Case: MFW Shareholder Litigation
Interview of Thomas J. Allingham, II
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Interviewed by: P. Clarkson Collins, Jr., Morris James LLP
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MR. COLLINS: Welcome Tom Allingham. We're going to talk a little bit today about the MFW Shareholders' litigation. But why don't you just take a minute and tell us a little bit about your background as a corporate litigator at Skadden?

MR. ALLINGHAM: Okay. I came to Wilmington for the first time in 1976; I had never been in Delaware or I had barely heard of Delaware before. I was coming down to interview as a summer associate at Morris Nichols, where I stayed both for the summer and then for six years after that. In 1983, I got an offer from Skadden, Arps to join their Wilmington office. And I was there from 1983 to the end of 2015, and became a partner in 19—gosh, it's a long time ago. 1986.

MR. COLLINS: How could you forget? And during your time there, you did almost exclusively corporate litigation? #00:01:27#

MR. ALLINGHAM: Yes. I did some – I did some pro bono civil rights work, but other than that, it was exclusively corporate litigation.

MR. COLLINS: Well, the – the MFW Shareholders' litigation has become a groundbreaking case in Delaware with respect to corporate controller transactions. If you wanted to just tell a story or describe this case in a nutshell, how would you do it? #00:02:02#

MR. ALLINGHAM: The – I think the most interesting thing about this case is that there had been rumblings in the Delaware Corporate Bar, and also the Delaware Judiciary, for a long time that the process of reviewing controller transactions was, depending on who you talked to, ranging from inefficient to broken. And there had been a fair amount of talk about how that might be improved. But, because of the structure of controller transactions and the way, which I am sure we will talk about, the way they were being reviewed, there was not – it was very hard for a controller to try to bring a case that would tee up the issue of whether you could get business judgment review for a controller transaction if you were willing to structure the transaction with certain procedural protections. It just – it was very hard for controllers to see the benefit of that. So, from a doctrinal

point of view, the issue remained, but nobody was willing to tee it up. #00:03:19#

I think a lot of corporate practitioners had been interested in the issue. I had the luxury for 30 years or so of having represented MacAndrews & Forbes and its owner, Ronald Perelman, in a whole variety of corporate transactions in Delaware. And I knew, because the structure of MacAndrews & Forbes, as a holding company, involved lots of controlled corporations, that this was an issue that was of real interest to MacAndrews & Forbes and Ronald Perelman and his in-house legal team. And so, when I got a call from one of my corporate partners that MacAndrews & Forbes was considering a control transaction involving MacAndrews & Forbes Worldwide, which was the – the controlled corporation in this transaction, we started thinking about whether this could be a transaction in which we might consider the possibility of implementing the dual procedural protections -- shareholder vote on the one hand and a special committee empowered to review the transaction -- to see whether we could get business judgment review. And it was interesting from that perspective because it was both – had the potential to be useful for the MacAndrews & Forbes Worldwide transaction, but from the point of view of MacAndrews & Forbes itself, there was a likelihood, or at least a possibility, that this would be doctrinally

useful for my client in other transactions as well. #00:05:19#

So, Perelman, I think, if not uniquely, unusually among people who might consider this structure, was willing to think about this, I think, more seriously than most potential clients.

MR. COLLINS: And you talked about some of the inefficiencies in the current standard of review that governed controller transactions, and that was arising from the entire fairness standard of review? #00:05:55#

MR. ALLINGHAM: Yes.

MR. COLLINS: What were some of the difficulties that that presented to any controller wanting to do a transaction with a controlled entity? #00:06:08#

MR. ALLINGHAM: Well, first of all, under the entire fairness review, it's the burden of the defendant to prove the entire fairness of the transaction. That meant, effectively, that motion practice was useless. So, if the transaction was not enjoined, the buyer was in a position in which, if entire fairness review applied, and if you were a controller, entire fairness did apply. There was no question about that. So, the question became, what situation do you find yourself in post-injunction? And the answer was you find yourself in a position where your risk is very high, and there is no certainty. And

so, there is no motion practice; there is no legal issue on which cases can turn. And so, plaintiffs, generally speaking, had a tremendous amount of leverage, which was – gave rise to the inefficiencies. You sort of have a choice of you can contemplate the notion of a trial with the possibility that if you lose the trial, there are – you don't know what the damages are. And so, it could be a very large damage award. Or you can say, all right, I'm going to examine cost benefit and settle. And plaintiffs understood that that was a powerful piece of leverage that they had. #00:07:48#

It was a piece of leverage – and I guess we can talk about this, but it was a piece of leverage that I think came about not as a compensation for some legal right under the Delaware corporate law that plaintiffs had given up. And there's been – there's been a sort of ebb and flow in Delaware merger law for a very long time in Delaware. And, typically, there is the relinquishment of some right on the part of shareholders and the granting of some protection to shareholders. In my judgment, anyway, this enormous leverage that had flowed from the application of the entire fairness review was not something that was an equal compensation for what had been the rejiggering of the balance of power between plaintiffs and defendants, between shareholders and corporate management.

MR. COLLINS: Now, the dual protection structure that you were talking about and considering for this transaction, was there a concern that the minority of the – of the majority be unaffiliated a stockholder vote might give the unaffiliated stockholders too much power in the transaction? #00:09:26#

MR. ALLINGHAM: Was there a concern? Yes, of course, because, just to take one step back, any controller contemplating trying to litigate this issue had to understand that the controller was basically giving up, in an important way, all of the power that it had accumulated or purchased or bought with real dollars. So, a controller has the control vote because the controller has bought a control block of shares. The controller has to give that up. And that's – and to whom does the controller give it up? To the minority. Well, if there is, and I think this is what you're getting at, if there is a – the unaffiliated minority, one would think, votes its interests, and does so individually. If you have an accumulated block that can represent… . I'll give you an example. So, in MFW there were – don't hold me to this, but I think it was – I think there were roughly 55-percent of the stock was not owned by MacAndrews and Forbes. It was still a control transaction for a variety of reasons that aren't important. So, if somebody held, I don't know, 20-percent of

that, even 10-percent of that, that represents a – 10-percent of the overall float – that represents you know, a 20-percent potential blocking position. #00:11:13#

When we discussed internally and with our client whether to do – whether to try this transaction, whether to try for business judgment review, one of the things we talked about was, okay, I, MacAndrews, I, Mr. Perelman, might be willing to say, okay, I won't do this deal unless it gets special committee and shareholder protection, but I want it to be a fair vote of the shareholders, not somebody who is holding me up because he recognizes that he's got the leverage to hold me up. So, we looked at the shareholder profile and it was a good case for this – for a, you know, a test case because there wasn't a very large blocking position among the minority. #00:12:05#

So, we did talk about it; there was a concern. The minority shareholder profile looked like we would get a fair shake from the minority, not a recognition of leverage kind of shake.

