avoiding the onerous process of judicial scrutiny and discovery that the defendants face in a challenged freeze-out merger. According to the Delaware Supreme Court in *Kahn*:

> The Appellants received more than 100,000 pages of documents, and deposed all four Special Committee members, their financial advisors, and senior executives of MacAndrews and MFW. After eighteen months of discovery, the Court of Chancery found that the Appellants offered no evidence to create a triable issue of fact with regard to: (1) the Special Committee's independence; (2) the Special Committee's power to retain independent advisors and to say no definitively; (3) the Special Committee's due care in approving the Merger; (4) whether the majority-of-the-minority vote was fully informed; and (5) whether the minority vote was uncoerced.[105]

Thus, even though the defendants avoided trial and were granted summary judgment, the defendants' litigation burden was still extremely heavy. As a result, one way to understand *Kahn* is that it provides an eclectic roadmap for satisfying the equivalent of entire fairness

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102. *Kahn*, 88 A.3d at 653.

103. *Id.* at 646.

104. *Id.* ("Stated differently, unless both procedural protections for the minority stockholders are established prior to trial, the ultimate judicial scrutiny of controller buyouts will continue to be the entire fairness standard of review.").

105. *Id.* at 665, 654 n.40.

in a freeze-out merger, but the process still requires that the transaction be subject to extensive judicial scrutiny and discovery.

Nevertheless, even though the defendants receive only a marginal reduction in their litigation burden, it is important to note that the rationale for the dual protection merger structure is to discourage frivolous lawsuits and the paying off of plaintiffs' attorneys to end these suits. Somewhat puzzling is that the *Kahn* opinion does not discuss this rationale. Rather, it is found in the underlying Chancery Court case, *MFW*, and most importantly, in a prior Chancery Court opinion also authored by Leo Strine, *In re Cox*.[106]

In *MFW*, Chancellor Strine describes freeze-out mergers' inherent problem: the defendants are locked into an entire fairness standard of review with no way of escape:

> [D]efendants can cite to empirical evidence showing that the *absence of* a legally recognized transaction structure that can invoke the business judgment rule standard of review has resulted not in litigation that generates tangible positive results for minority stockholders in the form of additional money in their pockets, but in litigation that is settled for fees because there is no practical way of getting the case dismissed at the pleading stage and the costs of discovery and entanglement in multiyear litigation exceed the costs of paying attorneys' fees.[107]

Chancellor Strine no doubt based this provocative statement on his own empirical observations from the bench but also on a compelling article by Elliott Weiss and Lawrence White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*.[108] In their Article, Weiss and White empirically demonstrate that the efforts of plaintiffs' attorneys in freeze-out merger litigation provide little in terms of "valued added" for stockholders but does result in significant fees for the attorneys.[109] The result is a tax (in the form of the fees) on freeze-out mergers that is absorbed by the controlling shareholder.[110] This tax may lead to a social welfare loss if it discourages controlling shareholders from entering into such mergers.[111]

It should be noted that the Weiss and White study most likely underestimates the current problem of frivolous lawsuits in merger deals and freeze-out mergers in particular. In their study, Weiss and White utilized a sample with merger deal values of over $100 million and found that only 104 of the 564 mergers, or 18%, were challenged over a three-year time period from 1999 to 2001.[112] However, that percentage has gone up dramatically over time. Cornerstone Research reported that by 2007, 44% of all merger deals valued over $100 million were challenged in court and by 2013, it was up to 94% after first reaching the 90% mark in 2010.[113]

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106. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 606 (Del. Ch. 2005).

107. *In re* MFW S'holders Litig, 67 A.3d 496, 525 (Del. Ch. 2013) (emphasis added).

108. *Id*. (citing Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions,* 57 VAND. L. REV. 1797 (2004)).

109. *Id.* at 534 (citing Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions,* 57 VAND. L. REV. 1797, 1856–62 (2004)).

