IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE CNX GAS CORPORATION SHAREHOLDERS LITIGATION	)	CONSOLIDATED C.A. No. 5377-VCL

MEMORANDUM OPINION

Date Submitted: June 25, 2010
Date Decided: July 5, 2010

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LASTER, Vice Chancellor.

By opinion dated May 26, 2010 (the "Injunction Decision"), I denied the plaintiffs' motion for a preliminary injunction against a controller's unilateral two-step freeze-out.[1] I rejected the defendants' position on the appropriate standard of review and held that the transaction would be reviewed for entire fairness under the unified standard articulated in *In re Cox Communications, Inc. Shareholders Litigation*, 879 A.2d 604 (Del. Ch. 2005). The defendants have applied to certify the Injunction Decision for interlocutory appeal (the "Application" or "App."). I grant the Application.

I. FACTUAL BACKGROUND

The facts remain as described in the Injunction Decision, except for the successful completion of the freeze-out. On May 27, 2010, CONSOL Energy, Inc. ("CONSOL"), the controller, announced that its first-step tender offer had expired the previous day with stockholders of CNX Gas Corporation ("CNX Gas"), the target, having tendered or

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[1] The term "unilateral two-step 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. The term "negotiated two-step freeze-out" refers to the same transactional structure when effected pursuant to an agreement between the controller and the subsidiary. The term "single-step freeze-out merger" refers to a long-form merger.

M&A argot yields a variety of terms for transactions that eliminate the minority float, including squeeze-out, freeze-out, buy-out, buy-in, and the more generic going-private (or go-private) transaction. The Injunction Decision and this opinion use "freeze-out" because that term has been employed widely by scholars and practitioners. For titular examples, see Martin Lipton & Erica H. Steinberger, *Takeovers & Freezeouts* (2009); Guhan Subramanian, *Post*-Siliconix *Freeze-Outs: Theory and Evidence*, 36 J. Legal Stud. 1 (2007); Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 Bus. Law. 25 (2005); Guhan Subramanian, *Fixing Freezeouts*, 115 Yale L.J. 2 (2005).

agreed irrevocably to deliver 24,006,706 shares of common stock. This figure represented approximately 95% of the minority shares. Only 1,269,411 shares remained outstanding. On June 1, CONSOL announced that it had effected the second-step short-form merger to eliminate the remaining minority shares. On June 4, CONSOL and its three representatives on the CNX Gas board filed the Application.

II. LEGAL ANALYSIS

The Application seeks interlocutory appellate review of the appropriate standard of review for a controller's unilateral two-step freeze-out. Similar applications have been denied on at least two occasions. *See Next Level Commc'ns, Inc. v. Motorola, Inc.*, 817 A.2d 804, 2003 WL 826015 (Del. Feb. 27, 2003) (ORDER) (affirming Court of Chancery's decision not to certify interlocutory appeal from denial of injunction under *Pure Resources* test); *In re Pure Res., Inc. S'holders Litig.*, 812 A.2d 224, 2002 WL 31304145 (Del. Oct. 10, 2002) (ORDER) (affirming Court of Chancery's decision not to certify interlocutory appeal). The current state of our law warrants interlocutory review.

A. The Defendants Have Standing To Appeal From The Injunction Decision.

As a threshold matter, the defendants have standing to appeal the Injunction Decision. "As a general rule, the prevailing party may not appeal a decision in its favor." *Hercules Inc. v. AIU Ins. Co.*, 783 A.2d 1275, 1277 (Del. 2000) (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980)). In the Injunction Decision, I ruled in the defendants' favor by denying the plaintiffs' motion for a preliminary injunction.

There are, however, two exceptions to the general rule:

> First, a party is aggrieved by a favorable judgment, and may appeal, if that party did not receive all of the relief that was sought. Second, a prevailing party is aggrieved, and may appeal from a judgment in its favor, if it includes a collateral adverse ruling that can serve as a basis for the bars of res judicata, collateral estoppel, or law of the case in the same or other litigation.

Id. (citations omitted). The second exception applies here because the Injunction Decision's analysis of the applicable standard of review would govern as law of the case going forward.

"[T]he doctrine of the law of the case normally requires that matters previously ruled upon by the same court be put to rest." *Frank G.W. v. Carol M.W.*, 457 A.2d 715, 718 (Del. 1983).

> At the trial court level, the doctrine of the law of the case is little more than a management practice to permit logical progression toward judgment. Prejudgment orders remain interlocutory and can be reconsidered at any time, but efficient disposition of the case demands that each stage of the litigation build on the last, and not afford an opportunity to reargue every previous ruling.

Siegman v. Columbia Pictures Entm't, Inc., 1993 WL 10969, at *3 (Del. Ch. Jan. 15, 1993) (quoting 1B Moore's Federal Practice ¶ 0.404[1], at 117-18 (1992)). Although I could revisit a prior interlocutory ruling like the Injunction Decision, as a practical matter that ruling would govern the case absent a "compelling reason" to disturb it. *See Zirn v. VLI Corp.*, 1994 WL 548938, at *2 (Del. Ch. Sep. 23, 1994) (Allen, C.) ("Once a matter has been addressed in a procedurally appropriate way by a court, it is generally held to be the law of that case and will not be disturbed by that court unless compelling reason to do so appears."); *see also Odyssey Partners, L.P. v. Fleming Companies, Inc.*, 735 A.2d 386,

415 (Del. Ch. 1999) (treating prior statement of the law from opinion denying motion to dismiss as law of the case for later stages).

The standard of review is pivotal in corporate litigation. "It is often of critical importance whether a particular decision is one to which the business judgment rule applies or the entire fairness rule applies." *Nixon v. Blackwell*, 626 A.2d 1366, 1376 (Del. 1993). Here, at the pleadings stage, the CONSOL defendants have filed a bare-bones, single-page motion to dismiss the complaint pursuant to Rule 12(b)(6). Assuming they make arguments similar to those addressed in the Injunction Decision, their prospects for dismissal are dim. Their motion would be fairly litigable under *In re Pure Resources, Inc. Shareholders Litigation*, 808 A.2d 421 (Del. Ch. 2002), and a likely winner under *In re Siliconix Inc. Shareholders Litigation*, 2001 WL 716787 (Del. Ch. June 19, 2001).