MR. COLLINS: So, what did you expect the major legal issues to be if you structured the transaction with these dual protections? #00:12:35#

MR. ALLINGHAM: There was an obvious major legal issue, which was that there were Delaware cases from the

Supreme Court that could easily be read, and plaintiffs had frequently read, to say you do not get business judgment review of controller transactions, period. End of story. I, personally, did not believe that that's what those cases meant. I didn't think it was consistent with the long arc of Delaware corporate law, and I thought we could—I didn't think that – I was confident, in fact, judges on the Chancery Court had already basically said, we don't think that's what those cases mean, but it's for the Supreme Court to say. So, I was confident that we could get past that issue in the Chancery Court. And I felt pretty good about, you know, we evaluated who was sitting on the Supreme Court at the time and, honestly, right down to the justice thinking about what was their connection to those cases, the Kahn v. Lynch case, for example, and we felt pretty good about that particular issue. #00:13:47#

So, if we could get past the, you know, the stare decisis problem, then I thought the issues were the straightforward ones. If you – if the controller is willing to give up all of his power, shouldn't he also, then, be entitled to a standard of review that is not – that is not the controller's standard of review. So, that was the legal issue.

The factual questions were then could we persuade the Vice Chancellor or Chancellor, whoever we got, and

ultimately, the Supreme Court -- because we were sure it would be appealed – could we persuade them that, in fact, the controller had relinquished the power of control so that he should be entitled to a standard of review that didn't reflect control?

MR. COLLINS: Let's talk a little bit about the transaction that actually occurred that became the subject of the litigation. What was the – what was sort of the dynamics of that transaction? #00:14:59#

MR. ALLINGHAM: MacAndrews & Forbes Worldwide was a combination of some unusual businesses. There was – now I am really digging into my memory. There was a check processing business that was, some might say, mature, some might say in decline. There was a licorice flavoring business that was a good business, but which the – for the supply for which was all in, I can't remember, Afghanistan, or somewhere in the Middle East that was very politically volatile. So, risk attached to that business. And there were some other businesses. It was a combination of some very unusual businesses which had, at least on the surface, very little relationship to one another. And I think it was – it's fair to say that our client felt that the market was not fairly valuing the company as a combination because of individual risks with various components of it. #00:16:17#

And so, he thought, well, if the market is not valuing this company fairly, in our judgment, and we are willing to put our money where our mouth is about our judgment, about value, maybe there is a deal to be made here which would satisfy the market, i.e., the minority shareholders, but also represent a potential for value for MacAndrews & Forbes. And that's sort of the ideal situation in which a controller transaction might develop. If the perceived disconnect between the market's value and the controller's value is large enough, then you have a situation in which you can be confident that a price – confident – you can – you could have some reasonable belief that a price that you think is a fair price and still offers the potential for upside for the controller will be attractive to the minority. #00:17:19#

And so, from a financial point of view, this looked like a very good transaction, again, to be a test case. So, to come back to your earlier question, no large blocking position among the minority, a real sense that there was a disconnect between the way the market viewed this company and the way the controller viewed the company from a financial point of view. So, that was good because the thought was the minority vote is one that might actually be possible to get. #00:17:55#

And then, a board of directors of the company to be acquired, of MFW, that offered some, we thought, extremely

attractive candidates for a special committee combining what we thought was demonstrable independence and real expertise, both financial valuation and transactional expertise so that we thought we could see on the other side of this a special committee that the board of MFW could put together from candidates on that board. That would be the kind of committee that the Chancery Court and, ultimately, the Supreme Court would respect in terms of the special committee review.

MR. COLLINS: Did you think it important, essential to the arguments that you expected to make eventually, that these protections be put in place ab initio from the outset? #00:19:08#

MR. ALLINGHAM: We did think it was important, but that was because… . I understand that there have been cases since in which that issue has been litigated. But, we thought, look, this is going to be a test case, so we should try to structure it in a way that makes the test as favorable to the possible outcome of getting a business judgment review as we could. So, if you think about if you do one or the other of the protections after the fact, then the protections become less powerful. If shareholders know from the outset that their vote is dispositive, they'll come out and vote, and they will vote their interests. If the special committee knows that if it says no, that's the end of the day, then the special

committee will exercise that power in a way that's appropriate. And if both protections were real protections, I thought, and I told our client that we had a very good chance of getting business judgment review. #00:20:22#

I know from talking to some of my colleagues at the time that that was not a view that was universally shared.

I thought there was a groundswell in the Chancery Court and I thought that the way Delaware merger law had developed over the last 60 or 70 or 80 years, more than that, actually, that the right way to solve the inefficiencies and problems with controller deals was to provide business judgment review if a controller was willing to, in effect, relinquish his control for this purpose.

MR. COLLINS: And so, the – your client went ahead and made a proposal to the, I guess, M&F Worldwide, at what was it? $24 a share? Do you remember the— #00:21:33#

MR. ALLINGHAM: I think it was $24 a share, but I should have reviewed it, and I didn't. There was an incremental bump, and I don't remember whether it was a bump that went to $24 or whether it was a bump that went to 25 and change. I just don't remember.

MR. COLLINS: Yeah ... I think the bump was from 24 to 25.

MR. ALLINGHAM: Okay.

MR. COLLINS: But that was – that was a bump that was achieved by the special committee as part of the negotiating process. #00:22:00#

MR. ALLINGHAM: Correct. And it's interesting. The pricing – I now recall, the pricing was 24. And the reason for that was that – and we talked about this – was that – I don't remember where the market was, 18 or 19, something like that. It represented a large premium. And then, pricing deals like this, you know, you have choices, right. You can reserve a lot of money for incremental negotiations. Or you can say I want to be clear that I am – you don't say this explicitly, I guess, but you want to send the signal, look, I am willing to pay a large premium here. And I want the minority to take this proposal seriously. And I recall a discussion in which the consensus emerged. Ee should try to make this… . If this is going to be a test case, we should try to make this a very full price because we should try – because that will be attractive to the minority.

