IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN KAHN, SAMUEL PILL, IRWIN PILL, RACHEL PILL and CHARLOTTE MARTIN,	§	No. 334, 2013
Plaintiffs Below, Appellants,	§	Court Below – Court of Chancery of the State of Delaware C.A. No. 6566
v.	§	
M&F WORLDWIDE CORP., RONALD O. PERELMAN, BARRY F. SCHWARTZ, WILLIAM C. BEVINS, BRUCE SLOVIN, CHARLES T. DAWSON, STEPHEN G. TAUB, JOHN M. KEANE, THEO W. FOLZ, PHILIP E. BEEKMAN, MARTHA L. BYORUM, VIET D. DINH, PAUL M. MEISTER, CARL B. WEBB and MacANDREWS & FORBES HOLDINGS, INC.,	§	
Defendants Below, Appellees.	§	

Submitted: December 18, 2013
Decided: March 14, 2014

Before **HOLLAND**, **BERGER**, **JACOBS** and **RIDGELY**, Justices and **JURDEN**, Judge,[1] constituting the Court *en Banc*.

Upon appeal from the Court of Chancery. **AFFIRMED**.

Carmella P. Keener, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, Peter B. Andrews, Esquire, Nadeem Faruqi, Esquire,

[1] Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ALAN KAHN, SAMUEL PILL, § IRWIN PILL, RACHEL PILL and § No. 334,

2013 CHARLOTTE MARTIN, §

§ Court Below – Court of Chancery Plaintiffs
Below, § of the State of Delaware Appellants, § C.A. No. 6566

§ v. § § M&F WORLDWIDE CORP., § RONALD O. PERELMAN, BARRY § F. SCHWARTZ, WILLIAM C. § BEVINS, BRUCE SLOVIN, § CHARLES T. DAWSON, STEPHEN § G. TAUB, JOHN M. KEANE, THEO § W. FOLZ, PHILIP E. BEEKMAN, § MARTHA L. BYORUM, VIET D. § DINH, PAUL M. MEISTER, CARL § B. WEBB and MacANDREWS & § FORBES HOLDINGS, INC., § § Defendants Below, § Appellees. §

Submitted: December 18, 2013

Decided: March 14, 2014

Before HOLLAND, BERGER, JACOBS and RIDGELY, Justices and JURDEN, Judge,1 constituting the Court en Banc.

Upon appeal from the Court of Chancery. AFFIRMED.

Carmella P. Keener, Esquire, Rosenthal, Monhait & Goddess, P.A., Wilmington, Delaware, Peter B. Andrews, Esquire, Nadeem Faruqi, Esquire,

1 Sitting by designation pursuant to Del. Const. art. IV, § 12 and Supr. Ct. R. 2 and 4.

Beth A. Keller, Esquire, Faruqi & Faruqi, LLP, Wilmington, Delaware, Carl L. Stine, Esquire (argued) and Matthew Insley-Pruitt, Esquire, Wolf Popper LLP, New York, New York, and James S. Notis, Esquire and Kira German, Esquire, Gardy & Notis, LLP, New York, New York, for appellants.

William M. Lafferty, Esquire, and D. McKinley Measley, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, and Tariq Mundiya, Esquire (argued), Todd G. Cosenza, Esquire and Christopher J. Miritello, Esquire, Willkie Farr & Gallagher LLP, New York, New York, for appellees, Paul M. Meister, Martha L. Byorum, Viet D. Dinh and Carl B. Webb.

Thomas J. Allingham, II, Esquire (argued), Christopher M. Foulds, Esquire, Joseph O. Larkin, Esquire, and Jessica L. Raatz, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware, for appellees MacAndrews & Forbes Holdings, Inc., Ronald O. Perelman, Barry F. Schwarz, and William C. Bevins.

Stephen P. Lamb, Esquire and Meghan M. Dougherty, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Wilmington, Delaware, for appellees M&F Worldwide Corp., Bruce Slovin, Charles T. Dawson, Stephen G. Taub, John M. Keane, Theo W. Folz, and Philip E. Beekman.