After the pleadings stage, if the Injunction Decision stands, the defendants will need to conduct discovery, retain experts, and prepare for trial with the expectation that entire fairness will govern. Absent burden-shifting, entire fairness places the burden of proof on the defendants. *E.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1222 (Del. 1999). Because a reviewing court conducts a detailed merits inquiry under the entire fairness test, and because the plaintiffs will pounce on any gaps in the defendants' proof, the defendants must prepare their case with particular thoroughness. The defendants also must decide whether to develop evidence that might shift the burden of proof on fairness, for example by showing that the minority-of-the-minority tender condition was effective

or that the potentially conflicted shares were not the dispositive swing shares.[2] The entire fairness standard likewise changes the parties' settlement leverage. *See Cox Commc'ns*, 879 A.2d at 605-06, 622, 632-33 (discussing incentives to settle an entire fairness case).

The implications of applying entire fairness review are sufficiently significant to provide the defendants with standing to appeal the Injunction Decision. This does not mean they can appeal as of right, only that they had standing to file the Application.

B. The Injunction Decision Meets The Criteria Of Supreme Court Rule 42.

Supreme Court Rule 42 governs interlocutory appeals. Rule 42(b) states: "No interlocutory appeal will be certified by the trial court or accepted by [the Supreme Court] unless the order of the trial court determines a substantial issue, establishes a legal right, and meets 1 or more of the following criteria. . . ." Under Rule 42(b)(i), one of the criteria is "[a]ny of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41." Rule 41(b) provides as follows:

> Without limiting the [Supreme Court's] discretion to hear proceedings on certification, the following illustrate reasons for accepting certification:

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[2] *See* Injunction Decision at 37 ("The defendants are free to argue at a later stage of the proceeding and on a fuller record that (i) the negotiations with T. Rowe Price were truly at arms' length and untainted by cross-ownership, and (ii) the majority-of-the-minority condition was effective."); *In re John Q. Hammons Hotels Inc. S'holder Litig.*, 2009 WL 3165613, at *14 n.48 (Del. Ch. Oct. 2, 2009) ("Although the procedural protections used in this case were not sufficient to invoke business judgment protection, they could have been sufficient to shift the burden of demonstrating entire fairness to plaintiffs."); *Cox Commc'ns*, 879 A.2d at 606, 644 (explaining that a controller that chose not to structure a transaction to obtain business judgment rule review under the unified standard could obtain a burden shift by using either a special committee or a majority-of-the-minority approval condition).

> (i) *Original question of law*. The question of law is of first instance in this State;
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> (ii) *Conflicting decisions*. The decisions of the trial courts are conflicting upon the question of law;
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> (iii) *Unsettled question*. The question of law relates to the constitutionality, construction, or application of a statute of this State which has not been, but should be, settled by the Court.

S. Ct. R. 41(b). The question of the standard of review for a controller's unilateral two-step freeze-out meets the Rule 41(b)(ii) test in that decisions of the trial court conflict. In addition, the importance of this question of first impression for the Delaware Supreme Court renders review appropriate by analogy to Rules 41(b)(i) and (iii). The Injunction Decision also determined a substantial issue and established a legal right.

1. The Decisions Of The Trial Court Conflict.

Court of Chancery decisions regarding a controller's unilateral two-step freeze-out conflict across multiple dimensions. The current doctrinal bramble results from the organic growth of common law jurisprudence over time, spurred by differing approaches to competing policies and efforts to apply analogous but distinguishable Supreme Court precedents. The time has come for specific high court guidance.

a. Conflict Over The Standard Of Review

Decisions of the trial court conflict over the standard of review that governs a controller's unilateral two-step freeze-out. At least three different standards of review have been applied. My discussion of the standards sets aside disclosure issues, because each standard assumes full disclosure of all material facts.

The Injunction Decision holds that entire fairness applies to a unilateral two-step freeze-out unless the transaction was structured to simulate arm's length third-party transactional approvals at both the board and stockholder levels. Injunction Decision at 27; *accord Cox Commc'ns*, 879 A.2d at 646; *cf. John Q. Hammons Hotels*, 2009 WL 3165613, at *10.[3] Consequently, if a first-step tender offer is both (i) recommended by a duly empowered special committee of independent directors and (ii) conditioned on the affirmative tender of a majority of the minority shares, then the business judgment standard of review presumptively applies. If either requirement is not met, then the transaction is reviewed for entire fairness. I refer to this approach as the "*Cox Communications* test."

A second line of Court of Chancery decisions holds that a unilateral two-step freeze-out will not be reviewed substantively if: (i) it is subject to a non-waivable majority of the minority tender condition; (ii) the controlling stockholder promises to consummate a prompt short-form merger at the same price if it obtains more than 90% of the shares; (iii) the controlling stockholder has made no retributive threats; and (iv) the independent directors on the target board have free rein and adequate time to react to the

[3] Two early Court of Chancery decisions also suggested that entire fairness review applies to a controller's unilateral two-step freeze-out. *See Joseph v. Shell Oil Co.*, 482 A.2d 335, 340 (Del. Ch. 1984); *Lewis v. Fuqua Indus.*, 1982 WL 8783, at *1 (Del. Ch. Feb. 16, 1982); *see generally* Injunction Decision at 20-22 (discussing *Joseph* and *Fuqua*); Letsou & Haas, *supra*, at 61-62 (same); Bruce L. Silverstein, *Judicial Valuation of Stock of a Delaware Corporation: The Legal Concept of "Fair Value"* 47-48 (October 21, 2003) (unpublished manuscript presented at the Corporate Theory Seminar on Valuation Principles in Corporate Litigation and M&A Transactions sponsored by the University of Pennsylvania Law School) (same).

tender offer. *Pure Res.*, 808 A.2d at 445; *accord In re Cox Radio, Inc. S'holders Litig.*, 2010 WL 1806616, *10-12 (Del. Ch. May 6, 2010); *Next Level Commc'ns, Inc. v. Motorola, Inc.*, 834 A.2d 828, 846 (Del. Ch. 2003). I refer to this approach as the "*Pure Resources* test."

