SPECIAL COMMITTEE REPORT

This issue of the Debevoise & Plimpton Special Committee Report surveys corporate transactions announced during the period from January through June 2022 that used special committees to manage conflicts and key Delaware judicial decisions during this period ruling on the effectiveness of such committees.

Of the nine special committee transactions surveyed in this issue, four were acquisitions by private equity funds managed by sponsors with preexisting control investments in the target company (another two transactions had other private equity or hedge fund involvement). Although each of those four transactions used special committees, the members of which were wholly independent of the controlling stockholder, to negotiate and ultimately approve the transaction on behalf of the target company, none used the second *MFW* prong of requiring approval of the transaction by holders of a majority of the stock held by unaffiliated stockholders. This middle ground may be indicative of private equity firms' general tendency, in weighing the trade-off between greater protection against post-closing stockholder claims versus lesser control over the outcome of the transaction, to put a higher value on control than other types of controlling investors.

Below, we discuss this control versus litigation risk mitigation dynamic in the context of an all-cash sale of a private equity controlled company in light of "liquidity conflict" claims. These claims, while still relatively rare, have become more common over the past few years.

Liquidity Conflicts: A Case for Special Committees?

While special committees are standard practice in transactions where a controlling stockholder stands on both sides of a sale transaction, sales to third parties in which the controller receives the same type and amount of per share consideration as other target stockholders do not generally present the kinds of conflicts that would justify a special committee process. Some plaintiffs, however, have argued that, even in these situations, the large size of the controller's interest in the company may create a conflict — sometimes called a "liquidity conflict" — where the sale of the company was driven, in whole or in part, by the controller's particular need or desire for the liquidity that would result from the sale.

For example, in its 2011 decision in *N.J. Carpenters Pension Fund v. infoGROUP, Inc.*, the Delaware Court of Chancery declined to dismiss a fiduciary duty claim based on allegations that infoGROUP's largest stockholder forced a sale of the company at an inopportune time and at an unfair price in order to satisfy his personal liquidity needs. [1] Unsurprisingly, this decision emboldened plaintiffs to press liquidity conflict claims in the context of private equity sponsor-

[1] C.A. No. 5334-VCN, 2011 Del. Ch. LEXIS 147 (Del. Ch. Sept. 30, 2011, *revised* Oct. 6, 2011); *see also In re Answers Corp. S'holders Litig.*, C.A. No. 6170-VCN (Del. Ch. Apr. 11, 2012). The court in N.J. Carpenters cited the Delaware Supreme Court's opinion in *McMullin v. Beran*, 765 A.2d 910, 922-23 (Del. 2000), for the proposition that "Liquidity has been recognized as a benefit that may lead directors to breach their fiduciary duties."

controlled companies, given that the private equity business model is based on a limited investment time horizon.

For the most part, Delaware courts have been unsympathetic to claims that the relative size of private equity sponsors' investments usually makes a whole-company sale the most efficient exit strategy, or that the timing of a sale resulted primarily from the liquidity requirements of the sponsor of the fund, at least in the absence of evidence that the private equity sponsor failed to seek to maximize value in the sale transaction.[2] Even if the sale is deemed to provide the sponsor with a non-ratable benefit — given the sponsor's limited ability to liquidate its investment in the existing public market as compared to smaller stockholders — where the sponsor receives the same pro rata consideration as all other stockholders, Delaware courts have found a strong inference of fairness. For Delaware courts to find a disabling conflict, the pressure on the controlling stockholder to sell quickly must be unusually high, such as the "very narrow circumstances" where the controlling stockholder forces a "fire sale" to meet some "exigent need."[3]

Nonetheless, the recent opinion by the Delaware Court of Chancery in *Manti Holdings, LLC et al. v. The Carlyle Group, Inc. et al.*[4] indicates that the liquidity conflict specter continues to lurk in Delaware case law. In *Manti*, the court declined to dismiss fiduciary duty claims arising from a portfolio company sale. The court found sufficient facts to sustain a claim against the private equity sponsor and its affiliated directors based on an alleged liquidity conflict, in no small part based on a statement by a sponsor board representative to the effect that he was under pressure to sell the company because it was one of the last remaining investments in the applicable fund, and that the sponsor needed to monetize and close that fund in short order. In this case, the sponsor had an additional conflict: it held preferred stock entitling it to receive the bulk of the sale consideration before common stockholders received anything, thus arguably making the sponsor indifferent to the possibility that waiting to sell the company could result in a materially higher price. Those facts, along with a board process that allegedly excluded a dissenting minority board member, gave rise to a reasonable inference that the sponsor derived a unique benefit from the timing of the sale not shared with other common stockholders, and that the sponsor-designated directors, as dual fiduciaries, had acted disloyally in connection with the sale. As a result, the court held that the sale was subject to the test of entire fairness.

