

SPECIAL COMMITTEE REPORT

This issue of the *Debevoise & Plimpton Special Committee Report* surveys corporate transactions announced during the first half of 2023 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.

Who Controls and When?

Delaware courts have held that transactions between a controlled company and its controller are subject to the test of entire fairness—Delaware’s most exacting standard of review—due to the inherent risk of minority stockholder abuse presented by such transactions. In structuring a transaction between a Delaware company and a significant stockholder—or a transaction in which a significant stockholder has interests that differ from those of other stockholders—the first step is to determine whether that significant stockholder controls the company, either generally or with respect to the specific transaction being considered.

In some cases, the answer is clear. A stockholder owning more than 50% of a company’s voting power controls that company. In the case of a public company, ownership of somewhat less than 50% can result in control given the practical reality that less than 100% of the shares will be present at any stockholder meeting, with the result that the near majority stockholder will be able to elect the entire board. But the controller status of a stockholder owning a significant, but meaningfully less than majority, equity interest occupies a more uncertain status. While Delaware courts have found control potentially to exist at levels well below 50% ownership, proving control in those circumstances requires the plaintiff to demonstrate that the alleged controller has actually dominated the company’s conduct, either generally or with respect to the particular transaction being challenged. The existence of such control is a “highly contextualized” question, depending not only on share ownership but also on a variety of other factors,¹ none of which alone may be sufficient to prove control. Rather, “[a] finding of control . . . typically results when a confluence of multiple sources combines in a fact-specific manner to produce a particular result,”² as illustrated by the examples below.

The Delaware Court of Chancery’s decision in *In re Zhongpin Inc. Shareholders Litigation*³ involved the take-private of Zhongpin by Xianfu Zhu, a 17.3% stockholder who was the company’s CEO and founder. In submitting his initial acquisition proposal, Zhu made it clear to

¹ In addition to significant stock ownership (but less than a majority), possible indicia of control include: relationships between the alleged controller and particular directors, managers or advisors; the ability to exercise contractual rights to create a particular outcome; the existence of commercial relationships that give the alleged controller leverage over the company (e.g., status as key supplier or customer); and the ability to exercise influence on the board through a high-status position (such as a founder or CEO)—among others. *Basho Techs. Holdco B, LLC v. Georgetown Basho Inv’rs, LLC*, 2018 WL 3326693 (Del. Ch. July 6, 2018).

² *Basho*.

³ C.A. No. 7393-VCN (Del. Ch. Nov. 26, 2014).

the company's board that he was only interested in acting as a buyer and had no interest in selling his shares to a third party. An independent special committee was formed to consider his proposal and to conduct a pre-signing market check. Only one competing offer was received, which, although higher than Zhu's proposal (\$15 per share compared to \$13.50 per share), was conditioned on Zhu's continuing as the company's CEO, which he refused to do. The special committee ultimately accepted Zhu's original offer of \$13.50 per share, subject to a 60-day post-signing go-shop during which no alternative proposals were received. The transaction was negotiated by the special committee and approved by a vote of the disinterested stockholders but that vote was not required at the outset of the deal and thus was not sufficient to shift the standard of review for a controller transaction from entire fairness to business judgment. Accordingly, the controller question was critical. In denying a motion to dismiss breach of fiduciary duty claims against Zhu, the Court of Chancery found it reasonably conceivable that Zhu exercised general control over the company's day-to-day operations, noting, in particular, that the company's Form 10-K explicitly stated that Zhu "has significant influence over our management and affairs and could exercise this influence against your best interests." The court also found that Zhu could—and conceivably did—exercise control over the challenged transaction, evidenced by his unwillingness to sell his own shares and his refusal to continue as CEO.

Similarly, in *In re Tesla Motors, Inc. Shareholders Litigation*,⁴ the Court of Chancery found it reasonably conceivable, at the motion to dismiss stage, that Elon Musk controlled Tesla despite owning only 22.1% of Tesla's common stock. The challenged transaction involved Tesla's 2016 acquisition of SolarCity Corporation. At the time of the acquisition, Musk was SolarCity's largest stockholder and the chairman of its board. In denying a motion to dismiss breach of fiduciary duty claims against Musk, the court noted that while a "close call," it was "reasonably conceivable that Musk controlled the Tesla Board in connection with the [challenged transaction]." Several well-pled facts factored into the court's decision, including statements in the company's SEC filings that Tesla is "highly dependent on the services of Elon Musk," Musk's public comments about the company's need for his management and Musk's demonstrated willingness to oust members of management who displeased him. Perhaps most importantly, in the court's view, was the fact that "there were practically no steps taken to separate Musk from the Board's consideration of the [challenged transaction]" and the failure of the Tesla board to consider forming a special committee notwithstanding the number of directors who were clearly conflicted with respect to the transaction. After trial, the Court of Chancery ultimately decided—without making a definitive determination as to Musk's status as a controller—that the transaction was entirely fair, a decision which was recently affirmed by the Delaware Supreme Court.⁵

