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# *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*: Deal Price as a Ceiling in Statutory Appraisal Actions

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# Note

## *VERITION PARTNERS MASTER FUND LTD. V. ARUBA NETWORKS, INC.*: DEAL PRICE AS A CEILING IN STATUTORY APPRAISAL ACTIONS

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In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*,[1] the Delaware Supreme Court addressed whether the lower court properly determined the fair value of stockholder shares in an appraisal proceeding.[2] The court held the Delaware Court of Chancery[3] abused its discretion when it used the unaffected thirty-day market price average[4] as fair value[5] over the deal price less synergies.[6] The court correctly held that there is no definitive formula for determining fair value but that the deal price less synergies

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1. 210 A.3d 128 (Del. 2019) (en banc) (per curiam).

2. *Id.* at 130. Appraisal proceedings are cases brought by minority shareholders dissenting from a merger who argue the deal price was inadequate. Appraisals are a statutory right that allow for the judiciary to assess the fair value of the shares. See *infra* Section II.A for a more detailed discussion.

3. This Note will refer to the Delaware Court of Chancery as the "Delaware Court of Chancery," the "court of chancery," and the "chancery court" interchangeably, and the Delaware Supreme Court as the "Delaware Supreme Court" or the "court."

4. The unaffected thirty-day market price average is "the thirty-day average market price at which . . . shares [were] traded before the media reported news of the [merger]." *Aruba*, 210 A.3d at 129.

5. Fair Value and Fair Market Value ("FMV") should not be confused here. Fair value is

> [t]he value ascribed to stock or partnership interests in a corporation or other entity when those interests are involuntarily sold because of the actions of the entity's majority or controlling owners. Fair value is used when fair market value would be inequitable to a dissenter or involuntary seller, as in a merger or squeeze-out. The fair value of a dissenting shareholder's stock is generally determined without applying the marketability or minority discounts that would apply in a fair-market-value determination.

*Value*, BLACK'S LAW DICTIONARY (11th ed. 2019). Whereas FMV is "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction. *Id.*

6. *Aruba*, 210 A.3d at 130. For a definition of deal price less synergies, see *infra* note 7.

approach[7] was the best indicator of fair value because the merger was a fully informed,[8] arm's-length transaction,[9] that resulted from a robust sales process.[10] The practical result of the court's holding will likely be a decline in appraisal proceedings, more specifically appraisal arbitrage,[11] in fully informed, arm's-length transactions.[12] This is because the incentives of appraisal arbitrage are removed by the *Aruba* holding.[13] The deal price likely will now serve as the ceiling for fair value determinations, and the likelihood of the court awarding a fair value over the agreed upon deal price, in fully

7. A requirement of Delaware General Corporation Law section 262 is that the determination of fair value of shares must exclude any amount attributable to synergistic merger gains. DEL. CODE ANN. tit. 8, § 262(h) (2018). Synergy, used in the merger context, is "the concept that the combined value and performance of two companies will be greater than the sum of the separate individual parts." Adam Barone, *Synergy*, INVESTOPEDIA (Mar. 10, 2020), https://www.investopedia.com/terms/s/synergy.asp. A strategic bidder in a merger transaction generally includes synergistic value in their offered deal price. DFC Glob. Corp. v. Muirfield Value Partner, L.P., 172 A.3d 346, 371 (Del. 2017) ("Part of why the synergy excision issue can be important is that it is widely assumed that the sales price in many M&A deals includes a portion of the buyer's expected synergy gains, which is part of the premium the winning buyer must pay to prevail and obtain control."). Deal price less synergies, then, is the calculation of fair value using the agreed upon deal price of the merger minus any synergistic value included in the deal price.

8. Fully informed, in the merger context, means the level of information buyers have access to regarding the seller's business. The deal price is likely to be considered fair when buyers are "fully informed" when accepting a deal price. For example, in *DFC*, the Delaware Supreme Court emphasized that "a merger . . . against the back drop of *a rich information base* . . . is probative of the company's fair value." 172 A.3d at 366 (emphasis added). Access to material, nonpublic information also lends to a transaction being fully informed. *Aruba*, 210 A.3d at 140.

9. An arm's-length transaction is "[a] transaction between two unrelated and unaffiliated parties," or "a transaction between two parties, however closely related they may be, conducted as if the parties were strangers, so that no conflict of interest arises." *Transaction*, BLACK'S LAW DICTIONARY (11th ed. 2019). The importance of an arm's-length transaction is the assumption that no conflict of interest and relatively equal bargaining power will result in a fair deal price.

10. *See infra* Section IV.A. A robust sales process, in this case, refers to the degree of competition and barriers to entry in the sale process of the merger. Low barriers to entry for potential buyers and higher degrees of competition lead to a "robust sales process" and lend support to deal price as fair value. *See Aruba*, 210 A.3d at 136–39, 142 (holding deal price less synergies was indicative of fair value where six potential buyers were contacted and none were interested); Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 28 (Del. 2017) (finding a competitive sale process where Silver Lake competed with interested parties "at every stage, both pre-signing and during the go-shop"); *DFC*, 172 A.3d at 350, 376 ( finding a "competitive process of bidding" where "every logical buyer" was contacted, three potential buyers expressed interest, and two engaged in negotiations, as well as, citing "failure of other buyers to pursue the company when they had a free chance to do so" as a factor).

11. Appraisal arbitrage is the practice of hedge funds purchasing shares of a corporation set to be acquired in a merger with the intention of asserting appraisal rights to obtain a fair value judgment above the deal price. Richard A. Booth, *The Real Problem with Appraisal Arbitrage*, 72 BUS. LAW. 325, 325 (2017).

12. *See infra* Section IV.B.

13. *See infra* Section IV.B.

informed, arm's-length transactions with a robust sales process, is greatly diminished.[14]

After synthesizing Delaware's appraisal jurisprudence, this Note calls for the Delaware legislature to amend section 262 of the Delaware General Corporation Law to reduce judicial uncertainty in fair value determinations.[15] Despite the chancery court's lauded expertise in business law, the judge's themselves have called for changes to the Delaware appraisal process and readily admit they are uncertain or feel unqualified to make fair value determinations.[16] But, because the statute plainly requires the chancery court to make the determination, they are barred by statute from utilizing neutral valuation experts.[17] By amending the statute to mandate a court-appointed valuation expert, judicial uncertainty in fair value determinations could be reduced, if not eliminated.[18]

## I. THE CASE

Hewlett-Packard Company ("HP") approached Aruba Networks, Inc. ("Aruba") about a potential merger[19] in August 2014.[20] Aruba proceeded to negotiate with HP and also shopped the deal to five other bidders, but none showed any interest.[21] After much back-and-forth negotiation, Aruba accepted HP's offer of $24.67 per share at a time when its stock price was $18.37.[22] Two weeks later, news of the deal leaked to the media and Aruba released its quarterly results, which beat analyst expectations, causing Aruba's stock to jump to $24.81 per share.[23] Shortly after news of the deal leaked, Aruba and HP formally announced the merger at a price of $24.67

14. *See infra* Section IV.B.

15. *See infra* Section IV.C.

16. *See infra* Section IV.C.

17. *See infra* Section IV.C.

18. *See infra* Section IV.C.

19. A merger is "[t]he absorption of one organization . . . that ceases to exist into another that retains its own name and identity and acquires assets and liabilities of the former." *Merger*, BLACK'S LAW DICTIONARY (11th ed. 2019).

20. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam).

21. *Id.*

22. *Id.*

23. *Id.*

per share and a final passive market check[24] was permitted, but no superior bid emerged.[25] The deal closed on May 18, 2015.[26]

Stockholders, Verition Partners Master Fund Ltd. and Verition Multi-Strategy Master Fund Ltd. (together, "Verition") petitioned the Delaware Court of Chancery for appraisal of fair value of shares in Aruba after its merger with HP was finalized.[27] Appraisal is a shareholder's right guaranteed under Delaware General Corporation Law section 262.[28] Both parties advocated for their preferred fair value calculation.[29] After the trial, the Vice Chancellor—*sua sponte*—requested supplemental briefing from the parties in response to the Supreme Court of Delaware's opinion in *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*,[30] which was published shortly after post-trial oral arguments.[31] In the supplemental briefs, Aruba dropped deal price less synergies as its preferred fair value calculation.[32] Aruba then argued, for the first time, that its preannouncement stock price (the thirty-day average unaffected market price) of $17.13 per share was the fair value.[33] The court of chancery, in its post-trial opinion, agreed with Aruba's post-trial supplemental brief that the fair value of the stock was its thirty-day average unaffected market price of publicly traded shares at $17.13 per share.[34] According to Vice Chancellor Laster, the thirty-day unaffected market price was the better fair value calculation because the deal price less synergies valuation method[35] continued to incorporate theoretical reduced agency costs, an element of value from the merger that inflated Aruba's value as a going concern.[36] After the court of chancery issued its opinion, Verition

24. A market check is a search, typically conducted by the seller in a merger transaction, to determine whether other interested buyers will bid more than the proposed deal price. *Glossary of Stock Market Terms*, NASDAQ, https://www.nasdaq.com/glossary/m/market-check. A market check—whether active or passive—in a change-of-control transaction, such as the one here, is necessary for compliance with Delaware's *Revlon* Doctrine (which will not be discussed in this Note). Kobi Kastiel, *Delaware Supreme Court Holds That Revlon Does Not Require Active Market Check*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 24, 2015), https://corpgov.law.harvard.edu/2015/01/24/delaware-supreme-court-holds-that-revlon-does-not-require-active-market-check/.

