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SPECIAL COMMITTEE REPORT

This issue of the *Debevoise & Plimpton Special Committee Report* surveys corporate transactions announced during the period from July through December 2022 that used special committees to manage conflicts and key Delaware judicial decisions during this period ruling on issues relating to the use of special committees.

Using *MFW* Protections Outside of Controller Squeeze-Outs

As discussed in prior issues of this *Report*, compliance with the procedural protections established by the Delaware Supreme Court's decision in *Kahn v. M&F Worldwide Corp.*[1] allows parties to a conflicted controller transaction—including the directors of the controlled company who approve the transaction—to obtain the benefit of the business judgment rule rather than to have the transaction, and their conduct, judged under the much more exacting standard of entire fairness. The *MFW* decision arose in the context of a squeeze-out merger, and most of the subsequent cases either following or distinguishing that decision have involved similar transactions. However, as discussed below, the Delaware courts have consistently held that compliance with the *MFW* playbook may also lead to business judgment rule treatment for a wide variety of transactions in which a controller receives a non-ratable benefit.

Perhaps the first case in which the Delaware courts considered the application of *MFW* to a transaction not involving a controller squeeze-out involved allegations that Martha Stewart, the controlling stockholder of Martha Stewart Living Omnimedia, received disparate consideration in the sale of that company to a third-party buyer. The transaction had been subject from its inception to the approval of an independent special committee and a majority vote by the stockholders unaffiliated with Stewart. In its 2017 decision dismissing breach of fiduciary duty claims against Stewart, the Court of Chancery held that those protections subjected the transaction to the business judgement rule.[2]

That same year, the Court of Chancery relied on the use of the *MFW* protections to dismiss a challenge to a recapitalization allegedly designed to preserve a controller's position. NRG Energy, which owned a majority of the voting power of NRG Yield, was concerned that its continued use of its NRG Yield shares to fund acquisitions would eventually dilute its voting power below 50%. To avoid that eventuality, it proposed that NRG Yield create a new class of non-voting common stock and pay a one-for-one dividend of such non-voting common shares to all of its stockholders, thus providing NRG Energy a currency to use for future acquisitions without diluting its control. The NRG Energy proposal was conditioned from the outset on approval by NRG Yield's independent conflicts committee and on a majority vote by stockholders not affiliated with NRG Energy. While the court agreed that the dividend provided a non-ratable benefit to the controller that would otherwise be subject to entire fairness review,

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1 88 A. 3d 365 (Del. 2014).

2 *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*, 2017 WL 3568089 (Del. Ch. 2017).

it held that the independent committee and majority-of-the-minority procedural protections rendered the transaction subject to business judgment rule review.[3]

The *Martha Stewart* and *NRG* decisions involved transactions that were mandatorily subject to stockholder approval under Delaware corporate law, but the Delaware courts have held that the *MFW* protections can also be used in transactions that are not otherwise subject to stockholder approval. For example, in a challenge to an incentive compensation award by Tesla to its controller Elon Musk, the Court of Chancery found that the grant of the award—involving stock options with a potential value of over $50 billion—was subject to entire fairness review. However, the court went out of its way to note that if the parties had utilized the protective provisions of *MFW*, the case might have been dismissed at the pleading stage: "Had the Board conditioned the consummation of the Award upon the approval of an independent, fully functioning committee of the Board and a statutorily compliant vote of a majority of the unaffiliated stockholders, the Court's suspicions regarding the controller's influence would have been assuaged and deference to the Board and stockholder decisions would have been justified."[4]

More recently, in a case discussed later in this *Report*, the Court of Chancery relied on *MFW* to dismiss a stockholder challenge to a charter amendment that extended the duration of a dual-class voting structure. The founder's control of the company was threatened by a provision in the company's charter that would have converted his high-vote Class B stock into single-vote Class A stock once the Class B stock dropped below 10% of the outstanding common shares. The board of the company formed a special committee of independent directors to consider the controller's request to modify the 10% dilution trigger. Following extensive negotiations, the special committee and the founder agreed to a charter amendment extending the founder's control for a limited period, which was approved by majority vote of the Class A stockholders. The court held that those procedures rendered the amendment subject to business judgment rule review.[5]

As demonstrated in the cases noted above, the procedural protections of *MFW* have utility well beyond squeeze-out mergers. Controlling stockholders and their advisors should consider using the *MFW* playbook in any transaction between the controller and the controlled company that would potentially be subject to stockholder challenge and entire fairness review.