110. Subramanian, *supra* note 1, at 45.

111. *Id.*

112. The sample merger deal values were taken from the three-year time period of 1999 through 2001. Weiss & White, *supra* note 9, at 1825. Of the 104 challenged mergers, 31 were freeze-out mergers. *Id.* at 1831–33.

113. Olga Koumrian, *Shareholder Litigation Involving Mergers and Acquisitions*, CORNERSTONE RESEARCH 1 (2013), *available at* http://www.cornerstone.com/getattachment/73882C85-ea7b-4b3c-a75f-

Vice Chancellor Strine provides an excellent description of the "ritualistic" process that plaintiffs' attorneys and the defendants will enter into once a freeze-out merger is announced:

> 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. . . .
>
> After the suits are filed, the Special Committee gets down to its work. . . .
>
> After the Special Committee completes its analysis of value and is ready to negotiate price and conditions, the activity heats up and the Special Committee begins bargaining—the so-called "first track." At some point in the negotiation process, the defendants—usually through the controller—open up a "second track" of negotiations with the plaintiffs' counsel. Increasingly, in this second track, the plaintiffs engage a financial advisor of their own, whose work is shared with the defendants in an effort to show that the controller's original offer was unfair and that a higher price should be paid in order to avoid a lawsuit . . . .
>
> At some point towards the very end of the first track, the controller frames the negotiation with the Special Committee in a manner so that it can assure itself that the Special Committee is likely to accept a particular price subject to the negotiation of an acceptable merger agreement and the delivery of a final fairness opinion from the Special Committee's financial advisor. When that price is known but before there is a definitive deal, defense counsel (who by now has a sense of the plaintiffs' bargaining position) makes its "final and best offer" to plaintiffs' counsel. The plaintiffs' counsel then accepts via a MOU [Memorandum of Understanding] that is subject to confirmatory discovery.[114]

At this point, plaintiffs' counsel is willing to settle for attorneys' fees because of the understanding that the plaintiff would most likely lose at trial and therefore, the expenditure of additional counsel resources would be non-economic.[115] This is so because at trial, the defendants would have evidence of negotiation, i.e., the bump-up in price from the initial offer, and a fairness opinion that backs-up the agreed-upon price.[116] Therefore, plaintiffs' attorneys are rationally compelled to pursue claims only up to the point where the Special Committee has agreed to this bumped-up price.[117]

As pointed out by then Vice Chancellor Strine, plaintiffs could not identify one "instance in the precise context of a case of this kind . . . of the plaintiffs' lawyers refusing to settle once a Special Committee has agreed on price with a controller." [118] Moreover, because the controlling shareholder understands this process beforehand, it has no incentive to initially put forth its best and final offer.[119] That price will be held in reserve in order to provide evidence that the independent committee had adequately negotiated on

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114. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 620–21 (Del. Ch. 2005). The Weiss & White study observed the pattern described above. Weiss & White, *supra* note 9, at 1822.

115. Weiss & White, *supra* note 9, at 1819–20.

116. *Id.* at 1819.

117. *Id.* at 1820.

118. *Cox*, 879 A.2d at 621.

119. Weiss & White, *supra* note 9, at 1816–17.

behalf of the minority shareholders.[120]

It cannot be expected that *Kahn*'s dual protection merger structure with its six requirements will do much to change this process. The burden of judicial scrutiny and discovery are still much too high for defendants. However, this does not mean that the dual protection merger structure cannot be enhanced to make it less burdensome for defendants, providing them with more leverage to resist settling frivolous lawsuits for attorneys' fees.

VI. WHERE DO WE GO FROM HERE?

If the *Kahn* holding only provided an eclectic roadmap for satisfying entire fairness as described above, then *Kahn* would not be terribly interesting. Fortunately, there is more to *Kahn* than that. The holding was extremely innovative because it allowed the standard of review to shift from entire fairness to the business judgment rule in a fact pattern where *Weinberger* was thought to have made this impossible.