25. *Aruba*, 210 A.3d at 130.

26. *Id.*

27. *Id.*

28. *Id.*; *see* DEL. CODE ANN. tit. 8, § 262(a), (h) (2018) (granting dissenting stockholders the statutory right to an appraisal by the court of chancery for determination of the fair value of the shares exclusive of any element of value arising from the merger).

29. *Aruba*, 210 A.3d at 131.

30. 177 A.3d 1 (Del. 2017).

31. *Aruba*, 210 A.3d at 131.

32. *Id.*

33. *Id.*

34. *Id.*

35. *See supra* note 7 for an explanation of the deal price less synergies valuation method.

36. *Aruba*, 210 A.3d at 32.

moved for reargument, which the court denied.[37] Verition appealed to the Delaware Supreme Court.[38]

## II. LEGAL BACKGROUND

Appraisal proceedings are a statutory right granted to shareholders in Delaware.[39] The purpose of an appraisal is to ensure petitioners "receive fair compensation for their shares in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's-length transaction," not to ensure they receive the highest possible value.[40] Section II.A discusses the origins of Delaware's appraisal statute.[41] Section II.B examines the rise of statutory appraisal cases.[42] Section II.C reviews valuation methods utilized in appraisal proceedings.[43] Finally, Section II.D analyzes the progression of Delaware's use of deal price as evidence of "fair value."[44]

### *A. The Delaware Appraisal Statute*

Prior to the enactment of appraisal rights, major decisions about a corporation, such as mergers, required unanimity from stockholders of the corporation.[45] This created a veto power and often allowed for a minority stockholder[46] to obstruct corporate action.[47] To address this problem,

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37. *Id.* at 132 n.24.

38. *Id.*

39. DEL. CODE ANN. tit. 8, § 262 (2018). Delaware is not the only jurisdiction to grant appraisal rights. Shareholders dissenting from a merger have a statutory right to an appraisal in virtually all jurisdictions. 19 AM. JUR. 2D *Corporations* § 2192 (2015).

40. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017).

41. *See infra* Section II.A.

42. *See infra* Section II.B.

43. *See infra* Section II.C.

44. *See infra* Section II.D.

45. *See* Chicago Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934) ("At common law it was in the power of any single stockholder to prevent a merger."); *In re* Appraisal of ENSTAR Corp., No. 7802, 1986 WL 8062, at *5 (Del. Ch. July 17, 1986) ("At common law there was no provision for an appraisal because unanimous consent of the stockholders was necessary to warrant certain acts such as a consolidation or merger.").

46. A minority stockholder or minority shareholder is someone who owns less than fifty percent of the total shares of a corporation's stock or someone who owns shares without voting control of the corporation. *Shareholder*, BLACK'S LAW DICTIONARY (11th ed. 2019).

47. *In re* Appraisal of Transkaryotic Therapies, Inc., No. Civ. A. 1554-CC, 2007 WL 1378345, at *3, (Del. Ch. May 2, 2007) ("Historically, all major corporate decisions required unanimous shareholder consent. This requirement created a veto power and allowed even a single shareholder to obstruct corporate action."); *see also* Voeller v. Neilston Warehouse Co., 311 U.S. 531, 535 n.6 (1941) ("At common law, unanimous shareholder consent was a prerequisite to fundamental changes in the corporation. This made it possible for an arbitrary minority to establish a nuisance value for its shares by refusal to coöperate [sic].").

legislatures enacted laws permitting corporations to effectuate fundamental changes without a unanimous vote.[48] In return, appraisal rights were statutorily established to compensate stockholders for the loss of veto power and gave dissenters the right to recover the cash value of their shares.[49]

In Delaware, the appraisal remedy is statutory.[50] Appraisal was intended to provide dissenting shareholders a remedy for the loss of voting rights in a fundamental corporate activity through "an independent judicial determination of the fair value of their shares" being taken from them.[51] If shareholders opt to seek appraisal, they forego their right to exchange shares at the negotiated deal price and instead accept the fair value for their shares as determined by the court of chancery.[52] Under section 262(b) of the Delaware appraisal statute, appraisal rights are only available in mergers and consolidations,[53] but the statute allows corporations to grant appraisal rights in other specified circumstances in its certificate of incorporation.[54] For a stockholder to have a valid appraisal claim, they must first perfect their appraisal rights.[55] To perfect their appraisal rights, the stockholder must deliver a separate written demand for appraisal to the corporation before the stockholder vote on the merger.[56] A stockholder must also not vote in favor of the merger or consent to it in writing.[57] Within 120 days following the effective date of the merger, any stockholder who has perfected their rights may file for appraisal in the court of chancery.[58] Through an appraisal

48. *See In re* Appraisal of ENSTAR Corp., 1986 WL 8062, at *5 ("Ever since 1899 Delaware law has permitted a stockholder's interest to be terminated by the payment of its value in the case of a [merger] . . . . Initially a super majority vote of all the stockholders was required, but now only a simple majority need approve a merger . . . .").

49. *See* Ala. By-Prods. Corp. v. Cede & Co., 657 A.2d 254, 258 (Del. 1995) (describing appraisal as "a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions"); *In re* Appraisal of ENSTAR Corp., 1986 WL 8062, at *5 ("The granting of appraisal rights to a dissenting stockholder . . . was given, at least in part, in compensation for the lost right of the minority to defeat a merger.").

50. DEL. CODE ANN. tit. 8, § 262 (2018); *see* Kaye v. Pantone, Inc., 395 A.2d 369, 374 (Del. Ch. 1978) ("The right to an appraisal in a merger proceeding is entirely a creature of statute.").

51. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 19 (Del. 2017) (citing *Ala. By-Prod. Corp.*, 657 A.2d at 258).

52. tit. 8, § 262; *see* Gilliland v. Motorola, Inc., 873 A.2d 305, 312 (Del. Ch. 2005) ("'[A] stockholder who seeks appraisal must forego all of the transactional consideration and essentially place his investment in limbo until the appraisal action is resolved.' As part of this risk, a minority stockholder faces the prospect of receiving less than the [deal] price in the appraisal action." (citing Turner v. Bernstein, 776 A.2d 530, 547–48 (Del. Ch. 2000)).

53. tit. 8, § 262(b).

54. *Id.* § 262(c).

55. *Id.* § 262(d).

56. *Id.*

57. *Id.* § 262(a).

58. *Id.* § 262(e).

proceeding, the chancery court is charged with using all relevant factors to determine "the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger."[59] Following its decision, the court of chancery directs payment of the appraised amount, in addition to interest, to each dissenting stockholder.[60]

### *B. The Rise of Statutory Appraisal Cases*

The appraisal remedy was long discarded as insignificant, but that was profoundly changed by appraisal arbitrage.[61] Appraisal arbitrage is a common investment strategy in which stockholders, generally hedge funds, acquire shares after an announcement of a merger, with the

> specific intention of exercising the statutory stockholder appraisal right found in [section] 262; in the subsequent appraisal action the court awards the appraisal petitioners what the court determines to be the fair value of the target, which, if the target was undervalued in the transaction, represents a positive return on the arbitrage investor's initial investment.[62]

Dissenting stockholders are also incentivized to practice appraisal arbitrage because they are entitled to receive interest on the court's fair value award at an above market rate, compounded quarterly, for the period the suit was pending.[63]

The basic appraisal arbitrage opportunity granted by appraisal rights stems from *In re Appraisal of Transkaryotic Therapies, Inc*.[64] Section 262 only allows shareholders who abstained or voted against the merger to assert appraisal rights.[65] In the *Transkaryotic* decision, the court held that investors that buy target company shares *after* the record date for the vote on a merger can still assert appraisal rights.[66] This decision gives a timing advantage to hedge funds because the hedge funds can delay purchasing shares until after

59. *Id.* § 262(h).

60. *Id.* § 262(i).

61. *See* Jay B. Kesten, *The Uncertain Case for Appraisal Arbitrage*, 52 WAKE FOREST L. REV. 89, 89 (2017) (noting that appraisal arbitrage was "[l]ong dismissed as a 'sleepy corporate [law] backwater'—rarely employed and economically insignificant" (quoting Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1553 (2015))).

62. Merion Capital LP v. BMC Software, Inc., C.A. No. 8900–VCG, 2015 WL 67586, at *1 (Del. Ch. Jan. 5, 2015).

63. tit. 8, § 262(h). 2016 amendments to section 262(h) allow corporations to prepay appraisal claimants an amount of their choosing to reduce the accrual of interest payments. *Id.*

64. No. Civ. A. 1554-CC, 2007 WL 1378345, at *1 (Del. Ch. May 2, 2007).

65. tit. 8, § 262(a) ("Any stockholder . . . who has neither voted in favor of the merger . . . nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery . . . .).

66. *In re Transkaryotic Therapies*, 2007 WL 1378345, at *3–*4.

they have reviewed information on the sale process, fairness of the price, and all other pertinent information at a time much closer to the merger date.[67] The chancery court, in its opinion, acknowledged the possibility of appraisal arbitrage but chose to defer to the legislature "to avoid the evil" of appraisal arbitrage.[68]

Following *Transkaryotic*, a dynamic market for appraisal rights developed.[69] The number of appraisal claims and overall value at stake has increased dramatically due to the tremendous growth of hedge funds using appraisal arbitrage to take advantage of the appraisal statute.[70] From 2006 to 2016, there was a consistent increase in appraisal petitions filed,[71] including a sharp rise from 2012 to 2016, where appraisal suits in Delaware rose 267% according to an analysis of Bloomberg Law data.[72] The ten most frequent petitioners who brought appraisal suits were mainly hedge funds and private equity firms that were actively pursuing arbitrage investment strategies.[73] These ten petitioners filed more than half of the 433 appraisal petitions filed between 2006 and 2018.[74]

### *C. Determining Fair Value*

Section 262(h) established the Delaware Court of Chancery's mandate to determine the value of shares that qualify for appraisal.[75] The Delaware

67. Philip Richter, Robert C. Schwenkel, David N. Shine & Gail Weinstein, *The Rise of Delaware Appraisal Arbitrage: A Survey of Cases and Some Practical Implications*, INSIGHTS: CORP. & SEC. L. ADVISOR, July 2014, at 18, 19–20.