HOLLAND, Justice:

Beth A. Keller, Esquire, Faruqi & Faruqi, LLP, Wilmington, Delaware, Carl L. Stine, Esquire (argued) and Matthew Insley-Pruitt, Esquire, Wolf Popper LLP,

New York, New York, and James S. Notis, Esquire and Kira German, Esquire, Gardy & Notis, LLP, New York, New York, for appellants.

William M. Lafferty, Esquire, and D. McKinley Measley, Esquire, Morris, Nichols, Arsht & Tunnell LLP, Wilmington, Delaware, and Tariq Mundiya, Esquire (argued), Todd G. Cosenza, Esquire and Christopher J. Miritello, Esquire, Willkie Farr & Gallagher LLP, New York, New York, for appellees, Paul M. Meister, Martha L. Byorum, Viet D. Dinh and Carl B. Webb.

Thomas J. Allingham, II, Esquire (argued), Christopher M. Foulds, Esquire, Joseph O. Larkin, Esquire, and Jessica L. Raatz, Esquire, Skadden, Arps, Slate, Meagher & Flom LLP, Wilmington, Delaware, for appellees MacAndrews & Forbes Holdings, Inc., Ronald O. Perelman, Barry F. Schwarz, and William C. Bevins.

Stephen P. Lamb, Esquire and Meghan M. Dougherty, Esquire, Paul, Weiss, Rifkind, Wharton & Garrison LLP, Wilmington, Delaware, for appellees M&F Worldwide Corp., Bruce Slovin, Charles T. Dawson, Stephen G. Taub, John M. Keane, Theo W. Folz, and Philip E. Beekman.

HOLLAND, Justice:

This is an appeal from a final judgment entered by the Court of Chancery in a proceeding that arises from a 2011 acquisition by MacAndrews & Forbes Holdings, Inc. ("M&F" or "MacAndrews & Forbes")—a 43% stockholder in M&F Worldwide Corp. ("MFW")—of the remaining common stock of MFW (the "Merger"). From the outset, M&F's proposal to take MFW private was made contingent upon two stockholder-protective procedural conditions. First, M&F required the Merger to be negotiated and approved by a special committee of independent MFW directors (the "Special Committee"). Second, M&F required that the Merger be approved by a majority of stockholders unaffiliated with M&F. The Merger closed in December 2011, after it was approved by a vote of 65.4% of MFW's minority stockholders.

The Appellants initially sought to enjoin the transaction. They withdrew their request for injunctive relief after taking expedited discovery, including several depositions. The Appellants then sought post-closing relief against M&F, Ronald O. Perelman, and MFW's directors (including the members of the Special Committee) for breach of fiduciary duty. Again, the Appellants were provided with extensive discovery. The Defendants then moved for summary judgment, which the Court of Chancery granted.

This is an appeal from a final judgment entered by the Court of Chancery in a proceeding that arises from a 2011 acquisition by

MacAndrews & Forbes Holdings, Inc. ("M&F" or "MacAndrews & Forbes")—a 43% stockholder in M&F Worldwide Corp. ("MFW")—of the remaining common stock of MFW (the "Merger"). From the outset, M&F's proposal to take MFW private was made contingent upon two stockholder-protective procedural conditions. First, M&F required the Merger to be negotiated and approved by a special committee of independent MFW directors (the "Special Committee"). Second, M&F required that the Merger be approved by a majority of stockholders unaffiliated with M&F. The Merger closed in December 2011, after it was approved by a vote of 65.4% of MFW's minority stockholders.

The Appellants initially sought to enjoin the transaction. They withdrew their request for injunctive relief after taking expedited discovery, including several depositions. The Appellants then sought post-closing relief against M&F, Ronald O. Perelman, and MFW's directors (including the members of the Special Committee) for breach of fiduciary duty. Again, the Appellants were provided with extensive discovery. The Defendants then moved for summary judgment, which the Court of Chancery granted.