MR. COLLINS: And then, after the deal was announced… . I guess the proposal was announced initially.Do you recall? #00:23:30#

MR. ALLINGHAM: There was a letter proposal that was delivered to the MFW board.

MR. COLLINS: And do you have any recollection now as to how long the sort of the negotiation process took between the time of the delivery of the proposal and the announcement of a deal? #00:23:46#

MR. ALLINGHAM: Oh, yeah, it was quite a while. And again, and this as very frustrating for my client, who is to – whose patience is not legendary in some ways, but who was persuaded in this case to be patient. I mean, we said, if you want the special committee to – the special committee's review to be one of the two precipitating factors for business judgment review, you have to let the special committee do what it wants to do. And you have to let the special committee take the time the special committee and its advisors think it needs. And that was not easy for my client. But I think, to his everlasting credit, he reined in his desire to get things done as quickly as possible and said, all right, we'll let them work. And that was partly… . I think that was made easier by the fact the people on the special committee were people who clearly knew what they were doing, and they hired advisors who also clearly knew what they were doing.

MR. COLLINS: Who were their advisors? Do you remember? Evercore was financial advisor? #00:25:09#

MR. ALLINGHAM: It was – Evercore was the financial advisor. I'm trying to think who the lawyers were.

MR. COLLINS: Willkie Farr?

MR. ALLINGHAM: Yes, Willkie Farr.

MR. COLLINS: And how many members of the – one of the members of the special committee was, resigned or withdrew early in the process? #00:25:28#

MR. ALLINGHAM: Yeah, so I don't know the ins and outs of this because I represented MacAndrews & Forbes, and the people who were setting up the special committee was Willkie Farr. I did hear that a very – a clearly independent director from an SEC rule point of view had been either appointed to the special committee or was being considered for the special committee. From the point of view of the controller, who was looking for business judgment review, there were competing considerations. I wanted to have very little or nothing to do with anything that was going on, on the MFW side, but I didn't want there to be any concerns about the independence of the special committee because that was going to be part of my argument. And I thought that this potential member, or maybe he was a member, I don't recall, while I thought he was clearly independent under SEC rules, he had a very, very long friendship with – or at least say business friendship with Mr. Perelman. And I thought that the better course from our legal perspective was for him not to be on the committee. #00:26:58#

It's interesting. I think that illustrates how far MacAndrews & Forbes and Mr. Perelman wanted to go. There are – there are always rumblings about oh, yeah, there's some – there's some, you know, insider on the special committee who is influencing the special committee. From our point of view, we wanted to get even the appearance of an insider off the special committee so that the legal issue could be presented as cleanly as possible.

MR. COLLINS: And so, the special committee engaged legal – independent legal advisors, independent financial advisors. I don't think the independence of either of the advisors were questioned in the case, as I recall. #00:27:52#

MR. ALLINGHAM: That's correct. And I was pleased because the more issues can be taken off the table – remember, this was – we knew – the whole purpose here is to try to develop an avenue for resolution of the case on motion. So, you want as few issues as possible that you were going to actually have to engage on—

MR. COLLINS: Sure.

MR. ALLINGHAM: -- on the standard of review for motion practice.

MR. COLLINS: So, there was some – there was, over a period of time, with the benefit of the legal and financial advisors, there was some negotiation. I think, initially,

MacAndrews & Forbes was unwilling to move off the $24 offer price, but eventually, the committee was able to acquire a bump in that to 25. #00:28:51#

MR. ALLINGHAM: Yeah, and it's interesting. Before that happened, Evercore wanted to develop its own projections or at least to develop absolutely contemporaneous projections for all of the businesses. So, Evercore through, I think, Willkie Farr, as I recall, came to MacAndrews & Forbes and said, we want projections made for all of these businesses. And MacAndrews & Forbes said, great. And Evercore said, and we want them done – we don't want these done in any unusual way. We want these done in the ordinary course. You're familiar with Delaware law that says projections done in the ordinary course are the most credible for purposes of Chancery litigation. #00:29:46#

And so, we said, that's great too. But I was involved in this. I said, that's great too, but you should be aware that the ordinary course in all – well, I don't know about all -- but in this particular controller situation, is that the projections are done on a business unit basis at MFW. And then they are reviewed at the MFW – at the MacAndrews & Forbes level. There is – there are common managers or financial people who deal with both subsidiaries and at the parent level. And I said, we'll do it however you want to do

it, but if you want to know what I think, I think what you should want is projections prepared at the business unit level without any involvement from MacAndrews & Forbes. And they said we'll think about that. And they came back and said, yeah, you're right. We want them without involvement from MacAndrews & Forbes personnel. And I said, okay, I'm now going to toddle over to my client and explain to them that new projections are being prepared, which are not going to be done in the ordinary course, because they are not going to be involved in the projections. And I can tell you without revealing attorney-client confidences, that that was not one of the easiest conversations I have ever had. But again, because this was a test case and because there was a lot of risk involved for the controller here, MacAndrews & Forbes was persuaded that they should be willing to deviate from the normal projection process and be entirely hands-off to the extent that Mr. Perelman himself was not even given the projections until after Evercore had done all of its work and reached its conclusions based on those projections. So, no input at all.

MR. COLLINS: Eventually, the negotiations between the special committee and the parent corporation resulted in a merger agreement that was then announced. Is that right? #00:32:22#

MR. ALLINGHAM: That is correct. And you asked a question earlier about a bump in the price. There were several times when the special committee said we want more money, and MacAndrews & Forbes said no. And there were at least two times that I can remember when what you and I discussed a few minutes ago was the stated rationale for the no. It was, look, we started at a price that we think is full and fair. Because this is a new kind of transaction, we wanted to make it as attractive to the minority as we could from the beginning, but we don't have any more space; we don't have any room. And finally, there was a meeting between the chairman of the special committee and one of the senior people at MacAndrews, at which, you know, the conversation was effectively, okay, we can generate – it's not going to be a large bump because we didn't contemplate any bump at all -- but we can generate an increase if that will get the deal done.