A third line of Court of Chancery decisions holds that a unilateral two-step freeze-out will not be reviewed for entire fairness unless the offer is structurally coercive.[4] *See In re Aquila Inc. S'holders Litig.*, 805 A.2d 184, 190 (Del. Ch. 2002); *Siliconix*, 2001 WL 716787, at *6-8; *In re Life Techs., Inc. S'holders Litig.*, 1998 WL 1812280, at *1 (Del. Ch. Nov. 24, 1998) (TRANSCRIPT); *In re Ocean Drilling & Exploration Co. S'holders Litig.*, 1991 WL 70028, at *5 (Del. Ch. Apr. 30, 1991); *Lewis v. LFC Holding Corp.*, 1985 WL 11554, at *6 (Del. Ch. Apr. 4, 1985) (applying Pennsylvania law); *Lewis v. Charan Indus., Inc.*, 1984 WL 8257, at *4 (Del. Ch. Sept. 20, 1984). I refer to this approach as the "*Siliconix* test."

The choice among standards of review goes beyond semantics. A number of transactions that passed muster under the *Siliconix* test would not satisfy the *Pure Resources* test or the *Cox Communications* test.

- The freeze-out that the *Siliconix* court declined to review would fail both later tests because the controller did not commit to a prompt back-end merger; it "stated that it

[4] The concept of structural coercion refers to "a wrongful threat that has the effect of forcing stockholders to tender at the wrong price to avoid an even worse fate later on." *Pure Res.*, 808 A.2d at 438. The threat can be overt, as in the form of a two-tiered, front-loaded offer, or it can be express, as when a controller "threatens to take action after the tender offer that is harmful to the remaining minority (*e.g.* to seek affirmatively to delist the company's shares)." *Id.* at 438 n.26.

intended to effect a short-form merger . . ., but it noted that it [was] not required to do so and that there might be circumstances under which it would not do so." 2001 WL 716787, at *4. Heading in the opposite direction from the route taken by the later tests, the *Siliconix* court treated the lack of a back-end commitment as a reason *not* to review the transaction for entire fairness because the two transactions could be treated as "separate events." *Id.* at *8 n.35. The *Pure Resources* and *Cox Communications* tests require the controller to commit to the back-end merger and subject a unilateral two-step freeze-out to entire fairness review if the controller tries to keep the two phases of the transaction separate.

- The freeze-out that the *Aquila* court declined to review would fail both more stringent tests because the target board lacked any independent directors. 805 A.2d at 186. The target board did not attempt to negotiate with the controller or make a recommendation on how to tender; it merely hired an investment banker and disseminated the banker's analysis. *Id.* at 191. The controller in *Aquila* therefore could not have satisfied its *Pure Resources* duty "to permit the independent directors on the target board both free rein and adequate time to react to the tender offer." 808 A.2d at 445. The *Aquila* transaction also failed to receive an affirmative recommendation from a duly empowered special committee, as required by the *Cox Communications* test.

- The freeze-out that the *Ocean Drilling* court declined to review would fail both more stringent tests because the controller did not commit irrevocably to a back-end merger, stating only that it intended to pursue one if it acquired 90% of the outstanding shares. 1991 WL 70028, at *5. The special committee in *Ocean Drilling* also recommended against the transaction, which is insufficient under the *Cox Communications* test.

Even the transaction that the *Pure Resources* court declined to review likely would not satisfy the *Cox Communications* test because the controller in *Pure Resources* restricted the special committee's ability to respond to the controller's offer. *See* 808 A.2d at 446.

The existence of conflicting standards flows in part from the nature of the common law process. The Court of Chancery decisions developed on a case-by-case basis, evolving from non-review under *Siliconix* to a hybrid standard under *Pure Resources* to the unified standard of *Cox Communications*.

The conflicting standards also result from the absence of Delaware Supreme Court precedent directly addressing a unilateral two-step freeze-out. The Supreme Court has reviewed single-step freeze-out mergers on multiple occasions and held consistently that they were subject to entire fairness review.[5] The Supreme Court likewise has reviewed a negotiated two-step freeze-out and held that it was subject to entire fairness review.[6]

At the same time, the Delaware Supreme Court has described a controller's tender offer as a voluntary transaction in which the offeror generally has no obligation to pay a fair price. *Solomon v. Pathe Communications Corp.*, 672 A.2d 35, 39-40 (Del. 1996) [hereinafter, "*Solomon II*"]; *accord Pfeffer v. Redstone*, 965 A.2d 676, 684 (Del. 2009). Although the Supreme Court has never applied this rule to a unilateral two-step freeze-out, its language did not exclude that possibility. In addition, the Supreme Court has held that a short-form merger is not subject to review for entire fairness. *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 248 (Del. 2001). Again the Supreme Court did not

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[5] *See, e.g.*, *Emerald Partners v. Berlin*, 726 A.2d 1215, 1221 (Del. 1999), *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985); *Weinberger v. UOP, Inc.*, 475 A.2d 701, 710 (Del. 1983).

[6] *Kahn v. Lynch Commc'n Sys., Inc.*, 638 A.2d 1110, 1111-12 (Del. 1994) [hereinafter, "*Lynch*"] (requiring controlling stockholder to prove that the agreed-upon "tender offer and cash-out merger" were entirely fair); *accord In re Revlon, Inc. S'holders Litig.*, 990 A.2d 940, 956-57 (Del. Ch. 2010); *In re Emerging Commc'ns S'holders Litig.*, 2004 WL 1305745, at *9 (Del. Ch. May 3, 2004); *In re Unocal Exploration Corp.*, 793 A.2d 329, 338 n.26 (Del. Ch. 2000); *Andra v. Blount*, 772 A.2d 183, 195 n.30 (Del. Ch. 2000); *Hartley v. Peapod, Inc.*, C.A. No. 19025 at 40 (Del. Ch. Feb. 27, 2002) (TRANSCRIPT); *see generally* 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 9.36A (3d ed. & 2010 Supp.) (describing *Peapod* ruling).

apply this rule in the context of a unilateral two-step freeze-out, and the Supreme Court has subjected a negotiated two-step freeze-out to entire fairness review, *see Lynch*, 638 A.2d at 1111-12, but the language of *Glassman* did not exclude unilateral two-step freeze-outs.

