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Lessons of 2013: The Perils of "Ready, Fire, Aim" and the Importance of an Integrated Litigation Strategy in Corporate Governance Matters

Thad A. Davis

Leslie A. Wulff

"LESSONS OF 2013: THE PERILS OF 'READY, FIRE, AIM' AND THE IMPORTANCE OF AN INTEGRATED LITIGATION STRATEGY IN CORPORATE GOVERNANCE MATTERS"

THAD A. DAVIS, CO-CHAIR, SECURITIES LITIGATION PRACTICE GROUP, GIBSON, DUNN & CRUTCHER LLP

LESLIE A. WULFF, ASSOCIATE, GIBSON, DUNN & CRUTCHER LLP

I. INTRODUCTION

2013 saw a number of high-profile and high-impact cases from the Delaware Chancery and Supreme Courts dealing with issues as divergent as the duty to negotiate in good faith, the meaning of "business combination" in the context of requiring shareholder approval, the standard of review for going-private transactions, and the enforceability of forum selection clauses in corporate bylaws. The panel selected four cases that are legally significant because of the conclusions the respective courts reached, but also because they

illustrate the effect that a solid litigation strategy (or lack thereof) can have on the outcome of the case. These cases serve as excellent food for thought for all parties negotiating corporate governance issues and should serve as encouragement to plan for litigation early and often.

As was discussed during the panel discussion, it is not a matter of whether a large corporate transaction will result in a lawsuit, but a matter of when and where. As long as Delaware continues to be the state in which most companies incorporate, more often than not the answer to the latter question will be: Delaware Chancery Court (and perhaps Delaware Supreme Court). Members of the bar who negotiate corporate transactions would be well advised to study up on the lessons from 2013 and incorporate these lessons into a thoughtful litigation strategy. Failure to do so may result not just in losing the instant case, but also in potentially contributing to precedent that may come back to haunt you in later cases.

Of the four cases the panel selected for discussion, *In re MFW Shareholders Litigation*, 67 A.3d 496 (Del. Ch. 2013), is the sole case in which a thoughtful pre-litigation strategy was used to structure the transaction with an eye towards developing the case law. Defendants saw space for further defining an arguably unrefined principle in a fertile area of the law; they structured their transaction in such a way so as to refine the principle; and they were rewarded with a ruling that provides defendants with an opportunity to have courts analyze their deals under the business judgment rule if they choose to use certain procedural safeguards.[1] In contrast, all indications are that the defendants in *SIGA Technologies, Inc. v. PharmAthene, Inc.*, 67 A.3d 330 (Del. 2013), the plaintiffs in *Activision Blizzard, Inc. v. Hayes*, No. 497, 2013, 2013 WL 6053804, (Del. Nov. 15, 2013), and the plaintiffs in *Boilermakers Local 154 Retirement Fund v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) did not evaluate how their strategic approach and tactical decisions—including questions of timing and whether to litigate at all—would appear in a court of equity in the cold light of day. The opinions in these three cases reflect these realities; the party who shot before aiming lost the legal battle and in the process built unfavorable legal precedent that will shape the legal war.

The Delaware Chancery Court and Delaware Supreme Court preside over an evolving and sophisticated body of law in which the apparent "fairness" of

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[1] In re MFW Shareholders Litig., 67 A.3d 496, 535 (Del. Ch. 2013). On the eve of publication, the Delaware Supreme Court issued its decision in *Kahn v. M&F Worldwide Corp.*, No. 334, 2014 WL 996270 (Del. Mar. 14, 2014) affirming the decision of the Delaware Chancery Court. Discussion herein focuses on the Delaware Chancery Court opinion as that was the opinion discussed during the panel and because the Delaware Supreme Court affirmed the Chancery Court decision using much of the same legal arguments and analysis.

outcomes and reasonableness of negotiation and litigation decisions are intertwined and "matter" a great deal. Parties anticipating review, or even hoping to avoid it, would be wise to heed the lessons learned from these four cases and integrate litigation strategies at the outset of corporate decision-making. Particularly as Delaware is, and shows all signs of remaining, the primary forum for litigating corporate governance issues, parties should be wary that hasty decisions in favor of short-term gain may result in long-term adverse precedent.

