

Special Committee Report

This issue of the Debevoise & Plimpton Special Committee Report surveys corporate transactions announced during the period from January through June 2021 that used special committees to manage conflicts and key Delaware judicial decisions during this period ruling on the effectiveness of such committees. While corporate transactional activity during the first half of 2021 may be remembered more for SPACs, cryptocurrencies and meme stocks, there continued to be a significant number of conflicted transactions and the Delaware courts continued to refine the boundaries of Delaware law involving the use of special committees.

Special Committee Independence: How Close is Too Close

Once a decision has been made to form a special committee, the most important question, and sometimes a fraught one, is which directors are sufficiently independent of the interested stockholder to effectively serve on that committee. Delaware case law is replete with examples of committees whose effectiveness has been challenged because one or more members allegedly lacked independence, in many cases as a result of social or business connections with the interested stockholder. However, a recent Delaware Court of Chancery decision may signal a willingness of the Delaware courts to apply closer scrutiny to such allegations.

The decision in *Franchi et al. v. Firestone et al.*¹ arose after Carl Icahn, the majority stockholder of Voltari Corporation, offered to take Voltari private in a merger conditioned on approval by a special committee and a majority-of-the-minority stockholder vote.

The court dismissed the claims under Delaware Supreme Court's 2014 *MFW* decision,² despite allegations that one special committee member founded a company that collaborated with an Icahn-controlled company, was nominated by Icahn to serve on two boards in the past decade and was assisting with a documentary about Icahn, and that a second special committee member served as President of Icahn Enterprises from 2006-2009 (during which he was head of portfolio operations for Icahn's activist hedge fund and 13 operating companies controlled by Icahn), served as a director of four Icahn-controlled companies during that period and three other Icahn-controlled companies thereafter, and continued to serve on two such boards at the time of the Voltari merger.

In prior Delaware cases, breach of fiduciary duty claims against controlling stockholders and directors of controlled companies have been allowed to proceed based on allegations of connections between a director and an interested stockholder including shared ownership of an NBA team;³ shared ownership of an airplane;⁴ a close and personal long-time friendship;⁵ charitable efforts by the interested person's family on the director's behalf;⁶ longstanding ties

¹ [*Franchi et al. v. Firestone et al.*](#), C.A. No. 2020-0503-KSJM (Del. Ch. May 10, 2021).

² [*Kahn v. M&F Worldwide Corp.*](#), 88 A.3d 635 (Del. 2014).

³ [*Cumming v. Edens*](#), 2018 WL 992877 (Del. Ch. Feb. 20, 2018).

⁴ [*Sandys v. Pincus*](#), 152 A.3d 124 (Del. 2016).

⁵ [*Delaware Cty. Employees Ret. Fund v. Sanchez*](#), 124 A.3d 1017 (Del. 2015).

⁶ [*Marchand v. Barnhill*](#), 212 A.3d 805 (Del. 2019).

between the director and the interested person's family⁷; being a "go-to director" for the interested person;⁸ and shared connections to a university.⁹

Nonetheless, in *Franchi* the court said most of the allegations against the first Voltari director concerned the "sort of ordinary past business relationships, board nominations, and board service that have been held by this court to be insufficient to cast doubt on independence." The court acknowledged that the relationships between the second Voltari director and Icahn were "more extensive" and created a "closer call," but found that, because the vast majority of those relationships had ended more than a decade before the merger, it was "unreasonable" to infer that they impugned the director's independence.

The reality is that controlling stockholders do not generally invite strangers to serve on the boards of their controlled companies. Some degree of connection is inevitable. The *Franchi* decision suggests that the Delaware courts may take an increasingly critical view of allegations that social and business connections compromise independence, particularly where those connections occurred in the past and are not continuing.

Other Recent Special Committee Decisions

Controlling stockholder did not "bully" a special committee by stating it would not consent to one of several transactions being considered by the committee.

