No. 17-375

In the Supreme Court of the United States

CHARLOTTE KOKOCINSKI, DERIVATIVELY ON BEHALF OF MEDTRONIC, INC., PETITIONER,

v.

ARTHUR D. COLLINS, JR., ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Faced with a derivative action, a corporate board may be permitted by state law to appoint a special litigation committee to evaluate the claims independently and decide whether and how to pursue them. If the committee decides that the corporation's best interests would not be served by pursuing the claims, the court must evaluate whether that decision is entitled to deference under the state's business judgment rule—an inherently fact-intensive inquiry—and, if so, terminate the action. Against that backdrop, the petition raises the following questions:

1. For purposes of the standard of review, is an order terminating a derivative case in deference to a special litigation committee more like a court's approval of a voluntary dismissal under Rule 23.1(c) than it is like either an award of summary judgment under Rule 56 or a dismissal under Rule 12(b)(6)—a question never considered by any federal circuit until now?

2. What is the standard of review for a dismissal based on the failure to plead demand futility under Rule 23.1(b)—a rule and a kind of order that are not implicated in this case?

3. Did the Eighth Circuit correctly hold—consistent with every other circuit to address the issue—that the availability of discovery is a matter entrusted to the discretion of the district court?

CORPORATE DISCLOSURE STATEMENT

Medtronic, Inc. is a wholly owned subsidiary of Medtronic Holding, Inc., which is a wholly owned subsidiary of Medtronic Group Holding, Inc., which is a wholly owned subsidiary of Medtronic Global Holdings S.C.A., which is jointly owned by Medtronic Global Holdings GP S.a.r.l. and Medtronic Luxembourg Global Holdings S.a.r.l., both of which are wholly owned by Medtronic plc. Medtronic plc is a corporation organized under the laws of Ireland, with stock traded on the New York Stock Exchange.

Thus, Medtronic plc is a publicly held company that indirectly holds 100% of Medtronic, Inc.'s stock. No other publicly held company owns 10% or more of Medtronic, Inc.'s stock.

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INTRODUCTION

The petition in this case misconstrues both the decision below and the state of federal procedure for derivative actions. The Eighth Circuit considered a question no circuit has considered before—whether an order terminating a derivative action in deference to a special litigation committee is more like a court's approval of a voluntary dismissal under Rule 23.1(c) than it is like a dismissal under Rule 12(b)(6) or an award of summary judgment under Rule 56. Concluding that Rule 23.1(c) is the closest fit—and recognizing the fact-intensive nature of the inquiry under the Minnesota business judgment rule—the Eighth Circuit held that a termination order should be reviewed for an abuse of discretion. None of the courts cited in the petition has ever analyzed this question. Accordingly, what the petition calls "a mature circuit split" (Pet. 3) is not a "split" at all, and it is certainly not "mature" enough to warrant this Court's review. Indeed, *none* of the three questions presented is appropriate for certiorari.

Petitioner brought this case as a derivative action against the officers and directors of Medtronic, Inc. Recognizing the inevitable conflicts of interest, Medtronic's board appointed a special litigation committee of outsiders to investigate the claims and decide whether to pursue them. The committee—made up of a distinguished judge and a prominent professor of corporate law—retained outside counsel and conducted an extensive, 18-month investigation. Ultimately, the committee concluded that it would not be in Medtronic's best interests to pursue the claims.

Based on that conclusion, the district court terminated the case. The framework for its decision was

Minnesota's business judgment rule, which requires deference to a special litigation committee as long as it "possessed a disinterested independence" and used methods that were "adequate, appropriate, and pursued in good faith." *In re UnitedHealth Group Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 559 (Minn. 2008). Weighing the case-specific facts and factors prescribed by state law, the court found that the committee's conclusion was entitled to deference.

In deciding what standard of review to apply to such a decision, courts typically begin by asking what rule of procedure gave rise to the motion to terminate in the first place. Unfortunately, the Federal Rules do not answer that question explicitly. Until now, every circuit to consider the issue has assumed that a motion to terminate arises under Rule 12(b)(6) or Rule 56—or a hybrid of the two—and thus has reviewed such decisions *de novo*. None of these courts considered whether Rule 23.1(c) is a better analog, or whether the equitable, fact-bound nature of the analysis calls for more deferential review. Only one circuit (the Eleventh) reviewed for abuse of discretion, and it did so without explanation.

Against this backdrop, the Eighth Circuit's decision does not implicate—much less "exacerbate"—any "mature circuit split." Pet. 3. It was the first to consider these issues, so a writ of certiorari would be premature.

In any event, this case would be a poor vehicle for resolving this issue. The decision to defer to the special litigation committee was not a close call; the committee was beyond reproach, and it conducted an extensive investigation without any limits in terms of scope, outcome, or cost. Indeed, the Eighth Circuit's

analysis confirms that it would have reached the same result under a *de novo* standard.

Nor would this case be a suitable vehicle for resolving the petition's second question presented, which concerns appellate review of a dismissal for failure to plead demand futility. As petitioner concedes, such a dismissal arises under Rule 23.1(b), and courts disagree about the standard of review to apply. It was *that* issue that this Court agreed to resolve in 2013. See *UBS Fin. Servs. of P.R.* v. *Union de Empleados de Muelles de P.R. PRSSA Welfare Plan*, 134 S. Ct. 40 (2013) (dismissed before merits briefing). *But this case does not involve a failure to plead demand futility.* If this Court is inclined to resolve a conflict about the standard of review in a demand futility case, it should wait for such a case.

