SPECIAL COMMITTEE REPORT

This issue of the Debevoise & Plimpton Special Committee Report surveys corporate transactions announced during the second half of 2024 that used special committees to manage conflicts and key Delaware judicial decisions rendered during this period that relate to issues relevant to the use of special committees. Several of those cases involved aiding and abetting claims against financial advisors or acquirors, the risks of which are further discussed below.

Neither an Aider nor an Abettor Be: Risks for Advisors and Acquirors

Special committees are used in transactions involving controlled companies in large part to limit the risk of liability for controllers and their appointed directors. However, other parties can also face liability for fiduciary duty breaches in the context of M&A transactions, regardless of whether special committees are used. While not themselves fiduciaries, financial advisors and acquirors can be held liable for aiding and abetting breaches by target company fiduciaries. Moreover, while exculpatory provisions often immunize directors from liability for breaches of the duty of care, that does not limit a plaintiff's ability to bring a claim against a target company's advisors or even a buyer for aiding and abetting such breach. [1] This often makes advisors or acquirors an attractive litigation target.

Aiding and abetting claims were addressed in several Delaware judicial decisions in 2024. In December 2024, the Delaware Court of Chancery, following a seven-day trial, found that officers of Enhabit, Inc. breached their fiduciary duties by usurping corporate opportunities and providing confidential information to two private equity firms in connection with a plan either to take the company private or to develop a competing venture—and that the private equity firms aided and abetted those breaches.[2] An aiding and abetting of fiduciary duty claim requires that the defendant "knowingly participate" in the breach by the fiduciary. In this case, the court found knowing participation in the "stunning efforts [the parties took] to conceal their actions." Those efforts included routing all communications through counsel, apparently in a failed expectation that they would be shielded by privilege. While the specific facts in the *Enhabit* case were egregious, actions that appear intended to hide activities, or communications by unusual means, should be a red flag to advisors or investors.

Earlier in 2024, in a case discussed in the July 2024 edition of this Report,[3] the Delaware Court of Chancery declined to dismiss aiding and abetting charges against the financial advisors to a

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1 For example, in a November 2015 decision relating to the 2011 sale of Rural/Metro Corporation, the Delaware Supreme Court upheld a $75 million damages award against a financial advisor to Rural/Metro for aiding and abetting a breach of fiduciary duty by the target directors despite the fact that the directors themselves were largely shielded from liability under the company's charter. *RBC Capital Markets v. Jervis*, 129 A.3d 816 (Del. 2015).

2 *Enhabit, Inc. et al. v. Nautic Partners IX, LP et al*, C.A. No. 2022-0837-LWW (Del. Ch. Dec. 2, 2024).

3 *Firefighters' Pension System of the City of Kansas City, Missouri Trust v. Foundation Building Materials, Inc. et al.*, C.A. No. 2022-0466-JTL (Del. Ch. May 31, 2024).

controlled company and to the special committee formed to evaluate conflicts between the controller and the minority stockholders in connection with the sale of the company. The primary conflict stemmed from a tax receivable agreement (TRA) entitling the controller to a substantial termination payment upon a sale. In this case, the requirement of "knowing participation" was found by the court to be evidenced in the terms of the advisors' engagement letters—specifically, the fact that their success fees were based on the sum of the deal price plus the TRA change of control payment—which the court held improperly aligned the interests of the advisors with those of the controller rather than solely those of the stockholders.

A Delaware Supreme Court decision at the end of 2024[4] may bring a measure of comfort on aiding and abetting risk, at least to unaffiliated acquirors. The Court of Chancery had found the CEO of Mindbody, Inc. liable for breach of fiduciary duty in connection with the 2019 sale of the company to Vista for initiating a flawed sale process without board authorization, keeping the board in the dark about his back-channel communications with Vista, tilting the sale process in Vista's favor and failing to discuss those actions in the proxy statement. On appeal, the Supreme Court affirmed the lower court's finding that Mindbody's CEO breached his duty of loyalty but reversed the aiding and abetting holding against Vista, which was based solely on the CEO's disclosure breaches, ruling that Vista's contractual right to review the proxy statement and its obligation to correct misstatements and omissions were insufficient to constitute "knowing participation."

