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Transaction ID 27043518
Case No. 4893-



IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALAN R. KAHN,)	
)	
Plaintiff,)	
)	
v.)	C.A. No.
)	
CHARLES E. HURWITZ, SHAWN M.)	
HURWITZ, J. KENT FRIEDMAN,)	
ROBERT J. CRUIKSHANK, EZRA)	
LEVIN, STANLEY D. ROSENBERG,)	
MICHAEL J. ROSENTHAL and)	
MAXXAM INC.,)	
)	
Defendants.)	

COMPLAINT

Plaintiff Alan R. Kahn ("Plaintiff") alleges as follows upon personal knowledge with respect to himself and his actions and upon information and belief as to all other allegations:

NATURE OF THE ACTION

1. Plaintiff brings this action individually and as a class action on behalf of the public shareholders of MAXXAM Inc. ("MAXXAM" or the "Company") for injunctive and other appropriate relief in connection with a plan (the "Going-Dark Plan") approved by the Company's board of directors, the Individual Defendants herein, to de-list MAXXAM common stock from the NYSE Amex and terminate MAXXAM's status as an SEC-regulated entity. Defendants propose to use MAXXAM's own cash to cash out the public shareholders of MAXXAM through a coercive series of transactions that would fully cash-out holders of less than 250 shares at an unfair price, pay shareholders who would have been entitled to fractional shares the same unfair price, and leave holders of 250 or more shares

with an illiquid equity interest in the Company which will no longer be required to make any regular financial disclosures. The transaction is not financially fair, and is the product of a flawed process, and the public minority shareholders are being deprived of any meaningful vote on the transaction because MAXXIM's controlling shareholder intends to dictate the outcome of the shareholder vote on the Plan.

THE PARTIES

2. Plaintiff Alan R. Kahn has been a shareholder of MAXXAM at all times relevant hereto.

3. MAXXAM is a Delaware corporation with principal executive offices located at 1330 Post Oak Boulevard, Suite 2000, Houston, Texas 77056. Through its subsidiaries, MAXXAM primarily conducts operations in two industries: real estate; and horse and greyhound racing operations. MAXXAM's racing operations include its ownership and operation of Sam Houston Race Park, a Class 1 horse racing in Houston, Texas, and a greyhound racing facility in Harlingen, Texas. MAXXAM's real estate operations include residential and commercial real estate investment and development primarily in Puerto Rico and Arizona, and to a limited extent in California and Texas.

4. MAXXAM has two classes of stock: Common Stock and Class A Preferred Stock. Preferred Stock has ten votes per share; Common Stock has one vote per share. Preferred Stock is also entitled to a \$0.05 non-cumulative preferential dividend if a dividend is declared on the Common Stock (no dividends of any kind have been declared for many years and the Company has publicly stated that it has no intention of declaring any dividends). Preferred Stock is also entitled to a \$0.75 per share preference in a liquidation of the Company (after payment of all creditor claims).

MAXXAM Common Stock is traded on the NYSE Amex (formerly known as the “American Stock Exchange”) under the symbol “MXM.”

5. Defendant Charles E. Hurwitz (“C. Hurwitz”) has been a director of the Company since August 1978 and Chairman of the Board of Directors and Chief Executive Officer of the Company since March 1980. C. Hurwitz owns or controls approximately 67.2% of the Company’s Common Stock and 99.2% of the Company’s 10-vote per share preferred stock, together representing 85.2% of the total voting power.

6. Defendant Shawn M. Hurwitz (“S. Hurwitz”) has been a director and Co-Vice Chairman of the Company since April 2006 and President of the Company since May 2007. S. Hurwitz is the son of C. Hurwitz.

7. Defendant J. Kent Friedman (“Friedman”) has been a director and Co-Vice Chairman of the Company since May 2000. Friedman, a former MAXXAM employee, is a partner in the law firm of Kelly Hart & Hallman, LLP, and Friedman personally serves as the Company’s outside General Counsel.

8. Defendant Robert J. Cruikshank (“Cruikshank”) has been a director of the Company since May 1993. Cruikshank has been a house director for numerous companies owned or controlled from time to time by C. Hurwitz, including Kaiser Aluminum Corp. (“Kaiser Aluminum”)

9. Defendant Ezra Levin (“Levin”) has been a director of the Company since May 1978. Levin is a partner and co-chair of the law firm of Kramer Levin Naftalis & Frankel LLP, and has acted as counsel for various corporate enterprises associated with C. Hurwitz for over 25 years. In a book detailing Hurwitz’s takeover battle for Pacific Lumber Company, Levin was described as C. Hurwitz’s “consiglieri,” who guided C.