The petition's third question presented is no better, as it misconstrues the decisions below. According to the petition, the Eighth Circuit held that a plaintiff opposing a motion to terminate is barred from obtaining discovery. Pet. 6. Not so. Instead, the district court and the Eighth Circuit evaluated the discovery requests made in this case—which went beyond the areas for legitimate dispute under Minnesota law—and found that petitioner had "point[ed] to no indication in the existing evidence that further discovery may be fruitful." Pet. 22a. To the extent the Eighth Circuit issued a legal holding about discovery at all, it held only that the issue fell within the district court's discretion. The petition does not identify a single decision to the contrary.

For all these reasons, the writ should be denied.

STATEMENT

A. Infuse® and its Uses

Infuse® is an implantable device developed and manufactured by Medtronic, Inc., a Minnesota corporation. It is comprised of a sponge infused with a synthetic protein that encourages bone growth, embedded in a titanium cage that can be inserted during spinal surgery. In 2002, the FDA approved Infuse® for sale in the United States. The indicated use in the device's approved labeling initially included only one surgical technique; later, two other surgical techniques were added. At the same time, physicians began to implant Infuse® using other surgical techniques as well.

Between about 2006 and 2008, a controversy arose about whether Medtronic had improperly promoted Infuse® to physicians for off-label use. See Pet. 2a (summarizing inquiries and investigations). Through it all, Medtronic stood by its product, bolstered its policies against off-label promotion, and instituted procedures to enforce them. Infuse® remains on the market today as an important option for physicians.

In 2012—without first making a demand on Medtronic's board—petitioner brought this shareholder derivative action in federal court, asserting a variety of claims relating to the allegations of off-label promotion. On behalf of Medtronic, Inc., the complaint alleged that certain Medtronic officers and directors (the "individual defendants") had breached their fiduciary duties, made various false and misleading statements, wasted corporate assets, and been unjustly enriched. After petitioner exercised her statutory right to review Medtronic's corporate records, Minn. Stat. § 302A.461, subd. 4, she filed an amended

complaint with additional allegations.

B. The Special Litigation Committee and its Investigation

To address the claims in petitioner's suit and in similar suits and demand letters, the board formed a special litigation committee (the "SLC"). Under Minnesota law, the SLC's members could be either outsiders or non-conflicted sitting board members and would have plenary authority to decide whether and how to proceed with claims alleged derivatively on Medtronic's behalf. The SLC had an obligation to undertake a "comprehensive weighing and balancing of factors" that takes into account the legal, ethical, commercial, professional, public relations, fiscal, and other factors "common to reasoned business decisions." *Janssen* v. *Best & Flanagan*, 662 N.W.2d 876, 889 (Minn. 2003). Its conclusion would be entitled to deference as long as the SLC had "a disinterested independence" and used methods that were "adequate, appropriate, and pursued in good faith." *UnitedHealth*, 754 N.W.2d at 559 (adopting New York's approach to the business judgment rule and rejecting Delaware's).

The SLC was initially created with three members. Its chair is John Matheson, the Law Alumni Distinguished Professor of Law and Director of the Corporate Institute at the University of Minnesota Law School, where he has taught since 1982. He is a member of the American Law Institute, publishes a treatise entitled *Corporation Law and Practice*, and served as Reporter for the 2006, 2008, 2010, and 2014 amendments to the Minnesota Business Corporation Act. Professor Matheson was not a member of Medtronic's board and had no prior ties to the parties.

The SLC's second member is the Honorable George McGunnigle, a retired Hennepin County (Minnesota) District Court judge. Judge McGunnigle is a former Assistant U.S. Attorney and a long-time corporate litigator in Minneapolis. During his 12 years on the bench, Judge McGunnigle presided over the *UnitedHealth* state-court derivative case, and in that capacity he jointly authored the first decision to apply the rule announced in *In re UnitedHealth Group Inc. Shareholder Derivative Litigation*, 754 N.W.2d 544 (Minn. 2008), the Minnesota Supreme Court's landmark business judgment rule decision. Since retiring from the bench, he has maintained an active arbitration and mediation practice and served on another SLC. Like Professor Matheson, he was not a member of Medtronic's board and had no prior ties to the parties.

The third member of the SLC was to be former Utah Governor Michael Leavitt, who was an outside board member of Medtronic (and was not named in any of the lawsuits). He and the other members of the SLC soon determined, however, that his previous role as Secretary of Health and Human Services ("HHS") might give the appearance that he was not disinterested, given that the FDA (a department of HHS) had approved Infuse®. On that basis, he resigned from the SLC. The Committee did not replace him, and Professor Matheson and Judge McGunnigle faithfully executed the committee's duties.

After hiring outside counsel, the SLC conducted an 18-month investigation into a variety of allegations relating to Infuse®, including all the claims raised by petitioner. The SLC's members met more than 70 times, reviewed evidence, assessed witness credibility, and identified information needed to de-

termine the course of action that would be in the best interests of Medtronic. They personally interviewed 60 individuals, including petitioner's counsel, current and former officers and directors, salespeople, confidential witnesses from a securities case on similar topics, an attorney from that case, physicians who used Infuse® on- and off-label, compliance officers, medical affairs directors, marketing personnel, personnel from Medtronic's regulatory affairs department, and persons familiar with disclosures in securities filings and quarterly calls. The SLC's counsel also conducted interviews and reported on them to the SLC members, as well as gathering 2.6 million pages of documents. Further, the SLC retained a seasoned forensic CPA and a Ph.D. economist—the former to audit and report on payments to physician-authors, and the latter to conduct a loss-causation analysis related to the securities claims.