Notably, the Supreme Court in its *Mindbody* opinion stated that in the context of an aiding and abetting claim against an arms'-length buyer, knowing participation in a breach of duty by a seller fiduciary should be very difficult to prove given that Delaware law protects arms'-length negotiations and recognizes as generally valid a bidder's arms'-length attempts to reduce the sale price. The Court contrasted this to a situation in which a buyer "attempts to create or exploit" board conflicts or where a buyer and a target board "conspire in or agree to the fiduciary breach." To be subject to liability, an aider and abettor must provide "substantial assistance," which, in the corporate governance context, the Supreme Court held to mean overt participation in active efforts rather than merely a failure to act or having "passive awareness" of misconduct.[5]

The numerous aiding and abetting holdings of the Delaware courts over the past several years serve as a reminder to advisors and counterparties to remain alert to any disloyal behavior on the part of clients or counterparties in order to avoid themselves facing legal jeopardy for the actions of others.

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4 *In re Mindbody, Inc. Stockholder Litigation,* No.484, 2023 (Del. Dec. 2, 2024).

5 The Delaware Supreme Court will have another opportunity to address aiding and abetting claims against acquirers in the *Columbia Pipeline* case, which is currently before the Supreme Court on appeal. The case before the Supreme Court challenges a 2023 decision from the Delaware Court of Chancery *(In re Columbia Pipeline Group, Merger Litigation, C.A.* No. 2018-0484-JTL (Del. Ch. June 30, 2023) that found that a third-party buyer was liable for aiding and abetting breaches of fiduciary duty.

Recent Special Committee Decisions

Court of Chancery Finds That 26.7% Stockholder Is Not a Controller

In February 2018, AstraZeneca spun off its subsidiary Veila Bio, Inc., retaining a 26.7% equity interest. Three years later, Veila was sold to a third party at a 52% premium. After closing, Veila stockholders sued, alleging breach of fiduciary duty against AstraZeneca and the Veila directors. Defendants moved to dismiss on the basis of *Corwin*. In addition to its 26.7% equity interest, AstraZeneca had the right to designate two of Veila's eight directors, most of Veila's top officers were former AstraZeneca employees, Veila's charter and by-laws effectively gave AstraZeneca blocking power over removal of directors from the company's classified board and certain amendments to the company's charter and by-laws, and Veila relied on AstraZeneca for certain important matters pursuant to "support agreements" put in place at the time of the spin-off. Plaintiffs asserted that this panoply of rights and interests constituted control and that, as a result, *Corwin* did not apply.

Prior Delaware decisions have held that a minority stockholder may be a controller but only if it possesses "actual control" of the company through its "domination and control" of a majority of the company's board—either generally or with respect to the particular matter being challenged. The court found that this standard was not met. The court held that neither AstraZeneca's appointment of two of Viela's eight directors nor the prior employment relationships between those directors and AstraZeneca were sufficient to evidence control, that AstraZeneca's blocking rights were "not nearly as formidable" as those held to create control in prior decisions of the court and that AstraZeneca did not dominate Veila's decision to sell. The court also held that the support agreements—and Veila's reliance upon them—did not support an inference that AstraZeneca had control over Veila's management or could prevent its board from exercising independent judgment. *Stephen M. Sciannella v. Astrazeneca UK Ltd., et. al. [Viela Bio]*, C.A. No. 2023-0125-PAF (Del. Ch. July 8, 2024).