Also encouraging is Vice Chancellor Laster's recent bench ruling in *Swomley v. Schlecht*,[121] which applied *Kahn* to the granting of a motion to dismiss. He granted the motion because the plaintiff did not actually allege gross negligence (recklessness) in the process of negotiating a fair price,[122] but what he referred to as "challenged judgmental factors of valuation."[123] In taking this approach, Vice Chancellor Laster appears to be challenging the *Kahn* Court's dicta that such allegations regarding valuation would have been enough to survive a motion to dismiss based on the facts of *Kahn*:[124]

> The Verified Consolidated Class Action Complaint would have survived a motion to dismiss under this new standard. First, the complaint alleged that Perelman's offer value[d] the company at just four times MFW's profits per share and five times 2010 pre-tax cash flow, and that these ratios were well below those calculated for recent similar transactions. Second, the complaint alleged that the final Merger price was two dollars per share lower than the trading price only about two months earlier. Third, the complaint alleged particularized facts indicating that MWF's share price was depressed at the times of Perelman's offer and the Merger announcement due to short-term factors such as MFW's acquisition of other entities and Standard & Poor's downgrading of the United States' creditworthiness. Fourth, the complaint alleged that commentators viewed both Perelman's initial $24 per share offer and the final $25 per share Merger price as being surprisingly low. These allegations about the sufficiency of the price call into question the adequacy of the Special Committee's negotiations, thereby necessitating discovery on all of the new prerequisites to the application of the business judgment rule.[125]

If Vice Chancellor Laster's approach in *Swomley* does not hold up under eventual Supreme Court review, then *Kahn*'s innovation can only be considered the first step in taming frivolous lawsuits in the world of freeze-out mergers. Given this innovation, the

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120. *Id.*
121. Swomley v. Schlecht, C.A. No. 9355-VCL, 66:17–68:14 (Del. Ch. Aug. 27, 2014) (Transcript).
122. *Id.*
123. *Id.*
124. *Id.*
125. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 645 n.14 (Del. 2014).

issue becomes whether the Delaware courts will allow the dual protection merger structure to evolve so that defendants can gain the protections of the business judgment rule at an even earlier stage of freeze-out litigation. If not, then the burden of this litigation will continue to encourage defendants to settle for attorneys' fees as soon as possible, as well as encourage plaintiffs' attorneys to file a lawsuit in every freeze-out merger, whether or not the lawsuit is meritorious.

If the Delaware Courts want the dual protection merger structure to have a significant effect on deterring frivolous lawsuits, then the issue becomes how the dual protection merger structure can be enhanced to shift the balance of power between plaintiffs' attorneys and defendants in the litigation process without sacrificing the economic interests of minority shareholders. This, of course, is easier said than done. Perhaps the best approach to take in trying to accomplish this goal is to find one or more ways to enhance the negotiation process such that it gives the minority shareholders a better chance, on average, of getting a higher price. This means finding ways to improve on the current structure that uses a Special Committee of independent board members to negotiate on behalf of minority shareholders.

The idea proposed here—an idea that is meant to be the starting point in the discussion and not the definitive answer—is to modify the dual protection merger structure by having the independent and disinterested Special Committee hire an independent third party vendor who specializes in negotiating transactions. Moreover, a significant part of the vendor's compensation would be a function of the price received. If handled in this manner, minority shareholders can be assured that professionals who share a common economic interest will handle the negotiations. The higher the price, the better it is for both minority shareholders and the vendor, not board members who, while adequately advised by outside financial advisors and counsel, may or may not have the required expertise or incentive to negotiate the best price for minority shareholders.

The validity of this transactional structure would be greatly enhanced if it were incorporated into the bylaws of the corporation prior to the transaction. Such a bylaw is to be interpreted as a legal contract between the corporation and shareholders consistent with the recent Delaware Supreme Court decision in *ATP Tour, Inc. v. Deutscher Tennis Bund*.[126] Given the presence of a controlling shareholder who may use the bylaw for an inequitable purpose,[127] a majority of the minority shareholders would need to approve the bylaw to pass judicial scrutiny.

