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Entire Fairness Remains Default Standard for Conflicted Controller Deals

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The Delaware Supreme Court announced that MFW remains the lodestar of earning the business judgment rule's protections for all conflicted controller transactions, and a single conflict on a special committee can be fatal to those efforts. On April 4, 2024, the Delaware Supreme Court issued its highly anticipated decision in *In re Match Group, Inc. Derivative Litigation*, -- A.3d ---, 2024 WL 1449815 (Del. Apr. 4, 2024), which we previewed in our 2023 Year-End Securities Litigation Update. The opinion includes two notable holdings. First, the Court held that the entire fairness standard is the default standard of review applicable to *all* transactions with a controlling stockholder in which the controller receives a non-ratable benefit. For the transaction at issue, involving IAC/InterActiveCorp's reverse spinoff from its controlled subsidiary March Group, Inc., the Court concluded that in order to invoke more deferential business judgment rule review, both requirements of *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) ("*MFW*") must be satisfied: review and approval by an independent and well-functioning special committee, and the informed approval of disinterested stockholders. Second, the Court held that to satisfy the first *MFW* element, all members of the special committee reviewing and approving the transaction must be independent of the controller. The Court found that one committee member's historical business ties with the controller were sufficient at the pleadings stage to compromise the member's independence, and therefore cast "a reasonable doubt" on "the entire [s]eparation [c]ommittee's independence." The Court therefore reversed the Court of Chancery's holding that *MFW* can be satisfied when a majority of a special committee's members are independent of the controller. **Takeaways** This decision confirms the Delaware Supreme Court's view of transactions involving a controlling stockholder and their potential for coerciveness. Because any transaction with a controlling stockholder from which the controller conceivably derives a non-ratable benefit presumptively will be reviewed under the entire fairness standard, careful attention and adherence to all aspects of the *MFW* framework is important to parties seeking to invoke its protections. That is especially true after *In re Match Group, Inc.* with respect to the independence of special committee members. The Delaware Supreme Court's holding expressly requires the independence of *all* members of a special committee, meaning that even a foot-fault in committee-member independence could subject a transaction to lengthy and expensive litigation. This was the case even though the Court of Chancery found that the conflicted special committee member "did not 'infect' or 'dominate' the separation committee process"—a finding that was unchallenged on appeal. Thus, even a rigorous, arms-length process alone will not be sufficient to invoke the protections of the business judgment rule at the pleadings stage if even one member lacks independence from a controlling stockholder. Together, these holdings provide important clarity to parties undertaking transactions in which a conflicted controller is, or may be, present. In short, *MFW* remains the lodestar of earning the business judgment rule's protections for all conflicted controller transactions, and a single conflict on a special committee can be fatal to those efforts.

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Gibson Dunn lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you

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