MR. COLLINS: And I guess there was some, in terms of the background of what was happening in the world and what was happening to the businesses at the time, I guess there was some argument that seemed to be developed in the record later on that the – that maybe the value of the businesses had maybe even declined from the time of the original offer— #00:34:13#

MR. ALLINGHAM: Precisely. So—

MR. COLLINS: And that argument at least could be made.

MR. ALLINGHAM: And that was part of the give and take in the negotiations. The check processing business, for example, was a physical check processing business, and you know, increasingly, and you can see that in every area of life, increasingly, everything was being done digitally. And so, there was danger there. There were – I spoke about the political issues with supply chains for the licorice business. And there were some other issues, too. But the overall gist of it during the negotiations was, look, we proposed a full and fair price. In the developments in the months since then, which we have been willing to – the months that we have been willing to accept because we want the special committee to do its job, we don't see the values going up; we think value is going down. So, you have already effectively gotten an increment.

MR. COLLINS: When the deal was announced, litigation followed—

MR. ALLINGHAM: Almost immediately—

MR. COLLINS: – almost immediately. And where was—

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MR. ALLINGHAM: Actually, I think the litigation started after the proposal letter went in.

MR. COLLINS: Oh, did it? Okay. And there was litigation in New York and Delaware?

MR. ALLINGHAM: Yes.

MR. COLLINS: And did you have a preference as to where the matter would be litigated? #00:35:54#

MR. ALLINGHAM: So, it's probably politically incorrect to say that you have a preference among judges, but in this case, we wanted the decision on the legal – you know, the pivotal legal question -- to be made by a judge who was, and, ultimately, justices who were very, very knowledgeable about these kinds of issues and about the, I've said it before, but the arc of Delaware M&A law because some of our arguments were going to be based on long history, and it's not easy to educate a judge on the long history of Delaware corporate law and in the matter of – and you know, in 15 minutes or 20 minutes of the legal argument. So, yes, we did prefer Delaware. I did go up to the New York State Supreme Court and argued that the State Supreme Court in New York should stay its hand in favor of Delaware. And after some understandable protestations from the judge up there that she could deal with these issues just as well as Vice-Chancellor Strine could, she did agree to stay New York in favor of Delaware.

MR. COLLINS: And, in Delaware, there was a preliminary injunction application? #00:37:15#

MR. ALLINGHAM: There was.

MR. COLLINS: Did you expect that to occur?

MR. ALLINGHAM: Well, it was customary. I mean – yeah – and so, yes. What happened in that PI process was that the plaintiffs took a fair amount of discovery, and although we were interested in getting a resolution of the legal issue, we had – I wanted to get the transaction done, so we had discussions about settling the case. And, at the last minute, I mean literally within a couple of days, at the most, of the scheduled PI meeting, the plaintiffs just said they would – just withdrew it. I think they thought they were going to lose, and so they thought they were better off not getting an opinion that would tilt the playing field, you know, in post-injunction proceedings.

MR. COLLINS: So, after they withdrew their preliminary injunction application, the deal then closed, is that right?

MR. ALLINGHAM: Correct.

MR. COLLINS: The merger closed. And what happened next in the litigation? #00:38:41#

MR. ALLINGHAM: One thing on the injunction proceeding that I thought was very important subsequently.

There was what I think was then, at least, a typical dance in which there are disclosure of – disclosure violations alleged, and we made a supplemental disclosure. And there were no further disclosure violations alleged. That made it very easy for us to argue that the shareholder vote was, almost by definition, fully informed because we had made disclosures. The disclosures were – I am proud of my firm, and I had nothing to do with the disclosures, so I can say it. The disclosures, in this case, were as clean and clear and crisp as they could have been, but we made some changes that the plaintiffs thought were necessary. And at the end of the day, we were before the court being able to say, look, nobody has said that the shareholders didn't get the appropriate disclosures in order to be able to make an informed decision here,so you should be respectful of the shareholder vote.

MR. COLLINS: Right. Another issue off the table. #00:40:02#

MR. ALLINGHAM: Yes.

MR. COLLINS: Yeah. You then moved for summary judgment.

MR. ALLINGHAM: We did, but not immediately. The plaintiffs wanted more discovery. We knew that we wanted to be in a position to get resolution of this on motion. We did not want to go to trial for all of the reasons that defendants

never want it to go to trial in these kinds of cases because we still had no certainty that the business judgment review would apply – the standard review would apply. And so – and we also thought it was highly likely that the court was going to give the plaintiffs at least some more discovery. So, we took a tack that is, I think, unusual in cases like this. We said, tell us what you want. Whatever you want, we'll give you. You want to take every special committee member? Great. You want to take some of the other directors who appointed the special committee members? Great. You want to take Evercore? Great. You want documents; we'll give them to you. And that took time. I mean it took – I don't remember, but a matter of several months at least for us to deliver the discovery that the plaintiffs said they wanted. And I think we – and then we moved for summary judgment on the grounds that whatever discovery they want, they've gotten. We will go through the Rule 56 procedural process, and the court should be in a position to decide. #00:41:48#

And the plaintiffs then said, no, no, no; we actually want more discovery. I think, actually, we filed our opening brief, and then they said, well, yeah, we need some more discovery. And we gave them that discovery, too; most of it, anyway. So, I think it was – I think the briefing was completed late in the summer of that year.

MR. COLLINS: Did you think that a motion on the pleadings – I'm not sure if you'd probably already answered the complaint – but did you think that you – or consider making – instead of making a motion to dismiss, instead of agreeing to additional discovery and the associated cost, did you consider a motion on the pleadings after they withdrew their preliminary injunction application? #00:42:47#

MR. ALLINGHAM: I've been asked this before. We did consider it, for sure. My recollection of why we decided to go the Rule 56 route, I think, had more to do with the fact that I thought that the discovery record, at each stage, whether it was what had been developed in the injunctive phase or in the first post-injunctive phase, or even after the – this wouldn't have been relevant to the decision on what kind of motion, but even in the post-opening brief phase, I thought was very favorable to us. I thought the reason it was favorable to us was, if you start from the very beginning with a transaction with a point of view in mind, if you say, okay, this is going to be a test case; we have to make this the very best test case. Then, what you end up with is a discovery record that's very good. We knew that the special committee was going to look very independent, and the discovery showed that. We knew that the discovery – the early discovery showed that there

really weren't any real disclosure violations and, so, that would buttress the shareholder vote. #00:44:07#

We knew that the indications of value were that the price was very strong. And so, we thought, look – and we had, at that point, a very experienced judge both in fiduciary duty questions,and merger standard of review questions. He had written one of the Chancery – actually, I think two of the Chancery decisions that had teed up the issue in the preceding years. Cox, in particular. And so, I thought we were in a position where we could basically put the burden back on the plaintiffs and say, you know, if you don't want business judgment review here, you better be able to say what's wrong with our dual protection procedures.