Controller of Parent Does Not Necessarily Control Subsidiary; Total Abstention Means Total Abstention

The 2019 spin-off of Match Group, Inc. from its majority stockholder, IAC/Interactive—in a transaction approved by a special committee and by a majority vote of Match Group's unaffiliated stockholders—has over the past three years led to three decisions of the Delaware courts relevant to conflicted controller transactions and the use of special committees. In September 2022, the Court of Chancery, in a decision[6] discussed in the January 2023 edition of this Report, held that the transaction was subject to the business judgment rule notwithstanding well-pled claims that one member of the special committee lacked independence. Then, in April 2024, the Delaware Supreme Court, in a decision[7] discussed in the July 2024 edition of this Report, reversed the lower court's decision and held that in order to avoid entire fairness review, a special committee must be entirely independent. Most recently, on October 2, 2024, the Delaware Court of Chancery, in response to motions to dismiss made on

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6 *In re Match Group, Inc. Derivative Litigation*, C.A. No. 2020-0505-MTZ (Del. Ch. Sept. 1, 2022).

7 *In re Match Group, Inc. Derivative Litigation*, C.A. No. 2020-0505 (Del. Apr. 4, 2024).

alternative grounds by the controller and director defendants, made two further notable holdings.

First, the court held that the facts that Barry Diller controlled IAC/Interactive and that IAC/Interactive controlled Match did not necessarily mean that Diller controlled Match. Diller and his family owned 42.9% of the voting power of IAC/Interactive. While prior Delaware cases have found that a majority owner of a parent corporation also controlled the parent's subsidiaries, the court found that this transitive property did not apply as a matter of law where the parent's controller had less than majority ownership. Rather, the court held, in order to state a claim that Diller controlled Match, plaintiffs had to plead facts demonstrating that Diller had actual—rather than merely potential—control over Match, which the court found plaintiffs failed to do.

Second, the court upheld breach of fiduciary duty claims against the directors who sat on the boards of both IAC/Interactive and Match. Those directors argued that although they were dual fiduciaries, they avoided liability by delegating responsibility for evaluating and negotiating the spin-off transaction to the special committee, which had then recommended the transaction to the full Match board. However, the dual directors attended the meeting of the Match board where it voted to approve the transaction, which the court held was fatal to their claim. The court acknowledged that while dual fiduciaries can avoid liability for a conflicted transaction by "totally abstaining" from participation in the transaction, it held that "at a minimum, abstention requires abstaining from the vote approving the transaction," which the directors had failed to do. *In re Match Group, Inc. Derivative Litigation*, C.A. No. 2020-0505-MTZ (Del. Ch. October 2, 2024).

Delaware Supreme Court Reverses Aiding and Abetting Holding Against Buyer

The Delaware Supreme Court affirmed the Court of Chancery's 2023 decision holding that Mindbody's CEO breached his duty of loyalty under *Revlon* in connection with Mindbody's 2019 sale to Vista Equity Partners by initiating a flawed sale process without board authorization, keeping Mindbody's board in the dark about his back-channel communications with Vista and tilting the sale process in Vista's favor. These breaches were not cleansed under *Corwin* because the proxy statement failed to disclose the CEO's conflicts of interest (namely, his need for near-term liquidity and his ardor for Vista), included misleadingly "anodyne" disclosures of the CEO's contacts with Vista and omitted other contacts entirely. Together, this created a false and misleading narrative, most importantly by omitting disclosure about "tips" to Vista about the CEO's pricing expectations and Mindbody' plans for a sale process. However, the Court reversed the Court of Chancery's holding that Vista was liable for aiding and abetting the CEO's disclosure breaches, rejecting the lower court's finding that Vista's contractual right to review the proxy statement and its obligation to correct misstatements and omissions translated into "knowing participation" in the CEO's disclosure breach.

The Court noted that the aider and abettor must act with scienter, meaning that the defendant must know not only that the primary actor was breaching a fiduciary duty but also that its own conduct was legally improper. The Court concluded that Vista's rights under the merger agreement did not create an independent duty of disclosure to the Mindbody stockholders and that Vista's failure to identify the omissions in the proxy statement did not rise to the level of

"knowing participation" in a fiduciary breach. *In re Mindbody, Inc. Stockholder Litigation*, No. 484, 2023 (Del. Dec. 2, 2024).