At the conclusion of its investigation, the SLC issued a 69-page report (with voluminous appendices) detailing its methods, the factors it weighed and balanced in reaching its conclusions, and facts supporting its independence. See C.A. App. 277–348. The SLC did not believe it would be in Medtronic's best interests to make detailed factual findings on every claim—a choice permitted under Minnesota law. The SLC did state, however, that it found no support for the core proposition of the demand letters and derivative complaints—namely, that Medtronic and the individual defendants schemed to evade the FDA's ban on off-label promotion—and therefore rejected it. The SLC ultimately concluded that it was not in the best interests of the company to pursue any claims against the defendants.

C. The District Court's Order

In light of the conclusions set forth in its report—as well as affidavits from both of its members—the SLC moved under Rule 23.1(c) to terminate the instant case. Motions to dismiss were also filed by the individual defendants and by Medtronic itself. The district court granted the motions.

The district court began its analysis by attempting to identify the best vehicle in the Federal Rules for considering a motion to terminate a derivative suit in deference to a special litigation committee. Because the motion necessarily goes beyond the pleadings, Rule 12(b)(6) would not apply. Pet. 45a–46a. The court also noted that while Rule 56 might be instructive, "there are important differences between [a motion to terminate] and a pure summary judgment motion." *Id.* at 47a. For example, on summary judgment, the court would never "'make determinations of credibility or weigh conflicting evidence.'" *Ibid.* (citing with approval *Johnson* v. *Hui*, 811 F. Supp. 479, 485 (N.D. Cal. 1991), which notes that applications of state business judgment rules generally *do* require such determinations). Ultimately, the court held that "Rule 23.1, while not a perfect fit, is the most applicable because it governs shareholder derivative suits." Pet. 46a. "While the rule does not explicitly discuss this type of motion, given that corporations are the true owners of derivative suits and that, in Minnesota, a properly[]constituted SLC has the power to end derivative litigation, the motions at issue here are akin to 'voluntary dismissals' under Rule 23.1(c)." *Id.* at 46a–47a.

The court then considered and rejected petitioner's argument that this particular SLC had been giv-

en inadequate authority. The court noted that the board's resolution tracked the language of the governing statute almost verbatim, giving the SLC "'complete power and authority to investigate' [petitioner's] allegations and the power to determine, completely unencumbered by the Medtronic Board, whether to pursue the company's rights and remedies." *Id.* at 50a. This is plainly sufficient. *Ibid.*

The court also concluded that the SLC was disinterested and independent, weighing the facts in light of a nonexclusive list of eleven factors set forth in Minnesota law. The court noted that the SLC's members were "respected corporate legal minds in Minnesota" who are "not defendants in the case, have never before served on Medtronic's board or had any other professional or personal ties to Medtronic, and who received counsel and advice from an outside law firm and other experts who also had no ties to Medtronic." *Id.* at 53a–54a. The court rejected petitioner's argument that the SLC's independence was impaired because Professor Matheson and Judge McGunnigle were paid their normal hourly rates. According to petitioner, that form of compensation was not allowed under Medtronic's bylaws and constituted an improper personal benefit. The court found that the bylaws *allowed* hourly compensation and that the SLC members received no improper benefit by being "paid at their standard rate for months of detailed and thorough work." *Id.* at 54a–57a.

Turning to the SLC's methodology, and considering "the totality of the circumstances," the court noted that the SLC hired independent counsel and experts; conducted a broad, 18-month investigation; reviewed thousands of pages of documents, including

more than 2 million pages from Medtronic and thousands from a Senate Finance Committee inquiry; and interviewed 60 individuals. *Id.* at 59a. The court also pointed to the lengthy factual accounting provided in the SLC's report and noted Medtronic's lack of involvement. Weighing all these facts—together with the "untarnished reputations" of the SLC members—the court concluded that the SLC's investigation was conducted in good faith and was "just the opposite of a 'pro forma or halfhearted' investigation meant to serve only as a pretext." *Id.* at 59a–60a.

Later, in response to a motion for post-judgment relief, the court issued a short opinion addressing petitioner's request for discovery—a topic she had raised before, "[a]lthough not by any type of formal motion." *Id.* at 71a. The court noted that it had before it the SLC's report and its members' affidavits, and it reiterated its conclusion—stated previously in response to petitioner's discovery requests—that the information before it was sufficient to carry the SLC's burden and that discovery was "permissible but not necessary." *Ibid.*

D. The Eighth Circuit's Opinion

The Eighth Circuit affirmed. The court began its analysis by explaining that the standard of review would depend on the proper way to construe the SLC's motion to terminate. The court observed that it "cannot be construed as a motion under Rule 12(b)(6)" because it "does not go to the adequacy of the pleadings"—and, indeed, necessarily reaches beyond them. Pet. 7a. Rule 56 is not a good fit either, the court held, because applying the business judgment rule may "involve[] making findings based on credibility determinations and the weighing of evi-

dence." *Ibid.* Further, the court noted that if the motion to terminate is denied, the case will simply move forward with the derivative plaintiff in charge; "the movant is not entitled to litigate th[e] fact questions" about the SLC's independence before a jury. *Ibid.* (citations omitted).

With that in mind, the court arrived at Rule 23.1(c)—part of a rule that specifically addresses derivative actions—as "the closest fit for a motion to terminate." *Id.* at 8a. Rule 23.1(c) was designed to provide judicial supervision over derivative cases to ensure that their conduct is in the best interests of the company. *Ibid.* This necessarily includes the court's process of deciding whether to defer to a special litigation committee's decision to voluntarily dismiss or settle the claims brought on the corporation's behalf. The court acknowledged that Rule 23.1(c) was not a perfect fit—given that the derivative plaintiff presumably is not in agreement with the dismissal, and that the corporation is also technically a "nominal defendant" antagonistic to the action. *Ibid.* Still, a derivative claim belongs to the corporation, and on that basis the court concluded that a motion to terminate the case is "a close analog" to a "voluntary dismissal." *Ibid.*

"This characterization" of the motion led the Eighth Circuit to conclude that "the proper standard of review is for an abuse of the district court's discretion." *Ibid.* The court observed that this standard is, in fact, the most appropriate in light of the nature of the district court's inquiry. *Id.* at 9a. Applying a multifactor, state-law business judgment rule requires a highly fact-intensive analysis, including weighing factors and, at times, making credibility determinations. *Id.* at 8a–9a. The court explained:

> [t]he range of circumstances district courts may face—the size of the corporation, the history and various relationships the SLC members may have with respect to the board and the corporation, the array of various methodologies an SLC may employ in its investigation, the nature and quality of its report, the size of the SLC, and the nature of the derivative claims—will result in myriad, case-specific situations, often vague, best able to be resolved with the experience and case familiarity possessed by the district court.