II. INTRODUCTION TO THE CASES

In re MFW Shareholders, *SIGA Technologies*, *Boilermakers*, and *Activision Blizzard* each made news this year out of the Delaware Chancery or Supreme Courts; although they will be discussed in further detail below, they merit a brief introduction here.

In *Activision Blizzard*, the Delaware Supreme Court considered whether a stock buy-back agreement was a "business combination" triggering the shareholder voter approval requirement from the corporate bylaws.[2] The Delaware Supreme Court held that the buy-back agreement was not a "business combination" or similar transaction, and that the buy-back agreement did not require shareholder approval.[3]

SIGA Technologies presented the Delaware Supreme Court with the issue of whether a clause in a term sheet requiring good faith negotiation is enforceable and, if so, the appropriate measure of damages.[4] The court found that an express contractual term to negotiate in good faith is binding on the parties, and that expectation damages are appropriate when the parties would have come to an agreement absent bad faith negotiation.[5]

In *Boilermakers*, the Delaware Chancery Court considered the facial validity of forum selection clauses under both Delaware General Corporate Law § 109(b) and common law breach of contract principles.[6] The Chancery Court held that forum selection clauses are facially valid under both legal theories.[7]

Lastly, in *In re MFW Shareholders* the Delaware Chancery Court assessed the appropriate standard of review of going-private transactions in which a controlling shareholder conditioned the transaction on approval by *both* an

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[2] Activision Blizzard, Inc. v. Hayes, No. 497, 2013 WL 6053804, at *1 (Del. Nov. 15, 2013).

[3] *Id.* at *4

[4] SIGA Technologies, Inc. v. PharmAthene, Inc., 67 A.3d 330, 333 (Del. 2013).

[5] *Id.* at 344, 351–52.

[6] Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 938 (Del. Ch. 2013).

[7] *Id.* at 950.

independent committee of the board of directors and a majority vote of the minority shareholders.[8] In light of the dual approval mechanisms, the Chancery Court found that the business judgment rule, rather than the entire fairness standard, was the appropriate standard by which to evaluate the transaction.[9]

With this brief introduction in mind, we turn to an expanded discussion of the facts and legal holdings in each case, as well as an assessment of how the litigation strategy (or lack thereof) influenced the legal rationale delivered by the courts.

III. *ACTIVISION BLIZZARD*: THE HAZARDS OF DELAY

On July 25, 2013, Vivendi, S.A. ("Vivendi") entered into a Stock Purchase Agreement ("SPA") with Activision Blizzard, Inc. ("Activision") to divest itself of 38% of Activision's outstanding common stock and $675 million in net operating loss carryforwards ("NOLs").[10] Prior to the SPA, Vivendi owned 61% of Activision's stock and had the right to designate six of Activision's eleven members of the board of directors.[11] Under the terms of the SPA, Activision agreed to pay $5.83 billion for New VH (referred to as "Amber" by the parties and the court), a wholly owned subsidiary of Vivendi whose primary assets were 429 million Activision shares and the NOLs.[12] Additionally, a limited partnership, ASAC II, LP, owned by Activision CEO Robert Kotick and Co-Chairman of the Board of Directors Brian Kelly, would pay $2.34 billion for 172 million Activision shares (a 24.7% stake in Activision).[13] The day following the announcement of the SPA, Activision's stock rose from $15.18 per share to $17.46 per share.[14]

Activision shareholders challenged the SPA on the grounds that Activision's proposed purchase of Amber (and its Activision shares) was a "merger, business combination or similar transaction" under Section 9.1(b) of Activision's charter, thereby necessitating shareholder approval.[15] Plaintiffs filed a shareholder derivative action and motion for a temporary restraining order on September 11, 2013, over six weeks after the SPA was announced and

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[8] In re MFW Shareholders Litig., 67 A.3d 496, 499 (Del. Ch. 2013).

[9] *Id.* at 505.

[10] Activision Blizzard, Inc. v. Hayes, No. 497, 2013 WL 6053804, at *1–2 (Del. Nov. 15, 2013).

[11] *Id.* at *1.

[12] *Id.*

[13] *Id.* at *2.