Recent Special Committee Decisions

Use of *MFW* protections to approve dual-class charter amendment extending founder's control of the company results in business judgment rule treatment.

The Trade Desk, Inc., a dual-class company, adopted a charter amendment in order to extend founder's control of the company, which was threatened by a "dilution trigger" in the company's charter that would have converted all high-vote Class B shares into single-vote Class A shares once the number of Class B shares dropped below 10% of the total number of outstanding shares. The charter amendment was approved by a special committee of

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3 *IRA Trust FBO Bobbie Ahmed v Crane*, 2017 WL 7053964 (Del. Ch. 2017).

4 *Tornetta v. Musk*, 2019 WL 4566943 (Del. Ch. Sept. 20, 2019).

5 *City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, Inc., et al.*, C.A. No. 2021-0560-PAF (Del. Ch. July 29, 2022).

independent directors and by a majority vote of the Class A stockholders unaffiliated with founder. In exchange for eliminating the dilution trigger, founder agreed to a package of corporate governance improvements including a five-year sunset on the dual-class structure, a provision eliminating the structure if founder ceased to be CEO, a right to board representation by the Class A stockholders, a right of holders of 20% of the common stock to call special meetings, and stockholder ability to act by written consent once founder no longer had 50% of the vote.

Plaintiffs challenged the application of *MFW* on the basis that the special committee lacked independence and that the disinterested stockholder vote was not fully informed. The Court of Chancery rejected the independence challenge, which was primarily based on compensation the Chair of the committee had received from the company as a director and, previously, as a consultant. The court held that even if there was a reasonable inference that the Chair's compensation was material to her, plaintiffs failed to allege a lack of independence on the part of the majority of the committee members. The court also rejected claims that the fact that the committee retained a financial advisor that the controller had mentioned favorably in an email demonstrated that the committee labored under a "controlled mindset." Finally, the court rejected various alleged disclosure deficiencies as immaterial, individually and collectively, to the stockholders' voting decision. Having found that *MFW* had been satisfied, the court held the transaction subject to the business judgment rule and dismissed fiduciary duty claims against founder and the board. *City Pension Fund for Firefighters and Police Officers in the City of Miami v. The Trade Desk, Inc., et al.*, C.A. No. 2021-0560-PAF (Del. Ch. July 29, 2022).

Special committee's extraction of meaningful concessions from controller in a take-private transaction provides compelling evidence that the transaction resulted from a fair process.

BGC Partners, Inc. acquired Berkeley Point Financial from an affiliate of BGC's controller, Howard Lutnick, in a transaction approved by a four-member special committee of BGC directors. Breach of fiduciary duty claims were brought against Lutnick and three of the four directors serving on the special committee. In Issue No. 3 of this *Report*, we discussed the Court of Chancery's decision with respect to certain summary judgment motions in which the court dismissed claims against two of the three directors but denied summary judgment for the third director, William Moran.[6] Following trial, the Court of Chancery found that the transaction was entirely fair and that Moran did not breach his duty of loyalty. In reaching its decision, the court placed significant emphasis on the concessions that the special committee was able to extract from Lutnick, in particular his agreement to acquire 100% of Berkeley Point, as well as concessions on terms and price. In regard to Moran, the court acknowledged that his communications with Lutnick were negligent but found that he did not act disloyally to advance Lutnick's self-interests. *In re BGC Partners, Inc. Derivative Litigation*, C.A. No. 2018-0722-LWW (consol.), memo. op. (Del. Ch. Aug. 19, 2022).

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[6] *In re BGC Partners, Inc. Derivative Litigation*, C.A. No. 2018-0722-LWW (consol.), memo. op. (Del. Ch. Sept. 20, 2021).

Presence of one potentially non-independent special committee member does not defeat applicability of *MFW* where member did not dominate process and a majority of the members were independent.