Id. at 9a–10a. Having settled on a standard of review, the court carefully reviewed each of petitioner's claims of error, analyzed her arguments in detail, and held that the district court had not abused its discretion. *Id.* at 10a–22a.

The court also rejected petitioner's argument that the district court erred in failing to allow her discovery requests. As the opinion explains, the district court's decisions about discovery are "'afforded great latitude.'" *Id.* at 21a (citation omitted). Here, the district court concluded that it had all the information it needed to apply Minnesota's business judgment rule. Pet. 22a. Further, the particular requests petitioner had made would not have been "fruitful"—including her request for the precise amount the SLC was paid (when everyone agreed that members were paid their standard hourly rates) and her request for information about the merits of the "substantive decision by the SLC" (which would have been "irrelevant to the analysis" under Minnesota law). *Ibid.* In this respect too, the district court

did not abuse its discretion.

Petitioner sought rehearing en banc, which was unanimously denied. This petition followed.

REASONS FOR DENYING THE PETITION

I. There is no "mature circuit conflict" with respect to whether Rule 23.1(c) is the best analog for a motion to terminate.

Petitioner insists that the decision below "exacerbated a mature circuit split regarding the standard of review" that applies to a motion to terminate. Pet. 3. But the cases the petition cites are not about the standard of review at all; they are about which Federal Rule of Civil Procedure governs such a motion. In each instance, the court assumed that the choice was between Rules 12(b)(6) and 56, both of which would necessarily yield *de novo* review. The Eighth Circuit considered a different argument—that the closest fit is Rule 23.1(c) instead—and thus arrived at a standard of review more suitable for the fact-intensive inquiry the district court must make in deciding such a motion. *That* is the question presented in this case, and the Eighth Circuit was the first federal court of appeals to consider it. Further review of that question would be premature, as no other circuit has had the chance to evaluate the application of Rule 23.1(c), or to follow (or reject) the Eighth Circuit's reasoning.

A. Courts have applied *de novo* review only after assuming that a motion to terminate falls under Rules 56, 12(b)(6), or a hybrid of both rules.

The first courts to adjudicate motions to terminate applied Rule 56 (and thus assumed a *de novo* stand-

ard of review) without any analysis. In *Gaines* v. *Haughton,* for example, the Ninth Circuit affirmed the termination of a derivative case and stated, in a footnote, that findings under Rule 56 are "freely reviewable as questions of law." 645 F.2d 761, 768 n.13 (9th Cir. 1981). The court did not discuss whether an alternative rule or standard of review would apply—and indeed, given the outcome, it had no reason to do so. Similarly, the Fifth Circuit affirmed a motion to terminate as if it were a grant of summary judgment, holding that "there was no genuine issue of material fact regarding the good faith, independence, or thoroughness of the SLC." *Bach* v. *Nat'l W. Life Ins. Co.,* 810 F.2d 509, 510 (5th Cir. 1987). Again, the court assumed that the summary judgment standard applied and did not mention alternative rules *or* the standard of review.

The First and Sixth Circuits did analyze which federal rule applies to a motion to terminate, but they focused on Rules 56 and 12(b)(6). The First Circuit deemed the motion "a hybrid of a motion to dismiss and a motion for summary judgment." *Sarnacki* v. *Golden*, 778 F.3d 217, 222 (1st Cir. 2015). In so holding, the court followed *Booth Family Trust* v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2011), which described a motion to terminate as "a hybrid that does not have a clear analogue under the Federal Rules of Civil Procedure, but shares some characteristics of a motion to dismiss pursuant to Rule 12, and some characteristics of a motion for summary judgment under Rule 56." *Id.* at 139. Neither court considered Rule 23.1(c)—and, indeed, the parties did not cite it. Both courts reviewed the judgments of dismissal *de novo* simply because that is the standard for reviewing orders entered under Rules 12 and 56.

As for the Second Circuit, it considered only which dispositive motion rule to apply—Rule 12(b)(6) or 56—and did not comment on the standard of review. See *Halebian* v. *Berv*, 644 F.3d 122, 133–134 (2d Cir. 2011). The court vacated and remanded a Rule 12(b)(6) order dismissing a derivative suit, explaining that the motion required "evidentiary submissions to determine whether the corporate entity rejecting [the] plaintiff's demand [was] independent." *Id.* at 129. Because "extraneous material" was necessary "to secure dismissal," "the dictates of [the business judgment rule were] sufficiently in conflict with the contours of" Rule 12(b)(6) to require conversion of the motion "into one for summary judgment." *Id.* at 130–31. Contrary to petitioner's suggestion (Pet. 18), the court said nothing about the standard of review for termination of a case in deference to a special litigation committee. And petitioner does not dispute that the case does not mention Rule 23.1.

