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Delaware Court of Chancery Confirms Market-Based Factors Constitute the Best Indicators of Fair Value

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Three recent Delaware Court of Chancery appraisal decisions offer a wealth of guidance not only regarding the determination of a merger partner's fair value, but also regarding elements that potentially undermine a quality sale process and strategic considerations for litigating valuation and sale process issues.

Statutory appraisal litigation, initiated after virtually every sizeable merger, requires the Delaware Court of Chancery to determine the fair value of a target company's shares, exclusive of any merger-created value, as of the effective date of the merger. Though the appraisal statute broadly empowers the Court to consider "all relevant factors" in determining fair value,[1] the Delaware Supreme Court has clarified the particular importance of certain market-based factors, namely, unaffected market price and merger consideration.[2] Though the unaffected market price is an

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[1] Del. Code Ann. tit. 8, § 262(h) ("Through such proceeding 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 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.").

[2] *See, e.g., Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019); *Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *DFC Glob. Corp. v. Muirfield Value P'rs*, 172 A.3d 346 (Del. 2017); *see also* Jason Halper *et al.*, *Corporate Governance Litigation & Regulation: A Periodic Review and Predictions for the Remainder of 2019*, Cadwalader, Wickersham & Taft LLP (May 23, 2019), https://www.cadwalader.com/resources/clients-friends-memos/corporate-governance-litigation--regulation--a-periodic-review-and-predictions-for-the-remainder-of-2019 (discussing appraisal litigation trends in 2019); J. Halper *et al.*, *M&A Update: The Delaware Supreme Court's Decision in Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.—Calculating Fair Value in Statutory Appraisal Cases*, Cadwalader, Wickersham & Taft LLP (April 22, 2019) https://www.cadwalader.com/resources/clients-friends-memos/ma-update-the-delaware-supreme-courts-decision-in-verition-partners-master-fund-ltd-v-aruba-networks-inccalculating-fair-value-in-statutory-appraisal-cases.

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"important indicator" of fair value (so long as the stock is trading in an efficient market),[3] deal price that is the product of "a robust market check will often be the most reliable evidence of fair value[.]"[4]

In a trio of recently issued appraisal decisions, the Delaware Court of Chancery reaffirmed the importance of market-based factors as indicators of fair value but came to divergent outcomes, including, in one case, (i) a fair value determination based on the unaffected market price, which was a substantial discount to the merger consideration, and, in the other two cases, (ii) a fair value determination based on the full deal price with no deduction for merger-related synergies. In *In re Appraisal of Jarden Corporation*,[5] Vice Chancellor Joseph R. Slights determined that the unaffected market price was the best indicator of the fair value of Jarden's stock (representing a 18.4% discount to the merger consideration). The Vice Chancellor found that the deal price, though relevant, was less reliable than the unaffected market price due to the flawed sale process undertaken by the Jarden Board of Directors.[6] In *In re Appraisal of Columbia Pipeline Group, Inc.*,[7] Vice Chancellor J. Travis Laster endorsed the reliability of deal price as the best indicator of fair value in finding that the fair value of Columbia Pipeline's shares was $25.50 per share, the merger consideration. Less than two weeks later, Vice Chancellor Laster again found the deal price persuasive evidence of fair value in *In re Appraisal of Stillwater Mining Company*,[8] in which he determined that the fair value of Stillwater Mining Company's stock on the date of the merger was $18.00 per share. In all three cases, the Court declined to rely upon more traditional valuation methodologies, such as comparable companies methodology or discounted cash flow ("DCF"), in favor of market-based evidence.

Although the Delaware Supreme Court has offered more guidance in recent years on the appropriate valuation methodology for appraisal actions, *Jarden*, *Columbia* and *Stillwater* serve as reminders that because the valuation process is a case-specific "fact-finding exercise," the valuation methodology used to determine fair value will largely depend on the facts of each case.[9]

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[3] *Aruba*, 210 A.3d at 137-138; *see also Dell*, 177 A.3d at 25 ("A market is more likely efficient, or semi-strong 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.").

[4] *DFC*, 172 A.3d at 366.

[5] 2019 WL 3244085 (Del. Ch. July 19, 2019).

[6] *Id.* at *4.