Hurwitz through years of SEC investigations, corporate bankruptcy proceedings, civil fraud charges, and battles with federal and state regulators. *The American Lawyer* magazine has likewise reported on the “close friendship” between Hurwitz and Levin. Like Cruikshank, Levin has also been a house director for C. Hurwitz, including a stint at Kaiser Aluminum, and was trustee of C. Hurwitz’s personal business trust from 1974 to 1995. On December 12, 2008, Levin and MAXXAM entered into an agreement whereby phantom shares held by Levin would convert to cash in the event the Company should cease to be a public reporting company.

10. Defendant Stanley D. Rosenberg (“Rosenberg”) has been a director of the Company since June 1981. Rosenberg has also been C. Hurwitz’s business associate and attorney for over 25 years. *The Houston Press* has referred to C. Hurwitz and Rosenberg as best friends, and reported that C. Hurwitz had provided sweetheart land deals “to his cash-strapped buddy Stanley Rosenberg.” Like Cruikshank and Levin. Rosenberg has also been a house director for C. Hurwitz, including a stint at Kaiser Aluminum.

11. Defendant Michael J. Rosenthal (“Rosenthal”) has been a director of the Company since May 2000.

CLASS ACTION ALLEGATIONS

12. Plaintiff brings this action on his own behalf and as a class action pursuant to Rule 23 of the Rules of the Court of Chancery, on behalf of all holders of MAXXAM stock who are being and will be harmed by defendants’ actions described below (the “Class”). Excluded from the Class are defendants herein and any person, firm, trust, corporation, or other entity related to or affiliated with any defendants.

13. This action is properly maintainable as a class action because:

(a) The Class is so numerous that joinder of all members is impracticable. There are approximately 956,000 shares of MAXXAM common stock outstanding, not owned or controlled by C. Hurwitz or other corporate insiders. Moreover, by defendants' own admissions, there are currently more than 300 MAXXAM shareholders of record.

14. There are questions of law and fact which are common to the Class and which predominate over questions affecting any individual Class member. The common questions include the following:

(a) whether defendants have breached their fiduciary duty of loyalty with respect to plaintiff and the other members of the Class in connection with the Going-Dark Plan; and

(b) whether plaintiff and the other members of the Class would suffer irreparable injury were the transactions complained of herein consummated.

15. Plaintiff's claims are typical of the claims of the other members of the Class and plaintiff does not have any interests adverse to the Class.

16. Plaintiff is an adequate representative of the Class, has retained competent counsel experienced in litigation of this nature, and will fairly and adequately protect the interests of the Class.

17. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for the party opposing the Class.

18. Defendants have acted on grounds generally applicable to the Class with respect to the matters complained of herein, thereby making appropriate the relief sought herein with respect to the Class as a whole.

DEFENDANTS' GOING DARK PLAN

19. C. Hurwitz has long operated MAXXAM as his personal fiefdom, larding its board of directors with compliant directors who have close personal and/or financial ties or who are otherwise beholden to C. Hurwitz.

20. *BusinessWeek* and *FORTUNE* have listed MAXXAM on its roster of "The Worst Boards of Directors" in America. *BusinessWeek* listed MAXXAM's board as the 10th worst, noting that it was "dominated by CEO" C. Hurwitz. *FORTUNE* placed MAXXAM on its list of the six worst boards, citing the Company's poor corporate governance practices. The magazine *CORPORATE BOARD MEMBER* named MAXXAM's board one of five "Lollapa-losers." MAXXAM's board has largely ignored the criticism. When certain shareholders, supported by CalPERS and the New York State Common Retirement Fund, agitated for change on the board in 1999, MAXXAM responded by moving its annual meeting from downtown Houston to Point Blank, Texas, at the edge of the Sam Houston National Forest, 85 miles away and 20 miles from the nearest hotel.

21. In April 1997, the Delaware Court of Chancery ruled in a case brought by public minority MAXXAM shareholders that C. Hurwitz had engaged in self-dealing in connection with loans that were to be found unfair to the Company. See *In re MAXXAM, Inc./Federated Development S'holders Litig.*, 1997 WL 187317 (Del. Ch.). Following a nine-day trial, the Court found that the defendants, including C. Hurwitz, had failed to

show the fairness of a 1987 loan that MAXXAM made to C. Hurwitz's private business trust. The Court also ruled that the defendants had failed to demonstrate the fairness of a 1991 transaction in which C. Hurwitz's trust sold to MAXXAM the underlying collateral, and MAXXAM then forgave the loan. Following this finding of liability, the case was settled for approximately \$20 million, the plaintiffs having sought \$27 million.