[14] *Id.*

[15] *Id.*

just eight days before the SPA was set to close.[16]

The Delaware Chancery Court, in a one-page opinion, found in favor of Plaintiffs and *sua sponte* converted the motion for temporary restraining order into a motion for a preliminary injunction.[17] The Chancery Court simultaneously granted Plaintiffs a preliminary injunction enjoining the SPA from closing pending a shareholder vote.[18] The Chancery Court issued its ruling on September 18, 2013, just one day before the SPA was set to close.[19] At the center of the dispute between the parties was whether the form or the substance of the SPA should be the primary motivator for determining whether it constituted a "business transaction."[20]

The Delaware Supreme Court reversed the order of the Chancery Court.[21] In a concise four-page opinion, the Delaware Supreme Court held that the SPA was unambiguously not a "business combination" under Activision's charter in light of the fact that the transaction did not "involve any combination or intermingling of Vivendi's and Activision's businesses."[22] The Delaware Supreme Court declined to find that the use of Amber as a holding company somehow converted the transaction into a "business combination," holding that doing so would "disregard[] its inert status and glorif[y] form over substance."[23]

A. *Monday Morning Quarterbacking: Timing As Your Own Worst Enemy*

Although the Supreme Court ultimately decided to rule on the merits of Plaintiffs' argument rather than rely on a laches defense raised by Defendants, a close reading of the opinion suggests that Defendants' equity arguments, including timeliness of Plaintiffs' motion, the Chancery Court's management of the issues, and the overall value of the SPA, at least in part, swayed the Supreme Court.[24]

Plaintiffs undoubtedly waited to bring the derivative action until the eve of closing in the hopes that Defendants would be more inclined to settle with their

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[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*, *see also*, Transcript of Oral Argument on Plaintiff's Motion for a Temporary Restraining Order and Rulings of the Court, Hayes v. Activision Blizzard, Inc., No. 497, 2013 WL 5293536 (Del. Ch. 2013) (No. 8885-VCL).

[21] *Activision Blizzard, Inc.*, at *4.

[22] *Id.*

[23] *Id.*

[24] *See id.* at 2–3.

backs against the wall. When Defendants opted to argue the merits rather than settle, Plaintiffs were forced to pursue their nonsensical arguments all the way to the Delaware Supreme Court. The Delaware Supreme Court easily saw through Plaintiffs' hastily assembled arguments, as is apparent from its language analyzing the logical conclusions of Plaintiffs' arguments.[25] Instead of swiftly chalking up a favorable settlement as intended, Plaintiffs lost and foreclosed a means of challenging going-private transactions.

IV. *SIGA TECHNOLOGIES:* THE RISKS OF BEING GREEDY

Between late 2005 and early 2006, SIGA Technologies, Inc. ("SIGA") negotiated a license agreement term sheet ("LATS") with PharmAthene, Inc. ("PharmAthene") in attempt to resuscitate its dwindling financial future and finance the development of its smallpox antiviral treatment.[26] The parties never signed the LATS, and the footer on both pages stated that it was "Non Binding."[27] Shortly after the parties orally agreed to the LATS, PharmAthene decided to pursue a merger with SIGA rather than a license agreement.[28] SIGA agreed to enter into merger negotiations so long as PharmAthene provided a bridge loan to help it get through the negotiation period.[29] To hedge its interest in SIGA's smallpox antiviral treatment, PharmAthene negotiated for a clause in the merger agreement (and the bridge loan) stating that, if the merger fell through, the parties would negotiate a definitive license agreement in good faith in accordance with the terms of the LATS.[30]

After the parties signed the merger agreement, but prior to the closing date, three material changes in SIGA's financial condition led it to experience "seller's remorse."[31] First, SIGA received a $5.4 million grant from the National Institutes of Health ("NIH").[32] Second, SIGA's audit committee approved an agreement for the first human trial of its smallpox antiviral

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[25] *See id.* at 3-4.

[26] SIGA Technologies, Inc. v. PharmAthene, Inc., 67 A.3d 330, 334 (Del. 2013).

[27] *Id.* at 335–36.

[28] *Id.* at 336.