The Delaware Supreme Court precedents point in different directions and imply that different policies should take precedence. The Court of Chancery decisions that have attempted to apply the Supreme Court precedents have reached different conclusions regarding the appropriate standard of review. This conflict warrants certification so that the Supreme Court can clarify the law.

b. Conflict Over Inherent Coercion

Decisions of the trial court conflict over the degree to which a controller's unilateral two-step freeze-out is inherently coercive. The *Siliconix* line of cases does not recognize any possibility of inherent coercion when a controller implements a unilateral two-step freeze-out. The *Pure Resources* test and the *Cox Communications* test recognize some degree of inherent coercion but differ as to the degree of procedural protections necessary to mitigate it.

In *Lynch*, the Delaware Supreme Court held that entire fairness always applies to a transaction with a controlling or dominating shareholder, "because the unchanging nature of the underlying 'interested' transaction requires careful scrutiny." 638 A.2d at 1116. The Supreme Court rejected the notion that stockholders could act freely and independently in the face of a controller:

> Parent subsidiary mergers . . . are proposed by a party that controls, and will continue to control, the corporation, whether or not the minority stockholders vote to approve or reject the transaction. The controlling stockholder relationship has the potential to influence, however subtly, the . . . minority stockholders in a manner that is not likely to occur in a transaction with a noncontrolling party.
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> Even where no coercion is intended, shareholders . . . might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder. For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation. At the very least, the potential for that perception, and its possible impact upon a shareholder vote, could never be fully eliminated. Consequently, in a merger between the corporation and its controlling stockholder – even one negotiated by disinterested, independent directors – no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation.

Id. at 1116 (quoting *Citron v. E.I. Du Pont de Nemours & Co.*, 584 A.2d 490, 502 (Del. Ch. 1990)). The Court of Chancery has described the controller's influence as "inherent coercion." *Pure Res.*, 808 A.2d at 433.

Because of the threat of inherent coercion, the Delaware Supreme Court concluded in *Lynch* that a protective device such as independent committee approval or majority-of-the-minority stockholder approval cannot alter the standard of review. 638 A.2d at 1115. Entire fairness remains the operative standard, and approval by an independent committee or by a majority of the minority stockholders only shifts the burden of proof from the defendants to prove fairness to the plaintiffs to prove unfairness. *Id.* at 1116. As the *Cox Communications* decision observes, *Lynch* did not address explicitly what standard of review would apply if a transaction was conditioned from the outset on *both* special committee approval *and* majority-of-the-minority approval. *See Cox Commc'ns*,

879 A.2d at 617; *but cf. Rosenblatt*, 483 A.2d at 937-39 (applying entire fairness review despite combination of arm's length negotiation, independent director approval, and majority-of-the-minority stockholder approval).

The *Lynch* court specifically considered the threat presented by a controller's ability to pursue a unilateral two-step freeze-out. The defendants in *Lynch* argued that the independent committee sufficiently replicated arm's length negotiations to shift the burden of proof to the defendants. The Delaware Supreme Court disagreed, focusing on the controller's threat to "proceed with an unfriendly tender offer at a lower price" if the committee did not agree to a negotiated transaction. 638 A.2d at 1113. The Supreme Court concluded that "the ability of the Committee effectively to negotiate at arm's length was compromised by [the controller's] threats to proceed with a hostile tender offer." *Id.* at 1121.

Court of Chancery decisions conflict over whether inherent coercion as recognized by *Lynch* exists when a controller proceeds with a unilateral two-step freeze-out. The *Siliconix* cases consistently rejected the concept and deemed it non-existent.[7] The

[7] *See, e.g.*, *Aquila*, 805 A.2d at 190 (following *Solomon II* and *Siliconix* in holding that controller's tender offer was voluntary and non-coercive); *Siliconix*, 2001 WL 716787, at *7 (holding that legal principles governing single-step freeze-out did not apply to unilateral two-step freeze-out); *Life Techs.*, 1998 WL 1812280, at *2 (holding that inherent coercion under *Lynch* did not apply to "a tender offer made directly to the stockholders of the subsidiary, which the stockholders were free to accept or reject"); *see also Ocean Drilling*, 1991 WL 70028, at *5 (pre-*Lynch* case applying restrictive view of coercion such that "a two-stage tender offer in which the buyer plans to freeze out non-tendering stockholders, giving them subordinated securities in the second stage, is coercive. . . . Also coercive is a tender offer structured so as to afford shareholders no practical choice but to tender for an unfair price or one at a fair price, but structured in

Siliconix cases took this view even when, as in *Lynch*, a controller failed to reach agreement with a special committee and then resorted to a unilateral tender offer.[8]

The *Pure Resources* line of cases, by contrast, recognized that inherent coercion can infect a unilateral two-step freeze-out. In *Pure Resources*, the Court of Chancery explained why the logic of *Lynch* applies equally to a controller's tender offer:

> [N]othing about the tender offer method of corporate acquisition makes the [controller's] retributive capabilities less daunting to minority stockholders. Indeed, many commentators would argue that the tender offer form is more coercive than a merger vote. In a merger vote, stockholders can vote no and still receive the transactional consideration if the merger prevails. In a tender offer, however, a non-tendering shareholder individually faces an uncertain fate. That stockholder could be one of the few who holds out, leaving herself in an even more thinly traded stock with little hope of liquidity and subject to a § 253 merger at a lower price or at the same price but at a later (and, given the time value of money, a less valuable) time. . . . For these reasons, some view tender offers as creating a prisoner's dilemma . . . . But whether or not one views tender offers as more coercive of shareholder choice than negotiated mergers with controlling stockholders, it is difficult to argue that tender offers are materially freer and more reliable measures of stockholder sentiment.

808 A.2d at 441-42 (footnotes omitted).

Having explained why the logic of inherent coercion applies equally to a controller's tender offer, the *Pure Resources* court identified other factors traditionally

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time so as to effectively deprive stockholders of the ability to choose [a] competing offer. . . .") (internal citations and quotations omitted).