Court of Chancery Decision

The Court of Chancery found that the case presented a "novel question of law," specifically, "what standard of review should apply to a going private merger conditioned upfront by the controlling stockholder on approval by both a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote." The Court of Chancery held that business judgment review, rather than entire fairness, should be applied to a very limited category of controller mergers. That category consisted of mergers where the controller voluntarily relinquishes its control – such that the negotiation and approval process replicate those that characterize a third-party merger.

The Court of Chancery held that, rather than entire fairness, the business judgment standard of review should apply "if, *but only if*: (i) the controller conditions the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee acts with care; (v) the minority vote is informed; and (vi) there is no coercion of the minority."[2]

[2] Emphasis by the Court of Chancery.

Court of Chancery Decision

The Court of Chancery found that the case presented a "novel

question of law," specifically, "what standard of review should apply to a going private merger conditioned upfront by the controlling stockholder on approval by both a properly empowered, independent committee and an informed, uncoerced majority-of-the-minority vote." The Court of Chancery held that business judgment review, rather than entire fairness, should be applied to a very limited category of controller mergers. That category consisted of mergers where the controller voluntarily relinquishes its control – such that the negotiation and approval process replicate those that characterize a third-party merger.

The Court of Chancery held that, rather than entire fairness, the business judgment standard of review should apply "if, but only if: (i) the controller conditions the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee acts with care; (v) the minority vote is informed; and (vi) there is no coercion of the minority."[2]

[2] Emphasis by the Court of Chancery.

The Court of Chancery found that those prerequisites were satisfied and that the Appellants had failed to raise any genuine issue of material fact indicating the contrary. The court then reviewed the Merger under the business judgment standard and granted summary judgment for the Defendants.

Appellants' Arguments

The Appellants raise two main arguments on this appeal. First, they contend that the Court of Chancery erred in concluding that no material disputed facts existed regarding the conditions precedent to business judgment review. The Appellants submit that the record contains evidence showing that the Special Committee was not disinterested and independent, was not fully empowered, and was not effective. The Appellants also contend, as a legal matter, that the majority-of-the-minority provision did not afford MFW stockholders protection sufficient to displace entire fairness review.

Second, the Appellants submit that the Court of Chancery erred, as a matter of law, in holding that the business judgment standard applies to controller freeze-out mergers where the controller's proposal is conditioned on both Special Committee approval and a favorable majority-of-the-minority vote. Even if both procedural protections are adopted, the

The Court of Chancery found that those prerequisites were satisfied and that the Appellants had failed to raise any genuine issue of material fact

indicating the contrary. The court then reviewed the Merger under the business judgment standard and granted summary judgment for the Defendants.

Appellants' Arguments

The Appellants raise two main arguments on this appeal. First, they contend that the Court of Chancery erred in concluding that no material disputed facts existed regarding the conditions precedent to business judgment review. The Appellants submit that the record contains evidence showing that the Special Committee was not disinterested and independent, was not fully empowered, and was not effective. The Appellants also contend, as a legal matter, that the majority-of-the-minority provision did not afford MFW stockholders protection sufficient to displace entire fairness review.

Second, the Appellants submit that the Court of Chancery erred, as a matter of law, in holding that the business judgment standard applies to controller freeze-out mergers where the controller's proposal is conditioned on both Special Committee approval and a favorable majority-of-the-minority vote. Even if both procedural protections are adopted, the

Appellants argue, entire fairness should be retained as the applicable standard of review.

Defendants' Arguments

The Defendants argue that the judicial standard of review should be the business judgment rule, because the Merger was conditioned *ab initio* on two procedural protections that together operated to replicate an arm's-length merger: the employment of an active, unconflicted negotiating agent free to turn down the transaction; and a requirement that any transaction negotiated by that agent be approved by a majority of the disinterested stockholders. The Defendants argue that using and *establishing* pretrial that both protective conditions were extant renders a going private transaction analogous to that of a third-party arm's-length merger under Section 251 of the Delaware General Corporation Law. That is, the Defendants submit that a Special Committee approval in a going private transaction is a proxy for board approval in a third-party transaction, and that the approval of the unaffiliated, noncontrolling stockholders replicates the approval of all the (potentially) adversely affected stockholders.