MR. COLLINS: So, did your adversaries in the case – did the plaintiffs' lawyers make arguments or emphasize points in the summary judgment proceedings that you did not expect? #00:45:22#

MR. ALLINGHAM: No. They did raise the stare decisis – res judicata based on Kahn and a long series of cases saying that this issue is decided and that there can't be business judgment review. We had anticipated that. I told you that we thought we could win that. They raised issues about special committee member independence. I was confident that they were going to raise those issues. But I was very much struck by the

fact that – if you think a little bit about director independence, they raised some financial connections with MacAndrews & Forbes. I thought the Delaware law was extremely clear that what's required is a material conflict. And, in all the discovery they took, and they took a lot, they never raised with the special committee members whether the financial contacts that they uncovered were material to those people. And I think that's the plaintiffs' burden, not my burden. #00:46:40#

So, while I wasn't surprised by the arguments, I was surprised by the approach that they took to discovery on some of those arguments.

MR. COLLINS: Right. They talked about the amounts that had been received, but they never talked about the – I think you called it "the denominator." the judge called it the "denominator."

MR. ALLINGHAM: Correct.

MR. COLLINS: So, there was some ability … #00:47:07#

MR. ALLINGHAM: So, there was – there was a special committee member who had gotten, I don't know, a hundred thousand dollars in fees, not to him, but to a law firm with which he was affiliated. Now, you know, if that's a one-person law firm for whom a hundred thousand dollars in fees was a

hundred percent of their revenue for the year, you know, I think that's a pretty good argument for a conflict – a material conflict. If it's, you know, a hundred thousand dollars in the context of Morris James or Skadden Arps or – it's probably not material. And they could not make an argument as to whether – I mean, the reality was maybe they didn't ask because I don't think it was material. But they just had nothing to say when I said it's the plaintiffs' burden and they haven't carried it.

MR. COLLINS: And that became a pretty important point, eventually, for the – both for the Chancery Court and the Supreme Court to deal with this in a summary – and affirm in a summary judgment context. #00:48:18#

MR. ALLINGHAM: I thought we would do fine on that issue in the Chancery Court. The Vice Chancellor – sorry, the Chancellor took a very significant part of his opinion addressing the arguments about special committee member independence. But I was – I felt pretty confident that, based on my experience, that he would not view the allegations as material on the merits. But I thought, in the Supreme Court, that the ability to argue was sort of bright-line. It's not my job to tell you whether these are material conflicts; it's the plaintiffs. And they didn't do it. I thought that would be very helpful on appeal.

MR. COLLINS: And so, let's talk about some of the arguments or some of the issues that seemed to concern the Chancellor when the arguments were being presented in the Court of Chancery. One of the issues, along the lines of what we were just talking about, was his ability to assess the special committee's independence without a trial. It's often a factually ladened inquiry. So, it's not hard to envision a case where maybe that could have been developed as more of a fact issue than the plaintiffs were able to do in this particular case, I guess. #00:50:01#

MR. ALLINGHAM: Well, it's then the plaintiffs did. What the plaintiffs were able to do or could have been able to do, I think, you know, they had – and I think this way was an important factor both for the Chancellor and for the Supreme Court. The plaintiffs had every opportunity to develop whatever record they wanted to. This was not a, you know, a limited discovery record. This was not even – this was not only not an injunction kind of a record -- this was not even a trial-style record that had been limited in some – or constrained in some way. The plaintiffs really couldn't – they kept saying, well, we need to take discovery on that, but they could never articulate any kind of discovery that they hadn't had the opportunity to take.

MR. COLLINS: Right ... What about the inherent coercion argument? How was that treated by – I mean, because there was some precedent that sort of supported this Kahn v. Lynch treatment, but I think that Vice-Chancellor Jacobs had talked about it in the Citron v. Du Pont case years before that you can introduce some of these protections – majority, the minority vote, independent special committee -- but you can never really deal or do away entirely with this specter of the controller maybe being able to do some retribution in the future— #00:51:40#

MR. ALLINGHAM: To do something.

MR. COLLINS: Something.

MR. ALLINGHAM: So, there was more than one lawyer on each side and on these teams, and I think each of us had some issues on which we had confidence and some issues on which we had, let's say, less confidence. I told you earlier that I was – look, you're concerned about everything, but I did not believe that the res judicata argument was a problem for us. I was sure that I could persuade the trial judge that this is an issue that should be – that could be teed up, and I was pretty sure that the Supreme Court was going to hear this on the merits. I think the plaintiffs were pretty sure that the res judicata argument was a great argument. #00:52:32#

Among my team, it's probably not – this is an old enough case now, and it's probably not revealing lots of really important confidences to say that my near certainty that we were going to be fine on res judicata was universally shared. There were people on my team who were worried about it. The thing I was most worried about among all the issues we had to face was the Citron problem. This kind of – because it was amorphous. It was – the Vice Chancellor in Citron had said, effectively, what I just said to you. You can never entirely eliminate the fear on the part of shareholders that the controller will do something. #00:53:23#

So, the way we took that on –and let me just say, I did not think that the plaintiffs made as much of that argument as they could have because I don't think it's a fair argument in the sense that controllers ought to be able to – ought to be able to respond. So, if it's – are going to slash the dividend, the controller could say, well, that's something that, you know, arguably is within my control, so, I'll give that power up. Or you know, delisting—

MR. COLLINS: Right.