[29] *Id.*

[30] *Id.* at 336–37 (quoting the draft merger sheet, "SIGA and PharmAthene will negotiate the terms of a definitive License Agreement in accordance with the terms set forth in the [LATS] . . . attached on Schedule 1 hereto. The License Agreement will be executed simultaneously with the Definitive [Merger] Agreement and will become effective only upon the termination of the Definitive [Merger] Agreement.").

[31] *Id.* at 338.

[32] *Id.*

treatment.[33] Third, the NIH awarded SIGA another grant, this time for $16.5 million for the development of the smallpox antiviral treatment.[34] SIGA's stock began trading at three times its 2005 share price.[35] On October 4, 2006, SIGA's Board of Directors voted to terminate the Merger Agreement with PharmAthene.[36]

After the merger died, PharmAthene sought a license agreement with SIGA based on the terms of the LATS pursuant to the clause in the Merger Agreement and the bridge loan.[37] SIGA, however, argued that the LATS was not binding, and countered with terms that were starkly different from the parties' previous positions: (1) $100 million instead of $6 million in upfront license fees, (2) $230 million instead of $10 million in milestone payments, and (3) running royalties of 18% to 28% of sales instead of 8% to 12%.[38] PharmAthene objected to SIGA's radically different terms and filed suit challenging SIGA's bad faith negotiations.[39]

The Delaware Supreme Court found that, under Delaware law, "an express contractual obligation to negotiate in good faith is binding on the contracting parties."[40] In this case, even though the parties had not signed the LATS and it stated that the terms were "Non Binding," the Supreme Court agreed with the Chancery Court that "'incorporation of the LATS into the Bridge Loan and Merger Agreements reflects an intent on the part of both parties to negotiate toward a license agreement with economic terms *substantially similar to the terms* of the LATS if the merger was not consummated.'"[41] The economic terms SIGA proposed for the license agreement after the merger fell through "'differed dramatically from the LATS in favor of SIGA' to the extent that they 'virtually disregarded the economic terms of the LATS . . . .'"[42] The courts concluded that SIGA's negotiating position was made in bad faith.[43] The

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[33] *Id.*

[34] *Id.*

[35] *Id.* at 339.

[36] *Id.*

[37] *Id.*

[38] *Id.* SIGA's proposal also included several non-monetary terms that were heavily favorable to its own interests, such as its right to unilaterally resolve disputes, block distribution to PharmAthene, and terminate the agreement under certain conditions without PharmAthene having the right to cure deficiencies. *Id.* at 339-40.

[39] *Id.* at 341.

[40] *Id.* at 344.

[41] *Id.* at 346 (emphasis added) (quoting Pharmathene, Inc. v. SIGA Techs., Inc., No. 2627-VCP, 2011 WL 4390726, at *22 (Del. Ch. Sept. 22, 2011)).

[42] *Id.* (quoting *PharmAthene, Inc.*, 2011 WL 4390726, at *26).

[43] *Id.*

Delaware Supreme Court further held that in light of the Chancery Court's finding, that but for SIGA's bad faith, the parties would have reached a deal on the terms of the licensing agreement, PharmAthene was entitled to expectation damages.[44]

A. *Monday Morning Quarterbacking: Going for the Kill May be the Death-Knell*

SIGA Technologies is a clear example in which a plaintiff's lack of forethought and/or failure to consider how its negotiation strategy would read to a judge came with substantial hard costs, and the intangible hard cost of strongly-worded precedent that will shape Delaware's legal landscape moving forward. As the Delaware Supreme Court noted, SIGA switched negotiating teams between the LATS and the ultimate license negotiations.[45] Presumably, these individuals were more focused on scoring a big win for the company than in considering the context in which they were negotiating. Had the team stopped to consider the multiples between their negotiating positions before and after SIGA's change in financial fortune, it seems likely that they would have seen what was apparent to the courts through the benefit of hindsight. Their failure to do so ended up reversing SIGA's financial outcome on the deal.

SIGA's apparent lack of thoughtful, or at least measured, negotiation strategy also resulted in strong legal precedent in an area of law that was previously murky.[46] The Delaware Supreme Court sent a clear warning that a breach of a duty to negotiate in good faith is both actionable and may expose the breaching party to substantial damages.[47] As other practitioners have commented, this is a significant ruling because Delaware law was previously unclear and other courts have only awarded reliance damages.[48] Reliance damages are often minor and drawn from the costs related to participating in the attempted transaction; by comparison, expectation damages can be huge—PharmAthene's expert opined that expectation damages would be between $400

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[44] *Id.* at 351.