The only case petitioner cites that even mentions Rule 23.1 is *Peller* v. *Southern Co.*, 911 F.2d 1532 (11th Cir. 1990), though that case does not analyze the question presented here. Rather, *Peller* held that Rule 23.1 applies to a dismissal for failure to plead demand futility—a dismissal that the Eleventh Circuit reviews for abuse of discretion. *Id.* at 1536 ("[S]hareholder derivative suits are governed by Fed. R. Civ. P. 23.1, and the district court correctly reviewed the Companies' motion under this rule. Specifically, Rule 23.1 required the district court to resolve the preliminary question of whether a demand was excused * * * ."). Although the corporation also moved to dismiss based on a special litigation committee report, the Eleventh Circuit simply assumed that the same abuse-of-discretion standard would ap-

ply to that question too. The court did not further analyze the standard of review or consider which rule or subsection of Rule 23.1 would govern a motion to terminate.

B. The Eighth Circuit's decision is the first to analyze whether Rule 23.1(c) is a better fit—and it holds (correctly) that it is.

The Eighth Circuit's decision in this case represents the first instance in which a federal circuit has considered whether a motion to terminate a derivative action can be treated by analogy as a motion under the derivative lawsuit rule, Rule 23.1. Thus, there is no conflict of authority with respect to what the Eighth Circuit actually decided.

1. Like the other courts of appeals, the Eighth Circuit held that a motion to terminate does not arise under Rule 12(b)(6). That rule is unsuitable because of the motion's "reliance on the SLC's report, and because it does not go to the adequacy of the pleadings." Pet. 7a.

Unlike its sister circuits, however, the Eighth Circuit did not reflexively resort to Rule 56; it went on to analyze whether Rule 23.1 would be a better fit. In contrast to a Rule 56 motion, a motion to terminate in deference to a special litigation committee may require the district court to resolve certain fact questions once and for all. The court cannot simply deny the motion based on the existence of disputed material facts. Rather, the district court judge must sit as a finder of fact and resolve any material dispute with respect to the committee's investigation or independence, "making findings based on credibility determinations and the weighing of evidence." Pet. 7a. And "in the event the motion is denied the movant is not

entitled to litigate those fact questions afterwards." *Ibid.*; accord *Booth Family Trust*, 640 F.3d at 143 nn.2, 3 (recognizing for this reason that Rule 56 is not a perfect fit). This provides a critical distinction between a motion to terminate and a typical motion to dismiss or for summary judgment. As petitioner concedes, under Rules 12(b)(6) or 56, "a district court should never be making factual findings or weighing evidence." Pet. 19–20. But on a motion to terminate, that is precisely what the district court may be required to do.

Moreover, "a ruling granting the motion [to terminate] would not go to the merits of Kokocinski's claims," as a Rule 56 ruling generally would. Pet. 7a. Instead, a motion to terminate concerns the judicial proceedings themselves, whether they are in the corporation's best interests, and who should speak for the corporation—the stockholder plaintiff proceeding derivatively, or the independent committee appointed by the board. *Id.* at 8a. These are equitable matters to be resolved by the judge in his or her discretion.

2. As among Rule 12(b)(6), Rule 56, and Rule 23.1(c), the Eighth Circuit found the latter to be the "closest fit." Pet. 8a. This is the rule, after all, that specifically refers to the disposition of a derivative case, whether through settlement or outright termination. FED. R. CIV. P. 23.1(c) ("A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval."). As the Advisory Committee explained, this rule reflects the court's "inherent power to provide for the conduct of the proceedings in a derivative action, including the power to determine the course of the proceedings and require that any appropriate notice be given to

shareholders or members." FED. R. CIV. P. 23.1 advisory committee's note to 1966 amendment.

As this Court explained in *Ross* v. *Bernhard*, 396 U.S. 531 (1970), a derivative suit "has dual aspects: first, the stockholder's right to sue on behalf of the corporation, historically an equitable matter; second, the claim of the corporation against directors or third parties on which, if the corporation had sued and the claim presented legal issues, the company could demand a jury trial." *Id.* at 538. The first aspect is separate from the merits and "must first be adjudicated as an equitable issue triable to the court." *Id.* at 539.

As with other "equitable issue[s] triable to the court" (*ibid.*), whether to allow the stockholder to control the corporation's claims falls within the court's discretion. For example, "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion by the district court, reviewable on appeal for abuse of discretion." *eBay Inc.* v. *MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). In all such cases, "[a]n appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." *Farmer* v. *Brennan*, 511 U.S. 825, 847 (1994). "The essence of equity jurisdiction has been the power of the Chancellor to do equity and to [mold] each decree to the necessities of the particular case." *Hecht Co.* v. *Bowles*, 321 U.S. 321, 329 (1944).

In light of *Ross*, then, it is not true that the Eighth Circuit "flipped [the] venerable rule" that "an appellate court should always review *de novo* a decision involving pure questions of law that results in dismissal of an action." Pet. 3. The Eighth Circuit did

not say anything at all about the standard of review for "pure questions of law." Rather, it correctly recognized the equally venerable practice of treating the power struggle between a derivative plaintiff and the corporation's other representatives as an equitable issue committed to the court's discretion. As this Court has already explained, this kind of issue is a fact-bound, case-specific, "equitable issue triable to the court." *Ross*, 396 U.S. at 539.

The footnote in *Burks* v. *Lasker*, 441 U.S. 471, 485 n.16 (1979), cited in Pet. 19, does not require a contrary result. The footnote does not resolve or even consider the issue in this case—that is, what rule or standard of review *does* govern a motion to terminate. Nor does it consider whether Rule 23.1(c)—even if not a perfect match—nonetheless provides the closest analog for a motion to terminate based on a special litigation committee report, which is what the Eighth Circuit held. Pet. 8a (noting *Burks* and holding that Rule 23.1(c) is the "closest fit" to the dismissal here).

