

Delaware Supreme Court Holds Entire Fairness Applicable to All Conflicted Controller Transactions

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The Delaware Supreme Court, in *In re Match Group Deriv. Litig.*, C.A. No. 2020-0505 (April 4, 2024), has held that the test of entire fairness—Delaware’s most stringent standard of review—applies whenever a controlling stockholder stands on both sides of a transaction, absent the procedural protections contemplated by *Kahn v. M&F Worldwide Corp.* (Del. 2014). The Court further held that, for a transaction to be eligible for business judgment (rather than entire fairness) review under *MFW*, the special committee must be entirely independent.

The case arose from the 2019 agreement by IAC/InteractiveCorp to separate its majority ownership of Match Group, Inc. The Delaware Court of Chancery held that the separation transaction was subject to business judgment review because it had been approved by an independent and disinterested “separation committee” of the Match board and by an uncoerced, fully informed vote of a majority of the public minority Match shares—despite allegations by the plaintiffs that one member of the separation committee was not independent of IAC.

During the course of plaintiff’s appeal, the defendants argued that satisfaction of both *MFW* conditions was not necessary because the transaction did not involve a freeze-out merger. The plaintiffs disagreed and also sought reversal of the Court of Chancery’s decision that well-pled allegations that one member of the committee lacked independence were insufficient to call into question the effectiveness of the committee where the allegedly conflicted director did not “dominate” or “infect” the committee’s decision-making process.

The Supreme Court rejected the “*MFW* creep” argument made by defendants—that *MFW* was intended to be confined to the context of controller squeeze-out mergers and that either of the *MFW* protections (special committee approval or majority-of-the-minority vote) should be adequate to trigger business judgment review outside that context. According to the Court, the standard of review did not depend on the nature of the challenged transaction. It found that precedent cases were animated by a concern that, whenever a controller stands on both sides of a transaction and receives a non-ratable benefit, the controller has “inherently coercive authority over the board and the

minority stockholders,” which may be used to their disadvantage. The Court believed that this inherent coercion could be neutralized only if the controller disabled itself from “using its control to dictate the outcome of the negotiations and the stockholder vote.” Otherwise, entire fairness review applies.

The Court agreed that the plaintiffs had adequately pled that one member of the Match separation committee lacked independence from IAC based on his prior employment with IAC and his service as a director of IAC-affiliated companies, noting that “[l]ongstanding business affiliations, particularly those based on mutual respect, are the sort that can undermine a director’s independence.” But the Court disagreed with the Court of Chancery’s view that, because there had been no allegation that the challenged director “dominated” or “infected” the separation committee’s decision-making, the independence of a majority of the separation committee sufficed to satisfy the special committee approval prong of *MFW*. According to the Court, a controlling stockholder’s influence is not “disabled” if a special committee includes any member loyal to the controller.

Importantly, the Delaware Supreme Court did not determine that the challenged director was not in fact independent or that the transaction was not entirely fair. The Court remanded the case to the Court of Chancery for further proceedings.

Debevoise & Plimpton LLP acted as counsel to the Match separation committee in this transaction and the ensuing litigation.

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