NO. _____

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 A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court of appeals reviews *de novo* a district court's dismissal with prejudice of a shareholder-derivative action based on a special litigation committee's recommendation, as the First, Second, Fifth, Sixth, and Ninth Circuits have held, or for an abuse of discretion, as held by the Eleventh Circuit and the Eighth Circuit here.

2. Whether a federal court of appeals reviews an appeal from a Federal Rule of Civil Procedure 23.1 order in a derivative action *de novo*, as the First, Second, Sixth, and Seventh Circuits have held, or for an abuse of discretion, as held by the Eighth Circuit here, and by the Third, Ninth, Tenth, Eleventh, and D.C. Circuits.

3. Whether a plaintiff in a shareholder-derivative action is entitled to discovery before the court rules on a special litigation committee's motion to dismiss.

PARTIES TO THE PROCEEDING

Petitioner is Ms. Charlotte Kokocinski, derivatively on behalf of Medtronic, Inc., a publicly traded company. Respondents are Arthur D. Collins, Jr., William A. Hawkins, Gary Ellis, Richard H. Anderson, David L. Calhoun, Victor J. Dzau, Shirly Ann Jackson, James T. Lenehan, Denise M. O'Leary, Kendall J. Powell, Robert C. Pozen, Jean-Pierre Rosso, Jack W. Schuler, Michael R. Bonsignore, Gordon M. Sprenger, William R. Brody, Omar Ishrak, Medtronic, Inc., and the Special Litigation Committee.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

PETITION APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Statutes

Rules

Other Authorities

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, App. 1a–23a, is reported at 850 F.3d 354. The opinion of the United States District Court for the District of Minnesota, App. 24a–63a, is not reported but available at 2015 WL 5736165. The order of the Eighth Circuit denying rehearing en banc, App. 77a, is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2017. App. 1a. The court of appeals order denying rehearing en banc was entered on April 11, 2017. App. 77a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rule of Civil Procedure 23.1 states, in relevant part:

> (c) Settlement, Dismissal, and Compromise. A derivative action may be settled, voluntarily dismissed, or compromised only with the court's approval. Notice of a proposed settlement, voluntary dismissal, or compromise must be given to shareholders or members in the manner that the court orders.

Federal Rule of Civil Procedure 56 states, in relevant part:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.
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> * * *
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> (d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time . . . to take discovery . . . .

INTRODUCTION

An appellate court should always review *de novo* a decision involving pure questions of law that results in dismissal of an action. But the Eighth Circuit flipped that venerable rule and applied an abuse-of-discretion standard here to affirm dismissal of Petitioner Charlotte Kokocinski's shareholder-derivative action. As the panel acknowledged, its approach exacerbated a mature circuit split regarding the standard of review applicable to the dismissal of a shareholder-derivative action based on a special litigation committee recommendation. App. 6a–10a (cataloguing 3-2 circuit split). This Court's immediate review is warranted.

Kokocinski filed this action derivatively on behalf of Medtronic, Inc., a global medical-device company. She alleges that Medtronic suffered hundreds of millions of dollars in damages due to the misconduct of Respondents, 17 Medtronic directors and officers, related to their promotions of off-label uses for Infuse Bone Graft, a product that helps grow new bone in patients.

The underlying misconduct has been the subject of multiple government investigations conducted by the United States Department of Justice and the United States Senate Finance Committee. These investigations resulted in Medtronic entering into a $40 million whistleblower settlement with the Department of Justice and an $85 million class-action settlement for securities fraud. Kokocinski also alleges that Respondents harmed the company by authorizing a $2.8 billion stock repurchase at a time when they knew Medtronic share prices were artificially inflated, and awarding executive compensation without accounting for settlement expenses.

To examine Kokocinski's allegations, Medtronic formed a two-member special litigation committee. Predictably, the committee recommended dismissing Kokocinski's action as in "Medtronic's best interests." Medtronic, Respondents, and the committee then brought separate motions to dismiss based on the committee's report and declarations from the committee's members. Denying Kokocinski discovery—including basic conflict-of-interest information, such as the amount of the committee members' compensation from Medtronic—the district court deferred to the special litigation committee's report and granted dismissal.

While the appeal was pending, additional misconduct involving Infuse came to light. According to news reports, Medtronic had conducted a study back in 2008 of Infuse patients that revealed many problems, including four patient deaths. Although federal law requires companies to report possible product-related injuries to the Food and Drug Administration (FDA) within 30 days after learning of them, Medtronic had shut down the study without disclosing its results to the government.[1] Nothing in the committee's report indicates the committee even investigated this misconduct.

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[1] Jim Spencer, Joe Carlson, & MaryJo Webster, *Medtronic's Lost Infuse Study, a Question of Risk*, STAR TRIBUNE, Apr. 10, 2016 (*available at* https://goo.gl/5ML6Zn).

Aligning itself with the Eleventh Circuit, the Eighth Circuit panel affirmed the district court's dismissal order under an abuse-of-discretion standard. App. 6a–10a (citing *Peller* v. *S. Co.*, 911 F.2d 1532, 1536 (11th Cir. 1990)). This standard was appropriate, said the panel, because the district court reached its decision "based on its familiarity with the case, its weighing of the evidence, and its credibility determinations." App. 9a. But the district court dismissed as a matter of law; it weighed no evidence and made no credibility determinations. And the panel decided the case on the same limited record the district court reviewed—the committee's report and its two members' declarations. That ruling presents three issues for this Court's review.