68. *In re Transkaryotic Therapies*, 2007 WL 1378345, at *5. The Council of the Corporation Law Section of the Delaware State Bar Association made two reform proposals in 2015 which were ultimately adopted. Wei Jiang, *Reforming the Delaware Law to Address Appraisal Arbitrage*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 12, 2016), https://corpgov.law.harvard.edu/2016/05/12/reforming-the-delaware-law-to-address-appraisal-arbitrage/. The Council proposed a "de minimis exception," which would require a minimum stake of $1 million or 1% stock of the company to seek appraisal and an "interest reduction amendment" that would reduce the pre-judgment interest rate paid on an award from an appraisal. *Id.* Notably, the Council did not propose legislation to overrule the *Transkaryotic* decision. *Id.*

69. Kesten, *supra* note 61, at 104.

70. Craig Boyd, *Appraisal Arbitrage: Closing the Floodgates on Hedge Funds and Activist Shareholders*, 65 U. KAN. L. REV. 497, 503 (2016).

71. DAVID F. MARCUS, FRANK SCHNEIDER, CHARLIE COSTELLO & YANLEI MA, CORNERSTONE RESEARCH, APPRAISAL LITIGATION IN DELAWARE: TRENDS IN PETITIONS AND OPINIONS 2006–2018 1, 4 (2019), https://www.cornerstone.com/publications/reports/appraisal-litigation-delaware-2006-2018.

72. Michael Greene, *M&A Deal Price Challenges Spiking in Delaware*, BLOOMBERG L. (Jan. 17, 2017, 2:41 PM), https://news.bloomberglaw.com/business-and-practice/m-a-deal-price-challenges-spiking-in-delaware.

73. Marcus, *supra* note 71, at 5.

74. *Id.*

75. DEL. CODE ANN. tit. 8, § 262(h) (2018) ("[T]he Court shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the

Supreme Court, in *Tri-Continental Corp. v. Battye*,[76] explained the concept of value from the statutory mandate:

> The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, *viz.*, his proportionate interest in a going concern. By value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger. In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earning prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of the merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value.[77]

The baseline objective of a statutory appraisal is to value the corporation as a whole entity, rather than as a specific fraction of shares belonging to a particular stockholder.[78]

The statute provides further that fair value shall be determined "exclusive of any element of value arising from the accomplishment or expectation of the merger."[79] Therefore, value from potential synergies[80] that will result from a merger is not considered in determining fair value.[81] Fair value, then, is best described as "the value of the company to the stockholder as a going concern, rather than its value to a third party as an acquisition."[82]

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merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the Court shall take into account all relevant factors.").

76. 74 A.2d 71 (Del. 1950).

77. *Id.* at 72.

78. Cavalier Oil Corp. v. Harnett, 1988 WL 15816, at *8 (Del Ch. Feb. 22, 1988), *aff'd* 564 A.2d 1137 (Del. 1989).

79. tit., 8 § 262(h).

80. *See supra* note 7 for an explanation of synergies.

81. *See* Cavalier Oil Corp. v. Hartnett, 564 A.2d 1137, 1144 (Del. 1989) ("[T]he company must be first valued as an operating entity by application of traditional value factors, weighted as required, but without regard to post-merger events or other possible business combinations."); *see also* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 20–21 (Del. 2017) (describing what the Court is valuing in an appraisal proceeding); DFC Glob. Corp. v. Muirfield Value Partner, L.P., 172 A.3d 346, 371 (Del. 2017) ("Part of why the synergy excision issue can be important is that it is widely assumed that the sales price in many M&A deals includes a portion of the buyer's expected synergy gains, which is part of the premium the winning buyer must pay to prevail and obtain control.").

82. M.P.M. Enters., Inc. v. Gilbert, 731 A.2d 790, 795 (Del. 1999).

The Court has recognized that fair value, over time, "has become a 'jurisprudential, rather than purely economic, construct.'"[83]

In *Weinberger v. UOP*,[84] the seminal case on Delaware statutory appraisal rights, the Delaware Supreme Court held that a proper valuation approach "must include proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court."[85] *Weinberger* also signified a large shift from prior valuation methodology by holding that valuation should include elements of future value that are known or susceptible to proof, excluding only speculative elements.[86] The court adopted "a more liberal, less rigid and stylized, approach to the valuation process."[87]

The takeaway is that two important provisions from section 262 explain "what" the Court is valuing, and "how" the court should complete the valuation. The "what" is that the Court "shall determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger."[88] The "how" is the statutory requirement that "[i]n determining such fair value, the Court shall take into account all relevant factors."[89]

When determining value, the court should value the corporation as an ongoing business at the time of the merger and not as a specific fraction of shares.[90] Therefore, the court should not apply a minority discount when a controlling shareholder exists, nor should the court include any value from synergies expected from the merger.[91] Once a total value is determined, the court awards each dissenting stockholder the pro rata percentage of the total.[92]

How the court determines fair value is difficult and fact-specific because the statute requires the court to "take into account all relevant factors," giving

83. *Dell*, 177 A.3d at 20 (citing *DFC*, 172 A.3d at 367–68).

84. 457 A.2d 701 (Del. 1983).

85. *Id.* at 713.

86. *Id.* This was a large shift from Delaware's long-time reliance on the "Delaware Block Method" which explicitly forbid elements of future value from the valuation determination. *Id.* at 712–13. The Delaware Block Method is a combination of three generally accepted valuation methods: the asset approach, the market approach, and the earnings approach. *In re* Radiology Associates, Inc. Litigation, 611 A.2d 485, 496 (Del. Ch. 1991). While the courts infrequently use the Delaware Block Method after *Weinberger*, it is still considered an acceptable method for valuing a corporation. *Id.*; *see* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940 (Del. 1985) (noting that *Weinberger* did not "abolish the block formula, only its exclusivity as a tool of valuation").

87. *Weinberger*, 457 A.2d at 704.

88. DEL. CODE ANN. tit., 8 § 262(h) (2018).

89. *Id.*

90. *Dell*, 177 A.3d at 20.

91. *Id.* at 20–21.

92. *Id.* at 21.

consideration to "proof of value by any techniques or methods which are generally considered acceptable in the financial community and otherwise admissible in court."[93] After analyzing all relevant factors, the court may use a single valuation metric or two or more metrics by apportioning weight among a variety of methodologies.[94] The appraisal process is flexible by design because every entity is different and every merger is different.[95] Regardless of the number of methodologies used or the weight given to each, the chancery court must "justify its methodology (or methodologies) according to the facts of the case and relevant, accepted financial principles."[96] Because appraisals are imperfect, the chancery court's findings generally will be upheld so long as they are logical and grounded in relevant, acceptable financial methods.[97]

Post-*Weinberger*, there are three recurring valuation techniques used in appraisal proceedings: (1) discounted cash flow ("DCF") analyses; (2) valuations based on comparables (e.g., comparable companies or comparable acquisitions); and (3) deference to the deal price.[98] Experts and Delaware Courts rely heavily on DCF analyses over other methodologies.[99]

### *1. Discounted Cash Flow Analysis*

Delaware courts most frequently use DCF analysis to determine the fair value of shares subject to appraisal despite recognizing concerns about the subjectivity of DCF models.[100] The Delaware Supreme Court held in *DFC*

93. tit., 8 § 262(h); Weinberger v. UOP, 457 A.2d 701, 713 (Del. 1983).

94. *Dell*, 177 A.3d at 22.

95. *Id.* at 21.

96. *Id.* at 22.

97. *Id.* at 22–23; *see also* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 348–49 (Del. 2017) ("[T]his Court must give deference to the Court of Chancery if its determination of fair value has a reasonable basis in the record and in accepted financial principles relevant to determining the value of corporations and their stock."); M.P.M. Enters., Inc. v. Gilbert, 731 A.2d 790, 795 (Del. 1999) ("The discretion to weigh the evidence [in a statutory appraisal proceeding] belongs to the Court of Chancery with our review one of abuse of that discretion." (quoting *In re* Shell Oil Co., 607 A.2d 1213, 1221 (Del. 1992))); *In re* Shell Oil Co., 607 A.2d 1213, 1219 (Del. 1992) (recognizing the Delaware Supreme Court defers to the Court of Chancery's findings due to its expertise in appraisal cases); Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972) (noting the Delaware Supreme Court will not ignore findings made by the Court of Chancery "[i]f they are sufficiently supported by the record and are the product of an orderly and logical deductive process . . . even though independently [the Court may] have reached opposite conclusions").

98. Marcus, *supra* note 71, at 2.

99. *Id.* at 10; *see also* Crescent/Mach I P'ship, L.P. v. Turner, Nos. 17455-VCN, 17711-VCN, 2007 WL 2801387, at *10 (Del. Ch. May 2, 2007) ("Although it is appropriate to consider all accepted methodologies, the Court tends to favor the discounted cash flow method . . . .").