[8] *See Siliconix*, 2001 WL 716787, at *3-4 (noting that controller made no-premium exchange offer after failing to reach agreement with special committee over premium cash offer); *see also Ocean Drilling*, 1991 WL 70028, at *1 (pre-*Lynch* case in which special committee rejected merger proposal as unfair and controller later proceeded with unilateral two-step freeze-out that committee recommended against).

relied upon to support fairness review of controller transactions that similarly apply to controller tender offers:

> The informational advantage that the controlling stockholder possesses is not any different. . . . The tender offer form provides no additional protection against this concern.
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> Furthermore, the tender offer method allows the controlling stockholder to time its offer and to put a bull rush on the target stockholders. . . .
>
> Likewise, one struggles to imagine why subsidiary directors would feel less constrained in reacting to a tender offer by a controlling stockholder than a negotiated merger proposal. Indeed, an arguably more obvious concern is that subsidiary directors might use the absence of a statutory role for them in the tender offer process to be less than aggressive in protecting minority interests, to wit, the edifying examples of subsidiary directors courageously taking no position on the merits of offers by a controlling stockholder[, or the] failure to demand the power to use the normal range of techniques available to a non-controlled board responding to a third-party tender offer.

Id. at 442-43.

There is yet another reason to think that inherent coercion per *Lynch* would infect a unilateral two-step freeze-out. *Lynch* held that inherent coercion exists in a negotiated two-step freeze-out in which the controller contractually binds itself to launch a first-step tender offer and effect a second-step short-form merger. Court of Chancery decisions have followed this rule and evaluated negotiated two-step freeze-outs under the entire fairness test.[9] In a unilateral two-step freeze-out, the controller "promises to consummate a prompt § 253 merger at the same price if it obtains more than 90% of the shares." *Pure Res.*, 808 A.2d at 445. It seems odd that inherent coercion exists when the second-step

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[9] *E.g.*, *Emerging Commc'ns*, 2004 WL 1305745, at *9; *see Revlon*, 990 A.2d at 956-57; *Unocal Exploration*, 793 A.2d at 338 n.26; *Andra*, 772 A.2d at 195 n.30.

commitment is guaranteed by contract yet does not exist when dependent on the controller's promise. In the abstract, one would think that the controller's promise would be less certain, more difficult to enforce, less likely to compensate for inherent coercion, and more worthy of closer judicial scrutiny.

The *Pure Resources* line of cases thus recognized that inherent coercion can infect a unilateral two-step freeze-out to the same degree (if not more) than a negotiated two-step freeze-out. The Injunction Decision and *Cox Communications* rest on the same premise. They conflict with *Pure Resources* only over the protections required to mitigate inherent coercion. It bears noting that the Injunction Decision, *Cox Communications*, and the *Pure Resources* line of cases implicitly conflict with *Lynch* by holding that a combination of protective devices can compensate sufficiently for inherent coercion to alter the standard of review. The *Siliconix* line of cases implicitly conflicts with *Lynch* by declining to recognize the threat of inherent coercion in a controller transaction.

The Court of Chancery decisions that have attempted to interpret the doctrine of inherent coercion have reached different conclusions regarding when it arises and whether it can be mitigated. These conflicts warrant certification so that the Delaware Supreme Court can more fully explain the doctrine.

c. Conflict Over The Role Of A Target Board

Decisions of the trial court conflict as to the degree to which a target board has a role in responding to a controller's tender offer. The *Siliconix* line of cases holds that the target board has no role. The *Pure Resources* line of cases holds that the target board has

an advisory role. The Injunction Decision holds that the target board has the same role as a board of directors responding to a third-party tender offer.

The *Siliconix* court best described the view that a target board has no role in responding to a controller's tender offer:

> [U]nder the corporation law, a board of directors which is given the critical role of initiating and recommending a merger to the shareholders (*see* 8 *Del. C.* § 251) traditionally has been accorded no statutory role whatsoever with respect to a public tender offer for even a controlling number of shares. This distinctive treatment of board power with respect to merger and tender offers is not satisfactorily explained by the observation that the corporation law statutes were basically designed in a period when large scale public tender offers were rarities; our statutes are too constantly and carefully massaged for such an explanation to account for much of the story. More likely, one would suppose, is that conceptual notion that tender offers essentially represent the sale of shareholders' separate property and such sales – even when aggregated into a single change in control transaction – require no "corporate" action and do not involve distinctly "corporate" interests.

2001 WL 716787, at *7. The *Siliconix* court saw no "statutory role" for a target board in either a third-party tender offer ("a public tender offer for even a controlling number of shares") or a controller's tender offer. *Id.*

The *Pure Resources* court initially agreed that "[t]ender offers are not addressed by the Delaware General Corporation Law" and observed that "no consent or involvement of the target board is statutorily mandated for tender offers." 808 A.2d at 437. The *Pure Resources* court then noted, however, that in the context of third-party tender offers, "the mere fact that the DGCL contemplates no role for target boards in tender offers does not, of itself, prevent a target board from impeding the consummation of a tender offer through extraordinary defensive measures, such as a poison pill . . . ."

Id. at 439-40. Indeed, in the landmark *Unocal* decision, the Delaware Supreme Court held that the target board had "both the *power and duty* to oppose a bid it perceived to be harmful to the corporate enterprise." *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 949 (Del. 1985) (emphasis added). The *Unocal* court later remarked that "the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source." *Id.* at 954. Rejecting the view that a board of directors should stand aside and allow stockholders to decide whether to tender their shares, the Supreme Court held that "a board of directors is not a passive instrumentality." *Id.* Rather, the board has a "clear duty to protect the corporate enterprise." *Id.* at 958.

Recognizing the prominence of the target board's role in responding to third party tender offers, the *Pure Resources* court found it "clear . . . that Delaware law has not regarded tender offers as involving a special transactional space, from which directors are altogether excluded from exercising substantial authority." 808 A.2d at 441. The *Pure Resources* court therefore required that the independent directors on the target board have free rein and adequate time to react to the tender offer. *Id.* at 445. The *Pure Resources* court nevertheless allowed the controller to limit a special committee's authority to respond to the tender offer, requiring at a minimum only that the committee be empowered to "hir[e] their own advisors, provid[e] the minority with a recommendation as to the advisability of the offer, and disclos[e] adequate information for the minority to make an informed judgment." *Id.* Under *Pure Resources*, the committee thus need only operate in an advisory role. In the current case, CONSOL relied on this language to

justify consistently refusing to grant the CNX Gas committee full board authority to respond to the tender offer and initially denying the committee authority to negotiate over the terms of the freeze-out.