The first question is what standard of review is proper with regard to a district court's dismissal of a derivative action based on a special litigation committee report. As the panel acknowledged, its decision to align itself with the Eleventh Circuit conflicts with decisions of the First, Sixth, and Ninth Circuits, all of which review such dismissals *de novo*. App. 6a–7a (citing *Sarnacki* v. *Golden*, 778 F.3d 217, 221 (1st Cir. 2015); *Booth Family Trust* v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2001); and *Gaines* v. *Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *overruled on other grounds by Churchill* v. *The F/V Fjord* (*In re* McLinn), 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc)). The split is actually deeper than even the panel realized, because the Second and Fifth Circuits are also in the *de novo* review camp. See *Halebian* v. *Berv*, 644 F.3d 122, 124 (2d Cir. 2011); *Bach* v. *Nat'l W. Life Ins. Co.*, 810 F.2d 509, 510 (5th Cir. 1987).

If the Court agrees with the Eighth and Eleventh Circuits that motions to dismiss shareholder-derivative actions are controlled by Federal Rule of Civil Procedure 23.1 instead of Rule 56, there is a secondary question of what standard of review to apply to motions to dismiss brought under Rule 23.1. The First, Second, Sixth, and Seventh Circuits say *de novo*. See *Union de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan* v. *UBS Fin. Servs. Inc. of Puerto Rico*, 704 F.3d 155, 162 (1st Cir. 2013); *Espinoza* v. *Dimon*, 797 F.3d 229, 236 (2d Cir. 2015); *Lukas* v. *McPeak*, 730 F.3d 635, 637 (6th Cir. 2013); and *Westmoreland Cnty. Emp. Ret. Sys.* v. *Parkinson*, 727 F.3d 719, 724–25 (7th Cir. 2013). The Eighth Circuit joins the Third, Ninth, Tenth, Eleventh, and D.C. Circuits and reviews for an abuse of discretion. See *Zomolosky* v. *Kullman*, 640 F. App'x 212, 215 (3d Cir. 2016); *Potter* v. *Hughes*, 546 F.3d 1051, 1056 (9th Cir. 2008); *Cadle* v. *Hicks*, 272 F. App'x 676, 677 (10th Cir. 2008); *Staehr* v. *Alm*, 269 F. App'x 888, 891 (11th Cir. 2008); and *Gaubert* v. *Fed. Home Loan Bank Bd.*, 863 F.2d 59, 61 (D.C. Cir. 1988). Notably, this Court granted a petition presenting a similar question in *Union de Empleados*, but the parties voluntarily dismissed the case before merits briefing. *UBS Fin. Servs.* v. *Union de Empleados de Muelles de P.R. PRSSA Welfare Plans*, 134 S. Ct. 40 (2013).

The third question is whether a plaintiff in a shareholder-derivative action is entitled to discovery regarding the special litigation committee before a court rules on a motion to dismiss. The Eighth Circuit said no. App. 21a–22a. Other circuit courts have said yes. *E.g.*, *Halebian* v. *Berv*, 644 F.3d 122, 133 (2d Cir. 2011) (ordering district court to reevaluate discovery request under Rule 56 standard); *Booth*

Family Trust v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2011) (district court allowed plaintiffs "to take rather extensive discovery" of special litigation committee); *Galef* v. *Alexander*, 615 F.2d 51, 56 (2d Cir. 1980) (same); *Zapata Corp.* v. *Maldonado*, 430 A.2d 779, 788 (Del. 1981) (discovery is appropriate to "inquire into the independence and good faith of the committee and the bases supporting its conclusions"); *Parkoff* v. *Gen. Tel. & Elecs. Corp.*, 53 N.Y.2d 412, 417–18 (N.Y. 1981) (business-judgment rule does not shield special litigation committees from discovery).

Accordingly, Kokocinski respectfully requests that the petition be granted, the court of appeals reversed, the litigation reinstated, and the case remanded to the district court for discovery.

STATEMENT

A. Respondents' misconduct

This case involves the loss of hundreds of millions of dollars in shareholder value because of Medtronic's illegal promotion of off-label uses for Infuse, a surgically implanted device that stimulates bone growth. 8th Cir. Appellant App. 148–49. It is illegal for a manufacturer to promote a device's off-label use, i.e., to prescribe a device for a form of administration the FDA has not approved. *Id.* at 148. Kokocinski alleges that Respondents caused Medtronic to issue false and misleading statements in its public disclosures, including SEC filings. *Id.* at 149–51. Respondents also caused Medtronic to conceal the extent of its promotion of off-label Infuse uses. *Id.* at 149. As noted above, this fraud resulted in a $40 million whistleblower settlement and an $85 million class-action settlement. *Id.* at 149–50.

Kokocinski alleges that Respondents breached their fiduciary duties in three other distinct ways. First, Respondents authorized a $2.8 billion stock buyback knowing that Medtronic's stock price was artificially inflated due to the fraudulent statements. *Id.* at 227–30. Second, Respondents formed a $100 million cash trust to protect themselves from liability rather than procuring traditional directors and officers' liability insurance. *Id.* at 1064, 211–15. Third, Respondents issued bonuses to Respondents Ishrak, Hawkins, and Ellis based on Medtronic's performance, after wrongfully *excluding* $90 million in settlement costs incurred the same year in connection with the wrongdoing. *Id.* at 213–33, 240–41, 246–47.

B. The litigation

To pursue damages for these bad acts, Kokocinski filed this litigation, asserting claims for violating Section 14(a) of the Securities Exchange Act of 1934, breaches of fiduciary duties, corporate waste, and unjust enrichment. *Id.* at 247–51. In March 2012, Medtronic's Board formed a three-member special litigation committee under MINN. STAT. § 302A.241, subd. 1, to investigate the allegations. *Id.* at 269. Although the Board's enabling resolution gave the committee members authority to investigate the derivative claims and determine whether they should be pursued, it did not authorize the committee itself to pursue derivative claims if appropriate. *Id.* And if the committee determined it was appropriate for Kokocinski to pursue the derivative claims, that decision could not bind the conflicted Board; the Board retained ultimate authority to accept or reject the committee's recommendations. A resignation by one of the members resulted in only two committee members moving forward. *Id.* at 257.