Moreover, the *Burks* footnote cites and underscores Judge Friendly's observations in *Wolf* v. *Barkes*, 348 F.2d 994 (2d Cir. 1965), regarding the court's "equity powers" to oversee the termination or settlement of a derivative action to ensure a fair result to shareholders, consistent with state law. *Id.* at 996–997. That is the same duty the district court exercised here, when it scrutinized whether the SLC had a disinterested independence and conducted an investigation that was adequate, appropriate, and in good faith. Only after answering those questions did the court defer to the SLC's assessment and end the case. If anything, then, the *Burks* footnote—with its citation to *Wolf*—underscores the appropriateness of viewing a decision to defer to a special litigation

committee as an exercise of inherent equity powers to be reviewed for abuse of discretion.

3. The Eighth Circuit was also the first circuit to consider the standard of review from the perspective of the nature of the issue to be resolved. As noted above, a determination about whether to defer to a special litigation committee report requires a fact-intensive exercise of the court's inherent equitable power to oversee the proceedings in a derivative case. FED. R. CIV. P. 23.1 advisory committee's note to 1966 amendment. In exercising that power, the court draws the relevant legal principles from state law. See Pet. 13a–14a. Here, the court applied the Minnesota business judgment rule, which requires the judge to evaluate an SLC's independence and good faith by assessing various factors. See *id.* at 52a–53a, 58a–59a. Further, the judge must examine a range of other considerations, including

> the size of the corporation, the history and various relationships the SLC members may have with respect to the board and the corporation, the array of various methodologies an SLC may employ in its investigation, the nature and quality of its report, the size of the SLC, and the nature of the derivative claims.

Id. at 9a. Invariably, the totality of these circumstances "will result in myriad, case-specific situations, often vague, best able to be resolved with the experience and case familiarity possessed by the district court." *Id.* at 9a–10a.

What is more, to reach an ultimate conclusion in its multifactor analysis, the court may find it necessary to make factual findings "based on credibility

determinations and the weighing of evidence," whether the underlying facts about the SLC are disputed or not. *Id.* at 7a, 9a. The credibility of the SLC and the weight to be given its various characteristics—even on a dry, paper record where the predicate facts are agreed upon—is still irreducibly equitable and discretionary.

4. For all these reasons, the Eighth Circuit correctly held that a motion to terminate is, in substance, most like a motion for court approval to "voluntarily dismiss" a derivative suit under Rule 23.1(c). In a derivative case, the true party in interest on the plaintiff's side of the "v" is the corporation itself. A motion to terminate represents the corporation's request for "voluntary dismissal" of the claims asserted on its behalf. The critical question is who gets to make the decision—the stockholder plaintiff, or the committee appointed by the board for that purpose. Given the equitable and fact-intensive nature of that inquiry—and its close ties to Rule 23.1(c)—the Eighth Circuit rightly entrusted that question to the sound discretion of the district court.

C. Because the Eighth Circuit is the first to analyze these motions under Rule 23.1(c), it would be premature to grant review.

This is precisely the sort of situation where allowing further "percolation" in the lower courts would be appropriate. In the eight months since the Eighth Circuit's decision, one court has already followed it. In *Matter of DISH Network Derivative Litigation*, 401 P.3d 1081 (Nev. 2017), the Nevada Supreme Court affirmed a trial-court judgment granting an SLC's "motion to defer to its decision to dismiss [the plaintiff's] derivative complaint." *Id.* at 1088, 1094. The

court first held, as a matter of first impression, that "courts should defer to the business judgment of an SLC that is empowered to determine whether pursuing a derivative suit is in the best interest of a company where the SLC is independent and conducts a good-faith, thorough investigation." *Id.* at 1088. The court then held that "application of this standard is a matter left to the sound discretion of the district court, and absent an abuse of that discretion, the district court's rulings will not be disturbed on appeal." *Ibid.*

The court explained the latter holding, in part, by relying on the Eighth Circuit's ruling below. See *id.* at 1088 n.2. The court acknowledged that the plaintiff and dissenting justice both "argue[d] that *de novo* review is required, analogizing to the standards of review applicable to summary judgment motions * * * and motions to dismiss." *Ibid.* But the court rejected these analogies on the same grounds as those cited by the Eighth Circuit. *Ibid.* (citing *Kokocinski ex rel. Medtronic, Inc.* v. *Collins*, 850 F.3d 354, 361 (8th Cir. 2017) (citation omitted)).

As the Nevada case shows, there is no basis for petitioner's doubt that "subsequent circuit decisions or en banc proceedings" will "resolve" any conflicts or "provide useful additional analysis." Pet. 30. As far as we know, the instant case is the first time the parties to a derivative case cited Rule 23.1(c) in the context of an appeal from a termination order. Surely other litigants will now do so as well. When they do, the courts in those cases may well join the Nevada Supreme Court in treating a motion to terminate as an equitable matter entrusted to the district court's discretion. And if they do not, this Court can grant review at that time, with the benefit of express lower

court analysis on both sides of the question. Until then, further review by this Court would be premature and inappropriate.

D. This case would be a poor vehicle for review of this question in any event.

When "this Court decides questions of public importance, it decides them in the context of meaningful litigation." *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959); accord *Sommerville* v. *United States*, 376 U.S. 909 (1964) (denying certiorari despite the government's concession of a significant conflict, where resolution of the conflict could not change the result below). Yet there is no reason to believe that applying a different standard of review would have made any difference at all in this case. This alone is a sufficient basis to deny certiorari.