In contrast, the Court of Chancery recently found, after trial, that Larry Ellison did not control Oracle, despite his status as the company's "visionary founder" and his ownership of 28% of Oracle's common stock. The challenged transaction, described in more detail later in this *Report*, involved Oracle's 2017 acquisition of NetSuite, a company in which Ellison owned an approximate 40% interest. In failing to find that Ellison had general control over Oracle's day-to-

⁴ *In re Tesla Motors, Inc. S'holder Litig.*, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

⁵ *In re Tesla Motors, Inc. S'holder Litig.*, No. 181, 2022 (Del. June 6, 2023).

day operations, the court relied on several specific examples in which either the board or Oracle's management acted in opposition to Ellison. As to the NetSuite transaction, the court noted that while Ellison "had the potential to influence the transaction," he did not do so in actuality, evidenced by, among other things, his complete lack of contact with the special committee and recusal from any discussions regarding the transaction. According to the court, "[t]he concept that an individual—without voting control of an entity, who does not generally control the entity, and who absents himself from a conflicted transaction—is subject to entire fairness review as a fiduciary solely because he is a respected figure with a potential to assert influence over directors, is not Delaware law." Despite the court's conclusion, it is worth bearing in mind that the claim that Ellison controlled Oracle survived a motion to dismiss, and the court's ultimate determination that the transaction was not subject to entire fairness review was reached only after a lengthy and undoubtedly expensive trial.

Delaware courts have also conferred controller status on minority stockholders deemed to be working together as a group. To establish a control group, the stockholders must be connected in a "legally significant way—such as by contract, common ownership, agreement or other arrangement—to work together toward a shared goal," and there must be "more than a mere concurrence of self-interest" among the alleged group members.⁶ A legally significant connection can be established through historical or transaction-specific ties between stockholders. For example, in *Garfield v. BlackRock Mortgage Ventures, LLC*⁷, which involved a reorganization of PennyMac, the Court of Chancery found it reasonably conceivable, at the pleading stage, that two significant stockholders who collectively owned 46.1% of the company's common stock constituted a control group. Historical ties were evidenced by the stockholders' ten-year history of joint investment in the company, their status as founding partners of the company and their interchangeable reference in transaction documents as "Sponsor Members." Examining transaction-specific ties, the court noted that management met with the two stockholders together to discuss the reorganization prior to talking to the board, while failing to discuss the reorganization with any other stockholders; that management presentations referred to the two stockholders as a group; and that the reorganization could not be terminated without the consent of both stockholders. In contrast, the Delaware Supreme Court, in *Sheldon v. Pinto*, declined to find that three venture capital funds constituted a control group despite their participation in a financing that significantly diluted other stockholders. In upholding a motion to dismiss in that case, the court noted that the three VC funds were not the only participants in the financing, that there was no history of coordination among the funds and that each of the three funds retained the right to vote in its discretion on all corporate matters outside of director elections.

Delaware Supreme Court Takes up "MFW Creep"

The Delaware Supreme Court held in *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("MFW") that a controller squeeze-out transaction could be entitled to business judgment review if certain conditions were met—in particular, that the transaction was conditioned *ab initio* on the approval of a special committee of independent directors and the favorable vote of a

⁶ *Sheldon v. Pinto*, A.3d, 2019 WL 2892348 (Del. Oct. 4, 2019) (collecting cases interpreting *Dubroff v. Wren Hldgs., LLC*, 2009 WL 1478697 (Del. Ch. May 22, 2009)).

⁷ C.A. No. 2018-0917-KSJM (Del. Ch. Dec. 20, 2019).

majority of unaffiliated stockholders. Since then, transaction planners and lower courts have applied the *MFW* formula to obtain business judgment rule protection for a wide range of conflicted transactions with controllers, including, for example, decisions related to executive compensation, related party transactions that result in a non-ratable benefit to the controller and agreements with the controller in the context of a third-party merger.

