

Delaware Chancery Court confirms continued applicability of *MFW* standard

June 07 2017 | Contributed by [Ropes & Gray LLP](#)

On October 10 2016 the Delaware Court of Chancery applied the standard established in *In re MFW Shareholders Litigation* and *Kahn v M & F Worldwide Corporation (MFW)* in rejecting a challenge to a controlling stockholder's buyout of the remaining shares of Books-A-Million, Inc (BAM) from minority stockholders. In the decision Vice Chancellor Laster confirmed the framework to be followed by Delaware companies and controlling stockholders that seek to avoid the 'entire fairness' standard of review.⁽¹⁾

BAM's controlling stockholder sent an unsolicited proposal to the BAM board of directors, offering to acquire the outstanding BAM shares that it did not already own for a price of \$2.75 per share. Consistent with the *MFW* standard, the proposal expressly stated that the transaction would be conditioned on approval by a special committee of independent directors with its own financial and legal advisers and a non-waivable majority-of-the-minority vote. The board formed a special committee comprising the directors not affiliated with the controlling stockholder to consider the proposal, and the committee solicited alternative proposals from three third parties that had previously expressed an interest in acquiring BAM. One of the parties ultimately submitted a proposal to acquire all of the shares of BAM for \$4.21 per share, but as the controlling stockholder was not interested in selling its shares, the special committee decided that a whole-company transaction was not viable. The special committee negotiated an increase in price to \$3.25 per share with the controlling stockholder, and the transaction was then approved by a majority of the shares held by the minority stockholders, which were fully informed of the higher potential alternative offer in the proxy statement that was provided to the stockholders.

Certain minority stockholders then challenged the transaction, alleging that the *MFW* standard was not met because:

- the special committee was not independent and did not satisfy its duty of care; and
- the transaction should be subject to the entire fairness review, rather than to the deferential business judgement standard.

The plaintiffs argued that the special committee acted irrationally and in bad faith in recommending the transaction to the board, primarily because it did not proceed with the third party that had indicated an interest in acquiring all of BAM's shares at a higher price. Laster dismissed these arguments, stating that:

- while independent directors supporting a controller transaction at a "grossly inadequate" price could potentially constitute bad faith, it was within the rights of a controller to decide not to sell its shares; and
- the controlling stockholder in this transaction "did not breach any duty to the corporation or its minority, nor did it overreach or threaten exploitation, by proposing a going-private transaction at a substantial premium to the market price", even though that price was lower than the price offered by a third party.

The court recognised that a comparison between offers from a controller and a third party could be relevant because if the amount of the minority discount was not "within a rational range of discounts", then "one might infer that the independent directors sought to serve the interests of the

AUTHORS

[Anne Johnson Palmer](#)



[Laura J Steinke](#)



controller, confident that stockholders focused on short-term gains would approve any transaction at a premium to market", but the court determined that this transaction was not such a case and that, if stockholders felt that the minority discount was egregious, their appraisal rights provided an appropriate remedy. This decision confirms that *MFW* remains the appropriate standard in assessing controller buyouts, and extends its applicability to situations where higher potential alternative offers are also on the table. The decision was also notable because the court dismissed the case based on *MFW*, even though the Supreme Court in *MFW* stated in a footnote that the *MFW* complaint would have survived a motion to dismiss.

For further information on this topic please contact [Anne Johnson Palmer](mailto:anne.johnsonpalmer@ropesgray.com) at Ropes & Gray LLP's San Francisco office by telephone (+1 415 315 6300) or email (anne.johnsonpalmer@ropesgray.com). Alternatively, contact [Laura J Steinke](mailto:laura.steinke@ropesgray.com) at Ropes & Gray LLP's New York office by telephone (+1 212 596 9000) or email (laura.steinke@ropesgray.com). The Ropes & Gray website can be accessed at www.ropesgray.com

Endnotes

(1) *In re Books-A-Million, Inc Stockholders Litig*, CA 11343- VCL (Del Ch Oct 10 2016).

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).