IAC/InterActive Corp ("Old IAC") engaged in a series of transactions that resulted in the separation of Match Group, Inc. and its dating business from the other businesses of IAC. The separation transaction was approved by a three-person special committee of Match directors and a majority vote of Match shareholders unaffiliated with IAC. Old IAC controlled Match through its holding of 24.9% of Match's publicly traded common stock and 100% of a separate class of high-vote common stock. As part of the separation, Old IAC spun off its non-Match businesses to a newly formed IAC entity ("New IAC"), resulting in Old IAC only holding interests in Match and certain debt obligations that were to remain with Match. Old IAC then reclassified its two classes of stock into a single class of common stock. In connection with the merger, public stockholders of Match received, at their election, either cash or stock in Old IAC, and Old IAC was renamed Match Group, Inc. ("New Match"). As a result of the separation, stockholders of Old IAC and public stockholders of Match held a single class of common stock in New Match going forward.

Plaintiffs alleged that Old IAC and the Match directors breached their fiduciary duties by obtaining significant benefits for New IAC to the detriment of the Match public stockholders. They further alleged that *MFW* was not satisfied because the Match special committee was not independent, and the vote of Match's minority stockholders was not sufficiently informed. One of the members of the Match special committee had been employed by Old IAC for many years, had served on the boards of several other affiliates of Old IAC affiliates and over a 20-year period had received over $58 million in compensation from such board service. While the Court of Chancery found these allegations sufficient to support a reasonable inference that this director lacked independence from Old IAC, it found that plaintiffs did not plead sufficient facts to show that he dominated the committee's process or that it was reasonably conceivable—based on allegations of various social connections—that either of the other two directors lacked independence. As a result, the court held that the requirements of *MFW* were satisfied and the transaction was subject to the business judgment rule. *In re Match Group, Inc. Derivative Litigation*, C.A. No. 2020-0505-MTZ (consol.), memo. op. (Del. Ch. Sept. 1, 2022).

Neither board service nor prior employment sufficient to show that director lacked independence from controller.

Isramco, Inc. was taken private by its indirect controlling stockholder in a transaction that was approved by a special committee of the Isramco board and a majority vote of the Isramco's stockholders unaffiliated with the controller. As discussed in more detail in Issue No. 3 of this *Report*, the Court of Chancery found in an August 2021 opinion that the vote was not fully informed, and as a result, the transaction was subject to entire fairness review. The entire fairness claim remains pending, but in this subsequent opinion the court dismissed breach of loyalty claims against the three special committee members.

Plaintiffs alleged that all three members of the special committee breached their duty of loyalty as a result of their relationship with the controller. Acknowledging that "the presence of a controller may raise an inference of lack of independence where the controller will maintain leverage over a special committee defendant post-transaction," the court found that this was not

the case here since the transaction would result in all directors losing their board positions. The court also dismissed lack of independence claims against a director who had been an employee of entities owned by the controller from 1989 to 1999, noting that the complaint did not "allege any relationship beyond employer-employee tenure at these jobs." Failing to find that any of the special committee members lacked independence from the controller, the court rejected plaintiffs' claims that the directors acted in bad faith, which requires an "intentional dereliction of duty, a conscious disregard for one's responsibilities." Specifically, the court rejected claims that the committee members acted in bad faith by disclosing a price "floor" to the controller, finding that doing so reflected "nothing more than questionable negotiating tactics." *Ligos v. Isramco, Inc. et al.*, C.A. No. 2020-0435-SG, memo. op. (Del. Ch. Nov. 30, 2022).

Significantly higher offer from third party does not render *MFW* inapplicable when controller refuses to sell to third party.

Edios Therapeutics, Inc. was taken private by its controller, BridgeBio, Inc., in a transaction approved by a special committee and by a majority vote of the stockholders unaffiliated with the controller. At the outset, the controller made clear that it was only a buyer, not a seller. The special committee rejected several offers from the controller as inadequate and finally accepted an offer at a price that was 20% higher than the controller's original offer. At the request of the controller, the take-private proposal and the special committee process was not made public until after the merger agreement was signed. Shortly after the deal was announced, a third party—which had in the prior year proposed a collaboration agreement with Edios but was rebuffed by the controller—made an unsolicited offer to acquire the company for an amount twice the controller's initial proposal and 65% more than the price in the merger agreement. As an alternative, the third party also proposed to buy only the public stub at a price 50% higher than the price in the merger agreement, subject to the controller agreeing to a fairly modest set of minority protections. The controller rejected both proposals, and the merger was ultimately approved by holders of 80% of the public shares.