FACTS

MFW and M&F

MFW is a holding company incorporated in Delaware. Before the

Appellants argue, entire fairness should be retained as the applicable standard of review.

Defendants' Arguments

The Defendants argue that the judicial standard of review should be the business judgment rule, because the Merger was conditioned ab initio on two procedural protections that together operated to replicate an arm's-length merger: the employment of an active, unconflicted negotiating agent free to turn down the transaction; and a requirement that any transaction negotiated by that agent be approved by a majority of the disinterested stockholders. The Defendants argue that using and establishing pretrial that both protective conditions were extant renders a going private transaction analogous to that of a third-party arm's-length merger under Section 251 of the Delaware General Corporation Law. That is, the Defendants submit that a Special Committee approval in a going private transaction is a proxy for board approval in a third-party transaction, and that the approval of the unaffiliated, noncontrolling stockholders replicates the approval of all the (potentially) adversely affected stockholders.

FACTS

MFW and M&F

MFW is a holding company incorporated in Delaware. Before the

Merger that is the subject of this dispute, MFW was 43.4% owned by MacAndrews & Forbes, which in turn is entirely owned by Ronald O. Perelman. MFW had four business segments. Three were owned through a holding company, Harland Clarke Holding Corporation ("HCHC"). They were the Harland Clarke Corporation ("Harland"), which printed bank checks; Harland Clarke Financial Solutions, which provided technology products and services to financial services companies; and Scantron Corporation, which manufactured scanning equipment used for educational and other purposes. The fourth segment, which was not part of HCHC, was Mafco Worldwide Corporation, a manufacturer of licorice flavorings.

The MFW board had thirteen members. They were: Ronald Perelman, Barry Schwartz, William Bevins, Bruce Slovin, Charles Dawson, Stephen Taub, John Keane, Theo Folz, Philip Beekman, Martha Byorum, Viet Dinh, Paul Meister, and Carl Webb. Perelman, Schwartz, and Bevins were officers of both MFW and MacAndrews & Forbes. Perelman was the Chairman of MFW and the Chairman and CEO of MacAndrews & Forbes; Schwartz was the President and CEO of MFW and the Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes; and Bevins was a Vice President at MacAndrews & Forbes.

Merger that is the subject of this dispute, MFW was 43.4% owned by MacAndrews & Forbes, which in turn is entirely owned by Ronald O.

Perelman. MFW had four business segments. Three were owned through a holding company, Harland Clarke Holding Corporation ("HCHC"). They were the Harland Clarke Corporation ("Harland"), which printed bank checks; Harland Clarke Financial Solutions, which provided technology products and services to financial services companies; and Scantron Corporation, which manufactured scanning equipment used for educational and other purposes. The fourth segment, which was not part of HCHC, was Mafco Worldwide Corporation, a manufacturer of licorice flavorings.

The MFW board had thirteen members. They were: Ronald Perelman, Barry Schwartz, William Bevins, Bruce Slovin, Charles Dawson, Stephen Taub, John Keane, Theo Folz, Philip Beekman, Martha Byorum, Viet Dinh, Paul Meister, and Carl Webb. Perelman, Schwartz, and Bevins were officers of both MFW and MacAndrews & Forbes. Perelman was the Chairman of MFW and the Chairman and CEO of MacAndrews & Forbes; Schwartz was the President and CEO of MFW and the Vice Chairman and Chief Administrative Officer of MacAndrews & Forbes; and Bevins was a Vice President at MacAndrews & Forbes.