In recent years, some observers have argued that requiring the *MFW* dual protections to obtain business judgment rule protection in contexts other than a controller squeeze-out—so-called “*MFW* creep”—is unnecessary, inefficient and inconsistent with Delaware precedent. Instead, the argument goes, any one of three cleansing mechanisms should be sufficient to obtain business judgment review of a conflicted transaction other than a controller squeeze-out: approval by a majority independent board; by an independent special committee; or by a majority of shares held by unaffiliated stockholders.

In May, the Delaware Supreme Court took up the issue of *MFW* creep in the context of *In re Match Group, Inc. Derivative Litigation*. The case involves a challenge to Match Group’s 2020 separation from its controlling stockholder, IAC/InterActiveCorp, by means of a reverse spin-off—a transaction that is arguably the opposite of a controller squeeze-out. The transactions effectuating the reverse spin-off were negotiated by a special committee and subject to the *MFW* conditions. The Court of Chancery dismissed the lawsuit under *MFW*, finding that the *MFW* conditions were satisfied, despite a pleading-stage inference that one of three special committee members lacked independence, because the committee had an independent majority, and a majority-of-the-minority vote was obtained. The plaintiffs appealed. After oral argument, the Delaware Supreme Court requested supplemental briefing on the question “whether the Court of Chancery judgment should be affirmed because the Transactions were approved by either of (a) the Separation Committee or (b) a majority of the minority stockholder vote”—in other words, whether satisfaction of only one of the *MFW* conditions would suffice to invoke the business judgment rule. Although this argument had not been raised below, the Supreme Court stated that resolving the issue “is in the interests of justice to provide certainty to boards and their advisors who look to Delaware law to manage their business affairs” and “will provide certainty to the Court of Chancery, which has continued to address *MFW* outside the context of controlling stockholder freeze out transactions in a manner that has evaded appellate review.”

While the Delaware Supreme Court has not yet ruled on the matter, a decision that provides an easier path to business judgment rule protection would likely to lead to a greater number of related party transactions and, as a result, increased use of special committees.

Recent Special Committee Decisions

A casual sharing of interests between neighbors—including frequent cycling—does not impair independence.

Orbit/FR was acquired by its controlling stockholder, Microwave Vision, in a transaction approved by a special committee of Orbit independent directors. Following closing, former Orbit stockholders challenged the transaction alleging, among other things, that one member of the special committee (Merrill) lacked independence from Microwave on the basis of his personal relationship with another member of the Orbit board (Iverson). Iverson was a senior executive of both Orbit and Microwave. Merrill and Iverson were friends, neighbors and

frequent cycling companions. Iverson was also responsible for Merrill becoming a director of Orbit. The Delaware Court of Chancery held these allegations—“a rather casual sharing of interests between neighbors”—insufficient to call Merrill’s loyalty to Orbit into question. *In re Orbit/FR, Inc. Stockholders Litigation*, C.A. No. 2018-0340-SG, memo op. (Del. Ch. Jan. 24, 2023).

Business judgment rule applies notwithstanding the ability of a conflicted fiduciary to control the board’s decision, where such control is forborne, and the transaction is negotiated and approved by a well-functioning special committee.

Oracle acquired NetSuite, which was approximately 40% owned by Larry Ellison, the Chairman, founder and 28% stockholder of Oracle, in a transaction approved by a special committee of independent directors of Oracle. Following closing, stockholders of Oracle brought fiduciary duty claims against the directors and certain officers of Oracle, claiming that NetSuite was acquired at an excessive price for the benefit of Ellison. Plaintiffs alleged that Ellison controlled Oracle and its board and that the officer defendants committed a fraud on the board by providing misleading information and failing to disclose certain discussions with NetSuite in connection with the negotiation of the transaction. After trial, the court ruled in favor of the defendants, finding that (i) Ellison did not have voting or operational control of Oracle, (ii) while his position as Oracle’s founder, largest stockholder and “visionary leader” likely would have allowed Ellison to exert control over Oracle’s decision to acquire NetSuite if he so wished, Ellison recused himself from the board’s consideration of the transaction and did not otherwise attempt to exercise control over the board’s decisions relating to the transaction; (iii) the officers of Oracle did not defraud the board, and (iv) as a result, the transaction was subject to business judgment rather than entire fairness review. In so holding, the court noted the robust special committee process, the quality of the committee’s advisors and evidence that the committee vigorously bargained over the terms of the transaction and was willing to walk away from the transaction. *In re Oracle Corp. Derivative Litigation*, C.A. No. 2017-0337-SG, memo. op. (Del. Ch. May 12, 2023).