22. Like all companies whose shares are publicly traded on a national securities exchange such as the NYSE Amex, MAXXAM is required under various SEC rules and regulations to make regular filings with the SEC that provide shareholders with important disclosures regarding the Company's operations and finances. Such disclosures are critical to shareholders in evaluating their investment in the Company, and represent the only source of material information released by the Company and verified as true and accurate under SEC rules. Likewise, the ability to trade MAXXAM's common stock on the NYSE Amex, a sophisticated, national exchange that provides accurate quotes and low transaction fees, is a significant benefit to MAXXAM's minority shareholders.

23. However, these benefits to the public minority shareholders are immaterial to MAXXAM's majority shareholder, C. Hurwitz, who has unlimited, direct access to the board and Company management and does not need public SEC filings to inform himself of the Company's finances and operations. Likewise, as a majority owner who does not engage in any open market sales or purchases of MAXXAM common stock, C. Hurwitz does not benefit from a low-cost and open securities exchange such as the NYSE Amex.

24. Thus, the Going-Dark Plan severely impairs the investment of Plaintiff and the other public minority shareholders of MAXXAM while benefitting C. Hurwitz by

increasing his proportionate ownership of the Company without any cost to or burden upon him.

25. Defendants announced the Going-Dark Plan through a press release on August 24, 2009 – the last week of August – and filed a preliminary proxy statement with the SEC just two days later on August 26. Among other things, the preliminary proxy statement confirms that C. Hurwitz has no intention of selling the Company or any of his shares.

26. The Going-Dark Plan provides for a 1-for-250 Reverse Stock Split of the Company's Common Stock and Preferred Stock. Shareholders who own fewer than 250 shares will be cashed out at \$10.77 for each share of Common Stock and \$11.52 for each share of Preferred Stock. No fractional shares will be issued; those shareholders who would have been entitled to fractional shares will receive cash (without interest) in the amount of \$10.77 for each share of Common Stock. MAXXAM expects to have just 180 shareholders following completion of the Going-Dark Plan, at which point MAXXAM intends to terminate its SEC-registered status and delist from the NYSE Amex.

27. Following the delisting, MAXXAM common stock will, if the Company permits, trade on the limited information tier of the "pink sheets" market for over-the-counter securities. The pink sheets is a quotation system that displays quotes from broker-dealers for certain over-the-counter securities. It is not a stock exchange, is not a NASD broker-dealer, and is not registered with the SEC. Pink sheets stocks are generally thinly traded, micro-cap companies that trade over-the-counter because they cannot meet the listing requirements for trading on a national securities exchange, such as the NYSE Amex. For these and other reasons, pink sheets stocks are often considered extremely

risky investments. Indeed, major brokerage houses often prohibit their analysts from covering pink sheets stocks.

28. Defendants' stated reasons for the Going-Dark Plan are pretextual and designed to conceal C. Hurwitz's selfish motivations to save negligible amounts of money by eliminating valuable benefits to the public minority shareholders while increasing his proportionate ownership of the Company.

29. For instance, Defendants assert that the Going-Dark Plan would save \$1.5 million annually through lower administrative and other fees. That figure, however, is inflated, does not represent the true cost savings for the Company, and is completely unsupported by any explanation in the preliminary proxy. Moreover, the cost savings, if any, pales in comparison to the value to the public minority shareholders of maintaining an NYSE Amex listing and regular financial reporting. In the absence of SEC-mandated financial reporting, MAXXAM shareholders will be left completely in the dark as to reliable, company-specific information. MAXXAM is unusually secretive in making public disclosures. Amazingly, the Company does not even maintain a website. (C. Hurwitz, by contrast, maintains his own personal, shrine-like website at www.charleshurwitz.com, which claims copyright protection by MAXXAM.)

30. The Going-Dark Plan was conceived and approved by the Individual Defendants without any safeguards to protect the interests of MAXXAM minority shareholders, and is not entirely fair to MAXXAM minority shareholders. Specifically, the Individual Defendants failed to provide independent representation for MAXXAM minority shareholders or allow any say for MAXXAM minority shareholders in the transaction. There was no special committee process and no "majority-of-the minority"

condition for shareholder approval of the Plan. Although MAXXAM will issue a proxy statement and hold a shareholders meeting, the vote is a foregone conclusion because C. Hurwitz controls 85.2% of the vote and will vote his shares to approve the Going-Dark Plan.