The Taking MFW Private Proposal

In May 2011, Perelman began to explore the possibility of taking MFW private. At that time, MFW's stock price traded in the $20 to $24 per share range. MacAndrews & Forbes engaged a bank, Moelis & Company, to advise it. After preparing valuations based on projections that had been supplied to lenders by MFW in April and May 2011, Moelis valued MFW at between $10 and $32 a share.

On June 10, 2011, MFW's shares closed on the New York Stock Exchange at $16.96. The next business day, June 13, 2011, Schwartz sent a letter proposal ("Proposal") to the MFW board to buy the remaining MFW shares for $24 in cash. The Proposal stated, in relevant part:

> The proposed transaction would be subject to the approval of the Board of Directors of the Company [*i.e.*, MFW] and the negotiation and execution of mutually acceptable definitive transaction documents. It is our expectation that the Board of Directors will appoint a special committee of independent directors to consider our proposal and make a recommendation to the Board of Directors. *We will not move forward with the transaction unless it is approved by such a special committee. In addition, the transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares of the Company not owned by M & F or its affiliates. . . .*[3]
>
> . . . In considering this proposal, you should know that in our capacity as a stockholder of the Company we are interested only in acquiring the shares of the Company not already owned by us and that in such capacity we have no interest in selling

[3] Emphasis added.

The Taking MFW Private Proposal

In May 2011, Perelman began to explore the possibility of taking

MFW private. At that time, MFW's stock price traded in the $20 to $24 per share range. MacAndrews & Forbes engaged a bank, Moelis & Company, to advise it. After preparing valuations based on projections that had been supplied to lenders by MFW in April and May 2011, Moelis valued MFW at between $10 and $32 a share.

On June 10, 2011, MFW's shares closed on the New York Stock Exchange at $16.96. The next business day, June 13, 2011, Schwartz sent a letter proposal ("Proposal") to the MFW board to buy the remaining MFW shares for $24 in cash. The Proposal stated, in relevant part:

> The proposed transaction would be subject to the approval of the Board of Directors of the Company [i.e., MFW] and the negotiation and execution of mutually acceptable definitive transaction documents. It is our expectation that the Board of Directors will appoint a special committee of independent directors to consider our proposal and make a recommendation to the Board of Directors. We will not move forward with the transaction unless it is approved by such a special committee. In addition, the transaction will be subject to a non-waivable condition requiring the approval of a majority of the shares of the Company not owned by M & F or its affiliates. . . .[3]
>
> . . . In considering this proposal, you should know that in our capacity as a stockholder of the Company we are interested only in acquiring the shares of the Company not already owned by us and that in such capacity we have no interest in selling

[3] Emphasis added.

> any of the shares owned by us in the Company nor would we expect, in our capacity as a stockholder, to vote in favor of any alternative sale, merger or similar transaction involving the Company. If the special committee does not recommend or the public stockholders of the Company do not approve the proposed transaction, such determination would not adversely affect our future relationship with the Company and we would intend to remain as a long-term stockholder.
>
> . . . .
>
> In connection with this proposal, we have engaged Moelis & Company as our financial advisor and Skadden, Arps, Slate, Meagher & Flom LLP as our legal advisor, and we encourage the special committee to retain its own legal and financial advisors to assist it in its review.

MacAndrews & Forbes filed this letter with the U.S. Securities and Exchange Commission ("SEC") and issued a press release disclosing substantially the same information.

The Special Committee Is Formed

The MFW board met the following day to consider the Proposal. At the meeting, Schwartz presented the offer on behalf of MacAndrews & Forbes. Subsequently, Schwartz and Bevins, as the two directors present who were also directors of MacAndrews & Forbes, recused themselves from the meeting, as did Dawson, the CEO of HCHC, who had previously expressed support for the proposed offer.

The independent directors then invited counsel from Willkie Farr & Gallagher – a law firm that had recently represented a Special Committee of

any of the shares owned by us in the Company nor would we expect, in our capacity as a stockholder, to vote in favor of any alternative sale, merger or similar

transaction involving the Company. If the special committee does not recommend or the public stockholders of the Company do not approve the proposed transaction, such determination would not adversely affect our future relationship with the Company and we would intend to remain as a long-term stockholder.