This was not a close case. The SLC was created through a board resolution that tracked the language of the governing statute. It was comprised of a prominent professor of corporate law and a distinguished judge—neither of whom had ties to the defendants—and employed outside counsel and experts in an extensive investigation with no artificial limits or constraints. And it issued a comprehensive report that described in detail the scope of its investigation. The quality and independence of the report were so undeniable, in fact, that petitioner was forced to limit her challenge to identifying specific alleged flaws in the SLC's makeup and report, rather than making an argument that took all of the Minnesota business judgment rule factors into account.

Moreover, the Eighth Circuit's reasoning with respect to each of petitioner's challenges demonstrates that it would have affirmed the termination order re-

gardless of which standard of review it applied. For example, petitioner "ma[d]e two arguments in her briefing" about purported flaws in the resolution creating the SLC: "(1) that the SLC must be given authority *itself* to 'pursue' litigation of the claims should it decide to do so; and (2) that the resolution must make clear that the SLC's decision to pursue the claims or not is binding on the Board." Pet. 11a (emphasis in original). The Eighth Circuit rejected both of these arguments based on its reading of "Minnesota case law" and statutes, holding as a matter of law that the SLC resolution was "enough to constitute an SLC under Minnesota law." *Id.* at 13a. Given the nature of this analysis, applying *de novo* review would not have changed the outcome.

The decision reflects a similar, searching analysis with respect to petitioner's challenges relating to independence. She argued that the SLC's members "were compensated in violation of the Board's bylaws," "were paid excessive compensation" because they were paid by the hour, and had their compensation and access to indemnification "controlled by the conflicted Board." *Id.* at 14a–15a. On the first argument, the court expressly stated that it "would reach the same conclusion as the district court"—that the bylaws' rules about compensation were not violated. *Id.* at 16a–17a. Further, the court noted that "Kokocinski d[id] not offer any meaningful argumentation on why this one factor" would require a finding that the SLC was not independent. *Id.* at 17a. As for the decision to pay SLC members by the hour, the court concluded for itself that this "could [not] be considered improper"—and, in fact, that this method of payment "*encourages* thorough, time-intensive investigation." *Ibid.* (emphasis in original). And the court

concluded that the fact that "the conflicted Board set the SLC members' compensation" and "determines whether they are eligible for indemnification" was "insufficient to overcome Medtronic's showing of independence." *Id.* at 18a. Again, on each of these points, the Eighth Circuit made its own conclusions clear, so we can say with confidence that a *de novo* standard would not have made any difference.

With respect to petitioner's challenge to the investigation itself, the Eighth Circuit similarly expressed its affirmative agreement with the district court, "conclud[ing] that the SLC's investigation easily met the requirements of Minnesota's [business judgment rule]." *Id.* at 19a. In so doing, the court "agree[d] with the district court that, in effect, [petitioner] seeks review of the substance and rationality of the SLC's decision," which "is something we are precluded from reviewing under Minnesota law." *Id.* at 20a.

In short, there is no reason to believe that applying *de novo* review would have altered the outcome of petitioner's appeal. This Court should wait for a case in which there is some reason to believe that the issue on review would make a meaningful difference.

II. The petition's second question relates to a conflict concerning the standards for reviewing demand-futility dismissals under Rule 23.1(b), which is not at issue here.

Petitioner also invites the Court to resolve a conflict of authority concerning the standard of review under what she generically refers to as "Rule 23.1." Pet. 21. According to petitioner, the district court "construed Respondents' motions 'as motions to dismiss under Rule 23.1,'" "and the Eighth Circuit felt

'the closest fit for a motion to terminate in the Federal Rules is Rule 23.1(c).'" *Ibid.* (citing Pet. 47a, 8a). These rulings, she says, "beg[] the question: what standard of review applies to a district-court decision made on a Rule 23.1 motion to dismiss?" *Ibid.*

This is a sleight-of-hand, concealing fundamental differences among the subsections of Rule 23.1. The district court applied subsection (c) of Rule 23.1, as did the Eighth Circuit. As the district court put it, "the motions at issue here are akin to 'voluntary dismissal[s]' under Rule 23.1(c), which require the Court's approval." Pet. 47a. The Eighth Circuit took the same approach, holding that "the closest fit for a motion to terminate * * * is Rule 23.1(c)." *Id.* at 8a.

By contrast, all the cases cited by petitioner on this point involve the requirements of Rule 23.1*(b)*, which the courts below did not mention. All but one of these cases address motions to dismiss based on a failure to plead demand futility under Rule 23.1(b)(3). See *id.* at 22a–24a (citing Rule 23.1(b) cases involving "demand futility"). The exception is *Cadle* v. *Hicks*, 272 F. App'x 676 (10th Cir. 2008), which affirmed dismissal for insufficient allegations of contemporaneous ownership—but that dismissal too arose under Rule 23.1(b).

Subsections (b) and (c) serve fundamentally different purposes and involve different sets of materials. By its terms, subsection (b) concerns *pleading*: it requires that the complaint "(1) allege that the plaintiff was a shareholder or member at the time of the transaction * * *; (2) allege that the action is not a collusive one * * *; and (3) state with particularity * * * any effort by plaintiff to obtain the desired action." FED. R. CIV. P. 23.1(b). By contrast, when used

to analyze a motion to terminate, subsection (c) necessarily requires review of materials outside of the complaint, such as a special litigation committee report. Further, that rule speaks to the court's approval of a settlement, voluntary dismissal, or compromise of a derivative action. And as noted, under Rule 23.1(c), the trial court resolves case-specific, equitable questions about the independence of the committee and whether its investigation was conducted in good faith—inquiries that necessarily "entail[] findings of fact." Pet. 10a & n.7; *supra* at 16–21.

The application of Rule 23.1(b) is many steps removed from this case. For this Court to consider the second question presented, it would first need to:

- grant review of the first question; *and*
- decide that the court erroneously held that Rule 23.1(c) is the best analog for a motion to terminate; *and*
- decide that, instead, Rule 23.1(b) is the best analog.