100. *See* M.G. Bancorporation, Inc. v. Le Beau, 737 A.2d 513, 523 (Del. 1999) ("The discounted cash flow methodology has been relied upon frequently . . . in other statutory appraisal proceedings."); Onti, Inc. v. IntegraBank, 751 A.2d 904, 916 (Del. Ch. 1999) ("[S]ince the abolishment of the Delaware Block method for appraisals in 1983, this Court frequently has

*Global Corp. v. Muirfield Value Partners, L.P.*[101] that a DCF model is generally most helpful in transactions where there is not an observable market price because "a single person's own estimates of the cash flows are . . . a good faith estimate by a single, reasonably informed person to predict the future."[102] The fundamental principle of DCF analysis is that the present value of a corporation's projected cash flows is equal to the corporation's value.[103] DCF analysis uses three components:[104] (1) cash flow projections,[105] (2) terminal value,[106] and (3) the discount rate.[107] Once these three components are determined, the cash flows and terminal value are discounted to present value using the discount rate and added together to derive a total present value of cash flows.[108] Then, the value of non-operating

employed the discounted cash flow [approach] as at least one method of valuation."). *But see Dell*, 177 A.3d at 37–38 ("Although widely considered the best tool for valuing companies when there is no credible market information and no market check, DCF valuations involve many inputs—all subject to disagreement by well-compensated and highly credentialed experts—and even slight differences in these inputs can produce large valuation gaps.").

101. 172 A.3d 346, 370 (Del. 2017).

102. *Id.* at 370.

103. Neal v. Ala. By-Prods. Corp., CIV. A. No. 8282, 1990 WL 109243, at *7 (Del. Ch. Aug. 1, 1990).

104. *In re* Radiology Assocs., Inc. Litig., 611 A.2d 485, 490 (Del. Ch. 1991) ("The DCF model entails three basic components: an estimation of net cash flows that the firm will generate and when, over some period; a terminal or residual value equal to the future value, as of the end of the projection period, of the firm's cash flows beyond the projection period; and finally a cost of capital with which to discount to a present value both the projected net cash flows and the estimated terminal or residual value.").

105. Cede & Co. v. Technicolor, Inc., No. Civ. A. 7129, 1999 WL 65042, at *5 (Del. Ch. Jan. 29, 1999) ("The first step of DCF is to project the company's future income stream."). The chancery court in *In re Radiology Associates* notes that "[t]he quality of the projection as to the future benefits over some period . . . is central to the reliability of the underlying methodology of the [DCF] method." 611 A.2d 485, 490 (Del. Ch. 1991).

106. The terminal value is the present value of all of the company's future cash flows beginning after the specific projection period. *Terminal Value*, CORP. FIN. INST., https://corporatefinanceinstitute.com/resources/knowledge/valuation/terminal-value/ (last visited Apr. 20, 2020). Terminal value calculations have been accepted by courts when derived as present value of the company's cash flows projected in perpetuity or determined by a capitalized earnings approach. *Compare* Onti v. Integra Bank, 751 A.2d 904, 923 (Del. Ch. 1999) (calculating terminal value using "the Constant Growth Valuation Model . . . which is widely accepted as the best, even if imperfect, method to determine a terminal value for a discounted cash flow analysis") *with* Cavalier Oil Corp. v. Harnett, 1988 WL 15816, at *21 (Del. Ch. Feb. 22, 1988) (calculating terminal value using the capitalized earnings approach with an average of three years of historical earnings and a capitalization multiple of 12), *aff'd*, 564 A.2d 1137 (Del. 1989).

107. *In re Radiology Assocs., Inc. Litig.*, 611 A.2d at 490, 492. The discount rate determines the present value of the annual cash flows for the projection period and the terminal value. *Id.* "The selection of an appropriate discount rate has a profound effect on the share price in an appraisal action." Crescent/Mach I P'ship, L.P. v. Turner, Nos. 17455-VCN, 17711-VCN, 2007 WL 2801387, at *12 (Del. Ch. May 2, 2007).

108. *See Cede & Co.*, 1999 WL 65042, at *5 ("[B]y adding the current year's cash flows to the discounted values of each future year's income (including the last year's lump-sum terminal value), one arrives at the net present value ("NPV") of the enterprise.").

assets[109] is added and the total is divided by the number of outstanding shares to reach the fair value per share of the company.[110] The DCF analysis "purports to represent the present value of [the corporation's] cash flow" which reflects the shareholder's proportionate "value without need for an adjustment."[111]

### *2. Valuations Based on Comparables*

Valuations based on comparables such as a Comparable Companies Approach or Comparable Acquisitions (Transactions) Approach are sometimes used to determine fair value.[112] The comparables approach is based on the same premise as the DCF method, except instead of directly estimating the company's future cash flows and reducing them to present value, the comparables method infers the future growth of the subject company using future expected cash flows from the market's expectations about comparable companies or transactions.[113] Comparable analyses determine the value of a company using the metrics of other businesses or transactions of similar size in the same industry, using the assumption that similar companies or transactions will have similar valuations.[114] The comparable companies valuation method involves several steps including:

> (1) finding comparable, publicly traded companies that have reviewable financial information; (2) calculating the ratio between the trading price of the stocks of each of those companies and some recognized measure reflecting their income . . . ; (3) correcting these derived ratios to account for differences, such as in capital structure, between the public companies and the target company being valued; and finally, (4) applying the average multiple of the comparable companies to the relevant income measurement of the target company.[115]

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109. Non-operating assets are assets that are not essential to a company's ongoing business operations but may still generate income or provide a return on investment. James Chen, *Non-Operating Asset*, INVESTOPEDIA (Apr. 29, 2019), https://www.investopedia.com/terms/n/nonoperatingasset.asp. For example, an owned parcel of land with no plans for building or usage in the near future is a non-operating asset until it is used. *Id.*

110. *See In re Radiology Assocs., Inc. Litig.*, 611 A.2d at 495 ("This Court clearly must add the value of non-operating assets . . . .").

111. *Id.* at 494.

112. Marcus, *supra* note 71, at 10.

113. *In re* Appraisal of Orchard Enters., Inc., C.A. No. 5713–CS, 2012 WL 2923305, at *9 (Del. Ch. July 18, 2012).

114. James Chen, *Comparable Company Analysis*, INVESTOPEDIA (Apr. 17, 2019), https://www.investopedia.com/terms/c/comparable-company-analysis-cca.asp.

115. Merion Capital, L.P. v. 3M Cogent, Inc., Civil Action No. 6247-VCP, 2013 WL 3793896, at *6 (Del. Ch. July 8, 2013).

The comparable transactions analysis is similar to the comparable companies analysis. The court of chancery in *Highfields Capital, Ltd. v. AXA Financial, Inc*.[116] described a comparable transactions analysis as, "identifying similar transactions, quantifying those transactions through financial metrics, and then applying the metrics to the company at issue to ascertain a value."[117] As with the comparable companies analysis, "[t]he utility of the comparable transactions methodology is directly linked to the 'similarity between the company the court is valuing and the companies used for comparison.'"[118] Because the selection of comparators requires a necessary degree of subjective judgment, the court is directed to "closely evaluate whether a party who relies on a comparable transactions [or companies] analysis has met its burden of persuasion."[119]

The comparables approach is more useful for valuation in competitive industries with a large number of similar entities.[120] Despite comparable analyses being credited as a valid valuation tool, it is not used much by the court when determining fair value.[121]

### 3. *Deference to the Deal Price*

When considering the agreed upon deal price for the merger transaction as fair value, the court looks to the company's stock market dynamics, the sale process, and the flow of information between parties to the transaction.[122] But, the court is not required to give any amount of weight to the deal price.[123] From 2006 to 2018, the court relied on deal price in determining fair value in thirty-eight percent of opinions, making it the second-most utilized methodology after DCF analysis.[124] Deal price as fair value is discussed at length in the next Section.[125]

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116. 939 A.2d 34 (Del. Ch. 2007).

117. *Id.* at 54.

118. *Id.* (quoting *In re* U.S. Cellular Operating Co., C.A. No. 18696-NC, 2005 WL 43994, at *17 (Del. Ch. Jan. 6, 2005)).

119. *Id.* at 54.

120. *See In re* Appraisal of Orchard Enters., Inc., C.A. No. 5713–CS, 2012 WL 2923305, at *9 (Del. Ch. July 18, 2012) ("[T]he utility of a [comparables] method depends on actually having companies that are sufficiently comparable that their trading multiples provide a relevant insight into the subject company's own growth prospects. When there are a number of corporations competing in a similar industry, the method is easiest to deploy reliably.").

121. Marcus, *supra* note 71, at 10.

122. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 23 (Del. 2017).

123. *Id.*

124. Marcus, *supra* note 71, at 10.

125. *See infra* Section II.D.

### *D. The Delaware Court's Increasing Reliance on Deal Price as Evidence of "Fair Value"*

In *Union Illinois 1995 Investment Ltd. Partnership v. Union Financial Group, Ltd.*,[126] the Delaware Court of Chancery initially held "[t]he [deal] price [was] the most reliable evidence of fair value."[127] Six years later, the Delaware Supreme Court took a firm stance *against* the use of deal price as fair value in an appraisal action in *Golden Telecom, Inc. v. Global GT LP*.[128] Then, just three years after *Golden Telecom*, under similar facts, the Delaware courts began a slow return back to approval of deal price in *Huff Fund Investment Partnership v. CKx, Inc.*[129] Subsequent cases took the same approach as *CKx*, relying exclusively on the deal price to determine fair value, in part because other valuation methods were unreliable.[130] Beginning in 2015 with *LongPath Capital, LLC v. Ramtron International Corp.*,[131] Delaware courts have consistently relied on deal price as the "best indicator" of fair value.[132] This is likely due, in part, to *In re Appraisal of Ancestry.com*,[133] which removed any restrictions on using deal price only in

126. 847 A.2d 340 (Del. Ch. 2004).