A conflicted controller can avoid the exacting standard of entire fairness by requiring a transaction to be approved both by a special committee of independent directors and by holders of a majority of the stock held by the company's unaffiliated stockholders.[5] Should a private equity investor controlling a company with minority public stockholders use a special committee — whether or not coupled with a majority-of-the-minority approval condition — in order to avoid liquidity conflict claims? In most cases, probably not. Absent other conflicts, the

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2 *See, e.g., In re Morton's Restaurant Group, Inc. S'holders Litig.*, 74 A.3d 656 (Del. Ch. 2013), and *In re Crimson Exploration Inc. S'holder Litig.*, 2014 Del. Ch. LEXIS 213 (Del. Ch. Oct. 24, 2014). In each of these cases, the court dismissed claims based on the alleged liquidity conflict.

3 *In re Synthes, Inc. S'holder Litig.*, 50 A.3d 1022 (Del. Ch. Aug 12, 2012).

4 C.A. No. 2020-0657-SG (Del. Ch. June 3, 2022).

5 *Kahn v. M&F Worldwide Corp.*, 88 A. 3d 365 (Del. 2014).

mere desire of a controller to achieve liquidity through an entire company sale generally would not present a level of litigation risk that would lead most controllers to cede control of a sale process to a special committee.

The additional fact in the *Manti* transaction that the sponsor held preferred rather than common stock does make it one in which having a special committee negotiate the transaction might have been a potentially meaningful protection. In the more garden variety liquidity conflict case, however, the sponsor still has alignment with the common stockholders in seeking the best price reasonably available and the sensitive issue — if indeed there is one — is the decision to sell in the first place. In any event, though, private equity sponsors and other controllers in this circumstance should be prepared to justify the sale process chosen, and should take care not to suggest that the timing or manner of the sale process is intended to confer some benefit on the controller that is not shared by the other stockholders.

Recent Special Committee Decisions

"Serving as a director of a Delaware corporation is not a pro bono gig."

The prior issue of this Special Committee Report discussed a September 2021 decision of the Delaware Court of Chancery denying a motion for summary judgment brought by members of a special committee of a Delaware corporation on the basis of material questions of fact as to the independence of two of the three committee members. In the case of one of those members, the director's fees paid by the corporation over the prior eight years, which averaged $164,500 per year and which constituted his primary source of income, were found to raise questions as to his independence from the controller. In light of that case, it is worth noting that in January 2022, in a decision by Chancellor McCormick, the Delaware Court of Chancery held that a director's receipt of $140,000 in annual fees — which the court described as "not unusually excessive" — did not call into question the director's independence, even though it was his only source of income. In the words of the court, "serving as a director of a Delaware corporation is not a pro bono gig." *Simons v. Brookfield Asset Management, Inc., et al.*, C.A. No. 2020-0841-KSJM (Del. Ch. Jan. 21, 2022).

Where a special committee was given the power to grant all corporate approvals in respect of a conflicted transaction, allowing a Section 203 waiver to be granted by the full board indicated that the special committee failed to function properly, thus rendering *MFW* inapplicable.

The founder, chairman and 20% stockholder of Highpower International proposed to take the company private at $4.80 per share. The transaction was conditioned on the approval of both a special committee of independent directors and a majority-of-the-minority stockholder approval. The special committee was given the exclusivity authority to grant any approvals of the board needed in furtherance of the transaction. After the founder proposed to expand the buyout group to include additional insiders, the expanded group sought a Section 203 waiver. The board granted that waiver, without any involvement by the special committee. The special committee ultimately approved the transaction at the originally proposed price, as did holders of 58% of the outstanding common stock held by unaffiliated stockholders. Following closing, former company stockholders brought fiduciary duty claims. Defendants moved to dismiss on the grounds that the requirements of *MFW* were met and the business judgment rule applied. The Delaware Court of Chancery held that "the special committee's failure to consider the

Section 203 waiver as a committee, but instead allowing the board to waive it in the face of a clear delegation of authority to the special committee, creates a reasonable inference that the committee was not in fact functioning independently and did not fully discharge its obligations as set forth in the authorizing resolutions." Thus, the requirements of *MFW* were not satisfied, and the motion to dismiss was denied. *Styslinger et al. v. Pan et al.*, C.A. No. 2020-0651-PAF (Del. Ch. Jan. 24, 2022; filed Feb. 7, 2022). Since *Digex*[6], Delaware courts have seen Section 203 approval as a key step—and a key leverage point for the target—in dealing with intricate interested stockholder situations, and this decision is consonant with that view.