While the committee investigation was ongoing, Kokocinski continued to litigate her derivative claims. After obtaining some internal company documents through a state-court books-and-records inspection proceeding, Kokocinski filed a 285-paragraph Amended Verified Shareholder Derivative Complaint on April 23, 2014. The Complaint included detailed facts regarding the individual Respondents' knowledge about the problems associated with Medtronic's marketing and use of Infuse. *Id.* at 158–60, 171–72, 181–83, 188–94, 203–15, 216–17.

Only six weeks later, in May 2014, the committee issued a report concluding that it was not in Medtronic's best interests to pursue litigation regarding the derivative claims. *Id.* at 277–348. Although the committee was itself not a party to this action and never sought to intervene, the committee moved the district court, in June 2014, to dismiss this action with prejudice. *Id.* at 254. In addition to submitting the report, the two committee members submitted affidavits. *Id.* at 256–57, 891–902. Unsurprisingly, Respondents and Medtronic quickly filed their own, separate motions to dismiss, relying on the special litigation committee's recommendation and report. *Id.* at 912, 914.

In preparing her opposition to the motions to dismiss, Kokocinski repeatedly asked for basic information regarding the compensation Medtronic paid the special litigation committee members. *Id.* at 818. The committee denied those requests, refusing to disclose even the total amount of compensation its members received. *Id.* at 926. All the committee would say was that its members "were paid their normal hourly rates as set in their [law] practices."

Id. The committee and Respondents also refused to disclose any details about the committee's methodology in reaching its recommendation, or even about the experts the committee retained.

C. The District Court's ruling

The district court struggled with how to characterize the committee's motion to dismiss, since the motion did not seek judgment on the pleadings under Rule 12(b) or summary judgment on the merits under Rule 56. App. 45a. The court ultimately concluded that Rule 23.1, which governs derivative actions, controlled and thus construed the motions as motions to dismiss or terminate under that Rule, though conceding that Rule 23.1 "does not explicitly discuss this type of motion." App. 46a–47a. The court analogized the motions as akin to "voluntary dismissal[s]" under Rule 23.1(c), App. 47a, even though Kokocinski was not voluntarily dismissing anything. The court believed its analysis required an examination of the independence and methodologies of the committee, borrowing "heavily from the summary judgment standard in guiding [the] Court on how deeply to delve into the" committee and its report. *Id.*

That said, the district court noted differences between deciding a summary-judgment motion and a motion to dismiss a shareholder-derivative action based on a special litigation committee report. In analyzing Respondents' motions, for example, the court "would 'not make determinations of credibility or weigh conflicting evidence.'" App. 47a (quotation omitted). "Similarly," "while limited discovery into the independence and methodologies of the [committee] may be ordered, it is not necessary." *Id.* So while construing Respondents' motions as a Rule 23.1 mot-

ions to dismiss, the court would "keep the summary judgment standard close at hand." App. 47a–48a.

On the merits, the district court concluded that the committee possessed (1) adequately broad power, App. 49a–52a, and (2) disinterested independence, App. 52a–57a. Further, the committee's investigative procedures and methodologies were adequate, appropriate, and pursued in good faith. App. 58a–61a.

D. The Eighth Circuit's ruling

The Eighth Circuit began with the proper standard for reviewing a district court's dismissal of a shareholder-derivative action based on the recommendation of a special litigation committee, noting this was "a matter of first impression for our circuit." App. 6a. The court explained that the First Circuit has classified such a motion as a "hybrid summary judgment motion for dismissal," warranting *de novo* review. App. 6a (citing *Sarnacki* v. *Golden*, 778 F.3d 217, 221 (1st Cir. 2015)). "Other circuits," said the court, have regarded such dismissals "as a Rule 56 motion, also reviewing *de novo*." App 6a–7a (citing *Booth Family Trust* v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2011), and *Gaines* v. *Haughton*, 645 F.2d 761, 769 (9th Cir. 1981)). In contrast, the Eleventh Circuit has "construed a motion to terminate as one arising under Rule 23.1 and applied an abuse-of-discretion standard of review." App. 7a (citing *Peller* v. *S. Co.*, 911 F.2d 1532, 1536 (11th Cir. 1990)).

The court sided with the Eleventh Circuit and reviewed the district court ruling for an abuse of discretion. App. 7a–8a. Although the district court expressly stated that it was not making determinations of credibility or weighing conflicting evidence, the Eighth Circuit felt that assessing the "indepen-

dence and adequacy of [a special litigation committee]'s investigation" *does* "involve[ ] making findings based on credibility determinations and the weighing of evidence." App. 7a. And though the motions' similarity to a Rule 23.1(c) voluntary dismissal "is only skin deep," "in the absence of a better fit, Rule 23.1(c) [and its deferential standard of review] is most closely concerned with the issues raised in a motion to terminate." App. 8a.