. . . .

In connection with this proposal, we have engaged Moelis & Company as our financial advisor and Skadden, Arps, Slate, Meagher & Flom LLP as our legal advisor, and we encourage the special committee to retain its own legal and financial advisors to assist it in its review.

MacAndrews & Forbes filed this letter with the U.S. Securities and Exchange Commission ("SEC") and issued a press release disclosing substantially the same information.

The Special Committee Is Formed

The MFW board met the following day to consider the Proposal. At the meeting, Schwartz presented the offer on behalf of MacAndrews & Forbes. Subsequently, Schwartz and Bevins, as the two directors present who were also directors of MacAndrews & Forbes, recused themselves from the meeting, as did Dawson, the CEO of HCHC, who had previously expressed support for the proposed offer.

The independent directors then invited counsel from Willkie Farr & Gallagher – a law firm that had recently represented a Special Committee of

MFW's independent directors in a potential acquisition of a subsidiary of MacAndrews & Forbes – to join the meeting. The independent directors decided to form the Special Committee, and resolved further that:

> [T]he Special Committee is empowered to: (i) make such investigation of the Proposal as the Special Committee deems appropriate; (ii) evaluate the terms of the Proposal; (iii) negotiate with Holdings [*i.e.,* MacAndrews & Forbes] and its representatives any element of the Proposal; (iv) negotiate the terms of any definitive agreement with respect to the Proposal (it being understood that the execution thereof shall be subject to the approval of the Board); (v) report to the Board its recommendations and conclusions with respect to the Proposal, including a determination and *recommendation as to whether the Proposal is fair and in the best interests of the stockholders of the Company other than Holdings* and its affiliates and should be approved by the Board; and (vi) determine to elect not to pursue the Proposal. . . .[4]
>
> . . . .
>
> . . . [T]he Board shall not approve the Proposal without a prior favorable recommendation of the Special Committee. . . .
>
> . . . [T]he Special Committee [is] empowered to retain and employ legal counsel, a financial advisor, and such other agents as the Special Committee shall deem necessary or desirable in connection with these matters. . . .

The Special Committee consisted of Byorum, Dinh, Meister (the chair), Slovin, and Webb. The following day, Slovin recused himself because, although the MFW board had determined that he qualified as an independent director under the rules of the New York Stock Exchange, he

[4] Emphasis added.

MFW's independent directors in a potential acquisition of a subsidiary of MacAndrews & Forbes – to join the meeting. The independent directors

decided to form the Special Committee, and resolved further that:

[T]he Special Committee is empowered to: (i) make such investigation of the Proposal as the Special Committee deems appropriate; (ii) evaluate the terms of the Proposal; (iii) negotiate with Holdings [i.e., MacAndrews & Forbes] and its representatives any element of the Proposal; (iv) negotiate the terms of any definitive agreement with respect to the Proposal (it being understood that the execution thereof shall be subject to the approval of the Board); (v) report to the Board its recommendations and conclusions with respect to the Proposal, including a determination and recommendation as to whether the Proposal is fair and in the best interests of the stockholders of the Company other than Holdings and its affiliates and should be approved by the Board; and (vi) determine to elect not to pursue the Proposal. . . .[4]

. . . .

. . . [T]he Board shall not approve the Proposal without a prior favorable recommendation of the Special Committee. . . .

. . . [T]he Special Committee [is] empowered to retain and employ legal counsel, a financial advisor, and such other agents as the Special Committee shall deem necessary or desirable in connection with these matters. . . .

The Special Committee consisted of Byorum, Dinh, Meister (the chair), Slovin, and Webb. The following day, Slovin recused himself because, although the MFW board had determined that he qualified as an independent director under the rules of the New York Stock Exchange, he

[4] Emphasis added.