127. *Id.* at 357–58.

128. 11 A.3d 214, 218 (Del. 2010).

129. C.A. No. 6844-VCG, 2013 WL 5878807, at *11–15 (Del. Ch. Nov. 1, 2013). "In the absence of comparable companies or transactions to guide a comparable companies analysis or a comparable transactions analysis, and without reliable projections to discount in a DCF analysis, I rely on the [deal] price as the best and most reliable indication of CKx's value." *Id.* at 11.

130. *See* LongPath Capital, LLC v. Ramtron Int'l Corp., C.A. No. 8094-VCP, 2015 WL 4540443, at *1 (Del. Ch. June 30, 2015) (finding that "the sales process in this instance was thorough and that the [deal] price less synergies provides the most reliable method of determining the fair value of the petitioner's shares" because the DCF analysis, comparable companies approach, and comparable transactions approach are not reliable.); Merlin Partners LP v. AutoInfo, Inc., C.A. No. 8509-VCN, 2015 WL 2069417, at *14, *18 (Del. Ch. Apr. 30, 2015) (finding that the sale process was "comprehensive" and that, at the same time, "there [was] no reliable data to input into a DCF or comparable companies model").

131. C.A. No. 8094-VCP, 2015 WL 4540443, at *25–26 (Del. Ch. June 30, 2015).

132. *See* DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 376 (Del. 2017) ("[W]e cannot sustain the Chancellor's decision to give *only* one-third weight to the deal price . . . ." (emphasis added)); *In re* Appraisal of PetSmart, Inc., C.A. No. 10782-VCS, 2017 WL 2303599, at *40 (Del. Ch. May 26, 2017) ("I 'defer' to deal price . . . because that is what the evidence . . . requires."); Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 6164771, at *18 (Del. Ch. Oct. 21, 2015) ("[Deal] price . . . [is] the best indicator of fair value of BMC . . . ."); LongPath Capital, LLC v. Ramtron Int'l Corp., C.A. No. 8094-VCP, 2015 WL 4540443, at *1 (Del. Ch. June 30, 2015) ("[Deal] price less synergies provides the most reliable method . . . ."); *Merlin Partners LP*, 2015 WL 2069417, at *16 ("[Deal] price appears to be the best estimate of value . . . ."); *In re* Appraisal of Ancestry.com, Inc., C.A. No. 8173-VCG, 2015 WL 399726, at *24 (Del. Ch. Jan. 30, 2015) ("[Deal] price . . . is the best indicator of Ancestry's fair value . . . .").

133. C.A. No. 8173-VCG, 2015 WL 399726 (Del. Ch. Jan. 30, 2015).

circumstances where other valuation methods are unreliable.[134] The court's trend of using deal price as fair value continued in its 2017 opinions in *DFC*[135] and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*.[136] The court determined in *DFC* that "economic principles suggest[ed] that the best evidence of fair value was the deal price" in the case of an arm's-length merger arising out of a "robust market search" free of any "hint of self-interest."[137] In *Dell*, the Court went even further to say:

> [W]hen the evidence of market efficiency, fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of [the founder]'s own votes is so compelling, then failure to give the resulting [deal] price heavy weight . . . abuses even the wide discretion afforded the Court of Chancery . . . .[138]

Despite its increasing reliance on deal price as fair value, the court's most recent decisions have continued to hold strong to the ideas that judicial discretion remains important, judges must take into account "all relevant factors," and the court must not give presumption to deal price as fair value.[139] The culmination of the case law surrounding deal price as fair value has led to the conclusion that in the proper circumstances, the courts can "select deal price to measure fair value, even if one or more other valuation techniques are reasonably reliable, simply because the deal price may be the 'most' reliable evidence of fair value."[140]

## III. THE COURT'S REASONING

In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Delaware Supreme Court reversed the court of chancery's fair value determination and held that the court abused its discretion in determining Aruba's thirty-day average unaffected market price was the fair value of

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134. *Id.* at *23 (relying exclusively on deal price as fair value despite acknowledging the DCF analysis was reliable).

135. 172 A.3d 346 (Del. 2017).

136. 177 A.3d 1 (Del. 2017).

137. *DFC*, 172 A.3d at 349.

138. *Dell*, 177 A.3d at 35.

139. *See DFC*, 172 A.3d at 366 ("[N]ot only do we see no license in the statute for creating a presumption that the resulting [deal] price in such a situation is the 'exclusive,' 'best,' or 'primary' evidence of fair value, we do not share DFC's confidence in our ability to craft, on a general basis, the precise pre-conditions that would be necessary to invoke a presumption of that kind."); *Dell*, 177 A.3d at 21–23 (noting the statutory burden placed on the chancery court to consider "all relevant factors" and echoing the doubts expressed in *DFC* on invoking a presumption).

140. Lawrence A. Hamermesh & Michael V. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price, Deal Process, and Synergies*, FAC. SCHOLARSHIP PENN. L. (2018), https://scholarship.law.upenn.edu/faculty_scholarship/1954.

shares.[141] The court reasoned that the decision to disregard the deal price less synergies as the proper fair value determination was "rooted in an erroneous factual finding that lacked record support."[142] On remand, the Delaware Supreme Court ordered a final judgement for Verition, awarding them $19.10 per share, the deal price less synergies.[143]

In coming to this conclusion, the Delaware Supreme Court entertained a number of corporate finance theories to properly evaluate fair value. The court addressed the unaffected thirty-day average market price adopted by the court of chancery but discarded its use due to its time delay and lack of developed record on whether the stock price was an adequate representation of fair value.[144] The court also considered the court of chancery's record on a DCF analysis, comparable companies and comparable transactions analyses, and deal price less synergies.[145] In the end, the court determined that a deal price less synergies approach in a fully informed, arm's-length transaction following a robust sales process is the best determination of fair value and that relying on the average unaffected market price of the seller's stock was not a reliable fair value determination.[146]

To support its determination that deal price less synergies was the best indicator of fair value, the court first addressed the court of chancery's reasoning as to why it decided not to use deal price less synergies.[147] The Vice Chancellor posited in his lower court opinion that to meet statutory requirements an additional deduction from the deal price was necessary to account for "reduced agency costs" that arise from a merger.[148] The court reasoned that while reduced agency costs is an added value in private equity deals, that was not the case here, because Aruba's public stockholders were not being replaced with a concentrated group of owners as is the case in private equity deals.[149] Instead, the HP-Aruba merger would simply swap out Aruba's set of public stockholders for HP's set of public stockholders, which would not create reduced agency costs.[150] Further, the court cited that neither party presented any evidence to indicate that any part of the deal price

141. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 129–30 (Del. 2019) (en banc) (per curiam).

142. *Id.* at 130.

143. *Id.*

144. *Id.* at 139–40.

145. *Id.* at 142.

146. *Id.* at 139–42

147. *Id.* at 133–34.

148. *Id.* The reduced agency cost theory is that "the acquisition would reduce agency costs essentially because the resulting consolidation of ownership and control would align the interests of Aruba's mangers and its public stockholders," and, thus, add value to the company. *Id.*

149. *Id.* at 134.

150. *Id.*

involved the potential for agency cost reductions that were not already included in its synergies estimate.[151] The chancery court ignored the reality that HP's synergies estimate likely already priced any agency cost reduction it may have expected.[152] In addition, the record provided no reason to suspect those estimates omitted any additional added value HP thought it could achieve from the merger.[153] Because of these factors, the Delaware Supreme Court considered Aruba's synergies estimate accurate and did not require further deduction of reduced agency costs.[154]

The Delaware Supreme Court next dispelled the lower court's reading of *DFC Global Corp. v. Muirfield Value Partners, L.P.*,[155] and *Dell, Inc. v. Magnetar Global Event Driven Master Fund, Ltd.*,[156] that compelled its "rote reliance on market prices."[157] The court said "the trial judge's sense that those decisions somehow compelled him to make the decision he did was not supported by any reasonable reading of those decisions or grounded in any direct citation to them," and pointed to the Delaware judiciary's long history, even prior to *DFC* and *Dell*, of "giving important weight to market-tested deal prices," involving a public company sold at a substantial premium after the deal is shopped around to fair and viable bidders.[158] Here, Aruba approached other logical buyers before signing the deal with HP, and HP had private information not available to the public when they made an offer above the then current market price of shares.[159] The court placed great emphasis on market efficiency and recognized that a buyer is in a strong position to properly value the seller when it has material, nonpublic information about the seller, as was the case here when HP offered a premium purchase price of Aruba.[160] The court determined that the deal price "should be given considerable weight . . . absent deficiencies in the deal process."[161] The court also acknowledged that while the price a stock trades at in an efficient market is an important indicator of fair value, when the deal is further informed by a buyer negotiating at arm's-length, using confidential, non-public information, the deal price that results is even more likely to be indicative of fair value.[162]

151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017).
156. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017).
157. *Aruba*, 210 A.3d at 135.
158. *Id.*
159. *Id.* at 136.
160. *Id.* at 137.
161. *Id.*
162. *Id.* at 137–39.