31. In addition, the financial advisor selected by the Individual Defendants was hopelessly conflicted due to its ties to C. Hurwitz, and the fairness opinion issued by the advisor cannot be used by the Individual Defendants to claim that the Going-Dark Plan is fair. The Individual Defendants' chosen financial advisor, WoodRock & Co. ("WoodRock"), suffers from disabling conflicts due to the close personal and financial ties between that firm's principals and C. Hurwitz, and cannot act independently. WoodRock is a small, Houston-based firm with only seven managing directors and two individuals who serve as advisors. C. Hurwitz and WoodRock advisor Fred Zeidman are next door neighbors in Houston. C. Hurwitz and his wife are also major contributors to charitable organizations headed by Zeidman and Woodrock Managing Director and Principal John P. Dennis III, with C. Hurwitz's wife serving as an advisor to one of John P. Dennis III's charitable organizations. Notably, the fairness opinion which defendants rely on to support the Going-Dark Plan is signed by John P. Dennis III.

32. The Going-Dark Plan is also at an unfair price that woefully undervalues many of the Company's assets, and pays an unjustified \$0.75 premium for Preferred Stock. (Preferred Stock would be entitled to the \$0.75 premium only in a liquidation of the Company and only after all other creditor claims had been satisfied). In coercing the minority shareholders to surrender some or all of their shares at an unfair price,

defendants have violated 8 *Del. C.* §155(2), which requires MAXXAM to pay “fair value” for fractional shares.

33. Among other things, the Going-Dark Plan fails to properly value the Company’s racetrack assets, which have the potential for explosive earnings growth if a legislative effort succeeds in legalizing slot machine gambling at Texas racetracks and dog tracks. Though previous efforts to create “racinos” at Texas racetracks and dog tracks have fallen short in the legislature when the State was operating at a budget surplus, the current economic climate is driving politicians unwilling to pursue tax increases to consider legalized gambling as a new source of revenue and job creation. Gambling is already legal in Texas as to horse and dog races, and so the proposal to install slot machine and other video gambling machines at venues that already permit gambling in other forms is viewed as a natural step that avoids the pitfalls of full blown Las Vegas-style casinos. Notably, bordering states of Louisiana, Oklahoma and New Mexico have legalized gambling in recent years by creating similar racinos, which draw many Texans in the absence, currently, of any Texas-based racinos. Texas Governor Rick Perry has publicly supported the effort to create racinos at existing race and dog tracks in Texas.

34. Legalized slot machine gambling will significantly increase the value of MAXXAM’s racetrack properties. MAXXAM owns and operates two of a total of eight racetracks/dogtracks in the State that would be eligible for slot machine operations, and is poised to capture a large share of the market for Texas gaming operations. Woodrock’s financial analysis acknowledges that the adoption of gaming legislation “could have a

material impact on the value of the Company.” Nonetheless, Woodrock did not incorporate that impact into any part of its financial analysis.

35. Significantly, the market reaction to the Going-Dark Plan is decidedly negative. MAXXAM Common Stock currently trades at under \$10 per share, as investors with more than 250 shares are rushing to dump their excess holdings rather than keep what will become an illiquid security in a Company no longer subject to SEC reporting requirements or any other reliable source of company-specific information.

36. As a result of Defendants’ wrongful conduct alleged herein, Plaintiff and all other members of the Class will suffer irreparable injury absent injunctive relief in this action.

37. Plaintiff has no adequate remedy at law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and on behalf of the Class, prays for the following relief:

- A. Declaring this action to be a proper class action and certifying Plaintiff as class representative and Plaintiff’s counsel as class counsel;
- B. Preliminarily and permanently enjoining defendants from effectuating the Going-Dark Plan;
- C. Rescinding the Going-Dark Plan if it is consummated before final judgment is entered herein;
- D. Awarding damages, including rescissory damages, in favor of Plaintiff and the Class against all Defendants, jointly and severally, together with interest thereon;
- E. Awarding Plaintiff reasonable attorneys’ fees and expenses; and

F. Granting such other and further relief as the Court deems just and proper.

ROSENTHAL, MONHAIT & GODDESS, P.A.

/s/ Joseph A. Rosenthal

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