Delaware Rejects Post-Trial Stockholder Ratification of Option Award

In January 2024, the Delaware Court of Chancery had held that Tesla's $55 billion option grant to Elon Musk failed the test of entire fairness in a decision[8] discussed in the July 2024 edition of this Report. Subsequently, Tesla sought and obtained another stockholder vote in favor of the award, leading Musk to ask the court to reverse its prior decision on the basis of stockholder ratification. Chancellor McCormick declined, finding four "fatal flaws" in defendants' motion to reverse: (1) there is no procedural ground to reverse a post-trial decision based on evidence created after the trial; (2) common-law ratification must be timely raised, which at a minimum means not after a post-trial opinion; (3) a stockholder vote, standing alone, cannot ratify a conflicted-controller transaction; and (4) even if a stockholder vote could have such a ratifying effect, it could not do so where, as here, the proxy statement "mangled the truth" with materially false or misleading statements about the requested vote and its potential ratifying effect. According to the Chancellor, any of these defects alone would defeat the defendants' motion. *Richard J. Tornetta v. Elon Musk, et al. and Tesla, Inc.*, C.A. No. 2018-0408-KSJM (Del. Ch. Dec. 2, 2024).

[8] *Tornetta v. Musk et al.*, C.A. No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024).

Special Committee Transactions Overview[9]

Transaction Summary and Reasons for Special Committee	On July 31, 2024, Raven Acquisition Holdings, LLC ("Purchaser"), an acquisition vehicle created by Clayton, Dubilier & Rice, LLC ("CD&R") and TowerBrook Capital Partners L.P. ("TowerBrook"), entered into a definitive agreement to acquire the outstanding common stock of R1 RCM Inc. ("R1 RCM") not already owned by TowerBrook for $14.30 in cash per share by means of a merger of a wholly owned subsidiary of Purchaser with and into R1 RCM. TowerBrook, which owned approximately 36% of the common stock of R1 RCM, entered into a support agreement pursuant to which it agreed to vote in favor of the transaction. The transaction was approved by a special committee of R1 RCM's board of directors comprised solely of disinterested and independent directors and was subject to the approval by holders of a majority of the shares of common stock of R1 RCM entitled to vote on the transaction.
Announced Date	July 31, 2024
Target Name	R1 RCM Inc. (a Delaware corporation)
Acquirer Name	Raven Acquisition Holdings, LLC (a Delaware limited liability company)
Equity Value	$6,723,000,000
Transaction Status	Completed
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On August 5, 2024, Tasmania Midco, LLC ("Purchaser"), an acquisition vehicle formed by Turing EquityCo II L.P. ("Turing"), entered into a definitive agreement to acquire the approximately 38.8% of common stock of Thoughtworks Holding, Inc. ("Thoughtworks") not already owned by Turing for $4.40 in cash per share by means of a merger of a wholly owned subsidiary of Purchaser with and into Thoughtworks. Both Purchaser and Turing are affiliates of Apax Partners LLP. The transaction was approved by a special committee of Thoughtworks's board of directors comprised solely of disinterested and independent directors and was approved via written consent by affiliates of Turing as the holder of a majority of the shares of Thoughtworks.
Announced Date	August 5, 2024
Target Name	Thoughtworks Holding, Inc. (a Delaware corporation)
Acquirer Name	Apax Partners LLP

[9] This Special Committee Transaction Overview generally does not include transactions with an equity value less than $500 million (excluding, unless otherwise indicated, the value of the equity already owned by the acquirer and its affiliates).

