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Delaware Supreme Court Confirms Dual MFW Protections Are Needed Outside of the Freeze-Out Merger Context for Application of Business Judgment Rule

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In *In re Match Group, Inc. Derivative Litigation*, the Delaware Supreme Court held that the dual procedural protections announced in the seminal case of *Kahn v. M & F Worldwide Corp.* (*MFW*) are required in order to shift the presumptive standard of review from entire fairness to the business judgment rule in transactions involving a controlling stockholder that stands on both sides of the transaction and receives a nonratable benefit, regardless of whether the transaction involves a freeze-out merger. That case, which was decided in the context of a freeze-out merger, famously required that to change the standard of review from entire fairness to the business judgment rule, the controlling stockholder must subject the transaction at the outset to *both* the approval of a special committee consisting of independent and disinterested directors and the approval of a majority of the minority stockholders. One of these procedural protections was insufficient.

In *Match*, the Delaware Supreme Court had the occasion to decide whether controlling stockholder transactions outside of the freeze-out merger context require only *one* of those protections, but not both. The court's decision confirms that both protections must be employed in not only freeze-out transactions, but also in transactions where a controller stands on both sides of a transaction and receives a nonratable benefit.

Takeaways

The primary takeaways from the court's decision are as follows:

- **Both Sides of a Transaction, Nonratable Benefit.** When a controlling stockholder stands on both sides of a transaction *and* receives a nonratable benefit, entire fairness review applies unless *both* prongs of *MFW* are satisfied.
- **Special Committee Independence.** One of the requirements of *MFW* is that the special committee is disinterested and independent. The court in *Match* found that for *MFW* to be satisfied, it is not enough that a *majority* of the members of the special committee are independent from the controlling stockholder. Rather, every member of the special committee must be independent from the controller.
- **Section 144 of the DGCL Does Not Impact the Standard of Review.** Finally, the court's decision contains ancillary commentary on Section 144 of the Delaware General Corporation Law (DGCL). That section, which

provides for a safe harbor for self-dealing transactions by directors, has occasionally been cited to operate to shift the standard of review in conflict transactions if its requirements are met, but the court confirmed in a footnote that the statute deals with “incurable voidness” and that the section “is not concerned with equitable review.”

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