In a going-private transaction, the failure to conduct a market check where controller states it is unwilling to sell and relationships of the controller and the advisors to the special committee of the target do not defeat the applicability of MFW.

Brookfield Renewable Partners, the majority stockholder of TerraForm Power, took TerraForm private in a transaction subject to the MFW conditions: namely, the approval of a special committee of independent TerraForm directors and the vote of a majority of the TerraForm shares not owned by Brookfield. Following closing, former stockholders of TerraForm brought breach of fiduciary duty claims against Brookfield and TerraForm’s former directors and officers. Defendants moved to dismiss, asserting that compliance with the MFW conditions rendered the transaction subject to the business judgment rule. The court rejected plaintiffs’ various assertions as to why MFW did not apply, including the failure of the committee to conduct a market check and its hiring of conflicted advisors. In particular, the court held that the decision not to conduct a market check was reasonable in light of Brookfield’s statement that it was not interested in selling its shares or in a third-party sale transaction. As to the advisor conflicts, the court held that, while the financial ties between Brookfield and the special committee’s financial advisor (including investments in other Brookfield entities and the advisor’s concurrent representation of Brookfield in an unrelated transaction) and the conflicts of the committee’s legal counsel (including their previous and concurrent unrelated work for

various Brookfield affiliates) were “suboptimal,” those relationships were insufficient to demonstrate a breach of the committee’s duty of care. *City of Dearborn Police & Fire Revised Retirement System (Chapter 23), et al. v. Brookfield Asset Management Inc., et al.*, C.A. No. 2022-0097-KSJM, tr. ruling (Del. Ch. June 9, 2023).

Special Committee Transaction Overview⁸

Transaction Summary and Reasons for Special Committee	<p>The Necessity Retail REIT, Inc. (“RTL”) and Global Net Lease, Inc. (“GNL”) entered into an agreement pursuant to which RTL will merge with and into a newly formed subsidiary of GNL, and all RTL Class A common shares will convert into the right to receive 0.67 shares of GNL common shares (the “REIT Merger”). Both GNL and RTL are externally managed by the same entity, AR Global Investments, LLC (“Advisor Parent”). In connection with the REIT Merger, GNL and RTL will also internalize their advisory and property management functions (the “Internalization Merger”), and 29,614,825 shares of GNL common stock will be issued to Advisor Parent as consideration for the Internalization Merger.</p> <p>The transactions were approved by special committees of each of RTL’s and GNL’s boards of directors consisting solely of disinterested and independent directors, and are subject to the approval of the holders of a majority of the shares of RTL and GNL, respectively, entitled to vote.</p>
Announced Date	May 23, 2023
Target Name	The Necessity Retail REIT, Inc.
Acquirer Name	Global Net Lease, Inc.
Equity Value	\$933,000,000
Transaction Status	Pending
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	<p>Monro, Inc. (“Monro”) entered into a recapitalization agreement with the holders of its Class C Convertible Preferred Stock (“Class C Preferred Stock”). The agreement provided for the simplification of Monro’s capital structure, including the elimination of the Class C Preferred Stock via an automatic conversion no later than the third anniversary of the upcoming annual meeting, whereby each share of Class C Preferred Stock would be converted into 61.275 common shares of Monro.</p> <p>The transaction was negotiated by a special committee consisting solely of disinterested and independent directors and is subject to the approval of the holders of a majority of the outstanding shares of (i) Monro common stock unaffiliated with the holders of the Class C Preferred Stock and (ii) Class C Preferred Stock, who have agreed to vote to approve the recapitalization.</p>
Announced Date	May 18, 2023
Target Name	N/A

⁸ This Special Committee Transaction Overview does not include certain transactions with an equity value of less than \$500 million.

Acquirer Name	N/A
Equity Value	N/A
Transaction Status	Pending
Was <i>MFW</i> Used?	No