Following closing, plaintiff stockholders brought fiduciary claims against the controller and the committee members. Plaintiffs asserted that "*MFW* cannot apply where a competing bidder makes an offer that is substantially higher than that offered by the controller and the controller refuses to sell control." Plaintiffs further argued that the vote was coerced given the controller's refusal to sell its shares or to grant minority rights to the competing bidder, that the special committee breached its duty of care and that the disclosure in the proxy was insufficient. The Delaware Court of Chancery rejected each of these claims, pointing to precedential decisions where the *MFW* framework had been applied in similar circumstances, noting the increased price that the committee ultimately extracted from the controller and pointing out that despite the controller's unwillingness to sell, the special committee had the power to say no. Finding that all six elements of *MFW* had been properly implemented, the court found the transaction subject to business judgment rule review and dismissed plaintiffs' claims. *Smart Local Unions and Counsels Pension Fund v. BridgeBio Pharma, Inc. et al.*, C.A. No. 2021-1030-PAF, memo. op. (Del. Ch. Dec. 29, 2022).

Special Committee Transaction Overview[7]

Transaction Summary and Reasons for Special Committee	On November 9, 2022, Maiden Holdings, Ltd., a Bermuda-based holding company ("Maiden"), announced its intention to exchange Maiden's outstanding non-cumulative preference shares series A, C and D for shares of Maiden's common stock. Maiden Reinsurance Ltd. owned more than 73% of each series of the preference shares and, following the exchange, approximately 29% of Maiden's common stock (but with its common voting power capped at 9.5% under Maiden's bylaws). A special committee of Maiden's board of directors consisting solely of disinterested and independent directors negotiated and approved the terms of the exchange. Maiden Reinsurance Ltd. delivered a written consent approving the transaction and no further shareholder approval was required.
Announced Date	11/9/2022
Target Name	N/A
Acquirer Name	N/A
Equity Value	N/A
Transaction Status	Completed
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On October 31, 2022, Poseidon Acquisition Corp. ("Poseidon") (an acquisition vehicle for Fairfax Financial Holdings Limited, the Washington Family, David Sokol (the Chairman of Atlas) and Ocean Network Express Pte. Ltd. (together, the "Consortium")) entered into a definitive agreement to acquire the approximately 32% of the outstanding common stock of Atlas Corp. ("Atlas") not already owned by members of the Consortium for $15.50 in cash per share by means of a merger of a wholly owned subsidiary of Poseidon with and into Atlas, with Atlas surviving the merger as a wholly owned subsidiary of Poseidon. The transaction was approved by a special committee of Atlas's board of directors consisting solely of disinterested and independent directors, and is subject to the approval by holders of (i) a majority of the shares of Atlas entitled to vote on the transaction and (ii) a majority of the shares of Atlas not owned by the Consortium or any director or officer of Atlas (or their affiliates).
Announced Date	11/1/2022
Target Name	Atlas Corp. (a Marshall Islands corporation)

[7] This Special Committee Transaction Overview does not include certain transactions with an equity value of less than $500 million.