In sum, said the court, a federal "district court's inquiry on a motion to terminate involves determining whether the legal criteria of [state] law have been met based on its familiarity with the case, its weighing of the evidence, and its credibility determinations." App. 9a. Abuse-of-discretion is the appropriate standard when a "district court must apply a fact-intensive legal standard, particularly where (1) the district court is better positioned than the reviewing court to decide the issue because of its familiarity with the evidence," and "(2) the facts of each case are of a 'multifarious, fleeting, special, [and] narrow' nature resulting in close calls, so as not to be susceptible of 'useful generalization.'" App. 9a (quoting *Cotter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 401–05 (1990)). In other words, the "district court must assess the weight and credibility of the evidence in order to evaluate the independence and adequacy of the [special litigation committee]'s investigation." *Id.*

On the merits, the court said that the district court did not abuse its discretion. App. 10a–20a. And it rejected Kokocinski's argument that she was entitled to discovery regarding the special litigation committee's independence and the validity of its methodology. App. 21a–22a. The Eighth Circuit held

that defendants had met their burden of showing no fraud or bad faith "with affidavits including the [special litigation committee]'s report, demand letters and complaints from shareholders, the Board's resolution, and Medtronic's marketing policies." App. 22a. Based on this one-sided presentation of the evidence, "the district court exercised its sound discretion in concluding that discovery was not necessary." *Id.*

REASONS FOR GRANTING THE PETITION

When corporate executives benefit from their own wrongful conduct, it is most often at the expense of the company's ultimate owners—shareholders. The purpose of a shareholder-derivative action is to give investors the ability to combat such wrongdoing by holding the company's officers and directors liable for the harm they caused to the company. See *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 95 (1991) ("Devised as a suit in equity, the purpose of the derivative action was to place in the hands of the individual shareholder a means to protect the interests of the corporation from the misfeasance and malfeasance of 'faithless directors and managers.'"). Balanced against such suits are special litigation committees, intended to be a shield for companies to ward off unworthy actions while allowing worthy claims to go forward. As a practical matter, special litigation committees almost never recommend pursuing claims, even highly meritorious claims like those Petitioners advance here. Without a proper legal standard of review to assess special litigation committees' recommendations to dismiss derivative lawsuits, the courts will simply become rubber stamps for company management.

That is exactly what materialized here. It is impossible to say that Medtronic was likely to receive no benefit whatsoever from allowing Kokocinski to pursue the derivative claims against Respondents for the damages they caused Medtronic through their misconduct. Given the well-documented record, established by the government, of fraud and abuse at Medtronic, it is likely that the company would have received substantial damages from Respondents, whether in a judgment or settlement. That the committee nonetheless recommended dismissal raises serious questions about its independence and methodology.

Yet when analyzing the committee's motion to dismiss, the Eighth Circuit treated the motion as procedurally indistinguishable from a motion for voluntary dismissal and deferred to fact findings and credibility determinations that the district court disclaimed it was making. That approach does not make analytically sense, conflicts with the approach of other circuits, and severely prejudiced Kokocinski.

Accordingly, this Court should grant the petition, resolve the circuit splits regarding the standard of review, hold that a motion to dismiss a shareholder-derivative action based on a special litigation committee report is akin to a Rule 56 summary-judgment motion, and remand for discovery and *de novo* review.

I. The Court should grant the petition to resolve a mature circuit conflict regarding the standard of review that applies to a district court dismissal of a shareholder-derivative action based on the recommendation of a special litigation committee.

The first question presented involves a mature circuit conflict with regard to an issue of substantial and recurring importance: the proper standard for reviewing a district court's dismissal of a shareholder-derivative action based on the recommendation of a special litigation committee. As the panel noted below, the First, Sixth, and Ninth Circuits have all previously held that the appropriate standard of review is *de novo*, while the Eleventh Circuit applies an abuse-of-discretion standard. App. 6a–8a. The Eighth Circuit aligned itself with the Eleventh Circuit, creating what the panel believed was a 3-2 circuit split. But because the Second and Fifth Circuits have also reviewed such motions as a matter of law, the circuit division is actually 5-2. And until this Court establishes a uniform rule, the standard of review applied to any particular decision dismissing a shareholder-derivative suit will depend entirely on geography.

1. The Eighth and Eleventh Circuits have now both held that the proper standard for reviewing an order dismissing a shareholder-derivative lawsuit is abuse-of-discretion. In *Peller* v. *Southern Co.*, 911 F.2d 1532, 1536 (11th Cir. 1990), a shareholder-derivative action was brought to recover damages based on alleged negligence and breach of fiduciary duties in connection with Southern Company's decision to build a nuclear power plant and pumped storage facility. Southern and its directors moved to

dismiss based on the recommendation of a special litigation committee. Although the motions were filed under Federal Rules of Civil Procedure 12(b)(6) and 56, the Eleventh Circuit said that a shareholder-derivative suit is governed by Rule 23.1 and, without further discussion, held that an abuse-of-discretion standard of review applies. *Id.* at 1536.

The Eighth Circuit in the present case aligned itself with the Eleventh Circuit because, "in the absence of a better fit, Rule 23.1(c) is most closely concerned with the issues raised in a motion to terminate." App. 8a. "The district court's inquiry on a motion to terminate involves determining whether the legal criteria of Minnesota law have been met based on its familiarity with the case, its weighing of the evidence, and its credibility determinations." App. 8a–9a. These are classic fact-intensive circumstances, concluded the panel, warranting application of the abuse-of-discretion standard. App. 9a.

2. The First, Second, Fifth, Sixth, and Ninth Circuits have reached the opposite conclusion. For example, in *Booth Family Trust* v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2001), shareholders alleged that corporate executives of Abercrombie made misleading statements that caused the company's stock price to be inflated. A special litigation committee recommended dismissal, and the district court granted the company's motion to dismiss based on the report.

On appeal, the Sixth Circuit began its analysis the same way the Eighth Circuit did here, acknowledging that a motion to dismiss based on a special litigation committee report "is 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.