[7] 2019 WL 3778370 (Del. Ch. Aug. 12, 2019).

[8] 2019 WL 3943851 (Del. Ch. Aug. 21, 2019)

[9] *See Jarden*, 2019 WL 3244085, at *1 ("The appraisal exercise is, at bottom, a fact-finding exercise, and our courts must appreciate that, by functional imperative, the evidence, including expert evidence, in one appraisal case will be different from the evidence presented in any other appraisal case. Different evidence, of course, can lead to different decision paths and different outcomes."); *see also Columbia*, 2019 WL 3778370, at *42 (recognizing different outcomes in cases with different facts).

However, these decisions ultimately underscore the preeminence of market-based factors over other valuation methodologies.

Jarden Background

On July 19, 2019, Vice Chancellor Slights issued a post-trial decision in an appraisal proceeding arising from the acquisition of Jarden Corporation ("Jarden") by Newell Rubbermaid, Inc. ("Newell") for cash and stock totaling $59.21 per share. The Court found that Jarden's unaffected market price was the most reliable indicator of fair value and determined a fair value of $48.31 per share.

The Court held that the deal price was unreliable due to a flawed sale process, "if one can call it that," which "may well have set an artificial ceiling on what Newell was willing to pay." Among other flaws in the sale process, the Court found that Jarden's CEO did not inform the Board of meetings with Newell's CEO, suggested a sales price without authorization from the Board, made unauthorized counteroffers, negotiated change-in-control compensation without authorization from the Board, and recommended a financial advisor without disclosing his prior "substantial relationship" with the bank.

Instead, the Court found the unaffected market price to be a "powerful indicator of Jarden's fair value" because Jarden's stock traded in a highly efficient market, never closed above the merger price, and was frequently analyzed by professional analysts. Jarden also did not have a controlling stockholder. The Court engaged in comparable companies and DCF analyses, but found the former unreliable and the latter consistent with the market evidence.

Columbia Background

On August 12, 2019, Vice Chancellor Laster issued a post-trial decision in a statutory appraisal proceeding arising out of the July 1, 2016 acquisition of Columbia Pipeline Group, Inc. ("Columbia") by TransCanada Corporation ("TransCanada") for $25.50 per share, holding that the deal price was the most reliable indicator of fair value. Despite management conflicts, the Court held that the deal price was reliable because the sale process "bore objective indicia of fairness."[10] Among other things, the Court noted that the acquisition was an arm's-length transaction with a "pure outsider" third party, the Board was free of conflicts, and Columbia extracted several price increases over the course of negotiations. The Court also noted favorably that TransCanada conducted due diligence and obtained confidential information, and that other potential buyers failed to pursue a merger either pre- or post-signing (notwithstanding the absence of unusual deal protection provisions).

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[10] *Columbia*, 2019 WL 3778370, at *19 (quoting *Aruba*, 210 A.3d at 349).

Though the Court seriously evaluated allegations that management was conflicted due to a desire for immediate retirement, the Court was unpersuaded that the conflict undermined the reliability of the deal consideration as evidence of fair value, stating that "management's divergent interests fell short of the conflicts that failed to undermine the sale process in *Dell*."

The Court also considered, and rejected, an argument that the sale process was undermined by Columbia's willingness to engage with TransCanada notwithstanding a standstill that precluded TransCanada (and three other suitors) from engaging without the Board's prior written invitation. Despite finding that TransCanada breached its standstill "several times" before Columbia waived the standstills binding the other potential bidders, the Court held that the standstills did not undermine the fairness of the deal price because none of the standstill parties bid even after the standstills were waived.

However, the Court was persuaded that the failure to disclose the standstills, and the fact that TransCanada was allowed to breach its standstill, rendered the proxy materially defective. The Court also found that Columbia should have disclosed management's desire to retire, and its failure to do so constituted a material omission. In light of the flawed proxy, the Court declined to give any weight to the overwhelmingly favorable stockholder vote in its evaluation of the deal price as evidence of fair value.