Only at *that* point could the Court use this case to resolve the purported conflict concerning Rule 23.1(b). But this Court does not grant review provisionally.

Moreover, even if the Court were to do so and to make it past the first two steps above, there is no conflict of authority—and, indeed, no authority at all—with regard to whether Rule 23.1*(b)* is a proper analog for a motion to terminate. Petitioner has not cited a single case from any jurisdiction holding that a motion to terminate in deference to a special litigation committee should be considered a motion under Rule 23.1(b). And while she assures the Court that a motion to terminate "is certainly more akin to a motion

to dismiss under Rule 23.1(b) than it is to a motion to settle or voluntarily dismiss a case under Rule 23.1(c)" (Pet. 24), she does not say why.

If the Court would like to resolve a conflict about the standard of review for a dismissal under Rule 23.1(b), it should do so in a case where that provision is at issue. In this case, however, petitioner's second question is no basis for granting certiorari.

III. The alleged conflict about discovery is illusory and rests on a mischaracterization of the Eighth Circuit's decision.

The petition also suggests that the decision below created a conflict of authority about whether a derivative plaintiff is entitled to discovery. Pet. 24. Not so. The Eighth Circuit did not make discovery unavailable *per se*; it held that the decision to grant or deny a particular request falls within the district court's discretion. This is consistent with the approach taken by every case the petition cites on this point.

The federal courts of appeals uniformly review discovery decisions for an abuse of discretion. See, *e.g.*, 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE CIVIL § 2006 (3d ed. 2010) (compiling authority). That rule applies equally in derivative cases involving a special litigation committee. See, *e.g.*, *Halebian*, 644 F.3d at 133, cited in Pet. 26. Indeed, as the Eighth Circuit observed, "[b]oth of the seminal cases" from state courts setting forth the business judgment rule "treat discovery as discretionary." Pet. 21a (citing *Zapata Corp.* v. *Maldonado*, 430 A.2d 779 (Del. 1981), and *Auerbach* v. *Bennett*, 47 N.Y.2d 619 (1979)); accord *Kaplan* v. *Wy-*

att, 499 A.2d 1184, 1192 (Del. 1985) ("[D]iscovery may be ordered to facilitate inquiries into independence, good faith, and the reasonableness of the investigation. This discovery is not by right, but by order of the Court, with the type and extent of discovery left totally to the discretion of the Court.").

This is precisely the approach the Eighth Circuit took in this case. The Eighth Circuit was never faced with any abstract question about "whether a plaintiff in a shareholder-derivative action is entitled to discovery," and it certainly did not answer such a question "no." Pet. 6. Instead, the court recognized that the availability of discovery—in a derivative case just like any other—is a matter for the court's sound discretion. Pet. 21a ("The trial court is afforded great latitude in such matters").

In the district court here, petitioner made only one request for discovery: by letter, her counsel demanded information about the SLC members' compensation. The SLC members did not reveal their total compensation but disclosed that they were paid on the basis of their standard hourly rates. *Id.* at 22a. Other than that, petitioner did not serve any discovery requests, file any motion to compel, or seek discovery in any other formal way. Although she raised a general complaint about the lack of discovery in opposition to the motions to terminate—and then raised the issue again in a motion for reconsideration—the court held that the SLC had already presented "sufficient evidence" to carry its burden, "such that discovery was not required." *Id.* at 71a. As the court explained, "discovery is permissible but not necessary." *Ibid.* (citing *Zapata*, 430 A.2d at 788).

On appeal, the Eighth Circuit concluded that in light of the evidence that was already before the district court, "the district court exercised its sound discretion in concluding that discovery was not necessary." Pet. 22a. The court explained that petitioner's briefs "point[ed] to no indication in the existing evidence that further discovery may be fruitful." *Ibid.* And "[t]o the extent any object of discovery would go to the substantive decision by the SLC," the court observed, "that is irrelevant to the analysis under [Minnesota law], which examines only the procedural reliability of the investigation." *Ibid.*

Although petitioner claims that the Eighth Circuit's decision "conflicts with those of numerous other federal courts" (Pet. 24), she cites decisions from only the Second and Sixth Circuits, both of which follow the same approach that the Eighth Circuit applied in this case. In *Halebian* v. *Berv*, for example, the Second Circuit held that the availability of discovery "is a matter within the District Court's discretion" (644 F.3d at 133, cited in Pet. 26), and it remanded for reevaluation of the requests because the district court had reflexively denied all discovery in light of a mistake about the law it was applying. And in *Booth Family Trust* v. *Jeffries*, the Sixth Circuit noted as a factual matter that the district court had allowed "rather extensive discovery"; it did not hold that extensive discovery was mandatory in every case. 640 F.3d at 139, cited in Pet. 26; accord *Zapata*, 430 A.2d at 788, cited in Pet. 26 (discovery appropriate but not mandatory).

Petitioner relies heavily on *Parkoff* v. *General Telephone & Electronics Corp.*, 53 N.Y.2d 412 (1981), but as the Eighth Circuit explained, *Parkoff* "dealt with a peculiar situation in which the lower court had essen-

tially placed on the plaintiff the burden of showing fraud or bad faith in order to be permitted to engage in discovery." Pet. 22a. "Nothing of the sort exists in the present case." *Ibid.*

In sum, the district court here made fact-bound determinations concerning petitioner's need for discovery, and the Eighth Circuit held that this decision fell within the trial court's sound discretion. None of these issues is suitable for this Court's review.

CONCLUSION

In short, the petition does not present any question that requires this Court's review. The writ should be denied.

Respectfully submitted.

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November 13, 2017