[45] *Id.* at 347.

[46] *See id.* at 348.

[47] *Id.* at 350-51.

[48] Grant L. Kim, *Delaware Supreme Court: Bad-Faith Attempt to Renegotiate Term Sheet May Create Liability for "Benefit-of-the-Bargain" Damages*, MORRISON FOERSTER CLIENT ALERT (June 10, 2013), http://www.mofo.com/files/Uploads/Images/130610-Benefit-of-the-Bargain.pdf; see *also* John M. Reiss, et al., *Delaware Supreme Court Confirms Liability for Failure to Negotiate in Good Faith*, WHITE & CASE CLIENT ALERT MERGERS AND ACQUISITIONS (June 2013), http://www.whitecase.com/files/Publication/58ae563d-a3d4-46f5-88c9-cffd53d14d00/Presentation/PublicationAttachment/983ef6fc-5d86-4ad0-80bc-e5bb8665ef05/alert-delaware-supreme-court-liability-failure-good-faith.pdf.

million and $1 billion.[49]

Of course, actually obtaining expectation damages may be difficult because they require proof that (1) the parties agreed to a binding obligation to negotiate, (2) there was a bad-faith breach of this duty, (3) the parties would have entered into a final contract but for this breach, and (4) the amount of expectation damages can be calculated with reasonable certainty.[50] Nevertheless, the Delaware Supreme Court made clear that express agreements to negotiate in good faith are binding and failure to do so can be costly.[51]

V. *BOILERMAKERS:* THE PERILS OF OVERREACHING

The boards of directors of Chevron Corporation ("Chevron") and FedEx Corporation ("FedEx") each unilaterally adopted and amended exclusive forum selection bylaws, providing that certain lawsuits must be brought in Delaware.[52] The forum selection clauses of the bylaws applied to: (i) derivative actions, (ii) actions asserting claims for breach of fiduciary duties, (iii) actions asserting claims arising under any provision of the Delaware General Corporation Law, and (iv) actions governed by the internal affairs doctrine.[53] The certificates of incorporation of both Chevron and FedEx provide their boards with the power to adopt, amend, and repeal bylaws without shareholder approval.[54]

Plaintiffs, who were all clients of the same law firm, filed nearly identical complaints challenging the unilateral adoption of the forum selection clauses by Chevron, FedEx, and at least ten other corporations.[55] Plaintiffs argued that the forum selection clauses were facially invalid under Delaware General Corporation Law section 109(b) on the grounds that they exceeded the scope of matters capable of regulation under the bylaws.[56] Plaintiffs also argued that the

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[49] Kim, *supra* note 40.

[50] *See id.*

[51] *Id.* at 350-51.

[52] Boilermakers Local 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 937 (Del. Ch. 2013).

[53] *Id.* at 942–43.

[54] *Id.* at 937.

[55] *Id.* at 944–45. Ten other corporations repealed the forum selection clauses, leaving Chevron and FedEx as the only defendants who answered the complaints. In the interests of judicial economy, to hasten a decision by the court, and to end the chilling effect of the pending lawsuits, the Chancery Court consolidated the FedEx and Chevron cases for the purposes of evaluating the facial validity of the forum selection clauses.

[56] *Id.* at 938. Section 109(b) provides that: "[T]he bylaws of a corporation 'may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees.'" *Id.*

forum selection clauses were contractually invalid because the board of directors unilaterally adopted the clauses without shareholder agreement.[57]

Chancellor Strine, writing for the Chancery Court, held that the forum selection clauses were statutorily valid under Delaware law and fell within the scope of section 109(b) "because they regulate where stockholders can exercise their right to bring certain internal affairs claims against the corporation and its directors and officers. They also plainly relate to the conduct of the corporation by channeling internal affairs cases into the courts of the state of incorporation . . . ."[58] Under section 109(b), bylaws may include a broad range of subject matter, and the Chancery Court noted that Plaintiffs had an uphill battle in order to successfully argue that the forum selection clauses were outside the scope of section 109(b).[59] The fact bylaws do not "traditionally" include that forum selection clauses was not by itself convincing.[60] Additionally, the Chancery Court noted that shareholders had ample opportunity to repeal the forum selection clauses by a simple majority vote.[61]