But the Sixth Circuit departed from the Eighth Circuit's conclusion, holding that such a motion "is most similar to a summary judgment motion" under Rule 56. *Id.* The inquiry's focus is not on the ultimate merits of the plaintiffs' claims, "but on whether maintenance of the suit would be in the company's best interest." *Id.* Nonetheless, the motion "is similar to a summary judgment motion because the movant points to matters outside the pleadings, i.e. the special litigation committee's report, as providing the basis for relief. The opposing party seeks to oppose with other evidence, if available, and the movant replies in support." *Id.* "Because the district court is only making legal conclusions about uncontroverted facts, . . . there is no reason for according deference to the district court's conclusion." *Id.* at 139–40. "Moreover," the court continued, "the nature of the inquiry is similar to a summary judgment motion, in that the court is determining whether there is a question of material fact as to the relevant legal issue." *Id.* at 140.

Accordingly, as a matter of federal law, the court held that it would "review *de novo* the district court's decision to grant a corporation's motion to dismiss pursuant to the recommendation of its special litigation committee." *Id.* at 140–41. Applying that standard, and harboring "serious doubts" that Abercrombie's special litigation committee was actually independent, the court reversed the district court's dismissal and reinstated the shareholder-derivative action. *Id.* at 141–47.

The First Circuit has reached the exact same conclusion as the Sixth Circuit, and for the same reasons. *Sarnacki* v. *Golden*, 778 F.3d 217, 221–22 (1st Cir. 2015) (as a "matter of federal law," "[w]e now hold that the applicable standard of review is *de novo*, because a summary dismissal under Delaware law is a hybrid of a motion to dismiss and a motion for summary judgment, both of which we review *de novo*) (citing *Booth*, 640 F.3d at 139–41).

So have the Second, Fifth, and Ninth Circuits. *Halebian* v. *Berv*, 644 F.3d 122, 127–33 (2d Cir. 2011) (insofar as a motion to dismiss "encourages or requires the parties to submit, and under which it is expected that the court will review, evidentiary materials outside the scope of what the plaintiff has already included or incorporated into his or her complaint," the procedure is "incompatible" with a Rule 12(b)(6) motion to dismiss and must be "adjudicate[d] . . . within the framework of a summary judgment by converting the defendants' motion"); *Bach* v. *Nat'l W. Life Ins. Co.*, 810 F.2d 509, 510 (5th Cir. 1987) (following the district court's treatment of a motion to dismiss as a motion for summary judgment); *Gaines* v. *Haughton*, 645 F.2d 761, 769 (9th Cir. 1981), *overruled on other grounds by Churchill* v. *The F/V Fjord* (*In re* McLinn), 739 F.2d 1395, 1397 (9th Cir. 1984) ("Construe[ing] the allegations of the complaint favorably to the pleader," the reviewing court will uphold dismissal "only when there is no genuine issue of material fact" and "the movant is clearly entitled to prevail as a matter of law.") (citation omitted).

3. The Sixth Circuit and those aligned with it have the better of the argument. Contrary to the Eighth Circuit's reasoning here, a motion to dismiss

a shareholder-derivative action based on a special litigation committee's recommendation is nothing like a settlement or voluntary dismissal under Rule 23.1(c). The shareholder plaintiff does not concur in the company's relief but actively opposes it. Because Rule 23.1(c) "appl[ies] only to *voluntary settlements* between derivative plaintiffs and defendants, and [is] intended to prevent plaintiffs from selling out their fellow shareholders," *Burks* v. *Lasker*, 441 U.S. 471, 485 n.16 (1979) (emphasis added), the rule is inapplicable here. Moreover, the moving party—the special litigation committee here—is not seeking court "approval," Fed. R. Civ. P. 23.1(c), but outright dismissal, akin to summary judgment under Rule 56.

Such a motion—like one under Rule 56—necessarily involves evidence outside the pleadings. Without the committee report and affidavits from the committee's members, the district court would have nothing on which to base its ruling other than the complaint and any documents attached to it. And the decision to grant or deny the motion turns on two questions of law informed by the evidence introduced by both parties in their evidentiary exhibits: (1) Were the committee and its members truly independent?; and (2) Were the committee's investigative methodologies and procedures adequate, appropriate, and pursued in good faith?

The illogic in the Eighth Circuit's opinion is laid bare in its justification for applying an abuse-of-discretion standard. The panel felt that assessing the "independence and adequacy of [a special litigation committee]'s investigation" "involves making findings based on credibility determinations and the weighing of evidence." App. 7a. But on a motion to dismiss, a district court should never be making

factual findings or weighing evidence. And here, the district court expressly said it would "*not* make determinations of credibility or weigh conflicting evidence." App. 47a (emphasis added).

Finally, as this Court recently reaffirmed, questions of law are traditionally reviewed *de novo*, while matters of discretion are reviewable for abuse of discretion. *Highmark Inc.* v. *Allcare Health Mgmt. Sys., Inc.*, 134 S. Ct. 1744, 1748 (2014) (citing *Pierce* v. *Underwood*, 487 U.S. 552, 558 (1988)). District courts do not have discretion to grant motions seeking dismissal of a shareholder-derivative action; courts decide such motions as a matter of law. Accordingly, as a matter of logic, precedent, and procedure, such decisions must be reviewed *de novo*.

For purposes of the Court's consideration of this petition, it ultimately does not matter whether the circuits are split 5-2, as Kokocinski counts them, or 3-2, as the panel concluded. App. 6a–8a. Nor does it matter which set of circuit courts has the better side of the split. It simply cannot be the case that parties litigating shareholder-derivative actions receive abuse-of-discretion review on appeal in the Eighth and Eleventh Circuits, and *de novo* review when litigating in the First, Second, Fifth, Sixth, and Ninth Circuits. This is particularly so given that the standard of appellate review is frequently dispositive.