As in *Jarden* and *Stillwater*, the Court declined to deduct synergies from the deal price because the company failed to offer adequate proof quantifying the appropriate downward adjustment, and thus failed to meet its burden. According to the Court, it declined to make any downward deduction because "TransCanada likely could have justified a smaller synergy deduction, but it claimed a larger and unpersuasive one." The Court also rejected reliance on unaffected market price, noting that, in light of its determination that the deal price is the most reliable indicator of fair value, "[r]elying on the trading price would only inject error into the fair value determination." The Court also rejected reliance on a DCF analysis, noting the difficulty in assessing drastically different inputs offered by competing experts. The Court explained, "If this were a case where a reliable market-based metric was not available, then the court might have to call the balls and strikes of the valuation inputs. In this case, the DCF technique 'is necessarily a second-best method to derive value.'"[11] Because the sale process—though not perfect—resulted in a fair price for the Columbia stockholders, the deal price was the most reliable indicator of fair value.

Stillwater Background

On August 21, 2019, Vice Chancellor Laster issued a post-trial decision in which he determined that the fair value of Stillwater Mining Company ("Stillwater") at the time of its acquisition through a

[11] *Columbia*, 2019 WL 3778370, at *52 (internal citations omitted).

reverse triangular merger with Sibanye Gold Limited ("Sibanye") was $18.00 per share, equal to the merger consideration. As with *Columbia*, the Court found that the sale process bore "objective indicia of fairness" that rendered the deal price a reliable indicator of fair value. In finding an effective sale process, the Court stated that the merger was an arm's-length transaction with an unaffiliated acquirer with no prior ownership interest, the Board did not have any conflicts of interest and had the authority to say "no" to any merger, Sibanye conducted due diligence and received confidential information about Stillwater's value, Stillwater negotiated with Sibanye and extracted multiple price increases, and the Board conducted a post-signing market check. The Court reiterated that the "key inquiry is whether the dissenters got fair value and were not exploited."[12] Importantly, the Court found the deal price reliable notwithstanding the fact that Stillwater's CEO engaged in unauthorized sale negotiations with Sibanye while at the same time negotiated a favorable employment agreement for himself. The Court determined that the Board implemented sufficient protections later in the sale process, such as retaining Bank of America Merrill Lynch to conduct a pre-signing canvas of potential bidders, authorizing negotiations that resulted in a higher price, and facilitating a post-signing market check, to render the deal price reliable.

The Court declined to make any adjustments to the deal price based on synergies or changes in value between signing and closing. The company failed to prove that any synergies were captured in the deal price because the evidence showed the opposite—Sibanye told stockholders the price did not account for synergies, and Sibanye's own valuation expert testified that the evidence did not reflect any "quantifiable synergies" included in the price.[13] The Court also declined to make any adjustments for increases in value between signing and closing because petitioners did not argue that the deal price should be adjusted on that basis. The Court recognized that precedent exists for adjusting the deal price based on changes in value between signing and closing, but the proponent of the adjustment must prove that an adjustment is warranted. The Court determined that the company's unaffected trading price was a less reliable indicator of fair value than the deal price. The Court did not find, however, that the trading price was unreliable, and pointed to factors including a large market capitalization, high percentage of shares in public float, high weekly trading volume, low bid-ask spread, high analyst coverage, presence of at least nineteen market makers, eligibility to register shares using SEC Form S-3, and institutional ownership. Other factors, however, undermined the reliability of the trading price as an indicator of fair value, such as limitations imposed by Industry Guide 7, which "specifies what the United States Securities and Exchange Commission permits a mining company to disclose[,]"[14] and, therefore, restricts a mining company from disclosing certain information regarding reserves or probable reserves. Disclosure

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[12] *Stillwater*, 2019 WL 3943851, at *44 (quoting *Dell*, 177 A.3d at 33).

[13] *Stillwater*, 2019 WL 3943851, at *45.

[14] *Id.* at *57.

restrictions, according to the Court, weakened the reliability of the trading price as an indicator of fair value.