Finally, the Delaware Supreme Court noted the court of chancery created due process and fairness problems by requesting post-trial briefing on the unaffected thirty-day average market price because "the extent to which the market price approximated fair value was never subjected to the crucible of pretrial discovery, expert depositions, cross-expert rebuttal, expert testimony at trial, and cross-examination at trial."[163] In conclusion, the court determined the deal price less synergies calculation of Aruba's fair value was supported by "abundant record evidence," and ordered a final judgment for Verition in the amount of $19.10 per share (the deal price less synergies) plus interest.[164]

## IV. ANALYSIS

In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Delaware Supreme Court held that the chancery court abused its discretion in using Aruba's thirty-day unaffected average market price, rather than deal price less synergies, as fair value of shareholders' going concern in a fully informed, arm's-length merger.[165] Section IV.A discusses why the Court made the correct judgment in *Aruba.*[166] The court made the correct judgment because it followed Delaware precedent, acknowledged that market-tested deal prices are the best indicator of fair value in a robust sales process and a fully informed, arm's-length transaction, and removed the uncertainty of some corporate finance methodologies regularly employed in circumstances of non-efficient markets.[167] Section IV.B considers why the number of statutory appraisal cases in Delaware will likely decline due to the Court's holding in *Aruba*.[168] Finally, Section IV.C explains why the Delaware legislature should amend Delaware General Corporation Law section 262 to avoid uncertainty in future fair value determinations.[169]

### *A. The Deleware Supreme Court's Holding Is Correct*

The court in *Aruba* correctly determined the Delaware Court of Chancery abused its discretion in using the unaffected average thirty-day market price over deal price less synergies because the chancery court failed to recognize prior Delaware case law's emphasis on well-informed deal prices following a non-conflicted, robust sales process.[170] The Delaware

163. *Id.* at 139–40.
164. *Id.* at 141–42.
165. *Id.* at 130.
166. *See infra* Section IV.A.
167. *See infra* Section IV.A.
168. *See infra* Section IV.B.
169. *See infra* Section IV.C.
170. *See infra* Section IV.A.1.

Supreme Court also properly recognized that an appraisal must be flexible due to the uniqueness of each merger.[171] Finally, the court correctly acknowledged that an efficient market,[172] as well as finance professionals, are best suited to make valuation determinations.[173]

### *1. The Court's Holding Is Consistent with Precedent and Recognizes an Appraisal Must Be Flexible*

The Delaware Supreme Court has made clear that it will not adopt a presumption that the deal price reflects fair value because "Section 262(h) unambiguously calls upon the Court of Chancery to perform an *independent* evaluation of 'fair value' at the time of a transaction."[174] The court refuses to adopt such a presumption because each merger is unique, and, thus, creating a presumption or a single way to value a merger would be a fallacy.[175] The Delaware Supreme Court, however, has a long history of giving important emphasis to market-tested deal prices, particularly in efficient markets.[176]

The Delaware Supreme Court's decisions in *DFC Global Corp. v. Muirfield Value Partners, L.P.* and *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd*. lean toward acceptance of deal price as the primary, if not exclusive, means of measuring fair value, while retaining judicial discretion to use other methods where the sales process is not robust.[177] Factors the supreme court has found compelling when relying on deal price as the most reliable indication of fair value include an open and arm's-length

171. *See infra* Section IV.A.1.

172. A market is described as efficient

> if it has many stockholders; no controlling stockholder; "highly active trading"; and if information about the company is widely available and easily disseminated to the market. . . . In these circumstances, a mass of investors quickly digests all publicly available information about a company, and in trading the company's stock, recalibrates its price to reflect the market's adjusted, consensus valuation of the company.

Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 25 (Del. 2017) (quoting DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 373–74 (Del. 2017)).

173. *See infra* Section IV.A.2.

174. Golden Telecom, Inc., v. Glob. GT LP, 11 A.3d 214, 217 (Del. 2010).

175. *Dell*, 177 A.3d at 21 ("This Court has relied on the statutory requirement that the Court of Chancery consider 'all relevant factors' to reject requests for the adoption of a presumption that the deal price reflects fair value if certain preconditions are met . . . ."); *Golden Telecom, Inc.*, 11 A.3d at 217–18 (noting that requiring a presumption for deal price as fair value, "even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute").

176. *See DFC*, 172 A.3d at 366 (discussing the court of chancery's proven record "in exercising its discretion to give the deal price predominant, and indeed exclusive weight, when it determines, based on the precise facts before it that led to the transaction, that the deal price is the most reliable evidence of fair value"); *see* cases cited *supra* note 132.

177. *DFC*, 172 A.3d at 366–67; *Dell*, 177 A.3d at 21–24.

transaction process,[178] the buyer's easy access to non-public information,[179] a robust and fair sale process (often a non-conflicted, open market check),[180] and a well-functioning, efficient market.[181] In comparison, the court found the deal price was not reliable evidence of fair value in *Global GT LP v. Golden Telecom, Inc.*[182] because the transaction was conflicted and did not welcome buyers not already tied to the company's major stockholders.[183] In *Golden Telecom*, the seller (Golden Telecom) "did not engage in any sales

178. *See Dell*, 177 A.3d at 28 (noting that the individuals who ran the sales process were "independent, experienced directors and armed with the power to say 'no'"); *DFC*, 172 A.3d at 376 (finding no conflict of interest in the sale from the record); Highfields Capital, Ltd. v. AXA Fin., Inc., 939 A.2d 34, 59 (Del. Ch. 2007) (deferring to the deal price where an arm's-length transaction was conducted).

179. *See DFC*, 172 A.3d at 349 (observing that the best evidence of fair value was the deal price because the deal price was "informed by robust public information, and easy access to deeper, non-public information"); Union Ill. 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 357–58 (Del. Ch. Jan. 5, 2005) (holding the deal price was the best indicator of fair value because the sales process "involved the broad dissemination of confidential information to a large number of prospective buyers.").

180. The transaction in *DFC* and other cases where the court of chancery has found the deal price was the most reliable evidence of fair value involved a robust and fair sale process, which often included a non-conflicted, open market check. *DFC*, 172 A.3d at 351; *see, e.g.*, *Dell*, 177 A.3d at 35 (explaining that Dell's sale process presented "fair play, low barriers to entry, outreach to all logical buyers, and the chance for any topping bidder to have the support of Mr. Dell's own votes"); *In re* Appraisal of PetSmart, Inc., C.A. No. 10782-VCS, 2017 WL 2303599, at *27–*31 (Del. Ch. May 26, 2017) (noting the "well-constructed and fairly implemented auction process"); Merion Capital LP v. Lender Processing Servs., Inc., C.A. No. 9320-VCL, 2016 WL 7324170, at *33 (Del. Ch. Dec. 16, 2016) (deferring to deal price because "[t]he Company ran a sale process that generated reliable evidence of fair value"); Merion Capital LP v. BMC Software, Inc., C.A. No. 8900-VCG, 2015 WL 6164771, at *18 (Del. Ch. Oct. 21, 2015) (finding the deal price to be the best indicator of fair value because it came from an "arm's-length transaction negotiated over multiple rounds of bidding among interested buyers"); LongPath Capital, LLC v. Ramtron Int'l Corp., C.A. No. 8094-VCP, 2015 WL 4540443, at *25 (Del. Ch. June 30, 2015) ("[T]he [m]erger process was thorough and supports my reliance on the [deal] price as an indication of Ramtron's fair value."); Merlin Partners LP v. AutoInfo, Inc., C.A. No. 8590-VCN, 2015 WL 2069417, at *17 (Del. Ch. Apr. 30, 2015) (asserting that any valuation method other than deal price is second best to derive fair value when "the market prices a company as the result of a competitive and fair auction"); *In re* Appraisal of Ancestry.com, Inc., C.A. No. 8173-VCG, 2015 WL 399726, at *23 (Del. Ch. Jan. 30, 2015) ("[B]ecause the sales process here was robust, I find fair value in these circumstances best represented by the [deal] price."); Huff Fund Inv. P'ship v. CKx, Inc., C.A. No. 6844-VCG, 2013 WL 5878807, at *13 (Del. Ch. Nov. 1, 2013) ("The record . . . support[s] a conclusion that the process by which CKx was marketed to potential buyers was thorough, effective, and free from any spectre of self-interest or disloyalty."), *aff'd* 2015 WL 631586 (Del. 2015). These cases from approximately 2013 to 2017 mark a shift from earlier Delaware case law, which deferred less to deal prices, even with a robust sales process. *See, e.g.*, Golden Telecom, Inc. v. Glob. GT LP, 11 A.3d 214, 218 (Del. 2010) ("Requiring the Court of Chancery to defer—conclusively or presumptively—to the merger price, even in the face of a pristine, unchallenged transactional process, would contravene the unambiguous language of the statute and the reasoned holdings of our precedent.").

181. *DFC*, 172 A.3d at 349, 359; *see supra* note 172 for an explanation of efficient markets.

182. 993 A.2d 497 (Del. Ch. 2010), *aff'd*, 11 A.3d 214 (Del. 2010).