Accordingly, the petition should be granted so this Court can establish uniformity among the circuits and equal treatment to plaintiffs and defendants alike in shareholder-derivative actions, regardless of the circuit in which they might be litigating.

II. The Court should also grant the petition to resolve a mature circuit conflict regarding the standard of review that applies to a district court ruling under Rule 23.1.

Even if the First, Second, Fifth, Sixth, and Ninth Circuits are wrong, and motions to dismiss shareholder-derivative actions based on the recommendation of a special litigation committee are somehow controlled by Rule 23.1 rather than Rule 56, there is another circuit conflict that warrants this Court's attention: what review standard to apply to a district-court order granting or denying a motion under Rule 23.1.

When a shareholder brings a derivative action on behalf of a company and against its fiduciaries, Rule 23.1 applies and imposes certain pleading requirements. These requirements include allegations that the plaintiff was a shareholder at the relevant time, the action is not a collusive one to confer jurisdiction that the federal court would otherwise lack, and the plaintiff demanded that the company take the action itself (or should be excused from demanding, so-called "demand futility"). Fed. R. Civ. P. 23.1(b). A motion to dismiss based on a special litigation committee recommendation does not fit any of these requirements, much less the settlement or voluntary dismissal procedures contemplated by Rule 23.1(c). Nonetheless, the district court below construed Respondents' motions "as motions to dismiss under Rule 23.1," App. 47a, and the Eighth Circuit felt "the closest fit for a motion to terminate in the Federal Rules is Rule 23.1(c)," App. 8a. That begs the question: what standard of review applies to a district-court decision made on a Rule 23.1 motion to dismiss? Again, the circuits are deeply divided.

1. The First Circuit, reviewing a district court's dismissal of a shareholder-derivative action based on a failure to properly plead demand futility, held that the appropriate standard of review was *de novo*. *Union de Empleados de Muelles de Puerto Rico PRSSA Welfare Plan* v. *UBS Fin. Servs. Inc. of Puerto Rico*, 704 F.3d 155, 162–63 (1st Cir. 2013). That is because (1) the "legal sufficiency of a complaint" is a question of law, and (2) a "district court is no better positioned than" an appellate court "to read and evaluate a complaint" in a derivative action. *Id.* (numerous citations omitted).

Likewise, in *Espinoza* v. *Dimon*, 797 F.3d 229 (2d Cir. 2015), the Second Circuit abrogated its previous decisions in *Kaster* v. *Modification Sys., Inc.* 731 F.2d 1014 (2d Cir. 1984); *Lewis* v. *Graves*, 701 F.2d 245 (2d Cir. 1983); and *Elfenbein* v. *Gulf & W. Indus., Inc.*, 590 F.2d 445 (2d Cir. 1978), and held that any Rule 23.1 dismissal must be reviewed *de novo*. *Id.* at 234–36. "In reviewing the dismissal of a derivative claim, an appellate court performs exactly the same task as when reviewing the dismissal of any other action." *Id.* at 236. "No evidence is considered, no credibility determinations are made, and none of the other usual justifications for deferring to a district court are in play." *Id.*

The Sixth and Seventh Circuits agree. *Lukas* v. *McPeak*, 730 F.3d 635, 637 (6th Cir. 2013) (using *de novo* standard and rejecting the suggestion that an abuse-of-discretion standard be applied); *Westmoreland Cnty. Emp. Ret. Sys.* v. *Parkinson*, 727 F.3d 719, 724–25 (7th Cir. 2013) ("We review *de novo* the district court's determination that [plaintiff]'s allegations failed to meet the requirements of Rule 23.1 and thus that its action had to be dismissed). Until

now, so had the Eighth Circuit. See *Cottrell* v. *Duke*, 829 F.3d 983, 990 (8th Cir. 2016) (citing *Gomes* v. *Am. Century Cos.*, 710 F.3d 811, 815 (8th Cir. 2013)).

2. Conversely, the Eighth Circuit's decision here departs from its own precedent in *Cottrell* and *Gomes*, and aligns with those of the Third, Ninth, Tenth, Eleventh, and D.C. Circuits. *Zomolosky* v. *Kullman*, 640 F. App'x 212, 215 (3d Cir. 2016) ("We review a district court's ruling on demand futility under Fed. R. Civ. P. 23.1 for abuse of discretion."); *Potter* v. *Hughes*, 546 F.3d 1051, 1056 (9th Cir. 2008) ("Although dismissals for failure to state a claim are reviewed *de novo*, the district court's determination that Potter did not comply with Rule 23.1 . . . is reviewed for abuse of discretion."); *Cadle* v. *Hicks*, 272 F. App'x 676, 677 (10th Cir. 2008) ("Determinations under Rule 23.1 are generally reviewed for an abuse of discretion."); *Staehr* v. *Alm*, 269 F. App'x 888, 891 (11th Cir. 2008) ("We review the district court's dismissal of a shareholder derivative lawsuit [under Rule 23.1] for abuse of discretion."); and *Gaubert* v. *Fed. Home Loan Bank Bd.*, 863 F.2d 59, 61 (D.C. Cir. 1988) ("the district court did not abuse its discretion in dismissing this" shareholder-derivative action).

3. This Court has previously recognized the need to resolve the important and recurring question of what standard of review to apply to Rule 23.1 dismissals. In *UBS Financial Services* v. *Union de Empleados de Muelles de P.R. PRSSA Welfare Plans*, the Court granted a petition that presented that very question, 133 S. Ct. 2857 (2013), but the parties voluntarily dismissed the case before merits briefing, 134 S. Ct. 40 (2013). Although the *UBS* case involved a motion to dismiss for failure to plead demand futility with particularized facts, the need for this

Court's review is the same: "Certiorari is warranted to resolve the direct conflict of authority among the circuit courts as to what standard of appellate review governs dismissal of shareholder derivative lawsuits." *UBS* Pet. at 6, No. 12-1208.