The Injunction Decision holds that a special committee should be granted the same authority to respond to a controller's freeze-out that a target board would possess when responding to a third-party tender offer. Injunction Decision at 31-32. A controller that uses its influence over the target board to restrict the authority of the committee affirmatively chooses to stand on both sides of the transaction, thereby triggering entire fairness review. *Id*.

The Injunction Decision's approach rests on the premise of board-centrism that animates the General Corporation Law. *See* 8 *Del. C.* § 141(a). In each of its major decisions addressing target board responses to third-party tender offers, the Delaware Supreme Court commenced its analysis by citing Section 141(a) as the source of the board's power and authority to act.[10] To enable a controller to limit the Section 141(a) authority of a target board by restricting the delegation of authority to the special committee would seem to elevate the power of the stockholder majority (at least when

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[10] *See Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994) [hereinafter, "*QVC*"]; *Paramount Commc'ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989); *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988); *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334, 1341 (Del. 1987); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 179 (Del. 1986); *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1353 (Del. 1985); *Unocal*, 493 A.2d at 953. Section 141(a) legitimately could be cited, *contra Siliconix*, as a statutory provision that gives the board of directors a role in responding to tender offers.

control is held by one person) over the power of the board. Such an approach is contrary to Delaware law.[11] A legal regime that abandons board-centrism for controller tender offers appears more power-centric than board-centric. Delaware law would seem to call for a consistently board-centric approach.[12]

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[11] *See Hollinger Inc. v. Hollinger Int'l, Inc.*, 858 A.2d 342, 387 (Del. Ch. 2004) ("The reality is that controlling stockholders have no inalienable right to usurp the authority of boards of directors that they elect. That the majority of a company's voting power is concentrated in one stockholder does not mean that that stockholder must be given a veto over board decisions when such a veto would not also be afforded to dispersed stockholders who collectively own a majority of the votes."), *appeal refused*, 871 A.2d 1128, 2004 WL 1732185 (Del. 2004) (TABLE); *Paramount Commc'ns Inc. v. Time Inc.*, 1989 WL 79880, * 30 (Del. Ch. July 14, 1989) (Allen, C.) ("[T]he financial vitality of the corporation and the value of the company's shares is in the hands of the directors and managers of the firm. The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm."), *aff'd*, 571 A.2d 1140 (Del. 1990); *TW Servs., Inc. v. SWT Acquisition Corp.*, 1989 WL 20290, at *8 n.14 (Del. Ch. Mar. 2, 1989) (Allen, C.) ("[A] corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation, subject however to a fiduciary obligation."); *see generally* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging The Conceptual Divide*, 69 U. Chi. L. Rev. 1067, 1086 (2002) ("[C]ases such as *Moran v Household International, Inc*. and *Unocal* upheld the primacy of directorial power in [responding to tender offers] over fifteen years ago, leaving open only issues concerning the proper exercise of that authority in specific circumstances.") (footnotes omitted); Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 Del. J. Corp. L. 1, 27-29 (2002) (explaining the director-centric nature of Delaware law and the statutory, decisional, and policy-based justifications for the primacy of the target board's role in responding to tender offers).

[12] *See, e.g., McMullin v. Beran*, 765 A.2d 910, 916 (Del. 2000) ("One of the fundamental principles of the Delaware General Corporation Law statute is that the business affairs of a corporation are managed by or under the direction of its board of directors."); *Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291-92 (Del. 1998) ("One of the most basic tenets of Delaware corporate law is that the board of directors has the ultimate responsibility for managing the business and affairs of a corporation . . . .

The *Siliconix*, *Pure Resources*, and *Cox Communications* tests rest on differing notions about target board authority and the degree of board-centrism contemplated by Delaware law. Only the Delaware Supreme Court can choose among these divergent approaches.

d. A Non-Conflict: The Business Purpose Test

The Application contends that the Injunction Decision conflicts with other unilateral two-step freeze-out cases by implicitly adopting a business purpose test. App. at 13. The Application finds a business purpose test in the Injunction Decision's discussion of *Solomon II* and specifically in the observation that the controller in that case "was acting primarily in its role as a third-party lender." *Id.* (quoting Injunction Decision at 19). The Injunction Decision does not require an independent business purpose for a freeze-out.

For a short period between 1977 and 1983, the Delaware Supreme Court required that a controller establish an independent business purpose for a freeze-out, beyond eliminating the minority. *See Singer v. Magnavox Co.*, 380 A.2d 969, 980 (Del. 1977), *overruled by Weinberger*, 457 A.2d at 704. The Injunction Decision does not attempt to

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Section 141(a) . . . confers upon any newly elected board of directors *full* power to manage and direct the business and affairs of a Delaware corporation.") (internal citations omitted); *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984) ("A cardinal precept of the General Corporation Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation."); *see also C.A., Inc. v. AFSCME Employees Pension Plan*, 953 A.2d 227, 232 (Del. 2008) (holding that stockholders' statutorily mandated authority to amend bylaws is "not coextensive with the board's concurrent power and is limited by the board's management prerogatives under Section 141(a)").

resuscitate the business purpose test. The Injunction Decision instead attempts a contextualized analysis of controller tender offers in which not all such offers are regarded automatically as voluntary, non-coercive transactions. In its discussion of *Solomon II*, the Injunction Decision identifies reasons why the tender offer in that case did not present the threats or conflicts that would justify entire fairness review, including that the transaction was not a freeze-out, that the controller *qua* third party lender had independent contractual rights to foreclose on the value of the subsidiary, that the target board bargained for the tender offer, that the offer was not made unilaterally but rather pursuant to a negotiated agreement, and that the offeror engaged in other target-friendly actions, such as providing price support for the target's publicly held debt. Because of these factors, the Injunction Decision concluded that *Solomon II* does not support a blanket rule that all controller tender offers are voluntary and non-coercive, nor a blanket rule of non-review absent structural coercion for unilateral two-step freeze-outs.[13]