MR. ALLINGHAM: -- I'll give that power up. But—

MR. COLLINS: You might do something, so you can't get business judgment review—

MR. ALLINGHAM: It's very hard. I thought it was a little unfair because it can't be responded to, but because it's hard to respond to, I was very worried about it. Also, the author of Citron was on the Supreme Court, and I had enormous respect for the author of Citron, and I was worried that his colleagues would also have enormous respect for the author of Citron, and that this was an argument on which, you know, it's like an infinite whack-a-mole. You know, you, okay, no delisting. No cut the dividend. No this, no that. But it's always: there might be something else. #00:54:48#

So, our approach to the argument was to say I can talk to you about each of the potential retribution – forms of retribution that are mentioned in Citron, and I could tell you they won't happen here for the following reasons. And I think that the Chancellor understood that. And then, I said, I think that, in fairness, anyone who wants to make a structural coercion argument needs to be able to put up an example that is not rebutted by the controller because, otherwise, the controller is in an impossible position. And there is nothing to that explicit effect in the opinions, but I think that was the way in which the Chancellor solved the structural coercion problem.

MR. COLLINS: One of the other issues or concerns that the plaintiffs raised, and that the court asked about –

Chancery Court asked about-- was the inability to have an effective market check. I think that MacAndrews & Forbes, Mr. Perelman, made clear that they were interested in purchasing the minority interest, but they weren't interested in selling their interest to anyone else. And, as a result, the argument was, well, it really doesn't fully replicate an arms-length third-party transaction because there can be no effective market check. How did you think about that argument and whether that argument would be fatal to your doctrinal argument? #00:56:45#

MR. ALLINGHAM: I thought that there were two ways to think about it. This is when we were trying to decide whether this was a good case for this issue. I thought – I thought that the special committee was empowered to do whatever the special committee wanted to do subject to you always have to get 50-percent plus one vote to sell to you. And, you know, MacAndrews didn't even own 50-percent first of all, so, I thought actually, it is not impossible that there would be a market check if $25 was really, as the plaintiffs kept saying, a horrible price. Then, you know, somebody might be willing to pay 26 because, actually, it's worth 50; I don't know. But I thought that – I did not think that any constraints were imposed on what the special committee and its advisors wanted to do. If they wanted to go out and shop the

company, recognizing that there was a 43-percent, or whatever it was, holder, who is also a rational economic actor, they could do that. And, in fact, although they did not actually go out and shop the company, they did do extensive analyses of what values might be achieved if, in the absence of a majority holder, if you went out and did, in effect, the theoretical equivalent of a market check. So, I thought that was one very useful fact for us. #00:58:35#

And I thought from the outset that, because I knew MFW would – MFW's board would be a) putting together an independent special committee, or at least had good members available to it, and that b) once the special committee was empowered, it would hire independent, experienced advisors. I felt pretty confident that that would be the case. That is that those advisors would do what needed to be done in order to provide the equivalent to the special committee members of the information that you can derive from a market check. So, that was point number one. #00:59:18#

Point number two was, I had never believed that a market check is absolutely required. I think that – I think that courts are very skeptical when there is no market check when it is possible to do so. But there are cases, going back a long way, that say, sort of at its core, it's not that boards have to do market checks; it's that boards have to be

fully informed. And the standard for fully informed is what is reasonable? And what is reasonable is cost and benefit. And who makes the due judgment about what is reasonable? The board or special committee members do. And what is the standard of review on that determination? That is a business judgment determination. #01:00:15#

So, I did not think that a market check was legally required. I thought, as a practical matter, a powerful substitute or corollary for a market check was available to and, ultimately, was given to the special committee. And then, lastly, and this is on a high theoretical level, the way I tried to pitch this argument was not I am replicating a third-party transaction. I am sure we said that at some point. But what I kept trying to say was, we are not allowing the controller to do anything with his control that will tip the scales on this transaction. And so, as a 40-something-percent holder, he is entitled to sell or not sell as he wishes. And the Delaware law on that goes back for many, many, many decades.

MR. COLLINS: Mm-hmm, yeah. #01:01:17#

MR. ALLINGHAM: I thought he was not using that power to tip the scales. So, I thought we had two or three very strong arguments on that. There was a lot of discussion

at oral argument about it. The Chancellor was very interested, but I hope – I hoped that we had good answers for.

MR. COLLINS: One of the other arguments that you needed to confront that was made by the plaintiffs was the role of arbitrageurs in public transactions. And as a result, the meaningfulness that should be attributed to majority of the minority vote, that they would accept virtually anything because of their role as an arbitrageur. How did that argument concern you or get treated by you? #01:02:17#

MR. ALLINGHAM: So, first of all, I was asked about that argument early on, and I said I don't think there is any chance that argument will prevail. I think we're going to have a smart trial judge and a smart appellate panel. And they will understand that there will be X-number of shares. For each of those shares, there might be more than one economic judgment, but you can aggregate those economic judgments. So, if somebody wants to sell his share to an arb – arb at $24, and the arb then has a powerful incentive to sell for – to approve a transaction at any increment over his 24 bucks. That's fine, but there was also a vote by the guy who sold at 24 that this was already a good deal. And I was really confident that all of the judges that would be looking at this would see that as effectively an aggregate – an effective, informed aggregate vote. #01:03:24#

Also, I am not aware of anything under Delaware law that says arbitrageurs are not shareholders once they buy their shares and are entitled to make whatever judgment they want to make. But I thought the deeper argument was, actually, there were economic judgments made along the timeline for that share.

MR. COLLINS: So, the – you had your oral argument with the Chancery Court, and Chancellor Strine went back to work and wrote an opinion. How did you feel about the opinion that he wrote? Besides having won summary judgment? #01:04:07#

MR. ALLINGHAM: Well, I felt ecstatic, but I obviously felt thrilled about the result. That's tempered by the fact that I had always thought our chances were good in the Chancery Court. And that I, as I told my client, I think our chances are more – are harder to define in the Supreme Court. But I also was very pleased because I thought that the Chancellor's opinion was – almost couldn't have been better for atmospheric reasons. I have some familiarity with cases in which there is tension between the trial court and the appellate court. And I thought this was a case where there was potential for that kind of a tension. #01:05:01#

You know, the Chancery Court – several judges on the Chancery Court had, in the opinion of some people, gotten out

in front on the issue of should there be some hybrid standard of review for dual protection controller transactions. I thought that – I don't share that view, but there were, I think, practitioners who were – who thought that the Supreme Court might have thought that the Chancery Court was becoming activist on this issue. And I don't believe I have ever read an opinion that was more respectful of the importance of precedent. So, for example, on the res judicata argument, the Chancellor spent a very long time – I thought very respectfully – trying to divine what was the real reason behind the kinds of language on which the plaintiffs were relying. #01:06:07#

But at the end of his long discussion, he reached a conclusion as to whether it was res judicata or not and then said, almost matter of factly, but the Supreme Court knows what it meant, and the Supreme Court will tell me whether I am right, or I am wrong. So, he did his job, but he did it in a way that was – it posed no problem for me on appeal at all. So, I was – and that was true – that's an example, but it was true right down the line. So, I felt – I thought the opinion was great.