The Chancery Court also held that the forum selection clauses were contractually valid as a matter of law based on the principle that bylaws are "a binding part of the contract between a Delaware corporation and its stockholders."[62] Shareholders are on notice that boards of directors may unilaterally adopt bylaws concerning subjects within the scope of Section 109(b).[63] In other words, "the Chevron and FedEx stockholders h[ad] assented to a contractual framework established by the D[elaware] G[eneral] C[orpoarate] L[aw] and the certificates of incorporation that explicitly recognizes that stockholders will be bound by bylaws adopted unilaterally by their boards."[64]

Plaintiffs voluntarily dropped their appeals, and the forum selection clauses in Chevron and FedEx's bylaws bear the Chancery Court's approval, although not the ultimate stamp of the Delaware Supreme Court.[65]

A. *Monday Morning Quarterbacking: Know When to Hold 'Em, Know*

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[57] *Id.*

[58] *Id*. at 951.

[59] *Id.* at 950.

[60] *Id.* at 953.

[61] *Id.* at 954.

[62] *Id.* at 955.

[63] *Id.* at 955–56.

[64] *Id*. at 956.

[65] *See* http://blogs.law.widener.edu/delcorp/2013/10/16/fedexchevron-appeal-voluntarily-dismissed-smart-but-problematic-tactical-move/#sthash.fWVAWCHg.dpbs

When to Gamble

Boilermakers presents an excellent example of a case in which the plaintiffs' bar took a gamble a little too big and a little too far; rather than chipping away bit by bit on a particular practice, Plaintiffs attempted to tackle the entire practice in one fell swoop. The dozen or so companies that adopted forum selection clauses likely seemed like excellent targets for challenging this practice, but what Plaintiffs failed to consider was the extent to which Delaware courts acknowledge the utility of resolving Delaware law on home turf. Delaware courts would naturally be inhospitable to this type of facial challenge.

Had Plaintiffs actually wanted to challenge the unilateral implementation of forum selection clauses, they would have been far better off had they slowly chipped away on an as-applied basis. Succeeding on a facial challenge undoubtedly would have been a huge boon to Plaintiffs, but being greedy resulted in a big loss. Now Plaintiffs must mount as-applied challenges against the backdrop that similar forum selection clauses will likely be facially valid.[66]

VI. *IN RE MFW SHAREHOLDERS*: THE BENEFITS OF THOUGHTFUL STRATEGY

In June 2011, the holding company MacAndrews & Forbes ("MacAndrews"), which is itself entirely owned by Ron Perelman, owned a 43% controlling interest in M&F Worldwide ("MFW").[67] MacAndrews made a public offer to purchase the remaining shares of MFW in a going-private merger.[68] In a calculated move, MacAndrews made its bid contingent on the approval of *both* an independent special board committee of MFW as well as the majority of MFW's minority shareholders.[69]

In response to MacAndrews' proposal, MFW's board formed a special committee (the "Committee") that engaged its own legal and financial advisors to analyze the offer.[70] MacAndrews' negotiators and the Committee met eight times over a period of three months to negotiate the proposal and the Committee successfully convinced MacAndrews to raise its offer price by $1, from $24 a

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[66] Of course, the Chancery Court did not unilaterally approve all forum selection clauses and the holding is limited to the facts of the case. *See* Ronald O. Mueller & Jason J. Mendro, *Delaware Court of Chancery Upholds Validity of Forum Selection Bylaws*, GIBSON DUNN CLIENT ALERT (June 28, 2013), http://www.gibsondunn.com/publications/Documents/DelawareCourtofChancery-UpholdsValidity-Forum-Selection-Bylaws.pdf.

[67] *In re* MFW S'holders Litig., 67 A.3d 496, 499 (Del. Ch. 2013).