Takeaways

1. Delaware courts will look to "objective indicia" of reliability that show the deal price was fair. Deal price is the "best evidence of fair value" if it is the product of an open and informed process involving parties incentivized to bid.[15] In *Columbia*, the Court found that the deal price was a reliable indicator of fair value due to the presence of "objective indicia" of reliability, which included: (1) an arms-length transaction with a third party; (2) a well-informed board of independent and experienced directors; (3) the disclosure of material nonpublic information during due diligence; (4) interactions with other potential bidders during the pre-signing phase; (5) negotiations resulting in increased price or improved deal terms; and (6) deal protections that do not unduly restrict competing offers. The Court made clear that these factors are not minimum requirements, but they are indications of reliability.[16]

   In contrast, the "not well-conceived or well-executed"[17] sale process in *Jarden* lacked many of the "objective indicia" relied upon in *Columbia*. Jarden's sale process began when Jarden's CEO told Newell, without authorization, that Jarden would consider a sale. The CEO met in private with Newell representatives, and delayed reporting important information to Jarden's Board. The Court acknowledged that the CEO's conduct may have caused an artificial ceiling on price. Further, the reliability of the deal price was never tested because the exclusivity agreement prevented a post-signing market check, and the Board never considered contacting other potential bidders.

   Interestingly, as discussed below, many of the flaws in the sale process that led Vice Chancellor Slights to reject the deal price as reliable evidence of fair value also were present in *Stillwater*, but Vice Chancellor Laster nonetheless concluded that deal price was the most reliable evidence of fair value. Vice Chancellor Laster concluded that the sale process was sufficient to generate a reliable deal price because the challenged conduct occurred early in the sale process, and the Board implemented protections later in the sale process that corrected any issues created by Stillwater's CEO. Stillwater's engagement of a financial advisor, negotiations with Sibanye, and post-signing market check all confirmed

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[15] *Columbia*, 2019 WL 3778370, at *19 (quoting *Aruba*, 210 A.3d at 349).

[16] *Columbia*, 2019 WL 3778370, at *42; *see also Stillwater*, 2019 WL 3943851, at *22-23.

[17] *Jarden*, 2019 WL 3244085, at *26.

the reliability of the sale process. The CEO's behavior, therefore, ultimately did not undermine the sale process or the reliability of the deal price as an indicator of fair value.

2. <u>The board of directors needs to remain informed throughout the sale process</u>. It is well-known that directors must act on an informed basis, particularly during a sale process.[18] *Jarden*, *Columbia*, and *Stillwater* recognize that board oversight is imperative. In *Columbia*, the CEO ensured the Board "received a steady flow of information" and "regularly [kept] the directors informed through written memos, presentations during meetings, and one-on-one communication."[19] Though the Court found the Board was properly informed in *Columbia*, it cautioned that "[o]n different facts, fraud on the board could lead to a deal price below fair value."[20] In *Stillwater*, the Court determined the Board exercised proper oversight, even if it did not provide any meaningful engagement until two months before executing the merger agreement because, once involved, the Board played an active role in engaging a financial advisor, overseeing the expedited pre-signing canvas, authorizing the merger agreement, and instituting a post-signing market check. This oversight, the Court found, minimized the Board's failure to supervise the CEO's behavior in the pre-signing process.

In contrast, in *Jarden*, Jarden's CEO acted without Board authorization and failed to disclose key information during critical stages in the negotiating process. For instance, the CEO acted without authority in meeting twice with Newell's CEO and suggesting a price that the Board might accept without prior Board approval. Jarden's CEO also made unauthorized counteroffers and negotiated change-in-control payments without Board knowledge or authorization. The CEO also failed to inform the Board of important information, including that he had recommended a financial advisor without disclosing his "longstanding, fruitful relationship" with the bank, and that the financial advisor participated in early discussions between Jarden and Newell about a potential sale. Delaware courts consistently have recognized the important "gatekeeper" function that financial advisors serve in a sale process, and that any conflicts involving a financial advisor must necessarily be disclosed.[21]

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[18] *See In re Caremark Intern. Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

[19] *Columbia*, 2019 WL 3778370, at *32.

[20] *Id.*

[21] *See In re Rural Metro Corp.*, 88 A.3d 54 (Del. Ch. 2014); *In re Del Monte Foods Co. S'holders Litig.*, 25 A.3d 813 (Del. Ch. 2011); *see also* Jason Halper *et al.*, *M&A Update: The "Gatekeepers": Delaware Court Holds Conflicted Financial Advisor Liable for Aiding and Abetting Breach of Fiduciary Duty*, Cadwalader, Wickersham & Taft LLP (May 23, 2019), https://www.cadwalader.com/resources/clients-friends-memos/delaware-court-holds-conflicted-financial-advisor-liable-for-abiding-and-abetting-breach-of-fiduciary-duty.

