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Court of Chancery Expands Circumstances in Which *MFW* Procedural Protections Can Secure Business Judgment Review to Include Third-Party Mergers in Which Controller Receives Special Benefits

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In *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) (“*MFW*”), the Delaware Supreme Court held that the business judgment standard of review—rather than the exacting entire fairness standard—applies to a merger in which a controlling stockholder takes a company private if the merger is conditioned, from the outset, upon both (1) negotiation and approval by an adequately-empowered committee of independent directors that fulfills its duty of care and (2) the uncoerced, informed approval of a majority of the minority stockholders. On August 18, 2017, the Delaware Court of Chancery extended the *MFW* holding, concluding that the business judgment rule also applies to a third-party merger in which a controller is alleged to have received disparate consideration, provided the *MFW* conditions are met. *In re Martha Stewart Living Omnimedia, Inc. Stockholder Litigation*, Cons. C.A. No. 11202-VCS.

In *Martha Stewart*, former stockholders of Martha Stewart Living Omnimedia, Inc. (“MSLO”) challenged a merger in which a third-party buyer acquired MSLO. Martha Stewart controlled more than 88% of the total voting power of MSLO. The plaintiffs alleged that, although Stewart received the same per-share price as the other stockholders, she received additional consideration in the form of a post-merger employment agreement, among other “side deals.” They argued that the merger should be reviewed for entire fairness. The Court granted Stewart’s motion to dismiss, holding that, even if the merger was a conflicted transaction because Stewart received disparate consideration (which the Court concluded elsewhere in the decision she did not), business judgment rule review applies to conflicted “one-sided controller transactions” if the dual protective measures set forth in *MFW* are satisfied. Because an independent special committee and a majority-of-the-minority approval condition were in place before Stewart began to negotiate for any disparate consideration—the point at which a potential conflict between the interests of the controller and the minority stockholders arises—the Court applied business judgment review and dismissed the claims.

The decision confirms that there is a path to business judgment rule review, at the pleading stage, of challenges to third-party mergers of controlled companies where disparate consideration creates a conflict for the controlling stockholder. Deal makers should bear in mind the Court’s determination that achieving that deferential standard of review requires “strict compliance with the transactional road map” set forth in *MFW* and that the procedural protections must be in place before the controller begins to negotiate for disparate consideration.

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