[68] *Id.*

[69] *Id.*

[70] *Id.*

share to $25 a share.[71] The merger was then approved by 65% of MFW's minority shareholders.[72]

The non-approving stockholders sued and the Chancery Court was faced with the question of which standard of review to apply to the transaction.[73] Prior case law established that the approval by *either* a special committee *or* the majority of the non-controlling stockholders of a merger with a controlling stockholder would shift the burden of proof under the entire fairness standard from the defendant to the plaintiff.[74] Existing precedent did not address, however, what standard of review would apply or the appropriate burden-shifting that a court would use in the event a corporation employed both, not just one, of these procedural safeguards.[75]

MFW argued in favor of applying the business judgment rule on the grounds that Defendants would only employ both procedural protections if they could be guaranteed a more lenient standard of review.[76] Plaintiffs conceded that the use of both procedural protections was more beneficial to them than the use of only a single procedural safeguard.[77]

In an opinion that applied existing law and closely considered the costs and benefits of the procedural safeguards from the perspective of both the Plaintiffs and Defendants, Chancellor Strine, writing for the Chancery Court, held that use of both an independent special committee and a majority vote of minority shareholders provided justification for the use of the business judgment rule.[78] Accordingly, the Chancery Court stated that the following six conditions must be present in order for a transaction to be construed under the business judgment rule: (i) the controller must condition the transaction on the approval of both a special committee and a majority of the minority stockholders; (ii) the special committee must be independent; (iii) the special committee must be empowered to freely select its own advisors and defeat the transaction; (iv) the special committee must meet its duty of care; (v) the vote of the minority must be informed; and (vi) the minority vote cannot be coerced.[79]

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[71] *Id.*

[72] *Id.*

[73] *Id.* at 500.

[74] *Id.* (citing Kahn v. Lynch, 638 A.2d 1110 (Del. 1994)).

[75] *In re* MFW S'holders Litig., 67 A.3d 496 at 499.

[76] *Id. at* 501.

[77] *Id. at* 526. Plaintiffs still argued that losing the benefit of the entire fairness standard of review did not warrant the increased protections that came from use of both procedural safeguards. *Id.*

[78] *Id.* at 528, 536.

[79] *Id.* at 535.

The Chancery Court held that Plaintiffs had not presented an issue of fact as to whether Defendants had fully satisfied the requirements and held that the business judgment rule was the appropriate standard by which it should evaluate the transaction.[80]

A. *Monday Morning Quarterbacking: Planning Makes Perfect*

The recent opinion of the Delaware Supreme Court affirming the decision of the Chancery Court furthers the argument that the Defendants in *In re MFW Shareholders* adopted a wise litigation strategy.. Prior to *In re MFW Shareholders* (and now *Kahn v. M&F Worldwide Corp.*), going-private transactions were generally evaluated under the entire fairness standard, with the court applying the appropriate burden-shifting analysis.[81]

Here, Defendants appear to have seen the chance to refine this standard and draw on existing precepts, and carefully and thoughtfully structured their transaction in the hope that they would be rewarded. Defendants' strategy paid off as the Chancery Court recognized the ultimate advantages of Defendants' approach.[82] Of course, as others have noted, it remains to be seen whether this costly new avenue is one that corporations will employ, although many may find the upfront costs to be justified in terms of the back-end savings when it comes to legal review.[83]

VII. CONCLUSION

The value of employing a thoughtful litigation strategy early on in deal negotiations is nothing new, nor is the dominance of the Delaware Chancery and Supreme Courts on areas of corporate governance. These four cases serve as an excellent reminder of both principles. They also show that the mantra bears repeating as careless errors and strategy failures are still common issues plaguing corporate governance.

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[80] *Id.* at 517, 536. As stated above, the Delaware Supreme Court affirmed the decision of the Chancery Court on the eve of publication in *Kahn v. M&F Worldwide Corp.*, 334, 2014 WL 996270 (Del. Mar. 14, 2014).

[81] *Id.* at 500.

[82] *Id.* at 535.

[83] E. William Bates, II, et al., *In re MFW Shareholders Litigation: Business Judgment Standard of Review Applies to a Going Private Transaction with a Controlling Stockholder That is Approved by a Properly Organized Special Committee and Subject to a Fully-Informed Majority-of-Minority Vote*, KING & SPAULDING CLIENT ALERT (July 1, 2013), http://www.kslaw.com/imageserver/KSPublic/library/publication/ca070113.pdf.