3. Management's conflicting incentives do not necessarily undermine the reliability of deal price as an indicator of fair value. In *Columbia*, the Court, relying on *Aruba* and *Dell*, found that management's conflicting incentives do not automatically undermine the sale process or the fairness of the deal price. Columbia's CEO and CFO wanted to retire and had lucrative change-in-control provisions in their contracts that provided large upside if a deal closed before their departures and prior to July 1, 2018. The contingent nature of these benefits "made their recipients more averse to losing a deal, thereby limiting their incentive to push for the final nickel or quarter."[22] On the other hand, there was evidence demonstrating that the CEO and CFO worked to achieve the highest possible price by, for example, recommending that Columbia reject certain low offers. They also "had countervailing incentives to pursue the best deal possible" because their "change-in-control benefits included significant equity components that appreciated with a higher deal price."[23] According to the Court, "management's divergent interests fell short of the conflicts that failed to undermine the sale process in *Dell*."[24] The Court in *Jarden* and *Stillwater* likewise recognized that equity is a strong incentive for management and/or the board to negotiate a high price. In *Stillwater*, Stillwater's CEO had conflicting incentives, similar to Columbia's lead negotiators, but the Court found that those conflicts did not undermine the sale process because the CEO owned a significant equity stake in the company and was motivated to achieve the highest price.[25] Though the presence of conflicting incentives does not automatically preclude the Court's reliance on deal price as an indicator of fair value, Delaware courts closely monitor conflicting interests and motivations.[26] Boards need to carefully consider any potentially disabling conflicting interests of company representatives involved in transaction negotiations.

4. The Board's conduct may mitigate errors committed by management in the sale process. In *Stillwater*, the Court considered the CEO's missteps in the pre-signing process, including unauthorized communications and price negotiations, but determined that the Board's conduct mitigated the impact of the CEO's mistakes. Following the CEO's unauthorized negotiations, Stillwater's Board retained a financial advisor, assessed and contacted potential bidders, negotiated price increases, and conducted a post-signing market check in a situation where the merger agreement did not contain any restrictive deal protections that prevented other bidders from bidding. That no other bidders emerged

[22] *Columbia*, 2019 WL 3778370, at *28.

[23] *Id.*

[24] *Id.*

[25] *Stillwater*, 2019 WL 3943851, at *34.

[26] *See, e.g., In re El Paso Corp. S'holder Litig.*, 41 A.3d 432 (Del. Ch. 2012).

during the post-signing market check was a significant factor supporting the reliability of the deal price as an indicator of fair value. The *Stillwater* decision follows other precedent in Delaware holding that a post-signing market check carries greater weight than the absence of a pre-signing market check.[27] Although board involvement may cure earlier sale process deficiencies, it is far better for the board to actively participate and be engaged early in the sale process to ensure that it is fully informed and that its lead negotiators are acting consistent with the board's directives.

5. A single-bidder process may suffice depending on the particular facts of the case. *Jarden*, *Columbia*, and *Stillwater* suggest that deal price may be a reliable indicator of fair value even if the sale process involves a targeted or single-bidder process. Stillwater initially engaged in pre-signing discussions with two potential bidders, although Sibanye quickly emerged as the favored bidder. In rejecting petitioners' challenge to the pre-signing process, the Court explained that the deal price would have been persuasive of fair value even if Stillwater employed a single-bidder process targeting only Sibanye because the merger agreement allowed a "meaningful post-signing market check."[28] Similarly, the Court in *Columbia* rejected petitioners' argument that Columbia unduly favored TransCanada in the pre-signing process because the evidence showed that Columbia pursued the best deal available, and any "favoritism" did not restrict other potential bidders from participating in the process. These cases also suggest that in certain contexts, an effective sale process does not necessarily require an auction or pre-signing market check. This especially may be true in the context of large companies. In *Jarden*, for instance, the Court credited the company's expert testimony that "auctions are less effective as companies increase in scale and complexity."[29] A key inquiry is whether the sale process allows other bidders to participate.