183. *Id.* at 508.

efforts at all and instead concentrated solely on getting as good a deal as it could" from a single buyer (VimpelCom).[184] But, Golden Telecom's two largest shareholders owned more of VimpelCom than Golden Telecom, making the singular sale effort problematic due to major stockholders' conflicted interest in the transaction, and made the deal price non-reflective of fair value.[185] In *DFC*, the court held that the deal price should have been afforded greater weight in the fair value determination because there was an efficient market, no conflict of interest, every logical buyer had been approached about the deal, and there were no flaws in the sales process that could lead one to be suspicious that the deal price was not reflective of fair value.[186] Similarly, in *Dell*, the Supreme Court held that stock price and deal price—both market-based indicators of value—are indicative of fair value when the market is efficient and "fair play, low barriers to entry, outreach to all logical buyers," and a chance for the majority shareholder's support is evidenced in the sales process.[187]

The court decided *Aruba* correctly because the circumstances were similar enough to both *DFC* and *Dell* to also consider the deal price to be reliable evidence of fair value. Aruba shopped the deal and approached a number of logical bidders, the market was efficient as evidenced by its near-immediate reactions to published quarterly results, and Aruba engaged in a passive market check after the final merger agreement that did not bring forth a superior bid.[188] Because the Aruba transaction had all the factors the Court relied on in *DFC*—for example, non-conflicted, open market check; robust public information; and a fair sale process—the Delaware Supreme Court correctly held that the chancery court abused its discretion by not using the deal price as evidence of fair value.[189]

#### 2. *The Court's Holding Properly Acknowledges an Efficient Market Is Better Situated to Make Valuation Determinations*

The basic principle of appraisals—that a judicial proceeding can supply a more reliable valuation of shares than a market process—seems absurd. An efficient market and business professionals with knowledge and expertise to make corporate finance calculations that best represent the fairest deal price are better situated than the court to determine fair value of shares. In fact, allowing courts to value a company without any showing of process-based

184. *Id.*
185. *Id.*
186. *DFC*, 172 A.3d at 376.
187. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 35 (Del. 2017).
188. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam).
189. *Id.* at 138–40.

wrongdoing or conflicted transactions goes entirely against the Delaware Corporate Law's strong presumption that competitive markets are the best authorities of value.[190] Corporate finance theories reflect the belief that the collective judgment of people with an incentive to estimate an asset's future cash flows value and access to public information will produce a more reliable value than the view of a single analyst.[191] The Delaware Supreme Court has endorsed reliance on efficient markets for a long time.[192] Additionally, many corporate finance methods, such as DCF analysis, involve a number of subjective inputs and guesswork that can vary in accuracy, and the efficient market and those professionals who have incentive to reach the most fair deal price are better situated to make these calculations as opposed to a legal-trained judge.[193]

*DFC* and *Dell* recognized that, absent deficiencies in the deal process, the deal price should be given considerable weight when the buyer is in possession of material, nonpublic information because the buyer is uniquely incentivized to properly value the seller when agreeing to purchase the company.[194] In *Dell*, the court decided the court of chancery improperly ignored the efficient market hypothesis and overturned the lower court's decision.[195] In *Aruba*, the chancery court below used the thirty-day unaffected average market price, meaning the thirty-day average of the price at which the shares traded before the media reported news of the merger.[196] The Delaware Supreme Court rejected that fair value determination because the unaffected price was several months before the valuation date, and the buyer had material, non-public information that would not be reflected in the

190. Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1602 (2015).

191. William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61, 88 (2018); *see also Dell*, 177 A.3d at 24 (discussing the efficient market hypothesis which "teaches that the price produced by an efficient market is generally a more reliable assessment of fair value than the view of a single analyst"); *DFC*, 172 A.3d at 373 (describing the price produced by an efficient market as "informative of fair value"); *id.* at 373 n.144 ("In an efficient market you can trust prices, for they impound all available information about the value of each security." (quoting RICHARD A. BREALEY ET AL., PRINCIPLES OF CORPORATE FINANCE 214 (2008))).

192. *Dell*, 177 A.3d at 24; *see also DFC*, 172 A.3d at 370 (noting that "the relationship between market valuation and fundamental valuation has been strong historically"); *id.* at 370 n.121 ("[T]he extent to which company valuations based on the fundamental approach have matched stock market values over the past four decades is remarkable." (quoting TIM KOLLER ET AL., VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES 326 (2010))).

193. *Dell*, 177 A.3d at 7; *DFC*, 172 A.3d at 349 ("Like any factor relevant to a company's future performance, the market's collective judgment of the effect of regulatory risk may turn out to be wrong, but established corporate finance theories suggest that the collective judgment of the many is more likely to be accurate than any individual's guess.").

194. *DFC*, 172 A.3d at 367; *Dell*, 177 A.3d at 35.

195. *Dell*, 177 A.3d at 24.

196. *Aruba*, 210 A.3d at 132.

market price.[197] Therefore, the court decided correctly because it honored Delaware's precedence of reliance on an efficient market and allowed for the business professionals, with access to material, non-public information, to make the more accurate valuation.

### *B. The Court's Holding Will Likely Result in a Decline in Appraisal Suits*

Because the trilogy of *DFC*, *Dell*, and *Aruba* collectively held that in a robust market transaction deal price less synergies is strong evidence of fair value, the court of chancery, moving forward, will likely not award more than the deal price and, in fact, will likely award less than the deal price because synergies must be removed.[198] Appraisal arbitrage cases are brought with the hope that the court will find fair value to be greater than the deal price.[199] In a post-*Aruba* world, an appraisal case born from a non-conflicted, efficient market transaction will likely result in a court finding the fair value of shares to be the deal price or less, once synergies are subtracted. Unless convincing evidence exists to show the transaction was conflicted, the market was inefficient, or a corporation failed their due diligence requirement, Delaware courts will likely use the fully informed, arm's-length deal price as a fair value ceiling because synergies must then be deducted to determine fair value. Deal price as a fair value ceiling supplies little incentive for hedge funds to engage in appraisal arbitrage as there is little hope for a valuation higher than the deal price. As a result, the Delaware Chancery Court will likely see an overall decline in appraisal proceedings moving forward.

From a public policy standpoint, a decline in appraisal arbitrage could lead to negative results. Appraisal rights can serve as a check on abuse by corporate directors, controlling shareholders, and other insiders in merger transactions, just as the market serves as a check on general corporate governance.[200] A decline in this check function, then, could have wide-sweeping negative effects on market efficiency and trust in the market.

But, because the *DFC*, *Dell*, and *Aruba* trilogy puts a heavy emphasis on arm's-length transactions completed in a robust market, fewer appraisals could also have positive end results. Appraisal arbitrage will not be attractive in instances of an unconflicted, fair price merger; whereas, mergers done in conflicted circumstances or objectively priced below fair value will incentivize appraisal arbitrageurs to seek appraisal and continue to serve as the market check.[201]

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197. *Id.* at 138–39.
198. *Id.* at 142.
199. See *supra* Section II.B for a discussion of appraisal arbitrage.
200. Korsmo & Myers, *supra* note 190, at 1598.
201. *Id.* at 1599.

Another positive from a likely decrease in appraisal suits is the lessening of criticism placed on appraisal arbitrage. Many arbitrage critics argue that the practice has turned into a burden of nuisance litigation from opportunistic investors.[202] Others comment, similarly, that appraisal arbitrage creates uncertainty for an acquiring corporation and injects risk into the deal.[203] This uncertainty creates "incentives for buyers to lower their price in anticipation of having to pay appraisal arbitragers post-closing and therefore shift[s] value away from long-term stockholders toward short-term arbitragers without advancing the public policy rationale for appraisal rights."[204]

Thus, the likely decline in appraisal arbitrage will produce a more positive than negative end result. The appraisal remedy was created to compensate for a loss of voting rights to dissenting stockholders.[205] Arbitrageurs by definition do not need such compensation because they purchase the dissenting shares after the record date.[206] Therefore, opportunistic arbitrageurs undermine the intent of the appraisal remedy and the decline in appraisal arbitrage following *Aruba* will likely lead to positive outcomes by returning the appraisal remedy to its originally contemplated purpose.

### *C. The Delaware Legislature Should Amend Section 262 to Reduce Uncertainty in Fair Value Determinations*

The Delaware legislature should amend section 262 of the Delaware General Corporation Law because the current law unwisely gives the chancery court judges full discretion to make their own corporate finance calculations to determine fair value, in addition to considering the expert calculations put forth by each party. Delaware judges are renowned for their expertise in business matters.[207] Despite this, it is unrealistic to expect judges to do a better job valuing companies than competitive markets or professionals with insider information.[208] This flaw is evidenced by the

202. *Id.* at 1600. The authors note that there is no empirical evidence supporting this fear, but it nonetheless remains a criticism of appraisal arbitrage. *Id.*

203. Stanley Onyeador, *The Chancery Bank of Delaware: Appraisal Arbitrageurs Expose Need to Further Reform Defective Appraisal Statute*, 70 VAND. L. REV. 339, 356 (2017).

204. Daniel G. Dufner et al., *Increasing Hostility Towards Appraisal Arbitrage*, WHITE & CASE LLP (Apr. 17, 2015), https://www.whitecase.com/sites/whitecase/files/files/download/publications/alert-increasing-hostility-towards-appraisal-arbitrage.pdf.

205. *See supra* notes 50–51 and accompanying text.

206. *See supra* note 62 and accompanying text.

207. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1078 (2000) ("Delaware chancery judges are known for their expertise in business matters, and the court has developed a reputation for its sophistication in corporate law.")