Equity Value	$551,000,000
Transaction Status	Completed
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On August 16, 2024, Hedychium Group Limited ("Purchaser"), an affiliate of EQT Partners Asia Pte. Limited, entered into a definitive agreement to acquire PropertyGuru Group Limited ("PropertyGuru") for $6.70 in cash per share by means of a merger of a wholly owned subsidiary of Purchaser with and into PropertyGuru. Affiliates of TPG Inc. and KKR & Co., Inc. that collectively owned approximately 56% of the voting power of the common stock of PropertyGuru entered into voting and support agreements pursuant to which they agreed to vote in favor of the transaction. The transaction was approved by a special committee of PropertyGuru's board of directors comprised solely of disinterested and independent directors. The transaction was subject to the approval by holders of at least two thirds of the shares of common stock of PropertyGuru entitled to vote on the transaction.
Announced Date	August 16, 2024
Target Name	PropertyGuru Group Limited (a Cayman Islands exempted company with limited liability)
Acquirer Name	Hedychium Group Limited (a Cayman Islands exempted company with limited liability), a vehicle of EQT Partners Asia Pte. Limited
Equity Value	$1,098,000,000
Transaction Status	Completed
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On September 5, 2024, First Majestic Silver Corp. ("First Majestic") entered into a definitive agreement to acquire Gatos Silver, Inc. ("Gatos") for 2.55 First Majestic common shares per Gatos common share by means of a merger of Gatos with and into First Majestic. Electrum Silver US LLC, which owns approximately 32% of the common stock of Gatos, discussed rolling over its equity and maintaining a significant minority stake, leading Gatos to form a special committee. Electrum Silver ultimately did not roll over its equity but entered into a support agreement pursuant to which it agreed to vote in favor of the transaction. The transaction was approved by a special committee of Gatos's board of directors comprised solely of disinterested and independent directors and is subject to the approval by holders of a majority of the shares of common stock of (i) Gatos entitled to vote on the transaction and (ii) First Majestic entitled to vote on the share issuance in connection with the transaction.

Announced Date	September 5, 2024
Target Name	Gatos Silver, Inc. (a Delaware corporation)
Acquirer Name	First Majestic Silver Corp. (a Canadian corporation)
Equity Value	$933,000,000
Transaction Status	Pending
Was *MFW* Used?	No