A special committee of the board of directors of RCS Capital Corporation was formed to consider a proposed transaction in which its controlling stockholder was interested, as well as any other available alternatives. The committee ultimately considered three competing transaction proposals, but determined not to pursue the one that it determined to be superior because the controlling stockholder – whose support was needed to effectuate the transaction – made clear it would not be approved. A litigation trust created in the bankruptcy reorganization of the company brought breach of fiduciary duty claims against the controlling stockholder and his affiliates. In granting summary judgment in favor of defendants, the Delaware Court of Chancery held that the statement by the controlling stockholder that it would vote against the transaction did not constitute a "threat" that robbed the special committee of its independence. "A stockholder does not forfeit the right to exercise contract rights or to vote her stock merely by being a controller. There is no duty for a controller to sacrifice on behalf of the company." *RCS Creditor Trust v. Nicholas S. Schorsch, et al.*, C.A. No. 2017-0178-SG (Del. Ch. March 18, 2021)

MFW's requirement that a merger with a controlling stockholder must be subject to disinterested stockholder approval to avoid entire fairness review applies even where the transaction is structured to avoid any requirement for a stockholder vote under the DGCL.

Turning Point Brands (TPB) merged into SDI, its controlling stockholder, in a forward triangular merger that did not require the vote of TPB's stockholders. The transaction was approved by a special committee of independent directors of TPB. In a motion to dismiss breach

⁷ *Id.*

⁸ *In re BGC Partners, Inc.*, 2019 WL 4745121 (Del. Ch. Sept. 30, 2019).

⁹ *In re Oracle Corp. Deriv. Litig.*, 824 A.2d 917 (Del. Ch. 2003).

of fiduciary duty claims brought by a TPB stockholder, defendants asserted that the business judgment rule applied under *MFW*, notwithstanding the absence of majority-of-the-minority stockholder approval, on the ground that the transaction did not require any stockholder vote at all. The Delaware Court of Chancery declined to dismiss the fiduciary duty claims, pointing to numerous types of controlling stockholder transactions to which both prongs of *MFW* have previously been held applicable notwithstanding the absence of a statutorily required stockholder vote, as well as the fact that the structure of the present transaction – and thus the lack of any need for a stockholder vote – was mandated by the controlling stockholder. The court left open the possibility that the protections of *MFW* might in some circumstances be available without a stockholder vote but did not identify what those circumstances might be. [*Paul-Emile Berteau v. David E. Glazek, et al. and Turning Point Brands, Inc.*](#), C.A. No. 2020-0873-PAF (Del. Ch. June 30, 2021)

* * *

Special Committee Transaction Overview

Transaction Summary and Reasons for Special Committee	QAD entered into a definitive agreement to be acquired by Thoma Bravo for \$87.50 per Class A and Class B share. The Founder and CEO of QAD, who owned approximately 67% of the Company's outstanding shares, agreed to roll over a portion of those shares in the transaction and continue as a director and equityholder of the surviving company. Because of the potential interest of the Founder and CEO in rolling over her equity interest in any potential acquisition of the company, the QAD directors formed a special committee of directors unaffiliated with the Founder and CEO to consider any potential transaction. The closing of the transaction is subject to, among other things, the affirmative vote of a majority of the shares held by shareholders not affiliated with the Founder and CEO, or with any other directors or officers of the company.
Announced Date	06/28/2021
Target Name	QAD Inc.
Acquirer Name	Thoma Bravo, L.P.
Equity Value	\$1.812 billion
Transaction Status	Pending
Was MFW Used?	Yes

Transaction Summary and Reasons for Special Committee	Sitel Group entered into a definitive agreement to acquire Sykes Enterprises for \$54.00 per share in cash. Following receipt of the Sitel proposal, the Sykes board formed a "transaction committee" to manage matters related to the resulting strategic review process and to be available for any conflicts that might arise in exploring strategic alternatives.
Announced Date	06/18/2021
Target Name	Sykes Enterprises, Incorporated
Acquirer Name	Sitel Group
Equity Value	\$2.2 billion
Transaction Status	Completed 9/2/2021
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	Mitsubishi HC Capital Inc. agreed to acquire CAI International, Inc. for \$56 per share in cash. CAI International's CEO had discussions in his individual capacity with certain third parties regarding a potential management buy-out or take-private transaction of the company. In light of those discussions, the non-executive members of the board determined to form a special committee of disinterested directors to insulate the strategic alternatives process from any participation by Mr. Garcia. All members of the board other than Mr. Garcia were appointed to the special committee.
Announced Date	06/17/2021
Target Name	CAI International, Inc.
Acquirer Name	Mitsubishi HC Capital Inc.
Equity Value	\$1,100
Transaction Status	Pending
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	Navios Maritime Holdings entered into \$115 million senior secured term loan facility with a lender controlled with its Chairperson and Chief Executive Officer. The Company's board formed a special committee of independent directors to negotiate the terms of the loan facility with the lender and to recommend to the full board whether to enter into the financing transaction.
Announced Date	06/30/2021
Borrower Name	Navios Maritime Holdings
Affiliated Lender Name	Navios Shipmanagement Holdings Corporation
Transaction Value	\$115 million
Transaction Status	Completed
Was MFW Used?	No.