208. Delaware Court of Chancery judges have expressed frustration with this expectation placed upon them. *See, e.g.*, *In re* Appraisal of Ancestry.com, Inc. C.A. No. 8173-VCG, 2015 WL 399726,

indecision of Vice Chancellor Laster in *Aruba*, and the Delaware Supreme Court's highly critical opinion of his findings in the case on appeal.[209] Considering the imperfect and highly subjective methods used in corporate finance, it is likely better that, where possible, a law-trained judge is not the individual making an estimate of fair value based on their own calculations or "widely divergent partisan expert testimony."[210]

The supreme court in *DFC* and *Dell* acknowledged the mistakes made by chancery court judges in their fair value estimate calculations, along with the difficulties judges face when tasked with determining fair value.[211] The *DFC* court recognized that the chancery court may be enticed to take every valuation method put forth by the varying briefs and expert reports on either side, give each method equal weight, and then label the average of those the fair value.[212] Likewise, the *Dell* court described appraisals as "odd" and difficult because the burden "falls on the [trial] judge to determine fair value, using 'all relevant factors'" while "considering the trial presentations and submissions of parties who have starkly different objectives: petitioners contend fair value far exceeds the deal price, and the company argues that fair value is the deal price or lower."[213] It is not contested that a lot is being asked of chancery court judges in appraisal proceedings.[214] The Delaware legislature should consider removing the burden from judges to make fair value determinations because they "may not [have] a background well-suited to the [appraisal] process," and are often asked to make difficult determinations that may be outside of their expertise.[215]

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at *1 (Del. Ch. Jan. 30, 2015) ("I have commented elsewhere on the difficulties, if not outright incongruities, of a law-trained judge determining fair value of a company in light of an auction sale, aided by experts offering wildly different opinions on value."); Huff Fund Inv. P'ship v. CKx, Inc., C.A. No. 6844-VCG, 2013 WL 5878807, at *1 (Del. Ch. Nov. 1, 2013) (noting the absurdity of a law-trained judge being asked to "substitute his own appraisal for those of . . . valuation experts" in a number of arenas).

209. Verition Partners Master Fund Ltd v. Aruba Networks, Inc., C.A. No. 11448-VCL, 2018 WL 922139, at *53–*54 (Del. Ch. Feb. 15, 2018), *rev'd* 210 A.3d 128 (Del. 2019); *Aruba*, 210 A.3d at 139–41.

210. *Dell*, 177 A.3d at 35; *Id.* at 38 (observing the 1100 variable input values in the DCF analysis); *see also DFC*, 172 A.3d at 358 (noting the "sharp divide" between expert estimates of fair value due to disputes about the "proper inputs and methods" for a DCF analysis).

211. *See DFC*, 172 A.3d at 361 (explaining "the Court of Chancery acknowledged that it had mistakenly included" modified instead of unmodified estimates in its value determination).

212. *Id.* at 388.

213. *Dell*, 177 A.3d at 19–20 (quoting *In re Appraisal of Ancestry.com*, 2015 WL 399726, at *1).

214. *See* Eric L. Talley, *Finance in the Courtroom: Appraising Its Growing Pains*, DEL. LAW., Summer 2017, at 16–17 ("[U]nlike highly trained (and highly remunerated) investment bankers—whose job requires generating a 'football field' *range* of discounted cash flow (DCF) valuations—a judge presiding over an appraisal proceeding must conjure up a *single number* at the end of the process.").

215. *In re Appraisal of Ancestry.com, Inc.*, 2015 WL 399726, at *1.

Additionally, whether or not judges are capable of understanding the valuation process, corporate law generally disapproves of the judiciary forcing its own opinion on whether something is a good business decision.[216] The use of deal price, when it is a product of arm's-length negotiating, shaped in the "crucible of objective market reality,"[217] has acquired (non-mandated) deference from judges following the *DFC*, *Dell*, and *Aruba* trilogy and provides a convenient reference point for judges that does not require lengthy corporate finance valuation metrics. This is a move in the right direction toward alleviating judicial confusion in the value determination process; however, the solution could be to go one step further and amend the statute itself. The court, at one time, experimented with retaining an independent expert to advise and consult on appraisal matters, and should go back to this in order to remove calculation responsibilities from the judges.[218] Independent experts were essentially required under the appraisal statute before 1976, when an appraisal case was initially determined by a court-appointed appraiser.[219] The change to section 262, through an amendment in 1976, allowed for the court to solely appraise the value of shares.[220] This change was denoted as a cost-saving measure.[221]

The use of an independent expert is not a new idea and has been suggested a number of times.[222] The Delaware Supreme Court rejected the idea of an independent expert witness for valuation matters in *Cede & Co v. Technicolor, Inc.*,[223] because "appointment of a combination special appraisal master/independent expert witness and the delegation of responsibility for valuing the Technicolor shares is unlawful because it is contrary to the statutory mandate that 'the Court [of Chancery] shall appraise the shares.'"[224]

A likely reason the statute has not yet been amended is the landscape of Delaware corporate lawmaking. Local interest groups, made up largely of the Corporation Law Section of the Delaware Bar Association, control much

216. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004).

217. Highfields Capital, Ltd. v. AXA Fin., Inc., 939 A.2d 34, 42 (Del. Ch. 2007).

218. *See* Gonsalves v. Straight Arrow Publishers, Inc., 701 A.2d 357, 360–61 (Del. 1997) (discussing the history of Delaware's use of disinterested appraisers under section 262, until the statute was amended in 1976 to eliminate that requirement).

219. *Id.*

220. *Id.*

221. *Id.*

222. *In re* Shell Oil Co., 607 A.2d 1213, 1222 (Del. 1992) ("[I]f the Court is limited to the biased presentation of the parties, it is often forced to pick and choose from a limited record without the benefit of objective analysis and opinion. To compensate for this handicap, the Court of Chancery should consider, in a proper case, appointing its own expert witness.").

223. 758 A.2d 485 (Del. 2000).

224. *Id.* at 487 (quoting DEL. CODE ANN. tit. 8, § 262(h)).

of the corporate legislation in the state.[225] The Delaware legislature is known to rely on the expertise of the Delaware Bar Association to guide its corporate lawmaking.[226] As noted by Professors Jonathan Macey and Geoffrey Miller, rules put forth by the Delaware Bar that increase litigation, such as rules that stimulate disputes over appraisal rights, could increase legal fees for those who practice corporate law in Delaware.[227] The Delaware Bar's desire to keep appraisal arbitrage in its current state was evidenced by its actions following the *Transkaryotic* decision that spurred the dramatic increase in appraisal arbitrage. The Council of the Corporate Law Section of the Delaware State Bar Association made two reform proposals to section 262, but notably, the Council did not propose legislation to overrule the *Transkaryotic* decision.[228] Although an amendment to use independent valuation experts in appraisals is adverse to the Delaware Bar Association's financial interests, doing so will aid Delaware in maintaining its preeminent status as the nation's leading supplier of corporate law.

Because the chancery court's ability to rely on independent experts is plainly restricted by the requirement that the court make its own independent determination of fair value, the Delaware legislature should amend the statute to allow for such reliance, despite various interest groups' desires, to better effectuate the purposes of the dissenting shareholder's appraisal rights.

## V. CONCLUSION

In *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, the Delaware Supreme Court held that the chancery court abused its discretion when it used the unaffected thirty-day market price average as fair value instead of deal price less synergies.[229] The court correctly held there is no definitive formula for determining fair value, but that deal price is the best indicator of fair value in this case because the deal was a fully informed, arm's-length transaction that occurred after a robust sales process.[230] In conflicted transactions or transactions with a poorly run sales process, the deal price is not reflective of fair value, but other valuation methodologies,

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225. William J. Moon, *Delaware's New Competition*, 114 NW. U. L. REV. 1403, 1435 (2020) ("[A] crucial ingredient in Delaware's corporate law regime is the legislature's responsiveness to local interest groups."); *see also* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469, 472–73 (noting the strongest interest group in Delaware is an "elite cadre of Wilmington lawyers who practice corporate law in the state.").

226. Moon, *supra* note 225, at 1435.

227. Macey & Miller, *supra* note 225, at 504 n.132.

228. *See supra* note 68.

229. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 130 (Del. 2019) (en banc) (per curiam).

230. *See supra* Section IV.A.

such as the discounted cash flow analysis or comparable companies analysis, may be better suited for a fair value determination.[231]

The practical result of the court's holding will likely be a decline in appraisal proceedings, more specifically appraisal arbitrage, in fully informed, arm's-length transactions because the deal price will likely serve as the ceiling for fair value determinations, removing incentive for arbitrageurs to bring appraisal suits.[232] The decline in appraisal arbitrage following *Aruba* will likely lead to positive outcomes by returning the appraisal remedy to its originally contemplated purpose, to compensate for a loss of voting rights to dissenting stockholders.[233] Appraisal arbitrage will not be attractive in instances of an unconflicted, fair price merger; whereas, mergers completed in conflicted circumstances or objectively priced below fair value will incentivize appraisal arbitrageurs to seek appraisal and continue to serve as the market check against abuse by corporate directors, controlling shareholders, and other insiders in merger transactions.[234]

The *DFC*, *Dell*, *Aruba* trilogy also marks general judicial confusion and discord on proper methodologies to appraise company shares. But, the court of chancery's ability to rely on independent experts is plainly restricted by the statutory requirement that the court make its own independent determination of fair value.[235] To avoid future judicial confusion in appraisal proceedings, the Delaware legislature should amend Delaware General Corporation Law section 262 to allow for a neutral valuation professional to advise the court of chancery.[236]

231. *See supra* Section II.C.

232. *See supra* Section IV.B.

233. *See supra* Section IV.B.

234. *See supra* Section IV.B.

235. DEL. CODE ANN. tit. 8, § 262(h) (2018); *see also* Cede & Co v. Technicolor, Inc., 758 A.2d 485, 487 (Del. 2000) (noting the use of "a combination special appraisal master/independent expert witness" to value shares is "contrary to the statutory mandate").

236. *See supra* Section IV.C.