Close friendship with CEO does not defeat independence, but hoping controller will help you get a job might.

Oracle Corporation acquired NetSuite, Inc., which was 45% owned by Larry Ellison, Oracle's founder and largest stockholder, in a transaction approved by a special committee of the Oracle board. Following the closing of the transaction, Oracle stockholders brought fiduciary duty claims against certain Oracle directors and officers. Among other claims, plaintiffs challenged the independence of the chair of the special committee, who was a close friend of the CEO, who was simultaneously pursuing an investment on behalf of her private equity firm employer in which Oracle was expected to be a co-investor, and who was also seeking to find a CEO position, a goal Ellison was in a position to further. That director brought a motion for summary judgment holding that she was independent of both Oracle's CEO and its founder. The Delaware Court of Chancery held that the friendship with the Oracle CEO did not rise to the level of the "very warm and thick personal ties of respect, loyalty, and affection" that were found to demonstrate lack of independence in prior decisions of the court. At the same time, though, the court held that the director's interest in a proposed investment potentially involving Oracle, and her awareness that Ellison, "given his position in the industry, could help or hinder her CEO ambitions," were sufficient to defeat her motion for summary judgment. *In re Oracle Corp. Deriv. Litig.*, C.A. No. 2017-0337-SG (Del. Ch. May 20, 2022).

Delaware Supreme Court finds, on basis of factual analysis, social ties not to compromise independence.

The board of directors of El Pollo Loco, Inc. (EPL) formed a special litigation committee (SLC) of independent directors to evaluate derivative claims for breach of fiduciary duty asserted against certain members of EPL's board and management, as well as a private investment firm, related to the sale of EPL stock. After a lengthy investigation, the SLC moved to terminate the derivative claims based on its conclusion that the claims had no merit. The Court of Chancery granted the SLC's motion under the two-step framework set forth in *Zapata v. Maldonado*, which requires analysis of the SLC members' independence with respect to the potential claims (among other things), and the Delaware Supreme Court affirmed in June in a 5-1 decision. While the central challenge to independence was an argument that two of the three SLC members had prejudged the merits of the claims, the plaintiffs also asserted that one of the directors had professional and social connections over the course of decades with the founder of the investment firm. That director had gone to college with the founder's wife, and in the intervening 35 years the families had dined together approximately 20 times, with most of those

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[6] *In re Digex, Inc. S'holder Litig.*, 789 A.2d 1176 (Del. Ch. Dec 12, 2000).

meals concentrated in the time when their respective children, now grown, were little. In addition, the director had sought business advice from the founder on one occasion, and the two had donated to charities where the other was a board member, although not in amounts that were material compared to their wealth. The Delaware Supreme Court noted that these connections presented a "closer call" than plaintiffs' challenges to the other SLC members but nonetheless concluded that they were "unlikely to result in the type of awkward post-investigation encounters that would weigh on a director's decision-making." In reaching that conclusion, the court noted the director's "numerous leadership roles" apart from her service on the EPL board that gave her a "reputational incentive to act independently." *Diep v. Sather et al.*, No. 313, 2021 (Del. June 28, 2022).