Transaction Summary and Reasons for Special Committee	Ali Group made an unsolicited competing offer for Welbilt for \$23.00 per share in cash, jumping Middleby's agreed deal to acquire Welbilt for 0.1240 Middleby shares per Welbilt share. Ali Group subsequently increased its unsolicited competing offer for Welbilt to \$24.00 per share. The board of Welbilt determined that Ali Group's revised offer was superior to the company's agreed transaction with Middleby, and Welbilt notified Middleby of its intention to terminate the deal subject to Middleby's matching rights. Welbilt's board formed a 'transaction committee' at the outset of its process to manage time commitments and be available for any conflicts that might arise, although it does not appear from the proxy as though conflicts did in fact arise.
Announced Date	05/28/2021
Target Name	Welbilt, Inc
Acquirer Name	Ali Group S.r.l.
Equity Value	\$3.5 billion
Transaction Status	Pending
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	Altabancorp entered into a definitive agreement to be acquired by Glacier Bancorp for 0.7971 Glacier Bancorp shares per Altabancorp share. Because certain members of the Altabancorp board constituted a 13D group with a material position in the company's stock, the board formed a special committee consisting of all members other than the 13D group to manage conflicts, but it does not appear that material conflicts requiring action by the committee arose.
Announced Date	05/18/2021
Target Name	Altabancorp
Acquirer Name	Glacier Bancorp, Inc.
Equity Value	\$925 million
Transaction Status	Pending
Was MFW Used?	No

<p>Transaction Summary and Reasons for Special Committee</p>	<p>AT&T and Discovery agreed to combine WarnerMedia with Discovery to create a standalone company via an all-stock, Reverse Morris Trust transaction. Under the terms of the agreement, AT&T would receive \$43 billion (subject to adjustment) in a combination of cash, debt securities and WarnerMedia's retention of certain debt, and AT&T stockholders would receive stock representing 71% of the new company; Discovery stockholders would own 29% of the new company. Under Discovery's certificate of incorporation, the transaction requires the consent of Advance/Newhouse Programming Partnership, a founder and major shareholder in Discovery, as the sole holder of Discovery's Series A-1 Preferred Stock. The Discovery board formed a special committee of independent directors for the sole purpose of negotiating with Advance/Newhouse Programming Partnership. In exchange for Advance/Newhouse Programming Partnership's forfeiture of its significant rights pursuant to the terms of the Series A-1 Preferred Stock, and in the reclassification of the shares of Series A-1 Preferred Stock into common stock, it will receive an increase to the number of shares of common stock of Discovery into which the Series A-1 Preferred Stock would be converted.</p>
<p>Announced Date</p>	<p>05/17/2021</p>
<p>Target Name</p>	<p>Warner Media</p>
<p>Acquirer Name</p>	<p>Discovery</p>
<p>Transaction Value</p>	<p>\$130 billion</p>
<p>Transaction Status</p>	<p>Pending</p>
<p>Was MFW Used?</p>	<p>No</p>

Transaction Summary and Reasons for Special Committee	At Home Group was acquired by funds affiliated with Hellman & Friedman (H&F) pursuant to a tender offer followed by a short-form merger. The Board of At Home Group formed a special committee of independent directors to consider and negotiate the transaction because, in connection with a prior unsuccessful attempt by H&F to acquire the company, H&F indicated that it wished to retain the CEO following the transaction and for the CEO to roll-over a substantial portion of his equity interest in the company and the CEO had indicated a willingness to do so.
Announced Date	05/06/2021
Target Name	At Home Group Inc.
Acquirer Name	Hellman & Friedman LLC
Equity Value	\$2,354 billion
Transaction Status	Completed 7/23/ 2021
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	Navios Maritime Acquisition Corp entered into \$100 million senior secured term loan facility with a lender controlled with its Chairperson and Chief Executive Officer. The Company's board formed a special committee of independent directors to negotiate the terms of the loan facility with the lender and to recommend to the full board whether to enter into the financing transaction.
Announced Date	04/13/2021
Borrower Name	Navios Maritime Acquisition Corp
Affiliated Lender Name	Navios Shipmanagement Holdings Corporation
Transaction Value	\$100 million
Transaction Status	Completed
Was MFW Used?	No.