6. If a seller undertakes a pre-signing market check, for it to be effective, care should be taken in conducting the outreach to potential buyers, providing them with sufficient time for due diligence, and treating potential bidders fairly. The Delaware Supreme Court has recognized "the economic argument that the price of a merger that results from a robust market check, against the back drop of a rich information base and a welcoming environment for potential buyers, is probative of the company's fair value."[30] The information provided in the course of a sale should be complete and accurate. In *Stillwater*, the Court criticized the company's CEO for engaging with potential bidders on a

[27] *In re PLX Tech. Inc. S'holders Litig.*, 2018 WL 5018535, at *55 (Del. Ch. Oct. 16, 2018).

[28] *Stillwater*, 2019 WL 3943851, at *24.

[29] *Jarden*, 2019 WL 3244085, at *64 n. 298.

[30] *DFC*, 172 A.3d at 366.

"low key" and "informal basis."[31] Petitioners complained that this approach meant that the CEO unilaterally decided which information to provide, risking the possibility that potential bidders received incomplete or inaccurate information. The Court agreed with petitioners that this "soft sell" strategy "was not a positive feature of the sale process, and does not help support the persuasiveness of the deal price."[32]

It is not necessarily a requirement, however, for a seller to furnish the same information to every potential bidder. In *Columbia*, petitioners argued that Columbia favored TransCanada during the pre-signing process by not aggressively seeking other bids and by providing more information to TransCanada than to other potential bidders. The Court declined to find any requirement that a target company provide each potential buyer with the same information. While not a requirement, sellers should be cautious about providing different information to potential bidders. Material considered by potential bidders is "objective indicia" that the Court will consider in assessing the strength of a sale process for determining the reliability of deal price as an indicator of fair value. Creating a potentially uneven playing field among potential bidders by sharing different information with them will raise suspicions about the quality of the sale process and require companies to point to other indicia of an open, fair, and informed process.

7. Active negotiations between buyer and seller and the existence of a post-signing market check can provide strong evidence that deal price is reliable. *Jarden*, *Columbia*, and *Stillwater* confirm the importance of active negotiations and a post-signing market check, both of which are "objective indicia" of reliability of the sale process. In *Columbia* and *Stillwater*, the Court took particular note of the fact that the sellers in negotiations obtained multiple price increases in finding that the deal was a reliable indicator of fair value. In *Jarden*, on the other hand, the CEO acted "consistent with a stereotypical 'cut to the chase' CEO mentality [and] laid Jarden's cards on the table before negotiation began in earnest and before the Board and its financial advisors had a chance to formulate a plan."[33] As a result, according to the Court, the petitioners were "right to complain that [the CEO]'s approach may well have set an artificial ceiling on what Newell was willing to pay."[34] Thus, negotiations between high level executives may be a key factor in an effective sale process.

A post-signing market check is also critical to the reliability of the sale process as an indicator of fair value. An effective market check is one where "interested bidders have a fair opportunity to present a higher-value alternative, and the board has the flexibility to

[31] *Stillwater*, 2019 WL 3943851, at *7.

[32] *Stillwater*, 2019 WL 3943851, at *34.

[33] *Jarden*, 2019 WL 3244085, at *24.

[34] *Id.*

eschew the original transaction and accept the higher-value deal."[35] That Jarden never employed a post-signing market check was a fatal flaw that led the Court to decline to rely on deal price as evidence of fair value.

While a post-signing market check is important, parties may incorporate protective measures in the merger agreement without undermining the effectiveness of such a process. In *Columbia*, the merger agreement prohibited Columbia from soliciting, providing information to, or engaging in discussions with any party other than TransCanada unless Columbia received a "bona fide written Acquisition Proposal." The merger agreement also contained a no-change-of-recommendation provision, although there were fiduciary outs for the Columbia Board. The Court found that the deal protections did not impede the post-signing market check and, therefore, did not undermine the reliability of the deal price as an indicator of fair value. The Court reached the same conclusion in *Stillwater*, where the merger agreement included a no-solicitation provision and five-day matching rights. Because any party could submit a bona fide written bid that the Board could negotiate, the Board could provide information in response to a bona fide offer, and the Board retained a fiduciary out, the deal protections did not undermine the integrity of the post-signing market check.