Special Committee Transactions Overview

Transaction Summary and Reasons for Special Committee	On January 25, 2022, Standard General L.P. ("Standard General") made a preliminary, non-binding proposal to acquire the 79% of the outstanding shares of Bally's Corporation, a Delaware corporation ("Bally's"), that Standard General did not already own for $38.00 in cash per share. In response to Standard General's proposal, the board of directors of Bally's formed a special committee of independent and disinterested directors authorized, among other things, to evaluate Standard General's proposal, as well as any potential strategic alternatives to the proposal. Following the special committee's consideration, Standard General's proposal was rejected.
Announced Date	01/25/2022
Target Name	Bally's Corporation
Acquirer Name	Standard General L.P.
Equity Value	$1,632,000,000
Transaction Status	Withdrawn / Proposal Rejected
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On January 31, 2022, Picard Parent, Inc. (an acquisition vehicle for TIBCO Software Inc. ("TIBCO"), an indirect subsidiary of Vista Equity Partners ("Vista")) entered into a definitive agreement to acquire the outstanding common stock of Citrix Systems, Inc., a Delaware corporation ("Citrix"), for $104 per share. Vista partnered with an affiliate of Elliott Investment Management, L.P. ("Elliott" and, together with Vista, the "Investment Group") for the transaction. The transaction was approved by a transaction committee of the board of directors of Citrix consisting of independent and disinterested directors. While the transaction committee was formed as a matter of convenience and efficiency, the board of directors acknowledged that two board members were potentially conflicted (and such directors were not members of the transaction committee and recused themselves from relevant board and committee meetings). One was a director of an Elliott sponsored special purpose acquisition company and the other was a managing director of Vista.
Announced Date	01/31/2022
Target Name	Citrix Systems, Inc.
Acquirer Name	Picard Parent, Inc. (TIBCO, Vista and Elliott)
Equity Value	$11,415,000,000

Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On February 27, 2022, W.P. Carey, Inc. ("W.P. Carey"), the ultimate parent of the external advisor of the publicly registered non-traded REIT Corporate Property Associates 18 – Global Incorporated, a Maryland corporation ("CPA 18"), entered into a definitive agreement to acquire the remaining capital stock of CPA 18 not owned by W.P. Carey for $3.00 in cash and 0.0978 of a share of W.P. Carey common stock per share of capital stock of CPA 18. The transaction was approved by a special committee of the board of directors of CPA 18 consisting solely of independent directors.
Announced Date	02/28/2022
Target Name	Corporate Property Associates 18 – Global Incorporated
Acquirer Name	W.P. Carey, Inc.
Equity Value	$1,499,000,000
Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	No, but per the terms of the organizational documents of CPA 18, a majority of the minority vote was required to approve the transaction.

Transaction Summary and Reasons for Special Committee	On March 5, 2022, Camelot Return Intermediate Holdings LLC (an acquisition vehicle for private equity funds managed by Clayton, Dubilier & Rice, LLC ("CD&R")) entered into a definitive agreement to acquire the remaining approximately 51% of the outstanding common stock of Cornerstone Building Brands, Inc., a Delaware corporation ("Cornerstone"), not already owned by private equity funds managed by CD&R for $24.65 in cash per share. The transaction was approved by a special committee of the board of directors of Cornerstone consisting solely of independent directors who were not affiliated with CD&R.
Announced Date	03/07/2022
Target Name	Cornerstone Building Brands, Inc.
Acquirer Name	Camelot Return Intermediate Holdings LLC (CD&R)
Equity Value	$1,585,000,000

Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On April 10, 2022, Project Hotel California Holdings, LP (an acquisition vehicle for Thoma Bravo, L.P. ("Thoma Bravo")) entered into a definitive agreement to acquire the outstanding shares of common stock of Sailpoint Technologies Holdings, Inc., a Delaware corporation ("Sailpoint"), for $65.25 in cash per share. The transaction was approved by a special committee of the board of directors of Sailpoint consisting of directors determined to be independent and disinterested in relation to (i) a potential transaction with Thoma Bravo and (ii) Thoma Bravo and its affiliates. The board of directors formed the special committee in light of potential conflicts of interests with respect to a transaction involving Thoma Bravo as a result of the fact that Thoma Bravo had, prior to August 2018, held a controlling stake in Sailpoint and certain members of Sailpoints' board of directors served as a director and/or executive officer of Thoma Bravo portfolio companies or had certain other relationships with Thoma Bravo.
Announced Date	04/11/2022
Target Name	Sailpoint Technologies Holdings, Inc.
Acquirer Name	Project Hotel California Holdings, LP (Thoma Bravo)
Equity Value	$6,123,000,000
Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On May 11, 2022, Sunshine Bidco, Inc. (an acquisition vehicle for (i) investments funds controlled by DigitalBridge Partners II, LP ("DigitalBridge") and (ii) IFM Global Infrastructure Fund ("IFM GIF")) entered into a definitive agreement to acquire all outstanding shares of Class A common stock of Switch, Inc., a Nevada corporation ("Switch"), for $32.25 in cash per share. Each share of Class B common stock of Switch was cancelled for no consideration but with the right of any holder of a related common unit in Switch's subsidiary Switch, Ltd. to receive $32.25 in cash for such common unit in a subsequent merger of a newly formed subsidiary of Switch with and into Switch, Ltd. At signing, Switch's founder and CEO, Rob Roy, and President, Chief Legal Officer and Secretary, Thomas Morton, entered into a rollover agreement, pursuant to which they agreed to contribute, in the aggregate, approximately 424.3 million worth of common units in Switch, Ltd. in exchange for equity interests in Sunshine Bidco, Inc. Switch also amended the Tax Receivables Agreement (the "TRA") it had previously entered into with members of Switch, Ltd. in connection with Switch's IPO, reducing the amount that would be due to the members of Switch, Ltd. under the TRA in connection with the closing of the transaction. The transaction was approved by a special committee of the board of directors of Switch consisting of directors determined to be (i) independent, (ii) not current employees of Switch and (iii) otherwise disinterested in a potential strategic transaction. The board of directors of Switch formed the special committee as part of its process to consider strategic alternatives to retain flexibility in the event a potential financial buyer of Switch wanted Mr. Roy to remain in a management role or roll over some of his equity. The special committee was subsequently adjusted to replace a member who was an equityholder of Switch, Ltd. and, as a result, a beneficiary of the amount payable under the TRA.
Announced Date	5/11/2022
Target Name	Switch, Inc.
Acquirer Name	Sunshine Bidco, Inc. (DigitalBridge and IFM GIF)
Equity Value	$8,378,000,000
Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On May 15, 2022, Diamondback Energy, Inc. ("Diamondback") entered into definitive agreements to acquire all common units of Rattler Midstream LP, a Delaware limited partnership ("Rattler"), representing the remaining approximately 26% of limited partner interest not already owned by Diamondback, for 0.113 of a share of common stock of Diamondback per Rattler common unit. The transaction was approved by the Conflicts Committee of the board of directors of Rattled Midstream GP, LLC (the general partner of Rattler), with all members of the Conflicts Committee constituting independent directors as required by Rattler's agreement of limited partnership.
Announced Date	05/16/2022
Target Name	Rattler Midstream LP
Acquirer Name	Diamondback Energy, Inc.
Equity Value	$575,000,000
Transaction Status	Pending
Special Committee Type	Target
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On May 24, 2022, Corgi Bidco, Inc. (an acquisition vehicle for (i) private equity funds managed by Clayton, Dubilier & Rice, LLC ("CD&R") and (ii) TPG Global, LLC ("TPG")) entered into a definitive agreement to acquire the remaining approximately 76% of the outstanding common stock of Covetrus, Inc., a Delaware corporation ("Covetrus"), not already owned by private equity funds managed by CD&R for $21.00 in cash per share of common stock. The transaction was approved by a transaction committee of the board of directors of Covetrus consisting solely of non-management directors who were not affiliated with CD&R.
Announced Date	05/25/2022
Target Name	Covetrus, Inc.
Acquirer Name	Corgi Bidco, Inc. (CD&R and TPG)
Equity Value	$2,220,000,000
Transaction Status	Pending
Special Committee Type	Target

Transaction Summary and Reasons for Special Committee	On June 13, 2022, Liberty Broadband Corporation, a Delaware corporation ("Liberty"), entered into an Exchange Agreement (the "Exchange Agreement") with the chairman of its board of directors, John C. Malone, and a revocable trust of which Mr. Malone is the sole trustee and beneficiary whereby, among other things, Mr. Malone agreed to an arrangement under which his aggregate voting power in Liberty would not exceed 49%. As of April 30, 2022, Mr. Malone beneficially owned shares of common stock of Liberty constituting approximately 49.4% of the aggregate outstanding voting power of Liberty. The Exchange Agreement was approved by a special committee of independent and disinterested directors.
Announced Date	06/13/2022
Target Name	N/A
Acquirer Name	N/A
Equity Value	N/A
Transaction Status	Agreement executed
Special Committee Type	Agreement with significant stockholder
Was *MFW* Used?	No

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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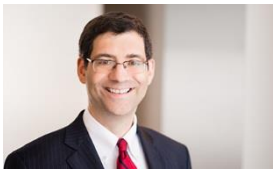

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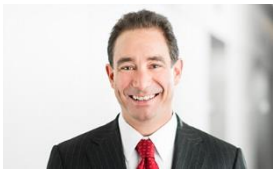

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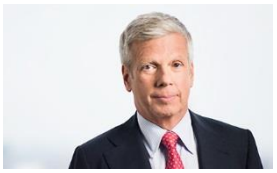

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