Transaction Summary and Reasons for Special Committee	Alden Global Capital and Tribune Publishing entered into a merger agreement pursuant to which Alden would acquire all the shares of Tribune that it did not already own. Alden owned 31.6% of Tribune's outstanding shares, which shares it had acquired in November 2019 from the Company's largest stockholder in a transaction made without the approval of the Tribune board under Section 203 of the Delaware General Corporation Law. The transaction was approved by a special committee of directors not affiliated with Alden Global Capital and is subject to the approval of holders of two thirds of the shares of the company not owned by Alden Global Capital or its affiliates.
Announced Date	04/05/2021
Target Name	Tribune Publishing Company
Acquirer Name	Alden Global Capital
Equity Value	\$676 million
Transaction Status	Completed 5/ 21/ 2021
Was MFW Used?	Yes

Transaction Summary and Reasons for Special Committee	An affiliate of the Carlyle Group acquired 100% of Fly Leasing Ltd, a Bermuda aircraft leasing company, for \$17.05 per share in cash. Fly Leasing Ltd is managed by Fly Leasing Management Co. Limited, an affiliate of BBAM Limited Partnership (BBAM), which received a change of control fee of US\$35.35 million and a termination fee equal to US\$15.66 million as required by its management agreement, less US\$1,000,000 to which the Manager agreed to waive its rights, in connection with the transaction. The transaction was recommended by a special committee of independent directors of Fly Leasing Ltd. The remaining members of the board of directors that did not participate on the special committee were employees of BBAM.
Announced Date	03/29/2021
Target Name	Fly Leasing Limited
Acquirer Name	The Carlyle Group Inc.
Equity Value	\$520 million
Transaction Status	Completed 8/2/2021
Was MFW Used?	No

Transaction Summary and Reasons for Special Committee	<p>MSG Entertainment (MSGE) agreed to acquire MSG Networks (MSGN) in a stock-for-stock transaction, with MSGN surviving the transaction as a direct wholly-owned subsidiary of MSGE. At the time of the agreement, MSGE and MSGN were both controlled by the Dolan Family Group through its ownership of all of the outstanding Class B common stock of each company. The transaction was recommended by special committees of independent directors on both sides. MSGN stockholders received 0.172 shares of MSGE for each Class A or Class B share of MSGN pursuant to a fixed exchange ratio.</p>
Announced Date	<p>03/26/2021</p>
Target Name	<p>MSG Networks Inc.</p>
Acquirer Name	<p>Madison Square Garden Entertainment Corp.</p>
Equity Value	<p>\$900 million</p>
Transaction Status	<p>Completed 7/9/2021</p>
Was MFW Used?	<p>No</p>

<p>Transaction Summary and Reasons for Special Committee</p>	<p>Rogers Communications agreed to acquire all of the outstanding common shares of Shaw Communications, a British Columbia corporation, via a plan of arrangement under Canadian law. Shaw is controlled by the Shaw Family Living Trust through its ownership of 79% of Shaw’s voting Class A shares. In the transaction, Shaw shareholders will receive cash consideration of \$40.50 per share, with the exception of approximately 60% of the shares owned by Shaw Family Living Trust which will be exchanged for 23.6 million Class B Shares of Rogers, with the Shaw family becoming one of the largest Rogers shareholders. The transaction was recommended by a special committee of independent directors and conditioned on the vote of (i) two-thirds of the votes cast by the Class A shareholders, (ii) two-thirds of the votes cast by the Class B shareholders, (iii) a majority of the votes cast by the Class A shareholders excluding votes cast by the Shaw family, and (iv) a majority of the votes cast by the Class A shareholders excluding votes cast by the Shaw family.</p>
<p>Announced Date</p>	<p>03/15/2021</p>
<p>Target Name</p>	<p>Shaw Communications Inc.</p>
<p>Acquirer Name</p>	<p>Rogers Communications Inc.</p>
<p>Equity Value</p>	<p>\$16 billion</p>
<p>Transaction Status</p>	<p>Pending</p>
<p>Was MFW Used?</p>	<p>No, but majority-of-minority votes described above were required by Canadian statute (section 8.1(2) of MI 61-101))</p>