In sum, Kokocinski rejects the premise that a motion to dismiss a shareholder-derivative action based on a special litigation committee recommendation even remotely fits the Rule 23.1 rubric. But if she is wrong, such a motion 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). And that characterization requires this Court to resolve the conflict among the circuits about the review standard that applies to such a motion. Again, certiorari is warranted.

III. The Court should grant the petition and resolve the conflict regarding whether a plaintiff in a shareholder-derivative action is entitled to discovery before the district court grants a motion to dismiss.

The third question presented stems from the Eighth Circuit's affirmance of the district court's decision to deny Kokocinski federal-court discovery as to the special litigation committee's independence and methodology. While the scope of discovery in a shareholder-derivative action is ultimately a matter of state law, every state (including Minnesota) allows at least some discovery. The question is one of scope. The Eighth Circuit's decision to allow no discovery conflicts with those of numerous other federal courts and further emphasizes why review is warranted.

The Eighth Circuit held that Kokocinski was not entitled to discovery because she could not prove "that further discovery may be fruitful." App. 22a. The panel's concern appeared to be granting a plaintiff in a shareholder-derivative action the opportunity to conduct a "fishing expedition" for evidence where there was none. *Id.*

The panel's decision forced Kokocinski to resist the motion to dismiss with both hands tied. She could argue that the committee members were biased because of the extraordinary compensation Medtronic was paying them, but she was not entitled to know how much the members were actually being paid. She could argue that Medtronic's formation of the committee and selection of its members were biased, but she was not entitled to know how the committee was formed or how its members were chosen. She could argue that Medtronic's process for adopting the committee's recommendation was conducted in bad faith, but she was not entitled to any information about the adoption process. And she could challenge the committee's retention and compensation of experts and the methods it used to conduct an investigation, but she was not entitled to discovery regarding the process for making those retentions or conducting that investigation.

Had the Eighth Circuit followed the circuit majority and correctly treated Respondents' motions to dismiss as akin to a summary-judgment motion under Rule 56, see *supra* Section I, Kokocinski could have responded with an affidavit or declaration requesting discovery. Fed. R. Civ. P. 56(d)(2). But she did not receive even that opportunity, even though she repeatedly sought discovery in the district court. Other federal and state courts have allowed

discovery in the same circumstances. *E.g.*, *Halebian* v. *Berv*, 644 F.3d 122, 133 (2d Cir. 2011) (ordering district court to reevaluate discovery request); *Booth Family Trust* v. *Jeffries*, 640 F.3d 134, 139 (6th Cir. 2011) (district court allowed plaintiffs "to take rather extensive discovery" of special litigation committee); *Galef* v. *Alexander*, 615 F.2d 51, 56 (2d Cir. 1980) (same); *Zapata Corp.* v. *Maldonado*, 430 A.2d 779, 788 (Del. 1981) (discovery appropriate to "inquire into the independence and good faith of the committee and the bases supporting its conclusions"); *Parkoff* v. *Gen. Tel. & Elecs. Corp.*, 53 N.Y.2d 412, 417–18 (N.Y. 1981) (business-judgment rule does not shield committees from discovery).

To be sure, the burden of proof in this case is on Respondents, not Kokocinski. Following New York's approach in *Auerbach* v. *Bennett*, 47 N.Y.2d 619 (N.Y. 1979), the Minnesota Supreme Court has placed the burden on the special litigation committee to prove that its members "possessed a disinterested independence," and that the committee's investigation was "pursued in good faith." *In re United Health Grp., Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 561 (Minn. 2008). Kokocinski has *no* burden "to prove a negative—that the [committee] did not act in good faith or was not independent." *Id.* Even so, before requiring Kokocinski to come forward with evidence to challenge the committee's showing of disinterested independence and good faith, discovery is necessary because she lacks "access to relevant information." *Id.* (quoting *Nat'l Commc'ns Ass'n, Inc.* v. *AT&T Corp.*, 238 F.3d 124, 130 (2d Cir. 2001)).

The decision of New York's highest court in *Parkoff* is instructive. There, a special litigation committee likewise moved to dismiss a shareholder-derivative action based on the committee's recommendation that pursuing the action would not be in the company's best interests. 53 N.Y.2d 416. After the trial court denied the motion without prejudice and ordered discovery to proceed, and the intermediate appellate court reversed and granted judgment for the committee, New York's high court unanimously held that discovery was essential before deciding whether to dismiss the case based on the committee's recommendation. *Id.* at 416–17. Dismissal would have been "premature." *Id.* at 416.

Specifically, said the court, it would have been "unreasonable to hold [the shareholder plaintiff] to the customary requirement that he show that facts essential to the defeat of the [committee's] motion may exist." *Id.* at 417. That is because "almost all possible evidentiary data . . . were *within the exclusive possession of defendants*." *Id.* (emphasis added).

So too here. The special litigation committee and Respondents have exclusive possession of all pertinent information regarding the disinterested independence and good faith of the committee and its members. The committee conducted its investigation in secret and disclosed only its final report, which is replete with generalized, conclusory statements. See, *e.g.,* 8th Cir. Appellant App. 344–48. Yet the committee has kept not only Kokocinski but also the district court and the Eighth Circuit in the dark with respect to the most basic information necessary for an adequate inquiry under *UnitedHealth*.