8. The unaffected market price of a seller's stock also may be evidence of fair value. In *Jarden*, the Court determined that the company's unaffected, pre-announcement market price was "a powerful indicator of Jarden's fair value on the Merger Date" because its stock traded in an efficient market, which means the "market price quickly reflects publicly available information."[36] Jarden's large market capitalization, significant public float, narrow bid-ask spread (minimal information asymmetry between insiders and public), and well-analyzed stock evidenced the market's efficiency. Petitioners argued that the unaffected market price was unreliable because the market lacked material information, the price did not account for Jarden's diversified portfolio and agency costs, and the market price was stale by the merger date. The Court rejected all of these arguments because petitioners failed to quantify what, if any impact, these factors had on the unaffected market price. Though the Court in *Stillwater* did not rely on the unaffected market price for determining fair value, the Court confirmed that the unaffected market price could evidence fair value, explaining that had the deal price been an unreliable indicator of fair value, the Court "might well have given weight to the trading price."[37]

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[35] *Stillwater*, 2019 WL 3943851, at *41 (quoting *C & J Energy Servs., Inc. v. City of Miami Gen. Empls.' & Sanitation Empls.' Ret. Tr.*, 107 A.3d 1049, 1068 (Del. 2014)).

[36] *Jarden*, 2019 WL 3244085, at *27, *29.

[37] *Stillwater*, 2019 WL 3943851, at *59.

9. Directors need to ensure that proxy statement disclosure is adequate. In *Columbia*, the seller argued that the Court should consider the stockholder vote in favor of the merger as evidence that the merger price was fair. In support of this argument, the company drew analogies to entire fairness cases.[38] Though the Court questioned whether "stockholder approval should have the same implications for an appraisal proceeding as an entire fairness case[,]"[39] the Court disregarded the stockholder vote as evidence that the deal price was fair because the proxy statements were misleading and, therefore, the stockholder vote was not fully informed.[40] First, the Court found that a reasonable stockholder would find it material that four bidders in the pre-signing phase were subject to standstill agreements containing "don't-ask-don't-waive" provisions, and Columbia allowed TransCanada to breach its standstill agreement on multiple occasions. The Court also found that a reasonable stockholder would find it material that the CEO and CFO, the two lead negotiators on behalf of Columbia, wanted to retire and therefore were incentivized to pursue the transaction most likely to facilitate that outcome. Finally, the Court determined that the CFO's meeting with TransCanada, at which the CFO advised TransCanada that it would likely not face competition if it made an offer, was material. Because of these disclosure flaws, the Court disregarded the stockholder vote in assessing the reliability of the deal price. Similarly, in *Stillwater*, the Court held that the Board should have disclosed its CEO's conflicting incentives, including that he was interested in retiring and his go-forward employment benefits. Importantly, the proxy also should have disclosed that Stillwater's general counsel resigned during the sale process due to his view that the CEO was acting inappropriately in the sale process.

10. A comparable companies analysis will be given weight only if there is evidence that the "peer set" is truly comparable to the seller. In *Jarden,* the Court found the comparable companies valuation methodology unreliable because the parties failed to present a valid peer set. The Court accepted the company expert's view that "Jarden's unique and highly diversified portfolio of businesses, its aggressively acquisitive growth strategy and its holding company structure made the selection of a valid peer set for a comparable companies analysis a fundamentally flawed exercise since Jarden 'lack[ed] truly comparable peers.'"[41] Jarden is instructive for complex or uniquely structured companies. Such companies may want to avoid using a comparable companies analysis to determine fair

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[38] *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); *see also ACP Master, Ltd. v. Sprint Corp.*, 2017 WL 3421142, at *29 (Del. Ch. July 21, 2017), *aff'd*, 2018 WL 1905256 (Del. Apr. 23, 2018).

[39] *Columbia*, 2019 WL 3778370, at *35.

[40] *See In re KKR Financial Holdings LLC S'holder Litig.*, 101 A.3d 980 (Del. Ch. 2014), *aff'd*, 125 A.3d 304 (Del. 2015).

[41] *Jarden*, 2019 WL 3244085, at *35.

value, especially in light of the Court's preference for market-based valuation methodologies.