Transaction Summary and Reasons for Special Committee	Apollo currently owns approximately 35% of the outstanding Athene Class A common shares. Athene and Apollo agreed to merge in an all-stock transaction. Upon closing of the merger, current Apollo stockholders will own approximately 76% of the combined company and Athene stockholders will own approximately 24% of the combined company. The transaction was approved on behalf of Athene by a special committee of disinterested directors that did not include any affiliates of Apollo. The Apollo affiliated directors also recused themselves when the transaction was approved by the full board of Athene. On the Apollo side, the transaction was approved by its conflicts committee as well as by the full Apollo board. Closing is subject to the approval of the transaction by holders of a majority of the voting power of both Apollo and Athene.
Announced Date	03/08/2021
Target Name	Athene Holding Ltd.
Acquirer Name	Apollo Global Management, LLC
Equity Value	7308
Transaction Status	Pending
Was MFW Used?	No

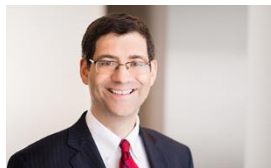
Transaction Summary and Reasons for Special Committee	TowerBrook and Further Global Capital Management agreed to acquire 100% of outstanding shares of ProSight Global in an all-cash transaction. The ProSight board of directors formed a special committee because one ProSight director was affiliated with Further Global, while Goldman Sachs, a minority investor in ProSight, was considering participating in a deal with another bidder. While the chairman of ProSight's board was an independent director of another company owned by TowerBrook, the board determined that he could serve on the special committee.
Announced Date	01/15/2021
Target Name	ProSight Global, Inc.
Acquirer Name	Further Global Capital Management, L.P., TowerBrook Capital Partners L.P.
Equity Value	\$561 million
Transaction Status	Pending
Was MFW Used?	No

<p>Transaction Summary and Reasons for Special Committee</p>	<p>Brookfield Asset Management (BAM) agreed to acquire all of the limited partnership units of Brookfield Property Partners L.P. (BPY) not already owned by BAM by way of an Ontario court-approved plan of arrangement, in which holders of BPY units could elect to receive \$18.17 in cash, 0.3979 of a BAM Class A share or 0.7268 of a BPY preferred unit, subject to pro ration, for an aggregate consideration mix of approximately 50% cash, 42% BAM Class A shares and 8% BPY preferred units. BPY formed a special committee of independent directors to negotiate with BAM, and the transaction was recommended by the special committee and conditioned on the approval of the majority of the minority of votes of BPY Units not held by BAM and its subsidiaries and other votes required to be excluded for purposes of “minority approval” under MI 61-101.</p>
<p>Announced Date</p>	<p>01/04/2021</p>
<p>Target Name</p>	<p>Brookfield Property Partners L.P.</p>
<p>Acquirer Name</p>	<p>Brookfield Asset Management Inc.</p>
<p>Equity Value</p>	<p>\$6.5 billion</p>
<p>Transaction Status</p>	<p>Completed 7/26/2021</p>
<p>Was MFW Used?</p>	<p>No, but majority-of-minority vote described above was required by Canadian statute (section 8.1(2) of MI 61-101))</p>

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.

Authors



Andrew L. Bab
Partner – New York
albab@debevoise.com
+1 212 909 6323



Michael Diz
Partner – San Francisco
madiz@debevoise.com
+1 415 738 5702



Gregory V. Gooding
Partner – New York
ggooding@debevoise.com
+1 212 909 6870



Elliot Greenfield
Partner – New York
egreenfield@debevoise.com
+1 212 909 6772



Emily F. Huang
Partner – New York
efhuang@debevoise.com
+1 212 909 6255



Jonathan E. Levitsky
Partner – New York
jelevitsky@debevoise.com
+1 212 909 6423



Sue Meng
Partner – New York
smeng@debevoise.com
+1 212 909 6163



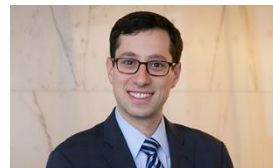
Maeve O'Connor
Partner – New York
mloconnor@debevoise.com
+1 212 909 6315



William D. Regner
Partner – New York
wdregner@debevoise.com
+1 212 909 6698



Jeffrey J. Rosen
Partner – New York
jrosen@debevoise.com
+1 212 909 6281



Zachary H. Saltzman
Partner – New York
zhsaltzman@debevoise.com
+1 212 909 6690



Shannon Rose Selden
Partner – New York
srselden@debevoise.com
+1 212 909 6082



Jonathan R. Tuttle
Partner – Washington, D.C.
jrtuttle@debevoise.com
+1 202 383 8124



Joel D. Salomon
Associate – New York
jsalomon@debevoise.com
+1 212 909 6458