Transaction Summary and Reasons for Special Committee	On October 17, 2024, Zodiac Purchaser, LLC ("Purchaser"), an affiliate of Silver Lake Group, LLC ("Silver Lake"), entered into a definitive agreement to acquire Zuora, Inc. ("Zuora") for $10.00 in cash per share by means of a merger of a wholly owned subsidiary of Purchaser with and into Zuora. Tien Tzuo, the founder, Chief Executive Officer and Chairperson of the board of directors of Zuora, and certain of his affiliates (together with Tzuo, the "CEO Rollover Stockholders"), who collectively own approximately 38% of the voting power of the common stock of Zuora, agreed to roll over a portion of their shares such that, following the transaction, they will own (directly or indirectly) approximately 8.4% of Zuora. The CEO Rollover Stockholders entered into a support agreement pursuant to which they agreed to vote in favor of the transaction. The transaction was approved by a special committee of Zuora's board of directors comprised solely of disinterested and independent directors and is subject to the approval by holders of (i) a majority of the shares of common stock of Zuora entitled to vote on the transaction, (ii) a majority of the shares of common stock of Zuora not owned, directly or indirectly by the CEO Rollover Stockholders, Silver Lake or its affiliates, the members of the board of Zuora who are not on the special committee or designated by an affiliate of Silver Lake or by Section 16 officers of Zuora, (iii) a majority of the shares of Class A Common Stock and (iv) a majority of the shares of Class B Common Stock.
Announced Date	October 17, 2024
Target Name	Zuora, Inc. (a Delaware corporation)
Acquirer Name	Zodiac Purchaser, LLC (a Delaware limited liability company), a vehicle of Silver Lake Group, LLC
Equity Value	$1,537,000,000
Transaction Status	Pending
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On November 12, 2024, Fusion Merger Sub 1, LLC and Fusion Merger Sub 2, LLC (collectively, the "Merger Subs"), each an acquisition vehicle formed by Charter Communications, Inc. ("Charter"), entered into a definitive agreement to acquire all of the common stock of Liberty Broadband Corporation ("Liberty") for (i) 0.236 Charter common shares per Liberty common share and (ii) 1 Charter cumulative redeemable preferred share per Liberty Series A cumulative preferred share by means of a merger of wholly owned subsidiaries of Charter with and into Liberty. As of September 30, 2024, Liberty owned approximately 25% of the issued and outstanding shares of Charter common stock. In connection with the transaction, certain entities affiliated with John C. Malone (the "Malone Group") and Greg Maffei, the President and CEO of Liberty (the "Maffei Group"), who collectively own approximately 52% of the total voting power of the issued and outstanding shares of Liberty common stock, entered into a voting agreement to vote in favor of the proposed transaction. Additionally, Charter, Liberty and Advance/Newhouse Partnership ("A/N"), an existing shareholder of Charter and party to the Second Amended and Restated Stockholders Agreement of Charter, agreed to amend certain existing governance arrangements of Charter including modifying the process for Charter to repurchase its shares of common stock from Liberty during the pendency of the transaction. Charter intends to make repurchases of Charter shares from Liberty in amounts of approximately $100 million per month, subject to certain adjustments, and as needed incremental repurchases or loans to Liberty, to allow for the timely repayment of Liberty debt in anticipation of the combination of the companies at closing. The transaction was approved by a special committee of Charter's board of directors comprised solely of disinterested and independent directors and is subject to the approval by holders of (i) a majority of the shares of common and preferred stock of Liberty, (ii) a majority of the shares of common stock of Liberty not owned, directly or indirectly, by Charter and its affiliates, the Malone Group and the Maffei Group and their respective affiliates, A/N and its affiliates, the members of the board of Charter, Section 16 officers of Charter and any immediate family members of the foregoing, (iii) a majority of the shares of common stock of Liberty entitled to vote on the transaction and (iv) a majority of the shares of common stock of Liberty not owned, directly or indirectly, by Liberty and its affiliates, the Malone Group and the Maffei Group and their respective affiliates, A/N and its affiliates, the members of the board of Liberty, Section 16 officers of Liberty and any immediate family members of the foregoing.
Announced Date	November 13, 2023
Target Name	Liberty Broadband Corporation (a Delaware corporation)
Acquirer Name	Charter Communications, Inc. (a Delaware corporation)
Equity Value	$13,215,000,000
Transaction Status	Pending
Was *MFW* Used?	Yes

Transaction Summary and Reasons for Special Committee	On November 24, 2024, Elk Merger Sub I, LLC and Elk Merger Sub II, LLC (collectively, the "Merger Subs"), each an acquisition vehicle of ONEOK, Inc. ("ONEOK"), entered into a definitive agreement to acquire the approximately 56.2% of the common stock of EnLink Midstream, LLC ("Enlink") not already owned by ONEOK for 0.1412 of an ONEOK common share per Enlink common share by means of two mergers of the Merger Subs with and into Enlink, with Enlink surviving the merger as a wholly owned subsidiary of ONEOK. ONEOK entered into a support agreement pursuant to which it agreed to vote in favor of the transaction. The transaction was approved by a special committee of Enlink's board of directors comprised solely of disinterested and independent directors and is subject to the approval by holders of a majority of the shares of common stock of Enlink entitled to vote on the transaction.
Announced Date	November 24, 2024
Target Name	EnLink Midstream, LLC (a Delaware limited liability company)
Acquirer Name	ONEOK, Inc. (an Oklahoma corporation)
Equity Value	$4,243,000,000
Transaction Status	Pending
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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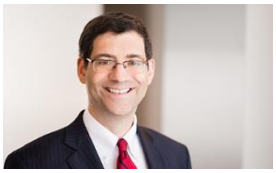

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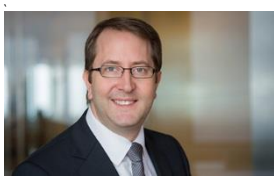

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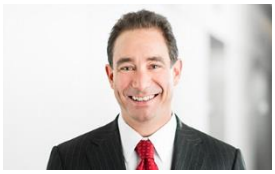

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