MR. COLLINS: So, I think that you and Chancellor Strine and – you know, made a very persuasive argument that the language from Kahn v. Lynch and some of the other

decisions was really dictum. It wasn't a holding; it didn't bind the Supreme Court. But, there's been a lot of language and a lot of opinions over the years that suggested that whatever – whenever you have a controlling stockholder merger transaction, it's going to be tested by entire fairness. The burden might shift, but the – it's going to be tested by entire fairness. Did you – and you mentioned you were confident that you would get a, you know, a respectful reception in the Chancery Court. What did you think that the Supreme Court might do? Even if they said it was dicta, they could easily say, but this is what we think the rule should be. #01:07:53#

MR. ALLINGHAM: So, they – the Supreme Court could have done that, and I thought there was a chance that the Supreme Court would do that. This is when I – I've been thinking for a long time about the way merger law had developed in Delaware. So, it used to be that any shareholder had a veto over a merger and, at some point, people saw that this was having at least some damping effect on the ability of people to do transactions. And so, there was, what I thought was – I'm being very simplistic, but -- in exchange for a shareholder's veto right, a shareholder got the right to be part of a shareholder vote on transactions like that requiring a majority. And, at the end of the day, also got an appraisal

right, so that if a majority approved the merger and the shareholder still thought it was a bad idea, at least he could get a judicial appraisal of the shares. So, that was one example of, you know, a rebalancing of the power and efficiency of the merger arena. #01:09:14#

When the entire fairness standard was put into place, it was a recognition that the shareholder vote and the appraisal was, perhaps, not a complete compensation for the loss of whatever it was that the shareholders had before because there was a specialized kind of transaction in which the shareholder vote was not meaningful. And where, you know, the board of directors' review of the transaction might also not be meaningful if the controller was willing to put his thumb on the scales. I thought that the Supreme Court could be persuaded that the reason that the entire fairness review was initially established was not because it was a controller transaction. It was because the protections that had been far earlier implemented for shareholders were being affected by the controller. And so, that's why I thought, if you could eliminate the effect of the controller on the protections that had already been established, then the court should be willing to say, okay, then, we should be back to, you know, first principles: business judgment review of transactions. #01:10:53#

And that's what I hoped to do. But you are absolutely right. I thought the chances were very good in the Chancery Court that we would prevail on that argument. I didn't know what the Supreme Court would do. And I told my client, look, I'm pretty sure that we can win this in Chancery. I don't know – I think it's a – people say a crapshoot. I don't think it was a crapshoot. I think you're going to get a very, very careful, thoughtful review of the issues. I can't tell you that – I'm not even sure which side of that argument I'd like to have. I think I'd – I think the better argument is our side, but you know there is precedent that could be brought to bear against us.

MR. COLLINS: What had been the reaction of other, you know, going into the Supreme Court, what had been the reaction before they decided, what had been the reaction of practitioners and academics to the decision below by Chancellor Strine? #01:11:57#

MR. ALLINGHAM: [laughs] I didn't read much of it. I was focused on the appeal. There was a sequence of commentary right after the Chancellor's decision, and then there was an almost endless avalanche of commentary after the Supreme Court's opinion. I didn't read most of the commentary after the Chancellor's decision, but I thought, generally, there was the same admiration that I had for the tone and content of the

Chancellor's decision, and I agreed with that to the extent that I read any of it. We can talk after the Supreme Court opinion or the Supreme Court phase of this about what I thought about the commentary afterwards. I did hear chatter, by the way, that, after the Chancellor's opinion, not careful commentary, but chatter that we were going to lose in the Supreme Court.

MR. COLLINS: So, what issue concerns you most on appeal? Was it the doctrinal issue? Was it the appropriateness of dealing with the issue at summary judgment stage? Other issues? What concerned you most? #01:13:28#

MR. ALLINGHAM: You know, everything concerned me. I was worried about the motion practice question. But there was no point in taking this case on – there was no point in structuring the case this way if we weren't going to take on the motion practice question. So, you know, I hoped that the same arguments we made in Chancery would prevail on that issue. I remained very worried about – partly because Justice Jacobs was on the court. I was worried about structural coercion, again because it was – it's kind of an argument that at the end of the day, because it's an amorphous concept, there isn't any you know, black and white answer to it. I didn't worry about the res judicata question, even in the Supreme Court. I thought we were right. And I thought the

Chancellor had done a great job, much better than I had done of articulating why we were right.

And on the doctrinal question, you know, I thought again, I thought the Chancellor' opinion couldn't have set it out better and we were going to try to write very good briefs, but I thought, in some sense, we were now in the hands of the people who were going to decide it and it couldn't have been presented better.

MR. COLLINS: Did you anticipate the Supreme Court's concern in that footnote 14, over the – do you remember that—

MR. ALLINGHAM: Sure.

MR. COLLINS: -- the price— #01:15:08#

MR. ALLINGHAM: I remember it well.