When reviewing two-step transactions that do not involve a controller, Delaware law does not ignore the transactional context in favor of a blanket rule. Arm's length, two-step transactions generally are end-stage transactions subject to enhanced scrutiny. *E.g.*, *In re Pennaco Energy, Inc.*, 787 A.2d 691, 705 (Del. Ch. 2001). Entire fairness can

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[13] *See* Injunction Decision at 16-23 (discussing *Solomon II*); *see also* Letsou & Haas, *supra*, 42-44, 57-68 (arguing that *Solomon II* does not provide support for *Siliconix*); Gilson & Gordon, *supra*, at 818 n.122 (same); Silverstein, *supra*, at 44-48 (same); Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 Bus. Law. 775, 818-22 (2007) (same); *cf.* Subramanian, *supra*, 36 J. Legal Stud. at 10-11 (concluding from freeze-out data that practitioners did not interpret *Solomon II* contemporaneously as applying to a controller's unilateral two-step freeze-out).

apply to an arm's length, two-step transaction if a breach of the duty of loyalty or duty of care is shown. *E.g., Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 361 (Del. 1993). Delaware law does not automatically decline to review the first-step tender offer absent structural coercion or regard appraisal as a stockholder's only remedy for the back-end merger. The Injunction Decision's analysis of *Solomon II* attempts to show that a similarly contextualized fiduciary analysis is warranted for two-step transactions involving a controller and that *Solomon II* should not be read to support a blanket rule of non-review. The Injunction Decision did not adopt a business purpose test and does not conflict with other Court of Chancery decisions in this regard.

2. The Standard Of Review Is A Significant Legal Issue Of First Impression For The Delaware Supreme Court.

In addition to the conflicts among trial court decisions, interlocutory review is warranted by analogy to Supreme Court Rules 41(b)(i) and (b)(iii). The former indicates that certification is appropriate for an "[o]riginal question of law." The latter indicates that certification is appropriate for a "question of law" if it relates to "the constitutionality, construction, or application of a statute of this State which has not been, but should be, settled by the Court." Both suggest that significant legal issues of first impression for the Delaware Supreme Court can be certified for interlocutory review.

The prospect of using a unilateral two-step freeze-out as a route around entire fairness review emerged nine years ago. In June 2001, the Court of Chancery issued its decision in *Siliconix*. Just one month later, the Delaware Supreme Court issued its

decision in *Glassman*. The two decisions together created a possible fairness-free path for controllers to follow. *See Pure Res.*, 808 A.2d at 437; Letsou & Haas, *supra*, at 48.

In the nine years since, the Delaware Supreme Court has not had the opportunity to address the *Siliconix* test. In the eight years since *Pure Resources*, the Supreme Court has not had the chance to examine the modified approach applied in that decision. In the five years since *Cox Communications*, the Supreme Court has not had the opportunity to consider the unified standard.

The standard of review for a controller's unilateral two-step freeze-out thus presents an issue of first impression for the Delaware Supreme Court. It is an issue with real-world consequences. In his study of post-*Siliconix* freeze-outs, Professor Guhan Subramanian found that stockholders received greater consideration in single-step freeze-outs and negotiated two-step freeze-outs than in unilateral two-step freeze-outs. Over the short run, calculated as the period from thirty days before to thirty days after announcement, completed negotiated freeze-outs generated cumulative abnormal returns of 36.6%, versus 14.9% for unilateral two-step freeze-outs. Over the longer run, calculated as the period from thirty days before to 250 days after announcement, completed negotiated freeze-outs generated cumulative abnormal returns of 50.6%, versus 18.2% for unilateral two-step freeze-outs. Subramanian, *supra*, 36 J. Legal Stud. at 23. Professor Subramanian noted that "[i]nterviews as well as informal conversations with New York City and Delaware lawyers indicate that [the finding of lower returns for stockholders in *Siliconix* deals] is consistent with practitioner experience." *Id.*

Controllers and their advisors take the governing legal regime into account when determining whether and how to proceed with a transaction. Professor Subramanian found that controllers moved decidedly towards unilateral two-step transactions after the blazing of the *Siliconix*-*Glassman* trail. *Id.* at 10-11.

These data raise policy questions. All else equal, a legal regime that makes it easier for controllers to freeze out stockholders will increase the number of transactions but result in lower premiums. Conversely, a legal regime that imposes greater procedural requirements will enable target stockholders to receive higher premiums but reduce the overall level of transactional activity. Either approach is legitimate and defensible. Either approach could result in the greatest aggregate benefits for stockholders, depending on the typical premium and overall level of deal activity.

Solomon II, *Siliconix*, and *Pure Resources* rely primarily on market forces, impose few procedural protections, and limit judicial review. All else equal, this approach should lead to more transactions and lower premiums. *Lynch* de-emphasizes market forces, encourages procedural protections, and relies heavily on judicial review. All else equal, this approach should lead to fewer transactions and higher premiums. Prominent commentators have suggested that *Siliconix* and *Pure Resources* may be too lenient towards controllers and under-protective of minority stockholders, while *Lynch* may be too strict and overprotective. They recommend a regime that applies the business judgment rule to a transaction that mimics third party transactional approvals, while allowing controllers the flexibility to employ fewer protections at the cost of some level

of fairness review.[14] This was the approach proposed in *Cox Communications* and applied in the Injunction Decision.

In other transactional settings, the Delaware Supreme Court has emphasized fiduciary duties and meaningful judicial review over *laissez-faire* deference to market forces. For true third-party deals, the Supreme Court opted for a regime that imposes a duty on target directors to seek out the best transaction reasonably available (which may be no transaction at all), empowers target fiduciaries to extract transaction-specific premiums, and reviews director conduct under the reasonableness test of enhanced scrutiny. *See QVC*, 637 A.2d at 48; *Revlon*, 506 A.2d at 182; *Unocal*, 493 A.2d at 954-57. For negotiated two-step freeze-outs and single-step freeze-outs, the Supreme Court opted for a regime that imposes fiduciary duties on the controller and the target directors, encourages the use of procedural protections, and reviews the transaction under the stringent entire fairness test. *Lynch*, 638 A.2d at 1117. Only the Supreme Court can determine definitively whether different policies, duties, and standards should govern unilateral two-step freeze-outs.