Acquirer Name	Fairfax Financial Holdings Limited; The Washington Family; David Sokol; Ocean Network Express Holdings, Ltd.
Equity Value	$1,440,000,000
Transaction Status	Pending
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On October 30, 2022, Acacia Research Corporation, a Delaware corporation ("Acacia"), entered into a recapitalization agreement with Starboard Value LP and certain of its affiliates ("Starboard"). The agreement provided for the simplification of Acacia's capital structure, including by Starboard converting its preferred stock, exercising its class A and B warrants and participating in a rights offering by Acacia. Immediately following the exercise of its class A warrants on October 30, 2022, Starboard had an approximately 11.5% common equity ownership in Acacia and an approximately 27.5% voting interest (inclusive of its preferred stock). The transaction was negotiated by a special committee of directors not affiliated or associated with Starboard. The conversion of the preferred stock (as the conversion is subject to Acacia amending the certificate of designation) and, if Acacia determines that a shareholder vote for the rights offering is required pursuant to NASDAQ rules, the rights offering and the exercise the class B warrants are subject to approval by Acacia's shareholders.
Announced Date	10/31/2022
Target Name	N/A
Acquirer Name	N/A
Equity Value	N/A
Transaction Status	Pending
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On October 23, 2022, Sumitovant Biopharma Ltd. ("Sumitovant") (an affiliate of Sumitomo Pharma Co., Ltd.) entered into a definitive agreement to acquire the approximately 48.4% of outstanding common stock of Myovant Sciences Ltd. ("Myovant") not already owned by Sumitovant for $27 in cash per share by means of a merger of a wholly owned subsidiary of Sumitovant with and into Myovant, with Myovant surviving the merger as a wholly owned subsidiary of Sumitovant. The transaction was approved by a special committee of Myovant's board of directors consisting solely of independent directors serving on the audit committee and is subject to the approval by holders of (i) a majority of the shares of Myovant entitled to vote on the transaction and (ii) a majority of the shares of Myovant not owned by Sumitovant or its affiliates.
Announced Date	10/23/2022
Target Name	Myovant Sciences Ltd. (an exempted company limited by shares incorporated under the laws of Bermuda)
Acquirer Name	Sumitovant Biopharma Ltd.
Equity Value	$1,243,000,000
Transaction Status	Pending
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On October 11, 2022, Oranje Holdco, LLC ("Oranje") (an affiliate of Vista Equity Partners Management, LLC ("Vista")) entered into a definitive agreement to acquire the outstanding common stock of KnowBe4, Inc. ("KnowBe4") not already owned by Vista for $24.90 in cash per share by means of a merger of a wholly owned subsidiary of Oranje with and into KnowBe4, with KnowBe4 surviving the merger as a wholly owned subsidiary of Oranje. As of September 30, 2022, affiliates of Vista owned approximately 9.4% of the outstanding common stock of KnowBe4. Vista also entered into agreements with certain stockholders of KnowBe4 affiliated with KKR, Elephant Partners and Sjoerd Sjouwerman (KnowBe4's founder), who collectively owned approximately 38.5% of the common stock of KnowBe4, to roll over a portion of their existing equity in the company. The transaction was approved by a special committee of KnowBe4's board of directors consisting solely of independent and disinterested directors and is subject to the approval by holders of (i) a majority of the shares of KnowBe4 entitled to vote on the transaction, (ii) a majority of the shares of KnowBe4 not owned by persons affiliated with Vista or any of the rollover stockholders, (iii) a majority the shares of KnowBe4's class A common stock and (iv) a majority the shares of KnowBe4's class B common stock.
Announced Date	10/12/2022
Target Name	KnowBe4, Inc. (a Delaware corporation)