The committee rejected Kokocinski's repeated requests for disclosure of member compensation. *Id.* at 917–18, 926. The committee and Respondents have kept secret all documents relating to the Board's decisions to (1) define the committee's authority, (2) select the committee's members, and (3) adopt the committee's recommendations. And the committee and Respondents have not disclosed basic information regarding the committee's retention of experts, such as how the experts were retained, whether they had any pre-retention dealings with Medtronic or committee members, or how the experts were compensated. The committee and Respondents have not even disclosed the basis of any findings made, or any reports produced, by the experts.

Unsurprisingly, even while applying state law regarding shareholder-derivative claims, other federal district courts have readily concluded that plaintiff shareholders are entitled to discovery in similar circumstances under the federal rules. *E.g.*, *Seidl* v. *Am. Century Cos.*, 799 F.3d 983, 991 (8th Cir. 2015), and No. 10-4152-CV-W-SOW, 2012 U.S. Dist. LEXIS 187835, at *21 n.10 (W.D. Mo. Oct. 31, 2012) (allowing shareholder to depose special litigation committee members and obtain "all of the documents that the committee reviewed and memoranda summarizing all twenty-two witness interviews"); *Gen. Elec. Co. ex rel. Levit* v. *Rowe*, No. Civ. A. 89-7644, 1991 U.S. Dist. LEXIS 8314, at **8–9 (E.D. Pa. June 18, 1991) (requiring production of documents relating to the special committee's investigative methodologies and procedures); *Kautz* v. *Sugarman*, No. 10 Civ. 3478 (RJS), 2011 U.S. Dist. LEXIS 35916, at *22 (S.D.N.Y. Mar. 31, 2011) (denying motion to dismiss and allowing discovery); *Scalisi* v. *Grills*, 501 F. Supp. 2d 356, 360 (E.D.N.Y. 2007)

(postponed ruling on a special committee's motion to terminate until after discovery into the "nature of the scope" of the committee's investigation, including depositions of committee members and production of documents "reviewed by the [c]ommittee and its counsel, as well as interview notes and memoranda"); *Genzer* v. *Cunningham*, 498 F. Supp. 682, 697 (E.D. Mich. 1980) (allowing "extensive discovery . . . on the issue of the good faith of the [s]pecial [l]itigation [c]ommittee and its determination").

These cases, and the resulting conflict with the Eighth Circuit's decision here, highlight the need for this Court to review the first and second questions presented. If a motion to dismiss a shareholder-derivative action based on a special litigation committee report really is akin to a joint stipulation to dismiss, then no discovery is necessary. But if this Court concludes that such a motion is more like a Rule 56 summary-judgment motion, or even a dispositive motion under Rule 23.1, then discovery is indispensable.

Kokocinski respectfully submits that the most appropriate way to deal with this record defect is to remand to the district court for reconsideration, as the Second Circuit did in *Halebian* v. *Berv*, 644 F.3d 122 (2d Cir. 2011). After reversing the district court for using an abuse-of-discretion standard of review, the court remanded for "a reevaluation of any [ ] application by the plaintiff for more discovery in light of Rule 56 case law and procedures." *Id.* at 133. The Court should grant the petition and order the same relief here.

IV. The questions presented are recurring and of national importance, and this case is an ideal vehicle for resolving them.

The numerous conflicting decisions on all three questions presented show that the issues are recurring and creating unnecessary district- and circuit-court litigation. The Court should grant the petition and resolve those conflicts now.

First, despite this Court's clear history of applying a *de novo* standard of review to questions of law, including motions for judgment as a matter of law, the circuits are in disarray regarding how those precedents apply in the shareholder-derivative context. The Second Circuit alone used an abuse-of-discretion standard three times before abrogating its precedents and applying *de novo* review in *Espinoza*. And this Court recognized the need to resolve the circuit conflict by granting the petition in the same case, even though that opportunity was ultimately lost when the parties settled.

Second, the circuit splits are deep and mature, with five circuits on one side of the divide and two on the other with respect to motions to dismiss based on special litigation committee recommendations, and with four circuits on one side and six on the other with respect to motions filed under Rule 23.1. The chances are nil that subsequent circuit decisions or *en banc* proceedings will resolve these conflicts, or even provide useful additional analysis. See *Rosenbloom* v. *Pyatt*, 765 F.3d 1137, 1160 (9th Cir. 2014) (Reinhart, J., specially concurring) (urging repeal of the abuse-of-discretion standard of review in appeals from Rule 23.1(b) dismissals). The Eighth Circuit panel in this very case, for example, had the opportunity to join the circuit majority regarding the

first question presented by adopting *de novo* review, but instead built on the minority position the Eleventh Circuit articulated in *Peller*.

Third, further delay in resolving the conflicts harms parties and the justice system. The appellate standard of review is crucial in litigation, often dispositive. See *Dickinson* v. *Zurko*, 527 U.S. 150, 162 (1999) ("The upshot in terms of judicial review is some practical difference in outcome depending upon which standard is used."). If the Eighth Circuit is correct, then district-court prevailing parties in circuits applying the *de novo* standard of review are being wrongfully deprived of the substantial deference to which their victories are entitled. And if the Sixth Circuit is correct, then parties who lose in the district court and are subjected to an abuse-of-discretion review standard are being wrongfully deprived of a fresh look at the law and evidence. Either way, the justice system is producing widely divergent results for similarly situated parties.

Finally, this case is an ideal vehicle to resolve the questions presented. There are no contested facts pertinent to the applicable standard of review. The sole issues left for the Court to decide are whether Kokocinski is entitled to *de novo* review of the district-court decision dismissing her action, and whether she is entitled to even a modicum of discovery under Rule 56(d)(2), the same as any other party opposing a summary-judgment motion filed before depositions or document production have proceeded.

All these factors counsel strongly in support of this Court's immediate review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[Appendix]