11. Proving synergistic value can be challenging. It is well recognized that in many M&A transactions the buyer pays a premium for anticipated synergies. As a result, "[i]n an arm's length, synergistic transaction, the deal price generally will exceed fair value because target fiduciaries bargain for a premium that includes . . . a share of the anticipated synergies."[42] Delaware's appraisal statute requires the Court to determine fair value exclusive of any such synergies. The company, however, bears the burden of proving any appropriate downward adjustments. In *Columbia* and *Stillwater*, the Court applied close scrutiny to evidence (or the lack thereof) proffered in support of synergistic value before declining to apply a synergy discount to the determination of fair value because the companies failed to meet their burdens of proof. In both cases, the parties presented conflicting evidence as to whether and to what extent the deal price accounted for synergies. In *Columbia*, the Court turned to expert testimony for guidance on any downward adjustment, but Columbia failed to provide competent expert testimony on the issue. The Court faulted the company's expert for opining that the deal price reflected 100% of the synergies. The Court found that contemporaneous evidence indicated that TransCanada did not allocate synergies to Columbia, "much less all of the synergies."[43] Among other things, the Court noted that a presentation to TransCanada's Board did not indicate that synergies were allocated to Columbia, and the "football field" page in the presentation placed the deal price within the DCF valuation of Columbia without synergies. Because there was no expert opinion that some—but not all—synergistic value was allocated to Columbia, the Court declined to make any downward adjustment to the deal price. In *Stillwater*, the Court found that the petitioner presented sufficient evidence—both fact and expert—hat proved that the deal price did not reflect any synergies. Sibanye told stockholders that the price did not account for synergies, and Sibanye's own valuation expert testified that the evidence did not reflect any "quantifiable synergies" included in the price. Accordingly, the Court declined to adjust for synergies in determining fair value.

12. A controlling stockholder may undermine the reliability of market-based valuation methodologies for determining fair value. *Jarden*, *Columbia,* and *Stillwater* viewed the absence of a controlling stockholder favorably in relying on market-based evidence in determining fair value. In *Jarden*, whether the company had a controlling stockholder was a factor in determining the efficiency of the market for Jarden's stock. That Jarden did not have a controlling stockholder increased the reliability of the unaffected market price as an indicator of fair value. Likewise, in *Columbia*, the fact that TransCanada was a "pure

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[42] *Columbia*, 2019 WL 3778370, at *43 (internal citations omitted).

[43] *Id.* at *44.

outsider with no prior stock ownership in Columbia" supported the deal price as a reliable indicator of fair value.[44] The Court in *Stillwater* also recognized that the absence of a controlling stockholder was a notable factor.[45]

13. Litigation strategy remains crucial to the outcome of an appraisal proceeding. Fair value is a fact-finding exercise, and, therefore, the evidence presented at trial is critical to the Court's analysis. Witness credibility remains crucial. In *Stillwater*, the Court credited the CEO's testimony at trial, observing from his "testimony and demeanor, [he] seems like someone who took considerable satisfaction in his ability to achieve outcomes."[46] In *Columbia*, the Court determined that the CEO and CFO, who negotiated the deal but had conflicting incentives, "were professionals who took pride in their jobs and wanted to do the right thing. They were not going to arrange a fire sale for below Columbia's standalone value, and the Board would not have let them."[47] In addition, in all three cases, the Court found that certain parties failed to carry their burdens of proof, in part due to litigation strategy. As noted, in *Columbia*, the Court criticized the company's strategy in seeking a deal price reduction accounting for 100% of the deal synergies, rather than providing expert testimony on alternative, reduced calculations. In *Jarden*, petitioners proffered a comparable company analysis from their expert, but did not proffer Jarden's own comparable company analysis, which "differed substantially" from the expert's valuations. As the Court observed, "the fact that the company employed comparable companies analyses in the past to value Jarden might be evidence that the methodology can work for Jarden, but the appraiser still has to apply the methodology in a principled way."[48]

Please click here for the full *Jarden* opinion.

Please click here for the full *Columbia* opinion.

Please click here for the full *Stillwater* opinion.

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[44] *Columbia*, 2019 WL 3778370, at *25.

[45] *Stillwater*, 2019 WL 3943851, at *22.

[46] *Id.* at *34.

[47] *Columbia*, 2019 WL 3778370, at *28.

[48] *Jarden*, 2019 WL 3244085, at *35 n. 425.

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