Acquirer Name	Vista Equity Partners
Equity Value	$3,966,000,000
Transaction Status	Pending
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On July 27, 2022, affiliates of PBF Energy Inc. ("PBF Energy") entered into a definitive agreement to acquire all of the outstanding common units of PBF Logistics LP ("PBF Logistics") not already owned by PBF Energy and its affiliates for $9.25 in cash and 0.270 of a share of class A common stock of PBF Energy (subject to a mechanism reducing the stock portion and increasing the cash portion of the consideration such that in no event would the number of shares issued by PBF Energy in the transaction exceed 19.9% of the shares of PBF Energy common stock). As of August 24, 2022, PBF Energy and its affiliates owned approximately 47.7% of the outstanding common units in PBF Logistics. The transaction was structured as a merger of a wholly owned indirect subsidiary of PBF Energy with and into PBF Logistics, with PBF Logistics surviving the merger as a wholly owned indirect subsidiary of PBF Energy. The transaction was approved by the conflicts committee of the board of directors of PBF Logistics GP LLC (the general partner of PBF Logistics), which comprises independent directors and, as required by the PBF Logistics partnership agreement, approved by holders of a majority of the outstanding common units of PBF Logistics.
Announced Date	7/28/2022
Target Name	PBF Logistics LP (a Delaware limited partnership)
Acquirer Name	PBF Energy Inc.
Equity Value	$579,000,000
Transaction Status	Completed
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On July 25, 2022, Shell USA, Inc. ("Shell") entered into a definitive agreement to acquire all common units of Shell Midstream Partners, L.P. ("Shell Midstream") not already owned by Shell and its affiliates for $15.85 per share by means of a merger of a wholly owned indirect subsidiary of Shell with and into Shell Midstream, with Shell Midstream surviving the merger as a wholly owned indirect subsidiary of Shell. As of July 25, 2022, Shell and its affiliates owned common units and perpetual convertible preferred units of Shell Midstream representing approximately 72% of the voting power of Shell Midstream's limited partner interests. The transaction was approved by the conflicts committee of the board of directors of Shell Midstream Partners GP LLC (the general partner of Shell Midstream), which comprises independent directors. At signing, Shell delivered a written consent approving the transaction, and as a result, no further approval by the holders of limited partner interests of Shell Midstream was required.
Announced Date	7/25/2022
Target Name	Shell Midstream Partners, L.P. (a Delaware limited partnership)
Acquirer Name	Shell USA, Inc.
Equity Value	$1,963,000,000
Transaction Status	Completed
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On July 13, 2022, Unity Software Inc. ("Unity") entered into a definitive agreement to acquire each outstanding ordinary share of ironSource Ltd. ("ironSource") for 0.1089 of a share of Unity common stock (the "Merger"). In connection with the Merger, Unity entered into an investment agreement with affiliates of Silver Lake and Sequoia Capital (Unity's two largest stockholders, which, as of September 2, 2022, owned approximately 12% and 13% of Unity's issued and outstanding common stock, respectively) to purchase $1 billion in aggregate principal amount of Unity's 2.0% convertible senior notes. The proceeds from the convertible senior note financing will be used to partially fund the repurchase of up to $2.5 billion of shares of Unity common stock in the public market following the closing of the Merger. The investment agreement was approved by a special committee of Unity's board of directors that consisted of disinterested directors. The issuance of the 2.0% convertible senior notes pursuant to the investment agreement is subject to the closing of the Merger, with the Merger being subject to the approval by holders of a majority of the shares of Unity entitled to vote thereon.
Announced Date	7/13/2022
Target Name	Unity Software Inc. (a Delaware corporation)

Acquirer Name	Silver Lake and Sequoia Capital
Equity Value	$1,000,000,000
Transaction Status	Pending
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On June 30, 2022, Constellation Brands, Inc., a Delaware corporation ("Constellation"), entered into a reclassification agreement with Richard Sands, Robert Sands, other members of the Sands family and certain of their related entities as part of its plan to eliminate Constellation's class B common stock. Pursuant to the reclassification agreement, each share of class B common stock was reclassified and converted into one share of class A common stock and the right to receive a cash payment of $64.64. As a result of the reclassification, the Sands family's voting power was reduced from approximately 60% to approximately 16%. The reclassification agreement was negotiated and recommended to the board of directors of Constellation by a special committee consisting of independent and disinterested directors, and was approved by the holders of (i) 50.3% of the equity interests of Constellation not affiliated with the Sands family, (ii) a majority of the voting power of the class A common stock and class B common stock entitled to vote thereon, voting together as a single class and (iii) a majority of the class B common stock.
Announced Date	6/30/2022
Target Name	N/A
Acquirer Name	N/A
Equity Value	N/A
Transaction Status	Completed
Was *MFW* Used?	Yes

Debevoise & Plimpton LLP has decades of experience in assisting special committees in transactions involving conflicted fiduciaries and other parties including controlling stockholders, other conflicted fiduciaries and transactional counterparties in transactions involving special committees. We keep databases of information relevant to the formation of special committees and regularly present on topics relating to special committees. We welcome the opportunity to speak with corporate general counsel, directors, advisors and others regarding these matters.

Please do not hesitate to contact us with any questions.

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