MR. COLLINS: -- sufficiency of price suggestion and what impact that might have in getting the benefit from offering dual protections and being able to dispose of a case at an early stage. #01:15:29#

MR. ALLINGHAM: I remember the footnote very well. I did not anticipate that we would get a footnote with that content. But there was – the Supreme Court argument was a very, very lively argument, and there was considerable skepticism expressed from the bench about the appropriateness of disposing of transaction – litigation on transactions like this on motion. And we had a discussion, the two justices who

expressed that skepticism and I, about the importance of making sure that there was not too much leverage – artificial leverage in the hands of plaintiffs because of the nature of the unavailability in all cases of resolution of a case like this on motion because of entire fairness. #01:16:33#

So, I thought we might get a three-two opinion or a four-one opinion. When we got the opinion that we got, which was unanimous, and I saw the footnote, I can only tell you – I'll just say what I thought. What I thought was that was a compromise footnote. I thought it was – I have no information to that effect, but those of us in the room who have practiced law for a long time know that that happens from time to time. And I thought that was what it was. I also thought that, as a brutal practical matter, it would not have much of an impact. And the reason I thought that was because the composition of the court was changing. And even thinking about three-justice panels, but certainly about en banc panels, the next case that came up to the Supreme Court, I thought that a majority of the Supreme Court did not share the view that you couldn't get – the arguments that were made by commentators was this is a case of very limited application because at best, it applies only to summary judgment resolutions, and that's not the way people want to do this. And I just didn't think that was the way, when it went back up, it was going to go. Whoever had

desired the footnote would either be in the ongoing reconstitution of the court, wouldn't be there anymore, or would be a minority vote if he insisted on that as a matter of doctrine rather than as a footnote that was dictum.

MR. COLLINS: Well, your sense has certainly proved to be prescient. Because I think that's, in fact, what's… . Delaware Supreme Court, I think, now has upheld a motion to dismiss at the pleading stage on MFW grounds, as it turns out, so— #01:18:56#

MR. ALLINGHAM: Absolutely. And it was interesting. So, most – almost all of the commentary that suggested that the footnote made this an opinion of extremely limited application came from outside of Delaware. I thought the people in Delaware who thought hard about the actual human beings who would be deciding these questions as they came up again didn't make the mistake that more national, general commentators were making.

MR. COLLINS: So, you may have already answered this in a way in our exchange here, but what did you think about the outcome of the case and its effect on corporate law? In Delaware? #01:19:47#

MR. ALLINGHAM: I thought it was – I thought it was a good result. I think that – I think that the balance had shifted. The balance of power had shifted, for what I thought

was an artificial reason, too much to shareholder plaintiffs. That's not to say that I am not sympathetic to shareholder plaintiffs or that I don't think there are lots of transactions that can be subject to legitimate challenge. But I thought that the absolute inability of defendants to really take on the merits because the risks were too high had really tilted the playing field. And I think that the Chancellor's opinion, and the Supreme Court's opinion affirming it, put the balance back, roughly speaking, where it belongs. There are lots of transactions in which you can't use the MFW structure for practical or legal reasons. But where it's appropriate and where it's practical, I think it strikes the right balance. #01:21:02#

So, I thought it was a good result for Delaware corporate law. It was obviously a good result for my client, so I was very happy about that. He's my client for 30 years, but he's my friend too, and I was glad for him. Because I thought – I thought it took a lot of nerve and a lot of – courage might be the wrong word because – but Perelman was willing, when nobody else was willing to do so, to give up his power. And he wanted to get this transaction done, but he was interested in whether there is a way for a controller to get the kind of standard of review that everybody else gets if the controller was willing to provide protections to shareholders.

And I thought it – I was very happy that his willingness to be a guinea pig was rewarded. I thought that was – and I think it had an impact on his reputation in the Delaware courts. I think it made a difference; it mattered.

MR. COLLINS: Did you anticipate that this deal protection structure would be extended to other kinds of controller transactions outside the merger context? #01:22:40#

MR. ALLINGHAM: Well, in some senses, it already had been, but I thought that if – I thought that if we were successful in the mergers that it would be – it would be broadly applicable. The concept is not transaction structure-dependent.

MR. COLLINS: Yes, so, I think you had mentioned earlier, Tom, that in thinking that this might be the right case and the right time to make this doctrinal argument for Delaware merger law, part of the timing was the influence of some earlier decisions and writings of some of the members of the Court of Chancery. What were some of those that caused you to think that this might be the right time and receive the right reception from that court? #01:23:38#

MR. ALLINGHAM: Well, the two that come to mind – the one that comes to mind most is Cox Communications, which the Chancellor had written. Also, Siliconix. But what I

thought, in my mind anyway, summarized a lot of different threads that had popped up from time to time in Chancery was Cox Communications. And I thought – when I met with my corporate partners, and ultimately with my client in the meetings leading up to the decision to structure this transaction this way, the Cox line of cases was an important – a very important -- contributor to my view expressed to my client and my corporate partners that we had a very good chance in Chancery. I expressed the view that I thought we had – we had, certainly had a puncher's chance, maybe better, in the Supreme Court, but I don't think that – I didn't think at that time that the fact that there were Chancery decisions going this way was going to be much of an impact on the Supreme Court. It was going to be whether the kind of theoretical and historical arguments that I had been mulling over in my mind -- even before Cox and Siliconix and those cases -- were going to be what would prevail or fail to prevail in the Supreme Court. #01:25:19#

What I will say is, you asked me earlier about what I thought about the Chancellor's opinion. One of the reasons I was so delighted with the Chancellor's opinion is that I actually thought it was such a good opinion that I thought there was a chance that – I thought there was a chance that – the opinion itself would influence the Supreme Court. It was

so well thought out, it was so respectful, and it was so comprehensive that I thought it would – it might – but that was much later; when I was talking to my client, the Cox and Siliconix cases informed my opinion that we had a really good chance in Chancery. Even if we didn't get a judge who had written on those issues, I thought all the judges on Chancery would be affected by those opinions. But in the Supreme Court, who knew?

MR. COLLINS: And it's interesting, the Supreme Court, in – for many of the arguments, quoted, at length, from the Chancellor's opinion.

MR. ALLINGHAM: Yes.

MR. COLLINS: To support the rationale for some of the various arguments or objections that were made to the, you know, to the doctrine that was being advanced. #01:26:50#

MR. ALLINGHAM: I don't mean I don't ever want to – I'm retired, so I'm not trying to attract new clients, but I always hate to minimize my own contribution to some landmark decision. But in this case, honestly, I mean, I tried to write a series of great briefs, but the Chancellor's opinion was as good a brief as you could hope for.

MR. COLLINS: Tom, thank you. It's been a real pleasure to listen to you talk about this particular case and to put it in context of a very long and successful career, but

it's quite an outcome and important to the development of our corporate law in this state and I am pleased that you were able to take the time to tell us about it.

MR. ALLINGHAM: Well, it was great fun. I appreciated the opportunity to do it.

MR. COLLINS: Thanks.

#01:27:45#

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