Once agreement on the sale price is reached between the third party vendor and the controlling shareholder, the Special Committee would need to approve the agreement. If an informed Special Committee and the full board of directors give approval[128] and a majority of the minority shareholders, "provided they are adequately informed," approve the transaction, then the Special Committee's decision to approve the merger agreement would be subject to a business judgment rule review.

While it is true the negotiating process is being delegated to a third party vendor, the Special Committee would not be abdicating its board duties but simply making different

126. ATP Tour, Inc. v. Deutscher Tennis Bund, 91 A.3d 554, 558 (Del. 2014).

127. *Id.* at 558 ("Bylaws that may otherwise be facially valid will not be enforced if adopted or used for an inequitable purpose.").

128. Evidence of how informed the board was when it approved the freeze-out price can most likely be found in the disclosure document provided minority shareholders.

types of decisions for the benefit of minority shareholders. First, the decision to hire a third party vendor because it believes that it can get a better price for minority shareholders than it could working on its own. Second, the hiring of what it believes to be the best third-party vendor to negotiate the transaction. Third, the approval of the price negotiated by a third-party vendor.

By using this enhanced dual protection merger structure,[129] or whatever process the courts ultimately adopt, defendants may be allowed the protections of the business judgment rule at a relatively early stage in the litigation. It also may allow defendants to avoid a substantive review of the transaction under requirement number four of *Kahn*, "the Special Committee meets its duty of care in negotiating a fair price,"[130] as it is no longer required. At this point, plaintiff shareholders can still challenge the transaction but under the business judgment rule. As a result, defendants have a reasonable opportunity to avoid being pressured into paying attorneys' fees in frivolous lawsuits, perhaps even garnering dismissal on the pleadings, if the Special Committee's independence is not challenged. At the same time, the minority shareholders might not only be able to get a fair price but perhaps a better price in a freeze-out merger.[131]

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129. While it is beyond the scope of this Commentary, such a process, or a similar process, could potentially be used to shift the standard of review from the *Revlon* duty to the business judgment rule when plaintiffs are seeking injunctive relief in a takeover transaction.

130. *Kahn*, 88 A.3d at 645. Alternatively, if acceptable to both the controlling shareholder and minority shareholders, perhaps a market driven auction process can be utilized to establish fair price. Faith Stevelman recommends such an auction process but only if the controller "has agreed to be a seller rather than a buyer if its bid was bettered by a third party." Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 BUS. LAW. 775, 790–91 (2007). Unfortunately, agreeing to this particular auction approach is quite risky for the controller as it may have no intention of relinquishing control even at a significant premium to market.

131. There has been significant movement to apply the dual protection structure to a unilateral two-step tender offer freeze-out. *See generally In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397 (Del. Ch. 2010) (explaining the conflicts of the standards of review). A unilateral two-step tender offer freeze-out "refers to a going-private transaction in which a controller unilaterally launches a first-step tender offer and commits to eliminate any remaining stockholders through a second-step short-form merger." *In re* CNX Gas Corp. S'holders Litig., 2010 Del. Ch. LEXIS 139, at *139 n.1 (Del. Ch. 2010). It is notable that the recently revised DEL. GEN. CORP. L. § 251(h), which allows interested shareholders, including controlling shareholders, to proceed with a back-end merger via a tender offer without a shareholder vote, does not relieve the decision to enter into a unilateral two-step freeze-out from scrutiny under an entire fairness standard of review. Unlike a short-form merger, "[t]he amendments do not change the fiduciary duties of directors in connection with mergers effected pursuant to Section 251(h) or the level of judicial scrutiny that will apply to the decision to enter into such a merger agreement, each of which will be determined based on the common law of fiduciary duty, including the duty of loyalty." Synopsis, 2013 DE H.B. 329 (July 15, 2014).