Transaction Summary and Reasons for Special Committee	<p>Freedom VCM Subco, Inc. ("Merger Sub" and an acquisition vehicle of Freedom VCM, Inc. ("Parent")) entered into a definitive agreement to acquire the approximately 67% of the voting power of Franchise Group, Inc. ("Franchise") not already owned by certain management stockholders (collectively, the "Management Stockholders") for a purchase price of \$30.00 per share in cash by means of a merger of Merger Sub with and into Franchise, with Franchise surviving the merger as a wholly-owned subsidiary of Parent. The Management Stockholders signed a voting agreement and also agreed to rollover their holdings.</p> <p>The transaction was approved by a special committee of Franchise's board of directors consisting solely of disinterested and independent directors, and is subject to the approval of the holders of (i) a majority of the shares of Franchise entitled to vote on the transaction and (ii) a majority of the shares of Franchise not owned by the Management Stockholders or any of their affiliates.</p>
Announced Date	May 10, 2023
Target Name	Franchise Group, Inc.
Acquirer Name	Freedom VCM Subco, Inc.
Equity Value	\$705,000,000
Transaction Status	Pending
Was <i>MFW</i> Used?	Yes

Transaction Summary and Reasons for Special Committee	<p>Diamond Merger Limited ("Diamond") and Olympus Water Holdings IV, L.P. ("Olympus"), acquisition vehicles created by Platinum Equity, LLC ("Platinum") for purposes of the transaction, entered into a definitive agreement to acquire 100% of the outstanding common stock of Diversey Holdings, Ltd. ("Diversey") (excluding the rollover shares described below) for \$8.40 in cash per share by means of a merger of Diamond with and into Diversey, with Diversey surviving the merger as a wholly-owned subsidiary of Olympus. BCPE Diamond Investor, LP, an entity advised by Bain Capital Private Equity, LP which held 73% of the voting power of Diversey (the "Bain Shareholder"), entered into a rollover agreement to contribute at least 56.1%, but no more than 61.5%, of the shares held by it. Any shares not rolled over by the Bain Shareholder will be exchanged for \$7.84 in cash per share.</p> <p>The transaction was approved by a special committee of Diversey's board of directors consisting solely of disinterested and independent directors</p>
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	unaffiliated with Bain, and is subject to the approval of the holders of a two-thirds majority of the shares of Diversey.
Announced Date	March 8, 2023
Target Name	Diversey Holdings, Ltd.
Acquirer Name	Platinum Equity, LLC
Equity Value	\$2,592,000,000
Transaction Status	Completed
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	<p>Chord Merger Sub I, Inc., Chord Merger Sub II, LLC (collectively, the "Merger Subs") and Chord Parent, Inc. ("Chord"), each an acquisition vehicle for EQT Partners, Inc. ("EQT") and Public Section Pension Investment Board ("PSP"), entered into a definitive agreement to acquire all of the outstanding common stock of Radius Global Infrastructure, Inc. ("Radius") for \$15.00 in cash per share by means of a merger of the Merger Subs with and into Radius, with Radius surviving the merger as a wholly-owned subsidiary of Chord.</p> <p>The transaction was approved by a transaction committee of Radius's board of directors consisting solely of disinterested and independent directors, and is subject to the approval of the holders of a majority of the shares of Radius.</p>
Announced Date	March 1, 2023
Target Name	Radius Global Infrastructure, Inc.
Acquirer Name	EQT Partners, Inc. and Public Sector Pension Investment Board
Equity Value	\$1,451,000,000
Transaction Status	Pending
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	<p>Ferdinand FFP Merger Sub 1, Inc. and Ferdinand FFP Merger Sub 2, LLC (collectively, the "Merger Subs"), each an acquisition vehicle created by Clayton, Dubilier & Rice, LLC ("CD&R") and Stone Point Capital LLC ("Stone Point" and collectively, the "Buyers"), entered into a definitive agreement to acquire 100% of the outstanding common stock of Focus Financial Partners Inc. ("Focus"), excluding certain rollover shares owned by Stone Point, for \$53.00 in cash per share by means of two mergers of the Merger Subs with and into Focus, with Focus surviving the mergers as a wholly-owned subsidiary of the Buyers. Prior to the consummation of the transaction, Stone Point was Focus's largest shareholder, owning approximately 20.6% of the company's outstanding equity interests. In</p>
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	<p>connection with the transaction, Stone Point agreed to rollover approximately 50% of its outstanding equity in Focus, in addition to providing new equity financing for the transaction.</p> <p>The transaction was approved by a special committee of Focus's board of directors consisting solely of disinterested and independent directors, and is subject to the approval of the holders of (i) a majority of the shares of Focus entitled to vote on the transaction and (ii) a majority of the shares of Focus not owned by the Buyers, their officers or any of their affiliates.</p>
Announced Date	February 27, 2023
Target Name	Focus Financial Partners Inc.
Acquirer Name	Clayton, Dubilier & Rice, LLC
Equity Value	\$3,495,000,000
Transaction Status	Pending
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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