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[14] *See* Subramanian, *supra*, at 115 Yale L.J. at 63-64; Letsou & Haas, *supra*, at 81-94; Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. Pa. L. Rev. 785, 838-40 (2003); Bradley R. Aronstam, Timo Rehbock, & R. Franklin Balotti, *Delaware's Going-Private Dilemma: Fostering Protections for Minority Shareholders in the Wake of* Siliconix *and* Unocal Exploration, 58 Bus. Law. 519, 552-57 (2003).

Because the appropriate standard of review for unilateral two-step freeze-out presents a question of first impression for the Delaware Supreme Court and implicates fundamental issues of Delaware public policy, certification is appropriate.

3. The Injunction Decision Determined A Substantial Issue.

An interlocutory ruling determines a "substantial legal issue" for purposes of Rule 42(b) if it "relate[s] to the merits of the case," not to collateral matters such as discovery. *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 301 A.2d 87, 87 (Del. 1973); *see also Sprint Nextel Corp. v. iPCS, Inc.*, 2008 WL 2861717, at *1 (Del. Ch. July 22, 2008) ("The 'substantial issue' requirement is met when an interlocutory order decides a main question of law which relates to the merits of the case, and not to collateral matters.") (citation omitted); *In re Kent County Adequate Pub. Facilities Ordinances Litig.*, 2007 WL 2875204, at *2 (Del. Ch. Sept. 26, 2007) ("[A]n order, to be deemed to have resolved a 'substantial issue' under Supreme Court Rule 42, 'must address and resolve one or more substantive legal issues between the parties.'") (citation omitted).

As discussed in Part I, *supra*, the standard of review is a substantial issue. After the injunction decision in *Pure Resources*, and despite declining to certify an interlocutory appeal on other grounds, this Court held that a ruling on the standard of review for a unilateral two-step freeze-out determined a substantial issue. *Pure Res.*, 2002 WL 31357847, at *2. So it is here.

4. The Injunction Decision Established A Legal Right.

A "legal right is established where the Court determines an issue essential to the position of the parties regarding the merits of the case." *Kent County*, 2007 WL

2875204, at *2. In holding that entire fairness applied to CONSOL's unilateral two-step freeze-out, the Injunction Decision determined an issue essential to the position of the parties regarding the merits of the case.

The Injunction Decision also established a legal right by holding that CONSOL could close its unilateral two-step freeze-out, albeit at the risk of a potential damages award. *Cf. Sports Complex, Inc. v. Golt*, 647 A.2d 382, 1994 WL 267697, at *1 (Del. 1994) (TABLE) (holding that Superior Court, in denying motion for partial summary judgment, "clearly made a legal determination that strict liability is applicable to the matter in controversy and therefore determined a substantial issue and established the parties' legal rights on this issue"). If I had granted the plaintiffs' motion and enjoined the deal, then CONSOL would not have had the legal right to close. Recognizing the significance of an injunction ruling, federal law provides a party with an appeal as of right from the grant or denial of an injunction. 28 U.S.C. § 1292(a)(1) (2006). The absence of a similar rule under Delaware law demonstrates our preference for a case-by-case determination regarding the need for interlocutory appellate review, but the federal statute illustrates the importance of the injunction phase for parties' legal rights.

Viewed more broadly, the Injunction Decision established a legal right by affecting how parties structure freeze-out transactions to minimize the risk of an injunction or damages award.

> A judicial standard of review is a value-laden analytical instrument that reflects fundamental policy judgments. . . . [I]n essential respects, the standard of review defines the freedom of action (or, if you will, deference in the form of freedom from intrusion) that will be accorded to the persons who are subject to its reach.

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, 1295 (2001).

Until the Delaware Supreme Court addresses the standard of review for a unilateral two-step freeze-out, controllers and their advisors must take into account the possibility that their transactions will be reviewed by this court under the unified standard. The Injunction Decision thus affects the legal rights of controllers and minority stockholders by applying a standard of review under which minority stockholder claims can be dismissed on the pleadings if the business judgment rule applies, but also can proceed to a trial under the entire fairness standard of review (with or without burden shifting). The Supreme Court has accepted interlocutory appeals from preliminary injunction rulings where a transactional standard of review was at issue. *See, e.g.*, *Mills Acquisition Co.*, 559 A.2d at 1264; *Revlon*, 506 A.2d at 175-76; *Unocal*, 493 A.2d at 952-53. The need for a definitive ruling from the Supreme Court on unilateral two-step freeze-outs similarly calls for interlocutory review.

5. The Supreme Court, Rather Than This Court Or The Defendants, Should Frame The Analysis On Appeal.

Although styled as an application for an interlocutory appeal pursuant to Supreme Court Rule 42, the Application in fact seeks certification of a specific legal issue: "[A]re voluntary non-coercive tender offers made with full disclosure by controlling stockholders of Delaware corporations subject to entire fairness review?" App. at 1. In

this regard, the Application more closely resembles a motion to certify a question of law to the Supreme Court for decision pursuant to Supreme Court Rule 41.

Rule 41(a) provides as follows:

> Other Delaware courts may, on motion or sua sponte, certify to [the Supreme Court] for decision a question or questions of law arising in any case before it prior to the entry of final judgment if there is an important and urgent reason for an immediate determination of such question or questions by [the Supreme Court] *and the certifying court has not decided the question or questions in the case.*

S. Ct. R. 41(a) (emphasis added). Because the Injunction Decision answered the question of what is the appropriate standard of review, Rule 41(a) is unavailable.

Additionally, the defendants' proposed question is objectionable because it puts the rabbit in the hat by assuming that the first-step tender offer in a controller's unilateral two-step freeze-out is "voluntary" and "non-coercive." Whether a unilateral two-step freeze-out merits these adjectives constitutes but one of several issues upon which trial court precedents conflict and which only the Delaware Supreme Court can resolve.

Regardless, the Delaware Supreme Court can and undoubtedly will determine for itself how best to frame its analysis. It is not for this Court or for the defendants to dictate what question the Supreme Court should answer if it accepts the interlocutory appeal.

III. CONCLUSION

For the foregoing reasons, the Application is granted and the Injunction Decision certified for interlocutory appeal. **IT IS SO ORDERED.**